Legal Fiction and Forfeiture: An Historical Analysis of the Civil Asset Forfeiture Reform Act

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INTRODUCTION

In The Palmyra, in 1827, the United States Supreme Court endorsed the judicially-created in rem personification fiction of the "guilty object." Writing for the Court, Justice Joseph Story held that a Spanish pirate ship could be put on trial for a crime, stating that the personification fiction was a settled principle in the law of admiralty. The pirate vessel itself was put on trial as a respondent "person" in the action in admiralty. Since that time, the legal fiction of personification has become an important part of the law of both civil and criminal forfeiture, accepted by the United States Supreme Court as a legal reality.

How did we get to this seemingly irrational, fanciful conclusion? And what has been the effect on United States forfeiture law — particularly on the civil side of the court? This article surveys the influence of legal fictions in the law of civil and criminal forfeiture. It examines the early attempts to systematize the concept and philosophy of what constitutes a legal fiction. This exploration of the historical foundations of the legal fiction lends itself to a critical analysis of the various species of legal fictions — legislative, judicial, and historical — used in the United States today.

Part I analyzes legal fictions, from Rome before the birth of Jesus Christ to the present, to ascertain why a court accepts as true that which is not. The so-called "civilian" definition of a legal

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fiction — developed and refined by medieval lawyers and scholars in Europe — proves to be the most organized and clearly defined.4 The civilian approach allows the intimate study of the structure of the fiction.

By thoroughly exploring the history and definitions of a legal fiction, we can examine the utility of these fictions. In particular, a consideration of some of the legal areas in which the concept has advanced, or impeded, important constitutional principles, including bedrock principles such as due process of law, freedom from double jeopardy, and freedom from self-incrimination as well as other valuable rights, such as private property and privacy, is helpful in understanding the benefits and detriments of the modern legal fiction.

When used sparingly and on a limited, short-term, equitable basis, there have been substantial benefits — like the equitable benefits achieved in early Roman law. However, our courts and legislature have perpetuated legal fictions that are cruel and unusual, particularly in the “War on Drugs,” with little or no thought or analysis of a definition of the fiction.5 Attempting to illuminate the evolution of the modern legal fiction, Part II traces the development of the deodand from a medieval religious sacrifice of property that caused harm to a modern revenue-generating device. The deodand and other forfeiture devices have developed hand-in-hand with fiction, often at the expense of individual liberties. Relying upon these dubious precedents, modern laws such as the Racketeer Influenced and Corrupt Organizations Act of 1970 and the Comprehensive Forfeiture Act of 1984 evaded the individual liberties guaranteed by the Constitution by using civil forfeiture to strike at alleged criminals — with the attendant reduction in constitutional protections — rather than trying the perpetrators in a criminal trial.6

Although the forfeiture-fiction continues, the Civil Asset Forfeiture Reform Act of 2000, first introduced by Congressman Henry Hyde in 1993 and finally enacted in April 2000, curtails its

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4. For a complete analysis of the roots of the legal fiction, see generally PIERRE J.J. OLIVIER, LEGAL FICTIONS IN PRACTICE AND LEGAL SCIENCE (1975).
5. LEVY, supra note 3, at 102-43. Levy documents various abuses of the civil forfeiture laws, like the district attorney who drove a BMW, seized from drug dealers, as his official car. Id. at 124.
growth and reach. Part III analyzes the changes brought about by that act. Notwithstanding, because legal fiction survives in the new law, Part III closely examines where it exists and why.

Finally, I will make some modest predictions for the future of fiction-forfeiture. It is my hope that by proceeding with this dissection of the organization and definition of terms, the worst excesses of the forfeiture laws can once and for all be exposed and avoided.

I. LEGAL FICTIONS

A. The Evolution of the Legal Fiction: Roman, Civilian and Modern Definitions

Jeremy Bentham referred to "the pestilential breath of Fiction," while in almost the next breath admitting that "with respect to... fictions, there once was a time, perhaps, when they had their use." But how does one know what a legal fiction is and, more specifically, whether it is "good" or "bad"?

Although the Romans employed legal fictions extensively, they did not attempt to analyze their use of fictions, nor did they systematize legal fictions or ever carefully define the term. Nevertheless, Roman law has served as a foundation and catalyst for later thought on the nature of the legal fiction. The Romans believed that fictions were to be used sparingly and only to achieve an equitable result; if the use would yield an unjust result, it was discouraged.

The "civilians" — medieval lawyers and scholars — were the first to fully define the term and to see the "good" in the concept, while recognizing the potential for serious abuse at the expense of the people. Medieval lawyers and scholars consciously employed the Roman use of fictions in formulating their own positive law. By the fourteenth century, the civilian scholar Cinus de Pistoia had considerably refined the definition of a legal fiction, stating: fictio

8. "Legal philosophy has tended to disregard the institutional processes... legal scholars have talked about the rules... rather than about 'the law' itself. A general antipathy to metaphysics has barred any inquiry into the nature of 'reality.'" LON L. FULLER, LEGAL FICTIONS xi (1967).
9. Id. at 2 (citing JEREMY BENTHAM, I WORKS 235, 268 (John Bowring ed., 1843)).
10. OLIVIER, supra note 4, at 5, 12.
11. Id. at 12.
12. Id. at 6.
est in re certa contraria veritati pro veritate assumptio, an assumption deliberately and consciously made, contrary to the facts and irrebuttable. Bartolus de Saxoferrato, a post-civilian, improved this definition by narrowing it to include only a false assumption that "is lawful or has a lawful effect." Bartolus applied the fiction to the concept of legal personality, rejecting, for example, the then-common acceptance of the legal personality of a university as a fact, insisting instead that the legal person was, in reality, a fiction.

Professor P.J.J. Olivier, examining the civilian definition of the legal fiction almost 500 years later, opined that:

[a legal fiction is] an assumption of fact deliberately, lawfully and irrebutably made contrary to the facts proven or probable in a particular case, with the object of bringing a particular legal rule into operation or explaining a legal rule, the assumption being permitted by law or employed in legal science.

Fictions, Olivier argued, can be useful as intellectual tools that help us "circumpass difficult obstacles in the path of thought."

However, Olivier also suggested that by the eighteenth century in Europe, "all remembrance . . . of the elements of the fiction concept seem to have sunk into oblivion. Jurists seem to be struggling to define and analyse [sic] the fiction de novo." Moreover, according to Olivier, Anglo-American jurists have also blindly follow the Roman conception of the legal fiction, without any consideration of its philosophic underpinnings.

By 1773, the traditional fiction definitions gave way to new formulations, like that provided by T. Boey in his legal dictionary, Woorden-Tolk:

Fiction is an un-Germanic word, meaning embellishment, fabrication, invention: by it we understand in legal sense an assumption of the law, which gives to a person or to a thing a certain quality which it does not possess by nature, with the object of founding thereon a consequence of a certain kind, which would have been contrary to reason and truth without

13. Id. at 16 (citation omitted).
14. Id.
15. OLIVIER, supra note 4, at 81.
16. Id. at 91.
17. Id.
the assumption.\textsuperscript{18}

A new school of thought emerged at the beginning of the twentieth century, founded by Hans Vaihinger.\textsuperscript{19} Vaihinger and his followers viewed the fiction as a useful tool in the human thought process.\textsuperscript{20} When the mind meets a problem that cannot be solved by the direct, logical rules of thought, it employs "artifices" in order to reach the solution through an alternative and, often paradoxical, path. In this manner, the mind is able to sidestep the obstacle. A fiction is such an artifice of thought, equating reality with something admittedly untrue, but assuming it to be true for the purpose of facilitating the thought process.\textsuperscript{21}

Vaihinger warned, however, that fictions, while useful in ascertaining the truth, can cause injustice by presuming to be true that which plainly is not.\textsuperscript{22} Accordingly, once a legal fiction ceases to be useful, it should be eliminated.\textsuperscript{23}

\textbf{B. Advantages and Disadvantages to Legal Fictions}

There are many advantages to the use of legal fictions. As discussed above, Olivier and others have observed that legal fictions facilitate thought, aid in the evolution of law, and serve as terminological devices.\textsuperscript{24} When the thought process encounters an unfamiliar obstacle that it cannot overcome with the tools at its disposal, a fiction allows the mind to analogize to a more familiar situation by treating the former as if it were the latter for the purpose of intellectual development.\textsuperscript{25} At the same time, when recognized for what it is, the fiction reminds us that the analogy is only an analogy, and should not be taken as truth.\textsuperscript{26}

Lon Fuller identified two motives for creating fictions: the expository motive, in which a fiction is used to convey thoughts or simplify expression, and the emotional motive, in which a fiction is used to persuade others that the legal result is the correct one.\textsuperscript{27} In

\begin{itemize}
\item \textsuperscript{18} Id. at 18 (citation omitted).
\item \textsuperscript{19} Id. at 38.
\item \textsuperscript{20} Olivier, supra note 4, at 38-39.
\item \textsuperscript{21} Id. at 40.
\item \textsuperscript{22} Id. at 42. Olivier offers as an example of an excessive legal fiction a rule that all women are to be treated as minors. Id.
\item \textsuperscript{23} Cf. Id. at 40, 42.
\item \textsuperscript{24} Id. at 91.
\item \textsuperscript{25} Olivier, supra note 4, at 91.
\item \textsuperscript{26} Id.
\item \textsuperscript{27} Id. at 143-45 (citing Fuller, supra note 8, at 51-52).
\end{itemize}
short, Fuller sees the dominant motive behind the creation of legal fictions to be "reconciliation of a specific legal result with some premise or postulate." 28

Nevertheless, several objections have been raised by modern theorists to the use of fictions in the law. 29 The first, and strongest of these objections, is that fictions promote scientific un-truthfulness, i.e. the fiction is employed because it is desirable to use one rule when another should be applied. 30 As in The Palmyra, the Court decreed a ship to be a person based on the notion that people may forfeit their possessions to the court if they do wrong. 31 If a ship is a person, the ship may do wrong and may be punished for it by forfeiture. Thus it appears that the Court applied a rule which ordinarily would not apply. The fiction allowed the Court to pretend that reality (i.e. the facts of the case) had changed. 32 This deception can lead to difficulties in properly understanding and applying the legal rule in the future. 33

Fictions have also been criticized for creating uncertainty in the law because they are often formulated broadly rather than narrowly, thereby leading to problems of interpretation. 34 Moreover, fictions can undermine respect for the law because they may be viewed as abandoning truth for the sake of convenience. 35 Applying fictions beyond their intended scope and justification can also lead to unforeseen and undesirable consequences. 36

Vaihinger observed that a fiction, the knowing assumption of an untrue fact, can easily degenerate into dogma, the unquestioning acceptance of an idea as established opinion. 37 The wide acceptance of fictions as truth can lead to far-flung and even disastrous results. 38

In short, the civilian method of revealing the fiction in the grammatical structure of the statement has been more or less

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28. Id. at 143 (quoting FULLER, supra note 8, at 51-52).
29. Id. at 88-91.
30. OLIVIER, supra note 4, at 88. I also see a “faith-based,” historical underpinning to legal fictions. For example, the need to clarify and apply legal rules in awkward situations may require an intellectual leap of faith that puts logic, the law, and even reality on hold. In other words, the ends justify the means to achieve a short-term fix.
31. See supra notes 1-2 and accompanying text.
32. OLIVIER, supra note 4, at 88.
33. Id. (citation omitted).
34. Id. at 89.
35. Id. at 90.
36. Id. at 90-91.
37. OLIVIER, supra note 4, at 43.
38. Id. at 164.
permanently discarded. Left are the rogue fictions of the legal world, which have been easily passed on to us by the similar English common law procedures, and allowed to blossom to full flower in the American drug war.

C. Types of Fictions: Legislative, Judicial and Historical Fictions

Simply stating the advantages and disadvantages identified by modern theorists does little to illustrate the utility and detriment of legal fictions as they operate in our legal system today. An analysis of the different types of fictions employed — legislative, judicial, and historical — provides a more informative picture.

Legislative fictions are those "employed, ordered, or permitted by a legislator in statutory enactments." This is done in order to extend the scope of a legal rule or statute to facts or situations not previously applicable. For example, if it were desirable to ascribe to an unborn fetus the rights of an already-born child in a particular circumstance, the legislature could pass a law stating that the fetus shall, in that circumstance, be treated as if it were born. Notice that this does not directly change the legal rule; it does not say that the statute should apply to the fetus. Instead, the legislature dictates that we are to make the false assumption that the fetus has in fact been born. In reality, however, the rule operates as if it applies to both the fetus and the child.

Legislative fictions can serve the purpose of advancing legal theory and development and bringing laws into line with contemporary beliefs and values. They should, however, be used cautiously and sparingly. Fictions can be used to address a problem and achieve an equitable solution on an ad hoc basis, but they can mask the fact that an underlying problem has not been solved. As Olivier warned,

[a]s soon as a fiction has attained its full or logical development — when it cannot be extended to provide a solution to new problems or a basis for new principles — its retention in law is harmful, and doubly so when it is retained or even worse, adopted by a legislature.
On a different note, judicial fictions, created or adopted by judges when interpreting the law, are so prevalent in the legal system that they are often hardly recognizable as fictions. Many of today's legal rules are based on ancient rules developed by using legal fictions; although the rules are adopted, the fictions are forgotten. Using a fiction allows a judge, who lacks any legislative power, to change or adapt the law to achieve equity while maintaining the existing legal rules, principles, and systems.

Lastly, historical fictions are typically adopted into the case law if they are equitable and have been part of the common law tradition. The common law rule is either expressed in the form of a fiction, such as the fetus shall be treated as if it has been born, or else is based on a fiction, such as implied terms in a contract, using the fiction that the terms implied represent what the parties actually intended.

D. The Modern Relevance of the Civilian Definition of Legal Fictions

Olivier derived from the civilians a definition of a legal fiction based upon these elements: assumptio; contra veritatem; in re certa; pro veritate; a jure facta; in re possibili; ex aequitate. In other words, a fiction is "[a]n assumption of fact deliberately, lawfully and irrebutably made contrary to the facts proven or probable in a particular case, with the object of bringing a

43. Id. at 108.
44. Id. at 115. Clearly fictions are not "reality," but certain more restricted fictions may one day mirror reality by a linguistic process of gradual change in the meaning of the words, according to current definition, and specific time of application. While this can work useful change when applied to traditional common law areas, such as torts or contract, it can also work tremendous damage when applied to our bedrock law, such as the Constitution. As is already implied, there is no deception involved here. Take for example the doctrine of the so-called "attractive nuisance" in torts. A child is supposedly "attracted" to something the youngster would normally be inquisitive about, and which is potentially hazardous, such as an open well, or an abandoned mine or a swimming pool on the property. Everyone realizes the property owner has not "invited" the child to visit the premises, as the legal fiction suggests. Notwithstanding, the term "inviting" may gradually expand in meaning and definition to include "attracting." See Fuller, supra note 8, at 12. Because this expansion or change in meaning has not occurred to date, however, we are still confronted with a "legal fiction." But once the linguistic change is fully developed, there is in effect no longer a fiction. Such a linguistic "death" may end some fictions, while other methods, such as rejection by the courts or acts of the legislature, may end others.
45. Olivier, supra note 4, at 115.
46. Id. at 130.
47. Id. at 133.
48. Id. at 134.
particular legal rule into operation or explaining a legal rule, the assumption being permitted by law or employed in legal science."\(^{49}\)
The civilian concept of the legal fiction, as refined, remains today the most accurate, useful and potentially positive characterization. On this fundamental point, I am confident.\(^{50}\)

The *assumptio* element derives linguistically from *assumere* and *sumere*, meaning to take, or rather, to understand or accept.\(^{51}\) It implies a level of untruthfulness, or the possibility of falsity in assuming for arguments sake, or hypothetically.\(^{52}\) It does not ask us to make an assumption for the sake of applying a legal rule.\(^{53}\)

The *contra veritatem* element means that the assumption is made contrary to the facts.\(^{54}\) While a fiction could merely contradict the law applicable at that time to a particular set of facts, of far more concern is when a fiction grossly distorts bedrock law. Some laws, like the United States Constitution, are more "real" than other laws, such as the fictitious law of implied conditions in contracts, and thus should be less susceptible to distortion by legal fictions.

The *pro veritate* element "indicates the finality of the false assumption."\(^{55}\) The false assumption is irrebuttable and may not be challenged; we are ordered to take it as the truth conclusively.\(^{56}\)

The *in re certa* element, in turn, explains that the false assumption was made consciously and deliberately, with full knowledge by all parties involved that we are assuming the untrue to be true.\(^{57}\) The fiction is not a presumption that may or may not be true, and it is not an attempt at fraud or deceit.\(^{58}\)

The *a jure facta* element states that the false assumption and the resulting legal consequences are "permitted and applied by law."\(^{59}\) No fraud or misrepresentation is involved when a legal fiction is employed as an instrument of the law; it is done openly and

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49. *Id.* at 81.
50. "Nothing will take the place, in a student of the law, of a sense of tact and balance — not even a burning desire to 'get the facts' or to know the 'societal background.'" *Fuller, supra* note 8, at 137.
51. *Olivier, supra* note 4, at 59.
52. *Id.* at 59-60.
53. *Id.* at 61.
54. *Id.* at 62.
55. *Id.* at 69.
56. *Olivier, supra* note 4, at 69.
57. *Id.*
58. *Id.*
59. *Id.* at 73.
according to legal prescription.60

The in re possibili element is understood to mean that the assumption must be possible, or that it must be possible to apply the legal results of the fiction to the case at hand.61 This understanding "qualifies the law and not the legal fiction [and] communicates nothing about the structure of the fiction."62

Finally, the ex aequitate element expresses the equitable motive behind fiction in Roman law.63 There are, however, other purposes and motives behind the use of legal fictions, such as "(i) to bring a particular legal rule into operation and (ii) to explain a particular legal rule."64

By critically applying these elements to modern legal fictions, the reach of the doctrine of legal fictions can be "reigned in." We can begin to make the use of fictions civilized and thereby perhaps protect against the worst abuses by making fictions more transparent. Ultimately, we must be vigilant to discover and discard those fictions that have outlived their usefulness before they are able to work great injustice.

II. THE FICTION OF ASSET FORFEITURE

Facilitated by state legislatures, Congress, and the judiciary, law enforcement agencies have evaded the constitutional rights of property owners in forfeiture cases in recent years.65 "The law allows government to seize and confiscate the property of people suspected of some crime, though they may never be tried or, if tried, may be acquitted."66 There is a financial incentive for law enforcement officials to seize property because seized assets can be used to finance law enforcement operations.67 The procedure by which property is seized, however, is devoid of most of the constitutional safeguards accorded to a criminal defendant.68

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60. Id. at 74.
61. OLIVIER, supra note 4, at 77.
62. Id. at 78.
63. Id.
64. Id. at 79.
66. LEVY, supra note 3, at 1. Roscoe Pound said that "fictions easily become starting points for legal reasoning . . . and are used as the basis for constructing and developing anomalous and unfortunate propositions." OLIVIER, supra note 4, at 166 (citation omitted).
67. LEVY, supra note 3, at 1.
68. Id. at 7.
fact, civil in rem forfeitures are a dramatic example of a modern dogmatic fiction, accepted as truth and no longer questioned, even in the face of constitutional protections to the contrary. A survey of the development and modern uses of civil and criminal forfeiture is helpful in understanding the nature of this fiction.

A. The Origins of Civil Forfeiture:
   Deodands, Animal Sacrifice and Admiralty

In the law of forfeiture several historical streams converge; the deodands are one such stream. In J.W. Goldsmith-Grant Co. v. United States, in 1921, the United States Supreme Court justified the personification fiction by observing:

the law ascribes to the property a certain personality, a power of complicity and guilt in the wrong. In such case there is some analogy to the law of deodand by which a personal chattel that was the immediate cause of the death of any reasonable creature was forfeited.69

The Court's justification in creating the in rem legal fiction is really very weak, however, as the original concept of the deodand was an expiation of guilt by trying and discarding the "guilty object," not selling it with profits to go to the seizing authorities.

Deodand, from the Latin phrase deo dandum, meaning "given to God," refers to "a thing forfeited, presumably to God for the good of the community, but in reality to the English crown."70 Modern courts sometimes find a textual basis for deodands in the Bible: "[i]f an ox gore a man or a woman that they die, the ox shall be surely stoned and its flesh shall not be eaten."71 In fact, the Bible provides little support for the deodand: the ox was stoned to death by the community because it was guilty of the murder of a human being.72 The ox was not forfeited and no one benefited from its death because its flesh was not eaten.73 Moreover, although the Hebrews destroyed living objects that did harm, they did not treat inanimate objects as though they were capable of guilt.74

On the other hand, "[i]n the case of a deodand some official

69. J.W. Goldsmith-Grant Co., 254 U.S. at 510; see also Levy, supra note 3, at 8.
70. J.W. Goldsmith-Grant Co., 254 U.S. at 510.
71. See, e.g., United States v. One 1963 Cadillac Coupe de Ville Two Door, 250 F. Supp. 183, 185 (W.D. Mo. 1966); see also Levy, supra note 3, at 7 (citing Exodus 21:28).
73. Id. at 8-9.
74. Id. at 9.
must be the beneficiary of the value of the agent causing the death."\textsuperscript{75} The Hebrew tradition therefore does not provide an adequate historical basis for the deodand, or later, \textit{in rem} forfeiture.

The ancient Athenian practice of animal trials, instead of just stoning the beast, and sacrifice provides a slightly better, but still inadequate, precedent for deodands. In actual trials of animals that killed people, Athenian judges endowed the animal with a personality and then condemned it to death.\textsuperscript{76} At least one commentator, however, has questioned whether an ancient Athenian practice actually served as the foundation for the medieval tradition of the deodand.\textsuperscript{77}

Despite the murky source of the European tradition, "\textit{retribution against inanimate objects, such as the sword of John at Stile or against irrational beasts, became common in the Middle Ages.}\textsuperscript{78} European Christians believed that these objects were demonically possessed and if not executed or destroyed, the community would be the victim of the divine wrath and fury of God.\textsuperscript{79} In the face of such compelling circumstances, little consideration was given to the owners of these objects.\textsuperscript{80} "The legal foundation was being built to regard the innocence of the owner of the property as an irrelevant consideration."\textsuperscript{81}

Both the ecclesiastical courts of the medieval church and secular authorities tried and executed animals as if they were rational beings, sometimes dressing them up in people's clothing before carrying out the death sentence.\textsuperscript{82} The guilty animal or object was either given to the family of the deceased to destroy or destroyed in a judicial proceeding, as a "symbolic ransom to appease the injured parties as well as God."\textsuperscript{83}

Over time, this practice transformed into a means of atonement for the "sins" of the guilty object or beast by providing

\textsuperscript{75} Id.
\textsuperscript{76} Id. at 9-10.
\textsuperscript{77} Levy, supra note 3, at 10.
\textsuperscript{78} Id.
\textsuperscript{79} Id.
\textsuperscript{80} Id.
\textsuperscript{81} Id.
\textsuperscript{82} Levy, supra note 3, at 11. Indeed, these practices continued well into the nineteenth and early twentieth centuries, with the last known execution occurring in Switzerland in 1906. Id. at n.20.
\textsuperscript{83} Id. at 11.
compensation to a chieftain or king.\textsuperscript{84} As the individual responsible for keeping the peace, the king or chieftain should be the one to benefit when a homicide, however accidental, broke that peace.\textsuperscript{85} By the thirteenth century, the English Parliament had even enacted a statute that specified the deodand procedure.\textsuperscript{86} The value of the deodand was determined by a coroner's jury, and that amount, rather than the object itself, was forfeitable to the king.\textsuperscript{87} The surviving kinsmen could no longer retrieve the object or animal because the king was responsible for maintaining the courts of justice and the public peace.\textsuperscript{88}

The deodand was thus transformed from a religious expiation of guilt to a useful revenue-generating device for the English crown, guaranteeing the perpetuation of the tradition for many centuries.\textsuperscript{89} This medieval European practice is the true root of the current fiction of \textit{in rem} forfeiture. Divorced from reality and concepts of right and wrong — or guilt and innocence — it is a grossly harsh, unjust, and inequitable procedure in relation to the civilian conception of the legal fiction.\textsuperscript{90} Unlike Roman legal fictions, which were applied sparingly and only to achieve an equitable result, the English statutory and common law of the deodand evolved over time to apply the presumptions of forfeiture to the Crown in all circumstances, masking the fiction as a dogmatic rule.\textsuperscript{91}

In the eighteenth century, William Blackstone offered negligence as a justification for the fiction of the deodand.\textsuperscript{92} He argued that accidental death caused by property was partly the result of negligence of the property owner, and therefore punishment in the form of forfeiture would induce the owner to take better care.\textsuperscript{93}

The problem with this argument is twofold: first, it ignores the fact

\begin{itemize}
\item \textsuperscript{84} \textit{Id.}
\item \textsuperscript{85} \textit{Id.}
\item \textsuperscript{86} \textit{Id. at 12}. At this juncture, the deodand became a permanent legislative fiction, at least until the law was changed or revoked.
\item \textsuperscript{87} \textit{LEVY, supra} note 3, at 12.
\item \textsuperscript{88} \textit{Id.}
\item \textsuperscript{89} \textit{Id.}
\item \textsuperscript{90} \textit{Id. at 10.}
\item \textsuperscript{91} Fuller offers as an example the Roman legal fiction that a foreigner would be considered "as if" he were a citizen of Rome, though a judge remained aware that such was not the case. \textit{FULLER, supra} note 8, at 36 (citation omitted). The English presumptions in the law of deodand, however, stood as incontrovertible fact. See \textit{supra} notes 86-90 and accompanying text.
\item \textsuperscript{92} \textit{LEVY, supra} note 3, at 15 (citing 1 \textsc{William Blackstone}, \textsc{Commentaries on the Laws of England} 301-02).
\item \textsuperscript{93} \textit{Id.}
\end{itemize}
that liability for one's own negligence was already a developing common law doctrine; second, the owner of the property may have been the victim of the accident, in which case the incentive to take care already existed.94

By the early nineteenth century in England, a judicially-fashioned doctrine under the law of deodand dictated that that the Crown, and not the relatives of an accident victim, would recover from the owner of the property causing the accident.95 Such an absurd rule could not stand for long. As increased population size and industrialization in England led to more frequent accidents in the eighteenth century, popular pressure finally forced Parliament to consider an alternative to deodands.96 Lord Campbell's Act, enacted in 1846, abolished deodands and vested a right of action in the victims' survivors.97

Although deodands were abolished in England, their underlying principles formed the foundations of civil forfeiture in the United States, and the fiction of the guilty object persists.98 The rationalization that deodands and the forfeiture of property were not punitive measures, because no person was found to be guilty, also continues to this day.99 Nowhere is this more apparent than in the admiralty law of the United States.

Admiralty, perhaps as much as or even more than deodands, shaped the development of the American law of forfeiture.100 Like the deodand, which provided the foundation for the fiction that the "thing can be guilty," Colonial admiralty courts often proceeded in rem against a vessel rather than in personam against the vessel's owner.101 A suspicious vessel could be arrested and prosecuted by name by the government, and the law treated the ship as if it were a guilty person.102

94. Id. at 15-16.
95. Id. at 17-18.
96. Id. at 18.
97. LEVY, supra note 3, at 19 (citation omitted).
98. Id. But see James Maxeiner, Bane of American Forfeiture Law — Banished at Last?, 62 CORNELL L. REV. 768, 771-72 (1977) (arguing that the deodand-forfeiture connection may not be as strong as some scholars believe).
99. LEVY, supra note 3, at 20.
100. Id. at 39.
101. Id. (citing OLIVER WENDELL HOLMES, THE COMMON LAW 26 (1881)).
102. LEVY, supra note 3, at 43. At the time, other modes of transportation were not treated as though they were human, and were not prosecuted in rem. Perhaps this difference existed because ships were often viewed as living things — "the most living of inanimate things," as Oliver Wendell Homes once observed. Id. (citation omitted). Another possibility is that ships carried the most valuable cargo, and were themselves also of high
In many cases, as with customs violations, the owner of a vessel was unknown, unavailable, or out of the court's jurisdiction. In those circumstances, the court proceeded in a civil action against the vessel itself. In the event that an owner contested the forfeiture, the owner had the affirmative burden of proof to demonstrate the innocence of the vessel. Even an illegal act by an ordinary crewmember could cause the forfeiture of a vessel, regardless of whether or not the vessel's captain or owner was aware of the crewmember's conduct. If the vessel's innocence could not be proven, then the vessel and its cargo were sold at public auction, with the judge of the court, any informer, the colonial governor, and the Crown all receiving revenues from the sale.

Despite the oppressive and unfair nature of colonial admiralty proceedings, after the Revolution the Founders perpetuated the personification fiction in admiralty. The Constitution extended the judicial power of the United States to "all cases of admiralty and maritime jurisdiction" and the First Congress enacted laws giving the new federal government the power to seize vessels. In this manner, substantial admiralty jurisdiction and in rem forfeitures in civil actions were written indelibly into American law.

In the 1827 case of The Palmyra, counsel for a Spanish privateer argued that forfeiture of the ship was illegal without conviction of the offender. The Supreme Court rejected this argument, holding that in admiralty an in rem proceeding could progress independent of any criminal in personam proceeding. The ship, and not the owner, was the offender and "the offense is attached primarily to the thing." Though there was no criminal conviction, the ship

monetary value, making the invention of a fiction allowing the seizure of ships and cargo more lucrative. Id. at 43. In The Common Law, Holmes noted that "it is only by supposing the ship to have been treated as if endowed with personality, that the arbitrary seeming peculiarities of the maritime law can be made intelligible." Id. (citing HOLMES, supra note 101, at 27, 29-30).

103. LEVY, supra note 3, at 43.
104. Id. at 43-44.
105. Id. at 44.
106. Id.
107. Id. at 46 (citations omitted). The Constitution thus facilitates the in rem legal fiction by establishing admiralty jurisdiction, while federal law continues in rem legal fiction by allowing the forfeiture of property, mimicking the presumption of the English forfeiture concept rather than the conscious use of fiction inherent in the Roman and civilian method.

108. LEVY, supra note 3, at 50 (citing The Palmyra, 25 U.S. at 14-15).
109. Id. (citation omitted).
110. Id. (citation omitted).
could be seized. *The Palmyra* remains good law to this day, and has been used by the Court to justify modern civil forfeiture laws.111

B. Origins of Criminal Forfeiture

It is to our advantage to examine the roots of criminal forfeiture. Unlike civil forfeiture, in which the guilt or innocence of the property owner is of no concern, the guilt or innocence of a defendant is central in criminal forfeiture.112 A criminal defendant forfeits nothing unless convicted of the crime.113 Thus, the proceeding in criminal forfeiture is *in personam*, or against a person being charged with a crime, while the proceeding in civil forfeiture is *in rem*, or against the object involved.114 The difference between civil and criminal forfeiture reflects the variance between civil and criminal law: civil law deals with private rights and remedies and is intended to be regulatory, not punitive; criminal law, on the other hand, punishes a criminal on behalf of society for committing a crime.115

The origin of criminal forfeiture lies in medieval escheats and reversions of an estate to a feudal lord.116 Originally, a tenant's failure to fulfill his obligation to his lord was called a "felony." Over time, however, the term felony took on a broader meaning, referring to any significant breach of the feudal bond, such as the commission of serious crimes like rape, murder, or robbery, and punishable by death.117 When a felon was executed, the felon's lands escheated to his lord.118 The king, being the greatest of the feudal lords, benefited the most from this arrangement.119 So lucrative were the revenues from escheat that "Henry II (1154-89) ... introduced reforms intended to extend his jurisdiction ... supplant[ing] the manorial courts of local lords, making royal justice the rule rather than the exception."120

Although financial benefit always seems to be the underlying

112. Levy, supra note 3, at 22.
113. Id.
114. Id.
115. Id.
116. Id. at 24 (citations omitted).
118. Id.
119. Id.
120. Id. at 26.
motivation for forfeitures, modern criminal forfeiture in the United States utilizes few of the excessive legal fictions found in the civil arena. This began as a result of colonial hostility to Crown revenue-generating devices. After the Revolution, the Founders limited forfeiture in cases of treason to the offending individual, forbidding the punishment of relatives by "Corruption of Blood." Moreover, the First Congress in 1790 abolished criminal forfeiture for felony, as well as for treason. This eliminated some of the strongest financial motives for criminal forfeiture in the early United States, and discouraged the use of extreme dogmatic fictions in criminal forfeiture.

These early renunciations of the legal fiction added to the greater equity of the American criminal forfeiture experience. However, confronted by the scourge of organized crime in the late 1960s, Congress attempted to get tough with the Racketeer Influenced and Corrupt Organizations Act of 1970 ("RICO"), which provided for the criminal forfeiture of properties involved in the commission of a crime or acquired from it.

RICO and similar laws, however, proved ineffective in the fight against organized crime, largely because the criminal forfeiture provisions as enacted in those laws did not provide for the "relation back" of title of proceeds of crime, and because the assets could not be seized pending trial. In other words, because these two legal fictions were omitted from the new laws, the laws initially did not work very well. The introduction of the relation back legal fiction in 1984, and the addition of "substitute asset forfeiture" — another legal fiction that allowed the government to seize assets in place of forfeitable assets that could not be traced — ameliorated these issues, while further diminishing a defendant's constitutional rights.

121. Id. at 37-38 (citing U.S. Const. art. III, § 3, cl. 2).
122. Levy, supra note 3, at 38 (citation omitted).
123. This makes criminal forfeiture inherently more "reality" based and less fictional than civil forfeiture, across a wide array of issues.

Limited criminal forfeitures continued to exist in some states and on the federal level. "In practice, however, criminal forfeitures nearly disappeared from the United States until 1970." Levy, supra note 3, at 38.
124. Levy, supra note 3, at 63, 77 (citations omitted).
125. Id. at 79-81, 82. The "relation back" doctrine is a fiction that presumes that forfeiture occurs at the time of the commission of a crime, regardless of any subsequent sales or encumbrances. Id. at 31. This means that any subsequent transactions, such as sale of the property or payment made to an attorney, are void and both the owner and the third party must forfeit their interests.
126. Id. at 109-10 (citations omitted). In the criminal forfeiture arena, there is an
C. The Modern Use of Civil Forfeiture: Evading Constitutional Protections Through Fiction

Civil forfeiture can be attractive to lawmakers because it is quick and easy. Because civil forfeiture does not require a criminal proceeding in which the defendant has the benefit of constitutional protections, it is much more likely to succeed than criminal forfeiture. For example, in a criminal trial guilt must be proven beyond a reasonable doubt before forfeiture is allowed. In civil forfeiture, however, the proceeding takes place in rem against the property to be forfeited. Thus, the government need only show probable cause, the reasonable belief that a connection exists between the property and a crime or that circumstances warranted suspicion, or what one commentator has characterized as “anything more than a hunch.” This is of course an intensely fictional approach that goes far beyond the limited Roman and civilian use of fictions “to do equity.”

In civil forfeiture, once probable cause is established, the burden of proof shifts to the property owner to show by a preponderance of the evidence that the property is not related to the crime. The significance of this burden shift to the rights of property owners cannot be overstated. It places innocent property owners, even those who have been acquitted of criminal charges, and third parties in the position of having to prove a negative. The owner must demonstrate, not that he was innocent or lacked knowledge, but that the property was not involved or connected in any way to the commission of a crime, i.e. that the object itself is innocent. It matters not whether the owner of the property was involved in the crime, or even aware that criminal activity was taking place. The owner does not even have to be accused or even suspected of involvement in the criminal activity for his property to be forfeited. If the owner cannot prove the object’s innocence, the government has a right to the property that relates back to the time of its

unavoidable tension between the crime control and due process in the criminal justice system. However, legal fictions, sparingly employed, may sometimes yield positive, limited, short-term benefits. It is generally best to “drop-out” the fiction as soon as possible, and for the court to force itself to formulate a more realistic, more long-term rule of law.

127. Id. at 47.
128. Id. at 48.
129. See supra notes 10-33 and accompanying text.
130. In fact, over three-fourths of those victimized by forfeiture are never charged with a crime. See Levy, supra note 3, at 48.
illegal use.\textsuperscript{131}

This is where the personification fiction comes in. The property itself is ascribed the qualities of a person and can, therefore, be found guilty in a court of law. Common sense suggests that an inanimate object is not capable of culpability. The legal fiction, however, allows the court to ignore common sense and prosecute the object as if it were a person. By employing this fiction the courts have been able to side-step the question of whether civil forfeiture imposes a punishment on the owner of the property seized, because the proceeding takes place against the property itself. Thus technically, the outcome is not a punitive measure against the owner. Again, common sense tells us that seizure of a person's property is punitive, regardless of the purpose of the seizure. If a person's property is found to be guilty because, unbeknownst to the owner, the lessee has committed a crime, it is the owner, and not the property, who suffers the consequences.

The \textit{in rem} legal fiction goes so far beyond reality that arguably it does not qualify as a "legal fiction." Instead, perhaps the \textit{in rem} personification is simply an outright "fiction," being so far removed from reality that the civilian definition of the \textit{contra veritatem} element — that is, the facts of the case at hand are contrary to only the facts as stated, not reality — is stretched beyond all reasonable limits.\textsuperscript{132} For our purposes, therefore, we classify \textit{in rem} legal fiction as a "dogmatic legal fiction".\textsuperscript{133}

Both civil and criminal forfeiture raise questions of constitutional concern.\textsuperscript{134} Many challenges have been brought questioning the

\begin{footnotes}
\footnote{131. \textsc{levy}, supra note 3, at 48.}
\footnote{132. \textit{see supra} notes 50-65 and accompanying text. Vaihinger spent considerable time and effort noting that because a fiction is \textit{contra veritatem}, it must be narrowly employed and not be "extended beyond all reasonable limits." \textsc{olviER}, supra note 4, at 62 (citation omitted). To better explore the concepts and useful definitions, we will treat \textit{in rem} forfeiture as a dogmatic legal fiction, although even this is likely generous.}
\footnote{133. \textit{cf. olviER}, supra note 4, at 162-67. Dogmatic legal fictions take something that seems inadequate on the facts and try to expand it in the context of a previously accepted rule. Dogmatic fictions exhibit the characteristic of being easily extended, thereby allowing highly undesirable secondary rules to flow from the original fiction. In civil forfeiture, for example, an indigent driver who is stopped on a pretext will not be entitled to a government-provided attorney, even if certain property is seized during the stop, unless the driver is also charged with a crime.}
\footnote{134. \textit{see, e.g.}, \textsc{levy}, supra note 3, at 2-3 (citation omitted). Issues include First Amendment freedom of the press challenges regarding obscene materials; Fourth Amendment search and seizure; Fifth Amendment due process, self-incrimination, and double jeopardy; Sixth Amendment right to counsel, speedy trial, confrontation of witnesses, and compulsory process; Seventh Amendment right to civil trial in civil cases of $20 or more; and Eighth Amendment cruel and unusual punishment and excessive fines. \textit{id at} 177.}
\end{footnotes}
constitutionality of forfeiture laws and proceedings. In particular, the First Amendment and the problem of defining what constitutes obscenity have made prosecutions under RICO controversial. Congress amended RICO in 1984 to include the obscenity business after finding evidence that organized crime was profiting from that industry. In United States v. Pryba, in 1987, a federal district court held that the post-conviction seizure of materials under the amended RICO provisions did not unconstitutionally chill speech “where there is proper proof that they were acquired or maintained with the ill-gotten gains from racketeering activity, including dealing in obscenity.” That decision could allow for the confiscation and destruction of constitutionally protected material simply because it sat on a shelf in the same bookstore as the obscene material. In the 1993 case of Alexander v. United States, the Supreme Court upheld the constitutionality of the destruction of both obscene and legally protected materials under the RICO forfeiture provisions. Thus, the judicial fiction places the First Amendment protections in a questionable light.

In 1886, in Boyd v. United States, the Supreme Court held that because civil in rem forfeiture had a punitive as well as remedial purpose, the exclusionary rule of the Fourth Amendment and the Fifth Amendment prohibition against self-incrimination extended to these “quasi-criminal” seizures. Professor Levy argues, however, that law enforcement officials pursue forfeiture to finance their operations and as an alternative to prosecution. If convictions are not the object of the police, they will not be deterred by the exclusionary rule. Although illegally seized evidence cannot be used to meet the probable cause standard for forfeiture, law enforcement officials can establish cause with other, untainted circumstantial evidence.

A forfeiture exception has also developed to the warrant requirement of the Fourth Amendment: if an officer believes that he has probable cause, he may seize property without a warrant.

135. Levy, supra note 3, at 177 (citations omitted).
136. Id.
137. Id. at 178.
139. Levy, supra note 3, at 180-81.
140. Id. at 180 (citing Alexander v. United States, 509 U.S. 544 (1993)).
141. Id. at 183 (citing Boyd v. United States, 116 U.S. 616, 633-34 (1886)).
142. Id. at 184.
143. Id. at 184-85.
144. Levy, supra note 3, at 185 (citations omitted).
This exception is supported by the fiction that the object, rather than the person, is being tried, which tends to de-emphasize the owner's rights. Once the property is associated with crime, whether as a means to it, a product of it, or an acquisition from it, title to the object reverts to the government under the relation-back doctrine; therefore, an officer may seize it regardless of whether there are proceedings against the guilty owner or claimant. "In effect the association with crime taints the property so that it no longer warrants the protection of the law." 145

Congress has often used civil in rem forfeiture to avoid these concerns. For example, during the Civil War, Congress passed the Confiscation Act of 1862, which authorized the use of in rem civil forfeiture proceedings to punish rebels who possessed property in the North. 146 That act allowed an in rem forfeiture of rebel property even though the property may have had no connection to the alleged crime of treason, and without a criminal trial against the offender. 147

In Miller v. United States, in 1871, the Supreme Court upheld the act on the grounds that it was an exercise of war power and not a criminal measure intended for the punishment of crime. 148 In a powerful dissent, Justice Field concluded that:

[i]t seems to me that the reasoning which upholds the proceedings in this case, works a complete revolution in our criminal jurisprudence, and establishes the doctrine that proceedings for the punishment of crime against the person of the offender may be disregarded, and proceedings for such punishment be taken against his property alone. 149

Since that time, civil forfeiture in federal law has expanded dramatically. Today, over 150 federal statutes mandate the forfeiture of property. 150 These "laws" allow forfeiture of "guilty" firearms, unsafe and uninspected food products, conveyances containing minute amounts of marijuana, and "guilty" animals used in fighting. 151 In surveying this modern state of affairs, one commentator has noted that:

145. Id.
146. Id. at 55 (citation omitted).
147. Id. at 56-57.
148. Id. (citing Miller v. United States, 78 U.S. 268, 305-06 (1871)).
149. Miller, 78 U.S. at 323 (Field, J., dissenting).
150. Levy, supra note 3, at 56-57 (citation omitted).
151. Id. (citations omitted).
[t]he personification fiction rationalized punishment of the vessel as a means of diverting attention from the practical fact that in the real world criminal punishment had been summarily inflicted on the innocent owner without allowing him the rights enjoyed by a common felon. In rem proceedings against things, like the deodands to which they were analogous, were make-believe prosecutions of property in order to deprive the owners of their constitutional rights, thereby enabling the government to make a confiscation not otherwise likely.

Thus, because the owner is not *per se* on trial, just his property, there is no criminal case, no need for proof beyond a reasonable doubt, no prohibition against double jeopardy or excessive fines, and no right to be free from unreasonable search and seizure. Furthermore, there is not necessarily a right to indigent defense counsel.

The dogmatic, historical fiction of *in rem* forfeiture excludes any possibility of a meaningful answer to the problem. The use of the *in rem* personification fiction clearly subverts the Constitution and the Bill of Rights, but itself remains unquestioned. The civilian definition of a legal fiction demands that such a false assumption have a lawful effect. To the contrary, *in rem* fiction is applied broadly and wholly without concern as to the unjust results to the accused.

In its modern incarnation, the *in rem* civil forfeiture can have profoundly unjust consequences. For example, in *Calero-Toledo v. Pearson Yacht Leasing Co.*, in 1974, Puerto Rican authorities confiscated a vessel owned by a yacht leasing company upon finding one marijuana cigarette onboard. The yacht leasing company had no knowledge that the lessee of the yacht had used it illegally; company officials only learned of the forfeiture when they attempted to repossess the vessel after having received no rent for it. Rejecting the yacht leasing company's argument that the forfeiture was an unconstitutional taking of property without just compensation, the Court held that the innocence of the yacht leasing company was immaterial because the law proceeded against the guilty thing. Moreover, there was no due process violation

152. *Id.* at 51.
153. *Id.* at 82 (citing *Pearson Yacht*, 416 U.S. at 663).
155. *Id.* at 680-88 (reviewing the history of deodand and its relation to modern asset
because the government had a special need to act promptly.156

Although the Pearson Yacht Court established an "innocent owners" test, that test imposed upon property owners an almost insurmountable burden, requiring an owner to demonstrate not only that he was unaware of the illegal use of his property, but that he had also done all that reasonably could have been expected to prevent the proscribed use of the property.157 Determining in conclusory fashion that the yacht leasing company had failed to meet this burden, the Court set no standard for making such a determination in future cases.158

D. The Dangers of Fiction:
   Effects of Civil and Criminal Forfeiture

How can the Supreme Court's lack of concern for the property rights of owners be explained? The 1976 case of New Orleans v. Dukes illustrates the Court's attitude toward such rights.159 In that case, the Court made clear that economic rights are not fundamental rights protected by the strict scrutiny standard that other rights enjoy, allowing a city to regulate a street vendor out of business.160 Rather, law regulating economic need only pass a rational basis test.161

Pearson Yacht is simply one more example of the Court's lack of concern for property rights.162 Once again, the highest court in the land engaged in a legal fiction. The guarantees of the Fifth and the Fourteenth Amendments could raise Constitutional questions in every property rights case that comes before the Court.163 The Court, however, has ruled that these are primarily matters of state forfeiture laws).

156. Id. at 679-80 (arguing that a boat could be moved beyond jurisdiction if pre-seizure notification was required).
157. Id. at 689-90.
158. Id. at 690.
160. Levy, supra note 3, at 87 (citing City of Orleans, 427 U.S. 297 (1976)).
161. Id.; see generally Eric Blumenson & Eva Nilsen, Policing for Profit: The Drug War's Hidden Economic Agenda, 65 U. Chi. L. Rev. 35 (1998) (surveying the myriad of state forfeiture statutes and the economic reasons for these laws).
162. Levy, supra note 3, at 89.
163. Both Amendments defend "life, liberty, and property" against any taking without due process of law. Levy, supra note 3 at 88. Levy notes that the Fifth Amendment's just compensation clause protects property, as do the Fourth and Seventh Amendments. Id. The Constitution does not grade rights, however, the Court does.

It is difficult to concur with the Court's logic in allowing a state to cause a person to lose his lawful employment and be unable to feed himself, while retaining his free speech rights.
concern. This is another non-equitable (meaning contrary to the ancient Roman, equitable tradition) historical fiction enforced by our highest judiciary.

The lack of protection provided to forfeiture victims raises many questions about the appropriate place of forfeiture law in a just society. Both civil and criminal forfeiture laws were intended to target Mafiosi and drug kingpins, but this is not the effect these laws have had.164

For example, California prosecutors conducted over 6,000 forfeiture cases in 1992, 94% of which involved the seizure of $5,000 or less.165 These are certainly not significant seizures undermining the economic base of organized crime. About 80% of civil forfeiture cases go uncontested, possibly because the suspects are in fact guilty, but also perhaps because many people simply cannot afford the high cost of legal counsel needed to contest a case.166 Perhaps many potential claimants balance the high cost of attorney fees against the chances of overcoming this burden and opt to just cut their losses.

In 1992 the president of the National Association of Criminal Defense Attorneys declared that civil forfeiture “is essentially government thievery.”167 The problems surrounding forfeitures are exacerbated by the fact that the forfeiture laws give the police a financial stake in the confiscated property.168 The Comprehensive Forfeiture Act of 1984 increased this stake by creating “equitable sharing” between state and federal law enforcement officials, one of the many ways in which this legislation “revolutionized” forfeiture in the United States.169 Through a process by which the federal government “adopts” a state forfeiture case, the United States brings a forfeiture proceeding under more favorable federal law and skims a small portion of the proceeds off the top, returning the rest to the law enforcement agency that made the seizure, on the condition that the money is spent only on law enforcement.170

Congressman John Conyers of the U.S. House of Representatives Committee on Government Operations commented that the

164. LEVY, supra note 3, at 127.
165. Id. (citation omitted).
166. Id. at 130.
167. Id. at 132 (citation omitted).
168. Id. at 137.
169. LEVY, supra note 3, at 145 (citation omitted).
170. Id. at 149.
guidance from the federal government on how that money is spent amounts to little more than:

whether it can pass two tests: (1) The Straight Face Test, which asks, Can you tell me this with a straight face? And (2) The Washington Post Test, which asks: If taken out of context and put on the front page of the Washington Post, will it still look good? 171

Equitable sharing and adoption reward state and local abuses of forfeiture law by providing a huge incentive to law enforcement agencies to seize as much property as possible. 172 Allowing a state law enforcement agency, historically limited by state constitutional provisions prohibiting civil forfeiture to have the federal government “adopt” the forfeiture, allows for a legislative fiction which both violates state’s rights and creates a dangerous and illegal precedent. The financial motivations that have been paramount since the development of the deodand and escheat in medieval England are obvious.

One of the civilian elements of the legal fiction is the in re certa element. This simply means that all parties involved — judge, jury, litigants and counsel on both sides — must be aware of the inherent falsehood of the in rem legal fiction. Somewhere along the way the in rem fiction became a matter of settled opinion and no longer subject to debate. This is a dangerous situation, as it has been well recognized that any legal fiction should be dropped from the case just prior to the court rendering a judgment. The fiction is ideally only a bridge between existing and future law which should assist, not conceal, the judicial process. 173

III. RECENT DEVELOPMENTS IN FORFEITURE LAW

If the expansion in the use of civil in rem forfeiture in the past three decades has been the occasion of some concern, then recent developments both in the case law and federal statutory law have been the cause of some hope for the future. While the Supreme Court has taken a small step in the right direction, Congress has enacted substantial legislation to curtail forfeiture in the Civil Asset Forfeiture Reform Act of 2000. Other members of Congress have proposed even more radical plans to eliminate civil forfeiture

171. Id. at 145 (citation omitted).
172. Id. at 156.
173. OLIVIER, supra note 4, at 71.
altogether, finally eradicating the legal fiction that we have come to use without honestly assessing the reasons why.

A. **Two Steps Forward, One Step Back:**

Recent Judicial Treatment of Forfeiture and Fiction

In 1972, in *One Lot Emerald Cut Stones v. United States*, the Supreme Court rejected a claim that a civil forfeiture proceeding against jewels following an unsuccessful criminal prosecution for smuggling those jewels constituted a violation of the Double Jeopardy Clause. Less than twenty years later, however, in the 1989 case *United States v. Halper*, the Court acknowledged that a civil forfeiture proceeding against a medical services manager already convicted of Medicare fraud was so punitive in nature that it constituted a second punishment for the same crime. In 1993, in *United States v. Austin*, the Court also held that a civil forfeiture is the equivalent of a fine, and thus is limited by the Eighth Amendment prohibition against excessive fines.

Even as the Court reached these positive outcomes, however, in other areas the fiction of civil forfeiture remained unquestioned. For example, in 1989, in *Caplin & Drysdale v. United States*, the Court upheld the seizure of funds earmarked to pay a defense lawyer under the fictional relation-back theory. The Court stated that "[a] defendant has no Sixth Amendment right to spend another person's money for services rendered by an attorney, even if those funds are the only way that that defendant will be able to retain the attorney of his choice." Recall also *Pearson Yacht*, a 1974 case in which civil *in rem* seizure was upheld without due process for fear that the yacht might be moved out of the court's jurisdiction.

In 1993, in *United States v. James Daniel Good Real Property*, the Court held that "the Due Process Clause of the Fifth Amendment prohibits the Government in a civil forfeiture case from seizing real property without first affording the owner notice and an opportunity to be heard." In that case, the federal

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174. LEVY, supra note 3, at 187 (citing One Lot Emerald Cut Stones v. United States, 409 U.S. 232 (1972)).
175. Id. at 188 (citing United States v. Halper, 490 U.S. 435 (1989)).
176. Id. (citing United States v. Austin, 509 U.S. 602 (1993)).
177. Id. at 198 (citing Caplin & Drysdale v. United States, 491 U.S. 617 (1989)).
178. Caplin & Drysdale, 491 U.S. at 626.
179. LEVY, supra note 3, at 191 (citation omitted).
government seized a home in which drugs and drug paraphernalia had been found over four years after the homeowner had pled guilty to a criminal offense under state law.\textsuperscript{181} While the Court did not overturn the underlying federal statute authorizing the seizure, Justice Clarence Thomas in a separate opinion expressed concern that the statute allowing seizure of real property was "so broad that it differs not only in degree, but in kind, from its historical antecedents."\textsuperscript{182} He questioned whether the legal fiction "that the thing is primarily considered the offender," supported the \textit{in rem} proceedings.\textsuperscript{183} He added: "Given that current practice under [the law] appears to be far removed from the legal fiction upon which the civil forfeiture doctrine is based, it may be necessary — in an appropriate case — to reevaluate our generally deferential approach to legislative judgments in this area of civil forfeiture."\textsuperscript{184} Justice Thomas courageously questioned the then-current state of civil forfeiture jurisprudence while at the same time challenging legislative authority.

Many of these decisions are giant steps in the right direction regarding the use of the personification fiction to justify the denial of constitutional rights. The more recent decisions have tended to uphold constitutional rights.\textsuperscript{185} The Court, however, has a long way to go before it adequately remedies the scores of decisions over the years which have failed to sustain those rights. The real culprit, however, is Congress, to whose judgment the Court frequently defers.\textsuperscript{186} But Congress has recently made strides in the right direction, as the Civil Asset Forfeiture Reform Act of 2000 plainly demonstrates.

\section*{B. Congressional Solutions to Forfeiture Problems}

Reform of civil forfeiture laws has garnered wide-spread support and created strange bedfellows. The National Association of Criminal Defense Lawyers; David B. Smith, a founder of the Department of Justice civil forfeiture program; the American Civil 46 (1993).\textsuperscript{187} James Daniel, 510 U.S. at 46.\textsuperscript{188} LEVY, supra note 3, at 191 (citing James Daniel, 510 U.S. at 82 (Thomas, J., concurring and dissenting in part)).\textsuperscript{189} LEVY, supra note 3, at 191 (citation omitted).\textsuperscript{190} James Daniel, 510 U.S. at 82 (Thomas, J., concurring and dissenting in part).\textsuperscript{191} An exception is the decision approving the forfeiture and destruction of non-obscene books. See supra note 139 and accompanying text.\textsuperscript{192} LEVY, supra note 3, at 205.
Liberties Union; financial and commercial institutions; and Republican congressman Henry Hyde, among others, are some of the leading advocates of legislative reform. The Orlando Sentinel, The Pittsburgh Press, and the Christian Science Monitor have all published influential articles criticizing civil forfeiture, as have other newspapers from across the nation.

In 1993, Congressman Henry Hyde introduced the Civil Asset Forfeiture Reform Act. His proposed legislation provided for significant reforms in forfeiture proceedings, including placing the burden of proof on the government and increasing this burden to a showing of “clear and convincing evidence.” Congressman John Conyers introduced an even more revolutionary bill, the Asset Forfeiture Justice Act. His proposal would have, in effect, abolished civil forfeiture by eliminating in rem proceedings and providing that forfeiture could only take place after a criminal conviction. This would have done away with the personification fiction once and for all. As Congress deliberated over the proposed legislation, Attorney General Janet Reno instructed the Department of Justice to review and recommend changes to civil forfeiture policies and procedures. With the 1994 “Republican Revolution” in Congress, Congressman Hyde became chair of the House Judiciary Committee, allowing him to push for his version of forfeiture reform. Seven years after these reforms were introduced, President Clinton signed the Civil Asset Forfeiture Reform Act of 2000 (“CAFRA”) into law.

Although the personification fiction is still clearly evident in the bill’s language, CAFRA is a substantial improvement for due process and property rights of individuals in forfeiture law in the following ways: (1) the so-called cost bond is abolished; (2) indigent defendants, with exceptions, will receive court-appointed counsel; (3) property can be released to the owner upon evidence of a hardship; and (4) there is a substantially increased innocent owner defense with wide application to almost all federal civil
forfeiture statutes.\textsuperscript{195}

Under the previous law, claimants wishing to challenge the forfeiture of their property were required to post a bond. This would clearly create hardships for indigent owners who may have few assets aside from the property seized. Given that the vast majority of forfeitures involve amounts below $5,000, is it any wonder that most of these are seizures are not contested?\textsuperscript{196} The high cost of posting bond and retaining counsel might have discouraged owners from bringing a claim, either because they lacked resources or because the challenge would be more costly than the value of the property seized. Regardless of the claimant, whether wealthy or poor, guilty or innocent, the cost bond is an impediment to justice and the elimination of the bond is a victory for individual rights.\textsuperscript{197}

In addition to abolishing the cost bond, CAFRA provides for court-appointed counsel for some indigent claimants.\textsuperscript{198} If a claimant is represented by court-appointed counsel in a related criminal proceeding, the court may authorize counsel to represent the civil forfeiture claim as well.\textsuperscript{199} For indigent property owners that are not defending related criminal charges, CAFRA provides for representation by an attorney from the Legal Services Corporation if the property subject to forfeiture is real property being used by the claimant as a primary residence.\textsuperscript{200} Though this change still leaves a large number of claimants without legal counsel, it is a step in the right direction.

In a small but significant victory for property rights, CAFRA allows the court to release the property to the claimant upon a showing of hardship.\textsuperscript{201} The court may order release of the property, pending the final disposition of the forfeiture proceeding, if continued possession by the government will cause "substantial hardship" to the claimant.\textsuperscript{202} Congress has recognized that while the property itself may technically be the one awaiting trial, the seizure

\begin{footnotes}
\footnote{196. \textit{See} Levy, \textit{supra} note 3, at 127.}
\footnote{197. Civil Asset Forfeiture Reform Act § 983(a)(2)(E).}
\footnote{198. CAFRA § 983(b)(1)-(2).}
\footnote{199. CAFRA § 983(b)(1)(A). The court is authorized to deny such a request, however, taking into consideration: "(i) the person's standing to contest the forfeiture; and (ii) whether the claim appears to be made in good faith." CAFRA §983(b)(1)(B).}
\footnote{200. CAFRA §983(b)(2)(A).}
\footnote{201. CAFRA §983(f)(1)(D).}
\footnote{202. \textit{Id.}}
\end{footnotes}
has a very real and sometimes devastating effect on the owner of the property.

CAFRA also provides a substantially greater innocent owner defense, with wide application to almost all federal civil forfeiture statutes. A meaningful innocent owner defense is crucial to restoring justice to civil forfeiture proceedings; however, the overwhelming majority of statutes contain no such defense. CAFRA remedies this by providing that "an innocent owner's interest in property shall not be forfeited under any civil forfeiture statute." Although the claimant in a civil forfeiture proceeding still must bear the burden of proving by a preponderance of the evidence that he is an "innocent owner," the new law makes this a somewhat easier task. First, the bill increases the burden the government must meet before forfeiture is justified, from probable cause to a preponderance of the evidence. CAFRA also defines an "innocent owner," clearing up the confusion created in Pearson Yacht by providing a reasonable standard: the owner must take affirmative steps to stop illegal use of property only upon learning that such conduct actually exists. The act also suggests the ways in which a person may meet this standard, including, demonstrating that the person:

gave timely notice to an appropriate law enforcement agency of information that led the person to know the conduct giving rise to a forfeiture would occur or has occurred; and . . . in a timely fashion revoked or made a good faith attempt to revoke permission for those engaging in such conduct to use the property or took reasonable actions in consultation with a law enforcement agency to discourage or prevent the illegal use of the property.

The bill does not require a person to take any steps that the person reasonably believes would put themselves or innocent third parties

203. CAFRA § 983(d).
204. LEVY, supra note 3, at 162.
205. CAFRA § 983(d)(1). However, the innocent owner has the burden of proof by a preponderance of the evidence. Id.
206. CAFRA § 983(c)(1).
207. CAFRA § 983(d)(2)(A)(i)-(ii). CAFRA defines an innocent owner as one who "(i) did not know of the conduct giving rise to forfeiture; or (ii) upon learning of the conduct giving rise to forfeiture, did all that reasonably could be expected under the circumstances to terminate such use of the property." Id.
208. CAFRA § 983(d)(2)(B)(I)-(II).
This increase in the ability of an innocent owner to defend against the seizure of his or her property is a step toward recognizing due process and property rights, and a step away from the employment of the personification fiction to circumvent these rights.

CAFRA continues to employ the legal fiction that the property, and not the person, is on trial. At the same time, however, the statute implicitly recognizes the fallacy of the personification fiction and seeks to protect owners by increasing their due process and property rights. The statute also explicitly encourages the use of criminal forfeiture as an alternative to civil forfeiture, thereby decreasing the number of forfeitures that would occur without a criminal trial and the constitutional protections that go along with it.

Although CAFRA represents an important reform of forfeiture law, Congress and the courts would do well to bear in mind the important due process consideration that the personification fiction conceals by shifting the burden of proof in civil forfeiture proceedings. Once the government has met its burden of proof — raised to a preponderance of the evidence by CAFRA — the presumption of innocence is reversed and the burden of proof is on the claimant to show that the property was not connected to any illegal activity. The claimant is left with the often insurmountable burden of proving innocence by a preponderance of the evidence because, as the fiction prescribes, it is the property itself and not the owner who is on trial. Because there is no criminal trial following the preponderance determination, the government enjoys a considerable advantage. The owner is thus denied constitutionally protected due process rights.

CAFRA does not do away with the personification fiction once and for all, and thus, "the unfairness inherent in the system remains: so long as innocence is an irrelevant consideration to the question of whether property is guilty, injustices will continue." However, CAFRA does represent a movement away from relying on the legal fiction to seize the property of those who are innocent under the law, and toward a recognition that civil forfeiture has

210. CAFRA § 2461(c).
211. Levy, supra note 3, at 194.
212. CAFRA § 983(c)(1); Levy, supra note 3, at 194.
213. Levy, supra note 3, at 194.
214. Id. at 160.
real, and sometimes devastating, consequences to the owners of the property. If justice is to prevail, individual rights require real protections. It will be fascinating to see how the cases coming under the new law will be decided and interpreted in terms of the legal fictions this article has discussed.

CONCLUSION

Congressman Conyers' proposal would eradicate the in rem legal fiction in civil forfeiture cases altogether, and if ever adopted, would be a powerful safeguard for all of our constitutional rights. Nevertheless, with CAFRA and its heightened concern for the reality beneath the fiction of forfeiture, Congress has drawn closer to that ultimate goal. Certain other fictions, such as the virtual impossibility of proving the innocent owner defense under Pearson Yacht, have now been exposed, debated, and discussed in Congress, and serious ameliorative alterations have been passed into law.

Even as the debates continue about the nature of our legal fictions today, we can appreciate the clarity the civilians brought to their debates over legal fictions hundreds of years ago. Much of this discussion and controversy has never been acknowledged by our courts, and this has allowed the courts to steal some of our most cherished rights under cover of darkness. At the same time, our legislatures and our courts have failed to categorize or define terms and, by this willful blindness, have failed to follow their responsibilities to all of us in a free and democratic republic to explain the precedent for forfeitures. This article has attempted to demonstrate that they have not adequately explained the justification for civil forfeitures and the erosion of our constitutional rights.

It remains to be seen how far the trend begun by CAFRA will continue. As it is, hundreds of thousands, and perhaps millions, of Americans have had their property stolen and their most fundamental rights violated. Perhaps one day, as the historical definition and structure of the legal fictions becomes more apparent, there will be a discussion of possible legislative or judicial remedies for the property that has already been taken.

Legal fictions will always play an important part in our courts, but their appearances should be brief and supplemental in nature. In sum, the courts would do well to maintain some contact with reality. As the civilians observed, the legal fiction should be only temporary, lawful, possible, and an irrebuttable assumption that
does not attack and nullify the fundamental laws. The legal fiction that best serves us acts as a temporary bridge from one law to the next — not as a law unto itself.