



5-10-2017

Civil Forfeiture: The Failure of the Courts

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Civil Forfeiture: The Failure of the Courts

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Submitted in Partial Completion of the
Requirements for Commonwealth Honors in Criminal Justice

Bridgewater State University

May 10, 2017

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Chapter 1: Introduction

In 1926, the state of Kansas seized a car from plaintiff Van Oster due to its alleged involvement in a bootlegging operation. Despite being acquitted of the crime, Van Oster's car was forfeited to the state of Kansas under the state's new civil asset forfeiture laws (*Van Oster v. Kansas*, 1926). These laws allowed the state to seize the property of an innocent owner. Per this case and many other civil forfeiture trials, law enforcement is allowed to seize property of innocent owners without being required to prove that the owner of a piece of property is guilty of a crime.

Asset forfeiture is a legal power that has existed in the United States since the country's inception. It permits law enforcement to seize property that has been used in a crime, used to commit a crime or, is the result of a crime, such as proceeds from a drug offense. Under asset forfeiture statutes and legislation, law enforcement is often able to retain proceeds from property seized via asset forfeiture (Worrall J. L., 2001). This has led to concerns about law enforcement profiting from crime and apprehensions of law enforcement becoming less dependent on tax payer money (Worrall & Kovandzic, 2008) (Worrall J. L., 2001). If police officers are able to seize property directly from a crime and profit from that crime, law enforcement profits from crime. Paradoxically, civil forfeiture provides investments for law enforcement in criminal behavior.

Furthermore, civil forfeiture does not provide adequate legal protections to indigent clients. Specifically, it does not provide legal counsel to property owners who cannot afford their own protections. As a result, civil forfeiture is a powerful tool wielded by law enforcement against the poor.

Finally, civil forfeiture precedent, as established through nearly two-hundred years of Supreme Court and district court appellate cases, created an overly complicated justification of

civil forfeiture. Time and again, the courts have contradicted each other when providing justifications for civil forfeiture trials. Some courts have deemed civil forfeiture a remedial power which helps law enforcement fight crime and keep the community safe. Other courts have declared civil forfeiture punitive, and a way for law enforcement to punish owners who use their property illegally. The Supreme Court of the United States declared civil forfeiture “quasi-criminal” (*Boyd v. United States, 1886*). Essentially, there is no consensus on whether civil forfeiture is a remedial punitive legal action. The implications of such discrepancies represent a large conundrum which has tangible effect on plaintiffs of civil forfeiture trials.

These arguments will be addressed throughout the paper to provide an understanding of civil forfeiture history and its applications contemporarily. It will become clear how potentially corrupt this legal power has become and how perplexing it is that it is still employed. Civil forfeiture is an archaic legal practice which provides too much incentive for corruption and is too inherently contradictory within its own legal definition to be permitted to continue.

1.1 Types of Asset Forfeiture

There are three variations of asset forfeiture: (1) administrative forfeiture, (2) criminal forfeiture and (3) civil forfeiture:

Administrative forfeiture is the most commonly employed forfeiture and is classified as a non-judicial forfeiture. The type of property seized under administrative forfeiture tends to be property that does not have a recent owner. This can include houses or facilities that been abandoned, and property that is illegal unto itself. Administrative forfeitures can only be conducted by federal agencies that have proper authority. An agency must present an administrative warrant and provide notice of the impending forfeiture to any potential claimants (Cassella, 2013). If no claim is made within a certain timeframe, the property is forfeited to the

government. If a claimant places a claim on the property, the administrative forfeiture must then move to a judicial forfeiture which is either a criminal forfeiture or a civil forfeiture.

Criminal forfeiture permits law enforcement to seize property only after the owner of the property has been convicted of a crime (Leach & Malcolm, 1994). Should the government wish to pursue a criminal forfeiture, any property that the government is interested in seizing must be labeled within the indictment of the offender (Cassella, 2013). After the conviction is rendered, there is a separate trial to ensure that the property is indeed related to the crime. Following this phase, the property is forfeited to the government. It is important to note that for the government to seize property, it must be specifically labeled within the indictment. If the property is not labeled, the property cannot be seized. Criminal forfeiture was used heavily during the 1970s to fight organized crime and was relatively ineffective (Levy, 1996). The goal of the government to employ criminal forfeiture was to cripple organized crime by seizing any illegal proceeds. However, due to procedural disadvantages, law enforcement was only ever able to seize a fraction of its intended forfeiture.

Finally, civil forfeiture allows law enforcement to seize property allegedly involved in a crime without having to charge the owner with a crime (Cassella, 2013). Currently, civil forfeiture is used primarily to weaken the economic foundations of the illicit drug trade and reduce drug-related crime (Worrall J. L., 2001). Civil forfeiture can be traced back to an archaic legal tradition based on a fiction where inanimate objects could commit crime or even be possessed by Satan (Finklestein, 1973). The personification of property during old English Common Law created the legal fiction which allowed government to place property on trial instead of an offender for a crime (Worrall J. L., 2001). Contemporary civil forfeiture no longer proscribes to this archaic legal fiction, yet the result of this legal fiction has classified civil

forfeiture as an *in rem* proceeding. *In rem* is a Latin term meaning “against a thing” and has branded civil forfeiture as part of civil law, not criminal law.

1.2 Civil Forfeiture

What makes civil forfeiture unique is the ability to seize property from an owner without having to prove that the owner was involved in a crime, or even prove beyond a reasonable doubt that a crime took place (Jenson & Gerber, 1996). In fact, in a civil forfeiture case, the guilt or innocence of the owner is largely irrelevant (Cassella, 2013) (Worrall J. L., 2001). This stems from civil forfeiture’s *in rem* classification.

Additionally, civil forfeiture’s burden of proof makes it unique in the context of the justice system in the United States. Due to its civil nature, the burden of proof is not placed on the government, rather the burden of proof is placed on the owner of the property that is endangered of being forfeited (Bourdreaux & Pritchard, 1996). To seize a property via civil forfeiture, a law enforcement agency must establish probable cause that a piece of property was involved in a crime. Once probable cause has been established, the government can seize the property. At this point, the property is taken to civil court. It is then the owner’s burden to prove with a preponderance of evidence that the property was not involved in a crime (Cassella, 2013).

The government can pursue a civil forfeiture in various stages of the justice process. While the government is trying the owner of a crime, the government can also pursue a civil forfeiture of any property involved in that crime, forcing the owner to defend himself criminally and prove his property’s innocence’s at the same time. Additionally, the government can pursue a criminal forfeiture and civil forfeiture of the same property concurrently (Cassella, 2013). The government may also seize property via civil forfeiture before a criminal trial or after a criminal conviction and the offender’s release from prison (Cheh, 1994). Concerningly, after an offender

is released from prison and has paid her debt to society, she may still be in danger of losing property linked to the original crime.

1.3 Types of Property Subject to Asset Forfeiture

There exist two forms of property that are subject to asset forfeiture laws. First is personal property. This form of property is anything that can be easily moved and usually includes smaller objects such as physical money, clothing, and cars. However, it can also include larger objects such as ships as in the case of an old civil forfeiture trial in the early-1800s (*The Palmyra v. United States*, 1827).

The second form of property subject to asset forfeiture is real property. Real property is anything that cannot be easily moved and is usually tethered to the ground. Examples include houses, buildings, or land itself (Bourdreaux & Pritchard, 1996). Real property was not officially subject to civil forfeiture until the Comprehensive Drug Abuse and Prevention Act of 1970, which expanded some asset forfeiture powers (Moores, 2009). However, judicial precedent allowing the civil forfeiture of real property has existed since the Supreme Court case of *Dobbin's Distillery v. United States*, (1877). During this case, an entire distillery was seized from the owner because the bookkeeper was involved in fraud without the owner's knowledge (*Dobbin's Distillery v. United States*, 1877).

Of the two variations of property forfeitable via asset forfeiture laws, there are three subcategories. First is contraband, which is any property that is illegal in of itself (Cheh, 1994). This can include certain weapons and drugs (Cheh, 1994). Contraband is subject to summary forfeiture. Under this type of forfeiture, the property is seized immediately on the spot without a judicial hearing (Worrall J. L., 2001). The second form of property, known as proceeds, are any property that is the result of an illegal action (Cheh, 1994). Examples include profits directly gained from an illegal transaction, or items purchases with tainted money. A house bought with

money from a drug sale would count as a proceed subject to forfeiture. If a purchaser of a house has a partner ignorant of their spouse's illegal actions, their house can be seized because of its relation to a crime. Finally, the third form of property is instrumental property. Instrumental property includes property used to facilitate or commit a crime (Cheh, 1994). If a drug sale took place in a house, the house would constitute as an instrumentality of the crime. Consequently, should a drug dealer use a friend's car to transport illegal drugs, the car would be subject to asset forfeiture.

As suggested in the previous paragraph, there are times where asset forfeiture can be complicated by multiple party ownership, especially if an owning party is innocent and unknowing of the illegal action. In the cases where there are multiple owners of a property that is forfeited to the government, the courts have adopted a controversial solution. The proposed solution, known as liquidated damages, liquidates the property seized (Cheh, 1994). From there, the court divides the money as deemed fit to the government and the remaining owners. This and other solutions – both proposed and actuated – will be conceptualized and analyzed later in Chapter 4.

1.4 Civil Forfeiture's In Rem Meaning

Civil forfeiture is an *in rem* proceeding. During this form of proceeding, a piece of property is placed on trial in the place of a person. As a result, many legal protections and rights that are taken for granted in criminal trials are not present in a civil forfeiture trial. Most notably, the *in rem* nature of civil forfeiture forces the owner to prove the innocents of her property (Bourdreaux & Pritchard, 1996). The origins of this comes from the Admiralty laws enacted by Congress in the early 1800s

Subsequently, asset forfeiture permits law enforcement to act independently of the political process. As the police rely on taxpayers, it is ultimately the government which decides

how taxes are divided and employed. Although it is the executive branch which is in control of law enforcement, should law enforcement become dependent on funds from other avenues, their focus will shift from upholding law and government mandates to ensuring it has the money to operate. Therefore, law enforcement becomes tethered to crime in such a way where law enforcement has an interest in ensuring that certain crimes exist in order to profit from, or at the least meet budgetary expectations.

1.5 Civil Forfeiture Procedure

For a law enforcement agency to seize property, it must first establish probable cause. In some civil forfeiture cases, the establishment of probable cause can justify a summary forfeiture of certain property that may have been involved in the crime. In such a case, an owner is deprived of property without being charged with a crime and the property is held by the government until a trial takes place. As stated earlier, it is the duty of the owner to prove their property innocent of the crime. This strange legal practice is due to the relation-back doctrine.

1.5.1 The Relation-Back Doctrine

Per the doctrine, the government is granted rights to any property once it has been involved in an illegal action (Cassella, 2013). For example, if a car is used to transport illegal drugs, once the drugs are placed in the car, the government has a right to that car.

Again, the issue of multiple party ownership is raised. In a case where an offender uses a car to transport illegal drugs, the relation-back doctrine grants the government legal rights over the car. However, if the offender were to sell the car to someone before it was seized, the government would still have a claim on the car. If the car was then forfeited to the government, the new owner of the car is of deprived their property while being innocent of any wrongdoing.

The relation-back doctrine was weakened by the Supreme Court Case *United States v. Parcel of Land, Building, Appurtenances, and Improvements. Known as 92 Buena Vista Avenue,*

Rumson, New Jersey, et al (1992), where the defendant had purchased a parcel of land with money given to her by a friend (*United States v 92 Buena Vista, 1992*). The defendant was ignorant that the money she was using to purchase the land was traceable to a drug transaction. However, under the relation-back doctrine, the government had a right to the money once it was involved to purchase or sell drugs. Therefore, the government had a right to anything that was purchased with the money.

Fortunately for the defendant, the Supreme Court decided that the innocent owner defense in *Buena Vista* was a sufficient defense. The Supreme Court ruled that the owner was unaware of the illegal drug money and therefore could retain the land purchased with the money (*United States v 92 Buena Vista, 1992*). The innocent owner defense has always been a highly-contested issue in civil forfeiture law. In the early 1800s the innocent owner defense provided minimal protections, but since the 1970s there has been a growing support for the defense. Unfortunately, there is no uniform innocent owner defense to this day. The definition of the innocent owner defense changes depending on which federal circuit hears the case. The history and application of this defense will be discussed further in Chapter 4.

1.6 Equitable Sharing

Since the 1970s, the use of asset forfeiture has steadily increased. Currently, forfeiture proceeds reach hundreds of millions of dollars each year (Worrall J. L., 2001). As stated earlier, many police agencies can retain proceeds from asset forfeitures. To curb possible police corruption and entanglement in crime, some states have enacted strict laws to ensure that forfeiture proceeds go into funds to better the community, such as education and construction. However, local and state police departments can circumvent these laws by employing a tactic called equitable sharing (Moore, 2009).

Through equitable sharing, police agencies can share proceeds from asset forfeiture cases. When proceeds are gathered in relation to a forfeiture, they are transferred into the Department of Justice's (DOJ's) asset forfeiture fund. These resources can then be transferred to other departments as the DOJ sees fit. To circumvent the laws, state and local agencies must partake in an adoptive forfeiture. During an adoptive forfeiture, a local agency surrenders an asset forfeiture case to the federal government. Upon the successful forfeiture of property, 80% of the proceeds are relinquished to the local or state agency which had original jurisdiction. The remaining 20% is retained by the federal government and placed in the DOJ's asset forfeiture fund (Worrall J. L., 2001). Equitable sharing provides local and state agencies with millions of dollars in forfeited proceeds each year (Worrall & Kovandzic, 2008). Most concerning about the possible abuse of asset forfeiture and equitable sharing is the notion that as police agencies become more dependent on asset forfeiture funds, they are less so dependent – and therefore responsible – to the public (Worrall & Kovandzic, 2008).

1.7 Introduction to the Punitive/Remedial Arguments of Civil Forfeiture

Perhaps the most controversial aspect of civil forfeiture law is its classification as a civil action. In multiple Supreme Court cases, such as *The Palmyra v. United States (1827)*, *Dobbin's Distillery v. United States (1866)*, *Boyd v. United States (1886)*, *Van Oster v. Kansas (1926)*, *Good v. United States (1993)*, *Austin v. Texas (1993)*, the Supreme Court of the United States (SCOTUS) has constantly argued civil forfeiture as remedial and punitive at the same time. This argument has been central in shaping civil forfeiture legislation and precedent and is the root cause to many of the inherent flaws within civil forfeiture. Civil forfeiture's punitive and remedial nature will be conceptualized in Chapter 3.

1.8 CAFRA

Civil forfeiture has presented many legal, ethical and constitutional questions.

Reforming and improving civil forfeiture laws presented logistical issues up until the Civil Asset Forfeiture Reform Act (CAFRA) of 2000. Before CAFRA, there was no uniform civil forfeiture legislation. Civil forfeiture laws derived from many different pieces of legislation that had civil forfeiture clauses (Cassella, 2013). For example, previous to the National Prohibition Act (NPA) of 1919, there were no civil forfeiture statutes that allowed for the seizure of property involved in bootlegging. When the act was passed, there was included such a clause, and it was overturned when the act was overturned.

CAFRA was the first attempt by Congress to establish a uniform civil forfeiture act. The act overruled most other federal legislations that included civil forfeiture clauses. It attempted to solve many of the problems inherent in civil forfeiture as well, such as establishing a universal innocent owner defense. It also attempted to provide protections to indigent clients who could not hire a lawyer for their case. Because civil forfeiture takes place in civil court, the Sixth Amendment's right to counsel is not protected or guaranteed (Rulli, 2011). CAFRA also attempted to alleviate the problem of proportionality and civil forfeiture. Often, property seized in a civil forfeiture trial can be of greater worth than the offense itself.

To litigate a civil forfeiture case with any hope of success, the cost of the case to the owner often is at least ten thousand dollars (Stillman, 2013). Thus, if a piece of property is seized and is worth less than said sum, it is often not worth for the owner to litigate the case. Additionally, civil forfeiture trials can have clear negative consequences for indigent clients who may not be able to accumulate the money required to litigate the case, no matter the monetary worth of the property.

1.9 Chapter Overview

The purpose of this project is to conceptualize and examine many of the flaws and procedures of civil forfeiture law. The thesis will start with a brief historical analysis of civil forfeiture laws since the Drug Abuse Prevention and Control Act of 1970. This chapter will present a common understanding of civil forfeiture law to better illustrate how civil forfeiture has grown since the 1980s War on Drugs.

Following a history of civil forfeiture, Chapter 3 will discuss civil forfeiture's place in the legal system. Although civil forfeiture relies on a criminal action, cases are held in civil court. On multiple occasions, the Supreme Court of the United States has attempted to grapple with this issue. In the past, the Supreme Court has ruled civil forfeiture to be both punitive and remedial at the same time. This ruling is problematic because it became difficult to narrow down and define which amendments of the constitution apply in a civil forfeiture trial. If civil forfeiture is purely remedial, then many of the amendments do not necessarily apply to civil forfeiture because it takes place in civil court. If civil forfeiture is wholly punitive, then it does not belong in civil court and all amendments and constitutional protections must apply to it. However, because it is "quasi-criminal" it exists in a legal limbo between remedial and punitive, civil and criminal. Civil forfeiture law has become overly complicated and convoluted because of this.

Chapter 4 will conceptualize contemporary civil forfeiture precedent established by the Supreme Court of the United States and various federal circuit court rulings. These cases will illustrate the internal conflicts present in civil forfeiture law. Finally, Chapter 5 will summarize and conclude the paper and mention final thoughts.

Chapter 2: History of Civil Forfeiture and its Procedural/Logical Inconsistencies

Since civil forfeiture's inception, there have been constant flaws and issues that have arisen within its practice, ethics and constitutionality. This chapter will begin with a brief history of civil forfeiture since 1970 until 2000 and the enactment of Civil Asset Forfeiture Reform Act (CAFRA). This history will help conceptualize many of the complications within civil forfeiture law.

2.1 Brief Summary of Early Civil Forfeiture History

The original purpose of civil forfeiture was to secure maritime interests during times of war (Leach & Malcolm, 1994). Civil forfeiture statutes derive from the Naval Acts (Bourdreaux & Pritchard, 1996) in the early 1800s. By employing civil forfeiture, the United States government could fight piracy more effectively (Finklestein, 1973). During the 1800s, it was very difficult to track down a pirate in the open water, however, if the government managed to come across stolen goods, they could enact civil forfeiture and seize the stolen property lawfully. Additionally, civil forfeiture was used to seize any vessels that were in violation of the United States' sovereignty.

In the 1920s, the United States used civil forfeiture to enforce the new laws within the National Prohibition Act of 1919. This was one of the first times in American history where the government used civil forfeiture to seize property related to drugs. After the National Prohibition Act was overturned by the Twenty-First Amendment, all of the civil forfeiture laws within the National Prohibition Act were also overturned.

2.2 Comprehensive Drug Abuse Prevention and Control Act of 1970

Civil forfeiture saw a large increase in power and usage during the 1970s as it was purposed to fight the rise of organized crime, specifically crime which revolved around illegal drugs (Johnson, 2002). During this time, civil forfeiture was largely unreformed. For example, civil forfeiture did not require the government to notify owners of impending seizures (Johnson,

2002). Should a house be involved or connected to a drug crime, whether drugs were sold directly in the home, or potential sellers were using the house as a place to discuss business, the house could be seized without government notification to the owners of the house. If there were any innocent third parties who lived in the house, such as a spouse or child, they could be rendered homeless without notice.

To fight crime in the 1970s, Congress enacted the Comprehensive Drug Abuse Prevention and Control Act of 1970. This law allowed for the seizure of any real¹ or personal² property involved in illegal drug transactions or activities (Moore, 2009). This was the first time that legislators created law where real property was subject to forfeiture. Before this act was passed, precedent had been established by the Supreme Court of the United States which allowed for the seizure of real property during the case, *United States v. Dobbin's Distillery* (1877). However, there had never been an act of Congress permitting the seizure of real property until 1970. Previously real property was seized through administrative forfeitures or criminal forfeitures due to their extra procedural protections.

The Comprehensive Drug Abuse Prevention and Control Act expanded civil forfeiture in an additional way. The act allowed for the seizure of any money or items involved or intended to be used in a drug offense (Jenson & Gerber, 1996). This has led to two problems within civil forfeiture law. First, seizing something based on intention can be controversial in law because an intention can never be fully proven true until the action has taken place. Essentially, the government is seizing money based on a crime that has not transpired. Additionally, civil forfeiture grants law enforcement the ability to seize property based on probable cause (Johnson,

¹ Real Property – any property that cannot be easily moved. Usually real property included buildings, houses, or something attached to land. Real property can also include land itself.

² Personal Property – any property that can be easily moved. Usually is reserved for smaller pieces of property but can include cars and in the case of *United States v The Palmyra* (1827) included a ship

2002). Owners can be deprived of property based on a perceived intention, rather than a criminal act.

Secondly, should a drug dealer use illegally obtained money to purchase another piece of property, such as a car, the car then becomes subject to civil forfeiture because it is a proceed of a drug offense. Should an innocent third party be reliant on that property, such as a spouse, the innocent party could be subject to governmental seizure. This is especially problematic when tainted money and legitimate money are used to purchase a single piece of property. Even more so problematic is if the legitimate money was provided by an innocent third party.

Courts have had difficulty differentiating property that is innocent from guilty property in asset forfeiture cases (Johnson, 2002). To provide an example, should a drug dealer place the money he has earned in a bank account which he keeps legitimate money in as well, it is nearly impossible to separate the legally obtained money from the illegal. To seize the entire account would be to deprive a person of legitimate property that was never used for wrongful purposes. However, to ignore the money would ensure that a drug dealer profited from crime. Property gained illegally but conveyed to another owner in a legal fashion leads to unfair applications of civil forfeiture law.

Despite the flaws inherent in the Comprehensive Drug Abuse Prevention and Control Act, it was passed with practical intentions to deter criminal activity. Namely, the act was purposed to remove financial incentives of organized crime (Jenson & Gerber, 1996). Per the act, offenders are meant to be deterred from earning money through criminal means if they understands that their proceeds will be forfeited to the government. However, this intention is fundamentally flawed for it relies on offenders understanding what is subject to forfeiture and

under what circumstances. Unless an offender has a firm understanding of civil forfeiture law, the deterrent effect is moot.

Coupled with the RICO acts that were also passed around this time, civil forfeiture saw a large increase in authority and power. As stated under the RICO act, all drug offenses count as a violation of federal law, therefore any drug offense can trigger a civil forfeiture under federal statutes (Jenson & Gerber, 1996).

2.3 Comprehensive Crime Control Act of 1984

Following the 1970s came the War on Drugs, ushered in by President Reagan. In 1984, the Comprehensive Crime Control Act was passed (CCCA). This act formulated many new crimes centered around drug offenses. It is notoriously known for establishing mandatory minimum sentences regarding drug offenses. However, CCCA also further enhanced civil forfeiture powers. It enabled the seizure of any real property that had been used or was intended to be used to violate the statute (Jenson & Gerber, 1996). Although the Comprehensive Drug Abuse Prevention and Control Act had already established the seizure of real property, the CCCA was much more comprehensive in its criminal codes and therefore expanded civil forfeiture to apply to more crimes (Rulli, 2011).

Since the CCCA, assets seized via civil forfeiture have increased annually. In 1985, just a year following CCCA's inception, \$27.2 million dollars of assets were seized. In 1994, \$649.7 million dollars of assets were seized (Jenson & Gerber, 1996). The CCCA also is accredited for creating equitable sharing (Moore, 2009).

2.4 Law Enforcement and Civil Forfeiture

In 1985, the Department of Justice (DOJ) created the asset forfeiture fund to make it easier to distribute funds. These funds are primarily distributed through equitable sharing. The CCCA had streamlined civil forfeiture and made it much easier for law enforcement agencies to

benefit from seized assets. By 1990, 4,800 local law enforcement agencies were engaged in equitable sharing (Jenson & Gerber, 1996). By 1989, the DOJ could fund itself without Congressional oversight via the asset forfeiture fund. At the same time, Attorney, General Richard Thornburgh stated that \$229 million dollars from the asset forfeiture fund would be used to build more than 3,000 federal prisons across the country (Leach & Malcolm, 1994).

Recently, police departments have become reliant on asset forfeiture proceeds to compensate for budgetary shortfalls. Specifically, according to Worrall (2001), the larger a police agency is, the more likely they are to depend on asset forfeiture funds. In Worrall's research, of a sample of 383 large police agencies, 45.95% of these agencies either agreed or strongly agreed that civil forfeiture was a necessary budgetary supplement. Additionally, in a separate study of 572 different police agencies across the country, 60% were found to be dependent on asset forfeiture funds to operate (Worrall & Kovandzic, 2008).

Most concerning about the dependency of law enforcement on civil forfeiture funds is the lessening of reliance on tax-payer money. First supplementing budgetary shortfalls with civil forfeiture creates a dependency of law enforcement on crime. In essence, if law enforcement profits from criminal activity, and some agencies view this profit as necessary to exist, law enforcement then has a pecuniary interest in preserving criminal activity in which it is able to seize assets. Instead of preventing the distributions of illegal goods, law enforcement is incentivized to seize money after it was used to buy an illegal substance. Therefore, law enforcement may pursue the assets of an illegal action instead of attempting to prevent the crime itself.

Furthermore, law enforcement does not have to prove a person guilty of a crime to seize the owner's property. Law enforcement is only required to prove with probable cause that the

property was involved in a crime. Following CAFRA, law enforcement must, at trial, prove with a preponderance of evidence that the property was involved in a crime to forfeit the assets, but this standard of proof is not difficult to obtain if the owner of the property is unable to afford necessary legal counsel.

In Texas during 2006-2007, a state trooper prioritized traffic stops based on possible civil forfeiture bounties. Specifically, the trooper would target cars that appeared old, beat up, or otherwise in bad condition as to indicate an indigent driver. Additionally, the trooper would try to focus on cars that were out of state and owners who spoke broken or no English to target for forfeiture (Stillman, 2013). The trooper's purpose was to seize as much assets for the department as possible with as little legal recourse. As many of the owners were not in a position to litigate the forfeitures, the trooper was able to connect the vehicle with a traffic crime and seize the vehicle and or property inside (Stillman, 2013). Within only six months, the civil forfeiture program which the state trooper department opened up had amassed \$1.3 million (Stillman, 2013). This represents a clear example of police not only profiting from crime, but of police purposely targeting poor and potentially innocent owners.

If law enforcement truly is becoming more dependent on civil forfeiture proceeds to fund itself, then law enforcement could become independent of taxpayers. Law enforcement must rely on taxes and governmental aid to pay for most of its expenses. This reliance on taxpayer money forces agencies to adhere to the will of the people. However, if law enforcement can fund itself through asset forfeiture, the dependency on the public dwindles.

Not only are agencies more likely to become autonomous of the political system, but some agencies have already begun to focus on asset forfeiture in extreme ways. In Fresno California, superiors have told their detectives that their performance will be judged based on

how many assets they seized (Moore, 2009). Officers being judged based on assets seized represents a direct conflict of interest between the police and criminals. For law enforcement to seize property, the property must be related to a crime. Civil forfeiture makes officers dependent on crime to make money. Or at the worst, civil forfeiture places officers in a position where they are forced to seize property from innocent owners in order to make up for budgetary shortfalls.

Law enforcement agencies are not the only ones who profit from the power to seize property. Attorneys can also profit from asset forfeiture law. In 2014, Texas police officers seized \$3.5 million dollars in forfeited assets which was used to pay for the salaries of sixteen employees (Sibilla, 2014). Additionally, in Oklahoma, an ADA used \$5,000 from an asset forfeiture fund to pay off student loans (Wing, 2015). Before Utah passed legislation forcing all asset forfeiture funds to be placed into an education fund in 2000, a district attorney prioritized cases based on potential forfeiture earnings (Moore, 2009). It is important to note, following the legislation, the same DA stopped prioritizing cases based on possible forfeitable assets.

2.5 Civil Forfeiture Inspired Tactics

There are two relatively new terms referring to the dependency law enforcement has obtained on asset forfeiture. First is a bounty-hunter system. In this system, police focus their efforts on the most lucrative forfeiture possibilities rather than more serious crimes” (Moore, 2009). Instead of fighting crime, law enforcement becomes a pseudo-bounty-hunting agency which does not actively fight crime, rather profits from crime. Additionally, in some departments “leaders encourage officers to pursue targets based on the potential profit they can provide the department, rather than the threat posed to the community” (Moore, 2009).

Recently, some agencies have adopted the reverse sting operation. Law enforcement will attempt to sell drugs to a potential buyer, at which point the officer will seize the money that was to be used to purchase drugs (Moore, 2009). Instead of seizing drugs, the officer seizes money.

Illicit drugs, from other buyers, remain on the streets. Furthermore, according to Moores, some officers attempted to sell the drugs at very low prices. If the officers are attempting to sell the drugs at lower prices, those who are most likely to be caught by these stings are the poor. Again, the potential harm civil forfeiture has on indigent clients grows.

2.6 Brief Summary of Civil Forfeiture Legal Complications

This section of the paper will divert to discuss the legal complications of civil forfeiture.

The heart of all the issues regarding civil forfeiture, including possible police corruption and indigent client abuse, stems from these complications.

2.6.1 Standard of Proof

As stated in Chapter 1, in an *in rem* proceeding, property is placed on trial instead of a person. Property is not afforded the equal rights as a defendant. Therefore, a presumption of innocence is not granted to the property, like it would be to a defendant. This concept becomes confusing when considering whether civil forfeiture is remedial or punitive. If civil forfeiture is remedial, then to seize property with a presumption of guilt has little repercussions. However, if civil forfeiture is considered punitive, and the reciprocate of the punishment is the owner of the property, then civil forfeiture allows the government to punish owners based on a presumption of guilt. Whether civil forfeiture is considered remedial or punitive, an owner is deprived of property in civil forfeiture trial.

2.6.2 The Fifth Amendment

A presumption of innocence is not the only legal sacrifice of *in rem* proceedings. Certain constitutional protections and rights are not guaranteed as would be in a criminal case. For

example, the Fifth Amendment's right of due process³, and protections against double jeopardy⁴ and self-incrimination⁵ are not protected in a civil forfeiture case (Leach & Malcolm, 1994). In a typical civil forfeiture trial, property is seized following a determination of probable cause by a law enforcement agency with proper authority. Law enforcement can seize the property before a trial to ensure that it is not destroyed or lost. This preliminary seizure violates due process. Additionally, the other rights and protections not guaranteed also violate proper due process, as will be shown.

Civil forfeiture's procedures have been questioned as to whether they violate the double jeopardy clause of the Fifth Amendment. During a civil forfeiture case, the government can pursue a criminal trial against the owner, and pursue a criminal forfeiture of the same property concurrently (Cassella, 2013). Additionally, should the government fail in pursuing a criminal forfeiture of a piece of property, the agency can follow up with a civil forfeiture. A defendant of a criminal trial may be forced to litigate their own innocence while being forced to defend their property. Should the owner decide not to litigate for their property, the lack of a presumption of innocence will in essence forfeit the property to the government.

Perhaps most concerning is the varying levels of proof for a criminal conviction and forfeiture compared to a civil forfeiture. To seize property in a criminal forfeiture, the property must be seized with the legal standard of beyond a reasonable doubt, yet to seize property in a civil forfeiture trial, the government must only show a preponderance of evidence that the property is guilty. Should the government fail to prove beyond a reasonable doubt that a

³ Fifth Amendment's Right of Due Process – Affords each person the right to a fair trial following proper procedures per the trial

⁴ Fifth Amendment's Protection Against Double Jeopardy – Prevents the government from charging a person with the same crime more than once and prevents the government from punishing a person twice for the same crime

⁵ Fifth Amendment's Protections Against Self Incrimination – Allows defendants to refrain from providing evidence which would incriminate themselves

property was involved in a crime, the government can lower the standard and seize the property nevertheless.

The exact difference between beyond a reasonable doubt and a preponderance of evidence is paramount. To prove something beyond a reasonable doubt is to declare that something did or did not happen as close to absolute certainty as possible. However, a preponderance of evidence is akin to declaring that something most likely happened but may not have. It is far easier for the government to suggest that a crime may have happened and that the property may be connected to that crime than it is for the owner of the property to prove their property's innocence (Johnson, 2002).

The Fifth Amendment is also designed to protect defendants from incriminating themselves. However, this protection is not protected in a civil forfeiture trial (Leach & Malcolm, 1994). Should a defendant try to defend himself in a civil forfeiture trial, anything said can be used against him in a concurrent or later criminal trial.

2.6.3 The Sixth Amendment

Consequently, there is no right to legal counsel⁶ as protected under the Sixth Amendment in a civil forfeiture trial (Rulli, 2011). The Sixth Amendment applies only to criminal trials and not to civil trials. The Constitution is designed to restrict government powers to prevent abuses. In a criminal trial, the government is always the legal actor and therefore all constitutional amendments apply. However, civil court is designed to be a place where private entities settle disputes and so constitutional amendments do not necessarily apply. As civil forfeiture takes place in civil court, the Sixth Amendment falls victim to civil forfeiture's exceptions

⁶ Sixth Amendment's Right to Counsel – Ensures that anyone who should face a crime will be represented by a public defender should they not be able to afford an attorney

Gideon v Wainwright (1963)⁷ ensured that the Sixth Amendment's right to counsel was provided for indigent clients in cases where the defendant was in danger of losing their physical liberty. However, the Sixth Amendment is not protected in civil cases because of the justification delivered in the case *Lassiter v. Department of Social Services* (1981). During this case, a mother had been found guilty of second degree murder and her child was given to the Department of Social Services (DSS). DSS then attempted to remove the mother's parental rights. At trial, the mother, who was indigent, was not provided legal counsel. Following the trial, the mother lost her parental rights and appealed under the Sixth Amendment.

The Supreme Court of North Carolina heard the case and upheld the decision of the lower courts, stating that the mother was not guaranteed a right to legal counsel in this specific case. Justice Stewart presented the opinion of the court stating that "an indigent's right to counsel...has been recognized to exist only where the litigant may lose his physical liberty⁸ if he loses the litigation" (*Lassiter v. Department of Social Services*, 1981). Justice Stewart essentially argued that parental rights do not mean the same as physical liberty. This same logic explains why civil courts, and therefore civil forfeiture cases, do not guarantee a right to counsel. The potential loss for the plaintiff is not seen as a large enough issue to warrant a right to counsel. This is especially true when civil forfeiture is regarded as remedial. If civil forfeiture is remedial, then, as far as the courts are concerned, the owner is not in danger of losing any form of liberty.

Perhaps more heinous, Justice Stewart also stated "the State...has a...pecuniary interest in avoiding the expense of appointed counsel and the cost of the lengthened proceedings his

⁷ (*Gideon v Wainwright*, 1963)

⁸ Physical Liberty – In this case, physical liberty refers to a person's freedom. The government removes a person's physical liberty when it arrests them, sentences them to prison or jail, or does anything which prevents a person from physically doing what she wishes

presence may cause...and...[the State] has a possible stronger interest in informal procedures” (*Lassiter v. Department of Social Services, 1981*). Justice Stewart’s justification for denying a right to counsel stems from the State’s interest in retaining money. The court’s interest in informal procedures is to prevent an overburdened system. However, the results of these interests is the violation of people’s liberties – whether physical or property liberties.

The lack of legal representation appears to be out of place when coupled with the government’s ability to pursue criminal and civil forfeitures at the same time. The defendant who is litigating for their freedom, must defend their property without legal counsel or guide, unless they can afford private counsel. However, to afford counsel for a criminal trial and civil trial at the same time would be costly.

Fighting the government in a civil forfeiture trial can be very expensive for the owner. Typically, for an owner to litigate a civil forfeiture case with any real chance of winning will cost around \$10,000 (Stillman, 2013). In many cases, the property which is in danger of being seized is not of the same value as it would be to litigate a proper defense. More concerning, property is sometimes targeted based on its value to prevent owners from litigating against the seizure. In Texas, the state trooper mentioned before was purposely targeting people he profiled to be indigent when seizing property (Stillman, 2013). Property owners who are unable to afford proper legal counsel often would not bother to attempt to contest the seizure of their property (Rulli, 2011).

Because it is so expensive to litigate civil forfeiture cases, only 20% of owners will attempt to defend their property at trial (Moore, 2009). This number can be attributed to a few possible reasons. Civil forfeiture trials are too expensive for the average person to litigate. Additionally, the property being seized could be less monetarily than it costs to litigate. Or, the

clear majority of times law enforcement seizes property, it is indeed in relation to a crime and the owner is too afraid to litigate for their property at the risk of endangering their liberty. However, given the information provided so far in this thesis, law enforcement's motives for seizing property is highly skeptical.

This statistic becomes more interesting when paired with a complimentary statistic, that in 80% of civil forfeiture cases, the owner is not charged with a crime (Moore, 2009). These two statistics seem to be opposites of each other, suggesting that when law enforcement does charge an owner with a crime, the owner is more likely to attempt to defend their property. There are a few possible reasons for this. First, the owner may understand that they are charged with a crime anyway so it is in their interest to attempt to defend their property. Or, perhaps law enforcement uses civil forfeiture as a tool to evade more formal legal proceedings. If 80% of owners are not charged with a crime, and only 20% of owners attempt to litigate, officers could be using civil forfeiture coercively. Attempting to convince owners not to litigate for their property and in return, no charges will be brought against the owner. Agents could be using civil forfeiture as a means for its own ends.

2.6.4 The Fourth Amendment

Finally, civil forfeiture also appears to violate the Fourth Amendment. Specifically, it violates the exclusionary rule⁹ (Worrall J. L., 2001). In a civil forfeiture trial, law enforcement can seize a piece of property and establish probable cause afterward (Worrall J. L., 2001). Not only is law enforcement held to a lower standard of proof in a civil forfeiture trial, law enforcement can seize property and then determine the meaning of the seizure later.

⁹ Fourth Amendment's Exclusionary Rule – prevents law enforcement from using evidence gained after establishing probable cause to establish probable cause

The exclusionary rule is designed to prevent law enforcement from using illegally obtained evidence or otherwise non-usable evidence. In a criminal trial, law enforcement is barred from using evidence post arrest to establish probable cause per the exclusionary rule. Civil forfeiture directly contradicts this legal practice.

Furthermore, law enforcement can use hearsay and circumstantial evidence to establish probable cause. Typically, to establish probable cause, the seizing party will present evidence to a judge who will determine if probable cause has been established (Jenson & Gerber, 1996). The seizing party also does not need to establish a clear nexus between the property and the crime, rather the agency need only show a reasonable belief that the property is connected to the crime.

2.7 Forfeiture Procedural Advantages

In addition to not conforming to constitutional constraints in a civil forfeiture trial, the government also enjoys procedural benefits compared to a criminal trial. First, should a forfeiture start as an administrative forfeiture, the owner of the property has a short window to place a claim on the property, If the claimant does nothing before it is too late, the property is forfeited to the government. Moreover, the only way for the owner to reobtain their property is through appeal based on procedure. Any other form of appeal of an administrative forfeiture is often not heard by the courts (Cassella, 2013).

To seize property via civil forfeiture, a law enforcement agency must establish a nexus between the property and the crime. However, this nexus is not required to be integral to the crime itself. For example, a house can be seized if it was involved in the negotiating of a drug offense (Jenson & Gerber, 1996). Until *Austin v. Texas*, there was no proportionality test established for civil forfeiture. So long as a piece of property could be linked to a crime, it could be seized. Precedent established in *Austin v. Texas* is conceptualized in Chapter 3.

Chapter 3: Civil Forfeiture, Remedial or Punitive?

“Courts of justice will not redress a wrong done by the defendant when he who seeks redress comes into court with unclean hands”

- Justice Louise Brandeis (Brandeis Papers Reel 36 Frame 00590)

Civil forfeiture has existed within a legal purgatory since its inception in the early history of the United States. Though civil forfeiture cases occur in civil court, judicial federal circuits and the Supreme Court have been at odds as to whether civil forfeiture constitutes a remedial or punitive litigation. The distinction is paramount. How civil forfeiture is legally classified will determine which procedures and protections apply during a civil forfeiture case. Should civil forfeiture be classified as purely remedial, it becomes difficult to attach constitutional and other legal protections to it. Should civil forfeiture be classified as purely punitive, its powers and applications will be greatly diminished. Should civil forfeiture remain in the legal limbo where it is neither purely remedial or punitive, the procedures and protections attached to civil forfeiture are doomed to remain ambiguous. This chapter will determine civil forfeiture to be punitive and that any other understanding of civil forfeiture is not only unfair but unconstitutional.

3.1 Civil Forfeiture’s Adversarial System

The intent of civil forfeiture is to seize property only when there is a substantial nexus between a crime and a piece of property (Jenson & Gerber, 1996). Civil forfeiture’s inherent tether to criminal activity is integral to its punitive nature. Civil trials were designed to be between two individuals or private parties. Although the government does get involved in civil trials, it is not necessary for the government to be a litigator in civil court. However, in all criminal cases, it is always the government who is the litigator for it is up to the government’s

discretion as to which crimes are enforced, which crimes are prosecuted and to what extent. This is best exemplified through the titles of criminal cases. Depending on the jurisdiction of the case, criminal cases always read *The State v Defendant*.

Civil forfeiture cases are similar to criminal trials in this way. In a civil forfeiture trial, the government is always the legal actor. Similar to criminal cases, civil forfeiture cases read *The State v Defendant*. The difference is that the defendant in a civil forfeiture trial is an object, not a person. Moreover, private actors cannot seize property of other private actors through asset forfeiture laws. Civil forfeiture appears to provide an avenue for which the government can apply its will over private individuals without having to litigate in a criminal case. Although it does not prove civil forfeiture is solely punitive, the similarity between civil forfeiture trials and criminal trials is evident suggesting a punitive nature.

Civil forfeiture would not be the only punitive function civil courts provide. Fines have been regarded to be punitive and yet are often litigated in civil court. Additionally, fines are issued in relation to committing a crime. However, fines tend to be substantive of criminal convictions and officers typically usher fines in relation to municipal violations. Civil forfeiture on the other hand is entwined mainly with felonies, such as drug law violations or white collar crimes.

Furthermore, civil forfeiture is viewed as a preventative tool law enforcement can employ to incapacitate future crime (Leach & Malcolm, 1994). As stated earlier, law enforcement employed criminal forfeiture in the 1970s to fight organized crime (Levy, 1996). The purpose of criminal forfeiture was to limit the capabilities of organized crime, not necessarily to deter organized crime. In his book *A License to Steel*, Levy mentions that in 1970, organized crime

had so much money that if a person were to build the Empire State building using nothing but hundred-dollar-bills lying flat, some organized crime institutions would still have more money.

3.2 Calero-Toledo v. Pearson Yacht Co. (1974)

In 1974, the Supreme Court of the United States seemed to uphold the punitive nature of civil forfeiture law in the case, *Calero-Toledo v. Pearson Yacht Company (1974)*. In this case, the owner of a yacht had leased the yacht to residents of Puerto Rico. The yacht was seized because the yacht housed marijuana. The owner of the yacht was unaware of the illegal usage of his yacht. Calero-Toledo appealed the forfeiture of his yacht because he had not been given a proper pre-trial seizure notice which violated his right to due process.

The Supreme Court denied his appeal on several grounds. First, the Supreme Court stated that the right to a pre-trial seizure notice is not guaranteed if the property can be easily moved, destroyed or concealed by the time of the trial (*Calero-Toledo v. Pearson Yacht Leasing Company, 1974*). Additionally, the Court stated forfeitures are not rendered unconstitutional if the owner of the property involved is innocent. This is attributed to the *in-rem* nature of civil forfeiture. The rights and innocents of the owner are not taken into consideration because it is the property which is on trial, not the owner.

Most importantly, the Court stated that Puerto Rican asset forfeiture statutes were designed to further the punitive and deterrent purposes of Puerto Rican law (*Calero-Toledo v. Pearson Yacht Leasing Company, 1974*). Civil forfeiture in this case was purposed to compliment the punitive nature of a specific law. The primary focus of the forfeiture, at least according to the Court, was not to remedy the drug violation which the yacht was involved in. Instead, the focus was to punish the violators of the law.

It is important to note who is being punished in this case. The lessees of the yacht are not the subject of the punitive action. Neither is the yacht company a direct recipient of the legal

action. Instead, it is the owner of the yacht who loses his property. This case represents an example of how civil forfeiture can deprive innocent owners of their property. The owner of the yacht did nothing illegal yet was the one who bore the brunt of the illegal action.

3.3 Congressional View of Civil Forfeiture

Civil forfeiture, and asset forfeiture in general, can be used as a supplemental tool to imprisonment. In 1992, a congressional panel stated that few people in Congress or law enforcement believe that imprisonment is enough of a punishment for participating in the drug trade and that civil forfeiture was a necessary procedure to punish and deter drug crimes (Jenson & Gerber, 1996). Importantly, Congress used of the word “punishment”. The purpose of civil forfeiture is to punish owners who use their property illegally. It is to deprive any potential criminals of the items they used to commit a crime or gained because of a crime.

Additionally, Congress mentioned civil forfeiture is meant to have a deterrence affect. Deterrence is a concept that is routinely connected with the criminal justice system. Preventative policing often relies on deterrence in some form to prevent a crime from happening. Typically, deterrence is in reference to the Rational Choice Theory¹⁰. If a criminal understands he may lose all his property should he use it to commit a crime, or if a criminal understands he will lose any proceeds of a crime, the would-be criminal is less likely to commit the crime in the first place. Civil forfeiture is punitive in this sense because it is relying on negative reinforcement to prevent a potential criminal from committing a crime. Civil forfeiture as a deterrence is reliant on a criminal action. Upon such action, civil forfeiture introduces a negative action, which is the seizure of property. This action is to be so negative that it is to make an example of the criminal

¹⁰ Rational Choice Theory – A criminal justice theory that explains all people are rational creatures and people only commit crimes when it benefits them. This theory is often compared to a hedonistic calculus where criminals try to maximize pleasure and minimize pain and therefore criminals only commit a crime when the benefits outweigh the costs. It assumes that criminals have a functioning understanding of the law they plan to violate.

to prevent others from committing the same crime. Civil forfeiture is not designed to remedy any specific crime, but to provide a punitive action in which others understand that committing another such action would be devastating.

In 1996, then Attorney General, Janet Reno had also declared civil forfeiture to be a punitive action law enforcement has the power to make. Specifically, civil forfeiture is designed to punish and deter criminal activity (Jenson & Gerber, 1996). Again, the same language appears. Civil forfeiture is designed to punish and deter, not remedy and alleviate.

3.4 Austin v. United States

In 1993, the Supreme Court of the United States heard the case *Austin v. United States*. Austin had been convicted of selling cocaine for which he used his auto-body shop as a location to sell the drugs. Upon conviction, law enforcement seized both the auto-body shop and his mobile home which Austin used to house the illicit drugs. Austin appealed the forfeiture of both his shop and home based on the Eighth Amendment's excessive fines clause. The Court had to decide whether the Eighth Amendment applied to civil forfeiture. For the Eighth Amendment to apply, civil forfeiture had to be deemed, at least in part, to be a punishment. Ultimately, the Supreme Court decided with Austin, that the seizure of both his home and shop violated the excessive fines clause of the Eighth Amendment (*Austin v. United States*, 1993).

The Court stated that civil forfeiture is considered punitive for three reasons. First, civil forfeiture focuses on the culpability of the owner (*Austin v. United States*, 1993). Although the guilt or innocence of an owner is not considered during a civil forfeiture trial, civil forfeiture is designed to punish owners who use their property illegally (Cassella, 2013). Civil forfeiture also punishes owners who lend their property to another party who in turn uses it illegally. This can be exemplified by *Calero-Toledo*, where the owner of the yacht leased his property to a third

party. The owner was ultimately punished for the actions of the people on the yacht when he was deprived of his property.

Secondly, the Court concluded that civil forfeiture is punitive because it is tied directly into a crime (*Austin v. United States, 1993*). For property to be seized via civil forfeiture, the property must have a direct link to a crime. Because of this relationship, it is difficult to view civil forfeiture as anything other than an additional criminal punishment. Simply put, if no crime occurs, the government has no right to seize property. Therefore, civil forfeiture must be – at least in part – a criminal sanction and punishment.

Lastly, the Court recognized Congress' intentions with civil forfeiture. As stated earlier, Congress enacted civil forfeiture laws as a method to deter and punish property owners who use their property illegally.

After declaring civil forfeiture punitive, the Supreme Court built its argument as to why the Eighth Amendment should apply to civil forfeiture. According to a previous decision, *Browning v. Ferris*¹¹, the Supreme Court had declared that the Eighth Amendment was designed to prevent the government from abusing its power to punish. Coupled with Justice Blackmun's claim "the government's conduct in a civil proceeding is limited by the Eighth Amendment...must fail unless the challenged governmental action, despite its label, would have been recognized as a criminal punishment..." (*Austin v. United States, 1993*), it is clear the Court agreed civil forfeiture to be punitive and went as far as to declare civil forfeiture a criminal punishment.

However, *Austin* failed to accomplish two important things. First, the case failed to establish to what extent the Eighth Amendment applies to civil forfeiture. Specifically, the Court

¹¹ (*Browning-Ferris Industries v Kelco Disposal, 1989*)

did not present a proportionality test to be used when determining the excessiveness of a forfeiture. Because the Supreme Court failed to establish an objective proportionality test, there are currently six different federal circuits that have varying standards of the proportionality test. In some circuits, it is enough to satisfy the proportionality test by simply establishing a nexus between a piece of property and a crime (Johnson, 2002).

Second, the Supreme Court not only failed to apply other amendments to civil forfeiture, such as the Fifth and Sixth Amendments, but went out of their way to argue why these amendments do not apply to civil forfeiture. The Court appears to conflict with its own argument. First, the Court established that the Eighth Amendment is not restricted to criminal trials, unlike the Fifth and Sixth Amendments. Because the Eighth Amendment is not strictly limited to criminal trials, it can be applied to civil forfeiture. However, the Fifth and Sixth Amendments are restricted to criminal trials and therefore cannot be applied to civil forfeiture.

This contradicts what the Court said earlier when it established its arguments justifying the Eighth Amendment's constitutional application to civil forfeiture. The Court declared the Eighth Amendment was designed to check the government's power to punish. Additionally, the Court stated the Eighth Amendment applies to legal powers that have a criminal punitive outcome, even if the label is civil. In this case, the Court recognized civil forfeiture as not only punitive, but in part, criminal. If civil forfeiture is punitive and criminal, then the other constitutional amendments must also apply to civil forfeiture. Yet the Court rejected this notion because the Fifth and Sixth Amendments are purely restricted to criminal trials and civil forfeiture is still civil law.

The Supreme Court declared the Eighth Amendment constitutionally applied to civil forfeiture in *Austin* because the Eighth Amendment is designed to restrict punitive actions by the

government and to check the government's ability to enforce criminal sanctions. Despite this ruling, the Court refused to claim civil forfeiture to be criminal or purely punitive and therefore decided that they were not constitutionally obligated to apply other amendments to civil forfeiture. Additionally, the Court failed to establish a proportionality test as to when the Eight Amendment should restrict civil forfeiture powers.

3.5 Civil Forfeiture's Adversarial Nature

It is difficult to fully discount the remedial aspect of civil forfeiture, specifically because of how the funds can be used. Not all states allow for forfeiture proceeds to be placed in law enforcement funds. Sometimes, the proceeds are placed in victim compensation funds and recently in Utah, the proceeds are placed in an education funds. However, civil forfeiture is an adversarial court process where property is placed on trial against the state. In such cases, just as in criminal court, the adversarial nature of the trial suggests that civil forfeiture is punitive.

During a criminal trial, a defendant is placed in an adversarial courtroom. When a defendant is convicted, the defendant is punished by the state through various means. The justice system considers this action punitive because it is viewed from the perspective of the defendant. A criminal case is not viewed from the perspective of the victim nor the state, otherwise it could also be considered partially remedial. For example, if a burglar is sentenced to prison, the state has remedied an injustice casted upon another citizen. However, since the justice system cares only for the perspective of the defendant, the governmental action of imprisonment is considered punitive.

Civil court is slightly different because the government is not always the litigator and the Constitution is designed to restrict government power, not private power. However, in civil forfeiture, the legal actor is always the government. Private parties are unable to seize each other's property. Using civil court as a stage in which to seize property is a way for the

government to bypass traditional legal understandings of government power allowing the government to seize property without being restricted by proper legal protections. If civil forfeiture is viewed from the perspective of the owner – for it is the owner who is in danger of losing property – then civil forfeiture is punitive.

In a civil forfeiture case, the adopted perspective is that of the government's. The purpose of civil forfeiture is to help law enforcement fight crime by possessing proceeds from crime. From this perspective, the legal actions taken by the government are remedial in the sense that they are designed to help fight crime. As a result, the government is able to bypass many legal protections. In reality, civil forfeiture must be viewed from the perspective of the owner who is being punished through the deprivation of his property. From this perspective, it is clear that civil forfeiture is punitive.

The perspective of the owner must be taken over the perspective of the government. The government is always the legal actor in a civil forfeiture trial. That is, the government decides when to pursue or not pursue a forfeiture. From the beginning, the owner is at a disadvantage. Additionally, the government is seeking to punish the owner and therefore the owner must have proper protections in order to prevent abuses. Finally, whether the property is seized or not by the end of the trial, the trial itself represents an intrusion of a citizen's life by the government, one in which the owner may be forced to pay for many legal expenses and lose out on work. The owner is the party most harmed by civil forfeiture, whether the property is seized or not.

[3.6 United States v. Halper](#)

In *United States v. Halper*, the Supreme Court of the United States tried to distinguish how perspective comes into play in a civil forfeiture trial. First, the Court recognized the

difference between instrumental¹² property and facilitating property¹³. For example, the Court ruled that forfeitures are considered remedial if the “instrument of harm is itself culpable” (United States v. Halper, 1989). This is an example of instrumental property, for the property was itself the object which committed the crime. However, civil forfeiture cannot retain its remedial purpose and must substitute it with punishment if the forfeiture is used to deter a crime or if it is used for retribution of a crime (*United States v. Halper, 1989*).

Note the perspective in the different definitions the Court provided. Civil forfeiture is remedial if taken from the perspective of the property. If the property is itself culpable, then the forfeiture is remedial to pay for the expenses of the crime of which the property committed. However, this perspective begs the question, how can an inanimate, thoughtless, un-living object be culpable of anything? Contrarily, civil forfeiture is punitive when perceived from the perspective of the owner. Civil forfeiture is a punishment if it used to deter. Deterrence is inherently of the perspective of the owner for deterrence is either used to prevent a person from committing an act or others from committing an act. Therefore, from the perspective of the owner, civil forfeiture is always a punishment.

Interestingly, the Court also stated civil forfeiture is also punitive if it is used for retribution of a crime. This appears to be an inherent contradiction between the purpose of civil forfeiture and its remedial nature. Civil forfeiture is remedial because the funds and proceeds of a crime are channeled back to fight crime or compensate for a crime. This is the same as retribution. Asset forfeiture provides retribution for a crime by its very nature.

Astoundingly, the Court leaves the determination of perspective to the government. If the government can show the forfeiture serves legitimate goals, then the forfeiture retains its

¹² Instrumental Property – Property used to commit the crime itself

¹³ Facilitating Property – Property used to house the crime but may not have taken direct action in the crime itself

remedial shield (*United States v. Halper, 1989*). Instead of admitting the contradictions which appear naturally in civil forfeiture, the Court layered another level on top of the existing concerns. Although it is up to the government to illustrate the legitimate goals of the forfeiture, the owner does not have a chance to illustrate the punitive nature of the seizure. The government is the affirmative actor in determining the punitive or remedial tone of a civil forfeiture trial. The government is also the singular party which benefits from a civil forfeiture trial.

3.7 Justice Holmes' Constitutionality Test

Whether civil forfeiture is purely punitive or semi-punitive, there is an important statement by Justice Holmes which he provided when he served on the Supreme Court. Justice Oliver Holmes stated “statutes...are unconstitutional...[if] they punish the plaintiff with heavy fines and penalties...without defining the crime...of which he is guilty and without providing any criminal procedure or right guaranteed him by the Constitution of the United States...” (Homes Paper Section 4 Sequence 17). Essentially, statutes are unconstitutional if (1) it punishes the plaintiff without declaring the plaintiff guilty of a crime, (2) it does not provide proper *criminal* procedure, and (3) it does not provide proper constitutional rights and protections. Civil forfeiture does everything Holmes declared unconstitutional.

First, for the government to seize property via civil forfeiture, it is not legally obligated to prove the owner of the seized property to be guilty of any crime. As stated before, civil forfeiture is an *in rem* proceeding so the property is placed on trial, not the owner. Therefore, the government does not have to charge the owner, let alone prove the owner guilty. Additionally, as mentioned, in 80% of civil forfeiture trials, the owner is not charged with a crime (Worrall & Kovandzic, 2008).

Second, civil forfeiture does not provide proper criminal procedure. In fact, civil forfeiture does not provide any criminal procedure. Civil forfeiture occurs in civil court. The

government can pursue a consecutive criminal trial against the owner of the property but the outcome of that trial has no bearing on the civil forfeiture case. The guilt or innocence of the owner does not act as a mitigating or aggravating factor in a civil forfeiture trial.

Third, civil forfeiture does not provide proper constitutional protections. The only amendment that has had success on mitigating the power of civil forfeiture is the Eighth Amendment, as exemplified by *Austin's* precedent. Therefore, if civil forfeiture is only partly punitive, it is unconstitutional according to the precedent established by Holmes..

Per Holmes' constitutionality test, civil forfeiture punishes owners unconstitutionally. Additionally, in any civil forfeiture trial, it is the government which is the legal actor. The government is compensated for a wrong – a crime – through forfeited assets. Civil forfeiture is not only punitive, but unconstitutional and acts as a device in which the government can seek compensation for a crime while avoiding many legal protections afforded to defendants in a criminal trial.

Chapter 4: Failed Precedent and Constitutional Misreading

The punitive and remedial nature of civil forfeiture is not the only thing the courts have had difficulty defining in civil forfeiture law. The courts have consistently provided contradictory precedent regarding the constitutionality of civil forfeiture. This chapter will analyze various court cases and the precedent established in order to highlight the discrepancies inherent in contemporary civil forfeiture law.

4.1 The Sixth Amendment and Legal Representation in Civil Forfeiture

During the 1960s, there was a large push to enact protections for indigent clients in civil forfeiture trials. Specifically, the Office of Economic Opportunity (OEO) readied federal funds to be available for legal services for the poor, and federal lawyers began to win legal victories in local and district courts in the name of a civil *Gideon*¹⁴ (Rulli, 2011). However, the OEO was later dismantled by President Nixon and *Lassiter* prevented a civil *Gideon* from taking place.

Despite the *Lassiter* ruling, the case, coupled with *Austin*, provides an interesting argument as to why there should be legal representation in civil forfeiture trials, if not a complete civil *Gideon*. *Austin* was not the first time the Supreme Court ruled civil forfeiture to be punitive. In 1886, the Supreme Court ruled civil forfeiture to be quasi-criminal (*Boyd v. United States*, 1886). Although this precedent was established long before *Austin*, it still holds significance. The quasi-criminal ruling created a strange legal limbo in which civil forfeiture currently exists. There are two possible legal courts, either criminal or civil. There is no such thing as a quasi-criminal justice system. Therefore, it is difficult to discern what “quasi-criminal” means.

However, the term, quasi-criminal, suggests that the legal action is quasi-punitive. This is only strengthened through the *Austin* precedent. If an owner is in danger of losing their property in a civil forfeiture trial, and if that legal action is considered partly punitive, owners

¹⁴ Civil Gideon – the push to incorporate similar legal protections of indigent clients in criminal court to civil court

should have the right of legal counsel. Otherwise the legal action is unconstitutional. According to the *Lassiter* precedent however, a person is only granted legal counsel should they be in danger of losing physical liberty.

Physical liberty can be difficult to define. According to John Locke, liberty is synonymous with property. In fact, John Locke argued that there are natural laws which state people have a right to “life, liberty and property” (Locke, 1884). Property is anything that a person mixes his labor with (Locke, 1884). A person can mix their labor with an object by working to produce an object or spending money on the object so long as the money comes from some form of labor. Therefore, anytime the government deprives an owner of their property, the government is essentially removing or defying a citizen’s physical liberty. If such is true, per *Lassiter*’s precedent, counsel must be appointed when someone is in danger of losing their physical property. Locke’s interpretation of property and liberty is paramount as the Declaration of Independence is based heavily on Locke-ian principles.

Despite Locke’s best attempt, the practicality of legal representation in civil forfeiture presents another problem. During the 1980s under President Reagan and President Clinton there were drastic federal funding cuts (Rulli, 2011). Due to these large funding cuts, providing legal counsel for indigent clients, even in criminal cases, became difficult. Currently, public defenders already face the challenges of an overburdened criminal justice system.

Years after *Austin*’s precedent, in 2005, some lawyers began to fight for the right of counsel in civil forfeiture trials (Rulli, 2011). This push was just as successful as the push in the 1970s. However, advocates learned a very important lesson, that the courts appeared incompetent to reform civil forfeiture law in any meaningful way. Instead, advocates shifted their position from the courts to the legislators and attempted to reform CAFRA. The civil

Gideon movement finally began to see tangible progress when a clause was added to CAFRA which guaranteed counsel for indigent clients. Although this right is not protected under the Constitution, CAFRA is a universal civil forfeiture legislation which applies to all civil forfeiture trials.

More specifically, CAFRA accomplishes three goals which makes indigent client representation possible. First, it provided funding for federal courts to appoint legal counsel for clients who are subject to civil forfeiture and a criminal proceeding at the same time in which the client is represented by a public defender (Rulli, 2011). Although this appears to be a step toward civil *Gideon*, it must be noted that this would not apply to most civil forfeiture cases. As stated earlier, in 80% of civil forfeiture cases, the owner is never charged with a crime, much less suffers a consecutive criminal trial (Worrall J. L., 2001).

Second, CAFRA mandated a client to have representation if the client's primary residence is subject to forfeiture (Rulli, 2011). Again, this is a limited protection. Any other property does not receive the same protection. Therefore, property which is disproportional to a crime, so long as the forfeiture is considered remedial via the instrumentality test, can still be seized without the owner having any form of representation.

Lastly, CAFRA offers an incentive for which lawyers can take advantage to make them more likely to litigate a civil forfeiture case. CAFRA awards attorneys with attorney fees who can successfully argue and defend a piece of property in a civil forfeiture trial (Rulli, 2011). This incentive is not limited by any specific piece of property or rule and offers a counter to civil forfeiture abuse.

A recurring problem within civil forfeiture is the investment law enforcement – including district attorneys – have in the forfeiture of property. That is that law enforcement gains

pecuniary benefits directly from successful forfeitures. By paying lawyers who successfully defend property in a civil forfeiture case, it provides a direct counterpoint to lawyers who benefit from a successful forfeiture. This however is by no means a fix to the conflict of interest found in civil forfeiture trials.

4.2 Introduction to the Innocent Owner Defense

In 1988, a new defense against civil forfeiture began to take traction known as the innocent owner defense. However, the innocent owner defense in the late 1980s and 1990s had many flaws. For example, there were different rules for how the innocent owner defense (IOD) could be employed over real or personal property. There was no uniformity between the federal district courts on how the defense should be employed (Rulli, 2011).

There are three factors that appellate courts have recognized in IODs. First, the legal conveyance of property, second, the ignorance of the owner, and third, the owner's actionable culpability (Johnson, 2002). It is important to understand that not all district courts recognize each factor, nor do all courts rank the factors equally. To better illustrate how the factors operate in a defense, each one will be analyzed individually.

First, the legal conveyance of property. According to this factor, the innocent owner defense can only work if the property involved in the crime was stolen or otherwise illegally obtained. For example, if a car was stolen and used to transport illegal drugs, the owner of the car could assert an innocent owner defense. However, if two people owned a car and one of them used it to transport drugs, the second owner could not employ an IOD. Should the second owner in this case be unaware of their co-owner using the car illegally, the IOD still could not be employed because the conveyance of property was legal.

Per the owner ignorance IOD, owners must be proven ignorant of their property's illegal usage for the defense to work. No matter if the conveyance of property was legal or illegal, the

owner must be unknowing of the illegal usage. If a person's car was stolen to transport drugs, the owner could use the ignorant owner defense. If two people co-owned a car and one used it to transport drugs, if the second owner was ignorant the IOD could be employed. In fact, the ignorant owner defense appears, at face value, to be a fair defense.

Lastly, the actionable culpability of the owner is the final factor. There is a distinction between actionable culpability and owner culpability. If an owner is aware their property could be used illegally, the owner must do everything reasonable to prevent the illegal usage of their property. To demonstrate, if a person's car was stolen, the owner of the car is mandated to alert the authorities. If the owner fails to do so and the car is used for illegal means, then the owner would be incapable of employing the IOD. Of course, in the example given, the owner would first have to be aware their car was stolen before they could be reasonably held accountable.

Again, not every court uses all three of these factors and not every court measures each factor equally. Additionally, the IOD is not constitutionally protected (Johnson, 2002). Because the IOD is not constitutionally protected, the Supreme Court of the United States is in no way obligated to stabilize the various ways in which civil forfeiture IODs can be used.

4.3 The Failure of *Austin* and *Whaler's Cove Dr.*

An IOD is not the only reform civil forfeiture needs. Per *Austin's* precedent, civil forfeiture is subject to the Eighth Amendment. However, *Austin's* precedent has largely been a failure for three reasons: (1) courts have rarely declared forfeitures as excessive, (2) there is little precedent regarding civil forfeiture and the excessive fines clause, and (3) the Supreme Court failed to create a universal test (Johnson, 2002). Before *Austin*, there was no precedent to regarding how the Eighth Amendment could apply to civil forfeiture. Thus, courts do not have precedent to fall back on when considering if a forfeiture violates the Eighth Amendment. Additionally, courts have been hesitant to declare forfeitures excessive, attributing to the scarce

amount of precedent regarding the subject. Without a universal test, there is no unifying precedent to establish what is constitutional during a forfeiture.

In 1992, it appeared the stars had finally aligned in an effort not only to prove civil forfeiture punitive, but that its punitive nature was unconstitutional. The Second Federal Court of Appeals had to decide in *United States v. Whalers Cove Drive*¹⁵ whether a piece of real property worth \$145,000 seized based on a \$250 drug sale was constitutional. The owner of the property, Levin, made two arguments of note: (1) the double jeopardy clauses prohibited the forfeiture and, (2) the Eighth Amendment was violated by the forfeiture.

The Court had to deliberate whether the forfeiture was punitive before it could address the constitutional challenges presented in this case. Before the Court decided if the action was punitive, the Court made an interesting claim regarding the punitive nature of civil forfeiture “The classification of a sanction as punitive under *Halper* does not automatically transform the sanction proceeding into a criminal prosecution... Nonetheless, certain constitutional protections do attach to a ‘civil’ sanction that in effect is punishment.” (*United States v. Whalers Cove Drive, 1992*). Essentially, if an action is considered punitive, it does not make the action a criminal sanction. However, should the action be civil and punitive at the same time, the constitution does still apply. Levin did not have to prove civil forfeiture is criminal, but punitive for the amendments to apply to not only his case but civil forfeiture in general.

Based on past precedent, such as *Halper*, the Second Federal Court declared the forfeiture to be punitive (*United States v. Whalers Cove Drive, 1992*). Their justification is largely based on the disproportionate forfeiture for a relatively small drug trade. However, the

¹⁵ (United States of America, Plaintiff-Appellee v. Certain Real Property and Premises Known as 38 Whalers Cove Drive, Babylon, New York, 1992)

Court seems to do what every court does when deliberating on a civil forfeiture case and double back on previous precedent, twist it and bend it until it can justify the forfeiture.

Although the action was punitive, the Second Federal Court denied that the Fifth and Eighth Amendment applied to the case. Specifically, double jeopardy prohibits the government from punishing the same party twice for one offense. However, the federal circuit court stated the double jeopardy clause only applies when the same government agency is trying to punish a certain party. Should two different government agencies wish to punish the same person for a single offence, the punitive action does not violate double jeopardy (*United States v Whalers Cove Drive, 1992*). Civil forfeiture's distinction as civil grants immunity from the double jeopardy clause under this understanding. The criminal and civil law of the justice system constitutes different government agencies in this definition. Essentially, civil forfeiture by nature provides an egregious excuse to bypass the double jeopardy clause.

Additionally, the Eighth Amendment does not apply to civil forfeiture in this case. There are three steps to determine whether a punishment or fine constitutes excessiveness. First, the gravity of the offense, (2) the gravity of the crime within the jurisdiction it was committed and, (3) the gravity of the offense within other jurisdictions (*Solem v Helm, 1983*). Essentially, a punishment is not excessive if the punishment measures to the gravity of the offense from an individual perspective, jurisdictional perspective and national perspective. In the case of Levin, the forfeiture of the real property is not excessive because of the Supreme Court's recognition of the impact of illegal drug activity in the aggregate (*United States v. Whalers Cove Drive, 1992*).

Instead of looking at the forfeiture individually, the Court compared the forfeiture of the property to all drug offenses. This is not a fair level of analysis to use for this case. To place blame on Levin for all drug offenses is not only unfair but inaccurate. Additionally, other crimes

are not held to the same standards. When a murderer is sentenced, the killer is not punished for all murders otherwise, in every state that has the death penalty, all murderers would be sentenced to death.

4.4 Instrumentality Test

To alleviate the problems presented by the *Austin* precedent and conflicting *Whalers Cove* precedent, some circuit courts began to develop an instrumentality test to determine if a forfeiture violated the Eighth Amendment. The Second Federal Court of Appeals spearheaded the movement in *United States v. Chandler*¹⁶. The government had seized thirty-three acres of land from Chandler after drugs were found growing in his farm. Chandler appealed the forfeiture under the proposition that it was excessive.

The instrumentality test is as follows, first there must be a clear nexus between the property and the crime. The role and culpability of the owner is also taken into consideration. If the owner is wholly unaware of her property having been used illegally, the owner stands a better chance of repealing the forfeiture based on the instrumentality offense. Lastly, the Court considered the ability for the guilty property to be separated from the innocent. To illustrate, if a drug dealer places money from his deals into a bank account that he uses also to save money gained from legitimate means – such as a credible job – it would be difficult for the government to separate the illegal money from the legal money. Therefore, in the example given, it could be excessive to seize the entire bank account if not all the money was gained through illicit means.

In addition to establishing a instrumentality test, the Court provided instructions on how to determine the strength of the nexus between the crime and the property. If the property was deliberately used for the sake of the crime and was used over a long period of time for criminal

¹⁶ (United States of America v. Robert H. Chandler and the Real Property Known as Tract 1 of Little Rivers Farms, Route 1, Island Road, Hillsborough, Orange County, North Carolina, 1994)

intentions and its original purpose was criminal, the nexus between the property and the crime would be strong. Essentially, the purpose of the instrumentality test is to decide if the property was a necessary for the crime to occur and if so, if the owner was culpable and if the property can be easily distinguished between illegal and legal property.

If the government can adequately prove that property was an instrumentality of a crime, through the nexus test listed above, the government is hence able to retain the remedial aspect of civil forfeiture. The understanding is that if a piece of property was an instrumentality of a crime, by removing the instrument which committed the crime, the government is thereby making the community safe by prohibiting further crimes to be committed by the said property (United States v. Shakeel Ahmad, 2000).

The problem with the instrumentality test is should a piece of property be deemed an instrumentality, the *in rem* action retains its remedial protections against the constitution and the Eighth Amendment, along with others, no longer applies to the forfeiture. In *Austin*, civil forfeiture was declared subject to the Eighth Amendment if it is considered punitive. In cases where civil forfeiture is declared an instrumentality, and is therefore remedial, any property which the government can prove with probable cause to be a part of the crime is then subject to forfeiture. According to the Fourth Circuit Court of Appeals, if a piece of property is considered an instrumentality, its proportionality to the committed crime no longer matters.

4.5 The Instrumentality Test in Practice

To elaborate, in *United States v. Shakeel Ahmad*, the Fourth Circuit Court deliberated on whether a fraud case involving \$186,587.42 allowed for the seizure of the entirety of the involved money. The Court declared that the money involved in the fraudulent action was itself an instrumentality of the offense. Following this declaration, the Court had to decide if the forfeiture of the money would be grossly disproportionate to the crime committed.

In a previous Supreme Court case, the Supreme Court of the United States declared that forfeitures – whether *in rem* or *in personam* – violate the Eighth Amendment excessive fines clause if the forfeiture is “grossly disproportional” to the crime committed (*United States v. Bajakajian*, 1998). To determine if the assets seized are grossly disproportional, the Court weighted the effects of the crime verse the seized assets.

Per *Ahmad*, the Fourth Circuit Court of Appeals did measure the assets against the result of the criminal action. Specifically, Ahmad committed fraud by transferring more than \$10,000 dollars to Pakistan in return for medical equipment. However, Ahmad was doing so in packets less than \$10,000 at a time, therefore bypassing custom service requirements of reporting transactions of more than \$10,000. The result of such a criminal action does not cost the government any money. The Fourth Circuit Court acknowledged that the only consequence of this crime is the government is not being notified of the transaction (*United States v. Shakeel Ahmad*, 2000).

To seize nearly \$190,000 in retaliation for not being notified of a transaction appears disproportional to the crime committed. However, the Fourth Circuit Court understood *Bajakajian*'s precedent to be limited to punitive forfeitures. As in *Ahmad*, the forfeiture was declared remedial because the money was an instrumentality of the crime. Therefore, in any case in which civil forfeiture is declared remedial, the forfeiture is not subject to the protections of the Eighth Amendment.

The significance of the instrumentality test is paramount when deliberating the cause of a civil forfeiture case. However, the Supreme Court has yet to deliberate either affirming or denying the test. The circuit courts have thus been on their own when deciphering the precedent

of *Austin*. Lacking universal precedent, civil forfeiture has only become more complicated, making it difficult for owners to follow civil forfeiture law.

For example, in *Ahmad*, there are two contradictions that appear within case law and previous civil forfeiture precedent. The government originally attempted to seize the assets in *Ahmad* in a criminal forfeiture case. To seize the property, the government had to prove Ahmad was willingly and knowingly defrauding the United States. After the government failed to do so, it attempted to seize the property via civil forfeiture which had no such requirement.

Following the switch to civil forfeiture, the government did not have to prove Ahmad willingly defrauded the United States. The term “willingly” is very important. It implies that Ahmad first had to knowingly understand United States fraud laws and then decided to violate those laws. “Willingly” can therefore be subsided with “culpability”. If so, the Court acknowledged that the owner does not have to be proven to be culpable of their property in a civil forfeiture case. This directly conflicts with precedent established in *Austin*, *Chandler* and *Whalers Cove* where the courts decided an owner must be culpable of their property to have their property seized.

Additionally, in *Ahmad*, when the government decided to seize property under civil forfeiture, it was required to prove by probable cause that the property was involved in the offense per civil forfeiture law. To do so, the government relied on Ahmad’s criminal conviction which took place prior to the civil forfeiture proceeding to show probable cause that the assets were involved in a crime. This appears to contradict civil forfeiture law. The guilt or innocence of an owner does not act as a mitigating or aggravating factor in a civil forfeiture case. Because of this, the government can seize property belonging to an owner who has not been convicted of

a crime. By using Ahmad's conviction, the Court is ignoring this civil forfeiture precedent, created a contradiction in which the government greatly benefits.

Although *Austin's* precedent appeared to be a progressive step in civil forfeiture law, the fallout from the case has caused conflict and division among lower courts. Civil forfeiture is in desperate need of unifying and decisive precedent which needs to come from the Supreme Court of the United States. Without such precedent, civil forfeiture law will continue to be full of contradictions. It cannot be expected for the people to follow civil forfeiture law and prevent the illegal use of their property under any definition if there is no singular definition for which they are to be held to. The goals of civil forfeiture will continue to be undermined until these contradictions are addressed.

4.6 United States v. Good and the Fifth Amendment

In 1993, another monumental case regarding civil forfeiture was decided by the Supreme Court of the United States. *United States v. Good (1993)*¹⁷, the Supreme Court declared when the due process clause of the Fifth Amendment applies to civil forfeiture cases. Prior to the case, Good had been convicted of possession of illegal drugs. Specifically, Good had grown eighty-nine pounds of marijuana on his multi-acre farm. Five years following the conviction, the government placed a warrant on the land and seized Good's property but, the government did not provide any prior notice to Good (*United States v. Good, 1993*).

Good appealed the forfeiture of his property claiming without prior notice, the government violated the due process clause of the Fifth Amendment. Also, Good stated the five-years following the conviction was too long of a time for the government to seize his property in relation to the drug violation. The government countered by declaring that drug forfeitures allow

¹⁷ (United States v. James Daniel Good Real Property, 1993)

law enforcement exceptions to time distillations when it comes to forfeiting property (*United States v Good, 1993*). The Supreme Court sided against both of the government's arguments.

The Supreme Court was not comfortable with relinquishing Good's home to the government easily. Although the Court stated that forfeitures were subjected to the Fourth Amendment, Good did not appeal based on the Fourth Amendment, but rather under the Fifth Amendment. Additionally, no amendment has dominion over the other, so long as the legal action defies one of the amendments, it is unconstitutional. Finally, the Court declared the right to prior notice of a forfeiture of real property is paramount to satisfying the due process clause of the Fifth Amendment (*United States v. Good, 1993*). Hence, since the government failed to provide prior notice, the seizure violated the due process of the Fifth Amendment and was unconstitutional.

The Supreme Court finally declared when due process applies to civil forfeiture cases, but the victory was minor at best. In order to prevent conflict with existing precedent, the Supreme Court limited its ruling to real property, and more specifically to property which the owner uses for a home (*United States v. Good, 1993*). Under this ruling, the government is not required to provide notice for any personal property and may even be able to seize certain real property if it is able to provide a strong enough legal argument.

Nevertheless, the victory of *Good* should not be understated. The Supreme Court did not bother with the punitive or remedial argument regarding civil forfeiture in *Good*. This could be an example of the Supreme Court unofficially recognizing the punitive nature of forfeiture. In previous cases, the Supreme Court found the punitive aspect of civil forfeiture to be awkward and a subject which it did not want to approach. By denying the argument any space in the case, the Court may be trying to avoid the conversation to prevent any contradictions with previous

precedent. Also, by providing a definition for when the Fifth Amendment's due process clause should be enforced against forfeiture, the Supreme Court may have recognized the punitive nature of civil forfeiture without declaring civil forfeiture punitive. Essentially, *Good* provides a foothold for further precedent to establish the punitive aspects of civil forfeiture.

4.7 *Bennis v. Michigan*

The final case analysis is *Bennis v. Michigan* (1996). This case illustrates the most perplexing aspect of civil forfeiture which is the application of the innocent owner defense. During this case, the petitioner's husband engaged in sexual activity with prostitutes inside of a car that was co-owned by the petitioner and her husband (*Bennis v. Michigan*, 1996). Per Michigan state law, the car was seized for being used for prostitution. *Bennis*, the petitioner, appealed the forfeiture of her car under the due process clause of the Fourteenth Amendment and that she was unaware of her husband's intentions.

The Supreme Court of the United States had the final word in this case and ruled against *Bennis*. To justify this decision, the Supreme Court relied on precedent from many of the cases mentioned earlier. First, the Supreme Court addressed the due process violation allegation. Unlike many of the cases mentioned, *Bennis* claimed that due process was violated based on the Fourteenth Amendment instead of the Fifth Amendment. The purpose of claiming the Fourteenth Amendment is to break free from precedent established under the Fifth Amendment. Per *Good*, due process under the Fifth Amendment is not violated so long as the owner is provided with prior notice and a chance to appeal the forfeiture.

In *Bennis*, the petitioner was afforded both prior notice and opportunity to appeal the forfeiture, however, *Bennis*' attempt to employ the Fourteenth Amendment would theoretically bypass Fifth Amendment precedent. Despite her legal cunning, unfortunately for *Bennis*, about seventy years prior to her case, another petitioner under similar circumstances attempted the

same appeal. In *Van Oster v. Kansas* (1926), petitioner Van Oster appealed the forfeiture of her car claiming it violated the due process clause of the Fourteenth Amendment. The Supreme Court of the United States declared that civil forfeiture under similar circumstances had never violated due process under the Fifth Amendment and therefore could not possibly violate due process under the Fourteenth Amendment (*Van Oster v. Kansas*, 1926). Per *Van Oster's* precedent, the Supreme Court was able to dismiss Bennis' Fourteenth Amendment claim.

Contrary to what the Supreme Court suggests in their ruling, the Fifth and Fourteenth Amendment provide due process in slightly different ways and have been understood to be different. The Fifth Amendment's due process is limited to trial procedures. For example, the protections against self-incrimination is protected under due process of the Fifth Amendment because this protection is pertinent to a trial. However, the Fourteenth Amendment provides protections against unreasonable government intrusions on a person's life. Just as officers forcing their way into a house without a search warrant or exigent circumstances would violate the Fourth Amendment, it would also violate the Fourteenth Amendment's due process clause as an unreasonable intrusion.

In *Van Oster*, the Court's decision declaring civil forfeiture not in violation of the Fourteenth Amendment due to Fifth Amendment precedent is disingenuous to the fine distinction between the Fifth and Fourteenth Amendment. To declare civil forfeiture constitutional per the Fifth Amendment's due process clause is not the same as to declare it constitutional per the Fourteenth Amendment. Under the Fifth Amendment, civil forfeiture simply follows trial due process, that the subject of the trial – in this case an inanimate object – is granted proper and reasonable rights, protections, and procedures. However, the Fourteenth Amendment provides protections against unreasonable government intrusions into a person's life. For the government

to seize property belonging to an innocent owner, such as in *Bennis*, appears to be an obvious example of an unreasonable government intrusion of private life.

Bennis' claim to ignorance as to her husband's intentions provided a slightly harder argument for the Court to bypass. To do so, the Court relied on precedent which traced back from *The Palmyra v. United States (1866)* to *Austin v. United States (1993)*. Over and over, the Supreme Court recognized that the innocent owner defense based on ignorance was not constitutionally protected. Although some federal circuit courts have declared ignorance to be enough to satisfy the innocent owner defense, the Supreme Court has never claimed that the constitution requires this definition (*Bennis v. Michigan, 1996*).

The alarming aspect of *Bennis* comes from this part of the decision. Although the innocent/ignorant owner defense is not protected under the Constitution, neither is the opposite. The Constitution does not declare that the innocent owner defense is not to be applied nor that ignorance of a crime shall not allow for a reversal of a forfeiture. Instead of deciding if the innocent/ignorant owner defense defies the Constitution, the Supreme Court has routinely declared the defense to not be present in the Constitution.

This very line of thinking appears to, if not violate, contradict the Bill of Rights. The Tenth Amendment declares that the rights listed within the Constitution are not encompassing. Rather, there are rights not listed within the Constitution which are still enjoyed by citizens. Following this amendment, the innocent/ignorant owner defense could easily fit within the Constitution. The Court should be barred from analyzing the innocent owner defense under the perspective of an encompassing Constitution and must be compelled by the Tenth Amendment to determine if the innocent owner defense directly violates the Constitution. Fundamentally, the

Supreme Court has failed to properly analyze the constitutionality of civil forfeiture and thus created all the internal legal contradictions of the practice.

The Supreme Court's reading of the IOD prohibits defendants from employing the innocent owner defense at the Supreme Court level. For as long as the government is constantly willing to appeal a case, any defendant appealing the forfeiture of their property is doomed to failure, despite lower court rulings on the IOD. However, the Court's dismissal of the IOD is derived from a false reading of the Constitution and the Tenth Amendment.

Chapter 5: Conclusion

Civil forfeiture is a legal practice which allows the government to seize property involved in criminal activity. Its ostensible purpose is to deprive criminals of profiting from illegal activity. Additionally, civil forfeiture is a powerful tool to protect the economic interests of the government. Any money that is involved in illegal activity and may otherwise be out of touch from the public or the government is turned against criminals as it is funneled into law enforcement agencies to fight crime.

5.1 Brief History of Civil Forfeiture

However, since its inception, civil forfeiture has been twisted by legislators, law enforcement and, the judiciary to become an egregious internal legal contradiction which deprives owners of their property unconstitutionally. Civil forfeiture in the United States was founded on archaic superstition derived from English Common Law which declared property was to be forfeited to the Crown because it was possessed by Satan (Finklestein, 1973). One of the first cases of civil forfeiture in the United States, *The Palmyra v. United States (1866)*, dismissed the old English superstition but did rely on its basic principle. Specifically, the Court declared that if a piece of property had the ability to move, it had the ability to commit a crime and therefore could be seized by the government (*The Palmyra v. United States, 1866*).

Under *The Palmyra* precedent, civil forfeiture was limited to personal property but, this restriction would soon expand to real property under *Dobbin's Distillery v. United States (1877)*. In this case, the Supreme Court allowed for the forfeiture of a distillery because the bookkeeper was involved in fraud (*Dobbin's Distillery v. United States, 1877*). Interestingly, the legislature would not officially endorse the forfeiture of real property until 1970 under the Drug Abuse Prevention and Control Act.

Civil forfeiture hit its first legal obstacle in *Boyd v. United States*, (1886). In this case, the Supreme Court of the United States declared civil forfeiture to be “quasi-criminal” and since this case the Supreme Court has been arguing in complex and contradictory circles to justify itself and the legal practice at large. Some of civil forfeiture’s largest legal grievances stem from this decision. Most notably, civil forfeiture’s internal conflict of punishment or remedy stems from *Boyd*. Just as the Supreme Court was too timid then to declare civil forfeiture as punitive or unfit to be a part of the justice system, the Court has since entrenched itself in precedent which the Court has shown themselves too weak or otherwise unwilling to break.

During Prohibition, civil forfeiture slowly began to grow. Due to its procedural nature, civil forfeiture is uniquely qualified to handle white collar crimes as well as drug crimes. As Prohibition rendered in a new illegal drug, civil forfeiture became a tool for prohibition officers to enforce newly made drug laws. Following the end of Prohibition, civil forfeiture was widely unused by the government.

It was not until the 1970s when the government started employing asset forfeiture. It attempted to stem the growth of organized crime through criminal forfeiture but this attempt was largely unsuccessful due to the higher standard of procedure inherent in criminal forfeiture. To combat the ineffectiveness of criminal forfeiture, law enforcement began to employ civil forfeiture more often. Around the same time, there was a large movement to enact a civil *Gideon* precedent which would guarantee a right to legal counsel in civil cases – including civil forfeiture cases – for indigent clients. However, this movement was deflated after *Lassiter*.

During the 1980s, President Reagan declared the War on Drugs and passed the Comprehensive Criminal Control Act of 1984 (CCCA). With its passing, the CCCA created many new drug laws and dramatically increased civil forfeiture powers. Essentially, the CCCA

made illegal drug violations a felony and attached civil forfeiture powers to each infraction. As law enforcement began to employ civil forfeiture more often, some police departments became reliant on civil forfeiture funds to supplement budgetary shortfalls.

5.2 Civil Forfeiture's Legal Contradictions

As more civil forfeiture cases arose, the courts were left to decipher precedent which dated back to the 1800s and discern if this long-standing practice was constitutional. Civil forfeiture appears to violate the Fourth Amendment's protection against unreasonable seizures, the Fifth Amendment's protections of due process and protection against double jeopardy, the Sixth Amendment's right of counsel and the Eighth Amendment's protection against excessive fines. However, these constitutionality arguments hinder on a separate argument which is whether civil forfeiture is punitive or remedial.

The Supreme Court of the United States, along with the federal circuit courts, have not been able to provide a clear definition of whether civil forfeiture is punitive or remedial. In *Austin v. United States*, the Supreme Court declared civil forfeiture to be in part punitive and therefore the excessive fines clause of the Eighth Amendment does apply to forfeitures. The Court failed to determine when forfeiture is excessive and failed to provide a proper legal test as to what constitutes an excessive forfeiture. As a result, many federal circuit courts were forced to discern this ruling on their own.

Federal circuit courts proved to be an inadequate venue for determining if civil forfeiture is punitive. Additionally, the federal courts provided conflicting tests when deciding if civil forfeiture is excessive. The instrumentality test only required for the property involved in the crime to be instrumental in the criminal action. If a car was used to transport illegal drugs, the car was directly involved in the criminal act and could therefore be seized despite the proportionality of the car to the offense. Additionally, a car purchased with drug money would

be harder to seize via the instrumentality test because that car would not have been part of the original crime.

The second test provided by the circuit courts was the proportionality test which stated that despite the property's use during the crime, the key factor to be analyzed is the proportion of the property seized to the crime committed. *Austin* is a clear example of how the proportionality test might be used. Austin had sold drugs in his workplace and housed the drugs in his home. Law enforcement seized both his business and home which was deemed to be excessive for a relatively small drug violation. The proportion between the money of the drugs sold compared to the cost of the business and home was too disproportionate.

As the courts put forth more complicated tests to determine the punitive and remedial nature of civil forfeiture, the courts began to contradict themselves. Where civil forfeiture was punitive enough as to warrant the Eighth Amendment, it was not so punitive to prevent protections of due process or double jeopardy, or the other amendments listed.

Finally, the innocent owner defense presented one of the largest complications in civil forfeiture precedent. If civil forfeiture is punitive, or in part punitive, there must be some rights and protections granted to owners. However, the innocents of property owners have never acted as mitigating or aggravating factors in civil forfeiture trials. Owners such as Van Oster and Bennis have tried to put an innocent owner defense in practice to provide protections for innocent owners. Enacting a proper innocent owner defense is paramount for civil forfeiture proceedings because of the lower standard of proof required to seize property in a civil forfeiture trial.

The Supreme Court of the United States has never upheld the innocent owner defense despite other circuit or district court rulings. Instead, the Supreme Court has ruled that the

innocent owner defense is not explicitly mentioned in the Constitution and therefore is not constitutionally backed. However, this reading of the innocent owner defense is the wrong perspective for the Supreme Court to take per the Tenth Amendment. Civil forfeiture is a large self-contradiction. Precedent circulating the legal practice is perplexing and overly complex. The courts – specifically the Supreme Court of the United States – has tried to step over itself in its legal arguments to uphold the constitutionality of civil forfeiture. It is clear so long as the Supreme Court upholds civil forfeiture’s “quasi-criminal” nature, civil forfeiture will remain unconstitutional. Instead, civil forfeiture must be deemed punitive and obtain the proper constitutional defenses including the innocent owner defense to belong in the justice system.

5.3 Why This Matters

Civil forfeiture is not an abstract legal power which provides a stage for academic conversation. It is a real practice which has harmed real people. In the 1960s, law enforcement used civil forfeiture to seize the home of a sixty-year-old man with cancer and his wife (Stillman, 2013). Fortunately, the house was returned to the couple, but the government intrusion of that extent is shameful. Civil forfeiture incentivizes officers to profit from crime. In the 1980s, Massachusetts law enforcement nearly seized an eighty-million-dollar cruise ship because a gram of marijuana was found on the ship (Levy, 1996).

Civil forfeiture is a legal power which preys on the disadvantaged. Indigent clients can be, and have been, targeted to have their property seized to put money into law enforcement coffers, exemplified by the Texas State Trooper mentioned earlier. Civil forfeiture does not permit all indigent clients to have proper representation. Often the cost of litigation can exceed ten-thousand-dollars (Stillman, 2013), forcing owners to give up their property if it is of less worth than the cost to litigate.

To see the corruption of civil forfeiture, one must only look at the precedent provided by the courts. It is clear civil forfeiture does not fit within the Constitution. The amendments listed in this paper show a disconnect between the legal spirit of the Constitution and its practical application. From punishing owners who could not be criminally convicted through the deprivation of their property, to punishing owners twice for the same crime in two separate trials, to punishing owners innocent of crimes, civil forfeiture defies the foundation of the Constitution and its design to limit corrupt application of power by the government.

Not only is civil forfeiture clearly unconstitutional, civil forfeiture removes property from owners who are unable to defend themselves. It violates the very soul of the United States. The founders threw tea in the ocean when the taxes were too high, yet now the government is blatantly taking property away from citizens and directly profiting. Civil forfeiture must be repealed.

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