Forfeitures Revisited: Bringing Principle to Practice in Federal Court

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IN FEDERAL COURT

By David Pimentel

ABSTRACT

Dramatically expanded use of federal forfeitures since the 1980s has raised persistent concerns about government overreaching in the seizure of private property. The Supreme Court failed to address the problem in Bennis v. Michigan (1996), upholding the forfeiture of property of an entirely innocent owner, relying on the ancient and unconvincing principle that the property itself is guilty. Congress stepped in to curb law enforcement’s worst abuses of this lucrative practice in 2000, but the Civil Asset Forfeiture Reform Act was a patchwork effort that tweaked the rules without revisiting the unsatisfying policies behind them. Thus a comprehensive, policy-based re-examination of forfeiture doctrines is overdue. This re-examination reveals three distinct and dissimilar categories of forfeitures—(1) contraband, (2) proceeds of crime, and (3) property used to facilitate crime—which are lumped together into a one-size-fits-all procedure. Because each of these types of forfeitures is based on distinct policy objectives, and because each poses different risks to the legitimate interests of property owners, separate procedures are required for each. Contraband forfeitures, which protect public health and welfare, can be effected on probable cause alone. Proceeds forfeitures, which effect a nonpunitive deterrence under the principle of unjust enrichment, raise factual questions that require stronger procedural safeguards and a higher burden of proof. Facilitating property forfeitures, which give rise to the worst abuses of the procedure, and which serve the most dubious of policy objectives, are difficult to justify under any procedure. A clearer articulation and understanding of the policy behind each type of forfeiture will set the stage for a more comprehensive and coherent reform. In the meantime, it can help courts to interpret and apply existing standards—including Eighth Amendment excessive fines analysis—in a more principled way. A policy-based approach, under a new taxonomy of forfeitures, is essential to address the persistent problems with federal forfeiture procedure and bring coherence and equity to the practice in federal court.
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INTRODUCTION

The law of forfeitures, particularly its procedure, is arcane, reflecting ancient concepts and old admiralty practices. Renewed emphasis on forfeitures starting in the 1980s highlighted problems and injustices inherent in the procedure, mostly rooted in historical idiosyncrasies of forfeiture law.

Congress responded in 2000 with the Civil Asset Forfeiture Reform Act (CAFRA), which attempted to address some of the most glaring inequities in the administration of forfeitures. But the problems with forfeiture procedure are not so easily patched up.

The real problem lies with the unexplored policy basis for forfeitures. Unless and until the policy is better defined, and the procedure is tied to the underlying policy, federal forfeitures are bound to generate anomalous and inequitable results.

Defining and refining the policy basis for federal forfeitures requires recognition of the different types of forfeitures; distinctions must be made between forfeitures (1) of contraband, (2) of proceeds of crime, and (3) facilitating property sometimes characterized more narrowly as “instrumentalities” of crime. Because the policy foundation for each of these forfeitures is different, the appropriate procedure for each—striking a proper balance between legitimate government interests and

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the rights of property owners—must also be different.

Policies and procedures appropriate for the summary removal of methamphetamine from circulation (a contraband forfeiture) may be grossly inappropriate to the confiscation of a family home when one of the family members is suspected of running an illegal gambling operation in it (a facilitating property forfeiture). Indeed, the forfeiture of profits of either the drug or gambling operations (a proceeds forfeiture) may require an entirely different set of procedural considerations.

A more nuanced approach to forfeiture procedure is needed for federal court, with procedural requirements that reflect diverse and even conflicting policy objectives. CAFRA was a positive step toward preventing the worst injustices, but the procedural requirements will lack coherence until they are specifically tailored to each of the three different types of forfeitures.

Once the analysis of forfeitures is broken down this way, it becomes apparent that the most serious problems arise in the context of facilitating property forfeitures. The policy justifications are by far the weakest, and the injustices and inequities—including the impact on innocent owners—are the most problematic in this category. Moreover, even when the owner is not innocent, the forfeiture amounts to little more than a truly arbitrary fine, doing violence to principles of uniform and proportionate sentencing, and in some cases violating Eighth Amendment protections against excessive fines.

This Article will summarize the procedural requirements for federal forfeiture, including the history of the doctrine, and the weak and poorly-articulated policy justifications that have been offered over the years. After summarizing CAFRA’s key innovations and detailing the most serious problems that persist, the Article attempts a more complete discussion of the first principles of forfeitures. Categorizing forfeitures by type, and highlighting the unique policy basis behind each, will provide a foundation for proposing more appropriate and effective procedures, tailored to each type of forfeiture.

In this analysis, the dubious policy objectives underlying facilitating property forfeitures, coupled with the serious problems that arise in that category, become apparent, raising doubts that such forfeitures are more trouble than they are worth. In any case, a long-overdue examination of the policy foundation for forfeitures strongly suggests that separately defined procedures, including burdens of proof, are warranted for forfeitures: (1) of contraband; (2) of proceeds of crime; and (3) of facilitating property, to the extent these latter forfeitures can be justified.
at all. At the same time, the categorical breakdown of forfeitures suggests a much-needed framework for assessing when forfeitures violate the Eighth Amendment.

I. BASICS OF FORFEITURE PROCEDURE

At present, there are two basic procedural approaches to forfeitures in federal court: criminal forfeiture and civil forfeiture. While the impact and purpose of these two procedures are virtually identical, the mechanics and conceptual approach are quite different.

A. Criminal forfeitures

Criminal forfeiture is an in personam action that follows a criminal conviction of the property owner. After a finding of guilt, the jury is asked to consider, by special verdict, which of the property identified in the indictment is subject to forfeiture. Upon a jury’s finding that the property is forfeitable, the court may enter a preliminary order of forfeiture, and allow discovery to locate the property, and a hearing to litigate any third-party claims to the property.

Because the procedural standards for criminal conviction, including burden of proof and Fourth (seizure), Fifth (due process), and Sixth (right to counsel) Amendment protections, are so high, these forfeitures have not been controversial. Moreover, the forfeiture order applies only to the property of the convicted defendant, so as long as third-party claimants get adequate notice and an opportunity to assert their own claim to the property, due process is easily satisfied.

Criminal forfeitures are distinct from civil forfeitures in several respects. Because the forfeiture is in personam, only the property of the convicted defendant may be forfeited, not the property of third parties used to facilitate the crime. No criminal forfeiture is possible if the

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1 Rule 31(e), Federal Rules of Criminal Procedure.
2 See, e.g., United States v. Totaro, 345 F.3d 989 (8th Cir. 2003) (involving a criminal forfeiture under RICO, where the defendant’s wife asserted partial ownership of the defendant’s estate; the court of appeals held that she had met her burden of showing by a preponderance of the evidence that the estate was partially hers, and not entirely paid for by the proceeds of defendant’s RICO activity). Property may be subject to forfeiture on a wide variety of grounds under a great many statutes calling for it. See infra Section I B 1; David Pimentel, Forfeiture Procedure in Federal Court: An Overview, 183 F.R.D. 1, 18-32 (1998) (listing in Appendix A over 160 separate federal statutes that have forfeiture provisions).
3 STEFAN CASSELLA, ASSET FORFEITURE LAW IN THE UNITED STATES 24-25 (2007) ("[A] third party challenging a criminal forfeiture on the ground that the property belonged to him, not to the defendant, when the crime occurred does not have to be
Government cannot or chooses not to prosecute, for whatever reason, including when critical evidence is inadmissible, when the defendant cannot be found, or when the defendant is deceased. Because the focus of criminal proceedings is on punishing the defendant, it is possible to forfeit substitute assets, if the forfeitable property cannot be located or identified, or if it is no longer in the possession of the defendant. Criminal forfeitures can also be slower, because the Government has no formal deadline to file an indictment after seizing the assets, and because disposal of the property must be delayed while the rest of the criminal process, including trial and any appeal, is pending.

B. Civil forfeitures

Of greater interest are the procedures for civil forfeiture, as it is far more easily effected, and consequently far more controversial. Unlike criminal forfeitures, civil forfeiture actions are filed in rem; the property itself is the defendant in the case. And until statutory defenses were created in recent years, the innocence of the owner was irrelevant. Indeed, in some cases civil forfeiture can be used as a substitute for prosecution. If the evidence is insufficient to establish guilt beyond a reasonable doubt, or if the evidence showing guilt is for some reason inadmissible, a successful criminal prosecution will not be possible. However, the Government may be able to get “half a loaf” by pursuing a civil forfeiture of key assets of the suspected wrongdoer. The inability to find the wrongdoer or the death of the wrongdoer similarly will not interfere with a civil forfeiture, as long as the property can be identified and seized. And because it is not subject to the constitutional safeguards that govern criminal procedure, the process can be straightforward and innocent. He or she must establish superior ownership, not innocent ownership. Thus, in criminal cases, non-innocent spouses and unindicted co-conspirators who had an interest in the property at the time the crime occurred can recover the forfeited property in the ancillary proceeding.

4 Id. at 18-19.
5 Id. at 23.
6 Id. at 25-26 (In a criminal forfeiture, the property cannot be disposed of until the criminal process is complete, and third parties have had a chance to litigate their claims; in a civil forfeiture administrative forfeitures can be done in summary fashion if no one files a claim to the property.).
8 Id.
9 Civil Asset Forfeiture Reform Act: Hearing on H.R. 1916 Before the H. Comm. on the Judiciary, 104 Cong. 214 (1996) (statement of Stefan Cassella, Deputy Chief, Asset Forfeiture and Money Laundering Section, Criminal Division, Dept. of Justice) (Cassella suggested this in his testimony before the House Committee on the Judiciary in 1996. “Civil forfeiture is particularly important because it allows us to reach assets that cannot be reached any other way....”).
swift, especially if no one comes forward to contest the forfeiture.\footnote{10}

1. What is forfeitable?

Justice Stevens once classified forfeitable property in 3 categories: (1) “pure contraband,” (2) “proceeds of criminal activity,” and (3) “tools of the criminal’s trade.”\footnote{11} The latter category includes not only property used to commit crimes but also property used to facilitate their commission. In some of the literature, a distinction is made between property “integral” to the commission of the crime, and the property that merely “facilitates” it, but the law does not make such a distinction.\footnote{12} Both are forfeitable on the same terms, and for purposes of this discussion, it is sufficient to lump them together under the label “facilitating property.”

These three different types of forfeitures—(1) contraband, (2) proceeds, and (3) facilitating property—are important to keep separate when discussing policy, as they all come from different sources and are implemented for different reasons.\footnote{13} For the most part, however, the procedure for all three types is the same, and it is from this counterproductive similarity of treatment that most of the problems with forfeiture procedure arise.

2. Jurisdiction and venue (civil)

Because the civil forfeiture proceeding is \textit{in rem}, jurisdiction must be established over the \textit{res}. This was traditionally done by seizing the property itself, so jurisdiction was solely in the district where the \textit{res} was located. In the 1990s, however, Congress expanded jurisdiction to include the district “in which any of the acts or omissions giving rise to the forfeiture occurred.”\footnote{14} Venue rules are permissive as well, allowing the case to proceed in (1) the district in which the forfeiture “accrues” or where “the defendant is found,” (2) the district where the “property is found,” or (3) “any district into which the property is brought.”\footnote{15}

\footnote{10}There are a variety of reasons why people do not come forward to contest the forfeiture. \textit{See infra} Section III.C.2.
\footnote{12}CASSELLA, \textit{ASSET FORFEITURE LAW}, supra note 3 at 779.
\footnote{13} \textit{See infra} Section IV.B.
\footnote{15}28 U.S.C. § 1395 (articulating more specific venue provisions for admiralty forfeitures as well). These provisions can be implemented under Supplemental Rule E(3)(a) (of the Supplemental Rules for Certain Admiralty and Maritime Claims) which, as amended in 1998, now allows service outside the district, bringing the rules into line with the statutory provision at 28 U.S.C. § 1355(d). \textit{See} Pimentel, \textit{supra} note 2, 183 F.R.D. at 12.
3. Administrative forfeitures

When no one comes forward to contest it, a civil forfeiture can be carried out administratively, without involving the court at all. Under this procedure, the Government must give owners and others with an interest in the property notice of the forfeiture, and an opportunity to contest it.\textsuperscript{16} If the claimant responds within the narrow time deadlines and files a claim, the matter becomes a case in federal court.\textsuperscript{17} More often, the forfeiture retains its administrative character and is finalized without any judicial proceedings.

The Government strongly favors civil administrative forfeiture procedure, which allows it “to obtain clear title to the property that is valid against the entire world—often within a matter of weeks—without the need to have any contact with the judiciary, if all potential claimants are properly notified and no one files a timely claim.”\textsuperscript{18} The Government also need never bring evidence to support an uncontested forfeiture, of course, other than the recitation of facts that support seizing the property in the first place.\textsuperscript{19}

Of course, the efficiency of the forfeiture is a two-edged sword; justice and equity may be casualties of a system that too quickly and too easily extinguishes legitimate property rights. Because a large proportion of federal forfeitures—as much as 80\%\textsuperscript{20}—are uncontested, and because of the staggering sums claimed by the Government in these proceedings over the past two decades, this administrative procedure warrants closer attention.\textsuperscript{21}

II. DEVELOPMENT OF FORFEITURE LAW – HOW DID WE GET HERE?

A. Origins

Although the emphasis on civil forfeitures is relatively new, the concept is exceedingly old, dating back to the British Navigation Acts of

\textsuperscript{17} CAFRA relaxed the time deadlines somewhat and eliminated the requirement to post a cost bond. See infra Section II.B.6; DEE EDGEBOROUGH, ASSET FORFEITURE: PRACTICE AND PROCEDURE IN STATE AND FEDERAL COURTS at 68-69 (2004)
\textsuperscript{18} CASSELLA, ASSET FORFEITURE LAW, supra note 3 at 132-133.
\textsuperscript{19} Rule G(2)(f) of the Supplemental Rules for Certain Admiralty and Maritime Claims.
\textsuperscript{21} The problem of uncontested forfeitures, to the extent it can be considered a problem, is discussed infra at Section III.C.2.
the 17th century, the common law, and even the Mosiac law of the Old Testament. Early cases of the United States Supreme Court embraced the doctrine, upholding civil forfeitures, in in rem proceedings, of ships involved in violation of customs laws, slave-trafficking laws, and war embargoes.

Criminal forfeitures also date back to English common law, specifically the concept of “forfeiture of estate.” Under this in personam proceeding, anyone convicted of a felony forfeited all his lands and personal property to the crown, in effect punishing the offender’s family for generations to come. Forfeiture of estate was rare in the United States; such extreme punishments were unconstitutional in treason cases, and the very first Congress promptly prohibited their application to other crimes.

A more logical approach to understanding the origins of forfeiture procedure requires breaking them down into categories.

1. Facilitating property forfeitures – origins

Originally, the concept was that the forfeitable property itself bears guilt; the forfeiture of such property was an appropriate sanction for the guilty property. The Biblical provision was that an ox that gores a man

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23 The first Congress passed a law almost immediately, subjecting to in rem forfeitures of ships and cargoes that violated customs laws. Act of July 31, 1789, §§ 12, 36, 1 Stat. 39, 47.
24 E.g. The Mary, 13 U.S. (9 Cranch) 126 (1815); Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 682-83 (1974) (“Almost immediately after adoption of the Constitution, ships and cargoes involved in customs offenses were made subject to forfeiture under federal law, as were vessels used to deliver slaves to foreign countries, and somewhat later those used to deliver slaves to this country”).
26 U.S. Constitution, Art. 3, Section 3 (“The Congress shall have power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.”). The “except during the Life” provision was apparently geared to ensure that future generations were not punished for the sins of their fathers. See also Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 682 (1974) (“Nor has forfeiture of estate as a consequence of a federal criminal conviction been permitted. Forfeiture of estate resulting from a conviction for treason has been constitutionally proscribed by Art. III, §3 though forfeitures of estate for the lifetime of a traitor have been sanctioned.”).
27 Doyle, Crime and Forfeiture, CRS Report for Congress, CRS-3 (rev. 2007). Remarkably, however, the war on terror has resurrected the concept in the 21st century. See discussion of the Patriot Act, infra at Section II.C.
must be destroyed, and its flesh not eaten. The innocence of the owner was immaterial if the guilt of the thing, the *res*, was clear.

a. Admiralty and maritime forfeitures

This doctrine behind facilitating property forfeitures was consistently upheld in 19th century American courts for the seizure of ships involved in a variety of customs and maritime offenses, with no notice other than service on the *res*. The procedure and consequences were draconian:

Vicarious liability also attached: a sailor’s single act could forfeit an entire ship even if committed contrary to the express wishes of master or owner. The claimant bore the burden of proving statutory compliance. In the American colonies, moreover, the ship-owner proceeded before newly established vice-admiralty courts, not a jury.

No criminal conviction was necessary to seize the ship. Because “the thing is primarily considered the offender,” a forfeiture could be sustained even if the innocence of the owner was fully established.

The origins of facilitating property forfeitures in customs and maritime law are reflected in procedure even today. The rules governing

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29 Exodus 2:28 (KJV) (An ox that gores a person to death will be stoned “and his flesh shall not be eaten.”).
30 *Cassella, Asset Forfeiture Law*, supra note 3 at 38 (“By the 1990’s, a long line of cases had firmly established that property used to commit a criminal offense could be forfeited in a civil *in rem* proceeding without regard to the innocence of the actual owner of the property.”).
31 Pimentel, supra note 2, 183 F.R.D. at 14 (citing *The Mary*, 13 U.S. (9 Cranch) 126 (1815), a case in which the ship’s forfeiture was upheld due to the owner’s failure to timely contest it).
33 Id. (citing 12 Geo. 1, ch. 28, § 8 (1725)).
34 Id. (“The Crown established these new courts to ensure preservation of its Navigation Acts revenue from the ‘obstinate resistance of American juries.’”) (citing *C. J. Hendry Co. v. Moore*, 318 U.S. 133, 141 (1943)).
36 Id. at 14 (“The thing is here primarily considered as the offender, or rather the offence is attached primarily to the thing; and this, whether the offense be *malum prohibitum*, or *malum in se*. The same principle applies to proceedings *in rem*, on seizures in the Admiralty. Many cases exist, where the forfeiture for acts done attaches solely *in rem*, and there is no accompanying penalty *in personam*. Many cases exist, where there is both a forfeiture *in rem* and a personal penalty.”).
civil in rem forfeitures are found in the Supplemental Rules for Certain Admiralty and Maritime Claims, appended to the Federal Rules of Civil Procedure. 38

By the 19th century, these forfeitures were justified as a deterrent to negligence, providing property owners with incentives to take care, to ensure that their property was not misused. 39 In the 1844 case of Brig Malek Adhel, the Supreme Court invoked tort principles, justifying the forfeiture of an innocent owner’s ship as “the only adequate means of suppressing the offense or wrong, or insuring an indemnity to the injured party.” 40 The shift in logic did not create new legal rules for forfeitures, but merely constituted new and more palatable justifications for continuing the time-honored practice of forfeiting property utilized in criminal activity.

b. Prohibition

In the 1920s, application of forfeiture procedure was expanded beyond maritime and customs actions, and were used to seize the facilitating property for the production and sale of illegal liquor. 41 Again such actions were brought in rem, based on the legal fiction of a guilty res.

The Supreme Court confronted the doctrine directly in 1921 in Goldsmith-Grant. 42 The case involved an automobile, sold to the buyer, in which the seller retained a security interest. 43 The buyer used the car to transport bootleg liquor, and the car was forfeited, including the security interest of the seller. 44 Despite the troubling equities of

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39 Reed & Gill, RICO Forfeitures, supra note 32, at 64 (“Because there was no traditional remedy for wrongful death, the threat of forfeiture provided an incentive for the owner of a dangerous res to exercise a higher duty of care”); CASSELLA, ASSET FORFEITURE LAW, supra note 3 at 38 (“to encourage property owners to take greater care lest their property be used for an unlawful purpose”).

40 United States v. Brig Malek Adhel, 43 U.S. (2 How.) 210, 233 (1844). Of course, the “suppress the offense” rationale certainly overlaps with criminal law principles of deterrence.


43 Id.

44 Id.
penalizing the seller, who was, after all, entirely without guilt, the Court upheld the forfeiture.  

Acknowledging the “formidable” argument that forfeiture was to “punish . . . guilt” and that it was mere superstition to assume the guilt of the res, the court detailed countervailing considerations, including: “the necessities of the government, its revenues and policies, and . . . the necessity of making provision against their violation or evasion and the ways and means of violation or evasion.” The Court also drew upon the tort theory of liability articulated in Brig Malek Adhel, citing Blackstone in support: “To the superstitious reason to which the rule was ascribed, Blackstone adds: ‘That such misfortunes are in part owing to the negligence of the owner, and therefore, he is properly punishable by such forfeiture.’”

Even as the Court appeared to express doubts about, and acknowledge the possible disingenuousness of, the justifications for the rule allowing the forfeiture of a “guilty” res by an innocent owner, it nonetheless upheld the rule: “whether the reason for [the challenged forfeiture scheme] be artificial or real, it is too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced.” This revealed, perhaps, the Court’s most compelling motivation: it upheld the forfeiture, not because it was persuaded that the practice could be justified on public policy grounds, but only because the doctrine was so old and well-established.

As unsatisfying as this justification is, it apparently remains sufficient to support the constitutionality of extinguishing property rights of an innocent owner. In 1996, the Supreme Court decided Bennis v.  

\[\text{\footnotesize 45 Id.} \]
\[\text{\footnotesize 46 Id. at 510.} \]
\[\text{\footnotesize 47 Id. at 511.} \]
\[\text{\footnotesize 48 Id. (emphasis added).} \]
\[\text{\footnotesize 49 Id. The fact that the practice is ancient is hardly a reason it should persist; some of the most odious legal concepts, including slavery, are deeply rooted in history as well. But it is worth noting that other countries that share our common law heritage presently see no role for facilitating property forfeitures. In the United Kingdom, forfeitures take place under the Proceeds of Crime Act (2002), and even before that legislation, the law targeted only the proceeds of criminal activity. Angela V.M. Leong, Assets recovery under the Proceeds of Crime Act 2002: the UK experience, in SIMON N.M. YOUNG, CIVIL FORFEITURE OF CRIMINAL PROPERTY AT 188 (2009). Ireland similarly carries out its asset forfeitures under a “Proceeds of Crime Act,” which applies only to “property obtained or received at any time … by or as a result of or in connection with the commission of an offence.” Proceeds of Crime Act 1996, § 1; see also Felix J. McKenna and Kate Egan, Ireland: a multi-disciplinary approach to the proceeds of crime in YOUNG, supra, at 55, explaining that these forfeitures, limited to proceeds of crime, are effected under in rem proceedings.}\]
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Michigan, involving a man who used a car for a liaison with a prostitute, and whose car was forfeited under the state’s public nuisance law. The man’s wife, who had a half-interest in the car, challenged the forfeiture, as she was certainly without guilt in the affair (and in some sense already a victim of the husband’s misconduct). Despite the compelling equities to the contrary, the Supreme Court upheld the forfeiture of the innocent wife’s share of the car. Reaffirming Goldsmith-Grant, the Court stated: “We conclude today, as we concluded 75 years ago, that the cases authorizing actions of the kind at issue are ‘too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced.’”

2. Proceeds forfeitures – origins: the war on organized crime

The proceeds of crime constitute an entirely separate category of forfeitable property. The provenance of proceeds forfeitures is independent and unrelated, driven by entirely different policy objectives.

In the 1960s, Congress took particular interest in fighting organized crime, culminating in Senator John L. McClellan’s “Corrupt Organizations Act,” proposed in 1969. The Department of Justice was plainly concerned at the time about the profitability of organized crime:

When Attorney General John N. Mitchell first testified before the Senate Committee that was considering measures against organized crime, his main point was that as long as the flow of money continued, imprisonment of the leaders of Mafia families stimulated the promotions of new people to take the places of those convicted.

The Act passed in October 1970, its forfeiture provisions contained in its Title IX, otherwise known as the Racketeer Influenced and Corrupt Organizations Act (RICO). Congress was strongly motivated by its belief that RICO’s forfeiture provisions would “strike at the profits of

51 Id.
52 Id. (quoting Goldsmith-Grant, supra note 42). This case involved state forfeiture laws, and the U.S. Supreme Court found no constitutional infirmity in the forfeiture of the innocent owner’s interest in the car.
54 Id. at 67.
organized crime and wipe out its hold on legitimate organizations.”

3. Contraband forfeitures – origins

Least controversial, and perhaps least interesting, are contraband forfeitures. These have been around as long as the concept of contraband has been in existence. Whenever possession of something is criminalized, the forfeitability of that property can be assumed. In

United States v. Jeffers, the Supreme Court considered the status of contraband seized in an illegal search. Although the property belonged to the petitioner, and was seized illegally, the petitioner did not have the right to its return: “Since the evidence illegally seized was contraband the respondent was not entitled to have it returned to him.”

We see an example in 21 U.S.C. § 881(f), which specifies that certain controlled substances “shall be deemed contraband and summarily forfeited to the United States.” Disposal of contraband does not generate revenue because regardless of the street value of the contraband, the Government will not return it to circulation. Indeed, the Government is normally authorized to destroy it.

4. Expansions of forfeiture law: the war on drugs

America’s “War on Drugs” had a significant impact on the development of forfeiture law, beginning with the Comprehensive Drug Abuse Prevention and Control Act of 1970, and the Nixon Administration’s 1973 declaration of an “all-out, global war on the drug menace.”

Old forfeiture doctrines, useful in maritime actions in the 19th century and against bootleggers in the early 20th century, were revitalized when it was determined that they might be effective in the late 20th century, serving the compelling public policy of suppressing

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58 Id. at 54. The contraband could not, however, be used as evidence in the criminal proceeding, as the exclusionary rule bars the use of illegally seized evidence.
60 See, e.g., 21 U.S.C. § 881(f)(2) (“The Attorney General may direct the destruction of all controlled substances in schedule I or II seized for violation of this subchapter.”).
61 Part of this legislation was the Continuing Criminal Enterprise Act, which applied criminal forfeiture provisions similar to RICO’s against “drug kingpins.” LEO NARD W. LEVY, A LICENSE TO STEAL – THE FORFEITURE OF PROPERTY 78-79 (1996).
62 Message from the President of the United States Transmitting Reorganization Plan No. 2 of 1973, Establishing a Drug Enforcement Administration, HR Doc No 69, 93d Cong, 1st Sess. 3 (Mar 28, 1973).
drug trafficking and use in the United States.\(^63\)

The Government did not hold back; all three types of forfeitures were involved in the War on Drugs. The 1970 legislation provided for the forfeiture of contraband (all drugs manufactured, distributed, dispensed, or acquired) and all facilitating property associated with the manufacture, transportation and delivery of drugs (raw materials, containers, vehicles, aircraft, etc.).\(^64\) In 1978, that legislation was amended to provide for civil in rem forfeiture of both proceeds traceable to drug crimes and property used or usable for facilitating such crimes.\(^65\) In 1984, the Act was amended again to include real property that can be classified as facilitating property for drug crimes.\(^66\) In 1986, Congress authorized the criminal forfeiture of substitute assets, if the original forfeitable property was no longer available.\(^67\) Within a few years, one senator hypothesized that drug cases accounted for 98 percent of forfeitures.\(^68\)

By the end of the 1980s, the War on Drugs had kicked into high gear, and the Department of Justice became increasingly active and aggressive in pursuing civil forfeitures in drug cases.\(^69\) By the mid-1990s the dramatic increase in forfeiture filings had attracted attention, generating criticism of the concept both from conservatives, who lamented the assault on private property rights,\(^70\) and from liberals who


\(^64\) H. Rpt. 106-192 at 3 (June 18, 1999).


\(^68\) 146 Cong. Rec. 1753 at 1762 (the estimate was made in the year 2000).


\(^70\) See, e.g., Henry Hyde, Forfeiting Our Property Rights: Is Your Property Safe from Seizure? (Cato Institute, 1995). Rep. Hyde was a leading Republican in the House and Chair of the House Judiciary Committee at the time his book was published.
questioned overreaching by law enforcement officials.\textsuperscript{71}

One example of the harshness of federal civil forfeiture as a tool in the War on Drugs is the case of Joseph Lopes, retired after 49 years of work on Hawaiian sugar plantations, who purchased a modest home for himself, his wife, and their 28-year-old mentally disturbed son Thomas.\textsuperscript{72} At some point, Thomas planted marijuana in the yard of the family home and threatened suicide whenever the parents tried to remove it. Arrested in 1987, Thomas pled guilty to this first offense, and was sentenced to probation and weekly psychotherapy. The family thought the episode was behind them until four years later, when government agents arrived to inform the Lopeses that the Government was taking their home.\textsuperscript{73} The property had been used to commit a crime, and was forfeitable under federal civil forfeiture statutes.\textsuperscript{74}

Remarkably, Congress authorized law enforcement, in 1984, to keep the assets they seize under federal forfeiture procedure.\textsuperscript{75} The Department of Justice has increased the size of the pie, and shared the wealth by implementing a program of “equitable sharing” by which state and local law enforcement can participate.\textsuperscript{76} In other words, local law enforcement can seize assets, turn them over to federal authorities for

\textsuperscript{71} E.g., Leading House Democrat Rep. Barney Frank, then a member of the House Judiciary Committee, stated that because a civil forfeiture is necessarily a consequence of criminal activity, a person may have “falsely been accused of a crime, and as a consequence, had his property seized…. [N]ot to appoint a lawyer [for him]… I think … is inconsistent with … social justice and fairness.” \textit{Civil Asset Forfeiture Reform Act: Hearing on H.R. 1916 Before the H. Comm. on the Judiciary}, 104th Cong. 251 (1996) (statement of Rep. Barney Frank, Member, Comm. on the Judiciary).

\textsuperscript{72} Andrew Schneider and Mary Pat Flaherty, \textit{Government seizures victimize innocent}, PITTSBURGH P\textsc{ress}, (August 11, 1991), p. 1.

\textsuperscript{73} Id. But see United States \textit{v} Real Property at 6625 Zumirez Drive, 845 F. Supp. 725, 740-42 (C.D. Cal. 1994) (holding that forfeiture of the father’s home of twenty-two years for the acts of his son was an excessive fine barred by the Eighth Amendment; see discussion of Eighth Amendment concerns infra at Section IV.B.3.a.i.

\textsuperscript{74} CAFRA’s “innocent owner” defense, discussed infra at Section II.B.3, would not have helped the Lopeses here, as they were fully aware of the criminal activity. However, CAFRA does require a judicial proceeding (not a mere administrative proceeding) for the forfeiture of a primary dwelling. The legislative history also suggests that Congress intended higher standards to apply to the forfeiture of the owner’s home: “In one area in particular, courts have been much too liberal in finding facilitation. An especially high standard should have to be met before we dispossess a person or family of their home.” Floor Statement of Henry Hyde re: H.R. 1658 (April 11, 2000), available at http://judiciary.house.gov/legacy/0411att.htm (last visited July 26, 2011). However, the final language of the statute uses the same standard for primary residences, preponderance of the evidence, as for any other forfeiture.


forfeiture purposes—taking advantage of the federal procedures which are so straightforward and favorable to law enforcement—and receive a substantial cut of the proceeds. The assets retained by the federal agencies are deposited in and Asset Forfeiture Fund, that they can draw upon to fund other aspects of their operations. It is a good deal for everyone: local law enforcement gets the benefit of the favorable federal forfeiture procedure laws, and the federal agency enjoys a cash flow from the law enforcement work done by state and local authorities.

This practice has been criticized as creating a conflict of interest, arguably encouraging a law enforcement strategy of targeting assets rather than stopping crime. Contributing to this concern is the fact that Fourth Amendment protections do not necessarily bar the forfeiture of illegally seized assets. Even though the evidence obtained in an illegal search will be suppressed, the forfeiture of property seized in that same operation will stand, as long as there is independent cause to believe the property is forfeitable. The message, and the incentives, for law enforcement are troubling.

B. Civil Asset Forfeiture Reform Act of 2000

Concern over such cavalier treatment of property rights in forfeiture cases, both by the Department of Justice and by the courts, led Congress to take up the issue, with a proposed bill and hearings in 1996, and with renewed activity in 1999 that would ultimately lead to the passage of

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77 Guide to Equitable Sharing for State and Local Law Enforcement Agencies, U.S. Department of Justice, Criminal Division, Asset Forfeiture and Money Laundering Section at 3 (April 2009) (“Any state or local law enforcement agency that directly participates in an investigation or prosecution that results in a federal forfeiture may request an equitable share of the net proceeds of the forfeiture.”) available online at http://www.justice.gov/usao/rb/projects/esguidelines.pdf. Local law enforcement can receive up to 80 percent of the net assets realized, after deductions for expenses, informant fees, and valid third-party interests. Id. at 12-15. The federal agency always gets its expenses covered, plus 20% of the assets that remain, and a substantially larger percentage if the federal authorities played a role in the investigation and seizure, Id.


79 Worrall, supra note 76, at 220-240; Blumenson & Nilsen supra note 63, at 37.

80 See DAVID SMITH, PROSECUTION AND DEFENSE OF FORFEITURE CASES (1998) (“Just as an illegal arrest of a criminal defendant is not a bar to prosecution, an illegal seizure of the res that is the defendant in a civil forfeiture action does not bar the suit or deprive the court of jurisdiction to hear it, at least in federal court. It is now codified in Rule G(8)(a) (‘Suppression does not affect forfeiture of the property based on independently derived evidence.’). While evidence obtained as the result of an illegal search or seizure may be suppressed, the government can still attempt to forfeit the property on the basis of evidence that is not tainted by the illegality.”)

81 Id.
CAFRA in 2000. CAFRA, which adjusted burdens of proof and bolstered the rights of property owners, including innocent owners, in federal civil forfeitures, was “the first significant reform of civil forfeiture procedure since the dawn of the Republic.”

But, while CAFRA may have been “significant,” it was not comprehensive. Indeed, the whole bill smacks of patchwork, adjusting standards and overturning the doctrines responsible for the worst injustices, but failing to reexamine the foundations of forfeiture law or establish a sound policy rationale for forfeiture procedure overall. It was a compromise bill with terms negotiated and tweaked until it could muster unanimous approval from the Senate Judiciary Committee, a necessary precondition to getting it passed in an election year. As one commentator put it:

The Act is not comprehensive. It is not a revision of forfeiture law based on first principles. It is, rather, a series of practical “fixes” of specific problems that have arisen that either the reformers or the government wanted to fix and with which the other side could agree, or at least tolerate.

Even post-CAFRA, forfeitures in the United States still attract criticism. Perhaps the problem is the fact that the “first principles” still await a thorough examination.

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82 David B. Smith, An Insider’s View of the Civil Asset Forfeiture Reform Act of 2000, 24 CHAMPION 28 (June 2000) (“Talk about reform being ‘overdue’ was an understatement.”).
83 Id.
84 Id. The legislative history provides some policy background, see, e.g., Civil Asset Forfeiture Reform Act: Hearing on H.R. 1835 Before the H. Comm. on the Judiciary, 105th Cong. 22-23 (1997) (statement of Stefan Cassella, Deputy Chief, Asset Forfeiture and Money Laundering Section, Criminal Division, Dept. of Justice, with respect to civil forfeiture legislation proposed in the previous Congress), but this discussion did not make it into the final legislation.
85 Smith, An Insider’s View, supra note 82 at 28.
86 Id.
87 See, e.g., John R. Emshwiller and Gary Fields, Federal Seizures Rise, Netting Innocent With Guilty, WALL ST. J. at 1 (August 22, 2011) available online at http://online.wsj.com/article/SB10001424053111903480904576512253265073870.htm (last visited August 27, 2011); Chip Mellor, Constitutional Crossroads: Civil Forfeiture Laws and The Continued Assault On Private Property, FORBES (June 8, 2011) (“Civil forfeiture laws represent one of the most serious assaults on private property rights in the nation today. Under civil forfeiture, police and prosecutors can seize your car or other property, sell it and use the proceeds to fund agency budgets—all without so much as charging you with a crime.”), available online at http://www.forbes.com/2011/06/08/property-civil-forfeiture.html (last visited July 27, 2011). See also infra, Section III, on “Continuing Criticisms and Concerns.”
Most of the criticisms of federal forfeiture have focused on the civil side; indeed, the 2000 reform legislation was directed almost exclusively at civil forfeitures. The procedures before CAFRA were exceedingly generous to the Government, requiring only a showing of probable cause, after which the burden of proof shifted to the property owner to establish that the property was not subject to forfeiture. But CAFRA made important changes to this requirement and to others deemed too hostile to property owners, particularly innocent ones. Key innovations from CAFRA are summarized below.

1. Burdens of proof

The House Committee on the Judiciary noted that the probable cause standard was too low, particularly since the Government was not required to “produce any admissible evidence and may deprive citizens of property based on the rankest of hearsay and the flimsiest evidence.” The Committee concluded that “[t]his result clearly does not reflect the value of private property in our society, and makes the risk of an erroneous deprivation intolerable.”

The House version of CAFRA would have imposed on the government the clear and convincing evidence standard for a civil forfeiture, but that met with opposition from the Justice Department and from some in the Senate. Opponents argued that the standard should be the same as in all other civil cases—preponderance of the evidence—and the version of CAFRA that passed the Senate, and that President Clinton ultimately signed into law, adopted the lesser,

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88 There is a provision in CAFRA that expands the availability of criminal forfeitures, but that was motivated entirely by a desire to limit the use of civil forfeitures, and to use criminal forfeitures instead, wherever possible. CAFRA, 106 P.L. 185, Sec. 16 (2002); 28 U.S.C. § 2461(c); see infra Section II.B.8.a.
89 Pre-CAFRA requirements are more thoroughly explained my 1998 overview of federal forfeiture procedure. Pimentel, supra note 2, 183 F.R.D. 1 (giving a thorough explanation of pre-CAFRA requirements in an overview of federal forfeiture procedure).
90 H.R. Rep. No. 106-192 at 12 (June 18, 1999). (quoting United States v. $12,390, 956 F.2d 801, 811 (8th Cir. 1992) (Beam, J., dissenting)).
91 Id.
preponderance standard. Nonetheless, the burden of proof now rests with the Government, and not with the property owner.

If the forfeiture goes uncontested, however, CAFRA still allows the Government to effect forfeitures without an evidentiary showing. The impact of the new burden of proof therefore is limited to the relatively small portion of forfeitures that are challenged in court.96

a. Claimant’s burdens – affirmative defenses

The property owner is still required to prove affirmative defenses, most notably the “innocent owner” defense, introduced by CAFRA.97 For these, the owner must meet the preponderance of the evidence standard.98

b. Claimant’s burdens – the PATRIOT Act’s exception to CAFRA

Just one year after the passage of CAFRA, the PATRIOT Act created an exception to this new burden of proof, reverting to the much criticized pre-CAFRA standard, even for a contested forfeiture.99 The provisions of the PATRIOT Act are discussed in more detail below.100

2. Appointment of counsel

Under CAFRA, indigent claimants in a civil forfeiture proceeding are entitled to counsel at public expense if (1) they are already represented by court-appointed counsel in related criminal proceedings,
or (2) the property at issue is the person’s primary residence.\textsuperscript{101} The House Report noted the “punitive nature” of civil forfeiture as a justification for the provision.\textsuperscript{102}

3. Uniform innocent owner defense

CAFRA formally created a uniform and comprehensive affirmative defense for innocent owners. The House Committee believed it was “required by fundamental fairness.”\textsuperscript{103} A variety of statutes and cases had recognized innocent owner defenses in certain circumstances,\textsuperscript{104} but an earlier Committee Report noted that these were not uniform and had been inconsistently interpreted in the federal courts.\textsuperscript{105}

The definition of an innocent owner includes “one who, at the time he acquired the interest in the property, was a bona fide purchaser or seller for value and reasonably without cause to believe that the property was subject to forfeiture.”\textsuperscript{106} The provision does not, for the most part, protect innocent donees.\textsuperscript{107} Otherwise, criminals could shield their property from forfeiture through transfers to relatives.\textsuperscript{108}

\textsuperscript{101} 18 U.S.C. § 983(b)(1)&(2).
\textsuperscript{102} H.R. Rep. 106-192 at 14; see also H.R. Rep. No. 105-358, pt. 1, at 29 (Oct. 30, 1997) (“This Committee believes that given the punitive, quasi-criminal nature of civil forfeiture proceedings, legal representation should be provided for those who are indigent in appropriate circumstance.”) If, as suggested here, the purposes of forfeiture are punitive, then determinate sentencing principles may play a role in assessing the fairness of such punishments. See infra Section IV.B.3.a.
\textsuperscript{104} Although the CAFRA innocent owner defense is comprehensive applying to all federal civil forfeitures, it created a narrower defense for innocent owners than was already available under some other statutes. Smith, An Insider’s View, supra note 82 at 28; see infra note 171 and accompanying text.
\textsuperscript{106} H.R. Rep. No. 106-192 at 16 (June 18, 1999).
\textsuperscript{107} There is a separate provision which covers innocent owners who acquired their interest through inheritance, divorce, etc. 18 U.S.C. § 983(d)(3)(B)(i)-(iv). For such claimants to prevail, however, all of the following must be true: (1) the property must be the primary residence of the claimant; (2) depriving the claimant of the property would deprive the claimant (and his/her dependents) of reasonable shelter; (3) the property must not be traceable to the proceeds of any criminal offense; (4) the claimant must have acquired interest in the property through marriage, divorce, legal separation, inheritance, or probate. 18 U.S.C. § 983(d)(3)(B)(i)-(iv).
\textsuperscript{108} H.R. Rep. No. 106-192 at 16 (June 18, 1999) (citing United States v. A Parcel of Land (92 Buena Vista Ave.) 507 U.S. 111, 139 (1993) (J. Kennedy, dissenting)). Innocent owner status may be accorded, however, to those who acquire property interests through probate or inheritance, or through marriage dissolution proceedings, as long as the recipient did not have cause to believe the property was subject to forfeiture. 18 U.S.C. § 983(d)(3)(B). The risk of fraud here is slight, the Committee concluded, and the injustice is great if the heir is called upon to defend the forfeiture later, as it will be difficult to present evidence as to what was in the mind of the
4. Hardship provision

Recognizing that hardship may result from the Government’s seizure of property pending resolution of disputed issues, CAFRA also created a provision to protect property owners in such circumstances. Operating much like preliminary injunctions, the statute calls for a balancing of hardships, taking into account “the risk that the property will be destroyed, damaged, lost, concealed, or transferred if it is returned during the pendency of the proceedings.” The upshot is that an owner who faces “substantial hardship” in being deprived of the property may be able to keep the property pending a final determination on forfeiture.\[109\]

5. Compensation for damage to property while in the government’s possession, with interest

CAFRA also amended the Federal Tort Claims Act to permit tort claims against the government to recover the value of property damaged or destroyed while in the possession of any law enforcement officer if the property was seized for the purposes of civil forfeiture. Of course, such claims cannot stand if the forfeiture is ultimately upheld.\[110\]

The House Report included the testimony of the owner/operator of an air charter service, named Billy Munnerlyn, whose plane was seized in 1989 after he unwittingly transported a client who was carrying drug money. Mr. Munnerlyn spent $85,000 on legal fees, selling his three other planes to fund the litigation, trying to get his plane back. When he finally succeeded in getting the plane returned to him, he found that the Government had done $100,000 worth of damage to it, presumably in their search for drugs or other evidence. The Government’s sovereign immunity barred any claim for the damage to the plane, so Mr. Munnerlyn had little choice but to declare personal bankruptcy and give up his business.\[113\] No doubt this story motivated Congress to include the

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\[110\] Of course, this provision does not apply to contraband. 18 U.S.C. § 983(f)(8)(A). Nor does it apply to property which is “suited for use in illegal activities, or is likely to be used to commit additional criminal acts if returned to the claimant.” 18 U.S.C. § 983(f)(8)(D).
\[111\] CAFRA, 106 P.L. 185, Sec. 3 (2000). This provision of CAFRA was clearly intended to address situations like the one cited.
\[112\] Id.
\[114\] Id.
\[115\] Id. Apparently, Mr. Munnerlyn ended up driving a truck for a living after the
provisions for government liability for damage to seized property.

Prior to CAFRA, the Government paid no interest for the time it held the property, before being ordered to returning it to a prevailing owner. The House Committee on the Judiciary had earlier expressed concern that this was “manifestly unfair.” Accordingly, CAFRA includes provisions entitling a successful claimant to interest on the assets seized for the time the Government retained them, and if the court finds that there was no reasonable cause for the seizure in the first place, the claimant can get costs and attorney fees as well.

6. Elimination of the cost bond

Prior to the passage of CAFRA, a claimant was required to post a cost bond to “defray the government’s cost of storing the property and to cover government litigation costs” as well as deter frivolous claims. The House Committee on the Judiciary felt the cost bond deprived indigent claimants access to the courts and was likely unconstitutional. Even for non-indigent claimants, the Committee felt that the cost bond added an unnecessary deterrent to contesting forfeitures. The Senate agreed, suggesting that the cost bond “offended[ed] the fundamental principle of equal and open access to the courts.” Instead of a bond, CAFRA provides for the imposition of a civil fine if the court finds a claimant’s challenge to be frivolous.

7. Notice and adequate time to contest forfeiture

CAFRA imposed requirements for the Government to move more expeditiously, imposing a 60-day time limit after the seizure to send notice to potential claimants. Prior to CAFRA, a potential challenger to forfeiture often had “an exceedingly short” time to file a claim, as government’s failed attempt to forfeit his plane destroyed his business and his credit.

Id.

117 CAFRA, 106 P.L. 185, Sec. 4 (2000).
119 146 Cong Rec S 1753 1761 (2000).
122 146 Cong Rec S 1753 1761 (2000)
123 CAFRA, 106 P.L. 185, Sec. 2(h)(1) (2000).
124 18 U.S.C. § 983(a)(1)(A)(i); Smith, An Insider’s View, supra note 82 at 28 (“The government is no longer given the power to delay the commencement of proceedings as long as it likes after seizing someone’s property.”).
little as 10 days, although these time frames varied under the sundry statutes that provided for forfeiture.\footnote{125} CAFRA remedied that by implementing a uniform and slightly more generous time period of 30 days to file a claim.\footnote{126}

8. Additional reforms

a. Expanded availability of criminal forfeiture

CAFRA encourages the use of criminal forfeiture by including a provision that amends 18 U.S.C. § 2461 to authorize use of criminal forfeiture any time civil forfeiture is authorized.\footnote{127} This change reflects a Congressional preference for criminal forfeitures, which enjoy far stronger due process protections, and are therefore far less likely to infringe on the legitimate property rights of citizens, innocent or not.\footnote{128}

b. Requiring a “substantial connection” between the property and the offense

CAFRA clarified the nexus that must be established between the offense prompting the forfeiture and the property forfeited. Case law had been inconsistent on this point,\footnote{129} and the legislation resolved the dispute in favor of the more demanding standard of a \textit{substantial connection}.\footnote{130}

\footnote{125} H.R. Rep. No. 106-192 at 19 (June 18, 1999) (quoting \textit{DAVID SMITH, PROSECUTION AND DEFENSE OF FORFEITURE CASES}, 9.03[1], at 9-45 (1998)); Pimentel, \textit{supra} note 2, 183 F.R.D. at 15 (explaining how in 1998 the Supplemental Rules were amended for non-admiralty forfeitures to allow 20 days to file a claim, instead of the previous 10 days, which still applied to admiralty forfeitures, but cautioning: “Even as amended, however, the time to respond is short. Because the property rights of innocent third parties are at stake, the adequacy of notice and time to respond deserve particular attention.”).


\footnote{127} CAFRA, 106 P.L. 185, Sec. 16 (2002); 28 U.S.C. § 2461(c).

\footnote{128} \textit{See infra}, note 202, discussion of the Congressional preference for criminal over civil forfeitures.

\footnote{129} \textit{See Eric Blumenson \\& Eva Nilsen, \textit{Policing for Profit: The Drug War’s Hidden Economic Agenda}, 65 U. Chi. L. Rev. 35, 45 n. 44 (1998) (discussing the conflicting case law on this issue).}

\footnote{130} Floor Statement of Henry Hyde re: H.R. 1658 (April 11, 2000), \textit{available at http://judiciary.house.gov/legacy/0411att.htm}. (“H.R. 1658 provides that the substantial connection test should be used whenever facilitating property is subject to civil forfeiture under the U.S. Code. And the test is intended to mean something, it is intended to require that facilitating property have a connection to the underlying crime significantly greater than just ‘incidental or fortuitous.’ . . . Under H.R. 1658’s substantial connection test, in order for an entire bank account composed of both tainted and untainted funds to be forfeitable, a primary purpose of its establishment or maintenance must be to disguise a money laundering scheme. This rule should also apply when the government seeks to forfeit an entire business because tainted funds
Under CAFRA’s standard, the Government must prove that facilitating property’s connection to the criminal offense was “substantial” and not merely incidental or fortuitous.\(^{131}\)

c. Forfeitability of proceeds of most crimes

Originally, forfeiture of the proceeds of crime was available only for violations of RICO and some money laundering statutes.\(^{132}\) By 1978, proceeds forfeitures were available for a number of drug crimes.\(^{133}\) By the 1990s, civil forfeiture authority had been extended to cover most federal crimes.\(^{134}\) Then, in 2000, CAFRA expanded section 981(a)(1)(C) to include the proceeds of more than 200 different state and federal crimes as defined under 18 U.S.C. § 1956(c)(7) or a conspiracy to commit any one of those offenses.\(^{135}\)

C. The PATRIOT Act and the war on terror – two steps forward, one step back

Almost exactly 18 months after CAFRA was signed into law by President Clinton, President Bush signed into law the USA PATRIOT Act (“PATRIOT Act”).\(^{136}\) It is not surprising that forfeitures were implicated in this opening salvo in the War on Terror, as they had been for Prohibition, the War on Organized Crime, and the War on Drugs.

1. Burden of proof

were laundered in a firm bank account. For the business to be forfeitable, a primary purpose for the establishment or maintenance of the entire business must be to disguise a money laundering scheme.” (last visited July 26, 2011).

\(^{131}\) CAFRA, 106 P.L. 185, Sec. 2 (2000); see also CASSELLA, ASSET FORFEITURE LAW, supra note 3 at 776.


\(^{133}\) See supra note 65.

\(^{134}\) Stefan D. Cassella, Development of Asset Forfeiture Law in the United States, at 8, www.fear.org/publicdocs/Cassella_SupCtCases%5B1%5D.rtf.


\(^{136}\) 197 P.L. 56 (2001), signed into law on October 26, 2001, 18 months and one day after April 25, 2000, when President Clinton signed CAFRA. The unwieldy title of the act, apparently manipulated to produce an appealing acronym, is the “Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001.”
As already noted, the PATRIOT Act brought back, for terrorism cases at least, the pre-CAFRA standards of proof for civil forfeitures:

Under section 316 of the Patriot Act, if the case goes to trial under 981(a)(1)(G), and the property involves the assets of “suspected international terrorists,” the normal burden of proof is reversed: once the Government makes its initial showing of probable cause, the claimant has the burden of proving, by a preponderance of the evidence, that his property is not subject to confiscation.\textsuperscript{137}

Thus, some of the very problems that Congress tried to fix with CAFRA have been reintroduced for cases of suspected terrorism. This is important when considering the policies underlying forfeitures. Forfeiture procedure inevitably involves striking a balance between the property rights of its citizens and the Government’s interest in combating crime. Anytime the Government’s interest is elevated to the status of “War on” something, it can be expected that the new policy priority will result in re-striking that balance in favor of the Government and to the detriment of the property rights of its citizens.

2. Forfeiture of estate

The PATRIOT Act also revived the concept of forfeiture of estate, by providing for forfeiture of all assets without any proof of any nexus between the assets and the terrorism offense.\textsuperscript{138} Already unconstitutional for treason,\textsuperscript{139} it had been barred by statute for other crimes since 1790.\textsuperscript{140} It is truly a remarkable development to see a long discredited doctrine, relegated to the dustbin of history for over 210 years, revived and re-enacted. As codified in Title 18, the PATRIOT Act permits the forfeiture of “[a]ll assets, foreign or domestic . . . of any individual . . . engaged in planning or perpetrating any Federal Crime of Terrorism.”\textsuperscript{141} It appears that this provision has only rarely if ever been invoked,\textsuperscript{142} possibly because the Department of Justice is reluctant to litigate its constitutionality. Certainly if the Constitution explicitly forbids

\textsuperscript{138} Id. at 7-8 (“[O]nce the Government establishes that a person, entity, or organization is engaged in terrorism against the United States,…the Government can seize and ultimately mandate forfeiture of \textit{all assets}, foreign or domestic, or the terrorist entity, whether those assets are connected to terrorism or not.”).
\textsuperscript{139} U.S. Constitution, Art. 3, Section 3, supra note 26.
\textsuperscript{140} 1 Stat. 177 (1790) (“[N]o conviction or judgment for any of the offenses aforesaid, shall work corruption of blood, or any forfeiture of estate.”).
\textsuperscript{142} Doyle, \textit{Crime and Forfeiture}, CRS Report for Congress, CRS-3-4, n. 16 (rev. 2007). (“At least to date [May 9, 2007], this authority has rarely, if ever, been used.”)
forfeiture of estate for treason, there is at least a question as to the
constitutionality of forfeiture of estate for acts of (or in support of)
terrorism against the state.

III. CONTINUING CRITICISM AND CONCERNS

Notwithstanding the reforms that came with CAFRA, the problems
persist and the criticisms continue.\textsuperscript{143} Much of the criticism comes in the
form of a parade of horribles, detailing how injustices were done in
individual cases.\textsuperscript{144} The cases of Mrs. Bennis and the Lopes family
remain potent examples, as CAFRA probably would not have helped
either one of them.\textsuperscript{145} Anecdotes like these aside, the criticism tends to
fall into a few general categories, summarized below.

\begin{enumerate}
  \item \textbf{A. The failure to justify forfeitures in terms of public policy}

As already suggested, the articulated policy justifications for
forfeiture procedure are unsatisfying, with even the Supreme Court
upholding them simply because they have been around so long.\textsuperscript{146} Other
justifications that have been proffered, particularly for facilitating
property forfeitures,\textsuperscript{147} appear to be ad hoc afterthoughts: attempts to
justify existing practice. Thus we have a practice and procedure in
search of a policy, rather than a practice and procedure that is driven by
and tailored to serve compelling policy objectives.

So are there policy objectives compelling enough to warrant this
problematic procedure? If so, what are they? Closer analysis of the
different types of forfeitures yields very different answers for each, both
in terms of what policy drives them, and whether it is sufficient to justify
them.

Today, forfeitures are justified on a variety of policy bases. Courts
occasionally cite various purposes to be served,\textsuperscript{148} but the closest thing

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\textsuperscript{143} See Mellor, supra note 87.
\textsuperscript{144} See, e.g., Eric Moores, Reforming The Civil Asset Forfeiture Reform Act, 51 ARIZ.
L. REV. 777 (2009); Barclay Thomas Johnson, Restoring Civility-the Civil Asset
Forfeiture Reform Act Of 2000: Baby Steps Towards A More Civilized Civil Forfeiture
System, 35 IND. L. REV. 1045 (2002); David Ross, Civil Forfeiture: A Fiction That
\textsuperscript{145} Mrs. Bennis lost her car under the laws of the state of Michigan, so CAFRA’s
innocent owner defense would have not been available to her. The Lopes were aware
of the marijuana patch their son had planted in their backyard, and therefore could not
have asserted CAFRA’s innocent owner defense in any case.
\textsuperscript{146} See supra.
\textsuperscript{147} See supra Section II.A.1 “Instrumentality forfeitures – origins.”
\textsuperscript{148} In Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 686 (1974), for
to a comprehensive statement comes from Stefan Cassella of the Asset Forfeiture and Money Laundering Section of the U.S. Department of Justice’s Criminal Division. In testimony before the House Committee on the Judiciary in 1997, he said that forfeiture exists to (1) seize contraband; (2) take the property that facilitates crime out of circulation; (3) seize the proceeds of crime; (4) return the proceeds of crime to victims; (5) deter crime; (6) and punish criminals. 149

The six purposes articulated here are remarkably unsatisfying as justifications for the forfeitures. 150 The first three are mutually exclusive; these are three different types of forfeitures and no forfeiture accomplishes more than one of them. Moreover, these reasons largely beg the question: the public policy purpose behind proceeds forfeitures cannot be merely to “seize the proceeds.” This circular justification, reduced to a tautology, betrays the thinness of the underlying policy. A more substantive justification is needed to justify the procedure, with respect to each of the three types of forfeitures. A more careful examination of each is set forth below in Section IV.B., infra.

The fourth purpose, returning the proceeds of crime to victims, is a laudatory objective, 151 but perhaps a misleading one, as historically very little of the assets seized in federal forfeitures was ever returned to victims. 152 The overwhelming majority of forfeited property is kept by and shared among law enforcement agencies to fund law enforcement example, the Supreme Court characterized the policy in terms of “punitive and deterrent purposes.”

149 Civil Asset Forfeiture Reform Act: Hearing on H.R. 1835 Before the H. Comm. on the Judiciary, 105th Cong. 112 (1997) (statement of Stefan Cassella, Deputy Chief, Asset Forfeiture and Money Laundering Section, Criminal Division, Dept. of Justice); this language is also reflected in H.R. Rep. No. 106-192 at 5 (June 18, 1999).

150 Mr. Cassella was not, in all fairness, attempting to justify forfeitures in this statement as much as describe their functions. The concern here is that there has been so little discussion of the actual justification for forfeitures.

151 It was a justification for forfeiture cited by the Supreme Court back in 1844, when the forfeiture of a ship was upheld as a “means of … insuring an indemnity to the injured party.” Brig Madek Adhel, 43 U.S. at 233, supra note 37.

activities.153

The final two purposes, to deter crime and punish criminals, may be the most compelling reasons underlying everything else. The Supreme Court lent support for this in Calero-Toledo, characterizing the policy to be served in terms of “punitive and deterrent purposes.” 154 But, these are largely duplicative of the purposes of criminal law, raising the question as to whether and why it is necessary to pursue criminal law objectives with forfeitures. The likely answers—for example, that it allows the Government to punish people without proving their guilt—may prove to be a better argument against the forfeitures than in favor of them.

B. The Government’s burden of proof is still too low

CAFRA attempted to address the problem of burdens of proof, and succeeded in shifting the burden to the Government to prove that the property is forfeitable. But, the Government need only establish such forfeitability by a preponderance of the evidence; the House’s efforts to set the standard at clear and convincing evidence failed in the Senate. 155 Although an innocent owner can assert her innocence under CAFRA, she still bears the burden of proving such innocence. 156 These factors have prompted critics to argue that the allocation of burdens still tips the scales too heavily in favor of the Government. 157 The problem is not just

153 Sourcebook of Criminal Justice Statistics Online, available at http://www.albany.edu/sourcebook/pdf/t4452010.pdf (last checked July 26, 2011) (“The funds are used for purposes such as equipment, training, investigative expenses, purchase of evidence, and drug and gang awareness programs.”). Cassella, in his testimony before Congress identified that as the primary use of seized assets: “[T]hat money is used to support the operation of law enforcement itself... There is poetic justice in this, Mr. Chairman, Forfeiture not only lets us take the profit out of crime; it provides support for the law enforcement agencies who catch the criminals and put them in jail.” Civil Asset Forfeiture Reform Act: Hearing on H.R. 1916 Before the H. Comm. on the Judiciary, 104 Cong. 214 (1996) (statement of Stefan Cassella, Deputy Chief, Asset Forfeiture and Money Laundering Section, Criminal Division, Dept. of Justice).


155 Floor Statement of Henry Hyde re: H.R. 1658 (April 11, 2000), available at http://judiciary.house.gov/legacy/0411att.htm (“H.R. 1658, as amended by the Senate, reduced the standard of proof the government has to meet in civil asset forfeiture cases from clear and convincing evidence to a preponderance of the evidence.”) (last visited July 26, 2011).

156 See infra, Section III.C.1, “Inadequacy of the ‘Innocent Owner’ Defense.”

157 Eric Moores, Reforming the Civil Asset Forfeiture Reform Act, 51 ARIZ. L. REV. 777, 799 (2009) (“Congress should increase the government’s burden of proof from ‘preponderance of the evidence’ to ‘clear and convincing evidence,’ which would make it more difficult for the government to prevail with flimsy evidence.”); Barclay Thomas Johnson, Restoring Civility—the Civil Asset Forfeiture Reform Act Of 2000: Baby Steps Towards A More Civilized Civil Forfeiture System, 35 IND. L. REV. 1045, 1075-
the language of the statute, but the interpretation the courts have chosen to give it. David B. Smith, author of a treatise on Prosecution and Defense of Forfeiture Cases, observes that “the courts have been steadily mitigating the 2000 bill’s impact, both by narrowly interpreting the protections it grants defendants and by being overly deferential to prosecutors when determining if they’ve met the new evidentiary standard.”

Illustrative is one of the horror stories told to the House Judiciary Committee and included in their report on CAFRA. In 1991, Willie Jones, who operated a landscaping business in Tennessee, attempted to fly to Houston to purchase nursery stock, carrying $9,000 in cash with him. He testified that he knew it would be easier to do with cash, especially since he was from out of town. As he put it, “[T]he nursery business is kind of like the cattle business. You can always do better with cash money.” After buying his ticket with cash, he was approached by officers who accused him of dealing drugs. They did a background check on him, and found him to be “clean,” but drug-sniffing dogs “hit” on the money, so they let him go but they kept his money. The officers refused to count the money or issue a receipt for it. In the litigation that followed, Mr. Jones, who is African-American, asserted his belief that the seizure was racially motivated, a product of law enforcement’s racial profiling of drug dealers.

The story is worth retelling because although Congress attempted to address this problem with its heightened standard of proof, there is nothing in CAFRA itself that would prevent this from happening again. Law enforcement can still seize money based on probable cause, and although it is doubtful that carrying large amounts of cash “while black” constitutes probable cause, the dogs’ “hit” on the money may be enough. In 2001, the Ninth Circuit upheld a forfeiture on similar facts, relying heavily on the dog alert, despite the fact that the probative value of dog alerts on currency has been seriously impugned in recent years.
Because probable cause may be sufficient for the initial seizure, CAFRA’s new burden of proof for the Government is relevant only if the forfeiture is contested. Unless it is contested, the forfeiture is completed administratively based on nothing more than the original cause to seize the property. Only if the claimant contests the forfeiture—and hiring counsel to help here may be difficult to do since the Government has seized his cash—is the Government actually called upon to prove forfeitability by a preponderance of the evidence. And as for Mr. Jones’s innocence, as explained below, he bears the burden of proving that.

C. Due process for owners, especially third-party owners

1. Inadequacy of the innocent owner defense

Although some forfeiture statutes, including CAFRA, have imposed separate owner consent or knowledge requirements as necessary conditions for the forfeiture, the courts have not always been generous to nonconsenting, unaware, or “innocent” owners in the interpretation of these restrictions. Some have held that the “lack of consent” defense requires proof that the owner did all reasonably within his or her power to prevent the proscribed use, or that the lack of knowledge defense is probative of the owner’s innocence. As explained below, the Government need not prove concealment or knowing ownership to establish forfeiture.

Probable cause to seize the cash, based in large part on the dog’s alert on a large quantity of cash); but see United States v. $242,484.00 in United States Currency, 351 F.3d 499, 511 (11th Cir. 2003) (a drug dog’s sniff of cash is “of little value” in determining whether the currency is presently being used for narcotics trafficking because as much as eighty percent of all cash in circulation contains drug residue); Humke, Passing the Buck, 83 Neb. L. Rev. at 1300 n. 2 (listing cases that discount the value of dog alerts on cash).

See infra Section III.C.2, “The Problem of Uncontested Forfeitures” for a discussion of why forfeitures may not be contested.

E.g., 18 U.S.C. § 981(a)(2) (in money laundering cases, “[n]o property shall be forfeited . . . to the extent of the interest of an owner or lienholder by reason of any act or omission established by that owner or lienholder to have been committed without [his or her] knowledge”); 21 U.S.C. § 881(a)(4) (in controlled substance cases, vehicles and vessels are not forfeitable if operated by an innocent common carrier, or if the actions prompting forfeiture were without “the knowledge, consent or willful blindness of the owner”); 21 U.S.C. § 881(a)(7) (in controlled substance cases, “no [real] property shall be forfeited . . . to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without [his or her] knowledge or consent”).

E.g., United States v. All Right, Title and Interest in Real Property and Appurtenances Thereto Known as 785 St. Nicholas Ave. and 789 St. Nicholas Ave., 983 F.2d 396, (2d Cir. 1993)(“[C]laimants have failed to prove by a preponderance of the evidence that they took all the precautions reasonably within their power to prevent drug sales from occurring on their property. Once a claimant acquires knowledge that
unavailable if the owner “should have known” of the criminal use of the property.\textsuperscript{170} CAFRA’s innocent owner defense is only slightly better:

\begin{quote}
[CAFRA] creates a narrower defense for innocent owners than is currently found in 21 U.S.C. § 881(a) and 18 U.S.C. § 981(a)(2). With respect to a property interest in existence at the time the illegal conduct giving rise to forfeiture took place, “innocent owner” means an owner who did not know of the conduct giving rise to forfeiture or who, upon learning of such conduct, did all that reasonably could be expected under the circumstances to terminate such use of the property.\textsuperscript{171}
\end{quote}

Applying this standard to the Lopes case shows how the problem persists. The Lopeses certainly knew of the marijuana patch their son had planted in the back yard, and they probably did not do “all that reasonably could be expected” to remove it. Indeed, they were intimidated by his threats of suicide. Moreover, CAFRA would have placed the burden on the Lopeses to prove their innocence, so inconclusive evidence on the question of innocence will not be sufficient to protect such owners from forfeiture.

2. The problem of uncontested forfeitures

The overwhelming majority of forfeitures under current procedure, both civil and criminal, go uncontested.\textsuperscript{172} As many as 80\% of these forfeitures in federal court, representing 71\% of the total amount forfeited, come in through uncontested proceedings.\textsuperscript{173} Prior to CAFRA, the DEA estimated that 85\% of drug case forfeitures went uncontested.\textsuperscript{174} Although both the Justice and Treasury Departments feared that the passage of CAFRA would dramatically increase the number of forfeiture challenges,\textsuperscript{175} most seizing agencies report the

\begin{quote}
his or her property is being used for drug-related purposes, that individual must take reasonable steps to prevent this illicit use of the premises in order to show a lack of consent to such use.”).
\textsuperscript{170} E.g., United States v. 755 Forest Road, 985 F.2d 70 (2d Cir. 1993) (defense is unavailable to the willfully blind); but see United States v. 6960 Miraflores Ave., 995 F.2d 1558 (11th Cir. 1993) (defense is available if the claimant can prove absence of “actual knowledge”).
\textsuperscript{171} Smith, An Insider’s View, supra note 82 at 28 (emphasis added).
\textsuperscript{173} Id.
\textsuperscript{174} Cassella, Asset Forfeiture Law, supra note 3 at 10 n. 22 (2007).
\textsuperscript{175} Eric H. Holder, Jr, Deputy Attorney General, Dept. of Justice testified “[T]here is a real potential for an increase in the number of claims … if a person … had the ability to get a lawyer appointed for them, [and] did not have to post a bond.…[T]he potential for
percentage of uncontested forfeitures remains reasonably steady.\(^\text{176}\) While the Department of Justice will appreciate the ease and efficiency of these forfeitures,\(^\text{177}\) the high rate of uncontested forfeitures may be indicative of widespread, or at least significant, compromises of due process.

a. Adequacy of notice

The high number of uncontested forfeitures may be a product, at least in part, of failures of notice.\(^\text{178}\) CAFRA requires that in any nonjudicial civil forfeiture proceeding under a civil forfeiture statute, with respect to which the Government is required to send written notice to interested parties, such notice shall be sent in a manner to achieve proper notice as soon as practicable, and in no case more than 60 days after the date of the seizure.\(^\text{179}\)

The Rule governing most civil forfeitures provides for public notice of the action “in a newspaper generally circulated in the district.”\(^\text{180}\) Absent actual notice, the third-party owner could lose his or her property on a mere showing of probable cause and without any other hearing.\(^\text{181}\) To the extent that “constructive notice” by publication is considered legally

the filing of frivolous claims really raises pretty dramatically.” \(^\text{178}\) See Barclay Thomas Johnson, *Restoring Civility-the Civil Asset Forfeiture Reform Act Of 2000: Baby Steps Towards A More Civilized Civil Forfeiture System*, 35 Ind. L. Rev. 1045, 1052-54 (2002) (noting that seizures of real property can no longer be done without notice to the owner, but that personal property can still be seized without notice). Johnson’s examples address only the initial seizure, however, not the ultimate forfeiture.


\(^\text{176}\) Cassella, *Asset Forfeiture Law*, supra note 3 at 10 n. 22.


\(^\text{178}\) See Barclay Thomas Johnson, *Restoring Civility-the Civil Asset Forfeiture Reform Act Of 2000: Baby Steps Towards A More Civilized Civil Forfeiture System*, 35 Ind. L. Rev. 1045, 1052-54 (2002) (noting that seizures of real property can no longer be done without notice to the owner, but that personal property can still be seized without notice). Johnson’s examples address only the initial seizure, however, not the ultimate forfeiture.


\(^\text{180}\) Rule G(4) (a)(iv), Supplemental Rules for Certain Admiralty and Maritime Claims.

\(^\text{181}\) See 18 U.S.C. § 985(d)(1)(A)(ii) (2012) (permitting seizure of real property prior to the entry of a forfeiture order if the court determines there is probable cause and exigent circumstances for the government to seize the property).
adequate, the end result may be a forfeiture that is never heard on its merits, and never justified, even under CAFRA’s preponderance of the evidence standard.

b. Owner reluctance to file a claim

Due process concerns also arise for the owner who does receive actual, timely notice, but who chooses not to appear and contest the forfeiture because of fears of prosecution. Once a seizure has occurred, it is obvious that the authorities are actively pursuing an investigation, and anyone even tangentially connected with the property at issue has a strong incentive to lie low. Coming forward to contest the forfeiture is certain to attract the attention of, and even antagonize, law enforcement at the precise moment that the potential claimant wants to appear uninvolved and/or cooperative.

There is also potential for the filing of a claim to compromise rights against self-incrimination. Consider, for example, Jane and Carl, who share a joint bank account, and who jointly acquire a boat with money they have earned legally and saved over the years. Later, Jane is investigated on suspicion of insider trading, although there is no evidence that Carl was ever aware of her inside information or that she was acting on it. The Government seizes the boat based on evidence that the boat was paid for out of the same account where Jane had deposited the proceeds of her insider trading activity. Jane and Carl’s best defense to the forfeiture may well be that her insider trading activity did not begin until after the boat was purchased and paid off. They may have witness testimony, including their own, that could substantiate the date upon which Jane’s involvement in insider trading began.

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182 The Supreme Court held that in the context of a ship forfeiture, service on the res was sufficient. The Mary, supra note 31. Notice for modern forfeitures is, as of 2009, governed by Rule G(4) of the Supplemental Rules for Certain Admiralty and Maritime Claims, which for the first time includes specifics on the timing, content, and placement of publication, and when publication is required at all. It also calls for direct notice to anyone the government knows to be a potential claimant. So while service on the res may be sufficient for due process purposes, it falls short of the minimum standards now established by rule.

183 18 U.S.C. § 983(e) does allow a post hoc challenge to an administrative forfeiture on the grounds of failure of notice, but the courts have been reluctant to exercise jurisdiction to consider the merits of the forfeitures challenged under this statute. See infra note 296.

184 Rule G(2)(f) of the Supplemental Rules for Certain Admiralty and Maritime Claims specifies that the Government’s complaint must “state sufficiently detailed facts to support a reasonable belief that the government will be able to meet its burden of proof at trial,” but if no claimant emerges to contest that forfeiture, the Government never actually has to carry that burden.
If the Government seizes the boat in a “proceeds forfeiture,” however, Jane and Carl are unlikely to contest it. The evidence that will clearly vindicate their claim to the property will simultaneously convict Jane of the underlying offense. Even if Jane and Carl’s evidence does not incriminate them directly, it may well be interpreted as a waiver of some or all of their rights against self-incrimination, opening them up to cross-examination in that hearing and in any subsequent trial regarding potentially incriminating matters.\footnote{Rogers v. United States, 340 U.S. 367 (1951) (a witness’s admission of an incriminating fact constitutes a waiver of Fifth Amendment protection with respect to the details surrounding that admission).}

Section 981(g)(2) of Title 18 attempts to address this problem by allowing the court to stay the forfeiture proceeding upon motion by a claimant, if (1) the claimant is “the subject of a related criminal investigation,” and (2) “continuation of the forfeiture proceeding will burden the right of the claimant against self-incrimination” in the criminal proceedings.\footnote{18 U.S.C. § 981(g).} The statutory provision may provide small comfort, however, for a variety of reasons. First a claimant, such as Carl, may not be a subject of criminal investigation himself, and therefore not entitled to the stay. Second, Carl may be motivated not by concerns about incriminating himself, but about incriminating Jane, so the stay is not necessary to protect his right against self-incrimination. Third, the claimant may be distrustful of the courts’ willingness or ability to protect him, given popular perception that the courts usually side with law enforcement.

The gambit, therefore, allows the Government to use the threat of criminal prosecution to intimidate property owners into waiving their rights to a hearing on the forfeitability of their property. Procedural due process, of course, is an important right shared by the guilty and innocent alike; denial of a fair hearing cannot be excused on the grounds that the defendant would not have prevailed on her claim anyway.\footnote{Carey v. Piphus, 435 U.S. 247 (1978) (students suspended without procedural due process were entitled to nominal damages for the violation of those rights, even if the suspension was fully justified on the merits, and would have been imposed in any case).} Moreover, there is no reason to assume that the claims owners are waiving are meritless. Even if the claimant is guilty of a criminal offense, the property may not be forfeitable: it may not actually bear a substantial connection to the crime, or may be the proceeds of the criminal’s legal business activities. Regardless of the issue of guilt, property owners will be victimized by a procedure that seizes such property, circumventing the due process guarantees by extorting waivers.
of those rights.

The example of Jane and Carl is a proceeds forfeiture, but the problem of waiving Fifth Amendment rights extends to the other types of forfeiture as well. In contraband cases, the owner may wish to argue that the seized material is not, in fact contraband—that the drugs are legitimate over-the-counter medications, or that the pornographic material is not obscene—but may be unwilling to come forward and contest the forfeiture. Contesting the forfeiture will likely involve admissions of ownership of the property alleged to be contraband, so filing a claim at all plays into the hands of the criminal investigators, so potential claimants have powerful incentives to concede the property’s status as contraband, and allow the forfeiture to proceed uncontested.

Similar concerns will inhibit owners from coming forward in facilitating property forfeitures as well. Rather than argue that the property had no “substantial connection” to the crime, which would require presenting evidence on how the crime was committed, the owner will likely waive her right to a hearing and let the property be taken. Again, even if there is no substantial connection, the owner may feel compelled to hold back rather than thrust him- or herself into the spotlight of an ongoing criminal investigation.

At least one commentator has cited the high rate of uncontested forfeitures as evidence that the system is working efficiently, and that owners are freely conceding the forfeitability of their property. Just as likely, the uncontested forfeitures may reflect strategic behavior, as described above, of individuals with colorable claims, who merely adjudge the risks of asserting such claims to outweigh the value of the property that is arguably improperly seized.

c. Access to justice

Finally, uncontested forfeitures may be evidence of an access to justice problem. If the individual cannot afford an attorney—likely in the case of someone whose assets have just been seized—or is otherwise intimidated by or unable to navigate the justice system, her legitimate claims may never be asserted.

CAFRA helps to some degree here, by ensuring that an indigent person whose home is seized can get an attorney from the Legal Services Corporation appointed to represent her, and by allowing court-appointed defense lawyer in a criminal case to contest related forfeitures

188 Cassella, The Case for Civil Forfeiture, supra note 20.
as well.\textsuperscript{189} But, CAFRA stops short of providing attorneys to every indigent claimant, and even non-indigent claimants can be bankrupted by legal fees contesting their forfeiture, as happened to Mr. Munnerlyn, the air charter service operator cited in the CAFRA House Report.\textsuperscript{190} Moreover, if property owners perceive the deck to be stacked against them,\textsuperscript{191} they may well choose to forgo meritorious claims rather than incur expense of bringing them.

For all of these reasons, the high rate of uncontested forfeitures may be evidence of a serious problem in protecting the rights of property owners. Due process may demand more that the current procedural regime provides.

\textit{D. Bad incentives for law enforcement}

Lucrative forfeiture opportunities can also warp law enforcement priorities.\textsuperscript{192} Because forfeiture schemes allow law enforcement to retain seized assets, the law enforcement agencies’ financial incentives may distort the policy judgment in how to allocate police resources, and will exert constant pressure for law enforcement to overreach when pursuing a lucrative forfeiture opportunity.\textsuperscript{193} Eric Blumenson and Eva Nilsen have argued that this constitutes a conflict of interest, given “the overwhelmingly dispositive role of discretionary prosecutorial decisions in a system where few cases ever go to trial: in most cases, the integrity of the system depends primarily on the fairness of the law enforcement branch.”\textsuperscript{194} They conclude that “[o]ne could hardly design an incentive system better calculated to bias law enforcement decisions than the present forfeiture laws.”\textsuperscript{195} Additionally, the exclusionary rule does not deter overreaching by law enforcement agencies as it does not prevent

\begin{footnotesize}
\textsuperscript{189} 18 U.S.C. § 983(b)(1)&(2).
\textsuperscript{190} See supra notes 113-115, and accompanying text.
\textsuperscript{191} See supra Sections III.B, “The Government’s Burden of Proof is Still Too Low” and III.C.1, “Inadequacy of the Innocent Owner Defense.” See also, Eric Moores, \textit{Reforming the Civil Asset Forfeiture Reform Act}, 51 ARIZ. L. REV. 777, 799 (2009) (“[T]he increased burden appears to have done little in terms of making civil asset forfeitures more difficult for the government to obtain, as 80% of forfeitures [still] go uncontested.” (citations omitted)).
\textsuperscript{193} See Karis Ann-Yu Chi, \textit{Follow The Money: Getting To The Root Of The Problem With Civil Asset Forfeiture In California}, 90 CAL. L. REV. 1635 (2002) (suggesting that the financial incentives for law enforcement are the corrupting influence, and that no reform can be meaningful or effective until those incentives are removed by, for example, diverting forfeited assets to public schools rather than to law enforcement).
\textsuperscript{195} Id.
\end{footnotesize}
the forfeiture of illegally seized property.\textsuperscript{196}

Congress, when it was debating CAFRA, was concerned about these incentives as well. Mark Kappelhoff, Legislative Counsel for the American Civil Liberties Union, testified before the House Committee on the Judiciary in 1996 that evidence suggested that law enforcement was pursuing assets at the expense of pursuing convictions, perverting justice by allowing those with substantial assets to forfeit them as part of their plea negotiations:

\begin{quote}
[M]ajor drug dealers are allowed to barter their way out of lengthy prison terms by prosecutors who have become intoxicated with the thought of huge sums of money to be obtained from drug forfeiture assets. Conversely, low level drug users with no assets or no information to swap are exposed to the full wrath of the harsh drug laws—mandatory minimums and nonparoleable sentences.\textsuperscript{197}
\end{quote}

The suggestion, of course, is that plea bargaining with forfeitures allows criminals to buy off prosecutors, with cash, in return for lighter sentences, and that the financial incentives are so strong that it may be unreasonable to expect law enforcement to resist such temptations. Indeed, a notorious 1990 memo from the Executive Office of the U.S. Attorneys in the Department of Justice is often cited as an example of the depth of the Government’s financial interest, and how easily it can skew official Department of Justice policy:

\begin{quote}
We must significantly increase production to reach our budget target . . . Failure to achieve the $470 million projection would expose the Department’s forfeiture program to criticism and undermine confidence in our budget projections. Every effort must be made to increase forfeiture income during the remaining three months of the [fiscal year] 1990.\textsuperscript{198}
\end{quote}

In any case, the powerful financial incentives remain, in the post-CAFRA world. That alone threatens to distort process and undermine justice.

\textsuperscript{196} See supra note 80 and accompanying text.  
\textsuperscript{197} Civil Asset Forfeiture Reform Act: Hearing on H.R. 1916 Before the H. Comm. on the Judiciary, 104th Cong. 263-264 (1996) (statement of Mark Kappelhoff, Legislative Counsel for the American Civil Liberties Union. He cited the Boston Globe, which reviewed major drug trafficking cases and reported that where $10,000 or more was forfeited, “75 percent of the drug dealers ended up charged with either lesser crimes or were allowed to plead to lower sentences. Some even received no time in jail.” \textit{Id}.  
IV. RECONCEPTUALIZING FORFEITURE PROCEDURE

Beyond these criticisms, or perhaps underlying them all, is the problem of ill-defined policy objectives for the forfeiture scheme that is now operating under federal law. As a result, the procedure itself is not properly tailored to further legitimate objectives, and therefore yields anomalous and inequitable outcomes, like those discussed above.\(^{199}\) The answer to this problem lies not in tweaking the standards and application, as was done in CAFRA, but in reconceptualizing forfeitures altogether.

A. The civil/criminal distinction

The primary distinction made by the federal forfeiture procedure, the civil/criminal distinction, is not a meaningful one, at least not tied to compelling and well-defined public policy. Both are occasioned by illegal conduct, and both serve essentially the same “punitive and deterrent” purposes. But, for idiosyncratic historical reasons, as already noted, they are treated entirely differently as a matter of procedure: criminal jurisdiction is in personam, after conviction beyond a reasonable doubt, while civil jurisdiction is in rem, proceeding against the property with much lighter evidentiary burdens.

Neither logic nor good public policy supports the distinction between criminal and civil forfeitures.\(^{200}\) CAFRA, in its effort to address the worst anomalies in forfeiture procedure, attempted to close the gap a bit. Under CAFRA, prosecutors now enjoy the option of pursuing the same property based on the same offense under either approach, as CAFRA makes criminal forfeiture available everywhere civil forfeiture is already available.\(^{201}\) Thus CAFRA attempts to treat the two procedures as virtually interchangeable, pushing its decided preference for criminal forfeitures.\(^{202}\) However, the theoretical bases of the two approaches are

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\(^{199}\) See description of the plight of Mrs. Bennis (forfeiture of car husband used with a prostitute), supra Section II.A.1.b, of the Lopes family (forfeiture of house when mentally disturbed son cultivates marijuana in the back yard), supra Section II.A.4., of Mr. Munnerlyn (forfeiture of air charter plane when client turns out to be a drug lord), supra Section II.B.5, and of Mr. Jones (forfeiture of cash because carrying so much of it is part of the profile of drug dealers), supra Section III.B.

\(^{200}\) “If the forfeiture of the instrument used to commit a crime is remedial in a civil case because it achieves some important social purpose, it is equally remedial in a criminal case. The nature of the relationship between the property and the crime, and the social and political objectives of the forfeiture, cannot depend on the procedure by which the forfeiture is accomplished.” CASSELLA, ASSET FORFEITURE LAW, supra note 3 at 837.

\(^{201}\) CAFRA, 106 P.L. 195, Sec. 16 (2002); 28 U.S.C. § 2461(c).

\(^{202}\) Section 16 of CAFRA is specifically entitled “Encouraging Use of Criminal
The inconsistency comes with the fact that a civil forfeiture is based on the guilt of the object, and the innocence of the owner was historically deemed to be irrelevant. The criminal forfeiture is based entirely on the guilt of the owner, whose property is confiscated because of his guilt. So in the first case, we argue that we are not, in fact, punishing the owner (innocent or not), as in *Bennis*, because it is enough to justify the forfeiture that the property is guilty. In the second case, we justify the forfeiture only if and precisely because the owner is found guilty.

**B. New distinctions based on the nature of the forfeiture**

The more serious problem, however, is not that the law makes distinctions where it should not, but that the law does not make distinctions where it should. To better understand and to better apply the public policy underlying federal forfeitures, the law needs to formally recognize a new taxonomy for forfeitures, distinguishing (1) contraband forfeitures, from (2) proceeds forfeitures, from (3) facilitating property forfeitures.

The anomalies and injustices inherent in modern forfeiture practice can be traced in large measure to the fact that the Government uses the

*Forfeiture as an Alternative to Civil Forfeiture,* although the terms of Section 16 merely permit the criminal forfeiture rather than encourage it. CAFRA, 106 P.L. 195, Sec. 16 (2002). Clearly the Congress hoped criminal forfeiture would be used more, in place of civil forfeiture, because there are fewer problems with the criminal procedure. And it appears that Congress may have achieved its objective. Since CAFRA, federal forfeitures have shifted significantly away from civil forfeitures in favor of criminal forfeitures, as shown on the chart below from the United States Attorneys Statistical Report 1990-2010.
same procedure to effect forfeitures in sharply dissimilar cases. Procedures for virtually automatic forfeiture that may be appropriate for the seizure of sawed-off shotguns (indisputable contraband), for example, would be inappropriate for the forfeiture of the Lopes family home (mere facilitating property, where the owner is not the wrongdoer). The Department of Justice acknowledged this in testimony before the House Committee in 1996:

It may be that [forfeiture] procedures were adequate when the object of the forfeiture was contraband or something else with no legitimate purpose, but when we move to the forfeiture of peoples’ houses, cars, businesses and bank accounts, we need to ensure that the forfeiture is as fair as possible.\(^{203}\)

Unfortunately, they went no further with this idea, and the terms of CAFRA do not make this critical distinction.

A more promising approach is to adopt separate procedural requirements, including a different burden of proof,\(^{204}\) for each of the different types of forfeitures, procedures tailored to protect the legitimate interests and public policy unique to each type of forfeitable property. The three categories will be considered in turn.

1. Contraband – forfeitable to protect public safety and health

The concept of a contraband forfeiture is summarized succinctly in the Federal Rules Decisions:

*Contraband*

The simplest forfeitures, both conceptually and practically, are forfeitures of contraband, that is, property the mere possession of which is illegal. Justification for this type of forfeiture is self-evident: because the law prohibits the individual from possessing the property in the first place, forfeiture is an essential element of the remedy. This is particularly true when

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\(^{203}\) Civil Asset Forfeiture Reform Act: Hearing on H.R. 1916 Before the H. Comm. on the Judiciary, 104th Cong. 220 (1996) (statement of Stefan Caggia, Deputy Chief, Asset Forfeiture and Money Laundering Section, Criminal Division, Department of Justice).

\(^{204}\) The House, clearly troubled by the facilitating property forfeitures, such as Mrs. Bennis’s car and Mr. Munnerlyn’s charter airplane, sought to require a higher burden of proof: clear and convincing evidence. When members of the Senate Judiciary Committee balked at this high burden, it was perhaps thinking of contraband or proceeds forfeitures, which should be far more straightforward and easier to effect. What no one discussed in this exchange was the possibility of applying a higher standard of proof to facilitating property forfeitures than to the others.
the contraband is a threat to public health or morals—e.g., obscene material, sawed-off shotguns, adulterated food, or illegal drugs. Seizure of these materials serves the important function of removing them from public circulation where they may do damage. Because there can be no legitimate claim to such property, procedural rights of “owners” in confiscation proceedings are not a significant concern. Contraband seizures typically do not result in significant revenues for the government.205

Of course, there is no “innocent owner” problem with contraband,206 since it is illegal to possess the property in the first place.207

Notice and hearing requirements for contraband forfeitures are also far less compelling. Unless the property’s status as contraband is at issue, there is no particular need to provide notice or other aspects of procedural due process when seizing such property. On the other hand, there may be a contestable issue as to whether the property is, in fact, contraband, e.g. whether the seized pornographic materials are actually obscene.208 It is in this respect only that notice and hearing may be

205 Pimentel, supra note 2, 183 F.R.D. at 6.
206 While it is conceivable that someone could be an “innocent owner” of contraband, in that they acquired it without knowing that it was contraband, or they acquired the contents of a warehouse without knowing that such contents included contraband, these innocent owners still cannot assert a legitimate claim to the property. Their innocence (lack of mens rea) may be a defense to criminal penalties for such possession, but it cannot serve to block the forfeiture, as they can have no property right in contraband to begin with.
207 Even CAFRA acknowledges that the innocent owner defense will not apply to contraband. 18 U.S.C. § 983(d)(4) (“[N]o person may assert an ownership interest under this subsection in contraband or other property that it is illegal to possess.”). This provision in CAFRA is a necessary acknowledgement of the profound differences between different types of forfeitures. Innocent owner defenses are important only for instrumentality forfeitures and, in very limited circumstances, for proceeds forfeitures. But CAFRA’s caveat in this respect notwithstanding, all three are typically lumped together under the same procedure.
208 Obscene materials are not protected by the first amendment, and are illegal in every state. Drawing the line between pornography that is protected by the First Amendment and obscene material that can be legitimately suppressed has been a notoriously difficult business, illustrated most popularly with Justice Potter Stewart’s definition of obscenity: “I know it when I see it.” Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (J. Stewart, concurring). The definition of obscenity and its application are vitally important, as it defines the limits of First Amendment protection. The implications for contraband forfeitures is obvious. If forfeitures are too easy, and material alleged to be obscene is forfeited without a proper finding that it is obscene, the result could easily be a violation of the First Amendment. Cf. Alexander v. United States, 509 U.S. 544 (1993) (finding no First Amendment violation for the forfeiture of non-obscene pornography along with material specifically found to be obscene, upon a finding of a RICO violation; four justices—Kennedy, Blackmun, Stevens, and Souter—dissented on the First Amendment issue).
important in a contraband forfeiture. But burdens of proof are less important, because the facts should be quite apparent: the seized property is what it is. Contested claims of ownership or innocence are irrelevant, and there is no issue over the source of the property or how strong the nexus is between the property and the crime. In the typical case, the court must simply apply the law to determine whether this property meets the legal definition of forfeitable contraband.

2. Proceeds – forfeitable as unjust enrichment

Consider, next, proceeds of crime. The primary principle here is an entirely different one than that for contraband. It is primarily one of denying the wrongdoer the benefit of ill-gotten gains.

Proceeds of Crime

Congress has also authorized the forfeiture of property generated by illegal activity, in some circumstances. More recently, it has authorized—in the case of criminal forfeiture at least—the forfeiture of substitute assets when the actual proceeds normally subject to confiscation are no longer available. These forfeitures are justified on the principle of avoiding unjust enrichment; the wrongdoer should not be permitted to profit from his crime. This type of forfeiture, first witnessed in RICO, has been aimed primarily at those activities likely to generate a large payoff for the perpetrators.209

As already discussed, proceeds forfeitures started with RICO210 and money laundering statutes,211 but quickly spread to drug crimes as well. Under CAFRA they are now available for a broad range of criminal activity. Congressional motivation for expanding the availability of proceeds forfeitures is clear: to “deprive criminals of the fruits of their criminal acts.”212 Department of Justice officials have echoed these

thoughts as well before Congress on separate occasions:

The attractiveness of asset forfeiture and a reason for its growth in the United States is very simple: it takes the profit out of crime. Asset forfeiture is a program that cuts to the heart of most criminal activity, dismantling criminal syndicates in a way that simple incarceration never could.213

“Many criminals fear the loss of their vacation homes, fancy cars, businesses, and bloated bank accounts far more than the prospect of a jail sentence.”214 Accordingly, proceeds forfeitures are important in ensuring that “crime doesn’t pay.”

This policy reflects a very unique status, because it is not punitive in nature, but is nonetheless rooted in deterrence.215 It deters not by threatening punishment, but by denying the would-be criminal certain benefits of her or his crime.

Unlike contraband, there is nothing inherently offensive in the property itself, only in the means by which it was acquired. But ill-gotten gains are not, as a matter of equity, something that the property-holder is entitled to retain, so forfeiture is appropriate. This “unjust

depriving criminals of the proceeds of crime.”)


215 The fact that proceeds forfeitures are not punitive is extremely important, both in terms of Eighth Amendment “excessive fines” provisions, and in terms of determinate sentencing concerns, both discussed infra at Section IV.B.3.a. Most courts find that forfeiture proceeds from a criminal enterprise are inherently nonpunitive. See Amanda Seals Bersinger, Grossly Disproportionate to Whose Offense? Why the (Mis)Application of Constitutional Jurisprudence on Proceeds Forfeiture Matters, 45 GA. L. REV. 841, 844 (2011) (recognizing the Fifth, Seventh, Eighth, and Tenth circuits as holding this view). However, recently the Fourth Circuit joined the Sixth and Eleventh Circuits in finding that forfeiture of proceeds from a criminal enterprise are not per se nonpunitive, and should, therefore, draw Eighth Amendment scrutiny. Id. See United States v. Jalaram, Inc., 599 F.3d 347, 354-57(4th Cir. 2010) (applying the Eighth Amendment Excessive Fine prohibition analysis to proceeds forfeiture); United States v. Corrado, 227 F.3d 543, 552 (6th Cir. 2000) (stating that courts can reduce forfeiture of illegal proceeds to make the forfeiture proportional to the seriousness of the offense so as not to violate the Eighth Amendment’s prohibition against excessive fines); United States v. Browne, 505 F.3d 1229, 1281-82 (11th Cir. 2007 (applying Eighth Amendment analysis to proceeds forfeiture in a RICO case).
enrichment” policy justification is a compelling one, reinforced and respected by centuries of jurisprudence in legal and equitable restitution.216

However, the unjust enrichment policy is compelling only when appropriately limited to depriving a defendant of the benefits of his crime. The Department of Justice has attempted to undermine this policy foundation in two important ways. First, the Government has attempted to define proceeds broadly to include not merely profit but gross revenues generated from the criminal activity.217 Second, it has argued for money judgments in forfeiture actions on the basis of joint and several liability,218 divesting lowly accessories or co-conspirators of proceeds far in excess of their profit from or involvement in the criminal enterprise.219 These arguments are inconsistent with the Department’s position before Congress that these forfeitures are about taking the profitability out of crime,220 and with its arguments before other courts

217 See Smith, Prosecution and Defense of Forfeiture Cases, § 4.03, n. 185 (2011) (“The government generally urges the courts to interpret ‘proceeds’ to mean gross receipts.”). The Department of Justice position appears to be disingenuously taken, testifying to Congress in CAFRA proceedings that proceeds forfeitures are to deny a criminal the benefit of his crime, and then in turn arguing to courts that proceeds include gross receipts (which clearly exceed the “benefit” of a crime). See also text at note 221, infra.
218 See Bersinger supra note 215, at 867 (noting that where cases involve co-conspirators courts may impose joint and several liability). Originally, joint and several liability was permitted with respect to proceeding forfeitures when the government could not determine how exactly benefits of a crime had been allocated to co-conspirators. See United States v. Caporale, 806 F.2d 1487, 1508 (11th Cir. 1986) (“If the government were required to determine the precise allocation of racketeering proceeds between two offenders before the court could impose forfeiture, the effectiveness of the remedy would be impaired substantially. The offenders would simply have to mask the allocation of the proceeds to avoid forfeiting them altogether. If the government can prove the amount of the proceeds and identify a finite group of people receiving the proceeds, it defeats the purpose of the provision to hold that the proceeds cannot be forfeited because the government cannot prove exactly which defendant received how much of the pot.”). However, the Fourth Circuit extended this rationale and permitted disgorgement of drug proceeds from a defendant which the prosecution knew was in excess of the amount he received from the conspiracy. See United States v. McHan, 101 F.3d 1027 (4th Cir. 1996). In an attempt to confine government overreaching under the McHan decision, the Fourth Circuit determined it would use the Excessive Fines Clause to prevent abuse of prosecutorial discretion. United States v. Jalaram, 599 F.3d 347, 355 (4th Cir. 2010).
219 See, e.g., United States v. Levesque, 546 F.3d 78, 80-82 (1st Cir. 2008) (a single, unemployed mother acted as a drug runner for a marijuana conspiracy, earning only $37,284, but was subjected to a $3 million money judgment for the full amount of the gross proceeds obtained by all the conspirators).
220 See supra notes 212-214 and accompanying text.
that because proceeds forfeitures are “remedial” and not punitive, the Eighth Amendment does not apply. As David Smith observes:

Whether proceeds forfeiture is truly a remedial measure depends on how “proceeds” is defined. If it means the gross receipts from the criminal activity, as opposed to net receipts, then it can be harshly punitive. The government generally urges the courts to interpret “proceeds” to mean gross receipts. At the same time, and without acknowledging any contradiction, the government contends that proceeds forfeiture is inherently a remedial measure that merely deprives criminals of their ill-gotten gains. The government cannot have it both ways.  

Whether the Government’s position on this issue is disingenuous, or merely the product of “too many cooks” is beside the point. If the Government seizes proceeds in excess of the wrongdoer’s profit, the forfeiture goes beyond ill-gotten gains, and operates as a punitive fine, which is inconsistent with the policy foundation for proceeds forfeitures. The better argument, more consistent with the legislative history of both RICO and CAFRA, is that proceeds forfeitures should be limited to ill-gotten gains, on what is essentially a theory of unjust enrichment.  

Indeed, the failure to articulate more clearly and enforce more transparently this policy foundation is a large part of the present problem with proceeds forfeitures; it has enabled Government to extract punitive fines—or extract guilty pleas with threats of crippling, life-long, non-dischargeable debt—under a proceeds forfeiture regime that was never intended to do anything other than deny the criminal the benefit of his crime.

In United States v. Santos, in 2008, the Supreme Court was faced with the question of how to define “proceeds” under a money-laundering statute, and ultimately interpreted it to mean “net profits.” The term was undefined in the statute, and consistent with the rule of lenity, the

221 SMITH, supra note 217, at § 13.02 (2011); see also, id. at 4.03, n. 185 (“In the negotiations over the CAFRA, Senator Leahy pointed this out [that the government cannot have it both ways] to the DoJ when he persuaded it to yield to his proposed definition of the key term “proceeds” in 18 U.S.C. § 981(a)(2).”). On the issue of excessive fines, Smith also observes that “Because a forfeiture order based on the theory of joint and several liability cannot be characterized as purely remedial in nature, it is subject to scrutiny under the Excessive Fines Clause.” Id.

222 See e.g., United States v. $152,160 United States Currency, 680 F. Supp. 354, 356 (D. Colo. 1988) (discussing the legislative history of RICO showed Congressional intent that the “purposes of § 881 civil forfeiture proceedings include removing the incentive to engage in the drug trade by denying drug dealers the proceeds of ill gotten gains.”).

Court declined to interpret it broadly as gross receipts.\textsuperscript{224} The Government had argued that limiting proceeds to net profits, \textit{i.e.} to actual unjust enrichment, would unnecessarily burden the Government with a complicated accounting exercise in order to prove money-laundering.\textsuperscript{225} Justice Scalia was dismissive of these concerns:

\begin{quote}
It is true that the “profits” interpretation demands more from the Government than the “receipts” interpretation. Not so much more, however, as to render such a disposition inconceivable—as proved by the fact that Congress has imposed similar proof burdens upon the prosecution elsewhere. See 18 U.S.C. \textsection{} 1963(a) (criminal forfeiture provision requiring determination of “gross profits or other proceeds”); 21 U.S.C. \textsection{} 853(a) (same). It is untrue that the added burdens “serve no discernible purpose.” They ensure that the severe money-laundering penalties will be imposed only for the removal of profits from criminal activity ….\textsuperscript{226}
\end{quote}

At the urging of the Department of Justice, Congress responded to \textit{Santos} by amending the statute in question to define proceeds as gross receipts for purposes of money laundering,\textsuperscript{227} but there remains considerable inconsistency on the definition of “proceeds” for purposes of asset forfeiture, including Section 981(a)(2)(B) under Title 18, which specifically limits it to profits.\textsuperscript{228} The conflict, however, is not a mere

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\textsuperscript{224} Id. at 514-15.
\textsuperscript{225} Indeed, these same concerns were sufficient to persuade Congress to amend the money laundering statute to reverse \textit{Santos}. Richard C. Alexander, “\textit{Cost Savings” As \textit{Proceeds of Crime}: A Comparative Study of the United States and the United Kingdom}, 45 THE INT’L LAWYER 749, 763 (2011) (“U.S. law enforcement … viewed with horror the prospect of having to undertake a complex accounting exercise in each and every money laundering prosecution, [and] Congress amended section 1956 the following year ….”).
\textsuperscript{226} \textit{Santos}, 553 U.S. at 519-20 (citations omitted).
\textsuperscript{227} Alexander, \textit{supra} note 225.
\textsuperscript{228} 18 U.S.C. \textsection{} 981(a)(2)(B) (2012) (“In cases involving lawful goods or lawful services that are sold or provided in an illegal manner, the term “proceeds” means the amount of money acquired through the illegal transactions resulting in the forfeiture, less the direct costs incurred in providing the goods or services. The claimant shall have the burden of proof with respect to the issue of direct costs. The direct costs shall not include any part of the overhead expenses of the entity providing the goods or services, or any part of the income taxes paid by the entity.”); \textit{but see} 18 U.S.C. \textsection{} 981(a)(2)(A) (2012) (“In cases involving illegal goods, illegal services, unlawful activities, and telemarketing and health care fraud schemes, the term “proceeds” means property of any kind obtained directly or indirectly, as the result of the commission of the offense giving rise to forfeiture, and any property traceable thereto, and is not limited to the net gain or profit realized from the offense.”) and 18 U.S.C. 1956 (c)(9) (2012)(“The term ‘proceeds’ means any property derived from or obtained or retained, directly or indirectly, through some form of unlawful activity, including the gross receipts of such activity.”).
technicality, as it reflects the core policy justification for proceeds forfeitures in the first place: the broader definition of proceeds can be justified only if those forfeitures are meant to be punitive, which was apparently never the original intention.

Characterizing proceeds forfeitures as “unjust enrichment” actions highlights that the underlying policy is not confined to deterrence, or to actions against a wrongdoer. Indeed the traditional basis for unjust enrichment actions is not necessarily the guilt of the defendant. Equitable restitution is appropriate also when the defendant is entirely innocent, enriched by someone else’s mistake or through the wrongdoing of another. If a homeowner finds stolen cash hidden in her tool shed, stashed there by a thief, she is not entitled to keep it. Similarly, if there is a “bank error in your favor,” you have no legal right to retain the mistakenly conferred benefit, the assumptions of Parker Bros.’ Monopoly game notwithstanding. Either of these would result in “unjust enrichment,” and equity, if not law, will require restitution from these innocent beneficiaries every bit as much as it would require restitution from the person who committed the crime or the error.229

Thus, the policy for proceeds forfeitures strongly suggests a limitation on the rights of innocent donees of forfeitable property. Their receipt of wrongfully obtained property is an unjust enrichment, quite regardless of their innocence, so the property should be forfeitable, notwithstanding the donative transfer.230 In other words, innocent owners of criminal proceeds, who gave no value for the forfeitable property should not be protected by an innocent owner defense. If they are bona fide purchasers for value, an innocent owner defense should protect them, but whatever “value” they gave for the property should be forfeitable as traceable proceeds or, alternatively, as substitute assets.

With respect to the procedure for a proceeds forfeiture, the critical issue to be decided by the court is whether the property is indeed the product of criminal activity. The parties need an adequate opportunity to contest and litigate that factual question, which may be a very difficult one; it may involve tracing funds through commingled accounts, and

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229 Dan B. Dobbs, Law of Remedies, 373 (1993) (“Benefits to defendant from money or services without misconduct— . . . Restitution is . . . appropriate when the plaintiff mistakenly delivers the wrong goods or delivers the right goods to the wrong person.”).
230 Portions of CAFRA actually run contrary to this, as the innocent owner defense appears to apply to donative transferees of proceeds forfeitures, under certain conditions. See discussion of the bona fide purchaser for value rule supra at note 107. This provision makes no distinction between facilitating property forfeitures and proceeds forfeitures. Applying the principles advocated in this article, it may be warranted for the former but not for the latter.
proofs of what funds were used for what purposes. Given the range of factual questions that must be resolved in these cases, therefore, procedural due process, in terms of meaningful notice and hearing requirements, is far more important in proceeds forfeitures than it would be in contraband cases.  

As already noted, the policy rationale behind proceeds forfeitures creates a compelling case for allowing the forfeiture of substitute assets. Again, this is a sharp contrast with contraband forfeitures, where the public policy is to remove the contraband from circulation, to protect public health and safety. Forfeiture of substitute assets, the money received when the contraband was sold, for example, does nothing to serve that purpose. On the other hand, for proceeds forfeitures, the public policy in undoing any unjust enrichment would be entirely defeated if the property holder could avoid forfeiture by transferring the property to family members or exchanging it for other property of value.

3. Facilitating property

Still different is the property used to facilitate crime, which is forfeited for entirely different reasons, as (a) punishment, (b) deterrence, (c) an incentive for property owners to take care, and (d) removal of the means of crime from circulation.

Instrumentalities/Tools of Crime

Property used in the commission of a crime may also be subject to forfeiture. Vehicles are often confiscated under these provisions, as well as real property used for the manufacture or cultivation of illegal narcotics. This type of forfeiture has been justified on two separate grounds: (1) it provides greater deterrence for the wrongdoer by prescribing an additional penalty for the crime, and (2) it provides an incentive to the property owner to take precautions that prevent others from using his property for criminal activity.

This is the theory underlying the forfeiture of the car used for a liaison with a prostitute in Bennis v. Michigan. There is nothing inherently bad about the automobile (as there is in the case of contraband), and there is nothing unseemly about how it was acquired (as there is in the case of proceeds). This is legitimate property acquired

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231 Contraband forfeitures, as suggested above in Section IV.B.1, are unlikely to raise factual issues, only the straightforward legal issue as to whether the property itself is, in fact, contraband.

232 Pimentel, supra note 2, 183 F.R.D. at 6.
in a legitimate way. The forfeiture is allowed only because the property has been misused.

The justification for this type of forfeiture is easily the weakest, and certainly the most problematic. The Supreme Court in *Calero-Toledo* acknowledged that facilitating property forfeitures serve “punitive and deterrent purposes,” sufficient to uphold them, against constitutional challenge, even against the innocent owners.\(^{233}\) As to the latter, punishment certainly doesn’t apply, but “confiscation may have the desirable effect of inducing them to exercise greater care in transferring possession of their property.”\(^{234}\) Finally, facilitating property forfeitures may serve public policy by removing the tools of crime from circulation, where they might otherwise be used for future criminal activity.

So there are four policy rationales for facilitating property forfeitures: (a) punishment, (b) deterrence, (c) incentives to greater care, and (d) removal of facilitating property from circulation. The first two apply only to the wrongdoer’s property, and the third applies only to the property of third-party owners. Each will be considered in turn.

a. Punishment – and the attendant problems of proportionality and uniformity

The Supreme Court in *Austin v. United States*, specifically recognized that “forfeiture generally and statutory in rem forfeiture in particular historically have been understood, at least in part, as punishment.”\(^{235}\) The punishment rationale appears to be straightforward, but it can raise serious questions of proportionality and uniformity in criminal punishment.

i. Proportionality – Excessive fines under the Eighth Amendment

The proportionality problem comes from two sources. First, the forfeiture is “extra” punishment, over and above the prescribed criminal penalty for the offense. The second is that the amount of the forfeiture, which must be characterized as a “fine” in the context of punishment, is almost entirely unrelated to the severity or seriousness of the offense.\(^{236}\)

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234 *Id.* at 687.
236 The word “proportionality” is commonly used to denote Eighth Amendment issues. In this article the term is used in a more general sense. Proportionality is an important first principle in criminal punishment. Egregious breaches of that principle may constitute cruel and unusual punishment violative of Eighth Amendment guarantees, but the principle of proportionality is neither defined by nor confined by Eighth...
If sentencing guidelines are carefully calibrated to apply an appropriate level of punishment to each crime according to its seriousness, the wildcard forfeiture factor has the potential to disrupt the entire regime. Someone who completes a drug deal in his own $20,000 car will suffer the criminal penalty plus an additional $20,000 “fine” in the form of the forfeiture of the car. The person who completes the same drug deal in the back of a taxi gets the same criminal penalty, but without the $20,000 fine. How can this disparity in punishment—for an otherwise identical crime—be justified?

This compelling problem of proportionality is illustrated by the case United States v. Bajakajian, involving a person who attempted to take a large sum of cash out the United States without properly declaring it on the customs forms. His failure to so declare was found to be based on “cultural differences”—he was a member of the Armenian minority in Syria, and had a profound distrust of government. Moreover, there was never a suggestion that the cash was improperly held or connected in any way with illegal activity. The sole violation was a failure to disclose.

The Supreme Court had already recognized in Austin that the Excessive Fines clause would apply to civil in rem forfeitures, precisely because those forfeitures are, at least in part, punishment. Consistent with this, the Supreme Court ultimately held that forfeiture of the full amount Mr. Bajakajian failed to disclose—over $350,000—for such a minor offense would constitute an “excessive fine” in violation of the

Amendment thresholds.

Although the perpetrator of the crime would not suffer the $20,000 fine, the taxi owner, who would normally not be subject to criminal penalties for a crime that occurs in her cab, could be “fined” $20,000 for a crime she did not commit, if and when her taxi is subjected to civil forfeiture.

One rationale might be if there were a public policy to encourage people who commit crimes to use others’ property or public property to do so. Perhaps they will be easier to catch and police if they are forced out of their own homes and their own cars to engage in criminal activity. On the other hand, criminal activity conducted in the privacy of one’s own car or home creates less opportunity for accidental or collateral victimization. Mr. Bennis, when he engaged the prostitute, could have avoided forfeiture of his car if he had exited the car and engaged her in a public place, or if he had trespassed into the property of another for purposes of the liaison. Neither of these seem like actions the law should be encouraging.


Bajakajian, 524 U.S. at 326 (“The District Court further found that respondent had failed to report that he was taking the currency out of the United States because of fear stemming from ‘cultural differences’: Respondent, who had grown up as a member of the Armenian minority in Syria, had a ‘distrust for the Government.’”).

Id.

Austin, 509 U.S. at 621-22.
Eighth Amendment. Instead, the Court upheld a forfeiture of a much smaller amount, $15,000, in a virtually arbitrary assessment made by the District Court. While the refusal to allow the full $350,000 to be forfeited is a salutary recognition of the proportionality problem inherent in facilitating property forfeitures, the Eighth Amendment is a very blunt instrument for ensuring proportionality. The lesson learned from the Bajakajian case is that $350,000 is an excessive fine for this particular offense, and that $15,000 is not an excessive fine for the same offense. This gives very little guidance to courts as to what the permissible limits for forfeitures are for this offense, much less for other offenses.

CAFRA formally codified Bajakajian, allowing claimants to

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243 Bajakajian, 524 U.S. at 333-34.
244 Id. at 348 (“By affirming, the majority in effect approves a … $ 15,000 forfeiture.”). The majority did not specifically assess the appropriateness of the $15,000 forfeiture, as the defendant failed to appeal that aspect of the District Court’s ruling. Id.
245 Technically speaking, the money in Bajakajian does not meet the definition of an “instrumentality.” The Court recognized that, because it was not the “actual means” of committing the crime of “failure to disclose.” Id. at 334. However, the court noted that this was not an in rem civil proceeding, but a criminal proceeding against the individual, with forfeiture prescribed in the statute. Moreover, the court noted that “It is … irrelevant whether respondent’s currency is an instrumentality; the forfeiture is punitive, and the test for the excessiveness of a punitive forfeiture involves solely a proportionality determination.” Id. at 333-34. For the analytical purposes of this paper, this forfeiture is functionally equivalent “instrumentality” forfeitures because (1) the property forfeited may be legally owned and has legitimate value (unlike contraband), and (2) the property was earned and acquired legally, with full and untainted title prior to the infraction (unlike proceeds). As long as instrumentality forfeitures are punitive, even in part, the Excessive Fines clause will apply. Id. at 331 (citing Austin, 509 U.S. at 621-22).
246 The Supreme Court did not rule on the appropriateness of the $15,000 forfeiture, but allowed the District Court holding to stand.
247 In a discussion of Bajakajian and the Eighth Amendment, Cassella notes: “Because it believed that the Eight Amendment applied only to punitive forfeitures, the Court concluded that the Excessive Fines Clause applied to all criminal forfeitures and to some, but not all, civil forfeitures. This distinction never made much sense. If the forfeiture of the instrument used to commit a crime is remedial in a civil case because it achieves some important social purpose, it is equally remedial in a criminal case. The nature of the relationship between the property and the crime, and the social and political objectives of the forfeiture, cannot depend on the procedure by which the forfeiture is accomplished.” CASSELLA, ASSET FORFEITURE LAW, supra note 3 at 837.
248 Floor Statement of Henry Hyde re: H.R. 1658 (April 11, 2000), available at http://judiciary.house.gov/legacy/0411att.htm (last visited July 26, 2011). Post-CAFRA, “the proper focus of the Eighth Amendment inquiry in civil forfeiture cases is not whether the Eighth Amendment applies at all, but whether the forfeiture of a given category of property, such as the proceeds of the offense or the instruments used to commit it, is ‘grossly disproportional’ to the crime. That, of course, is the same analysis that the Supreme Court made applicable to criminal forfeitures in Bajakajian.” CASSELLA, ASSET FORFEITURE LAW, supra note 3 at 839.
petition for a determination on whether the forfeiture is constitutionally excessive.\footnote{18 U.S.C. § 983(g).} Under the statute, the claimant has a burden of proving, by a preponderance of the evidence, that the forfeiture is “grossly disproportional.”\footnote{18 U.S.C. § 983(g).} Therefore, the statute acknowledges the proportionality problem but does little to address it, leaving the courts no guidance on how to assess the proportionality of a forfeiture.\footnote{CASSELLA, ASSET FORFEITURE LAW, supra note 3 at 839.}

It is important to note that the entire Excessive Fines analysis applies strictly to facilitating property forfeitures. One commentator has observed that “courts appear to be unanimous in holding that the forfeiture of the proceeds of the offense can never be considered disproportional. To the contrary, the courts view the forfeiture of proceeds as precisely calibrated to the gravity of the offense giving rise to the forfeiture.”\footnote{CASSELLA, ASSET FORFEITURE LAW, supra note 3 at 839.} In \textit{United States v. Betancourt} the Fifth Circuit held “the Eighth Amendment has no application to the forfeiture of property acquired with proceeds.”\footnote{422 F.3d 240, 250-251 (5th Cir. 2005)} As long as the proceeds forfeiture is limited...
to the actual benefit, or unjust enrichment, of the owner, this will continue to be true. With the exception of a few cases in a few courts, where the Government is seeking proceeds forfeitures far in excess of that particular owner’s enrichment, a proceeds forfeiture should always survive an Eighth Amendment challenge.

ii. Uniformity – public policy behind determinate sentencing

In an era of carefully controlled determinate sentencing, it is difficult, if not impossible, to justify a rule that imposes additional fines in such an unpredictable and arbitrary way. The assessment and the amount of the fine in an instrumentality case are in no way tied to the wrongdoer’s degree of culpability. The holding in Bajakajian, as codified in CAFRA, give judges discretion to impose a forfeiture penalty in an amount up to the value of the property used in the commission of the crime, as long as the amount is not “excessive” according to that judge’s interpretation of the Eighth Amendment.

Most surprising and disturbing, perhaps is the degree to which this development disregards the public policy priority, and the enormous resources, that have been given to principles of determinate sentencing in this country over the past 24 years. When Congress created the U.S. Sentencing Commission and the system of federal sentencing guidelines, it was very much concerned with the lack of uniformity in sentencing: “Congress’ basic goal in passing the Sentencing Act was to move the sentencing system in the direction of increased uniformity. That uniformity does not consist simply of similar sentences for those

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254 Supra notes 215, 217-221 and accompanying text.
255 CASSELLA, ASSET FORFEITURE LAW, supra note 3 at 840.
256 While wild card element—the forfeiture “fine” that may be imposed in some cases but not others—frustrates consistent and uniform sentencing, it does not violate the determinate sentencing goal of reining in judges’ discretion, except under Bajakajian. If the judge were required to award the forfeiture of the instrumentalities of crime regardless of the amount, the penalties for the crime would be objectively determinable, and not subject to the whims and sympathies of judges. But Bajakajian upheld a discretionary $15,000 forfeiture, on the basis that the forfeiture of the full $350,000 would have been unconstitutional. The Constitution did not dictate the $15,000 forfeiture award, an amount determined by the unfettered discretion of the court, it merely barred a $350,000 forfeiture award, which was objectively established as the value of the property in question.
convicted of violations of the same statute . . . [but] more importantly, of similar relationships between sentences and real conduct.”

The federal courts have grappled with these issues in a series of cases, trying hard to ensure that individually appropriate fact-based sentencing can be carried out consistently with the Congressional goal of uniformity in sentencing.

Facilitating property forfeitures pose a serious threat to these very principles. The sentencing guidelines are calibrated to ensure that no one is under-punished and no one is over-punished, but that consistency prevails. Neither contraband forfeitures nor proceeds forfeitures applied within the limits of unjust enrichment theory pose this threat, because neither of those is a punishment per se. But, facilitating property forfeitures—confiscating property legally acquired and lawfully held—for the purpose of punishing a wrongdoer, clearly do.

b. Deterrence – the problem of arbitrariness

While deterrence is cited as a reason for forfeitures, the deterrence generated by the threat of forfeiture is *sui generis*. It is not like tort law, where the first policy priority is compensation for victims, and the quantum of deterrence depends on the potential liability for actual harm. Nor is the threat of forfeiture calibrated to ensure an appropriate or effective level of deterrence, as happens in criminal law, particularly as required by principles of determinate sentencing discussed above. Rather the deterrence associated with the threat of forfeiture has an arbitrary quality about it.

i. Tort theories and deterrence

Deterrence in tort is based on the idea that the risk of tort liability will encourage an appropriate exercise of care to prevent undesirable outcomes. But if that duty of care is breached in some way, the penalty is calculated largely without reference to the severity of the

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260 J. Clark Kelso, Sixty Years of Torts: Lessons for the Future, 29 Torts & Ins. L.J. 1, 6 (1993) ("[C]ourts identified two instrumental goals for the law of torts, compensation and deterrence, but tended to emphasize compensation over deterrence.").

261 Prosser & Keeton on Torts § 4 (5th ed.) ("The 'prophylactic' factor of preventing future harm has been quite important in the field of torts . . . . When the decisions of the courts become known, and defendants realize that they may be held liable, there is of course a strong incentive to prevent the occurrence of the harm. . . . [O]ne reason for imposing liability is the deliberate purpose of providing that incentive.").
breach. The extent of tort liability is calculated not in terms of how bad the defendant’s conduct was, but by how much harm it proximately
caus ed.

Thus, a minor lapse of judgment or care can result in a large
award of compensatory damages for the harm actually caused.

In this sense—concerning the disconnect between the egregiousness
of the behavior and the penalty assessed—facilitating property
forfeitures are more like tort damages than like criminal fines. But even
in negligence cases, tort law provides some element of proportionality.
Defendants are held accountable only for the harm proximately caused
by their breach of duty, i.e., for the actual harm inflicted upon a
foreseeable plaintiff. Defendants will not be held responsible for more
remote and unforeseeable harms. Moreover, to some degree, and in
certain circumstances, a breach of duty that is likely to result in great
harm is more egregious precisely because it disregards that great harm.
And in those cases where the quantum of harm falls seriously short of
the liability that would generate appropriate deterrence, the system
compensates for the discrepancy with punitive damages.

Facilitating property forfeitures, however, cannot be justified on the
same terms as tort awards. The amount of the forfeiture typically bears
no connection to issues of foreseeability, proximate cause, or the harm
caus ed to victims. The forfeiture is effected even if there is no harm, and
even if there is no victim. None of these concepts behind tort damages
contribute to the policy foundation for facilitating property forfeitures.
Rather, the deterrence rationale for facilitating property forfeitures

262 The exception here is, of course, punitive damages, which exist precisely because compensatory damages may not reflect the egregiousness of the conduct and provide inadequate deterrence: “One of the major purposes [of punitive damages] is to provide an appropriate incentive for acceptable behavior in cases where compensatory damages . . . are not likely to do so.” DAN B. DOBBS, LAW OF REMEDIES, 212 (1993).

263 See, e.g., Cabral v. Ralph’s Grocery Company, 51 Cal. 4th 764, 248 P.3d 1170, 122 Cal. Rptr. 3d 313 (2011) (upholding a jury award of $475,298 against a defendant who had parked his truck on the dirt shoulder of the highway in an “Emergency Parking Only” zone; the action was brought by the widow of a driver who fell asleep at the wheel and went off the highway into the parked truck killing himself in the process; the jury found total wrongful death damages approaching $5 million, and allocated 90% of the fault to the decedent and 10% of the fault—and hence 10% of the damages—to the defendant.)


265 Bennis v. Michigan, again, presents a compelling example. It may be difficult to identify who is victimized by an illicit rendezvous with a prostitute. Arguably, the primary victim of this breach of moral decency is the innocent wife. Far from compensating her for the wrong (as might have been done, if the husband’s half share of the car had been forfeited, and then awarded to his wife), she was actually penalized for it.
consists only of: (1) a general deterrence embodied in the threat of a genuinely arbitrary penalty, unrelated to the wrongfulness of the conduct or the extent of the harm, or (2) the specific deterrence that once the instrument of the crime is forfeited, it cannot be used to commit further crimes. 266

Note, in contrast, that for proceeds forfeitures, the threat of forfeiture produces a perfectly appropriate quantum of deterrence. 267 The threat of a proceeds forfeiture promises the would-be criminal no profit from his crime. Because any and all financial benefit from the crime is forfeitable—no more and no less—the degree of deterrence is neither random nor arbitrary. Rather it is calibrated precisely to deny the wrongdoer any and all benefit from his crime, and no more. 268

Similarly, contraband forfeitures deprive the owner only of what he or she was never entitled to have in the first place. There can be nothing disproportionate about that.

ii. Criminal theories and deterrence

In criminal law, of course, the severity of the penalty—and consequently the quantum of deterrence—is tied directly to the reprehensibility of the criminal act. The Constitution requires this, rejecting not only disproportionate penalties as cruel and unusual, 269 but arbitrary penalties as violations of due process. 270 Nonetheless, this principle is entirely lacking in the facilitating property forfeiture. Unless an owner is entirely innocent, and able to carry the burden of proof under CAFRA’s “innocent owner” affirmative defense, he or she is subject to forfeiture of the full amount of the owner’s property used as

266 Such specific deterrence is discussed below in Section IV.V.3.d, “Removing the instrumentalities of crime from circulation.”
267 “[T]he courts view the forfeiture of proceeds as precisely calibrated to the gravity of the offense giving rise to the forfeiture.” CASSELLA, ASSET FORFEITURE LAW, supra note 3 at 839; but see the discussion of Government overreaching with proceeds forfeitures, claiming revenues and not just profits, and claiming joint and several liability against lowly co-conspirators, supra notes 215, 217-221 and accompanying text.
268 Id.
269 See supra Section IV.B.3.a.i, discussing the Eighth Amendment.
270 See Chapman v. United States, 500 U.S. 453, 465 (1991) (stating that a penalty based on an arbitrary distinction would violate the Due Process Clause of the Fifth Amendment, but holding that affixing punishments for drug crimes according to the weight of the drugs involved, including the weight of blotter paper that is the vehicle for delivering LSD, is not arbitrary).
Thus the “penalty” assessed a less-than-innocent owner has nothing to do with the degree of mens rea of that owner, or the egregiousness of her conduct. The arbitrariness of the punishments is precisely what prompts public outrage at cases like that of the Lopeses. Thomas’s parents knew their son was growing marijuana, so they were not fully “innocent owners.” But the penalty—having their home taken away from them—bears no proportionate resemblance to the severity of any lapse on their part. It violates fundamental principles of justice, or at least of equity, for punishments to be doled out in such an arbitrary way.

For proceeds forfeitures, in contrast, there is no problem of disproportionality when the defendant is forced to disgorge only the benefit he obtained from the crime. The forfeiture is not punishment per se, but denial of the benefit of the crime. For both proceeds and contraband forfeitures, the amount forfeited is precisely what the property-holder was never legally entitled to have in the first place.

c. Incentives for property owners to ensure against others’ misuse of their property

For third-party owners, the justification for facilitating property forfeitures has little to do with punishment or deterrence; indeed, the third-party who loses his or her property in such a forfeiture is not necessarily a wrongdoer. These forfeitures cannot truly be justified as punitive, but are defended as remedial, justified as a way to provide proper incentives to property owners. This policy rationale applies only to forfeitures of third-party owners, and only in civil forfeitures.

The characterization of these forfeitures as “remedial” rather than “punitive” has some compelling implications. The first is that property

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271 Of course, the Eighth Amendment will apply to any such forfeiture that is, at least in part, punitive. *Austin*, 509 U.S. at 621-22.

272 See supra Section II.A.4.

273 “[T]he courts view the forfeiture of proceeds as precisely calibrated to the gravity of the offense giving rise to the forfeiture.” *Cassella, Asset Forfeiture Law*, supra note 3 at 839.

274 “[T]he risk of forfeiture encourages owners to exercise care in entrusting their property to others.” *Bennis v. Michigan*, 516 U.S. at 469 (J. Stevens, dissenting) (citing *Calero-Toledo*, 416 U.S. at 687).

275 Criminal forfeitures permit the seizing of the property of the defendant, but not of any third party, whether they are innocent or not. See supra Section I.A.
can be and, throughout history, has been forfeited by entirely innocent owners. CAFRA has changed that, though, by creating an “innocent owner” defense. So if property can be forfeited only by owners who fail to qualify as “innocent” under CAFRA, then forfeitures are reserved only for those who share some level of guilt. In that sense, even a “remedial” forfeiture may take on some of the attributes of punishment.\textsuperscript{276} The second is that the Eighth Amendment does not apply to purely remedial forfeitures, since they cannot be characterized as “fines.”\textsuperscript{277}

The result of this is remarkable and counterintuitive. The amount of the forfeiture is subject to constitutional scrutiny, and Eighth Amendment limitations, only if the owner is being punished for his or her own wrongdoing. It may be unconstitutional to punish a wrongdoer too severely with an excessive forfeiture. But, for those who are not being punished, there is no limit to the amount of property that can be forfeited. The Constitution, therefore, allows much harsher treatment against those who are not being punished than against those who are.

The theory of these remedial forfeitures is that threat of a facilitating property forfeiture gives owners incentives to ensure that their property is not misused. This shifts some of the responsibility for policing wrongdoing from law enforcement to property owners. In Goldsmith-Grant, perhaps the leading case on the forfeiture liability of third-party owners, the Supreme Court acknowledged this remedial purpose of facilitating property forfeitures:

\begin{quote}
In breaches of revenue [\textit{i.e.} bootlegging] provisions, some forms of property are facilities, and therefore it may be said, that Congress interposes the care and responsibility of their owners in aid of the prohibitions of the law and its punitive provisions, by ascribing to the property a certain personality, a power of complicity and guilt in the wrong.\textsuperscript{278}
\end{quote}

In other words, the Supreme Court validated a Congressional purpose of enlisting the vigilance of property owners to ensure that their property was not facilitating crime. That assistance is secured through threat of forfeiture. In order to avoid that risk, owners of real property, for example, may need to hire private security services to police their land.

\textsuperscript{276} H.R. Rep. No. 106-192 at 12-13 (1999) (“In light of the historical understanding of forfeiture as punishment, the clear focus of the instant forfeiture provisions on the culpability of the owner, and the evidence that Congress understood those provisions as serving to deter and to punish, we cannot conclude that the provisions serve solely a remedial purpose.”); \textit{see also Austin}, 509 U.S. at 621-22.

\textsuperscript{277} \textit{Austin}, 509 U.S. at 621-22.

\textsuperscript{278} \textit{Goldsmith Jr.-Grant}, 254 U.S. at 510-11.
and buildings to ensure that criminal activity is not carried out there.

Although the Supreme Court did not have a problem with foisting law enforcement responsibilities onto property owners, Congress apparently did. The CAFRA House Report recounts a circumstance in 1998 when a motel in Houston was seized by the U.S. Attorney’s Office because the “management had failed to implement all of the ‘security measures’ dictated by law enforcement officials, such as raising room rates.” The House Report quotes at length, and with approval, a Houston Chronicle Editorial:

More than due to shortcomings of the motel owners, this situation appears to be the result of ineffective police work .... The prosecution’s action in this case is contrary not only to the reasonable exercise of government, but it contradicts government-supported enticements to businesses that locate in areas where high crime rates have thwarted development. Good people should not have to fear property seizure because they operate business in high crime areas. Nor should they forfeit their property because they have failed to do the work of law enforcement.

For personal property, the impact of the forfeiture risk is harder to conceive. The threat of forfeiture could, theoretically at least, dissuade someone from lending his car to an obviously intoxicated person, or from lending his gun to an enraged person, although in neither of these cases is the threat of government seizure of the loaned property likely to make a difference. Property owners already have incentives to decline to lend their property in these circumstances and to take steps to keep their assets secured where they could not be “borrowed” by a wrongdoer, out of concern for the lives and safety of potential crime victims, or even because they fear loss or destruction of their property. Against these incentives, which already exist, it seems unlikely that the risk of a government forfeiture of such property would play a serious role in prompting owners to take precautions, or to augment the precautions the owner is already taking.

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280 Id. (quoting U.S. Attorney Here Overstepped Bounds in Motel Seizure, HOUSTON CHRON. (March 12, 1998)).
281 One might be reluctant to lend a car to a drunk friend also because of fear that the car might be destroyed in an accident. These—the threat of grave physical harm or the destruction of the vehicle—are powerful incentives for the owner to be cautious. These already strong incentives are unlikely to be enhanced significantly by the threat the government might also seize the vehicle in a forfeiture proceeding.
d. Removing the property used to facilitate crime from circulation

There is one additional policy basis for facilitating property forfeitures, and that is the public interest in removing the instruments of crime from circulation,\textsuperscript{282} out of the reach of the criminal element who might otherwise use them for future criminal activity.\textsuperscript{283} This is not so much a deterrence argument, as a purely practical one. After an arrest for running liquor across state lines, returning the vehicle to the owner merely facilitates future bootlegging activity. The vehicle is confiscated not as a punishment, or as an example to deter others from attempting such crimes, but as a remedial effort to suppress the wrongdoing by removing the means of such criminal activity from the wrongdoer’s control, and perhaps even from the public sphere altogether.\textsuperscript{284}

While this rationale works well for facilitating property whose primary uses are related to criminal activity, such as automatic weapons,\textsuperscript{285} or equipment to outfit a meth lab, the procedure is more commonly used to seize property that is vital to people’s lives and livelihoods, such as homes, cash, and cars.\textsuperscript{286} As the Supreme Court observed in One 1958 Plymouth Sedan, “There is nothing even remotely

\begin{itemize}
\item \textsuperscript{282} See United States v. U.S. Currency in Amount of One Hundred Forty-Five Thousand, One Hundred Thirty-Nine Dollars, 18 F. 3d 73, 79-80 (2nd Cir. 1994). In this case, Judge Kearse, in her dissenting opinion, argued against the reasoning of the lower court, upheld by the majority in the Second Circuit, that “removal from circulation” was an appropriate policy justification for instrumentality forfeitures: “The third civil purpose, correction or prevention of an undesirable condition, was essentially the purpose relied on by the district court, which characterized transported unreported funds as a crime “instrumentality” that the government could properly, as a civil matter, remove from general circulation. I disagree with this characterization. The traditional approval of the government’s removal of ‘instrumentalities’ of crime ‘spring[s] from the historic fiction ... that ‘an instrument of harm is itself culpable.’’” Id. (citation omitted).
\item \textsuperscript{283} United States v. One Assortment of 89 Firearms, 465 U.S. 354 (1984) (interpreting the congressional purpose for the forfeiture provision to be “removing from circulation firearms that have been used or intended for use outside regulated channels of commerce.”).
\item \textsuperscript{284} Whether the asset is removed from the public sphere altogether will depend on what law enforcement does with the seized assets. If such property is sold at a police auction, then the means of crime are placed right back in circulation.
\item \textsuperscript{285} See, e.g., One Assortment of 89 Firearms, 465 U.S. 354, supra note 283.
\item \textsuperscript{286} Studies have suggested that the most commonly seized assets are real property and monetary instruments. John Worrall, Asset Forfeiture – Problem-Oriented Guides for Police Response Guides, Series No. 7, US Dept of Justice – Office of Community Oriented Policing Services, at 4, available online at http://www.cops.usdoj.gov/files/RIC/Publications/e1108-Asset-Forfeiture.pdf (last visited, August 27, 2011).
\end{itemize}
criminal in possessing an automobile."

Government seizures of cash and real property do not remove them for circulation in the economy in any case; those assets are merely reallocated within the economy. Moreover, forcing people into desperate circumstances by depriving them of their homes or of their means of support, such as Mr. Munnerlyn’s air charter business, is hardly a compelling strategy for combating crime or otherwise promoting societal welfare.

One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 699 (1965) (quoted in Austin, 509 U.S. at 621). Dee Edgeworth offers some compelling examples, presumably from his vast experience in carrying out these forfeitures—offering both a house example and a car example—when a facilitating property forfeiture may be justified on this basis:

[1] What would you do with a house that was modified to cultivate indoor marijuana? Thousands of plants, and finished marijuana are found within the premises. Every room is filled with marijuana plants, grow lights, and vents. No one lives at the house. The entire house is an indoor marijuana grow house. There is a tunnel that leads from under the house where the growers take the trash and dispose of the refuse in a public area. The windows are covered. The house was purchased with legitimate funds but the absentee owner is knowingly allowing the premises to be used to cultivate marijuana. The house is not contraband. No proceeds were used to purchase the property. Neighbors complain that the house is an eyesore and is depreciating property values.

[2] Officers make a valid traffic stop on a vehicle and obtain consent to search the vehicle. They find a concealed compartment that has been specifically built into the vehicle which contains a large quantity of drugs. The registered owner is a “mule” who admits driving drugs from Mexico to the US and takes currency back to Mexico inside the concealed compartment. The vehicle makes regular runs between Mexico and the US. CBP documents numerous entries by this vehicle into the US over the past six months. The vehicle is not contraband. There is no evidence that the vehicle was purchased with drug proceeds.

Email to the author, dated February 22, 2012, on file with the author. These are certainly compelling circumstances when a facilitating property forfeiture would serve legitimate public policy in combatting vice. The circumstances that justify the forfeiture in these cases are not merely that the property facilitated crime, but that they show a substantial likelihood of facilitating crime in the future. Certainly if facilitating property forfeitures are retained in law enforcement’s toolkit, it might be appropriate to limit their application to cases where the Government can show a substantial likelihood that absent forfeiture, the property will be used for criminal activity in the future. That showing would be easy to make in the factual scenarios posited by Mr. Edgeworth. And more importantly, they would be justified by a compelling public policy priority, unlike most facilitating property forfeitures today.

Forfeited real property is resold to others who might use it for illegal purposes, and forfeited cash is spent. Vehicles, on the other hand, are often kept and used by law enforcement themselves.
V. TOWARD A NEW PROCEDURAL APPROACH

Despite the due process concerns cited above, Constitutional safeguards have not, to date, been sufficient to bring rationality to the administration of forfeitures in our federal system. In Bennis v. Michigan, the Supreme Court found no constitutional infirmity with seizing the property of a wholly innocent person. While the Supreme Court found an excessive fines violation in Bajakajian, it gave little guidance or structure for addressing such issues in the future.\(^9\)

A. What the courts can do: Drawing on policy for a more principled application of forfeiture procedure

1. Tailoring the application of forfeiture procedure to serve its policy objectives

In an effort to address these problems, the federal courts can begin by formally recognizing the unique policy foundation for each type of forfeiture. For proceeds forfeitures, for example, courts should focus on the principle of unjust enrichment, depriving the wrongdoer of the profit from his or her crime. Courts should be skeptical of the Government’s attempts to seize assets in excess of the benefit received by the wrongdoer in such cases for several reasons. First, the legislative history of forfeiture statutes suggests that the purpose of these provisions was limited to taking the profit out of crime, not to adding punitive fines to the punishments already prescribed for criminal conduct. Second, because proceeds forfeitures in excess of actual enrichment are necessarily punitive, they bring with them almost all of the problems generated by facilitating property forfeitures: they constitute fines that are arbitrary, and potentially excessive under the Eighth Amendment, they disrupt principles of uniformity and proportionality in sentencing, and therefore, any deterrent effect that otherwise might justify such fines is not calibrated to the seriousness the crime. Third, law enforcement directly profits from these forfeitures, presenting a moral hazard,\(^9\) if not an outright conflict of interest, unlike contraband forfeitures which

\(^9\) See discussion supra at text accompanying notes 245-247.

\(^9\) “Moral hazard” is a concept in economic theory that has wide application, dealing mostly with situations when individuals make choices or take risks that are self-serving, knowing that any harm from such actions will be borne by others. The OECD Economic Outlook: Sources and Methods, http://stats.oecd.org/glossary/detail.asp?ID=1689. Although it is usually associated with risk-based behavior, such as an insured’s failure to exercise care, knowing that insurance shields him from liability for any resulting harm, it has application here as well. Overreaching in a forfeiture action will directly benefit law enforcement at the expense of the property owner, but the Government faces very little, if any, downside if the overreaching is challenged or exposed.
cannot enrich law enforcement authorities.

At the same time, courts need to be sensitive the lack of a compelling policy basis for facilitating property forfeitures. The Supreme Court has upheld civil in rem forfeitures on the basis that they are deeply rooted in our jurisprudence, so the concept itself is not unconstitutional. But the latitude the Government is given to carry them out can and should be tailored to serve the legitimate public interest in effecting the forfeiture without intruding unduly on citizens’ legitimate interests in their own legal, and legally acquired, property. The thinness of the public policy justifications for facilitating property forfeitures suggests that the benefit of the doubt should be given almost always to the property owner.291 Because facilitating property forfeitures may involve high-value assets, such as real estate and vehicles, there is a moral hazard problem that should also prompt extra scrutiny from the courts.

2. Establishing standards for assessing when forfeitures constitute excessive fines

In the application of constitutional safeguards, including the Excessive Fines Clause, the courts should also consider adopting more concrete guidelines or thresholds, to give guidance to the Government as to what forfeitures will be considered unconstitutionally excessive. The Supreme Court’s willingness to articulate such guidelines in State Farm v. Campbell, suggesting a ratio in punitive damages cases sets a good precedent.292 This should not be difficult to do for forfeiture cases, given that any forfeiture is premised upon criminal conduct. The severity of the criminal penalty prescribed for such conduct is a sound and reliable starting point for evaluating the “fine” for excessiveness. The courts might declare that a crime punishable by no more than one year, for example, cannot justify a forfeiture of more than a certain dollar figure.293 A mathematical formula or ratio, such as that set forth in

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291 Exceptions may include those situations where the property is particularly suited to criminal activity, in which case, there may be a public interest in removing it from circulation. For example, the forfeiture of lab equipment used to make crystal methamphetamine might be more easily justified, because there is compelling public interest in curtailing production of that substance. Forfeitures of cars and real property, on the other hand, are far more difficult to justify in terms of public policy.

292 The Supreme Court, although “reluctant to identify concrete constitutional limits,” suggested that few punitive damage awards “exceeding a single-digit ratio between punitive and compensatory damages will satisfy due process.” State Farm Mutual Automobile Insurance Co. v. Campbell, 538 U.S. 408, 424-25 (2003).

293 The actual numbers to be used in the formula would be up to the courts, but considerable guidance can be found elsewhere in the law. It is noteworthy, for example, that Title 18 prescribes that fines for Class B and C misdemeanors cannot
Campbell, might be easily derived to support this.\textsuperscript{294}

An even more compelling application of such an Excessive Fines formula would address the problem of forfeitures by owners who are not the actual wrongdoers. The Lopeses were aware that their son was growing marijuana in the backyard, so they would not be entitled to the innocent owner defense provided in CAFRA. But under an Excessive Fines formula, which could be adopted judicially without legislative involvement, the Lopeses’ “fine” would have to be justified with respect to the criminal penalties they, the parents, could face for their conduct. Such an approach would go a long way toward addressing the most disproportionate of facilitating property forfeitures.

B. What Congress can do: Procedural reform

Although a number of the problems with federal forfeiture procedure can be addressed by the judicial branch, as suggested above, legislative action will be necessary to address some of the more serious and persistent problems. At the outset, it would help enormously if Congress enacted a single forfeiture statute that was generally applicable to all crimes. The myriad statutes that provide some forfeiture remedy are hopelessly scattered and inconsistent.\textsuperscript{295}

Administrative forfeitures, for example, where due process may be particularly at risk, are not judicial proceedings in any case, so the propriety of those forfeitures appears only rarely on the dockets of

\begin{itemize}
\item\textsuperscript{296}It might be appropriate to suggest, for example, that a facilitating property forfeiture is presumptively excessive under the Eighth Amendment if it exceeds a threshold calculated by multiplying the number of months imprisonment that can be given for the offense the owner has committed times $1000. For example, if a crime is punishable by 20 years, the presumptive limit for the forfeiture would be $240,000 (240 months x $1000). For a crime punishable by only six months, the forfeiture of a used car valued at $6000 may be presumed to fall within permissible constitutional bounds, but a forfeiture in excess of that would be constitutionally suspect. While it may seem strange for constitutional thresholds to be tied to legislatively-enacted limits, this is precisely what the Supreme Court did in the context of punitive damages: “Comparing the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct provides another indicium of excessiveness.” BMW of North America, Inc. v. Gore, 517 U.S. 559, 583 (1996). Whether the forfeiture could be granted in addition to the assessment of a fine under Title 18, is a separate question. Certainly, whether a fine has been imposed as well should be an important criterion in the courts’ determination whether a forfeiture based on the same offense is constitutionally excessive.
\item\textsuperscript{295}See, e.g. Pimentel, supra note 2, 183 F.R.D. at 18-32 (listing in Appendix A over 160 separate federal statutes that contain forfeiture provisions).
\end{itemize}
federal courts. The litigants who voluntarily waive their rights to contest a forfeiture because they fear more serious consequences in a criminal investigation or prosecution will not be in a position to appeal either, as they have voluntarily surrendered those rights. Adequate safeguards for justice and equity in the law of forfeitures are therefore unlikely to come from purely judicial sources. The solutions, if they are to be had, will need to come from statutory sources.

As suggested throughout this Article, a re-examination of first principles in the law of forfeitures exposes the weakness of the civil/criminal distinction. Logic and fairness will come only if the procedure is defined in terms of the type of forfeiture being pursued: (1) contraband, (2) proceeds, or (3) facilitating property. A procedural approach to each type of forfeiture is proffered below, prompted by each’s respective policy concerns. However, given the particular problems associated with facilitating property forfeitures, and the weak policy foundations for them, it is doubtful that they can be justified under any procedural regime.

1. Procedure for contraband forfeitures

As discussed above, contraband forfeitures have the most straightforward and compelling policy justification. Public health and safety require that these assets be removed from circulation. Moreover, the risk of infringing the legitimate rights of property owners is small, as no one can legally assert rights to contraband in the first place. Accordingly, summary procedures are entirely appropriate, and the Government’s burden of proof can be low. Indeed, probable cause may be enough in these cases, because where contraband is involved, the presumption should be in favor of the forfeiture.

Notice and hearing requirements can be minimal. There is unlikely to be a genuine question of fact or law in the typical seizure of contraband.

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296 There is a provision that allows a claimant to challenge an administrative forfeiture after the fact, based on a failure of notice. 18 U.S.C. § 983(e). Several of these challenges have been raised in recent years, but the courts have generally dismissed them, finding that because the challenges to the administrative forfeitures are untimely or otherwise procedurally deficient, the court lacks jurisdiction to consider the merits of the forfeiture. See, e.g., In re: Seizure of $143,265.78, 616 F.Supp. 2d 699 (E.D. Mich. 2009) (rejecting a lender’s Section 983 challenge to an administrative forfeiture of a borrower’s funds it retained a security interest in; the disputed notice was deemed adequate and the challenge untimely, depriving the court of jurisdiction to consider the merits of the lender’s claims) (citing Mesa Valderrama v. United States, 417 F.3d 1189, 1196 (11th Cir.2005)); Mohammad v. United States, 2006 WL 462478 (7th Cir. 2006).
The one exception here may be with forfeitures of obscene material. If contraband forfeitures are too easily done, without a hearing or a judicial determination that the material is obscene, then First Amendment rights may be jeopardized by the procedure. Accordingly, it may be important to adopt a rule, similar to CAFRA’s rule for real property, that obscenity forfeitures are always judicial, as opposed to administrative, proceedings.

2. Procedure for proceeds forfeitures

Proceeds forfeitures are also compelling in terms of public policy. It would be unconscionable for society to allow criminals to profit from their crimes even as we attempt to punish them. The risk of infringing the rights of legitimate property holders is somewhat greater, however, because the sometimes-difficult factual question must be settled as to which property was acquired by criminal activity. The downside of getting it wrong and erroneously applying the forfeiture is greater here as well, so a higher standard of proof is appropriate. It will be appropriate, therefore, for the Government to carry the burden by a preponderance of the evidence.

The problems associated with proceeds forfeitures have typically involved the seizure of cash, either because (1) a person who carries too much of it or uses it to buy plane tickets is presumed by law enforcement to be a drug dealer, or (2) because drug sniffing dogs alert to the existence of illegal drugs on the cash. Courts have become increasingly hostile to seizures on such bases in recent years, however, and hopefully the courts’ hostility will rein in law enforcement efforts to seize such assets on such flimsy grounds.

Minimizing the financial incentives for law to overreach in proceeds forfeitures, which unlike contraband typically involve cash, or valuable

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297 See discussion of First Amendment concerns supra note 208.
298 The House Report on CAFRA cited a case in which police had seized $500,000 in cash from a pizzeria in Chicago:
   The court found the need to remind the U.S. Attorney that “the government may not seize money, even half a million dollars, based on its bare assumption that most people do not have huge sums of money lying about, and if they do, they must be involved in narcotics trafficking or some other sinister activity.
299 See supra, Section III.B. “The Government’s Burden of Proof is Still Too Low.”
300 Humke, Passing the Buck, 83 Neb. L. Rev. at 1300 n. 2 (listing cases that discount the value of dog alerts on cash)
assets traceable to that cash, should also go a long way toward curbing abuse. Requiring that seized funds go into the general treasury, or to schools, rather than into the coffers of the law enforcement agencies who are solely and directly responsible for recovering such cash, may remove this temptation.\textsuperscript{301} The arguments for this approach have been made effectively elsewhere, and need not be reiterated here.\textsuperscript{302} Such reforms appear to be essential, however, to curbing abuse of proceeds forfeitures by law enforcement. Absent such changes, the temptations and incentives for Government overreaching may be simply too great to contain.

Notice and hearing requirements should be more stringent for proceeds forfeitures than for contraband forfeitures. Not only do the seizures of cash need judicial scrutiny, but tough factual issues— involving the sources of funds and commingled account—are likely to arise and will need to be resolved.

3. Procedure for facilitating property forfeitures

Facilitating property forfeitures are the problem child. As demonstrated above, the policy justifications for facilitating property forfeitures are weak, even dubious. For the wrongdoer, they offer additional punishment and deterrence for conduct that is already subject to appropriate criminal sanctions. For the third-party owner, they provide additional incentives to take care to avoid misuse of their property, incentives that are arguably both unnecessary and ineffective. Owners already have incentives to keep their property from being used in illegal activity,\textsuperscript{303} and it is unlikely that they are heavily influenced by the threat of forfeiture, as draconian and disproportionate as that consequence may be.

At the same time, most of the worst examples of misuse of forfeitures by overzealous law enforcement, or of injustices resulting from the application of forfeiture law and procedure, come in the context

\textsuperscript{301} See Karis Ann-Yu Chi, \textit{Follow The Money}, supra note 193 (suggesting the public schools as an appropriate beneficiary of forfeited property).
\textsuperscript{302} Id.; Blumenson & Nilsen, \textit{Policing for Profit}, supra note 194.
\textsuperscript{303} The property owner already faces criminal liability for conspiracy if the prosecution can show that the owner knew about the criminal activity, and if the jury can infer agreement from the owner’s failure to stop it. \textit{Iannelli v. United States}, 420 U.S. 770 (1975) (“The agreement need not be shown to have been explicit. It can be inferred from the facts and circumstances of the case.”) The owner is also likely to be motivated by the desire to protect the property from damage, and to protect himself and others from harm due to criminal use of his property. Any negligence in controlling dangerous property may also subject the owner to tort liability (for lending a car to an intoxicated person, for example).
of facilitating property forfeitures. The downside of getting this wrong and erroneously forfeiting the property is particularly grave, as it involves depriving individuals of their hard-earned and legally-acquired property.\textsuperscript{304} Moreover, a successful forfeiture may easily end up over-punishing the wrongdoer, who is already subject to an appropriate measure of criminal punishment in any case, supported by our systems of determinate sentencing.

With facilitating property, therefore, in contrast with contraband, one should err on the side of \textit{not} forfeiting the property, as there is relatively little downside risk if the forfeiture is erroneously quashed: the wrongdoer is subject to appropriate criminal sanctions in any case. With this in mind, the Government’s burden of proof should be very high. The original language of CAFRA called for \textit{clear and convincing evidence},\textsuperscript{305} but a more appropriate standard would be \textit{beyond a reasonable doubt}.\textsuperscript{306} The fact that the proceeding has been a civil one historically, \textit{in rem}, cannot change the fact that such forfeitures function in a punitive way, in the fight against criminal conduct. The “beyond a reasonable doubt” standard has been consistently applied in these contexts.

At the same time, and for the same reasons, notice and hearing requirements for facilitating property forfeitures should be especially demanding. It is typically in facilitating property forfeitures that third-party owners lose their property, not due to their own wrongdoing but due to another’s use of their property. Third party owners are more likely to want to contest the forfeiture than wrongdoers; they may have claims of innocence and are less likely to risk self-incrimination by litigating the issue. Failure of notice or inability to get a hearing, however, will extinguish those rights without giving the claims a fair hearing.

Owners of facilitating property have the strongest claim to their property; as stated above, “[t]here is nothing inherently bad about the property (as there is in the case of contraband), and there is nothing unseemly about how it was acquired (as there is in the case of proceeds).”

\textsuperscript{304} This contrasts sharply with contraband forfeitures and proceeds forfeitures, where the property seized is something the property-holder never had a legal right to in the first place.

\textsuperscript{305} \textit{Supra} note 92 and accompanying text.

This is legitimate property acquired in a legitimate way.” Private property rights of law-abiding citizens are held sacred in American society. The Fifth Amendment provides that “No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.” With such deeply rooted principles and core American values at stake, it is not surprising to see public outrage at anything that resembles a cavalier seizure of such lawfully-held private property by Government. Accordingly, the procedural due process required for a facilitating property forfeiture, to satisfy the requirements of due process and the sensibilities of the American public, must be substantial and rigorously applied.

4. The case against facilitating property forfeitures altogether

Given the dubious policies behind facilitating property forfeitures, and the due process problems inherent in carrying them out, the more potent question is whether facilitating property forfeitures should be allowed at all. If the taking of such property is to be justified, or even tolerated, it must be for the most compelling public policy purposes, none of which can be demonstrated for facilitating property forfeitures.

The Supreme Court has upheld them, since the Palmyra case in 1831, and through the Bennis case in 1996, on the ground that the practice of in rem civil forfeiture is strongly entrenched in our legal history. Absent compelling policy reasons to support the practice, it presumably fell of its own weight. Only the Americans continue to pursue this practice with such intensity and zeal. As a result, only Americans are subjected to the self-serving overreaching of law enforcement, who never have to defend their seizures in the overwhelming majority of cases, and who are able to support these activities with the spoils of the practice.

In light of all of this, Congress should go back to first principles and eliminate facilitating property forfeitures altogether. Their primary public policy justifications—duplicative deterrence and punishment, incentives to third parties to undertake precautions and policing—are the weakest, and the countervailing private property interests are the strongest. Facilitating property forfeitures appear to be a concept whose time has come, and gone.

307 Supra at Section II.B.2. Instrumentalities/Tools of Crime, first paragraph.
308 U.S. Constitution, Amendment 5.
309 As observed above, however, at note 49, the U.K.—sharing the same legal history and tradition—abandoned the concept of facilitating property forfeitures long ago.
310 See supra Section III.C.2. on the problem of uncontested forfeitures.
CONCLUSION

Concerns about fundamental unfairness in federal forfeitures, as practiced in the 1980s and 1990s, drove Rep. Hyde and others in Congress to propose and pass CAFRA, bringing long-overdue relief from some outrageous abuses of government power. But, the problems with forfeitures persist. It is a procedure vulnerable to abuse, with an ignominious history of overreaching whenever American society is fighting something it fears.

Indeed, the War on Terror has brought back some of the most oppressive aspects of it, retreating from the modest progress embodied by CAFRA, and even from the ban on “forfeiture of estate” that dates back to 1790. The financial incentives that forfeitures provide to law enforcement also encourage overreaching with the procedure. The reluctance of property owners to contest forfeitures, both because they perceive the deck to be stacked against them, and because they fear self-incrimination in the process, enables the Government to seize large amounts of property administratively, without having to defend the seizure in a hearing or otherwise meet its burden of proof.

Because Congress’s effort to address these problems was a patchwork job, succumbing to the pressures to achieve political compromise in an election year, CAFRA fell far short of the comprehensive re-examination of principles that was called for. As a result, the law still tries to lump civil forfeitures together—contraband forfeitures, proceeds forfeitures, and facilitating property forfeitures—despite the fact that these three types of forfeitures are categorically different from each other, pursue different policy objectives, and pose very different risks to justice and equity.

The federal courts can do much to address these problems, by recognizing the policy basis behind the different types of forfeiture, and applying existing procedures with reference to such policies. A principled approach to forfeitures, narrowly tailoring them to serve legitimate public interests while minimizing the violence they do to private property rights, can help keep the process in check. In addition, the courts can adopt mechanisms for Excessive Fines analysis that can similarly guide and rein in government overreaching in this area.

But judicial action will not be enough. Congress, in promulgating a new and comprehensive forfeiture statute, must also undertake a thorough re-examination of these doctrines and devise a new approach, with separate procedures, including distinct burdens of proof, for each type of forfeiture in the new taxonomy of forfeitures. And in the case of
facilitating property forfeitures, the appropriate procedure may well be no procedure at all.