CLEAR AND CONVINCING CIVILITY: APPLYING THE CIVIL COMMITMENT STANDARD OF PROOF TO CIVIL ASSET FORFEITURE

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In a time of deep political divisions in nearly every area, civil asset forfeiture is the rare topic that draws opprobrium from both the right and the left. Civil libertarians despise an overbearing government stealing private property from otherwise innocent citizens, and Progressives object to the disproportionate impact forfeiture has on low-income and minority communities. Scholars have written much about the constitutionality of civil in rem *forfeiture; however, missing from the discussion is an examination of the low evidentiary burden the government must hurdle to successfully confiscate private property. Additionally, the similarity between civil commitment proceedings and civil* in rem *forfeiture proceedings lends a comparison that implies the latter requires a higher standard of proof.*

This Comment argues that due process demands courts in civil in rem *forefeiture proceedings apply a clear and convincing standard of proof. It does so by using the Supreme Court's framework in* Mathews v. Eldridge*, as applied to civil commitment in* Addington v. Texas*, and concludes that only the clear and convincing standard is constitutionally acceptable. Civil commitment and civil* in rem *forfeiture are both quasi-criminal proceedings that run the risk of more than the mere deprivation of money. Due process requires that these serious deprivations*

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occur only after the government satisfies a clear *and convincing standard of proof.*

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INTRODUCTION

The abuses of civil asset forfeiture are well-known, well-documented, and well-ridiculed.[1] Indeed, in the modern political climate where partisans on either side find little to agree about, both the Democratic Party and the Republican Party unite in criticism of civil asset forfeiture.[2] Many have convincingly argued that civil asset forfeiture is an unconstitutional practice;[3] however, the Supreme Court explicitly rejected that argument.[4] In light of the Court's determination that civil asset forfeiture is constitutional, this Comment approaches the discussion with a discrete focus on the standard of proof in civil *in rem* forfeiture proceedings.[5] Civil *in rem* forfeiture is a civil action filed by the government against property rather than against a specific person.[6] Comparing civil *in rem* forfeiture to civil commitment, this Comment

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1. *See, e.g.*, DICK M. CARPENTER II ET AL., INST. FOR JUST., POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE 2 (2d ed. 2015) ("Civil forfeiture threatens the constitutional rights of all Americans. Using civil forfeiture, the government can take your home, business, cash, car or other property on the mere suspicion that it is somehow connected to criminal activity—and without ever convicting or even charging you with a crime."); *Last Week Tonight with John Oliver: Civil Forfeiture* (HBO television broadcast Oct. 5, 2014), https://www.youtube.com/watch?v=iRJSWokFK3s&list=ELIsVgFEe2SK [https://perma.cc/6PT3-V96K] (calling civil forfeiture "even worse" than "a Gwyneth Paltrow euphemism for divorce" and proposing a satirical new procedural drama, "Law and Order: Civil Asset Forfeiture Unit," to highlight the absurdity of unjust modern civil *in rem* forfeiture actions against property).

2. *See* DEMOCRATIC PLATFORM COMMITTEE, 2016 DEMOCRATIC PARTY PLATFORM 14 (2016) (declaring that the Party would "reform the civil asset forfeiture system to protect people and remove perverse incentives for law enforcement to 'police for a profit'"); REPUBLICAN PARTY, REPUBLICAN PLATFORM 2016 15 (2016) (noting that civil asset forfeiture "has become a tool for unscrupulous law enforcement officials, acting without due process, to profit by destroying the livelihood of innocent individuals, many of whom never recover the lawful assets taken from them" and calling "on Congress and state legislatures to enact reforms to protect law-abiding citizens against abusive asset forfeiture tactics").

3. *See, e.g.*, David Benjamin Ross, Comment, *Civil Forfeiture: A Fiction that Offends Due Process*, 13 REGENT U. L. REV. 259, 276–77 (2000/2001) (arguing that civil forfeiture is an unconstitutional "practice [that] offends traditional notions of due process").

4. *See* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 680 (1974) (noting the Court's history of upholding forfeiture statutes as constitutional).

5. *See In Rem*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining *in rem* as "[i]nvolving or determining the status of a thing, and therefore the rights of persons generally with respect to that thing").

6. LEONARD W. LEVY, A LICENSE TO STEAL: THE FORFEITURE OF PROPERTY 22 (1996); *see* David Pimentel, *Forfeitures Revisited: Bringing Principle to Practice in Federal Court*, 13 NEV. L.J. 1, 5 (2012) (noting that in an *in rem* proceeding "the property itself is the defendant").

argues that the standard of proof for civil *in rem* forfeiture proceedings should be the same clear and convincing evidence standard the Supreme Court requires in civil commitment proceedings.

Civil commitment and civil asset forfeiture are analogous proceedings. Both are controversial government actions that allow for significant deprivations.[7] Both have a long history in England and the United States.[8] Both have been found constitutional in part because of their historical origins.[9] Both have expanded beyond a historically limited practice.[10] Both are authorized under state and federal statutes.[11] Both are civil proceedings with a quasi-criminal element.[12] However, civil commitment requires the higher evidentiary standard of proof, clear and convincing evidence, while civil asset forfeiture remains permissible under the lesser preponderance of the evidence standard.[13]

The evidentiary standard of proof is an essential due process safeguard against erroneous deprivations and is not a mere matter of semantics.[14] Indeed, a standard of proof is the only thing standing between an individual and involuntary commitment or forfeiture of his property.[15] Courts decide what level of proof satisfies due process.[16] Using the Supreme Court's framework in *Mathews v. Eldridge*,[17] as applied to civil commitment in *Addington v. Texas*,[18] this Comment argues that due process demands judges in civil *in rem* forfeiture proceedings, like those in civil commitment proceedings, apply the higher clear and convincing standard of proof.[19]

Part I provides an overview of civil asset forfeiture, civil commitment, and standards of proof.[20] It identifies and explores contraband, facilitating property, and proceeds forfeiture and traces the historical expansion of

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7. *See infra* Section II.A.
8. *See infra* Part I.
9. *See infra* Part I.
10. *See infra* Part I.
11. *See infra* notes 31 & 32 and accompanying text.
12. *See infra* notes 294–96 and accompanying text.
13. *See infra* Part I.
14. *See* Addington v. Texas, 441 U.S. 418, 423, 425 (1979) (noting that a standard of proof allocates risk between parties and that adopting a new standard is more than an exercise in semantics).
15. *See id.*
16. *See infra* Section I.C.
17. 424 U.S. 319 (1976).
18. 441 U.S. 418 (1979).
19. *See infra* Part II.
20. *See infra* Part I.

each.[21] It considers civil *in rem* forfeiture's evolution to a modern practice that allows forfeiture of criminal activity proceeds.[22] It likewise surveys civil commitment's historical origins and evolution.[23] Finally, it explores the applicable standards of proof by explicitly examining the purpose of the clear and convincing standard.[24]

Part II uses the *Mathews* factors, as applied to civil commitment in *Addington*, to show that the preponderance standard currently used in civil *in rem* forfeiture proceedings does not satisfy Fifth Amendment Due Process requirements.[25] Finally, this Comment concludes that the clear and convincing evidentiary standard should be applied in all federal civil *in rem* forfeiture proceedings.[26]

I. BACKGROUND

This section provides an overview of federal civil asset forfeiture, civil commitment, and the clear and convincing evidentiary standard of proof in the United States. Section I.A. focuses on federal civil asset forfeiture. Because the Supreme Court justified the constitutionality of civil forfeiture by relying on the limited historical practice that existed prior to the Constitution, Section I.A.1. charts the extensive history of civil asset forfeiture practices from Medieval England to the modern United States.[27] Section I.A.2. delineates the categories of property that may be forfeited under federal law, while Section I.A.3. explains the differences between criminal, administrative, and civil forfeiture proceedings.[28] Section I.B. expounds civil commitment's history and compares it favorably to civil forfeiture's history.[29] Finally, Section I.C. provides an overview of standards of proof used in civil proceedings and focuses on the clear and convincing standard.[30]

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21. *See infra* Section I.A.2.
22. *See infra* Section I.A.1.
23. *See infra* Section I.B.
24. *See infra* Section I.C.
25. *See infra* Part II.
26. *See infra* Conclusion.
27. Leonard v. Texas, 137 S. Ct. 847, 848 (2017) (Thomas, J., concurring) (discussing the denial of certiorari); *see infra* Section I.A.1.
28. *See infra* Sections I.A.2, I.A.3.
29. *See infra* Section I.B.
30. *See infra* Section I.C.

A. Federal Civil Asset Forfeiture

Modern civil asset forfeiture proceedings are authorized by statute and occur at both the state and federal level. Several statutes authorize federal civil asset forfeiture,[31] but all of them were updated to include the provisions of the Civil Asset Reform Act of 2000[32] (CAFRA). No federal common law of forfeiture exists, but rather Congress enacted a variety of forfeiture provisions over time that resulted in an illogical body of law.[33] Civil *in rem* forfeiture requires no underlying criminal conviction of the property owner or other person linked to the property.[34] Instead, the government commences an action against the property itself, i.e., *in rem*, based on the idea that the property has been put to "improper use," not based on any theory that the person to whom it belongs was involved in wrongdoing.[35]

1. Historical forfeiture practices

The Supreme Court expressly relied on the longstanding history of forfeiture practices to justify the constitutionality of modern civil asset forfeiture.[36] However, an examination of the historical practice in relation to the modern one exposes the deficiencies of relying on a historical rationale to justify a radically expansive modern practice.[37] Forfeiture practices and laws in Medieval England, Colonial America, and the United States pre-1970 allowed only for contraband and facilitating

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31. *See, e.g.*, 31 U.S.C. §§ 5317(c), 5332 (2012) (authorizing forfeiture in bulk cash smuggling and currency reporting instances).

32. Pub. L. No. 106-185, 114 Stat. 202 (2000).

33. STEFAN D. CASSELLA, ASSET FORFEITURE LAW IN THE UNITED STATES § 1–3, at 4 (2d ed. 2013) (arguing there is "almost no rhyme or reason" to current forfeiture law).

34. *Id.* § 1–5, at 18.

35. Austin v. United States, 509 U.S. 602, 624 (1993) (Scalia, J., concurring in part and concurring in the judgment). *But see* New Mexico v. Nunez, 2 P.3d 264, 284–85 (N.M. 1999) (noting that in "modern jurisprudence . . . [a]n in rem action is directed, not *against* the property per se, but rather at resolving the interests, claims, titles, and rights in that property. And it is persons . . . who possess those interests, claims, titles, and rights").

36. *See* Leonard v. Texas, 137 S. Ct. 847, 848 (2017) (Thomas, J., concurring) (noting that "[t]he Court has justified its unique constitutional treatment of civil forfeiture largely by reference to a discrete historical practice that existed at the time of the founding").

37. *See, e.g.*, J.W. Goldsmith, Jr.-Grant Co. v. United States, 254 U.S. 505, 511 (1921) (finding that civil forfeiture is "too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced"); *see also Leonard*, 137 S. Ct. at 849 (Thomas, J., concurring) (noting that he is "skeptical that th[e] historical practice is capable of sustaining, as a constitutional matter, the contours of modern practice").

property forfeiture.[38] However, in the modern civil asset forfeiture context, proceeds forfeiture is now more common than facilitating property forfeiture.[39] This section traces the practice's history with a focus on the ways in which the practice has expanded over time.

a. Guilty property: forfeiture from the Bible to the Middle Ages

Asset forfeiture, like many American legal practices, traces its origins to the English common law; however, there is some debate whether the practice may be even older.[40] Some scholars identify the genesis of forfeiture in this Old Testament passage, "[i]f 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."[41] Under Mosaic law, this biblical passage justified removing the animal from its owner, killing the animal, and disposing of the meat without eating it.[42] This biblical concept was likely the origin of the English common law "deodand,"[43] a legal doctrine that allowed the monarch to seize personal chattel that was "the immediate occasion of the death of any reasonable creature."[44]

Originally, the deodand was paid to the Church as atonement "for the souls of such as were snatched away by sudden death."[45] However, as the deodand concept progressed through the Middle Ages, the State

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38. *See* discussion *infra* Section I.A.1.b.

39. *See* CASSELLA, *supra* note 33, § 26–1, at 937 (noting that facilitating property forfeiture is an older concept than proceeds forfeiture and "prior to the 1970s, most forfeitures were limited to the property used to commit a criminal offense").

40. *See* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 680–81 (1974) (holding that asset forfeiture is constitutional in part because of the "historical background of forfeiture statutes in this country," which are "traceable" to both the English common law "deodand" and to "Biblical and pre-Judeo-Christian practices"). *But see* LEVY, *supra* note 6, at 8–9, 20 (arguing that the deodand from English common law is the "basis of civil forfeiture in America today" but that it is not derived from the Mosaic law); Adam Crepelle, *Probable Cause to Plunder: Civil Asset Forfeiture and the Problems it Creates*, 7 WAKE FOREST J.L. & POL'Y 315, 318 (2017) (arguing that deodand is not "the progenitor of modern American civil asset forfeiture," but that the "English Navigation Acts are the most direct antecedent of U.S. civil asset forfeiture law").

41. *Exodus* 21:28 (King James); *see also Calero-Toledo*, 416 U.S. at 681 n.17 (citing the passage from Exodus as an origin for English common law forfeiture).

42. *See Exodus*, *supra* note 41.

43. *See Calero-Toledo*, 416 U.S. at 681 n.16 (noting that deodand was derived "from the Latin *Deo dandum*, [meaning] 'to be given to God'"); *Deodand*, BLACK'S LAW DICTIONARY, *supra* note 5 (defining deodand as "[s]omething (such as an animal) that has done wrong and must therefore be forfeited to the Crown").

44. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *300 (Wayne Morrison ed., Cavendish Publishing Ltd. 2001) (1765–1769).

45. *Id.*

personified in the monarch became the forfeited property beneficiary, rather than the Church.[46] Likewise, the innocence of the property owner became "an irrelevant consideration" to whether the property was forfeitable.[47] The guilty property facilitated the crime and was consequently forfeitable regardless of the owner's culpability.[48]

While the deodand concept was limited to "guilty property," English common law also allowed for forfeiture when one was convicted of a felony or treason.[49] The individual's criminal conviction required the confiscation of his "moveables [sic] or personal estate" and the vesting of rights to the property "in the king, who [was] the person supposed to be offended" by the criminal act.[50] The criminal act itself, not the nature of the property, demanded the complete forfeiture of all property.[51] Aside from this criminal forfeiture proceeding, early English common law allowed for the forfeiture of facilitating property or contraband but not proceeds of any criminal acts.[52]

b. Customs, rebellion, and booze: statutory forfeiture in the early modern period

In the advent of seafaring exploration, England instituted a statutory forfeiture practice that bears a stronger resemblance to the modern American practice than the Medieval deodand concept.[53] Under the Navigation Acts of 1660,[54] a single crewman's misconduct could cause

46. LEVY, *supra* note 6, at 11 ("As societies became more developed, the notion emerged that the guilty object required community atonement by providing compensation to someone in charge, like a chieftain or king. He was the one responsible for keeping the peace that had been shattered by the homicide, even if it was accidental. He was therefore the one who should benefit from the sacrifice.").

47. *Id.* at 10.

48. *See* Pimentel, *supra* note 6, at 8; *see also* discussion of facilitating property *infra* Section I.A.2.

49. *See* Austin v. United States, 509 U.S. 602, 611 (1993) (noting that "[t]hree kinds of forfeiture were established in England . . . deodand, forfeiture upon conviction for a felony or treason, and statutory forfeiture"); BLACKSTONE, *supra* note 44, at *299; *see also* discussion *infra* Section I.A.3.

50. BLACKSTONE, *supra* note 44, at *299.

51. *See* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 682–83 (1974) (noting that unlike English law, American law never permitted "forfeiture of estates as a consequence of a federal criminal conviction").

52. *See supra* Section I.A.2.

53. *See Austin*, 509 U.S. at 612–13 (explaining that the United States adopted statutory forfeiture laws similar to those in England); Crepelle, *supra* note 40, at 318–19.

54. 12 Car. II. c. 18 (Eng.).

the forfeiture of an entire ship.[55] The English government's enforcement of the Navigation Acts and similar laws in the colonies allowed for the forfeiture of vessels and commodities used in violation of those laws.[56] Under the Navigation Acts, the Crown brought an *in rem* action against a ship, as facilitating property, without regard to the owner's innocence or guilt.[57] Prosecution occurred in common law courts, as well as vice-admiralty courts without juries.[58] American jurisprudence from the early Republic to the twentieth century reaffirmed the permissibility of forfeiture of property that was itself guilty of facilitating criminal activity.[59] Contraband and facilitating property remained the exclusive categories of property that could be forfeited until the late twentieth century.[60]

In the early Republic, statutory *in rem* forfeiture actions continued in admiralty courts and focused primarily on customs and maritime issues.[61] Indeed, the first Congress enacted legislation allowing for

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55. Crepelle, *supra* note 40, at 318. *Compare* Mitchell v. Torup (1766) 145 Eng. Rep. 764, 764, 766; Parker 227, 232–33 (finding permissible the forfeiture of a ship that illegally imported 221 pounds of tea into England unbeknownst to the owner because any requirement that an owner have actual knowledge would have "opened a door for perpetual evasion, and the provisions of this excellent act for the increase of the navigation would have been defeated"), *with* Jeremy Roebuck, *Challenge to Phila. Civil Forfeiture Law Continues*, PHILA. INQUIRER (Dec. 18, 2014), http://www.philly.com/philly/news/local/20141219_Challenge_to_Philadelphia_s_civil-forfeiture_law_continues.html [https://VG52-ZAT3] (documenting a case in Philadelphia where the owners of $350,000 home were subjected to a civil forfeiture proceeding because their twenty-two-year-old son sold "less than $40 of heroin outside" the home).

56. *Calero-Toledo*, 416 U.S. at 683.

57. *Id.*; *see* LEVY, *supra* note 6, at 43 (explaining that "[a] vessel whose guilt was suspected would be arrested and prosecuted by name" because "[t]he law treated the ship as if it were alive [and] a guilty person").

58. *See* C.J. Hendry Co. v. Moore, 318 U.S. 133, 140–41 (1943) (noting that colonial common law courts maintained jurisdiction over *in rem* forfeiture proceedings; however, vice-admiralty courts were used more frequently "prompted in part by the Crown's desire to have access to a forum not controlled by the obstinate resistance of American juries").

59. *See, e.g.*, J.W. Goldsmith, Jr.-Grant Co. v. United States, 254 U.S. 505, 511 (1921) (holding that the forfeiture of an automobile used "for the deposit and concealment of . . . distilled spirits upon which a tax was imposed by the United States and had not been paid" was acceptable even though the owner was innocent because "the thing is primarily considered the offender"); The Palmyra, 25 U.S. (12 Wheat) 1, 13–14 (1827) (holding a proceeding against a forfeited Spanish brig engaged in piracy was a permissible *in rem* action in which "the offence [sic] is attached primarily to the thing").

60. *See supra* Section I.A.2.

61. *See, e.g.*, *The Palmyra*, 25 U.S. (12 Wheat.) at 12–13 (affirming that *in rem* forfeitures in Admiralty were civil proceedings and it was sufficient "for forfeitures . . .

forfeiture of ships and goods involved in customs violations.[62] Early American statutes and case law continued to advance the notion that the property itself was guilty; however, courts increasingly applied a negligence rationale to imply that the property owner was negligent in allowing illegal use of his property.[63] The negligence rationale allowed courts and policymakers to justify property forfeiture that would otherwise seem unjust.[64] If a court found that an otherwise innocent owner was negligent in allowing his property to be used for illegal purposes, it helped justify the loss of property when the owner had no actual knowledge of the property's illegal use.[65]

During the Civil War, Congress enacted the Confiscation Act of 1862[66] with the explicit purpose to "suppress Insurrection, to punish Treason and Rebellion, [and] to seize and confiscate the Property of Rebels."[67] Congress declared that the Act's goal was "to insure [sic] the speedy termination of the . . . rebellion" by making it "the duty of the President of the United States to cause the seizure of all the estate and property, money, stocks, credits, and effects" from all those who actively participated in the Confederate Government or those who gave "aid and comfort to [the] rebellion."[68] Any judicial proceedings conducted under the Act were instituted *in rem* and had to adhere to the procedures set forth in admiralty or revenue proceedings.[69]

The punitive Confiscation Act represented a watershed in forfeiture jurisprudence because for the first time, Congress applied forfeiture principles, previously limited to admiralty or customs cases, to all property

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to allege the offence [sic] in the terms of the statute creating the forfeitures"); United States v. La Vengeance, 3 U.S. (3 Dall.) 297, 301 (1796) (holding that a seizure of a French privateer was rightfully decided in an Admiralty court because it was "a civil cause . . . *in rem*; and [did] not, in any degree, touch the person of the offender").

62. Austin v. United States, 509 U.S. 602, 613 (1993).

63. *Id.* at 616.

64. *See, e.g.*, *supra* note 55.

65. *See supra* note 55.

66. Confiscation Act of 1862, 12 Stat. 589 (1862).

67. *Id.*

68. *Id.* § 5.

69. *Id.* § 7. *Compare* LEVY, *supra* note 6, at 53 ("Forfeiture had nothing to do with conviction for treason or even rebellion. As a matter of fact the *in rem* proceedings, which the statute authorized, were not even aimed at the property of traitors; the forfeiture sections referred rather to the property of 'persons in armed rebellion, or abetting it.'"), *with* Austin v. United States, 509 U.S. 602, 611–12 (1993) (noting that English common law forfeiture "obviously served to punish felons and traitors" but was allowed only upon conviction "of a felony or of treason"), *and supra* text accompanying notes 49–51.

with an explicitly punitive intention.[70] The Supreme Court initially upheld the Confiscation Act as constitutional, but did not explicitly endorse the new expansive application of forfeiture proceedings.[71] Seven years later, in *Dobbins's Distillery v. United States*,[72] the Court relied on traditional admiralty *in rem* proceedings against ships as precedent and unanimously held that land leased to a distiller who failed to pay taxes and kept false books should be forfeited even though the landowner did not actually know that his distillery had been used for fraudulent purposes.[73] The offense attached to the distillery "and the real and personal property used in connection with" it, even though the landowner knew nothing of the distiller's criminal acts.[74]

Throughout Prohibition, the Federal Government, with the Supreme Court's acquiescence, expanded civil forfeiture's reach to include property used in bootlegging and the illegal transport of alcohol.[75] Increasingly, the Court justified the confiscation of facilitating property—"the instrument by which the offense was committed"—in the broader context of federal law enforcement and public policy objectives.[76] However, forfeiture cases during the Prohibition period were still more closely related to the early admiralty forfeiture cases than they were to modern forfeiture actions because the "Government's right to take possession of property stemmed from the misuse of the property itself;" forfeitable property was still limited to contraband and facilitating property, but not proceeds.[77] Until 1970, the Government prosecuted guilty facilitating property in a variety of contexts, and the Court repeatedly upheld those forfeiture actions as constitutional.[78]

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70. *See* LEVY, *supra* note 6, at 57 (finding that "*[i]n rem* forfeiture proceedings became common after the Civil War").

71. *See* Miller v. United States, 78 U.S. (11 Wall.) 268, 306 (1870) (holding that the Confiscation Act of 1862 was constitutional because "Congress had then full power to provide for the seizure and confiscation of any property which the enemy or adherents of the enemy could use for the purpose of maintaining the war against the government").

72. 96 U.S. 395 (1877).

73. *Id.* at 402; LEVY, *supra* note 6, at 57–58.

74. *Dobbins's Distillery*, 96 U.S. at 402, 404.

75. *See, e.g.*, Van Oster v. Kansas, 272 U.S. 465, 466–69 (1926) (permitting the forfeiture of an automobile used "for the illegal transportation of intoxicating liquor" even though the owner of the automobile had no knowledge of the illegal use of the automobile).

76. CASSELLA, *supra* note 33, § 2–3, at 32.

77. United States v. 92 Buena Vista Ave., 507 U.S. 111, 121 (1993); *see supra* Section I.A.2.

78. *See, e.g.*, J.W. Goldsmith, Jr.-Grant Co. v. United States, 254 U.S. 505, 511 (1921) (holding that forfeiture of an automobile to which the dealer retained title was constitutional because the automobile itself was guilty of being used for bootlegging).

The Supreme Court's repeated use of a negligence rationale to justify what would otherwise seem an unjust procedure implicated a punitive purpose in the civil forfeiture action that the Court had difficulty reconciling with the civil label.[79] For instance, in *Boyd v. United States*,[80] the Court concluded that an *in rem* forfeiture action was criminal in nature and entitled to protection under the Fourth and Fifth Amendments to the Constitution.[81] The Court later explained that the forfeiture in *Boyd* was "a penalty that had absolutely no correlation to any damages sustained by society or to the cost of enforcing the law," and that the forfeiture proceeding could "prejudice [the property owner] in respect to later criminal proceedings."[82] The quasi-criminal forfeiture proceeding in *Boyd* evidenced a "countervailing punitive purpose or effect" even though the legislative purpose was civil in nature.[83] Ten years after *Boyd*, in *United States v. Zucker*,[84] the Court found paradoxically that civil forfeiture was not "technically criminal" and thus the Sixth Amendment did not apply.[85] In *One 1958 Plymouth Sedan v. Pennsylvania*,[86] the Court clarified that civil forfeiture is a civil action, in fact, but nevertheless, the proceeding has a quasi-criminal character.[87] The Court reasoned that the purpose of a statute allowing the forfeiture of an automobile transporting contraband liquor was to penalize violations of the law.[88] The government charged the automobile owner with a criminal offense but also intended that the forfeiture action penalized the owner.[89]

Like their English forbearers, early American statutes and case law authorized civil forfeiture of contraband and facilitating property in

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79. *See* Austin v. United States, 509 U.S. 602, 615 (1993) (noting that civil *in rem* "forfeiture has been justified on two theories—that the property itself is 'guilty' of the offense, and that the owner may be held accountable for the wrongs of others to whom he entrusts his property. Both theories rest, at bottom, on the notion that the owner has been negligent in allowing his property to be misused and that he is properly punished for that negligence").

80. 116 U.S. 616 (1886).

81. *Id.* at 633–34.

82. United States v. Ward, 448 U.S. 242, 244, 254 (1980) (comparing "the assessment of a 'civil penalty' under . . . the Federal Water Pollution Control Act (FWCPA)" with civil forfeiture to determine whether the FWCPA penalty is a "criminal case" and entitled to protections under the Fifth Amendment).

83. *Id.*

84. 161 U.S. 475 (1896).

85. *Id.* at 481.

86. 380 U.S. 693 (1965).

87. *Id.* at 700.

88. *Id.*

89. *See id.*

the maritime and customs context.[90] During and following the Civil War, Congress expanded civil forfeiture to include contraband and property facilitating rebellion, bootlegging, and other federal crimes.[91] During this same period, the Supreme Court continued to justify civil forfeiture under a guilty property justification, but the Court's rationale increasingly focused on a theory of owner negligence.[92] Advancement of this negligence theory introduced a punitive aspect to civil forfeiture that required the Court to grapple with whether civil forfeiture was a *de facto* criminal proceeding.[93] The Court settled on the term "quasi-criminal" to describe civil forfeiture proceedings, and that appellation has applied since.[94]

c. The war on organized crime, drugs, and terror: expansion of forfeiture to proceeds of criminality

The Racketeer Influenced and Corrupt Organizations (RICO) chapter of the Organized Crime Control Act of 1970[95] marked the beginning of a "rediscovery of criminal forfeiture" that allowed the government to forfeit proceeds of organized crime and white-collar crime.[96] Similarly, the Comprehensive Drug Abuse Prevention and Control Act of 1970,[97] amended in 1978, allowed the forfeiture of proceeds from drug activity.[98] By the mid-1990s, federal civil forfeiture statutes applied to contraband, facilitating property, and proceeds for "virtually all serious offenses, including money laundering, car-jacking, espionage, child pornography, bank fraud, and most other 'white collar' crimes."[99]

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90. *See supra* notes 61–65 and accompanying text.
91. *See supra* notes 66–74 and accompanying text.
92. *See supra* notes 79–89 and accompanying text.
93. *See supra* notes 79–89 and accompanying text.
94. *See* One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 700 (1965).
95. Pub. L. No. 91-452, 84 Stat. 941 (codified as amended at 18 U.S.C. §§ 1961–1968 (2012)).
96. LEVY, *supra* note 6, at 61–62; *see also* United States v. 92 Buena Vista Avenue, 507 U.S. 111, 121 n.16 (1993); Pimentel, *supra* note 6, at 11 (stating that RICO is "the provenance of proceeds forfeitures" and that proceeds "is independent and unrelated" to the other types of forfeiture).
97. Pub. L. No. 91-513, 84 Stat. 1236 (codified as amended at 21 U.S.C. § 881(a)(6) (2012)).
98. *See 92 Buena Vista Avenue*, 507 U.S. at 121–22 (explaining that before the 1978 amendment, Congress had authorized only the forfeiture of "the illegal substances themselves and the instruments by which they were manufactured and distributed"); CASSELLA, *supra* note 33, § 2–4, at 33 (noting that forfeiture of criminal proceeds under the 1978 amendment was an entirely new idea).
99. CASSELLA, *supra* note 33, § 2–4, at 34.

The expansion of civil forfeiture caused a similar increase in Supreme Court rulings on the topic.[100] The Court explicitly disavowed the concept of guilty property and acknowledged that the legal fiction was not necessary to conduct *in rem* proceedings against property.[101] Some commentators have opined that the Supreme Court's rulings in the 1990s do not represent a "structure and logic" or "an unfolding plan," but are more akin to the Court "making it up as they went along."[102] During the decade, the Court ruled on the following important forfeiture issues, many of which were eventually codified in the Civil Asset Forfeiture Reform Act of 2000 (CAFRA): the Due Process Clause and innocent ownership of forfeited property;[103] the Due Process Clause and the right to notice and a hearing before forfeiting property;[104] the application of

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100. *See id.* § 2–1, at 28.

> Asset forfeiture came into prominence as a law enforcement tool in the United States during the 1990s. At the beginning of that decade, the Department of Justice . . . was forfeiting approximately $200 million per year in criminal assets, mostly from drug cases. By the end of the decade, it was forfeiting more than $600 million per year in assets involved in an enormous variety of serious crimes.

Id.

101. *See* United States v. Ursery, 518 U.S. 267, 295 (1996) (Kennedy, J., concurring) (noting that the Court is not reviving the fiction "that the property is punished as if it were a sentient being capable of moral choice"); Austin v. United States, 509 U.S. 602, 616 (1993) (explaining that the Court understood the guilty property fiction "to rest on the notion that the owner . . . [is] negligent" because he allowed his property to become involved in a crime).

102. CASSELLA, *supra* note 33, § 2–5, at 37 (quoting JOSEPH ELLIS, FOUNDING BROTHERS: THE REVOLUTIONARY GENERATION 216 (2000)).

103. *See* Bennis v. Michigan, 516 U.S. 442, 453 (1996) (holding that *in rem* forfeiture of an automobile owned by an innocent owner that nonetheless "facilitated and was used in criminal activity" was not a violation of the innocent owner's right to due process under the Fifth Amendment). *But see* Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106-185, 114 Stat. 202, 206 (2000) (codified at 18 U.S.C. § 983(d) (2012)) ("An innocent owner's interest in property shall not be forfeited under any civil forfeiture statute. The claimant shall have the burden of proving that the claimant is an innocent owner by a preponderance of the evidence.").

104. *See* United States v. James Daniel Good Real Prop., 510 U.S. 43, 62 (1993) (holding that "[u]nless exigent circumstances are present, the Due Process Clause requires the Government to afford notice and a meaningful opportunity to be heard before seizing real property subject to civil forfeiture"); *see also* Civil Asset Forfeiture Reform Act of 2000, 18 U.S.C. § 7 (2012) ("The Government shall initiate a civil forfeiture action against real property by—(A) filing a complaint for forfeiture; (B) posting a notice of the complaint on the property; and (C) serving notice on the property owner, along with a copy of the complaint.").

the Eighth Amendment's Excessive Fines clause to forfeiture actions;[105] and the application of the Fifth Amendment's Double Jeopardy Clause to forfeiture actions.[106]

In 2000, Congress responded in a bipartisan fashion to the "inadequate protections for private property" provided in statute or by the courts and passed the first comprehensive overhaul of federal civil asset forfeiture laws, CAFRA.[107] Notably, CAFRA applies to all federal civil forfeiture proceedings and "requires the Government to prove by a preponderance of the evidence

105. *See* United States v. Bajakajian, 524 U.S. 321, 334, 336 (1998) (applying the Court's ruling in *Austin*, but also establishing a "gross disproportionality" test that renders forfeiture unconstitutionally excessive when the amount of the forfeiture "is grossly disproportional to the gravity of the defendant's offense"); *Austin*, 509 U.S. at 610, 618, 621–22 (holding that the Excessive Fines Clause of the Eighth Amendment applies to civil *in rem* forfeiture and reasoning that the issue is not "whether forfeiture . . . is civil or criminal, but rather whether it is punishment," and since forfeiture *in rem* was historically understood as punishment that did not "serve[] solely a remedial purpose," it is subject to the Eighth Amendment); *see also* Timbs v. Indiana, 139 S. Ct. 682, 687 (2019) (holding that the Excessive Fines Clause is incorporated against the States under the Fourteenth Amendment's Due Process Clause); Civil Asset Forfeiture Reform Act of 2000, 18 U.S.C. § 983(g) (codifying the Court's gross-proportionality test: "(1) The claimant under subsection (a)(4) may petition the court to determine whether the forfeiture was constitutionally excessive. (2) In making this determination, the court shall compare the forfeiture to the gravity of the offense giving rise to the forfeiture").

106. *See Ursery*, 518 U.S. at 278, 288, 291–92 (holding that "*in rem* civil forfeitures are neither 'punishment' nor criminal for the purposes of the Double Jeopardy Clause" because civil forfeitures are remedial civil sanctions that are distinct from punitive *in personam* civil penalties such as a fine, and establishing a two-part test to determine when the provision constitutes punishment).

107. 146 CONG. REC. 3654 (2000) (statement of Sen. Hatch); *see* 146 CONG. REC. 5227–28 (statement of Rep. Hyde) (stating that CAFRA "represents the culmination of a 7-year effort to reform our Nation's civil asset forfeiture laws" that will return "civil asset forfeiture to the ranks of respected law enforcement tools that can be used without risk to the civil liberties and property rights of American citizens"). *But see* Jennifer Levesque, Note, *Property Rights—When Reform is not Enough: A Look Inside the Problems Created by the Civil Asset Forfeiture Reform Act of 2000*, 37 W. NEW ENG. L. REV. 59, 59 (2015) (arguing that "ongoing abuses of civil forfeiture . . . have continued to plague innocent property owners . . . years after enactment of the Act"); Daniel Reed, Note, *The Next Step in Civil Asset Forfeiture Reform: Passing the Civil Asset Forfeiture Reform Act of 2014*, 66 CATH. U. L. REV. 933, 934–35 (2017) (arguing in favor of CAFRA 2014, a proposed reform bill that has yet to get a vote, because CAFRA 2000 "did not do enough to protect citizens from civil forfeiture abuse" specifically because the "preponderance of the evidence standard . . . is an inappropriately light standard for the government to prove").

that the property is subject to forfeiture."[108] CAFRA raised the standard from the previous statutory requirement that the government only needed to "make an initial showing of probable cause that the property [was] subject to civil forfeiture."[109] To prevail in a forfeiture proceeding, CAFRA shifted the burden of proof to the government instead of requiring, as before that the owner establish the property's innocence.[110] CAFRA proponents argued that the preponderance standard provided insufficient protection for the interests of property owners.[111] The Supreme Court has not yet ruled on the constitutionality of the standard of proof for civil asset forfeiture.[112] Indeed, as recently as the October 2018 term, a unanimous Supreme Court took for granted that civil *in rem* forfeiture is constitutional and instead focused on the applicability of the Eighth Amendment to the state practice.[113]

2. Categories of property subject to forfeiture

Three categories of property that may be forfeited under federal law today. In *Bennis v. Michigan*,[114] the Supreme Court considered whether a state must allow a forfeited property owner to contest the forfeiture by arguing the

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108. 146 CONG. REC. 5228 (statement of Rep. Hyde). *Cf.* United States v. Twenty One Thousand Dollars in United States Postal Money Orders, 298 F. Supp. 2d 597, 601 (E.D. Mich. 2003) (stating that the Government can meet its preponderance burden without demonstrating "a direct connection between Defendant property and the illegal activity").

109. 146 CONG. REC. 5228 (statement of Rep. Hyde).

110. *Id.*; *cf. infra* text accompanying notes 157–60 (discussing the current burden of proof under CAFRA as well as additional protections for property owners).

111. 146 CONG. REC. 3665 (statement of Sen. Leahy); *see also* CASSELLA, *supra* note 33, § 1–5(a)(1) at 18 (noting that the advantage of civil forfeiture is the lower burden of proof that only requires the Government "to prove the forfeitability of the property by a preponderance of the evidence"). *But see* Reed, *supra* note 107, at 944 (arguing that the "preponderance of the evidence standard is too easy for overzealous prosecutors to abuse, and does not create enough of a safeguard against frivolous forfeiture actions").

112. *See, e.g.*, Leonard v. Texas, 137 S. Ct. 847, 847 (2017) (Thomas, J., concurring) (reasoning "that the Due Process Clause required the State to carry its burden by clear and convincing evidence rather than by a preponderance of the evidence"); *cf.* Timbs v. Indiana, 139 S. Ct. 682, 690 (2019) (focusing only on the question of whether the Eighth Amendment's Excessive Fines Clause is incorporated to the states under the Due Process Clause of the Fourteenth Amendment).

113. *See Timbs*, 139 S. Ct. at 686; *cf.* Damon Root, *Supreme Court Agrees to Hear Significant New Case About Civil Asset Forfeiture and the Bill of Rights*, REASON (June 18, 2018, 1:00 PM), https://reason.com/blog/2018/06/18/supreme-court-agrees-to-hear-significant [https://perma.cc/8TG-87FF] (noting that the case could give the Court "an opportunity to consider the broader injustices that occur in the name of civil asset forfeiture").

114. 516 U.S. 442 (1996).

owner's innocence.[115] In a dissent from the majority opinion, Justice Stevens divided property into three categories useful for understanding civil forfeiture: contraband, proceeds, and instrumentalities.[116]

The first category, contraband, is the least controversial of the three types of forfeited property.[117] In a civil action against contraband, the government has a public policy interest in preventing private possession of the object.[118] Owning the object in question is illegal, thus government can assume that it is forfeitable.[119] The government has a strong and obvious interest in seizing contraband to remove the item from public use.[120] There is little debate that the government has a legitimate objective in the removal or destruction of contraband, and that the contraband owner has no legitimate property right in that contraband.[121] While some may dispute whether a substance should be considered contraband, few would dispute the legitimacy of the government's interest in removing contraband from the streets.[122]

Justice Stevens's second forfeitable category contains the proceeds of an illegal activity.[123] Under federal law, forfeiture is statutorily permissible for "the *proceeds* of more than 200 different state and federal crimes."[124] Proceeds means "any property, real or personal, tangible or

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115. *Id.* at 453 (holding that the innocence of a partial owner of an automobile used to facilitate prostitution did not render civil forfeiture of the automobile impermissible).

116. *Id.* at 459 (Stevens, J., dissenting); *see also* Pimentel, *supra* note 6, at 3, 6 (arguing that the "policy basis for federal forfeitures" must recognize Justice Stevens's three categories and tailor procedures to each type based on its historical practice and policy basis).

117. Pimentel, *supra* note 6, at 12 (noting that contraband forfeiture is also "perhaps [the] least interesting" of the three types of property forfeitures).

118. One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 699 (1965) (contrasting forfeiture of "objects the possession of which, without more, constitutes a crime" with an automobile used to transport bootleg liquor and noting that "[t]here is nothing even remotely criminal in possessing an automobile").

119. Pimentel, *supra* note 6, at 12.

120. *Bennis*, 516 U.S. at 459 (Stevens, J., dissenting) (noting that "adulterated food, sawed-off shotguns, narcotics, and smuggled goods" are examples of contraband); *see* 21 U.S.C. § 881(f) (2012) ("All controlled substances in schedule I or II . . . ; all dangerous, toxic, or hazardous raw materials or products . . . shall be deemed contraband and seized and summarily forfeited to the United States.").

121. *See Bennis*, 516 U.S. at 459 (Stevens, J., dissenting).

122. *See id.*

123. *Id.*

124. CASSELLA, *supra* note 33, § 1–3, at 5 (noting that 18 U.S.C. § 981(a)(1)(C) is the most expansive forfeiture statute, and it allows proceeds forfeiture of the following federal crimes: "fraud, bribery, embezzlement and theft, and scores of more obscure

intangible, that the wrongdoer would not have obtained or retained *but for* the [commission of a] crime."[125] Proceeds statutes are "powerful" law enforcement tools that encompass many types of property not traditionally considered forfeitable and are theoretically limited in scope to only proceeds tainted by illegal activity.[126] In a civil forfeiture action against proceeds, the government must only prove that possession of the property was derived from the commission of a crime.[127] The forfeiture of proceeds is a relatively modern invention, meant to deprive criminal enterprises such as the mafia or drug cartels of the funding necessary to continue their illegal activity.[128]

Finally, in the third category, Justice Stevens identified the forfeiture of instrumentalities; however, this Comment will identify this category by the more general term, "facilitating property."[129] Facilitating property is defined broadly to include "any property that makes the prohibited conduct 'less difficult or more or less free from obstruction or hindrance.'"[130] In federal statutes, the use of the phrase "any property used to facilitate such an offense" denotes the permissibility of the forfeiture of facilitating property.[131] Both England and the United States historically have permitted facilitating property forfeiture, unlike proceeds forfeiture.[132]

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ones," while the "state crimes include murder, kidnapping, gambling, arson, robbery, bribery, extortion, obscenity, and state drug trafficking").

125. *Id.* (emphasis added); *see, e.g.*, United States v. Farkas, 474 F. App'x 349, 359–60 (4th Cir. 2012) (finding that the district court correctly applied "the 'but for' nexus test first articulated by the Seventh Circuit" to find that Farkas should forfeit nearly thirty-nine million dollars "of the property constituting or derived from proceeds he obtained directly or indirectly as a result" of a mortgage lending fraud scheme).

126. CASSELLA, *supra* note 33, § 1–3, at 6.

127. *Id.* § 2–4, at 35.

128. *See* Pimentel, *supra* note 6, at 11; *infra* Section I.A.3.

129. Bennis v. Michigan, 516 U.S. 442, 460 (1996) (Stevens, J., dissenting); *see* Pimentel, *supra* note 6, at 3 (noting that instrumentalities is a different, more narrow characterization of the larger facilitating property category); *see also* CASSELLA, *supra* note 33, § 26–1 at 938 (stating that there is a distinction between the terms "facilitating property" and "instrumentality," but that the distinction "has little practical significance in most cases").

130. CASSELLA, *supra* note 33, § 26–3, at 942 (quoting United States v. Schifferli, 895 F.2d 987, 990 (4th Cir. 1990)).

131. *See, e.g.*, 18 U.S.C. § 981 (2012) (enabling forfeiture of "[a]ny property, real or personal, within the jurisdiction of the United States, constituting, derived from, or traceable to, any proceeds obtained directly or indirectly from an offense against a foreign nation, or any property used to facilitate such an offense").

132. *See supra* Section I.A.1.

3. Types of forfeiture proceedings

This Comment limits its discussion to federal civil *in rem* forfeiture,[133] but there are two additional types of asset forfeiture allowed under federal law: criminal forfeiture and administrative forfeiture.[134] Criminal forfeiture is a post-conviction proceeding that is "part of a sentence in a criminal case" and is an *in personam* action rather than an *in rem* action against the property itself.[135] An *in personam* action occurs in a standard criminal or civil case; either the government charges an individual with a crime or one individual sues another individual.[136] In either instance, an individual is the object of the legal action, which means it is an *in personam* proceeding.[137] The criminal forfeiture proceeding occurs after the property owner has been found guilty beyond a reasonable doubt of an underlying crime.[138] During the sentencing phase, following a conviction, the government must prove by a preponderance of the evidence that the property was used in the commission of a crime or that it constituted the proceeds of illegal activity.[139] The Supreme Court held that criminal forfeiture actions using a lesser burden of proof are constitutional in part because the government already proved the individual's guilt beyond a reasonable doubt.[140] The lesser preponderance standard satisfies due process in criminal forfeiture proceedings because the underlying conviction protects against an erroneous deprivation.[141]

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133. The argument in favor of a higher standard of proof in civil forfeiture actions could also logically extend to criminal forfeiture proceedings; however, this Comment limits its discussion to civil *in rem* forfeiture because it is the forfeiture proceeding most prone to erroneous deprivation and abuse. The underlying criminal conviction in criminal forfeiture proceedings adds a heightened evidentiary standard not present in civil forfeiture.

134. CASSELLA, *supra* note 33, § 1–4, at 9.

135. *Id.* § 1–4, at 11.

136. *See In Personam*, BLACK'S LAW DICTIONARY, *supra* note 5 (defining *in personam* as "[i]nvolving or determining the personal rights and obligations of the parties").

137. *See* CASSELLA, *supra* note 33, § 1–4, at 11–12.

138. *Id.* § 15–3, at 570.

139. *Id.*

140. *See* Libretti v. United States, 516 U.S. 29, 49 (1995) (rejecting the argument that criminal *in personam* forfeiture falls "within the Sixth Amendment's constitutional protection" because forfeiture is "an aspect of sentencing"); *see also* CASSELLA, *supra* note 33, § 18–5, at 663–68. *But see* Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (holding that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt").

141. *See infra* Section II.A.

Administrative forfeiture is the default first-step proceeding in most federal civil forfeiture actions.[142] It occurs "without any judicial involvement" when a federal law enforcement agency has probable cause to believe that property is statutorily forfeitable and the agency sends proper notice to the property's owner of its intent to forfeit the property.[143] Most forfeiture statutes either expressly allow for administrative forfeiture or incorporate the Tariff Act of 1930,[144] which allows for administrative forfeiture.[145] The federal agency must "notify parties with an interest in the seized property of its intent to forfeit the goods administratively," which allows the owner or interested parties an opportunity to contest the forfeiture and force the agency to commence a civil *in rem* action.[146] If an individual contests the administrative forfeiture, the matter becomes a civil forfeiture proceeding adjudicated in federal court.[147] The majority of asset forfeiture cases originate from administrative forfeiture actions initiated by the Drug Enforcement Administration (DEA).[148] The DEA, or other federal agencies, "may administratively forfeit goods valued at or less than $500,000" under the customs laws, subject to the modifications under CAFRA.[149] An administrative forfeiture has the same legal effect as a final order in a judicial proceeding.[150] Administrative forfeiture is subject to only the probable cause standard of proof unless contested, and then the civil forfeiture preponderance of the evidence standard applies.[151]

Federal civil forfeiture occurs after an individual challenge to the administrative forfeiture or when the Government files a separate civil *in rem* action against property.[152] Since the Supreme Court abandoned

142. CASSELLA, *supra* note 33, § 4–1, at 150.

143. *Id.*

144. Pub. L. No. 71–361, 46 Stat. 590 (codified as amended at 19 U.S.C. §§ 1602–1621 (2012)) (generally referred to as the Customs laws).

145. CASSELLA, *supra* note 33, § 4–3, at 153.

146. Malladi Drugs & Pharm., Ltd. v. Tandy, 552 F.3d 885, 887 (D.C. Cir. 2009) (explaining the process of a DEA administrative forfeiture proceeding against chemicals illegally imported from India); *see* CASSELLA, *supra* note 33, § 1–4(a), at 10–11; *infra* text accompanying notes 152–60.

147. *See* Pimentel, *supra* note 6, at 7.

148. CASSELLA, *supra* note 33, § 4–1, at 150 & n.2.

149. *Malladi Drugs*, 552 F.3d at 887; *see also* CASSELLA, *supra* note 33, § 4–3, at 153 (explaining that administrative forfeitures are only authorized by statutes incorporating or cross-referencing the Customs laws (19 U.S.C. § 1602–1621)).

150. *Malladi Drugs*, 552 F.3d at 887.

151. *Infra* notes 185–87 and accompanying text.

152. CASSELLA, *supra* note 33, § 1–4(a), at 11, § 1–4(c), at 14 (noting that "civil forfeiture does not depend on a criminal conviction, the forfeiture action may be filed before indictment, after indictment, or if there is no indictment at all").

the fiction of guilty property, the *in rem* nature of the proceeding is now "simply a procedural convenience"; however, it is a convenience with exceedingly inconvenient results.[153] The steps in a civil forfeiture action are no different than any other civil case.[154] The government files a complaint against the property, and a party with an interest in the property must file an answer to the complaint.[155] Since the CAFRA reforms, the Government bears the burden at trial of proving property forfeitable by a preponderance of the evidence.[156] To show that the property is forfeitable, the Government must establish a nexus between the property and the alleged crime.[157] Additionally, to protect against erroneous deprivation, civil forfeiture proceedings, unlike regular civil proceedings, provide a statutory innocent owner defense.[158] The innocent owner defense allows the property owner or claimant to prove his innocence by a preponderance of the evidence.[159] If the government meets its burden and the owner fails to prove his innocence, the title of the property passes to the United States.[160]

B. Civil Commitment: A History Parallel to Civil Asset Forfeiture

Like civil forfeiture, civil commitment has Medieval origins and originally empowered the monarch to act on behalf of, and in the best interest of, his or her subjects.[161] The *parens patriae* doctrine provides the first historical justification for civil commitment.[162] Under a claim

153. *Id.* § 1–4(c), at 15; *see supra* Section I.A.1.

154. CASSELLA, *supra* note 33, § 1–4(c), at 16.

155. *Id.*

156. *Id.*; *see, e.g.*, Bennis v. Michigan, 516 U.S. 442, 463–64 (1996) (Stevens, J., dissenting) (arguing that there was no nexus to support the forfeiture because the car seized for facilitating prostitution "was used as little more than an enclosure for a one-time event").

157. CASSELLA, *supra* note 33, § 1–4(c), at 16.

158. *Id.*; *see* 18 U.S.C. § 983(d) (2012) ("An innocent owner's interest in property shall not be forfeited under any civil forfeiture statute.").

159. CASSELLA, *supra* note 33, § 1–4(c), at 16; *see* 18 U.S.C. § 983(d)(1) ("The claimant shall have the burden of proving that the claimant is an innocent owner by a preponderance of the evidence.").

160. CASSELLA, *supra* note 33, § 1–4, at 17.

161. JUDITH LYNN FAILER, WHO QUALIFIES FOR RIGHTS? HOMELESSNESS, MENTAL ILLNESS, AND CIVIL COMMITMENT 68–69 (2002); *see* Mara Lynn Krongard, Comment, *A Population at Risk: Civil Commitment of Substance Abusers After* Kansas v. Hendricks, 90 CALIF. L. REV. 111, 117–18 (2002) (describing the ancient and Medieval civil commitment practices employed to care for the mentally ill).

162. *See Parens Patrie*, BLACK'S LAW DICTIONARY, *supra* note 5 (defining *parens patriae*, Latin for "parent of his or her country," as actions taken by "the state in its capacity as provider of protection to those unable to care for themselves").

of *parens patriae*, the English monarch could declare someone a "lunatic" and "provide for the custody and sustenation [sic] of" that person by taking the person's "lands and the profits of them" to pay for his commitment.[163] Like the deodand, *parens patriae* enabled the "King in his capacity as 'father of the country' . . . [to act] as guardian of persons under legal disabilities" who were unable to act for themselves.[164] In the United States, the Federal and state governments retain the *parens patriae* power.[165] The exercise of the state's police power provides the second historical justification for civil commitment.[166] The common law has long recognized the sovereign's authority to commit the mentally ill to preserve public health and safety.[167]

From 1874 to 1882, Congress employed these two doctrines to justify establishing a civil commitment program whereby the government could hold a convicted prisoner in a federal mental institution during the term of the prisoner's incarceration.[168] In the late-1940s, Congress expanded the previously-limited incarceration in a mental institution to allow for the continued incarceration of "insane criminals upon the expiration of their terms of confinement."[169] In the 1984 Insanity Defense Reform Act,[170] Congress again changed the standard to allow for "civil commitment if . . . the prisoner's 'release would create a

163. BLACKSTONE, *supra* note 44, at *304; *see* FAILER, *supra* note 161, at 68–69 (confirming that the first ground for historic civil commitment, *parens patriae*, in "Anglo-American law . . . derives from the *Prerogativa Regis*, an English statute passed in the latter half of the thirteenth century").

164. Hawaii v. Standard Oil Co., 405 U.S. 251, 257 (1972); *see supra* text accompanying notes 46–47 (comparing favorably the Medieval origins of civil asset forfeiture (deodand) with the concept of the benevolent monarch who cares for the mentally ill by confiscating their property and hospitalizing them (*parens patriae*)).

165. Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 57 (1890) (holding that the *parens patriae* power is a "beneficent function" of the Federal Government that is "often necessary to be exercised in the interests of humanity, and for the prevention of injury to those who cannot protect themselves").

166. FAILER, *supra* note 161, at 68.

167. *Id.* at 70 (quoting Jacobson v. Massachusetts, 197 U.S. 11, 25 (1905)).

168. United States v. Comstock, 560 U.S. 126, 138 (2010); *see* Act of Aug. 7, 1882, ch. 433, 22 Stat. 302, 330 (1882); Act of June 23, 1874, ch. 465, 18 Stat. 251 (1874) (expanding the scope of involuntary commitment from those who were "insane" at the time of commitment to include those who "during the term of their imprisonment, have or shall become and be insane").

169. *Comstock*, 560 U.S. at 139; *see* 18 U.S.C. § 4247 (1952) (providing a mechanism to transfer to the Attorney General's custody any mentally ill prisoner whose incarceration will soon end after a judicial hearing confirms the Director of the Bureau of Prisons's view that the mentally ill prisoner still poses a danger to society).

170. Pub. L. 98-473, 98 Stat. 2057 (codified at 18 U.S.C. §§ 4241–47 (2012)).

substantial risk of bodily injury to another person or serious damage to the property of another.'"[171] Like the history of civil asset forfeiture, civil commitment expanded beyond its historically-limited purpose at the time of America's founding and at English common law.[172] Yet, even though the modern practice bears little resemblance to the historical one, the Supreme Court has held modern civil commitment constitutional by favorably comparing the modern practice to the historical one.[173]

Finally, in 2006, Congress expanded civil commitment to include those "persons who, due to mental illness, are sexually dangerous."[174] A court determines a person is sexually dangerous by finding: (1) the person "has engaged or attempted to engage in sexually violent conduct or child molestation"; and (2) the person "is sexually dangerous to others."[175] Unlike federal civil forfeiture statutes, federal civil commitment statutes require a court to find these things by clear and convincing evidence.[176] This standard of proof requirement codifies the Supreme Court's prior ruling in *Addington v. Texas*[177] that the clear and convincing evidence standard comports with the "due process guarantees" of the United States Constitution.[178] Civil commitment in the United States expanded over time to include sexually dangerous persons, but retained the same rationale used to justify a more limited historical practice.[179] While the Court accepted this expansion, it also required a higher standard of proof than exists in a run-of-the-mill civil action.[180] Likewise, as civil asset forfeiture continues to expand beyond its historical roots, it too warrants a reexamination of the appropriate evidentiary burden.

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171. *Comstock*, 560 U.S. at 141 (quoting 18 U.S.C. § 4246(d) (2006)).

172. *See supra* Section I.A.1.

173. *See, e.g.*, *Comstock*, 560 U.S. at 137–38; *cf. supra* notes 36–37 and accompanying text.

174. 18 U.S.C. § 4248(d) (2012); *Comstock*, 560 U.S. at 141.

175. § 4247(a)(5)–(6) ("[A person is sexually dangerous to others when] the person suffers from a serious mental illness, abnormality, or disorder as a result of which he would have serious difficulty in refraining from sexually violent conduct or child molestation if released.").

176. § 4248(d).

177. 441 U.S. 418 (1979).

178. *Id.* at 433; *see also Comstock*, 560 U.S. at 132–33 (upholding 18 U.S.C. § 4248 as constitutional under the Necessary and Proper Clause, but not considering an argument that the clear and convincing standard violated procedural due process).

179. *See supra* notes 168–73 and accompanying text.

180. *See infra* note 185 and accompanying text.

C. The Clear and Convincing Evidentiary Standard of Proof

An evidentiary standard evinces a commitment to due process, for by allocating risk of error between litigants it requires different burdens of proof based on what one may lose in a judicial proceeding.[181] The standard of proof creates a continuum of risk with the most risk allocated to litigants at one end, and with the least risk to the litigants at the other end.[182] The reasonable doubt standard exists only in criminal cases because the specter of a conviction places immense risk on the defendant.[183] The possibility that a defendant "may lose his liberty upon conviction," as well as the stigmatic effect a conviction has on the convicted, weighs heavily in favor of the most stringent evidentiary standard.[184] At the other end of the spectrum, disputes that do not place a litigant's freedom in jeopardy and merely pose the risk of financial loss require only the preponderance of the evidence standard.[185] The preponderance standard exists in cases where "society has a minimal concern with the outcome" of the case.[186] The Supreme Court has found that the preponderance standard is acceptable even in cases where "severe civil sanctions" are possible.[187]

The clear and convincing standard is the intermediate standard required "where particularly important individual interests or rights are at stake."[188]

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181. *Addington*, 441 U.S. at 423.

182. *See id.* at 423–24 (explaining that the preponderance of the evidence standard is at one end of the spectrum (most risk to litigants), while the beyond a reasonable doubt standard is at the other end of the spectrum (least risk to defendant)).

183. *In re* Winship, 397 U.S. 358, 363–66 (1970) (holding that "civil labels and good intentions do not themselves obviate the need for criminal due process safeguards" because the Due Process Clause protects the accused against conviction under a lesser burden of proof).

184. *Id.* at 363–64.

185. *Addington*, 441 U.S. at 423.

186. *Id.*; *see also* Kevin M. Clermont & Emily Sherwin, *A Comparative View of Standards of Proof*, 50 AM. J. COMP. L. 243, 251 (2002) (the preponderance of the evidence standard "translates into more-likely-than-not . . . [and] is the usual standard in civil litigation").

187. Herman & Maclean v. Huddleston, 459 U.S. 375, 389–90 (1983); *see also* United States v. Regan, 232 U.S. 37, 47–48 (1914) ("[I]n civil actions it is the duty of the jury to resolve the issues of fact according to a reasonable preponderance of the evidence, and this although they may involve a penalized or criminal act.").

188. *Herman & Maclean*, 459 U.S. at 389; *see* Clermont & Sherwin, *supra*, note 186, at 251 (the clear and convincing standard is "roughly translated as much-more-likely-than-not" and it "applies in special situations, such as when terminating parental rights"); *see also* RHONDA WASSERMAN, PROCEDURAL DUE PROCESS: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 107 (2004) (arguing that due process requires a heightened clear and convincing "standard of proof when the liberty interest at stake

Courts consistently apply the standard in "civil cases involving allegations of . . . quasi-criminal wrongdoing" or to "protect particularly important individual interests in various civil cases."[189] The Supreme Court has held that the intermediate clear and convincing evidence standard applies when more is at stake than the mere loss of money.[190] The Supreme Court reasoned that in those instances, a court should use a "higher degree of proof than applies in a negligence case."[191] Generally, the possibility of individual injury must be "significantly greater than any possible harm to the state."[192] For example, the Supreme Court held that the heightened clear and convincing standard applies when terminating parental rights, but not in a suit for paternity.[193]

The standard of proof in a civil case represents an important concept embodied in the Due Process Clause.[194] To determine whether a given standard of proof comports with procedural due process, the Court applies a three-part inquiry articulated in *Mathews v. Eldridge*.[195] In *Mathews*, a state agency terminated a disabled man's Social Security disability (SSD) payments administratively without providing him with an evidentiary hearing.[196] The plaintiff challenged the constitutional validity of the agency's use of administrative procedures, rather than holding a hearing, to determine whether he was still disabled and eligible for benefits.[197] In finding that

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is significant, a majority of states apply a heightened standard of proof in the given context, the issues to be decided are factual in nature, and the state itself is a litigant").

189. *Addington*, 441 U.S. at 424.

190. *Id.*

191. Woodby v. Immigration & Naturalization Serv., 385 U.S. 276, 285 (1966).

192. *Addington*, 441 U.S. at 427.

193. *See* Rivera v. Minnich, 483 U.S. 574, 575 (1987) (holding that "applying the preponderance standard to [a paternity] determination is constitutionally permissible"); Santosky v. Kramer, 455 U.S. 745, 769–70 (1982) (holding "that a 'clear and convincing evidence' standard of proof strikes a fair balance between the rights of the natural parents and the State's legitimate concerns"); *see also* WASSERMAN, *supra* note 188, at 106 (noting that the *Rivera* Court refused to extend *Santosky* to paternity suits because the government was not a party in paternity cases, the "putative father's interest in avoiding financial responsibility for another man's child and the mother's interest in holding the father financially responsible" are equal interests that warrant an equal distribution of risk, and a majority of states applied the preponderance standard in paternity suits).

194. *See* 29 AM. JUR. 2D *Evidence* § 176 (2019) (explaining two reasons why requiring the government to meet the standard of proof in an action against an individual coheres with due process: (1) the government's required burden demonstrates the significance of the adjudication, and (2) the higher the burden of proof, the more risk the individual faces with an adverse judgment).

195. 424 U.S. 319, 334–35 (1976).

196. *Id.* at 323–25.

197. *Id.* at 324–25.

an evidentiary hearing was not required, the Court evaluated three factors: (1) the private interest affected by the official action; (2) the risk of private interest deprivation in the procedures used; and (3) the government's interest in the official action.[198] While *Mathews* dealt with administrative procedures, the Court has since applied the test in both the civil commitment and civil asset forfeiture contexts.[199]

In *Addington*, the Court applied the *Mathews* test to determine that the use of the clear and convincing evidentiary standard was necessary to satisfy due process in civil commitment cases.[200] In *Addington*, police arrested a mentally ill man for threatening to assault his mother.[201] After his mother filed a petition for the man's indefinite commitment, a Texas jury determined the man was mentally ill and recommended that he go to a state hospital for an indefinite period for his own and others' welfare.[202] The Supreme Court examined the *Mathews* factors to evaluate the appropriate standard of proof required in the commitment proceeding.[203]

Likewise, in *United States v. James Daniel Good Real Property*,[204] the Court used the *Mathews* factors in a civil forfeiture case where a Hawaii man was sentenced to jail time and probation for violating Hawaii drug laws.[205] Four years after the drugs were found, the Federal government filed an *in rem* action against the man's house and four-acre parcel of land and seized both without notice or a hearing.[206] After analyzing the *Mathews* factors, the Court found that the Due Process Clause required notice and a hearing before property can be seized.[207] The Court emphasized the importance of the private interests at stake to find that there was no justification for holding the hearing after the property was seized.[208]

The Court's prior use of the *Mathews* factors to analyze whether civil forfeiture actions comport with the Due Process Clause, and the Court's use

198. *Id.* at 334–35.

199. *See* United States v. James Daniel Good Real Prop., 510 U.S. 43, 53, 62 (1993) (applying the *Mathews* balancing test to find that the civil forfeiture proceedings require notice and a hearing); Addington v. Texas, 441 U.S. 418, 425, 431–33 (1979) (applying the *Mathews* balancing test to find that a preponderance of the evidence standard in civil commitment proceedings was unconstitutional).

200. *Addington*, 441 U.S. at 433.

201. *Id.* at 420.

202. *Id.* at 420–21.

203. *Id.* at 425.

204. 510 U.S. 43 (1993).

205. *Id.* at 46, 53.

206. *Id.* at 46.

207. *Id.* at 62.

208. *Id.*

of the *Mathews* factors to consider the constitutionality of an evidentiary standard of proof, confirms the appropriateness of the use of those factors to determine what standard must be used in civil forfeiture actions.[209]

II. ANALYSIS

This Comment argues that the current preponderance evidentiary standard of proof used in civil asset forfeiture actions does not satisfy due process. Using the three-factor *Mathews* balancing test, this Section argues that the Constitution only permits a heightened clear and convincing standard of proof. An individual's interest in maintaining access to private property balanced against the state's interest in fighting crime and punishing those who benefit from illegal activity with a mind toward the great risk of erroneous deprivation clearly leads to the conclusion that civil *in rem* forfeiture actions require a clear and convincing standard of proof.

First, private property rights are fundamental to the functioning of a society.[210] While civil *in rem* forfeiture puts all types of private property at risk, its most serious implication is the deprivation of one's home.[211] The home is at the core of an individual's private property portfolio and accounts for a large percentage of an individual's total wealth.[212] The Supreme Court considers the home to be a constitutionally-protected,

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209. *See infra* Part II.

210. *See, e.g.*, Vanhorne's Lessee v. Dorrance, 2 U.S. 304, 310 (1795) ("[T]he right of acquiring and possessing property . . . is one of the natural, inherent, and unalienable rights of man. . . . Property is necessary to their subsistence, and correspondent to their natural wants and desires; its security was one of the objects, that induced them to unite in society."); III ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 862 (Edwin Cannan, ed., 1937) (1791) ("Commerce and manufactures can seldom flourish long in any state which does not enjoy a regular administration of justice, in which the people do not feel themselves secure in the possession of their property.").

211. *See, e.g.*, Sarah Stillman, *Taken*, NEW YORKER (Aug. 5, 2013), https://www.newyorker.com/magazine/2013/08/12/taken [https://perma.cc/4EZA-JNJQ] (documenting the forfeiture of an indigent elderly couple's home after their adult son "allegedly sold twenty dollars' worth of marijuana to a confidential informant, on the porch of his parents' home").

212. *See* Michael Neal, *Homeownership Remains a Key Component of Household Wealth*, NAT'L ASS'N HOME BUILDERS (Sept. 3, 2013), http://www.nahbclassic.org/generic.aspx?sectionID=734&genericContentID=215073 (explaining that in 2010, ownership of a primary residence accounted for nearly one-third of national household assets and that more households owned a home than had a retirement account).

near-sacred location.[213] When the Court abandoned the historical fiction that guilty property should be subject to civil forfeiture actions, it imputed a negligent owner rationale to forfeiture proceedings that rendered the civil forfeiture actions quasi-criminal in nature and ultimately with a punitive goal.[214] Thus, the loss of one's home in a civil *in rem* forfeiture action is meant to punish the negligent homeowner.[215] That punishment, the loss of a home, is not unlike the loss of liberty in that it carries with it a serious financial deprivation and a stigma that is not easily shaken.[216] A home is an extension of one's self that serves as an entrée into a community or society at-large, a place to host family and friends, and an individual's largest asset.[217] The loss of that home carries with it a stigmatic effect that could forfeit one's most intimate relationships or the ability to participate in a community.[218] While the loss of one's home is not the only property implicated in civil *in rem* forfeiture actions, the fact that it does occur weighs strongly in favor of a heightened evidentiary standard for the practice at large. The individual has a great interest in maintaining his property against punitive action unless the state can prove wrongdoing by at least a clear and convincing standard of proof.[219]

Second, the risk of erroneous deprivation of property heightens with a lesser standard of proof.[220] This risk is not equally allocated between the government and the individual because the government carries the entire benefit of gaining title to property which funds government activities, while the individual loses items of immense value and potentially great personal significance.[221] Finally, the government's interest in preventing

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213. *See* Payton v. New York, 445 U.S. 573, 601 (1980) (noting that "overriding respect for the sanctity of the home has been embedded in our traditions since the origins of the Republic").

214. *See supra* notes 100–02 and accompanying text.

215. *See supra* notes 63–65 and accompanying text.

216. *Cf.* Robert J. Shiller, *The Scars of Losing a Home*, N.Y. TIMES, May 18, 2008, at BU5 (noting in the home foreclosure context that "there is deep trauma" in the loss of a home because "homeownership is [a] fundamental part of a sense of belonging to a country" and the home itself is "an extension of self").

217. *See* 1 WILLIAM JAMES, THE PRINCIPLES OF PSYCHOLOGY 291–92 (1890) (explaining that the home is a part of oneself because "[i]ts scenes are a part of our life" and "a man's Self [sic] is the sum total of all that he CAN call his, not only his body and his psychic powers, but his clothes and his house . . . his lands and horses, and yacht and bank-account").

218. *See id.* at 292–93.

219. *See infra* Section II.A.

220. *See infra* Section II.A.

221. *See* CARPENTER, *supra* note 1, at 10–11 (noting that deposits into the Department of Justice's Asset Forfeiture Fund grew by 4667 percent from 1986 to 2014 and

crime—and in punishing those who benefit financially from it—is simply not enough to distribute the risk evenly. A heightened evidentiary standard would not unnecessarily stifle law enforcement goals. The heightened standard would merely protect the individual against the erroneous deprivation that has become the object of popular ridicule.[222]

A. The Mathews v. Eldridge *Balancing Test Renders the Preponderance Evidentiary Standard in Civil* In Rem *Forfeiture Proceedings Unconstitutional*

Civil *in rem* forfeiture, like civil commitment, requires an evidentiary standard of proof higher than mere preponderance of the evidence. This section applies the three *Mathews* factors, as applied to civil commitment proceedings in *Addington*, to argue that the use of the lower preponderance standard violates the Due Process Clause.[223] Applying the *Mathews* balancing test to the current civil *in rem* forfeiture preponderance standard clearly demonstrates that the lower standard is unconstitutional.[224] The *Mathews* balancing test provides a due process-based framework to challenge state procedures that deprived a party of an interest.[225] The first *Mathews* factor requires a court to consider the extent to which the official action will affect the private party's interest.[226] When the Supreme Court previously used the *Mathews* framework to analyze a federal forfeiture proceeding in the seizure of a home following a state criminal conviction, the Court found that the first factor, the individual's private interest in the property subject to forfeiture, weighed

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accounted for $4.5 billion). State-level data is difficult to obtain, but presents the opportunity for "police and prosecutors [to] self-fund, [thus going] entirely beyond the democratic controls embodied by city councils, county commissions and state legislatures." *Id.*

222. *See supra* note 1 and accompanying text; *see also infra* Section II.B.

223. *See infra* Section II.A.

224. *See* 18 U.S.C. § 983(c) (2012) ("In a suit or action brought under any civil forfeiture statute for the civil forfeiture of any property—(1) the burden of proof is on the Government to establish, by a preponderance of the evidence, that the property is subject to forfeiture.").

225. Parham v. J.R., 442 U.S. 584, 599–600 (1979) (applying the *Mathews* factors to determine that Georgia's commitment procedures for minor children did not violate due process).

226. Mathews v. Eldridge, 424 U.S. 319, 335 (1976); *see* United States v. James Daniel Good Real Prop., 510 U.S. 43, 53–56 (1993) (applying the first *Mathews* factor to find a civil forfeiture proceeding against a home required notice and a hearing to comport with the Due Process Clause's requirements); Addington v. Texas, 441 U.S. 418, 425 (1979) (applying the first *Mathews* factor to civil commitment to "assess . . . the extent of the individual's interest in not being involuntarily confined indefinitely").

heavily in the *Mathews* analysis.[227] The Court found that an individual has a significant and historic private interest "to maintain control over [a] home, and to be free from governmental interference," and the same applies "to real property in general, not simply residences."[228] Thus, when the government seizes property, like its seizure of an individual through civil commitment, it creates a "significant deprivation" that requires due process protection.[229] The *Addington* Court found that civil commitment also had the real potential to "engender adverse social consequences to the individual."[230] The Court has similarly acknowledged that the owner of forfeited property "feels the pain and receives the stigma of the forfeiture."[231]

The substantial private interests at stake in a civil *in rem* forfeiture proceeding weigh the first *Mathews* factor in favor of a higher evidentiary standard of proof because civil forfeiture is a quasi-criminal proceeding that results in more than a mere loss of money. First, the quasi-criminal nature of civil asset forfeiture suggests an evidentiary standard higher than mere preponderance.[232] In *One 1958 Plymouth Sedan*, the Supreme Court held that a forfeiture proceeding was quasi-criminal in character.[233] Similarly, the Court in *Austin* confirmed that civil forfeiture was historically understood as punishment with a penal purpose and remedial character.[234] Indeed, the Federal Bureau of Investigation confirms that it uses asset forfeiture "[t]o punish criminals [and t]o deter illegal activity."[235] Former Attorney General Jeff Sessions further confirmed this quasi-criminal character when he stated that "civil asset forfeiture is a key tool that helps

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227. *James Daniel*, 510 U.S. at 54–55.

228. *Id.* at 53–54, 61.

229. *See Addington*, 441 U.S. at 425 (repeating axiomatically that civil commitment for any purpose constitutes a significant deprivation of liberty requiring due process protection).

230. *Id.* at 426 (stopping short of labeling those consequences as stigma but recognizing that civil commitment "can have a very significant impact on the individual"); *cf. supra* note 211 and accompanying text.

231. United States v. Ursery, 518 U.S. 267, 295 (1996) (asserting that stigma and pain exist in the context of reaffirming the Court's condemnation of the legal fiction of guilty property).

232. *See supra* text accompanying notes 84–89.

233. One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 700 (1965).

234. Austin v. United States, 509 U.S. 602, 621–22 (1993); *see also* Timbs v. Indiana, 139 S. Ct. 682, 687, 690 (2019) (unanimously declining "to reconsider [the Court's] unanimous judgment in *Austin* that civil *in rem* forfeitures are fines for purposes of the *Eighth Amendment* when they are at least partially punitive"). The Court held that the "*Excessive Fines Clause* is incorporated by the *Due Process Clause of the Fourteenth Amendment*." *Id.*

235. *What We Investigate: Asset Forfeiture*, FEDERAL BUREAU OF INVESTIGATION, https://www.fbi.gov/investigate/white-collar-crime/asset-forfeiture [https://perma.cc /7ULQ-MWJW].

law enforcement defund organized crime, take back ill-gotten gains, and prevent new crimes from being committed, and it weakens the criminals and the cartels."[236] Sessions announced the purpose of civil asset forfeiture in the context of his decision to reverse an Obama-era directive that suspended a Department of Justice Equitable Sharing Program that adopted property seized by localities.[237] Sessions announced that the Department would now adopt seized property if "the state or local agency involved provides information demonstrating that the seizure was justified by probable cause."[238] Notably, Sessions directed "Department attorneys to proceed with an abundance of caution when handling all forfeitures involving vehicles and especially residences."[239] This directive acknowledges the important interests at stake in civil *in rem* forfeiture actions.[240]

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236. DEPARTMENT OF JUSTICE, *Attorney General Sessions Issues Policy and Guidelines on Federal Adoptions of Assets Seized by State or Local Law Enforcement* (July 19, 2017), https://www.justice.gov/opa/pr/attorney-general-sessions-issues-policy-and-guidelines-federal-adoptions-assets-seized-state [https://perma.cc/PC5J-75QG] [hereinafter *Sessions Press Release*]. *But cf.* Nick Sibilla, *Congress Killed Efforts to Undo Sessions's Civil Forfeiture Expansion, Despite Unanimous House Votes*, FORBES (Apr. 2, 2018, 12:10 PM), https://www.forbes.com/sites/instituteforjustice/2018/04/02/congress-killed-efforts-to-undo-sessionss-civil-forfeiture-expansion-despite-unanimous-house-votes [https://perma.cc/W32A-JY7A] (opining that Sessions's civil forfeiture changes brought a "brief moment of bipartisan unity" that saw no opposition to amendments that would curtail Sessions's reversal of "a 2015 policy by then-Attorney General Eric Holder that placed strict limits on so-called 'adoptive' forfeitures"). "Adoptive" forfeitures allow state agencies to confiscate valuable property and transfer it to federal agencies who "adopt" it to pursue federal forfeiture actions. *Id.*

237. Matt Ford, *The Bipartisan Opposition to Sessions's New Civil-Forfeiture Rules*, ATLANTIC (July 19, 2017), https://www.theatlantic.com/politics/archive/2017/07/sessions-forfeiture-justice-department-civil/534168 [https://perma.cc/7MUV-8NF5].

238. *Sessions Press Release*, *supra* note 236.

239. *Sessions Press Release*, *supra* note 236. *But see* Letter from Mike Lee et al., United States Senators, to Jeff Sessions, Attorney General of the United States (May 31, 2017), https://www.scribd.com/document/349961824/Letter-to-AG-Sessions-Calling-for-Civil-Asset-Forfeiture-Reform [https://perma.cc/3XGY-PTN3] (observing bipartisan concern about the government's civil asset forfeiture practices). The Senators' letter reiterated Justice Clarence Thomas's skepticism "that civil asset forfeiture practices are constitutional" should mandate that "the Department of Justice . . . err on the side of protecting constitutional rights . . . [and] revise its civil asset forfeiture practices to reflect our nation's commitment to the rule of law and due process." Letter from Mike Lee, *supra.*

240. *See Sessions Press Release*, *supra* note 236 (recognizing "that Department attorneys should think hard before they agree to forfeit these types of property, or waive any asset thresholds associated with them" and that "protecting the rights of property owners" was a valid objective).

Second, a forfeiture action often results in deprivations "more substantial than mere loss of money."[241] As the most egregious examples of abuse in the media illustrate, forfeiture actions often reach the home or personal possessions in addition to mere money.[242] The home occupies a near-sacred status in the Court's jurisprudence that places it far above a simple loss of money in a run-of-the-mill civil action.[243] Depriving property under a quasi-criminal statutory regime implicates a serious enough private interest—the loss of property and financial stability—to weigh the first *Mathews* factor in favor of a higher evidentiary standard.[244]

The second *Mathews* factor requires a court to weigh "the risk of an erroneous deprivation of [the private] interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards."[245] In civil forfeiture proceedings, the individual risks being erroneously deprived of his or her property.[246] The entire legal process functions generally "to minimize the risk of erroneous decisions;" however, the standard of proof is instrumental in preventing erroneous decisions within the legal process because it "serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision."[247] The loss of liberty associated with an erroneous commitment presented the Supreme Court with too great a risk under the preponderance standard and thus a higher allocation of the risk to the

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241. Addington v. Texas, 441 U.S. 418, 424 (1979) (stating that the intermediate clear and convincing standard applies in civil cases "involving allegations of fraud or some other quasi-criminal wrongdoing by the defendant"). The substantial loss associated with those cases necessitates courts "accordingly reduc[ing] the risk to the defendant of having his reputation tarnished erroneously by increasing the plaintiff's burden of proof." *Id.*

242. *See, e.g.*, *supra* note 55 and accompanying text; *see also* Stillman, *supra* note 211 (documenting many instances of civil *in rem* forfeiture abuse and noting that the "system that proved successful at wringing profits from drug cartels and white-collar fraudsters has also given rise to corruption and violations of civil liberties").

243. *See* United States v. James Daniel Good Real Prop., 510 U.S. 43, 53–54 (1993) (describing the significant and historic private interest that exists in "maintain[ing] control over [a] home"); *see, e.g.*, Stephen P. Jones, *Reasonable Expectations of Privacy: Searches, Seizures, and the Concept of Fourth Amendment Standing*, 27 U. MEM. L. REV. 907, 957 (1997) ("The most sacred of all areas protected by the Fourth Amendment is the home.").

244. *Cf.* Painter v. Abels, 998 P.2d 931, 941 (Wyo. 2000) (finding the presence of "allegations of quasi-criminal wrongdoing" in a proceeding against a medical licensee supported the use of a clear and convincing standard of proof).

245. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

246. *See James Daniel*, 510 U.S. at 55.

247. Addington v. Texas, 441 U.S. 418, 423, 425 (1979).

government was required.[248] Likewise, in *James Daniel*, the Court found that the seizure proceedings created an unacceptable risk of innocent deprivation.[249] While Congress codified an innocent owner defense and allocated the burden of proof to the government in CAFRA, the preponderance standard still allocates the risk equally to the government and the individual and does not adequately protect against erroneous deprivation.[250] This equal allocation of risk does not reflect the reality of the two parties in a civil *in rem* forfeiture action. Federal law enforcement agencies have resources and power that an individual citizen cannot hope to match.[251] The government risks little by bringing a civil *in rem* forfeiture action.[252] If the government wins, it gets new equipment or funding for a new program, in addition to any indirect punishment of criminal activity, while the individual potentially loses an item of great worth like an automobile, a home, or cash.[253] Even in instances where property owners prevail in court and regain their property, they still lose time and

248. *Id.* at 427.

249. *James Daniel*, 510 U.S. at 55 (highlighting the unacceptable risk in the context of an *ex parte* drug seizure and finding that "[a]lthough Congress designed the drug forfeiture statute to be a powerful instrument in enforcement of the drug laws, it did not intend to deprive innocent owners of their property," thus due process required notice and a hearing).

250. *See supra* notes 103, 107–11 and accompanying text.

251. *Compare FBI Budget Request for Fiscal Year 2019: Hearing Before the Subcomm. on Commerce, Justice, Sci., and Related Agencies of the S. Appropriations Comm.*, 115th Cong. (May 16, 2018) (statement of Dir. Christopher Wray, Fed. Bureau of Investigation) (requesting a "total of $8.92 billion in direct budget authority to carry out the FBI's national security, criminal law enforcement, and criminal justice services missions" which included funding for "12,927 special agents, 3,055 intelligence analysts, and 18,712 professional staff"), *with* Camilo Maldonado, *Is Your Net Worth Higher than Average?*, FORBES (Aug. 15, 2018, 9:16 AM), https://www.forbes.com/sites/camilo maldonado/2018/08/15/is-your-net-worth-higher-than-average [https://perma.cc/AE2T-V7M5] (underscoring that "[t]he most recent census data shows a median household net worth of $80,039" but without real estate "the number drops to $25,116").

252. *See, e.g.*, *What We Investigate: Asset Forfeiture*, FEDERAL BUREAU OF INVESTIGATION, https://www.fbi.gov/investigate/white-collar-crime/asset-forfeiture [https://perma.cc/C4KY-Y63Q] (asserting that "[a]ll across the country, forfeited funds are being used to help protect and serve our communities and support law enforcement").

253. *See, e.g.*, United States v. $28,000.00 in U.S. Currency, No. 10CV2378–LAB (CAB), 2013 WL 525648, at *1, *1 (S.D. Cal. Feb. 11, 2013), *vacated and remanded*, 802 F.3d 1100 (9th Cir. 2015) (awarding only $14,000 in attorney's fees to a claimant who "successfully obtained return of the Defendant currency, and moved pursuant to the Civil Asset Forfeiture Reform Act of 2000 (CAFRA) for attorney's fees of over $50,000").

money.[254] Neither the allocation of power between the parties nor the allocation of risk are equally balanced in a federal civil *in rem* forfeiture action, so it follows that the evidentiary standard of proof should likewise not balance risk between the parties. Neither the innocent owner defense nor the allocation of the initial burden of proof in a civil *in rem* forfeiture proceeding is enough to counter-balance the significant risk of deprivation. Indeed, in the two decades since Congress enacted CAFRA, examples of unjust and erroneous deprivations remain legion with increasing denunciation coming from all sides of the political spectrum.[255]

The third *Mathews* factor requires a court to weigh "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[256] The *Addington* Court defined the third factor as "the state's interest in committing the emotionally disturbed under a particular standard of proof."[257] Similarly, the *James Daniel* Court framed the analysis as a consideration of the government's specific interest related to the forfeiture proceeding at issue and not a consideration of "some general interest in forfeiting property."[258] The *Addington* Court confirmed that the state has two legitimate interests in civil commitment—the *parens patriae* power and the police power—that justify the practice in general.[259] However, those powers do not justify the use of a preponderance standard.[260] Similarly, the Supreme Court noted that there are three legitimate government interests in civil forfeiture; however, only two of those interests are relevant to the discussion of civil *in rem* forfeiture.[261] First, the government has a legitimate pecuniary interest in "recovering all forfeitable

254. *See* United States v. $28,000.00 in U.S. Currency, 802 F.3d 1100, 1103–04 (9th Cir. 2015) (stating that the claimant retained "an experienced forfeiture specialist to oppose the government's claim and assert [his] ownership of the [forfeited] funds" under a fee agreement that required the claimant to pay his attorney "the greater of one third of recovery or any statutory fee award").

255. *See, e.g.*, Stillman, *supra* note 211.

256. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

257. Addington v. Texas, 441 U.S. 418, 425 (1979).

258. United States v. James Daniel Good Real Property, 510 U.S.43, 56 (1993).

259. *Addington*, 441 U.S. at 426.

260. *Id.*

261. *See* Caplin & Drysdale v. United States, 491 U.S. 617, 629–30 (1989) (documenting the three government interests as: first, a "pecuniary interest in forfeiture" that seeks to recover "*all* forfeitable assets" and deposit them "in a Fund that supports law-enforcement efforts in a variety of important and useful ways;" second, a "restitutionary [sic]" interest to "return[] property, in full, to those wrongfully deprived or defrauded of it;" third, an interest in "lessen[ing] the economic power of organized crime and drug enterprises").

assets" and "using the profits of crime to fund" important law enforcement activities.[262] Second, the Government has an interest in lessening the "the economic power of organized crime and drug enterprises."[263] The second justification falls within the same police power cited by the *Addington* Court.[264] However, while affirming the existence of the government's police power as the basis for commitment, the *Addington* Court simultaneously affirmed that this legitimate interest does not provide legitimacy to the erroneous commitment of those who are not mentally ill.[265] Likewise, the State has no legitimate interest in the forfeiture of innocent property, as the codification of an innocent owner defense in CAFRA demonstrates.[266]

After balancing the three *Mathews* factors, the preponderance of the evidence standard does not pass constitutional muster under the Due Process Clause and must be abandoned.[267] On the one hand, the Court must balance the individual's historic and fundamental interest in property[268] with the possibility that the lowered preponderance standard would result in an erroneous deprivation.[269] On the other hand, the Court must acknowledge

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262. *Id.* at 629; *see What We Investigate: Asset Forfeiture*, *supra* note 252 (outlining that "forfeited funds are being used to help protect and serve our communities and support law enforcement" including financing gun buy-back programs and paying for a "plaque for a law enforcement officer killed in the line of duty"). *But see* Diane Jennings, *Lawmakers Eye Reforms for Texas Asset Forfeitures*, DALL. NEWS (Feb. 2011), https://www.dallasnews.com/news/texas/2011/02/28/lawmakers-eye-reforms-for-texas-asset-forfeitures [https://perma.cc/TGS9-L2LC] (demonstrating that local Texas law enforcement used the proceeds of forfeited property to buy "trips to casinos," bonuses paid to staff, and "tequila, rum, kegs and a margarita machine for an employee party").

263. *Id.* at 630.

264. *See* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 686–87 (1974) (establishing that forfeiture has "punitive and deterrent purposes" and that it "impos[es] an economic penalty [that] render[s] illegal behavior unprofitable").

265. *Addington*, 441 U.S. at 426.

266. *See* 18 U.S.C. § 983(d) (2012); *supra* note 103 and accompanying text; *see also* United States v. James Daniel Good Real Prop., 510 U.S. 43, 55 (1993) (highlighting an "affirmative defense of innocent ownership" contained in "the drug forfeiture statute" meant that Congress "did not intend to deprive innocent owners of their property").

267. *Cf. Addington*, 441 U.S. at 431 (concluding "that the preponderance standard falls short of meeting the demands of due process" in the civil commitment context).

268. *See, e.g.*, BLACKSTONE, *supra* note 44, at *138 ("The third absolute right, inherent in every Englishman, is that of property: which consists in the free use, enjoyment and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land."); THE FEDERALIST No. 10 (James Madison) (stating that "rights of property originate" from "[t]he diversity in the faculties of men," and that "[t]he protection of these faculties is the first object of government").

269. *See* CARPENTER, *supra* note 1, at 6 (concluding that both federal laws "and most state civil forfeiture laws put innocent property owners at risk").

the state's interest in preventing ill-gotten property from remaining in public hands, in gaining funds from illegal activity to help law enforcement, and in deterring would-be criminals from engaging in illicit activity.[270] The risk of the erroneous deprivation of property, including a home or assets by which an individual makes a living, is too great under the equal allocation of risk represented by the preponderance standard. As the Court found in civil commitment, so should it find in civil *in rem* forfeiture. They are analogous procedures that deprive individuals of liberty and property; both require a higher evidentiary standard to satisfy procedural due process.[271]

B. The Mathews v. Eldridge *Balancing Test Requires the Clear and Convincing Evidentiary Standard in Civil* In Rem *Forfeiture Proceedings*

This section argues that the clear and convincing standard satisfies the Due Process Clause. Even though civil *in rem* forfeiture without an underlying criminal conviction is arguably a criminal procedure with fewer inherent procedural protections than civil commitment, the highest evidentiary standard, beyond a reasonable doubt, is not required.[272]

Since applying the preponderance of the evidence standard is unconstitutional in civil *in rem* forfeiture cases, it is necessary to examine the two remaining evidentiary standards of proof: reasonable doubt and clear and convincing evidence. While undoubtedly convincing arguments exist that civil *in rem* forfeiture is a *de facto* criminal process,[273] the Supreme Court has rejected them.[274] The Court's selective application of criminal

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270. *See supra* notes 261–64 and accompanying text.

271. *See supra* notes 229–31 and accompanying text.

272. *See* Lilienthal's Tobacco v. United States, 97 U.S. 237, 271 (1878) (holding that proof beyond a reasonable doubt is not required in civil *in rem* forfeiture cases in part because actions "against property differ widely from an action against the person to recover a penalty imposed to punish the offender").

273. *See, e.g.*, Note, *How Crime Pays: The Unconstitutionality of Modern Civil Asset Forfeiture as a Tool of Criminal Law Enforcement*, 131 HARV. L. REV. 2387, 2396–97 (2018) (arguing that modern "practices have morphed civil forfeiture into a creature of criminal law and resultantly a punitive rather than remedial instrument"). The Note explains that because the Supreme Court "has deviated from its historical nonpenal justification for in rem forfeitures," law enforcement employs "criminal law enforcement tactics for civil forfeiture purposes, advancing the aims of criminal punishment." *Id.* at 2396. Statutes that allow *in rem* forfeiture "are punitive based on the Supreme Court's criteria for determining when a statute is punitive." *Id.* Should the Court apply this logic, one implication would be added strength to an argument that the reasonable doubt standard should apply in these cases.

274. *See, e.g.*, Caleb Nelson, The Constitutionality of Civil Forfeiture, 125 YALE L.J. 2446, 2491 (2016) (quoting United States v. Ursery, 518 U.S. 267, 270–71 (1996)) (explaining that "the Court announced a not-quite-categorical rule[] in *United States*

constitutional protections insufficiently supports the argument that all civil *in rem* forfeitures are *de facto* criminal proceedings. Indeed, the Court explicitly ruled in *Lilienthal's Tobacco v. United States*[275] that due process did not require the reasonable doubt standard in a civil forfeiture case.[276] Just eight years later, in *Boyd*, the Court cast doubt upon its prior declarations[277] that civil asset forfeiture was a civil rather than a criminal action.[278] The *Boyd* ruling applied only to property forfeited "by reason of offences [sic] committed" by an individual, which seems to preclude application of the holding to civil *in rem* forfeiture actions with no underlying conviction.[279]

Since *Boyd*, the Supreme Court continues to apply constitutional protections to civil forfeiture proceedings in a manner that draws distinctions between provisions that are and are not limited to criminal proceedings.[280] There remains a tension[281] between *Boyd's* holding and the Court's subsequent decision in *United States v. Zucker*,[282] which found that civil forfeiture proceedings require no Sixth Amendment protections.[283] The Court attempts to distinguish its position in *Zucker* with that in *Boyd* by declaring that the Sixth Amendment applies only to "a prosecution of an accused person which is technically criminal in its nature."[284] The implication is that the "quasi-criminal" case from *Boyd* is not technically criminal enough.[285] Additionally, the Court held that the Fourth

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v. Ursery, a case involving the extensive forfeiture provisions in modern drug and money-laundering statutes, the Court held that 'these civil forfeitures (and civil forfeitures generally) . . . do not constitute punishment for purposes of the Double Jeopardy Clause'").

275. 97 U.S. 237, 237 (1878).

276. *Id.* at 271–72 (focusing on the distinction between criminal and civil cases to hold that the same reasonable doubt level of proof is not required in both, but not deciding what standard of proof is appropriate in a forfeiture case).

277. *See, e.g.*, United States v. La Vengeance, 3 U.S. (3 Dall.) 297, 301 (1796) (holding unanimously that the forfeiture of a vessel illegally transporting arms was "a civil cause . . . of a libel *in rem*; and does not, in any degree, touch the person of the offender").

278. Boyd v. United States, 116 U.S. 616, 633–34 (1886) (holding "that proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offences [sic] committed by him, though they may be civil in form, are in their nature criminal").

279. *Id.*; *see* Nelson, *supra* note 274, at 2488.

280. Austin v. United States, 509 U.S. 602, 608 n.4 (1993).

281. Nelson, *supra* note 274, at 2488–89 (stating that "the Supreme Court unsettled" the "well-settled" principle articulated in *Boyd* "just four years later" and noting that the "tension between *Boyd* and *Zucker* has carried forward into more recent [forfeiture] cases").

282. 161 U.S. 475 (1896).

283. *Id.* at 481.

284. *Id.*

285. *See supra* notes 278–79 and accompanying text.

Amendment's exclusionary rule applies to forfeiture,[286] as does the Self-Incrimination Clause of the Fifth Amendment;[287] however, the Eighth Amendment's Double Jeopardy Clause does not.[288] The Court prefers a case-by-case analysis rather than a general pronouncement that all civil *in rem* forfeiture actions are criminal.[289]

Likewise, for civil commitment, the Supreme Court explicitly rejected the reasonable doubt standard in *Addington* and, in 2010, refused to reconsider whether civil commitment requires proof beyond a reasonable doubt.[290] If the Court has previously ruled, and recently refused to reconsider, that the deprivation of liberty associated with civil commitment does not rise to the level of the reasonable doubt evidentiary standard, the deprivation of property associated with civil *in rem* forfeiture could not convincingly fit within the Court's jurisprudence as requiring reasonable doubt.[291]

With the reasonable doubt standard eliminated, the only remaining standard of proof is clear and convincing evidence.[292] The Supreme Court's rationale for the application of the clear and convincing standard to civil commitment applies to the discussion of the same standard for civil *in rem* forfeiture.[293] The Court has repeated that a "forfeiture proceeding is quasi-criminal in character. Its object, like a criminal proceeding, is to penalize for the commission of an offense against the law."[294] The quasi-criminal nature of civil forfeiture justifies the use of the

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286. *See* One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 702 (1965).

287. *See* United States v. U.S. Coin & Currency, 401 U.S. 715, 718 (1971).

288. *See* United States v. Ursery, 518 U.S. 267, 270 (1996).

289. *See, e.g.*, *id.* at 277–78 (applying a two-part inquiry to determine whether the forfeiture at issue was "criminal and punitive, or civil and remedial" (quoting United States v. One Assortment of 89 Firearms, 465 U.S. 354, 362 (1984))).

290. United States v. Comstock, 560 U.S. 126, 132 (2010) (addressing only the question of "whether the Necessary and Proper Clause . . . grants Congress authority" for civil commitment of sexual offenders, but "not decid[ing] that other provisions of the Constitution—such as the *Due Process Clause*—do not prohibit civil commitment"); *see also* United States v. Comstock, 627 F.3d 513, 519 (4th Cir. 2010) (citing Addington v. Texas, 441 U.S. 418, 432–33 (1979) (finding that the "Supreme Court has never retreated from" the holding that "proof by clear and convincing evidence sufficed to justify commitment of the mentally ill").

291. One could argue that civil *in rem* forfeiture with no underlying conviction is more egregious than civil commitment. With civil commitment, the statute requires an underlying conviction, whereas in the forfeiture context there has been no conviction. Property deprivations in civil *in rem* forfeiture cases occur without any prior procedures conferring additional due process safeguards.

292. *See supra*, notes 181–91 and accompanying text.

293. *See supra* Section II.A.

294. One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 700 (1965); *see also* Bennis v. Michigan, 516 U.S. 442, 453 (1996) (quoting J.W. Goldsmith, Jr.-Grant Co.

clear and convincing standard because the intermediate standard is meant for "civil cases involving allegations of fraud or some other quasi-criminal wrongdoing."[295] Additionally, the Court has held that the state's efforts to civilly confine someone advances a non-punitive governmental objective that places it outside the realm of a criminal punishment.[296]

Additional justification for the application of the clear and convincing evidentiary standard comes from an examination of areas of law, other than civil commitment, to which the standard applies. The Supreme Court has held that revoking a naturalization decree is so important to the liberty of the citizen that a clear, unequivocal, and convincing evidentiary standard must apply.[297] Additionally, the Court required a clear and convincing standard in a dispute between the states of Colorado and New Mexico about the diversion of a river.[298] The Court reasoned the application of the clear and convincing standard was appropriate because diverting interstate water was not an ordinary civil case.[299] As it would in civil *in rem* forfeiture cases, the clear and convincing standard in the water diversion case "accommodate[d] society's competing interests in increasing the stability of property rights and in putting resources to their most efficient uses."[300]

The Supreme Court's designation of civil *in rem* forfeiture and civil commitment as quasi-criminal proceedings render them both outside the protection of the most stringent evidentiary standard: proof beyond a reasonable doubt. The use of the intermediate clear and convincing evidentiary standard is necessary for quasi-criminal proceedings. Indeed, the Court's application of the intermediate standard to naturalization proceedings and land disputes between states only bolsters the argument that the clear and convincing evidence is constitutionally required in civil *in rem* forfeiture cases.

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v. United States, 254 U.S. 505, 511 (1921)) (concluding that forfeiture cases are "too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced"); United States v. One Assortment of 89 Firearms, 465 U.S. 354, 354 (1984) (holding that civil forfeiture constitutes punishment for purposes of the Double Jeopardy Clause).

295. Addington v. Texas, 441 U.S. 418, 424 (1979).

296. Kansas v. Hendricks, 521 U.S. 346, 363 (1997).

297. Chaunt v. United States, 364 U.S. 350, 353 (1960) (quoting Schneiderman v. United States, 320 U.S. 118, 125 (1943)).

298. *See* Colorado v. New Mexico, 467 U.S. 310, 312–13 (1984).

299. *Id.* at 316.

300. *Id.*

CONCLUSION

Finding the clear and convincing standard necessary to satisfy due process in civil *in rem* forfeiture proceedings will not cure all the ills or abuses associated with civil asset forfeiture; indeed, that would likely require even greater reform in Congress and state legislatures.[301] However, a heightened standard of proof would comport with due process and bring consistency to analogous civil procedures—civil commitment and civil *in rem* forfeiture. Balancing the *Mathews* factors in light of the Supreme Court's ruling in *Addington* renders a heightened evidentiary standard of proof necessary to comport with constitutional due process requirements.

Civil *in rem* forfeiture is a powerful law enforcement tool used to advance the noble purpose of fighting crime by strangling the finances of often evil criminal enterprises. This noble goal conflicts with an individual's interest in keeping legitimate property, notably the home. Until the late twentieth century, civil forfeiture allowed removing contraband from the streets and confiscating property that facilitated illegal activity. A ship used to smuggle tea that had not paid customs duties or a car used to transport illegal liquor could be forfeited because it was used to commit a crime. While the initial guilty property rationale faded, the negligent owner theory perpetuated this limited use of forfeiture on contraband and facilitating property. However, as wealthy criminal enterprises became more prevalent, the federal government expanded forfeiture to cut off revenue sources. Once forfeiture expanded to the proceeds of criminality, the use of civil *in rem* forfeiture ballooned and created a financial dependency that remains a strong incentive for the government to pursue forfeiture actions. Forfeiture became a strategy necessary for the bottom line as well as for the removal of criminality from the streets.

This history resulted in the CAFRA reform effort, including the preponderance standard of proof; however, that standard does not comport with the Due Process Clause. The *Mathews* balancing test, as applied to the civil commitment standard of proof in *Addington*, leads to the inescapable conclusion that civil forfeiture likewise requires the heightened clear and convincing evidentiary standard of proof.

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301. *See, e.g.*, Nick Sibilla, *New Federal Legislation Would Drastically Overhaul Civil Forfeiture*, INST. FOR JUST. (Mar. 16, 2017), https://ij.org/press-release/new-federal-legislation-drastically-overhaul-civil-forfeiture [https://perma.cc/2QAT-75HA] (outlining the Fifth Amendment Integrity Restoration Act of 2017).