THE YALE LAW JOURNAL

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To Be Given to God: Contemporary Civil Forfeiture as a Taking

ABSTRACT. Although civil asset forfeiture enjoys an impressive historical pedigree, in recent decades, it has mutated into something else entirely. Traditionally, civil forfeiture was justified as a particularized law-enforcement mechanism, designed to punish a specific wrongdoing. Today, however, civil forfeiture functions frequently as a fundraising tool, deployed to supplement government budgets. This Note highlights that metamorphosis and argues that contemporary civil forfeiture—forfeiture that is motivated by profit—is unconstitutional for a novel reason: it is a taking without just compensation.

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I dedicate this Note in loving memory of my late grandmother.

NOTE CONTENTS

Punished for what
he couldn't understand,

or is punishment
even an applicable word?

Deodand, I think,
picturing the blood—

that principle of old English law
where the rain-soaked bough

which crushed the ox driver's spine
must be splintered and scattered,

the waterwheel whose paddles
drowned the bather
must be salted and burned.

A thing forfeited or given to God
the text says.

To believe such a thing
is to imagine the world
as two natures.[1]

INTRODUCTION

On February 27, 2016, two sheriff's deputies stopped a black Suzuki Forenza on North 32nd Street in Muskogee County, Oklahoma.[2] The deputies effected the traffic stop originally because of a broken taillight, but a police K-9 provided a positive alert for drug contraband.[3] They conducted a search and uncovered over $53,000 in cash stashed in the vehicle.[4] When questioned, the driver, a

1. Kyle McCord, *Elegy for the Deodand*, BLACKBIRD (Spring 2015), https://blackbird-archive.vcu.edu/v14n1/poetry/mccord_k/deodand_page.shtml [https://perma.cc/CGG8-9MWE].

2. Affidavit at 1, State v. Wah, No. 2016-2471 (Okla. Muskogee Cnty. Dist. Ct. Apr. 5, 2016).

3. *Id.*

4. *See* Dan Alban, *The Impact Litigation Campaign to End Civil Forfeiture*, 45 LITIGATION, no. 2, 2019, at 41, 41; Affidavit, *supra* note 2, at 1.

forty-year-old man, offered "inconsistent stories" and was "unable to confirm the money was his."[5]

After six hours of interrogation, the deputies suspected that the money represented the proceeds of drug sales.[6] That night, they seized all of the driver's cash, and, two weeks later, prosecutors sought to appropriate it permanently.[7] They attempted to do so through a civil asset-forfeiture action, a process that allows police and prosecutors to take ownership of private property by filing a civil suit against the property itself. Civil forfeiture, as its name implies, is not a criminal proceeding, and a criminal conviction is not a prerequisite to confiscating the property.[8] Accordingly, prosecutors need only prove by a preponderance of the evidence that the property at issue is connected to criminal activity.[9] Justice, it seemed, was imminent for this drug-trafficking driver.

In reality, the police had just taken money from a nonprofit intended to support a school in Burma and an orphanage in Thailand.[10] The driver, Eh Wah, a Burmese refugee and U.S. citizen, was a volunteer for a Christian rock band fundraising through sales of tickets that were ten to twenty dollars each.[11] Much of what the police took represented revenue from the band's concerts.[12] As for the "inconsistent stories," Wah could not adequately explain the source of funds

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5. Affidavit, *supra* note 2, at 1.

6. Alban, *supra* note 4, at 41.

7. Notice of Seizure and Forfeiture at 1, State *ex rel.* Loge v. $53,234.00 Cash, No. CV-2016-66 (Okla. Muskogee Cnty. Dist. Ct. Mar. 11, 2016). The "seizure" of property is the initial (ostensibly interim) assertion of the government's power to take property incident to its law-enforcement power; the "forfeiture" of property is the mechanism by which the government perfects title to seized property. *See infra* note 68 and accompanying text.

8. *See* Note, *How Crime Pays: The Unconstitutionality of Modern Civil Asset Forfeiture as a Tool of Criminal Law Enforcement*, 131 HARV. L. REV. 2387, 2390 (2018).

9. Lisa Knepper, Jennifer McDonald, Kathy Sanchez & Elyse Smith Pohl, *Policing for Profit: The Abuse of Civil Asset Forfeiture, 3rd Edition*, INST. FOR JUST. 39 (2020), https://ij.org/wp-content/uploads/2020/12/policing-for-profit-3-web.pdf [https://perma.cc/AT24-ZYWH]. As discussed below, a closely related form of forfeiture, administrative forfeiture, requires only probable cause. *See infra* note 81 and accompanying text.

10. *See* Christopher Ingraham, *How Police Took $53,000 from a Christian Band, an Orphanage and a Church*, WASH. POST (Apr. 25, 2016, 9:18 AM EDT), https://www.washingtonpost.com/news/wonk/wp/2016/04/25/how-oklahoma-cops-took-53000-from-a-burmese-christian-band-a-church-in-omaha-and-an-orphanage-in-thailand [https://perma.cc/WRA8-XEP6].

11. *See id.*; Claim for Property and Verified Answer at 1-3, *Loge*, No. CV-2016-66 (Okla. Muskogee Cnty. Dist. Ct. Apr. 22, 2016).

12. Chris Fuchs, *Months After $53,000 Seized, Oklahoma County Returns Donations to Christian Band*, NBC NEWS (May 2, 2016, 11:21 AM EDT), https://www.nbcnews.com/news/asian-america/months-after-53-000-seized-charity-donations-returned-christian-band-n565871 [https://perma.cc/Z5W5-3WJZ].

to the sheriff's deputies because of his limited proficiency in English.[13] And when the band's leader tried to explain over the phone that Wah was part of a charity music group touring through the United States, one of the deputies stated, "You are wrong."[14]

The night of the traffic stop, police released Wah and allowed him to drive off to a different state with nothing but a handwritten "property receipt" for the seized cash and a traffic warning for a "defective vehicle."[15] Despite the purported positive alert from the police dog, officers found no drugs or drug paraphernalia in Wah's car.[16] Nor did they conduct further investigation into Wah's purported crimes after the night of the stop.[17] In Oklahoma, police departments can keep up to 100% of the funds they forfeit, creating a perverse incentive to seize and forfeit as much as possible.[18]

In light of these facts, the Institute for Justice filed papers to reclaim the cash on Wah's behalf.[19] Within hours, the district attorney dismissed the case and returned the money to Wah.[20] But the district attorney also stated that "based on what they had and what they were presented with," the deputies had "acted appropriately."[21] He believed that law enforcement could not have done anything differently for Wah—the justice system, he claimed, had worked.[22]

In a sense, it had. Wah and his band got their property back from the police. But many others never do. Take, for instance, the story of Michael Albin. After serving two tours in Vietnam, Albin retired to South Carolina, where he became the proud proprietor of Putters Restaurant and Lounge in Myrtle Beach.[23] Unfortunately, in the late aughts, Putters became the site of six burglaries, so Albin

13. *See* Ingraham, *supra* note 10.

14. *Id.*

15. *Id.*; *Contact Report: Eh Wah*, Muskogee Cnty. Sheriff's Dep't (Feb. 27, 2016, 6:35 PM), https://www.washingtonpost.com/blogs/wonkblog/files/2016/04/20160413_091052.jpg [https://perma.cc/FCP5-BED9].

16. *See* Ingraham, *supra* note 10.

17. Alban, *supra* note 4, at 41.

18. Ingraham, *supra* note 10.

19. Dan Alban, *The Fastest VICTORY in the South: How IJ Launched and Won a Case in Six Hours*, 25 Liberty & L., no. 3, 2016, at 1, 1.

20. *Id.*

21. Fuchs, *supra* note 12.

22. *Id.*

23. *Michael James Albin*, Sun News (June 13, 2012), https://www.legacy.com/us/obituaries/myrtlebeachonline/name/michael-albin-obituary?id=13502603 [https://perma.cc/7LE7-37ER]; *Putters, Inc.*, S.C. Sec'y State Bus. Entities Online, https://businessfilings.sc.gov/BusinessFiling/Entity/Profile/60a816aa-3e25-4609-a0c7-128b998bf62a [https://perma.cc/F98Q-TRG2] (noting the address of Putters, Inc.).

moved into a motor home in the restaurant's parking lot.[24] But when Albin unknowingly invited two undercover police officers to smoke marijuana with him in the RV, they seized approximately $17,000 in cash, along with the motor home itself.[25] Again, police brought a civil-forfeiture action to finalize the confiscation.[26]

South Carolina, though, had codified some limitations to civil forfeiture. Most pertinent to Albin, state law prohibited the forfeiture of a vehicle on the basis of its use during illegal drug activity unless it contained at least one pound of marijuana or other prohibited substances.[27] Police had found only four ounces in Albin's motor home.[28] But this statutory restriction posed no problem for prosecutors, who argued that, under a separate statutory provision, Albin's *home* was forfeitable because it served as a *container* of controlled substances.[29] On July 28, 2011, the trial court agreed and allowed police to take title to Albin's "container."[30] On June 12, 2013, the South Carolina Court of Appeals reversed, holding that the lower court's logic would "render the one-pound weight limitation" meaningless.[31] But the vindication came too late. One year and one day before the decision, on June 11, 2012, Albin had died, without the "container" he called home.[32]

Wah's and Albin's stories are by no means unique in the United States. On July 19, 2012, a militarized police unit, equipped with riot gear and a battering ram, raided the Philadelphia home of Mary Adams, a sixty-eight-year-old woman, and her seventy-year-old husband, Leon Adams.[33] The officers then arrested their son, Leon Adams, Jr., for allegedly selling marijuana to a confidential informant.[34] A month later, the police returned, seeking to forfeit the entire

24. Anna Lee, Nathaniel Cary & Mike Ellis, *Trail of Targets Shows Breadth of Lives Changed by Forfeiture*, Greenville News (Jan. 27, 2019, 11:51 PM ET), https://www.greenvilleonline.com/in-depth/news/2019/01/27/trail-people-targeted-south-carolina-police-property-seizure/2469207002 [https://perma.cc/MY7W-FJ8H].

25. *See* Hembree v. One Thousand Eight Hundred Forty-Seven Dollars (1,847.00), U.S. Currency, 743 S.E.2d 864, 865 (S.C. Ct. App. 2013).

26. *See id.*

27. S.C. Code Ann. § 44-53-520(a)(6) (2024).

28. *See Hembree*, 743 S.E.2d at 865.

29. *See id.*; S.C. Code Ann. § 44-53-520(a)(3) (2024).

30. *Hembree*, 743 S.E.2d at 865.

31. *Id.* at 867.

32. *Compare id.* at 865 (noting that the appeal was decided on June 12, 2013), *with Michael James Albin*, *supra* note 23 (listing Albin's date of death as June 11, 2012).

33. Sarah Stillman, *Taken*, New Yorker (Aug. 5, 2013), https://www.newyorker.com/magazine/2013/08/12/taken [https://perma.cc/TQY3-QBJ5].

34. *Id.*

house because Leon, Jr. had made the twenty-dollar sale on the porch of his parents' house.[35] In 2017, the Wyoming Highway Patrol took more than $90,000 from Phil Parhamovich after a routine traffic stop because he was intimidated into signing a waiver forfeiting the cash amount, even though law enforcement never found any evidence of illegal activity and never accused or charged him of any crime (except a $25 traffic citation).[36] The list of baseless civil-forfeiture proceedings targeting cash, homes, and livelihoods is practically endless.[37]

* * *

Two relevant constitutional provisions limit the government's ability to confiscate property: the Due Process Clause[38] and the Takings Clause.[39] But these apparent restrictions have not yet been interpreted to limit civil forfeiture, in large part owing to forfeiture's impressive historical pedigree.

The American regime of civil forfeiture traces its roots to England, where statutory law allowed forfeiture of objects used in violation of customs and admiralty laws.[40] Adopting this English practice, the First Congress similarly permitted law enforcement to proceed in rem to forfeit property.[41] These laws

35. *Id.*

36. *Wyoming Forfeiture*, INST. FOR JUST., https://ij.org/case/wyoming-forfeiture [https://perma.cc/K7G8-XA9C].

37. Civil-forfeiture abuse is not limited to state and local police. In 2014, the Internal Revenue Service (IRS) and the Department of Justice (DOJ) attempted to forfeit more than $100,000 from Lyndon McLellan. *Government Unreformed*, INST. FOR JUST., https://ij.org/case/north-carolina-forfeiture [https://perma.cc/9NST-K4X3]. McLellan had allegedly made frequent cash deposits just under $10,000, the threshold that triggers certain reporting requirements. Greg Lindenberg, *U.S. Drops Case Against N.C. C-Store Owner*, CSP (May 14, 2015), https://www.cspdailynews.com/company-news/us-drops-case-against-nc-c-store-owner [https://perma.cc/FV87-FDAC]. But recognizing that such "structuring" is unlawful only when an individual deliberately intends to evade those reporting requirements, IRS had announced that it would not confiscate assets traceable to a legal source nearly two months prior to seizing McLellan's bank account. Nick Sibilla, *IRS Seizes over $100,000 from Innocent Small Business Owner, Despite Promise to End Raids*, FORBES (May 5, 2015, 9:05 AM EDT), https://www.forbes.com/sites/instituteforjustice/2015/05/05/irs-seizes-over-100000-from-innocent-small-business-owner-despite-promise-to-end-raids [https://perma.cc/4C26-WGP3]. When public outrage began bubbling, a federal prosecutor advised McLellan's lawyer and accountant: "[P]ublicity about [this case] doesn't help. It just ratchets up feelings in the agency. My offer is to return 50% of the money." *Government Unreformed*, *supra*.

38. U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."); *id.* amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .").

39. U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

40. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 682 (1974).

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

followed the fiction that the property itself was guilty of the customs or maritime offense charged,[42] and accordingly, "no personal conviction of the offender [was] necessary to enforce a forfeiture in rem."[43] On some accounts, historical civil forfeiture was originally "justified by necessity," for the responsible party was located beyond the United States's jurisdiction.[44] For example, if a foreign owner of goods fraudulently undervalued import merchandise in violation of customs law, customs officials and prosecutors might forfeit the cargo on the justification that the foreign owner was out of reach for criminal action.[45]

That history might mean that today's civil forfeiture, often wielded against property whose owners are within easy reach, is a violation of due process. But there is disagreement on this point.[46] The existing literature instead finds common ground in identifying a different historical justification for civil forfeiture: its use as a law-enforcement mechanism.[47] Indeed, it was by reference to this use—what this Note broadly refers to as the "enforcement" purpose—that the Supreme Court held that "forfeiture schemes are not rendered unconstitutional" as a "taking for government use of innocent parties' property without just compensation."[48] This enforcement purpose, described further in Section II.B, authorized the government to confiscate property as a form of punishment, rather than as incident to its "power of eminent domain."[49]

It would seem, however, that today's civil forfeiture is worlds apart from its ancestral analogue. As various sitting Justices have recognized, civil forfeiture is no longer primarily an enforcement endeavor.[50] Instead, it has become a government fundraising tool. According to one study, 40% of law-enforcement

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42. Leonard v. Texas, 580 U.S. 1178, 1181 (2017) (Thomas, J., statement respecting the denial of certiorari).

43. The Palmyra, 25 U.S. (12 Wheat.) 1, 15 (1827).

44. *Leonard*, 580 U.S. at 1181 (Thomas, J., statement respecting the denial of certiorari); *see also* Oliver Wendell Holmes, Jr., The Common Law 19 (Am. Bar Ass'n 2009) (1881) ("The ship is the only security available in dealing with foreigners, and . . . it is easy to seize the vessel and satisfy the claim at home . . . .").

45. *See* United States v. Twenty-Five Packages of Panama Hats, 231 U.S. 358, 362 (1913) ("The very fact that the criminal provision of the statute does not operate extraterritorially against the consignor, would be a reason why the goods themselves should be subjected to forfeiture on arrival here.").

46. *See infra* Section II.A.

47. *See infra* Section II.B.

48. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 680 (1974).

49. Bennis v. Michigan, 516 U.S. 442, 452 (1996).

50. *See infra* Section II.B.

agencies indicated that "civil forfeiture [is] a *necessary*" part of their budgets.[51] In Washington, D.C., the police at one point crafted an operating budget that took into account "millions of dollars in anticipated proceeds from future civil" forfeitures.[52] And in one Texas county, police officers received bonuses of up to $26,000 from forfeiture proceeds.[53] These perverse incentives fuel indiscriminate forfeitures of whatever law enforcement can find. And indeed, the numbers confirm the power of these incentives: in 2018, forty-two states, the District of Columbia, and the federal government collectively obtained over $3 billion worth of private property through civil-forfeiture proceedings.[54] Between 2002 and 2018, just twenty states, in conjunction with the federal government, took in over $63 billion from civil-forfeiture actions.[55]

This Note argues that today's civil forfeiture—which places the desire for profit above the duty of policing—is unconstitutional for a novel reason: it is a taking without just compensation. To be sure, there are state-based reforms underway,[56] and statutory innocent-owner defenses (i.e., defenses against forfeiture premised on the ground that the property owner had no knowledge of the underlying criminal activity) have existed for years.[57] Advocates,[58] judges,[59] and academics[60] have produced a significant body of litigation and literature attempting to curb the pernicious effects of civil forfeiture. This Note recognizes these efforts and explains why the recategorization of contemporary civil forfeiture as a taking without just compensation might be a superior legal tool (or at least another arrow in the quiver) in the battle against civil forfeiture.[61]

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51. John L. Worrall, *Addicted to the Drug War: The Role of Civil Asset Forfeiture as a Budgetary Necessity in Contemporary Law Enforcement*, 29 J. CRIM. JUST. 171, 179 (2001); *see also* Knepper et al., *supra* note 9, at 52 ("In 2018, 32% of total expenditures [of forfeiture funds] across 13 states went toward equipment and capital expenditures, and 19% was spent on personnel.").

52. Robert O'Harrow Jr. & Steven Rich, *D.C. Police Plan for Future Seizure Proceeds Years in Advance in City Budget Documents*, WASH. POST (Nov. 15, 2014), https://www.washingtonpost.com/investigations/dc-police-plan-for-future-seizure-proceeds-years-in-advance-in-city-budget-documents/2014/11/15/7025edd2-6b76-11e4-b053-65cea7903f2e_story.html [https://perma.cc/M7RU-EFNB].

53. Stillman, *supra* note 33.

54. Knepper et al., *supra* note 9, at 15.

55. *Id.* at 5.

56. *See, e.g.*, *infra* text accompanying notes 346-349.

57. *See, e.g.*, *infra* text accompanying notes 246-247, 364, 367.

58. *See, e.g.*, Plaintiffs' Third Amended Complaint at 2, 4, Morrow v. Washington, No. 08-cv-288-JRG (E.D. Tex. Feb. 17, 2010); *supra* text accompanying note 20.

59. *See, e.g.*, *infra* text accompanying notes 157-160.

60. *See, e.g.*, *infra* note 154 and accompanying text.

61. *See, e.g.*, *infra* Section III.A; Section IV.B.

This Note proceeds in four Parts. Part I provides legal background on the two most relevant avenues through which the government confiscates property—forfeiture and takings—and the existing jurisprudence distinguishing between them. Part II considers the evolution of civil forfeiture and argues that the practice has mutated from its traditional form premised on law-enforcement goals (what this Note refers to as "historical civil forfeiture") to a certain modern form that centers on a profit motive to the detriment of an enforcement purpose (what this Note refers to as "contemporary civil forfeiture").[62] Building on that discussion, Part III develops the core of this Note's argument: contemporary civil forfeiture is nothing more than a taking in disguise. Part III also operationalizes this new theory by proposing an analytical framework that can reveal when forfeiture hides a profit-motivated public-use purpose. It then clarifies why revenue-generating forfeiture is not simply a tax and why the new theory does not also subject taxes and other forms of state-sanctioned property deprivations to takings scrutiny. Next, Part IV highlights the stakes of this theory and demonstrates why constitutional intervention will not disrupt existing efforts toward policy reform. The Note then concludes.

I. TWO FORMS OF STATE-SANCTIONED PROPERTY DEPRIVATION

Despite the soaring rhetoric of commentators defending "that sole and despotic dominion" over property,[63] the state has always wielded significant power to deprive individuals of their assets.[64] Two methods are most relevant to this

62. In a recent article, Professor Stephanie Holmes Didwania distinguished between "destructive" forfeitures and "revenue" forfeitures. Stephanie Holmes Didwania, *Asset Forfeiture and Inequality*, 77 STAN. L. REV. 159, 164-65 (2025). In Professor Didwania's dichotomy, destructive forfeitures include weapons and ammunition, which generate little revenue for the government. *Id.* at 164. In contrast, revenue forfeitures include "cash, financial instruments, electronics, and vehicles." *Id.* Although contemporary civil forfeitures are likely to overlap significantly with revenue forfeitures, they are not perfectly alike. Most notably, the terms used in this Note seek to distinguish forfeitures not by *whether* they generate revenue but rather by whether the forfeiture is *intended* to generate revenue.

63. 2 WILLIAM BLACKSTONE, COMMENTARIES *2; *accord* HENRY HYDE, FORFEITING OUR PROPERTY RIGHTS: IS *YOUR* PROPERTY SAFE FROM SEIZURE? 5 (1995) ("The signers of the American Declaration of Independence, who staked their lives and fortunes on that courageous act, believed firmly that preeminent among our natural human rights is the right to own and enjoy private property.").

64. *See, e.g.*, LEONARD W. LEVY, A LICENSE TO STEAL: THE FORFEITURE OF PROPERTY 1 (1996) ("Law enforcement agencies . . . perpetrate astonishing outrages . . . through forfeitures. Although property has the same constitutional protection as life and liberty, police and drug enforcement officers seize money, cars, houses, land, and businesses of people who may be entirely innocent of criminal conduct.").

Note: forfeiture and takings.[65] This Part explains these methods and distinguishes between them.

A. The Law of Forfeitures

Forfeiture is the "divestiture of property without compensation."[66] In the public-law context, forfeiture is a tool by which the government can permanently appropriate property that is allegedly connected to criminal activity.[67] The state's property divestiture by forfeiture involves three stages: (1) upon commission of a crime, title to the subject property immediately vests in the government; (2) the government asserts this property right by way of seizing the property; and (3) the government's title to the property is perfected by forfeiture, and, because the government's title relates back to the moment the crime was committed, any interceding alienations of the property—even those involving good-faith purchasers—are null and void.[68]

The forms of forfeiture vary widely. Forfeiture may be judicial or nonjudicial; summary, administrative, criminal, or civil; and in personam or in rem. And the state's decision to use one form or another might depend on whether it intends to forfeit contraband per se; proceeds of crime; or property used in facilitation or as an instrumentality of crime.[69]

Contraband, proceeds, and instrumentalities. Property subject to forfeiture generally fall into one or more of these three broad categories. The first category, contraband per se, refers to property for which possession alone constitutes a

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65. These two methods are by no means the only powers under which the state takes property. Other forms of confiscation are discussed in Section III.C, *infra*.

66. *Forfeiture*, BLACK'S LAW DICTIONARY (11th ed. 2019); *see also Forfeiture*, BALLENTINE'S LAW DICTIONARY (3d ed. 1969) ("[A] divestiture of property without compensation, in consequence of a default or an offense . . . .").

67. *Forfeiture*, BALLENTINE'S LAW DICTIONARY (3d ed. 1969).

68. *See* United States v. Eight (8) Rhodesian Stone Statues, 449 F. Supp. 193, 195 n.1 (C.D. Cal. 1978); *see also* United States v. Stowell, 133 U.S. 1, 16-17 (1890) ("By the settled doctrine of this court, whenever a statute enacts that upon the commission of a certain act specific property used in or connected with that act shall be forfeited, the forfeiture takes effect immediately upon the commission of the act; the right to the property then vests in the United States, although their title is not perfected until judicial condemnation, the forfeiture constitutes a statutory transfer of the right to the United States at the time the offence is committed, and the condemnation, when obtained, relates back to that time, and avoids all intermediate sales and alienations, even to purchasers in good faith.").

69. *See* DEE R. EDGEWORTH, ASSET FORFEITURE: PRACTICE AND PROCEDURE IN STATE AND FEDERAL COURTS 18 (3d ed. 2014); *see also id.* at 1-21 (summarizing the different forms of forfeiture and the theories underlying them).

crime,[70] such as illegal narcotics or counterfeit bills.[71] The second category, proceeds, refers to "any property, real or personal, tangible or intangible, that the wrongdoer would not have obtained or retained but for the crime."[72] For example, a Cézanne painting bought with cash stolen during a bank robbery or the appreciation in value of an Audemars Piguet watch received as an unlawful bribe (along with the watch itself) constitute proceeds. The third category, instrumentalities, refers to "property not intrinsically illegal in character," but rendered forfeitable as "derivative contraband" because it was "illegally used."[73] A clear example of an instrumentality is a vehicle, lawfully possessed, but used to transport contraband.[74]

Nonjudicial forfeiture vs. judicial forfeiture. Nonjudicial forfeiture refers to forfeitures authorized by statute and effected typically by law-enforcement agencies without the participation of a court, prosecutor, or claimant (i.e., a person with a legal interest in the subject property who intervenes to contest the forfeiture) in adversarial proceedings.[75] Nonjudicial forfeiture includes summary and administrative forfeitures.[76] Summary forfeiture generally occurs "without formal

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70. *See* One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 699 (1965); *see also* 4 JOEL M. ANDROPHY, WHITE COLLAR CRIME § 30:35 (3d ed. 2023) ("[C]ontraband per se . . . is property for which the possession or production is in itself illegal . . . ."); *Contraband*, BLACK'S LAW DICTIONARY (11th ed. 2019) (noting that "contraband per se" refers to "[p]roperty whose possession is unlawful regardless of how it is used").

71. EDGEWORTH, *supra* note 69, at 11-12; *see also* Bennis v. Michigan, 516 U.S. 442, 459 (1996) (Stevens, J., dissenting) ("The first category—pure contraband—encompasses items such as . . . sawed-off shotguns, narcotics, and smuggled goods.").

72. Stefan D. Cassella, *An Overview of Asset Forfeiture in the United States*, *in* CIVIL FORFEITURE OF CRIMINAL PROPERTY: LEGAL MEASURES FOR TARGETING THE PROCEEDS OF CRIME 23, 33-34 (Simon N.M. Young ed., 2009). Proceeds are generally understood to be gross receipts, not net profits. *See id.* at 34.

73. *One 1958 Plymouth Sedan*, 380 U.S. at 699-700.

74. *See, e.g.*, United States v. 2001 Lexus LS430, 799 F. Supp. 2d 599, 607 (E.D. Va. 2010) (finding that using vehicles to transport minors for unlawful sexual conduct renders such vehicles instrumentalities of crime and thus forfeitable); United States v. One Dodge Durango 2004, 545 F. Supp. 2d 197, 202-03 (D.P.R. 2006) (finding that using vehicles to transport an individual to meetings where drug-trafficking business was discussed renders such vehicles forfeitable).

As may be evident from these cases, the connection between noncontraband property (e.g., a vehicle) and unlawful activity (e.g., drug sales) need not be a close one. For instance, in *Commonwealth v. Real Property & Improvements Commonly Known as 5444 Spruce Street*, the court found forfeitable a home in which drugs were sold, despite the fact that police found less than eighty dollars' worth of narcotics and the culprit was a first-time offender who was sentenced to only two years of probation and a fine of $185. 890 A.2d 35, 37-40, 43 (Pa. Commw. Ct. 2006).

75. *See* Cassella, *supra* note 72, at 37-38; EDGEWORTH, *supra* note 69, at 2-3; 34 CAL. JUR. 3D *Forfeitures and Penalties* § 3, Westlaw (database updated Feb. 2025).

76. EDGEWORTH, *supra* note 69, at 2.

legal process"[77] (i.e., without notice or an opportunity to be heard) and applies uniquely to contraband.[78] The local police can, for instance, summarily forfeit illicit drugs without providing a claimant with the opportunity to contest the confiscation.[79] Meanwhile, administrative forfeiture is, in essence, how law enforcement acquires property by default of potential claimants.[80] First, a law-enforcement agency can generally seize property, assuming there is probable cause to do so.[81] The seizing agency can then perfect title to the property through administrative forfeiture if it gives notice to potential claimants and receives no opposition for a statutorily determined period.[82] If an interested party does file a claim, the administrative forfeiture halts, and the seizing agency must pursue a judicial remedy if it wishes to complete the forfeiture.[83]

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77. *Id.* at 3.

78. *Id.* at 2.

79. *See, e.g.*, 21 U.S.C. § 881(f)(1) (2018) ("All controlled substances . . . shall be deemed contraband and seized and summarily forfeited to the United States."); N.C. GEN. STAT. § 90-112(e) (2024) ("All [controlled] substances . . . shall be deemed contraband and seized and summarily forfeited to the State.").

80. *See* EDGEWORTH, *supra* note 69, at 3-4, 18; 4 ANDROPHY, *supra* note 70, § 30:36; *see also* Cassella, *supra* note 72, at 38 ("An administrative forfeiture is not really a proceeding at all in the judicial sense. It is more like an abandonment.").

81. *See* Note, *supra* note 8, at 2389 ("Administrative forfeiture occurs when a law enforcement agency seizes property based on probable cause to believe that it is connected to criminal activity."). To be clear, administrative forfeitures are not limited to police departments—the Department of the Treasury (Treasury) and DOJ both use the administrative-forfeiture process far more frequently than other forms of forfeiture. *See* Knepper et al., *supra* note 9, at 24. Between 2000 and 2019, 78% of all DOJ forfeitures were administrative (civil forfeiture composed 6% and criminal forfeiture 16%); between 2000 and 2016, *96%* of all Treasury forfeitures were administrative. Knepper et al., *supra* note 9, at 24; *see also* Cassella, *supra* note 72, at 37 (noting that most "federal forfeitures are administrative forfeitures" because "the vast majority of all forfeiture proceedings are uncontested" (footnote omitted)). This also means that, in the vast majority of federal forfeiture cases, law enforcement requires only probable cause to dispossess individuals of their private property permanently.

82. Cassella, *supra* note 72, at 37-38; *see also, e.g.*, 19 U.S.C. §§ 1607(a), 1609(a) (2018) (authorizing customs officers to seize certain goods, requiring them to provide "notice of the seizure of such articles and the intention to forfeit," and, in the event no claim is filed within twenty days, mandating them to declare the good forfeited); GA. CODE ANN. §§ 16-13-49(b)(5), 9-16-11(c)(4) (2024) (providing for the forfeiture of "[a]ny property found in close proximity to any controlled substance or other property subject to forfeiture" if "no claim is received within 30 days after service . . . or the second publication of the notice, whichever occurs last").

83. *See* EDGEWORTH, *supra* note 69, at 3; *see also* Money Laundering & Asset Recovery Section, *Asset Forfeiture Policy Manual*, U.S. DEP'T OF JUST. 6-2 (2025) [hereinafter *Asset Forfeiture Policy Manual*], https://www.justice.gov/criminal/criminal-afmls/file/839521/dl [https://perma.cc/4GCC-NY6Z] ("If a party files a timely and valid claim with the seizing agency, the

In contrast to nonjudicial forfeiture—which requires neither prosecutor nor court—judicial forfeiture involves formal adversarial proceedings. If prosecutors prevail in a judicial-forfeiture proceeding, the court orders that the property's title be transferred to the government.[84] The two types of judicial forfeiture are criminal forfeiture and civil forfeiture.[85] To effect criminal forfeiture, in contrast to all other forms of forfeiture, the state must first obtain a criminal conviction or a guilty plea.[86] Civil forfeiture, on the other hand, does not require the institution of criminal proceedings. Using civil forfeiture, the state can take title to property that prosecutors establish—by a preponderance of the evidence—was connected to a crime without ever charging the owner (or anyone else) with that crime.[87]

In personam vs. in rem. Forfeiture proceedings can be conducted either in personam (i.e., against the owner of property) or in rem (i.e., against the property itself).[88] All criminal-forfeiture proceedings are conducted in personam, while most civil-forfeiture proceedings are brought in rem.[89] Because most in personam forfeiture actions are criminal proceedings, they also trigger more procedural protections, such as "the right to a jury trial and a heightened standard of proof."[90]

In rem forfeiture proceedings are brought against the property itself, and those wishing to challenge the forfeiture must intervene as claimants.[91] This procedural quirk leads to case captions that seem utterly incongruent with the seriousness of what prosecutors are seeking to achieve, such as *United States v.*

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administrative forfeiture process terminates, and the agency refers the case to the U.S. Attorney's Office (USAO) for judicial forfeiture.").

84. Cassella, *supra* note 72, at 37 (footnote omitted).

85. EDGEWORTH, *supra* note 69, at 2.

86. *See* Libretti v. United States, 516 U.S. 29, 38-39 (1995) ("Forfeiture is an element of the sentence imposed *following* conviction or . . . a plea of guilty . . . .").

87. Cassella, *supra* note 72, at 41.

88. EDGEWORTH, *supra* note 69, at 1-2.

89. *Id.* at 5, 6-11; Cassella, *supra* note 72, at 39. A few states do authorize civil in personam forfeiture actions by statute. *See, e.g.*, LA. STAT. ANN. § 40:2613(A)(1) (2024) ("A forfeiture may be ordered by a court on proceedings brought by the district attorney on behalf of the state in an in personam civil action alleging conduct giving rise to forfeiture if it is authorized by law."). However, the norm is that civil forfeiture is done in rem while criminal forfeiture is done in personam. *See* State v. Vallot, 970 So.2d 1174, 1177 (La. Ct. App. 2007); *see also* CHARLES DOYLE, CONG. RSCH. SERV., RS22005, CRIME AND FORFEITURE: IN SHORT 1 (2023) ("Civil forfeiture is ordinarily the product of a civil, in rem proceeding . . . ."). As such, the literature tends to treat in rem forfeiture and civil forfeiture synonymously.

90. Leonard v. Texas, 580 U.S. 1178, 1179 (2017) (Thomas, J., statement respecting the denial of certiorari).

91. EDGEWORTH, *supra* note 69, at 2.

144,774 Pounds of Blue King Crab,[92] *United States v. "The Wolf of Wall Street" Motion Picture*,[93] and *United States v. 11¼ Dozen Packages of Article Labeled in Part Mrs. Moffat's Shoo Fly Powders for Drunkenness*.[94] This Note focuses on the in rem civil or administrative forfeiture of proceeds and instrumentalities—what the Note broadly refers to as "civil forfeiture"—because it is in these types of forfeitures that the state most often takes property without an enforcement justification and with a profit motive.[95]

B. The Law of Takings

Eminent domain refers to the state's power to confiscate private property for public use.[96] The authority to deprive individuals of their property in this way "requires no constitutional recognition; it is an attribute of sovereignty"[97] and "inheres in every independent State."[98] But the power to take is not without its limits in this country. The Takings Clause of the Fifth Amendment provides that "private property [shall not] be taken for public use, without just compensation."[99] This provision limits eminent domain in two ways. First, property must

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92. 410 F.3d 1131 (9th Cir. 2005).

93. First Amended Verified Complaint for Forfeiture in Rem at 157-60, United States v. "The Wolf of Wall Street" Motion Picture, No. CV 16-5362 (C.D. Cal. Aug. 4, 2017).

94. 40 F. Supp. 208 (W.D.N.Y. 1941).

95. Forfeitures of contraband are not profitable because law enforcement cannot liquidate contraband to generate revenue. *See supra* note 62 (discussing Professor Holmes's classification of "destructive" forfeitures). And because criminal forfeitures require criminal convictions, they require greater prosecutorial and policing efforts on lengthier timelines, diminishing the returns. *See infra* note 155 (discussing why civil forfeitures are attractive to law enforcement).

96. 1 JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § 1.11 (3d ed. 2024); *see also* Jennifer Danis & Michael Bloom, *Taking from States: Sovereign Immunity's Preclusive Effect on Private Takings of State Land*, 32 STAN. L. & POL'Y REV. 59, 64 (2021) ("Eminent domain is the power of the sovereign to take property for its own use."); Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077, 1081 (1993) ("The 'eminent domain' power refers to the state's prerogative to seize private property, dispossess its owner, and assume full legal right and title to it in the name of some ostensible public good.").

97. Boom Co. v. Patterson, 98 U.S. 403, 406 (1879); *see also* PennEast Pipeline Co. v. New Jersey, 594 U.S. 482, 494 (2021) ("[E]minent domain was one of those means well known when the Constitution was adopted, and employed to obtain lands for public uses." (quoting Kohl v. United States, 91 U.S. 367, 372 (1876))).

98. Georgia v. City of Chattanooga, 264 U.S. 472, 480 (1924).

99. U.S. CONST. amend. V. The government's power to take property may also be fairly inferred from this limitation. *See Kohl*, 91 U.S. at 372-73 ("The fifth amendment contains a provision that private property shall not be taken for public use without just compensation. What is that but an implied assertion, that, on making just compensation, it may be taken?").

be taken for public use;[100] second, taken property must be justly compensated.[101] These dual limitations can be justified in myriad ways, but the Supreme Court has in particular "emphasized [their] role in 'bar[ring] Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'"[102]

The idea of the Just Compensation Clause is simple and forms the heart of the Takings Clause: if the state takes property—which it can do—it must pay what the property is worth.[103] The Public Use Clause, on the other hand, is the impotent condition precedent of the Takings Clause. To be sure, it forbids government from taking property "for the purpose of conferring a private benefit on a particular private party."[104] A city council, for instance, could not forcibly take privately owned land—even if it were to pay fair market value for it—simply to provide it to another owner who wishes to build a vacation home. There must be a public purpose.

But public purpose is a concept that the Supreme Court has consistently defined broadly, "reflecting [a] longstanding policy of deference to legislative judgments in this field."[105] Accordingly, the Public Use Clause is no barrier to the state's taking of private property for transfer to another private party under the guise of economic development,[106] enhancing competition,[107] or curbing land

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100. *See* Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 245 (1984) ("A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void."); Kelo v. City of New London, 545 U.S. 469, 478 (2005) ("Nor would the City be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit.").

101. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 537 (2005) (quoting First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 315 (1987)).

102. *Id.* at 537 (second alteration in original) (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)); *see also* Micah Elazar, Comment, *"Public Use" and the Justification of Takings*, 7 J. CONST. L. 249, 254 (2004) ("[A] taking singles out a particular, identifiable individual to bear certain costs of the sake of social welfare. . . . Because only a limited number of individuals are asked to bear the burden of a taking, it is important that they be provided with adequate reasons for having to bear costs that others do not.").

103. *See* United States v. 50 Acres of Land, 469 U.S. 24, 29 (1984). Just compensation "normally is to be measured by 'the market value of the property at the time of the taking,'" and "[d]eviation from this measure . . . has been required only 'when market value has been too difficult to find, or when its application would result in manifest injustice to owner or public.'" *Id.* (first quoting Olson v. United States, 292 U.S. 246, 255 (1934); and then quoting United States v. Commodities Trading Corp., 339 U.S. 121, 123 (1950)).

104. *Kelo*, 545 U.S. at 477.

105. *Id.* at 480.

106. *See id.*; Berman v. Parker, 348 U.S. 26, 33-34 (1954).

107. *See* Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1015 (1984).

oligopolies.[108] In reality, then, "the public use restriction is toothless; for purposes of the takings power, everything is a public use."[109]

In the paradigmatic taking requiring just compensation, the government physically appropriates private property.[110] Whether temporary or permanent, a physical invasion is a per se taking requiring just compensation because, "however minimal the economic cost it entails, [it] eviscerates the owner's right to exclude others from entering and using her property—perhaps the most fundamental of all property interests."[111] Although the concept is most often discussed in the context of real-property takings, the government's appropriation of *any* property can be understood as a taking. In *Horne v. Department of Agriculture*, for example, the Court held that the government's physical appropriation of raisins constituted a per se taking, confirming the notion that movable property is no less protected than real property.[112] Indeed, the Court declared that the government "has a categorical duty to pay just compensation when it takes your car, just as when it takes your home."[113]

The physical appropriation of cash can also be a taking. The Court has rejected the "proposition that an obligation to spend money can never provide the basis for a takings claim."[114] In a series of cases, the Court held that when the government conditions approval of land-use permits on the dedication of a public-use easement on that land, there must be (1) an "essential nexus" between the governmental ends and means,[115] and (2) a "rough proportionality" between the

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108. *See* Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 241-42, 244 (1984).

109. Abraham Bell, *Private Takings*, 76 U. CHI. L. REV. 517, 539 (2009); *see also id.* at 535 & n.82 (collecting sources demonstrating that "the public use requirement has effectively disappeared"); Rubenfeld, *supra* note 96, at 1079 ("[C]ommentators . . . have been proclaiming the demise of the public-use limitation or mocking it as 'invisible' for more than forty years.").

110. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 537, 539 (2005); Cedar Point Nursery v. Hassid, 594 U.S. 139, 147 (2021) ("The government commits a physical taking when it uses its power of eminent domain to formally condemn property.").

111. *Lingle*, 544 U.S. at 539; *see also Cedar Point*, 594 U.S. at 153 ("[A] physical appropriation is a taking whether it is permanent or temporary.").

112. 576 U.S. 351, 358-59 (2015) ("Nothing in the text or history of the Takings Clause, or [the Court's] precedents . . . suggests that personal property [is] any less protected against physical appropriation than real property."). In *Horne*, at issue were title to and compensation for "reserve raisins"—raisins that the "Raisin Administrative Committee" (a division of the U.S. Department of Agriculture) determined should be allocated to the government. *Id.* at 354-55. At the time, the Raisin Administrative Committee would order raisin growers to relinquish, without compensation, significant portions of their crop to the United States. *Id.* at 355. Between 2003 and 2004, the required allocation was 30%; between 2002 and 2003, 47%. *Id.*

113. *Id.* at 358.

114. Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 612 (2013).

115. Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987).

harm caused by the sought-after land use and the burden imposed by the governmental exaction.[116] Without these requirements, a land-use exaction becomes a per se taking because, had the government simply dedicated the easements by force (rather than conditioning the easement on a permit), it would have effected a taking via physical appropriation.[117] Most relevant here, in *Koontz v. St. Johns River Water Management District*, the Court ruled that "'monetary exactions' must [also] satisfy the nexus and rough proportionality requirements."[118] When the government's demand for payment of money fails those tests, it becomes a per se taking, much like the physical appropriation of an easement.[119]

Furthermore, when the government takes more cash than it is due, the Court has not hesitated to adjudge the act a taking. In *Tyler v. Hennepin County*, for example, the county government had seized and sold Geraldine Tyler's home to satisfy overdue taxes, interest, and penalties.[120] The county received $40,000 for the sale, but Tyler's tax debt amounted to only $15,000.[121] The Court ruled that the county's retention of the surplus $25,000 was a taking.[122] It held that although the county could sell Tyler's home to recover accrued tax debts, "it could not use the toehold of the tax debt to confiscate more property than was due."[123] In another case, *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, the Court wrestled with whether a state court in Florida could constitutionally retain interest accrued on an interpleader fund.[124] It ruled that, while a court may charge fees for holding an interpleader fund, its attempt also to retain interest accrued on that interpleader fund constituted a taking.[125] The upshot of these cases is that the government may not evade the Takings Clause merely because it appropriates cash rather than other types of property.

At the same time, in the course of its meandering takings jurisprudence, the Court has suggested that a law requiring the payment of money—though it may

116. Dolan v. City of Tigard, 512 U.S. 374, 398 (1994).

117. *See* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 546-47 (2005).

118. *Koontz*, 570 U.S. at 612.

119. *Id.* at 615.

120. 598 U.S. 631, 634-35 (2023).

121. *Id.* at 634.

122. *Id.* at 639.

123. *Id.*

124. 449 U.S. 155, 155-56 (1980). Interpleader is a suit brought by a disinterested third party holding property (the "stakeholder") "who is in doubt about ownership." *Interpleader*, BLACK'S LAW DICTIONARY (12th ed. 2024). The stakeholder "therefore deposits the property with the court" in an interpleader fund "to permit interested parties to litigate ownership." *Id.*

125. *Webb's Fabulous Pharmacies, Inc.*, 449 U.S. at 164-65. This was so even though Florida considered the interpleader fund "public money" while it was deposited with the court. *Id.* at 164.

levy "a staggering financial burden"—is merely "an obligation to perform an act" and thus not a taking of an identifiable property interest.[126] The idea here is that takings doctrine "bristles with conceptual difficulties" when cash sums are involved, for if the imposition of general cash liability could constitute a taking, then the whole scheme of taxation would be subject to serious constitutional scrutiny.[127] Section III.C grapples with the natural extension of that question—if forfeiture is a taking, why not taxation, or fees imposed as a result of a moving violation?—and also explains why, under this Note's theory, taxes are not takings.

Finally, the doctrine of physical appropriations—of homes, cars, and other assets—is the primary subject of this Note because when the government forfeits property, it takes actual possession and title.[128] For that reason, this Note largely sets aside the complex discussion of regulatory takings,[129] the body of law that seeks to address the multifarious scenarios in which a government policy diminishes the value of private property.[130] Happily for readers of this Note, while the

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126. E. Enters. v. Apfel, 524 U.S. 498, 540 (1998) (Kennedy, J., concurring in the judgment and dissenting in part); *see also* Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 624 (2013) (Kagan, J., dissenting) ("[A] requirement that a person pay money . . . is not a taking.").

127. *Apfel*, 524 U.S. at 555-56 (Breyer, J., dissenting).

128. *See supra* note 68 and accompanying text.

129. Regulatory takings, are, however, briefly discussed below for the purpose of demonstrating that courts regularly investigate deprivations of private property interests to determine whether a taking has occurred. *See infra* text accompanying notes 238-241, 250.

130. Until 1922, "it was generally thought that the Takings Clause reached only" the "physical appropriation[] of private property" or a "functional equivalent" of an ouster of possession. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1014 (1992). That year, however, the Supreme Court recognized in *Pennsylvania Coal Co. v. Mahon* that, although the government may regulate property "to a certain extent, if regulation goes too far it will be recognized as a taking." 260 U.S. 393, 415 (1922). The essential conceptual difference between a physical taking and a regulatory taking is this: Consider Blackacre, a tract of undeveloped private land one mile from the coast. The council of the city in which Blackacre sits condemns Blackacre and turns it into a public road. That act is a clear physical taking requiring just compensation. In contrast, say that the city council passes a local ordinance prohibiting landowners from building any structures on land within three miles of the coast. That ordinance causes Blackacre to lose 80% of its value. The debate over whether that ordinance is a taking requiring just compensation is the subject of regulatory takings.

For further background and discussion regarding regulatory takings, see generally Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964), which analyzes the disarray with which various theories have sought to distinguish compensable takings from police-power regulations and proposes its own method; Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967), which investigates the line between compensable and noncompensable harms by reference to

doctrine of regulatory takings presents a set of "difficult and uncertain rule[s],"[131] physical takings are governed by "a clear and categorical obligation" under the Constitution: "The government must pay for what it takes."[132]

C. Forfeitures vs. Takings

Based on the foregoing, those unfamiliar with forfeiture law might reason that civil forfeiture is simply an uncompensated, and thus unconstitutional, taking. (And indeed, a nuanced form of that intuition comprises the heart of this Note's argument, which Part III develops in full.) After all, both civil forfeitures and takings are methods by which the state can confiscate private property for some public purpose, whether it be taking land to build a highway or forfeiting a car used in a drug sale to punish the seller and deter future sales. It would seem, therefore, that civil forfeitures, like takings, require just compensation. But when litigants brought that argument to the Supreme Court, it chose a different path.

In 1971, the Pearson Yacht Leasing Company (Pearson) leased one of its vessels to two Puerto Rican residents.[133] More than a year later, Puerto Rican authorities discovered marijuana on the boat.[134] In response, Puerto Rico brought criminal charges against one of the lessees and sought to forfeit the yacht itself.[135] In *Calero-Toledo v. Pearson Yacht Leasing Co.*, Pearson challenged Puerto Rico's forfeiture authority and argued that, since it was not involved in the criminal conduct, the forfeiture of its yacht "unconstitutionally [effected] the taking for government use of innocent parties' property without just compensation."[136] But the Court was not persuaded. In the face of a "proliferation of forfeiture enactments, the innocence of the owner . . . ha[d] almost uniformly been rejected as a defense," meaning that the state's power to forfeit was not eviscerated — or even diminished — merely because the owner was innocent of the criminal conduct giving rise to forfeiture.[137]

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considerations of fairness; and Robert Brauneis, *"The Foundation of Our 'Regulatory Takings' Jurisprudence": The Myth and Meaning of Justice Holmes's Opinion in* Pennsylvania Coal Co. v. Mahon, 106 YALE L.J. 613 (1996), which discusses the advent of regulatory-takings jurisprudence in *Mahon* and tracks *Mahon*'s shifting meanings.

131. *Koontz*, 570 U.S. at 614 (quoting *Apfel*, 524 U.S. at 542 (Kennedy, J., concurring in the judgment and dissenting in part)).

132. Cedar Point Nursery v. Hassid, 594 U.S. 139, 147 (2021).

133. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 664-65 (1974).

134. *Id.* at 665.

135. *Id.* at 665-68.

136. *Id.* at 680.

137. *Id.* at 683.

In essence, the Court drew a line: forfeitures are confiscations designed to address criminal activity, but whether the owner of the property is criminally culpable is constitutionally irrelevant. Takings, on the other hand, are confiscations untethered from a governmental interest in addressing criminal activity. But the *Calero-Toledo* majority did leave an exception for innocent owners who did all they could to prevent unlawful conduct. If the owner was not only "uninvolved in and unaware of the wrongful activity, but also . . . d[id] all that reasonably could be expected to prevent the proscribed use of his property" (a fact Pearson had not proved), then the forfeiture might not serve any legitimate governmental purpose.[138]

Twenty-two years later, however, when the Court took up the question again, it relegated *Calero-Toledo*'s discussion of the innocent-preventionist owner to the status of dictum and forever separated the jurisprudential lineage of takings and forfeitures.[139] In *Bennis v. Michigan*, a man had "engaged in sexual activity with a prostitute" in an automobile he co-owned with his wife.[140] When the state attempted to forfeit the vehicle as a "public nuisance" with no compensation for her share of the car, the wife, Tina Bennis, argued that the state violated (1) the Due Process Clause because she was denied an opportunity to contest the forfeiture "by showing she did not know her husband would use it to violate" the law, and (2) the Takings Clause because it confiscated her interest in the vehicle for public use without just compensation.[141]

First, relying on "a long and unbroken line of cases" and a historical understanding of forfeiture, the *Bennis* Court ruled that due process does not forbid the forfeiture of an owner's interest in property used unlawfully, even if the owner was unaware of such use.[142] Then the Court stated: "The government may not be required to compensate an owner for property which it has already lawfully acquired under the exercise of governmental authority other than the power of eminent domain," and the government's power to forfeit is "too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced."[143] Accordingly, lower courts have interpreted *Bennis* to mean that the

138. *Id.* 689-90 (footnote omitted).

139. *See* Bennis v. Michigan, 516 U.S. 442, 449-50 (1996).

140. *Id.* at 443.

141. *Id.* at 446.

142. *Id.* at 446-48.

143. *Id.* at 452-53 (quoting J.W. Goldsmith, Jr., Grant Co. v. United States, 254 U.S. 505, 511 (1921)).

"Takings Clause has no application when title to property was transferred to the state via a valid civil forfeiture proceeding, rather than by eminent domain."[144]

II. THE EVOLUTION OF CIVIL FORFEITURE

The question at the center of this Note is this: precisely what is it about civil forfeiture that justifies its continued use? One theory of justification is based on *necessity*. Some scholars have suggested that, historically, law-enforcement and revenue officials used civil forfeiture to confiscate property linked to criminal wrongdoing only where in personam jurisdiction over the owner was unavailable. This "necessity" framework for civil forfeiture has led to an influential reformist argument from due-process principles: in most civil-forfeiture cases today, jurisdiction over the owner *is* available, meaning that the government can—and must—pursue its enforcement aims using criminal-forfeiture proceedings.[145]

This Part questions the necessity framework and offers an alternative: civil forfeiture is justified by its *enforcement purpose*. As Section II.A points out, whether civil forfeiture has its origins in necessity is unclear. However, as Section II.B argues, civil forfeiture does have a clear historical lineage as a law-enforcement tool. And that enforcement use of historical civil forfeiture is what justifies its continued operation as a form of state confiscation distinct from takings.

A. From Necessity to Ubiquity

As the story goes, when God dictated his laws to Moses, he included a provision for civil forfeiture: "When an ox gores a man or a woman to death, the ox must be stoned; its meat may not be eaten. The owner of the ox, however, shall be free of blame."[146] This view—that an object causing death is guilty of

144. Ross v. Duggan, 402 F.3d 575, 582 (6th Cir. 2004); *accord* United States v. Davis, 648 F.3d 84, 97 (2d Cir. 2011); McKenna v. Portman, 538 F. App'x 221, 224 (3d Cir. 2013); United States v. $7,990.00 in U.S. Currency, 170 F.3d 843, 845 (8th Cir. 1999); AmeriSource Corp. v. United States, 525 F.3d 1149, 1153-54 (Fed. Cir. 2008).

145. *See infra* text accompanying notes 154-160.

146. *Exodus* 21:28 (New American Bible, Revised Edition). It has been suggested that similar doctrines of forfeiture existed even in the laws of ancient civilizations. *See* Edmund Webster Burke, *Deodand: A Legal Antiquity That May Still Exist*, 8 CHI.-KENT L. REV. 15, 16 (1930) ("From the Law of the ancient Athenians we find this same attitude towards the instrumentality causing the death, for 'whatever was the cause of a man's death by falling upon him, was exterminated or cast out of the dominion of the republic[]' and again among the ancient Goths we find a law providing for the forfeiture of the sword or weapon employed in the killing of another, even though the actual owner of that weapon were not concerned in the action." (citations omitted)).

wrongdoing—became reflected in the English common law of "deodands," by which such an object was "forfeited to the Crown"[147] for "pious uses . . . as an expiation for the souls . . . snatched away by sudden death."[148] This forfeiture to God[149] and King, however, "faded in England, and . . . it 'did not become part of the common-law tradition of this country.'"[150] But American courts nevertheless adopted a related fiction—that an instrumentality of crime is a guilty object subject to forfeiture.[151] By the Supreme Court's own words, this "fiction . . . has a venerable history in our case law."[152]

The Court also appeared to accept a particular historical justification for this fiction: necessity. Forfeiture, according to this justification, developed out of necessity in admiralty law as the only possible enforcement measure against shipowners upon whom a court could not exercise in personam jurisdiction.[153] Accordingly, scholars have made forceful arguments that, to the extent civil forfeiture once depended on the unavailability of in personam jurisdiction over

147. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 681 (1974).

148. 1 BLACKSTONE, *supra* note 63, at *290; *see also* Jimmy Gurulé, *Introduction: The Ancient Roots of Modern Forfeiture Law*, 21 J. LEGIS. 155, 156 (1995) ("At common law, the value of an inanimate object that directly or indirectly caused the accidental death of a King's subject was forfeited to the Crown as a deodand.").

149. The term "deodand" derives from the Latin *Deo dandum*, which translates to, "to be given to God." *Deodand*, BLACK'S LAW DICTIONARY (6th ed. 1990).

150. Culley v. Marshall, 601 U.S. 377, 402 (2024) (Gorsuch, J., concurring) (quoting *Calero-Toledo*, 416 U.S. at 682).

151. *See* United States v. La Vengeance, 3 U.S. (3 Dall.) 297, 301 (1796) ("[W]e are unanimously of opinion, that [this] is a civil cause: It is a process of the nature of a libel *in rem*; and does not, in any degree, touch the person of the offender."); The Palmyra, 25 U.S. (12 Wheat.) 1, 14-15 (1827) ("The thing is here primarily considered as the offender, or rather the offence is attached primarily to the thing . . . ."); *see also* Jami Brodey, *Supreme Court Rejects Fifth and Fourteenth Amendment Protection Against the Forfeiture of an Innocent Owner's Property*, 87 J. CRIM. L. & CRIMINOLOGY 692, 693 (1997) ("Under English law, there were three types of forfeiture: (1) deodand; (2) escheat upon attainder; and (3) statutory forfeitures of 'offending objects used in violation of the customs and revenue laws.' Of the three types of forfeiture, only statutory forfeiture was incorporated into American law. However, the courts initially used the rationales underlying deodands and escheat upon attainder, namely that the property itself is guilty and that a wrongdoer could legitimately be deprived of his property, respectively, as justification for statutory forfeitures in the United States." (footnotes omitted)).

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

153. *Id.* at 615 n.9 ("'The fictions of *in rem* forfeiture were developed primarily to expand the reach of the courts,' which, particularly in admiralty proceedings, might have lacked *in personam* jurisdiction over the owner of the property." (citations omitted) (quoting Republic Nat'l Bank of Mia. v. United States, 506 U.S. 80, 87 (1992))); United States v. Brig Malek Adhel, 43 U.S. (2 How.) 210, 233 (1844) ("The vessel which commits the aggression is treated as the offender, as the guilty instrument or thing to which the forfeiture attaches . . . . It is not an uncommon course in the admiralty . . . [a]nd this is done from the necessity of the case, as *the only adequate* means of suppressing the offence or wrong . . . ." (emphasis added)).

the offender, modern extensions beyond that narrow realm "should be condemned as a violation of due process."[154] They have denounced the ubiquity of civil forfeiture, arguing that where in personam jurisdiction is available, the government cannot use civil forfeiture merely because it is procedurally convenient.[155] Prosecutors "should be compelled to use criminal forfeiture proceedings, in which all of the customary procedural safeguards are applicable."[156]

At least two members of the current Court seem to welcome this logic. Last Term, Justice Gorsuch recited the historically limited use of civil forfeiture "in the discrete arenas of admiralty, customs, and revenue law" and in cases where American courts could not exercise in personam jurisdiction.[157] Against that background, he questioned "how well" the "profound changes" in civil forfeiture "comport with the Constitution's enduring guarantee that '[n]o person shall . . . be deprived of life, liberty, or property, without due process of law.'"[158] Justice Thomas, writing in an earlier case, noted that he is "skeptical" that "historical practice is capable of sustaining, as a constitutional matter, the contours of modern" civil forfeiture.[159] He, too, recognized that the "narrower" nature of historical forfeiture focused on "customs and piracy" and was justified by the necessity of proceeding in rem because the alleged wrongdoer "was frequently located . . . beyond the personal jurisdiction of the United States courts."[160]

However, whether civil forfeiture was actually limited to cases in which in personam jurisdiction was unavailable is a matter of scholarly debate. As

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154. Stefan B. Herpel, *Toward a Constitutional Kleptocracy: Civil Forfeiture in America*, 96 MICH. L. REV. 1910, 1926 (1998); *see also id.* at 1924 ("Because of the difficulty of obtaining *in personam* jurisdiction over perpetrators of certain classes of crime, our legal tradition long ago accepted the use of *in rem* forfeiture actions as a sanction for certain limited classes of violations of law. . . . Civil forfeiture, then, was viewed [as] a narrow exception to the basic requirement that criminal proceedings . . . be used to enforce the criminal law."); Donald J. Boudreaux & A.C. Pritchard, *Innocence Lost:* Bennis v. Michigan *and the Forfeiture Tradition*, 61 MO. L. REV. 593, 618-19 (1996) ("*In rem* procedures were essential to enforce revenue and piracy laws, given that the vessel's owner was likely beyond the court's [personal] jurisdiction. . . . And the rule did not extend beyond the necessity . . . .").

155. *See* Kevin Arlyck, *The Founders' Forfeiture*, 119 COLUM. L. REV. 1449, 1477-78 (2019) ("According to a number of critics, modern forfeiture should be similarly limited to cases in which it is difficult to penalize lawbreaking conduct through an in personam action against the wrongdoer."); LEVY, *supra* note 64, at 47 ("The *in rem* proceeding that leads to civil forfeiture is attractive to the nation's lawmakers because it is swift, cheap, productive, and much more likely to be successful than a criminal forfeiture proceeding.").

156. Herpel, *supra* note 154, at 1926.

157. Culley v. Marshall, 601 U.S. 377, 398-99 (2024) (Gorsuch, J., concurring).

158. *Id.* at 403 (alterations in original).

159. Leonard v. Texas, 580 U.S. 1178, 1181 (2017) (Thomas, J., statement respecting the denial of certiorari).

160. *Id.*

Professor Caleb Nelson puts it, "[L]egislatures did authorize in rem proceedings in situations where in personam proceedings would often have been impractical," but they did not limit in rem proceedings only to such situations.[161] Federal tax statutes in the early Republic, for instance, authorized in rem forfeiture proceedings even where U.S. courts easily would have had personal jurisdiction over the owner of the defendant property.[162] And under many antebellum state liquor laws, forfeiture could proceed in rem, even where personal penalties were possible.[163] Indeed, the government could forfeit "horses used in races that violated gambling laws, shingles sold in bundles that violated commercial regulations, and gunpowder stored above the quantities permitted by fire safety laws," all outside the confines of admiralty and customs.[164]

In addition, as a practical matter, only two members of the Court have invited challenges against civil forfeiture based on its modern departure from its purported origin as a necessary tool in exceptional cases with jurisdictional challenges.[165] But it is clear that at least five members of the Court have reservations about civil forfeiture today. Last Term, in *Culley v. Marshall*, the Court considered a pair of cases involving Halima Culley, who loaned her car to her son, and Lena Sutton, who loaned her car to her friend.[166] Culley's son and Sutton's friend were driving when officers discovered contraband in their respective borrowed vehicles.[167] They seized both cars.[168] The question was whether the Due Process Clause mandates a preliminary hearing after seizure and prior to forfeiture in cases regarding personal property.[169] The Court held that although the Constitution requires a *timely* forfeiture hearing, it does not require a *preliminary* hearing.[170] It was in this case that Justice Gorsuch, joined by Justice Thomas, concurred but expressed his desire to reassess modern civil-forfeiture practices "in future cases, with the benefit of full briefing."[171] The liberal wing of the Court dissented in an opinion by Justice Sotomayor.[172] Even the majority, perhaps with doubts in mind, took pains to ensure the limited nature of its holding: "In this

161. Caleb Nelson, *The Constitutionality of Civil Forfeiture*, 125 YALE L.J. 2446, 2469 (2016).

162. *Id.* at 2470.

163. *See id.* at 2473-75.

164. *Id.* at 2472.

165. *See supra* notes 157-160 and accompanying text.

166. 601 U.S. 377, 381 (2024).

167. *Id.*

168. *Id.*

169. *Id.* at 380-81, 387.

170. *Id.* at 392-93.

171. *See id.* at 403 (Gorsuch, J., concurring).

172. *Id.* at 403-15 (Sotomayor, J., dissenting).

opinion, we do not address any due process issues related to civil forfeiture other than the question about a separate preliminary hearing."[173]

If not the departure from necessity, what might the issue with today's civil forfeiture be?

B. From Enforcement to Profit

Justice Sotomayor gives us the answer. Dissenting in *Culley*, she recognized that "forfeiture revenue is not a supplement; many police agencies in fact depend on cash flow from forfeitures for their budgets."[174] Even Justices Gorsuch and Thomas seemed to acknowledge the same issue: "Law enforcement agencies have become increasingly dependent on the money they raise from civil forfeitures."[175] This form of forfeiture — whose primary purpose is government fundraising — is the "contemporary civil forfeiture" with which this Note is concerned.

As discussed above, historical civil forfeiture seems to have been used in more than just admiralty cases where proceeding in personam was not possible.[176] And even in the Court's admiralty jurisprudence, the fact that in personam jurisdiction might not have been available is not the central point. The clearer justification for historical uses of civil forfeiture is that shipowners — from whose vessels "piratical aggression" was launched, contraband was smuggled, or "other misconduct" had arisen — "impliedly submit[ted] to whatever the law denounces . . . by reason of their unlawful or wanton wrongs."[177] Against them, civil forfeiture meant "the *penalty* of confiscation."[178] Indeed, from the very beginning, deodands were designed to be expiation "for the appeasing of God's

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173. *Id.* at 387 n.3 (majority opinion); *see also* Louis S. Rulli, *Civil Forfeiture Decision "May Present Hope as Well as Disappointment*," PENN CAREY L. (May 15, 2024), https://www.law.upenn.edu/live/news/16740-civil-forfeiture-decision-may-present-hope-as-well [https://perma.cc/9EHU-R55Z] ("The unmistakable message is that there is growing support on the Court to address the question posed by Justice Thomas in *Leonard*: *Whether, and to what extent, contemporary civil forfeiture practices can be squared with the Constitution's promise of due process?*").

174. *Culley*, 601 U.S. at 405 (Sotomayor, J., dissenting) (citing John L. Worrall & Tomislav V. Kovandzic, *Is Policing for Profit? Answers from Asset Forfeiture*, 7 CRIMINOLOGY & PUB. POL'Y 219, 222 (2008)).

175. *Id.* at 396 (Gorsuch, J., concurring).

176. *See supra* text accompanying notes 161-164.

177. United States v. Brig Malek Adhel, 43 U.S. (2 How.) 210, 234 (1844).

178. *Id.* at 233 (emphasis added).

wrath."[179] And certainly since the Founding, forfeiture in rem has been construed as punishment—a mechanism of law enforcement.[180]

Scholars, even those who disagree over whether civil forfeiture was historically limited to jurisdictional necessity, are in agreement that forfeiture proceedings at the Founding and in the continuing legal tradition of this country were used as "tool[s] of law enforcement"—measures that were meant to exact retribution or a remedy for a particular wrongdoing.[181] As Professor Kevin Arlyck describes, forfeiture in the early Republic was "a means of imposing punishment."[182] That is why, in the Founding Era, Alexander Hamilton and his successors at the Department of the Treasury liberally exercised their administrative

179. 18 CORPUS JURIS 489 (William Mack & William Benjamin Hale eds., 1919); *see also supra* text accompanying notes 147-148 (discussing this history).

180. *See* Austin v. United States, 509 U.S. 602, 613 (1993) ("[T]he First Congress viewed forfeiture as punishment." (discussing Act of July 31, 1789, ch. 5, § 12, 1 Stat. 29, 39)); *id.* at 619 (holding that federal civil forfeiture is "properly considered punishment today" as well and that statutory exemptions for innocent owners "serve to focus the provisions on the culpability of the owner in a way that makes them look more like punishment"); *see also* Aaron Xavier Fellmeth, *Challenges and Implications of a Systemic Social Effect Theory*, 2006 U. ILL. L. REV. 691, 731 (arguing that civil forfeiture serves "predominantly or exclusively punitive purposes"); Marc B. Stahl, *Asset Forfeiture, Burdens of Proof and the War on Drugs*, 83 J. CRIM. L. & CRIMINOLOGY 274, 337 (1992) ("[F]orfeitures of derivative contraband constitute criminal punishment . . . .").

It is important to distinguish here the nature of *punishment* from *crime*. Although civil forfeiture is capable of levying punishment, it is—by its very nature—not a criminal proceeding. For example, the Double Jeopardy Clause is not triggered in the context of civil-forfeiture actions. *See* United States v. Ursery, 518 U.S. 267, 287 (1996) ("[F]orfeitures are [not] so punitive as to constitute punishment for the purposes of double jeopardy."). This curious carveout has received criticism as "hopelessly at odds with" the remainder of civil-forfeiture jurisprudence. Herpel, *supra* note 154, at 1931. However, "the Court's outcomes can be rationalized" on an understanding that certain "types of punishment (including punitive deprivations of property) can be declared in 'civil' proceedings." Nelson, *supra* note 161, at 2492.

To be sure, there are valid arguments against this formalism. *See infra* note 187. But a full discussion of the distinction between measures punitive and proceedings criminal is beyond the scope of this Note. It is sufficient here to observe that, if civil forfeiture can be justified at all, it must be done on the basis that forfeiture is a mechanism of enforcement.

181. Nelson, *supra* note 161, at 2464, 2468; *see also* One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 700 (1965) ("[A] forfeiture proceeding . . . like a criminal proceeding, is to penalize for the commission of an offense against the law."); Leonard v. Texas, 580 U.S. 1178, 1182 (2017) (Thomas, J., statement respecting the denial of certiorari) ("Some of this Court's early cases suggested that forfeiture actions were in the nature of criminal proceedings."); Herpel, *supra* note 154, at 1924 ("[C]ivil forfeiture is quite clearly designed to serve the criminal law objectives of deterrence and retribution.").

182. *See* Arlyck, *supra* note 155, at 1452.

"remission" authority to return seized property in cases where the owner lacked culpability.[183]

Justices Gorsuch and Thomas, too, highlight that "the law recognized that seizing the ship . . . represented 'the only adequate means of *suppressing the offence or wrong*.'"[184] The Court as a whole, in fact, has used language signifying that "forfeiture proceedings historically have been understood as imposing punishment."[185] It is *this* "historical background of forfeiture" upon which the Supreme Court has based its decisions upholding the constitutionality of the government's power to forfeit property in civil proceedings.[186] And it is this historical civil forfeiture—a confiscation justified by enforcement needs in particular cases—that firmly fixed the state's forfeiture power.[187]

But a great deal of today's civil forfeiture would prove to be a disappointment to its forebears.[188] Civil forfeiture, in large part, has morphed from an

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183. *Id.* at 1452, 1482-83.

184. Culley v. Marshall, 601 U.S. 377, 399 (2024) (Gorsuch, J., concurring) (emphasis added) (quoting United States v. Brig Malek Adhel, 43 U.S. (2 How.) 210, 233 (1844)).

185. *Austin*, 509 U.S. at 615 n.9.

186. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 680 (1974); *see also* J.W. Goldsmith, Jr., Grant Co. v. United States, 254 U.S. 505, 511 (1921) ("[Civil forfeiture] is too firmly fixed in the *punitive* and *remedial* jurisprudence of the country to be now displaced." (emphasis added)).

187. There remains serious doubt as to whether characterizing the forfeiture power as part of the enforcement authority of the state resolves constitutional infirmities for even historical civil forfeiture. One major concern is that, "as a general matter," it would seem "that the use of civil, rather than criminal procedures, to administer the criminal law 'offends [a] principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental'—and, as such, violates due process." Herpel, *supra* note 154, at 1925 (alteration in original) (footnote omitted) (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)). A number of scholars have made thoughtful arguments to this effect. *See* Nelson, *supra* note 161, at 2487 ("According to many commentators, courts should not permit this end run around criminal procedure. . . . [L]egislatures should not be able to avoid the constitutional safeguards for criminal prosecutions simply by authorizing the government to impose punishments through nominally 'civil' proceedings."); *id.* at 2487 n.195 (collecting sources).

188. It bears mentioning, perhaps, that although deodands were traditionally provided to the church, to charitable causes, or to the family members of the accidentally killed as restitution, eventually, "the Crown came to profit from deodand." Boudreaux & Pritchard, *supra* note 154, at 600; *see also infra* note 281 (discussing how deodands had been used to give to charitable causes); 2 Frederick Pollock & Frederic William Maitland, The History of English Law Before the Time of Edward I 496 (Liberty Fund 2d ed. 2009) (1898) ("In very early records we sometimes find that the justices in eyre name the charitable purpose to which the money is to be applied; thus the price of a boat they devote 'for God's sake' to the repair of Tewkesbury bridge, and the sister of a man who has been run over obtains the value of the condemned cart, since she is poor and sick." (footnote omitted)); Tamara R. Piety, *Scorched Earth: How the Expansion of Civil Forfeiture Doctrine Has Laid Waste to Due Process*, 45 U. Mia.

enforcement measure into a government-fundraising tool—it has become a "booming business."[189] The Department of Justice's *Asset Forfeiture Policy Manual*, for instance, sets a threshold value that a particular category of property should meet before prosecutors initiate forfeiture proceedings.[190] Cash, an asset that is immediately useful, has a low threshold of $5,000 (and an even-lower threshold of $1,000 if there is already a criminal prosecution underway), while aircraft, an asset that is difficult to liquidate, has a high threshold of $30,000.[191] These limitations suggest "that modern asset forfeiture practice values efficiency over historical justifications for asset forfeiture, such as retribution."[192] Law enforcement today forfeits "less to fight crime than to raise revenue."[193]

Indeed, police and prosecutors' increasing "dependen[ce] on the money they raise from civil forfeitures" is empirically substantiated.[194] Research indicates that law-enforcement agencies "augment their discretionary budgets through forfeiture activities," and civil forfeiture is "so pervasive that local governments reduce allocations to police after taking forfeiture proceeds into account."[195] About 40% of police agencies indicate that civil forfeiture forms a *necessary* component of their funding,[196] and 60% of them report at least some dependence on forfeiture funds.[197] At one point, annual forfeiture funding averaged 20% of the budget for the Philadelphia District Attorney's Office.[198] And "when local budgets are tight," there is "greater recourse to forfeiture" to make up for shortfalls.[199]

L. Rev. 911, 933 n.99 (1991) ("[T]he deodand may have persisted because the Crown was loath to give up a source of revenue.").

But this history does not mean that contemporary civil forfeiture is justified by reference to it. Recall, first, that deodands were never adopted into American law. *See supra* notes 150-151 and accompanying text. Moreover, forfeitures became "a mere source of revenue to the crown" only because "the law [was] perverted from its original intention"—one that centered on charity, church, and restitution. 1 Matthew Hale, The History of the Pleas of the Crown 424 (Philadelphia, Robert H. Small 1847) (1736).

189. *Culley*, 601 U.S. at 395 (Gorsuch, J., concurring).

190. *Asset Forfeiture Policy Manual*, *supra* note 83, at 1-7.

191. *Id.*

192. Didwania, *supra* note 62, at 186.

193. Brian D. Kelly, *Fighting Crime or Raising Revenue?: Testing Opposing Views of Forfeiture*, Inst. for Just. 3 (June 2019), https://ij.org/wp-content/uploads/2019/06/Fighting-Crime-or-Raising-Revenue-7.20.2020-revision.pdf [https://perma.cc/8TG5-NECV].

194. *Culley*, 601 U.S. at 396 (Gorsuch, J., concurring).

195. John L. Worrall & Tomislav V. Kovandzic, *Is Policing for Profit? Answers from Asset Forfeiture*, 7 Criminology & Pub. Pol'y 219, 221 (2008).

196. *See supra* note 51 and accompanying text.

197. Worrall & Kovandzic, *supra* note 195, at 222.

198. Knepper et al., *supra* note 9, at 34.

199. Kelly, *supra* note 193, at 15.

All told, a *conservative* estimate puts the total amount forfeited by federal and state agencies between 2000 and 2020 at almost $70 billion.[200]

Incentives for police and prosecutors, too, are structured to encourage indiscriminate forfeiture. In the forfeiture schemes of thirty-two states and the federal government, law enforcement controls between 80% and 100% of the forfeiture proceeds.[201] In Hunt County, Texas, police officers have been awarded personal bonuses of up to $26,000 from forfeiture funds.[202] In Titus County, forfeiture paid for the entirety of a prosecutor's salary.[203] In another county, the forfeiture proceeds amounted to a staggering 1,344% of the district attorney's budget.[204] One sheriff's office in Georgia was unable to account for more than $660,000 in forfeiture funds.[205] Upon investigation, federal officials found that the sheriff had paid $35,125 of these forfeited funds to incarcerated individuals to work on his property, $90,000 for a sports car, $79,000 for a boat, and $250,000 to establish a scholarship at his alma mater in his own name.[206] In Philadelphia, officials confiscated more than 1,000 houses, 3,300 cars, and $44 million in cash over a ten-year period.[207] In a single year, Philadelphia filed nearly 7,000 petitions for civil forfeiture.[208]

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200. Knepper et al., *supra* note 9, at 5 ("Since 2000, states and the federal government forfeited a combined total of at least $68.8 billion. And because [thirty states did not provide data on forfeitures between 2002 and 2018], this figure drastically underestimates forfeiture's true scope.").

201. *Id.* at 34.

202. Stillman, *supra* note 33.

203. *Id.*

204. Marian R. Williams, Jefferson E. Holcomb, Tomislav V. Kovandzic & Scott Bullock, *Policing for Profit: The Abuse of Civil Asset Forfeiture*, INST. FOR JUST. 21 (Mar. 2010), https://ij.org/wp-content/uploads/2015/03/assetforfeituretoemail.pdf [https://perma.cc/3RY6-YR4P]. Even excluding that agency, "[t]he top 10 forfeiture earners [in Texas] take in, on average, about 37 percent of their budgets in forfeiture funds." *Id.*

205. Gordon Jackson, *U.S. to Camden Sheriff: Pay Up $663,000*, FLA. TIMES-UNION (July 15, 2009, 12:01 AM ET), https://www.jacksonville.com/story/news/2009/07/15/us-to-camden-sheriff-pay-up-663-000/15979480007 [https://perma.cc/TU9W-3MPQ].

206. *Id.*; Williams et al., *supra* note 204, at 19.

207. Pamela Brown, *Parents' House Seized After Son's Drug Bust*, CNN (Sept. 8, 2014, 10:45 AM EDT), https://www.cnn.com/2014/09/03/us/philadelphia-drug-bust-house-seizure [https://perma.cc/3SQD-9CNW].

208. *Id.* Even under Larry Krasner, who "has been at the forefront of the progressive-prosecutor movement since becoming Philadelphia's district attorney in 2017," Ronald Brownstein, *What Does the Philadelphia D.A. Do Now?*, ATLANTIC (Sept. 23, 2022), https://www.theatlantic.com/politics/archive/2022/09/larry-krasner-philadelphia-impeachment-prosecutor/671521 [https://perma.cc/Q2HU-K7FD], and who has been an outspoken critic of civil forfeiture, the number of forfeiture petitions increased, Ryan Briggs, *DA Krasner Fought Against Civil*

The mere existence of what might be considered collateral benefits, of course, does not necessarily vitiate the enforcement justification of civil forfeiture. But the incentives and benefits are so enticing that the *primary* purpose of many civil-forfeiture actions has changed in recent decades. It is not merely that, for example, forfeiture funds paid for $7 million in salaries for Philadelphia authorities over a three-year period[209]—it is also that, given these financial incentives, law-enforcement agencies with overlapping jurisdictions are "turf conscious" to the point of impairing interagency cooperation, which in turn can lead to "numerous suspects . . . left at large."[210]

To be sure, at the Founding and in the early Republic, bounty systems were integral to various enforcement schemes. And the existence of such profit-motivated enforcement schemes might belie the notion that contemporary civil forfeiture is a novel mechanism. As Professor Nicholas R. Parrillo explains, in several states, "the public prosecutor got [paid] only when he could collect [fees] from the defendant."[211] Also pertinent here, throughout much of the nineteenth century, federal customs officers enjoyed "moieties"—"shares . . . of the forfeitures that federal law imposed for intentional [tax] evasion."[212]

However, these early bounty systems were justified not so much by fundraising as by enforcement rationales. Professor Parrillo, in fact, argues that lawmakers' "primary rationale" for adopting "conviction fees"—whereby a prosecutor was paid only upon obtaining conviction—was to incentivize prosecutors to bring stronger cases, rather than to finance prosecutions.[213] In the absence of any payment for acquittals, conviction fees could better enforcement objectives by encouraging efficient resource allocation toward cases that were more likely to

Asset Forfeiture. But Under His Watch, the Practice Continues, WHYY (Sept. 11, 2019), https://whyy.org/articles/da-krasner-fought-against-civil-asset-forfeiture-but-under-his-watch-the-practice-continues [https://perma.cc/UK6S-C24E].

209. Brown, *supra* note 207. During that time period, Philadelphia prosecutors "spent no money on community-based drug and crime-fighting programs." *Id.*

210. J. Mitchell Miller & Lance H. Selva, *Drug Enforcement's Double-Edged Sword: An Assessment of Asset Forfeiture Programs*, 11 JUST. Q. 313, 328-30 (1994). In one case, for instance, police tailed a man suspected of cultivating marijuana to a rural farm. *Id.* at 330. After watching the man tend to marijuana plants, armed officers "cut down the plants, seized the suspect's firearms, [and] took approximately" five hundred dollars in cash. *Id.* at 330-31. Then, "[a]fter taking everything of value, the agents ordered the grower to enter his truck and leave, without formally arresting him for cultivating marijuana. In effect they appeared to rob the suspect." *Id.* at 331.

211. NICHOLAS R. PARRILLO, AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780-1940, at 267 (2013).

212. *Id.* at 221; *see also id.* at 222 ("Customs officers had been eligible for bounties since the inception of the federal government in 1789 and, before that, through much of the colonial period.").

213. *See id.* at 267-68.

result in convictions.[214] It was this rationale of encouraging prosecutors to prosecute "convictable defendants" vigorously while "protecting the innocent," not a "treasury-protecting rationale," that Professor Parrillo believes primarily drove conviction fees.[215] Tellingly, although English practice ordinarily required even *acquitted* defendants to pay the prosecutors' fees, early Americans thought it "contrary to natural justice" and rejected the practice.[216]

As with criminal prosecution, the purpose of bounties for tax forfeiture was to incentivize enforcement, not profiteering: "[T]he official aim of the bounty system was to discover intentional" fraud, not mere accidental tax avoidance.[217] Although moieties had existed "for generations," they only began having "perverse effects in the 1860s and 1870s," precisely when a novel regime of tax and forfeiture systems "gave officers much greater reason and opportunity to seek profits."[218] And by 1874, when it became evident that a profit motive drove "harsh settlements" for "innocent mistakes," Congress "recoiled" and abolished moieties.[219] And yet, contemporary civil forfeiture continues, despite its perverse effects.

It was clear to Congress in 1874, as it should be to all of us today, that a focus on generating revenue is fundamentally incompatible with enforcement goals. For instance, with the advent of civil forfeiture came the meteoric rise of the "reverse sting," an investigative tactic "in which police pose as dealers and *sell* drugs," so that "police [can] seize a buyer's cash rather than a seller's drugs."[220] The reverse sting's potential to target only "trivial drug activity" and to "actually place[] more drugs on the street" is apparently "of little, if any, importance" to law enforcement.[221] And even in operations targeting sellers, police have been known to delay raids until drugs have been sold off to individual consumers

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214. *Id.* at 265; *see also id.* ("To get paid, [prosecutors] had to sift accusations to find the 'convictable' suspects.").

215. *Id.* at 267.

216. *Id.* at 258-59. Furthermore, legislators generally did not allow prosecutors to collect fees from private accusers that had brought forth frivolous charges. *Id.* at 268. Had the objective been fee financing, allowing such an exaction would have made sense. *Id.* But that would have created perverse incentives "because the officer would have reason to bring the very flimsiest cases." *Id.*

217. *Id.* at 226.

218. *Id.* at 222-23.

219. *Id.* at 223.

220. Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 67 (1998) (emphasis added).

221. *Id.*

because "[l]ess drugs meant more cash, and [law enforcement's] objective was to seize currency rather than cocaine."[222]

This focus on revenue has produced an entire ecosystem that profits from civil-forfeiture actions — an ecosystem far more extensive than that created by the moieties and conviction fees of the early Republic. For example, even though defense attorneys are prohibited from representing clients on contingency-fee agreements in criminal matters,[223] the State of Indiana allows its prosecutors to hire "private attorneys who are then rewarded with a healthy percentage of all the property they can forfeit."[224] There are seminars offered to police officers in which forfeiture experts provide "useful tips on seizing property."[225] (Jewelry should be avoided, apparently, because it is "too hard to dispose of," but cash and vehicles are good to have.[226]) There is an entire industry of consultants — earning millions of dollars from government contracts — built on teaching law-enforcement agencies to forfeit assets most effectively without pursuing criminal actions.[227] Police in Florida, Indiana, Oklahoma, Tennessee, and Wisconsin have collectively spent $1 million in federal grants to obtain training from just one of those companies, and the U.S. Drug Enforcement Agency expended more than

222. Miller & Selva, *supra* note 210, at 328; *see also* Blumenson & Nilsen, *supra* note 220, at 67-68 ("Even if a sting targeted a drug dealer, the police might defer the operation until the dealer sold some of the drugs to other buyers in order to make the seizure incident to arrest more profitable."). In 1986, police in both New York City and Washington, D.C., instituted policies directing officers to "seize the cash and cars of persons coming into the city to buy drugs," which meant "that the drugs that would have been purchased continued to circulate freely" within each city. Blumenson & Nilsen, *supra* note 220, at 68. Explaining this policy to Congress, the former Police Commissioner of New York City stated: "[S]eized cash will end up forfeited to the police department, while seized drugs can only be destroyed." *Id.* at 68. Echoing a similar sentiment, one DOJ manual "suggest[ed] that prosecution may be contingent on the presence of forfeitable assets, rather than forfeiture being an incident of prosecution." *Id.* at 68.

223. Louis S. Rulli, *Prosecuting Civil Asset Forfeiture on Contingency Fees: Looking for Profit in All the Wrong Places*, 72 ALA. L. REV. 531, 550 (2021); *see also* MODEL RULES OF PRO. CONDUCT r. 1.5(d)(2) (AM. BAR ASS'N 2020) ("A lawyer shall not enter into an arrangement for, charge, or collect . . . a contingent fee for representing a defendant in a criminal case.").

224. Rulli, *supra* note 223, at 561-62.

225. Shaila Dewan, *Police Use Department Wish List When Deciding Which Assets to Seize*, N.Y. TIMES (Nov. 9, 2014), https://www.nytimes.com/2014/11/10/us/police-use-department-wish-list-when-deciding-which-assets-to-seize.html [https://perma.cc/ZNR5-4VHD].

226. *Id.* In one of these seminars, a police officer acknowledged that forfeitures affect family members who, for instance, rely on a shared vehicle. *Id.* But he expressed no sympathy for such family members. *See id.* Instead, he imitated a female voice with a Spanish accent: "I can't tell you how many people have come in and said, 'Oh my hijito would never do that.'" *Id.*

227. Michael Sallah, Robert O'Harrow Jr., Steven Rich & Gabe Silverman, *Stop and Seize*, WASH. POST (Sept. 6, 2014), https://www.washingtonpost.com/sf/investigative/2014/09/06/stop-and-seize [https://perma.cc/L7HG-D4LD].

$2 million on another.[228] As the owner of one of these companies declared, "It's all about the money."[229]

III. THE RECATEGORIZATION OF CONTEMPORARY CIVIL FORFEITURE

Civil forfeiture has transformed into a taking by another name—and that transformation has constitutional consequences. This Part argues that contemporary civil forfeiture should be considered a taking because its primary purpose is a type of public use, rather than law enforcement. On this theory, which emphasizes the fundraising function of contemporary civil forfeiture rather than its label, the government must provide just compensation for confiscations motivated by profit, just as it must for any other taking. The effect of the takings-based theory, then, is to nullify the value of contemporary civil forfeiture. Section III.A presents this theory through a hypothetical case. Next, Section III.B operationalizes the theory by exploring how courts may inquire into the purpose of forfeitures to "recategorize" them as takings. Section III.C shores up the theory by explaining why contemporary civil forfeiture is better classified as a taking rather than as a tax.

A. The Takings-Based Theory of Unconstitutionality

The essence of the proposed recategorization is this: Historical civil forfeiture was justified by its enforcement purpose. But the primary purpose that drives contemporary civil forfeiture is the public use of forfeited objects (for example, the use of forfeited vehicles as police cruisers or forfeited cash to pay for government-employee salaries), not enforcement. When the government confiscates private property for such a public use, it is considered a taking. Accordingly, contemporary civil forfeiture, in reality, is a taking that requires just compensation.

The logic of this theory is perhaps best explained through a hypothetical. Imagine Robert, the good friend that he is, lends Jane his red pickup truck so that Jane can move to her new apartment. Jane, with the help of a third friend, Kelly, loads the truck with home goods, clothing, and a duffel bag containing her $10,000 emergency cash fund. But unbeknownst to Robert and Jane, Kelly is a local drug dealer. Under the pretense of helping Jane, Kelly loads the truck with a few boxes of marijuana she needs to bring across town. Fully packed, Jane begins driving, speeding at the excitement of moving into a new home. A state

228. *Id.* To their credit, these companies get results: after receiving training, officers in Kansas nearly doubled the value of their seizures, from $2.6 million a year to $4.9 million a year. *Id.*

229. *Id.*

trooper clocks her going ten miles per hour over the speed limit and pulls her over. Smelling marijuana, he conducts a search, finds the drugs and cash, and arrests Jane for possession with intent to distribute a controlled substance. She goes to trial, where a jury finds her not guilty because Jane was not aware, and had no reason to know, that Kelly (who has since fled to Russia) had made her an unwitting drug mule.

The state police have summarily forfeited Kelly's marijuana because it is contraband. But, having expended its budget for the year, they also want to forfeit the truck to add to their fleet of offroad vehicles and the cash to retrofit the truck with police capabilities. The police are thus presented with three options: (1) take the truck and cash via criminal-forfeiture proceedings; (2) take the truck and cash via condemnation (i.e., as a taking requiring just compensation); or (3) take the truck and cash via civil-forfeiture proceedings.[230] The first option is not possible because there is no criminal conviction. The second option is not possible because it would require just compensation, which is not in the budget. So, the police elect to pursue the third option: civil-asset forfeiture.

Accordingly, at law enforcement's request, state prosecutors file suit against the truck and the cash. In *State v. One Red Truck & $10,000 in Currency*, the government argues that the truck was an instrumentality of crime (transporting drugs), and the cash represents the proceeds of crime (drug sales). Jane's cash represents her savings over the years from various cash-paying jobs, like babysitting. But in this civil proceeding, the government need only prove its case by a preponderance of the evidence. And Jane cannot prove that the cash is hers or that she earned it legally.[231] Moreover, Robert cannot defend against the truck's forfeiture: he is out of the country, and the notice of seizure never reaches him. In any case, any lawyers' fees would exceed the value of the truck. As a result, the police take both the truck and the cash using just a few hours of an assistant district attorney's time.[232]

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230. There is a fourth option: increase taxes to purchase a truck. This possibility is discussed in Section III.C, *infra*.

231. In most states and under federal law, owners of seized property "bear the burden of proving their own innocence to win seized property back." Knepper et al., *supra* note 9, at 37.

232. Perhaps the most famous instance of the state's attempt to confiscate by civil forfeiture what it should have taken by eminent domain regards the federal government's efforts at obtaining title to the firearm Lee Harvey Oswald used to assassinate President John F. Kennedy. By the time the government brought a civil-forfeiture action to recover the rifle, John J. King had purchased the weapon from Oswald's wife for $5,000. United States v. One 6.5 mm. Mannlicher-Carcano Mil. Rifle, 250 F. Supp. 410, 419 (N.D. Tex. 1966). The district court held that "[t]he government is entitled to judgment of forfeiture." *Id.* at 415.

On appeal, the Fifth Circuit examined "whether the government may obtain such title by forfeiture, without compensation to the owner, or must resort to condemnation by the exercise

Situated in this hypothetical, the archetypal contemporary civil forfeiture functions as nothing more than a taking without just compensation. This intuitive resemblance is because contemporary civil forfeiture has public use (by police and prosecutors) as its primary purpose. By "forfeiting" from Jane and Robert their property, the police have forced them "alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[233]

Simply stated, contemporary civil forfeiture's departure from its historical enforcement justifications renders such forfeiture practices unconstitutional unless compensated as a taking. Under existing doctrine, a confiscation justified by the state's forfeiture power requires no compensation to the owner.[234] In contrast, a confiscation justified by the state's eminent-domain power requires that the state give compensation for the public appropriation.[235] To the extent that contemporary civil forfeiture has as its justification some public purpose (like fundraising), it falls outside the state's traditional forfeiture power. Instead, it becomes a confiscation effected pursuant to the exercise of eminent domain—a taking that requires just compensation.

This recategorization makes more than just intuitive sense. It is grounded in the Supreme Court's established functional analysis for determining whether governmental action amounts to a taking. It did not matter, for instance, that Hennepin County had labeled its taking a tax forfeiture or that Seminole County had labeled its taking interests accrued on public money.[236] What matters is not what the government calls its confiscation, but whether the confiscation appears in function to be a taking and in purpose to be public.[237]

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of eminent domain, in which event the owners must be compensated." King v. United States, 364 F.2d 235, 235 (5th Cir. 1966). Although "[i]t would certainly be convenient . . . [to] affirm the trial court's judgment forfeiting the weapons to the United States as a species of Deodands," the Fifth Circuit held "that it would strain the fabric of the law beyond repair were [it] to accept the theory which the government propounds to achieve this result." *Id.* at 235-36. Perhaps having learned its limits, when the government sought to take possession of Abraham Zapruder's recording of the assassination in 1999, it did so under its eminent-domain power and paid just compensation of $16 million. Steve Hendrix, *Zapruder Captured JFK's Assassination in Riveting Detail, Fueling Decades of Conspiracy Theories*, WASH. POST (Oct. 27, 2017), https://www.washingtonpost.com/news/retropolis/wp/2017/10/25/zapruder-captured-jfks-assassination-in-riveting-detail-it-brought-him-nothing-but-heartbreak [https://perma.cc/FB65-KBZV].

233. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 537 (2005) (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).

234. *See supra* note 66 and accompanying text.

235. *See supra* text accompanying notes 103, 113.

236. *See supra* notes 121-125 and accompanying text.

237. Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1012 (1984) ("[A] sovereign, 'by ipse dixit, may not transform private property into public property without compensation. . . . This is the

In the arena of regulatory takings, too, the Court often faces the question: "[W]hat constitutes a 'taking'"?[238] Each time, it has stressed that "the character of the governmental action" is an important factor in determining whether some governmental burden on property interests amounts to a taking.[239] Indeed, in efforts to answer that question, the Court has called for a multifactor inquiry into whether the governmental burden is "functionally equivalent to the classic taking."[240] And a contemporary civil forfeiture is functionally equivalent to a classic taking because it has as its primary purpose revenue generation, not law enforcement.[241]

True, virtually any forfeiture can advance *some* enforcement aim. In Jane's case, the addition of a retrofitted truck to the police fleet may very well help the police in another case in which, say, the truck is needed to tow a stolen car. But crucially, ancillary law-enforcement use is insufficient to distinguish forfeitures from takings. After all, these second-order functions of forfeited property are merely another way of stating that the property was taken for a public use. Further, the historical civil-forfeiture power was much more narrowly aimed at

very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent.'" (alteration in original) (quoting Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 164 (1980))).

238. *Id.* at 1004.

239. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978); *see also, e.g.*, PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 83 (1980) ("[T]he determination whether a state law [effects an unconstitutional taking] requires an examination . . . into such factors as the character of the governmental action . . . ."); *Ruckelshaus*, 467 U.S. at 1005 (similar); Murr v. Wisconsin, 582 U.S. 383, 393 (2017) (similar). When the Court originally mentioned the "character of the governmental action," it elaborated by comparing physical invasion with land-use regulation. *Penn Cent. Transp. Co.*, 438 U.S. at 124. However, lower courts have largely opted for an open-ended interpretation rather than a "single-variable distinction between invasion and regulation." Thomas W. Merrill, *The Character of the Governmental Action*, 36 VT. L. REV. 649, 653 (2012).

240. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 539 (2005).

241. It is entirely reasonable to believe that certain forms of contemporary civil forfeiture are so egregiously for personal benefit that they cannot possibly be a taking because there is no conceivable public use. For instance, the earlier-mentioned Georgia sheriff's forfeiture-funded purchase of a sports car and other personal expenditures hardly fit within the definition of public use. *See supra* text accompanying note 206. But such forfeitures still cannot be justified by reference to the historical enforcement purpose. Thus, they simply become takings *without* public use, which, much like uncompensated takings, are unconstitutional. But unlike an uncompensated taking for public use, whose constitutional infirmities can be cured by just compensation, a taking without public use is simply prohibited—even remuneration cannot save it. *See supra* text accompanying note 104.

responding to *particular* offenses—not general policing needs.[242] And forfeiture, in Jane's case, is not aimed at responding to the particular offense to which the asset is purportedly connected (Jane was acquitted, the drugs were confiscated, and any remaining retribution should be exacted on Kelly, not Jane). It is instead aimed at responding to general policing needs, and any law-enforcement purpose is unrelated to the crime at hand. When viewed in reference to the historical forfeiture power, that kind of forfeiture is merely a taking.

Bennis—the case involving the forfeiture of a jointly owned car in which the innocent co-owner raised a takings challenge—does not foreclose this interpretation of contemporary civil forfeiture.[243] The Court there held that the state is not "required to compensate an owner for property which it has already lawfully acquired under the exercise of governmental authority other than the power of eminent domain."[244] But the state cannot operate under the color of its forfeiture authority when its primary justification underpinning the confiscation is fundraising, not enforcement, for it is—if anything—that enforcement justification that firmly fixed the power to take without compensation.[245]

Indeed, the *Bennis* Court had no occasion to decide whether the forfeiture in that case was driven by public-use considerations (like fundraising) because Tina Bennis's takings challenge was styled as an innocent-owner defense, not as an attack on the nature of the government's action.[246] An innocent-owner defense—now commonplace by statutory edict, though with varying protections

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242. *See supra* notes 181-187 and accompanying text (discussing the enforcement justification); *see also* Austin v. United States, 509 U.S. 602, 615 (1993) ("[T]heories [justifying civil forfeiture] rest, at bottom, on the notion that the owner has been negligent in allowing *his* property to be misused and that *he* is properly punished for *that* negligence." (emphases added)).

243. To be sure, the time may be ripe for the Court to overrule *Bennis* outright. Commentators have written about the *Bennis* Court's improper use of history and its own precedent, and more recent scholarly findings indicate that innocent owners were, in fact, protected at the Founding. *See* Boudreaux & Pritchard, *supra* note 154, at 632 ("Forfeiture is a well-established feature of Anglo-American legal history. That history, however, is marked by nuances and limitations on government's forfeiture powers ignored by the *Bennis* majority."); Didwania, *supra* note 62, at 173 ("The Founding-era Supreme Court was similarly attentive to the concerns of innocent owners whose property might be forfeited because of others' criminal conduct."); Arlyck, *supra* note 155, at 1504-14 (discussing historical evidence demonstrating that Founding Era Treasury Secretaries' power to return seized property—and their expansive use of that power—"may have precisely been what made the government's otherwise unfettered power to forfeit private property constitutionally acceptable").

244. Bennis v. Michigan, 516 U.S. 442, 452 (1996); *see also supra* note 143 and accompanying text (quoting *Bennis*).

245. *See supra* text accompanying notes 142-144.

246. Brief for Petitioner at 36-37, *Bennis*, 516 U.S. 442 (No. 94-8729) (arguing that the government must "pay just compensation when a statute authorizes takings of property belonging to entirely blameless persons").

and little success[247]—may overlap with the takings defense but remains distinct in significant ways. As a result, *Bennis* did not address any arguments regarding a forfeiture's purpose.

B. Inquiry into Governmental Purpose

The recategorization of contemporary civil forfeiture admittedly requires courts to discern the purpose underlying a confiscation. A profit motive turns a forfeiture into a taking, but not all civil forfeitures are *contemporary* civil forfeitures (i.e., those premised on a profit motive). Some are truly intended to be tied to an enforcement purpose, or, more accurately, an enforcement intent *primarily* underlies the forfeiture. This recognition raises two related questions. First, why should we interrogate the governmental purpose when the state labels a confiscation as a forfeiture? Second, how are courts to conduct such an inquiry?

The first question is easier: without an inquiry into purpose, we would be left to the whims of government and how it labels the action it takes. As Chief Justice Warren wrote, "How simple would be the tasks of constitutional adjudication and of law generally if specific problems could be solved by inspection of the labels pasted on them!"[248] In the *Red Truck* hypothetical, police were able to effect what was, in truth, a taking without just compensation, by labeling it as a forfeiture. This is the very issue with contemporary civil forfeiture—it is a taking by another name.

But where the government seeks to levy an exaction on its subjects, the legislature's "choice of label" is not dispositive.[249] As already mentioned, in regulatory takings, "the Supreme Court has insisted independent judicial review is required to assure that when the government purports to be exercising the police power (or the power to tax) it is not in fact exercising the power of eminent domain."[250] In the context of distinguishing between a tax and a penalty, the

247. *See infra* Section IV.B.

248. Trop v. Dulles, 356 U.S. 86, 94 (1958).

249. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 564 (2012).

250. Merrill, *supra* note 239, at 649-51; *see also supra* notes 236-240 and accompanying text (discussing the functional analysis the Court has preferred in takings cases). In lower courts, property owners do bring, with some regularity, takings claims for intrusions and deprivations that the government alleges are carried out during law-enforcement activities. *See, e.g.*, Slaybaugh v. Rutherford County, 114 F.4th 593, 595 (6th Cir. 2024) ("Police damaged the [plaintiffs'] home while arresting [their son]. The [plaintiffs] filed this action . . . seeking to recover for property damage [which is in excess of $70,000] . . . under the Takings Clause of the Fifth Amendment . . . ."), *petition for cert. filed*, No. 24-755 (U.S. Jan. 16, 2025); Baker v. City of McKinney, 84 F.4th 378, 379 (5th Cir. 2023) ("[P]olice officers employed armored vehicles, explosives, and toxic-gas grenades to resolve [a hostage] situation. . . . However,

Supreme Court has preferred a "functional approach" in which it searches beyond "the designation of the exaction, and view[s] its substance and application."[251] Or consider another example from Eighth Amendment jurisprudence, where one threshold question is whether a law is penal and thus subject to the constitutional limitations on punishment: even if the legislature states that a particular legislation is "technically not a penal law," courts have long independently inquired into its purpose.[252] Neither form nor label controls; the inquiry, instead, "must be directed to substance."[253] Analogously, whether a confiscation is a taking or a forfeiture should be subject to independent inquiry by the courts.

Indeed, an inquiry into governmental purpose is not an exercise foreign to the judiciary. Across different types of legislation, "[e]xamination of purpose is a staple of statutory interpretation that makes up the daily fare of every appellate court in the country . . . and governmental purpose is a key element of a good deal of constitutional doctrine."[254] The Court, for instance, regularly engages in such analysis to determine whether a statute is designed to be punitive or regulatory.[255]

The second question—*how* courts determine whether a forfeiture is profit-motivated—requires more discussion. The remainder of this Section explores how the takings-based theory might be operationalized as a defense to contemporary civil forfeiture.

[plaintiff's] home suffered severe damage, much of her personal property was destroyed, and the City refused to provide compensation. [She] brought suit in federal court alleging a violation of the Takings Clause . . . ."), *cert. denied*, 145 S. Ct. 11 (2024).

In the course of determining whether the government deprived or damaged private property pursuant to its police power or its takings power, at least the Federal Circuit has explicitly stated that "the character of the government action is the sole determining factor." AmeriSource Corp. v. United States, 525 F.3d 1149, 1155 (Fed. Cir. 2008); *cf.* Lech v. Jackson, 791 F. App'x 711, 717 (10th Cir. 2019) ("[We] hold that when the state acts pursuant to its police power, rather than the power of eminent domain, its actions do not constitute a taking . . . . But that does not end the matter. We must next determine whether [the government] acted pursuant to [its] police power here.").

251. *Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 522 (quoting United States v. Constantine, 296 U.S. 287, 294 (1935)).

252. *See Trop*, 356 U.S. at 94-99.

253. *Id.* at 95.

254. McCreary County v. ACLU of Ky., 545 U.S. 844, 861 (2005) (collecting examination-of-purpose cases); *see also id.* at 861-62 ("With enquiries into purpose this common, if they were nothing but hunts for mares' nests deflecting attention from bare judicial will, the whole notion of purpose in law would have dropped into disrepute long ago.").

255. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963).

1. *Fundamental Feasibility in Clear Cases*

This Note is not intended to provide an instruction manual for litigants taking on the challenge of recategorization. It is meant to begin a discussion that reignites takings doctrine as another reason why contemporary civil forfeiture is unconstitutional. But outlining paradigm cases may be useful to illustrate the practicability of the recategorization proposed herein. Imagine a spectrum of potential recategorization claims.[256] On one end, there are forfeitures clearly intended to respond to particular criminal activity, left undisturbed by the recategorization urged in this Note. Take, for instance, a fifty-pound box of cocaine found in a convicted drug trafficker's apartment and a bundle of cash next to the box with a note stating, "money from cocaine sales." Civil forfeiture of that cash is surely not a taking. There is a clear enforcement purpose in prohibiting pecuniary gain from the sale of drugs (and, for the drugs, there is no legitimate property interest in contraband).[257]

The institution of criminal proceedings might be evidence that a parallel civil-forfeiture proceeding has enforcement as its primary justification.[258] Forfeiture funds distributed to victims—rather than the seizing agency—also suggest that public-use fundraising is not part of the governmental purpose. For instance, the Department of Justice recovered billions of dollars via civil-forfeiture proceedings in connection with the fraud perpetrated by Bernie Madoff.[259] This did not constitute a taking requiring compensation because such forfeiture was accompanied by both criminal proceedings and victim-restitution schemes.[260]

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256. Professor Thomas W. Merrill has discussed an analogous spectrum that ranges from clear cases of eminent domain on one end to clear cases of police-power regulation on the other. In the center of the spectrum are regulatory-takings cases, whose purpose is to determine whether a regulation burdening some property interest is a compensable taking or a noncompensable police-power regulation. *See* Merrill, *supra* note 239, at 649-50, 670-72.

257. *See supra* note 70 and accompanying text.

258. Note the significance of *parallel* proceedings. Where prosecutors initiate criminal proceedings long after civil-forfeiture proceedings have begun or where they institute civil-forfeiture proceedings after acquittal, there is greater doubt as to the enforcement purpose. In the former case, there is a higher probability that the criminal proceeding might be pretextual—an effort to bolster the government's argument for an enforcement purpose. In the latter case, an acquittal substantially weakens any enforcement purpose that might have existed, and it is more likely that the civil-forfeiture proceeding's purpose is unrelated to that of the prior criminal action (as was the case in the *Red Truck* hypothetical).

259. *See* Press Release, U.S. Dep't of Just., Justice Department Announces Distribution of over $158.9M to Nearly 25,000 Victims of Madoff Ponzi Scheme (Dec. 11, 2023), https://www.justice.gov/opa/pr/justice-department-announces-distribution-over-1589m-nearly-25000-victims-madoff-ponzi [https://perma.cc/5UKU-7JFF].

260. *Id.*

When such forfeitures are contrasted with classic contemporary civil forfeiture, the stark distinction between the types of forfeiture becomes evident. Consider the following hypothetical. A city council slashes the police budget by 40%. Then, the city's chief of police sends a memorandum instructing his officers to stop and seize all black Mercedes-Benz G 550 sport utility vehicles because "they would make excellent and necessary additions to the police fleet." Within two months, the city seizes and takes title, by civil forfeiture, to twenty-five such vehicles. In no cases are criminal charges filed, and all twenty-five vehicles are added to the police fleet as is. The vehicles' owners would have a strong argument that the forfeitures constituted takings. There was no connection to law-enforcement goals tied to a particularized criminal act, the value of the subject property was immense (particularly given that there was no criminal wrongdoing alleged against any of the vehicles' owners), and all the vehicles were added to the police fleet (a public use). It seems implausible that these confiscations were forfeitures simply because the government said so. If this act were a forfeiture, so too would be the physical appropriation of private property to build a public road.

Admittedly, police can always attach a facial enforcement purpose to forfeitures. Say, for example, that the police chief's memo also included a second justification: the G-Wagons "would make excellent additions to the police fleet *and* they are mostly used by drug dealers." Even with this added provision, there could be little question that the weight of the various indicators points towards a profit motive.[261] Or imagine that some of the vehicles seized did have small amounts of contraband in them. That fact certainly does not affect the property owners whose vehicles did not contain contraband. But even for the owners whose vehicles contained unlawful items—and let us further stipulate that these owners were all released without criminal charges, much less an investigation—other indicia of purpose suggest the police acted primarily to obtain resources rather than with the intent to enforce against drug crimes. For one, what they forfeited seems disproportionate in value to the minor drug crimes alleged. Moreover, they sought out and forfeited precisely what they needed at a time when their operating fund was reduced.

The hypothetical police chief's memo is not far removed from the reality of contemporary civil forfeiture.[262] In countless jurisdictions, law enforcement

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261. It is, of course, questionable whether an enforcement justification of the kind that underlies historical civil forfeiture exists at all because the enforcement justification here is broadly applied rather than particularized. *See supra* text accompanying note 242.

262. In 1990, one memo from Attorney General Richard Thornburgh stated:

> [T]he President's budget for FY 1990 projects forfeiture deposits of $470 million. . . . We must significantly increase production to reach our budget target.

specifically targets "out-of-state rental cars," pulling them over in "pretextual traffic stops."[263] In Tenaha, Texas, police ran one such program, ostensibly as a highway drug-interdiction program.[264] And, to be sure, in certain cases, there was a clear enforcement purpose. Law enforcement in Tenaha once "caught a man driving a sleek motor home filled with five hundred pounds of pot."[265] But Tenaha officials stopped — on a conservative estimate — hundreds of people in the span of two years, the vast majority of whom committed no crime warranting forfeiture.[266] Tenaha forfeited property from James Morrow, Stephen Stuart Watson, Amanee Busby, Yuselff Dismukes, Linda Dorman, Marvin Pearson, Jennifer Boatright, Ronald Henderson, Javier Flores, William Parsons, and countless others.[267] None of these named plaintiffs were convicted; some were

> Failure to achieve the $470 million projection would expose the Department's forfeiture program to criticism and undermine confidence in our budget projections. Every effort must be made to increase forfeiture income during the remaining three months of FY 1990. The Attorney General and the Deputy Attorney General solicit your personal commitment to reaching our forfeiture production goal.

Exec. Off. for U.S. Att'ys, U.S. Dep't of Just., *Asset Forfeiture*, 38 U.S. ATT'YS' BULL. 179, 180 (1990); *see also* United States v. James Daniel Good Real Prop., 510 U.S. 43, 56 n.2 (1993) ("The extent of the Government's financial stake in drug forfeiture is apparent from a 1990 memo, in which the Attorney General urged United States Attorneys to increase the volume of forfeitures in order to meet the Department of Justice's annual budget target . . . .").

263. Stillman, *supra* note 33; *see also* John Malcolm, *Testimony Before the Pennsylvania State Senate Judiciary Committee*, HERITAGE FOUND. (Oct. 26, 2015), https://www.heritage.org/research/testimony/civil-asset-forfeiture-when-good-intentions-go-awry [https://perma.cc/Y9QN-ENDN] ("Forfeiture-related traffic stops follow a common pattern. Drivers — usually those with out-of-state license plates — are stopped on some pretext.").

264. According to the deputy city marshal who spearheaded the civil-forfeiture program in Tenaha, God spoke to him through a beam of light, and he then "swore an oath to God that [he] would get out there" and stop drug traffickers. Danny Robins, *Children Were Pawns in Alleged Texas Shakedown Scheme*, LUBBOCK AVALANCHE-J. (May 8, 2012, 11:21 PM CT), https://www.lubbockonline.com/story/news/state/2012/05/09/children-were-pawns-alleged-texas-shakedown-scheme/15159024007 [https://perma.cc/6HTK-ZJNJ].

265. Stillman, *supra* note 33.

266. Morrow v. Washington, 277 F.R.D. 172, 190-91 (E.D. Tex. 2011); *see also* John Ross, *Shelby County, Texas to Return Property Stolen from Innocent Motorists*, REASON (Nov. 2, 2012, 4:21 PM), https://reason.com/2012/11/02/shelby-county-tx-officials-to-return-som [https://perma.cc/2L9H-PAYY] ("Police detained over 140 drivers — overwhelmingly minorities with out-of-state tags — for minor (and probably made-up) infractions. . . . In most cases, no one was ever charged with a crime."); Jason Snead & Andrew Kloster, *License, Registration — And All Your Valuables, Please*, DAILY SIGNAL (Jan. 13, 2014), https://www.dailysignal.com/2014/01/13/license-registration-valuables-please [https://perma.cc/CC5A-Y6AG] ("Between 2006 and 2008 . . . Tenaha police executed dozens of traffic stops in which vast sums of money and property were seized, though no criminal charges were filed against drivers or passengers.").

267. Plaintiffs' Third Amended Complaint, *supra* note 58, at 1-2.

not even charged.[268] Even those who were found with drugs were ultimately released following forfeiture.[269] While police had nearly nothing to show on the enforcement front, the program satisfied another purpose: within six months of beginning the Tenaha operation, law enforcement had seized $1.3 million.[270] And the officer who led the program received tens of thousands of dollars in bonuses traceable to the forfeiture fund.[271]

It is on this end of the spectrum that litigants might first bring a takings challenge in order to prove the basic workability of the recategorization proposed in this Note. When looking to the practices in Tenaha, a clear profit motive emerges. The police practice of stopping out-of-state rental cars was well established. Contraband had been found on some, yes, but law enforcement managed to effect forfeitures in many other cases without investigation or prosecution. And, importantly, even those who were confirmed to be involved in the drug trade — including one woman who was carrying more than $600,000 in laundered cash — were "swiftly released and never hit with criminal charges."[272] If the police in Tenaha were looking to address crime, they were not trying very hard.

2. *Key Principles and Proposed Factors*

Clear indicators evincing a profit motive, admittedly, may not always be present. Much of the difficulty lies in less obvious cases — those toward the center of the forfeiture spectrum. Fortunately, from the clear cases, we can extrapolate core principles and apply them to situations in which both enforcement and fundraising justifications might plausibly support forfeiture. Namely, if there is an enforcement purpose, we would expect to see a tight connection between police conduct and the wrongdoing targeted. By contrast, a forfeiture looks like a taking when the value of the property forfeited (for example, forfeiting $500,000 worth of cash, jewelry, and cars while releasing the owner) does not match the magnitude of the wrongdoing (for example, allegedly purchasing one-eighth of an ounce of marijuana). And if forfeited assets are immediately useful or necessary to police operations, the forfeiture seems more suspect, for it evinces a profit motive rather than an enforcement purpose. What emerges from these principles is a proposed set of factors that can help guide the takings-based analysis: (1) the value of forfeiture and the investigative or prosecutorial conduct relative to

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268. *Id.* at 6-14.

269. Stillman, *supra* note 33; *see also supra* notes 220-222 and accompanying text (discussing reverse stings in which law enforcement has prioritized cash over drugs).

270. *See* Stillman, *supra* note 33.

271. *Id.*

272. *Id.*

the purported criminal wrongdoing; (2) the asset's liquidity or immediate utility; and (3) the role of forfeiture proceeds in police budgets and their subsequent use.

First, an enforcement-driven forfeiture would likely confiscate an amount that reflects the gravity of the wrongdoing, whereas a forfeiture amount that is grossly incongruent with the magnitude of the alleged offense may indicate a profit-motivated taking. Indeed, courts already engage in a similar proportionality analysis to scrutinize civil forfeitures in the context of the Eighth Amendment. Since the Court ruled in *Austin v. United States* that the Excessive Fines Clause applies to civil forfeitures,[273] lower courts have compared the "severity" of a challenged forfeiture with the "seriousness of the underlying offense" to determine whether the forfeiture is excessive.[274] And, as discussed in Section I.B, the Court's existing takings doctrine establishes that when the government takes more property than it is due, the excess deprivation is deemed a taking.[275] A determination as to primary purpose that is informed by the congruence of forfeiture value and purported wrongdoing is thus familiar territory and closely related to the excessive-fines analysis.

However, part of the issue in forfeiture abuse is that police "often pursue relatively small 'petty cash' seizures," which renders litigation against the forfeiture unlikely because it would be more costly than the forfeiture itself.[276] Therefore, a proportionality analysis in which a claimant alleges a pattern of abuse should also take into account whether individual forfeiture amounts are too *trivial* in light of the stated enforcement purpose.[277] This analysis should also

273. 509 U.S. 602, 622 (1993).

274. United States v. 829 Calle de Madero, 100 F.3d 734, 737 (10th Cir. 1996) (collecting cases and stating that "[t]he majority of the circuits which have addressed the question perform an analysis that purports to balance the severity of the fine, *i.e.,* the forfeiture, with the seriousness of the underlying offense and the culpability of the owner"); *see also, e.g.*, United States v. 427 & 429 Hall St., 74 F.3d 1165, 1170 (11th Cir. 1996) ("[T]he appropriate inquiry with respect to the Excessive Fines Clause is . . . a proportionality test.").

275. *See supra* notes 121-123 and accompanying text. Concededly, in cases where the daylight between the value of forfeiture and the damage of the wrongdoing is less obvious, there is a difficulty in measuring what is due to the government. This, of course, is part of the challenge in an Excessive Fines Clause analysis as well. But what this Note is concerned with is the initial viability of establishing a takings challenge in civil-forfeiture cases, and an examination of closer cases may be best left to future endeavors, following this proof of concept.

276. Jolie McCullough, Acacia Coronado & Chris Essig, *Texas Police Can Seize Money and Property with Little Transparency. So We Got the Data Ourselves.*, Tex. Trib. (June 7, 2019), https://apps.texastribune.org/features/2019/texas-civil-asset-forfeiture-counties-harris-webb-reeves-smith [https://perma.cc/6VN8-86P2].

277. By assessing comparative triviality in addition to comparative excessiveness, the proportionality calculus here might be understood as a better proxy (than assessing only comparative

consider how law enforcement treated the investigation and prosecution. If police were really concerned with enforcement, we would expect to see congruent investigative activity, arrests, searches, and seizures of related persons and assets, and, potentially, prosecution, rather than a forfeit-and-release scheme like in Tenaha. Similar purpose-driven analyses are common in the judiciary. For instance, when determining whether a statute is punitive, courts examine "whether an alternative purpose to which [the statute's sanction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned."[278]

Second, the prevalence of currency forfeitures alone may not inherently insinuate a profit motive, but targeting assets that can easily be liquidated (or that can immediately be used in policing activity, such as vehicles) is often at odds with enforcement purposes. As discussed in Section II.B, a focus on liquid assets may cloud and overshadow law-enforcement needs, particularly where drug proceeds are involved, such that police end up targeting buyers with money rather than suppliers with drugs.[279]

Third, police departments with significant budget deficits or ones that rely heavily on forfeiture funding might indicate a profit motive that is at odds with enforcement goals.[280] One way to discern a fundraising motive might be to ascertain what the law-enforcement agency intends to do with the forfeited property (or has historically done with such property). If the police destroy property or make it part of victim-restitution funds upon forfeiture, they are more likely to be acting with an enforcement purpose rather than a fundraising purpose.[281]

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excessiveness) for measuring the strength of the link between a particular criminal wrongdoing and forfeiture. Although this analysis may seem counterintuitive, if the police purport to be targeting drug kingpins and forfeitures stemming from billion-dollar enterprises, it would cast suspicion on the enforcement purpose to focus on forfeitures averaging just a few hundred dollars from individuals who are not criminally charged. Nor is such an analysis likely to encourage larger forfeiture amounts. The drawbacks of doing so, namely the possibilities of legal challenge and media attention, remain robust disincentives. *See infra* text accompanying notes 328-329.

278. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963) (footnotes omitted) (collecting cases).

279. *See supra* text accompanying notes 220-222.

280. *See* discussion *supra* Section II.B.

281. It is possible that donation of forfeiture funds to charitable organizations might also indicate a lack of fundraising purpose, and instead a willingness to abide by the ancient—and colonial—practice of distributing the proceeds of deodands to the poor. *See* 18 CORPUS JURIS, *supra* note 179, at 489 ("In English law, any personal chattel whatever, animate or inanimate, which, becoming the immediate instrument by which the death of a human creature was caused, was forfeited to the king, for sale and a distribution of the proceeds *in alms to the poor* by his high almoner, for the appeasing of God's wrath." (emphasis added)); Cyrus H.

Accordingly, courts and litigants are not without factors—even before discovery—to analyze whether there is a plausible claim that law enforcement is using forfeiture mainly to bolster their own budgets and inventory. Once past this initial barrier of plausibility, discovery may help reveal a pattern of policing practices demonstrating a fundraising motive across multiple forfeitures. And such a pattern may even provide the basis for a class action, which, as explained below, is not novel in civil-forfeiture litigation.[282]

This inquiry, to be sure, is fact intensive and ad hoc; an abstract set of factors alone may not demonstrate its practicability. Consider, then, how the takings-based theory applies to the case of Eh Wah, whose story commenced this Note, and whose $53,000, held on behalf of a nonprofit organization, was forfeited by local authorities in Oklahoma.

On the first factor (the proportionality analysis), the value of the forfeited sum is hefty and in line with what one would expect a drug trafficker to be holding in currency. But the police's conduct does not match the severity of the alleged crime. The police released Wah the night he was detained and allowed him to travel to another state with nothing more than a traffic warning.[283] If the police suspected Wah of being involved in the drug trade, why did they not search and seize beyond the car? Why did they not seize and forfeit the car itself? Why not freeze his bank accounts? Why let him leave? Wah was eventually charged, some four weeks later, but the two-paragraph information attached only a five-sentence affidavit from the officer that stopped him.[284] The affidavit described the traffic stop and then asserted in a single conclusory sentence: "Due to the inconsistent stories and Wah [being] unable to confirm the money was his[,] the money was seized for evidence, awaiting . . . charges to be filed for Possession of Drug Proceeds."[285] But there was no other evidence of drug trafficking

Karraker, *Deodands in Colonial Virginia and Maryland*, 37 AM. HIST. REV. 712, 712, 716 (1932) ("In England, on report of a violent death, the coroner's inquest was summoned, and were a personal chattel found guilty it was declared deodand. Its value was then determined and the object forfeited to the crown or its grantee *to be devoted to pious or charitable purposes*. . . . As in England[, in the Colonies,] deodands were given to charity. In a majority of instances, this meant grants to the needy family of the deceased . . . ." (emphasis added) (footnote omitted)). However, considering charitable contributions as such an indication might raise additional incentive problems. For instance, a sheriff might use forfeiture funds to donate to local charitable causes that would help his reelection campaign. Or, as explained above, one sheriff donated $250,000 to his alma mater to endow a scholarship in his name. *See supra* text accompanying note 206.

282. *See infra* text accompanying note 289.

283. *See supra* text accompanying note 15.

284. Information at 1, State v. Wah, No. CF-2016-354 (Okla. Muskogee Cnty. Dist. Ct. Apr. 5, 2016); Affidavit, *supra* note 2, at 1.

285. Affidavit, *supra* note 2, at 1.

found or even sought. These actions cast doubt on a bona fide enforcement purpose and demonstrate, at best, a half-hearted attempt at prosecution.

On the second factor (the forfeited asset's liquidity or immediate utility), currency is the most liquid form of property and the easiest for police to use. The police found no contraband, and they declined to seize a check that had been made out to Wah's name, an illiquid asset.[286]

On the third factor (whether there are budget gaps and whether proceeds are used to fill them), Oklahoma allows its law enforcement to keep up to 100% of what it forfeits.[287] Furthermore, Muskogee County had been in a budget deficit since 2008, and in the same year that the officers stopped Wah, the county commission had cut $250,000 from its operating fund and $400,000 from the sheriff's budget.[288]

These factors are not conclusive, of course, but they set forth at least a prima facie case that law enforcement may be concealing a fundraising motive under the guise of a surface-level enforcement justification. Once this showing has been made, discovery, including depositions, could answer more questions: What is the traffic-stop policy in the Muskogee County Sheriff's Office? Do they target out-of-state license plates? What does body-worn-camera footage show the two deputies discussing during the traffic stop? Is there a pattern of unjustified stops accompanied by seizures? Answers to these questions might not only help Wah make out his own case but also allow individuals to aggregate their claims—if there is a pattern—in a class action. A takings claim would provide another basis for relief for those individuals who could not justify bringing a standalone lawsuit because the cost of such a suit outweighs the value of property forfeited.[289]

One objection here might be that, under the proposed inquiry, prosecutors would be incentivized to bring more criminal charges and police to launch more unwarranted investigations. And indeed, while the takings-based theory does not argue that civil forfeiture is appropriate only following a criminal conviction, the existence of bona fide criminal investigations and proceedings is one indicator that the parallel civil-forfeiture action is enforcement-based. It is also true that prosecution, even without conviction, can have debilitating effects. Even "the fact of an arrest itself" can trigger a whole host of consequences, "such as

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286. Claim for Property and Verified Answer, *supra* note 11, at 7.

287. Ingraham, *supra* note 10.

288. News on 6, *Muskogee County Commissioners Making Budget Cuts*, NEWS9 (Oct. 13, 2016, 10:53 PM), https://www.news9.com/story/5e3605552f69d76f62033815/muskogee-county-commissioners-making-budget-cuts [https://perma.cc/F9FY-5598].

289. *See, e.g.*, Plaintiffs' Third Amended Complaint, *supra* note 58, at 2 (seeking relief individually and as a "putative class").

deportation, eviction, loss of a professional license, or loss of custody."[290] Pretrial detention—even just a few days of incarceration—poses risks to continued employment.[291] The concern for overcharging, then, is not one that should be taken lightly.

However, in this case, the concern is at odds with the very reason law enforcement prefers civil forfeiture over criminal forfeiture—that it bypasses the procedural protections that attach in criminal proceedings, so it is less costly and quicker. For that reason, it is precisely the goal of many reformers to link civil forfeiture to a criminal case.[292] Put simply, the incentive of possibly satisfying one part of one prong of the takings test would not outweigh the existing disincentives of criminal proceedings.

Furthermore, even assuming that recategorization would produce greater incentives to overcharge, there is substantial evidence to suggest that prosecutors *already* maximally charge defendants. That is, any additional incentive to charge would have no practical effect—there are simply no charges that could be brought but are not. According to one recent survey, for example, many prosecutors stated that they "would bring multiple charges or charge a felony in order to get the offender to plea[d] to fewer or lesser charges."[293] One respondent to that survey stated specifically, "When I screen for charges, I usually charge the maximum charges that I can . . . ."[294] Others confessed that they "tend to overcharge," and that "[a] person should generally be charged with the most serious offense possible."[295] Indeed, prosecutors routinely divide crimes so that they can "stack" charges in an effort to maximize punishment and the chance of

290. Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 811 (2015).

291. Sandra Susan Smith, *How Pretrial Incarceration Diminishes Individuals' Employment Prospects*, FED. PROB., Dec. 2022, at 11, 14; *see also* Brian Nam-Sonenstein, *Research Roundup: Evidence That a Single Day in Jail Causes Immediate and Long-Lasting Harms*, PRISON POL'Y INITIATIVE (Aug. 6, 2024), https://www.prisonpolicy.org/blog/2024/08/06/short_jail_stays [https://perma.cc/WWQ2-BWJL] ("[D]etention also immediately disrupts a person's ability to work and increases their risk of death.").

292. *See supra* text accompanying note 156; *infra* note 345 and accompanying text; *see also, e.g.*, Roger Pilon & Trevor Burrus, *Civil Forfeiture Reform*, *in* CATO HANDBOOK FOR POLICYMAKERS 163, 163 (9th ed. 2022), https://www.cato.org/sites/cato.org/files/2023-03/cato-handbook-9th-edition.pdf [https://perma.cc/F5Y4-FRVN] ("Congress should . . . require, in most cases, a criminal conviction to be obtained before assets may be forfeited to the government . . . .").

293. Megan S. Wright, Shima Baradaran Baughman & Christopher Robertson, *Inside the Black Box of Prosecutor Discretion*, 55 U.C. DAVIS L. REV. 2133, 2183 (2022).

294. *Id.* at 2183-84 (quoting one of the anonymous respondents).

295. *Id.* at 2184-85 (quoting two of the anonymous respondents).

conviction.[296] Therefore, additional incentives for criminal charges would have little actual effect—prosecutors are already doing all they can to charge defendants.[297]

Another objection might be that, as discussed, police can always assert a facial, but particularized, enforcement justification, especially if there is evidence of some crime. In cases like that of Mary and Leon Adams—whose home was seized after their son sold twenty dollars' worth of marijuana on the porch—the owners could have taken more precautions to ensure that criminal activity did not take place using their property.[298] Their failure to do so, the argument might go, is worthy of punishment.

The proposed takings-based framework, however, demonstrates how such an enforcement justification may be rebutted. Applying the first proposed factor (proportionality), the value of the forfeited home is much greater than the value of the illegal transaction. Given the magnitude of disproportionality, the first factor alone should immediately raise suspicion as to whether a stated enforcement purpose is pretextual. The second factor (utility) also cuts against the police in the Adams case: Philadelphia held regular, biannual auctions of forfeited property, where the home could be liquidated quickly.[299] Philadelphia would fare little better on the third factor (usage). Both the Philadelphia District Attorney's Office and its police force relied heavily on forfeiture funds. Philadelphia prosecutors "claimed to have spent anywhere from $2 million and $7 million in forfeiture funds each year," including millions in salaries.[300] Over the course of ten

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296. *See* Note, *Stacked: Where Criminal Charge Stacking Happens—And Where It Doesn't*, 136 HARV. L. REV. 1390, 1391 & n.16 (2023); *see also* John F. Stinneford, *Dividing Crime, Multiplying Punishments*, 48 U.C. DAVIS L. REV. 1955, 1958 (2015) ("There is little to prevent prosecutors from dividing crimes and obtaining multiple punishments . . . ."). This Note does not express a view on the constitutionality or ethical implications surrounding charge stacking. The example is merely given in support of the idea that even if the recategorization of civil forfeiture were to incentivize additional criminal charges, such incentives could not translate into action because, in general, prosecutors already maximally charge defendants.

297. To be sure, there is always the danger of aggressive policing tactics accompanying rampant civil forfeitures. *See, e.g.*, Delvin Davis, *Ending Business as Usual: The Need for Alabama Civil Asset Forfeiture Data Transparency*, SPLC (Feb. 12, 2025), https://www.splcenter.org/resources/reports/alabama-civil-asset-forfeiture [https://perma.cc/X4SP-6RSN] (explaining that when the 1,300-person town of Brookside, Alabama, increased its fines and forfeitures from about $82,000 in 2018 to about $610,000 in 2020, it also increased its misdemeanor arrests from ninety to 1,273). But this danger exists—as is evident from the situation in Brookside—irrespective of these proposed factors.

298. *See supra* text accompanying notes 33-35.

299. Stillman, *supra* note 33.

300. Ryan Briggs & Max Marin, *Uncovering Philly Law Enforcement's Secret Bank Accounts*, CITY & STATE PA. (Sept. 19, 2017), https://www.cityandstatepa.com/politics/2017/09/uncovering-philly-law-enforcements-secret-bank-accounts/364925 [https://perma.cc/KW2Z-8PDV].

years, Philadelphia had seized assets worth some $64 million.[301] The city's police department spent $160,000 in forfeited assets to repave its gun range.[302] In fact, the forfeitures of homes and cars were such a large part of the city's fundraising scheme that it spent hundreds of thousands just to maintain its real-estate portfolio and to lease a garage to store forfeited vehicles.[303] The District Attorney's Office alone spent $70,000 from forfeiture funds to pay a single company to do a single task: "[N]otifying people that their property was being seized by law enforcement."[304]

Accordingly, the forfeiture of the Adams home could have been, and should have been, adjudged a taking without just compensation. Any enforcement justification that police and prosecutors could have asserted (e.g., that the forfeiture was intended to punish the Adams family for failing to prevent an unlawful drug transaction on their property) is not sufficient to overcome the clear public-use purpose driving the confiscation.

The analysis proposed here is not easy.[305] But it is well within the bounds of what courts regularly do: weigh the particulars to ensure that the government is

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301. Bobby Allyn, *Philadelphia Offers to Reform Use of Forfeiture Funds, but Critics Say That's Not Enough*, WHYY (July 24, 2017), https://whyy.org/articles/philadelphia-offers-to-reform-use-of-forfeiture-funds-but-critics-say-thats-not-enough [https://perma.cc/VAJ5-9J4X].

302. Briggs & Marin, *supra* note 300.

303. *Id.*

304. *Id.*

305. Among the more difficult hypothetical scenarios is one in which the police confiscate property under a pure public-use justification but later discover that the property is connected to criminal activity. Because part of the goal of recategorization is incentive restructuring, the most effective analysis of governmental purpose should focus on purpose at the moment of *seizure*. After all, if governmental purpose is measured at the moment of *forfeiture*, the state could seize first and develop its investigation and enforcement justification later. But seizure alone has harms. *See* Culley v. Marshall, 601 U.S. 377, 407 (2024) (Sotomayor, J., dissenting) (connecting the loss of access to a car to the loss of work); Stephanie Wilson, *I Was Innocent, but Police Seized My Car and Stalled for Years. Their Scheme Has to Stop.*, USA TODAY (Oct. 23, 2023, 5:10 AM ET), https://www.usatoday.com/story/opinion/voices/2023/10/23/supreme-court-civil-forfeiture-decision-police-personal-property/71167845007 [https://perma.cc/G6ZM-HEP9] ("They did not arrest me, accuse me of wrongdoing or issue a citation. Yet they seized my car and left me stranded 15 miles from home. . . . Just in Wayne County during a recent two-year span, law enforcement agencies seized more than 2,600 vehicles and ransomed them back to their owners for more than $1.2 million."); Rulli, *supra* note 173 ("This harm can be very severe. The loss of the family car may prevent individuals from getting to work, accessing medical appointments or hospital care, shopping, and fulfilling other family obligations, especially in rural areas where public transportation is limited or non-existent."). In this way, the takings-based theory may operate prophylactically, much like the exclusionary rule. *See infra* notes 385, 386. And, if the criminal purpose is discovered after an unlawful seizure (pursuant to a takings justification), the property may be something akin to a fruit of the poisonous tree.

not trampling on the rights of its citizens. And indeed, courts across the country—on suppression motions, in civil suits, and at probable-cause hearings—scrutinize law-enforcement conduct every day.

There is one further framework, somewhat distinct from that presented above, by which takings doctrine might apply to contemporary civil forfeiture via analogy to land-use exactions. Some local law-enforcement agencies have offered property owners an impossible option: sign an agreement waiving all rights and any claims to your assets, or we bring (fabricated) criminal charges against you.[306] When Wyoming authorities took $91,800 from Phil Parhamovich, for instance, they pressured him into signing a pro forma waiver to the property, then released him.[307] There may be a potential analogue in such cases to takings by exaction. Just as the government cannot impose conditions on land use without an essential nexus and rough proportionality,[308] the government should not be able to forfeit property without demonstrating that doing so was in the pursuit of an enforcement purpose and that what was taken was not beyond the scope of the crime itself. However, these types of forfeitures might be dealt with more efficiently through a straightforward application of the unconstitutional-conditions doctrine.[309]

C. Taking, Taxing, and Ticketing

Separate from the question of feasibility is the doctrinal issue of whether contemporary civil forfeiture can be properly classified as a taking rather than a tax. A closely related question is whether the same principles underlying the recategorization of contemporary civil forfeiture would transform taxes into takings, too. Income taxes, for example, take funds for public use, but like contemporary civil forfeiture, they are not meant to punish. These two forms of property deprivation—taxing and profit-motivated forfeiture—share characteristics that can be difficult to distinguish. "[T]he essence of taxation lies in

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306. For further background regarding and arguments against the use of these "roadside waivers," see generally Louis S. Rulli, *Duress, Coercion, and Intimidation on the Highway: A Call to Ban Roadside Waivers in Civil Forfeiture*, 43 YALE L. & POL'Y REV. 699 (2025).

307. *See Wyoming Forfeiture*, *supra* note 36.

308. *See supra* text accompanying notes 116-119.

309. The unconstitutional-conditions doctrine seeks to "vindicate[] the Constitution's enumerated rights by preventing the government from coercing people into giving them up." Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 604 (2013). Exactions "'involve a special application' of this doctrine." *Id.* (quoting Lingle v. Chevron U.S.A., Inc. 544 U.S. 528, 547 (2005)). It would seem that threatening baseless charges if one does not surrender private property would require a straightforward application of the unconstitutional-conditions doctrine, but the theory would require further research, beyond the scope of this Note, regarding how strong protections of prosecutorial discretion would play into the analysis.

coercive takings by government,"[310] and a confiscation by contemporary civil forfeiture would seem to include what the Court has called "the essential feature of any tax"—generating "at least some revenue for the Government."[311] If contemporary civil forfeiture can be categorized as a tax rather than a taking, there would be no change from the status quo. Police could still forfeit with impunity without facing the deterrent effect of the Just Compensation Clause.[312]

Fortunately, basic principles that have distinguished a tax from a taking also establish that contemporary civil forfeiture falls in the latter category. The line is not always bright, but "[t]axes usually fall on a relatively large portion of the population," whereas "[t]he archetypal taking is the condemnation of a single piece of" property from one owner.[313] The distinction is one rooted in "justice and fairness" and recognizes that "economic injuries" levied in the name of public use must not be "disproportionately concentrated on a few" individuals.[314] In other words, taxation, as confiscation levied generally against the populace, gives some public benefit, including for the individual taxed. Every citizen pays taxes, and every citizen receives public benefits (e.g., emergency services, public roads,

310. Walter J. Blum & Harry Kalven, Jr., *The Anatomy of Justice in Taxation* 9 (U. Chi. L. Sch., Occasional Paper No. 7, 1973), https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1026&context=occasional_papers [https://perma.cc/B7NQ-F525].

311. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 564 (2012).

312. As one scholar declared, "[E]very theory of takings law should explain or at least struggle with the question of why the power to tax—without compensation, of course—is not fundamentally inconsistent with the constitutional obligation to compensate condemnees." Saul Levmore, *Just Compensation and Just Politics*, 22 CONN. L. REV. 285, 292 (1990).

313. Eric Kades, *Drawing the Line Between Taxes and Takings: The Continuous Burdens Principle, and Its Broader Application*, 97 NW. U. L. REV. 189, 199 (2002). Although taxes are also understood to "usually require payment in fungible money," *id.*, currency forfeitures are not the kind of "fungible money" being confiscated in taxation. When civil forfeiture is effected against currency, those particular bills are the only cash that can be forfeited because the government cannot demand that an individual relinquish substitute res without bringing an in personam action. *Compare* STEFAN D. CASSELLA, ASSET FORFEITURE LAW IN THE UNITED STATES 21-22 (2007) ("The most serious limitation of civil forfeiture is that, as an *in rem* action, the Government must prove that the defendant property is directly traceable to the underlying criminal offense. The court may not, in other words, order the forfeiture of a money judgment or substitute assets."), *with id.* at 580 ("The use of money judgments in criminal forfeiture cases is now well-established in the case law."). In contrast, the "fungible asset" demanded in taxation can be a product of liquidation of any asset the person holds. *See* Kades, *supra*, at 198 ("When the government requires citizens to part with fungible assets by imposing a general liability and taking money, it is taxation . . . .").

314. E. Enters. v. Apfel, 524 U.S. 498, 523 (1998) (first quoting Andrus v. Allard, 444 U.S. 51, 65 (1979); and then quoting Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979)).

and use of the courts).[315] A taking in the form of contemporary civil forfeiture, in contrast, requires just compensation because it places a public burden squarely on the shoulders of an individual.[316]

One further distinction is that a tax, because it is generally levied across the whole citizenry, is inherently susceptible to majoritarian responses. For instance, in the *Red Truck* hypothetical raised earlier, the police department had a potential fourth option to raise funds: ask the legislature to increase taxes to cover the costs of purchasing a truck and retrofitting it. But raising taxes might have jeopardized the police commissioner's or various legislators' chances to stay in power. Confiscation via contemporary civil forfeiture, as with a taking, could be precisely targeted at Robert and Jane, whose two votes probably would not make a difference.[317] These distinctions separate contemporary civil forfeitures from taxes, and the recategorization proposed here does not render taxes unconstitutional. Forfeiture is not a general assessment against fungible assets but rather a specific confiscation targeted at particular owners and assets. In sum, although contemporary civil forfeiture also raises revenue, the resemblance to taxes ends there.

It is plausible, however, that the logic of the recategorization could extend to certain categories of individual fines and fees.[318] For instance, citations resulting from traffic infractions often form significant portions of state and local funding,

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315. *Cf.* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Regul. Plan. Agency, 535 U.S. 302, 341 (2002) ("While each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others." (quoting Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 491 (1987))).

316. *See* Palazzolo v. Rhode Island, 533 U.S. 606, 617-18 (2001) ("[T]he purpose of the Takings Clause . . . is to prevent the government from 'forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960))).

317. Of course, it is possible that all those affected by civil forfeiture could band together to affect electoral outcomes. But that possibility is extremely unlikely because although the class of individuals affected by civil forfeiture is numerous in absolute terms, it is, by comparison to the total population, only a small subset. For example, between 2012 and 2018, civil forfeiture ensnared more than 30,000 individuals in Philadelphia. Jennifer McDonald & Dick M. Carpenter, II, *Frustrating, Corrupt, Unfair: Civil Forfeiture in the Words of Its Victims*, INST. FOR JUST. 2 (Oct. 2021), https://ij.org/wp-content/uploads/2021/09/Frustrating-Corrupt-Unfair_Civil-Forfeiture-in-the-Words-of-Its-Victims-2.pdf [https://perma.cc/3WNC-KPPA]. In 2017, Philadelphia—the sixth largest city in the United States—boasted a population of nearly 1.6 million people. Dep't of Pub. Health, *Health of the City*, CITY OF PHILA. 3 (2018), https://www.phila.gov/media/20181220135006/Health-of-the-City-2018.pdf [https://perma.cc/CF9S-GQ57].

318. Tort judgments—and other private-law claims—clearly are not affected by the recategorization principles. Although tort judgments are enforced on the authority of the government, most obviously, the distinction lies in the fact that a potential governmental profit motive is not implicated.

and across at least twenty states, police performance is evaluated in part by measuring an officer's traffic stops per hour.[319] What is more, some of the same normative criticisms of contemporary civil forfeitures apply to certain fines and fees. For instance, in one Louisiana town, traffic fines constituted 89% of its general revenue, and "[t]icket revenue helped finance sheriff's equipment in Amherst County, V[irginia]; a 'peace officers annuity and benefit fund' in Doraville, G[eorgia]; and police training in Connecticut, Oklahoma and South Carolina."[320] In Chicago, "tickets brought in nearly $264 million in 2016, or about 7 percent of the city's $3.6 billion" budget.[321] The debts accrued from traffic "tickets prompt so many bankruptcies [that] the court [in Chicago] leads the nation in Chapter 13 filings."[322] But, despite similar issues, traffic infractions pose distinct analytical questions because of their largely in personam nature — the driver, not the owner of the car or the car itself, is targeted.[323] This difference may mean that the enforcement justification is more closely tied to the wrongdoing, akin to a criminal forfeiture.[324]

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This Part has advanced a novel, takings-based theory of contemporary civil forfeiture's unconstitutionality. Section III.A established that forfeiture that is intended primarily to fundraise cannot be justified by reference to its historical enforcement purpose. Instead, it must be justified as a taking for public use. But an uncompensated taking is unconstitutional. Thus, by requiring just compensation for contemporary civil forfeitures, the takings-based theory nullifies the value of such forfeitures. The key question, then, is when an act of civil forfeiture can properly be classified as *contemporary* civil forfeiture. To begin answering that question, Section III.B developed three factors: (1) proportionality; (2) utility; and (3) usage. And finally, Section III.C fortified the takings-based theory by

319. *See* Mike McIntire & Michael H. Keller, *The Demand for Money Behind Many Police Traffic Stops*, N.Y. TIMES (Nov. 2, 2021), https://www.nytimes.com/2021/10/31/us/police-ticket-quotas-money-funding.html [https://perma.cc/S6YX-62BN].

320. *Id.*

321. Melissa Sanchez & Sandhya Kambhampati, *How Chicago Ticket Debt Sends Black Motorists into Bankruptcy*, PROPUBLICA ILL. (Feb. 27, 2018), https://features.propublica.org/driven-into-debt/chicago-ticket-debt-bankruptcy [https://perma.cc/23RL-FDH6].

322. *Id.*

323. *See, e.g.*, CAL. VEH. CODE § 22348(b) (West 2025) ("A *person* who drives a vehicle upon a highway at a speed greater than 100 miles per hour is guilty of an infraction . . . ." (emphasis added)).

324. Given these differences, whether the profit motives underlying traffic tickets and other fines are so pervasive as to warrant a takings analysis is a question for separate research. Such research might be particularly relevant in jurisdictions with significant civil-forfeiture reform to understand if or how law enforcement might rely on revenue from fines where revenue from forfeiture is decreasing.

distinguishing contemporary civil forfeiture from taxes. In the next Part, this Note continues the discussion by explaining the practical benefits of the takings-based theory and why it marks a critical step in civil-forfeiture reform.

IV. THE IMPACT OF CONTEMPORARY CIVIL FORFEITURE AND THE IMPORTANCE OF A TAKINGS-BASED THEORY

The stories discussed throughout this Note demonstrate the injustice of unchecked contemporary civil forfeiture. This Part first argues that these stories are not merely anecdotal. They exemplify what is empirically true – civil forfeiture does nothing to curb crime and harms the most vulnerable in American society. Noticing these disturbing trends, reformers have made efforts to restrict or dismantle civil forfeiture. This Part acknowledges those efforts and then discusses the unique benefits of the takings-based theory to situate it within the constellation of civil-forfeiture reforms.

A. The Meager Public-Safety Benefits and Unequal Costs of Civil Forfeiture

Police and prosecutors have long premised civil forfeiture on its role in enforcing against "major fraudsters and criminal enterprises."[325] But civil forfeiture in practice has very little to do with crime control. After New Mexico effectively outlawed civil forfeiture, for example, arrest and crime rates remained flat overall.[326] Expanded forfeiture funds, too, have "no meaningful effect on crime fighting."[327] Indeed, despite the claim that forfeiture is used against "major fraudsters" and vast criminal operations, across the twenty-one states in which

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325. Ian MacDougall, *Police Say Seizing Property Without Trial Helps Keep Crime Down. A New Study Shows They're Wrong.*, PROPUBLICA (Dec. 14, 2020, 2:33 PM EST), https://www.propublica.org/article/police-say-seizing-property-without-trial-helps-keep-crime-down-a-new-study-shows-theyre-wrong [https://perma.cc/3R77-JVQG]. In 1989, Attorney General Richard Thornburgh announced that it is "now possible for a drug dealer to serve time in a forfeiture-financed prison after being arrested by agents driving a forfeiture-provided automobile while working in a forfeiture-funded sting operation." Arthur W. Leach & John G. Malcolm, *Criminal Forfeiture: An Appropriate Solution to the Civil Forfeiture Debate*, 10 GA. ST. U. L. REV. 241, 251 (1994). Nearly thirty years later, Attorney General Jeff Sessions echoed similar defenses of civil forfeiture: "[C]ivil asset forfeiture is a key tool that helps law enforcement defund organized crime, take back ill-gotten gains, and prevent new crimes from being committed, and it weakens the criminals and the cartels." Christopher Ingraham, *Jeff Sessions's Defense of Civil Asset Forfeiture, Annotated*, WASH. POST (July 19, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/07/19/jeff-sessions-defense-of-civil-asset-forfeiture-annotated [https://perma.cc/RZ2Y-54E3].

326. MacDougall, *supra* note 325.

327. *See* Kelly, *supra* note 193, at 3.

data is available, the median currency forfeiture is only $1,276—less than half of the minimum cost of an attorney to fight a simple state-level forfeiture action.[328] In Michigan, the median is $423, and in Pennsylvania, $369.[329]

These low-value "forfeiture operations frequently target the poor and other groups least able to defend their interests" and "most burdened by forfeiture."[330] One year in Michigan, for instance, police "seized 54 homes with an average value of $15,881 at a time when the nation's [average] house price was over $100,000" as well as 807 vehicles with an average value of $1,412.[331] At one point in Philadelphia, despite the city's penchant for forfeiting homes and cars,[332] half of all currency seizures were in amounts below $192.[333] Yet, "taking off the four days required, on average, to attend court to resolve a case would cost a minimum wage-earning person $232 in lost income."[334]

Civil forfeitures also impose unequal racial burdens. In Seattle, the "drug nuisance abatement program, which used civil forfeiture to seize buildings suspected of being involved in drug dealing, targeted property owned by racial minorities in 96% of cases."[335] Across a sample of ten counties in Oklahoma, "two-thirds of [cash] seizures came from African Americans, Latinos, and other racial

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328. Knepper et al., *supra* note 9, at 6.

329. *Id.* at 20.

330. Leonard v. Texas, 580 U.S. 1178, 1180 (2017) (Thomas, J., statement respecting the denial of certiorari); *see also* Andrew Crawford, Note, *Civil Asset Forfeiture in Massachusetts: A Flawed Incentive Structure and Its Impact on Indigent Property Owners*, 35 B.C. J.L. & SOC. JUST. 257, 277 (2015) ("The financial motivations behind forfeiture actions have the potential to disproportionately impact lower income parties . . . because one way for law enforcement agencies to generate profits is to target low-income parties who are financially incapable of challenging seizures."); Louis S. Rulli, *Seizing Family Homes from the Innocent: Can the Eighth Amendment Protect Minorities and the Poor from Excessive Punishment in Civil Forfeiture?*, 19 J. CONST. L. 1111, 1140 (2017) ("[C]ivil forfeiture petitions were brought more often in communities with a high proportion of African-American residents and in communities with a high degree of economic inequality."); C.J. Ciaramella, *Poor Neighborhoods Hit Hardest by Asset Forfeiture in Chicago, Data Shows*, REASON (June 13, 2017, 8:00 AM), https://reason.com/2017/06/13/poor-neighborhoods-hit-hardest-by-asset [https://perma.cc/6MHS-79K7] ("[L]ow-income neighborhoods like the South Side and West Side were more frequently the targets of asset forfeiture.").

331. Crawford, *supra* note 330, at 277 (citing HYDE, *supra* note 63, at 32).

332. *See supra* text accompanying note 207.

333. Cassie Miller, *Civil Asset Forfeiture: Unfair, Undemocratic and Un-American*, S. POVERTY L. CTR. 2 (Oct. 2017), https://www.splcenter.org/sites/default/files/com_policybrief_civil_asset_forfeiture_web.pdf [https://perma.cc/XQ3K-DU4G].

334. *Id.*

335. Rulli, *supra* note 330, at 1140 n.150.

and ethnic minorities, even though 75% of the state's population is white."[336] Alarmingly, "seizure of nonnarcotic property from black and Hispanic arrestees increases with the size of the deficit in states where police departments can retain revenue from seized property."[337] Indeed, according to Professor Stephanie Holmes Didwania, prosecutors in districts with larger nonwhite populations conduct more "revenue" forfeitures—those that tend to generate income for the government (e.g., cash or vehicles)[338]—than do their counterparts in districts with greater numbers of white residents.[339] But where "destructive" forfeitures—those that tend *not* to generate income (e.g., weapons)—are concerned, there were no such relationships between racial demographics and the number of forfeiture actions.[340]

Courts are attuned to the problems of civil forfeiture. They have recognized time and time again that "[c]ivil forfeiture is a much maligned practice."[341] They

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336. *Id.* at 1142. "Perversely" indeed, these marginalized "groups are often the most burdened by forfeiture" in part because

> [t]hey are more likely to use cash than alternative forms of payment, like credit cards, which may be less susceptible to forfeiture. And they are more likely to suffer in their daily lives while they litigate for the return of a critical item of property, such as a car or a home.

Leonard v. Texas, 580 U.S. 1178, 1180 (Thomas, J., statement respecting the denial of certiorari); *see also* Culley v. Marshall, 601 U.S. 377, 407 (2024) (Sotomayor, J., dissenting) ("For many people, loss of access to a car, even temporarily, is significant. Over 85% of Americans drive to work. Unsurprisingly, studies have found a link between the inability to drive and the loss of a job." (citation omitted)).

337. Michael D. Makowsky, Thomas Stratmann & Alex Tabarrok, *To Serve and Collect: The Fiscal and Racial Determinants of Law Enforcement*, 48 J. LEGAL STUD. 189, 208-09 (2019). As discussed in Section II.B, police often resort to forfeiture to make up budget shortfalls, which means that any progressive efforts to decrease law-enforcement funding would, in fact, perversely increase contemporary civil forfeitures. *See Cutting American Police Budgets Might Have Perverse Effects*, ECONOMIST (July 7, 2020), https://www.economist.com/united-states/2020/07/07/cutting-american-police-budgets-might-have-perverse-effects [https://perma.cc/AD2C-Q4CF] ("Reforming police departments demands more than starving them of resources. It also requires changing how budgets affect their incentives. Otherwise, defunding may pave the way for more intrusive policing, as forces seek to recoup lost revenue.").

338. Didwania, *supra* note 62, at 164-65; *see also supra* note 62 (discussing the distinction between "destructive" forfeitures and "revenue" forfeitures).

339. Didwania, *supra* note 62, at 219.

340. *Id.*

341. United States v. Funds in the Amount of $100,120.00, 901 F.3d 758, 772 (7th Cir. 2018); *see also, e.g.*, United States v. All Assets of Statewide Auto Parts, Inc., 971 F.2d 896, 905 (2d Cir. 1992) ("We continue to be enormously troubled by the government's increasing and virtually unchecked use of the civil forfeiture statutes . . . ."); Richardson *ex rel.* 15th Cir. Drug Enf't Unit v. $20,771.00, 878 S.E.2d 868, 878 (S.C. 2022) ("An undercurrent of this case is Green's claim that the civil forfeiture process is ripe for abuse.").

often lament that "the government's conduct in forfeiture cases leaves much to be desired."[342] Dissents and concurrences—even those of sitting Justices—recognize that contemporary civil forfeiture "preys" on those with a "lack of power."[343] And yet, these same courts have denied relief to property owners because they believe that they must accept the state's theory of what civil forfeiture is.[344] The takings-based theory provides otherwise.

B. The Takings-Based Theory in the Context of Existing Reforms

This Note has argued that a faithful application of the Takings Clause requires understanding contemporary civil forfeiture as an unconstitutional taking. If forfeiture of a certain type is, in reality, a taking for public use, it requires just compensation. And just compensation for a forfeiture, of course, would disincentivize law enforcement from being motivated by profit—it would nullify the forfeiture. But this Note does not attempt to bring into constitutional question the propriety of all civil-forfeiture proceedings. Quite contrary to much of the existing commentary, which seeks to trigger criminal-procedure rights in civil-forfeiture cases because of their enforcement nature,[345] this Note establishes the unconstitutionality of a subset of those cases best described as "contemporary civil forfeiture," which is *not* enforcement-related in nature and is instead primarily designed to be a fundraising mechanism for police departments. In its

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342. United States v. $506,231 in U.S. Currency, 125 F.3d 442, 454 (7th Cir. 1997).

343. Culley v. Marshall, 601 U.S. 377, 401 (2024) (Gorsuch, J., concurring); *see also* Leonard v. Texas, 580 U.S. 1178, 1180 (2017) (Thomas, J., statement respecting the denial of certiorari) ("This system—where police can seize property with limited judicial oversight and retain it for their own use—has led to egregious and well-chronicled abuses."); *Richardson*, 878 S.E.2d at 878 (Beatty, C.J., concurring in part and dissenting in part) ("[T]he current statutory scheme places an undue burden on property owners . . . .").

344. *See, e.g.*, *Funds in the Amount of $100,120.00*, 901 F.3d at 772 ("The claimants, who lose $100,120, have not been charged with, let alone convicted of, any crime relating to that $100,120. . . . But it is not our role to decide whether the government should be pursuing these kinds of cases. Our responsibility is solely to decide whether the law as it stands was followed."); *Richardson*, 878 S.E.2d at 878 ("[I]f the General Assembly believes our state's civil asset forfeiture laws should be amended to address the potential for abuse . . . it may do so. In the case before us, however, we reverse the circuit court's order . . . .").

345. *See, e.g.*, Christine A. Budasoff, *Modern Civil Forfeiture Is Unconstitutional*, 23 TEX. REV. L. & POL. 467, 480 (2019) ("Civil forfeiture is an unconstitutional deprivation of property without due process. Civil forfeiture has lesser legal requirements to satisfy than its criminal counterpart."); Arlyck, *supra* note 155, at 1457 ("[C]ritics charge that the government often uses civil forfeiture as a means of imposing penalties for alleged lawbreaking free of the constraints of the criminal process. Given the potentially enormous costs forfeiture can impose on its victims, critics argue that heightened protections are not simply warranted as a policy matter but also as a constitutional one.").

barest form, all that is urged here is the basic principle that the government must not force individual citizens to provide funding that it could not otherwise constitutionally obtain merely by mislabeling a taking of private property as a forfeiture.

Of course, a judicial reform of civil forfeiture would not arrive on the scene alone. Legislative activity aimed at addressing these same problems abounds. And one might think this Note raises difficult constitutional questions the judiciary should avoid while democratic processes play out. Civil forfeiture is, after all, wildly unpopular. In an era of polarization, there is unusual bipartisan support for civil-forfeiture reform.[346] A recent poll indicates that some 59% of Americans oppose the use of civil forfeiture, whereas only 22% support it.[347] Many states have accordingly responded to democratic input. North Carolina, New Mexico, Nebraska, and Maine have "eliminated the practice entirely."[348] Thirty-two other states and the District of Columbia have implemented some other measure of reform since 2014.[349]

One popular reform is strengthening the innocent-owner defense. Although innocent-owner protections vary significantly from state to state, a common theme is that property owners must prove they had no knowledge of, or did not consent to, the criminal activity giving rise to forfeiture.[350] But reforms are distributed haphazardly across states. In Washington State, the onus is on owners of forfeited property—not the government—to prove that the connected crime occurred "without [their] knowledge or consent."[351] So, too, for various types of

346. *See* J. Justin Wilson, *Both Democratic and GOP Party Platforms Endorse Reforming Civil Forfeiture*, INST. FOR JUST. (Nov. 17, 2016), https://ij.org/democratic-gop-party-platforms-endorse-reforming-civil-forfeiture [https://perma.cc/U7P5-MGYN].

347. Nick Sibilla, *Poll: Most Americans Want Congress to Abolish Civil Forfeiture*, FORBES (Nov. 12, 2020, 4:15 PM EST), https://www.forbes.com/sites/nicksibilla/2020/11/12/poll-most-americans-want-to-defund-civil-forfeiture [https://perma.cc/MQX3-H5MZ]. Another poll puts the figure of Americans opposing civil forfeiture as high as 84%. Emily Ekins, *84% of Americans Oppose Civil Asset Forfeiture*, CATO INST. (Dec. 13, 2016, 1:33 PM), https://www.cato.org/blog/84-americans-oppose-civil-asset-forfeiture [https://perma.cc/6CQL-ZPWD].

348. Pilon & Burrus, *supra* note 292, at 166.

349. *Id.*

350. *See infra* notes 351-354 and accompanying text.

351. WASH. REV. CODE § 69.50.505(1)(d)(ii), (1)(g), (1)(h)(i) (2024); *id.* § 69.50.506(a) ("It is not necessary for the state to negate any exemption or exception [to civil forfeiture]. The burden of proof of any exemption or exception is upon the person claiming it.").

property in Arkansas,[352] West Virginia,[353] and many other states. In Georgia, there is no innocent-owner defense available at all when an individual owns a vehicle "jointly, in common, or in community with a person whose conduct gave rise to the forfeiture."[354]

Moreover, reforms focused on strengthening innocent-owner protections obscure another pernicious problem: contemporary civil forfeiture often exacts disproportionately from the alleged wrongdoer.[355] Consider again, for instance, the story of Michael Albin, against whom South Carolina authorities brought criminal charges for drug possession. Albin did not and could not employ an innocent-owner defense, but the forfeiture of his motor home and $17,000 in cash seems wildly disproportionate to his crime of possessing four ounces of marijuana. And yet, due to the vivid injustice of forfeiting property from innocent owners,[356] reforms seem to focus on that issue alone. For instance, until the year 2000, the government needed to prove only *probable cause* in order to maintain a federal civil-forfeiture action.[357] Once it made that threshold showing, the burden of proof would shift to the claimant, who had to establish that the subject property was not linked to the alleged offense.[358] Congress responded to reform efforts by enacting the Civil Asset Forfeiture Reform Act (CAFRA), which established a uniform innocent-owner defense and required that the government prove its case by a preponderance of the evidence in federal civil-forfeiture cases.[359] But CAFRA did nothing to ease the burden of disproportionate forfeitures.[360]

And even where reforms are, in principle, designed to curtail civil forfeiture, federal equitable-sharing programs provide local law enforcement with a

352. ARK. CODE ANN. § 5-64-505(a)(4)(B)(i) (2024) ("No [vehicle] is subject to forfeiture . . . by reason of any act . . . *established by the owner* of the [vehicle] to have been committed . . . without his or her knowledge or consent." (emphasis added)).

353. W. VA. CODE § 60A-7-703(a)(7) (2024) ("[N]o property may be forfeited . . . by reason of any act . . . *established by th[e] owner* to have been committed . . . without his or her knowledge or consent . . . ." (emphasis added)).

354. GA. CODE ANN. § 9-16-17(a)(2)(G) (2024).

355. Didwania, *supra* note 62, at 226 ("[A] focus on innocent owners can obscure a different concern, which is that forfeiture is often disproportionate.").

356. *See* Didwania, *supra* note 62, at 225-26.

357. RICHARD M. THOMPSON II, CONG. RSCH. SERV., R43890, ASSET FORFEITURE: SELECTED LEGAL ISSUES AND REFORMS 3 (2015).

358. *Id.* ("If the government made [the probable cause] showing, the burden would shift to the property owner to prove that the property was not implicated in the alleged crime.").

359. Louis S. Rulli, *The Long Term Impact of CAFRA: Expanding Access to Counsel and Encouraging Greater Use of Criminal Forfeiture*, 14 FED. SENT'G REP. 87, 87 (2001).

360. Didwania, *supra* note 62, at 189; *see also id.* ("Rather, efforts to limit forfeitures to property that is proportional to alleged criminal activity have proceeded through the courts.").

workaround. Under "adoptive" forfeiture processes, local police "can hand a case over to federal officials," who will work to confiscate the defendant asset through federal civil-forfeiture proceedings.[361] The process for adoption is rather simple. First, a local law-enforcement agency seizes property. Then, if "the conduct giving rise to the seizure violates federal law," a federal agency can take custody of the asset and use federal proceedings to forfeit the property.[362] Once the forfeiture is complete, "as much as 80% of adoptive forfeiture proceeds can be returned to the . . . local law-enforcement agency (or agencies)."[363]

As a result of equitable sharing, forfeiture statistics, even in states with strong protections, remain staggering. Consider California. There, innocent-owner protections are robust: "[T]he government must prove third-party owners knew about criminal activity connected to their property."[364] Yet, in the ten years between 2009 and 2018, California forfeited more than $1.14 billion—less than a quarter of which was from direct forfeitures.[365] The rest of the forfeiture proceeds ($879 million) were from equitable sharing.[366] In Florida, the standard of proof is unusually high: prosecutors must prove beyond a reasonable doubt that forfeiture of property is linked to a crime.[367] Yet, in the same span of ten years, Florida took in more than $727 million, with nearly half of it through equitable sharing.[368]

Importantly, "[s]tatutes, policies, and regulations applicable to state forfeiture . . . do not apply to federal forfeiture or sharing."[369] Empirical research, unsurprisingly, reveals that "[a]gencies in states with more burdensome or less rewarding [from the perspective of law enforcement] civil forfeiture laws forfeited more assets through equitable sharing, even controlling for a variety of potentially confounding variables."[370] Even in New Mexico, where civil forfeiture has been abolished, equitable sharing continues.[371] In the fifteen years prior to the

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361. Worrall & Kovandzic, *supra* note 195, at 227.

362. *Asset Forfeiture Policy Manual*, *supra* note 83, at 3-1.

363. Worrall & Kovandzic, *supra* note 195, at 227.

364. Knepper et al., *supra* note 9, at 68.

365. *Id.*

366. *Id.*

367. *Id.* at 78.

368. *Id.*

369. *Guide to Equitable Sharing for State, Local, and Tribal Law Enforcement Agencies*, U.S. Dep't of Just. and U.S. Dep't of Treasury 20 (Mar. 2024), https://www.justice.gov/criminal/media/1044326/dl?inline= [https://perma.cc/RRG8-NB8L].

370. Jefferson E. Holcomb, Marian R. Williams, William D. Hicks, Tomislav V. Kovandzic & Michele Bisaccia Meitl, *Civil Asset Forfeiture Laws and Equitable Sharing Activity by the Police*, 17 Criminology & Pub. Pol'y 101, 106 (2018).

371. Knepper et al., *supra* note 9, at 122.

ban on civil forfeiture, New Mexico agencies collected between $1 million and $5.5 million annually in equitable-sharing proceeds.[372] In 2019, four years after the state had abolished civil forfeiture, its law-enforcement agencies still received nearly $1 million in equitable-sharing proceeds from the Department of Justice.[373]

Adding to the problem, when local law-enforcement agencies receive their portion of the proceeds from adoptive forfeitures, they *must* use it for themselves. Indeed, "[f]ederal equitable sharing policy requires that all proceeds returned to the state or local agency must be retained by law enforcement, *even if state law indicates otherwise*."[374] This equitable-sharing scheme thus creates a gaping loophole through which police can earn forfeiture funds even where the standards of proof are high, innocent-owner protections are strong, and the seizing agency is forbidden by state law from retaining a majority of forfeiture funds.[375] Maryland lawmakers, for example, have attempted to eliminate the profit incentive in civil forfeiture by requiring all forfeiture proceeds to be deposited in the state's or local government's general fund.[376] But "Maryland law enforcement agencies can receive payments . . . as part of an equitable sharing agreement."[377] The result is that between 2009 and 2018, Maryland's law-enforcement agencies earned nearly $80 million through federal equitable sharing—more than twenty-two times the approximately $3.5 million it obtained in direct-forfeiture proceeds during the same period.[378]

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372. *Id.*

373. *Id.*

374. Holcomb et al., *supra* note 370, at 104 (emphasis added); *see also Sharing for State, Local, and Tribal Law Enforcement Agencies*, *supra* note 369, at 21 ("Shared funds may not be transferred to any []other agency.").

375. Between 2015 and 2017, DOJ scaled back equitable-sharing practices. Didwania, *supra* note 62, at 211. During that time, there was a meaningful reduction in revenue-generating forfeitures in districts with larger nonwhite populations. *Id.* at 212, 219.

376. Knepper et al., *supra* note 9, at 100.

377. *Seizure and Forfeiture Reporting*, MD. GOVERNOR'S OFF. CRIME PREVENTION & POL'Y, https://web.archive.org/web/20250305083000/https://gocpp.maryland.gov/crime-statistics/law-enforcement-reports/seizure-and-forfeiture-reporting [https://perma.cc/2VW6-JACC].

378. Knepper et al., *supra* note 9, at 100. In 2016, Maryland enacted, among other reforms, a prohibition on state and local law-enforcement agencies transferring custody of a seized asset to federal authorities unless it is valued in excess of $50,000 or is the subject of a federal warrant. Jared Meyer, *Maryland Curtails Civil Asset Forfeiture: The Old Line State Takes Major Steps to Limit Policing for Profit.*, MANHATTAN INST. (May 23, 2016), https://manhattan.institute/article/maryland-curtails-civil-asset-forfeiture [https://perma.cc/WF6F-BXV9]. The effect of this reform is not evident. *See* Knepper et al., *supra* note 9, at 100 (showing that Maryland agencies received more in equitable-sharing proceeds from DOJ in 2018 than in all but three years between 2000 and 2015).

In Missouri, too, civil-forfeiture shields are ostensibly robust—a criminal conviction is required prior to forfeiture, and forfeiture proceeds are supposed to be directed to schools.[379] But in 2019, an investigation found that "less than 2% of forfeited funds make it to Missouri schools."[380] The reason: equitable sharing. Despite the state's attempts to remove incentives for civil forfeiture by requiring proceeds to be transferred to schools, it "does not prevent state and local agencies from using equitable sharing to circumvent state forfeiture law[s]."[381] As a result, in just one county, officers used equitable sharing to forfeit $2.6 million across thirty-nine cases.[382] In none of those thirty-nine cases did the state file criminal charges.[383]

The upshot is that even robust statutory reforms fall short in addressing the root cause of civil forfeiture's proliferation—the profit incentive. But the takings-based theory of contemporary civil forfeiture prescribes a powerful antidote. Unlike the innocent-owner defense, the takings defense looks to the character of the governmental purpose underlying the confiscation. This shift in inquiry incentivizes the police to prioritize criminal investigations that might properly justify forfeiture rather than allowing them to take a civil shortcut to the fruits of forfeiture. Practices like the reverse sting, in which police target revenue over taking drugs off the streets,[384] would naturally lose their appeal. Accordingly, an important contribution of the innovation here is not only the protection against suspect forfeitures, but also an incentive restructuring that encourages law enforcement to actually enforce the law.[385]

A takings defense would also be available where an innocent-owner defense might fail. Imagine, for example, that the *Red Truck* hypothetical in Section III.A takes place in Georgia, and Robert—who has remained in town—owns his truck jointly with Kelly. Consider what would happen if Robert contested the forfeiture. Georgia's innocent-owner protections would be of no benefit to Robert because state law prohibits a co-owner of a vehicle from asserting that defense

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379. William H. Freivogel, *St. Charles County Police Pressured Suspects in Private Tow Lot to Hand Over $10,000 in Cash*, STLPR (Dec. 29, 2019, 7:41 AM CST), https://www.stlpr.org/show/st-louis-on-the-air/2019-12-29/st-charles-county-police-pressured-suspects-in-private-tow-lot-to-hand-over-10-000-in-cash [https://perma.cc/E8NM-RE99].

380. Knepper et al., *supra* note 9, at 49.

381. *Id.* at 110.

382. Freivogel, *supra* note 379.

383. *Id.*

384. *See supra* notes 220-222 and accompanying text (discussing reverse stings and their impact on law-enforcement priorities).

385. An apt, if imperfect, analogy might be the application of the exclusionary rule, the primary purpose of which "is to deter future unlawful police conduct and thereby effectuate" constitutional guarantees. United States v. Calandra, 414 U.S. 338, 347 (1974).

when he jointly owns it with an individual "whose conduct gave rise to the forfeiture."[386] But the analysis with respect to the takings defense—a constitutional defense—would not change. If the factors of proportionality, utility, and usage discussed above indicate that the confiscation was motivated by profit, the claimant need not rely on an innocent-owner defense.[387]

Even when compared against other constitutional arguments, the takings-based theory might provide a more solid foundation on which to argue against contemporary civil forfeiture. As discussed in Section II.A, some scholars and Justices have posited that civil forfeiture's expansion beyond the narrow confines of historical civil forfeiture should be denounced as a violation of due process. The basic issue with this argument is that although a historical practice that enjoyed "the sanction of settled usage both in England and in this country" comports with due process, "it by no means follows, that nothing else can be due

386. GA. CODE ANN. § 9-16-17(a)(2)(G) (2024). The takings defense has prophylactic traits, much like the exclusionary rule. *See supra* notes 305, 385. But one critique of the exclusionary rule is that it "benefit[s] *only* guilty persons." AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 114 (2012); *see also id.* at 174 ("[A] regime of evidentiary exclusion is upside-down, providing windfalls for the guilty and nothing for the innocent . . . ."). This Note takes no position regarding the exclusionary rule. However, as discussed in Section III.B.2, the prophylactic nature of the takings defense is not one that would provide windfalls to guilty owners of property—it would, in fact, *encourage* law enforcement to act in accordance with an enforcement purpose.

387. Even if courts were to consider a takings defense as coextensive with innocent-owner protections, and even if there were no practical value to constitutionalizing the argument against contemporary civil forfeiture, recognizing a fundamental constitutional right has a broader societal value: it announces that profiteering by taking private property under the guise of law enforcement is beyond the powers of government.

In *Ramos v. Louisiana*, for instance, the Supreme Court rectified the injustice of allowing non-unanimous jury verdicts in criminal cases. *See* 590 U.S. 83, 111 (2020). But by the time of the decision, Louisiana citizens had voted to amend the state constitution to outlaw split verdicts, and Oregon remained the sole state in which such verdicts were permitted. John Simerman & Gordon Russell, *Louisiana Voters Scrap Jim Crow-Era Split Jury Law; Unanimous Verdicts to Be Required*, ADVOCATE (Nov. 6, 2018), https://www.theadvocate.com/baton_rouge/news/politics/elections/louisiana-voters-scrap-jim-crow-era-split-jury-law-unanimous-verdicts-to-be-required/article_194bd5ca-e1d9-11e8-996b-eb8937ebf6b7.html [https://perma.cc/29NB-MA6L]. Of course, Mr. Ramos himself was granted relief, but a year later, the Court decided against retroactive application of the rule in *Ramos*, further limiting the practical effect of the decision. *See* Edwards v. Vannoy, 593 U.S. 255, 258 (2021). Indeed, the law in general, in the form of nominal damages, "recognizes the importance to organized society that [certain] rights [should] be scrupulously observed," Carey v. Piphus, 435 U.S. 247, 266 (1978), for "when a right is absolute, the law should not authorize any violations of it," Sadie Blanchard, *Nominal Damages as Vindication*, 30 GEO. MASON L. REV. 227, 238 (2022).

process of law."[388] In other words, settled usage is a sufficient but not necessary condition giving rise to due process.[389] Applied here, then, historical civil forfeiture comports with due process if it enjoys the sanction of settled usage; but contemporary civil forfeiture *may or may not* comport with due process, despite its divergence from historical civil forfeiture.[390] Under the takings-based theory, contemporary civil forfeiture *is* unconstitutional.

Thus, although recategorization is compelled by the Constitution, the takings-based theory also provides some practical benefits over other legal arguments against contemporary civil forfeiture. It also is not redundant and does not interfere with existing statutory reforms — reforms that have failed to meaningfully curb forfeiture schemes.

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388. Hurtado v. California, 110 U.S. 516, 528-29 (1884); *see also* SEC v. Jarkesy, 603 U.S. 109, 153-54 (2024) (Gorsuch, J., concurring) ("If [the Due Process Clause] sets customary common-law practice as the ordinary procedural baseline, clear historical evidence of a different practice might warrant a departure from that baseline. That's why this Court has said 'a process of law . . . must be taken to be due process of law if it enjoys the sanction of settled usage . . . .'" (second alteration in original) (citations omitted) (quoting Culley v. Marshall, 601 U.S. 377, 397 (2024) (Gorsuch, J., concurring))). Indeed, this understanding of the value of history "would be to stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and Persians." *Hurtado*, 110 U.S. at 529. It would be, as the Court has written in the Second Amendment context, "to suggest a law trapped in amber." United States v. Rahimi, 602 U.S. 680, 691 (2024).

389. *See* Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 31-32 (1991) (Scalia, J., concurring in the judgment) ("If the government chooses to *follow* a historically approved procedure, it necessarily *provides* due process, but if it chooses to *depart* from historical practice, it does not necessarily *deny* due process.").

390. There are other reasons why contemporary civil forfeiture might still violate due process. In *Marshall v. Jerrico, Inc.*, the Court recognized that "[a] scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions." 446 U.S. 238, 249-50 (1980). Seizing on this language, scholars and litigants alike have persuasively argued that the profit motive underlying contemporary civil forfeiture violates the Due Process Clause. *See* Emma Andersson, *The Supreme Court Didn't Put the Nail in Civil Asset Forfeiture's Coffin*, ACLU (Mar. 15, 2019), https://www.aclu.org/news/criminal-law-reform/supreme-court-didnt-put-nail-civil-asset [https://perma.cc/75TN-N6JB] ("One of the most pernicious parts of many civil asset forfeiture laws is the profit motive baked into them. . . . This self-interest, in our view, violates the Due Process Clause . . . ."); Blumenson & Nilsen, *supra* note 220, at 62 ("[I]n the case of forfeiture, *every* [*Jerrico* factor] cuts [against the government], and to an extreme degree. One could hardly design an incentive system better calculated to bias law enforcement decisions than the present forfeiture laws.").

CONCLUSION

In *Bennis*, the Supreme Court seemed to foreclose Takings Clause challenges to property confiscated via the state's forfeiture power.[391] But the majority there failed to account for the profit motive that is now central to contemporary civil forfeiture—a profit motive so strong that it often outweighs law-enforcement considerations for law-enforcement agencies. And the Court in *Bennis* is not the Court of today. The current judicial environment, as the Court aggressively limits the state's power to take property[392] and prioritizes the primacy of history and tradition over precedent,[393] presents an opportune moment to reexamine the constitutionality of civil forfeiture.

Prior to the twentieth century, "the Takings Clause was understood to be limited to physical appropriations of property."[394] But in *Pennsylvania Coal Co. v. Mahon*, the Court made clear that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[395] Two terms ago, in *Tyler*, the Court ruled that the government's forfeiture of funds from a tax sale in excess of the tax liability constituted a taking because "[a] taxpayer who loses her $40,000 house to the State to fulfill a $15,000 tax debt has made a far greater contribution to the public fisc than she owed."[396] In some sense, then, the Court has made clear that a forfeiture that goes too far will be recognized as a taking, too. And what is contemporary civil forfeiture but forfeiture gone too far?

391. Bennis v. Michigan, 516 U.S. 442, 453 (1996).

392. *See, e.g.*, Tyler v. Hennepin County, 598 U.S. 631, 639 (2023); Cedar Point Nursery v. Hassid, 594 U.S. 139, 152 (2021).

393. *See, e.g.*, Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 240 (2022); N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 22 (2022).

394. *Cedar Point*, 594 U.S. at 148.

395. *Id.* (quoting Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922)).

396. *Tyler*, 598 U.S. at 647.