

---

---

## NOTES

### HOW CRIME PAYS: THE UNCONSTITUTIONALITY OF MODERN CIVIL ASSET FORFEITURE AS A TOOL OF CRIMINAL LAW ENFORCEMENT

In 1989 Attorney General Richard Thornburgh touted the benefits of civil asset forfeiture, describing how it enables “a drug dealer to serve time in a forfeiture-financed prison after being arrested by agents driving a forfeiture-provided automobile while working in a forfeiture-funded sting operation.”<sup>1</sup> Nearly thirty years later, the symbiotic relationship between civil forfeiture and law enforcement continues to thrive. Civil forfeiture authorizes the government to seize property where it has probable cause to believe that the property is sufficiently connected to criminal activity.<sup>2</sup> The forfeiture proceeding operates against the property itself rather than pursuant to criminal charges against an individual, imposing fewer procedural burdens on the government.<sup>3</sup> It also prevents unjust enrichment where criminal prosecution is infeasible;<sup>4</sup> civil forfeiture has, for example, restored ancient artifacts to the countries from which they were looted<sup>5</sup> and recovered artwork stolen from Jewish families by Nazis.<sup>6</sup>

However, civil forfeiture has come under bipartisan fire with stories of abuse and claims that it provides law enforcement with excessive power.<sup>7</sup> People have lost their homes or vehicles after a third party misused the property without the owner’s knowledge.<sup>8</sup> For example, Mary and Leon Adams resided in their West Philadelphia house for forty-six years when the police told them to vacate and initiated a civil forfeiture proceeding against the property because their adult son sold \$60 worth of marijuana on the porch.<sup>9</sup> Tina Bennis faced a similar fate when the Supreme Court upheld the civil forfeiture of the car she jointly

---

<sup>1</sup> Sarah Stillman, *Taken*, NEW YORKER (Aug. 12 & 19, 2013), <https://www.newyorker.com/magazine/2013/08/12/taken> [<https://perma.cc/N7T5-3SZA>].

<sup>2</sup> See STEFAN D. CASSELLA, ASSET FORFEITURE LAW IN THE UNITED STATES § 3-3, at 104–05 (2d ed. 2013).

<sup>3</sup> See *id.* § 1-5, at 18–20.

<sup>4</sup> See *id.* § 1-5, at 18–19.

<sup>5</sup> See Alan Feuer, *Hobby Lobby Agrees to Forfeit 5,500 Artifacts Smuggled Out of Iraq*, N.Y. TIMES (July 5, 2017), <https://nyti.ms/2tNDe4S> [<https://perma.cc/7ZCC-8KSY>].

<sup>6</sup> See Press Release, U.S. Attorney’s Office for the S. Dist. of N.Y., United States Announces \$19 Million Settlement in Case of Painting Stolen by Nazi (July 20, 2010), <https://www.justice.gov/archive/usao/nys/pressreleases/July10/portraitofwallysettlementpr.pdf> [<https://perma.cc/X7AU-ZGHH>].

<sup>7</sup> See Shaila Dewan, *Police Use Department Wish List when Deciding Which Assets to Seize*, N.Y. TIMES (Nov. 9, 2014), <https://nyti.ms/2jRAsXl> [<https://perma.cc/L3XQ-W9W7>].

<sup>8</sup> See Stillman, *supra* note 1.

<sup>9</sup> See *id.*

owned with her husband after he secretly had sex with a prostitute inside the vehicle.<sup>10</sup> The police also use minor traffic stops to seize cash or cars without so much as issuing a ticket.<sup>11</sup> Victor Ramos Guzman experienced this when he was pulled over for speeding and a state trooper seized \$28,500; he was a church secretary en route to buy land for the church with the donated money and possessed no contraband.<sup>12</sup>

Some state reforms have sought to curb civil forfeiture,<sup>13</sup> and though the Supreme Court has historically upheld the practice,<sup>14</sup> in a recent statement respecting a denial of certiorari Justice Thomas signaled that modern civil forfeiture may be unconstitutional.<sup>15</sup> Nevertheless, the Trump Administration has fortified the practice by expanding equitable sharing,<sup>16</sup> a program that undermines state reforms by financially inducing local law enforcement to work with federal authorities and forfeit property pursuant to federal procedures.<sup>17</sup> In short, civil forfeiture heavily incentivizes federal and state agencies to participate in a system that has become dangerously entangled with criminal law, implicating a number of constitutional concerns.

This Note proceeds in three major parts. Part I provides an overview of the forfeiture regime and current civil forfeiture practices. Part II addresses constitutional considerations implicated by civil forfeiture. After reviewing Justice Thomas's statement, it explores how current practices have become entwined with criminal law enforcement and thus are unconstitutionally punitive. Part III discusses equitable sharing, focusing on its punitive and criminal enforcement underpinnings as well as its federalism implications.

## I. THE ASSET FORFEITURE REGIME

### A. *The Modern Forfeiture Framework*

Asset forfeiture is the seizure and retention of property that the government has reason to believe is sufficiently connected to criminal activity.<sup>18</sup> Forfeiture occurs pursuant to either state or federal law. While

---

<sup>10</sup> See *Bennis v. Michigan*, 516 U.S. 442, 443–44 (1996).

<sup>11</sup> See Stillman, *supra* note 1.

<sup>12</sup> See *id.*

<sup>13</sup> See DICK M. CARPENTER II ET AL., INST. FOR JUSTICE, POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE 3 (2d ed. 2015).

<sup>14</sup> See *infra* section II.B, pp. 2395–96.

<sup>15</sup> See *Leonard v. Texas*, 137 S. Ct. 847 (2017) (Thomas, J., respecting the denial of certiorari).

<sup>16</sup> See U.S. DEP'T OF JUSTICE, ORD. NO. 3946-2017, FEDERAL FORFEITURE OF PROPERTY SEIZED BY STATE AND LOCAL LAW ENFORCEMENT AGENCIES (July 19, 2017), <https://www.justice.gov/opa/press-release/file/982611/download> [<https://perma.cc/XUK9-2CZK>]; Rebecca R. Ruiz, *Justice Dept. Revives Criticized Policy Allowing Assets to Be Seized*, N.Y. TIMES (July 19, 2017), <https://nyti.ms/2uAkhUg> [<https://perma.cc/X6H8-9W3R>].

<sup>17</sup> See CARPENTER ET AL., *supra* note 13, at 25.

<sup>18</sup> See CASSELLA, *supra* note 2, § 3-3, at 104–05.

state and federal forfeitures have many commonalities, state provisions vary widely in the protections they offer property owners.<sup>19</sup>

There are three forfeiture methods:<sup>20</sup> criminal forfeiture, administrative forfeiture, and civil forfeiture. Criminal forfeiture occurs pursuant to an in personam action and requires a conviction.<sup>21</sup> The forfeiture is determined during the sentencing stage,<sup>22</sup> though it proceeds similarly to the guilt phase: there is a right to retain the jury, the government bears the burden of proving a nexus between the property and the defendant's conviction(s), and the defendant may offer a defense.<sup>23</sup> However, unlike the guilt phase's beyond a reasonable doubt standard, the government's forfeiture burden is a preponderance of the evidence.<sup>24</sup> The forfeiture then becomes part of the judgment, though ancillary proceedings permit third parties to contest a criminal forfeiture by claiming ownership over the property.<sup>25</sup>

Administrative forfeiture occurs when a law enforcement agency seizes property based on probable cause to believe that it is connected to criminal activity.<sup>26</sup> The agency must notify any known parties with a potential interest in the property, offering an opportunity to challenge the forfeiture.<sup>27</sup> Where no claim in protest is filed, the agency can finalize the forfeiture without judicial review.<sup>28</sup>

When the seizure is challenged, a prosecutor must seek judicial approval to forfeit the property.<sup>29</sup> This takes the form of an in rem civil forfeiture proceeding filed against the property itself.<sup>30</sup> The action proceeds civilly, with the government bearing the preponderance of the evidence burden of proving that the *property* was derived from or used in the commission of a crime.<sup>31</sup> Many jurisdictions allow an innocent owner defense where the owner lacks criminal culpability, but the owner must affirmatively prove her innocence.<sup>32</sup>

<sup>19</sup> See, e.g., CARPENTER ET AL., *supra* note 13, at 150–51.

<sup>20</sup> For simplicity this Note uses the federal framework in providing a general explanation of the forfeiture regime.

<sup>21</sup> See CASSELLA, *supra* note 2, § 1-4, at 13–14.

<sup>22</sup> See *id.* § 15-2, at 562.

<sup>23</sup> See *id.* § 18-5, at 659.

<sup>24</sup> See *id.* § 15-3, at 570.

<sup>25</sup> See *The Need to Reform Asset Forfeiture: Hearing Before the S. Comm. on the Judiciary, 114th Cong. 3–4 (2015)* (Statement of the U.S. Department of Justice), [https://www.justice.gov/sites/default/files/testimonies/witnesses/attachments/2015/10/06/doj\\_submission\\_for\\_the\\_record\\_re\\_asset\\_forfeiture\\_reform\\_act\\_15apr152\\_2\\_508\\_compliant.pdf](https://www.justice.gov/sites/default/files/testimonies/witnesses/attachments/2015/10/06/doj_submission_for_the_record_re_asset_forfeiture_reform_act_15apr152_2_508_compliant.pdf) [https://perma.cc/7DR7-A9LX] [hereinafter Statement of U.S. Department of Justice].

<sup>26</sup> See CASSELLA, *supra* note 2, § 1-4, at 10.

<sup>27</sup> See Statement of the U.S. Department of Justice, *supra* note 25, at 4.

<sup>28</sup> See *id.*

<sup>29</sup> See *id.*

<sup>30</sup> See CASSELLA, *supra* note 2, § 1-4, at 11, 14.

<sup>31</sup> See *id.* § 1-4, at 14, 16.

<sup>32</sup> See, e.g., 18 U.S.C. § 983(d) (2012).

In federal cases, civil forfeitures typically occur pursuant to the Civil Asset Forfeiture Reform Act<sup>33</sup> (CAFRA). CAFRA responded to calls for forfeiture reform<sup>34</sup> by expanding owner protections.<sup>35</sup> For example, it imposes deadlines for forfeiture filings, adds seizure notice requirements, shifts the burden of proof to the government, adopts an innocent owner defense, and provides for attorneys' fees and interest for successful claimants.<sup>36</sup> It also applies the Eighth Amendment's excessive fines framework to civil forfeitures and expands Fourth Amendment protections.<sup>37</sup> Nevertheless, the statute has broadened civil forfeiture's reign by providing for forfeiture of "fungible property"<sup>38</sup> without tracing the property to unlawful activity and establishing forfeiture power in "virtually all serious federal crimes, and a number of state and foreign crimes."<sup>39</sup>

### B. Modern Civil Forfeiture and Its Incivilities

Forfeiture is profitable. While a lack of reporting requirements makes it difficult to fully account for its revenues, the Justice and Treasury departments alone received nearly \$4.5 billion in forfeiture proceeds in 2014; individual states have taken in as much as \$46 million in a single year from the practice.<sup>40</sup> It is therefore unsurprising that forfeiture is an attractive tool for law enforcement. This is particularly true of civil forfeiture. Compared to criminal forfeiture, civil forfeiture offers fewer procedural requirements. It does not necessitate a criminal conviction or confine forfeiture to property belonging to a given defendant.<sup>41</sup> Civil forfeiture's appeal has thus resulted in its heavy and problematic entanglement with criminal law enforcement.

Officials often use prosecutorial tactics to obtain forfeitures, subjecting individuals to criminal enforcement practices without the corresponding criminal procedure protections. For example, drug task forces utilize undercover operations to forfeit drug money from buyers.<sup>42</sup>

---

<sup>33</sup> Pub. L. 106-185, 114 Stat. 202 (2000) (codified as amended at 18 U.S.C. §§ 983, 985). CAFRA exempts certain forfeitures. See 18 U.S.C. § 983(i)(2).

<sup>34</sup> See CARPENTER ET AL., *supra* note 13, at 2.

<sup>35</sup> Stefan D. Cassella, *The Civil Asset Forfeiture Reform Act of 2000: Expanded Government Forfeiture Authority and Strict Deadlines Imposed on All Parties*, 27 J. LEGIS. 97, 97 (2015). While CAFRA supersedes and amends prior forfeiture provisions, to the extent that preexisting statutes do not conflict with CAFRA, they remain good law. See *id.* at 102-03.

<sup>36</sup> *Id.* at 97, 102, 108, 110-13.

<sup>37</sup> See *id.* at 109-10, 113.

<sup>38</sup> *Id.* at 115.

<sup>39</sup> *Id.* at 116.

<sup>40</sup> See CARPENTER ET AL., *supra* note 13, at 10-11.

<sup>41</sup> See CASSELLA, *supra* note 2, § 1-5, at 18-19.

<sup>42</sup> Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 67 (1998).

“Highway interdiction” uses minor traffic violations as a pretext for vehicle stops.<sup>43</sup> These stops rarely result in criminal penalties but produce civil forfeitures based on a driver appearing nervous or possessing large sums of cash.<sup>44</sup> Police and district attorneys also collaborate to seize nonlocal drivers’ property and pressure them into waiving their property claims in exchange for a nonprosecution agreement, or a “cash-for-freedom” deal.<sup>45</sup> While such practices are abominable themselves, they become even more alarming when the threatened criminal charges — including felonies — are unsubstantiated.<sup>46</sup>

Such activities are not confined to police and prosecutors. Numerous federal organizations have civil forfeiture power.<sup>47</sup> For example, the Internal Revenue Service has relied on the third party doctrine<sup>48</sup> in its civil forfeitures to comb through bank records and seize accounts of individuals suspected of structuring without ever charging a crime.<sup>49</sup> This forces the account holder — like a Michigan store owner who regularly deposited just under \$10,000 to keep cash holdings below his insurance policy’s limit — to bear the costs of proving the deposits were not made with the intent to avert reporting requirements.<sup>50</sup>

The toxic relationship between criminal enforcement and civil forfeiture is further exacerbated by the lack of regulations on spending forfeiture proceeds.<sup>51</sup> Many police budgets depend on forfeiture revenues to fund crime-fighting equipment, salaries, and officer bonuses.<sup>52</sup> In some Texas counties, forfeitures fund nearly 40% of police budgets.<sup>53</sup> The Cook County, Illinois state’s attorney’s office’s 2016 budget anticipated \$4.96 million in forfeiture revenues, which it earmarked to pay

---

<sup>43</sup> Robert O’Harrow Jr. et al., *They Fought the Law. Who Won?*, WASH. POST (Sept. 8, 2014), <https://wapo.st/1wet45B> [<https://perma.cc/HA9R-W85E>].

<sup>44</sup> *See id.* Drivers may possess these large sums of money for innocent reasons, but officers assume a relationship to drug activities for seizure purposes. *See id.*

<sup>45</sup> *See Stillman*, *supra* note 1.

<sup>46</sup> *See Leonard v. Texas*, 137 S. Ct. 847, 848 (2017) (Thomas, J., respecting the denial of certiorari).

<sup>47</sup> These include the Drug Enforcement Administration, Treasury Department, Immigration and Naturalization Service, Securities and Exchange Commission, Department of Health and Human Services, Food and Drug Administration, Federal Bureau of Investigation, Coast Guard, Postal Service, and certain Interior Department bureaus. *See HENRY HYDE, FORFEITING OUR PROPERTY RIGHTS* 24 (1995).

<sup>48</sup> The third party doctrine enables the government to obtain information without a warrant where the information was disclosed to a third party. *See Smith v. Maryland*, 442 U.S. 735, 743–44 (1979).

<sup>49</sup> Brief of Institute for Justice et al. as *Amici Curiae* Supporting Petitioner at 1–2, *United States v. Carpenter*, No. 16-402 (U.S. Aug. 7, 2017). Structuring is an attempt to evade bank reporting requirements by restricting transactions to under \$10,000. *See id.* at 14.

<sup>50</sup> Shaila Dewan, *Law Lets I.R.S. Seize Accounts on Suspicion, No Crime Required*, N.Y. TIMES (Oct. 25, 2014), <https://nyti.ms/2kTBVxq> [<https://perma.cc/C4CW-BUSJ>].

<sup>51</sup> *See CARPENTER ET AL.*, *supra* note 13, at 7.

<sup>52</sup> *See Stillman*, *supra* note 1.

<sup>53</sup> *See id.*

forty-one full-time employees' salaries and benefits.<sup>54</sup> But forfeiture proceeds are not just used for policing activities; with little accountability, law enforcement officials have also spent them on extravagancies like expensive dinners, parties, and personal expenses.<sup>55</sup>

As a result, the decision to pursue a forfeiture is often governed not by justice, but by "department wish lists."<sup>56</sup> Police civil forfeiture trainings include instruction on "maximizing profits, defeating the objections of so-called 'innocent owners' . . . , and keeping the proceeds in the hands of law enforcement."<sup>57</sup> The U.S. Immigration and Customs Enforcement's Asset Forfeiture Handbook similarly emphasizes profit maximization as central in forfeiture decisions.<sup>58</sup> "[T]he handbook outlines six key factors agents should consider[, of which] . . . four involve how much a property is worth."<sup>59</sup>

Given these concerns, states have attempted to cabin civil forfeiture, such as by imposing reporting requirements, increasing the burden of proof, and even abolishing the practice entirely.<sup>60</sup> However, the federal government has found a powerful work-around via equitable sharing.<sup>61</sup> Equitable sharing allows federal rather than state in rem procedures to govern property seized by state or local authorities.<sup>62</sup> It occurs when a state or local authority turns over seized property to a federal agency for "adoption" or works with the agency on a joint task force or investigation.<sup>63</sup> The state or local entity is then eligible to receive up to 80% of the forfeiture proceeds.<sup>64</sup> In 2013, equitable sharing payouts to state and local law enforcement from the Department of Justice (DOJ) amounted to \$643 million.<sup>65</sup> Other federal agencies offered additional equitable sharing funding, such as the nearly \$124 million in payments made by the Treasury Department.<sup>66</sup> When Attorney General Eric

---

<sup>54</sup> Joel Handley et al., *Inside the Chicago Police Department's Secret Budget*, CHI. READER (Sept. 29, 2016), <https://www.chicagoreader.com/chicago/police-department-civil-forfeiture-investigation/Content?oid=23728922> [<https://perma.cc/ELV9-MKC4>].

<sup>55</sup> J.F., *Fighting Crime Through Superior Steak*, THE ECONOMIST (Oct. 15, 2013), <https://www.economist.com/blogs/democracyinamerica/2013/10/asset-forfeiture> [<https://perma.cc/AE47-7KAL>].

<sup>56</sup> Dewan, *supra* note 7.

<sup>57</sup> *Id.*

<sup>58</sup> See Nick Sibilla, *Leaked Handbook Reveals How ICE Uses Civil Forfeiture to Seize Millions*, FORBES: #THEVERDICT (Oct. 16, 2017, 1:52 PM), <https://www.forbes.com/sites/instituteforjustice/2017/10/16/leaked-handbook-reveals-how-ice-uses-civil-forfeiture-to-seize-millions/> [<https://perma.cc/7UZT-3L4F>].

<sup>59</sup> *Id.*

<sup>60</sup> See CARPENTER ET AL., *supra* note 13, at 16–17, 33–34.

<sup>61</sup> See *id.* at 28.

<sup>62</sup> See *id.* at 25.

<sup>63</sup> See *id.*

<sup>64</sup> See *id.*

<sup>65</sup> See *id.*

<sup>66</sup> See *id.*

Holder imposed some limits on the program in 2015,<sup>67</sup> more than 42% of police departments and task forces were participants; hundreds received 20% or more of their annual budget outlays from equitable sharing revenues.<sup>68</sup> Attorney General Jeff Sessions fully revived equitable sharing last July, further undermining state forfeiture reforms.<sup>69</sup>

## II. PUNITIVE FORFEITURE AND CONSTITUTIONAL CONCERNS

### A. *Prior Constitutional Critiques*

Some have claimed that civil forfeiture violates the Due Process Clause,<sup>70</sup> and even the Supreme Court has recognized that such an argument is not inherently unreasonable: “There is strength . . . in the contention that [civil forfeiture] . . . seems to violate that justice which should be the foundation of the due process of law required by the Constitution.”<sup>71</sup> Nevertheless, the Court has upheld the practice on historical grounds: “[F]orfeiture of property without proof of the owner’s wrongdoing, merely because it was ‘used’ in or was an ‘instrumentality’ of crime has been permitted in England and this country, both before and after the adoption of the Fifth and Fourteenth Amendments.”<sup>72</sup>

Given this framework, scholars have suggested that civil forfeiture deprives owners of procedural due process when applied to conduct beyond its historic scope,<sup>73</sup> a position recently advanced by Justice Thomas in *Leonard v. Texas*.<sup>74</sup> James Leonard was stopped for a traffic infraction, and a police officer searched a safe in the car’s trunk after Leonard and his passenger gave conflicting explanations about its contents.<sup>75</sup> The officer found \$201,100 and a home bill of sale in the safe, which was civilly forfeited as connected to narcotics sales.<sup>76</sup> The lower courts rejected Leonard’s mother’s innocent owner defense.<sup>77</sup> Mrs.

---

<sup>67</sup> See U.S. DEP’T OF JUSTICE, PROHIBITION ON CERTAIN FEDERAL ADOPTIONS OF SEIZURES BY STATE AND LOCAL LAW ENFORCEMENT AGENCIES 1 (Jan. 16, 2015), [https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/01/16/attorney\\_general\\_order\\_prohibiting\\_adoptions.pdf](https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/01/16/attorney_general_order_prohibiting_adoptions.pdf) [<https://perma.cc/XNM3-TAFJ>].

<sup>68</sup> See Robert O’Harrow Jr. et al., *Holder Limits Seized-Asset Sharing Process that Split Billions with Local, State Police*, WASH. POST (Jan. 16, 2015), <https://wapo.st/2E8oRqF> [<https://perma.cc/EU4P-QQ3Q>].

<sup>69</sup> See U.S. DEP’T OF JUSTICE, *supra* note 16.

<sup>70</sup> See, e.g., Stefan B. Herpel, *Toward a Constitutional Kleptocracy: Civil Forfeiture in America*, 96 MICH. L. REV. 1910, 1923–26 (1998) (reviewing LEONARD LEVY, *A LICENSE TO STEAL* (1996)).

<sup>71</sup> *J.W. Goldsmith, Jr.-Grant Co. v. United States*, 254 U.S. 505, 510 (1921).

<sup>72</sup> *Bennis v. Michigan*, 516 U.S. 442, 454 (1996) (Thomas, J., concurring).

<sup>73</sup> See, e.g., Herpel, *supra* note 70, at 1931.

<sup>74</sup> See 137 S. Ct. 847 (2017) (Thomas, J., respecting the denial of certiorari).

<sup>75</sup> See *id.* at 847.

<sup>76</sup> See *id.*

<sup>77</sup> See *id.*

Leonard appealed to the Supreme Court, arguing that due process required Texas to prove its case by clear and convincing evidence rather than by a preponderance standard.<sup>78</sup> The Supreme Court denied certiorari because she failed to previously raise her due process claim, but Justice Thomas issued a statement questioning “[w]hether th[e] Court’s treatment of the broad modern forfeiture practice can be justified by the narrow historical one.”<sup>79</sup>

Justice Thomas argued that modern civil forfeiture applies to crimes and property not historically covered. He noted that traditional civil forfeitures were limited to a narrow class of cases, such as customs and piracy, where the offender was often overseas and beyond courts’ jurisdiction.<sup>80</sup> Early civil forfeitures were also narrower in the type of property forfeitable, “typically cover[ing] only the instrumentalities of the crime (such as the vessel used to transport the goods), not the derivative proceeds of the crime (such as property purchased with money from the sale of the illegal goods).”<sup>81</sup> Justice Thomas suggested that to the extent that modern forfeitures exceed these narrow historic practices they implicate due process concerns.<sup>82</sup>

This argument is supported by the historical record and existing scholarship. Traditionally, civil forfeiture was restricted to maritime, customs, and war power cases<sup>83</sup> and did not break free of these constraints until the Prohibition era when applied to violations of criminal statutes regulating alcohol.<sup>84</sup> In rem forfeiture’s extension into the realm of general criminal activity remained narrowly employed until it was revived as a tool in the war on drugs in the 1980s and ultimately expanded to cover most federal crimes.<sup>85</sup> Civil forfeiture was also extended to property used to facilitate a crime, proceeds of an offense,<sup>86</sup> and property traceable to those proceeds.<sup>87</sup> In 2000 CAFRA further provided for forfeiture of “fungible property” with relaxed tracing requirements.<sup>88</sup>

Yet the Court has been unreceptive to arguments to constrain forfeiture by its historic scope. The Justices have not shown willingness to

---

<sup>78</sup> *See id.*

<sup>79</sup> *Id.* at 850.

<sup>80</sup> *See id.* at 849 (citing Herpel, *supra* note 70, at 1925–26).

<sup>81</sup> *Id.*

<sup>82</sup> *See id.*

<sup>83</sup> *See* Herpel, *supra* note 70, at 1928.

<sup>84</sup> *See* HYDE, *supra* note 47, at 23.

<sup>85</sup> *See* CASSELLA, *supra* note 2, § 2-4, at 33–34.

<sup>86</sup> *See id.*

<sup>87</sup> Caleb Nelson, *The Constitutionality of Civil Forfeiture*, 125 YALE L.J. 2446, 2480–81 (2016) (discussing the limited historical support for civil forfeiture of derivative proceeds).

<sup>88</sup> Cassella, *supra* note 35, at 115.

draw distinctions by the underlying crime.<sup>89</sup> While Justice Stevens has noted that forfeiting criminal proceeds “marked an important expansion of governmental power,” the Court has not yet found that this expansion violates due process.<sup>90</sup> In fact, Justice Scalia’s concurrence in that case<sup>91</sup> has been interpreted to justify proceed forfeitures on the grounds that the government’s interest in the property — and thus any subsequent proceeds — attaches at the time of misuse.<sup>92</sup>

### B. Constitutionally Punitive: The Court’s Jurisprudence

Despite being unwilling to strike down civil forfeiture on historical grounds, the Court has paved the way for an alternative mechanism to challenge statutes like that in *Leonard*. It has recognized that civil forfeitures can become overly punitive, and in such cases certain constitutional protections must attach.<sup>93</sup> The applicability of such protections depends on if the proceeding is a (1) criminal proceeding, (2) civil proceeding that is sufficiently punitive or quasi-criminal, or (3) civil proceeding that is remedial.<sup>94</sup>

Because civil forfeiture is not a criminal proceeding, constitutional protections that attach only to criminal prosecutions are inapposite. These include the Confrontation Clause,<sup>95</sup> the Sixth Amendment right to counsel,<sup>96</sup> and “the due process requirement that guilt in a criminal proceeding be proved beyond a reasonable doubt.”<sup>97</sup>

The Supreme Court has expressed a limited, albeit inconsistent, willingness to extend other constitutional protections to sufficiently punitive in rem proceedings. It held that the Fifth Amendment’s Double Jeopardy Clause attaches to in rem proceedings that are sufficiently punitive in nature, but the civil forfeiture at issue did not meet that bar.<sup>98</sup> The Court relied on a similar distinction between punitive and non-punitive forfeitures two years later, determining that the Eighth Amendment’s Excessive Fines Clause applies to forfeitures serving “as

---

<sup>89</sup> See Herpel, *supra* note 70, at 1931; see also *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 85 (1993) (Thomas, J., concurring in part and dissenting in part) (“[A]mbitious modern statutes and prosecutorial practices have all but detached themselves from the ancient notion of civil forfeiture.”).

<sup>90</sup> *United States v. Parcel of Land, Bldgs., Appurtenances & Improvements, Known as 92 Buena Vista Ave., Rumson, N.J.*, 507 U.S. 111, 121 (1993).

<sup>91</sup> See *id.* at 131–34 (Scalia, J., concurring in the judgment).

<sup>92</sup> See Nelson, *supra* note 87, at 2479–80.

<sup>93</sup> See *infra* text accompanying notes 98–102.

<sup>94</sup> See generally Nelson, *supra* note 87, at 2488–94; see also *Austin v. United States*, 509 U.S. 602, 608 n.4 (1993).

<sup>95</sup> *United States v. Zucker*, 161 U.S. 475, 481 (1896).

<sup>96</sup> See *United States v. \$292,888.04 in U.S. Currency*, 54 F.3d 564, 569 (9th Cir. 1995) (quoting *Austin*, 509 U.S. at 608).

<sup>97</sup> *Austin*, 509 U.S. at 608 n.4 (internal citations omitted).

<sup>98</sup> See *United States v. Ursery*, 518 U.S. 267, 288, 292 (1996).

punishment for some offense.”<sup>99</sup> It recognized that “some recent federal forfeiture laws have blurred the traditional distinction between civil in rem and criminal in personam forfeiture.”<sup>100</sup> Therefore, “a modern statutory forfeiture is a ‘fine’ for Eighth Amendment purposes if it constitutes punishment even in part, regardless of whether the proceeding is styled in rem or in personam.”<sup>101</sup> Finally, the Fourth Amendment and the Fifth Amendment’s privilege against self-incrimination have been subject to similar analyses: civil forfeitures “are of this quasi-criminal nature . . . [for] the Fourth Amendment . . . [and] the Fifth Amendment . . . declar[ation] that no person shall be compelled in any criminal case to be a witness against himself.”<sup>102</sup> Where modern civil forfeiture practices are punitive rather than remedial and do not afford these constitutional protections, they infringe on owners’ constitutional rights.

### C. *Unconstitutionally Punitive: Modern Civil Forfeiture*

The last several decades have seen a shift in civil forfeiture practices that is “so broad that it differs not only in degree, but in kind.”<sup>103</sup> These practices have morphed civil forfeiture into a creature of criminal law and resultantly a punitive rather than remedial instrument. This is evident in three ways. First, the Court has deviated from its historical nonpenal justification for in rem forfeitures. Second, law enforcement uses criminal law enforcement tactics for civil forfeiture purposes, advancing the aims of criminal punishment. Third, many modern forfeiture statutes are punitive based on the Supreme Court’s criteria for determining when a statute is punitive.

While civil forfeiture was historically justified on the grounds that the forfeited property itself was guilty and thus forfeiture served to hold

<sup>99</sup> *United States v. Bajakajian*, 524 U.S. 321, 328 (1998) (quoting *Austin*, 509 U.S. at 609–10).

<sup>100</sup> *Id.* at 331 n.6 (emphasis omitted).

<sup>101</sup> *Id.* (emphasis omitted). Though the punitive/remedial distinction may seem logical, it is complicated by the fact that the Court has held the same statute punitive for Excessive Fines Clause purposes but not under the Double Jeopardy Clause. See CASSELLA, *supra* note 2, § 2-10, at 75–77 (comparing *Austin*, 509 U.S. 602, and *Ursery*, 518 U.S. 267). Justice Kennedy has attempted to reconcile the two doctrines on the ground that civil forfeiture “is not a punishment for . . . criminal wrongdoing,” *Ursery*, 518 U.S. at 294 (Kennedy, J., concurring), but rather holds an owner “accountable for the misuse of [her] property,” *id.* at 295.

<sup>102</sup> *Boyd v. United States*, 116 U.S. 616, 634 (1886). However, while the full force of the Fourth Amendment, including the prophylactic exclusionary rule, is applied in civil forfeiture cases, see *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 702 (1965), Fifth Amendment jurisprudence has not barred an adverse inference based on invocation of the privilege in civil proceedings, as it does in the criminal context, see, e.g., *United States v. U.S. Currency in the Amount of \$119,984.00, More or Less*, 304 F.3d 165, 177 (2d Cir. 2002) (citing *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976)).

<sup>103</sup> *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 82 (1993) (Thomas, J., concurring in part and dissenting in part) (discussing the broadening of modern civil forfeiture provisions).

the property rather than the owner accountable,<sup>104</sup> the Court has abandoned this legal fiction.<sup>105</sup> Instead, it has relied on the idea “that the owner who allows his property to become involved in an offense has been negligent.”<sup>106</sup> Given this jurisprudential shift, in rem proceedings aim at least in part to punish an owner for the misuse of her property.<sup>107</sup> Modern statutes like CAFRA further support this view, as the inclusion of an innocent owner defense<sup>108</sup> implies an intent to hold owners accountable only where scienter exists. Of course there remain cases that serve overwhelmingly remedial rather than punitive purposes; using in rem forfeiture to restore money to Bernie Madoff’s Ponzi scheme victims provides a good example.<sup>109</sup> But in cases where forfeiture proceeds are used for purposes other than making victims whole, the process is predominately punitive against the property owner.

The collapse of the guilty property justification is not the only change that suggests civil forfeiture has become heavily punitive — law enforcement practices have changed as well. As Justice Kennedy stated, “[w]e would not allow a State to evade its burden of proof by replacing its criminal law with a civil system in which there is no presumption of innocence.”<sup>110</sup> Yet, in its use of civil forfeiture, the law enforcement community does just that.

Police and prosecutors’ regular use of criminal law enforcement techniques with the goal of obtaining a forfeiture rather than effectuating an arrest demonstrates how civil forfeiture has become a replacement for criminal law enforcement. Just as plea deals offer defendants fewer charges and a potentially lessened punishment for bypassing the trial process, “cash-for-freedom” waivers guarantee certain criminal charges will not be filed in exchange for the uncontested forfeiture of personal

---

<sup>104</sup> See, e.g., *J.W. Goldsmith, Jr.-Grant Co. v. United States*, 254 U.S. 505, 510–11 (1921).

<sup>105</sup> See, e.g., *Urserly*, 518 U.S. at 295 (Kennedy, J., concurring) (“Distinguishing between in rem and in personam punishments does not depend upon, or revive, the fiction alive in [*Various Items of Personal Property v. United States*, 282 U.S. 577, 581 (1931)], but condemned in *Austin* [509 U.S. at 615 n.9], that the property is punished as if it were a sentient being capable of moral choice. It is the owner who feels the pain and receives the stigma of the forfeiture, not the property.” (emphasis omitted)).

<sup>106</sup> *Austin*, 509 U.S. at 616.

<sup>107</sup> See *id.* at 615 (“[T]he owner has been negligent in allowing his property to be misused and [thus] he is properly punished for that negligence.”).

<sup>108</sup> See 18 U.S.C. § 983(d) (2012).

<sup>109</sup> Press Release, U.S. Dep’t of Justice, Department of Justice Compensates Victims of Bernard Madoff Fraud Scheme with Funds Recovered Through Asset Forfeiture (Nov. 9, 2017), <https://www.justice.gov/opa/pr/departments-justice-compensates-victims-bernard-madoff-fraud-scheme-funds-recovered-through> [https://perma.cc/2NBP-ZCEP].

<sup>110</sup> *Foucha v. Louisiana*, 504 U.S. 71, 94 (1992) (Kennedy, J., dissenting); see also Herpel, *supra* note 70, at 1925.

property.<sup>111</sup> Because the threat of criminal charges may drive an individual to agree to a deal,<sup>112</sup> such practices tie the seizure to the criminal punishment process in a way that civil forfeiture has not historically contemplated. The use of pretextual traffic stops to forfeit property, the third party doctrine to seize accounts suspected of structuring,<sup>113</sup> and sting operations to seize money from attempted drug buyers<sup>114</sup> — all without accompanying criminal charges — similarly substitute civil forfeiture for criminal punishment.

This punitive intent is clear from law enforcement statements. Attorney General Sessions has pronounced that civil forfeiture is intended to reduce crime by hitting it “in the wallet.”<sup>115</sup> Police discussions highlight how forfeiture amounts are based not on the value of the wrongfully used property, but on considerations like the individual’s ability to afford the forfeiture, repeat offender status, seriousness of the offense, and if enough money is seized to “have an impact.”<sup>116</sup> Many of these same factors are weighed by judges in criminal sentencings under the Federal Sentencing Guidelines,<sup>117</sup> pointing to criminal punishment’s goals of deterrence and retribution.

Such an argument is not just theoretical; applying the Court’s own framework for determining when a civil statute is criminal for the purposes of constitutional protections demonstrates that some civil forfeiture statutes cross the line. The Court historically utilizes a two-part test: “whether [the legislature] intended [the] proceedings . . . to be criminal or civil . . . [and] whether the proceedings are so punitive in fact as to ‘persuade us that the forfeiture proceeding[s] may not legitimately be viewed as civil in nature,’ despite [the legislature’s] intent.”<sup>118</sup> While many states’ forfeiture laws may be punitive under this framework, a good exemplar is Texas’s civil forfeiture legislation, Chapter 59,<sup>119</sup>

---

<sup>111</sup> See Stillman, *supra* note 1.

<sup>112</sup> See *id.*

<sup>113</sup> See *supra* text accompanying notes 43–49.

<sup>114</sup> See Blumenson & Nilsen, *supra* note 42, at 67.

<sup>115</sup> Press Release, U.S. Dep’t of Justice, Attorney General Sessions Issues Policy and Guidelines on Federal Adoptions of Assets Seized by State or Local Law Enforcement (July 19, 2017), <https://www.justice.gov/opa/pr/attorney-general-sessions-issues-policy-and-guidelines-federal-adoptions-assets-seized-state> [<https://perma.cc/XFW3-TCBU>].

<sup>116</sup> Dewan, *supra* note 7.

<sup>117</sup> U.S. SENTENCING COMM’N, AN OVERVIEW OF THE FEDERAL SENTENCING GUIDELINES 1–2, [https://www.ussc.gov/sites/default/files/pdf/about/overview/Overview\\_Federal\\_Sentencing\\_Guidelines.pdf](https://www.ussc.gov/sites/default/files/pdf/about/overview/Overview_Federal_Sentencing_Guidelines.pdf) [<https://perma.cc/SRV7-FQRY>].

<sup>118</sup> United States v. Ursery, 518 U.S. 267, 288 (1996) (fourth alteration in original) (quoting United States v. One Assortment of 89 Firearms, 465 U.S. 354, 366 (1989)); see also, e.g., United States v. Ward, 448 U.S. 242, 249 (1980).

<sup>119</sup> See TEX. CODE CRIM. PROC. ANN. art. 59.01–59.14 (West 2016).

which was implicated in *Leonard*<sup>120</sup> and shares features with numerous other state and federal forfeiture laws.<sup>121</sup>

The Texas legislature's intent is for civil forfeiture to operate as a civil proceeding. Despite its codification in the State's Code of *Criminal Procedure*,<sup>122</sup> the statute expressly states that "[i]t is the intention of the legislature that asset forfeiture is remedial in nature and not a form of punishment."<sup>123</sup> In far less explicit circumstances the Court has found a forfeiture statute's references to civil penalties and lack of criminal procedural protections sufficient evidence of civil intent.<sup>124</sup>

On the second question, the Court has weighed a number of nonexhaustive criteria. While jurisprudence in this area has not always been clear, the Court has traditionally considered the factors established in *Kennedy v. Mendoza-Martinez*<sup>125</sup> when determining if a statute is punitive<sup>126</sup>:

[1] Whether the sanction involves an affirmative disability or restraint, [2] whether it has historically been regarded as a punishment, [3] whether it comes into play only on a finding of scienter, [4] whether its operation will promote the traditional aims of punishment — retribution and deterrence, [5] whether the behavior to which it applies is already a crime, [6] whether an alternative purpose to which it may rationally be connected is assignable for it, and [7] whether it appears excessive in relation to the alternative purpose assigned.<sup>127</sup>

Regarding factor one, Chapter 59 forfeitures likely do not meet the Court's current definition of an affirmative disability, which involves analyzing "how the effects of the [sanction] are felt by those subject to it."<sup>128</sup> "[I]mprisonment . . . is the paradigmatic affirmative disability,"<sup>129</sup> which is not implicated by civil forfeiture. However, if a court were to take a less restrictive approach, it could find that Chapter 59 imposes burdens that are functionally disabling. "[S]eizure of forfeited property directly imposes harm on property owners by depriving them of their

---

<sup>120</sup> See *Leonard v. Texas*, 137 S. Ct. 847, 847 (2017) (Thomas, J., respecting the denial of certiorari).

<sup>121</sup> See *CARPENTER ET AL.*, *supra* note 13, at 150–51.

<sup>122</sup> See *TEX. CODE CRIM. PROC. ANN.* art. 59.01–59.14.

<sup>123</sup> *Id.* art. 59.05(e).

<sup>124</sup> See *United States v. Ward*, 448 U.S. 242, 249 (1980).

<sup>125</sup> 372 U.S. 144 (1963).

<sup>126</sup> See Terrance G. Reed, *On the Importance of Being Civil: Constitutional Limitations on Civil Forfeiture*, 39 N.Y. L. SCH. L. REV. 255, 279–80 (1994). To the extent that other frameworks are considered, they often rely on similar considerations to those expressed in *Mendoza-Martinez*. See, e.g., *Ward*, 448 U.S. at 249–50.

<sup>127</sup> *Mendoza-Martinez*, 372 U.S. at 168–69 (emphasis omitted) (footnotes omitted).

<sup>128</sup> *Smith v. Doe*, 538 U.S. 84, 99–100 (2003).

<sup>129</sup> *Id.* at 100.

property rights.”<sup>130</sup> The loss of a car or home under Chapter 59 can be debilitating, interfering with an owner’s ability to maintain employment and economic stability. The disability caused by civil forfeiture is particularly acute where the statute authorizes forfeiture of assets unconnected to the criminal activity.<sup>131</sup> Chapter 59 does so by providing for forfeiture of substitute property in certain cases where the sought property cannot be obtained or has “diminished in value.”<sup>132</sup> Finally, Chapter 59 places an affirmative disability on owners by requiring them to prove their own innocence to challenge a seizure, which likely necessitates hiring outside counsel.<sup>133</sup> A Texas Senate Committee on Criminal Justice found that this burden allocation puts the government at “an unfair advantage,” with “great cost to property owners.”<sup>134</sup>

The second factor — whether the sanction has historically been considered punishment — militates in favor of finding Chapter 59 punitive. The Court has stated that in rem forfeitures were not historically regarded as punishment.<sup>135</sup> But this is at odds with its prior language recognizing that civil forfeitures “historically have been understood, at least in part, as punishment.”<sup>136</sup> Early cases also suggest that civil forfeitures were conducted akin to criminal matters, such as by requiring the government to prove its case beyond a reasonable doubt.<sup>137</sup> Finally, Chapter 59 authorizes forfeiture for virtually all felonies and many misdemeanors.<sup>138</sup> To the extent that these forfeitures exceed traditional in rem forfeiture’s narrow scope,<sup>139</sup> they would have required criminal protections and thus were historically punitive.

---

<sup>130</sup> See Michael Schecter, Note, *Fear and Loathing and the Forfeiture Laws*, 75 CORNELL L. REV. 1151, 1161 (1990). The statute implicitly recognizes this by allowing owners to retain seized property in exchange for an equal value bond, pending a judicial forfeiture determination. See TEX. CODE CRIM. PROC. ANN. art. 59.02(b) (West 2016). But this provision offers little solace to owners as it merely substitutes a financial burden for the property-deprivation burden and exempts broad property categories, such as monetary forfeitures. See *id.* It also applies only pretrial, leaving owners no less burdened once the forfeiture is finalized. See *id.* art. 59.02(b)(1).

<sup>131</sup> See Reed, *supra* note 126, at 280.

<sup>132</sup> See TEX. CODE CRIM. PROC. ANN. art. 59.021(b)(1), (4).

<sup>133</sup> See *id.* art. 59.02(h)(1); CARPENTER ET AL., *supra* note 13, at 20.

<sup>134</sup> S. OF TEX., S. COMM. ON CRIMINAL JUSTICE, INTERIM REPORT TO THE 81ST LEGISLATURE, 80th Sess., at 68 (2008).

<sup>135</sup> See *United States v. Ursery*, 518 U.S. 267, 291 (1996).

<sup>136</sup> *Austin v. United States*, 509 U.S. 602, 618 (1993).

<sup>137</sup> See *Leonard v. Texas*, 137 S. Ct. 847, 849–50 (2017) (Thomas, J., respecting the denial of certiorari) (collecting cases); see also *Boyd v. United States*, 116 U.S. 616, 633–34 (1886) (“We are . . . clearly of [the] opinion that proceedings instituted for the purpose of declaring the forfeiture of a man’s property by reason of offen[s]es committed by him, though they may be civil in form, are in their nature criminal.”); *United States v. Brig Burdett*, 34 U.S. (9 Pet.) 682, 690 (1835) (“The object of the prosecution . . . is to enforce a forfeiture of the vessel . . . for a violation of a revenue law. The prosecution then is a highly penal one, and the penalty should not be inflicted, unless the infractions of the law shall be established beyond reasonable doubt.”).

<sup>138</sup> See TEX. CODE CRIM. PROC. ANN. art. 59.01(2)(B) (West 2016).

<sup>139</sup> See *supra* p. 2394.

Third, Chapter 59 is applicable on a finding of scienter. In demonstrating that the property was used in the commission of a crime the prosecutor must prove that the crime occurred, including the criminal intent element.<sup>140</sup> Chapter 59 also includes an affirmative defense for innocent owners, prohibiting forfeiture where the owner is not sufficiently culpable for her property's misuse.<sup>141</sup>

Chapter 59 clearly meets the fourth prong: promoting punishment's retribution and deterrence aims. The Court has repeatedly acknowledged "that forfeiture serves 'punitive and deterrent purposes.'"<sup>142</sup> Texas's own Senate Committee on Criminal Justice has stated that Chapter 59's motivation was to fight crime and deter criminal activity by reducing its profitability.<sup>143</sup> In operation, Chapter 59 forfeitures may deter and retribute crime. They confiscate valuable property that is connected to criminal activity — such as a "sleek motor home" carrying drugs<sup>144</sup> — which can easily be viewed as retribution for the owner's illegal conduct as well as a deterrent from committing future violations.

On factor five, Chapter 59 applies to already-criminalized behavior.<sup>145</sup> Criminal activity is a predicate to in rem forfeiture. Though one may seek to distinguish between holding owners accountable for their property's misuse and the criminal violation,<sup>146</sup> such accountability is inextricably tied to the underlying criminalized conduct.

Sixth, the statute does have a rationally connected nonpenal purpose, making this one of few factors favoring a nonpunitive finding. Chapter 59 intends to "protect the community" and generate law enforcement revenue.<sup>147</sup> The latter aim is diluted, however, by the inappropriateness of forcing certain property owners to bear the expense of funding law enforcement through civil forfeiture rather than through legislative taxes or funding increases.<sup>148</sup> The Court has also recognized that civil forfeiture prevents people from profiting from unlawful conduct, "encourages property owners to take care in managing their property[,] and

---

<sup>140</sup> See TEX. CODE CRIM. PROC. ANN. art. 59.01(2)(A); *id.* art. 59.05(b). The actor with criminal intent need not be the property owner.

<sup>141</sup> See *id.* art. 59.02(h)(1), 59.05(c).

<sup>142</sup> *Austin v. United States*, 509 U.S. 602, 618 (1993) (quoting *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 686 (1974)).

<sup>143</sup> S. OF TEX., S. COMM. ON CRIMINAL JUSTICE, INTERIM REPORT TO THE 81ST LEGISLATURE, 80th Sess., at 65 (2008).

<sup>144</sup> See Stillman, *supra* note 1.

<sup>145</sup> See TEX. CODE CRIM. PROC. ANN. art. 59.01(2)(A); Reed, *supra* note 126, at 281; *cf.* Schecter, *supra* note 130, at 1162.

<sup>146</sup> See *supra* note 101 (discussing *United States v. Ursery*, 518 U.S. 267, 294–95 (1996) (Kennedy, J., concurring)).

<sup>147</sup> S. OF TEX., S. COMM. ON CRIMINAL JUSTICE, INTERIM REPORT, at 65.

<sup>148</sup> The Texas Senate Committee on Criminal Justice has also expressed concern that this financial motivation has created a law enforcement dependency on Chapter 59 proceeds, leading to "skew[ed] enforcement priorities," *id.* at 69, and inappropriate spending, *id.* at 66–69.

ensures that they will not permit that property to be used for illegal purposes.”<sup>149</sup> While the Court characterizes these aims as nonpunitive, they could just as easily be cast as serving criminal deterrence.<sup>150</sup>

Finally, the Court analyzes whether the statute is excessive in relation to its nonpunitive purpose.<sup>151</sup> Chapter 59’s heavily punitive nature far outweighs the alternative purposes discussed in prong six. It was specifically developed as a tool in the war on crime rather than to further restitutive aims.<sup>152</sup> A system that deprives individuals of property for criminal activity without criminal procedural protections is an unduly severe mechanism by which to protect the community. Such protection is not advanced by provisions enabling forfeiture of otherwise noncriminalized property, like homes and cars, that do not create a risk to the community. In fact, Texas’s civil forfeiture practices actually threaten community safety by undermining “the integrity and trust in the criminal justice system.”<sup>153</sup> The penal nature of the statute similarly outweighs the state’s interest in moneymaking. Wielding the force of criminal law is a disproportionate response to budgetary deficits. Moreover, an innocent owner defense that is narrowly applicable and places the burden on the defendant to pursue judicial recourse and prove her innocence is in tension with the statute’s nonpenal goals. The defense permits forfeitures where the owner was not negligent or criminally culpable, which does nothing to deter property misuse or protect the community. This may have been the case for Lisa Leonard, who testified that the money seized from her son was from her recent home sale, but was unable to establish an innocent owner defense to forfeiture.<sup>154</sup> In short, Texas is capable of protecting its communities and addressing crime without excessively burdening its citizens by bypassing the criminal justice system’s protections.

#### *D. The Consequences of a Punitive Finding*

If the Court were to determine that modern forfeiture practices are punitive, current forfeitures would be unconstitutional to the extent that the proceedings fail to provide the requisite constitutional protections.<sup>155</sup> The effect of applying additional procedural protections to civil forfeitures could be significant. The Excessive Fines Clause’s application

---

<sup>149</sup> *Ursery*, 518 U.S. at 290–91.

<sup>150</sup> *But cf.* *Bennis v. Michigan*, 516 U.S. 442, 452 (1996) (“[F]orfeiture also serves a deterrent purpose distinct from any punitive purpose.”).

<sup>151</sup> *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 169 (1963).

<sup>152</sup> S. OF TEX., S. COMM. ON CRIMINAL JUSTICE, INTERIM REPORT, at 65.

<sup>153</sup> *Id.* at 69.

<sup>154</sup> *See* *Leonard v. Texas*, 137 S. Ct. 847, 847 (2017) (Thomas, J., respecting the denial of certiorari).

<sup>155</sup> *See supra* text accompanying notes 98–102.

may impose a ceiling on forfeiture amounts in some cases,<sup>156</sup> reducing law enforcement incentives to base seizure decisions on assets' value and liquidity. A punitive determination would also extend the Double Jeopardy Clause's protection to in rem proceedings,<sup>157</sup> encouraging more property owners to challenge forfeitures by eliminating concerns that coming forward could lead to their prosecution for the underlying criminal conduct.

More fundamentally, the added constitutional protections may reduce in rem forfeiture's appeal vis-à-vis in personam actions. Faced with additional procedural obstacles, prosecutors may hesitate to pursue civil over criminal forfeitures, helping to limit civil forfeitures to cases that are truly nonpunitive. However, constitutional protections that apply only to criminal prosecutions<sup>158</sup> would remain inapplicable to civil forfeitures, failing to entirely eliminate the scheme's temptations.<sup>159</sup>

### III. THE INEQUITIES OF EQUITABLE SHARING

While the aforementioned issues are alarming, they are not lost on legislatures. Many states have revised their statutes to reduce civil forfeiture's maleffects.<sup>160</sup> Unfortunately, equitable sharing undermines these efforts.

#### A. *Equitable Sharing as a Punitive Criminal Law Enforcement Tool*

Equitable sharing's criminal law enforcement purposes have been obvious since inception. It was established to help fight the war on drugs under the Comprehensive Crime Control Act of 1984.<sup>161</sup> According to the federal government, "[t]he most important objective of the [forfeiture p]rogram is law enforcement," which "[e]quitable sharing further enhances."<sup>162</sup> Equitable sharing is vital to "deter[ring] crime [and] provid[ing] . . . resources to state and local law enforcement."<sup>163</sup>

<sup>156</sup> The Excessive Fines Clause is currently applicable to federal civil forfeitures under CAFRA. See 18 U.S.C. § 983(g) (2012).

<sup>157</sup> See *United States v. Ursery*, 518 U.S. 267, 288, 292 (1996).

<sup>158</sup> See *supra* text accompanying notes 93–97.

<sup>159</sup> Though beyond the scope of this Note, it is worth questioning whether it is logical to reserve some constitutional protections solely for criminal prosecutions. While owners subject to punitive civil forfeitures are not facing criminal charges, the forfeiture may subject them to a criminal-like investigation and a harsh penalty in the confiscation of valuable property. In such circumstances, the full panoply of criminal law procedures may seem an appropriate safeguard.

<sup>160</sup> See *CARPENTER ET AL.*, *supra* note 13, at 16–17, 33.

<sup>161</sup> See Shawn Kantor et al., *Civil Asset Forfeiture, Crime, and Police Incentives: Evidence from the Comprehensive Crime Control Act of 1984*, at 2–3 (Nat'l Bureau of Econ. Research, Working Paper No. 23873, 2017).

<sup>162</sup> ASSET FORFEITURE AND MONEY LAUNDERING SECTION, U.S. DEP'T OF JUSTICE, *GUIDE TO EQUITABLE SHARING FOR STATE AND LOCAL LAW ENFORCEMENT AGENCIES 1* (2009) [hereinafter *GUIDE TO EQUITABLE SHARING*].

<sup>163</sup> Richard Weber, *Foreword* to *GUIDE TO EQUITABLE SHARING*, *supra* note 162.

It is therefore unsurprising that equitable sharing facilitates punitive civil forfeitures. To the extent that any civil forfeiture pursued via equitable sharing is independently punitive, section II.C's analysis governs. Equitable sharing requirements also include minimum property value thresholds for adoption.<sup>164</sup> These thresholds are not typically tethered to the underlying crime or its costs,<sup>165</sup> demonstrating how equitable sharing forfeitures are generally removed from remedial purposes.

Moreover, the federal government uses equitable sharing to bolster its own criminal law enforcement agenda. The program creates a channel for the federal government to impose its criminal law on localities while expending fewer resources on prosecutions. For example, after an Anaheim, California police officer bought marijuana from a medical dispensary, state prosecutors refused to take forfeiture action against the property.<sup>166</sup> Under separate California statutes, medical marijuana is legal and civil forfeiture of real property for a controlled substance offense is barred.<sup>167</sup> Despite this, local Anaheim authorities teamed up with the Drug Enforcement Administration to pursue civil forfeiture of the office building from its lessor, since marijuana remains federally criminalized and federal law allows forfeiture of real property.<sup>168</sup> By turning local officials into "bounty hunters,"<sup>169</sup> the federal government may use equitable sharing to give teeth to any number of controversial policies subject to federal criminal enforcement.

### *B. Equitable Sharing Violates Longstanding Federalism Principles*

The Framers designed a government of dual sovereignty with "two political capacities, one state and one federal, each protected from incursion by the other."<sup>170</sup> This system hinges on states retaining an inalienable sovereignty,<sup>171</sup> empowering federal and state governments to "exercise independent and concurrent authority in their respective spheres."<sup>172</sup> While the federal government has the power to regulate

<sup>164</sup> GUIDE TO EQUITABLE SHARING, *supra* note 162, at 7.

<sup>165</sup> *See id.*

<sup>166</sup> Nick Sibilla, *The Shame of "Equitable Sharing,"* SLATE (Apr. 2, 2014, 1:03 PM), <https://slate.me/1jonYnX> [<https://perma.cc/46CX-DDSG>].

<sup>167</sup> *Id.*; *see also* CAL. HEALTH & SAFETY CODE §§ 11362.5, 11470 (West 2007).

<sup>168</sup> Sibilla, *supra* note 166. Eventually the federal government dropped the suit. *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Printz v. United States*, 521 U.S. 898, 920 (1997) (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring)). *See also* *New York v. United States*, 505 U.S. 144, 162 (1992) ("[T]he preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the . . . maintenance of the National government." (quoting *Texas v. White*, 74 U.S. (7 Wall.) 700, 725 (1869))).

<sup>171</sup> *Printz*, 521 U.S. at 919–21.

<sup>172</sup> Michael J. Duffy, Note, *A Drug War Funded with Drug Money: The Federal Civil Forfeiture Statute and Federalism*, 34 SUFFOLK U. L. REV. 511, 513 (2001).

citizens via legislation or *encourage* state cooperation with grant funding, it is unable to *compel* states to adopt or enforce federal provisions.<sup>173</sup> This limitation “reduce[s] the risk of tyranny and abuse”<sup>174</sup> and ensures state governments remain democratically accountable to their citizens.<sup>175</sup> As the Court explained:

If a State’s citizens view federal policy as sufficiently contrary to local interests, they may elect to decline a federal grant. If state residents would prefer their government to devote its attention and resources to problems other than those [federally prioritized,] . . . they may choose to have the Federal Government rather than the State bear the expense of a federally mandated regulatory program . . . .<sup>176</sup>

However, where the federal government coerces state participation, state and federal accountability wane. Federal actors are insulated from critique, while state officials “bear the brunt of public disapproval” despite being unable to “regulate in accordance with the views of the local electorate.”<sup>177</sup>

Equitable sharing undermines these federalism principles. Though an imperfect fit with current Tenth Amendment coercive funding jurisprudence,<sup>178</sup> equitable sharing nonetheless threatens state sovereignty by coopting local authorities into pursuing federal civil forfeitures through irrefusable funding offers. Many local agencies are functionally unable to decline the hundreds of millions of dollars that come with equitable sharing when faced with significant budget cuts.<sup>179</sup> Multiple studies show that as state laws make forfeiture tougher, equitable sharing participation increases; stricter state forfeiture laws reduce profits for law enforcement agencies, forcing them to seek alternative funding to supplant the deficit.<sup>180</sup> And that deficit may be significant. Police budgets can depend on civil forfeiture revenues and “[m]any officers contend that their departments would collapse if [civil forfeiture] were too heavily regulated.”<sup>181</sup> One national study found that more than 60%

<sup>173</sup> See *New York*, 505 U.S. at 166, 168.

<sup>174</sup> *Id.* at 181 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)).

<sup>175</sup> See *Printz*, 521 U.S. at 920.

<sup>176</sup> *New York*, 505 U.S. at 168.

<sup>177</sup> *Id.* at 169.

<sup>178</sup> Existing doctrine has confined findings of coercion to situations where the federal government threatens to *revoke* significant funding grants to engender compliance. See *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 581 (2012); *South Dakota v. Dole*, 483 U.S. 203, 211 (1987).

<sup>179</sup> See CARPENTER ET AL., *supra* note 13, at 25, 29.

<sup>180</sup> See *id.* at 26 (citing Jefferson E. Holcomb et al., *Civil Asset Forfeiture, Equitable Sharing, and Policing for Profit in the United States*, 39 J. CRIM. JUST. 273 (2011); and John L. Worrall & Tomislav V. Kovandzic, *Is Policing for Profit? Answers from Asset Forfeiture*, 7 CRIMINOLOGY & PUB. POL’Y 219 (2008)).

<sup>181</sup> Stillman, *supra* note 1. One may argue that this dependency is undermined by the fact that local law enforcement agencies continued operating after equitable sharing was scaled back in 2015. But the 2015 order failed to meaningfully hamper equitable sharing. It eliminated federal adoption, but made exceptions. See U.S. DEP’T OF JUSTICE, *supra* note 67, at 1. It did not ban seizures

of the 1400 municipal and county agencies surveyed “relied on forfeiture profits as a necessary part of their budget.”<sup>182</sup> Shrinking police budgets have also forced localities to turn to equitable sharing. Payments to some small cities “increased dramatically following cuts to police budgets.”<sup>183</sup> Equitable sharing revenues comprise 20% or more of hundreds of state and local agencies’ annual budgets,<sup>184</sup> providing “great value to law enforcement . . . worth hundreds of millions [of dollars].”<sup>185</sup>

This coercion not only deprives local officials of meaningful choice, but also handicaps states in reacting to citizen demands to limit forfeiture. Where federal coercion occurs, “elected state officials cannot regulate in accordance with the views of the local electorate.”<sup>186</sup> While a few states have worked around the federal government’s usurpation of local actors by entirely banning equitable sharing participation,<sup>187</sup> this alone does not cure the federalism problem. For example, some states and citizens may recognize their economic dependency on forfeiture proceeds and thus favor the practice when accompanied by restrictions on forfeited funds’ disposition to prevent biasing law enforcement priorities. However, “state legislative restrictions placed on assets in federal forfeiture would likely be preempted as a result of direct conflict with the language of the [federal] act.”<sup>188</sup> The DOJ makes this explicit: state and local law cannot direct equitable sharing expenditures.<sup>189</sup> Therefore, states remain disempowered from responding to citizen preferences about local participation in equitable sharing to the extent that they demand something other than complete divestment. And states that are financially unable to divest “ha[ve] no choice but to participate in the federal forfeiture regime” without the autonomy to direct the parameters of their law enforcement’s participation.<sup>190</sup>

---

pursuant to joint task forces or investigations, *id.* at 2, which provide the bulk of equitable sharing payouts. See CARPENTER ET AL., *supra* note 13, at 6.

<sup>182</sup> S. POVERTY LAW CTR., FORFEITING YOUR RIGHTS 6 (2018) (citing John L. Worrall, *Addicted to the Drug War: The Role of Civil Asset Forfeiture as a Budgetary Necessity in Contemporary Law Enforcement*, 29 J. CRIM. JUST. 171 (2001)); see also S. OF TEX., S. COMM. ON CRIMINAL JUSTICE, INTERIM REPORT TO THE 81ST LEGISLATURE, 80th Sess., at 66–67 (2008) (reporting that civil forfeiture funds are necessary “to cover expenses and provide needed services to [some Texas] communities”).

<sup>183</sup> CARPENTER ET AL., *supra* note 13, at 29.

<sup>184</sup> *Id.* at 28.

<sup>185</sup> *The Need to Reform Asset Forfeiture: Hearings Before the S. Comm. on the Judiciary*, 114th Cong. 3 (2015) (statement of Chuck Canterbury, National President, Fraternal Order of Police).

<sup>186</sup> *New York v. United States*, 505 U.S. 144, 169 (1992).

<sup>187</sup> See CARPENTER ET AL., *supra* note 13, at 30; Carimah Townes, *How to End Civil Forfeiture*, SLATE (July 27, 2017, 4:55 PM), <https://slate.me/2uCBxY6> [<https://perma.cc/SU58-3PYP>].

<sup>188</sup> Duffy, *supra* note 172, at 537.

<sup>189</sup> U.S. DEP’T OF JUSTICE, *Department of Justice Equitable Sharing Program 1* (2014), <https://www.justice.gov/sites/default/files/criminal-afmls/legacy/2014/07/31/Use-of-Shared-Funds-Policy-2014.pdf> [<https://perma.cc/8A7U-3WDX>].

<sup>190</sup> Duffy, *supra* note 172, at 537.

Equitable sharing distorts the relationship between states and their localities, inserting federal priorities into a traditionally state realm. As the Founders feared, the absence of checks on the federal government's power has allowed it to respond to the "crisis of the day"<sup>191</sup> — the war on crime — with an "expedient solution"<sup>192</sup>: an abusive forfeiture system. The federalism issues at play have animated decisions to strike down federal policies with far better intentions, including requiring local officials to assist with background checks on gun purchasers<sup>193</sup> and compelling states to conform with a plan for safe radioactive waste disposal.<sup>194</sup> If the Court were persuaded to find a constitutional hook for these federalism violations, it could strike a major blow to federal attempts to strengthen in rem forfeiture by empowering sustainable state-level reforms.

#### IV. CONCLUSION

Civil forfeiture has metastasized to serve ends far beyond its reach. Its crime-fighting role has continued to escalate, turning civil forfeiture into an essential law enforcement tool. It allows prosecutors to seek retribution against alleged offenders by confiscating valuable property while skirting more demanding criminal procedures. This is not to say that there is no place for civil forfeiture in modern society. A nonpunitive forfeiture regime can enhance civil law's goal of protecting private rights by remedying unjust enrichment and providing restitution to victims, particularly when the offender is unavailable for prosecution. Such a scheme would rightfully restore both the offender and victim to their positions prior to the wrongful act. While discouraging owners from neglecting their property may be a worthy aim, forfeiting property for this purpose is punitive;<sup>195</sup> it leaves owners in a *worse* position by confiscating their rightly owned property to deter and avenge undesirable behavior for which they have not been convicted. These cases are thus more appropriately addressed via criminal forfeiture. This system would be most effective when coupled with statutory restrictions on equitable sharing and government spending of forfeiture proceeds. As a result, states would be free to craft their own forfeiture programs, while property owners would benefit from essential procedural protections and prosecutorial discretion that considers culpability and evidentiary strength rather than the profits at play.

---

<sup>191</sup> *New York*, 505 U.S. at 187.

<sup>192</sup> *Id.*

<sup>193</sup> See *Printz v. United States*, 521 U.S. 898, 902–03, 935 (1997).

<sup>194</sup> See *New York*, 505 U.S. at 176.

<sup>195</sup> See *supra* text accompanying notes 106–108.

Given civil forfeiture's economic benefits to law enforcement, the key to effective reform lies with legislatures and the judiciary. And it does not appear that all hope is lost. There have been bipartisan congressional proposals to limit civil forfeiture.<sup>196</sup> The Supreme Court has also wavered from its pro-forfeiture approach, with Justice Thomas speaking out against the practice<sup>197</sup> and a few recent opinions laying the potential foundation for future civil forfeiture challenges.<sup>198</sup> On the state level, legislative reforms continue to emerge,<sup>199</sup> and judiciaries have found cause to further constrain civil forfeitures.<sup>200</sup> Nevertheless, until systemic in rem forfeiture reform occurs, law enforcement will continue to find ways to profit from the forfeiture of citizens' constitutional rights.

---

<sup>196</sup> See Andrea Noble, *House Passes Federal Asset Forfeiture Reform Bill*, WASH. TIMES (Sept. 18, 2017), <https://www.washingtontimes.com/news/2017/sep/18/house-passes-federal-asset-forfeiture-reform-bill/> [<https://perma.cc/43JV-4PD9>].

<sup>197</sup> See *Leonard v. Texas*, 137 S. Ct. 847 (2017) (Thomas, J., respecting the denial of certiorari).

<sup>198</sup> See, e.g., *Kokesh v. SEC*, 137 S. Ct. 1635 (2017) (finding an SEC disgorgement punitive, *id.* at 1642); *Honeycutt v. United States*, 137 S. Ct. 1626 (2017) (limiting the ability to hold a coconspirator jointly and severally liable in forfeiture proceedings, *id.* at 1630); *Nelson v. Colorado*, 137 S. Ct. 1249 (2017) (invalidating a state scheme that required exonerated defendants to separately prove their innocence in a civil proceeding to recover court costs, *id.* at 1252).

<sup>199</sup> See, e.g., CARPENTER ET AL., *supra* note 13, at 3. For example, forfeiture reform bills have emerged in the Texas legislature. See Stephen Young, *Despite Trump's Threat, Texas Legislators from Both Parties Back End to Civil Forfeiture*, DALL. OBSERVER, (Feb. 16, 2017, 4:00 AM), <http://www.dallasobserver.com/news/despite-trump-s-threat-texas-legislators-from-both-parties-back-end-to-civil-forfeiture-9189730> [<https://perma.cc/NYB3-G8C9>].

<sup>200</sup> See, e.g., *Commonwealth v. 1997 Chevrolet and Contents Seized from Young*, 160 A.3d 153, 159, 198 (Pa. 2017) (expanding Eighth Amendment protections and easing the innocent owner defense burden).