"Tainted" Assets, "Dirty" Money and the Civil–Criminal Dichotomy: A Novel Approach to the Classification of Civil Forfeiture Proceedings under the Criminal Proceeds (Recovery) Act 2009

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The Criminal Proceeds (Recovery) Act 2009 is a dangerous piece of legislation. Individuals can be stripped of their wealth and assets simply by the state proving, on the balance of probabilities, that some unlawful benefit was obtained from significant criminal activity. However, despite the legislative text indicating that the Act is civil in nature, the actual substance of forfeiture proceedings seem to favour a criminal interpretation. If this is correct, then criminal due process safeguards must be implemented. This paper considers both arguments through the application of international tests to the New Zealand forfeiture context. It concludes that, while cogent arguments exist in favour of a criminal reading, the Act is, on balance, actually concerned with civil proceedings. This paper then argues that adequate non-criminal safeguards exist to mitigate the Act's potentially draconian application.

I INTRODUCTION

Recently, New Zealand made significant changes to its civil forfeiture regime through the enactment of the Criminal Proceeds (Recovery) Act 2009 (CPRA). This mechanism for confiscating "tainted" assets and "dirty" profit has clearly thrived, as news headlines such as "Depriving the guilty of their assets",[1] and "Police target more assets of jailed finance director" demonstrate.[2] Surprisingly, however, for an area that has garnered high public interest, there is seemingly a paucity of literature and commentary. While this may perhaps stem from the relative novelty of the CPRA, New Zealand's forfeiture regime nonetheless presents complex and perplexing

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1 Bevan Hurley "Depriving the guilty of their assets" *The New Zealand Herald* (online ed, Auckland, 14 April 2013).

2 Hamish Fletcher "Police target more assets of jailed finance director" *The New Zealand Herald* (online ed, Auckland, 1 December 2014).

issues, particularly concerning its classification in the traditional civil–criminal dichotomy.

The CPRA allows for property or profit "tainted" by significant criminal offending to be confiscated by the Commissioner of Police, an arm of the state. Parliament, through an explicit provision in the CPRA, has labelled these proceedings as civil in nature.[3] The Commissioner is only required to prove the significant criminal activity forming the basis of a forfeiture application on the balance of probabilities and not on the traditional criminal standard.[4] Accordingly, a conviction is not required before property is forfeit.[5] This immediately raises the question: is Parliament's "civil" label a legitimate depiction of the actual substance of CPRA proceedings or is it a mere veil, disguising the true draconian "criminal" nature of forfeiture proceedings? If it is the latter, a further concern then arises: are sufficient non-criminal safeguards available to protect the fair trial rights of those facing forfeiture action?

In response to these two questions, this article argues that, on balance, the legislature has correctly categorised CPRA proceedings as civil in nature. While persuasive counter-arguments exist for a criminal construction, criminal law safeguards are not justifiable for those responding to CPRA proceedings. Nonetheless, non-criminal safeguards are still available to defendants and are sufficient to protect against the potential harshness and draconian nature of the CPRA regime.

The following structure is applied in advancing this argument.[6] Part II briefly sets out the main provisions of the CPRA and discusses Parliament's classification of CPRA proceedings as "civil" in nature. Part III explores the "civil" paradigm, contrasting it with the alternative criminal paradigm. Part III concludes that it is the actual substance of an enactment that is crucial to ascertaining whether an enactment is truly civil or criminal, rather than the legislative label given. In light of this, Part IV identifies and analyses the two frameworks used to determine what an enactment or proceeding's "actual substance" really is. These two frameworks are then specifically applied to the New Zealand forfeiture context in Part V, resulting in the conclusion that the CPRA proceedings are, in substance, civil actions. Part VI tests this conclusion against counter-arguments of civil forfeiture critics, including those who argue that the civil–criminal distinction is inadequate to describe the complex, hybrid nature of civil forfeiture. While some counter-arguments are persuasive, the ultimate conclusion is that CPRA proceedings are, on balance, civil in nature. Given this conclusion, Part VII identifies particular non-criminal safeguards available to defendants of CPRA proceedings.

3 Criminal Proceeds (Recovery) Act 2009, s 10.
4 Sections 50(1) and 55(1).
5 Section 15.
6 See Anthony Davidson Gray "Forfeiture Provisions and the Criminal/Civil Divide" (2012) 15 New Criminal Law Review 32. The author's analysis has been assisted by Gray's article on the topic.

II THE CPRA: FORFEITURE ORDERS AND PARLIAMENTARY CLASSIFICATION

Civil Forfeiture and the CPRA

"Forfeiture", whether criminal or civil, is concerned with the removal by the state of some profit or property that has been directly or indirectly involved in criminal or illegal activity.[7] "Civil forfeiture", more specifically, is appropriation of that profit or property by the state pursuant to a court order, *irrespective* of whether charges have been filed or a conviction entered.[8]

New Zealand's civil forfeiture regime came into effect on 1 December 2009 with the enactment of the CPRA.[9] Accordingly, forfeiture actions can now be brought, under the CPRA, where no conviction has been entered.

Complementary to the CPRA, however, is the instrument forfeiture regime contained in the Sentencing Act 2002.[10] Where a defendant is convicted of an offence warranting confiscation of instruments of crime, an instrument forfeiture order may be made as part of the sentencing process.[11] Nevertheless, as the Sentencing Act 2002 is conviction-based and concerns criminal forfeiture, it lies outside the scope of this article and will not be discussed.

1 The Purpose of the CPRA

Section 3 of the CPRA clearly sets out its objectives. The Act aims to "establish a regime for the forfeiture of property",[12] and to:[13]

> (a) eliminate the chance for persons to profit from undertaking or being associated with significant criminal activity; and
> (b) deter significant criminal activity; and
> (c) reduce the ability of criminals and persons associated with crime or significant criminal activity to continue or expand criminal enterprise; and
> (d) deal with matters associated with foreign restraining orders and foreign forfeiture orders that arise in New Zealand.

2 Forfeiture Orders Under the CPRA

The CPRA provides for two confiscation orders to be made: the assets forfeiture order and the profit forfeiture order. Provision is also made for

7 Roger Bowles, Michael Faure and Nuno Garoupa "Forfeiture of Illegal Gain: An Economic Perspective" (2005) 25 OJLS 275 at 276–277.
8 Nikolay Nikolov "General characteristics of civil forfeiture" (2011) 14 JMLC 16 at 17.
9 Criminal Proceeds (Recovery) Act, s 2; and Sentencing Amendment Act 2009, s 2.
10 Sentencing Act 2002, ss 142A–142Q. See also Criminal Proceeds (Recovery) Act, ss 70–79.
11 Section 142.
12 Section 3(1).
13 Section 3(2).

restraining orders, which preserve property while evidence is gathered in preparation for a subsequent forfeiture application.[14]

An assets forfeiture order is imposed where the High Court is satisfied on the balance of probabilities that specific assets are "tainted property".[15] "Tainted property" refers to any property wholly or partly "acquired as a result of", or "directly or indirectly derived from", significant criminal activity.[16] An activity is a "significant criminal activity" where, if criminal charges were laid, it would amount to offending "that consists of, or includes, 1 or more offences punishable by a maximum term of imprisonment of 5 years or more" or "from which property, proceeds, or benefits of a value of $30,000 or more have, directly or indirectly, been acquired or derived."[17] Where an assets forfeiture order is made, the tainted property is forfeited, vested in the Crown absolutely and transferred to the custody and control of the Official Assignee.[18]

Similarly, a profit forfeiture order is made where the High Court is satisfied on the balance of probabilities that the defendant "has interests in the property" and "has unlawfully benefited from significant criminal activity within the relevant period of criminal activity".[19] This period refers to either the period of seven years preceding the date of the application for a "restraining order" in respect of the property or, where no such application was made, the date of the application for the profit forfeiture order itself.[20] Once the court has determined the amount payable by the defendant — a sum commensurate with the value of the illicit profit ("the maximum recoverable amount") — then such a sum is to be transferred to the Official Assignee or recovered from the defendant's restrained assets.[21] Despite these ostensibly criminal characteristics, Parliament has classified both assets forfeiture orders and profit forfeiture orders as civil legislation.

Parliament's Classification of the CPRA as Civil Legislation

The CPRA explicitly provides that all forfeiture proceedings are civil in nature and effect. Section 10 states this in the clearest of terms:[22]

14 Section 24. A restraining order (which may be with or without notice) is made where the court is satisfied that it has reasonable grounds to believe that any property is "tainted property".

15 Section 50(1).

16 Section 5(1).

17 Section 6. The appropriateness of the $30,000 threshold was not debated during parliamentary proceedings. See further (17 February 2009) 652 NZPD 1382, where the Associate Minister of Justice, the Hon Dr Richard Worth, admitted that, while a higher number might have been chosen, the National Party would "run with" the relatively low figure "in the context of getting the legislation through".

18 Section 50(3).

19 Section 55(1). The phrase "unlawfully benefited from significant criminal activity" has the meaning given in s 7 of the Act; that is, "knowingly, directly or indirectly, derived a benefit from significant criminal activity (whether or not that person undertook or was involved in [that] activity)."

20 Section 5(1).

21 Section 54.

22 (Emphasis added).

10 Nature of proceedings

(1) Proceedings relating to any of the following are *civil proceedings*:

...

(c) an assets forfeiture order:

(d) a profit forfeiture order:

Similar provisions in the CPRA support this position. Section 16(1) provides that the commencement, determination or withdrawal of criminal proceedings in respect of the significant criminal activity in question does not affect the forfeiture application in any way. This is so even if the conviction entered in those proceedings is quashed or set aside.[23] Further, any legal aid granted to the defendant of a forfeiture application is processed as civil, not criminal, legal aid.[24]

Provisions relating to the procedural aspects of a forfeiture application also indicate a legislative desire for civil classification. The significant criminal offending forming the basis of an assets or profit forfeiture order is only required to be proved on the balance of probabilities and not the criminal standard of beyond reasonable doubt.[25] In terms of a profit forfeiture order, any order to recover the value of the profit is one made "as a result of civil proceedings instituted by the Crown".[26] All such legislative references to the nature of forfeiture proceedings therefore undoubtedly indicate an intention to classify the CPRA as civil.

III PARLIAMENTARY CLASSIFICATION AND THE CIVIL–CRIMINAL DICHOTOMY

While the New Zealand Parliament, through the legislative text, purposely classified the CPRA as civil, a broader question still remains: what does it mean for the CPRA, or indeed any legislative enactment, to be "civil" in nature? Is an enactment "civil" simply because the elected representatives have so promulgated or are there some inherent, shared characteristics of civil proceedings that transcend arbitrary legislative classification? This part identifies several distinctions between the civil and criminal jurisdictions, which may assist in ascertaining the true substance of a given proceeding.

23 Section 16(2).
24 Section 209.
25 Sections 50 and 55.
26 Section 55(4).

The Civil and Criminal Paradigms

1 Distinguishing Between the Civil and Criminal Paradigms

The civil–criminal distinction has long been recognised at common law. In 1775, Lord Mansfield in *Atcheson v Everitt* noted: "Now there is no distinction better known, than the distinction between civil and criminal law; or between criminal prosecutions and civil actions."[27]

While Lord Mansfield stated that determining a criminal cause from a civil one is based on "the form of the proceeding, not the offence which occasions it", subsequent developments have rendered it difficult to draw the boundary line.[28] Some argue that the role of the civil law is to "price" (through pecuniary incentives and disincentives) specific forms of behaviour which have positive consequences for society as a whole, while the role of the criminal law is to ban any activity that lacks social utility.[29] Still, others recognise the potential existence of "middle ground" hybrid perspectives between these two paradigms (for example, punitive civil sanctions). The applicability of this hybrid model as an alternative framework for analysing the CPRA is discussed below.

Since the exact line between the civil and criminal paradigms has been subject to much debate in recent times, this article attempts to briefly identify four distinguishing features between the civil and criminal systems. Not only does the identification of such features serve to narrow the parameters specific to this article but it also sheds light on what the process of labelling a proceeding "civil" or "criminal" entails. These four features are: the nature of the harm done, the rationale for the proceeding, the existence of a conviction for criminal proceedings and the role of the state in criminal law.

(a) The Nature of the Harm Done

The first difference between civil and criminal systems is the seriousness of criminal wrongs, which are generally perceived to touch upon the public, rather than the private, sphere. Prima facie, it would seem that the criminal law prohibits acts that are inherently wrong or mala in se — offences such as murder or sexual violation.[30] Even where an act can give rise to both criminal and civil proceedings, the act is nonetheless criminalised and pursued by the state because it directly "threatens the security or well-being of society".[31]

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27 *Atcheson v Everitt* (1775) 1 Cowp 382 at 391, 98 ER 1142 (KB) at 1147.

28 At 386.

29 John C Coffee Jr "Paradigms Lost: The Blurring of the Criminal and Civil Law Models—And What Can Be Done About It" (1992) 101 Yale LJ 1875 at 1884–1885.

30 AP Simester and others *Simester and Sullivan's Criminal Law: Theory and Doctrine* (5th ed, Hart Publishing, Oxford, 2013) at 2.

31 Carleton Kemp Allen *Legal Duties and Other Essays in Jurisprudence* (The Clarendon Press, Oxford, 1931) at 233.

Conversely, civil wrongs are those that are largely redressable by recourse to pecuniary compensation and are commonly private affairs. For instance, a victim may forgive a thief for stealing her belongings by desisting from the private action of conversion in tort. The same victim, however, is powerless to halt the state's criminal prosecution of the thief on a charge of theft.

(b) The Rationale for the Proceeding

Another distinguishing factor between the civil and criminal paradigms is the rationale for their respective proceedings. The primary object of civil law is to redress wrongs through compensation or restitution.[32] As such, the extent of compensation (usually in the form of financial reparation) is only so much as is necessary to make good the wrong done. Conversely, the purpose of criminal proceedings is to punish conduct that society deems reprehensible.[33]

(c) The Uniqueness of a Conviction in Criminal Proceedings

Another point of distinction between the civil and criminal systems is the existence of a conviction in criminal proceedings. The imposition of a conviction, where the fact-finder has been satisfied beyond reasonable doubt of the offence charged, is a power reserved solely for the criminal law. The conviction itself operates as a punishment *in its own right.* There is considerable stigma attached to criminal convictions, which acts as a mechanism for the public to specifically identify and declare the offender to be blameworthy for his or her actions.[34] And such stigma attaches regardless of whether the offender is fined or imprisoned.

On the other hand, in the civil system, there is no power for the fact-finder to impose a conviction or sentence the defendant to any term of imprisonment. If the plaintiff is successful in his or her civil action, any award made is for the plaintiff's benefit, rather than the defendant's condemnation. An award of substantial damages against a defendant, though detrimental on an economic level, makes no express or implied comment regarding the *moral* culpability of the defendant.[35]

(d) The State in Criminal Law

One final fundamental difference between the civil and criminal law is the role of the state in proceedings. Any criminal prosecution is commenced by the state (normally with the Crown or the police as a party to proceedings) and can only be withdrawn at the Crown's discretion. It is natural, therefore,

32 CMV Clarkson *Understanding Criminal Law* (4th ed, Sweet & Maxwell, London, 2005) at 6; and AP Simester and WJ Brookbanks *Principles of Criminal Law* (4th ed, Brookers, Wellington, 2012) at 3.

33 Clarkson, above n 32, at 3.

34 Simester and others, above n 30, at 5. See also Clarkson, above n 32, at 6.

35 Simester and others, above n 30, at 5.

that the costs related to criminal proceedings are wholly borne by the state. Moreover, the state in criminal proceedings may draw on expansive and intrusive powers to investigate alleged offences, such as the powers of arrest, detention, and search and seizure. The rules of evidence are also much more stringent in criminal proceedings. Conversely, many of these benefits relating to resources, investigation and safeguards are unavailable for civil proceedings.[36]

Thus, based on the development of the characteristics of both systems, it seems that Lord Mansfield's observation is only of limited application. In recent decades, it is no longer just the "form of proceeding" which defines a civil proceeding relative to a criminal one. Instead, numerous factors and considerations, as canvassed above, now define the true nature of a proceeding.

2 Determining the True Nature of the CPRA

Where a proceeding conforms to a substantial number of the civil characteristics identified above, the likelihood of that proceeding being classified as civil increases proportionately. The converse is true for criminal proceedings. On this basis, the *true* nature of a given proceeding cannot, therefore, be reduced to a simple matter of legislative classification — it is the substance of the proceeding that defines its true character.

This tension is most palpable in civil forfeiture proceedings. The legislative text expressly provides that the CPRA is civil in nature. As discussed above, other legislative provisions support divorcing forfeiture proceedings from criminal proceedings; for instance, the enforceability of a profit forfeiture order as a debt or the standard of proof being on the balance of probabilities.

However, the legislative classification only presents a partial picture. Applications for civil forfeiture orders are to be made by the Commissioner of Police or the Commissioner's delegated representatives.[37] The role of the Commissioner is, therefore, akin to a prosecuting agency; the state bears the full cost of instituting proceedings and has access to the wide-ranging resources and manpower of the New Zealand Police. Further, any assets or profit subject to a forfeiture order are to be transferred to the Official Assignee, a Crown entity.[38] This is unlike civil proceedings, where any compensatory damages are ultimately awarded to the successful plaintiff.

Finally, proceedings under the CPRA appear to seek redress for harm suffered as a community, rather than by a specific individual. Unlike in civil proceedings, where the plaintiff may desist from his or her claim, the Commissioner makes applications for assets or profit forfeiture orders on behalf of the state. Therefore, it is not difficult to see that substantial overlaps occur between the CPRA, classified as a civil proceeding, and

36 Colin King "Using civil processes in pursuit of criminal law objectives: a case study of non-conviction-based asset forfeiture" (2012) 16 E&P 337 at 338.
37 Criminal Proceeds (Recovery) Act, ss 43 and 91.
38 Sections 82–83.

prosecutions brought by the state, which are classified as criminal proceedings.

This part has shown that whether an enactment is civil or criminal depends not on legislative classification. Rather, the actual substance of the enactment — and the extent to which it corresponds with the characteristics of civil or criminal law — is determinative. The CPRA demonstrates this most pertinently. Although one method of determining a proceeding's true nature is to evaluate its similarities with the various factors identified above, such an approach is unsatisfactory. This is due to the arbitrariness of what is, or is not, included in the criteria. Accordingly, a more systematic and refined approach must be identified and analysed before it is applied to the CPRA.

IV A STRUCTURED FRAMEWORK: *MENDOZA-MARTINEZ* AND *ENGEL*

New Zealand jurisprudence itself has not yet devised a test that provides a systematic framework to determine the true nature of a given proceeding.[39] But a potential answer may lie in tests applied in two comparable jurisdictions, both of which possess similar experiences relating to civil forfeiture. These are the approaches of the Supreme Court of the United States in *Kennedy v Mendoza-Martinez*,[40] and the European Court of Human Rights in *Engel v The Netherlands (No 1)*.[41] This part briefly outlines the relevant fact patterns of the cases and identifies the criteria within the two approaches. Those criteria are then analysed and compared to ascertain their usefulness for determining the true nature of proceedings in general and the CPRA specifically.

The American and European Frameworks in Determining the Nature of an Enactment

1 The American Approach: Kennedy v Mendoza-Martinez

In *Mendoza-Martinez*, the Supreme Court of the United States considered the question of whether a statute should be deemed criminal or civil in character, notwithstanding legislative intent. The case concerned the constitutionality of legislation that imposed forfeiture of citizenship on those who had left or remained outside the United States during wartime to evade military service.[42] Congress had expressly employed such provisions to deprive American citizenship as a punishment, without observing the

39 Judicial attention has, however, been given to the general distinction between a crime and a civil wrong. See, for example, *Mafart v Television New Zealand Ltd* [2006] NZSC 33, [2006] 3 NZLR 18 at [28]–[40] per Elias CJ. While no systematic test was laid out, her Honour noted at [31] that "it is necessary to look to the substance of the application and the order sought under it."

40 *Kennedy v Mendoza-Martinez* 372 US 144 (1963).

41 *Engel v The Netherlands (No 1)* (1976) 1 EHRR 647 (ECHR).

42 *Kennedy*, above 40, at 146.

procedural guarantees of the Fifth and Sixth Amendments (namely, due process and double jeopardy rights, and the right to trial by jury, respectively).[43] Constitutionality thus turned on the fundamental issue of whether the sanction itself, namely the deprivation of citizenship, was penal or merely regulatory in character.[44]

The Supreme Court enunciated a test to determine whether legislation is "penal" or "regulatory" in nature.[45] In particular, a court is to have regard to:

(a) Whether the sanction involves an affirmative disability or restraint;
(b) Whether it has been historically regarded as a punishment;
(c) Whether it is only applicable where there has been a finding of scienter (that is, a finding that an act has been done knowingly and intentionally);
(d) Whether its operation promotes the traditional retributive and deterrent aims of punishment;
(e) Whether the behaviour to which the statute applies is already a crime;
(f) Whether an alternative purpose to which it may be rationally connected is attributable to it; and
(g) Whether it appears excessive in light of the alternative purpose assigned.

On the facts of the case, the Court concluded that forfeiture of citizenship was substantially punitive and that the fundamental purpose of the provision was to serve as an additional penalty for deserters.[46]

2 *The European Approach:* Engel v The Netherlands (No 1)

The European Court of Human Rights, in *Engel*, also proposed a test for determining whether proceedings are criminal in nature despite their civil or regulatory label. The applicants in *Engel* were conscripted soldiers serving in the Dutch armed forces who were punished for offences against military discipline.[47] The Court was required to adjudicate, inter alia, on whether there had been a violation of art 6 of the European Convention on Human Rights, which primarily concerns the right to a fair trial.[48] In relation to this issue, the preliminary question posed was whether "any criminal charge" existed to bring the applicants within the protection of the article.[49] Under

43 At 165–167.
44 At 163–164.
45 At 168–169.
46 At 169–170.
47 *Engel*, above n 41, at [12].
48 At [78]. See also Convention for the Protection of Human Rights and Fundamental Freedoms 213 UNTS 222 (opened for signature 4 November 1950, entered into force 3 September 1953), art 6.
49 *Engel*, above n 41, at [79].

Dutch law, the military proceedings, whilst appearing to be substantially punitive, were classified as disciplinary in form.[50]

The Court proposed a three-factor test to determine whether the true nature of a proceeding is criminal despite its civil label.[51] The test involves consideration of:

(a) The classification of the proceedings in the domestic law of the relevant state;
(b) The nature of the offence; and
(c) The nature and degree of severity of the penalty that the person concerned risked incurring.

On the facts of the case, the Court disposed of the argument that the disciplinary proceedings were merely disciplinary in nature, concluding that they were, in fact, criminal. This was particularly so due to the imposition of serious punishments and discipline involving deprivation of the soldiers' liberty, a shared characteristic with criminal proceedings.[52]

A Critical Analysis of the Two Frameworks

Prior to applying the test in a New Zealand context it is necessary to conduct a critical comparison of both tests, outlining their convergences and divergences. This comparison identifies the strengths and weaknesses of both approaches and examines why the American and European approaches are preferable when analysing the criminal-civil dichotomy.

1 Convergences and Divergences in the American and European Frameworks

(a) Convergences

Several convergences are clearly visible when both frameworks are viewed together. First, the idea that a proceeding is shaped by the punishment it inflicts. In the *Mendoza-Martinez* test, the second factor asks whether the sanction has been historically regarded as punishment, while the fourth inquires whether its operation promotes traditional retributive and deterrent aims. Similarly, in the *Engel* test, the third factor requires consideration of the nature and degree of severity of the penalty. As discussed above in Part II, the rationale for any proceeding is crucial to understanding its overall purpose, as this will then define its procedure and, ultimately, its actual nature.

Another repeated element in the two tests is the requirement to consider the quality of the act predicating the sanction. In the *Mendoza-Martinez* test, the third factor scrutinises whether the sanction is available

50 At [79].
51 At [82].
52 At [85].

only on a finding of scienter. Where the act is done intentionally and voluntarily, this increases the culpability of the action. In the same way, the second factor in the *Engel* test asks about the nature of the conduct that is the subject of the proceeding. If the act is mala in se, then a criminal interpretation of the proceeding is strengthened.

Overall, the existence of convergences between the two frameworks indicates that both the Supreme Court of the United States and the European Court of Human Rights have identified salient features that distinguish civil from criminal proceedings. In applying the two frameworks to the CPRA, more effort is therefore devoted to considering whether civil forfeiture proceedings are shaped by the punishment inflicted and the true nature of the predicate offence in CPRA proceedings.

(b) Divergences

At the same time, however, divergences do still exist between the two frameworks. One major difference is that the *Mendoza-Martinez* criteria make no mention of how the proceedings are classified in the domestic law of the relevant state, whereas the *Engel* test uses this factor as its starting point.

Although this factor may be helpful, placing this as the first consideration seems to overlook the essential inquiry in cases where the actual substance of the proceeding is in issue. As Lord Hope observed in *R (McCann) v Crown Court at Manchester*, how the legislature classified the proceeding does not resolve the issue. The essential inquiry turns not on the form but on the substance of the enactment; the focus is not what Parliament thought to have intended but the effect of the legislation.[53] Otherwise, such arguments in favour of classifying civil forfeiture will largely be circular — namely, that it is "civil" in nature because Parliament has said it is so.

(c) Potential Weaknesses

A contrastive approach not only reveals the similarities and differences between the two tests and therefore what should or should not be emphasised but also the limitations common to both. A weakness of both the *Mendoza-Martinez* and *Engel* factors is their combined failure to devote any consideration to the role of procedure (and the state) in the relevant proceedings. As discussed above, one of the defining distinctions between criminal and civil proceedings is the party instituting the proceedings, the funding of those proceedings and any associated procedural advantages possessed by the applicant party. An incomplete picture is presented if only the rationale of the proceedings and the nature of the offence are analysed.

Strict-liability offences, for example, are often not considered to be overly punitive. They commonly result in a simple fine for minor offences. The nature of the offence is usually technical and does not involve an

53 *R (McCann) v Crown Court at Manchester* [2002] UKHL 39, [2003] 1 AC 787 at [68].

inherently repugnant act. This paints a prima facie conclusion that favours a civil classification, rather than a criminal one. However, once the element of prosecution by the Crown or the state is added, this casts doubt on the prima facie conclusion.

Overall, contrasting both the *Mendoza-Martinez* and *Engel* frameworks has underlined aspects of the tests that are significant and worthy of further attention. At the same time, it has illustrated the weaknesses of both tests. Nonetheless, both tests are still largely useful for the purposes of this article, as discussed next.

2 The Usefulness of the Frameworks in a New Zealand Context

(a) The *Mendoza-Martinez* Criteria

As noted above, New Zealand jurisprudence does not have a formal framework to determine whether a specific proceeding is civil or criminal in nature. This in itself is insufficient justification for why the American and European approaches are to be preferred. It also does not resolve the question of why the Supreme Court of the United States' test should be prioritised over that of the European Court of Human Rights. This part, therefore, argues that the comprehensive nature of the *Mendoza-Martinez* criteria, and its correlation with the definitions of the civil and criminal paradigms adopted above, justify its adoption in preference to other tests.

The comprehensive nature of the *Mendoza-Martinez* factors stems from the fact that it covers the essential elements of what distinguishes a civil proceeding from a criminal one. As discussed above, these are: the nature of the harm done, the rationale for the proceedings, the existence of a conviction for criminal proceedings and the defining role of the state in criminal proceedings. Although the *Mendoza-Martinez* criteria do not explicitly address the fourth element (neither do the *Engel* criteria), they address the three remaining essential elements, while the *Engel* criteria narrowly address just two.

The first essential element (the nature of the harm done) is embodied in the third and fifth factors of the *Mendoza-Martinez* framework. Discussion of the presence, or absence, of scienter necessarily involves considering whether that act was done with a culpable state of mind. Discussion of whether forfeiture orders are already classified as criminal in nature also touches upon the notion of inherently criminal acts — or at least those sufficiently criminal to justify a protective response by the state.

The second element (the rationale for the civil or criminal proceeding) is represented by the second and the fourth factors enunciated in *Mendoza-Martinez*. As mentioned, the rationale for criminal proceedings is primarily the desire to punish the offender for his or her actions, whereas civil proceedings are traditionally compensatory in nature. Therefore, considering whether or not civil forfeiture conforms to the punitive rationale of criminal law aids in the overall categorisation of the CPRA.

Finally, the third element (a conviction imposed in criminal proceedings) is encapsulated in the first *Mendoza-Martinez* factor. This concerns whether the CPRA involves an affirmative disability or restraint. As discussed above, a unique feature of criminal proceedings is the imposition of a conviction. Exploring whether a criminal conviction is a prerequisite to CPRA proceedings, or whether the practical effect of a forfeiture order operates in a manner akin to a criminal conviction, can be covered under this factor.

Accordingly, preference is given to the *Mendoza-Martinez* test due to its substantial correlation with the parameters between the criminal and civil paradigms identified at the outset of this article.

(b) The *Engel* Criteria

The *Engel* criteria are still nonetheless useful, though they are significantly less comprehensive than their American counterpart and devoid of the assistance of years of forfeiture jurisprudence from that jurisdiction.[54] While there is a degree of overlap between the reasoning used in the American and European tests, applying both tests enables analysis of the CPRA from different perspectives and provides a more convincing conclusion.

Overall, both the *Mendoza-Martinez* and *Engel* frameworks are necessary because they approach the question of how to determine the actual substance of a civil or criminal proceeding from different vantage points. The American test, however, is preferred because of its comprehensive coverage of what it means for a proceeding to be truly civil or criminal. But the European test is also discussed because it requires consideration of the legislative classification of the relevant proceeding, giving a more comprehensive conclusion.

V APPLICATION OF THE *MENDOZA-MARTINEZ* AND *ENGEL* FRAMEWORKS TO THE CPRA

Having acknowledged the limitations and usefulness of the two frameworks, both frameworks are now specifically applied to the CPRA. In doing so, this article will ascertain the actual nature of forfeiture proceedings in New Zealand.

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54 The United States Congress first passed a form of civil forfeiture into law in 1789. See Jeffrey Simser "Perspectives on civil forfeiture" in Simon NM Young (ed) *Civil Forfeiture of Criminal Property: Legal Measures for Targeting the Proceeds of Crime* (Edward Elgar Publishing, Cheltenham (UK), 2009) 13 at 16.

The *Mendoza-Martinez* Framework

1 Whether the Sanction Involves an Affirmative Disability or Restraint

First, it is likely that the CPRA imposes an affirmative disability or restraint. The CPRA makes express provision for restraining orders, which allow courts to make such interim orders in anticipation of a future civil forfeiture order. Such orders may be made in respect of tainted property (in anticipation of an assets forfeiture order),[55] as well as in respect of property of a defendant who has unlawfully benefited from significant criminal activity (in anticipation of a profit forfeiture order).[56] It is quite clear, therefore, that the defendant will suffer some form of affirmative disability or restraint, given that his or her property may be restrained, placed in the custody of the Official Assignee and ultimately be subject to forfeiture. Thus, since the forfeiture sanction seems to be an "affirmative" one which occasions disability or restraint, the first factor favours an interpretation of the CPRA as providing for criminal proceedings.

2 Whether the Sanction Has Been Historically Regarded as a Punishment

In terms of the second factor, it can be argued that the principles of civil forfeiture underlying the CPRA have not been historically regarded as punishment. The notion that civil forfeiture proceedings are brought in rem, or against the property, is not a legislative innovation. The earliest forms of forfeiture were "more compensatory in nature than punitive" and were primarily used as a means to recompense family members of those killed as a result of industrial accidents.[57]

The Supreme Court of the United States, which has had extensive experience with civil forfeiture, has long confirmed its in rem nature. In 1827, the Supreme Court heard the case of *The Palmyra, Escurra, Master*, which concerned the in rem forfeiture of an armed vessel allegedly committing an act of "piratical aggression".[58] The Supreme Court observed that "the proceeding *in rem* stands independent of, and wholly unaffected by, any criminal proceeding *in personam*" and therefore an offender does not have to be convicted before in rem forfeiture is enforceable.[59]

This recognition of the separation between in rem forfeiture and notions of punishment has been subsequently extended to the civil forfeiture regime itself. The Supreme Court in *United States v Ursery* held that, because the relevant funds in that case were simply proceeds of an illegitimate criminal enterprise, they were not property that the respondents had any right to retain.[60] This confiscation did not amount to

55 Section 24.
56 Section 25.
57 Robert G Kroeker "The pursuit of illicit proceeds: from historical origins to modern applications" (2014) 17 Journal of Money Laundering Control 269 at 269.
58 *The Palmyra, Escurra, Master* 25 US 1 (1827) at 2.
59 At 15.
60 *United States v Ursery* 518 US 267 (1996) at 292.

unconstitutional double jeopardy.[61] Other cases show that the Supreme Court perceives the purpose of civil forfeiture to serve "remedial" rather than punitive purposes, particularly to prohibit illegitimate merchandise from circulating.[62]

It is therefore clear that, historically speaking, the Supreme Court has rejected the notion of civil forfeiture as punitive. Accordingly, from an analysis of the historical roots of forfeiture, it would seem that the second factor favours an interpretation that civil forfeiture proceedings are truly civil in nature.

3 Whether the Sanction is only Applicable Upon a Finding of Scienter

The term "scienter" generally refers to the satisfaction of the court that there has been some wrongdoing involved, which necessarily requires proof of knowledge and intention.[63] For the criminal law, the more reprehensible the mental state present, the harsher the penalty required. Prima facie, CPRA proceedings seem to reflect this criminal nature. Section 6 employs the phrase "significant criminal activity". Evidently, this requires the court to first be satisfied of some substantial illegal action or illegitimate benefit before a forfeiture order is made.

Upon closer inspection, however, this position seems untenable. First, it seems the CPRA, in defining "significant criminal activity", does not require the defendant to be guilty of a crime. Section 6(2) provides that a "significant criminal activity" is deemed to be such irrespective of the existence of a conviction. Accordingly, the guilt — or innocence — of the defendant is irrelevant to the making of an order. Therefore, a finding of scienter, or the mental state and knowledge of the defendant at the time of offending, seems to be unnecessary.

Evidently, arguments exist on both sides. Yet the stronger argument is that the way in which civil forfeiture and the CPRA itself is designed in relation to scienter militates against an interpretation of criminality. Accordingly, it would seem that the third factor slightly favours an interpretation that the CPRA is civil in substance.

4 Whether the Operation of the Sanction Promotes the Traditional Punitive Aims of Retribution and Deterrence

This limb requires considering whether the CPRA corresponds to traditional punitive aims. While it is undeniable that the CPRA does retain some retributive characteristics, the array of alternative purposes served may balance and potentially outweigh these characteristics.[64] As the Supreme Court of the United States noted in *United States v One Assortment of 89 Firearms*, the simple fact that the forfeiture action is based on a criminal

61 At 293.
62 *One Lot Emerald Cut Stones and One Ring v United States* 409 US 232 (1972) at 237.
63 Gray, above n 6, at 56.
64 See Criminal Proceeds (Recovery) Act, s 3.

activity does not render the legislation inherently punitive. Rather, it is completely possible for the legislature, in respect of the same set of circumstances, to impose both a criminal and civil penalty.[65]

This analysis may extend to civil forfeiture also. Some incidental punitive characteristics in the CPRA do not preclude its *overall* function being non-punitive in nature. For example, another express purpose of the CPRA is to disallow criminals from benefiting from their illegal activities.[66] This purpose suggests a reparative purpose for forfeiture; prohibiting criminals from being unjustly enriched and allowed to retain their illegitimate benefits. It is a reversion to the status quo ante and a disgorgement of the fruits of illegal conduct.[67] It leaves the wrongdoer in exactly the same position had he or she not engaged in illegal conduct.

This non-punitive approach to forfeiture has also been accepted in United States jurisprudence. The Supreme Court of the United States in *Ursery,* when reviewing the case law concerning civil forfeiture, noted forfeiture's non-punitive aims.[68] These aims include preventing property from being illegally used, rendering illegal behaviour unprofitable, discouraging unregulated commerce and abating a nuisance.[69]

Thus, while the CPRA includes notions of retribution and deterrence, such notions do not constitute the defining goal of the regime and are arguably overshadowed by aims of compensation and reparation. This fourth factor, on balance, does not seem to favour construction of the CPRA as criminal in nature.

5 Whether the Behaviour to Which the Statute Applies is Already a Crime

This fifth element bears some overlap with the third limb of the test, which requires the existence of scienter. The CPRA itself, however, clearly provides that forfeiture proceedings do not involve the determination of a crime.

In forfeiture proceedings, the evidence of criminal offending is adduced for the sole purpose of establishing that the *property itself* was involved in a crime. The mere fact that the current owner of the property is also the wrongdoer charged with the criminal offence and the subject of a subsequent criminal trial is incidental and irrelevant to the CPRA.[70] Accordingly, the criminal offending being proffered as evidence to satisfy the requirement of "significant criminal activity" in s 6 of the CPRA does not, in any way, make forfeiture a punishment for those specific offences. This limb of the test, therefore, fails to justify the CPRA as being criminal in nature. The behaviour to which the CPRA applies is not "already" a crime.

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65 *United States v One Assortment of 89 Firearms* 465 US 354 (1984) at 361.
66 Section 3(2)(a).
67 Anthony Kennedy "Justifying the Civil Recovery of Criminal Proceeds" (2004) 12 JFC 8 at 16.
68 *Ursery,* above n 60, at 290–291.
69 At 290.
70 At 295.

However, there have been some trenchant criticisms of this artificial nature of in rem forfeiture. It has been argued that the in rem–in personam distinction stems from a "legal fiction".[71] The property in question is forfeited on the mistaken basis that the guilt is attributable to the property itself and not the possessor of the property.[72] Property is an inanimate object; it cannot exercise conscious volition or commit a crime itself. Rather, it must be controlled or manipulated by an individual.[73] Therefore, it is the individual, not the property, which should be punished on the basis of the crime committed with the property.

Considering both positions, the latter seems more persuasive. While the CPRA does not require proof of the actual commission of an offence, evidence that shows the occurrence of a particular event amounts to an offence is required and can still be interpreted as proof of the predicate "crime". Further, the criticism regarding the artificiality of the in rem–in personam distinction has merit and is difficult to counter. Overall, it would seem that this factor favours the interpretation of the CPRA being criminal in nature.

6 Whether an Alternative Purpose to Which the Statute May Be Rationally Connected is Attributable to it

The sixth limb of the test requires consideration of whether the CPRA serves an alternative purpose. The various purposes of the CPRA have been discussed above in the fourth factor, with the tension fundamentally between punitive and non-punitive characteristics. If the CPRA's dominant purpose is compensation, then an "alternative purpose" of the CPRA may be the promotion of "punishment's traditional aims of condemnation, retribution and deterrence".[74]

The regime upholds the purpose of deterrence because confiscating assets significantly affects defendants and their families at an economic level. Considerable stigma and condemnation attaches to those who are subject to a civil forfeiture order. The defendants in a forfeiture proceeding are, to an extent, deterred from offending in a similar manner in the future. These alternative purposes are "rationally connected" in that they are incorporated into the CPRA regime as part of the legislative text itself. If this alternative purpose is accepted, then it must be analysed in terms of proportionality to the sanction below.

71 IL van Jaarsveld "The History of *In Rem* Forfeiture – A Penal Legacy of the Past" (2006) 12 Fundamina 137 at 140.

72 At 140.

73 M Michelle Gallant *Money Laundering and the Proceeds of Crime: Economic Crime and Civil Remedies* (Edward Elgar Publishing, Cheltenham (UK), 2005) at 57.

74 Liz Campbell "The Recovery of 'Criminal' Assets in New Zealand, Ireland and England: Fighting Organised and Serious Crime in the Civil Realm" (2010) 41 VUWLR 15 at 26.

7 Whether the Sanction Appears Excessive in Light of the Alternative Purpose Assigned

The final factor to be considered in the *Mendoza-Martinez* test is whether the "alternative purpose" discussed under the previous factor is proportionate to the sanctions imposed by the CPRA. Even if it is accepted that the CPRA's "alternative purpose" is punishment and retribution, those aims still do not seem to be proportionate to the sanction of forfeiture imposed by the regime. The sanction, being forfeiture of property, is characterised as a "debt".[75] To consider this as a punishment would be disproportionate and clearly "excessive". The CPRA should be more appropriately classified as remedial and compensatory and therefore this factor seems to favour a civil interpretation.

8 Conclusion of the Mendoza-Martinez *Test*

The *Mendoza-Martinez* factors are a systematic framework to assess whether legislation is civil or criminal in nature. While the factors are in no way "exhaustive nor conclusive on the issue", they are particularly useful in circumstances where the substance of the legislation is so punitive as to render the legislation itself criminal, despite the lawmaking body's express intent to the contrary.[76] In light of Parliament's civil characterisation of the CPRA, the *Mendoza-Martinez* test is a useful analytical tool.

On balance, after assessing the *Mendoza-Martinez* factors in their totality, the CPRA should be construed as civil rather than criminal. The concept of civil forfeiture, upon which the CPRA is predominantly based, was not historically regarded as punishment. Owing to its in rem nature, no finding of scienter seems necessary. The exclusive focus on the tainted property, not the property holder, also means that it is more appropriate to classify the CPRA as compensatory and remedial in nature, regardless of any alternative purposes it may have. Thus, at least on the American test, the CPRA is civil and not criminal in nature.

The *Engel* Test

As noted above, the conclusion reached under the American test — that the CPRA concerns civil proceedings — is more relevant and persuasive given that the American test incorporates more of the civil–criminal factors set out in Part II. However, for a more comprehensive approach, the European test is likewise considered, albeit more briefly.

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75 Criminal Proceeds (Recovery) Act, s 55(4).
76 *United States v Ward* 448 US 242 (1980) at 250.

1 Classification of Proceedings by the Domestic State

The first factor is to ascertain how the domestic legislature has categorised the proceedings. In terms of the CPRA, Parliament has expressly classified civil forfeiture orders as civil proceedings. Section 10 of the CPRA expressly provides that restraining orders, assets forfeiture orders and profit forfeiture orders are all civil proceedings.

As discussed above, other provisions in the CPRA reinforce this express categorisation. The withdrawal of criminal proceedings in respect of the same alleged offending does not affect the validity of a forfeiture order.[77] Moreover, a profit forfeiture order, once made, is enforceable "as an order made as a result of civil proceedings instituted by the Crown".[78] Finally, even the granting of legal aid for a defendant in relation to an application for civil forfeiture is treated as civil legal aid.[79] Thus, in respect of the first factor, it is clear that Parliament has purposely classified forfeiture proceedings under the CPRA as civil in nature.

2 Nature of the Conduct

The second factor requires an examination of the nature of the conduct that constitutes the offence charged. However, a necessary preliminary question is whether proceedings for a civil forfeiture order actually involve the bringing of a charge at all.

On the one hand, an argument could be advanced that CPRA proceedings are civil in nature because they do not involve the bringing of a "charge". It is true that assets and profit forfeiture orders hinge on proof of "significant criminal activity". Such activity is defined with reference to the severity of the activity; "if proceeded against *as a criminal offence*".[80] Similarly, it could likewise be argued that this does not denote nor imply that the court is required to make a *finding* of criminality. In order to make such a finding, the state would have to go further and prove that the offence was committed with the appropriate state of mind (knowingly and intentionally). That is not the case under the CPRA. Accordingly, there cannot be a "charge" imposed on the defendant in forfeiture proceedings.

However, this latter argument seems unconvincing. While the strict statutory language uses the conditional form ("if proceeded against"),[81] there is nonetheless some implicit recognition of criminal guilt on the defendant's behalf. For any application to be brought, the Commissioner would have to be satisfied to some extent that the relevant actions (or omissions) have taken place in order to justify the bringing of a forfeiture order. The acts are not required to be proved to a criminal standard and a *finding* of criminality is not required to be made. Evidence of criminal activity, however, must

77 Section 16.
78 Section 55(4).
79 Section 209.
80 Section 6(1) (emphasis added).
81 Section 6(1).

exist and is indirectly assumed by the court when a forfeiture order is granted. Accordingly, some form of "charge" is brought, even if that "charge" does not require proof to a criminal standard or result in a criminal conviction. It would seem, therefore, that this second factor in the *Engel* test favours the interpretation of the CPRA as criminal in nature.

3 Nature and Degree of the Penalty's Severity

The final factor in the *Engel* test is a consideration of whether civil forfeiture under the CPRA is a penalty and, if so, its degree of severity.

(a) The Nature of the Penalty

The key aim of civil forfeiture orders is to deprive the defendant of illegitimate property. This is the case regardless of whether the order involves assets or profit. The purpose of the deprivation is to disallow criminal profiteering and recompense the community for the economic harm suffered.

Prima facie, these characteristics of CPRA forfeiture orders do not seem redolent of "penalties". The CPRA does not afford the court a mandate to determine an appropriate sanction for the defendant's past conduct or "significant criminal activity". Indeed, nowhere does the CPRA provide that the severity of the prior conduct — a factor relevant in criminal punishment and sentencing — has any bearing on whether an order is to be made. Further, the CPRA does not allow courts to impose orders restricting the liberty of the defendant or to commit him or her to pay any fines. A forfeiture order, as set out in the CPRA, is only an order requiring forfeiture of property or of a benefit commensurate with the profit made by the defendant. Therefore, in regard to the nature of the penalty, a civil forfeiture order does not appear criminal in nature. However, the degree of severity of the penalty may point to forfeiture proceedings as being criminal in nature.

(b) The Penalty's Degree of Severity

An assets or profit forfeiture order can be unduly severe. Where the bulk of the defendant's assets have been derived from criminal offending, forfeiture of such assets will operate harshly on the defendant. This may be sufficient to render the punishment akin to a criminal sanction.

However, the observations of the New Zealand Court of Appeal regarding civil forfeiture orders (albeit under the CPRA's predecessor) are apposite:[82]

> There will always be some hardship to an offender and sometimes to a third party when a forfeiture order is made. It stems from the operation of the Act and is disregarded ....

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82 *Lyall v Solicitor-General* [1997] 2 NZLR 641 (CA) at 646.

The reasoning of the Court is an accurate observation of the potentially severe results of forfeiture orders (and civil orders in general). For instance, freezing orders, formerly known as Mareva injunctions, prevent a defendant from transferring or dealing with assets pending final resolution of a dispute by a court.[83] Similarly, search orders, formerly known as Anton Piller orders, grant the holder a right to search premises and seize evidence and can be made without notice to a defendant.[84] Such orders are undoubtedly intrusive in nature and the consequences of non-compliance are severe.[85] Penalties may even be imposed. However, it is widely accepted that such orders are civil, not criminal, in nature.[86]

As such, the "severe" consequences of a forfeiture order cannot serve as a distinguishing point between civil and criminal proceedings for the CPRA. Nor can they be used to support the argument that the CPRA "penalties" are unduly severe on defendants. It would seem that civil forfeiture orders under the CPRA do not reach the high threshold of severity required to constitute a "penalty". Thus, they cannot be classified as criminal proceedings under this third factor.

3 Conclusion of the Engel *Test*

The three-factored *Engel* analysis is the dominant European approach to assess whether proceedings are in substance civil or criminal. Such analysis is useful in addition to the *Mendoza-Martinez* factors, as English courts have applied and interpreted the *Engel* test. Notwithstanding the non-binding authority of Strasbourg jurisprudence, the European approach is still persuasive in a New Zealand context. While the second factor of the *Engel* test favours the interpretation of the CPRA as criminal in nature, the remaining two factors point to forfeiture proceedings as being civil. Therefore, it seems that a similar conclusion to the American framework is reached under the European framework, albeit with different reasoning: the CPRA is civil and not criminal in nature.

Overall Conclusion on both American and European Frameworks

This part undertook a detailed consideration of the arguments in favour of both civil and criminal categorisation. It cannot be denied that persuasive counter-arguments exist that favour a criminal construction of CPRA proceedings. Indeed, some areas, when viewed in isolation, justify a conclusion that the CPRA should be deemed criminal in substance. However, on balance, both the American and European tests find that the CPRA is true to its legislative label. It is civil in character. Nonetheless, to reinforce this conclusion, the main arguments of critics of the forfeiture regime are considered and addressed.

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83 High Court Rules, r 32.2.
84 Rule 33.2.
85 See *R (McCann)*, above n 53, at [25].
86 See *R (McCann)*, above n 53, at [25].

VI TESTING THE CONCLUSION: CRITICS OF CIVIL FORFEITURE

While on the basis of the two frameworks it has been concluded that the CPRA is civil in nature, critics have made several persuasive arguments to suggest otherwise. These criticisms are useful and require attention, not least because they adopt frameworks that differ to those of the American and European courts. As mentioned above, opponents essentially argue that Parliament's mere labelling of proceedings as "civil" does not change the fact that they are inherently criminal. This position is justified in two main respects. First, civil forfeiture itself was historically regarded as, and continues to be, criminal in nature.[87] Second, the actors involved in the process of forfeiture mean a criminal construction is correct. Both criticisms are addressed below.

Criticisms of Civil Forfeiture

1 Criticism One: The Historical Basis for Civil Forfeiture is Essentially Criminal

(a) Substance of the Criticism

Critics have first argued that civil forfeiture is essentially criminal in nature due to its historical links with the common law actions of deodand and attainder.

The doctrine of deodand, as recognised by early English courts, required forfeiture to the Crown of any object associated with or implicated in the premature death of an individual.[88] The Crown's seizure represented a reaction against the wrong perpetrated against the community and was not carried out for the value of the object being forfeited. Rather, it had punitive overtones, with the action taking place in a criminal court.[89] Coroners' juries determined what specific property was deodand (and its value) and methods used to fix such amounts were highly crude and arbitrary. Deodands were eventually abolished in English law in 1846.[90]

Similarly, the doctrine of attainder, or "corruption of the blood", also served to shape modern conceptions of forfeiture.[91] Upon conviction of a felony resulting in a sentence of death or outlawry, attainder would attach to all property owned both at the time of the offence and subsequent to it,

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87 This is distinctive to the second *Mendoza-Martinez* criterion, which focuses on the *punitive* history of the sanction.

88 Kroeker, above n 57, at 270.

89 William Blackstone *Commentaries on the Laws of England* (The Clarendon Press, Oxford, 1765) vol 1 at 301. See also Jacob J Finkelstein "The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty" (1973) 46 Temp LQ 169; and Paul Schiff Berman "An Anthropological Approach to Modern Forfeiture Law: The Symbolic Function of Legal Actions Against Objects" (1999) 11 Yale JL & Human 1 at 24.

90 Deodands Act 1846 (UK) 9 & 10 Vict c 62.

91 Kroeker, above n 57, at 270.

effectively barring the prisoner from owning or inheriting any property forthwith.[92] Where the property had been transferred or disposed, the court was empowered to trace it into the hands of the third party.[93]

Therefore, critics argue that because deodand and attainder were conceived as involving punishment, their progeny — the civil forfeiture regime — should be construed in a similar fashion.[94] While there is no mention of the two doctrines in the CPRA, New Zealand's common law heritage necessitates some consideration of whether this historical argument is a suitable justification.

(b) A Potential Response to Criticism One

It is true that the earliest forms of forfeiture are those of deodand and attainder. It is also true that the rationale underlying those two forms might continue in the CPRA specifically or civil forfeiture generally. However, there are noticeable differences between those historical doctrines and the modern regime.

First, the fundamental principle behind the operation of deodand was a "primitive attempt" to punish the object in question, serving as a way in which the community's desire for revenge could be sated and a premature death appropriately grieved.[95] Therefore, it was not compensatory for the bereaved family at all. Rather, it was a means of channelling collective retribution towards an inanimate thing. This can be distinguished from the compensatory and restitutionary rationale under the CPRA, as discussed above.

Similar arguments can be made to distinguish the doctrine of attainder from the civil forfeiture regime. The crux of attainder was to punish the offender in personam and, therefore, it could only apply once the offender had been convicted.[96] It was, like deodand, essentially punitive in purpose, aiming to isolate the offender and strip him or her of all property. On the other hand, the CPRA applies in rem as against the property and does not necessarily require a formal criminal finding of guilt. It also does not confiscate assets or profit for the purpose of punishment but ensures that those who have come into possession of unlawfully obtained property are not illegitimately enriched as a result.

Overall, the argument that the CPRA is criminal in nature because of its historical affiliations with the criminal doctrines of deodand and attainder is not compelling. While the modern forfeiture regime has indeed evolved from such origins, the CPRA is a regime altogether different from any criminal proceedings experienced by the common law.

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92 At 270.
93 At 270.
94 See Gray, above n 63, at 60.
95 *Profits of Crime and their Recovery: Report of a Committee chaired by Sir Derek Hodgson* (Heinemann Educational Books, London, 1984) at 14.
96 Van Jaarsveld, above n 71, at 142.

2 Criticism Two: The Actors Involved in the Civil Forfeiture Process Betrays its Criminal Nature

(a) Substance of the Criticism

The second argument supporting the notion that civil forfeiture is, in substance, a criminal proceeding is the fact that it is the state (represented by the Commissioner of Police) who institutes forfeiture proceedings. Unlike typical civil actions, where private individuals may bring claims, the Commissioner is the only entity permitted to bring an action for forfeiture against the property owner. The fact that the Commissioner (or the Commissioner's delegate) is the applicant, representing an entity with "virtually limitless" access to resources and agents, therefore requires counterbalancing in the form of due process rights available to criminal defendants.[97]

Subsuming this task under the policing agency suggests a parallel may be drawn between criminal prosecutions and civil forfeiture applications; both are functions for which the New Zealand Police is responsible. The police have access to similar prosecutorial resources, expertise and personnel when bringing an application under the CPRA. Further, the extensive investigative powers available to the police under the CPRA — including the obtaining of a warrant for the search and seizure of evidence and property — reinforce the "criminal" nature of the CPRA.[98] Such intrusive powers are reminiscent of the methods used in the criminal regime to obtain evidence for a criminal trial. All such characteristics of the CPRA, therefore, seem to support a finding that the proceedings are more criminal than civil in nature.

(b) A Potential Response to Criticism Two

This criticism is the stronger of the two. In response, one might argue that the Crown is the most appropriate entity to bring civil forfeiture proceedings. Because forfeiture proceedings can be viewed as redressing harm suffered by society as a whole, there is unlikely to be any institution more fitting than the Crown, on behalf of the community, to bring recovery proceedings. Further, because the subject matter of CPRA proceedings touches on criminal law, having access to legal counsel experienced in criminal matters is also advantageous.

It is acknowledged that this response does not fully respond to the second criticism. The substantial similarities in procedure between the CPRA and criminal proceedings cannot be answered simply by reference to the need for expertise. Accordingly, the critics seem to be correct to assert that there are indeed certain characteristics of civil forfeiture that substantially favour a criminal, rather than civil, interpretation. Nonetheless,

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97 See Gray, above n 63, at 61.

98 Section 101.

under the two frameworks adopted in this article, it would seem that, on balance, the civil interpretation of the CPRA is slightly more persuasive than that of its criminal counterpart.

The CPRA as a Hybrid "Punitive Civil Sanction"

One final consideration on the topic of the correct classification of the CPRA is whether any alternative frameworks can be used to analyse the CPRA. Some commentators have refrained from framing the debate in such absolute "black and white" terms, rather noting that the CPRA is not necessarily required to be *either* civil *or* criminal but can be a mixture of both.[99] Such an idea is briefly explored here.

1 Punitive Civil Sanctions

The term "punitive civil sanction", famously coined by Professor Kenneth Mann, is the "middleground" between the traditional civil–criminal dichotomy.[100] Mann's innovation was to "levy punitive monetary sanctions (but not as punitive as criminal sanctions) in response to behavior that is culpable (but not egregious enough to require criminal sanctions)."[101] Punitive civil sanctions, according to Mann, should be used wherever possible, with the criminal law reserved only for the "most damaging wrongs".[102]

2 Framing the CPRA as a "Punitive Civil Sanction"

However, two main issues seem to arise when attempting to analyse the CPRA as a hybrid "punitive civil sanction". First, Mann does not adequately define what constitutes a "punitive civil sanction".[103] While Mann adopts the argument that all "more-than-compensatory" money sanctions are punitive, he does not go further to define what "compensatory" actually means.[104] This presents a major problem, as one of the fundamental distinctions between the criminal and civil law (which he himself points out) is that the criminal paradigm punishes, whereas the civil paradigm compensates.[105] Further, the term "punitive civil sanction" seems to be insufficiently distinguished from other middle-ground counterparts. As noted by Zimring, there are three distinctions in middle-ground innovations:[106]

99 See Peter Wright "Criminal Punishment Without Civil Rights: The Criminal Proceeds and Instruments Bill's Punitive Civil Sanctions" (2006) 37 VUWLR 623 at 631.
100 Kenneth Mann "Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law" (1992) 101 Yale LJ 1795.
101 At 1862.
102 At 1863.
103 Franklin E Zimring "The Multiple Middlegrounds Between Civil and Criminal Law" (1992) 101 Yale LJ 1901 at 1901.
104 Zimring, above n , at 1815.
105 See Mann, above n 100, at 1813.
106 Zimring, above n 103, at 1903–1904.

> ... the distinction between middleground criminal sanctions and innovative civil sanctions; the distinction between civil sanctions designed as alternatives to criminal processing and those meant to supplement the criminal process; and the distinction between administratively delivered and judicially determined civil sanctions.

This lack of precision in punitive civil sanctions feeds into the second issue. Without proper definitional boundaries, it is difficult to determine which procedural safeguards should be associated with punitive civil sanctions. It also becomes difficult to draw the line as to when punitive civil sanctions should be used and when it becomes necessary to invoke the criminal law.

While many questions still surround the application of Mann's hybrid framework to civil forfeiture, it does present an innovative way to escape the confines of the traditional civil–criminal dichotomy. Therefore, the American and European models seem to provide for safer conclusions on this question.

Conclusion

In this part, alternative ways of conceiving civil forfeiture and its classification have been examined: first, through the two main arguments of its critics; and secondly, through the discussion of a hybrid framework. While it must be conceded that some such arguments are worthy of further exploration, the safest conclusion remains that the CPRA is civil and not criminal in nature.

VII PROTECTING CIVIL FORFEITURE DEFENDANTS

The preceding rationalisation of forfeiture under the CPRA as civil is not to deny that the regime raises questions not easily and immediately resolvable. Indeed, it is especially unwise to trivialise the very real and catastrophic consequences faced by defendants subject to forfeiture proceedings. For example, property amounting to millions of dollars may be confiscated on the lower standard of the balance of probabilities, which is especially disconcerting given the Crown's formidable role in CPRA proceedings.[107]

It is because of the potential for draconian abuses of power that this article does not condone defendants in forfeiture proceedings being afforded lesser rights — or no rights at all. On the contrary, while there may be no place for *criminal* safeguards and rights in CPRA proceedings, there actually exist sufficient civil safeguards to protect defendants of CPRA applications. This part briefly canvasses two of these safeguards: first, statutory

107 As of October 2013, the New Zealand Police had obtained forfeiture orders over assets worth an estimated $30,500,000. See Department of the Prime Minister and Cabinet *Tackling Methamphetamine: Indicators and Progress Report* (October 2013) at 12.

protections to mitigate the harshness of forfeiture orders; and secondly, the courts' rights-consistent interpretation of the CPRA to protect the fair trial rights of defendants.

Safeguard One: Statutory Protections

1 Statutory Protection for Defendants

The CPRA allows certain property to be excluded from forfeiture if the court is satisfied that undue hardship is reasonably likely to be caused to the defendant because of the order.[108] The court is to have regard to the use of the property, the nature and extent of the defendant's interest in the property and the circumstances of the significant criminal activity forming the basis of the forfeiture order.[109] While the courts have held that "undue hardship" requires proof of something more than mere ordinary hardship, they have not been unduly reticent in granting exclusions on this basis.[110]

For example, in *Commissioner of Police v Whakatihi*, it was held that forfeiture of a vehicle, being payment for methamphetamine trafficking, would cause undue hardship.[111] This was because the defendant lived in a community with little public transport infrastructure and was reliant on family support to meet his financial needs.[112] Accordingly, the defendant retained the tainted vehicle. Likewise, in *Cooksley-Mellish v Solicitor-General*, under the predecessor to the CPRA, the Court of Appeal held that the appellant, who had cultivated cannabis plants on his land, would suffer undue hardship if he were to forfeit that land.[113] This conclusion was reached after considering the value of the property he would lose, the fact that the property was his only major asset and the fact that he was already 50 years old and disabled.[114]

Therefore, it is arguable that sufficient statutory protection already exists for defendants in relation to the effect of forfeiture orders, without requiring specific designation of the CPRA as criminal legislation.

2 Statutory Protection for Innocent Third Parties

While the CPRA is potentially draconian in the effect of its orders, the adverse effect of confiscation is compounded when innocent third parties are involved. This may be, for instance, where a property owner rents his or her house to unscrupulous tenants who then cultivate marijuana in the backyard.[115] The third party is completely unaware of the illegitimate

108 Sections 51 and 56.
109 Sections 51(2) and 56(2).
110 See *Lyall*, above n 82, at 646.
111 *Commissioner of Police v Whakatihi* [2014] NZHC 1774 at [36].
112 At [36].
113 *Cooksley-Mellish v Solicitor-General* CA209/05, 27 March 2006 at [34].
114 At [31]–[32].
115 See Jason Van Rassel "Senior may lose home to scam: Province says property used in fraud case" *Calgary Herald* (online ed, Calgary, 20 January 2010).

conduct, generally discovering the state of affairs after being served a restraining order.

The CPRA also provides statutory protection for innocent third parties. Section 66(1) provides that the court may grant relief against forfeiture for third parties who prove that they have an interest in the relevant property but have not unlawfully benefited from the significant criminal activity in question. However, any relief given by the court is discretionary.[116] This provision, therefore, serves to protect the ignorant landlord from having his or her property forfeited when he had no knowledge of the criminal offending.[117]

In sum, it would appear that statutory protections are sufficient to mitigate the harshness of forfeiture orders. The protections associated with criminal proceedings therefore do not seem to be necessary to ensure that the defendants and those around them are unduly penalised.

Safeguard Two: Rights-Consistent Interpretation of the CPRA

While statutory protections exist in relation to the effect of forfeiture orders, these seem to neglect the fundamental need for defendants' rights to be guaranteed *during* forfeiture proceedings. Nonetheless, courts have also read the CPRA consistent with fair trial rights, in a way that serves to protect forfeiture defendants.

1 Fair Trial Rights Under the CPRA

The anomaly arising under the CPRA, which necessitates consideration from a New Zealand Bill of Rights Act 1990 (NZBORA) perspective, involves the potential for prejudice to the defendant where concurrent forfeiture and prosecution proceedings are afoot, particularly where forfeiture proceedings *precede* the criminal determination of guilt.

Courts have conceded that the defendant may experience some prejudice due to such an ordering of proceedings. The prejudice does not occur at the forfeiture stage but at the subsequent criminal prosecution because adverse inferences may be drawn as a result of the prior unfavourable civil finding.[118] More importantly, the Crown, as the institutor of both the civil and criminal proceedings, may be able to gain a tactical advantage. This is because the evidence and cross-examination at the forfeiture proceedings may be used to assist the police and prosecution in the subsequent criminal charges brought.[119]

One way of giving effect to fair trial rights is by reading down s 16 of the CPRA in a way that is consistent with s 25 of the NZBORA, which provides for minimum standards of criminal procedure and the presumption

116 Section 66(2).

117 Note that third parties may also argue "undue hardship" under s 67. The relevant factors for the court are similar to those for an undue hardship application by the defendant but the list includes an additional factor, which is the degree of knowledge of the significant criminal activity that the third party had.

118 Geeti Faramarzi "Criminal proceeds recovery" [2010] NZLJ 208 at 208.

119 *Commissioner of Police v Corless* HC Auckland CIV-2010-404-5585, 15 December 2011 at [45].

of innocence. This was the position taken in the High Court by Ellis J in *Wei v Commissioner of Police*,[120] and Brewer J in *Commissioner of Police v Corless*,[121] cases that were both affirmed by the Court of Appeal.[122]

2 *Reading the CPRA Consistently with s 25 of the NZBORA*

First, Ellis J accepted that s 25 is only relevant to an individual who is presently "charged with an offence" and even then only insofar as it is "in relation to the determination of the charge."[123] Her Honour also accepted that "forfeiture proceedings themselves do not involve the determination of a charge".[124]

Notwithstanding these findings, Ellis J observed that s 25 applies to the forfeiture defendant, not in relation to the civil proceeding, but in relation to the subsequent criminal one. Her Honour deemed that the s 25 right to a fair trial and the presumption of innocence were potentially triggered as a court, in order to grant a forfeiture application, might be required to make a finding in relation to the very activity that would be the fundamental issue at an upcoming trial.[125] A civil finding that the defendant had been involved in "significant criminal activity", as well as any publicity related to the forfeiture application, would unfairly influence jurors at the criminal proceedings.[126]

Thus, her Honour held that, even if s 16 of the CPRA expressly contemplated the possibility that a forfeiture proceeding may be made simultaneously to a criminal prosecution and that the forfeiture court is not to have regard to the existence of those parallel criminal proceedings, s 16 should still be interpreted consistently with NZBORA.[127] This means that the court, when considering a forfeiture application, cannot "disregard completely the fact of an acquittal or discharge".[128] Essentially, it now seems that, where the forfeiture proceeding precedes a criminal prosecution, the forfeiture application should be adjourned pending the outcome of the criminal trial, as it would otherwise be inconsistent with s 25 of the NZBORA.

3 *Caveats to this Reading*

Two caveats, however, must be noted regarding this fair trial interpretation. First, this rights-based interpretation of the CPRA only applies to situations where there are concurrent civil and criminal proceedings. It does not encompass situations where there has already been an acquittal or a finding

120 *Wei v Commissioner of Police* HC Auckland CIV-2010-404-5461, 24 November 2011 at [53]–[54] [*Wei* (HC)].
121 *Corless*, above n 119, at [46]–[48].
122 *Commissioner of Police v Wei* [2012] NZCA 279 [*Wei* (CA)].
123 *Wei* (HC), above n 120, at [33].
124 At [34].
125 At [36].
126 At [61].
127 At [53]–[54].
128 At [62].

of guilt, or where criminal proceedings are not yet instituted. It is, therefore, relatively confined in its scope. The Court of Appeal recognised this, warning against "turn[ing] case-specific rulings into something they were not", in reference to the Commissioner's criticism that a pending forfeiture application could never be heard in advance of a criminal trial.[129] Accordingly, it is possible, as the Court of Appeal clarified, that in some circumstances the interests of justice *would not* dictate that the forfeiture application be adjourned pending the determination of the criminal trial. If this were the case, then the civil application could *still* be heard prior to the criminal one, regardless of NZBORA rights. It would be a matter of balance and weighing of relevant factors by the trial judge.

The second caveat relates to the length of adjournment, assuming it were in the interests of justice that the application be adjourned. In both *Wei* and *Corless*, the forfeiture proceedings were adjourned for several months. It was recognised that the adjournment was necessary in *Wei* because the "temporal gap" between the forfeiture application and criminal trial was smaller, which heightened the "authority" and effect of a civil finding of significant criminal activity on the jury in the subsequent trial.[130]

Thus, if both caveats are read together, this rights-based approach should be confined to situations where there are concurrent forfeiture and criminal proceedings and where there is only a small "temporal gap" between the hearing of both proceedings, since the adjournment of the civil application could not exceed several months.

Overall, it would seem that courts have identified an approach to resolving, or at least mitigating, the dangers presented by concurrent civil forfeiture and criminal proceedings. Provided that the courts continue to recall the fundamental civil nature of the CPRA, then it is likely New Zealand's burgeoning civil forfeiture jurisprudence will develop in a coherent and comprehensible fashion but with appropriate regard to the fair trial rights of defendants.

VIII CONCLUSION

The recent enactment of the CPRA has undoubtedly simplified actions in forfeiture against those participating in major criminal activity. This is particularly significant at a time where New Zealand is opening its borders and becoming more susceptible to large-scale international organised crime and drug trafficking. Cases involving the seizure and parading by police of colossal sums contribute to a public sentiment in favour of digging out "'Mr Bigs' of the crime world".[131] At the same time, however, the passing of the CPRA has forced both proponents and opponents of the forfeiture regime to

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129 *Wei* (CA), above n 122, at [40].
130 *Wei* (HC), above n 120, at [39].
131 Hurley, above n 1.

consider whether any due process rights are lacking and should be in place to protect forfeiture defendants.

This article has argued that, on balance, the civil label placed by Parliament on the CPRA is correct, notwithstanding some powerful arguments in favour of a criminal interpretation. It has outlined the CPRA's operative provisions, then examined the traditional civil–criminal dichotomy and the major distinguishing characteristics of each. This resulted in recognition that the essential consideration is the extent of correlation between the actual substance of the proceeding and those distinguishing characteristics, not the legislative label. This article then identified two frameworks to ascertain the true substance of a proceeding, critically analysing them in terms of similarities, weaknesses and usefulness, before eventually applying them both to the CPRA. The resulting conclusion was that the CPRA, all things considered, is civil in nature, with such a conclusion being able to withstand the major arguments of critics. Finally, this article has explored the ways in which the potentially draconian effects of the CPRA proceedings are mitigated through statutory protections and rights-consistent interpretations. This would indicate that it is unnecessary to resort to criminal safeguards in order to guarantee fair trial protections to defendants.

Overall, it has been shown that the CPRA as a *civil* regime is not an inconceivable idea, with fair trial rights still guaranteed and protected by the courts. However, despite New Zealanders' seeming fascination with the lives of organised criminals, the CPRA itself is an area attracting surprisingly sparse literature. Therefore, it is desirable that further scrutiny be given to this formidable power of the state in order to safeguard the rights of those facing this draconian legislation, which bears much potential for abuse.