UC DAVIS LAW REVIEW ONLINE

VOL. 51 SEPTEMBER 2017

Justice Thomas, Civil Asset Forfeitures, and Punitive Damages

Jill Wieber Lens[*]

TABLE OF CONTENTS

INTRODUCTION

In March 2017, the Supreme Court denied certiorari on a constitutional challenge to Texas's civil asset forfeiture law.[1] Generally, that law allows the government to seize property used in criminal activity and, after civil proceedings, take ownership of such property.[2] Justice Clarence Thomas agreed with the denial, but wrote separately to question the constitutionality of civil asset forfeiture law.[3] He explained

 Professor of Law, Baylor University School of Law (J.D., University of Iowa College of Law; B.A., University of Wisconsin). I dedicate this essay to my son, Caleb Marcus Lens, who liked to kick me — a lot — while I worked on it. Caleb died in utero on June 19, 2017, two weeks before our scheduled induction.

[1] Leonard v. Texas, 137 S. Ct. 847 (2017).

[2] *Id.* at 847 (Thomas, J., concurring).

[3] *See id.* at 847-50.

that the purpose of the law is to punish, briefly cited statistics showing how the law is abused, and questioned whether the historical existence of civil forfeiture justifies its current constitutionality — even though the Supreme Court, including Justice Thomas, has previously held exactly that. Many interpreted Justice Thomas's statement as an invitation for challenges to civil forfeiture laws.[4]

As a punitive damages scholar, I was shocked by what I saw in Justice Thomas's separate statement. In short, it was almost the exact opposite of what he has written about punitive damages. He admits that the purpose of punitive damages is to punish, but he has never acknowledged possible abuse. And he has always held true to the idea that the historical existence of punitive damages justifies their current constitutionality.

The purpose of this essay is to explore the remarkable similarities between civil forfeitures and punitive damages — their punishment purposes, controversial natures, and long histories. It also explores one specific inconsistency between the civil punishments — and Justice Thomas's views of both. In addition, the essay reviews lessons for those seeking constitutionally based reforms of civil forfeitures based on the limited success of such reforms of punitive damages.

I. LONGSTANDING CIVIL PUNISHMENTS

Civil asset forfeitures and punitive damages are both forms of civil punishments,[5] meaning punishments imposed in civil, as opposed to criminal, proceedings. A forfeiture is a punishment — loss of property

[4] *See, e.g.*, Matt Ford, *Justice Thomas's Doubts About Civil Forfeiture*, ATLANTIC (Apr. 3, 2017), https://www.theatlantic.com/politics/archive/2017/04/clarence-thomas-civil-forfeiture/521583/?utm_source=nl-politics-daily-040317 (interpreting Thomas's statement as "a clear signal that he'd like to revisit the issue in the future," and "as a sort of flare gun to catch lawyers' attention on an issue"); German Lopez, *A Very Conservative Supreme Court Justice Seems Ready to Stop Police from Taking Your Stuff*, VOX.COM (Mar. 6, 2017), http://www.vox.com/policy-and-politics/2017/3/6/14830278/civil-forfeiture-supreme-court (explaining that Thomas is "seemingly ready to finally do away with the practice altogether"); Nick Wing, *Supreme Court Begins to Question Government's Broad Power to Seize Property*, HUFFINGTON POST (June 7, 2017), http://www.huffingtonpost.com/entry/supreme-court-honeycutt-us_us_5936f959e4b013c4816bc8e4?ncid=inblnkushpmg00000009 (interpreting, along with Justice Thomas's statement, the Court's recent decision in *Honeycutt v. United States* as signaling the Court's willingness to re-evaluate the constitutionality of civil forfeitures).

[5] "Modern civil forfeiture statutes are plainly designed, at least in part, to punish the owner of property used for criminal purposes." *Leonard*, 137 S. Ct. at 847. Similarly, "[t]he purpose of punitive damages, it can hardly be denied, is not to compensate, but to punish." Philip Morris USA v. Williams, 549 U.S. 346, 362 (2007) (Ginsburg, J., dissenting).

— because of property's involvement in crime.[6] The government can seize such property, and then, within a set time period and after providing notice to those with an interest in the property, file a civil action *in rem* against the property itself.[7] The *in rem* action proceeds like any other civil case — the government files the complaint, claimants must answer it, discovery occurs, civil motions can be filed, and eventually civil trial will occur.[8] At trial, the government must prove by a preponderance of evidence that the property was derived from or used to commit a crime.[9] If successful, title to the property will transfer to the government.[10]

Punitive damages punish by requiring the defendant to pay a sum imposed by the jury in a tort claim, which is a civil proceeding.[11] More specifically, if the jury determines that the defendant's conduct was reprehensible,[12] it has discretion to award punitive damages, in whatever amount it believes is proper.

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[6] Under the federal standard, civil forfeiture is proper if the property "was derived from or was used to commit a crime." STEFAN D. CASSELLA, ASSET FORFEITURE LAW IN THE UNITED STATES 15 (2d ed. 2013).

[7] *Id.* at 15-16 (explaining that the *in rem* structure is a "procedural convenience" allowing the government to identify the property and "to give anyone and everyone with an interest in that property the opportunity to come into court at one time and contest the forfeiture action").

[8] *Id.* at 15.

[9] This is a description of the federal forfeiture process, which is governed by 18 U.S.C. § 983 (2012). States have their own processes. For instance, one state has prohibited forfeitures and nine states allow forfeitures only after criminal convictions. Caleb Nelson, *The Constitutionality of Civil Forfeiture*, 125 YALE L.J. 2446, 2451 (2016).

[10] As a factual example, in *Leonard v. Texas*, a police officer stopped a car for a traffic violation along a known drug corridor. While searching the vehicle, the officer discovered a safe in the trunk. After obtaining a search warrant, the officer searched the safe and discovered $201,000 along with a bill of sale for a Pennsylvania home. The officer seized the cash and the State of Texas later initiated forfeiture proceedings for the $201,000 because it was "substantially connected to . . . narcotics sales." *Leonard*, 137 S. Ct. at 847. The trial court granted the forfeiture and the appellate court affirmed, finding "that the government had shown by a preponderance of evidence that the money was either the proceeds of a drug sale or intended to be used in such a sale." *Id.* Once she attempted to get review from the Supreme Court, the petitioner challenged the constitutionality of Texas's forfeiture procedure. By not raising the constitutional challenge in the lower courts, the petitioner had waived the argument, and the Court denied certiorari. *Id.* at 850.

[11] RESTATEMENT (SECOND) OF TORTS § 908 cmts. a & d (AM. LAW INST. 1979) (explaining that punitive damages are imposed by the jury in a civil judgment).

[12] *Id.* § 908(2) (explaining that punitive damages are available when the defendant's conduct was "outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others").

While both of these forms of civil punishment have risen in frequency, the rise of civil forfeitures has been more recent. In 2014, the Washington Post reported that federal forfeitures related to illegal drugs had increased as follows: "money deposited into Justice's federal forfeitures fund increased from $27 million in 1985 to $556 million in 1993. (It reached $2.6 billion in 2007)."[13] More recently, the Washington Post reported that "[i]n 2014, police took more property from people than burglars did."[14] The rise of punitive damages received media attention in the 1980's and 1990's, partly based on Justice Sandra O'Connor's frequent criticism of the awards. In 1989, she explained that "[a]wards of punitive damages are skyrocketing,"[15] pointing out that, a decade ago, the largest products liability punitive damage award affirmed on appeal was $250,000, but "awards more than 30 times as high" have since been "sustained on appeal."[16] She repeated her concern a few years later, noting the "explosion in the frequency and size of punitive damage awards."[17]

Accompanying the concern about the increase in frequency of these civil punishments was and currently is a concern about potential abuses of the system. Both punishments have been criticized as targeting certain citizens, although the victims differ dramatically — economically speaking. "[F]orfeiture options frequently target the poor and other groups least able to defend their interests in forfeiture proceedings."[18] And poor people are generally more susceptible as they are more likely to have cash, which can be subject to forfeiture, as opposed to credit cards, which cannot.[19] The most commonly portrayed victims of punitive damages, on the other hand, are

[13] Michael Sallah et al., *Stop and Seize*, WASH. POST (Sept. 6, 2014), http://www.washingtonpost.com/sf/investigative/2014/09/06/stop-and-seize/?tid=a_inl&utm_term=.46ade63dd55b; *see also* CASSELLA, *supra* note 6, at 28 ("At the beginning of [the 1990's], the Department of Justice — the principal federal law enforcement agency — was forfeiting approximately $200 million per year in criminal assets, mostly from drug cases. By the end of the decade, it was forfeiting more than $600 million per year in assets involved in an enormous variety of serious crimes.").

[14] Christopher Ingraham, *Congress Could Soon Make It Much Harder for Police Officers to Take Innocent People's Cash*, WASH. POST (May 19, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/05/19/congress-could-soon-make-it-much-harder-for-cops-to-take-innocent-peoples-cash/?utm_term=.b1f776bf4cc2.

[15] Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 282 (1989) (O'Connor, J., dissenting).

[16] *Id.*

[17] *Id.*

[18] Leonard v. Texas, 137 S. Ct. 847, 848 (2017).

[19] *Id.*

defendants with deep pockets, usually in the corporate form.[20] Justice O'Connor described that deep-pocket corporations are likely to be targeted because "[c]orporations are mere abstractions and, as such, are unlikely to be viewed with much sympathy. Moreover, they often represent a large accumulation of productive resources; jurors naturally think little of taking an otherwise large sum of money out of what appears to be an enormously larger pool of wealth."[21]

Concerns exist about both of these forms of civil punishments because of the lack of procedural protections; civil proceedings "often lack certain procedural protections that accompany criminal proceedings."[22] Not surprisingly, the two systems have been challenged constitutionally based on the lack of procedural protections.[23] And those arguments have looked similar. Many years ago in *Pacific Mutual Life Insurance Co. v. Haslip*,[24] the petitioner argued that defendants should be entitled to numerous procedural protections when punitive damages are imposed, including a heightened burden of proof.[25] Additional protections were appropriate and necessary "[g]iven the close analogy of punitive damages to criminal fines," and because "[t]he risks of erroneous fact finding and jury bias are too high in cases where civil fines can be awarded which far exceed any conceivable criminal fine."[26] Years later, in *Leonard v. Texas*, the petitioner similarly argued for a heightened burden of proof

[20] Justice O'Connor vividly depicted the deep-pocket victim in her dissent in *TXO Production Corp. v. Alliance Resources Corp.*, which involved a constitutional challenge to a $10 million punitive damage award imposed in a slander of title case where the jury awarded only $19,000 in compensatory damages. 509 U.S. 443, 446 (1993). Justice O'Connor explained: "As I read the record in this case, it seems quite likely that the jury in fact was unduly influenced by the fact that TXO is a very large, out-of-state corporation." *Id.* at 489. She found it "inescapable that the jury was influenced unduly by TXO's out-of-state status and its large resources." *Id.* at 495 (O'Connor, J., dissenting).

[21] *Id.* at 490-91.

[22] *Leonard*, 137 S. Ct. at 847.

[23] Both civil forfeitures and punitive damages have also been challenged constitutionally on other grounds. For a description of the various constitutional challenges to civil forfeitures, see CASSELLA, *supra* note 6, at 37-91. For a description of the various constitutional challenges to punitive damages, see Jill Wieber Lens, *Procedural Due Process and Predictable Punitive Damage Awards*, 2012 B.Y.U. L. REV. 1, 12-20.

[24] 499 U.S. 1 (1991).

[25] Brief of Petitioner at 38, Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991) (No. 89-1279).

[26] *Id.* at 38-39.

because forfeiture is "quasi-criminal in character,"[27] and thus the jury should "come to a clear conviction . . . of the truth of the precise facts."[28]

However, both civil forfeitures and punitive damages have been imposed — without heightened procedural protections — for centuries, long before the adoption of the Constitution and the Amendments. Civil forfeiture laws can be traced back to English law and the colonies' common law before the adoption of the Constitution, and can even be traced back as far as Biblical times.[29] Jury-imposed punitive damages can similarly be traced back to English common law.[30] And the Supreme Court has found these histories relevant in evaluating any constitutional challenge to either civil forfeitures or punitive damages.[31]

History has always been important in resolving constitutional concerns about punitive damages and civil forfeitures. With respect to punitive damages, the Court — not including Justice Thomas — eventually determined some limitations despite that history. And the Court may similarly change its mind on civil forfeitures — maybe this time including Justice Thomas.

II. JUSTICE THOMAS'S INCONSISTENCY

"During his first two decades on the Supreme Court, Justice Clarence Thomas has established himself as its most outspoken originalist."[32] One would expect, then, that Justice Thomas would enthusiastically support the constitutionality of punitive damages and civil forfeitures. And he has for one of the two — punitive damages.[33]

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[27] Petition for Writ of Certiorari at 14, Leonard v. Texas, 137 S. Ct. 847 (2017) (No. 16-122).

[28] *Id.* at 15.

[29] Austin v. United States, 509 U.S. 602, 611-13 (1993).

[30] Mo. Pac. Ry. Co. v. Humes, 115 U.S. 512, 521 (1885).

[31] *See, e.g.*, Bennis v. Michigan, 516 U.S. 442, 453 (1996) ("We conclude today, as we concluded 75 years ago, that the cases authorizing actions of the kind at issue [civil forfeitures] are 'too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced.'") (quoting J.W. Goldsmith, Jr., Grant Co. v. United States, 254 U.S. 505, 510 (1921)); Day v. Woodworth, 54 U.S. 363, 371 (1852) (although the constitutionality of jury-imposed punitive damages has "been questioned by some writers; but if repeated judicial decisions for more than a century are to be received as the best exposition of what the law is, the question will not admit of argument").

[32] Joel K. Goldstein, *Calling Them as He Sees Them: The Disappearance of Originalism in Justice Thomas's Opinions on Race*, 74 MD. L. REV. 79, 79 (2014).

[33] *See, e.g.*, Philip Morris USA v. Williams, 549 U.S. 346, 361 (2007) (Thomas, J.,

He has also voted in favor of the constitutionality of civil forfeitures, but currently seems enthusiastic to reverse course if given the opportunity.

With respect to punitive damages, Justice Thomas has maintained the constitutionality of the traditional common law system of imposing punitive damages. Justice Antonin Scalia introduced that historical justification before Justice Thomas joined the Court: "In 1868, therefore, when the Fourteenth Amendment was adopted, punitive damages were undoubtedly an established part of the American common law of torts. It is just as clear that no particular procedures were deemed necessary to circumscribe a jury's discretion regarding the award of such damages, or their amount."[34] The fact that "the common-law system for awarding punitive damages is firmly rooted in our history" is "dispositive for due process purposes"[35] as "no procedure firmly rooted in the practices of our people can be so 'fundamentally unfair' as to deny due process of law."[36]

Once Justice Thomas joined the Court, he wasted no time adopting Justice Scalia's historical justification. He both joined Justice Scalia's opinions and authored his own.[37] In short, Justice Thomas has remained faithful to the historical justification for the constitutionality of punitive damages. He has not even acknowledged any weaknesses in his originalist understanding of the constitutionality of punitive damages.

Justice Thomas has not, however, exhibited that same faithfulness to the historical justification for the constitutionality of civil forfeitures. Even while voting in favor of that constitutionality, Justice Thomas expressed doubts. In *United States v. James Daniel Good Real Property*,[38] he mentioned that he was "disturbed by the breadth of new civil forfeiture statutes."[39] In *Bennis v. Michigan*,[40] he voted in favor of the

dissenting); State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 429-30 (2003) (Thomas, J., dissenting) (explaining that he "continue[s] to believe that the Constitution does not constrain the size of punitive damages awards"); Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 443 (2001) (Thomas, J., concurring) (same); BMW v. Gore, 517 U.S. 559, 600 (1996) (Scalia, J., dissenting) (joining Justice Scalia's opinion); TXO Prod. Corp. v. All. Res. Corp., 509 U.S. 443, 470 (1993) (Scalia, J., concurring) (joining Justice Scalia's opinion).

[34] Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 26-27 (Scalia, J., concurring). He noted only one possible exception — "some review by the trial court." *Id.* at 27.

[35] *Id.* at 27.

[36] *Id.* at 38.

[37] *See, e.g.*, cases cited *supra* note 33.

[38] United States v. James Daniel Good Real Prop., 510 U.S. 43 (1993).

[39] *Id.* at 81 (Thomas, J., concurring).

constitutionality of the forfeiture system, but he also commented that "[o]ne unaware of the history of forfeiture laws and 200 years of this Court's precedent regarding such laws might well assume that such a scheme is lawless — a violation of due process."[41] He also expressed confusion regarding the limits of forfeitures — what property could be forfeited and for what criminal activity.[42] Additionally, he warned that if "[i]mproperly used, forfeiture could become more like a roulette wheel employed to raise revenue from innocent but hapless owners whose property is unforeseeably misused, or a tool wielded to punish those who associate with criminals, than a component of a system of justice."[43]

Most recently, Justice Thomas specifically acknowledged the vulnerabilities in the originalist justification of the constitutionality of punitive damages when he wrote separately to deny certiorari in *Leonard v. Texas*.[44] He explicitly questioned whether the history of civil forfeitures justifies their current constitutionality. In his words, "I am skeptical that this historical practice is capable of sustaining, as a constitutional matter, the contours of modern practice, for two reasons."[45]

His first reason was that "historical forfeiture laws were narrower in most respects than modern ones,"[46] in that the historical laws were limited "to a few specific subject matters, such as customs and piracy"[47] and that those laws limited "the type of property" that could be forfeited.[48] He also suggested that *in rem* proceedings were allowed only because of the impracticability of using *in personam* proceedings.[49] In short, the current forfeiture practice does not mirror the historical practice.

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[40] Bennis v. Michigan, 516 U.S. 442 (1996).

[41] *Id.* at 454 (Thomas, J., concurring). Justice Thomas also has publicly stated that he "agonized" over *Bennis*. *Justice Thomas Remarks at the Heritage Foundation*, C-SPAN (Oct. 26, 2016), https://www.c-span.org/video/?417506-1/supreme-court-justice-clarence-thomas-delivers-remarks-heritage-foundation.

[42] *Bennis*, 516 U.S. at 455.

[43] *Id.* at 456.

[44] Leonard v. Texas, 137 S. Ct. 847, 849 (2017) (Thomas, J., concurring).

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] *Id.* (citing Stefen B. Herpel, *Toward a Constitutional Kleptocracy: Civil Forfeiture in America*, 96 MICH. L. REV. 1910, 1918-20 (1998)). Professor Caleb Nelson recently rejected this argument, providing numerous examples of *in rem* proceedings that occurred despite *in personam* proceedings being practicable. *See* Nelson, *supra* note 9,

The same could be said of punitive damages; in fact, Justice O'Connor said the same. She argued that the availability of punitive damages was historically more limited. "Unheard of only 30 years ago, bad faith contract actions now account for a substantial percentage of all punitive damages awards. Other significant legal developments include the advent of product liability and mass tort litigation."[50] These expansions in the availability of punitive damages has led to an "explosion in the frequency and size of punitive damages awards."[51] In short, historical imposition of punitive damages was more limited, an idea that helped convince the rest of the Court to reevaluate constitutionality despite the history.

The second reason Justice Thomas identified in *Leonard* that the historical practice of forfeitures may not justify the current constitutionality is that "it is unclear whether courts historically permitted forfeiture actions to proceed civilly in all respects."[52] He specifically noted that some evidence exists that "the government was historically required to prove its case beyond a reasonable doubt," citing only an 1835 case.[53]

Again, the same questions could be raised of punitive damages. Although punitive damages were imposed in civil proceedings at the time of the adoption of the Fourteenth Amendment, the practice was still thought of as "highly dubious" at that time.[54] "Critics questioned how the Constitution could fairly be interpreted to permit a form of judicially imposed punishment without affording the defendant the benefits of . . . criminal procedural safeguards."[55] Mere years after adoption of the Fourteenth Amendment, Justice William Lawrence Foster of the New Hampshire Supreme Court harshly criticized

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at 2470-75.

[50] Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 62 (1991) (O'Connor, J., dissenting) (citations omitted).

[51] *Id.*

[52] *Leonard*, 137 S. Ct. at 849.

[53] *Id.* at 849-50. Not specific to Justice Thomas's one identified potential exception, Professor Nelson points to the long history of punitive damages imposed civilly to show the constitutionality of forfeitures based on a preponderance of the evidence standard. "If one accepts the constitutionality of genuinely punitive damages, and if one also accepts the constitutionality of statutes that threaten violators with 'civil penalties' payable to the government, . . . it is hard to maintain that no form of punishment can ever be imposed through civil proceedings." Nelson, *supra* note 9, at 2506.

[54] Thomas B. Colby, *Clearing the Smoke from* Philip Morris v. Williams*: The Past, Present, and Future of Punitive Damages*, 118 YALE L.J. 392, 416 (2008).

[55] *Id.*

punitive damages for punishing defendants without affording criminal procedural safeguards, including the beyond all reasonable doubt burden of proof.[56] Five years later, the Nebraska Supreme Court refused to allow the imposition of punitive damages in a civil action for the same conduct for which the defendant had already received criminal punishment, based on something akin to the criminal procedural right against double jeopardy.[57] If one case is enough to motivate Justice Thomas to question whether courts historically permitted forfeiture actions to proceed civilly, then numerous criticisms should also be enough to question whether courts historically believed it proper to impose punitive damages without additional procedural safeguards.[58]

Also in *Leonard*, Justice Thomas expressed concern about the lack of procedural protections,[59] the rise in civil forfeitures,[60] and the possible abuses, especially the potential victimization of poor people.[61] Again, all of these concerns apply to punitive damages, and Justice O'Connor identified all of them, the only difference being the identity of the likely victims.

Justice Thomas very well may have disagreed with Justice O'Connor about the supposed changes in the law or about the potential abuses of punitive damages.[62] It's impossible to know, however, because he

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[56] Fay v. Parker, 53 N.H. 342, 397 (1872).

[57] *See* Boyer v. Barr, 8 Neb. 68, 73-74 (1878).

[58] When all of the Justices still believed in the originalist view of the constitutionality of punitive damages, the Court was not swayed by the criticism of punitive damages. "We are aware that the propriety of this doctrine has been questioned by some writers; but if repeated judicial decisions for more than a century are to be received as the best exposition of what the law is, the question will not admit of argument." Day v. Woodworth, 54 U.S. 363, 371 (1852).

[59] Leonard v. Texas, 137 S. Ct. 847, 847-48 (2017) (Thomas, J., concurring).

[60] *Id.* at 848.

[61] *Id.*

[62] Many did disagree with Justice O'Connor. *See, e.g.*, Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System — And Why Not?*, 140 U. PA. L. REV. 1147, 1254 (1992) (stating that "every empirical study of the question has reached conclusions that, to say the least, fail to support" the claim that "punitive damages have grown dramatically in both frequency and size"); *see also* Anthony J. Sebok, *Punitive Damages: From Myth to Theory*, 92 IOWA L. REV. 957, 964-65 (2007) (explaining that there was no evidence of an increased frequency in the awarding of punitive damages in the 1980's and that no studies have "reported an increase in the rate of punitive-damages awards in litigated cases in recent years"). No Justice, however, questioned or disputed Justice O'Connor's characterizations and her opinions greatly influenced the Court's eventual decisions limiting punitive damages. *See, e.g.*, Anthony J. Franze & Sheila B. Scheuerman, *Instructing Juries on Punitive Damages: Due Process Revisited After State Farm*, 6 U. PA. J. CONST. L. 423, 433 (2004)

never acknowledged either. Instead, he has remained faithful to the view that the history of punitive damages justifies their current constitutionality — exactly opposite of how he has handled the history of civil forfeitures.

Justice Thomas's potential inconsistent treatment of civil forfeitures and punitive damages is also surprising because of the potential victims of civil forfeitures and punitive damages. Justice Thomas is viewed as the most conservative member of the Supreme Court, and is a Republican. Stereotypically, one would think Justice Thomas would then be more concerned about the deep-pocket defendants likely to be subject to unyielding punitive damage awards than with the poor people likely to be victimized by civil forfeitures.[63] But the opposite is true.[64]

Justice Thomas may have a good explanation for what seems to be his inconsistent views on why the history justifies the constitutionality of punitive damages, but a similar history may not justify the constitutionality of civil forfeitures. Practically speaking, however, we may never learn that explanation. Even if Justice Thomas does eventually vote against the constitutionality of civil forfeitures and writes an opinion, such an opinion would not likely also address punitive damages. And it is unlikely that Justice Thomas may write again on punitive damages as the Court seems to have lost its interest in the constitutional limitations of punitive damages.[65] That lack of

(explaining that Justice O'Connor's *Haslip* dissent "influenced the Court's later approach to due process limits on punitive damages"); Robert J. Rhee, *A Financial Economic Theory of Punitive Damages*, 111 MICH. L. REV. 33, 46 (2012) (noting that Justice O'Connor's criticism of punitive damages in her early dissenting opinions "may have influenced her colleagues and the Court's later thinking").

[63] *See* Sachin Bansal, Philip Morris USA v. Williams*: A Confusing Distinction*, 3 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 49, 58 (2007) (explaining that Justice Thomas's views on punitive damages show that "politically conservative justices are not unilaterally pro-business justices, because a pro-business perspective would be to limit punitive damages"). That said, groups from both sides of the political spectrum support civil asset forfeiture reform. *See* Faiz Shakir & Kanya Bennet, *Letter Endorsing Fair Act (Civil Forfeiture Reform)*, AM. CIV. LIBERTIES UNION (Mar. 16, 2017), https://www.aclu.org/letter/aclu-letter-endorsing-fair-act-civil-forfeiture-reform; Jason Snead, *A Dysfunctional Civil-Forfeiture System Seizes Savings, Destroys Lives*, HERITAGE FOUND. (June 24, 2015), http://www.heritage.org/crime-and-justice/commentary/dysfunctional-civil-forfeiture-system-seizes-savings-destroys-lives.

[64] The answer may be that "in the punitive damages jurisprudence, the justices are not traditionally split along the usual conservative-liberal lines." Bansal, *supra* note 63, at 58.

[65] *See* Jim Gash, *The End of an Era: The Supreme Court (Finally) Butts Out of Punitive Damages for Good*, 63 FLA. L. REV. 525, 584-89 (2011) (predicting that *Philip Morris* would be the Court's last word on constitutionality of punitive damages); *see also* Petition for Writ of Certiorari at 31, Wyeth LLC v. Scofield, 131 S. Ct. 3028

interest may be due to the current disarray of that jurisprudence, the same disarray that should leave those hopeful for constitutional reform of civil forfeitures less optimistic.

III. BRIEF LESSONS FOR CIVIL FORFEITURES

Although the Court did impose constitutional limitations on punitive damages, the quest to reform punitive damages through courts was a relative failure. Despite hearing numerous procedural due process challenges, the Court has required very few procedural protections in the imposition of punitive damages — *de novo* judicial review of the substantive constitutionality of an award,[66] a jury instruction that the jury cannot punish the defendant for its out-of-state conduct,[67] and an unspecified protection ensuring that the jury does not punish the defendant for harming nonparties.[68] That's it. The Court has never even required a higher burden of proof to impose the civil punishment. The closest it came was in *Haslip*, where it mentioned in a footnote that "[t]here is much to be said in favor of a State's requiring" more than a preponderance of evidence, but "[w]e are not persuaded . . . that the Due Process Clause requires that much."[69]

And it's not clear that even Justices more skeptical of punitive damages would have required any certain procedural changes. Justice O'Connor, the most outspoken critic of punitive damages, wanted to leave the states to experiment: "As a number of effective procedural safeguards are available, we need not dictate to the States the precise manner in which they must address the problem. We should permit

(2011) (No. 10-1177), 2011 WL 1155235 ("Members of this Court have famously expressed divergent views as to the propriety of reviewing the excessiveness of punitive damages.").

[66] Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 436 (2001).

[67] State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 422 (2003).

[68] Philip Morris USA v. Williams, 549 U.S. 346, 356-57 (2007). Many have questioned the Court's purported procedural due process basis for the holding. *See, e.g.*, Colby, *supra* note 54, at 401-05 (explaining that the Court intentionally disguises substantive due process decisions as procedural due process decisions because it is "ashamed of the substantive due process doctrine's very existence"); Lens, *supra* note 23, at 21 (explaining a substantive right related to the scope of a punitive damage award); *see also Philip Morris USA*, 549 U.S. at 361 (Thomas, J., dissenting) (explaining that "[a] 'procedural' rule is simply a confusing implementation of the substantive due process regime this Court has created for punitive damages").

[69] Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 23 n.11 (1991).

the States to experiment with different methods and to adjust these methods over time."[70]

The Court has arguably done more with respect to substantive protections. In *BMW of North America v. Gore*,[71] the Court created three guideposts to test whether a specific punitive damage award is "grossly excessive" and violates a defendant's due process rights.[72] Theoretically, these substantive limitations are a successful reform to punitive damages. But, in reality, so many questions remain regarding how to apply the guideposts, which affects courts' abilities to use the guideposts to reduce awards.[73] Plus, the substantive guideposts apply only on a case-by-case basis to individual punitive damage awards, inherently limiting how much the guideposts can reform punitive damages. So again, even the Court's substantive constitutional reforms to punitive damages do little, meaning the Court has done little to reform punitive damages.

Of course, the Court's failure to reform punitive damages does not mean it would also not reform civil forfeitures. The Court may be more motivated because the state itself is involved in the forfeiture proceeding, whereas the state is not at all involved in a tort claim in which a private plaintiff seeks punitive damages from a private defendant. Also, the state directly benefits from asset forfeitures. It keeps assets it forfeits,[74] whereas a plaintiff traditionally retains any punitive damages award she collects.[75]

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[70] *Id.* at 63-64 (O'Connor, J., dissenting).

[71] BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996).

[72] They include the level of reprehensibility of the defendant's conduct, the relationship between the amounts of compensatory and punitive damages, and a comparison of the punitive damages award to the civil or criminal penalties imposed for comparable conduct. *Id.* at 575-83. Along with the guideposts, *BMW* also clarified that punitive damages cannot punish a defendant for lawful conduct committed in another state. *Id.* at 572.

[73] Lower courts remain confused regarding "how each guidepost interacts with the others," and how to apply the reprehensibility and ratio guideposts when the defendant has caused physical injury. Laura J. Hines & N. William Hines, *Constitutional Constraints on Punitive Damages: Clarity, Consistency, and the Outlier Dilemma*, 66 HASTINGS L.J. 1257, 1315 (2015).

[74] *See* Sallah et al, *supra* note 13; *see also* Nick Sibilla, *Cops in Texas Seize Millions by 'Policing for Profit,'* FORBES (June 5, 2014), https://www.forbes.com/sites/instituteforjustice/2014/06/05/cops-in-texas-seize-millions-by-policing-for-profit/#726d12381a81 (explaining that "the average law enforcement agency in Texas took in forfeiture proceeds equal to about 14 percent of its budget in 2007" and used "forfeiture funds on ridiculous purchases, including visiting casinos, a vacation to Hawaii and a margarita machine").

[75] RESTATEMENT (SECOND) OF TORTS § 908 cmt. a (AM. LAW INST. 1979).

Still, these two differences are not as material as they may seem. The state certainly still has an interest in the imposition of punitive damages as those damages serve the state's interests.[76] Also, many states do directly benefit as many state legislatures have mandated that a portion of the punitive damages be paid to the state.[77] Regardless, the Court's decisions to decline or require due process-based protections in imposing punitive damages do not appear to have ever turned on the state's involvement or the benefit to the state.[78]

Moreover, if the history of civil forfeitures is what makes them constitutional, as the Court has repeatedly held, the fact that the state is involved in and benefits from forfeitures shouldn't make a difference. Specific to Justice Thomas, there is little logic in remaining faithful to the history of punitive damages but not to the similar history of civil forfeitures because the state collects one but not the other.

Regardless, even if the Court finds constitutional problems with the civil forfeitures, it still may want to leave it to the states to experiment with procedures as Justice O'Connor advocated in *Haslip*.[79] Like with punitive damages, states have controlled civil forfeitures for centuries, and the Court may want to defer to that experience.

And legislative reform can bring real change. It has, in fact, brought real change to the imposition of punitive damages. State legislatures have passed procedural reforms requiring a clear and convincing evidence burden of proof in imposing punitive damages, unanimous jury findings, bifurcated trials, etc.[80] Additionally, legislatures have capped the recovery of punitive damages.[81] While legislative reform is

[76] Jill Wieber Lens, *Punishing for the Injury: Tort Law's Influence in Defining the Constitutional Limitations on Punitive Damage Awards*, 39 HOFSTRA L. REV. 595, 614 (2011).

[77] *See, e.g.*, ALASKA STAT. ANN. § 9.17.020(j) (2017); IND. CODE § 34-51-3-6 (2017); MO. REV. STAT. § 537.675(3) (2017); OR. REV. STAT. § 31.735(1)(b)-(c) (2017).

[78] The lack of state involvement did matter in *Browning-Ferris*, where the Court determined that the Eighth Amendment (excessive fines clause) did not apply to punitive damages. Browning-Ferris Indus. v. Kelco Disposal, 492 U.S. 257, 263-64 (1989). The Court has already determined that the Eighth Amendment does apply to civil forfeitures. *See* Austin v. United States, 509 U.S. 602, 622 (1993).

[79] Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 63-64 (1991) (O'Connor, J., dissenting).

[80] *See, e.g.*, TEX. CIV. PRAC. & REM. CODE ANN. § 41.003 (2017) (increasing burden of proof to clear and convincing evidence and requiring unanimous jury finding); *id.* § 41.009 (2017) (allowing bifurcated trials).

[81] ELLIOT M. KROLL & JAMES M. WESTERLIND, ARENT FOX LLP SURVEY OF DAMAGE LAWS OF THE 50 STATES INCLUDING THE DISTRICT OF COLUMBIA AND PUERTO RICO (2012), https://www.arentfox.com/sites/default/files/Downloads/practicesindustries/practices/

slower and less comprehensive than constitutional reform, it also may be the most efficient way to reform civil forfeiture procedures.

CONCLUSION

"Circumstances today are different than they were 200 years ago, and nothing in the Fourteenth Amendment requires us to blind ourselves to this fact."[82] Justice O'Connor made this statement when trying to convince her colleagues to discount the history of punitive damages and evaluate the need for constitutional limitations. The statement could have just as easily come from Justice Thomas — but only with respect to civil forfeitures, not punitive damages.

Whether the Court will ultimately require reform to civil forfeitures remains to be seen; Justice Thomas certainly seems enthusiastic to entertain possible reforms. The Court's eventual determination of constitutional limitations on the imposition of punitive damages also suggests that the Court will require reform to civil forfeitures. But the Court's treatment of punitive damages also suggests that any reform of civil forfeitures will be limited. Thus, although even Justice Thomas has expressed enthusiasm, legislative action may be necessary to achieve substantial reform.

AF-Survey-of-Damage-Laws.pdf (showing that sixteen states cap the recovery of punitive damages as of 2012).

[82] *Haslip*, 499 U.S. at 63 (O'Connor, J., dissenting).