CIVIL ASSET FORFEITURE ABUSES: CAN STATE LEGISLATION SOLVE THE PROBLEM?

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INTRODUCTION

Civil asset forfeiture is an extraordinarily powerful tool for law enforcement, allowing the seizure of assets on mere suspicion, or probable cause, without any proof of wrongdoing.[1] Police seize such assets without notice or warrant, and as much as 88 percent of these seizures are effected without any court hearing or other judicial oversight.[2] The constitutionality of civil forfeitures has been consistently upheld in decisions that show only the most limited recognition of the rights of the property owners, even entirely innocent ones.[3] Accordingly, the potential for abuse of the procedure by law enforcement is great, particularly given the powerful incentives it creates; indeed, the law enforcement agencies that seize these assets (or cooperate with each other in their seizure) are almost always permitted to keep whatever they seize for their own use.[4]

Civil libertarians on both sides of the political aisle in the United States have expressed outrage at the practice, the left citing the police's abuse of the civil forfeiture power,[5] and the right complaining of the assault on individual property rights.[6] The shared concern has spawned some legislative efforts to

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[1] *See, e.g.*, Sarah Stillman, *Taken*, NEW YORKER (Aug. 12 & 19, 2013), www.newyorker.com/magazine/2013/08/12/taken.

[2] *See* Darpana Sheth, *Incentives Matter: The Not-So-Civil Side of Civil Forfeiture*, FED. LAW., July 2016, at 46, 47–48 (citing Dick M. Carpenter et al., *Policing for Profit: The Abuse of Civil Asset Forfeiture*, 2 INST. FOR JUST. 1, 12–13 & fig. 4 (2d ed, 2015), https://ij.org/wp-content/uploads/2015/11/policing-for-profit-2nd-edition.pdf).

[3] *See generally* CHARLES DOYLE, CONG. RESEARCH SERV. 97-139A, CRIME AND FORFEITURE at 27–39 (January 22, 2015).

[4] *See* David Pimentel, *Forfeitures Revisited: Bringing Principle to Practice in Federal Court*, 13 NEV. L.J. 1, 31 (2012).

[5] *See, e.g.*, Conor Friedersdorf, *The Injustice of Civil-Asset Forfeiture*, ATLANTIC (May 12, 2015), https://www.theatlantic.com/politics/archive/2015/05/the-glaring-injustice-of-civil-asset-forfeiture/392999/; Stillman, *supra* note 1, at 6; *Last Week Tonight with John Oliver: Civil Forfeiture* (HBO television broadcast Oct. 5, 2014), https://www.youtube.com/watch?v=3kEpZWGgJks.

[6] *See, e.g.*, HENRY HYDE, FORFEITING OUR PROPERTY RIGHTS: IS YOUR PROPERTY SAFE FROM SEIZURE? 5 (Cato Inst. 1995); Radley Balko, *Forfeiture Folly: Cover Your Assets*, REASON.COM (Mar. 7,

rein in the abuses. Congress's effort, the Civil Asset Forfeiture Reform Act of 2000, had a modest impact but failed to address the core problems underlying forfeiture abuse in the federal system.[7] The utter absence of bipartisanship in Congress today,[8] as well as the Trump administration's staunch support for expansive use of forfeitures,[9] suggests the hopelessness of a further legislative fix at the federal level.

Greater interest at present and, perhaps, greater hope lie with the potential for reform on the state level. Some states have already weighed in, enacting civil asset forfeiture reform in various forms, and others are considering bills that would similarly circumscribe the practice, or at least rein in the worst abuses of it.[10] Resistance to the proposed reforms comes primarily from the law enforcement community,[11] for whom civil asset forfeiture is a powerful tool, but the sincerity of law enforcement's policy arguments can be called into question, given the huge payoff those agencies get from continuing the practice. And even where reforms are implemented, powerful financial incentives may prompt police to find loopholes or workarounds that will allow them to continue the practice.[12] The upshot is a patchwork of mixed results, and marginal impact, in these various attempts

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2008, 7:51 AM), http://reason.com/archives/2008/03/07/forfeiture-folly; Chip Mellor, *Civil Forfeiture Laws and the Continued Assault on Private Property*, FORBES (June 8, 2011, 5:30 PM), http://www.forbes.com/2011/06/08/property-civil-forfeiture.html ("Civil forfeiture laws represent one of the most serious assaults on private property rights in the nation today. Under civil forfeiture, police and prosecutors can seize your car or other property, sell it and use the proceeds to fund agency budgets—all without so much as charging you with a crime."); Richard Miniter, *Ill-Gotten Gains*, REASON.COM (Aug. 1, 1993, 12:00 AM), http://reason.com/archives/1993/08/01/ill-gotten-gains/.

7 Pimentel, *supra* note 4, at 15–16.

8 *See* Christopher Hare, Keith T. Poole & Howard Rosenthal, *Polarization in Congress Has Risen Sharply. Where Is it Going Next?* WASH. POST (Feb. 13, 2014), https://www.washingtonpost.com/news/monkey-cage/wp/2014/02/13/polarization-in-congress-has-risen-sharply-where-is-it-going-next/ ("The most recent data show that polarization in Congress reached a new record high in 2013.").

9 *See* Christopher Ingraham, *Trump Jokes with Sheriffs about Destroying a Texas Legislator's Career over Asset Forfeiture,* WASH. POST (Feb. 7, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/02/07/trump-jokes-with-sheriffs-about-destroying-a-texas-legislators-career-over-asset-forfeiture/. While the exchange with sheriffs demonstrated the President's general ignorance of the issues, suggesting that this may not be a considered policy position, Attorney General Jeff Sessions has a well-established record in support of expansive use of forfeitures, and opposition to any reform. *See* Johnny Kampis, *AG Nominee Sessions Champions Civil Asset Forfeiture, Worrying Reform Advocates,* WATCHDOG.ORG (Dec. 15, 2016) http://watchdog.org/284348/sessions-civil-asset-forfeiture/; George Leef, *Sessions Has No Problem With Civil Asset Forfeiture — And That's A Problem,* FORBES (Jan. 3, 2017, 12:00 PM), http://www.forbes.com/sites/georgeleef/2017/01/03/sessions-has-no-problem-with-civil-asset-forfeiture-and-thats-a-problem/#541d99fe2d38. Accordingly, it is fair to infer that the Trump administration will not be pressing for forfeiture reform in the foreseeable future.

10 *See* Carpenter et al., *supra* note 2, at 23.

11 *Id.* at 24 ("A common refrain in the states where reform efforts have been unsuccessful is that resistance from law enforcement leaders killed the bills.").

12 *Id.*

to fix the forfeiture problem at the state level. Indeed, the limited impact of these efforts suggests that a closer look is warranted.

This Article analyzes some of the approaches taken in the various states, in an effort to understand why reform of civil asset forfeiture has failed in so many of them. It proposes specific approaches to state legislation to close loopholes that law enforcement agencies can exploit and for which they may actively lobby in the reform legislation itself. Public outrage and bipartisan concern are prompting action, but better legal guidance is needed if state legislative solutions are to be effective.

Part I of the Article provides the historical background of civil asset forfeiture and highlights the inequities inherent in the procedure. It discusses how civil asset forfeitures work in practice today, including the problematic allocation of burdens of proof, and gives an overview of the recent attempts at reform, including the federal Civil Asset Forfeiture Reform Act of 2000. Part II of the Article details the various approaches that states have implemented to stem the abuse of civil asset forfeitures, including attempts to eliminate them altogether. It discusses how virtually every one of these efforts—mostly in shifting or raising burdens of proof—has fallen short, due in large part to the powerful financial incentives for law enforcement to continue to employ the practice. States wishing to address the problem should learn from the lessons of others as they attempt to close the loopholes exposed by other states' reform efforts and, perhaps most importantly, shut off the financial incentive spigot that drives and perpetuates the problem.

I. BACKGROUND ON CIVIL ASSET FORFEITURE

A. *What Is Civil Asset Forfeiture?*

Civil asset forfeiture is a procedure by which law enforcement can seize assets implicated in the commission of a crime. Although it has ancient roots, its modern incarnation grew out of the Navigation Acts of Great Britain in the 17th century.[13] These laws allowed the seizure of ships used for piracy or smuggling, establishing an in rem procedure by which legal action was brought by the state against the ship itself.[14] The constitutionality of the procedure was first upheld by the U.S. Supreme Court in the 1820s in the context of ship seizures[15] but has been consistently upheld in more recent cases involving the seizure of automobiles, even when the owner of the property is entirely innocent of any wrongdoing.[16] The technical legal

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13 DOYLE, *supra* note 3, at 2.

14 *Id.*

15 *See* The Palmyra, 25 U.S. (12 Wheat.) 1, 15 (1827).

16 *See* Bennis v. Michigan, 516 U.S. 442, 446 (1996); J.W. Goldsmith, Jr.–Grant Co. v. United States, 254 U.S. 505, 513 (1921). Note, however, that Justice Thomas, who sided with the majority in

rationale is that if the "property is guilty," then the innocence of the owner is irrelevant in an in rem action.[17]

Criminal forfeitures, in contrast, are done in personam and can be carried out only after the owner of the property has been convicted of a crime.[18] If the property has a sufficiently strong connection to the crime, the forfeiture becomes a part of the criminal punishment carried out.[19] Because of the procedural protections enjoyed by the owner/defendant in these cases, criminal forfeitures are far less problematic and, of course, far less controversial.

1. Three Types of Civil Asset Forfeiture

Conceptually, there are three circumstances in which civil asset forfeitures are triggered, or more precisely, three types of property that are forfeitable.[20] First is contraband, which can be seized because it is unlawful to possess in the first place.[21] This type of forfeiture is uncontroversial, as no one can assert a legitimate property interest in assets such as illegal drugs, adulterated food, or obscene material.[22]

Second are proceeds of crime. Starting with the passage of the Racketeer Influenced and Corrupt Organizations Act ("RICO") in 1970, and in a number of statutes enacted thereafter (including, most notably, federal drug laws), the proceeds of criminal activity have been deemed forfeitable.[23] This is justifiable as a legitimate law enforcement tool—taking the profit out of crime is important in deterring its commission[24]—as well as under the general theory of unjust enrichment, as there is something inequitable about allowing

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Bennis, has recently raised doubts about the constitutionality of civil forfeitures as currently practiced. *See* Leonard v. Texas, 137 S. Ct. 847, 849 (2017) (Thomas, J., respecting denial of certiorari).

17 *See Bennis*, 516 U.S. at 461 n.5 (Stevens, J., dissenting).

18 *See, e.g.*, Alice W. Dery, *Overview of Asset Forfeiture*, BUS. L. TODAY 4 (June 2012), https://www.americanbar.org/publications/blt/2012/06/02_dery.html.

19 U.S. DEP'T OF JUSTICE, POLICY MANUAL: ASSET FORFEITURE POLICY MANUAL 71–72 (2016), https://www.justice.gov/criminal-afmls/file/839521/download.

20 David Pimentel, *Forfeiture Procedure in Federal Court: An Overview*, 183 F.R.D. 1, 5–6 (1999) (quoting *Bennis*, 516 U.S. at 459 (Stevens, J., dissenting)).

21 *Id.* at 6.

22 *Id.*

23 *Id.*

24 RICO was specifically responding to the problem of organized crime figures, who would be convicted and serve time, only to be replaced by others who would assume the leadership of the vast crime empires left behind. *See* Pimentel, *supra* note 4, at 11 (quoting LEONARD W. LEVY, A LICENSE TO STEAL: THE FORFEITURE OF PROPERTY 67 (1996)) ("When [the] Attorney General . . . first testified before the Senate committee that was considering measures against organized crime, his main point was that as long as the flow of money continued, imprisonment of the leaders of Mafia families stimulated the promotions of new people to take the places of those convicted.").

a wrongdoer to keep ill-received gains.[25] Again, it is difficult for the owner of such property to assert any legitimate property right in such proceeds.[26]

Third, and most problematic, are the instrumentalities of crime, better characterized as facilitating property.[27] This was the rationale for the historical seizure of ships: if they have been used to commit crimes against the crown, they may be properly seized.[28] The justification is somewhat harder to define here than it is for contraband or proceeds of crime, although it has been articulated in terms of deterrence in two ways: (1) if the ship is seized, it can no longer be used for this purpose (absent the forfeiture, there may be nothing preventing its falling into the hands of other criminals who will use it for the same purpose), and (2) it creates an incentive for property owners to take care to ensure that their property is not used by others, including strangers, to further criminal activity.[29]

2. The Problems with Civil Asset Forfeiture

The core problems with civil asset forfeiture—almost exclusively applicable to the third category, or "facilitating property" forfeitures—include the following:

(1) The ease with which law enforcement can take the property with little regard for the private property rights of the owner, in light of the low standards of proof necessary to effect a forfeiture,[30] and that even these standards are rarely required to be met because often the forfeiture is

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25 Pimentel, *supra* note 4, at 36.

26 The Fourth Circuit has complained that proceeds forfeitures *can* be punitive, however, particularly in conspiracy cases or other cases where there is joint and several liability for the proceeds. In those cases, one minor player in, for example, a large drug conspiracy, may be forced to forfeit the entire proceeds of the conspiracy, even though that individual never saw more than a tiny fraction of those proceeds. United States v. Jalaram, Inc., 599 F.3d 347, 355 (4th Cir. 2010). The Supreme Court granted certiorari to consider the split of authority that emerged, *see* Honeycutt v. United States, 137 S. Ct. 588, 588–89 (2016), and held that joint and several liability did not apply. *Honeycutt v. United States*, 137 S. Ct. 1626, 1631–32 (2017).

27 *See* Pimentel, *supra* note 20, at 6.

28 *See* Pimentel, *supra* note 4, at 8–9.

29 If a ship is forfeitable because a single seaman is smuggling illegal goods in his duffle, the ship owner has powerful incentives to police the crew to ensure that such violations are not occurring on board. *See* Pimentel, *supra* note 20, at 6.

30 *Compare* MASS. GEN. LAWS ch. 94C, § 47(d) (2017) (noting that "the commonwealth shall have the burden of proving to the court the existence of probable cause to institute the [forfeiture] action"), *with* 18 U.S.C. § 983(c)(1) (2012 & Supp III 2016) ("[T]he burden of proof is on the Government to establish, by a preponderance of the evidence, that the property is subject to forfeiture."), *and* D.C. CODE § 41-308(d)(1)(B) (2017) (providing a preponderance standard, except for vehicles and real property), *and* TEX. CRIM. PROC. CODE ANN. art. 59.05(b) (2017) ("The state has the burden of proving by a preponderance of the evidence that property is subject to forfeiture.").

executed "administratively," without a hearing where the parties might have been put to their proofs.[31]

(2) The fact that innocent property owners are at risk of forfeiture because forfeitability turns on the guilt of the property, not the guilt of its owner, and even in those jurisdictions that recognize an "innocent owner" defense, the burden is typically on the owner to prove his or her own innocence.[32]

(3) The disturbingly powerful incentives for law enforcement to make such seizures (rising to the level of a conflict of interest), borne of the reality that the law enforcement agencies themselves are typically allowed to keep whatever they seize for their own use.[33]

Anecdotes about the abuse of civil forfeitures are easy to find. The popular press and media have seized on these stories, milking them for their shock value, as they offend some basic notions of justice and decency that Americans take for granted. These stories fall into two key categories—namely, (1) the seizures of cash on suspicion of drug activity, when the suspicion is based entirely, or almost entirely, on the existence of the cash itself (the assumption being that it must be dirty money because law-abiding citizens don't carry large quantities of cash),[34] and (2) seizures of property owned by an entirely innocent, or almost entirely innocent, party because a wrongdoer has used the property for illegal purposes.[35] The law often proves to be impotent to vindicate the rights of the victims of these forfeitures. The outrageous outcomes and tragic consequences of these cases make a compelling case for legal reform.

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31 Carpenter et al., *supra* note 2, at 12–13.

32 *Id.* at 8, 20.

33 *See* Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 56 (1998).

34 *See, e.g.*, H.R. Rep. No. 106-192, at 6–7 (1999) (telling the story of Willie Jones having $9,000 in cash seized from him at a Tennessee airport after dogs identified the money, even though Mr. Jones had no criminal record or drugs on his person); Carpenter et al., *supra* note 2, at 8 (discussing Charles Clark's life savings—$11,000—which was seized in the Cincinnati airport, after officers claimed Mr. Clark "smelled of marijuana"); Stillman, *supra* note 1 (describing a police practice where cops stopped people for minor violations, asked about and seized the cash they had, while threatening serious penalties if individuals did not waive the right to contest the forfeiture).

35 *See, e.g.*, Bennis v. Michigan, 516 U.S. 442, 443 (1996) (upholding the forfeiture of a family vehicle after Mr. Bennis used it to engage in prostitution, even though it deprived Mrs. Bennis, a joint-owner with no knowledge or role in the illegal conduct, her interest in the property); H.R. REP. NO. 106-192, at 8–9 (1999) (describing the case of Billy Munnerlyn, whose charter plane was seized due to it being used to unknowingly transport a person with drug money, and the legal battle forcing him into bankruptcy); Andrew Schneider & Mary Pat Flaherty, *Government Seizures Victimize Innocent*, PITT. PRESS (Feb. 27, 1991), http://www.fear.org/guilty1.html (telling the story of the Lopes family, whose home was seized through forfeiture after their mentally challenged son planted a marijuana plant in the yard and threatened suicide if his parents removed it).

3. Legitimate Uses for Civil Forfeiture

Amidst the popular denunciation of civil asset forfeitures, it may be difficult to discern the legitimate role for such seizures in law enforcement practice. Again, the justifications for it, coming from law enforcement, often come across as disingenuous. Yet there are compelling arguments that can be made for keeping the procedure.

a. *When the Criminal Is (for All Practical Purposes) Beyond the Reach of the Law*

International drug conspiracies are often directed by kingpins located outside the United States.[36] It may be impossible, in these situations, to make arrests and carry out prosecutions of such individuals. Nonetheless, the equipment they use to distribute drugs and the proceeds of their drug transactions may be, at times, within easy reach of American law enforcement personnel.

In these circumstances, civil asset forfeiture allows law enforcement to dismantle the drug operation going on in the United States, even if they cannot reach those ultimately responsible for the operation.[37] To suggest that the property should be seized only if and after the individuals responsible are captured, prosecuted, and convicted is to deprive local law enforcement of its primary weapon against the absentee drug distributer.

b. *When the Criminal Is Unknown but the Crime Is Obvious*

In other circumstances, there may be ample evidence that a crime has been committed but reasonable doubt about who is responsible. If police uncover a methamphetamine lab in a previously abandoned warehouse property, it may be very difficult for police to find and prosecute the persons responsible. But it is also hard to articulate a reason police should not be able to seize the lab equipment itself; there is no question that the lab has been used (and may yet be used) to manufacture methamphetamine, despite the police's inability to identify or pin a criminal conviction on any particular suspect.

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[36] *See* Roger McDonough, *Collaring Drug Kingpins: International Extradition and Continuing Criminal Enterprise in* United States v. Levy, 16 MD. J. INT'L L. 127, 127 (1992).

[37] *Cf.* Stefan D. Cassella, *Overview of Asset Forfeiture Law in the United States*, 55 U.S. ATT'YS BULL. 8, 8, 11 (2007) (discussing how civil asset forfeiture allows law enforcement to "remove the tools of the crime from circulation," including guns, planes and cars used for drug smuggling and all real or personal property used to commit or facilitate the commission of drug offenses).

c. *When the Assets Seized Are Contraband, or Otherwise Valuable Only for Illegal Purposes*

The state has a legitimate interest in removing contraband from circulation.[38] Adulterated food, obscene material, and the raw materials uniquely useful for building nuclear weapons, for example, serve no legitimate or defensible purpose for a law-abiding citizen. These things should certainly be seized, regardless of whether anyone can be shown to have committed a crime in their acquisition or use.

Dee Edgeworth, an expert on civil asset forfeiture with the Department of Justice ("DOJ"), has offered other compelling examples in which assets are uniquely designed to facilitate crime.

> [1] What would you do with a house that was modified to cultivate indoor marijuana? Thousands of plants, and finished marijuana are found within the premises. Every room is filled with marijuana plants, grow lights, and vents. No one lives at the house. The entire house is an indoor marijuana grow house. There is a tunnel that leads from under the house where the growers take the trash and dispose of the refuse in a public area. The windows are covered. The house was purchased with legitimate funds [but] the absentee owner is knowingly allowing the premises to be used to cultivate marijuana. The house is not contraband. No proceeds were used to purchase the property. Neighbors complain that the house is an eyesore and is depreciating property values.
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> [2] Officers make a valid traffic stop on a vehicle and obtain consent to search the vehicle. They find a concealed compartment that has been specifically built into the vehicle which contains a large quantity of drugs. The registered owner is a "mule" who admits driving drugs from Mexico to the US and takes currency back to Mexico inside the concealed compartment. The vehicle makes regular runs between Mexico and the US. CBP [U.S. Customs and Border Protection] documents numerous entries by this vehicle into the US over the past six months. The vehicle is not contraband. There is no evidence that the vehicle was purchased with drug proceeds.[39]

In both of these circumstances, there is a compelling case for allowing the forfeiture of the property to combat vice. In both cases, it appears likely that the assets—unless seized—will be used to facilitate future criminal activity. However, it may be difficult to craft a legal reform that allows seizures of these assets but does not also open the door to the kind of overreach that has galvanized public opposition to the practice.

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38 *See* Nat'l Conf. of Commissioners on Uniform State Laws, *Uniform Controlled Substances Act (1994)*, ANN. CONF. 2 (Aug. 5, 1994), http://www.uniformlaws.org/shared/docs/controlled%20substances/UCSA_final%20_94%20with%2095amends.pdf.

39 Pimentel, *supra* note 4, at 51 n.295 (quoting E-mail from Dee Edgeworth, Attorney-Advisor, Organized Crime Drug Enforcement Task Force, U.S. Dep't of Justice, to David Pimentel (Feb. 22, 2012, 4:12 PM) (on file with George Mason Law Review)).

B. *How Does Civil Asset Forfeiture Work in Practice?*

A civil forfeiture is always precipitated by criminal activity.[40] It is the crime that justifies the seizure of property connected in some way to that crime.[41] Accordingly, it is law enforcement officials, investigating suspected crime, who typically act to seize the property in question. But they need not make an arrest before seizing the property.[42] Moreover, they can typically pursue the forfeiture as a civil proceeding even if there is never an arrest or prosecution for the underlying crime.[43]

1. Equitable Sharing

Every state has its own rules and procedures for seizing assets it deems forfeitable.[44] However, one of the most popular methods for forfeiting property, even for local law enforcement, is to invoke federal procedure. Because federal procedures are reasonably straightforward[45] and uniform throughout the country, it is relatively easy for law enforcement to seize property under color of federal law, turning it over to federal authorities to carry out the forfeiture according to the federal procedures. The DOJ has actively encouraged this practice with a program called "equitable sharing," which allows it to kick back a large percentage of the seized assets to the local law enforcement agency that seized the assets in the first place.[46] The result is a win–win for both local and federal law enforcement: the local authorities can seize the assets easily, without having to comply with state

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[40] Carpenter et al., *supra* note 2, at 8 (describing civil forfeiture as a mechanism to allow the government to seize and keep property suspected of being connected to a crime).

[41] Dery, *supra* note 18, at 3 ("Since the forfeiture action is against the property and not the defendant, it is limited to property that is traceable to the offense, that facilitated the offense, or that was involved in money laundering.").

[42] Carpenter et al., *supra* note 2, at 8 (explaining that the government proceeds against property, instead of the person, during civil forfeiture and that "civil forfeiture allows law enforcement to take property from innocent people who have never been formally accused of a crime, let alone convicted of one").

[43] Craig Gaumer, *A Prosecutor's Secret Weapon: Federal Civil Forfeiture Law*, 55 U.S. ATT'YS BULL. 59, 63 (2007) (discussing that civil forfeiture is independent of criminal cases, thus the government can file the action "before indictment, after indictment, or even if there is no indictment"); *see also* United States v. 3120 Banneker Drive, 691 F. Supp. 497, 499 (D.D.C. 1988) ("A property is subject to civil forfeiture even it its owner is acquitted of—or never called to defend against—criminal charges.").

[44] *Cf.* Carpenter et al., *supra* note 2, at 22 tbl. 1 (grading the civil asset forfeiture laws of each state based on the state's financial incentive to seize property, the government's standard of proof, and the burden in innocent owner claims).

[45] *See generally* 18 U.S.C. § 983 (2012 & Supp. III 2016) (setting forth the procedures for a civil asset forfeiture).

[46] *See* U.S. DEP'T OF JUSTICE, A GUIDE TO EQUITABLE SHARING FOR STATE AND LOCAL LAW ENFORCEMENT AGENCIES 1 (2009), https://www.justice.gov/criminal-afmls/file/794696/download.

law and procedure, and the federal authorities get a percentage of the take without having to expend their own resources to carry out the seizure.[47]

Equitable sharing happens in two ways. First, it can arise in the context of joint and cooperative efforts between state and federal authorities.[48] When a joint task force seizes assets, equitable sharing allows the federal authorities to share the wealth with state and local authorities that assisted in the operation.[49] Equitable sharing, however, also contemplates "adoptions," in which property seized by state authorities, acting alone, is handed over to federal authorities for purposes of perfecting the forfeiture under federal law.[50] The future of the equitable sharing program was cast in doubt in 2015, when Attorney General Eric Holder announced a suspension of portions of the equitable sharing program,[51] but his successor, Loretta Lynch, reinstated the program the following year.[52]

2. Burdens of Proof

Once property is seized, the burden is on the owner of the seized property to contest the forfeiture.[53] If the owner does not step forward, the property can be kept as an "administrative forfeiture" without any court oversight and without anyone checking to see if law enforcement had a legitimate basis for seizing the property in the first place.[54] An estimated 80

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47 *See* Drug Policy Alliance, *Above the Law: An Investigation of Civil Asset Forfeiture in California* 10, https://www.drugpolicy.org/sites/default/files/Drug_Policy_Alliance_Above_the_Law_Civil_Asset_Forfeiture_in_California.pdf (Apr. 20, 2015) (last visited Jan. 1, 2018) (describing equitable sharing as a win-win, in that it allows state and local authorities to seize what they wanted, while not costing the DOJ money).

48 *See* U.S. DEP'T OF JUSTICE, *supra* note 46, at 6.

49 *See id.* at 12 (discussing the allotment amount shared between federal and non-federal law enforcement agencies, based on joint investigations for asset forfeiture).

50 *Id.* at 6.

51 *See* Robert O'Harrow Jr., Sari Horwitz, & Steven Rich, *Holder Limits Seized-Asset Sharing Process that Split Billions with Local, State Police*, WASH. POST (Jan. 16, 2015), https://www.washingtonpost.com/investigations/holder-ends-seized-asset-sharing-process-that-split-billions-with-local-state-police/2015/01/16/0e7ca058-99d4-11e4-bcfb-059ec7a93ddc_story.html?utm_term=.1daf9401c060.

52 *See* Christopher Ingraham, *The Feds Have Resumed a Controversial Program that Lets Cops Take Stuff and Keep It*, WASH. POST (Mar. 28, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/03/28/the-feds-have-resumed-a-controversial-program-that-lets-cops-take-stuff-and-keep-it/?utm_term=.73ba4ed03130.

53 *See* Carpenter et al., *supra* note 2, at 11.

54 *See id.* at 12–13 (explaining that when a person does not challenge a seizure, it becomes an administrative forfeiture with no judicial involvement, leaving the seizing agency to decide if the seizure was warranted).

percent to 88 percent of forfeitures, at least in the federal system, are uncontested.[55]

Civil forfeitures do not require a criminal conviction, or even an arrest.[56] Historically, the property can be seized on no more than probable cause to believe that a crime has occurred and that the property was connected to the crime somehow.[57] The action is brought in rem with the property itself as the named defendant. Historically, if the property was guilty, it never mattered whether the owner was innocent: the property could be forfeited anyway.[58] For example, if a car thief stole a car, and then used the car to transport illegal drugs, the car would be deemed guilty and could be forfeited. If trespassers ran an illegal gambling operation in a commercial garage,[59] the real property

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[55] *See id.* at 5 (giving the 88 percent figure); Stefan D. Cassella, *The Case for Civil Forfeiture: Why* In Rem *Proceedings Are an Essential Tool for Recovering the Proceeds of Crime*, 11 J. MONEY LAUNDERING CONTROL 8, 10 (2008), (giving the 80 percent figure); Pimentel, *supra* note 4, at 27–31 (2012) (discussing possible reasons for uncontested forfeitures rising above 80 percent, including difficulty in providing notice, costs of legal counsel, the burden of proof on innocent owners, a reluctance to incriminate themselves or others in criminal activity, and the possibility of compromising one's rights against self-incrimination). Why so many are uncontested is not entirely clear. Sometimes, no doubt, it is impossible to give proper notice to the actual owner of the seized property, if the owner cannot be identified readily. The expense of hiring counsel to contest the forfeiture will prompt owners to abandon even meritorious claims, especially if the amount of the forfeiture is relatively small. DOJ representatives tout the high rate of uncontested forfeitures as evidence that they are justified, as if no meaningful defense against the forfeitures could be made. But historically, the burden of proof was on the claimant; even under new rules designed to protect "innocent owners," the owner has the burden of proving her innocence. It is also likely that property owners are reluctant to step forward because they do not want to implicate themselves or their friends, family, or associates in alleged criminal activity, or waive their own Fifth Amendment rights by voluntarily testifying about their relationship to the property in question, property that someone suspects of being involved in criminal activity. Law enforcement is able to extort such property—which may or may not be legally forfeitable—from parties who fear criminal prosecution will follow if they object to the seizure. In the alternative, law enforcement can use the threat of forfeiture to extort a waiver of Fifth Amendment rights.

[56] *See* Gaumer, *supra* note 43 (discussing that civil forfeiture is independent of criminal cases, thus the government can file the action "before indictment, after indictment, or even if there is no indictment"); *see also* United States v. 3120 Banneker Drive, 691 F. Supp. 497, 499 (D.D.C. 1988) ("[A] property is subject to civil forfeiture even if its owner is acquitted of—or never called to defend against—criminal charges.").

[57] *See* United States v. Brock, 747 F.2d 761, 762 (D.C. Cir. 1984) (discussing that the government only needed to show probable cause that the property in dispute was connected to the criminal violation); Carpenter et al., *supra* note 2, at 11 ("In most jurisdictions and for most types of property, all police need to seize is 'probable cause' to believe that the cash, car or other property is connected to a crime that permits civil forfeiture.").

[58] *But see* 18 U.S.C. § 983(d) (2012 & Supp III 2016) (setting forth a federal innocent owner defense for those who have committed no crime); Carpenter et al., *supra* note 2, at 20 fig. 8 (showing which party has the burden in each state for innocent owner defenses).

[59] Damon Runyon's musical *Guys and Dolls* depicts Nathan Detroit's illegal craps game as "the oldest established permanent floating crap game in New York." *See* Frank Loesser, *The Oldest Established, in* GUYS AND DOLLS Act 1, Scene 1 (Jo Swerling and Abe Burrows 1950), http://guysdolls.weebly.com/uploads/5/7/4/7/5747752/full_script__1_.pdf. A major plot point involved

could be forfeited, even if the owner of the garage was entirely unaware of the trespassers and of their illegal use of her property.

C. *Federal Reforms: The Civil Asset Forfeiture Reform Act of 2000*

Concern about how civil forfeitures were running roughshod over property rights prompted Congress to undertake an overhaul of federal forfeiture procedure in the 1990s, resulting eventually in the Civil Asset Forfeiture Reform Act ("CAFRA"), which became law with overwhelming bipartisan support in 2000.[60] Unfortunately, to obtain that bipartisan support, in an election year no less, the bill's supporters had to water it down considerably, and what was ultimately passed provided only a modest check on law enforcement's use of this tool.[61]

A more thorough analysis of CAFRA's provisions, and why they have failed to solve the underlying problems, has been laid out elsewhere.[62] Key provisions of CAFRA include, inter alia, the following: (1) a shift of the burden of proof to the government to show, by a preponderance of the evidence, that the property is forfeitable (a burden that, in practice, it bears only in the 12–20 percent of cases that are actually contested);[63] (2) the creation of an "innocent owner" defense to a forfeiture (but the burden of proving innocence still lies with the claimant);[64] (3) the provision of counsel in limited circumstances (when already represented by state-appointed counsel in the criminal case, or if the asset at issue is the claimant's residence);[65] (4) a "hardship" provision that may allow, based on a balancing of the equities, the claimant to retain custody of property pending a final adjudication of the forfeiture;[66] (5) compensation for damage done to the

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finding a location for the game—the song lyrics extol his prowess in this regard: "If you're looking for action, he'll furnish the spot, even when the heat is on it's never too hot." Nathan ultimately held his game at the Biltmore Garage, and if Lt. Brannigan had succeeded in busting up the game, it appears that he could have seized the Biltmore Garage in a civil forfeiture. *Id.*

60 In fact, the Senate Committee approved CAFRA unanimously, something that was considered essential since 2000 was an election year. *See* David B. Smith, *An Insider's View of the Civil Asset Forfeiture Reform Act of 2000*, 24 CHAMPION 28, 28 (2000).

61 *See id.* at 28–29.

62 *See* Pimentel, *supra* note 4, at 3–4 (discussing the problems and injustices inherent in the arcane forfeiture procedure).

63 *See* Eric Moores, *Reforming the Civil Asset Forfeiture Reform Act*, 51 ARIZ. L. REV. 777, 798 (2009).

64 *See* H.R. REP. NO. 105-358, pt. 1, at 31 (1997).

65 *See* 18 U.S.C. § 983(b)(1)(A), (2)(A) (2012 & Supp. III 2016); H.R. REP. NO. 106-192, at 14 (1999); *see also* H.R. REP. NO. 105-358, pt. 1, at 29 (1997) ("This Committee believes that given the punitive, quasi-criminal nature of civil forfeiture proceedings, legal representation should be provided for those who are indigent in appropriate circumstance.").

66 *See* H.R. REP. NO. 105-358, pt. 1, at 29.

property while in the government's possession;[67] (6) elimination of the requirement that the claimant post a "cost bond" when contesting a forfeiture;[68] and (7) a requirement that there be a "substantial connection" between the crime and the property seized.[69]

D. *State Reforms*

Not surprisingly, a variety of states have attempted to crack down on law enforcement's overreaching with forfeitures. New Mexico was embarrassed by the Las Cruces City Attorney's boasts, made "with an amiable bemusement that bordered on glee" and later made public, about how they can enrich the municipalities by raising their sights from just seizing vehicles to seizing real property: "We could be czars. We could own the city. We could be in the real estate business."[70] The state legislature, embarrassed, and undoubtedly encouraged by expressions of outrage from its constituents, responded by passing legislation that purported to ban civil forfeitures altogether.[71]

Several other states and the District of Columbia have adopted new reforms in the past few years, aimed at curtailing the use, or at least the abuse, of civil forfeitures.[72] As many of these bills are very new, it is too early to draw final conclusions on their effectiveness in curbing the problems they purport to address. Early indications suggest, however, that many of these state reforms overall will have—like CAFRA—only limited impact. Indeed, the financial incentives behind civil forfeitures continue to inspire law enforcement to oppose beforehand, and to circumvent afterward, the states' attempts to rein them in.[73]

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67 *See id.* at 33.

68 *See id.* at 34.

69 *See* Pimentel, *supra* note 4, at 20–21.

70 Rob Nikolewski, *A 'Gold Mine' or a Civil Liberties Outrage? Civil Forfeiture Remarks Go Viral*, WATCHDOG (Nov. 13, 2014), http://watchdog.org/182915/gold-mine-forfeiture/.

71 Nonetheless, it appears that law enforcement has found ways around the legislative ban, and is carrying out forfeitures anyway. *See* Martin Kaste, *New Mexico Ended Civil Asset Forfeiture. Why Then Is It Still Happening?*, NPR (June7, 2016, 5:02 AM), http://www.npr.org/2016/06/07/481058641/new-mexico-ended-civil-asset-forfeiture-why-then-is-it-still-happening; *see also* discussion *infra* Section II.A.2.

72 *See, e.g.*, Jo Ingles, *Ohio's Civil Asset Forfeiture Bill Signed into Law*, STATEHOUSE NEWS BUREAU (Jan. 5, 2017) http://statenews.org/post/ohios-civil-asset-forfeiture-bill-signed-law; Nick Sibilla, *Washington, D.C. Council Votes to Reform City's Civil Forfeiture Laws, Ban Policing Profit*, FORBES (Dec. 3, 2014, 1:39 PM), https://www.forbes.com/sites/instituteforjustice/2014/12/03/washington-d-c-council-votes-to-reform-citys-civil-forfeiture-laws-ban-policing-for-profit/#450e98883010; Nick Wing, *Montana Governor Signs Law to Protect Innocent People from Having Their Property Seized by Police*, HUFFINGTON POST (May 6, 2015, 2:37 PM) http://www.huffingtonpost.com/2015/05/06/montana-civil-asset-forfeiture_n_7222258.html.

73 *See* Carpenter et al., *supra* note 2, at 28.

A more thorough analysis of states' possible approaches to scaling back civil forfeitures is needed, to guide those state legislatures that want meaningful reform and, perhaps, to expose those legislatures with toothless reform agendas that nonetheless want to take credit for addressing the problem. At the same time, as long as the system preserves law enforcement's financial stake in civil forfeitures, any attempt at reform will be actively opposed, undermined, and even circumvented by the very agencies entrusted with implementing it.

II. APPROACHES TO STATE-BASED REFORM

Several reforms have been proposed and adopted in various states, all of which sound good in principle, and each of which reflects good intentions and motivation to address the problems cited above. They appear to be aimed at curbing abuse of forfeitures and better protecting the rights of property owners.[74] Examination of the various approaches taken will reveal some common pitfalls in the reform efforts while highlighting the provisions more likely to produce meaningful results.

A. *Elimination of Civil Forfeiture Altogether*

One approach is to eliminate civil forfeiture altogether.[75] The basic idea is to remove civil forfeiture from law enforcement's toolbox, leaving criminal forfeiture intact. Again, that would shift the focus to the culpability of the owner and allow the forfeiture of his or her property—in an in personam action aimed at punishing the offender—only if the owner is actually convicted of the crime, by a "beyond a reasonable doubt" standard, affording the claimant the full phalanx of Fourth (search and seizure), Fifth (due process), and Sixth (right to counsel) Amendment rights.

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74 *See* Nick Wing, *More Than a Dozen States Are Trying to Stop Cops from Taking Innocent People's Stuff*, HUFFINGTON POST (Feb. 7, 2017, 2:17 PM), https://www.huffingtonpost.com/entry/state-civil-asset-forfeiture-reform_us_5899d21be4b09bd304bd73dc.

75 *See* 2016 Wyo. Sess. Laws 1-8 (codified and amended at WYO. STAT. ANN. §35-7-1049 (West 2017)); *see also* 2015 Mont. Laws 1926-36 (codified and amended at MONT. CODE ANN. § 44-12-103 (West 2017)).

1. States Cannot Stop Federal Civil Forfeitures, Leaving the Door Open for Their Law Enforcement Officials to Conduct Forfeitures Under Federal Law

The simplicity of this approach is deceptive. The problem is that law enforcement may or may not be operating under state law authorizations. Rescinding those authorizations, therefore, can only do so much.

For example, there are broad authorizations for civil forfeitures under federal law, most notably drug laws but in—at one count—almost two hundred other federal statutes.[76] There is no reason that local law enforcement couldn't operate under color of federal law, seizing property as authorized by federal law when conducting investigations of federal crimes, even if state law does not separately authorize the seizures. Indeed, the DOJ has strongly encouraged local and state authorities to execute such seizures with its equitable sharing program.

The state of Montana earned plaudits for its civil asset forfeiture reform legislation in 2015,[77] but that new law fails to place any restriction on participation in DOJ's equitable sharing program.[78] Accordingly, forfeitures continue apace there under federal law, and law enforcement agencies in Montana continue to reap the rewards of such seizures.[79]

2. States May Eliminate State-Law Civil Forfeitures but Leave the Door Open to Forfeitures Under Local Law

At the same time, some local law enforcement agencies have claimed authorization under municipal ordinances to carry out forfeitures, even where state law does not authorize them.[80] New Mexico's forfeiture reform law is arguably the strongest and most sweeping of the reforms undertaken in any state,[81] yet vehicle seizures continue in both Albuquerque and Santa Fe.[82]

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76 *See* Pimentel, *supra* note 20, at 18–19.

77 *See, e.g.*, Nick Sibilla, *Civil Forfeiture Now Requires a Criminal Conviction in Montana and New Mexico*, FORBES (July 2, 2015), http://www.forbes.com/sites/instituteforjustice/2015/07/02/civil-forfeiture-now-requires-a-criminal-conviction-in-montana-and-new-mexico/#4e6551206a48; Wing, *supra* note 72.

78 *See* Sam Gedge, *Montana Must Do More to Reform Civil Forfeiture Law*, BILLINGS GAZETTE (Nov. 16, 2015), http://billingsgazette.com/news/opinion/guest/montana-must-do-more-to-reform-civil-forfeiture-law/article_fd0c3785-2b9c-5892-a2d5-0bc6ac198fb9.html.

79 *See* discussion *infra* Section II.B.

80 *See* Anne Constable, *Civil Forfeiture Ongoing Despite Change to State Law*, SANTA FE NEW MEXICAN (Sept. 5, 2016), http://www.santafenewmexican.com/news/local_news/civil-forfeiture-ongoing-despite-change-to-state-law/article_bbc6c721-b1ff-5438-b735-65d533fd3706.html.

81 *See* Carpenter et al., *supra* note 2, at 3.

82 *See* Constable, *supra* note 80.

Those seizures have been challenged in court, and the outcome may require a careful parsing of the statute, but a key case challenging the practice—brought by two state legislators, aggrieved that the statute they had passed was being ignored—was dismissed for lack of standing.[83] A second case challenging the practice prompted the voluntary return of the vehicle in question, but the city explained its decision to drop the case by conceding that the vehicle was seized outside city limits, and therefore beyond its jurisdiction.[84] Skeptics have viewed this action as strategic, to avoid a ruling on their authority to seize vehicles at all.[85] In the meantime, forfeitures—at least of vehicles—continue in the capital, and in the largest city, of a state that attempted, and purported, to eliminate them entirely.[86]

3. Eliminating Civil Forfeiture" Cannot Extinguish All Civil Aspects to the Forfeiture Proceeding

New Mexico's new law does eliminate the power, under state law, to seize property without criminal process.[87] In this sense, they *have* eliminated civil forfeiture. But what happens under New Mexico's new legislation still contains elements of civil process, particularly when the person charged with and convicted of the crime is not the owner of the property.[88]

The new procedure awaits the conclusion of the criminal trial.[89] Only after the trial concludes with a conviction can the forfeiture proceeding occur, and it does so before the same jury that decided the criminal case.[90] In the latter hearing, the government must prove a nexus between the property and the crime that was committed, and they must show that nexus by clear and convincing evidence,[91] a standard lower than the "beyond a reasonable

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83 *See* Ryan Boetel, *Judge Throws Out Challenge to DWI Seizure Program*, ALBUQUERQUE J. (May 20, 2016), https://www.abqjournal.com/777339/judge-throws-out-challenge-to-dwi-seizure-program.html.

84 *See* Melissa Quinn, *She Got the Car the Government Seized Back. But Her Fight Isn't Over*, DAILY SIGNAL (Jan. 3, 2017), http://dailysignal.com/2017/01/03/she-got-the-car-the-government-seized-back-but-her-fight-isnt-over/.

85 *Id.*

86 *See* N.M. STAT. ANN. § 31-27-4(A)(3) (2017). Such problems can be dealt with through careful drafting of the statute intended to eliminate or curtail civil forfeitures, of course. The state statute can explicitly deprive municipalities of the power to pass contrary legislation. *See* discussion *infra* Section II.C.

87 *See* N.M. STAT. ANN. § 31-27-4(A).

88 *See id.* § 31-27-6(F).

89 *See id.* § 31-27-6(C).

90 *See id.*

91 *See id.* § 30-31-34; Carpenter et al., *supra* note 2, at 108 ("It must then tie the property to that crime with clear and convincing evidence in criminal court."). The New Mexico statute also protects innocent owners by requiring that the state to prove that the owner of the property had actual knowledge of the criminal use of the property, and was not a bona fide purchaser. N.M. STAT. § 31-27-7.1(F).

doubt" standard that applies to the criminal conviction, but higher than the "preponderance of the evidence" standard that applies in a typical civil case.[92]

Other than the lower standard of proof, the forfeiture hearing will be carried out in a manner that reflects a criminal proceeding, at least when the owner of the property is the person convicted of the crime.[93] The defendant presumably enjoys many of the procedural protections she did in a criminal proceeding, as she will have the assistance of counsel, will get a jury trial, and will enjoy a legal presumption in her favor that the government must overcome by meeting its burden of proof.[94]

If, however, the property at issue does not belong to the defendant, the proceeding with respect to the owner resumes the character of a civil proceeding.[95] The owner of the property, in this case, has not been a party to the criminal trial and must make an appearance after the verdict, if he or she hopes to contest the forfeiture.[96] The jury will decide whether the property is sufficiently connected to the crime to make it subject to forfeiture,[97] and whether the owner of the property "had actual knowledge" of the crime giving rise to the forfeiture,[98] and will allow the forfeiture only if both elements are met.

If the owner was aware of the crime, and his property was used to facilitate the crime, then that guilt is sufficient to support the forfeiture.[99] Awareness of another's criminal behavior is not normally sufficient to support criminal sanctions or punishment,[100] and the owner escapes the proceeding without a criminal record. But even under New Mexico's sweeping forfeiture reform, the owner who did nothing wrong, but was merely aware of the crime being committed on or with his property, can be

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92 *See* N.M. STAT. ANN. § 31-27-4(A)(3) (2017). Florida has actually adopted the higher standard of proof of beyond a reasonable doubt standard in establishing that the crime was committed and the nexus between the crime and the property sought be seized. *See* FLA. STAT. § 932.704(8) (2017) ("Upon proof beyond a reasonable doubt that the contraband article was being used in violation of the Florida Contraband Forfeiture Act, the court shall order the seized property forfeited to the seizing law enforcement agency.").

93 *See* N.M. STAT. ANN. § 31-27-6(C)–(D).

94 *See id.*

95 *See id.* § 31-21-7.1.

96 *See* id.

97 *See id.* §§ 31-27-4(8), 31-27-6. In a forfeiture proceeding the right to a jury trial only exists when the property being seized is valued over $20,000; however, the discovery rules are still governed by the rules of criminal procedure for the state. *See id.* § 31-27-6(C)–(E).

98 *See* N.M. STAT. ANN. § 31-27-7.1(F).

99 *Id.*

100 Even the flexible crime of conspiracy requires more than awareness; the defendant must have agreed to the commission of the crime before he can be punished for conspiracy. *See* United States v. Kaplan, 836 F.3d 1199, 1212 (9th Cir. 2016) ("To prove a conspiracy . . . the government must establish: '(1) an agreement to engage in criminal activity, (2) one or more overt acts taken to implement the agreement, and (3) the requisite intent to commit the substantive crime.'" (quoting United States v. Sullivan, 522 F.3d 967, 976 (9th Cir. 2008))).

punished by the loss of that property.[101] And while the owner can hire counsel if he can afford it,[102] he has no right—as he would if he were a criminal defendant—to court-appointed counsel to defend his interests.[103] Again, this gives the proceeding a civil character.

B. *Prohibiting or Limiting Participation in Federal Forfeiture Operations*

Because federal forfeiture procedure remains generous to law enforcement, even post–CAFRA, a restriction on state-law-based forfeitures runs the risk of simply channeling the forfeitures onto the federal track, without meaningful abatement of the offensive law enforcement practices. It is not enough to trust the goodwill of local law enforcement; the financial incentives to continue with the forfeitures are too compelling. As already noted, the effectiveness of Montana's civil asset forfeiture reform is in doubt precisely because it failed to close this door.[104]

These incentives are not necessarily rooted in greed, despite the unfortunate appearances created in Las Cruces.[105] In some ways, however, the financial imperative is far more compelling than greed-based excesses, as it relates to maintaining adequate funding for basic operations. All these agencies face budget limitations, and if they, or their funders, have come to rely on forfeitures as a regular revenue source, cutting off that cash flow could be painful, if not crippling, for the law enforcement agencies involved.[106]

In any case, if the equitable sharing remains available as a source of much-needed funds, it will be very difficult to shut off that tap without explicit language in state legislation prohibiting such participation. The states, of course, have no power to supersede a federal statute that authorizes civil forfeiture, and need to continue—under principles of federalism and

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101 *See* N.M. STAT. ANN. § 31-27-7.1(F)(1).

102 A court may order the return of enough of the seized funds to enable the claimant to hire counsel, however. *See id.* § 31-27-4.1(F). Also, a public defender *may* represent the defendant at a forfeiture proceeding related to the criminal offence. *See id.* § 31-27-6(C) ("If the criminal defendant in the related criminal matter is represented by the public defender department, the chief public defender or the district public defender may authorize department representation of the defendant in the forfeiture proceeding.").

103 *Compare id.* § 31-27-4.1(F) (granting owners the potential to receive funds to obtain counsel), *with id.* § 31-27-6(C) (granting the criminal defendant the potential court-appointed counsel).

104 *See* discussion *supra* Section II.A.1.

105 *See* Nikolewski, *supra* note 70. The "we could be czars" comment was very bad publicity, but a flippant remark, even done in an effort to be humorous, should not be mistaken for the true motives.

106 *See* Carpenter et al., *supra* note 2, at 2 ("[W]hen the recession hit in the late 2000s, and governments at all levels faced significant budgetary shortfalls, law enforcement agencies had even more of an incentive to raise revenue through forfeiture."); *id.* at 29 ("[C]ities' equitable sharing payments had increased dramatically following cuts to police budgets.").

comity—to cooperate in joint federal–state law enforcement task forces and initiatives, some of which will result in federal forfeitures.[107] State law enforcement should not be permitted, much less compelled by state law, to act in a way that obstructs or frustrates federal authorities in carrying out their own mandate. State cooperation with federal authorities is important, and forfeiture reform should not be permitted to abrade that relationship.

While state law enforcement needs to cooperate with federal authorities in crime-fighting enterprises, which may or may not generate forfeitures permitted by federal law, the states can prohibit state and local law enforcement from participating in the spoils of the forfeiture operations.[108] The upshot is that although a state statute could never bar federal law enforcement authorities (the Drug Enforcement Administration; the Federal Bureau of Investigation; the Bureau of Alcohol, Tobacco, Firearms and Explosives; etc.) from carrying out civil forfeitures authorized under federal law, it could prevent local authorities from taking the kickback the federal equitable sharing program otherwise provides.[109]

1. Limitations on Equitable Sharing

a. *Barring Participation in Equitable Sharing Completely*

The District of Columbia's statute requires that all proceeds of forfeitures go into the city's general fund,[110] which violates the terms of the DOJ's equitable sharing program.[111] The DOJ will share the seized assets only if those assets go back to law enforcement, and the District of Columbia's statute prohibits that, rendering it ineligible for participation in

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107 *See* Michael J. Duffy, *A Drug War Funded with Drug Money: The Federal Civil Forfeiture Statute and Federalism*, 34 SUFFOLK U. L. REV. 511, 533–34 (2001).

108 *See* discussion *infra* Section II.C.

109 Many of the anecdotes about forfeiture abuse arise in the context of routine traffic stops, e.g., Terry-stops, when law enforcement officers can use just about any suspicious circumstance—including the fact that the individual stopped is carrying a large amount of cash—as an excuse to seize the property. Federal agents typically do not engage in this type of policing, and will be in a position to seize property only in less-common scenarios, such as big drug busts.

110 D.C. CODE § 41-310 (2017). The redirecting of forfeiture proceeds to the general fund goes a long way toward removing financial incentives for law enforcement agencies to overreach or abuse forfeitures. *See* discussion *infra* Section II.D.

111 *See* U.S. DEP'T OF JUSTICE, INTERIM POLICY GUIDANCE REGARDING THE USE OF EQUITABLE SHARING FUNDS 2 (2014), http://www.justice.gov/sites/default/files/criminal-afmls/legacy/2014/07/31/Use-ofShared-Funds-Policy-2014.pdf ("[E]quitably shared funds shall be used by law enforcement agencies for law enforcement purposes only."). Exceptions to this policy include providing budgetary support for community-based programs, such as drug treatment facilities, jobs skills programs, and crime prevention education. *See id.* at 2–5.

equitable sharing altogether.[112] To date, no state has been willing to go that far, but the District of Columbia's uncompromising, "no exceptions" approach has the advantage of avoiding the problem of the camel's nose or, alternatively stated, of the slippery slope.[113]

Of course, this is a weak bar to participation, as the DOJ could simply alter its own policy for equitable sharing, and the door would open again. The effectiveness of the District of Columbia's statutory bar on participation in equitable sharing is dependent on the DOJ maintaining the current parameters for such participation.

b. *Dollar-Value Thresholds*

Most states that have attempted to curtail participation in equitable sharing have stopped short of cutting it off entirely. The most common approach is to place a dollar threshold on seizures, allowing equitable sharing of the seized assets only if they exceed a statutory minimum. For example, Nebraska allows it for seizures over $25,000,[114] Maryland and New Mexico for seizures over $50,000,[115] and Ohio for seizures over $100,000.[116]

In these states, participation in equitable sharing *is* permitted when the seizure is large enough, and on one level, this makes sense. There can be no question that some of the most problematic abuses of forfeiture procedure lie with low-value seizures (cash amounts in the hundreds, or in the low thousands), which go uncontested because it costs more to challenge the forfeiture than to surrender the assets.[117] Some of the worst horror stories about forfeiture abuse come from police practices and policies—like those of

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112 *See* Jason Snead, *An Overview of Recent State-Level Forfeiture Reforms,* BACKGROUNDER (Aug. 23, 2016), http://www.heritage.org/crime-and-justice/report/overview-recent-state-level-forfeiture-reforms ("[T]he City Council directed that District law enforcement agencies deposit federal equitable sharing payments into the city's general fund beginning on October 1, 2018. This mandate runs directly afoul of equitable sharing rules that require money be retained and spent only by a law enforcement agency. It is expected that the move will force an end to property transfers at that time.").

113 The powerful financial incentives for law enforcement to continue their equitable sharing operations make the threat of the camel's nose particularly potent. *See* discussion *infra* Section II.D. The "camel's nose" refers to "[a] small, seemingly innocuous act or decision that will lead to much larger, more serious, and less desirable consequences down the line. The term refers to an alleged Arab proverb that if a camel is allowed to get its nose inside of a tent, it will be impossible to prevent the rest of it from entering." *A Camel's Nose (Under the Tent)*, FREE DICTIONARY, http://idioms.thefreedictionary.com/a+camel's+nose+(under+the+tent) (last visited Feb. 13, 2017).

114 NEB. REV. STAT. ANN. § 28-1603 (2017).

115 MD. CODE ANN., CRIM. PROC. § 12-212 (West 2017); N.M. STAT. ANN. § 31-27-11(A)(1) (2017).

116 OHIO REV. CODE ANN. § 2981.14(B) (West 2017).

117 *See* Michael van den Berg, *Proposing a Transaction Approach to Civil Forfeiture Reform*, 163 U. PA. L. REV. 867, 871 (2015) (arguing that increasing the state's transaction costs for forfeitures will rein in these abuses because it won't be worth it to pursue assets of modest value).

Tenaha, Texas—of seizing relatively small amounts of cash on flimsy grounds, trusting that the seizure is unlikely to face any legal challenge.[118]

However, high-value forfeitures may be problematic as well. In particular, the prospect of a large jackpot—landing an especially lucrative forfeiture—may create incentives that are too hard to resist, even when justice and equity suggest a more tempered approach. Worse, these thresholds could produce the opposite effect, encouraging law enforcement to seize far more than they otherwise would—no longer content to seize the cash, since they can't keep such a small amount, they may try to seize the car and the real property as well—as they try to make sure they seize enough to meet or clear the statutory minimal dollar threshold.

c. *Exceptions for Federal Actions*

Of the few jurisdictions that limit participation in equitable sharing, most have carved out exceptions to permit cooperation and support of federal law enforcement efforts.[119] The New Mexico law, for example, permits the transfer of seized assets to federal authorities not only if the $50,000 threshold is met, but also when (1) the underlying criminal conduct was "interstate in nature and sufficiently complex to justify the transfer," or (2) the property is forfeitable *only* under federal law.[120] But the New Mexico statute also provides that even in these circumstances, transfer to federal authorities is not permitted "if the transfer would circumvent the protections of the Forfeiture Act that would otherwise be available to a putative interest holder in the property."[121] This provision betrays the caution with which New Mexico approached its reform of forfeiture, undoubtedly aware that their reform could easily be swallowed up by the exceptions, particularly those allowing the state to piggyback on federal procedures.

Nebraska adopts a similar approach but with its own list of limitations. Specifically, it allows state officials to participate in equitable sharing only if the value threshold is met or if (1) a federal agent conducts the initial seizure, or (2) the owner is the subject of a federal prosecution.[122]

While federal–state cooperation is important, and while it may be entirely appropriate to ensure that state authorities can hand seized assets over to federal authorities, the policy basis for allowing state and local law

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118 *See* Elora Mukherjee, *Settlement Means No More Highway Robbery in Tenaha, Texas,* ACLU (Aug. 9, 2012, 11:22 AM), https://www.aclu.org/blog/settlement-means-no-more-highway-robbery-tenaha-texas; Stillman, *supra* note 1.

119 *See, e.g.*, MD. CODE ANN., CRIM. PROC. § 12-212 (permitting under $50,000 if the seizing authority transfers the property to a federal authority under a federal seizure warrant issued to take custody of assets); OHIO REV. CODE ANN. § 2981.14 (permitting under $100,000 if the property is being transferred or referred to a federal *criminal* forfeiture proceeding).

120 N.M. STAT. ANN. § 31-27-11(A)(1)–(3) (emphasis added).

121 *Id.* § 31-27-11(B).

122 NEB. REV. STAT. § 28-1603 (2017).

enforcement to profit from that cooperation is far less compelling. It is to those issues we turn next.

2. Redirecting the Kickback Received from the DOJ Under Equitable Sharing

Where state law does allow participation in the equitable sharing program, there is considerable risk that the negative effects of forfeiture will be perpetuated, despite reform of state law. As long as state authorities can profit from them, they are likely to prioritize such seizures at the expense of other, perhaps less lucrative, law enforcement priorities. Why should police utilize limited time and resources responding to a domestic violence call, when there is so much money to be made chasing down, or shaking down, suspected drug dealers who carry cash? And given the ease with which forfeitures can be effected under federal law, leaving the door open to equitable sharing will perpetuate the temptation to overreach and otherwise abuse the procedure. Legislation that allows continued participation in equitable sharing to any degree should, therefore, ensure that the proceeds of such participation go somewhere other than back to the law enforcement agency that carried out the seizure.

As noted above, the District of Columbia requires such funds to go into the city's general fund, which effectively disqualifies it from taking equitable sharing funds at all.[123] But a state could, presumably, if it believes it is important to preserve some participation in equitable sharing, redirect the shared assets to more general law enforcement funds,[124] or to specific "education" or "rehabilitation" funds that are less likely to create pernicious incentives for the officers or departments involved.

Presumably, the DOJ would like to compensate local law enforcement for their outlays and investment in federal law enforcement priorities. They may fear that state law enforcement will give federal initiatives low priority if there is "nothing in it for them." But such fears do a great injustice to local law enforcement, as they assume that absent a financial incentive, our peace officers are not otherwise motivated to engage meaningfully in fighting crime. And, as discussed *infra* Part II.D, if we do build a system around financial incentives, we can only distort the priorities of these same officers and their departments.

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123 D.C. CODE § 41-310(a)(2) (2017).

124 If, for example, the equitable sharing moneys went into a statewide fund that got spread over all the city and county law enforcement agencies in the state, the payoff for any particular forfeiture would be pretty low for the particular agency involved. This type of wealth-spreading might satisfy the DOJ's equitable sharing rules without over-incentivizing any particular seizure.

C. *Superseding Local Ordinances*

As already noted, one of the great lessons from New Mexico's statute is that changing state law may not necessarily limit the reach of local jurisdictions, including municipalities, to carry out civil forfeitures.[125] That state's bold moves to walk back civil forfeitures have failed to curtail the practice as intended, as local authorities claim that municipal ordinances provide adequate authority for them to continue the practice. While these claims have yet to be tested in court,[126] it should be simple enough for state legislators to shut down this loophole in the text of the statute itself. But to date, none have done so.

D. *Ensuring That Law Enforcement Agencies Don't Profit from Forfeitures*

Mentioned above in the context of equitable sharing, the point can and should be generalized: assets seized, whether under federal *or* state law, should not be channeled back to the agencies that carry out the seizures. If local law enforcement can benefit from forfeitures, the incentives are sufficiently powerful that they may threaten to undermine any and all other reforms.

Ironically, the provisions for seizing the proceeds of crime—such as those under RICO—have been justified as "taking the profit out of crime."[127] Prosecutors have been quick to point out that deterring criminal behavior is very difficult as long as such behavior is highly profitable.[128] DOJ officials testified before Congress in 1997:

> The attractiveness of asset forfeiture and a reason for its growth in the United States is very simple: it takes the profit out of crime. Asset forfeiture is a program that cuts to the heart of

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125 *See* discussion *supra* Section II.A.2.

126 The challenges that have been brought have been either dismissed for lack of standing or settled short of a determination on the merits. *See* Boetel, *supra* note 83; Quinn, *supra* note 84.

127 *See* Douglas Leff, *Money Laundering and Asset Forfeiture: Taking the Profit out of Crime*, 81 FBI L. ENFORCEMENT BULL. 23, 31 (2012).

128 *See* H.R. REP. NO. 106-192, at 5 (1999) (statement of Stefan Cassella, Assistant Chief, Asset Forfeiture and Money Laundering Section, Criminal Division, U.S. Dep't of Justice) ("The government . . . uses forfeiture to take the profit out of crime . . . . Many criminals fear the loss of their vacation homes, fancy cars, businesses and bloated bank accounts far more than the prospect of a jail sentence." (quoting *Civil Asset Forfeiture Reform Act: Hearing on H.R. 1916 Before the H. Comm. on the Judiciary*, 105th Cong. 112 (1997))); *see also* LEVY, *supra* note 24, at 76 (1996) (noting that in passing the forfeiture provisions in RICO, Congress was strongly motivated by its belief that they would "strike at the profits of organized crime and wipe out its hold on legitimate organizations").

> most criminal activity, dismantling criminal syndicates in a way that simple incarceration never could.[129]

Similar arguments were pitched to the previous Congress: "Many criminals fear the loss of their vacation homes, fancy cars, businesses and bloated bank accounts far more than the prospect of a jail sentence."[130] By the same token, if we hope to contain overly aggressive law enforcement agencies in their pursuit of forfeitures, it would be wise, perhaps necessary, to take the profit out of forfeitures.

1. Where Should the Seized Assets Go?

If the seized assets do not go to the law enforcement agency that seized them, where should they go? Various jurisdictions have taken different approaches. Some—including the District of Columbia, New Mexico, and New Hampshire—have provided that the seized assets should go into the city's or state's general fund, rather than law enforcement's own coffers.[131]

North Carolina has not had serious problems with forfeitures under state law,[132] perhaps because its constitution provides that "[p]roceeds of all penalties and forfeitures . . . [must] be faithfully appropriated and used exclusively for maintaining free public schools."[133] It should not be surprising that the problems North Carolina has experienced with civil forfeitures have come not from state authorized procedure but from the invocation of federal authority under the equitable sharing program.[134]

Indiana's constitution similarly requires that seized assets be applied to public schools but leaves a loophole that allows law enforcement to first deduct their investigation costs before depositing the rest into the school fund.[135] As a result, some local agencies have withheld most if not all the assets seized;[136] Marion County, the largest county in the state, reportedly has

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129 *Civil Asset Forfeiture Reform Act: Hearing Before the H. Comm. on the Judiciary on H.R. 1916*, 104th Cong. 237 (1996) (statement of Jan P. Blanton, Director, Executive Office for Asset Forfeiture, Dep't of Treasury).

130 H.R. REP. NO. 105-358, pt. 1, at 23 (1997) (quoting *Civil Asset Forfeiture Reform Act: Hearing Before the H. Comm. on the Judiciary on H.R. 1916*, 105th Cong. 112 (1997) (statement of Stefan Cassella, Assistant Chief, Asset Forfeiture and Money Laundering Section, Criminal Division, U.S. Dep't of Justice)).

131 D.C. CODE § 41-310(a)(2) (2017); N.H. REV STAT. § 318-B:17-b (2017); N.M. STAT. § 31-27-7(b) (2017).

132 *See* Jon Guze, *Good News on Civil Asset Forfeiture*, CAROLINA J. (Jan. 27, 2015, 12:00 AM), https://www.carolinajournal.com/opinion-article/good-news-on-civil-asset-forfeiture/.

133 N.C. CONST. art. IX, § 7(a).

134 Guze, *supra* note 132.

135 IND. CONST. art. 8, § 2; IND. CODE § 34-6-2-73 (2017).

136 *See, e.g.*, Pat Munsey, *Prosecutor Sued over Forfeiture Practices*, KOKOMO PERSP. (Dec. 2, 2010), http://kokomoperspective.com/news/local_news/prosecutor-sued-over-forfeiture-

exploited this loophole to keep all forfeiture proceeds in the hands of local law enforcement.[137]

Some states designate specially identified repositories for the assets seized, including special funds related to law enforcement, such as Idaho's "drug and driving under the influence donation fund."[138] Maryland law suggests that forfeiture revenues go into the general fund but then requires that 20 percent of them be spent on drug abuse and treatment programs.[139] Nebraska allows seized assets to be kept for "official use"—specifically to enforce their child pornography statute—but for no longer than one year.[140] Beyond that, proceeds from forfeiture are deposited with the county treasurer, with half the funds going to the County Drug Law Enforcement and Education Fund and the other half going to public schools.[141]

To the extent that forfeitures can be used to cover investigation costs, or go into special funds that support law enforcement in some way, this approach still runs the risk of incentivizing police. Police and sheriffs' departments may be highly motivated to get reimbursed for expensive cases they have undertaken and be aggressive about seizing assets needed to cover those costs. Moreover, to the extent that the surplus is put into "enforcement donation funds," the law enforcement agency may still benefit indirectly from the assets seized. Any contribution that eases budgetary pressures on law enforcement (e.g., to include donation funds for the enforcement of DUI or drug laws) may liberate other funds that the agency could spend on competing priorities. In such circumstances, the seized assets remain "found money."

2. Taking the Profit out of Forfeitures Does Not Impair Their Effectiveness

Of critical importance here is the fact that whatever legitimate law enforcement purposes are served by civil forfeitures, they are in no way undermined by this reform. Law enforcement will push back on most of the proposed reforms, arguing that they need this tool—civil asset forfeiture—to fight crime effectively. No doubt any reform that makes civil asset forfeiture more difficult—whether imposing higher burdens of proof or taking away

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practices/article_969e2ff2-fd8d-11df-981f-001cc4c002e0.html ("The complaint states, 'Plaintiff alleges that millions of dollars have been kept by law enforcement agencies, prosecutors and private attorneys hired by prosecutors to file civil forfeiture actions, money that was required to be paid into the common school fund.'").

137 *See* Carpenter et al., *supra* note 2, at 16.

138 IDAHO CODE § 37-2744 (d)(3)(D)(IV)(ii)(2)(C), (e)(2)(C) (2017).

139 MD. CODE ANN., CRIM. PROC. §§ 12-403, 405, 503 (2017).

140 NEB. REV. STAT. §§ 28-1439.02, 28-1601(5)(b) (2017).

141 *Id.* § 28-1439.02.

the ability to just hand the assets to the federal authorities—will blunt the instrument's impact in combatting crime.

The pushback against this reform—redirecting the seized assets—in contrast, is *not* motivated by the need to preserve an officer's options when performing an investigation or executing an arrest. Resistance to this reform is purely mercenary. Police departments want to be able to keep this money because they have come to depend on it and because they can use it for things they could never spend their regular budget on.[142] Columbia, Missouri Police Chief Kenneth M. Burton explained the expenditure of forfeiture funds this way:

> 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 heaven—it gets you a toy or something that you need is the way that we typically look at it to be perfectly honest.[143]

No doubt this influx of resources is a boon to law enforcement and to the quality of life for the officers in the trenches. But to the extent it encourages police to overreach in seizing assets on questionable or marginal grounds, it comes at a very heavy price in terms of the rule of law. Even the distortion of departmental priorities in favor of maximizing assets seized is a corruption of law enforcement's proper role. Even if police resist the temptation to let the profit motive drive their policies and actions, the fact that they do profit from the seizures sullies their image and reputation. Redirecting those assets into the general fund, or to public schools, or to *anywhere* else will remove the temptation while protecting law enforcement's public image and inspiring the respect that necessarily follows.

E. *Requiring a Criminal Conviction*

As discussed above, New Mexico claims credit for eliminating civil forfeiture altogether,[144] while it is clear that some civil aspects of the procedure remain.[145] The requirement of a criminal conviction before a civil forfeiture can move forward, however, is a powerful check on a state's civil forfeiture power. Yet it is important to avoid oversimplifying the issue, because the person convicted of the crime is not necessarily the owner of the seized property.

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142 *See* Carpenter et al., *supra* note 2, at 15.

143 *Id.*

144 N.M. STAT. ANN. § 31-27-2(A)(6) (2017) ("The purposes of the Forfeiture Act are to . . . ensure that only criminal forfeiture is allowed in this state.").

145 *See* discussion *supra* Section II.A.3.

1. A Criminal Conviction of the Property Owner

One approach to forfeiture reform—adopted in Minnesota,[146] Montana,[147] and Nebraska[148]—is to require that the property owner be convicted of the crime before her property can be forfeited.[149] This approach tracks criminal forfeiture closely, where the forfeiture of assets becomes part of the punishment for the crime, and is similar in thrust to the idea of eliminating civil forfeitures altogether. It is an appealing approach, because it forecloses the possibility that innocent people will lose their property to forfeiture or that property will be seized without first affording the owner the full array of procedural protections occasioned by the Fourth, Fifth, and Sixth Amendments to the Constitution. On the other hand, it dramatically impairs the use of civil forfeiture as a crime-fighting tool.

Moreover, it creates certain tensions with the underlying concept of what a civil forfeiture is and what justifies the seizure. If the starting point of the civil forfeiture is that the "property is guilty," then it shouldn't matter who the owner is or whether that owner is guilty of anything. The Supreme Court has so held, on hard facts, allowing forfeitures of vehicles although completely and demonstrably innocent parties hold property interests in the vehicle.[150] These tensions are explored *infra* Section II.G.1.

2. A Criminal Conviction of Someone, Not Necessarily the Owner

If the state decides to require a criminal conviction before the forfeiture is allowed, that may be a step forward, but the constitutional protections embedded in our criminal procedure will protect the owner of seized property only if that owner is the person charged and ultimately convicted of the crime.[151] When the owner is *not* the person convicted, there are separate issues that remain to be litigated by this owner (who was not a party to the criminal proceeding), including proof of the nexus between the property and

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146 MINN. STAT. § 609.5313 (2017).

147 MONT. CODE ANN. §§ 44-12-102(1), 44-12-207 (West 2017).

148 NEB. REV. STAT. § 28-1601(1)(a) (2017). Also, forfeiture must be specifically pled within criminal charge. *Id.* § 28-1602(1).

149 Other jurisdictions have moved this direction, but have stopped short of requiring criminal convictions for *all* forfeitures. For instance, in the District of Columbia, there is no need for a criminal conviction unless the property being seized is someone's primary residence. D.C. CODE § 41-308(d)(4) (2017).

150 *See* Bennis v. Michigan, 516 U.S. 442, 453 (1996); J.W. Goldsmith, Jr.–Grant Co. v. United States, 254 U.S. 505, 513 (1921) (upholding the forfeiture of a vehicle used to run bootleg liquor over the protests of the undisputedly innocent note holder, who had a security interest in the car).

151 *Cf.* Pimentel, *supra* note 4, at 4 ("Because the procedural standards for criminal conviction—including burdens of proof and Fourth (seizure), Fifth (due process), and Sixth (right to counsel) Amendment protections—are so high, [criminal] forfeitures have not been controversial.").

the crime and, to the extent a statute makes it relevant, the level of culpability of the owner.[152] These issues will be addressed in turn.

3. Allowing Exceptions to the Criminal Conviction Requirement

There is a dramatic difference between requiring proof that a crime took place and requiring a criminal conviction of the owner of the property, or of anyone else. If the police find drugs and a large quantity of cash in the back seat of a taxi, the police may be quite confident that a crime occurred but may have no idea who committed it. They may be able prove, even by the highest standards of proof, that *someone* possessed and, perhaps, distributed the controlled substance, but they have only the most speculative basis for believing that the owner of the taxi is guilty of that crime or any other. Far more likely, the culprit was one of the taxi's customers, whom it may be impossible to find and prosecute. The problem is compounded when the suspect is a fugitive, or is outside the country, beyond the reach of local law enforcement. In this situation, law enforcement will be unable to secure the criminal conviction necessary for a forfeiture of the cash and drug paraphernalia found in the taxi.

Florida's statute provides a nice solution to this problem. While Florida does not require a criminal conviction, it does require an arrest before a civil forfeiture can be executed.[153] But recognizing circumstances in which an arrest may not be possible, Florida carves out a couple of exceptions, identifying circumstances when forfeitures may still be executed absent the arrest:

> (1) The owner of the property cannot be identified after a diligent search, or the person in possession of the property denies ownership and the owner of the property cannot be identified by means that are available to the employee or agent of the seizing agency at the time of the seizure.
>
> (2) The owner of the property is a fugitive from justice or is deceased.[154]

Such a provision could easily be applied to a conviction requirement for a forfeiture, when it is obvious a crime has been committed but the suspect (1) cannot be identified, (2) is a fugitive, or (3) is deceased.[155]

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152 *See id.* at 26–27 (highlighting issues that forfeiture poses uniquely to innocent owners).

153 FLA. STAT. § 932.703 (2017).

154 *Id.*

155 Pimentel, *supra* note 4, at 5.

F. *The Nexus Between the Property and the Crime*

The fact that a crime was committed—even if proved beyond a reasonable doubt and even if the owner is the person convicted—does not itself justify the forfeiture of any property in the vicinity. The state should have to prove that the property was either (1) proceeds of the criminal activity or (2) utilized in facilitating the commission of the crime. Yet there appears to be little to stop law enforcement from scooping up anything of value at the time of an arrest and treating it as forfeitable unless and until the forfeiture is challenged. This is another species of overreach in forfeiture practice: not simply seizing property on flimsy evidence of wrongdoing, but of seizing too much property even when the evidence of wrongdoing is strong.

A particularly egregious example comes from a case in Michigan in which a self-described "soccer mom" was subjected to a drug raid, prompted by her status as a registered provider of medical marijuana.[156] The invasive raid included the seizure of an astonishing array of valuables from her home:

> "[T]hey proceeded to take every belonging in my house. And when I say every belonging, I mean every belonging." That included, she said, her husband's tools, the lawnmower and a bicycle. They took credit card statements, tax returns, and the public assistance card Shattuck used to help feed her family. They even took $90 worth of birthday money out of her daughter's "pink bedroom," as it's listed in a summary of seized property compiled by the police.
>
> "My children's artwork was on the floor with boot-prints on it," she says, recalling what she saw when she returned home. She testified that they hung her lingerie from the ceiling fans. The men took her vehicles, which she said included the car seats for the smaller children.[157]

A similar incident, spelled out in a legislative hearing in Michigan, depicts the sweep of such seizures. "A medical marijuana patient, [Ginnifer] Hency's home was raided and officers confiscated thousands of dollars of property, including televisions, her children's iPads, and even a vibrator, ten months earlier. 'Why a ladder? Why my vibrator? I don't know either. Why TVs?' Hency told a house judiciary meeting last May [2015]."[158] Although Hency was cleared by a judge, she was still trying to get her possessions back ten months later.[159]

Indeed, the fact that the state obtains a criminal conviction does not speak to the question of whether the property seized was sufficiently connected to that crime to warrant seizure. The state may need to articulate

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156 Christopher Ingraham, *Why Armed Drug Cops Took 'Every Belonging' from a Michigan Soccer Mom*, WASH. POST (June 3, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/06/03/why-armed-drug-cops-took-every-belonging-from-a-michigan-soccer-mom/?utm_term=.3b0f8113ac78.

157 *Id.*

158 Sean Allocca, *How States Are Curbing Millions of Dollars in Police Seizures*, FORENSIC MAG. (Jan. 22, 2016, 1:05 PM), https://www.forensicmag.com/article/2016/01/how-states-are-curbing-millions-dollars-police-seizures.

159 *Id.*

specifically how the owner's rights may be protected in the making of such a determination, in (1) allocating the burden of proving such a connection to the government, (2) establishing a sufficiently high standard of proof,[160] and (3) ensuring that the claimant had adequate access to counsel in what is certainly a complex legal proceeding, etc.[161]

G. *Degree of Culpability (or Innocence) of the Owner*

A separate concern deals with the level of culpability required of the owner. Historically, of course, no culpability was required; it was enough that the property was guilty, and that guilt could be fully demonstrated by showing that a crime had been committed and that there was a nexus between the property and the crime.[162]

But that is not enough to satisfy modern sensibilities about justice in these cases. Indeed, concern for entirely innocent owners is a critical impetus for the forfeiture reform efforts that have developed and that continue to develop across America. CAFRA, the federal reform in 2000, created a statutory "innocent owner" defense to forfeiture, although it placed the burden of proving innocence on the owner asserting the defense.[163] The House Judiciary Committee stated in its report that such protection for innocent owners was "required by fundamental fairness."[164]

Consistent with this thinking, most states that have taken up forfeiture reform have introduced some kind of protection for innocent owners.[165] But the provisions vary widely, and the question remains as to how much owner culpability must be shown before it is fair to seize the property.

Some jurisdictions (e.g., New Hampshire and D.C.) protect owners who *never consented* to the illegal use of their property.[166] Others (e.g., Maryland,

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160 The standard of proof for establishing that nexus is discussed *infra* Section II.H.2. This offers little comfort, of course, to Mrs. Bennis, who has been deprived of her car based on a third party's actions, taken without her consent or even her knowledge. She was, apparently and perhaps obviously, entirely innocent in the affair—her husband's unduly public engagement of a prostitute in the family car—that led to the seizure of the car she had a half interest in. *See generally* Bennis v. Michigan, 516 U.S. 442 (1996).

161 New Mexico has responded to most of these concerns, providing, as described above, for a hearing after the criminal case, before the same jury, on the issue of forfeiture, and requiring the government to prove the nexus between the property and the crime by clear and convincing evidence. *See* discussion *supra* Section II.A.3.

162 *See* Pimentel, *supra* note 4, at 8.

163 *See id.* at 19.

164 H.R. REP. NO. 105-358, at 31.

165 *See* Carpenter et al., *supra* note 2, at 18.

166 D.C. CODE § 41-302(b) (2017); N.H. REV. STAT. ANN. § 318-B:17-b(III) (2017). Specifically, the District of Columbia requires both consent *and* actual knowledge. D.C. CODE § 41-302(b). The D.C. statute muddles this standard, however, by stating willful blindness as an alternative, but without making it clear whether willful blindness can substitute for consent as well, or only for actual knowledge: "No property shall be subject to forfeiture by reason of an act or omission committed or omitted without the

Montana, Nebraska, New Mexico, Ohio, and Minnesota) provide that lack of consent is not enough and extend innocent owner protection only if the owner is *without actual knowledge* of the illegal use,[167] although some (e.g., D.C. and Minnesota) will protect the owner who has actual knowledge but *takes reasonable steps* to prevent the illegal use.[168] Still others (e.g., Florida) will deny the defense to owners who "*should have known*" that their property was being used illegally.[169] Some (e.g., D.C., Maryland, New Mexico, Michigan, Minnesota, and Florida) single out holders of security interests in property and grant them special protections.[170]

Minnesota affords protection against forfeiture in a variety of other owner innocence circumstances.[171] Landlords, for example, will not lose their property because of the actions of tenants, as long as landlords cooperate with authorities either by evicting the tenant or by assigning the right of eviction to law enforcement.[172] Parents of the wrongdoer will not lose their real property because of criminal activity of their child on the property, unless the parents "knowingly acquiesce" in the activity.[173] Common carriers are similarly protected, as long as the carrier does not consent to, or is not privy to, the illegal use.[174] Similarly, the District of Columbia also affords an affirmative defense if an owner can prove, by a preponderance of the evidence, that he either took reasonable action to prevent the commission of the crime, as noted above,[175] or his failure to do so was "because [he]

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actual knowledge and consent of the owner, unless the owner was willfully blind to the knowledge of the act or omission." *Id.*

167 MD. CODE, CRIM. PROC. § 12-103(a)-(b) (2017); MINN. STAT. § 609.5311(3)(d) (2017); MONT. CODE §44-12-21 (West 2017); NEB. REV. STAT. § 28-1601(3) (2017); N.M. STAT. ANN. § 31-27-7.1(a)–(g) (2017); OHIO REV. CODE ANN. § 2981.04(E) (West 2017). Vehicles seizures in Maryland are harder to do, as the government must show that the owner consented to or is privy to the drug violation. MD. CODE, CRIM. PROC. § 12-205.

168 D.C. CODE § 41-308(f)(1); MINN. STAT. § 609.5311(3)(g).

169 FLA. STAT. § 932.703(7) (2017). Interestingly, if the owner is lienholder the state must prove "*actual knowledge*, at the time the lien was made, that the property was employed or likely to be employed in criminal activity. *Id.* § 932.703(7)(b). This is much higher than the "*should have known*" standard for other types of property owners. Florida also protects the rights of innocent co-owners by giving them the right to buy out the forfeitable interest of co-owner. *Id.* § 932.703.

170 D.C. CODE § 41-308(2); FLA. STAT. § 932.703(7)(b); MD. CODE, CRIM. PROC. § 12-402(c); MICH. COMP. LAWS § 333.7523(3) (2017); MINN. STAT. §. 609.5311(3)(e); N.M. STAT. ANN. § 31-27-10(a)(1).

171 MINN. STAT. § 609.5311.

172 *Id.* § 609.5317.

173 *Id.* § 609.5311(3)(g). A provision like this would have protected the Lopes family from losing their home, simply because their son, over their objections, planted a marijuana patch in the backyard. *See* Schneider & Flaherty, *supra* note 35.

174 MINN. STAT. § 609.5311(3)(c).

175 D.C. CODE § 41-308(f)(1).

reasonably believed to have done so would have placed [him] or a third party in physical danger."[176]

Some states, like the federal government post-CAFRA, spell out protections for people who acquire forfeitable property after the fact. Under CAFRA, the definition of an "innocent owner" includes "one who, at the time he acquired the interest in the property, was a bona fide purchaser or seller for value and [was] reasonably without cause to believe that the property was subject to forfeiture."[177] Ohio protects "bona fide purchaser[s] for value . . . reasonably without cause to believe that [the property] was subject to forfeiture."[178] In the District of Columbia, the owner who acquires the property without reason to know it was subject to forfeiture enjoys a rebuttable presumption of nonforfeitability.[179]

All of these provisions appear to be reasonable and/or justifiable, in terms of protecting innocent parties from the otherwise indiscriminate reach of civil asset forfeiture. Some are stronger and more effective than others, particularly when one considers the allocation of the burden of proof and the standard of proof to be applied, which will be discussed *infra* Section II.H. Of particular concern, however, are the many states that contain no particular protection for innocent owners. Because innocent owner protections cannot be found in the common law or in equitable precedent, nor in the guarantees of the due process clauses or takings clauses of the Fifth and Fourteenth Amendments,[180] the absence of a state statute can be fatal to the claim of a genuinely innocent person, deprived of her property at the hands of overzealous or simply self-interested law enforcement.

1. Dissonance in the Legal Theories

To the extent that states want to preserve the concept and structure of civil forfeiture, but condition it on the proven criminal conduct of the owner, they blur the line between civil and criminal forfeitures and create tension with the doctrinal foundation for civil forfeiture. Conceptually, if the process is in rem, then what matters is the guilt of the property, and the guilt of the owner is irrelevant. The owner, though entitled to at least constructive notice of the seizure, is not technically even a party to the proceeding unless and

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176 *Id.*

177 H.R. REP. NO. 106-192, at 16 (1999).

178 OHIO REV. CODE ANN. § 2981.04(E)(1)(d)(ii) (West 2017).

179 D.C. CODE § 41-308(g). Specifically, the District of Columbia provides a rebuttable presumption that the property is not forfeitable to owners who acquired their interest in the property after the commission of the forfeitable offense, and the owner did not know or have reason to know the property was forfeitable. *Id.* § 41-308(g)(1). The government may rebut this presumption by showing by clear and convincing evidence that the property was proceeds of the forfeitable offence and the owner did not provide fair consideration for his interest in the property. *Id.* § 41-308(g)(2).

180 *See* Bennis v. Michigan, 516 U.S. 442, 446 (1996).

until she intervenes, by filing a claim to the property, and thereby challenging the forfeiture.

At the same time, there can be little doubt that the owner of the property suffers the loss of a legal interest when the assets are forfeited, even if her right to guilty property is not constitutionally protected.[181] And Congress, by creating an "innocent owner" exception to federal forfeitures in 2000,[182] albeit one that puts the burden on the owner to prove her own innocence, has already pierced the guilty property fiction anyway. That is, CAFRA acknowledges that the innocence of the owner may be a circumstance of sufficiently compelling import that it supersedes the guilt of the property and blocks the forfeiture.[183]

On the other hand, if criminal conviction is required of *someone*, but not necessarily the owner—meaning the state must prove beyond a reasonable doubt that the crime occurred but not that the owner bears guilt—there is no tension in the doctrinal foundation for the forfeiture.

Of course, the pure theory of guilty property is a legal fiction today. It makes little sense to punish property for its involvement in crime: property cannot be deterred from future criminal activity and cannot be punished in any meaningful way (even the seizure of property from its owner punishes only the owner and not the property).[184] The innocent owner defense, therefore, is important as an acknowledgement that it is really the owner being punished and that such punishment is indefensible unless the owner bears some guilt.

2. Other Crime-Specific Variations

Some states have carved out exceptions for certain types of crimes, generally banning civil forfeitures otherwise.[185] Nebraska eliminated state-law-based civil forfeitures absent a criminal conviction but went one step

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181 *See id.* at 443; J.W. Goldsmith, Jr.–Grant Co. v. United States, 254 U.S. 505, 509–10 (1921)..

182 18 U.S.C. § 983(d) (2012 & Supp. III 2016).

183 *Id.*

184 This conclusion follows from the practice of repurposing the seized property. The "goring ox," often cited as one of the earliest examples of in rem forfeiture, is a counterexample. *See, e.g.*, Jacob J. Finkelstein, *The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty*, 46 TEMP. L.Q. 169, 180–81 (1973). Under Mosaic Law, the ox who killed a man was to be killed and its meat "not . . . eaten." *Exodus* 21:28 (King James) ("If an ox gore a man or a woman, that they die: the ox shall be stoned and his flesh shall not be eaten."). Today, if an ox were used in the commission of an assault, the forfeiture would not result in the killing of the ox and the wasting of its meat. Rather, the ox would be seized and sold, with law enforcement reaping the proceeds of sale, and the new owner appropriating the still-valuable ox.

185 Several states explicitly list what offenses can subject property to a forfeiture. For instance, Ohio defines "offenses subject to forfeiture proceeds" as a violation of one of the listed criminal offenses within the definition. *See* OHIO REV. CODE ANN. § 2927.21(A)(1) (West 2017).

further to limit the remaining criminal forfeitures to cases involving drugs, child pornography, or illegal gambling.[186] It is not entirely clear why forfeitures should be a meaningful crime-fighting tool, or, perhaps revenue source, for some crimes but not others. One possibility is that certain types of crimes are likely to result in "proceeds" forfeitures, as opposed to "facilitating property" forfeitures, and as already noted, proceeds forfeitures have a far more compelling policy foundation. Indeed, drug and gambling offenses (two of the crime categories singled out by Nebraska's statute[187]) are likely to be cash-intensive enterprises—taking the profit out of them may be a high priority. But any proceeds forfeiture will take the profit out of crime, so this distinction, discussed *infra* Section II.K., may be a more meaningful distinction that one based on the particular types of crime.

H. *Shifting and Raising Burdens of Proof*

As discussed above, historically, an in rem civil forfeiture required only probable cause, at which point the burden of proving the property's innocence shifted to the owner/claimant.[188] That means, of course, that there was no need to prove—by the higher standards that typically apply in criminal law—that a crime had been committed. Prosecutors who lacked sufficient evidence to make charges stick to any individual could nonetheless pursue the assets and seize them on a comparatively tenuous evidentiary basis. Unless the owner could prove by a preponderance of the evidence that the property was innocent, the forfeiture was upheld.

This approach created an unseemly situation in which innocent property owners bear the onus of proving their own innocence or, more precisely, their property's innocence,[189] to retain what is rightfully theirs. Accordingly, forfeiture reform statutes sometimes shift the burden to the state to show that the property is forfeitable, rather than to allow the forfeiture absent proof of nonforfeitability by the owner.

1. Shifting the Burden from the Owner to the State

Congress, when it began debating CAFRA, attempted to lay a far heavier burden on the government seeking to seize assets. CAFRA succeeded

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186 NEB. REV. STAT. ANN. § 28-1601(1) (2017). Similarly, in the District of Columbia "[o]nly property designated as forfeitable pursuant to a forfeitable offense shall be subject to forfeiture." D.C. CODE § 41-302(a) (2017); *see also* OHIO REV. CODE ANN. § 2927.21(A)(1) (listing all offenses subject to forfeiture proceedings).

187 NEB. REV. STAT. ANN. § 28-1601(1) (2017).

188 *See* discussion *supra* Section I.B.2.

189 As discussed above, statutorily created "innocent owner" defenses are now recognized in the federal system, and in some state systems as well. *See* discussion *supra* Section II.G.2.

in shifting, de jure anyway, the burden of proof to the government.[190] This federal legislation initially proposed a higher, "clear and convincing" standard of proof, by which the government would have to prove forfeitability before the seizure could be upheld.[191] Only later was the bill amended to adopt a "preponderance of the evidence" standard,[192] one of the changes made to secure unanimous approval of CAFRA in the Senate.[193]

This shifting of the burden of proof has had a far more modest impact than was, perhaps, initially envisioned, in large part because unless the forfeiture is contested—which occurs in only a fraction (estimated at 12–20 percent) of forfeiture cases carried out in federal court[194]—the proceeding bypasses the hearing process and the government is never actually put to its proof. In other words, for up to 88 percent of forfeitures, the proportion that go uncontested, the government still succeeds in seizing the assets based on nothing more than probable cause.[195] Indeed, an "administrative forfeiture" like this, carried out without judicial supervision, can be executed without any showing at all for law enforcement bold enough to gamble on the owner's timidity about challenging it.

Owners' reluctance to contest forfeitures may be explained by a variety of factors that may have more to do with the expense of legal process,[196] or with fear of incriminating oneself or others, in a proceeding perceived to be stacked in favor of law enforcement anyway[197] than with the merits of the forfeiture claim. Recognizing these concerns, states have enacted additional protections for property owners. Specifically, regarding fear of incrimination, Maryland excludes testimony given during a forfeiture proceeding pertaining to ownership of the seized property from being used in a subsequent criminal prosecution.[198] To the extent states require a criminal conviction before a forfeiture can take place, they effectively require that the

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190 18 U.S.C. § 983(c)(1) (2012 & Supp. III 2016).

191 146 CONG. REC. H2049 (daily ed. Apr. 11, 2000) (statement of Rep. Hyde). Rep. Hyde cautioned that "Congress remains extremely dubious as to the probative value of certain types of evidence in meeting this standard," giving examples from cases: carrying large quantities of cash, purchasing airline tickets with cash, dog-alerts on cash (absent evidence how or when the cash became tainted with drugs), and matching a drug courier profile. *Id.* at H2049–50.

192 *Id.* at H2049.

193 The year 2000 being an election year, it was deemed particularly important that CAFRA secure unanimous support, presumably in an effort to avoid creating a campaign issue against anyone running for reelection.

194 *See* Carpenter et al., *supra* note 2, at 5 (stating that "88 percent" of civil forfeitures carried out by the DOJ were done "administratively"); *see also* Cassella, *supra* note 55 (estimating that 80 percent of federal forfeitures are "administrative" forfeitures, which can be carried out without a judge ever approving them, or even seeing them).

195 *See* Cassella, *supra* note 37, at 15.

196 *See* Pimentel, *supra* note 4, at 31.

197 *See id.* at 31–32.

198 MD. CODE, CRIM. PROC. § 12-313 (2017). The statute does provide an exception for impeachment at the criminal trial. *Id.*

civil forfeiture proceeding happen after the criminal trial, easing concerns about self-incrimination at the forfeiture hearing.[199]

No state currently provides counsel to property owners subject to forfeiture proceedings.[200] Nevertheless, several states have enacted laws to help property owners obtain counsel. For instance, in Montana, the property subject can be released if "the property is the only reasonable means for the claimant to pay the costs of legal representation in the forfeiture or criminal proceeding."[201] New Mexico and the District of Columbia have enacted similar provisions.[202] Florida does not allow the seized property to be returned to pay for a lawyer but articulates circumstances in which a property owner who successfully contests a forfeiture can claim attorney's fees.[203]

Nonetheless, the reform requiring that the government bear the ultimate burden of proof in state court forfeiture proceedings is salutary; indeed, it functions as the state's formal recognition of the property rights of its citizens. And for those who do choose to challenge the forfeiture, the fact that the ultimate burden of proof rests with the government may make it considerably easier to prevail.

2. Higher Standards of Proof

States need to be explicit, when raising the standard of proof, about what they are demanding proof of. It depends, in part, on what the state is trying to accomplish. If it is trying to protect innocent owners from having their property seized, it will be important to require proof that the property owner was indeed involved in the criminal activity that justifies the seizure. If the state is clinging to the hoary tradition of in rem civil forfeitures, where the only thing that matters is the guilt of the property, there should be no need to demand proof that the owner is guilty of wrongdoing. Rather the emphasis should be on proving first that a crime was committed, and second that the property was indeed connected to the crime—either proceeds of the crime or property used to facilitate the crime. Whatever the state is required to prove, it may be a meaningful reform to increase the burden of proof the state must

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199 *See* discussion *supra* Section II.A.3.

200 However, New Mexico states that a public defender *may* represent a criminal defendant at a forfeiture proceeding related to a criminal offense. N.M. STAT. ANN. § 31-27-6(C) (2017).

201 MONT. CODE § 44-12-209(5)(c) (West 2017).

202 D.C. CODE § 41-306(g)(1) (2017) ("If the owner establishes that there is probable cause that the *seized currency* is necessary to assist the owner in securing counsel in a pending criminal matter related to the seizure or to meet the basic necessities of life, including the purchase of food, payment of utilities, provision of shelter, transportation costs, support of the owner's family, or operation of a lawful business, the portion of the currency necessary for demonstrated needs shall be returned.") (emphasis added); N.M. STAT. ANN. § 31-27-4.1(E)(3) (2017) (allowing return of property when "the property is the only reasonable means for a defendant to pay for legal representation in a related criminal or forfeiture proceeding").

203 FLA. STAT. § 932.704(10) (2017).

satisfy before it can carry out the forfeiture. Recall that the overwhelming majority of these cases (up to 88 percent, in federal court at least) never get challenged at all, so the state in those cases is never required to meet its evidentiary burden. But if the purpose of the reform is to rein in overreaching, raising the burden of proof can have an impact: by making it easier for the property owner to prevail in those few cases that *are* challenged, and by encouraging more owners to contest the forfeitures. Ultimately, law enforcement may think twice before seizing the property in the first place if a demanding burden of proof will make the forfeiture difficult to defend in court. Accordingly, some states have not only shifted the burden of proof to the state but also raised that burden significantly.

a. *Standards of Proof That the Crime Was Committed*

As discussed above, some states have opted to require a criminal conviction before a forfeiture of related property can take place. In these jurisdictions, therefore, the underlying crime must be proved beyond a reasonable doubt.

But in these states, the states are proving more than may be strictly necessary to justify a forfeiture. A criminal conviction, after all, requires proof beyond a reasonable doubt not only that a crime was committed but also who committed it. In concept, a forfeiture doesn't require the latter—it should be enough to prove that the crime was committed. It is easy to imagine a scenario in which a drug lab or growing operation is discovered, but the operators were tipped off and fled before the bust, so there is no competent evidence to convict anyone for the crimes of manufacture or cultivation.[204]

It might make sense, therefore, to require proof beyond a reasonable doubt that a crime was committed, without actually requiring a criminal conviction. Florida's statute does this, requiring "proof beyond a reasonable doubt that the [property] was being used in violation of the . . . Act."[205] No conviction is required; in fact, the statute is written in the passive voice, requiring proof that the property "was being used," without any reference to who may be responsible for such use.[206]

Most reform initiatives apply lesser standards—clear and convincing evidence (e.g., Michigan[207]) or even preponderance of the evidence (e.g., New Hampshire[208])—that the crime was committed. And these provisions are lumped together with the standard of proof that the property was linked to the crime, imposing a standard "that the property is subject to forfeiture" by

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204 *See* discussion *supra* Section I.A.3.b.

205 FLA. STAT. § 932.704(8).

206 *Id.*

207 MICH. COMP. LAW § 333.7521(2) (2017).

208 N.H. REV. STAT. ANN. § 318-B:17-b(IV)(b) (2017).

the applicable standard of proof.[209] Of course, a property is subject to forfeiture only if (1) a crime was committed *and* (2) the property was connected to the crime.[210]

b. *Standards of Proof of the Nexus Between the Property and the Crime*

Even if it is abundantly clear that a crime took place, property typically is not forfeitable unless it either was used to facilitate the crime or constitutes the proceeds of crime. This nexus, connecting the seized property to the crime, is an essential element of the forfeiture, and the burden of proving it should presumably be borne by the state, although historically it fell to the owner to prove the property's innocence.[211] But this raises the question of what standard of proof applies, and some states are raising these standards.

Again, Florida adopts the highest standard, insisting that the connection be shown beyond a reasonable doubt.[212] Nebraska's new legislation, for example, which limits forfeitures to cases in which a criminal conviction has been obtained, requires clear and convincing evidence of the property's connection to the crime.[213] This same standard applies to both proceeds forfeitures and facilitating property forfeitures.[214] A significant number of states (e.g., Maryland, Michigan, Minnesota, Montana, New Mexico, and Ohio) have adopted similar standards, with statutes that require clear and convincing evidence that the seized property was either an instrumentality of the criminal offense or proceeds from it.[215] In the District of Columbia, the standard remains a preponderance of the evidence, except for vehicles and real property; in those cases, the government must show the connection by clear and convincing evidence.[216] This makes it easier to seize cash (and guns and other assets) but keeps the standard for taking cars and homes significantly higher. Other states (e.g., New Hampshire), like the federal government, have opted for a preponderance standard.[217]

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209 D.C. CODE § 41-308(d)(1)(B) (2017).

210 *See* Cassella, *supra* note 37, at 15 ("In a civil forfeiture case, the government . . . proves, by a preponderance of the evidence, that the property was derived from, or was used to commit, a crime.").

211 *See* Pimentel, *supra* note 20, at 15. CAFRA shifted this burden for federal forfeitures, at least for the small percentage of cases where the forfeiture is contested. Pimentel, *supra* note 4, at 16–17.

212 FLA. STAT. § 932.704(8) (2017).

213 NEB. REV. STAT. § 28-1601(1)(c) (2017). Again, whatever proof the legislation requires of the government is of little import when the forfeiture is uncontested, however, as so many of them are.

214 *Id.*

215 MD. CODE, CRIM. PROC. § 12-312(a) (2017); MICH. COMP. LAWS § 333.7521(2) (2017); MINN. STAT. § 609.531(6a)(d) (2017); MONT. CODE § 44-12-207(1) (West 2017); N.M. STAT. ANN. § 31-27-4(a)-(b) (2017); OHIO REV. CODE ANN. §§ 2981.04(B), 2981.02(A); 2981.05(D)(3) (West 2017).

216 D.C. CODE § 41-308(d)(1) (2017).

217 N.H. REV. STAT. ANN. § 318-B:17-b(IV)(b).

It is important to note that even where a lower standard has been adopted, the forfeiture reform bills that have passed have succeeded in shifting the burden from the owner to the government. Therefore, for a seizure of cash in either the District of Columbia or New Hampshire, it is the government's burden to show, by a preponderance, that the money is dirty.[218] And that is a dramatic shift from the days when the owner bore the evidentiary burden of demonstrating that the money was clean.[219]

c. *Standards for Owner Innocence*

As already discussed, if the assets seized belong to someone other than the alleged criminal, there are separate issues surrounding the forfeitability of the property. The "innocent owner" defenses are designed to deal with the inequity inherent in seizing property from blameless individuals.[220] In the federal arena, CAFRA created such a defense but labeled it an affirmative defense, so the claimant can prevail only if he comes forward and produces evidence to prove his innocence.[221] CAFRA has been criticized elsewhere for putting this burden on an innocent party.[222] Nevertheless, it was a step forward.

New Mexico improves on the CAFRA standard dramatically, allowing a civil forfeiture only if the state, after obtaining a criminal conviction in the underlying case, can prove *by clear and convincing evidence* that the property owner had "actual knowledge of the underlying crime giving rise to the forfeiture."[223] This, in effect, puts the burden back on the state to prove at least knowledge by the owner, and to do it by clear and convincing evidence. It does not require proof of guilt—the property owner need not be guilty of the underlying crime, or of any crime at all—but it makes clear that a property owner whose innocence is rooted in a lack of awareness of the crime should keep her property. And in New Mexico, unlike in federal court, it is the government's burden to prove such knowledge.[224]

The District of Columbia's forfeiture reform was designed to protect an innocent owner, but not one who is aware of and consented to, or is willfully blind to, the fact that someone is using her property for criminal activity.[225] The forfeiture is still a civil one, based not on the owner's *guilt* but on the

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218 D.C. CODE § 41-308(d)(1); N.H. REV. STAT. ANN. § 318-B:17-b(IV)(b).

219 But, as noted before, the shifting of the formal burden of proof may be meaningful only in the small percentage of cases where the forfeiture is contested.

220 *See* Pimentel, *supra* note 4, at 17–18.

221 *See* Smith, *supra* note 60, at 28.

222 *See* Pimentel, *supra* note 4, at 25.

223 N.M. STAT. ANN. § 31-27-7.1(F) (2017).

224 *Id.*

225 D.C. CODE § 41-302(b) (2017).

owner's *knowledge* (or constructive knowledge) of the crime.[226] Nonetheless, the District of Columbia's law will not allow the forfeiture of a primary residence unless the owner is herself convicted of the underlying crime.[227]

I. *Special Provisions Related to Cash*

Seizures of cash have long been a problem area, featuring some of the more glaring anecdotes of forfeiture abuse. Police practices in Tenaha, Texas, seizing cash of passing motorists, attracted both media and legal attention;[228] a class action lawsuit ultimately put a stop to the worst abuses.[229] Because police require only probable cause to seize cash, sometimes the existence of the cash alone—at least possession of a suspiciously large quantity of it—has provided sufficient basis to seize it. Willie Jones discovered this when he attempted to fly from Tennessee to Texas, carrying $9,000 in cash.[230] With suspicions based solely on the quantity of cash, he was detained on suspicion of dealing drugs.[231] Jones's background check came up clean, but the officers kept the cash anyway,[232] refusing even to count it or give Jones a receipt for it.[233]

From the perspective of the agency making the seizure, cash is preferable to other assets. It is already liquid and can be spent on whatever the agency needs. It is easy to articulate justifications for seizing cash, too, as illustrated by the examples above and further explained below.

First, a lot of cash has drug residue on it,[234] and drug-sniffing dogs will alert to it, giving a handy basis for suspecting the cash-holder of drug offenses. The problem, of course, is that there can be no way of distinguishing the cash-holder, who taints his own money with drugs, from

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226 *Id.*

227 *Id.* § 41-308(d)(4).

228 *See.* Stillman, *supra* note 1.

229 *See* Mukherjee, *supra* note 118.

230 *See* H.R. REP. NO. 106-192, at 6 (1999).

231 *See id.*

232 *See* Jones v. U.S. Drug Enf't Admin., 819 F. Supp. 698, 706–07 (M.D. Tenn. 1993). The officers attempted to rely also on a "hit" by a drug-sniffing dog on the money itself, but the court found that evidence to be of little value. *See id.* at 719–20.

233 *See id.* at 707. After two years of litigation and a week-long trial, the court held that the government had failed to show that they had even probable cause for the seizure. *Id.* at 724. Jones is an exceptional case, as he, unlike most, chose to contest the forfeiture in court.

234 Estimates run as high as 96 percent of paper money in circulation in the U.S. is contaminated with illegal drugs. *See* United States v. $80,760.00 in U.S. Currency, 781 F. Supp. 462, 475–76 n.32 (N.D. Tex. 1991) (quoting a newspaper article describing the results of a study at National Medical Services in Willow Grove, Pennsylvania: 80 percent of the bills tested were contaminated); United States v. $83,375 in U.S. Currency, 727 F. Supp. 155, 160 (D.N.J. 1989) (describing testimony of Jay Poupko, Ph.D., who found in a study that 96 percent of the bills in circulation were contaminated).

the innocent cash-holder who receives drug-tainted money in an otherwise legitimate transaction. The district court in Mr. Jones's case agreed:

> The presence of trace narcotics on currency does not yield any relevant information whatsoever about the currency's history. A bill may be contaminated by proximity to a large quantity of cocaine, by its passage through the contaminated sorting machines at the Federal Reserve Banks, or by contact with other contaminated bills in the wallet or at the bank.[235]

Not all courts have reached the same conclusion, and that may embolden further cash seizures based on little more than a dog alert.[236] Second, possession of a large quantity of cash can be deemed suspicious in itself. There are myriad examples of individuals being relieved of their cash by law enforcement officers who assert that "law abiding citizens don't carry this much cash," even in situations where the individual was able to give a compelling explanation for why he or she was carrying so much cash.[237]

Third, since a lot of crime is carried out for profit, it is easy to make a logical connection between money and crime. Money can be "facilitating property" if the crime involved sale of drugs or of anything else prohibited by law,[238] structuring financial transactions,[239] money laundering,[240] or gambling.[241] "Proceeds" of criminal activity, of course, are also likely to be reflected in cash holdings.[242]

But deducing that "proceeds" of crime are likely to be cash is a very different thing from deducing that cash is likely to be proceeds of crime. And it is this latter presumption that opens the door to abuse of forfeiture

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235 *Jones*, 819 F. Supp. at 720 (citations omitted).

236 *See, e.g.*, United States v. $22,474 in U.S. Currency, 246 F.3d 1212, 1214, 1217 (9th Cir. 2001) (involving facts similar to those of Jones and finding that there was probable cause to seize the cash, based in large part on the dog's alert on a large quantity of cash). *But see* United States v. $242,484.00, 351 F.3d 499, 510–11 (11th Cir. 2003) (deeming a drug dog's sniff of cash is "of little value" in determining whether the currency is presently being used for narcotics trafficking because as much as 80 percent of all cash in circulation contains drug residue); Jason R. Humke, Note, *Passing The Buck: An Analysis of* State v. Franco, *257 Neb. 15, 594 N.W.2d 633 (1999), and Nebraska's Civil Forfeiture Law*, 83 NEB. L. REV. 1299, 1300 n.2 (2005) (listing cases that discount the value of dog alerts on cash).

237 *See* sources cited *supra* note 34.

238 21 U.S.C. § 881(a)(6) (2012 & Supp. III 2016) (declaring as forfeitable "all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter").

239 Timothy J. Ford, Note, *Due Process for Cash Civil Forfeitures in Structuring Cases*, 114 MICH. L. REV. 455, 456–57 (2015).

240 *See, e.g.*, United States v. Huber, 404 F.3d 1047, 1056, 1058 (8th Cir. 2005) (holding that forfeiture allows the government to obtain the value of all property involved in a money laundering offense, including the money or other property being laundered, and "any property used to facilitate the laundering offense," including untainted, commingled property).

241 *See, e.g.*,. In re Return of Property Confiscated October 30, 1999 from 411 East Mac Dade Blvd., 856 A.2d 238, 249 (Pa. Commw. Ct. 2004).

242 United States v. Lyons, 870 F. Supp. 2d 281, 295–96 (2012) (holding defendants jointly and severally liable to forfeit approximately $30 million in gambling proceeds).

procedure by law enforcement authorities who come across significant amounts of cash in their work. The temptation to seize cash is hard to resist, and the rationalization for seizing it is all too easy to articulate. An arrest of someone possessing marijuana, for example, is likely to result in the forfeiture of all cash on her person, based on the assumption that such money (1) might have been meant for further drug transactions or (2) could be the proceeds of past ones.

The upshot is that cash is particularly vulnerable to forfeiture abuse, and for that reason, states may wish to pay particular attention to the problem of cash seizures in their approach to forfeiture reform. In the District of Columbia, for example, the law creates a presumption that cash amounts less than $1,000 are *not* linked to the underlying crime; to seize cash in amounts that low, law enforcement will need to make an evidentiary showing sufficient to overcome that legal presumption.[243]

Maryland, in turn, has legislated against seizures of cash when the underlying crime is mere possession of controlled substances.[244] Cash forfeitures are permitted there only if they are connected with manufacture or distribution crimes.[245]

Florida law requires that "[t]he determination as to whether to seize currency must be made by supervisory personnel,"[246] imposing a check on any avaricious impulse to which an individual officer may be subject in the heat of the moment.

In Michigan, if cash is seized, the owner's attorney is entitled to examine the cash at any time in the next 60 days, before it can be deposited.[247] This presents yet another safeguard, so the seizure of cash is somewhat less automatic and somewhat easier to contest. Maryland allows deposit of the seized money but does require that the cash be photographed before it is deposited.[248]

These approaches all reflect innovation in targeting, and attempting to limit, the most tempting and easiest to rationalize of all asset forfeitures.[249]

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243 D.C. CODE § 41-308(d)(1)(C) (2017). Idaho has proposed legislation, not adopted at the time this was written, that would prohibit the seizure of cash based solely upon its quantity. The proposed legislation would require some other indicia of criminal activity. H.B. 202, 64th Leg., Reg. Sess. (Idaho 2017) ("Mere presence or possession of United States currency, without other indicia, is insufficient probable cause for seizure.").

244 MD. CODE, CRIM. PROC. § 12-102 (a)(7) (2017).

245 *Id.* Furthermore Maryland requires that any cash seized be immediately photographed and deposited. *Id.* § 12-202(b).

246 FLA. STAT. §932.704(11)(c) (2017). Interestingly, in Florida, the requirement for an arrest does not apply when the seized asset is cash. *Id.* § 932.703(1)(a)(5).

247 MICH. COMP. LAWS § 333.7523(4).

248 MD. CODE, CRIM. PROC. § 12-202(b).

249 In Tennessee, a news team tracked the activity of law enforcement on Highway 40 for an extended period. They found that "rather than working eastbound lanes, where smugglers transport drugs to the East Coast, officers focused on westbound lanes, where smugglers haul cash back to Mexico. A

Hopefully, some of these limits on cash seizures can check law enforcement's ability to seize cash indiscriminately.

J. *Reporting*

Good state legislation should require reporting of the seizures, including amounts seized, and what was done with the proceeds. Some transparency will help rein in abuses, as police may be embarrassed if they have to publicize a pattern of overreaching with the seizures or featherbedding with the proceeds. A little transparency can go a long way. As Justice Brandeis said, "Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman."[250]

Effective reporting, however, will require that information about forfeitures be collected in a way that makes sense and is made available to the public and media in a manner they can access. New legislation in a handful of jurisdictions—Nevada,[251] New Mexico,[252] Texas,[253] and the District of Columbia[254]—requires not only collection of the information but also posting it online.[255] The overwhelming majority of states do not post anything online, and as many as seventeen states have no requirement to collect, compile, or record data on forfeitures at all.[256]

Moreover, the agencies required to report data need a proper incentive to keep good records. Some states, including those where reporting is required by law, nonetheless have large gaps in their records and are missing

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subsequent review of drug task force records indicated that officers made 10 times as many stops on the westbound side of the highway as they did on the eastbound side." *See* Carpenter et al., *supra* note 2, at 16.

250 LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 92 (1914).

251 S.B. 138, 78th Sess. (Nev. 2015).

252 N.M. STAT. ANN. § 31-27-9 (2017).

253 TEX. CODE CRIM. PROC. art. 59.06(g), (s) (2017).

254 D.C. CODE § 41-312 (2017).

255 *See* Carpenter et al., *supra* note 2, at 33. Idaho's proposed legislation, after passing out of the House Judiciary Committee, was amended before going to the Senate in March 2017. Kimberlee Kruesi, *Civil Asset Forfeiture Reform Bill Cleares Idaho House*, ASSOCIATED PRESS, Mar. 2, 2017, https://www.apnews.com/1123d5d31fdf4e1c931e03ecdd32bed4. In an effort to secure support from law enforcement, the bill's reporting requirements have been watered down to the point where the data collection is required to be done by each county and maintained in each county, without any reporting to the Controller, or any other statewide office. *See* H.B. 202, 64th Leg., Reg. Sess. (Idaho 2017). As a result, even if this bill gets signed into law, the only way to obtain this information is to contact each of the forty-four counties directly and request the information. Because no penalties or consequences are prescribed for failure to maintain such information, it is highly unlikely that even the most determined investigative reporter can acquire reliable statewide information about what's happening with forfeitures in the state.

256 *See* Carpenter et al., *supra* note 2, at 34–35.

a lot of data.[257] Florida law now imposes a fine of $5,000 on any agency that fails to report as required by law.[258] This may help, but for a large jurisdiction, it may be far easier to pay a fine of this magnitude than to engage in the tedious work of compiling accurate reports of forfeiture activity. The temptation to dispense with the reporting requirements may be far greater if the reports themselves paint an unflattering picture of the agencies' activities in this area: for example, if they have to report on how much they've taken in and what they've spent the money on.

A meaningful reporting regime should be drafted to reveal several key figures that reflect on the health of forfeiture practice in that state. The number of seizures and the size of each one (valued in dollars)[259] should be included along with the disposition of the seized assets, including expenditures made with the liquid assets seized or with the funds generated by liquidating other seized assets.

The funds generated through equitable sharing should be reported as well, to depict the degree to which local agencies are avoiding state strictures by shifting their forfeiture activity onto the federal track. There is some evidence that states with more restrictive laws on forfeiture are much greater participants in and consumers of federal equitable sharing funds.[260]

No less important is to sort these data according to the character of the legal proceeding: (1) Were criminal charges brought? (2) Was a conviction obtained? (3) Was the forfeiture contested? (4) Was the challenge brought by the person charged with the crime, or by a third-party owner? A pattern of small-value seizures, in which no criminal charges are brought and the forfeiture is processed administratively (without challenge in court proceedings), would certainly be a red flag. If the police in Tenaha, Texas, had been writing reports containing this level of detail,[261] the abuses there could have been exposed and curtailed much earlier.

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257 *See id.* at 36 (noting substantial deficiencies in the states of California, Georgia, Michigan, Minnesota, Missouri, Oregon, and Pennsylvania, among others).

258 FLA. STAT. § 932.7062 (2017).

259 The valuation of seized assets will undoubtedly create challenges for the agencies, but they should be capable of making estimates. Once the assets are liquidated, of course, the amount of cash generated by the auctions can be recorded and reported.

260 *See* Carpenter et al., *supra* note 2, at 28 ("Given California's relatively restrictive civil forfeiture laws, the state's poor ranking on equitable sharing—50th out of the 50 states and the District of Columbia—underscores the circumvention risks the practice poses. Likewise, North Carolina requires a conviction for most civil forfeitures and directs proceeds to public schools, earning the state a B+ for its laws, yet it ranks 42nd for equitable sharing. New York, Indiana and Missouri all receive higher marks than most states for their civil forfeiture laws but rank poorly for equitable sharing, at 49th, 39th and 34th, respectively.").

261 *See* Stillman, *supra* note 1.

K. *Distinguishing Between Proceeds and Facilitating Property*

What we have very little of, in the state statutes, is a distinction between proceeds forfeitures and facilitating property forfeitures. To the extent that states want—or need—to strike compromises, recognizing the importance of forfeitures to law enforcement as a tool in their war on crime, this distinction deserves more attention than it is getting.

In Minnesota's new law, there is some recognition of the importance of this distinction. The law there now forbids the seizure of a vehicle as a facilitating property forfeiture on the basis of drugs found in the vehicle valued less than seventy-five dollars,[262] presumably because this is a disproportionate response to a minor offense.[263] This contrasts with the forfeiture of a vehicle purchased with dirty money, which should be seized as ill-gotten gains—there is no risk of disproportionality in a proceeds forfeiture (as long as the assets seized are genuinely proceeds).[264]

Indeed, proceeds forfeitures are important in taking the profit out of crime and are rooted in equitable principles of unjust enrichment. States have a legitimate interest in denying criminals the fruits of criminal activity. Accordingly, if some civil forfeitures are to be retained as part of a larger reform, it makes sense that proceeds forfeitures should get this privileged treatment over facilitating property forfeitures. As long as the government can prove its case that these assets are, indeed, the proceeds of crime,[265] there should be little objection to their seizure.

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262 MINN. STAT. § 609.5311(3) (2017).

263 *See* Nick Wing, *Court Says Cops Wrong to Seize Car over $20 Of Weed, But Not for Reason You'd Think*, HUFFINGTON POST (Oct. 14, 2015, 6:48 PM), http://www.huffingtonpost.com/entry/michigan-police-asset-seizure_us_561e94a7e4b028dd7ea62184 (relating the story of a vehicle seizure based on a minor offense in Michigan, and highlighting the seizure's problematic disproportionality).

264 *See* United States v. Bajakajian, 524 U.S. 321, 334 (1998) (finding that if the disproportionality is "gross," then the forfeiture may be unconstitutional under the Eighth Amendment's excessive fines clause). For a more detailed treatment of Eighth Amendment application to civil forfeitures, see generally David Pimentel, *Forfeitures and the Eighth Amendment: A Practical Approach to the Excessive Fines Clause as a Check on Government Seizures*, 11 HARV. L & POL'Y REV. 541 (2017).

265 *See* Pimentel, *supra* note 4, at 55 ("The risk of infringing the rights of legitimate property holders is somewhat greater . . . because sometimes difficult factual question must be settled as to which property was acquired by criminal activity."). The primary risk for proceeds forfeitures is that the state will be able to seize the assets without having to prove that it is actually the proceeds of crime. Administrative forfeitures (i.e., uncontested seizures, where law enforcement never has to make its evidentiary showing) are particularly problematic for these seizures, which include a lot of the cash grabs discussed separately above. For that reason, "[n]otice and hearing requirements should be more stringent for proceeds forfeitures . . . . Not only do the seizures of cash need judicial scrutiny, but difficult factual issues—involving the sources of funds and commingled accounts—are likely to arise and will need to be resolved." *Id.* at 56–57.

Facilitating property forfeitures, in contrast, are already of dubious conceptual merit.[266] These forfeitures are of property legally obtained (unlike proceeds) and legitimately held (unlike contraband) and are much harder to justify on a policy basis.[267] It is here that innocent parties are at greatest risk. A reasonable reform of civil forfeiture should, therefore, target facilitating property forfeitures in particular.[268] The primary downside of frustrating such forfeitures is that it will be much harder for our system to punish wrongdoers if we have to prove guilt before punishing them.[269] The debate over this issue, of course, was settled many hundreds of years ago, when the common law embraced the presumption of innocence.[270]

CONCLUSION

As concerns about civil forfeitures roil the electorate, state legislators may be motivated to step in, rein in law enforcement, and curtail the most serious abuses of the procedure. The various tweaks that have been proposed, and that can be made, may sound good, but meaningful reform in this area is elusive.

States wishing to scale back the offensive uses of forfeitures within their borders need to take specific steps to ensure that the reforms have their intended impact. Merely shifting or increasing burdens of proof may have little impact, for example, when the overwhelming majority (up to 88 percent) of forfeitures are carried out administratively, without the government ever being asked to make its proofs.

Shutting down equitable sharing with federal authorities, as well as operations under separate municipal authorizations, is critical. Partial shutdowns—adopting exceptions that would allow equitable sharing for large dollar seizures, for example—create dangerous opportunities to perpetuate the very evils the reform is intended to curtail, particularly because there are such strong financial incentives to perpetuate the practice. To address the problematic incentives, the states should ensure that the assets

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266 *See* Pimentel, *supra* note 4, at 58.

267 *See* discussion *supra* Section I.A.1.

268 *See* Pimentel, *supra* note 4, at 58–59.

269 The author attended a hearing on forfeiture reform before Idaho's House Judiciary Committee on February 27, 2017, and met with a legislator individually about the pending bill on March 13, 2017. The arguments articulated were startling to hear, that civil forfeiture is an important means of punishing people you know are guilty, but can't prosecute in the regular way. That makes it a power law enforcement tool, no doubt, but it assumes that constitutional protections promised to all Americans, innocent and guilty alike, are something that can and should be circumvented to permit punishment without proof of guilt.

270 *See* Coffin v. United States, 156 U.S. 432, 453–61 (1985) (tracing the history of the presumption of innocence); In re Winship, 397 U.S. 358, 364 (1970) (making clear that the presumption of innocence is constitutionally protected: "[W]e explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged").

seized go to the general fund, or to public education, or to something else from which the law enforcement authorities cannot benefit even indirectly. Again, the financial incentives are simply too great to resist, and unless that spigot is shut off completely, loopholes and workarounds will be found, devised, and exploited.

Finally, a solid reporting system should be adopted to ensure that the other branches of government, and the public at large, can see how much is being seized and what is happening to it. The scrutiny itself will prompt some restraint on the part of law enforcement. Moreover, whatever reforms are adopted may need to be adjusted in the future, to account for unanticipated outcomes, and it is critical that legislatures have the information they need to determine whether forfeiture abuse has been contained, and to what degree it remains a problem.

State authorities are to be commended for their desire to fix a problem, particularly one that is undermining public confidence in government and police. But they need to be aware of what reforms may be meaningful, and which are not. The legislature needs to be kept honest every bit as much as law enforcement does, and there is risk in this area that elected officials will either naïvely believe or disingenuously claim that their weakly drafted legislation has addressed the problem. The states that have yet to address the serious problems in the law of forfeiture should learn from others' mistakes, and be careful, as they work to lock the front door on objectionable practices in this area, that they not leave the back door open.