COMMENT

PROPOSING A TRANSACTIONAL APPROACH TO CIVIL FORFEITURE REFORM

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INTRODUCTION

Civil forfeiture is a truly extraordinary legal doctrine—so much so that those who find themselves subject to a forfeiture proceeding frequently express disbelief that such an action could exist in the United States.[1] The Kafkaesque civil forfeiture system is ancient, labyrinthine, and impermeable to the uninitiated. Despite its esoteric nature, federal, state, and local

[1] *See infra* note 290 and accompanying text.

authorities commonly utilize this legal doctrine. While the practice once had reputable roots, it has become a tool with enormous potential for abuse. This Comment explores the doctrine of civil forfeiture at a macro level before suggesting some specific recommendations for reform.

I begin by briefly examining the history of civil forfeiture. Forfeiture has its origins in biblical text and was present in English law as early as the tenth century. Rapidly appearing via statute in the United States, it was used as a tool against smugglers, confederate sympathizers, and liquor runners during Prohibition. The practice grew increasingly common in the 1980s, as legislatures realized forfeiture could prove a potent weapon in the war on drugs. As such, forfeiture use has since expanded dramatically; today, the value of property forfeited annually stands in the billions of dollars.[2]

The historical underpinnings of civil forfeiture continue to be relevant because they help clarify what forfeiture *is*. Essentially, forfeiture is an action filed directly against property, rather than against an individual. It depends on the central notion that property can be guilty per se. Forfeiture actions, then, proceed against the property itself. The property owner, who is reduced to a third party claimant, lacks many constitutional protections that would otherwise be available in a criminal action.[3]

Nationwide, civil forfeiture laws are a complex, multilayered landscape of federal and state statutes. The federal forfeiture statute—the Civil Asset Forfeiture Reform Act (CAFRA)[4]—stands as the dominant federal paradigm, although it interacts with other federal laws, like customs statutes, that provide for forfeiture. Simultaneously, forty-nine states—all except North Carolina—allow civil forfeiture. Law enforcement officers pursuing a seizure of property have a number of options; for instance, federal "equitable sharing" guidelines allow officers in a state with a more restrictive statute to bypass state guidelines and access more favorable federal forfeiture proceedings.

Critically, many of these statutes—most notably CAFRA—allow law enforcement to keep the proceeds of forfeiture actions. Although the revenue raised by forfeiture has proved vital to reinforcing sagging law enforcement budgets in difficult economic times, such provisions also increase the threat of abuse. The resulting revenue, combined with a lower burden of proof than in criminal prosecutions, incentivizes law enforcement

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[2] *See infra* note 32 and accompanying text (citing several articles that detail the high aggregate value of the property seized).

[3] *See infra* note 140-141 and accompanying text (noting that double jeopardy applies to people but not property).

[4] Pub. L. No. 106-185, 114 Stat. 202 (2000).

to use civil forfeiture as a tool to seize and dispose off individual property for its own ends.

This Comment addresses the problems associated with civil forfeiture in a very specific context: mid value chattel (MVC) and low value chattel (LVC) forfeiture. This should not suggest that forfeiture against real property (RP) or high value chattel (HVC), defined here as chattel with a value greater than $10,000, is not problematic. Rather, MVC and LVC forfeiture pose several unique problems.

The major issue that MVC and LVC seizure creates is that it is simply not economically rational for most individuals to defend an action against such chattel, given the relatively high cost of doing so. Standard attorneys' retainers in forfeiture actions can be upwards of $10,000—an amount that may be several times greater than the value of the chattel itself.[5] Indeed, data reveal that approximately eighty percent of forfeitures are uncontested.[6] Moreover, it is not readily apparent that the seizure of MVC and LVC—often involving small, personal belongings, such as phones or sneakers—is particularly effective at stopping pernicious drug traffickers. Finally, the Constitution, which provides some due process protections for the deprivation of real property via forfeiture, does not afford analogous protection to MVC and LVC.

Many other proposed solutions to the problems of civil forfeiture fall short of providing a framework to protect MVC and LVC. First, law enforcement officers, prosecutors, and their lobbies oppose any limitation on forfeiture. Second, some legal commentators have argued for extending constitutional protections to forfeiture. MVC and LVC, however, pose unique problems for any ex post constitutional protections. The major problem, of course, is that the majority of such actions are uncontested. As such, courts simply do not consider any constitutional protections because it is not economically rational for individuals to litigate a defense in the first place.

Even if the advanced constitutional protections of the Fifth or Eighth Amendments merited consideration, they would fail to provide much help to MVC and LVC claimants. For example, although the Eighth Amendment's excessive fines clause can overturn certain forfeitures, which in the language

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[5] *See infra* note 112 and accompanying text (referencing a forfeiture case involving property of very low monetary value).

[6] *See infra* note 106 and accompanying text (providing uncontested rates for forfeiture cases generally and for drug cases specifically).

of CAFRA are "grossly disproportional,"[7] MVC and LVC are frequently of such little value that this provision does not provide sufficient protection.

The most serious suggestion—and one not disparaged here—is the abolition of the profit motive in forfeiture. This Comment, however, cautions against viewing such an approach as a panacea that would cure all the ills of forfeiture. First, there is evidence that forfeiture can be a tool of racial oppression.[8] Merely abolishing monetary profit from forfeiture might not therefore dissuade officers from engaging in forfeiture to harass minorities.[9] Furthermore, abolishing the profit motive might discourage officers from undertaking the forfeitures that "matter"—i.e., pursuing valuable proceeds or instrumentalities of the drug trade, such as the massive property owned by Pablo Escobar, seized in Florida during the 1980s.[10] Forfeitures of such properties are likely to be complicated and dangerous, and police should be rewarded for pursuing them. Finally, totally stripping the profit system from forfeiture might cripple police budgets, which, particularly in our current economic milieu, rely on forfeiture proceeds.[11]

In light of these issues, I propose a new approach to civil forfeiture reform. I argue that forfeiture should be seen as a transaction—one that transfers rights in property from the claimant to the seizing department. As such, different costs can affect the "market" for forfeiture. Within this framework, I suggest increasing the transaction costs of forfeiture and requiring police departments to internalize the externalities they impose on non-consenting parties (i.e., owners) in these actions. The idea, in essence, is to change the ex ante incentive structure to protect MVC and LVC from entering a system where defense is simply not economically rational. Increasing transaction costs—by requiring heightened procedural formality or by forcing immediate probable cause hearings for plaintiffs—would make police discount the value of any seized property against the costs of its seizure, with the hope that MVC and LVC will simply no longer be worth the effort.

This Comment proceeds in five parts. In part I, I examine the history of forfeiture, beginning in Exodus and continuing through medieval England. I track the development of forfeiture law in the United States, before examining its initial deployment in the war against drugs in the early 1980s. I then discuss the vociferous criticism of forfeiture in the 1990s, which

7 18 U.S.C. § 983(g)(3) (2012).

8 *See infra* notes 233-238 and accompanying text.

9 *See infra* notes 233-238 and accompanying text.

10 *See infra* note 32 and accompanying text.

11 *See infra* notes 239-242 and accompanying text.

eventually led to the passage of CAFRA, the federal forfeiture act in place today.

In Part II, I turn to the statutory framework, examining CAFRA, followed by the particular forfeiture statutes of three states: North Carolina, Alaska, and Florida. Last, I look briefly at the intersection of federal and state law in the context of the doctrine of federal equitable sharing.

After this general discussion of forfeiture, in Part III I narrow my focus to the aforementioned problem of MVC and LVC. I examine in detail the issues facing MVC and LVC, and explain why these two categories of chattel pose unique difficulties for any sort of protective framework. I also detail specific instances of abuse of MVC and LVC forfeiture.

In Part IV, I turn to four proposed solutions for resolving forfeiture abuses (1) retaining the forfeiture status quo without reform, (2) expanding constitutional defenses, (3) stripping the profit motive from forfeiture, and (4) abolishing forfeiture entirely. I detail the advantages and disadvantages of these provisions, both generally and in the specific context of MVC and LVC.

Finally, in Part V, I turn to my proposal: the transactional approach. First, I advance the idea of forfeiture as a transaction, specifically within the Calabresi–Melamed framework of rights transfer. Establishing forfeiture as transactional in nature, I then discuss three economic concepts that should inform forfeiture reform ideas: transaction costs, externalities, and "nudges." I conclude by applying these concepts in the form of six proposed solutions.

I. THE HISTORY OF CIVIL FORFEITURE

Although this Comment largely focuses on the use and abuse of civil forfeiture in the twenty-first century, it is still worthwhile to turn to the ancient—indeed, biblical—roots of the practice. This historical detour proves germane to the discussion, as the unique development of civil forfeiture as legal fiction continues to resonate in modern Supreme Court opinions on the subject.[12]

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[12] *See, e.g.*, Various Items of Personal Prop. v. United States, 282 U.S. 577, 581 (1931) ("It is the property which is proceeded against, and, by resort to a legal fiction, held guilty."); Todd Barnet, *Legal Fiction and Forfeiture: An Historical Analysis of the Civil Asset Forfeiture Reform Act*, 40 DUQ. L. REV. 77, 94 (2001) (discussing the use of civil forfeiture as legal fiction to evade constitutional protections).

A. *The Ancient Roots of the Practice*

The core conceit of civil forfeiture, that *objects* can be "guilty," stems from Exodus: "When an ox gores a man or a woman to death, the ox shall be stoned, and its flesh shall not be eaten; but the owner of the ox shall not be liable."[13]

The concept acquired additional substance in Medieval England, where it evolved into an action called deodand. Deodand—a transformation of an earlier action called noxal surrender, which involved surrendering property to the wronged party, rather than to the state—developed in the tenth century laws of Alfred the Great, and reflected a mixture of biblical ideas and Anglo-Saxon wergild traditions.[14] Deodand required the surrender, directly to the Crown, of an object that had caused the death of a king's subject.[15]

Deodand became a source of revenue for the Crown before its eventual excision from the English common law in the early nineteenth century.[16] This form of forfeiture did not make its way into early U.S. common law. In fact, forfeiture laws, like the infamous "writs of assistance" that British

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13 *Exodus* 21:28; *see also* Alan Nicgorski, *The Continuing Saga of Civil Forfeiture, the "War on Drugs," and the Constitution: Determining the Constitutional Excessiveness of Civil Forfeitures*, 91 NW. U. L. REV. 374, 378 (1996) ("[C]ivil forfeiture's origins can be traced back as far as the Book of Exodus."); Evan Williford, *The Basics of Forfeiture: Testing the Limits of Constitutionality*, 14 CRIM. JUST., Winter 2000, at 26, 27 (noting the biblical origins of forfeiture and quoting the same passage from Exodus).

14 *See generally* Jacob J. Finkelstein, *The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty*, 46 TEMP. L.Q. 169, 181 (1973) ("The Laws of Alfred the Great were prefaced by a translation of chapters 21-22 of the Book of Exodus, and Christian—i.e., biblical—moral notions permeate much of the statement of the laws proper, even if the substance of the rules themselves may be thought to be largely pre-Christian in origin. It may nevertheless be conceded that the rule in Alfred, Ch. 13 . . . is a fair reflection of an early and widespread usage designated as the 'noxal surrender.'" (footnote omitted)); Anna Pervukhin, *Deodands: A Study in the Creation of Common Law Rules*, 47 AM. J. LEGAL HIST. 237, 241 (2005) (discussing the still mysterious transition from the practice of noxal surrender to deodand after the Norman conquest).

15 *See, e.g.*, Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 681 (1974) ("The value of the instrument was forfeited to the King, in the belief that the King would provide the money for Masses to be said for the good of the dead man's soul, or insure that the deodand was put to charitable uses."); OLIVER WENDELL HOLMES, JR., THE COMMON LAW 34 (Law Book Exch., Ltd. 2005) (1881) (tracing the evolution of deodand to the intrinsic desire to retaliate against the inanimate object itself); Scott A. Hauert, Comment, *An Examination of the Nature, Scope, and Extent of Statutory Civil Forfeiture*, 20 U. DAYTON L. REV. 159, 163-64 (1994) (positing that deodand served a "revenue function" for the Crown).

16 *See* Pervukhin, *supra* note 14, at 249 (describing how railroads, under intense pressure from a series of sky-high deodand judgments, eventually lobbied to have the practice abolished in 1849); Hauert, *supra* note 15, at 164-66 (tracking the evolution of deodand as a revenue producer for the Crown to its eventual end in the early nineteenth century).

customs agents enforced, were a major grievance of the Colonies and contributed to sparking the American Revolution.[17] Consequently, the Constitution explicitly bans forfeiture of estate.[18]

B. *Uses Throughout American History*

Although common law forfeiture was not part of the U.S. tradition, statutory forfeiture achieved recognition as legitimate and played a role through the first two centuries of the republic.

Early uses of civil forfeiture in the United States reflected the balance between controversies raised by estate forfeiture and the necessary revenue and enforcement goals of forfeiture actions. Many early forfeiture statutes, derived from the British Navigation Acts passed in the seventeenth century, targeted smugglers.[19] A series of early Supreme Court cases upheld Congress's authority to pass such statutes, distinguishing common law forfeiture from statutory forfeiture.[20] These forfeiture acts were justified as necessary, as it was often easier for customs officials to seize smuggled

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17 *See Calero-Toledo*, 416 U.S. at 682 ("Deodands did not become part of the common-law tradition of this country."); Hauert, *supra* note 15, at 165 ("The repugnancy of deodands resulted in our Founding Fathers rejecting the institution as part of American common law."); *see also* M.H. SMITH, THE WRITS OF ASSISTANCE 251-56 (1979) (describing how the vitriolic response to the writs of assistance led to the passage of the Fourth Amendment).

18 *See* U.S. CONST. art. III, § 3, cl. 2 ("[N]o Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.").

19 *See* Act of July 31, 1789, ch. 5, §§ 12, 36, 1 Stat. 29, 39, 47-48 (allowing the federal government to seize and civilly confiscate property for failure to pay duties on imports), *repealed by* Act of Aug. 4, 1790, ch. 35, § 74, 1 Stat. 145, 178; Penhallow v. Doane's Adm'rs, 3 U.S. 53, 54-56 (1795) (citing Resolution of November 25, 1775, enacted by the Continental Congress, which provided for the forfeiture of vessels and their cargoes used to supply British forces); MARIAN R. WILLIAMS ET AL., INST. FOR JUSTICE, POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE 10 (2010) ("American forfeiture law did not arise strictly from [deodand] but rather from the British Navigation Acts of the mid-17th century."). For an in-depth look at the Navigation Acts, see Donald J. Boudreaux & A.C. Pritchard, *Civil Forfeiture and the War on Drugs: Lessons from Economics and History*, 33 SAN DIEGO L. REV. 79, 95-96 (1996).

20 *The Palmyra*, 25 U.S. 1 (1827), is perhaps the most cited of these cases. There, Justice Story, writing for the majority, explained the justification for statutory (as opposed to common law) civil forfeiture as allowing a proceeding directly against the property since "[t]he thing is here primarily considered as the offender." *Id.* at 14.

property than to apprehend the smugglers themselves.[21] However, these early uses of forfeiture were limited to enforcing admiralty jurisdiction.[22]

These cases laid the legal foundation of forfeiture. However, the doctrine long remained dormant in the American legal landscape, emerging only briefly during the Civil War as the Confiscation Acts, which allowed for the seizure of property belonging to those who aided the rebellion.[23] Similarly, government agents employed forfeiture to seize the profits and possessions of liquor smugglers during Prohibition.[24] Under the National Prohibition Act,[25] conveyances of intoxicating liquors were subject to forfeiture.[26] The Act facilitated the seizure of automobiles belonging to liquor smugglers, as in *United States v. One Ford Coupe Automobile*.[27]

C. *The Drug War and the Expansion of Forfeiture*

The use of forfeiture exploded with the onset of the drug war. The passage of the Comprehensive Drug Control Act (CDCA)[28] in the early 1970s marked the first instance in which the government used civil forfeiture as a tool to combat drug trafficking. *Calero-Toledo*, a seminal forfeiture case from

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21 *See* Susan R. Klein, *Civil In Rem Forfeiture and Double Jeopardy*, 82 IOWA L. REV. 183, 191 (1996) (discussing the early use of civil forfeiture to pursue privateers and smugglers); Sarah Stillman, *Taken*, NEW YORKER, Aug. 12, 2013, at 49, 52 ("It was easier to prosecute a vessel and seize its cargo than to try to prosecute its owner, who might be an ocean away.").

22 *See* WILLIAMS ET AL., *supra* note 19, at 10 ("The Supreme Court held that civil forfeiture was closely tied to the practical necessities of enforcing admiralty, piracy and customs laws."); Klein, *supra* note 21, at 191 ("These forfeiture provisions applied primarily to two categories of items traveling on the high seas.").

23 *E.g.*, An Act to Suppress Insurrection, to Punish Treason and Rebellion, to Seize and Confiscate the Property of Rebels, and for Other Purposes, ch. 195, 12 Stat. 589 (1862); An Act to Confiscate Property for Insurrectionary Purposes, ch. 60, 12 Stat. 319 (1861).

24 *See* WILLIAMS ET AL., *supra* note 19, at 11 (briefly discussing the use of forfeiture against the tools of liquor smuggling); Nicgorski, *supra* note 13, at 381 (describing the brief use of forfeiture during Prohibition); Brent Skorup, *Ensuring Eighth Amendment Protection From Excessive Fines in Civil Asset Forfeiture Cases*, 22 GEO. MASON. U. C.R. L.J. 427, 433 (2012) ("When Prohibition began in the first half of the twentieth century, use of civil forfeiture reemerged and was expanded to combat criminal bootlegging networks.").

25 National Prohibition Act, ch. 85, 41 Stat. 305, 317 (1919) (repealed 1933).

26 *See* Brant C. Hadaway, Comment, *Executive Privateers: A Discussion on Why the Civil Asset Forfeiture Reform Act Will Not Significantly Reform the Practice of Forfeiture*, 55 U. MIAMI L. REV. 81, 91 (2000) (discussing the use of the National Prohibition Act in expanding forfeiture during Prohibition).

27 272 U.S. 321 (1926).

28 Pub. L. No. 91-513, 84 Stat. 1236 (1970) (codified as amended at 18 U.S.C. § 983 (2012)); *see also* Nicgorski, *supra* note 13, at 375-76 (discussing the early use of civil forfeiture in the drug war).

this period, still provides much of the backbone supporting the modern understanding of and justification for the doctrine.[29]

Forfeiture truly came to the fore with the passage of the 1984 Comprehensive Crime Control Act,[30] which permitted law enforcement to use forfeited funds.[31] The resulting revenue gains have been staggering: in 2012 the government seized $4.2 billion in property and has enjoyed other notable achievements, such as the seizure of real estate properties from Latin American drug kingpins.[32]

In spite of the trumpeted successes of civil forfeiture, stories of abuse began to trickle into the national media. Federal officials killed reclusive millionaire Donald Scott when he resisted arrest during a raid on his ranch in search of marijuana plants, which, if found, would have allowed for the seizure of his property.[33] Willie Jones, a Tennessee man, had $9600 in cash—which he had accumulated to purchase shrubbery for his business—confiscated for no reason other than that drug dogs alerted authorities to the presence of trace drug residue on his cash.[34] Mr. Jones's case so alarmed

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[29] Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 686 (1974) ("But whether the reason for [the forfeiture] be artificial or real, it is too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced." (citation and internal quotation marks omitted)).

[30] Pub. L. No. 98-473, 98 Stat. 1837 (1984) (codified at 21 U.S.C. § 853 (2012)).

[31] *See* WILLIAMS ET AL., *supra* note 19, at 12 (describing the new profit incentive in the Comprehensive Crime Control Act); Stillman, *supra* note 21, at 53 (noting that forfeiture remained an "infrequent resort" until the passage of the Comprehensive Crime Control Act). The Act allowed for broad uses of forfeited funds. *See* 28 U.S.C. § 524(c)(1)(F)(i) (2012) (allowing the use of forfeited funds to equip "law enforcement functions of any Government-owned or leased vessel, vehicle, or aircraft available for official use by any Federal agency participating in the Fund").

[32] *See* Stillman, *supra* note 21, at 53 ("Last year, the department took in nearly $4.2 billion in forfeitures, a record. . . . The federal government seized a four-hundred-acre Montana ranch tied to the Colombian drug kingpin Pablo Escobar, and laid claim to the bank accounts of assorted Wall Street con men."); Jean Thompson, *$20 Million in Property Seized*, MIAMI SUN-SENTINEL (Dec. 1, 1987), http://articles.sun-sentinel.com/1987-12-01/news/8702080899_1_kellner-cocaine-property, *archived at* http://perma.cc/NTZ6-8B9B (describing the seizure of over $20 million in properties from the Escobar cocaine cartel, including a "$480,910 bayfront mansion in a Miami Beach neighborhood; a $1.9 million, 45-unit apartment complex on a Biscayne Bay island in Miami; a $442,000, three-bedroom Bal Harbour condominium; and a ranch near Ocala").

[33] *See* Eric Blumenson & Eva S. Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 74-75 (1998) (detailing the raid and shooting of Scott); Stillman, *supra* note 21, at 53 (describing Donald Scott's death).

[34] *See* Jones v. DEA, 819 F. Supp. 698, 706-07 (M.D. Tenn. 1993) (detailing the basic facts of the case and invalidating the forfeiture because almost all U.S. currency contains trace amounts of narcotics); Williford, *supra* note 13, at 27 (describing the arrest of Mr. Jones).

Representative Henry Hyde that he brought Jones to testify before Congress during the passage of CAFRA.[35]

Moreover, three seminal Supreme Court cases from the 1990s showed the limitations of constitutional protections against abuses of civil forfeiture, sparking cries for reform. The first, *Bennis v. Michigan*, turned on the forfeiture of a car in a prostitution sting.[36] Mrs. Bennis claimed that although her husband had been using the car to solicit prostitutes, she—as an innocent owner—should not have to forfeit her interest in the car.[37] Unfortunately, the Court ruled against Mrs. Bennis, holding that there was no innocent owner defense absent statutory intervention.[38]

In *United States v. Ursery*, a man growing marijuana on his property contended that its seizure, conducted after a prosecution against him, violated the Double Jeopardy Clause.[39] The Court disagreed, ruling that a civil in rem forfeiture action is not punitive, and therefore not violative of the Double Jeopardy clause of the Fifth Amendment.[40]

Finally, in *United States v. Bajakajian*, the Court addressed the "excessive fines" issue.[41] Bajakajian secretly attempted to take $357,144 out of the United States in violation of customs reporting requirements.[42] Although the government sought forfeiture of the entire sum, the Court did not permit it, finding the seizure of the entire amount disproportionate to the conduct authorizing its forfeiture.[43]

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35 *Civil Asset Forfeiture Reform Act: Hearing on H.R. 1916 Before the H. Comm. on the Judiciary*, 104th Cong. 12-14 (1996) (statement of Willie Jones) (describing to Congress how the Drug Enforcement Administration seized his cash and expressing his frustration at how easily an "innocent person can get caught up" in forfeiture).

36 516 U.S. 442, 443 (1996).

37 *Id.* at 444 ("Petitioner defended against the abatement of her interest in the car on the ground that, when she entrusted her husband to use the car, she did not know that he would use it to violate Michigan's indecency law.").

38 *Id.* at 454 (Thomas, J., concurring) ("As detailed in the Court's opinion and the cases cited therein, forfeiture 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.").

39 518 U.S. 267, 273 (1995).

40 *Id.* at 270-71 ("[C]ivil forfeitures . . . do not constitute 'punishment' for purposes of the Double Jeopardy Clause.").

41 524 U.S. 321 (1998). For a more thorough discussion of the excessive fines issue, see *infra* notes 160-171 and accompanying text.

42 524 U.S. at 324-25.

43 *Id*. at 339-40 ("Comparing the gravity of respondent's crime with the $357,144 forfeiture the Government seeks, we conclude that such a forfeiture would be grossly disproportional to the gravity of his offense. It is larger than the $5,000 fine imposed by the District Court by many orders of magnitude, and it bears no articulable correlation to any injury suffered by the Government.").

These cases, particularly *Bennis*, and the widely reported abuses of civil forfeiture eventually ratcheted up pressure on Congress to enact major reform. This reform materialized as CAFRA, the dominant paradigm of civil forfeiture today. [44]

II. FORFEITURE LAW TODAY

A. *The National Landscape*

Nowadays, forfeiture remains an intricate system, not merely due to the complexity of CAFRA, but also because of the interlocking nexuses between state and multiple aspects of federal law. Thus, we must briefly explore how federal forfeiture works, how state forfeiture works, and, finally, the intersection between these two sets of laws.

1. Federal Law

Federal forfeiture laws are extremely complicated. As one scholar has suggested, "CAFRA does not replace, but is superimposed upon, the existing procedures in the customs laws, the Supplemental Rules, and the forfeiture statutes themselves."[45]

a. *CAFRA*

CAFRA is the natural starting point for discussing the national forfeiture landscape. CAFRA reformed several of the most troubling aspects of forfeiture, as fleshed out in courts during the 1990s. For instance, CAFRA explicitly provides for an innocent owner defense, responding to concerns *Bennis* invoked.[46] Similarly, § 983(g) implements the ruling in *Bajakajian* and requires proportionality in forfeiture.[47]

Other critical changes relate to the burden of proof. CAFRA increased the level of proof necessary for forfeiture, requiring the government to

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[44] *See* Pub. L. No. 106-185, 114 Stat. 202 (2000) (codified at 18 U.S.C. § 983 (2012)).

[45] 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, 103 (2001).

[46] 18 U.S.C. § 983(d)(1) (2012) ("An innocent owner's interest in property shall not be forfeited under any civil forfeiture statute. The claimant shall have the burden of proving that the claimant is an innocent owner by a preponderance of the evidence.").

[47] *Id*. § 983(g)(4) ("If the court finds that the forfeiture is grossly disproportional to the offense it shall reduce or eliminate the forfeiture as necessary to avoid a violation of the Excessive Fines Clause of the Eighth Amendment of the Constitution.").

prove by a preponderance of the evidence that the property is subject to forfeiture.[48]

Finally, some of the provisions are aimed at reducing litigation hardships to claimants. Section 983(b)(1)(A) allows for indigent claimants—in narrow circumstances—to receive court-appointed counsel.[49] Similarly, § 983(f)(1)(C) provides for the release of property during proceedings to a claimant who can show that government retention of the property will cause "undue hardship" to the claimant.[50]

b. *Customs Rules and Other Federal Laws*

While CAFRA provides the dominant framework for federal forfeiture, it does not stand alone. Rather, it interacts with a complex set of other provisions and statutes that provide for specific forfeiture for various federal offenses. This can prove extremely complicated:

> For example, 19 U.S.C. § 1615 says the burden of proof is on the property owner in any civil forfeiture case brought under a statute incorporating the customs laws. Section 981(d) still incorporates the customs laws and § 1615 has not been amended; but § 983(c) says the burden of proof is on the government in any case brought under any "civil forfeiture statute," as that term is defined in § 983(i). Which statute applies when a civil forfeiture action is filed under § 981? Because § 983(c) is inconsistent with the customs provision on this issue, it overrides § 1615 and the burden of proof is on the government.[51]

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[48] *Id*. § 983(c)(1) ("In a suit or action brought under any civil forfeiture statute for the civil forfeiture of any property, the burden of proof is on the Government to establish, by a preponderance of the evidence, that the property is subject to forfeiture."); *see also* 13 FED. PROC., L. ED. § 35:773 ("Under the Civil Asset Forfeiture Reform Act (CAFRA), in a suit or action brought under any civil forfeiture statute for the civil forfeiture of any property, the burden of proof is on the government to establish, by a preponderance of the evidence, that the property is subject to forfeiture." (citation omitted)).

[49] 18 U.S.C. § 983(b)(1)(A) ("If a person with standing to contest the forfeiture of property in a judicial civil forfeiture proceeding under a civil forfeiture statute is financially unable to obtain representation by counsel, and the person is represented by counsel appointed under section 3006A of this title in connection with a related criminal case, the court may authorize counsel to represent that person with respect to the claim."). Counsel is also available should the claimant be faced with the forfeiture of his or her primary residence. *Id.* § 983(b)(2)(A).

[50] *Id.* § 983(f)(1)(C) ("A claimant under subsection (a) is entitled to immediate release of seized property if the continued possession by the Government pending the final disposition of forfeiture proceedings will cause substantial hardship to the claimant, such as preventing the functioning of a business, preventing an individual from working, or leaving an individual homeless.").

[51] Cassella, *supra* note 45, at 103 (citations omitted).

Outside of the customs context, CAFRA interacts with a host of other obscure federal forfeiture provisions. For instance, CAFRA applies to forfeiture carried out by the Fish and Wildlife Service and the National Oceanographic and Atmospheric Administration.[52] However, § 983(i) carves out specific forfeiture proceedings to which CAFRA does *not* apply including, for example, customs forfeiture generally.[53] Straightforward application of CAFRA is confused here because, despite the general exclusion of customs rules from CAFRA, some statutes enforced by U.S. Customs and Border Protection—for example, currency reporting statutes—are nevertheless subject to its dictates.[54]

2. State Law

In addition to federal law, different states' laws also include unique forfeiture provisions. Some relevant axes of comparison include the standard of proof for seizure, which party bears the burden in the innocent owner defense, the amount of time prosecutors have to file forfeiture actions after seizures, and the amount of value that may be retained by the seizing department. Below, I examine the representative cases of North Carolina, Alaska, and Florida.

a. *North Carolina*

North Carolina has no state civil forfeiture in rem action.[55] Property owners must be convicted of a crime before being forced to forfeit property.[56] North Carolina's lack of a civil forfeiture statute earned it an "A" from the

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[52] *Id.* at 103-04 (detailing forfeiture provisions with which CAFRA interacts).

[53] 18 U.S.C. § 983(i) ("In this section, the term 'civil forfeiture statute' (1) means any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense; and (2) does not include (A) the Tariff Act of 1930 or any other provision of law codified in title 19; (B) the Internal Revenue Code of 1986; (C) the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301 et seq.); (D) the Trading with the Enemy Act (50 U.S.C. App. 1 et seq.) or the International Emergency Economic Powers Act (IEEPA) (50 U.S.C. 1701 et seq.); or (E) section 1 of title VI of the Act of June 15, 1917 (40 Stat. 233; 22 U.S.C. 401)."); *see also* Cassella, *supra* note 45, at 104 (listing civil forfeitures exempted under CAFRA).

[54] Cassella, *supra* note 45, at 104.

[55] N.C. GEN. STAT. ANN. §§ 90–112 (West 2013).

[56] *See* State v. Hill, 570 S.E.2d 768, 769 (N.C. Ct. App. 2002) ("It is important to note that our forfeiture provisions operate *in personam* and that forfeiture normally follows conviction."); State v. Johnson, 478 S.E.2d 16, 25 (N.C. Ct. App. 1996) ("G.S. § 90-112(a)(2) is a criminal, or *in personam,* forfeiture statute, as opposed to a civil or *in rem,* forfeiture statute.").

Institute for Justice (IJ) in its state rankings.[57] However, despite the lack of state forfeiture proceedings, North Carolina police still make use of federal equitable sharing. [58]

b. *Alaska*

Alaska, by contrast, earned one of the IJ's lowest grades, an "F," for its state civil forfeiture statute.[59] Alaska's statute causes several major problems for property owners. First, property can be forfeited for probable cause.[60] Second, the innocent owner bears the burden of proof in that defense.[61] Finally, property owners must move quickly, as the statute affords only thirty days to contest the seizure.[62]

The Alaska statute also creates problematic incentives for law enforcement. First, the statute allows law enforcement to keep a high percentage of profits that result from forfeiture.[63] Moreover, there is no legal requirement to track forfeiture data in the state, meaning that it is almost impossible to collect systematic data on the level of forfeiture occurring in Alaska.[64] As such, knowing that there is no system of public accountability or oversight, police have every incentive to seize as much property as possible.

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57 WILLIAMS ET AL., *supra* note 19, at 80. The IJ embarked on a massive survey of state civil forfeiture practice in 2010. In the study, the IJ ranked the states on both the quality of the state's own civil forfeiture laws and its abuse of equitable sharing. *Id.* at 41-42. The results were troubling: twenty-two states scored a "D" or lower on the IJ test and the highest overall grade received was Maine's "A-." *Id.* at 43-44.

58 The state's extensive use of equitable sharing pulled down its final grade to a "C+". *Id.* at 8. For a discussion of federal equitable sharing, see *infra* subsection II.A.3.

59 *Id.* at 46.

60 ALASKA STAT. § 17.30.114(a) (2013).

61 *Id.* § 17.30.110(4)(A) ("[A] conveyance may not be forfeited under this paragraph if the owner of the conveyance establishes, by a preponderance of the evidence, at a hearing before the court as the trier of fact, that use of the conveyance in violation of this chapter or AS 11.71 was committed by another person and that the owner was neither a consenting party nor privy to the violation."); *see also* State v. Rice, 626 P.2d 104, 113-14 (Alaska 1981) (finding that substantive due process concerns mandate an innocent owner defense).

62 ALASKA STAT. § 17.30.116(b).

63 *Id.* § 17.30.112(c) ("When forfeiting property under (a) of this section, a court may award to a municipal law enforcement agency that participated in the arrest or conviction of the defendant, the seizure of property, or the identification of property for seizure, (1) the property if the property is worth $5,000 or less and is not money or some other thing that is divisible, or (2) up to 75 percent of the property or the value of the property if the property is worth more than $5,000 or is money or some other thing that is divisible.").

64 WILLIAMS ET AL., *supra* note 19, at 46.

c. *Florida*

Finally, Florida, which earned a "D+" in the IJ rankings, is an interesting middle ground between the two extremes of North Carolina and Alaska.[65] Florida law increases protections for property owners in some instances, while simultaneously undercutting rights in others.

Florida raises the burden of proof for the government, allowing forfeiture only upon a showing of "clear and convincing evidence."[66] Moreover, the government bears the burden of proof in an innocent owner defense.[67] Finally, the Florida statute has an explicit policy objective of vindicating property rights.[68]

However, Florida allows only twenty days for the property owner to contest the forfeiture action—fewer than even Alaska.[69] More troubling is the fact that Florida law enforcement retains eighty percent or higher of forfeiture proceeds, creating problematic incentives.[70] The short window for

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[65] *Id.* at 53.

[66] FLA. STAT. § 932.704(8) (2011).

[67] *Id*. § 932.704(6)(a) ("Property may not be forfeited under the Florida Contraband Forfeiture Act unless the seizing agency establishes by a preponderance of the evidence that the owner either knew, or should have known after a reasonable inquiry, that the property was being employed or was likely to be employed in criminal activity."). *But see* Gomez v. Village of Pinecrest, 41 So. 3d 180, 188 (Fla. 2010) (distinguishing "seizure" from "forfeiture" and finding that, at the seizure stage, the seizing agency need only establish "probable cause that the property was used in violation of the Act").

[68] FLA. STAT. § 932.704(1) ("It is the policy of this state that law enforcement agencies shall utilize the provisions of the Florida Contraband Forfeiture Act to deter and prevent the continued use of contraband articles for criminal purposes while protecting the proprietary interests of innocent owners and lienholders and to authorize such law enforcement agencies to use the proceeds collected under the Florida Contraband Forfeiture Act as supplemental funding for authorized purposes. The potential for obtaining revenues from forfeitures must not override fundamental considerations such as public safety, the safety of law enforcement officers, or the investigation and prosecution of criminal activity. It is also the policy of this state that law enforcement agencies ensure that, in all seizures made under the Florida Contraband Forfeiture Act, their officers adhere to federal and state constitutional limitations regarding an individual's right to be free from unreasonable searches and seizures, including, but not limited to, the illegal use of stops based on a pretext, coercive-consent searches, or a search based solely upon an individual's race or ethnicity."). Florida courts take this policy statement quite seriously. *See, e.g.*, Sheriff of Seminole Cnty. v. Oliver, 59 So. 3d 232, 234 (Fla. Dist. Ct. App. 2011) (reading the policy portion of the statute to disallow the forfeiture of checks the sheriff knew were stolen from an innocent owner, even though forfeited checks technically met the definition of "contraband articles").

[69] *Compare* FLA. STAT. § 932.704(5)(c), *with* ALASKA STAT. § 17.30.116(b) (2013).

[70] WILLIAMS ET AL., *supra* note 19, at 53 (discussing Florida's IJ ranking); Jefferson E. Holcomb et al., *Civil Asset Forfeiture, Equitable Sharing, and Policing for Profit in the United States*, 39 J. CRIM. JUST. 273, 277 tbl.1 (2011) (showing the percentage of forfeiture proceeds that may be used by law enforcement in different states).

contesting seizure, combined with high profit retention, incentivizes police to seize as much property as possible, knowing that most of the value will revert to their departments.[71]

3. The Interrelation: Equitable Sharing

Equitable sharing is the final element of the national forfeiture landscape. Equitable sharing gives state officers the ability to access favorable federal forfeiture statutes, thereby bypassing restrictive state statutes.[72]

Under the doctrine of equitable sharing, any state or local law enforcement agency that directly participates in an investigation or prosecution resulting in a federal forfeiture may request an equitable share of the net proceeds of the forfeiture.[73] Two paths lie open to agencies seeking to participate in equitable sharing: joint investigation or adoption.[74]

The joint investigation path is far less controversial. In a joint investigation, local or state (or even foreign) agencies cooperating with or working alongside federal officials can share in a split of the proceeds.[75]

Adoption is much more controversial. Adoption allows a local law enforcement agency that has seized property to turn the property over to federal officials.[76] When the seized property passes the necessary monetary thresholds and also violates federal law—as is often the case with drug laws—federal officials will step in and proceed with the forfeiture under federal law.[77]

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71 For a more thorough discussion of the perverse profit incentive, see *infra* notes 219-244 and accompanying text.

72 *See* Blumenson & Nilsen, *supra* note 33, at 51-56 (agreeing that equitable sharing incentivizes police to bypass more restrictive state statutes); Holcomb et al., *supra* note 70, at 274-75 (describing the motivations to bypass state law via equitable sharing); Kyla Dunn, *Reining in Forfeiture: Common Sense Reform in the War on Drugs*, FRONTLINE, http://www.pbs.org/wgbh/pages/frontline/shows/drugs/special/forfeiture.html, *archived at* http://perma.cc/3QQT-RFUB (last visited Jan. 16, 2015) ("[P]olice are circumventing their own state law in order to continue reaping the financial rewards of civil asset forfeiture.").

73 U.S. DEP'T OF JUSTICE, GUIDE TO EQUITABLE SHARING FOR STATE AND LOCAL LAW ENFORCEMENT AGENCIES 3 (2009) (outlining which nonfederal agencies are eligible for equitable sharing).

74 *Id.* at 6.

75 *Id.*

76 *Id.*; *see also* Blumenson & Nilsen, *supra* note 33, at 51 ("The equitable sharing program includes a 'federal adoption' procedure, whereby state police who turn seized assets over to the Justice Department for 'federal forfeiture' receive back up to 80 percent of the assets' value, to be used exclusively for law enforcement purposes.").

77 U.S. DEP'T OF JUSTICE, *supra* note 73, at 6 (outlining the requirements for federal adoption of a state or local seizure); *see also* Blumenson & Nilsen, *supra* note 33, at 51 n.64 ("Seizures accomplished exclusively by state or local agencies may be 'adopted' by the federal government whenever the conduct giving rise to the seizure is in violation of federal law.").

Adoption is a much more dubious policy than joint investigation because it allows state and local officials to circumvent stricter state requirements regarding forfeiture by substituting more relaxed federal standards.[78] For instance, states with stringent homestead exemptions may find that equitable sharing evades these protections, as a state homestead exemption is not a defense under federal law.[79]

Moreover, adoption *requires* that the recipient agency "benefit directly from the sharing."[80] Thus, agencies thwart state laws prohibiting police from retaining a share of the proceeds from civil forfeiture, as officers may receive funds from federal coffers. Indeed, empirical studies have backed up anecdotal evidence that state officers are likely to resort to equitable sharing to evade stricter state rules, particularly with regard to distribution of profits.[81]

Immediately before this article's publication, outgoing Attorney General Eric Holder took steps to constrain the Equitable Sharing Program.[82]

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[78] *See* Blumenson & Nilsen, *supra* note 33, at 51 n.64; Holcomb et al., *supra* note 70, at 274 ("In effect, adoptive forfeitures allow state and local law enforcement to circumvent their own state laws and utilize federal law for processing forfeitures."); Stillman, *supra* note 21, at 58 (detailing some of the abuses of equitable sharing).

[79] *See* DEE EDGEWORTH, ASSET FORFEITURE: PRACTICE AND PROCEDURE IN STATE AND FEDERAL COURTS 248 (2008) ("A state homestead exemption is not a defense to a federal real property forfeiture case because the federal supremacy clause preempts the state exemption . . . . Therefore, in jurisdictions with state homestead exemptions, law enforcement will use the federal forfeiture system for any real property that may be exempted under state law.").

[80] U.S. DEP'T OF JUSTICE, *supra* note 73, at 22.

[81] Holcomb et al., *supra* note 70 at 282 (demonstrating empirically that law enforcement agencies tend to resort to equitable sharing to receive a more generous portion of the proceeds from forfeiture). Academics have observed that, "when state laws make forfeiture more difficult and less rewarding, agencies are even more apt to turn to the federal government's easier and more generous forfeiture procedures." *Id.* The Holcomb study supports numerous unsystematic pieces of evidence that suggests state officials manipulate equitable sharing programs to their economic advantage. *See, e.g.*, Stillman, *supra* note 21, at 58 ("In Bal Harbour, Florida . . . a small vice squad ran a forfeiture network that brought in nearly fifty million dollars in just three years . . . . [M]uch of it had already been spent: on luxury-car rentals and first-class plane tickets to pursue stings . . . ; on a hundred-thousand-dollar police boat; and on a twenty-one-thousand-dollar drug-prevention beach party."). *But see* U.S. DEP'T OF JUSTICE, *supra* note 73, at 35-37 (providing a list of acceptable uses for equitable sharing funds, including "establish[ing] a detoxification center").

[82] David Post, *Rule of Law 1, Outrageous Police Power 0: Eric Holder Limits Asset-Seizure "Equitable Sharing" Program*, VOLOKH CONSPIRACY (Jan. 17, 2015), http://washingtonpost.com/news/volokh-conspiracy/wp/2015/01/17/rule-of-law-1-outrageous-police-power-0-eric-holder-limits-asset-seizure-equitable-sharing-program, *archived at* http://perma.cc/C3PK-4CK2; *see also* Rober O'Harrow, Jr., Sari Horwitz & Steven Rich, *Holder Limits Seized-Asset Sharing Process That Split Billions with Local, State Police*, WASH. POST (Jan. 16, 2015), http://washingtonpost.com/investigations/holder-ends-seized-asset-sharing-process-that-split-billions-with-local-state-police/

Specifically, Holder dramatically pared back the adoption process discussed above, limiting adoption to "property that directly relates to public safety concerns, including firearms, ammunition, explosives, and property associated with child pornography."[83] While Holder's action is a step in the right direction, critics rightly point out that potential for abuse still exists.[84] For instance, police departments can still form joint task forces with federal officials to seize assets.[85] Hundreds of such task forces already exist around the country.[86] It is also unclear how long-lasting Holder's unilateral action on the process will be. Nevertheless, it is still a step in the right direction towards reforming civil forfeiture.

B. *Arguments for Robust Civil Forfeiture Laws*

This convoluted system of laws has led to dramatic results in practice. Many proponents of civil forfeiture are quick to point out its benefits: crime control, increased drug arrests, and a steady stream of money for otherwise cash-strapped police departments.[87]

A Justice Department memorandum cites several of the concrete benefits of forfeiture. For instance, the practice can be employed to seize electronics used to distribute child pornography or to shut down large marijuana farms.[88] Police can also repurpose the instrumentalities of crime. Dramatically, in Tulsa, Oklahoma, "cops drive a Cadillac Escalade stenciled with the

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2015/01/16/0e7ca058-99d4-11e4-bcfb-059ec7a93ddc_story.html, *archived at* http://perma.cc/6G76-GXR3.

[83] Jacob Sullum, *Despite Holder's Forfeiture Reform, Cops Still Have a License to Steal*, FORBES (Jan. 22, 2015, 4:04 p.m.), http://www.forbes.com/sites/jacobsullum/2015/01/22/despite-holders-forfeiture-reform-cops-still-have-a-license-to-steal, *archived at* http://perma.cc/UT9x-GRKV (quoting Prohibition on Certain Federal Adoptions of Seizures by State and Local Law Enforcement Agencies, Att'y Gen. Order (Jan. 16, 2015), *available at* http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/01/16/attorney_general_order_prohibiting_adoptions.pdf).

[84] *See id.* (noting that the order "did not put an end to civil forfeiture").

[85] *Id.*

[86] *Id.*

[87] *See* John L. Worrall, *Asset Forfeiture*, PROBLEM-ORIENTED GUIDES FOR POLICE RESPONSE GUIDES SERIES, No. 7, at 2 (2008) ("Though it is an enforcement tool, asset forfeiture can assist in the budgeting realm by helping to offset the costs associated with fighting crime.").

[88] *See generally* Stefan D. Cassella, *Overview of Asset Forfeiture Law in the United States*, 17 S. AFR. J. CRIM. JUST. 347, 347, 360-62 (2004) (citing some concrete benefits of civil forfeiture, including "[s]hut[ting] down the 'crack house'"); Worrall, *supra* note 87, at 21-25 (providing some concrete examples of problems solved by forfeiture, including street racing and prostitution).

words 'THIS USED TO BE A DRUG DEALER'S CAR, NOW IT'S OURS!'"[89]

Outside of seizing the direct instrumentalities of crime, civil forfeiture provides other related benefits. For instance, forfeiture strips criminals of their lavish lifestyles, sending the message that "crime doesn't pay."[90] This separates the profit motive from crime. Moreover, forfeiture allows for the seizure of assets that can be used to establish a recovery fund for victims,[91] as demonstrated recently in the aftermath of the Madoff scam.[92]

From a macro perspective, civil forfeiture has resulted in a massive level of asset seizures: the overall federal fund currently stands at $4.2 billion.[93] Other stories of success abound. For example, Deutsche Bank forfeited $403.8 million in late September 2011 as part of a settlement for allowing fraudulent tax shelters.[94] The U.S. Marshal's website provides a listing of all properties currently for sale, including the house once used by the infamous Russian spies captured in 2010.[95]

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89 Stillman, *supra* note 21, at 50.

90 *See* Cassella, *supra* note 88, at 348 ("Taking the criminals' toys away . . . sends a signal to the community that the benefits of a life of crime are illusory and temporary at best."); Worrall, *supra* note 87, at 13 ("[Forfeiture] is intended to reduce criminal activity by denying offenders the profits from their crimes.").

91 *See, e.g.*, 18 U.S.C. § 981(e)(6) (2012) (authorizing forfeiture to be used "as restoration to any victim of the offense giving rise to the forfeiture, including, in the case of a money laundering offense, any offense constituting the underlying specified unlawful activity"); Cassella, *supra* note 88, at 348 ("[R]estoration of property to victims in white-collar cases is the first priority of law enforcement when it comes to disbursing forfeited property."); Richard Weber, *Introduction*, 55 U.S. ATTYS' BULL. 1, 6 (2007) (identifying one of the guiding principles of civil forfeiture as "[r]estor[ing] property to crime victims").

92 *See* Grant McCool, *Ruth Madoff Forfeits Asset Claims, Left with $2.5 million*, REUTERS, June 27, 2009, *available at* http://www.reuters.com/article/2009/06/27/us-madoff-ruth-idUSTRE55Q0BF20090627 (describing the forfeiture of the Madoff's assets); Larry Neumeister, *Peter Madoff, Bernie Madoff's Brother, to Forfeit $143.1 Billion on Fraud Charges*, HUFFINGTON POST (June 27, 2009), http://www.huffingtonpost.com/2012/06/27/peter-madoff-bernie-madoff_n_1632124.html, *archived at* http://perma.cc/Y4AG-QKG8 (reporting that Peter Madoff "agreed to the criminal forfeiture of $143 billion, including all of his real estate and personal property").

93 Stillman, *supra* note 21 at 53. For current information on the fund, see U.S. DEP'T OF JUSTICE, ASSETS FORFEITURE FUND, FY 2013 PERFORMANCE BUDGET (2013), *available at* http://www.justice.gov/jmd/2013justification/pdf/fy13-aff-justification.pdf.

94 *See* TREASURY EXEC. OFFICE FOR ASSET FORFEITURE, TREASURY FORFEITURE FUND, FY 2013 PRESIDENT'S BUDGET SUBMISSION 4 (2013), *available at* http://www.treasury.gov/about/budget-performance/Documents/17%20-%20FY%202013%20TEOAF%20CJ.pdf ("Deutsche Bank AG (Deutsche Bank) forfeited $403.8 million in late September 2011.").

95 *Asset Forfeiture Program—Current Auctions/Sales*, U.S. MARSHALS SERVICE, http://www.usmarshals.gov/assets/sales.htm (last visited Jan. 16, 2015), *archived at* http://perma.cc/GG7E-DGWH.

III. Refining the Issue

As stated in the thesis, the challenge of civil forfeiture is determining how to finely tune the incentives underlying the program. Police should be encouraged to go after big-ticket items while maintaining the personal property of innocent individuals safe from government seizure.

After the more general discussion above, I refine the focus here. Since forfeiture allows for seizure of both real property and chattel, the distinction between the two is a natural and important one to make.[96] In addition to separating chattel from real property, chattel itself ought to be divided into three categories: high-value chattel (HVC) (value higher than $10,000), mid-value chattel (MVC) (value between $2000 and $10,000); and low-value chattel (LVC) (value less than $2000).

Of these, I will focus on MVC and LVC for several reasons. First, CAFRA imposes additional protections for real property. For instance, real property can never be the subject of administrative forfeiture; notice is required.[97] Second, there is also a more resilient innocent owner defense for real property.[98] Finally, there is an additional statute linked to CAFRA, section 985, which provides further safeguards for real property.[99]

I also exclude HVC for two reasons. First, police should be *encouraged* to pursue HVC, as it most strongly meets the justifications for civil forfeiture: stripping away the instrumentalities of crime or removing the fruits of criminal success.[100] More importantly, the intrinsic value of HVC forfeiture means that a legal defense is economically rational.

The economic rationality of defense is central to this Comment. Defense in forfeiture actions is expensive, and counsel is often not provided for indigent defendants.[101] Lawyers' fees only add to this cost, meaning that

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[96] I lump movable currency in with chattel, although there are clearly distinctions between the two. The general focus, however, is less on the difference between property conceptions of chattel and monetary instruments, and more on the *inherent value* of the property at question. Thus, for ease of reference, chattel and currency will be considered together.

[97] *See* 18 U.S.C. § 985(c)(1) (2012) (providing for notice in civil forfeiture proceedings against property). Even before the passage of CAFRA, the Court recognized that forfeitures of real property required notice. *See* United States v. James Daniel Good Real Prop., 510 U.S. 43, 52-60 (1993) (reciting the reasons for requiring notice before forfeiture of real property).

[98] *See* 18 U.S.C. § 983(d)(3)(B)(i) (refusing to apply exceptions to the innocent owner defense if the property in question is the claimant's primary residence); Holcomb et al., *supra* note 70, at 277 tbl.2 (pointing to several states, including Alabama, Kentucky, and Maine, in which the government has the burden in the innocent owner defense *only* for real property).

[99] For instance, 18 U.S.C. § 985(b)(1)(B) provides that real property owners who are subject to forfeiture may not be evicted during the pendency of that action.

[100] *See supra* notes 78-80 and accompanying text.

[101] CAFRA only provides for counsel for indigent defendants in narrowly defined circumstances. 18 U.S.C. § 983(b)(1)(A) ("If a person with standing to contest the forfeiture of property

HVC is oftentimes the only chattel worth defending; for instance, the American Civil Liberties Union (ACLU) estimates that the average cost of forfeiture defense in Georgia exceeds $5000.[102]

Circumstantial evidence indicates that it is often only real property or HVC that merits a defense. Indeed, all of the seminal forfeiture cases involve the defense of real property or HVC. In *Calero-Toledo*, for instance, the property at issue was a yacht;[103] in *Bajakajian* the government sought the forfeiture of over $300,000;[104] and in *United States v. James Daniel Good Real Property,* the property at issue was Mr. Good's home.[105] Since MVC and LVC often do not economically merit a defense, very few forfeiture cases are contested at all; the rate of contested cases pre- and post-CAFRA has only been about twenty percent.[106]

Thus, I seek to construct a system that allows for the maximum protection for mid- and low-value chattel. The focus on MVC and LVC is important, as these items represent the lion's share of forfeitures. For instance, in Georgia, the police seized $2.76 million in forfeitures in 2011; items worth $650 or less comprised more than half of this amount.[107]

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in a judicial civil forfeiture proceeding . . . is financially unable to obtain representation by counsel, and the person is represented by counsel . . . in connection with a related criminal case, the court may authorize counsel to represent that person with respect to the claim."). Even vis-à-vis counsel, CAFRA extends additional protections to real property. *See id.* § 983(b)(2)(A) (ensuring legal defense when a claimant is defending his or her residence).

102 Chloe Cockburn, *Easy Money: Civil Asset Forfeiture Abuse by Police*, ACLU (Feb. 3, 2010, 1:16 PM), https://www.aclu.org/print/blog/criminal-law-reform/easy-money-civil-asset-forfeiture-abuse-police, *archived at* http://perma.cc/N35A-MWEA.

103 Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 664 (1974).

104 United States v. Bajakajian, 524 U.S. 321, 324 (1998).

105 United States v. James Daniel Good Real Prop., 510 U.S. 43, 46 (1993).

106 *See Oversight of Federal Asset Forfeiture: Its Role in Fighting Crime: Hearing Before the Subcomm. on Criminal Justice Oversight of the S. Comm. on the Judiciary*, 106th Cong. 90 (1999) (statement of Roger Pilon, Dir., Cato Ctr. for Constitutional Studies) ("The Justice Department's principal spokesman for forfeiture has claimed that 80 percent of forfeitures are uncontested." (internal quotation marks omitted)); Cassella, *supra* note 88, at 354 n.20 ("Prior to the enactment of the Civil Asset Forfeiture Reform Act of 2000 (CAFRA), the Drug Enforcement Administration (DEA) estimated that 85 percent of forfeitures in drug cases were uncontested. Since CAFRA, which made it easier to contest a forfeiture action, the number of uncontested DEA cases has dropped to 80 percent."); Mike Fishburn, *Gored by the Ox: A Discussion of the Federal and Texas Laws that Empower Civil-Asset Forfeiture*, 26 RUTGERS L. REC. 4, 19 (2002) ("About eighty percent of all civil-forfeiture cases are uncontested.").

107 *See* Stillman, *supra* note 21, at 57 ("In 2011 . . . fifty-eight local, county, and statewide police forces in Georgia brought in $2.76 million in forfeitures; more than half the items taken were worth less than six hundred and fifty dollars."); *see also* Nick Sibilla, *DA's Office in Georgia Used Asset Forfeiture Funds on Booze, Steak, Galas, and to See Ceelo Green*, INST. FOR JUST. (Oct. 11, 2013) [hereinafter Sibilla, *DA's Office in Georgia*], http://ij.org/da-s-office-in-georgia-used-asset-forfeiture-funds-on-booze-steak-galas-and-to-see-ceelo-green, *archived at* http://perma.cc/3Z78-A7KW ("As for

The dispersion of the practice is hard to estimate, as many states simply do not report forfeiture data.[108] However, a survey on Westlaw is revealing. Perusing the first fifty results for a search for "Civil Forfeiture" within a three-month time frame returned forty-eight results that constitute HVC.[109] Representative cases like *United States v. 2,000,000 in U.S. Currency*[110] or *United States v. 2005 Porsche Cayenne*[111] dominate the landscape. Only two results were even in the realm of MVC: *United States v. Approximately $3,199 in U.S. Currency*[112] and *United States v. One 2005 Jeep Cherokee Ltd.*[113]

LVC is not represented at all in this search. We can thus infer that it is simply not worth the time or energy to contest the seizure of LVC. Police, then, can essentially seize LVC without check. Protecting this type of chattel is rendered even more important because police are often incentivized to pursue MVC and LVC forfeiture: "When there's less than $2,000 at stake, law enforcement agencies in the state get to keep 70 percent of what they take. If more than $2,000 is taken, departments can keep half."[114]

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the property being seized in the Peach State, the median value was worth $647. Evidently, forfeiture mainly targets working-class Georgians, not drug kingpins."); Nick Sibilla, *Seize First, Ask Questions Later: Philadelphia Police Take Over $6 Million a Year in Civil Asset Forfeiture*, INST. FOR JUST., http://ij.org/seize-first-ask-questions-later-philadelphia-police-take-over-6-million-a-year-in-civil-asset-forfeiture (last visited Jan. 16, 2015), *archived at* http://perma.cc/T6VU-E4SH ("The average amount of cash taken in a currency forfeiture case was $550, while some cases involved amounts less than $100, belying the myth that forfeiture mainly takes money from drug kingpins.").

108 *See* WILLIAMS ET AL., *supra* note 19, at 27 (explaining that only nineteen states provide "reliably useful information" about forfeiture).

109 Search Results, WESTLAW NEXT, http://next.westlaw.com (search for "civil forfeiture," then select "Cases" in the "View" menu and "Last three months" in the "Date" menu) (last visited Jan. 16, 2015).

110 No. 12-1279-18, 2013 WL 5462320, at *1 (M.D. Fla. Oct. 2, 2013) (concerning the forfeiture of two million dollars in relation to money laundering).

111 No. 12-423, 2013 WL 5755044, at *2 (M.D.N.C. Oct. 23, 2013) (concerning the forfeiture of a Porsche purchased with fraudulent proceeds).

112 No. 07-1587, 2013 WL 486278, *1 (E.D. Cal. Feb. 6, 2013) (concerning the forfeiture of less than $4,000 in jewelry).

113 No. 12-720, 2013 WL 6440508, at *1 (W.D. Wis. Dec. 9, 2013) (concering the forfeiture of a Jeep Cherokee in relation to a drug transaction).

114 Radley Balko, *Under Asset Forfeiture Law, Wisconsin Cops Confiscate Families' Bail Money*, HUFFINGTON POST, http://www.huffingtonpost.com/2012/05/20/asset-forfeiture-wisconsin-bail-confiscated_n_1522328.html (last updated May 21, 2012, 2:53 PM), *archived at* http://perma.cc/FZW2-DWLP. Many commentators have sounded the alarm that the current economic incentive structure essentially renders forfeitures of LVC and MVC immune to accountability. *See, e.g.*, Karis Ann-Yu Chi, Comment, *Follow the Money: Getting to the Root of the Problem with Civil Asset Forfeiture in California*, 90 CALIF. L. REV. 1635, 1642 (2002) ("Some defense attorneys . . . will not accept a case unless the forfeiture value is large. The expense may discourage contests. For example, it would not be economical to spend $10,000 in attorney's fees to contest the forfeiture of a $5,000 car."); Randy Balko, *Tennessee Asset Forfeiture Bill Seeks to Abolish Abusive Police Practice*, HUFFINGTON POST (last updated Mar. 22, 2013, 3:35 PM), http://www.huffingtonpost.com/

The challenge, then, is to design a system that can adequately protect against the abuse of forfeiture as directed against MVC and LVC, while encouraging the lawful pursuit of forfeiture against real property and HVC.

IV. POTENTIAL SOLUTIONS

Forfeiture—hotly debated in the 1990s—is again assuming a place among the pressing legal issues of the day. As such, multiple groups have proposed different solutions for addressing the current national forfeiture landscape. Unfortunately, none of these solutions adequately addresses the general problems of civil forfeiture or the more specific problem of MVC and LVC forfeiture.

A. *Inaction*

Much of the current law enforcement establishment argues vociferously against any changes to civil forfeiture, through both public and political advocacy.[115] The arguments in favor of maintaining the existing forfeiture system can be reduced to two components (1) that forfeiture is an effective mode of crime control and (2) that forfeiture provides benefits to law enforcement that makes them more effectively able to police drug crime.

On the first point, law enforcement and prosecutors argue that civil forfeiture is an essential tool in their arsenal and ought not to be tampered with. Indeed, during the CAFRA hearings, the Director of the Department of Justice's forfeiture program testified that "[a]sset forfeiture can be to modern law enforcement what air power is to modern warfare."[116]

Others have echoed this refrain. The Fourth Circuit, in *United States v. Two Tracts of Real Property with Buildings*, called forfeiture "[o]ne of the most potent weapons in the government's war on drugs."[117] This is the case because, although low-level drug dealers are essentially fungible, the

2013/03/22/tennessee-asset-forfeiture_n_2933246.html, *archived at* http://perma.cc/PK5S-2WWY ("People are also less likely to go to court to demand the return of smaller amounts of cash or property of lesser value—even if they're innocent—because the cost of winning it back often exceeds its value."); J. F., *Fighting Crime Through Superior Steak*, ECONOMIST (Oct. 15, 2013, 2:28 PM), http://www.economist.com/blogs/democracyinamerica/2013/10/asset-forfeiture, *archived at* http://perma.cc/4ZVY-P6VM ("This sounds as though federal investigators are taking poor people's money and stuff so that friends of the Fulton County DA's office can eat crab cakes in champagne sauce and enjoy a fancy Christmas party.").

[115] For a discussion of the difficulty of changing civil forfeiture laws via the political process, see *infra* notes 255-258 and accompanying text.

[116] Blumenson & Nilsen, *supra* note 33, at 55 (citation omitted).

[117] 998 F.2d 204, 213 (1993).

property used to make or distribute drugs is often expensive or difficult to attain; thus, seizing this property can be more effective in stopping drug distribution than seizing any individual dealer.[118] Moreover, forfeiture sends an important message to criminals that "crime doesn't pay," and thus has the potential to act as a deterrent to individuals contemplating criminal activity.[119]

Law enforcement advocates also argue that as forfeiture allows for more effective enforcement against drug criminals, it produces fringe benefits that further control crime. Scholars note that "[p]olice and prosecutors argue that 21 U.S.C. § 881 enables them to carry out ordinary law enforcement business and raise money at the same time—to do well by doing good."[120]

Relatedly, law enforcement groups maintain that forfeiture is critical to maintaining their bottom lines.[121] Without such funds, law enforcement would be bereft of critical equipment and other materials needed to combat illegal drug distribution effectively.[122] Numerous commentators note the reliance of law enforcement on forfeiture to provide their offices with equipment. For instance, FBI Special Agent Victor E. Hartman, in a 2001 bulletin, remarked that "[a]sset forfeiture laws . . . allow law enforcement to use proceeds of certain seizures for equipment and other needs."[123] As Stillman recounts, not only is the cash from sold property leveraged to benefit the department, but police often directly repurpose the vehicles of drug dealers.[124]

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118 *See* Blumenson & Nilsen, *supra* note 33, at 44 ("When criminal prosecution sends a drug dealer to jail, a subordinate will most likely take his place, but seizing the means of production and other capital may shut down the trafficking business for good.").

119 Worrall, *supra* note 87, at 13 (explaining how forfeiture denies criminals the profits from their crimes).

120 Blumenson & Nilsen, *supra* note 33, at 55; *see also* Alison Roberts Solomon, *Drugs and Money: How Successful Is the Seizure and Forfeiture Program at Raising Revenue and Distributing Proceeds?*, 42 EMORY L.J. 1149, 1161 (1993) ("[T]he purposes of § 881 civil forfeiture include . . . denying drug dealers the proceeds of ill gotten gains." (citations and internal quotation marks omitted)). Section 881 was later reformed as CAFRA. *See supra* notes 35-43 (providing a more detailed discussion of CAFRA).

121 *See* Worrall, *supra* note 87, at 14 ("The obvious advantage of asset forfeiture is its potential to boost an agency's bottom line.").

122 Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 629 (1989) ("[T]he Government has a pecuniary interest in forfeiture that goes beyond merely separating a criminal from his ill-gotten gains; that legitimate interest extends to recovering *all* forfeitable assets, for such assets are deposited in a Fund that supports law-enforcement efforts in a variety of important and useful ways.").

123 Victor E. Hartman, *Implementing an Asset Forfeiture Program*, 70 FBI LAW ENFORCEMENT BULL. 1, 2 (2001).

124 Stillman, *supra* note 21, at 50 ("[Forfeiture] enables authorities to confiscate cash or property obtained through illicit means, and, in many states, funnel the proceeds directly into the fight against crime.").

The arguments are crafted pragmatically. In a U.S. Attorneys' Bulletin, Craig Gaumer explained: "Federal civil forfeiture law is a prosecutor's secret weapon, a valuable tool used to guarantee that wrongdoers do not reap the financial benefits of criminal activity or continue to use the tools of their illegal trade."[125] By contrast, many local officials are even blunter, acknowledging that forfeiture is simply essential to maintaining their operating budgets.[126]

Law enforcement is thus intensely critical of restricting forfeiture, which it sees as both directly and indirectly aiding their ability to combat illegal drug distribution. Law enforcement agencies would be loath to see their "most favored weapon" neutered.[127] Accordingly, law enforcement groups such as Community Oriented Policing Services (COPS) point out that the benefits of forfeiture outweigh the negatives and conclude that "it is difficult to fault financially strapped law enforcement agencies for seeking resources to continue their crime-fighting efforts."[128]

Many of these agencies claim that outrage over forfeiture abuse misunderstands the practice.[129] Therefore, many organizations attempt to communicate the benefits of civil forfeiture to their communities through education and outreach programs.[130]

Despite the vehement opposition of law enforcement agencies and some federal officials, the current pernicious use of forfeiture is out of control.[131]

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125 Craig Gaumer, *A Prosecutor's Secret Weapon: Federal Civil Forfeiture Law*, 55 U.S. ATTYS' BULL. 59, 59 (2007).

126 *See* Stillman, *supra* note 21, at 50 (quoting Steve Westbrook, the Executive Director of the Sheriff's Association of Texas, as saying: "We all know the way things are right now—budgets are tight . . . . [Forfeiture is] definitely a valuable asset to law enforcement, for purchasing equipment and getting things you normally wouldn't be able to get to fight crime." (internal quotation marks omitted)).

127 M. Lynette Eaddy, *How Much is Too Much? Civil Forfeitures and the Excessive Fines Clause After* Austin v. United States, 45 FLA. L. REV. 709, 711 (1993) ("In its ongoing war against drugs, civil forfeiture has perhaps been the federal government's most favored weapon.").

128 Worrall, *supra* note 87, at 29.

129 *See id.* at 28 ("The 'Possible Criticisms and Negative Consequences' section . . . may give the impression that forfeiture's negatives outweigh its positives. Nothing could be further from the truth."); *see also* Shaila Dewan, *Police Departments Use Wish List When Deciding Which Assets to Seize*, N.Y. TIMES, Nov. 10, 2014, at A12 ("In defense of the practice, Gary Bergman, a prosecutor with the Prosecuting Attorneys' Council of Georgia, said civil forfeiture had been distorted in news reports.").

130 *See* Weber, *supra* note 91, at 1 (defining one of the goals of the "Strategic Plan" as "[c]ommunicat[ing] the benefits and accomplishments of the [Asset Forfeiture] Program to law enforcement leadership, government leaders, and the American public").

131 *See supra* notes 94-102 and accompanying text (describing the abuse and underreporting of MVC or LVC forfeiture often due to the financial incentives police have to pursue such forfeiture and noting that the property is not valuable enough to merit a defense); *see also infra* notes 149-151 and accompanying text (detailing the use of waivers in forfeiture proceedings to avoid contestation

As such, simply maintaining the status quo or promoting public education of the benefits of forfeiture programs is insufficient to solve any of the problems associated with forfeiture.

B. *Expanding Constitutional Defenses*

Expanding constitutional defenses is a problematic proposition, as the *property* is the defendant in forfeiture actions, with the owner standing as a third party claimant.[132] Hence, the property is relatively unprotected by the Constitution, as "few of the constitutional safeguards imposed on criminal prosecutions apply [in civil actions against property]."[133] In forfeiture proceedings, there is no presumption of innocence,[134] no right to attorney representation,[135] and no hearsay objection.[136]

However, the major difficulty with expanding constitutional defenses is—as noted previously—that most MVC and LVC simply are not economically valuable enough to merit a defense, absent a blanket right to counsel.[137] Although constitutional doctrines *may* apply, any application will in effect never be tested because these cases are simply not litigated.

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in forfeiture cases); *infra* notes 181-183 and accompanying text (explaining how the perverse incentives behind forfeiture result in poor or corrupt policing).

132 *Cf.* United States v. Certain Real Prop. at 317 Nick Fitchard Rd., 579 F.3d 1315, 1317 (11th Cir. 2009) (naming the three claimants in the action); Claudio Riedi, Comment, *To Shift or to Shaft: Attorney Fees for Prevailing Claimants in Civil Forfeiture Suits*, 47 U. MIAMI L. REV. 147, 156 (1992) ("[T]he claimant must prove her case by a preponderance of the evidence to be entitled to the return of her property.").

133 Blumenson & Nilsen, *supra* note 33, at 47-48.

134 *See, e.g.*, Leyh v. Prop. Clerk of City of N.Y. Police Dep't, 774 F. Supp. 742, 746 (E.D.N.Y. 1991) ("As noted above, the 'presumption of innocence' is inapplicable to a non-criminal proceeding such as the civil forfeiture action."); Nkechi Taifa, *Civil Forfeiture vs. Civil Liberties*, 39 N.Y.L. SCH. L. REV. 95, 97 (1994) ("While human defendants enjoy a presumption of innocence . . . inanimate defendants in forfeiture actions are presumed guilty based upon probable cause that they have been used in the commission of a crime.").

135 United States v. $292,888.04 in U.S. Currency, 54 F.3d 564, 569 (9th Cir. 1995) (declining to extend a Sixth Amendment right to counsel in the forfeiture context because the proceeding was not criminal).

136 United States v. Zucker, 161 U.S. 475, 480-82 (1896) (holding that the right to confront adverse witnesses does not apply in forfeiture proceedings).

137 *See supra* note 112 and accompanying text (comparing attorneys' fees with the average property seized in civil forfeiture and noting the troubling difference in value).

1. Double Jeopardy

Under the traditional view, espoused in *Ursery v. United States*, double jeopardy does not apply to civil forfeiture because it is not punishment in the traditional sense.[138]

The Double Jeopardy Clause provides: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb."[139] The clause prohibits subjecting a defendant to successive trials and successive punishments for the same offense.[140] In *Ursery*, however, the Court overruled both the Sixth and Ninth Circuits, which had held that civil forfeiture constituted punishment in the context of double jeopardy.[141]

The distinction between *civil* and *criminal* proceedings was central to the Court's analysis in *Ursery*. By holding that forfeiture was not punishment, the Court signaled that forfeiture lay beyond the purview of the Fifth Amendment.

This distinction between civil forfeiture and criminal punishment reaches its *ne plus ultra* in cases like *United States v. One Assortment of 89 Firearms*, which hold that even acquittal in an underlying criminal case does not preclude an in rem forfeiture action against associated property.[142] The Court will apply the Double Jeopardy Clause only when the statutory provision turns the "civil trial into a criminal one."[143]

The Court's analysis is problematic on several levels. As many point out, this standard will effectively *never* provide double jeopardy protection in civil forfeiture.[144] Troublingly, the Court's rationale explicitly depends on

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[138] 518 U.S. 267, 270-71 (1996) ("These civil forfeitures (and civil forfeitures generally), we hold, do not constitute 'punishment' for purposes of the Double Jeopardy Clause.").

[139] U.S. CONST. amend. V.

[140] U.S. v. Dixon, 509 U.S. 688, 696 (1993) ("This protection applies both to successive punishments and to successive prosecutions for the same criminal offense.").

[141] *Ursery*, 518 U.S. at 274 ("[T]his Court has considered the application of the Double Jeopardy Clause to civil forfeitures, consistently concluding that the Clause does not apply to such actions because they do not impose punishment.").

[142] 465 U.S. 354, 366 (1984) ("We hold that a gun owner's acquittal on criminal charges involving firearms does not preclude a subsequent *in rem* forfeiture proceeding against those firearms.").

[143] Susan R. Klein, *Civil In Rem Forfeiture and Double Jeopardy*, 82 IOWA L. REV. 183, 234 (1996); *see also* 89 Firearms, 465 U.S. at 362 ("Unless the forfeiture sanction was intended as punishment, so that the proceeding is essentially criminal in character, the Double Jeopardy Clause is not applicable.").

[144] Klein, *supra* note 143, at 229, notes that this bar is so high it can almost never be met. Indeed, it is often only met in the context of deportation or juvenile proceedings. *Id.*; *see also, e.g.*, Kennedy v. Mendoza-Martinez, 372 U.S. 144, 165-66 (1963) ("Congress has plainly employed the

the historical justification for forfeiture, which is no longer applicable.[145] The Court has also set up different standards of "punishment" in its forfeiture cases for purposes of comparing Fifth Amendment analysis with Eighth Amendment analysis.[146]

The central problem is the Court's normative focus on the successive punishment, rather than successive prosecution, rationale for double jeopardy.[147] In practice, prosecutors who fail in criminal trials will often bring forfeiture proceedings to get a "second bite at the apple" with a lower standard of proof.[148] These actions are just like sequential criminal proceedings, and commentators urge that they be treated accordingly by extending double jeopardy protection to forfeiture actions.[149]

Although double jeopardy analysis could conceivably provide a framework to protect forfeiture claimants, such a result is unlikely for two reasons. First, the application of double jeopardy to forfeiture proceedings could undermine the "legal fiction" of forfeiture, which the Court has thus far been loath to abandon. Second, many civil forfeiture actions are brought without a parallel criminal action, thus evading any sort of double jeopardy protection altogether.

On the first ground, it is unlikely that the Court would extend double jeopardy protection to forfeiture actions because an admission of the applicability of double jeopardy would directly contravene the central

sanction of deprivation of nationality as a punishment . . . without affording the procedural safeguards guaranteed by the Fifth and Sixth Amendments.").

145 *Ursery*, 518 U.S. at 282 (explaining that the historical rationale behind forfeiture was central to understanding the distinction between civil and criminal penalties). Justice Stevens, in his dissent in the case, noted that a continued reliance on forfeiture's historical in rem roots may be inappropriate. *Id.* at 301 (Stevens, J., dissenting) (calling the historical fiction of treating forfeiture as an in rem proceeding only against property "fanciful").

146 *Compare* United States v. Bajakajian, 524 U.S. 321, 333 (1998) (describing the forfeiture as punitive because the government proceeded directly against Bajakajian in personam rather than against his currency in rem), *with Ursery*, 518 U.S. at 278 ("*In rem* civil forfeiture is a remedial civil sanction, distinct from potentially punitive *in personam* civil penalties such as fines, and does not constitute a punishment under the Double Jeopardy Clause."). However, language in *Bajakajian* indicates that the historical "guilty property" legal fiction continues to undergird the Court's analysis: "Acceptance of the Government's argument would require us to expand the traditional understanding of instrumentality forfeitures. This we decline to do. Instrumentalities historically have been treated as a form of 'guilty property' that can be forfeited in civil *in rem* proceedings." 524 U.S. at 333.

147 Klein, *supra* note 143, at 265 ("These abusive parallel civil in rem forfeiture and criminal proceedings should be barred under the successive prosecution prong of the Double Jeopardy Clause.").

148 *Id.* at 259.

149 *See id.* (suggesting that because prosecutors can punish defendants through civil actions, forfeiture actions should be considered among those actions that the Double Jeopardy Clause was designed to prohibit).

conceit of forfeiture, namely that forfeiture is an action against the *res*, rather than against the offender.[150] Throughout the twentieth and into the twenty-first century, the Court has continually clung to this historic rationale for forfeiture.[151] Because the Court has maintained this artificial distinction as necessary to preserve the edifice of forfeiture in spite of significant pressure for reform,[152] double jeopardy protection is unlikely.

The second ground is more troubling because, in many forfeiture cases, double jeopardy will simply *not apply*. Consider two alternative scenarios: the case of the Adams family[153] and the case of the Caswell family.[154] The owners of the property had not been charged with any wrongdoing in either situation, but authorities seized each family's belongings simply because it was connected to illegal behavior on the premises.[155] Double jeopardy is completely inapplicable in both instances because no action against the property or owners was possible *except* for the forfeiture action.[156] Similarly, in the case of Willie Jones, double jeopardy would not protect Mr. Jones, who was not accused of any criminal wrongdoing, but was nonetheless forced to forfeit his cash.[157]

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150 *See, e.g.*, United States v. One Assortment of 89 Firearms, 465 U.S. 354, 363 (1984) (noting that the forfeiture is filed against the *res*); Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 684 (1974) (describing the roots of forfeiture as an in rem action).

151 *See Calero-Toledo*, 416 U.S. at 686 ("[W]hether the reason for [the forfeiture] be artificial or real, it is too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced." (citation and internal quotation marks omitted)).

152 *See, e.g., supra* notes 120-128 (detailing various theories recommending the extension of double jeopardy protections to forfeiture actions).

153 *See* Stillman, *supra* note 21, at 51-52 (describing the forfeiture of the Adams' home based on a minor drug deal in which the Adams' son was involved on the porch of the family home).

154 *See* Press Release, Inst. for Justice, *IJ Scores Major Federal Court Victory in Massachussets Civil Forfeiture Case* (Jan. 24, 2013), *available at* http://ij.org/massachusetts-civil-forfeiture-release-1-24-2013 (relaying the court victory for the Caswell family, which contested the federal seizure of their hotel for "facilitat[ing]" drug crimes by guests).

155 In the case of the Adams family, Philadelphia officials sought the forfeiture of the family home because their son sold twenty dollars worth of marijuana to a confidential informant. Stillman, *supra* note 21, at 51-52. Similarly, federal officials sought the forfeiture of the Caswell's hotel because Mr. Caswell "facilitated" drug crimes by having guests use drugs in his rooms. None of Mr. Caswell's measures—installing security cameras and bright lights and allowing police free rooms for drug busts—stopped the seizure, although he subsequently prevailed in his federal case. Russ Caswell, *Congress Must Protect Americans from 'Policing for Profit': Motel Owner Lives Through 'Civil Forfeiture' Horror Story*, WASH. TIMES (Feb. 9, 2014), http://www.washingtontimes.com/news/2014/feb/9/caswell-the-covetous-cops-of-motel-caswell/?, *archived at* http://perma.cc/W4HD-W36P.

156 *See* United States v. 434 Main St., 961 F. Supp. 2d. 298, 302-03 (D. Mass. 2013) ("There is no contention in this case that anyone from the Caswell family has been involved in any criminal activity either at the Motel or elsewhere. It is undisputed that they are a law-abiding family. Mr. Caswell testified that he had never been charged with any crime in his life.").

157 *See supra* notes 32-33 and accompanying text.

Thus, even in the unlikely event that double jeopardy were extended to the civil forfeiture context, the doctrine would act perversely to protect those who had been convicted of criminal offenses, rather than innocent owners who had their property seized because of its probable connection to illegal activity.

2. The Due Process Clauses of the Fifth and Fourteenth Amendments

Due process was one of the explicit concerns underlying CAFRA. Representative Henry Hyde, sponsor of CAFRA, openly recognized that "[d]ue process is overdue for some protection."[158] Forfeiture implicates multiple due process issues, three of which are discussed here.

First, forfeiture implicates procedural due process concerns about court access. The Court and CAFRA have both largely addressed this issue. In *James Daniel Good*, the Court held that the Due Process Clause protected owners from having their real property seized by the government without being afforded the right to be heard in court.[159] This decision brought real property forfeiture squarely within the ambit of procedural due process protection.[160] The Court has also drawn links between the right to own property in a community and the right of access to its courts, finding the two implicitly related: "[t]he right of a citizen to defend his property against attack in a court is corollary to the plaintiff's right to sue there."[161] CAFRA has also picked up the torch, requiring notice for seizures of real property.[162]

Unfortunately, although *James Daniel Good* extended procedural due process protection to real property forfeiture,[163] it is unlikely that such protection would ever extend to MVC or LVC. Indeed, the Court in *James*

158 Rep. Henry Hyde, Chairman, House Judiciary Comm., Forfeiture Reform: Now or Never?, Remarks at the Cato Institute (May 3, 1999), *available at* https://www.aclu.org/technology-and-liberty/statement-rep-henry-hyde-forfeiture-reform-now-or-never.

159 United States v. James Daniel Good Real Prop., 510 U.S. 43, 62 (1993) ("[T]he Due Process Clause requires the Government to afford notice and a meaningful opportunity to be heard before seizing real property subject to civil forfeiture.").

160 *See* Mary M. Cheh, *Can Something This Easy, Quick, and Profitable Also be Fair? Runaway Civil Forfeiture Stumbles on the Constitution*, 39 N.Y.L. SCH. L. REV. 1, 7-8 (1994) (describing the *James Daniel Good* ruling as ensuring due process protection in forfeiture cases).

161 Degen v. United States, 517 U.S. 820, 828 (1996); *see also* Fishburn, *supra* note 106, at 13 (describing the *Degen* holding as extending some minimal due process protections to civil forfeiture).

162 *See* 18 U.S.C. § 985(c)(1) (2012) (describing the required process for forfeiture of real property).

163 510 U.S. at 62.

Daniel Good explicitly held that the due process protections afforded to the defendant in that case would not apply to chattel.[164]

The Court's reasoning depended heavily on a test laid out in *Mathews v. Eldridge*.[165] The *Mathews* test determines when "extraordinary circumstances" exist to excuse the requirement of pre-hearing notice.[166] The three *Mathews* factors—(1) the nature of the private interest at stake, (2) the risk of error associated with the procedure used, and (3) the government's interest, including the administrative burden of a more elaborate procedure[167]—weigh heavily against extending procedural due process protection to MVC and LVC.[168]

The third factor proves the most directly problematic for chattel. In *James Daniel Good*, the Court found critical the fact that the real property could not be *removed* from the seizing court's jurisdiction pending the hearing.[169] The Court contrasted *Calero-Toledo*,[170] and insinuated that pre-forfeiture notice for chattel is almost never appropriate, recognizing the importance of immediate seizure to maintaining a court's jurisdiction over movable property.[171]

This statutory framework has been used to provide forfeiture protection for automobiles. In *Krimstock v. Kelly*, the Second Circuit applied the *Mathews* factors to a New York statute that provided for the forfeiture of automobiles.[172] Then-Judge Sotomayor considered the deprivation of the claimant's vehicle, which she noted was significant due to the centrality of a vehicle to an individual's ability to earn a living.[173] She weighed this against the State's interest in keeping potentially forfeitable property safe from

164 *Id.* at 57 (explaining the difference between the seizure of real property and chattel).

165 424 U.S. 319 (1976).

166 *James Daniel Good*, 510 U.S. at 53-54; *see also Mathews*, 424 U.S. at 334 (noting that due process is a flexible concept and depends on the context).

167 *Mathews*, 424 U.S at 335; *see also* Chi, *supra* note 114, at 1644 (explaining the *Mathews* factors and their application to chattel vis-à-vis real property).

168 *See* Chi, *supra* note 114, at 1644 ("[A] mobile object can easily move out of the court's jurisdiction and would do so unless seized immediately, without delays that may result from notice and hearing.").

169 *See* 510 U.S. at 57 ("[R]eal property cannot abscond.").

170 416 U.S. 663 (1974).

171 *James Daniel Good*, 510 U.S. at 57 ("First, immediate seizure was necessary to establish the court's jurisdiction over the property, and second, the yacht might have disappeared had the Government given advance warning of the forfeiture action." (citation omitted)).

172 306 F.3d 40, 60-68 (2d Cir. 2002) (noting that the district court applied the *Mathews* balancing test to determine what procedural safeguards would be appropriate in this case).

173 *Id.* at 61 ("The particular importance of motor vehicles derives from their use as a mode of transportation and, for some, the means to earn a livelihood.").

destruction or sale.[174] Finally, Judge Sotomayor noted that the city's pre-seizure procedures did not adequately protect against the erroneous deprivation of an interest.[175] As such, Judge Sotomayor found that the *Mathews* test required due process protections for automobiles, including swift hearings after their seizure.[176]

Although Judge Sotomayor's opinion provides some hope for expanding procedural due process protection to chattel, it is unlikely this would help protect MVC or LVC for two reasons. First, key to the first component of the *Mathews* test was the fact that vehicles are so central to their owners and are often the lynchpin of their livelihoods.[177] The same cannot be said of MVC or LVC, which often consist of personal property, jewelry, or petty cash, which do not bear as directly on an individual's ability to earn a living. Second, in *Krimstock*, Judge Sotomayor continued to rely on the fact that the vehicles at issue—cars seized pursuant to a DUI arrest—were already in the State's possession and thus immovable, unlike the yacht in *Calero-Toledo*.[178] Again, this offers little help for protecting MVC or LVC, which are usually eminently transportable.

Mobility is a concern because the central notion of forfeiture depends on the *res* actually being before the court.[179] Thus, since any form of chattel—no matter how valuable—can be removed from the seizing court's jurisdiction pending a hearing, courts are unlikely to extend procedural due process protection to MVC or LVC.[180]

Civil forfeiture also invokes a substantive due process issue: impartiality. Indeed, impartiality is essential to justice, and the principle is embedded in the due process guarantee. The Court has found the right abridged whenever a conflict exists that could "offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true."[181]

174 *Id.* at 64.

175 *Id.* at 62-63.

176 *Id.* at 70.

177 *Id.* at 61 ("A car or truck is often central to a person's livelihood or daily activities. An individual must be permitted to challenge the City's continued possession of his or her vehicle.").

178 *Id.* at 65 ("The critical difference between *Calero-Toledo* and the present case is that plaintiffs' vehicles have already been seized and are in the hands of the police. Just as with real property seized by the government in forfeiture proceedings, there is no danger that these vehicles will abscond.").

179 *See* United States v. James Daniel Good, 510 U.S. 43, 57 (1993) ("It is true that seizure of the res has long been considered a prerequisite to the initiation of *in rem* forfeiture proceedings.").

180 *See* Chi, *supra* note 114, at 1644 ("Application of [the *Mathews*] factors has resulted in exceptions in almost all cases involving personal property.").

181 Tumey v. Ohio, 273 U.S. 510, 532 (1927); *see also* Blumenson & Nilsen, *supra* note 33, at 57 ("Impartiality is inseparable from justice.").

The Court, in *Marshall v. Jerrico, Inc.*, created a problematic precedent for those seeking to extend the conflict of interest doctrine into the forfeiture context.[182] In *Jerrico*, the defendant, a restaurant management company, challenged a provision in the Fair Labor Standards Act requiring the return of fines to the enforcing agency to defray the costs of enforcement.[183] The defendant argued that "this provision created an impermissible risk and appearance of bias by encouraging the assistant regional administrator to make unduly numerous and large assessments of civil penalties."[184]

The Court, however, after restating the principle that "[t]he Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases," found for the government.[185] The Court distinguished previous impartiality cases—including, most centrally, *Tumey v. Ohio*[186]—and held that the remuneration provision did not create impermissible bias. The Court distinguished *Tumey* on the basis that, in *Jerrico*, no official's salary depended directly on the level of fines and the fines amounted to less than one percent of the Employment Standards Administration's annual budget.[187]

From *Jerrico*, we can coalesce three concerns that determine impartiality: financial dependence, personal interest, and funding formulas.[188] Importantly, the Court has drawn a sharp distinction between prosecutorial and judicial impartiality.[189]

Despite this distinction, it seems clear that an application of the three *Jerrico* factors to forfeiture could find that forfeiture impinges on impartiality. Although personal interest on the prosecutors' part may be lacking, as discussed *infra*, prosecutors and police have a marked pecuniary interest in

[182] 446 U.S. 238 (1980).

[183] *Id.* at 240-41.

[184] *Id.* at 241.

[185] *Id.* at 242.

[186] 273 U.S. 510 (1927).

[187] *Jerrico*, 446 U.S. at 247 (relying on the fact that the administrator at issue in *Jerrico* did not exercise anything like the judicial discretion seen in *Tumey*). The one percent of funding distinction was also important to the Court's decision: "Nor is there a realistic possibility that the assistant regional administrator's judgment will be distorted by the prospect of institutional gain. . . . [T]he civil penalties collected . . . represent substantially less that 1% of the budget of the ESA." *Id.* at 250.

[188] *Id.* at 247-51; *see also* Blumenson & Nilsen, *supra* note 33, at 61-62 (listing succinctly the three *Jerrico* factors).

[189] *Jerrico*, 466 U.S. at 248 ("The rigid requirements of *Tumey* and *Ward,* designed for officials performing judicial or quasi-judicial functions, are not applicable to those acting in a prosecutorial or plaintiff-like capacity.").

high levels of forfeiture.[190] Moreover, the distinction may be artificial: "the Court's sharp distinction between judicial and prosecutorial standards is controversial and belies the overwhelmingly dispositive role of discretionary prosecutorial decisions in a system where few cases ever go to trial."[191]

But even accepting *arguendo* the *Jerrico* distinction, its application to civil forfeiture is tenuous. The actions of police and prosecutors seeking forfeiture are substantively different than that of the ESA in *Jerrico*. Indeed, unlike the ESA, police agencies use violent and dangerous tactics, which threaten liberty and life in ways not contemplated in *Jerrico*.[192]

Substantive due process protection in the form of impartiality requirements unfortunately does not also hold out much hope for protecting MVC and LVC. As noted, the Court in *Jerrico* repeatedly distinguished between adjudicative officials and prosecutors, noting that prosecutors need not remain "neutral and detached."[193] In an adversarial system, the courts strive to maintain incentives for prosecutors to zealously pursue justice.[194] Although the distorted profit mechanisms of civil forfeiture have led many to be disturbed by conflicts of interest, the Court has yet to step over the formalistic prosecutor–adjudicator divide to examine the real and looming conflict of interest.

Finally, due process is implicated in the disturbing use of waivers in forfeiture. Although this issue is difficult to quantify as substantive or procedural, elements of both underpin this concern.

Essentially, using waivers in forfeiture allows police departments to completely bypass the judicial system. Police departments entice individuals to sign away their rights to property via waiver in exchange for non-prosecution for some related offense. In Florida, Delane Johnson was

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190 *See supra* notes 81, 221-224 and accompanying text (describing the perverse incentives set up under the forfeiture system, which allows police and prosecutors to retain seized funds and property); *see also* Blumenson & /Nilsen, *supra* note 33, at 69 ("One Department of Justice manual governing racketeering prosecutions, for example, suggests that prosecution may be contingent on the presence of forfeitable assets, rather than forfeiture being an incident of prosecution."); Stillman, *supra* note 21, at 61 (detailing how the District Attorney of Tenaha, Texas, named in a class action suit filed by forfeiture targets, attempted to use forfeiture funds for her own defense).

191 Blumenson & Nilsen, *supra* note 33, at 69.

192 It is important to compare the peaceful enforcement of the ESA in *Jerrico* with the sometimes-violent actions carried out to enforce forfeiture. In *Jerrico*, the ESA and defendant Jerrico contested the matter peaceably, resorting to the Court. By contrast, law enforcement officers often carry out forfeiture with great violence. *See supra* note 33 and accompanying text (describing the violent death of Donald Scott at the hands of officials seeking the forfeiture of his ranch).

193 466 U.S. at 248 (citation omitted).

194 *See id.* at 248-49 ("The constitutional interests in accurate finding of facts and application at law, and in preserving a fair and open process for decision are not to the same degree implicated if it is the prosecutor, and not the judge, who is offered an incentive for securing civil penalties.").

required to sign away his property to avoid trial for another criminal charge.[195] Similarly, in Tenaha, Texas, prosecutors and police frequently threatened motorists with aggressive, felony drug charges if motorists would not agree to forfeit their property.[196] The use of these waivers should be invalidated under any theory of due process, since "[t]he use of asset-forfeiture waivers deprives property owners of due process because there are no forfeiture proceedings."[197]

Thus, although due process should unequivocally eliminate some forfeiture programs—like the use of waivers in chattel seizure—it is unlikely to extend much real protection to MVC or LVC.

3. Excessive Fines Clause of the Eighth Amendment

When asset forfeiture is partly punitive, it is subject to an excessive fines analysis.[198] The appropriate inquiry under this Eighth Amendment analysis is whether the forfeiture is "grossly disproportional to the offense."[199] Congress explicitly approved this standard in CAFRA by requiring the claimant to prove that the forfeiture was "grossly disproportional."[200]

Unfortunately, there are two problems with this approach. The first is that lower courts selectively apply it, often distinguishing "proceeds" forfeiture from other types of forfeiture and refusing to undertake an Eighth Amendment analysis.[201] For instance, the Fifth Circuit, in *United*

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[195] *See* Eric Moores, Comment, *Reforming the Civil Asset Forfeiture Reform Act*, 51 ARIZ. L. REV. 777, 795-97 (2009) (describing how Florida police used a "Contraband Forfeiture Agreement" to induce Mr. Johnson to forfeit his property in exchange for not pursuing potential charges against him). The practice was later found unconscionable and public pressure halted the program. *Id.* at 796.

[196] *See* Stillman, *supra* note 21, at 54 (recounting the story of Jennifer Boatright, who was threatened with criminal prosecution and the removal of her children to foster care if she did not sign a waiver forfeiting her property to Tenaha).

[197] Moores, *supra* note 195, at 797. Moores is appropriately alarmed that the practice "invites deceit" since fearful property owners simply sign away their rights rather than contest the forfeiture. *Id.*

[198] Austin v. United States, 509 U.S. 602, 609-10 (1993); *see also* Alexander v. United States, 509 U.S. 544, 558-59 (1993) (finding that forfeiture is no different from a monetary fine and thus subject to Eighth Amendment analysis).

[199] 18 U.S.C. § 983(g)(4) (2012); *see also* United States v. Bajakajian, 524 U.S. 321, 334 (1998) (holding that the appropriate inquiry is whether the forfeiture is "grossly disproportional to the gravity of a defendant's offense").

[200] 18 U.S.C. § 983(g)(3)-(4) (2012).

[201] *See* Amanda Seals Bersinger, Note, *Grossly Disproportional to Whose Offense? Why the (Mis)application of Constitutional Jurisprudence on Proceeds Forfeiture Matters*, 45 GA. L. REV. 841, 861 (2011) ("Circuit courts disagree as to whether the forfeiture of proceeds gained from a criminal enterprise is necessarily punitive.").

States v. Betancourt, held that criminal proceeds forfeiture can *never* be considered punitive.[202] Courts consequently bifurcate the inquiry, asking both whether the forfeiture is punitive and whether it is disproportionate.[203] Problematically, many lower courts often "answer the first question with the second," confusing the question altogether.[204]

Establishing how "disproportionate" the forfeiture must be empirically increases the difficulty of the determination. Some courts have held that proportionality should be judged according to the gravity of the individual's offense. For instance, in *United States v. Van Brocklin*, the Eighth Circuit found that holding one codefendant liable for a $1.3 million forfeiture violated the Excessive Fines Clause because the codefendant's role was "secondary" to that of her co-conspirators, and she received little personal benefit from the criminal activity.[205] The Fourth Circuit, by contrast, has held that proportionality should be measured against the per se gravity of the criminal enterprise as a whole.[206]

More difficult is determining exactly how "disproportional" the forfeiture must be empirically. One common technique is to refer to the statutory fines for a criminal offense and compare them to the value of forfeited property. In *United States v. 817 N.E. 29th Drive*, the Eleventh Circuit upheld the forfeiture of a $70,000 piece of property because the statutory fine for the defendant's four cocaine sales was over $1 million.[207] If Congress has endorsed such a fine, the court reasoned, how could it be disproportionate?[208]

However, this technique obscures the element of "disproportionality" that offends many. The issue is not the sheer value of the property, but the *connectedness* of the property to the crime. Indeed, this concern is rooted in the fiction of civil forfeiture itself, which depends on the idea of the guilty

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202 422 F.3d 240, 250 (5th Cir. 2005).

203 *See* Bersinger, *supra* note 201, at 865-66 & n.171 (describing the two-prong *Bajakajian* test).

204 *Id.* ("By finding that proceeds forfeiture is, as a matter of law . . . proportional, courts ignore the first prong of the *Bajakajian* analysis. Instead of determining whether a forfeiture is punitive and then whether it is excessive, courts answer the first question with the second."); *see also* United States v. Black, 526 F. Supp. 2d 870, 885 n.10 (N.D. Ill. 2007) (finding that proceeds forfeiture is not disproportionate, and therefore not punitive, and noting that "[i]t is not that proceeds forfeitures are not *subject to* the Eighth Amendment, but rather that, as direct proceeds of a crime, they are *not disproportionate* to the offense").

205 115 F.3d. 587, 601-02 (8th Cir. 1997).

206 *See* United States v. Bollin, 264 F.3d 391, 418-19 (4th Cir. 2001) (upholding the forfeiture despite the defendant's relatively minor role in the conspiracy).

207 175 F.3d 1304, 1310 (11th Cir. 1999).

208 *Id.* at 1310-11 ("[T]he sentencing guidelines and the statute agree that a fine of up to $1,000,000 would be proportional to [defendant's] crimes; consequently, the forfeiture of a $70,000 property based on those crimes does not violate the Eighth Amendment.").

res. Cases like that of Sarah Leino—who lost her home because her husband was charged with one count of possessing prescription drugs with intent to distribute—offend these common notions of proportionality.[209]

Thus, one proposed solution for proportionality is that contemplated in *United States v. Real Property Located at 6625 Zumirez Drive*: an instrumentality–proportionality test.[210] Under this test, the court considers not just the value of the property against the fine, but also attempts to judge the instrumentality of the property to the crime. Specifically, the test considers: "(1) the *gravity* of the offense compared with the harshness of the forfeiture; (2) whether the property was an *integral part* of the commission of the crime; and (3) whether the criminal activity involving the defendant property was *extensive* in terms of time and spatial use."[211]

Such a test better captures standard notions of justice, and looks to see just how closely the property was involved with the illicit conduct. Moreover, applying this test in the case of the Leino family would have yielded the right result—that of allowing Mrs. Leino and her children to remain in their home.

The instrumentality–proportionality test of *Zumirez* does offer some potential relief for MVC and LVC. Most MVC and LVC would probably not be seen as sufficiently instrumental to drug crimes to pass the *Zumirez* test and would therefore qualify for forfeiture. Indeed, most of these items forfeited are personal items: jewelry, sneakers, or petty cash, and thus not "instrumental" to any drug offense.[212]

Unfortunately, the *Zumirez* standard was generated by a district court and has not garnered widespread national favor because of its inherent

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[209] *See* Isaiah Thompson, *House Hunting*, PHILA. CITY PAPER, Aug. 15, 2013, at 6, *available at* http://issuu.com/phillycp/docs/issuu_8_15_2013 ("Long before the forfeiture action against her house would be completed . . . Leino would be forced from her house and made homeless along with her three children."); Radley Balko, *Philadelphia Family Loses Home over a Single Drug Charge*, HUFFINGTON POST, http://www.huffingtonpost.com/2013/09/10/philadelphia-family-loses_n_3899905.html (last updated Sept. 10, 2013, 12:13 PM), *archived at* http://perma.cc/734T-BUQF (relaying the story of the Leino family, who lost its home after Sam Leino was witnessed handing small amounts of prescription pills in exchange for money "outside the house").

[210] 845 F. Supp. 725, 732 (C.D. Cal. 1994).

[211] Skorup, *supra* note 24, at 441; *see also Zumirez*, 845 F. Supp. at 732-34 (laying out the three factors Skorup cites).

[212] *See, e.g.*, *Shakedown in Tenaha, Texas*, INST. FOR JUST., http://www.ij.org/about/3nexium%20order/3192, *archived at* http://perma.cc/GC3U-WYZU ("Officers seized cash, cars, cell phones, jewelry and even sneakers."); Stillman, *supra* note 21, at 49 (describing the Tenaha police station, in which two tables "were heaped with jewelry, DVD players, cell phones, and the like").

subjectivity.[213] Even worse, it appears that most MVC and LVC are forfeited under a "proceeds" theory, which knows no proportionality analysis.[214]

Without this "instrumentality" analysis, the Excessive Fines Clause of the Eighth Amendment offers little hope for MVC and LVC. Indeed, the excessive fines clause and proportionality often cut the other way: expensive property is protected, while less valuable property is not.

Under the current test espoused by both *Bajakajian* and CAFRA, MVC and LVC will remain unprotected. As *Bajakajian* reminds us, the appropriate inquiry is whether the forfeiture is "grossly disproportional to the gravity of [the] offense."[215] As such, it is highly unlikely that MVC and LVC—with a maximum value of $10,000—will receive any protection.

Indeed, should the current disproportionality practice of comparing forfeiture values to fine amounts continue, there is no hope for protecting these types of property, as drug fines frequently run into the millions of dollars. For instance, 21 U.S.C. § 841(b) provides for a maximum fine of $1 million for trafficking less than 500 grams of cocaine.[216] This is a comparatively low fine; the same section provides for a fine of $10 million for an individual trafficking in PCP or crack, with fines of $50 million for syndicates.[217] By comparison, most forfeited items—the average value of which is $650[218]—stand no chance of insulation under a purely monetary disproportionality standard.

The resulting system is surely a perverse one, because "the small time dealer risks losing the same amount of property as the drug baron."[219] Unfortunately, with the current state of Eighth Amendment jurisprudence, the Excessive Fines Clause offers more protection to drug lords holding

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213 *See, e.g.*, Kristen Michelle Caione, Note, *When Does* In Rem *Civil Forfeiture Under 21 U.S.C. § 881(a)(7) Constitute An Excessive Fine? An Overview and an Attempt to Set Forth a Uniform Standard*, 47 SYRACUSE L. REV. 1093, 1116-17 (1997) (noting that the *Zumirez* test—although admirable—is problematic because of its inherent subjectivity and the tendency of its prongs to yield conflicting results); Charmin Bortz Shiely, Note, United States v. Bajakajian*: Will a New Standard for Applying the Excessive Fines Clause to Criminal Forfeitures Affect Civil Forfeiture Analysis?*, 77 N.C. L. REV. 1595, 1618 (1999) (noting that the *Zumirez* test has been superseded in the Ninth Circuit).

214 *See supra* notes 154-156 (discussing the problematic doctrine of "proceeds forfeiture" and how it insulates forfeiture from any Eighth Amendment review).

215 United States v. Bajakajian, 524 U.S. 321, 334 (1998).

216 21 U.S.C. § 841(b) (2012).

217 *Id.* For a more straightforward view of the federal drug penalties, see BRIAN T. YEH, CONG. RESEARCH SERV., RL30722, DRUG OFFENSES: MAXIMUM FINES AND TERMS OF IMPRISONMENT FOR VIOLATION OF THE FEDERAL CONTROLLED SUBSTANCES ACT AND RELATED LAWS 1-3 (2012), *available at* http://www.fas.org/sgp/crs/misc/RL30722.pdf.

218 *See supra* note 107 and accompanying text.

219 Chet Little, Note, *Civil Forfeiture and the Excessive Fines Clause: Does* Bajakajian *Provide False Hope for Drug-Related Offenders?*, 11 U. FLA. J.L. & PUB. POL'Y 203, 219 (2000).

valuable real estate than to common individuals facing the seizure of their personal chattel.

C. *Removing the Profit Motive from Civil Forfeiture*

Excising the profit motive from civil forfeiture is perhaps the most widely suggested reform. Although governments originally relied upon the profit motive to induce police departments to pursue forfeitures, allowing police to profit from forfeiture has led to widespread abuse.

The IJ proposes that the government "[e]nd the direct profit incentive under civil forfeiture laws. Civil forfeiture revenue should be placed into a neutral fund, such as one for education or drug treatment, or, most desirably, in the general revenue fund of the county or state government."[220]

Giving individuals the opportunity for pecuniary gains in law enforcement practice creates perverse incentives and potential for abuse.[221] Indeed, reporters have uncovered atrocious tales of exploitation, from flashy cars,[222] to concert tickets,[223] to popcorn machines.[224]

Generally, allowing police departments to profit from forfeiture leads to an aggressive hunt for properties that *might* be subject to forfeiture. Such an approach led to the botched raid and death of Donald Scott.[225] Indeed, it

[220] WILLIAMS ET AL., *supra* note 19, at 14; *cf.* Vanita Gupta, *End Policing for Profit*, ACLU (Apr. 12, 2010, 5:18 PM), https://www.aclu.org/blog/criminal-law-reform/end-policing-profit, *archived at* http://perma.cc/HT6-XAUQ ("Rather than giving police and prosecutors a direct financial incentive to increase forfeitures, states and the federal government should put that money into a general, neutral fund, perhaps for education or drug treatment.").

[221] *See, e.g.*, Andrew Cohen, *Is Anyone Not a Cop in Favor of "Civil Forfeiture" Laws?*, BRENNAN CENTER FOR JUSTICE (Aug. 9, 2013), http://www.brennancenter.org/analysis/anyone-not-cop-favor-%E2%80%9Ccivil-forfeiture%E2%80%9D-laws, *archived at* http://perma.cc/3AY3-WT9X (deeming it pure common sense that civil forfeiture laws create "perverse incentives"); Megan McArdle, *How the Lone Star State Legalized Highway Robbery*, BLOOMBERG (Aug. 7, 2013), http://www.bloomberg.com/news/2013-08-07/how-the-lone-star-state-legalized-highway-robbery.html, *archived at* http://perma.cc/U5XL-WBFE ("If you give people incentives to take things, then they probably will."); Inst. for Justice, *New Jersey Ex-Sheriff Fights Civil Forfeiture Abuse*, PROGRESS REPORT (Dec. 26, 2002), http://www.progress.org/tpr/new-jersey-ex-sheriff-fights-civil-forfeiture-abuse/, *archived at* http://perma.cc/KNP8-WY8D (describing New Jersey's forfeiture program as "perverse").

[222] Robyn E. Blumner, *Police Are Addicted to Lure of Easy Money*, ST. PETERSBURG TIMES, Aug. 17, 2003, at 7D (recounting the use of flashy seized cars by the Tampa Police Department).

[223] Sibilla, *DA's Office in Georgia*, *supra* note 107 (detailing the abuses of forfeiture in Georgia, including the purchase of CeeLo Green concert tickets).

[224] Stillman, *supra* note 21, at 58 (mentioning a nine-page spreadsheet listing items funded by Tenaha's roadside seizures, including a popcorn machine).

[225] For a discussion of the botched raid on Scott's ranch, see *supra* note 33 and accompanying text. The quest for profit initially drove the fatal raid on Scott's ranch. Blumenson & Nilsen, *supra* note 33, at 73-74. They show that "as the Ventura County District Attorney's report concluded, a purpose of this operation was to garner the proceeds from the forfeiture of Scott's $5 million

seems that the policy of maximizing profits in this way came from the highest level. A former head of the Justice Department's Asset Forfeiture Section claims the department's "marching orders" were: "Forfeit, forfeit, forfeit. Get money, get money, get money."[226]

Moreover, the profit motive has led to two other disturbing trends in law enforcement and forfeiture practice. The first is the "privatization" of civil forfeiture. In Oklahoma, a contracted private party, Desert Snow, conducted forfeitures along highways in exchange for ten to twenty-five percent of the proceeds.[227] Public outrage eventually brought the program to a halt.[228]

The profit motive also results in distorted policing practices. For instance, the "reverse sting" has become popular. In the reverse sting, police target *buyers* of drugs, rather than sellers, because buyers carry forfeitable cash, while sellers carry only drugs that must be destroyed if seized.[229] The practice is extremely widespread. In Tennessee, for example, the highway patrol concentrated ninety percent of its enforcement efforts on seizing cash *departing* Nashville and only ten percent on the drugs *entering* Nashville.[230] Such procedures are clearly problematic, as they work counter to the stated objective of forfeiture: getting drugs off the streets. Moreover, such procedures often lead to questionable seizures, such as the seizure of an elderly couple's home in Philadelphia after their son completed a few minor marijuana transactions on the porch.[231]

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ranch." *Id.* at 74. This concern continues today. *See* Dewan, *supra* note 121 ("[P]rofit motives can outweigh public safety.").

226 Cheh, *supra* note 160, at 4 (internal citations omitted).

227 *See* David Blatt, *Policing for Profit in Oklahoma*, OKLA. POL'Y INST. (Aug. 26, 2013), http://okpolicy.org/policing-for-profit-in-oklahoma, *archived at* http://perma.cc/Y2H-E3XU (describing the controversial program); Nolan Clay, *Oklahoma DA Halts I-40 Drug Stops After Criticism*, NEWSOK (July 21, 2013), http://newsok.com/oklahoma-da-halts-i-40-drug-stops-after-criticism/article/3864488, *archived at* http://perma.cc/CZ38-VVS3 ("After seizing more than $1 million in cash in drug stops this year, a district attorney has suspended further roadside busts by his task force because of growing criticism over a private company's participation.").

228 *Id.*

229 *See, e.g.*, Blumenson & Nilsen, *supra* note 33, at 67 ("The chief attraction of the reverse sting is that it allows police to seize a buyer's cash rather than a seller's drugs (which have no legal value to the seizing agency)."); Chi, *supra* note 114, at 1645-46 (detailing how the perverse incentive of profit in forfeiture is reflected in the "reverse sting").

230 NC5PhilWilliams, *NewsChannel 5 Investigates: Policing for Profit*, YOUTUBE (Jan. 15, 2013), http://www.youtube.com/watch?v=TU_nh51FU14, *archived at* http://perma.cc/7EHL-EFPH (full report available at http://www.jrn.com/newschannel5/news/newschannel-5-investigates/policing-for-profit); *cf.* Blumenson & Nilsen, *supra* note 33, at 68 (noting that police have "a financial incentive to impose roadblocks on the southbound lanes of I-95, which carry the cash to make drug buys, rather than the northbound lanes, which carry the drugs. After all, seized cash will end up forfeited to the police department, while seized drugs can only be destroyed" (internal citation omitted)).

231 *See* Stillman, *supra* note 21 (recounting the case of Mary and Leon Adams).

Proponents of abolishing the profit motive from civil forfeiture claim a plethora of benefits: not only will it clean up the distorted and damaging police practices resulting from pecuniary motivation, but departments will also consider more carefully whether to pursue certain forfeitures if they do not stand to gain.

Unfortunately, removing the profit motive is far from a magic bullet where MVC and LVC are concerned. This Comment is not meant to disparage ending the profit motive as part of comprehensive forfeiture reform generally. I question instead how effective such a reform would be in reducing MVC and LVC forfeiture. Relatedly, removing the profit motive might severely decrease police budgets, hamstringing departments, or disincentivize the pursuit of the property of large-scale drug dealers.

The first concern, specific to MVC and LVC, is that evidence shows that police disproportionately target minorities in forfeiture actions.[232] Simply ending profit incentives might not therefore prevent seizures of the property of minorities, carried out simply to harass them.

The ACLU described Texas forfeiture programs as "a regime of racial profiling."[233] Another ACLU report describes Texas law enforcement as specifically targeting minorities: "near the Mexican border, Hispanics allege that they are being singled out by local law enforcement."[234] Police officers testifying in a class action suit the ACLU filed in Tenaha, Texas, revealed that race played an explicit part of their calculus in pursuing forfeiture actions.[235] Benson, Rasmussen, and Sollars reinforce this point, noting that some law enforcement agencies show a "desire . . . to control racial minorities through the enforcement of such laws."[236] Representative Henry Hyde,

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232 Stillman, *supra* note 21, at 52 (quoting Louis Rulli, a clinical law professor at the University of Pennsylvania, as stating that "[f]or real-estate forfeitures, it's overwhelmingly African-Americans and Hispanics"); *see also* Dewan, *supra* note 121 ("Officials . . . mocked Hispanics whose cars were seized.").

233 Chloe Cockburn, *Easy Money: Civil Asset Forfeiture Abuse by Police*, ACLU (Feb. 3, 2010, 1:16 PM), https://www.aclu.org/blog/criminal-law-reform/easy-money-civil-asset-forfeiture-abuse-police, *archived at* http://perma.cc/646K-VPKB.

234 Chloe Cockburn, *Texas Statute Paves Way for Highway Robbery*, ACLU (Oct. 7, 2009, 4:24 PM), https://www.aclu.org/blog/criminal-law-reform/texas-statute-paves-way-highway-robbery, *archived at* http://perma.cc/JM7H-44R7.

235 Elora Mukherjee, *Settlement Means No More Highway Robbery in Tenaha, Texas*, ACLU (Aug. 9, 2012, 11:22 AM), https://www.aclu.org/blog/criminal-law-reform-racial-justice/settlement-means-no-more-highway-robbery-tenaha-texas, *archived at* http://perma.cc/46XE-DZ33 (recording police officer testimony stating that "[t]he number one thing is you have two guys stopped, and these two guys are from New York. They're two Puerto Ricans").

236 Bruce L. Benson, David W. Rasmussen & David L. Sollas, *Police Bureaucracies, Their Incentives, and the War on Drugs*, 83 PUB. CHOICE 21, 24 (1995).

in his book, also cites to a study finding that in more than five hundred stops involving forfeiture actions, over eighty percent had minority drivers.[237]

It would appear that simply removing the profit motive from forfeiture might not work to totally remove the tool as one of racial harassment. Where a police officer maintains negative racial attitudes, he is likely to use forfeiture to target minority motorists aggressively, regardless of the eventual monetary outcome. The forfeiture—as a weapon of abuse—becomes an end *in itself*.

More generally, there is a concern that if the profit element of forfeiture were abolished, police departments would be caught in a massive budgetary crisis and would be unable to maintain other, valuable crime control activities. As the IJ notes, nearly forty percent of police departments *depend* on forfeiture for their budgets.[238]

Stillman, who heard echoes of similar concerns in interviews, relays that many officers are concerned their departments "would collapse" if forfeiture practices become more heavily regulated.[239] The COPS bulletin is quite explicit about the matter: "Though it is an enforcement tool, asset forfeiture can assist in the budgeting realm by helping to offset the costs associated with fighting crime."[240] Thus, there is a very real concern that if the profit motive were eliminated, other valuable law enforcement resources might likewise suffer, resulting in the scaling back of crime control.

Finally, the profit motive can be influential in prodding police to pursue HVC or real property forfeiture they might otherwise avoid. It is intuitively important that, for instance, police seize the major properties of drug dealers—like the Escobar-owned condos in Miami[241]—or key instrumentalities of the drug trade, such as expensive cars or boats, used in transporting illegal drugs.[242] Allowing some profit from forfeiture ensures that the police will assiduously check on the legal status of wealthy property owners, as well as impoverished ones. Unfortunately, current forfeiture statutes

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[237] HENRY HYDE, FORFEITING OUR PROPERTY RIGHTS: IS YOUR PROPERTY SAFE FROM SEIZURE? 38 (1995).

[238] WILLIAMS ET AL., *supra* note 19, at 12 (reporting that these agencies consider forfeiture a "*necessary* budget supplement").

[239] Stillman, *supra* note 21, at 50.

[240] Worrall, *supra* note 87, at 2.

[241] *See supra* note 32 and accompanying text (describing the seizure of the Escobar properties and other successes of civil forfeiture).

[242] *See* Stillman, *supra* note 21, at 59 (describing how police repurpose key instrumentalities of the drug trade, like cars, in law enforcement activities); *see also* Blumner, *supra* note 222, at 7D (describing the Tampa Police Department's use of seized cars).

incentivize the pursuit of MVC or LVC by giving police a higher portion of the profits from less valuable property.[243]

Thus, although abolishing the profit motive would arguably eliminate much abuse of civil forfeiture, there are legitimate concerns that such a measure would wreak havoc on otherwise legitimate law enforcement measures, disincentivize the pursuit of key drug dealing instrumentalities, or simply fail to account for the racial bias of the enforcing officers.

D. *Abolishing Civil Forfeiture*

Abolishing civil forfeiture entirely is the most radical solution, although it garners support from both ends of the political spectrum. The political right tends to express concerns about forfeiture violating the sanctity of property rights.[244] The political left, by contrast, considers police overreach, rights infringement, and racial bias in seizures alarming.[245]

Many groups, including the IJ, formally advocate for a total ban on all civil forfeiture, although they often indicate that compromise solutions, such as those described above, may be required before total abolition.[246] Other commentators, however, express concern that further piecemeal reforms—akin to CAFRA—will only mask the problem, suggesting that "[a] categorical ban on civil asset forfeiture would be easier to administer than piecemeal reforms, and therefore more likely to succeed."[247] Most proponents of an absolute ban on civil forfeiture eschew action at the state level, which

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243 *See, e.g.*, ALASKA STAT. ANN. § 17.30.112(c) (West 2013) (providing that a court can award the police the seized property if its value is worth $5,000 or less).

244 *See, e.g.*, Tim Lynch, *Policing for Profit: The Abuse of Civil Asset Forfeiture*, CATO INST. at 07:20 (Apr. 28, 2010), http://www.cato.org/multimedia/events/policing-profit-abuse-civil-asset-forfeiture, *archived at* http://perma.cc/UDX5-LW6P ("[C]ivil forfeiture laws really create a trifecta of circumstances that place property rights at risk.").

245 *See, e.g.*, *Civil Asset Forfeiture*, ACLU, https://www.aclu.org/criminal-law-reform/civil-asset-forfeiture, *archived at* http://perma.cc/9FXS-EEMV (last visited Jan. 16, 2015) ("Asset forfeiture practices often go hand-in-hand with racial profiling and disproportionately impact low-income African-American or Hispanic people who the police decide look suspicious.").

246 *See* WILLIAMS ET AL., *supra* note 19, at 14 ("Ideally, civil forfeiture should be abolished, at least outside of its narrow historical use in enforcing admiralty and customs laws.").

247 Ilya Somin, New Yorker *Article on Asset Forfeiture Abuse*, VOLOKH CONSPIRACY (Aug. 5, 2013, 4:31 PM), http://www.volokh.com/2013/08/05/new-yorker-article-on-asset-forfeiture-abuse, *archived at* http://perma.cc/7BRT-FU9H; *see also* Steve Clowney, New Yorker *Article on Asset Forfeiture Abuse*, PROPERTYPROF BLOG (Aug. 9, 2013), http://lawprofessors.typepad.com/property/2013/08/new-yorker-article-on-asset-forfeiture-abuse.html, *archived at* http://perma.cc/MJ6M-ZSYZ (approving of Somin's stance on forfeiture).

equitable sharing easily bypasses, and instead advocate for congressional action to reform the national forfeiture landscape in one sweeping stroke.[248]

Although the solution is radical, some states have taken tentative steps that might eventually result in a total abolition of civil forfeiture. Indeed, North Carolina already lacks a *civil* forfeiture statute.[249] Meanwhile, Tennessee's legislature recently introduced a bill that would entirely abolish forfeiture.[250]

As attractive as such a solution may be, it is completely unfeasible for two reasons (1) damage to police budgets and (2) political infeasibility. As discussed above, forfeiture is critical to police budgeting.[251] Thus, any major drawdown of forfeiture could cripple other important law enforcement efforts.

Additionally, abolishing civil forfeiture is almost certainly politically infeasible. In fact, almost every legislative reform of forfeiture at the state level has been eviscerated. In California, for instance, a bill sponsored by Assemblyman Chris Norby attempted to close a loophole in equitable sharing.[252] The bill, AB639, would have ended abuses of adoptive sharing by requiring a court order before an agency could transfer a forfeiture case to the federal government.[253] After extensive lobbying by district attorneys and law enforcement groups, however, the bill died in the California Senate.[254]

Similarly, in Tennessee, a bill proposed by Representative Barrett Rich, a former state trooper, proposed outlawing civil forfeiture entirely.[255] However, the bill was completely rewritten in committee. As one of the sponsors of

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[248] *See, e.g.*, *End Asset Forfeiture*, DOWNSIZE DC, https://secure.downsizedc.org/etp/end-asset-forfeiture, *archived at* http://perma.cc/MHA2-4JVK (last visited Jan. 16, 2015) ("Because the courts will not act to end civil asset forfeitures, Congress must. Another 'compromise' asset forfeiture bill will only lead to more abuses and outrages. Civil asset forfeiture must be abolished.").

[249] *See supra* note 46 and accompanying text.

[250] *See* Nick Sibilla, *Tennessee Bill Would Abolish Civil Forfeiture*, INST. FOR JUSTICE, http://www.ij.org/tennessee-bill-would-abolish-civil-forfeiture, *archived at* http://perma.cc/WA8K-BEFV (last visited Jan. 16, 2015) (discussing a Tennessee bill aiming to "eliminate civil forfeiture in Tennessee").

[251] *See, e.g.*, WILLIAMS ET AL., *supra* note 19, at 12 (reporting that forty percent of police departments depend on forfeiture to meet budgeting shortfalls).

[252] *See* Steven Greenhut, *Why Asset Forfeiture Abuse Is on the Rise*, REASON (Aug. 10, 2012), http://reason.com/archives/2012/08/10/why-asset-forfeiture-abuse-is-on-the-ris, *archived at* http://perma.cc/LM32-ZSST (discussing AB639 and its failure to pass the legislature).

[253] *Id.*

[254] *Id.*

[255] *See* Sibilla, *supra* note 250 (describing the bill in Tennessee that would have dismantled the state's forfeiture program).

the bill complained, "[i]n what is called an amendment, the entire wording of the bill . . . was literally deleted and new wording replaced it."[256]

Finally, in Utah, lawmakers recently passed a forfeiture bill that eviscerated a reform passed in 2000. The law—pitched as a "recodification" of existing law—contains several troubling features: it gutted awards of attorneys' fees to successful claimants, capping them at twenty percent of the value of the seized property; it reduced the deadline for prosecutors to file against the property from a sixty-day mandatory deadline to a ninety-day optional deadline; and it upheld the use of waivers in forfeiture actions.[257]

Forfeiture reform bills often die because of extensive lobbying of law enforcement groups or prosecutors. For instance, California Bill AB639 failed because the California District Attorney Association complained about the burden the bill would place on law enforcement, and the Los Angeles District Attorney opined that the bill's only purpose was "to make it impossible for state/local law enforcement agencies [to] us[e] federal asset forfeiture procedures."[258] Similar concerns emerged during the debate on CAFRA, which meant that several proposed reforms were ultimately excluded from the final version of the bill.[259] Finally, pressure from law enforcement groups, including the International Association of Chiefs of Police, the Florida Department of Law Enforcement, the North Carolina Department of Crime Control and Public Safety, and the U.S. Attorney General's Office, led to the overturning of a 1988 amendment to North Carolina's civil forfeiture statute.[260]

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[256] *See* Eapen Thampy, *Tennessee Lawmakers Gut Forfeiture Reform Proposal, Push for Ex Parte Determinations of Probable Cause*, AMS. FOR FORFEITURE REFORM (Apr. 8, 2013), http://www.forfeiturereform.com/2013/04/08/tennessee-lawmakers-gut-forfeiture-reform-proposal-push-for-ex-parte-determinations-of-probable-cause/, *archived at* http://perma.cc/B3GS-RUD9 (quoting Hal Rounds, a co-author of the Tennessee bill frustrated at its evisceration).

[257] Jason Snead & Andrew Kloster, *Utah's New Law Helps Law Enforcement Nab Property of Innocent People*, DAILY SIGNAL (Jan. 21, 2014), http://dailysignal.com/2014/01/21/utah-reverses-court-forfeiture-reforms-hopes-wont-notice/, *archived at* http://perma.cc/7EB9-WFKK (describing the provisions of the reforms and likely negative consequences); *see also* Nick Sibilla, *Utah Made It Easier for Cops to Seize Innocent People's Property. And Not A Single Lawmaker Voted Against It*, FORBES (Dec. 23, 2013, 9:37 AM), http://www.forbes.com/sites/instituteforjustice/2013/12/23/utah-made-it-easier-for-cops-to-seize-innocent-peoples-property-and-not-a-single-lawmaker-voted-against-it/, *archived at* http://perma.cc/YQ3A-V2UU (describing the troubling aspects of the Utah bill).

[258] Greenhut, *supra* note 252.

[259] *See, e.g.*, Holcomb et al., *supra* note 70, at 275 (describing the power of law enforcement during the political process, including the fact that several provisions were inserted into CAFRA that actually "strengthened forfeiture powers in some circumstances").

[260] Benson et al., *supra* note 236, at 30.

Thus, although abolishing civil forfeiture entirely would completely solve the problem, such a move is incredibly unlikely, both because of the collateral damage to police budgets, and because of the power of law enforcement in the political process.

V. THE TRANSACTIONAL APPROACH

In this Comment, I propose a transactional paradigm for reforming civil forfeiture. Although forfeiture actions lack many of the features of a transaction—most notably a voluntary exchange between parties—the application of economic insights to forfeiture reveals some new approaches to dealing with the problem of MVC and LVC forfeiture.[261] Specifically, I construct a theoretical and practical framework that can provide for the ex ante protection of MVC and LVC by raising the costs of forfeiture actions to prevent these items from being seized in the first place.

A. *Some Insights from Economic Theory*

Several economic concepts are applicable to the forfeiture context. Although forfeiture actions provide a unique "form" of transaction, the analogy nevertheless applies and can help provide a valuable lens through which to conceptualize and understand civil forfeiture.

1. Transaction Costs

Before applying the following analyses, we must analytically define forfeiture as a transaction, despite the fact that it does not fall neatly into the conventional "transaction" paradigm. Textbook definitions of transactions tend to focus on the fact that transactions are typically voluntary exchanges between parties: "An agreement between a buyer and a seller to exchange goods, services or financial instruments."[262]

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[261] For most of this section, I use "forfeiture" and "seizure" interchangeably. As has been noted, the actions are legally distinct: police seize the item, followed by the actual forfeiture—a separate legal action transferring title. However, my concern was with increasing the costs of the *seizure*, as the low contest rates in forfeiture actions (eighty percent uncontested, *see Oversight Committee*, *supra* note 106, at 86) mean that the seizure and forfeiture actions often blend together. There is obviously more empirical work to be done here on top of the more ad hoc analysis I conducted *supra* in note 109 to determine the rate at which forfeiture is contested depending on the value of the chattel. Such work, unfortunately, is outside the scope of this Comment.

[262] *Transaction Definition*, INVESTOPEDIA, http://www.investopedia.com/terms/t/transaction.asp (last visited Jan. 16, 2015), *archived at* http://perma.cc/4YH5-ER3Q.

Drawing insights from the Calabresi–Melamed and Coasean framework,[263] however, legal commentators have expanded their understanding of transactions. Specifically, the focus is less on the goods per se, and more on the *entitlements* underlying those goods.

Calabresi–Melamed's "property" and "liability" rules essentially relate to whether or not coercion may be used to obtain an entitlement. Theoretically, property rule protection prevents the transfer or destruction of entitlements without the consent of the owner.[264] By contrast, liability rules "allow a would-be buyer to bypass the original entitlement holder's consent and instead to take the entitlement through coercion."[265]

As such, we may understand civil forfeiture in the context of a "liability rule" transaction.[266] Kontorovich is explicit on the matter: "Constitutional transactions . . . occur when the government condemns an entitlement through the judicial process."[267] We therefore must understand forfeiture as a transaction—one in which an entitlement (i.e., the ownership of MVC or LVC) is forcibly transferred to the government.

Within this context, we then turn to the concept of "transaction costs." For purposes of this Comment, I will define a transaction cost as anything that renders the transfer of rights more costly. Transaction costs can thus include tangible costs like search costs, or more intangible costs like inconvenience. Coase, in his seminal article *The Problem of Social Cost*, identified transaction costs as impacting the general level of transactions in a marketplace: "Once the costs of carrying out market transactions are taken into account it is clear that such a rearrangement of rights will only be

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[263] *See generally* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972) (discussing the circumstances in which entitlements are granted); R.H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960) (advocating for economic solutions to social problems that consider the complete effect of any entitlement granted).

[264] Calabresi & Melamed, *supra* note 263, at 1092 ("An entitlement is protected by a property rule to the extent that someone who wishes to remove the entitlement from its holder must buy it from him in a voluntary transaction.").

[265] Eugene Kontorovich, *The Constitution in Two Dimensions: A Transaction Cost Analysis of Constitutional Remedies*, 91 VA. L. REV. 1135, 1143 (2005).

[266] A more extensive application of forfeiture within the Calabresi–Melamed framework is beyond the scope of this Comment, as forfeiture poses complicated questions for that theory. Even though forfeiture may be understood as a forced transaction, it cannot be truly protected by a "liability rule" as understood by Calabresi–Melamed. This question will have to be explored more thoroughly in later scholarship.

[267] Kontorovich, *supra* note 265, at 1144.

undertaken when the increase in the value of production . . . is greater than the costs which would be involved in bringing it about."[268]

Once forfeiture is placed into this framework, many of the problems with the practice can be understood as either diminishing or increasing transaction costs. One critical example is the use of waivers in forfeiture cases, which drastically reduce transaction costs for police departments.[269] The Tenaha police department, for instance, forced motorists to sign *pre-notarized* waivers, ceding their rights to property.[270] This approach drastically decreased transaction costs for Tenaha.

First, the waiver precluded a costly and inconvenient search of property to assure that it might be subject to forfeiture. The forfeiture was faster and more convenient, avoiding the mental costs of time or inconvenience and the empirical cost of paying the searching officer. Second, the waiver was pre-notarized, decreasing the inefficiency costs of locating a notary public to notarize the document—something that might not be possible should the forfeiture occur late at night. Finally, the waiver precluded a later forfeiture hearing, another costly redirection of resources for the police department.

Similarly, the use of dogs in forfeiture actions also decreases the transaction cost of the forfeiture. First, drug dogs alerting to cars can allow a search, even without the vehicle owner's consent, decreasing transaction costs by avoiding the inefficiency of obtaining a judicial search warrant.[271] Second, most U.S. currency contains trace amounts of drug material, facilitating the seizure of cash with little effort on the part of the officer.[272] Drug-sniffing dogs thus facilitate raising revenue, as they alert to almost any drug-tainted currency, and such an alert is often sufficient to establish forfeiture. Indeed, cash-strapped police departments are quite explicit about their use of dogs as a revenue-raising device: "[Police Chief] Andrews told

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268 Coase, *supra* note 263, at 15.

269 Indeed, it appears that police departments themselves intrinsically view forfeiture as a "profitable" transaction. *See, e.g.,* Dewan *supra* note 121 ("[O]fficials share tips on maximizing profits.").

270 *See supra* notes 156-158 and accompanying text (discussing the use of waivers in asset forfeiture cases).

271 For a more thorough discussion of issues regarding drug-sniffing dogs, warrants, and forfeiture, see *infra* notes 296-309 (discussing the recent Supreme Court decision in *Florida v. Harris*, 133 S. Ct. 1050, 1054 (2013), which established a troubling precedent for the use of dogs in forfeiture.).

272 Willie Jones's story provides one example of the use of dogs to justify otherwise indefensible forfeiture actions. *See* Jones v. DEA, 819 F. Supp. 698, 720 (M.D. Tenn. 1993) (overturning the forfeiture of Mr. Jones's property because it was based on a dog alert; the judge noted the problems with such alerts, since almost all U.S. currency is drug tainted).

board members that the city is missing out on possible revenues that a K9 would bring."[273]

A final indication that police try to reduce transaction costs in forfeiture is the practice of directing policing efforts toward roads that contain a flow of drug *buyers*, rather than drug sellers.[274] This again is an attempt to reduce the transaction costs of forfeiture actions. Since police have limited resources, they attempt to divert as many of these resources toward maximizing forfeiture revenues, decreasing inefficiency and enforcement costs for seizures that will not produce a large return. Other enforcement patterns reflect a similar attempt to decrease transaction costs, most notably the reverse-sting operation.[275]

Recognizing that forfeiture is transactional and that seizing agencies strive to reduce transaction costs provides insight into potential solutions, especially those involving MVC and LVC. Because these items represent a relatively low monetary recovery, any significant increase in transaction costs would make seizure of such items economically inefficient.

2. Externalities

Applying the transactional paradigm to forfeiture also allows us to confront the problem of externalities in MVC and LVC forfeiture. Externalities are costs or benefits imposed on parties not directly involved in the transaction.[276] Because externality costs are not factored into the price of the market transaction, actors engage in socially suboptimal levels of transactions with externalities.[277]

Pollution is the classic example: producing many goods imposes significant costs—negative externalities—on the environment, which are not factored into the price of the goods themselves. Therefore, because the cost of pollution is not "priced" into the market, goods are priced too low and thus overproduced. This results in generally greater environmental costs, such as

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[273] Orin Kerr, *Town Plans to Raise Revenue by Combining Drug-Sniffing Dogs with Asset Forfeiture*, VOLOKH CONSPIRACY (Aug. 22, 2012, 11:33 PM), http://www.volokh.com/2012/08/22/town-plans-to-raise-revenue-by-combining-drug-sniffing-dogs-with-asset-forfeiture/, *archived at* http://perma.cc/R9DK-PHTE (detailing the plans of Henry, Tennessee to "institute a K9 program for the [local] [p]olice [d]epartment").

[274] *See, e.g.*, *supra* note 230 and accompanying text.

[275] *See id.* (describing the perverse incentives that lead to reverse-sting operations).

[276] Thomas Helbling, *Externalities: Prices Do Not Capture All Costs*, INT'L MONETARY FUND (Mar. 28, 2012), http://www.imf.org/external/pubs/ft/fandd/basics/external.htm, *archived at* http://perma.cc/RK9L-6PMK (stating that failing to internalizing indirect costs or benefits will lead to inefficient market outcomes).

[277] *Id.*

the cost of pollution cleanup.[278] Here, neoclassical economics sees government as the solution, as taxes or other incentive programs can force market actors to price their product for the externality, moving the market toward a more socially optimal level.[279]

An externality analysis is also relevant in the forfeiture context. In all cases, police departments attempt to structure forfeiture "transactions" in a manner that will increase externalities, pushing costs to other parties so they may retain the value of forfeiture entirely for themselves.

One clear and concrete example of this is police pushback against the mandatory grant of attorneys' fees to victorious claimants in Utah. A prior version of a Utah fee-shifting statute provided that "the court shall award a prevailing party reasonable attorneys' fees and other costs of litigation reasonably incurred by the owner."[280] By contrast, a newer version of the statute, HB384, dramatically changed the statute by changing the mandatory "shall" to the permissive "may," thus giving courts discretion in whether or not fees should be awarded.[281] HB384 also caps attorneys' fees at twenty percent of the property value.[282] This change in the statutory language is an attempt by police departments to impose the costs of forfeiture actions as "externalities" on non-consenting parties: innocent owners and their attorneys. Where once the government had to foot the bill for a wrongful forfeiture—an internalized cost, as it was imposed on the party effectuating the seizure—the cost is now passed to involuntary parties in the transaction, namely the claimant and her legal counsel, who must come up with the extensive fees and time necessary to contest forfeiture actions.

Innocent owner defenses similarly outline the problem of externalities in forfeiture actions. The case of *Bennis*—where Mrs. Bennis lost the entire value of her property even though she was a completely innocent claimant—is indicative.[283] Here, again, the cost of forfeiture was passed on to an

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278 *Id.*

279 *Id.*

280 UTAH CODE ANN. §24-1-11 (2004) (amended by 2013 Utah Laws 1975, 1986); *see also* Radley Balko, *Utah Lawmakers Quietly Roll Back Asset Forfeiture Reforms*, WASH. POST (Jan. 8, 2014), http://www.washingtonpost.com/news/opinions/wp/2014/01/08/utah-lawmakers-quietly-roll-back-asset-forfeiture-reforms/, *archived at* http://perma.cc/3ZAA-P38F (discussing the discontinuation of asset forfeiture reforms and its effect on Utah residents); Sibilla, *supra* note 250.

281 *See* UTAH CODE ANN. §24-1-110(1) (2004) ("In any forfeiture proceeding under this chapter, the court may award a prevailing party reasonable: (a) legal costs; and (b) attorney fees."); Sibilla, *supra* note 250.

282 UTAH CODE ANN. § 24-1-110(2) (amended by 2013 Utah Laws HB384).

283 Bennis v. Michigan, 516 U.S. 442, 453 (1996) (holding that forfeiture was proper considering Michigan's objective of deterring illegal activities).

involuntary party—the innocent claimant of the property—constituting a clear externality.

Any proposed solution to the forfeiture dilemma thus should force the voluntary party to the transaction (in forfeiture, only the seizing agency) to internalize its costs so as not to impose burdens on involuntary parties and to achieve a more socially optimal level of seizure.

3. Nudges

Final insights on this analytical framework emerge from prospect theory and behavioral economics, specifically the idea proposed by Thaler and Sunstein in *Nudge*.[284] There, the authors propose that the *structure* of choices influences their outcomes.[285] As defined by Thaler and Sunstein, a nudge "is any aspect of the choice architecture that alters people's behavior in a predictable way without forbidding any options or significantly changing their economic incentives."[286] Significantly, in designing choice architecture, the "default" option often is the most selected; thus, the authors propose that nudges should be carefully selected to try and maximize social outcomes.[287]

Similarly, in the context of forfeitures, procedures should be structured to try to minimize the abuse of the practice. Unfortunately, this is not currently the case: in many instances, forfeiture procedure is structured to make forfeiture the "default" option.

Again, the use of waivers in forfeiture is indicative of the practice. The pre-notarized waivers have removed all procedural barriers to forfeiture; all property owners must do is sign the form and leave the police station. Thus, forfeiture has become the "default" option. Switching from the default has a series of costs for the police department, such as holding the property without disposing of it and litigating the forfeiture action.

Potential forfeiture solutions, then, should include restructuring forfeiture procedures to erect barriers to viewing forfeiture as the "default" option. Several levels of decision barriers should be erected, with multiple decisionmakers, each of whom should agree that the forfeiture is proper. Forfeiture should never be the "path of least resistance."

Relatedly, because it is often not economically rational to defend MVC and LVC against forfeiture,[288] this Comment proposes additional procedural

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[284] RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE (2008).

[285] *Id.* at 6.

[286] *Id.*

[287] *Id.* at 6-11.

[288] *See supra* note 116 and accompanying text (discussing the costs of forfeiture defenses).

burdens that police departments would have to bear *before* engaging in a seizure. The goal of increasing the cost of forfeiture actions is to lower levels of MVC and LVC forfeiture, making it no longer cost-efficient for officers to seize such low-value property.

B. *Proposed Solutions*

These economic theory insights provide the civil forfeiture reformer with several new tools. First, forfeiture procedures should be tailored to increase transaction costs, specifically so that it is no longer "profitable" for police to pursue MVC and LVC forfeiture. Second, the burdens imposed by forfeiture should impact police departments, who should bear the costs when they engage in a wrongful seizure. Third, forfeiture procedures should be structured to make forfeiture difficult and inconvenient, requiring police to actively choose to seize property. Some proposals follow.

1. Require an Immediate in Personam Hearing to Determine Whether the Seizure is Justified

This solution would function on all of the axes mentioned above. First, it increases transaction costs, because it would require the seizing police officer to take the property and its owner to court immediately to justify the seizure. Such an inconvenience and hassle to the police officer would not justify the seizure of small personal items, and thus many officers might be loath to seize a pair of sneakers or petty cash if they know they would have to engage in a lengthy court hearing.[289]

Moreover, such a solution also works to correct the externality problem of forfeiture. The seizing department would be required to bear costs directly—by spending time and energy in court—rather than passing them off to innocent litigants seeking to contest the forfeiture down the line.

This solution is also aligned with Thaler and Sunstein's "nudge" concept. Officers would not simply be able to follow forfeiture as a "path of least resistance"; seizure would no longer be the default option. Rather, an officer would have to justify the seizure in court, which would certainly lead to a lower incidence of the practice.

Finally, this solution is attractive because it addresses one of the major problems in forfeiture: that claimants feel entirely disempowered in the process. For instance, Jennifer Boatright, who had her property seized in Tenaha, expressed her frustration as follows: "Where *are* we? . . . Is this

[289] As noted in the text accompanying *supra* note 212, LVC and MVC are often petty personal property like sneakers, cellphones, or jewelry.

some kind of foreign country, where they're selling people's kids off?"[290] Adding an immediate review of the action, and allowing claimants to present their stories to an impartial party, would give individuals a sense that they, at minimum, were empowered within the process, which is itself a positive outcome.

2. Require Forfeiture Documentation to be Notarized by Independent Notaries

This barrier is similar to the first, but procedural rather than substantive in nature. As noted multiple times, police departments use pre-notarized forms in forfeiture actions. This practice should not continue. Rather, police departments processing documents for forfeiture should be required to send those documents to an *external* notary. The goal is purely to increase transaction costs. Sending documents to an external notary is time-consuming and inefficient. As such, it increases the transaction costs of forfeiture and would make the forfeiture of MVC or LVC less attractive.

Similarly, the additional step of sending documents to an external notary works against forfeiture remaining a default option for police departments. The inconvenience and added effort of sending documents to an external notary would diminish the attractiveness of forfeiture.

3. Require Extensive Documentation on Any Dogs Used in Forfeiture Actions

Drug-sniffing dogs are becoming increasingly common in forfeiture actions, as police departments become ever more aware of their ability to generate revenue through forfeiture.[291] Indeed, dogs are often an excellent investment, requiring a small, upfront cost that consistently returns revenue by alerting officers of the presence of drugs on currency.[292]

Thus, efforts should be made to increase the "expense" of dogs in forfeiture actions. One important factor is maintaining extensive documentation on the accuracy of dogs in the field. Such data is obviously normatively relevant to forfeiture actions, and claimants should be able to access this information in proceedings challenging whether the forfeiture was in fact justified. Unreliable dogs should create a degree of doubt in the court, which could potentially reverse the seizure.

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290 Stillman, *supra* note 21, at 49.
291 Kerr, *supra* note 273.
292 *Id.*

Within the suggested framework, the required paperwork on dogs would greatly increase the transaction costs of forfeiture. An officer's use of a dog would require extensive documentation, monitoring, and follow-up, necessitating paperwork and attention to detail. Officers could not use dogs indiscriminately to seize currency but rather would be expected to maintain and vouch for the accuracy of their dogs' alerts.

Moreover, requiring documentation on dog accuracy decreases the "inertia" of forfeiture. Police would need to assess the accuracy of the dog at every step, demanding conscious engagement throughout the forfeiture process. Such an approach is at odds with intellectual inertia and would render pursuing MVC and LVC forfeiture much less attractive.

4. Disallow the "Alert" of Drugs on Currency to Justify Forfeiture

Studies report that over ninety percent of currency in the United States is contaminated with trace amounts of cocaine.[293] As such, one easy path to forfeiture—particularly with petty cash—is to permit a dog to alert on drug-tainted cash, justifying the seizure. Indeed, this was the approach followed in the case of Mr. Willie Jones: after dogs alerted on his cash, authorities seized almost $9600 from him.[294]

Scientific studies—such as those previously mentioned—should now disqualify the drug alert on currency from being considered "probable cause" for a forfeiture action. Since over ninety percent of U.S. currency is contaminated, a drug alert on cash is simply not indicative that the money is in any way related to illegal activity.[295]

Such an approach would increase the transaction costs of forfeiture by requiring officers to come up with other, more expensive measures to justify seizures. Indeed, dog alerts have frequently been cited as a "cost-effective" way to engage in forfeiture actions for revenue purposes.[296] Disallowing the alert on tainted cash would require police to dig deeper into the nature of the offense, demanding greater effort on their part. These inconvenience costs would decrease the rate at which petty cash would be forfeited.

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293 *See, e.g.*, Madison Park, *90 Percent of U.S. Bills Carry Traces of Cocaine*, CNN (Aug. 17, 2009, 3:01 PM), http://www.cnn.com/2009/HEALTH/08/14/cocaine.traces.money/, *archived at* http://perma.cc/6PNK-VEKR ("Many of th[e] bills, over 90 percent, are contaminated with cocaine.").

294 *See supra* note 34 and accompanying text (recounting the story of Mr. Jones).

295 Park, *supra* note 293.

296 Kerr, *supra* note 273.

5. Require One Hundred Percent of Attorneys' Fees to Be Returned to Successful Claimants

The mandated attorneys' fees grant, an idea which several state legislatures have considered, is an attempt to internalize an externality of forfeiture: the cost of the proceeding. As mentioned, it is often not economically viable to contest the seizure of MVC or LVC, which is worth less than the average value of an attorney's retainer.

The grant of attorneys' fees, however, confronts the seizing agency with the real possibility that they would be compelled to pay a victorious claimant's fees. As such, agencies would be forced to realize and account for the increased costs of these awards. In the language of economic analysis, they would be required to internalize the imposed externality of costly legal action. This approach would lead to a lower level of forfeiture across the board, as agencies would be more cautious about seizing property if they knew of the potential for a monetary award against them.

Moreover, such a change would also decrease the use of forfeiture as a default option. As discussed above, many forfeiture actions are simply not contested.[297] Thus, forfeiture—for seizing agencies—is relatively easy, as they can be secure in their belief that the seizure will never be challenged before a judge. If these agencies, however, were to know of an increased probability that they would be called to account for their actions, forfeiture would become much less psychologically attractive.

6. Require Officers Who Would Engage in Seizure to Obtain Certification

To increase transaction costs of forfeiture for officers, legislatures should require officers who wish to seize property to become licensed beforehand. Such a licensing requirement should not be superficial. Rather, officers should undergo extensive training in forfeiture, studying the justifications of forfeiture and the potential hardships it can impose on those who lose their property.[298] Such training could also be practical, teaching the proper bases for forfeiture or different techniques to effect forfeiture. Moreover, such training should have to be renewed, biannually or at some sufficiently

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[297] *See supra* note 106 (noting that eighty percent of forfeiture actions are uncontested).

[298] Such training is routine in other contexts. For instance, to use drug dogs, officers in Florida are required to undergo over 280 hours of training. *See* Florida v. Harris, 133 S. Ct. 1050, 1054 (2013) (describing the training and testing used to establish a drug-sniffing dog's reliability).

regular date to both impose a cost on the officer and department and to keep the real damage of forfeiture prevalent in the officers' minds.

This proposal would burden forfeiture actions on multiple axes. First, it would increase transaction costs of civil forfeiture. Departments or officers would have to pay to certify their officers to engage in forfeitures, a significant monetary investment to maintain the program. Moreover, in individual forfeiture actions, if an unlicensed officer would wish to seize property, he would have to radio for backup and get a certified officer present. Such a time investment would not merit the seizure of MVC or LVC and might justify leaving such property alone.

Furthermore, training would act as a "nudge" against forfeiture. By actively educating seizing officers, the training would reduce the subconscious attractiveness of forfeiture actions, particularly if officers were aware of the havoc forfeiture could wreak on claimants' lives. Requiring frequent training is important to keep this knowledge fresh in officers' minds.

C. *Progress?*

Unfortunately, progress on these fronts has been muted. Courts and legislatures have actually gone in the opposite direction, at times reducing transaction costs, allowing police departments to pursue forfeiture more easily. Indeed, a recent *New York Times* article indicates that police departments across the United States are actually *increasing* their forfeiture programs, in spite of public outcry.[299]

Specifically with regards to drug-sniffing dogs, a recent Supreme Court decision took the matter in entirely the wrong direction. In *Florida v. Harris*, appellant Harris attempted to suppress evidence obtained from a dog alert on his truck.[300] Florida's Supreme Court allowed the suppression of evidence, finding a dog's reliability directly relevant to establishing the probable cause necessary for a search.[301]

The Supreme Court, however, overturned the state court's determination. The Court found field data of dog alerts to be unreliable because it may potentially fail to capture false negatives or may provide a seemingly false positive if drugs were too well-concealed to be revealed in a search.[302] Much more important to the Court was the dog's performance in training: "If a bona fide organization has certified a dog after testing his reliability in

[299] Dewan, *supra* note 121 ("Despite that opposition, many cities and states are moving to expand civil seizures of cars and other assets.").

[300] 133 S. Ct. 1050 (2013).

[301] *Id.* at 1055.

[302] *Id.* at 1056-57.

a controlled setting, a court can presume . . . the dog's alert provides probable cause to search."[303]

The Court's reasoning proves problematic in the forfeiture context for two reasons. First, establishing a presumption in favor of a dog's accuracy as a basis for probable cause establishes a dangerous precedent in forfeiture actions, where probable cause is often the necessary standard for seizure.[304] If trained dogs are presumed to be accurate for probable cause purposes,[305] then their accuracy would be practically unassailable if a seizure were to proceed based on a dog's alert.

More troubling, however, is the Court's parsing of police motives. The Court held that the police dogs should generally be trusted because "only accurate drug-detection dogs enable officers to locate contraband without incurring unnecessary risks or wasting limited time and resources."[306]

However, this is patently not true in the forfeiture context. Instead, it would advantage police departments to obtain wildly inaccurate dogs that would constantly alert, thus justifying the seizure of property. Police have no incentive to ensure the accuracy of their dogs, as they would in a search context where officers must invest time with an uncertain pay-off.[307] This decision has in fact alarmed forfeiture watchdog groups, like the Americans for Forfeiture Reform, which, in its commentary on the decision, called the case "very bad news for anyone concerned with civil asset forfeiture reform and anyone worried about how these laws corrupt law enforcement and/or prey on the poor."[308]

Progress on other fronts has been similarly troubling. Utah's legislature recently eviscerated an effective attorneys' fee program, which required one hundred percent of attorneys' fees to go to successful claimants.[309] Additionally, the Tennessee legislature rewrote a bill that would have required immediate in personam forfeiture hearings.[310]

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303 *Id.* at 1057.

304 *See, e.g.*, *Asset Forfeiture*, FBI, http://www.fbi.gov/about-us/investigate/white_collar/asset-forfeiture, *archived at* http://perma.cc/SY47-6D3C ("The burden of proof on the FBI to seize property for civil, administrative and judicial forfeiture is probable cause."); *see also* Stillman, *supra* note 21, at 50 ("[S]uspicion on a par with 'probable cause' is sufficient.").

305 *Harris*, 133 S. Ct. at 1057.

306 *Id.*

307 *Id.*

308 Scott Alexander Meiner, Florida v. Harris *in the Context of Civil Asset Forfeiture*, AMS. FOR FORFEITURE REFORM (Feb. 20, 2013), http://www.forfeiturereform.com/2013/02/20/florida-v-harris-in-the-context-of-civil-asset-forfeiture/, *archived at* http://perma.cc/DW7X-YQ5Y.

309 *See supra* note 280 and accompanying text.

310 *See supra* note 250 and accompanying text (describing the gutting of the Tennessee asset forfeiture reform bill).

These are undoubtedly troubling—if expected—setbacks. Law enforcement politics and a powerful lobby mean that any reform to forfeiture will be politically difficult.[311] Properly framed, however, these suggested reforms would hopefully be more successful than proposals for a wholesale abolition of the practice. Intelligent legislators could frame the issue to the public as an attempt to provide procedural safeguards for individuals' private property rights. Rather than attacking police, these measures could be framed as ensuring fairness to potential innocent persons in the community.

Additional cause for optimism comes from the fact that attitudes on the drug war seem to be shifting, particularly with regards to marijuana.[312] As states increasingly legalize marijuana, and once-shunned drugs become more normalized, the pressing need for forfeiture to enforce drug laws will wane. Moreover, the number of forfeiture actions initiated will likely drop, as many are premised on the "smell" of marijuana[313] in a vehicle, a contention that is impossible to disprove, since marijuana is burned in consumption, and smells do not linger.

Thus, overall, forfeiture reformers should attempt to understand very specifically *what* they are targeting. Although broad, sweeping forfeiture reforms are important, they may be politically infeasible or may too broadly outlaw forfeiture actions that are valuable. By contrast, measures narrowly targeted at protecting MVC and LVC—often individual's personal, private property—would go a long way toward curbing abuse of the practice.

CONCLUSION

Any optimism for reform must necessarily be cautious. Forfeiture is like the mythic hydra—successfully severing one "head" merely encourages another to grow. However, the recent popular outcry over the practice means that legislatures may soon feel pressure from constituencies to pursue more meaningful reform.

Legislatures that embark on the project of reforming forfeiture must do so with very clear goals in mind. This Comment proposes approaching

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311 *See supra* notes 255-263 (recounting the difficulty of reforming forfeiture through the legislative process).

312 Marijuana legalization has recently become a pressing national issue as more and more states take steps to regulate and tax the once-illegal drug. *See generally High Time: Colorado Embarks on an Unprecedented Experiment*, ECONOMIST (Jan. 11, 2014), http://www.economist.com/news/united-states/21593467-colorado-embarks-unprecedented-experiment-high-time, *archived at* http://perma.cc/FJK4-6XMY (providing a thorough account of legalization efforts in Colorado and Washington).

313 *See* Stillman, *supra* note 21, at 49-50 (narrating the seizure of Ms. Boatright's property, which was premised on the odor of marijuana, although police found no drugs).

forfeiture as a "transaction"—one in which costs, externalities, and psychic biases play an important role.

While legislatures have thus far given seizing agencies unlimited upside by allowing them to recoup profits or property seized, they have not imposed any concomitant costs on these agencies. As such, forfeiture levels have spiraled dramatically out of control. The goal then should be to impose proper levels of transaction costs and to require seizing agencies to internalize the externalities they would impose on claimants.

Properly regulating the "market" of forfeiture would necessarily result in a reduction in the most pernicious area of forfeiture abuse: MVC and LVC forfeiture. Because these items are of such low value, any increase in the costs of forfeiture would make such items economically unappealing to seizing agencies. Adjusting this incentive structure ex ante is key because these items are simply not valuable enough to merit an ex post defense in convoluted forfeiture actions. Most laypeople—and even attorneys without a sophisticated knowledge of forfeiture—simply find it more cost-effective to let seized property go than to challenge the action. As such, any system must work to prevent such property from being seized in the first place.

This Comment makes no claims of determining the exact "value" of costs that would be required to successfully regulate such forfeiture. Indeed, many of these costs are not economically explicit but relate more to psychic costs individual officers bear: inconvenience, repetition, and other "irritating" activities that would lead officers to simply decide a seizure was not worth the effort.

This Comment's contribution is its theoretical framework. If legislatures were to concentrate on increasing the upfront costs to seizing agencies, they would inevitably alter police incentives. These new incentive structures would hopefully keep the property of law-abiding people safe from seizure.