

Summer 1992

## Criminal Activity Forfeiture Act: Replete with Constitutional Violations, The

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### Recommended Citation

Steffanie Stracke, *Criminal Activity Forfeiture Act: Replete with Constitutional Violations, The*, 57 Mo. L. REV. (1992)

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# The Criminal Activity Forfeiture Act: Replete with Constitutional Violations

## I. INTRODUCTION

Congress has provided for the forfeiture of practically any type of property related to an illegal activity in order to take the profit out of crime.<sup>1</sup> The federal forfeiture statute dealing specifically with criminal drug activity is commonly known as the Controlled Substances Act.<sup>2</sup> In addition to the federal forfeiture laws, every state and the District of Columbia has enacted a statute providing for the forfeiture of "guilty" property.<sup>3</sup> This Comment

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1. See Controlled Substances Act, 21 U.S.C. §§ 853, 881 (1988 & Supp. 1990); Racketeer Influenced and Corrupt Organization Act, 18 U.S.C. §§ 1963-1964 (1988). For an extensive list of forfeiture laws covering specific violations such as money laundering or transportation of gambling devices, see LEGAL FORFEITURE UNIT, U.S. DEP'T OF JUSTICE, OUTLINE OF FORFEITURE LAW AND PROCEDURES (1989).

2. 21 U.S.C. §§ 853, 881. Section 853 is the criminal forfeiture provision of the Act while § 881 provides for civil forfeiture.

3. See ALA. CODE § 20-2-93 (1990); ALASKA STAT. §§ 17.30.100-126 (Supp. 1991); ARIZ. REV. STAT. ANN. §§ 13-3413-3415 (1989); ARK. CODE ANN. § 5-64-501 (Michie 1987); CAL. HEALTH & SAFETY CODE § 11470 (West 1991); COLO. REV. STAT. § 16-13-501.5 to 511 (Supp. 1991); CONN. GEN. STAT. ANN. § 21a-246(d) (West Supp. 1985); DEL. CODE ANN. tit. 16, § 4784 (Supp. 1990); D.C. CODE ANN. § 33-552 (Supp. 1991); FLA. STAT. ANN. § 893.12 (West Supp. 1992); GA. CODE ANN. § 79A-828 (Harrison Supp. 1989); HAW. REV. STAT. § 329-55 (Supp. 1991); IDAHO CODE § 37-2744 (Supp. 1991); ILL. ANN. STAT. ch. 56 1/2, para. 1505 (Smith-Hurd Supp. 1986); IND. CODE ANN. § 16-6-8.5-5.1 (Burns 1990); IOWA CODE ANN. §§ 809.1-.21 (West 1991); KAN. STAT. ANN. § 65-4135 (Supp. 1991); KY. REV. STAT. ANN. §§ 218A.405-.460 (Michie/Bobbs-Merrill 1991); LA. REV. STAT. ANN. § 32.1550 (West Supp. 1992); ME. REV. STAT. ANN. tit. 15, § 5821 (West Supp. 1991); MD. ANN. CODE OF 1957 art. 27, § 297 (1992); MASS. GEN. LAWS ANN. ch. 94C, § 47 (West Supp. 1992); MICH. COMP. LAWS ANN. § 333.7521 (West Supp. 1991); MINN. STAT. ANN. § 609.5311 (West Supp. 1992); MISS CODE ANN. § 41-29-153 (Supp. 1991); MO. REV. STAT. §§ 513.600-.645 (1986); MONT. CODE ANN. §§ 44-12-101 to -104 (1991); NEB. REV. STAT. § 28.431 (1989); NEV. REV. STAT. § 453.301 (1991); N.H. REV. STAT. ANN. § 318-B:-17-b (Supp. 1991); N.J. STAT. ANN. §§ 2C:64-1 to -8 (West 1982 & Supp. 1991); N.M. STAT. ANN. §§ 30-31-34 to -36 (Michie 1989); N.Y. PUB. HEALTH LAW §§ 3387-3388 (McKinney 1985 & Supp. 1992); N.C. GEN. STAT. § 90-112 (1990); N.D. CENT. CODE § 19-03.1-36 (1991); OHIO REV. CODE ANN. §§ 2933.42-.43 (Anderson Supp. 1991); OKLA. STAT. tit. 63, § 2-503 (Supp. 1992); OR. REV. STAT. § 167.247 (1991); 35 PA. CONS. STAT. ANN. § 831.1 (Supp. 1991); R.I. GEN. LAWS § 21-28-5.04 (1989); S.C. CODE ANN. § 44-53-520 (Law. Co-op. Supp. 1991); S.D. CODIFIED LAWS ANN. § 34-20B-70 (1986); TENN. CODE ANN.

focuses on the civil forfeiture proceedings<sup>4</sup> of the Controlled Substances Act and the drug activity portion of Missouri's Criminal Activity Forfeiture Act<sup>5</sup> (CAFA).

This Comment traces how the "War on Drugs" has turned a legitimate criminal penalty into a strong-arm tactic that has been abused by law enforcement agencies across the country. By allowing law enforcement agencies to keep the proceeds of forfeited finds, Congress has created an inherent conflict of interest and an incentive for abuse. Additionally, state legislatures have defined the forfeitures as civil or quasi-criminal instead of criminal, which has not only created confusion but has stripped defendants of the constitutional protections they are entitled to in a criminal proceeding.

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§ 39-11-116 (1991); TEX. HEALTH & SAFETY CODE ANN. § 482.153 (West 1992); UTAH CODE ANN. § 58-37a-6 (1990); VT. STAT. ANN. tit. 18, § 4241 (Supp. 1991); VA. CODE ANN. § 18.2-249 (Michie Supp. 1992); WASH. REV. CODE ANN. § 69.50.505 (West 1992); W. VA. CODE § 60A-7-703 (1988); WIS. STAT. ANN. § 161.55 (West Supp. 1991); WYO. STAT. § 35-7-1049 (1988).

4. Forfeitures are either criminal or civil in nature. Criminal forfeiture is an *in personam* action which requires the conviction of the accused before there can be any forfeiture. In a civil forfeiture proceeding, however, the action is *in rem*; therefore, the court's jurisdiction is only over the property and no person is involved in the action. It is the guilt of the property that determines the outcome of the case. The guilt or innocence of the property's owner is irrelevant. See John Brew, Comment, *State and Federal Forfeiture of Property Involved in Drug Transactions*, 92 DICK. L. REV. 461, 461 n.3 (1988).

5. MO. REV. STAT. §§ 513.600.-645 (1986). Missouri also has an exclusive drug forfeiture statute found in MO. REV. STAT. §§ 195.140-145 (1986).

## II. BACKGROUND

### A. History of Forfeiture Laws<sup>6</sup>

The concept of forfeiture<sup>7</sup> can be traced to Biblical times.<sup>8</sup> More recently, forfeiture is found in the English common law concept of the "deodand."<sup>9</sup> A deodand was any object that caused the death of any living thing.<sup>10</sup> An *in rem* proceeding was brought against the "guilty" object which resulted in its forfeiture to the King.<sup>11</sup> After the abolition of the deodands, *in rem* civil proceedings still existed under the Navigational Acts,<sup>12</sup> which provided for forfeiture upon violation of customs and revenue laws.<sup>13</sup> In those proceedings, like the civil *in rem* actions of today, guilt of the property's owner was not considered by the court.<sup>14</sup> Forfeiture in such admiralty proceedings was brought to the United States along with much of England's common law. In fact, the fifth statute passed by the first session of the United States Congress permitted the forfeiture of ships when their owners did not pay the customs duties owed on them.<sup>15</sup>

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6. For a discussion of the history of forfeiture laws, see Brew, *supra* note 4, at 463-64.

7. Forfeiture is defined as "[l]oss of some right or property as a penalty for some illegal act." BLACK'S LAW DICTIONARY 650 (6th ed. 1990).

8. "If an ox gore a man or woman and they die, then the ox shall be stoned and his flesh not eaten; but the owner of the ox shall be quit" [without guilt or further obligation]. *Exodus* 21:28-30.

9. Brew, *supra* note 4, at 463 (citing Jacob J. Finklestein, *The Goring Ox: Historical Perspectives on Deodands, Forfeitures, Wrongful Death, and the Western Notion of Sovereignty*, 46 TEMP. L.Q. 169, 180-82 (1973)).

10. *Id.*

11. *Id.*

12. *Id.* (citing LAURENCE A. HARPER, *THE ENGLISH NAVIGATION LAWS: A SEVENTEENTH-CENTURY EXPERIMENT IN SOCIAL ENGINEERING* 387-414 (1964)).

13. *Id.* (citing I.M. BACON, *A NEW ABRIDGEMENT OF THE LAW, ACTIONS QUITAM* 60-62 (6th ed. London 1807)).

14. *Id.* at 463-64 (citing WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 261-62 (1st ed. 1765-1769)).

15. See *United States v. One 1976 Mercedes Benz* 280S, 618 F.2d 453, 461 (7th Cir. 1980) (citing *An Act to Regulate the Collection of Duties*, ch. V, § 36, 1 Stat. 29, 47 (1789)).

## B. Modern Drug Forfeiture Laws

### 1. Property Subject to Forfeiture

Courts often distinguish between contraband per se and derivative contraband.<sup>16</sup> Mere possession of contraband per se is illegal.<sup>17</sup> For example, any type of controlled substance is contraband per se.<sup>18</sup> Derivative contraband, on the other hand, has a much wider scope. This type of contraband includes any type of property which is used in, intended to be used in, or facilitates the commission of the illegal activity.<sup>19</sup> Derivative contraband may include boats, cars, planes, or homes. Missouri law defines property subject to forfeiture in the same manner as the federal law.<sup>20</sup>

### 2. Procedure to Begin Forfeiture

#### a. Missouri's Procedure

Under Missouri's CAFA forfeiture proceeding, the action may commence before or after the seizure of the property.<sup>21</sup> The action is filed by either the local prosecuting attorney or the attorney general.<sup>22</sup> If the petition is filed before the seizure, it must state what property is to be forfeited, that the property is within the court's jurisdiction, the grounds for forfeiture, and the names of all persons known to have or claim an interest in the property.<sup>23</sup> A court then determines ex parte whether there is reasonable cause to believe the property is forfeitable and whether notice to interested parties prior to seizure would cause the loss or destruction of the property.<sup>24</sup> If the court determines that reasonable cause exists to forfeit the property and that notice could result in the loss or destruction of the property, then the court "shall," without any further hearing or notice, issue a writ of seizure.<sup>25</sup> However, if

16. Brew, *supra*, note 4, at 465.

17. *Id.*

18. 21 U.S.C. § 881(a)(1) (1988).

19. 21 U.S.C. § 881(a)(2)-(11) (1988 & Supp. 1990).

20. MO. REV. STAT. § 513.607.1 (1986) provides: "All property of every kind used or intended for use in the course of, derived from, or realized through criminal activity is subject to civil forfeiture." *Cf.* 21 U.S.C. § 881(a)(1)-(11) (1988 & Supp. 1990).

21. MO. REV. STAT. § 513.607.3 (1986).

22. *Id.*

23. *Id.* § 513.607.5(1).

24. *Id.*

25. *Id.*

the court determines there is reasonable cause, yet notice to interested parties will not result in loss of the property, then, prior to a hearing that decides whether a writ of seizure should be issued, the court orders service on all persons known to have or claim an interest in the property.<sup>26</sup> If the court finds no reasonable cause exists to believe the property is subject to forfeiture, it "shall" dismiss the action.<sup>27</sup>

The police, however, may seize property prior to the issuance of a writ of seizure or the filing of a forfeiture petition.<sup>28</sup> An authorized law enforcement agent may seize property if the seizure is incident to a lawful arrest, search, or inspection, provided the officer has probable cause to believe the property is subject to forfeiture and will be lost or destroyed if it is not seized.<sup>29</sup> The seizure must be reported by the officer to the prosecuting attorney of the county in which the seizure was made or to the attorney general within three days.<sup>30</sup> Within five days of notice of the seizure, the prosecuting attorney or the attorney general must file a petition for forfeiture.<sup>31</sup> This petition must contain all the required elements of a pre-seizure petition plus the date and place of the seizure.<sup>32</sup> Regardless of whether the seizure is effected before or after the issuance of notice, the agency responsible for the seizure must prove all the allegations in the petition.<sup>33</sup> Every person known to have or claim an interest in the property is served with notice of the forfeiture proceeding if they have not been previously notified.<sup>34</sup>

#### *b. The Federal Act's Procedure*

There are two types of forfeiture procedures provided for under the federal act.<sup>35</sup> The type and amount of property involved determines which procedure applies.<sup>36</sup> Either procedure is available to local law enforcement if they allow a federal agency like the Federal Bureau of Investigation (FBI) or the Drug Enforcement Agency (DEA) to adopt the forfeiture.<sup>37</sup> Federal

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26. *Id.*

27. *Id.*

28. *Id.* § 513.607.5(2).

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* § 513.607.6.

35. 21 U.S.C. § 881(b), (f) (1988 & Supp. 1990).

36. *Id.* § 881(f); 19 U.S.C. § 1607(a)(1) (Supp. 1990).

37. Louis J. Rose & Tim Poor, *Confiscations: Police Department Under Attack*, ST. LOUIS POST-DISPATCH, Oct. 6, 1991.

adoption of a state forfeiture allows state law enforcement to avoid state forfeiture laws. Missouri law mandates that the proceeds of forfeiture be directed to schools rather than law enforcement agencies.<sup>38</sup> By using federal adoption, local law enforcement agencies have been able to evade Missouri law and keep the forfeited funds for their own use rather than direct funds to schools.

### (1) Summary Forfeiture

This procedure operates in much the same way as the Missouri CAFA proceeding. However, there are several distinctions. First, contraband per se may be summarily forfeited.<sup>39</sup> Summary forfeiture allows the government to seize and retain contraband per se without any judicial proceeding. Second, the property may be forfeited in an administrative forfeiture proceeding.<sup>40</sup> If the property's value is \$500,000 or less<sup>41</sup> or, regardless of its value, it was used to import, export, or otherwise transport or store drugs, the administrative forfeiture proceeding applies.<sup>42</sup> This proceeding begins by sending a notice of seizure to any persons believed to have an interest in the property.<sup>43</sup> The notice informs recipients of their right to contest forfeitures and describes the necessary steps to contest.<sup>44</sup> The notice refers to the requirements for filing a claim and a bond in order to challenge the forfeiture.<sup>45</sup> The amount of the bond is ten percent of the appraised value of the property or \$5,000, whichever is less.<sup>46</sup> The notice also contains a verified claim form that the interested party must file within ten days after the property

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38. Reorganized Sch. Dist. No. 7 Lafayette County v. Douthit, 799 S.W.2d 591, 593 (Mo. 1990).

39. 21 U.S.C. § 881(f) (Supp. 1990).

40. 19 U.S.C. § 1607 (Supp. 1990).

41. *Id.* § 1607(a)(1).

42. *Id.* § 1607(a)(3). Note that 21 U.S.C. § 881(d) incorporates the customs laws containing forfeiture proceedings. Section 881(d) reads:

The provisions of law relating to the seizure, summary, and judicial forfeiture, and condemnation of property for violation of the customs laws . . . shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under any of the provisions of this subchapter, insofar as applicable and not inconsistent with the provisions hereof.

21 U.S.C. § 881(d) (Supp. 1990).

43. David B. Smith, *The Civil Forfeiture Case's Critical Beginning*, 35 PRAC. LAW., July 1989, at 57, 59.

44. *Id.*

45. *Id.* at 59-60.

46. *Id.* at 60.

is seized.<sup>47</sup> The claim must assert that the claimant has an interest in the property to prove standing to protest the forfeiture.<sup>48</sup> Upon receipt of a verified claim, the government has sixty days to file its complaint.<sup>49</sup> The claimant must file an answer to the government's complaint within twenty days of the date when the claim was filed.<sup>50</sup>

## (2) *Judicial Forfeiture*

A judicial forfeiture proceeding may be filed for property valued over \$500,000<sup>51</sup> or, regardless of value, for property upon which a claim and bond has been filed.<sup>52</sup> There are no bond or claim requirements in a judicial forfeiture proceeding. The proceeding begins when the United States files its complaint. The filing of this complaint generally satisfies the government's initial burden of proof<sup>53</sup> that probable cause exists for forfeiture.<sup>54</sup> The mere allegation of facts supporting the assertion of probable cause shifts the ultimate burden of persuasion to the defendant or interested party to prove by a preponderance of the evidence that the property is not subject to forfeiture.<sup>55</sup> If the party fails to offer evidence or does not meet this burden of proof, the government is entitled to summary judgment and the property will be forfeited.<sup>56</sup>

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47. *Id.* at 63.

48. *Id.*

49. *Id.*

50. *Id.*

51. 19 U.S.C. § 1610 (1988).

52. 19 U.S.C. § 1608 (1988).

53. Anton R. Valukas & Thomas P. Walsh, *Forfeitures: When Uncle Sam Says You Can't Take It with You*, *LITIG.*, Winter 1988, at 31, 34.

54. *Id.* See also 19 U.S.C. § 1615 (1988); *United States v. \$38,600.00 in U.S. Currency*, 784 F.2d 694, 697-98 (5th Cir. 1986).

55. Valukas & Walsh, *supra* note 53, at 34. See also 19 U.S.C. § 1615 (1988); *United States v. \$50,000 in U.S. Currency*, 757 F.2d 103, 105 (6th Cir. 1985).

56. Valukas & Walsh, *supra* note 53, at 34. See also *United States v. \$5,644,540.00 in U.S. Currency*, 799 F.2d 1357, 1362 (9th Cir. 1986).



(3) *State's Use of Federal Adoption*<sup>57</sup>

The federal adoption process begins with the seizure of property by local police.<sup>58</sup> The authority for that seizure is found in a state's forfeiture laws.<sup>59</sup> After seizing property, local law enforcement requests a federal agency to adopt the seizure.<sup>60</sup> Most seizures are adopted by the DEA or the FBI.<sup>61</sup> If the agency agrees, it takes the seized goods and notifies the owner.<sup>62</sup> The forfeiture process is then under the control of federal prosecutors. The procedure used under federal adoption is virtually the same as summary or judicial forfeiture procedures.<sup>63</sup> The crucial difference, however, is that through federal adoption, forfeiture proceeds can be returned to the law enforcement agency responsible for the seizure. Under a 1990 Missouri Supreme Court ruling, all forfeiture proceeds obtained under the state law must be allocated to the state's schools.<sup>64</sup> Use of federal adoption allows law enforcement agencies to circumvent the 1990 ruling.

C. *How Forfeiture Really Works*

There are many areas of the forfeiture statute which could be improved. This Comment will focus on a few of the areas in the greatest need of reform. Those points include (1) the conflict of interest caused by the allowance of federal adoption in a state which mandates forfeited proceeds be given to the state's schools,<sup>65</sup> (2) the prosecutorial abuse manifested in delays and

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57. For a discussion of how the adoption process functions, see Rose & Poor, *supra* note 37.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. See *supra* notes 40-57 and accompanying text.

64. Reorganized Sch. Dist. No. 7 Lafayette County v. Douthit, 799 S.W.2d 591 (Mo. 1990). Prior to this ruling Missouri Revised Statute § 513.623 (1986) directed forfeited proceeds to be contributed to the children's trust fund. The court in *Douthit* held that statute violated Article IX, § 7 of the Missouri Constitution which requires "proceeds of penalties, forfeitures and fines collected . . . for any breach of the penal laws of the state . . . [be] available for school purposes, and none other." *Douthit*, 799 S.W.2d at 593. (quoting MO. CONST. art IX, § 7). Note that in order to reach this finding the court classified forfeitures under CAFA as penal in nature. *Id.* at 594.

65. See *infra* notes 68-84 and accompanying text.

apparent bribery,<sup>66</sup> and (3) the lack of adequate protections for forfeiture defendants due to the classification of the forfeiture penalty as civil.<sup>67</sup>

### 1. Prosecutorial Abuse

Although Missouri law requires that all forfeiture proceeds must be allocated to state schools,<sup>68</sup> many proceeds ultimately return to the law enforcement agency responsible for the forfeiture. This re-routing of funds is accomplished through the adoption procedure.<sup>69</sup> No federal regulations prevent law enforcement agencies from ultimately receiving forfeited proceeds. Therefore, under the federal adoption process, local agencies are allowed to retain the fruits of their labor. This practice creates an inherent conflict of interest for law enforcement agencies. The most honest officer may be tempted to enhance a department's budget by waiting to search a suspect until the suspect is in his home or vehicle rather than a place without forfeitable property.

It is impossible to determine accurately the amount of abuse of the civil forfeiture laws; however, the media has covered many examples of abuse.<sup>70</sup> Because the law does not require a conviction of the criminally accused, forfeiture actions may continue even if all criminal charges are dropped. This relationship between the two causes of actions creates the potential for great abuse.

For example, a Mexico, Missouri man, who was never charged with a crime, paid \$5,000 to prosecutors in exchange for their dismissal of a two-year-old forfeiture action against his farm.<sup>71</sup> Although a small patch of marijuana was found growing on the man's 115-acre farm, prosecutors never found any evidence that the owner was aware of the patch.<sup>72</sup> No charges were ever filed against the man, but prosecutors continued to attempt to take his farm away.<sup>73</sup>

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66. See *infra* notes 85-86 and accompanying text.

67. See *infra* notes 137-78 and accompanying text.

68. *Douthit*, 799 S.W.2d at 593.

69. For a discussion of the adoption procedure, see *supra* notes 58-64 and accompanying text.

70. The examples which follow are from a series of articles by Tim Poor and Louis J. Rose which appeared in the *St. Louis Post-Dispatch* from October 6 to October 11, 1991.

71. Tim Poor & Louis J. Rose, *Farmer Paid \$5,000 To Thwart Land Grab: County Was Set To Take Farm—But Not Charge Owners*, ST. LOUIS POST-DISPATCH, Oct 9, 1991.

72. *Id.*

73. *Id.*

The payment of any sum of money in return for dropping charges or a forfeiture action reeks of legal extortion. The purpose of the forfeiture laws is to take the profit out of crime, and it is that very purpose which is being violated by the actions of prosecutors such as those involved in the Mexico, Missouri case. If an accused may buy her way out of trouble, it hinders the purpose of the forfeiture laws. An accused should not retain property that is truly "guilty" merely by making a contribution. Permitting such extortion payments taints the criminal process.

There are other cases in which a defendant has bought his way out of trouble. Jeff Jepsen, a Kirkwood, Missouri resident was arrested for possession of marijuana.<sup>74</sup> Police seized his van during the arrest.<sup>75</sup> The prosecutor, Martin Mazzei, allowed Jepsen to plead guilty to a misdemeanor drug charge, which was reduced from a felony charge, and he was allowed to keep his van.<sup>76</sup> Jepsen paid the prosecutor's office \$3,000.<sup>77</sup> The payment was not reflected in the files of the criminal case.<sup>78</sup> Over a year after Jepsen's arrest, a newly-elected prosecutor formally dropped the forfeiture action because she felt the case had been "'tainted' by the payments."<sup>79</sup> The county sheriff called the actions of Mazzei "a bribe, plain and simple."<sup>80</sup> Surprisingly, even the former prosecutor agreed that the payment of money "gave the appearance of suspects buying their way out of charges."<sup>81</sup> Even though the prosecutor responsible for "settlement" had moral reservations about the transaction, he continued the practice after the Missouri Bar Administration Advisory Committee issued a March 2, 1988 opinion approving of the practice.<sup>82</sup>

The chairman of the advisory committee wrote: "We view this in the same nature as negotiating the amount of a fine to be levied against a criminal defendant and do not find anything unethical in a prosecuting attorney simultaneously negotiating the criminal plea and the disposition of a civil

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74. Tim Poor & Louis J. Rose, *Prosecutor Dealt Away Charge On Marijuana For \$3,000: 'All They Wanted Was Money Out of the Deal,' Says Suspect*, ST. LOUIS POST-DISPATCH, Oct 10, 1991.

75. *Id.*

76. *Id.*

77. *Id.* The current prosecutor made a series of \$1,000 donations to three county school superintendents only a few months before his re-election campaign. He lost the election. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* This statement was made by Sheriff Bob Kent of Crawford County, Missouri regarding the actions of former prosecutor Martin Mazzei. *Id.*

81. *Id.*

82. *Id.*

forfeiture action. . . ."<sup>83</sup> However, there are important differences between negotiating a fine and negotiating a criminal plea while a civil forfeiture action is pending. First, fines are generally determined after the defendant is found guilty. The negotiation of a criminal plea in conjunction with a civil forfeiture action occurs before a trial even begins. Further, a trial may never occur if the charges are dropped or were never filed in the first place. Second, prosecutors do not benefit from the amount of the fine because they are not the recipient of that money. In forfeiture cases, however, the local law enforcement agency may benefit from the donation made by the accused. Although the prosecutor does not personally receive the money, a definite relationship exists between the local prosecutor and the local law enforcement agency.

Obviously law enforcement agencies approve of the forfeiture statutes, especially when they benefit from them financially. A prosecutor who does not cooperate with the local law enforcement agency might have a difficult time performing his or her job. As one prosecutor stated, "[t]he last thing a prosecuting attorney wants to do is anger law enforcement."<sup>84</sup> Because the law enforcement agency may receive the benefits of any "contribution," a blatant conflict of interest arises for prosecutors acting in this dual role. Due to this lack of objectivity, prosecutors should either not participate in the bargaining process, or they should not directly or indirectly benefit from any proceeds derived from the bargaining process.

## 2. Delay of the Forfeiture Process

In contrast to the swiftness of the seizure process, the actual forfeiture process may drag on for years. Unfortunately there are no guidelines or requirements in CAFA stating when the actual forfeiture should be completed. This lack of guidance has led to another form of abuse in the forfeiture process. The *St. Louis Post-Dispatch* reported a case where, in order to free their land of title problems, the owners had to agree not to sue the government before the government would drop the forfeiture action against their property.<sup>85</sup> Other landowners also paid money in exchange for dropping a

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83. *Id.*

84. *Id.* This statement was made by former Crawford County, Missouri prosecutor Martin Mazzei. *Id.*

85. Tim Poor & Louis J. Rose, *Undue Process: U.S. Kept Trying To Take Home After Officials Dropped Charges*, ST. LOUIS POST-DISPATCH, Oct 6, 1991. Even though the Adair County prosecutors had dropped all charges against Matt and Sheri Farrell, federal prosecutors continued to try to take their land. *Id.* Federal prosecutors did not drop their case until ten months after filing suit, and not until the Farrells signed an agreement not to sue the government. *Id.*

two-year-old forfeiture action against their property.<sup>86</sup> By allowing delay in the prosecution of forfeiture actions, the forfeiture laws give too much discretion to prosecutors. Justice is better served by the implementation of a time limitation for prosecutors to commence a forfeiture action. Shorter delays in the process would result in less opportunity and less incentive for bribery because defendants would have a quicker opportunity to prove their property's innocence and attain its return. Just as defendants in criminal cases have a right to a speedy trial, so should defendants in forfeiture actions. The following discussion addresses the similarities between criminal defendants and forfeiture defendants. These similarities create a need to give forfeiture defendants the same rights criminals defendants have.

### III. COMMENT: REFORMING A GOOD CONCEPT

Forfeiture is an excellent tool to fight crime, especially drug crimes; however, forfeiture's current use is often unfair. Several issues must be reformed in order to make the process fair. The question as to what may constitute probable cause to seize forfeitable property must be reevaluated. Improved notice requirements would better protect the rights of interested parties. Conflicts between criminal and civil proceedings must be resolved. The system's delay in processing forfeiture actions must be shortened. Finally, the interests of innocent property owners or tenants by the entirety<sup>87</sup> must be better protected.

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86. Tim Poor & Louis J. Rose, *supra* note 71. Sherwood Craghead of Audrain County, Missouri thought prosecutors had dropped the forfeiture action against him until he tried to sell his farm and he was told there was a lien on his property preventing him from selling it. *Id.* Craghead then decided to pay the Audrain County Sheriff's Department \$5,000 in exchange for the prosecutor dropping his case. *Id.*

87. *See infra* notes 187-89 and accompanying text.

A. *Forfeiture is not a Civil Action*

1. Criminal Versus Civil Classification<sup>88</sup>

The intent of the forfeiture laws is to punish; a forfeiture action is basically criminal in nature and should be treated as such.<sup>89</sup> No such action as a "civil forfeiture proceeding" should exist. Treating all forfeiture provisions as criminal more accurately reflects their nature and ensures that forfeiture defendants are provided with constitutional protections.

The United States Supreme Court has expounded a series of tests to distinguish between a criminal and civil action. The first test was established in *Helvering v. Mitchell*.<sup>90</sup> In *Mitchell*, the Court stated that, in order to determine whether a statute is criminal or civil, courts should attempt to determine whether Congress intended to create a criminal or a civil penalty.<sup>91</sup> Before the limits of the Court's deference to Congress could be tested, the Court revised the test in subsequent holdings.<sup>92</sup> The Court, in *Kennedy v. Mendoza-Martinez*,<sup>93</sup> set forth a two-part test to determine whether a statute is civil or criminal. The first prong of the test requires the court to examine Congress' intent in enacting the statute.<sup>94</sup> If the court determines that Congress intended the statute to be civil, then, under the second prong, the court must determine if Congress can constitutionally characterize the statute as civil.<sup>95</sup> The court weighs seven factors in this determination:

[F]irst, whether the statute creates an affirmative disability or restraint; second, whether the underlying behavior has been historically punished as a crime; third, whether the statute requires scienter; fourth, whether the statute promotes retribution and/or deterrence; fifth, whether the underlying behavior is currently a crime, sixth, whether there is an alternative, non-penal purpose behind the law; and seventh, whether the law is well-tailored to its non-penal purpose.<sup>96</sup>

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88. The criminal/civil classification analysis which follows originated in the cases cited, and Michael Schecter further developed the analysis and applied it to forfeitures. See Michael Schecter, Note, *Fear and Loathing and the Forfeiture Laws*, 75 CORNELL L. REV. 1151 (1990). Schecter argues that forfeiture defendants should enjoy the same rights as criminal defendants. *Id.* at 1160-63, 1182.

89. *Id.* at 1155.

90. 303 U.S. 391 (1938).

91. *Id.* at 402. See also Schecter, *supra* note 88, at 1157.

92. Schecter, *supra* note 88, at 1157-58.

93. 372 U.S. 144 (1963).

94. *Id.* at 169.

95. Schecter, *supra* note 88, at 1158.

96. *Id.* at 1158 (citing *Mendoza-Martinez*, 372 U.S. at 168-69).

Many years after *Mendoza-Martinez*, the Supreme Court established a new test.<sup>97</sup> In *United States v. Ward*<sup>98</sup> the Court maintained the first prong of the *Mendoza-Martinez* test, but changed the second prong.<sup>99</sup> The seven factors of the *Mendoza-Martinez* test were replaced with an examination of whether the "statutory penalty is so punitive that the law should be considered criminal."<sup>100</sup> However, the court may override Congressional intent to create a civil statute only upon the "clearest of proof."<sup>101</sup> This burden gives greater deference to Congressional intent than did the *Mendoza-Martinez* test.<sup>102</sup> Neither test, however, has achieved prominence; rather, courts seem to consider them as alternatives.<sup>103</sup>

The Supreme Court has haphazardly applied both tests to forfeitures.<sup>104</sup> Rather than uniformly deciding that all forfeitures are either criminal or civil, the Court has chosen to decide the issue depending on what constitutional protection the defendant claims.<sup>105</sup> This approach has resulted in the classification of some forfeitures as quasi-criminal.<sup>106</sup> A quasi-criminal classification leaves forfeiture defendants with a patchwork of criminal constitutional protections. As one author has noted, the Constitution never states that one criminal right is more important than another.<sup>107</sup> Therefore, it makes no sense that forfeiture defendants are entitled to some rights and not other rights. They should be entitled to all the constitutional protections given to defendants or to none of them. The classification of all forfeitures as criminal solves this dilemma.

## 2. The Necessary Classification of the Controlled Substances Act and CAFA as Criminal

The first prong of both the *Mendoza-Martinez* and the *Ward* tests "requires the examination of Congressional intent."<sup>108</sup> The legislative history of the federal act states that it was enacted as a civil statute.<sup>109</sup> CAFA

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97. *Id.*

98. 448 U.S. 242 (1980).

99. Schecter, *supra* note 88, at 1158 (citing *Ward*, 448 U.S. at 248-49).

100. *Id.*

101. *Id.* (citing *Ward*, 448 U.S. at 248-49).

102. *Id.* at 1158-59.

103. *Id.* at 1159.

104. *Id.*

105. *Id.*

106. *Id.* at 1159 n.62.

107. *Id.* at 1159.

108. *Id.* at 1160.

109. H.R. REP. NO. 1444, 91st Cong., 2d Sess. 5 (1970), *reprinted in* 1970

actually states that the legislative intent is to treat forfeiture as civil in nature.<sup>110</sup> Hence, whether the Controlled Substances Act or CAFA is criminal turns on the second prong of the tests. Despite the newer *Ward* test, some courts continue to apply the *Mendoza-Martinez* test. If a court chooses to apply the *Mendoza-Martinez* test, the court balances the seven factors to determine whether to characterize the statutes as criminal. To override the legislative intent to create a civil statute, the court must find the statute "sufficiently criminal in nature."<sup>111</sup>

The first factor is whether the statute creates an affirmative disability.<sup>112</sup> The Court in *Mendoza-Martinez* did not define this term.<sup>113</sup> However, both the federal law and CAFA prevent interested parties from claiming title to forfeited property and from enjoying their property rights.<sup>114</sup> This definitely qualifies as an affirmative disability.<sup>115</sup>

The second factor asks whether the underlying behavior has been punished as a crime throughout history.<sup>116</sup> Possession of drugs has been a crime since the nineteenth century.<sup>117</sup> The federal law and CAFA may require forfeitures for more crimes than just drug possession. For example, in Missouri, offenses against the person, robbery, arson, and gambling may result in forfeiture.<sup>118</sup>

The third factor is whether the statute contains a *mens rea* requirement.<sup>119</sup> Neither the Act nor CAFA require a direct showing of mental state; however, because the ultimate burden of proof is on the interested party to prove their innocence, a failure to show an absence of *mens rea* will result in the forfeiture of their property.<sup>120</sup>

The fourth factor is whether the statute "promotes retribution or deterrence, which would make the offence more criminal than civil."<sup>121</sup> The forfeiture laws were intended to deter illegal drug activity by taking the profit

U.S.C.C.A.N. 4566, 4570-71.

110. MO. REV. STAT. § 513.607 (1986).

111. Schecter, *supra* note 88, at 1160-61.

112. *Id.* at 1161. A disability is normally defined as a restraint that prevents an individual from enjoying "ordinary legal rights." *Id.* at 1161 n.71 (quoting BLACK'S LAW DICTIONARY 415 (5th ed. 1979)).

113. *Id.* at 1161.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. MO. REV. STAT. § 513.605(3)(a)-(p) (1986).

119. Schecter, *supra* note 88, at 1161.

120. *Id.*

121. *Id.*



out of the activity. Confiscated goods and profits are placed in a state fund or even in law enforcement budgets; this practice serves as some retribution for society.<sup>122</sup>

The fifth factor "examines whether the underlying behavior is currently a crime."<sup>123</sup> Drug possession and drug trafficking are obviously both current crimes. Therefore, forfeiture is not necessary to prosecute guilty defendants because they can be tried for their underlying crimes.<sup>124</sup>

The sixth factor is the only factor which bolsters the argument that the legislature intended to create a civil statute.<sup>125</sup> There is an alternative, non-penal purpose to the forfeiture laws.<sup>126</sup> That purpose is to deter drug smuggling by not allowing smugglers to keep their illegally gained assets.<sup>127</sup> A criminal forfeiture law, however, could still serve this important purpose. The tradeoff means that all forfeiture defendants would have constitutional protections. If the state can prove their guilt, the state can take their goods. This tradeoff is worth making.

The last factor is "whether the law creates a penalty that is well-tailored to the alternative non-penal goal."<sup>128</sup> If law enforcement agencies only used forfeiture laws to bring down major drug suppliers, then one could argue that the forfeiture law is well-tailored to its non-penal goal.<sup>129</sup> However, the forfeiture laws are often used against drug users and small-scale drug dealers.<sup>130</sup> Though it might seem this is good, it is not the use that legislators contemplated when they drafted these forfeiture laws. Hence, the law is not well-tailored to its non-penal goals.

Upon considering all seven factors, courts should rule that forfeiture laws are criminal in nature and override the legislative intent to the contrary.<sup>131</sup> Regardless of what legislatures intended to create, they created a criminal penalty.

If a court chose to apply the *Ward* test, the determinative issue is whether the penalty is so punitive so as to negate the legislature's intent to enact a

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122. *Id.* at 1162.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* Schecter argues that the non-penal purpose should not be the determining factor because almost every criminal statute has an alternative non-penal purpose. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* at 1162-63.

130. See, e.g., Louis J. Rose & Tim Poor, *Domestic Dispute Leads to Forfeit*, ST. LOUIS POST-DISPATCH, Oct. 8, 1991.

131. See Schecter, *supra* note 88, at 1162-63.

civil statute.<sup>132</sup> Due to the rising number of cases where a significant amount of money or property is forfeited in relation to the amount of drug involvement,<sup>133</sup> forfeitures have become so punitive in nature that they meet the *Ward* standard. Forfeiture as a punishment is out of proportion with many crimes which allow forfeiture as a penalty. This is especially true when the defendant is never charged with a crime or when the charges are dropped due to a lack of evidence. Law enforcement officers and prosecutors throughout the state abuse the forfeiture laws precisely because forfeiture is a stiff penalty with an easier burden of proof.

Missouri may have already taken the first step to reclassify forfeitures as criminal. The Supreme Court of Missouri in *Reorganized School District. No. 7 v. Douthit*<sup>134</sup> declared the forfeiture statute "manifestly penal."<sup>135</sup> The court, however, did not see a conflict between this holding and the continued classification of forfeiture as a civil proceeding.<sup>136</sup> Upon further consideration, the court will hopefully see the inherent inconsistency in finding forfeitures to be penal but not calling for an end to civil forfeitures.

## *B. What Classifying Forfeiture as Criminal Means to Defendants*

### 1. Due Process Rights

The Constitution guarantees certain rights to all criminal defendants. If the forfeiture laws are labeled criminal rather than civil, then forfeiture defendants would also be guaranteed these rights. The classification of forfeiture as criminal would mean: (1) "the state cannot shift certain elements of the state's case onto the defendant,"<sup>137</sup> (2) "the statute must normally contain a mens rea requirement,"<sup>138</sup> (3) "the prosecutor cannot force the defendant to testify against himself,"<sup>139</sup> and (4) "the prosecutor cannot use evidence against the defendant if the state obtains it in violation of the defendant's fourth amendment rights."<sup>140</sup> Classifying all forfeiture actions as criminal eliminates the past confusion caused by courts' piecemeal approach to the issue.

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132. *Id.*

133. *See* Rose and Poor, *supra* note 130.

134. 799 S.W.2d 591 (Mo. 1990).

135. *Id.* at 594.

136. *Id.*

137. Schecter, *supra* note 88, at 1164 (citing *In re Winship*, 397 U.S. 358 (1970)).

138. *Id.* (citing *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978)).

139. *Id.* (citing U.S. CONST. amend. V (self-incrimination clause)).

140. *Id.* (citing *Weeks v. United States*, 232 U.S. 383 (1914)).

## 2. Why Present Forfeiture Laws Must Grant Forfeiture Defendants Their Constitutional Rights

The United States Supreme Court, in *In re Winship*,<sup>141</sup> interpreted the "due process clause to require the state to prove 'beyond a reasonable doubt . . . every fact necessary to constitute the crime with which he is charged.'"<sup>142</sup> However, as the law reads today, the government needs only probable cause to subject the defendant's property to forfeiture.<sup>143</sup> Once this easy burden is satisfied, the defendant must then prove his innocence or forfeit his property.<sup>144</sup> The applicable level of proof in both instances is by a preponderance of the evidence.<sup>145</sup> This burden of proof is unconstitutional if forfeitures are viewed as criminal in nature because it violates two constitutional protections granted to all criminal defendants. First, in a criminal proceeding, the state must prove its case beyond all reasonable doubt, not by a mere preponderance of the evidence.<sup>146</sup> Second, the state must prove all the essential elements of its case. The Supreme Court, in *United States v. United States Gypsum Co.*,<sup>147</sup> held that mens rea is an essential element of the majority of crimes.<sup>148</sup> However, in forfeiture actions, the state does not have to prove mens rea. The burden of proving a lack of mens rea is on the defendant in forfeiture actions.<sup>149</sup> Courts use the quasi-criminal classification to conclude this shift of burden is allowable.<sup>150</sup> This classification should not be allowed. Courts should not create a new combination of rights by coining a new phrase for a crime. Forfeiture is a criminal action and forfeiture defendants should receive all the constitutional protections granted criminal defendants.

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141. 397 U.S. 358 (1970).

142. Schecter, *supra* note 88, at 1165. See also *Winship*, 397 U.S. at 364.

143. Schecter, *supra* note 88, at 1165. See also 21 U.S.C. § 881(b)(3) (1988); Mo. REV. STAT. § 513.607.5(1) (1986).

144. Schecter, *supra* note 88, at 1165. See also 19 U.S.C. § 1915 (1988).

145. See, e.g., *United States v. One 1977 Lincoln Mark V*, 453 F. Supp. 1388, 1391 (S.D.N.Y. 1978).

146. Schecter, *supra* note 88, at 1165.

147. 438 U.S. 422 (1978).

148. Schecter, *supra* note 88, at 1166. See also *United States Gypsum Co.*, 438 U.S. at 436 (quoting *Dennis v. United States*, 341 U.S. 494, 500 (1951)).

149. Schecter, *supra* note 88, at 1166.

150. *Id.* See, e.g., cases cited *id.* at 1166 n.100.

### 3. What Due Process Requires Regarding Burden of Proof<sup>151</sup>

The Supreme Court, in *Mathews v. Eldridge*,<sup>152</sup> established a test for determining the constitutionality of a challenged procedural rule.<sup>153</sup> To determine what due process requires, a court must analyze three factors: "first, the governmental interest served by the challenged procedure; second, the individual interest affected by the official action; and third, the risk of an erroneous deprivation and the probable value of additional procedural safeguards."<sup>154</sup> Missouri courts have applied the *Mathews* test.<sup>155</sup> This Comment views this as the appropriate test to determine whether shifting the burden of proof in a forfeiture action violates due process.

The first prong of the *Mathews* test examines how the challenged procedures "advance legitimate governmental objectives."<sup>156</sup> Shifting the burden of proof to the defendant encourages the government to use forfeiture because it lessens the government's evidentiary burden.<sup>157</sup> Forfeiture itself advances three important governmental interests.<sup>158</sup> First, "it generates and protects governmental revenues."<sup>159</sup> Second, forfeiture punishes people who use their property to commit crimes.<sup>160</sup> Third, forfeiture "regulates the unlawful use of property."<sup>161</sup>

The second prong examines the private interests affected by the forfeiture.<sup>162</sup> Forfeiture deprives a property owner of all of his rights in that property.<sup>163</sup> The third prong considers the "risk of an erroneous deprivation

151. For a comprehensive discussion of due process requirements regarding burden of proof, see Peter Petrou, Note, *Due Process Implications of Shifting the Burden of Proof in Forfeiture Proceedings Arising Out of Illegal Drug Transactions*, 1984 DUKE L.J. 822.

152. 424 U.S. 319 (1976).

153. Petrou, *supra* note 151, at 829. See also *Mathews*, 424 U.S. at 335.

154. Petrou, *supra* note 151, at 829. See also *Mathews*, 424 U.S. at 335.

155. State *ex rel.* Cook v. Saynes, 713 S.W.2d 258, 262-63 (Mo. 1986).

156. Petrou, *supra* note 151, at 829-30.

157. *Id.* at 830.

158. *Id.*

159. *Id.* (citing Gordon Chang, Note, *Forfeitures—Due Process—Supreme Court Upholds Forfeiture of Innocent Owner's Property Without Prior Notice and Hearing*, 60 CORNELL L. REV. 467, 478 (1975)).

160. *Id.* See also *United States v. Rush*, 666 F.2d 10, 11 n.1 (2d Cir. 1981).

161. See Petrou *supra* note 151, at 830. Senator Nunn, who sponsored the bill that amended the Drug Control Act to include the forfeiture of illegal drug proceeds, listed all three of the above objectives as purposes of the amendment. *Id.* at 830 n.76 (citing 124 CONG. REC. 23,055 (1978)).

162. *Id.* at 836.

163. *Id.* See also 21 U.S.C. § 881(a) (1988 & Supp. 1990).

under the challenged procedures."<sup>164</sup> The acceptability of the risk of error depends on "the type of facts to be discerned,"<sup>165</sup> "the adequacy of the existing safeguards,"<sup>166</sup> and "the benefit of additional procedural safeguards."<sup>167</sup> According to one author, the "best allocation of the burden maximizes protection for the individual against an erroneous deprivation, but minimizes obstacles to . . . drug law enforcement by the government."<sup>168</sup>

Currently the defendant in a forfeiture action bears the ultimate burden of persuasion once the government shows probable cause for forfeiting the defendant's property. A better approach would be for the government to maintain its initial burden of proof by a showing of probable cause.<sup>169</sup> Once the government meets its burden, the burden would shift to the defendant to show a reasonable explanation refuting the showing of probable cause.<sup>170</sup> The ultimate burden of disproving the defendant's explanation would rest with the government.<sup>171</sup> This allocation of the burden of proof would best protect against an erroneous deprivation of property.<sup>172</sup>

#### 4. Double Jeopardy and Collateral Estoppel Issues

Ordinarily, a defendant can be prosecuted for the same crime only once because of the constitutional protection against double jeopardy.<sup>173</sup> Additionally, the doctrine of collateral estoppel does not apply to forfeiture actions because of the different burdens of proof between a criminal action and a subsequent civil action.<sup>174</sup> The Supreme Court has held that a forfeiture action, after a failed criminal action, is not double jeopardy.<sup>175</sup> The most serious consequence is not that a defendant may be punished twice with criminal sanctions and forfeited goods. The problem is that a defendant acquitted of criminal charges may still forfeit her property under a civil

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164. Petrou, *supra* note 151, at 838. *See also Mathews*, 424 U.S. at 335.

165. Petrou, *supra* note 151, at 838 (citing *Mathews*, 424 U.S. at 343).

166. *Id.* (citing *Mathews*, 424 U.S. at 345-46).

167. *Id.* (citing *Mathews*, 424 U.S. at 346-47).

168. *See* Petrou, *supra* note 151, at 841.

169. This approach was originally suggested by Peter Petrou. *See id.* at 840-43.

170. *Id.* at 841.

171. *Id.*

172. *Id.* at 843.

173. U.S. CONST. amend. V.

174. *Helvering v. Mitchell*, 303 U.S. 391, 397 (1938).

175. *Missouri v. Hunter*, 459 U.S. 359, 368 (1983) (upholding the state's right to impose plural sanctions because the question is one of legislative intent rather than one of double jeopardy); *Various Items of Personal Property v. United States*, 282 U.S. 577, 581 (1931).

forfeiture statute because of the differing burdens of proof. This possibility creates a potential for great abuse. Because law enforcement agencies can ultimately obtain goods they have previously seized, the agencies have a much greater incentive to concentrate their efforts on the forfeiture action. This is especially true when the criminal case is weak. This potential for abuse could be eliminated by requiring that a criminal conviction be a prerequisite to a forfeiture action.

However, the Supreme Court, in *United States v. One Assortment of 89 Firearms*,<sup>176</sup> made it clear that neither collateral estoppel nor double jeopardy barred a civil forfeiture proceeding initiated after an acquittal on related criminal charges.<sup>177</sup> This ruling was based on the assumption that the forfeiture proceeding is civil in nature. What happens, however, if the forfeiture is considered criminal? Double jeopardy will occur. The double jeopardy clause prohibits "punishing twice, or attempting a second time to punish criminally, for the same offense."<sup>178</sup> A possible solution to avoid double jeopardy is to include the provision for forfeiture in the underlying crime. This allows for forfeiture of guilty goods in the same way that fines are provided for in the sentencing process.

### 5. How to Prevent Prosecutors From Unduly Delaying the Forfeiture Hearing

Despite authority that "notice and an opportunity to be heard must be provided by the state in a meaningful manner prior to deprivation of a protected interest,"<sup>179</sup> defendants have experienced major delays in some cases.

The Supreme Court, in *Barker v. Wingo*,<sup>180</sup> supplied a test for determining whether due process was denied a defendant whose trial was eighteen months after his property was seized.<sup>181</sup> Under *Barker*, a court must weigh four factors to determine if there has been an undue delay: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right to a speedy determination; and (4) prejudice.<sup>182</sup> In applying *Barker*, however, courts have upheld delays as long as fourteen months from the time

176. 465 U.S. 354 (1984).

177. *Id.* at 361. See also *One Lot Emerald Cut Stones & One Ring v. United States*, 409 U.S. 232, 234-35 (1972).

178. *Helvering*, 303 U.S. at 399.

179. *State v. Eberenz*, 805 S.W.2d 359, 361 (Mo. Ct. App. 1991) (quoting *State ex rel. Williams v. Marsh*, 626 S.W.2d 223, 230 (Mo. 1982)).

180. 407 U.S. 514 (1972).

181. *Id.* at 530.

182. *Id.*

of seizure to the institution of the forfeiture action.<sup>183</sup> There are very few acceptable reasons the government could offer for delaying commencement of a forfeiture suit. The majority of delays are unnecessary and deprive defendants of their property without legitimate reason. Currently there are no guidelines as to when prosecutors must bring forfeiture actions after property has been seized. Criminal defendants are constitutionally guaranteed the right to a speedy trial; forfeiture defendants deserve the same treatment. Justice would be better served by adding such a requirement to all forfeiture laws.

## 6. Do Away with the Conflict of Interest for Law Enforcement

The simple solution is to follow the law as it exists in Missouri.<sup>184</sup> A requirement that proceeds of forfeiture actions be contributed to the school fund rather than to a law enforcement agency will ensure the objectivity of the prosecutorial process. To ensure this result, Missouri should ban the use of federal adoption. The use of federal adoption gives law enforcement more incentive to use the forfeiture laws, but the direct benefit from the process provides the wrong incentive. Through federal adoption local law enforcement officers and prosecutors throughout Missouri have supplemented their budgets with \$11.23 million from drug-related seizures during the past three and a half years.<sup>185</sup> Allowing enforcement agencies to supplement their budgets through forfeiture proceeds is akin to "bounty hunting."<sup>186</sup>

## 7. Forfeiture and the Rights of Third Parties

The question of whether property held in tenancy by the entirety is subject to forfeiture seems to have been resolved by the courts. Prior to these rulings, it would have been possible for innocent husbands or wives to find themselves tenants with the United States government if property was forfeited. Courts have ruled, however, that if the five unities of tenancy by the entirety<sup>187</sup> have not been broken and one spouse is innocent of the

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183. See *United States v. \$47,980 in Canadian Currency*, 804 F.2d 1085, 1088-89 (9th Cir. 1986), cert. denied, 481 U.S. 1072 (1987).

184. MO. REV. STAT. § 513.623 (1986).

185. Rose & Poor, *supra* note 37. For a breakdown by city and county law enforcement agencies proceeds from forfeitures, see *id.*

186. Tim Poor & Louis J. Rose, *Seizures Aid Newton County: Forfeiture Cases Have Netted Sheriff's Office \$116,000*, ST. LOUIS POST-DISPATCH, Oct. 7, 1991. The analogy to bounty hunting was made by Dan Viets, a defense attorney from Columbia, Missouri. *Id.*

187. See *United States v. One Parcel of Real Estate*, 751 F. Supp. 1538, 1539 (S.D. Fla. 1990). The five unities required to be present to create a tenancy by the

accused conduct, then each spouse's interest comprises the whole or entirety of the property and not a divisible part; hence, the estate is nonseverable.<sup>188</sup> Essentially, the government is without recourse because the property is held by both spouses equally. To grant the government an interest in the property would alienate and convey one spouse's interest without his or her consent. The government may, however, place a lien on the property and take the guilty spouse's interest should the property ever be divided by divorce, death of the other spouse, or some other event.<sup>189</sup> For property held other than by tenancy by the entirety the law is not as clear or as fair.

The federal act provides that property may not be forfeited from someone who had a preexisting interest in the property and who was not aware that his property was being used illegally.<sup>190</sup> Courts, however, have struggled with the "without knowledge or consent" requirement.<sup>191</sup> The difference in interpretations turns on a court's interpretation of the constitutional defense established in dictum in *Calero-Toledo v. Pearson Yacht Leasing Co.*<sup>192</sup> In *Calero-Toledo* a yacht owned by a New York resident and leased to two Puerto Rican residents was forfeited under a Puerto Rico forfeiture statute similar to § 881(a)(4) of the Controlled Substances Act.<sup>193</sup> The yacht contained one marijuana cigarette.<sup>194</sup> The owner was unaware of the forfeiture until he attempted to repossess the yacht for nonpayment.<sup>195</sup> The United States Supreme Court held that the innocence of the owner is almost always rejected as a defense.<sup>196</sup> In dicta, however, the Court discussed two circumstances when an innocent owner might have a defense to the forfeiture

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entirety are "the joint owners must be married to each other; the owners must both have title; the owners must have received title from the same conveyance; the owners must share an equal interest; and the owners must have the right to use the entire property." *Id.*

188. *United States v. One Single Family Residence*, 894 F.2d 1511, 1514 (11th Cir. 1990).

189. *Id.* at 1516 n.6.

190. Stefan D. Cassella, *The Rights of the Innocent in Forfeitures*, 37 PRAC. LAW., Apr. 1991, at 87, 90. See also 21 U.S.C. § 881(a)(4), (6), (7) (1988).

191. Alice Marie O'Brien, "Caught In The Crossfire": *Protecting The Innocent Owner Of Real Property From Civil Forfeiture Under 21 U.S.C. § 881(a)(7)*, 65 ST. JOHN'S L. REV. 521, 529 (1991).

192. 416 U.S. 663 (1974). See also Lalit K. Loomba, *The Innocent Owner Defense To Real Property Forfeiture Under The Comprehensive Crime Control Act Of 1984*, 58 FORDHAM L. REV. 471, 487 (1989) (discussing *Calero-Toledo* in depth).

193. *Calero-Toledo*, 416 U.S. at 665-67.

194. *Id.* at 693.

195. *Id.* at 668.

196. *Id.* at 683.



action.<sup>197</sup> These exceptions have developed into what is currently known as the innocent owner defense.

Some courts have interpreted *Calero-Toledo* to require the owner to show not only that he was not involved and lacked knowledge of the transaction, but that he also did everything he reasonably could to prevent the illegal use of his property.<sup>198</sup> Other courts completely reject the *Calero-Toledo* defense.<sup>199</sup> State legislatures need to address this issue and incorporate into their state's forfeiture statute a well-defined defense for owners who did not know their property was used for an illegal transaction.<sup>200</sup>

### C. *Contemplated Reform*

Due to the press attention received on many of the issues discussed in this Comment, the Missouri legislature has begun debates on how to reform CAFA. Senate Bill 460 has been perfected by the Senate; however, it was part of a large drug bill that was defeated.<sup>201</sup> Hence, there were no changes made to CAFA during the 1992 session. Senate Bill 460 proposed such needed changes as banning federal adoption unless the violation is a felony in Missouri, more than one state is involved in the seizure or investigation, and the adoption is approved by a judge after property owners receive notice and hearing.<sup>202</sup> Another proposed change was that there could be no forfeiture unless there was a criminal conviction on the violation.<sup>203</sup> If there was no conviction then the CAFA proceeding would be stayed.<sup>204</sup> In addition, the bill prohibited monetary payment in exchange for the release of property.<sup>205</sup> It also prohibited holding seized property unless a petition had been filed within the time limit provided by section 513.607<sup>206</sup> or a court had granted an extension.<sup>207</sup> If Senate Bill 460 had become law, it would be a significant step in reforming CAFA. Unfortunately, Senate Bill 460 is

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197. Loomba, *supra* note 192, at 488.

198. *Id.*

199. *Id.*

200. See MO. REV. STAT. § 513.615 (1986).

201. S. 460, 86th Gen. Assembly (1992). Senate Bill 460 was perfected on March 11, 1992. It was defeated on May 15, 1992.

202. *Id.* at 24.

203. *Id.* at 21.

204. *Id.*

205. *Id.* at 22.

206. Section 513.607 requires law enforcement officers to report a seizure within three days, and a petition for forfeiture must be filed within five days of the report of a seizure. MO. REV. STAT. § 513.607 (1986).

207. S. 460, 86th Gen. Assembly 22 (1992).

the third such bill to fail in the last three sessions of the legislature.<sup>208</sup> Missourians can only hope that their legislature will respond during the next session.

#### IV. CONCLUSION

Forfeiture is an excellent law enforcement tool. It forces drug dealers to pay for the crimes they have committed. However, this benefit is being outweighed by the anger and frustration of innocent law-abiding citizens whose money or property is being seized without legitimate cause and sometimes being held for months before trial.<sup>209</sup> Forfeiture's current use has fostered disrespect for law enforcement and the entire criminal justice system.<sup>210</sup> This negative image can be overcome. By classifying forfeitures as criminal in nature, defendants would be guaranteed the rights to which they are constitutionally entitled. Additionally, forfeiture laws should be amended to ensure speedy trials and keep the ultimate burden of proof on the government. This gives defendants a real opportunity to defend against an unfair taking of their property. Through these simple reforms the government would continue to have an effective enforcement tool against drug dealers without subjecting innocent citizens to unconstitutional process.

STEFFANIE STRACKE

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208. Virginia Young, *Senate Tightens Forfeiture Laws*, ST. LOUIS POST-DISPATCH, Mar. 12, 1992, at 1A.

209. Steven Fishman, *Forfeiture: An Effective Drug Law Tool?*, 64 MICH. B.J. 1020, 1022 (1985).

210. *Id.*

