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CIVIL FORFEITURE IN THE SECOND CIRCUIT

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I. INTRODUCTION

In 1930, eleven years before he was appointed to the Second Circuit, Jerome Frank, with characteristic brashness, wrote, "in a sense, all legal rules, principles, precepts, concepts, standards—all generalized statements of law—are fictions."1 Perhaps no area of the law embodies more legal fictions—and better illustrates their use and misuse—than does civil forfeiture. Premised on one overt fiction, and driven by another, unacknowledged fiction, civil forfeiture has at times led to results that are unfair and oppressive. Since this unfairness stems from the unscrutinized, combined use of these legal fictions, civil forfeiture warns of the dangers that accompany the indiscriminate use of unexamined legal fictions.

Civil forfeiture's overt fiction is, in Justice Harlan's words, that "inanimate objects themselves can be guilty of wrongdoing."2 Historically, a civil forfeiture was brought against an object, formerly known as a "deodand," which (so the fiction goes) had committed some wrong; it was believed that the wrong could only be expiated through the destruction of the object itself. Legal histori-

* Judge, United States Court of Appeals for the Second Circuit. The footnotes in this Essay are to citations only.
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1 J. FRANK, LAW AND THE MODERN MIND 167 (1930).
ans have traced this desire to punish the guilty object all the way back to the ancient precept in the Book of Exodus: "[i]f an ox gore a man that he [shall] die, the ox shall be stoned and his flesh shall not be eaten." Over time, forfeiture of the guilty object to the Crown, rather than its destruction, became the proper way to expiate an object’s guilt.4

While the origin of civil forfeiture may be of historical interest, and may explain the peculiar captions5 of forfeiture cases, it does not account for the continuing viability of the doctrine. According to Professor Lawrence M. Friedman:

[w]hat is kept of old law is highly selective. Society in change may be slow, but it is ruthless. Neither evolution nor revolution is sentimental. Old rules of law and old legal institutions stay alive when they have a purpose—or, at least, when they do not interfere with the demands of current life.6

Professor Friedman has asserted that “working doctrines of law, however quaint they may seem, must be acting as the servants of some economic or social interest.”7 Assuming the correctness of Professor Friedman’s thesis, which is amply supported by his persuasive book, there must be reasons why civil forfeiture, a doctrine historically based on animism, has remained a viable and active part of American law. Why then has the doctrine of civil forfeiture survived? What purpose does it serve?

The doctrine of civil forfeiture has survived because it has efficiently and quietly served an important interest—the swift punishment of unacceptable conduct. This truth cannot be squared with civil forfeiture’s unacknowledged fiction, that it punishes only property, and not its owner. Yet this unacknowledged fiction has been used to support the conclusion that civil forfeiture, not being a punishment, does not require the protections that attach to a criminal proceeding. For this reason, civil forfeiture’s nonpunishment fiction is furtive and insidious; it is, in Professor Finklestein’s words, “a deliberate subterfuge—a judicial fiction, by resort to which the sovereign, with the sanctions of the courts, can impose a

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6 See, e.g., United States v. 300 Cans of Frozen Eggs, 189 F. 351 (2d Cir. 1911).
7 Id. at 19.
Throughout most of its American history, civil forfeiture has been harnessed by its overt, guilty property fiction. This fiction limits the punitive impact of civil forfeiture because it prevents the forfeiture of property on the basis of its owner's guilt. Instead, it insists that the property itself be somehow guilty. At times, however, this overt, guilty-property fiction has been suppressed, and the scope of civil forfeiture has been expanded to function as punishment for the property owner's criminal conduct, while the doctrine continues to masquerade as a civil proceeding against property. This duplicity in the doctrine should be cause for great concern.

Significantly, the expansion of the scope of civil forfeiture, which tacitly rejects the guilty property fiction upon which the doctrine is based, has occurred during times of great social pressure when the law seemed to function clumsily and ineffectually. By expanding the reach of the doctrine, Congress has turned civil forfeiture into a weapon to be used against guilty people as well as guilty property, and it has done so in a manner that has been relatively unconstrained by constitutional limitations. On only two occasions has the government wielded this weapon openly and extensively: first during the Civil War, and second, at present, during another kind of war on our own soil, the "war on drugs."

In both of these wars, civil forfeiture's scope was expanded without any change in its procedures. However, when used in proceedings that decide punishment, these procedural requirements, developed for limited in rem proceedings, have produced substantive results that are greatly troubling. The incongruity of applying civil procedure to what is in effect a criminal proceeding threatens to reduce the law of civil forfeiture into, in Judge Frank's words, "one of the major arts of rationalization."

This Article will briefly examine the erosion of civil forfeiture's guilty property fiction, and the disconcerting ramifications of Congress's failure, in the face of this erosion, to strengthen civil forfeiture's procedural safeguards. This failure has led to a confrontation between two of the most fundamental assumptions in American law: (1) that crime does not, or at least should not, pay, and (2) that property rights are a fundamental aspect of individual

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* Finklestein, supra note 4, at 252.
* J. Frank, supra note 1, at 31.
freedom. As civil forfeiture has been used with increasing aggressiveness, the discord between these two assumptions has increased to a point at which they seem unable to coexist. Indeed, unless Congress intervenes, the first assumption may well eradicate the second. Before examining the constitutional implications of an expansive use of civil forfeiture, we must first briefly review its American history.

II. ORIGINS OF CIVIL FORFEITURE

A. Antebellum America

Respect for property is one of the touchstones of American law. Great Britain's perceived misuse of revenue statutes was one of the rallying points of the American Revolution. In the years preceding 1776, the British decided that all smuggling cases should be brought in admiralty. Under admiralty law, a conviction for smuggling, or any other attempt to avoid revenue obligations to the Crown, resulted in forfeiture of the "guilty" property. The colonies viewed this decision as an attempt to circumvent jury trials, which traditionally were not available in admiralty cases. The colonists' desire for jury trials was neither irrational nor a species of romantic illusion. In the harsh criminal procedure of the day it was only the jury that could dispense the leaven of mercy, and in civil proceedings it functioned as an immediate corrective for the lack-learned or overbearing judge . . . . To subtract this protection, to the end that collection would be assured of revenues imposed without consent, amounted in the colonial eyes to the employment of an unconstitutional means to effect an unconstitutional end.10

Independence led to a marked decentralization of governmental power, but with this loss of central power came a surprising and unsettling problem. According to Gordon Wood, by the 1780's many Americans were troubled by the belief that "[a]n excess of power in the people was leading not simply to licentiousness but to a new kind of tyranny, not by the traditional rulers, but by the people themselves—what John Adams in 1776 had called a theoretical contradiction, a democratic despotism."11 While there was general agreement that an individual's property rights did not au-

10 1 J. Goebel, Jr., History of the Supreme Court of the United States 87 (1971).
tomatically trump the will of the government, there was a growing perception that state legislatures were acting capriciously and unfairly with regard to these rights. It was this perception which led Noah Webster to write: “[s]o many legal infractions of sacred right—so many public invasions of private property—so many wanton abuses of legislative powers!”

The Constitution had outlawed bills of attainder and forfeiture of an estate for treason, “except during the Life of the Person attainted.” Despite this protection of property, civil forfeiture remained a remedy in admiralty cases.

The Judiciary Act of 1789 gave the federal courts exclusive jurisdiction over admiralty cases; “the national government was in effect empowered to bring about through its courts the uniform development of a body of admiralty law.” In upholding the constitutionality of civil forfeiture in early admiralty cases, the Supreme Court explicitly relied on the guilty property fiction that “[t]he thing is here primarily considered as the offender, or rather the offence is attached primarily to the thing.” More importantly, Justice Story, writing for the Court, stated that “[t]he strict rules of the common law as to criminal prosecutions, have never been supposed by this Court to be required in informations of seizure in the Admiralty for forfeitures, which are deemed to be civil proceedings in rem.” This crucial decision, to view forfeiture as a civil proceeding unencumbered by the constitutional protections extended to criminal actions, no doubt seemed benign in the limited context of admiralty cases. However, as events thirty-five years later demonstrated, civil in rem procedures against property could have a disconcertingly powerful and swift impact.

B. The Civil War

During the Civil War, the government extended the scope of civil forfeiture so that it could be used against the supporters of the rebellion; specifically, it could be invoked against the property of a person who merely supported the South. Thus, although the judiciary may have remained “for the most part outside the main-

12 Id. at 411 (quoting Noah Webster).
13 U.S. Const. art. I, § 9, cl. 2 and art. III, § 3, cl. 2.
16 Id. at 12-13.
stream of events," it was hardly business as usual for federal judges. In addition to the well-studied habeas corpus problem, the judiciary faced difficult questions concerning forfeiture. As early as 1861, some unionists argued that "military necessity" required the confiscation of confederate property, including slaves. However, the Constitution required "just compensation" for the taking of private property. Could confiscation be reconciled with the Constitution? According to James McPherson, proponents of this practice argued that the

rebels had forfeited their constitutional rights . . . . Their property was liable to confiscation as a punishment for treason. Moreover, while in theory the South was engaged in domestic insurrection, in practice it was waging a war. The Lincoln administration had already recognized this by proclaiming a blockade and by treating captured rebel soldiers as prisoners of war. Having thus conceded belligerent status to the Confederacy, the Union could also confiscate enemy property as a legitimate act of war.18

In 1861, Congress passed an Act "to confiscate property used for insurrectionary purposes." The Act covered only property that was used to aid the rebellion, and therefore still followed and was limited by the guilty property fiction.19 The next year, however, Congress extended confiscation to property of people who were engaged in rebellion. At this point, under the pressure of military necessity, the guilty property fiction was set aside; for the first time forfeiture was used to attack a property owner, rather than the property itself. The Act of 1862 was "[l]inked with provisions dealing with the punishment of treason, it was in considerable part punitive in concept . . . . The condemnation and sale of property to be confiscated was to be processed in the District Courts of the United States.20

These acts engendered great consternation. Opponents of confiscation argued that its use

would constitute criminal prosecutions of the rebel property owners, since confiscation could occur only upon a finding that the owner was guilty of treason. One Senator noted that the choice of the in rem proceeding was no more than "hocus pocus" designed

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17 C. Swisher, supra note 14, at 841.
19 C. Swisher, supra note 14, at 931.
20 Id. at 932.
to avoid the constitutional requirements of a criminal trial. If the
government could proceed in rem to punish treason, nothing
would stop it from proceeding similarly to punish lesser crimes.\footnote{Note, Bane of American Forfeiture Law—Banished at Last!, 62 Cornell L. Rev. 768, 786 (1977) (footnotes omitted).}

The amount of property actually confiscated under the confiscation acts “had no such dimension as the tumultuous public discus-
sion would seem to assume,”\footnote{C. Swisher, supra note 14, at 936.} and it was not until after the war that the question of the constitutionality of the Acts reached the
Supreme Court. In 1871, the Court upheld the Acts on the narrow
basis of the government’s military power. Calling confiscation a
“belligerent right,” the Court held that

the power to declare war involves the power to prosecute it by all
means and in any manner in which war may be legitimately pros-
ecuted. It therefore includes the right to seize and confiscate all
property of an enemy and to dispose of it at the will of the
captor.\footnote{Id. at 312.}

Regardless of its justification, however, in confiscation cases, the
Supreme Court for the first time approved civil forfeitures that
had indisputably been used to punish.

In his dissent, Justice Field pointed out that in previous for-
feiture cases the “thing [was] the instrument of wrong, and [was]
forfeited by reason of the unlawful use made of it, or the unlawful
condition in which it [was] placed. And generally the thing, thus
subject to seizure, itself furnishe[d] the evidence for its own con-
demnation.”\footnote{Id. at 319 (Field, J., dissenting).} He also argued that the confiscations did not stem
from the government’s military power, but rather from the “mu-
unicipal power of the government to legislate for the punishment of
offences against the United States.”\footnote{Id. at 321-22 (Field, J., dissenting).} If the confiscations were
punishments, then they should have been covered by the constitu-
tional protections afforded in all criminal actions. Nevertheless,
the majority concluded that the confiscations were acceptable be-
cause the Constitution “imposed no restriction upon the power to
prosecute war or confiscate enemy’s property.”\footnote{Id. at 312.}

With the end of the Civil War, there was no longer a justifica-
tion for an expansive use of civil forfeiture. The guilty property

\footnote{\textsuperscript{21} Miller v. United States, 78 U.S. (11 Wall.) 268, 305 (1871).}
fiction was reasserted and once again established a boundary beyond which civil forfeiture did not extend. Indeed, in *Boyd v. United States*, the Court went so far as to call civil forfeiture "quasi-criminal" and to conclude that the protections of the fourth and fifth amendments applied. Against this backdrop, the Second Circuit began to develop a substantial body of case law on civil forfeiture.

III. SECOND CIRCUIT CASE LAW

In 1891, Congress created the current federal court system, which "transformed" the lower federal courts "from tribunals specializing in admiralty, patent, and a few other areas, to important forums overseeing the exercise of regulatory powers by the federal government." Prior to 1891, the federal judiciary was divided into geographical regions, each run by one Supreme Court Justice and one district judge. Under this early system, "circuit courts had in essence become one-judge tribunals carried on by the district judges, and were largely free from Supreme Court oversight." Through the Act of 1891, Congress created a new tier of federal circuit courts to review the work of the district courts.

Sitting for the first time on June 16, 1891, the Second Circuit immediately faced cases involving forfeiture issues. Only one year before, Congress had enacted the Customs Administrative Act, which permitted forfeiture of property for failure to declare merchandise upon entry, the importation of legitimate merchandise by false or fraudulent means, and smuggling of unlawful merchandise into the United States. This Act, along with the Food & Drugs Act of 1906, the National Prohibition Act of 1919, and the Tariff Act of 1930, provided the statutory basis for most civil forfeitures during the first half of this century.

For the most part, forfeitures under these statutes involved strict liability civil proceedings closely harnessed by the guilty property fiction. Because they were brought against the property itself, these actions required no showing of criminal intent. Rather,

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27 116 U.S. 616 (1886).
28 Id. at 634-35.
30 Id. at 35.
31 Id. at 93.
"the use to which the property was put would determine the forfeiture question, regardless of the owner's guilt or innocence."\textsuperscript{33} It is, therefore, not surprising that the owner's claim of ignorance did not have much influence on the Second Circuit. In interpreting the Tariff Act of 1930, for example, the court bluntly stated: "The purpose of Congress is perfectly clear and must be carried out, even if . . . innocent persons suffer great hardships."\textsuperscript{34} In \textit{United States v. One Pearl Necklace},\textsuperscript{35} the Second Circuit upheld the forfeiture of property that an individual returning from Europe had failed to declare, and, in so doing, it considered the intent of the owner irrelevant.\textsuperscript{36}

One statutory exception to this general strict liability standard could be found in the Prohibition Act of 1919. The Act was passed to enforce the eighteenth amendment, which prohibited "the manufacture, sale, or transportation of intoxicating liquors within, into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes."\textsuperscript{37} In addition to the forfeiture of alcohol, the Prohibition Act provided for the forfeiture of vehicles used in the transportation of liquor. The Act, however, created a defense for owners who could prove that they had no notice that the vehicle was being used in violation of the Act. The Second Circuit interpreted the defense to mean that the Act required a criminal conviction before the government could successfully forfeit a vehicle.\textsuperscript{38} This case suggested that when the court was called upon to evaluate behavior, it was more protective of the property owner's rights than the government's right to forfeiture.

\textit{United States v. Seventy-Five Bales of Tobacco},\textsuperscript{39} a case involving the Customs Administration Act, shows a similar tendency. The pertinent section of the Act provided for the forfeiture of undervalued, imported merchandise, stating that undervaluation was "presumptive evidence of fraud." Since the section targeted, however perfunctorily, the behavior of the owner, the guilty-property fiction was set aside. For this reason, the court was unwilling to

\begin{itemize}
\item \textsuperscript{33} Note, \textit{supra} note 21, at 791.
\item \textsuperscript{34} \textit{In Re Four Packages of Cut Diamonds}, 255 F. 314, 317 (2d Cir. 1918), \textit{modified}, 256 F. 305 (2d Cir. 1919).
\item \textsuperscript{35} 111 F. 164 (2d Cir. 1901) (per curiam).
\item \textsuperscript{36} \textit{Id.} at 171-72.
\item \textsuperscript{37} U.S. \textit{Const.} amend. XVIII (repealed 1933).
\item \textsuperscript{38} \textit{United States v. One Reo Truck Auto.}, 9 F.2d 529, 530 (2d Cir. 1925).
\item \textsuperscript{39} 147 F. 127, 130 (2d Cir. 1906).
\end{itemize}
give the government the same broad forfeiture powers that it will-
ingly granted when construing other sections of the Act. Accord-
ingly, the court concluded that this section of the Act was "penal
in character" and, therefore, had to be "strictly construed." The
court further held that a "mere mistake in the description of im-
ported merchandise unaccompanied by acts from which an intent
to defraud may be presumed is . . . insufficient to justify a
forfeiture."41

In the absence of such a statutory nudge, however, the court
remained unreceptive to challenges to civil forfeitures, nor were
such challenges made with any frequency. During the period from
1890 to 1945, apparently only one case raised a constitutional chal-

lenge.42 There, the court rejected a due process argument, reason-
ing that, because the forfeiture provision in question had "been
applied innumerable times without question of its validity," there
was "no ground to doubt its constitutionality."43 This weak, circu-
lar reasoning epitomizes the Second Circuit's passive and tolerant
attitude towards civil forfeiture in the first half of the twentieth
century. Civil forfeiture was used only in revenue and customs
cases brought in admiralty, or in cases that involved "tainted"
property. All of these cases fell comfortably within the guilty prop-
erty fiction. Any indirect punitive effects of these forfeitures ap-
parently did not concern the court. In upholding a forfeiture under
a revenue statute, the court offered a justification that it could
have easily offered for all forfeitures of the period, stating that,
unlike penal laws which were strictly construed, "statutes to pre-
vent fraud upon the revenue are considered as enacted for the
public good, and . . . although they impose penalties or forfeiture
. . . they are to be fairly and reasonably construed."44

In 1949 the Second Circuit decided United States v. Physio,45
a case which on its face seemed inconsequential, yet addressed a
fact pattern that would later dominate civil forfeiture. The case
involved what was then the relatively minor, almost novel problem
of illegal drugs. The case's significance, however, extends beyond

40 Id.
41 Id.
42 See The Mistinguette, 27 F.2d 738 (2d Cir.), cert. denied, 278 U.S. 627 (1928).
43 Id. at 741.
44 United States v. Various Items of Personal Property, 40 F.2d 422, 424 (2d Cir. 1930)
(quoting United States v. Stowell, 133 U.S. 1, 12 (1890)), aff'd, 282 U.S. 577 (1931).
45 175 F.2d 338 (2d Cir. 1949).
its role as a harbinger; in addition it offered a sharply different approach to civil forfeiture, an approach that, if followed, would have radically changed the course of civil forfeiture.

In Physic, the police stopped and searched an automobile. On the strength of their discovery of heroin inside the car, they initiated criminal charges against the vehicle’s owner and civil forfeiture proceedings against the car. Because, at that time, no forfeiture statute existed for illegal narcotics, the government was forced to rely on a revenue statute. As part of his defense to the criminal charge of unlawfully transporting heroin, the automobile owner argued that the heroin evidence should be suppressed, since it was the result of an illegal search and seizure. This motion was denied, although the defendant/owner was ultimately acquitted by the jury. He then filed a claim for the automobile in the subsequent forfeiture action. The trial court did all the expected things: it denied the owner’s motion to suppress the heroin; it concluded that the owner’s acquittal in the criminal case had no impact on the forfeiture proceeding because the innocence of the owner was not a defense under the applicable statute; and it ordered that the automobile be forfeited.

A panel consisting of Judges L. Hand, Clark, and Frank heard the owner’s appeal and reversed. Judge Frank, writing for the court, viewed the attempted forfeiture as a punishment of an owner who was entitled to constitutional protections. Holding that the motion to suppress should have been granted because the government failed to offer any evidence of probable cause, the court concluded that “the judgment cannot stand since, except for the fruit of the search, the record is lacking in any evidence to support the forfeiture.”

When Judge Frank was appointed to the Second Circuit, some detractors likened the event to “the choice of a heretic for a Catholic Bishopric.” Overlooking the hyperbole of this statement, it does suggest Judge Frank’s frequent refusal to follow the expected, anticipated approach to a legal problem. In Physic, Judge Frank suggested a sharply different approach to civil forfeiture, which the Second Circuit as a whole ignored. Had the Circuit adopted this approach “civil forfeiture” would have become an oxymoron, since it would be viewed as a punishment that required the constitu-

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46 Id. at 339.
47 J. Morris, supra note 29, at 145.
tional protections due a criminal defendant. Instead, the strength of the guilty property fiction firmly kept forfeitures in the "civil" category. In later years, not only would Judge Frank's approach be disregarded, but changes in both society and law would lead the Second Circuit to endorse an aggressive and zealous use of civil forfeiture strongly reminiscent of the approach adopted during the Civil War.

IV. CURRENT ISSUES IN CIVIL FORFEITURE

Beginning in 1970, Congress enacted a series of laws intended to undercut what it believed to be "two of the most serious crime problems facing the country: racketeering and drug trafficking." In response to the "growing menace of drug abuse in the United States," the first criminal forfeiture statutes in United States history were passed. In 1978, Congress expanded civil forfeiture provisions to allow the seizure of cash proceeds from illegal drug activity; in 1984, Congress further amended the civil forfeiture provisions to allow the forfeiture of real property. Intended to enable law enforcement agencies to attack the "economic" aspects of drug trafficking, these changes permitted the government to mount a vigorous assault on individuals involved in illegal drug activity. The Justice Department's Drug Agent's Guide to Forfeiture of Assets emphasizes this by stressing that the recent changes in forfeiture law have given drug agents "a very real, a very powerful, new weapon to strike at the profits of crime."

The government has justified its extensive use of civil forfeiture with the same rationale that it offered during the Civil War: since the enemy threatens the very fabric of the nation, the strongest measures are required. There are those in the federal government who believe that the "war on drugs" is not metaphorical, but rather "the greatest non-military assault on the minds, bodies, and well-being of our citizens in our Nation's history."

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52 See id. § 881.
55 Id.
56 U.S. Dep't of Justice, Office of the Attorney General, Drug Trafficking: A Re-
Although it extensively expanded the scope of civil forfeiture to attack illegal drug activity, Congress left untouched the procedural aspects for instituting forfeitures. The same *in rem* proceeding, based on admiralty rules, continues to govern civil forfeiture cases. While this procedure functioned satisfactorily when used in conjunction with the guilty property fiction, it has an undeniably punitive effect when severed from that fiction. To continue to use the unaltered procedure in the much changed context seems, at the very least, peculiar.\(^7\)

### A. Civil Forfeiture Procedure

A glance at the current civil forfeiture procedure demonstrates that it weighs heavily in favor of the government.

1. **Burden shifting.** The burden-shifting statute, section 1615 of the United States Code, title 19, provides that once the government has demonstrated probable cause for the suit, the claimant bears the burden of proving his claim to the property, either by showing that there was no ground for the forfeiture, or by qualifying for the innocent owner defense.

2. **Probable cause.** Probable cause in this context has been defined as "reasonable grounds, rising above the level of mere suspicion, to believe that certain property is subject to forfeiture."\(^8\) It need not "amount to what has been termed 'prima facie proof'"\(^9\) In other words, the government can succeed without satisfying the preponderance of the evidence standard applicable in most civil suits.\(^6\)

3. **Hearsay.** Even the minimum standard of probable cause does not require the kind of proof normally necessary in a civil case, but "traditionally may be established by hearsay."\(^10\)

4. **Defenses.** The defenses to forfeiture are narrow and difficult to establish. Once the government demonstrates probable cause, often with no more than an affidavit, "the claimant bears
the ultimate burden of proving that the factual predicates for forfeiture have not been met.\textsuperscript{65} To meet this burden, the claimant must prove either that the property was not used in connection with illegal activity, or that "the illegal use was without the claimant's knowledge or consent."\textsuperscript{66} Neither defense is easy to prove.

The owner may be hampered in establishing the first defense—that the property was not used in illegal activity—because the government "need not link the property to a particular transaction,"\textsuperscript{64} nor does forfeiture require the "criminal" activity to satisfy all the elements of a crime. For example, in United States v. One Mercedes Benz,\textsuperscript{65} the court affirmed the forfeiture of an automobile in which less than twenty-five grams of marijuana was found, an amount too small to be a crime in the state where the discovery took place. The One Mercedes Benz court rested its decision on dicta from a prior case suggesting that "the transportation of any quantity of drugs however minute is . . . sufficient to merit the forfeiture of the vehicle."\textsuperscript{66}

Cases involving forfeiture of currency often present facts evincing only a nebulous connection between the currency and the alleged illegal activity. Indeed, the required link between the two is so tenuous that the Second Circuit has recently observed "[i]t may well be that through the Byzantine world of forfeiture law, [C]ongress and the courts have implicitly created a rebuttable presumption that the possession of large amounts of cash is per se evidence of illegal activity."\textsuperscript{67}

Furthermore, to establish the legitimacy of the forfeited property, it is often necessary for the owner to testify, which may require a waiver of his fifth amendment privilege against self-incrimination—a serious matter, given the criminal context of most forfeiture cases.

The second defense, known as the "innocent owner" defense and provided in section 881(a)(7) of the United States Code, title 21, has an historical antecedent in the Prohibition Act of 1919. Created in 1984, this defense pertains to real property and

\textsuperscript{65} Banco Cafetero, 797 F.2d at 1160.

\textsuperscript{66} United States v. Property at 4492 S. Livonia Rd., 889 F.2d 1258, 1267 (2d Cir. 1989).

\textsuperscript{64} United States v. Banco Cafetero Panama, 797 F.2d 1154, 1160 (2d Cir. 1986).

\textsuperscript{65} 846 F.2d 2 (2d Cir. 1988) (per curiam).

\textsuperscript{66} Id. at 5 (quoting United States v. One 1974 Cadillac Eldorado, 548 F.2d 421, 425 (2d Cir. 1977)).

\textsuperscript{67} United States v. $37,780 in United States Currency, 920 F.2d 159, 162 (2d Cir. 1990).
provides that

no property shall be forfeited under this paragraph, to the extent
of an interest of an owner, by reason of any act or omission estab-
lished by that owner to have been committed or omitted without
the knowledge or consent of that owner.8

This defense also presents difficulties for the claimant. Since the
claimant bears the burden of proof in establishing the defense, the
government can succeed without having to prove that the claimant
had actual knowledge of the illegal activity.6 If the claimant is un-
able to prove that he did not know of the activity, he must estab-
lish that he did not consent to it. In the Second Circuit, he will be
deemed to have withheld consent only if "he did all that reasona-
bly could be expected to prevent the illegal activity once he
learned of it ...."70 Ironically, suspicions destroy innocence. If the
claimant is suspicious of the use to which his land is being
put—even if his suspicion would be too meager to establish proba-
bable cause and allow police action—but does nothing, he will forfeit
his defense. Thus, a claimant can be completely uninvolved in the
illegal activity but still not be considered "innocent" under section
881(a)(7).

5. Summary judgment. The combination of civil forfeiture
and summary judgment proves particularly potent, and "creates an
unusual, and perhaps even harsh, result."71 Yet given the charac-
terization of these forfeitures as "civil," the result seems logical
and, indeed, inevitable. If the claimant's defense does not raise "a
genuine issue for trial" as required by Federal Rule of Civil Proce-
dure 56(e), a motion for summary judgment will result in the for-
feiture of the property based on evidence establishing nothing
more than probable cause. While the Second Circuit has suggested
that "under some circumstances a claimant's flat denial of knowl-
edge, without more, could suffice to create a genuine issue of fact
precluding summary judgment under Rule 56(e),"72 no such set of
circumstances comes easily to mind.

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6 See United States v. $359,500 in United States Currency, 828 F.2d 930, 933-34 (2d
Cir. 1987).
70 United States v. 141st St. Corp., 911 F.2d 870, 879 (2d Cir. 1990), cert. denied, 111 S.
71 United States v. Property at 4492 S. Livonia Rd., 889 F.2d 1258, 1271 (2d Cir. 1989).
72 United States v. Property Located at 15 Black Ledge Dr., 897 F.2d 97, 102 (2d Cir.
1990).
Under a civil forfeiture procedure that does not include constitutional protections, owners can be stripped of their property in a precipitous, summary fashion. In amending the Controlled Substance Act to allow for an expanded use of forfeiture, Congress explicitly stated that "it is the intent of these provisions that property would be forfeited only if there is a substantial connection between the property and the underlying criminal activity." But civil forfeitures under section 881 can occur on the strength of nothing more than an affidavit that establishes probable cause.

While "[p]robable cause determinations in the criminal context are followed by a full panoply of procedural rights at the trial of the ultimate issue of guilt or innocence, including proof of guilt beyond a reasonable doubt," this panoply does not protect property owners in civil forfeiture proceedings. Of course, prior to 1970, this full panoply was unnecessary, since forfeiture's guilty property fiction greatly restricted its operation. But by discarding this fiction, and expanding civil forfeiture to include "innocent" property that is subject to forfeiture only because of its owner's activity, Congress has created a draconian punishment that is virtually bereft of constitutional protections.

B. Constitutional Concerns

Despite its expanded scope, civil forfeiture is still not considered a punishment, and, thus, courts decline to recognize the constitutional protections that attach to criminal proceedings. This has disturbing implications, as even a greatly abbreviated review demonstrates.

The fourth amendment protection against illegal searches and seizures has a limited impact on civil forfeitures. While the Supreme Court has held that the exclusionary rule may apply to civil forfeitures, the Second Circuit has concluded that "an illegal seizure of property does not immunize that property from forfeiture, ... the property itself cannot be excluded from the forfeiture action, and ... evidence obtained independent of the illegal seizure may be used in the forfeiture action." Thus, there is little to discourage federal agents from seizing property illegally and then

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73 1978 U.S. CODE CONG. & ADMIN. NEWS 9522 (emphasis added).
74 Livonia Rd., 889 F.2d at 1267.
76 United States v. $37,780 in United States Currency, 920 F.2d 159, 163 (2d Cir. 1990).
seeking evidence of probable cause that can be presented at the
forfeiture hearing. The procedures allow, and even encourage, the
government to seize property first, and build its case later. While
such precipitous actions may be understandable in the case of
property such as currency, which can quickly vanish, such justifica-
tion is lacking when the government seeks to forfeit a house or an
apartment building.

The fifth amendment states in part that no person "shall be
compelled in any criminal case to be a witness against himself." General;
however, "the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them." Accordingly, in a civil forfeiture proceeding, a negative in-
ference may be drawn if a claimant invokes his fifth amendment
privilege. Recently, the Second Circuit acknowledged this to be "troubling . . . given the severity of the deprivation at risk," but left the question unanswered. Given the claimant's burden of proof, the government's extensive use of summary judgment, and the classification of these forfeitures as civil, a claimant may well suffer forfeiture of his money, home, car, or other property simply because he invokes his fifth amendment rights.

The eighth amendment states that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." When an expensive automobile is forfeited on the strength of less than twenty-five grams of marijuana, one must swallow hard to maintain that the "punishment" is propor-
tionate to the "crime." In United States v. Property at 4492 S. Livonia Road, the court has expressed its concern on this issue in the context of real property:

We are troubled by the failure of [the civil forfeiture statutes] to place an express territorial limit on the extent of the real property that is forfeitable. For example, if drugs were sold in a shed on [an 800,000 acre ranch], would [all those] acres be lost? The theory of civil forfeiture is that property devoted to an unlawful purpose is tainted as an instrumentality of crime and therefore must be condemned. While that concept makes sense for a car or

78 United States v. Property Located at 15 Black Ledge Dr., 897 F.2d 97, 103 (2d Cir. 1990).
79 See, e.g., United States v. One Mercedes Benz, 846 F.2d 2, 4 (2d Cir. 1988).
80 889 F.2d 1258 (2d Cir. 1989).
a boat, and perhaps for a home and its curtilage, it raises troubling constitutional questions when applied to all of an individual's contiguous property. At some point, it seems that a forfeiture would cross the line of condemning an instrumentality of crime and move into the area of punishing a defendant by depriving him of his estate. If punishment is involved, the Constitution requires many more procedural protections than are available under civil forfeiture.81

The Supreme Court has stated that “[t]he constitutional principle of proportionality has been recognized explicitly in this Court for almost a century,”82 yet, the principle pertains to criminal cases only, and has failed to gain acceptance in civil forfeiture cases.

V. CONCLUSION

Throughout most of its history, civil forfeiture has been viewed as a proceeding against “guilty” property. This fiction served to restrain the government, and to prevent forfeiture from becoming a generalized punishment. During the Civil War, the guilty property fiction was temporarily abandoned, and property could be forfeited solely because of its owner's actions. Courts were able to justify this abandonment on the basis of the federal government's military needs against American citizens in rebellion. With the end of the Civil War, civil forfeiture's historical boundaries were reestablished, and forfeitures were once again undertaken only against property that was itself “guilty.”

Beginning in 1970, however, Congress began to expand the scope of civil forfeiture in its war on drugs. For the first time since the Civil War, forfeiture has been used vindictively, as punishment against those involved in illegal activity. There is no denying that illegal drugs are a “scourge . . . that is ravaging this country,”83 and it may well be that an extensive use of forfeiture is justifiable, and even appropriate, given the seriousness of the problem. However, if forfeitures are to be used aggressively, beyond their limited, historical scope, then the procedures that govern their use should be reexamined. Current civil forfeiture procedure was not designed to address cases involving punishment. In his dissent to Miller v. United States, Justice Field declared “that the reasoning, which

81 Id. at 1270.
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upholds the [confiscation] proceedings in this case, works a complete revolution in our criminal jurisprudence. This warning fully applies to the present situation.

During the Civil War, the expanded use of civil forfeiture was accepted as a necessary, temporary response to an extreme, though temporary situation. But the government's current expansive use of civil forfeiture shows no sign of abating; on the contrary, there are strong indications that this weapon will become a permanent and enlarged part of the government's arsenal. First, civil forfeitures generate tremendous revenue. In an eight month period during 1989, for example, the United States Attorney's office in the Eastern District of New York collected $37,000,000 from civil forfeitures. This amount is four times what it cost to run that office during that period. In a era of dwindling revenues, such large amounts of money would be difficult to relinquish. Second, some members of Congress, impressed with the speed and power of civil forfeiture, would like to expand its use into other criminal areas. For example, Congressman Bill McCollum of Florida has introduced a bill to allow civil forfeiture in cases involving mail and wire fraud. Together, these two factors strongly suggest that an aggressive use of civil forfeiture may not disappear even if the war on drugs should abate.

In a recent speech, Justice Kennedy stated that "any system that wishes to protect freedom has to protect property." Still, property rights, along with constitutional protections for criminal proceedings, are being sacrificed in a militant use of civil forfeiture.

And the government's power over private property will not diminish; it will increase concomitantly with the expanding scope and reach of forfeiture. Yet, until civil forfeiture is changed by Congress or declared unconstitutional by the Supreme Court, precedent confines courts to apply punitively a procedure never intended to inflict punishment. The Second Circuit, at least for now, remains unable to avoid the inevitably unjust results. Judge Frank once warned that if a legal system is to function properly and fairly, "[l]egal principles ... must learn to live together, socially, in

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84 Miller v. United States, 78 U.S. (11 Wall.) 268 (1871) (Field, J., dissenting).
86 Id. at 1, col. 5.
a sort of democracy of principles in which none is dictator. Left unchecked by either its historical limits or by constitutional protections, civil forfeiture threatens to become the dictator against which Judge Frank warned.

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89 J. Frank, Courts on Trial 285 (1949).