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**ARTICLE:** CAN AMERICAN ASSET FORFEITURE LAW BE JUSTIFIED?

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**SUMMARY:**

... American asset forfeiture law, however varied by federal or state system, enables law enforcement officials to seize private property believed to be connected to wrongdoing for the purpose of forfeiture to the government. ... Part VI concludes that most of American asset forfeiture law cannot be justified and thus should be abolished. ... Although Congress has steadily increased its reach - and the RICO statute itself is extraordinarily vague - criminal forfeiture is relatively less objectionable than civil forfeiture because it is justified as punishment for a crime and thus follows only after an in personam proceeding against the person, not an in rem proceeding against the property. ... The basic principle, in fact, is clear: the remedy must equal the wrong, as measured by the holdings that were redistributed by the tort or crime. ... Obviously, the variations are many, but making the victim whole, through forfeiture by the wrongdoer, is the aim, even when the specific goods taken from the victim may have been lost or transferred to third parties and substitute goods are now required. ... On the procedural side, modern forfeiture law fares no better, although it is difficult at times to tell whether a given doctrine is substantive or procedural. ... Those parts of forfeiture law that cannot be justified - the larger parts, as just outlined - should be abandoned. ...

**TEXT:**

**[\*311]**

## I. Introduction

American asset forfeiture law, however varied by federal or state system, enables law enforcement officials to seize private property believed to be connected to wrongdoing for the purpose of forfeiture to the government. <sup>1</sup> Finding its roots in the Old Testament, in medieval doctrine, and in admiralty law, forfeiture has been with us since our inception as a nation. <sup>2</sup> In recent years, however, it has taken on a life of its own as a tool in the never-ending War on Drugs, <sup>3</sup> becoming something of an addiction to the law enforcement community that so profits from its practice. As a

result of that increased use, and the abuse that has attended it, forfeiture law is under scrutiny today as perhaps never before in our history. <sup>4</sup> [**\*312**]

This essay steps back from much of the case law and commentary on the subject to ask a simple question: Can American asset forfeiture law be justified? Although simple in form, the question requires an answer of several parts. Part II draws a brief picture of modern American forfeiture law, with examples taken from recent Supreme Court decisions and elsewhere to show how forfeiture works in practice. <sup>5</sup> Part III outlines the theory of justification, showing how law, if it is to be justified, must be grounded not simply in political but in moral theory - and in particular in the theory of rights. <sup>6</sup> Against that background, Part IV outlines the theory of rights and derives a theory of remedies, both private and public, <sup>7</sup> treating "remedy" in its generic sense, not in the sense in which "remedial" is opposed to "punitive," as in much of the forfeiture case law. <sup>8</sup> Finally, Part V shows the place of seizure and forfeiture under the theory - it is a very small place - and shows further that arguments purporting to justify the rest of forfeiture law will not withstand scrutiny. <sup>9</sup> Part VI concludes that most of American asset forfeiture law cannot be justified and thus should be abolished.

## II. Modern Asset Forfeiture Law

Although modern asset forfeiture law varies by federal or state statute, the essence of that law is simple and stark. Stated operationally, under most civil asset forfeiture statutes, as opposed to criminal statutes, law enforcement officials can seize a person's property, real or chattel, without notice or hearing, upon an ex parte showing of mere probable cause to believe that the property has somehow been "involved" in a [**\*313**] crime. <sup>10</sup> Proceeding thus in rem - against the property, not the person - the government need not charge the owner or anyone else with a crime, for the action is against "the property." <sup>11</sup> The allegation of "involvement" may range from a belief that the property is contraband to a belief that it represents the proceeds of crime (even if the property is in the hands of someone not suspected of criminal activity), that it is an instrumentality of crime, or that it somehow "facilitates" crime. And the probable cause showing may be based on nothing more than hearsay, innuendo, or even the paid, self-serving testimony of a party with interests adverse to the property owner.

Once the property is seized, the burden is upon the owner, if he wants to try to get his property back, to prove its "innocence," not by a probable-cause but by a preponderance-of-the-evidence standard. Until recently, that standard has been all but impossible to meet because "the thing is primarily considered the offender." <sup>12</sup> Imbued with personality, the thing is said to be "tainted" by its unlawful use. Therefore, the rights of the owner never come into consideration. Given the manifest injustice in that, Congress and several states in the 1980s enacted innocent-owner defenses. <sup>13</sup> But under those defenses, the owner must prove that he lacked both control over and knowledge of the property's unlawful use - negatives that are often impossible to prove. <sup>14</sup> Moreover, before the Supreme Court reined in the "relation-back" doctrine in 1993 <sup>15</sup> - which holds that title to property vests in the government at the [**\*314**] time it is used illegally, even if the property changes hands many times after that - those few owners who could prove their innocence often lost because the relation-back doctrine was said to trump the innocent-owner defense.

The substantive and procedural hurdles owners face are only compounded by the practical hurdles. Deprived of their property, ranging from homes, cars, boats, and

airplanes to businesses and bank accounts, owners are at a distinct legal and practical disadvantage if they choose to wage a costly legal battle against the government to recover their property. Moreover, if the owner has been involved in activity that in any way might lead to criminal charges - however trivial or baseless those charges might ultimately prove to be - the risk of self-incrimination entailed by any effort to get the property back has to be weighed against the value of the property. Often, this means that the owner will simply not make the effort.

In contrast with civil forfeiture, as just outlined, criminal forfeiture is a recent development in American law, stemming from the enactment by Congress in 1970 of the Racketeer Influenced and Corrupt Organizations Act (RICO).<sup>16</sup> Although Congress has steadily increased its reach<sup>17</sup> - and the RICO statute itself is extraordinarily vague - criminal forfeiture is relatively less objectionable than civil forfeiture because it is justified as punishment for a crime and thus follows only after an in personam proceeding against the person, not an in rem proceeding against the property. Defendants are thus entitled to the procedural protections of the criminal law, including the requisite burdens and standards of proof. And forfeiture turns on conviction, not on the antiquated fictions of civil forfeiture. Although criminal forfeiture is in a sense broader than civil forfeiture, because under it the government can reach even "untainted" assets, that result follows simply from the different rationales for criminal and civil forfeiture. Under criminal forfeiture, property is forfeited because of the guilt of the owner, not the "guilt" of the property.

Four decisions handed down by the Supreme Court in 1993 serve to illustrate both how forfeiture works in practice and how the Court has begun finally to rein this law in, albeit in a very limited way. In *Alexander v. United States*,<sup>18</sup> a criminal forfeiture case, defendant Alexander was convicted under federal obscenity laws and RICO of **[\*315]** having sold seven obscene magazines and videotapes through his numerous businesses dealing in sexually explicit materials. In addition to a fine of \$ 100,000 and a prison sentence of 6 years, he was ordered to forfeit 10 pieces of commercial real estate, 31 current or former businesses, including all of their assets, and nearly \$ 9 million in monies acquired through racketeering activity. The Supreme Court upheld his conviction against a First Amendment challenge but remanded the case for a determination as to whether "RICO's forfeiture provisions, as applied in this case, ... resulted in an 'excessive' penalty within the meaning of the Eighth Amendment's Excessive Fines Clause."<sup>19</sup> Although the Court gave no real guidance on this question, it did hold, at least, that in personam criminal forfeiture "is clearly a form of monetary punishment no different, for Eighth Amendment purposes, from a traditional "fine.""<sup>20</sup>

In a companion case, *Austin v. United States*,<sup>21</sup> the Supreme Court faced the question of whether the Eighth Amendment's Excessive Fines Clause applies also to civil forfeiture. In that case defendant Austin pled guilty to a state drug charge of possessing two grams of cocaine, worth about \$ 2000, with intent to distribute, for which he had been sentenced to seven years in prison. The federal government subsequently filed an in rem action for forfeiture of Austin's home and auto body shop, alleging that the property had "facilitated" the commission of a crime. Against the government's claim that civil forfeiture, being civil and not criminal, is not punitive and so is not subject to the Excessive Fines Clause, the Court said - in a good example of the kind of "reasoning" one finds in forfeiture law - that "even though this Court has rejected the "innocence" of the owner as a common-law defense to forfeiture, it consistently has recognized that forfeiture serves, at least in part, to punish the owner."<sup>22</sup> Thus, because it is in part punitive, civil forfeiture is

subject to the Excessive Fines Clause. But here also, the Court gave no real guidance as to whether any given forfeiture might be constitutionally excessive.

The innocent-owner defense arose in yet another civil forfeiture case the Court decided in 1993, *United States v. 92 Buena Vista Avenue*,<sup>23</sup> where the question before the Court was whether the government could [**\*316**] invoke the relation-back doctrine to claim title against an innocent owner. Here, the owner had purchased a home in 1982 with funds given to her by a man with whom she was intimately involved from 1981 until 1987.<sup>24</sup> In 1989, the government filed an in rem action against the property, claiming probable cause to believe that the home had been purchased with funds traceable to illegal drug activity.<sup>25</sup> In response to her innocent-owner defense, the district court held that the defense applies only to bona fide purchasers for value and only to persons who acquire an interest in the property before the acts giving rise to the forfeiture take place. The Supreme Court rejected the lower court's conclusions, holding that the donee was in fact an "owner" and that the fictional retroactive vesting of the relation-back doctrine is not self-executing but occurs only upon a forfeiture judgment.<sup>26</sup> Until such a judgment, therefore, the innocent-owner defense is available to the owner.

Finally, late in 1993, in *United States v. James Daniel Good Real Property*,<sup>27</sup> the Court held that, "unless exigent circumstances are present, the Due Process Clause requires the Government to afford notice and a meaningful opportunity to be heard before seizing real property subject to civil forfeiture."<sup>28</sup> Here, the government initiated an in rem action against the house and land of a man who had pled guilty to violating state drug laws four and one-half years earlier - a lapse of time that speaks volumes about the oft-stated "crime-fighting" rationale for forfeiture. The Court's opinion was limited, however, to procedural questions, and its holding applies only to real property, not to chattels.

As the cases just outlined should indicate, the Supreme Court is placing at least some restraints on the government's forfeiture power, but with the limited exception of Buena Vista, and possibly Austin (where the question was simply whether civil forfeiture is punitive), the Court has yet to raise serious or systematic questions about the underlying rationale for forfeiture. As a result, proponents of reform - whether in Congress,<sup>29</sup> among the National Conference of Commissioners on Uniform State [**\*317**] Laws,<sup>30</sup> or the Justice Department itself<sup>31</sup> - are little encouraged to do more than chip away the more offensive aspects of the practice. In fact, the recent Justice Department proposal, if anything, expands the government's forfeiture power.<sup>32</sup>

But while the cases just cited may indicate some movement toward forfeiture reform, they do not give a wholly accurate picture of forfeiture in practice. After all, they are cases in which the owner, for whatever reason, was willing and able to contest the forfeiture - all the way to the Supreme Court. As recent reports in the popular press have revealed,<sup>33</sup> many victims of government forfeiture policy have not been so fortunate.

Until reporters exposed it in 1992, for example,<sup>34</sup> a drug squad operating out of the sheriff's office of Volusia County, Florida, stopped thousands of motorists traveling Interstate 95 who fit a "drug-courier profile" - seventy percent black or Hispanic - then simply confiscated, on the spot, any funds those motorists were carrying in excess of \$ 100.<sup>35</sup> In 1989, in Jacksonville, Florida, U.S. Customs Service agents destroyed a new \$ 24,000 sailboat in a fruitless search for drugs, then refused to

compensate the owner, requiring him to seek a private claim bill from Congress that eventually gave him partial compensation. <sup>36</sup>

"Mere" property examples such as those could continue almost endlessly, but it is not only property that is endangered by the zeal that surrounds forfeiture. In March of 1994, for example, a 13-member Boston Police Department SWAT team, acting on an informant's tip, broke down the door of the wrong apartment in a search for drugs and guns, then pinned down and handcuffed the seventy-five-year-old black [\*318] minister who lived there, resulting in his death a few minutes later from a heart attack. <sup>37</sup> And on the other side of the country, in perhaps the most celebrated case of its kind, thirty local, state, and federal agents burst into a Malibu, California, home - nominally in a fruitless search for drugs, but actually, as a subsequent investigation brought out, as part of a forfeiture action - during the course of which the owner was shot and killed. <sup>38</sup>

Again, examples of forfeiture in practice could be cited at length - most, but by no means all, taken from the ever-expanding War on Drugs. Driving forfeiture, of course, is the fact that law enforcement agencies get to keep what they seize - an invitation to abuse so patent that it survives only because the War on Drugs, from which it flows, is itself driven by so blinding a moral fervor. <sup>39</sup> Given that fervor, appeals to reason have proven futile. Nevertheless, it is only through reason that the issue of forfeiture can be sorted out and its true rationale, if any, discovered.

### III. Justification

Taking the profits out of crime, denying criminals the means of crime, and punishing criminals for the crimes they commit are among the reasons cited as justification for modern American asset forfeiture law. Thus stated, those reasons seem compelling, yet they lead to the law and legal practices just outlined. To determine whether that law and those practices are justified, therefore, it is not enough to give a reason or even a set of reasons. After all, even if we could dramatically reduce the crime rate by executing all convicted felons, however minor their crimes, or by incarcerating all males between the ages of fifteen and thirty, that reason would hardly justify those practices. [\*319]

To get to the bottom of the matter, then, what is needed is a theory of justification, rooted in first principles, which relates reasons systematically. <sup>40</sup> And that theory must itself be grounded in reason, not will, political or otherwise, for will-based theories of justification, even systematic ones, do not do the job. <sup>41</sup> It is no justification of forfeiture law, for example, to say simply that it has been recognized by courts or declared by legislatures. Mere declaration, even by legal authorities, tells us simply what the law is, not whether it is justified. Nor does declaration coupled with democratic process solve the problem of justification. <sup>42</sup> For democracy derives whatever moral force it enjoys from the political right of self-rule, which is grounded in turn in the individual right of self-rule. Yet that individual right - the bedrock of a free society - is precisely the right that democratic process necessarily overrides, as the following analysis shows.

The problem that justification through democratic process faces, in a nutshell, is the problem of preserving individual autonomy - the right of self-rule on which democracy itself is founded. Clearly, majority rule does not do that, for under it the majority, by definition, rules the minority. (The numbers make no difference, of course, whether they are 51 to 49, or 99 to 1.) But neither does the argument from

social-contract theory fare any better - the idea that the minority is bound by virtue of prior unanimous consent to the process. That argument may get the legal regime off the ground and running - and it works in its application to private associations, which individuals are free to enter and leave - but it does not serve to justify majority rule except among members of a founding generation who actually do consent to that rule. Nor, finally, does pointing to the individual's right to leave solve the problem of preserving minority rights, for it begs the question, forcing members of the minority to choose between their right to stay and their right to rule themselves. <sup>43</sup> Thus, even democratic government is at bottom a forced association, which is why America's founding generation spoke of **[\*320]** government as a "necessary evil," and why George Washington remarked that "government is not reason, it is not eloquence, it is force." <sup>44</sup>

What these reflections indicate, then, is that insofar as political or process theories justify anything, they depend in the end on substantive or moral theories, which is precisely what America's founding documents indicate - from the Declaration of Independence through the Constitution and the Bill of Rights to the Civil War Amendments. <sup>45</sup> Those documents all proceed, at least by implication, not in the organic tradition of majority rule but in the more individualistic and libertarian tradition of state-of-nature theory, which begins with the world of private individuals, then derives the rights of those individuals, and finally demonstrates how limited governments and limited governmental powers arise, more or less legitimately, to secure those individual rights. Individuals and their rights come first, in short, government and its powers come second, with governmental powers derived from individual rights. <sup>46</sup>

Thus, at the core of the theory of justification is the theory of rights, for in the end, both individuals and governments justify their actions, when challenged to do so, by showing them to be performed "by right." Individuals can do this directly, by appeal to the theory of rights. Governments must do so indirectly, by appeal either to a delegated power alone or, better, to a delegated power undergirded by a natural individual right.

An example of delegated power alone is the power of eminent domain. Governments can claim to exercise that power "by right," when they can, only because individuals in the original position delegated it to them. Nevertheless, this power is problematic because, as noted above, delegation that can bind those not in the original position is itself problematic; and because this particular power is not one that individuals have to delegate in the first place. There is, after all, no individual power of eminent domain in the state of nature, which is why it was known in the seventeenth and eighteenth centuries as "the despotic power." <sup>47</sup> The **[\*321]** power's saving grace is its compensation requirement, which leaves individuals whose property is taken at least as well off (in principle) as they were before the taking took place. <sup>48</sup> Still, the association is forced.

An example of delegated power undergirded by a natural individual right is the police power. Here, too, governments can claim to exercise that power "by right," when they can, from the still problematic consideration of delegation in the original position. But unlike in the case of eminent domain, individuals do have a police power to delegate: it is what John Locke called the Executive Power that each of us has in the state of nature, the power to secure our rights. <sup>49</sup> Thus, while government's exercise of the police power "by right" may be problematic from a consideration of delegation - and with the federal government it is problematic for

the additional reason that the Framers delegated very few police powers to it - the power itself, unlike the eminent domain power, is not problematic - provided, of course, that its exercise remains within the bounds of the undergirding individual right.

In summary, a governmental power can be justified only if it has been delegated (with the caveat noted above); it springs from an underlying individual power; and its scope is no broader than that of the underlying power. Insofar as they meet those tests, therefore, the police power of the states and the limited police power of the federal government are justified. More problematic are delegated powers that enjoy no underlying individual counterpart - such as the power of eminent domain; and powers that do enjoy an underlying individual counterpart but that have not been delegated - such as many of the federal government's modern police powers.<sup>50</sup> Finally, enjoying no justification whatever are powers that are neither delegated nor reflective of underlying individual powers. **[\*322]** Regrettably, such powers exist today at all levels of government. To determine whether the forfeiture power is among them, the underlying police powers of individuals must be determined.

#### IV. Rights and Remedies

It is a common misconception that state-of-nature theory presupposes that a state of nature, whatever its description, in fact existed. No such presupposition is necessary, for state-of-nature theory of a kind that was common among America's founding generation is simply a thought experiment. It requires plumbing the depths of reason for first principles and then doing the casuistry that is necessary to draw a picture of the moral world - especially the world of rights, the exercise of which might lead to legitimate government.

As previously noted, thought experiments of just that kind - thinking about, as Locke put it, "the True Original, Extent, and End of Civil-Government"<sup>51</sup> - led to our American experiment in ordered liberty. And liberty indeed was at the center of the picture the Founders drew, as our founding documents make clear. This is especially true of the Declaration of Independence, where the outcome of the Founders' thinking is stated most succinctly.<sup>52</sup> Because the implications of the picture the Founders sketched in that document have particular bearing on the forfeiture issue, it will be useful to draw them out more fully here.

After placing us squarely in the reason-based natural law tradition - with its "self-evident" truths of right and wrong, which serve as a model for positive law - the Declaration sets forth a premise of moral equality, defined by rights to "life, liberty, and the pursuit of happiness,"<sup>53</sup> from which all else follows. Implying that no one has rights that are superior to those of anyone else, that premise both launches and limits the ensuing argument, for it enables the assertion of rights in the name of equality, yet limits such assertions by that very equality. Moreover, in thus defining equality through the language of rights, and reducing rights to the generic "life, liberty, and the pursuit of happiness," the Declaration reminds us of Locke's insight that all rights, however described, can be reduced to the single idea, broadly understood, of property: "Lives, Liberties and Estates, which I call by the general Name, **[\*323]** Property."<sup>54</sup> Indeed, what are our rights to life, liberty, speech, religion, association, and so on if not rights to things that are, in the end, ours? And what are violations of those rights if not takings of things that belong to us?<sup>55</sup>

That insight from Locke, which was common among the Founders,<sup>56</sup> proves

especially helpful once the casuistry begins. For if possession is the root of title and entitlement, <sup>57</sup> then we have a relatively substantial tool not only for giving content to the premise of equal rights but for tracing out the world of rights and sorting out justified from unjustified claims about rights. The first step in that process, however, is to draw a distinction between general and special rights, a distinction that exhausts the world of rights and correlative obligations. <sup>58</sup> General or natural rights are those we are born with. Good against the world, we hold them simply as members of the human race. <sup>59</sup> Essentially, they are rights to be free, to plan and live our own lives by our own values, provided only that in doing so we respect the equal rights of others to do the same. Special rights, by contrast, are created in time, as we work our way through life. They arise in two basic ways: through voluntary association, as a result of promises or contracts; or through forced association, as a result of torts or crimes. When such voluntary or forced events occur, general rights and obligations are alienated and new, special rights and obligations are created. Held only by the parties to the particular events that bring them into being, these rights are "special" to those parties.

The content of general rights is determined by the scope of our entitlements - the scope of that to which we hold title, quite literally, **[\*324]** including our lives and liberties. <sup>60</sup> In doing the casuistry here it is important to notice that rights reach only to those things that are held free and clear, not to things that are merely "enjoyed" at the pleasure of others - others who hold rights over what, in the end, belongs to them. <sup>61</sup> By contrast, the content of those special rights that arise through promise or contract can be as varied as the parties agree to make it. Here too the rights can be reduced to property, but the titles that can be exchanged through such voluntary associations are limited only by the rights of third parties.

We come, then, to those special rights and obligations that arise through forced association - torts and crimes - and to the foundations, if any, of forfeiture law. <sup>62</sup> Here, the principle of equality plays a particularly important role in the casuistry, but it does so at two levels. First, in the uncomplicated case in which A hits (or takes from) B, the principle tells us that the prior moral equality between the parties has been disturbed - the rights of B have been violated, the obligations of A have been forgone. If rights are to have any force, the wrong must be remedied, the moral equality reset. The logic of rights is thus the logic of equilibrium, which voluntary association preserves (absent fraud), <sup>63</sup> but forced association upsets.

To violate a right, then, is to create and incur an obligation to make one's victim whole again, an obligation to right the wrong, to restore the equilibrium between the parties. But by the logic of equality it is also to alienate a right in oneself to that property that is necessary to make one's victim whole; to create a right in one's victim to that property; and to extinguish an obligation in one's victim to not take that property. Thus does the world of rights and obligations change by the commission of a **[\*325]** tort or a crime; thus must it change again if the moral world is to be set right.

But what, specifically, is needed to set the moral world right? Here, the principle of equality comes in a second time, not in its formal application, as above, but in its substantive application. At this point, however, difficulties start to arise, for while the theory of rights can tell us when remedies are required and why they are required, it cannot tell us precisely what those remedies should be - beyond the formal conclusion that they must right the wrong, make the victim whole, and restore the status quo. What the theory calls for, of course, is some redistribution between the

parties that will remedy the forced redistribution that was brought about by the tort or crime in the first place. But what redistribution? Clearly, the parties need to place a value on the loss, which the wrongdoer must "pay" - whatever form that payment takes. But what if the parties dispute the value of the loss or the form of payment? Although we can "reason" about values, disputes about values, unlike most disputes about rights,<sup>64</sup> are not resolved by recourse to principles of reason. For in the end, as economists have long understood, values are subjective.

Notice that voluntary associations also involve redistribution. But there the parties themselves, relying on their own subjective preferences, determine the equality of any proposed redistribution.<sup>65</sup> If they fail to agree, no redistribution takes place and they simply walk away. Here, however, there is no walking away: the redistribution has already occurred, through force; if justice is to be done, a second redistribution is needed to undo or remedy the first. Obviously, wrongdoers have an incentive to value the losses they cause low; victims have an incentive to value the losses they suffer high. Yet between them, again, there is no difference of principle, resolvable by reason, only a difference of assessment, about which reasonable people can disagree.

How, then, is the problem to be resolved, given that it must be resolved if justice is to be done? The traditional answer, which this essay follows, is to introduce third-party forced adjudication, a device that seems **[\*326]** inescapable if the promise of the theory of rights is to be realized.<sup>66</sup> Notice, however, that the introduction of that device makes no change in the basic moral picture, for the question remains one of determining just what the wrongdoer is obligated to do and what the victim has a right to insist be done - or a right to do himself under his police power in the state of nature. Thus, a neutral adjudicator - made necessary by the subjectivity of valuation - in no way alters the moral relations that arise as a result of a tort or crime.

If an adjudication is to be justified, however, that third party, whether it be a judge, a jury, or a legislature setting a range of sanctions, cannot abandon reason simply because reason has come to its principled end. For there is still "reasoning," even about values, as easy cases make clear. Thus, if the principle of reason to be applied is that the remedy must equal the wrong, as measured by the holdings that were redistributed by the tort or crime, it is no reasonable application of that principle, other things being equal, to require A to give B \$ 100 as a remedy for his having taken \$ 10 from B by mistake. To be sure, the present value of the \$ 100 may be less to B than the past value of the \$ 10, but if that is the case - if other things are not equal - that fact can be factored into the remedy. As easy cases like this demonstrate, then, reasoning about values may not be perfect - owing to the subjectivity of valuation - but it is not impossible either. The basic principle, in fact, is clear: the remedy must equal the wrong, as measured by the holdings that were redistributed by the tort or crime. Insofar as possible, the wrongdoer must make the victim whole - not more than whole, not less than whole either. That is the wrongdoer's obligation, to which the victim has a right - and a police power to enforce.

In the above scenario, then, few would disagree that \$ 10 is the right remedy - other things being equal - and \$ 100 the wrong remedy, for the value of the holding redistributed by the tort (the conversion) is easily objectified. As we move away from easy cases, however, applying the principle of equality becomes increasingly difficult. What is the right remedy, for example, if A takes the \$ 10 intentionally, or hits B, or takes B's limb or life by accident, or negligently, recklessly, or intentionally? In such

cases, the principle that the remedy must equal the wrong, measured by the holdings the wrong redistributed, continues to operate, but its application becomes more difficult because the valuation of the redistributed holdings is increasingly subjective. Crimes are not mere torts, for example. By virtue of the mens rea element they are affronts to [\*327] the dignity of the victim, which belongs to him. By using his victim, the criminal takes his victim's dignity, which is worth something. Mere money damages may not reach that element of the wrong. What are money damages to a rape victim, for example, especially if the victim or rapist or both are wealthy? The idea that a murderer, by his act, has alienated his own right to life has a long history in moral theory. It is perhaps the "easy" case at the other end of a continuum that begins with the easy case discussed above. Along that continuum, however, are countless other cases that require careful assessment of just what was taken and what now must be returned or restored or done if rights are to be respected and enforced through remedies for their violation. <sup>67</sup>

The search for principled remedies is often not easy, therefore, but it is not impossible either, provided it remains principled - informed by equality, as measured by the holdings the wrong redistributed. Clearly, as those holdings become more difficult to discern or measure, remedies that purport to be based on them become more difficult to sustain. Still, the basic idea of grounding the remedy in the wrong to be remedied must be the guide. And that applies to public as well as to private remedies. The discussion thus far of private wrongs, including intentional or criminal wrongs, has focused on holdings taken from the victim by the wrongful act, which is only proper in a moral and legal system grounded on the rights of the individual. But private wrongs have public implications too, some of which involve rights. Robbers, rapists, and murderers take not only from their victims, after all, but from the community as well - by creating fear in the community, which lessens the liberty that belongs to all and might otherwise be enjoyed. <sup>68</sup> Although it is difficult to measure that loss, it is nonetheless real. The loss to society calls for a remedy, therefore, in addition to any that is due the victim. That remedy can take any number of forms, of course, but it must have some reasonable relation to the loss that gives rise to it. <sup>69</sup>

### [\*328]

As we move farther afield, however, serious problems start to arise, nowhere more clearly than in the case of crimes without claimants - so-called victimless crimes. One seeming variation of this is not problematic: when public safety laws are violated by acts like running a stop light, members of the public are victims, as just discussed, whether or not any individual is injured. Thus, identifiable rights have been violated, rights that find their roots in the theory of rights, and remedies are in order. But true crimes without claimants - "victimless crimes" - are not crimes in the ordinary sense, for no one, private or public, can make a credible claim that the acts criminalized violate his rights. To be sure, people who drive under the influence of alcohol or drugs endanger others and thus violate their rights. But driving under the influence is not an act typically prohibited by victimless-crime legislation. Rather, such legislation prohibits things like growing, making, selling, distributing, or using certain substances, the properties of which are known to all who participate in those activities and endanger none who do not participate. There simply are no rights, private or public, that such activities violate. <sup>70</sup> On the contrary, and accordingly, those activities are performed "by right."

When such activities are criminalized, however, the task of crafting principled remedies is made impossible, for there is no victim to come forward, no wrong from which to derive a remedy. Because such legislation is not grounded in the theory of

rights - indeed, is contrary to that theory - there are no holdings that the "crime" redistributed, no holdings to serve as the basis for a principled remedy. Remedies for simple torts seek to make the victim whole by returning what was taken, insofar as sanctions on wrongdoers can do that. Remedies for torts with a mens rea element (of whatever degree, including criminal) seek the same end, usually by including some punishment to address that element insofar as it took the victim's dignity. And remedies for wrongs against the public - including wrongs with no identifiable, individual victims - seek also to make such public victims whole by punishing wrongdoers for taking the public's safety. But here, there are no victims, individual or public. Thus, there is no loss to serve as a measure for any remedy. What we see, then, is baseless remedies - indeed, remedies for nothing. It is not surprising then, that such remedies are so wildly varied, for in the [\*329] end they reflect little more than moral outrage at unpopular behavior. The history of alcohol prohibition in America demonstrates the point. Modern drug prohibition is repeating that history.

Turning finally to the procedural side of the theory of rights, two preliminary points need to be made. First, it is misleading to think of two discrete, separately grounded bodies of rights, one substantive, the other procedural. Rather, those rights we call "procedural" - whether invoked by plaintiffs or officials on one side, or defendants on the other - are simply derived from our substantive rights - in particular, from our basic right to be free. Thus, before anyone can rightly interfere with that freedom - even to secure his or another's rights - he must have sufficient reason, whether it be to arrest, to search, to seize, to charge, or to do any of the many other things that are done in the name of procedure. Second, at this point another basic state-of-nature theory problem arises, for just as victims in a state of nature tend to place a high value on their losses, so too they tend to believe, when faced with uncertain search costs, that the suspect in hand is in fact the wrongdoer. Here too, then, neutral third-party adjudicators are necessary if justice is to be done. For the idea is not simply to find the right remedy but to exact it from the right person, which means that some wrongs will go unremedied in order to prevent other wrongs. <sup>71</sup>

Just what constitutes sufficient reason to interfere with another's freedom - the substantive part of procedural justice - is not a simple matter, of course. In fact, the issue is more difficult than determining just what constitutes the right remedy for a substantive wrong, once liability has been established, for there is no equivalent of redistributed holdings to serve as a measure. Instead, the issue is one of proof before the neutral adjudicator, and of how much evidence will be sufficient at each step of the proceeding to justify yet another intrusion on the freedom of the defendant. In general, the elements of the substantive wrong should shape the process, with the aim being to get to the truth of the matter with a minimum of intrusion. Given that at least the defendant knows the truth of the matter, however, an English rule regarding procedural costs, expanded to cover all procedures, is better than the American rule. For if the loser pays all such costs, not only will inadequate complaints and prosecutions and meritless defenses be discouraged but, more to the point, the proper parties will be kept whole.

Other issues of procedural justice - especially those that pertain directly to forfeiture - are considered below, following a discussion of the substantive side of forfeiture. For the present, having derived remedies [\*330] from the theory of rights, it must be determined how forfeiture fits into that picture of justified and unjustified remedies.

## V. Forfeiture

In a free society, as we have seen, individuals may pursue their own ends by right, provided only that in the process they not take what belongs to others, including members of the public. The purpose of remedies in such a society is to secure rights, insofar as possible, by ensuring that those who violate them return what they have taken. As a remedy, therefore, forfeiture must find whatever justification it enjoys in that rationale and that rationale alone: it must be part of a remedial scheme aimed at securing rights by restoring a pre-violation status quo.

Stated most generally, legitimate or justified remedies are forfeitures: to require a wrongdoer to restore the status quo by returning what his action has taken is to require him to "forfeit" those holdings that are necessary to that end. But while all justified remedies are forfeitures, not all forfeitures are justified remedies.<sup>72</sup> In fact, when not justified, forfeitures are themselves rights violations: they take what belongs to the person required to make the forfeiture. The central question, then, is which forfeitures are justified?

Clearly, the most easily justified forfeitures are those that involve the return of ill-gotten goods - the fruits of crime. As outlined above, however, that conclusion needs to be generalized beyond the obvious examples, for all rights can be reduced to property; thus, all right violations - tortious, criminal, or contractual - can be characterized as forced transfers from the victim to the wrongdoer.<sup>73</sup> In pursuing his ends (if he does) at no or lower cost to himself. The victim's "expenditures" need to be returned. Similarly, a person who fails to perform a contractual obligation keeps that good to himself; it or its equivalent needs to be forfeited to the other party. Obviously, the variations are many, but making the victim whole, through forfeiture by the wrongdoer, is the aim, even when the specific goods taken from the victim may have been lost or transferred to third parties and substitute goods are now required. Only in the rare case of "unique goods" should forfeiture be imposed on third-party transferees - and only after just **[\*331]** compensation from the wrongdoer - for forfeiture should not result in new victims. The "relation-back" doctrine<sup>74</sup> is thus completely inconsistent with the theory of rights. It looks at things from the perspective of the state, not from the perspective of the individual the state was established to protect.

The same analysis applies to what might be thought of as the "softer" goods that are transferred when rights are violated - not such things as pain and suffering, which are very real, but the affronts to dignity and public safety that accompany intentional or criminal wrongs and, to a lesser extent, wrongs that result from reckless and even negligent behavior. Again, the criminal or reckless actor derives a benefit by imposing a cost on his victim. Thus, the damages, fine, or other form of punishment that follows is properly seen as a forfeiture of that gain, aimed at making the victim or society whole. Whether the forfeiture is "punitive" as well as "remedial" is not the point. Rather, the point is to make the victim whole with remedies that reach the whole of the wrong, even its "softer" side. Thus, insofar as "punitive" forfeitures remedy all and only such wrongs, they are justified under an ill-gotten-goods rationale. Note, however, that such forfeitures can reach no further than the wrong they are intended to remedy. Properly grounded and thus limited, therefore, forfeiture is perfectly consistent with the Eighth Amendment's prohibition of "excessive fines." Forfeitures that reach beyond that grounding, however, become

excessive. Thus, the theory of rights - with its foundations in property, broadly understood - provides a basis for defining "excessive."

Beyond this limited application, however, it is difficult to find any substantive rationale for forfeiture. In a word, what more could a victim want - individual or societal - than to be made whole? There is, to be sure, some latitude in the idea of being made whole, but modern forfeiture law is not about exploiting that latitude with sharp bargaining about the "true" costs of the wrongs for which forfeiture is sought. No, it is about reaching well beyond any well-grounded forfeiture law. Thus, it is about contraband, most of which should not be considered contraband in the first place. (Were Mr. Alexander's sexually explicit magazines violating anyone's rights?) And even more it is about the "instrumentalities" of crime, including those things that "facilitate" crime, which include virtually anything that can be remotely connected to a crime. (Was Mr. Austin's body shop violating anyone's rights?) What is forgotten, once victims have been made whole, is that the additional things that are forfeited - beyond the legitimate forfeitures - belong to people. Take them, without sufficient reason, and another wrong has been committed. [**\*332**]

On the procedural side, modern forfeiture law fares no better, although it is difficult at times to tell whether a given doctrine is substantive or procedural. Thus, in rem forfeiture, based on the ancient substantive fiction that the property commits the wrong, follows from process against the property. In such cases the underlying "personification" and "taint" doctrines are simply too fantastic to require much rebuttal: obviously, only people are capable of actionable wrongs. If those baseless doctrines were abandoned, the innocent-owner defense would be rendered unnecessary. In short, nothing in that approach finds any foundation whatever in the theory of rights. There are times, of course, when seizure is necessary to preserve goods or evidence. And there are times when in rem methods of obtaining jurisdiction are necessary, but that is an entirely different matter: such methods simply enable a plaintiff or prosecutor to reach the kind of thing - a person - that alone can be a wrongdoer. Those methods are perfectly consistent with the theory of rights, not contrary to it.

In all cases, however, the burdens and standards of proof should be shaped, as noted above, by the elements of the alleged substantive wrong. Thus, in rem jurisdiction may allow seizure, but not forfeiture. To obtain forfeiture as a remedy, the plaintiff or prosecutor must continue to carry the burdens of proof and persuasion until sufficient evidence has been adduced to convince the adjudicator. In general, whereas a probable cause standard of proof may be sufficient for an in rem jurisdictional seizure, it hardly suffices for forfeiture of title. Before title is transferred by force of law, the reasons for doing so should be established by a preponderance of the evidence - in the case of "hard" losses, at least, which may be easier to prove. In the case of "soft" losses, which may be more difficult to prove, but where sanctions may reach the wrongdoer himself, proof of loss should be by a higher standard, regardless of whether the case is styled "civil" or "criminal." When punishment is justified as a remedy to make either individuals or the public whole, we must ensure not only that we have the right wrongdoer but that the requisite mens rea and loss of dignity that justify that remedy are proven.

## VI. Conclusion

Most of modern American asset forfeiture law, in theory and in practice, flies in the face of common standards of justice. Ordinary intuition tells us that. Systematic analysis confirms it, and tells us why. Those parts of forfeiture law that cannot be justified - the larger parts, as just outlined - should be abandoned. Rooted in pre-modern authoritarianism, forfeiture looks at the world from the perspective of the state, then asks what needs to be done to bring about certain public ends, such as the reduction of crime, the end of drug use, whatever. Lost or **[\*333]** ignored in the process, too often, is the individual and his rights, which is inexcusable in a society dedicated to the individual.

Rather than assume the perspective of the state, then attempt to chip away forfeiture's more offensive features, this essay has approached forfeiture from the other direction, from the perspective of the individual. Rooted in post-modern libertarianism, this approach, which is the American approach, does not aim at the public good. Rather, it attends to private goods, indirectly, by securing private rights, from which both private and public goods follow.

Like Prohibition before it, the War on Drugs that drives most of forfeiture law and practice today is a paradigmatic example of public policy in pursuit of public ends, all but oblivious to the rights of private individuals. Public policy of that kind uses people for public ends - today to eradicate drugs, which we cannot even keep out of our prisons, tomorrow to fight tobacco, or disease, or whatever. Those who look at the world in such a way, through public eyes, have lost touch with America's roots as a nation. We need to return to those roots, not to revise forfeiture law but to rethink it from the ground up.

#### FOOTNOTES:

<sup>n1</sup>. See, e.g., [21 U.S.C. 881](#) (1988 & Supp. V 1994) (statute providing for the forfeiture of real property, vehicles, possessions, and conveyances used, or intended to be used, to facilitate the commission of certain drug-related crimes). See generally Steven L. Kessler, *Civil and Criminal Forfeiture: Federal and State Practice* (1993 & Supp. 1994); David B. Smith, *Prosecution and Defense of Forfeiture Cases* (1992).

<sup>n2</sup>. See, e.g., Oliver W. Holmes, Jr., *The Common Law* 1-38 (Little, Brown & Co. 1923) (1881) (comparing and contrasting the common law with other doctrines, specifically the doctrines of admiralty and maritime law, to illustrate examples of early forfeiture); Jacob J. Finkelstein, *The Goring Ox: Some Historical Perspective on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty*, 46 *Temple L.Q.* 169 (1973); *The History of Forfeiture*, 2 *Low Profile* 12 (1993).

<sup>n3</sup>. [21 U.S.C. 881](#)(a) (1988 & Supp. V 1994) (specifically noting that controlled substances which are "manufactured, distributed, dispensed, or acquired" and all "raw materials, products, and equipment" used or intended for use in "manufacturing, compounding, processing, delivering, importing, or exporting any controlled substance ... " shall be subject to forfeiture).

<sup>n4</sup>. See, e.g., Henry J. Hyde, *Forfeiting Our Property Rights: Is Your Property Safe from Seizure?* (1995); Tamara R. Piety, *Scorched Earth: How the Expansion of Civil Forfeiture Doctrine Has Laid Waste to Due Process*, [45 U. Miami L. Rev.](#) 911 (1991); J. William Snyder, Jr., *Reining in Civil Forfeiture Law and Protecting Innocent Owners*

From Civil Asset Forfeiture: United States v. 92 Buena Vista Avenue, [72 N. Car. L. Rev. 1333 \(1994\)](#); Terrance G. Reed, American Forfeiture Law: Property Owners Meet the Prosecutor, Cato Policy Analysis No. 179 (Cato Inst., Sept. 29, 1992). In the legal press, see, e.g., John Henry Hingson III, Federal Asset-Forfeiture Laws: Time for Reform, Leg. Times, May 2, 1994, at 25 (Opinion and Commentary); Run Amok?, Nat'l L.J., Apr. 12, 1993, at 12 (Editorial). In the popular press, see, e.g., Jeff Brazil & Steve Berry, Tainted Cash or Easy Money? Orlando Sentinel Trib., June 14, 1992, at A-1, A-17, June 15, 1992, at A-6; Andrew Schneider & Mary P. Flaherty, Presumed Guilty: The Law's Victims in the War on Drugs, Pitt. Press, Aug. 11-Sept. 16, 1991 (series reprint, 1991); Gary Webb, The Forfeiture Racket, San Jose Mercury News (reprint of two articles appearing Aug. 30, 1993); Deborah Yetter, Police Work or Piracy? The Government's Power to Take Property in Drug Cases, Courier-J. (Louisville, Ky.), Oct. 6, 1991, at 16A; Oct. 7, 1991, at 1A; see also 20/20: Killing in Paradise (ABC television broadcast, Apr. 2, 1993); Street Stories (CBS television broadcast, July 9, 1992); 60 Minutes: You're Under Arrest (CBS television broadcast, Apr. 5, 1992).

¶5. See infra notes 10-39 and accompanying text.

¶6. See infra notes 40-50 and accompanying text.

¶7. See infra notes 51-71 and accompanying text.

¶8. See, e.g., [Austin v. United States, 113 S. Ct. 2801, 2808 \(1993\)](#).

¶9. See infra notes 72-74 and accompanying text.

¶10. For a more expansive discussion of this and the descriptive points that follow, see Smith, supra note 1.

¶11. See Comment, State and Federal Forfeiture of Property Involved in Drug Transactions, 92 Dick. L. Rev. 461, 461 n.3 (1988).

¶12. [Goldsmith-Grant v. United States, 254 U.S. 505, 511 \(1921\)](#).

¶13. See, e.g., [21 U.S.C. 881\(a\)\(4\)\(C\), 881\(a\)\(6\)](#); Michael Goldsmith & Mark Linderman, Asset Forfeiture and Third Party Rights: The Need for Further Law Reform, [1989 Duke L. J. 1254, 1272-75](#) (arguing that the apparent reasons Congress amended the civil forfeiture statute to include an innocent owner defense were "the public's outrage over the potential hardship of 'zero tolerance' on innocent third parties, and ... the perceived need [by the Justice Department] to enact reforms rather than risk restrictive rulings by judges angered by the 'zero tolerance' policy.").

¶14. See, e.g., Seth Faison, In Largest Takeover Under Narcotics Law, U.S. Seizes a Large New York City Hotel, N.Y. Times, June 9, 1994, at A1, B3 (unable to stem drug trafficking in the building, officials simply seized it); Ron Galperin, Landlords vs. Drug Dealers, L.A. Times, Jan. 12, 1992, at K1, K5.

¶15. [United States v. 92 Buena Vista Avenue, 113 S. Ct. 1126, 1134-38 \(1993\)](#) (finding that 881(h), the relation-back provision of the forfeiture statute, does not vest ownership in the Government at the moment the proceeds of the illegal transaction were used to fund the purchase of the property); see [id. at 1137](#) ("The

Government cannot profit from the common-law doctrine of relation back until it has obtained a judgment of forfeiture."); see also Snyder, *supra* note 4.

<sup>16</sup> [18 U.S.C. 1963-1968](#) (1988 & Supp. V 1994); see also [Alexander v. United States](#), 113 S. Ct. 2766, 2772 (1993).

<sup>17</sup> See Terrance Reed, Criminal Forfeiture under the Comprehensive Forfeiture Act of 1984: Raising the Stakes, 22 Am. Crim. L. Rev. 747, 748 (1985).

<sup>18</sup> [113 S. Ct. 2766 \(1993\)](#).

<sup>19</sup> [Id. at 2776](#).

<sup>20</sup> [Id. at 2775](#) (citing [Austin v. United States](#), 113 S. Ct. 2801 (1993), and noting that when the Excessive Fines Clause of the Eighth Amendment was drafted and ratified, the "word 'fine' was understood to mean a payment to a sovereign as punishment for some offense") (citation omitted).

<sup>21</sup> [113 S. Ct. 2801](#).

<sup>22</sup> [Id. at 2810](#) (quoting [Dobbin's Distillery v. United States](#), 96 U.S. 395, 404 (1878)).

<sup>23</sup> [113 S. Ct. 1126 \(1993\)](#).

<sup>24</sup> [Id. at 1130](#).

<sup>25</sup> *Id.*

<sup>26</sup> See [id. at 1136-38](#).

<sup>27</sup> [114 S. Ct. 492 \(1993\)](#).

<sup>28</sup> [Id. at 505](#).

<sup>29</sup> Both Congressman Henry J. Hyde, the chairman of the House Judiciary Committee in the 104th Congress, and Congressman John Conyers introduced forfeiture reform bills in the 103rd Congress: H.R. 2417, 103d Cong., 1st Sess. 1 (1993) (a companion bill, S. 1655, 103d Cong., 1st Sess. (1993), was later introduced by Senator Jim Jeffords in the United States Senate) and H.R. 3547, 103d Cong., 1st Sess. 1 (1993), respectively.

<sup>30</sup> Amendments to Uniform Controlled Substances Act (1990) (Draft for Approval: Nat'l Conference of Comm'rs on Uniform State Laws, July 29-Aug. 5, 1994) 1-30 (on file with the New York Law School Law Review).

<sup>31</sup> Cheryl Anthony Epps, DOJ "Forfeiture Reform' Proposal Ignores Problems In Current Law and Expands Government's Ability to Seize Property, Wash. Digest, May 1994, No. 8, at 1.

<sup>32</sup> *Id.* at 2.

<sup>33</sup> See *supra* note 4 and accompanying text.

<sup>34</sup>. See Brazil & Berry, *supra* note 4.

<sup>35</sup>. See Testimony Slams Drug Team Tactics, *Miami Herald*, Apr. 29, 1994, at B5; The Seizure Squads, *St. Petersburg Times*, Nov. 15, 1992, at 2D (Editorial); Jeff Brazil, Forfeiture Laws Seize National Scorn, *Orlando Sentinel*, Aug. 2, 1992, at A-1, A-21. For a thorough discussion of this issue, see Carol M. Bast, *The Plight of the Minority Motorist*, [39 N.Y.L. Sch. L. Rev. 49 \(1994\)](#).

<sup>36</sup>. James Bovard, *The Custom Service's Chain Saw Massacre*, *Wall St. J.*, Mar. 27, 1992, at A14; Red Marston, *Customs Destroys Boat and a Dream*, *St. Petersburg Times*, Feb. 5, 1993, at 8C; *Florida Man's Plight Sparks Customs Service Bill*, UPI, Mar. 13, 1992, available in LEXIS, News Library, UPI File.

<sup>37</sup>. Sara Rimer, *Minister Who Sought Peace Dies in a Botched Drug Raid*, *N.Y. Times*, Mar. 28, 1994, at A1, A13; *Police Mistakes Cited in Death of Boston Man*, *N.Y. Times*, May 16, 1994, at A12.

<sup>38</sup>. See Report on the Death of Donald Scott, Office of the District Attorney, Cty. of Ventura, Cal. (March 30, 1993); see also Richard Miniter, III-Gotten Gains, *Reason*, Aug.-Sept. 1993, at 32-33; Miniter, *Property Seizures On Trial*, *Insight*, Feb. 22, 1993, at 10; *60 Minutes: You're Under Arrest* (CBS television broadcast, Apr. 5, 1992).

<sup>39</sup>. For an outstanding critique of the War on Drugs, see Steven B. Duke & Albert C. Gross, *America's Longest War: Rethinking Our Tragic Crusade Against Drugs* (1993); see also Conservative U.S. Judge Offers a Word on Drugs: Decriminalize, *N.Y. Times*, Mar. 4, 1994, at A25 (quoting U.S. Dist. Judge Vaughn R. Walker: "I make no bones about my personal view that the best course of action for us to take is exactly the same course of action we took after Prohibition, and that is decriminalization....").

<sup>40</sup>. See, e.g., Lawrence C. Becker, *On Justifying Moral Judgments* (1973); Alan Gewirth, *Reason and Morality* 1-47 (1978); Robert S. Summers, *Two Types of Substantive Reasons: The Core of a Theory of Common-Law Justification*, 63 *Cornell L. Rev.* 707 (1978).

<sup>41</sup>. See Roger Pilon, *On Moral and Legal Justification*, 11 *Sw. U. L. Rev.* 1327 (1979).

<sup>42</sup>. For a critique of democratic theory from a somewhat different perspective than will be argued here, see Robert P. Wolff, *In Defense of Anarchism* 22-67 (1970).

<sup>43</sup>. For a more detailed discussion of these issues, see Roger Pilon, *Individual Rights, Democracy, and Constitutional Order: On the Foundations of Legitimacy*, 11 *Cato J.* 373 (1992) (discussing challenges that face the Russian people in their attempt to legitimize their government).

<sup>44</sup>. Frank J. Wiltach, *A Dictionary Of Similes* 526 (rev. ed. 1924); see also William Stoebuck, *A General Theory of Eminent Domain*, 47 *Wash. L. Rev.* 553, 585-86 (1972): "In essence, Lockean social contract theory says this:... Government is a servant, necessary but evil, to which its subjects have surrendered only what they

must, and that grudgingly ... His was the accepted theory of government in America when the American doctrine of eminent domain was being hammered out."

<sup>n</sup>45. See, e.g., Bernard Bailyn, *The Ideological Origins of the American Revolution* 188 (1967); Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law* 4-5, 61, 67, 89 (1955).

<sup>n</sup>46. See Roger Pilon, *Freedom, Responsibility, and the Constitution: On Recovering Our Founding Principles*, [68 Notre Dame L. Rev. 507 \(1993\)](#).

<sup>n</sup>47. See Stoebuck, *supra* note 44.

<sup>n</sup>48. For an excellent discussion of this point, see Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* (1985) (examining the rule of first possession, labor theory, and contract and common usage theories and their relationship to property rights).

<sup>n</sup>49. John Locke, *The Second Treatise of Government*, 13, in *Two Treatises of Government* (Peter Laslett ed., 1960) (1698).

<sup>n</sup>50. Many federal "police powers" are rationalized, of course, under modern interpretations of the Commerce Clause. In fact, just that kind of move is at issue in [United States v. Lopez, 2 F.3d 1342](#) (5th Cir.), *reh'g and reh'g en banc denied*, [9 F.3d 105 \(1993\)](#), now before the Supreme Court, No. 93-1260 (filed Feb. 2, 1994; argued Nov. 8, 1994), which presents the question of whether Congress has the power, under the Commerce Clause, to enact the 1990 Gun-Free School Zones Act, or whether that Act instead reflects simply a naked assertion of an unenumerated police power. See Glenn Harlan Reynolds, *Kids, Guns, and the Commerce Clause: Is the Court Ready for Constitutional Government?*, *Cato Policy Analysis* No. 216 (Cato Inst., Oct. 10, 1994) (arguing that the Supreme Court should "hold Congress to its constitutionally enumerated powers" and strike down the Gun-Free School Zones Act as unconstitutional).

<sup>n</sup>51. See Locke, *supra* note 49, at 170 (original title page of *Two Treatises of Civil Government*).

<sup>n</sup>52. See generally Carl L. Becker, *The Declaration of Independence: A Study in the History of Political Ideas* (1922).

<sup>n</sup>53. *The Declaration of Independence* para. 2 (U.S. 1776).

<sup>n</sup>54. Locke, *supra* note 49, 123.

<sup>n</sup>55. The propertarian foundations of the theory of rights are developed more fully in Roger Pilon, *Ordering Rights Consistently: Or What We Do and Do Not Have Rights To*, 13 *Ga. L. Rev.* 1171 (1979).

<sup>n</sup>56. See, e.g., James Madison, *Property*, 1 *Nat'l Gazette*, Mar. 29, 1792, at 174, reprinted in *4 Letters and Other Writings Of James Madison 1829-1836*, at 478 (1884) ("As a man is said to have a right to his property, he may be equally said to have a property in his rights.").

<sup>n</sup>57. See Richard A. Epstein, *Possession as the Root of Title*, 13 *Ga. L. Rev.* 1221

(1979).

¶n58. On the distinction between general and special rights, see H.L.A. Hart, *Are There Any Natural Rights?*, in *Political Philosophy* (Anthony Quinton ed., 1967). On the correlativity of rights and obligations, see Wesley N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (1964) (originally published in 23 *Yale L.J.* 16 (1913) and 26 *Yale L.J.* 710 (1916-17)).

¶n59. For a more expansive discussion see Roger Pilon, *A Theory of Rights: Toward Limited Government* (unpublished Ph.D. dissertation, University of Chicago), drawing in part upon Gewirth, *supra* note 40.

¶n60. Note that general rights are equal only at the generic level of description - life, liberty, property, security, freedom from trespass, etc. At the specific level of description, of course, holdings among individuals vary greatly. From that observation, however, it is a mistake to conclude that rights are unequal. In fact, any attempt to equalize "rights" by equalizing specifically described holdings would entail violations of generically described rights. See Robert Nozick, *Anarchy, State, and Utopia* 167-74 (1974).

¶n61. Thus, when A's addition to his home blocks B's view, A does not "take" that view or otherwise violate B's right because B never owned that view and hence never had a right to it to begin with. He merely "enjoyed" it at A's pleasure (and might have bought it, had he wanted to, through the purchase of an easement).

¶n62. The discussion that follows draws in part upon Roger Pilon, *Criminal Remedies: Restitution, Punishment, or Both?*, 88 *Ethics* 348 (July 1978) (critiquing Randy E. Barnett, *Restitution: A New Paradigm of Criminal Justice*, 87 *Ethics* 279 (July 1977)).

¶n63. Cf. *infra* note 65.

¶n64. There are four classic areas in which the theory of rights comes to its principled end and values must be introduced to complete the theory: remedies (as here); nuisance and endangerment (where the question is just where to draw the line between rights of active use and rights of quiet use); and enforcement (where the question is, as discussed below, what one may do to others in the name of enforcing one's rights when one is uncertain about who violated those rights).

¶n65. That is the way it looks from a third-party perspective. In truth, however, the redistribution or exchange takes place only because each party values what the other has more than he values what he has. See Richard A. Posner, *Economic Analysis of Law* 11 (2d ed. 1972).

¶n66. Although some argue that forced third-party adjudication can be avoided by resort to ostracism, boycott, and other such "passive" sanctions, rights will not be enforced in given cases under such arrangements. See, e.g., Bruce L. Benson, *The Enterprise of Law: Justice Without the State* 357-64 (1990).

¶n67. Practical problems aside, notice that the right to punish belongs in the first instance to individuals. Notice also that when arguing from first principles, remedies are justified with reference to wrong done to victims, not with reference to such consequentialist reasons as deterrence.

¶n68. See Nozick, *supra* note 60, at 65-71.

¶n69. Notice that a remedial theory rooted in first principles does not ask whether a remedy is civil or criminal, remedial or punitive. Rather, if the victim of the wrong is entitled to be made whole, then the only question is what will do that. In the case of simple torts, money damages may. But as mens rea elements intensify, punishment may also be justified to remedy the losses that result from those elements, even when the victims are members of the public. Thus, punishment too is "remedial." Not only does it flow from the wrong, but it is aimed at remedying the wrong.

¶n70. It is no objection to that conclusion to point to the crime and the third-party victims that are associated with the drug business, for most of that crime is a function not of the business but of the illegality of the business. When the alcohol business was illegal, there too we had crime and third-party victims. See Duke & Gross, *supra* note 39, at 103-21; see also Steven Wisotsky, *A Society of Suspects: The War on Drugs and Civil Liberties*, Cato Policy Analysis No. 180 (Cato Inst., Oct. 2, 1992) (describing the War on Drugs as a war on the Bill of Rights).

¶n71. Procedural justice in the state of nature is explored in Nozick, *supra* note 60, at Part I.

¶n72. See *supra* Part II.

¶n73. Notice that even contractual wrongs - fraud, breach, and so forth - fit properly under the tort/crime model, for they take (through misrepresentation, withholding, etc.) what belongs to others. However unconventional that analysis may seem, it captures the element of unilateral force that is present, in one way or another, in all contractual wrongs.

¶n74. See *supra* note 15 and accompanying text.