CIVIL REMEDIES TO CONTROL CRIME: LEGAL ISSUES AND CONSTITUTIONAL CHALLENGES

by

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Abstract: *The use of civil remedies by criminal justice officials to prevent or punish criminal behavior has grown rapidly in the U.S. in recent years, in part because criminal remedies are often cumbersome, inefficient, and ineffective. Along with the increased use of civil remedies have come legal challenges. In this chapter, the workings of two of the most widely used civil tools — civil asset forfeiture and injunctive relief — are reviewed, followed by an analysis of the constitutional challenges each has faced. The principal legal assaults have involved procedural and substantive constitutional claims. The chief constitutional issues raised by anti-gang injunctions and other forms of injunctive relief are the proper scope of the orders entered and the procedures used to protect the enjoined party's rights. The U.S. Supreme Court's rulings have resulted in some constitutional boundaries limiting the application of the two civil remedies, but with few exceptions the court has confirmed a relatively permissive approach to new uses of civil remedies to control crime. Officials have been left with enormous discretion to employ civil remedies creatively and expansively. As civil remedies proliferate, however, the challenge to maintain principles of fairness and sensitivity continues.*

THE APPEAL OF CIVIL REMEDIES IN FIGHTING CRIME

Society relies on a variety of means to force or encourage people to follow its rules. The most familiar and most potent tool of societal control is the criminal law. A person convicted of a crime suffers the

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stigma and condemnation of being adjudged a criminal and faces the punishment of fines, incarceration and even death. The criminal law deters misconduct, reaffirms the moral boundary line of acceptable behavior, incapacitates wrongdoers and exacts retribution. But, as powerful and as special a tool of social control as the criminal law may be, it is also inadequate.

In the U.S., the use of criminal procedures and the imposition of criminal sanctions are strictly limited by constitutional guarantees. Criminal defendants are entitled to a trial by jury and appointed counsel; they are innocent until proven guilty beyond a reasonable doubt; they may stand mute in the face of accusation, and no inference may be drawn from their silence. Because of constraints such as these, the use of criminal remedies is often cumbersome, inefficient and ineffective. By its nature, the criminal law focuses on specific wrongdoers, relies on government initiative and prosecution, generally responds to crime only after its commission, and, by itself, does little to upset the conditions or remove the resources that permit crime to flourish.

Because of these inadequacies, criminal justice officials are now vigorously pursuing a range of alternative and supplementary methods to prevent or to punish criminal behavior. They have found a treasure trove of possibilities in the civil law, and have turned to restitution, injunctions, equitable relief such as constructive trusts, nuisance abatement, asset forfeitures and civil commitment. In addition, officials have drawn upon devices characteristic of the modern regulatory state such as statutory fines and loss of government benefits (Cheh, 1991).

Civil remedies offer a range of advantages that the criminal law cannot match in either scope or flexibility. First, through a variety of devices such as reporting requirements or threats of confiscation of property, the civil law can enlist or dragoon third parties to monitor or control would-be criminals. Under the Bank Secrecy Act (31 U.S.C. sec. 5311-5322), for example, banks and other financial institutions are required to report currency transactions of more than $10,000. This reporting alerts the government to possible money laundering and is the principal means by which the government can measure, detect and punish the concealment of illegally obtained income (President's Commission on Organized Crime, 1984). Landlords, parents and spouses at risk of forfeiting houses, apartments, or cars must insure that their business or the family property is not used to carry on criminal activities (21 U.S.C. sec. #881 authorizing civil forfeiture of property connected to narcotics activity). These obligations go well beyond criminal prohibitions on aiding and abetting. In general, the criminal law prohibits culpable behavior; it does not

require reporting on or intervention in the bad behavior of others. Under civil forfeiture laws, property may be at risk even where the owner did not condone or did not even know of the illegal use of his or her property.

Second, civil remedies may be employed to strike at the direct supports of crime. Rather than simply prosecuting wrongdoers, civil remedies can target for destruction or confiscation the resources devoted to crime such as entire criminal business enterprises or the warehouses, supplies or other tools of a criminal trade. Drug traffickers, for example, may face not only jail but loss, through civil forfeiture, of boats, planes, safehouses and other assets that would allow others simply to step into their shoes. Law enforcement personnel have long recognized that arrest and prosecution of individuals, even on a massive scale, is often ineffective in ending political corruption, organized crime or the operation of illicit businesses (President's Commission on Organized Crime, 1986).

Third, civil remedies can also target the indirect supports of crime or affect the "habitat," environment, or circumstances within which crime flourishes. Laws such as teen curfews or even simple regulatory measures such as requiring all-night stores to be specially lit may deter crime (Hunter and Jeffrey, 1992). More specifically, the civil law may provide the mechanism for removing guns from felons or the mentally ill, or, through the old-fashioned remedy of nuisance abatement, may close down houses of prostitution or gambling sites. Injunctions may be sought to disband gangs or protect individuals from abusive domestic partners.

Finally, civil remedies expand the punishments that can be meted out to wrongdoers, and they permit punishment without the same cumbersome and time-consuming constraints associated with the criminal law. Civil asset forfeiture is an excellent example. Property owners stand to lose any assets that are used or intended for use in the commission of a crime. Thus, even if the government is unable to prove beyond a reasonable doubt that a property owner has committed a crime, the more lenient burdens of proof of asset forfeiture may permit a sufficient penalty to punish or deter wrongdoing.

Although it is hard to gauge the precise crime-fighting benefits of civil remedies, such remedies — particularly asset forfeitures — have stripped many criminals of the tools of their trade and the proceeds of their crimes, and have successfully broken up criminal enterprises and deterred or prevented criminal activity. Perhaps more importantly, by blending criminal and civil remedies as part of a single law enforcement strategy, officials have taken a more systematic look at the immediate causes and effects of criminal activity. And, on the local level, communities have been enlisted to think strategically

about how to rout crime from their neighborhoods (Finn and Hylton, 1994). Nevertheless, civil remedies, freed of many of the individual liberty protections that apply to criminal proceedings, have sometimes produced unfair, disproportionate or harsh results. Individuals have suffered multiple punishments for a single offense, been denied due process of law through procedures calculated to limit notice and one's opportunity to defend, and have lost property, such as their homes or cars, even though they were uninvolved in or unaware of criminal activity.

As the use of civil remedies has increased so, too, have the legal challenges. In a series of cases, lower courts and the U.S. Supreme Court have now met and answered many of the constitutional objections raised against these devices of social control. Many of the courts' rulings have come in cases involving two of the most widely used civil tools, namely, civil asset forfeiture and injunctive relief. To understand the very generous boundary lines the courts have drawn, it is necessary to understand how civil forfeiture and injunctive relief actually work.

CIVIL FORFEITURE

Civil forfeiture is an in rem action, that is, a proceeding directed against property and not against any person having an interest in the property. It is based on the legal fiction that property used in or derived from violations of law is "guilty" and may be confiscated. Although the most popular and well-known use of forfeiture is against assets connected with drug trafficking or narcotics use, property is subject to forfeiture under a wide array of federal and state laws. Forfeiture is authorized in over 140 federal laws, and all states have one or more statutes permitting seizure of assets (Kessler, 1994). The federal and state governments may, for example, seize property smuggled into the country in violation of custom laws, property used to violate gambling or liquor laws, property obtained in violation of antitrust statutes and misbranded food or medicine. Many states have general forfeiture statutes permitting confiscation of "any property" used as an instrument of crime. Under these various statutes, state and federal officials have seized property ranging from cars and planes to currency, jewelry, businesses and farm equipment.

Civil asset forfeiture is easy to use and offers distinct procedural advantages to seizing authorities. In federal and most state forfeiture proceedings, the government may seize property when it has probable cause to believe that the property was used or intended to be used to commit a crime. Probable cause is the weakest of all evidentiary burdens requiring only a "fair probability" that property was

used contrary to law (United States v. United States Currency, 1982). It involves more than mere suspicion but constitutes less than a prima facie case. Typically the government seizes property without notice to the owner and without giving the owner any prior opportunity to object. The property owner need not have been charged or convicted of a crime, either at the time of seizure or ever. Indeed, most people who lose property through civil forfeiture are never charged with a crime and, because of the fiction that it is the property that is guilty, they need not be. Alternatively, asset seizures may come long after conviction, even years after a criminal defendant has served his or her sentence (United States v. James Daniel Good Real Property, 1993).

Once the property owner is notified that a seizure has occurred, he or she has a stunningly brief period of time (usually 10 to 20 days) within which to file a notice indicating a wish to contest the seizure. At a court hearing on the matter, the law effectively assumes that the property is subject to forfeiture, and the property owner — not the government — must now prove, by a preponderance of evidence (meaning that it is more likely than not), that the property is "innocent." This shift in the burden of proof is at odds with ordinary civil practice where the party taking adverse action — in this case, the government — must prove it was entitled to do so. In addition, the property owner must pay all of the costs and expenses associated with this legal proceeding and must do without his or her property in the meantime. Expenses include lawyers' fees because indigent civil defendants have no right to an appointed counsel. Lawyers will not take forfeiture cases on a contingent-fee basis because, of course, there is no recovery for the defendant and only a return of the property. And, again, because civil forfeiture proceeds against "guilty" property, property is subject to forfeiture even if the property owner was uninvolved in crime and did not know the property was used for or derived from criminal activity (Kessler, 1994). This harsh result is somewhat softened by statutes that may, but need not, recognize an "innocent owner" defense. Federal statutes and some state statutes provide such a defense, but it applies only if property owners prove that they had no knowledge of any wrongdoing or that they did all that they reasonably could to prevent the wrongdoing. For example, the Comprehensive Drug Abuse Prevention and Control Act provides, in part, that "no conveyance shall be forfeited under this paragraph to the extent of an interest of an owner, by reason of any act or mission established by that owner to have been committed or omitted *without the knowledge, consent, or willful blindness of the owner"* (21 U.S.C. sec. 881(a)(4)(c) (1994, emphasis added).

These extraordinarily congenial features of civil asset forfeiture make the tool quite attractive to law enforcement authorities and sharply distinguish it from criminal forfeiture. Criminal forfeiture is an in personam proceeding, that is, an action taken against an individual as part of the criminal case against him or her, for example, 21 U.S.C. sec. 853 (1994), criminal forfeiture in federal drug cases. Criminal forfeiture affects only the defendant's interest in the property, not the property itself. Because criminal forfeiture is part of the criminal process, the defendant enjoys all rights recognized in criminal cases, such as a right to counsel, government proof of guilt beyond a reasonable doubt, and the privilege not to testify. And, ordinarily, property may not be adjudged forfeit until the defendant is convicted of the underlying crime.

In addition to civil asset forfeiture, many states also permit forfeiture of property under public nuisance laws. Such laws declare that certain property or activity is harmful to the public, and they permit the government to bring an action to "abate," or end, the nuisance. Abatement remedies include injunctions that order an end to the activity and forfeitures or orders to seize or destroy the property that constitutes or facilitates the nuisance. State and local officials have used public nuisance laws to close illicit sex shops, seize apartments used as havens for drug use and confiscate cars in which the owners committed lewd acts. Although nuisance forfeiture typically does not proceed on the minimal probable cause standard used in many civil asset forfeiture statutes, this form of forfeiture is still quite congenial to the government. An action to abate a nuisance is a civil proceeding usually held before a judge without a jury; the protections afforded to persons accused of crime are not applicable; and, once the government proves the existence of a nuisance by a preponderance of evidence (meaning more likely than not), an order of forfeiture against the offending or facilitating property follows as a matter of course. Public nuisance statutes vary, but the following Michigan law (Michigan Statutes Annotated 27A:3801) is illustrative:

> Any building, vehicle, boat, aircraft, or place used for the purpose of lewdness, assignation, or prostitution or gambling . . . or used for the unlawful manufacturing, transporting, sale, keeping for sale, bartering, or furnishing of any controlled substance . . . . is declared a nuisance, and the furniture, fixtures, and contents of the building, vehicle, boat, aircraft, or place and all intoxicating liquors therein are also declared a nuisance, and all controlled substances and nuisances shall be enjoined and abated. . . .

Civil forfeiture is justified as a means of depriving criminals of their profits, confiscating the tools of the criminal trade and destroying criminal enterprises. But asset forfeiture has also become big business for the law enforcement community. On the federal level, for example, the Department of Justice's Asset Forfeiture Program reports that, over the last decade, deposits to the Asset Forfeiture Fund have exceeded $3 billion (U.S. Department of Justice, 1985-1995). State and local law enforcement officers have seized millions more over the same period. As one illustration, between 1989 and 1992, the sheriffs office in Volusia County, FL seized an astonishing $8 million in cash in roadside stops of motorists. Although about half the money was returned to property owners in settlements, the sheriff's office netted nearly $4 million over the three-year period (Brazil and Berry, 1992).

Law enforcement benefits directly from seizing assets through forfeiture. The confiscated money and property have been used for a variety of needs such as prisons, prosecutors' salaries, police equipment, payments to informants, and other subsidies to state and local law enforcement programs. Sensing the potential, some local police agencies have been particularly aggressive in setting up criminal opportunities in order to seize property. For example, in certain drug stings, police agents instructed their informant/buyers to arrange purchases in homes or condominiums knowing this would permit seizure of the seller's real estate (United States v. 41430 De Portola Rd., 1992).

Although the government finds civil forfeiture easy to use and highly profitable, courts and commentators frequently describe it as harsh, oppressive and disfavored (United States v. $31,990, 1993). This is because forfeiture, although formally a proceeding against offending property, carries the implication that the property owner either participated in, obtained profits from, or somehow aided others in the commission of a crime. Moreover, whether the property owner did or did not participate in criminal activity, the effect of a forfeiture may be altogether disproportionate to the underlying transgression. It is the hallmark of civil forfeiture that the nature or value of seized property may bear no equivalence to the harms caused by use of the property or the culpability of the property owner. Drug cases are instructive. Inattentive parents may lose the family car because their teenager smoked marijuana in the vehicle (United States v. 1978 Chrysler LeBaron Station Wagon, 1986). A parent's home may be seized because a son is selling cocaine from the premises (United States v. 141st St. Corp., 1990). A boat rental business may forfeit a yacht because, unknown to the owner, the rental party used marijuana on board (Calero-Toledo v. Pearson Yacht Leasing Co., 1974).

Of course, not all forfeitures are disproportionate. It is perfectly appropriate to seize contraband, such as cocaine or stolen property, because, by definition, such property is illegal and may not be possessed. It is also perfectly appropriate to confiscate the proceeds derived from crime because criminals should not be able to profit from their wrongdoing. The real unfairness arises when the government seizes property as "instruments" of crime, that is, any property used or intended to be used to commit a crime. Instrumentality forfeiture is broadly applied and may reach the assets of an organized-crime-infiltrated business, the entire property where a group planning a crime may have met, the apartment of a family where one member is storing drugs or the car used to drive to the crime scene. Moreover, the entire property may be seized even if illegality only took place on part of it (United States v. Santoro, 1986).

CONSTITUTIONAL BOUNDARIES

Since federal and state statutes permit civil forfeiture under very generous procedural and substantive rules, few forfeitures are questioned as unauthorized by law. Rather the principal legal assaults have involved procedural and substantive constitutional claims. The constitutionally based procedural challenges begin with the observation that even ordinary civil actions must comport with procedural due process protected by the Fifth and Fourteenth Amendments. Parties are entitled to fair notice, an opportunity to be heard and such other procedures as will insure an accurate and rational decision. Critics of civil forfeiture have argued that the entire civil forfeiture regime, crafted as it is to be a "prosecutor's tool and a defendant's nightmare" (Kessler, 1994: sec. 3.01[l], 3-4), violate these minimal procedural requirements. They have taken particular aim at summary, no-notice seizures of property and the shifting of the burden of proof to the property owner.

The federal courts have, with one exception, been entirely unsympathetic. Facial challenges to federal forfeiture laws have been uniformly rejected, with courts concluding that minimal fairness and an opportunity to be heard are adequately provided for. In particular, challenges to burden shifting have been shrugged off with the observation that forfeiture statutes specifically allow for the practice, and there has been long historical acceptance of such an approach (J.W. Goldsmith, Jr.-Grant Co. v. United States, 1921; United States v. Premises and Real Property at 4492 S. Livonia Rd., 1989).

However, in United States v. James Daniel Good Real Property (1993), the Supreme Court tugged slightly on the government's broad powers to seize property with no advance notice or an opportunity to

be heard. At least with respect to real property, such as land, houses, and farms, the Court held that, absent exigent circumstances, procedural due process requires the government to afford notice and a meaningful opportunity to be heard before seizure. While this was a welcome development for property owners, including those living in private and government owned apartments, its significance must not be overstated. The rule applies only to real property; cars, boats, planes, currency and other "movables" remain automatically covered by the "exigent" need to seize-first-ask-questions later (United States v. James Daniel Good Real Property, 1993).

With no substantial federal constitutional basis to challenge the procedural rules of forfeiture, some state courts, such as the Florida Supreme Court, have looked to state law to rein in the harshness of their state forfeiture regimes (Department of Law Enforcement v. Real Property, 1991). But in most states and at the federal level, it is starkly apparent that any greater procedural protections for property owners must come, if they are to come at all, from statutory reform.

Substantively, parties and legal scholars have argued that, as applied in particular circumstances, civil forfeiture violates the excessive fines clause of the Eighth Amendment, constitutes double jeopardy under the Fifth and Fourteenth Amendments, and is fundamentally unfair to innocent owners under basic principles of due process of law. There are two main ways to press these constitutional claims. The first is to say that civil forfeiture, although called "civil" and enacted as "civil" law, is actually a criminal proceeding. If civil forfeiture were deemed to be a criminal proceeding, then all of the constitutional provisions ordinarily associated with criminal proceedings, such as proof beyond a reasonable doubt, would apply. Since no current civil forfeiture statute satisfies these requirements, all would be declared unconstitutional. Not surprisingly, the Supreme Court has rejected this maneuver, and in United States v. Ursery (1996) it specifically held that in rem forfeitures are civil, not criminal, proceedings.

In Ursery, the Supreme acknowledged, as it had in previous cases, that a civil proceeding could exhibit certain features and invoke punishment that was so punitive that, although called civil, it was really a criminal proceeding. Yet the test the Court used to reach this result is, in practice, so difficult to satisfy that it is exceedingly unlikely that any of the civil remedies currently used to combat crime will be deemed criminal proceedings for constitutional purposes. The Court asked, first, did Congress (or a state legislature) intend a proceeding to be civil. If it did, that is conclusive unless a party establishes, "on the clearest proof," that the proceedings are so far punitive that they may not legitimately be viewed as civil in nature, de-

spite Congress's intent (Kennedy v. Mendoza-Martinez, 1963; United States v. One Assortment of 89 Firearms, 1984). Among the factors that would be relevant are whether: (1) the sanction involves an affirmative disability or restraint; (2) it has historically been regarded as a punishment; (3) it comes into play only on a finding of scienter (that is, intent); (4) its operation will promote the traditional aims of punishment — retribution and deterrence; (5) the behavior to which it applies is already a crime; (6) an alternative purpose to which it may rationally be connected is assignable for it; and (7) it appears excessive in relation to the alternative purpose assigned (Kennedy, 1963: 168-169).

But it is obvious that the Court did not take its test very seriously. Except for a single case where it found that loss of citizenship, though a civil proceeding, was a criminal punishment (Kennedy, 1963), no civil punishments have been found to be criminal for constitutional purposes. In addition, lower courts have routinely and consistently found that the federal drug forfeiture laws are civil and not criminal in nature (United States v. 6109 Grubb Rd., Millcreek Township, Erie County, 1989 [collecting many cases]). They then readily concluded that "claimants....are not entitled to the wide range of constitutional protections afforded to a criminal defendant.... [including].... the presumption of innocence....or proof beyond a reasonable doubt" (p. 701).

However, even if proceedings are regarded as civil for constitutional purposes — and most, if not all, will be — they may still run afoul of constitutional guarantees that apply to both civil and criminal proceedings. For example, the Supreme Court has long held that the Fourth Amendment protection against unreasonable searches and seizures applies in the civil and criminal context. Indeed, the Court has specifically ruled that the Fourth Amendment and the protections of the exclusionary rule extend to forfeitures (One 1958 Plymouth Sedan v. Commonwealth of Pennsylvania, 1965). This, then, is the second way to apply constitutional limits to civil remedies.

Recently the Court grappled with the question of whether Eighth Amendment protection against excessive fines ("Excessive bail shall not be required, nor excessive fines imposed..."), or the Fifth and Fourteenth Amendment protections against double jeopardy ("nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb..."), apply to civil proceedings, particularly forfeiture proceedings. The verdict has been mixed.

In Austin v. United States (1993), the Supreme Court decided that some civil forfeitures can impose punishments so severe and disproportionate to the underlying wrong that they will violate the prohibi-

tion against excessive fines. Richard Austin was convicted of cocaine possession, and, thereafter, the government seized his mobile home and auto body shop. The government considered these properties "instruments" of crime because Austin stored the cocaine in his home and sold it in his body shop. The heart of the Court's opinion was its realistic appraisal of the nature of forfeiture. The Court pierced the fiction of forfeiture as simply a proceeding against property: it acknowledged that many forfeitures are forms of punishment, and that, as punishment akin to fines, they can be constitutionally excessive.

Not all forfeitures, particularly confiscation of contraband and proceeds, are punishment. Yet, instrumentality forfeiture, particularly loss of one's entire house and business solely because they served as the location to store drugs, plainly could be. The Austin Court gave little guidance on how to calculate excessiveness, but lower courts have judged the nature and value of the forfeited property against factors such as the degree of culpability of the defendant, the relationship of the property to the offense, the duration of the wrongdoing and the harm that resulted. Austin has thus put into place at least some outer limits on grossly disproportionate forfeitures. These limits may be invoked whenever any property is seized as an instrumentality of crime, and they may be claimed by any property owner whether or not guilty or innocent of the underlying offense.

Many commentators believed that three court decisions signaled that forfeitures would also be limited by the double jeopardy clause. These were: Austin; United States v. Halper (1989), which held that double jeopardy barred noncompensatory statutory fines imposed on a defendant for the same conduct that led to a criminal conviction for fraud; and Montana Department of Revenue of Montana v. Kurth Ranch (1994), which held that a state tax imposed on marijuana was invalid under the double jeopardy clause where the taxpayer had already been convicted of owning the marijuana

That idea was dispelled in United States v. Ursery (1996), in which defendants who had been convicted of drug offenses or who had suffered forfeitures because of such activity claimed that criminal punishment and forfeiture for the same offense amounted to double jeopardy. The Court ruled otherwise. The majority began by noting that double jeopardy protects against double prosecutions or double punishments for the same offense. Double jeopardy was not applicable, the Court said, because forfeiture did not count as a punishment for the purposes of the double jeopardy clause. Civil forfeitures, it said, are primarily civil regulatory measures. They were so identified by Congress and, viewed in their overall operation, were

not so punitive in form and effect as to render them a form of double jeopardy punishment despite Congress's intent to the contrary. Forfeitures, the Court explained, encourage people to ensure that their property is not used for illegal purposes, prevent further illicit use of property, abate nuisances, confiscate contraband and deprive criminals of their profits. The Court declined to look at the application of particular forfeitures to determine whether they were sufficiently punitive to invoke the double jeopardy clause. It was enough to conclude that, historically, in rem forfeitures had not been regarded as punishment and that although forfeitures may have some punitive aspects, they have not been so regarded under prior precedent. Thus, for double jeopardy purposes, criminal punishment and loss of property through asset forfeiture did not constitute double punishment for the same offense.

The conclusion that forfeiture of a defendant's house because police found marijuana seeds, stems, stalks and a grow light inside was anything but punitive was too much for Justices Kennedy and Stevens. Justice Kennedy agreed that civil forfeiture and criminal punishment did not violate double jeopardy, but he offered a different rationale. Justice Kennedy recognized that "[forfeiture [in fact] punishes an owner by taking property involved in a crime," (Ursery, 1996:2150) but he found that a forfeiture punishes for misuse of property and not for the same offense as the underlying transaction. Thus, for him, there could be no double jeopardy because the person was not being twice punished for the same wrong.

Justice Stevens, in a lone dissent, also found one of the challenged forfeitures to be a form of punishment, but he believed this did amount to a violation of double jeopardy. Justice Stevens began with the proposition that forfeitures apply to different categories of property — proceeds, contraband, and instrumentalities — and that instrumentality forfeiture may sometimes constitute punishment. He said, "[t]here is simply no rational basis for characterizing the seizure of respondent's home as anything other than punishment for his crime. The house was neither proceeds nor contraband and its value had no relation to the Government's authority to seize it" (Ursery, 1996:2161). Despite Justice Steven's view, Ursery finally settled — in favor of the government — the double jeopardy issue that had bedeviled the lower courts in numerous cases. Indeed the Supreme Court has now altogether retreated from its earlier ruling in United States v. Halper (1989): double jeopardy no longer applies to any proceeding found to be civil in nature (Hudson v. United States, 1997).

The final substantive challenge to forfeiture involved the protection of "innocent owners," a matter addressed most recently in Bennis v. Michigan (1996). In an earlier case, Calero-Toledo v. Pearson

Yacht Leasing Co. (1974), the Supreme Court held that forfeiture laws do not violate due process simply because they apply to the property of innocent owners. This makes sense if the property is contraband because, by definition, contraband may not be owned or possessed. Applying forfeiture to the property of innocent owners also makes sense if the property constitutes the traceable proceeds of crime, because the criminal should not gain from wrongdoing. This is true even if such proceeds rest in the hands of an unknowing third party. The idea is that, as between harm to the innocent party and closing off avenues for criminals to launder their profits, a legislature may choose to frustrate the criminal. Moreover, a third party, like a lawyer, may be in a position to consider whether property was obtained from a known or suspected criminal.

Commentators have argued, however, that forfeitures applied to innocent persons whose property is simply used by another to commit a crime may be irrational and, therefore, unconstitutional under due process of law (Cheh, 1991). The Supreme Court appeared to acknowledge this possibility in the Calero-Toledo case. There the Court upheld the forfeiture of a yacht because a single marijuana cigarette was recovered on board. The leasor boat company had no knowledge of the drug use but, at the same time, offered no evidence of its degree of care in superintending how the yacht was used. The Court upheld the forfeiture, saying, "confiscation may have the desirable effect of inducing [the lessors] to exercise greater care in transferring possession of their property" (Calero-Toledo, 1974:688). But the Court also said:

> .... it would be difficult to reject the constitutional claim of an owner....who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property; for, in that circumstance, it would be difficult to conclude that forfeiture served legitimate purposes and was not unduly oppressive [pp. 689-699].

In Bennis v. Michigan (1996), however, a bare majority of the Supreme Court permitted the forfeiture of an innocent wife's interest in a car seized from her husband. He had been convicted of an indecent act with a prostitute while the two were in the vehicle. The wife's interest was sacrificed even though she had no awareness whatsoever that her husband had behaved or would behave as he did. Nevertheless, the plurality opinion reasoned that there was long-standing precedent permitting forfeiture against innocent owners, that there was no reason to make different rules for forfeiture of instrumentalities and that such forfeitures serve purposes distinct from punish-

ment such as preventing further illicit use of property. The plurality said that, just as Michigan makes a motor vehicle owner liable for the negligent operation of the vehicle by a driver who had the owner's consent, so too it could make Mrs. Bennis liable for her husband's use of the car contrary to decency laws.

Even if the Bennis Court had gone the other way and had mandated a constitutionally based innocent-owner defense, it is unclear whether property owners would have much to cheer about. Many federal and state laws already recognize an innocent-owner defense in their forfeiture statutes, but proving innocence is very difficult. To be innocent, one must have no knowledge of any wrongdoing or prove that he or she did all that reasonably could have been done to prevent the wrongdoing. To illustrate, a court found lack of reasonable care where a parent loaned the family car to a son who had a minor record. When the son later used the car to transport drugs, the car was forfeited (United States v. 1978 Chrysler LeBaron Station Wagon, 1986). Courts have, for example, permitted forfeiture of homes from law-abiding parents because they failed to report their children's drug use to police or failed to throw them out of the house (Guerra, 1996).

INJUNCTIVE RELIEF

Many of the civil tactics now used to prevent crime employ the ancient and widely used injunction remedy. An injunction is a court order directing particular persons to do or refrain from doing specific acts. The order is typically enforced through a criminal contempt proceeding. Injunctive relief is the basis of many statutory programs aimed at unsocial or criminal behavior, including laws prohibiting domestic violence, interference with another's civil rights, participation in gang activity and maintenance of a public nuisance. Injunctions have been obtained against labor picketing, anti-abortion protests, gang activity, and the operation of drug and gambling rings.

Using the injunctive remedy to curb antisocial or criminal activity ordinarily involves a two-step process. First, relying on equitable rules or statutes that permit the granting of injunctive relief, a private individual or government officials apply to a court for an injunction. Because this part of the process is civil in nature, only civil procedural protections apply. This ordinarily means that private litigants or the government have a better chance of success because rules such as proof by a preponderance of evidence and no appointed counsel for indigent defendants apply. Moreover, if the proving party (usually government officials) presents a particularly urgent case, a court will award immediate and ex parte (one side only) relief on a

temporary basis. Based on the government's proofs, courts have enjoined defendants from engaging in a wide variety of conduct including appearing in certain public places; having contact with specific persons; annoying, harassing or threatening other persons; or committing other antisocial or criminal acts. In nuisance abatement actions, courts have also entered affirmative injunctions: that is, orders telling the defendant to perform certain acts as opposed to orders stopping him or her from performing them. Property owners have been ordered to repair their buildings, comply with fire and safety codes and evict drug-abusing tenants. Injunctive orders can be modified but may remain in effect for months, a year or even longer with renewals. Some injunctions might be "permanent," that is, remain in place indefinitely until modified or lifted by the courts that entered them.

The second step in using an injunctive remedy is enforcement. Once an injunction is obtained and served on a party, violation of the order is a crime, enforced either by contempt proceedings or the ordinary criminal process. Although some courts have erroneously concluded that minor punishments for violation of court orders are a form of civil contempt, it is clear that any determinate contempt sentence is criminal in nature. It follows that, in these instances, all of the procedural protections applicable to criminal cases must be honored. However, the government retains one distinct advantage even in the criminal contempt phase. Under a doctrine known as the "collateral bar rule," defendants may not, in the enforcement stage, challenge the constitutionality of the scope or nature of the underlying injunction. The only relevant issues in the criminal contempt proceeding are whether the court has jurisdiction to enforce the injunction, and whether the defendant knowingly violated it (Yoo, 1994).

Since punishing the violation of an injunction through criminal contempt is itself a criminal proceeding, complete with all constitutional criminal procedural protection for the accused, one might question why, apart from the collateral bar rule, the injunctive remedy is used at all. Why don't the authorities simply rely on criminal prosecution to deal with the defendant's underlying behavior?

Injunctive relief is attractive for a number of reasons. First, as indicated, injunctions may prohibit behavior that is not criminal, such as ordering named gang members not to associate with other named gang members in a certain area. In addition, unlike criminal prosecution, injunctions are a form of relief that can be molded to particular circumstances, such as specifying the precise conditions under which a batterer may have contact with an abused spouse or how a landlord must end drug use in an apartment complex. Second, in-

junctions may be sought even though the conduct enjoined would, if continued, amount to a criminal act. Thus, they can serve as an alternative to prosecution in circumstances where it is easier to obtain or to prove violation of the injunction than it is to prove the underlying offense, or in any other circumstances where obtaining or enforcing the injunction is speedier or more practicable. Noting this use of the injunction, one commentator observed that enjoining crime is easier than prosecution because it will, at the injunction stage, result in a non-jury trial and may, at the criminal contempt phase, result in penalties more severe than those prescribed for committing any underlying crime (Dobbs, 1973). Third, some injunctions may be sought by "victims," and thus provide a "self-help" remedy where a prosecutor is unwilling to bring an action. Finally, and perhaps most importantly, the very process of obtaining an injunction serves notice on an offender that his or her conduct is in question, that the courts are involved and that serious consequences may follow if the behavior persists. This by itself may deter future misconduct. There is growing evidence that the California anti-gang injunctions have had this effect (Boga, 1994).

CONSTITUTIONAL BOUNDARIES

The chief constitutional issues raised by anti-gang injunctions and other forms of injunctive relief are the proper scope of the orders entered, and the procedures used to protect the enjoined party's rights. Civil injunctions frequently restrain an individual from committing acts that are not, in themselves, criminal. Since the individual will face criminal contempt for violation of the injunction, the injunction operates as a personal criminal code that the individual alone must obey. Principles of due process require that the individual have fair notice of the conduct that will entitle the government to obtain an injunction, and that he or she have an adequate opportunity to defend and limit any order that may be entered. Moreover, if the enjoined behaviors are too broadly stated, the order may violate constitutionally protected freedom of speech, association and movement.

The place to start is the underlying statute or law that permits an injunction to be entered. If a statute specifically identifies behavior that may be enjoined, due process is satisfied. If officials rely on broad and open-ended laws that permit, for example, "abatement of any public nuisance," then court specification of some standards is necessary. The California courts, for example, have tried to tailor that state's general nuisance law, as applied to anti-gang activity, by requiring that the enjoined conduct pose an actual or threatened, sub-

stantial and unreasonable interference with health, property or rights common to the public (Gallo v. Acuna, 1997). The behavior may be — but need not be — criminal, and, in most instances, will be based on allegations of extreme and continuing interference with others' personal and property rights. So refined and narrowed, these nuisance laws can meet the fair notice requirements of due process.

The scope of an injunctive order must also be scrutinized, both as to persons to whom it is addressed and the activities prohibited. To avoid infringing on constitutional rights such as freedom of expression and free association, injunctions may be entered only against persons who have actively participated in a gang's unlawful activities. One's simple association with other gang members or even one's self-identification as a gang member is an inadequate proxy for proving that a specific individual has created a public nuisance.

Courts and individual judges have disagreed over the precise behavior that will justify an order binding a particular individual. The debate centers on whether an injunction may bind only those defendants who are proved to have "a specific intent to further an unlawful aim embraced by [the gang]," as suggested by at least one Supreme Court opinion, NAACP v. Claiborne Hardware Co. (1982); or, whether it is permissible, with notice, to allow an injunction to run to classes of persons (such as all gang members, all union members, all members of an abortion protest group) who are agents, employees or others acting in concert with other enjoined persons. The key, it appears, is whether the broader scope of the injunction rests on specifically describing the coercive and prohibited conduct, and, in effect, enjoining agents from aiding others continuing in that specific conduct (Milk Wagon Drivers v. Meadowmoon Dairy, 1940). Of course, no one may be bound by an injunction without notice. The issue of precisely who may be enjoined under anti-gang decrees will continue to arise as courts struggle to refine the appropriate reach of orders in particular cases.

The scope of a court's order against gang activity must also be carefully considered and tailored. If an order curtails expression, association or free assembly, it must burden no more activity than is necessary to serve the government's legitimate interests (Madsen v. Women's Health Center, 1994; Schenck v. Pro-Choice Network of Western New York, 1997). In California, officials have obtained injunctions that prohibit gang members from associating with one another in various ways (e.g., "standing, sitting, walking, driving, gathering or appearing anywhere in public view"), from wearing distinctive gang clothing or insignia or using certain hand signs or signals to communicate with one another, from fleeing from police or being in a public place after a certain hour at night, and from engaging in a

variety of behaviors that "annoy, harass, intimidate, threaten, [or] challenge...any person." Prohibitions that are too broad or too indefinite may also run afoul of the due process requirement that people have fair notice of what conduct is proscribed, and that officials not be permitted to apply the law with completely unfettered discretion.

State courts have grappled with the degree of precision they will require, and, to date, there is considerable variability in the decisions. To illustrate, the California Supreme Court upheld an injunction against certain gang members, applicable in a four-block neighborhood of San Jose known as Rocksprings that, among other restraints, enjoined named defendants from being in the company of any other gang member while "standing, sitting, walking, driving, gathering or appearing anywhere in public view" (Gallo v. Acuna, 1997). The majority acknowledged the breadth of the order but concluded that the order was valid in light of: the extensive misbehavior that led to the granting of the injunction (threats, destruction of property, drug use, violence, etc.); the limited four-block area within which the order operated; the minimal affect on actual rights of free speech or intimate association; the alternate opportunities for gang members to congregate with one another; and the need to show some deference to the trial court's superior knowledge of the conditions calling for the specific order. In dissent, Justice Kennard disagreed, saying: "The evidence presented in this case falls far short of establishing that so drastic a restriction on the rights of defendants and [other gang members] to peacefully assemble is necessary to abate the public nuisance....[W]hen a constitutionally protected interest is at stake....the injunctive relief must be narrowly tailored so as to minimally infringe upon the protected interest" (pp. 619-620).

Finally, because of the special dangers to individual liberties posed by the injunctive remedy, and given the growing attraction of this device to law enforcement officials, commentators and some judges have expressed concern that the procedures used to obtain an injunction do not give a target a complete and fair opportunity to contest the action (Yoo, 1994). The most troubling procedural feature of the injunction regime is the award of a temporary restraining order obtained without notice and without any opportunity to be heard. In many cases, government officials may apply to a court ex parte (one side only), allege a public nuisance and ask for immediate relief. An order is then entered and the affected parties are served with a notice (called an order to show cause) requiring them to explain why a preliminary and then a permanent injunction should not be issued.

If the party does not show up, the injunction is entered by default. But even if the party does appear, the burden of proof may be

shifted, thus requiring the individual to show that the order was not improperly entered. Moreover, indigent defendants have no right to appointed counsel to assist them in challenging the basis for or the scope of any injunction, and there is no trial by jury. The standards for granting the injunction, especially under general "public nuisance" statutes, are left largely to the trial judge's discretion. Under the circumstances, it is quite clear that "the injunction...[is] an instrument of some danger in a free society, as well as an instrument of considerable power" (Dobbs, 1973:105). To date, however, courts have rejected facial constitutional challenges to these procedures. As with the procedures used to obtain forfeitures, it appears that any systematic reform or enhanced procedural protections for persons made subject to injunction orders, such as appointed counsel or bans on ex parte relief, must come from an unlikely quarter — the legislature.

CONCLUSION

In Bennis v. Michigan (1996), Justice Thomas joined with a majority of the Court to hold that it was constitutional to forfeit a wife's interest in the family car even though she was completely innocent of her husband's illegal use of the car. Justice Thomas said that history and precedent supported that outcome, but that, not knowing the courts' treatment of forfeiture laws in the past, one "might well assume that such a scheme is lawless — a violation of due process" (p: 1001). The Bennis case, he said, "is ultimately a reminder that the Federal Constitution does not prohibit everything that is intensely undesirable" (pp. 1001-1002). With few exceptions, that sober observation sums up the Supreme Court's relatively permissive approach to new uses of civil remedies to fight crime.

Some constitutional boundaries have been marked. With civil forfeitures, seizure of valuable property only incidentally or haphazardly associated with criminal activity may, for example, constitute the equivalent of an excessive fine. Furthermore, confiscating real property like a home, requires prior notice and a pre-seizure chance to be heard. With injunctive relief, there must be fair notice of what constitutes proscribed conduct and appropriate tailoring of injunctive decrees. Yet, in the main, officials are left with enormous discretion to employ civil remedies creatively and expansively. With modest care, they can avoid most constitutional difficulties.

At the same time, the allure of civil remedies presents a challenge. As the use of this tool proliferates, particularly forfeiture and injunctive decrees, legislators and enforcement officials must maintain

principles of fairness and sensitivity. Practices that are constitutional are not necessarily wise. Indeed they may be "intensely undesirable."

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