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# Misunderstanding Civil Forfeiture: Addressing Misconceptions About Civil Forfeiture with a Focus on the Florida Contraband Forfeiture Act

Brittany Brooks

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# Misunderstanding Civil Forfeiture: Addressing Misconceptions About Civil Forfeiture with a Focus on the Florida Contraband Forfeiture Act

BRITTANY BROOKS\*

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## I. INTRODUCTION

At the age of twenty-six and with a bright future ahead of her, Ashley Erin died from an overdose of illegally-marketed prescription

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\* J.D. Candidate 2015, University of Miami School of Law. This article is in memoriam of Ashley Brooks. The author wishes to thank Maureen Scanlon and Roger Diaz for the unwavering support and encouragement that they have provided time and again, but especially during the formation of this article. The author also wishes to thank Glenn Theobald and Patricia Scanlon for being extraordinary mentors and Professor Stephen Schnably for challenging the direction and quality of this article. The author interns at the Martin County (Florida) Sheriff's Office. The views expressed in this article are entirely her own.

pain medication.<sup>1</sup> University of Michigan student Thibault DeSaintPhalle died from an overdose of cocaine and heroin at just eighteen years old.<sup>2</sup> At twenty-eight, aspiring model and actress Elisa Bridges died from an overdose of heroin.<sup>3</sup> These individuals are just three of the hundreds of thousands of people who have died as a result of drug abuse over the last decade.<sup>4</sup> In 2009, drug overdoses outnumbered traffic accidents as a leading cause of death, and the gap has only widened since.<sup>5</sup>

The national increase in drug-related deaths has largely resulted from an increase in prescription drug abuse.<sup>6</sup> In fact, forty-three percent of all fatal drug overdoses in 2010 involved prescription painkillers.<sup>7</sup> Despite national efforts to curtail prescription drug abuse, recent studies show that prescription drug-related deaths have continued to rise in the United States.<sup>8</sup> According to Tom Frieden, the Director of the U.S. Centers for Disease Control and Prevention, prescription drug abuse is “a big problem, and it’s getting worse.”<sup>9</sup> Illicit drug abuse is also worsening in the United States. A 2012 survey reported that approximately 335,000 Americans were current users of heroin, up from the 153,000 reported in 2007, and that approximately 18.85 million Americans were

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1. *Obituaries*, MIAMI HERALD (Feb. 14, 2007), <http://www.legacy.com/obituaries/herald/obituary-preview.aspx?n=ashley-brooks&pid=86449756&referrer=150>.

2. John Counts, *Autopsy: U-M Student Died from Accidental Heroin and Cocaine Overdose*, MLIVE (Dec. 26, 2013, 10:36 PM), [http://www.mlive.com/news/ann-arbor/index.ssf/2013/12/autopsy\\_u-m\\_student\\_died\\_from.html](http://www.mlive.com/news/ann-arbor/index.ssf/2013/12/autopsy_u-m_student_died_from.html).

3. *Drug-Related Deaths—Notable Celebrities*, DRUGS.COM, [http://www.drugs.com/celebrity\\_deaths.html](http://www.drugs.com/celebrity_deaths.html) (last visited Sept. 6, 2014).

4. Kenneth D. Kochanek et al., *Deaths: Final Data for 2009*, NAT'L VITAL STAT. REP., Dec. 29, 2011, at 50 (reporting 39,147 drug-induced deaths in 2009); Sherry L. Murphy et al., *Deaths: Final Data for 2010*, NAT'L VITAL STAT. REP., May 8, 2013, at 11 (reporting 40,393 drug-induced deaths in 2010); see also Lisa Girion et al., *Drug Deaths Now Outnumber Traffic Fatalities in U.S.*, *Data Show*, L.A. TIMES (Sept. 17, 2011), <http://www.latimes.com/news/local/la-me-drugs-epidemic-20110918-m,0,1591295.story#axzz2qPsLh42N> (“While most major causes of preventable death are declining, drugs are an exception. The [drug-induced] death toll has doubled in the last decade. . .”).

5. Kochanek et al., *supra* note 4, at 49–50 (reporting 39,147 drug-induced deaths and 36,216 deaths from motor vehicle accidents in 2009, reflecting a difference of 2,931 deaths); Murphy et al., *supra* note 4, at 39–40 (reporting 40,393 drug-induced deaths and 35,332 deaths from motor vehicle accidents in 2010, reflecting a difference of 5,061 deaths); Scott Glover & Lisa Girion, *Prescription Drug-Related Deaths Continue to Rise in U.S.*, L.A. TIMES (Mar. 29, 2013), <http://articles.latimes.com/2013/mar/29/local/la-me-ln-prescription-drugrelated-deaths-continue-to-rise-20130329>.

6. Glover & Girion, *supra* note 5 (stating that overdose deaths involving prescription painkillers, including OxyContin and Vicodin, and anti-anxiety drugs, such as Valium and Xanax, more than tripled between 2000 and 2008).

7. *Id.*

8. *Id.*

9. *Id.*

current users of marijuana, up from the 14.4 million reported in 2007.<sup>10</sup>

Along with—and indeed, *because of*—the increase in drug abuse, violent crime is on the rise across America.<sup>11</sup> In October 2013, the U.S. government reported a fifteen percent increase in violent crime from the previous year.<sup>12</sup> As drug addicts desperate for their next high frequently resort to violent measures,<sup>13</sup> the effect of drug abuse on the crime rate is substantial.<sup>14</sup> In fact, sixty percent of crime is drug or alcohol-related.<sup>15</sup> Gang violence resulting from “turf battles” and the generally hierarchical infrastructure of illegal street sales is responsible for another twenty percent of all crime.<sup>16</sup> Because the civil forfeiture framework may be invoked to deter gang violence in addition to drug crimes, civil forfeiture is in a position to address eighty percent of all crime.<sup>17</sup>

Behind the increase in crime is the increase in drug abuse, and behind the increase in drug abuse are the illegal drug sales that supply drug addictions. Drugs that are illegally injected into our society “threaten the health and welfare of youth and children, families and

10. SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., NATIONAL SURVEY ON DRUG USE AND HEALTH tbl.1.1A (2007), available at <http://www.icpsr.umich.edu/icpsrweb/SAMHDA/studies/23782>; SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., NATIONAL SURVEY ON DRUG USE AND HEALTH tbl.1.12A (2012), available at <http://www.icpsr.umich.edu/icpsrweb/SAMHDA/studies/34933>; see also News Release, Substance Abuse and Mental Health Services Administration, *National Survey Shows a Rise in Illicit Drug Use from 2008 to 2010* (Sept. 8, 2011), available at <http://www.samhsa.gov/newsroom/press-announcements/201109081245>.

11. *Drugs and Crime*, NAT’L COUNCIL ON ALCOHOLISM & DRUG DEPENDENCE, INC., <http://ncadd.org/index.php/learn-about-drugs/drugs-and-crime> (last visited Sept. 7, 2014) (“Drug addiction can lead to criminal behavior. . . . Without question, drug use and criminality are closely linked.”); Donna Leinwand Leger, *Violent Crime Rises for Second Consecutive Year*, USATODAY (Oct. 24, 2013, 10:56 PM), <http://www.usatoday.com/story/news/nation/2013/10/24/violent-crime-rising-in-united-states/3180309/> (“The 2012 National Crime Victimization Survey by the Bureau of Justice Statistics found . . . a 15% increase in how many people reported being victims of rape, robbery or assault. Property crime—burglary, theft and car theft—rose 12% . . . . For 2011, data from the victims survey also showed an increase in violent crime: up 17% from 2010, the sharpest rise in two decades.”).

12. Leger, *supra* note 11; see also Pete Yost, *Crime on the Rise for a Second Year*, BOSTON GLOBE (Oct. 25, 2013, 11:45 AM), <http://www.bostonglobe.com/news/nation/2013/10/24/survey-marks-year-crime-increases/at2pC9KazFMmUP5oxq5y2M/story.html>.

13. *Social Effects of an Addiction—Drug Addiction*, MEDIC8, <http://www.medic8.com/drug-addiction/social-effects.html> (last visited Sept. 7, 2014) (“Burglary, muggings, robberies . . . are all ways of funding an addiction . . . [and] the more serious the addiction the greater the chance of these being accompanied by violence. There are people who are so . . . completely controlled by their addiction that they will do anything to service [it]. If this means using violence then they will do so.”).

14. Leger, *supra* note 11.

15. *Drugs and Crime*, *supra* note 11 (stating that “60% of individuals arrested for most types of crimes test positive for illegal drugs at arrest”); see also Ed Gogek, *Why Legalization Won’t Work*, REASONS TO OPPOSE ‘MEDICAL MARIJUANA’ IN ARIZONA, <http://edgogek.com/brief-summary/> (last visited Sept. 7, 2014).

16. Gogek, *supra* note 15.

17. Florida Contraband Forfeiture Act, FLA. STAT. § 874.08 (2013).

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communities,’” and the money generated by their illegal sale “‘feed[s] corruption, enhance[s] the power of criminal networks[,] and create[s] fear and instability.’”<sup>18</sup> According to the 2013 World Drug Report issued by the United Nations Office on Drugs and Crime, trafficking in illegal drugs undermines the stability, security, and social and economic development of entire regions.<sup>19</sup> However, drug dealers and drug abusers are, in many ways, equally culpable. In fact, “drug traffickers are merely filling an insatiable demand for their products. It is the drug users—addicts and casual users alike—who finance this national destruction, and it is they, in addition to the drug traffickers, who must ultimately bear the cost of their annihilative and illegal behavior.”<sup>20</sup> By penalizing both the sale and abuse of drugs, civil forfeiture mounts a thorough response to the increase in crime.

Civil forfeiture was designed to address the various criminal maladies that plague society by providing law enforcement an avenue to disincentivize crime.<sup>21</sup> By taking the economic profit out of crime, civil forfeiture eliminates the incentive to engage in criminal activity.<sup>22</sup> In addition to deterring future crime, civil forfeiture penalizes criminals by separating them from their profits<sup>23</sup> and makes it difficult for criminals to command the resources necessary to continue their illegal activities.<sup>24</sup> In so doing, civil forfeiture tears away at the illegal narcotics market, thereby attacking one of America’s greatest problems at its source.

Using the Florida Contraband Forfeiture Act as an example, Part II of this article will explain what civil forfeiture is and how it works. Part III of this article will explain the policy objectives justifying civil forfeiture, and Part IV will explain critics’ concerns with civil forfeiture. Part V of this article will continue to use the Florida Contraband Forfeiture Act to demonstrate how statutory codifications of civil forfeiture have upheld constitutional rights, despite critics’ claims to the contrary, and will explain why criminal forfeiture is an insufficient alternative to civil forfeiture. Part VI will challenge critics’ allegations that civil forfeiture

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18. Susan Scutti, *Drug Trafficking as Well as Drug Abuse Pose Health Threat to Many*, *UN Report States*, MED. DAILY (June 28, 2013, 5:32 PM), <http://www.medicaldaily.com/drug-trafficking-well-drug-abuse-pose-health-threat-many-un-report-states-247253>.

19. UNITED NATIONS OFFICE ON DRUGS & CRIME, *WORLD DRUG REPORT 2013*, available at [http://www.unodc.org/unodc/secured/wdr/wdr2013/World\\_Drug\\_Report\\_2013.pdf](http://www.unodc.org/unodc/secured/wdr/wdr2013/World_Drug_Report_2013.pdf).

20. Kelly McClure, *Federal Civil Forfeiture of Assets: How It Works and Why It Must*, 11 U. BRIDGEPORT L. REV. 419, 420 (1991).

21. Stefan D. Cassella, *Forfeiture is Reasonable, and It Works*, CRIM. L. & PROC. PRAC. GROUP NEWSL. (Federalist Soc’y, Wash., D.C.), May 1, 1997, available at <http://www.fed-soc.org/publications/detail/forfeiture-is-reasonable-and-it-works>.

22. *Id.*

23. *Id.*

24. *Asset Forfeiture*, FED. BUREAU OF INVESTIGATION, [http://www.fbi.gov/about-us/investigate/white\\_collar/asset-forfeiture](http://www.fbi.gov/about-us/investigate/white_collar/asset-forfeiture) (last visited Sept. 7, 2014).

is inherently corruptive, and Part VII will discuss the future of civil forfeiture.

## II. WHAT CIVIL FORFEITURE IS AND HOW IT WORKS

Do you remember when the class clown in your junior high school English class had his pencil confiscated by the teacher because he wouldn't stop rapping on the table with it? Or how about when the most popular girl in school had her cell phone confiscated by the principal because she wouldn't stop playing "Tracker" during an important assembly in the auditorium? Civil forfeiture channels the nature of these scenarios as it too is based upon the confiscation of assets. The activities that are punishable by civil forfeiture are criminal, however, and the assets sought to be confiscated are the proceeds and instrumentalities of criminal activity. An instrumentality of crime is any real or personal property that has facilitated the commission of a crime, and the proceeds of crime are the profits, or "ill-gotten gains," of that illegal activity.<sup>25</sup> Although civil forfeiture is most commonly thought of as a response to drug crimes, it may also be used as a response to certain white-collar crimes.<sup>26</sup>

Civil forfeiture occurs at both the federal and state levels of government.<sup>27</sup> In fact, federal contraband forfeiture statutes formed the template upon which many states based their own statutory constructions.<sup>28</sup> Because the same policy objectives justify both federal and state civil forfeiture schemes, the influence of federal contraband forfeiture statutes upon their state counterparts comes as no surprise. Indeed, the federal government has, like many state governments, taken the position that civil forfeiture has the capacity to render criminal enterprises "powerless to operate."<sup>29</sup> Criminal enterprises, like legitimate businesses, "generate a profit from the sale of their 'product' or 'services'" and "require employees, equipment, and cash flow to operate."<sup>30</sup> By separating criminals and criminal organizations from the equipment, cash flow, and profits vital to their operation, civil forfeiture severs the lifeline to

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25. Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal—Civil Law Distinction*, 42 HASTINGS L.J. 1325, 1335 (1991).

26. Brad Reid, *An Overview of Civil Asset Forfeiture and Recent Cases*, HUFFINGTON POST (Aug. 14, 2013, 7:03 PM), [http://www.huffingtonpost.com/brad-reid/civil-asset-forfeiture-ch\\_b\\_3745209.html](http://www.huffingtonpost.com/brad-reid/civil-asset-forfeiture-ch_b_3745209.html).

27. Joseph Cramer, Note, *Civilizing Criminal Sanctions—A Practical Analysis of Civil Asset Forfeiture Under the West Virginia Contraband Forfeiture Act*, 112 W. VA. L. REV. 991, 995 (2010).

28. *Id.*

29. *Asset Forfeiture*, *supra* note 24.

30. *Id.*

crime.<sup>31</sup> For example, civil forfeiture may be employed to confiscate a vehicle that has been used to transport and distribute illegal narcotics. Similarly, money gained from illegal drug sales may also be confiscated. By disrupting both the criminal's incentive and ability to commit a crime, his criminal enterprise is incapacitated, and his and others' desire to commit similar crimes is discouraged.

To provide a definition using formal terminology, civil forfeiture is the process by which the government or a law enforcement agency may gain title to an article of contraband seized pursuant to statutory authorization.<sup>32</sup> In Florida, the Florida Contraband Forfeiture Act (referred to hereinafter as "the Act") enables law enforcement agencies to forfeit any article of contraband that, in violation of the Act, is unlawfully transported, concealed, or possessed.<sup>33</sup> Real or personal property acquired with the proceeds of crime is similarly violative of the Act, as is the use of any real or personal property "to facilitate the transportation, carriage, conveyance, concealment, receipt, possession, purchase, sale, barter, exchange, or giving away of any contraband article."<sup>34</sup> Under the Act, the term "contraband article" includes, but is not limited to, controlled substances and any real or personal property used or attempted to be used in the commission of a felony, or acquired with proceeds gained by a violation of the Act.<sup>35</sup>

In Florida, civil forfeiture is a bifurcated process to which two distinct evidentiary standards apply.<sup>36</sup> The first stage of forfeiture, the seizure stage, begins when an authorized agency takes possession of, or "seizes," property for which there is probable cause to believe in the requisite, statutorily-defined connection to crime.<sup>37</sup> The ultimate issue of ownership is decided only later, in the second stage of civil forfeiture, the forfeiture stage, to which a "clear and convincing" evidentiary standard applies.<sup>38</sup> Law enforcement may seize personal property found to be in violation of the Act at the time that the violation is discovered, subject, of course, to the individual's Fourth Amendment right to be free from unreasonable searches and seizures and to the requirement that the seizing agency notify all persons entitled to notice of the right to a post-seizure adversarial preliminary hearing.<sup>39</sup> Unlike personal property, real

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31. *Id.*

32. *Id.*

33. Florida Contraband Forfeiture Act, FLA. STAT. § 932.702 (2013).

34. *Id.* § 932.702(3).

35. *Id.* § 932.701(2).

36. *Id.* § 932.703(2)(c), 932.704(8).

37. *Id.* § 932.703(2)(c).

38. *Id.* § 932.704(8).

39. *Id.* § 932.703(2)(a); U.S. CONST. amend. IV.

property—including land and structures<sup>40</sup>—generally may not be seized at the time of violation.<sup>41</sup> Rather, individuals entitled to notice must first be given the opportunity to attend a pre-seizure adversarial preliminary hearing before real property is seized.<sup>42</sup> Thus, any judge presiding over an adversarial preliminary hearing must review the available evidence and determine whether personal property has been properly seized or, in the case of real property, whether the property should be seized at all.<sup>43</sup> Presumably, the potentially farther-reaching consequences of taking control of real, rather than personal, property necessitates the statutory requirement that a finding of probable cause be made by a neutral judge before real property is seized.

The purpose of an adversarial preliminary hearing is to determine whether probable cause exists to believe that the subject property is in violation of the Florida Contraband Forfeiture Act.<sup>44</sup> That is, the purpose of an adversarial preliminary hearing is “to determine whether there is probable cause to believe that the property was used, is being used, was attempted to be used, or was intended to be used” to facilitate the transportation, concealment, possession, or exchange of any contraband article, or whether the property was acquired by proceeds obtained as a result of such an act.<sup>45</sup> Note that the standard of proof applied at adversarial preliminary hearings, which deal only with the legality of the seizure stage of forfeiture, is “probable cause.”<sup>46</sup> Whether property is ultimately forfeited is based on a “clear and convincing” standard of proof.<sup>47</sup>

Persons entitled to notice of their right to attend an adversarial preliminary hearing include any owner, lienholder, entity, or person in possession of the property at the time of seizure.<sup>48</sup> This notice must be given to such individuals at the time the property is seized, or mailed no more than five working days after the seizure.<sup>49</sup> Should any such individual request an adversarial preliminary hearing, such a hearing must be held no more than ten days after the request is received or as soon as practicable thereafter.<sup>50</sup> Should they elect for and attend the hearing,

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40. *Real Property*, LEGAL INFORMATION INST., [http://www.law.cornell.edu/wex/real\\_property](http://www.law.cornell.edu/wex/real_property) (last visited Sept. 7, 2014).

41. § 932.703(2)(b).

42. *Id.*

43. *Id.* § 932.701(11)(f).

44. *Id.*

45. *Id.* § 932.703(2)(c).

46. *Id.*

47. *Id.* § 932.704(8).

48. *Id.* § 932.701(2)(e).

49. *Id.* § 932.703(2)(a).

50. *Id.*

these individuals may present evidence to contest the existence of probable cause and, thus, the seizure of the subject property. At the adversarial preliminary hearing—as well as at any other hearing on the subject of forfeiture under the Florida Contraband Forfeiture Act—the seizing law enforcement agency carries the burden of proof.<sup>51</sup> If the law enforcement agency establishes that probable cause exists to believe that the subject property is in violation of the Act, the court will thereafter enter an order finding probable cause<sup>52</sup> and will authorize either the initial or continued seizure of the property sought to be forfeited.<sup>53</sup>

If no person that is entitled to notice requests an adversarial preliminary hearing, the court will determine whether a probable violation exists by reviewing a complaint filed by the seizing agency.<sup>54</sup> Unlike criminal forfeiture, which is forfeiture achieved through criminal sentencing,<sup>55</sup> civil forfeiture is an action made directly against property.<sup>56</sup> Consequently, the law enforcement agency must file an *in rem* action against the seized property within forty-five days of seizure.<sup>57</sup> If the court determines from the complaint that probable cause exists to believe that a violation of the Act has occurred, the court will enter an order showing the probable cause finding.<sup>58</sup>

Once an order for probable cause has been entered and a copy thereof, along with a copy of the complaint, served to each person with an ownership or security interest in the property, any claimant who wishes to contest the forfeiture has twenty days to file any responsive pleadings.<sup>59</sup> In addition to serving these documents to each person that a “diligent search and inquiry”<sup>60</sup> identifies as having an interest in the property, the seizing agency must publish notice of the complaint in a newspaper of general circulation once a week for two consecutive weeks.<sup>61</sup> If responsive pleadings are filed and the issue of forfeiture is taken to trial, claimants are entitled to a jury trial, unless such right is

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51. *Id.* § 932.701(11)(f).

52. *Id.* § 932.704(5)(b).

53. *Id.* § 932.703(2)(c).

54. *Id.* § 932.704(5)(b).

55. Stefan D. Cassella, *The Case for Civil Forfeiture: Why In Rem Proceedings Are an Essential Tool for Recovering the Proceeds of Crime*, SELECTED WORKS OF STEFAN D. CASSELLA (Jan. 2008), [http://works.bepress.com/cgi/viewcontent.cgi?article=1019&context=stefan\\_cassella](http://works.bepress.com/cgi/viewcontent.cgi?article=1019&context=stefan_cassella).

56. *Forfeiture*, LEGAL INFO. INST., <http://www.law.cornell.edu/background/forfeiture/> (last visited Sept. 7, 2014).

57. § 932.701(2)(c).

58. *Id.* § 932.704(5)(b).

59. *Id.* § 932.704(5)(c).

60. *Id.* § 932.704(6)(c).

61. *Id.* § 932.704(6)(a).

waived.<sup>62</sup> If the forfeiture goes to trial and the court or jury<sup>63</sup> determines that clear and convincing evidence exists to believe that the contraband article was used or intended to be used in violation of the Florida Contraband Forfeiture Act, the court will enter an order forfeiting the property to the seizing law enforcement agency.<sup>64</sup>

### III. POLICY OBJECTIVES JUSTIFYING CIVIL FORFEITURE

Civil forfeiture is used by law enforcement agencies as a means of undermining “the economic infrastructure of the criminal enterprise.”<sup>65</sup> By separating the criminal from his profits, the financial incentive to commit crime is eliminated.<sup>66</sup> Because civil forfeiture is an *in rem* action capable of achieving strong public policy objectives where circumstances have rendered *in personam* criminal forfeiture impossible or unfavorable, federal officials have supported the fifty states in developing their own legislative framework codifying civil forfeiture. In 2007, Stefan D. Cassella, the Deputy Chief for Legal Policy at the U.S. Department of Justice, commented that “it is essential that the forfeiture laws have a civil component that allows the State to recover the proceeds of crime whether there is a criminal prosecution of the wrongdoer or not.”<sup>67</sup> Also a proponent of civil forfeiture, the Federal Bureau of Investigation (“FBI”) has stated on its website that it aims to incorporate civil forfeiture, “where appropriate and allowed by law, to deter criminal activity and dismantle criminal enterprises.”<sup>68</sup> The State of Florida has invoked these interests statutorily, as indicated by the preface to the Florida Contraband Forfeiture Act, which states that it is the policy of the State of Florida that the Act be used “to deter and prevent the continued use of contraband articles for criminal purposes while protecting the proprietary interests of innocent owners . . . .”<sup>69</sup> Indeed, civil forfeiture is only appropriate so long as it is able to balance these interests.

In addition to preventing criminal activity, civil forfeiture allows states to take the instrumentalities of crime out of circulation. Coupled with its focus on the elimination of articles of contraband used or intended to be used in the commission of drug crimes and various other, nonspecifically expressed felonies, the Florida Contraband Forfeiture

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62. *Id.* § 932.704(3).

63. *Id.* (stating that the ultimate issue of forfeiture shall be tried by a jury, unless the right to a jury trial is waived).

64. *Id.* § 932.704(7).

65. *Asset Forfeiture*, *supra* note 24.

66. Cassella, *supra* note 21.

67. Cassella, *supra* note 55.

68. *Asset Forfeiture*, *supra* note 24.

69. § 932.704.

Act has explicitly been dedicated by the legislature to the elimination of contraband articles affiliated with gang activity. Pursuant to the Act, “all profits, proceeds, and instrumentalities of criminal gang activity . . . and all profits, proceeds, and instrumentalities of criminal gang recruitment . . . are subject to seizure and forfeiture. . . .”<sup>70</sup> In addition to its ability to address gang violence, civil forfeiture has the power to shut down a “crack house” from which drug dealers are selling drugs to children on their way to school and thereby endangering the health, safety, and welfare of the community.<sup>71</sup> Similarly, “an airplane used to fly cocaine from Peru into Southern California, or a printing press used to mint phony \$100 bills” may be confiscated through civil forfeiture.<sup>72</sup> While such visuals might incite enthusiasm for civil forfeiture, it is of paramount importance that the desire to fight crime be offset by the right to secure property ownership.<sup>73</sup>

#### IV. CRITICS’ CONCERNS WITH CIVIL FORFEITURE

Critics of civil forfeiture believe that the procedure functions to replace criminal forfeiture as an easy and convenient means of “divesting private citizens of property.”<sup>74</sup> This belief is largely influenced by the notion that “civil remedies offer speedy solutions that are unencumbered by the rigorous constitutional protections associated with criminal trials, such as proof beyond a reasonable doubt, trial by jury, and appointment of counsel.”<sup>75</sup> Before explaining why these concerns are unfounded, this article will identify and give due recognition to each.

##### A. *Standard of Proof*

Among critics’ greatest concerns with civil forfeiture is the difference between the standard of proof applicable to civil forfeiture proceedings and that applicable to criminal proceedings.<sup>76</sup> A “standard of proof” dictates how compelling the evidence presented must be in order for the

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70. Florida Contraband Forfeiture Act, FLA. STAT. § 874.08 (2013).

71. Cassella, *supra* note 21.

72. *Id.*

73. Reid, *supra* note 26.

74. Cramer, *supra* note 27, at 997; *see also Forfeiture, supra* note 56 (stating that civil forfeiture is a “threat to those concerned about abuse or circumvention of Constitutional protections” and that “the source of [civil forfeiture’s] attractiveness to law enforcement” is its independence from any criminal conviction).

75. Cheh, *supra* note 25, at 1329.

76. Williams, Holcomb & Kovandzic, *Policing for Profit*, INST. FOR JUST., <http://www.ij.org/part-i-policing-for-profit-2> (last visited Sept. 7, 2014); McClure, *supra* note 20, at 438 (“As a result of the differing burdens of proof in criminal and civil forfeiture cases, the government stands in a better position to recover assets in the civil arena and will often opt not to prosecute criminally nor separate the criminal prosecution from the forfeiture proceedings.”).

prosecutor or petitioner—the former in a criminal proceeding and the latter in a civil forfeiture case—to succeed on his or her claim.<sup>77</sup> Generally, the standard of proof required to succeed on a civil forfeiture claim is less than that “required to prove that the individual was guilty of the criminal activity that supposedly justified the forfeiture in the first place.”<sup>78</sup> In other words, the standard of proof required in a civil trial is less than that required in a criminal trial. The standard of proof required in a criminal trial is “beyond a reasonable doubt,” which means that the evidence must be so compelling that there is no reasonable doubt as to the defendant’s guilt.<sup>79</sup> “Beyond a reasonable doubt” is the highest standard of proof recognized by the American judicial system.<sup>80</sup> The standard of proof in a civil trial requires less compelling evidence, either a “preponderance of the evidence” or “an intermediate standard variously expressed as proof by ‘clear and convincing,’ ‘clear, cogent, and convincing,’ or ‘clear, unequivocal, and convincing’ evidence.”<sup>81</sup> This, critics point out, can produce the paradoxical result of a criminal defendant’s property being forfeited via civil forfeiture, despite an acquittal of the defendant in a criminal court on charges arising from the same facts as those that produced the forfeiture. Because of the lesser evidentiary standard applied in civil forfeiture proceedings, critics feel that civil forfeiture allows law enforcement to circumvent the protections accorded defendants in criminal courts and to succeed on claims they would not otherwise succeed on were the higher, criminal evidentiary standard applied.

### B. *Civil Forfeiture as an Action In Rem*

Critics have also undermined civil forfeiture by pointing out that the procedure is based on the antiquated judicial theories supporting and defining actions *in rem*.<sup>82</sup> More specifically, critics argue that “[b]y proceeding directly against the property itself rather than a property owner, *in rem* civil forfeiture allows the government to avoid many of the constitutional protections that a criminal defendant would ordinarily be enti-

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77. Williams, Holcomb & Kovandzic, *supra* note 76.

78. *Id.*

79. *Criminal Cases*, U.S. COURTS, <http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/HowCourtsWork/CriminalCases.aspx> (last visited Sept. 7, 2014).

80. TERENCE ANDERSON ET AL., *ANALYSIS OF EVIDENCE* 243 (2d ed. 2005).

81. *Id.*

82. LEONARD LEVY, *A LICENSE TO STEAL: THE FORFEITURE OF PROPERTY* 20 (1996) (“The personification fiction infects the law of civil forfeiture to this day, as does the notion that the inanimate thing caused a misfortune or even a crime, for which it must be punished by forfeiture to the government. The government has superseded the king.”); *see also Forfeiture*, *supra* note 56 (“By acting civilly, the government seeks to remedy a harm, through the fiction of the property’s ‘guilt.’”).

tled to receive.”<sup>83</sup> Opponents of civil forfeiture dedicate a great deal of their literature to reminding readers of the historic—and often laughable—legal fictions that originally justified *in rem* proceedings. Historically, these critics remind us, ships suspected of criminal activity were treated as if they were “living, breathing defendant[s] accused of crime” and were “arrested and prosecuted by name.”<sup>84</sup> When the property was ‘convicted,’ the government would sell “the offending property” at an auction and deliver the proceeds to the king and governor.<sup>85</sup> According to critics, these historic *in rem* proceedings were riddled with “reduced protection of innocent owners, potential hardship to family and descendants, reduced due process protection, and lessened focus on owner culpability.”<sup>86</sup> Critics believe that “modern civil forfeiture . . . shares many of the drawbacks of ancient forfeiture,” because it, like “ancient forfeiture,” is an *in rem* proceeding.<sup>87</sup>

### C. Criminal Procedure Guarantees

Aside from the difference in standards of proof, there are other guarantees accorded to criminal defendants that are not constitutionally *required* in civil proceedings. Consequently, critics argue that civil forfeiture is an avenue through which law enforcement agencies may avoid the “strict due process requirements” that apply to criminal prosecutions.<sup>88</sup> While the Fifth and Sixth Amendments entitle criminal defendants to state-supplied counsel and a jury trial, there are no constitutional provisions that entitle parties to civil actions to the same protections.<sup>89</sup> Although opponents of civil forfeiture have dedicated much of their attention to the alleged “circumvention” of these specific guarantees, they often criticize civil forfeiture for depriving citizens of procedural due process generally, arguing that civil forfeiture allows law enforcement to take property “without a semblance of fair procedure.”<sup>90</sup> A more specific concern about civil forfeiture as it relates to procedural due process is the allegation that it allows law enforcement officials to seize

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83. Cramer, *supra* note 27, at 996.

84. *Id.* at 994.

85. *Id.*

86. *Id.* at 995.

87. *Id.*

88. *Id.* at 992.

89. U.S. CONST. amend. VI; U.S. CONST. amend. V; *The Right to Effective Assistance of Counsel*, NAT'L PARALEGAL C., [http://nationalparalegal.edu/conlawcrimproc\\_public/RightsAtTrial/RightToCounsel.asp](http://nationalparalegal.edu/conlawcrimproc_public/RightsAtTrial/RightToCounsel.asp) (last visited Sept. 7, 2014).

90. LEVY, *supra* note 82, at 20; *see also* Nkechi Taifa, *Civil Forfeiture v. Civil Liberties*, 39 N.Y.L. SCH. L. REV. 95, 95 (1994) (“[Civil forfeiture violates the constitutional] right not to be deprived of property without due process of law.”); *see generally* Douglas Kim, *Asset Forfeiture: Giving Up Your Constitutional Rights*, 19 CAMPBELL L. REV. 527 (1997).

property without fair notice or an opportunity to be heard.<sup>91</sup>

#### D. *Improper Incentives for Law Enforcement*

Opponents of civil forfeiture also argue that the civil forfeiture framework is inherently corruptive. Specifically, they believe that by allowing a seizing law enforcement agency to gain title to property that it itself seizes,<sup>92</sup> civil forfeiture injects an “improper monetary incentive” that encourages “for profit policing.”<sup>93</sup> They further claim that there are essentially no “real limitations” as to how law enforcement agencies may spend money earned by civil forfeiture.<sup>94</sup> Critics argue that because of a lack of limitations on spending, the majority of law enforcement revenue is now improperly dependent upon how often and how aggressively law enforcement agencies pursue private citizens’ property.<sup>95</sup>

### V. ADDRESSING CRITICS’ CONCERNS USING CIVIL FORFEITURE AS CODIFIED BY THE FLORIDA CONTRABAND FORFEITURE ACT

#### A. *Defending the Difference in Standards of Proof*

Critics often misalign the probable cause standard applicable to the seizure stage of civil forfeiture with the “proof beyond a reasonable doubt” standard applicable to criminal trials.<sup>96</sup> Instead, critics should compare the standard of proof applied in criminal trials to that applied in civil forfeiture trials. In other words, critics should compare the evidentiary standard applicable to criminal trials to the evidentiary standard applied at the forfeiture stage of civil forfeiture—at which the ultimate issue of ownership is decided—rather than to the often lesser standard applied to the seizure stage of civil forfeiture. This would be a more equitable approach because, although a law enforcement agency must promptly submit to a court for a probable cause determination for the purpose of mitigating the potential for long-term and ultimately improper seizures, states’ civil forfeiture schemes generally apply higher

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91. Roger Pilon, *Forfeiting Reason*, CRIM. L. & PROC. PRAC. GROUP NEWSL. (Federalist Soc’y, Wash., D.C.), May 1, 1997, available at <http://www.fed-soc.org/publications/detail/forfeiting-reason> ([O]fficials can seize a person’s property, real or chattel, without notice or hearing. . . .”).

92. Florida Contraband Forfeiture Act, FLA. STAT. § 932.703(1)(a) (2013).

93. Cramer, *supra* note 27, at 992.

94. *Id.* at 1015.

95. Mary M. Cheh, *Can Something This Easy, Quick, and Profitable Also Be Fair? Runaway Civil Forfeiture Stumbles on the Constitution*, 39 N.Y.L. SCH. L. REV. 1, 4 (1994).

96. Taifa, *supra* note 90, at 98 (“Authorities must simply satisfy a requirement of probable cause that the property was used in an illicit activity or was purchased with funds from illicit activity in order to subject the property to forfeiture.”).

standards of proof to determine the ultimate issue of forfeiture.<sup>97</sup> For example, although probable cause is required to effectuate a seizure of property alleged to be in violation of the Florida Contraband Forfeiture Act,<sup>98</sup> the standard of proof required to prove the forfeitability of property at trial is “clear and convincing.”<sup>99</sup> The misalignment of standards of proof is especially unwarranted considering that, in a bifurcated, criminal proceeding where liability and sentencing are considered separately, the government may only need to prove the forfeitability of property by “a preponderance of the evidence,” which is *less* than the standard of proof required in civil forfeiture proceedings in Florida and fifteen other states and at least *equal* to the standard of proof required in civil forfeiture proceedings in another twenty-four states.<sup>100</sup> Thus, the reverse of critics’ concern with the difference in standards of proof could actually be true—the government could meet the applicable evidentiary standard establishing a right to criminal forfeiture, but not meet the applicable evidentiary standard establishing a right to civil forfeiture.

Traditionally, criminals may face two potential trials.<sup>101</sup> That is, a criminal may be made defendant to both a criminal prosecution initiated by the government, as well as to a civil suit initiated by the criminal’s victim(s).<sup>102</sup> While the purpose of a criminal trial is to adjudicate guilt and impose a proper punishment, civil actions are generally pursued by victims for the purpose of obtaining compensation.<sup>103</sup> These traditional purposes aptly demonstrate the complementary relationship and appropriate distinction between “criminal sanctions” and “civil remedies.”<sup>104</sup>

Property rights are not absolute and generally do not warrant the added protection of the “beyond a reasonable doubt” evidentiary standard. As where an individual’s property may be subject to forfeiture based on the same allegations of which that individual was acquitted in criminal court, a civil plaintiff may be awarded compensation at the expense of a defendant who has been acquitted of the crime that supposedly justified the plaintiff’s recovery in the first instance.<sup>105</sup> Despite this

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97. Williams, Holcomb & Kovandzic, *supra* note 76.

98. Florida Contraband Forfeiture Act, FLA. STAT. § 932.703(2) (2013).

99. *Id.* § 932.704(8).

100. Williams, Holcomb & Kovandzic, *supra* note 76.

101. Cheh, *supra* note 25, at 1327.

102. *Id.*

103. *Id.*

104. *Id.*; see also LEVY, *supra* note 82, at 22 (“The distinction between civil and criminal forfeitures reflects the distinction between civil and criminal law. Civil law determines private rights, and it provides remedies and compensation for harm done to those rights. Criminal law punishes criminal offenders.”).

105. Compare *People v. Simpson*, No. BA 097211, 1995 WL 569648 (Cal. Super. Ct. L.A. County Sept. 21, 1995), with *Rufo v. Simpson*, 103 Cal. Rptr. 2d 492 (Cal. Ct. App. 2001).

apparent paradox, the difference in the standards of proof applied in civil and criminal trials is justified by the consequences that face the defendant should the prosecution or plaintiff prevail.<sup>106</sup> Indeed, “many judicial dicta suggest that the degree of probability [of guilt or liability] may depend on the seriousness of the consequences to the subject of the allegation . . . .”<sup>107</sup> This trend suggests that society is more willing to accept the possibility of a false payment of damages than the possibility of false incarceration, which entails a physical deprivation of liberty. Criminal trials require a higher standard of proof than civil trials because criminal defendants face a deprivation of liberty if convicted, whereas civil defendants face the lesser evil of an order to pay monetary damages if the plaintiff prevails.<sup>108</sup> Because claimants to property in a civil forfeiture proceeding are facing a deprivation of neither life nor liberty, the heightened standard of proof necessary to protect criminal defendants is not warranted. Just as the civil defendant faces the less severe consequence of an order to pay money, so too the claimant to property in a civil forfeiture proceeding faces the less severe consequence of an order to forfeit property of monetary value.

However, the fact that there is one, identifiable victim hoping to be “made whole” in most civil proceedings may contribute to society’s greater acceptance of false payment than false imprisonment. Yet, the fact that claimants to property in a civil forfeiture proceeding do not generally have any one, particular victim to answer to does not mean that their offenses have not produced victims. For example, drug trafficking—the most common offense for which property is forfeited<sup>109</sup>—victimizes both individuals and entire *communities*. This is because the illegal injection of drugs into a community affects the health and safety of the community’s population.<sup>110</sup> Consequently, the remedies offered to plaintiffs in civil cases at a lesser burden of proof are equally—if not more—deserved by the communities that suffer from the crimes at the center of civil forfeiture cases. Indeed, even civil forfeiture’s worst critics have conceded that civil forfeiture “[provides] financial restitution to the community.”<sup>111</sup> Civil forfeiture allows law enforcement agencies to collect civil remedies on behalf of their communities. By collecting on

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106. ANDERSON ET AL., *supra* note 80, at 243 (“[I]n proportion as the crime is enormous, so ought the proof to be clear.”).

107. *Id.*

108. Scott E. Sundby & Barbara D. Underwood, *Burden of Proof*, ENCYCLOPEDIA OF CRIME & JUST. (2002), [http://www.encyclopedia.com/topic/Burden\\_of\\_proof.aspx](http://www.encyclopedia.com/topic/Burden_of_proof.aspx).

109. Radley Balko, *Take the Money and Run: The Crazy Perversities of Civil Asset Forfeiture*, SLATE (Feb. 4, 2010, 5:09 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2010/02/take\\_the\\_money\\_and\\_run.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2010/02/take_the_money_and_run.html).

110. Scutti, *supra* note 18.

111. Cramer, *supra* note 27, at 995.

crimes that, like drug trafficking, have a wide span of victims who are not specifically identifiable and are not otherwise actionable by the community's general population for want of standing, law enforcement agencies are able to use earnings from civil forfeiture in ways that benefit the true victim: the community. Moreover, where specific victims have proven identifiable, civil forfeiture has been said to allow for these victims' compensation more adequately than restitution statutes.<sup>112</sup>

While the objective in a criminal forfeiture is to punish,<sup>113</sup> the objective in a civil forfeiture is to deter the commission of similar crimes by both the defendant and others and to use criminals' profits against them by making law enforcement agencies better and communities safer. Indeed, the desire for punishment is so deeply embedded in the context of criminal sentencing that property forfeited criminally need not even be related to the crime.<sup>114</sup> Because civil forfeiture is based on using criminals' "ill-gotten gains" to benefit the community, civil forfeiture is more appropriately aligned with civil remedies than criminal sanctions, and, thus, with the lesser standard of proof applied to the pursuit of civil remedies.

B. *How the In Rem Nature of Civil Forfeiture Serves Functions for Which Criminal Forfeiture is Insufficient*

Although critics balk at the antiquated theories upon which civil forfeiture has developed, it is the *in rem* nature of civil forfeiture that allows the procedure to function and to achieve the public policy goals, which justify it in the first instance. Unlike an action *in personam*, an action *in rem* is directed toward property, rather than toward a person.<sup>115</sup> As previously mentioned, *in rem* proceedings were historically justified by the legal fiction that the property had done something wrong.<sup>116</sup> Over time, however, this otherwise antiquated justification has been "merged with a belief that the right to own property could be denied an individual who engaged in criminal conduct," as well as with a need to resolve multiple claims to property in a single proceeding.<sup>117</sup> As such, the support for an action *in rem* goes beyond any archaic theory. Specifically, the *in rem* character of civil forfeiture promotes judicial efficiency. That

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112. Cassella, *supra* note 21.

113. Heather J. Garretson, *Federal Criminal Forfeiture: A Royal Pain in the Assets*, 18 S. CAL. REV. L. & SOC. JUST. 45, 47 (2008).

114. *Id.* at 52 ("If tracing the directly forfeitable asset is impossible, the government may seek forfeiture of other property as a substitute asset."); see also LEVY, *supra* note 82, at 22 (conceding that, in criminal forfeiture, "[t]he property need not have a relationship to the crime").

115. *Actions in Rem: Proceedings Against Property*, JUSTIA US LAW, <http://law.justia.com/constitution/us/amendment-14/41-actions-in-rem.html> (last visited Aug. 6, 2014).

116. Cassella, *supra* note 55.

117. *Asset Forfeiture*, *supra* note 24.

is, in contrast to an *in personam* action—which requires that defendants be individually located, served, and tried—civil forfeiture provides notice to all claimants with an interest in seized property at once, thus minimizing the burden on courts.<sup>118</sup>

Contrary to critics' accusations that the independence of civil forfeiture from any criminal conviction is for the purpose of "[circumventing] Constitutional protections,"<sup>119</sup> it is by virtue of its separation from any criminal prosecution that civil forfeiture often becomes the only viable option through which criminal proceeds may be separated from even the most clearly guilty defendants. That is, as an *in rem* action separate from criminal prosecution, civil forfeiture provides law enforcement the opportunity to pursue legitimate interests in situations where criminal forfeiture—*forfeiture achieved through criminal sentencing—is or becomes unavailable, despite the existence of evidence sufficient to prove guilt beyond a reasonable doubt.*<sup>120</sup> Such situations arise where a criminal conviction (the necessary prerequisite to criminal forfeiture) is either not possible or not pursued for reasons other than the demanding burden of proof. For example, a criminal conviction is not possible where the criminal defendant has died, has fled, or is unknown. Although a criminal conviction is possible absent such circumstances, a criminal conviction may not be appropriate in situations where the interests of justice are more effectively served by the civil forfeiture of property than by the criminal conviction of the malfeasant, which must always precede a criminal forfeiture.<sup>121</sup> The justification for law enforcement's forfeiture of criminal proceeds remains strong in such instances, notwithstanding the unavailability or impropriety of criminal forfeiture. That is especially true in cases where the alleged crime is of such a nature as to be more effectively addressed by civil forfeiture than by the imprisonment of the wrongdoer, such as where a young adult has used his or her computer to create counterfeit currency.<sup>122</sup>

There are several situations for which criminal forfeiture is insufficient. For example, in a criminal forfeiture, only property in which the defendant has an interest may be forfeited, regardless of whether or not the owner of the property knew their property was being used in the

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118. Cassella, *supra* note 55 (arguing that "[w]e could bring a separate . . . action against each party with an interest in the property, but that would be cumbersome. . . . Civil forfeiture is the better approach: we bring an action against the property . . . give everyone notice and an opportunity to litigate a claim, provide a defense for innocent owners and resolve all third party issues at one time . . .").

119. *Forfeiture*, *supra* note 56.

120. Cassella, *supra* note 55.

121. *Id.*

122. *Id.*

commission of a crime.<sup>123</sup> This would mean that the same individual could repeatedly and without consequence lend their vehicle to known drug dealers for the purpose of transporting illegal narcotics. Thus, having a civil counterpart to criminal forfeiture is necessary for the forfeiture of criminal proceeds that may have been seized from a criminal defendant, but which are owned by third parties who are aware of or involved in the commission of the underlying crime.<sup>124</sup> Under the Florida Contraband Forfeiture Act, the government has the burden of demonstrating by a preponderance of the evidence that the third party owner “either knew, or should have known after a reasonable inquiry, that the property was being employed or was likely to be employed in criminal activity.”<sup>125</sup> Unless the government proves that the owner was more likely than not aware of the manner in which their property was being used, the owner’s interest in the property is protected by what has been coined the “innocent owner” defense to forfeiture.

Demonstrating the austerity of this evidentiary burden, the court in *In re Forfeiture of 1984 Chevrolet S-10 Pickup Truck* held that a woman neither knew, nor should have known, that her husband would use her vehicle to conduct an illegal drug transaction, despite her admitted awareness of his having a history of drug addiction and evidence that she had removed him from their joint bank account and from the title on her motor vehicle as a result of his addiction.<sup>126</sup> Coming to the opposite conclusion, the court in *Gross v. City of Wilton Manors* allowed the forfeiture of a third-party owner’s vehicle, but only after the owner openly testified to having had reason to believe that her son was using the car in furtherance of illegal activities.<sup>127</sup>

Civil forfeiture is also necessarily distinct from a criminal conviction in situations where the criminal defendant has died, has fled, or is unknown and therefore incapable of incurring criminal liability.<sup>128</sup> Where the defendant is unknown, criminal proceeds may be discovered

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123. *Id.*

124. *Id.*

125. Florida Contraband Forfeiture Act, FLA. STAT. § 932.703(6)(a) (2013).

126. *In re Forfeiture of 1984 Chevrolet S-10 Pickup Truck*, 515 So. 2d 274, 275–76 (Fla. Dist. Ct. App. 1986) (“[A]s a result of [her husband’s] drug addiction, [wife] had changed all of their bank accounts and the title to the car she drove from their joint names to her name alone, because she did not want to chance their dissipation in the event [her husband] was unsuccessful in effecting a cure of his drug dependency. She did nothing toward restricting his use of the truck during the rehabilitation period, nor did she make any independent inquiry as to his progress in that regard.”).

127. *Gross v. City of Wilton Manors*, 487 So. 2d 303, 303 (Fla. Dist. Ct. App. 1986) (Owner of confiscated vehicle admitted knowledge of her son’s drug problem before giving him “‘total use’ of the car for two months prior to [his using the car in the furtherance of a burglary].”).

128. Cassella, *supra* note 55.

in the hands of a mere courier not otherwise connected to the crime.<sup>129</sup> In such a case, law enforcement's interest in confiscating property that is between crimes remains strong, though their interest in pursuing criminal charges against the courier may be minimal or nonexistent. This is especially true in the context of organized crime, wherein "organi[z]ed crime heads use their resources to keep themselves distant from the crime which they are controlling and to mask the criminal origin of their assets," thereby preventing their prosecution and keeping their profits out of the reach of criminal forfeiture.<sup>130</sup> Although putting kingpins in jail is beyond its reach, civil forfeiture does put pressure on criminal organizations by cutting them off from the resources essential to their regime. In the similar situation where a criminal defendant becomes a fugitive and thereby insusceptible to either conviction or criminal forfeiture, civil forfeiture allows for forfeiture of the fugitive's criminal gains.<sup>131</sup> The fugitive maintains his right to contest such a forfeiture, but may only do so if he surrenders to law enforcement.<sup>132</sup>

Criminal forfeiture is also incapable of reaching the illegal profits of a criminal defendant who has died.<sup>133</sup> Because civil forfeiture is not precluded by the death of a criminal defendant, civil forfeiture maintains both its deterrent effect and the possibility of restitution beyond the criminal defendant's lifetime. For example, Kenneth Lay, the former Chief Executive Officer of Enron, died after he had been convicted of six counts of conspiracy and fraud, but before a criminal forfeiture order could be imposed to recover the more than \$95 million that he made from "trading Enron stock, manipulating his Enron line of credit and receiving an incentive bonus' as the company was spiraling into insolvency."<sup>134</sup> Civil forfeiture became the only way that the proceeds of Lay's criminal activity could be recovered.<sup>135</sup> Although the action against these proceeds is still pending, a judgment in the government's favor will yield funds for the Enron Victim Trust, which was established for the 20,000 Enron employees and countless investors that lost their life savings after the 2001 scandal.<sup>136</sup>

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129. *Id.*

130. Anthony Kennedy, *Justifying the Civil Recovery of Criminal Proceeds*, 12 J. FIN. CRIME 8, 12 (2004).

131. Cassella, *supra* note 55 ("[The fugitive] cannot ignore the process of the court in the criminal case and ask the court to protect his property interests in the civil one.").

132. *Id.*

133. *Id.*

134. Richard Rubin, *Kenneth Lay, Deceased Enron CEO, Triumphs Over IRS in Tax Court*, BLOOMBERG NEWS (Aug. 30, 2011, 12:50 PM), <http://www.bloomberg.com/news/2011-08-29/enron-ceo-kenneth-lay-bests-irs-in-tax-court.html>.

135. Cassella, *supra* note 55.

136. ENRON VICTIM TRUST, <http://www.enronvictimtrust.com/> (last updated Sept. 11, 2013).

Criminal forfeiture is also insufficient to the extent that it is limited to those crimes for which a state's legislature has statutorily authorized punishment by criminal forfeiture,<sup>137</sup> whereas a civil forfeiture action may be brought against property used in the commission of "any felony."<sup>138</sup> Of course, state legislatures could extend criminal forfeiture schemes to cover the same crimes as civil forfeiture, but such would serve only to supplant civil forfeiture with a procedure still incapable of addressing the scenarios described in the foregoing comparison.

Additionally, criminal forfeiture is insufficient to the extent that the policy rationales justifying civil forfeiture are not served by criminal forfeiture. By nature and unlike civil forfeiture, criminal forfeiture is a prosecution tool the proceeds of which the state does not necessarily appropriate to the assistance of law enforcement. Consequently, criminally forfeited property would not necessarily be used to better law enforcement the way that civilly forfeited property is.<sup>139</sup> By making the state responsible for forfeitures, convictions by plea bargain could present the unusual circumstance of criminal defendants turning over their property in an effort to lessen their sentence, which could be interpreted as effectively paying off the state to achieve a lesser sentence. The significance of that scenario is that the state's judgment in sending criminals to jail might be impaired by the attraction of assets offered up in plea agreements by wealthy criminal defendants. In other words, critics would have to worry about prosecuting for profit, rather than policing for profit.<sup>140</sup> Rather than being put in jail, criminals could remain on the streets. Furthermore, criminal forfeiture provides only for the forfeiture of property related to the offenses for which a criminal defendant is being tried and convicted, but not for property related to criminal offenses to which the defendant may admit, but for which he or she was not otherwise charged or arrested. Such property may be limited in comparison to the entirety of proceeds from a drug empire, for example. In contrast, civil forfeiture, by focusing on the property rather than on the criminal, provides for the forfeiture of proceeds of crimes for which there is evidence to prove, though no conviction for the commission thereof.

Despite the inadequacies of criminal forfeiture relative to civil forfeiture, one consequence of the *in rem* nature of civil forfeiture that concerns critics is the independence of civil forfeiture from criminal

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137. *Criminal Forfeiture*, INTERNAL REVENUE SERV., [http://www.irs.gov/irm/part9/irm\\_09-007-003.html](http://www.irs.gov/irm/part9/irm_09-007-003.html) (last visited Aug. 18, 2014) (stating that criminal forfeiture may not be ordered except as a response to those crimes "for which forfeiture is to be imposed").

138. Florida Contraband Forfeiture Act, FLA. STAT. § 932.701(2)(a)(5) (2013).

139. *Id.* § 932.7055(5)(a).

140. Williams, Holcomb & Kovandzic, *supra* note 76.

conviction. Critics' concern with this independence lies with the possibility that a person may have his or her property civilly forfeited but be exonerated of the alleged criminal activity that justified the forfeiture.<sup>141</sup> In such a scenario, the purported purpose of civil forfeiture of taking criminal's profits and resources would fail on its face, as the person from whom property will have been forfeited would not then be a criminal. Civil forfeiture proceedings function to prevent law enforcement authorities from being able to use the procedure as a means of taking property away from those who they otherwise lack the evidence to have convicted. In fact, the nature of civil forfeiture proceedings ensures that where the applicable evidentiary standard establishes a right to the forfeiture of a claimant's property, society can generally rely on the claimant being convicted in his or her counterpart criminal case. That is, by requiring a connection between property sought to be civilly forfeited and criminal activity, civil forfeiture schemes inherently give rise to courts delving into the matter of criminal liability, though the process is removed from any formal conviction. Because there can be no connection between property and that which does not exist, civil forfeiture by nature requires the underlying crime to have actually been committed and to have been committed by the claimant.<sup>142</sup>

In Florida, "[i]t is an affirmative defense to a forfeiture proceeding that the nexus between the property sought to be forfeited and the commission of any underlying violation was incidental or entirely accidental."<sup>143</sup> By operation of this provision, the reverse of critics' concerns could actually occur—a criminal defendant could be adjudicated guilty and yet his property not be civilly forfeited because the property was deemed to have had only an *incidental* connection to the criminal activity. By virtue of having to determine whether there is a connection between seized property and criminal activity, the criminal nature of the alleged activity is reviewed by the court, if only inadvertently. Supporting this proposition is the fact that Florida courts have extended the exclusionary rule to civil forfeiture proceedings to prevent the review of inculpatory evidence that is unlawfully obtained.<sup>144</sup> There would be no reason to extend the exclusionary rule if criminal liability were not being considered through the review of inculpatory evidence.

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141. *Id.*

142. JUDITH SECHER & JAMES SWAIN, *FLORIDA FORFEITURE HANDBOOK* 365 (2d ed. 2005) (explaining the innocent owner defense to forfeiture).

143. § 932.703(8).

144. *Alvarez v. City of Hialeah*, 900 So. 2d 761 (Fla. Dist. Ct. App. 2005) (“[W]here the claimants raised a Fourth Amendment challenge to the stop of the vehicle, that issue must be addressed first and independently of the question of whether there is a nexus between the seized currency and unlawful drug activity.”).

Also assuaging critics' concern with the independence of civil forfeiture from criminal conviction is the fact that proof establishing a criminal defendant's innocence in criminal court remains available to the defendant in a counterpart civil forfeiture proceeding. Furthermore, if the indirect review of criminal liability is insufficient to address the scenario concerning critics, the possibility of its occurrence is slim. In an informal survey of those civil forfeiture actions initiated by the Martin County Sheriff's Office over a period of eighteen months and resulting in the forfeiture of property, there was also a conviction for the crime alleged.<sup>145</sup>

C. *How the Florida Contraband Forfeiture Act Preserves the Procedural Due Process Rights Accorded in Criminal Proceedings*

1. RIGHT TO TRIAL BY JURY

Although the right to a fair trial is guaranteed by the Due Process Clauses of the Fifth and Fourteenth Amendments, "the Constitution 'defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment.'"<sup>146</sup> Opponents of civil forfeiture argue that claimants in civil forfeiture proceedings are not provided the same assurances to procedural due process as criminal defendants because, unlike criminal proceedings, civil proceedings are not governed by the Fifth and Sixth Amendment's right to counsel and by the Sixth Amendment's right to trial by jury.<sup>147</sup> Civil forfeiture statutes have largely been attacked as violative of due process to the extent that the guarantees of the Sixth Amendment do not explicitly apply, despite the fact that the Fifth Amendment implicitly applies procedural due process requirements to civil and criminal proceedings alike.<sup>148</sup> Although civil proceedings are not governed by a separate, constitutional amendment specifically outlining the minimum procedural requirements necessary to satisfy due process the way that criminal proceedings are, the due process standard established by the Fifth and Fourteenth Amendments are no less stringent in civil forfeiture proceedings than in criminal proceedings.<sup>149</sup> Indeed, the standard is the same. Because the due process standard to be met in a criminal proceeding is the same as that to be met in a civil proceeding, state civil forfeiture statutes include procedural

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145. Informal survey on file with the author.

146. *Strickland v. Washington*, 466 U.S. 668, 684–85 (1984).

147. Jay A. Rosenberg, *Constitutional Rights and Civil Forfeiture Actions*, 88 COLUM. L. REV. 390, 401 (1988); U.S. CONST. amend. V; U.S. CONST. amend. VI.

148. U.S. CONST. amend. VI.

149. *Id.*; U.S. CONST. amend. XIV.

rules that bind civil forfeiture proceedings just as the Sixth Amendment binds criminal proceedings.<sup>150</sup> In fact, many states have interpreted procedural due process rights to require the right to a jury trial in a civil forfeiture proceeding.<sup>151</sup> Taking the Florida Contraband Forfeiture Act as an example, the Florida Supreme Court held in *In re Forfeiture of 1978 Chevrolet Van* that a claimant of seized property is entitled to a jury trial in any forfeiture proceeding held pursuant to the Florida Contraband Forfeiture Act.<sup>152</sup> In 1992, the Florida legislature codified this ruling by providing for the right to a jury trial in the Act itself.<sup>153</sup>

## 2. RIGHT TO COUNSEL

Although the Sixth Amendment's right to counsel applies only to criminal proceedings, the Supreme Court has shown a willingness to extend the right to counsel to civil cases where necessary.<sup>154</sup> However, the Supreme Court has only found the extension of the right to counsel necessary in cases where a "physical deprivation of liberty is threatened."<sup>155</sup> In fact, it has also created a presumption *against* the right to counsel in cases lacking such a threat.<sup>156</sup> Based on the Court's position, the rationale that justifies a higher standard of proof in criminal cases than in civil cases appears to be the same rationale that justifies the appointment of counsel in criminal cases and not in civil cases. That is, protections such as a right to counsel and a high standard of proof are necessary in criminal proceedings because most criminal defendants face a physical deprivation of liberty: incarceration.<sup>157</sup> In contrast, civil defendants and claimants to property in a civil forfeiture proceeding are not punishable by incarceration. Absent the severe consequences facing criminal defendants, extension of the right to counsel to the civil setting is not warranted. To require otherwise would be to burden the state with the requirement of providing counsel to an alleged criminal for both his criminal trial and civil forfeiture proceeding.<sup>158</sup>

Although the circumstances justifying the appointment of counsel

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150. Reid, *supra* note 26.

151. DEE EDGEWORTH, ASSET FORFEITURE: PRACTICE AND PROCEDURE IN STATE AND FEDERAL COURTS 112 (2004) ("[T]he right to a jury trial varies among the states. Several states specifically grant a statutory right to a jury trial . . . and a few hold that the right to a jury trial is granted under the state constitution.")

152. *In re Forfeiture of 1978 Chevrolet Van* VIN: CGD1584167858, 493 So. 2d 433 (Fla. 1986).

153. FLA. STAT. § 932.704(3) (2013); 1992 Fla. Sess. Law Serv. Ch. 92-54 (C.S.H.B. 397) (West).

154. Rosenberg, *supra* note 147, at 401.

155. *Id.*

156. *Id.* at 402.

157. Sundby & Underwood, *supra* note 108.

158. Rosenberg, *supra* note 147, at 405.

in criminal cases do not exist in civil forfeiture cases, the Florida legislature nonetheless provides claimants prevailing in civil forfeiture cases with financial compensation for attorney's fees.<sup>159</sup> That is, if the court at an adversarial preliminary hearing determines that no probable cause exists to believe that a claimant's property was used in violation of the Florida Contraband Forfeiture Act, the statute provides that the claimant is entitled to "reasonable attorney's fees and costs."<sup>160</sup>

### 3. FAIR NOTICE AND AN OPPORTUNITY TO BE HEARD

Governmental takings of life, liberty, or property without due process of law are prohibited by the Fifth and Fourteenth Amendments to the U.S. Constitution.<sup>161</sup> There is both a substantive and procedural component to due process.<sup>162</sup> Procedural due process generally "refers to the procedural limitations placed on the manner in which a law is administered, applied, or enforced. Thus, procedural due process prohibits the government from arbitrarily depriving individuals of legally protected interests without first giving them notice and the opportunity to be heard."<sup>163</sup> Indeed, courts have consistently interpreted procedural due process as requiring "an appropriate legal procedure including prior notice and a right to be heard by a neutral decision maker."<sup>164</sup> In other words, procedural due process requires that fair notice, a neutral judge, and a hearing be accorded any individual facing a deprivation of their life, liberty, or property.<sup>165</sup>

As claimants in civil forfeiture cases face a possible deprivation of their property, the requirements satisfying an individual's right to procedural due process are necessarily invoked. In order to satisfy this constitutional requirement, "[c]ivil asset forfeiture statutes contain procedural rules . . . ."<sup>166</sup> In the case of the Florida Contraband Forfeiture Act, for example, there are procedural rules that ensure that claimants to property receive the adequate notice and opportunity required by due process.

Fair notice requires that individuals be given the "opportunity to

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159. Florida Contraband Forfeiture Act, FLA. STAT. § 932.704(9)(b) (2013).

160. *Id.*

161. Reid, *supra* note 26.

162. James Bilione, *Due Process of Law Legal Definition*, BENJAMIN BUFFETT (Feb. 7, 2014), <http://benjaminbuffett.com/2014/02/due-process-of-law-legal-definition-of-due-process-of-law-due-process-of-law-synonyms-by-the-free-online-law-dictionary/>.

163. *Id.*

164. Reid, *supra* note 26; *see, e.g.*, United States v. Mancuso, 420 F.2d 556 (2d Cir. 1970).

165. Goldberg v. Kelly, 397 U.S. 254 (1970) ("The fundamental requisite of due process of law is the opportunity to be heard.' . . . [Due process] principles require that a recipient have timely and adequate notice. . . . [A]n impartial decision maker is essential [to due process].").

166. Reid, *supra* note 26.

know what the law is and to conform their conduct accordingly . . . .”<sup>167</sup> Although fair notice is constitutionally required for the benefit and protection of the individual, fair notice is incidentally also in the best interest of the government.<sup>168</sup> Without fair warning as to what the law is and what conduct it deems legal and illegal, compliance with the law would not be effectuated.<sup>169</sup> The deterrence of prosecution would have no effect on individuals’ behavior if individuals were not aware of what they could be prosecuted for in the first instance.<sup>170</sup> Fair notice is particularly important in the context of civil forfeiture, which is justified by a need for deterrence of crime. Although common law suggests that the property of even an innocent owner should be forfeited where that owner has negligently entrusted their property to the wrong person,<sup>171</sup> the Florida Contraband Forfeiture Act is mindful of the tenet that deterrence from crime is not effectuated if those whose property is subject to forfeiture are not involved in the underlying crimes. Evidencing a commitment to effective deterrence, the Act protects third-party owners who do not have a reason to know that their property is being used in the commission of a crime through the innocent owner defense to forfeiture.<sup>172</sup>

In most instances, the constitutional requirement of “fair notice” may be satisfied simply by virtue of the law having been put into effect.<sup>173</sup> The threshold issue is that “[f]airness requires that an actor have at least an opportunity to find out what the criminal law prohibits. Actual notice is not required for liability; it is enough that the prohibition has been lawfully enacted.”<sup>174</sup> This is so even though it is unlikely “that a criminal will carefully consider the text of the law before he murders or steals . . . .”<sup>175</sup>

By virtue of its lawful enactment and detailed provisions of rights, the Florida Contraband Forfeiture Act ensures individuals’ right to fair

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167. *Campbell v. Bennett*, 212 F. Supp. 2d 1339, 1343 (M.D. Ala. 2002) (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994)).

168. Paul H. Robinson, *Fair Notice and Fair Adjudication: Two Kinds of Legality*, 154 U. PA. L. REV. 335, 363–64 (2005) (identifying the following societal interests in providing fair notice: “increasing compliance, such as through deterrent effect; reserving criminalization decisions to the legislature; increasing uniformity in the treatment of similar cases; and reducing the potential for the abuse of discretion”).

169. *Id.* at 363.

170. *Id.* at 347 (“Men . . . cannot be required to guess at the meaning of the enactment.”).

171. *Bennis v. Michigan*, 516 U.S. 442, 466 (1996) (“[All] historical antecedents [were based] on the notion that the owner ha[d] been negligent in allowing his property to be misused and that he [could be] properly punished for that negligence.”).

172. SECHER & SWAIN, *supra* note 142, at 365.

173. Robinson, *supra* note 168, at 364.

174. *Id.*

175. *Id.*

notice. In addition to outlining the claimant's rights and opportunities at each of the several stages of a forfeiture proceeding, several provisions of the Florida Contraband Forfeiture Act even detail claimants' possible defenses. In addition to the innocent owner defense, the Act outlines an "accidental or incidental nexus" defense theory.<sup>176</sup> By detailing not only what constitutes a violation of the Act, but also what theories may defend an allegation thereof, the Act provides fair notice beyond the constitutional minimum. Because fair notice is sufficient where a warning has been provided in comprehensible language as to "what the law intends to do if a certain line is passed," the Florida Contraband Forfeiture Act and other lawfully enacted civil forfeiture statutes have *per se* met this constitutional requirement.<sup>177</sup>

The Florida Contraband Forfeiture Act also provides law enforcement agencies with instructions to ensure that claimants are given an opportunity to be heard. At the onset of the forfeiture process—the moment at which the property is seized by law enforcement—any person determined "after a diligent search and inquiry"<sup>178</sup> by the seizing agency to be entitled to notice has the statutory right to receive such notice at either the time of seizure or via certified mail sent no more than five working days after the seizure.<sup>179</sup> In addition to being prompt, the notice provided must explain to the recipient that he or she has the right to an adversarial preliminary hearing, which is the first of claimants' opportunities to be heard and to contest the seizure if they so desire.<sup>180</sup> As with the initial provision of notice, a law enforcement agency is again responsible for acting nearly immediately should an individual elect to contest the seizure at such a hearing. More specifically, the seizing agency must arrange and give notice for an adversarial preliminary hearing to be held no more than ten days after the claimant's request is received or as soon as thereafter practicable.<sup>181</sup> Whether or not a claimant elects to attend an adversarial preliminary hearing, the adversarial preliminary hearing is not the end of claimants' opportunities to be heard. Even where claimants do not prevail at the adversarial preliminary hearing, they continue to be entitled to a jury trial at which they may again contest the forfeiture of their property.

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176. Florida Contraband Forfeiture Act, FLA. STAT. § 932.703(8) (2013) ("It is an affirmative defense to a forfeiture proceeding that the nexus between the property sought to be forfeited and the commission of any underlying violation was incidental or entirely accidental.").

177. Robinson, *supra* note 168, at 364.

178. § 932.701(2)(e).

179. *Id.* § 932.703(2)(a).

180. *Id.*

181. *Id.*

D. *Why Civil Forfeiture Does Not Offend Notions of Liberty Despite Its Perceived Economic Benefit*

As previously explicated, critics argue that “[t]he ability to confiscate property . . . creates a perverse incentive for the police to seize property, [because] they get to keep it.”<sup>182</sup> This allegation is incongruent with the statutory protections that thwart the possibility of an economic incentive, however. In some ways, the argument is also undercut by the lack of literature criticizing the use of civil forfeiture in the context of white collar crimes—from which law enforcement agencies generally stand to gain sums of money equal to, if not greater than, those they stand to gain from drug crimes—suggesting that critics can be unwarrantedly more sympathetic to the generally less wealthy, though no less culpable, drug dealer. Nevertheless, the possibility of an improper economic incentive in the context of either type of crime is tempered by the fact that law enforcement officers are officials acting on behalf of the government, not “self-interested private parties.”<sup>183</sup> While it is uncontested that law enforcement officers may not directly pocket seized money, or drive home from the scene of a seizure in a claimant’s vehicle, critics nonetheless seem to rely on the theory of a trickle-down effect to prove a perverse economic incentive. That is, critics seem to believe that although funds gained from civil forfeiture are initially deposited into a general fund, funds ultimately end up in the hands of officers in the form of higher salaries. However, the Florida Contraband Forfeiture Act explicitly provides that neither the proceeds of nor the interest from civil forfeiture gains may ever “be used to meet normal operating expenses of the law enforcement agency,” including and especially officers’ salaries.<sup>184</sup> Funds remaining after the payment of costs incurred in connection with the forfeiture of property are only to be used for “law enforcement purposes,” limited to “crime prevention, safe neighborhood, drug abuse education and prevention programs” and to the defrayment of such costs as those incurred by “complex investigations” and by the provision of “additional equipment or expertise.”<sup>185</sup> One advisory opinion by the former Attorney General of Florida suggested that the standard for use of the funds is a strict one, as it opined that funds could not properly be used to construct a building for the storage of evidence because such an activity was neither expressly pro-

182. Fred E. Foldvary, *Civil Asset Forfeiture*, PROGRESS REPORT (Jan. 9, 2007), <http://www.progress.org/tpr/civil-asset-forfeiture-2/>.

183. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 663 (1974) (distinguishing between “self-interested private parties” and “government officials” in response to plaintiff’s allegations of for-profit policing).

184. § 932.7055(5)(b).

185. *Id.* § 932.7055(5)(a).

vided for in the statute nor an activity that was beyond the normal operations of the agency.<sup>186</sup>

If the seizing agency wishes to use money from the fund, the sheriff or chief of police must make a written request to the board of county commissioners or to the governing body of the municipality certifying its compliance with these requirements.<sup>187</sup> Moreover, law enforcement agencies that acquire \$15,000 or more pursuant to the Florida Contraband Forfeiture Act “must expend or donate no less than 15 percent of such proceeds for the support or operation of any drug treatment, drug abuse education, drug prevention, crime prevention, safe neighborhood, or school resource officer program(s).”<sup>188</sup> Though there are no statutory safeguards to prevent the Florida Legislature from decreasing funds appropriated to such programs in reliance of forfeiture funds, as has been an issue in the case of funds appropriated to schools by lotteries, for example,<sup>189</sup> the Florida Legislature *has* acknowledged the threat of supplantation by agencies and the entities having control over them by statutorily prohibiting the anticipation of “future forfeitures or proceeds therefrom in the adoption and approval of the [agency’s] budget. . . .”<sup>190</sup> Such statutory language reveals a concession by the legislature that there is no reasonable or reliable way to project the amount of funds that will be donated from forfeiture revenue in any given year. Proceeds from civil forfeiture depend on the number of offenses made in violation of the Florida Contraband Forfeiture Act, the number of which cannot be reasonably predicted. Projecting the funds to be donated would also be difficult considering the variance in circumstances between agencies across the state. This lack of certainty in calculation should prevent the Florida Legislature from relying on such funds and keep the required fifteen percent donation as surplusage.

Because none of the permissible expenditures end with money in officers’ hands, it seems that critics have at times unwarrantedly intertwined corruption with the lawful practice of civil forfeiture. Contrary to critics’ allegations, however, funds earned by civil forfeiture are to be used for the betterment of law enforcement agencies so that they may, in turn, make communities and neighborhoods safer. Because each of the

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186. Expenditure of Funds Generated by Florida Contraband Forfeiture Act by Board of County Commissioners to Construct a Permanent Building to be Used for Storing Evidence in Criminal Cases, Unauthorized, 1986 Fla. Op. Att’y Gen. 110 (1986).

187. § 932.7055(5)(b).

188. *Id.* § 932.7055(5)(c).

189. Oliver Libaw, *Where Does Lottery Revenue Go?*, ABC NEWS, <http://abcnews.go.com/US/story?id=92598> (last visited Aug. 30, 2014) (“The lottery money does go to the intended cause. However, instead of adding to the funds for those programs, legislators factor in the lottery revenue and allocate less government money to the program budgets. . . .”).

190. § 932.7055(9).

enumerated, allowable expenditures is for the good of the public, the overarching incentive to officers is the desire to contribute to the public welfare.

Akin to their combining corruption with lawful civil forfeiture, critics have argued that “[a]sset forfeiture practices often go hand-in-hand with racial profiling and disproportionately impact low-income African-American or Hispanic people who the police decide look suspicious . . . .”<sup>191</sup> Although these arguments fail to separate the lawful use of civil forfeiture from the discriminatory use of racial profiling—a practice which neither the law, nor law enforcement supports—civil forfeiture legislation in Florida has been proactive about addressing these concerns.<sup>192</sup> For example, the Florida Contraband Forfeiture Act requires law enforcement officers to undergo special training classes emphasizing racial and ethnic sensitivity before they are able to seize property for the purpose of a civil forfeiture.<sup>193</sup> Also preventing civil forfeiture from disproportionately impacting minorities is the fact that, with or without an adversarial preliminary hearing, a neutral judge reviews every civil forfeiture action to ensure the existence of probable cause before forfeiture can proceed. Law enforcement officers’ awareness of this judicial review serves to deter questionable seizures arising from unlawful or pretextual detentions.<sup>194</sup>

In terms of racial profiling, the real evil is not the lawful practice of civil forfeiture, but rather the separate and distinct problem of corrupt law enforcement. Racial profiling is a serious societal harm that must be addressed, but it is not caused or influenced by the civil forfeiture framework. Even in the context of pretextual traffic stops, prejudice is at the root of racial profiling, not the ability to conduct a traffic stop itself. Discrimination by law enforcement personnel is a serious problem that is offensive to the lawful pursuit of civil forfeiture, and states with their own civil forfeiture framework would agree with that. Indeed, Florida courts have not shied away from castigating agencies exhibiting discrim-

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191. *Civil Asset Forfeiture*, AM. CIV. LIBERTIES UNION, <https://www.aclu.org/criminal-law-reform/civil-asset-forfeiture> (last visited Aug. 19, 2014).

192. § 932.706 (“The curriculum for the course of training and continuing education [in civil forfeiture pursuant to the Florida Contraband Forfeiture Act] must include . . . racial and ethnic sensitivity . . .”).

193. *Id.* § 932.706.

194. Jack E. Call, *Virginia Police Legal Bulletin*, RADFORD UNIVERSITY, <http://www.radford.edu/content/va-chiefs/home/october-2008/probably-cause.html> (last visited Aug. 30, 2014) (“The reason why courts review probable cause and reasonable suspicion determinations of the police in the first place is to make law enforcement officers aware that these determinations will often be examined later in a court of law. Awareness of this fact should have the desirable effect of making those officers more careful when deciding whether to stop, arrest, frisk, or search.”).

inatory tendencies.<sup>195</sup>

## VI. UNTANGLING CIVIL FORFEITURE FROM CRITICS' ACCUSATIONS OF IMPROPRIETY

### A. *Why Critics Have Misplaced the Blame for Their Concerns*

Rather than any functional defect, perhaps it has been the high rate of default judgments in civil forfeiture proceedings that has unnecessarily caught the attention of critics. Similarly, the reputation of civil forfeiture may have been unjustifiably damaged by the multitude of false and informal literature pervading the Internet, from which the general population gathers much of its information.<sup>196</sup> For example, one website expressing opposition to civil forfeiture erroneously states that law enforcement agencies pursue civil forfeiture whenever they feel they have come upon “a civil rather than a criminal case,” thereby insinuating that law enforcement agencies pursue civil forfeiture when they do not feel they have enough evidence to make a criminal case.<sup>197</sup> The same website also maintains that civil forfeiture is “increasingly . . . used for . . . even legal activities” and that “[s]ometimes, just having the property . . . is sufficient to have it seized.”<sup>198</sup> Even more formal literature, as that from the Institute of Justice, for example, has accused law enforcement personnel of “[preferring] civil forfeiture because it affords property owners fewer protections than criminal proceedings, thus making it easier to seize assets. . . .”<sup>199</sup> Scholarly literature has also been found making the erroneous statement that civil forfeiture allows law enforcement officials to seize property from innocent owners “without notice or hearing. . . .”<sup>200</sup> As the foregoing analysis has demonstrated, however, claimants of property sought to be civilly forfeited are accorded the same if not greater protections than that provided to those whose property is sought to be criminally forfeited.

Assuming, *arguendo*, that critics' concerns with civil forfeiture are reasonable and that innocent owners' property is, in fact, being forfeited, critics have wholly neglected to address the failure of claimants to assert defenses. Eighty percent of forfeiture cases in the United States are

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195. Taifa, *supra* note 90, at 105 (“The [Florida] court found that not only were the claimant’s constitutional rights to property, privacy, equal protection, due process and freedom from unreasonable search and seizure violated, but it also found ‘a lack of good faith and an abuse of the Alachua County Sheriff’s Office’s discretion under the Florida Contraband Forfeiture Act.’”).

196. *See generally* Foldvary, *supra* note 182.

197. *Id.*

198. *Id.*

199. Williams, Holcomb & Kovandzic, *supra* note 76.

200. Pilon, *supra* note 91.

uncontested.<sup>201</sup> One scholar reported that in August 2013 they found that in the forty federal and state decisions concerning civil forfeiture made in the previous month, the government prevailed by default in “a significant number” of them because—aside from the government’s meeting the applicable evidentiary standard—no claimant challenged the forfeiture.<sup>202</sup> A complete failure to take advantage of the guarantees accorded cannot be overcome by an increase in notice or in the number of opportunities to be heard. If property were being taken from innocent owners, as critics argue, it may be fair to say that more forfeiture actions would be contested. Of course, critics would counter that the expense of hiring an attorney prevents claimants’ responses, but that too is unconvincing when one considers that the Florida Contraband Forfeiture Act provides compensation for a claimant’s attorney’s fees should they prevail at the adversarial preliminary hearing and even for lost wages should they prevail at trial.<sup>203</sup> In many cases, claimants who know they have committed the alleged offense may opt for a default judgment as an alternative to hiring an attorney because they know their case will be adjudicated according to their guilt.<sup>204</sup>

B. *How the Florida Contraband Forfeiture Act Mitigates and  
Recompenses Losses Incurred by Ultimately Prevailing  
Claimants: Balancing Deterrence and the  
Innocent Owner’s Property Rights*

As with criminal proceedings, civil forfeiture proceedings have the potential to substantially inconvenience accused individuals who ultimately prevail on their defense. Seizures of property are not foolproof, and civil forfeiture does not purport to be. Absolute justice does not exist—all we have is human decision-making. Persons charged with a crime are not always found guilty, and property seized for civil forfeiture is not always going to be found as having been used in violation of the governing statute. Indeed, it is in recognition of these very possibilities that the Constitution guarantees an opportunity to be heard and a neutral judge to listen. It goes without saying that the false arrest of an innocent person and the false seizure of honestly-earned property are discomfiting possibilities of our legal system, but insusceptibility to

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201. Cassella, *supra* note 55.

202. Reid, *supra* note 26.

203. Florida Contraband Forfeiture Act, FLA. STAT. § 932.704(9)(b) (2013).

204. Mark Johnson, *Legal Definition of a Default Judgment*, LEGALSOURCE (Mar. 19, 2010), <http://www.legalsource360.com/index.php/legal-definition-of-a-default-judgment-2645/> (“A default judgment may not always be a bad thing for the defendant. . . . [I]f someone is being sued and has no defense—they know they will lose, and fully expect to pay . . . they may choose this route to avoid hiring an attorney.”).

error cannot exist when human fallacy innately affects our judges, juries, and law enforcement officers. Instead, we must rely on rules to mitigate and compensate for the inconveniences suffered by those individuals whose defenses prove legitimate.

Cognizant of the unfortunate possibility of a false seizure, many states' civil forfeiture statutes—the Florida Contraband Forfeiture Act among them—include provisions to mitigate the losses incurred by claimants to falsely seized property. Because of the risk of interfering with an ultimately innocent owner's property, state legislatures often subject the use of civil forfeiture to the strong property rights of the innocent owner by providing for a manner of compensation where those rights have been encroached upon. For example, by attempting to minimize the length of time a claimant's property is held while a finding of probable cause is pending, the short statutory deadlines mandated by the Florida Contraband Forfeiture Act account for the possibility that property may be determined by the court to have been seized absent a probable violation and ensure that claimants receive their property back promptly if such turns out to be the case. Further, the Florida Contraband Forfeiture Act mandates that notice of the opportunity for a hearing be sent within five working days after the seizure of the subject property and that adversarial preliminary hearings be held within ten days of a claimant's request for one or as soon as practicable thereafter.<sup>205</sup> In addition to ensuring prompt resolution via short statutory deadlines, there are several other guidelines by which seizing agencies must abide so as to mitigate or compensate for losses that may be incurred by a claimant whose property is ultimately found to have been held absent the required probable cause. For example, at no time prior to gaining title may a law enforcement agency use seized property for any purpose.<sup>206</sup> In addition, the agency must make "[r]easonable efforts . . . to maintain seized property in such a manner as to minimize loss of value."<sup>207</sup> Moreover, that probable cause must first be established before any trial on the subject of forfeiture may be held shows the importance of law enforcement agencies being able to immediately demonstrate a legitimate cause for their continued seizure of property.

Seizing agencies must even pay a claimant's reasonable attorney's fees and costs if no probable cause is found to exist at the adversarial preliminary hearing.<sup>208</sup> If the claimant prevails at the conclusion of the forfeiture proceeding, whether at trial or on appeal, the seizing agency is

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205. § 932.703(2)(a).

206. *Id.* § 932.703(1)(d).

207. *Id.*

208. *Id.* § 932.704(9)(b).

responsible for indemnifying the claimant for the reasonable loss of value of the seized property and for any loss of income attributable to seizure of the property.<sup>209</sup> (Loss of income may occur, for example, when an individual's motor vehicle or other source of transportation to work has been seized.) Furthermore, the seizing agency may not charge a prevailing claimant for any fees or costs associated with the seizure or forfeiture proceeding.<sup>210</sup>

## VII. WHAT'S NEXT?

As drug abuse and drug trafficking worsens in the United States, criminals involved in the drug trade “must shoulder the blame for the desperately unwanted phenomena of the desecration of individual lives, erosion of the quality of life in America, and threats to national security.”<sup>211</sup> Because approximately sixty percent of crime is related to drug or alcohol abuse, however, states' legalization of drugs like marijuana make both violent crimes and drug crimes more likely.<sup>212</sup> That is, because the use of marijuana is associated with an increased likelihood of prescription drug abuse,<sup>213</sup> trafficking in illegal substances is poised to increase as a result of marijuana's legalization. As a result, civil forfeiture will become an increasingly relevant deterrent to counteract liberal legislations that may otherwise incentivize criminal activity.

Going forward, civil forfeiture will continue to face a bandwagon of critics that misstate and misperceive the legitimate objectives of civil forfeiture. Just as these critics built their oppositional movement one piece of writing at a time, so too will proponents of civil forfeiture have to promote the redirection of thoughts on civil forfeiture one response at a time, starting, of course, with this one.

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209. *Id.*

210. *Id.*

211. McClure, *supra* note 20, at 420.

212. Gogek, *supra* note 15.

213. Amanda Cuda, *Yale Study: Marijuana May Really be Gateway Drug*, CTPOST.COM (Aug. 21, 2012, 11:15 PM), <http://www.ctpost.com/local/article/Yale-study-Marijuana-may-really-be-gateway-drug-3805532.php>.