To Shift or to Shaft: Attorney Fees for Prevailing Claimants in Civil Forfeiture Suits

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I. INTRODUCTION

Billy Munnerlyn's 1969 Lear Jet was his pride and joy. When

the government seized it, Munnerlyn went to court to get it back. He sold everything he had, paid $85,000 in legal fees, proved his innocence to a jury—and went bankrupt over it.

Munnerlyn, a veteran of 9,000 flights, had built a small business flying executives, air freight and air ambulance runs. In the Fall of 1989, he flew a banker and four boxes of “financial records” from Little Rock via Oklahoma City to Ontario, Canada. Three hours after the flight, Drug Enforcement Administration agents arrested Munnerlyn. The banker was, in fact, a convicted cocaine trafficker and the “financial records” were $2,795,685 in cash. Munnerlyn was never charged with any wrongdoing. The government released him seventy-one hours later, but kept his plane and the $8,500 charter airfare. Federal prosecutors claimed the plane had been used to facilitate drug trafficking and therefore became property of the government. Civil forfeiture law required no less.

The government instituted forfeiture proceedings against the plane. Munnerlyn did not dispute that his plane had carried a drug dealer; however, he claimed “innocent ownership”—the only defense available. Munnerlyn testified that he had never seen the man before and that he never had anything to do with drugs. A jury found for Munnerlyn and ruled that the plane be returned. The government asked for a new trial and argued that witnesses who testified for Munnerlyn had lied. Munnerlyn’s attorneys responded with fifty-one affidavits supporting Munnerlyn’s witnesses. The government’s attorneys offered Munnerlyn a deal: the government would return the

2. Id. at 31. In this case, the government later dropped charges against Munnerlyn’s passenger. See 60 Minutes: You’re Under Arrest (CBS television broadcast, Apr. 5, 1992).
3. The section of the forfeiture statute applicable to Munnerlyn’s airplane reads:

(A) SUBJECT PROPERTY

The following shall be subject to forfeiture to the United States and no property right shall exist in them: . . . (4) All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property


4. Once the government showed probable cause that the plane was used to transport drugs, the government was entitled to forfeit the plane. However, 28 U.S.C. § 881(a)(4)(C) provides that the government may not forfeit property if owners prove their innocence. Specifically, “[n]o conveyance shall be forfeited under this paragraph to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge, consent, or willful blindness of the owner.” 21 U.S.C. § 881(a)(4)(C) (1988). Together with parts of subsections (a)(6) and (a)(7), this language is commonly called the “innocent owner provision” of the civil forfeiture statute. Note that “innocent ownership” does not refer to “innocence” in the criminal sense of “not guilty.” Rather, it means that the owner was “without knowledge” that the property was used to facilitate drug-dealing. See Part II.C., infra.
plane if Munnerlyn paid $66,000. But Munnerlyn was almost broke; he could not understand why he had to pay the government after a jury had found in his favor. Munnerlyn’s patience was running low; his savings were running out. The government lowered the plane’s price to $30,000 and eventually to $6,500. In return, Munnerlyn would get the plane, and the government would keep the $8,500 airfare. Of course, Munnerlyn would pay the $50,000 to bring the idle plane back to FAA standards. He accepted the offer. The government never even mentioned the $80,000 Munnerlyn had spent in legal fees. “If he was innocent, he would have taken reasonable steps to avoid any involvement in illicit drug activity,” said the Assistant U.S. Attorney on Munnerlyn’s case.

The federal forfeiture statute for drug violations, 21 U.S.C. § 881, does not provide attorney fees for innocent owners. When


6. PRESUMED GUILTY, supra note 1, at 32. The United States Supreme Court apparently concurs with that assessment. In Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 687-88 (1974), the Court found that, “[t]o the extent that such forfeiture provisions are applied to lessors, bailors, or secured creditors who are innocent of any wrongdoing, confiscation may have the desirable effect of inducing them to exercise greater care in transferring possession of their property.”

7. 21 U.S.C. § 881 provides in pertinent part:
   (a) Subject Property
      The following shall be subject to forfeiture to the United States and no property right shall exist in them: . . . .
      (4) All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1), (2), or (9), except that . . . .
      (C) no conveyance shall be forfeited under this paragraph to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge, consent, or willful blindness of the owner. . . .
   (6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.
   (7) All real property, including any right, title and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year’s imprisonment, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by
Congress enacted § 881, it was “more concerned about seeing that the government satisfy its costs of forfeiture from the proceeds of forfeited property than about providing for the innocent owner's cost of defense.”

Congress authorized forfeiture, one of the most powerful weapons in the government’s arsenal in the continuing “war” on drugs, to discourage “big-time” drug dealers by hitting them where it hurts most. However, as in Munnerlyn's case, authorities sometimes hit innocent owners. A property owner can be financially ruined after paying costly legal fees, even though all concerned parties agree that the owner did nothing wrong. Those “who challenge the government,” said one forfeiture attorney, “have the choice of fighting the full resources of the U.S. Treasury or caving in.”

reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.


9. United States v. 28 Emery Street, 914 F.2d 1, 3 (1st Cir. 1990). In the words of Cary H. Copeland, Director of the Department of Justice's Executive Office for Asset Forfeiture, forfeiture is the war on drug's most important weapon. “It is to the drug war what smart bombs and air power are to modern warfare.” Dennis Cauchon, Government Doesn't Have to Prove Guilt, USA TODAY, May 18, 1992, at 2A.

10. See, e.g., United States v. 2639 Meetinghouse Rd., 633 F. Supp. 979, 994 (E.D. Pa. 1986) (explaining that purpose of the Act is to strip the drug-trade of its instrumentalities); see also S. Rep. No. 225, 98th Cong., 2d Sess. 4 (1984), reprinted in 1984 U.S.C.C.A.N. 3182, 3374 (noting that profit is the sole motivation for the drug trade and that economic power sustains the criminal enterprise); Stephanie Saul, A House Could be the Price of a Joint Under Federal Asset-Seizure Law, LOS ANGELES TIMES, May 6, 1990, at A2 (“If we put the kingpins in prison for life, it doesn't do much, but if we seize the instrumentalities of the drug trade, it's like shutting down a manufacturing plant.” (quoting Cary H. Copeland, Director of the Justice Department's forfeiture program)).

Note, however, that the Federal Drug Administration's database shows that only 17% of the 25,297 items seized between July 1989 and December 1990 were valued at more than $50,000. Current law thus may have its most profound effect on people other than big-time drug-dealers. PRESUMED GUILTY, supra note 1, at 4.

11. An unscientific, ten-month study conducted by the Pittsburgh Press [hereinafter Pittsburgh Press Study] documented 510 current forfeiture cases that involved “innocent” people—or those possessing a very small amount of drugs—who lost their possessions. PRESUMED GUILTY, supra note 1, at 4.


The basic problem . . . is the inability of many Americans to combat the vast resources of the Government in administrative adjudication. In the usual case, a party has to weigh the high cost of litigation or agency proceedings against the value of the rights to be asserted. Individuals and small businesses are in far too many cases forced to knuckle under to regulations even though they have a direct and substantial impact because they cannot afford the adjudication process. In
owner proves his innocence, his only remedy in most cases is the 
return of the property. Almost always, the owner gets shafted with 
the legal bill.

Billy Munnerlyn's case created quite a stir. The Senate Judici-
ary Committee promptly announced that it would conduct an over-
sight hearing. The Committee proposed the hearing to give 
prosecutors, attorneys, and others who deal with forfeiture laws an 
opportunity to voice their concerns about those laws. Not surpris-
ingly, the hearing was later cancelled on short notice and indefi-
nitely postponed because of "scheduling problems."

One can argue that forfeiture is part of the war on drugs, and 
that war demands sacrifices. Yet, it is unclear why random individu-
als—innocent owners—should make more sacrifices than others. 
This Comment will show that current law occasionally singles out 
innocent owners to bear the brunt of the "war on drugs." To rem-
many cases the Government can proceed in expectation of outlasting its adversary. . . . [In many cases, [private litigants] find that even if they . . . win, 
that they are losers because the attorneys' fees and cost that they have to pay to 
defend against arbitrary and capricious acts of their Government, frequently 
exceed the amount that is at issue.

Award of Attorneys’ Fees Against the Federal Government: Hearings on S. 265 & Identical H.R. 
6423 Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the 
Comm. on the Judiciary, 96th Cong., 2d Sess. 16-17 (1980) (testimony of Sen. Pete V. 
Domenici, R-N.M.) [hereinafter Hearings]. Courts have also recognized the unequal strength 
of private litigants and the United States Government. The Fourth Circuit found that:

[i]t is the United States is the strongest and most important party that appears before 
us. It dwarfs all others in power, resources, and awesome responsibilities . . . . 
When the government takes a position in litigation, it takes a position on behalf 
of the people, and “the people” . . . includes the government’s opponent in the 
litigation.


14. Billy Munnerlyn's case, first documented in the Pittsburgh Press story, supra note 1, 
has since become national news through a segment on a prime-time network-TV news 
magazine, focusing on the hardships created by the current forfeiture laws. See 60 Minutes: 
You're Under Arrest, supra note 2.

15. The hearing was originally called for by Senator Arlen Specter, R-Pa, for the latter 
part of May, 1992. Telephone Interview with David Lavallee, Press Secretary of the Senate 
Judiciary Committee (Apr. 27, 1992); Telephone Interview with Richard Hertling, Staff Aide 

16. Telephone Interview with Arthur W. Leach, Assistant Director for Policy and 
Legislation of the Executive Office for Asset Forfeiture (July 17, 1992). One may query 
whether the fact that 1992 was an election year may have played a role in the postponement of 
the hearing.

17. Legal commentators have bemoaned the harsh results caused by the forfeiture doctrine 
for quite a while. See, e.g., Peter A. Winn, Seizures of Private Property in the War against 
Drugs: What Process is Due? 41 Sw. L.J. 1111 (1988); Steven Wisotsky, Crackdown: The 
Emerging “Drug Exception” to the Bill of Rights, 38 HASTINGS L.J. 889 (1987). Many of these 
commentators lament the absence of basic constitutional protections for owners of forfeitable 
property. Some focus on the respective evidentiary burdens of the government and the
edy the situation, this Comment proposes a way to compensate innocent owners from government coffers, and so to spread the cost of the war on drugs to the general citizenry. It suggests changes in the current forfeiture laws to shift liability for a claimant’s legal fees to the government if the government does not prevail in its forfeiture attempt. This Comment does not rehash the argument that the legal rights of suspected drug-dealers merit better protections. Rather, the proposed changes would help owners only after a court authoritatively determines that the property owner was not connected to any illegal drug activity.

Part II of this Comment will demonstrate how the apparent simplicity of current forfeiture procedure hides contradictions, inconsistencies, and other fundamental shortcomings of civil forfeiture law. In particular, it will show how the deck is stacked against the innocent owner. Part III will provide an overview of the history and current rules regarding attorney fees. It will discuss the variations, the policies, and the common effects of fee shifting under the current system and will thus define a standard by which the suitability of specific fee-shifting provisions may be judged. Part IV will use that standard to appraise the limited means available today to shift fees away from the successful claimant in forfeiture cases. Using the conclusions of Parts II through IV, Part V will assess two possible variations of the current law. It will propose the adoption of a one-way, pro-claimant fee shift, which could relieve meritorious claimants by spreading the cost of their attorney fees to the general citizenry.

II. PROBLEMS WITH THE APPLICATION AND DOCTRINE OF EXISTING FORFEITURE LAWS

A. 21 U.S.C. § 881

The history of federal drug forfeiture law in general, and of § 881 in particular, has been one of steadily expanding scope and shrinking procedural safeguards. Congress first enacted § 881 as part of the Comprehensive Drug Abuse Prevention and Control Act of 1970. The history of federal drug forfeiture law in general, and of § 881 in particular, has been one of steadily expanding scope and shrinking procedural safeguards. Congress first enacted § 881 as part of the Comprehensive Drug Abuse Prevention and Control Act of 1970.19

innocent owner. One simply called forfeiture a “farrago of injustices sanctified by tradition” and objected to the use of outdated and archaic concepts to deprive owners of their hard-earned property. See David J. Fried, Rationalizing Criminal Forfeiture, 79 J. CRIM. L. & CRIMINOLOGY 328, 331 (1988) (referring to forfeiture in the criminal context). This Comment does not reiterate the complaints about forfeiture laws in general, but rather focuses on the narrow issue of innocent ownership, which was raised vividly in Billy Munnerlyn’s case, supra note 1.

18. For a comprehensive treatise on forfeiture procedure, see generally DAVID B. SMITH, PROSECUTION AND DEFENSE OF FORFEITURE CASES (1991).

19. Pub. L. No. 91-513, 84 Stat. 1236 (1976). The law is also referred to as the
The statute provided for forfeiture of raw materials, paraphernalia, and vehicles used in the drug trade. In 1978, Congress extended the breadth of § 881 to include as forfeitable items property furnished in exchange for illegal drugs or proceeds traceable to such an exchange. Perceiving a rising tide of drug trafficking in the early 1980s, Congress passed the Comprehensive Forfeiture Act of 1984, which again extended § 881. The 1984 Act profoundly changed the nature of § 881 by allowing governmental seizure of property used to "facilitate" any felony drug violation under the Controlled Substances Act. § 881 permitted the government to seize property prior to charging or convicting the owner. By extending the government's forfeiture powers, the legislators wanted to "include an attack on the economic aspects of these crimes." The 1984 amendment had the desired effect of rendering the statute a much more effective tool to


(1) All controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of this subchapter.

(2) All raw materials, products, and equipment . . . .

(3) All property which is used, or intended for use, as a container for property described in paragraph (1) or (2).

(4) All conveyances, including aircraft, vehicles, or vessels, which are used . . . to transport . . . property described in paragraph (1) or (2) . . . .


21. The amendment to 21 U.S.C. § 881(a) included as forfeitable items:

(6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter . . . .


23. Revised § 881(a) subjected the following to forfeiture:

(7) All real property, including any right, title, and interest in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.


seize real and personal property. Today, § 881 is firmly entrenched in the law as part of the broad effort to reduce the trade in illicit drugs in the United States.

Civil forfeiture is a strange creature. It is an odd mix of civil, criminal and admiralty concepts. Still, forfeiture appears to be a fairly straightforward concept. A civil forfeiture proceeding usually begins with a government agency’s request for a warrant to seize the defendant property. In many cases, the government can act without warrant. The physical seizure of the property by government agents and the transfer of title to the attorney general follow. In a second phase, the attorney general files a complaint for forfeiture of the prop-

28. Numerous federal agencies bring forfeiture proceedings for a variety of reasons. These agencies include the Drug Enforcement Administration, the Federal Bureau of Investigations, the Immigration and Naturalization Service, the Postal Inspection Service, the Internal Revenue Service, the Bureau of Alcohol, Tobacco, and Firearms, and the U.S. Park Police. See generally DRUG ENFORCEMENT AGENCY, DEPARTMENT OF JUSTICE, DRUG AGENTS GUIDE TO FORFEITURE OF ASSETS (1987 & Supp. 1990). Sometimes, federal agencies seize property in concert with local law enforcement, and occasionally federal agencies take over cases after local agencies make the seizure. See id. at 99-105.
29. Note that § 881 relies on rules originally created in Admiralty for all forfeitures under the statute. § 881(b) reads, in part:

(b) SEIZURE PURSUANT TO SUPPLEMENTAL RULES FOR CERTAIN ADMIRALTY AND MARITIME CLAIMS; ISSUANCE OF WARRANT AUTHORIZING SEIZURE

Any property subject to civil forfeiture to the United States under this subchapter may be seized by the attorney General upon process issued pursuant to the supplemental Rules for Certain Admiralty and Maritime Claims by any district court of the United States having jurisdiction over the property, except that seizure without such process may be made when —

(1) the seizure is incident to an arrest or a search under a search warrant or an inspection under an administrative inspection warrant . . .

30. 28 U.S.C. § 881(b) states, in part, that:

seizure without such process may be made when: . . .

(2) the property subject to seizure has been the subject of a prior judgment in favor of the United States in a criminal injunction or forfeiture proceeding under this subchapter;
(3) the Attorney General has probable cause to believe that the property is directly or indirectly dangerous to health or safety; or
(4) the Attorney General has probable cause to believe that the property is subject to civil forfeiture under this subchapter.

The third and final phase in a civil forfeiture proceeding, codified under § 881(d), is the forfeiture trial itself. The evidentiary burdens of customs forfeiture proceedings govern the trial. To prevail during a forfeiture trial, the government must merely show existence of probable cause to believe that the property had the requisite connection to an illegal purpose. The issue of whether the owner is...

31. The seizure stage in all § 881 forfeiture proceedings is regulated by the Supplemental Rules for Admiralty and Maritime claims. Supplemental Rule E provides in part:

**ACTIONS IN REM AND QUASI IN REM: GENERAL PROVISIONS**

1. **APPLICABILITY.** Except as otherwise provided, this rule applies to actions in personam with process of maritime attachment and garnishment, actions in rem, and petitory, possessory, and partition actions, supplementing Rules B, C, and D.

2. **COMPLAINT; SECURITY.**

(a) **Complaint.** In actions to which this rule is applicable the complaint shall state the circumstances from which the claim arises with such particularity that the defendant or claimant will be able, without moving for a more definite statement, to commence an investigation of the facts and to frame a responsive pleading.


32. § 881(d) reads:

(d) **OTHER LAWS AND PROCEEDINGS APPLICABLE**

The provisions of law relating to the seizure, summary and judicial forfeiture, and condemnation of property for violation of the customs laws; the disposition of such property or the proceeds from the sale thereof; the remission or mitigation of such forfeitures; and the compromise of claims shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under any of the provisions of this subchapter, insofar as applicable and not inconsistent with the provisions hereof; except that such duties as are imposed upon the customs officer or any other person with respect to the seizure and forfeiture of property under the customs laws shall be performed with respect to seizures and forfeitures of property under this subchapter by such officers, agents, or other persons as may be authorized or designated for that purpose by the Attorney General, except to the extent that such duties arise from seizures and forfeitures effected by any customs officer.


33. 19 U.S.C. § 1615 provides, in part:

**BURDEN OF PROOF IN FORFEITURE PROCEEDINGS**

In all suits or actions ... brought for the forfeiture of any vessel, vehicle, aircraft, merchandise, or baggage ... where the property is claimed by any person, the burden of proof shall lie upon such claimant ...: Provided, That probable cause shall first be shown for the institution of such suit or action ... .


34. Id.; accord United States v. 15 Black Ledge Drive, 897 F.2d 97, 101 (2nd Cir. 1990) (affirming summary judgment in favor of government where government's unrebutted affidavits showed reasonable grounds for forfeiture); cf. United States v. 28 Emery Street, 914 F.2d 1, 3-4 (1st Cir. 1990) (reversing summary judgment where evidence was inconclusive whether forfeited residence had substantial connection with drug offense). Some courts have found that probable cause requires only a belief by a reasonable person that the property was used to further the trafficking of illegal narcotics. See United States v. One 56-Foot Motor
ever charged with, let alone convicted of, any wrongdoing, is insignificant. If the government proves its case by showing probable cause, the burden shifts to the person attempting to reclaim the forfeitable property to rebut the government’s evidence, or to show that the property was illegally used without the owner’s knowledge or consent (“innocent ownership”). For both defenses, the claimant must prove her case by a preponderance of the evidence to be entitled to the return of her property.

In spite of the apparent simplicity of the forfeiture laws, their application raises some puzzling questions. The following section will highlight the most controversial issues regarding the application of these laws, and show how strongly they favor the government over an innocent owner.

B. The Government’s Case in Chief

1. PROBABLE CAUSE AS BURDEN OF PROOF

The probable cause standard is problematic as an ultimate burden of proof. This purposely low standard, created for criminal law, is not readily adaptable to a civil proceeding. Moreover, the use of this standard in the civil forfeiture context, while greatly beneficial to the government’s case, is not entirely logical.

The forfeiture statute places the burden on the government to...
establish probable cause that the defendant property was used to facilitate illegal drug transactions.41 To meet this burden, the government can rely on the “totality of the circumstances.”42 Courts have generally defined probable cause as “reasonable ground for the belief of guilt supported by less than prima facie proof but more than mere suspicion.”43

The appropriateness of the probable cause standard in civil forfeiture cases is questionable for several reasons: First, it is by no means clear that the probable cause standard is suitable as a final burden of proof in a civil case. In criminal cases, probable cause is a preliminary showing that must be superseded with final proof beyond a reasonable doubt.44 Criminal laws thus do not permit conviction

41. See supra note 34 and accompanying text.
42. A cursory survey of civil forfeiture cases shows that the government usually uses one or more of the following pieces of evidence: (a) Uncorroborated or corroborated tips from informants; (b) Owner’s (claimant’s) behavior attracted attention because he (i) walked too slowly, (ii) walked too fast, (iii) seemed too nervous, (iv) seemed too relaxed, (v) paid in cash, (vi) bought one-way ticket, (vii) bought two-way ticket with return on the same day; (c) Owner’s personal or real property was used to store/transport drugs; (d) Owner carried large amounts of cash or cash bundled in drug-dealer fashion; (e) Owner was present at a suspected site; (f) Owner was previously convicted/indicted of drug offense; (g) Funds were traceable to a narcotic exchange/transaction; (h) Alert of drug-detection dog caused suspicion.

The dog-alert is a commonly used piece of evidence, although it is highly problematic in practice. Trained drug-dogs react to the smell of a controlled substance coming from currency carried by the owner. Several studies, however, confirm that between 80% and 96% of all U.S. currency is contaminated with cocaine. Traces of cocaine adhere to a contaminated bill for weeks or months. Moreover, if the government seizes cocaine-contaminated currency, the bills are not burned or otherwise destroyed. Oddly, the government frequently deposits the bills with a local bank. Contaminated bills are thus re-circulated, and may be available for the government to justify another forfeiture within a short time. See PRESUMED GUILTY, supra note 1, at 15 (drawing on studies performed by Toxicology Consultants Inc., Miami, FL, and National Medical Services, Willow Grove, PA).

43. United States v. 11348 Wyoming, 705 F. Supp. 352 (E.D. Mich. 1989). Although the government must connect the property it seeks to forfeit to illegal drug activity, courts have consistently held that the government is not required to link the property to a particular drug transaction. See, e.g., United States v. Four Million, Two Hundred Fifty-Five Thousand, Six Hundred and Twenty-Five Dollars and Thirty-Nine Cents, 762 F.2d 895, 904 (11th Cir. 1985); cert. denied, 474 U.S. 1056 (1986). The absence of such a requirement facilitates the government’s case immeasurably. An example is a drug dog alert to drug-contaminated currency. Naturally, in such a case, the government is frequently unable to connect the currency with a narcotic transaction.

44. The probable cause threshold in the criminal context is purposely minimal so as not to hamper police investigations. Probable cause is required, for example, to obtain a search warrant. The low evidentiary burden is justified because it only permits the search, and not the conviction. In the civil forfeiture context, however, the government uses the probable cause standard to establish its prima facie case, and thus frequently to meet its final burden of proof. This use renders the low evidentiary burden highly problematic. Frequently, the government can meet its burden of proof by simply qualifying one of its detectives as an expert, who then testifies, for example, that a particular way of bundling money is typical for drug dealers. Standing alone, such testimony may be enough for a showing of probable cause, and may
after a mere showing of probable cause. Civil cases, on the other hand, ordinarily require proof by a preponderance of the evidence for either party to prevail. In a civil forfeiture, however, probable cause alone suffices to prove the government's case. A person may thus be deprived of her entire livelihood by civil forfeiture after a mere showing of probable cause!

Second, the probable cause standard is borrowed from a criminal context. The distinction between criminal and civil forfeiture is crucial, and the use of a criminal concept in a civil case can present courts with vexing problems regarding the applicability of constitutional protections.

A third problem with the standard is that courts have admitted evidence gathered after the seizure to establish probable cause in civil forfeiture cases. In the criminal context, law enforcement officers therefore entitle the government to forfeiture. In contrast, an innocent owner must adduce massive evidence to prove her case. See PRESUMED GUILTY, supra note 1, at 18, for an example of a claimant who faced 14 individual discovery requests.

45. In fact, at least one state's highest court (Florida) has found that a showing of probable cause is not enough under its state laws, which are modeled after the federal forfeiture statute, to entitle the government to forfeiture. Department of Law Enforcement v. Real Property, 588 So. 2d 957, 967 (Fla. 1991) (requiring no less than clear and convincing evidence as burden of proof).

46. Most states have similar statutes with the same probable cause burden of proof. A notable exception is Florida, which requires "due proof" from the government. See FLA. STAT. § 932.704(1) (1991). Until recently, Florida courts interpreted "due proof" to mean "probable cause" in the forfeiture context. See Florida Dep't of Law Enforcement v. Lazzara, 580 So. 2d 855 (Fla. 2d DCA 1991). However, in Department of Law Enforcement v. Real Property, 588 So. 2d 957 (Fla. 1991), the Florida Supreme Court recognized that the probable cause standard is simply too low. "Accordingly," the court explained, "'due proof' under the [forfeiture] Act constitutionally means that the government may not take an individual's property in forfeiture proceedings unless it proves, by no less than clear and convincing evidence, that the property being forfeited was used in the commission of a crime." Id. at 967; see also Fernandez v. McLane, 603 So.2d 96 (Fla. 2d DCA 1992). While Department of Law Enforcement could be an epochal decision if it induces other states to follow suit, local law enforcement will most likely transfer lucrative cases to federal agents—and so share in the bounty. See supra note 28.

47. See United States v. Halper, 490 U.S. 435, 447 (1989) (discounting importance of civil-criminal distinction in context of "humane" or "personal" interests); see infra part II.D. for a more detailed discussion of this problem.

48. Post-seizure evidence is admitted because such evidence is collected before forfeiture, but after seizure. A textual interpretation of 21 U.S.C. § 881(b)(4), however, requires that probable cause be present at the time of the seizure. The subsection provides that the Attorney General can seize property if there is, "probable cause to believe that the property is subject to civil forfeiture." Still, most courts freely consider evidence found after the seizure when determining whether the government had probable cause. See, e.g., United States v. $37,780 in U.S. Currency, 920 F.2d 159, 162-63 (2d Cir. 1990) (finding no persuasive reason to bar use of evidence obtained after seizure, such as criminal record, to show probable cause for forfeiture); United States v. Banco Cafetero Panama, 797 F.2d 1154, 1162 (2d Cir. 1986) (determining that government "need not demonstrate probable cause until the forfeiture trial"); United
CIVIL FORFEITURE

must show they had probable cause before or as they arrested a defendant. This rule leads to careful investigation before action. In the civil forfeiture context there are no such restrictions. Law enforcement can “act” by seizing the defendant property in the hope of finding the necessary proof once the property is in their hands. The probable cause standard, a threshold requirement for police action in criminal investigations, loses much of its logic if applied after police action in the forfeiture context.

2. THE FACILITATION REQUIREMENT

One commentator has said that “nothing about the course of the civil forfeiture juggernaut is more obfuscated” than the meaning of “facilitation.” §§ 881(a)(6) and (7) of Title 21 provide forfeiture for any property used to facilitate any violation of the statute. Thus, the meaning of “facilitation” is central to the government’s case. Yet, the federal circuits are hopelessly split in their interpretation of the term “facilitation.” At present, the federal circuits define “facilitation” in nine different ways. Despite the existing confusion, the United


49. See, e.g., United States v. Montoya De Hernandez, 473 U.S. 531 (1985). The Court required, “except in ‘certain carefully defined classes of cases,’ a magistrate’s prior authorization even where ‘probable cause in the criminal law sense is not required.’” Id. at 555.

50. See generally Michael E. Herz, Note, Forfeiture Seizures and the Warrant Requirement, 48 U. Chi. L. Rev. 960 (1981); See also Winn, supra note 17.

51. For example, standard police procedure at airports around the country entails approaching ticket-buyers after they pay for expensive tickets with cash. Police usually ask the ticket-buyers for consent to search their belongings. If the search or the reaction of the traveller reveals anything “suspicious,” police will intensify the search, for example, by bringing in a drug-detection-dog. At that point, police often seize currency carried by the ticket-buyer. After the seizure, investigators frequently search for more evidence, which will routinely be admitted into evidence in subsequent forfeiture hearings. See, e.g., Fletcher v. Metro-Dade Police Dep’t Law Enforcement Trust Fund, 593 So. 2d 266 (Fla. 3d DCA 1992). Although Fletcher arose under state law, the facts of the case give a good impression of standard police procedure. See also PRESUMED GUILTY, supra note 1, at 22.


53. See supra note 7.

54. Id. The First Circuit uses the “antecedent relationship” plus “integral part” test. See United States v. One 1972 Chevrolet Corvette, 625 F.2d 1026, 1029 (1st Cir. 1980) (reversing forfeiture of car used to drive a banker to prearranged location to receive up-front payment for a drug transaction because the car did not have an antecedent relationship to the sale of narcotics). The Second Circuit follows with the “sufficient nexus” standard. See United States v. 4492 South Livonia Road, 889 F.2d 1258, 1269 (2d Cir. 1989) (approving forfeiture of residence containing small quantities of drugs, drug paraphernalia, weapons, and currency, because it had a sufficient nexus to illegal narcotics activity). The Third and Fourth Circuits apply the “substantial connection” test. See United States v. Certain Lots in Virginia Beach, 657 F. Supp. 1062, 1065 (E.D. Va. 1987) (reversing forfeiture of a residence because the home
States Supreme Court has refused to settle the issue. The silence of the Supreme Court on this issue is perhaps paradigmatic for the Court’s unwillingness or inability to clear up the contradictions inherent in the current forfeiture laws. Perhaps the Court cannot reconcile these contradictions without depriving the government of the edge it currently enjoys.

3. EVIDENTIARY ISSUES

Civil forfeiture cases are far easier for the government to win than other cases because some of the evidentiary safeguards that are considered essential in other areas of litigation are discarded in the forfeiture context. These safeguards exist to keep unreliable evidence out of the courtroom; it is not entirely clear why they should not apply in forfeiture proceedings. Most strikingly, the government may
use hearsay evidence to establish probable cause. It may introduce, for example, statements of confidential informants, presented to the court by any member of its police force, to establish its claims.\(^5^6\) In contrast, the innocent owner seeking to establish his defense may not introduce hearsay evidence.\(^5^7\)

Courts admit hearsay evidence because “the question of probable cause depends not upon the admissibility of the evidence upon which the government relies, but only upon the legal sufficiency and reliability of evidence.”\(^5^8\) This reasoning derives directly from the evidentiary requirements for probable cause determinations in the criminal context.\(^5^9\) However, courts admit hearsay in criminal cases for the purpose of showing probable cause only because such a showing is a preliminary element: it shows that the arrest or investigation was proper.\(^6^0\) In a civil forfeiture case, on the other hand, probable cause may be all the government needs to show in order to win the entire case.\(^6^1\) With hearsay evidence admitted to show probable cause, and with probable cause as final burden of proof, reliability of evidence issues loom large.\(^6^2\) The absence of evidentiary protections gives the government another edge over the claimant.

56. In a telling example, the Second Circuit said, “[a]ppellant contends, however, that the district court could not properly rely on out-of-court statements attributed to an unidentified confidential informant. We disagree, at least insofar as this evidence was considered on the issue of probable cause.” United States v. 15 Black Ledge Drive, 897 F.2d 97, 101 (2d Cir. 1990). But see United States v. 28 Emery Street, 914 F.2d 1, 5 (1st Cir. 1990) (finding that hearsay may be considered by a court in evaluating probable cause to forfeit only if there is a substantial basis for crediting the hearsay).


58. United States v. One 56-Foot Motor Yacht Named Tahuna, 702 F.2d 1276, 1283 (9th Cir. 1983).

59. E.g., United States v. Fortna, 769 F.2d 243, 251 (5th Cir. 1985) (finding inadmissible hearsay not necessarily improper to show probable cause in criminal case).

60. The use of the full range of adversary safeguards, such as the right to confront the accuser in court, is not essential in a probable cause hearing. Gerstein v. Pugh, 420 U.S. 103, 120 (1975). No interest would be served by formalism in this process. Morrissey v. Brewer, 408 U.S. 471, 487 (1972) (noting that statements of confidential informant may be admitted in parole revocation hearing).

61. The government’s probable cause showing is enough to conclude the case if the claimant cannot rebut it or introduce sufficient evidence of innocent ownership. See United States v. 508 Depot Street, 964 F.2d 814, 816-17 (8th Cir. 1992) (affirming summary judgment in government’s favor where owner could not rebut essential elements in government’s affidavit).

62. It appears that the government need not be concerned with Confrontation Clause problems. The owner’s right to face her accuser should not apply to civil proceedings. After all, the property is “accused” and not the owner.
C. Innocent Ownership

If the government shows probable cause, the claimant may offer evidence of "innocent ownership." For several reasons, the innocent ownership defense does not effectively protect the "innocent" owner. First, the defense does not afford protections to every owner who is "innocent"—in the sense of "not guilty"—of drug-dealing. "Innocent" in the forfeiture context means that the owner's property was used in violation of the statute without the owner's knowledge or consent. By that standard, a claimant is innocent in many cases. A good example of an innocent owner is the landlord whose tenant dealt drugs without the landlord's knowledge. Yet the innocent owner

63. See supra note 38 and accompanying text. In contrast to the government, which merely must show probable cause, the owner must meet a "preponderance of the evidence" standard. Some litigants have fought this shift in the burden of proof as a violation of due process by claiming that it was unfair and at odds with ordinary civil practice. See, e.g., United States v. 4492 S. Livonia Rd., 889 F.2d 1258, 1267-1268 (2d Cir. 1989), reh'g denied, 897 F.2d 659 (1990) (rejecting criticism of probable cause standard in civil forfeiture context). However, appellate courts have been less than receptive to such claims, pointing to historical acceptance or statutory intent. See, e.g., United States v. 250,000 in U.S. Currency, 808 F.2d 895, 900 (1st Cir. 1987) (rejecting argument that use of probable cause as burden of proof in civil proceedings violates due process).

For a general discussion of the constitutional implications of shifting of evidentiary burdens, see Peter Petrou, Due Process Implications of Shifting the Burden of Proof in Forfeiture Proceedings Arising out of Illegal Drug Transactions, 1984 DUKE L.J. 822.

64. See supra notes 33 & 34. In Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974), the Supreme Court upheld the application of Puerto Rico's forfeiture statute to a yacht leased to drug traffickers. The Court expressly left open the possibility that the forfeiture might have been denied if the owner could prove he was innocent of the crime and did all that could be reasonably expected to prevent misuse of his property. Id. at 689. The Court, in dicta, suggested that statutes such as § 881 could not constitutionally apply to innocent owners. To hold otherwise, the Court said, would allow use of forfeiture proceedings for oppressive purposes beyond the legitimate intent of the statutes. Id. at 689-90. However, the Court stopped short of providing a rule for determining "innocence" for an owner in the forfeiture context. The "innocent owner" defense, originally referred to as the "Calero-Toledo" defense, is an integral part of today's forfeiture statute. See supra note 4.

65. Because lack of knowledge is one of the elements establishing innocent ownership, a landlord may be well advised to consciously ignore drug dealing by her tenants. Otherwise, she may share the fate of Lincoln Adair, the landlord of a building on East Sixth Street in Manhattan. He heard rumors that one of his tenants was dealing drugs from the rented property. Adair informed police and began eviction proceedings. The suspected drug dealers operated the East Side Deli from the ground floor of Adair's building. Police raided the deli three times and made seven arrests. Later, a squad of federal law enforcement officers descended on the deli and seized it with its contents, potato salad and all. After considerable litigation, the government offered to return the property—if Adair paid them $4,000 in management fees for the closed deli. Adair resisted. According to Adair, the federal officers shut off the utilities after they seized the delicatessen. Food rotted, Adair said, and pipes burst when the weather got cold. Rather than pay the government, Adair wanted the government to pay him $3,100 in repairs. After six months, Adair got his deli back. The government paid him $1,500, but he was left to do the repairs. Paul Moses, Fighting for Their Buildings, NEWSDAY, Nov. 26, 1990, at 4.
may not be able to gather enough evidence to prove she knew nothing of the drug transactions on her property. Second, it is not entirely clear how ignorant an owner may or must be in order to be considered "without knowledge." 66 Frequently, courts hold owners responsible to do "all that could be reasonably expected to prevent misuse of his property." 67 In United States v. One 1976 Lincoln Mark IV, 68 the court discussed the owner's duty in great detail. The court found that any knowledge or even suspicion may trigger an affirmative duty on the part of the owner to prevent illegal use of the property. 69 That standard compels an owner either to remain completely ignorant or to take action against the suspected drug dealers, neither entirely satisfying prospects. One practicing attorney has suggested that to force an owner to do "all that could be reasonably expected" is to give the owner the role of law enforcer. 70 Most observers agree that the innocent owner is fighting an uphill battle against the government, and that the innocent owner defense cannot effectively shield the owner from governmental overreaching. 71

D. Constitutional Problems

Several of the most basic individual rights are protected by the Constitution only in the criminal context. 72 When adopting the 1984 amendments to 21 U.S.C. § 881, Congress characterized the criminal justice system as one of "ambiguities" and "limitations", and tried to clear the legal path for civil forfeitures. 73 Apparently, hardliners in Congress wanted to "bypass entirely the cumbersome criminal justice

67. United States v. One Tintoretto Painting, 691 F.2d 603, 607-08 (2d Cir. 1982). Federal courts recognize that the innocent owner provision in today's § 881 is part of common law as well. They accept the dicta in Calero-Toledo, as "in accord with the policy and history of civil forfeiture in this country." Id. at 607.
69. Id. at 1387.
70. See Moses, supra note 65. As forfeiture attorney Jay Litzman noted: "I believe that it puts an unfair burden on the landlord to play police. It's a very, very dangerous situation. There are landlords who are afraid to do anything. They don't know which way to turn." Id. One can only wonder about the propriety of compelling private citizens to act (e.g. search) in ways the police can not constitutionally act.
72. See, e.g., U.S. CONST. amend. V: "No person . . . shall be compelled in any criminal case to be a witness against himself, nor shall be deprived of life, liberty, or property, without due process of law." (emphasis added).
73. During congressional discussions regarding the 1984 amendment to § 881, legislators said that "[t]his bill is intended to eliminate the statutory limitations and ambiguities that have frustrated active pursuit of forfeiture by Federal law enforcement agencies." S. REP. NO. 225 98th Cong., 2d Sess. 191 (1984), reprinted in 1984 U.S.C.C.A.N. 3182, 3375.
system, with its tedious set of impediments to investigation, prosecution, and conviction, and substitute a control system consisting of civil sanctions. However, the distinction between civil and criminal proceedings is not clear-cut. The Supreme Court has, for example, held that forfeiture proceedings are sufficiently criminal that the property owner can claim the protection of the Fifth Amendment privilege against self-incrimination. Other constitutional rights, such as the right to a jury trial, the provision against cruel and unusual punishment, and the provision against double jeopardy have rarely or never been successfully asserted in the civil forfeiture arena. Various commentators have attempted to define which proceedings are criminal and which are civil. Some have argued that laws serving primarily to punish are criminal in nature. However,

74. One commentator uses this language rhetorically to give an example of a typical stance of forfeiture hardliners. See Wisotsky, supra note 17, at 925.

75. Boyd v. United States, 116 U.S. 616 (1886). Boyd, as part of its holding, affirmed the Fifth Amendment right against self-incrimination for claimants in forfeiture proceedings. However, the modern forfeiture claimant is ill-advised to remain silent, because the claimant usually has the burden of proof to show innocent ownership. With the claimant invoking Fifth Amendment protections, the government may win in summary fashion.

76. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury ...." U.S. CONST. amend. VI, cl.1. The Seventh Amendment provides that "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved ...." U.S. CONST. amend. VII, cl.1.

77. The Eighth Amendment commands that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. One could argue that the government's practice of forfeiting entire properties for apparently minor infractions is unusual, or even cruel, punishment. See, e.g., United States v. 508 Depot Street, 964 F.2d 814, 817 (8th Cir. 1992) ("reluctantly" holding that proportionality analysis is inappropriate in civil forfeiture proceeding); United States v. Tax Lot 1500, 861 F.2d 232 (9th Cir. 1988) (affirming forfeiture of land worth $95,000 used to grow marijuana plants worth less than $1,000); United States v. One Porsche 911S, 670 F.2d 810 (9th Cir. 1979) (upholding forfeiture of sportscar because it was found to contain .226 grams of marijuana).

78. The Fifth Amendment provides that "[n]o person ... shall ... be subject for the same offence to be twice put in jeopardy of life or limb ...." U.S. CONST. amend. V, cl. 2. The double jeopardy issue arises frequently in the forfeiture context, where a defendant may be subjected to a criminal trial for participation in drug-activity, as well as to civil proceedings to forfeit tainted property. Because the burden of proof in criminal cases is beyond a reasonable doubt, an acquittal of the owner on criminal charges has no collateral estoppel effect on the civil forfeiture case, where the government needs to show only probable cause to establish its case. See One Lot Emerald Cut Stones v. United States, 409 U.S. 232 (1972) (permitting civil forfeiture after acquittal on criminal charges arising out of the same circumstances).

79. See, e.g., id.; 508 Depot Street, 964 F.2d at 814; United States v. Tax Lot 1500, 861 F.2d at 232; United States v. One Porsche 911S, 670 F.2d at 810.

80. See, e.g., J. Morris Clark, Civil and Criminal Penalties and Forfeitures: A Framework for Constitutional Analysis, 60 MINN. L. REV. 379, 385-86 (1976); see also Lawrence A. Kasten, Note, Extending Constitutional Protection to Civil Forfeitures that Exceed Rough Remedial Compensation, 60 GEO. WASH. L. REV. 194 (1991) (arguing that, where forfeiture
this distinction creates problems in areas such as civil forfeiture, where the forfeiture arguably is punitive.81 The Supreme Court has sought to distinguish civil and criminal punishments through a seven-prong test.82 Paradoxically, civil forfeiture sanctions fit the test in several respects,83 and the Court has yet to explain how an action it calls civil can essentially fit the definition given for criminal actions. What the Supreme Court did explain is that forfeiture laws may not violate due process even if they are made applicable to property interests of innocent owners.84 The Supreme Court noted that "confiscation may have the desirable effect of inducing [owners] to exercise greater care in transferring possession of their property."85

punishes, rather than deprives offenders of ill-gotten gains, constitutionally established criminal procedures and safeguards should apply).

81. "It is clear that certain proceedings, even though statutorily or judicially labeled ‘civil,’ in reality exact punishments at least as severe as those authorized by the criminal law." 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, 1350 (1991); "Civil forfeiture is penal in nature." Biss, supra note 52, at 177; In the legislative history to the Comprehensive Crime Control Act of 1984, Congress stated: "The extremely lucrative nature of drug trafficking is well established, and indeed is a primary reason why the forfeiture of the proceeds of drug transactions is necessary to effectively deter and punish such conduct." S. Rep. No. 225, 98th Cong., 2d Sess. 4 (1984), reprinted in 1984 U.S.C.C.A.N. 3182, 3395.

82. The factors to be considered when deciding whether a punishment is criminal or civil in nature are (1) whether the sanction involves an affirmative disability or restraint, (2) whether it has historically been regarded as punishment, (3) whether a finding of scienter is required for its application, (4) whether the punishment will promote the traditional aims of retribution and deterrence, (5) whether the behavior to which it applies already is a crime, (6) whether it serves an alternative purpose to which it may rationally be connected, and (7) whether it appears excessive in relation to that alternative purpose. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963).

83. Factors (2), (3), (4), and (5), discussed at supra note 82, arguably qualify civil forfeiture as criminal. Forfeiture has historically been regarded as "punishment." See Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 686 (1974); see also Boyd v. United States, 116 U.S. 616, 633-34 (finding civil forfeitures sufficiently punitive to be labeled quasi-criminal). Because the innocent owner can block forfeiture by a showing of ignorance, it can be said that forfeiture requires scienter. See supra text accompanying note 69. Congress has stated that retribution and deterrence are goals of tough forfeiture laws. See Legislative History to the Comprehensive Crime Control Act, which emphasizes the necessity for tough forfeiture laws because traditional sanctions inadequately "deter and punish." S. Rep. No. 225, 98th Cong., 2d Sess. 4 (1984), reprinted in 1984 U.S.C.C.A.N. 3182, 3374. The drug-violation underlying the forfeiture already constitutes a crime. Note that the Mendoza-Martinez Court formulated this test in dicta, and that it did not rely on the test in its decision. See Mendoza-Martinez, 372 U.S. at 169.

84. Calero-Toledo v. Pearson Yacht Leasing, 416 U.S. 663, 680 (1974). In Calero Toledo, renters used a yacht under a long-term lease. The yacht was forfeited because a single marijuana cigarette was found on it. The owner was not accused of any involvement in or even knowledge of the drugs. Id. at 665-68.

85. Id. at 688. One may disagree with the Supreme Court on this point. It is debatable whether owners of yachts or operators of private airlines even have the capacity to "take
E. Outdated Dogma

The personification fiction, carried into today’s forfeiture laws from ancient dogma, can leave a property owner exposed to governmental overreaching against the property itself. Forfeiture, rooted deeply in common law, most likely sprang from the English common law action of *deodand*, where the instrumentality of a crime automatically fell to the crown. The *deodand* concept bore the seeds for two of the most troublesome features of today’s forfeiture doctrine: the “in rem proceeding” and the “taint doctrine”.

Civil forfeiture proceedings are *in rem*, directed against the property and not against the owner. Under this personification fiction, only the “guilt” of the property is at issue. Thus, if a home has been used to facilitate drug-transactions, the house falls to the government, no matter what the actual owner’s contribution was. The governmental action “against the home” may be entirely appropriate while such action would be entirely inappropriate against the owner herself.

Under the taint doctrine, if property has been touched or “tainted” by drugs, the ownership rights to such property immediately vest in the government. Therefore, any transaction involving

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89. Courts use the *in rem* characterization to circumvent decisions such as *Boyd*, supra note 70. In the blunt terms of one court, “it is this historic characterization [as an *in rem* action] which permits admiralty forfeitures, and civil forfeitures in general, to escape the stricture of the due process provisions of the Fifth Amendment.” United States v. Veon, 538 F. Supp. 237, 242 n.2 (E.D. Cal. 1982).
90. See Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 681 n.17 (1974). The Supreme Court, in *Calero-Toledo* noted that the origins of the notion that a thing can be “guilty” may be found in the Bible at EXODUS 21:28-30: “[I]f an ox gore a man or a woman, and they die, he shall be stoned and his flesh shall not be eaten.” *Calero-Toledo*, 416 U.S. at 681 n.17. Billy Munnerlyn, the pilot, expressed the concept in less gory terms: “They said they arrested the airplane for hauling money. Something I don’t understand today.” 60 Minutes: You’re Under Arrest, supra note 2.
91. “All right, title, and interest in property described in subsection (a) of this section shall vest in the United States upon commission of the act giving rise to forfeiture under this section.” 21 U.S.C. § 881(h) (1988).
tainted property is subject to the rights of the government. A transfer or other legal maneuver that takes place after the taint will not spare the property. At the same time, any legal rights attached to a property at the time of the taint, such as liens on a forfeitable home, retain a priority position. The taint doctrine has been compared to “demonic possession” because property, once tainted, can be purged only by the forfeiture ritual. A property owner who becomes aware that her property, be it money, cars, or real estate, has been used for illegal purposes, cannot take any action to protect her own interests. Some commentators and cases have called the fiction a “perversion;” others described it as “superstitious,” “repugnant,” and a legal “curiosity.” Yet, the in rem forfeiture proceeding and the taint doctrine are alive and well today. For the innocent owner, they are just part of the obstacle course he must run to obtain return of his property and to be made whole for all losses stemming from government action.

F. The Second Coming of Forfeiture

Considering the shortcomings of the present forfeiture laws, one might expect Congress or the Supreme Court to take corrective action. Yet, one waits in vain. For some untold reason, neither Congress, nor the courts, nor law enforcement have any interest in adding protections for individuals to civil forfeiture proceedings. Every amendment to § 881 in the past twenty years has expanded governmental powers at the cost of individual freedoms. The con-
cept of forfeiture has existed for hundreds of years, but the number
of forfeitures of property involved in criminal acts has mushroomed in recent years. The search for the ultimate reason for this sudden revival of forfeiture would be singularly unsuccessful if limited to legal literature. A survey of press sources proves much more fruitful and may provide some possible explanations for the sudden popularity of forfeiture law.

The government may try to justify the recent surge in crime-related forfeitures as a necessary feature of the government’s “war on drugs.” While strict forfeiture laws have not led to a noticeable downturn in drug activity in recent years, police and politicians are nevertheless convinced that forfeitures are a very effective bulwark against the tide of drugs entering this country, and they vow to press on. Yet, there seems to be another, more forceful motivation behind the sudden popularity of forfeitures than the desire to stop drug dealers. After all, politicians in the past have consistently vowed to fight crime with iron fists, but have been more careful in their choice of words when costly legislation was on the table. Forfeiture laws are different. Forfeitures are money makers. In 1990, proceeds


101. See supra notes 87 & 88 and accompanying text.

102. From 1985 to 1991, the value of properties seized nation-wide has increased by 99%. Since 1985, more than $2.4 billion worth of property has been forfeited. See Annual Report of the Department of Justice Asset Forfeiture Program, 1991, Foreword. As of April, 1991, the seizures had given the U.S. Marshals Service “a bulging $1.4 billion inventory of more than 30,000 homes, cars, airplanes, yachts, businesses and other items—including 1,800 cases of jewelry, 62 horses and cattle, 96 art works and antiques and 26 cases of baseball cards.” Michael Isikoff, Drug Raids Net Much Valuable Property—and Legal Uproar, WASH. POST, Apr. 1, 1991, at A1. The U.S. Justice Department alone generated $1.5 billion from forfeitures between 1986 and 1990. See PRESUMED GUILTY, supra note 1, at 5.

103. Most forfeiture cases are settled or disposed of without ever reaching the appellate stage. Therefore, many of the more shocking cases are never reported in legal publications. In order to use those cases as illustrations, it is necessary to draw on sources not frequently used in law review articles. In addition to the usual legal sources, this article also relies on press-reports (or true to fashion, “storytelling”) regarding individual forfeitures. Because of the tendency of such reports to be somewhat less specific than legally reported materials, the reader is encouraged to interpret them for what they are — anecdotes rather than precedents.

104. Stanley E. Morris, Deputy Director for Supply Reduction, Office of National Drug Control Policy, Executive Office of the President, said “the reality is, it’s very difficult to tell what the impact of drug seizure and forfeiture is.” Andrew Schneider & Mary P. Flaherty, Drug Law Leaves Trail of Innocents — In 80% of Seizures, No Charges, CHI. TRIB., Aug. 11, 1991, at 1.

105. Frederick E. Dashiell, Chief of the U.S. Attorney’s Asset Division, said: “We’re going to maximize forfeitures until we can stop the drug traffickers who are out there causing problems in the communities.” Sean P. Murphy, Forfeitures Help Finance the War on Drugs, BOSTON GLOBE, Mar. 10, 1991, at 21.
from forfeitures paid for ten percent of federal law enforcement costs. A trickle-down provision built into the forfeiture statute provides a rich, new source of income for local law enforcement agencies who crack cases alongside their federal counterparts. If the police are funded with forfeiture money, less tax money needs to be appropriated to support the departments. Politicians who vow to levy "no new taxes" are understandably delighted by this sudden new source of revenue. Apparently because the laws are politically safe, and because they make their proponents appear "tough on crime," many politicians support the current civil forfeiture laws. Moreover, most constituents consider it poetic justice that the government can use some money made from the drug dealers' old houses to build their new houses (jails). Time and again, amendments expanding government power in forfeiture cases have sailed smoothly through Congress.

A final reason for the sudden popularity of forfeitures is the fact that law enforcement agencies have only recently learned how to

106. Id.
107. § 881(e)(1) provides, in part: The Attorney General may . . . (A) retain the property for official use or, in the manner provided with respect to transfers under section 1616a of title 19, transfer property to a Federal agency or to any State or local law enforcement agency which participated directly in the seizure or forfeiture of the property.
108. Lorne C. Kramer of the Los Angeles Police Department's Bureau of Special Investigations, praised the increased cooperation between local and federal law enforcement in cases with prospective forfeitures. "It has been the catalyst to create a more harmonious working relationship between local and federal law enforcement agencies," Kramer said. "I can't think of a time when there was such a close, cooperative working relationship with so many federal agencies as we have now," Kramer added. Crime is Paying Local Dividends, THE NAT'L J., Feb. 25, 1989, Vol. 21, No. 8, at 474.
109. Some police officials believe that state legislatures now approve less money for law enforcement because they expect that proceeds from the asset forfeiture program will make up the difference. "State policy makers consider [the forfeiture income] when drawing up budgets," said Tim Moore, Commissioner of the Florida Department of Law Enforcement, "even though it is contrary to the substantive law in this state." Id. The training manual for federal drug agents, published by the U.S. Department of Justice, states the same proposition: [F]orfeitures produce vast amounts of revenue. Law enforcement has the potential, through forfeiture, of producing more income than it spends. With tax dollars becoming scarce, forfeiture holds the promise of improving drug enforcement and the method to use the assets of violators to support enforcement activities . . . The long-range implications are enormous.
manage and dispose of seized property. In the Comprehensive Crime Control Act of 1984,\textsuperscript{112} Congress centralized the responsibility for management and disposition of forfeited property with the U.S. Marshal's Service.\textsuperscript{113} Before the Act, law enforcement officials tended to shy away from seizing assets difficult to manage.\textsuperscript{114} Now, law enforcement agencies can confiscate properties such as a 4000-tree macadamia nut plantation in Hawaii, a brass and aluminum foundry, and a golf course.\textsuperscript{115}

The preceding quandaries demonstrate the problems inherent in the current forfeiture laws. The existing laws present no disincentive to governmental overreaching. Innocent owners deserve protection against the effects of misguided government action. Yet, all signs indicate that political considerations take precedence over individual rights in the civil forfeiture context. With a view to this reality, this Comment does not propose radical changes to § 881, but rather seeks to make innocent owners whole in individual cases after § 881 runs its course. The goal is to achieve fairness by obligating the government to compensate those it injures. Payment of legal fees by the government may prove to be an effective way to cure some of the ailments of § 881.

III. SHIFTING CONSIDERATIONS

Litigation in the United States is frequently said to follow the "American rule" of attorney fee allocation, a system where each party pays its own way. This system differs from the "English rule," where the loser pays the winner's attorney fees. In reality, the United States uses a system that lies somewhere in between the "American" and the "English" rule.\textsuperscript{116} For historical reasons, litigants in the United States generally pay their own fees, but the practice has been subjected to so many exceptions that this system of fee allocation is no longer a pure form. In \textit{Alyeska Pipeline Service Co. v. Wilderness Soci}...
The Supreme Court defined the practice in the United States: Absent a contractual agreement stating otherwise, or absent specific statutory authority for fee shifting, each party pays its own fees. As noted in *Alyeska*, numerous state and federal fee-shifting statutes are designed to promote policies of general fairness and access to justice.118

This Comment will propose another statutory fee-shifting provision, one that would promote fairness and ensure access to justice for innocent owners. However, before considering the addition of another fee-shifting exception to the American rule, one should understand why the United States developed the American rule in the first place. In particular, one must consider whether the historic justifications for the American rule override arguments for fee shifting in the civil forfeiture context. Toward that end, this Part will first briefly trace the history of attorney fees in the United States. It will then consider the broader spectrum of policies behind fee shifting. Fee shifting may, after all, advance policies undesirable in the forfeiture context. In addition to the "promotion of justice through reparation of the damaged party" and "access to justice" arguments, this Comment will discuss the policies of "punishment of abuses" and "private enforcement of justice."119 Finally, this Part will attempt to predict some of the effects a fee shift may have in the forfeiture context. Such a prediction is difficult because of the numerous variables involved. The discussion of effects of a fee shift will therefore be limited to two typical situations, for which a prediction is sensible and frequently accurate: suits by litigants of modest means and harassment suits.120

The discussion of the two situations is appropriate in this Comment because forfeiture actions are often perceived to fall into these two

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119. Frances Kahn Zemans, of the American Jurisprudence Society, and Professor Thomas D. Rowe, Jr., of Duke University, define these policies as the main reasons for attorney fee shifting. This section of the discussion relies to some degree on the parameters defined by Zemans in *Fee Shifting and the Implementation of Public Policy*, 47 LAW & CONTEMP. PROBS. 187 (1984), and by Professor Rowe in *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 DUKE L.J. 651.
120. Note that a harassment suit for purposes of this Comment refers to a rational, though unethical, attempt to maximize financial gain through the legal process. For the purpose of this discussion, a harassment suit is not a suit brought with the malicious intent to annoy the other party.
categories. Many forfeiture litigants are poor; additionally, the government at times seems to pursue suits against the property of owners purely in the hope of a lucrative settlement, a practice here termed "harassment suit."

A. The History of Attorney Fees in the United States

In colonial America, accepted practice was the English rule—a two-way fee shift whereby the loser of a lawsuit paid the winner's expenses. Statutes limited the amounts recoverable from the opponent. Courts administered fees collected from opponents and afforded the individual attorney relatively little opportunity to evade these regulations. Attorneys were thus effectively restrained from charging their clients what the market would bear. With the rise of capitalism and the free market economy, pressure grew to adjust the system. State courts began to support lawyers who charged their own clients market rates in circumvention of the statutory provi-

121. While there are no exact data on the average income of forfeiture claimants, it appears that few claimants are high-level drug dealers. DEA's own data show that big-ticket items—valued at more than $50,000—comprised only 17% of the total 25,297 items seized by the DEA from July 1989 to December 1990. PRESUMED GUILTY, supra note 1, at 4.

122. Case law does not offer support for this assertion because the government usually reaches its goal by settling cases profitably or simply loses on the merits, in which case it rarely appeals. Ample evidence of this practice exists, however, in anecdotal press-reports, such as the following passage:

In April 1989, deputies from Jefferson Davis Parish, Louisiana, seized $23,000 from Johnny Sotello, a Mexican-American whose truck overheated on a highway.

They offered help, he accepted. They asked to search his truck, he agreed. They asked if he was carrying cash. He said he was because he was scouting heavy equipment auctions.

They then pulled a door panel from the truck, said the space behind it could have hidden drugs, and seized the money and the truck, court records show. Police did not arrest Sotello but told him he would have to go to court to recover his property.

Sotello sent auctioneer's receipts to police, which showed that he was a licensed buyer. The sheriff offered to settle the case, and with his legal bills mounting after two years, Sotello accepted. In a deal cut last March, he got his truck but only half his money. The cops kept $11,500. PRESUMED GUILTY, supra note 1, at 6.

123. One Virginia statute simply stated, "it is, unreasonable that the party who prevails ... should be subject to the payment of a greater fee to his lawyer than he can recover from the adverse party." 1778 Va. Acts, ch. 14 § 5, reprinted in THE FIRST LAWS OF THE STATE OF VIRGINIA 84 (John D. Cushing comp. 1982). Not surprisingly, early Americans followed the system their English ancestors had considered fair.


125. Id. at 12.

126. Id. at 13-17.
The first acknowledgment by the Supreme Court of the newly developing practice came in the 1796 case of Acrambel v. Wise-
man. The new American rule became the accepted and prevailing mode for the payment of attorney fees during the second half of the nineteenth century. Yet, even as the rule reached its zenith, exceptions began to develop. Courts of the time almost always deferred to the agreements of the contracting parties. They bent the new American rule to grant prevailing parties recovery of attorney fees from the opponent pursuant to contractual provisions entered into before the dispute arose.

The statutes permitting recovery of attorney fees soon introduced a new variation: one-way fee shifts that were neither the pure English nor the pure American rule. Under one-way shifts, successful
plaintiffs could recover fees while defendants could not. The one-way shifting concept transformed attorney fee provisions from a simple payment method into a tool for dispensing justice and equality. Legislation incorporating such one-way fee shifts to advance a stated policy became common in the twentieth century. In 1975, the United States Supreme Court in *Alyeska Pipeline Service Co. v. Wilderness Society*, clarified attorney fee practice for modern litigation: each party pays its own fees unless there is a specific contract or a statutory provision to the contrary.

Lawyer emancipation, the driving force behind the American rule in its early days, no longer plays a role. Today's lawyer has a firm position in the free market. Modern fee-shifting provisions, while frequently providing for payment of the loser's fees by the winner, do not curtail the ability of the attorney to charge her own client. The early legal profession's fear of being constrained by fee-shifting statutes thus no longer militates against such legislation. On the other hand, fee shifts today continue to play a role as tools of social justice. As the following section will demonstrate, there are good arguments that fee-shifting provisions promote access to justice and fairness in the legal process. In summary, a review of the history of attorney fees in the United States shows no valid reasons against fee-shifting legislation in general, but good reasons in favor of such laws.

B. Policy Considerations

Statutory fee-shifting provisions advance several public policies, some of which affect the very problems faced by innocent owners in

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133. The American rule thus evolved from a manifestation of lawyer emancipation to a tool of social engineering. Id.

134. A comprehensive survey of state fee-shifting statutes found an “explosion” of legislation incorporating fee-shifting provisions between 1961 and 1980. Of the approximately 2000 fee-shifting provisions on the books in the various states in 1982, only 5% were enacted before 1900. See Note, *State Attorney Fee Shifting Statutes: Are We Quietly Repealing the American Rule?*, supra note 118, at 341.


forfeiture suits. This section will first discuss the policies that are patently relevant in the civil forfeiture/innocent owner context and will then consider other policies that could affect forfeiture laws in more subtle ways. The section will thus move from the “promotion of fairness” and concurrent “reparation of the damaged party” reasoning, via the “access to justice” argument, to the “punishment for abuses” policy and later to the “private enforcement of justice” argument.

1. PROMOTION OF FAIRNESS BY MAKING THE WINNER WHOLE

In defense of the American Rule, the Supreme Court explained that “since litigation is at best uncertain one should not be penalized for merely defending or prosecuting a law suit.” In other words, because the courts dispense justice imperfectly, fairness is best served if the parties can at least predict their potential liability for legal fees. Proponents of fee-shifting agreements take a less cynical stance when they assess the manner in which courts dispense justice. They seem to assume that those who were wronged prevail in litigation. Because two-way fee-shifting provisions award winners the expenses required to vindicate their rights, those who were wronged are made whole. Such provisions promote fairness because those who cause injury, or those who cause hardship by bringing an unjust suit, must completely restore the opponent to the status held before the injury or suit. One-way fee shifts on the other hand, while making the designated party whole if she wins, will not protect the winning non-designated party. One-way fee shifts favor one party over the other and thus do not promote fairness in cases where opposing parties have roughly equal resources and strength. However, for parties of grossly unequal strength, this inherent bias in one-way fee shifts can promote fairness by levelling the playing field. This occurs in disputes between the government and a private party (for instance in civil forfeiture proceedings). Under such circumstances, a one-way “pro-prevailing private party” fee shift would give the private party the assurance that an impartial proceeding can fully vindicate her rights. In contrast, the

136. Fleischman Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718 (1967). As one commentator stated: “The American rule assumes that, given the uncertainties of litigation, it is unfair to penalize the loser with the payment of the winner’s fees. The English rule assumes that it is unfair to force one who wins a law suit to pay for the needless expense occasioned by the loser’s erroneous contest of the winner’s position. The winner should be made whole.” Murray L. Schwartz, Attorney Fee Shifting, Foreword, 47 LAW & CONTEMP. PROBS. 1, 2 (1984).

137. With a one-way, pro-plaintiff shift, that axiom holds true only if the plaintiff wins. If the defendant wins, the plaintiff remains in the same situation as under the American rule.

138. “Designated” refers to one-way, pro-plaintiff or one-way, pro-defendant shifts.
American rule will cause the prevailing litigant, who is always responsible for her attorney fees, a net loss. Again, civil forfeiture is a good example. A claimant's satisfaction of victory is always soured by the loss of legal fees incurred to secure the victory. In sum, fee-shifting provisions make prevailing or designated parties whole, while the American rule does not. Arguably, these provisions promote fairness more effectively than the pure American rule does.

2. ACCESS TO JUSTICE

Inherent in the American legal system is the notion that parties should have their rights vindicated regardless of their economic status. Yet the costs of legal representation can thwart meritorious claims in cases where these costs outweigh the expected recovery or where the litigant simply cannot afford them. Additionally, because of the slim chance of ever getting paid, attorneys are often unwilling to represent poor clients. The American rule thus deters poor litigants from bringing potentially meritorious cases and attorneys from accepting such cases. One can easily imagine a forfeiture scenario where an innocent owner loses her residence, in which she has only minimal equity, after an acquaintance stores small amounts of drugs on the premises. She will be hard-pressed to spend more than the equity she holds in her home on legal fees to assert her innocent ownership claim. Moreover, few attorneys would take her case knowing that, even if she prevails, the equity in her homestead cannot cover her legal expenses. The prospect of a one-way, pro-claimant fee shift would change this scenario. A poor client with a strong claim could stage a defense costing more than the net worth of the res, balancing the reasonable hope of recovering attorney fees against the risk of having to pay no more than her own attorney fees. A two-way fee-shifting provision, however, pits the hope for full recovery against the risk of possibly having to pay the opponent's fee as well. Depending upon the litigant's evaluation of these two competing factors, a two-way shifting provision may or may not improve access to justice.

Attorneys, in contrast, should be more willing to provide legal

139. According to one commentator, "by discouraging the poor from taking legal action the American rule has the effect of actually encouraging violations of their rights." Zemans, supra note 119, at 189. Note that the emergence of contingency fees as a variation of the pure American rule provided the poor with the means to hire legal representation—at the cost of full recovery.

140. For clients with low risk aversity, or for clients who believe they have strong cases, even a two-way fee shift is an improvement over the pure American rule. Yet, as discussed infra note 165, those litigants who need easier access to justice, namely poor litigants, often have high risk aversity and accordingly would profit little from a two-way fee-shifting provision.
services in both one-way and two-way shifting scenarios. Under one-way shifting, two-way shifting, or the pure American rule, attorneys risk no more than the value of their services. On the other hand, the prospect for full payment improves with both one-way and two-way provisions. For the attorney pondering whether or not to undertake a civil forfeiture defense, the availability of any fee shift may make the difference. Considering both clients’ and their attorneys’ motivations, it is safe to say that one-way fee shifting will improve access to justice for claimants. Compared to the American “no-shift” rule, two-way shifting will increase the willingness of attorneys to accept forfeiture cases, but possibly decrease the willingness of risk averse clients to bring cases.

3. PUNISHMENT FOR ABUSES

One of the earliest justifications for fee shifting was to punish the filing of frivolous or bad faith suits. When American courts first began to grant exceptions to the American rule, they justified fee shifting as a punitive measure to ensure the integrity of the judicial process. Trial courts were given great latitude to assess legal fees against parties who acted in bad faith, vexatiously, wantonly, or for oppressive reasons. The imposition of attorney fees as punishment

141. A two-way shifting provision creates slightly higher risk. The client may run out of money before paying both his and his opponent’s attorney. For attorneys balancing that heightened risk of non-payment against the expectation of full payment after a fee shift, the equation remains virtually unchanged. For them, an estimation of case-strength may ultimately decide whether or not to represent the client. In forfeiture cases, innocent ownership claims can be very strong, such as the landlord’s claim against the property used for drug-dealing by a renter. Thus, in strong forfeiture cases, a two-way shift could entice attorneys to defend property owners.

142. See infra note 167 and accompanying text.

143. See infra note 167 and accompanying text.

144. See infra note 167 and accompanying text.

145. See infra note 167 and accompanying text.

146. See infra note 167 and accompanying text.
taught the punished litigant how to behave in court in the future and also served as a general deterrent to future litigants' misbehavior.

The effect of fee shifting as punishment is insignificant in the forfeiture context. It makes no sense to think of a fee shift as punishment if the affected agency strictly followed current laws but was trumped by the claim of an innocent owner. Any imaginable punitive effect would merely act as general deterrence, affecting only the government's general forfeiture policy.

The additional purpose of teaching the wrongdoer a lesson plays no role in forfeiture cases, either. The losing agency would not need a lesson if it followed existing law. Moreover, even if an overzealous agent deserved punishment, a court could not realistically assess fees against the individual agency employee who forced the innocent owner to go to court. A fee shift would be directed against an agency or a department as a whole. Hence, the pedagogical value of the shift would be minimal.

On the whole, a fee-shifting provision in the current forfeiture laws would not significantly advance the policy of punishing a party. Given the current mood of legislature and judiciary in favor of tough government action on the forfeiture front, lawmakers hardly want to "punish" agencies who press forfeiture laws to the limits. To the contrary, the absence of a punitive purpose or rationale make the proposed fee-shifting provisions more palatable for those favoring the current forfeiture laws.

4. PRIVATE ENFORCEMENT OF JUSTICE

Private actions based on statutory provisions serve a purpose beyond the vindication of a litigant's rights. These actions effectuate the policy intent of the legislature. As such, private actions are useful to advance the goals of the legislature and thus, by implication, society as a whole. Because a fee shift can encourage a private

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147. See supra part II.F.
148. "Laws are to a substantial extent effectuated through the demands of their beneficiaries." Zemans, supra note 119, at 194.
149. "That is to say, whenever a legislative body passes a law, it does so for public policy purposes. Therefore, there is always a public argument to be made for encouraging its enforcement. The desirability of such enforcement is basically a political decision." Id. at 197.
150. See Jon S. Hoak, Note, Attorney Fees: Exceptions to the American Rule, 25 DRAKE L. REV. 717, 723 (1976). In contrast to one-way fee shifting, the American rule does not encourage enforcement of statutes by private action. After all, a litigant who can expect to pay her own litigation expenses has little incentive to act as quasi-governmental enforcer of legislation for the common good. In recognition of that fact, commentators have called the
party to bring actions based on statutory provisions, the shift directly or indirectly advances legislative policy. A typical example is the "citizen suit," a statutorily created cause of action brought by private individuals or groups against federal agencies. A citizen suit usually challenges proposed or actual implementation of an administrative policy based on inconsistency with authorizing legislation. Typically, citizen-suit statutes seek to promote litigation in areas the government wishes to regulate but where it does not have the supervisory manpower or resources to do so. By offering to pay a citizen's attorney fees after a successful suit against an agency, the federal government taps the resource of the "private attorney general" to supervise its agencies.

The policy of private enforcement of justice is not a factor in connection with a fee shift in civil forfeitures. The shifts proposed in Part V of this Comment neither advance nor frustrate the legislature's announced intent for civil forfeiture laws. The legislative policy imbedded into the forfeiture laws is to deprive the drug trade of its economic power by effectively siphoning off profits. The availability of a fee shift for innocent owners will not affect the efficiency of the current forfeiture laws. Furthermore, the claim of an innocent owner hardly constitutes a "citizen suit." Such a claim does not challenge administrative policy inconsistent with authorizing legislation, but

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151. Fein, *supra* note 118, at 212. Most statutory fee-shifting provisions resemble the following subsection of the Clean Air Act: "in any judicial proceeding under this section, the court may award costs of litigation (including reasonable attorney and expert witness fees) whenever it determines that such award is appropriate." 42 U.S.C. § 7607(f) (1992).

152. One example is the Clean Air Act, 42 U.S.C. § 7607(f)(1992). While the government wants to advance the policy of preserving air quality, it simply cannot field an army of inspectors to control potential malefactors. Congress recognized this dilemma in its comment to the Surface Mining and Regulation Act, 30 U.S.C. § 1270(d) (Supp. V. 1981). There, Congress acknowledged that

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\text{[t]he success or failure of a national coal surface mining regulation program will depend, to a significant extent, on the role played by citizens in the regulatory process. . . . [P]roviding citizens access to administrative appellate procedures and the courts is a practical and legitimate method of assuring the regulatory authority's compliance with the requirements of the act."
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154. To the contrary, a one-way pro-claimant fee shift may, in the long run, improve the efficiency of the forfeiture laws. By encouraging the government to investigate the rights of the innocent owner carefully before instituting a forfeiture action, a fee-shifting provision might reduce cases resulting in return of the property to the innocent owner. As a result, the government would spend less time and money pursuing fruitless cases, which would render its forfeiture efforts in meritorious cases more effective.
rather attacks the application of existing legislation to particular circumstances. Because a fee shift would not seriously affect the policy of private enforcement of justice, that policy will not be further considered in the discussion of existing and proposed fee-shifting provisions for civil forfeiture laws.

C. The Effects of Fee Shifting

A cost-benefit analysis of a given fee-shifting provision must consider not only the policies to be furthered by the provision, but also the anticipated economic effects of the measure. Economists, who only recently began to analyze such effects, are confronted by numerous, unwieldy factors. First, the effects of two-way fee shifts radically differ from the effects of one-way shifts. In addition, all fee-shifting systems are subject to one or more of the following structural variables: the breadth of applicability of the scheme, the legal standard for awarding fees, the effect of "offer of judgment" devices on fee liability, and the method for calculating the fees. For each permutation of these factors, the effects of the fee shift further depend on "situation factors," such as the parties' perception of the strength of the case, the character of the litigants, the relation between the

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155. One of the foremost scholars on the issue of attorney fees, Thomas D. Rowe, Jr., complained about the lack of sophistication in the discussion surrounding fee shifting. In particular, Rowe bemoaned the overgeneralization pervading the literature on attorney fee shifting and the failure of many commentators to take into account the effects of fee rules on both sides. Thomas D. Rowe, Jr., Predicting the Effects of Attorney Fee Shifting, 47 LAW & CONTEMP. PROBS. 139, 144 (1984).

This section will rely on the parameters set out by Professor Rowe for the discussion of potential effects of fee shifts. Id. at 140-43.


157. Rule 68 of the Federal Rules of Civil Procedure permits defendants to make formal settlement offers during litigation. If the plaintiff rejects the offer and later recovers less than the offered amount, the plaintiff may not collect her own costs and additionally must pay the defendant's fees and costs incurred after the offer. See, e.g., Marek v. Chesny, 473 U.S. 1 (1985).

158. This factor is particularly significant in predicting when parties will settle. Normally, the specter of unreimbursed attorney fees can bridge the gap between the parties' relative estimate of their cases' strength and thus encourage them to settle. However, "if a fee-shifting rule applies, expectations about the outcome will influence whether a party foresees little chance of reimbursement . . . or anticipates recovery of costs as well as success on the merits, reducing any gap-bridging effect." Rowe, supra note 155, at 143.

159. The character of "repeat players" is generally distinguishable from that of "one-shotters" in litigation. Usually, repeat players are risk neutral, which means that the risk of losing does not deter them from litigation. One-shotters, on the other hand, are risk averse, or very much concerned about losing the particular case. The risk-preference of a given party greatly influences whether the party will pursue a claim or defense and under what circumstances a party will settle. Thus, the effects of a given fee-shifting scheme will greatly
costs and the stakes in the litigation, and the estimates by the parties of their opponent's eventual legal bill. It is not surprising that comprehensive expositions of the effects of fee shifting are incredibly intricate. Yet, predictions about the effects of fee shifting are possible and fruitful for certain typical, but isolated settings. With an eye toward application in the forfeiture context, two situations will be considered: harassment suits and suits by litigants with modest means.

1. SUITS BY LITIGANTS WITH MODEST MEANS


160. The higher the projected fees are in relation to the amount at stake, the greater will be the influence of fee concerns. Litigation costs do not usually increase proportionally to the increase in the stakes. Therefore, the relative importance of attorney fees is generally greater in small cases than in high-stake cases. See Matthew B. Wills & Neil Gold, Attorneys' Fees Litigation: Time to Discard the American Rule?, LITIGATION, Spring 1978, at 31. Fee-shifting agreements will thus influence small-claim parties to a greater degree than large-scale litigants.


162. An example of a predictable effect of fee shifting is that a one-way shift in favor of the prevailing plaintiff will encourage the pursuit of claims under virtually all circumstances. See Rowe, supra note 155, at 147. Because such a fee shift invariably rewards plaintiffs for a successful suit without simultaneously increasing the risk, it naturally works as an incentive for a plaintiff to stake a claim. See Shavell, supra note 156, at 55. However, it remains unclear how strongly that incentive varies among distinct litigants. Moreover, the prospect of fee shifting may affect not only the willingness of a litigant to sue, but also the eagerness of an attorney to accept a case. One must therefore consider the influence of a shift on the lawyer as well as on a litigant when predicting potential effects of the shift.

163. As explained in the introduction to this part, it makes sense to study these two cases in the forfeiture context because numerous claimants in forfeiture actions are poor and because the government occasionally appears to forfeit property of arguably innocent owners in the hope of reaching a favorable settlement—a practice termed here "harassment suit."

164. The observed effects of fee shifting on litigants of modest means hold true for most middle-income litigants as well. In fact, almost any private litigant who pays her own legal fees falls into this same category. This Comment uses the terms "poor litigant" and "litigant of modest means" interchangeably.

165. Under a general economic analysis of risk, the standard assumption is "that the higher a person's wealth, the less averse he is to a given size risk." A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 52 n.31 (1983). See Robert D. Cooter & Edward L. Rubin, A Theory of Loss Allocation for Consumer Payments, 66 TEX. L. REV. 63, 71 (1987) (noting that "most decision makers are risk neutral toward losses that are small in proportion to their wealth, and risk averse toward losses that are relatively large."); Louis Kaplow, An Economic Analysis of Legal Transactions, 99 HARV. L. REV. 509, 596 (1986) (explaining that "risk aversion tends to decline as wealth increases, less wealthy individuals tend to give greater
For litigants of modest means, the prospect of having to pay the opponent's fees outweighs the prospect of being compensated for their expenditures. Under the American rule, the poor litigant neither has the chance of being compensated for fees nor the risk of having to pay the opponent's fees. Rational litigants of modest means should thus prefer the American rule over a two-way fee shift because the deterrent effect of a two-way fee shift outweighs incentives to litigate. Because of poor litigants' heightened risk aversity, a two-way fee shift tends to deter them from even raising a meritorious claim. However, the most promising prospect for the poor litigant is a one-way fee shift in his favor. Such a litigant could expect reimbursement for the considerable percentage of his resources spent in pursuit of the claim. If unsuccessful, his only expense would be his own attorney's fee and costs. The majority of fee-shifting provisions in force today fall into the one-way, pro-plaintiff category.

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weight to the risk imposed by uncertainty concerning future government policy than do more wealthy individuals); see also Erin A. O'Hara, Note, *Hedonic Damages for Wrongful Death: Are Tortfeasors Getting Away With Murder?* 78 GEO. L.J. 1687, 1715 (1990) (noting that "there are at least some instances in which poor individuals tend to be more risk averse than wealthy individuals.").

In the area of attorney fees, "[t]he mechanism is simply that, given risk aversion and diminishing marginal utility of income and wealth, the threat of having to pay the other side's fee can loom so large in the mind of a person without considerable disposable assets that it deters the pursuit of even a fairly promising and substantial claim or defense." Rowe, supra note 146, at 153. In other words, the risk of having to pay the opponent's fees usually looms larger for the impecunious plaintiff than the prospect of being compensated for his fee expense, because legal fees constitute a larger percentage of a poor person's disposable income. Risk aversity thus is an inverse function of a litigant's economic status. Of course, plaintiffs who are so poor that the threat of personal bankruptcy is meaningless to them should be subject to entirely different rules.

166. The U.S. Supreme Court framed that proposition in the following terms:

In support of the American rule, it has been argued that since litigation is at best uncertain one should not be penalized for merely defending or prosecuting a lawsuit, and that the poor might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included the fees of their opponents' counsel.


167. Two-way fee-shifting provisions most strongly deter reasonable, but not clearly meritorious, claims of plaintiffs who are on the lower rungs of the economic ladder. Robin C. White, *Contingent Fees: A Supplement to Legal Aid?,* 41 MOD. L. REV. 286, 295 (1978); see generally BARLOW CHRISTENSEN, LAWYERS FOR PEOPLE OF MODERATE MEANS (1970). The availability of a fee shift also affects the poor litigant's ability to secure legal representation. See discussion supra part III.B.2. Unless a fee shift attracts a hungry attorney, poor plaintiffs will hardly find representation to assert their claim. See Zemans, supra note 119, at 189.

168. A reminder of early colonial practice is that courts routinely impose "costs" on the losing party under the American rule. See Fed. R. Civ. P. 54(d).

169. Of 1,974 fee-shifting provisions in force on the state level in 1982, 1073 (54.4%) were of the "prevailing plaintiff" kind. "Prevailing party" schemes (the English rule) finished a distant second with 383 statutes (19.4%), and "prevailing defendant" provisions came in third
In a civil forfeiture context, poor claimants will profit from a one-way fee-shifting provision in their favor, but probably not from any other type. Even the current system, under which the parties pay their own fees, should be preferable over a potential two-way shifting provision for a risk averse, poor claimant.

2. HARASSMENT SUITS

A common, but nevertheless despicable outgrowth of the American legal system is the harassment suit. In harassment litigation, a plaintiff files a suit without any real chance for success, but in the hope that the opposing party will settle out-of-court because defense costs would be higher than an acceptable settlement. Under the American system, a litigant can always pursue a suit in the hope of winning, or at the very least of vexing the opponent with burdensome discovery. Even if the plaintiff expects to gain little at trial, the suit may nevertheless be rational given the prospect of a favorable settlement. If the defendant stands firm, the plaintiff can jump ship via voluntary dismissal at little cost.

Commentators justifiably argue that fee shifting discourages har-
A fee-shifting sanction forces the plaintiff to balance the risk of paying an opponent's legal fees against the benefit to be gained from harassing the opponent. A one-way, pro-defendant provision strongly deters nuisance plaintiffs because it increases the risk of suing without significantly increasing the prospect for recovery. Under two-way shifting, the risks of suing increase along with the prospects for recovery. However, the risks of suing tend to outweigh the increased recovery prospects in the usual, weak harassment suit. In the typical harassment suit, the increased recovery prospect under a two-way shift is purely theoretical while the corresponding higher risk is very real. Two-way (and one-way, pro-defendant) fee-shifting provisions therefore effectively deter harassment suits.

In forfeiture actions instituted by the government in the hope of a favorable settlement, one-way, pro-defendant (i.e. pro-claimant) fee shifts, as well as two-way shifts, could thus make a difference. If the government must calculate the opponent's attorney fees in its cost equation, unfounded suits become unprofitable. The government would no longer pursue borderline cases in order to maximize profits.

IV. FEE AWARD REMEDIES AVAILABLE TODAY TO CLAIMANTS IN FORFEITURE SUITS

The current forfeiture statute does not provide attorney fees for claimants who prevail on an innocent owner defense. There are,


If a party abusing the system is made to pay the actual expense of the injury caused, it is to his financial advantage not to abuse the system. The possibility of having to pay a lawyer's fee for both sides of the litigation would make a plaintiff think twice before he files a petition.

Id. at 80.

175. The current Federal Rules of Civil Procedure provide for fee shifting as a sanction under limited circumstances. Federal Rule of Civil Procedure 11 provides that if a party interposes a pleading or motion to harass an opponent, the signing attorney may have "to pay the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading . . . including a reasonable attorney's fee." FED. R. CIV. P. 11. The Supreme Court used a similar rationale when it sanctioned the imposition of fees against frivolous complaints in Christianburg Garment Co. v. EEOC, 434 U.S. 412, 421 (1978) (finding that a fee award to the defendant in a civil rights action is appropriate if the plaintiff's action was frivolous, unreasonable, or brought in bad faith).

176. A one-way, pro-plaintiff fee-shifting provision cannot discourage harassment suits. On the contrary, because the theoretically improved recovery prospects under the one-way, pro-plaintiff shift are not offset by an increased risk of having to pay the opponent's fees, such provisions are, if anything, an incentive for harassment.

177. See supra note 7. See also United States v. Six Parcels of Real Property, 920 F.2d 798 (11th Cir. 1991). Current federal regulations for forfeiture proceedings reject the idea that the "net equity" in a piece of property being returned to an owner after a finding of innocent ownership includes an entitlement to attorney fees. See 28 C.F.R. 9.2(h) (1992). One federal
however, two fee-shifting mechanisms in place today under which an innocent owner may sometimes recover attorney fees from the government. First, the Equal Access to Justice Act ("EAJA")\textsuperscript{178} provides attorney fee compensation for defendants in government-instigated lawsuits after a finding that the government's case was not "substantially justified."\textsuperscript{179} Second, many courts have found that by seizing and forfeiting property, the government assumes all rights and obligations encumbering the property at the time of the violation.\textsuperscript{180} Therefore, where a creditor has a pre-violation lien on the owner's property, with a provision that the debtor must pay the litigation expenses caused by the debtor, the government assumes that obligation when it receives the property.\textsuperscript{181} The two methods of fee recovery offer an interesting juxtaposition of two basic governmental roles: the EAJA holds the government liable in its capacity as government,\textsuperscript{182} while the contractual method binds the government because it has assumed the obligations of a private party.\textsuperscript{183} Moreover, the
district court explained that "the 'interest' of an innocent owner under 21 U.S.C. § 881(a)(6) is the amount allowed by the government under its administrative practice for remissions. The applicable section, 28 C.F.R. § 9.1(b)(sic), explicitly disallows recovery for attorney's fees ... ." United States v. Gulfstream West, 710 F.Supp. 792, 796 (S.D. Fla. 1989).

\textsuperscript{178} The Act reads in part:

§ 504. COSTS AND FEES OF PARTIES

(a)(1) An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust. Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought. 5 U.S.C. § 504 (Supp. 1991).

§ 2412. COSTS AND FEES

(d)(1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded ... incurred by that party in any civil action ... unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust . ... .

(d)(2)(C) "United States" includes any agency and any official of the United States acting in his or her official capacity.


\textsuperscript{180} See supra part III.E.


\textsuperscript{182} The theory is that the government should represent its citizens, and any damage incurred by the citizens at the hands of the government should be borne by the government itself.

\textsuperscript{183} While the fiction of the government standing in the shoes of a private party has a populist ring to it, reality is that the government does not work under the same strictures as a
EAJA applies to shortcomings in the government's initial showing of probable cause, while the contractual recovery method only takes effect after the lienholder has established its defense of innocent ownership.

In the end, neither recovery method helps the average innocent owner. Because of their limited scope, these mechanisms fail to protect adequately the innocent owner from becoming a casualty of the war on drugs. Nevertheless, they merit discussion because they show that limited fee shifting already has a place in forfeiture law. These methods can also serve as models for more effective provisions.

A. The Equal Access to Justice Act

The Equal Access to Justice Act permits prevailing private parties in civil actions against the United States to recover attorney fees and costs as part of their damages if the court finds that the United States' position in the litigation was not substantially justified. The EAJA, in force in its current version since 1985, was created, in part, to diminish the deterrent effect of looming legal expenses on a party contesting government action. Members of Congress acknowledged that persons or entities with limited financial resources frequently cannot bring meritorious cases against administrative agencies because they lack the financial resources to compete with the agency. In simple terms, a mechanism to reimburse private parties

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184. See infra notes 197-206 and accompanying text; see discussion infra part IV.B.
185. The EAJA defines an eligible party as:
   (b)(1)(B)(i) An individual whose net worth did not exceed $2,000,000 at the time the adversary adjudication was initiated, or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government or organization, the net worth of which did not exceed $7,000,000 at the time the adversary adjudication was initiated.
188. Id. at 4985; see also Hearings, supra note 13.
for litigation expenses incurred because of misdirected government action may level the playing field between the parties.

Beyond the purpose suggested by the EAJA's title, namely providing equal access to justice for private litigants, Congress envisioned the Act as a tool to enable courts to channel and limit agency power. It increases the average citizen's access to the courts, and it serves to make whole the litigant who expended money to defend against unjustified government action. Furthermore, the EAJA promotes private enforcement of justice by encouraging private parties to sue runaway agencies. The EAJA also has a punitive component in that it makes agencies pay for expenses caused by bad faith claims.

It might initially appear that innocent owners could effectively use the EAJA to recover expenses caused by an unjustified forfeiture attempt by a governmental agency. Yet, the EAJA has proven singularly ineffective in the civil forfeiture context. The main rea-

189. As Senator Domenici said:
Since we can't get to these regulations, because they are so numerous and beyond our capacity, it seemed to me that in the marketplace where citizens and Government rub shoulders, that we should instil on the side of the citizen another opportunity to combat and fight and resist not only so they can win, but also to test whether or not the Government was being arbitrary. Hearings, supra note 13, at 17-18. Lawmakers in the House of Representative specifically intended the EAJA to have a regulatory effect on government agencies: “[The Act is] an instrument for curbing excessive regulation and the unreasonable exercise of Government authority.” H.R. Rep. No. 1418, 96th Cong., 2d Sess. 5, reprinted in 1980 U.S.C.C.A.N. 4984, 4991. The regulatory effect of the EAJA is particularly strong where an individual agency is found to have acted in bad faith. Generally, fees awarded to prevailing parties against an agency are paid through the General Accounting Office as provided by 28 U.S.C. § 2414 (state/foreign decisions) and § 2517 (Court of Claims decisions). However, “if the basis for the award is that the United States acted in bad faith, then the award shall be paid by any agency found to have acted in bad faith and shall be in addition to any relief provided in the judgment.” 28 U.S.C. § 2412(a)(2) (Supp. 1990). With this provision, at least the individual agency responsible for the litigant's fees is made to pay.

190. See supra part III.C.
191. See supra note 189.
192. See supra note 189.
193. Although the failure of the government to achieve forfeiture appears to be evidence that its forfeiture attempt was not justified, courts have so far rejected such an argument. See United States v. B & M Used Cars, 860 F.2d 121, 124 (4th Cir. 1988).
194. See, e.g., United States v. Real Property, 970 F.2d 515, 520 (9th Cir. 1992) (denying EAJA fee award because the government was substantially justified and because the fee application was premature); United States v. One 1985 Chevrolet Corvette, 914 F.2d 804 (8th Cir. 1990) (reversing recovery of attorney fees for a successful claimant in civil forfeiture action under the EAJA even though the government's amended complaint was dismissed); United States v. 4880 S.E. Dixie Highway, 838 F.2d 1558 (11th Cir. 1988) (rejecting EAJA fee award to claimant in civil forfeiture action where the government strictly abided by the statutory procedure when attempting forfeiture); cf. United States v. Estridge, 797 F.2d 1454,
son for this failure is the Act’s limitation to government action that was not “substantially justified.” The “substantially justified” standard, found at the heart of most controversy regarding the EAJA, poses particular problems in the civil forfeiture context. First, substantial justification of the government’s decision to initiate and pursue forfeiture proceedings must be examined in light of its burden under the appropriate statute. In forfeiture actions, the government must show no more than probable cause to make a case. Furthermore, under current law, if the government fails to succeed in its forfeiture attempt, there is no presumption that the government’s position was not substantially justified. If the record reveals that the government had a reasonable likelihood of prevailing in the action, the claimant has no claim for attorney fees under the EAJA. Under existing civil forfeiture law, the government has a reasonable likelihood of prevailing in virtually all cases. Therefore, the EAJA very rarely applies in civil forfeiture cases.

Secondly, the civil forfeiture action is an in rem proceeding.

1460 (8th Cir. 1986) (affirming EAJA fee awards where the government brought civil action without conducting a reasonable investigation into underlying facts).

195. See supra note 179.

196. Not surprisingly, the term “substantially justified” is not clearly defined. The term depends on the facts and circumstances of the individual case. See 5 U.S.C. 504 (a)(1) cl. 2, supra note 170. Even the U.S. Supreme Court has acknowledged that “substantially justified” is an abstract term. See Pierce v. Underwood, 487 U.S. 552, 563 (1988). In Underwood, Justice Scalia defined “substantially justified” as “justified in substance or in the main,” or “justified to a degree that could satisfy a reasonable person.” Id. at 553. With that issue elucidated, the Court found that a “reasonable basis both in law and fact” satisfies the government’s burden of proof in defending against attorney fee claims under the EAJA. Id. For an in-depth discussion of the court’s definition of the “substantially justified standard” in Underwood, see Sharon G. Cheney and Cecilia S. Howard, Note, Pierce v. Underwood: Equal Access to Justice Act - Standards Defined by the High Court, 40 MERCER L. REV. 1001 (1989).


198. See supra text accompanying notes 41-43.

199. B & M Used Cars, 860 F.2d at 124.

200. Id.

201. Yet, at least one court acknowledged that “potentially unjustified forfeiture actions should be subject to particular scrutiny because . . . [f]orfeitures are not favored in the law; strict compliance with the letter of the law by those seeking forfeiture must be required.” United States v. 4880 S.E. Dixie Highway, 838 F.2d 1558, 1564 (11th Cir. 1988) (quoting United States v. $38,000 in U.S. Currency, 816 F.2d 1538, 1547 (11th Cir. 1987)) (other citations omitted). The court, however, proceeded to reverse the award of attorney fees under the EAJA. Id.


203. See supra notes 89-90 and accompanying text.
The United States, as plaintiff, brings the suit against a certain piece of real or personal property as defendant. In many cases, that piece of property is “guilty” under the forfeiture statute because it facilitated the drug trade. At the same time, frequently the owner knew nothing about the drug activity and so is “innocent.” Once the government makes its initial showing of probable cause that drugs tainted the piece of property, the claimant can hardly argue that the government’s action against the res was not “substantially justified.”

The EAJA thus provides remedies only for claimants who can actually rebut the government’s initial showing of probable cause as to the res. When innocent owners assert their defense, after the government has made its probable cause showing, they cannot, even if successful, claim that the government’s actions were not substantially justified. The innocent owner may be entitled to have her property returned, but the government is entitled to be spared the EAJA sanction.

B. Contractual Agreements for Attorney Fees

In a few, exceptional cases, the general rule that the government is not liable for the innocent owner’s attorney fees does not apply. Such exceptions are founded on a premise first enunciated by the Supreme Court in United States v. Stowell. In Stowell, the Court held that through forfeiture the government may succeed to no greater interest in the property than that which belonged to the owner at the time of the illegal act. Thus, if the government seizes property encumbered by a mortgage, the government takes possession sub-

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204. See United States v. B & M Used Cars, 860 F.2d 121, 124 (4th Cir. 1988) (finding the district court’s determination that the government’s position lacked substantial justification was incomprehensible where the district court had previously acknowledged that the government had satisfied the initial evidentiary burden for a full-scale forfeiture trial).

205. Not surprisingly forfeiture proceedings ending in EAJA awards are few. If an EAJA award of attorney fees survives a governmental appeal it is usually because the government has brought a civil action without diligently investigating the underlying facts. United States v. Estridge, 797 F.2d 1454, 1458 (8th Cir. 1986); see also United States v. Eighty-Eight (88) Designated Accounts, 786 F.Supp. 1578 (S.D. Fla. 1992). But see United States v. One Parcel of Real Property, 960 F.2d 200, 208 (1st Cir. 1992) (“[I]n a forfeiture case, the fact that the government’s attempt at confiscation misfired will not raise a presumption that its position lacked substantial justification.”).

206. Courts so far have not distinguished between substantial justification as to the res and substantial justification as to the owner. Such a distinction in the interpretation of the EAJA could be the remedy sought in this Comment: because a finding of innocent ownership logically implies that government action was not justified with respect to the owner, all innocent owners would be compensated for their attorney fee expenses under the EAJA if courts were to make such a distinction.

207. 133 U.S. 1 (1890); see also supra note 131 and accompanying text.

208. Title vests in the government at the moment the violation of the statute takes place.
ject to the provisions of that encumbrance. Therefore, if the mortgage contract includes a provision for the payment of attorney fees and costs in litigation connected with the note, that provision also binds the government. However, except in cases involving institutional lenders or commercial landlords, few innocent owners have the security net of a contract regulating attorney fees. Thus, fee shifts based on contracts fail to provide an adequate remedy for most innocent owners in forfeiture cases.

In summary, neither of the two existing provisions allowing for attorney fee awards in forfeiture proceedings effectively protects innocent owners. The following Part will discuss potential alternatives and describe a more appropriate and inclusive fee-shifting provision for the forfeiture context.

V. PROPOSED FEE-SHIFTING AMENDMENTS TO FORFEITURE STATUTES

The main thrust of this Comment is to suggest a way to compensate innocent owners for their expenses incurred in forfeiture battles. The potential value of the fee-shifting schemes discussed below must thus be gauged primarily by their potential to restore every owner who proves her defense to the status she held before the seizure. That, of course, implies an assurance of access to the courts for those who claim innocence. Influencing the litigation behavior of the parties is a secondary goal. In the end, one will see that the two pro-

Judicial condemnation serves only to formalize the transfer of ownership. Stowell, 133 U.S. at 16-17; see supra note 131 and accompanying text.

209. The plaintiff (claimant) in Stowell obtained a mortgage interest in the property before any illegality occurred. Because the claimant concededly had no involvement in the illegality, the Court held that "the mortgage is valid as against the United States, and . . . so far as concerns the real estate, the judgment of condemnation must be against the equity of redemption only." Stowell, 133 U.S. at 20. Modern courts apply this concept without essential modification. See, e.g., In re Metmor Financial, Inc., 819 F.2d 446, 449 (4th Cir. 1987) (reversing lower court's holding that the government is not responsible for interest payments on mortgages encumbering forfeited property); see also Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 579 n.7 (1935) ("[I]t is the general rule that a holder of the equity of redemption [the government after forfeiture] can redeem from the mortgagee only on paying the entire mortgage debt.").


211. Influencing the behavior of potential litigants serves as a prime purpose of fee-shifting provisions in general. However, the two most common thrusts encompassed by this purpose, punishing litigants for undesirable litigation behavior and encouraging private enforcement of justice, are of secondary importance in the forfeiture context. Punishing for abuses: First, given the popularity of the current forfeiture laws among politicians and the judiciary, changes must relieve the innocent owners of their disproportionate burden and not "punish" agencies. Second, any one governmental agency should not be singled out for "punishment" if the agency proceeds within the parameters of established law. Third, if a governmental agency
posed types of fee shifts are likely to produce disparate results. One type will leave most innocent owners in the same sad shape they are today, while the other type could be the antidote against overly burdensome forfeiture laws.

A. Elective Two-Way Shifting

1. THE EXECUTIVE ORDER

Two-way fee shifting, disfavored in the United States since the late eighteenth century, has recently gained popularity. On October 23, 1991, as part of an effort by the executive branch to reform civil justice, then-President Bush issued Executive Order No. 12778 ("Executive Order"). Concerned about the growth in civil litigation in American courts, the President made the order applicable to all federal agencies involved in civil litigation. In subsection (h), the Executive Order provides:

To the extent permissible by law . . . in any civil litigation initiated by the United States, litigation counsel shall offer to enter into a two-way fee-shifting agreement with opposing parties to the dispute, whereby the losing party would pay the prevailing party's fees and costs, subject to reasonable terms and limitations. The Attorney General shall review the legal authority for entering into such agreements.

The Executive Order also commands that where existing legislation
does not empower an agency to enter a fee-shifting agreement, the agency should make "legislative proposals" to that end when reviewing its policies.\textsuperscript{217} The order naturally encompasses civil forfeiture proceedings.\textsuperscript{218}

None of the statutes presently regulating forfeiture contain provisions empowering an agency bringing a forfeiture suit to offer the opponent a fee-shifting agreement.\textsuperscript{219} In fact, current federal regulations specifically direct federal agencies not to consider attorney fees as part of the interest of the innocent owner in forfeiture proceedings.\textsuperscript{220} While the Executive Order directs federal agencies reviewing their procedures to take steps to incorporate fee-shift offers into their regulations, it is unclear whether Congress will follow the efforts of the Bush administration. Congress received the President's proposal with little enthusiasm, and it is unlikely that the Clinton administration will continue to push for civil justice reform.\textsuperscript{221}

2. THE EFFECTS OF A TWO-WAY FEE-SHIFTING PROVISION IN THE FORFEITURE CONTEXT

The two-way shift proposed by the Executive Order would

\textsuperscript{217} "(a) General Duty to Review Legislation and Regulations. Within current budgetary constraints and existing executive branch coordination mechanisms . . . each agency that is promulgating new regulations, reviewing existing regulations, developing legislative proposals concerning regulations, and developing new legislation shall adhere to [the order]. . . ." \textit{Id.} at § 2(a).

\textsuperscript{218} The Executive Order specifically mentions civil forfeiture proceedings in subsection 7(b), which provides that the pre-filing notice to the opponent provision therein is inapplicable in "any action to seize or forfeit assets subject to forfeiture." \textit{Id.} at § 7(b). That exclusion ostensibly harmonizes the Executive Order with Supreme Court precedent such as \textit{Calero-Toledo v. Pearson Yacht Leasing Co.}, 416 U.S. 663, 677 (1974). In \textit{Calero-Toledo}, the Court agreed that forfeiture seizure is one of those " 'extraordinary situations' that justify postponing notice and opportunity for a hearing" until after seizure. \textit{Id.} (quoting \textit{Fuentes v. Shevin}, 407 U.S. 67, 90 (1972)). The effort to except forfeiture suits from the Executive Order's notice requirement makes sense only if forfeiture suits are otherwise encompassed by the order.

\textsuperscript{219} \textit{See supra} note 177 and accompanying text.

\textsuperscript{220} 28 C.F.R. §§ 9.1-9.6 regulate the return of certain property to claimants after a determination of innocent ownership or after a forfeiture failed otherwise. Subsection 9.2 (h) provides that the government must return \textit{net equity}, the owner's monetary interest in the subject property, to the owner in case of an aborted forfeiture. In particular, the section provides:

Net equity is to be computed by determining the amount of unpaid principal and unpaid interest at the time of seizure, and by adding to that sum unpaid interest calculated from the date of seizure through the last full month prior to the date of the notification granting the petition. . . . In this computation, however, there shall be no allowances for . . . attorney's fees, or other similar charges.


\textsuperscript{221} At the time this Comment goes to print, more than fifteen months after the President released his Executive Order on Civil Justice Reform, Congress has not shown any initiative to fundamentally reform the civil justice system on its own terms.
doubtlessly affect claimants in forfeiture proceedings. The order directs agencies involved in civil litigation to offer opposing litigants a fee shift. A literal reading of the Executive Order indicates that if forfeiting agencies comply with the order and offer the claimant a fee shift, the claimant could decide at the outset of a forfeiture suit whether or not to gamble on entering a fee-shifting agreement.\textsuperscript{222}

Such a system would seem to favor all claimants by giving them the opportunity to choose—an opportunity not given to the government.\textsuperscript{223} Wealthy, less risk averse claimants would be at a distinct advantage compared to litigants of modest means, who are generally more risk averse.\textsuperscript{224} Wealthy litigants would be more likely to take advantage of an offered fee shift than poor litigants. Assuming that poor litigants would not readily accept the gamble of a fee-shifting agreement, one can predict that litigants of modest means would be largely unaffected by the proposed fee shift. That shortcoming does not necessarily render the proposal ineffective. Wealthy claimants may be just as innocent as poor claimants and thus equally deserving of added protection. Perhaps, it is a step in the right direction at least to give affluent litigants a better chance to vindicate their rights.\textsuperscript{225} At a minimum, the suggested system is better suited to the forfeiture context than the English rule, under which risk averse litigants must either risk having to pay the government's bill or allow the govern-

\textsuperscript{222}. One must not confuse the system suggested by the Executive Order with a pure two-way system (essentially the English rule). Under a pure two-way system, fee-shifting is mandatory. Any litigating party must pay the other party's attorneys' fees if that party prevails. The Executive Order, on the other hand, suggests a scenario where the federal agency would offer a fee shift to the opponent.

\textsuperscript{223}. The Executive Order should be welcome news to all litigants against the government. If the scheme envisioned by the Executive Order becomes reality, a private litigant against the government could assess the situation before accepting or rejecting a fee shift. The government would have to offer fee shifting regardless of the strength of its case and would, therefore, be at a distinct disadvantage. Of course, the proposed scheme would favor not only innocent owners but also hard-core drug dealers. One may rightfully question whether we should indiscriminately handicap the government against all private litigants.

\textsuperscript{224}. See supra note 165. Note that, while the situational factor "risk aversity" produces contrasting results between poor and affluent litigants, other situational factors do not. For example, the "perceived strength of the case" factor, supra text accompanying note 168, influences both groups of potential claimants in similar fashion: the stronger they believe their case to be, the more likely they will be to pursue it. Like other situational factors, the perceived strength of the case will have essentially the same effect under the traditional American rule (now in force), as under one- or two-way shifting schemes. No matter what the fee scheme, cases perceived to be strong will more likely be pursued than weak ones. This Comment will not discuss such factors.

\textsuperscript{225}. For wealthy claimants with low risk aversity, the proposed elective two-way shift would likely improve their access to justice. Where the claimants actually accept the offer to enter a fee-shifting agreement, they have at least the chance to be made whole, though they have the risk of having to pay their own and the government's fees.
The advantage offered to wealthy litigants under the scheme envisioned by the Executive Order raises issues of equality and fairness. The proposal does little, in essence, for litigants of modest means. This Comment seeks a solution to the dilemma of all innocent owners. The Executive Order does not provide such a solution.

B. Pure One-Way, Pro-Claimant Shifting

Most problems created by elective two-way shifting in the forfeiture context would not exist under a one-way, pro-prevailing-claimant fee-shifting model. Under such a system, the prevailing-claimant always recovers attorney fees from the government, but not vice versa. The Equal Access to Justice Act in many ways resembles a one-way, pro-prevailing-claimant concept because it provides fees only for “prevailing parties” against the government. As demonstrated, the Act’s narrow definition of “substantially justified” has rendered the EAJA largely ineffective to protect innocent owners in forfeitures. The EAJA could, however, be the basis for a legislative amendment to § 881. Such an amendment could adopt the language of the EAJA, but redefine the “substantially justified” standard for forfeiture cases to mean “succeeding, in spite of an innocent ownership claim, in the forfeiture action.” Thus, if the innocent owner prevails, the government was not substantially justified in its action.

However, the EAJA’s “substantially justified” concept need not

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226. See supra part III.C.1.
227. For an in-depth discussion of issues of equality concerns for proposed legislation, see Galanter, supra note 159, at 95.

It might appear convenient simply to call the forfeiture claimant either “plaintiff” or “defendant,” and then to discuss the issues in these terms. Yet, the courts do not agree on the correct label of a forfeiture claimant. Properly, the claimant is an “intervenor” and, as such, is neither plaintiff nor defendant. On the other hand, the claimant naturally takes a position opposite that of the plaintiff, the government, and might thus be labelled “defendant.” This Comment will avoid unnecessary conceptualism and call the proposed fee-shifting provision a “one-way, pro-prevailing-claimant model.” Cf. United States v. 122 Acres of Land, 856 F.2d 56 (8th Cir. 1988) (referring to claimants under the Act as “condemnees”); Florida Rock Industries, Inc. v. United States, 9 Ct.Cl. 285 (Ct. Cl. 1985) (calling the claimant “plaintiff”).

229. Such a reading of “substantially justified” clashes with the current positivist view expressed in cases such as United States v. B&M Used Cars, 860 F.2d 121, 124 (4th Cir. 1988). Given the discrepancy of burdens of proof between the government and claimant, one could reasonably argue that, if the government cannot win on these odds, its claim could not have been substantially justified.
be part of a successful fee-shifting concept for forfeiture cases. In eminent domain law, an area strikingly similar to forfeiture, Congress has laid the groundwork for fee awards to victims of unsuccessful deprivation attempts by the government.\(^{230}\) The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970\(^ {231}\) governs eminent domain proceedings.\(^ {232}\) That Act provides that real property owners are entitled to reimbursement of legal expenses incurred in defense against an unsuccessful governmental attempt to take their property.\(^ {233}\) The attorney fee provision in the Act is properly termed a mandatory one-way, pro-claimant fee shift. Notably, expenses incurred in litigation under the Act are reimbursed only if the government agency cannot prove its case or abandons the case.\(^ {234}\) Moreover, the agency that brought the suit is liable for payment of the owner’s expenses.\(^ {235}\)

\(^{230}\) The “eminent domain” concept provides that the government can take property from private owners for public purposes so long as it fairly compensates the owners. The Fifth Amendment to the U.S. Constitution provides that “... private property [shall not] be taken for public use, without just compensation.” Courts usually find that a taking of private property is permissible, even over the objections of the private owner, if the government pays a fair price for a piece of property. For the utilitarian justification of the concept, see Frank I. Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law, 80 Harv. L. Rev. 1165, 1214-15 (1967). Frequently, the only bothersome issue in eminent domain cases is what constitutes “just compensation.” See, e.g., Almota Farmers Elevator & Warehouse Co. v. United States, 409 U.S. 470 (1973).


\(^{232}\) The Property Acquisition Act reads, in part:

§ 4651. UNIFORM POLICY ON REAL PROPERTY ACQUISITION PRACTICES....

(8) If any interest in real property is to be acquired by exercise of the power of eminent domain, the head of the Federal agency concerned shall institute formal condemnation proceedings. No Federal agency head shall intentionally make it necessary for an owner to institute legal proceedings to prove the fact of the taking of his real property.


\(^{233}\) In pertinent part, the Property Acquisition Act provides:

(a) Judgment for owner or abandonment of proceedings

The Federal court having jurisdiction of a proceeding instituted by a Federal agency to acquire real property by condemnation shall award the owner of any right, or title to, or interest in, such real property such sum as will in the opinion of the court reimburse such owner for his reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees, actually incurred because of the condemnation proceedings, if—

(1) the final judgment is that the Federal agency cannot acquire the real property by condemnation; or

(2) the proceeding is abandoned by the United States.


\(^{234}\) See, e.g., Rocca v. United States, 500 F.2d 492, 496 (Ct. Cl. 1974) (denying fee award to owners of land condemned by Congress rather than federal agency).

\(^{235}\) The payment provision of the Property Acquisition Act reads: “Any award made
Civil forfeiture, if sought against an innocent owner, closely resembles an unsuccessful eminent domain proceeding. Both types of proceedings attempt to take private property for public purposes. Both can deprive the owner who broke no law of her property. Both can financially ruin the owner who is forced to defend her property. In the words of the U.S. Court of Claims, the Act permits the owner to be made whole for the expenses incurred in achieving victory. This Comment suggests no less: the innocent owner in forfeiture suits must be made whole by the government for her expenses in achieving victory. 21 U.S.C § 881 should be amended to include a fee-shifting provision similar to that contained in the Property Acquisition Act. The sections of the Property Acquisition Act providing that expenses are paid only if the government cannot prove its case and that the individual agency attempting the suit is liable for the expenses would fit seamlessly into the amendment here proposed. The only requirement for the adaptation of the provisions of the Act to the forfeiture context is a recognition by legislators that an unsuccessful forfeiture attempt is the equivalent of an unsuccessful attempt to "take" property.

A mandatory one-way, pro-prevailing-claimant fee shift would advance several basic policies mentioned in connection with fee shifts in general. A mandatory fee shift in favor of the successful claimant would make every innocent owner whole. At the same time, the elaborate judicial inquiry in forfeiture cases would guarantee fairness by assuring that only worthy claimants benefit from fee shifting. Moreover, a fee-shifting provision as suggested would give owners

pursuant to subsection (a) of this section shall be paid by the head of the Federal agency for whose benefit the condemnation proceedings was [sic] instituted." 42 U.S.C. § 4654 (1991).


237. At least one court has ingeniously explained why a governmental attempt to take forfeiture property is not really a taking:

If probable cause to seize the [property] did not exist, the DEA action would not give rise to a Fifth Amendment taking claim. A taking within the meaning of the Fifth Amendment occurs when the rightful property, contract or regulatory powers of the government are employed to control rights or property which have not been purchased. No taking claim arises when rights or property have been impaired through unlawful government action.

Golder v. United States, 15 Ct. Cl. 513, 518 (Cl. Ct. 1988) (emphasis added) (citations omitted). In other words: Because a government agency seeking forfeiture without probable cause acts illegally, the Constitution does not protect the owner.

Such reasoning, of course, does not concern the innocent owner or the fee shift proposed on her behalf. After all, innocent ownership comes into play only after the government has shown probable cause. See supra note 4. Under the Golder rationale, there is no reason why the forfeiture attempt should not be considered a taking at this point.

238. Other policy considerations are simply unaffected in the forfeiture context. See supra text following note 146.
who have a bona fide claim of innocence (as manifested by their success in litigation) the access to justice they deserve. Notably, a mandatory one-way shift would benefit claimants regardless of their economic status. Because the suggested shift is one-way, the claimant would run no risk of having to pay the government's fees if he fell short of his high burden of proof. Thus, the competing considerations inherent in two-way shifts would not exist under the proposed amendment to the current forfeiture statute.

A welcome by-product of a one-way, pro-prevailing-claimant shift is that poor claimants of a small res will have a better chance of finding legal representation. Under the current system, poor litigants are often unable to hire an attorney unless they promise the attorney part of the res. If the res is small, such promises entice few. If an attorney knows, however, that she will be fully compensated if she defends the claimant well, she will be more likely to accept civil forfeiture suits.

Finally, the political feasibility of the proposed amendment to § 881 must be considered. Such a proposal may meet considerable resistance in Congress, given the monetary benefits the government receives from existing forfeiture laws. Yet, financial considerations should not weigh heavily against the proposed amendment.239 The government may even profit in the long run from a one-way, pro-prevailing-claimant fee-shifting provision. While such a provision would initially cause higher government expenditures to cover fee awards, the provision will eventually reduce waste of governmental resources. By encouraging agencies to pursue only cases in which they have evidence against the owner as well as against the property, such a provision would reduce governmental litigation expenses on losing causes.

In sum, a one-way, pro-prevailing-claimant shift has significant advantages over the elective two-way shift proposed in President Bush's Executive Order. A one-way shift dispenses equal justice while the two-way shift does not. One-way fee shifting is particularly suited in the forfeiture context, where parties of grossly unequal strength confront each other. In contrast to the two-way shift, a one-way shift could level the litigation plane between the government and less resourceful private parties. The one-way, pro-claimant shift

239. Forfeitures currently produce more revenues than some police departments can spend. The police in Little Compton, R.I., for example, received more than $3 million from a single forfeiture. After the department bought new guns and bulletproof vests, built a new firing range and a tower for a new police radio system, added overtime shifts, and finally a new police station, it still had $1.5 million it did not know how to spend. Cauchon, supra note 9, at 7A. Obviously, some of these funds could be spent more sensibly.
could consistently achieve the legislative policy underlying laws like the Equal Access to Justice Act, namely compensation of innocent individuals forced to expend resources fighting the government. Thus, while the fee-shifting scheme envisioned in the Executive Order improves the status quo for some litigants, only a one-way, pro-prevailing-claimant shift will give all innocent owners the relief justice requires.

VI. CONCLUSION

Turning and turning in the widening gyre of several recent amendments, 21 U.S.C. § 881 cannot hold its ultimate promise: combatting drug traders\textsuperscript{240} for the benefit of innocent citizens. Some of these citizens, found by courts to be "innocent owners" in forfeiture suits, are forced to expend their life savings on legal representation to assert their rights. They pay a disproportionate share of the cost of the government's "war on drugs." No doubt, the current drug laws are strong medicine for a serious illness. Yet, there is no reason why innocent owners should endure more side effects than others. A simple fee-shifting provision in the forfeiture statute will effectively protect them.

This Comment does not suggest that drug dealers deserve a break. It does not tread the same old path of complaining about the abridgment of constitutional rights of accused drug-dealers. For better or for worse, Congress and the Supreme Court have made it amply clear that the protection of such rights is not high on their agenda. However, the protection of innocent citizens must be. This Comment suggests that innocent owners, who successfully jump through the countless hoops held up by the law, should be made whole. If the claimant overcomes the handicap of grossly uneven burdens of proof, if the claimant perseveres in the absence of constitutional safeguards, and if a competent court has determined that the claimant is innocent, the government must indemnify that claimant. An elective two-way shift could markedly improve the position of an innocent owner with low risk aversity; however, because risk aversity is directly related to

\textsuperscript{240} According to the legislative history to the Comprehensive Crime Control Act of 1984:

Today, few in the Congress or the law enforcement community fail to recognize that the traditional criminal sanctions of fine and imprisonment are inadequate to deter or punish the enormously profitable trade in dangerous drugs which, with its inevitable attendant violence, is plaguing the country. Clearly, if law enforcement efforts to combat racketeering and drug trafficking are to be successful, they must include an attack on the economic aspects of those crimes. Forfeiture is the mechanism through which such an attack may be made.

economic status, an elective two-way shift favors affluent litigants over poor litigants and so raises issues of fairness and equality. A more efficient, but also more politically sensitive solution to the attorney fee problem is the mandatory one-way, pro-prevailing-claimant fee shift. Such a shift would be an acknowledgment of reality. It would admit that the strict forfeiture laws, whatever their value, occasionally injure innocent citizens. A one-way, pro-prevailing-claimant fee shift would compensate every innocent owner, and would ensure that civil forfeiture law fulfills its promise: hurt the bad guys; help the good guys. Congress should amend § 881 with a one-way, pro-prevailing-claimant fee-shifting provision to ensure that innocent property owners do not get hurt by the laws designed to protect them.

Claudio Riedi