
ARTICLES

THE DEVIL SEIZES PRADA: WHY CIVIL ASSET FORFEITURE MUST BE ADJUDICATED UNDER A CRIMINAL LAW STANDARD

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I. INTRODUCTION

On February 19, 2021, Stephen Lara (“Lara”), a sixteen year Marine combat veteran, was driving from Texas to California to visit his two daughters for the weekend.¹ While he was driving down a Nevada highway near Reno,² a Highway Patrol cruiser flashed its emergency lights and pulled Lara over.³ The officer informed Lara he was pulled over for following a semi-truck too closely and traveling *under* the speed limit.⁴ After the officers asked Lara some routine questions, they asked him if he had any guns, drugs, or cash in his car.⁵ Lara openly admitted to the officers he had \$87,000 in cash in the car, explaining, “I don’t trust banks, so I keep my own money.”⁶ Lara had years of bank receipts documenting the source of his money, telling police, “I have nothing to hide from you.”⁷ Officers then asked to search Lara’s vehicle.⁸ Lacking probable cause to seize the cash, officers extended the search to try to establish probable cause and deployed a drug sniffing dog.⁹ Although the dog alerted, the search failed to uncover any illegal drugs or weapons. However, officers did find the \$87,000 in cash and two years of bank receipts documenting

¹ C.J. Ciaramella, *Watch Nevada Highway Patrol Officers Seize a Veteran’s Life Savings Through Asset Forfeiture*, REASON (Dec. 1, 2021, 4:50 PM), <https://reason.com/2021/12/01/watch-nevada-highway-patrol-officers-seize-a-veterans-life-savings-through-asset-forfeiture>.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ Ciaramella, *supra* note 1.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

the source of Lara's money.¹⁰ Despite there being no evidence of wrongdoing, officers told Lara they were seizing the \$87,000, gave him a receipt of seizure, and released him without as much as a traffic ticket nor any money to complete his journey to see his daughters.¹¹

Lara became another victim of Civil Asset Forfeiture. However, his ordeal reflects the massive threat that this practice poses to many other unsuspecting individuals nationwide. Between the years 2000 and 2020, forty-five states and the Federal Government have seized at least \$68.8 billion.¹² However, five states did not provide full data, therefore the actual amount of money seized is likely much higher.¹³

Civil Asset Forfeiture is an *in rem* civil action where the government pursues an action against the property, seeking a court determination of the government's right to the property, where the property is treated as the offender.¹⁴ As a result, law enforcement can seize money or other property from an individual suspected of criminal activity, without arresting or charging the individual.¹⁵ An *in rem* action requires the lower "preponderance of the evidence" standard of proof (compared to a criminal trial where the court requires the beyond a reasonable doubt standard), which greatly increases the likelihood of forfeiture and liquidation, even when no arrest or conviction is required.¹⁶

Asset forfeitures can be conducted in both the criminal and civil contexts. Criminal forfeitures occur in an *in personam* context where the court

¹⁰ Terell Wilkins, *Marine Veteran Suing NHP for Seizing His \$87,000 in Life Savings During Traffic Stop*, RENO GAZETTE J. (Oct. 13, 2021, 3:18 PM), <https://www.rgj.com/story/news/2021/09/02/marine-vet-sues-nevada-highway-patrol-over-seizure-life-savings/5686851001/>.

¹¹ Ciaramella, *supra* note 1.

¹² *Data Sources*, INST. FOR JUST., <https://ij.org/report/policing-for-profit-3/policing-for-profit-data/> (last visited Jan. 13, 2025); J. Justin Wilson, *New Report Finds Civil Forfeiture Rakes in Billions Each Year, Does Not Fight Crime*, INST. FOR JUST. (Dec. 15, 2020), <https://ij.org/press-release/new-report-finds-civil-forfeiture-rakes-in-billions-each-year-does-not-fight-crime-2/>.

¹³ *Data Sources*, *supra* note 12; Wilson, *supra* note 12.

¹⁴ Benjamin Thomas Greer, *Crime Shouldn't Pay: How California Should Expand and Restructure Its Human Trafficking Asset Forfeiture Laws*, 12 INTERCULTURAL HUM. RTS. L. REV. 267, 279 (2017); Jennifer Levesque, *Property Rights - When Reform Is Not Enough: A Look Inside the Problems Created by the Civil Asset Forfeiture Reform Act of 2000*, 37 W. NEW ENG. L. REV. 59, 66 (2015).

¹⁵ Legal Info. Inst., *Civil Forfeiture*, CORNELL L. SCH., https://www.law.cornell.edu/wex/civil_forfeiture (last updated Aug. 2022).

¹⁶ Greer, *supra* note 14, at 279.

exercises authority over an individual defendant.¹⁷ In a criminal context, the government must charge and convict the property owner of a crime before the government may order asset forfeiture.¹⁸ Such forfeiture occurs during the sentencing phase of a trial if the forfeited property was connected to the offense of which the defendant was convicted.¹⁹ Thus, the government does not obtain jurisdiction over the property until after a conviction and the forfeiture becomes part of the imposed criminal punishment.²⁰ Should law enforcement seek to seize property pending prosecution, the government must have probable cause the individual committed a crime before seizing that property.²¹ Because criminal defendants enjoy stronger constitutional procedural protections, such forfeitures are less problematic and less controversial.²²

While law enforcement does employ Asset Forfeiture in a post-judgment criminal context (after a court has found a criminal defendant guilty),²³ this Article focuses on the pre-judgment use of Civil Asset Forfeiture by local law enforcement during routine traffic stops, where law enforcement neither arrest nor charge the victim of the seizure.²⁴ Civil Asset Forfeiture differs from Criminal Asset Forfeiture in one simple way. With Criminal Asset Forfeiture, the government must prove an *individual* guilty of a crime before subjecting the individual's property to forfeiture.²⁵ Seizure involves temporarily taking possession of the subject property, pending a future hearing, while forfeiture is the legal action the government takes to remove ownership of property involved in a crime.²⁶ In contrast,

¹⁷ *Id.* at 176; Legal Info. Inst., *in rem*, CORNELL L. SCH., https://www.law.cornell.edu/wex/in_rem (last updated Sept. 2023); *see also* 21 U.S.C. § 853(a).

¹⁸ *See* 21 U.S.C. § 853(a).

¹⁹ Stefan D. Cassella, *Criminal Forfeiture Procedure: An Analysis of Developments in the Law Regarding the Inclusion of a Forfeiture Judgment in the Sentence Imposed in a Criminal Case*, 32 AM. J. CRIM. L. 55, 57 (2004).

²⁰ David Pimentel, *Civil Asset Forfeiture Abuses: Can State Legislation Solve the Problem?*, 25 GEO. MASON L. REV. 173, 176 (2017).

²¹ *Bailey v. United States*, 568 U.S. 186, 192 (2013).

²² Pimentel, *supra* note 20, at 176.

²³ Legal Info. Inst., *Criminal Forfeiture*, CORNELL L. SCH., https://www.law.cornell.edu/wex/criminal_forfeiture (last updated Aug. 2021).

²⁴ The Leadership Conf. on Civ. and Hum. Rts., *Why Civil Asset Forfeiture Is Legalized Theft*, 1 <https://civilrightsdocs.info/pdf/criminal-justice/Civil-Asset-Forfeiture-Fact-Sheet.pdf> (last updated July 23, 2015).

²⁵ *Criminal Forfeiture*, *supra* note 23.

²⁶ Colin May, *Asset Seizure and Forfeiture: A Basic Guide*, FBI L. ENF'T BULL., (Aug. 10, 2016), <https://leb.fbi.gov/articles/featured-articles/asset-seizure-and-forfeiture-a-basic-guide/>.

Civil Asset Forfeiture does not require law enforcement to prove guilt before seizing property from an individual presumed innocent before the law, contrary to the very basis of the American justice system.²⁷ Instead, law enforcement must merely establish probable cause the *property* is forfeitable as proceeds of criminal activity.²⁸

In an *in rem* proceeding, the Government proceeds against the property in question rather than the offender under the legal fiction that it is “guilty property.”²⁹ Because the property is presumed guilty, it is subject to forfeiture.³⁰ Because the forfeiture occurs within the civil context, police do not even need to arrest the individual before seizing the property.³¹ Nor must a prosecutor file any charges against the property owner.³² Instead, the government files a civil – not criminal – action for forfeiture, naming the seized property – not the property owner – as the defendant.³³ However absurd this may sound, the case captions sound even more absurd. A few examples of Civil Asset Forfeiture case captions include: *United States v. Article Consisting of 50,000 Cardboard Boxes More or Less, Each Containing One Pair of Clacker Balls*,³⁴ *United States v. Approximately 64,695 Pounds of Shark Fins*,³⁵ and *United States v. Seventeen Thousand Nine Hundred Dollars in United States Currency*.³⁶

For the property’s owner to contest the forfeiture, the property owner must prove that his property was not involved in criminal activity.³⁷ The bedrock principle of “innocent until proven guilty” gets flipped on its head.³⁸ However, to make matters worse, the victim whose property was

²⁷ *Id.*; Steven W. Hawkins, *Presumed Guilty*, U.S. NEWS & WORLD REP. (Aug. 24, 2016, 2:45 PM), <https://www.usnews.com/opinion/articles/2016-08-24/civil-asset-forfeiture-is-the-opposite-of-innocent-until-proven-guilty>.

²⁸ *Why Civil Asset Forfeiture Is Legalized Theft*, *supra* note 24, at 2.

²⁹ *United States v. Bajakajian*, 524 U.S. 321, 330, 340 (1998).

³⁰ *Id.* at 340.

³¹ *Civil Forfeiture*, *supra* note 23.

³² *Id.*

³³ Florence Ashley, *Humorous Styles of Cause in In Rem Actions: A Comparison of Canada and the United States*, 24 GREEN BAG 2D 15, 25 (2020).

³⁴ *United States v. Article Consisting of 50000 Boxes of Clacker Balls*, 413 F. Supp. 1281 (E.D. Wis. 1976).

³⁵ *United States v. Approximately 64,695 Pounds of Shark Fins*, 353 F. Supp. 2d 1095 (S.D. Cal. 2005).

³⁶ *United States v. Seventeen Thousand Nine Hundred Dollars (\$17,900.00) in U.S. Currency*, 859 F.3d 1085 (D.C. Cir. 2017).

³⁷ Hawkins, *supra* note 27; *Civil Forfeiture*, *supra* note 23; Ashley, *supra* note 33.

³⁸ *Civil Asset Forfeiture: Unpopular and Unjust*, AMS. FOR PROSPERITY (Mar. 3, 2021), <https://americansforprosperity.org/civil-asset-forfeiture-unpopular-and-unjust>.

seized also must show that he has standing to contest the forfeiture.³⁹ To do so, the property owner must prove both he was in possession of the property when it was seized and *prove a colorable ownership* of the property.⁴⁰ Proving *colorable ownership* is almost impossible when police seize cash.⁴¹ Consequently, forfeiture victims generally lack standing because merely asserting ownership to cash without supporting evidence, fails to suffice to establish standing.⁴² The few claimants who survive this standing challenge are not afforded the same constitutional protections as criminal defendants in Criminal Asset Forfeiture actions.⁴³ Unlike in a criminal proceeding, constitutional protections, such as the right to counsel and the beyond a reasonable doubt standard, do not apply in a civil asset forfeiture proceeding.⁴⁴

Currently, thirty-four states permit Civil Asset Forfeiture by law enforcement to seize property from individuals without securing a criminal conviction against them.⁴⁵ Only four States (Maine, Nebraska, North Carolina, and New Mexico) have eliminated the practice entirely.⁴⁶ Law enforcement has transformed Civil Asset Forfeiture from a powerful tool to combat white collar crime into an unconstitutional abuse of government power.⁴⁷ One of the avenues the police use to do this is the Equitable Sharing Program, which will be discussed in detail in Part III of this Article. Such abuse unnecessarily creates a public perception of policing for profit,⁴⁸ a practice often associated with banana republics where the police

³⁹ United States v. Funds in the Amount of \$239,400, 795 F.3d 639, 646 (7th Cir. 2015).

⁴⁰ *Id.* at 645; United States v. Phillips, 883 F.3d 399, 405 (4th Cir. 2018).

⁴¹ *Phillips*, 883 F.3d at 404.

⁴² *Id.* at 405.

⁴³ Levesque, *supra* note 14, at 69.

⁴⁴ Note, *How Crime Pays: The Unconstitutionality of Modern Civil Asset Forfeiture as a Tool of Criminal Law Enforcement*, 131 HARV. L. REV. 2387, 2395 (2018) [hereinafter *How Crime Pays*].

⁴⁵ Samuel Strom, *Asset Forfeiture Law by State*, FINDLAW, <https://www.findlaw.com/criminal/criminal-rights/asset-forfeiture-laws-by-state.html>, (Jan. 25, 2024).

⁴⁶ Nicole Ezech, *Supreme Court to Reexamine Use of Civil Asset Forfeiture*, NAT'L COUNCIL OF STATE LEGISLATURES (May 1, 2021), <https://www.ncsl.org/state-legislatures-news/details/supreme-court-to-reexamine-use-of-civil-asset-forfeiture>.

⁴⁷ Michael Van Den Berg, Comment, *Proposing a Transactional Approach to Civil Forfeiture Reform*, 163 U. PA. L. REV. 867, 869, 906 (2015); Levesque, *supra* note 14, at 71; Adam Creppelle, *Probable Cause to Plunder: Civil Asset Forfeiture and The Problems It Creates*, 7 WAKE FOREST J.L. & POL'Y 315, 337 (2017).

⁴⁸ Levesque, *supra* note 14, at 81.

use the forfeited property for their own use.⁴⁹ Such practices induce the populace to lose faith that police act evenhandedly to enforce the law.⁵⁰

To bring this powerful law enforcement tool into appropriate constitutional parameters, this Article recommends that Asset Forfeiture only be enforced in the criminal law context. By constraining Asset Forfeiture to the criminal law context, prior to seizing an individual's property, police would need to establish a finding of probable cause that the individual whose property was seized had committed a crime.⁵¹ Such a finding would require the government to adhere to an individual's rights under the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution.⁵² Doing so in a criminal law context would enable individuals to have standing to challenge the seizure and allow them to enforce their rights in court because they have the opportunity to challenge the constitutionality of the seizure during their criminal trial.⁵³ Additionally, such a constraint would limit the use of Asset Forfeiture to only legitimate and justifiable cases where the police have a legally sufficient suspicion an individual committed a crime, sufficient enough the police would arrest the individual. The arrest would set in motion the process of adjudicating whether the police officer's belief was reasonable and supported by evidence.⁵⁴ Moreover, eliminating Civil Asset Forfeiture would aid in restoring public confidence that, when police stop motorists, their priority is public safety and not lining their own department's pockets.⁵⁵

⁴⁹ See John Burnett, *Sheriff Under Scrutiny over Drug Money Spending*, NPR (June 18, 2008), <https://www.npr.org/2008/06/18/91638378/sheriff-under-scrutiny-over-drug-money-spending> (D.A.s have used forfeited cash for a re-election campaign, a Hawaiian "training seminar," and a political friend's golf tournament fundraiser).

⁵⁰ The Editorial Board, *When Police Play Bounty Hunter: Our View*, USA TODAY (Nov. 19, 2014, at 8:10 PM), <https://www.usatoday.com/story/opinion/2014/11/19/police-civil-asset-forfeiture-profit-drug-trafficking-editorials-debates/19299879>; Don Boudreaux, *On the Banana Republic Practice of Civil Asset Forfeiture*, CAFE HAYEK (Mar. 8, 2023), <https://cafehayek.com/2023/03/on-the-banana-republic-practice-of-civil-asset-forfeiture.html>.

⁵¹ See *United States v. Monsanto*, 491 U.S. 600, 615 (1989) (explaining how probable cause about the property was the old standard, and now probable cause should be applied to the individual).

⁵² See generally Creppelle, *supra* note 47, at 342–44.

⁵³ Elizabeth Weaver, *Money Doesn't Grow on Trees: Civil Asset Forfeiture Reform is a Necessary Precursor to Police Reform*, 87 MO. L. REV. 343, 346 (Oct. 2021); Jasmin Chigbrow, *Police or Pirates? Reforming Washington's Civil Asset Forfeiture System*, 96 WASH. L. REV. 1147, 1162 (Winter 2022).

⁵⁴ See *id.* at 320, 357, 359.

⁵⁵ See Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 66 (1998).

Although Asset Forfeiture also exists within federal law and as a post-judgment remedy, this Article will focus solely on the use of Civil Asset Forfeiture by State and local law enforcement during traffic stops. To begin, Part I examines the history of Asset Forfeiture as well as the differences between how the government conducts Asset Forfeiture in the criminal and civil contexts. Next, Part II examines the rules governing Civil Asset Forfeiture, including federal and state legislation, as well as relevant case law. Then, Part III examines beneficial uses and resultant problems involved with Civil Asset Forfeiture. Finally, Part IV recommends reforms that would properly advance the needs of law enforcement while protecting innocent individuals’ constitutional rights.

II. HISTORY OF CIVIL ASSET FORFEITURE

A. History of Civil Asset Forfeiture

Civil Asset Forfeiture originated in the Middle Ages from the “deodand” theory, under which a goring ox was subject to forfeiture because it was guilty of injuring a person.⁵⁶ This practice later arose under the Navigation Acts of Great Britain.⁵⁷ If a British ship owner abroad, beyond the reach of an *in personam* action, was involved in piracy, smuggling, or failed to pay duties on goods shipped to America, officials could seize the goods through an *in rem* action.⁵⁸ In 1789, the United States Congress enacted the Act of July 31, 1789 (“The Act”), the nation’s first civil forfeiture statute against ships involved in customs violations.⁵⁹ The United States Supreme Court first upheld the constitutionality of the Act as it pertains to ship seizures in 1820.⁶⁰ On June 17, 1971, President Nixon declared a War on Drugs.⁶¹ President Nixon declared drugs to be “public enemy number one” and that to “defeat this enemy, it is necessary to wage a new, all-out offensive.”⁶² Subsequently, in 1978, Congress expanded The Act to include forfeiture of all money used in, or acquired from, the sale

⁵⁶ Roger Pilon & Trevor Burrus, *Civil Forfeiture Reform*, CATO INST. (2022), <https://www.cato.org/cato-handbook-policymakers/cato-handbook-policymakers-9th-edition-2022/civil-asset-forfeiture-reform>.

⁵⁷ *Id.*; Pimentel, *supra* note 20, at 175.

⁵⁸ Pimentel, *supra* note 20, at 175.

⁵⁹ Greer, *supra* note 14, at 274.

⁶⁰ *See generally*, Pimentel, *supra* note 20, at 175.

⁶¹ Conor Friedersdorf, The War on Drugs Turns 40, THE ATLANTIC (Jun. 15, 2011), <https://www.theatlantic.com/politics/archive/2011/06/the-war-on-drugs-turns-40/240472>.

⁶² *Id.*

of illicit drugs.⁶³ This amendment allowed the federal government to order the forfeiture of money from motorists suspected of drug trafficking. Finally, in 1984, Congress further amended The Act to include the forfeiture of real property.⁶⁴ The 1984 amendment also authorized the federal government to partner with State and local law enforcement to keep up to 80% of the forfeited money if they partnered with the federal government through the Equitable Sharing Program.⁶⁵

Traditionally, Civil Asset Forfeiture involves three types of forfeitable property.⁶⁶ The first is contraband, which the government may seize because the law does not allow for anyone to assert a property interest in assets inherently unlawful to possess.⁶⁷ The second is proceeds from a crime, which law enforcement seizes to deter crime and prevent the wrongdoer from keeping ill-gotten gains.⁶⁸ The third type of property is instrumentalities of crime.⁶⁹ The government may seize such property to ensure they may no longer be used in crime and to let property owners know that if they allowed their property to be involved in drug crimes, it would be subject to forfeiture.⁷⁰ Such a change would help property owners ensure that their property does not further criminal activity.⁷¹

B. Differences in the Criminal and Civil Context

Asset forfeitures can be conducted in both the criminal and civil contexts. Criminal forfeitures occur in an *in personam* context.⁷² In the criminal context, the government must charge and convict the property owner of a crime before the government may order asset forfeiture.⁷³ Such forfeiture occurs as part of the sentencing phase of the trial if the forfeited property was connected to the offense of which the defendant was convicted.⁷⁴ Thus, the government does not obtain jurisdiction over the property until

⁶³ Greer, *supra* note 14, at 274–75.

⁶⁴ Greer, *supra* note 14, at 274–75; 21 U.S.C. § 853.

⁶⁵ John R. Emshwiller & Gary Fields, *Federal Asset Seizures Rise, Netting Innocent with Guilty*, WALL ST. J. (Aug. 22, 2011), <https://www.wsj.com/articles/SB10001424053111903480904576512253265073870>.

⁶⁶ Pimentel, *supra* note 20, at 176–77.

⁶⁷ *Id.* at 176.

⁶⁸ *Id.* at 176–77.

⁶⁹ *Id.* at 177.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* at 176.

⁷³ *See* 21 U.S.C. § 853(a).

⁷⁴ Cassella, *supra* note 19.

after a conviction and the forfeiture becomes part of the imposed criminal punishment.⁷⁵ Should law enforcement seek to seize property pending prosecution, the government must have probable cause the individual committed a crime before seizing that property.⁷⁶ Because criminal defendants enjoy stronger constitutional procedural protections, such forfeitures are less problematic and less controversial.⁷⁷

Conversely, Civil Asset Forfeiture is an *in rem* action against the property where a court determines the government's right to that property and where the property is treated as the offender.⁷⁸ In civil actions, the lower "preponderance of the evidence" standard of proof is required, which greatly increases the likelihood of forfeiture and liquidation, even when no arrest or conviction is required.⁷⁹

State and local police have employed Civil Asset Forfeiture to seize property from individuals under the guise of enforcing criminal law.⁸⁰ Lara's case illustrates how police can use the pretext of enforcing criminal laws to justify Civil Asset Forfeiture. While officers stopped Lara for driving *under* the speed limit, they quickly began asking him if he had drugs, guns, or cash inside his vehicle, a line of questioning wholly unrelated to the pretextual traffic stop.⁸¹ The officers chose to seize property through the civil context because it offers the uniquely lower standard of suspicion⁸² and provides property owners whose property the government seized with far fewer procedural rights.⁸³

⁷⁵ Pimentel, *supra* note 20, at 176.

⁷⁶ *Bailey v. United States*, 568 U.S. 186, 192 (2013).

⁷⁷ Pimentel, *supra* note 20, at 176.

⁷⁸ Greer, *supra* note 14, at 279; Levesque, *supra* note 14, at 66.

⁷⁹ Greer, *supra* note 14, at 279.

⁸⁰ *How Crime Pays*, *supra* note 44, at 2387.

⁸¹ Ciaramella, *supra* note 1.

⁸² *Id.* at 2389.

⁸³ *Id.* at 2390.

III. THE RULES GOVERNING CIVIL ASSET FORFEITURE

A. *Legislative History*

1. Federal Laws

Beginning in the 1970's, Congress began to enact a number of laws authorizing federal law enforcement to seize property from individuals suspected of criminal activity, specifically focused on drug crimes.⁸⁴ In 1970, Congress enacted the Comprehensive Drug Abuse Prevention and Control Act to pave the way for further use of Civil Asset Forfeiture.⁸⁵ In 1978, Congress enacted the Psychotropic Substances Act, which allowed for forfeiture of money and securities connected to drug-related crimes.⁸⁶ In 1984, Congress laid the groundwork for the modern use of Civil Asset Forfeiture when it enacted the Comprehensive Crime Control Act of 1984 ("CCCA").⁸⁷ The CCCA authorized forfeiture of property upon a showing of the preponderance of the evidence standard that the property was related to a drug crime.⁸⁸ The CCCA also allowed the law enforcement agency making the seizure to seek forfeiture of the proceeds of that seizure.⁸⁹ The CCCA also set up the Equitable Sharing Program, which allows State and local law enforcement to keep up to 80% of the proceeds of such seizures.⁹⁰ The Equitable Sharing Program enables State and local law enforcement to transfer seized property that may fall short of satisfying the preliminary burden of proof required under its own State laws or the federal government.⁹¹ The federal government then applies the easier to satisfy federal preponderance burden under the CCCA to justify the seizure.⁹² The federal government then transfers up to 80% of the proceeds back to the State and local law enforcement agency.⁹³

⁸⁴ Brittany Hunter, *A History of Civil Asset Forfeiture in America: Pirates, Mob Bosses, and the War on Drugs*, FOUND. FOR ECON. EDUC. (Apr. 9, 2019), <https://fee.org/articles/a-history-of-civil-asset-forfeiture-in-america-pirates-mob-bosses-and-the-war-on-drugs/>.

⁸⁵ Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (1970).

⁸⁶ Hunter, *supra* note 84.

⁸⁷ The Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976 (1984).

⁸⁸ *Id.*

⁸⁹ Hunter, *supra* note 84.

⁹⁰ *Id.*; see Wilkins, *supra* note 10, at 3; Levesque, *supra* note 14, at 79–80.

⁹¹ Levesque, *supra* note 14, at 80.

⁹² *Id.*

⁹³ *Id.*; see Wilkins, *supra* note 10, at 3.

2. State Laws

While each State may enact their own laws governing Civil Asset Forfeiture, the CCCA made these laws largely toothless.⁹⁴ This Act allowed State and local police to participate in the Equitable Sharing program when the suspected crime violates federal law.⁹⁵ Under this program, federal law enforcement “adopts” the property seized by State and local law enforcement.⁹⁶ Because State and local law enforcement seizes the property under federal law, State and local law enforcement may bypass State law in favor of federal law and need only satisfy the federal preponderance standard of proof established under CAFRA.⁹⁷ Thus, examining the impact of different State laws on Civil Asset Forfeiture is inapposite to the focus of this Article.

IV. PROBLEMS WITH CIVIL ASSET FORFEITURE

A. Beneficial Uses of Civil Asset Forfeiture

Law enforcement’s use of Civil Asset Forfeiture has several beneficial uses: to punish wrongdoing, deter future crimes, and lessen the power of criminal enterprises.⁹⁸ When police find ample evidence property was involved in crime (such as encountering a drug lab), police have a legitimate interest in removing contraband from circulation, regardless of whether they can find the people involved in committing a crime through the property’s acquisition or use.⁹⁹ To allow the government to capture, prosecute, and convict those responsible would deprive local law enforcement of its primary weapon against absentee criminals.¹⁰⁰

⁹⁴ Levesque, *supra* note 14, at 79–80.

⁹⁵ Jefferson B. Sessions III, OFF. OF THE ATT’Y GEN., *Federal Forfeiture of Property Seized by State and Local Law Enforcement Agencies*, Order No. 3946–2017 (2017), <https://www.justice.gov/media/905971/dl?inline>.

⁹⁶ *Id.*; Madewell v. Downs, 68 F.3d 1030, 1037–38 (8th Cir. 1995) (“A federal agency may adopt the seizure of property seized by another agency as related to illegal drug use or trafficking”); 1 MOORE’S FEDERAL PRACTICE - CIVIL § 711.21.

⁹⁷ 18 U.S.C.S. § 983(c)(1) (LEXIS through Pub. L. No. 118-183).

⁹⁸ Kaley v. United States, 571 U.S. 320, 323–24 (2014) (citing Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 630, 634 (“Forfeiture provisions are powerful weapons in the war on crime”)); Leonard v. Texas, 580 U.S. 1178, 1179 (2017), *cert. denied* (Thomas, J., concurring); Pimentel, *supra* note 20, at 176.

⁹⁹ Pimentel, *supra* note 20, at 179–80.

¹⁰⁰ *Id.* at 179.

B. *Problems with Civil Asset Forfeiture*

Despite its beneficial law enforcement uses, Civil Asset Forfeiture poses significant problems as it is currently employed for three reasons. First, it creates an anomaly in the law because it presumes guilt before any court proceeding. Second, it creates practical problems for law enforcement's relationship with the community at large because it creates the perception of a corrupt profit motive by law enforcement. Lastly, it poses significant constitutional problems because it would be considered a violation under virtually every other scenario.

1. An Anomaly in the Law

The use of Civil Asset Forfeiture by law enforcement is an anomaly from how the law typically operates to punish and mitigate criminal activity.¹⁰¹ Typical forfeitures based on suspected criminal activities follow a criminal conviction, not before or absent a criminal conviction.¹⁰² Conversely, Civil Asset Forfeiture cases typically fall into two categories that do not involve a criminal prosecution at all: (1) Seizures of cash on the mere suspicion of drug activity, where the suspicion is based almost entirely on the existence of a large amount of cash (on the sole presumption that law abiding citizens don't carry large quantities of cash), and (2) seizures of property used by criminals but owned by an innocent party.¹⁰³ This Article focuses exclusively on the former. While Civil Asset Forfeiture laws were intended to target the ill-gotten gains of those committing drug crimes, its practice has led to the wrongful forfeiture of money and property belonging to innocent people, particularly motorists carrying large amounts of cash for lawful purposes.¹⁰⁴

a. *Civil Asset Forfeiture Invites Police Abuse*

Criminal asset forfeiture occurs within *in personam* jurisdiction, where the government brings an action against the defendant's property

¹⁰¹ Steven L. Kessler, *Asset Forfeiture: Home and Abroad*, 4 ILSA J. OF INT'L & COMPAR. L. 385, 386 (1998); Jasmin Chigbrow, *Police or Pirates? Reforming Washington's Civil Asset Forfeiture System*, 96 WASH. L. REV. 1147, 1165 (2021).

¹⁰² Casella, *supra* note 19.

¹⁰³ Pimentel, *supra* note 20, at 178.

¹⁰⁴ Levesque, *supra* note 14, at 59–60; See Stephen J. Dunn, *Nothing Civil About Asset Forfeiture*, FORBES, (Feb. 18, 2013, 4:49 PM) <https://www.forbes.com/sites/stephendunn/2013/02/18/asset-forfeiture-is-anything-but-civil/>.

interest¹⁰⁵ and forfeiture depends on proving the defendant's guilt.¹⁰⁶ However, when law enforcement uses Civil Asset Forfeiture to combat crime, such actions are brought *in rem* against the property itself, prior to or without proving guilt.¹⁰⁷ Law enforcement does not have to secure a conviction or even make an arrest.¹⁰⁸ In fact, police can seize property by showing probable cause the property is somehow connected to a crime, yet never actually prosecute the individual connected to the property they supposedly suspect committed the crime.¹⁰⁹ Additionally, because these seizures occur within the civil context, individuals whose property was taken lack the constitutional procedural protections afforded to criminal defendants because the purpose of an *in rem* action is merely to adjudicate ownership of the property.¹¹⁰ Because of this one-sided treatment, Civil Asset Forfeiture is plagued by abuse,¹¹¹ demonstrated by the experience of Stephen Lara and countless others who were able to provide police a compelling reason why they were carrying such a large amount of cash.¹¹² The temptation for police to seize cash is hard to resist, although the pre-textual rationalization for the seizure is all too easy for police to articulate.¹¹³ As a result, law enforcement has the motive and opportunity to create faulty scenarios in order to seize property from those who they have no reason to think committed a crime.¹¹⁴ This imposes on the innocent property owner the burden to prove the property's innocence before it can be returned.¹¹⁵

¹⁰⁵ Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325, 1340 (1991).

¹⁰⁶ *Paret-Ruiz v. United States*, 827 F.3d 167, 171–72 (1st Cir. 2016).

¹⁰⁷ Cheh, *supra* note 105, at 1340.

¹⁰⁸ *Paret-Ruiz*, 827 F.3d at 171; Pimentel, *supra* note 20, at 183.

¹⁰⁹ Keith R. Fisher, *In Rem Alternatives to Extradition for Money Laundering*, 24 LOY. L.A. INT'L & COMPAR. L. REV. 409, 437 (2003).

¹¹⁰ Karris Ann-Yu Chi, *Follow the Money: Getting to the Root of the Problem with Civil Asset Forfeiture in California*, 90 CALIF. L. REV. 1635, 1641 (2002); *Caesars World, Inc. v. Caesars-Palace.com*, 112 F. Supp. 2d 505, 506 (E.D. Va. 2000).

¹¹¹ Berg, *supra* note 47, at 869, 906. See Levesque, *supra* note 14, at 71; see also Crepelle, *supra* note 47, at 337.

¹¹² Pimentel, *supra* note 20, at 213.

¹¹³ *Id.* at 213–14.

¹¹⁴ See Levesque, *supra* note 14, at 78.

¹¹⁵ Pilon, *supra* note 56.

b. The Property Is Presumed to Be the Guilty Party

A significant aspect of Civil Asset Forfeiture that departs from traditional jurisprudence is the property itself is presumed guilty.¹¹⁶ Because the property is presumed guilty, the owner's innocence is irrelevant.¹¹⁷ Such a presumption erects a sometimes insurmountable burden of proof for the property owner because it remains far more difficult to prove property was not involved in a crime than for police to meet the preliminary probable cause burden that would exist if the property were forfeited in a criminal context.¹¹⁸ Additionally, because the property is considered the guilty defendant in such actions, the property owner must assert the "innocent owner" defense under CAFRA in order to have Article III standing to contest the seizure.¹¹⁹ To have Article III standing, the plaintiff must show an injury in fact, must establish a traceable connection between the alleged injury in fact and the defendant's alleged conduct, and must show that the court can remedy the injury in fact.¹²⁰ Under CAFRA, the claimant must assert some evidence of superior right to the property beyond a mere allegation of a property interest to have Article III standing.¹²¹ While evidence of superior right may be easy to establish for titled property, such as a bank account, real property, or a motor vehicle, it remains elusive for seizures of cash or other fungible personal property seized by police during a traffic stop.¹²² Unexplained naked possession of cash fails to establish the ownership interest required to establish Article III standing to contest a forfeiture proceeding because the property owner's possession of the cash only shows mere custody of the cash, not an ownership interest.¹²³ To establish standing as the owner of the cash, the owner must make an allegation of ownership and provide sufficient evidence of ownership.¹²⁴

¹¹⁶ Pimentel, *supra* note 20, at 183.

¹¹⁷ *Id.* at 175–76, 183.

¹¹⁸ Levesque, *supra* note 14, at 72, 75–76.

¹¹⁹ 18 U.S.C.S. § 983(d) (2024).

¹²⁰ *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 771 (2000).

¹²¹ *United States v. 16 Parcels of Real Prop.*, 320 F. Supp. 2d 1307, 1311 (S.D. Fla. 2003); 14B MICHIE'S JURIS. OF VA. & W. VA. - PENALTIES & FORFEITURES § 4.

¹²² *United States v. Phillips*, 883 F.3d 399, 404 (4th Cir. 2018).

¹²³ *United States v. \$557,933.89, More or Less, in U.S. Funds*, 287 F.3d 66, 79 n.10 (2d Cir. 2002) ("Mercado had custody of the money orders at the time of their seizure.").

¹²⁴ *Torres v. \$36,256.80 United States Currency*, 25 F.3d 1154, 1158 (2d Cir. 1994).

c. Law Enforcement Keeps the Funds They Seize

When cash is seized from motorists, the Equitable Sharing program permits the State or local law enforcement agency that seized the cash keeps up to 80% of these funds.¹²⁵ This presents a financial incentive to not only conduct as many seizures as possible but also to take measures to maximize the value of each seizure, potentially at the expense of proper justice.¹²⁶ This perverse incentive creates an unnecessary and improper conflict of interest for law enforcement which is forced to decide between its financial incentives and serving the public who they are sworn to protect.¹²⁷ Because police resources are inherently scarce, they must choose between pursuing lucrative forfeitures at the expense of less lucrative, but foundational, duties, such as responding to domestic violence calls.¹²⁸ This undermines the very foundation upon which police serve.¹²⁹ Ultimately, because law enforcement can keep much of the proceeds of such civil forfeitures, a substantial number of law enforcement agencies became dependent on forfeitures and now view Civil Asset Forfeiture as a necessary source of income.¹³⁰

d. Little to No Oversight

Under federal Civil Asset Forfeiture laws, money seized by local law enforcement may only be used for “law enforcement purposes.”¹³¹ But what is considered a “law enforcement purpose”? With such little regulation and oversight, law enforcement has very liberally construed this term.¹³² Some law enforcement agencies classified “law enforcement purpose” as dinners, football tickets, fundraisers, Christmas parties, and even gifts to public schools.¹³³ With such free reign, law enforcement has sometimes become unapologetic about such spending.¹³⁴ During a budget

¹²⁵ Levesque, *supra* note 14, at 83–84.

¹²⁶ Pimentel, *supra* note 20, at 194; Levesque, *supra* note 14, at 82.

¹²⁷ Levesque, *supra* note 14, at 82.

¹²⁸ Pimentel, *supra* note 20, at 194.

¹²⁹ *Id.* at 194–95.

¹³⁰ Levesque, *supra* note 14, at 81.

¹³¹ *Id.* at 84 (quoting Phillip Smith, *Law Enforcement: Asset Forfeiture Funds Spent on Banquets, Balls, and Balloons in Atlanta*, STOP THE DRUG WAR (Sept. 14, 2007, 1:00 AM), http://stopthedrugwar.org/chronicle/2007/sep/14/law_enforcement_asset_forfeiture_

¹³² *See id.* at 83–84.

¹³³ *Id.*

¹³⁴ *See id.*; *see also* Pimentel, *supra* note 20, at 198 (claiming “[r]esistance to this reform [of redirecting seized assets] is purely mercenary”) (alteration in original).

meeting with the Columbia, Missouri City Council, Police Chief Kenneth Burton was asked if there were any limitations to the police department's use of forfeited funds and stated: "There's some limitations on it Actually, there's not really on the forfeiture stuff. . . . It's kind of like pennies from heaven - it gets you a toy or something that you need is the way that we typically look at it to be perfectly honest."¹³⁵ Law enforcement agencies have become accustomed to revenue generated from such forfeitures.¹³⁶ The continued pressure to generate forfeiture revenue has led to an ever-increasing dependency to finance basic operational costs such as rank and police officer payroll.¹³⁷

2. Practical Problems

Civil Asset Forfeiture also presents practical problems for law enforcement. The practice can unnecessarily create alienation between law enforcement and the public at large.¹³⁸ Because law enforcement faces pressure to continue to produce forfeiture revenue, it does so at the expense of the public's trust.¹³⁹ Civil Asset Forfeiture provides an incentive for law enforcement to prioritize targeting assets for forfeiture that it ultimately retains for itself rather than focusing on combatting actual crime.¹⁴⁰ To the extent such pressures encourage police to overreach in seizing assets under questionable or marginal grounds, the police end up paying a heavy reputational price when the public believes law enforcement no longer prioritizes policing for the public good.¹⁴¹ Even if police were able to resist such temptation, the public perception that law enforcement profits from making such seizures sullies law enforcement's image and reputation.¹⁴² Despite this damage to local law enforcement's reputation, the Department of Justice actively encourages local law enforcement to prioritize the practice through the Equitable Sharing program.¹⁴³ As a result of such encouragement, the revenue generated by local law enforcement through

¹³⁵ Pimentel, *supra* note 20, at 198 (quoting Darpana Sheth, *Incentives Matter: The Not-So-Civil Side of Civil Forfeiture*, FED. LAW., July 2016, at 46-48).

¹³⁶ Nora V. Demleitner, *Commodifying Policing: A Recipe for Community-Police Tensions*, 51 GA. L. REV. 1047, 1056 (2017).

¹³⁷ *Id.*

¹³⁸ *See id.* at 1076.

¹³⁹ *Id.*

¹⁴⁰ David Pimentel, *Forfeitures Revisited: Bringing Principle to Practice in Federal Court*, 13 NEV. L.J. 1, 14 (2012).

¹⁴¹ Pimentel, *supra* note 20, at 198.

¹⁴² *Id.*

¹⁴³ *Id.* at 181.

Civil Asset Forfeiture has grown exponentially in recent years.¹⁴⁴ Because of this conflict of interest, some States have tried to curtail its abuse, however States generally have stopped short of barring participation in the Equitable Sharing program.¹⁴⁵ The District of Columbia is a notable exception.¹⁴⁶ When informed by the Department of Justice that the forfeited funds may not go into the District's General Fund, the Department of Justice rendered it ineligible to participate in the Equitable Sharing program.¹⁴⁷ Such a requirement induces states to rely on specious reasoning as to what constitutes a "law enforcement purpose" that allows them to continue participating in the Equitable Sharing program.¹⁴⁸ Instead, these States placed a statutory minimum dollar amount on seizures.¹⁴⁹ For example, Nebraska permits seizures over \$25,000, Maryland and New Mexico permit seizures over \$50,000, and Ohio permits seizures over \$100,000.¹⁵⁰ While this would ostensibly reduce the number of seizures, it could likely produce the opposite effect – as it incentivizes police to seize far more than they otherwise would in order to meet the minimum dollar amount threshold, even if the connection between the property and the suspected crime tenuously meets the preponderance standard.¹⁵¹

3. Constitutional Problems in the Civil Context

Civil Asset Forfeiture poses a number of potential constitutional violations under the Fourth, Fifth, Sixth, Eighth, and Tenth Amendments.¹⁵² Although these amendments directly restrain only the federal government, the United States Supreme Court has held the Fourteenth Amendment's

¹⁴⁴ Levesque, *supra* note 14, at 78.

¹⁴⁵ See Pimentel, *supra* note 20, at 191–92.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ Levesque, *supra* note 14, at 83–84.

¹⁴⁹ *Id.*

¹⁵⁰ Pimentel, *supra* note 20, at 192.

¹⁵¹ See *id.* at 193.

¹⁵² See generally *Kaley v. United States*, 571 U.S. 320 (2014); *United States v. Monsanto*, 491 U.S. 600 (1989); *How Crime Pays*, *supra* note 45 at 2389, 2393, 2395-96; *People v. \$30,000 U.S. Currency*, 35 Cal. App. 4th 936 (Cal. Ct. App. 1995); *United States v. \$292,888.04 in U.S. Currency*, 54 F.3d 564 (9th Cir. 1995); *Timbs v. Indiana*, 586 U.S. 146 (2019); Anthony B. Ching, *Travelling Down the Unsteady Path: United States v. Lopez, New York v. United States, and the Tenth Amendment*, 29 LOY. LA. L. REV. 99 (1995); *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937).

Due Process Clause incorporates the protections contained in each of these amendments, rendering them applicable to the States.¹⁵³

a. The Fourth Amendment

The Fourth Amendment of the United States Constitution states, in part: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.”¹⁵⁴ In 2014 in *Kaley v. United States*, the Supreme Court reaffirmed the precedent it set in *United States v. Monsanto*¹⁵⁵ that a pre-trial asset restraint is constitutional whenever there is probable cause to believe that the property is forfeitable.¹⁵⁶ For the property to be forfeitable, law enforcement must have probable cause that (1) the defendant has committed an offense permitting forfeiture, and (2) the property at issue has the requisite connection to that crime.¹⁵⁷ The *Monsanto* Court, however, made no holding whether the Due Process Clause required a hearing to establish either or both prongs of forfeitability.¹⁵⁸ Since *Monsanto*, lower courts generally provide a hearing to any *indicted defendant* seeking the return of his seized property to pay for counsel.¹⁵⁹ In this hearing, courts permit the defendant to litigate *only the second prong*.¹⁶⁰ This holding and its downstream effects fail to help individuals whose property was seized by local law enforcement through Civil Asset Forfeiture.

First, courts who grant the hearing do so only for *indicted defendants*, not for individuals whose property was seized but who police did not charge.¹⁶¹ Second, courts permit litigation of the second prong, *but not the first*.¹⁶² This is crucial because, with Civil Asset Forfeiture, law enforcement does not charge individuals, they charge property,¹⁶³ and law enforcement must only demonstrate probable cause the restrained assets are

¹⁵³ *Timbs v. Indiana*, 586 U.S. 146, 150 (2019).

¹⁵⁴ U.S. CONST. amend. IV.

¹⁵⁵ *United States v. Monsanto*, 491 U.S. 600, 613 (1989), *aff’d by Kaley v. United States*, 571 U.S. 320, 323 (2014).

¹⁵⁶ *Kaley*, 571 U.S. at 323.

¹⁵⁷ *Id.*; see 18 U.S.C. § 853(a).

¹⁵⁸ *Kaley*, 571 U.S. at 324.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ RICO: Civil and Criminal Law Strategy § 6.06, fn.130.

properly forfeitable, not that the property's owner committed a crime.¹⁶⁴ Even if law enforcement were to charge the individual, the seized property would likely be suppressed as illegally obtained evidence at trial, however the forfeiture would still stand, provided police have cause to believe that the property is forfeitable.¹⁶⁵ This sends a troubling message and creates an untenable double standard.¹⁶⁶ Law enforcement could counter that this is merely a superficial disparity because police must have probable cause in an *in rem* action, just as they would in an *in personam* criminal action.¹⁶⁷ However, this difference between the two probable cause standards epitomizes why this practice is such an anomaly in the law. Police seize property, claiming it is forfeitable because it was connected to criminal activity, but then use an *in rem* action to bypass constitutional protections to which the property owner would be entitled were police to prosecute the property owner for committing the crime underlying the seizure.¹⁶⁸ However, because federal courts have heard a case on this legal anomaly, it remains likely that the status quo will continue and a Fourth Amendment claim will not prevail.¹⁶⁹

b. The Fifth Amendment

The Fifth Amendment to the United States Constitution states, in part: "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."¹⁷⁰ The Due Process Clause of the Fifth Amendment provides a basis for challenging Civil Asset Forfeiture.¹⁷¹ "Due process requires the opportunity for a timely and meaningful hearing before the deprivation of [a] property [interest]."¹⁷² "Civil Asset Forfeiture falls short of this requirement when the seizure of property precedes a hearing to contest the seizure."¹⁷³ To date, the Court has not determined whether the core practice of Civil Asset Forfeiture is constitutional on Due Process grounds, but has instead left it for lower courts to determine, leaving the

¹⁶⁴ RICO: Civil and Criminal Law Strategy § 6.06, fn.130.

¹⁶⁵ Pimentel, *supra* note 140, at 14–15.

¹⁶⁶ *Id.* at 15.

¹⁶⁷ Susan R. Klein, *Civil In Rem Forfeiture and Double Jeopardy*, 82 IOWA L. REV. 183, 197–98 (1996).

¹⁶⁸ Pimentel, *supra* note 140, at 5–6.

¹⁶⁹ *See id.*; Klein, *supra* note 167, at 260.

¹⁷⁰ U.S. CONST. amend. V.

¹⁷¹ Chi, *supra* note 110, at 1642.

¹⁷² *Id.*

¹⁷³ *Id.*

core constitutional question unanswered and creating possible inconsistency among lower courts.¹⁷⁴

In *Mathews v. Eldridge*, the Supreme Court reaffirmed its holding in *Goldberg v. Kelly*, which established a three factor test to determine whether the government has met its burden of providing sufficient procedural due process to an individual of whom the government infringed a property interest.¹⁷⁵ The Court considers (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the Government's interest, "including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."¹⁷⁶

Under the first factor, the private interests of motorists having a large amount of cash taken from them without so much as being issued a traffic ticket certainly should be weighted heavily.¹⁷⁷ Under the third factor, the government certainly has an important interest in interdicting drug trafficking and other crimes committed by motorists on the nation's roads.¹⁷⁸ However, when considering "the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail",¹⁷⁹ this factor deserves far less weight. The function involved and the administrative burden of *not* seizing the property is minimal, if not nonexistent.¹⁸⁰ The very burden of additional or substitute criminal procedural requirements are not only not burdensome, but they are inherently the most elemental part of a police officer's job, namely,

¹⁷⁴ Douglas Kim, *Asset Forfeiture: Giving up Your Constitutional Rights*, 19 CAMPBELL L. REV. 527, 564–65 (1997).

¹⁷⁵ *Goldberg v. Kelly*, 397 U.S. 254, 262–65 (1970), *aff'd by Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976).

¹⁷⁶ *Mathews*, 424 U.S. at 335.

¹⁷⁷ See generally Carol M. Bast, *The Plight of the Minority Motorist*, 39 N.Y.L. SCH. L. REV. 49 (1994).

¹⁷⁸ Barclay Thomas Johnson, *Restoring Civility – The Civil Asset Forfeiture Reform Act of 2000: Baby Steps Toward a More Civilized Civil Forfeiture System*, 35 IND. L. REV. 1045, 1077 (2002).

¹⁷⁹ *Mathews*, 424 U.S. at 335.

¹⁸⁰ Sally R. Wiest, *Civil Drug Forfeitures after James Daniel Good Real Property: Preseizure Notice and Hearing Do Not Weaken the Powerful Weapon in 'The War on Drugs'*, 4 WIDENER J. PUB. L. 663, 689 (1995).

arresting those involved in criminal activity.¹⁸¹ Thus, the third factor should receive little weight.

Lastly, the second factor is the most important: “the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards.”¹⁸² This factor is the core point of dispute with Civil Asset Forfeiture, the risk that innocent motorists face when police erroneously deprive them of their property in light of the value that additional procedural safeguards would provide them to mitigate such risk.¹⁸³ This factor should be weighted heavily in favor of the motorist. The government may argue that the seizure and forfeiture process satisfies the *Mathews* test based on three factors. First, the property owner has no property interest in proceeds from illegal activity.¹⁸⁴ Second, the government has a strong interest in deterring future crimes.¹⁸⁵ Finally, the risk of an erroneous deprivation is low, as documented by the fact that almost 90% of property owners never contest the forfeiture.¹⁸⁶ While the government does have a strong interest in deterring crimes, the persuasiveness of its claims fails under the second factor of the *Mathews* test. Regarding the claim that seized cash is proceeds from illegal activity, law enforcement seizes the cash upon *probable cause* of such a suspicion, however such claims rarely get officially adjudicated because property owners often lack standing to contest the forfeiture.¹⁸⁷ Those who do have standing may fear contesting the forfeiture because it may tie them to illegal activity.¹⁸⁸ Because such property owners often lack standing to contest the forfeiture, the risk of an erroneous deprivation would be high, weighing in favor of such property owners.¹⁸⁹ Granting them standing to challenge the forfeiture would also provide them with an important procedural safeguard to protect innocent property owners from such an erroneous deprivation.¹⁹⁰

¹⁸¹ *Id.* at 700–01.

¹⁸² *Mathews*, 424 U.S. at 335.

¹⁸³ Wiest, *supra* note 180, at 700.

¹⁸⁴ See *United States v. Clymore*, 245 F.3d 1195, 1200 (10th Cir. 2001).

¹⁸⁵ *United States v. Martin*, 662 F.3d 301, 309 (4th Cir. 2011).

¹⁸⁶ See Pimentel, *supra* note 20, at 207.

¹⁸⁷ See *United States v. \$557,933.89, More or Less, in U.S. Funds*, 287 F.3d 66, 79 (2d Cir. 2002).

¹⁸⁸ Catherine E. McCaw, *Asset Forfeiture as a Form of Punishment: A Case for Integrating Asset Forfeiture into Criminal Sentencing*, 38 AM.J. CRIM. L. 181, 190 (2011).

¹⁸⁹ *Mathews*, 424 U.S. at 334–35.

¹⁹⁰ *Id.*

On April 17, 2023, the Supreme Court granted *certiorari* in *Culley v. Marshall*, a consolidation of cases asking whether police use of Civil Asset Forfeiture violates Procedural Due Process under the *Mathews* Test pursuant to the Fifth Amendment’s Due Process Clause, and whether the State violated plaintiff’s rights under the Fourteenth Amendment.¹⁹¹ On May 9, 2024, the Court held that the Due Process Clause “requires a timely forfeiture hearing,” but did not address the constitutionality of State laws governing Civil Asset Forfeiture, which the Court described as “legislatively prescribed innovations.”¹⁹² The Court looked to the historical practice in civil forfeiture proceedings.¹⁹³ The Court noted that Congress and the States have long authorized law enforcement to seize personal property and hold it until a subsequent forfeiture hearing, while “the absence of separate preliminary hearings in civil forfeiture proceedings—from the Founding until the late 20th century—is weighty evidence that due process does not require such hearings.”¹⁹⁴

Based on the Court’s holding in *Culley* that a timely forfeiture hearing is required to satisfy procedural due process,¹⁹⁵ were the Court to take up a case to determine the constitutionality of Civil Asset Forfeiture where the property owner lacks standing to contest the forfeiture, I believe the Court would likely hold the practice to be unconstitutional as a violation of the property owner’s Procedural Due Process.¹⁹⁶

c. *The Sixth Amendment*

The Sixth Amendment to the United States Constitution states, in part: “In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence.”¹⁹⁷ The Sixth Amendment thus guarantees that a criminal defendant has the right to an attorney during a criminal proceeding.¹⁹⁸ However, because Civil Asset Forfeiture is an *in rem* proceeding, and not a criminal proceeding which implicates an

¹⁹¹ Nicole Ezech, *Supreme Court to Reexamine Use of Civil Asset Forfeiture*, NAT’L CONF. OF STATE LEGISLATURES (May 1, 2023), <https://www.ncsl.org/state-legislatures-news/details/supreme-court-to-reexamine-use-of-civil-asset-forfeiture>; *Culley v. Marshall*, 601 U.S. 377, 380–81, 397 (2024).

¹⁹² *Culley*, 601 U.S. at 393.

¹⁹³ *Id.* at 392.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ U.S. CONST. amend. VI.

¹⁹⁸ Randy J. Sutton, *Construction and Application of Sixth Amendment Right to Counsel—Supreme Court Cases*, 33 A.L.R. FED. 2d § 3 (2009).

individual's liberty interest, the right to counsel under the Sixth Amendment does not attach.¹⁹⁹ Courts have uniformly relied on Civil Asset Forfeiture's civil status to reject Sixth Amendment challenges, despite its facial similarities to a criminal proceeding.²⁰⁰

Although property owners may have a right to a hearing to challenge forfeiture, under the Sixth Amendment, courts generally do not permit the use of seized funds to retain an attorney.²⁰¹ This creates a significant setback for property owners because the cost of retaining an attorney may exceed the value of their forfeited property due to the inevitable burdens common to most civil proceedings: discovery battles, depositions, and seemingly endless motions.²⁰² Because their money has been taken, victims of Civil Asset Forfeiture receive threats of severe consequences from law enforcement should they not agree to waive their right to their money and property.²⁰³

In one instance, police pulled over James Morrow for driving too close to the white line, police asked Morrow to get out of the car so they could search it.²⁰⁴ Police found \$3,969 inside the car.²⁰⁵ Police arrested Morrow for money laundering and took him to the police station.²⁰⁶ At the station, the officer gave Morrow a startling ultimatum: he could either sign away the cash or stay in jail and face prosecution for money laundering.²⁰⁷ Morrow reluctantly agreed and was released without charges.²⁰⁸

In another case, Jennifer Boatright, her boyfriend, and her two children were driving to Louisiana.²⁰⁹ The couple decided to bring along enough cash to purchase a used car at a dealership on their way.²¹⁰ Police

¹⁹⁹ *People v. \$30,000 U.S. Currency*, 35 Cal. App. 4th 936, 944 (4th Cir. 1995); *United States v. \$292,888.04 in U.S. Currency*, 54 F.3d 564, 570 (9th Cir. 1995).

²⁰⁰ Chi, *supra* note 110, at 1641–42.

²⁰¹ *Id.*

²⁰² *Id.*; Greer, *supra* note 14, at 283.

²⁰³ See Rachel L. Stuteville, Comment, *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, 1170 (2014).

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 1170–71.

²⁰⁸ *Id.* at 1171.

²⁰⁹ *Id.*

²¹⁰ *Id.*

trailed their car and pulled her over for a traffic violation and searched the car, where they found \$6,037 in cash.²¹¹ Despite Boatright's logical explanation for having the money in the car, the officer arrested Boatright for money laundering.²¹² The officer gave her an ultimatum: either waive her right to the cash or face money laundering charges and have her children sent to foster care.²¹³ Unsurprisingly, she chose to surrender the cash.²¹⁴ When asked later, the arresting officer could not explain how the cash from Boatright's car was linked to any form of criminal activity.²¹⁵

Because of situations such as these, property owners whose cash was seized lack the funds to hire an attorney and have no right to counsel because the forfeiture proceeding is a civil proceeding.²¹⁶ Unsurprisingly, between 80-88 percent of forfeitures are never challenged because "the authorities can pocket what they can seize by forfeit."²¹⁷

d. The Eighth Amendment

The Eighth Amendment to the United States Constitution states, in part: "Excessive bail shall not be required, nor excessive fines imposed."²¹⁸ In *Austin v. United States*, the Court held civil forfeiture is not inherently constitutionally excessive.²¹⁹ However, Eighth Amendment violations may arise when a large cash forfeiture results from a minor drug infraction.²²⁰ For example, police sought to seize the home of Rochelle Bing, a forty-two-year-old grandmother who spends her time working as a home health aide and as a babysitter for her grandchildren.²²¹ Bing's home was the site of an alleged drug deal involving one of her children and a police informant.²²² Bing was not present at the time of the encounter.²²³ Police never charged Bing with a crime.²²⁴ Even so, Bing subsequently received a letter

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *United States v. Starling*, 76 F.4th 92, 101 (2d Cir. 2023).

²¹⁷ *Id.*; Levesque, *supra* note 14, at 80.

²¹⁸ U.S. CONST. amend. VIII.

²¹⁹ *Austin v. United States*, 509 U.S. 602, 622 (1993).

²²⁰ Chi, *supra* note 110, at 1643–44.

²²¹ Levesque, *supra* note 14, at 62.

²²² *Id.* at 61–62.

²²³ *Id.* at 62.

²²⁴ *Id.*

stating that she had just a mere thirty days to convince a judge to allow her to keep her home, or be forced to vacate the premises.²²⁵

Law enforcement may argue such forfeitures are not fines, because fines are levied as punishment,²²⁶ and forfeiture serves to deter, not to punish.²²⁷ However, such an argument remains unpersuasive for two reasons.

First, the Drug Enforcement Administration's own webpage dedicated to Civil Asset Forfeiture lists punishment as one of its intended effects.²²⁸ Second, the Supreme Court held in *Browning-Ferris* that a forfeiture constitutes "payment to a sovereign as punishment for some offense."²²⁹ However, because the holding in *Austin* pertained to the federal government, the question remained whether this right was incorporated to the States through the Fourteenth Amendment.²³⁰

In 2019, in *Timbs v. Indiana*, the Supreme Court held Civil Asset Forfeiture proceedings are subject to the Eighth Amendment's prohibition against excessive fines as incorporated to the States through the Fourteenth Amendment.²³¹ The Court left it to lower courts to determine whether a particular forfeiture violates the Eighth Amendment.²³² However, the Court did give guidance in an earlier case, *United States v. Bajakajian*, holding the forfeiture of \$357,144 was grossly disproportionate to the gravity of the defendant's offense, willfully failing to report the removal of currency from the United States.²³³ Because the offense was solely a reporting offense and it was permissible to transport the currency out of the country so long as he reported it,²³⁴ the Court found the forfeiture to be an excessive fine in violation of the Eighth Amendment because the fine was

²²⁵ *Id.*

²²⁶ McCaw, *supra* note 188, at 212.

²²⁷ *Id.* at 197.

²²⁸ *DEA Asset Forfeiture*, U.S. DRUG ENF'T ADMIN., <https://www.dea.gov/operations/asset-forfeiture> (last visited Nov. 4, 2024).

²²⁹ *Austin*, 509 U.S. at 622 (citing *Browning-Ferris Indus. of Vermont Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 65 (1989)).

²³⁰ U.S. CONST. amend. XIV, § 1.

²³¹ *See Timbs v. Indiana*, 586 U.S. 146, 156 (2019).

²³² *Id.*

²³³ *Bajakajian*, 524 U.S. at 337.

²³⁴ *Id.*

grossly disproportional to the gravity of his offense.²³⁵ Based on this standard, the likelihood remains high that a court would consider a forfeiture an excessive fine against an uncharged individual because the value of the seizure would surely be disproportionate compared to a *nonexistent* offense against an individual who the government elects not to charge and thus not deem as a defendant.²³⁶ Thus, because the victim is not a criminal defendant and no charge would exist, Civil Asset Forfeiture would likely violate the Eighth Amendment as an excessive fine because the value of the forfeiture cannot be measured for proportionality without a corresponding criminal offense for comparison.

e. The Tenth Amendment

The Tenth Amendment to the United States Constitution states, in part: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”²³⁷ Under the Tenth Amendment, the federal government may not coercively commandeer State resources to enforce a federal law.²³⁸ But does the federal Equitable Sharing program commandeer State and local law enforcement? In *Printz*, the Court held the whole object of the commandeering federal law was to direct the functioning of the State executive branch, and hence to compromise the structural framework of dual sovereignty.²³⁹ With Civil Asset Forfeiture, the Equitable Sharing program may coercively induce the State’s Executive Branch – in this case, law enforcement – to enforce federal laws (narcotic trafficking and money laundering).²⁴⁰ But does such direction amount to commandeering? In *Steward Machine Co. v. Davis*, the Court held, in some circumstances, the financial inducement offered by Congress might be so coercive that the “pressure turns into compulsion.”²⁴¹ Because so many law enforcement agencies have grown accustomed to the revenue generated by Civil Asset

²³⁵ See *Bajakajian*, 524 U.S. at 334, 337, 339, 340 (1998), *superseded by statute*, USA Patriot Act, Pub. L. No. 118-82, 31 U.S.C.S. § 5332, *as recognized in* *United States v. Jose*, 499 F.3d 105 (1st Cir. 2007).

²³⁶ See *generally id.* (stating that the amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish).

²³⁷ U.S. CONST. amend. X.

²³⁸ See *Printz v. United States*, 521 U.S. 898, 929 (1997).

²³⁹ *Id.* at 932.

²⁴⁰ Levesque, *supra* note 14, at 80.

²⁴¹ Anthony B. Ching, *Travelling Down the Unsteady Path: United States v. Lopez, New York v. United States, and the Tenth Amendment*, 29 LOY. L.A. L. REV. 99, 127, 128 (1995); *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937).

Forfeiture,²⁴² greater dependency on such funds results.²⁴³ As a result, the “choice” to reject the funds becomes more and more infeasible.²⁴⁴ The conditions attached to such funds are, in a true sense, coercive because law enforcement has become so dependent on these funds for their operations it cannot survive without them.²⁴⁵ For example, the District of Columbia’s statute required that all forfeiture proceeds go into the city’s general fund.²⁴⁶ However, because the statute violated the terms of the federal Equitable Sharing Program, the Department of Justice rendered it ineligible for participation in the program altogether.²⁴⁷

With such incentives for local law enforcement to bypass their own State’s asset forfeiture laws in favor of treating the forfeiture as a violation of federal law, instead of adhering to the federal Equitable Sharing program’s provisions, the Equitable Sharing program might infringe upon the constitutional powers of the States because it effectively commandeers the State and local law enforcement to enforce federal law.²⁴⁸ The program encourages local law enforcement to abandon potentially stricter State policies simply because of the greater financial incentives provided by the Department of Justice.²⁴⁹ Coercion can exist when State officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation.²⁵⁰ Because the Department of Justice actively encourages local law enforcement to circumvent State asset forfeiture laws – and thus reduce its accountability to its State – the federal government likely commandeers local law enforcement by way of coercion, and thus violates the Tenth Amendment.²⁵¹ In essence, the Equitable Sharing program coerces local law enforcement to become solely revenue-driven entities at the expense of protecting innocent property owners.²⁵²

Although such arguments may be persuasive regarding a Tenth Amendment claim, two arguments barring such a claim are likely to prevail. First, the funds transferred to local law enforcement originate not from

²⁴² Demleitner, *supra* note 136.

²⁴³ *Id.*

²⁴⁴ Ching, *supra* note 241, at 132.

²⁴⁵ *Id.*

²⁴⁶ Pimentel, *supra* note 20, at 191 (citing D.C. Code § 41-310 (2017)).

²⁴⁷ *Id.* at 191–92.

²⁴⁸ Levesque, *supra* note 14, at 80.

²⁴⁹ *Id.* at 81.

²⁵⁰ *New York v. United States*, 505 U.S. 144, 169 (1992).

²⁵¹ *Id.*

²⁵² Levesque, *supra* note 14, at 79–81.

Congressional spending, but from the Department of Justice, an agency within the Executive Branch, who originally received the same funds from the same State law enforcement agency.²⁵³ Because Congress never authorized these particular funds to go to local law enforcement, any coercion claim likely fails.²⁵⁴ Lastly, any Tenth Amendment claim by the property owner would likely be barred by prudential standing.²⁵⁵ Under the prudential standing doctrine, the plaintiff “generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.”²⁵⁶ Thus, because the property owner would be asserting his State’s right not to be commandeered, a court would likely dismiss his claim for lack of standing.

V. HOW TO REFORM CIVIL ASSET FORFEITURE

Despite the numerous problems implicated by Civil Asset Forfeiture, this Article recommends any Asset Forfeiture program used by local law enforcement be conducted solely within the criminal law context. In addition, any forfeiture proceeds must not be distributed to law enforcement. Enacting these two reforms would support Civil Asset Forfeiture’s future use as a powerful law enforcement tool, while simultaneously protecting the constitutional rights of the citizens they are sworn to serve. While not a focus of this Article, the State of California has enacted a number of reforms that, if similarly enacted by Congress, would greatly support the aim of this Article.²⁵⁷

A. *Restrict Asset Forfeiture to a Criminal Standard*

This Article recommends taking the “Civil” out of Civil Asset Forfeiture by encouraging States to enact laws barring their law enforcement agencies from participating in *in rem* forfeitures. This would remove pre-conviction forfeitures from “law enforcement’s toolbox.”²⁵⁸ Doing so would shift the focus to the culpability of the owner and restrict forfeiture to an *in personam* criminal forfeiture action, where the action focuses on

²⁵³ See Stuteville, *supra* note 203, at 1179, 1184.

²⁵⁴ See *id.* at 1179, 1184–85.

²⁵⁵ Ara B. Gershengorn, Note, *Private Party Standing to Raise Tenth Amendment Commandeering Challenges*, 100 COLUM. L. REV. 1065, 1074 (2000) (quoting Warth v. Seldin, 422 U.S. 490, 499 (1975)).

²⁵⁶ *Id.* (quoting Warth v. Seldin, 422 U.S. 490, 499 (1975)).

²⁵⁷ *Overview of State Asset Forfeiture in California*, LEGIS. ANALYST’S OFF. 1, 2, 4 (July 12, 2024), <https://lao.ca.gov/handouts/crimjust/2024/Asset-Forfeiture-071224.pdf>.

²⁵⁸ Pimentel, *supra* note 20, at 186.

punishing the offender upon proof beyond a reasonable doubt.²⁵⁹ This would provide the property owner with the full quiver of constitutional rights afforded criminal defendants.²⁶⁰ Because the forfeiture action would be within *in personam* jurisdiction, the *in rem* concept that the property was guilty would become inoperative. Moreover, because criminal prosecutions are *in personam* actions, the government would not obtain jurisdiction over the property until after the conviction.²⁶¹ Should the government have a concern that the property owner might destroy or diminish the value of the property, the government may seek a restraining order to protect its potential interest.²⁶²

California offers a model to follow to eliminate Civil Asset Forfeiture. In California, the restraining order may be based upon the sworn declaration of a peace officer with personal knowledge of the criminal investigation that establishes probable cause to believe the aggravated white-collar crime, a material element of which is fraud or embezzlement, involves the taking or loss of more than \$100,000.²⁶³ Thus, for law enforcement to seize property before a conviction, (1) law enforcement must have probable cause of a white-collar crime, (2) that crime must involve fraud or embezzlement, and (3) the property's value must exceed \$100,000.²⁶⁴ Such a high bar would eliminate all pre-trial civil seizures conducted during traffic stops because the crime must be charged and involve fraud or embezzlement of at least \$100,000.²⁶⁵ California's statute presumes any forfeiture outside of these parameters as invalid, and thus the property owner need not file a claim for the return of his property.²⁶⁶

California also enacted Health and Safety Code section 11488.4, which requires a forfeiture petition to be filed in the county in which the defendant *has been charged* with the related criminal offense.²⁶⁷ Section 11488.4 mandates that the issue of forfeiture is to be *tried in conjunction with the underlying related criminal action and tried before the same jury*,

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ Greer, *supra* note 14, at 278; CAL. PENAL. CODE § 186.11(d)(1) (Deering 2023).

²⁶² 18 U.S.C. § 983(j).

²⁶³ CAL. PENAL. CODE § 186.11(d)(2).

²⁶⁴ *Id.* CAL. PENAL. CODE § 186.11(f)(1).

²⁶⁵ CAL. PENAL. CODE § 186.11(a)(1).

²⁶⁶ Ramirez v. Tulare County Dist. Att'y Off., 9 Cal. App. 5th 911, 939 (2017).

²⁶⁷ MATTHEW BENDER & CO., CAL. CRIMINAL DEFENSE PRACTICE § 145.01A(1)(d) (rel. 93, 2024); CAL. HEALTH & SAFETY CODE § 11488.4(a)(1) (Deering 2024).

if the trial is by a jury, *or before the same court*, if the trial is by a court.²⁶⁸ This provision mandates that (1) the property owner is charged with a crime, and (2) the outcome of the forfeiture is in the hands of the same trier of fact as the underlying criminal charge.²⁶⁹ This gives the property owner greater confidence in the outcome of the seizure, encourages police not to seize property unless there is sufficient evidence to charge the property owner, and helps restore public trust that law enforcement does not police with a profit motive.²⁷⁰

B. Recoveries

Currently, forfeitures under the federal Equitable Sharing program go to the law enforcement agencies who made the seizure.²⁷¹ This Article also recommends State legislation that prohibits law enforcement agencies from participating in the federal Equitable Sharing program. While local law enforcement occasionally needs to cooperate with federal authorities, States remain free to enact legislation that prohibits any of its law enforcement agencies from participating in the Equitable Sharing program.²⁷² Such State legislation would remove the powerful financial carrot dangled by the Department of Justice and would enable law enforcement to focus on its primary function: public safety.

Law enforcement claims it champions the use of Civil Asset Forfeiture because it takes the profit out of crime.²⁷³ Perhaps the best way to prevent law enforcement agencies from being overly aggressive with forfeitures would be to take the profit motive out of law enforcement.²⁷⁴

VI. CONCLUSION

Civil Asset Forfeiture is a civil *in rem* action that has transformed from a Middle Ages remedy to deter injuries from livestock, to a British Colonial remedy to deter piracy, to a modern remedy to deter drug trafficking and money laundering.²⁷⁵ The practice has historically been a civil procedure to punish property when the property owner was not readily

²⁶⁸ CAL. HEALTH & SAFETY CODE § 11488.4(i)(3), (5).

²⁶⁹ *Id.*

²⁷⁰ *See id.*

²⁷¹ Pimentel, *supra* note 20, at 181.

²⁷² *Id.* at 191.

²⁷³ *See id.* at 176.

²⁷⁴ *Id.* at 195.

²⁷⁵ *See supra* Part IA.

identifiable or when the government wanted to emphasize the undesirability of the underlying action.²⁷⁶

Currently, the Department of Justice (through its Equitable Sharing program) encourages local law enforcement to use Civil Asset Forfeiture by enabling local law enforcement agency to share virtually all the proceeds from money and property that local law enforcement seizes.²⁷⁷ Many local law enforcement agencies use traffic stops as an opportunity to probe for cash and other valuables to seize and subject to forfeiture.²⁷⁸ While doing so may further the legitimate law enforcement goals of deterring and punishing criminal activity, a number of problems accompany the practice. Because law enforcement agencies that participate in the Equitable Sharing program receive a significant financial windfall from actively searching for money to seize from motorists, law enforcement becomes a profit seeking entity at the expense of focusing on crimes that significantly and adversely affect their local community.²⁷⁹

Moreover, Civil Asset Forfeiture also faces significant constitutional problems. It may violate the Fourth Amendment because the property owner whose cash was seized has few avenues to challenge an *in rem* seizure.²⁸⁰ It likely violates the Due Process Clause of the Fifth Amendment for its lack of adequate pre-seizure procedural protections. Although it likely does not textually violate the Sixth Amendment because no criminal action takes place, it likely violates the spirit of the Sixth Amendment because the Founders knew the importance of having competent counsel to protect against government infringement upon a property interest. The practice likely violates the Eighth Amendment because such forfeitures likely constitute excessive fines.²⁸¹ Lastly, the Equitable Sharing program may violate the Tenth Amendment because the Department of Justice's financial incentives through the Equitable Sharing program likely constitute coercion and commandeering of local officials and resources in order to enforce federal law.²⁸² However, the victim of the forfeiture will likely

²⁷⁶ *Id.*

²⁷⁷ Pimentel, *supra* note 20, at 181.

²⁷⁸ Michael Sallah et al., *Stop and Seize*, WASH. POST (Sep. 6, 2014), <https://www.washingtonpost.com/sf/investigative/2014/09/06/stop-and-seize/>.

²⁷⁹ A. Barton Hinkle, *The Civil Asset Forfeiture Racket*, REASON (Sep. 24, 2014, 10:30 AM), <https://reason.com/2014/09/24/the-civil-asset-forfeiture-racket/>.

²⁸⁰ Stephan B. Herpel, *Toward a Constitutional Kleptocracy: Civil Forfeiture in America*, 96 MICH. L. REV. 1910, 1925–1926 (1998).

²⁸¹ *How Crime Pays*, *supra* note 44.

²⁸² *Id.* at 2405.

not prevail because courts will likely hold the claimant lacks standing. Such a victim likely lacks standing because an individual who challenges federal action on Tenth Amendment grounds cannot complain “simply that their Government is violating the law.”²⁸³

To reform Civil Forfeiture, this Article recommends two primary changes. First, States should enact laws that prohibit their law enforcement agencies from participating in *in rem* civil forfeitures and require a criminal conviction before subjecting money or property to forfeiture. This would not only remedy any public perception that law enforcement acts with a profit motive.²⁸⁴ This would also allow the victim to assert all relevant constitutional rights when his property is seized. Lastly, the States should also enact a law that prohibits law enforcement agencies from participating in the federal Equitable Sharing program. By cutting off the financial incentive, police will return to focusing on deterring crime and not enriching themselves at the expense of those they are sworn to serve.

²⁸³ *Bond v. United States*, 564 U.S. 211, 225 (2011).

²⁸⁴ Hinkle, *supra* note 279.