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**SUMMARY:**

... 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. ... Other members of Congress have proposed even more radical plans to eliminate civil forfeiture altogether, finally eradicating the legal fiction that we have come to use without honestly assessing the reasons why. ... 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. ... 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. ... 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. ...
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. n3 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 [*78] fiction—developed and refined by medieval lawyers and scholars in Europe—proves to be the most organized and clearly defined. n4 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. n5 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. n6 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 [*79] growth and reach. n7 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. n8
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.” 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 [*80] 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 [*81] the assumption.
viewed the fiction as a useful tool in the human thought process. n20 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. n21 Vaihinger warned, however, that fictions, while useful in ascertaining the truth, can cause injustice by presuming to be true that which plainly is not. n22 Accordingly, once a legal fiction ceases to be useful, it should be eliminated. n23

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. n24 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. n25 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. n26 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. n27 In short, Fuller sees the dominant motive behind the creation of legal fictions to be “reconcil[iation of] a specific legal result with some premise or postulate.” n28 Nevertheless, several objections have been raised by modern theorists to the use of fictions in the law. n29 The first, and strongest of these objections, is that fictions promote scientific untruthfulness, i.e. the fiction is employed because it is desirable to use one rule when another should be applied. n30 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. n31 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. n32 This deception can lead to difficulties in properly understanding and applying the legal rule in the future. n33 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. n34 Moreover, fictions can undermine respect for the law because they may be viewed as abandoning truth for the sake of convenience. n35 Applying fictions beyond their intended scope and justification can also lead to unforeseen and undesirable consequences. n36 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. n37 The wide acceptance of fictions as truth can lead to far-flung and even disastrous results. n38 In short, the civilian method of revealing the fiction in the grammatical structure of the statement has been more or less [*83] 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.” They are created 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, as 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 “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.”

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. The assumptio element derives linguistically from assumere and sumere, meaning to take, or rather, to understand or accept. It implies a level of untruthfulness, or the possibility of falsity in assuming for arguments sake, or hypothetically. It does not ask us to make an assumption for the sake of applying a
legal rule. The contra veritatem element means that the assumption is made contrary to the facts. 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.” The false assumption is irrebuttable and may not be challenged; we are ordered to take it as the truth conclusively. 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. The fiction is not a presumption that may or may not be true, and it is not an attempt at fraud or deceit. The a jure facta element states that the false assumption and the resulting legal consequences are “permitted and applied by law.” No fraud or misrepresentation is involved when a legal fiction is employed as an instrument of the law; it is done openly and according to legal prescription. 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. This understanding “qualifies the law and not the legal fiction and communicates nothing about the structure of the fiction.” Finally, the ex aequitate element expresses the equitable motive behind fiction in Roman law. 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. 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. 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. There is a financial incentive for law enforcement officials to seize property because seized assets can be used to finance law enforcement operations. The procedure by which property is seized, however, is devoid of most of the constitutional safeguards accorded to a criminal defendant. In 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. n69

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.” n70 Modern courts sometimes find a textual basis for deodands in the Bible: “If an ox gore a man or a woman that they die, the ox shall be surely stoned and its flesh shall not be eaten.” n71 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. n72 The ox was not forfeited and no one benefited from its death because its flesh was not eaten. n73 Moreover, although the Hebrews destroyed living objects that did harm, they did not treat inanimate objects as though they were capable of guilt. n74 On the other hand, “in the case of a deodand some official [*88] must be the beneficiary of the value of the agent causing the death.” n75 The Hebrew tradition therefore does not provide an adequate historical basis for the deodand, or later, 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. n76 At least one commentator, however, has questioned whether an ancient Athenian practice actually served as the foundation for the medieval tradition of the deodand. n77

Despite the murky source of the European tradition, “retribution against inanimate objects, such as the sword of John at Stile or against irrational beasts, became common in the Middle Ages.” n78 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. n79 In the face of such compelling circumstances, little consideration was given to the owners of these objects. n80 “The legal foundation was being built to regard the innocence of the owner of the property as an irrelevant consideration.” n81

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. n82 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.” n83 Over time, this practice transformed into a means of atonement for the “sins “ of the guilty object or beast by providing [*89] compensation to a chieftain or king. n84 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. n85 By the thirteenth century, the English Parliament had even enacted a statute that specified the deodand procedure. n86 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. n87 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. n88 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. n89 This medieval
European practice is the true root of the current fiction of 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. n90 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. n91 In the eighteenth century,
William Blackstone offered negligence as a justification for the fiction of the deodand.
n92 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. n93 The problem with this argument is
twofold: first, it ignores the fact [*90] 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.
n94 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. n95 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. n96 Lord Campbell’s Act,
enacted in 1846, abolished deodands and vested a right of action in the victims’
urvivors. n97 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. n98 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. n99 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. n100 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. n101 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. n102 [*91]

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. n103 In the event that an owner contested the
forfeiture, the owner had the affirmative burden of proof to demonstrate the innocence of
the vessel. n104 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. n105 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
informers, the colonial governor, and the Crown all receiving revenues from the sale. n106
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. Though there was no criminal conviction, the ship could be seized. The Palmyra remains good law to this day, and has been used by the Court to justify modern civil forfeiture laws.

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. A criminal defendant forfeits nothing unless convicted of the crime. 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. 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.

The origin of criminal forfeiture lies in medieval escheats and reversions of an estate to a feudal lord. 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. When a felon was executed, the felon’s lands escheated to his lord. The king, being the greatest of the feudal lords, benefited the most from this arrangement. So lucrative were the revenues from escheat that “Henry II (1154-89) . . . introduced reforms intended to extend his jurisdiction . . . supplanting the manorial courts of local lords, making royal justice the rule rather than the exception.”

Although financial benefit always seems to be the underlying 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.
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. n123 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. n124 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. n125 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. n126 [*94] 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. n127 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.” n128 This is of course an intensely fictional approach that goes far beyond the limited Roman and civilian use of fictions “to do equity.” n129 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. n130 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 [95] illegal use. n131 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 in rem legal fiction goes so far beyond reality that arguably it does not qualify as a “legal fiction.” Instead, perhaps the in rem personification is simply an outright “fiction,” being so far removed from reality that the civilian definition of the 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. n132 For our purposes, therefore, we classify in rem legal fiction as a “dogmatic legal fiction.” n133 Both civil and criminal forfeiture raise questions of constitutional concern. n134 Many challenges have been brought questioning the [*96] constitutionality of forfeiture laws and proceedings. n135 In particular, the First Amendment and the problem of defining what constitutes obscenity have made prosecutions under RICO controversial. n136 Congress amended RICO in 1984 to include the obscenity business after finding evidence that organized crime was profiting from that industry. n137 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.” n138 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. n139 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. n140 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. n141 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. n142 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. n143

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. n144 [*97] 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.” n145
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. 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.

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. In a powerful dissent, Justice Field concluded that: it 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.

Since that time, civil forfeiture in federal law has expanded dramatically. Today, over 150 federal statutes mandate the forfeiture of property. These “laws” allow forfeiture of “guilty” firearms, unsafe and uninspected food products, conveyances containing minute amounts of marijuana, and “guilty” animals used in fighting.

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 repossession 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
Moreover, there was no due process violation because the government had a special need to act promptly.  

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. 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.

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. 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. Rather, law regulating economic need only pass a rational basis test. Pearson Yacht is simply one more example of the Court’s lack of concern for property rights. 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. The Court, however, has ruled that these are primarily matters of state 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. For example, California prosecutors conducted over 6,000 forfeiture cases in 1992, 94% of which involved the seizure of $5,000 or less. 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. 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.” The problems surrounding forfeitures are exacerbated by the fact that the forfeiture laws give the police a financial stake in the confiscated property. 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. 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.
Congressman John Conyers of the U.S. House of Representatives Committee on Government Operations commented that the [*101] 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? n171

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. n172 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. n173

### 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 [*102] 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. n174 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. n175 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. n176 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 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. 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.” He questioned whether the legal fiction “that the thing is primarily considered the offender,” supported the in rem proceedings. 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.” 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. 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. But Congress has recently made strides in the right direction, as the Civil Asset Forfeiture Reform Act of 2000 plainly demonstrates.

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 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
fictitious 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. n193 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. n194 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 [*105]
forfeiture statutes. n195 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? n196 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. n197 In addition to abolishing the cost bond, CAFRA
provides for court-appointed counsel for some indigent claimants. n198 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. n199 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. n200
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. n201
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. n202 Congress has recognized that while the property itself may
technically be the one awaiting trial, the seizure [*106] 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. n203 A meaningful innocent
owner defense is crucial to restoring justice to civil forfeiture proceedings; however, the
overwhelming majority of statutes contain no such defense. n204 CAFRA remedies this
by providing that “an innocent owner’s interest in property shall not be forfeited under
any civil forfeiture statute.” n205 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. n206 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. n207 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. n208 The bill does not require a person to take any steps that the person reasonably believes would put themselves or innocent third parties [*107] in danger. n209 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. n210 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. n211 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. n212 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. n213 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.” n214 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 [*108] 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 [*109] 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.

**FOOTNOTES:**


n4 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).

n5 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.


“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).

Id. at 2 (citing Jeremy Bentham, 1 Works 235, 268 (John Bowring ed., 1843)).

Olivier, supra note 4, at 5, 12.

Id. at 12.

Id. at 16 (citation omitted).

Id. at 6.

Id. at 81.

Id. at 91.

Id. at 18 (citation omitted).

Id. at 38.

Id. at 38-39.

Id. at 40.

Olivier offers as an example of an excessive legal fiction a rule that all women are to be treated as minors. Id.

Cf. Id. at 40, 42.

Id. at 91.

Id. at 91.

Id. at 143-45 (citing Fuller, supra note 8, at 51-52).

Id. at 143 (quoting Fuller, supra note 8, at 51-52).

Id. at 88-91.

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.

See supra notes 1-2 and accompanying text.

Olivier, supra note 4, at 88.

Id. (citation omitted).
n34 Id. at 89.

n35 Id. at 90.

n36 Id. at 90-91.

n37 Olivier, supra note 4, at 43.

n38 Id. at 164.

n39 Id. at 95.

n40 Id. at 101.

n41 Id. at 97.

n42 Olivier, supra note 4, at 107.

n43 Id. at 108.

n44 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.

n45 Olivier, supra note 4, at 115.

n46 Id. at 130.

n47 Id. at 133.

n48 Id. at 134.

n49 Id. at 81.

n50 “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.

n51 Olivier, supra note 4, at 59.

n52 Id. at 59-60.

n53 Id. at 61.
n54 Id. at 62.
n55 Id. at 69.
n56 Olivier, supra note 4, at 69.
n57 Id.
n58 Id.
n59 Id. at 73.
n60 Id. at 74.
n61 Olivier, supra note 4, at 77.
n62 Id. at 78.
n63 Id.
n64 Id. at 79.


n66 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).

n67 Levy, supra note 3, at 1.

n68 Id. at 7.

n69 J.W. Goldsmith-Grant Co., 254 U.S. at 510; see also Levy, supra note 3, at 8.

n70 J.W. Goldsmith-Grant Co., 254 U.S. at 510.

n71 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).

n72 Levy, supra note 3, at 9.

n73 Id. at 8-9.

n74 Id. at 9.

n75 Id.

n76 Id. at 9-10.

n77 Levy, supra note 3, at 10.

n78 Id.

n79 Id.

n80 Id.

n81 Id.
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.

At this juncture, the deodand became a permanent legislative fiction, at least until the law was changed or revoked.

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. Fuller, supra note 8, at 36 (citation omitted). The English presumptions in the law of deodand, however, stood as incontrovertible fact. See supra notes 86-90 and accompanying text.

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).

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 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).

n103 Levy, supra note 3, at 43.

n104 Id. at 43-44.

n105 Id. at 44.

n106 Id.

n107 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.


n109 Id. (citation omitted).

n110 Id. (citation omitted).

n111 See, e.g., Calero-Toledo v. Pearson Yacht Leasing Co. (“Pearson Yacht”), 416 U.S.
663, 683-84 (1974) (citing The Palmyra as precedent for a modern asset forfeiture law).

n112 Levy, supra note 3, at 22.

n113 Id.

n114 Id.

n115 Id.

n116 Id. at 24 (citations omitted).

n117 Levy, supra note 3, at 24.

n118 Id.

n119 Id.

n120 Id. at 26.

n121 Id. at 37-38 (citing U.S. Const. art. III, § 3, cl. 2).

n122 Levy, supra note 3, at 38 (citation omitted).

n123 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

n124 Levy, supra note 3, at 63, 77 (citations omitted).

n125 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.

n126 Id. at 109-10 (citations omitted). In the criminal forfeiture arena, there is an 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.

n127 Id. at 47.

n128 Id. at 48.

n129 See supra notes 10-33 and accompanying text.

n130 In fact, over three-fourths of those victimized by forfeiture are never charged with a crime. See Levy, supra note 3, at 48.

n131 Levy, supra note 3, at 48.

n132 See supra notes 50-65 and accompanying text. Vaihinger spent considerable time and effort noting that because a fiction is contra veritatem, it must be narrowly employed and not be “extended beyond all reasonable limits.” See Olivier, supra note 4, at 62 (citation omitted). To better explore the concepts and useful definitions, we will treat in rem forfeiture as a dogmatic legal fiction, although even this is likely generous.

n133 Cf. Olivier, 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.

n134 See, e.g., 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. Id at 177.

n135 Levy, supra note 3, at 177 (citations omitted).

n136 Id.

n137 Id. at 178.


n139 Levy, supra note 3, at 180-81.

n140 Id. at 180 (citing Alexander v. United States, 509 U.S. 544 (1993)).
n141 Id. at 183 (citing Boyd v. United States, 116 U.S. 616, 633-34 (1886)).

n142 Id. at 184.

n143 Id. at 184-85.

n144 Levy, supra note 3, at 185 (citations omitted).

n145 Id.

n146 Id. at 55 (citation omitted).

n147 Id. at 56-57.

n148 Id. (citing Miller v. United States, 78 U.S. 268, 305-06 (1871)).

n149 Miller, 78 U.S. at 323 (Field, J., dissenting).

n150 Levy, supra note 3, at 56-57 (citation omitted).

n151 Id. (citations omitted).

n152 Id. at 51.

n153 Id. at 82 (citing Pearson Yacht, 416 U.S. at 663).

n154 Pearson Yacht, 416 U.S. at 668.

n155 Id. at 680-88 (reviewing the history of deodand and its relation to modern asset forfeiture laws).

n156 Id. at 679-80 (arguing that a boat could be moved beyond jurisdiction if pre-seizure notification was required).

n157 Id. at 689-90.

n158 Id. at 690.

n159 427 U.S. 297 (1976).

n160 Levy, supra note 3, at 87 (citing City of Orleans, 427 U.S. 297 (1976)).

n161 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).

n162 Levy, supra note 3, at 89.

n163 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.

n164 Levy, supra note 3, at 127.

n165 Id. (citation omitted).
n166 Id. at 130.
n167 Id. at 132 (citation omitted).
n168 Id. at 137.
n169 Levy, supra note 3, at 145 (citation omitted).
n170 Id. at 149.
n171 Id. at 145 (citation omitted).
n172 Id. at 156.
   n173 Olivier, supra note 4, at 71.
n174 Levy, supra note 3, at 187 (citing One Lot Emerald Cut Stones v. United States, 409 U.S. 232 (1972)).
n175 Id. at 188 (citing United States v. Halper, 490 U.S. 435 (1989)).
   n176 Id. (citing United States v. Austin, 509 U.S. 602 (1993)).
n177 Id. at 198 (citing Caplin & Drysdale v. United States, 491 U.S. 617 (1989)).
   n178 Caplin & Drysdale, 491 U.S. at 626.
   n179 Levy, supra note 3, at 191 (citation omitted).
n182 Levy, supra note 3, at 191 (citing James Daniel, 510 U.S. at 82 (Thomas, J., concurring and dissenting in part)).
   n183 Levy, supra note 3, at 191 (citation omitted).
n184 James Daniel, 510 U.S. at 82 (Thomas, J., concurring and dissenting in part).
n185 An exception is the decision approving the forfeiture and destruction of non-obscene books. See supra note 139 and accompanying text.
   n186 Levy, supra note 3, at 205.
n187 Id. at 210.
n188 Id. at 209-10.
n189 Id. at 210.
n190 Id. at 210-11.
   n191 Levy, supra note 3, at 213.
   n192 Id.
   n193 Id. at 217. The proposals that came out of that review, however, turned out to be “overwhelmingly a prosecutor’s wish list,” according to David B. Smith. Id. at 219.
n194 Id. at 226.


n196 See Levy, supra note 3, at 127.

n197 Civil Asset Forfeiture Reform Act § 983(a)(2)(E).

n198 CAFRA § 983(b)(1)-(2).

n199 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).

n200 CAFRA §983(b)(2)(A).

n201 CAFRA §983(f)(1)(D).

n202 Id.

n203 CAFRA § 983(d).

n204 Levy, supra note 3, at 162.

n205 CAFRA § 983(d)(1). However, the innocent owner has the burden of proof by a preponderance of the evidence. Id.

n206 CAFRA § 983©(1).

n207 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.

n208 CAFRA § 983(d)(2)(B)(I)-(II).

n209 CAFRA § 983(d)(2)(B)(ii).

n210 CAFRA § 2461©.

n211 Levy, supra note 3, at 194.

n212 CAFRA § 983©(1); Levy, supra note 3, at 194.

n213 Levy, supra note 3, at 194.

n214 Id. at 160.