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Civil Asset Forfeiture: Good Intentions Gone Awry and the Need for Reform

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Abstract

Despite civil asset forfeiture's noble intentions, the many stories of innocent victims and law enforcement abuses prove that the pendulum has swung too far in favor of law enforcement. In reforming forfeiture laws, however, we must be careful not to swing the pendulum too far in the opposite direction. The process should be made fairer and more transparent, the profit incentive of forfeiture should be abolished or severely constrained, and there should be greater oversight. Civil asset forfeiture should be returned to its original purpose: penalizing those who seek to profit from their illegal activities. If such funds were deposited into the general treasury, nothing would preclude law enforcement authorities from going to Congress or their state legislatures and seeking an increase in their budgets or victims' compensation funds.

The chairmen of the Senate and House Judiciary Committees have stated that reforming federal civil asset forfeiture laws is a top priority for them.¹ The Department of Justice's Office of the Inspector General (DOJ IG) has issued several critical reports on how some federal agencies and state and local authorities administer their forfeiture programs.² And Attorney General Eric Holder recently announced certain policy changes related to DOJ's Equitable Sharing Program as part of a "first step" in a "comprehensive" departmental review of the federal asset forfeiture program.³

Why all of this attention? The answer is that, despite its good intentions, civil asset forfeiture has gone awry and is in serious need of reform.

Civil asset forfeiture is based on a fiction, albeit one of ancient lineage,⁴ that property can be guilty of a crime and thereby forfeited to

KEY POINTS

- Civil asset forfeiture is based on a fiction: that property can be guilty of a crime and thereby forfeited to the sovereign regardless of whether any individual is ever charged with or convicted of a crime related to that property.
- The goal behind this fiction is the development of a means to deprive criminals of the fruits of their nefarious labor, sometimes in cases where it may be clear that particular property was used in a crime, and to use some of those funds to compensate the victims of crime.
- Regrettably, the procedures used to effectuate a civil forfeiture are skewed against innocent property owners whose property may have been misused by others to engage in criminal activity. Moreover, in many instances, what began as a means to a laudable end has become an end in itself.
- Civil asset forfeiture should be returned to its original purpose: penalizing those who seek to profit handsomely from their illegal activities.

This paper, in its entirety, can be found at <http://report.heritage.org/lm151>

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the sovereign regardless of whether any individual is ever charged with (and much less convicted of) a crime related to that property. It is a fiction because *things* obviously cannot think or act, but there is a laudable goal behind this fiction: the development of a means to deprive criminals of the fruits of their nefarious labor, sometimes in cases where it may be clear that particular property was used in a crime, but where the “kingpin”—be it a drug dealer, fraudster, foreign kleptocrat, or terrorist—is impossible to identify or is outside the United States, and to use some of those funds to compensate the victims of crime.⁵

Regrettably, the procedures used to effectuate a civil forfeiture are skewed against innocent property owners⁶ whose property may have been misused by others to engage in criminal activity. Moreover, in many instances, what began as a means to a laudable end has become an end in itself.

Some law enforcement authorities focus more on getting money and property and less on catching

criminals—behavior that some have referred to as a form of legalized bounty hunting.⁷ Police and prosecutors end up having a substantial budgetary stake in forfeiture because in most cases, the proceeds from any forfeited property are returned to the agency that seized it for its use, thereby providing a direct funding mechanism that is totally outside the legislative appropriations and oversight process.

This runs counter to the long-established principle of separation of powers. As George Mason, one of our Founding Fathers and often referred to (along with James Madison) as the father of the Bill of Rights,⁸ warned, “When the same man, or set of men, holds both the sword and the purse, there is an end of liberty.”⁹ As a 2011 study succinctly put it: “The dependency of police on public resources for their operations is an important check on police power. Self-generating revenues by the police through forfeiture potentially threatens the ability of popularly elected officials to constrain police activities.”¹⁰

1. Jennifer Jacobs, *Grassley's Checklist of Priorities*, DES MOINES REG., Jan. 7, 2015, available at <http://www.desmoinesregister.com/story/news/politics/2015/01/07/grassley-checklist-priorities-judiciary-committee/21394233/>; http://judiciary.house.gov/index.cfm/hearings?Id=2966A160-FF62-4083-B937-3F3C399CAF11&Statement_id=1288FD34-6459-4E29-B8B2-CEC779CF9B33. Problems with current civil asset forfeiture proceedings have even become fodder for comedians. See *Last Week Tonight with John Oliver: Civil Forfeiture*, HBO (Oct. 5, 2014), available at <https://www.youtube.com/watch?v=3kEpZWGgJKs> (last accessed March 3, 2015) (Warning: contains profanity).
2. OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, REVIEW OF THE DRUG ENFORCEMENT ADMINISTRATION'S USE OF COLD CONSENT ENCOUNTERS AT MASS TRANSPORTATION FACILITIES (2015), available at <http://www.justice.gov/oig/reports/2015/e153.pdf>; OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, AUDIT OF THE CITY OF SUNRISE POLICE DEPT'S EQUITABLE SHARING PROGRAM ACTIVITIES (2014), available at <http://www.justice.gov/oig/reports/2014/g4015003.pdf>; OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, AUDIT OF THE OKLAHOMA HIGHWAY PATROL'S EQUITABLE SHARING PROGRAM ACTIVITIES (2013), available at <http://www.justice.gov/oig/reports/2013/g6013014.pdf>.
3. Press Release, Dept. of Justice, Attorney General Prohibits Federal Agency Adoptions of Assets Seized by State and Local Law Enforcement Agencies Except Where Needed to Protect Public Safety (Jan. 16, 2015), available at <http://www.justice.gov/opa/pr/attorney-general-prohibits-federal-agency-adoptions-assets-seized-state-and-local-law>.
4. See, e.g., *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 680–686 (1974) (discussing history of forfeiture); Charles Doyle, *Crime and Forfeiture*, CONGRESSIONAL RESEARCH SERVICE (Jan. 22, 2015), available at <http://fas.org/sgp/crs/misc/97-139.pdf> (discussing history of forfeiture); Donald J. Boudreaux & A. C. Pritchard, *Civil Forfeiture and the War on Drugs: Lessons from Economics and History*, 33 SAN DIEGO L. REV. 79, 135 (1996).
5. See, generally, *Federal Asset Forfeiture: Uses and Reforms: Hearing Before the Subcomm. on Crime, Terrorism, Homeland Security, and Investigations of the H. Comm. on the Judiciary*, 114th Cong. (2015) (testimony of Kenneth A. Blanco), available at http://judiciary.house.gov/_cache/files/f60fb681-47a1-4a79-a803-9359a497aaf6/blanco-testimony.pdf.
6. Those procedures are codified at the federal level at 18 U.S.C. § 983(d), available at <https://www.law.cornell.edu/uscode/text/18/983>.
7. See, e.g., *Policing and Prosecuting for Profit: New Jersey Ex-Sheriff Fights Civil Forfeiture Abuse*, INSTITUTE FOR JUSTICE, LITIGATION BACKGROUNDER, available at <https://www.ij.org/new-jersey-civil-forfeiture-background>.
8. See Jonathan Yardley, *A Founding Father Insisted that the Constitution Wasn't Worth Ratifying Without a Bill of Rights*, WASH. POST, Nov. 5, 2006, available at http://www.washingtonpost.com/wp-dyn/content/article/2006/11/02/AR2006110201182_pf.html.
9. George Mason, *Fairfax County Freeholders' Address and Instructions to Their General Assembly Delegates* (May 30, 1783), in JEFF BROADWATER, *GEORGE MASON: FORGOTTEN FOUNDER* 153 (2006).
10. Jefferson E. Holcomb, Tomislav V. Kovandzic, & Marian R. Williams, *Civil Asset Forfeiture, Equitable Sharing, and Policing for Profit in the United States*, 39 J. CRIM. JUST. 273, 283 (2011).

Roots and Nature of Civil Asset Forfeiture

In the United States, the roots of civil asset forfeiture come from admiralty and customs law, under which ships carrying contraband on the high seas were seized and forfeited, usually because the ship's owners were not aboard and could not be arrested and charged. Civil forfeiture grew during Prohibition, when laws were revised to permit the seizure of vehicles used by bootleggers.

But it was not until 1984, with the passage of the Comprehensive Crime Control Act and the war on drugs, that civil forfeiture really began to grow dramatically. Today, there are hundreds of forfeiture laws covering a broad panoply of federal crimes.¹¹ The federal government also operates an Equitable Sharing Program¹² that has dramatically expanded the scope of civil asset forfeiture.

Civil forfeiture differs from criminal forfeiture in several significant ways. In a criminal forfeiture case, the government sets out the property that is subject to forfeiture as part of the indictment against the individuals who used or derived the property, and the forfeiture proceeding is an ancillary proceeding that follows after the defendants are convicted. A civil forfeiture proceeding, on the other hand, is an *in rem* proceeding against the property only and does not involve any formal charges of wrongdoing against individuals. The types of property that can be forfeited, which include real and personal property, are any item used to commit a crime (facilitating property); the proceeds of crime (the fruit); or property bought with the proceeds of crime (substitute assets).

Criticisms of Civil Asset Forfeiture

One of the main criticisms of civil asset forfeiture is that the deck is stacked against any property owner who wishes to contest the forfeiture.¹³ Because the legal proceeding is against the property rather than the property owner, the owner does not enjoy many of the constitutional protections that are afforded to those who are accused of engaging in criminal activity. Such inequities prompted Brad Cates, director of the asset forfeiture program at the Justice Department from 1985 to 1989, to declare recently that “[a]ll of this is at odds with the rights that Americans have.”¹⁴

First, the vast majority of cases never see the inside of a courtroom.¹⁵ Any amount of currency can be administratively forfeited; the only time administrative forfeiture is not available is when the forfeiture involves any real estate or personal property worth more than \$500,000 (except for so-called hauling conveyances: that is, vehicles, vessels, and aircraft allegedly used to transport illegal drugs, which, like cash or other monetary instruments, can be subjected to administrative forfeiture regardless of their value).

In an administrative proceeding, the agency that stands to gain directly from the forfeiture acts as investigator, prosecutor, judge, and jury. The rules and deadlines governing these proceedings are complicated and opaque, a minefield of technicalities full of traps for an unwary (and often unrepresented) property owner.

With the exception of the Customs Service, there is no effective judicial review from an administrative ruling, and the administrator does not even need to write an order justifying his or her decision. While there is within many agencies a process whereby

11. For a list of many of these statutes, see Charles Doyle, *Crime and Forfeiture*, CONGRESSIONAL RESEARCH SERVICE (January 22, 2015), available at <http://fas.org/sgp/crs/misc/97-139.pdf>.

12. 21 U.S.C. § 881(e)(3) provides the Attorney General with authority to transfer property forfeited under federal law to participating state and local law enforcement agencies.

13. In 2000, Congress passed the Civil Asset Forfeiture Reform Act (CAFRA), which was designed to provide claimants with some modest additional protections, including affording an owner the opportunity to petition the court for release of certain kinds of property pending the completion of forfeiture proceedings, establishing an “innocent owner’s” defense, allowing an indigent claimant who is already represented by court-appointed counsel in connection with a related federal criminal case to request the assistance of court-appointed counsel to contest the forfeiture, and requiring the government to pay attorney’s fees and costs if it loses a forfeiture action. Property owners, however, are rarely apprised of their rights under CAFRA, and because most forfeitures are administrative, its provisions are rarely invoked.

14. Robert O’Harrow, Jr. & Steven Rich, *Asset Seizures Fuel Police Spending*, WASH. POST, Oct. 11, 2014, available at <http://www.washingtonpost.com/sf/investigative/2014/10/11/cash-seizures-fuel-police-spending/>.

15. See *Federal Asset Forfeiture: Uses and Reforms: Hearing Before the Subcomm. on Crime, Terrorism, Homeland Security, and Investigations of the H. Comm. on the Judiciary*, 114th Cong. (2015) (testimony of David B. Smith), available at http://judiciary.house.gov/_cache/files/e1528de2-86fc-4bc4-b1d2-0fd1075ff554/smith-testimony.pdf.

someone can file a petition for mitigation or remission of the harsh effects of forfeiture, the rules do not allow someone to file such a petition while at the same time contesting the validity of the forfeiture itself.¹⁶ Moreover, it is once more an agency official, not an impartial arbiter, who acts on the petition.

Second, unlike a criminal case, there is no entitlement either to representation by counsel or (except as to real property) to a pre-seizure hearing.¹⁷ Forfeitures are often for an amount small enough that it would make little financial sense for a property owner to hire counsel to contest the forfeiture. Forfeiture cases can take months or years, effectively tying up somebody's property and creating an extreme hardship for people of modest means or people who run small businesses.¹⁸

Adding insult to injury, the Civil Asset Forfeiture Reform Act of 2000 (CAFRA)¹⁹ lays out specific filing deadlines that must be met by property owners challenging forfeitures. Failure to meet a filing deadline by even a day often results in immediate forfeiture, whereas agencies can allow property to languish in their custody for years.²⁰

Third, unlike a criminal case in which a prosecutor must prove a defendant's guilt beyond a reasonable

doubt, in a civil forfeiture case, the prosecutor only needs to establish the basis for the forfeiture by a preponderance of the evidence. Defenders of current civil asset forfeiture procedures note that preponderance of the evidence is the standard of proof that is traditionally used in civil cases. While a true statement, this does not mean that it is the appropriate standard to use in civil asset forfeiture cases given the clear connection between this type of action and a typical criminal case.²¹ Moreover, unlike a dispute between two private citizens, there are tremendous disparities in available resources and expertise between the property owner contesting the forfeiture and the governmental entity seeking the forfeiture.

Fourth, also unlike a criminal case in which the prosecutor must prove that the person who used or derived the property acted intentionally or at least was willfully blind to its misuse, in a civil case, the government does not have to prove any of that. Rather, the burden is placed on the "innocent owner" to prove a negative: that he did not know about its illegal use and that, if he did know about it, he did all that could reasonably be expected under the circumstances to terminate such use.²²

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16. Most seizing agencies adhere to the old doctrine that a petition for remission "presumes a valid forfeiture." The Customs Service is the exception, permitting a petitioner to challenge the underlying basis for the forfeiture. See 19 C.F.R. 171.31 (allowing a petitioner to seek remission on the grounds that "the act or omission forming the basis of a penalty or forfeiture claim did not in fact occur."). Petitioners are seldom aware that by seeking remission or mitigation, they are sacrificing the chance to pursue their case in court.
 17. CAFRA codified the right to a pre-seizure hearing in real property cases, as originally articulated by the Supreme Court in *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993). See 18 U.S.C. § 985. However, this right exists only if the property is physically seized. "Constructively" seizing the property, such as posting a notice of complaint or filing a *lis pendens* notice, carries no such right. Consequently, actual seizure by the government of real property is rare so as to avoid this hearing requirement.
 18. In *U.S. v. \$8,850*, 461 U.S. 555 (1983), the Supreme Court applied the *Barker v. Wingo*, 407 U.S. 514 (1972), speedy trial test to civil forfeiture cases, acknowledging that significant delays in forfeiture proceedings undoubtedly create hardships for property owners but do not necessarily constitute a violation of a property owner's due process rights.
 19. Pub. L. No. 106-185, 114 Stat. 202 (2000).
 20. In 2012, the assets of Bi-County Distributors, Inc., a small, family-run business that sold snacks, candy, and cigarettes to local convenience stores, were seized over alleged structuring violations. For two and a half years, the federal government retained the assets without filing a forfeiture action or charging the owners with a crime. *Held Up: Feds Use Civil Forfeiture to Seize More than \$446,000 from Innocent Family Business; Deny Hearing for More than Two Years*, INSTITUTE FOR JUSTICE, LITIGATION BACKGROUNDER, available at <http://www.ij.org/long-island-forfeiture-backgrounder>.
 21. There is a long history of jurisprudence blurring the line between civil and criminal proceedings in forfeiture cases. In *Boyd v. United States*, 116 U.S. 616, 634 (1886), the Supreme Court determined that "forfeitures incurred by the commission of offenses against the law are...quasi-criminal [in] nature." Relying on its holding in *Boyd*, the Court applied the exclusionary rule, previously reserved for criminal prosecutions, to certain civil forfeiture cases in *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1965). The Court also acknowledged in *Austin v. United States*, 509 U.S. 602 (1993), that certain forfeitures are bound by the limits of the Excessive Fines Clause. And in *U.S. v. Bajakajian*, 524 U.S. 321 (1998), the Court adopted a gross disproportionality test to determine whether such a forfeiture violates the Excessive Fines Clause.
 22. See, e.g., 18 U.S.C. § 983(d); Richard Jacobson & Hunt Leibert, *Don't Be Caught Red-Handed: When Your Property Is Involved in a Crime*, USFN (2005), available at http://www.usfn.org/AM/PrinterTemplate.cfm?Section=USFN_E_Update&template=/CM/HTMLDisplay.cfm&ContentID=2241; Charles Doyle, *Crime and Forfeiture*, CONGRESSIONAL RESEARCH SERVICE (January 22, 2015), available at <http://fas.org/sgp/crs/misc/97-139.pdf>.

Defenders of current civil asset forfeiture procedures note that the Supreme Court of the United States has held that an innocent owner defense is not constitutionally required,²³ yet the law provides a claimant with the opportunity to present such a defense. Again, while true, that does not mean that the current procedure is fair or the most appropriate standard under the circumstances. The Constitution provides a floor, not a ceiling, when it comes to providing rights; it states what must be provided at a minimum, not what ought to be provided to ensure fairness and strengthen the integrity of the process.

Asset Forfeiture Programs

The amounts of money involved in forfeiture cases are huge and have grown exponentially. Many federal agencies within the Justice and Treasury Departments participate in forfeiture programs, including the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF); the Drug Enforcement Administration (DEA); the Federal Bureau of Investigation (FBI); the Postal Inspection Service; the Marshal's Service; the Internal Revenue Service (IRS); Immigration and Customs Enforcement (ICE); Customs and Border Protection (CBP); and others.

The Department of Justice administers the Assets Forfeiture Fund, the largest of several such funds.²⁴ In 1985, the first year of its existence, the fund took in \$27 million. In 2012, the value of seized assets had grown to \$4.3 billion.²⁵

Many states have their own forfeiture programs but do not collect or publish such data. The majority of states allow law enforcement authorities to keep 100 percent of forfeiture proceeds, just as fed-

eral authorities are allowed to keep all proceeds forfeited under federal law. Only a small handful of states bar state and local authorities from using forfeiture proceeds; the rest allow the state and local authorities to keep somewhere between 50 percent and 95 percent of forfeiture proceeds.²⁶

In addition to work that federal and state agents do together as part of task forces, federal authorities frequently "adopt" state cases and institute federal forfeiture proceedings. When they do, federal authorities frequently return up to 80 percent of the proceeds to state and local authorities as part of an "equitable sharing" program.²⁷ Equitable sharing represents serious money. In 2013, DOJ paid out \$657 million through the Equitable Sharing Program, roughly a threefold increase from 2001. Since 1984, more than \$5 billion has been dispersed directly to state and local law enforcement authorities for their use under this program.

Many local authorities prefer to have federal authorities handle forfeiture matters, in part because the Equitable Sharing Program enables them to circumvent any state laws that make forfeitures more difficult or less profitable than the federal route. This certainly runs counter to the spirit of federalism and impinges on state sovereignty.

Abuses of Civil Asset Forfeiture

Unfortunately, the financial incentives to seize cash and valuable property are so high that it sometimes warps the priorities of many law enforcement officials. For example, authorities have been known to let bad guys commit their crimes just so they can seize the cash that they earn from those crimes. Even though there is a federal ban on the use of equitably shared forfeiture funds to pay salaries or other-

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

24. The other federal forfeiture funds are the Department of the Treasury Forfeiture Fund and the Crime Victims Fund, administered by the Justice Department's Office for Victims of Crime, which is part of DOJ's Office of Justice Programs. A Special Forfeiture Fund, originally financed by the Office of National Drug Control Policy, has been abolished. See Charles Doyle, *Crime and Forfeiture*, CONGRESSIONAL RESEARCH SERVICE (January 22, 2015), available at <http://fas.org/sgp/crs/misc/97-139.pdf>.

25. In 2013, the fund held more than \$1.8 billion.

26. See Marian R. Williams, Jefferson E. Holcomb, Tomislav V. Kovandzic, & Scott Bullock, *Policing for Profit: The Abuse of Civil Asset Forfeiture*, INSTITUTE FOR JUSTICE (March 2010) at Table 1, available at <http://www.ij.org/policing-for-profit-the-abuse-of-civil-asset-forfeiture-4>.

27. For a description about how the program operates, see <http://www.justice.gov/usao/ri/projects/esguidelines.pdf>.

wise support budgets, hundreds of law enforcement agencies rely on such funds as part of their annual budgets.²⁸

- A deputy sheriff in Kane County, Illinois, wrote in a training book that “All of our home towns are sitting on a tax-liberating gold mine.”²⁹
- The Chief of Police of Columbia, Missouri, described his view of civil asset forfeiture as “kind of like pennies from heaven. It gets you a toy or something that you need, is the way we typically look at it.”³⁰
- The City Attorney of Las Cruces, New Mexico, was caught on videotape telling a roomful of people how police officers waited outside a bar hoping that the owner of a 2008 Mercedes would walk out drunk because they “could hardly wait” to get their hands on his car. He added, “We could be czars. We could own the city. We could be in the real estate business.”³¹
- A Metro Gang Strike Force in Minnesota, which was under investigation by state and federal authorities for abusive forfeiture practices, was forced to shut down and pay out more than \$840,000 in settlements.³²

Highway stops have also become a real problem.

- In a six-part expose published in the fall of 2014,³³ reporters for *The Washington Post* reviewed case files documenting 61,998 cash seizures made on highways and elsewhere since 9/11, without search warrants or indictments and processed through the Equitable Sharing Program with a total haul of more than \$2.5 billion. State and local authorities kept more than \$1.7 billion, while Justice, Homeland Security, and other federal agencies received \$800 million. Half of the seizures were below \$8,800.³⁴ Officers disproportionately target vehicles with out-of-state license plates on the assumption that out-of-state drivers will be less likely to return to challenge a forfeiture.
- In Tennessee, a local news investigation revealed that drug task force officers were 10 times more likely to patrol the westbound lanes of I-40 than the eastbound lanes. Why? Because it was known that illegal drugs from Mexico were

28. See, e.g., John Worrall, *Addicted to the Drug War: The Role of Civil Asset Forfeiture as a Budgetary Necessity in Contemporary Law Enforcement*, 29 J. CRIM. JUST. 171-87 (2001); Marian R. Williams, Jefferson E. Holcomb, Tomislav V. Kovandzic, & Scott Bullock, *Policing for Profit: The Abuse of Civil Asset Forfeiture*, INSTITUTE FOR JUSTICE (March 2010), available at <http://www.ij.org/policing-for-profit-the-abuse-of-civil-asset-forfeiture-4>; Sarah Stillman, *TAKEN: Under Civil Forfeiture, Americans Who Haven't Been Charged with Wrongdoing Can Be Stripped of Their Cash, Cars, and Even Homes. Is that All We're Losing?*, NEW YORKER, Aug. 12, 2013, available at <http://www.newyorker.com/magazine/2013/08/12/taken>; David Slayton, Admin. Dir., Office of Court Admin., *Asset Forfeiture in Texas: DPS and County Interactions*, PUBLIC POLICY RESEARCH INSTITUTE (2014), available at <http://www.txcourts.gov/media/782473/sting-report-final.pdf>.

29. See Michael Sallah, Robert O'Harrow, Jr., & Steven Rich, *Stop and Seize: Aggressive Police Take Hundreds of Millions of Dollars from Motorists Not Charged with Crimes*, WASH. POST, Sept. 6, 2014, available at <http://www.washingtonpost.com/sf/investigative/2014/09/06/stop-and-seize/>.

30. See Andrew Denney, *CPD Chief Ken Burton's "Pennies from Heaven" Mentioned on "Last Week Tonight with John Oliver,"* COLUMBIAN DAILY TRIBUNE (Oct. 6, 2014), http://www.columbiatribune.com/blogs/after_deadline/cpd-chief-ken-burton-s-pennies-from-heaven-mentioned-on/article_e7d0c9a9-8cd7-5c18-b23e-78d1ca8d7fb5.html.

31. See Laura Sullivan, *Police Can Seize and Sell Assets Even When the Owner Broke No Law*, NPR (Nov. 10, 2014), <http://www.npr.org/blogs/thetwo-way/2014/11/10/363102433/police-can-seize-and-sell-assets-even-when-the-owner-broke-no-law>.

32. See Randy Furst, *Victims of Metro Gang Strike Force Awarded \$840,000*, STAR TRIBUNE (July 23, 2012), <http://www.startribune.com/local/minneapolis/163478566.html>. Minnesota now requires a criminal conviction before civil forfeiture proceedings can be initiated, and the standard of proof has been raised to “clear and convincing evidence.” See Ilya Somin, *Minnesota Adopts Law Curbing Asset Forfeiture Abuse*, VOLOKH CONSPIRACY (May 10, 2014), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/05/10/minnesota-adopts-law-curbing-asset-forfeiture-abuse/>.

33. The entire series can be accessed at http://www.washingtonpost.com/investigations/dc-police-plan-for-future-seizure-proceeds-years-in-advance-in-city-budget-documents/2014/11/15/7025edd2-6b76-11e4-b053-65cea7903f2e_story.html.

34. See Sallah, O'Harrow, & Rich, *supra* note 29.

transported into Nashville on the eastbound road, but the couriers would return with the proceeds on the westbound road. Rather than arrest the drivers, officers often have them sign a waiver to the funds on the side of the road and then let them go.³⁵

- The same thing happened and may still happen in Volusia County, Florida, where authorities routinely stop motorists heading south on I-95 and seize amounts of cash in excess of \$100 on suspicion that it is going to be used to buy drugs. Authorities in that county have seized over \$8 million, and 90 percent of the people stopped were minorities.³⁶
- In Tenaha, Texas, which is between the Mexican border and Houston, police executed well over a hundred pretextual traffic stops of cars heading south on U.S. 59. Officers seized cash and valuables from the passengers, frequently threatening to charge them with crimes (even though no drugs were found) or to turn over any children in the car to protective services unless they signed away their rights to the cash. The town eventually settled a lawsuit filed by the American Civil Liberties Union and instituted several policy

changes, including videotaping all traffic stops and banning the use of roadside waivers.³⁷

A great many innocent motorists have been stopped and harassed by authorities. For example:

- Victor Guzman, a church secretary from El Salvador, was pulled over by a Virginia trooper for speeding. When he revealed to the officer that he was carrying \$28,500 in cash from parishioners' donations, which he was going to use to buy land for the church, the trooper seized it.³⁸
- Mandrel Stuart and his girlfriend were pulled over on I-66 by a Fairfax County, Virginia, officer because he had tinted windows and a video playing in his sightline. Stuart, the owner of a small barbecue restaurant called the Smoking Roosters, was carrying \$17,550 in cash that he was going to use that night to purchase restaurant supplies and equipment. After finding a tiny amount of marijuana residue in a bag, the police assumed it was drug money and seized it. Luckily for him, he got a good lawyer who was willing to accept a modest fee and won his case after a jury trial 14 months later. He lost his restaurant in the interim because he was unable to pay his bills and lacked credit.³⁹

35. See, e.g., Phil Williams, *I-40 Search Raises New "Policing for Profit" Questions*, NEWS CHANNEL 5 (Nov. 11, 2014), <http://www.jrn.com/newschannel5/news/newschannel-5-investigates/policing-for-profit/i-40-search-raises-new-policing-for-profit-questions-282197971.html>; *Officer Larry Bates: Liar, Thief, and the Face of "Asset Forfeiture" in Tennessee*, REPUBLIC MAGAZINE, <http://www.republicmagazine.com/videos/officer-larry-bates-liar-thief-and-the-face-of-asset-forfeiture-in-tennessee.html>; Phil Williams, *Middle Tennessee Police Profiting Off Drug Trade?*, NEWS CHANNEL 5 (May 16, 2011), <http://www.jrn.com/newschannel5/news/newschannel-5-investigates/policing-for-profit/265578741.html>.

36. See, e.g., James Bovard, *Seizure Fever: The War on Property Rights*, THE FREEMAN (Jan. 1, 1996), <http://fee.org/freeman/detail/seizure-fever-the-war-on-property-rights/>; Roger Pilon, *America's Frightening "Policing for Profit" Nightmare*, NAT'L INTEREST (Jan 23, 2015), <http://nationalinterest.org/feature/americas-frightening-policing-profit-nightmare-12094>; Jeff Brazil & Steve Berry, *Tainted Cash or Easy Money?*, ORLANDO SENTINEL (June 14, 1992), http://articles.orlandosentinel.com/1992-06-14/news/9206131060_1_seizures-kea-drug-squad.

37. See, e.g., Elora Mukherjee, *Settlement Means No More Highway Robbery in Tenaha, Texas*, ACLU BLOG (Aug. 9, 2012), <https://www.aclu.org/blog/criminal-law-reform-racial-justice/settlement-means-no-more-highway-robbery-tenaha-texas>; Sarah Stillman, *TAKEN: Under Civil Forfeiture, Americans Who Haven't Been Charged with Wrongdoing Can Be Stripped of Their Cash, Cars, and Even Homes. Is That All We're Losing?*, NEW YORKER, Aug. 12, 2013, available at <http://www.newyorker.com/magazine/2013/08/12/taken>.

38. See, e.g., Editorial, *Forfeiture Without Due Process*, WASH. POST, Jan 2, 2012, available at http://www.washingtonpost.com/opinions/forfeiture-without-due-process/2011/12/22/gIQAckn3WP_story.html; Sarah Stillman, *TAKEN: Under Civil Forfeiture, Americans Who Haven't Been Charged with Wrongdoing Can Be Stripped of Their Cash, Cars, and Even Homes. Is That All We're Losing?*, NEW YORKER, Aug. 12, 2013, available at <http://www.newyorker.com/magazine/2013/08/12/taken>.

39. See, e.g., Robert O'Harrow & Michael Sallah, *They Fought the Law. Who Won?*, WASH. POST, Sept. 8, 2014, available at <http://www.washingtonpost.com/sf/investigative/2014/09/08/they-fought-the-law-who-won/>; Nick Sibilla, *Cops Seized \$17,550 from Driver, Never Charged Him with a Crime*, INSTITUTE FOR JUSTICE (Oct. 9, 2014), <http://www.ij.org/cops-seized-17-550-from-driver-never-charged-him-with-a-crime>.

- Vincent Costello, a home improvement contractor, and his girlfriend were stopped on Highway 17 by a sheriff's deputy from Charleston County, South Carolina. Costello was on his way to Florida from New York to fix up a house he had bought in foreclosure. He was carrying \$32,000. The officer claimed he smelled marijuana and seized the cash. By the time Costello paid his lawyer and settled the case, he was left with only \$7,000.⁴⁰
- José Cristobal Guerrero, a construction foreman from Raleigh, North Carolina, was stopped by police in DeKalb County, Georgia, while traveling with his two nephews, whom he had just picked up at his brother's house. They were headed to Mexico to see their grandfather. The police seized the \$13,630 in cash that he was carrying, which he intended to use to pay for land in Mexico and to pay some bills for Guerrero's extended family there. It took three years for him to get his money back, and even then, he had to agree not to sue the police or the prosecutors—a routine condition.⁴¹
- Ming Tong Liu, a Chinese-born American from Newnan, Georgia, was stopped on I-10 in Alabama for driving 10 miles per hour over the speed limit while heading to Louisiana to buy the Hong Kong Chinese restaurant in Lake Charles for himself and his investors (two daughters and another relative). He was detained for nearly two hours, and the authorities found and seized \$75,195. He got back his money 10 months later but only after spending thousands of dollars on a lawyer and losing out on the restaurant deal.⁴²
- George Reby, an insurance adjuster from New Jersey, had \$22,000 seized by a police officer

in Tennessee on suspicion that it was related to drug activity. The money was intended for use to buy a car, and Reby had active bids online for an automobile. His story was picked up by a local broadcast news affiliate, prompting the authorities to offer to return Reby's money—but only if he agreed not to sue.⁴³

Moreover, it is not just highway stops. The IRS and other agencies have seized and forfeited bank accounts of individuals and small businesses for alleged structuring violations.

Seizures Under the Bank Secrecy Act

In order to help combat money laundering, the Bank Secrecy Act requires the filing of a currency transaction report for every transaction of more than \$10,000 in currency. In order to avoid detection and the unwanted attention that might be triggered by such reports, drug dealers and others involved in criminal activity have been known to “structure” their financial transactions by breaking up large piles of cash into smaller bundles of under \$10,000 and depositing them in different institutions or on different days. In order to discourage this, Congress passed a law (31 U.S.C. § 5324) making it a crime (punishable by fine, forfeiture, and up to five years in prison) to structure or attempt to structure a financial transaction for the purpose of evading a reporting requirement, and banks are required to file a “suspicious activity report” if they suspect that somebody might be engaged in structuring.

While it is true that there is nothing in the law that says that the currency being deposited must have come from an illegitimate source, it would certainly strike most people as horrifically unfair if the government were to use a law designed to catch crimi-

40. See Robert O'Harrow & Michael Sallah, *They Fought the Law. Who Won?*, WASH. POST, Sept. 8, 2014, available at <http://www.washingtonpost.com/sf/investigative/2014/09/08/they-fought-the-law-who-won/>.

41. *Id.*

42. See, e.g., Anthony Zurcher, *The Growing Outcry over Police Confiscation*, BBC NEWS ECHO CHAMBERS (Sept. 16, 2014), <http://www.bbc.com/news/blogs-echochambers-29228851>; *Police Seizure of Motorists' Money on Rise, Concealment \$2.5 Billion Given 9/11*, AUTOMOTIVE DIGEST (Sept. 8, 2014), <http://automotive.tdprofit.com/police-seizure-of-motorists-cash-on-rise-netting-2-5-billion-since-911.html>; Michael Sallah, Robert O'Harrow, Jr., & Steven Rich, *Stop and Seize: Aggressive Police Take Hundreds of Millions of Dollars from Motorists Not Charged with Crimes*, WASH. POST, Sept. 6, 2014, available at <http://www.washingtonpost.com/sf/investigative/2014/09/06/stop-and-seize/>.

43. See, e.g., Phil Williams, *Man Loses \$22,000 in New "Policing for Profit" Case*, NEWS CHANNEL 5 (Mar. 20, 2013), <http://www.jrn.com/newschannel5/news/newschannel-5-investigates/policing-for-profit/265578441.html>; *Officer Larry Bates: Liar, Thief, and the Face of "Asset Forfeiture" in Tennessee*, REPUBLIC MAGAZINE, <http://www.republicmagazine.com/videos/officer-larry-bates-liar-thief-and-the-face-of-asset-forfeiture-in-tennessee.html>.

nals trying to launder their ill-gotten gains to target honest citizens and legitimate businesses that may be unaware of the law's existence and that may have perfectly legitimate and sensible reasons for making regular cash deposits under \$10,000.⁴⁴ Yet that is precisely what is happening.⁴⁵ Consider these examples:

- Randy and Karen Sowers, dairy farmers in Maryland, have had their account (\$62,963) seized and frozen for alleged structuring violations even though it was undisputed that the funds had been earned legitimately. They ended up settling the case after agreeing to forfeit about \$30,000.⁴⁶
- In Spirit Lake, Iowa, federal authorities froze and attempted to forfeit the funds in the bank account (\$33,000) of Carole Hinders, who for 38 years owned and operated a restaurant called Mrs. Lady's Mexican Food. The restaurant was cash only, and Hinders made frequent small deposits because she did not want to keep too much cash at the location. Although she eventually got her money back, she was unable to pay her bills, went heavily into debt, and had to close her restaurant.⁴⁷
- The IRS seized over \$940,000 from Andrew Clyde, an Iraq war veteran who owns a gun shop in Athens, Georgia, for alleged structuring offenses. He eventually got most of his money back, but not before paying nearly \$150,000 in attorney's fees and agreeing to forfeit \$50,000 to the government.⁴⁸
- Jeff Cortazzo, an Army sergeant in Virginia, had \$66,000 seized that he had been saving for his daughter's college education. Settling cost him \$21,000, and his daughter had to wait a year to attend college.⁴⁹
- Police in Long Island seized \$447,000 (a year's worth of daily deposits) from Bi-County Distributors, Inc., a small business run by three brothers for 27 years that sold snacks, candy, and cigarettes to local convenience stores. After the case attracted considerable national attention, federal prosecutors agreed to return the money, although not before the brothers had spent approximately \$50,000 on lawyers and accountants.⁵⁰

44. Some insurance companies, for example, will insure against theft up to \$10,000, prompting many small-business owners who regularly collect cash from customers to limit their deposits to under \$10,000 in case they are robbed on the way to the bank.

45. Between 2005 and 2012, more than a third of IRS structuring cases were civil cases in which structuring itself was the only alleged offense. Over the same time period, funds seized purely for alleged structuring violations rose to \$26.5 million, an increase of 111 percent. Between 2007 and 2013, funds actually forfeited in these cases rose 490 percent. See Dick Carpenter II & Larry Salzman, *Seize First, Question Later: The IRS and Civil Forfeiture*, INSTITUTE FOR JUSTICE (Feb. 2015), available at <http://www.ij.org/seize-first-question-later>.

46. See, e.g., Jonathan Turley, *Federal Prosecutors Seize Creamery's Accounts Under Terror Financing Law*, JONATHANTURLEY.ORG (June 28, 2013), <http://jonathanturley.org/2013/06/28/federal-prosecutors-seize-creamerys-accounts-under-terror-financing-law/>; *Md. Farmer Settles Federal Financial Probe*, CBS BALTIMORE (May 31, 2012), <http://baltimore.cbslocal.com/2012/05/31/md-farmer-settles-federal-financial-probe/>; Paul Strand, *Felon Farmers? Law Criminalizes Legitimate Businesses*, CBN NEWS (Oct. 1, 2012), <http://www.cbn.com/cbnnews/us/2012/july/felon-farmers-law-criminalizes-legitimate-businesses/>.

47. See, e.g., Shaila Dewan, *I.R.S. Asset Seizure Case Is Dropped by Prosecutors*, N.Y. TIMES, Dec. 13, 2014, available at http://www.nytimes.com/2014/12/14/us/irs-asset-forfeiture-case-is-dropped.html?_r=0; Chris Carson, *Iowa Restaurant to Close Its Doors After IRS Seizes Accounts; No Crime Committed*, KDAT (Oct. 29, 2014), <http://kdat.com/iowa-restaurant-to-close-its-doors-after-irs-seizes-accounts-no-crime-committed/>.

48. See, e.g., Rachael Bade, *IRS Under a Spotlight for Freezing Assets*, POLITICO (Feb. 11, 2015), <http://www.politico.com/story/2015/02/irs-under-a-spotlight-for-freezing-assets-115091.html>; Jim Thompson, *Athens Gun Shop Owner Testifies to Congress on Asset Seizure*, ATHENS BANNER-HERALD (Feb. 13, 2015), <http://onlineathens.com/local-news/2015-02-12/athens-gun-shop-owner-testifies-congress-asset-seizure>; *Small Business Owners Forced to Battle IRS over Seized Bank Accounts*, FOXNEWS.COM (Feb. 11, 2015), <http://www.foxnews.com/politics/2015/02/11/small-business-owners-battle-irs-over-seized-bank-accounts/>.

49. See Shaila Dewan, *Law Lets I.R.S. Seize Accounts on Suspicion, No Crime Required*, N.Y. TIMES, Oct. 25, 2014, available at <http://www.nytimes.com/2014/10/26/us/law-lets-irs-seize-accounts-on-suspicion-no-crime-required.html>.

50. See *id.*; Shaila Dewan, *\$447,000 Seized by Government Will Be Returned to Business*, N.Y. TIMES, Jan. 20, 2015, available at <http://www.nytimes.com/2015/01/21/us/447000-seized-by-government-will-be-returned-to-business.html>; Rachael Bade, *IRS Under a Spotlight for Freezing Assets*, POLITICO (Feb. 11, 2015), <http://www.politico.com/story/2015/02/irs-under-a-spotlight-for-freezing-assets-115091.html>.

Some of the seizures that have been made seem to be wildly disproportionate and unfair in relation to the alleged offense.

- In Detroit, Michigan, authorities raided a “Funk Night” event at the Contemporary Art Museum and seized 40 cars from the 130 attendees on the theory that the attendees were somehow responsible for the fact that the organizers of the event had failed to obtain a permit to serve alcohol, and the cars had been used to transport them to the event. Eventually, a federal judge ruled that the officers had violated the constitutional rights of the attendees.⁵¹
- In Philadelphia, several homeowners—some of them quite elderly—are fighting to keep their primary residences after family members, usually children or grandchildren, engaged in small narcotics transactions on the premises with undercover officers. A pending class action has been filed on their behalf by the Institute for Justice (a public-interest law firm that has done yeoman’s work in this area) challenging this practice.⁵²
- Russ Caswell had to fight for years to win back a family-run motel in Tewksbury, Massachusetts, after authorities sought to forfeit it based on 15 drug-related arrests that took place over a 14-year period, during which the Caswells rented over 200,000 rooms.⁵³
- In Albuquerque, New Mexico, authorities seize and forfeit the cars of suspected drunk drivers and men who attempt to pick up prostitutes. In Illinois, authorities not only seize and forfeit the cars of suspected drunk drivers, but also seize and forfeit the boats of suspected intoxicated boaters. In Mercer, New Jersey, a prosecutor informed authorities that they should seize and forfeit the cars in shoplifting and statutory rape cases.⁵⁴
- In Georgia, the Fulton County District Attorney purchased sports tickets, paid for office parties, made donations to a lawyers’ group that later inducted him into its hall of fame, and paid for a personal home security system for his private residence.⁵⁵
- The former sheriff in Camden County, Georgia, spent hundreds of thousands of dollars in forfeiture funds on things like paying for renovations to his weekend home, called The Ponderosa; a \$250,000 donation to his alma mater to establish a scholarship; and a \$93,000 Dodge Viper to “impress kids” as part of the county’s Drug

Additionally—and not surprisingly—with an influx of cash and no real accountability, enforcement officials sometimes spend forfeiture funds in highly questionable ways, some of which have been deemed permissible while others have not.

51. See, e.g., Press Release, Federal Judge Rules CAID Raid Arrests and Car Seizures Unconstitutional, ACLU (2012), available at <https://www.aclu.org/criminal-law-reform/federal-judge-rules-caid-raid-arrests-and-car-seizures-unconstitutional>; Lee DeVito, *John Oliver Revisits “the Funkiest Shakedown in Human History,” the CAID Raid*, METRO TIMES (Oct. 7, 2014), <http://www.metrotimes.com/Blogs/archives/2014/10/07/john-oliver-revisits-the-funkiest-shakedown-in-human-history-the-caid-raid>.

52. See, e.g., Nick Sibilla, *Philadelphia Earns Millions by Seizing Cash and Homes from People Never Charged with a Crime*, FORBES (Aug. 26, 2014), <http://www.forbes.com/sites/instituteforjustice/2014/08/26/philadelphia-civil-forfeiture-class-action-lawsuit/>; Sarah Stillman, *TAKEN: Under Civil Forfeiture, Americans Who Haven’t Been Charged with Wrongdoing Can Be Stripped of Their Cash, Cars, and Even Homes. Is That All We’re Losing?*, NEW YORKER, Aug. 12, 2013, available at <http://www.newyorker.com/magazine/2013/08/12/taken?currentPage=all>.

53. See, e.g., *United States v. 434 Main St.*, 961 F.Supp.2d 298 (D. Mass. 2013); *United States v. 434 Main Street, Tewksbury, Mass. (The Motel Caswell): Federal & Local Law Enforcement Agencies Try to Take Family Motel from Innocent Owners*, INSTITUTE FOR JUSTICE, available at <https://www.ij.org/massachusetts-civil-forfeiture>; Elizabeth Kreft, *Civil Asset Forfeiture Victim Fought—and Won—When the Government Tried to Take His Property*, THE BLAZE (Oct. 2, 2014), <http://www.theblaze.com/stories/2014/10/02/civil-asset-forfeiture-victim-fought-and-won-when-the-government-tried-to-take-his-property/>; Jon Chesto, *Tewksbury Motel Owner Wins Battle Against Feds in High-Profile Property Seizure Case*, BBJ THE BOTTOM LINE (Jan. 24, 2013), http://www.bizjournals.com/boston/blog/bottom_line/2013/01/motel-caswell-owner-victorious-over-feds.html?page=all.

54. Shailla Dewan, *Police Use Department Wish List When Deciding Which Assets to Seize*, N.Y. TIMES, Nov. 9, 2014, available at <http://www.nytimes.com/2014/11/10/us/police-use-department-wish-list-when-deciding-which-assets-to-seize.html>.

55. See *Report: Fulton DA Spent Public Funds on Parties*, ATHENS BANNER-HERALD (June 7, 2013), <http://onlineathens.com/local-news/2013-06-07/report-fulton-da-spent-public-funds-parties>.

Awareness and Resistance Education (DARE) program.⁵⁶

- A district attorney in Texas distributed more than \$1 million in forfeiture funds to three favored employees and millions more to supplement his own salary and to pay for several “training” trips to Las Vegas casinos.⁵⁷
- A DOJ IG audit of the Oklahoma Highway Patrol found \$1.9 million (out of \$3.4 million over a three-year period) in unallowable and unsupported expenditures including salaries, overtime pay, and construction.⁵⁸
- A recent DOJ IG report similarly disallowed \$374,257 in questionable expenditures by officials in Sunrise, Florida. Although not disallowed, the report noted that Sunrise officials paid themselves approximately \$1.2 million in overtime and related fringe benefits using forfeiture funds.⁵⁹

- Using forfeiture funds, authorities have funded lavish “training” trips to exotic locations⁶⁰ and purchased, among other things, a margarita machine;⁶¹ a tanning salon (the officials who did this also used forfeiture funds to purchase prostitutes and marijuana);⁶² and a Zamboni machine.⁶³

Positive State and Federal Developments

Fortunately, there have been some positive developments recently at both the state and federal levels that may help to ameliorate some of these abuses, although more is needed. Facing significant opposition from local law enforcement agencies, who treat this issue as though it were an existential threat, a few intrepid states have taken steps to reform their own laws to make the process fairer and more transparent.

- A few states, including Maine, North Dakota, and Vermont, require that forfeiture funds be deposited into the state’s general treasury,⁶⁴ and

56. See, e.g., Paul Pinkham, *Georgia Inmates Reportedly Did Work out of State*, FLORIDA TIMES-UNION, Oct. 14, 2007, available at http://jacksonville.com/tu-online/stories/101407/met_208183322.shtml; John Burnett, *Sheriff Under Scrutiny over Drug Money Spending*, NPR (June 18, 2008), <http://www.npr.org/templates/story/story.php?storyId=91638378>; Terry Dickson, *Former Camden Sheriff Challenges Incumbent to Get Job Back*, JACKSONVILLE.COM (July 30, 2012), <http://jacksonville.com/news/crime/2012-07-30/story/former-camden-sheriff-challenges-incumbent-get-job-back>; Teresa Stepinski & Terry Dickson, *A Tool to Fight Crime or Just a Lot of Flash?*, FLORIDA TIMES-UNION, Aug. 7, 2002, available at http://jacksonville.com/tu-online/stories/080702/met_10114798.html.

57. See Mark Collette, *As New Questions Emerge, Former District Attorney Garza Speaks About Forfeiture Funds*, CALLER.COM (Jan. 22, 2012), <http://www.caller.com/news/as-new-questions-emerge-former-district-attorney>.

58. See OFFICE OF THE INSPECTOR GEN., U.S. DEP’T OF JUSTICE, *AUDIT OF THE OKLAHOMA HIGHWAY PATROL’S EQUITABLE SHARING PROGRAM ACTIVITIES* (2013), available at <http://www.justice.gov/oig/reports/2013/g6013014.pdf>.

59. See OFFICE OF THE INSPECTOR GEN., U.S. DEP’T OF JUSTICE, *AUDIT OF THE CITY OF SUNRISE POLICE DEPT’S EQUITABLE SHARING PROGRAM ACTIVITIES* (2014), available at <http://www.justice.gov/oig/reports/2014/g4015003.pdf>.

60. See Collette, *supra* note 57.

61. See Renee Lee, *Montgomery DA Says Funds Used for Liquor at Cook-off*, CHRON (Mar. 18, 2008), <http://www.chron.com/neighborhood/humble-news/article/Montgomery-DA-says-funds-used-for-liquor-at-1757341.php>.

62. See Melanie Scott Dorsey, *Ex-Romulus Police Chief, Wife, 5 Officers Head to Trial*, DETROIT FREE PRESS, Sept. 27, 2012, available at <http://www.freep.com/article/20120927/NEWS02/309270120/Ex-Romulus-police-chief-wife-5-officers-head-to-trial>; Dave Bartkowiak, Jr., *Ex-Romulus Police Chief Sentenced for Corruption*, CLICK ON DETROIT (Oct. 17, 2014), <http://www.clickondetroit.com/news/exromulus-police-chief-sentenced-for-corruption/29196354>; Guy Burns, *Romulus Police Chief’s Wife, Patricia St. Andre, Gets 7 to 20 Years in Prison for Operating Criminal Enterprise*, MLIVE.COM (Feb. 20, 2014), http://www.mlive.com/news/detroit/index.ssf/2014/02/romulus_police_chiefs_wife_pat.html.

63. See Laura Krantz & Jessica Trufant, *Audit: Worcester DA’s Office Bought Zamboni, Lawn Gear with Forfeited Drug Money*, METROWEST DAILY NEWS (Feb. 15, 2013), <http://www.metrowestdailynews.com/x1522323792/Audit-Worcester-DAs-office-bought-Zamboni-lawn-gear-with-forfeited-drug-money#ixzz2LH4vHjJv>.

64. In Maine, 15 M.R.S.A. § 5822 (4) requires “the disposition of the property to the General Fund, less the reasonable expenses of the forfeiture proceedings, seizure, storage, maintenance of custody, advertising and notice,” with certain exceptions for the transfer of title to state, municipal, and county agencies. The North Dakota Century Code, Chapter 29-31.1-06, permits the seizing agency to retain forfeited property for official use, transfer custody to another agency, or arrange for sale of the property, the proceeds of which, together with monetary forfeitures, shall be deposited in the “appropriate state, county, or city general fund” minus costs. Vermont has multiple forfeiture statutes. For example, 23 V.S.A. § 1213c(j) requires that excess proceeds from vehicle forfeitures be deposited in the general fund.

Missouri places those funds into an account earmarked for public education.⁶⁵

- Other states, such as Connecticut, Florida, and Utah, have raised the standard of proof that the government must establish from a “preponderance of the evidence” to “clear and convincing evidence,”⁶⁶ while Nebraska and Wisconsin require proof “beyond a reasonable doubt” to justify the forfeiture.⁶⁷
- Other jurisdictions, such as the District of Columbia, place the burden on the government to prove that an owner either did know that his property was being used for an illicit purpose or was otherwise willfully blind to (in other words, intentionally avoided finding out about) the use of his property in criminal conduct. That reform also raised the burden of proof to “clear and convincing” when the property being seized is real property.⁶⁸
- Minnesota, North Carolina, and Colorado have essentially abolished civil forfeiture at the state level, requiring a conviction or guilty plea from

the property owner before a forfeiture proceeding can be instituted.⁶⁹

At the federal level, the IRS recently announced that it would no longer seek forfeitures in structuring cases unless it has evidence that the business or individual making the deposits was engaged in criminal activity.⁷⁰ The DOJ has announced a similar internal policy shift.⁷¹ However, neither agency is dropping any of its pending structuring cases. Moreover, these are only policy changes that can be reversed at any time.

More significantly, on January 16, 2015, Attorney General Eric Holder announced a new policy limiting when agency participants in the Equitable Sharing Program can “adopt” cases involving assets seized by state or local authorities under state law. He stated that this was part of a comprehensive Justice Department review of DOJ’s civil asset forfeiture program.⁷²

Of course, this too is only a policy change that can be reversed at any time. It remains to be seen how much of an impact DOJ’s new policy will have, since there are several exceptions that threaten to swallow the rule.⁷³

65. In Missouri, section 513.623 of the Missouri Revised Statute mandates that proceeds from the sale of forfeited goods be distributed “pursuant to section 7 of article IX of the Constitution of the state of Missouri,” which covers investment of education funds.

66. CONN. GEN. STAT. § 54-36H (b); FLA. STAT. § 932.704 (8); UTAH CODE 24-1-4 (6)(c).

67. NEB. REV. STAT. 28-431 (4); Wisconsin Statute section 973.076(3) establishes that the “state shall have the burden of satisfying or convincing to a reasonable certainty by the greater weight of the credible evidence” that property is subject to civil forfeiture.

68. See Jason Snead & Andrew Kloster, *Washington, D.C., Civil Forfeiture Reform: A Model for the States*, HERITAGE FOUNDATION ISSUE BRIEF NO. 4312 (Dec. 5, 2014) available at <http://www.heritage.org/research/reports/2014/12/washington-dc-civil-forfeiture-reform-a-model-for-the-states>.

69. Regarding Minnesota, see https://www.revisor.mn.gov/bills/text.php?version=latest&session=1s88&number=SF0874&session_year=2014&session_number=0&format=pdf; <http://dailysignal.com/2014/05/16/minnesota-raises-bar-forfeiture-reform/>. In North Carolina, civil forfeiture actions (G.S. G.S. § 1-532) are initiated pursuant to G.S. § 14-2.3, which requires that forfeiture actions be filed within three years of the date of conviction. Colorado Revised Statutes 16-13-307 requires that a property owner be convicted of a specified offense before a judgment of forfeiture may be entered.

70. See IRM 9.5.5.3.2 (Feb. 27, 2015) (regarding “legal source” structuring cases), available at http://www.irs.gov/irm/part9/irm_09-005-005.html.

71. See Memorandum from the Attorney General on Guidance Regarding the Use of Asset Forfeiture Authorities in Connection with Structuring Offenses (Mar. 31, 2015), available at <http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/31/ag-memo-structuring-policy-directive.pdf>.

72. See Press Release, U.S. Dept. of Justice, Attorney General Prohibits Federal Agency Adoptions of Assets Seized by State and Local Law Enforcement Agencies Except Where Needed to Protect Public Safety (Jan. 16, 2015), available at <http://www.justice.gov/opa/pr/attorney-general-prohibits-federal-agency-adoptions-assets-seized-state-and-local-law>; ATTORNEY GENERAL, ORDER, PROHIBITION ON CERTAIN FEDERAL ADOPTIONS OF SEIZURES BY STATE AND LOCAL LAW ENFORCEMENT AGENCIES (2015), available at http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/01/16/attorney_general_order_prohibiting_adoptions.pdf; 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, available at http://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.

73. For additional information about how forfeiture activity might be affected by this new policy, see *Federal Asset Forfeiture: Uses and Reforms: Hearing Before the Subcomm. on Crime, Terrorism, Homeland Security, and Investigations of the H. Comm. on the Judiciary*, 114th Cong. (2015) (testimony of Darpana Sheth) (Appendix B), available at http://judiciary.house.gov/_cache/files/84cdf08-d3d2-4810-92aa-2c035e809488/sheth-testimony.pdf.

- The policy will still allow for equitable sharing in cases generated from federal–state task forces, which, according to a 2012 U.S. Government Accountability Office report, constitutes about 83 percent of equitable sharing cases;⁷⁴
- The policy will still allow adoption when federal authorities obtain a federal seizure warrant, which is not a terribly difficult thing to do;
- The policy contains a “public safety” exception when the seizure involves firearms, ammunition, explosives, and property related to child pornography; and
- A catch-all provision allows for adoptive seizures based on the sole discretion of the Assistant Attorney General in charge of the Criminal Division.

Despite DOJ’s efforts to stave off action by Congress, there appears to be a great deal of bipartisan support for reform. The Fifth Amendment Integrity Restoration (FAIR) Act of 2015,⁷⁵ recently introduced by Senator Rand Paul (R–KY) and Congressman Tim Walberg (R–MI), would address many of the issues discussed herein, including:

- Abolishing the Equitable Sharing Program;
- Assigning the proceeds of any forfeiture to the general treasury;
- Raising the standard for the burden of proof in civil asset forfeiture cases from “preponderance of the evidence” to “clear and convincing evidence”;
- In cases involving alleged facilitating property, placing the burden on the government to show by clear and convincing evidence that the owner used the property himself to engage in unlawful activity, knowingly consenting to its use, or was willfully blind to its use;

- Allowing forfeiture in structuring cases only when the government proves that the owner “knowingly” sought to avoid the filing of a bank report and that the funds in question were derived from an illegitimate source;
- Requiring a probable cause hearing within 14 days of a seizure in a structuring case;
- Adding a proportionality requirement to seizures in which a court would have to consider not only “the seriousness of the offense” (as provided for under current law), but also “the extent of the nexus of the property to the offense,” “the range of sentences available for the offense,” “the fair market value of the property,” and “the hardship to the property owner and dependents”;
- Providing for legal representation for property owners who cannot afford counsel in cases in which they wish to contest forfeiture of their primary residence; and
- Requiring the Department of Justice to submit an annual report on forfeitures to Congress, separating criminal forfeiture cases from civil forfeiture cases.

Conclusion

Proposals like the FAIR Act and measures being debated by several state legislatures deserve serious consideration. Despite forfeiture’s noble intentions, the many stories of innocent victims and law enforcement abuses prove that the pendulum has swung too far in favor of law enforcement.

In reforming forfeiture laws, however, we must be careful not to swing the pendulum too far in the opposite direction. For the sake of citizens, the process should be made fairer and more transparent, the profit incentive of forfeiture should be abolished or severely constrained, and there should be greater oversight.

74. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-12-736, JUSTICE ASSETS FOR FORFEITURE FUND: TRANSPARENCY OF BALANCES AND CONTROLS OVER EQUITABLE SHARING SHOULD BE IMPROVED 43 (2012), available at <http://www.gao.gov/assets/600/592349.pdf>.

75. FAIR Act, S. 255, 114th Cong. (2015), available at <http://www.paul.senate.gov/files/documents/ALB15102.pdf>. The companion bill in the House of Representatives is H.R. 540.

In other words, civil asset forfeiture should be returned to its original purpose: penalizing those who seek to profit handsomely from their illegal activities. If such funds were deposited into the general treasury, nothing would preclude law enforcement authorities from going to Congress or their state legislatures and seeking an increase in their budgets or victims' compensation funds. Such requests could then be weighed in due course against competing legislative priorities.

After many years of struggling to draw the public's attention to this issue, those who favor reforming our nation's asset forfeiture laws finally appear to have momentum. Through unfortunate and ill-advised instances of overreaching and, in some cases, outright avarice, law enforcement authorities who favor the status quo may be hoist by their own petard.

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