

Reforming Property Forfeiture Laws to Protect Citizens' Rights

Why and How to Curtail Abuses of Laws that Permit Private Property Seizures

by Donald J. Kochan, J. D.

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EXECUTIVE SUMMARY

The Framers of the United States Constitution understood that freedom depends upon the vigorous protection of private property rights and that this protection was therefore the most sacred obligation of government. However, despite Fifth and Fourteenth Amendment guarantees, recent years have witnessed a massive expansion of a legal practice known as “asset forfeiture,” which allows government to violate the very property rights it is charged with protecting.

Hundreds of asset forfeiture laws—many of them intended to stop illegal drug trafficking—give state and federal law enforcement agents the power to seize property even without proof of the owners' guilt in a criminal trial because, in many cases, the government considers the *property itself* to be the criminal.

Use of forfeiture by authorities has exploded. In Michigan alone, law enforcement agents in a recent year used forfeiture laws in 9,770 instances to seize more than \$14 million in private property.

This Mackinac Center for Public Policy report examines the practice of asset forfeiture in Michigan and recommends reforms to help authorities prosecute criminals while still protecting the property rights of innocent citizens and preserving the freedom and due process rights of everyone.

Michigan and federal policy makers should

- **Remove incentives for law enforcement agencies to employ asset forfeiture.** End the twin practices of allowing law enforcement agencies to profit from the sale of the assets they seize and paying informants to provide information to help build forfeiture cases.
- **End federal “adoption” of state forfeiture cases.** State law enforcement agents should be prohibited from asking federal agents to “adopt” forfeiture cases. Michigan property owners should not have to fight the full resources of the federal government, whose forfeiture laws provide less of a barrier to asset seizure.
- **Shift the burden of proof from property owners to government.** Property owners must currently establish the “innocence” of their property once it has been seized. Government should be required to show proof that disputed property is connected to illegal activity before it can be seized.

A legal practice known as “asset forfeiture” allows government to violate the very property rights it is charged with protecting.

- **Establish nexus and proportionality requirements for forfeiture.** Current law should be changed to require government to show connection between *specific* property and a crime for which guilt has been found. The amount of property seized should be in proportion to the crime committed by its owner.
- **Eliminate legal hurdles to citizens' ability to challenge forfeiture.** Lawmakers should extend the length of time citizens are given to file claims to seized property and eliminate the requirement that they post bond to do so. Successful claimants should be reimbursed by the government for expenses incurred during forfeiture proceedings.
- **Require law enforcement agents to publicly justify forfeiture proceedings.** Law enforcement agencies should be required to publish an explanation each time they seize and retain private property. The resulting public awareness will encourage self-restraint on the part of law enforcement agencies.
- **Enact protections against forfeiture for innocent owners of property.** Language in forfeiture statutes should be strengthened to ensure that property owners who have not participated in, or acquiesced to, a crime committed with their property are not punished with forfeiture.
- **Give third-party creditors the chance to recover seized property.** Innocent third parties with an interest in seized property, such as lien holders, should be given a judicial remedy to recover against the government.
- **Ensure that asset forfeiture reforms do not include an expanded definition of criminal behavior.** If asset forfeiture is allowed only upon proof of a related crime, lawmakers should resist any urge to broaden the definition of criminal behavior to include currently noncriminal activities.

The principles of private property, limited government, and individual liberty that America's founders cherished must be preserved for all generations. These reforms at the state and federal levels will help guarantee that the citizens of Michigan continue to enjoy the benefits of those principles and remain protected from unjustified and arbitrary seizure of their personal possessions.

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INTRODUCTION

While flipping through the newspaper on a Sunday morning, many of us have seen the advertisements for government auctions—cars, homes, art, and more, all at fire sale prices. Most people who attend these auctions, if they think about the former owners at all, probably assume that these bargains are the result of the government's seizure of property from some worthless criminal who never deserved to own this stuff in the first place. Not only do the purchasers get a bargain, but they can feel, in essence, that their purchases do a service for the community because the profits go to law enforcement to fight more crime.

But how many readers or purchasers *really* stop to think about whose property is being sold? After all, the government must have had a good reason to take these things away from their owners, right? How many readers or purchasers stop to question the incentives this system creates when the people who “obtain” all that property for free get to sell it and keep the profits—so that they can use that money to obtain more property that will bring in even more money?

Unfortunately, the current civil asset forfeiture system is structured in such a way that these auction advertisements may not necessarily reflect the belongings of worthless criminals, which should spark concern in every property owner and responsible citizen. This report asks the questions that many of these auction readers or purchasers may neglect. The answers should give everyone pause.

Civil liberties are being swept up in the fervor of the “war” against crime and drugs being waged by a burdensome regulatory apparatus that seeks to manage every part of society. Mass confiscation, unleashed under the banner of “law and order,” has come instead at the expense of the innocent. Politicians have created a system that grants government officials broad power and discretion to seize private property and which leaves owners virtually powerless in the face of arbitrary and capricious behavior. Abdicating their role as the watchdogs of liberty, courts have placed very few checks on the government's power to seize property through forfeiture laws.

For example, Republican Congressman Henry Hyde of Illinois has reported that 80 percent of the people whose property is seized by the federal government under drug laws are never formally charged with any crime, yet the government maintains a power, often employed in practice, to keep the seized property.¹ The concern over this “asset forfeiture,”

¹ HENRY HYDE, FORFEITING OUR PROPERTY RIGHTS 6 (1995)(citing Andrew Schneider and Mary Pat Flaherty, *Presumed Guilty: The Law's Victims in the War on Drugs*, PITTSBURGH PRESS, Aug. 11-Sept. 16 (series of installments on the drug war)).

Politicians have created a system that grants government officials broad power and discretion to seize private property.

Hundreds of statutes give law enforcement agents the power to seize property even without proof of guilt at a criminal trial.

in fact, transcends party divisions. For example, Democratic Representative John Conyers of Michigan has summarized American forfeiture law as “designed to give cops the right to confiscate and keep the luxury possessions of major drug dealers [but which] mostly ensnares the modest homes, cars, and hard-earned cash of ordinary, law-abiding people.”²

Currently, hundreds of statutes give law enforcement agents the power to seize property even without proof of guilt at a criminal trial. Many seizures are the result of relatively recent laws, while some result from applications of older ones. According to the Washington, D.C.-based Institute for Justice, the number of federal seizures of property under asset forfeiture laws increased by 1500 percent between 1985 and 1991.³ There is little evidence of change since 1991, and given the recent Supreme Court decisions upholding broad forfeiture powers, the trend of increasing forfeiture is likely to continue. Similar trends exist at the level of state law enforcement. Stories of abuses abound across America,⁴ and many of these tales are taking place close to home here in Michigan.

On October 3, 1988, Detroit police found Royal Oak resident John Bennis engaging a prostitute in the front seat of his car. Bennis was convicted of indecency and fined \$250. The police also obtained a civil court order to seize his car as a public nuisance. As if she had not been harmed enough by her husband's indecency, Tina Bennis was further victimized by the state's seizure of the vehicle.⁵ Despite the fact that she held half ownership of the vehicle, used it to transport her five children to and from school, and had purchased the car with her babysitting fees,⁶ the state refused to recognize that Tina Bennis had any interest in the vehicle. In 1994, the Michigan Supreme Court ruled against Mrs. Bennis in a suit alleging that the seizure violated her property rights and rights to due process by punishing an innocent party.⁷ Worse yet, the United States Supreme Court in 1996 agreed with the Michigan high court and allowed the state to punish Tina Bennis for the acts of her

² James Bovard, *Seizure Fever: The War on Property Rights*, THE FREEMAN, Jan. 1996, at 6.

³ Brief of the Institute for Justice in *U.S. v. James Daniel Good Real Property, et al.*, No. 92-1180.

⁴ For an interesting array of some of the most egregious horror stories about victims of forfeiture laws, see Bovard, *supra* note 2, at 8-13; R.W. Bradford, *Today's War on Property*, THE FREEMAN, Feb. 1997, at 93.

⁵ See Noah Eliezer Yanice, *Court Abdicates Its Role Against Tyranny*, THE DETROIT NEWS, April 11, 1996; Aaron Epstein, *Michigan Case Sparks Supreme Court Debate*, DETROIT FREE PRESS, Nov. 30, 1995, at 5A; *Forfeiting Innocence*, DETROIT NEWS, Dec. 4, 1996, at 6A.

⁶ *Forfeiting Innocence*, DETROIT NEWS, Dec. 4, 1995, at 6A.

⁷ *Michigan v. Bennis*, 447 Mich. 719, 527 N.W.2d 483 (1994).

husband. Neither a lack of knowledge nor even efforts to prevent the illegal use of her vehicle could protect her from state confiscation.⁸

In December 1997, 70-year-old Joseph Puertas's Oakland County home and business were raided by 100 law enforcement officers on the suspicion that Puertas was running a major cocaine operation.⁹ The businesses and homes of Puertas's family members were also searched. The police found no drugs, drug paraphernalia, or records of drug transactions and drug-sniffing dogs failed to respond to the drawers where cocaine was allegedly stored. Law enforcement officers seized large sums of cash found in the raids based solely on an informant's tip and a line of reasoning best summed up by one prosecutor who asked, "If this isn't dirty money, why didn't they put it in the bank?"¹⁰

None of the marked bills used in the fake drug buys that allegedly occurred at Puertas's business appeared in any of his safes, and Puertas's fingerprints were never found on any bags of drugs that were allegedly purchased by the undercover informant. Prosecutors appear to have no evidence to connect the seized assets to illegal activity other than the testimony of an informant whose credibility is described by the judge of the case as follows: "[O]n a scale of zero to 10 . . . [the informant's credibility] comes close to zero."¹¹

Despite the lack of evidence, the Oakland County prosecutor charged Joseph Puertas with dealing in illicit drugs. Most charges against Puertas, as of June 1998, have been thrown out of court; only the charge of dealing less than 50 grams of cocaine remains. But that hasn't stopped the County from seizing the Puertas family business, a bowling alley estimated to be worth around \$3.2 million; nearly \$2 million in cash; and thousands of dollars' worth of coins and jewelry belonging to various Puertas family members. All of this property could be subject to forfeiture whether or not Joseph Puertas is guilty of the charge against him.

The family claims that the money was from their legitimate businesses. Joseph Puertas owns the bowling alley, his wife owns a vending company, and his three sons have their own businesses in Oakland County. While neither his sons nor his wife are charged with any crime, each stands to lose hundreds of thousands of dollars they had stored in their safes if the County's forfeiture of these assets is approved in a civil trial scheduled for November 1998. The same holds true for several partners in Puertas's bowling alley, who could lose their investment and future profits if the seizure of the bowling alley stands.

Because assets can be seized without actually proving criminal guilt beyond a reasonable doubt, even an acquittal in Puertas's criminal trial—scheduled for October 1998—will not protect Joseph or his family members from losing their assets to the County. Puertas may or may not be innocent of all charges against him; but whether he is or not, his

Assets can be seized without actually proving criminal guilt beyond a reasonable doubt.

⁸ *Bennis v. Michigan*, 116 S.Ct. 994, 134 L.Ed.2d 68, 64 U.S.L.W. 4124 (1996).

⁹ For the account of the Puertas story on which this account is based, see L. L. Brasher, *Family's Assets at Center of Fierce Forfeiture Battle*, DETROIT FREE PRESS, June 1, 1998, at 1A.

¹⁰ *Id.* at 9A.

¹¹ *Id.*

Simply carrying cash can make one a candidate for positive detection of drugs and possible seizure of the cash. An average of 96 percent of all paper currency analyzed from 11 cities tested positive for cocaine.

case reminds us that criminal guilt need not be determined before a family's assets are lost under civil asset forfeiture laws.

Not even art is safe from civil asset forfeiture. Judy Enright's Michigan backyard was a haven for birds. In September 1993, she added feathers collected from the ground in her yard to an old painting she had done in art school. While showing the newly altered painting at an art fair, U.S. Fish and Wildlife officials from Ann Arbor seized the painting. As justification for the seizure, they cited the Federal Migratory Bird Act of 1918, which makes it illegal to sell these feathers.¹²

Simply carrying cash can make one a candidate for positive detection of drugs and possible seizure of the cash. A seven-year study of paper currency by Toxicology Consultants, Inc., revealed that, "An average of 96 percent of all the bills . . . analyzed from 11 cities tested positive for cocaine."¹³ The fibers in paper currency, after being in contact with drugs, become ingrained with drug residue. This money has the ability to "infect" other bills it comes in contact with (such as at the bank or in a store's cash register).¹⁴

Apparently, the problems don't stop with just cash. A Virginia State Police agent, involved in the training of detection dogs, has stated that the odor can also permeate luggage. The odor from a suitcase filled with marijuana and placed with a hundred other bags in a compartment runs the risk of permeating those bags in a matter of hours.¹⁵ Despite the apparent unreliability of drug sniffs, they are often relied upon to provide the police with the requisite cause to seize property implicated by the detection.

For example, in December of 1988, police in Detroit raided Joseph Haji's Sunshine Market to make a drug arrest. The officers failed to find any drugs. After police dogs reacted to three one-dollar bills in the cash register, however, the police seized the entire contents of the register and the store's safe, totaling \$4,384.¹⁶ Though Haji was never charged with a crime, a Michigan court, arguing that the sniff was sufficient evidence that

¹² *Investigative Reports: Seized by the Law* (A&E television broadcast, 1995).

¹³ Jarret B. Wollstein, *The Government's War on Property*, THE FREEMAN, July 1993, at 247. The evidentiary value of dog sniffs has also been questioned by at least one United States District Court. In *United States v. \$80,760.00*, the court noted that, "there is some indication that residue from narcotics contaminates as much as 96% of the currency currently in circulation," and thus that courts should "seriously question the value of a dog's alert without other persuasive evidence." 781 F.Supp. 462, 475-76, n. 32 (N.D. Tex. 1991). Even where courts question the validity of a dog sniff, however, because the federal probable cause standard is an extremely low threshold, observance of "suspicious" behavior can often constitute that additional "persuasive evidence."

¹⁴ See *Dirty Money*, U.S. BANKER, Oct. 1989, at 10 (discussing the study of Lee Hearn, Chief Toxicologist for Florida's Dade County Medical Examiner's Office, showing that 97% of bills from around the country tested positive for cocaine and noting that banks play a role in spreading the drug traces when tellers count money, rubbing bills against one another).

¹⁵ LEONARD W. LEVY, *A LICENSE TO STEAL: THE FORFEITURE OF PROPERTY* 136 (1996).

¹⁶ *Drug Laws Work Against Innocent*, DETROIT NEWS, Oct. 24, 1989.

the seized money was tied to illicit drugs, allowed the government to keep the money and ordered Haji to pay court costs.¹⁷

In November of 1988, DEA agents in Detroit Metropolitan airport observed what they considered suspicious behavior on the part of Andre Edwards, a resident of Detroit arriving from Cleveland. The agents stopped Edwards, asked for his ticket and identification, then proceeded to question him. He volunteered that he was carrying a large sum of cash, approximately \$13,000, from the recent sale of his van. Though no contraband was found, the agents informed Edwards that they would detain the cash overnight so a dog could examine it in the morning and gave him a receipt. The next day, the dog reacted to the presence of drugs on the money. A United States district court found that the police had reasonable suspicion to approach Edwards and that the dog sniff established probable cause that the cash was linked to illegal drug activity. Edwards was then unable to meet the burden of showing, by a preponderance of the evidence, that he had a legal claim to the cash. The court failed to find that his contention of the van sale met this burden. Thus, his cash was forfeited.¹⁸

On June 6, 1988, DEA agents approached Gregory Brunson and Willie Dixon based on four observations: Brunson was shaking nervously; both were waiting in a departure area of a plane headed for Dallas, a known narcotics source city; they were carrying only small gym bags; and they had isolated themselves from the crowd. After being approached by the agents, Brunson and Dixon allowed the agents to search their bags. During the search, they volunteered that together they were carrying \$45,000 in their socks. Without asking the travelers for permission, the agents brought in a dog that reacted positively to the money. The cash was seized and forfeiture proceedings were instituted. The District Court found that there had been a seizure without probable cause since the travelers were *told* that the money would be subjected to a dog sniff instead of *asked* if they would allow it. The Court ruled that the sniff was inadmissible at the forfeiture proceeding, thus no probable cause to forfeit was present. The Sixth Circuit affirmed that ruling.¹⁹

Returning from a vacation to Canada, a Michigan couple had their 1987 Mercury Cougar confiscated by customs agents after those officials found two marijuana cigarettes. Though no criminal charges were ever filed, the government kept the car.²⁰

Suspecting a Michigan family of engaging in a loan fraud scheme, federal agents raided the homes of James Fouch and his two sons on the morning of October 6, 1992. Armed with search warrants and a civil forfeiture order, the agents seized hundreds of thousands of dollars' worth of property that they alleged were proceeds of an embezzlement scheme. By June 1994, all of the property had been sold at auctions, putting over \$500,000

¹⁷ *Id.*

¹⁸ U.S. v. \$13,715.00, 736 F.Supp. 135 (E.D. Mich. 1990). *Cf.* U.S. v. \$53,082.00, 985 F.2d 245 (6th Cir. 1993)(opinion by Suhrheinrich, J.)(District court ruling by Gadola, J.)

¹⁹ U.S. v. \$13,715.00, 736 F.Supp. 135 (E.D. Mich. 1990).

²⁰ Aaron Epstein, "Zero Tolerance" Backlash Brings Fury, Threatened Suit, MIAMI HERALD, May 25, 1988, at D8.

Even when there is proof that an individual committed a criminal act, the amount of property seized is often disproportionate to the offense.

in the pockets of the federal government, and the credit union owned by the family was liquidated. The forfeiture was justified solely on the basis of alleging behavior—that is, providing probable cause that a crime might have been committed. The government was permitted to keep the items or the profits from their sale despite the fact that no criminal charges were filed against any member of the family for the alleged criminal activity.²¹ In other words, no finding of guilt is required for the government to snatch away—and keep—a citizen's property.

Even when there is proof that an individual committed an act currently labeled criminal, the amount of property seized is often disproportionate to the degree of the criminal offense. This can often be devastating to an individual. In late 1992, federal authorities raided the Flint, Michigan home of James Rivett. They found 36 marijuana plants. Rivett worked out a plea bargain with the U.S. Attorney's office. He would forfeit his house and business (or make a flat payment of \$75,000), pay an additional fine of at least \$10,000, and spend 24 to 30 months in prison. The federal probation office, however, subsequently recommended that Rivett forfeit his properties, pay the fine, and also be sentenced to more than 5 years in prison. Unable to accept the magnitude of the punishment and finding it too late to withdraw his guilty plea, Rivett attempted to take his own life. He set his house on fire, put a rifle in his mouth, and shot himself.²² Though he survived and was allowed to withdraw his guilty plea and negotiate a new deal, James Rivett's psychological plight illustrates that forfeiture can have an effect beyond the "mere" loss of material possessions.

In May 1989, Oakland County's Narcotics Enforcement Team and the West Bloomfield Police Department executed a search warrant on the home of Robert Hawkins and his family based on the tip of an informant who indicated that he had seen cocaine in the Hawkinses' basement. The search revealed weapons, a suspected drug ledger, and a large amount of cash. A canine unit picked up traces of cocaine on the cash and in several areas of the house and car, though no drugs were actually discovered. Prosecutors initially suspected drug activity based on Robert Hawkins's financial status, combined with the fact that, a year earlier, Hawkins had been convicted of attempted possession of 25 grams of cocaine. They felt he was living beyond the means of a legitimate income.

Hawkins accounted for his income, claiming that it was a result of several rental

²¹ *Feds Sell Seized Assets, But Officials Not Charged*, BANKING ATTORNEY, June 27, 1994, at 6. Though the seizures largely went unchallenged by the Fouches, this is not an implicit admission of guilt. First, many people feel a sense of impotence in their individual ability to fight the state (the "You can't fight city hall" mentality). Second, as will be discussed in later sections of this study, the attorney fees, court costs, and bond requirements involved in most challenges make it difficult for one to challenge a seizure (especially if all of his assets have been taken by the government). Finally, the forfeiture statutes require a very low threshold showing of only probable cause to allow the government to seize and keep someone's property. Thus, the unlikelihood of success may have also been a reason for the Fouches' decision not to challenge the seizures. Furthermore, it is the American legal tradition to adopt a presumption of innocence toward the accused and not to impose punishment until the state has fulfilled its obligation to show guilt beyond a reasonable doubt. Forfeitures of this kind ignore such principles and responsibilities.

²² *Friends back pot grower who tried to take his life*, SAGINAW NEWS (Saginaw, Mich.), Feb. 28, 1994, at A6; *In 'pot' trouble, man burned house, shot himself*, MIDLAND DAILY NEWS (Midland, Mich.), Feb. 28, 1994, at A8.

properties in Detroit he had owned since he was 19, his ownership of a beer and wine store, some gambling profits and interest from private loans he had made, and a \$2 million personal injury lawsuit settlement in Macomb Circuit Court. The trial court found that the explanation was not credible and that the lawsuit was really nothing more than a money laundering scheme. Thus, trial court Judge Michael J. Talbot of the Wayne County Circuit Court ordered forfeiture of the West Bloomfield home, the cash found in the home, jewelry, weapons, cars, a computer and printer, a boat, property in Florida, and several different bank accounts, annuities, and life insurance policies.

What finding was required to order such a forfeiture? Under Michigan law, the state needs only to show, by a preponderance of evidence, that the assets were connected with a criminal activity. No finding of guilt of the underlying criminal activity is necessary, because a forfeiture proceeding is considered civil, not criminal, in nature. Furthermore, because the forfeiture suit is technically against the property (*in rem*) and not against an individual owner (*in personam*), the Hawkinses were not entitled to have a jury determine whether, or how much of, their assets should be forfeited. The court also determined that Hawkins's wife had no claim to the property, presuming that Mrs. Hawkins was aware of the illegal conduct of her husband and arguing that she shared in illegitimate wealth.²³

Judge Talbot's motives for imposing such a sweeping forfeiture and his actions during the forfeiture trial were called into question by Hawkins. Talbot had sent a letter to the federal government regarding an "opportunity to serve at the federal level in a position" fighting the war on drugs. The Michigan Court of Appeals found this personal ambition of no consequence.²⁴ In a dissent, however, Judge Doctoroff found that this personal interest supported the assertion that a fair trial was not conducted.²⁵

In May 1989, Thelbert Crossland was carrying over \$26,000 on his person in Detroit Metropolitan Airport. Detroit DEA agents received a tip that someone matching Crossland's description would be traveling that day with a large amount of cash that was involved in the drug trade. After being searched by agents, Crossland stated that the money was for investments in a music production venture. Crossland worked for an entertainment production company in California. The money was subjected to two independent sniffs by a dog that reacted to the scent of narcotics on the currency. Agents seized the currency and the government subsequently initiated forfeiture proceedings. Edwards was never arrested or charged with a crime. The court, finding Edwards's testimony about the source of the money to be dubious, ordered him to forfeit the money to the government. The court argued that, "The remote possibility that this money originated from legitimate ventures does not vitiate a strong probability, nor will it create a preponderance of evidence against a more reasonable

²³ In re Forfeiture of \$1,159,420, 194 Mich.App. 134, 486 N.W.2d 326 (1992). See also *People v. One 1986 Mercedes Benz* (Lawyer's Weekly No. 17168, 1994)(reported in Michigan Lawyer's Weekly, Aug. 29, 1994, at 23)(finding that \$17,000 in a car, a positive dog sniff on the cash, and a digital scale in the car, constituted sufficient evidence to show a substantial connection between the automobile and drug trafficking thus granting a forfeiture order against the car).

²⁴ 194 Mich.App. 134, 153, 486 N.W.2d 326, 336.

²⁵ 194 Mich. App. 134, 157, 486 N.W.2d 326, 338 (Doctoroff, J., dissenting).

Federal officials seized a total of 117 vehicles in Detroit in 1989, 43 of which were later returned for a variety of reasons, including that the owner was innocent of any wrongdoing.

conclusion.”²⁶

Federal Immigration and Naturalization Service (INS) officials seized a total of 117 vehicles in Detroit in 1989. According to the INS, 43 of these were later returned for a variety of reasons, including that the owner was innocent of any wrongdoing. But even in cases where vehicles were mistakenly seized, the INS still billed each owner as much as \$500 for procedural costs and vehicle storage, while those whose vehicle seizure was justified under current law were also forced to pay the procedural and storage costs in addition to a fine up to the value of the car.²⁷

In documents obtained under the state Freedom of Information Act, officials of the Michigan Association for the Preservation of Property (MAPP) discovered that the use of civil forfeiture in Michigan is widespread.²⁸ Congressman Henry Hyde (R-Illinois) summarizes their findings in his book, *Forfeiting Our Property Rights*. In Michigan in 1992, for example:

- Michigan law enforcement agencies used civil forfeiture in 9,770 instances and confiscated an average of \$1,434 worth of property per seizure.
- A total of \$14,007,227 in cash and property was seized, up from \$11,848,547 in 1991.
- Property taken included 54 private homes (up from 29 homes in 1991) with an average value of \$15,881.
- Auto seizures totaled 807, with an average value of \$1,412.
- A total of 8,909 seizures produced \$9,225,515 in cash and other negotiable instruments and \$2,754,818 in personal property. An examination of the records indicated these seizures often went uncontested because the value of the property confiscated was normally less than the cost of recovery (attorney and court fees, time lost, etc.).
- As one example, the Muskegon police, one of the 123 separate reporting police agencies, seized cash 72 times, totaling \$31,199, with an average for each seizure of \$433.
- No police department gave any evidence of convictions associated with the seizures and only the Muskegon Police Department was able to offer any

²⁶ U.S. v. \$26,284.00, 781 F.Supp. 1236 (E.D. Mich. 1992).

²⁷ *Drug Laws Work Against Innocent*, DETROIT NEWS, October 24, 1989.

²⁸ Tom Flook, *Police Documents Show Most Property Seizures in Michigan Resemble Curbside Shakedowns*, F.E.A.R. CHRON., Nov. 1993, at 3,9 (F.E.A.R., an acronym for “Forfeiture Endangers American Rights,” is a California-based organization. FEAR’s state coordinator in Michigan is Tom Flook, who can be contacted via the internet at “tomflook@aol.com”).

detailed accounting of the number of arrests made.²⁹

Both the selected illustrations and the data above illustrate the problems that arise under forfeiture laws. Virtually no due process is afforded to citizens whose property is seized and punishment is often imposed regardless of whether criminal guilt has been established or not.

I. THE FORFEITURE EXCEPTION TO CONSTITUTIONAL NORMS

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.³⁰

The protection of private property rights is a fundamental condition for freedom and the most sacred obligation of government. The Framers of the United States Constitution strongly embraced such a view. James Madison observed the importance of this obligation when he wrote, "Government is instituted to protect property of every sort. . . . This being the end of government, that alone is a *just* government, which *impartially* secures to every man, whatever is his *own*."³¹ Madison's statement of this truth echoed a similar pronouncement by John Locke: "The great and chief end therefore, of men's uniting into commonwealths, and putting themselves under government, *is the preservation of property*. To which in the state of nature there are many things wanting."³² Thus, the government has a negative obligation to refrain from violating property rights as well as an affirmative obligation to ensure their preservation.

Despite the placement of these obligations into America's constitutional structure, protection of property rights has gradually foundered. Receiving compensation for property

Virtually no due process is afforded to citizens whose property is seized and punishment is often imposed regardless of whether criminal guilt has been established or not.

²⁹ HYDE, *supra* note 1, at 32.

³⁰ U.S. CONST., Amendment V (emphasis added). Though Amendment V was originally intended to limit only federal power, Amendment XIV applies this due process requirement upon the states ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law") and the Fifth Amendment takings clause has been incorporated through the Fourteenth Amendment to be applicable against the States. *See Chicago Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226 (1896). Furthermore, the Michigan Constitution has textually similar provisions guarding against state action. MICH. CONST., art. I, §17 ("No person shall . . . be deprived of life, liberty or property, without due process of law."); MICH. CONST., art. X, §2 ("Private property shall not be taken for public use without just compensation therefor being first made or secured in a manner prescribed by law. Compensation shall be determined in proceedings in a court of record."). For a brief annotated text of the Michigan Constitution, *see* SUSAN P. FINO, *THE MICHIGAN STATE CONSTITUTION: A REFERENCE GUIDE* (1996).

³¹ JAMES MADISON, 14 *THE PAPERS OF JAMES MADISON* 266 (Rutland et al. eds, 1983)(citing an essay entitled *Property*, NAT'L GAZETTE, March 27, 1792).

³² JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* 75 (Cox ed., 1982).

Framers such as Madison understood that property rights could not be excluded from protected freedoms because the protection of property is the foundation of all freedoms.

taken by the government has become extremely difficult, and the Fifth Amendment prohibition against taking property for non-public uses has essentially disappeared.³³ Furthermore, property rights have been relegated to an inferior position in the scheme of protected freedoms.³⁴ As the power of the state has grown, those rights that were of primary concern to the Framers have become a secondary concern for contemporary legislatures and courts.

Yet Framers such as Madison understood that property rights could not be excluded from protected freedoms because the protection of property is the foundation of all freedoms. He emphasized this relationship when he wrote, “[A]s a man is said to have a right to his property, he may be equally said to have a property in his rights. Where an excess of power prevails, property of no sort is duly respected. No man is safe in his opinions, his person, his faculties, or his possessions.”³⁵

Given Madison’s warning, each violation of property rights must be carefully scrutinized and guarded against by all who value individual liberty. Violations must be kept in check if our property in liberty is to be preserved. Current policymakers should emulate the Founders’ respect for private property rights whenever making decisions which affect those rights.

Unfortunately, that respect is too often absent in current legislators. The state of property rights law can be, in part, illustrated by the forfeiture laws currently in use by both the federal and Michigan governments.

Two main categories of forfeiture statutes exist in today’s legal system: criminal forfeiture and civil asset forfeiture. Civil asset forfeiture concerns the seizure of property presumed to have a relation to a crime or to be obtained as a consequence of criminal activity. No determination of criminal guilt is necessary to trigger a civil asset forfeiture, which is *in rem*, or against property, in nature. The bulk of this report will address this

³³ See DONALD J. KOCHAN, REFORMING THE LAW OF TAKINGS IN MICHIGAN, Mackinac Center for Public Policy (April 1996).

³⁴ See *United States v. Carolene Products Co.*, 304 U.S. 144, note 4, 58 S.Ct. 778, 82 L.Ed. 1234 (1938)(holding that regulatory legislation affecting commercial transactions need only rest upon some rational basis in order to withstand constitutional review). In Michigan, the same type of standard with strong deference to the legislature has been applied. See, e.g., *Blue Cross and Blue Shield of Michigan v. Governor*, 422 Mich. 1, 367 N.W.2d 1 (1985); *Romein v. General Motors*, 436 Mich. 515, 462 N.W.2d 555 (1990).

³⁵ Madison, *supra* note 31; See also *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972)(language stating that, “Property does not have rights. People have rights. The right to enjoy property without lawful deprivation . . . is in truth a ‘personal’ right. . . . In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized.” The statement that property does not have rights, though intuitively true, has been rejected by the courts in favor of a legal fiction which allows the government to seize a piece of property and thereby avoid complying with the due process protections that can only be claimed by people. See discussion of due process, *infra*.

category of forfeiture and the constitutional and civil rights problems it poses.

The second category involves criminal forfeitures, which are primarily *in personam*—against the person—in nature. A criminal forfeiture results after a conviction for the crime to which the forfeited property is related. This can occur upon a showing that the property is contraband (illegally obtained, obtained through the profit from a crime, or involved as an instrument of the underlying offense), as a consequence of sentencing, or as a condition of a plea bargain. Fewer injustices are likely to result in this category of forfeiture, given the more protective procedural safeguards in criminal prosecutions.

Nonetheless, several concerns arise in the analysis of criminal forfeiture laws. Eighth Amendment protections from excessive fines and the implied protection against disproportionate punishments must be considered. In fact, on June 22, 1998, the U.S. Supreme Court addressed whether a violation of a customs law requiring reporting of more than \$10,000 in cash transported across the border warranted a forfeiture of \$357,144 in lawfully obtained cash carried by the defendants. Finding the forfeiture disproportionately high given the nature of the violation and limiting their opinion to the distinct issue of criminal forfeiture, the Court held for the first time that a criminal forfeiture violated the Excessive Fines clause.³⁶

Though these and other problems arise in both categories of forfeitures, their significance to the criminal category lies primarily beyond the scope of this report. Criminal forfeiture is particularly relevant to this report's analysis, however, when innocent owners or co-owners of property are punished as a result of such forfeitures.

A. Recent United States Supreme Court Decisions and the Michigan Connection

Two recent significant pronouncements by the United States Supreme Court on forfeiture originated in Michigan. In *Bennis v. Michigan*, the Court held that the state need not offset an innocent owner's interest in a forfeited asset.³⁷ In *U.S. v. Ursery*, the Court held that *in rem* civil forfeiture proceedings are neither "punishment" nor criminal for purposes of the Fifth Amendment's "double jeopardy" provision.³⁸

Two recent significant forfeiture pronouncements by the United States Supreme Court originated in Michigan.

³⁶ United States v. Bajakajian, 1998 WL 323512 (U.S.).

³⁷ *Bennis v. Michigan*, 116 S.Ct. 994, 134 L.Ed.2d 68 (1996).

³⁸ United States v. Ursery, 116 S.Ct. 2135, 135 L.Ed.2d 549 (1996). See also *Court Limits Legal Help, OK's Seizures*, CHATTANOOGA TIMES, June 25, 1996, at A5 (discussing *Ursery*); *Forfeiture; Personal Property-Double Jeopardy*, Michigan Lawyer's Weekly, October 5, 1995, at 10 (discussing *Fanny v. United States*, opinion from the U.S. District Court in the Eastern District holding that jeopardy doesn't attach to forfeiture proceedings which are remedial and not punitive in nature); *Forfeiture; Double Jeopardy-Previous Civil Forfeiture*, Michigan Lawyer's Weekly, October 9, 1995, at 7 (discussing *United States v. Salinas*, a Sixth Circuit opinion holding that forfeiture of car as drug proceeds did not count for double jeopardy purposes during a criminal trial). For a recent Michigan decision applying the *Ursery* standard, see *People of the State of Michigan v. Everard*, 1997 Mich.App. LEXIS 321, *11 (1997)(deciding on the validity of a forfeiture taken pursuant to Michigan's chop shop statute, MCL 750.535a(2), MSA 28.803 (1)(5)).

The Supreme Court held that an owner, even if unaware that her property will be put to an illegal use, cannot claim a defense to a forfeiture claim and has no legal right to recover against the state.

As discussed in the introduction, the *Bennis* case involved the joint ownership of a vehicle by a Royal Oak couple. Subsequent to John Bennis being found conducting illicit activities with a prostitute in that vehicle, Michigan successfully sought to have his car forfeited as a nuisance.³⁹ His wife then sued the state to recover her half-interest in the car.

The Supreme Court held that an owner, even if unaware that her property will be put to an illegal use, cannot claim a defense to a forfeiture claim and has no legal right to recover against the state. So long as the state can prove the “guilt” of the property by showing its connection to an illegal act by a user or possessor, it retains the ability to seize the property and owes no duty to any innocent owners. In other words, the government’s claim to the property is superior to that of any others exhibiting an ownership interest. The Court also found that because the car was lawfully acquired by the government through a power other than eminent domain, Mrs. Bennis had not been deprived of property without just compensation under the Fifth Amendment’s “takings” clause.

Basing their decision primarily on the strength of precedent and with little discussion of the principles or importance of due process, the U.S. Supreme Court affirmed the ruling of the Michigan Supreme Court. The Court suggested that Mrs. Bennis was strictly liable and could not claim a defense even if she took affirmative steps to prevent illegal usage of her property. In his dissent, Justice John Paul Stevens recognized the consequences of the majority ruling:

The logic of the Court’s analysis would permit the States to exercise virtually unbridled power to confiscate vast amounts of property. . . . Some airline passengers have marijuana cigarettes in their luggage; some hotel guests are thieves; some spectators at professional sports events carry concealed weapons; and some hitchhikers are prostitutes . . . [N]either history nor logic supports the Court’s apparent assumption that [the airline,

³⁹ The statutory authority for forfeiture came from a Michigan nuisance abatement statute (Michigan Compiled Laws §600.3801):

“Any building, vehicle, boat, aircraft, or place used for the purpose of lewdness, assignation or prostitution or gambling, or used by, or kept for the use of prostitutes or other disorderly persons, . . . is declared a nuisance . . . and all . . . nuisances shall be enjoined and abated as provided in this act and as provided in the court rules.

Any person or his or her servant, agent, or employee who owns, leases, conducts, or maintains any building, vehicle, or placed used for any of the purposes or acts set forth in this section is guilty of a nuisance.”

One important note, however, is that, under a nuisance action such as the one in question, the court in equity can use its discretion to tailor a remedy to fit the situation. The decision to deny an abatement order is within that permissible discretion. *See People ex rel Wayne Co. Prosecutor v. Tate*, 306 Mich. 667, 669, 11 N.W.2d 282 (1943). In *Bennis*, the trial judge chose not to exercise that remedial discretion, though the Michigan Supreme Court and United States Supreme Court recognized its existence in the case law.

hotel, stadium owners, and car owners'] complete innocence imposes no constitutional impediment to the seizure of their property simply because it provided the locus for a criminal transaction.⁴⁰

Stevens's concerns should not be dismissed, for the Court's decision truly does allow a state government to broadly sweep up the innocent when drafting its forfeiture provisions.⁴¹

At least one member of the Court, Justice Clarence Thomas, seemed to indicate his dislike for the policy while finding no constitutional protection against it.⁴² Thomas's opinion reflects an application of the laudable principle of judicial restraint. For Thomas, the Constitution does not prohibit the legislature from passing statutes such as the one in question in *Bennis*, nor does it prohibit their application by law enforcement.

Thomas's concurrence raises an important issue for those concerned with reform. If the goal is to alter policy, then protests against undesirable governmental conduct should be made to the political, not judicial, branches. Reasonable people can disagree as to whether the Constitution recognizes a limit on the government's power to seize assets. But certainly many of the government's actions in this area of law are at least unreasonable as a policy matter. Even to those who believe the Constitution prohibits asset forfeiture as currently practiced, the battle in the courts does not look promising. Thus, focusing reform efforts on the legislature is the most prudent alternative.

In *Ursery*, Michigan police found marijuana growing adjacent to Guy Ursery's home and also discovered marijuana seeds, stalks, and a plant-growing lamp in the house. Under federal forfeiture laws, the United States sought forfeiture of the house, but Ursery eventually settled the forfeiture suit for \$13,250. He was subsequently indicted, tried, and convicted for manufacturing marijuana. A divided Sixth Circuit reversed the conviction arguing that the forfeiture proceeding constituted punishment and thus the criminal prosecution for the same offense was barred by the Fifth Amendment's "Double Jeopardy" clause.⁴³

The Supreme Court analyzed the intent of the statute authorizing forfeiture and found it to be remedial, and not punitive, in nature. Stating that "punishment" for "excessive fines" purposes under *Austin v. United States* is different than "punishment" for double jeopardy purposes, the Court refused to equate *Ursery* with its earlier ruling in *Austin*.⁴⁴ If a

If the goal is to alter policy, then protests against undesirable governmental conduct should be made to the political, not judicial, branches.

⁴⁰ *Bennis*, 116 S.Ct. 994 (Stevens, J., dissenting).

⁴¹ As an example from the past, a car dealer was required to forfeit his secured interest in an automobile that was used, after sale, to unlawfully transport distilled spirits during Prohibition. *Goldsmith-Grant v. United States*, 254 U.S. 505 (1921). Both the car dealer in this case and Tina Bennis, however, may retain the ability to sue their co-owner for the loss on the basis of private law, such as contract.

⁴² "This case is ultimately a reminder that the Federal Constitution does not prohibit everything that is intensely undesirable." 116 S.Ct. 994 (Thomas, J., concurring).

⁴³ *Ursery v. United States*, 56 F.3d 568 (1995).

⁴⁴ *Ursery*, 116 S.Ct. 2135.

civil forfeiture statute were to indicate an intent to punish, presumably the outcome of the double jeopardy analysis would be different.

B. The Scope of Civil Asset Forfeiture Statutes

Law enforcement officers are given the power to seize property under a plethora of statutes dealing with a variety of illegal activities, nuisances, and otherwise proscribed conduct. Federal agents alone are given seizure power under more than 200 different statutes.⁴⁵ These statutes reach property related to a variety of violations, including possession of illegal firearms, uninspected meat, diseased poultry, and drugs; conveying illegal aliens; using animals for fighting; laundering money; using equipment unlawfully in a national park; acquiring a corporation in violation of antitrust law; failing to report cash in excess of \$10,000 when traveling across the border; and unlawfully importing pre-Columbian art.⁴⁶ Numerous seizure statutes also exist in Michigan. Those statutes dealing with controlled substances such as drugs, however, are the most often employed by law enforcement and the most sweeping in their reach. These include Sections 333.7521-333.7525 of the Michigan Compiled Laws and Section 881 of Title 28 in the U.S. Code.

Anything that is “furnished or intended to be furnished in exchange for a controlled substance or . . . traceable to an exchange for a controlled substance” is subject to forfeiture under Michigan law.⁴⁷ The forfeiture statute also provides that “money that is found in close proximity to any property that is subject to forfeiture . . . shall be presumed to be subject to forfeiture.”⁴⁸ The state need not demonstrate a connection with a specific incident of drug dealing for an asset to be forfeited. Rather, assets need only be traceable to drug trafficking in general.⁴⁹

In Michigan, the prosecution must prove by a preponderance of the evidence⁵⁰ that the assets should be subject to forfeiture due to a “substantial connection” between the property and illegal behavior.⁵¹ Though preponderance of evidence must be shown at trial, only probable cause is necessary to initially seize the property.⁵² A “preponderance of

⁴⁵ Bovard, *supra* note 2, at 6 (citing Cary Copeland, *Civil Forfeiture and the Non-Lawyer*, U.S. Dept. of Justice, Bureau of Justice Assistance Forfeiture Project, Spring 1992).

⁴⁶ LEVY, *supra* note 15, at 47 and n. 18 (citing a list of federal statutes in Doyle, *Crime and Forfeiture*, CRS Report for Congress, October 15, 1992, appendix, pp. 45-49).

⁴⁷ MCL 333.7521(1)(f); MSA 14.15(7521)(1)(f); *In re Forfeiture of United States Currency*, 164 Mich.App. 171, 178, 416 N.W.2d 700 (1987).

⁴⁸ *Id.*

⁴⁹ *Michigan v. \$1,159,420.00*, 194 Mich. App. 134, 147, 486 N.W.2d 326, 333 (1992).

⁵⁰ *In re Forfeiture of \$15,232*, 183 Mich.App. 833, 836, 455 N.W.2d 428 (1990); *In re 301 East Cass Street*, 194 Mich. App. 381, 487 N.W.2d 795 (1992).

⁵¹ *In re Forfeiture of \$5,264*, 432 Mich. 242, 244-45, 439 N.W.2d 246 (1989).

evidence” standard is stricter than “probable cause” (the standard required to obtain a search warrant), but less demanding than the standard required to find a defendant in a criminal trial guilty “beyond a reasonable doubt.”

By contrast, most federal forfeiture laws require only a showing of probable cause that an asset is connected to an illegal activity before it is subject to forfeiture. Probable cause is more than a mere suspicion but much less than prima facie proof or proof beyond a reasonable doubt. It is merely the showing of a “reasonable ground for belief” that there was an illegal activity to which this property had a substantial connection.⁵³ In either case, the state need not obtain a finding of guilt of a crime in a criminal court before subjecting a citizen to the punishment of forfeiture.

Once the state has met its limited burden, the burden shifts to the owner to establish his property’s innocence by a preponderance of the evidence (under both federal and Michigan laws). But under federal law, a strong preference is given to the government. By shifting the burden to the owner, both jurisdictions ignore the strongly defended presumption against the state involved in a criminal trial.

Despite the owner’s role in the trial, however, the proceedings are considered *in rem* civil proceedings—that is, against the “guilty” property and not a person.⁵⁴ This legal fiction proceeds on the assumption that inanimate objects can be guilty of wrongdoing yet not protected by the rights available to persons. Though this personification of inanimate objects is heavily criticized and often described by judges as an anomaly or “archaic theory,” most judges nonetheless feel compelled to follow the longstanding precedent establishing the fiction. However, the fact that a legal doctrine exists does not establish that it ought to exist, constitutionally or otherwise.

Because the proceedings are *in rem* and civil, most of the normal protections afforded criminal defendants⁵⁵ do not exist in forfeiture proceedings. Thus, the right to an

⁵² This “seizure without process” power is provided in MCL 333.7522(c) and (d), MSA 14.15(7522)(c) and (d).

⁵³ U.S. v. Real Property known as 11348 Wyoming, Detroit, Michigan, 705 F.Supp. 352, 355 (E.D. Mich. 1989); U.S. v. One 1975 Mercedes 280S, 590 F.2d 196, 199 (6th Cir. 1978); U.S. v. One 1975 Chevrolet K-5 Blazer, 495 F.Supp. 737, 740 (W.D. Mich. 1980). Probable cause for seizures without process in Michigan has been similarly defined. Michigan v. U.S. Currency and One Mercedes Benz, 164 Mich. App. 171, 178, N.W.2d 700, 703 (1987)(citing People v. Oliver, 417 Mich. 366, 374, 338 N.W.2d 167 (1983)).

⁵⁴ City of Lansing v. \$30,632.41, 184 Mich. App. 677, 459 N.W.2d 99 (1990)(citing People v. U.S. Currency, 158 Mich. App. 126, 404 N.W.2d 634 (1986); In re Forfeiture of \$28,088, 172 Mich. App. 200, 431 N.W.2d 437 (1988)); In re Forfeiture of 719 N. Main, 175 Mich. App. 107, 114, 437 N.W.2d 332 (1989).

⁵⁵ Michigan Constitution, Article I, Section 20 describes the rights of accused individuals, above and beyond other protections found elsewhere such as the due process clause:

“Rights of accused in criminal proceedings. In every criminal prosecution, the accused shall have the right to a speedy and public trial by an impartial jury, which may consist of less than 12 jurors in prosecutions for misdemeanors punishable by

In federal civil forfeiture proceedings, probable cause may be based wholly on circumstantial evidence.

indictment, the presumption of innocence, the right to effective assistance of counsel, the right to a jury trial, the right not to be punished prior to adjudication of guilt beyond a reasonable doubt, the right not to be punished in a manner disproportionate to the crime, the general presumption that the state prove culpability, and the practice of resolving legal ambiguities in favor of the defendant all do not apply. Many of the limitations on government action normally attendant to a criminal trial are likewise eliminated. Civil discovery is but one example: It allows the state broad evidence-gathering tools, including the ability to compel production of certain evidence from the owner. Thus, the civil forfeiture scheme ignores the policy that imposing punishment—despite court rulings, the seizure of property can be nothing else—is meant to be difficult. Consequently, the government often has an incentive to use this less difficult route as a substitute for criminal prosecution.

In federal civil forfeiture proceedings, probable cause may be based wholly on circumstantial evidence.⁵⁶ The preponderance standard in Michigan makes it slightly more difficult to sustain a forfeiture on circumstantial evidence alone, but not so difficult as to block many government attempts to obtain a forfeiture.

Many of the rights guaranteed in most civil proceedings are also not available. For instance, the right to a jury trial protected under Michigan's Constitution in Article I, Section 14, applies only to civil actions at law that were triable by a jury at the time the constitutional guarantee was adopted.⁵⁷ Traditionally, there was not a right to a jury trial in equitable matters unless created by statutory law.⁵⁸

Because forfeiture proceedings are recognized as quasi-criminal in nature, some of the rules of evidence applicable in a criminal trial also apply in forfeiture proceedings in Michigan, creating some level of protection to owners. Much of Fourth Amendment law regarding searches and seizures, including the exclusionary rule, can work to bar admission of evidence in a forfeiture proceeding.⁵⁹ Moreover, hearsay is inadmissible in a forfeiture

imprisonment for not more than 1 year; to be informed of the nature of the accusation; to be confronted with the witnesses against him to have compulsory process for obtaining witnesses in his favor; to have the assistance of counsel for his defense; to have an appeal as a matter of right, except as provided by law an appeal by an accused who pleads guilty or *nolo contendere* shall be by leave of the court; and, as provided by law, when the trial court so orders, to have such reasonable assistance as may be necessary to prosecute an appeal.”

⁵⁶ U.S. v. 11348 Wyoming, 705 F.Supp., at 355 (citing U.S. v. \$41,305.00, 802 F.2d 895, 904 (11th Cir. 1986).

⁵⁷ Wolfenden v. Burke, 69 Mich. App. 394, 399, 245 N.W.2d 61 (1976)(citing Conservation Dep't v. Brown, 335 Mich. 343, 55 N.W.2d 859 (1992). See also Michigan v. \$1,159,420.00, 194 Mich. App. 134, 154 (1992).

⁵⁸ Wolfenden, *supra*, at 399; Thomas v. Steuernol, 185 Mich. App. 148, 155-56, 460 N.W.2d 577 (1990).

⁵⁹ See Conservation Dep't v. Brown, 335 Mich. 343, 350-51, 55 N.W.2d 859 (1952)(reviewing legality of a seizure of illegally used fishing nets during a forfeiture proceeding); In re Forfeiture of \$28,088, 172 Mich. App. 200, 206, 431 N.W.2d 437 (1988)(reviewing validity of a search warrant

proceeding in Michigan,⁶⁰ though federal forfeitures allow otherwise inadmissible hearsay to prove the probable cause necessary to sustain a forfeiture.⁶¹

The Supreme Court has also upheld an avenue for challenging the proportionality of a forfeiture. Holding that the Excessive Fines clause of the Eighth Amendment applies to civil forfeiture proceedings in *Austin v. United States*,⁶² the Court sustained an important means for judicial control on proportionality. Though the means may exist, it is another question whether it will serve as a successful tool. Though the provision applies, reaching a determination of excessiveness is extremely difficult. Determining the amount of property “tainted” and therefore subject to forfeiture is not easy, especially under current standards and because the state need not prove that property is related to an *actual* crime. Proportionality tests will provide little protection so long as the state can take any property for which there is probable cause to believe it is connected to a crime. In other words, the state really need only show that the property might have been related to what might have been a crime.

Often, the government takes property on the spot through a “seizure without process.” Following such an action, the Michigan government must promptly institute formal *in rem* forfeiture proceedings and provide notice to the owners.⁶³ Such promptness and notice has been found necessary to comply with the due process requirement of the Michigan Constitution, Article I, Section 17. For certain property, such as drugs and other items which are illegal to possess, however, individuals can have no claim of ownership and summary forfeiture is allowed without any requirement that process ever be afforded.⁶⁴

The hurdles to challenging a forfeiture are high. The owner usually must file a claim within ten or twenty days following notice and must post a bond (normally ranging between

during a forfeiture proceeding); *In re Forfeiture of United States Currency*, 171 Mich. App. 684, 686-87, 431 N.W.2d 131 (1988)(reviewing legality of an investigative stop during a forfeiture proceeding); *In re Forfeiture of United States Currency*, 166 Mich. App. 81, 89, 91-92, 420 N.W.2d 131 (1988)(holding that a suppression issue decided in a criminal case could not be relitigated in a forfeiture proceeding, but that the rules of evidence should be strictly applied). For a similar application in a federal case involving a Michigan defendant, see *U.S. v. \$53,082.00*, 985 F.2d 245 (6th Cir. 1993)(excluding the use of a dog sniff in a forfeiture proceeding after holding that officers telling individuals in Detroit Metro Airport that their money would be subject to a dog sniff presented them with no choice and constituted a Fourth Amendment seizure without a warrant and did not fall within an exception to the warrant requirement).

Often, the government takes property on the spot through a “seizure without process.”

⁶⁰ See *In re \$15,232*, 183 Mich. App., at 834-837.

⁶¹ *U.S. v. Real Property Known as 11348 Wyoming*, Detroit, Michigan, 705 F.Supp. 352 (E.D. Mich. 1989).

⁶² 509 U.S. 602, 125 L.Ed.2d 488, 113 S.Ct. 2801 (1993).

⁶³ MCL 333.7523, MSA 14.15 (7523); construed in *Michigan v. One 1983 Cadillac*, 176 Mich. App. 277, 439 N.W.2d 346 (1989) (citing *Lenawee Prosecutor v. One 1981 Buick Two Door Riviera*, 165 Mich. App. 762, 766-67, 419 N.W.2d 458 (1988)).

⁶⁴ MCL 333.7525, MSA 14.15(7525).

All civil asset forfeiture punishes the legally innocent because it does not require the government to prove criminal guilt beyond a reasonable doubt.

\$250 and \$500) with sureties in order to successfully file. A claimant cannot be his own surety.⁶⁵ Court costs and attorney fees also add to the burden. If a claim is not filed pursuant to these requirements, the owner has not perfected his right to a judicial proceeding and the property is declared administratively forfeited.⁶⁶ The owner loses any ability to recover the property absent a separate suit challenging the constitutionality of the action or the statute, or through a petition for mercy to the attorney general or seizing authority. These remedies also remain when a judgment is rendered adverse to the owner in the government-initiated forfeiture proceeding. In other words, an owner who loses his property might still seek an appeal to either a court or the political branches in an effort to have the forfeiture reversed.

C. Punishing the Innocent

All civil asset forfeiture punishes the legally innocent because it does not require the government to prove criminal guilt beyond a reasonable doubt before property can be seized and held. Acquittal on the criminal charge to which the property relates will not necessarily immunize an individual from a forfeiture proceeding.⁶⁷ Because of the lower standard of proof in forfeiture proceedings, a determination that one is not guilty beyond a reasonable doubt in a criminal trial does not mean that the state will be unable to establish by probable cause (in federal court) or by a preponderance of the evidence (in Michigan court) that property is connected to illegal activity.

The high standard of proof in criminal proceedings supports a policy which seeks to prevent the innocent from being punished. This concern for the innocent is noticeably lacking in forfeiture proceedings, despite the fact that the loss of property punishes the individual. Conversely, even in criminal proceedings where only a fine will be imposed and physical liberty is not at stake, the protections of a criminal trial rule. Thus, basing the differing standards on a distinction between liberty and property interests is, in light of the earlier discussion of property's relationship to liberty, an imperfect and illegitimate justification.

Beyond individuals legally innocent but "guilty" by a preponderance of evidence (or by a showing of probable cause in federal matters), civil asset forfeiture sweeps under its scope many individuals whom it cannot even connect to illegal activity under such a permissive standard—the truly innocent. The failure to establish a general innocent owner defense in *Bennis* and the use of the relation-back doctrine both work to adversely affect innocent citizens.

⁶⁵ Michigan v. U.S. Currency, 172 Mich.App. 790, 432 N.W.2d 442 (1988).

⁶⁶ See, e.g., Horne v. Office of the Attorney General, 662 F.Supp. 237 (E.D. Mich. 1987)(showing the consequences of failure to file a proper claim under federal statutes).

⁶⁷ See U.S. v. Real Property Commonly Known as 16900 Mark Twain, Wayne Cty., Detroit, Mich., et al (Lawyer's Weekly No. WD-12007)(discussed in Michigan Lawyer's Weekly, January 24, 1994, at 15.); See also Michigan v. Coon, 200 Mich. App. 244, 503 N.W.2d 746 (1993)(acquittal on a charge of concealing or misrepresenting the identification of one vehicle did not make the confiscation of that vehicle improper because confiscation statute [MCL 750.415(4), MSA 28.647(4)] allows confiscation merely upon a showing that the identity of the vehicle cannot be determined).

Under the relation-back doctrine, incorporated in the language of many forfeiture statutes, the government's title to forfeitable property vests at the time the property was used unlawfully. For example, if you purchase a used car from a stranger, and the government five years later proves (by only a preponderance of evidence) that the stranger acquired that car through proceeds obtained through illegal activity, your car is forfeitable to the government. The relation-back doctrine holds that the government's title is superior to that of any subsequent purchaser, transferee, or owner of the asset.⁶⁸ In order to protect himself from the implications of this doctrine, an individual would be required to thoroughly research all of the activities of another person with whom he wishes to transact business. This is a considerable and unreasonable burden. This doctrine has, traditionally, been vigorously defended by the United States Department of Justice.⁶⁹

The doctrine, however, was curtailed in 1993 when the U.S. Supreme Court decided *U.S. v. Buena Vista Avenue, Rumson, New Jersey*.⁷⁰ The Court held that the title does not vest with the government until judicial condemnation of the property. The decision, however, was a matter of statutory interpretation and the ruling does not bar statutory authorization of a relation-back doctrine.

Stating that "Michigan's failure to provide an innocent owner's defense was 'without constitutional consequence,'" both the Michigan Supreme Court and the U.S. Supreme Court held that the state is under no obligation to account for the rights of the innocent when drafting its forfeiture laws.⁷¹ The acts of the user bind the interest of the owner, irrespective of the owner's culpability.

Lacking a statutory exemption for innocent owners, the courts have refused to find a violation of due process when an owner's interest in his property is forfeited by the government because of the acts of one using or having co-ownership of the property. Some statutes have, however, incorporated such exemptions. For example, Michigan's forfeiture law regarding narcotics activity has been interpreted to include a statutory innocent owner's defense in Section 333.7521 of Michigan's Compiled Laws.⁷²

⁶⁸ TERRANCE G. REED, AMERICAN FORFEITURE LAW: PROPERTY OWNERS MEET THE PROSECUTOR 9, Cato Institute *Policy Analysis* No. 179 (Sept. 29, 1992).

⁶⁹ *Id.*

⁷⁰ 113 S.Ct. 1126 (1993).

⁷¹ *Bennis*, 116 S.Ct. 994.

⁷² *In re Forfeiture of \$53*, 178 Mich. App. 480, 444 N.W.2d 182 (1989)(distinguished from abatement law in *Bennis* based on statutory construction). The court concluded that

"§7521(1)(d)(ii) was intended to establish a separate defense for each claimant who has a personal interest in the property as an owner. Hence, where the prosecution commences an action against a conveyance that is used for unlawful narcotics activity, the forfeiture of the *res* is subject to the interest of the co-owner who proves that the proscribed act was done without his or her knowledge or consent, express or implied. The state may only forfeit the ownership interest of a non-innocent owner. If, for example,

One poll indicates that, by a three-to-one margin, Americans feel that it is more important to “take any step necessary” to stop the use of drugs than to “protect civil liberties.”

Such defenses, however, have varying effects. An innocent owner’s defense often requires proof that the owner lacked knowledge of the illegal activity and took all reasonable steps possible in preventing the use of his property in an illegal manner or preventing the property from becoming connected with, or in proximity to, illegal activity. In essence, this limit on the exemption drafts owners as private officers of the law who must take affirmative steps to police those around them and not merely refrain from illegal conduct themselves if they wish to avoid forfeiture.

II. THE HISTORY OF FORFEITURE LAW AND THE BLINDERS OF “CRISES”

The Constitution is the rock of our political salvation; it is the palladium of our rights; . . . [but] when the [government] pursues a favorite object with passionate enthusiasm, men are too apt, in their eager embrace of it, to overlook the means by which it is attained. These are the melancholy occasions when the barriers of the government are broken down and the boundaries of the Constitution defaced.⁷³

—Junius Americanus, 1790

Nothing arouses men’s passions as much as fear does. The tactics of Hitler and Stalin illustrate what a powerful tool fear can be for inflaming the passions of the populace in an effort to grab more power at the expense of institutional constraints. That such a fear exists in today’s American society is illustrated by a variety of polls indicating the majority view toward crime, its control, and the appropriate governmental response. One poll indicates that, by a three-to-one margin, Americans feel that it is more important to “take any step necessary” to stop the use of drugs than to “protect civil liberties.”⁷⁴ It is precisely when passions run high that constitutional restraints on majority action become critical and require a vigilant defense.⁷⁵

the innocent owner has a fifty percent interest in the vehicle, the property may be sold and the proceeds divided equally between the state and the innocent co-owner.”

Id. at 495-96.

⁷³ Junius Americanus [pseud.], letter, N.Y. DAILY ADVERTISER, July 23, 1790 (quoted in CHARLES WARREN, CONGRESS, THE CONSTITUTION, AND THE SUPREME COURT 105 (1930)).

⁷⁴ Doug Bandow, *War on Drugs or War on America?*, STANFORD L. & POL’Y REV. 242, 252 (Fall 1991).

⁷⁵ In addressing the crisis of Watergate and strong majority pressures to legislate additional checks on the Executive power, Robert Bork stated this proposition well in his objections, based on principles of separation of powers, to the independent counsel law:

“It is particularly important in times of crisis and deep-seated unease that we adhere to the constitutional system that has sustained us for so long. It is all too easy to say that this is an emergency and we will only violate the Constitution this one time. But that kind of expediency is habit forming. Bad precedents, once established, are easily used in the future.”

A. Forfeiture in the United States Before the Civil War⁷⁶

One of the earliest sparks of the American revolution was the outrage of the colonists at the British Crown's forfeiture of John Hancock's ship, *Liberty*, for his failure to pay an unpopular customs duty.⁷⁷ Nonetheless, early Congresses resorted to forfeiture in certain limited instances.

Most of these procedures occurred in admiralty law, which historically has had a distinct existence and procedure in the judicial system. Forfeitures of ships that failed to pay customs duties were thought to be necessary to protect the primary source of revenue in the early republic.⁷⁸ Thus, *in rem* civil proceedings, with burdens of proof on owners, were instituted in a manner similar to those used by the British Crown. Early laws, at least in the courts, were narrowly applied, included proportionality requirements, and recognized that forfeiture as a punishment, despite its more liberal procedural setting.⁷⁹

Thus, in an early precedent-setting case, *United States v. La Vengeance*, the 1796 Supreme Court held that the proceeding involving the seizure of a French ship carrying illegally exported arms and cargo was one of admiralty law in which the cause was civil. Stating that the process was *in rem* and "does not, in any degree, touch the person of the offender," the Court held that the ship was not entitled to a jury trial.⁸⁰ This precedent was

Special Prosecutor: Hearings Before the Senate Comm. on the Judiciary, 93d Cong., 1st Sess. 453 (1973)(testimony of Robert H. Bork, Acting Attorney General).

A similar statement was made at the same hearing by Roger C. Cramton, Professor of Law at Cornell, when he stated:

"[There is a] historic tendency for governmental devices that have once proven handy to be called on again and again and again. . . . The existence of an emergency, the Supreme Court has held, does not create power where none exists. As Mr. Justice Holmes stated, passions of the moment should not be allowed 'to exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful and before which even well-settled principles of law will bend.'"

Id. at 358 (testimony of Roger C. Cramton, Professor of Law, Cornell Law School).

⁷⁶ For a discussion of the historical legal origins of civil forfeiture doctrine, such as English law and "deodands," and historical opposition to the doctrines, such as the English Barons' efforts to obtain protections against governmental forfeiture power in the Magna Carta, see LEVY, *supra* note 15, at 1-38.

⁷⁷ Reed, *supra* note 68, at 4.

⁷⁸ *Id.*

⁷⁹ LEVY, *supra* note 15, at 46.

⁸⁰ 3 Dallas 297 (1796).

Forfeiture laws arise most strongly during perceived crises, which cause the public to be persuaded of the necessity for drastic measures to combat an “enemy,” real or imagined.

followed in subsequent admiralty cases, despite significant criticism of such a profoundly un-American procedure. The legal fiction that a suit could be against the property for its role in an action by the owner was established and followed. Later cases affirmed that a conviction was not required⁸¹ and that innocence would be no bar to forfeiture if the relevant statute makes no exceptions for such owners.⁸²

B. The Confiscation Act of 1862 and Civil War Forfeitures

As seen in the admiralty cases, the need for governmental revenues provides a strong motive for creating broad forfeiture powers. Similarly, forfeiture laws arise most strongly during perceived crises, which cause the public to be persuaded of the necessity for drastic measures to combat an “enemy,” real or imagined.

The Confiscation Act of July 17, 1862,⁸³ passed during the Civil War, authorized *in rem* procedures against the property of Southern rebels and their sympathizers.⁸⁴ Furthermore, similar to the modern forfeiture scheme which redirects proceeds to law enforcement to wage the war on crime, the Act stated that the properties seized were to be used for supporting the Union cause in waging its war.⁸⁵

Opponents of the Act were concerned that seizure was unconstitutional without a prior judicial finding of guilt, that the concept of a forfeiture against the property and not the person was a fiction that no one could reasonably believe, and that the *in rem* nature of the proceeding unconstitutionally circumvented the rights of accused persons in regular criminal trials.⁸⁶ Thus, the arguments against civil asset forfeiture have not really changed over time.

⁸¹ U.S. v. The Palmyra, 25 U.S. 1 (1827).

⁸² U.S. v. Brig Malek Adhel, 43 U.S. 210 (1844); U.S. v. Schooner Little Charles, 1 Brock Rep. 347 (1818).

⁸³ U.S. Stat. at Large, XII, 589. The Act was titled, “An Act to Suppress Insurrection; to punish Treason and Rebellion, to seize and confiscate the Property of Rebels, and for other purposes.” It stated that, “to insure the speedy termination of the present rebellion, it shall be the duty of the President of the United States to cause the seizure of all the estate and property, money, stocks, credits, and effects of the persons hereinafter named.” Those named, however, were not limited to those convicted of treason or rebellion. Instead, due to the *in rem* character of the proceedings, forfeiture related to the property of “persons armed in rebellion, or abetting it.”

⁸⁴ George C. Pratt & William B. Petersen, *Civil Forfeiture in the Second Circuit*, 65 ST. JOHN’S L. REV. 653, 658 (1991).

⁸⁵ LEVY, *supra* note 15, at 53.

⁸⁶ LEVY, *supra* note 15, at 54.

Furthermore, the importance of Illinois Senator Orville Browning's prophetic warning about the consequences of enacting this Confiscation Act also survives the passage of time:

[A] total revolution [will be] wrought in our criminal jurisprudence, and, in despite of all the safeguards of the Constitution, proceedings *in personam* for the punishment of crime may be totally ignored, and punishment inflicted against the property alone.⁸⁷

President Lincoln initially shared this objection to the Act's deprivation of property without a criminal conviction or other protective hearing,⁸⁸ but eventually signed it into law.⁸⁹ Lincoln continued, however, to consistently express a conviction that the power should be employed only in situations of necessity.⁹⁰ Furthermore, Lincoln's later actions indicate, at least in form, that confiscations were to be only temporary and "restoration of all rights of property," absent intervening third-party interests, was to occur at the conclusion of the war.⁹¹ Lincoln recognized that confiscation should only be an emergency measure and that, upon termination of the emergency, the practice of confiscation should end and seized property should revert to those from whom it was taken. These limitations on the confiscation power were, of course, based in presidential self-restraint. Such abstinence surely should not be presumed.

The Act was really in reply to a Confederate law that confiscated the southern properties of Union supporters.⁹² But, the country was embroiled in a *civil* war: Southern rebels were not simply enemies to whom the government owed no constitutional duty; they were also citizens. Senator Jacob M. Howard of Michigan explained the status of rebels

⁸⁷ *Congressional Globe*, 37th Cong., 2d sess. 1574 (1862). See also *Miller v. U.S.*, 78 U.S. 268, at 322, 323 (1871)(Field, J., dissenting)(arguing that, in upholding the Act, constitutional safeguards "would be broken down and swept away" and that the majority's decision "works a complete revolution in our criminal jurisprudence").

⁸⁸ LEVY, *supra* note 15, at 55 (citing 5 THE COLLECTED WORKS OF ABRAHAM LINCOLN 328-331 (Roy P. Basler ed. 1953)).

⁸⁹ *Id.*

⁹⁰ See Abraham Lincoln, Letter to Orville H. Browning, Sept. 22, 1861, in LINCOLN: SPEECHES AND WRITINGS 1859-1865, at 268 (Fehrenbacher ed. 1989).

⁹¹ Abraham Lincoln, Proclamation of Amnesty and Reconstruction, Sept. 8, 1863, in LINCOLN: SPEECHES AND WRITINGS 1859-1865, at 268 (Fehrenbacher ed. 1989)(granting to rebels a "full pardon . . . with restoration of all rights of property, except as to slaves, and in property cases where rights of third parties shall have intervened, and upon the condition that every such person shall take and subscribe an oath . . ."). See also Abraham Lincoln, Letter to Ulysses S. Grant, April 6, 1865, in LINCOLN: SPEECHES AND WRITINGS 1859-1865, at 268 (Fehrenbacher ed. 1989)(explaining again that, "confiscations shall be remitted to the people of any State which will now promptly, and in good faith, withdraw its troops and other support, from resistance to the government.").

⁹² LEVY, *supra* note 15(citing MCPHERSON, POLITICAL HISTORY OF THE UNITED STATES 203-04 (where a reprint of the Confederate Act can be found)).

Lincoln recognized that confiscation should only be an emergency measure and that, upon termination of the emergency, the practice of confiscation should end and seized property should revert to those from whom it was taken.

when he declared that the United States was not waging war against “foreign enemies . . . but against persons who owe obedience to this government and are rightfully subject to it.”⁹³ Presumably, if the rebels had an obligation to the United States government, that same government had an obligation to them. But Howard further asserted that certain inflictions of punishment, calculated to repel the violence and rebellion, were lawful.⁹⁴

The Supreme Court, in upholding the Act, argued that extraordinary conditions justified such a law as part of broad military powers. In other words, the exercise of confiscation was a war power and not a criminal measure for the punishment of a crime.⁹⁵ Furthermore, the Court argued that the United States retained the powers of both a “belligerent and a sovereign, and had the rights of both” allowing the government to treat the rebels as if they were enemies.⁹⁶ It avoided determining whether such measures could be applied to full citizens (that is, citizens without the subsequent enemy status) under normal conditions. As Senator Browning warned, however, the Civil War forfeiture scheme became called on again and again as a handy governmental tool.⁹⁷

C. Civil War Precedents and Beyond: Forfeiture through 1970

Following the Civil War, the *in rem* civil forfeiture procedure continued to be employed, with consequences mirroring those seen in earlier years.⁹⁸ In an anomalous ruling, however, the Supreme Court in 1886 applied the dictates of the Fourth Amendment search and seizure provisions and the Fifth Amendment’s privilege against self-incrimination by declaring the forfeiture procedures “civil in form” but “in substance and effect” criminal.⁹⁹ This ruling, however, remained unique.

In 1896, the Court held that the Sixth Amendment does not apply in forfeiture proceedings because that amendment relates only to criminal prosecutions, of which an *in rem* forfeiture proceeding was not.¹⁰⁰ Such civil proceedings were again vigorously

⁹³ Quoted in *Id.* at 52.

⁹⁴ *Id.*

⁹⁵ *Miller v. United States*, 78 U.S. 268 (1871)(stating, “The power to declare war involves the power to prosecute it by all means and in any manner in which war may be legitimately prosecuted. It therefore includes the right to seize and confiscate all property of the enemy and dispose of it at the will of the captor.”)

⁹⁶ *Id.* at 307.

⁹⁷ See Bork & Cramton, *supra* note 76.

⁹⁸ See, e.g., *Dobbins v. United States*, 96 U.S. 395 (1878)(holding that land leased to a distiller who defrauded the U.S., where the owner lacked knowledge of the fraudulent use of his land, was still subject to forfeiture because the property was guilty).

⁹⁹ *Boyd v. United States*, 116 U.S. 616 (1886).

¹⁰⁰ *United States v. Zucker*, 161 U.S. 475 (1896).

employed during Prohibition, a period spurred by the perceived crisis of alcohol consumption. By the early 1920s, the Court had determined that the legal fiction of property personification had become entrenched in the law. In fact, it stated that irrespective of the violence the fiction does to constitutional requirements of due process, it was “too firmly fixed in the punitive and remedial jurisprudence of the country to now be displaced.”¹⁰¹

D. The Modern Forfeiture Regime: 1970-Present

Civil forfeiture doctrine has proceeded on the same rationale developed in the early periods of American history and expanded during the Civil War. It has, moreover, been extended to an unprecedented number of illegal activities—activities whose criminality is often based on the perceived need to address some pressing social concern or crisis. Arguments of an environmental crisis, public health and safety crises, and the crisis of drugs have increased the power of government to regulate or criminalize a vast number of individual activities and choices.

Specifically in relation to drug forfeitures, the scope of the laws has gradually been broadened over the past 25 years. The primary justification for the extension of forfeiture into the realm of drugs is one of deterrence. Legislators believe that imprisonment for drug traffickers is often treated as a mere “cost of business” and, therefore, is not an effective deterrent against such action. Forfeiture laws therefore attempt to remove the financial profit from drug trafficking by seizing the fruits or proceeds of drug transactions. Reaching the pocketbooks of drug traffickers is a far more effective deterrent, according to this line of reasoning.

Even accepting this as a legitimate goal, it fails to justify either the scope of the forfeiture law’s application or the limited procedural safeguards involved in forfeiture proceedings. Criminal forfeiture, allowing the seizure of drug proceeds after a finding of criminal guilt, could certainly accomplish this task of deterrence as stated. Furthermore, whether operating in the criminal or civil realm, matters of enforcement efficiency are never a valid justification for violating principles of fairness or private property rights. We live in a country founded upon values which favor the autonomy of the individual over the efficiency of the state. The growth of forfeiture statutes in the shadow of the drug war has lost sight of that individual-state relationship.

In 1970, Congress passed the Comprehensive Drug Abuse Prevention and Control Act¹⁰² containing the basic federal anti-drug civil asset forfeiture provisions. This original version allowed for forfeiture of property used in connection with controlled substances. In 1978, forfeiture of money and other things of value furnished or intended to be furnished in a drug exchange was authorized. In 1984, the law was amended to include all real property used or intended to be used in a drug exchange and all proceeds traceable to a drug exchange. Several other statutes intended to fight the drug war extended forfeiture power to money laundering, counterfeiting, and various other offenses.

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¹⁰¹ J.W. Goldsmith, Jr.-Grant Co. v. United States, 254 U.S. 505, 509, 510, 511 (1921).

¹⁰² 21 U.S.C. §881.

The current onslaught of law enforcement through civil asset forfeiture is primarily based on the belief that various crises exist which require extraordinary measures—an outright war—to quell.

During the 1980s, the fight against drugs was elevated to a “war.” Intervention and interdiction abroad influenced the nature of the domestic war. Statements about the crisis and the need for drastic measures to fight the war were used to justify the increased attack.

In 1992, an increase in the federal government’s forfeiture power occurred when a law was adopted completely eliminating any requirement that the actual property seized be “tainted” by a connection to a crime. The statute allows the government to seize any property identical to the property involved in the offense if it can be found in the same place or same account. Thus, identification and connection are no longer required under certain statutes.¹⁰³

In 1970, the government’s reach of power further increased when legislators added a criminal forfeiture layer to the federal law enforcement scheme. Congress enacted the federal criminal statute known as the Racketeer Influenced and Corrupt Organizations Act (RICO), which includes broad criminal forfeiture provisions. As previously discussed, criminal forfeiture laws are *in personam* and punitive, thus affording the protections available to criminal defendants. Property may be subject to forfeiture under these laws regardless of taint and irrespective of the property’s guilt. Legitimately acquired assets unconnected to criminal activity may be forfeited as punishment for a conviction. Since RICO, several additional statutes have been passed to provide for forfeitures of assets upon criminal convictions.

E. Forfeiture and Crisis: The Theory and Its Historical Support

“[C]hanges less than revolutionary, but nonetheless changes, will be worked in the permanent structure of government and society. . . . Alterations in the structure of a constitutional government may be wrought and made permanent that do not represent the mature and collected judgment of the representatives of the people, alterations that in their nature are far more difficult to disestablish than they were to institute. Federalism and free enterprise will serve as examples of institutions easy to break down in crisis and infinitely more difficult to restore thereafter.”¹⁰⁴

The current onslaught of law enforcement through civil asset forfeiture is primarily based on the belief that various crises exist which require extraordinary measures—an outright war—to quell. Asset forfeiture has seen expansive application in the wake of at least two other situations: the Civil War and Prohibition. With each, exceptions to normal constitutional standards have been seen as a necessity for combating the underlying threat.

In the midst of a war—be it on the South, on alcohol, or on drugs—mature and collected judgment is lacking. Alterations become permanent, such as those Civil War

¹⁰³ See HYDE, *supra* note 1, at 25 (citing 18 U.S.C. §984(b)(1)(Supp. IV 1992) and 832 F.Supp. 542 (E.D. N.Y. 1993).

¹⁰⁴ CLINTON ROSSITER, *CONSTITUTIONAL DICTATORSHIP* 5 (1948).

precedents that have been used in the gradual increase of state seizure powers. The public acquiesces to the government's search for additional power out of fear.

For a moment, assume that an actual crisis exists. Though he argues that constitutional dictatorship may be necessary in certain crises, Clinton Rossiter describes several limits to the institution of such a regime. First, such alterations of power should occur only to preserve the state or the constitutional order.¹⁰⁵ It is not evident that either the Constitution or the state's existence are dependent on our ability to fight a "drug war" with a two-tiered system of rights in which property is granted less protection.

Second, specific provision for termination of the "crisis government" should exist, for no crisis government should ever be permanent.¹⁰⁶ Implicit in this argument is that a crisis government should only be instituted if the crisis is actually redressible by such a government. Neither the current forfeiture regime nor the drug war itself has any clear stopping point. Furthermore, no right or procedure should be restricted more than absolutely necessary for the conquest of the crisis.¹⁰⁷ Given that the forfeiture scheme sweeps up the innocent and that drug use remains a serious problem despite the application of forfeiture laws, the infringements are not sufficiently narrowed to meet Rossiter's reasoned criteria.

But this drug crisis is not of the magnitude envisioned by Rossiter or others who defend the temporary alterations of constitutional government in times of war. The drug war is not a threat to the existence of the state. The enemy is the American citizen, not some foreign threat or rebellion. Thus, the war mindset is misguided in the current situation and often works to blind individual citizens to the harm caused by the powers created in this war government. Parents fear their children becoming prisoners of war to the opposition, drugs. Others see moral corruption and hope to eliminate it through a fight. In each case, passions and emotions, not reasoned judgment, rule the day.

Much of the modern regulatory state has resulted from the perception of crises. For example, restrictive pharmaceutical regulations are largely the result of the scare caused by birth defects attributable to thalidomide. Today, the Food and Drug Administration (FDA) has a drug approval system that errs on the side of excessive caution in an effort to avoid another thalidomide crisis. Its expansive powers to block life-saving drugs from entering the market are consistently justified by reference to this one event. Yet, the exercise of these powers prevents large numbers of persons with illnesses from using scores of medicines that may improve their health or save their lives, whether or not they voluntarily wish to take the risks associated with a lower level of testing than that required by the FDA. Those who die because a drug has not been approved are the hidden victims of that regime. As a means for enforcing its hefty power to make pharmaceutical decisions for ill persons, the FDA has the power to seize the property of those who dare to defy it. Thus, a doctor who prescribes, or who the state has probable cause to believe has prescribed, an unapproved drug could have his entire practice subject to forfeiture under RICO or other laws for doing so, even if his

As a means for enforcing its hefty power to make pharmaceutical decisions for ill persons, the FDA has the power to seize the property of those who dare to defy it. Those who die because a drug has not been approved are the hidden victims of that regime.

¹⁰⁵ *Id.* at 298.

¹⁰⁶ *Id.* at 300,303.

¹⁰⁷ *Id.* at 302.

“The Constitution was made to guard the people against the dangers of good intentions. There are men in all ages who mean to govern well, but they mean to govern. They promise to be good masters, but they mean to be masters.”

patient willingly accepts the risks and even if the doctor believes, in his expert opinion, that the drug or device can help cure the patient.

Consider another example. Environmental regulations are largely the result of powerful rhetoric by environmental lobbying groups proclaiming the planet’s impending doom. The environmental “crisis” has been used to justify numerous increases in state power over personal property, from restrictions on uses of private property to costly and inefficient regulation on productive economic activities. Under many of these provisions, showing probable cause to believe a citizen has violated a regulation will subject his property to forfeiture.

In each “crisis,” overheated rhetoric creates the fear and support necessary for the public to believe that extreme governmental action is necessary. And once granted, as Rossiter warned, government power becomes difficult to dissolve. For example, President Franklin Roosevelt’s New Deal programs permanently weakened economic liberties, even though the programs were proposed as temporary measures to address the Great Depression crisis. People eventually came to believe that the social welfare state and the subjugation of property created by the programs needed to continue to prevent a future crisis. Similarly, people have come to believe that the drug war exception to constitutional rights like due process and private property are necessary to prevent escalation of the crisis and to eventually end the crisis. Even the courts sometimes explicitly include language in their opinions justifying the decision or the legislative statute in question on the basis of a drug “crisis.”¹⁰⁸ Far too often, those caught up in the emotion of the “war,” fail to acknowledge the innocent casualties brought down by the unprincipled fight. But we cannot ignore the first principles inherent in the Constitution; thus, the crisis mentality must be eliminated to allow a mature and collected response to the problems of drug use.

No doubt many of the individuals supporting the fight, and its consequent means, believe that they are acting in the public interest. But, as Daniel Webster warned, “Good intention will always be pleaded for every assumption of power . . . [T]he Constitution was made to guard the people against the dangers of good intentions. There are men in all ages who mean to govern well, but they mean to govern. They promise to be good masters, but they mean to be masters.”¹⁰⁹ In the process, the regulators often forget that the true goal of liberty is to allow each person to be his own master.

¹⁰⁸ See, e.g., *U.S. v. Montoya de Hernandez*, 473 U.S. 531, 105 S.Ct. 3304, 87 L.Ed.2d 381 (1985)(Chief Justice Rehnquist stating that more than 24 hours detention, attempts to force defecation, and a rectal exam of Montoya by Customs agents, even after a thorough search failed to turn up any evidence of drug smuggling, was justified because of “the veritable national crisis in law enforcement caused by the smuggling of illegal narcotics.”)

¹⁰⁹ HYDE, *supra* note 1, at 29.

III. PROPOSALS AND PROSPECTS FOR REFORM

Several reforms can at least move the system in a more just direction. The perverse incentives in this area of law, though reduced by these reforms, can never be eliminated so long as the general populace fails to question the government's authority to limit protections of property and so long as the legal system leaves open the avenue of forfeiture legislation to some political constituency or special interest.

Given the reluctance of the courts to deviate from the longstanding precedents that have carved out an exception from normal methods of punishment for forfeiture law, statutory and constitutional reforms appear to be the most immediate route for re-injecting due process into this area of law. Courts, however, should remain cognizant of the inconsistent applications of constitutional protections and attempt to correct the system as far as their legitimate authority will allow.

Though reform at the state level should be encouraged, it will not be enough to guarantee adequate protection for Michigan's citizens. First, the incorporation doctrine has severely limited the ability of states to develop constitutional doctrine independent of the dictates of the federal Constitution and its judicial interpretation. Second, state law enforcement agents, encumbered by more protective state forfeiture laws, can request that federal officials "adopt" a case,¹¹⁰ allowing seizures under broader federal laws and forcing property owners to fight the full legal and financial resources of the national government.¹¹¹ This is relevant in the areas of concurrent jurisdiction—such as drug and racketeering laws—where the majority of forfeitures are practiced. Enacting state laws restricting the power of adoption could address these concerns to some extent.

The financial incentives for states to assist the federal government in forfeitures are also strong. The U.S. Department of Justice maintains an Asset Forfeiture Fund. Part of the proceeds from the fund is shared with state and local law enforcement agencies to assist them in fighting the drug war. In 1990, Michigan received almost \$3.7 million in cash from this fund.¹¹²

The burden of proof should be shifted to the government to prove that property is connected to illegal activity beyond a reasonable doubt.¹¹³ The underlying theme in such a reform is to formally recognize that forfeiture is considered punishment for all purposes and normal standards of due process should apply. Contingent to such a reform would be the elimination of civil *in rem* forfeiture. Property could only be forfeited upon a showing of guilt commensurate with that required in a criminal trial. The presumption should be against the state.

The burden of proof should be shifted to the government to prove that property is connected to illegal activity beyond a reasonable doubt.

¹¹⁰ LEVY, *supra* note 15, at 148-49.

¹¹¹ Jarret Wollstein, *The Government's War on Property*, THE FREEMAN, July 1993, at 250.

¹¹² *Department of Justice Announces \$14.4 Million Grant for Michigan Law Enforcement*, U.S. Newswire, March 1, 1991.

¹¹³ Henry Hyde's federal bill would change the burden to proof by "clear and convincing evidence." That standard is certainly an improvement over the current standard, especially in the federal system where probable cause can trigger a forfeiture.

Just as someone cannot be subject to capital punishment for shoplifting, he should not have his entire home forfeited for the presence of a small amount of drugs within it.

With such a reform, there should be the formal elimination of the archaic legal fiction which personifies property. Property does not have rights; people have rights. Likewise, property cannot commit a bad act; people commit bad acts. Eliminating the legal fiction and instituting all forfeiture proceedings *in personam* will afford owners the rights of persons. When combined with the recognition of punishment, the rights afforded the owners should become the same as those afforded to individuals threatened with punishment in the criminal justice system.¹¹⁴

Another necessary reform in forfeiture should involve the establishment of a proportionality and nexus requirement between the property deprivation and the crime committed. Any presumptions of nexus should be eliminated and the government should bear the burden of showing a connection between specific property and the actual crime for which guilt is found. In England, before the Magna Carta, rulers often seized all property belonging to any person convicted of a felony. As a result of pressure by English barons, King John was forced to limit these powers.¹¹⁵

Proportionality in the degree of forfeiture allowed should be a concern. Just as someone cannot be subject to capital punishment for shoplifting, he should not have his entire home forfeited for the presence of a small amount of drugs within it. Likewise, a proportionality requirement should apply to all criminal forfeitures, both as currently constituted and as they would be defined under the reform described. In the current criminal system, prison or jail sentences are intended to be commensurate with the crime proven. The loss of property, as opposed to liberty, should not be treated differently.

In civil asset forfeiture, procedural hurdles that make it difficult to challenge the government action should be eliminated. The time limits on filing a claim require significant extension. Furthermore, when a person is involuntarily brought into litigation—as a victim of a forfeiture certainly is—the burden should be on the government to prove its case and to bear the financial costs of doing so. Thus, the requirement in most forfeiture laws that a claimant post a bond with sureties should be eliminated. Additionally, the government should be required to reimburse a successful claimant for reasonable litigation costs related to his defense of his property rights in a forfeiture proceeding.

Because of the difficulty, cost, and inconvenience of a court challenge, the government should limit the number of forfeitures that are actually conducted, especially those based on seizures without process. Often the cost of a challenge outweighs the

¹¹⁴ A reform short of this should at least place forfeiture defendants in the same position as other civil litigants—such as granting a right to a jury trial.

¹¹⁵ Brief of American Library Assoc., et al, at 6, *Alexander v. U.S.*, 113 S.Ct. 2766 (1993)(No. 91-1526): “Criminal forfeiture *in personam* arose in medieval England, where, following a felony conviction, the entire estate of the felon was confiscated and any inheritance from the felon was prohibited. In the Magna Carta, forfeiture on the ground of commission of a felony was sharply curtailed, but survived to an extent in the English common law.” Conversely, in the brief of the U.S. Solicitor General in the same case, the government lauded forfeiture as an “ancient punishment” while quoting the Old Testament. Brief for the United States, at 43, *Alexander v. U.S.*, 113 S.Ct. 2766 (1993)(No. 91-1526).

potential recovery of property. Knowing that their seizures will likely go unchallenged, police have a perverse incentive to conduct more of them. Self-restraint on the part of law enforcement is the most needed reform.

One reform which could encourage such restraint and increase accountability would require a formal procedure by which police and prosecutors would be required to explain and justify why they are seeking forfeiture against an alleged wrongdoer in the absence of criminal charges. Both the police and prosecutors should be required to publish such an explanation each time an asset is seized and retained. This would increase the public awareness of forfeiture activities. Criticism of unreasonable actions would be much easier, granting the populace a tool by which they can analyze the actions of their governmental agents and subsequently hold them accountable. As a consequence, police and prosecutors would be more likely to analyze their own actions and restrain from activities that they would have difficulty explaining to the public. Finally, such a reform will raise awareness of activities even when a property owner is financially unable to challenge a forfeiture himself.

Greater protections for innocent owners should be implemented and applied in both civil and criminal forfeitures. Courts have seriously eroded most current statutory efforts to grant innocent owners a defense. Stronger language should be inserted into all forfeiture statutes that indicates that an innocent owner shall not be punished through forfeiture absent a culpability requirement approaching or reaching a standard based in actual knowledge of, and involvement in, the offense. In other words, those who have neither participated in the offense nor knowingly acquiesced in the crime should not be punished. If the system is reformed to allow only criminal forfeitures upon a showing of guilt for a crime, co-owners would only be responsible if they were also guilty of some offense, such as aiding and abetting or conspiracy. That reformed system would ensure that fewer innocent owners would have a property interest harmed.

Innocent owners are often third parties, thus making it more difficult to recover because they must inject themselves into a forfeiture proceeding or bring a claim following a forfeiture order. The system should be eased to allow these individuals to challenge a forfeiture and assert their claim to the property. Furthermore, third-party creditors or lien holders should be given a judicial remedy to recover against the government. Currently, these individuals normally must petition the agency, the attorney general, or the Justice Department asking for an equitable share. Because the decision to do so is within the discretion of the authority, and because the authority normally has a monetary incentive to keep the property, the likelihood of success in filing such a petition is low.¹¹⁶

Finally, a note of caution is required relating to a reform proposal that allows forfeiture only upon the proof of a related crime. Given both the crisis mentality and the desire to obtain resources through forfeiture, there may be a natural tendency among state officials to circumvent the protections afforded in reform measures by broadening the definitions of criminal behavior to include activities not currently considered criminal. This would, indeed, be a grave consequence of reform. But we must heed the message of California deputy attorney general Gary Schons: "Much like a drug addict becomes addicted

Knowing that their seizures will likely go unchallenged, police have a perverse incentive to conduct more of them. Self-restraint on the part of law enforcement is the most needed reform.

¹¹⁶ See HYDE, *supra* note 1, at 69.

Law enforcement agencies have consistently opposed reforms of forfeiture laws because of the enormous profits forfeitures bring to their departments.

to drugs, law enforcement agencies have become dependent on asset forfeitures. They have to have it.”¹¹⁷ Thus, altering our approach to governance and our mindset on criminality may be the only effective means of eliminating this addiction and the behavior it inspires.

Reform should also be instituted that limits the ability for law enforcement agents to seize property in the first place. For example, informants often receive money for information that will lead to a successful forfeiture. This incentive system can only increase the amount of unreliable information, allowing innocent citizens to be targeted on the basis of such tips.

In fact, the current system provides a disincentive for the acquisition of reliable information. For example, a landlord who discovers illegal activity in his building may want to report it to the police. Because the entire building may be subject to forfeiture and because the owner with knowledge will normally have no defense to the loss of his interest in the property, he has a disincentive to assist the police in the discovery of illegal behavior. Caught in a Catch-22, he may often decide not to report.¹¹⁸

One final reform which might help to eliminate the enforcers' addiction involves the elimination of the financial incentives which encourage overuse and abuse of the asset forfeiture system. Seizing agencies normally retain the cash or profits from the sale of property forfeited. Law enforcement agencies have consistently opposed reforms of forfeiture laws because of the enormous profits forfeitures bring to their departments.¹¹⁹ Their survival and growth become dependent on the revenue that then makes forfeitures a self-perpetuating process in which the need to seize is insatiable. This is the nature of all bureaucracies.¹²⁰

When enforcement agencies perceive the existence of real threats of reform, they have even attempted to adopt measures disguised as reform, as a self-preservation technique, to quell an imminent threat of more drastic reform.¹²¹ Minor reform creates a facade of change, calming the opposition and allowing the agency to begin expanding its powers once again.

Eliminating the incentive created when law enforcement is permitted to keep the spoils of its forfeitures, however, may only create additional problems. The money gained

¹¹⁷ See *Id.*, at 78.

¹¹⁸ Steven B. Duke and Albert C. Gross, *Casualties of War: Drug prohibition has shot gaping holes in the Bill of Rights*, REASON, Feb. 1994, at 27.

¹¹⁹ Reed, *supra* note 68, at 23-24.

¹²⁰ See generally, WILLIAM NISKANEN, BUREAUCRACY AND REPRESENTATIVE GOVERNMENT (1971)(arguing that bureaucrats maximize their budgets). See ALSO LUDWIG VON MISES, BUREAUCRACY (1944); GEORGE C. ROCHE, AMERICA BY THE THROAT: THE STRANGLEHOLD OF FEDERAL BUREAUCRACY (1983).

¹²¹ See Judy Osburn, *DOJ Seeks Expanded Forfeiture Powers Disguised as "Reform,"* F.E.A.R. CHRON., July 1994.

through seizures necessarily must be shifted somewhere, thus someone will always maintain an incentive to perpetuate the current system of forfeiture law which makes owner recovery difficult. Representative John Conyers has proposed shifting the money to drug abuse treatment¹²² and the Missouri legislature has shifted the proceeds to education.¹²³ Wherever the money goes, there will always be a political constituency employing the rent-seeking¹²⁴ process to encourage legislatures to maintain and expand the forfeiture system. Legislatures can, in turn, influence law enforcement by making their budgets contingent upon the number of forfeitures performed. Given the realities of the legislative and lobbying process, the incentive for law enforcement to vigorously seize property, therefore, is not likely to diminish. Institutional forces are at work that cannot be cured by merely shifting the pool from which the incentives are created.

Though no significant property seizure reform effort appears to be occurring in Michigan, many of the types of reform options discussed in this section are occurring in various federal legislative efforts to inject greater property protections into the system.¹²⁵ Though many reforms help to protect liberty, they should at least be approached with a watchful eye and should not divert our attention from the need to eliminate the roots of the perverse institutional incentives that have surfaced.

Many reforms help to protect liberty, but they should be approached with a watchful eye and not divert our attention from eliminating the roots of perverse incentives in civil asset forfeiture.

¹²² William Raspberry, *Whittling Away the Demand for Drugs*, WASH. POST, July 5, 1991, at A19.

¹²³ HYDE, *supra* note 1, at 79.

¹²⁴ “Rent seeking” occurs when individual or special interests use the political system to redistribute income toward themselves.

¹²⁵ For a general discussion of some of these proposals, see Michael Zeldin, *Forfeiture Plan Would Strike a Judicious Balance; All Sides Would Benefit From This Fair Compromise*, LEG. TIMES, May 2, 1994, at 25. When reforming the forfeiture laws, the legislature must also recognize potential means for circumventing reform. For example, even if it becomes more difficult to effectuate a forfeiture, an action might be characterized as something other than a forfeiture and, thus, not subject to procedural rules meant to limit forfeiture powers. This outcome is demonstrated in a recent Michigan Supreme Court decision in which property was padlocked for one year under a Grand Rapids nuisance ordinance. Because padlocking involves no loss of title, the court determined that it was not a forfeiture and consequently not subject to the procedural rules for effectuating a valid forfeiture. *Rental Property Owners Association of Kent County v. City of Grand Rapids*, 455 Mich. 246, 263-64, 566 N.W.2d 514 (1997). This type of outcome resembles much of the modern takings jurisprudence where a regulation which infringes on property rights is deemed not a taking and thus not subject to the just compensation requirement. See generally KOCHAN, *supra* note 33.

SUMMARY OF RECOMMENDATIONS

Michigan and federal policy makers should

- **Remove incentives for law enforcement agencies to employ asset forfeiture.** End the twin practices of allowing law enforcement agencies to profit from the sale of the assets they seize and paying informants to provide information to help build forfeiture cases.
- **End federal “adoption” of state forfeiture cases.** State law agents should be prohibited from asking federal agents to “adopt” forfeiture cases. Michigan property owners should not have to fight the full resources of the federal government, whose forfeiture laws provide less of a barrier to asset seizure.
- **Shift the burden of proof from property owners to government.** Property owners must currently establish the “innocence” of their property once it has been seized. Government should be required to show proof that disputed property is connected to illegal activity before it can be seized.
- **Establish nexus and proportionality requirements for forfeiture.** Current law should be changed to require government to show connection between *specific* property and a crime for which guilt has been found. The amount of property seized should be in proportion to the crime committed by its owner.
- **Eliminate legal hurdles to citizens’ ability to challenge forfeiture.** Lawmakers should extend the length of time citizens are given to file claims to seized property and eliminate the requirement that they post bond to do so. Successful claimants should be reimbursed by the government for expenses incurred during forfeiture proceedings.
- **Require law enforcement agents to publicly justify forfeiture proceedings.** Law enforcement agencies should be required to publish an explanation each time they seize and retain private property. The resulting public awareness will encourage self-restraint on the part of law enforcement agencies.
- **Enact protections against forfeiture for innocent owners of property.** Language in forfeiture statutes should be strengthened to ensure that property owners who have not participated in, or acquiesced to, a crime committed with their property are not punished with forfeiture.
- **Give third-party creditors the chance to recover seized property.** Innocent third parties with an interest in seized property, such as lien holders, should be given a judicial remedy to recover against the government.
- **Ensure that asset forfeiture reforms do not include an expanded definition of criminal behavior.** If asset forfeiture is allowed only upon proof of a related crime, lawmakers should resist any urge to broaden the definition of criminal behavior to include currently noncriminal activities.

CONCLUSION

“Property is surely a right of mankind as real as liberty. The moment the idea is admitted into society that property is not sacred as the laws of God, and that there is not a force of law and public justice to protect it, anarchy and tyranny commence.”¹²⁶

More than merely altering the procedural requirements of the forfeiture system, we must analyze the underlying concerns of governmental power over individuals, as well as the motives and incentives for governmental action in seeking that power. Individual liberty, property rights, and individual choice must prevail to maintain a free society. The crisis mentality must be lifted, allowing us to create a reasoned and limited system of government based on the protection of individual freedom.

The stakes are high, sometimes even matters of life and death. Shortly before 9:00 a.m. on October 2, 1992, Donald Scott, a 61-year-old millionaire, was shot dead by federal agents in his Malibu, California home. Thirty law enforcement officers from the Los Angeles Sheriff's Department, Los Angeles Police Department, the U.S. Drug Enforcement Administration, the National Park Service, and the California National Guard stormed Scott's 200-acre ranch. They burst into the home to serve a search warrant and to seize marijuana plants said to be growing there. Awakened by the noise of someone bursting into his home, Scott came downstairs to investigate, gun in hand, only to be shot and killed by a sheriff's deputy.¹²⁷

A search of the ranch found no marijuana and no contraband. The warrant was issued on the statement of a federal agent who claimed that, while flying 1,000 feet above the ranch and without binoculars, he saw marijuana growing below. Unfortunately, the real motive was much more sinister.

The raiders saw the federal forfeiture laws as a convenient means to seize a piece of property they desired. The warrant was based on misstatements and omissions and was later deemed invalid.¹²⁸ The intruders were hoping that they might find something in the house that would allow the federal government to bag the \$5 million ranch.

The real motive was to increase the size of the Santa Monica Mountains National Recreation Area, a National Park adjacent to the Scott ranch. Scott had repeatedly refused to sell his ranch to the Park Service. U.S. Park Service officers took part in the raid, though they had no jurisdiction to do so. Ventura District Attorney Michael Bradbury's

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¹²⁶ LEGAL PAPERS OF JOHN ADAMS 106-47 (L. Wroth & H. Zobel, ed. 1965).

¹²⁷ Gideon Kanner, *Never Mind, 'Only' Property Rights Were Violated*, WALL ST. J., Aug. 25, 1993, at A9; HYDE, *supra* note 1, at 14-15; Bovard, *supra* note 2, at 8. See also Phil Reeves, *Gun Law Claims a Rich Recluse*, INDEPENDENT, Oct. 18, 1992; *Thieves With Badges*, SACRAMENTO BEE, April 2, 1993; Carol Bidwell, *Motives for Raid Questioned*, HOUSTON CHRON., April 4, 1993; Daryl Kelley, *Block Challenges Critical Report on Malibu Ranch Raid*, L.A. TIMES, April 9, 1993.

¹²⁸ REPORT ON THE DEATH OF DONALD SCOTT, Office of the District Attorney, Ventura County, Calif. (1993).

The danger to life, liberty, and property is greatest when the pecuniary desire for confiscation alone motivates the government to act.

investigation discovered that the value of the ranch was discussed at pre-raid briefings, where agents reviewed property appraisal statements and a parcel map showing adjacent land sales in the area. As Bradbury noted, there was no reason “law enforcement officers who were investigating suspected narcotics violation would have any interest in the value of property sold in the same area other than if they had a motive to forfeit the property.”¹²⁹

In this case, as in many others, forfeiture law became the reason for law enforcement action and not merely an incidental consequence. Though there are great harms in either case, the danger to life, liberty and property is greatest when the pecuniary desire for confiscation alone motivates the government to act. It was not until after this incident that California realized the need to seriously commit to reforming the incentive structure which motivates many forfeitures in America today. It no longer permits agencies to use property they seize.¹³⁰ California’s system should be examined, for it has passed more significant seizure reforms than any other state.¹³¹

Lord Acton could have been thinking of asset forfeiture when he penned his famous dictum that, “Power tends to corrupt and absolute power corrupts absolutely.”¹³² When the government gains extensive powers such as those in asset seizure and forfeiture laws, combined with the creation of perverse incentives which bring benefits to the state or its officials for the exercise of that power, tragedies like the death of Donald Scott should be expected. Though we do not have evidence of a tragedy of this magnitude yet occurring in Michigan, this war makes such casualties inevitable in one degree or another.

With this report’s information, the next time one attends a government auction, he should wonder whether it is Mrs. Bennis’s car he is buying. Similarly, the next time we flip through the Sunday paper and see an advertisement for a government auction, we shouldn’t just glance and move on to the next page. Instead, we should be worried and wonder, even if we know we would never commit a crime ourselves, whether someday the things for sale will be the things we now call ours.

¹²⁹ *Id.* Documents indicating this interest in confiscation were also uncovered in an expose on the raid aired on CBS television’s *60 Minutes* on April 5, 1993.

¹³⁰ Charles Oliver, *A Forfeiture of Civil Liberties?*, INVESTORS BUSINESS DAILY, March 7, 1995, at A1.

¹³¹ See HYDE, *supra* note 1, at 76-77.

¹³² Letter from Lord Acton to Bishop Mandell Creighton (Apr. 5, 1887), quoted in GERTRUDE HIMMELFARB, LORD ACTON: A STUDY IN CONSCIENCE AND POLITICS 160-61 (1952).

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