LIKE FOR LIKE (AND DISLIKE FOR DISLIKE?): FORFEITING SUBSTITUTE PROPERTY UNDER AUSTRALIA'S PROCEEDS OF CRIME STATUTES

GREGORY DALE*

Instruments of crime are regularly forfeited to the state under proceeds of crime laws. Where a defendant uses someone else's property to commit a crime, several jurisdictions permit the forfeiture of a defendant's substitute property. This article advocates the repeal of such laws because they are unlikely to discourage offending. Furthermore, in trying to produce similar outcomes between defendants who use their own property to commit crimes and those who use others' property, legislatures have lost sight of the instrumentalist goals of forfeiture.

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I INTRODUCTION

The past two decades have witnessed a rapid expansion of proceeds of crime laws in Australia. Western Australia pioneered many of the legislative innovations that other Australian jurisdictions would later adopt, including the ability to confiscate unexplained wealth, the automatic confiscation of a declared drug traffickers' property, and the forfeiture of substitute property.[1] This last innovation augments long-standing laws that deprive defendants of property used in the commission of an offence ('instruments of crime'). This remedy is not aimed to punish but to deprive a defendant of the tools of crime.[2] But what happens when the defendant has used property that

* Lecturer, TC Beirne School of Law, University of Queensland. The author has benefited greatly from the comments of his co-editors and reviewers.

1 See Ben Clarke, "'A man's home is his castle" – or is it? How to take houses from people without convicting them of anything: the Criminal Property Confiscation Act 2000 (WA)' (2004) 28(5) *Criminal Law Journal* 263.

2 See *Wulaign Association Incorporated v Minister for Racing and Gaming* (1991) 1 NTLR 118, 124.

they do not own in the commission of an offence? Six Australian jurisdictions permit authorities to apply to have substitute assets of the defendant forfeited ('substitute property').[3] This legislative mechanism 'essentially swaps the assets the [defendant] owns, for the assets used in the offence'.[4] Although these laws are seldom used, legislatures have argued that, without them, there would be loopholes which may have the unintended effect of encouraging individuals to commit crimes using other people's property.[5]

This article questions the grounds for forfeiting substitute property against the rationales traditionally raised to justify the forfeiture of instruments of crime. It argues that the normative basis for forfeiting substitute property is weak because such laws can neither deter offending nor prevent reoffending. In addition, these laws cannot close the perceived loopholes because the incentive to use another's property to commit crime persists. In addition, there is a paucity of cases that involve the forfeiture of substitute property, suggesting that these laws can only serve symbolic goals. However, translating symbolism into practical applications proves less than straightforward because it is not obvious what property is an appropriate substitute to the actual instrument of crime ('ordinary instrument of crime'). Jurisdictions have approached this problem from one of two ways: either targeting substitute property of a similar nature to the ordinary instrument of crime (substituting 'like for like') or requiring the defendant to pay the state an amount equivalent to the value of the instrument of crime (forfeiting the equivalent value). Both responses are problematic in that they become detached from concerns about instrumentalism and instead resemble penalties.

The structure of this article proceeds as follows. Part II explains how the law enables ordinary instruments of crime to be forfeited, as well as the traditional justifications for these laws. Part III sets out how substitute property can be forfeited where the ordinary instrument of crime is unavailable for forfeiture. This part also summarises the key differences between the statutes in the six jurisdictions that permit the forfeiture of substitute property. It also summarises the rationales for these laws. Part IV argues that the justifications used to pursue substitute property lack validity. Part V concludes.

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[3] The names of the legislative provisions vary. In Queensland and Victoria, they are known 'tainted property substitution declarations': *Criminal Proceeds Confiscation Act 2002* (Qld) pt 4, div 2A; *Confiscation Act 1997* (Vic) pt 3, div 1A. In Western Australia and the Northern Territory, they are known as 'crime-used property substitution declarations': *Criminal Property Confiscation Act 2000* (WA) pt 3, div 3; *Criminal Property Forfeiture Act 2002* (NT) pt 6, div 3. In South Australia, they are called 'instrument substitution declarations': *Criminal Assets Confiscation Act 2005* (SA) s 48. Finally, in New South Wales, they are known as either 'substituted tainted property declarations' or 'substituted serious crime use property declarations': *Confiscation of Proceeds of Crime Act 1989* (NSW) s 33 and *Criminal Assets Recovery Act 1990* (NSW) s 22AA, respectively. Note that the Commonwealth, Tasmania and the Australian Capital Territory make no provision for the forfeiture of substitute property for instruments of crime.

[4] Victorian Auditor-General, *Asset Confiscation Scheme* (Report, September 2013) 4 [1.1.4].

[5] Where a party other than the owner committed the offence, various legislative provisions protect the owner from forfeiture. The adequacy of these provisions is discussed in Natalie Skead and Sarah Murray, 'Criminal Property Confiscation and Third-party Rights: Giving the Hedgehog a Foxy Tail' (2024) 52(1) *University of Western Australia Law Review* 9.

II FORFEITING ORDINARY INSTRUMENTS OF CRIME

Laws enabling the forfeiture of substitute property aim to complement long-standing laws permitting the forfeiture of ordinary instruments of crime. Unlike the forfeiture of items that are the subject of an offence (eg, illegal weapons or drugs),[6] there is nothing problematic with an individual owning or possessing an item that may be used as instrument of crime. It is the *use*, not possession of such property that imperils the owner's title to it. Australian legislation labels property used in the commission of a crime as an 'instrument of crime',[7] 'tainted property'.[8] 'crime-used property',[9] or the grammatically awkward 'serious crime use property'.[10] For property to be labelled as such, the state is required to prove a sufficient nexus between the offence and the property.[11]

For an instrument of crime to be forfeited, it falls on the state to satisfy a court that the instrument of crime is sufficiently tied to the offence in question.[12] While the

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6 Peter Alldridge, *Money Laundering Law: Forfeiture, Confiscation, Civil Recovery, Criminal Laundering and Taxation of the Proceeds of Crime* (Hart Publishing, 2003) 60. See, eg, the *Criminal Code* (Qld) s 228G.

7 *Proceeds of Crime Act 2002* (Cth) s 329(2)(a); *Criminal Assets Confiscation Act 2005* (SA) s 7(1)(b); *Crime (Confiscation of Profits) Act 1993* (Tas) s 4(1).

8 But this term can also refer to 'proceeds' (that is, property derived from crime*): Proceeds of Crime Act 2002* (Cth) s 338 (definition of 'tainted property'); *Confiscation of Criminal Assets Act 2003* (ACT) s 10(1)(a); *Confiscation of Proceeds of Crime Act 1989* (NSW) s 4(1) (definition of 'tainted property') which is limited to 'serious offences'; *Criminal Proceeds Confiscation Act 2002* (Qld) s 104(1)(a); *Confiscation Act 1997* (Vic) s 3(1) (definition of 'tainted property').

9 *Criminal Property Confiscation Act 2000* (WA) s 146(1)(a*); Criminal Property Forfeiture Act 2002* (NT) s 11(1).

10 *Criminal Assets Recovery Act 1990* (NSW) s 9B.

11 In some jurisdictions the nexus is satisfied if the property was 'used in … the commission' of an offence: *Crimes (Confiscation of Profits) Act 1993* (Tas) s 4(1) (definition of 'instrument of crime'); *Confiscation of Proceeds of Crime Act 1989* (NSW) s 4(1) (definition of 'tainted property'). The Commonwealth and NSW require that it be proved that the property was 'used in connection' with the offence or the commission of an offence: *Proceeds of Crime Act 2002* (Cth) s 329(2); *Criminal Assets Recovery Act 1990* (NSW) s 9B(1). In other jurisdictions, the nexus is satisfied If the property was merely intended to be used or likely to be used in the commission of a future offence: *Criminal Proceeds Confiscation Act 2002* (Qld) s 104(1)(a); *Criminal Assets Confiscation Act 2005* (SA) s 7(1)(b); *Proceeds of Crime Act 2002* (Cth) s 329(2); *Criminal Property Confiscation Act 2000* (WA) s 147; *Criminal Property Forfeiture Act 2002* (NT) s 11(1)(a); *Confiscation of Criminal Assets Act 2003* (ACT) s 10(1)(a); *Confiscation Act 1997* (Vic) s 3(1) (definition of 'tainted property'). The nexus is satisfied in Tasmania if the property was 'used…to facilitate the commission' of an offence: *Crimes (Confiscation of Profits) Act 1993* (Tas) s 4(1) (definition of 'instrument of crime'). Lastly, simply using property to store 'property that was acquired unlawfully in the course of the commission' of an offence is enough to satisfy the nexus in WA and the Northern Territory: *Criminal Property Confiscation Act 2000* (WA) s 146(1)(b); *Criminal Property Forfeiture Act 2002* (NT) s 11(1)(b).

12 In practice, prior to forfeiture, the defendant's property might be subject to a restraining order. Should the defendant apply to remove the restraining order, the onus shifts to the defendant to prove on the balance of probabilities that the property is not an instrument of crime (or represents the proceeds derived from crime): see, eg, *Proceeds of Crime Act 2002* (Cth) s 29.

outcome of each case turns on the specific facts and wording of the statute,[13] it is not a particularly onerous task for law enforcement authorities to prove the connection between property and crime.[14] Simply committing an offence on land will not be enough to justify forfeiture of the land:[15] more than 'passive' or 'incidental' use of the property is usually required.[16] However, the way most proceeds of crime statutes are drafted, the 'degree of use need not be proportionate to the forfeiture that has occurred.'[17]

The primary contemporary justifications[18] for forfeiting ordinary instruments of crime are confined to deterring crime and preventing the commission of further crimes. These have been described as 'overlapping'[19] justifications and hence there are no bright lines that mark the borders between them. However, as a starting point, general deterrence works on the belief that sanctions and sentences will discourage the commission of similar offences and crime more generally. Deterrence 'assumes some rational analysis or reasoning in the course of comparing the likely gains from crime against the prospect, and likely severity, of punishment.'[20] Where an individual shows a propensity to commit certain offences, regard for specific deterrence might warrant the imposition of a greater sanction. By contrast, crime-prevention is reactive and concerned with the seizure, and eventual forfeiture, of the instruments of crime. Whereas deterrence aims to dissuade offending by making it clear to offenders what the consequences will be if they choose to engage in criminal activity,[21] crime-prevention is focused on limiting the physical resources needed to carry out crime.[22]

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13 As Kiefel CJ, Bell, Gageler and Edelman JJ stated, these statutory descriptions 'do not readily admit of detailed exposition in the abstract': *Commissioner of the Australian Federal Police v Hart* (2018) 262 CLR 76, 84 [10].

14 This is even the case where the statute provides that there must be 'substantial connection' between the property and the crime: *State of Queensland v Noble* [2018] QSC 59 [13] (Crow J). Typically, law enforcement authorities first apply to restrain the property before it is forfeited. In practice, where a defendant seeks to have a restraining order overturned, it falls on the defendant to prove on the balance of probabilities that the property has not been used in crime. See, eg, the *Confiscation Act 1997* (Vic) s 22.

15 *DPP (WA) v White* (2010) 41 WAR 249, 257 [29] (McLure P). However, there are statutory exceptions to this. For example, s 146(3) of the *Criminal Property Confiscation Act 2000* (WA) provides that 'any property in or on which an offender under Chapters XXII or XXXI of *The Criminal Code* is committed is crime-used property'. Those chapters of the Western Australian *Criminal Code* comprise various offences against morality and sexual offences.

16 *Chalmers v The Queen* (2011) 215 A Crim R 275, 294 [91]; Director of Public Prosecutions for Western Australia, *Statement of Prosecution Policy and Guidelines 2022*, Appendix 2 [18].

17 *Commissioner of the Australian Federal Police v Hart* (2018) 262 CLR 76, 84–85 [10] (Kiefel CJ, Bell, Gageler and Edelman JJ).

18 The historical objectives are anachronistic and not entirely clear: see Gregory Dale, 'Crime, Confiscation and Emotion' (PhD Thesis, Monash University, 2022) 30-33.

19 *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393, 418 [19] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

20 *Payne v The Queen* [2002] WASCA 186 [43] (Steytler J).

21 Johan Boucht, *The Limits of Asset Confiscation: On the Legitimacy of Extended Appropriation of Criminal Proceeds* (Hart Publishing, 2017) 101–103.

22 Arie Freiberg and Richard Fox, 'Forfeiture, Confiscation and Sentencing' in Brent Fisse and David Fraser (eds), *The Money Trail: Confiscation of Proceeds of Crime, Money Laundering and Cash Transaction Reporting* (The Law Book Company, 1992) 106, 133–134.

Other justifications for proceeds of crime laws are less relevant to the forfeiture of instruments of crime. While forfeiture has a punitive effect,[23] only the Commonwealth's proceeds of crime statute explicitly lists punishment among its aims.[24] Moreover, where a defendant has been convicted, more than half of Australia's jurisdictions forbid courts from having regard to the forfeiture of instruments of crime in their sentencing considerations.[25] Other common justifications are also irrelevant, such as 'redress[ing] the unjust enrichment of those who profit at society's expense'[26] which has no bearing on stripping defendants of legally-acquired instruments of crime. Lastly, while forfeiture can be justified on the basis that such recovered assets are used to compensate society or reimburse the state,[27] both are secondary justifications because they assume 'there is a sound basis for the state confiscating the assets in the first place.'[28]

In contrast to punishment, most proceeds of crime statutes specifically cite deterrence as a legislative objective.[29] Even where it not clearly stated in the legislation, authorities tasked with forfeiting property clearly view deterrence as a prominent objective.[30] The deterrent aim is particularly evident where legislation gives courts little discretion to exclude innocent owners from the ambit of provisions requiring the forfeiture of instruments of crime.[31] This strict approach is more of a feature of *in rem* forfeiture[32] than *in personam* forfeiture.[33] This is not to say that *in personam* forfeiture cannot lead to harsh results. For example, where an offender is found guilty of distributing or producing certain quantities of drugs, he or she may be subject to automatic forfeiture of all their assets.[34]

Effective deterrence requires widespread knowledge of the consequences of breaking a law. In their survey of persons involved with proceeds of crime legislation,

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23 *Bell v Police* [2012] SASC 188 [45]–[46].

24 *Proceeds of Crime Act 2002* (Cth) s 5(c).

25 *Criminal Proceeds Confiscation Act 2002* (Qld) s 260; *Sentencing Act 1995* (WA) s 8(3); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 24B; *Crimes (Confiscation of Profits) Act 1993* (Tas) s 16(3); *Crimes (Sentencing) Act 2005* (ACT) s 34(2). However, forfeiture can be taken into account in the remaining jurisdictions, namely the Commonwealth, Victoria, South Australia and the Northern Territory: *Proceeds of Crime Act 2002* (Cth) s 320(c); *Sentencing Act 1991* (Vic) s 5(2A)(a); *Criminal Assets Confiscation Act 2005* (SA) s 224; *Sentencing Act 1995* (NT) s 5(4)(b).

26 These justifications must be contrasted with those raised in pursuit of the confiscation of assets. The latter is concerned with stripping ill-gotten gains primarily to 'redress the unjust enrichment of those who profit at society's expense': David Lusty, 'Civil Forfeiture of Proceeds of Crime in Australia' (2002) 5(4) *Journal of Money Laundering Control* 345, 345.

27 Ibid 345.

28 Dale (n 18) 63.

29 *Criminal Proceeds Confiscation Act 2002* (Qld) s 4(2)(b); *Proceeds of Crime Act 2002* (Cth) s 5(c); *Confiscation of Criminal Assets Act 2003* (ACT) s 3(a); *Confiscation Act 1997* (Vic) s 3A(b). See also Tasmania, *Parliamentary Debates*, Legislative Assembly, 31 March 1993, 78 (Mr Cornish).

30 Director of Public Prosecutions for Western Australia, *Statement of Prosecution Policy and Guidelines 2022* (1 July 2022) Appendix 2 [18(c)]; Director of Public Prosecutions for New South Wales, *Prosecution Guidelines* (March 2021) [17.1]–[17.2].

31 *Re DPP; Ex Parte Lawler* (1994) 179 CLR 270, 290 (Dawson J), 295 (McHugh J).

32 Namely an action taken against the property itself: see Michelle Gallant, *Money Laundering and the Proceeds of Crime* (Edward Elgar, 2005) 57.

33 Namely an action taken against an individual: ibid 57.

34 See, eg, the serious drug offence restraining orders made under *Confiscation Act 1997* (Vic) s 18.

Skead and others found that while there might be awareness among some drug dealers, overall awareness of proceeds of crime legislation was not particularly high.[35] It would certainly be unusual for most members of the public to be acquainted with these laws, let alone their particulars, such as what constitutes an instrument of crime and the breadth of assets vulnerable to forfeiture.[36] Moreover, these matters do not attract much publicity.[37] The only exceptions are the government campaigns that inform illegal fishers that they risk forfeiting their boats, and drivers of repeated hooning offences that they will jeopardise their vehicles. Images of vehicles being crushed may have the potential to seep into the public's consciousness[38] So too do slogans like Queensland's Government's 'Go too far. Lose your car'[39] and the Western Australia Government's 'You take their picture, we'll take their car.'[40] But these are niche examples.

While forfeiting instruments of crime has the potential to prevent defendants from committing further crimes, it is probably more accurate to describe such measures as only temporarily incapacitating defendants. Although it is rarely listed as an objective in legislation,[41] crime-prevention is generally accepted as the other central justification for forfeiture of instruments of crime.[42] This is especially the case where the property in question is land. An offender can easily rent, borrow, illegally occupy, or steal property to achieve the same means, a view that has been instrumental in some courts' decisions to refuse forfeiture.[43] It is for all these reasons that forfeiting substitute property is held up as an appropriate remedy, the foundations of which are described in Part III.

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35 Natalie Skead et al, *Pocketing the proceeds of crime: Recommendations for legislative reform* (Australian Institute of Criminology, 2020) 46.

36 Janet Ulph, 'Confiscation orders, human rights, and penal measures' (2010) 126(2) *Law Quarterly Review* 251, 278; Boucht (n 21) 108.

37 Skead et al (n 35) 43.

38 See, eg, David Rood, 'Hoons to face car crush law in crash wake', *The Age* (Melbourne, 23 January 2010) 5.

39 For example, see the printed advertisement of Queensland Government (Queensland Police Service) entitled 'Go too far. Lose your car' which appeared in *The Sunday Mail* (Brisbane, 27 October 2013) 20.

40 See advertisements ran using this slogan in Western Australia in late-2007: 'Print — Anti-hoon law: No car', *bestadsontv.com* (Web Page) <https://www.bestadsontv.com/ad/9362/Anti-hoon-Law-No-car>.

41 It is only listed in the *Proceeds of Crime Act 2002* (Cth) s 5(d) and *Confiscation of Criminal Assets Act 2003* (ACT) s 3(d).

42 Australian Law Reform Commission, *Confiscation that counts: A review of the Proceeds of Crime Act 1987* (Report No 89, 1999) 28 [2.61]; Sir Derek Hodgson et al, *Profits of crime and their recovery: Report of a Committee chaired by Sir Derek Hodgson* (Heinemann Educational Books, 1984) 98.

43 *British Columbia (Director of Civil Forfeiture) v Wolff*, 2012 BCSC 100 [57]; *R v Wu* (2010) 258 CCC (3d) 135, 142 [37] (British Columbia Court of Appeal) (Bennett JA delivering the court's judgment). See also Stevens J's comment that forfeiting a vehicle used to solicit prostitution could hardly disable the owner from 'using other venues for similar illegal rendezvous, since all that is needed to commit this offense is a place': *Bennis v Michigan*, 516 US 442, 466 (1996).

III THE FOUNDATIONS OF FORFEITING SUBSTITUTE PROPERTY

Legislatures introduced property-substitution powers because they saw the need to close perceived statutory 'loopholes'.[44] A party with a proprietary interest in an instrument of crime who is not involved in the offence should be able to successfully apply to exclude the property from forfeiture.[45] Without the ability to deprive the defendant of substitute property:

> a person is effectively encouraged to use property belonging to another person rather than his own property in the commission of a crime. The absence of such a provision would create an incentive to steal property for use in the commission of further offences.[46]

Of particular concern is the ease with which a criminal may rent a house to manufacture drugs or rent a car to commit offences, in the knowledge that there will be no proprietary consequences for their actions.[47] Similar concerns convinced legislatures to permit the forfeiture of substitute vehicles whose owners committed breaches of certain traffic laws that would ordinarily require forfeiture of the vehicle (had the driver owned it). Legislatures sought the statutory means to hold offenders 'to account'[48] and ensure that drivers did not 'escape this penalty even though they may own a motor vehicle themselves'.[49] However, in Western Australia, such provisions were introduced to ameliorate the harsh effects of strict anti-hoon laws that demanded a car be impounded or forfeited, even when the vehicle's owner had not committed the offences, but a third party entrusted with the vehicle.[50]

The laws relating to the forfeiture of substitute property are complex and vary between jurisdictions. However, there are features common to the six jurisdictions that permit the forfeiture of substitute property. First, the court still must be satisfied that there is a sufficient nexus between the property and the crime:[51] ie, it is still necessary to prove that the property is an instrument or crime. Second, the property that was

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44 Queensland, *Parliamentary Debates*, Legislative Assembly, 10 February 2009, 51 (Mr MJ Horan).

45 However, this can be difficult in some jurisdictions, especially where the innocent party needs to prove his or her interest has ceased to be an instrument of crime: see, eg, *Proceeds of Crime Act 2002* (Cth) s 330(4).

46 Explanatory Memorandum, Criminal Property Confiscation Bill 2000 (WA) cl 22.

47 Explanatory Memorandum, Criminal Property Confiscation Bill 2000 (WA) cl 23; South Australia, *Parliamentary Debates*, Legislative Council, 28 February 2005, 1202 (Hon P Holloway).

48 Explanatory Memorandum, Road Safety and Others Acts (Vehicle Impoundment and Other Amendments) Bill 2005 (Vic) cl 4 (new s 84V).

49 South Australia, *Parliamentary Debates*, Legislative Council, 30 May 2007, 206 (Hon P Holloway).

50 Western Australia, *Parliamentary Debates*, Legislative Assembly, 9 March 2010, 487 (Mr RF Johnson, Minister for Police). See also Nicole Cox, 'Lambo limbo ends', *The Sunday Times* (Perth, 31 January 2010) 30. For further discussion on innocent third parties, see Skead and Murray (n 5).

51 *Criminal Proceeds Confiscation Act 2002* (Qld) s 153D(1)(a); *Confiscation Act 1997* (Vic) s 34C(2)(a); *Criminal Assets Confiscation Act 2005* (SA) s 7(1)(b); *Criminal Assets Recovery Act 1990* (NSW) s 22AA(2); *Confiscation of Proceeds of Crime Act 1989* (NSW) s 33(5)(b).

used, or intended to be used, must not be available for forfeiture.[52] That might be because the defendant never held a proprietary interest in the property or the 'effective control of' it.[53] Or, perhaps, between the commission of the offence and the start of forfeiture proceedings, the defendant has sold or lost his or her interest in the property,[54] the property 'cannot be found',[55] or a court has set aside a restraining order in favour of the defendant's partner/dependant.[56] Third, the defendant must have a proprietary interest in the substitute property.

Among the jurisdictions that permit the forfeiture of substitute property, several differences exist. The first significant point of difference between the jurisdictions is the way in which their statutes choose to characterise the substitute property. NSW, Queensland, Victoria and South Australia define substitute property as being of the 'same nature or description' as the property that was actually used in the commission of or in connection with the crime.[57] I will refer to this as 'substituting like for like'. The Victorian statute contains the following illustration:

> An accused is convicted of a sexual offence against a child and, in the commission of that offence, the accused used a rented flat although the accused owned a flat at the time. The prosecution may apply to the court for a declaration that the flat owned by the accused is tainted property although the rented flat and the flat owned by the accused are not of equal value.[58]

In South Australia and Victoria, it does not matter that the substitute property selected is more valuable than the property actually used in the commission of the offence,[59] whereas in Queensland and New South Wales, authorities are explicitly forbidden from applying for substitute property that is greater in value than the actual instrument of crime.[60] Moreover, like-for-like substitution is not confined to the main proceeds of crime statutes. For example, in Western Australia, Victoria and South

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52 *Criminal Proceeds Confiscation Act 2002* (Qld) s 153D(1)(b); *Confiscation Act 1997* (Vic) s 34C(1)(b); *Criminal Assets Confiscation Act 2005* (SA) s 48(c); *Criminal Assets Recovery Act 1990* (NSW) s 22AA(5)(c); *Confiscation of Proceeds of Crime Act 1989* (NSW) s 33(5)(c).

53 *Criminal Assets Recovery Act 1990* (NSW) s 9B(3)(a); *Confiscation of Proceeds of Crime Act 1989* (NSW) s 33(5)(c)(i); *Criminal Property Confiscation Act 2000* (WA) s 22(2)(a). The Northern Territory goes further in making it clear that if an innocent person has granted the defendant his or her proprietary interest or a 'right of occupancy, use or possession', this makes the property unavailable for forfeiture: *Criminal Property Forfeiture Act 2002* (NT) s 82(a)(ii).

54 *Criminal Assets Recovery Act 1990* (NSW) s 9B(3)(b); *Confiscation of Proceeds of Crime Act 1989* (NSW) s 33(5)(c)(ii); *Criminal Property Confiscation Act 2000* (WA) s 22(2)(c).

55 *Criminal Assets Recovery Act 1990* (NSW) s 9B(3)(b); *Confiscation of Proceeds of Crime Act 1989* (NSW) s 33(5)(c)(ii); *Criminal Property Confiscation Act 2000* (WA) s 22(2)(c).

56 *Criminal Property Confiscation Act 2000* (WA) s 22(2)(b); *Criminal Property Forfeiture Act 2002* (NT) s 82(b).

57 *Criminal Proceeds Confiscation Act 2002* (Qld) s 153C(2)(c)(ii); *Confiscation Act 1997* (Vic) ss 34B(2)(c)(ii), 34C(2)(ii); *Criminal Assets Confiscation Act 2005* (SA) s 48(b). NSW legislation provides that 'if it is practicable to do so, [the substitute property] must be … of the same kind' as the instrument of crime: *Confiscation of Proceeds of Crime Act 1989* (NSW) s 33(8)(b); *Criminal Assets Recovery Act 1990* (NSW) s 22AA(8)(b).

58 *Confiscation Act 1997* (Vic) s 34B(2)(c)(ii).

59 *Criminal Assets Confiscation Act 2005* (SA) s 48(b); *Confiscation Act 1997* (Vic) s 36F(2).

60 *Confiscation of Proceeds of Crime Act 1989* (NSW) s 33(8)(a); *Criminal Assets Recovery Act 1990* (NSW) s 22AA(8)(a); *Criminal Proceeds Confiscation Act 2002* (Qld) s 153D(2).

Australia, so-called 'anti-hoon' laws permit the forfeiture of substitute vehicles. In those jurisdictions, where a driver commits a relevant offence in a vehicle that he or she does not own, authorities may apply for a forfeiture order against a substitute vehicle that the driver does own.[61]

An alternative to 'substituting like for like' is to define substitute property by reference to the value of the property that was used in the commission or in connection with the crime ('forfeiting the equivalent value'). This is the approach that Western Australia and the Northern Territory favour.[62] In this case, the value of the instrument of crime is payable like a fine.[63] That is not to say that those states cannot appropriate specific property to meet that debt. This is achieved through freezing orders and subsequently using that frozen property to satisfy that debt.[64] Where it is necessary to value the actual instrument of crime, its value is always assessed at the time of the offence.[65]

There is a second significant point of difference between the jurisdictions that substitute like for like. Victoria and Queensland require the defendant to have an interest in the substitute property at the time of the offence.[66] The other relevant jurisdictions do not contain such a limitation. In other words, they are not concerned with looking backwards to the date of the offence to fix the defendant's assets to a specific time.

Apart from Western Australia, none of the six jurisdictions specifically report on substituted property forfeitures. They clearly do occur; it is just unclear from the statistics what portion of forfeitures are made on these terms. In Western Australia, between 2000/2001 and 2012/2013 only eight applications for crime-used substitution declarations were successful.[67] Due to the differences in the way Western Australia has reported forfeiture applications since 2012/2013, it is unclear whether the Western Australian Director of Public Prosecutions or the Western Australia Crime and Corruption Commission still pursues such applications and, if so, whether the court has granted them. Given that legislatures were so concerned with closing loopholes, it may come as a surprise to note that, at the time of writing, only ten reported and

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61 *Road Traffic Act 1974* (WA) s 79BCA; *Road Safety Act 1986* (Vic) s 84V; *Criminal Law (Clamping, Impounding and Forfeiture of Vehicles) Act 2007* (SA) s 11(c)(ii).

62 *Criminal Property Confiscation Act 2000* (WA) s 24(1); *Criminal Property Forfeiture Act 2002* (NT) s 81(4)(c).

63 *Criminal Property Confiscation Act 2000* (WA) s 24(1); *Criminal Property Forfeiture Act 2002* (NT) s 87.

64 As EM Heenan J states, the frozen property is 'treated as security for an amount found to be owing by the offender in the crime-used property substitution declaration proceedings: *DPP (WA) v McPherson* [2012] WASC 342 [17]. See also *DPP (NT) v Tran* (2021) 296 A Crim R 148, 151 [5], 168–169 [65]–[66] and *Criminal Property Forfeiture Act 2002* (NT) s 101.

65 *Criminal Property Forfeiture Act 2002* (NT) s 85(1); *Criminal Property Confiscation Act 2000* (WA) s 23(1). This is also the case for the jurisdictions that 'substitute like for like: *Confiscation of Proceeds of Crime Act 1989* (NSW) s 33(7); *Criminal Assets Recovery Act 1990* (NSW) s 22AA(7).

66 *Confiscation Act 1997* (Vic) ss 34C(3), 36B(4)(i); *Criminal Proceeds Confiscation Act 2002* (Qld) s 153C(2)(b).

67 See Office of the Director of Public Prosecutions for the State of Western Australia, *2008/2009 Annual Report* (Report, 2009) 27 (Figure 19); Office of the Director of Public Prosecutions for the State of Western Australia, *2012/2013 Annual Report* (Report, 2013) 31 (Table 19).

unreported cases specifically concern such applications.[68] In New South Wales, the Crime Commission informs that between 2016 and 2023:

> the Commission sought 49 s 22AA declaration across 46 matters (in three Matters, the Commission sought two s 22AA declarations – one against each defendant). The court did not make s 22AA declarations in any matters. Note: this is very likely to be because all matters which were finalised were finalised by consent. In the majority of finalised matters, the asset(s) that the s 22AA declaration was sought was used as security for an Unexplained Wealth/PAO, or forfeited as a normal AFO.[69]

It is possible that authorities occasionally seek such orders, primarily as a security when seeking unexplained wealth orders or confiscation of proceeds (that is, property derived or realised from crime). In such cases, where the court ultimately deprives a defendant of such assets, this tends to occur using other legislative provisions, rather than using substitution-powers.

IV FORFEITING SUBSTITUTE PROPERTY: A CRITIQUE

A The failure to close 'loopholes' and the incongruence with the usual justifications for forfeiting instruments of crime

Judging by the paucity of cases, it would appear that these laws have neither been successful in deterring nor preventing crime. The few successful cases would hardly instil fear in the mind of a would-be criminal. But there is even less hope of deterring criminals if authorities do not periodically release detailed forfeiture statistics that break down the kinds of orders courts are making. The 'deterrent effect depends upon a recognition, by potential malefactors, of the existence of such schemes and of the relevant agencies' willingness and ability to enforce them.'[70]

Implicit in the creation of substitute property forfeiture laws is the idea that criminals are well-versed in the nuances of proceeds of crime statutes. This is apparent from statements that, without substitute property provisions, existing proceeds of

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[68] In terms of actual matters, it is fewer than ten, because many of these matters were subject to multiple applications or appeals. Those judgments are: *DPP (WA) v White* [2009] WASC 62; *DPP (WA) v White* (2010) 41 WAR 249; *White v DPP (WA)* (2011) 243 CLR 478; *DPP (WA) v McPherson* [2012] WASC 342; *DPP (NT) v Green* (2009) 195 A Crim R 364; *DPP (NT) v Green* (2010) 201 A Crim R 513; *DPP (SA) v Condo* [2008] SADC 25; *DPP (NT) v Tran* (2021) 296 A Crim R 148; *DPP (NT) v Tran* [2021] NTSC 7; *DPP (NT) v Tran (No 2)* [2022] NTSC 2.

[69] Personal communication, NSW Crime Commission, 6 September 2023. 'PAO' and 'AFO' are abbreviations for 'Proceeds Assessment Order' and 'Asset Forfeiture Order', respectively: see *Criminal Assets Recovery Act 1990* (NSW).

[70] Drugs Legislation Working Party, *Confiscation of Proceeds of Crime: Issues Paper* (Director of Public Prosecutions for Victoria, 1990) 123 [14.2.3].

crime laws would be ripe for 'exploitation'[71] by 'canny crooks'.[72] There have been prominent examples of criminal gangs setting up illegal cannabis and tobacco farms on leased agricultural and residential land.[73] But nowhere in the *Parliamentary Debates* is any evidence proffered as to the extent to which these 'loopholes' are being exploited. Additionally, nowhere does it appear in any *Parliamentary Debates*, Explanatory Notes/Memoranda or media releases, that substitute property forfeiture provisions were created in answer to any requests from any Directors of Public Prosecutions or other law enforcement bodies.

Forfeiting substitute property has a limited capacity to deter offending. This is because even with a statutory provision allowing the forfeiture of substitute assets, there is still an incentive to use another person's property to commit crime. A defendant's choice to steal another person's car for a joyride or to lease premises to manufacture drugs might simply arise because he or she does not own any comparable property. Alternatively, he or she may not wish to expose his or her own property to possible damage or destruction through criminal or inherently risky activities.[74] Lastly, if a criminal uses his or her own vehicle or premises, any criminal activity conducted with that asset will necessarily draw attention back to them, whether that be law enforcement bodies or rival criminals.[75] Taking into account all of these considerations, many offenders might choose to commit crime using property that cannot be traced back to them. None of this involves the offender reflecting on how proceeds of crime legislation might affect them. Moreover, laws enabling the forfeiture of substitute property rest on an assumption that offenders are weighing up various considerations before engaging in criminal activity, instead of haphazardly seizing upon opportunities as they arise.

In relation to the goal of crime-prevention, one problem is that the forfeiture order becomes so disconnected to the circumstances that gave rise to the forfeiture, that it is unlikely to serve this goal. Consider, for example, the case of *DPP (WA) v White*.[76] In this case, the respondent, White, had been convicted of murdering Tapley's at an address he was leasing in the Perth suburb of Maddington. The DPP did not seek forfeiture of the freehold estate at Maddington because there was no suggestion that

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71 Victoria, *Parliamentary Debates*, Legislative Assembly, 1 May 2003, 1313–1314 (Mr RJ Hulls, Attorney General). Speaking about a proposed amendment to Northern Territory's property substitution laws, Attorney-General and Minister for Justice John Elferink stated that certain provisions of the law 'created a *loophole* that has been, and will be, *exploited* if not rectified': Northern Territory, *Parliamentary Debates*, Legislative Assembly, 27 August 2014, 4850 (emphasis added).

72 South Australia, *Parliamentary Debates*, Legislative Council, 28 February 2005, 1202 (Hon P Holloway).

73 See, eg, Chris McLennan, 'Crime gangs target leases for illicit crops', *The Land* (North Richmond, 21 July 2022) 18; John Silvester, 'Police warn on drug lab booby traps', *The Age* (Melbourne, 1 February 2010) 2.

74 For example, see Alison Ritter, David Bright and Wendy Gong, *Evaluating drug law enforcement interventions directed towards methamphetamine in Australia*, NDLERF Monograph Series No 44 (Australian Institute of Criminology, 2012) 75 [5.2.5]. The report's authors found that 95% of clandestine methamphetamine labs in Victoria were in rented houses.

75 See, eg, *DPP (NT) v Tran* [2021] NTSC 7 [13], [15].

76 (2010) 41 WAR 249.

the individual holding that estate was complicit in White's crime.[77] Instead, the DPP froze White's property including his bank account with a balance of $135,000.[78] The Maddington address was surrounded by an imposing six-foot-high fence topped with barbed wire.[79] Tapley arrived at the address in White's absence. When White learnt of Tapley's presence, he instructed a man present on the land to lock the gates to the property.[80] When White arrived at Maddington, he shot at Tapley as he attempted to escape through the yard and climb over the front gates. After Tapley finally did escape onto the other side of the fence, White fired six bullets into Tapley's head, killing him. White later took Tapley's body to a property at Northam, where it was incinerated.

So much of the court's reasoning (at first instance and in the Court of Appeal) turns on the degree to which aspects of the physical land at Maddington contributed to Tapley death.[81] These factors might be relevant to establishing a financial liability to the state. But how does a monetary payment to the state cure the actual instrument of crime of any of the features of the land said to be *instrumental* in the offence? This is especially so if, as is suggested by the facts, the physical characteristics of the Maddington property (the high fence, locked gates, etc) made it conducive to the commission of such crimes. In a much earlier Western Australian case, Parker J said that forfeiture 'is a means of ensuring that the offence will not be repeated by the same means'.[82] But how does the deprivation of *substitute* property achieve the objective of crime-prevention (in this case, the dollar value of the Maddington freehold estate, said to be $265,000)?[83]

B Determining the substitute property

1 Forfeiting the equivalent value

A further issue with forfeiting substitute property is that is not obvious what is the best way to determine whether the substitute property is equivalent to the actual instrument of crime. Are there advantages to 'forfeiting the equivalent value' over the

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77 *Criminal Property Confiscation Act 2000* (WA) s 153(1) provides that 'a person is an innocent party in relation to crime-used property if the person — (a) was not in any way involved in the commission of the relevant confiscation offence; and (b) did not know, and had no reasonable grounds for suspecting, that the relevant confiscation offence was being or would be committed, or took all reasonable steps to prevent its commission.'

78 *White v DPP (WA)* (2011) 243 CLR 478, 490 [32].

79 *DPP (WA) v White* (2010) 41 WAR 249, 251 [4].

80 Ibid 251 [5].

81 Although the High Court recounted the facts of the case, the physical characteristics of the land were not as instrumental to its judges' reasoning: *White v DPP (WA)* (2011) 243 CLR 478. In that case, French CJ, Crennan and Bell JJ noted that 'the mere doing of an act in or on a property in connection with the commission of a confiscation offence, does not necessarily fit comfortably within the concept of use applied to property': 488 [21]. However, they conceded that under the terms of the *Criminal Property Confiscation Act 2000* (WA) a defendant could 'use' land by simply committing offences on it.

82 *Gayfer v Bere* (Unreported, Supreme Court of Western Australia, 24 June 1998, Lib No 980360) (Parker J).

83 *White v DPP (WA)* (2011) 243 CLR 478, 490 [31].

'like for like' approach? Determining the monetary value of an instrument of crime might be a relatively easy inquiry for a judge to undertake. However, from the public's point of view, it could be regarded as a somewhat cynical exercise. The defendant is essentially subjected to paying a fine, whose value is not determined by the seriousness of the defendant's conduct, but by the monetary value of the actual instrument of crime. Again, this is a world away from the circumstances of the offending behaviour. Forfeiting the equivalent value also has the potential to lead to unusual outcomes. As the Hon Malcolm McCusker AC QC argued, a relevant offence committed in the Crown Hotel would render the defendant liable to pay an amount equivalent to the value of the entire hotel.[84] All sense of proportionality would be lost.[85] This harks back to the days of criminal bankruptcy.[86] Moreover, it might unintentionally encourage offenders to use less-valuable equipment or commit offences on comparatively worthless land.

The other problem with forfeiting equivalent values is that this approach conflates use-value with exchange-value (or market-value). Section 11 of the Northern Territory's *Criminal Property Forfeiture Act* provides that 'property is crime-used' if 'the property is or was used, or intended for use, directly in or in connection with the commission of a forfeiture offence'. Under the legislation, 'property' is defined as '(a) real or personal property of any description … or (b) legal or equitable interest in any property mentioned in paragraph (a)'. For the purposes of calculating the value of the actual instrument of crime, the 'value … is taken to be its full value' and 'the value of the crime-used property is the freehold value of real property, or the full value of other property, and the value of an interest in the property under an agreement'. Furthermore, it does not matter that the defendant 'did not outlay an amount equal to [the property's] full value'.[87] In effect, this means that in the case of real property, even though it is the nefarious *use* to which the defendant has put the property, the legislature has chosen to discard the conventional ways property use is valued.[88] For land, there

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84 The Hon Malcolm McCusker AC QC, 'Some of the problems with the Criminal Property Confiscation Act 2000', Submission to Review of the Criminal Property Confiscation Act 2000 (WA) (28 November 2018). See also the example SA Shirrefs SC gave: Transcript of Proceedings, *White v DPP (WA)* [2011] HCATrans 047, 583–592.

85 The lack of proportionality in proceeds of crime legislation is well known: see Natalie Skead and Sarah Murray, 'The Politics of Proceeds of Crime Legislation' (2015) 38(2) *University of New South Wales Law Journal* 455, 481–484.

86 See Hodgson et al (n 42) ch 10. As Mildren J mused, if a person buried a small tin of cannabis in Kakadu National Park, '[i]s he to be met with a crime-used property substitution declaration resulting in a monstrous debt? Apart from bankruptcy, what would that achieve?': *DPP (NT) v Dickfoss* (2011) 28 NTLR 71, 99 [84].

87 *Criminal Property Forfeiture Act 2002* (NT) s 85(2). See an identical provision in the *Criminal Property Confiscation Act 2000* (WA) s 23(2).

88 Although this is clearly the way in which the Northern Territory and Western Australia designed these laws. As Skead has argued, that the legislatures chose to exempt certain pre-existing interests from extinguishment upon the order of forfeiture, shows that 'the legislation contemplates that it is the land itself that is confiscated rather than an interest in land': Natalie Skead, 'Crime-used property confiscation in Western Australia and the Northern Territory: Laws Befitting Draco's Axones?' (2016) 41(1) *The University of Western Australia Law Review* 67, 82–83, 85–86. Indeed, after the Full Court of the Northern Territory Supreme Court decision in *DPP (NT) v Green* (2010) 201 A Crim R 513, the Northern Territory passed a 'commonsense

are numerous estates and interests that fall short of a freehold estate, the holder of which enjoys the full complement of incidents. Those lesser interests include leases, easements, *profits à prendre* (and licences, which do not even rise to the level of a proprietary interest). These all entitle the interest-holder to some *use* of the land. Yet, the legislature has opted for a definition of property that is widely accepted as the largest form of land ownership known to the law and whose full monetary value is not realised through use, but through exchange.

If property is derived from crime, then it is fitting to trace those proceeds through to whatever that form those proceeds currently take. However, forfeiting instruments of crime is not an exercise in tracing assets. By forfeiting the equivalent value, the Western Australian and Northern Territory's statutes treat forfeiture as simply a means to undermining the capital bases of offenders. This has never been the intent of depriving offenders of ordinary instruments of crime.

2 Substituting like for like

Does the 'like for like' approach to forfeiting substitute property offer more promise? In *DPP (SA) v Condo*,[89] the DPP sought the forfeiture of substitute land at Renmark West. The defendant had previously pleaded guilty to producing cannabis at a different location near Cobera. Police found around 900 cannabis plants at that property, estimated to have a value of $1m. Like the facts in *DPP (WA) v White*, the Cobera property was owned by a third party; but, unlike the Western Australian legislation, the trial judge found that the DPP had failed to adduce sufficient evidence to show that the owner of the Cobera property was entirely blameless in the defendant's cannabis operation to make it necessary for authorities to pursue the defendant's substitute property. Moreover, Judge Tilmouth found that the DPP had failed to introduce sufficient evidence to show that the Renmark West and Cobera properties were of the same nature or description. In doing so, his Honour rejected the argument that 'property' referred to the defendant's interest in the substitute property but instead referred to a lay conception of property. In this case, the defendant was said to have either a beneficial interest or one-third legal interest in the Renmark West property. As his Honour noted, such a statutory construction would 'produce incongruous and plainly unintended results' because it 'would fall to be determined by the co-incidence of legal interests [between the two properties] and nothing else'.[90]

Judge Tilmouth went on to observe:

> There is a distinct biblical connotation in the notion 'the same', for it appears to contemplate making substitution declaration on the broad basis of an 'eye for an eye' or

amendment': Northern Territory, *Parliamentary Debates*, Legislative Assembly, 23 October 2014, 5225 (Mr J Elferink, Attorney-General and Minister for Justice). It clarified that where land is an instrument of crime, and the defendant only holds a lesser interest in it, the defendant is liable to pay an amount equal to value of the *freehold* interest: *Criminal Property Forfeiture Amendment Act 2014* (NT).

89 [2008] SADC 25.

90 Ibid [27].

> 'a tooth for a tooth'. There would be no apparent difficulty in applying the section where quite specific property is involved, such as a motor vehicle for instance.[91]

It is perhaps the sage warning (usually attributed to Mahatma Gandhi) that 'an eye for an eye makes the whole world blind' that best captures today's understanding of the phrase.[92] Gandhi cautioned against giving into vengeful instincts, for violence begets violence. But there are other ways to comprehend the phrase. Instead of an endless cycle of violence, the eye taken for an eye is a means of ending a dispute between the victim and perpetrator. It is a means of completing the circle. On the one hand, it represents payback in its crudest form. On the other hand, it signifies a degree of exactness. As Miller notes:

> Other body parts shade into one another because they're made out of the same flesh as the parts right next to them, such as ears, hands, feet, tongues, noses. But an eye can be precisely an eye, a tooth precisely a tooth; their boundaries are clear. This gives them a special salience.[93]

There is at least a superficial appeal to applying the *lex talionis* to instruments of a crime. But its simplicity falls away in its application. As Judge Tilmouth went on to reflect:

> This language reflects the need for a degree of parity or recognisable similarity between the instrument [of crime] and that liable to substitution. A simplistic generic comparator of real property for real property is too broad to afford any meaningful content to the limiting words, whereas house for house, home-unit for a home-unit, town house for town house, farm for farm, might conceivably be too narrow.[94]

Indeed, when studying property law, the first thing every law student learns is to set aside their lay understandings of property and ownership.[95] Although statutes do occasionally intend to refer to property as a tangible thing, more often than not property means a relationship among persons with respect to a thing, a 'bundle of rights', or even simply as a synonym for any asset that holds wealth.[96] It is this last conception of property that forms the foundation of unexplained wealth laws.[97] Those laws are not concerned with the form that property takes, but rather with tracing illicit wealth back through property.

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91 Ibid [18].

92 See James E Clapp et al, *Lawtalk: The Unknown Stories Behind Familiar Legal Expressions* (Yale University Press, 2011) 310, n 7. See also Larry May, *Ancient Legal Thought: Equity, Justice and Humaneness from Hammurabi and the Pharaohs to Justinian and the Talmud* (Cambridge University Press, 2019) 158–165.

93 William Ian Miller, *Eye for an Eye* (Cambridge University Press, 2006) 29.

94 *DPP (SA) v Condo* [2008] SADC 25 [18].

95 For example, see KJ Gray and PD Symes, *Real Property and Real People: Principles of Land Law* (Butterworths, 1981) 7–10.

96 Rudden believes there are circumstances in which the law should view things merely as a 'vessel into which wealth is poured and stored': Bernard Rudden, 'Things and Thing and Things as Wealth' (1994) 14(1) *Oxford Journal of Legal Studies* 81, 86.

97 See Liz Campbell and Áine Clancy, 'The principled and practical limits to unexplained wealth orders' (2024) 52(1) *University of Western Australia Law Review* 29.

The encapsulation of the *lex talionis* in those jurisdictions that substitute like for like, speak to an instinctive and intrinsic understanding of justice. However, this approach is completely divorced from understandings of property that are heavily based on the historical and social features that informed their development. Unlike an eye, the boundaries of property are frequently arbitrary and largely imposed upon on us by the decisions of previous generations, such as where land should be subdivided. If a defendant commits an environmental crime on a mining tenement, should a judge order the forfeiture of the defendant's luxury beachfront apartment? These kinds of property do not make for ready comparisons. They are not rival products sitting beside each other on a supermarket shelf. Moreover, the solution of the *lex talionis* is misguided. Property has been used to facilitate a crime. So, why is the person robbed of the possession of the thing, not simply its use? To translate this for the context forfeiture, if a defendant uses someone else's car to commit an offence, the defendant should be impeded from using his or her own vehicle. That could be achieved by temporarily clamping the car or impounding it.[98]

Besides the practical problems of determining equivalency, the allusion to the eye-for-an-eye is disturbing for other reasons. If proceeds of crime laws are not designed to punish, as is so often claimed,[99] then references to an-eye-for-an-eye do not help their cause. Moreover, this ancient practice was a means of self-help, a process by which two parties could resolve a dispute. Now that the state has assumed the mantle of punishing the offender and keeping the peace, this approach is not warranted. Earlier talionic societies are thought to have seldom applied the eye-for-an-eye in any literal sense.[100] Throughout history compensatory measures developed to relieve an offender of the pain of losing organs and limbs.[101]

It is possible to appreciate the *lex talionis* in yet another way; not in terms of robbing the offender of the item, but in terms of restoring the deprived item to the victim. In other words, the *lex talionis* is restorative: "'giving an eye" as opposed to "taking an eye"'.[102] However, in the context of forfeiting substituted property, there is nothing restorative because the owner of the actual instrument of crime has not suffered any loss. The defendant's loss is not measured against the loss suffered by any victim of crime. Even if it were, items are forfeited to the state and not directly 'restored' to victims of crime.

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98 See discussion in Brent Fisse and David Fraser, 'Some Antipodean Skepticisms about Forfeiture, Confiscation of Proceeds of Crime, and Money Laundering Offenses' (1993) 44(3) *Alabama Law Review* 737, 751.

99 As Burns J stated, 'Forfeiture of property as a means of prevention of crime, where the property was not derived from criminal offending, will undoubtedly feel punitive to an offender, but that circumstance does not make punishment the purpose of the forfeiture': *DPP (ACT) v Nikro* [2017] ACTSC 15 [38].

100 Mario Biagioli, 'Justice out of balance' (2019) 45(Winter) *Critical Inquiry* 280, 295–296.

101 Ibid.

102 Jonathan Burnside, *God, Justice, and Society: Aspects of Law and Legality in the Bible* (Oxford University Press, 2010) 277.

C Problems all around

Each of the two approaches have the potential to produce absurd outcomes. For example, although Western Australia's legislation approaches substitute property from a monetary perspective, it gives courts little discretion when making such orders.[103] As for the alternative of substituting like for like, in jurisdictions like South Australia and Victoria, there is the potential for a defendant to forfeit substitute property that is significantly greater in value than the actual instrument of crime. Both approaches can lead to an outcome that feels twice removed from the underlying offence.

Equally problematic is determining whether the defendant's liability should be limited to the property the defendant owned at the time of the offence. New South Wales and South Australia permit authorities to pursue substitute property that the defendant has acquired since the commission of the offence. In contrast, Queensland and Victoria only subject a defendant to forfeiture of substitute property that he/she owned at the time of the offence. In this respect the Queensland/Victorian laws appear to be on a surer footing and represent a more proportionate response to the threats of crime. On the other hand, it would not be difficult for criminals to thwart Queensland/Victorian laws by divesting themselves of assets they owned at the time of the offence and replacing them with other assets (effectively substituting their substitute assets).

D Saving graces

None of this is to say that forfeiture of substitute property has no saving graces. First, it is admirable that legislatures have tried to achieve comparable outcomes between those who use their own property to commit offences and those who choose to use others' property. Second, the state can at least resort to these laws where it would be otherwise be impossible for the state to bring forfeiture proceedings. For example, Crown land or native title interests should not be the subject of such proceedings. As the Northern Territory Attorney-General commented:

> Aboriginal land is inalienable land. Obviously, land which does not have to have a transferable title is not available [for forfeiture] ... We do not want to disturb current land tenure arrangements on Aboriginal land.[104]

It is entirely appropriate that authorities pursue substitute property in cases like this. Third, forfeiting substitute property is preferrable to forfeiture laws in other jurisdictions which operate *in rem*. In attempting to combat illegal street racing, New Zealand employs a variation on these laws. Where an individual uses another's vehicle to commit such offences, instead of pursuing the driver's substitute vehicle, officials can still forfeit the vehicle provided that the vehicle has previously been used to commit

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[103] There have been recommendations to repeal and replace the *Criminal Property Confiscation Act 2000* (WA) to grant courts greater discretion to refuse substitution orders: The Hon Wayne Martin AC QC, *Review of the Criminal Property Confiscation Act 2000* (WA) (May 2009) [6.1]–[6.13].

[104] Northern Territory, *Parliamentary Debates*, Legislative Assembly, 18 June 2002, 1691 (Dr Peter Toyne).

a similar offence and the owner has been cautioned about it.[105] Substituting the property is preferable to substituting the owner, if it makes an owner vicariously liable for the actions of others. Fourth and finally, pursuing substitute property might be suitable when an offender repeatedly engages in certain conduct. For example, if an offender repeatedly uses a rental vehicle to drive under the influence of alcohol. In these circumstances, the forfeiture of a substitute vehicle might have the desired effect of inhibiting the offender from repeatedly flaunting the law.

V CONCLUSION

Laws facilitating the forfeiture of substitute property were introduced to close statutory loopholes that might otherwise allow individuals to thwart proceeds of crime laws. Although intended to complement existing laws, laws that target substitute property fail to align with the rationales usually advanced in support of forfeiting instruments of crime. More specifically, these laws are unlikely to deter or prevent individuals from offending. This is especially so given that powers to forfeit substitute property are seldom employed and are poorly publicised.

As the term suggests, an 'instrument of crime' is liable to forfeiture because it was *instrumental* in the commission of a crime. In trying to produce similar outcomes between offenders who use their own property and those who use others' property, legislatures promote symbolism over instrumentalism. However, translating symbolic goals into concrete applications is not straightforward. Legislatures have adopted one of two approaches to pursuing equivalence between the instrument or crime and substitute thing. One approach is to simply make the defendant liable for an amount equivalent to value of the actual instrument of crime. The other approach sees the defendant forfeit an item of a similar nature to the actual instrument of crime. Both approaches are far removed from the instrumentalist concerns usually raised to justify forfeiture and instead resemble penalties. In other words, 'like for like' becomes 'dislike for dislike.' With such a weak foundation, these laws ought to be repealed.

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[105] *Sentencing Act 2002* (NZ) ss 127–142.