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Hoisted by Their Own Petard: Adverse Inferences in Civil Forfeiture

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COMMENTS

HOISTED BY THEIR OWN PETARD:¹ ADVERSE INFERENCES IN CIVIL FORFEITURE

I. INTRODUCTION

Civil forfeiture laws² are an important weapon in the government's arsenal against drugs.³ By attacking the economic base of drug traffickers through civil forfeiture proceedings and seizing "drug financed" property, the government hopes to cripple drug trafficking in the United States.⁴ The government's war on drugs is bolstered by

¹ WILLIAM SHAKESPEARE, *HAMLET* act 3, sc. 4. Hamlet says, referring to Rosencrantz and Guildenstern: "For tis the sport to have the engineer/Hoist with his own petar. . . ." Hamlet has switched the letters they carried to the King of England for letters asking the King to kill them. See also Arthur W. Leach & John W. Malcolm, *Criminal Forfeiture: An Appropriate Solution to the Civil Forfeiture Debate*, 10 GA. ST. U. L. REV. 241 (1994) (using the phrase "hoisted by their own petard" to refer to the effect of forfeiture on narcotics traffickers). Today, this phrase commonly means "destroyed by his own trickery or inventiveness." *DICTIONARY OF WORD & PHRASE ORIGIN* 290 (William & Mary Morris eds., 1988).

² This Comment will discuss only the Drug Abuse Prevention and Control Act, 21 U.S.C. § 881 (1988). Other civil forfeiture proceedings may have the same constitutional problems; however, a discussion of each of them would be outside the scope of this Comment.

³ See Christine M. Durkin, Note, *Civil Forfeiture Under Federal Narcotics Law: The Impact of the Shifting Burden of Proof upon the Fifth Amendment Privilege Against Self-Incrimination*, 24 SUFFOLK U. L. REV. 679, 679-80 nn.1-4 (1990) (citing Charles Edward Anderson, *Uncle Sam Gets Serious: A Report from the Front Line*, 76 A.B.A. J. 60, 60-61 (Feb. 1990) (during the 1980s the number of narcotics cases rose 270% although the war on drugs was not officially declared until 1989)). The Reagan administration initiated the current aggressive use of forfeiture laws to combat both the use of drugs as well as drug trafficking through the "zero tolerance policy." Michael Schecter, Note, *Fear and Loathing and the Forfeiture Laws*, 75 CORNELL L. REV. 1151, 1152 (1990). Prior to the Reagan administration, forfeiture laws were used primarily against drug traffickers. *Id.* See also *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 687 (1974) (discussing the importance of forfeiture as a method of combatting narcotics trafficking).

⁴ U.S. DEPARTMENT OF JUSTICES, CRIMINAL DIVISION, ASSET FORFEITURE OFFICE, *FORFEITURES VOLUME I: INTRODUCTION TO CIVIL STATUTES V* (1984) (stating that today "forfeiture has become one of the primary law enforcement tools" because it is a "powerful" weapon against crime). See, e.g., *Calero-Toledo*, 416 U.S. 663 (yacht forfeited because of the discovery of one marijuana cigarette); *United States v. One 1971 Porsche Coupe Auto*, 364 F. Supp.

civil forfeiture proceeds which are used to finance the government's law enforcement efforts.⁵ In a discussion about seized proceeds, former Attorney General Richard Thornburgh stated: "It's satisfying to think that it's now possible for a drug dealer to serve time in a forfeiture-financed prison after being arrested by agents driving a forfeiture-provided automobile while working in a forfeiture-funded sting operation."⁶ While this concept may appeal to our sense of justice, it may compromise constitutional principles.

Since forfeiture proceedings are civil actions, many of the constitutional protections of criminal proceedings do not apply. For example, claimants do not have the full Fifth Amendment "right to silence." If a claimant chooses to "take the Fifth" in civil proceedings, a court may draw an adverse inference from her silence.⁷

This Comment will evaluate the constitutional implications of drawing such negative inferences from a claimant's decision to invoke her Fifth Amendment privilege in forfeiture actions under the Drug Abuse and Prevention Act.⁸ First, this Comment will explore the historical background of forfeiture and discuss the Fifth Amendment and any implications that the amendment's historical development might have on its use in forfeiture proceedings. Then, this Comment will analyze the Supreme Court's holdings with regard to the use of the Fifth Amendment in forfeiture actions and will analyze its more recent holdings that arguably broaden the constitutional protections for claimants in forfeiture proceedings. A discussion of the constitutional implications of drawing a negative inference from a claimant's silence will conclude this Comment.

II. A CIVIL CLAIMANT'S CONSTITUTIONAL RIGHTS

Civil claimants do not always receive the same constitutional

745 (E.D. Pa. 1973) (Porsche forfeited when its occupant bought a small quantity of heroin).

⁵ 21 U.S.C. § 881(e) (1988). See also Leach & Malcolm, *supra* note 1, at 251 nn.37-38 (showing that the Department of Justice has committed millions of dollars of forfeited funds to the federal prison system).

⁶ Leach & Malcolm, *supra* note 1, at 251 nn.37-38 (citing *Seized Drug Funds to Pay for Prisons*, WASH. TIMES, Sept. 28, 1989, at A10). Thornburgh announced that \$229 million from forfeited funds would be used to build prison cells. *Id.*

⁷ See, e.g., *United States v. 900 Rio Vista Blvd.*, 803 F.2d 625 (11th Cir. 1986) (finding that a negative inference may be taken from a claimant's silence in a civil forfeiture proceeding as long as the court's final judgment is not based solely on that inference). *But see United States v. Property Located at 15 Black Ledge Drive*, 897 F.2d 97 (2d Cir. 1990) (stating that negative inferences may be impermissible in the forfeiture context "given the severity of the deprivation at risk").

⁸ 21 U.S.C. § 881(a)-(k) (1988).

rights awarded criminal defendants.⁹ This is problematic in civil forfeiture proceedings because often the government simultaneously institutes both criminal and civil actions against a suspected drug trafficker¹⁰ and evidence in a civil action may be used in a criminal action.¹¹ Basically, the civil claimant unwillingly may provide the government with the information that may convict her.¹²

One reason forfeiture proceedings operate in the civil arena is because of the "guilty property" fiction.¹³ In civil forfeiture actions, the property is the defendant, not its owner.¹⁴ Property has no constitutional rights; therefore, owners have not always received full consti-

⁹ The Sixth Amendment's Confrontation Clause does not apply in civil forfeiture proceedings, *Austin v. United States*, 113 S. Ct. 2801, 2804 n.4 (1993), nor does the Due Process requirement of guilt beyond a reasonable doubt. *Id.* The state may take an innocent owner's property that has been an instrumentality of a crime under a remedial equitable state statute without violating the Due Process Clause or the Takings Clause. *See Bennis v. Michigan*, 1996 WL 88269, at *6-7 (U.S. Mar. 4, 1996). The Double Jeopardy Clause does not apply to civil forfeiture cases that may be characterized as remedial. *Austin*, 113 S. Ct. at 2804 n.4. *But see United States v. One 1978 Piper Cherokee Aircraft*, 1994 WL 528447 (9th Cir.). In *Piper Cherokee* juries found against claimant in both civil and criminal proceedings. *Id.* Later, when the claimant's criminal conviction was reversed, the Ninth Circuit reversed and remanded the civil forfeiture of the aircraft, finding that the forfeiture was premised on the same facts as the criminal charges and therefore fell under the Double Jeopardy Clause. *Id.*

Sometimes a civil claimant may have the right to a jury trial. The government may bring a forfeiture proceeding through the Federal Rules of Civil Procedure Supplemental Rules of Admiralty Rule C, per 21 U.S.C. § 881 (b), or through other statutory avenues pursuant to § 881(d). While claimants in a common law court may request a jury trial under the Seventh Amendment, parties in an admiralty suit are specifically denied the right to a jury trial. FED. R. CIV. PROC. 38(e). *See also* Schecter, *supra* note 3, at 1167 (discussing the injustice of the denial of a jury trial in admiralty suits). The Seventh Circuit has recently held that it will grant a jury trial to property seized on land under admiralty rules. *United States v. One 1976 Mercedes Benz 280S*, 618 F.2d 453 (7th Cir. 1980).

¹⁰ *See, e.g., United States v. Kordel*, 397 U.S. 1, 11-12 (1970) (holding that the government may bring both proceedings except when "the Government has brought a civil action solely to obtain evidence for its criminal prosecution or has failed to advise the defendant in its civil proceeding that it contemplates his criminal prosecution"). *See also United States v. Rural Route 1, Box 137-B*, 24 F.3d 845, 851 (6th Cir. 1994).

¹¹ *Lodon v. Patterson*, 463 F.2d 95, 97-98 (9th Cir. 1972), *cert. denied*, 411 U.S. 906 (1973) (holding that a deposition voluntarily given in a civil action was admissible in a subsequent criminal action when the defendant knew of his Fifth Amendment privilege and that there were possible criminal charges).

¹² Parties who voluntarily testify in a civil proceeding waive their privilege and are therefore bound to answer any questions during their cross-examination that were made relevant by their direct examination. *Brown v. United States*, 356 U.S. 148 (1958). Additionally, prosecutors may use civil discovery to obtain information about other drug crimes that may be related to the property. *See, e.g., United States v. Michelle's Lounge* 39 F.3d 684, 701 (7th Cir. 1994). Both parties may abuse discovery by using information obtained in one proceeding in another. *Id.*

¹³ *See generally Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 684 (1974) (detailing the history of the guilty property fiction).

¹⁴ *See* discussion *infra* part III.A-B.

tutional protection, such as the Fifth Amendment right to due process, the Sixth Amendment right to a speedy trial, or the Eighth Amendment right against excessive punishment.¹⁵ Since the owner's guilt or innocence is not at issue, sometimes a guiltless owner will lose her property.¹⁶

The government has attempted to address this problem by including "innocent owner" provisions in some forfeiture statutes.¹⁷ These provisions require the owner to prove that she did not consent nor did she know that her property was going to be used in association with any drug transactions.¹⁸ This burden is often hard to meet; consequently, it does not protect many owners. For example, the innocent owner provision has not applied to parents who let their child borrow their car, knowing that their child had used drugs in the past or had associated with people who use drugs.¹⁹

Although the Supreme Court recently reexamined civil forfeiture laws and ensured claimants their Fifth Amendment Due Process rights and the protection of the Eighth Amendment's Excessive Fines Clause,²⁰ important constitutional rights still remain undefined in the civil forfeiture context.²¹ An individual's Fifth Amendment right not

¹⁵ See *supra* note 9 and accompanying text. Claimant's now have some of these rights. See *Austin v. United States*, 113 S. Ct. 2801 (1993) (Eighth Amendment's excessive fines clause applies in civil forfeiture actions); *United States v. James Daniel Good Real Property*, 114 S. Ct. 492 (1993) (holding that the Fourteenth Amendment's due process clause requires notice and a preseizure hearing before the government seizes real property).

¹⁶ See, e.g., *Bennis v. Michigan* 1996 WL 88269 (U.S. Mar. 4, 1996) (upholding the forfeiture of an automobile co-owned by a husband and wife without any compensation to the innocent wife when the automobile was forfeited to the state upon the husband's conviction of gross indecency with a prostitute inside the automobile); *Calero-Toledo*, 416 U.S. at 690 (upholding the forfeiture of a yacht although it was the lessees of the yacht that brought marijuana aboard her).

¹⁷ 21 U.S.C. § 881(a)(4)(C), (a)(6)-(7) (1988). Recently, the Supreme Court noted that the inclusion of an innocent owner defense in this statute indicates that the purpose of the statute is to punish. *Austin*, 113 S. Ct. at 2810; but see *Bennis*, 1996 WL 88269, *6-7 (In an opinion that was not joined by a majority of the court Justice Rehnquist noted that a state remedial civil forfeiture statute was both punitive, deterrent, and remedial.). Commentators have argued that the "innocent owner" provisions do not sufficiently ameliorate the harshness of forfeiture laws. See, e.g., Schecter, *supra* note 3, at 1180.

¹⁸ 21 U.S.C. § 881(a)(4)(C), (a)(6)-(7) (1988).

¹⁹ *United States v. One 1978 Chrysler Le Baron Station Wagon*, 648 F. Supp. 1048, 1051 (E.D.N.Y. 1986) (finding that parents who knew that their child had a minor criminal record did not take reasonable care when they let him drive their car).

²⁰ See *Austin v. United States*, 113 S. Ct. 2801 (1993); *United States v. James Daniel Good Real Property*, 114 S. Ct. 492 (1993). But see *Bennis v. Michigan*, 1996 WL 88269 (U.S. Mar. 4, 1996).

²¹ See, e.g., *United States v. Riverbend Farms, Inc.*, 847 F.2d 553, 556 (9th Cir. 1988) (civil forfeiture statutes do not afford the full spectrum of constitutional protections); *United States v. D.K.G. Appaloosas, Inc.*, 829 F.2d 532, 540 (5th Cir. 1987) ("It is true that forfeiture statutes like Section 881 have been considered criminal for certain purposes . . . However, for other purposes, the civil nature of forfeiture procedures has been held to bar

to incriminate herself lingers in this nebulous arena.²² Can one infer "guilt" when a claimant exercises her Fifth Amendment privilege not to incriminate herself in a civil forfeiture proceeding?

In *Baxter v. Palmigiano*²³ a prison disciplinary board was permitted to infer guilt from a prisoner's silence in the face of charges against him.²⁴ The Supreme Court held that in prison administrative disciplinary proceedings "an adverse inference in a quasi-criminal action from assertion of the Fifth Amendment privilege does not impermissibly burden a claimant's constitutional rights."²⁵ The circuit courts have disagreed in their interpretations of the *Baxter* holding as applied to proceedings under the Drug Abuse and Prevention Act.²⁶

III. FORFEITURE

A. HISTORICAL BACKGROUND

Historically, statutory *in rem* forfeiture has been considered a form of punishment.²⁷ However, commentators have disagreed about its origins and the purpose of the "sanctions" it imposes. In *The Common Law*, Oliver Wendall Holmes argues that contemporary forfeiture statutes arose primarily as a legal justification for the "deodand,"²⁸ an object that caused the death of another²⁹ and was forfeited to the

the application of important constitutional protections.") (citation omitted), *cert. denied*, 108 S. Ct. 1270 (1988).

²² The Fifth Amendment in the United States Constitution provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself . . ." U.S. CONST. amend. V.

²³ 425 U.S. 308 (1976).

²⁴ *Id.* at 317-18.

²⁵ *Id.*

²⁶ See *United States v. Property Located at 15 Black Ledge Drive*, 897 F.2d 97, 103 (2d Cir. 1990) (stating that negative inferences may be impermissible in the forfeiture context "given the severity of the deprivation at risk"); *United States v. A Single Family Residence*, 803 F.2d 625, 630 (11th Cir. 1986) (holding that a negative inference may be taken from a claimant's silence in a civil forfeiture proceeding as long as the court's final judgment is not based solely on the inference); *United States v. United States Currency*, 626 F.2d 11 (6th Cir.), *cert. denied*, 449 U.S. 993 (1980) (holding that a negative inference may not be taken from a claimant claiming her Fifth Amendment privilege to remain silent because claimants have the same safeguards as criminal defendants).

²⁷ *Austin v. United States*, 113 S. Ct. 2801, 2806 (1993).

²⁸ Deodand derives from the Latin *Deo dandum*, "to be given to God." See *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 681 n.16 (1974). Holmes traces the development of the deodand to Exodus 28:21: "If an ox gore a man or a woman, that they die: then the ox shall be surely stoned, and his flesh shall not be eaten; but the owner of the ox shall be quit." OLIVER W. HOLMES, *THE COMMON LAW* 31 (Mark Dewolfe Howe ed., 1963). But see Jacob J. Finkelstein, *The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty*, 46 TEMP. L.Q. 169 (arguing that deodands and forfeiture laws developed independently).

²⁹ See HOLMES, *supra* note 28, at 10, 31.

Crown.³⁰ The deodand was tainted by the death it had caused,³¹ so with its value, the Crown purportedly paid the church to say masses for the dead person's soul.³² Holmes argues that the deodand was a substitute for revenge.³³ Since the owner of the object did not suffer any liability other than forfeiture of her property, all guilt for the act was held by the *object*, not the *perpetrator*.³⁴

In contrast, Blackstone believed that the deodand had deeper significance than a family's need for revenge. He argued that ultimately the only valid foundation for forfeiture lies in the substance of the contract that individuals make when forming a community.³⁵ If an individual transgresses the law of a society, she breaks the social contract.³⁶ Consequently, she forfeits to the state any rights or privileges derived from that social contract.³⁷

³⁰ 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 290 (1st ed. 1765, 1979); see also *Calero-Toledo*, 416 U.S. at 680-81.

³¹ Tamara R. Piety, *Scorched Earth: How the Expansion of the Civil Forfeiture Doctrine Has Laid Waste to Due Process*, 45 U. MIAMI L. REV. 911, 929 (1991) (quoting Jay A. Rosenberg, Comment, *Constitutional Rights and Civil Forfeiture Actions*, 88 COLUM. L. REV. 390, 391 (1988)).

³² See *id.* See also *United States v. Schmalfeldt*, 657 F. Supp. 385, 387-89 (W.D. Mich. 1987) (tracing the development of the deodand).

³³ HOLMES, *supra* note 28, at 31. Common law mandated forfeiture for felonies and treason. BLACKSTONE, *supra* note 30, at 299. Those that breached the king's peace through criminal acts lost the privilege of owning property. *Id.* Additionally, objects used in violation of English customs and revenue laws were statutorily forfeited. *Id.* at 261-62. Usually, these forfeitures were enforced in the Court of Exchequer in the same *in rem* procedures used to seize the property of felons. *Id.* A problem with this theory is that objects often caused the death—objects that may have even belonged to the victim. See Finkelstein, *supra* note 28, at 182.

³⁴ BLACKSTONE, *supra* note 30, at 261-62. However, Blackstone notes that forfeiture of chattels was also grounded, in part, on the negligence of the owner. *Id.* at 290-91. If an individual were killed by a moving object, the owner probably could have avoided the accident; failure to avoid the accident constituted negligence. *Id.* From this perspective, loss of the object was essentially a punishment. *Id.* Support for Blackstone's argument may be found in the elimination of the deodand in England during the same year (1846) as the passage of the first statute, "Act For Compensating Families of Persons Killed By Accidents" (also known as "Lord Cambell's Act"), creating a private cause of action for wrongful death. See Finkelstein, *supra* note 28, at 170-73 & nn.1-16.

³⁵ Blackstone states:

The true reason and only substantial ground for any forfeiture of crimes consist in this; that all property is derived from society, being one of those civil rights which are conferred upon individuals, in exchange for that degree of natural freedom which every man must sacrifice when he enters into social communities. If therefore a member of any national community violates the fundamental contract of his association, by transgressing the municipal law, he forfeits his right to such privileges as he claims by that contract; and the state may very justly resume that portion of property, or any part of it, which the laws have before assigned him.

BLACKSTONE, *supra* note 30, at 289.

³⁶ *Id.*

³⁷ *Id.* Some commentators disagree with Blackstone, arguing that the deodand shifted the focus from an owner, and the justification for punishing her, to the object. See Piety,

Recent commentators, agreeing in part with Blackstone, contend that early English forfeitures were imposed on individuals for the benefit of the community; an owner's guilt or innocence was moot³⁸ because the good of the community transcended the needs of the individual.³⁹ Therefore, forfeiture was not about liability, but evolved as a means to compensate the King and society for the loss of one of its components.⁴⁰ Whatever one's views of its derivations, deodands were a valuable source of revenue for the Crown and continued in England until the mid-nineteenth century when they were abolished by statute.⁴¹

Modern forfeiture acts originated during England's seventeenth century maritime expansion.⁴² Forfeiture proceedings arose in admiralty as a response to the needs of the merchant class.⁴³ Through forfeiture, the government could proceed in an *in rem* action against the property.⁴⁴

Although deodands never became part of the common law in

supra note 31, at 931.

³⁸ HOLMES, *supra* note 28, at 23. See also Michael D. Dantrick, Note, *The "Innocent Owner" Defense in Civil Drug Forfeiture After United States v. 92 Buena Vista Avenue: Still an Uphill Battle for Third Party Claimants*, 1994 WIDENER J. PUB. L. 995, 999 (Dantrick quotes a medieval English author who described forfeiture as "[W]here a man kylleth a nother with the sworde of J[ohn] at [S]tyle the sworde shal[I] be forfet as deodande [and] yet no defaulte [was] in the owner.")

³⁹ Finkelstein, *supra* note 28, at 250. The deodand was only used in wrongful death cases. Moreover, the death causing instrument was forfeited even if it had belonged to the victim. *Id.* at 182; James R. Maxeiner, Note, *Bane of American Forfeiture Law—Banished at Last*, 62 CORNELL L. REV. 768, 772 n.31 (1977).

⁴⁰ Finkelstein, *supra* note 28, at 183 (arguing that the real rationale for the deodand institution lay in the assumption by the state—in England, i.e., the Crown—"of the role of the vicar of transcendent concerns and values, superseding the Church in most of its authority in these domains"); see also Piety, *supra* note 31, at 931-32.

⁴¹ In 1846 Parliament abolished the law of deodands when it passed An Act to Abolish Deodands, 1846, 9 & 10 Vict., ch. 62 (Eng.). However, at the same time, Parliament passed Lord Campbell's Act, which created a private cause of action for wrongful death. See *supra* note 34 and accompanying text.

⁴² Schecter, *supra* note 3, at 1154. Admiralty *in rem* actions came from the mid-seventeenth century English Navigation Acts, which were enacted to compensate for the inability of the admiralty courts to assert *in personam* jurisdiction. Piety, *supra* note 31, at 935-36. Merchants liked the *in rem* proceeding because it gave them a significantly greater chance at compensation than would a similar suit at common law. Schecter, *supra* note 3, at 1154. Governments liked it because it allowed the forfeiture of ships as a penalty when owners attempted to avoid paying customs duties. Piety, *supra* note 31, at 935-36. See also *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 684 (1974); *The Palmyra*, 25 U.S. 1 (12 Wheat.) (1827).

⁴³ See Schecter, *supra* note 3, at 1154. Because ships were often owned by more than one person, at common law a merchant would have to bring separate *in personam* suits against each of the owners, who sometimes numbered 30 or more. *Id.* n.27. See also Piety, *supra* note 31, at 935-36.

⁴⁴ See Schecter, *supra* note 3, at 1154; Piety, *supra* note 31, at 935-36.

America,⁴⁵ forfeiture laws did cross the Atlantic. Forfeiture for stolen goods or goods in violation of the revenue laws was authorized first by English statutes and then, after the establishment of the United States government, by American revenue acts.⁴⁶ During the American Revolutionary War and the Civil War, forfeiture statutes were an important means of crippling enemies and of raising revenue.⁴⁷

A modern day civil forfeiture provision appears within The Drug Abuse Prevention and Control Act.⁴⁸ It, too, like the forfeiture statutes during the Revolutionary and Civil Wars, is meant to cripple “enemies” and raise revenue. Toward this end, it incorporates admiralty and custom law procedures.⁴⁹ Through these procedures, the government can proceed against property *in rem*.⁵⁰ Since the government proceeds against the “guilty” property and not against an individual, *in rem* actions offer the government the benefit of conducting the proceedings in a civil arena where there is a lower burden of proof and fewer constitutional protections.

The Supreme Court regularly has recited the “guilty property” fiction as support for its holdings regarding the constitutionality of forfeiture procedures.⁵¹ The Court has stated that it is the thing that has committed the offense.⁵² Since the property is the offender, the

⁴⁵ *Calero-Toledo*, 416 U.S. at 682. See also Terrance O. Reed & Joseph D. Gill, *RICO Forfeitures, Forfeitable “Interests” and Procedural Due Process*, 62 N.C. L. REV. 57 (1983) (giving the history of the deodand).

⁴⁶ Schecter, *supra* note 3, at 1153 (noting that the fifth statute passed by the first Session of the United States Congress “provided for the forfeiture of ships when the owners did not pay customs duties”). See also *Calero-Toledo*, 416 U.S. at 683; *Boyd v. United States*, 116 U.S. 616, 623 (1886).

⁴⁷ During the Revolutionary War, forfeiture statutes were an important means of taking enemy property. Leach & Malcolm, *supra* note 1, at 249; see, e.g., *Miller v. United States*, 78 U.S. (11 Wall.) 268 (1871) (permitting forfeiture of property of a northern rebel as an exercise of Congress’ war powers). Later, forfeiture statutes were used to seize Confederate property. Some commentators maintain “that were it not for these forfeitures, our country might not exist in its current form today.” Leach & Malcolm, *supra* note 1, at 249.

⁴⁸ 21 U.S.C. § 881(a)(1)-(7) (1988).

⁴⁹ 21 U.S.C. § 881(b)-(c) (1988). Although a criminal forfeiture provision also exists, it is used less frequently. 21 U.S.C. § 853 (1988).

⁵⁰ See *Austin v. United States*, 113 S. Ct. 2801, 2809 (1993).

⁵¹ See, e.g., *Bennis v. Michigan*, 1996 WL 88269 (U.S. Mar. 4, 1996) (the Court’s most recent citing of the guilty property fiction); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 684 (1974) (citing the history of the guilty property fiction); *Various Items of Personal Property v. United States*, 282 U.S. 577, 581 (1931) (distinguishing between *in rem* and *in personam* actions); *J.W. Goldsmith Jr.-Grant Co. v. United States*, 254 U.S. 505, 510 (1921) (stating that it is the object that is the offender); *The Palmyra*, 25 U.S. 1, 14 (12 Wheat.) (1827) (attributing the guilty property fiction to admiralty, commenting that “[t]he thing is here primarily considered as the offender or rather the offense is attached primarily to the thing; and this, whether the offense be *malum prohibitum* or *malum in se*”).

⁵² *J.W. Goldsmith Jr.-Grant Co.*, 254 U.S. at 510.

property is the defendant.⁵³

Through the guilty property fiction, the government has been able to pursue two different proceedings, criminal and civil; a proceeding *in rem* is fully independent of a proceeding *in personam*.⁵⁴ With the property as the defendant, the government arguably can circumvent rights granted to individuals charged with crimes.⁵⁵ In this way, civil forfeiture proceedings are similar to seventeenth century English procedures; they "purge" the community of guilty "objects" for the general good.⁵⁶

B. DRUG ABUSE PREVENTION AND CONTROL ACT

Under the Drug Abuse Prevention and Control Act, codified in 21 U.S.C. § 881(a)-(k), the United States government may seize all monies used in drug transactions, properties used to contain, transport, or facilitate the transportation of drugs, and real property which facilitates drug transactions.⁵⁷ In addition, all proceeds from such transactions are subject to forfeiture.⁵⁸ The government interprets the term "proceeds" broadly to include all property that may have a connection with drug transactions.⁵⁹

⁵³ *Id.* (holding that "Congress interposes the core and responsibility of their owners in and of the prohibition of the law and its punitive provisions, by ascribing to the property a certain personality, a power of complicity and guilt in the wrong"). See also *The Palmyra*, 25 U.S. at 14-15; *Calero-Toledo*, 416 U.S. at 683-6; *United States v. One 1985 Mercedes*, 917 F.2d 415, 419 (9th Cir. 1990).

⁵⁴ *The Palmyra*, 25 U.S. at 14-15 (1827). See also *Dobbin's Distillery v. United States*, 96 U.S. 395, 401 (1877) (holding that no guilt attaches to the person in *in rem* proceedings).

⁵⁵ Sandra Guerra, *Reconciling Federal Asset Forfeitures and Drug Offense Sentencing*, 78 MINN. L. REV. 805, 816 (1994).

⁵⁶ A Senate Report states that the government needs "new approaches that will deal not only with individuals, but also with the economic base through which those individuals constitute such a serious threat to the economic well-being of the Nation. In short, an attack must be made on their source of economic power itself, and the attack must take place on all available fronts . . ." S. REP. NO. 617, 91st Cong., 1st Sess. 79 (1969). Yet sanctions imposed for acts that are "public wrongs" are usually criminal. See Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L.J. 1795, 1806 (1992). Mann distinguishes the typical criminal paradigm from the typical civil paradigm by noting that the government imposes sanctions for criminal acts because criminal acts are "public wrongs" while civil sanctions apply "to conduct that causes actual damage to an individual interest . . ." *Id.* Thus, the criminal law has been characterized as "an instrument for protecting the public." *Id.* at 1807. Because punitive civil sanctions do not fit into either paradigm, they have been frequently challenged. *Id.* at 1813.

⁵⁷ 21 U.S.C. § 881(a)(1)-(7) (1988). It is irrelevant whether the drugs are meant to be sold or are meant for personal use. See, e.g., *United States v. One Clipper Bow Ketch Nisku*, 548 F.2d 8, 11 (1st Cir. 1977) (holding that "the statutory language belies the argument that the forfeiture provisions are limited to commercial trafficking, and the uniform course of judicial decisions indicates that it is not the role of the courts to mitigate the harshness of these statutes").

⁵⁸ 21 U.S.C. § 881(a)(6).

⁵⁹ 21 U.S.C. § 881(a)(6) authorizes forfeiture of "all monies, negotiable instruments,

The government's interest in the forfeited property vests at the time of the illegal act; the forfeiture proceeding perfects this interest.⁶⁰ This is called the "relation back doctrine."⁶¹ It allows the government to take all traceable proceeds, including derivative proceeds, such as interest, income, and dividends.⁶²

Property may be seized by the government through either an admiralty or a statutory route.⁶³ Once the government has seized the property, it must follow the forfeiture proceeding outlined in the customs laws⁶⁴ whereby the government may forfeit property through either a summary or a judicial procedure.⁶⁵ Owners may purchase back their property in a summary procedure or they may request a judicial proceeding.⁶⁶ To initiate a judicial proceeding, they must file a claim establishing their ownership interest, and demonstrate standing.⁶⁷ Only then must the government prove that it had probable cause to seize the property.⁶⁸

Courts have defined the government's burden of probable cause loosely,⁶⁹ to establish a *prima facie* case, the government need only

securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance . . . [and] all proceeds traceable to such an exchange"

⁶⁰ "All right, title, and interest in property described in subsection (a) shall vest in the United States upon commission of the act giving rise to forfeiture under this section." 21 U.S.C. 881(h) (1988). *But see* *United States v. 92 Buena Vista Ave.*, 113 S. Ct. 1126 (1993) (weakening the relation back doctrine by holding that a government's title in property is not self-executing and does apply until the government perfects its title in the property by obtaining a forfeiture order).

⁶¹ In *Buena Vista*, Scalia describes the "relation back doctrine" as "a doctrine of retroactive vesting of title that takes effect only upon entry of the judicial order of forfeiture or condemnation." 113 S. Ct. at 1128.

⁶² *See* *United States v. One Parcel of Real Estate*, 675 F. Supp. 645 (D. Fla. 1987) (Narcotics traffickers used their profits to buy property in North Carolina. Later they sold this property and bought real estate in Florida. The government seized the Florida property as derivative proceeds.).

⁶³ 21 U.S.C. § 881(b) (1988). *See* *Schechter*, *supra* note 3, 1167-68 (discussing the constitutionality of the use of admiralty rules in forfeiture proceedings).

⁶⁴ 21 U.S.C. § 881(d) (1988).

⁶⁵ 19 U.S.C. § 1606 (1988).

⁶⁶ *Id.* § 1607.

⁶⁷ Rule C(6) of the Supplemental Rules for Certain Admiralty and Maritime Claims of the Federal Rules of Civil Procedure, 28 U.S.C. Rule C(6) (1988).

⁶⁸ 19 U.S.C. § 1615 (1988); *see, e.g.*, *United States v. 4492 S. Livonia Road*, 889 F.2d 1258, 1267 (2d Cir. 1989). Constitutional challenges to the probable cause standard have not been successful. *See* *United States v. \$2,500 in United States Currency*, 689 F.2d 10, 15-16 (2d Cir. 1982), *cert. denied*, 465 U.S. 1099 (1984); *United States v. United States Currency Totaling \$87,279*, 545 F. Supp. 1120 (S.D. Ga. 1982) (finding that the test for determining probable cause for forfeitures is the same as the test applied to arrests, searches, and seizures).

⁶⁹ *Brinegar v. United States*, 338 U.S. 160, 175 (1949) (finding that "probable cause" is not a technical term but involves "probabilities" and "[t]he standard of proof is accordingly

introduce evidence that establishes a "reasonable ground for belief [that the property is narcotics proceeds], supported by less than prima facie proof, but more than mere suspicion."⁷⁰ Courts find probable cause under a "totality of the circumstances standard."⁷¹ The rules of evidence are relaxed for this purpose. Often circumstantial evidence will show probable cause.⁷² Hearsay evidence is also admissible,⁷³ and evidence acquired after the seizure of the property may also be used.⁷⁴ Additionally, the prosecutor does not need to introduce evidence establishing a direct connection between the seized property and the illegal activity.⁷⁵ Only after a claimant presents her evidence must the government produce "trial-quality" evidence.⁷⁶

After the government shows probable cause, the burden shifts to the claimant.⁷⁷ She must show that the property is not subject to forfeiture by a preponderance of the evidence.⁷⁸ Unlike the govern-

correlative to what must be proved").

⁷⁰ See, e.g., *United States v. Rural Route 1, Box 137-B*, 24 F.3d 845, 848 (6th Cir. 1994); *United States v. \$250,000 in United States Currency*, 808 F.2d 895 (1st Cir. 1987). The standard for probable cause is similar to the standard for obtaining a search warrant. See, e.g., *United States v. \$191,910.00 in United States Currency*, 16 F.3d 1051, 1071 (9th Cir. 1994); *United States v. Lot 9, Block 2 of Donnybrook Place*, 919 F.2d 994, 998 (5th Cir. 1990).

⁷¹ *United States v. Thomas*, 913 F.2d 1111 (4th Cir. 1990) (reversing a district court who denied forfeiture after considering the evidence piecemeal because "parsing evidence in isolation for a fatal flaw threatened to transform the standard of 'probable cause' into a steep threshold requirement that would impede the operation of forfeiture statutes."). The probable cause standard is not totally favorable to the government. See *Leach & Malcolm*, *supra* note 1, at 255. Sometimes courts do not allow the government to present their probable cause evidence to a jury. *Id.* at 256. The judge makes a legal determination regarding the government's evidence and informs the jury. *Id.* Then the claimant presents her evidence. *Id.*

⁷² See, e.g., *United States v. 15 Black Ledge Drive*, 897 F.2d 97, 101 (2d Cir. 1990); *United States v. Edward*, 885 F.2d 377 (7th Cir. 1989).

⁷³ See, e.g., *United States v. 1964 Beechcraft Baron Aircraft*, 691 F.2d 725, 728 (5th Cir. 1982); *Ted's Motors v. United States*, 217 F.2d 777, 780 (8th Cir. 1954).

⁷⁴ *United States v. Four Parcels of Real Property*, 941 F.2d 1428, 1439 n.24 (11th Cir. 1991).

⁷⁵ *Id.*; *United States v. \$5,644,540.00 in United States Currency*, 799 F.2d 1357 (9th Cir. 1986); *United States v. Four Million, Two Hundred Fifty-Five Thousand Dollars*, 762 F.2d 895 (11th Cir. 1985), *cert. denied*, 474 U.S. 1056 (1986). *But see* 124 CONG. REC. 34,671 (1978) (The joint House-Senate explanation of the Senate amendment states that "due to the penal nature of forfeiture statutes, it is the intent of these provisions that property would be forfeited only if there is a substantial connection between the property and the underlying criminal activity which the statute seeks to prevent").

⁷⁶ Admissible evidence is evidence that meets the standards of the Federal Rules of Evidence and the Federal Rules of Civil Procedure. See generally *Mann*, *supra* note 56, at 1810-12 (arguing the procedural differences between civil and criminal law are based on the different public interests "implicated by wrongful conduct").

⁷⁷ *Austin v. United States*, 113 S. Ct. 2801, 2815 (1993) (Scalia, J., concurring).

⁷⁸ *United States v. Rural Route 1, Box 137-B*, 24 F.3d 845, 848 (6th Cir. 1994). The

ment, a claimant may not use hearsay evidence to meet her burden.⁷⁹ To reclaim her property she must prove that her property is not "guilty" by establishing one of the following: she had no knowledge of the drug violation and she did everything she reasonably could to prevent the violation from occurring;⁸⁰ the property was stolen or it is a common carrier;⁸¹ or there is no traceable connection between the property and unlawful drug transactions.⁸² Only "innocent" owners of real estate or conveyances are exempt from forfeiture if they can prove their lack of knowledge or consent.⁸³

Since these are affirmative defenses regarding knowledge,⁸⁴ the claimant faces a dilemma; if she fails to answer the pleading or comply with discovery, she may waive her right to testify at trial.⁸⁵ Yet if she

circuit courts have found that the shifting of the burden of proof is not unconstitutional because of the historically civil nature of forfeiture statutes. *See, e.g.*, *United States v. Santoro*, 866 F.2d 1538, 1543-44 (4th Cir. 1989) (Congress may constitutionally alter the burden of proof in civil proceedings).

⁷⁹ FED. R. EVID. 802 (hearsay not admissible). However, if the claimant's evidence falls under one of the exceptions to the hearsay rule, it may be admissible. *See* FED. R. EVID. 803, 804 (listing hearsay exceptions).

⁸⁰ 21 U.S.C. § 881(a)(4)(C), (a)(6)-(7) (1988) (establishing an innocent owner defense); *see also* *United States v. One Parcel of Land Known as Lot 111-B*, 902 F.2d 1443, 1445 (9th Cir. 1990).

⁸¹ 21 U.S.C. § 881(a)(4)(A)-(B), (a)(7) (providing exceptions for common carriers and stolen property).

⁸² *Id.* at § 881(a)(6)-(7). The "innocent owner" provision is often interpreted narrowly. *See, e.g.*, *United States v. One 1957 Rockwell Aero Commander 680 Aircraft*, 671 F.2d 414 (10th Cir. 1982). The court found that the owner was not an innocent owner within the scope of the provision because the owner had been negligent. *Id.* at 418. The owner took possession of the plane as collateral for a defaulted loan but left it in a hanger. *Id.* at 415-16. When the plane was used for a drug run, the owner could not prove that it was stolen. *Id.* The court found that the owner had not "done all that could reasonably be done" to protect against the illegal use. *Id.* at 418. *But see* *United States v. Four Million, Two Hundred Fifty-Five Thousand*, 762 F.2d 895, 906 (11th Cir. 1985) (holding that the "innocent owner" defense depends on claimants' actual, not constructive, knowledge), *cert. denied*, 474 U.S. 1056 (1986); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 689-90 (1974) (stating in dicta that it may be unconstitutional to seize an "exceptionally innocent" owner's property).

⁸³ An innocent owner is one who had not consented or had knowledge of the illegal use of her property. 21 U.S.C. § 881(a)(4)(C), (a)(6)-(7) (1988). Note that some civil forfeiture statutes do not have innocent owner provisions. If such statutes are considered remedial, then an innocent owner is not protected from forfeiture of her property. *See* *Bennis v. Michigan*, 1996 WL 88269 (U.S. Mar. 4, 1996) (Five to four decision with no majority opinion holding that an innocent owner was not protected from civil forfeiture under the Due Process or the Takings Clause).

⁸⁴ It is constitutional to put the burden of an affirmative defense on a defendant. *Patterson v. New York*, 432 U.S. 197, 210 (1977). Although the government is required to prove every element of the charged offense, it is not required to prove the absence of an affirmative defense. *Leland v. Oregon*, 343 U.S. 790, 795-96 (1952).

⁸⁵ If the owner files a claim, she will give the government her identity, which may lead to criminal charges. But if she does not file a claim, she has no standing to pursue her ownership interests, and the property will be lost to her by default. *See* *United States v.*

does not answer, she cannot establish a defense to the forfeiture.⁸⁶ More importantly, if she answers, she may incriminate herself with regard to any criminal proceedings that either have been filed, or will be filed.⁸⁷ Generally, courts have held that the civil proceeding does not bar the criminal proceeding because the civil proceeding does not require a showing of intent.⁸⁸ This dilemma has burdened the claimant's right to silence.⁸⁹

IV. FIFTH AMENDMENT

A. HISTORICAL BACKGROUND

A review of the history of the Fifth Amendment privilege against self-incrimination demonstrates that it evolved as a means to prevent governments from abusing their power. Prior to the establishment of the Fifth Amendment, governments regularly forced self-incriminating information from its citizens. Frequently, the government derived information from no more than an individual's silence, which they interpreted as a confession.

The Fifth Amendment's origins can be traced to English law.⁹⁰ It

\$321,470.00 in United States Currency, 874 F.2d 298, 303 (5th Cir. 1989); *United States v. Five Hundred Thousand Dollars*, 703 F.2d 1437 (11th Cir. 1984). Improperly filed claims, i.e. claims with conclusory allegations, may be struck as insufficient. *See Mercado v. United States Customs Service*, 873 F.2d 641 (2d Cir. 1989). If a substitute claim is not filed promptly, the property is forfeited. *Id.*

⁸⁶ *See United States v. Rylander*, 460 U.S. 752 (1983); *United States v. United States Coin and Currency*, 401 U.S. 715, 721-23 (1971). *See also United States v. One 1975 Ford Pickup Truck*, 558 F.2d 755, 756-57 (5th Cir. 1977) (holding that an un rebutted showing of probable cause sustains forfeiture). However, invocation of the "innocent owner" defense may waive a claimant's other privileges. *United States v. 281 Syosset Woodbury Road*, 862 F. Supp. 847, 854-55 (E.D.N.Y. 1994) (holding that invoking the innocent owner defense waives the marital communication privilege. The court found further that an adverse inference may be drawn from a refusal to waive the confidential marital communications privilege.).

⁸⁷ *See United States v. \$250,000 in U.S. Currency*, 808 F.2d 895, 900-01 n.22 (1st Cir. 1987) (describing the dilemma the claimant faced by noting that if the claimant "could prove that the money was proceeds from jewel thefts [and not narcotics], it would not be subject to forfeiture, but [the claimant] would have subjected to himself to prosecution for theft").

⁸⁸ *See Various Items of Personal Property v. United States*, 282 U.S. 577 (1931) (following an unsuccessful criminal prosecution with a civil forfeiture action does not constitute Double Jeopardy); *see also One Lot Emerald Cut Stones v. United States*, 409 U.S. 232, 234 (1972). For this reason, as well as the lower burden of proof, civil forfeitures have no collateral estoppel effect on criminal proceedings. *See United States v. U.S. Currency in the Amount of \$228,536.00*, 895 F.2d 908 (2d Cir.), *cert. denied*, 495 U.S. 958 (1990).

⁸⁹ *See Minnesota v. Murphy*, 465 U.S. 420 (1984) (holding that the "mere existence of a parallel proceeding is not a compulsion to testify protected by the Fifth Amendment"). In *Williams v. Florida*, 299 U.S. 78 (1970), the Supreme Court held that it is not unconstitutional to burden a defendant's right of silence.

⁹⁰ LEONARD W. LEVY, *ORIGINS OF THE FIFTH AMENDMENT* 42 (2d ed. 1986).

developed during the sixteenth century as a resistance to heresy proceedings in the English ecclesiastical courts.⁹¹ When heresy became more prevalent in England in the late fourteenth century, English ecclesiastical courts began to use the oath *ex officio*.⁹² The oath *ex officio* came from the *inquisitio* proceedings that dominated the European continent.⁹³ In the European proceeding the judge played the role of accuser, prosecutor, judge, and jury.⁹⁴ Before the proceeding, the suspect swore the oath *ex officio*, which required the suspect to tell the truth to all interrogatories.⁹⁵ The court compelled the witness to take this oath without knowing the charges, the accusers, or the evidence.⁹⁶

In these proceedings the defendant had the burden of proof; she had to establish her innocence.⁹⁷ Yet the oath provoked self-incrimination.⁹⁸ If the witness did not take the oath, under the *pro confesso* rule she was believed guilty. If she did take the oath, she risked being accused of perjury if she did not answer in the expected manner.⁹⁹

Initial opposition to the oath came primarily from the civil courts

⁹¹ *Id.*

⁹² In 1401 the statute "*De Haeretico Comburnedo*," also known as the "Statute *ex officio*" was passed. LEVY, *supra* note 90, at 57. The statute gave the ecclesiastical courts jurisdiction over all heretics. *Id.* at 58-59. The statute "effectively introduced the Inquisition to England." MARK BERGER, TAKING THE FIFTH 8 (2d ed. 1980). *De Haeretico Comburnedo* was enacted in response to Lollardy. *Id.* at 8. Lollardy developed from the teachings of John Wycliff. LEVY, *supra* note 90, at 54. Wycliff attacked the authority of the Pope and priesthood, denied transubstantiation, and translated the Scriptures into English. *Id.* *De Haeretico Comburnedo* allowed the burning of these "heretics." BERGER, *supra*, at 8. With the state's support, the ecclesiastical courts used the oath interrogation as an important procedural technique. *Id.*

⁹³ LEVY, *supra* note 90, at 42. The *inquisitio* originated on the European continent during the end of the twelfth century as a method of discovering and punishing misconduct in the clergy and later, was adopted to eradicate heresy. *Id.* at 20-37.

⁹⁴ *Id.* at 23.

⁹⁵ The oath was originally known as the oath *de veritate dicenda*, but because it became associated with a proceeding in which "the judged served *ex officio* as indicator, assailant, and convictor," it was also called the oath *ex officio*. LEVY, *supra* note 90, at 23-24.

⁹⁶ *Id.*; see also BERGER, *supra* note 92, at 6.

⁹⁷ BERGER, *supra* note 92, at 38.

⁹⁸ Refusal to take the oath *ex officio* sometimes resulted in an individual being held *pro confesso* (as though she confessed) and *convicto* (convicted for the crime charged). LEVY, *supra* note 90, at 32. However, generally the prisoner was punished only for contempt of court. *Id.* The silence of individuals who refused to respond to any questions after taking the oath was also taken as *pro confesso*. *Id.* at 55 (discussing the trial in 1392 of John Ash-ton) and at 75 (discussing the conviction in 1549 of Edmund Bonner, Bishop of London).

⁹⁹ LEVY, *supra* note 90, at 23-24. After Henry VIII repudiated the Pope, Sir Thomas More was executed for his failure to take the Oath of Supremacy and the oath *ex officio*. *Id.* at 69. He reportedly said, "thei offred me an othe by which I should be sworn to make true aunswere to suche thinges as shoulde be asked me on the Kinges behalfe, concerning the Kinges owne person Whereto I aunswered that verily I never purposed to swere any nooke othe more while I lived." *Id.* at 70.

who felt that the ecclesiastical courts were infringing on their jurisdiction.¹⁰⁰ The first recorded instance of someone objecting to the procedure and claiming an early form of the American Fifth Amendment occurred in 1532.¹⁰¹ Widespread resistance to the oath did not begin until 1554, when large numbers of Anglicans and Puritans were tried as heretics during the reign of Mary I.¹⁰²

Puritans refused to take the oath for many reasons. Some believed that the oath was barred by the Magna Charta's "law of the land" clause.¹⁰³ Some adopted the stance of the civil courts, arguing that the thirteenth century common law prohibited ecclesiastical encroachment on civil court jurisdiction.¹⁰⁴ Others contested that the common law forbade forcing self-incrimination.¹⁰⁵ And still others refused to take the oath on moral grounds.¹⁰⁶

In 1606, the appointment of Sir Edward Coke as chief justice of

¹⁰⁰ *Id.* at 12. See also Lisa Tarello, *The Fifth Amendment Privilege Against Self-Incrimination: The Time Has Come for the United States Supreme Court to End Its Silence on the Rationale Behind The Contemporary Application of the Privilege*, 27 NEW ENG. L. REV. 137, 140 (1992).

¹⁰¹ In 1532, John Lambert, who died at the stake, refused to answer by sworn statement one of the 45 articles charging him with Protestant convictions. LEVY, *supra* note 90, at 3. He stated "though I did remember . . . yet were I more than twice a fool to show you thereof; for it is written in your own law, 'No man is bound to bewray [accuse] himself.'" *Id.*

¹⁰² Mary I established the Court of High Commission which functioned as the ecclesiastical branch of the Privy Council and the Star Chamber. LEVY, *supra* note 90, at 76. She charged the Commission with inquiring into all heresies, including offenses against the church, offenses in the church, offenses against church property, failure to attend church, and all seditious words. *Id.* The letters creating the commission gave the commission discretionary power. *Id.* Extensive vocal opposition to the oath *ex officio* began in 1583 when Elizabeth I, following Mary's example, began using the High Commission to purge the country of heretics. BERGER, *supra* note 92, at 9-11. The High Commission had limited powers. It could imprison but it could not convict those that refused to take the oath—only the Star Chamber had the power to convict. *Id.* at 12. Opposition was usually futile. *Id.* Although Star Chamber proceedings had many common law protections, the oath could be administered in all but capital cases. *Id.*

¹⁰³ BERGER, *supra* note 92, at 13. The Magna Charta stated: "No Freeman shall be taken, or imprisoned, or be disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any otherwise destroyed; now will we not pass upon him, nor condemn him, but by lawful Judgment of his Peers, or by the Law of the Land." In re Winship, 397 U.S. 358, 378-79 (1970) (citing 9 Hen. 3, c. 29 (1225)).

¹⁰⁴ BERGER, *supra* note 92, at 12.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 13. In a trial for harboring the Jesuit, Father Edmund Campion, Sir Thomas Tresham stated:

For if I sweare falselie, I am perjured; if by my othe I accuse myselfe, I am condemned to the penaltie of the law and displeasure of my prince, which is contrarye to the law of nature *seipsum prodere* Secondlie, I should greatlly synne uncharitably to belye hym, to make hym and myselfe both, guyltie by my othe, who to my knowledge ar most innocent, which I am by Gods worde expreslie forbidden. Lastlie I should committ a grevous synne to sweare against the knowledge of my owne conscience

LEVY, *supra* note 90, at 103.

the Court of Common Pleas resulted in more resistance to the oath *ex officio*.¹⁰⁷ During Coke's tenure, he, as well as common law judges and members of Parliament, promoted the Latin maxim *nemo tenetur seipsum prodere*—no one is bound to accuse himself.¹⁰⁸ Their efforts met with some success. Their long campaign against the oath in England stimulated a growing belief that the oath was unjust because it violated human dignity and the human instinct for self-preservation by requiring defendants to accuse themselves.¹⁰⁹

Nonetheless, even at common law, the right against self-incrimination was limited.¹¹⁰ Although defendants could not be forced to answer, the prosecutor and the judge could construe their silence adversely.¹¹¹ More importantly, the indictment was a *prima facie* case against the defendant—there was no authentic presumption of innocence.¹¹² One commentator argues that if the defendant claimed his right to silence, “he could rely on a verdict of guilty,” meaning that “accused persons, whether in ecclesiastical or common-law courts still had no meaningful right against compulsory self-incrimination.”¹¹³

In 1662, enacted legislation forbade the use of the oath in any proceeding on the grounds that compelled self-accusation was unfair.¹¹⁴ Simultaneously, criminal procedures adopted civil rules that barred a party in interest from testifying;¹¹⁵ interested parties were deemed untrustworthy.¹¹⁶ Compulsory interrogation became pointless since an accused could not testify for or against herself.¹¹⁷

Although the right against self-incrimination is part of America's common law inheritance from England, its transition into America

¹⁰⁷ In 1616 Coke tried *Burrowes and Others v. The High Commission*. LEVY, *supra* note 90, at 254-55. He decided to make it the leading case on the oath *ex officio*. *Id.* at 254. Eight Puritan layman had been imprisoned for holding private conventicles, refusing to kneel at communion, and other crimes. *Id.* Coke argued that the High Commission could not examine on oath; it was lawful only in matrimonial and testamentary cases. *Id.* at 255. If they testified under oath they would subject themselves to the danger of a penal law. *Id.*

¹⁰⁸ BERGER, *supra* note 92, at 14.

¹⁰⁹ LEVY, *supra* note 90, at 263.

¹¹⁰ *Id.* at 264.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* at 265.

¹¹⁴ The trial of John Lilburne in 1637 for sending seditious books from Holland to England was the catalyst that led to the eventual ban of the oath *ex officio*. LEVY, *supra* note 90, at 271-72. Lilburne refused to take the oath, stating “I understand, that this Oath is one and the same with the High Commission Oath, which Oath I know to be both against the law of God and the law of the land; and therefore in brief I dare not take the oath, though I suffer death for the refusal of it.” BERGER, *supra* note 92, at 17.

¹¹⁵ BERGER, *supra* note 92, at 21.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

was not smooth.¹¹⁸ Some American colonies had been established before the right became fixed in English common law.¹¹⁹ Neither the Star Chamber nor the High Commission courts—courts which regularly compelled self-incrimination—were imported into America; this deprived the American colonies of a symbol around which to coalesce a movement against self-incrimination.¹²⁰ Consequently, American colonies did not respect the right against self-incrimination with any consistency.¹²¹

Congressman James Madison framed the first American version of the right against self-incrimination.¹²² This version would have given the right to parties in both civil and criminal proceedings.¹²³ However, the House of Representatives amended it so that today it applies only to criminal matters.¹²⁴

B. THE FIFTH AMENDMENT TODAY

Today, protected language includes any communication that "relate[s] a factual assertion or disclose[s] information."¹²⁵ Whenever testimony may implicate a person in criminal acts or "furnish a link in the chain of evidence to prosecute" her, she may invoke the privilege¹²⁶ as long as it is done in good faith.¹²⁷ If the court questions whether there is any actual danger of self-incrimination, she must provide a foundation showing that there is a "reasonable possibility" that

¹¹⁸ See *id.*; LEVY, *supra* note 90, at 333; Tarello, *supra* note 100, at 141.

¹¹⁹ LEVY, *supra* note 90, at 333.

¹²⁰ BERGER, *supra* note 92, at 21.

¹²¹ *Id.* The oath *ex officio* was adopted in some colonies as a means of suppressing divergent religions. See Tarello, *supra* note 100, at 141. The first mention of the right against self-incrimination occurs in 1637 in Virginia where Reverend John Wheelwright was prosecuted for his Antinomian beliefs. LEVY, *supra* note 90, at 340-41. When he was told that the interrogation would be conducted *ex officio*, he objected. *Id.* at 341. However, he objected because of the association of the term *ex officio* with the High Commission. *Id.* at 341-42. Wheelwright did not try to claim a substantial right against self-incrimination. *Id.* at 343. After the court assured him that their purpose was not to elicit "involuntary" admissions from him, he responded freely to almost all of their questions. *Id.*

¹²² The first "self-incrimination" clause appeared in the Virginia Bill of Rights. BERGER, *supra* note 92, at 22.

¹²³ *Id.* at 23.

¹²⁴ *Id.* The privilege has never been interpreted narrowly. See BERGER, *supra* note 92, at 50. Moreover, if the amendment had been interpreted literally, it would be hard to see any justification for it because at the time it was adopted, most jurisdictions prevented defendants from testifying in their own trials. *Id.*

¹²⁵ Doe v. United States, 487 U.S. 201, 210 (1988). The privilege is available "in any proceeding, be it criminal or civil, administrative or judicial, investigatory or adjudicatory." Murphy v. Waterfront Comm'n, 378 U.S. 52, 94 (1964) (White, J., concurring).

¹²⁶ Hoffman v. United States, 341 U.S. 479, 486 (1951).

¹²⁷ Carlson v. United States, 209 F.2d 209, 214 (1st Cir. 1954) (holding that taking the privilege in bad faith constitutes perjury).

answering will self-incriminate.¹²⁸

The policies behind the Fifth Amendment are not as clear. Once, the Fifth Amendment was believed to safeguard the truth.¹²⁹ This rationale stemmed from a belief that if a court compelled a defendant to answer, she might be tempted to perjure herself.¹³⁰ Another factor behind the amendment was the worry that if the defendant did answer, the jury might give her answers, which would be self-interested, undue weight.¹³¹

However, in *Tehan v. United States ex re. Shott*,¹³² the Court found that "the Fifth Amendment privilege against self-incrimination was not an adjunct to the ascertainment of truth," nor was its basic purpose to protect the innocent.¹³³ Since *Tehan*, the Court has characterized the Fifth Amendment as a "private enclave" whereby a citizen may "create a zone of privacy which the government may not force him to surrender to his detriment."¹³⁴ Today, the Fifth Amendment is believed to function as a shield against the government's sword.¹³⁵ Through her right to silence, the individual can better establish a balance of power between herself and the state.¹³⁶

V. THE IMPACT OF FORFEITURE ON THE FIFTH AMENDMENT

A. FORFEITURE AS A QUASI-CRIMINAL ACTION

The first Supreme Court case to discuss the Fifth Amendment dilemma in forfeiture proceedings was *Boyd v. United States*.¹³⁷ In *Boyd*,

¹²⁸ *Hoffman*, 341 U.S. at 486-87 (finding that the witness need only show "that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result"). See also BERGER, *supra* note 92, at 91-92 (discussing the *Hoffman* holding).

¹²⁹ BERGER, *supra* note 92, at 29-30. When the First Congress originally considered the Bill of Rights, the defendant could not testify at her trial because her interest in the results made her testimony unreliable. *Id.* at 50. See also Tarello, *supra* note 100, at 140 n.54.

¹³⁰ See *United States v. Wong*, 431 U.S. 174 (1977) (feeling compelled to answer, a Chinese woman perjured herself in front of a grand jury).

¹³¹ BERGER, *supra* note 92, at 30.

¹³² 382 U.S. 406 (1966).

¹³³ *Id.* at 415-16. In *Quinn v. United States*, 349 U.S. 155 (1955), the Supreme Court stated that the Fifth Amendment is "a protection to the innocent though a shelter to the guilty, and a safeguard against heedless, unfounded or tyrannical prosecutions." *Id.* at 162.

¹³⁴ *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

¹³⁵ *But see Garner v. United States*, 424 U.S. 648, 655 (1976) (stating that the fundamental purpose of the privilege against self-incrimination is the preservation of an adversarial system of criminal justice).

¹³⁶ See discussion and analysis of *Boyd v. United States*, 116 U.S. 616 (1886), *infra* section V.A. See also BERGER, *supra* note 92, at 40 (noting that "the law's preference for an accusatorial system of justice simply reflects a commitment to retain that balance [of power between the state and the individual].").

¹³⁷ 116 U.S. 616 (1886).

the government seized thirty-five cases of plate glass for violations of the customs revenue laws.¹³⁸ During the trial the claimants were ordered to produce an invoice of twenty-nine cases of glass previously imported into the United States.¹³⁹ Although the claimants objected, arguing that compelling production of evidence from claimants in a forfeiture case to incriminate them was unconstitutional, they produced the invoice.¹⁴⁰ The jury found for the United States; the thirty-five plates of glass were forfeited.¹⁴¹

On appeal, the Supreme Court reversed and remanded.¹⁴² The Court reasoned that the customs statute compelled the production of the documents.¹⁴³ If the claimants failed to produce them, the claimants would be considered guilty.¹⁴⁴ In other words, their silence would be construed as a confession.¹⁴⁵ Moreover, the actions that resulted in the forfeiture could have resulted in criminal charges.¹⁴⁶ There was a strong possibility that if the claimant or owner testified, she would incriminate herself.¹⁴⁷ The *Boyd* Court found that forfeiture actions are "in their nature criminal,"¹⁴⁸ or quasi-criminal;¹⁴⁹

¹³⁸ *Id.* at 617. The customs law violated was 18 Stat. 186 (1874). It stated:

[A]ny owner, importer, consignee, & c., who shall, with intent to defraud the revenue, make or attempt to make, any entry of imported merchandise, by means of any fraudulent or false invoice, affidavit, letter or paper, or by means of any false statement written or verbal, or who shall be guilty of an wilful act or omission, by means whereof the United States shall be deprived of the lawful duties, or any portion thereof, accruing upon the merchandise, or any portion thereof, embraced or referred to in such invoice, affidavit, letter, paper, or statement, or affected by such act or omission, shall for each offence be fined in any sum not exceeding \$5,000 nor less than \$50, or be imprisoned for any time not exceeding two years, or both; and, in addition to such fine, such merchandise shall be forfeited.

Id.

¹³⁹ *Id.* at 618.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.* at 638.

¹⁴³ *Id.* at 621-22.

¹⁴⁴ *Id.*

¹⁴⁵ Historically, the statute was like the oath *ex officio* since it allowed an allegation to be taken as confessed if the claimant or defendant did not produce the required papers. The statute stated that "the allegations stated in the said motion shall be taken as confessed, unless his failure or refusal to produce the same shall be explained to the satisfaction of the court." *Id.* at 620.

¹⁴⁶ *Id.* at 634.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ The Court has distinguished between civil and quasi-criminal proceedings by applying a three prong test. Courts must ask: 1) is there is a separate criminal proceeding?; 2) will the proceedings prejudice the defendant in later criminal proceedings?; and 3) is there is any evidence of "countervailing punitive purpose or effect. . . ?" *United States v. Ward*, 448 U.S. 242, 254, *reh'g denied*, 448 U.S. 916 (1980). *See also* *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963) (discussing a seven prong test for distinguishing between civil and criminal proceedings). One commentator has found the "quasi-criminal" label

therefore, certain Fifth Amendment protections apply.¹⁵⁰ An owner or claimant, who is a substantial party, retains all privileges awarded to criminal defendants.¹⁵¹

The *Boyd* opinion focused on an individual's right to feel secure in both his person and property.¹⁵² Writing for the Court, Justice Bradley traced the similarities between the abuse of early American civil rights and the infringement upon Boyd's Fourth and Fifth Amendment rights.¹⁵³ The *Boyd* Court recognized that individuals must be shielded from arbitrary power with full constitutional protection.¹⁵⁴ Toward that end, the *Boyd* Court recommended that "constitutional provisions for the security of person and property should be liberally construed."¹⁵⁵

The Court expanded *Boyd's* scope in *United States v. United States Coin and Currency*¹⁵⁶ when it held that gamblers could raise the Fifth Amendment privilege in a civil action for failure to file statutorily required forms.¹⁵⁷ The Court found that there was a "substantial" risk that the forms would incriminate the gamblers.¹⁵⁸ The gambling statute contained an innocent owner provision allowing individuals to petition for the return of their property. Through this provision, the Court inferred a scienter of negligence.¹⁵⁹ Since guilt or innocence was an element of the forfeiture action,¹⁶⁰ the Court found that the forfeiture statute, when viewed in its entirety, was intended to penalize only those "significantly" involved in a criminal enterprise.¹⁶¹ For

problematic. See Schechter, *supra* note 3, at 1159-60. Schechter notes that there is no hierarchy of the constitutional rights granted a criminal defendant; when courts grant or withhold constitutional rights to forfeiture claimants, they do so at their discretion. *Id.* at 1159-60. Therefore, either courts grant forfeiture claimants too many constitutional rights or too few. *Id.*

¹⁵⁰ *Boyd v. United States*, 116 U.S. 616, 634 (1886).

¹⁵¹ *Id.* at 638.

¹⁵² *Id.* at 635.

¹⁵³ *Id.* at 624-30.

¹⁵⁴ Justice Bradley speculated that the Framers relied on Lord Camden's opinion in *Entick v. Carrington and Three Other King's Messengers*, 19 How. St. Tr. 1029 when composing the Bill of Rights. *Id.* at 626. Justice Bradley showed how Camden traced general warrants for search and seizures to the Star Chamber and denounced unreasonable search and seizures as displays of arbitrary power, equating unreasonable search and seizures with self-incrimination. *Id.* at 627-29.

¹⁵⁵ The rest of the quote reads "[a] close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon." *Id.* at 635.

¹⁵⁶ 401 U.S. 715 (1971).

¹⁵⁷ *Id.* at 721-22.

¹⁵⁸ *Id.* at 717-18.

¹⁵⁹ *Id.* at 719-21.

¹⁶⁰ *Id.* at 721-22.

¹⁶¹ *Id.*

Fifth Amendment purposes the action was a criminal proceeding¹⁶² and, therefore, the forfeiture statute was unconstitutional.¹⁶³

The innocent owner provision within 21 U.S.C. § 881 would seem to indicate that claimants should receive the same protections awarded to the *Coin and Currency* claimants. Although the gambling statute at issue in *Coin and Currency* contained a self-reporting requirement, and § 881 does not, § 881 does require that an owner affirmatively prove her innocence to obtain her property.¹⁶⁴ If under § 881¹⁶⁵ an owner can establish that she was completely "innocent" of any knowledge or negligence with regard to the illegal use of her property, her property will not be forfeited.¹⁶⁶ Thus, guilt or innocence is a significant element with regard to an owner's ability to retain her property.

Proving one's innocence requires reporting on one's activities.¹⁶⁷ To prove innocence an individual must establish that she acquired the property in another way or that she had no knowledge of its unlawful use.¹⁶⁸ An individual's activities may not always be innocent or lawful.¹⁶⁹ For example, the property may not be the proceeds of illegal narcotics activity but may be the proceeds of some other illegal activity.¹⁷⁰ Requiring a claimant to report on the origin of her property or her lack of knowledge requires her to self-report.¹⁷¹ Thus, it appears as though the rationale underlying the holding that, for Fifth Amendment purposes, the *Coin and Currency* statute initiated a criminal proceeding would also indicate that, for Fifth Amendment purposes, the forfeiture proceedings in the Drug Abuse and Prevention Act are also criminal.

¹⁶² *Id.*

¹⁶³ *Id.* at 724.

¹⁶⁴ 21 U.S.C. § 881(a)(4)(C), (a)(6)-(7) (1988). *See, e.g.*, *United States v. Two Parcels of Real Property Located in Russell County, Alabama*, 868 F. Supp. 306, 311-13 (M.D. Ala. 1994) (granting summary judgment because claimants did not prove that their property had been purchased by honestly earned income).

¹⁶⁵ *See* 21 U.S.C. § 881(a)(4)(C), (a)(6)-(7).

¹⁶⁶ *See Austin v. United States*, 113 S. Ct. 2801, 2810 (1993) (finding that the innocent owner defense in § 881 implies some measure of guilt in an owner). *But see Bennis v. Michigan*, 1996 WL 88269 (U.S. Mar. 4, 1996) (refusing to import a culpability requirement for a strict liability civil forfeiture statute characterized as remedial).

¹⁶⁷ *See Two Parcels of Real Property Located in Russell County, Alabama*, 868 F. Supp. at 311-13; *but see United States v. Premises Located at Highway 13/5 Phil Campbell, (Parcel 2)*, 747 F. Supp. 641, 649-50 (N.D. Ala. 1990) (commenting that a claimant who is a criminal target "cannot be placed in the position of having to make the Hobson's choice between relinquishing valuable real property on the one hand, and seriously exposing himself to possible self-incrimination on the other").

¹⁶⁸ 21 U.S.C. § 881(a)(4)(C), (a)(6)-(7) (1988).

¹⁶⁹ *See supra* note 88.

¹⁷⁰ *Id.*

¹⁷¹ *See discussion supra* section III.B.

While *Coin and Currency* focused on the scienter of the claimant, *Garrity v. New Jersey*¹⁷² addressed the meaning of “coercion.” In *Garrity*, the appellants were police officers.¹⁷³ During an investigation by the Attorney General they were told that: 1) they could refuse to answer his questions; 2) refusal to answer would mean forfeiture of their employment; and 3) anything they said could be used against them in criminal proceedings.¹⁷⁴ Later, though they objected, the appellants’ statements were used against them in criminal prosecutions.¹⁷⁵

The Supreme Court held that the appellants’ Fifth Amendment rights had been violated because the state had compelled the incriminating statements used in the criminal proceedings.¹⁷⁶ The Court held that in order to determine the issue of coercion, courts must ask whether the accused had a “free choice to admit, to deny, or to refuse to answer.”¹⁷⁷ In *Garrity*, appellants’ could not freely choose whether or not to answer because the choice offered to them—either to forfeit their jobs or incriminate themselves—unduly pressured them.¹⁷⁸ The Court refuted the government’s argument that a police officer’s employment contract was conditioned on her agreement to perform the job as required, stating “[t]he privilege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as equivalent either to a confession of guilt or a conclusive presumption of perjury”¹⁷⁹

Expanding *Garrity*, *Lefkowitz v. Cunningham*¹⁸⁰ pointed out that the touchstone of the Fifth Amendment is compulsion, and “direct economic sanctions and imprisonment are not the only penalties capable of forcing the self-incrimination that the Amendment forbids.”¹⁸¹ In a grand jury proceeding, the appellant in *Lefkowitz* refused to sign a waiver of immunity of his Fifth Amendment right not to incriminate himself.¹⁸² Consequently, he was divested of all of his party offices and was banned from holding any public or party office for five years.¹⁸³

¹⁷² 385 U.S. 493 (1967).

¹⁷³ *Id.* at 500.

¹⁷⁴ *Id.* at 494.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 495.

¹⁷⁷ *Id.* at 497 (citing *Lisenba v. California*, 314 U.S. 219, 241, *reh’g denied*, 315 U.S. 826 (1942)).

¹⁷⁸ *Id.* at 496. The Court reasoned that “[w]here the choice is ‘between the rock and the whirlpool,’ duress is inherent in deciding to waive one or the other.” *Id.* at 498.

¹⁷⁹ *Id.* at 498-500.

¹⁸⁰ 431 U.S. 801 (1977).

¹⁸¹ *Id.* at 806.

¹⁸² *Id.* at 803-04.

¹⁸³ *Id.*

The Court held that a state cannot impose sanctions for invoking the Fifth Amendment right¹⁸⁴ nor may a citizen be forced to surrender the Fifth Amendment privilege to serve a governmental need.¹⁸⁵ The Court distinguished *Lefkowitz* from an earlier case, *Baxter v. Palmigiano*, by singling out the "automatic" imposition of a penalty in *Lefkowitz* as being one of its most important differentiating characteristics.¹⁸⁶

Between the *Boyd* holding that constitutional rights should be construed liberally, and the holdings in *Garrity-Lefkowitz*, a claimant should be able to take her Fifth Amendment privilege against self-incrimination in any forfeiture proceedings under 21 U.S.C. § 881 without fear that the court could construe her silence adversely. According to *Garrity-Lefkowitz*, the government cannot take a property right from a claimant in order to compel testimony,¹⁸⁷ nor may the government impose automatic sanctions in retaliation for a claimant's silence.¹⁸⁸ An adverse inference from a claimant's use of her Fifth Amendment privilege is similar to an automatic sanction.¹⁸⁹ If a claimant does not give up her right to silence, she will lose her property because she cannot rebut the government's probable cause that her property is guilty of drug activity.¹⁹⁰ If she does give up her right, any information she gives may be used in a parallel criminal proceeding.¹⁹¹

Despite the constitutional safeguards that *Garrity-Lefkowitz* seem to erect for forfeiture claimants, circuit courts have permitted adverse inferences against claimants who invoke the Fifth Amendment.¹⁹² Circuit courts have construed the *Garrity-Lefkowitz* holdings narrowly.¹⁹³ Citing the Supreme Court's holdings in *Baxter v. Palmigiano* and *United States v. Rylander*, circuit courts have limited the Fifth Amendment right under 21 U.S.C. § 881.¹⁹⁴

¹⁸⁴ *Id.* at 805.

¹⁸⁵ *Id.* at 808 n.5.

¹⁸⁶ The Court stated that only when an individual's silence is "one of a number of factors to be considered by the finder of fact in assessing a penalty" may a court permit an adverse inference. *Id.*

¹⁸⁷ *Garrity v. New Jersey*, 385 U.S. 493, 495-96 (1967).

¹⁸⁸ *Lefkowitz v. Cunningham*, 431 U.S. 801, 808 n.5 (1977).

¹⁸⁹ See *supra* notes 85-87, 178 and accompanying text.

¹⁹⁰ *United States v. Little Al*, 712 F.2d 133, 136 (5th Cir. 1983) (holding that an unrebutted showing of probable cause is enough to sustain forfeiture); see discussion of claimant's dilemma, *supra* section III.B.

¹⁹¹ See *supra* note 11-12 and accompanying text.

¹⁹² See *supra* note 23.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

B. ADVERSE INFERENCES IN CIVIL PROCEEDINGS

An analysis of the Supreme Court's decisions in *Baxter v. Palmigiano*¹⁹⁵ and *United States v. Rylander*¹⁹⁶ has led some of the circuit courts to conclude that the *Garrity-Lefkowitz* line of cases are not dispositive of the Fifth Amendment right of claimants in narcotics forfeiture proceedings.¹⁹⁷ Circuit courts have interpreted the *Baxter-Rylander* cases as considerably narrowing the Fifth Amendment privileges outlined in the *Garrity-Lefkowitz* cases.¹⁹⁸ Specifically, courts have cited *Baxter* to support their holdings that an adverse inference may be taken from a claimant's silence in a civil forfeiture proceeding.¹⁹⁹

In *Baxter*, a state prison inmate was charged with initiating a disturbance that could have led to a riot.²⁰⁰ After being informed by the prison disciplinary board that he could be prosecuted for violation of a state statute, the inmate was told that he could remain silent during the hearing, but that his silence would be construed adversely.²⁰¹ Although the Board advised him to consult his attorney, it did not permit his attorney to be present during the hearing.²⁰² The disciplinary hearing took place before any criminal charge was filed.²⁰³ Forced to choose between remaining silent so as not to incriminate himself in any subsequent criminal action or defending himself by testifying, the inmate chose silence.²⁰⁴ Subsequently, the Board put the inmate in "punitive segregation" for thirty days and downgraded his classification.²⁰⁵

The Supreme Court upheld the decision of the Board, finding that the Fifth Amendment permits adverse inferences in civil actions when parties do not testify in response to probative evidence.²⁰⁶ The Court distinguished the *Garrity-Lefkowitz* cases by pointing out that in *Baxter*, there was no automatic penalty when the inmate claimed his right to silence—the discipline was imposed only upon consideration

¹⁹⁵ 425 U.S. 308 (1976).

¹⁹⁶ 460 U.S. 752 (1983).

¹⁹⁷ *United States v. A Single Family Residence*, 803 F.2d 625 (11th Cir. 1986); *United States v. United States Currency*, 626 F.2d 11 (6th Cir.), *cert. denied*, 449 U.S. 993 (1980).

¹⁹⁸ *See, e.g., A Single Family Residence*, 803 F.2d at 630 (11th Cir. 1986).

¹⁹⁹ *See, e.g., id.*

²⁰⁰ *Baxter*, 425 U.S. at 313.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.* at 317.

²⁰⁴ *Id.* at 313.

²⁰⁵ *Id.*

²⁰⁶ The Court stated: "This does not smack of an invalid attempt by the State to compel testimony without granting immunity or to penalize the exercise of the privilege." *Id.* at 318.

of all of the evidence,²⁰⁷ and there had to be a showing of "substantial evidence."²⁰⁸ The Court emphasized that it is constitutional to take an individual's property based on presented evidence, but it is unconstitutional to take an individual's property simply because he will not waive his Fifth Amendment privilege.²⁰⁹ The *Baxter* Court found additional support for its holding in the important state interests that state prison disciplinary hearings serve.²¹⁰

Since an owner bears the burden of proof in establishing an affirmative defense, *United States v. Rylander*²¹¹ must be read in conjunction with *Baxter*. In *Rylander*, the Supreme Court upheld the trial court's finding that a corporation's president was in contempt for failing to produce corporate documents subpoenaed by the IRS.²¹² The Court noted that Rylander's only defense to the contempt charge was that he did not have the documents.²¹³ For this defense, Rylander had the burden of production.²¹⁴ Rylander's invocation of the Fifth Amendment during cross examination prevented him from satisfying his burden.²¹⁵

Writing for the Court, Chief Justice Rehnquist said that the Fifth Amendment has "never been thought to be in itself a substitute for evidence that would assist in meeting the burden of production."²¹⁶ To allow the Fifth Amendment to be used in this way "would convert the privilege from the shield against compulsory self-incrimination . . . to a sword . . ."²¹⁷

Together, *Baxter* and *Rylander* have been cited for the proposition that adverse inferences are permissible when a claimant takes the

²⁰⁷ The Court commented:

[T]his case is very different from the circumstances before the Court in the *Garrity-Lefkowitz* decisions, where refusal to submit to interrogation and to waive a Fifth Amendment privilege, standing alone and without regard to the other evidence, resulted in loss of employment or opportunity to contract with the State. There, failure to respond to interrogations was treated as a final admission of guilt. Here Palmigiano remained silent at the hearing in the face of evidence that incriminated him; and, as far as this record reveals, his silence was given no more evidentiary value than was warranted by the facts surrounding the case.

Id. at 317-18.

²⁰⁸ *Id.* at 317.

²⁰⁹ The Court found that a prison disciplinary proceeding was not a criminal procedure. *Id.* at 317. Therefore, it declined to extend the *Griffin* ruling barring adverse inferences in criminal cases. *Id.* See generally *Griffin v. California*, 380 U.S. 609 (1965).

²¹⁰ *Baxter*, 425 U.S. at 317.

²¹¹ 460 U.S. 752 (1983).

²¹² *Id.* at 761.

²¹³ *Id.* at 760-61.

²¹⁴ *Id.* at 756.

²¹⁵ *Id.*

²¹⁶ *Id.* at 758.

²¹⁷ *Id.*

Fifth Amendment in a forfeiture proceeding.²¹⁸ Courts reason that the owner's "innocence" is an affirmative defense that she has the burden of proving.²¹⁹ She cannot sustain this burden by refusing to answer based on her Fifth Amendment rights.²²⁰

The Eleventh Circuit has interpreted these holdings to mean that a negative inference may be drawn in a civil forfeiture action when a claimant takes the Fifth Amendment, as long as the court's final judgment is not based solely on the negative inference.²²¹ Although the Second Circuit has not committed itself on this issue, it has speculated that negative inferences may be impermissible within the forfeiture context "given the severity of the deprivation at risk."²²² In contrast, the Sixth Circuit has held that a negative inference may not be drawn in a civil forfeiture proceeding if the inference could "harm" the claimant in a parallel criminal action.²²³

The Sixth Circuit found that since the forfeiture provisions appear within the criminal code, and since they are intended to impose a penalty only on those "significantly involved in a criminal enterprise," claimants have the same safeguards as criminal defendants—including the presumption of innocence, proof beyond a reasonable doubt, and the right to remain silent—without automatically suffering forfeiture of their property.²²⁴

Arguably, the Second and the Eleventh Circuits misread *Baxter* and *Rylander*. Two important factors are missing in narcotics civil forfeiture proceedings that were present in *Baxter*: 1) the Court found the state had an "important state interest" in maintaining discipline within its prison system,²²⁵ and 2) the Court found the adverse infer-

²¹⁸ See, e.g., *United States v. A Single Family Residence*, 803 F.2d 625, 630 (11th Cir. 1986); *United States v. Property Located at 15 Black Ledge Drive*, 897 F.2d 97, 103 (2d Cir. 1990).

²¹⁹ See, e.g., *A Single Family Residence*, 803 F.2d at 630.

²²⁰ *Id.*

²²¹ *A Single Family Residence*, 803 F.2d at 630. The Eleventh Circuit stated that Baldwin, a suspected drug dealer, improperly attempted to take the privilege for the corporation (Heidi) that owned the home, which was the subject of the forfeiture proceeding. *Id.* at 630. Citing *Baxter*, the Eleventh Circuit noted that the district court permissibly had drawn an adverse inference from Baldwin's failure to respond to probative evidence, concluding that his testimony would have been adverse to Heidi's claims. *Id.* Finally, the Eleventh Circuit attempted to dispel any constitutional concerns by stating: "The Property was proceeds of Baldwin's illegal drug sales. Therefore, forfeiture of the Property was not an instance of arbitrary or discriminatory enforcement of Section 881." *Id.* at 631.

²²² *United States v. 15 Black Ledge Drive*, 897 F.2d 97, 103 (2d Cir. 1990).

²²³ *United States v. United States Currency*, 626 F.2d 11 (6th Cir.), *cert. denied*, 449 U.S. 993 (1980).

²²⁴ *Id.* at 18-19. The Sixth Circuit reasoned: forfeiture proceedings are quasi-criminal; forfeiture penalties are closely related to criminal sanctions; and adverse inferences force claimants to choose between two constitutional rights. *Id.*

²²⁵ *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976).

ence permissible in *Baxter* because *Baxter* was found guilty on the basis of substantial evidence—the disciplinary board did not rely solely on his silence to prove his guilt.²²⁶

In contrast, forfeiture actions do not serve the same type of important state interests as those served in prison disciplinary hearings. Unlike civil claimants, prisoners have limited constitutional rights.²²⁷ Prison official decisions are judged by a less restrictive test than that applied to laws and regulations outside prison walls.²²⁸ Moreover, the state's burden of proof, substantial evidence, is interpreted in light of the state's need to maintain order within the prison system.²²⁹ Finally, the states' burden of proof in a prison disciplinary hearing, substantial evidence, may be considerably higher than the government's burden of proof in civil forfeiture, which, if un rebutted, may be met by probable cause. Therefore, the *Baxter* test is arguably more lenient than the test that should be applied to the rights of claimant's under 21 U.S.C. § 881.

Rylander is also distinguishable from civil forfeiture. In *Rylander*, the defendant was charged with civil contempt.²³⁰ Civil contempt is imposed for violating court orders. An individual may purge himself of that contempt by complying with the court order.²³¹ In contrast, in civil forfeiture proceedings what is at stake is ownership of property—once it is lost, the owner will not regain it.²³²

²²⁶ *Id.* at 317-18.

²²⁷ In *Price v. Johnson*, 334 U.S. 266, 285 (1948), the Court stated: "Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights."

²²⁸ *Washington v. Harper*, 494 U.S. 210, 224 (1990), (quoting *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349 (1987)) (holding that "prison regulations alleged to infringe constitutional rights are judged under a 'reasonableness' test less restrictive than that ordinarily applied to alleged infringements of fundamental constitutional rights").

²²⁹ *Wolff v. McDonnell*, 418 U.S. 539, 556 (1974) (holding that "[p]rison disciplinary proceedings are not part of a criminal prosecution, and the full panoply of rights due a defendant in such proceedings does not apply," but "there must be mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application").

²³⁰ *United States v. Rylander*, 460 U.S. 752, 761 (1983). Civil contempt sanctions are imposed until an individual complies with a court order. Note that those who are charged with criminal contempt receive full constitutional protections. *Hicks v. Feiock*, 485 U.S. 624, 632 (1988).

²³¹ Civil contempt sanctions are avoidable through obedience. The court may impose them after a civil proceeding, which requires neither a jury trial nor proof beyond a reasonable doubt. See *International Union United Mine Workers v. Bagwell*, 114 S. Ct. 2552, 2557 (1994) (distinguishing between civil and criminal contempt). However, criminal contempt may only be applied after a trial that includes full constitutional protections.

²³² However, it is often difficult to distinguish between criminal and civil contempt sanctions. The difficulty of distinguishing between the two of them, the "confusing mess of the law," as well as the potential perception that the sanctions are arbitrary, has fueled criticism from many commentators. See, e.g., Earl C. Dudley, Jr., *Getting Beyond the Civil/Criminal Distinction: A New Approach to the Regulation of Indirect Contempt*, 79 VA. L. REV. 1025, 1025

More importantly, as the Supreme Court held in *Lefkowitz*, citizens cannot be compelled to incriminate themselves to serve governmental needs.²³³ Claimants technically retain their constitutional right in their property until they are shown to have used their property in such a way as to break the law.²³⁴ By permitting an adverse inference against the claimant, the Eleventh Circuit arguably circumvented a claimant's rights so the government could meet its goal of undermining the economic base of narcotics traffickers.²³⁵

VI. THE CURRENT STATE OF FORFEITURE

A. CLAIMANTS' CONSTITUTIONAL RIGHTS

Recent Supreme Court holdings arguably indicate that claimants should be awarded full Fifth Amendment protection in civil forfeiture proceedings. Although the current line of cases have not directly addressed the *Baxter-Rylander* holdings, they seem to support the view that *Baxter-Rylander* do not apply to narcotics forfeiture cases.

In *United States v. James Daniel Good Real Property*,²³⁶ the government seized a property owner's home and four acres of land four years after he pled guilty to drug charges.²³⁷ The district court granted summary judgment to the government.²³⁸ The Ninth Circuit reversed the district court's holding, finding that the government had violated the Due Process Clause through the seizure of Good's property without prior notice and a hearing.²³⁹ The Supreme Court affirmed the Ninth Circuit,²⁴⁰ holding that absent "exigent circumstances," due process requires the government to give notice and an opportunity to be heard prior to seizing real property.²⁴¹

(1993).

²³³ See *Lefkowitz v. Cunningham*, 431 U.S. 801, 808 n.5 (1977).

²³⁴ See *United States v. James Daniel Good Real Property*, 114 S. Ct. 492, 501 (1993) (depriving claimants of their property deprives them of the "valuable rights of ownership"). See also *United States v. Section 17 Township 23 North*, 40 F.3d 320, 322 n.3 (10th Cir. 1994) (finding that a stay did not come within the collateral order doctrine because the claimant's property rights were being preserved through an occupancy agreement that allowed them to stay on their property).

²³⁵ See *supra* note 224 and accompanying text.

²³⁶ 114 S. Ct. 492 (1993).

²³⁷ Good had been convicted of promoting a harmful drug, HAW. REV. STAT. § 712-1245(1)(b)(date). The court sentenced him to one year in jail, five years probation, and fined him \$1,000. *Id.* at 497.

²³⁸ *Id.* at 498.

²³⁹ The Court of Appeals also found that the action had not been timely. *Id.* They reasoned that limits are imposed on forfeiture actions by 19 U.S.C. §§ 1604-04; therefore, the five year statute of limitations in 19 U.S.C. § 1621 creates only the "outer limit" for filing forfeiture actions. *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.* at 504.

Writing for the majority, Justice Kennedy indicated the important property rights that forfeiture provisions implicate: "Individual freedom finds tangible expression in property rights. At stake in this and many other forfeiture cases are the security and privacy of the home and those who take shelter within it."²⁴² Depriving Good of his property, even if only for a short time, deprived him of the "valuable rights of ownership."²⁴³

The Court noted that the claimant's criminal conviction was irrelevant because "fair procedures are not confined to the innocent."²⁴⁴ Reaffirming its earlier holdings, the Court stated that the applicability of one constitutional right does not pre-empt the applicability of another.²⁴⁵ The Court concluded that adversary hearings will ensure the neutrality that should be characteristic of all governmental decision-making,²⁴⁶ and courts must scrutinize governmental actions more carefully whenever the State may benefit.²⁴⁷ Otherwise, *ex parte* seizure will create a danger that the individual and society will perceive governmental action as arbitrary and unfair.²⁴⁸

James Daniel Good affirms the importance of an individual's property rights. It reiterates the *Boyd* Court's concern with arbitrary government action.²⁴⁹ The holding arguably makes it more difficult for the government to forfeit property through summary judgment. If the government cannot rely on a claimant's conviction as part of its case for summary judgment, and the court must carefully examine state action whenever it is in a position to benefit, the state arguably must make a stronger showing than that which is currently statutorily demanded to justify summary judgment.²⁵⁰

The Court recognized further constitutional protection to civil

²⁴² *Id.* at 504.

²⁴³ *Id.* at 501.

²⁴⁴ *Id.* at 505.

²⁴⁵ *Id.* at 499 (quoting *Sodal v. Cook County*, 113 S. Ct. 538, 548 (1992)).

²⁴⁶ *Id.* at 502.

²⁴⁷ *Id.* (quoting *Harmelin v. Michigan*, 501 U.S. 957 (1991) (opinion of Justice Scalia)).

²⁴⁸ *Id.* at 500 (citing *Fuentes v. Shevin*, 407 U.S. 67, 82 (1972)) (arguing that the purpose of prior notice and a hearing is to "ensure abstract fair play to the individual" and to "protect his use and possession of property from arbitrary encroachment—to minimize substantively unfair or mistaken deprivations of property . . ."). The Court noted that the seizure in this case was different from the usual governmental search and seizure because the Government seized property in order to assert ownership and control over it, not to preserve evidence for future proceedings. *Id.*

²⁴⁹ *Id.* at 501.

²⁵⁰ *Cf.* *United States v. One Parcel of Real Property Located at 4560 Kingsbury Road, Township of Brunswick Hills, No. 93-3-54*, 1994 WL 28772, at *2 (6th Cir. Feb. 2, 1994) (although a claimant's husband was convicted of running an illegal gambling business, claimant's defense that she was an "innocent owner" without any other evidence, was sufficient to defeat government's motion for summary judgement).

forfeiture actions in *Austin v. United States*.²⁵¹ In *Austin* the government forfeited the mobile home and the bodyshop of the claimant, Austin, after he sold a government informant two grams of cocaine.²⁵² The district court granted summary judgment for the United States and the Eighth Circuit affirmed.²⁵³

The Supreme Court reversed, reasoning that governments historically have perceived forfeiture as a punishment.²⁵⁴ Reserving the question as to whether it violates due process to forfeit the possessions of a truly innocent owner, the Court pointed out that the innocent owner defense in the forfeiture statute implies some measure of guilt in an owner.²⁵⁵ Additionally, the legislative history of 21 U.S.C. § 881(a)(4) and (a)(7) indicate that Congress intended the statute to be punitive.²⁵⁶ Since the statute and the legislative history focus on the culpability of the owner, the Court concluded that forfeiture under § 881 serves as “payment to a sovereign as punishment for some offense.”²⁵⁷

The acknowledgement in *Austin* that forfeiture is punishment closed the gap even further between forfeiture as a civil action and forfeiture as a criminal sanction.²⁵⁸ Since the *Austin* Court found that the guilt or innocence of an owner is now at issue in an action under § 881, there is no longer any substance to the “guilty” property fiction within this statute.²⁵⁹ The excuse that Fifth Amendment rights are not pertinent no longer applies. Courts must recognize that since the guilt of a claimant is at issue, the Fifth Amendment right must not be burdened.

²⁵¹ 113 S. Ct. 2801 (1993).

²⁵² Austin pled guilty to one count of possession with intent to distribute and was sentenced to seven years. *Id.* at 2803.

²⁵³ *Id.*

²⁵⁴ *Id.* at 2810.

²⁵⁵ *Id.* *But see* Bennis v. Michigan, 1996 WL 88269 (U.S. Mar. 4, 1996) (finding that when a state civil forfeiture statute is remedial, it does not violate due process to forfeit the possessions of a truly innocent owner).

²⁵⁶ *Austin*, 113 U.S. at 2811 (quoting from S. REP. NO. 98-225, 191 (1983) (“[T]he traditional criminal sanction of fine and imprisonment are inadequate to deter or punish the enormously profitable trade in dangerous drugs.”).

²⁵⁷ *Id.* at 2812 (quoting *Browning v. Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. 257, 265 (1989)). In *Helvering v. Mitchell*, 303 U.S. 391, 402 n.6 (1938), the Court stated in a footnote that “Congress may not provide civil procedure for the enforcement of punitive sanctions”

²⁵⁸ *See also* *United States v. Halper*, 490 U.S. 435, 448 (1989) (finding that in civil cases brought by the government the defendant should receive some of the same procedural protections usually applied only in criminal cases).

²⁵⁹ However, the guilty property fiction is alive and well with regard to state remedial civil forfeiture statutes. *See* Bennis v. Michigan, 1996 WL 88269 (U.S. Mar. 4, 1996).

B. POTENTIAL SOLUTIONS

Courts have attempted to protect claimants from the harsh effects of their testimony in civil forfeiture through stays, use immunity, and protective orders.²⁶⁰ However, these solutions have not resolved the problem. For the most part, these remedies have been unable to fully protect the claimant against the possible adverse affects of her testimony in the civil proceeding.

1. Stay

If the government has initiated criminal proceedings, it has a statutory right to ask for a stay in the civil proceedings; the court may grant one for "good cause shown."²⁶¹ However, a claimant will have trouble obtaining a stay if she has not established adequate standing;²⁶² sometimes proving standing alone can implicate a claimant in a crime. Moreover, a stay does not resolve the problem if the government has not filed criminal proceedings.²⁶³ Since the government may not have decided whether to pursue criminal charges, it is difficult for a civil court to determine the necessary length of time to stay the proceedings.²⁶⁴ Finally, a stay will not be granted if a claimant merely invokes her privilege against self-incrimination—she has to af-

²⁶⁰ *United States v. Parcels of Land*, 903 F.2d 36 (11th Cir. 1990) (finding that a district court had discretionary power to determine how to accommodate a Fifth Amendment interest).

²⁶¹ The relevant provision reads:

The filing of an indictment of information alleging a violation of this subchapter or subchapter II of this chapter, or a violation of State or local law that could have been charged under this subchapter or subchapter II, which is also related to a civil forfeiture proceeding under this section shall, upon motion of the United States and for good cause shown, stay the civil forfeiture proceeding.

21 U.S.C. § 881(i) (1989).

See also *U.S. v. Kordel*, 397 U.S. 1 (1970) (holding that courts may defer civil discovery when in the interest of justice); *United States v. Little Al*, 712 F.2d 133 (5th Cir. 1983) (upholding the district court's denial of a stay pending an appeal of his criminal conviction). In *Little Al* the court stated that stays are granted only for "special circumstances" and the need to avoid "substantial and irreparable prejudice." *Id.* at 136 (quoting *SEC v. First Financial Group of Texas, Inc.*, 659 F.2d 660, 668 (5th Cir. 1981)).

²⁶² *United States v. 526 Liscum Dr.*, 866 F.2d 213, 217 (6th Cir. 1989) ("[P]ossession of bare legal title by one who does not exercise dominion or control over property may be insufficient to establish standing to challenge a forfeiture.") (citing *United States v. A Single Family Residence*, 803 F.2d 625, 630 (11th Cir. 1986); *United States v. One 1945 Douglas C-54 (De-4) Aircraft*, 604 F.2d 27, 28 (8th Cir. 1979), *cert. denied*, 454 U.S. 1143 (1982)).

²⁶³ *United States v. Premises Located at Highway 13/5 Phil Cambell*, 747 F. Supp. 641, 651 (finding that the stay requested by the government was unreasonable since two of the claimants were "apparently" not going to be prosecuted).

²⁶⁴ *In re Ramu Corp.*, 903 F.2d 312 (5th Cir. 1990) (criticizing the government for seizing property and then attempting to put "on hold" the civil forfeiture proceeding pending the outcome of the civil case although the government had not demonstrated that "no substantial harm" would be suffered by the claimant).

firmatively prove why she cannot use other testimony to substantiate her defense.²⁶⁵

If there is a pending criminal charge, acquittal of that charge will not have collateral estoppel effect,²⁶⁶ whereas conviction will.²⁶⁷ Acquittal also will not protect the claimant from a subsequent forfeiture under the Double Jeopardy Clause.²⁶⁸ And, after an acquittal, through discovery in the civil forfeiture proceedings, the government may obtain information regarding crimes for which the claimant has not been charged.²⁶⁹ For example, it may discover information about other narcotics proceeds.²⁷⁰ Therefore, a stay in the civil proceeding arguably may not offer a claimant adequate protection.

2. Use Immunity

Frequently, a claimant will ask for use immunity for any testimonial information she gives during a civil forfeiture proceeding.²⁷¹ Use immunity protects a claimant from the use of any incriminating information revealed by her testimony during the civil proceeding.²⁷² However, only the executive branch has the authority to grant use immunity.²⁷³ In federal court, the United States Attorney must request use immunity before it will be granted.²⁷⁴ Use immunity has not been automatically applied in civil forfeiture cases because courts have found that it does not meet the test established by *Simmons v. United States*.²⁷⁵

In *Simmons*, the Court held that use immunity must be granted

²⁶⁵ *United States v. Lot 5, Fox Grove*, 23 F.3d 359, 364 (11th Cir. 1994) (finding that a court may deny a stay as long as the privilege's invocation does not compel an adverse judgement).

²⁶⁶ *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232, 234 (1972) (finding that a civil proceeding does not require a showing of intent).

²⁶⁷ *United States v. United States Currency in the Amount of \$228,536.00*, 895 F.2d 908, 917-20 (2d Cir.), *cert. denied*, 495 U.S. 958 (1990).

²⁶⁸ *See id.* at 916; *United States v. Price*, 914 U.S. 1507, 1512 (D.C. Cir. 1990).

²⁶⁹ *See Christine Meyer, Zero Tolerance for Forfeiture: A Call for Reform of Civil Forfeiture Law*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 853 (1991).

²⁷⁰ *See, e.g., Harrison v. United States*, 392 U.S. 219, 222 (1968) (holding "a defendant's testimony at a former trial is admissible against him at a later trial"); *United States v. Little Al*, 712 F.2d 133 (5th Cir. 1983); *see also* FED. R. EVID. 801(d)(2)(A) (party admissions are not hearsay). However, discovery may cut both ways. The government may request a stay in the proceedings so as to avoid civil discovery that might hamper their criminal case. *See, e.g., United States v. Section 17 Township*, 23 North, 40 F.3d 320, 321 (10th Cir. 1994).

²⁷¹ *See, e.g., United States v. All Assets and Equipment of West Side Building Corp.*, 843 F. Supp. 377, 383 (N.D. Ill. 1994).

²⁷² *See Simmons v. United States*, 390 U.S. 377 (1968).

²⁷³ *In Re Grand Jury Subpoena*, 836 F.2d 1468, 1475 (4th Cir.), *cert. denied*, 487 U.S. 1240 (1988).

²⁷⁴ *Id.*

²⁷⁵ 390 U.S. 377 (1968).

when a claimant gives up one constitutional right at the expense of another.²⁷⁶ Courts have viewed civil forfeiture proceedings as burdening the Fifth Amendment right but not eliminating it.²⁷⁷ More importantly, because of the Supreme Court's statement in *Simmons* that "testimony given for his own benefit by a plaintiff in a civil suit is admissible against him in a subsequent criminal prosecution,"²⁷⁸ courts have interpreted *Simmons* to limit a claimant's right. Claimants are not often successful in their attempt to obtain use immunity. The government is reluctant to grant it because it can significantly cripple any subsequent prosecution of the claimant.²⁷⁹

3. Protective Orders

Claimants will also attempt to shield themselves against further charges by requesting a protective order.²⁸⁰ Protective orders seal the court records and forbid disclosure of any discovery or testimony in the forfeiture proceedings to anyone not designated in the order.²⁸¹ But protective orders tend to be ineffective.²⁸² They are subject to modification, and courts are unpredictable in their decisions regarding modification.²⁸³

²⁷⁶ *Simmons* held that use immunity is constitutionally required when a proceeding places a defendant in a position of choosing one constitutional right over another. *Id.* *But see* *Spevack v. Klein*, 385 U.S. 511, 515 (1987) (holding that the Constitution limits "the imposition of any sanction which makes the assertion of the Fifth Amendment 'costly'").

²⁷⁷ *United States v. A Single Family Residence*, 803 F.2d 625, 629-30 (11th Cir. 1986) (holding that courts may take a negative inference from a claimant's silence as long as the final judgement is not based solely on the negative inference).

²⁷⁸ *Simmons*, 390 U.S. at 394 n.23.

²⁷⁹ If the government grants use immunity, then in subsequent proceedings it must meet the test established in *Kastigar v. United States*, 406 U.S. 441 (1972). This test requires the government to show that it did not obtain evidence in the criminal trial through the immunized testimony. *Id.*

²⁸⁰ *United States v. Korbel*, 397 U.S. 1, 9 (1970) (stating that the appropriate remedy for concurrent proceedings is a protective order postponing civil discovery until the resolution of the criminal action).

²⁸¹ *Id.*

²⁸² Protective orders are ineffective against a grand jury subpoena. *See In re Grand Jury Subpoena*, 836 F.2d 1468, 1474-75 (4th Cir. 1988) (The Fourth Circuit reasoned that a civil protective order could not shield deponents from grand jury subpoenas since they were entitled only to a grant of use immunity or their Fifth Amendment right to silence. A protective order would "usurp the authority of the executive branch to balance the public's interest in confidentiality against their interest in effective criminal investigation."). Additionally, a protective order does not prevent a claimant's statements from being used in another jurisdiction. *See United States v. Parcels of Land*, 903 F.2d 36, 44-45 (1st Cir. 1990) (responding to a claimant's fear that his statements would lead to criminal prosecution in New Hampshire, the First Circuit held that "[t]he court's protective order was a reasonable effort to address fifth amendment concerns and more than satisfied the requirements of the accommodation principle.").

²⁸³ *See, e.g., United States v. Parcels of Land*, 903 F.2d 36 (1st Cir. 1990); *United States v. 121 Nostrand Ave.*, 760 F. Supp. 1015 (E.D.N.Y. 1991).

Recently, the Sixth Circuit rejected stays, use immunity, and protective orders as adequate means of safeguarding a claimant's rights in civil forfeiture proceedings. The Sixth Circuit made a compelling argument that the close alignment between civil forfeiture and criminal sanctions require the same safeguards for forfeiture claimants as for criminal defendants.²⁸⁴

C. FUTURE SOLUTIONS

Claimants' constitutional rights can only be protected by merging civil forfeiture actions into the parallel criminal action.²⁸⁵ Current civil forfeiture statutes give the government unfair advantage²⁸⁶ by granting it the lower burden of proof and allowing it, through the use of adverse inferences, to collect evidence from the claimant herself.²⁸⁷ Arguably, claimants have been compelled to choose between their liberty and their property.²⁸⁸

Allowing the government to seize property only under criminal forfeiture statutes would protect a claimant's constitutional rights. The government would proceed *in personam* and prove the property forfeitable beyond a reasonable doubt. Only then could the govern-

²⁸⁴ *United States v. Real Property Known and Numbered as Rural Route 1*, 24 F.3d 845, 851 (6th Cir. 1994) (holding that in light of *Austin's* finding that civil forfeiture is "closely related" to a criminal sanction, the court cannot regard these proceedings as "traditional civil proceedings"); *see also United States v. U.S. Currency*, 626 F.2d 11 (6th Cir.), *cert. denied*, 449 U.S. 993 (1980). *But see United States v. \$250,000 in United States Currency*, 808 F.2d 895, 901 (1st Cir. 1987) (holding that courts should not dismiss forfeiture even if it prejudices claimant's Fifth Amendment rights).

²⁸⁵ Several commentators have suggested that the legislature either merge the two procedures or grant the civil procedures the same constitutional safeguards as the criminal procedure. *See Schecter, supra* note 3, at 1182-83 (suggesting that the government be required to prove every element of the offense beyond a reasonable doubt or "at a minimum" prove that the owner had scienter and that their property is connected to illegal drugs); Leach & Malcolm, *supra* note, 1, at 285-91 (proposing a revision of the criminal forfeiture statute, 18 U.S.C. § 982, which would eliminate civil forfeiture proceedings). *See generally Ann L. Iijima, The War on Drugs: The Privilege Against Self-Incrimination Falls Victim to State Taxation of Controlled Substances*, 29 HARV. C.R.-C.L. L. REV. 101, 104 (arguing that the government either should use the criminal justice system to pursue the objectives of deterrence and retribution or grant defendants "the full spectrum of constitutional guarantees, including the privilege against self-incrimination"). *But see Durkin, supra* note 3, at 705 (suggesting that to resolve the Fifth Amendment dilemma, the government should have the burden of proof by a preponderance of the evidence).

²⁸⁶ *See Leach & Malcolm, supra* note 1, at 242-43; Finklestein, *supra* note 28, at 182; Piety, *supra* note 31, at 927-42.

²⁸⁷ *See Mann, supra* note 56, at 1871-73 (suggesting that the "existing framework of punitive civil monetary sanctions must be criticized not only for the inadequate procedural protections it provides for defendants, but also for the inadequate severity of the sanctions allowed").

²⁸⁸ *But see United States v. \$2,500 in United States Currency*, 689 F.2d 10, 16 n.5 (2d Cir. 1982) (stating in a jury instruction that forfeitures laws do not "expressly" compel claimants to testify).

ment convict the defendant and return a special verdict against the property. Most important, the court would afford the claimant all the constitutional protections of a criminal defendant, including an unburdened right to silence.

A single proceeding would be consistent with recent Supreme Court holdings.²⁸⁹ Now that the Court has recognized that civil forfeiture actions under the Drug Abuse and Prevention Act are punitive and meant to have a deterrent effect,²⁹⁰ the judicial system can no longer submerge a claimant's "guilt or innocence" within the fiction of the *in rem* action. If a claimant's guilt or innocence is being judged in a civil proceeding, it is redundant to require separate civil and criminal proceedings. Moreover, such a requirement arguably violates the Double Jeopardy Clause.²⁹¹

Merging the two actions also will take some of the burden off the overloaded court system.²⁹² Two proceedings, civil and criminal, usually require two lawyers, two courtrooms, and two judges. The dual proceedings waste time and resources.²⁹³ And the civil proceeding often requires many expensive procedural devices like depositions, interrogatories, motions, and pretrial orders.²⁹⁴ If forfeitures are limited to criminal proceedings, the claimant will have a higher incentive to plea bargain, and the judge might be more amenable to listen to a request for leniency.²⁹⁵ Finally, mandating use of the criminal system for forfeiture may make it more difficult for claimants to circumvent the system by transferring property to relatives²⁹⁶ who can claim that they are "innocent owners"²⁹⁷ or by claiming protection for civil forfei-

²⁸⁹ See *United States v. Halper*, 490 U.S. 435 (1989) (holding that some of the procedural protections granted to criminal defendants should apply in civil cases brought by the government when the purpose of the proceeding is to punish the defendant); *Austin v. United States*, 113 S. Ct. 2801, 2812 (1993) (finding that under some circumstances forfeiture is punishment).

²⁹⁰ See *Austin*, 113 S. Ct. 2801 (1993).

²⁹¹ See *supra* note 9 and *infra* note 298 and accompanying text.

²⁹² See *United States of America v. Contents of Accounts Nos. 3034504504 and 144-07143, 971 F.2d 974, 981* (3rd Cir. 1972) (stating that "the backlog of civil forfeiture cases in some parts of the country has become unmanageable" and suggesting that federal prosecutors pursue criminal, rather than civil forfeitures in drug cases).

²⁹³ See *Leach & Malcolm*, *supra* note 1, at 244-45.

²⁹⁴ See *id.* at 266.

²⁹⁵ *Id.* at 266-77.

²⁹⁶ See *id.* at 267-68 (discussing *Onwubiko v. United States*, 969 F.2d 1392 (2d Cir. 1992)). In *Onwubiko*, a defendant plea bargained a narcotics charge then disputed the civil forfeiture action on the grounds that the cash that was seized was not proceeds. *Id.*

²⁹⁷ *Id.* at 268-69 (discussing *United States v. A Parcel of Land Known as 92 Buena Vista Ave*, 113 S. Ct. 1126, 1128 (1993)) *Leach & Malcolm* argue that if *Buena Vista* had proceeded under a criminal forfeiture statute, the innocent owner provision would not have applied and 21 U.S.C. § 853(c) (1988) would have governed. It protects only a transferee who is a "bona fide purchaser for value of such property who at the time of purchase was

ture under the Double Jeopardy Clause.²⁹⁸

VII. CONCLUSION

The history of the Fifth Amendment indicates that it arose as a means of preventing the government from abusing its power by extracting incriminating statements from individuals.²⁹⁹ Current civil forfeiture proceedings are uncomfortably like the English ecclesiastical proceedings that produced the Fifth Amendment: the government's complaint may establish prima facie proof of its case; the higher burden of proof is on the defendant; and silence is taken as a confession through adverse inferences.³⁰⁰ Most importantly, until recently, the lack of constitutional protections for a claimant's rights may have given the impression that the government acted arbitrarily.³⁰¹

As commentators have pointed out, our society was founded on protection of individual rights; yet civil forfeiture proceedings tend to subordinate the individual to the common good.³⁰² Undoubtedly there is something satisfying about funding our law enforcement efforts with forfeiture proceeds; in effect, hoisting the drug trafficker with her own petard.³⁰³ But we cannot fight the drug problem in the United States at the expense of an individual's constitutional rights.

Merging criminal and civil forfeiture statutes would fulfill the needs of our society by depriving a narcotics dealer of her illegally

reasonably without cause to believe that the property was subject to forfeiture under this section." *Id.*

²⁹⁸ See Leach & Malcolm, *supra* note 1, at 270-71 (discussing *United States v. Halper*, 490 U.S. 435 (1989)). In *Halper*, the Court found that punitive civil sanctions as opposed to remedial sanctions violate the Double Jeopardy Clause when a defendant has undergone a criminal prosecution for the same underlying act. *Halper*, 490 U.S. at 448-49. See also *Austin v. United States*, 113 S. Ct. 2801, 2812 (1993) (holding that in some circumstances civil forfeiture actions are punitive).

²⁹⁹ *Michigan v. Tucker*, 417 U.S. 433, 440 (1974) (quoting *Ullmann v. United States*, 350 U.S. 422, 428 (1956) that "the privilege against self-incrimination 'was aimed at a . . . far-reaching evil—a recurrence of the Inquisition and the Star Chamber, even if not in their stark brutality'").

³⁰⁰ See *supra* section II.B.

³⁰¹ See Leach & Malcolm, *supra* note 1, at 254 (contending that the government uses the civil penalty to "exact an economic sanction against individuals who are either beyond the reach of the criminal justice system or against whom there is simply insufficient evidence to convict them of a crime."); David J. Fried, *Criminal Law: Rationalizing Criminal Forfeiture*, 79 J. CRIM. L. & CRIMINOLOGY 328, 331 (1988). Fried argues: "Civil forfeiture is a farrango of injustice sanctified by tradition. Its historical justifications, such as they are, have been left behind by its alarming extension in recent years, and its adoption as a criminal punishment, when its viability has always depended on its status as a civil penalty, is unprincipled." *Id.*

³⁰² See *supra* note 56 and accompanying text.

³⁰³ See *supra* note 1.

acquired money and property but not at the expense of her constitutional rights. The procedure would be more just because a claimant could claim the protections of the Fifth Amendment without jeopardizing her property rights. The single action would eliminate any societal perception that civil forfeiture proceedings are arbitrary and unfair.

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