

The Lacey Act and Civil Forfeiture: Can the Government Sell Forfeited Wildlife and Plants?

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ABSTRACT

Civil forfeiture, the taking by the government of property that is illegally used or acquired, creates a legal fiction that the thing itself is guilty of the offense. This in turn has created a complexity in executing the forfeiture sale process because the thing, such as illegally-harvested timber, becomes tainted with that guilt. So although the process of civil forfeiture vests title of the thing in the government, does the taint affect the subsequent sale of the thing to a bona fide purchaser? For a forfeiture of a plant or wildlife under the Lacey Act Amendments of 1981, some argue that the taint remains with the thing because the forfeiture only vested title. Thus, the thing, which would be otherwise legal to possess, cannot be sold in a forfeiture sale because the original violation continues to taint the thing, and therefore, law enforcement can seize the thing if it should have any subsequent movement. Others maintain that the forfeiture process not only vests title, but also cleanses the thing so that the thing may be sold as clear and free to a bona fide purchaser. This Article explores this question and whether the U.S. government should recognize and allow, without further violation, imports of goods that have been seized and forfeited by a foreign government.

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INTRODUCTION

A person harvests timber in foreign country X in violation of that country's law. The person then attempts to export the illegally-harvested timber out of that country. The foreign government seizes the illegally harvested timber, which is now tainted with the violation. After the government, under its national law, forfeits the timber, the government of X, now having title to the timber, sells the timber to a *bona fide* purchaser. The *bona fide* purchaser wants to export the timber from country X to the United States but has concerns that the United States will seize the timber under the Lacey Act¹ upon import because the timber is tainted with the original violation.

The question at the core of this scenario is: Does the taint from the illegal harvest remain with the timber, or does the forfeiture and the subsequent forfeiture sale allow the timber to be legally sold and transported without further violation?

At the outset, the answer seems relatively simple. The various forfeiture laws provide for a variety of disposal methods, including forfeiture sales. Every year the United States government sells thousands of assets that were seized and forfeited by federal law enforcement agencies. This process, known as a forfeiture sale, allows the government to dispose of forfeited assets by selling them to *bona fide* purchasers. And *bona fide* purchasers may purchase, or bid if an auction format, forfeited assets from jewelry and cars to businesses and real property. And when asked whether a *bona fide* purchaser may import or export an asset purchased from the government via a forfeiture sale, a forfeiture attorney will say yes. But when questioned on the legality of forfeiture sales and whether that forfeited good can be imported or exported despite the illegality that caused it to be forfeited, most forfeiture attorneys fall into the fallacy of *petitio principii*—assuming the conclusion in the premise²—and accept that forfeiture sales are legal because forfeiture sales are legal.

1. Lacey Act Amendments of 1981, Pub. L. No. 97-79, §§ 2–9, 95 Stat. 1073, 1073–80 (1981) (codified as amended at 16 U.S.C. §§ 3371–3378, 18 U.S.C. § 42 (2008)).

2. *Petitio principii*, DICTIONARY.COM, <http://www.dictionary.com/browse/petitio-principii?s=t> (last visited Oct. 14, 2018).

In the case of wildlife and plants, the main forfeiture provision is in the Lacey Act.³ The Lacey Act is a unique statute protecting plants and wildlife that have been illegally taken, possessed, transported, or sold by supplementing federal, state, tribal, and even foreign laws. The underlying purpose of the Lacey Act is to aid the enforcement of conservation laws in order to preserve valuable plant and wildlife resources and protect the legal trade. Like other forfeiture statutes, the Lacey Act's forfeiture provision seeks to remove the tools of crime and deprive wrongdoers of the proceeds of crimes in order to deter illegal acts.

To answer the question posed above, Part I of this Article provides an analysis of the Lacey Act and its forfeiture provision. Part II examines civil forfeiture law, including a discussion on the history of civil forfeiture, modern civil forfeiture, forfeiture sales and the legality of such disposition, and a consideration of the definition of contraband. Part III surveys the recognition of foreign judgments in the United States and forfeiture in foreign jurisdictions. Finally, the conclusion addresses whether the United States government should recognize and allow imports of goods that were seized and forfeited by a foreign government.

I. THE LACEY ACT

The Lacey Act is unprecedented in the realm of environmental statutes because it primarily targets trade to address conservation.⁴ Enacted in 1900, the Lacey Act addressed three primary concerns.⁵ First, Congress sought to combat illegal commercial hunting and preserve game and wild birds;⁶ and so the Act made it a federal crime to poach game or wild birds in one state with the purpose of selling the harvest in another.⁷ Second, the Act intended to prevent the introduction of non-native, or exotic, species of birds and game into native ecosystems;⁸ thus, the Act required all interstate shipments of wildlife to be clearly marked and labeled.⁹ Finally, the Act aimed to augment existing state laws for the protection of game and birds;¹⁰ consequently, the Act removed federal restrictions on the state's ability to regulate the sale of wildlife within their borders by subjecting all game

3. 16 U.S.C. § 3374 (2012).

4. See H.R. REP. NO. 56-474, at 2 (1900) (discussing that the purpose of the bill is to prohibit interstate commerce of wildlife killed or caught in violation of state laws). In comparison, other environmental statutes, such as the Endangered Species Act, 16 U.S.C. §§ 1531-1544 (2012), or Migratory Bird Treaty Act, 16 U.S.C. §§ 703-712 (2012), regulate the "taking" of wildlife, which may include trade, but trade is not the primary focus.

5. For a comprehensive discussion on the history and purpose of the Lacey Act, see Robert S. Anderson, *The Lacey Act: America's Premier Weapon in the Fight against Unlawful Wildlife Trafficking*, 16 PUB. LAND L. REV. 27 (1995).

6. See H.R. REP. NO. 56-474, at 1. The Lacey Act of 1900 did not apply to plants or fish.

7. Lacey Act of 1900, ch. 553, § 3, 31 Stat. 187, 188.

8. H.R. REP. NO. 56-474, at 2.

9. Lacey Act of 1900, ch. 553, § 4, 31 Stat. 187, 188.

10. H.R. REP. NO. 56-474, at 2.

animals and birds entering a state to the state's laws.¹¹ Congress found this third goal to be the "most important purpose . . . to begin where State laws leave off [because] [t]he State laws can have no extraterritorial force and the national laws operate in a single State."¹²

Since its enactment in 1900, the Lacey Act has been amended several times, with relevant amendments to its forfeiture provision in 1981 and 2008. In 1981, Congress substantially strengthened the Lacey Act. First, Congress repealed the Black Bass Act of 1926¹³ along with parts of the Lacey Act, and merged the two laws as the Lacey Act Amendments of 1981.¹⁴ As a part of these changes, Congress also authorized independent civil forfeiture on a strict liability basis,¹⁵ with clear intent that forfeiture could occur "regardless of whether any civil penalty or criminal prosecution is brought."¹⁶ Prior to the 1981 amendments, the Lacey Act allowed forfeiture only upon conviction or assessment of a civil penalty,¹⁷ and the Black Bass Act did not have a forfeiture provision.¹⁸ Congress determined that the change to strict liability forfeiture "would allow the protection of various species from harmful illegal trade by withdrawing such illegal shipments from the marketplace, even when the violation itself is inadvertent."¹⁹ This meant that an accused could not claim an "innocent owner" defense to defeat forfeiture.²⁰ Because of its strict liability basis, Congress found that "[t]he harshness of this [forfeiture] provision is mitigated by Section 5(b)'s incorporation of the customs forfeiture provisions, including the remission and mitigation provisions."²¹

The 1981 amendments also expanded the Lacey Act's scope to encompass all wild animals, including those bred in captivity,²² along with some wild

11. Lacey Act of 1900, ch. 553, § 5, 31 Stat. 187, 188.

12. H.R. REP. NO. 56-474, at 2.

13. Congress had enacted The Black Bass Act of 1926 to provide identical protection as The Lacey Act for two species of fish commonly known as black bass. 16 U.S.C. §§ 851–856 (1976), *repealed by* The Lacey Act Amendments of 1981, Pub. L. No. 97-79 § 9(b)(1), 95 Stat. 1079 (1981).

14. *See* H.R. REP. NO. 97-276, at 5–6 (1981). *See also* MICHAEL J. BEAN & MELANIE J. ROWLAND, *THE EVOLUTION OF NATIONAL WILDLIFE LAW* 45 (3d ed. 1997) ("The only significant part of the Lacey Act left untouched was the provision governing importation of injurious wildlife.")

15. 16 U.S.C. § 3374 (2008).

16. H.R. REP. NO. 97-276, at 22 (1981).

17. *See Lacey Act Amendments of 1981: Hearing on S. 736 Before the Subcomm. on Envtl. Pollution of the S. Comm. on Env't and Public Works*, 97th Cong. 60 (1981) (statement of Angus Macbeth, Deputy Assist. Attorney General, Land and Nat. Res. Div., Dep't of Justice).

18. *See* 16 U.S.C. §§ 851–856 (1976), *repealed by* The Lacey Act Amendments of 1981, Pub. L. No. 97-79 § 9(b)(1), 95 Stat. 1079 (1981).

19. H.R. REP. NO. 97-276, at 22 (1981).

20. *United States v. One Afghan Urial Ovis Orientalis Blanfordi Fully Mounted Sheep*, 964 F.2d 474, 476 (5th Cir. 1992); *accord United States v. Proceeds from the Sale of Approximately 15,538 Panulirus Argus Lobster Tails*, 834 F. Supp. 385, 390–91 (S.D. Fla. 1993); *United States v. 2,507 Live Canary Winged Parakeets*, 689 F. Supp. 1106, 1117 (S.D. Fla. 1988).

21. S. REP. NO. 97-123, at 13 (1981) (referring to the Tariff Act of 1930, Pub. L. No. 71–36119, 46 Stat. 590 (1930) (current version at 19 U.S.C. ch. 4 (2010))).

22. 16 U.S.C. § 3371(a) (2012).

plants.²³ Prior to this expansion, the Tariff Act of 1930²⁴ aided the Lacey Act in enforcing foreign conservation laws. Section 527 of the Tariff Act permits forfeiture of any mammal or bird imported in violation of the laws or regulations of any foreign country or political subdivision.²⁵ Despite the 1981 amendments reducing the importance of Section 527, the 1981 amendments continued the relationship between the two laws by providing that the customs laws were applicable to all seizures and forfeitures, including “the disposition of [forfeited] property or the proceeds from the sale thereof.”²⁶

In 2008, Congress sought to address the growing issue of illegal, and unsustainable, logging,²⁷ and so the 2008 amendments broadened the prohibition against the importation or sale of plants and plant products in violation of law.²⁸ The 2008 amendments also required that the Lacey Act forfeiture provision be governed by the Civil Asset Forfeiture Reform Act of 2000 (“CAFRA”).²⁹ By overlaying the Lacey Act’s forfeiture provision with CAFRA, the government’s burden of proof for a civil forfeiture became a preponderance of the evidence,³⁰ and any civil forfeiture had to provide for CAFRA’s innocent owner defense.³¹

In its present form, the Lacey Act prohibits two general types of activity. First, it prohibits the falsification of documents for most shipments of wildlife, which is a criminal penalty, and prohibits the failure to mark wildlife shipments, a civil penalty.³² Second, it prohibits the trade in wildlife, fish, or plants that have been illegally taken, possessed, transported, or sold in violation of a federal, state, tribal, or foreign law or regulation.³³ It is under this second type of prohibited activity—trafficking offenses—in which forfeiture is permitted:

All fish or wildlife or plants imported, exported, transported, sold, received, acquired, or purchased contrary to the provisions of section 3372 (other than [the marking offenses of] section 3372(b) of this title), or any regulation issued pursuant thereto, shall be subject to forfeiture to the United States notwithstanding any culpability requirements for civil penalty assessment or criminal prosecution included in section 3373 of this title.³⁴

23. *See id.* § 3371(f).

24. 19 U.S.C. §§ 1202–1683.

25. 19 U.S.C.A. § 1527 (2012).

26. 16 U.S.C. § 3374(b) (2012).

27. *See Legislative Hearing on H.R. 1497: Legal Timber Protection Act*, 110th Cong. 110-49 (2007).

28. *See* 16 U.S.C. §§ 3371(f), 3372(a).

29. 16 U.S.C. § 3374(d) (referring to Pub. L. No. 106-185, 106th Cong. (2000) (codified as amended 18 U.S.C. §§ 981–987 (2002)). Congress intended CAFRA “to make federal civil forfeiture procedures fair to property owners and to give owners innocent of any wrongdoing the means to recover their property and make themselves whole after wrongful government seizures.” H.R. REP. NO. 106-192, at 11 (1999).

30. *See* 18 U.S.C. § 983(c) (2012).

31. *See id.* § 983(d).

32. 16 U.S.C. §§ 3372(b), 3373 (2012).

33. *Id.* § 3372(a).

34. *Id.* § 3374(a)(1).

As the forfeiture provision has remained on a strict liability basis, the government is not required to prove the mental state of the person accused of trafficking. As long as the government meets its burden of proof, forfeiture may occur. But to get to the crux of the question posed above, we need to have a better understanding of forfeiture.

II. CIVIL FORFEITURE

A. A BRIEF HISTORY

Forfeiture is “the taking by the government of property that is illegally used or acquired, without compensating the owner.”³⁵ English common law recognized three forms of forfeiture: (1) deodand,³⁶ traceable to Biblical and pre-Judeo-Christian practices,³⁷ where a thing that caused the death of a subject was forfeited to the crown;³⁸ (2) forfeiture of estate, where upon conviction for a felony or treason, all real and personal property of the convict was forfeit;³⁹ and (3) statutory forfeiture, used originally for violations of the customs and revenue laws, where the law was construed so that the offending object was forfeit.⁴⁰ Statutory forfeiture is the only type of forfeiture that took hold in the United States.⁴¹

Decades before the American Revolution, colonial vice-admiralty courts, created in the late seventeenth century, enforced various British Navigation Acts.⁴² These Acts included a civil forfeiture provision that imputed the actions of a crew member to the ship’s owner, so that a violation of the Acts resulted in forfeiture of both the cargo *and* the vessel.⁴³ These *in rem* proceedings secured the payment of fines due the Crown and prevented the offending vessel from being further engaged in illegal trade.⁴⁴ Because of the punitive aspect of penalizing the owner

35. 1 DAVID B. SMITH, PROSECUTION AND DEFENSE OF FORFEITURE CASES ¶ 2.01 (Matthew Bender & Co., Inc.).

36. The word “deodand” is originated from the Medieval Latin *deōdandum*, meaning “(a thing) to be given to God.” *Deodand*, Dictionary.com, <https://www.dictionary.com/browse/deodand> (last visited Oct. 19, 2018); see also *Deodand*, Black’s Law Dictionary (8th ed. 2004) (“something (such as an animal) has done wrong and must therefore be forfeited to the Crown”).

37. See *Exodus* 21:28 (New International Version) (“If a bull gores a man or woman to death, the bull is to be stoned to death, and its meat must not be eaten. But the owner of the bull will not be held responsible.”).

38. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 290 (1992).

39. See 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 380–82 (1992).

40. See 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 261–62 (1992).

41. See *Austin v. United States*, 509 U.S. 602, 613 (1993).

42. Matthew P. Harrington, *Rethinking in Rem: The Supreme Court’s New (and Misguided) Approach to Civil Forfeiture*, 12 YALE L. & POL’Y REV. 281, 291 (1994). The Navigation Act refer to four principal acts passed by the British Parliament, enacted between 1651 and 1696 and in effect until repealed in 1849. See LAWRENCE A. HARPER, THE ENGLISH NAVIGATION LAWS: A SEVENTEENTH-CENTURY EXPERIMENT IN SOCIAL ENGINEERING 34, 59, 414 (1939).

43. See *Austin*, 509 U.S. at 612.

44. Harrington, *supra* note 42, at 291–292.

for the act of an individual seaman, “forfeiture under the Navigations Acts was justified as a penalty for negligence.”⁴⁵

Even after the break from Britain, the colonies continued *in rem* proceedings based in statutory forfeiture.⁴⁶ Following the signing of the Constitution, the First Congress passed customs and revenues laws, which had, as a punishment, a forfeiture provision for violations of those laws.⁴⁷ Several other early statutes also used forfeiture as a penalty for acts such as smuggling, fraudulent entry with customs officials, and piracy.⁴⁸ Recognizing the need to enforce these acts, the First Congress provided the new federal court system with jurisdiction over “all seizures under laws of impost, navigation, or trade of the United States”⁴⁹—cases which traditionally had been heard by the vice-admiralty courts.⁵⁰

The new laws resulted in an abundance of claims over the forfeiture provisions. The early forfeiture case law of the United States Supreme Court discussed the fundamental principle that an action *in rem* was not dependent on whether any defendant is joined *in personam*,⁵¹ and so the guilt or innocence of the owner was not considered in civil forfeiture.⁵² Instead, the “guilt” resulted from the violation and attached to the thing.⁵³

The thing is here primarily considered as the offender, or rather the offence is attached primarily to the thing; and this, whether the offence be *malum*

45. *Austin*, 509 U.S. at 612 (finding that negligence is imputable to the owner because had he exercised due care in examining the ship, as was his duty, he would have found the smuggled cargo) (citing *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 682 (1974)). See also 19 U.S.C. § 1592(a) & (c)(14) (2011) (allowing for seizure and forfeiture for fraud, gross negligence, or negligence).

46. Harrington, *supra* note 42, at 292.

47. *Austin*, 509 U.S. at 613 (noting that the language used in the Act of July 31, 1789, ch. 5, § 12, 1 Stat. 39, included the word “forfeit”).

48. See An Act for Registering and Clearing Vessels, Regulating the Coastwise Trade, and for Other Purposes, §§ 29, 34, Stat. 55, 63–65 (1789), *repealed by* An Act of Concerning the Registering and Recording of Ships or Vessels, 1 Stat. 287, 287–88 (1792); An Act to Protect the Commerce of the United States and Punish the Crime of Piracy, 3 Stat. 510, 510 (1819), *amended by* An Act to Continue in Force “An Act to Protect the Commerce of the United States and Punish the Crime of Piracy,” and Also to Make Further Provisions for Punishing the Crime of Piracy, 7 Stat. 600, 600 (1820).

49. An Act To Establish the Judicial Courts of the United States, § 9, 1 Stat. 73, 77 (1789).

50. Harrington, *supra* note 42, at 292.

51. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 684 (1974); see *J. W. Goldsmith, Jr.-Grant Co. v. United States*, 254 U.S. 505 (1921); *Dobbins’s Distillery v. United States*, 96 U.S. 395 (1878); *Harmony v. United States*, 43 U.S. 210 (1844); *The Palmyra*, 25 U.S. 1 (1827).

52. In contrast, criminal forfeiture is brought as part of the criminal prosecution of a defendant, and requires that the government indict the property used or derived from the crime along with the defendant. See 18 U.S.C. § 982 (2012). See also *United States v. Bajakajian*, 524 U.S. 321, 332 (1998) (Criminal forfeiture is a judgment *in personam* against the defendant, and “cannot be imposed upon innocent owners.”).

53. 1 RUFUS WAPLES, A TREATISE ON PROCEEDINGS IN REM 2 (1882). As Oliver Wendell Holmes noted, “[A] ship is the most living of inanimate things . . . [E]very one gives a gender to vessels . . . It is only by supposing the ship to have been treated as if endowed with personality, that the arbitrary seeming peculiarities of the maritime law can be made intelligible.” OLIVER WENDELL HOLMES, JR. ET AL., THE COMMON LAW 26–27 (Harvard Univ. Press 2009) (1881).

prohibitum, or *malum in se*. The same principle applies to proceedings *in rem*, on seizures in the Admiralty. Many cases exist, where the forfeiture for acts done attaches solely *in rem*, and there is no accompanying penalty *in personam*. Many cases exist, where there is both a forfeiture *in rem* and a personal penalty. But in neither class of cases has it ever been decided that the prosecutions were dependent upon each other. But the practice has been, and so this Court understand the law to be, that the proceeding *in rem* stands independent of, and wholly unaffected by any criminal proceeding *in personam*.⁵⁴

Consider the parallel *in rem* civil forfeiture action and criminal prosecution, both of which are based on the same underlying conduct or events.⁵⁵ Even an acquittal of a defendant in the *in personam* criminal action would not affect the civil forfeiture proceeding.⁵⁶ The Supreme Court has justified civil forfeiture based on two theories: the property itself is guilty, and an owner is accountable for the wrongs of others who use his property.⁵⁷ “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.”⁵⁸ This has led to the modern model of forfeiture which rests on the legal fiction that the thing is the offender, and “the Court has understood this fiction to rest on the notion that the owner who allows his property to become involved in an offense has been negligent.”⁵⁹

B. THE LEGAL FICTION EXAMINED

The fiction underlying *in rem* forfeiture⁶⁰—that the thing itself is guilty of the

54. *The Palmyra*, 25 U.S. at 14–15.

55. See, e.g., 18 U.S.C. § 981(a)(1)(C) (2012) (authorizing the forfeiture of the proceeds of a long list of federal criminal offenses); *id.* §§ 981(a)(1)(A) (authorizing forfeiture of all property involved in a money laundering offense); 18 U.S.C. § 1963(a)(2) (2012) (authorizing forfeiture of any property giving a defendant a source of influence over a racketeering enterprise); and 18 U.S.C. § 981(a)(1)(G) (2012) (authorizing forfeiture of all assets of a person engaged in terrorism).

56. *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 361–62 (1984) (also finding that the Double Jeopardy Clause is not applicable because *in rem* civil forfeitures are neither a punishment nor criminal for purposes of the Fifth Amendment); accord *United States v. Ursery*, 518 U.S. 267, 291–92 (1996); *The Palmyra*, 25 U.S. at 14.

57. *Austin v. United States*, 509 U.S. 602, 615 (1993).

58. *Id.*

59. *Id.* at 611 (citing 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 301 (1992) (“[S]uch misfortunes are in part owing to the negligence of the owner, and therefore he is properly punished by such forfeiture.”)); accord *J. W. Goldsmith, Jr.-Grant Co. v. United States*, 254 U.S. 505, 511 (1921) (“[T]he thing is primarily considered the offender.”); *Harmony v. United States*, 43 U.S. 210, 233 (1844) (“The vessel which commits the aggression is treated as the offender, as the guilty instrument or thing to which the forfeiture attaches, without any reference whatsoever to the character or conduct of the owner.”); *The Palmyra*, 25 U.S. at 14 (“The thing is here primarily considered as the offender, or rather the offence is attached primarily to the thing.”).

60. *In rem* forfeiture actions are formally known as non-conviction based asset forfeiture, or for ease of reference, civil forfeiture.

offense and thus deserves to be forfeited⁶¹—has created a complexity in executing the forfeiture sale process. Under CAFRA, title to forfeitable property “vest[s] in the United States upon commission of the act giving rise to forfeiture under this section.”⁶² This subsection is the codification of the common law doctrine of relation-back.⁶³ The theory of relation-back provides that as soon as the possessor of the forfeitable property commits the violation, the property is “tainted” by that illegal act, and forfeiture takes effect and operates from that time as a statutory conveyance to the United States.⁶⁴

The Lacey Act’s implementing regulations also support the relation-back theory:

The effect of any prior illegality on a subsequent holder of any wildlife or plant disposed of or subject to disposal is terminated upon forfeiture or abandonment, but the prohibitions, restrictions, conditions, or requirements which apply to a particular species of wildlife or plant under the laws or regulations of the United States or any State, including any applicable conservation, health, quarantine, agricultural, or Customs laws or regulations remain in effect as to the conduct of such holder.⁶⁵

Indisputably, a thing, such as wildlife or a plant, is not “guilty” by any definition or commonsense understanding of the term.⁶⁶ A forfeiture of wildlife or a plant is instead the legal outcome of an act done by or with the wildlife or plant in contravention of law. In the scenario outlined above, a person harvested timber in violation of foreign law, such as logging in excess of the allowed limit or without the proper permits. But for the failure of the person to follow the allowed limits or have the correct permits, the timber otherwise would be legal to possess. Because the thing did not do anything wrong, instead a person did, the forfeiture proceeding produces an inaccuracy when the thing is ascribed the power of complicity and guilt.

61. *Various Items of Pers. Prop. v. United States*, 282 U.S. 577, 581 (1931) (“It is the property which is proceeded against, and, by resort to a legal fiction, held guilty and condemned as though it were conscious instead of inanimate and insentient.”).

62. 18 U.S.C. § 981(f) (2012).

63. *See Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 627 (1989).

64. *United States v. Stowell*, 133 U.S. 1, 17–18 (1890)) (finding that the relation-back theory works as “to take effect immediately upon the commission of the offence, so as to prevent any subsequent alienation by him before seizure and condemnation.”).

65. 50 C.F.R. § 12.32 (2018). The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), Mar. 1, 1973, 27 U.S.T. 1087 (implemented through the Endangered Species Act (ESA), 16 U.S.C. § 1537a and 1538(c), 50 C.F.R. parts 10, 13, 17, and 23), also supports this assertion. CITES, an international agreement of 183 member states, aims to ensure that international trade in specimens of wild animals and plants does not threaten their survival. *Id.* art. 2. All import, export, re-export, and introduction from the sea of species covered by CITES has to be authorized through a licensing system. *Id.* art. 3. On the license, or permit, CITES has a code to indicate whether the specimen was confiscated or seized. CITES Res. Conf. 12.3(I)(i) (Rev. CoP17).

66. *See guilty*, BLACK’S LAW DICTIONARY (8th ed. 2004) (“having committed a crime, responsible for a crime”).

Distinguishing between *in rem* and *in personam* punishments does not depend upon, or revive, the fiction . . . that the property is punished as if it were a sentient being capable of moral choice. It is the owner who feels the pain and receives the stigma of the forfeiture, not the property. The distinction simply recognizes that Congress, *in order to quiet title to forfeitable property* in one proceeding, has structured the forfeiture action as a proceeding against the property, not against a particular defendant.⁶⁷

So instead of the guilt of the thing, the issue at the core of an action *in rem* is an absolute right to title, formally referred to as *jus in re*.⁶⁸ This concept is elemental to the commencement of a forfeiture action because the right to or in the thing must already have vested for a cause of action to exist. “[T]he forfeiture is the statutory transfer of right to the goods at the time the offence is committed.”⁶⁹ A forfeiture proceeding merely seeks judicial recognition of the government’s already existing right to forfeiture.⁷⁰ Therefore, an action *in rem* does not declare the thing guilty in a criminal sense, but instead declares its status. The court, instead of punishing the property, recognizes the change in the status of property’s ownership,⁷¹ and when the property’s status is declared, the “taint” that attached at the time of the illegal act is effectively erased.⁷² Once the United States has title, it may then dispose of the property in accordance with law because any prior illegality has been terminated.⁷³

67. *United States v. Ursery*, 518 U.S. 267, 295–96 (1996) (Kennedy, J., concurring) (emphasis added).

68. *The Carlos F. Roses*, 177 U.S. 655, 666 (1900) (*jus in re* is implicated by guilty things, compared to an obligation for which the property is bound, or *jus ad re*, which is created by things indebted); *see also* *WAPLES*, *supra* note 53, at 32 (“*Jus in re* is the absolute and exclusive right to a thing. . . . *Jus ad rem* is a relative right resting upon a thing. . . . Briefly, the former is the right to property, and the latter a right in property.”).

69. *Caldwell v. United States*, 49 U.S. (8 How.) 366, 381 (1850) (“If this was not so, the transgressor, against whom, of course, the penalty is directed, would often escape punishment, and triumph in the cleverness of his contrivance by which he has violated the law.”); *see also* 18 U.S.C. § 981(f).

70. *Caldwell*, 49 U.S. (8 How.) at 381 (finding that “the title of the United States to the goods forfeited is not consummated until after judicial condemnation; but the right to them relates backwards to the time the offence was committed, so as to avoid all intermediate sales of them between the commission of the offence and condemnation”). *See also* *WAPLES*, *supra* note 53, at 151–52 (“[S]o the proceeding in rem to enforce a *jus in re* is not to forfeit the thing but to ascertain whether it is forfeited.”).

71. An administrative forfeiture proceeding has the same result as a civil judicial forfeiture proceeding, in that the action recognizes the change in the status of the thing’s ownership. *See* 18 U.S.C. § 983(c), 19 U.S.C. § 1607 (2012).

72. *See* *United States v. Stowell*, 133 U.S. 1, 19 (1890) (finding that the title to the property was valid and effectual once forfeiture under the law took effect and the judicial condemnation merely perfected it); *accord* *Caplin & Drysdale v. United States*, 491 U.S. 617, 627 (1989).

73. *See generally* *Tariff Act of 1930*, 19 U.S.C. § 1527(b) (2012) (providing that wild mammals and birds, imported in violation of foreign law and subsequently forfeited, may be “sold in the manner provided by law”); 19 U.S.C. §§ 1527, 1592, 1607, 1609, 1611–13b, 1616a (2012), 19 C.F.R. §§ 162.46 (c), 162.50, 162.51, 162.52 (2018) (providing that goods seized may be sold).

C. FORFEITURE SALES

The interplay of the Lacey Act's forfeiture provision and its reference to other forfeiture laws presents intricacies in addressing questions on the legality of forfeiture sales.⁷⁴ Assuming the government established that the property is subject to forfeiture, the government, at the conclusion of the forfeiture action, receives title and the thing becomes United States government property. Once it is government property, the things may be disposed through various means, including destruction, retention, transfer, restoration, remission, or sale.⁷⁵ By providing that the Attorney General or her designee⁷⁶ may direct the disposal of forfeited assets, Congress recognized that because the government seizes and forfeits millions of dollars' worth of assets each year,⁷⁷ it must have a way to dispose of these items.

The disposal of forfeited property "by sale or any other commercially feasible means, without subsequent court approval"⁷⁸ is known as a "forfeiture sale" and does not require judicial confirmation.⁷⁹ Once there is a declaration of forfeiture and the United States has been given right of title to the thing, whether by court order or administrative process, the thing may be legally sold to a *bona fide* purchaser.⁸⁰ Thus, the purchaser received title from the United States and may assume using the thing for its intended purpose. This means that the "guilt" assigned to the thing was cleansed when the United States took title, so the purchaser may use the thing without fear of future seizure.

Forfeiture sales are allowed by the implementing regulations of the Lacey Act.⁸¹ "Wildlife and plants may be sold or offered for sale,"⁸² unless the particular species meets certain requirements.⁸³ Furthermore, the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES")

74. See 16 U.S.C. § 3374 (2012).

75. See 18 U.S.C. § 981(d), (e) (2012); 18 U.S.C. § 1963(l)(1) (2012); 21 U.S.C. § 853(n)(1) (2012).

76. Under the implementing regulations for the Lacey Act, this would be the Director of U.S. Fish and Wildlife (FWS). See 50 C.F.R. §§ 12.1, 12.2, and 12.30 (2018).

77. See U.S. DEP'T OF JUSTICE, AUDIT OF THE ASSETS FORFEITURE FUND & SEIZED ASSET DEPOSIT FUND ANNUAL FINANCIAL STATEMENTS FISCAL YEAR 2015 (2016) (showing that the adjusted assets of the Asset Forfeiture Fund, created by the Comprehensive Crime Control Act of 1984 to be the repository of the proceeds of forfeitures under any law enforced and administered by the DOJ (28 U.S.C. § 524(c)), was \$6.5 billion for FY 2015); U.S. MARSHALS SERVICE, ASSET FORFEITURE FACT SHEET 1 (2018) (showing that as of September 30, 2017, the Marshals Service managed \$1.8 billion worth of assets).

78. See 21 U.S.C. §§ 881(e), 853(h); 18 U.S.C. § 1963(f) (2012); see also 50 C.F.R. § 12.37 (2018) (providing for the sale of wildlife or plants forfeited under the Lacey Act or other statute enforced by FWS).

79. See 28 U.S.C. § 2001 (2012); see also U.S. DEP'T OF JUSTICE, ASSET FORFEITURE AND MONEY LAUNDERING SECTION, POLICY MANUAL: ASSET FORFEITURE POLICY MANUAL (2016), Chap. 5, Sec. III(B) (internal citations omitted).

80. "Forfeiture divests an owner of property of all his or her right, title, and interest therein and vests such right, title, and interest in the Government." *Id.*

81. 50 C.F.R. part 12 (2018).

82. *Id.* § 12.37(a).

83. *Id.* § 12.37(a)(1)–(5).

also provides for the disposal, including the sale, of wildlife, both alive and deceased, and plants, both live and harvested.⁸⁴ Upon confiscation of certain listed species, CITES permits parties “to dispose[] of [the species] in the best manner possible to achieve the purposes of the Convention, and [take steps] to ensure that the person responsible for the offence does not receive financial or other gain from the disposal and that such disposal does not stimulate further illegal trade.”⁸⁵ Although CITES does not define “confiscated” or “disposal,” the meaning is clear—parties have the right to sell (or destroy or donate)⁸⁶ the specified listed species as long as the violator(s) receive no gain from the disposal. This corresponds with the goal of forfeiture to penalize the owner for the wrong act and to deter the violators from committing future wrong acts. But U.S. forfeiture law, as well as CITES, recognizes that a certain type of items should not be sold. Those items are typically described as “contraband.” Yet, neither CAFRA nor the Lacey Act defines “contraband.”⁸⁷

D. CONTRABAND

CAFRA provides that “no person may assert an ownership interest . . . in contraband or other property that it is illegal to possess.”⁸⁸ But CAFRA provides no explanation or definition to determine what contraband is. The Lacey Act does not refer to contraband at all except through its reference to CAFRA. In reviewing the legislative history of the Lacey Act, a 1981 Senate report on the Lacey Act Amendments of 1981 asserted that “[t]he act provides for forfeiture of the fish, wildlife and plants on a strict liability basis because the merchandise is, *in effect*, contraband.”⁸⁹ Then a 2012 House report stated the 2008 Lacey Act amendments “did not overturn the 2005 decision of the Ninth Circuit Court,” in which the court determined that if a wildlife or plant “was imported, received, or acquired in violation of the Lacey Act . . . it constitutes ‘property that it is illegal to possess.’”⁹⁰

84. Convention on International Trade in Endangered Species of Wild Fauna and Flora [hereinafter CITES], Res. Conf. 17.8 (Rev. CoP17).

85. *Id.* at 17.8(2)(b).

86. *See id.* (allowing for the sale, donation, loan, or destruction of wildlife or plants).

87. It is possible that because CAFRA is silent on the issue, the forfeiture provision in the Tariff Act of 1930 applies. *See* Stefan D. Cassella, *The Civil Asset Forfeiture Reform Act of 2000: Expanded Government Forfeiture Authority & Strict Deadlines Imposed on All Parties*, 27 J. LEG. 97, 103 (2015) (stating that “the rule of thumb [is to] look to Sections 983, 985, and 2465(b) first; if they address an issue, they prevail; but if they are silent on an issue, or do not apply for some reason, the old law still applies”). The Tariff Act in 19 U.S.C. § 1595a refers to the definition of “contraband” found in the Act of August 9, 1939, ch. 618, 53 Stat. 1291 (1939) and 49 U.S.C. § 80302 (2012). *But see* United States v 144,774 pounds of Blue King Crab, 410 F.3d 1131, 1136 (9th Cir. 2005) (the court only considered the plain language of CAFRA). To date, the Ninth Circuit is the only court to have considered this issue.

88. 18 U.S.C. § 983(d)(4) (2012).

89. S. REP. NO. 97-123, at 13 (1981) (emphasis added).

90. H.R. REP. NO. 1112-604, at 4 (2012) (quoting United States v 144,774 pounds of Blue King Crab, 410 F.3d 1131, 1136 (9th Cir 2005)) (discussing the Retailers and Entertainers Lacey Implementation and Enforcement Fairness Act, H.R. 3210, 112th Cong. § 2 (2012)).

So if a plant or wildlife is considered effectively contraband, or is “property that it is illegal to possess,” then the question becomes can the United States sell a forfeited plant or wildlife that is classified as contraband even if the United States now has title to the forfeited plant or wildlife? But what is the difference between contraband and “property that it is illegal to possess”?

Courts have recognized two types of contraband—*per se* and derivative.⁹¹ Contraband *per se* is property that is “intrinsically illegal in character,” and so there can be no property interest in it.⁹² The Supreme Court has found that because the possession of *per se* contraband, “without more, constitutes a crime,” to return it would “frustrate[] the express public policy against the possession of such objects.”⁹³ In other words, when the property is *per se* contraband, a claimant has “no right to have it returned to [him].”⁹⁴ A classic example of contraband *per se* is child pornography.⁹⁵

In contrast, derivative contraband is property that is “not inherently unlawful but which may become unlawful because of the use to which [it is] put.”⁹⁶ Therefore, forfeiture of the item “fosters the purposes served by the underlying criminal statutes, both by preventing further illicit use of the conveyance and by imposing an economic penalty, thereby rendering illegal behavior unprofitable.”⁹⁷ For instance, a ship is an item that is not illegal to possess, but when used to smuggle goods in violation of law, becomes unlawful.⁹⁸ But unlike *per se* contraband, derivative contraband is subject to forfeiture only when authorized by

91. See *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 699 (1965). In *Blue King Crab*, 410 F.3d at 1136, the Ninth Circuit declined to determine whether CAFRA’s use of the term “contraband” in 18 U.S.C. § 983(d)(4) was limited to contraband *per se* or included derivative contraband. Instead, the Ninth Circuit determined that the phrase “‘other property that it is illegal to possess’ includes items that may be legally possessed in some circumstances but that become illegal to possess in others” because of extrinsic circumstances. To date, this question has not been addressed by any other circuit.

92. *One 1958 Plymouth Sedan*, 380 U.S. at 699–700.

93. *Id.* at 699 (citing *United States v. Jeffers*, 342 U.S. 48 (1951) (concerning narcotics); *Trupiano v. United States*, 334 U.S. 699 (1948) (concerning mash and a distillery)).

94. *Jeffers*, 342 U.S. at 54 (quoting *Trupiano*, 334 U.S. at 710).

95. See 18 U.S.C. §§ 2251–2252A, 2256, 2260. Federal law generally provides that any visual depictions (broadly defined to include photographs; videos; digital or computer generated images indistinguishable from an actual minor; images created, adapted, or modified, but appear to depict an identifiable, actual minor; undeveloped film, undeveloped videotape, and electronically stored data that can be converted into a visual image of child pornography) of sexually explicit conduct involving a minor, which does not require a depiction of a child engaging in sexual activity, “are not protected under First Amendment rights, and are illegal contraband under federal law.” U.S. DEP’T OF JUSTICE, CITIZEN’S GUIDE TO U.S. FEDERAL LAW ON CHILD PORNOGRAPHY (2015), available at <https://www.justice.gov/criminal-ceos/citizens-guide-us-federal-law-child-pornography>.

96. *Cooper v. Greenwood*, 904 F.2d 302, 305 (5th Cir. 1990) (citing *One 1958 Plymouth Sedan*, 380 U.S. at 700).

97. *Calero v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 687 (1974).

98. See *id.* (allowing the forfeiture of a yacht that was seized for smuggling drugs in violation of narcotics laws).

statute that provides appropriate safeguards of due process.⁹⁹

The difference between contraband *per se* and derivative contraband means that a claimant has no expectation that contraband *per se* will ever be returned, but does have a legitimate expectation that derivative contraband may be returned *unless* the government successfully forfeits that property.¹⁰⁰

Based on this understanding of the two types of contraband, wildlife and plants must be derivative contraband and not contraband *per se* because wildlife and plants are not “intrinsically illegal in character,” but become unlawful because of the use to which they are put. Furthermore, wildlife and plants are subject to forfeiture only when authorized by statute.¹⁰¹ Thus, as derivative contraband, the government must successfully forfeit the wildlife or plant, or it will have to be returned to the claimant. But once the wildlife or plant is forfeited and the United States has title, all prior illegality is terminated;¹⁰² and then the United States may dispose of the wildlife or plant, which may include sale to a *bona fide* purchaser.¹⁰³

III. RECOGNIZING FOREIGN LAW JUDGEMENTS

As discussed above, the Lacey Act, as well as CAFRA, provides for the sale of forfeited items to *bona fide* purchasers as a method to dispose of forfeited property. Because the United States recognizes and allows for the sale of forfeited items, the United States should recognize the forfeiture process and subsequent forfeiture sale of foreign jurisdictions so that *bona fide* purchasers may import the foreign-seized and forfeited timber (wildlife, fish, or any other item) into the United States.

A. U.S. RECOGNITION OF FOREIGN JUDGMENTS

There is no definitive authority on the source of law to recognize a judgment of a foreign court in the United States federal court system.¹⁰⁴ In an early case on foreign judgments recognition law, the Supreme Court opined:

99. *Cooper*, 904 F.2d at 305 (citing to *United States v. Farrell*, 606 F.2d 1341, 1345 (1979)). *Accord Helton v. Hunt*, 330 F.3d 242, 248 (4th Cir. 2003); *United States v. Rodriguez-Aguirre*, 264 F.3d 1195, 1213 n.13 (10th Cir. 2001).

100. *Rodriguez-Aguirre*, 264 F.3d at 1213, n.13. This is also supported by the legislative history of the Lacey Act, in which endangered species are likened to contraband *per se* and equipment used in aid in the criminal violations is considered derivative contraband. Yet the report notes that even endangered species, like controlled substances, can be lawfully imported. S. REP. 97-123, at 13–14 (1981).

101. *See generally* 16 U.S.C. §§ 668b(b), 1540(e)(4), 3374 (2012).

102. *See* 50 C.F.R. § 12.32 (2018).

103. *Id.* § 12.37(a).

104. *Recognition & Enforcement of Foreign Judgments: Hearing Before the H. Subcomm. on Courts, Commercial & Admin. Law of the H. Comm. on the Judiciary*, 112th Cong. 1 (2011) (statement of Linda J. Silberman and Martin Lipton, Profs., NYU School of Law). *See also* Yuliya Zeynalova, *The Law on Recognition and Enforcement of Foreign Judgments: Is It Broken and How Do We Fix It?*, 31 BERKELEY J. INT’L L. 150, 155 (2013) (“To ‘recognize’ a foreign judgment is in essence to domesticate it, thus making it equal to any other judgment produced by a U.S. court, as well as to judgments of other state courts that benefit from the Full Faith & Credit Clause ‘Enforcement,’ on the other hand,

“Comity,” in the legal sense, is neither a matter of absolute obligation, on the one hand, nor a mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.¹⁰⁵

Despite the lack of definitive authority, the United States has carried the principle of comity of nations¹⁰⁶ over to foreign judgments, even in the absence of any bilateral or multilateral treaties.¹⁰⁷ Because the United States routinely uses forfeiture, the United States, under the doctrine of comity of nations, should recognize a declaration of forfeiture by a foreign government. And as forfeiture under U.S. law terminates any prior illegality, the same should hold for foreign declarations of forfeiture. CITES further supports this conclusion by recognizing confiscated specimens.¹⁰⁸ The United Nations Convention on Transnational and Organized Crime and the Protocols Thereto (“UNTOC”)¹⁰⁹ and the United Nations Convention Against Corruption (“UNCAC”)¹¹⁰ also encourages the use of forfeiture in combatting acquisitive crimes¹¹¹ and provides that forfeited property be sold as a means of disposal.¹¹²

requires the aid of the courts and law enforcement of the enforcing jurisdiction, which may or may not be afforded along with recognition of the judgment.”)

105. *Hilton v. Guyot*, 159 U.S. 113, 163–64 (1895) (describing the factors to be used when considering the application of comity).

106. Comity of nations is a British doctrine adopted by U.S. courts, which is based on the idea that “the laws of the one [country] will, by the comity of nations, be recognized and executed in another [country], where the rights of individuals are concerned.” *Id.* at 165 (citing *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 589 (1839)).

107. Scott A. Edelman, et. al, *United States, in ENFORCEMENT OF FOREIGN JUDGMENTS* 2015 131 (Patrick Doris, ed., 2015); see also *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* § 98 (AM. LAW INST. 1988); *RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES* § 481 (AM. LAW INST. 1986).

108. See CITES Res. Conf. 12.3(I)(i) (Rev. CoP17).

109. G.A. Res. 55/25, U.N. Doc. A/Res/55/25 (January 8, 2001) (identifying endangered species of wild fauna and flora as one of several types of items that are trafficked).

110. G.A. Res. 58/4, at 8 (Oct. 31, 2003). For a list of signatories to the UNCAC, see <https://www.unodc.org/unodc/en/treaties/CAC/signatories.html> (last visited May 3, 2018).

111. The U.N. estimates that the total amount of criminal proceeds generated in 2009 may have been approximately \$2.1 trillion, or 3.6 percent of global GDP, with the “typical” transactional organized crime proceeds (e.g., proceeds resulting from wildlife and timber trafficking, counterfeiting, human trafficking, drug trafficking) to be around \$650 billion, or 1.5 percent of global GDP. Yet less than one percent, possibly as low as 0.2 percent, of the proceeds that are laundered via the financial system are seized and forfeited. U.N. OFFICE ON DRUGS & CRIME, *ESTIMATING ILLICIT FINANCIAL FLOWS RESULTING FROM DRUG TRAFFICKING & OTHER TRANSNATIONAL ORGANIZED CRIMES* 7 (2011) (noting this is a best estimate).

112. G.A. Res. 55/25, *supra* note 109, at art. 14.

Additionally, the U.N. Office on Drugs and Crime (“UNDOC”)¹¹³ and the World Bank partnered to form the Stolen Asset Recovery Initiative (“StAR”),¹¹⁴ which strives “to prevent the laundering of the proceeds of corruption and to facilitate more systematic and timely return of stolen assets.”¹¹⁵ As a part of this partnership, StAR released a best practices guide for enacting and implementing non-conviction based forfeiture, which provides that non-conviction based asset forfeiture should not preclude any specific disposal method.¹¹⁶

B. FORFEITURE LAW IN FOREIGN JURISDICTIONS

To understand why forfeiture proceedings of a foreign jurisdiction should be recognized, a brief overview of forfeiture laws in other jurisdictions is helpful. Civil, or non-conviction based, forfeiture has become an increasingly accepted tool to combat acquisitive crime. Although the Lacey Act as a conservation statute targeting trade is exclusive to the United States, many other countries do have general civil forfeiture laws, but most are not conservation-specific. This section briefly summarizes a few of those civil forfeiture statutes.¹¹⁷

1. United Kingdom

Forfeiture has had a long history in British law.¹¹⁸ Historically, it was based on a criminal conviction in which all of a convicted felon’s property was automatically forfeited to the crown.¹¹⁹ Although the enactment of the Forfeiture Act of 1870 abolished automatic criminal forfeiture,¹²⁰ forfeiture in England remained primarily dependent upon on a criminal conviction.¹²¹ When the government found that forfeiture based on criminal conviction did not have a significant impact on criminal assets, it reviewed and subsequently revised the system.¹²²

113. See *About UNDOC*, UN OFFICE ON DRUGS AND CRIME, <https://www.unodc.org/unodc/en/about-unodc/index.html?ref=menutop> (last visited Nov. 16, 2018).

114. See *Our Work*, STOLEN ASSET RECOVERY INITIATIVE, <https://star.worldbank.org/about-us/our-work> (last visited Nov. 3, 2018).

115. *Id.*

116. THEODORE S. GREENBERG ET AL., *A GOOD PRACTICES GUIDE FOR NON-CONVICTION BASED ASSET FORFEITURE* 24 (2009) (noting that no disposal method is precluded).

117. Many countries use the term “confiscation” instead of “forfeiture.” The terms are interchangeable as used in this Article.

118. See *supra* notes 36–40 and accompanying text.

119. See Forfeiture Act 1870, 33 & 34 Vict., c. 23 (Gr. Brit.).

120. *Id.* § 1.

121. See Drug Trafficking Act 1994, c. 37, § 43 (UK); Criminal Justice Act 1988, c. 33, § 69 (UK); Drug Trafficking Offences Act 1986, c. 32, § 1 (UK); Customs and Excise Management Act 1979, c. 2, § 49 (UK); Powers of Criminal Courts Act 1973, c. 62, § 43 (UK); Misuse of Drug Acts 1971, c. 38, §27 (UK).

122. Angela V.M. Leong, *Assets Recovery Under the Proceeds of Crime Act 2002: The UK Experience*, in *CIVIL FORFEITURE OF CRIMINAL PROPERTY LEGAL MEASURES FOR TARGETING THE PROCEEDS OF CRIME* 187 (Simon N.M. Young ed., 2009) (referring to Proceeds of Crime Act 2002, c. 29 (UK)).

The resulting legislation, the Proceeds of Crime Act 2002 (“POCA 2002”), established the new civil asset forfeiture regime that allows for *in rem* forfeiture.¹²³

The POCA 2002 introduced civil forfeiture of “property obtained through unlawful conduct.”¹²⁴ Civil forfeiture is instituted when the government lacks sufficient evidence for a criminal conviction, the person is beyond the reach of criminal proceedings, other proceedings have failed for procedural faults, or the government declines the case for public interest reasons.¹²⁵ The initial burden of proof on a balance of probabilities falls on the government to first show whether the alleged conduct constitutes “unlawful conduct,” and that the property was obtained by or in return for the conduct.¹²⁶ The burden then shifts to the respondent to prove the lawful provenance of the property.¹²⁷ Should the government meet its burden and overcome any challenges by the respondent, the property is forfeited and the court must make a recovery order requiring the sale of the property.¹²⁸ Amidst challenges to civil forfeiture, the United Kingdom High Court has ruled that civil forfeiture does not amount to a criminal proceeding.¹²⁹

2. Italy

A civil law state, Italy, along with the United States, has been a pioneer in adopting modern civil forfeiture law. In 1956, Italy enacted a law that allowed forfeiture, without conviction, of property connected to organized crime.¹³⁰ Italy followed the 1956 law with a similar anti-organized crime law in 1982, which included a measure for the seizure and forfeiture of illicitly gained assets.¹³¹ In the early 1990s, Italy enacted a new non-conviction (civil) based forfeiture law,¹³² and then introduced in 1996 a law to regulate management and disposal of seized and forfeited assets.¹³³ But it was not until 2010 that Italy adopted complementing measures to the 1996 law, such as a national agency to create the mechanisms and structures for the data collection and social use of the forfeited property.¹³⁴ The 2010 law that established Italy’s national agency for the administration and management of assets provides that sale of forfeited assets.¹³⁵

123. Proceeds of Crime Act 2002 [POCA 2002], c. 29, pt. 5 (UK).

124. *Id.* § 240.

125. Leong, *supra* note 122, at 208.

126. POCA 2002, pt. 5 §§ 241(3), 242(1).

127. *See id.* §§ 266, 270, 281, & 282.

128. *Id.* § 266.

129. *See* McIntosh v. Lord Advocate [2001] UKPC D1, [2003] 1AC 903 (appeal taken from Scot.);; R. (The Director of the ARA) v. He & Cheng [2004] EWHC 3021 (UK).

130. Legge 27 dicembre 1956, n.1423, G.U. Dec. 31, 1956, n. 327 (It.).

131. Legge 13 settembre 1982, n.646, G.U. Sept. 14, 1982 n.253 (It.) (commonly known as the “Rognoni – La Torre”).

132. Legge 7 agosto 1992, n.306, G.U. Aug. 7, 1992, n.185 (It.).

133. Legge 7 marzo 1996, n.109, G.U. Mar. 9, 1996, n.58 (It.).

134. Legge 31 marzo 2010, n.50, G.U. Apr. 3, 2010, n.78 (It.).

135. *Id.* *See also* FIN. ACTION TASK FORCE (FATF), ITALY FATF MUTUAL EVALUATION: FIRST BIENNIAL UPDATE 3 (2011).

3. Canada

As a constitutional monarchy with a parliamentary democracy, lawmaking in Canada is shared among one federal, ten provincial, and three territorial governments.¹³⁶ Canada's Constitution Act of 1867 enables the federal level to legislate criminal law¹³⁷ whilst it empowers the provincial governments to legislate civil law.¹³⁸ And so, civil forfeiture is found exclusively in provincial law. The province of Ontario first initiated civil forfeiture in 2001,¹³⁹ followed shortly thereafter by the province of Alberta,¹⁴⁰ and then six provinces enacted similar legislation.¹⁴¹ Property subject to forfeiture may include any property derived from any criminal offense acknowledged under Canadian federal or provincial law, even if the offense occurred outside the provincial jurisdiction.¹⁴² In 2009, the Supreme Court of Canada found that the provincial civil forfeiture law of Ontario was remedial, not criminal, in nature, and upheld it.¹⁴³

The provincial civil forfeiture laws generally follow the United States approach. The initial burden of proof first falls on the state, and then, upon meeting the evidentiary standard of probabilities,¹⁴⁴ forfeiture is declared.¹⁴⁵ As in the United States, the burden is a lower standard than found in criminal law.¹⁴⁶ Once

136. HOUSE OF COMMONS PROCEDURE AND PRACTICE (Robert Marleau & Camille Montpetit, eds., 2000), available at <http://www.parl.gc.ca/marleaumontpetit/DocumentViewer.aspx?DocId=1001&Sec=Ch001&Seq=0&Language=E> (last visited Nov. 16, 2018).

137. Constitution Act, 1867, 30 & 31 Vict., c 3, § 91(27) (UK), *reprinted* in R.S.C 1985, app II, no 5 (Can.).

138. *Id.* § 92(13).

139. *See* Civil Remedies Act, 2001, S.O. 2001, c 28 (Can.).

140. *See* Victims Restitution and Compensation Payment Act, S.A. 2001, c V-3.5 (Can.).

141. *See* Criminal Property Forfeiture Act, C.C.S.M. 2004, c C306 (Can.); Seizure of Criminal Property Act, 2009, S.S. 2009, c S-46.002 (Can.); Civil Forfeiture Act, S.B.C. 2005, c 29 (Can.); The Civil Forfeiture Act, S.N.S. 2007, c 27 (Can.); Act Respecting the Forfeiture, Administration, and Appropriation of Proceeds and Instruments of Unlawful Activity, C.Q.L.R. c C-52.2 (Can.); The Civil Forfeiture Act, S.N.B. 2010 c C-4.5, (Can.). Two provinces, Prince Edward Island and Newfoundland and Labrador, have not adopted civil forfeiture law.

142. *See supra* notes 138 & 140. Quebec's and Alberta's legislation stipulates that forfeiture can be imposed for Criminal Code and Controlled Drug and Substances Act offenses, but other offenses must be incorporated by regulation or otherwise stipulated. Quebec has added 11 federal and provincial statutes, whereas Alberta has added none. DEREK JAMES FROM, *ET AL.*, CIVIL FORFEITURE IN CANADA 2015–2016 25 (2016), <http://theccf.ca/civilforfeiture/>.

143. *Chatterjee v. Ontario*, [2009] 1 S.C.R. 624, 626 (Can.) (holding that Ontario's Civil Remedies Act's forfeiture provisions are constitutional).

144. The Supreme Court of Canada has described "balance of probabilities" as "the degree of proof which will suffice to support a particular conclusion of fact. The applicant must prove his case. This does not mean that he must demonstrate his case. If the more probable conclusion is that for which he contends, and there is anything pointing to it, then there is evidence for a Court to act upon." *Jones v. Canadian Pacific R. Co.*, [1913] D.L.R. 900, 909 (Can.). This standard is known as the civil standard as it exclusively used in civil trial cases.

145. ELAINE KOREN, CIVIL FORFEITURE REGIMES IN CANADA AND INTERNATIONALLY: LITERATURE REVIEW 22 (Public Safety Canada 2013).

146. *Id.* at 22–23.

property is declared under provincial civil forfeiture law, it may be sold in accordance with law by the provincial government.¹⁴⁷

4. Commonwealth of Australia

Australia's federal civil forfeiture dates back to the Customs Act of 1901, which provided for *in rem* forfeiture of property used in unlawful import or export.¹⁴⁸ Subsequent amendments to the Act expanded the types of goods allowed to be seized, including tools used to aid in the unlawful import or export, enabled a pecuniary penalty order, and added an innocent owner provision.¹⁴⁹ In 2002, the Commonwealth enacted the Proceeds of Crime Act, which has the principal objective to deprive persons the proceeds, instruments, and benefits derived from offenses.¹⁵⁰

In addition to the two federal laws, five out of the six states, and the two mainland territories each passed legislation providing for civil forfeiture.¹⁵¹ Although there is no single model, the Australian forfeiture laws are based on the common law principles of *deodand* and *attainder*.¹⁵² Regardless the civil forfeiture model, the various civil forfeiture laws in Australia provide that forfeited items may be sold.¹⁵³

5. South Africa

The Republic of South Africa, a representative democracy with a three-tier system of government,¹⁵⁴ first adopted forfeiture in 1992, but the law required a conviction of a drug offense before the government could seek civil forfeiture.¹⁵⁵ It

147. See Civil Remedies Act, 2001, S.O. 2001, c 28 (Can.); see also James McKeachie & Jeffrey Simser, *Civil Asset Forfeiture in Canada*, in CIVIL FORFEITURE OF CRIMINAL PROPERTY LEGAL MEASURES FOR TARGETING THE PROCEEDS OF CRIME, 170–176 (Simon N.M. Young, ed. 2009).

148. *Customs Act*, 1901 (Cth) s 229 (Austl.).

149. Sylvia Grono, *Civil Forfeiture—the Australian Experience*, in CIVIL FORFEITURE OF CRIMINAL PROPERTY LEGAL MEASURES FOR TARGETING THE PROCEEDS OF CRIME, 115, 116 (Simon N.M. Young, ed. 2009).

150. *Proceeds of Crime Act 2002* (Cth) s 5 (Austl.).

151. See *Anti-Money Laundering & Counter-Terrorism Financing Act 2006* (Cth) (Austl.); *Criminal Assets Confiscation Act 2005* (SA) (Austl.); *Confiscation of Criminal Assets Act, 2003* (ACT) (Austl.); *Australian Criminal Proceeds Confiscation Act 2002* (Qld) (Austl.); *Criminal Property Forfeiture Act 2002* (NT) (Austl.); *Crime Commission Act 2002* (Cth) (Austl.); *Criminal Property Confiscation Act 2000* (WA) (Austl.); *Confiscation Act 1997* (Vic) (Austl.); *Crimes (Confiscation of Profits) Act 1993* (Tas) (Austl.); *Criminal Assets Recovery Act, 1990* (NSW) (Austl.); *Confiscation of Proceeds of Crime Act, 1989* (NSW) (Austl.); *Proceeds of Crime Act 1987* (Cth) (Austl.); *Drug Misuse & Trafficking Act 1985* (NSW) (Austl.); *Director of Public Prosecutions Act 1983* (Cth) (Austl.); *Australian Federal Police Act 1979* (Cth) (Austl.); *Customs Act 1901* (Cth) (Austl.).

152. Koren, *supra* note 145, at 10.

153. See generally *supra* note 150. See also Grono, *supra* note 149, at 128 n.17, 137 (discussing the Proceeds of Crime Act), 145.

154. *Structure & Functions of the South African Gov't*, SOUTH AFRICAN GOV'T, <http://www.gov.za/node/537988> (last visited Nov. 16, 2018).

155. *Drugs and Drug Trafficking Act 140 of 1992* § 25 (S. Afr.).

was not until 1998 with the enactment of the Prevention of Organised Crime Act of 1998 (“POCA 1998”) that South Africa implemented non-conviction based civil forfeiture.¹⁵⁶ The POCA 1998 provides that the government may forfeit tainted property—any property that “is an instrumentality of an offense . . . or proceeds of unlawful activities.”¹⁵⁷ The government first applies to the High Court for an order of forfeiture,¹⁵⁸ and has the initial burden of proof, a balance of probabilities,¹⁵⁹ which is less than the criminal standard that requires proof of illegal conduct beyond a reasonable doubt. South African courts have upheld the POCA 1998 and have found that the POCA 1998 “[is] designed to reach far beyond organized crime and apply also to cases of individual wrongdoing.”¹⁶⁰ Once forfeiture is declared, the property is to be disposed “by sale or any other means.”¹⁶¹

Other foreign jurisdictions that have adopted some type of civil forfeiture law include the Republic of Ireland (Eire),¹⁶² New Zealand,¹⁶³ the Republic of Bulgaria,¹⁶⁴ Romania,¹⁶⁵ Malaysia,¹⁶⁶ the Republic of Fiji,¹⁶⁷ Antigua & Barbuda,¹⁶⁸ Colombia,¹⁶⁹ Pakistan,¹⁷⁰ Singapore,¹⁷¹ and the People’s Republic of China.¹⁷²

156. Prevention of Organised Crime Act 121 of 1998 (S. Afr.).

157. *Id.* § 38(2).

158. *Id.* § 48.

159. *Id.* § 50.

160. *Nat’l Dir. Of Pub. Prosecutions v. Van Staden* 2006 (2) All SA 1 (SCA) (S. Afr.) (citing *Nat’l Dir. Of Pub Prosecutioons v. R O Cook Properties (Pty) Ltd*; *Nat’l Dir. Of Pub. Prosecutions v. 37 Gillespie Street Durban (Pty) Ltd*; *Nat’l Dir. Of Pub. Prosecutions v. Seeynarayan* 2004 (2) SACR 208 (SCA)). This reasoning was upheld by the Constitutional Court in *Mohunram v. N’atl Dir. Of Pub. Prosecutions* 2007 (4) SA 222 (CC) (S. Afr.), but the court cautioned that the proportionality between the effect on deterring the individual and purposed served by forfeiture must be considered with the underlying purpose of the POCA 1998. See also Raylene Keightley, *Asset Forfeiture in South Africa under the Prevention of Organised Crime Act 121 of 1998*, in *CIVIL FORFEITURE OF CRIMINAL PROPERTY LEGAL MEASURES FOR TARGETING THE PROCEEDS OF CRIME* 93, 93–96 (Simon N.M. Young, ed. 2009).

161. Prevention of Organised Crime Act 1998 § 57 (S. Afr.).

162. Proceeds of Crime Act 1996 (Act No. 30/1996) (Ir.), amended by Proceeds of Crime (Amendment) Act 2005 (No. 1/2005) (Ir.). Ireland adopted the Criminal Assets Bureau Act (No. 31/1996), a criminal forfeiture system, also in 1996.

163. Criminal Proceeds (Recovery) Act 2009 (N.Z.).

164. Forfeiture of Illegal Assets Act, State Gazette 38/18.05.2012 (Bulg.).

165. Law no. 63/2012 and Law no. 286/2009 (Rom.).

166. Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 and Anti-Corruption Act of 1997 (Malay.).

167. Proceeds of Crime Act 22 of 1997, amended by Act No. 7 of 2005, § 19C (Fiji).

168. Proceeds of Crime Act of 1993, n. 13/1993 L.S. Cap. 345A (Ant. & Barb.).

169. L. 793, diciembre 27, 2002 DIARIO OFICIAL [D.O.] (Colom.).

170. Prevention of Corruption Act, No. 2 of 1947 and 1999 (Pak.).

171. Corruption, Drug Trafficking, and Other Serious Crimes (Confiscation of Benefits) Act of 1999, ch. 65A (Sing.).

172. Law of the People’s Republic of China on Administrative Penalty (promulgated by Order No. 63 of the President of the People’s Republic of China, Mar. 17, 1996, effective Mar. 17, 1996), available at <http://www.china.org.cn/english/government/207307.htm>.

CONCLUSION

Forfeiture is a historic legal concept that nearly every culture and form of government, including the United States, utilizes as a remedial device to deprive those who commit illegal activity the benefits and gains of that activity. And because of the unlawful nature of the activity, governments have decided that individuals should not be afforded the traditional rights and privileges normally associated with property law. This has been accepted as a matter of policy based on the rationale that governments often find it impossible to prosecute organized crime leaders, particularly if the criminal enterprise extends beyond the borders of that state. So civil forfeiture provides a solution by removing the benefits and gains of the illegal activity. The issue then becomes what to do with the forfeited goods, proceeds, or instruments.

It has long been recognized in the United States that forfeiture terminates any prior illegality, and thus, forfeited items may be sold, as allowed by law, and placed back into the stream of commerce. Foreign states and international inter-governmental organizations also provide that non-conviction based forfeited items may be sold. As discussed above, CAFRA provides that title to the property vests in the United States upon forfeiture,¹⁷³ so any prior illegality has been terminated. The relation-back theory—that title vests in the United States upon commission of the act giving rise to forfeiture—means that the prior illegality, or “taint,” is terminated. This theory is supported by the Lacey Act and its implementing regulations, which provides that the prior illegality, or “taint” is terminated upon forfeiture.¹⁷⁴ CITES also supports this assertion as CITES permits have a code to indicate whether the specimen was confiscated or seized.¹⁷⁵

Because the United States routinely uses forfeiture and allows for forfeiture sales, the United States should recognize declaration of forfeiture by foreign governments. So when a foreign government seizes and forfeits an illegally taken wildlife or plant, thus taking clean title, and then sells the wildlife or plant to a *bona fide* purchaser, the purchaser may import the wildlife or plant into the United States without violating the Lacey Act.

173. 18 U.S.C. § 981(f) (2012).

174. 50 C.F.R. § 12.32 (2018).

175. CITES Res. Conf. 12.3(I)(i) (Rev. CoP17).