

PROBABLE CAUSE TO PLUNDER: CIVIL ASSET FORFEITURE AND THE PROBLEMS IT CREATES

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I. INTRODUCTION

People lock their doors and place their valuables in safes because they fear criminals may take their property. However, law enforcement took more property from Americans than criminals in 2015.¹ When criminals take property, the law calls it theft. When law enforcement confiscates property, the process is called civil asset forfeiture.

Civil asset forfeiture enables law enforcement to seize property and keep it for their own use without arresting anyone, much less charging or convicting anyone of a crime.² Law enforcement's ability to profit directly from forfeiture would trouble the United States Founders who intended to separate the purse and sword.³ Nonetheless, contemporary law enforcement

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1. Christopher Ingraham, *Law Enforcement Took More Stuff from People than Burglars Did Last Year*, WASH. POST: WONKBLOG (Nov. 23, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/11/23/cops-took-more-stuff-from-people-than-burglars-did-last-year>.

2. Adam Bates, *Civil Asset Forfeiture*, CATO INST., <https://www.policemisconduct.net/explainers/civil-asset-forfeiture> (last visited Mar. 12, 2017).

3. *See, e.g.*, THE FEDERALIST NO. 78, at 392 (Alexander Hamilton) (Ian Shapiro ed. 2009); JONATHAN ELLIOT, *The Debates in the Convention of the Commonwealth of Virginia, on the Adoption of the Federal Constitution*, in THE DEBATES OF THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 384–95 (2d ed. 1901).

often finds itself in a revenue generating role.⁴ This is particularly true during poor economic times.⁵

Placing law enforcement in a revenue generating role is problematic because it creates tension between raising money and protecting the public. For example, the Department of Justice's assessment of the Ferguson, Missouri, Police Department's practices determined that "Ferguson's law enforcement practices are shaped by the City's focus on revenue rather than by public safety needs."⁶ Commentators have noted the best example of revenue generation warping Ferguson's law enforcement's priorities is civil asset forfeiture.⁷

This Article begins by discussing the historical roots of civil forfeiture and charting its evolution to its contemporary form. The Article next summarizes present day civil asset forfeiture laws in the United States. Then, the Article delves into civil asset forfeiture's machinations, the ease with which law enforcement can seize property, and law enforcement's motive for doing so. The troubles presented by civil asset forfeiture are discussed next. Possible solutions to the issues presented by civil asset forfeiture are then offered and followed by a conclusion.

4. *Developments in the Law—Policing and Profit*, 128 HARV. L. REV. 1723, 1723 (2015); Jack Hitt, *To Collect and Serve*, MOTHER JONES, Sept.–Oct. 2015, at 5, 6 (discussing how police often play a role in raising money to underwrite their governing entity's budget and usually do so at the expense of poor minorities); Brian Jackson, *Ferguson: When Cops Become Cash Cows*, NEWSWEEK (Mar. 13, 2015, 4:44 PM), <http://www.rand.org/blog/2015/03/to-serve-and-collect.html>.

5. Christopher Ingraham, *New Report: In Tough Times, Police Start Seizing a Lot More Stuff from People*, WASH. POST: WONKBLOG (Nov. 10, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/11/10/report-in-lean-times-police-start-taking-a-lot-more-stuff-from-people>; Paul LaCommare, *Generating New Income Revenue Streams . . . Can You Afford Not To?* 3 (May 2009) (unpublished essay).

6. U.S. DEP'T OF JUSTICE CIVIL RIGHTS DIV., *INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 2* (2015), http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf.

7. Stephen L. Carter, *Ferguson and Its Money-Hungry Police*, BLOOMBERG (Mar. 5, 2015, 1:43 PM), <http://www.bloombergview.com/articles/2015-03-05/ferguson-and-its-money-hungry-police>; Curtis Harris, *Police Misconduct Costs Black People Their Livelihood Even When It Sparing Their Lives*, THINKPROGRESS (Aug. 19, 2014), <http://thinkprogress.org/economy/2014/08/19/3472902/police-economic-ferguson> (noting eighty-one of the eighty-eight civil forfeitures in Ferguson involved no criminal charges); Eapen Thampy, *Police Militarization in Ferguson, Missouri Funded by Asset Forfeiture and Federal Partnerships*, AMS. FOR FORFEITURE REFORM (Aug. 15, 2014), http://www.forfeiturereform.com/police_militarization_in_ferguson_missouri_funded_by_asset_forfeiture_and_federal_partnerships (noting how asset forfeiture funds enabled the Ferguson Police Department to militarize).

II. HISTORY OF CIVIL ASSET FORFEITURE

The premise underlying civil asset forfeiture—that objects are responsible for their actions—is ancient. In fact, the U.S. Supreme Court traced the practice to the second book of the Bible, which says, “If an ox gore a man or a woman, and they die, he shall be stoned: and his flesh shall not be eaten.”⁸ The Bible, however, only applied this punishment to offending animals. Leonard Levy speculates that the ancient Hebrews believed animals could be possessed by the devil since offending creatures were dispatched, while inanimate objects involved in an accidental human death were allowed to remain in use.⁹

Similar practices continued into the Middle Ages. Believing that fatal bee stings were a consequence of satanic forces, the Council of Worms ordered the extermination of bee colonies that caused a human death.¹⁰ Ecclesiastical and medieval courts even dressed animals in human clothing, tried them, and then sentenced them to death by conflagration or hanging.¹¹ The unholy hides of guilty animals were discarded as was their meat.¹² The condemned thing was *deo dandum* or “given to God.”¹³ From this comes the term “deodand,” an object that causes a person’s death.¹⁴

Deodands became part of English law during the reign of Alfred the Great but took on a new twist.¹⁵ Unlike the biblical and medieval practices that forbade the use of the guilty animal or object, the Crown kept the deodand,¹⁶ and thereby transformed deodands into a revenue source.¹⁷ Deodands expanded from encompassing only accidental sources of death to including the

8. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 681 n.17 (1974) (quoting *Exodus* 21:28).

9. LEONARD LEVY, *A LICENSE TO STEAL: THE FORFEITURE OF PROPERTY* 9 (1996).

10. *Id.* at 10.

11. *Id.* at 11.

12. *Id.*

13. *Calero-Toledo*, 416 U.S. at 681 n.16.

14. Donald J. Boudreaux & A.C. Pritchard, *Innocence Lost: Bennis v. Michigan and the Forfeiture Tradition*, 61 MO. L. REV. 593, 600 (1996).

15. Michael van den Berg, Comment, *Proposing a Transactional Approach to Civil Forfeiture Reform*, 163 U. PA. L. REV. 867, 873 (2015).

16. *Id.*

17. LEVY, *supra* note 9, at 12; Boudreaux & Pritchard, *supra* note 14; van den Berg, *supra* note 15.

deadly object used in murders and suicides.¹⁸ In fact, estimates of the instrument of death's value accompanied murder indictments.¹⁹ Deodands took place in England's American colonies as well but were rare in early America.²⁰

Though deodands are often credited as the progenitor of modern American civil asset forfeiture, this is false.²¹ The criteria to become a deodand is the ending of a human life,²² and many contemporary offenses that permit civil asset forfeiture do not involve human death.²³ England allowed for two other types of forfeiture, both of which influenced current American forfeiture law. The most common type of forfeiture in English law was the attainder forfeiture.²⁴ Attainder forfeitures proceeded directly against the property owner and required a criminal conviction before an individual's property could be forfeited.²⁵ Attainder forfeitures provided a means for the Crown to oppress political opponents, as well as their innocent family members.²⁶

The English Navigation Acts are the most direct antecedent of U.S. civil asset forfeiture law. Unlike attainder forfeitures, the Navigation Acts permitted prosecutions of property, referred to as *in rem* proceedings, so the property owner's guilt or innocence was irrelevant.²⁷ Accordingly, a ship could be forfeited because of the misdeed of a single crewman.²⁸ In the American colonies, Navigation Act cases were tried in vice-admiralty courts.²⁹ These courts operated much differently than common law courts. For example, defendants in vice-admiralty courts were presumed guilty, and vice-admiralty cases proceeded before a magistrate

18. LEVY, *supra* note 9, at 12.

19. *Id.*

20. *Id.* at 13–14.

21. Boudreaux & Pritchard, *supra* note 14, at 601 (noting that courts often claim deodands are the root of modern civil asset forfeiture despite the lack of evidence for this claim).

22. LEVY, *supra* note 9, at 13; Boudreaux & Pritchard, *supra* note 14, at 601 (listing the reasons why deodands are not the source of present day civil asset forfeiture laws, such as “property became deodand only if it caused a human’s death”).

23. *See, e.g.*, 17 U.S.C. § 506(b) (2012); 18 U.S.C. § 545 (2012); 19 U.S.C. § 2609 (2012).

24. Boudreaux & Pritchard, *supra* note 14, at 602.

25. *Id.* at 602–03.

26. *Id.* at 604.

27. *Id.* at 605.

28. *Id.* at 606.

29. *Id.*

rather than a jury.³⁰ Vice-admiralty and common law courts often had jurisdiction over the same matters; thus, the Crown was able to bring cases in the forum most likely to rule in its favor.³¹

The Navigation Acts violated the rights of Englishmen³² and attempted to stifle the colonial American economy.³³ Nonetheless, writs of assistance, the mechanism used to enforce the Navigation Acts and many other colonial laws, were ultimately what sparked the revolution.³⁴ Almost all searches and seizures during the colonial period were accompanied by a warrant.³⁵ Warrants were usually issued on the basis of some specific information, but one who possessed a writ could search wherever he desired, whenever he pleased.³⁶ Additionally, the Crown permitted customs officials wielding writs of assistance to keep the

30. See *United States v. One 1976 Mercedes Benz 280S*, 618 F.2d 453, 464 (7th Cir. 1980) (discussing John Adams's argument for Englishmen's right to trial by jury in the context of the Sugar Act); *The Vice Admiralty Courts*, USHISTORY.ORG, <http://www.ushistor.org/declaration/related/vac.html> (last visited Feb. 22, 2017).

31. *The Vice Admiralty Courts*, *supra* note 30 (noting vice-admiralty court judges were often drawn from the local population, but this did not matter because the Crown established a vice-admiralty court in Nova Scotia with jurisdiction over all Britain's American colonies, and if the Crown predicted the local magistrate would rule against it, cases were brought to the Nova Scotia court).

32. See *One 1976 Mercedes Benz 280S*, 618 F.2d at 468–69 (discussing how trial by jury has been viewed as a right since the Magna Carta's signing).

33. Thomas Ladenburg, *Chapter 4: British Mercantilism and the Cost of Empire*, DIGITAL HIST., at 14–15, http://www.digitalhistory.uh.edu/teachers/lesson_plans/pdfs/unit1_4.pdf (last visited Feb. 22, 2017) (noting the Navigation Acts were designed to make American colonists dependent upon goods produced in England, and many colonial staples could be legally sold only after paying a tariff in Britannia).

34. See *Stanford v. Texas*, 379 U.S. 476, 481–82 (1965) (noting the colonists' aversion to writs of assistance, and John Adams's assertion that the Revolution was born during James Otis's argument against the writs); *Harris v. United States*, 331 U.S. 145, 159 (1947) (Frankfurter, J., dissenting) (asserting the Fourth Amendment "sought to guard against an abuse that more than any one single factor gave rise to American independence").

35. See *Frank v. Maryland*, 359 U.S. 360, 379 (1959) (Douglas, J., dissenting) (claiming the colonists were not necessarily offended by searches; rather, "[i]t was the absence of a warrant issued on a showing of probable cause" that made a search outrageous); Thomas K. Clancy, *The Importance of James Otis*, 82 MISS. L.J. 487, 491 (2013) [hereinafter Clancy, *Otis*] (stating that immediately before the American Revolution, "[w]arrantless searches and seizures were rare").

36. Thomas Clancy, *The Framers' Intent: John Adams, His Era, and the Fourth Amendment*, 86 IND. L.J. 979, 991 (2011) [hereinafter Clancy, *Framers' Intent*] (noting that writs of assistance gave their possessor "practically absolute and unlimited" discretion to search for contraband); Clancy, *Otis*, *supra* note 35, at 492–93 (discussing how writs of assistance enabled their possessor tremendous authority to search for any reason).

fruits of their seizures.³⁷ The Crown saw this as a means to encourage the enforcement of customs laws.³⁸

American Colonists viewed the profit incentive accompanying writs of assistance as a recipe for corruption.³⁹ As writs of assistance allowed informants to profit from snitching,⁴⁰ evidence was fabricated.⁴¹ Procedural obstacles caused seizure victims, who had done nothing wrong, to enter into “extortionary agreements” in order to reclaim their property.⁴² Political rascallions were victimized by writs of assistance while the politically connected went untouched.⁴³ Furthermore, unjust application of the writ was challenged in admiralty courts where the Crown had all the advantages.⁴⁴

The legality of writs of assistance was the question before the Boston Superior Court in 1761.⁴⁵ James Otis, an advocate general for the Crown,⁴⁶ resigned from his post rather than defend the legality of writs of assistance.⁴⁷ In fact, he argued the colonial merchants’ case pro bono and asserted, “[The writ of assistance] appears to me the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that ever was found in an English law-book.”⁴⁸ He also asserted:

37. Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 75 (1998) (noting writs of assistance allowed customs officers to keep up to a third of the contraband they seized); Clancy, *Framers' Intent*, *supra* note 36, at 992 (noting writs of assistance enabled informers to collect a portion of the seized goods, and this was one of the features of writs of assistance that James Otis despised).

38. Blumenson & Nilsen, *supra* note 37.

39. *Id.*

40. *Id.* (noting customs officers were authorized to pay informants from seized proceeds); Clancy, *Framers' Intent*, *supra* note 36, at 992 (noting that successful informers received a portion of seized goods, and this was an issue in the *Writs of Assistance* case).

41. Blumenson & Nilsen, *supra* note 37, at 75–76.

42. *Id.* at 76 n.149.

43. *Id.* at 76 n.147; James Otis, Advocate-General, Speech Against Writs of Assistance, (Feb. 24, 1761), http://www.constitution.org/bor/otis_against_writs.htm (drawing attention to Mr. Ware exercising his power under the writ against Justice Walley because Walley scolded him for breaching Sabbath laws).

44. Blumenson & Nilsen, *supra* note 37, at 76 n.149; see *The Vice Admiralty Courts*, *supra* note 30.

45. Otis, *supra* note 43.

46. James Otis Jr., ENCYCLOPEDIA.COM (2004), http://www.encyclopedia.com/topic/James_Otis.aspx.

47. *Id.*

48. Otis, *supra* note 43.

In the first place, the writ is universal, being directed “to all and singular justices, sheriffs, constables, and all other officers and subjects;” so that, in short, it is directed to every subject in the King’s dominions. Every one with this writ may be a tyrant; if this commission be legal, a tyrant in a legal manner, also, may control, imprison, or murder any one within the realm. In the next place, it is perpetual; there is no return. A man is accountable to no person for his doings. Every man may reign secure in his petty tyranny, and spread terror and desolation around him, until the trump of the Archangel shall excite different emotions in his soul. In the third place, a person with this writ, in the daytime, may enter all houses, shops, etc., at will, and command all to assist him. Fourthly, by this writ not only deputies, etc., but even their menial servants, are allowed to lord it over us. What is this but to have the curse of Canaan with a witness on us: to be the servants of servants, the most despicable of God’s creation?⁴⁹

Though he lost the case, Otis’s words resonated with the colonists and earned him great acclaim. John Adams claimed “the American Revolution was born” during Otis’s speech.⁵⁰

In the Revolution’s wake, the newly formed nation sought to ensure liberty by barring writs of assistance and forfeitures. The Constitution expressly forbids the issuance of bills of attainder,⁵¹ as well as “[f]orfeiture except during the [l]ife of the [p]erson attained.”⁵² The subsequent addition of the Fourth Amendment—based upon the Fourteenth Article of the Massachusetts Declaration of Rights, which was penned by John Adams and

49. *Id.*

50. Clancy, *Otis*, *supra* note 35, at 518; *see also* *Boyd v. United States*, 116 U.S. 616, 625 (1886) (“‘Then and there,’ said John Adams, ‘then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born.’”).

51. U.S. CONST. art. I, § 9.

52. *Id.* art. III, § 3.

inspired by Otis's speech⁵³—protected people and their property from unreasonable searches and seizures, meaning those conducted without a warrant.⁵⁴ Furthermore, the Fifth Amendment prohibited the government from depriving individuals of their property without due process of law.⁵⁵

Nevertheless, the Constitution's protection seemed to stop at the water's edge. Customs duties accounted for over eighty percent of the United States' revenues; thus, Congress modeled customs laws on those applied by the British.⁵⁶ Consequently, early Congresses passed in rem forfeiture laws targeting the vessels of smugglers, pirates, and slave traders.⁵⁷ Significantly, these laws applied exclusively to maritime offenses.⁵⁸ The Supreme Court relied on this point in affirming the in rem civil forfeiture of an arms smuggling ship without a jury.⁵⁹ Justice Chase justified using maritime procedures in forfeitures by noting, "The reason of the legislature for putting seizures of this kind on the admiralty side of the court was the great danger to the revenue if such cases should be left to the caprice of juries."⁶⁰ However, maritime forfeitures were never common.⁶¹

53. Clancy, *Framers' Intent*, *supra* note 36, at 1001–02 (discussing how John Adams relied on James Otis's concept of "security" when drafting Article Fourteen of the Massachusetts Declaration of Rights, and the term is copied in the Fourth Amendment).

54. *Henry v. United States*, 361 U.S. 98, 100–01 (1959) (discussing the contempt the Founding generation held for general warrants, and the warrant requirement); *see also* *Coolidge v. New Hampshire*, 403 U.S. 443, 481 (1971) ("The rule that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions,' is not so frail that its continuing vitality depends on the fate of a supposed doctrine of warrantless arrest. The warrant requirement has been a valued part of our constitutional law for decades . . ."); CHARLES DOYLE, CONG. RESEARCH SERV., 7-5700, CRIME AND FORFEITURE 37 (2015) ("The hallmark of a seizure which is not unreasonable is the presence of warrant issued upon probable cause.").

55. U.S. CONST. amend. V ("[N]or be deprived of life, liberty, or property, without due process of law.").

56. DICK M. CARPENTER II ET AL., INST. FOR JUSTICE, POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE 10 (2d ed. 2015), <http://www.ij.org/wp-content/uploads/2015/11/policing-for-profit-2nd-edition.pdf>.

57. *Bennis v. Michigan*, 516 U.S. 442, 460 (1996).

58. *van den Berg*, *supra* note 15, at 875.

59. *United States v. La Vengeance*, 3 U.S. (3 Dall.) 297, 301 (1796).

60. *United States v. Schooner Betsey*, 8 U.S. 443, 446 (1808) (Chase, J., dissenting).

61. Steven L. Schwarcz & Alan E. Rothman, *Civil Forfeiture: A Higher Form of Commercial Law*, 62 *FORDHAM L. REV.* 287, 291 (1993) (noting that forfeiture saw only limited use during the United States early years).

The Civil War brought forfeiture to the forefront. Congress passed multiple laws that allowed for the seizure of rebel property from 1861 to 1864.⁶² The most notable of these acts is likely the Confiscation Act of 1862, which allowed for the in rem forfeiture of rebel property, and its use in the persecution of the Union's wartime efforts.⁶³ Although President Lincoln ultimately signed the bill, he intended to veto the Confiscation Act of 1862 because he doubted its constitutionality.⁶⁴ Lincoln thought the Act clearly contradicted the Constitution's prohibition against "forfeiture, except during the life of the person attained." He was also troubled that the Act "by proceedings in rem forfeits property, for the ingredients of treason, without a conviction of the supposed criminal, or a personal hearing given him in any proceeding."⁶⁵ Many others opposed the bill as well, believing that it was patently unconstitutional.⁶⁶ Property confiscations were common under the Act,⁶⁷ and the Supreme Court affirmed the Confiscation Act's constitutionality in 1871 under Congress's war-time powers.⁶⁸

62. van den Berg, *supra* note 15, at 875; *Confiscation Acts*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/event/Confiscation-Acts> (last visited Feb. 2, 2017).

63. *The Second Confiscation Act*, FREEDMEN & SOUTHERN SOC'Y PROJECT, <http://www.freedmen.umd.edu/contact2.htm> (last visited Feb. 2, 2017) ("That, to insure the speedy termination of the present rebellion, it shall be the duty of the President of the United States to cause the seizure of all the estate and property, money, stocks, credits, and effects of the persons hereinafter named in this section, and to apply and use the same and proceeds thereof for the support of the army of the United States, that is to say.")

64. Daniel W. Hamilton, *The First and Second Confiscation Acts (1861, 1862)*, ENCYCLOPEDIA.COM (2004), <http://www.encyclopedia.com/history/encyclopedias-almana-cs-transcripts-and-maps/first-and-second-confiscation-acts-1861-1862>.

65. *Abraham Lincoln to Congress, July 17, 1862 (Draft of Veto Message)*, AM. MEMORY, [https://memory.loc.gov/cgi-bin/query/r?ammem/mal:@field\(DOCID+@lit\(d1715400\)\)](https://memory.loc.gov/cgi-bin/query/r?ammem/mal:@field(DOCID+@lit(d1715400))) (last visited Apr. 5, 2017).

66. *See, e.g.*, CONG. GLOBE, 37th Cong., 2d Sess. 303 (1862) ("I hold the bill of the select committee in all its main provisions relating to the seizure, capture, and condemnation of rebel property, to be totally without support from the Constitution, and in open violation of some of the most important and most precious provisions of that sacred instrument."); CONG. GLOBE, 37th Cong., 2d Sess. 105 (1862) ("[T]hose who advocate the passage of this bill can point to no clause in the Constitution that will authorize its passage.")

67. Schwarcz & Rothman, *supra* note 61, at 291 (noting forfeiture was widely used during the Civil War).

68. *Miller v. United States*, 78 U.S. 268, 305 (1871) ("Of course the power to declare war involves the power to prosecute it by all means and in any manner which war may be legitimately prosecuted. It therefore includes the right to seize and confiscate all property of an enemy and to dispose of it at the will of the captor. This is and always has been an undoubted belligerent right.")

Forfeiture vanished after the Civil War but was resurrected with the ratification of the Eighteenth Amendment.⁶⁹ With prohibition came the widespread use of civil forfeiture against bootlegging automobiles, money, and real estate.⁷⁰ However, civil forfeiture's revenue generating potential is best illustrated by the Supreme Court's holding in *J.W. Goldsmith, Jr.-Grant Co. v. United States*.⁷¹ In this case, the government attempted to forfeit a vehicle that was used in bootlegging without the owner's consent.⁷² The Court admitted forfeiting the property of innocent people conflicted with principles of justice, but affirmed the forfeiture based on government revenue generation and forfeiture's history in the United States.⁷³ Alcohol related civil asset forfeitures largely vanished with the Twenty-First Amendment, which repealed prohibition for revenue-generation reasons.⁷⁴

III. CONTEMPORARY FEDERAL AND STATE CIVIL FORFEITURE LAWS

Civil asset forfeiture was resurrected in the modern era with the passage of the Comprehensive Drug Abuse Prevention and Control Act of 1970 ("CDAPCA").⁷⁵ The CDAPCA limited forfeitures exclusively to "the illegal substances themselves and the instruments by which they were manufactured and distributed."⁷⁶ In 1974, the Supreme Court relied on a pirate forfeiture case from 1827 when it affirmed the civil asset forfeiture of an innocent

69. CARPENTER ET AL., *supra* note 56.

70. *Id.* ("[Civil asset forfeiture] was used extensively during Prohibition against automobiles and other vehicles transporting illegal liquor."); Boudreaux & Pritchard, *supra* note 14, at 627 ("Prohibition brought forfeiture into common use in the United States."); *Civil Asset Forfeiture*, *supra* note 2 (noting civil forfeiture was widely used to seize cash, cars, and real estate during the Prohibition Era).

71. *See generally* *J.W. Goldsmith, Jr.-Grant Co. v. United States*, 254 U.S. 505 (1921).

72. *Id.* at 505.

73. *Id.* at 510–11.

74. Donald J. Boudreaux & A.C. Pritchard, *The Price of Prohibition*, 36 ARIZ. L. REV. 1, 5 (1994); Christopher Klein, *The Night Prohibition Ended*, HIST. HEADLINES (Dec. 5, 2013), <http://www.history.com/news/the-night-prohibition-ended> ("[T]he federal government turned to alcohol to quench its thirst for desperately needed tax money and put an estimated half-million Americans back to work."); Mark Thornton, *The Real Reason for FDR's Popularity*, MISES INST. (Oct. 20, 2010), <https://mises.org/library/real-reason-fdrs-popularity> (noting repealing Prohibition was an all-around win for FDR because it increased his popularity and generated tremendous tax revenue).

75. 21 U.S.C. § 801 (2012).

76. *United States v. 92 Buena Vista Ave., Rumson, N.J.*, 507 U.S. 111, 121–22 (1993).

owner's yacht.⁷⁷ The CDAPCA was amended a few years later to permit the forfeiture of illegal drug proceeds, a feat the Supreme Court described as "an important expansion of governmental power."⁷⁸ Nevertheless, the Government Accountability Office reported that forfeiture's high burden of proof and lack of incentives led to the doctrine's infrequent usage during the 1970s.⁷⁹

The Comprehensive Crime Control Act of 1984 ("CCCA") was designed to encourage civil asset forfeiture by allowing law enforcement to keep forfeited assets.⁸⁰ Included in the CCCA was an equitable sharing provision that allowed the federal government to "adopt" property seized by state and local law enforcement and then transfer the bulk of the money back to the seizing agencies.⁸¹ Equitable sharing was designed to incentivize states to adopt the federal government's drug policies.⁸² Accordingly, the CCCA established the policing-for-profit system that is common throughout the United States today.⁸³ It also encouraged the use of paid informants by tripling the amount informants could be paid for providing information leading to

77. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 683–84 (1974).

78. *92 Buena Vista Avenue*, 507 U.S. at 121.

79. COMPROLLER GEN., U.S. GEN. ACCOUNTING OFFICE, ASSET FORFEITURE—A SELDOM USED TOOL IN COMBATTING DRUG TRAFFICKING 23 (1981), <http://www.gao.gov/assets/140/133043.pdf>.

80. 18 U.S.C. § 981(e) (2012); 28 U.S.C. § 524(c)(1) (2012) (establishing the Department of Justice Assets Forfeiture Fund); van den Berg, *supra* note 15, at 876 (discussing how forfeiture use became more frequent after law enforcement obtained the ability to maintain forfeiture funds).

81. 18 U.S.C. § 981(e); Katherine Baicker & Mireille Jacobson, *Finders Keepers: Forfeiture Laws, Policing Incentives, and Local Budgets*, 91 J. PUB. ECON. 2113, 2116 (2007) (noting the equitable sharing program was the most controversial provision of the CCCA's forfeiture provisions).

82. Isaiah M. Hunter, *The War on Drugs and Taxes: How Tax Expenditure Analysis Can Shed Light on Civil Asset Forfeiture*, 9 N.Y.U. J.L. & LIBERTY 549, 556 (2015) (discussing how equitable sharing gave money to states in order to encourage the states to comply with federal drug policy).

83. van den Berg, *supra* note 15, at 876 (noting how forfeiture has become more common since the CCCA was passed).

forfeitures.⁸⁴ However, countless civil asset forfeiture horror stories accompanied the CCCA.⁸⁵

There are dozens of federal forfeiture statutes that apply to dozens of federal crimes,⁸⁶ but the Civil Asset Forfeiture Reform Act of 2000 (“CAFRA”) is the main federal forfeiture statute.⁸⁷ CAFRA was Congress’s response to civil asset forfeiture horror stories, and has many positive aspects.⁸⁸ The burden of proof in civil forfeiture cases shifted from the property owner to the government.⁸⁹ Innocence is a defense under CAFRA, provided the owner can prove her claim by a preponderance of the evidence.⁹⁰ Indigent property owners have the right to counsel in some instances under CAFRA, including when the forfeiture is of a real property residence.⁹¹ Additionally, CAFRA gives property owners a chance to determine whether the forfeiture is “grossly disproportional” to the alleged crime and, consequentially, unconstitutional.⁹²

Nonetheless, CAFRA leaves much to be desired. The government is only required to prove its case by a preponderance of the evidence in order to forfeit property,⁹³ a much lower standard than is required in criminal cases. CAFRA did not affect law enforcement’s ability to seize property without a warrant if the officer has probable cause to believe the property is subject to

84. 18 U.S.C. § 981(e); *All Bill Information (Except Text) for S.948-Comprehensive Forfeiture Act of 1984*, CONGRESS.GOV, <https://www.congress.gov/bill/98th-congress/senate-bill/948/all-info> (last visited Feb. 27, 2017) (noting the maximum award an informant can receive was increased from \$50,000 to \$150,000).

85. See, e.g., Jarret B. Wollstein, *The Government’s War on Property*, FOUND. FOR ECON. EDUC. (July 1, 1993), <https://fee.org/articles/the-governments-war-on-property>.

86. See U.S. DEP’T OF JUSTICE, *ASSET FORFEITURE AND MONEY LAUNDERING STATUTES* (2015), <https://www.justice.gov/sites/default/files/criminal-afmls/legacy/2015/04/24/statutes2015.pdf>.

87. van den Berg, *supra* note 15, at 869 (noting CAFRA is the “dominant federal paradigm”).

88. CARPENTER ET AL., *supra* note 56, at 2 (discussing how atrocious uses of civil asset forfeiture, like in *Bennis v. Michigan*, 516 U.S. 442 (1996), helped prompt CAFRA).

89. 18 U.S.C. § 983(c); *United States v. \$493,850 in U.S. Currency*, 518 F.3d 1159, 1167 (9th Cir. 2008) (noting that pre-CAFRA, the burden of proof was on the property owner to prove her innocence, and this “allowed the government to seize property based on nothing more than its initial showing of probable cause in many cases”).

90. 18 U.S.C. § 983(d)(1).

91. *Id.* § 983(b)(2)(A).

92. *Id.* § 983(g)(4).

93. *Id.* § 983(c)(1).

forfeiture.⁹⁴ Also, revealing civil asset forfeiture's Navigation Act roots, CAFRA proceedings use the Supplemental Rules for Certain Admiralty and Maritime Claims.⁹⁵ Most troublingly, CAFRA enables law enforcement to retain 100% of forfeiture proceeds.⁹⁶ The federal government has forfeited over \$1 billion worth of assets every year since 2006, including over \$5 billion in 2014 alone.⁹⁷

Although each state has its own forfeiture laws, state forfeiture laws tend to resemble federal forfeiture laws.⁹⁸ However, state forfeiture laws vary. Thirty-one states require the government to prove its case by a preponderance of the evidence in civil forfeiture proceedings, but seventeen others require a higher burden of proof.⁹⁹ Massachusetts and North Dakota allow property to be forfeited upon a mere showing of probable cause.¹⁰⁰ Other states require criminal convictions before property can be forfeited.¹⁰¹

Which party bears the burden of proof varies widely between states. Ten states require the government to prove the owner violated some law as a prerequisite to civil forfeiture,¹⁰² and the others place the burden on the property owner to disprove the government.¹⁰³ Where the forfeited money goes depends upon the state as well. In several states, law enforcement keeps 100% of the proceeds.¹⁰⁴ Half a dozen states direct forfeiture proceeds away from law enforcement and into the state's general fund or education fund.¹⁰⁵

94. *Id.* § 981(b)(2).

95. *Id.* § 983(a)(4)(A).

96. *Id.* § 981(e).

97. CARPENTER ET AL., *supra* note 56, at 148.

98. *Id.* at 2 (noting many states amended their forfeiture laws to track federal law during the 1980s); Louis S. Rulli, *Access to Justice and Civil Forfeiture Reform: Providing Lawyers for the Poor and Recapturing Forfeited Assets for Impoverished Communities*, 17 YALE L. & POL'Y REV. 507, 512 (1998) (noting states modeled their civil forfeiture laws on federal law).

99. CARPENTER ET AL., *supra* note 56, at 16, 150.

100. *Id.* at 16.

101. *Id.* at 16–17.

102. *Id.* at 20.

103. *Id.*

104. *Id.* at 14.

105. *Id.*

States can also obtain forfeiture proceeds through the federal equitable sharing program. There are two ways that states can participate in the equitable sharing program. One way is through joint investigations with the federal government.¹⁰⁶ Adoption is the other: it allows local law enforcement to seize property and then have federal authorities pursue the forfeiture under federal law.¹⁰⁷

IV. WHY LAW ENFORCEMENT LOVES CIVIL ASSET FORFEITURE

CAFRA failed to address two major problems with civil asset forfeiture. First, probable cause remains the standard for seizing property, while property owners must surmount Sisyphean barriers to regain their belongings. Second, law enforcement keeps what it takes, providing officers with an incentive to enrich their agencies rather than keep the public safe.

A. Seizing Property Is Easy, Reclaiming It Is Tough

Civil asset forfeiture statutes grant law enforcement the authority to seize property upon probable cause that the property was, or will be, used to violate a law to which forfeiture applies.¹⁰⁸ Though constitutionally required, the warrant requirement—a prophylactic against unreasonable searches and seizures¹⁰⁹—has been all but done away with, for there are approximately two dozen court created exceptions to the warrant requirement.¹¹⁰ Eliminating the warrant requirement in favor of the probable cause standard is problematic because it is a vague concept that

106. RICHARD WEBER, U.S. DEP'T OF JUSTICE, GUIDE TO EQUITABLE SHARING FOR STATE AND LOCAL LAW ENFORCEMENT AGENCIES 6 (2009), <https://www.justice.gov/sites/default/files/usao-ri/legacy/2012/03/26/esguidelines.pdf>.

107. *Id.*

108. 18 U.S.C. 981(b)(2)(B)(ii)(C) (2012); *see, e.g.*, MISS. CODE ANN. § 41-29-153(b)(4) (2012).

109. U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches, and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”).

110. *California v. Acevedo*, 500 U.S. 565, 582 (1991) (Scalia, J., concurring) (noting that exceptions to the warrant requirement render the warrant requirement “unrecognizable”); Craig S. Lerner, *The Reasonableness of Probable Cause*, 81 TEX. L. REV. 951, 955 (2003) (stating there are at least twenty-four exceptions to the warrant requirement).

gives law enforcement virtually unbridled authority to search and seize.

To determine whether probable cause for a search and seizure exists, the Supreme Court applies the reasonable man standard.¹¹¹ This means that probable cause requires a “fair probability” that contraband exists in light of the “totality of the circumstances.”¹¹² This does little to clear the fog “between mere suspicion and probable cause.”¹¹³ Professor Craig Lerner described the degree of certainty necessary to satisfy the probable cause standard as “somewhere between .01% and 51%.”¹¹⁴ The percentage may be closer to 0.01% because courts tend to grant tremendous deference to law enforcement’s probable cause judgments.¹¹⁵

Forfeitures often stem from traffic stops entirely unrelated to nefarious activity, such as illegal lane changes and speeding.¹¹⁶

111. *Ornelas v. United States*, 517 U.S. 690, 696 (1996) (“[P]robable cause to search as existing where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found.”); *Florida v. Jimeno*, 500 U.S. 248, 250 (1991) (“The touchstone of the Fourth Amendment is reasonableness.”); *Henry v. United States*, 361 U.S. 98, 102 (1959) (“Probable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed.”); *Brinegar v. United States*, 338 U.S. 160, 175 (1949) (“In dealing with probable cause, . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.”).

112. *Florida v. Harris*, 133 S. Ct. 1050, 1055 (2013) (quoting *Illinois v. Gates*, 462 U.S. 213, 238 (1983)).

113. *Brinegar*, 338 U.S. at 176; LEVY, *supra* note 9, at 102 (noting probable cause is an “opaque standard”).

114. Lerner, *supra* note 110, at 996.

115. *Ornelas*, 517 U.S. at 699 (noting the judgments of local law enforcement should be given “due weight”); Kit Kinpoints, *Veteran Police Officers and Three-Dollar Steaks: The Subjective/Objective Dimensions of Probable Cause and Reasonable Suspicion*, 12 U. PA. J. CONST. L. 751, 755 (2010).

116. *One Hundred Seven Thousand Dollars (\$107,000.00) U.S. Currency v. State*, 643 So. 2d 917, 919 (Miss. 1994) (illustrating a Mississippi law enforcement officer who pulled a car over for a traffic violation then attempted to seize and forfeit \$107,000 despite the seizing officer’s admission that “he had no reason to believe that Tagle [the money’s owner] had violated any laws of the State of Mississippi, and there was nothing special about the money found in Tagle’s vehicle”); Michael Sallah et al., *Stop and Seize*, WASH. POST, Sept. 7, 2014, at A; Editorial, *Forfeiture Without Due Process*, WASH. POST, Jan. 3, 2012, at A12; John Burnett, *Cash Seizures by Police Prompt Court Fights*, NPR (June 16, 2008, 2:04 PM), <http://www.npr.org/templates/story/story.php?storyId=91555835>; Nick Sibilla, *Cops Use Traffic Stops to Seize Millions from Drivers Never Charged with a Crime*, FORBES (Mar. 12, 2014, 11:38 AM), <http://www.forbes.com/sites/instituteforjustice/2014/03/12/cops-use-traffic-stops-to-seize-millions-from-drivers-never-charged-with-a-crime/#707f998446ae>.

Law enforcement officers can search cars without a warrant if they have probable cause.¹¹⁷ Since courts give law enforcement the benefit of the doubt when it comes to probable cause determinations, nearly everything clears this hurdle. In fact, the Supreme Court has stated on multiple occasions that perfectly lawful behavior can provide an officer with probable cause to search and seize.¹¹⁸ Thus, law enforcement seemingly always has probable cause to seize property.¹¹⁹

The ease with which law enforcement can seize property stands in stark contrast to the time consuming and byzantine process property owners must undergo to reclaim their belongings.¹²⁰ Several states only require the government to prove its case by the preponderance of the evidence standard, meaning a mere feather's weight in favor of the state.¹²¹ In fact, forty states place the burden on a property owner to prove his innocence.¹²² Proving one's innocence likely requires hiring an attorney, and standard attorneys' fees in forfeiture cases can easily exceed one thousand dollars.¹²³ The poor likely cannot afford this expense,¹²⁴

117. *California v. Acevedo*, 506 U.S. 565, 580 (1991) (“The police may search an automobile and the containers within it where they have probable cause to believe contraband or evidence is contained.”).

118. *United States v. Sokolow*, 490 U.S. 1, 9–10 (1989) (citing *Illinois v. Gates*, 462 U.S. 213, 243 n.13 (1983)); *Reid v. Georgia*, 448 U.S. 438, 441 (1980); *see also Sokolow*, 490 U.S. at 13 (Marshall, J., dissenting) (noting contradictions that lead to probable cause).

119. *See, e.g., United States v. Arvizu*, 534 U.S. 266 (2002) (holding a car's slowing down at the sight of a police car combined with the driver's failure to wave at the cop constituted probable cause to search the vehicle); *Ornelas*, 517 U.S. at 694 (example of source states such as California); *Sokolow*, 490 U.S. at 1 (majority opinion) (traveling to or from a “source city”).

120. CARPENTER ET AL., *supra* note 56, at 11–12; Adam Bates, *Quiet Change Expands ATF Power to Seize Property*, CATO LIBERTY (Feb. 25, 2015, 3:59 PM), <http://www.cato.org/blog/quiet-change-expands-atf-power-seize-property>; Daniel Bier, *Confiscating ‘Criminals’ Property Is a Cop Racket*, NEWSWEEK (Apr. 17, 2015, 1:12 PM), <http://www.newsweek.com/confiscating-criminals-property-is-a-cop-racket-323041>; Kevin Drum, *Chart of the Day: Civil Asset Forfeiture Is a Moral Abomination*, MOTHER JONES (Nov. 10, 2015, 3:37 PM), <http://www.motherjones.com/kevin-drum/2015/11/chart-day-civil-asset-forfeiture-moral-abomination>.

121. CARPENTER ET AL., *supra* note 56, at 16 (noting that the majority of the state and the federal government set the burden of proof in civil forfeitures at probable cause, which is slightly more than half the proof).

122. *Id.* at 20 (noting only ten states and the District of Columbia require the government to prove wrongdoing in order to forfeit any type of property).

123. van den Berg, *supra* note 15, at 870 (stating \$10,000 is the typical retainer fee in civil asset forfeiture cases); Brad Cates, *Taking the Profit Out of Police Work*, WALL STREET J. (Feb. 10, 2016), <http://www.wsj.com/articles/taking-the-profit-out-of-police-work-1455148232> (noting the average amount of money seized in Oklahoma is \$1,200 while the average cost of hiring an attorney to contest the seizure is \$5,000); Chloe Cockburn, *Easy Money:*

so targeting the indigent provides law enforcement with a friction-free way to collect forfeiture money.¹²⁵

Assuming a property owner has the financial wherewithal to fight a forfeiture, doing so is economically irrational if contesting the forfeiture costs more than what the property is worth.¹²⁶ This means civil asset forfeiture authorizes the seizure of relatively low value items,¹²⁷ which could explain why the median forfeiture case involves approximately \$500.¹²⁸ Indeed, eighty-eight percent of federal civil forfeitures are uncontested due to factors such as the cost of hiring an attorney.¹²⁹ Foundational tenets of the American criminal justice system, like the presumption of innocence and the beyond a reasonable doubt standard, are cast aside in civil forfeiture cases.¹³⁰

Civil Asset Forfeiture Abuse by the Police, ACLU (Feb. 3, 2010, 1:16 PM), <https://perma.cc/N35A-MWEA> (noting the standard attorney's fee in Georgia civil asset forfeiture cases is \$5,000).

124. Andrew Crawford, *Civil Asset Forfeiture in Massachusetts: A Flawed Incentive Structure and Its Impact on Indigent Property Owners*, 35 B.C. J.L. & SOC. JUST. 257, 268–69 (2015) (noting the poor do not have the resources to contest frivolous seizures).

125. *Id.* at 277 (discussing how the indigents' inability to challenge seizures makes them easy targets for profit driven law enforcement personnel); Laura Sullivan, *Police Can Seize and Sell Assets Even When the Owner Broke No Law*, NPR (Nov. 10, 2014, 5:46 PM), <http://www.npr.org/sections/thetwo-way/2014/11/10/363102433/police-can-seize-and-sell-assets-even-when-the-owner-broke-no-law> (noting “the cases are expensive to contest and often disproportionately affect people without means or access to a lawyer”).

126. David Benjamin Ross, *Civil Forfeiture: A Fiction That Offends Due Process*, 13 REGENT U. L. REV. 259, 267 (2001) (noting the property at issue is often worth less than the cost of hiring an attorney and other procedural hurdles one encounters when contesting a civil asset forfeiture); Louis S. Rulli, *On the Road to Civil Gideon: Five Lessons from the Enactment of a Right to Counsel for Indigent Homeowners in Federal Civil Forfeiture Proceedings*, 19 J.L. & POL'Y 683, 729 (2011) (noting that citizens are often deprived of their property because “[t]he cases [are] often too expensive to litigate in relation to the value of property at stake”); Cates, *supra* note 123.

127. van den Berg, *supra* note 15, at 870 (discussing the unique problems presented when forfeiture involves property of low or medium value); Crawford, *supra* note 124, at 277 (noting the poor's inability to challenge forfeitures makes them easy targets for revenue hungry cops).

128. Ingraham, *supra* note 5.

129. CARPENTER ET AL., *supra* note 56, at 5.

130. Mark W. Bennett, *The Presumption of Innocence and Trial Court Judges: Our Greatest Failing*, CHAMPION, Apr. 2015, at 18, 18, http://www.americanbar.org/content/dam/aba/events/criminal_justice/Implicit%20Bias_Presumption_Innocence.authcheckdam.pdf.

B. It's All About the Money

In 1990, the U.S. Attorney General stated that increasing forfeitures was a top priority,¹³¹ and obtaining civil asset forfeiture revenue appears to be law enforcement's chief priority today. There is an entire industry devoted to maximizing law enforcement's civil asset forfeiture revenue,¹³² and for decades, law enforcement has ardently opposed reforms that make collecting forfeiture revenue more difficult.¹³³ In fact, CAFRA's architect, Representative Henry Hyde, did not attempt to place forfeiture funds in a neutral account because of law enforcement's intense opposition.¹³⁴

Since law enforcement still reaps the proceeds of forfeitures, it continues to block state level civil asset forfeiture reform efforts. California law enforcement successfully lobbied to block a bipartisan civil asset forfeiture reform bill in 2015.¹³⁵ Despite admitting that asset forfeiture can be abused, Maryland's governor vetoed civil forfeiture reform in 2015 at the behest of law enforcement.¹³⁶ Wyoming's governor, a former prosecutor, "sided with law enforcement groups"¹³⁷ and vetoed a bipartisan civil asset forfeiture reform bill in 2015 that, in his own words, "was

131. U.S. DEP'T OF JUSTICE, 127204, FEDERAL FORFEITURE OF THE INSTRUMENTS AND PROCEEDS OF CRIME: THE PROGRAM IN A NUTSHELL 1 (1990), <https://www.ncjrs.gov/pdffiles1/Digitization/127204NCJRS.pdf>.

132. Radley Balko, *The Forfeiture Racket*, REASON, Feb. 2010, at 33, 34, <http://reason.com/archives/2010/01/26/the-forfeiture-racket> ("A cottage industry has sprung up to offer law enforcement agencies instruction on how to take and keep property more efficiently.").

133. Blumenson & Nilsen, *supra* note 37, at 107 (noting law enforcement stopped efforts that would have placed forfeiture proceeds in a neutral account); Jefferson Holcomb et al., *Civil Asset Forfeiture, Equitable Sharing, and Policing for Profit in the United States*, 39 J. CRIM. JUST. 273, 275 (2011) (noting law enforcement has consistently opposed state and federal level forfeiture reforms to civil asset forfeiture).

134. Blumenson & Nilsen, *supra* note 37, at 107.

135. Jeremy B. White, *California Civil Forfeiture Curb Soundly Defeated*, SACRAMENTO BEE (Sept. 10, 2015, 5:57 PM), <http://www.sacbee.com/news/politics-government/capitol-alert/article34818903.html>.

136. Letter from Governor Lawrence Hogan to Thomas Miller, President of the Senate (May 22, 2015), http://content.govdelivery.com/attachments/MDGOV/2015/05/22/file_attachments/392912/SB%2B528%2B-%2BCriminal%2BProcedure%2B-%2Bseizure%2Band%2Bforfeiture.pdf (noting that state law enforcement requested that he veto the civil forfeiture reform).

137. Trevor Brown, *Gov. Matt Mead's Asset Forfeiture Veto Stands*, WYO. EAGLE TRIB. (Feb. 28, 2015), http://www.wyomingnews.com/news/gov-matt-mead-s-asset-forfeiture-veto-stands/article_63c15748-8196-5c20-a46f-711c8d789dc6.html.

overwhelmingly supported.”¹³⁸ Law enforcement claimed requiring a criminal conviction in order to forfeit property would transform Tennessee¹³⁹ and Oklahoma¹⁴⁰ into criminal havens. The Utah legislature reversed voter approved forfeiture reform due to pressure from law enforcement in 2014.¹⁴¹

Even when state laws forbid law enforcement from directly benefiting from forfeitures, law enforcement often attempts to circumvent the rules in order to reap forfeiture money. While serving as Governor of Missouri, John Ashcroft allowed law enforcement to keep forfeiture proceeds despite a state constitutional provision requiring that forfeiture proceeds go to schools.¹⁴² The Indiana Constitution requires that the proceeds “from all forfeitures” be deposited into the common school fund,¹⁴³ yet Indiana prosecutors have found a loophole in the law that enables them to keep forfeiture proceeds.¹⁴⁴ Although New Mexico abolished civil asset forfeiture in 2015,¹⁴⁵ law enforcement within the Land of Enchantment continued to civilly forfeit

138. Ben Neary, *Gov. Mead Vetoes Asset Forfeiture Bill*, CASPER STAR TRIB. (Feb. 17, 2015), http://trib.com/news/state-and-regional/govt-and-politics/gov-mead-vetoes-asset-orfeiture-bill/article_f1f2f2f2-4d18-5240-b947-3fc34edb3319.html.

139. Erik Schelzig, *Keep Asset Forfeiture Law Intact, Tennessee Lawmakers Urged*, THE TENNESSEAN (Oct. 19, 2015, 7:17 PM), <http://www.tennessean.com/story/news/politics/2015/10/19/keep-asset-forfeiture-law-intact-tennessee-lawmakers-urged/74245068>.

140. Nick Wing, *Prosecutor and Cop Lose It Over Idea of Needing a Conviction to Take Property*, HUFFINGTON POST (Nov. 13, 2015, 6:21 PM), http://www.huffingtonpost.com/entry/oklahoma-civil-asset-forfeiture_us_56461dd1e4b045bf3deedb11.

141. Radley Balko, *Utah Lawmakers Quietly Roll Back Asset Forfeiture Reforms*, WASH. POST (Jan. 8, 2014), <https://www.washingtonpost.com/news/opinions/wp/2014/01/08/utah-lawmakers-quietly-roll-back-asset-forfeiture-reforms>.

142. Baicker & Jacobson, *supra* note 81, at 2129 (noting Governor Ashcroft let law enforcement keep forfeiture proceeds despite a state constitutional provision forbidding the practice); Press Release, Drug Policy Alliance, Ashcroft Administration Worked with Feds to Circumvent Missouri Law (Jan. 19, 2001), <http://www.drugpolicy.org/news/2001/01/ashcroft-administration-worked-feds-circumvent-missouri-law>; Daniel Forbes, *Did Ashcroft 'Look the Other Way' as Missouri Governor?*, ALTERNET (Jan. 18, 2011), http://www.alternet.org/story/10358/did_ashcroft_%22look_the_other_way%22_as_missouri_gov_ernor.

143. IND. CONST. art. 8, § 2.

144. Kristine Guerra, *Indy Officials Face Lawsuit Alleging Misuse of Civil Forfeiture Funds*, INDY STAR (Feb. 19, 2016, 9:07 AM), <http://www.indystar.com/story/news/crime/2016/02/10/lawsuit-against-indy-officials-challenges-civil-forfeiture/80027058>; *Indiana's Civil Forfeiture*, INST. FOR JUST., <http://ij.org/case/indiana-civil-forfeiture> (last visited Mar. 3, 2017).

145. Executive Message No. 25 from Governor Susana Martinez to Don L. Tripp, Speaker of the House (Apr. 10, 2015), <http://www.nmlegis.gov/Sessions/15%20Regular/final/HB0560.pdf>.

property in 2016 to raise revenue.¹⁴⁶ The more common practice, however, is for law enforcement to disregard strict state forfeiture laws in favor of more lax federal forfeiture laws.¹⁴⁷ Indeed, a 2011 study in the *Journal of Criminal Justice* found that “when state laws make forfeiture more difficult and less rewarding, agencies are even more apt to turn to the federal government’s easier and more generous forfeiture procedures.”¹⁴⁸

Money and property obtained through civil asset forfeiture can certainly benefit police departments. Nevertheless, the funds can also be used in ethically questionable ways. For example, state and local enforcement use civil asset forfeiture proceeds to pay salaries in multiple jurisdictions,¹⁴⁹ and this is in direct conflict with federal forfeiture policy.¹⁵⁰ Many law enforcement agencies

146. Scott Shackford, *New Mexico Cities Attempt to Ignore Tough Restrictions on Property Seizure. Lawsuits Follow*, REASON (Dec. 2, 2015, 11:25 AM), <http://reason.com/blog/2015/12/02/new-mexico-cities-attempt-to-ignore-toug>.

147. CARPENTER ET AL., *supra* note 56, at 26; Hunter, *supra* note 82, at 557 (discussing how equitable sharing blocks state forfeiture reform efforts); Rachel L. Stuteville, *Reverse Robin Hood: The Tale of How Texas Law Enforcement Has Used Civil Asset Forfeiture to Take from Property Owners and Pad the Pockets of Local Government—The Righteous Hunt for Reform Is On*, 46 TEX. TECH L. REV. 1169, 1185 (2014) (noting law enforcement uses equitable sharing to get around stricter state laws).

148. Holcomb et al., *supra* note 133, at 282.

149. CARPENTER ET AL., *supra* note 56, at 19 (noting Philadelphia spends forty percent of forfeiture money on salaries); AUSTIN CLEMENS ET AL., ASSET FORFEITURE IN TEXAS: DPS AND COUNTY INTERACTIONS 25 (2014), <http://www.txcourts.gov/media/782473/sting-report-final.pdf> (noting Texas permits prosecutors to use forfeiture money to pay salaries); JOINT LEGISLATIVE COMM. ON PERFORMANCE EVALUATION & EXPENDITURE REVIEW, NO. 535, A SURVEY OF STRATEGIES FOR ENFORCEMENT OF DRUG LAWS IN MISSISSIPPI 33 (2010), <http://www.peer.ms.gov/reports/rpt535.pdf> (noting Mississippi spends twelve percent of forfeiture money on salaries); TIM KELLER ET AL., ARIZONA’S PROFIT INCENTIVE IN CIVIL FORFEITURE: DANGEROUS FOR LAW ENFORCEMENT; DANGEROUS FOR ARIZONANS 1 (2012), <http://ij.org/wp-content/uploads/2015/03/az-forfeiture-report.pdf> (noting Arizona lets cop use money for salaries); Kristine Guerra, *In Some Cases, Police Seize Cars, Homes—with No Charges Filed*, INDY STAR (Feb. 22, 2015, 7:01 AM), <http://www.indystar.com/story/news/crime/2015/02/22/cases-police-seize-cars-homes-charges-filed/23802807> (“[F]orfeiture dollars pay for the salary and benefits of three deputy prosecutors and one paralegal, all of whom specialize in forfeiture cases.”); Robert O’Harrow Jr. et al., *Asset Seizures Fuel Police Spending*, WASH. POST (Oct. 11, 2014), <http://www.washingtonpost.com/sf/investigative/2014/10/11/asset-seizures-fuel-police-spending> (noting Braselton, Georgia, spent \$134,000 of equitable sharing money on salaries in 2008).

150. WEBER, *supra* note 106, at 19 (declaring equitable sharing money generally cannot be used for salaries because this would cause accusations of profit driving law enforcement).

depend on forfeiture revenue to fill their annual budgets¹⁵¹ despite federal guidelines that require forfeiture proceeds be used to “increase and not replace” budget appropriations.¹⁵² Likewise, federal guidelines forbid law enforcement budgets from supplanting governmental appropriations,¹⁵³ yet law enforcement budget allocations are often based upon the amount of forfeiture revenue the law enforcement agency collects.¹⁵⁴ Forfeiture also enables law enforcement to use the items they seize, so law enforcement has “wish lists” to determine which property to forfeit.¹⁵⁵

Law enforcement likes forfeiture money so much because, as one police chief stated:

It’s usually based on a need—well, I take that back. There’s some limitations on it. . . . Actually, there’s not really on the forfeiture stuff. We just usually base it on something that would be nice to have that we can’t get in the budget, for instance. We try not to use it for things that we need to depend on because we need to have those purchased. It’s kind of like pennies from

151. See JASON SNEAD, THE HERITAGE FOUND., NO. 4469, INSTEAD OF RAIDING THE ASSETS FORFEITURE FUND, CONGRESS SHOULD SIMPLY DISCONTINUE IT (2015) (noting a significant percentage of law enforcement agencies depend on forfeiture); Baicker & Jacobson, *supra* note 81, at 2115 (noting local governments make budget allocations based upon how much law enforcement forfeits); van den Berg, *supra* note 15, at 909 (noting that civil asset forfeiture revenue is necessary for approximately forty percent of police department budgets); Sallah, *supra* note 116 (noting hundreds of law enforcement agencies rely on forfeiture proceeds); Stuteville, *supra* note 147, at 1188 (stating Texas police agencies admit projecting forfeiture revenue into budget plans); John L. Worrall, *Addicted to the Drug War: The Role of Civil Asset Forfeiture as a Budgetary Necessity in Contemporary Law Enforcement*, 29 J. CRIM. JUST. 171, 173 (2001); John Burnett, *Seized Drug Assets Pad Police Budgets*, NPR (June 16, 2008, 12:01 AM), <http://www.npr.org/templates/story/story.php?storyId=91490480> (noting some governing bodies tell law enforcement to fund themselves through asset forfeiture).

152. WEBER, *supra* note 106, at 22.

153. *Id.*

154. JOINT LEGISLATIVE COMM. ON PERFORMANCE EVALUATION & EXPENDITURE REVIEW, *supra* note 149, at 32 (noting nineteen survey respondents admitted that their budget appropriations were based upon how much forfeiture revenue they collected); Baicker & Jacobson, *supra* note 81, at 2124 (“The results indicate that increases in seizures within a county are associated with reductions in budgetary allocations to police the following year.”).

155. Shaila Dewan, *Police Use Department Wish List When Deciding Which Assets to Seize*, N.Y. TIMES, Nov. 10, 2014, at A12.

heaven—it gets you a toy or something that you need in the way we typically look at it to be perfectly honest.¹⁵⁶

Other law enforcement officers have made comments to the same effect.¹⁵⁷ The absence of limitations, combined with the fact that forfeiture expenditures are largely unmonitored, enables law enforcement to spend forfeiture money on whatever it wants; some examples include a tanning salon, a margarita machine, illegal drugs, and prostitutes.¹⁵⁸ Forfeiture money has been used to pay off a prosecutor's student loans,¹⁵⁹ to hire a clown named Sparkles, buy a popcorn machine, CeeLo Green concert tickets, and gold plated whistles.¹⁶⁰ Forfeiture money has even been used to fund political campaigns.¹⁶¹

The Supreme Court has declared the government's interest in forfeiture extends beyond attacking the financial base of criminals.¹⁶² The government's interest encompasses "recovering all forfeitable assets," as law enforcement can obtain "substantial" money from forfeiture.¹⁶³ Accordingly, the Court has declared, "The extent of the Government's financial stake in drug forfeiture is apparent."¹⁶⁴ The Court supported its assertion by citing a memo from the attorney general "urg[ing] United States Attorneys to increase the volume of forfeitures in order to meet the Department of Justice's annual budget target. . . . Every effort must be made to increase forfeiture revenue."¹⁶⁵

156. CARPENTER ET AL., *supra* note 56, at 15.

157. Sallah et al., *supra* note 116 (quoting a former Drug Enforcement Administration agent describing forfeiture as the "gift that keeps on giving"); Sarah Stillman, *Taken*, NEW YORKER, Aug. 12 & 19, 2013, at 48 (quoting the director of the Sheriffs' Association of Texas admitting assets forfeiture is way for law enforcement to get items that are not in the budget).

158. Nick Sibilla, *The 14 Most Ridiculous Things Police Bought with Asset Forfeiture*, BUZZFEED (June 24, 2013, 12:27 PM), <http://www.buzzfeed.com/nicks29/the-14-most-ridiculous-things-police-bought-with-a-4y3w>.

159. Clifton Adcok, *Law Enforcement Seizures Misspent, Missing*, OKLA. WATCH (July 15, 2015), <http://oklahomawatch.org/2015/07/15/law-enforcement-seizures-misspent-missing>.

160. Sibilla, *supra* note 158.

161. *Id.*

162. Caplin & Drysdale, *Chartered v. United States*, 491 U.S. 617, 629 (1989).

163. *Id.*

164. *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 56 n.2 (1993).

165. *Id.*

V. PROBLEMS WITH CIVIL ASSET FORFEITURE

The Supreme Court has warned that revenue-generating penalties, like forfeitures, are the punishments most ripe for abuse because the state collects money when it doles out these penalties.¹⁶⁶ Thus, the Court suggests that heightened scrutiny be applied when the government stands to benefit from a punishment.¹⁶⁷ Based upon the discussion above, there is good reason to be concerned about how forfeiture's profit incentive influences law enforcement practices. This section discusses problematic law enforcement behaviors that result from civil asset forfeiture.

A. *Warps Law Enforcement Priorities*

Civil asset forfeiture is a lucrative and effortless process¹⁶⁸ for law enforcement that alters police behavior.¹⁶⁹ It creates a "built-in" conflict of interest," according to a federal court, because it presents law enforcement with the option of pursuing profit or public safety.¹⁷⁰ Another federal court stated that civil asset forfeiture "gives the government an incentive to investigate criminal activity in situations involving valuable property, regardless of its seriousness, but to ignore more serious criminal activity that does not provide financial gain for the government."¹⁷¹

This practice has been confirmed. Before law enforcement was able to keep forfeiture proceeds, it based decisions on public safety; however, since obtaining the ability to keep seized property, profit generation has become the main law enforcement influence.¹⁷² A Department of Justice publication even notes that

166. *Harmelin v. Michigan*, 501 U.S. 957, 980 n.9 (1991).

167. *Id.*

168. *CARPENTER ET AL.*, *supra* note 56, at 12 (noting eighty-eight percent of civil forfeitures proceed administratively).

169. *Developments in the Law—Policing and Profit*, *supra* note 4 ("Civil forfeiture changes police behavior too: the allure of cash diverts police attention from nonfinancial crimes toward more lucrative drug cases.").

170. *United States v. 632-636 Ninth Ave.*, 798 F. Supp. 1540, 1551 (N.D. Ala. 1992).

171. *United States v. 6625 Zumirez Drive*, 845 F. Supp. 725, 735 (C.D. Cal. 1994).

172. Marian R. Williams, *Civil Asset Forfeiture: Where Does the Money Go?*, 27 CRIM. JUST. REV. 321, 322 (2002) (noting that scholarship shows police behavior has shifted towards profit generation rather than public safety since law enforcement gained the ability to keep forfeiture proceeds).

law enforcement needs to figure out whether it is more lucrative “to target major dealers or numerous smaller ones.”¹⁷³ Indeed, a former director of the Department of Justice’s Executive Office for Asset Forfeiture Section declared that law enforcement was instructed to “[f]orfeit, forfeit, forfeit. Get money, get money, get money.”¹⁷⁴ Hence, it should come as no surprise that the Bureau of Alcohol, Tobacco, Firearms, and Explosives attempted to order gear emblazoned with a reminder, as well as its unofficial motto, to “Always Think Forfeiture.”¹⁷⁵

There are numerous examples of law enforcement prioritizing revenue generation over public safety in civil asset forfeiture cases. The Ventura County District Attorney’s investigation of the law enforcement raid that killed Donald Scott determined that the raid was motivated “by a desire to seize and forfeit [his Malibu] ranch for the government.”¹⁷⁶ Law enforcement forfeited a Kentucky man’s ninety-acre farm, although he had no prior criminal convictions, because he was using marijuana—in a medically validated way—to prevent blindness.¹⁷⁷ The government thought forfeiting the Motel Caswell would be an easy way to obtain cash,¹⁷⁸ so it attempted to forfeit the small, family-owned business because a handful of drug arrests occurred on the premises.¹⁷⁹ Likewise, the Philadelphia District Attorney has made a habit of forfeiting homes for minor offenses, such as a child selling forty dollars worth of drugs from his parents’ residence.¹⁸⁰ These forfeiture efforts did little to improve

173. U.S. DEP’T OF JUSTICE, MULTIJURISDICTIONAL DRUG CONTROL TASK FORCES: A FIVE YEAR REVIEW 1988–1992, at 23 (1993), <https://www.ncjrs.gov/pdffiles1/Digitization/146395NCJRS.pdf>.

174. van den Berg, *supra* note 15, at 907.

175. *El-Ali v. State*, 428 S.W.3d 824, 829 (Tex. 2014) (Willet, J., dissenting).

176. MICHAEL D. BRADBURY, REPORT ON THE DEATH OF DONALD SCOTT 61 (1993), <http://www.fear.org/chron/scott.txt>.

177. Andrew Schneider & Mary Pat Flaherty, *Presumed Guilty: The Law’s Victims in the War on Drugs*, PITT. PRESS (Feb. 27, 1991), <http://www.fear.org/guilty1.html#1> (noting the only government-authorized doctor to experiment with marijuana to treat eye disease testified at the trial that marijuana was the only medicine that could prevent Burton from going blind).

178. Jennifer Levesque, *Property Rights—When Reform Is Not Enough: A Look Inside the Problems Created by the Civil Asset Forfeiture Reform Act of 2000*, 37 W. NEW ENG. L. REV. 59, 61 (2015).

179. *United States v. 434 Main St.*, 961 F. Supp.2d 298, 298 (D. Mass. 2013).

180. Pamela Brown, *Parents’ House Seized After Son’s Drug Bust*, CNN (Sept. 8, 2014, 10:45 AM), <http://www.cnn.com/2014/09/03/us/philadelphia-drug-bust-house-seizure>.

public safety, but they had high potential payouts for law enforcement.

Which side of the road law enforcement directs its attention to reveals much about its priorities. New York City Police Commissioner Patrick Murphy stated, “The large monetary value of forfeitures . . . has created a great temptation for state and local police departments to target assets rather than criminal activity.” Murphy also acknowledged that a local New York City Police Department “has a financial incentive to impose roadblocks on the southbound lanes of I-95, which carry the cash to make drug buys, rather than the northbound lanes, which carry the drugs. After all, seized cash will end up forfeited to the police department, while seized drugs can only be destroyed.”¹⁸¹ Similarly, ninety percent of drug enforcement resources are devoted to capturing cash exiting Nashville, Tennessee, while law enforcement dedicates only ten percent of its resources to interdicting drugs entering the city.¹⁸² This practice has been reported around the country¹⁸³ and prompted Representative John Conyers to state, “We’re getting cash off the streets instead of drugs.”¹⁸⁴

Law enforcement does not mind that focusing enforcement efforts on seizing cash rather than drugs allows drugs to flow into cities.¹⁸⁵ Law enforcement prefers to arrest drug buyers to sellers because buyers have forfeitable cash.¹⁸⁶ In fact, cops actually sell drugs in a practice known as reverse stings.¹⁸⁷ Reverse stings were once rare but have become common since law

181. Richard Minter, *Ill-Gotten Gains*, REASON (1993), <https://reason.com/archives/1993/08/01/ill-gotten-gains/1>.

182. van den Berg, *supra* note 15, at 907.

183. Clifton Adcock et al., *Most Police Seizures of Cash Come from Blacks, Hispanics*, OKLA. WATCH (Oct. 27, 2015), <http://oklahomawatch.org/2015/10/07/most-police-seizures-of-cash-come-from-blacks-hispanics> (noting defense attorneys claim law enforcement focuses on south and westbound traffic because drug money is shipped this way); Bier, *supra* note 120 (stating cops are more likely to pull over vehicles leaving cities since these vehicles will be carrying cash rather than drugs); Jeff Brazil & Steve Berry, *Tainted Cash or Easy Money?*, ORLANDO SENTINEL (June 14, 1992), http://articles.orlandosentinel.com/1992-06-14/news/9206131060_1_seizures-kea-drug-squad/3 (stating cops are more likely to stop cars heading south since these cars will be carrying drug proceeds).

184. LEVY, *supra* note 9, at 153.

185. Eric D. Blumenson & Eva S. Nilsen, *Contesting the Government’s Financial Interest in Drug Cases*, 13 CRIM. JUST. 1, 7 (1999).

186. *Developments in the Law—Policing and Profit*, *supra* note 4.

187. Blumenson & Nilsen, *supra* note 37, at 67.

enforcement gained the ability to keep forfeiture money.¹⁸⁸ During reverse stings, one Florida law enforcement agency lured drug purchasers from multiple states, and even out of the country, into city limits by offering cocaine at discount rates.¹⁸⁹ This caused some to question why the city's police were offering invitations to out-of-town drug buyers instead of addressing the crime that already existed within city limits.¹⁹⁰ The answer seems to be that law enforcement keeps the cash and property drugs buyers bring.¹⁹¹ Law enforcement is making a decision based on revenue gain rather than public safety.¹⁹²

To make the forfeiture process more lucrative, law enforcement has privatized its functions. An Oklahoma prosecutor hired a private company to stop and search cars and allowed the private company to keep twenty-five percent of the assets that it seized.¹⁹³ The prosecutor admitted that the purpose of hiring the private company was to increase forfeiture revenue.¹⁹⁴ Prosecutors in Indiana and Kansas refer cases to private law firms, and the law firm gets to keep a percentage of the forfeited property.¹⁹⁵ One Kansas district attorney even hired his own law firm to perform the forfeitures.¹⁹⁶

188. *Id.*

189. Megan O'Matz & John Maines, *Cops. Cash. Cocaine. How Sunrise Police Make Millions Selling Drugs*, SUN SENTINEL (Sept. 29, 2014, 10:08 AM), <http://www.sun-sentinel.com/news/interactive/sfl-cops-cash-cocaine-htmlstory.html>.

190. Video: *Cops Cash Cocaine*, SUN SENTINEL (Sept. 29, 2014, 10:08 AM), <http://launch.newsinc.com/share.html?trackingGroup=91082&siteSection=sunsentinel&videoId=25232761>.

191. Karis Ann-Yu Chi, *Follow the Money: Getting to the Root of the Problem with Civil Asset Forfeiture in California*, 90 CALIF. L. REV. 1635, 1645 (2002) (discussing how civil asset forfeiture's financial incentives cause law enforcement to pursue profits rather than crime); O'Matz & Maines, *supra* note 189.

192. Blumenson & Nilsen, *supra* note 37, at 57 (explaining that the ability to rake in revenue clearly creates a conflict of interest for law enforcement agencies); Chi, *supra* note 191.

193. Nolan Clay, *Oklahoma DA Halts I-40 Drug Stops After Criticism*, THE OKLAHOMAN (July 21, 2013, 12:00 AM), <http://newsok.com/oklahoma-da-halts-i-40-drug-stops-after-criticism/article/3864488>.

194. *Id.*

195. Radley Balko, *Lawsuit Takes Aim at Asset Forfeiture in Indiana*, WASH. POST (Feb. 29, 2016), <https://www.washingtonpost.com/news/the-watch/wp/2016/02/29/lawsuit-takes-aim-at-asset-forfeiture-in-indiana>.

196. Gary Feuerberg, *Police Can Seize Your Property with Little Reason; Opens Door to Corruption, Say Experts*, EPOCH TIMES (Aug. 9, 2014, 8:13 AM), <http://www.theepochtimes.com/n3/860456-police-can-seize-your-property-with-little-reason-opens-door-to-corruption-say-experts>.

Former director of the Department of Justice's Asset Forfeiture Office, Michael Zeldin, said, "We had a situation in which the desire to deposit money into the asset forfeiture fund became the reason for being of forfeiture, eclipsing in certain measures the desire to effect fair enforcement of the laws as a matter of pure law-enforcement objectives."¹⁹⁷ In line with this, a federal court described law enforcement's behavior in civil asset forfeiture cases as "super-aggressive arrogance."¹⁹⁸

B. Burden on Innocent Owners

Justice Thomas warned that "forfeiture could become like a roulette wheel employed to raise revenue from innocent but hapless owners whose property is unforeseeably misused."¹⁹⁹ It appears that the United States has reached this point. Today, civil asset forfeiture routinely targets those who have never been charged with a crime.²⁰⁰ This completely undermines the presumption of innocence; however, the Supreme Court has no problem with this because civil forfeiture has a history of punishing the innocent.²⁰¹ Nevertheless, the legal fiction upon which civil asset forfeiture is premised is difficult to square with the Bill of Rights.²⁰² Civil asset forfeiture's Kafka-esque

197. Steven Kessler, *And the House Said: Let There Be Justice, Forfeiture and H.R. 1658*, KESSLER ON FORFEITURE (Sept. 20, 1999), <http://www.kessleronforfeiture.com/hr-1658>.

198. *United States v. That Certain Real Prop.*, 798 F. Supp. 1540, 1551 (N.D. Ala. 1992) (referring to the government's behavior in *United States v. 110 Collier Drive*, 793 F. Supp. 1048, 1052 (N.D. Ala. 1992), wherein the court apologized to the property owner, Julie Moon, for wrongfully ordering the forfeiture of her home, car, and \$8,861 in cash. The court claimed that "[i]t was misled particularly by the affidavits of the state law enforcement officials whose agencies stand to gain financially as a result of the forfeiture").

199. *Bennis v. Michigan*, 516 U.S. 442, 456 (1996) (Thomas, J., concurring).

200. *See, e.g.*, Casey Harper, *The 7 Most Egregious Examples of Civil Asset Forfeiture*, DAILY CALLER (Jan. 30, 2015, 5:07 PM), <http://dailycaller.com/2015/01/30/the-7-most-egregio-us-examples-of-civil-asset-forfeiture>; Tim Walberg, *Stopping the Abuse of Civil Forfeiture*, WASH. POST (Sept. 4, 2014), https://www.washingtonpost.com/opinions/tim-walberg-an-end-to-the-abuse-of-civil-forfeiture/2014/09/04/e7b9d07a-3395-11e4-9e92-0899b306bbea_sforfeiture.html.

201. *Bennis*, 516 U.S. at 446 (majority opinion) ("[A] long and unbroken line of cases holds that an owner's interest in property may be forfeited by reason of the use to which the property is put even though the owner did not know that it was to be put to such use.").

202. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 693 (1974) (Douglas, J., dissenting) ("I realize that the ancient law is founded on the fiction that the inanimate object itself is guilty of wrongdoing. But that traditional forfeiture doctrine cannot at times be reconciled with the requirements of the Fifth Amendment.").

machinations are possible because the Constitution protects people, not property.²⁰³

The Fourth Amendment is supposed to protect people from unreasonable government invasions of their property²⁰⁴ and is the first line of defense for property owners against civil asset forfeitures. However, the Department of Justice successfully lobbied against a warrant requirement in forfeiture cases claiming, “[I]t would seriously damage efforts to increase the use of civil forfeitures, particularly in drug enforcement.”²⁰⁵ The Court has been happy to disregard the Fourth Amendment in civil forfeitures as well,²⁰⁶ thanks in large part to jurisprudential exceptions.²⁰⁷

Since the Fourth Amendment and the Fifth Amendment illuminate each other,²⁰⁸ the erosion of the Fourth’s protections has diminished the protections provided by the Fifth. After all, an unreasonable seizure of evidence effectively compels a person to be a witness against himself.²⁰⁹ The Fifth Amendment also bars the government from punishing people twice for the same offense;²¹⁰

203. LEVY, *supra* note 9, at 106 (discussing how much easier civil asset forfeiture makes seizing property than criminal asset forfeiture); Hunter, *supra* note 82, at 553 (noting the Bill of Rights offers limited protection in *in rem* proceedings); Stillman, *supra* note 157 (citing civil asset forfeiture expert Louis Rulli); Terrance G. Reed, *American Forfeiture Law: Property Owners Meet the Prosecutor*, CATO POL’Y ANALYSIS (Sept. 29, 1992), <http://www.cato.org/pubs/pas/pa-179.html> (noting that civil asset forfeiture deprives individuals of constitutional protections by resorting to legal fiction).

204. U.S. CONST. amend. IV.

205. *United States v. All Assets of Statewide Auto Parts, Inc.*, 971 F.2d 896, 907 (2d Cir. 1992) (Van Graafeiland, J., concurring in part and dissenting in part) (noting that the Department of Justice’s argument against judicial approval of pre-seizure warrants was influential in shaping civil forfeiture rules).

206. *United States v. Eight Thousand Eight Hundred & Fifty Dollars (\$8,850) in U.S. Currency*, 461 U.S. 555, 562 n.12 (1983) (“The general rule, of course, is that absent an ‘extraordinary situation’ a party cannot invoke the power of the state to seize a person’s property without a *prior* judicial determination that the seizure is justified. But we have previously held that such an extraordinary situation exists when the government seizes items subject to forfeiture.”).

207. LEVY, *supra* note 9, at 103 (“Freedom from unreasonable search and seizure, which the Fourth Amendment protects, would be paltry if it depended on the discretion of the police.”); *see* Lerner, *supra* note 110 (stating there are at least twenty-four exceptions to the warrant requirement).

208. *Terry v. Ohio*, 392 U.S. 1, 39 (1968) (Douglas, J., dissenting); *Boyd v. United States*, 116 U.S. 616, 633 (1886).

209. *Boyd*, 116 U.S. at 633–34.

210. U.S. CONST. amend. V (“[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb.”).

nevertheless, civil forfeiture is not considered a “punishment” for Fifth Amendment double jeopardy purposes.²¹¹ Applying this rationale, a person can be acquitted in a criminal case but still have his property forfeited for the same offense.²¹² Civil forfeitures also deprive people of property for a supposed public benefit without just compensation, further violating the Fifth Amendment.²¹³

Amendments Five and Fourteen categorize property with life and liberty because the Constitution’s authors held all three in equal esteem.²¹⁴ Civil asset forfeiture treats property as an inferior right because it enables the government to take a person’s property much more easily than it can take one’s life or liberty. Defendants in criminal cases receive greater procedural safeguards than do civil asset forfeiture claimants who have never been charged with a crime.²¹⁵ The presumption is always innocence when life and liberty are at stake; however, civil asset forfeiture can require those not even accused of crimes to prove their property is innocent. The most glaring example of the low regard for property is the Sixth Amendment right to counsel. Criminal defendants have a fundamental right to an attorney,²¹⁶ but forfeiture claimants do not enjoy this fundamental right when the government attempts to forfeit their property.²¹⁷ In fact, the government can deprive an individual of the means to hire an

211. *United States v. Ursery*, 518 U.S. 267, 288 (1996) (discussing the two-part test to determine whether a civil asset forfeiture is civil or criminal in nature).

212. *See, e.g.*, LA. STAT. ANN. § 40:2611(J) (2014) (“An acquittal or dismissal in a criminal proceeding shall not preclude civil proceedings under this Chapter . . .”).

213. U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”).

214. *Boyd*, 116 U.S. at 635 (“[C]onstitutional provisions for the security of person and property should be liberally construed.”); John Adams, *Defence of the Constitutions of Government of the United States*, in 1 FOUNDERS’ CONST. ch. 16, document 15 (1787), <http://press-pubs.uchicago.edu/founders/documents/v1ch16s15.html> (“Property is surely a right of mankind as really as liberty.”); James Madison, *Property*, in 1 FOUNDERS’ CONST. ch. 16, document 23 (Mar. 29, 1792), <http://press-pubs.uchicago.edu/founders/documents/v1ch16s23.html> (noting that where property is insecure, despotism reigns); Letter from Thomas Jefferson to Samuel Kercheval (Jun. 12, 1816), <http://teachingamericanhistory.org/library/document/letter-to-samuel-kercheval> (“The true foundation of republican government is the equal right of every citizen, in his person and property, and in their management.”).

215. *See Gideon v. Wainwright*, 372 U.S. 335, 343–44 (1963).

216. *Id.* at 339.

217. 18 U.S.C. § 983(b) (2012) (making court appointed counsel *possible* in two instances); Rulli, *supra* note 98, at 518–22.

attorney by freezing her assets upon a showing of probable cause.²¹⁸

Moreover, the Eighth Amendment states, “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”²¹⁹ It seems that the Eighth Amendment should protect innocent property owners from having their property forfeited. By definition, fines are excessive and punishments are cruel when a person has done no wrong. Plus, the Court has determined that a civil forfeiture proceeding can rise to the level of an excessive fine if the forfeiture is “grossly disproportional to the gravity of a defendant’s offense.”²²⁰ Innocent persons can suffer tremendous damage when their property is wrongfully seized,²²¹ and penalizing someone who has done nothing wrong is, ipso facto, grossly disproportionate to the offense because there is no offense.

The Supreme Court recognizes that forfeiting the property of innocent persons seems unfair.²²² There is a reason it seems unfair—it is. Dissenting Texas Supreme Court Justices declared, “[Civil asset forfeiture] has a distinctive ‘Alice in Wonderland’ flavor, victimizing innocent citizens who’ve done nothing wrong.”²²³ Likewise, other state supreme courts have acknowledged that civil asset forfeiture has the potential to punish not only criminals but also “innocent owners who did all they reasonably could to prevent the misuse of the property.”²²⁴ Seizing and forfeiting the property of innocent Americans is clearly something the Constitution’s authors sought to prevent.²²⁵ Plus,

218. *Kaley v. United States*, 134 S. Ct. 1090, 1096–97 (2014); LEVY, *supra* note 9, at 130 (discussing the government’s seizure of every item Fred Weaver attempted to use to hire an attorney to contest a civil asset forfeiture).

219. U.S. CONST. amend. VIII.

220. *United States v. Bajakajian*, 524 U.S. 321, 334 (1998).

221. *United States v. \$107,702.66 in U.S. Currency Seized from Lumbee Guar. Bank Account No. 82002495*, No. 7:14-CV-00295-F, 2016 WL 413093, at *3 (E.D.N.C. Feb. 2, 2016) (“Certainly, the damage inflicted upon an innocent person or business is immense when, although it has done nothing wrong, its money and property are seized.”).

222. *Bennis v. Michigan*, 516 U.S. 442, 454 (1996).

223. *El-Ali v. State*, 428 S.W.3d 824, 827 (Tex. 2014) (Willet, J., dissenting).

224. *Parcel Real Prop. v. City of Jackson*, 664 So. 2d 194, 198 (Miss. 1995); *State v. 1979 Pontiac Trans AM*, 487 A.2d 722, 726 (N.J. 1985).

225. JAMES WILSON, *Of the Nature of Crimes; and the Necessity and Proportion of Punishments*, in COLLECTED WORKS OF JAMES WILSON 1087, 1111 (Kermit L. Hall & Mark David Hall eds., 2007), <http://oll.libertyfund.org/titles/2074>. James Wilson, one of the most influential Founding Fathers, wrote:

seizing the property of innocent Americans does not benefit public safety.²²⁶ Thus, civil asset forfeiture places an unjust burden on innocent property owners.²²⁷

C. Paid Informants

The federal government has over four thousand active informants at any time,²²⁸ and informants play an integral role in drug crime investigations.²²⁹ Although other motivations may

Need I mention it as a rule, that punishments ought to be inflicted upon those persons only, who have committed crimes—that the innocent ought not to be blended in cruel and ruinous confusion with the guilty?

Yes; it is necessary to mention this as a rule: for, however plain and straight it is, when viewed through the pure and clear ether of reason and humanity, it has not been seen by those whom pride and avarice have blinded; nay, it has been represented as a rule, crooked and distorted, by those who have beheld it through the gross and refracting atmosphere of false policy and false philosophy. The doctrines of forfeiture and corruption of blood have found their ingenious advocates, as well as their powerful patrons.

Id.

226. *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 55 (1993) (noting that Congress did not intend for forfeitures to strip the innocent of their property); Reed, *supra* note 203 (noting that forfeiting the property of innocent persons does not benefit public safety).

227. *United States v. One 1976 Mercedes Benz 280S*, 618 F.2d 453, 454 (7th Cir. 1980) (“In many cases forfeiture is a harsh and oppressive procedure, depriving innocent owners of their property because it was used by other persons for unlawful purposes; and courts have strained to avoid unjust results.”).

228. AUDIT DIV., OFFICE OF THE INSPECTOR GEN., U.S. DEP’T OF JUSTICE, THE DRUG ENFORCEMENT ADMINISTRATION’S PAYMENTS TO CONFIDENTIAL SOURCES I (2005), <https://oig.justice.gov/reports/DEA/a05/final.pdf>.

229. Erin Beck, *Becoming a Confidential Informant Can Be Both Risky and Enticing*, CHARLESTON GAZETTE-MAIL (Aug. 4, 2014), <http://www.wvgazettemail.com/article/20140804/GZ01/140809834> (noting confidential informants are an integral component of drug enforcement efforts); Dennis G. Fitzgerald, *Inside the Informant File*, CHAMPION (May 1998), <http://www.nacdl.org/CHAMPION/ARTICLES/98may03.htm> (noting that informants are used in almost all drug cases); Brian Lieberman, *Ethical Issues in the Use of Confidential Informants for Narcotic Operations*, POLICE CHIEF (June 2007), http://www.policiefmagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=1210&issue_id=62007 (“Confidential informants are crucial to many law enforcement investigations and are especially essential in the field of narcotics investigations.”); Scott Stewart & Fred Burton, *Confidential Informants: A Double-Edged Sword*, STRATFOR (Aug. 19, 2009), https://www.stratfor.com/weekly/20090819_confidential_informants_double_edged_sword (noting that when compared to other types of crimes, informants are extremely vital to drug cartel investigations).

cause a person to become an informant,²³⁰ money is often the informant's muse.²³¹ Since civil asset forfeitures usually target drug crimes,²³² Congress has authorized paying informants for information that leads to a forfeiture,²³³ and law enforcement shells out millions of dollars in informant payments every year.²³⁴

Informants often get paid over one thousand dollars for their efforts.²³⁵ The payment is often a percentage of the forfeited property.²³⁶ By collecting a percentage of sixty-three forfeitures, one Florida police informant received \$806,640.²³⁷ A drug-using Hell's Angel earned roughly one million dollars between 1985 and 1988 serving as a paid informant.²³⁸ In addition to paying for services, the Drug Enforcement Administration gave a different

230. Lieberman, *supra* note 229 (noting scorned lovers reveal information in their quest for revenge and informants snitch for reduced sentences too); Ian Leson, *Toward Efficiency and Equity in Law Enforcement: "Rachel's Law" and the Protection of Drug Informants*, 32 B.C. J.L. & SOC. JUST. 391, 411 (2012) (stating informants may be motivated by "duty, revenge, jealousy, or business interests; and those similar to the coerced informant class who make a plea-style agreement with prosecutors in exchange for leniency in sentencing"); Clifford S. Zimmerman, *Toward a New Vision of Informants: A History of Abuses and Suggestions for Reform*, 22 HASTINGS CONST. L.Q. 81, 138–39 (1994–95).

231. AUDIT DIV., *supra* note 228; Lieberman, *supra* note 229 (noting that money is often the key to getting an informant to cooperate); Beck, *supra* note 229 (explaining that drug using informants often become informants for monetary reasons); Gregory D. Lee, *Article #1-Confidential Informant Motivation*, THIRD DEGREE COMMS., INC. (2016), <http://www.tdcorg.com/article/?a=21>.

232. Kyla Dunn, *Reining in Forfeiture: Common Sense Reform in the War on Drugs*, PBS, <http://www.pbs.org/wgbh/pages/frontline/shows/drugs/special/forfeiture.html> (last visited Apr. 8, 2017) (noting most forfeiture proceeds are considered drug-related); Lucy Steigerwald, *Asset Forfeiture, the Cash Cow of the Drug War*, VICE (July 15, 2013, 12:27 PM), <http://www.vice.com/read/bad-cop-blotter-asset-forfeiture-the-cash-cow-of-the-drug-war> (noting civil asset forfeiture encourages prosecutions in the drug war).

233. 28 U.S.C. §§ 524(a)(1), (c)(1), (B), (C) (2012).

234. Evan Ratliff, *The Mark*, NEW YORKER, May 2, 2011, at 56 (noting the Department of Justice spends millions of dollars per year on informants).

235. *Id.* (noting that informants commonly receive thousands of dollars and up to a quarter of the confiscated goods).

236. Ross, *supra* note 126, at 271; Ratliff, *supra* note 234, at 58; Steve Schmadeke, *Informant Shares in Drug Cash*, CHI. TRIB. (Sept. 20, 2009), http://articles.chicagotribune.com/2009-09-20/news/0909180461_1_informant-federal-narcotics-drug-enforcement-administration (explaining that the asset forfeiture office in Washington, D.C., must approve payments that provide informants a percentage of the forfeiture's proceeds). Courts understand the need for law enforcement to sometimes compensate informants. *See* United States v. Cervantes-Pacheco, 826 F.2d 310, 315 (5th Cir. 1987) (holding that the credibility of a compensated witness is for a properly instructed jury to determine).

237. O'Matz & Maines, *supra* note 189, at pt. 2.

238. Andrew Schneider & Mary Pat Flaherty, *Crime Pays Big for Informants in Forfeitures*, PITT. PRESS (Aug. 14, 1991), <http://www.fear.org/guity4.html#1>.

informant \$18,400 to pay off debts he owed a drug dealer and to purchase more cocaine.²³⁹ The Federal Employees' Compensation Act, which provides coverage to federal employees debilitated in scope of duty, covers informants, thus making them eligible for pensions.²⁴⁰ Furthermore, informants have successfully sued the government for over one million dollars in monetary damages for injuries obtained while informing.²⁴¹

Compensating informants in forfeiture cases is problematic for a few reasons. For example, contingency fees encourage informants to target a mansion that contains a single gram of marijuana over a meth manufacturing hovel because the informant's commission is based upon the forfeiture proceeds, which only take into account monetary value and not the danger to society.²⁴² Likewise, informants have an incentive to pursue nonviolent offenders because informing against a truly nasty character places the informant and his family at risk.²⁴³ Informants

239. Rich Lord, *Confidential Informants Are an Integral but Problematic Part of Federal Law Enforcement*, PITT. POST-GAZETTE (Oct. 19, 2014), <http://www.post-gazette.com/local/region/2014/10/19/Confidential-informants-are-an-integral-but-problematic-part-of-federal-law-enforcement/stories/201410190076>.

240. OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, AUDIT 15-28, AUDIT OF THE DRUG ENFORCEMENT ADMINISTRATION'S CONFIDENTIAL SOURCE POLICIES AND OVERSIGHT OF HIGHER-RISK CONFIDENTIAL SOURCES 24–25 (2015), <https://oig.justice.gov/reports/2015/a1528.pdf>. Some informants have been receiving FECA benefits since 1974, and FECA benefits can exceed \$6000 per month. *Id.* at 25. The Office of the Inspector General (“OIG”) questioned the legality of providing informants with FECA benefits in a 2015 report. *Id.* at 26. The OIG report also questioned the DEA's process for determining informant FECA benefit eligibility as well as the benefit amount. *Id.* at 25–34.

241. See Michael Doyle, *Federal Drug Informant Scores Victory Over DEA*, MCCLATCHY (Sept. 29, 2014, 4:33 PM), <http://www.mcclatchydc.com/news/crime/article24773920.html> (informant received a \$1.14 million judgment against the DEA for recklessly placing her in danger); Nick Wing, *DEA Informant Who Helped Defeat Medellin Cartel Sues Feds for Back Pay*, HUFFINGTON POST (Sept. 15, 2015, 7:50 AM), http://www.huffingtonpost.com/entry/carlos-toro-dea-informant-lawsuit_us_55e606f2e4b0c818f619825a (describing a lawsuit filed against the DEA by a former cartel official on the grounds that it failed to pay him over five million dollars and provide legal status in the United States for his role in various cartel busts).

242. Schneider & Flaherty, *supra* note 238 (quoting the head of the Criminal Justice Policy Foundation stating, “What paid informant in their right mind is going to turn over a crack house—which may be destroying an inner neighborhood—when he can turn over information about a nice, suburban spread that will pay off big when it comes time to get his share?”).

243. Rich Lord, *U.S. Agencies Work to Hide Every Detail About Thousands of Informants*, PITT. POST-GAZETTE (Apr. 27, 2014), <http://www.post-gazette.com/news/nation/2014/04/27/Telling-for-dollars-series-Confidential-sources-vital-to-investigation/stories/201404270143>.

are also prone to lie to collect their contingency fee;²⁴⁴ hence, informants attempt to entrap innocent people²⁴⁵ and plant drugs on them.²⁴⁶ Informants have an incentive to prolong investigations in order to rack up per diem payments.²⁴⁷ Moreover, informants are allowed to engage in illegal activity, including violent crime, while setting up civil forfeitures,²⁴⁸ and law enforcement has been known to cover up crimes to keep informants embedded.²⁴⁹ Informants have also been known to target rival gangs, in essence forming an alliance between the informant's criminal enterprise and law enforcement against other criminals.²⁵⁰

In addition to these problems, informants are, by their very nature, untrustworthy, and this should raise serious issues about using them in civil forfeiture proceedings, which provide few protections to innocent property owners. Professor Alexandra Natapoff describes the information provided by informants as "infamously unreliable."²⁵¹ Similarly, Judge Stephen Trott of the

244. Ross, *supra* note 126, at 271–72 (noting informants with a personal stake in the outcome of the forfeiture have a strong incentive to lie).

245. See Lord, *supra* note 243 (quoting a former DEA agent stating that informants will entrap innocent people "ninety percent of the time" if left to their own devices); Schmadeke, *supra* note 236 (noting the potential to receive a portion of the forfeiture's proceeds provides paid informants with an incentive to create larger, more profitable drug deals).

246. Pamela Engel, *Police Informant Caught on Video Allegedly Framing Guy Busted for Cocaine*, BUS. INSIDER (July 26, 2013, 3:36 PM), <http://www.businessinsider.com/police-informant-allegedly-plants-cocaine-in-mans-business-2013-7>; Video: *Cops Cash Cocaine*, *supra* note 190 (see video at approximately 4:30).

247. Lee, *supra* note 231.

248. OFFICE OF THE INSPECTOR GEN., *supra* note 240, at 10; Matthew Guariglia, *Boston Police Releases Confidential Informant Consent Form*, MUCKROCK (Dec. 7, 2015), <https://www.muckrock.com/news/archives/2015/dec/07/informant-working-agreement> (quoting the Boston Police Department's Informant Working Agreement stating crimes committed by an informant are punishable "except when the criminal is justified in connection with an authorized police investigation to obtain evidence").

249. See Ratliff, *supra* note 234, at 58 (noting that FBI agents covered up crimes committed by their informant, Whitey Bulger); Stewart & Burton, *supra* note 229 (noting that informants must engage in criminal activity to maintain their criminal relationships).

250. Stewart & Burton, *supra* note 229 (stating that informants often use their law enforcement connections to further their own criminal ambitions); Clarence Walker, *U.S. Government and Mexican Cartel, Partners in Drug Plot?*, GLOB. RES. (Feb. 27, 2014), <http://www.globalresearch.ca/u-s-government-and-mexican-cartel-partners-in-drug-plot/5371143>.

251. Alexandra Natapoff, *Secret Justice: Criminal Informants and America's Underground Legal System*, PRISON LEGAL NEWS (June 15, 2010) (stating that nearly half of wrongful capital convictions involved informant testimony). Natapoff also notes a 2004 study by Northwestern University Law School that examined all wrongful capital convictions found that over forty-five percent of those cases involved testimony of a lying informant. *Id.* at 8.

Ninth Circuit Court of Appeals stated, “These informants are very good at fooling the [prosecutors] and everybody else. They’re basically sociopaths.”²⁵² Giving informants, typically ignominious individuals, a direct personal interest in the outcome of a forfeiture proceeding raises serious questions about the wisdom of using informants in civil asset forfeiture proceedings.

D. Racist Implementation

Law enforcement has targeted minorities for generations and continues to do so.²⁵³ The drug war itself has racist roots,²⁵⁴ and the ability to seize property based on probable cause makes it easy for officers with racial prejudices to exercise their biases. Accordingly, civil asset forfeitures disproportionately target minorities.²⁵⁵ For example, Oklahoma’s population is seventy-five percent white,²⁵⁶ yet minorities are party to sixty-five percent of cash seizures in the state.²⁵⁷ A *Pittsburgh Press* investigation found

252. Lord, *supra* note 239.

253. Terry v. Ohio, 392 U.S. 1, 14 n.11 (1968); Michael Wines, *Are Police Bigoted?*, N.Y. TIMES, Aug. 31, 2014, at SR1 (noting that some police tactics “disproportionately target African-Americans”).

254. See Steven B. Duke, *Drug Prohibition: An Unnatural Disaster*, 27 CONN. L. REV. 571, 595 (1995) (noting that “racism has been linked to drug prohibition throughout its history in America”); Frederic Block, *Racism’s Hidden History in the War on Drugs*, HUFFINGTON POST (Jan. 3, 2013, 2:44 PM), http://www.huffingtonpost.com/judge-frederic-block/war-on-drugs_b_2384624.html (noting anti-opium laws were directed at the Chinese, cocaine use was associated with African-Americans, and the marijuana prohibition was associated with Mexicans); Sean Illing, *Former Nixon Aide Admits Racist Roots of America’s Drug War: Bernie and Hillary Must Own This Issue and Fix This Injustice—Now*, SALON (Mar. 23, 2016, 11:29 AM), http://www.salon.com/2016/03/23/former_nixon_aide_admits_racist_roots_of_americas_drug_war_bernies_and_hillary_must_own_this_is_sue_and_fix_this_injustice_now (citing to one of President Nixon’s former aides who claimed that the administration indirectly targeted the anti-war left and black people by enforcing and increasing the penalties for drug crimes).

255. See LEADERSHIP CONFERENCE, FACT SHEET: WHY CIVIL ASSET FORFEITURE IS LEGALIZED THEFT 1 (2015), <http://civilrightsdocs.info/pdf/criminal-justice/Civil-Asset-Forfeiture-Fact-Sheet.pdf> (stating the stops based upon racial profiles are often the launching point of civil of forfeitures); Joint Letter from Laura Murphy, Dir., Wash. Nat’l Office, ACLU, & Hilary Shelton, Dir., Wash. Nat’l Office, NAACP, to Congressional Representatives (June 10, 1999), <https://www.aclu.org/letter/letter-house-civil-asset-forfeiture-act-1999> (urging support of H.R. 1658, a reform bill needed to address the heavy impact civil forfeiture laws have on minorities).

256. *Quick Facts: Oklahoma*, U.S. CENSUS BUREAU, <http://www.census.gov/quickfacts/table/PST045216/40> (last visited Feb. 5, 2017).

257. Adcock et al., *supra* note 183.

seventy-seven percent of forfeitures targeted minorities.²⁵⁸ An *Orlando Sentinel* report found ninety percent of forfeitures involved minorities.²⁵⁹ Other studies show that minorities are more likely to be targeted by forfeitures too.²⁶⁰

Although blacks, whites, and Hispanics use drugs at approximately the same rate,²⁶¹ blacks and Hispanics are much more likely than whites to be incarcerated for a drug crime.²⁶² In New York, for example, ninety-four percent of people incarcerated for drug charges in 2003 were black or Hispanic.²⁶³ Likewise, stop and frisk has been repeatedly shown to disproportionately target minorities.²⁶⁴ Minorities are even more likely to be pulled over by

258. Andrew Schneider & Mary Pat Flaherty, *Drug Agents Far More Likely to Stop Minorities*, PITT. PRESS (Aug. 12, 1991), <http://www.fear.org/guilty2.html#1>.

259. Brazil & Berry, *supra* note 183.

260. See van den Berg, *supra* note 15, at 908 (stating minorities are disproportionately targeted by police in forfeitures); Rulli, *supra* note 98, at 514 (noting a disproportionate amount of people at Philadelphia forfeiture proceedings are minorities); Alexandra D. Rogin, Note, *Dollars for Collars: Civil Asset Forfeiture and the Breakdown of Constitutional Rights*, 7 DREXEL L. REV. ONLINE 45, 62 (2014), <http://drexel.edu/law/lawreview/issues/Archives/DLRO-Winter-2015> (noting vulnerable people, minorities, and the poor are at higher risk of forfeiture proceedings); Sallah et al., *supra* note 116 (stating that of four hundred federal forfeiture court cases examined the majority involved minorities); Cockburn, *supra* note 123 (claiming that civil forfeiture results in a “regime of racial profiling”).

261. U.S. DEP’T OF HEALTH & HUMAN SERVS., RESULTS FROM THE 2013 NATIONAL SURVEY ON DRUG USE AND HEALTH: SUMMARY OF NATIONAL FINDINGS 26 (2014), <https://www.samhsa.gov/data/sites/default/files/NSDUHresultsPDFWHHTML2013/Web/NSDUHresults2013.pdf>.

262. See Ian Urbina, *Blacks Are Singled Out for Marijuana Arrests, Federal Data Suggests*, N.Y. TIMES, June 4, 2013, at A11 (stating that despite similar drug use rates, blacks are four times more likely to be arrested for marijuana possession than whites); *Criminal Justice Fact Sheet*, NAACP, <http://www.naacp.org/pages/criminal-justice-fact-sheet> (last visited Mar. 6, 2017) (stating that blacks are ten times more likely than whites to be incarcerated for a drug offense); Jonathan Rothwell, *How the War on Drugs Damages Black Social Mobility*, BROOKINGS INST. (Sept. 30, 2014), <http://www.brookings.edu/blogs/social-mobility-memos/posts/2014/09/30-war-on-drugs-black-social-mobility-rothwell> (noting that whites are more likely to sell drugs than blacks, yet blacks are more likely to be arrested for selling drugs).

263. FATEMA GUNJA, RACE AND THE WAR ON DRUGS 1 (2003), <https://www.aclu.org/sites/default/files/FilesPDFs/ACF4F34.pdf>.

264. See *ACLU: Chicago Minorities Unfairly Subjected to Stop-and-Frisk*, CBS NEWS (Mar. 23, 2015, 5:49 PM), <http://www.cbsnews.com/news/aclu-chicago-minorities-unfairly-subjected-to-stop-and-frisk> (noting that blacks account for approximately one-third of Chicago’s population but three-quarters of those frisked); Rande Iaboni, *NYPD Report: Most of Those “Stopped and Frisked” Are Minorities*, CNN (Feb. 5, 2013, 11:28 PM), <http://www.cnn.com/2013/02/05/us/new-york-stop-and-frisk> (noting that in New York City, blacks and Hispanics accounted for eighty-seven percent of those subjected to stop and frisk though they compose 52.8% of the population); Jeremy Roebuck, *Civil Rights Group: Stop-and-Frisk*

the police while driving than whites,²⁶⁵ and forfeitures often result from traffic stops.²⁶⁶ Some law enforcement officers have admitted that race is a factor in their criminal profile.²⁶⁷ As long as law enforcement is more likely to suspect minorities of criminality, civil asset forfeitures will disproportionately affect minorities. Civil asset forfeiture leaves minorities particularly open to discriminatory police tactics due to the lack of procedural protections contained in the civil asset forfeiture process.

E. Drug Dogs

Refusing a law enforcement officer's request to search a vehicle frequently results in a drug dog being called in.²⁶⁸ The Supreme Court has held that drug dog sniffs do not constitute a search under the Fourth Amendment because the sniff "discloses only the presence or absence of narcotics, a contraband item."²⁶⁹ Furthermore, the Court has ruled that a certified drug dog's alert constitutes probable cause for a warrantless search and seizure.²⁷⁰ The Court's reasoning hinges on the belief in the drug dog's

Still Targets Minorities, PHILA. INQUIRER (Feb. 25, 2015), http://www.philly.com/philly/news/20150225_Civil_rights_group_Philadelphia_police_still_target_minorities.html (noting that over eighty percent of those stopped by police were black or Hispanic though they account for fifty-four percent of Philadelphia's population).

265. Sharon LaFraniere & Andrew W. Lehren, *The Disproportionate Risk of Driving While Black*, N.Y. TIMES, Oct. 24, 2015, at A1; Christopher Ingraham, *You Really Can Get Pulled Over for Driving While Black, Federal Statistics Show*, WASH. POST (Sept. 9, 2014), <https://www.washingtonpost.com/news/wonk/wp/2014/09/09/you-really-can-get-pulled-over-for-driving-while-black-federal-statistics-show/>; see James Warren, *Driving While Black*, THE ATLANTIC (July 2009), <http://www.theatlantic.com/magazine/archive/2009/07/driving-while-black/307625> (noting blacks are three times and Hispanics are 2.4 times more likely than whites to have their vehicles searched by law enforcement).

266. See *supra* note 116 and accompanying text.

267. See *United States v. Laymon*, 730 F. Supp. 332, 337 (D. Colo. 1990) (noting testimony by officers that that "candidly admitted that race is part of the profile"); cf. James B. Comey, Dir., Fed. Bureau of Investigation, Address at Georgetown University: Hard Truths: Law Enforcement and Race (Feb. 12, 2015), <https://www.fbi.gov/news/speeches/hard-truths-law-enforcement-and-race>; Conor Friedersdorf, *The NYPD Officers Who See Racial Bias in the NYPD*, THE ATLANTIC (Jan. 7, 2015), <http://www.theatlantic.com/national/archive/2015/01/the-nypd-officers-who-see-racial-bias-in-the-nypd/384106> (discussing the experience of black and Hispanic police officers who were themselves targeted while not in uniform).

268. Sallah et al., *supra* note 116.

269. *Illinois v. Caballes*, 543 U.S. 405, 409–10 (2005) (quoting *United States v. Place*, 462 U.S. 696, 707 (1983)).

270. *Florida v. Harris*, 133 S. Ct. 1050, 1052 (2013).

infallibility, but drug dog infallibility is a myth.²⁷¹ A study found that drug dogs produce false positives up to an incredible eighty percent of the time.²⁷² The *Chicago Tribune's* analysis of drug dog sniffs showed that drugs were discovered in only forty-four percent of alerts,²⁷³ and a federal appellate court has said a forty-three percent success rate is good enough for drug dogs.²⁷⁴ However, the *Chicago Tribune* found the drug dog alert accuracy rate was a mere twenty-seven percent when Hispanics were the sniff's focus.²⁷⁵

The reason for the increased false alert rate with Hispanic subjects is that the dog handler's behavior is causing the dog to alert.²⁷⁶ Lisa Lit, lead author of a major study on how handlers influence dog alerts, stated, "[The handler's beliefs] might be as important—or even more important—than the sensitivity of a dog's nose."²⁷⁷ Although the potential for handlers to mislead their canines exists, the Supreme Court claims, "[L]aw enforcement units have their own strong incentive to use effective training and certification programs, because only accurate drug-detection dogs enable officers to locate contraband without incurring unnecessary risks or wasting limited time and resources."²⁷⁸

The Court is flatly wrong about law enforcement wasting time on erroneous alerts. Civil asset forfeiture provides law enforcement with a direct financial interest in the outcome of searches, and the Court knows this because it has acknowledged that revenue raising plays a role in forfeitures.²⁷⁹ Law enforcement has a powerful incentive to use a drug dog that *always* alerts

271. *Caballes*, 543 U.S. at 411 (Souter, J., dissenting).

272. Jacob Sullum, *This Dog Can Send You to Jail*, REASON (Mar. 2013), <https://reason.com/archives/2013/01/31/this-dog-can-send-you-to-jail>.

273. Dan Hinkel & Joe Mahr, *Tribune Analysis: Drug-Sniffing Dogs in Traffic Stops Often Wrong*, CHI. TRIB. (Jan. 6, 2011), http://articles.chicagotribune.com/2011-01-06/news/ct-met-canine-officers-20110105_1_drug-sniffing-dogs-alex-rothacker-drug-dog.

274. *United States v. Green*, 740 F.3d 275, 283 (4th Cir. 2014).

275. Hinkel & Mahr, *supra* note 273.

276. Lisa Lit et al., *Handler Beliefs Affect Scent Detection Dog Outcomes*, 14 ANIMAL COGNITION 387, 387 (2011).

277. Lisa Lit, *Explosive- and Drug-Sniffing Dogs' Performance Is Affected by Their Handlers' Beliefs*, U.C. DAVIS HEALTH (Feb. 23, 2011), https://www.ucdmc.ucdavis.edu/welcome/features/2010-2011/02/20110223_drug_dogs.html.

278. *Florida v. Harris*, 133 S. Ct. 1050, 1057 (2013).

279. *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 56 n.2 (1993); *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 629 (1989).

because the alert grants officers permission to search regardless of the alert's accuracy.²⁸⁰ Police departments purchase drug dogs for the stated purpose of raising revenue;²⁸¹ accordingly, drug dogs can receive a treat *every time* they alert.²⁸² A federal appellate court stated that rewarding a dog for every alert should cause the dog to alert whenever called but went on to affirm the search based upon such an alert anyway.²⁸³

The handler's preconceptions about whether a suspect is guilty or a location contains contraband, in addition to a dog's incentive for alerting, raise serious questions about the reliability of drug dogs. Other factors raise concerns about the usefulness of dog sniffs too. Approximately ninety percent of U.S. paper currency contains narcotics residue;²⁸⁴ hence, a drug dog's identification of drug tainted currency is of minimal value. Drug dogs can also produce false positives by correctly detecting the chemical component of a drug, such as acetic acid, which canines use to find heroin but is also common in foods, vinegar, and glue.²⁸⁵ Then the drug dog can alert to something it simply likes, such as a tennis ball.²⁸⁶ The myriad of factors that cause drug dogs to err have caused some to call them "four-legged search warrants" and "probable cause on a leash."²⁸⁷ A tool this unreliable should not be used to strip a person of her property.

280. van den Berg, *supra* note 15, at 924 (noting that an inaccurate drug dog is not a problem for law enforcement, provided that the dog alerts frequently in the forfeiture context).

281. *Id.* at 915–16.

282. *See* United States v. Bentley, 795 F.3d 630, 636 (7th Cir. 2015) (noting that the dog in the case received a treat every time it alerted).

283. *Id.*

284. Madison Park, *90 Percent of U.S. Bills Carry Traces of Cocaine*, CNN (Aug. 17, 2009, 3:01 PM), <http://www.cnn.com/2009/HEALTH/08/14/cocaine.traces.money>.

285. Sullum, *supra* note 272.

286. *Id.*

287. Taylor Phipps, *Probable Cause on a Leash*, 23 B.U. PUB. INT. L.J. 57, 57 (2014).

F. *Buying Justice*

Due to the difficulty of reclaiming seized property, most contested civil forfeitures end with settlements.²⁸⁸ Forfeiture settlements enable people to purchase justice and, in some cases, their freedom. For example, an individual chose to have his house forfeited rather than go to jail, and the police chief agreed to the deal.²⁸⁹ Courts have affirmed agreements that reduce charges in exchange for cash²⁹⁰ and property,²⁹¹ and the ability to generate assets may seduce the state into settling with an unsavory character rather than pursuing maximum charges.²⁹² Hence, asset-rich defendants receive lighter punishments than the asset-poor.²⁹³ Indeed, some courts have noted that plea bargains involving property forfeiture enable justice to be “bought.”²⁹⁴

Forfeiture waivers are plea bargains on steroids. Like plea bargains, forfeiture waivers allow individuals to eschew criminal charges, and even deprivation of their children, if they sign over their property.²⁹⁵ Forfeiture waivers enable law enforcement to

288. See Dewan, *supra* note 155 (noting “[p]rosecutors boasted . . . that seizure cases were rarely contested or appealed, . . . [and] that many seizures go uncontested because the property is not worth the expense”); Brazil & Berry, *supra* note 183 (noting that three out of four forfeiture cases end in settlements); Michael Greibrok, *Settlement: Another Arrow in the Government’s Civil Asset Forfeiture Quiver*, FREEDOMWORKS (June 12, 2015), <http://www.freedomworks.org/content/settlement-another-arrow-government%E2%80%99s-civil-asset-forfeiture-quiver> (noting that settlements are common in civil forfeiture cases); Jason Pye, Editorial, *Fix Forfeiture Laws in Buckeye State*, CIN. (Dec. 4, 2015, 11:11 AM), <http://www.cincinnati.com/story/opinion/contributors/2015/12/04/pye-fix-forfeiture-laws-buckeye-state/76778850> (discussing how the expense and duration of the forfeiture process leads to settlements).

289. Andre J. Bowser, *Town Ready for Sale of Seized Home*, HARTFORD COURANT (Aug. 15, 2002), http://articles.courant.com/2002-08-15/news/0208152197_1_forfeiture-program-asset-forfeiture-drug-education.

290. *State v. Hendrix*, 985 S.W.2d 878, 879 (Mo. Ct. App. 1998).

291. *State v. Davis*, 886 N.E.2d 916, 916 (Ohio Ct. App. 2008).

292. See Brittany Brooks, Note, *Misunderstanding Civil Forfeiture: Addressing Misconceptions About Civil Forfeiture with a Focus on the Florida Contraband Forfeiture Act*, 69 U. MIAMI L. REV. 321, 340 (2014) (noting the possibility of receiving a lucrative sum, even from an extremely villainous individual, could cause the state to settle).

293. See Blumenson & Nilsen, *supra* note 185, at 8 (noting investigations have shown that asset rich defendants receive more favorable treatment than the asset poor because the rich can purchase better deals).

294. *Thrower v. Steel*, 966 F.2d 1454, 1992 WL 120201 (6th Cir. 1992) (unpublished table decision) (citing *State v. Conley*, 1991 WL 129796 (Ohio Ct. App. 1991) (unpublished decision)).

295. *Developments in the Law—Policing and Profit*, *supra* note 4, at 1730–31.

circumvent the judicial system.²⁹⁶ People are often presented forfeiture waivers without counsel and under extreme duress;²⁹⁷ thus, forfeiture waivers are a gross violation of procedural due process.²⁹⁸ The absence of procedural safeguards makes it exceedingly easy for law enforcement to confiscate property even when the property is not legally subject to forfeiture. Since law enforcement is profit-driven, forfeiture waivers are growing in popularity.²⁹⁹

VI. RECOMMENDATIONS

In 2015, former directors of the Justice Department's Asset Forfeiture Office declared that civil asset forfeiture "should be abolished" because "[i]t is unreformable."³⁰⁰ Indeed, civil asset forfeiture should be abolished as soon as possible. The doctrine can only be justified by resorting to antiquity, and as Oliver Wendell Holmes famously stated:

It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.³⁰¹

Leading up to England's elimination of deodands, Lord Campbell stated that it was a "wonder that a law so extremely absurd and inconvenient should have remained in force down to

296. van den Berg, *supra* note 15, at 901.

297. See Sallah et al., *supra* note 116 (discussing how law enforcement pressured a driver into signing a waiver); Stillman, *supra* note 157 (discussing how a district attorney gave a family the choice between signing a forfeiture waiver and losing their children); Balko, *supra* note 141 (describing the roadside forfeiture waiver process as a "devil's bargain").

298. Eric Moores, Note, *Reforming the Civil Asset Forfeiture Reform Act*, 51 ARIZ. L. REV. 777, 797 (2009).

299. See *id.* at 784 (noting forfeitures are growing in popularity with law enforcement).

300. John Yoder & Brad Cates, *Government Self-Interest Corrupted a Crime-Fighting Tool into an Evil*, WASH. POST (Sept. 18, 2014), https://www.washingtonpost.com/opinions/abolish-the-civil-asset-forfeiture-program-we-helped-create/2014/09/18/72f089ac-3d02-11e4-b0ea-8141703bbf6f_story.html.

301. Oliver Wendell Holmes, *The Path of the Law*, 110 HARV. L. REV. 991, 1001 (1997).

the middle of the nineteenth century.”³⁰² Some states, recently New Mexico³⁰³ and Montana,³⁰⁴ have realized the injustice of depriving people of their property without convicting them of a crime and have eliminated civil forfeiture.

Although civil asset forfeiture needs to be eradicated, politics may render this infeasible in the immediate future.³⁰⁵ Other, smaller-scale reforms should be pursued if civil asset forfeiture cannot be abolished. Civil asset forfeiture can be made less loathsome by eliminating law enforcement’s profit motive, requiring a warrant or an arrest before property can be seized, setting threshold values for civil asset forfeiture, granting property owners the right to counsel before their property can be forfeited, reforming drug dog use, and prohibiting trades of property for liberty.

A. Eliminate Law Enforcement’s Profit Incentive

Contrary to the Supreme Court’s assertion in *Calero-Toldeo v. Pearson Yacht Leasing Co.*, law enforcement is “self-interested.”³⁰⁶ Law enforcement makes forfeiture revenue generation a priority,³⁰⁷ and the Supreme Court has stated that a government official’s ability to “profit economically from vigorous enforcement” of the law presents due process issues.³⁰⁸ In fact, the Court has stated the “possible temptation” that financial interests could alter a government official’s behavior is deeply problematic.³⁰⁹ Zealous prosecution is permitted,³¹⁰ but the Court

302. LEVY, *supra* note 9, at 19.

303. Dan Boyd, *Civil Asset Forfeiture Bill Signed into Law by Gov. Susana Martinez*, ALBUQUERQUE J. (Apr. 10, 2015, 12:55 PM), <http://www.abqjournal.com/567598/politics/civil-asset-forfeiture-bill-signed-into-law-by-gov-susana-martinez.html>.

304. Casey Harper, *Montana Gov Signs Major Bill to Protect You from Asset Forfeiture*, DAILY CALLER (May 5, 2015, 4:07 PM), <http://dailycaller.com/2015/05/05/montana-gov-signs-major-bill-to-protect-you-from-asset-forfeiture>.

305. Louis Nelson, *Trump Invites Sheriff to ‘Destroy’ Texas State Lawmaker Who Opposes Asset Forfeiture*, POLITICO (Feb. 7, 2017), <http://www.politico.com/story/2017/02/trump-sheriff-asset-forfeiture-texas-234740> (describing President Trump’s threat to ruin the career of a politician who supports civil asset forfeiture reform, which suggests he will veto reform legislation).

306. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 679 (1974).

307. *See supra* Section IV.A.

308. *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 249–50 (1980).

309. *Ward v. Monroeville*, 409 U.S. 57, 60 (1972).

310. *Marshall*, 446 U.S. at 248–49.

forbids paying magistrates per warrant issued because this gives magistrates a personal incentive to issue warrants.³¹¹

The same profit incentive is currently at play in civil asset forfeitures and was one of the reasons the Founding Fathers despised writs of assistance.³¹² Forfeiture revenues should not be direct deposited into the hands of law enforcement and informants because law enforcement and informants are not angels.³¹³ Some states have addressed this concern by placing forfeiture proceeds in their general fund³¹⁴ or education fund.³¹⁵ Furthermore, equitable sharing proceeds should be deposited into a neutral fund as well in order to prevent law enforcement from sidestepping stricter state laws. Placing forfeiture proceeds in a neutral fund will help mitigate due process concerns in forfeiture proceedings and eliminate allegations of policing for profit.³¹⁶

B. Require a Warrant or an Arrest to Seize Property

Probable cause is a low standard that makes it easy for law enforcement to confiscate legitimately obtained property from innocent Americans. For example, carrying a large amount of cash is perfectly legal, yet the government can snatch the cash despite the absence of any illegal activity. This, combined with law enforcement's pecuniary interest in forfeiting property, undermines the property rights of all Americans. Pursuant to the Fourth Amendment, law enforcement should be required to obtain a warrant before seizing property. If law enforcement cannot obtain a warrant, an arrest should have to be made in conjunction with the seizure. After all, when law enforcement seizes cash or property and lets the owner go, either a criminal is let loose or an innocent person has her property confiscated. Neither is acceptable. Requiring that a warrant be issued prior to seizure or that an arrest accompany the seizure will mitigate the

311. *Connally v. Georgia*, 429 U.S. 245, 250 (1977).

312. Blumenson & Nilsen, *supra* note 37, at 75–76.

313. THE FEDERALIST NO. 51 (James Madison) (discussing why checks on government are necessary).

314. ME. REV. STAT. ANN. tit. 15, §§ 5822(4), 5824 (2016); N.M. STAT. ANN. § 31-27-7(B) (2009).

315. MO. CONST. art. IX, § 7; N.C. CONST. art. IX, § 7.

316. Moores, *supra* note 298, at 798.

risk of innocent people being stripped of their property by law enforcement.

C. *Set De Minimis Value to Forfeit Property*

Inadequate records make determining the types of property seized and forfeited in most jurisdictions impossible. However, low value property presents unique forfeiture challenges because property owners are not willing to spend more money attempting to reclaim their property than the property is worth.³¹⁷ Additionally, a major goal of forfeiture laws is encouraging the pursuit of drug kingpins.³¹⁸ Forfeiting small amounts of money and low-value property do not advance this objective. For this reason, the Department of Justice sets threshold values for adoptive forfeitures of state and local law enforcement seizures.³¹⁹ The values can be lowered, but “[a]ny downward departure from the monetary thresholds in individual cases must be approved in writing by a supervisory level official, and an explanation of the reason for the departure must be noted in the case file.”³²⁰ Law enforcement efforts will not be hindered by setting a threshold forfeiture value, and, in any event, the threshold could be erased if the property owner was convicted of a crime related to the property. Thus, a minimum property value should be established in order to forfeit property if the owner has not been convicted of a crime.

D. *Allow Right to Counsel in Forfeiture Proceedings*

Americans deserve the right to counsel when the government seeks to punish them by depriving them of their property. Property is classed with life and liberty in state and

317. van den Berg, *supra* note 15, at 870 (discussing the impracticality of contesting the seizure of mid- to low-value property).

318. Thomas E. Payne, *An Introduction to Civil Forfeiture in Mississippi: An Effective Law Enforcement Tool or Cash Register Justice?*, 59 MISS. L.J. 453, 460 (1989). *But see* Balko, *supra* note 132 (noting that “a law aimed at denying drug kingpins their ill-gotten millions ended up affecting mostly those with so little loot it didn’t even make sense to hire an attorney to win it back”); Stephanie Saul, *A House Could Be the Price of a Joint Under Federal Asset-Seizure Law*, L.A. TIMES (May 6, 1990), http://articles.latimes.com/1990-05-06/news/mn-309_1_criminal-charge (noting that individual drug users are often penalized with forfeitures).

319. WEBER, *supra* note 106, at 7.

320. *Id.*

federal constitutions. Indigent Americans have the right to counsel in criminal matters when life and liberty are at stake,³²¹ and they should have the right to counsel when the government seeks to punish crimes through deprivation of property because “[i]ndividual freedom finds tangible expression in property rights.”³²² Federal civil asset forfeiture law allows indigents the right to counsel if the forfeiture stems from a related criminal matter.³²³ Federal civil asset forfeiture law also grants a person who is unable to afford counsel an attorney when the government is attempting to deprive the individual of her home.³²⁴ The right to counsel is particularly important in forfeiture cases because the government can seize an individual’s assets and prevent her from hiring an attorney to defend against the forfeiture.³²⁵ Forfeiture proceeds can fund this policy, and placing forfeiture proceeds in this fund further disincentivizes frivolous forfeitures. Accordingly, Americans should have the right to counsel in forfeiture proceedings when the government seeks to forfeit their property.

E. Reform Drug Dog Use

Drug dogs produce false alerts more than half the time, and this makes one wonder why drug dogs are used at all.³²⁶ Regardless of the alert’s veracity, the alert grants law enforcement permission to detain a driver and rifle through her belongings. This is why drug dogs are rewarded for alerting but are not reprimanded when wrong. Compensating people who are wrongfully searched would reduce the amount of erroneous searches. The compensation can be derived from the forfeiture fund.

Additionally, drug dog alerts on currency outside the presence of contraband should be disregarded. Possessing cash is perfectly legal, so it should take more than a dog’s nose to strip a person of her money—especially considering the frequency at

321. *Gideon v. Wainwright*, 372 U.S. 335, 344–42 (1963).

322. *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 61 (1993).

323. 18 U.S.C. § 981(b)(1)(A) (2012).

324. *Id.* § 981(b)(2)(A).

325. *Kaley v. United States*, 134 S. Ct. 1090, 1107–08 (2014).

326. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 594–95 (1993) (noting relevance and reliability are the hallmarks of relevant evidence).

which drug dogs are wrong. Moreover, most currency contains drug residue; thus, an alert on currency alone is meaningless.

F. Ban Waivers and Plea Bargains

Trading property to reduce charges is not fair. It benefits the rich and ruthless drug lord while penalizing lowly, less dangerous offenders. Worse, forfeiture waivers outside the presence of counsel allow law enforcement to coerce innocent individuals into signing away their property. Forfeiture waivers do violence to due process because they deny people the right to be heard,³²⁷ and this is one of the features of writs of assistance that the Constitution's authors found abhorrent.³²⁸ Exchanges of property for favorable treatment from law enforcement should be abandoned. If such bargains are to be made, the property owner should have the opportunity to speak with an attorney.

VII. CONCLUSION

In the writs of assistance case that made James Otis an icon, Jeremiah Gridley represented the Crown.³²⁹ Gridley's argument stipulated that writs of assistance violated the rights of Englishmen but argued revenue generation justified the transgression.³³⁰ Gridley went so far as to assert:

Tis the necessity of the Case and the benefit of the Revenue that justifies this Writ. Is not the Revenue the sole support of Fleets and Armies abroad, and Ministers at home? without which the Nation could neither be preserved from the Invasions of her foes, nor the Tumults of her own Subjects. Is not this I say infinitely more important, than the imprisonment of

327. *Mullane v. Cent. Hanover Bank & Tr.*, 339 U.S. 306, 315 (1950).

328. See Blumenson & Nilsen, *supra* note 37, at 75–76, 76 n.149 (noting procedural advantages gave the Crown tremendous leverage to extract favorable settlements from the American colonists).

329. BARTLETT BURLEIGH JAMES, *THE HISTORY OF NORTH AMERICA: VOLUME V: THE COLONIZATION OF NEW ENGLAND* 401 (1904).

330. Adams' "Abstract of the Argument": *Ca. April 1761*, NAT'L ARCHIVES, <http://www.founders.archives.gov/documents/Adams/05-02-02-0006-0002-0003> (last visited Mar. 7, 2017).

Thieves, or even Murderers? yet in these Cases 'tis agreed Houses may be broke open.³³¹

Though the United States was founded in large part to kill revenue generating writs of assistance, their rancid spirit survives in today's civil asset forfeiture laws.

Modern civil asset forfeiture was intended as a tool in the drug war. Law enforcement claims that asset forfeiture is vital to the drug war;³³² however, there is no evidence that civil asset forfeiture is *effective* in the drug war.³³³ In fact, drug use rates have not changed with civil asset forfeiture's increased use and abuse.³³⁴ It does not deter drug dealers either. The United States' illegal drug market has an estimated value of between \$100³³⁵ and \$750 billion.³³⁶ States keep poor records of their forfeitures, but the federal government forfeited approximately five billion dollars in 2014.³³⁷ Assuming the total of all fifty states' forfeitures matched the federal forfeiture sum, U.S. forfeitures totaled ten billion dollars, which is barely a ten percent tax on drug dealers.

331. *Id.*

332. Stefan D. Cassella, *Forfeiture Is Reasonable, and It Works*, FEDERALIST SOC'Y (May 1, 1997), <http://www.fed-soc.org/publications/detail/forfeiture-is-reasonable-and-it-works>.

333. Ingraham, *supra* note 5 (quoting Dick Carpenter: "People say this is an essential crime fighting tool but there's no evidence").

334. See LLOYD D. JOHNSTON ET AL., MONITORING THE FUTURE: NATIONAL SURVEY RESULTS ON DRUG USE: 1975–2013: SECONDARY SCHOOL STUDENTS 12 (2013), http://www.monitoringthefuture.org//pubs/monographs/mtf-voll_2013.pdf (noting drug use increased during the 1990s, and that in 2013 illicit drug use continued to increase); U.N. OFFICE ON DRUGS & CRIME, *World Drug Report 2010*, at 124 fig.94, U.N. Doc. E.10.XI.13 (2010), https://www.unodc.org/documents/wdr/WDR_2010/World_Drug_Report_2010_lo-res.pdf; OFFICE OF NAT'L DRUG CONTROL POLICY, U.S. DEP'T OF JUSTICE, THE NATIONAL DRUG CONTROL STRATEGY: 2001 ANNUAL REPORT 9 (2001), <https://www.hsdl.org/?view&did=3425>; MARIAN R. WILLIAMS ET AL., POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE 29 (2010), <http://ij.org/wp-content/uploads/2015/03/assetforfeituretoemail.pdf>; Eduardo Porter, *Numbers Tell of Failure in Drug War*, N.Y. TIMES, July 3, 2012, at B1 (discussing how the war on drugs is an objective failure).

335. BEAU KILMER ET AL., WHAT AMERICA'S USERS SPEND ON ILLEGAL DRUGS: 2000–2010, at 103 (2014), https://obamawhitehouse.archives.gov/sites/default/files/ondcp/policy-and-research/wausid_results_report.pdf.

336. Joseph Adinolfi, *Six Things You Need to Know About America's Illegal Drug Trade: Who's Using What Where and at What Cost*, INT'L BUS. TIMES (Oct. 29, 2013, 8:17 AM), <http://www.ibtimes.com/six-things-you-need-know-about-americas-illegal-drug-trade-whos-using-what-where-what-1444242>.

337. *FY 2014 Total Net Deposits to the Fund by State of Deposit*, U.S. DEP'T JUST., <https://oig.justice.gov/reports/2015/a1528.pdf> (last updated Mar. 18 2015).

Civil asset forfeiture is not about stopping the illegal drug trade—it is about the money.³³⁸ Tactics like civil asset forfeiture give law enforcement a financial interest in continuing the drug war,³³⁹ and as Justice Thurgood Marshall warned in a prescient dissent, “[t]he first, and worst, casualty of the war on drugs will be the precious civil liberties of our citizens.”³⁴⁰ Civil asset forfeiture and the drug war have granted law enforcement the power to search and seize property at will, and this sets the nation down “the totalitarian path.”³⁴¹

Fortunately, Americans are becoming aware of civil asset forfeiture’s perils. Civil asset forfeiture was eliminated by New Mexico and Montana in 2015.³⁴² In recent years, several other states have passed or proposed civil asset forfeiture reforms that afford greater protections to innocent property owners.³⁴³ Civil asset forfeiture reform has even reached the federal level. Eric Holder curtailed federal forfeiture policy during his last months as

338. *Developments in the Law—Policing and Profit*, *supra* note 4, at 1731 (“Beginning with the war on drugs, civil forfeiture has become more a way to fund supposed crime-fighting than a way to actually fight crime.”).

339. Worrall, *supra* note 151, at 182–84 (stating, “If law enforcement is ‘in it for the money,’ which some agencies clearly are, then it is difficult to see how the ‘war on drugs’ can ever be won”); Rogin, *supra* note 260, at 68 (questioning why a fiscally aware law enforcement department, who has an interest in seizing property through forfeitures, would want the drug war to stop).

340. *Skinner v. Ry. Labor Execs.’ Ass’n*, 489 U.S. 602, 636 (1989) (Marshall, J., dissenting).

341. *Terry v. Ohio*, 392 U.S. 1, 38 (1968) (Douglas, J., dissenting).

342. Nick Sibilla, *Civil Forfeiture Now Requires a Criminal Conviction in Montana and New Mexico*, FORBES (July 2, 2015, 8:45 AM), <http://www.forbes.com/sites/instituteforjustice/2015/07/02/civil-forfeiture-now-requires-a-criminal-conviction-in-montana-and-new-mexico/#2d0273b96a48>; see *supra* notes 302–03 and accompanying text.

343. See Logan Albright, *Wyoming Governor Signs Civil Asset Forfeiture Reform*, FREEDOMWORKS (Mar. 1, 2016), <http://www.freedomworks.org/content/wyoming-governor-signs-civil-asset-forfeiture-reform> (Wyoming); Nick Sibilla, *Minnesota Now Requires a Criminal Conviction Before People Can Lose Their Property to Forfeiture*, FORBES (May 7, 2014, 4:54 PM), <http://www.forbes.com/sites/instituteforjustice/2014/05/07/minnesota-forfeiture-reform/#37010e3d5a85> (Minnesota); Nick Wing, *Florida Just Made It Harder for Police to Take Stuff*, HUFFINGTON POST (Apr. 1, 2016, 6:10 PM), http://www.huffingtonpost.com/entry/florida-civil-asset-forfeiture_us_56fe9d7ce4b0a06d5805896d (Florida); Nick Wing, *Michigan Just Made It Harder for Police to Take People’s Property Without Charging Them*, HUFFINGTON POST (Oct. 21 2015, 2:01 PM), http://www.huffingtonpost.com/entry/michigan-civil-asset-forfeiture_us_562798e6e4b0bce347031fff (Michigan).

Attorney General,³⁴⁴ and forfeiture reforms were proposed by both houses of Congress in 2015.³⁴⁵

Civil asset forfeiture is a dreadful doctrine that can only be justified by resorting to “old, forgotten, far-off things, and battles long ago.”³⁴⁶ It enables law enforcement to seize property with ease, regardless of the owner’s guilt or innocence, and it forces property owners to undergo a costly and complex process in order to reclaim what is rightfully theirs. Furthermore, civil asset forfeiture invites law enforcement to perpetuate this injustice. Congress should put an end to this vulgar law enforcement tactic immediately.

344. Press Release, Office of the Att’y Gen., U.S. Dep’t of Justice, Prohibition on Certain Federal Adoptions of Seizures by State and Local Law Enforcement Agencies (Jan. 16, 2015), <https://oig.justice.gov/reports/2015/a1528.pdf>.

345. H.R. 540, 114th Cong. (2015); S. 255 114th Cong. (2015).

346. *United States v. One 1976 Mercedes Benz 280S*, 618 F.2d 453, 461 (7th Cir. 1980).