HANDS OFF MY *TIMBS*: AN OVERVIEW OF THE METHODS AND MISUSES OF CIVIL FORFEITURE AS A TOOL OF LAW ENFORCEMENT

NATHANIEL SHERMAN*

* J.D. Candidate, Belmont University College of Law, 2021; B.S., Middle Tennessee State University, 2017. Special thanks to Professor Jeffrey Usman for his advice and direction, as well as all the members of the Belmont Law Review who helped to correct my myriad mistakes. Additionally thanks to my family and friends for their inspiration and support.

INTRODUCTION

In the past twenty years, around $36.4 billion in cash and assets were taken by the federal government through civil asset forfeiture.[1] Very few of these seizures were ever challenged in court; in many cases, the owners were required to agree not to sue the seizing police department.[2]

One such seizure occurred to a couple traveling with their two young children, from Texas to Louisiana.[3] Along the way, police pulled the family over; they had been in the left-most lane for more than half a mile without passing.[4] In a search of the vehicle, the police officers found no drugs, but did find money the parents intended to use to purchase another car. As the parents matched a profile of drug couriers, the police removed the two to the police station, where the district attorney made an offer: the couple could either turn over their money to the police department or be charged with money laundering and child endangerment.[5]

Civil forfeiture seems to be a benign practice: a flexible weapon for law enforcement to wield against dangerous drug lords or terrorist cells, cleverly moving money or contraband in methods the police cannot quite track. Civil forfeiture allows the government to seize property suspected to be involved in illegal proceedings without filing any sort of notice, given probable cause to seize the property exists and the seizure is the result of an otherwise lawful search. [6] The law accounts for innocent owners whose property may be improperly seized: Innocent ownership may be asserted as an affirmative defense at court, giving the owner an opportunity to present evidence showing their innocence in a bid to reclaim the property.[7] If the owner cannot establish their innocence in owning the property, the government retains the property. Problems arise, however, when this weapon is used to target innocent citizenry incapable of mustering a legal defense, rather than the hardened criminals that the practice ostensibly targets.

---

1. William H. Freivogel, *No Drugs, No Crime and Just Pennies for School: How Police Use Civil Asset Forfeiture*, PULITZER CTR. (Feb. 18, 2019), https://pulitzercenter.org/reporting/no-drugs-no-crime-and-just-pennies-school-how-police-use-civil-asset-forfeiture [https://perma.cc/852Y-RHAU]; *see also* Michael Sallah et al., *Stop and Seize*, WASH. POST (Sept. 6, 2014), ahttps://www.washingtonpost.com/sf/investigative/2014/09/06/stop-and-seize/ [https://perma.cc/6PTJ-KZZF].

2. Sallah, *supra* note 1 ("only a sixth of the seizures were legally challenged, in part because of the costs of legal action against the government."); *see also* Freivogel, *supra* note 1.

3. Sarah Stillman, *Taken*, N.Y. POST (Aug. 5, 2013), https://www.newyorker.com/magazine/2013/08/12/taken [https://perma.cc/UJP9-V5JM].

4. *Id.*

5. *Id.*

6. 18 U.S.C. § 981 (2016).

7. 18 U.S.C. § 983 (2016).

Part I of this note will look at the historical development of civil asset forfeiture, starting with the procedure's beginnings in English law and proceeding through the early American adoption of civil forfeiture and its evolution to the modern day. Part II will address some of the more prevalent problems posed by civil asset forfeiture and its modern usage. Part III will propose some solutions for the problems posed in Part II, as well as analyze *Timbs v. Indiana* and discuss whether this recent Supreme Court decision on the Excessive Fines clause will remedy those same problems. Due to the variety in asset forfeiture laws between the fifty states and the federal system, this note will primarily discuss the federal civil asset forfeiture scheme, unless mentioned otherwise.

I. THE HISTORICAL DEVELOPMENT OF CIVIL ASSET FORFEITURE

A. Historical English Forfeiture Methods

Civil forfeiture in the United States descends from English common law, which had three commonly recognized forms of forfeiture: deodand, forfeiture for felony or treason, and statutory forfeitures.[8]

Deodand forfeitures originate from pre-Judeo-Christian times and practices.[9] Under the deodand system, inanimate objects which cause the death of a human being were subject to forfeiture to the monarchy.[10] The monarch would then theoretically spend the money gained on prayers for the deceased or other charitable ventures.[11] The object itself was not always taken as forfeit: the value of the loss would be calculated and the owner of the object could pay that value as deodand. [12] Despite this, the object itself was the accused offender in deodand actions, not the owner.[13]

Convicted felons or traitors could also lose their property. A felon would lose his personal property to the Crown and his real property to his lord, while traitors lost the entirety of their property to the Crown.[14]

Similarly, English statutes allowed for the forfeiture of objects used in a manner that broke customs and revenue laws.[15] Under these statutes, a

8. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 680–83 (1974).

9. *Id.* at 681.

10. *Id.*

11. *Id.*

12. M. Fourie & Gj Pienaar, *Tracing the Roots of Forfeiture and the Loss of Property in English and American Law*, FUNDAMINA, Aug. 2017, at 20, 25.

13. *Id.*

14. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 682 (1974).

15. *Id.*

single seaman, operating alone and without the knowledge of the ship's owner or master, could cause an entire ship to be subject to forfeiture.[16]

B. Development of Civil Forfeiture in America

The fledgling United States avoided adopting the first two forfeiture methods—deodand was excluded from the early common law,[17] while the Constitution itself forbade permanent seizure of a traitor's property.[18] The third forfeiture scheme was treated differently: even before the adoption of the Constitution, courts were utilizing *in rem* jurisdiction to enforce forfeiture statutes similar to those found in England.[19]

Early use of civil forfeiture in the United States was largely focused on piracy and other, similar maritime crimes.[20] In *The Palmyra*, one of the first forfeiture cases before the Supreme Court, the Court held that the *in rem* framework for statutory forfeitures used in the English common law applied to American forfeiture actions.[21] As a result, criminal convictions were not required for property to be subject to forfeiture; in fact, the Court declared any *in rem* forfeiture action to be entirely separate from any sort of *in personam* criminal action against the owner or offender.[22] Despite this, on at least one occasion, the Court required proof beyond a reasonable doubt to support a seizure.[23] Ever since, the Supreme Court has consistently held that even an owner of property with no knowledge that the property is being illegally used is not guaranteed innocence as a defense.[24] The illegal use of one's property by another has been consistently upheld as satisfactory to sustain a forfeiture;[25] the crime attaches to the property itself, not necessarily to the owner or operator.

---

16. Alan Nicgorski, *The Continuing Saga Of Civil Forfeiture, The 'War On Drugs,' And The Constitution: Determining The Constitutional Excessiveness Of Civil Forfeitures*, 91 NW. U. L. REV. 374, 380 (1996).

17. *Calero-Toledo*, 416 U.S. at 682.

18. U.S. CONST. art. I, § 3; *see Calero-Toldeo*, 416 U.S. at 683.

19. *Calero-Toledo*, 416 U.S. at 683.

20. Nicgorski, *supra* note 16, at 381.

21. The Palmyra, 25 U.S. 1, 13 (1827).

22. *Id.*

23. United States v. Brig Burdett, 34 U.S. 682, 691 (1835).

24. Bennis v. Michigan, 516 U.S. 442, 446 (1996).

25. *See* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974) (upholding forfeiture of a leased yacht after illegal drug use aboard by lessees); *see also* Van Oster v. Kansas, 272 U.S. 465 (1926) (upholding the forfeiture of the interest of a purchaser of a car due to misuse by the seller); *see also* J.W. Goldsmith, Jr.–Grant Co. v. United States, 254 U.S. 505 (1921) (upholding the forfeiture of the interest of a seller of a car due to misuse by the purchaser); *see, e.g.*, Dobbin's Distillery v. United States, 96 U.S. 395 (1878) (upholding the forfeiture of a distillery due to tax fraud committed by the lessee).

Civil forfeiture remained a fairly quiet doctrine for much of the nineteenth and twentieth centuries, other than the rare piracy case and a brief resurgence during Prohibition.[26] It was not until 1970 that civil forfeiture in its modern form began to appear, codified in the Comprehensive Drug Abuse Prevention and Control Act of 1970.[27] Designed to combat the spread of drug use and the associated trade, the Act made subject to forfeiture goods used in almost any way imaginable related to the activities it forbade, whether they be manufacture, transportation, or mere possession of illegal drugs.[28] The goal of the act was to target the financial incentives of drug dealers and importers: If the profit from drug dealing is seized, fewer drugs will be dealt.[29] Civil asset forfeiture was seen as a success by law enforcement and legislatures, its use and total value of seized property rose,[30] and the federal government passed nearly 100 statutes on the subject, with the states enacting more of their own.[31]

The increasing use of civil forfeiture inspired backlash.[32] Many found various aspects of forfeiture disconcerting; the government's burden of proof to seize property was merely probable cause,[33] while an owner seeking reclamation of his ill-seized property would have to pass a preponderance of the evidence test to succeed.[34] In response to growing discontent and criticism of the civil forfeiture scheme then in place,[35] Congress passed the Civil Forfeiture Reform Act of 2000 (CAFRA), which shifted the burden of proof in federal actions: the government was required to establish by a preponderance of the evidence that the property was subject to forfeiture.[36] CAFRA also formally codified innocent ownership as a defense, giving owners an opportunity to protest their lack of knowledge as to the property's illegal use or otherwise their immediate

---

26. Walter J. Van Eck, *The New Oregon Civil Forfeiture Law*, 26 WILLAMETTE L. REV. 449, 453–54 (1990).Walter J. Van Eck, *The New Oregon Civil Forfeiture Law*, 26 WILLAMETTE L. REV. 449, 453–54 (1990).

27. *Id.* at 454; *see also* 21 U.S.C. § 881 (2002).

28. 21 U.S.C. § 881.

29. Nicgorski, *supra* note 16, at 382.

30. *Id.* at 376.

31. Henry J. Reske, *A Law Run Wild: Conservative Lawmaker Seeks Asset Forfeiture Limits*, A.B.A. J., Oct. 1993, at 24, 24–25.

32. *Id.* at 24–26; *see generally* United States v. Real Prop. in Section 9, Town 29 N., Range 1 W. Twp. of Charlton, Otsego Cty., Mich., 241 F.3d 796, 799 (6th Cir. 2001) (collecting criticisms of civil forfeiture by courts and other legal commentators).

33. Reske, *supra* note 31, at 26; *see* United States v. $80,180.00 in U.S. Currency, 303 F.3d 1182, 1184 (9th Cir. 2002).

34. David A. Cohen, *Exactly How Much Process is Due? The Federal Courts Grapple with the Shifting Burdens of Proof in Civil in rem Forfeiture Under 21 U.S.C. § 881(a)*, 86 KY. L. REV. 711, 718 (1998).

35. *$80,180.00*, 303 F.3d at 1184.

36. *Id.*; *see* 18 U.S.C. § 983(c)(1) (2016).

action to end illegal usage of the property upon becoming aware of it.[37] While this seems to provide enhanced due process protection to owners of seized property, the owner must prove his own innocence, rather than the government prove his guilt.[38] The Act also provided for court-appointed counsel when a person with standing lacked the ability to acquire counsel of their own.[39]

Legislative reform was not the only adjustment to civil forfeiture to be found: In 1993, the Supreme Court decided *Austin v. United States*.[40] In *Austin*, a cocaine dealer's automobile body shop was seized by the government after a search discovered small amounts of marijuana, cocaine, and cash within the shop.[41] The Court held that *in rem* civil forfeiture actions could be considered fines under the Eighth Amendment when at least some aspect of the forfeiture was meant to punish,[42] and thus, the Excessive Fines clause applies to federal forfeiture actions.[43] The Court noted that while forfeiture can serve multiple purposes, the specific statute allowing for the seizure of Austin's body shop was clearly designed to punish the drug trade and associated persons and property.[44] However, the Court expressly declined to lay down factors, standards, or a test to determine whether a forfeiture was constitutionally excessive,[45] a decision the Court would not rectify until *United States v. Bajakajian*.[46]

In the absence of clear standards established by the Supreme Court, lower courts were left to estimate what test might pass constitutional muster.[47] Some tried strict proportionality tests, rejecting any excessive forfeiture of the entire property;[48] others considered an "instrumentality assessment," where forfeiture was only constitutional if the seized property had a sufficiently close relationship to the offense giving grounds for the forfeiture.[49] Most circuits applied some mix of the two tests.[50]

---

37. 18 U.S.C. § 983(d).
38. 18 U.S.C. § 983(c)–(d).
39. 18 U.S.C. § 983(b)(1).
40. Austin v. United States, 509 U.S. 602 (1993).
41. *Id.* at 605.
42. *Id.* at 618.
43. *Id.* at 604.
44. *Id.* at 610–18.
45. *Id.* at 622.
46. United States v. Bajakajian, 524 U.S. 321, 324 (1998).
47. Charmin Bortz Shiely, United States v. Bajakajian*: Will a New Standard for Applying the Excessive Fines Clause to Criminal Forfeitures Affect Civil Forfeiture Analysis?*, 77 N.C. L. REV. 1614, 1614–19 (1999) (examining the standards used in some of the various circuits and states in analyzing Eighth Amendment claims on forfeitures and fines).
48. *Id.* at 1615.
49. *Id.* at 1616.
50. *Id.* at 1617.

The Supreme Court finally clarified its standards for excessiveness under the Eighth Amendment in its 1998 decision *United States v. Bajakajian*.[51] In *Bajakajian*, a traveler illegally attempted to carry some $350,000 in cash out of the country, without reporting it, while travelling to Cyprus.[52] The traveler was indicted and pled guilty to failure to report, but sought a bench trial when the government attempted to criminally seize the entire sum of $350,000.[53] The district court found the whole of the money subject to forfeiture, despite finding that the money was legally obtained and intended for legal use.[54] In deciding the case, the Supreme Court held that the standard for punitive *in rem* seizures was gross disproportionality.[55] The Court based its decision on two considerations: first, the judgment of proper punishments for offenses was the legislature's, not the court's; second, any judicial determination about the seriousness of a certain offense will be imprecise.[56] The Court then held that the forfeiture of the full $350,000 would be grossly disproportionate to the traveler's comparatively small crime of failing to report.[57]

In the years following *Bajakajian*, the standard set forth would be applied in cases covering civil *in rem* seizures, as well as criminal seizures.[58] However, some critics have argued that *Bajakajian*, rather than granting a constitutional protection to those who suffer from civil forfeiture, actually loosened the reins by allowing the mechanism to proceed with less oversight.[59] While the Court held in *Bajakajian* that the Eighth Amendment limited *punitive* seizures, it also limited what seizures were considered punitive. Seizures of instrumentalities of crimes, even if punitive in nature, were not subject to Eighth Amendment protection.[60] This reading of the *Bajakajian* holding would allow the government to use civil *in rem* forfeiture as a mechanism to punish, circumventing the more rigorous procedural requirements and burdens of proof of criminal actions, so long as the property seized was an instrumentality of the crime.[61] Under this reading, certain objects, which would typically require the normal Eighth Amendment rigor, could be categorized differently and instead receive no

51. *Bajakajian*, 524 U.S. at 336.
52. *Id.* at 324–25.
53. *Id.* at 325.
54. *Id.* at 325–26.
55. *Id.* at 336.
56. *Id.*
57. *Id.* at 337.
58. Chet Little, *Civil Forfeiture and the Excessive Fines Clause: Does* Bajakajian *Provide False Hope for Drug-Related Offenders?*, 11 U. FLA. J.L. & PUB. POL'Y. 203, 218–19 (2000).
59. Shiely, *supra* note 47, at 1632.
60. *Bajakajian*, 524 U.S. at 333 n.8.
61. Shiely, *supra* note 47, at 1632.

protection, simplifying the seizure process and enabling law enforcement to target those objects more freely.

C. Civil Forfeiture in the Modern Day

Perhaps in part due to growing public concern with the state of civil asset forfeiture, many states and territories, including New York, Florida, and Washington, D.C., have enacted their own civil forfeiture reform statutes since 2014; some increasing the government's burden of proof to clear and convincing evidence, others removing the burden-shifting method set forth in the Civil Asset Forfeiture Reform Act in favor of placing the burden squarely on the government.[62]

Opponents of civil forfeiture within Congress have also advocated federal reform: the Fifth Amendment Integrity Restoration Act (FAIR Act) has been advanced by representatives from both sides of the aisle.[63] The FAIR Act, still awaiting passage, aims at reforming civil forfeiture in several ways: by guaranteeing an attorney to those financially incapable of acquiring one, without requiring the person subject to forfeiture request it or that the seized property be their residence;[64] by raising the burden of proof from a preponderance of the evidence to clear and convincing evidence;[65] by lowering the requirement when asking the Court to reduce or eliminate the forfeiture from gross disproportionality to disproportionality;[66] and by changing the destination of the proceeds from forfeited property from the Asset Forfeiture Fund to the general treasury of the United States,[67] while also forbidding the use of forfeited property by the federal government and redistribution of forfeited property to state or local law enforcement.[68]

The courts have not left the entirety of civil forfeiture reform to the legislature: In 2018, the Supreme Court granted certiorari to an Indiana case on civil forfeiture—*Timbs v. Indiana*.[69] Tyson Timbs had purchased an SUV for $42,000, using money he received from an insurance policy on his deceased father.[70] When Timbs later pled guilty to dealing heroin, the

---

62. Kelly Milliron, *Addressing Due Process Concerns: Evaluating Proposals for Civil Asset Forfeiture Reform*, 70 FLA. L. REV. 1379, 1388–89 (2018).

63. Nick Sibilla, *Bipartisan Bill in Congress Would Dramatically Reform Civil Forfeiture*, INST. FOR JUST. (Mar. 27, 2019), https://ij.org/press-release/bipartisan-bill-in-congress-would-dramatically-reform-civil-forfeiture/ [https://perma.cc/2WLA-YQZL].

64. H.R. 1895, 116th Cong. § 2(1) (2019).

65. H.R. 1895 § 2(2)–(3).

66. H.R. 1895 § 3(b)(2).

67. H.R. 1895 § 3(b)(1)(A).

68. H.R. 1895 § 3(a)(1).

69. State v. Timbs, 84 N.E.3d 1179 (Ind. 2017), *cert. granted*, 138 S. Ct. 2650 (June 18, 2018) (No. 17-1091).

70. Timbs v. Indiana, 139 S. Ct. 682, 686 (2019).

police seized the SUV, claiming it had been used to transport heroin.[71] The trial court denied the forfeiture, noting that the $42,000 SUV was more than four times the maximum fine the state could levy against Timbs for his conviction.[72] When the case reached the Indiana Supreme Court, it was reversed: that court determined that states were not bound by the Excessive Fines provision of the Eighth Amendment.[73] The Supreme Court granted certiorari to determine whether the Excessive Fines clause bound states as well as federal law enforcement.[74]

The Court held that the Eighth Amendment's Excessive Fines clause was "fundamental to our scheme of ordered liberty," and so incorporated against the States by the Due Process clause of the Fourteenth Amendment.[75] The Court noted the danger that fines pose as a tool of remediation or punishment: while other forms of punishment might cost a State money, fines enrich them.[76] The potential for misuse when the State stands to benefit from inflicting a disproportionate punishment merits greater scrutiny.[77] Fines can even be used as a method to target political enemies or politically unpopular opinions.[78]

Certain members of the Court have pondered whether even further action should be taken to limit the use of civil forfeiture. In an opinion respecting a denial of certiorari in the 2017 case of *Leonard v. Texas*, Justice Thomas discussed whether the Due Process clause afforded citizens more protection from seizure than was historically granted.[79] Justice Thomas noted that without the long historical tradition of seizures and forfeitures operating in a similar manner to the way they do today, the Constitution would likely require civil forfeiture actions lie plumb with other punishments and deprivations, and he expressed his doubts as to whether history alone could sustain the modern usage.[80] The Justice also pointed out the differences between historical and modern practice: there is evidence that historically forfeiture was much more akin to criminal

71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.* at 686–87 (quoting McDonald v. Chicago, 561 U.S. 742, 767 (2010)).
76. *Id.* at 689 (citing Harmelin v. Michigan, 501 U.S. 957, 979 n.9 (1991) (opinion of Scalia, J.)).
77. *Id.*; *see also Harmelin*, 501 U.S. at 978 n.9 ("it makes sense to scrutinize governmental action more closely when the State stands to benefit").
78. *Timbs*, 139 S. Ct. at 689; *see* Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 267 (1989).
79. Leonard v. Texas, 137 S. Ct. 847, 849 (2017) (*cert. denied*) (statement of Thomas, J.).
80. *Id.* at 849.

actions,[81] with some evidence even pointing to a requirement that the government establish its case beyond a reasonable doubt.[82]

Today civil forfeiture stands on shakier ground than ever before, plagued by poor public opinion, recent limitations by courts providing constitutional protections, and a growing trend of State legislation shackling the regime ever further. Increased media attention has helped to expose the misuses of civil forfeiture into the light of day,[83] revealing some of the troubling problems with the procedure as applied to modern times.

II. PROBLEMS PRESENTED BY THE MODERN USAGE OF CIVIL ASSET FORFEITURE

Civil asset forfeiture, in its current incarnation, has seen widespread criticism and outrage, and is increasingly unpopular among American citizens.[84] The current federal method, which is mirrored in many states, poses several particular problems. This note will address three: (1) the burden-shifting model which requires an owner prove his innocence rather than requiring the government to prove his guilt; (2) the disproportionate impact civil asset forfeiture has upon minorities and poor persons; and (3) the misuse and potential for misuse of civil asset forfeiture as a method of funneling money into law enforcement agencies and departments.

A. Guilty Until Proven Innocent: The Burden-Shifting Model

The Civil Asset Forfeiture Reform Act of 2000 (CAFRA) authorizes seizures to be made with a warrant or, lacking a warrant, if "there is probable cause to believe that the property is subject to forfeiture and the seizure is made pursuant to a lawful arrest or search … ."[85] If the forfeiture is challenged, CAFRA requires that the state prove, "by a preponderance of the evidence, that the property is subject to forfeiture."[86] Once the government has done so, however, then anyone claiming their status as an innocent owner shall have the burden of proving that the claimant is an innocent owner by a preponderance of the evidence."[87] The

81. *Id.*

82. *Id.* at 849–50 (citing United States v. Brig Burdett, 9 Pet. 682, 690 (1835) (holding the seizure of a ship a "highly penal" prosecution and requiring proof beyond reasonable doubt)).

83. *See, e.g.*, Stillman, *supra* note 3.

84. Peter Moore, *Poll Results: Civil Asset Forfeiture*, YouGov (Sep. 14, 2019), https://today.yougov.com/topics/politics/articles-reports/2015/08/28/poll-results-civil-asset-forfeiture [https://perma.cc/7VWC-WKXG].

85. 18 U.S.C. § 981(b)(2)(B) (2016).

86. 18 U.S.C. § 983(c)(1) (2016).

87. *Id.* § 983(d)(1).

preponderance of the evidence standard requires that one side establish their case so that it is "more likely than not" to be true.[88]

This burden-shifting scheme flips the traditional burden of proof on its head, allowing the government to use a "quasi-criminal" proceeding to punish a citizen without proving that the citizen was guilty of any crime.[89] Further, it requires the citizen to establish his own innocence in court, rather than calling upon the government to disprove it. Every ten-year-old child knows the maxim "innocent until proven guilty," but in civil forfeiture actions, the exact opposite is true. The state can seize property based solely on probable cause, which "can be provided by hearsay and innuendo,"[90] is only required to justify the seizure if actually challenged by the owner, and even then need only be justified by a preponderance of the evidence.

The requirement that an owner establish his own innocence also imposes further financial burdens. CAFRA mitigates this burden slightly: if a claimant has court-appointed counsel for a related criminal charge, the court may choose to authorize that counsel to serve as representation on the civil charge as well.[91] The court will also insure representation for financially-incapable claimants when the property in question is the claimant's primary residence.[92] This partial provision of counsel is not shared by all States, however, leaving many claimants without the ability to secure legal representation in civil forfeiture proceedings. This inability to secure legal counsel—along with the cost of actually pursuing action when property is improperly seized—often prohibits the ability to challenge forfeitures; statistics show the majority of forfeiture cases are never contested, often because hiring an attorney is more expensive than the seized property.[93]

It is also worth noting that the "innocent owner" defense is exactly that—an affirmative defense which must be raised by the claimant or else forsaken.[94] If not raised, the case is lost—meaning a claimant must be able to hire an attorney to go to court or represent themself *pro se*.[95]

---

88. *See, e.g.*, Herman & MacLean v. Huddleston, 459 U.S. 375, 390 (1983).

89. *See* Austin v. United States, 509 U.S. 602, 626 (1993); *see also* One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 697 (1965) (quoting Boyd v. United States, 116 U.S. 616, 633–34 (1886)).

90. Reske, *supra* note 31, at 26.

91. 18 U.S.C. § 983(b)(1)(A).

92. *Id.* § 983(b)(2)(A).

93. Karen Lia & Pam Dempsey, *Taken: Despite Reforms, Burden Still Heavy on Owners of Seized Property*, ST. LOUIS POST-DISPATCH (Jun. 16, 2019), https://www.stltoday.com/news/local/crime-and-courts/taken-despite-reforms-burden-still-heavy-on-owners-of-seized/article_2e31b58c-1f4e-5dfa-a231-e367b36836fd.html [https://perma.cc/4W7W-Y6XH]; *see also* Stillman, *supra* note 3 ("More than seventy per cent of seizures in Texas are 'administrative' cases, which means that they are never contested by the owner.").

94. *Civil Forfeiture*, FOSTER & FOSTER, P.L.L.C., https://www.stephenfosterlaw.com/lawsuits/civil-forfeiture/#:~:text=The%20innocent%20owner%20defense

At least some of the current "shifting burden of proof" model is attributable to the still-surviving legal fiction that the property, rather than the person, is on trial.[96] This fiction is, in part, what allowed such low burdens of proof to stand—before CAFRA passed in 2000, the government's burden of proof was only probable cause.[97] Because the property was on trial, not the owner, the trial could not have been punitive, and therefore a standard of proof befitting a punitive action need not be applied.[98] This fiction has been critiqued by several legal scholars, including Justice Thomas, who stated his opinion that this legal fiction and its effect on forfeiture practice would probably not withstand Constitutional scrutiny without its historical usage.[99]

This fiction also allows for a circumvention of the traditional criminal proceeding. If a district attorney is unable to muster sufficient evidence for a successful criminal prosecution of a defendant, the attorney has the option to instead pursue civil forfeiture, with its lower burden of proof.[100] This would allow for a punitive action to be pursued without the complications involved in a full prosecution.[101]

The burden of proof seems dangerously low for a procedure the Supreme Court has called "quasi-criminal"[102] and admitted to being punitive in nature.[103]

%20is%20what%20is%20called,innocent%20owner%20by%20a%20preponderance%20of%20the%20evidence [https://perma.cc/9E6X-PZEP].

95. Commonwealth v. 2338 N. Beechwood St., 134 A.3d 507, 510 (Pa. Commw. Ct. 2016).

96. *See* Leonard v. Texas, 137 S. Ct. 847, 849 (2017) (Thomas, J., concurring); *see also* Todd Barnet, *Legal Fiction and Forfeiture: An Historical Analysis of the Civil Asset Forfeiture Reform Act*, 40 DUQ. L. REV. 77, 94–95 (2001).

97. Barnet, *supra* note 96, at 94, 106.

98. *Id.* at 94.

99. *See Leonard*, 137 S. Ct. at 849; *see also* United States v. James Daniel Good Real Prop., 510 U.S. 43, 85 (1993) (Thomas, J., concurring in part and dissenting in part) (noting that "ambitious modern statutes and prosecutorial practices have all but detached themselves from the ancient notion of civil forfeiture").

100. David Pimentel, *Forfeitures Revisited: Bringing Principal to Practice in Federal Court*, 13 NEV. L.J. 1, 5 (2012).

101. *Id.* at 6.

102. *See* One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 697 (1965); *see also* Boyd v. United States, 116 U.S. 616, 634 (1886).

103. *See* Austin v. United States, 509 U.S. 602, 610 (1993) (citing United States v. Halper, 490 U.S. 435, 447 (1981)).

B. Disproportionate Target and Impact Upon Minorities and the Poor

There is a significant body of evidence indicating that civil asset forfeiture disproportionately targets low-income communities and minorities.[104] Civil forfeiture puts a higher burden of recovering property upon low-income claimants than it does upon wealthier claimants.

There are many purported justifications for the increased impact and use of racial profiling upon minorities. One such reason is the "hit-rate" theory, which holds that minorities are more likely to be drug traffickers.[105] Adherence to this theory leads to increased suspicion of minorities by some police officers.[106] This theory has little factual basis: data from various states points to the hit-rate of whites being equal to or greater than the hit-rate for any given minority.[107]

Due to either overt or subtle discrimination (long reported in banking), minorities are more likely to carry money in cash.[108] This inclination could incite increased use of civil forfeiture against them: Police might infer illicit goals or gains from stopped travelers carrying large amounts of cash with them and thus seize the money. While this reasoning

---

104. *See, e.g.*, Report from the Tennessee Advisory Comm. to the United States Comm. on C.R., at 53–55 (Feb. 2018) (citing hearing testimony which stated that two-thirds of forfeitures were from minorities as well as collecting other records of discrimination in civil asset forfeiture); Sallah, *supra* note 1 (analyzing 400 challenges to federal seizures and finding the majority of seizure challengers to be minorities); William Freivogel, *For Phelps County, Seizing Suspects' Assets Is 'Like Pennies From Heaven,'* ST. LOUIS PUB. RADIO (Feb. 21, 2019 at 12:05 AM), https://news.stlpublicradio.org/government-politics-issues/2019-02-21/for-phelps-county-seizing-suspects-assets-is-like-pennies-from-heaven [https://perma.cc/9XN3-UBYX] (finding two-thirds of stops from 2016 to 2017 involved drivers with Hispanic names); Nathaniel Cary & Mike Ellis, *65% of Sash Seized by SC Police Comes From Black Men. Experts Blame Racism.*, GREENVILLE NEWS, https://www.greenvilleonline.com/story/news/taken/2019/01/27/south-carolina-racism-blamed-civil-forfeiture-black-men-taken-exclusive-investigation/2459039002/ [https://perma.cc/WW7H-G74S] (last visited Sep. 14, 2019); Stillman, *supra* note 3 (interviewing an employee of a legal clinic in Philadelphia who stated that civil forfeiture has a disparate race and class impact).

105. Mary Murphy, *Race and Civil Asset Forfeiture: A Disparate Impact Hypothesis*, 16 TEX. J. ON C.L. & C.R. 77, 91 (2010).

106. *Id.*

107. *Id.*

108. *Id.* at 94 (citing sources stating that banks are less likely to open in minority neighborhoods and offer less satisfactory loans to minorities); *see generally* Anthony D. Taibi, *Banking, Finance, and Community Economic Empowerment: Structural Economic Theory, Procedural Civil Rights, and Substantive Racial Justice*, 107 HARV. L. REV. 1463, 1466 (1994) (explaining that discrimination in and consolidation of the banking industry negatively impacts non-White communities).

is not overtly racial, it does have a disparate impact upon racial minorities due to their increased propensity for carrying money in cash.

Even if the targeting was completely even across the board for all racial and class distinctions, the use of civil asset forfeiture would still impose a harsher burden on poor persons and communities than it would upon persons or communities of greater means. Seizure can be backbreaking for the impoverished. A family sitting on fragile financial stability can be driven to homelessness with the seizure of a car: with no method of obtaining other transportation, jobs could be lost, and without income, making rent or mortgage payments becomes harder and harder.[109] Homes have been seized for drug infractions as minor as twenty dollars, uprooting long-standing members of communities unable to shoulder a mountain of legal fees in an attempt to reclaim their residence.[110]

This problem is further exacerbated by the amounts claimed by law enforcement, which are often small but still impactful to people in poverty. A study of forfeitures in Georgia showed a reported $2.76 million in forfeitures—but half of the properties taken were worth less than $650.[111] Not only do these small proceeds circumvent the intended use of civil forfeiture—to weaken and disrupt the profits of drug lords and other crime kingpins and enable litigation against these to proceed without excessive public cost[112]—they hurt the owners of seized property, who often cannot afford to hire an attorney to reclaim the property.[113] Even worse, since seizures often target cash, would-be claimants could be left with no money with which to seek legal aid or carry out a court battle. Even if they had the resources to seek legal redress, it often would not be economically sensible to do so—the cost of the time and work it would take for an attorney to recover $650 worth of property would almost certainly exceed the value of the property itself, and without a guaranteed attorney from the court, this property will remain unchallenged, in the hands of the seizers.

This problem is compounded even further when forfeiture is wielded against immigrants, who might know little English and fail to fully comprehend their rights to refuse a search or remain quiet in the face of law enforcement.[114] This lack of knowledge, when added to the fact that many immigrants are racial minorities and thus have increased chances of being

---

109. *See* Report from the Tennessee Advisory Comm. to the United States Comm. on C.R., *supra* note 104, at 54.

110. *See* Stillman, *supra* note 3.

111. Dick M. Carpenter II & Lee McGrath, *Rotten Reporting in the Peach State: Civil Forfeiture in Georgia Leaves the Public in the Dark*, INST. FOR JUST. (2013), https://ij.org/report/rotten-reporting-in-the-peach-state/ [https://perma.cc/8VRT-QCPG].

112. *See* Stillman, *supra* note 3.

113. *Id.*

114. *See* Report from the Tennessee Advisory Comm. to the United States Comm. on C.R., *supra* note 104, at 41.

targeted for seizure, as addressed above, can cause an increased danger in the misuse of forfeiture. According to some commentators, the use of forfeiture is not even applied equally based on the same charges: wealthy white citizens might be charged with drug possession but not suffer seizure, while poorer minority citizens will have their possessions taken.[115]

C. Misuse of Asset Forfeiture as a Fundraiser by Law Enforcement Agencies

"It makes sense to scrutinize governmental action more closely when the State stands to benefit."[116] Civil asset forfeiture has become a huge boon to law enforcement budgets across the country since the expansion of the practice in response to the War on Drugs in the 1980s. This was part of the original purpose of civil asset forfeiture: to allow law enforcement campaigns and prosecutions against drug lords to proceed at cost to the drug lord, rather than the taxpayer.[117]

This also has the unfortunate incidental effect of incentivizing the abuse of civil asset forfeiture as a generator of revenue for police departments and prosecutors.[118] The current civil asset forfeiture scheme in place in many states gives some, if not all, of the proceeds from a seizure to a seizing agency.[119] Providing a direct financial stake to the dollar amount of forfeitures poses several problems.

First, providing a direct financial stake can change the targets and motives of police action.[120] When proceeds from seizures are funneled back into the department, police action often changes from crime control to funding via asset seizure.[121] In pursuit of this new goal, police more frequently target purchasers of drugs rather than the sellers: the purchasers carry cash, which the police can seize and keep, while the drugs the dealers carry must be destroyed, offering no financial reward for the department.[122] Even when targeting drug dealers themselves, police might choose to hold off on the arrest until some sales had been made, guaranteeing a cash inflow

115. *Id.* at 46.

116. Harmelin v. Michigan, 501 U.S. 957, 979 n.9 (1991) (Scalia, J., concurring).

117. Stillman, *supra* note 3; *see also* H.R. REP. NO. 106-192, at 5 (1999).

118. *See* Karis Ann-Yu Chi, Comment, *Follow the Money: Getting to the Root of the Problem with Civil Asset Forfeiture in California*, 90 CALIF. L. REV. 1635, 1635–36 (2002).

119. *Id.* at 1645.

120. *See, e.g.*, Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 66–76 (1998).

121. *Id.* at 67.

122. *Id.* (detailing a procedure called the "reverse sting," wherein police pose as drug dealers in order to catch and seize assets from potential drug purchasers).

to the department.[123] These seizures had little impact on the amount of drugs circulating, as the drugs were not seized and destroyed as they would have been had police moved sooner: the only parties affected were the aspirational purchasers themselves, who often found their wallets lighter and their vehicles in an impound lot.

Second, providing a direct financial incentive to seize property creates a greater risk of improper use of civil asset forfeiture, targeting persons not for their illegal actions but for the potential income their seized property could generate. Take, for example, the tale of Donald Scott. Mr. Scott lived alone with his wife on a two-hundred-acre ranch in Malibu.[124] In 1992, the Los Angeles County Sheriff's department received a tip that Mr. Scott was filling those acres with thousands of marijuana plants.[125] The Sheriff's department obtained a warrant for the ranch, which required probable cause for the search.[126] At around 8:30 in the morning, a five-man entry team from the Sheriff's department, accompanied by a dozen other officers from various agencies who remained waiting in the wings, travelled to Scott's ranch.[127] The team began to loudly knock on the door and yell, awaking Scott and his wife.[128] The team broke down the door and entered, finding Scott's wife.[129] When Scott emerged, armed with a pistol, two deputies shot and killed him.[130] Searching the property produced no marijuana,[131] and a report later publicized by the county District Attorney[132] stated that forfeiture of Mr. Scott's ranch was a motivating factor for the police to seek the search warrant and raid.[133]

Several searches of the ranch had failed to produce anything conclusive: the only evidence that marijuana was present on the property came from a DEA flyover of the property with an expert, who said he saw with his naked eye "about 50" plants on the property.[134] Two physical, in-person searches, one performed prior to the flight, one after, had failed to

123. *Id.* at 67–68.

124. Report by Michael D. Bradbury, District Attorney, on the Death of Donald Scott to the Office of the District Attorney County of Ventura at 1 (Mar. 30, 1993).

125. *Id.*

126. *Id.* at 11.

127. *Id.* at 15–16.

128. *Id.* at 16.

129. *Id.* at 17.

130. *Id.* at 19–21.

131. Bradbury v. Superior Court, 49 Cal. App. 4th 1108, 1111 (Cal. Ct. App. 1996).

132. Report by Michael D. Bradbury, *supra* note 124.

133. *Id.* at 33.

134. Cynthia Cotts, *The Pot Plot*, THE VILLAGE VOICE (June 15, 1993), https://web.archive.org/web/20080212023422/http://www.villagevoice.com/news/9338%2Ccotts%2C11865%2C1.html [https://perma.cc/Q64V-R9R2].

find the alleged marijuana.[135] With no evidence of drug possession beyond a reported account from an airplane's berth, police, driven by the seizure of property, killed an innocent landowner.

Mr. Scott is not the only person targeted for the purpose of forfeiture. In 2008, Detroit police raided a party at an art institute which was serving alcohol without a license.[136] 130 patrons of the party were detained under Prohibition-style "blind pig" laws;[137] 44 of those patrons had their vehicles seized, solely for being at the party, with no probable cause to suspect those patrons of a crime.[138] In overturning the seizures, a district court noted that the city had a "widespread practice, permanent and well-settled," of detaining large groups present at facilities selling alcohol without a proper license and impounding the vehicles every person had driven to get there.[139]

Forfeiture has even been a motive in some sting operations targeted at homosexual men. A procedure known to police as "bag a fag" would have undercover police officers proposition—often covertly—another man for sex, and then arrest him under public indecency or nuisance laws if the man responded—often in imperceivably subtle ways, such as "flirtatious eye contact" or "tapping feet in a toilet stall."[140] Law enforcement would then seize the vehicle of the arrested man, as well as receiving a percentage of the various costs associated with the arrest, furthering the incentive to continue these sting operations. [141]

If the proceeds from properly made seizures were entirely dedicated to furthering the war on crime, perhaps civil forfeiture would be looked upon kindlier. Unfortunately, the money taken by police has, on many occasions, been put to improper use. Forfeiture funds have been used for personal bonuses to seizing officers,[142] boats, cars, Apple computers,[143]

---

135. *Id.*

136. Mobley v. City of Detroit, 938 F. Supp. 2d 669, 674–75 (E.D. Mich. 2012).

137. *Id.* at 674 (defining "blind-pig" to be a term referring to establishments which illegally sell alcohol).

138. *Id.* at 675, 679–80.

139. *Id.* at 684.

140. Jordan Blair Woods, *Don't Tap, Don't Stare, and Keep your Hands to Yourself! Critiquing the Legality of Gay Sting Operations*, 12 J. GENDER RACE & JUST. 545, 545-46, 67 (2009); *see also* Stillman, *supra* note 3.

141. Woods, *supra* note 140, at 569; Stillman, *supra* note 3.

142. Stillman, *supra* note 3 (reporting on a civil forfeiture fund in Hunt County, Texas, where at least one officer received a forfeiture-funded bonus of $26,000 a year, among other stories of personal bonuses).

143. Michael Sallah and Daniel Chang, *Feds probe Bal Harbour Police Department over seized millions*, MIAMI HERALD (Oct. 27, 2012) https://www.miamiherald.com/latest-news/article1944061.html [https://perma.cc/FR8C-DQ5E].

cowboy hats,[144] margarita machines, alcohol for an employee cook-off,[145] and even, in one instance, a $21,000 beach party.[146] Properly used proceeds from forfeiture could pay for an assistant district attorney's salary[147] or drug treatment facilities as well as job skills and youth programs aimed at drug prevention.[148]

Even when forfeiture funds are put to proper uses, however, the risk still remains that the funds were seized improperly, or that law enforcement seized the funds for want of the proceeds rather than arrest the criminal introducing drugs into the community. The personal incentive driving the use of civil asset forfeiture creates far too much motivation for the police to abuse forfeiture by targeting those perceived to be easy, profitable marks, rather than dangerous criminals who may bring in less cash, or even by improperly targeting those with assets to seize but few resources and little opportunity to fight back.

Modern civil asset forfeiture poses several problems in society. It permits the police to target cash-heavy individuals, often minorities, seize their cash and property, and require the victim to seek out counsel and argue her innocence in court in order to have the property returned. In many cases the victims are literally incapable of recovering their property, due to factors such as the low value of the property seized, the high costs of arguing for the property's return before a court, or even an inability to speak sufficient English to seek out resources in order to begin the reclamation procedure.[149] The funds seized are often shared amongst State, local, and federal law enforcement officers[150] as well as the prosecution departments that work with them, providing even more incentive to seize lucratively and seize often. With an increasing number of American citizens growing dissatisfied with the modern implementation of civil asset forfeiture, there is growing pressure on legislatures and the courts to rectify the situation in some manner.[151]

---

144. Tommy Witherspoon, *Sheriff tops off deputies with new cowboy hats*, WACO TRIB.-HERALD (Nov. 8, 2017), https://wacotrib.com/news/mclennan_county/sheriff-tops-off-deputies-with-new-cowboy-hats/article_7f78ad84-3419-534c-8d3f-eb6f0b0e0768.html [https://perma.cc/T92C-D6SF].

145. Renee C. Lee, *Montgomery DA says funds used for liquor at cook-off*, HOUS. CHRON. (Mar. 18, 2008), https://www.chron.com/neighborhood/humble-news/article/Montgomery-DA-says-funds-used-for-liquor-at-1757341.php [https://perma.cc/KQG2-Q5VC].

146. Sallah & Chang, *supra* note 143.

147. *See* Stillman, *supra* note 3.

148. *Asset Forfeiture*, FBI, https://www.fbi.gov/investigate/white-collar-crime/asset-forfeiture [https://perma.cc/P3AJ-AXET] (last visited Aug. 10, 2020).

149. *See* Stillman, *supra* note 3.

150. *See* 21 U.S.C.A. § 881 (West, Westlaw through P.L. 116–51).

151. *Policing in America*, CATO INSTITUTE, https://www.cato.org/policing-in-america/chapter-4/civil-asset-forfeiture [https://perma.cc/F6YM-V9MQ] (last visited Aug. 10, 2020); *see also* Moore, *supra* note 84. *Policing in America*, CATO

III. PROPOSED SOLUTIONS TO PROBLEMS POSED BY CIVIL ASSET FORFEITURE

Many states have already begun to recognize the issues presented by the current civil asset forfeiture procedure and statutorily correct them. Since 2014, some thirty-three states and the District of Columbia have implemented reform of some level in their civil forfeiture laws.[152] These changes range from Tennessee's implementation of new reporting requirements on forfeiture spending[153] to the complete eradication of civil forfeiture entirely, as done in North Carolina, New Mexico, and Nebraska.[154] While state-by-state reform is certainly better than no reform whatsoever, civil forfeiture as applied today would be best reformed by a holding from the Supreme Court limiting its power and impact on all American citizens regardless of state. Additionally, Congress should limit the power of the federal government to enable state law enforcement to skirt their own states' limitations on forfeiture. This note proposes two possible solutions to the civil forfeiture problem, preferably to be introduced simultaneously: raising the government's burden of proof and eliminating the "burden-shifting" model of litigation; and/or eliminate the profit motive behind civil forfeiture by requiring the proceeds from civil asset forfeiture be placed into a general-purpose fund or other dedicated fund, rather than allowing law enforcement departments and prosecutors to retain the proceeds.

A. Raise the Government's Burden of Proof and Abolish the Burden-Shifting Model

In several states and the federal civil asset forfeiture statutory scheme, the government must show by a preponderance of the evidence that the property is subject to forfeiture.[155] Once done, a claimant seeking to establish his or her innocent ownership must do so by a preponderance of the evidence.[156] Preponderance of the evidence, the burden of proof generally applied in civil cases, is defined to be the "greater weight of the

---

INST., https://perma.cc/F6YM-V9MQ (last visited Oct. 25, 2019); *see also* Moore, *supra* note 84.

152. *Civil Forfeiture Reforms on the State Level*, INST. FOR JUSTICE, https://ij.org/activism/legislation/civil-forfeiture-legislative-highlights/ [https://perma.cc/2ZXU-NDKT] (Last visited Aug. 10, 2020).

153. Nick Sibilla, *Tennessee Will Require Law Enforcement to Report Their Forfeiture Spending*, INST. FOR JUSTICE (May 22, 2018), https://ij.org/press-release/tennessee-will-require-law-enforcement-to-report-their-forfeiture-spending/ [https://perma.cc/52DT-SPZ7].

154. *Civil Forfeiture Reforms on the State Level*, *supra* note 152.

155. 18 U.S.C.A. § 983(c)(1) (West, Westlaw through P.L. 116-52).

156. *Id.* at § 983(d)(1).

evidence"[157]—or that the trier of fact thinks a fact is more likely to exist than not.[158] The government need not establish a direct connection between the property and some illegal activity.[159]

The burden on the government should be raised to, at a minimum, clear and convincing evidence, which would require the government to prove that it is "highly probable or reasonably certain" that the claimant utilized her property, or knew of a utilization of her property, in a criminal manner.[160] Furthermore, to comport with due process requirements, the government should be required to either provide clear and convincing evidence that the property is subject to forfeiture prior to the property's seizure or show an extraordinary circumstance that would justify a taking of the property prior to giving the claimant an opportunity to contest the taking.

The clear and convincing evidence standard is higher than the burden of proof in civil cases, which requires a preponderance of the evidence, but is lower than the "beyond a reasonable doubt" standard used in criminal cases.[161] The Supreme Court has held that clear and convincing evidence should be required "where particularly important individual interests or rights are at stake."[162] This makes the clear and convincing evidence standard a fitting match for the "quasi-criminal" nature of civil forfeiture actions.[163] It allows the government to retain the key purpose of civil forfeiture—removing the assets of large and powerful crime rings and drug lords, for whom sufficient evidence of a crime will be accessible—while providing more protection to innocent citizens, for whom there will be no evidence of wrongdoing. It is worth noting that this would not prevent police from seizing property that is, in itself, illegal—if it is already unlawful to possess marijuana or assault weapons, then the owner has no legal right to the property and thus the seizure can be made on those grounds.[164]

The greater protections afforded by the clear and convincing standard of evidence has been noticed by several states. Eight states, as well as the District of Columbia, have raised their evidentiary standards for

---

157. *Preponderance of the evidence*, BLACK'S LAW DICTIONARY (11th. ed. 2019).

158. In re Dewey, 263 B.R. 258, 263 (Bankr. N.D. Iowa 2001).

159. United States v. Twenty One Thousand Dollars ($21,000) in U.S. Postal Money Orders and Seven Hundred Eighty Five Dollars ($785.00) In U.S. Currency, 298 F. Supp. 2d 597, 601 (E.D. Mich. 2003).

160. *Clear and convincing evidence*, BLACK'S LAW DICTIONARY (11th ed. 2019).

161. *Id.*

162. Herman & MacLean v. Huddleston, 459 U.S. 375, 389 (1983).

163. *See* One 1958 Plymouth Sedan v. Commonwealth of Pennsylvania, 380 U.S. 693, 697 (1965); *see also* Boyd v. United States, 116 U.S. 616, 634 (1886).

164. *See* Pimentel, *supra* note 100, at 56.

seizure to at least the clear and convincing evidence standard.[165] Fifteen states go so far as requiring a criminal conviction of the owner to forfeit most types of property.[166] Even Congress has recognized that the preponderance of the evidence standard might be too low: in drafting the Civil Asset Forfeiture Reform Act of 2000, certain members of the House of Representatives proposed that clear and convincing should be the evidentiary standard required for civil forfeiture to occur.[167] However, others in the House and Senate opposed that standard, favoring the traditional civil standard of a preponderance of the evidence, and this side eventually won out.[168] In a newly-proposed modification to CAFRA, the FAIR Act, the House has once again proposed an increase in the burden of proof to clear and convincing evidence.[169] The Senate and the President still need to pass the bill, but it marks the second time within the modern era of civil forfeiture that the House of Representatives has proposed a clear and convincing evidence standard.

The due process weighing requirements from *Mathews v. Eldridge* also favors a shift to the clear and convincing evidence standard.[170] The three-part inquiry from *Mathews* requires a consideration of "the private interest affected by the official action; the risk of an erroneous deprivation of that interest through the procedures used, as well as the probable value of additional safeguards; and the Government's interest, including the administrative burden that additional procedural requirements would impose."[171] While the *Mathews* test initially applied to an administrative proceeding, the Supreme Court has since applied the test to civil forfeiture contexts, as seen in *United States v. James Daniel Good Real Property*.[172]

The first factor in the *Mathews v. Eldridge* test measures "the private interest affected by the official action."[173] The Supreme Court has held that the taking of real property, regardless of that property's status as a residence or otherwise, is a heavy weight in the *Mathews* test.[174] Even the deprivation of personal property, such as cash or cars, can have a hugely

165. *See* Milliron, *supra* note 62, at 1392.

166. *Civil Forfeiture Reforms on the State Level*, *supra* note 152.

167. H.R. Rep. No. 106–192, at 13 (1999); *see also* Pimentel, *supra* note 100, at 16.

168. H.R. Rep. No. 106–192, at 34; *cf.* 18 U.S.C.A. § 983(c) (West, Westlaw through P.L. 116-52).

169. H.R. 1895, 116th Cong. § 2 (1st Sess. 2019).

170. *See generally* Mathews v. Eldridge, 424 U.S. 319 (1976).

171. United States v. James Daniel Good Real Prop., 510 U.S. 43, 53 (1993).

172. *Id.*; *see also* Stephen J. Moss, *Clear and Convincing Civility: Applying the Civil Commitment Standard of Proof to Civil Asset Forfeiture*, 68 AM. U. L. REV. 2257, 2282 (2019).

173. *James Daniel Good Real Prop.*, 510 U.S. at 52.

174. *Id.* at 55.

negative impact on a claimant's life.[175] Losing a car could cost a person valuable time or even a job; losing cash can be even more devastating, especially for people who tend to carry more of their value with them rather than entrust it to other institutions.[176] Even if the owner manages to successfully mount a defense at court and reclaim her property, she must still bear the costs of her legal representation and the impact of the temporary deprivation, such as renting a car for the duration of the proceedings.

Further, even the mere accusation of wrongdoing can harm a person's interests. Merely being seen as a criminal can negatively impact their reputation—seizing a person's property on the grounds that it was used for criminal conduct would place such an impression upon a person in their community. The perception of being a criminal—or at best, associated with criminals—can and will affect the lives of people within their communities: their friends, family, or neighbors may treat or think of them in a more negative light. While civil forfeiture is not a criminal action, and thus does not designate anyone a criminal, when neighbors hear stories such as "Tina's car was taken by the police because her husband was using it to meet prostitutes"[177] or "the Adams' house was seized by the government because drugs were sold there,"[178] the impression of criminal activity is placed upon the owner of that property. Even acquittal in criminal courts may be insufficient to convince a community that their neighbor is not guilty—once the idea takes root, it is hard to eradicate completely. The Supreme Court has acknowledged the impact that forfeiture can have on a person's reputation amongst his community: Justice Kennedy, in his concurring opinion to *United States v. Ursery*, wrote, "It is the owner who feels the pain and receives the stigma of the forfeiture, not the property."[179]

In cases where the association with criminality does not directly harm a person's reputation, it can still inflict lasting psychological or emotional damage.[180] Even if neighbors are not discussing a person's possible wrongdoing, it could create a delusion or paranoia that such gossip is occurring and thus hurt both the owner's mental state as well as their relations within their community. Further, the loss of the seized property

175. *See* Report from the Tennessee Advisory Comm. to the United States Comm. on C.R., *supra* note 104, at 54; *see also* Stillman, *supra* note 3.

176. *See supra* Part II, Section B.

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

178. Stillman, *supra* note 3 (telling the story of Mary and Leon Adams, whose home of forty years was taken by police because their adult son had sold $60 worth of marijuana to a police informant).

179. United States v. Ursery, 518 U.S. 267, 295 (1996) (Kennedy, J., concurring).

180. John M. Darley & Thane S. Pittman, *The Psychology of Compensatory and Retributive Justice*, 7 PERSONALITY AND SOC. PSYCHOL. REV. 324, 329-30 (2003).

itself can cause a psychological or emotional loss. Houses and vehicles are often incredibly important to citizens, both in a practical manner—a place to live or a method to get around—and in an emotional one.[181] Homes and vehicles can relate indelibly to the way people choose to express or define themselves: how they are decorated, the location, the color, the maintenance, and many more facets can all be a way people choose to express their life or relationships to the world. Some people even spend hundreds or thousands of hours and dollars to upgrade or personalize their homes and cars.[182] People can come to associate homes or vehicles with major life milestones encountered while possessing them: graduations, weddings, favorite pets, or important relationships. A great emotional value is injected into and associated with these objects, and they are often treated with respect, reverence, or even love.[183]

It stands to reason, then, that such emotionally wrought property could cause psychological or emotional harm when taken away. With such a connection to homes and vehicles, the sudden and seemingly random loss can seem radically more impactful than the practical loss of the property actually is—even though the practical loss may also be substantial. This is compounded by another factor: that civil forfeiture, to an innocent owner at risk of erroneous deprivation, seems flatly unfair. Almost everyone knows the concept of "innocent until proven guilty." Through asset forfeiture, however, the police can seemingly take whatever they desire and then compel a citizen to prove his own innocence, in effect turning the maxim on its head: guilty until proven innocent. To those uneducated about civil asset forfeiture, it seems strikingly unjust and is increasingly unpopular.[184] In some cases, especially children of parents whose property was seized, it inspires a fear of or disrespect towards the police; they see police as thieves taking a person's rightfully owned property.[185]

The second factor in the *Mathews* test analyses the risk of an erroneous deprivation, as well as the cost of further procedural

---

181. *See, e.g.*, Julie Beck, *The Psychology of Home: Why Where You Live Means So Much*, THE ATLANTIC (Dec. 30, 2011), https://www.theatlantic.com/health/archive/2011/12/the-psychology-of-home-why-where-you-live-means-so-much/249800/ [https://perma.cc/6FGJ-PBX3]; *see also* Megan Turchi, *Why We're Sentimental About Cars*, BOSTON.COM (Dec. 29, 2014), https://www.boston.com/cars/news-and-reviews/2014/12/29/why-were-sentimental-about-cars [https://perma.cc/CB8B-7F5R].

182. Matthew DeBord, *Americans Are Spending a Record Amount of Money on New Cars and Trucks*, BUS. INSIDER (Jan. 4, 2018), https://www.businessinsider.com/americans-spending-big-money-for-new-cars-2018-1 [https://perma.cc/5AKH-89CH].

183. Beck, *supra* note 181; Turchi, *supra* note 181.

184. Moore, *supra* note 84.

185. Stillman, *supra* note 3.

safeguards.[186] This factor also favors a change to the modern implementation of civil forfeiture, both in raising the evidentiary standard and requiring a showing which satisfies the standard prior to the deprivation. The current scheme poses huge risks of erroneous deprivations—property can be taken on as little ground as the very existence of cash being present in a car on the wrong roadway.[187] The existence of affirmative defense for innocence does not eliminate the risk of wrongful deprivation: even if the property is returned, the owner has still undertaken the costs of seeking legal recourse, as well as lost their property for the time spent obtaining said recourse. Once property is taken, the burden on the government and the individual litigant is identical: both must show by a preponderance of the evidence that they should possess the property; the government simply must go first.[188] The potential deprivation here could have ruinous effects on the claimant. Even disregarding the entirely fiscal injuries the owner of improperly seized property may undergo, forfeiture can impose serious reputational, psychological, and emotional damage, as discussed above.[189]

This risk is exacerbated by the lower standard of proof used to seize property. Even when challenged, the government need only show that it is more likely than not that the property was used in an illicit way, and the innocent owner bears the same burden of proof. In *United States v. James Daniel Good Real Property*, the Supreme Court held that the *ex parte* system of civil forfeiture, at least as applied to real property, did not satisfy due process: it provided scarce protection to an innocent owner by allowing the state to seize property prior to any hearing, with only the determination of a magistrate judge.[190] "[F]airness can rarely be obtained by secret, one-sided determination of facts decisive of rights.... No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it."[191]

The same reasoning should apply to all property, not solely real property. Placing an identical burden upon both the government and an innocent owner ignores the inherent difference between the two: any government, whether federal, state, local, or even an agency, will

186. United States v. James Daniel Good Real Prop., 510 U.S. 43, 53 (1993).

187. *See* Stillman, *supra* note 3 (detailing several instances of cash being seized by police from drivers on a road suspected to be commonly used by drug smugglers).

188. 18 U.S.C.A. § 983(c) (West, Westlaw through P.L. 116–65).

189. *See* Stillman, *supra* note 3 (describing the inscribed fear of police instilled within a child after his parents had money seized from their car).

190. *James Daniel Good Real Prop.*, 510 U.S. at 55 .

191. *Id.* (quoting Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 170–72 (Frankfurter, J., concurring)).

have "resources and power that an individual citizen cannot hope to match."[192]

Further, the risks borne by the parties are different: the government stands to risk little and gain much by bringing forfeiture actions against owners. By bringing forfeiture actions, the government stands to gain property it can use for its own purposes or sell in order to gain funds, in addition to being able to punish criminal activity without meeting the rigors of a full criminal trial.[193] Owners of forfeited property, however, stand to either lose much by standing down or lose some by challenging the government. If they do not challenge the forfeiture, they lose the property; if they challenge and fail, they lose the property as well as the costs of the challenge; if they challenge and win, they still risk losing huge amounts in attorney and other legal fees, as well as further costs in appeals and other litigation.[194] Even if successful in their challenges, the owners of seized property may still bear the black mark of such seizure on their reputation.[195] Such an unequal distribution of risk and interest is the reason such a demanding burden of proof is placed on the government in criminal cases.[196] Accordingly, a higher burden of proof should be applied to the "quasi-criminal" procedure of civil forfeiture, where the risk of erroneous deprivation grows higher with a lower burden.

This risk could easily be mitigated by substituting the post-deprivation hearing for a hearing prior to the seizure. At this hearing, the government must establish, by clear and convincing evidence, that the property is subject to civil asset forfeiture.

The third and final factor of *Mathews* requires an analysis of "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[197] In *James Daniel Good*, the Supreme Court specified that this meant "not some general interest in forfeiting property" but rather a specific need to seize property in the case at hand.[198] In general, this requires the government to have a "pressing need for prompt action" in the immediate case.[199]

Such a limited interest should not justify the immediate deprivation of a person who has not been accused of a crime. In many cases, the seizure is effectively permanent: owners of seized property are either too destitute

192. Moss, *supra* note 172, at 2289.

193. *Id.* at 2290.

194. *See, e.g.*, United States v. $28,000.00 in U.S. Currency, 802 F.3d 1100, 1103–04 (9th. Cir. 2015) (discussing attorney's fees for $50,000 for an asset forfeiture case, eventually remanding for further recalculation).

195. Addington v. Texas, 441 U.S. 418, 424 (1979).

196. Speiser v. Randall, 357 U.S. 513, 525–26 (1958).

197. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

198. United States v. James Daniel Good Real Prop., 510 U.S. 43, 56 (1993).

199. *Id.*; *see also* Fuentes v. Shevin, 407 U.S. 67, 91–92 (1972).

or too afraid of retaliation to challenge the seizure in a court of law.[200] The immediate, pre-hearing seizure of a piece of property could be allowed, given judicial permission, in cases where time or notice to the adverse party could subvert the purpose behind the seizure itself; say, a seizure targeting a drug lab where a hearing would give the producers opportunity to destroy evidence. Absent such a risk, however, the government's interest could be properly served by requiring hearings be held prior to seizure.

There would be a cost to the government in requiring such hearings be held before the actual seizure rather than after. However, this cost should not be sufficient enough to shift the *Mathews v. Eldridge* analysis in favor of the government. Were the government required to show that property is properly subject to forfeiture prior to the seizure taking place, there would likely be either far more challenges to seizures than currently occur or fewer seizures taking place to begin with. However, these hearings would not infringe upon a governmental interest any more than a criminal trial does: while the government does have an interest in declawing criminal organizations and drug smugglers and turning those assets into weapons against those offenders,[201] "the State has no legitimate interest in the forfeiture of innocent property."[202] Pre-seizure hearings would allow for the seizure of property actually in use by criminals while preventing the use of civil forfeiture as a method of enrichment for law enforcement.

Analyzing the three factors of *Mathews v. Eldridge* together, the current burden of proof is inadequate to properly protect Americans. The interest people have in owning their property suffers too much harm through the procedures currently in place, and the government's general interest in the ability to seize property is not powerful enough to enable the immediate seizure of any property.

The Supreme Court's holdings and dicta seem to indicate that a clear and convincing standard would be applicable and fitting for civil forfeiture. In a variety of cases, the Court has called forfeiture proceedings "quasi-criminal," aimed at penalizing lawbreakers for their actions.[203] Certain civil actions require clear and convincing evidence; typically those cases "involving allegations of fraud or some other quasi-criminal wrongdoing by the defendant."[204] Clear and convincing evidence is additionally applicable because the interests involved are more than merely financial and could negatively impact the defendant's reputation.[205] While the seizure of property inevitably has pecuniary consequences, the loss of a

200. *See supra* Section 2; *see also* Stillman, *supra* note 3.

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

202. Moss, *supra* note 172, at 2291.

203. *See* One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 700 (1965) (designating civil forfeiture as quasi-criminal).

204. Addington v. Texas, 441 U.S. 418, 424 (1979).

205. *Id.*

home or car is far more impactful than merely the loss of the money required to attain such property, and the mere impression that a person is guilty of some criminal act can have disastrous effects on a person's reputation. Both of the factors mentioned by the Court as deserving of the clear and convincing evidence standard are present in civil forfeiture.

B. Eliminate the Profit Motive for Improper Seizures by Mandating Proceeds Be Placed Into an Impartial General Fund and Abolishing Equitable Sharing

As discussed above,[206] the potential for misuse in civil asset forfeiture as a tool to enrich law enforcement poses several problems—both in the actual possibility of misuse and in the perception such a mechanism can create in the public. Civil forfeiture is an increasingly unpopular tool[207] amongst the American public, and the appearance that police officers are enriching themselves at the cost of the people can have deleterious effects on the reputation of such officers. Furthermore, allowing police departments to retain the proceeds of the items seized using civil forfeiture can create a profit motive, driving police to use seizure more often than is necessary and prioritize targets which have property which would be profitable or useful once seized, increasing the opportunity and possibility of misuse.[208] While the goods seized can go towards funding the necessities to run a police department,[209] far too often news stories break of forfeiture proceeds being dedicated to coffee makers, clowns,[210] and beach parties,[211] the spending of which even the most skilled public relations officer would struggle to explain as being necessary to battle crime.

The federal "equitable sharing" program can worsen these problems, allowing local law enforcement to evade the local forfeiture laws—which may be less lucrative—and instead work with and under the

206. *See supra*, Part II, Section C.

207. *See* Moore, *supra* note 84.

208. *See supra*, Part II, Section C; *see also* Shaila Dewan, *Police Use Department Wish List When Deciding Which Assets to Seize*, N.Y. TIMES (Nov. 9, 2014), https://www.nytimes.com/2014/11/10/us/police-use-department-wish-list-when-deciding-which-assets-to-seize.html [https://perma.cc/4YTY-GU6P].

209. *See* Robert O'Harrow Jr. et al., *Asset seizures fuel police spending*, WASH. POST (Oct. 11, 2014), https://www.washingtonpost.com/sf/investigative/2014/10/11/asset-seizures-fuel-police-spending/ [https://perma.cc/Z83F-YL49].

210. Erin Fuchs, *Here Are The Ridiculous Things Cops Bought With Cash 'Seized' From Americans*, BUS. INSIDER (Oct. 14, 2014, 2:53 PM), https://www.businessinsider.com/heres-what-police-bought-with-civil-forfeiture-2014-10 [https://perma.cc/KR3G-WWC3].

211. Sallah & Chang, *supra* note 143.

federal government, receiving nearly 80% of the value of forfeited property while the federal government keeps the other 20%.[212]

Eliminating the economic incentive for police departments to seek forfeiture will allow the procedure to function as originally planned: a way to neutralize property used by criminals to maintain their enterprises, not a way for a police department to buy margarita makers. If the police were not looking to receive a payout from the actions they take, perhaps it would allow for seizures to again target the more dangerous members of criminal enterprises, such as targeting drug dealers rather than buyers.[213] Civil forfeiture has become so engrained in the law enforcement toolbox that some agencies continue to seize property despite such seizures violating the state's laws.[214]

There are several ways the incentive could be removed. Rather than revenue from forfeitures being given back to law enforcement departments, the proceeds could be deposited into a general use fund. Other writers have proposed using the funds in a "general restitution" fund, aimed at helping the victims of crimes.[215]

Several states have adopted a system that funnels the proceeds from civil forfeiture into a general use fund for the state, rather than returning them to law enforcement.[216] In Maine, for example, title of forfeited property automatically transfers to a general fund unless especially approved by certain members of state or local governments.[217] With an additional level of oversight required to gain profitable property, the

---

212. *See* Blumenson & Nilsen, *supra* note 120, at 51–54 (explaining mechanics and profitability of equitable sharing).

213. *See id.* at 67.

214. Martin Kaste, *New Mexico Ended Civil Asset Forfeiture. Why Then Is It Still Happening?*, NPR (June 7, 2016), https://www.npr.org/2016/06/07/481058641/new-mexico-ended-civil-asset-forfeiture-why-then-is-it-still-happening [https://perma.cc/G97Y-3V49] (telling a story of police seizing a family's car, despite a New Mexico law requiring a criminal conviction for any civil forfeiture to take place).

215. *See* Milliron, *supra* note 62, at 1401–05.

216. *See, e.g.*, LA. STAT. ANN. § 40:2616 (2018) (dividing the share of forfeitures as follows: 60% of the value to the law enforcement agency that seized the property, 20% to the district attorney's office that handled the forfeiture action, and 20% to a criminal court fund); MD. CODE ANN., CRIM. PROC. § 12-403 (West 2018) (a law enforcement agency may dispose of the property or keep it for official use, and pay any proceeds from the sale of forfeited property to the state's general fund); ME. STAT. tit. 15, § 5824 (2018) (stating that any forfeited asset must either go to the General Fund of the state or, if approved by the proper entity, the forfeited property may be equitably transferred); H.B. 560, 52d Leg., 1st Sess. (N.M. 2015) (when the New Mexico state legislature reformed civil forfeiture laws in 2015, it mandated that 100% of the proceeds of forfeited assets are sent to the state's general fund).

217. ME. STAT. tit. 15, § 5824 (2018).

opportunity for misuse is reduced. Washington, D.C., likewise, requires seized currency and the proceeds from sales of forfeited property be deposited into a general fund.[218] Missouri spends proceeds from seized property on schools, not law enforcement.[219]

Some other states have adopted a "compromise system," sending certain amounts of funds to different parts of the government or separate funds.[220] In Connecticut, seizing agencies have the right to keep nearly 70% of seized funds—except for property seized for human trafficking, sexual exploitation, or prostitution, wherein all funds go to a special victim's compensation fund.[221] In Louisiana, the seizing police department keeps 60% of proceeds, the district attorney's office that handled the forfeiture action gets 20%, and the remaining 20% goes into a criminal court fund.[222] Maryland allows law enforcement to keep seized property for official use, but if the property is sold, the proceeds go into a fund which is spent on drug treatment and education programs.[223]

Each of these states has established a system that at the very least mitigates the financial incentive for law enforcement to seek forfeiture. In different states, some solutions may be more attractive than others: in states more commonly ravaged by drug use and abuse, such as those afflicted by the opioid crisis, perhaps money received from forfeiture could be put to use, as in Maryland, aimed at rehabilitating and otherwise helping addicts recover.[224] Any of these possible solutions would help to alleviate the potential abuse of civil forfeiture at the state level.

Even for some of those states which have disallowed civil forfeiture as a moneymaker for local police, equitable sharing still provides a potential way for both state and federal law enforcement to profit from forfeiture.[225] Equitable sharing is an application of federal law, not state, so a state's higher burden of proof or even outright elimination of civil forfeiture can be circumvented.[226] And, much like traditional civil forfeiture, equitable sharing is remarkably vulnerable to potential abuse. For example, in 2014 a college student's tuition money was taken via equitable sharing by a combination of state and federal law enforcement,

---

218. D.C. CODE § 41–310 (2020).

219. MO. REV. STAT. § 513.623 (2020).

220. Milliron, *supra* note 62, at 1403.

221. *Asset Forfeiture Laws by State*, FINDLAW.COM (last updated Feb. 6, 2019), https://criminal.findlaw.com/criminal-rights/asset-forfeiture-laws-by-state.html [https://perma.cc/BMF7-7R82]; *see also* CONN. GEN. STAT. § 54-36p (2019).

222. LA. STAT. ANN. § 40:2616 (2018).

223. MD. CODE. ANN., CRIM. PROC. § 12-403, § 12-405 (West 2018).

224. *See* Milliron, *supra* note 62, at 1404.

225. *Federal Equitable Sharing*, INST. FOR JUSTICE (last visited Aug. 14, 2020), https://ij.org/report/policing-for-profit/federal-equitable-sharing/ [https://perma.cc/CA5K-37SJ].

226. *Id.*

claiming they smelled marijuana.[227] The student was not carrying drugs and was never convicted for a crime[228]—yet, somehow, civil forfeiture found a way to seize it. The student and the Institute of Justice, a libertarian law firm with a focus on civil forfeiture who represented the student pro bono, were able to get his tuition returned, but other owners of seized property may not be so lucky as to attract the attention of a law firm willing to work for free.[229]

Certain states share concerns about equitable sharing's loophole around their laws, and have enacted further statutes to close the loophole. Washington, D.C., along with seven other states, has passed some sort of statute limiting the ability of local police to gain revenue from cases passed to federal prosecutors.[230] The loophole should be closed entirely by eliminating the equitable sharing programs—if a state has foreclosed on civil forfeiture, the procedure should not be utilizable.

C. Does the Supreme Court's Recent Decision in *Timbs v. Indiana* Correct Civil Forfeiture's Failures?

In early 2019, the Supreme Court held that the Excessive Fines clause was "fundamental to our scheme of ordered liberty" and thus incorporated against the States, along with the clause's protections in a civil forfeiture context.[231] Certain media outlets latched onto the case, believing it to be a major change to the landscape of civil forfeiture in favor of the average American, rather than law enforcement.[232] However, the Court limited its holding to incorporation alone: the court did not "discuss, let alone decide," whether the seizure of Timbs' vehicle was disproportionate

227. Nick Wing, *Feds Swiped $11,000 From an Innocent Student. Now, They're Paying Him Back with Interest*, HUFFPOST (Nov. 30, 2016), https://www.huffpost.com/entry/charles-clarke-civil-forfeiture_n_583f2470e4b0c68e047e52ec [https://perma.cc/S2Y3-KSJR].

228. *Id.*

229. *See supra* Part II, Section C.

230. *Civil Forfeiture Reforms on the State Level*, *supra* note 152.

231. Timbs v. Indiana, 139 S. Ct. 682, 689 (2019) ("[W]hen a Bill of Rights protection is incorporated, the protection applies 'identically to both the Federal Government and the States.'" (Citing *McDonald v. City of Chicago*, 561 U.S. 742, 766 (2010))).

232. German Lopez, *Why the US Supreme Court's new ruling on excessive fines is a big deal*, VOX (Feb. 20, 2019), https://www.vox.com/policy-and-politics/2019/2/20/18233245/supreme-court-timbs-v-indiana-ruling-excessive-fines-civil-forfeiture [https://perma.cc/XE4E-38XN]; *see also*, Mitchell Nemeth, *6 Wins for Freedom in 2019*, FOUND. FOR ECON. EDUC. (Dec. 31, 2019), https://fee.org/articles/6-wins-for-freedom-in-2019/ [https://perma.cc/GQY2-CSD7].

in relation to his crime of selling drugs.[233] *Timbs* simply expanded the limitation that Excessive Fines placed on civil forfeitures, first laid out against the federal government in *Austin*, to the states.

Austin did not prevent federal use or misuse of civil forfeiture, as seen by the spread of the equitable sharing practice.[234] *Timbs* does not attack any of the problems addressed above with regard to civil forfeiture: it merely imposes the same disproportionality inquiry established in *Bajakajian*[235] upon the states. *Timbs* does not go nearly far enough in tackling civil forfeiture's failures.

CONCLUSION

As the Department of Justice describes civil forfeiture: These programs "remove the tools of crime from criminal organizations, deprive wrongdoers of the proceeds of their crimes, recover property that may be used to compensate victims, and deter crime."[236] This much is, potentially, true. However, civil forfeiture can also cripple and frighten innocent people for the sake of police department pockets. The current construction of civil forfeiture remains untenable, constitutional only because it has a history of being permitted.[237]

There are many potential avenues of correction within the civil forfeiture scheme: the burden requiring an owner to prove his innocence, the low standard of proof by which the government must establish its forfeitures, and the incentive to abuse the procedure for revenue. Perhaps in a perfect world forfeiture would be banished altogether to the criminal arena, rather than eternally haunting civil courts with a procedure designed to punish.[238] This step may not be necessary, but any combination of the solutions addressed above could help go a long way towards legitimizing the process.

---

233. Sabri Properties, LLC v. City of Minneapolis, No. 18-cv-3098 (MJD/HB), 2019 WL 2052597, at *2 (D. Minn. May 9, 2019); *Timbs*, 139 S. Ct. at 691.

234. *See Federal Equitable Sharing*, *supra* note 225.

235. United States v. Bajakajian, 524 U.S. 321 (1998).

236. U.S. DEP'T OF JUSTICE, GUIDE TO EQUITABLE SHARING FOR STATE, LOCAL, AND TRIBAL LAW ENFORCEMENT AGENCIES 1 (2018), https://www.justice.gov/criminal-afmls/file/794696/download [https://perma.cc/K4TY-RKLL] [hereinafter DEP'T OF JUSTICE].

237. Leonard v. Texas, 137 S. Ct. 847, 848 (2017), *cert. denied*, (statement of Thomas, J., concurring).

238. *Id.* at 847; *see also* Austin v. United States, 509 U.S. 602, 610 (1993) (noting that "a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term," (quoting *United States v. Halper*, 490 U.S. 435, 448 (1989)); DEP'T OF JUSTICE, *supra* note 236.