

Republic of South Africa's Prevention of Organised Crime Act: A Comparative Bill of Rights Analysis

*Deepak Gupta**

I. INTRODUCTION

When life or liberty is at stake, the landmark judgments of the Supreme Court of the United States, giving fresh meaning to the principles of the Bill of Rights, are studied with as much attention in New Delhi or Strasbourg as they are in Washington, D.C., or the State of Washington, or Springfield, Illinois.¹

It is widely known that the U.S. Bill of Rights has been an integral formative text of the American Republic for over 200 years. However, the magnitude of its influence on other constitutional democracies is less widely known. Through the years, foreign judiciaries have consistently looked to the U.S. Bill of Rights for guidance when expounding rights within their nations.² The Constitutional Court of South Africa is one of the courts that has looked to the Supreme Court's case law on numerous occasions, to supplement its indigenous jurisprudence.³ In the tradition of the "overseas trade in the Bill of Rights,"⁴ this Article explores the constitutionality of a recently enacted South African statute by applying a blend of South African and American constitutional law. For constitutional questions that South African law is developed enough to answer on its own, South African law alone is used. However, in areas where South

* B.S., Stanford University, 1995; J.D. candidate, Harvard Law School, 2002. In January 2001, I served as a researcher in South Africa's Office of the National Director of Public Prosecutions. I would like to thank Mr. Willie Hofmeyr, the Deputy Director of Public Prosecutions to whom I reported, as well as Professor Philip Heymann and the *Harvard Civil Rights-Civil Liberties Law Review*, for their comments on this Article. All errors are mine; please direct your comments to gupta@law.com.

¹ Anthony Lester, *The Overseas Trade in the American Bill of Rights*, 88 COLUM. L. REV. 537, 541 (1988).

² *Id.* See also Claire L'Heureux-Dubé, *The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court*, 34 TULSA L.J. 15, 18 (1998) ("As the bonds of colonialism loosened, the prominence of American jurisprudence grew throughout the world. This is particularly true in the field of constitutionalism and human rights.").

³ See discussion *infra* Part II.

⁴ Lester, *supra* note 1, at 541.

African law is less developed, American law is marshaled as a supplement.

In 1998, South Africa enacted the Prevention of Organised Crime Act (“POCA”).⁵ This statute embodies an aggressive Parliamentary stance against “a rapid growth of organised crime, money laundering and criminal gang activities nationally and internationally.”⁶ The statute fortifies law enforcement through several mechanisms. This Article focuses on the constitutionality of one of POCA’s mechanisms, civil asset forfeiture.

Civil asset forfeiture minimizes the government showing required to confiscate “tainted” assets. POCA chapters 5 and 6 “provide for a civil remedy for the preservation and seizure, and forfeiture of property which is derived from unlawful activities or is concerned in the commission or suspected commission of an offence.”⁷ POCA enables the National Prosecutor of South Africa to take property when, on a balance of probabilities, it appears that the property is either the proceeds of unlawful activities, or was an instrumentality of an offense.⁸

The benefits of civil asset forfeiture are indisputable—the power of law enforcement to combat organized criminal activity is greatly increased. This is of particular importance in South Africa, a country deeply troubled by organized crime. One scholar has observed, “South Africa’s rising crime rate makes it one of the most disturbing and dangerous countries in the world.”⁹ By making it easier for law enforcement to take the profit out of criminal activity, civil asset forfeiture gives society a powerful weapon with which to combat sophisticated criminal activities such as drug trafficking, prostitution rings, organized fraud against the government, and government corruption.

The practice of civil asset forfeiture, however, does raise serious constitutional concerns. Though the proportions of South Africa’s current organized crime problem are staggering, law enforcement measures threatening individual rights must withstand vigilant constitutional scrutiny lest South Africa’s transition entail a shift from one oppressive regime to another.

This Article investigates the arguments relating to the constitutionality of civil asset forfeiture under POCA. Part II presents the comparative methodology of analysis used throughout the Article. Part III contains arguments against the appropriation of the in rem fiction into South

⁵ Prevention of Organised Crime Act 121 of 1998 (codified as amended at 1 JSRSA 1-534 (2000)).

⁶ *Id.* at Preamble.

⁷ *Id.*

⁸ *Id.* at § 38.

⁹ Joseph P. Shereda, *The Internationalization of the War on Drugs and its Potential for Successfully Addressing Drug Trafficking and Related Crimes in South Africa*, 31 GEO. WASH. J. INT’L L. & ECON. 297 (1997).

African forfeiture jurisprudence. Parts IV, V, and VI look at particular rights provisions of the South African Constitution and analyze whether POCA infringes on each. Part VII concludes with recommendations for South African courts reviewing POCA, and for American courts considering comparative constitutionalism.

II. METHODOLOGY

This Article uses the traditional constitutional techniques of textualism, structuralism, and precedential analysis, but supplements these with a comparative methodology. In *State v. Makwanyane*, the South African Constitutional Court wrote, "Comparative 'bill of rights' jurisprudence will no doubt be of importance, particularly in the early stages of the transition when there is no developed indigenous jurisprudence in this branch of the law on which to draw."¹⁰

The practice of comparative inquiry is accepted in many justice systems.¹¹ Justice Breyer of the U.S. Supreme Court articulated the logic of comparative inquiry when, in his dissent in *Printz v. United States*, he drew upon the German form of federalism for illustrative purposes, stating that, "[o]f course we are interpreting our own Constitution, not those of other nations . . . [b]ut their experience may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem."¹² Justice O'Connor also has encouraged judicial cross-pollination across borders.¹³

Justice Claire L'Heureux-Dubé of the Canadian Supreme Court has pointed to four factors that have contributed to the trend of "globalization" in the practice of legal adjudication: (1) similar issues; (2) the international nature of human rights; (3) advances in technology that have made opinions available through computer networks; and (4) increasing personal contact among judges.¹⁴ Also, the widespread use of English in judiciaries, the common legal heritage of common law countries, and the

¹⁰ *State v. Makwanyane*, 1995 (3) SA 391, 414 (CC) (stating that a precedent for young legal systems borrowing from foreign systems can be found in colonial and early American history, and noting that Americans imported the British common law as a foundation for their own legal system).

¹¹ See L'Heureux-Dubé, *supra* note 2, at 16 ("More and more courts, particularly within the common law world, are looking to the judgments of other jurisdictions, particularly when [deciding] human rights issues. Deciding on applicable legal principles and solutions increasingly involves a consideration of the approaches that have been adopted with regard to similar legal problems elsewhere.")

¹² *Printz v. United States*, 521 U.S. 898, 977 (1997) (Breyer, J., dissenting) (citations omitted).

¹³ See Anne-Marie Slaughter, *Court to Court*, 92 AM. J. INT'L. L. 708, 710-11 (1998) ("Justice Sandra Day O'Connor has been exhorting U.S. lawyers around the country to pay more attention to foreign law and has led several delegations of U.S. Supreme Court Justices to meet their foreign counterparts.")

¹⁴ L'Heureux-Dubé, *supra* note 2, at 23-26.

inherent flexibility of the common law are factors that have facilitated sharing.

Comparative techniques are particularly appropriate for POCA. The South African Bill of Rights is in large part modeled on foreign bills of rights.¹⁵ The subject matter of its protections largely overlaps with the U.S. Bill of Rights, and POCA is itself based on American forfeiture statutes.¹⁶ Since the two primary sources of law informing an investigation of South African civil asset forfeiture are substantially similar to their American analogs, drawing upon the abundant reflections of American scholars and judges in this field should yield significant benefits.

The advantages of comparative analysis having been enumerated, it is equally important to recognize its pitfalls. The South African Court has articulated the challenges of the comparative pursuit, drawing attention to the “different contexts within which other constitutions were drafted, the different social structures and milieu [sic] existing in those countries as compared with those in this country, and the different historical backgrounds against which the various constitutions came into being.”¹⁷

The discussion that follows uses American jurisprudence to assess the constitutionality of South African civil asset forfeiture in a manner that is consistent with the South African Constitutional Court’s own professed philosophy on comparative constitutionalism.¹⁸ American jurisprudence is used only to fill in the South African canon’s gaps. By using the American Bill of Rights in a manner accepted by South African legal professionals, the general debate surrounding comparative constitutionalism is largely avoided.¹⁹

¹⁵ See Jeremy Sarkin, *The Effect of Constitutional Borrowings on the Drafting of South Africa’s Bill of Rights and Interpretation of Human Rights Provisions*, 1 U. PA. J. CONST. L. 176, 183–84 (1998). Sarkin notes that drafters of South Africa’s Interim Constitution “referred to the Bills of Rights of other countries, specifically the German Basic Law (1949), the Canadian Charter of Rights and Freedoms (1982), and the Chapter on Fundamental Human Rights and Freedoms in the Constitution of the Republic of Namibia (1990).” *Id.* Admittedly, there is little direct evidence that the South African Bill of Rights is modeled on its American counterpart. Evidence is largely circumstantial—the areas generally covered by the two bills of rights are largely overlapping.

¹⁶ See <http://www.iss.co.za/Pubs/ASR/9No5And6/Redpath.html> (last visited Nov. 19, 2001) (“South Africa’s Prevention of Organised Crime Act, an omnibus act which also includes provisions on criminal and civil asset forfeiture, is based on the controversial Racketeer Influenced Corrupt Organisations Act (RICO) of the US.”).

¹⁷ *Park-Ross v. Dir.: Office for Serious Econ. Offenses*, 1995 (2) SA 148, 160 (CC). See also *L’Heureux Dubé*, *supra* note 2, at 26 (“[T]hrough the solutions of other countries or of the international community are useful and important considerations, we must ensure that foreign reasoning is not imported without sufficient consideration of the context in which it is being applied. There are important reasons why the solutions developed in one jurisdiction may be inappropriate elsewhere.”).

¹⁸ See S. AFR. CONST. Ch. 2, § 39(1)(c) (“When interpreting the Bill of Rights, a court, tribunal or forum . . . may consider foreign law.”).

¹⁹ See *infra* text accompanying note 99 (regarding Scalia’s hostility towards comparative constitutionalism).

III. DE-EMPHASIZING THE "IN REM FICTION"

Perhaps the most compelling empirical lesson to be taken from the American civil asset forfeiture experience is the technique's potential unpopularity. Asset forfeiture has come under considerable fire from Americans who consider themselves guardians of individual liberties. Organizations, including Forfeiture Endangers American Rights (FEAR),²⁰ the American Civil Liberties Union (ACLU)²¹ and the Cato Institute²² have published statements opposing the practice.

Dissatisfaction with civil asset forfeiture was so great in 1998 and 1999 that the "Civil Asset Forfeiture Reform Act of 2000"²³ passed in Congress by a landslide.²⁴ That bill brought together organizations as disparate as Democrats, Republicans, the National Association of Criminal Defense Lawyers and the National Rifle Association.²⁵ Though the protections of the Civil Asset Forfeiture Reform Act have quelled some of the opposition to civil asset forfeiture, significant dissatisfaction remains.²⁶

The vocal outrage at civil asset forfeiture in the States is largely attributable to a deep-rooted individual rights culture and, in some cases, the raw interests of those whose activities are precisely those targeted by civil asset forfeiture. However, at least some portion of its unpopularity can be blamed on the way American courts have developed and presented the technique.²⁷

American courts have upheld civil asset forfeiture against countless objections using an age-old theory termed the in rem fiction.²⁸ Under the

²⁰ See <http://www.fear.org> (last visited Nov. 15, 2001).

²¹ See <http://www.aclu.org/congress/lg033098a.html> (Mar. 30, 1998).

²² Roger Pilon, *Can American Asset Forfeiture Law be Justified?*, 39 N.Y.L. SCH. L. REV. 311 (1994). Roger Pilon is the Senior Fellow and Director of the Center for Constitutional Studies at the Cato Institute. *Id.*

²³ Pub. L. No. 106-185, 114 Stat. 202 (2000).

²⁴ See Patrick Poole, *Asset Forfeiture Reform Takes Effect*, WorldNetDaily, at http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=20047 (Aug. 25, 2000) (noting that H.R. 1658 "sailed through the House" and passed in the Senate "under a unanimous-consent motion").

²⁵ 146 CONG. REC. H2040 (daily ed. Apr. 11, 2000) (statement of Rep. Hyde), available at <http://www.house.gov/judiciary/hyde0411.htm>.

²⁶ See, e.g., <http://www.fear.org> (last visited Nov. 15, 2001); <http://www.civilliberty.about.com/cs/assetforfeiture> (last visited Nov. 15, 2001).

²⁷ This section admonishes the South African Constitutional Court not to duplicate the mistakes of the United States. The South African Constitutional Court exercised this form of "learning from the mistakes of others" comparative reasoning in *Makwanyane* when adjudicating the constitutionality of the death penalty. The court stated that "[t]he difficulties that have been experienced in following this path, to which Justice Blackmun and Justice Scalia have both referred, but from which they have drawn different conclusions, persuade me that we should not follow this route." *State v. Makwanyane*, 1995 (3) SA 391, 422 (CC).

²⁸ See *Austin v. United States*, 509 U.S. 602, 615 (1993) ("The fiction that 'the thing is primarily considered the offender,' has a venerable history in our case law.") (quoting *Goldsmith-Grant Co. v. United States*, 254 U.S. 505, 511 (1921)). The pedigree of this

in rem fiction, proceedings are brought against property rather than against its owner. Under such a legal theory, property may be forfeited without a showing of any culpability of the owner and, in extreme cases, without actually notifying the owner.

Rationalizations of civil asset forfeiture based on what is openly called a traditional fiction are discrediting on their face. Justice Scalia, an avid supporter of forfeiture, expounds this observation when he writes that the object of punishment in forfeiture is “more realistically . . . the property’s owner” rather than the “property itself.”²⁹ The contemporary application of the ancient doctrine yields anachronistic results, including comical case names. “A 1983 *Volkswagen v. Washoe County*,”³⁰ for example, conjures an image of a disgruntled VW bug appealing a judgment.

The supreme folly of the in rem fiction, however, is the paradox that has resulted from two relatively recent cases, *Austin v. United States*³¹ and *Bennis v. Michigan*.³² *Austin* held that the Excessive Fines Clause of the Constitution limits civil asset forfeiture while *Bennis* held that an innocent owner defense to civil asset forfeiture is not required by the Constitution. From these holdings, we must conclude that an innocent owner—one who, by definition, has committed no knowing or willfully blind wrong—who must forfeit her property, is not excessively fined. This conclusion presents a paradox, however, since penalizing an innocent person would seem to be the quintessential excessive fine.³³ It is this core paradox that led Justice Stevens in his *Bennis* dissent to write, “our recent decision in [*Austin*] compels reversal.”³⁴ The Court’s divergent results in *Austin* and *Bennis* are attributable to its reliance on a variety of doctrinal techniques in *Austin* and an almost exclusive reliance on the in rem fiction in *Bennis*.³⁵

The in rem fiction has led to a legitimacy problem for civil forfeiture. The fiction is alarming on its face, has been criticized by the Su-

practice dates as far back as the medieval tradition of deodand and British maritime practice. See, e.g., *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 680–83 (1974).

²⁹ *Austin*, 509 U.S. at 602.

³⁰ *A 1983 Volkswagen v. County of Washoe*, 101 Nev. 222 (1985).

³¹ 509 U.S. at 602.

³² 516 U.S. 442 (1996).

³³ Justice Scalia, in his *Austin* concurrence, advances an ingenious way to circumvent this paradox. He defines “excessiveness” in terms of a piece of property’s degree of connectedness to a crime, rather than in terms of the proportionality of the crime to the value of the property forfeited. “The question is not how much the confiscated property is worth, but whether the confiscated property has a close enough relationship to the offense.” 509 U.S. at 628 (Scalia, J., concurring) (italics omitted). This interpretation, however, is dictum.

³⁴ 516 U.S. at 459 (Stevens, J., dissenting).

³⁵ See Mark E. Beatty, *Bennis v. Michigan: The Supreme Court Clings to Precedent and Denies Innocent Owners a Defense to Forfeiture*, 48 *MERCER L. REV.* 1265, 1270 (1997) (“Despite one hundred and seventy years of social, economic, and industrial change, this decision clearly adheres to precedent rooted in early, nineteenth-century admiralty law cases such as *The Palmyra*.”).

preme Court, and has led to an unsightly paradox in the canon of American case law. Since South Africa does not have a binding tradition of forfeiture, the South African Constitutional Court should downplay the in rem fiction and focus instead on contemporary doctrinal arguments that illuminate POCA's constitutionality.

IV. ARBITRARY DEPRIVATION OF PROPERTY

The Constitution of South Africa states, "no law may permit arbitrary deprivation of property."³⁶ There is very little South African jurisprudence expounding the concept of arbitrariness, but using one South African case and several American cases relating to excessive fines, one can approximate a doctrine of arbitrariness applicable to POCA in South Africa.

A. Application of Existing South African Law

The High Court of South Africa has addressed arbitrariness in the area of warrants for search and seizure. In *Deutschmann NO v. Commissioner for the Revenue Service*, the state, after an ex parte proceeding, had issued a warrant to seize property believed to represent the benefit of tax fraud. The constitutionality of the issuance was questioned in court. The owners objected on grounds of arbitrariness and the High Court held:

The provisions in terms of which the warrant was sought and obtained in both matters do anything but permit arbitrary deprivation of property—these provisions require an application supported by information supplied under oath and the exercise of discretion by a Judge. The Judge who authorises the warrant does not thereby affect the property or the rights to such property vesting in an individual. Any party remains free, in terms of the statute, to establish his entitlement and claim delivery.³⁷

The constitutional bar on arbitrariness established by the *Deutschmann* court is minimal. The three prongs enumerated by the High Court—an informative application, discretionary judicial authorization and a chance to establish entitlement—are all present in the POCA proceeding. POCA discusses the process whereby property is preserved (i.e., seized), stating:

³⁶ S. AFR. CONST. Ch. 2, § 25(1).

³⁷ *Deutschmann NO v. Commissioner for the South African Revenue Service*, 2000 (2) SA 106, 124 (E).

38. Preservation of property orders—(1) The National Director may by way of an *ex parte* application apply to a High Court for an order prohibiting any person, subject to such conditions and exceptions as may be specified in the order, from dealing in any manner with any property.³⁸

Deprivation is thereby achieved only after an application and an exercise of judicial discretion. The opportunity to establish entitlement is left with the owner in the form of an innocent owner defense proceeding. Based on the above analysis, under the South African judiciary's existing conception of arbitrariness, POCA would likely pass muster with relative ease.

B. Application of American Law

If the Constitutional Court were to expand the arbitrariness doctrine in the direction of the United States' protective regime by importing conceptions of excessive fines, the arbitrariness analysis would be more involved, vesting more rights in the owners of forfeited property.

The U.S. Supreme Court has grappled extensively with the question of whether and when civil forfeiture comprises an excessive fine. Analysis of this question is simplified if forfeiture is divided into two broad categories—proceeds and instrumentalities. Proceeds are the revenues or profits of criminal activity, while instrumentalities are the tools used to execute criminal activities. Each category of forfeiture can be further subdivided for purposes of excessive fines analysis into cases where the possessor is an innocent owner and those where he is not. The American courts' holdings can be summarized as follows:

| | Proceeds | Instrumentalities |
|---------------------------|--|--|
| Non-innocent owner | Never excessive (<i>see Bajakajian</i> ³⁹ dicta) | Sometimes excessive (<i>see Austin</i>) |
| Innocent owner | Probably never excessive (<i>see Bajakajian</i> dicta; <i>Bennis</i>) | Usually excessive (<i>see Bennis</i>) |

³⁸ § 38 (1) of Prevention of Organised Crime Act 121 of 1998, 1 JSRSA 1-548 (2000).

³⁹ *United States v. Bajakajian*, 524 U.S. 321 (1998) (Kennedy, J., dissenting).

1. *Proceeds*

Proceeds forfeiture is easier to justify constitutionally than instrumentality forfeiture. This fact is represented in the first column of the table above. The American courts have found no constitutional obstacles to forfeiture when proceeds are being forfeited. Because the proceeds were acquired through a wrongful act, whether embezzlement, drug dealing or something else, the proceeds represent *unjust enrichment*. The proceeds of criminal activity are property to which some other individual or society has a higher claim by virtue of the current possessor's wrongful acquisition. Justice Kennedy, in his dissent in *Bajakajian*, succinctly articulates the logic of proceeds forfeiture:

If respondent had acquired the money in an unlawful manner, it would have been forfeitable as proceeds of the crime. As a rule, forfeitures of criminal proceeds serve the nonpunitive ends of making restitution to the rightful owners and of compelling the surrender of property held without right of ownership.⁴⁰ Most forfeitures of proceeds, as a consequence, are not fines at all, let alone excessive fines.⁴¹

Because proceeds forfeiture is rationalized on the basis of restitution, there is neither a fine nor punishment. Hence, the excessive fines and proportionality barriers established by the Constitution are bypassed.

The American courts' general response to forfeiture of property in the possession of an innocent person one or more transactions removed from the underlying illegal activity would probably be definitional—such property could not correctly be construed as the proceeds of criminal activity. Though the drug dealer's car, bought with drug profits, is the proceeds of criminal activity in his hands, once sold to the innocent third party, it represents the proceeds of a perfectly legal transaction. The courts have not examined a forfeiture proceeding against someone analogous to the innocent third party of the hypothetical. A reason for this is probably that prosecutors do not pursue such property, suggesting a tacit consensus between the judicial and executive branches on the narrow definition of proceeds.

A more difficult conundrum with a higher probability of arising occurs when the innocent owner of proceeds is the criminal's spouse. In *United States v. 92 Buena Vista Ave.*, the U.S. Supreme Court determined that a particular statutory formulation of the innocent owner's defense did not apply solely to bona fide market purchasers and therefore could

⁴⁰ See *United States v. Ursery*, 518 U.S. 267, 284 (1996).

⁴¹ *Bajakajian*, 524 U.S. at 349–50.

be utilized by a spouse.⁴² However, the availability of the defense does not mean that forfeiture of property in the possession of an innocent spouse would necessarily be considered an excessive fine. Analysis of excessiveness should balance the policy interests on each side. In favor of the spouse it might be argued that being married to a criminal is not a criminal activity. Therefore, the property in possession of the innocent spouse is not proceeds of criminal activity and is hence not forfeitable. Additionally, a court would likely consider the spouse's reliance interest in property. The countervailing arguments are: (a) depriving the spouse of the property is not as unjust as not restoring the property to someone who had to work for the property and was deprived of it wrongfully; and (b) depriving people of the proceeds of their spouse's criminal activity would encourage a norm of in-house criminal law enforcement. American courts are likely to rule in favor of the countervailing arguments because of a demonstrated commitment to the policies underlying forfeiture, especially the incentives for spousal monitoring.⁴³

2. Instrumentalities

Arguments for instrumentality forfeiture have three general forms. The first is that instrumentality forfeiture is remedial. By dealing a blow to organized crime—removing one link in the chain of criminal activity—such activity is hindered, if only for the time it takes for the forfeited link to be replaced. Second, the remedy of forfeiture is justified because the owner is believed to have been negligent with her property.⁴⁴ The third rationale conceptualizes instrumentality forfeiture as a fair approximation of proceeds forfeiture, when proceeds are not available. However, these doctrines have limited force for some fact patterns. For those, the Court has limited the reach of forfeiture using excessive fines.

The paradigmatic limitation of instrumentality forfeiture is found in *Austin*. There, the Court held that instrumentality forfeiture of defendant's auto body shop and mobile home for possession of two grams of cocaine with intent to distribute was limited by the Eighth Amendment's Excessive Fines Clause. The Court concluded "that forfeiture under [federal drug forfeiture provisions] constitutes 'payment to a sovereign as punishment for some offense,' and, as such, is subject to the limitations of the Eighth Amendment's Excessive Fines Clause."⁴⁵

⁴² *United States v. 92 Buena Vista Ave.*, 937 F.2d 98 (3d Cir. 1991).

⁴³ *See, e.g., Bennis v. Michigan*, 516 U.S. 442, 443 (holding that forfeiture of an *instrumentality* owned jointly by the criminal's spouse was constitutional). *A fortiori*, forfeiture of *proceeds* owned jointly by the spouse would not be excessive.

⁴⁴ Blackstone explained that the misfortunes of instrumentality forfeiture "are in part owing to the negligence of the owner, and therefore he is properly punished by such forfeiture." 1 WILLIAM BLACKSTONE, COMMENTARIES *291.

⁴⁵ *Austin*, 509 U.S. at 622 (quoting *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 265 (1989)).

The American Court's *Austin* holding, however, is difficult to square with its holding in *Bennis*. *Bennis* analyzes the constitutionality of instrumentality forfeiture of an innocent owner. A husband had engaged a prostitute using an automobile in which his wife had a community property interest. Could the Court sanction the forfeiture of the wife's interest in the automobile? The Court held that total forfeiture was constitutional. The Court's reasoning is summarized in the opinion's last paragraph: "We conclude today, as we concluded 75 years ago, that the cases authorizing actions of the kind at issue are 'too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced.'"⁴⁶

The *Bennis* and *Austin* holdings, taken together, are paradoxical. Under *Bennis*, the Constitution does not require an innocent owner defense to civil forfeiture. *Austin* says that forfeiture is limited by the Excessive Fines Clause. From this we must conclude that forfeiture of property from an innocent person is not an excessive fine. However, that is problematic because forfeiture of an innocent's property would in the opinion of most be the quintessential example of an excessive fine. This is the concern that Justice Stevens raised in his *Bennis* dissent:

[T]he forfeiture of petitioner's half interest in her car is surely a form of "excessive" punishment. For an individual who merely let her husband use her car to commute to work, even a modest penalty is out of all proportion to her blameworthiness; and when the assessment is confiscation of the entire car, simply because an illicit act took place once in the driver's seat, the punishment is plainly excessive.⁴⁷

Despite Justice Stevens' astute and scathing criticism of the *Bennis* majority, there is one forgiving way to read *Bennis*. Because the theory of the defense in *Bennis* did not use the Excessive Fines Clause, which was the Court's ground in *Austin*, the outcome was justifiably different from the *Austin* outcome. It could be viewed as an attempt to curtail the growth of the Due Process and Takings Clauses, which were the provisions cited by *Bennis*' counsel. Under this interpretation, the Court is guilty not of contradicting itself—only of not raising a winning argument based on the Eighth Amendment, *sua sponte*. Had *Bennis*' counsel based its client's argument on excessive fines à la *Austin*, then *Bennis* may have kept her car.

The South African Constitutional Court should recognize the interests being explored by the U.S. courts in the *Austin* and *Bennis* line of cases, and should grow its arbitrary deprivation doctrine with a consciousness of the jurisprudential pitfalls that have been already discov-

⁴⁶ *Bennis*, 516 U.S. at 453.

⁴⁷ *Id.* at 471.

ered for it. It is likely that the *Deutschmann* formulation of arbitrary deprivation will not adequately curb state action. The difficult question will be whether to draw the line recommended by *Bennis* or that of *Austin*. What the South African Court should not do is draw the line somewhere in the nebulous region between those two cases, as the American Supreme Court has done.

V. RIGHTS OF THE ACCUSED

Inquiry in this constitutional dimension has two parts. First, one must explore whether the owner of property that is the object of a forfeiture proceeding is accused under the constitutional definition of the word. Then, assuming they are accused, one must ask whether forfeiture compromises their constitutional rights as accused persons.

A. *Is the Owner Accused?*

Under South African law, whether a person is “accused” for constitutional purposes depends on whether the proceedings at question are criminal or civil. In *Nel v. Le Roux NO and Others* (1996), the Constitutional Court specified preconditions for the attachment of the section 35 rights of the accused. In that case the Constitutional Court examined whether subpoenaed witnesses were entitled to these rights and held that a subpoenaed person was not entitled “to the section 25(3) rights, for the simple reason that such examinee is not an accused facing criminal prosecution.”⁴⁸ Criminal prosecution, then, is a precondition to the attachment of the rights of the accused.

Though civil forfeiture proceedings are nominally civil, whether they are essentially criminal hinges on whether forfeiture is punishment. This section first analyzes the question using a doctrinal framework as established by several legal scholars. The second analysis looks to the South African Constitutional Court’s own jurisprudence on the civil-criminal distinction. Finally, the rights of the accused are examined using the American Supreme Court’s framework.

1. *Doctrinal Framework*

H. L. A. Hart, the pioneer of legal positivism and scholar of jurisprudence at Oxford,⁴⁹ provided the basic five-part test with which “most

⁴⁸ *Nel v. Le Roux NO*, 1996 (3) SA 562, 571 (CC). The number of the constitutional section relating to the rights of the accused, arrested, and detained was changed from 25 to 35 when South Africa made the transition from the Interim Constitution to the Final Constitution.

⁴⁹ See generally Tony Honoré, *H. L. A. (Herbert) Hart* (profile on *Legal Philosophy in Oxford* Web site), at <http://www.law.ox.ac.uk/jurisprudence/hart.htm> (last visited Oct. 17,

discussions about the nature of punishment begin, even if they do not end."⁵⁰

- (i) [The punishment] must involve pain or other consequences normally considered unpleasant.
- (ii) It must be for an offence against legal rules.
- (iii) It must be of an actual or supposed offender for his offence.
- (iv) It must be intentionally administered by human beings other than the offender.
- (v) It must be imposed and administered by an authority constituted by a legal system against which the offence is committed.⁵¹

In our analysis, we must add a sixth element that contemporary scholars, including Professors Carol Steiker and Donald Dripps, have argued is necessary to truly identify criminal prosecution. Steiker has called this element the "blaming" function.⁵² Dripps has written, "[Punishment is] accompanied not by the reluctance of sad necessity, but by the self-congratulatory emotion of blame. The convict is held up for hatred as well as confined; the government inflicts pain with a self-conscious attitude of moral superiority."⁵³

If we start our analysis of civil asset forfeiture by discarding the in rem fiction and accepting Justice Scalia's conclusion that the owner is the true object of forfeiture, then Hart's qualifications (i), (iv), and (v) are trivially satisfied.⁵⁴ The deprivation of property is normally considered unpleasant; it is applied by the National Prosecutor and her staff, who derive their authority from the same legal system that articulates the offenses for which the forfeiture proceeding is initiated.

So long as there is an innocent owner defense, POCA creates a new derivative offense that can be succinctly stated as the knowing or will-

2001) (on file with the Harvard Civil Rights-Civil Liberties Law Review).

⁵⁰ Carol S. Steiker, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO. L.J. 775, 880 (1997).

⁵¹ H.L.A. Hart, Prolegomenon to the Principles of Punishment, Presidential Address to the Aristotelian Society (Oct. 19, 1959), in H. L. A. HART, PUNISHMENT AND RESPONSIBILITY 1, 4-5 (1968).

⁵² Steiker, *supra* note 50, at 804.

⁵³ Donald Dripps, *The Exclusivity of the Criminal Law: Toward a "Regulatory Model" of, or "Pathological Perspective" on, the Civil-Criminal Distinction*, J. CONTEMP. LEGAL ISSUES 199, 204 (1996).

⁵⁴ One could argue that the "administration" requirement (iv) is not satisfied if the intentionality of administration must be not merely of the physical act by the state of depriving property, but also of the unpleasant consequences that follow. If the goal of the state is merely restitution and confounding organized criminals, then the state does not intend to generate a subjective experience of pain. This, however, reads too much into Hart's language as the word "intentionally" mentioned in (iv) attaches literally only to "administered."

fully blind ownership of tainted property. It is for this offense that forfeiture occurs.⁵⁵ Therefore, the qualification that it must be an offense against legal rules (ii) appears satisfied. As discussed above, the qualification that there must be an actual or supposed offender (iii) is satisfied too, as long as there is an innocent owner defense, because then forfeiture is imposed on owners for their commission of a derivative offense.

The final question is whether the blaming function is fulfilled. Steiker provides a set of three sub-questions she believes enable us to satisfactorily answer the final question. "First, what is the state's intent? . . . Second, what is the effect of the forfeiture on the defendant? . . . Finally, what is the public message or social meaning of the forfeiture of the defendant's property by the government?"⁵⁶ As for the question of the state's intent, POCA, in its preamble, states, "no person should benefit from the fruits of unlawful activities."⁵⁷ This aim certainly does not seem aimed at blaming. The goal of proceeds forfeiture is restitution and that of instrumentality forfeiture is to confound organized crime. Both seem more remedial than punitive. These arguments suggest the blaming function is not fulfilled.

Additionally, it might be argued that inquiring into the state's intent is futile. It is doubtful that the state even has intent. Arguably, legal rules are just a set of legislative compromises representing the tensions between competing political factions' interests. The state may not actually have a discrete identity or consciousness that would serve as a repository of intent. The difficulties of finding the intent of the state are analogous to those of finding the mens rea of a corporation.⁵⁸

The answer to the second question in Steiker's piece, as to what the effect of forfeiture is on the defendant, can be deduced. Almost by definition, the individuals targeted by civil asset forfeiture are wealthy. Because they are participating in organized crime, they are usually not perceived to be petty criminals, and may even have a high degree of status in the community. The sudden deprivation of assets is extremely visible in their communities and likely to be extremely humbling. Empirical evidence supports this deduction. The owner of an upscale brothel, called "The Ranch," was shocked and angered by a civil asset forfeiture raid on his business. "The closing-down of The Ranch was an act of revenge by the police's aliens investigative unit because I was trying to expose their corruption. Why did this happen when it did, after 13

⁵⁵ In the absence of an innocent owner defense, the violation of law resulting in forfeiture of an innocent's property is wholly passive. It is questionable if passive violations are "offenses" since offensive intentionality is lacking.

⁵⁶ Steiker, *supra* note 50, at 815-16.

⁵⁷ Preamble of Prevention of Organised Crime Act 121 of 1998, 1 JSRSA 1-534 (2000).

⁵⁸ For example, if an individual employee knows or should know that she is violating the law, then does the state have the required mens rea for a finding of recklessness?

years of The Ranch's being a successful adult entertainment business? There were no drugs or children involved,"⁵⁹ he said to reporters. Arguably, his desire to demonstrate those community boundaries that were not transgressed reflects the value he placed on respectability.

Ultimately, the third question is difficult to answer because it is difficult to know the public's perception, or social meaning, of forfeiture. It is equally plausible that the social meaning of forfeiture is "the self-congratulatory emotion of blame,"⁶⁰ in that forfeiture represents an effective, concerted effort to clean up South Africa. The plausibility of either hypothesis recommends further research and analysis. In addition, it should be noted that the two are not mutually exclusive. The preceding analysis strongly suggests that the question of whether POCA is a criminal proceeding masquerading as a civil one is indeterminate.⁶¹

2. South African Law

In defense of POCA, the state can advance an alternate line of punishment theory. The state must argue that a suit geared entirely to the deprivation of property lacks the potential for imprisonment, which is the true, essential signifier of criminal accusation, not the tests of Hart and Steiker.

This argument finds some structural support in the Constitution. Section 35 of the Constitution is entitled "Arrested, detained and accused persons." The fact that these three items are clustered in the same section of the Bill of Rights suggests that they provide a related set of protections. It would violate textual coherence of the Constitution if the defining characteristic of the first two in the cluster were different from that of the last. The first two (arrest and detention) are defined by physical restraint of the person, which suggests that at least the potential for the same should be implicit in the last.

Since forfeiture holds no potential for the owner's potential confinement, it would seem that its subjects fall outside the Constitutional definition of "accused." The Constitutional Court equated accusation with bodily threat in *Baloyi*, writing that actions aiming "to coerce the will," are civil, while those aiming "to punish the body for completed violation," are criminal in character.⁶²

⁵⁹ Glenda Daniels, *Ranch Owner Fights Back*, MAIL & GUARDIAN, June 1, 2001, available at LEXIS, Africa News File.

⁶⁰ Hart, *supra* note 51, at 54.

⁶¹ The outcome of this analysis of South African forfeiture is less certain than Steiker's analysis of U.S. forfeiture law in the context of the landmark case *United States v. Ursery*, 518 U.S. 267 (1996). Steiker writes, "[My] analysis strongly suggests that civil forfeiture as generally practiced today by the federal government is in fact punishment." Steiker, *supra* note 50, at 817.

⁶² *State v. Baloyi*, 2000 (2) SA 425, 439 (CC). Such a definition of accusation is consistent with the definition suggested by the American Constitution in the Fifth Amend-

3. *Application of American Law*

Additionally, the state can look to the U.S. Supreme Court for support of its claim that civil asset forfeiture is not a criminal proceeding clothed as a civil one. In *United States v. Ursery*, the Court wrote,

[T]here is no requirement in the statutes that we currently review that the Government demonstrate scienter in order to establish that the property is subject to forfeiture; indeed, the property may be subject to forfeiture even if no party files a claim to it and the Government never shows any connection between the property and a particular person.⁶³

By analogy, there is no scienter requirement in the prima facie government case under POCA civil forfeiture. A proceeding against property that does not require even the identification of a person cannot require a showing of *state of mind* and therefore lacks the imprimatur of criminal prosecution.

This argument, however, can be strongly countered. For a statute to be constitutional, it must pass muster in the individual case at hand. Though there may be cases where scienter need not be shown (those in which the owner does not launch an innocent owner defense), those cases in which a defendant does choose to launch an innocent owner defense, necessitate a court finding of scienter. In those cases, an owner comes forth and must be shown by the state to have been at least willfully blind.⁶⁴

The South African Constitutional Court may borrow another innovative piece of the U.S. Supreme Court's reasoning from *Ursery*. The Court lent significant weight to the non-punitive goals of civil forfeiture. "Requiring the forfeiture of property used to commit federal narcotics violations encourages property owners to take care in managing their property and ensures that they will not permit that property to be used for illegal purposes."⁶⁵ The Court concluded that this was an important factor in finding a civil asset forfeiture proceeding civil.

However, it cannot be that the mere existence of a remedial effect makes a prosecution civil as opposed to criminal. All criminal penalties, including imprisonment, serve important remedial goals. Imprisonment is frequently said to enable rehabilitation and specific deterrence, by keep-

ment. The protection from two prosecutions for the same offense is defined as a protection from double jeopardy of "life and limb."

⁶³ *Ursery*, 518 U.S. at 291-92.

⁶⁴ See *supra* text accompanying note 55.

⁶⁵ *Ursery*, 518 U.S. at 290. The reasoning cited was just one factor in a balancing test that also gave considerable weight to scienter, precedent, and forfeiture's aim of deterrence. See *id.* at 291.

ing the convict off of the streets.⁶⁶ If these remedial effects alone carried the day, then there would be no such thing as criminal prosecution. There must be a way to balance the civil and criminal characteristics of a proceeding to determine its nature. However, Hart, Steiker, the U.S. Supreme Court, and the South African Constitutional Court have failed to provide a satisfactory mechanism for balancing factors when a particular proceeding has civil and criminal characteristics.

B. *The Avalanche of Infringement*

If the owner is considered an accused person despite these strong countervailing considerations, then a large set of constitutional protections attach under § 35(3). Civil forfeiture as formulated under POCA infringes on several of these rights if the owner is considered an accused person.⁶⁷

1. *Right to Counsel*

Right to counsel objections against POCA potentially have two forms.⁶⁸ The simpler version is that POCA civil forfeiture is essentially criminal and therefore the state should pay for indigent defense when “substantial injustice” might result. There is a jurisprudential pitfall underlying this language arising from the ambiguity of the substantial injustice standard. In an interview, a South African professor of law told Professor Charles Ogletree that, “The future of the right to counsel will depend solely on the interpretation of the phrase ‘substantial injustice.’ It isn’t a particularly strong foundation.”⁶⁹ The remedy in cases where the Court analyzes the provision and finds an objection valid is relatively simple: court-appointed counsel.

The second form of objection is more closely tailored to the nuances of forfeiture and is much harder to remedy. Under civil asset forfeiture, frequently all of a person’s assets are frozen. Oftentimes, a wealthy person, who would otherwise be able to afford an exceptional defense team, is rendered indigent for purposes of appointing counsel. So even where the court appoints counsel, the right to counsel might be burdened be-

⁶⁶ See *id.* at 292 (“[T]hough [the forfeiture] statutes [at issue] may fairly be said to serve the purpose of deterrence, we long have held that this purpose may serve civil as well as criminal goals.”).

⁶⁷ See S. AFR. CONST. Ch. 2, § 35(3)(e) (setting forth the right “to be present when being tried”). In addition to the three rights provisions discussed in this section in some detail, POCA procedure may violate the right to be present when being tried. Confiscation without notice enables property to be taken without an in court confrontation.

⁶⁸ See S. AFR. CONST. Ch. 2, § 35(3)(f), (g) (establishing the right to counsel).

⁶⁹ Charles J. Ogletree, Jr., *From Mandela to Mthwana: Providing Counsel to the Unrepresented Accused in South Africa*, 75 B.U. L. REV. 1, 20 (1995) (citing an interview with Etienne Mureinik, Professor of Law, Witwatersrand University (Jan. 17, 1994)).

cause a defendant may not select counsel of choice—counsel that they would have been able to afford had their assets not been frozen.

This problem was resolved by the U.S. Supreme Court in *Caplin & Drysdale*.⁷⁰ There, the Court found “untenable” the proposition that the Sixth Amendment should limit a forfeiture statute in cases where forfeiture prevents a defendant from retaining counsel that he or she would have been able to afford absent forfeiture.⁷¹ The Court supported its holding on the theory that “a defendant has no Sixth Amendment right to spend another person’s money.”⁷²

While the defendant objected that the property did not belong to the aggrieved bank in actuality, but only through the fiction of relation-back doctrine, the Court rejected this argument, emphasizing the relation-back doctrine’s precedential value and the defendant’s dubious title to the money.⁷³ The Court’s reasoning here was suspect, because the defendant’s legitimate title to the property was what he sought to prove—an endeavor in which competent counsel would have been of considerable benefit.

The second constitutional argument raised by the defendant in that case involved the Fifth Amendment “balance of forces” doctrine.⁷⁴ The Court handily dismisses this argument stating, “The Constitution does not forbid the imposition of an otherwise permissible criminal sanction, such as forfeiture, merely because in some cases prosecutors may abuse the processes available to them”⁷⁵

The South African Court may find the dissent’s reasoning in *Caplin* more persuasive than the majority’s. In dissent, Justices Blackmun, Brennan, Marshall and Stevens reiterate from an earlier case the proposition that the majority’s opinion demonstrates an “apparent unawareness of the function of the independent lawyer as a guardian of our freedom.”⁷⁶ The dissent assails the majority decision on the grounds of fairness and policy, arguing that it (a) violates basic fairness,⁷⁷ (b) deprives

⁷⁰ *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617 (1989).

⁷¹ *Id.* at 626.

⁷² *Id.* at 625–26.

⁷³ *Id.* at 627 (“There is no constitutional principle that gives one person the right to give another’s property to a third party, even where the person seeking to complete the exchange wishes to do so in order to exercise a constitutionally protected right.”).

⁷⁴ *Id.* at 633 (citing *Wardius v. Oregon*, 412 U.S. 470, 474 (1973)).

⁷⁵ *Id.* at 634. The majority’s response to this argument is too dismissive because the “balance of forces” doctrine is not only about prosecutorial abuse. At its core, it addresses the disparity between the prosecution’s economic incentives to wage a grand case and the economic capabilities of the subject of civil asset forfeiture to counter that case effectively.

⁷⁶ *Id.* at 644 (quoting *Wheat v. United States*, 486 U.S. 153, 172 (1988)) (internal quotation marks omitted).

⁷⁷ *Id.* at 644–51. The dissent’s fairness argument is that the title of forfeited property is exactly what the Court must determine in a proceeding. To deprive a defendant of access to that property in order to make their case on a mere showing of probable cause cripples the defense through an *ex ante* assumption of guilt or liability. This argument is less persuasive today than at the time it was made because the federal forfeiture statutes after the Civil

defendants of attorney-client relationships characterized by trust, (c) disrupts the equality of legal representation between state and defendant, (d) threat-ens the foundations of the criminal defense bar and (e) does not further forfeiture's core aim of taking the profit out of crime. The dissent's vehement opposition to the *Caplin* rule persuasively recommends a point of South African departure from American tradition.

2. *Presumption of Innocence*

The presumption of innocence poses the most serious constitutional obstacle to civil forfeiture under POCA. The South African Constitutional Court has laid out the contours of presumption of innocence protection in some detail. In *State v. Zuma and Others*, the Court wrote, "In . . . South Africa the presumption of innocence is derived from the centuries old principle of English law, . . . it is always for the prosecution to prove the guilt of the accused person, and . . . the proof must be proof beyond a reasonable doubt."⁷⁸ The Court proceeded to adopt two principles:

- I. The presumption of innocence is infringed whenever the accused is liable to be convicted despite the existence of a reasonable doubt.
- II. If by the provisions of a statutory presumption an accused is required to establish, that is to say to prove or disprove, on a balance of probabilities either an element of an offence or an excuse, then it contravenes section 11(d).⁷⁹ Such a provision would permit a conviction in spite of a reasonable doubt.⁸⁰

Under POCA, the state need only prove its case on a balance of probabilities. This seems to violate Principle I since a reasonable doubt could exist despite the balance of probabilities standard having been met. However, is the innocent owner defense an adequate prophylactic? It is not, because the innocent owner defense violates Principle II. It requires the defendant to prove an excuse on a balance of probabilities. This is too high of a standard—it might permit conviction despite a reasonable doubt. So, though the presumption of innocence as formulated in *Zuma* does not disqualify the burden shift entailed in POCA per se, it does discredit the balance of probabilities standard advanced by the latter.

Asset Forfeiture Reform Act now require a prima facie showing that property is tainted, rather than a mere probable cause showing.

⁷⁸ *State v. Zuma*, 1995 (2) SA 642, 656 (CC) (quoting *Regina v. Downey*, [1992] D.L.R. 449, 461 (Can.)).

⁷⁹ The Interim Constitution's precursor to § 35(3) was § 11(d).

⁸⁰ *Zuma*, 1995 (2) SA at 656.

3. *Double Jeopardy*

Section 35(3)m advances what amounts to a double jeopardy provision. The most natural interpretation of this provision in the context of civil asset forfeiture is that a second trial may not follow, since the first trial (if only nominally civil) would be preclusive.⁸¹ The state would have to combine the POCA proceedings with the underlying criminal proceedings and engage in a single, grand, unified litigation.

If POCA were found to be a form of punishment, an avalanche of rights for the accused would follow, effectively eviscerating POCA. Accommodating a meaningful right to counsel and requiring a prosecution in conjunction with the civil case would entail increased administrative costs, while presuming innocence would deprive the State of its most powerful advantage under POCA as it stands. In order to avoid precipitating the avalanche in the first place, the State would aggressively refute arguments that the owner in a POCA civil forfeiture proceeding is an accused facing criminal prosecution.

VI. DISTINCTLY SOUTH AFRICAN CONSTITUTIONAL PROVISIONS

A. *Equality*

Section 9(1) of the South African Constitution states that, “[e]veryone is equal before the law and has the right to equal protection and benefit of the law.”⁸² This clause, though related in subject matter to the U.S. Constitution’s Equal Protection Clause, is distinct, because it grants “equal benefit.” Professor Jeremy Sarkin has written, “the final Constitution requires more than formal equality in law; equality must be achieved in the effect and impact of laws as well.”⁸³ In America, disparate impact arguments have frequently failed under equal protection.⁸⁴ In South Africa, however, the Court appears to welcome impact reasoning.

⁸¹ In *Ursery*, 518 U.S. 267 (1996), the American Supreme Court held that civil asset forfeiture was neither punitive nor a criminal proceeding but only for double jeopardy purposes, suggesting that the inquiry into punitiveness and criminality might be different with respect to other Bill of Rights provisions. Such multifarious inquiries are neither required nor recommended for the developing South African Bill of Rights analysis.

⁸² S. AFR. CONST. Ch. 2, § 9(1).

⁸³ Jeremy Sarkin, *The Drafting of South Africa’s Final Constitution From a Human-Rights Perspective*, 47 AM. J. COMP. L. 67, 80 (1999).

⁸⁴ See *United States v. Armstrong*, 517 U.S. 456 (1996) (holding that evidence that an overwhelming majority of crack distribution prosecutions were made against black defendants was not enough to enforce defendant’s request for government records that might illuminate selective prosecution). See also *Washington v. Davis*, 426 U.S. 229 (1976). *Davis* overruled a challenge to a written verbal ability test that applicants for police positions were required to pass. Blacks failed the test four times more frequently than whites, and there was evidence that performance on the test did not necessarily correlate with job performance. The Court held that equal protection was not violated absent discriminatory purpose.

In *President of South Africa v. Hugo*, Justice Goldstone wrote: "Each case, therefore, will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the Constitutional goal of equality or not."⁸⁵

Most forfeiture activity in South Africa is initiated against people from minority groups.⁸⁶ In most cases, prosecutions are being carried out against whites and in some cases against Indians. Very little forfeiture activity is initiated against blacks, who comprise the overwhelming majority of South Africans. Facially it might seem that the civil forfeiture's impact is unequal, in potential contravention of § 9(1).

However, the National Director of Public Prosecutions could handily counter such an equality argument with its own reasoning, showing that whites and Indians are the groups most frequently engaging in organized crime of the sort targeted by POCA.⁸⁷ To the extent organized crime requires large capital outlays and legitimized economic and political fronts, this argument is tenable since blacks have proportionately less influence in the aforementioned spheres. Additionally, black South Africans continue to own significantly less property than whites. Since in rem proceedings pursue property, this too would explain some of the discrepancy.

B. Limitations Clause

The South African Court could conceivably find that POCA infringes upon all of the rights enumerated above and still find civil asset forfeiture constitutional. The South African Constitution formally enunciates the standard to be used when scrutinizing laws and state activities that infringe rights in § 36, which is entitled "Limitations of Rights." The existence of an explicit provision is different from the American system, in which a threshold determination as to the appropriate level of scrutiny must be made by the Court on an ad hoc basis.

The uniform test advanced by the South African Constitution resembles American intermediate scrutiny. If, after weighing the importance of fighting organized crime, the degree of infringement effected by rights, the relation of POCA to the aim of fighting organized crime and the availability of less restrictive means, the Constitutional Court finds

⁸⁵ *President of S. Afr. v. Hugo*, 1997 (4) SA 1, 23 (CC).

⁸⁶ I make this assertion based on my personal experience in the NDPP.

⁸⁷ Statistical data in support of the NDPP's counter-argument would be hard to find. While most measurement of crime arises from law enforcement activity, there is no credible benchmark against which to evaluate discrimination by law enforcement. For any statistical claims of disparate impact to be forceful, crime would have to be measured through mechanisms other than law enforcement.

POCA “reasonable” and “justifiable” then it could still pass muster.⁸⁸ This standard is easier to pass than strict scrutiny, the latter being the standard that American courts apply when laws curtail the rights enumerated above.⁸⁹

C. *Horizontal Applicability*

While the American Bill of Rights operates exclusively to limit state action, the South African Bill of Rights operates to regulate private relations as well. Professor Sarkin has written, “the final Bill of Rights not only binds the state (vertical application) but, to the extent that the nature of the rights permits, it also binds private and juristic persons (horizontal application).”⁹⁰ Section 12 enshrines the right to freedom and security of the person and specifically protects the right “to be free from all forms of violence from either public or private sources.”⁹¹ In *Baloyi*, when examining whether the procedural nuances of a statute designed to combat domestic violence infringed the presumption of innocence, the Constitutional Court interpreted §12(1) to establish “the imperative for such legislation.”⁹² The Court continued:

[S]ection 12(1) has to be understood as obliging the state directly to protect the right of everyone to be free from private or domestic violence. Indeed, the state is under a series of Constitutional mandates which include the obligation to deal with domestic violence⁹³

This form of reasoning enables a “constitutional equation”⁹⁴ in which the Court weighs the interests served by a statute by the yardstick of the constitutional rights the statute may serve to protect. To the extent that organized crime threatens the freedom and security of individuals, the goals of POCA are transformed from mere policy interests to constitutional imperatives. An analysis analogous to the one in *Baloyi* would likely be appropriate and could provide a sturdy last line of defense for civil forfeiture.

⁸⁸ See S. AFR. CONST. Ch. 2, § 36.

⁸⁹ All of the rights analyzed would be subject to strict scrutiny because they would be considered fundamental rights or involve the suspect classification of race.

⁹⁰ Sarkin, *supra* note 83, at 80. Cf. S. AFR. CONST. Ch. 2, § 8(2) (“A provision of the Bill of Rights binds natural and juristic persons if, and to the extent that, it is applicable, taking into account the nature of the right and any duty imposed by the right.”).

⁹¹ S. AFR. CONST. Ch. 2, § 12(1)(c).

⁹² State v. Baloyi, 2000 (2) SA 425, 432 (CC).

⁹³ *Id.*

⁹⁴ *Id.* at 434.

VII. CONCLUSION

As a newly established, developing democracy, South Africa is facing a host of difficult challenges. A revolution in the political and social foundations of a nation does not come without difficulties. South Africa is benefiting in its endeavor by learning from the mistakes and successes of other nations. Though it has a long way to go, it continues to make progress at an impressive clip because of its vigilant, selective constitutional borrowings.

From the analysis above, civil asset forfeiture as implemented by POCA, would probably pass muster if scrutinized by the South African Constitutional Court. Though any analysis grounded in comparative constitutional law cannot be strongly conclusive, it can serve to signal important empirical facts and shortcuts to resolution of legal problems. The avalanche of infringement that follows if the owners targeted by civil asset forfeiture are considered to be accused persons signals the gravest danger to the statute. However, enough constitutional jurisprudence is available for the court to steer clear of the avalanche. The remedial powers of forfeiture have been given great weight by the U.S. Supreme Court and the fact that it does not require imprisonment renders it incongruent with the concept of criminal prosecution under South African case law. The signal from the United States' arbitrariness jurisprudence, arising under the doctrines of excessive fines and due process, is to create some civil rights checks grounded in an idea of proportionality, but not to entangle and confuse civil rights with an *Austin-Bennis*-type paradox. POCA's last lines of defense would come from the Limitations Clause and horizontal applicability. That the U.S. Supreme Court has consistently upheld civil asset forfeiture in the absence of a Limitations Clause and horizontal applicability suggests that POCA should have an even easier time passing muster in South Africa than U.S. civil asset forfeiture statutes have had in this country.

The analysis above shows that the ideas that drive judicial decision-making are sometimes useful outside of the countries in which they originate. The international compatibility of law across democracies could herald a new era of international cooperation in scholarship and governance. However, the benefits of a dialogue will not be realized until the countries to which South Africa has been a devoted pupil take one lesson from their student—progress is quickened when democracies learn from each other.⁹⁵

⁹⁵ See generally L'Heureux-Dubé, *supra* note 2 (noting that the one-way transmission of constitutional ideas from the U.S. to the rest of the world should be replaced by a dialogue).

The United States must be included in the short list of countries that are reluctant to draw upon the constitutional traditions of others.⁹⁶ Professor Bruce Ackerman of Yale Law School has observed the “emphatic provincialism” of contemporary American constitutionalism.⁹⁷ While other countries clip the triumphs of our constitutional jurisprudence and transplant them on their own soil, giving them new life, our courts dig to the roots of their own work in pursuit of original meaning. Ackerman has prescribed a fundamental change in American legal practice:

First and foremost, we must learn to think about the American experience in a different way. Until very recently, it was appropriate to give it a privileged position in comparative study. Other experiments with written constitutions and judicial review were simply too short to warrant confident predictions about which, if any, would successfully shape long-run political evolution. But as we move into the next century, such skepticism is no longer justified.⁹⁸

The skepticism has manifested itself in a fierce debate among Justices of the U.S. Supreme Court. Opposing Justices Breyer and O’Connor is Justice Scalia.⁹⁹ In his majority opinion in *Printz*, Justice Scalia wrote, “Justice Breyer’s dissent would have us consider the benefits that other countries, and the European Union, believe they have derived from federal systems that are different from ours. We think such comparative

⁹⁶ Recent U.S. Court opinions exhibit relatively infrequent references—found largely in dissents—to foreign constitutional law. *See, e.g.*, *Printz v. United States*, 521 U.S. 898, 976 (1997) (Breyer, J., dissenting); *Knight v. Florida*, *cert. denied*, 528 U.S. 990, 993 (1999) (Breyer, J., dissenting). Disfavor of comparative constitutionalism is demonstrated in some Court opinions. *See, e.g.*, *Stanford v. Kentucky*, 492 U.S. 361, 370 n.1 (1989) (Scalia, J.) (rejecting a proposed constitutional age limit on the death penalty, based in part, on practices in other countries) (“We emphasize that it is *American* conceptions of decency that are dispositive”). Older case law, however, treats foreign law more favorably, giving it some weight in majority and concurring opinions. *Duncan v. Louisiana*, 391 U.S. 145, 146 (1968) (determining whether a jury trial was a fundamental procedure by examining whether it “is necessary to an Anglo-American regime of ordered liberty”); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 650–52 (1952) (Jackson, J. concurring) (examining the experience of Germany, France and Great Britain when rejecting the argument that the President had the inherent power to take possession of the Nation’s steel industry in wartime.) (“This contemporary foreign experience may be inconclusive as to the wisdom of lodging emergency powers somewhere in a modern government. But it suggests that emergency powers are consistent with free government only when their control is lodged elsewhere than in the Executive who exercises them. That is the safeguard that would be nullified by our adoption of the ‘inherent powers’ formula.”)

⁹⁷ *See* Bruce Ackerman, *The Rise of World Constitutionalism*, 83 VA. L. REV. 771, 773 (1997) (“Over the past decade, we have been grappling with the original understanding of the Constitution of 1787, the Bill of Rights, and the Reconstruction Amendments with new intensity.”).

⁹⁸ *Id.* at 774.

⁹⁹ *See supra* text accompanying note 12, *supra*, for Justice Breyer’s belief in the value of comparative constitutionalism.

analysis inappropriate to the task of interpreting a constitution.”¹⁰⁰ Justice Scalia’s use of “a constitution” as opposed to “the Constitution” suggests that he is not against comparative analysis only in relation to the American Constitution, but in relation to constitutions generally. By advising as to the absolute impropriety of certain types of interpretation, he posits the existence of some universals of constitutional interpretation. Simultaneously, however, by refusing to look elsewhere, he implies that only his Court is privy to those universals. The model of world constitutionalism conceived by Justice Scalia, then, is not one of complete sovereign isolationism. In this world, the United States Supreme Court prescribes what is and is not appropriate when analyzing “a constitution,” but does not take reciprocal input from other courts. The image of an expanded Federal hierarchy where all other nations’ highest courts are spliced under the Supreme Court, at the same level as United States Courts of Appeals, comes to mind.

The model of globalization implicit in Justice Scalia’s *Printz* opinion is deeply problematic. Justice L’Heureux-Dubé has written:

It is to be hoped . . . that the United States Supreme Court will begin to consider, in more depth, the opinions of other high courts around the world. In doing so, perhaps the Court will benefit from the work of others, as those around the world have learned and continue to learn so much from the United States. If we continue to learn from each other, we as judges, lawyers, and scholars will contribute in the best possible way to the advancement not only of human rights but to the pursuit of justice itself, wherever we are.¹⁰¹

Her optimism regarding comparative constitutionalism is well founded. The process of consideration, adoption and rejection taking place between the highest courts of many different nations is a dialog of tremendous value. It is a process of legal development that produces more resilient legal principles than its alternative. By closing its borders to foreign constitutional principles, the United States is denying itself access to a valuable, vibrant exchange. By not entering the fray of judicial globalization and by not considering competing ideals of foreign origin, we are limiting the potential of our own jurisprudence.

¹⁰⁰ *Printz*, 521 U.S. at 921.

¹⁰¹ L’Heureux-Dubé, *supra* note 2, at 40.