Running with United States v. Totaro: Should Divorce Law Preserve Innocent Non-owner Spouses’ Rights in Property Subject to Federal Criminal Forfeiture?

Matthew Jordan Cochran
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Running with *United States v. Totaro*: Should Divorce Law Preserve Innocent Non-owner Spouses’ Rights in Property Subject to Federal Criminal Forfeiture?

MATTHEW JORDAN COCHRAN

This article examines the question of whether state divorce law should be used to carve out non-forfeitable property rights for innocent spouses—even those without legal title, or those whose title did not vest prior to their spouse’s illegal conduct. The author believes the divorce law analogy seems to present a promising means to an important end, but added scrutiny suggests it is beset by a number of legal and practical complexities.

Adrienne and Ronald Totaro owned a lot in rural western New York. In 1974, they both took out mortgages to fund construction of their country home on the property. After Ronald filed for bankruptcy in 1977, Adrienne managed to obtain full legal title to the property. In 1984, Ronald began to implement an unlawful racketeering scheme and funneled illicit funds into Adrienne’s checking account, from which she made the mortgage payments. Not surprisingly, when Ronald was later convicted of violating the Racketeer Influenced and Corrupt Organizations (“RICO”) Act, the government sought to forfeit the Totaros’ country home as property “maintained” with Ronald’s unlawful proceeds. The question for the Eighth Circuit’s appellate court was what law to con-
sult in dividing Ronald’s interest in the property from that of his innocent spouse—and it settled on “divorce law.” The court explained that

the relationship of divorcees is analogous to the relative positions of the parties here. The government is stepping into Ronald’s shoes and claiming his interest, and its interests are decidedly adverse to Adrienne’s. By referring to [state] divorce law, the district court should be able to determine what Adrienne’s interests in the property are, forfeit everything else, and thereby adhere to both the letter and spirit of the forfeiture statute without penalizing or punishing the Totaros for remaining married. Proceeding in this manner also accomplishes the primary purpose of [18 U.S.C.] § 1963, which is to forfeit all of Ronald’s interest in the property.

The court thus assumed that if the Totaros had divorced prior to Ronald’s crimes, part of the property would have gone to Adrienne in a division of the marital estate. Otherwise, there would be little reason to characterize forfeiture as “punishing the Totaros for remaining married.”

If the divorce analogy is sound, why should the federal judiciary not take this reasoning and run with it—even in cases where the defendant’s spouse was not so fortunate as to secure legal title to the property, like Adrienne did? This article examines that very question: whether state divorce law should be used to carve out non-forfeitable property rights for innocent spouses—even those without legal title, or those whose title did not vest prior to their husbands’ illegal conduct. The divorce law analogy seems to present a promising means to an important end, but added scrutiny suggests it is beset by a number of legal and practical complexities.

Note that while it is certainly possible that the innocent spouse would be male and the racketeering convict would be female, statistics indicate that such a scenario is virtually unheard-of. Consequently, the following discussion assumes any innocent spouse is the wife of a male convict.

BACKGROUND

Ever since RICO was first proposed as part of the Organized Crime Control Act of 1970, a diverse group of voices has expressed concern
over its innovative crime-fighting provisions. The American Civil Liberties Union feared the new law would overshoot mobsters and drug syndicates, wrongly targeting even “the corner grocer [who] might accept money for food from people whom he knew to have been involved with the Mafia.” The Bar Association of the City of New York feared RICO would “sweep far beyond the field of organized crime.” Academics later decried the law as “legislation on the cheap” and “an attempt to use one statute to solve all the evils of society.” Of course, as RICO’s drafters candidly acknowledged, “Congress never intended to restrict its application to the Mob.” Federal courts have certainly recognized as much.

But surprisingly, hardly anyone specifically attacked RICO’s forfeiture provisions prior to its enactment, and the few contentions that did surface were for the most part misguided. The New York County Lawyers Association, for example, wrongly believed the law sought “forfeiture of the racketeer’s estate” and thus ran afoul of statutes forbidding any conviction to “work corruption of blood or any forfeiture of estate.” Several congressmen seem to have agreed. Their reaction is perhaps understandable in light of the fact that, up until that time, criminal forfeiture—as opposed to civil—“had actually been prohibited in the United States.” But more justifiable was these dissenters’ uneasiness concerning the vague, cursory provision made for protecting “the rights of innocent persons.” Leaving forfeiture’s impact on innocent parties to the discretion of the Attorney General must have seemed little better than leaving it to the auspices of the feudal-era Crown.

Criminal forfeiture statutes have since evolved to include special procedures by which third parties can challenge the forfeiture of property in which they have superior title or of which they were bona fide purchasers. As concerns the rights of innocent spouses, however, early doubts have been at least partially validated. Some federal circuit courts have shielded from forfeiture the innocent spouse’s interest in community property and in property held with the defendant as tenants by the entirety. But other circuits have been less deferential to state property law, holding entireties interests, “homestead” property, and rights obtained by divorce decree are nevertheless vulnerable to forfeiture. Surveying this case law,
one commentator has complained that federal criminal forfeiture is inconsistent and unpredictable, to the hazard of innocents.27 Another writer has suggested such problems could be mitigated by incorporating into criminal forfeiture the “innocent owner” defense available under civil forfeiture statutes.28 Others, contending that these statutes inspire judicial confusion and are laden with due process pitfalls, recommend balancing government and private interests to minimize any deprivation of rights.29

But critics of the criminal forfeiture scheme ignore what is already a very clear (albeit very grim) consistency in the law: if the innocent spouse does not own the subject property in more than a nominal sense, she can have no hope of preventing its forfeiture to the government.30 There is nothing confusing about that. Even in Totaro, for example, legal title to the property had been vested in Adrienne since before her husband’s crimes began.31 The Eighth Circuit had no occasion to address whether its divorce law analogy should extend beyond the ownership focused framework of RICO forfeiture to preserve non-legal interests. Indeed, there seems to be no historical justification for offering protection against forfeiture to spouses who are not at least innocent “joint owners” of the property.32

Yet a well-developed body of law shows that when spouses go their separate ways, there is ample reason to ignore questions of legal title in dividing the marital estate. Virtually every state in the nation uses some system of equitable distribution,33 wherein property acquired separately or jointly becomes marital property upon divorce and is apportioned between the former spouses by a judge.34 By requiring judges to give weight to the contributions of the homemaker spouse and not just the breadwinner, equitable distribution and community property regimes address the hardship historically imposed on women by division of property according to title.35 This worthy policy objective should also find expression in criminal forfeiture law.

What follows is an examination of the merits and difficulties of the analogy at which the Totaro court only hinted: putting the government in the defendant’s shoes and treating the RICO conviction as a divorce, upon which the court must divide any forfeit portion of the marital estate between the government and its “former spouse.”36
EVALUATING THE DIVORCE LAW ANALOGY

Taking *United States v. Totaro* and running with it certainly seems justified by fairness considerations. Where family law entitles couples to expect that equity will recognize their investments in marriage’s economic partnership, it would be unfair for forfeiture to leave an innocent, non-owner spouse in worse position than she would occupy if the disruption of her marriage were voluntary. The inequity of such a result would be particularly acute in jurisdictions where courts have refused to forfeit property won by the innocent spouse in a *pre*-conviction distribution of the marital estate as part of a divorce action.37

The divorce law approach also appears justified on a conceptual level. As the Ninth Circuit observed, “[s]tate law determines whether [third parties] have a property interest, but federal law determines whether or not that interest can be forfeited.”38 If this is true, only the most myopic of jurists could purport to identify property rights under “state law” yet ignore the very interests that would be recognized through an equitable distribution in that state. The greater question is what rules should constitute the “federal law” by which property can be deemed forfeit.

So is there any *statutory* justification—setting aside jurisdictional questions for the moment39—for treating criminal forfeiture as an occasion for equitable distribution? If the innocent spouse is allowed to benefit from the same legal fiction enjoyed by the government, the answer might be yes. According to RICO, the moment Ronald Totaro committed the first of his racketeering crimes, “[a]ll right, title, and interest in property [maintained with the proceeds of that crime] vest[ed] in the United States.”40 Congress has thus codified an odd fiction known as the “relation-back doctrine,” a concept formerly reserved for civil *in rem* forfeitures.41 If the government’s title in the property relates back to the time of the crime, then the innocent spouse’s equitable interest—which normally would vest only upon divorce and property distribution—should relate back as well, to the extent she was making contributions to the marriage at that time. For purposes of her third party challenge under § 1963(l), this would mean the wife’s “right, title, or interest was vested in [her] rather than the defendant or was superior to [his] right, title, or interest. . .at the
time of the commission of the acts which gave rise to the forfeiture.”42

Assuming *arguendo* that a federal court would be justified—at least as a preliminary matter of fairness, concept, and statutory construction—in applying the divorce analogy to such a forfeiture, the question becomes whether this approach is prudent and practicable.

**Enhanced Fairness and Precision**

The divorce law approach to federal criminal forfeiture would effectively replace the title-based legal considerations spelled out in § 1963(l) and analogous statutes with a merit-based equitable analysis. This innovation would bring about at least two desirable consequences.

First, as suggested above, an innocent spouse would no longer be left out in the cold merely because she was not fortunate enough to hold some sort of legal title to the forfeit property. However, she would not automatically be entitled to, say, a one-half interest. Rather, her share would be determined based on the extent of her contributions to the marriage, her ability to support herself, and other equitable factors.43

For example, suppose a seasoned criminal entrepreneur manages to marry a young lady just out of college. For all she or anyone else knows, he is a successful restaurant owner. She comes to live with him in the sprawling mansion he built using the proceeds of his flourishing criminal enterprise. They have several children, whom she spends the next two decades raising as a dedicated homemaker. Her husband is then convicted under RICO, and the government seeks to forfeit the home. Rather than simply declare the woman to have no interest savable under § 1963(l)(6)(A), the district court would award her an interest commensurate with her contribution to the marriage, ascribing value to her twenty years of homemaking and considering all relevant factors, including her sacrifice of career opportunities and limitations on her ability to earn an income independent of her husband.

Moreover, the existence of significant marital assets *other* than the property subject to forfeiture could be considered in determining the extent of the innocent spouse’s entitlement to property targeted by the government, and would likely militate against divesting the government of that property. For instance, a “trophy” wife who raised no children and was herself a “trust-fund baby” would be unlikely to be awarded an interest in the property (to
which she otherwise lacks title) simply by virtue of her husband’s crimes. Thus, it seems an equitable distribution analysis could bring fairness—but a precise, cautious fairness—to the harsh spectacle of forfeiture.

Second, application of the divorce law analogy in cases where the innocent spouse does have title might serve to frustrate the evasive efforts of more thoughtful criminals, who might attempt to shield their assets from the government simply by transferring some form of title to their spouse prior to engaging in their criminal enterprise. The current statutes reward careful planning by wrongdoers who anticipate forfeiture: as long as the spouse’s interest in the property becomes “vested” or “superior to” that of the prospective racketeer before his crimes begin, the government cannot forfeit that property even if it is later “maintained” with drug money.44

For example, it is possible that a man planning to start a life of interstate crime might first decide to buy a splendid home with his wife as tenants by the entirety. He knows that even if he is someday convicted, he will still be able to enjoy possession of the house with his wife when he gets out of jail—thanks to her entireties interest, which cannot be forfeit.45 But if the divorce analogy governed criminal forfeiture, the mere fact of her legal title would not be determinative. Instead, her interest in the property would be preserved only to the extent it is validated by equitable distribution considerations.46 This would discourage sham marriages and the evasive titling of property by fastidious criminals,47 for the defendant would only be allowed to benefit from the innocence of his spouse if she was actually a participant in the marital economic partnership (as opposed to a mere placeholder). Of course, divesting the spouse of an interest in property to which she lawfully and innocently holds title—just because she did not contribute an equivalent share of resources or other support to the marriage—would certainly raise eyebrows. But this sort of thing already takes place in the civil in rem forfeiture context, where proceedings against property can result in the forfeiture of even an innocent owner’s property without violating her right to due process.48

Problems of Implementation and Policy

Though the divorce analogy would likely yield important results, the legal, practical, and prudential obstacles to its implementation are not in-
significant. An initial problem is that it is unclear whether federal courts have jurisdiction to conduct an equitable distribution-like analysis, even for purposes of adjudicating congressionally sanctioned claims such as those brought by innocent spouses or other third parties under § 1963(l). The statutes’ succinct language speaks only of a petitioner’s “legal right, title, or interest” and does not appear to invite a court to exercise equity powers in “amend[ing] the order of forfeiture in accordance with its determination.” Yet one might argue that because Congress has explicitly withheld jurisdiction over state law matters in other statutes, its failure to do so in the forfeiture context should not be read as intent to forbid the divorce analysis. Even assuming such reasoning is persuasive, however, federal courts will remain careful to “avoid entangling [themselves] in family law matters best left to state court.” Indeed, even the Totaro court has been criticized for “deciding to graft federal common law rules onto state property law,” so perhaps the expanded divorce analogy posited here is even more suspect. But although the validity of federal common law continues to receive vigorous debate, precedent certainly exists for judicial creation of rules by virtue of powers implied by federal statutes.

Another significant concern is whether it would be practicable for federal judges to engage in the complex weighing of equities called for under the distribution scheme of a given jurisdiction. While a federal trial court would certainly be competent to research and apply state law to a controversy, the necessarily fact intensive nature of an equitable distribution analysis would make a § 1963(l)-type proceeding almost unrecognizable. The inquiry would change from a simple chronology of property interests to a broad examination of each spouse’s finances, earning ability, domestic contributions, family history, and the like. The longer the marriage and the greater the extent and diversity of assets, the more involved the proceeding would become. In contrast, the ancillary proceeding provided for in the criminal forfeiture statutes is supposed to take place in short order: within thirty days of the third party’s petition. Of course, at least the requisite valuation of forfeit property would not be an undertaking unfamiliar to courts hearing such third-party challenges.

In addition to increasing the burden on judicial resources, imple-
menting this divorce simulation would effectively reapportion the innocent spouse’s statutory burden of proof. Currently, third-party petitioners must prove their vested or superior interest by a preponderance of the evidence. The government may—but need not—present a rebuttal case. But the divorce law approach would appear to create a burden of proof for the government as well; for if only the innocent spouse presents evidence of the property to which equity entitles her, the government risks a result that reflects inflated, subjective characterizations of the wife’s contributions—a true gamble. Furthermore, assuming the government would want to demonstrate that she contributed less to the marriage than she claimed, it would soon find itself in the very odd position of trying to prove that the criminal spouse—who the government just convicted for racketeering—was a better provider and a more valuable asset to the marriage than his innocent wife. The divorce analogy would thus transform a relatively brief, straightforward statutory process into something more onerous (at least from the government’s standpoint) than Congress ever intended.

Perhaps the most obvious practical problem with the divorce analogy relates to the matter of the defendant spouse’s prison sentence. The idea, of course, is that his conviction should be treated like a divorce that triggers an equitable distribution of the forfeit property. But if he will only be “separated” from his innocent spouse for a brief period (due to a lenient sentence, for example), salient questions of the wife’s economic need or independent earning ability must be limited by the term of his imprisonment. A five-year sentence is distinguishable from an absolute divorce, and this difference threatens to throw the analogy into disarray. For instance, does equity entitle the innocent spouse to a one-half interest in a seven million dollar condo bought with illicit money if her enterprising husband will soon be out of prison, able to provide for her again? Adding this question of time to the equitable distribution calculus would profoundly augment an already-tedious determination.

More importantly, should a criminal be permitted to invest unlawful proceeds in costly property, let the court award his innocent spouse an equitable share of that property, and then get out of jail and enjoy the remaining fruits of his illicit business with his loyal wife? Such “fruits” might include his wife’s undivided interest in the property (in which the
government also holds an interest), or even his wife's portion of the proceeds from a sale of the forfeit property. Of course, anything purchased using proceeds from the sale of the wife's equitable interest could itself be described as property "derived from . . .proceeds [the husband] obtained, directly or indirectly, from racketeering." But res judicata as well as constitutional protections against double jeopardy would likely prevent the government from taking another swipe at the new property, despite its somewhat unwholesome pedigree.

At the very least, it seems there is some potential for effective anticipation of the divorce analogy by criminals hoping to take advantage of their wives' innocence. It is therefore possible that implementation of the divorce analogy would frustrate Congress's objectives by converting a wife's innocence into a virtual safe-haven for her husband's ill-gotten gains, diminishing the deterrent and remedial effect of the criminal forfeiture statutes.

CONCLUSION

Although there are compelling reasons for honoring contributions to the marriage made by a RICO or other criminal's innocent non-owner spouse, practical and policy considerations may make an equitable distribution approach to criminal forfeiture unwieldy. If Congress, however, is willing to acknowledge the merits of the Totaro court's divorce analogy, perhaps that worthy innovation will be successfully wedded to the existing forfeiture regime, with the benefit of legislative precision.

NOTES

1 United States v. Totaro, 345 F.3d 989, 992 (8th Cir. 2003).
2 Id.
3 Id. (“In 1978, Adrienne acquired full legal title to the property by paying $500 to become the assignee of a creditor holding a mechanic's lien on Ronald’s undivided half-interest in the property.”).
4 Id. (explaining that Ronald’s predicate crimes included “operating an ‘advance fee’ scheme in which he conned investors out of millions of dollars..."
between 1984 and 1999”).

5 Id.

6 Id. at 998.

7 Id. at 999 (stating that “[i]n the absence of rules specifically designed for the forfeiture context, the best rules to apply to sort out the property rights of married people are found in the laws governing divorce—an established body of law designed to do just that”).

8 Id. (emphasis added).

9 See Kenneth E. Carlson & Peter E. Finn, Prosecuting Criminal Enterprises: Federal Offenses and Offenders (Nov. 1993), available at http://www.lectlaw.com/files/cri18.htm (stating that over 97 percent of racketeering convicts at the time of the report were male).


12 William L. Anderson & Candice E. Jackson, Law as a Weapon: How RICO Subverts Liberty and the True Purpose of Law, 9 Independent Rev. 85, 91 (2004); cf. Levy, supra note 11, at 74 (observing that the Big Apple’s bar association “found enough wrong with [RICO] to oppose the measure, yet had not a word to say against or about criminal forfeiture”).


14 Id. (relating the comments of Notre Dame law professor and RICO drafter Robert Blakey, who opposed creating “one set of rules for people whose collars are blue or whose names end in vowels [presumably Italians], and another set for those whose collars are white and have Ivy League diplomas”).

15 See, e.g., Nat’l Org. for Women v. Scheidler, 510 U.S. 249 (1994) (reversing district court’s dismissal of a civil RICO claim brought against a coalition of antiabortion groups, holding that economic motive is not an element of a RICO offense).

16 Levy, supra note 11, at 74.

112, 117 (1790). The Constitution states that although “Congress shall have the Power to declare the Punishment of Treason. . .no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.” U.S. CONST., art. III, § 3, cl. 2. These provisions represent a rejection of harsh features of feudal England’s common law: when a person was found guilty of treason or a felony, “the feudal covenant and mutual bond of fealty [were] held to be broken, the estate instantly [fell] back from the offender to the lord of the fee, and the inheritable quality of his blood [was] extinguished and blotted out forever.” 2 WILLIAM BLACKSTONE, COMMENTARIES *251–52; see also DONALD J. BOUDREAU & A.C. PRITCHARD, INNOCENCE LOST: BENNIS V. MICHIGAN AND THE FORFEITURE TRADITION, 61 MO. L. REV. 593, 614 (1996) (discussing the pointed rejection of such doctrines by members of the Constitutional Convention). Forfeiture under RICO today, however, is limited to “any interest the person has acquired or maintained in violation of [the statute’s substantive provisions; or interests, claims, or property] affording a source of influence over [a RICO enterprise; or] any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from [that] violation.” 18 U.S.C. § 1963(a)(1)–(3). In theory, at least, what is forfeit is not the criminal’s entire estate but only his ill-gotten gains. See STEFAN D. CASSELLA, CRIMINAL FORFEITURE PROCEDURE IN 2006: A SURVEY OF DEVELOPMENTS IN THE CASE LAW, 42 CRIM. L. BULL. 515, 546–47 (2006); BILL SHAW, FIFTH AMENDMENT FAILURES AND RICO FORFEITURES, 28 AM. BUS. L.J. 169, 171–72 (1990) (stating forfeiture under RICO “requires some nexus between the racketeering activity and the assets subject to forfeiture; thus, not all of a defendant’s assets are necessarily lost”). In any event, RICO’s forfeiture provisions have been held to violate neither the Corruption of Blood Clause nor its statutory counterpart. See United States v. Grande, 620 F.2d 1026 (4th Cir. 1980), cert. denied, 449 U.S. 830, and cert. denied, 449 U.S. 919 (1980).

18 See Levy, supra note 11, at 75 (discussing the views of Congressmen John Conyers, Abner Mikva, and Sylvester Ryan).

19 For a concise discussion of the differences between criminal and civil forfeiture, see Heather J. Garretson, FEDERAL CRIMINAL FORFEITURE: A ROYAL PAIN IN THE ASSETS, 18 S. CAL. REV. L. & SOC. JUST. 45, 47–48 (2008) (explaining, inter alia, that civil forfeitures are proceedings in rem against “guilty property,” and that criminal forfeitures are in personam, targeting an individual).

see also Levy, supra note 11, at 38 (noting, after outlining the admiralty law pedigree of forfeiture generally, that “criminal forfeitures nearly disappeared from the United States until 1970”); id. at 75 (expressing surprise that RICO did not instead provide for civil forfeiture, which avoids “the freight of constitutional protections associated with criminal forfeiture”).

21 Id. (quoting Pub L. 91-452, 84 Stat. 922, 943 (1970), which stated only that “[t]he United States shall dispose of all [forfeited] property as soon as commercially feasible, making due provision for the rights of innocent persons”).


23 See Boudreaux & Pritchard, supra note 17, at 611 (explaining that because “English kings were constantly straining the law of forfeiture,” the protection of “innocent owners from royal avarice” required a vigilant Parliament (internal quotation marks omitted)).


25 See, e.g., United States v. 2525 Leroy Lane, 910 F.2d 343, 350 (6th Cir. 1990) (“While the federal forfeiture scheme permits the Government to assume [defendant’s] interest in the property, it may not by virtue of the forfeiture alter the essential characteristics of the entireties estate.”); United States v. Lee, 232 F.3d 556, 561–62 (7th Cir. 2000) (refusing to allow government, via forfeiture, to thwart state property law by becoming innocent wife’s co-tenant by the entirety, and holding marital home could not be forfeited as “substitute” asset under § 853(p)); United States v. Lester, 85 F.3d 1409, 1413 (9th Cir. 1996) (holding § 853 “does not extend to the community property interest of an innocent spouse in substitute property”).

26 See, e.g., United States v. Fleet, 498 F.3d 1225, 1230–31 (11th Cir. 2007) (rejecting Seventh Circuit’s Lee decision, holding remedial purpose of criminal forfeiture would be undermined by allowing defendants to evade it by retaining homestead or entireties property, and declaring state property law preempted by § 853(p)’s substitute asset forfeiture); United States v. Kennedy,
201 F.3d 1324, 1327–28, 1331 (11th Cir. 2000) (forfeiting defendant’s former interest in entireties property that had been won by his ex-wife in divorce court). But see United States v. Cox, No. 3:05CR92, 2006 WL 1431694, at *9–10 (W.D.N.C. May 23, 2006) (holding spouse who received property as part of arbitration award in divorce could be a bona fide purchaser of that property for purposes of preventing its forfeiture under § 853(n)).

See Garretson, supra note 19, at 47–48, 63–64, 74–76.

27 See, e.g., Avital Blanchard, Note, The Next Step in Interpreting Criminal Forfeiture, 28 Cardozo L. Rev. 1415, 1441–43 (2006). For civil forfeitures there exists a uniform “innocent owner” defense, which requires one to prove that she “did not know of the conduct giving rise to forfeiture,” or that “upon learning of the conduct giving rise to the forfeiture, [she] did all that reasonably could be expected under the circumstances to terminate such use of the property.” 18 U.S.C. § 983(d)(2)(A)(i)–(ii). For criminal forfeitures, an innocent owner defense as such would appear to be redundant. See Blanchard, supra, at 1435 (“When describing the forfeited property, Congress. . .specified that only the person involved in the criminal action could lose his property.”). Instead, the third party challenging a criminal RICO forfeiture must show either that her interest in the property “was vested in [her] rather than the defendant” or that it “was superior to any right, title, or interest of the defendant at the time of the commission of [the racketeering] acts.” 18 U.S.C. § 1963(l)(6)(A) (emphasis added). Proving she was a good faith purchaser for value will also suffice, but only if she was “without cause to believe that the property was subject to forfeiture.” Id. § 1963(l)(6)(B).


30 See, e.g., United States v. Morgan, 224 F.3d 339, 343, 345 (4th Cir. 2000) (rejecting state law concept of ownership in favor of “dominion and control” test and holding innocent spouse’s interest in account substituted under § 853(p) was merely nominal and thus forfeit); United States v. Totaro, 345 F.3d 989, 997–98 (8th Cir. 2003) (surveying cases and explaining that spouses’ marital and possessory interests have been held insufficient to halt criminal forfeiture under § 1963).

31 Id. at 995.

32 Boudreaux & Pritchard, supra note 17, at 609–15 (criticizing the Supreme Court’s decision in Bennis v. Michigan, 516 U.S. 442 (1996), as failing to recognize a long history—beginning as early as the English law of deodand—
of protecting the joint ownership interests of innocent spouses against forfeiture for the crimes of husbands).


35 See Grossman, *id* at 607, 614. Until 1980, the State of New York was “one of only a handful of states that retained a title system. . . . Because property was often held in the man’s name, this rule led to inequitable results for women. Any property bought in the husband’s name or with his assets belonged solely to him upon divorce.” *Id.* at 609 (footnotes omitted). “Equitable distribution embraced the modern concept of marriage as an economic partnership and allowed wives to receive a share of the marital assets upon divorce because of their contributions as a homemaker.” *Id.* at 607 (emphasis added).

36 See *United States v. Totaro*, 345 F.3d 989, 998–99 (8th Cir. 2003).


38 *United States v. Nava*, 404 F.3d 1119, 1127 (9th Cir. 2005).

39 Current statutory exclusions of divorce, equitable distribution, and related matters from the jurisdiction of the federal courts are addressed *infra* in the text accompanying notes 49–54.

40 18 U.S.C. § 1963(c); see also *Totaro*, 345 F.3d at 993 (explaining that “[t]he government’s interest in the property vests at the time of the unlawful activity”).

41 Shaw, *supra* note 17, at 176; see also JIMMY GURULÉ ET AL., THE LAW OF ASSET FORFEITURE § 10-1(c)(4) (2d ed. 2004) (explaining that the doctrine was engineered primarily to invalidate evasive transfers of the subject property by the criminal to third parties).

as of the time [he] engaged in those illegal activities, these proceeds, and any property purchased with the proceeds, never became community property.” (emphasis added)).

43 See, e.g., N.C. GEN. STAT. § 50-20(c) (2007) (describing similar factors used by judges in dividing marital property); cf. Grossman, supra note 34, at 610, 613 n.46 (describing similar New York statutes).


45 See United States v. Lee, 232 F.3d 556, 560–62 (7th Cir. 2000) (holding the government’s interest in seizing the defendant husband’s rights in the jointly-owned home was outweighed by the rights of the innocent spouse to control and manage her share of the estate); United States v. 2525 Leroy Lane, 910 F.2d 343, 350 (6th Cir. 1990) (refusing to allow forfeiture to affect the innocent spouse’s undivided tenancy-by-the-entireties interest).

46 See supra text accompanying note 43.

47 Similar strategies have worried some federal appellate courts. E.g., United States v. Fleet, 498 F.3d 1225, 1230–31 (11th Cir. 2007).

48 See Gurulé ET AL., supra note 41, at § 1-5 (describing in rem forfeitures and explaining that “[d]eeming inanimate property to be a party to a civil lawsuit allows the government to avoid providing property owners with many of the protections the Constitution affords to individuals charged with crimes”); cf. Bennis v. Michigan, 516 U.S. 442, 453 (1996) (rejecting Fifth Amendment and other challenges to state’s forfeiture statute even though it effectively “relieve[d] prosecutors from the burden of separating co-owners who are complicit in the wrongful use of property from innocent co-owners”).

49 18 U.S.C. § 1963(l)(6) (emphasis added). Note that whether the language supports the divorce law analogy is a question altogether different from whether the court is permitted to go outside the statute to exercise equitable jurisdiction in implementing that approach. See supra text accompanying notes 39–42.

50 See, e.g., 42 U.S.C. § 13981(e)(4) (stating that the Violence Against Women Act is not to be construed as “confer[ring] on the courts of the United States jurisdiction over any State law claim seeking the establishment of a divorce, alimony, equitable distribution of marital property, or child custody decree”).

51 Cummings v. Cummings, 244 F.3d 1263, 1267 (11th Cir. 2001) (quoting Carver v. Carver, 954 F.2d 1573, 1579 (11th Cir. 1992)) (internal quotation marks omitted) (deferring to divorce court in determining whether an equitable distribution award was intended as a domestic support obligation
and thus dischargeable under 11 U.S.C. § 523(a)(5), and remarking that “[i]t is appropriate for bankruptcy courts to avoid incursions into family law matters out of consideration of court economy, judicial restraint, and deference to our state court brethren and their established expertise in such matters”).


53 See Jay Tidmarsh & Brian J. Murray, A Theory of Federal Common Law, 100 Nw. U.L. Rev. 585, 614–15 (2006) (“Armed with the ambiguous phrasing of the Rules of Decision Act and the political truism that, in a democracy, the creation of law should be left to the political branches of government, [some scholars] believe that courts [lack] the institutional competence to make federal common law.”).

54 Id. at 590–91 (describing cases in which federal common law was fashioned to enforce statutes or to provide defenses and presumptions for claims brought under those statutes).

55 See, e.g., Julie K. Freeman, Bifurcation of Divorce Upheld, L WYE RS J., Oct. 8, 1999, at 3–5 (describing a complex divorce case that required “twelve hearings over eleven months to determine an equitable distribution recommendation” and explaining the need to separate the parties’ divorce claims from their economic claims so that the divorce could take place sooner).

56 See supra note 43 and accompanying text.

57 See Freeman, supra note 55, at 3, 17–18 (describing an equitable distribution proceeding that lasted nearly a year); Lee R. Russ, Annotation, Divorce: Equitable Distribution Doctrine, 41 A.L.R.4th 481 (1991) (illustrating, by reference to various cases, the complexity of a proper equitable distribution analysis).


59 See Sonja A. Soehnel, Annotation, Necessity that Divorce Court Value Property Before Distributing It, 51 A.L.R.4th 11 (1991) (examining the diverse range of valuation inquiries that are necessary to enable the court to divide marital property appropriately).

60 E.g., United States v. Martinez, 228 F.3d 587, 591 (5th Cir. 2000) (rejecting district court’s conclusion that innocent spouse’s non-forfeitable interest in land acquired prior to defendant husband’s crimes should be valued as of the date of its purchase and instructing district court to allow government and innocent spouse to present evidence of land’s current value).

62. *Id.* § 1963(l)(5).
63. The government’s incentive to make such a showing is explained *supra* in the text accompanying notes 43–48.
64. *See supra* note 43; *supra* text accompanying note 56 (pointing out that these factors are often central in the distribution analysis).
65. The counterargument, of course, is that the possibility of divorced spouses someday reuniting and reconciling does not, *a priori*, compromise the efficacy of a court’s equitable distribution efforts.