
NOTES

CIVIL FORFEITURE: A MODERN PERSPECTIVE ON ROMAN CUSTOM

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“The Roman law is the basis of most modern systems of law, and has profoundly influenced the Anglo-American system.”¹

I. INTRODUCTION

Though the common law and subsequent American jurisprudence developed independently, they have always been influenced both by Roman law and the various systems that developed (in a more direct sense) from the Roman model.² Indeed, there is still a strong presence of “Roman and civil law systems in the Anglo-American legal world as sources of jurisprudential inspiration, as models of intellectual elegance, and as a comparative basis for law reform efforts.”³ This Note does not purport to be a

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1. MAX RADIN, HANDBOOK OF ROMAN LAW 477 (1927). This statement may seem somewhat of a *non sequitur* to the casual reader. However, in a very fundamental way it makes clear one of the major premises underlying this Note: American law, and indeed modern society in general, is greatly influenced by Rome on many levels. Without this connection, many of the arguments that follow would be, at best, academic in nature.

2. See M. H. HOEFLICH, ROMAN AND CIVIL LAW AND THE DEVELOPMENT OF ANGLO-AMERICAN JURISPRUDENCE IN THE NINETEENTH CENTURY 139 (1997). Many European countries still have legal systems that are closely based on the Roman model. For instance, much Swiss doctrine (if not legislation) is “Romanized.” See RADIN, *supra* note 1, at 477.

3. HOEFLICH, *supra* note 2, at 132. Hoeflich states that Roman law had a direct influence on many areas of Anglo-American common law, including commercial and water law. See *id.* This is probably correct, but is difficult to prove. Caesar invaded Britain in 54 B.C. and Rome ruled the is-

comprehensive treatment of the “genesis” effect that Roman law has had on Western civilization, or its lingering effects that can still be seen on American jurisprudence. Instead, this Note uses the confluence of two legal systems as a metaphor for the underlying similarity between two societies separated by over 2,000 years. I hope to demonstrate that there are lessons to be learned from the subrogation of certain rights that both of these societies have, at various times, considered fundamental.

Specifically, this Note compares the evolution of civil, and later criminal forfeiture proceedings in the Roman Republic and early Empire to modern American laws regarding seizure. It is well to preface the arguments that follow with the proviso that there are often great discrepancies, both procedural and substantive, between the two legal systems. That this analysis is based more on the spirit than the letter of the law should in no way impede its value, for often we can learn more from differences than from similarities.⁴

The basis for this Note’s comparison of the Roman and American legal systems is the alarming rise in the latter half of the twentieth century in the use of civil and criminal forfeiture proceedings by the U.S. government in prosecuting discrete social groups,⁵ particularly under anti-drug and RICO statutes. This trend mirrors the evolution of forfeiture proceedings under the Roman Republic, particularly during the transition period between late Republic and Empire. Forfeiture, then as now, was used primarily as both deterrent and punishment for noncapital offenses. Its Roman roots suggest that it was not originally motivated by the desire to remunerate the state, although it took on this function in the period of the late Republic when summary seizure proceedings against wealthy citizens became the lifeblood of state funding. Modern forfeiture has recently be-

land for over 500 years afterward, but some experts dispute the effect of Roman influence on English law. See, e.g., WILLIAM L. BURDICK, *THE PRINCIPLES OF ROMAN LAW AND THEIR RELATION TO MODERN LAW* 60-61 (1938). Without a doubt, there has been a significant amount of “genetic drift” in the common law since the Twelve Tables were introduced 2,500 years ago.

4. “[T]he main practical value of comparative law is that . . . it shows how rules and institutions have been adopted from elsewhere and have undergone transformations.” ALAN WATSON, *ROMAN LAW & COMPARATIVE LAW* 97 (1991) [hereinafter *ROMAN LAW & COMPARATIVE LAW*]. This point cannot be underestimated, because it is comparative law’s ability to discover the *nature* of law that makes it “a particularly valuable form of jurisprudence.” *Id.*

5. This is not meant to imply that forfeiture is racially motivated. Statistically, minorities suffer more than their fair share of forfeiture because they represent a disproportionately large percentage of those engaging in the proscribed activities. See, e.g., Randall Kennedy, *The State of Criminal Law, and Racial Discrimination: A Comment*, 107 *HARV. L. REV.* 1255, 1261 (1994). Whether this is due to ex ante government design, or is just the ex ante consequence, is open to debate. However, this question is irrelevant to the fundamental liberty issues that are implicated by forfeiture procedures, and thus is beyond the scope of this Note.

gun to follow suit, with the expansion of its use as a de facto means of funding the very agencies that initiate the proceedings.

Part II.A of this Note will give a brief overview of the development of Roman forfeiture law, emphasizing the difference between civil and criminal law and the tort-like structure of private actions. In Part II.B, I will examine the emergence in ancient Rome of seizure as a form of de facto taxation, and the political and economic circumstances which both allowed and compelled this paradigm shift. I will then argue in Part II.C that the loss of both personal liberties and of the “rule of law,” which resulted from this paradigm shift, were largely responsible for the end of the Roman Republic and the ultimate concentration of political power in an erratic monarchy.

Part III.A of this Note will give an overview of modern American forfeiture procedure, emphasizing the role of the federal drug-forfeiture statute.⁶ Part III.B will illustrate some of the fundamental liberty issues which are implicated by civil forfeiture, including a brief discussion of double jeopardy and innocent-owner issues. In Part III.C, I will argue that the problems embodied by a system which remunerates the government for finding its citizens “guilty” of an offense compel reevaluation of our federal laws. Specifically, I will argue that undermining the impartiality of government officials by allowing them to profit from the prosecution of discrete categories of crimes threatens to upset our system of constitutional jurisprudence.

Part IV of this Note will compare both the early (“bounded”) period and the later (“unbounded”) stages of Roman forfeiture with current procedure. I will argue that, on some levels, the paradigm shift which occurred over the last fifty years of the Roman Republic conceptually mirrors recent events in American law. Part V concludes that when the government stands to profit from its own prosecutions, we tread dangerously close to the destabilization caused by the erosion of individual rights under later Roman law.

II. ROMAN FORFEITURE

A. EVOLUTION

No study of Roman law would be complete without a glimpse into the historical background from which many of our own laws have evolved. Of

6. See 21 U.S.C. § 881 (1994 & Supp. III 1997).

specific importance to forfeiture law are two periods: the years between 150 B.C. to 50 B.C., and 50 B.C. to 100 A.D. The first of these periods has been dubbed “the century of Roman revolution,”⁷ and was characterized by a series of civil wars fought between republicans and those who favored either a monarchy or concentrated oligarchy.⁸ The latter period⁹ represented the triumph of the monarchy, and the beginning of a struggle between groups favoring power concentrated in a single individual¹⁰ and factions that favored maintaining the old constitution (and the republican values that it embodied).

Roman law “developed primarily as private law conceived as a system of . . . rights and claims of individuals, each protected by its own, specific procedural remedy.”¹¹ Criminal law never obtained the importance of civil (private) law under the Roman system,¹² and, indeed, the distinction between criminal and civil law was frequently unclear because Rome had no public prosecutor. “Offenses against men and property were first regarded as private wrongs, wrongs not punishable by the state but left to personal remedies.”¹³ Accordingly, private individuals were left to initiate and prosecute both criminal and civil suits, and ultimately enjoyed the remunerative benefits of their efforts.¹⁴ The private system of Roman law, particularly delictal¹⁵ action, was thus startlingly akin to modern tort law.¹⁶ Roman courts foreshadowed modern convention by recognizing the defense of contributory negligence to claims of delict,¹⁷ and (similar to con-

7. RADIN, *supra* note 1, at 9.

8. *See id.* at 10. This may be an oversimplification in that many of the great leaders who arose during this period—Julius Caesar and Lucius Sulla to name two—may have been motivated more by personal ambition than by any discernible wish to have a de jure monarchy. *See id.* I will call this period, for reasons that will become clear, the “bounded” period of Roman law.

9. Similarly, I will argue that this is the “unbounded” period of Roman law.

10. Power which went with the office of the *princeps*, or emperor. This power was ostensibly conferred by the senate but, in reality, was semiheditary. *See RADIN, supra* note 1, at 11.

11. HANS JULIUS WOLFF, *ROMAN LAW: AN HISTORICAL INTRODUCTION* 52-53 (1951).

12. *See id.* at 53. From the earliest times in Roman history, prosecution for most offenses was left to the injured party, although “it is likely that the penalties were executed by officials.” *Id.*

13. BURDICK, *supra* note 3, at 676. Public crimes were limited during the early period of Roman law to offenses against religion and the state. *See id.* at 676-77.

14. *See M. CICERO, PRO RABIRIO POSTUMO* 8 (N.H. Watts trans., Harvard Univ. Press 1992). *See also* Michael C. Alexander, *Compensation in a Roman Criminal Law*, 1984 U. ILL. L. REV. 521, 523.

15. Private actions were called *privata delicta*, or sometimes just *delicta*. *See BURDICK, supra* note 3, at 485.

16. “[T]he common law tort could easily be substituted for the Roman and civil law category of delict.” HOEFLICH, *supra* note 2, at 134. *See also* BURDICK, *supra* note 3, at 485.

17. It has been postulated that the phrase “*damnum absque injuria*” reflects an early formulation of the doctrine of contributory negligence. *See RADIN, supra* note 1, at 149.

temporary civil procedure) requiring the defendant to post bond when there was a risk that his funds would be dissipated before judgment.¹⁸

Romans also developed the use of the action in rem, or against the “thing itself.”¹⁹ The in rem action was, then, as now, a legal fiction that allowed courts to exercise jurisdiction over animate or inanimate objects against which a claim was laid.²⁰

The early, or “bounded,” period of Roman law was characterized by the fact that the beneficiaries of forfeiture proceedings were private individuals, and were usually aggrieved parties.²¹ Under the most commonly applied laws, such as the Lex Acilia (the earliest extant Roman criminal statute),²² moneys awarded prosecutors would frequently be paid directly to the public treasury, which later disbursed the same amount to the plaintiff. Typically the state would only keep unclaimed money for a period of five years, meaning that essentially 100% of all awards would go to the private initiator of the suit.²³

Roman forfeiture procedure emerged as an efficient means of deterring wrongdoers, while simultaneously giving aggrieved parties incentive to bring suit.²⁴ Indeed, the system may at times have been too successful

18. “*Igitur, si uerbi gratia in rem tecum agam, satis mihi dare debes.*” “If then I bring an action in rem against you, you are bound to give me security.” G. INST. 4.89 (Francis De Zulueta trans., Oxford Univ. Press, photo. reprint 1976) (1946). This point is interesting both for its historical value and for its apparent contradiction in grammar. Without putting too fine a point on it, actions in rem are directed not at a person, but rather at her property. Thus, it should be the property itself (and not the owner) from which security is demanded. This distinction becomes important in the face of the modern arguments against double jeopardy defenses to in rem actions. If the government has to concede that the property is really just an extension of the owner, and not its own entity, double jeopardy problems arise. See discussion *infra* Part III.A.

19. “*In rem actio est cum aut corporalem rem intendimus nostram esse aut ius aliquod nobis competere.*” “An action in rem is one in which we claim either that some corporeal thing is ours, or that we are entitled to some right.” G. INST. 4.3.

20. See *id.* 4.16.

21. But plaintiffs were not necessarily victims. “The characteristic of criminal procedure was that it created an *iudicium publicum*. Any citizen might prosecute, and not merely the injured person.” RADIN, *supra* note 1, at 467. The procedural irregularity was one of ancient significance; the formal procedure was a substitute to private vengeance, so it was designed to encourage recourse to law—if only by a third party—to avoid vigilante justice. See *id.* at 469.

22. The law was criminal in the sense that it covered extortion, although it was privately enforced. See LEX ACILIA, in 4 REMAINS OF OLD LATIN 316 (E.H. Warmington trans., Harvard Univ. Press 1993) (1940), cited in Alexander, *supra* note 14, at 523.

23. See *id.* at 353-61.

24. This system functioned efficiently, provided that everybody played by the rules. However, with no police force and a limited court system, the premise that held the legal structure together was that there would be both a minimal need for retribution and a strong disincentive either to commit an offense or to bring a false case. The system probably reflected a market level of efficiency because prosecution was almost a certainty for offenses that exceeded a threshold level (since any citizen could

in inspiring litigation, as evidenced by the fact that some delicts provided that the defendant would be paid a penalty should the prosecution bring a false case.²⁵ The earliest codification of Roman law, the Twelve Tables, indicates a tradition of forfeiture under the Republic dating from at least the fifth century B.C.²⁶ The Twelve Tables essentially crystallized the evolution of private vengeance into private remuneration. The main point of the formal procedure was to force guilty defendants to pay for the injuries they caused, obviating the need for private acts of violence.²⁷ For example, an early homicide statute dictates that killers deliver a ram to the relatives of the deceased as penalty, after which the victim's family could exact no further vengeance.²⁸

Though the Twelve Tables were the first tangible step in the evolution of Roman law, the remaining fragments suggest that their practical effect was to invest broad discretion in the judiciary, providing few legal principles as guidelines.²⁹ To cope with the void presented by the ambiguity of the Twelve Tables, the genus of delicts³⁰ was established through statutes and supplemented by edicts (orders by magistrates that were only valid for limited time periods).³¹ Delicts were the principal body of substantive forfeiture law and included offenses that are generally consistent with both modern tort and criminal law. They accounted for a broad range of personal offenses, such as theft and personal injury.³² For most offenses,

bring an action and collect the monetary judgment), and fines could be unpleasantly high for losers (including those who filed spurious cases).

25. Note the similarity to the modern charge of malicious prosecution. See ROMAN LAW & COMPARATIVE LAW, *supra* note 4, at 73; J.A. CROOK, LAW AND LIFE OF ROME 276-77 (1994).

26. See WOLFF, *supra* note 11, at 55-58. The Twelve Tables were a rather cryptic statement of the law, having "the form of terse commands and prohibitions, sometimes brief to the point of obscurity." *Id.* at 59.

27. See Alexander, *supra* note 14, at 536-37. The existence of these procedures is an anthropologically significant fact which suggests a primitive yet definite step towards the rule of law and the civilization of man.

28. See TWELVE TABLES 8.24, in 3 REMAINS OF OLD LATIN 492 (E.H. Warmington trans., Harvard Univ. Press 1961) (1938) ("*si telum manu fugit magis quam iecit . . . aries subicitur.*"), cited in Geoffrey MacCormack, *Revenge and Compensation in Early Law*, 21 AM. J. COMP. L. 69, 72 n.5 (1973).

29. See generally WOLFF, *supra* note 11, at 55-60.

30. The term *delict* included a broad group of offenses that were functionally equivalent to modern torts. See G. INST. 3.182. Though structurally akin to tort law, *delicts* were "penal, and not compensatory" in nature. RADIN, *supra* note 1, at 127. That this is true is indicated by the calculation of a penalty of some multiple of the property taken, as opposed to equivalent value. See *id.* at 128.

31. The *edict* was a pronouncement of the laws which the magistrate intended to enforce, and included the magistrate's favored interpretation of current laws. See RADIN, *supra* note 1, at 32.

32. *Delicts* included theft, robbery, damage to property, personal injury, and some related offenses. See ROMAN LAW & COMPARATIVE LAW, *supra* note 4, at 69-76; J. INST. 4.1.1-3 (J.B. Moyle trans., Oxford Univ. Press 5th ed. 1955) (1883). *Delicts* also included negligent acts. See BURDICK,

fixed financial penalties were imposed, graded by the severity of the injury.³³ Penalties were also assessed vicariously; if the damage was caused by a domestic animal or slave, the owner had to either compensate the victim or surrender the animal or slave.³⁴ Fines were typically determined by praetors³⁵ in consultation with the judges in the case. Harsher penalties, such as death and exile, were rare in the Republic and were only announced by the praetors.³⁶ Imprisonment was virtually nonexistent, as it was not a legal penalty in Rome.³⁷

To compensate for the fact that Roman law did not recognize attempted wrongs as being actionable, the definitions of crimes were often quite broad, which correspondingly broadened the reach of forfeiture.³⁸ For instance, theft could be committed by mere touching of property and the penalty could be severe.³⁹ If the theft was *furtum manifestum* (the thief being caught in the act), the penalty was four times the value of the stolen item. If the theft was *furtum nec manifestum* (nonmanifest theft), the penalty was only double the value of the item, probably because of the greater margin for error in convicting a thief who was not caught in the act.⁴⁰

supra note 3, at 486-87. For instance, the *Lex Aquila*, a statute dealing with trespass to property, was predicated on the offense being negligent, not intentional. The result of the lower standard of culpability was a correlatively lower penalty—only double damage. See RADIN, *supra* note 1, at 144.

33. See RADIN, *supra* note 1, at 128. However, for some offenses—such as *iniuria*, or personal injury—the plaintiff proposed a maximum award which was then reduced, if necessary, by the judge. See *id.* at 140.

34. These were called “*noxal actions*” and bear a strong resemblance to modern vicarious liability doctrine. In a *noxal* action, the vicariously guilty party could either choose to pay damages or surrender the offending party to the victim. See G. INST. 4.75. “*Omnes autem noxales actiones caput sequuntur. Nam si filius tuus seruusue noxam commiserit, quamdiu in tua potestate est, tecum est actio; si in alterius potestatem peruenerit, cum illo incipit actio esse; si sui iuris coeperit esse, directa actio cum ipso est, et noxae deditio extinguitur.*” This translates to:

Noxal actions always follow the person of the offender. Thus, if your son or slave commits a wrong, the action lies against you so long as he is in your *potestas* [control]; if he passes into another person’s *potestas*, the action now lies against that person; if he becomes *sui iuris* [in charge of himself], there is a direct action against the offender himself, and *noxal* surrender is ruled out.

Id. 4.77.

35. Praetors were senior magistrates charged with the administration of justice.

36. See BURDICK, *supra* note 3, at 695-96. Exile (“*interdictio aquae et ignis*”) was far more common than the death penalty during the Republic. See *id.* In fact, the death penalty was banned altogether in the late Republic for Roman citizens, although it was reintroduced briefly by Sulla, and re-emerged in the early Empire. See RADIN, *supra* note 1, at 469-70.

37. See CROOK, *supra* note 25, at 274.

38. See ROMAN LAW & COMPARATIVE LAW, *supra* note 4, at 69.

39. “Any kind of physical appropriation of goods belonging to another, without the consent of the owner either at the time of getting possession or subsequently, is covered by *furtum*.” BURDICK, *supra* note 3, at 488. *Furtum* was a broad term that included not only the modern concept of larceny, but also embezzlement. See *id.*

40. See ROMAN LAW & COMPARATIVE LAW, *supra* note 4, at 69.

Roman law also provided for a search of the accused's house which, if it led to the discovery of stolen property, directed that the theft be treated as manifest even if the householder was not in fact the thief.⁴¹ This last provision is similar to the stringent requirements of the modern "innocent owner" defense.⁴²

By the second century B.C., delictal action lay for both physical assaults and assaults without physical blows, including public insult.⁴³ Damages for these offenses were assessed by judges.⁴⁴ During the first century B.C., delicts were extended to include extortion (80 B.C.) and fraud (66 B.C.), both of which chronically plagued the government, as petty officials and *publicani* (private tax collectors) frequently abused their authority.⁴⁵ Extortion was a particularly common cause of action, brought by private citizens who had lost money to corrupt local governors and magistrates.⁴⁶

This early, or "bounded," period of Roman law was characterized by the relatively broad procedural safeguards it afforded citizens against legal impositions.⁴⁷ The state played a disinterested role in the judicial process, having no financial stake in the outcome of litigation. Cases were brought and judgments awarded exclusively to private parties, with penalties awarded according to the gravity of the offense—often not exceeding double the cost of the harm.⁴⁸ The offenses which comprised the genus of delicts were formally publicized in Institutes⁴⁹ and other written and oral media, upholding the Roman tradition of *nulla poena sine lege*.⁵⁰ Though

41. See *id.* at 70. See also G. INST. 3.192. Interestingly, a later edict made the penalty for preventing such a search heavier than actually being caught with the stolen goods. See *id.* 3.190-192.

42. See discussion *infra* Part III.A.

43. See ROMAN LAW & COMPARATIVE LAW, *supra* note 4, at 72-73. Public insult occurred "not only by striking a man with the fist . . . but also by raising a clamour against him, or if, knowing that he owes one nothing, one advertises his property for sale as a debtor's, or by writing defamatory matter . . . against him." G. INST. 3.220.

44. See ROMAN LAW & COMPARATIVE LAW, *supra* note 4, at 72.

45. See *id.* at 73. The Romans had a curious system of taxation in the provinces, which involved private citizens and organizations in Rome making competitive bids on territories. The winning bidders would be given legal authority to collect taxes in a particular province for a number of years. This led to inflated bids with bidders knowing that they would be able to recoup their investments, often by levying illegally high tax rates on the provinces they were assigned. See generally M. CARY & H. H. SCULLARD, A HISTORY OF ROME DOWN TO THE REIGN OF CONSTANTINE 173-74 (3d ed. 1991).

46. See Alexander, *supra* note 14, at 523. See also CARY & SCULLARD, *supra* note 45, at 174.

47. Relative to the safeguards afforded citizens in the late Republic, discussed in *infra* Part II.B.

48. See *supra* notes 14 & 34.

49. See, e.g., J. INST. 4.1-4. See also G. INST. 3.182-.225.

50. "No crime without law." This maxim is still used in modern criminal law to argue against a broad application of existing statutes to criminal defendants.

the standard of proof for delicts was the same as for other civil actions, citizens were entitled to jury trials, which ensured at least a semblance of procedural justice.⁵¹ Finally, for most offenses, prosecutorial abuse was prevented by the Roman Constitution's version of protection against double jeopardy.⁵²

B. THE PARADIGM SHIFT

The first systematic use of forfeiture proceedings by the Roman government began in 80 B.C. under Lucius Cornelius Sulla.⁵³ In order to make good on generous promises to his troops during a short period of civil war, General Sulla (later dictator) made "proscription" lists of political opponents with substantial resources and confiscated their estates through summary proceedings.⁵⁴ "Sulla punished intransigent foes mercilessly. Proscriptions and confiscations lopped off many wealthy adversaries."⁵⁵ The total number killed in this process was several thousands, and the forfeited property provided estates for approximately 120,000 soldiers.⁵⁶

While these first proscriptions were essentially political in nature, the possibility of funding the government through financial persecution of the wealthy was immediately recognized. By the mid-50s B.C., the Roman court system was clogged with political prosecutions meant to crack down on subversives.⁵⁷ A "staggering number of prosecutions" were recorded in the final years of the Republic, amid three decades of strife between aspi-

51. See generally Alexander, *supra* note 14, at 536.

52. See *id.* at 535 & n.70.

53. An infamous Roman general who fought a bitter civil conflict with fellow general G. Marius. Sulla's victory over Marius resulted in Sulla conferring upon himself quasi-imperial power for several years, using the title of *dictator*. As Republican Romans had a strong cultural aversion to despotism, Sulla was posthumously vilified as a tyrant. See generally ERICH S. GRUEN, *THE LAST GENERATION OF THE ROMAN REPUBLIC* (1974).

54. See CARY & SCULLARD, *supra* note 45, at 234. See generally GRUEN, *supra* note 53.

55. GRUEN, *supra* note 53, at 7. It is not clear whether Sulla's first proscriptions were motivated by personal animus towards those he slaughtered, or whether he simply needed their estates to pay off his supporters. See *id.* Whatever the reason, the genie was now out of the bottle. Sulla's later proscriptions and confiscations seem to have been clearly motivated by a desire to reward his followers at the expense of his political enemies. See *id.* at 411. It could be argued that the use of forfeiture proceedings to air political grievances was legitimate, as such grievances may have been caused by underlying illegal activities (though probably engaged in by both factions). However, the seizure of estates merely to satisfy the avarice of henchmen is another story, and reflects the first example of the paradigm shift towards an "unbounded" period of Roman law.

56. See CARY & SCULLARD, *supra* note 45, at 234.

57. See GRUEN, *supra* note 53, at 356.

rant leaders.⁵⁸ The use of forfeiture proceedings became so common that they began to take on a “remarkable conventionality.”⁵⁹ These actions were characterized by their personal nature: Many grew “out of private enmities, familial conflicts, and lingering feuds. . . . [even in] cases of larger political significance.”⁶⁰

In 43 B.C., after a brief period of calm, forfeiture proceedings were reintroduced as a sinister form of “taxation”⁶¹ by the members of the so-called “Second Triumvirate” (Marc Antony, Octavian, and Lepidus⁶²). Their confiscation of the estates of over 2,000 of Rome’s richest men was occasioned by the intense need to fund the armies led by Antony and Octavian.⁶³ However, unlike the Sullan massacres, most of these seizures were purely economically motivated rather than politically driven. Many of those subjected to proscription under the Second Triumvirate were wealthy *equites* (Roman knights), whose involvement in partisan politics was cursory.⁶⁴

This new wave of forfeiture featured proceedings that were, at best, summary. Those who failed to submit their property and flee into exile were executed.⁶⁵ It became customary during this period for generals and rich citizens to raise their own armies, kept loyal by promises of spoil.⁶⁶

58. *See id.* at 356. Gruen claims that there are over 50 cases from this period which are at least partially detailed in extant sources. *See id.* This figure is remarkable when the relative paucity of surviving materials is accounted for, belying what may have been a truly staggering number of politically motivated prosecutions.

59. *See id.* at 357.

60. *Id.* The Sullan-era forfeitures retained this personal component, later to be lost by the emperors, who typically cared more for the bottom line than the particular grievance. This may have been of some consolation to victims (and potential victims) as they at least had fair warning of their plight.

61. Roman taxation was initially centered around property. Seizures merely broadened the government’s reach by effectively introducing a 100% bracket for political offenders. *See generally* CROOK, *supra* note 25, at 256-57.

62. Lepidus has been historically dwarfed by his two better-known colleagues. Ironically, Lepidus gained early prominence by calling for the restoration of property confiscated by Sulla. *See* GRUEN, *supra* note 53, at 13.

63. *See* CARY & SCULLARD, *supra* note 45, at 288.

64. *See id.* at 624. *Equites* occupied the second rung on the Roman social ladder under senators, and were usually merchants, not politicians. However, many victims may have indirectly supported political enemies of the triumvirs, making them fair game for forfeiture proceedings.

65. *See id.* at 234, 288.

66. Gruen argues that Roman armies were not commonly paid mercenaries, but there were clearly instances of wealthy Romans raising troops in sufficient quantities to take into the field. For instance, it is preposterous to imagine J. Caesar’s troops making the march on Rome (the infamous crossing of the Rubicon) merely to clear Caesar’s good name from the slanders of his foes. More likely, the truth is that Caesar bought the troops with generous promises in advance, knowing that he

The fastest way of obtaining the tremendous wealth necessary to fund these large numbers of troops was through wholesale confiscation of estates based initially on trumped-up political charges, and, eventually, on no charges at all.

This subversion of citizens' rights continued unabated as the Republic collapsed into the Empire, with generals being replaced by emperors such as Caligula and Nero, who needed proscriptions to keep the Empire solvent. The prevalence of seizures led to large numbers of *delatores* (informers),⁶⁷ who made a living by selling the information which formed the basis of forfeiture proceedings against the wealthy.⁶⁸ Since most plebs were effectively too impoverished to be taxed, summary forfeiture proceedings against the wealthy became an efficient means of funding the armed forces and other branches of government.⁶⁹

C. THE FALL OF THE ROMAN REPUBLIC

“Civil war caused the fall of the Republic—not vice versa.”⁷⁰

To suggest that forfeiture proceedings brought about the fall of the Republic is, at best, trite. However, just as the push of the train attendant began the unhappy sequence of events leading to a station scale falling on Mrs. Palsgraf,⁷¹ the exponential increase in the use of politically motivated forfeiture proceedings was one of the triggering events in the chain of causation which led to the paradigm shift. Sulla launched his proscriptions largely to gain revenge on political enemies; that he could simultaneously retain the loyalty of his troops by extending his largesse to them was merely a useful benefit.⁷² Within three decades, however, the sinister im-

could make good after gaining power. We know that Caesar “doubled the regular pay of his legionaries” at about this time. GRUEN, *supra* note 53, at 374.

67. *Delatores* came to be a problem that sorely plagued the empire, engendering deep mistrust among colleagues. “Professional *delatores* flourished on the rewards to be gathered. The emperors knew well enough the dangers of unleashing the informer, but . . . they feared treason more.” CROOK, *supra* note 25, at 278.

68. See FRITZ M. HEICHELHEIM, CEDRIC A. YEO & ALLEN M. WARD, A HISTORY OF THE ROMAN PEOPLE 288 (2d ed. 1984).

69. There was a political aspect to seizures as well: Distributions “for veterans would enhance the prestige and increase the adherents of returning generals.” GRUEN, *supra* note 53, at 387. Indeed, failure to provide such largesse could effectively force the hand of Roman policy. It appears that G. Pompey launched some of his campaigns to avoid the consequences of not having sufficient funds to reward his veterans. See *id.* at 388.

70. *Id.* at 504.

71. See Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 99 (N.Y. 1928).

72. This may be a charitable view of Sulla. Though it is true that most of his known seizures concerned famous political opponents, almost certainly this fact is due more to the stature of the victims than to any positive limitation on Sulla's exploits. He had also “been compelled to dispossess

plications of Sulla's policy had come to fruition. Leaders such as Pompey and Caesar knew that at any moment they could be charged with treason (or some related offense against the state) and lose their lands, their armies, and possibly their lives.

To combat this possibility, generals had little choice but to defend themselves by forming private armies that were loyal only to those who paid them.⁷³ To fund these troops, the leaders needed land and hard currency, most easily obtained by seizing the estates of rich enemies. Aspiring leaders also needed such funds because they "could add significantly to their repute and following by providing grain for the proletariat below the market price."⁷⁴

With the coming of the Empire, even the pretense of procedural fairness in seizure proceedings was dropped. Political trials were adjudicated by the emperor himself, or by the senate, as opposed to the courts which had previously heard such cases.⁷⁵ This was a crippling blow to the supporters of Republican values, as even in the time of Sulla, "[w]hatever the political machinations behind the scenes, Roman jurors might still render verdicts on the merits of the case."⁷⁶

The autocratic power of the emperor became more pronounced with time,⁷⁷ and the offenses which were classified as *perduellio*⁷⁸ became so

numerous farmers and landowners" in order to supply his veterans with promised lands. GRUEN, *supra* note 53, at 11. However, these actions were probably more in the nature of "public domain" proceedings than typical forfeiture actions, and thus relate only tangentially.

73. See generally CARY & SCULLARD, *supra* note 45, at 271-72.

74. GRUEN *supra* note 53, at 385. M. Crassus, a contemporary of J. Caesar, fed the citizens of Rome for three months in 70 B.C. out of his own pocket. See *id.*

75. This is indicated by peripheral evidence, but is hard to demonstrate conclusively. It appears that courts continued to hear ordinary cases, but the courts for political crimes disappeared. See O.F. ROBINSON, *THE CRIMINAL LAW OF ANCIENT ROME* 7 (1995). "Probably the growth of criminal jurisdiction of the senate, for certain forms of crime involving the upper social classes, had led to a grouping of two or three of the obsolescent [judges] under a single [political administrator] to deal with offenses affecting lower ranks of society." *Id.* (quoting A.N. SHERWIN-WHITE, *THE LETTERS OF PLINY: A HISTORICAL AND SOCIAL COMMENTARY* 336 (1966)). There was no practical difference between the presiding authority of the senate and the emperor, since the senate would uniformly follow the policy of its leader.

76. GRUEN, *supra* note 53, at 265. Obviously, this procedural consolation for the defense ended when the emperor began to exert personal jurisdiction over such trials.

77. See J.A.C. THOMAS, *TEXTBOOK OF ROMAN LAW* 23 (1976).

78. Treason. This was also known as *maiestas*, and was "the political crime *par excellence*." CROOK, *supra* note 25, at 269.

broad as to include “the slightest affront or disrespect to the emperor.”⁷⁹ Even in the time of Sulla the definition of treason had been unclear, but it now became even more “slippery and ambiguous.”⁸⁰ To add to the sham nature of forfeiture proceedings, torture was regularly employed in trials to obtain evidence against the accused from his slaves.⁸¹ Wealthy citizens frequently committed suicide before charges were formally brought, in the hope that their families would inherit their estates.⁸²

In short, the constitutional rights enjoyed by Romans for over five centuries had come to an inglorious end.⁸³ It is difficult for an observer not to be “struck by the apparent contrast between the simplicity and lack of savagery of the penalties for crime in the Republican age of Rome and the diversity and increasing brutality of those under the Principate.”⁸⁴ That this brutality was tied to the erosion of individual procedural and libertarian rights in the name of facilitating prosecution of “enemies of the state” is a point which should not be lost on the modern scholar, and which is uniquely relevant to modern forfeiture.⁸⁵

79. BURDICK, *supra* note 3, at 680 (referring specifically to the reign of Tiberius, second emperor of Rome). This reflects only a comparison of Tiberius’ reign with that of Augustus. In light of later emperors, Tiberius was only modestly heavy-handed.

80. GRUEN, *supra* note 53, at 263.

81. See BURDICK, *supra* note 3, at 702. Testimony obtained through torture was not given the same weight as that given freely by citizens, and, legally, the use of torture was confined to slaves. See *id.* However, the finder of fact could easily credit such testimony if it served to transfer wealth to the emperor. Needless to say, it took little torture to convince most slaves to testify against their masters. In the early years of the Empire, torture was even used to obtain evidence from citizens: “We hear often enough of free persons, even *cives*, being tortured in trials for treason.” CROOK, *supra* note 25, at 275.

82. “If you wanted to save your property you must . . . commit suicide before any charge had been preferred, that is, before you were even on trial.” CROOK, *supra* note 25, at 276. This startling phenomenon probably became fashionable during the reign of Tiberius. See *id.* However, even in Cicero’s day, such activity was not unknown. Upon hearing that he would be convicted of extortion, Licinius Macer is quoted as saying “I have died not condemned but still under trial, so my property cannot be sold . . .” *Id.* He promptly killed himself.

83. “An imperial constitution is what the emperor ordains by decree or edict or letter. It has never been doubted that this has the force of statute . . .” ALAN WATSON, *THE SPIRIT OF ROMAN LAW* 148 (1995) (quoting G. INST. 1.5). The emperor’s jurisdiction was conferred not by law, but rather by his own *imperium*, “the power of life and death over all citizens.” ROBINSON, *supra* note 75, at 9. This jurisdiction was *extra ordinem* and entirely discretionary. See CROOK, *supra* note 25, at 272.

84. CROOK, *supra* note 25, at 271-72. Not only were the proceedings irregular, but frequently the punishment did not fit the crime. “[T]he emperor . . . could please himself and inflict penalties greater or less or of a different kind” than those prescribed by statute. *Id.* at 272.

85. See discussion *infra* Part III.C.

III. MODERN UNITED STATES FORFEITURE

A. OVERVIEW

“Forfeiture is one of the most powerful and effective weapons available in the fight against crime. . . . [F]ederal seizures [are now] valued in excess of a billion dollars [yearly]. . . . Yet federal forfeiture is only beginning to realize its full potential. . . . The volume of property subject to forfeiture is staggering.”⁸⁶

The federal drug-forfeiture statute, 21 U.S.C. § 881, allows the government to seize any property that has been used to facilitate a drug crime.⁸⁷ This statute, the government’s primary weapon in its “war on drugs,” evidences procedural characteristics that are frighteningly reminiscent of the “unbounded” period of Roman law. For example, § 881 is technically “civil” rather than “criminal,” so the government need only establish that there is probable cause to believe the property has been used in connection with a drug offense, after which the burden shifts to its owner to prove his innocence.⁸⁸ This reduction of the government’s criminal burden of proof to below the “reasonable doubt” standard is closely analogous to the procedural (and substantive) unfairness of forfeiture trials under the personal jurisdiction of the emperor in ancient Rome.⁸⁹

Similarly, as in later Roman law, the normal “boundedness” of modern criminal law’s *mens rea* requirements do not apply to civil forfeiture: The government prevails merely by showing that property owners have not actively overseen their property, even if they did not actually know of the precipitating criminal activity.⁹⁰ Further, in both the “unbounded” Roman model and modern forfeiture trials where the prosecution’s burden of proof

86. *Federal Drug Forfeiture Activities: Hearing Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 101st Cong., 119 (1989) (prepared statement of Cary H. Copeland, Deputy Associate Attorney General).

87. 21 U.S.C. § 881(a)(7) (1994 & Supp. III 1997); Andrew L. Subin, *The Double Jeopardy Implications of In Rem Forfeiture of Crime-Related Property: The Gradual Realization of a Constitutional Violation*, 19 SEATTLE U. L. REV. 253, 253 (1996).

88. See Subin, *supra* note 87, at 253; William Patrick Nelson, *Should the Ranch Go Free Because the Constable Blundered? Gaining Compliance with Search and Seizure Standards in the Age of Asset Forfeiture*, 80 CAL. L. REV. 1309, 1320 (1992) (describing that the procedural effect is that it is as easy to effect forfeiture under the current regime as it is for law enforcement to obtain a warrant to search a citizen’s house).

89. See discussion *supra* Part II.C.

90. See *infra* notes 104-22.

is lessened, it is the government which both adjudicates and stands to benefit from a finding of “guilt.”

Other conceptual problems abound in modern forfeiture proceedings in addition to those that directly mirror the Roman model. For instance, because of the civil nature of the modern proceeding, the defendant has no right to a court-appointed attorney, and may not have the right to a jury trial.⁹¹ The civil forfeiture action is usually brought while a separate criminal action is pending against the property owner, forcing the defendant to choose between using his resources to defend himself in the criminal action or defending his property in the forfeiture action.⁹² Modern defendants are also hampered by the fact that many defense attorneys will not accept forfeiture cases on a contingency basis, since there is no monetary award for a successful defense.⁹³

In addition to § 881 (which provides for drug-related forfeitures), 18 U.S.C. § 981 provides for the forfeiture of “any property, real or personal” involved in crimes relating to currency transactions and money laundering.⁹⁴ There are also several other criminal forfeiture statutes, such as 18 U.S.C. § 1963 (by virtue of which a defendant forfeits various types of property if convicted under the RICO laws).⁹⁵ Unlike § 881, these criminal forfeiture statutes are pursued as in personam proceedings that are part of the defendant’s criminal punishment.⁹⁶ Forfeiture, in such cases, is perfected only after a jury reaches a guilty verdict on the criminal charge, and thus is less likely to violate double jeopardy or other constitutional rights.⁹⁷

There are four broad categories of property subject to forfeiture. “Contraband”—including drugs, guns, smuggled goods, liquor, and other items that are criminal to possess—may be seized, as well as “derivative

91. See Subin, *supra* note 87, at 254; *United States v. RR #1, Box 224*, 14 F.3d 864, 876 (3d Cir. 1994).

92. See Subin, *supra* note 87, at 254. “[B]ecause such forfeitures are tied to the commission of a crime, the property owner is often incarcerated while the forfeiture action is pending.” *Id.* This suggests that such defendants are in a particularly vulnerable situation, and may be coerced into accepting unfavorable plea bargains. See *infra* note 158 and accompanying text.

93. See Sandra Guerra, *Family Values?: The Family as an Innocent Victim of Civil Drug Asset Forfeiture*, 81 CORNELL L. REV. 343, 364 (1996).

94. 18 U.S.C. § 981(a)(1)(A) (1994).

95. See *id.* § 1963. See also J. Kelley Strader, *Taking the Wind Out of the Government’s Sails?: Forfeitures and Just Compensation*, 23 PEPP. L. REV. 449, 470 (1996). Property involved in other specified financial crimes is also forfeitable. See 18 U.S.C. § 982(a)(2) (1994 & Supp. III 1997).

96. See Strader, *supra* note 95, at 469.

97. See T.J. Hiles, *Civil Forfeiture of Property for Drug Offenders Under Illinois and Federal Statute: Zero Tolerance, Zero Exceptions*, 25 J. MARSHALL L. REV. 389, 425 (1992).

contraband”—property used in the manufacture of contraband.⁹⁸ “Proceeds,” usually cash, are also subject to seizure as well as “derivative proceeds,” which include almost any property of value purchased with the proceeds of an illegal transaction.⁹⁹

Forfeiture procedure is simple. The U.S. Attorney can obtain a seizure warrant by filing a verified complaint.¹⁰⁰ Until *United States v. James Daniel Good*,¹⁰¹ the government was able to seize property under civil forfeiture statutes without providing notice to the owner.¹⁰² *Good* held that the government must give reasonable notice before seizing real property (though not personal property), reasoning that the government has the ability to file a *lis pendens* and the owner is unable to asportate or otherwise alienate the land.¹⁰³

There is a statutory “innocent owner” defense to § 881, which states that “no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.”¹⁰⁴ Generally, however, there is no requirement that the property owner have actual knowledge of the act that precipitated the forfeiture. Rather, owners are deemed to have knowledge if they “knew,” or should have “known,” of previous offenses on the property.¹⁰⁵ Because § 881 penalizes wrongdoers for criminal activity,¹⁰⁶ the reduction in the typical *mens rea* requirement is troubling, but has been upheld by the Supreme Court in *Calero-Toledo v. Pearson Yacht Leasing Company*.¹⁰⁷ In *Pearson*, the Court identified two types of innocent owners who are not subject to forfeiture: those whose property was taken “without . . . privity or consent”¹⁰⁸ and those who “had done all that reasonably could be ex-

98. See Peter A. Winn, *Seizures of Private Property in the War Against Drugs: What Process Is Due?*, 41 Sw. L.J. 1111, 1119 (1988). Preseizure hearings for seizures of contraband or “property that poses a danger to the public” are not required. *Id.* at 1120.

99. See *id.* at 1120. A complete list of subject property includes “all books, . . . microfilm, tapes, . . . moneys, negotiable instruments, securities, . . . real property, . . . controlled substances, . . . chemicals, . . . [and] [a]ny firearm . . .” 21 U.S.C. § 881(a)(5)-(11) (1994 & Supp. III 1997).

100. See Winn, *supra* note 98, at 1121. That the Attorney General initiates the seizure is supposed to act as a check on “the enthusiasm of an overzealous [enforcement] agency.” *Id.*

101. 510 U.S. 43 (1993).

102. See Strader, *supra* note 95, at 473.

103. *James Daniel Good*, 510 U.S. at 62.

104. 21 U.S.C. § 881(a)(7) (1994 & Supp. III 1997).

105. See Guerra, *supra* note 93, at 373.

106. See discussion *infra* Part III.B.

107. 416 U.S. 663 (1974).

108. *Id.* at 689.

pected to prevent the proscribed use.”¹⁰⁹ The Court upheld forfeiture against an “innocent” owner by relying on a legal fiction, reasoning that the property itself was guilty and that the owner had technically failed to qualify under either defense.¹¹⁰

The government has justified “innocent owner” forfeitures as preventing illicit use of property, rendering illegal behavior unprofitable through heavy penalties, and encouraging innocent owners to exercise diligence in managing their properties.¹¹¹ The Supreme Court recently revisited the innocent owner issue in *Bennis v. Michigan*.¹¹² The Court held that the plaintiff’s failure to do “all that reasonably could be expected to prevent the proscribed use of his property” subjected the property to forfeiture.¹¹³ This is consistent with the Court’s previously expressed opinion that forfeiture serves “a deterrent purpose distinct from any punitive purpose”¹¹⁴ and is “too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced.”¹¹⁵

Thus, under current law, the government does not need to prove that a property owner gave actual consent to the criminal activity that precipitated forfeiture proceedings. Instead, the burden is on the property owner to prove a lack of “constructive” consent by showing that he took “all reasonable steps” to prevent the illegal activity.¹¹⁶ This shifting of the evidentiary burden onto the defendant is one of the reasons forfeiture has become such a devastating prosecutorial weapon. Additionally, the lowering of the *mens rea* requirement under the “innocent owner” defense confers a unique prosecutorial advantage that is fundamentally at odds with criminal law in general and the Model Penal Code (“MPC”) in particular. For ex-

109. *Id.*

110. See Michael Goldsmith & Mark Jay Linderman, *Asset Forfeiture and Third Party Rights: The Need for Further Law Reform*, 1989 DUKE L.J. 1254, 1265. For discussion of the Roman counterpart, see *supra* Part II.A.

111. See Strader, *supra* note 95, at 466.

112. 516 U.S. 442 (1996). The facts of the case are extremely sympathetic in favor of the innocent owner. She was joint-owner, along with her husband, of a car in which her husband was found engaged in a sex act with a prostitute. There was no question that the wife was unaware of the illegal use the husband was making of the car. Michigan authorities, however, confiscated the vehicle under a local nuisance abatement statute notwithstanding her lack of complicity in the act. As Justice Kennedy pointed out in a vigorous dissent, there was not even a showing of negligence on the part of the wife to warrant the seizure. See *id.* at 473.

113. *Id.* at 449 (citing *Calero-Toledo*, 416 U.S. at 689).

114. *Id.* at 452.

115. *Id.* at 448 (citing *J.W. Goldsmith, Jr.-Grant Co. v. U.S.*, 254 U.S. 505, 511 (1921)).

116. Guerra, *supra* note 93, at 374. See also *Bennis*, 516 U.S. at 450 (suggesting that forfeiture can occur even though the defendant was “in no way . . . involved in the criminal enterprise . . . and had no knowledge that [his] property was being used in connection with or in violation of [law].”) (citing *Calero-Toledo*, 416 U.S. at 668).

ample, under the MPC approach of determining culpability, unless the owner actually believed the criminal fact did not exist, knowledge can be satisfied by proof of willful blindness.¹¹⁷ This approach contrasts with the *Bennis* standard, which holds a defendant liable if he fails to take affirmative steps to prevent criminal activity if it exists or is likely to occur.¹¹⁸ The important difference between the two standards is that under the MPC willful blindness approach, actual belief that the fact did not exist is a defense.¹¹⁹

Another prosecutorial advantage of statutory forfeiture is that a drug offense committed anywhere inside a property line renders the entire lot subject to forfeiture under § 881.¹²⁰ Under *Pearson*,¹²¹ this is true even if the owner did not know that illicit activity was occurring on the property. For instance, in the *Pearson* case, a leased yacht was seized because the lessees were found with a marijuana cigarette on board, even though the owner had no knowledge of the lessees' activity. The broad scope of forfeiture, accompanied by a reduced *mens rea* requirement and a lowered standard of proof, produces a prosecutorial weapon which can be greater in scope than strict liability.¹²²

One justification for the seemingly draconian statutory forfeiture scheme is that the government's law enforcement and court expenses associated with the proceedings are paid with the captured funds.¹²³ This apparently plausible argument, however, invokes a disturbing aspect of the system, namely that it allows law enforcement agencies that participate in seizures to share in the proceeds.¹²⁴

117. See Goldsmith & Linderman, *supra* note 110, at 1280.

118. See *Bennis*, 516 U.S. at 449-50. The *Bennis* standard is also more stringent than the "recklessness" standard of the MPC, which finds the defendant guilty if he consciously disregards a substantial and unjustifiable risk that the element exists or that a result will occur. See generally Goldsmith & Linderman, *supra* note 110, at 1281.

119. See Goldsmith & Linderman, *supra* note 110, at 1281. This contrasts with a recklessness standard which "imposes liability on an actor regardless of actual knowledge." *Id.*

120. See *Guerra*, *supra* note 93, at 361.

121. See *Calero-Toledo*, 416 U.S. at 665.

122. The procedural weapon is greater than strict liability in the sense that, under civil forfeiture, the penalty may bear no relation to the harm, unlike typical (nonpunitive) strict liability statutes.

123. This means that the accused is essentially paying the government to prosecute him. "The proceeds from any sale . . . and any moneys forfeited under this title shall be used to pay . . . all property expenses of the proceedings for the forfeiture and sale including expenses of seizure, maintenance of custody, advertising, and court costs . . ." 21 U.S.C. § 881(e)(2)(A)-(i) (1994 & Supp. III 1997).

124. "Whenever property is civilly or criminally forfeited under this subchapter the Attorney General may . . . transfer the property to any Federal agency or to any State or local law enforcement agency which participated directly in the seizure or forfeiture of the property . . ." *Id.* § 881(e)(1)(A).

Assets forfeited pursuant to federal statutes may be given directly to participating law enforcement agencies or be sold at auction.¹²⁵ Proceeds from the sale of forfeited property are deposited in the Department of Justice Asset Forfeiture Fund, out of which hundreds of millions of dollars per year are distributed to various participating agencies.¹²⁶ This program of “equitable sharing”¹²⁷ creates an unmistakable incentive for law enforcement agencies to maximize revenues by increasing the number of seizures they effect.¹²⁸

B. INFRINGEMENT OF PERSONAL LIBERTY

Forfeiture statutes are conceptually troubling because they embody, in substance, status criminalization. The argument that civil forfeiture proceedings violate double jeopardy when brought separately from criminal actions is compelling. Equally troubling is the question why any criminal activity, particularly any which is nonviolent, should be afforded substantially less procedural protection than others. For example, if persons accused of murder or insider stock trading could lose their houses and other real and personal property merely on a showing of “probable cause,” there seems little doubt that constitutional claims of double jeopardy and uncompensated governmental taking would prevail. The question relevant to forfeiture law is why those subjected to forfeiture proceedings are not afforded similar protection. The answer may be another question: “*Cui bono?*”¹²⁹

125. See Nelson, *supra* note 88, at 1322. Of course, assets may also be forfeited and the proceeds distributed according to state laws.

126. See *id.* at 1322-23.

127. *Id.* at 1328. The “‘equitable sharing’ program . . . is designed to promote cooperation between law enforcement agencies engaged in the control of illegal narcotics by allowing them to share in the spoils of forfeiture.” *Id.* at 1322-23. This incentive can be compelling: In 1991, \$279 million was disbursed to state and local governments by the federal government out of more than \$644 million in forfeiture receipts for that year. See *id.* at 1324.

128. See discussion *infra* Part III.C. This incentive is perverse in that it targets the “bottom line” of a particular transaction, as opposed to the public’s interest in safety. If law enforcement agencies are economically rational actors, under this regime they will choose to spend their resources pursuing a single, well-capitalized “criminal” rather than several thinly funded suspects. However, from a safety aspect it may (or may not) be more socially desirable to remove the smaller scale dealers. Conversely, the incentive to find bigger fortunes to seize may result in law enforcement reaching beyond due diligence (beyond their constitutional limitations) to find offenses. What seems clear is that law enforcement agencies should be motivated by public safety concerns before the financial benefit of their own departments, otherwise it will be mere fortuity that correct law enforcement allocations are made (from a safety perspective).

129. “Who profits?” I argue that a significant factor in the reduction of offenders’ procedural rights under modern forfeiture is the government’s interest in finding “guilt”—both pecuniary interest and interest in gaining political capital (for being perceived as taking a firm stance on crime).

The guarantee against double jeopardy protects individuals against three different situations: being prosecuted again for the same offense after acquittal, being prosecuted for the same offense after a conviction, and receiving multiple punishments for the same offense.¹³⁰ Civil forfeitures raise serious questions under the latter of these. The Supreme Court held in *United States v. Halper*¹³¹ that a civil forfeiture can constitute “punishment” for purposes of double jeopardy analysis: “Simply put, a civil . . . sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment.”¹³² The Court later held in *Austin v. United States*¹³³ that civil forfeitures stemming from criminal cases and pursuant to 28 U.S.C. § 881 “are punitive and therefore also subject to review under the Eighth Amendment’s Excessive Fines Clause.”¹³⁴

Halper is logically consistent with the purposes of the Fifth Amendment, since § 881 sanctions have clearly been established to punish and deter criminal activity. Accordingly, in *Department of Revenue of Montana v. Kurth Ranch*,¹³⁵ the Supreme Court held that when two punishments are imposed for the same violation under the same statute, both punishments are imposed for the same offense.¹³⁶ This opinion led to the approach taken by the Ninth Circuit in *United States v. Barton*,¹³⁷ which held that “once convicted in a criminal case, a defendant cannot subsequently be punished in a civil forfeiture action based on the same violations of law.”¹³⁸

Despite the obvious concerns, civil forfeiture statutes have withstood constitutional scrutiny even though they are essentially criminal in nature, unless the statute is facially punitive.¹³⁹ Some courts have reasoned that there is no double jeopardy violation because the civil forfeiture proceeding and a simultaneous criminal proceeding constitute a single, coordi-

130. See Subin, *supra* note 87, at 256.

131. 490 U.S. 435 (1989).

132. *Id.* at 448.

133. 509 U.S. 602 (1993).

134. Subin, *supra* note 87, at 259.

135. 511 U.S. 767 (1994).

136. See *id.* at 784.

137. 46 F.3d 51 (9th Cir. 1995).

138. *Id.* at 52.

139. See Lawrence A. Kastan, *Extending Constitutional Protection to Civil Forfeitures that Exceed Rough Remedial Compensation*, 60 GEO. WASH. L. REV. 194, 204-05 (1991).

nated prosecution and thus are “effectively” a single proceeding.¹⁴⁰ This viewpoint was sharply criticized in *United States v. \$405,089.23 in U.S. Currency*,¹⁴¹ where the Ninth Circuit held that “two separate actions, one civil and one criminal, instituted at different times, tried at different times before different factfinders, presided over by different district judges, and resolved by separate judgments,” are clearly not the same proceeding.¹⁴² However, the Ninth Circuit was resoundingly overruled by the Supreme Court, which held that civil in rem forfeitures were not punishment for purposes of double jeopardy, and thus are constitutionally permissible.¹⁴³

The government has responded to constitutional arguments by asserting that defendants who fail to file a claim to recover seized property effectively waive any double jeopardy claim.¹⁴⁴ This theory was upheld in *United States v. Nakamoto*,¹⁴⁵ where the Ninth Circuit agreed that failure to file a claim constitutes waiver. The trial court in *Nakamoto* issued its holding largely on the basis that if it found otherwise, there would be few instances where double jeopardy would not apply.¹⁴⁶ This decision exemplifies a disturbing trend by courts to give priority to the government’s forfeiture procedures over the constitutional rights of individuals.¹⁴⁷

A possible new defense that may protect citizens against statutory forfeiture is found in the unlikely form of recent land-use cases. In *Dolan v. City of Tigard*,¹⁴⁸ the Supreme Court held that to avoid paying just compensation, a governmental taking of property must be supported by “rough proportionality” between the asserted government interest and the restric-

140. See Subin, *supra* note 87, at 276. These courts rely largely “on the fact that the forfeiture actions and criminal prosecutions took place at approximately the same time and involved the same criminal violations.” *Id.*

141. 33 F.3d 1210 (9th Cir. 1994), *rev’d*, 518 U.S. 267 (1996).

142. See *\$405,089.23 in U.S. Currency*, 33 F.3d at 1216.

143. See *\$405,089.23 in U.S. Currency*, 518 U.S. at 291-92. The Court’s analysis rests tenuously on the fiction that the in rem action is brought not against the individual but rather against the guilty property, and that the action is civil, not criminal, in nature. Of course these distinctions beg the question, since merely characterizing the punishment as “civil” does not dispel the double jeopardy implications. If anything, this characterization is more troubling, as it effectively lowers the procedural bar for finding liability (“guilt”) as a requirement for avoiding the constitutional issue. See *also supra* note 18.

144. See Subin, *supra* note 87, at 279-80.

145. 876 F. Supp. 235 (D. Haw. 1995), *aff’d*, 67 F.3d 310 (9th Cir. 1995).

146. See 876 F. Supp. 235, 238 (D. Haw. 1995).

147. Disturbingly, it appears that the *Nakamoto* court was more concerned with upsetting the government’s forfeiture procedure than with analyzing whether the defendant’s constitutional rights were being infringed: “Without an interest in the property [because he failed to contest the forfeiture, the defendant] cannot be said to have been subjected to [double] jeopardy” *Id.* at 239.

148. 512 U.S. 374 (1994).

tion on the property's use.¹⁴⁹ While *Dolan* specifically dealt with land use regulation, the holding can apply whenever the government attempts to seize control over property and the required nexus between the regulation and the government interest is unclear.¹⁵⁰ In a related case, *Nollan v. California Coastal Commission*,¹⁵¹ the Court held that the government has to prove that a regulation substantially advances a legitimate state interest to defend against a just compensation claim.¹⁵²

However, a direct challenge to civil forfeiture via the Takings Clause is both unlikely and probably nugatory. Though there is clearly legitimate concern that ongoing drug enterprises will spread both crime and substance abuse, there seems to be little rationale for affording them less procedural protection than that given other criminal activities. Indeed, though the government's desire to retard such enterprises by extracting illicit gains is both logical and useful—such as for replacing revenue lost by the failure of such enterprises to pay federal income tax—these ends can be achieved by other means. There is no reason to suggest that forfeiture trials cannot be held concurrently with criminal trials, and with the same procedural standards.

If the government were to prove defendants guilty of criminal wrongs under a criminal standard of proof, both monetary penalties and incarceration could clearly be jointly imposed without presenting a constitutional problem. I suggest that any attempt to circumvent criminal procedure by applying penalties under a civil standard of proof is *prima facie* unconstitutional. To hold otherwise implicitly encourages a fundamental unraveling of constitutional rights.

C. WHEN THE GOVERNMENT PROFITS FROM CITIZENS' GUILT: THE FALL OF INDIVIDUAL RIGHTS

On October 2, 1992, Los Angeles County Sheriff's deputies led a raid on the 200 acre estate of millionaire Donald P. Scott in Malibu, California, following up on information that drugs were being grown on the property.¹⁵³ The raid ended with Scott being shot and killed by two deputies,

149. *See id.* at 391.

150. *See Strader, supra* note 95, at 451.

151. 483 U.S. 825 (1987).

152. *See id.* at 841.

153. *See* Ron Soble, *D.A. Widens Inquiry Into Fatal Raid at Scott Ranch Malibu*, L.A. TIMES, Nov. 15, 1992, at B1. The information which led to the raid was apparently based on a reconnaissance flight made by DEA agents over the property, acting on an erroneous tip by a drug informant. *See id.*

and no trace of drugs or drug paraphernalia was found.¹⁵⁴ After investigating the incident, Ventura County District Attorney Michael D. Bradbury released a report concluding that the drug raid “was not legally justified and was prompted in large part by authorities’ desire to seize Donald P. Scott’s \$5-million ranch.”¹⁵⁵

The Scott case clearly represents the extreme end of the forfeiture spectrum.¹⁵⁶ The great likelihood is that citizens will not be subjected to the kind of brute force which was brought to bear in that scenario.¹⁵⁷ A host of other serious problems, however, attend current forfeiture procedure, which, if unaddressed, could result in Scott being less the exception than the norm. One of those problems is the strong incentive for prosecutors to use a civil forfeiture action as a plea bargaining tool in order to avoid a criminal trial.¹⁵⁸ Further incentive for abuse is provided by the ability of law enforcement to keep seized property and distribute it among participating agencies.¹⁵⁹ Since the government only has to show probable cause to effect the forfeiture, the direct benefit to agencies that initiate the proceedings creates a due process “vacuum” that is particularly troubling.

The management and sale of seized property also demonstrate the problems of the current system. For example, a one-day notice of sale posted by a U.S. Marshal in Houston, Texas, for a forfeited aircraft drew only a \$4,000 price for a plane valued at \$50,000 when seized.¹⁶⁰ Once

154. *See id.*

155. Daryl Kelley, *Sheriff Clears Deputies in Fatal Raid on Ranch*, L.A. TIMES, Sept. 10, 1993, at B1. L.A. County Sheriff Sherman Block vigorously denied Bradbury’s claim, clearing the deputies involved of any wrongdoing in the incident. Bradbury responded by claiming that “one of the primary purposes [of the raid] was a land grab by the Sheriff’s Department.” *See id.*

156. Assuming the validity of the theory that the raid was motivated by the desire to seize Scott’s property.

157. At least at the present time. Roman Senators in the early first century B.C. would not have expected to be on trial for their lives over minor offenses less than 50 years later.

158. *See Subin, supra* note 87, at 267-68. Offenders faced with the probability of losing all their possessions can be expected to quickly capitulate to a reduced prison sentence in exchange for being allowed to retain some of their assets. Shockingly, some courts have held that such a settlement *absolutely precludes* finding a double jeopardy violation. *See id.* at 282. Additionally, rich defendants may be able to buy reduced prison sentences by agreeing to forfeit large sums. *See, e.g.,* Mireya Navarro, *When Drug Kingpins Fall, Illicit Assets Buy a Cushion*, N.Y. TIMES, March 19, 1996, at A1 (alleging that rich defendants bargain for lighter sentences by using their illicit proceeds); *Colombian Forfeits \$150 Million in Drug Plea*, N.Y. TIMES, Dec. 10, 1995, at A1 (discussing the forfeiture of \$150 million in illegal proceeds as part of Colombian Sheila Miriam Arana de Nasser’s plea bargain).

159. *See Winn, supra* note 98, at 1134.

160. *See id.* at 1128. Negligent disposition of seized property raises questions as to the legitimacy of sale proceedings. Failure to monitor such sales could produce significant abuses, such as sham or “insider” transactions at below fair market value. There is also a significant possibility for abuse *before* disposition of the property. *See, e.g.,* Robert D. McFadden, *Jersey City Officers Are Accused of Turning Stolen Cars to Profit*, N.Y. TIMES, Nov. 14, 1995, at A1 (discussing investigation of

again, the inherent conflict of interest when participating agencies benefit from forfeiture is seen: Few or no procedural safeguards exist against the disposal of seized property at prices well below fair market value, with sales possibly going to agents themselves or other “insiders” with access to the sales. When agencies sell captured property for only pennies on the dollar, it inexorably leads to the presumption of either corruption or incompetence.¹⁶¹

Yet another procedural problem is the trend to deny double jeopardy claims when the government can show that the amount of forfeiture is proportionate to the cost of investigating and prosecuting the crime.¹⁶² For example, in *Johnson v. State*,¹⁶³ the court looked at “whether the forfeiture amount approximates the cost of investigating, apprehending, and prosecuting the defendant, or whether the forfeiture relates otherwise to any actual damages that the defendant caused the state.”¹⁶⁴ This is a dangerously broad test because even if the government were to try to make a fair assessment of its costs for investigation and prosecution, these costs would be extremely difficult to estimate.¹⁶⁵

Finally, one of the principal problems with statutory forfeiture is that it encourages prosecution by the very agencies charged with enforcing the law. Since many, if not all, criminal laws are enforced selectively, there is an obvious tendency underlying the reduced procedural protection of forfeiture laws to encourage prosecution of these crimes instead of others. Prosecutors have incentive to seize as much property as possible because “forfeiture . . . provides a ready statistical measure of success in [law] enforcement.”¹⁶⁶ Further, prosecutors have strong motivation under these laws to bend procedural rules in their own favor—both because their own departments will financially benefit from successful prosecutions and be-

Jersey City police for allegedly using 113 impounded cars for fun and profit instead of returning them to their owners); *Prosecutor Says He Will Return a Seized BMW*, N.Y. TIMES, March 11, 1993, at B6 (reporting that in Suffolk County, the New York District Attorney agreed to stop using a seized BMW automobile as his official car because of the vehicle’s “high mileage” and fear of retaliation after publicity about his use).

161. In the Houston example, if either the original owner or his creditors were solvent, they would certainly have purchased the \$50,000 plane for more than the \$4,000 auction price. In all likelihood, however, notice of the sale was inadequate. If the agency had sold the plane for its fair market value, under current law it would have been forced to share the proceeds with cooperating agencies. An “insider” sale at less than fair market value, on the other hand, would allow the department (or agents of the department) to capture the entire value of the seized property.

162. See Subin, *supra* note 87, at 268.

163. 882 S.W.2d 17 (Tex. App. 1994), *aff’d*, 931 S.W.2d 314 (Tex. App. 1996).

164. 882 S.W.2d at 20.

165. See Subin, *supra* note 87, at 269.

166. Nelson, *supra* note 88, at 1325.

cause the civil offenders found liable may never serve time in prison.¹⁶⁷ Whether these same rules also influence the impartiality of judges is an open question, but perhaps one of lesser importance considering the low procedural hurdles prosecutors currently face in securing judgments against alleged offenders.

IV. COMPARISON

Early Roman forfeiture closely parallels modern forfeiture in the United States in several respects. Striking similarity can be seen between the current use of the legal fiction of an “in rem” proceeding and the custom of prosecuting inanimate objects under Roman law.¹⁶⁸ The relaxed prosecutorial burden of proof necessary under the modern “innocent owner” defense¹⁶⁹ is a close relative of the presumption of guilt imposed against a Roman owner found with stolen property under the delict of theft.¹⁷⁰ Modern forfeiture law has clearly surpassed its ancient counterpart in the sheer volume of crimes it addresses, but the principles governing its use—namely, deterrence and punishment—remain the same.

Early Roman forfeiture law focused on the use of compensation as a deterrent to private acts of vengeance.¹⁷¹ This system was essentially designed to minimize social harm by maximizing disincentives to wrongdoers, while simultaneously increasing incentive for aggrieved parties to bring legal action.¹⁷² Because of the lack of a clear criminal/civil distinction, this early system was more analogous to modern tort action than to modern criminal law, with private actors working within a state-adopted legal framework to achieve retribution through monetary compensation.

The most critical analogy between these two somewhat disparate legal systems is their use of forfeiture as a mechanism for governmental remuneration. From its first use by Sulla in 80 B.C. as a form of de facto “taxation,” Roman forfeiture rapidly passed through two stages of expan-

167. I suggest that, at least in certain instances, prosecutors could be moved to suppress or even fabricate evidence in order to prevail under the current regime. Perhaps the most important element underlying this argument is that unlike conventional criminal trials, defendants in forfeiture proceedings will not face incarceration if found guilty—a factor which might make some prosecutors more willing to bend the rules in favor of the government. This dilemma, however, is probably only hypothetical, in that the necessary showing for liability of “probable cause” is so low as to alleviate the need for any additional prosecutorial advantage in most cases.

168. See *supra* note 19 and accompanying text.

169. See *supra* note 104 and accompanying text.

170. See *ROMAN LAW & COMPARATIVE LAW*, *supra* note 4, at 69.

171. See *supra* note 27 and accompanying text.

172. See Alexander, *supra* note 14, at 536.

sion. The earliest use of the proscription power was clearly political in nature. Sulla specifically targeted wealthy members of the political opposition, but did not broaden his scope beyond those who had supported Marius in their brief civil war.¹⁷³ This can be seen as the beginning of the end of the “bounded” period of Roman forfeiture, as the government still observed the formality of bringing judicial proceedings against property owners based on specified charges.

Parallels can be seen between the end of the “bounded” period of Roman forfeiture and the current state of U.S. forfeiture. The vast majority of those currently subject to forfeiture proceedings by the federal government are drug offenders, roughly analogous to the political criminals subject to the Sullan proscriptions. The “war on drugs” has been a cornerstone of American politics for the past two decades, and drug dealers have, in essence, been branded enemies of the state.¹⁷⁴

Though the culpability of modern property owners subjected to seizure is often dubious,¹⁷⁵ the government is able to justify the resulting forfeitures under the rubric that offenders are, in essence, political subversives.¹⁷⁶ The government’s message is clear: Allow your property, knowingly or not, to be used by those who subvert the government’s policies (even in a tangential manner, as in *Bennis*¹⁷⁷), and face the consequences of total forfeiture. The government’s decision to actively prosecute drug offenders and RICO violators, among others, as enemies of the state is probably constitutionally permissible. On the other hand, the lessening of these groups’ procedural rights is not constitutionally permissible, nor is it morally justifiable merely because of the danger these groups represent to society.¹⁷⁸

The second, or “unbounded,” stage of Roman forfeiture that was initiated in 43 B.C. represents a logical progression from the earlier policy. Forfeiture became more than just a political weapon to be brandished against defeated rivals. Rome’s failure to institute a comprehensive tax plan, combined with its need to fund armies that were often fighting on

173. See CARY & SCULLARD, *supra* note 45, at 234.

174. See, e.g., Subin, *supra* note 87, at 253. “Although the ‘war’ has not decreased drug use or . . . availability . . . the government continues to sacrifice the constitutional rights of its citizens in an effort to escalate the hostility.” *Id.*

175. See discussion *supra* notes 121-22.

176. See generally Strader, *supra* note 95, at 466.

177. See discussion *supra* notes 112-13.

178. The danger that these groups represent to society, as discussed in *supra* Part III.B, is not tangibly greater than that posed by murderers or insider traders (and may even be less).

multiple fronts, gave rise to taxation by forfeiture.¹⁷⁹ Government officials singled out the wealthy for seizure, delatores procured incriminating information against them, and summary proceedings would follow.¹⁸⁰ A climate of fear arose with concomitant instability at the highest levels of government. The wealthy became powerful subversives of government in an effort to protect their estates.¹⁸¹ As a result, factionalized warring broke out, and during the period between 41 to 69 A.D., Rome was ruled by seven different emperors.¹⁸²

This second stage of Roman forfeiture merits the closest attention from the modern legal scholar. It is premature to envision a time when forfeiture supplants the federal income tax as a means of funding the state. However, the elements of personal liberty and constitutional protection that are undermined by allowing even the lowest level of governmental remuneration through civil forfeiture are too important to be abused. Although the expansion of the use of seizures as a *de facto* form of taxation akin to Roman practice is unlikely, even the cost of the precursor of such a system is painfully high. Indeed, morally our present system already seems insupportable. It represents not merely economic redistribution, but also status criminalization—no different than the criminalization of wealth in ancient Rome.¹⁸³ Taken to its extreme in our modern capitalist society, such a policy could lead to the same anarchy the Romans experienced, with the economically affluent being discouraged from generating wealth and forced into subversive behavior to protect their interests.¹⁸⁴

The uncertainty and fear which attend a system of unbounded governmental power and arbitrary proceedings are, as Roman citizens discovered, a heavy price to pay for government solvency. Roman citizens of the late Republic found their constitutional protections, including the Roman law against double jeopardy,¹⁸⁵ to be of little value against the force of the state once the government became an interested party in the judicial process. Disturbingly, U.S. courts have recently begun to follow the Roman

179. See CARY & SCULLARD, *supra* note 45, at 234.

180. See *supra* note 67 and accompanying text.

181. See generally *supra* note 73 and accompanying text.

182. See GAIUS SUETONIUS TRANQUILUS, *THE TWELVE CAESARS* 153-292 (Robert Graves trans., Penguin Books 1989) (1957).

183. Assuming the government chose to pursue only wealthy offenders, the analogy would be nearly complete. For discussion of the Roman model, see generally CARY & SCULLARD, *supra* note 45, at 234.

184. This is similar to the transformation in the late Republic of J. Caesar and Pompey from Roman generals to private individuals fighting for their political (and physical) lives. See discussion *supra* Part II.C.

185. See Alexander, *supra* note 14, at 535-36.

model by taking lengths to perpetuate the legal fiction of a “single proceeding,”¹⁸⁶ in order to allow simultaneous civil and criminal prosecutions to occur without technically violating double jeopardy protection. Worse, since it is the government agencies themselves who stand to benefit from these proceedings, the diminution of constitutional protection by the judiciary raises serious questions about the legitimacy of these seizures and the scope forfeiture proceedings will ultimately attain.

V. CONCLUSION

When it is the government which profits from forfeiture prosecutions, and indeed is able to include internal calculations of its own costs in determining forfeiture amounts,¹⁸⁷ we seem perilously close to the days when Sulla supported troops and Caligula funded an empire through arbitrary forfeiture proceedings. The conflict between constitutional rights and the “boundedness” of government is a lesson in moral hazard we can learn from Roman law. To give government untrammelled power over the wealthy (or any social class) is to create a climate of fear and to undermine the foundations of democracy. The destruction of individual rights, procedural safeguards, and *mens rea* requirements which attend modern civil forfeiture, should be declared unconstitutional in order to avoid reenacting the unhappy legacy of our predecessors.

186. See, e.g., *United States v. \$405,089.23 in U.S. Currency*, 518 U.S. 267, 292 (1996) (holding that civil in rem forfeitures were not a form of punishment for the purposes of double jeopardy). See also Subin, *supra* note 87, at 276.

187. See *supra* note 162 and accompanying text.