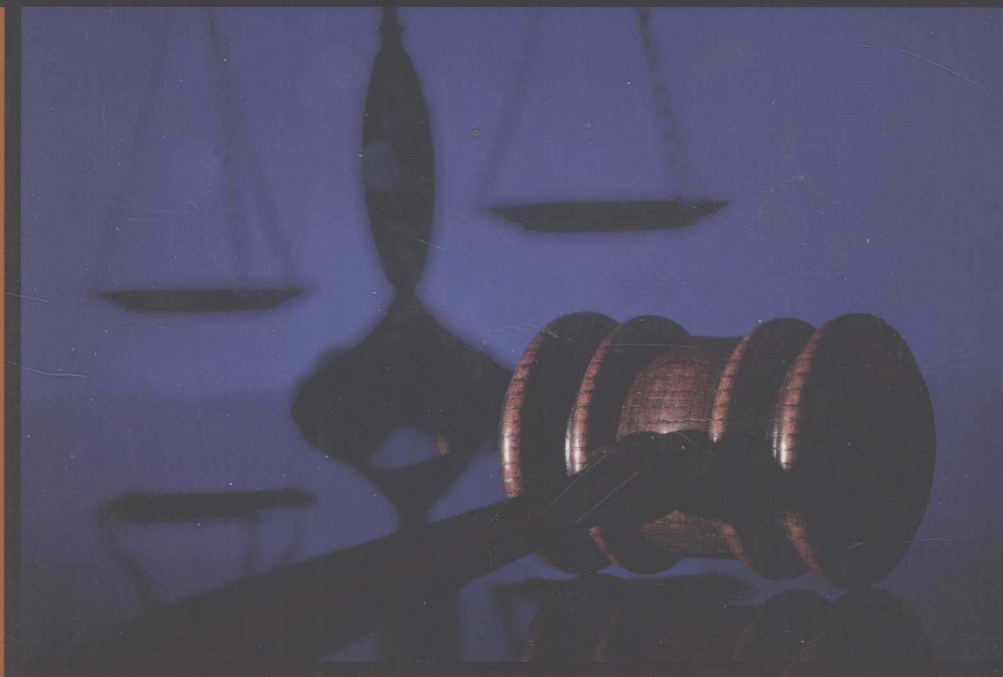


# COURTS, LAW, and JUSTICE



GENERAL EDITOR  
William J. Chambliss

---

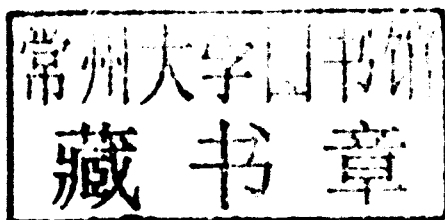
KEY ISSUES IN *Crime* AND PUNISHMENT

---

# COURTS, LAW, and JUSTICE

GENERAL EDITOR  
William J. Chambliss

*George Washington University*



---

KEY ISSUES IN *Crime* AND PUNISHMENT

---

 SAGE

  
reference



Los Angeles | London | New Delhi  
Singapore | Washington DC

FOR INFORMATION:

SAGE Publications, Inc.  
2455 Teller Road  
Thousand Oaks, California 91320  
E-mail: [order@sagepub.com](mailto:order@sagepub.com)

SAGE Publications India Pvt. Ltd.  
B 1/1 Mohan Cooperative Industrial Area  
Mathura Road, New Delhi 110 044  
India

SAGE Publications Ltd.  
1 Oliver's Yard  
55 City Road  
London EC1Y 1SP  
United Kingdom

SAGE Publications Asia-Pacific Pte. Ltd.  
33 Pekin Street #02-01  
Far East Square  
Singapore 048763

---

Vice President and Publisher: Rolf A. Janke  
Senior Editor: Jim Brace-Thompson  
Project Editor: Tracy Buyan  
Cover Designer: Candice Harman  
Editorial Assistant: Michele Thompson  
Reference Systems Manager: Leticia Gutierrez  
Reference Systems Coordinator: Laura Notton

---

Golson Media  
President and Editor: J. Geoffrey Golson  
Author Manager: Lisbeth Rogers  
Layout and Copy Editor: Stephanie Larson  
Proofreader: Mary Le Rouge  
Indexer: J S Editorial

Copyright © 2011 by SAGE Publications, Inc.

---

All rights reserved. No part of this book may be reproduced or utilized in any form or by any means, electronic or mechanical, including photocopying, recording, or by any information storage and retrieval system, without permission in writing from the publisher.

Printed in the United States of America.

Library of Congress Cataloging-in-Publication Data

Key issues in crime and punishment / William Chambliss,  
general editor.

v. cm.

Contents: v. 1. Crime and criminal behavior — v. 2. Police and law enforcement — v. 3. Courts, law, and justice — v. 4. Corrections — 5. Juvenile crime and justice.

Includes bibliographical references and index.

ISBN 978-1-4129-7855-2 (v. 1 : cloth) — ISBN 978-1-4129-7859-0 (v. 2 : cloth) — ISBN 978-1-4129-7857-6 (v. 3 : cloth) — ISBN 978-1-4129-7856-9 (v. 4 : cloth) — ISBN 978-1-4129-7858-3 (v. 5 : cloth)

1. Crime. 2. Law enforcement. 3. Criminal justice, Administration of. 4. Corrections. 5. Juvenile delinquency. I. Chambliss, William J.

HV6025.K38 2011

364—dc22

2010054579

11 12 13 14 15 10 9 8 7 6 5 4 3 2 1



# Introduction

## What Makes an Act a Crime?

---

What makes an act a crime? “Thou shalt not kill” certainly does not apply to the law. One may kill in self defense, if under duress, or to protect your own property. Law enforcement officers and executioners may kill another human being, as can soldiers under orders. Furthermore, at a bare minimum, for an act to be a crime, it must be the result of an overt act or omission to act when one is legally responsible to do so; must be intentional (in most but not all cases); must have caused harm; and must have a causal relationship between the act and the harm.

Even knowing these principles, however, does not mean that no one is ever found guilty and punished for acts that do not meet these criteria. The roles in the criminal justice system, from police to judges, are filled by fallible human beings; no set of rules or principles can guarantee that role, and that occupants will not find ways to circumvent them.

The chapters in this volume cover a wide range of topics, including drug and gun control laws, as well as numerous chapters that discuss the ins and outs of the justice system once suspected offenders are arrested, during the trial process, and during sentencing.

The chapter *Drug Laws* (Dombrink) gives a historical overview of American drug policy, including changing drug laws over time and the movement to have drugs decriminalized. He explains the pros and cons of current drug policies, international efforts, and the recent changes in America to reduce drug-related crime and harm. *Gun Control Laws* (McGuire) looks at gun control laws in America and discusses America’s unique culture and history, which has led to gun control laws being highly contested by many Americans.

Legal issues pertaining to the investigative process once a suspected offender has been taken into custody are reviewed. *Miranda Rights* (Candela) discusses suspects' rights prior to and since the landmark *Miranda* decision, which address an individual's Fifth Amendment rights. In addition to discussing the *Miranda v. Arizona* case, Candela details the pros and cons of *Miranda* and how court cases have since limited *Miranda*. Scott-Hayward's chapter *Polygraphs* and Inman and Beck's chapter *DNA Testing* explain the impact that technology has had on the investigation process, how polygraphs and DNA testing works, and to what degree the information obtained through polygraph and DNA testing has been allowed in criminal trials.

Legal and procedural issues during the prosecution of suspected offenders are also covered in this volume. Binnall's *Exclusionary Rules* outlines the development of the legal doctrine that enables courts to exclude certain pieces of evidence from trial due to unconstitutional police and/or investigation tactics, its constitutional basis, and limitations to the doctrine as ruled by the courts. This chapter shows the impact investigations can have on prosecutions, and that court decisions can have on both investigations and prosecutions. Similarly, Steele's chapter *Double Jeopardy* examines the Fifth Amendment of the U.S. Constitution, which states, "... nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb ..." and discusses how court interpretations, over time, have impacted the justice system. Campbell's chapter *Plea Bargaining* reviews the development and spread of plea bargaining, including different types of plea bargaining, reasons for their use, and the consequences of plea bargaining. Binnall's *Jury System* discusses the development of the American jury system as well as the mechanics and laws pertaining to juries.

This volume also contains extensive information about sentencing and punishments for crimes, including different types of offenses such as sex offenses and DUI. Grimes's chapter on *Three-Strikes Laws* and Fearn's *Mandatory Sentencing* chapter on mandatory minimums both help the reader understand the intended purposes of these laws, the variation of these laws across time and states, and the sociopolitical environment from which these laws developed. Evans's chapter *Sex Offender Registry* analyzes society's attempts to monitor and control sex offenders, especially following the highly publicized kidnappings, murders, and rapes of children such as Jacob Wetterling, Polly Klaas, and Megan Kanka. This chapter also discusses the ongoing debate over whether or not sex offense registries are constitutional or effective.

Finally, Wood's chapter *Restorative Justice* looks at the role the victim plays during the prosecutorial process. Although the U.S. Constitution guarantees rights to suspects and convicted offenders, there are no constitutional rights specific to victims. Wood discusses how society and the justice system have changed over time, which has led to a call by victims' rights activists for changes in the justice system to allow victims to be more involved and protect them from being "re-victimized by the system."

Although the topics of this volume are quite varied, the authors all provide detailed overviews of the development of the justice system and give consideration to the contrasting leading opinions that support or denounce the laws and policies used during the investigative, prosecutorial, and sentencing processes.

William J. Chambliss  
General Editor

# Contents

---

<b>Introduction: What Makes an Act a Crime?</b>	<b>xiii</b>
<i>William J. Chambliss, General Editor</i>	
<b>1. Asset Forfeiture</b>	<b>1</b>
Types of Asset Forfeiture	2
Asset Forfeiture in American History	2
Recent History: Acts and Legislation	3
Asset Forfeiture and Police Budgets	5
<i>Pro</i> : Arguments Supporting Asset Forfeiture	6
Funding Police and Saving Taxpayers	7
Restoration to Victims	8
<i>Con</i> : Arguments Against Asset Forfeiture	8
The Taint Doctrine	9
Constitutional Rights and Pivotal Cases	9
<b>2. DNA Evidence</b>	<b>13</b>
History of DNA Typing in Criminal Justice	14
Specialized Processes to Enhance DNA Testing	15
The Misunderstood Science of DNA Testing	16
DNA Storage	17
Developing Felon Databases of DNA	18
Conducting a Mass Screening of Ordinary Citizens	18
Admissibility of DNA Evidence:	
History and New Tests	19
Current Legal and Ethical Issues	20
Who Should Be in the Database?	20
Database and Familial Searches	20
Touch/Transfer/Low-Level DNA Samples	21
Post-Conviction Testing: Access and Timeliness	22
<i>Pro</i> : Support for Expanding DNA Databases	24
<i>Con</i> : Opposition to Expanding DNA Databases	25
DNA Dragnets	26
Future of DNA Evidence and New Scientific Techniques	27

3. Double Jeopardy	31
History of the Double Jeopardy Rule	32
The Attachment of Jeopardy	33
Same Offense	34
Exceptions to the Double Jeopardy Clause	35
Separate Sovereignities	35
Petite Policy	36
Government Appeal	37
Termination Without Acquittal or Conviction	38
Application in Non-Criminal Proceedings	38
<i>Pro</i> : Arguments in Favor of Double Jeopardy	39
<i>Con</i> : Arguments Against Double Jeopardy	40
4. Drug Laws	45
Drugs: The Stalled Movement for Decriminalization	46
History: Changing Frames for Drug Laws	46
The 1960s and 1970s: Cultural Strife and Moral Dissonance	47
From the Reagan Era Onward	48
<i>Pro</i> : The Prophylactic Features of Criminalization	49
<i>Con</i> : Criticism of the War on Drugs	50
Hints of a Slowly Shifting Drug Policy	52
Challenging the Punitive Approach to Drug Enforcement	52
International Parallels	54
Conclusion	55
5. DUI Penalties	61
Relevant Databases	62
Effects or Influences of Drugs on Driving	63
Control of Impaired Drivers	63
Measuring Blood Alcohol Content	64
Implied Consent Laws and Administrative Sanctions	65
Zero Tolerance Laws	66
Standard Criminal Penalties for DUI	67
Nontraditional DUI Penalties	67
Locking the Ignition	68
<i>Pro</i> : Arguments for Strong Impaired-Driving Laws	69
<i>Con</i> : Enforcement and Sanctions Are Inadequate	70
Questionable Deterrence	71



<b>6. Exclusionary Rules</b>	<b>75</b>
Building the Exclusionary Rules	76
Fourth Amendment Context	76
Fifth Amendment Context	78
Sixth Amendment Context	78
Fruit of the Poisonous Tree	79
Limiting the Exclusionary Rules	80
The Current State of the Exclusionary Rule	83
<i>Pro</i> : Arguments in Support of the Exclusionary Rule	83
<i>Con</i> : Arguments Opposing the Exclusionary Rule	85
 <b>7. Expert Witnesses and Hired Guns</b>	 <b>89</b>
Quality of the Science	91
Expert Witnesses in Criminal Cases	92
Psychiatric/Psychological Evaluation	92
Physical Evidence Evaluation	93
Medical/Biological Evidence Evaluation	94
Documentary and Computer Evidence Evaluation	94
Acoustical Evidence Evaluation	95
Traffic Accident Reconstruction	95
Financial Evaluation	96
Hired Guns	96
<i>Pro</i> : Arguments in Favor of Using Expert Witnesses	97
<i>Con</i> : Arguments Opposing the Use of Expert Witnesses	98
Conclusion	99
 <b>8. Eyewitness Testimony and Accuracy</b>	 <b>101</b>
History of Eyewitness Identification Research	102
The Research of Loftus and Wells	102
DNA Testing and Factors in Eyewitness Error	103
<i>Pro</i> : Variables Leading to Accurate Eyewitness Testimony	104
Estimator Variables	105
System Variables	106
<i>Con</i> : Variables Leading to Mistaken Eyewitness Testimony	107
Estimator Variables	108
System Variables	109
Lineup Presentation Method	110
Administrator's Behavior	111
Conclusion	112

<b>9. Gun Control Laws</b>	<b>117</b>
History of Gun Control and Gun Rights	117
Foreign Examples of Gun Control	119
Gun Control Laws and the Constitution	120
Recent Landmark Cases	122
Types of Gun Control Laws	123
Keeping Guns out of the Hands of Criminals	123
Waiting Periods	124
Safe Storage and Distance	124
Major Federal Gun Control Initiatives	125
Gun Rights Legislation: Conceal and Carry	125
Gun Laws: The Empirical Evidence	127
<i>Pro</i> : Arguments in Favor of Gun Control	127
<i>Con</i> : Arguments in Opposition to Gun Control	128
Conclusion	128
 <b>10. Insanity Defense</b>	 <b>133</b>
Procedures Involved in the Defense	134
History of the Defense	135
The <i>M'Naghten</i> Test	135
Irresistible Impulse	136
The <i>Durham</i> Test	136
American Law Institute Test	137
Guilty but Mentally Ill	137
Insanity Defense Reform Act of 1984	138
Post-Traumatic Stress Disorder and Postpartum Psychosis	139
The Supreme Court Gets Involved	140
<i>Pro</i> : Arguments in Support of the Insanity Defense	140
<i>Con</i> : Arguments Against the Insanity Defense	142
A Case in Point	143
 <b>11. Jury System</b>	 <b>145</b>
Mechanics of the Jury System	146
History of the Jury System	147
The Supreme Court Shapes the American Jury System	149
Fair Cross-Section Requirement	151
<i>Pro</i> : Arguments in Support of the American Jury System	153
<i>Con</i> : Criticisms of the American Jury System	154

<b>12. Mandatory Sentencing</b>	<b>159</b>
A Brief History of Mandatory Sentencing	160
Describing Mandatory Sentencing Today	161
Rationale for Mandatory Sentencing	162
Effectiveness of Mandatory Sentencing	163
<i>Pro</i> : Arguments for Mandatory Minimum Sentencing	165
Protecting the Public	165
Sentencing Equity	166
<i>Con</i> : Arguments Against Mandatory Minimum Sentencing	167
Discretion and Bias	168
Rigid and Expensive	169
Future Issues in Mandatory Sentencing	170
 <b>13. Miranda Rights</b>	 <b>173</b>
The Law Prior to <i>Miranda</i>	174
Ernesto Miranda	176
The <i>Miranda</i> Ruling	177
Court Specifies the Language of the Warnings	178
The Aftermath	179
Congress, the Court, and the Problem of <i>Miranda</i>	180
Subsequent Caselaw	181
<i>Berghuis v. Thompkins</i> : A Critical Change	183
<i>Pro</i> : Arguments in Support of the <i>Miranda</i> Ruling	184
<i>Con</i> : Criticism of the <i>Miranda</i> Ruling	
 <b>14. Plea Bargaining</b>	 <b>186</b>
The Development and Spread of Plea Bargaining	188
Plea Bargaining in America and Internationally	188
<i>Pro</i> : Arguments in Support of Plea Bargaining	189
The Issue of Coercion	190
In the Shadow of Trials	191
Plea Bargains as Contracts	192
Substantive Justice	193
<i>Con</i> : Arguments in Opposition to Plea Bargaining	194
Diverging From the Shadow of Trials	194
The Contract View Fails the Public	195
Hawks and Doves	196
Result of an Overadversarial System	197

<b>15. Polygraphs</b>	<b>201</b>
History of the Polygraph	201
Polygraph Groundbreakers: Larson and Reid	202
Procedures of the Polygraph	203
The Use of Polygraphs in the Criminal Justice System	204
The Admissibility of Polygraphs in Criminal Cases	205
<i>Daubert</i> and <i>Scheffer</i> : A Split in the Federal Circuits	205
The Exception: New Mexico	207
<i>Pro</i> : Supporting the Validity of the Polygraph	208
Rehabilitation and Recidivism	208
<i>Con</i> : Questioning the Validity of the Polygraph	209
The Error Rate	209
Poor Research Standards	210
No Uniform Training Standards or Procedures	211
 <b>16. Restorative Justice</b>	 <b>215</b>
Basic Premises of Restorative Justice	216
Conflict as Property	217
The Work of Braithwaite and Zehr	217
History of Restorative Justice	219
Victim-Offender Reconciliation Programs	219
Victims' Rights Movements and	
Indigenous Justice	220
Restorative Justice Interventions	221
Victim-Offender Mediation	222
Family Group Conferencing	222
Sentencing Circles	223
Community Restorative Boards	223
Restorative Community Service	223
<i>Pro</i> : Arguments in Support of Restorative Justice	224
Offender Agreements and Recidivism	225
<i>Con</i> : Arguments Against Restorative Justice	226
Whose Justice?	226
Due Process, Fair Sentencing, and Mainstreaming	226
 <b>17. Sentencing Disparities</b>	 <b>231</b>
Inconsistencies in the Research	232
Methodological Flaws in Sentencing Research	232
Variables Used in Sentencing Research	233
Theoretical Premises of Sentencing Disparity	234

Ethnicity and Disparity in Sentencing	235
Disparities in Sentencing and Sentencing Guidelines	236
RDS and the War on Drugs	238
Crack Versus Powder	238
<i>Pro</i> : Positive Outcomes of Racial Disparity Research	240
<i>Con</i> : Negative Outcomes of Racial Disparity Research	241
<b>18. Sex Offender Registry</b>	<b>243</b>
The History of Sex Offender Legislation	244
Contemporary Sex Offender Registry Legislation	245
Wetterling Act and Megan's Law	245
Inconsistent Procedures, Specific Types of Information	246
Sex Offender Levels	246
Updated Legislation	247
The Tier System	248
The Legality of Sex Offender Legislation	250
Two Cases of Constitutional Challenge	251
<i>Pro</i> : Arguments in Support of Sex Offender Registration	252
<i>Con</i> : Arguments Against Sex Offender Registration	253
<b>19. Three-Strikes Laws</b>	<b>257</b>
The History and Development of Three-Strikes Laws	258
The Klaas Murder	259
The Legality of Three-Strikes Laws	260
<i>Pro</i> : Arguments in Support of Three-Strikes Laws	261
The Deterrent Effect	262
<i>Con</i> : Arguments Against Three-Strikes Laws	264
Burdensome Costs and Racial Disparities	264
<b>20. Victim Rights and Restitution</b>	<b>269</b>
Victim Rights Overview	270
Restitution Overview	271
Typical Victim Rights	272
Receiving Information and Notification	272
Reasonable Protection and Separate Waiting Areas	272
Availability of Transportation	273
Participation and Attendance in the Justice Process	273
Restitution and Return of Property	273
Victim Services and Applying for Victim Compensation	274
Expectation of Compliance and Legal Remedies	274

State Legislation for Victim Rights and Restitution	275
Federal Legislation for Victim Rights and Restitution	275
Proposed Victim Rights Amendment	277
<i>Pro</i> : Arguments for Constitutional Victims' Rights	278
<i>Con</i> : Arguments Against Constitutional Victims' Rights	279
Conclusion	281
<b>Index</b>	<b>283</b>
<b>About the General Editor</b>	<b>317</b>



# 1

## Asset Forfeiture

---

*Stephen A. Bishopp*

*John L. Worrall*

*University of Texas at Dallas*

Asset forfeiture is loosely defined as the confiscation of property by the state of proceeds or instruments of a crime. It is a government practice deeply rooted in history, one that continues to be the subject of much contention today. It has become an integral part of the war on crime, shaped law enforcement practices, and led to a variety of legislative changes over the past several decades.

The debate over asset forfeiture centers on the necessity of finding a balance between the desire to control crime and the need to protect citizens' civil rights. Asset forfeiture is touted as a tool used by law enforcement to address the daunting task of controlling criminal activity. It is meant to serve as deterrent against organized crime and drug trafficking. However, asset forfeiture is seen by many as a Draconian approach to crime control. This is partly because it creates the opportunity and financial motivation for law enforcement to follow the money, not the crime.

Understanding the key issues underlying the forfeiture debate is vital, including the early history of asset forfeiture, as well as the various benefits and drawbacks associated with the practice. Asset forfeiture is beneficial because it targets criminal profits, is not as difficult as securing a criminal conviction, and funds law enforcement activities (e.g., by funding task forces). To its detriment, forfeiture can create a profit motive for law enforce-

ment; may lead to circumvention of state law through a practice known as equitable sharing; has at its core a questionable taint doctrine; may threaten people's rights; does not require a criminal charge or conviction; and requires a lower standard of proof.

## **Types of Asset Forfeiture**

Historically, there have been two basic types of asset forfeiture, *in rem* and *in personam*. Property seized *in personam* occurs as a result of a person being found guilty of a criminal offense. Such property can be confiscated and is utilized primarily as a penalty for a crime. In contrast, *in rem* forfeiture is a civil proceeding and results in a judgment against a person's property. In effect, the property itself is found guilty, or part of a criminal enterprise, and as such it is subject to seizure. A salient difference between criminal and civil proceedings is the burden of proof required to establish guilt. A criminal trial traditionally requires a judge or a jury to find guilt beyond a reasonable doubt. The government must be able to prove, with the same standard of proof required of a criminal conviction, that the defendant's property is a forfeitable asset. In contrast, a civil trial only requires a preponderance of the evidence. This means that the government must only convince a judge with 51 percent certainty that property is subject to forfeiture. In comparison, criminal trials, proof beyond a reasonable doubt requires at least 95 percent certainty.

## **Asset Forfeiture in American History**

Asset forfeiture has a long history that predates the American colonies. In feudal times, offenses designated as felonies or treasons were considered offenses against the king and required repayment to the crown. This repayment came in the form of forfeited lands or goods, which were immediately seized upon conviction. Eventually, the vigorous use of asset forfeiture by England against the American colonies was partly responsible for the wording of the Fifth, Sixth, and Eighth Amendments to the U.S. Constitution. Since then, the Supreme Court has held that there is no significant constitutional limit to the government's use of civil asset forfeiture.

The use of civil proceedings in asset forfeiture cases began primarily with the Navigation Act of 1651. This act allowed England to seize ships and property of merchants who were in violation of its provisions. The Navigation Act was a means by which England was able to control world trade



through the use of statutes that made shipping practices illegal, or deemed a particular type of cargo as contraband. This allowed for the seizure of ships or cargo in rem rather than in personam, thereby avoiding the higher burden of proof associated with criminal proceedings.

Some of America's first asset forfeiture statutes were meant to protect against illegal shipping and piracy in violation of American admiralty laws. Much like English law, a merchant had the opportunity to defend his ship and his cargo (or himself if charged with crime by customs officials); however, contraband cargo was automatically found guilty and was immediately seized.

From the mid-1800s through the mid-1900s, various laws were enacted and government agencies created to regulate and collect funds from the supplying, shipping, and distribution of many drugs and narcotics. For instance, heroin, cocaine, morphine, and marijuana were all once legally shipped, bought, and used throughout the United States. The federal government profited from the taxation and fee collection from drugs and drug-related activity. Doctors were required to have licenses to administer or prescribe certain drugs, and licensing fees were payable to the various government agencies. During this time period, drugs were tightly regulated, but not criminalized, and there was no threat of forfeiture for violating the drug laws.

### *Recent History: Acts and Legislation*

There have been many recent legislative developments in the forfeiture arena. For example, two important pieces of legislation introduced in 1970 had the intent of removing profitability from organized crime and illegal drug activity: (1) the Comprehensive Drug Abuse Prevention and Control Act and (2) the Racketeering Influenced and Corrupt Organizations Act (RICO). The first drug-related asset forfeiture laws were enacted as part of The Comprehensive Drug Abuse Prevention and Control Act. Through utilization of this act, the government was able to seize property involved in criminal activity, such as any equipment or assets used in the making or distributing of contraband, or purchased with money gained from illegal drug activity. This act also categorized certain drugs at various levels of dangerousness and began the process through which many substances were banned, which effectively extended the reach of asset forfeiture laws. Increased penalties and newly prohibited drugs were added to the controlled substance list, allowing for the use of asset forfeiture statutes in more cases.