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Guilty Until Proven Innocent: Rethinking Civil Asset Forfeiture and the Innocent Owner Defense

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GUILTY UNTIL PROVEN INNOCENT: RETHINKING CIVIL ASSET FORFEITURE AND THE INNOCENT OWNER DEFENSE

By: Luis Suarez †

ABSTRACT

Law enforcement departments across the country use civil asset forfeiture as a method to fund the work of law enforcement departments under the guise of combatting the “War on Drugs.” Attorney General Jeff Sessions made increasing civil asset forfeiture a DOJ priority. If civil asset forfeiture continues to rise to the level that Attorney General Sessions would like to see it, then we will soon find ourselves fighting to keep what is rightfully ours. This Comment will argue that the government should be required to prove that the owner of forfeited property had actual knowledge that the property was connected to an underlying crime.

Dick M. Carpenter, Director for the Institute for Justice, believes that civil asset forfeiture is a thing of the past that today’s legal system should eschew. Civil asset forfeiture plays a relevant role in contemporary law enforcement, but additional safeguards should be enacted to ensure that civil asset forfeiture is not used at the expense of citizens’ property rights.

Uniform reporting reform regarding forfeiture should occur amongst the states, and the government must prove that the innocent owner is not innocent. This is not to say that the government is required to succeed in a criminal prosecution before property can be forfeited, but this Comment argues that the government must prove from the onset that any owner of the property is not innocent and detached from the crime. Property owners should never be forced to prove their innocence without the constitutional protections guaranteed in criminal courts.

I. INTRODUCTION.....	1001	R
II. HISTORY OF CIVIL ASSET FORFEITURE	1004	R
A. <i>Modern Day Forfeiture</i>	1004	R
III. BURDEN OF PROOF	1006	R
IV. PROCEDURAL ISSUES	1007	R
V. FINANCIAL INCENTIVES	1008	R
A. <i>Inadequate Forfeiture Reporting</i>	1009	R
B. <i>Equitable Sharing</i>	1010	R
VI. DIFFICULTY OF PROVING INNOCENCE.....	1012	R
VII. COMPARISON AMONG STATE LAWS	1016	R
VIII. CONCLUSION	1018	R

I. INTRODUCTION

On July 19, 2017, Attorney General Sessions signed an order that strengthened civil asset forfeiture programs by allowing the Department of Justice and other federal agencies to forfeit assets seized by state or local law enforcement, a process known as “federal adop-

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tions.”¹This new order creates a stronger federal forfeiture program, which is troubling news for citizens like Charles Clarke.

In 2014, the Cincinnati law enforcement officials seized \$11,000 in cash from Charles Clarke.² Clarke lost his entire life savings because the officials claimed that his bag smelled of marijuana.³ Officials did not find any drugs, illegal items, or evidence connected to a criminal activity on Clarke’s body or in his carry-on.⁴ Regardless, the law enforcement officials seized all of the cash found in Clarke’s carry-on before proving that the cash had a probable relation to a crime.⁵

Current civil asset forfeiture law allows law enforcement to seize property they suspect is connected to criminal activity.⁶ Police may seize cash, cars, jewelry, and homes—even without a warrant.⁷ So long as law enforcement officials have probable cause to believe that the property being seized is subject to forfeiture and the seizure is made pursuant to a lawful arrest or search, then law enforcement officials can effectively seize a person’s property without any judicial oversight.⁸ Officials can bring actions seeking forfeiture as *in rem* proceedings, which allow the government to circumvent bringing an action against the property owner by filing an action against the property itself.⁹

When beginning civil forfeiture proceedings, the prosecution must send a written notice to interested parties within sixty days of seizing the property.¹⁰ An interested party must file the claim to the property no later than thirty days after the date of final publication of the notice of seizure.¹¹ The government designates an interested party if no person claims an interest in the property.¹² After a claim has been made, the government has ninety days to file a complaint for forfeiture against the property.¹³ The government has an advantage over

1. Att’y Gen. Order No. 3946-2017 (July 19, 2017); *see also* U.S. Dep’t of Just., Crim. Div., Policy Directive 17-1 on Attorney General’s Order on Federal Adoption and Forfeiture of Property Seized by State and Local Law Enforcement Agencies (2017).

2. DICK M. CARPENTER II ET AL., INST. FOR JUST., *POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE* 8 (2d ed. 2015), <https://ij.org/wp-content/uploads/2015/11/policing-for-profit-2nd-edition.pdf> [<https://perma.cc/G6KF-VFGF>].

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. 18 U.S.C. § 981(b)(2) (2012).

8. *Id.*

9. Rachel L. Stuteville, *Reverse Robin Hood: The Tale of How Texas Law Enforcement Has Used Civil Asset Forfeiture to Take From Property Owners and Pad The Pockets Of Local Government-the Righteous Hunt for Reform Is On*, 46 TEX. TECH L. REV. 1169, 1176 (2014).

10. § 983(a)(1)(A)(i).

11. § 983(a)(2)(B).

12. § 983(a)(1)(A)(v).

13. § 983(a)(3)(A).

interested parties at the time the complaint is filed because 18 U.S.C. § 983 does not allow the dismissal of a complaint for failure to establish that the property was forfeitable on the ground that the government possessed inadequate evidence at the time the complaint was filed.¹⁴

The burden of proof during forfeiture proceedings is on the government to establish by a preponderance of the evidence that the property is subject to forfeiture.¹⁵ Furthermore, if the government relies on the theory that the property was used to facilitate or commit a crime, then the government must also establish that a substantial connection existed between the property and the offense.¹⁶ Moreover, the proceeding is the first time that the owner of the property is offered the opportunity to regain ownership of his or her property. The owner may raise an “innocent owner” defense, which would stop the government from forfeiting the property interest under any civil forfeiture statute.¹⁷

Innocent owners must prove by a preponderance of the evidence that they “did not know of the conduct giving rise to forfeiture; or upon learning of the conduct giving rise to forfeiture, did all that reasonably could be expected under the circumstances to terminate such use of the property.”¹⁸ Therefore, because the forfeiture is characterized as a civil matter, property owners are not afforded the constitutional procedural protections guaranteed in criminal proceedings, such as a right to a jury trial and requiring the government to prove its case beyond a reasonable doubt.¹⁹ Historically, courts permitted civil asset forfeiture actions but acknowledged that the actions were criminal in nature.²⁰

This Comment proposes a change of civil asset forfeiture laws at both the federal and state levels due to the unjust difficulties that property owners face throughout the country. The Comment begins by discussing the roots of civil asset forfeiture and how the criminal nature of forfeiture should impact the standard of proof and the procedural posture of forfeiture proceedings. The Comment’s latter half discusses the potential for abuse that civil asset forfeiture creates when considering law enforcement agencies’ financial incentive to pursue forfeiture and the difficulty property owners face when challenging a forfeiture. Finally, the Comment concludes with a comparison of forfeiture laws amongst the states, and a proposal of uniformity of those laws to better protect citizens’ property rights.

14. § 983(a)(3)(D).

15. § 983(c)(1).

16. § 983(c)(3).

17. § 983(d)(1).

18. § 983(d)(2)(A).

19. *Leonard v. Texas*, 137 S. Ct. 847, 849 (2017) (mem.).

20. *Boyd v. United States*, 116 U.S. 616, 633-34 (1886).

II. HISTORY OF CIVIL ASSET FORFEITURE

Civil asset forfeiture traces back to biblical times when it was common practice to relinquish anything connected to one's wrongdoing over to God.²¹ Many believed that an object or piece of property could be involved in a wrongdoing and the object or property itself should be held responsible for its wrongdoing.²² Early English common law further developed this line of thought with the Deodand procedure that allowed the King to forfeit any property that caused the deaths of English citizens.²³ Originally, the property seized under the Deodand procedure was used for religious purposes. The procedure evolved, however, into a source of revenue for the King.²⁴

Early United States forfeiture law expanded this concept in the realm of admiralty law.²⁵ The United States invoked forfeiture proceedings against ships that violated the law of the high seas for crimes such as slave trafficking.²⁶ In effect, the United States would bring an action against a ship for a crime such as slave trafficking and then seize the ship through forfeiture proceedings. The Supreme Court determined that a violation of the law of nations necessitated seizure of ships because seizure was the only adequate means of suppressing the offense or wrong.²⁷ Additionally, another earlier Court held that a forfeiture proceeding can be against the ship rather than the ship's owner, thereby disregarding the will of the owner and the innocent owner defense.²⁸ The logic used by these earlier Court decisions in admiralty law created the framework for future civil asset forfeiture proceedings.

A. *Modern Day Forfeiture*

Modern day civil asset forfeiture did not become widely used until the "war on drugs" began during the Nixon and Reagan administrations.²⁹ In the 1980s, Congress strengthened civil asset forfeiture by amending the Comprehensive Drug Abuse and Prevention Act of 1970.³⁰ The Act's original goals were to prevent drug abuse, to provide more effective means of law enforcement, and to provide a bal-

21. Mike Fishburn, *Gored by the Ox: A Discussion of the Federal and Texas Laws that Empower Civil-Asset Forfeiture*, 26 RUTGERS L. REC. 4 (2002).

22. *Id.*

23. *Id.*

24. *Id.*

25. Stuteville, *supra* note 10, at 1178.

26. *Id.*

27. *Harmony v. United States*, 43 U.S. 210, 233 (1844).

28. *United States v. The Little Charles*, 26 F. Cas. 979, 982 (1818).

29. Stuteville, *supra* note 10, at 1179.

30. *Id.*

anced scheme of criminal penalties for drug offenses.³¹ The amendments that followed authorized forfeiture of proceeds from drug related offenses, as well as forfeiture from any property that facilitated drug offenses.³² In 1984, Congress passed another amendment to the Act that created the Department of Justice Assets Forfeiture Fund.³³ The fund authorized the Attorney General to reimburse any federal, state, or local agency for any costs necessary for forfeiture or costs that were incident to forfeiture.³⁴

In 2000, Congress passed the Civil Asset Forfeiture Reform Act (“CAFRA”) to “provide a more just and uniform procedure for Federal civil forfeitures.”³⁵ During the June 24, 1999, floor debate, Congresswoman Deborah Pryce stated that the “current civil asset forfeiture laws, at their core, deny basic due process, and the American people have reason to be both offended and concerned by the abuse of individual rights. . . .”³⁶ CAFRA became law at a time when people began to realize that civil asset forfeiture was tilted too far in the government’s favor.

Even Attorney General Sessions, then a United States Senator, realized that civil asset forfeiture laws needed reform. During the Senate Proceedings and Debates on October 6, 1999, Senator Sessions introduced the Sessions–Schumer Civil Asset Forfeiture Reform Act of 1999.³⁷ The Sessions–Schumer bill, which would later be incorporated in part with CAFRA, raised the burden of proof on the government in forfeiture proceedings from probable cause to preponderance of the evidence.³⁸ CAFRA also created the “innocent owner defense” for owners, which stated that “an innocent owner’s interest in property shall not be forfeited under any civil forfeiture statute.”³⁹ When asserting the innocent owner defense, however, the burden is on the claimant to prove by a preponderance of the evidence that he or she is actually innocent.⁴⁰

CAFRA provided greater protection to individuals by allowing them to prove their innocence in forfeiture proceedings by a prepon-

31. David L. Luck, *Guns, Drugs, and . . . Federalism?* —Gonzales v. Raich *Enfeebles the Rehnquist Court’s Lopez-Morrison Framework*, 61 U. MIAMI L. REV. 237, 246 (2006).

32. Stuteville, *supra* note 10, at 1179; See 21 U.S.C.S. § 881(a)(7) (2012).

33. Comprehensive Crime Control Act of 1984, 28 U.S.C. § 524 (2012).

34. *Id.*

35. Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106-185, 114 Stat. 202 (2000).

36. 145 CONG. REC. H4,852 (daily ed. June 24, 1999) (statement of Rep. Pryce), 145 Cong Rec H 4851-01, at *H4,852 (Westlaw).

37. 145 CONG. REC. S12,108 (daily ed. Oct. 6, 1999) (statement of Sen. Sessions), 145 Cong Rec S 12101-03, at *S12,108 (Westlaw).

38. *Id.*

39. Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106-185, 114 Stat. 202 (2000).

40. *Id.*

derance of the evidence. Nevertheless, CAFRA still provided law enforcement the ability to benefit from the proceeds of civil forfeiture.⁴¹ Since CAFRA was adopted, the reach of civil forfeiture proceedings has expanded at the federal and state levels.⁴² As a result, forfeiture has expanded long past its biblical roots. Despite its protections, United States citizens are still unjustly deprived of their property every year.

III. BURDEN OF PROOF

Most state forfeiture laws currently require law enforcement officials to show probable cause that the property is connected to a crime.⁴³ Because the proceeding is civil, property owners are not entitled to the right to counsel. If property owners want to regain their property, then the property owners must find legal counsel to represent them or represent themselves *pro se*.⁴⁴ By making the proceedings civil, the government may circumvent the procedural safeguards that are offered in criminal cases such as the right to counsel. The lack of procedural safeguards makes forfeiture susceptible to abuse by law enforcement.

Further, law enforcement departments are motivated to seize properties and assets because they profit from its forfeiture.⁴⁵ Allowing law enforcement agencies to benefit from forfeiture promotes abuse by law enforcement, especially when there are few procedural safeguards prior to the civil proceedings.⁴⁶ Citizens would be more protected if the government was required to prove that the property owner had actual knowledge of the underlying crime. Law enforcement would then less likely seize property simply for monetary gain.

Raising the burden of proof on the government at the time of the seizure would minimize the frequent application of forfeiture proceedings. A study conducted by the Inspector General found that seventy-nine out of 100 sample Drug Enforcement Administration (“DEA”) seizures occurred absent any preexisting intelligence of a specific drug crime.⁴⁷ This could explain the reason why 87% of forfeitures at the federal level are pursued through civil rather than criminal proceedings.⁴⁸ Furthermore, most forfeiture proceedings are never challenged because of the associated legal difficulties.⁴⁹ For ex-

41. CARPENTER II ET AL., *supra* note 3, at 10.

42. *Id.*

43. *Id.* at 11.

44. *Id.* at 12.

45. *Id.* at 11-12.

46. *Id.* at 11.

47. OFFICE OF INSPECTOR GEN., U.S. DEP’T OF JUSTICE, REVIEW OF THE DEPARTMENT’S OVERSIGHT OF CASH SEIZURE AND FORFEITURE ACTIVITIES 22 (2017), <https://oig.justice.gov/reports/2017/e1702.pdf> [<https://perma.cc/3LTQ-3WRF>].

48. CARPENTER II ET AL., *supra* note 3, at 12.

49. *Id.*

ample, defendants in Illinois are required to pay the greater of \$100 or 10% of the property's value before challenging the seizure proceeding to prove the individual's innocence.⁵⁰ The difficulty and costs associated with trying to retrieve the property partially is the reason why 90% of judicial cash forfeitures are uncontested.⁵¹

IV. PROCEDURAL ISSUES

Forfeiture proceedings may be brought *in rem*, which allows the government to bring an action against the property rather than the individual.⁵² *In rem* proceedings are beneficial to the government for a few reasons. First, *in rem* proceedings have different evidentiary rules and procedures than criminal proceedings. Also, the culpability of the party does not need to be proven for *in rem* proceedings.⁵³ This means that the government does not need to accompany the *in rem* proceeding with a criminal proceeding at all.⁵⁴ Further, the standard of proof is lower for *in rem* proceedings as opposed to criminal proceedings. The standard used in most states is "preponderance of the evidence," which requires that the government prove the property is more likely connected to a crime than not.⁵⁵ Civil asset forfeiture standards are considered constitutional because the proceeding is *in rem* and therefore is not offending any individuals' due process rights.⁵⁶ The low standard of proof makes civil forfeiture cases easy for the government but difficult for the claimants to win.⁵⁷

The federal government can also avoid judicial proceedings through a process known as administrative forfeiture.⁵⁸ Administrative forfeiture can be used for personal property, including cash.⁵⁹ If no party files a claim within the twenty-day deadline prescribed by statute, then an administrative official can declare the property forfeited.⁶⁰ After the government seizes property, it must provide written notice to interested parties within sixty days of the seizure.⁶¹ Once the notice is publicized or sent to the interested parties, they have thirty days to file

50. *Id.*

51. Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 50 (1998).

52. See 18 U.S.C. § 985(c)(3) (2012).

53. William Carpenter, *Reforming the Civil Drug Forfeiture Statutes: Analysis and Recommendations*, 67 TEMP. L. REV. 1087, 1096 (1994).

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

55. CARPENTER II ET AL., *supra* note 3, at 16.

56. David Ross, *Civil Forfeiture: A Fiction That Offends Due Process*, 13 REGENT U.L. REV. 259, 263 (2001).

57. CARPENTER II ET AL., *supra* note 3, at 18.

58. Caleb Nelson, *The Constitutionality of Civil Forfeiture*, 125 YALE L.J. 2446, 2449 (2016).

59. 19 U.S.C. § 1607(a) (2012).

60. *Id.* § 1609(a).

61. 18 U.S.C. § 983(a)(1) (2012).

a claim.⁶² The interested party must then file an answer to the government's complaint within twenty days.⁶³ Once the twenty days have passed, a customs officer declares the property forfeited and sells the property at a public auction.⁶⁴ The interested party can petition the seizing agency after the administrative forfeiture; however, the seizing agency evaluates the petitioner's interest rather than the court.⁶⁵

Administrative forfeiture can occur on any property valued under \$500,000.⁶⁶ Statistics suggest that approximately 81% of all DEA cash seizures have been administratively forfeited at a value of over \$3.2 billion.⁶⁷ Uncontested forfeitures have two likely causes: (1) the forfeiture is valid, and therefore, no one is willing to contest it; or (2) the process to challenge the forfeiture is unduly burdensome, and therefore, claimants are hesitant to challenge the forfeited property.⁶⁸ Therefore, it is not difficult to understand why 80% of forfeitures go uncontested in light of the government's initial benefit from the proceedings and the difficulties the proceedings impose on property owners.

For Attorney General Sessions, civil asset forfeitures and the accompanying proceedings benefit the public at large because "it helps return property to the victims of crime."⁶⁹ However, a study of 100 DEA cases, which involved warrantless searches and seizures that turned up no illicit narcotics, showed that over half of the seizures had "no discernable connection between the seizure and the advancement of law enforcement efforts."⁷⁰ The administrative forfeiture gives the government a lower standard of proof to meet, allowing them to subsequently forfeit the cash when it is not found to further law enforcement efforts.

V. FINANCIAL INCENTIVES

At the federal level, the Department of Justice ("DOJ") created the Asset Forfeiture Program ("AFP") in 1984 to support the use of asset forfeiture.⁷¹ The AFP is comprised of agencies that deposit any assets

62. *Id.* § 983(a)(4)(A).

63. *Id.* § 983(a)(4)(B).

64. 19 U.S.C. § 1609(a) (2012).

65. OFFICE OF INSPECTOR GEN., *supra* note 51, 13-14.

66. *Id.* at 7.

67. *Id.* at 13.

68. *See* CARPENTER II ET AL., *supra* note 3, at 18.

69. *Attorney General Sessions Issues Policy and Guidelines on Federal Adoptions of Assets Seized by State or Local Law Enforcement*, U.S. DEP'T JUST. (July 19, 2017), <https://www.justice.gov/opa/pr/attorney-general-sessions-issues-policy-and-guidelines-federal-adoptions-assets-seized-state> [<https://perma.cc/F3HZ-XKPE>].

70. OFFICE OF INSPECTOR GEN., U.S. DEP'T OF JUSTICE, *REVIEW OF THE DEPARTMENT'S OVERSIGHT OF CASH SEIZURE AND FORFEITURE ACTIVITIES* 21 (2017).

71. OFFICE OF INSPECTOR GEN., U.S. DEP'T OF JUSTICE, *AUDIT OF THE ASSETS FORFEITURE FUND AND SEIZED ASSET DEPOSIT FUND ANNUAL FINANCIAL STATEMENTS FISCAL YEAR 2016 4* (2016).

into the Assets Forfeiture Fund (“AFF”).⁷² In return, those agencies are eligible to receive an annual allocation of resources from the fund.⁷³ The AFF and the Seized Asset Deposit Fund (“SADF”) combine to form a financial reporting entity of the DOJ, which includes cash and property seized by forfeiture.⁷⁴ Assets are held in the SADF until the end of a successful forfeiture action, at which time they are transferred to the AFF, and then the AFF expends the assets to the agencies that are in the AFP.⁷⁵ The AFF’s funds cover the operating costs of the AFP such as payments to innocent third-party claimants; federal and state task force expenses; and forfeiture training.⁷⁶ The AFF receives revenue from the forfeited cash, other assets, and the sale of forfeited property.⁷⁷ In 2017, the total amount of resources in the AFF was \$1,455,113.⁷⁸

In 2017, an independent audit on the AFF and SADF noted deficiencies in both funds’ internal controls over financial reporting.⁷⁹ The audit also noted that the management of neither fund had controls in place to ensure that: (1) revenue was recognized in the appropriate accounting period; (2) journal entries properly represented the accounting events; and (3) budgetary information in the financial statements was properly reported and presented.⁸⁰ Further, the audit noted that the lack of management of the AFF and SADF caused “incomplete and inaccurate information in the Consolidated Assets Tracking System impacting revenue cut-off and regulation” as well as “insufficient review of manual journal entries.”⁸¹ Issues with reporting and record keeping are even worse at the state level. Twenty-six states do not require any public reporting system at all.⁸² Fifteen states practice an accounting system similar to the federal government’s system, whereby an agency compiles an aggregate report on forfeiture.⁸³ The detail and level of the report, however, varies among the states.⁸⁴

A. *Inadequate Forfeiture Reporting*

Most state reports fail to provide adequate information needed for proper assessment of law enforcement’s forfeiture use. Some states require that law enforcement agencies report their forfeiture use for

72. *Id.* at 3.

73. *Id.* at 5.

74. *Id.* at 4.

75. *Id.*

76. *Id.*

77. *Id.* at 5.

78. *Id.* at 4.

79. *Id.* at 21.

80. *Id.* at 23.

81. *Id.* at 18-19.

82. CARPENTER II ET AL., *supra* note 3, at 33-35.

83. *Id.*

84. *Id.*

purposes of record keeping or public accounting.⁸⁵ Even though some states and the federal government require that data be made public, another issue arises when the information is either inadequate or incomplete.⁸⁶ For example, most state reports do not distinguish between criminal or civil forfeitures or whether the person from which the property was seized was ever convicted.⁸⁷ Further, most state reports lack essential information such as the type of property seized or forfeited; the size or amount of seized property; the average size of seized property; and the value in property retained by the local law enforcement.⁸⁸

An additional issue regarding state reports is the complete omission of data, as was the case for at least nine states.⁸⁹ In 2013, Minnesota's Office of the State Auditor reported that fifty-three law enforcement agencies throughout the state failed to file a criminal forfeiture report.⁹⁰ Minnesota is not alone in this regard. Michigan was missing data from fifty-six agencies; Kentucky was missing information from 178 agencies; and Washington was missing data from forty-three agencies.⁹¹ Several other law enforcement agencies across the country failed to report forfeiture data that was required by state law.⁹² Few states report data, and of those few states, most of them either: (1) fail to report useful data, (2) fail to report data from multiple law enforcement agencies within the state, (3) or fail to report both.

State and federal forfeiture reporting is meager at best. Aside from the federal government, no jurisdiction requires reports regarding the expenditure of the funds acquired by forfeiture.⁹³ The federal reporting requirements, as discussed earlier, do not require the audit to go into specific detail about how the funds are spent. The DOJ's reports omit information about how individual agencies spend their money from the AFF.⁹⁴ The expenditure reports do cover a few general topics, including equitable sharing payments to states.⁹⁵

B. *Equitable Sharing*

Equitable sharing promotes cooperation between the state governments, state law enforcement agencies, and the federal government in

85. *Id.* at 36.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *See* REBECCA OTTO, OFFICE OF STATE AUDITOR, CRIMINAL FORFEITURES IN MINNESOTA (2013).

91. CARPENTER II ET AL., *supra* note 3, at 37.

92. *Id.* at 36.

93. *Id.* at 39.

94. *See generally* OFFICE OF INSPECTOR GEN., *supra* note 76.

95. CARPENTER II ET AL., *supra* note 3, at 39.

order to forfeit property under federal laws.⁹⁶ Equitable sharing also allows states to process forfeiture under other forms besides state law.⁹⁷ Essentially, any law enforcement agency that forfeits any property under the presumption that the property owner violated a federal law may request a share of the forfeiture's net proceeds through equitable sharing.⁹⁸ A federal authority then approves or denies the state's request for equitable sharing.⁹⁹

In practice, the state or local law enforcement agency may seize the property and then requests a federal agency to adopt the seizure and proceed with the forfeiture.¹⁰⁰ The federal agency is authorized to adopt the seizure if it evidences a violation of federal law.¹⁰¹ Equitable sharing may arise in joint investigations when state and local law enforcement agencies work with federal agencies to enforce federal criminal laws.¹⁰² Federal agencies have minimum threshold requirements to consider before they adopt a forfeiture, such as a minimum of a \$2,000 value on forfeitures of currency, bank accounts, monetary instruments, and jewelry.¹⁰³ These minimum requirements, however, may be waived if the "forfeiture will serve a compelling law enforcement interest."¹⁰⁴

The United States Attorney General has the discretion to share federally forfeited property with participating state and local law enforcement agencies.¹⁰⁵ The amount that state law enforcement agencies receive through equitable sharing is calculated from the forfeiture's net proceeds, but the amount is ultimately decided by an equitable sharing deciding authority.¹⁰⁶ In determining the amount to be shared, the deciding authority takes the gross amount from the forfeited property less a number of factors such as qualified third-party interests, money paid to victims, and any award paid to a federal informant.¹⁰⁷ After the factors are subtracted from the gross amount of the forfeited property, the deciding authority may distribute funds to any local or state law enforcement agencies or may deposit funds into AFF.¹⁰⁸

96. OFFICE OF INSPECTOR GEN., *supra* note 76, at 6.

97. Simon James, Note, *Civil Asset Forfeiture in Virginia: An Imperfect System*, 74 WASH. & LEE L. REV. 1295, 1312-13 (2017).

98. ASSET FORFEITURE & MONEY LAUNDERING SECTION, U.S. DEP'T OF JUSTICE, GUIDE TO EQUITABLE SHARING FOR STATE AND LOCAL LAW ENFORCEMENT AGENCIES 3 (2009).

99. *Id.*

100. *Id.* at 6.

101. *Id.*

102. *Id.*

103. *Id.* at 7.

104. *Id.*

105. 21 U.S.C. § 881(e)(1)(A) (2012).

106. *Id.* at 12.

107. *Id.* at 15.

108. *Id.*

Equitable sharing in practice gives state and local law enforcement agencies a wider branch of law in which to forfeit property because it allows them to also forfeit under federal forfeiture laws while taking advantage of lower standards of proof in states where the burden of proof is higher than the federal standard.¹⁰⁹ Further, states utilize equitable sharing for instances when the action is legal under state law but violates federal law, such as marijuana possession in states that have legalized it.¹¹⁰

There is a strong incentive for state and local law enforcement agencies to participate in equitable sharing because they can receive up to 80% of the proceeds from a federal-based forfeiture.¹¹¹ Equitable sharing gives states the opportunity to circumvent state law by using the federal law and still receive a lump sum, 80%, of the profit from the forfeiture.¹¹² From 2000 to 2013, equitable sharing payments from the DOJ to state and local law enforcement agencies tripled, rising from \$198 million to \$643 million.¹¹³ Further, state and local law enforcement agencies rely heavily on the funding from forfeiture and equitable sharing. Equitable sharing is referred by some as “a virtual cash cow.”¹¹⁴ A 2014 investigation showed that 298 departments and 210 task forces across the nation used equitable sharing to make up approximately 20% of their annual budgets.¹¹⁵

The need for greater protection of individuals’ property rights is evident when considering the lack of reporting mixed with the ability of departments to fund their budgets through forfeiture and other avenues such as equitable sharing. Even in states with reporting requirements, the reports often do not have the necessary information to hold the state and local law enforcement agencies accountable for their forfeiture practices. The difficulty for property owners to prove their innocence, coupled with the powerful financial incentive that forfeiture gives to law enforcement officials, creates a system ripe for abuse.

VI. DIFFICULTY OF PROVING INNOCENCE

In the United States, the “innocent until proven guilty” standard should apply to civil forfeiture proceedings. For example, an analysis using the innocent until proven guilty standard could have been life changing for Rochelle Bing. In Philadelphia, Bing purchased a home

109. James, *supra* note 103, at 1313.

110. *Id.*

111. CARPENTER II ET AL., *supra* note 3, at 6.

112. *Id.*

113. *Id.*

114. *Id.* at 28.

115. Michael Sallah, *Stop and Seize*, WASH. POST (Sept. 6, 2014), http://www.washingtonpost.com/sf/investigative/2014/09/06/stop-and-seize/?utm_term=.3d27c64cedc6 [<https://perma.cc/MA6N-3UFX>].

to house eighteen of her grandchildren while their parents were at work, and she was forced to prove her innocence.¹¹⁶ Unbeknownst to Bing, one of her grandchildren was accused of selling crack from the house.¹¹⁷ Bing's case lasted for two years and she had to appear at court with her attorney twenty-three times.¹¹⁸ The case was eventually settled and Bing was able to retain ownership under certain conditions.¹¹⁹ An instance like this illustrates the importance of applying the innocent until proven guilty standard to forfeiture proceedings.

In American criminal and civil legal practice, the presumption of innocence acts as a barrier against punishment before conviction.¹²⁰ The maxim "innocent until proven guilty" applies only to criminal defendants. However, throughout history courts around the world have applied the maxim in civil cases as well.¹²¹ For example, in France the presumption of innocence is an individual's personal right even in civil instances.¹²² The maxim's importance in criminal trials is great; however, the maxim is equally necessary when an individual is losing his or her property.

The creation of the innocent owner defense in CAFRA was a big step forward to give property owners protection from law enforcement. Nevertheless, fighting the government over property may become more difficult than living life without it.¹²³

Individuals asserting the innocent owner defense face a significant disadvantage due to the costs of litigation, length of time, and the resources required to sustain litigation.¹²⁴ In Arizona, Rhonda Cox ended her pursuit to win back the title to her truck after discovering the obstacles of challenging a civil forfeiture.¹²⁵ Initiating the proceeding can cost up to \$304 in filing fees.¹²⁶ The filing fees alone could be enough to dissuade some families from pursuing their own property. Like Cox, the individual may be told that on top of the filing fees, he or she must pay for the county's attorney fees and investigations costs, which could potentially exceed the property's value.¹²⁷ The struggles

116. Isaiah Thompson, *How Civil Forfeiture Laws Are Costing Innocent People Their Homes*, PAC. STANDARD (Aug. 22, 2013), <https://psmag.com/news/law-to-clean-up-nuisances-costs-innocent-people-their-homes-64809> [https://perma.cc/J2X7-REKA].

117. *Id.*

118. *Id.*

119. *Id.*

120. Francois Quintard-Morenas, *The Presumption of Innocence in the French and Anglo-American Legal Traditions*, 58 AM. J. COMP. L. 107 (2010).

121. *See generally id.*

122. *Id.* at 149.

123. CARPENTER II ET AL., *supra* note 3, at 18.

124. *Id.* at 18.

125. *Id.*

126. *Id.*

127. *Cox v. Voyles, Et. Al.*, ACLU (Aug. 21, 2017) <https://www.aclu.org/cases/cox-v-voyles-et-al> [https://perma.cc/3LF7-TFQV].

Cox encountered are commonplace for individuals attempting to win back their property.

Additionally, Philadelphia requires individuals to show up in Courtroom 478, which was run by district attorneys, with no presiding judge or jury.¹²⁸ As a result, 83% of the proceedings were decided in the first appearance in Courtroom 478, and of those proceedings, 96% were decided in the government's favor.¹²⁹ If a case did not end in the initial proceeding, the district attorneys could "relist" the case, requiring the individuals to return to the courtroom at a later date.¹³⁰ If an individual misses just one relisted court date, the government could then immediately forfeit the property.¹³¹ The schemes like those in Arizona and Philadelphia, where state actors effectively persuaded individuals to not pursue the innocent owner defense, is the first burden individuals must pass before retrieving their own property.

Federal law does allow for individuals asserting the defense to demand the release of their property while the proceedings are conducted.¹³² In order to force the government to release the seized property, the claimant must have a possessory interest in the property and sufficient ties to the community to assure that the property will be available at trial.¹³³ Furthermore, the claimant must prove that continued possession by the government will cause the claimant substantial hardship and that the hardship outweighs the risk that the property will be destroyed if returned to the claimant.¹³⁴ However, the individual who lost their property cannot demand that it be released during the proceeding if the property is contraband, currency, electronic funds, or other monetary instruments.¹³⁵ Also, the individual cannot demand release of any property that is (1) used as evidence of a violation of law; (2) is particularly suited for use in illegal activities; or (3) is likely used to commit additional criminal acts if returned to the claimant.¹³⁶ The ability to demand release of the property while proceedings are in place seems beneficial to the claimants; however, proving that continued possession by the government will result in substantial hardship is difficult in practice.¹³⁷

128. Nick Sibilla, *Philadelphia Earns Millions By Seizing Cash and Homes From People Never Charged With a Crime*, FORBES (Aug. 26, 2014, 09:17 AM), <https://www.forbes.com/sites/instituteforjustice/2014/08/26/philadelphia-civil-forfeiture-class-action-lawsuit/#601575345d9e> [<https://perma.cc/WJQ4-EDNJ>].

129. *Id.*

130. *Id.*

131. *Id.*

132. 18 U.S.C. § 983(f)(1) (2012).

133. *Id.* § 983(f)(1)(A)–(B).

134. *Id.* § 983(f)(1)(C)–(D).

135. *Id.* § 983(f)(8)(A).

136. *Id.* § 983(f)(8)(B)–(D).

137. See *Generally United States v. \$9,451.00 United States Currency*, No. 14-CV-275-LM, 2015 WL 965819 (D.N.H. Mar. 3, 2015).

Once the individual commits significant time and money, the individual's struggle to prove his or her innocence begins. Federal law and thirty-five states place the burden of proof on the owners to prove that they had no knowledge that the property was being used for illegal purposes, nor did they consent to use of the property for illegal purposes.¹³⁸ Proving innocence is difficult because the individual must prove a negative—that they did not know about criminal activity related to their property.¹³⁹ In *\$18,800 in United States Currency v. State*, the claimant failed to affirmatively assert that she had no knowledge of the criminal activity.¹⁴⁰ The evidence in the record showed that the claimant had recently kicked out her boyfriend who was accused of the crime, was not present at the arrest, and had not been charged with any connection to the offense.¹⁴¹ The Court still held against the owner, reasoning that insufficient evidence existed to establish that the claimant did not know of the criminal activity.¹⁴²

Further, innocent owners may have no redress when the property is jointly held. In *Laase v. 2007 Chevrolet Tahoe*, a married couple in Minnesota were joint owners in a Chevrolet Tahoe that was seized after the police arrested the wife for a driving while intoxicated and charged for a second-degree criminal test refusal.¹⁴³ The husband had no knowledge that his wife was drinking that evening nor that his wife was driving while intoxicated.¹⁴⁴ However, the Supreme Court of Minnesota held in favor of the government, determining that all owners must be innocent for the innocent owner defense to apply.¹⁴⁵

The innocent owner defense creates the illusion that individuals are afforded proper redress to retain their property when it is taken by the government. Initiating the procedure can be costly and time consuming. When and if the individual actually gets to litigation, the difficulty in proving one's innocence is a task that even our nation's founders believed would never have to be surmounted. As James Madison once said, "[t]he personal right to acquire property, which is a natural right, gives to property, when acquired, a right to protection, as a social right."¹⁴⁶ Proving one's innocence to retain one's right to property is a burden that is extremely difficult to prove, and individuals learn of the uphill struggle to retain their property rights when their property is seized by law enforcement. Therefore, it is not sur-

138. CARPENTER II ET AL., *supra* note 3, at 20.

139. *Id.*

140. 961 S.W.2d 257, 262 (Tex. App.—Houston [1st Dist.] 1997, no writ).

141. *Id.*

142. *Id.*

143. 776 N.W.2d 431, 433 (Minn. 2009).

144. *Id.* at 432-33.

145. *Id.* at 439.

146. Steve Straub, *James Madison, Speech on the Virginia Constitutional Convention*, FEDERALIST PAPERS (Sept. 3, 2013, 09:03 AM), <https://thefederalistpapers.org/founders/madison/james-madison-speech-on-the-virginia-constitutional-convention> [<https://perma.cc/3QYX-298Q>].

prising that 90% of forfeitures are uncontested while considering that only 8% of cash seizures made by the DEA between 2007 and 2016 were eventually returned to their owners.¹⁴⁷ Individuals know that the likelihood of regaining possession of property is slim to none, and if they are able to retrieve their property, it may be cost-prohibitive.

VII. COMPARISON AMONG STATE LAWS

Being modeled after federal law, most states' civil asset forfeiture laws are disadvantageous towards their residents. However, jurisdictions with looser forfeiture laws make forfeiting actions easier for law enforcement, which increase the forfeiture victimization rate.

For example, Massachusetts arguably has the loosest civil forfeiture laws in the country.¹⁴⁸ Similar to federal law, Massachusetts law also places the burden on innocent owners to prove that they are innocent.¹⁴⁹ Civil forfeiture laws in Massachusetts are possibly the most unjust in the country because of factors such as the standard of proof that is required of state law enforcement officials to forfeit property. As in most states, preponderance of the evidence is a relatively easy burden of proof. However, Massachusetts law only requires the state to prove probable cause to bring a civil forfeiture cause of action.¹⁵⁰ Probable cause might be considered the easiest burden to prove. Further, the financial incentive from the forfeited funds could be another factor that persuades Massachusetts law enforcement agencies to pursue civil forfeiture more aggressively.

All monies that are collected from forfeiture proceedings are placed in special trust funds for the local or state police and the district attorney.¹⁵¹ Probable cause as the standard of retaining forfeited property, combined with the possibility of retaining 100% of funds, creates an almost insurmountable incentive for law enforcement officials to aggressively pursue civil forfeiture in Massachusetts.

Unlike Massachusetts, many states do not make civil forfeiture an easy project, and a few states are giving their residents greater constitutional protections against it. In ten states and the District of Columbia, the government bears the burden of proving that the owners committed a criminal, civil, or municipal violation before forfeiting their property.¹⁵² Out of the ten states, New Mexico provides a model for other states.

147. Blumenson, *supra* note 55; Office of Inspector Gen., *Review of the Department's Oversight of Cash Seizure and Forfeiture Activities*, U.S. DEP'T OF JUST. 14 (Mar. 2017) <https://oig.justice.gov/reports/2017/e1702.pdf> [<https://perma.cc/6UTL-RQ6T>].

148. CARPENTER II ET AL., *supra* note 3, at 88.

149. MASS. GEN. LAWS ch. 94C, § 47(d) (West 2006).

150. *Id.*

151. *Id.*

152. CARPENTER II ET AL., *supra* note 3, at 20.

In 2015, New Mexico's legislature passed a civil asset forfeiture reform bill to ensure that only criminal forfeiture is allowed in the state.¹⁵³ The legislature passed the bill hoping to protect their citizens' property rights.¹⁵⁴ Under the bill, a person's property is only subject to forfeiture if the person was arrested for an offense to which forfeiture applies, the person was convicted of the offense, and the state establishes by clear and convincing evidence that the property was subject to forfeiture.¹⁵⁵ The requirement of conviction highlights a big win for the residents of New Mexico, which is the elimination of civil asset forfeiture. The New Mexico legislature worried, as did most proponents of civil asset forfeiture, that passing the bill would severely defund local law enforcement and increase drug crimes.¹⁵⁶ Nonetheless, the New Mexico Governor signed the bill in April of 2015.¹⁵⁷

New Mexico's civil asset reform bill advances and ensures citizens' property rights by redefining the innocent owner defense. The reform bill puts the burden on the innocent owner to prove that he or she holds the legal right in the property and that he or she had an ownership interest in the property at the time of seizure.¹⁵⁸ However, the owner's burden is lifted after proving a legitimate interest in the property. After proving these elements, the bill requires that the government immediately return the property to the innocent owner.¹⁵⁹ The burden then shifts to the state, who then must prove by clear and convincing evidence that the innocent owner had actual knowledge of the underlying crime that gave rise to the forfeiture.¹⁶⁰ The reform bill in practical terms is far from resolving the issue.

New Mexico residents believed that civil asset forfeiture would cease to exist by July 1, 2015, the forfeiture reform law's effective date.¹⁶¹ Ashley Martinez, a resident of New Mexico, learned the hard way that law enforcement agencies were simply ignoring the forfeiture reform bill.¹⁶² Martinez recounts the story of Albuquerque law enforcement forfeiting her parents' 2006 Pontiac stating,¹⁶³ "[w]hy should they take something that we worked hard for . . . that I had nothing to do with and because they don't want to go by the laws that

153. H.R. 560, 52nd Leg., 1st Sess. (N.M. 2015).

154. N.M. STAT. ANN. § 31-27-2(A)(2) (West Supp. 2016).

155. *Id.* § 31-27-4(A).

156. 2015 Legis. Bill Hist. NM H.B. 560.

157. H.R. 560, 52nd Leg., 1st Sess. (N.M. 2015).

158. N.M. STAT. ANN. § 31-27-7.1(B) (West Supp. 2016).

159. *Id.*

160. *Id.* § 31-27-7.1(F).

161. *New Mexico Civil Forfeiture*, INST. FOR JUST. (Nov. 18, 2015), <http://ij.org/case/new-mexico-forfeiture/> [<https://perma.cc/JQ3P-AJRR>].

162. Renee Montagne, *New Mexico Ended Civil Asset Forfeiture. Why Then Is It Still Happening?*, NPR (June 7, 2016, 05:02 AM), <https://www.npr.org/2016/06/07/481058641/new-mexico-ended-civil-asset-forfeiture-why-then-is-it-still-happening>.

163. *Id.*

they're supposed to be following right now?"¹⁶⁴ Like other victims of civil forfeiture, following July 1, 2015, Martinez, was shocked when law enforcement officials proceeded to forfeit property even though doing so had become illegal. Martinez retained legal counsel to reclaim her stolen property, but to no avail, as her family's case was dismissed for procedural issues.¹⁶⁵ Law enforcement continues engaging in civil asset forfeiture, even when state laws prohibit civil asset forfeiture. One possible reason for law enforcement's flagrant disregard for the law is likely that the vast amount of funding law enforcement agencies around the country stand to lose if civil asset forfeiture becomes stricter or outright banned.

VIII. CONCLUSION

In order to avoid problems of inequitable or unlawful forfeitures, like the cases of Charles Clarke in Cincinnati or Rochelle Bing in Philadelphia, our system of civil asset forfeiture at both the state and federal level must be reformed. The current scope of civil asset forfeiture has expanded beyond its historical scope. The "war on drugs" campaign tolerates the abuse of civil asset forfeiture and has directly affected citizens' property rights. Attorney General Sessions defends civil asset forfeiture as helping the victims of crime, but when the DEA can seize property without a warrant, without any accompanying illicit narcotics, and possibly without a burden of proof to meet, it seems as if civil asset forfeiture can create more victims than it helps.¹⁶⁶

Reform should begin at the state level by having a uniform forfeiture reporting system. A uniform system will provide better access to necessary information so that the state and local law enforcement agencies can be held accountable. The public would have more faith and trust in their local law enforcement if they could see, through reformed reporting standards, how civil asset forfeiture is utilized. Improving faith and trust in local law enforcement can in turn raise morale and in the future, could lead to greater cooperation with law enforcement, which would aid in the fight against criminal activity.

Second, the seizing agency should be required to prove by clear and convincing evidence that the innocent owner had actual knowledge of the underlying crime that gave rise to the forfeiture. Considering the historical root of asset forfeiture and the criminal nature of forfeiture proceedings, the burden of proof should be imposed on the govern-

164. *Id.*

165. *Id.*

166. See *Attorney General Sessions Issues Policy and Guidelines on Federal Adoptions of Assets Seized by State or Local Law Enforcement*, U.S. DEP'T JUST. (July 19, 2017), <https://www.justice.gov/opa/pr/attorney-general-sessions-issues-policy-and-guidelines-federal-adoptions-assets-seized-state> [https://perma.cc/KWK4-VTGV].

ment and applied uniformly amongst all the states.¹⁶⁷ Furthermore, the criminal nature of the proceeding should raise the general presumption of innocent until proven guilty. However, forfeiture laws have found a way to circumvent that presumption by hiding behind the guise of a civil proceeding. Hiding behind the guise of civil proceedings remains problematic because “even people who had nothing to do with an alleged crime can lose their property through civil forfeiture unless they can prove their innocence – flipping the American legal tradition of innocent until proven guilty on its head.”¹⁶⁸

Requiring the state to prove that the innocent owner had actual knowledge of the underlying crime can become burdensome. However, that burden of knowledge can prevent law enforcement officials from using forfeiture as a means to an end. More importantly, it safeguards society’s civil liberties. This heightened standard could help ensure that law enforcement officials are seizing property that they truly believe is connected to criminal activity.

This reform will not eliminate civil asset forfeiture because the seizing agency can still forfeit the property without achieving criminal charges or convictions. However, this will prevent costly litigation and hardship for individuals who were unaware of their property’s criminal use by others. Placing this burden on the seizing agency will ensure that law enforcement agencies are conducting their forfeiture proceedings in both ethical and legal ways. This minor burden shift to the government greatly enhances citizens’ property rights. Thus, the slightest state and federal reforms would offer citizens the protection they deserve at a cost that the government can bear.

167. *See* *United States v. The Brig Burdett*, 34 U.S. 682 (1835); *Leonard v. Texas*, 137 S. Ct. 847, 849 (2017).

168. *CARPENTER II ET AL.*, *supra* note 3, at 8.

