

Forfeiting the Fourth: How Fourth Amendment Forfeitures as a Condition of Plea Deals Cheapen
Fundamental Rights

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Introduction

Ninety percent of all criminal cases result in a guilty plea.¹ In order to accept a guilty plea, criminal defendants must waive certain rights, such as their right to a jury trial, their right to appeal their conviction, and/or their right to have their sentence reconsidered at a later date.² However, in some localities, this waiver is broader: plea deals include a provision that defendants must “forfeit” their Fourth Amendment rights for a period of time after their case is resolved.³ This provision is categorically different from ordinary plea waivers because it extends beyond the case itself and into the defendant’s daily life after release. Unlike the backward-looking rights typically waived in a plea, this forfeiture is forward-looking: it conditions future liberty on the surrender of an ongoing constitutional protection. The broad scope of this Fourth Amendment forfeiture should raise concerns about the sanctity of fundamental rights.

In practice, Fourth Amendment forfeitures function this way: prosecutors present a plea deal to defendants, and one of the conditions of the plea is that they “shall submit to search and seizure of his person, property, place of residence, vehicle and personal effects, at any time of day or night by any law enforcement officer with or without a search warrant, warrant of arrest or reasonable cause for a period of 3 years from the date of his release from active incarceration.”⁴ The specific duration varies, but three years is common.⁵ Defendants then face a choice: they either accept the plea and waive their Fourth Amendment rights for the next few years, or they reject the plea and face the trial penalty. The trial penalty means that prosecutors

¹ Alexandra W. Reimelt, *An Unjust Bargain: Plea Bargains and Waiver of the Right to Appeal*, 51 B.C. L. Rev. 871, 871 (2010).

² Ellen A. Weincek, *Waivers of Compassionate Release in Plea Bargains: The Need for Administrative Action to Prevent Unfair Sentencing*, U. Chi. L. Rev. (2021).

³ See Lauren Gill, “An Impossible Choice:” Virginians Asked to Waive Constitutional Rights to Get a Plea Deal, Bolts, (May 9, 2024) (discussing Fourth Amendment forfeiture in Virginia today).

⁴ See *id.* (language from Richmond, Virginia plea agreement).

⁵ See *id.*

typically punish defendants with harsher sentences if they reject the plea and decide to go to trial.⁶

Fourth Amendment forfeiture as a condition of plea deals is common in many localities in Virginia, along with Georgia, Idaho, and California.⁷ There are three main reasons why this essay focuses on Virginia. First, Virginia is one of the only states where this is a widespread practice.⁸ Second, a bill banning Fourth Amendment waivers was recently passed in the 2024 Virginia General Assembly Session, but was vetoed by Governor Youngkin, making this a pressing issue today.⁹ Third, Virginia has a deep history going back to the 1690s that sheds interesting light on whether this practice coincides with or is antithetical to the core values that formed the nation we know today.¹⁰

Further, there is scant legal historical literature on this topic, especially in Virginia. There is little data on Fourth Amendment forfeiture use in each Virginia locality. Accordingly, more research is needed to assess the full extent of this issue. Despite these limitations, this practice raises deep constitutional concerns and, thus, should be reassessed.

Fourth Amendment forfeitures as a condition of plea deals should be banned because they coerce people to surrender a fundamental right in exchange for liberty, undermining the very purpose of constitutional protections. In Part I, fundamental terms are defined and the analytical framework is laid out. Part II focuses on Fourth Amendment forfeiture in Virginia specifically. Part III ties the history of Fourth Amendment forfeiture and waiver of rights in

⁶ See Robert F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. Pa. L. Rev. 79, 83 (2005).

⁷ See Lauren Gill, “An Impossible Choice:” Virginians Asked to Waive Constitutional Rights to Get a Plea Deal, Bolts, (May 9, 2024) (focusing on Virginia but mentioning other states).

⁸ See *id.*

⁹ See Va. S.B. 334, 2024 Gen. Assemb., Reg. Sess. (Va. 2024). This bill also bans plea deal provisions that require defendants to waive their right to have their criminal record sealed or expunged later in life. This bill will be reintroduced in the 2026 General Assembly Session with the same language.

¹⁰ See William B. Porter, *Buying a Better Sentence: The Troubling Results from Libretti v. United States*, 7 Geo. Mason C.R.L.J. 83, 83-84 (1997).

general to the current state of the issue in Virginia today. In this final section, Fourth Amendment forfeiture is connected to lessons from the slavery era and the civil rights movement.

Although the law states that guilty pleas must be made freely and voluntarily, Fourth Amendment forfeiture provisions as a condition of plea deals leave defendants with no real choice at all.¹¹ Due to this practice becoming the norm in many Virginia plea deals, core constitutional rights are being forfeited at a rapid rate. Therefore, this essay ultimately concludes with an assertion that Fourth Amendment forfeitures as a condition of plea deals undermine the very purpose of constitutional protections.

I. The Foundations

A. Terminology

Before diving into a legal and historical analysis of Fourth Amendment forfeiture, relevant terminology must be defined. This issue is often colloquially discussed using the term Fourth Amendment “waiver.”¹² However, the more precise term is a Fourth Amendment “forfeiture.”¹³ A waiver is an “intentional relinquishment or abandonment of a known right or privilege.”¹⁴ The waiver must be done knowingly, voluntarily, and intelligently.¹⁵ Forfeiture, on the other hand, occurs by operation of law.¹⁶ A defendant can forfeit rights or defenses “without

¹¹ See Lauren Gill, “An Impossible Choice:” Virginians Asked to Waive Constitutional Rights to Get a Plea Deal, Bolts, (May 9, 2024).

¹² See *id.* (using the “waiver” language).

¹³ Peter Westen, *Away from Waiver: A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure*, 75 Mich. L. Rev. 1214, 1214 (1977) (discussing the waiver/forfeiture distinction in the plea context more generally).

¹⁴ *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

¹⁵ Peter Westen, *Away from Waiver: A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure*, 75 Mich. L. Rev. 1214, 1214 (1977).

¹⁶ See *id.* Defendants may also forfeit rights by failing to assert them.

ever having made a deliberate, informed decision to relinquish them, and without ever having been in a position to make a cost-free decision to assert them.”¹⁷

The scenario faced by criminal defendants who are presented with Fourth Amendment forfeiture provisions is properly understood as forfeiture, not waiver. Embedding the Fourth Amendment forfeiture in the plea deal, which is a ticket to a criminal defendant’s freedom, does not present them with a cost-free opportunity to decide whether to relinquish their Fourth Amendment rights. There is an immense cost to rejecting the plea deal that contains a Fourth Amendment forfeiture provision: in rejecting that plea, the criminal defendant is losing their chance to either go home soon or to have a lighter sentence than they otherwise would if found guilty at trial.

Since this decision is not made in a cost-free environment, Fourth Amendment forfeiture, rather than Fourth Amendment waiver, is the proper terminology. This distinction is important because the individual has less control over their decision to forfeit a right than they do over their decision to waive a right. The right forfeited here is a fundamental constitutional right. Accordingly, this issue raises constitutional concerns because the stakes are high, yet the individual autonomy over this decision is low.

B. Analytical Framework

One way to approach this issue is to use a balancing test to determine whether Fourth Amendment forfeiture is sound. Peter Westen argues that forfeiture should only be allowed when the government’s interest in forfeiture outweighs the defendant’s interest in asserting the right.¹⁸ Westen lays out three factors that should be considered when deciding whether the government’s

¹⁷ See *id.*

¹⁸ See *id.* at 1239.

interest in forfeiture outweighs the defendant's interest in asserting their right.¹⁹ First, the nature of the right should be considered, i.e., whether it is fundamental or not.²⁰ Second, the state's interest in forfeiture should be analyzed.²¹ Third, the availability of alternatives to forfeiture should be considered.²² In Part II, these factors will be unpacked and applied to the Virginia case.

C. History of Forfeiture

Forfeiture is a concept that came to the United States from England.²³ Originally, the doctrine of forfeiture was used to maintain American neutrality and to destroy the maritime activities of our enemies by seizing hostile ships.²⁴ In 1789, the United States Constitution banned this practice as a punishment for treason, holding "Congress shall have the power to declare the Punishment of Treason, but no Attainer of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted."²⁵ Although there was disdain for the practice of forfeiture when the Constitution was framed, forfeiture was brought back in 1970 with the rise of the war on drugs through the Organized Crime Control Act and the Comprehensive Drug Abuse Prevention and Control Act.²⁶ Forfeiture was invoked as a tool to increase punishment for drug dealers by requiring people to forfeit drug-tainted property.²⁷

Courts have only marginally clarified this doctrine since the 1970s. A defendant may only be convicted of a crime if the government proves beyond a reasonable doubt that the

¹⁹ See *id.*

²⁰ See *id.*

²¹ See *id.*

²² See *id.*

²³ William B. Porter, *Buying a Better Sentence: The Troubling Results from Libretti v. United States*, 7 Geo. Mason C.R.L.J. 83, 83 (1997).

²⁴ See *id.* at 84.

²⁵ See *id.*

²⁶ See *id.*

²⁷ See *id.*

defendant committed that crime or if the defendant accepts a guilty plea.²⁸ In order to ensure defendants are entering guilty pleas because they are in fact guilty of the crime charged, courts conduct a factual analysis to decide whether there is a factual basis for the guilty plea.²⁹ In *Libretti vs. United States*, 116 U.S. 356 (1995), the Supreme Court held that Federal Rule of Criminal Procedure 11(f) did not require courts to do a factual analysis of whether forfeiture is grounded in fact; they are only required to do a factual analysis of whether the guilty plea itself is grounded in fact.³⁰ In effect, this ruling nullified FRCP 11(f) and paved the way for guilty pleas which included forfeiture, either of property or of a right, to almost never face scrutiny.³¹

Justice Stevens dissented, arguing that there must be a factual basis for the forfeiture included in the guilty plea, not just a factual basis for the guilty plea itself.³² The dissenting argument in *Libretti* better aligns with the core ideals around criminal convictions. Without a factual analysis of whether the forfeiture, which was a condition of the plea deal, was grounded in fact, the court arguably has not fully conducted a factual analysis of the guilty plea itself. *Libretti* demonstrates there is a lack of consistent jurisprudence in this area. More importantly, the Supreme Court's reasoning demonstrates yet another area where governmental disregard for fundamental rights cheapens those rights.

Over time, forfeiture provisions in plea deals have expanded to forfeiture of fundamental rights, such as the Fourth Amendment protection against unreasonable searches and seizures. The Fourth Amendment was originally created to put an end to the use of general warrants,

²⁸ See *In re Winship*, 397, 397 U.S. 358 (1970).

²⁹ See *Libretti v. United States*, 516 U.S. 29, 38 (1995) (holding forfeiture is part of sentencing so no factual analysis is needed).

³⁰ See *id* at 51 (although Ginsburg's concurrence argued the defendant needs to know about the right before it can be given up voluntarily)

³¹ William B. Porter, *Buying a Better Sentence: The Troubling Results from Libretti v. United States*, 7 Geo. Mason C.R.L.J 83, 85 (1997).

³² See *id* at 103 (Stevens dissent). Stevens further warned that failure to conduct a factual analysis of forfeiture may allow prosecutors to take advantage of forfeiture without evidence that the conduct or property is tied to criminal activity.

which the King used to search and seize homes and ships without any reason.³³ The Virginia Constitution contains a similar provision, calling general warrants “grievous and oppressive.”³⁴ Accordingly, it is clear that the sanctity of the Fourth Amendment was important to the founding fathers. Yet the routine practice of Fourth Amendment forfeiture as a condition of plea deals demonstrates governmental cheapening of fundamental rights. In the following section, these foundational concepts will shape the critique of the Virginia case.

II. Analyzing the Virginia Case

A. Forfeiture in Practice Today: Fourth Amendment Forfeiture in Virginia

Today, criminal defendants in Virginia forfeit fundamental constitutional rights without ever having made a deliberate, informed decision to relinquish them.³⁵ Many plea deals in Virginia include a provision in which defendants waive their Fourth Amendment protection against unreasonable search and seizure.³⁶

In effect, this process nullifies the weight of fundamental rights. As Lynchburg Public Defender Aaron Boone aptly stated, “when your rights become negotiable, they become cheap.”³⁷ The American Bar Association’s Criminal Justice Section supports this contention in their 2023 Plea Bargaining Task Force Report, where they argue that defendants should not be required to waive Fourth Amendment rights.³⁸ To support this argument, the ABA contends that public pre-trial hearings such as Motions to Suppress bring governmental and police misconduct

³³ See Laura K. Donohue, *The Original Fourth Amendment*, 83 U. Chi. L. Rev. 1181, 1197 (2016).

³⁴ Va. Const. art. 1 § 10.

³⁵ See Lauren Gill, “An Impossible Choice:” Virginians Asked to Waive Constitutional Rights to Get a Plea Deal, *Bolts*, (May 9, 2024).

³⁶ See *id.*

³⁷ See *id.* Fourth Amendment forfeiture provisions are now used sparingly in Lynchburg.

³⁸ ABA Criminal Justice Section, Plea Bargain Task Force, *Report on Plea Bargaining*, Principle 10, at 25 (2023).

to light, ultimately promoting the integrity of the criminal justice system.³⁹ Accordingly, constitutional protections are present for a reason, and Fourth Amendment forfeiture undermines the very purpose of those protections. If this practice continues, American fundamental rights will no longer be fundamental, they will be cheap and meaningless.

As described in Part I, Peter Westen's three-part balancing test for determining whether forfeiture is sound helps break this issue into pieces that appeal to common sense.⁴⁰ When this balancing test is applied to the Virginia case, a clean, logical explanation for why Fourth Amendment forfeiture should be banned emerges. The central idea behind Westen's framework is that forfeiture should only be allowed when the government's interest in forfeiture outweighs the defendant's interest in asserting the right.⁴¹ Westen lays out three factors that should be considered when deciding whether the government's interest in forfeiture outweighs the defendant's interest in asserting their right.⁴²

The first factor for consideration is the nature of the right, i.e., whether it is fundamental or not.⁴³ Here, Virginians are forfeiting their Fourth Amendment rights, which is a fundamental constitutional right. Accordingly, this calculus sways in favor of the defendant's interest.

Second, the state's interest in forfeiture should be analyzed.⁴⁴ The government's interest in forfeiture is quite low. State and local law enforcement agencies in Virginia can, and historically have, enforced public safety without infringing upon the fundamental rights of its citizens. Therefore, forfeiture is not required to effectuate public safety.

³⁹ See *id.*

⁴⁰ Peter Westen, *Away from Waiver: A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure*, 75 Mich. L. Rev. 1214, 1239 (1977).

⁴¹ See *id.*

⁴² See *id.*

⁴³ See *id.*

⁴⁴ See *id.*

Other proponents of Fourth Amendment waivers argue that defendants who accept Fourth Amendment waivers get better outcomes, but that contention is not supported by empirical data.⁴⁵ The government does give more favorable terms to defendants who agree to a narrow waiver of their rights of appeal, i.e., those rights ordinarily forfeited as a result of a plea deal, than to those who waive no rights at all.⁴⁶ But the data shows no pattern of favorable terms given to defendants who sign plea agreements with broad appellate waivers.⁴⁷ While the cited study examined forfeiture of appellate rights, this rationale can also be applied to waiver of constitutional rights. If defendants receive no benefit from broadly waiving their appellate rights, it follows that they also receive no benefit from broadly waiving their Fourth Amendment rights either. Therefore, the counterargument that defendants benefit from Fourth Amendment waivers has no merit.

On the other hand, the defendant's interest against forfeiting their right is quite high. As explained in Part I, constitutional protections, especially the Fourth Amendment, have been viewed as sacred since the founding of the nation.⁴⁸ Accordingly, this calculus sways in favor of the defendant.

The third factor for consideration is the availability of alternatives to forfeiture.⁴⁹ There are many alternatives to Fourth Amendment forfeiture. The government contends that they offer Fourth Amendment forfeitures to people who they believe need some motivation to behave legally.⁵⁰ However, a convicted person already has an incentive to act lawfully in order to avoid

45 See Ellen A. Weinck, *Waivers of Compassionate Release in Plea Bargains: The Need for Administrative Action to Prevent Unfair Sentencing*, U. Chi. L. Rev. (2021).

46 See *id.* (commenting on waiver of appellate rights in the compassionate release context).

47 See *id.*

48 Laura K. Donohue, *The Original Fourth Amendment*, 83 U. Chi. L. Rev. 1181, 1284 (2016).

49 See *id.*

50 See Lauren Gill, "An Impossible Choice:" Virginians Asked to Waive Constitutional Rights to Get a Plea Deal, Bolts, (May 9, 2024). Richmond Commonwealth's Attorney Collette McEachin made this argument.

subsequent punishment because they have faced the punishment of conviction itself, as well as any jail time or fines that may have accompanied that conviction. Alternatively, courts can, and have historically, used probation to continue to monitor individuals who the court deems to be a continuous threat to society. These options are valid alternatives to Fourth Amendment forfeiture. Other tools, short of stripping constitutional rights, can achieve the government's stated goal. Therefore, this third factor also weighs in the defendant's favor.

Accordingly, since all three of Westen's factors lean in favor of the defendant's interest in asserting their Fourth Amendment rights rather than the government's interest in encouraging defendants to forfeit their rights, Fourth Amendment forfeitures as a condition of plea deals should be banned.

B. Judicial Action

Virginia's use of Fourth Amendment forfeiture in plea deals is unique; only a few other states engage in this practice.⁵¹ Accordingly, similarly situated defendants in different states face vastly different outcomes because of their plea deals. This is concerning because uniform treatment for defendants charged with similar offenses is a central goal of the criminal justice system.⁵² However, there is no clear guidance from the Supreme Court on whether Fourth Amendment forfeitures are valid.⁵³ Despite this, one case from the United States District Court for the Northern District of California does provide a useful framework that can and should guide future courts assessing this issue.⁵⁴

⁵¹ See Lauren Gill, "An Impossible Choice:" Virginians Asked to Waive Constitutional Rights to Get a Plea Deal, Bolts, (May 9, 2024).

⁵² Ellen A. Wiencek, *Waivers of Compassionate Release in Plea Bargains: The Need for Administrative Action to Prevent Unfair Sentencing*, U. Chi. L. Rev. Online (Online Essay).

⁵³ *But see Anderson v. Commonwealth*, 256 Va. 580 (1998). The Virginia Supreme Court upheld a plea deal including a Fourth Amendment forfeiture on the grounds that the plea agreement was not coerced and was made freely and voluntarily. However, this case left questions open about the validity and constitutionality of Fourth Amendment forfeiture itself, demonstrating the need for legislative action to clarify this issue.

⁵⁴ See *Order Rejecting Plea Agreement*, No. 3:19-cr-00381-CRB (N.D. Cal. 2020).

In that case, the court rendered invalid a plea agreement in which the defendant waived his future right to compassionate release.⁵⁵ Congress created the compassionate release program to allow inmates to leave prison before the end of their sentences in extraordinary circumstances.⁵⁶ The court reasoned that the waiver of one's future right to compassionate release (1) frustrated congressional intent, and (2) was "appallingly cruel."⁵⁷

First, Congress intended to make compassionate release easier for defendants to obtain by creating the First Step Act.⁵⁸ Accordingly, barriers to compassionate release, through forfeiture of that right in a plea deal, frustrated congressional intent.⁵⁹ Second, Judge Breyer explained that the purpose of compassionate release is to allow courts to amend sentences based on "extraordinary and compelling" circumstances.⁶⁰ Therefore, he argued, stripping someone of that opportunity, through forfeiture of that right in a plea deal, is cruel and violates public policy.⁶¹

When this reasoning is applied to Virginia's use of Fourth Amendment forfeiture as a condition of plea deals, it leads to the same conclusion: plea deals including forfeiture provisions should be rendered invalid. The first factor that Judge Breyer considered is whether the clause in the plea agreement goes against congressional intent. Congressional intent about the Fourth Amendment is clear. The framers' core rationale behind the Fourth Amendment was to ensure the rights of the people were secure against government overreach.⁶² To effectuate that goal, the framers created the Fourth Amendment with the goal of preventing general warrants, which they

⁵⁵ See Ellen A. Wiencek, *Waivers of Compassionate Release in Plea Bargains: The Need for Administrative Action to Prevent Unfair Sentencing*, U. Chi. L. Rev. Online (Online Essay).

⁵⁶ See *id.*

⁵⁷ *Order Rejecting Plea Agreement*, No. 3:19-cr-00381-CRB (N.D. Cal. 2020).

⁵⁸ See *id.*

⁵⁹ See *id.*

⁶⁰ See *id.*

⁶¹ See *id.*

⁶² Laura K. Donohue, *The Original Fourth Amendment*, 83 U. Chi. L. Rev. 1181, 1284 (2016) (discussing the framers' intent behind the Fourth Amendment).

saw as the pinnacle of governmental overreach.⁶³ Ever since the Constitution was framed, the rights embedded in that document, which includes the Fourth Amendment, have been treated as sacred.

The second factor that Judge Breyer considered is whether the provision of the plea agreement is cruel and/or goes against public policy, rendering it unconscionable.⁶⁴ In making this argument, Judge Breyer argued that compassionate release is in place for a reason.⁶⁵ Compassionate release allows the government to account for the tragically unforeseeable, such as terminal illness, the deaths of spouses and partners, and disability.⁶⁶ Finally, Judge Breyer concludes that although defendants can choose whether to take the government's offer or leave it, defendants who reject the government's offer do so at their peril.⁶⁷ The government's immense power, weighed against the slim chance of release in extraordinary circumstances, "is not really a choice at all."⁶⁸

Like compassionate release, the Fourth Amendment is in place for a reason: to protect the people against government overreach.⁶⁹ Accordingly, stripping people of that protection is cruel and goes against the public policy ideals around the Fourth Amendment. But not only is this practice cruel, it also leaves defendants with no real choice, and can be analogized to the compassionate release example that Judge Breyer explained.⁷⁰ When defendants accept a plea deal with a Fourth Amendment forfeiture provision, they do so knowing that if they reject that deal, the government will use its immense resources to build the case against them and/or

⁶³ See *id.*

⁶⁴ *Order Rejecting Plea Agreement*, No. 3:19-cr-00381-CRB (N.D. Cal. 2020). Unconscionable contracts are invalid.

⁶⁵ See *id.*

⁶⁶ See *id.*

⁶⁷ See *id.*

⁶⁸ See *id.*

⁶⁹ Laura K. Donohue, *The Original Fourth Amendment*, 83 U. Chi. L. Rev. 1181, 1284 (2016).

⁷⁰ *Order Rejecting Plea Agreement*, No. 3:19-cr-00381-CRB (N.D. Cal. 2020).

retaliate via the trial penalty. Accordingly, this leaves defendants with no real choice. But as Judge Breyer made clear, courts *do* have a choice each time they decide a case, and judges can and should choose to reject plea deals that contain such unconscionable provisions.⁷¹

C. Executive Action

Although Judge Breyer laid out this reasoning at the federal district court level, there is unfortunately not much clear guidance from the Supreme Court. Accordingly, executive branch action may help clarify this issue. The executive branch has stepped in on issues like this before. For example, in October 2014, Deputy Attorney General James Cole issued a memorandum to federal prosecutors declaring that plea deals should no longer include provisions that require the defendant to waive their right to raise future claims of ineffective assistance of counsel.⁷² The Deputy Attorney General clarified that although those types of waivers are legal under most case law, the nonuniformity of application across the 50 states frustrated the criminal justice system's goal of uniformity.⁷³ Accordingly, executive action was necessary.⁷⁴

This situation is similar to the Fourth Amendment forfeiture issue - in both scenarios, defendants are being asked to waive a fundamental constitutional right that they may want to assert in the future. The ineffective assistance of counsel example demonstrates that executive action declaring Fourth Amendment waivers as a condition of plea deals has some precedent and thus can be done. However, for long-term, sustainable change to occur in this space, uniform case law and/or legislative action would be necessary.

⁷¹ See *id.*

⁷² Ellen A. Wiencek, *Waivers of Compassionate Release in Plea Bargains: The Need for Administrative Action to Prevent Unfair Sentencing*, U. Chi. L. Rev. Online (Online Essay).

⁷³ See *id.*

⁷⁴ See *id.*

D. Legislative Action

In 2024, the Virginia General Assembly passed a bill banning Fourth Amendment forfeitures as a condition of plea deals, but Governor Youngkin vetoed the bill.⁷⁵ Despite this veto, there is legislative support for this bill. The only organization who openly opposed this bill was the powerful Virginia Association of Commonwealth's Attorneys, but that opposition did not stall the legislation.⁷⁶ This bill will be presented again in the 2026 General Assembly Session under a new governor who is likely to be more open to criminal justice reform than the previous governor.⁷⁷

In sum, Fourth Amendment forfeitures as a condition of plea deals deteriorate fundamental rights by treating those rights as cheap rather than fundamental. This goes against the core foundations of fundamental rights - they were designed to be guaranteed, not easily forfeitable. While there are steps that each branch of government can take to resolve this issue, legislative action is likely to result in the most sustainable, long-term change. But Fourth Amendment forfeiture does not only raise constitutional concerns. As the following section explains, this practice also has racial justice implications.

III. Racial Implications & Lessons from History

A. Perpetuation of Mass Incarceration

As a whole, plea deals perpetuate mass incarceration. There is broad agreement that America incarcerates too many people.⁷⁸ America incarcerates 693 people for every 100,000

⁷⁵ See Va. S.B. 334, 2024 Gen. Assemb., Reg. Sess. (Va. 2024).

⁷⁶ See Lauren Gill, "An Impossible Choice:" Virginians Asked to Waive Constitutional Rights to Get a Plea Deal, Bolts, (May 9, 2024).

⁷⁷ Information provided by Justice Forward Virginia, the proponent of the bill. Democrat Abigail Spanberger was elected as Virginia's next governor on November 4, 2025.

⁷⁸ Tracie A. Todd, *Mass Incarceration: The Obstruction of Judges*, 82 Law & Contemp. Probs. 191, 191 (2019). Alabama alone is within the top five highest incarcerators globally.

Americans on average, making America the eleventh highest incarcerator in the world.⁷⁹ There are many factors that play into the perpetuation of mass incarceration, and Fourth Amendment forfeitures are one of those factors. When someone waives their Fourth Amendment rights, they are waiving their right to file a Motion to Suppress based on unreasonable search and seizure, a key procedural protection which is commonly used to exclude incriminating evidence at trial that was obtained illegally. Accordingly, illegally obtained evidence may be used against people who have forfeited their Fourth Amendment rights, making it more likely that they are convicted and ultimately incarcerated.

But Fourth Amendment forfeitures do not *only* perpetuate mass incarceration, they also have a specific, disproportionate impact on black people.⁸⁰ Today, many criminal defendants are forced to waive their Fourth Amendment rights in order to accept a plea deal.⁸¹ However, this practice is not equally applied.⁸² Freedom of Information Act requests revealed that 96% of all plea waivers in Richmond, Virginia were signed by a person of color.⁸³ In Lynchburg, Virginia, a city where only 28% of the population is black, 78% of all Fourth Amendment plea waivers were signed by a black person.⁸⁴ Accordingly, Fourth Amendment forfeitures are not only constitutionally abhorrent, they are also racist.

As described in Part I, forfeiture was frowned upon when the Constitution was framed but re-emerged as a tool to crack down on drug dealers during the war on drugs in the 1970s.⁸⁵

⁷⁹ See *id* at 191-192.

⁸⁰ See Lauren Gill, “An Impossible Choice:” Virginians Asked to Waive Constitutional Rights to Get a Plea Deal, Bolts, (May 9, 2024).

⁸¹ See *id*.

⁸² See City of Richmond Police Department, FOIA Response to Ashley Shapiro (July 12, 2020). This FOIA response was retrieved from Justice Forward Virginia, a nonprofit organization who received it from Richmond Public Defender Ashley Shapiro.

⁸³ See *id*.

⁸⁴ See Lauren Gill, “An Impossible Choice:” Virginians Asked to Waive Constitutional Rights to Get a Plea Deal, Bolts, (May 9, 2024).

⁸⁵ William B. Porter, *Buying a Better Sentence: The Troubling Results from Libretti v. United States*, 7 Geo. Mason C.R.L.J 83, 83 (1997).

The war on drugs was not racially neutral.⁸⁶ Black and Latino Americans were, and still are, disproportionately targeted by law enforcement and face racially skewed charging and plea-bargaining decisions by prosecutors.⁸⁷ Black Americans constitute 13% of all drug users but 35% of those arrested, 55% of those convicted, and 74% of those sent to prison.⁸⁸ These statistics make it clear that the war on drugs did not target drug dealers of all races equally; black Americans were, and still are, more likely to face criminal legal punishment for drug offenses than white Americans.⁸⁹

Accordingly, the disproportionate number of black Americans who are incarcerated and have forfeited their Fourth Amendment rights is no coincidence; Fourth Amendment forfeiture and other tools of oppression were initially invoked to perpetuate racism. Many of those tools are still in place today, and as a result, we are still feeling the racist effects of those tools. Thus, the racialized impact of Fourth Amendment forfeiture is not incidental but deeply rooted in historical patterns of discriminatory enforcement.

B. Historical Examples

Governmental disregard for fundamental rights has occurred throughout many historical periods, and people of color have disproportionately felt the brunt of this disregard. It is no secret that slavery is an example of the government disregarding the fundamental rights of black people. But the government did not *only* disregard the fundamental rights of slaves, the government also placed slaves in situations where they had to make an impossible choice, just like many criminal defendants face in plea bargains today.⁹⁰

⁸⁶ See Deborah Small, *The War on Drugs is a War on Racial Justice*, 68 Soc. Res. 896, 898 (2001).

⁸⁷ See *id.*

⁸⁸ See *id.* at 897.

⁸⁹ See *id.*

⁹⁰ Gen. Assembly, An Act to Amend the Several Laws Concerning Slaves, 1806, in *Statutes at Large of Virginia*, 3 Va. St. L. 251.

Specifically, in response to Gabriel’s Conspiracy to plan a slave rebellion in 1800, the Virginia General Assembly in 1806 mandated that all free black people must leave the state within 12 months of their freedom, or when they turn 21.⁹¹ Free black people could petition to stay in Virginia, but if their petition was denied, they were left with an impossible choice: leave their friends, family, and life behind to keep their free status, or stay in Virginia and risk losing that free status.⁹²

In December 1812, a woman named Jenny Parker was emancipated following the death of her enslaver.⁹³ She petitioned to stay in the state, arguing that “all her children and friends” lived in Surry County, Virginia, where she wished to stay.⁹⁴ Relatives of her enslaver and white neighbors supported her request, but the General Assembly rejected her request.⁹⁵ It is unknown whether Ms. Parker was re-enslaved, forced to leave the state, or remained safely in Virginia.

The “choice” faced by free black Virginians, such as Jenny Parker, echoes the situation many criminal defendants face today when confronted with a plea deal containing Fourth Amendment forfeiture provisions. These defendants are left with an impossible choice: accept the plea deal with the forfeiture and be subject to unreasonable search and seizure at any time or reject the plea deal with the forfeiture and risk losing their freedom through the harsher punishment they will face because of the trial penalty. Just as free black people had to choose between their family and their freedom, so do criminal defendants today.

This parallel suggests that the government’s history of presenting black people with a “choice,” which is really no choice at all, is not a piece of distant history but rather still plagues

⁹¹ See *id.*

⁹² See *id.*

⁹³ See Jenny Parker, *Petition to Remain in Virginia*, Library of Virginia (1813).

⁹⁴ See *id.*

⁹⁵ See *id.*

society today. This parallel from the slavery era to today demonstrates that Fourth Amendment forfeitures are yet another example of governmental disregard for fundamental rights.

Not only does Fourth Amendment forfeiture leave criminal defendants with an impossible choice, but it also relegates them to second-class citizens. The core principle behind the American criminal legal system is that a person is innocent until the government proves, beyond a reasonable doubt, that the person is guilty. Fourth Amendment forfeiture essentially turns that premise on its head. Since police can unreasonably search and seize someone if that person has waived their Fourth Amendment rights, defendants are left feeling the need to prove that they still retain their Fourth Amendment rights to avoid such unreasonable search and seizure. This is especially true today with how common Fourth Amendment forfeitures are. This effect is antithetical to the core idea that the person is innocent until the government proves them guilty.

Yet, the idea that an individual must “prove” their liberty is not new. During the slavery era, free black people were required to register with county courts to secure Certificates of Freedom, which are colloquially known as freedom papers.⁹⁶ For example, one free black man named Joseph Trammell registered as a free black person in Loudon County, Virginia in 1852, and continued to do so every two years until emancipation in 1865.⁹⁷ Trammell used a handmade tin to carry his precious freedom papers.⁹⁸ Many free black people in this era had to carry their freedom papers around in order to avoid being mistaken as a fugitive, which would put them at risk of being enslaved.⁹⁹

⁹⁶ See National Museum of African American History & Culture, *Joseph Trammell’s Freedom Papers*. This analogy between Fourth Amendment forfeiture and freedom papers is inspired by an unpublished op-ed written by Justice Forward Virginia.

⁹⁷ See *id.*

⁹⁸ See *id.*

⁹⁹ See *id.*

The practice of Fourth Amendment forfeiture harkens back to the slavery era. Just as slaves carried their freedom papers around to rebut the assumption that they were fugitives, many black criminal defendants in cities that frequently use Fourth Amendment forfeitures have to rebut an assumption that they have waived certain fundamental rights. While the two examples have different underlying facts, the feeling of fear that both practices instilled in people are disturbingly similar.

The United States was founded on the principle of equal justice for all and the idea that each person is innocent until proven guilty. But these examples of governmental disregard for fundamental rights demonstrate that core American ideals have historically been compromised to oppress people of color. Although this is a deeply rooted issue, a good first step towards revitalizing the sacred nature of the principle of innocence until proven guilty is to follow that principle in every scenario. In practice, this would include banning Fourth Amendment forfeiture.

Another period marked by governmental disregard for fundamental rights is the Civil Rights Era. Rather than being coerced or forced to waive their constitutional rights through plea deals, protestors in the civil rights movement were deprived of their fundamental rights to peacefully protest.¹⁰⁰ Local law enforcement abused their discretion to infringe on that right by arresting people for peacefully protesting, such as the sit-in protestors.¹⁰¹

For example, in *Garner v. Louisiana*, 368 U.S. 157 (1961), sit-in protestors were prosecuted for disturbing the peace, but the Supreme Court held that the convictions were baseless.¹⁰² The history of local law enforcement using their discretion to infringe on the rights of

¹⁰⁰ See *Garner v. Louisiana*, 368 U.S. 157 (1961).

¹⁰¹ See *id.*

¹⁰² The Supreme Court overturned the convictions of black students who were arrested at a peaceful sit-in demonstration at a segregated lunch counter in Baton Rouge, Louisiana.

sit-in protestors sheds light on the Fourth Amendment forfeiture issue facing many criminal defendants today because in both situations, the government abused its discretion to prosecute people for exercising a fundamental right. Both examples are evidence of local law enforcement officers treating people's fundamental rights as "cheap" throughout history.

History demonstrates that Fourth Amendment waivers are rooted in racial oppression, and therefore, the disproportionate impact that this issue has on communities of color today is no coincidence.

Conclusion

In Virginia, prosecutors in many localities offer plea deals to criminal defendants that include a Fourth Amendment forfeiture, which allows law enforcement to search their home or person at any time of day or night, without any reason or any warrant.¹⁰³ This forfeiture is broader than the other rights that defendants typically waive by accepting a plea deal, such as the right to a jury trial or the right to confront witnesses against them because Fourth Amendment forfeiture extends after the current case has concluded, sometimes for a period of years.¹⁰⁴ Accordingly, Fourth Amendment forfeiture has far-reaching implications for fundamental rights.

Fourth Amendment forfeitures as a condition of plea deals should be banned because they coerce people to surrender a fundamental right in exchange for liberty, undermining the very purpose of constitutional protections. First, this practice leaves criminal defendants with no real choice: they either accept the plea with the forfeiture provision, giving up their Fourth Amendment rights, or they reject the plea and face the trial penalty. Second, Fourth Amendment forfeitures do not pass the balancing test advanced by Peter Westen because the government's

¹⁰³ See Lauren Gill, "An Impossible Choice:" Virginians Asked to Waive Constitutional Rights to Get a Plea Deal, Bolts, (May 9, 2024).

¹⁰⁴ See *id.*

interest in forfeiture does not outweigh the defendant's interest in asserting their Fourth Amendment rights.¹⁰⁵ Lastly, Fourth Amendment forfeitures have racist origins and harken back to examples of governmental disregard for fundamental rights in the slavery and civil rights eras.

Although the judicial and executive branches can act on this issue, long-term change is most likely to come through the legislative branch. The Virginia General Assembly passed a bill banning this practice in 2024, but it was vetoed by the governor.¹⁰⁶ This bill should be re-introduced in the 2026 General Assembly Session and signed by Virginia's new governor, Abigail Spanberger, to end this unjust practice once and for all.

Overall, Fourth Amendment forfeiture should be banned because it is rooted in the historical oppression of black people and fundamentally contradicts core constitutional values.

¹⁰⁵ See Peter Westen, *Away from Waiver: A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure*, 75 Mich. L. Rev. 1214, 1239 (1977).

¹⁰⁶ See Va. S.B. 334, 2024 Gen. Assemb., Reg. Sess. (Va. 2024).