

REFORMING THE CIVIL ASSET FORFEITURE REFORM ACT

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Civil asset forfeiture laws provide law enforcement agencies with the power to seize property and money connected to illegal activity. Over the last forty years, the system has grown exponentially and now constitutes a significant source of funding for law enforcement operations. Without adequate safeguards, however, citizens are at risk of losing their property to overzealous police forces motivated more by the prospect of forfeiture proceeds than a desire to enforce laws and protect society. The Civil Asset Forfeiture Reform Act of 2000 attempted to level the playing field between law enforcement and property owners. Unfortunately, it has failed and further reform is needed at both the federal and state levels. The Note examines the dangers created by the current civil asset forfeiture program and proposes changes necessary to create a fairer process.

INTRODUCTION

Luther and Meredith Ricks live in Lima, Ohio.¹ Now retired, the couple spent much of their lives working at local factories and steel plants.² The Rickses lived frugally and managed to amass more than \$400,000 over the years, enough,

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1. Dan Harkins, *Legalized Theft: An Ohio Case Suggests that Civil Forfeiture Laws Are Ripe for Abuse*, CLEVELAND FREE TIMES, June 18, 2008, available at <http://www.freetimes.com/stories/15/59/legalized-theft>.

The focus of this Note is primarily on federal civil asset forfeiture and CAFRA. Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106-185, 114 Stat. 202. However, it includes examples of abuses at the state and local levels to provide a more complete picture of the problems the system presents. Many state governments modeled their civil asset forfeiture systems after federal legislation. For example, nearly every state adopted the Uniform Controlled Substances Act, which is similar to federal narcotics laws and authorizes forfeiture of property related to drug crimes. UNIF. LAW COMM'RS, UNIFORM CONTROLLED SUBSTANCES ACT, http://www.nccusl.org/nccusl/uniformact_summaries/uniformacts-s-ucsa90.asp (last visited August 12, 2009). Because of the commonalities in their structures, the abuses at both levels are similar as well. Thus, state lawmakers must also take action if civil asset forfeiture laws are to be reformed to ensure a fair system.

2. Harkins, *supra* note 1.

they hoped, to support themselves as they entered retirement.³ The Rickses did not trust banks and felt more comfortable keeping their nest egg in a safe at home.⁴

In June 2007, two men forced their way into the Rickses' house, demanding money from Luther and his son.⁵ The pair, however, did not oblige.⁶ A physical altercation ensued, and the ordeal ultimately ended when Luther fatally shot one of the intruders after they stabbed his son.⁷ The Rickses protected their life savings from the would-be thieves that night, but their nest egg would soon be in danger again. This time, however, the threat came from those they called to report their ordeal: the police.⁸

The local police concluded the shooting was self-defense and cleared Luther of any wrongdoing.⁹ During the course of the investigation, however, officers executed a search warrant and thoroughly combed the house, eventually finding a safe in the bedroom.¹⁰ Inside they found jewelry, car titles, the Rickses' life savings, and eleven ounces of marijuana.¹¹

Luther says he uses marijuana to ease the symptoms associated with a variety of painful medical conditions, including arthritis, rickets, and a previous hip replacement surgery.¹² Police have another theory: Luther was a drug dealer.¹³ To back up their claim, they point to the fact that they found marijuana, that many of the bills they found were newer, and that the surviving robber claimed that he and his cohort targeted the Rickses because they believed them to be drug-dealers.¹⁴

Police confiscated the drugs and the money, which amounted to \$403,503.¹⁵ It is unclear why the police did not charge Luther or Meredith for possessing the marijuana. What is clear, however, is that the federal government became involved shortly after the local police confiscated the contents of the safe.¹⁶ Even though it did not respond to the Rickses' home that night, execute the search warrant, or confiscate the money from the safe, the Federal Bureau of

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.* Luther's son survived the stabbing. *Id.*

8. *Id.*

9. Radley Balko, *Forfeiture Folly: Cover Your Assets*, REASON, Apr. 2008, at 11.

10. Marcus Baram, *Conflicting Tales Behind Cash Seized by FBI*, ABC NEWS, Apr. 16, 2008, <http://www.abcnews.go.com/print?id=4656671>. The police apparently obtained a warrant to search the house after finding what they believed to be crack cocaine on a dresser in the bedroom. Harkins, *supra* note 1. Meredith Ricks claims the "crack" was actually dried shea butter. *Id.*

11. Harkins, *supra* note 1.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. Baram, *supra* note 10.

Investigation (FBI) seized the Rickeses' nest egg using federal civil asset forfeiture laws.¹⁷

One may think the government would be required to prove the Rickeses committed a crime before it would be entitled to confiscate everything the family had worked to save. Unfortunately, because these cases are civil actions, property owners do not receive the same protections as a criminal defendant. Thus, civil asset forfeiture laws permitted the FBI to take the Rickeses' life savings without ever filing criminal charges.¹⁸ Instead, the family faces the difficult burden of proving the money was made through legitimate means—not through a family drug operation.¹⁹ There is no court-provided assistance of counsel for indigent property owners,²⁰ so the Rickeses are fortunate that attorney Bryan Westhoff decided to take their case pro bono.²¹

Unfortunately, the existence of civil asset forfeiture laws means the Rickeses' case is not as unusual as one would expect. In Illinois, Paul Born lost his house when a court found that the use of a telephone to negotiate one two-ounce cocaine sale was enough to warrant forfeiture of the entire home.²² In Nebraska, Emiliano Gonzolez lost the \$125,000 he was carrying in cash in part because mere "[p]ossession of a large sum of cash is 'strong evidence' of a connection to drug activity."²³ And in Nevada, Billy Munnerlyn was forced to close his air charter business after the government seized his plane for unknowingly transporting a convicted drug dealer.²⁴

When implemented fairly, civil asset forfeiture provides a valuable tool for law enforcement and the government. Compared to the challenges of obtaining a conviction, the system provides police with a relatively easy way to deprive criminals of the fruits of their acts. The incentive for abuse is great, however, because law enforcement agencies use forfeiture proceeds to fund their operations.²⁵ Unfortunately, procedural safeguards are minimal and police seize property with virtually no oversight.²⁶

17. *Id.*

18. See Jennifer Abel, *Drug Money?*, HARTFORD ADVOC., Oct. 4, 2007, available at <http://www.hartfordadvocate.com/article.cfm?aid=3384>.

19. Harkins, *supra* note 1.

20. Federal civil asset forfeiture laws provide indigent property owners with court-appointed counsel only when their residence is the property at issue. Barbara J. Van Arsdale, Annotation, *Validity, Construction, and Application of Civil Asset Forfeiture Reform Act of 2000 (CAFRA)*, 195 A.L.R. FED. 349 (2004).

21. Baram, *supra* note 10.

22. *United States v. 916 Douglas Ave.*, 903 F.2d 490 (7th Cir. 1990).

23. *United States v. \$124,700*, 458 F.3d 822, 826 (8th Cir. 2006).

24. David Benjamin Ross, *Civil Forfeiture: A Fiction That Offends Due Process*, 13 REGENT U. L. REV. 259, 259 (2001). Neither man was ever charged with a crime. *Id.*

25. Abel, *supra* note 18.

26. Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 45 (1998) [hereinafter Blumenson & Nilsen, *Policing for Profit*].

In response to growing public resentment over these laws, Congress passed the Civil Asset Forfeiture Reform Act (CAFRA) in 2000.²⁷ While it provides some procedural safeguards to property owners,²⁸ CAFRA has ultimately failed to assure property owners that the system is fair and just. Part I of this Note provides a background on the history of civil asset forfeiture laws and the passage of CAFRA. Part II identifies problems that continue to persist in spite of CAFRA. Finally, Part III proposes new legislation and amendments to current laws needed to address the concerns raised in Part II and ensure a fair and just civil asset forfeiture system.

I. AN OVERVIEW OF CIVIL ASSET FORFEITURE

A. A Historical Perspective

Civil asset forfeiture laws have a lengthy and rather unique history. Today, they are referred to as a legal fiction because they are premised on the idea that property itself can be guilty of a crime.²⁹ As a result, civil asset forfeiture actions are brought directly against the property, resulting in bizarre case names such as *United States v. One 1974 Cadillac Eldorado Sedan*.³⁰

While the growth of civil asset forfeiture laws in the United States has mainly occurred over the last thirty years, it has a history that stretches back to biblical times.³¹ Civil asset forfeiture is rooted in the doctrine of “deodands,”³² and its origin has been traced back to a passage in the Old Testament: “If an ox gore a man or a woman, that they die; then the ox shall be surely stoned and its flesh shall not be eaten”³³ In ancient times, giving God an object or animal involved in a wrong against a human was common practice, as it was believed that the object or animal was guilty for its own behavior.³⁴ Later, objects and animals were given to the lord³⁵ or king, “in the belief that the [k]ing would provide the money for

27. Louis S. Rulli, *The Long Term Impact of CAFRA: Expanding Access to Counsel and Encouraging Greater Use of Criminal Forfeiture*, 14 FED. SENT’G REP. 87, 87 (2001).

28. These procedural safeguards include an “Innocent Owner’s Defense,” the subject of *Bennis v. Michigan*, 516 U.S. 442 (1996).

29. *Id.* at 447; Todd Barnet, *Legal Fiction and Forfeiture: An Historical Analysis of the Civil Asset Forfeiture Reform Act*, 40 DUQ. L. REV. 77, 80–81 (2001).

30. 548 F.2d 421 (2d Cir. 1977).

31. LEONARD W. LEVY, A LICENSE TO STEAL: THE FORFEITURE OF PROPERTY 7 (1995).

32. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 680–81 (1974). The idea is derived from the Latin “Deo dandum,” meaning “to be ‘given to God.’” *Id.* at 681 n.16.

33. LEVY, *supra* note 31, at 7.

34. Mike Fishburn, *Gored by the Ox: A Discussion of the Federal and Texas Laws that Empower Civil-Asset Forfeiture*, 26 RUTGERS L. REC. 4 (2002) (“This practice tended to personify the thing or animal, as if it had acted of its own accord and could be held responsible for its reprehensible behavior.”). The personification went so far in medieval Europe that animals involved in injuries to humans were dressed in human clothing and hanged or burned at a stake. *Id.*

35. *Id.* Fishburn attributes the change in philosophy to people growing more practical, as they began to see the advantages to not destroying property. *Id.* This practice

Masses to be said for the good of the dead man's soul, or insure that the deodand was put to charitable uses."³⁶

The doctrine evolved under English law after its ties to religion ended. In biblical times, the law prevented anyone from benefitting from guilty property, but under English law, it was forfeited to the Crown.³⁷ It became a source of revenue for the Crown, which justified it as a penalty for carelessness.³⁸ Sometimes the object itself was not seized, but its owner was required to remit its value. Deodand laws were abolished in England during the mid-1800s, causing Lord Campbell to declare that it was a "wonder that a law so extremely absurd and inconvenient should have remained in force [so long]."³⁹

The deodand never became a part of the American common law.⁴⁰ However, the United States adopted the English concept of in rem proceedings specifically for vessels.⁴¹ Because ship owners were often located overseas, England enforced its admiralty laws in rem against ships themselves, enabling the government to recover when it otherwise could not find the owner.⁴² The American forfeiture system sprung from these in rem admiralty laws.⁴³ The use of civil asset forfeiture laws in the United States slowly expanded through the 1800s and finally exploded in the last forty years as a tool in the war on drugs.⁴⁴

In 1970, Congress passed the Comprehensive Drug Abuse Prevention and Control Act.⁴⁵ This Act included a provision authorizing the government to seize drugs, drug manufacturing and storage equipment, and items used to transport drugs.⁴⁶ Later, Congress passed legislation broadening forfeiture laws to include proceeds from drug transactions⁴⁷ and real property.⁴⁸ Then in 1984, Congress

was justified by the newfound notion that a "deodand lost its cursedness or taint when it reverted to the government." *Id.*

36. *Calero-Toledo*, 416 U.S. at 681.

37. Ross, *supra* note 24, at 261.

38. *Calero-Toledo*, 416 U.S. at 681.

39. Ross, *supra* note 24, at 261 (citing Tamara Piety, *Scorched Earth: How the Expansion of Civil Forfeiture Doctrine Has Laid Waste to Due Process*, 45 U. MIAMI L. REV. 911, 931 (1989)).

40. *Calero-Toledo*, 416 U.S. at 682-83 (citing *Parker-Harris Co. v. Tate*, 188 S.W. 54 (Tenn. 1916)).

41. Piety, *supra* note 39, at 935.

42. Melissa A. Rolland, *Forfeiture Law, the Eighth Amendment's Excessive Fines Clause*, and *United States v. Bajakajian*, 74 NOTRE DAME L. REV. 1371, 1372-73 (1999).

43. HENRY HYDE, *FORFEITING OUR PROPERTY RIGHTS* 20 (1995).

44. See Fishburn, *supra* note 34 (describing the adoption of civil asset forfeiture laws in the United States); Joy Chatman, *Losing the Battle but Not the War: The Future Use of Civil Asset Forfeiture by Law Enforcement Agencies After Austin v. United States*, 38 ST. LOUIS U. L.J. 739, 747 (1994) (recounting the expansion of civil asset forfeiture since 1970).

45. 21 U.S.C. § 801 (2006).

46. *Id.* § 881(a).

47. Psychotropic Substances Act of 1978, Pub. L. No. 95-633, 92 Stat. 3768 (codified as amended in scattered sections of 21 U.S.C.).

passed the Comprehensive Crime Control Act, further expanding federal prosecutors' ability to seize assets.⁴⁹

B. The Civil Asset Forfeiture Reform Act

After more than twenty years of unbridled police power in the area of asset forfeitures, critics, led by Representative Henry Hyde, the former chairman of the House Judiciary Committee, began calling for reforms. Rep. Hyde was CAFRA's primary sponsor and was instrumental in its passage.⁵⁰ In his book, *Forfeiting Our Property Rights*, Rep. Hyde examined the problems with civil asset forfeiture laws and proposed needed changes.⁵¹

Specifically, Rep. Hyde was troubled by the government's "abuses of fundamental fairness" and inadequate due process for property owners.⁵² He cited numerous examples of law enforcement's disregard for civil liberties and property rights.⁵³ Rep. Hyde was also concerned about development in low-income areas. For example, he described the forfeiture of a hotel that the government seized because drug dealers conducted business on the premises.⁵⁴ He warned that "business owners who dare to invest in high crime areas are at the complete mercy of our civil asset forfeiture laws and the predilections of prosecutors."⁵⁵ Rep. Hyde also sought to address the common situation many innocent owners faced when they overcame the odds in recovering their property only to find it had been severely damaged while in the government's possession.⁵⁶ In these cases, owners rarely received any compensation.⁵⁷

While not all of Rep. Hyde's proposals were adopted in the final version of CAFRA, enacted in 2000, the Act revised many aspects of federal administrative and civil judicial forfeiture proceedings.⁵⁸ One of the most important of these changes related to the parties' required burden of proof. A federal appellate judge described the pre-CAFRA process in a 1992 opinion:

In civil forfeiture cases, where claimants are required to go forward with evidence and exculpate their property by a preponderance of

48. 21 U.S.C. § 881(a)(7) (authorizing forfeiture of real property used, or intended to be used, to commit or facilitate a federal drug felony).

49. Pub. L. No. 98-473, 98 Stat. 1976 (codified as amended in scattered sections of titles 5, 18, and 19 of the U.S. Code).

50. Rulli, *supra* note 27, at 87.

51. HYDE, *supra* note 43, at 20.

52. Rep. Henry Hyde, Chairman, House Judiciary Comm., *Forfeiture Reform: Now or Never?* (May 3, 1999), <http://www.aclu.org/crimjustice/searchseizure/10304leg19990503.html>.

53. *Id.*

54. *Id.* The police attempted to seize the hotel, even though there was no evidence the owners were connected to any illegal activity. *Id.* Instead, the justification rested on the grounds that they did not do enough to prevent crimes from taking place on the premises. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. Van Arsdale, *supra* note 20, at 349.

the evidence, all risks are squarely on the claimant. The government, under the current approach, need not produce any admissible evidence and may deprive citizens of property based on the rankest of hearsay and the flimsiest evidence. This result clearly does not reflect the value of private property in our society, and makes the risk of an erroneous deprivation intolerable.⁵⁹

While Rep. Hyde fought unsuccessfully for the government to carry a burden of clear and convincing evidence,⁶⁰ he settled for a standard of preponderance of the evidence.⁶¹

CAFRA included many other important changes, including an innocent-owner defense and court-appointed counsel for indigent owners whose primary residences had been seized.⁶² But CAFRA failed to address some notable areas, including the distorted incentives that result when law enforcement agencies are granted the power to both seize property and use it to fund their operations.⁶³ This inherent conflict of interest is primarily responsible for today's broken civil asset forfeiture system.⁶⁴

II. THE CASE FOR REFORMING CAFRA

While CAFRA was a step in the right direction towards a civil asset forfeiture system that respects property rights and due process, the Rickses' story highlights that there is still room for improvement. Annual forfeitures continue to rise, along with stories of police abuse and corruption. Procedural protections are also vitally needed, as property owners only contest about 20% of seizures instituted under civil asset forfeiture.⁶⁵ Further, 80% of owners who have property seized are never charged with a crime.⁶⁶ The result is stories like that of Luther and Meredith Ricks, in which citizens who are never criminally charged are nonetheless stripped of their property.

CAFRA has not reduced the amount of annual forfeitures. In fact, the value of assets seized annually by the federal government has risen substantially since CAFRA was passed: in 1985, \$27 million was deposited into the Department of Justice's Asset Forfeiture Fund.⁶⁷ A decade later in 1996, four years before CAFRA and during the period that motivated Rep. Hyde to press for changes, \$338 million was deposited into the fund.⁶⁸ And in 2008, the fund reported receipts

59. United States v. \$12,390, 956 F.2d 801, 811 (8th Cir. 1992).

60. See HYDE, *supra* note 43, at 59.

61. Van Arsdale, *supra* note 20.

62. *Id.*

63. Blumenson & Nilsen, *Policing for Profit*, *supra* note 26, at 56.

64. *Id.*

65. Ross, *supra* note 24, at 265.

66. Blumenson & Nilsen, *Policing for Profit*, *supra* note 26, at 77.

67. Hyde, *supra* note 52.

68. The fund was created by the Comprehensive Crime Control Act of 1984.

U.S. DEP'T OF JUSTICE, ASSET FORFEITURE FUND FY2009 PERFORMANCE BUDGET 2, available at <http://www.usdoj.gov/jmd/2009justification/pdf/fy09-aff.pdf>. Its purpose is to be a repository for the proceeds of forfeitures by the Department of Justice. *Id.*

of approximately \$1.3 billion,⁶⁹ a figure that does not include hundreds of millions of dollars more that federal agencies collected as their share from seizures by state agencies.⁷⁰ As evidenced by the substantial growth in the fund's revenues, CAFRA has not proven to be an obstacle to federal law enforcement agencies. In fact, most people familiar with the program agree that the number of forfeitures is set to rise: "[t]he broad powers of the government, coupled with the financial incentives of states, should make forfeiture an increasingly popular law enforcement tool."⁷¹

While CAFRA was hailed as the solution to the procedural and constitutional problems with pre-CAFRA civil asset forfeiture laws, many of those same concerns persist today. First, the current system creates perverse incentives and provides little to no oversight or accountability over law enforcement agencies' forfeiture activities.⁷² This results in the potential for corruption, which invites public mistrust in the asset forfeiture system and the police in general. Second, civil asset forfeiture is plagued with various constitutional concerns, leaving property owners without adequate protection and fueling even more skepticism among the public. Law enforcement is at its most effective when it has the full faith and cooperation of the public. As a result, CAFRA, as well as state forfeiture laws, should be improved to address these concerns and create a fair forfeiture system.

A. Law Enforcement Agencies and Public Trust

Civil asset forfeiture has contributed to a general decline in the public perception of law enforcement agencies. According to Tom R. Tyler and Yuen J. Huo, professors of psychology at New York University and the University of California, Los Angeles, respectively, police operate most effectively when they have the cooperation of the communities they serve.⁷³ Tyler and Huo contend that how people view law enforcement is based in large part on their own personal experiences, the experiences of those they know, and, in particular, how fairly people feel they have been treated during encounters.⁷⁴

Public opinion polls reflect a declining respect and confidence in the police. When asked about their view of the police in a 2005 Gallup poll, 56% of

69. U.S. DEP'T OF JUSTICE, ASSET FORFEITURE FUND AND SEIZED ASSET DEPOSIT FUND METHOD OF DISPOSITION OF FORFEITED PROPERTY – FISCAL YEAR 2008, <http://www.usdoj.gov/jmd/afp/02fundreport/2008affr/report5.htm> (last visited Apr. 13, 2009).

70. *Vested Interests of Prohibition I: The Police*, DRUG WAR CHRON., July 11, 2008, available at http://stopthedrugwar.org/chronicle/542/vested_interests_drug_prohibition_law_enforcement.

71. Rob Garver, *State and Local Agencies Got \$417 Million as DOJ Forfeitures Leapt in 2007*, ASSETFORFEITUREWATCH.COM, Nov. 6, 2008, <http://assetforfeiturewatch.com> (search "\$417 million"; then select "State and Local Agencies Got \$417M" hyperlink) (last visited July 14, 2009).

72. Blumenson & Nilsen, *Policing for Profit*, *supra* note 26, at 94.

73. TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS 13 (2002).

74. *Id.* at 131.

respondents said they had a “great deal of respect” for law enforcement.⁷⁵ In 1967, the last time this same poll was conducted before the rise of civil asset forfeiture laws in the 1980s, 77% of participants expressed this same level of respect for police.⁷⁶

In the world of civil asset forfeiture laws, a fairer system will likely engender more trust among citizens, which, in turn, will likely result in better cooperation between the public and law enforcement. Putting aside the financial benefits gained through forfeited assets, law enforcement agencies could become more effective by implementing a fairer civil asset forfeiture system.

Officers that abuse civil asset forfeiture laws can create perceptions of police corruption and self-interest, fueling public mistrust and suspicion. CAFRA has done little to address these concerns. First, minimal public oversight exists over asset forfeitures.⁷⁷ Second, CAFRA did not address the perverse incentives civil asset forfeiture creates when police are permitted to keep forfeiture proceeds.⁷⁸ As a result, many agencies operate independent of any legislative budgetary process and are ripe with the potential for corruption.⁷⁹ Third, many agencies lack adequate internal controls to ensure forfeiture proceeds are spent appropriately.⁸⁰ As a result, some forfeiture money is used on non-law-related purchases.⁸¹ Finally, the current economic crisis and budgetary shortfalls that accompany it will likely make agencies even more reliant on forfeiture proceeds, adding another incentive for police to focus their efforts on forfeitures.⁸² Unless the system is improved to address these problems, public mistrust in law enforcement, and the forfeiture program in particular, will continue to erode.

1. Lack of Public Oversight

CAFRA did little to address the lack of law enforcement accountability. Agencies are given the power to finance themselves through seizures, but they are rarely required to report their activities through a budgetary process.⁸³ One study reports that approximately 40% of local police agencies in the United States

75. Jeffrey M. Jones, *Confidence in Local Police Drops to 10-Year Low*, GALLUP, Nov. 10, 2005, <http://www.gallup.com/poll/19783/Confidence-Local-Police-Drops-10Year-Low.aspx#1>.

76. *Id.*

77. *See infra* Part II.A.1.

78. *See infra* Part II.A.2.

79. *See id.*

80. *See infra* Part II.A.3.

81. *See, e.g.*, John Burnett, *Sheriff Under Scrutiny over Drug Money Spending*, NAT'L PUB. RADIO, June 18, 2008, <http://www.npr.org/templates/story/story.php?storyId=91638378>; Brian J. Pedersen, *Former South Tucson Cop Admits Embezzling \$560,000*, ARIZ. DAILY STAR, Jan. 26, 2009, available at <http://www.azstarnet.com/sn/hourlyupdate/277506.php>.

82. *See infra* Part II.A.4.

83. Blumenson & Nilsen, *Policing for Profit*, *supra* note 26, at 84.

depend on seized assets as a necessary supplement to their budgets.⁸⁴ In some cases, seizures alone are enough to support the agency's operations.⁸⁵ The Department of Justice has noted that one big task force bust can provide it with the resources to be financially independent.⁸⁶ When a law enforcement agency no longer needs appropriations from the legislative branch to fund its activities, it can operate virtually independent of any political process and with a potentially unchecked degree of secrecy.⁸⁷

United States v. Reese presents an especially egregious example of the consequences of letting a law enforcement entity operate under asset forfeiture laws without accountability.⁸⁸ Reese brought a civil rights case against the officers of a drug task force that operated as an independent unit within the housing authority police agency to which it belonged.⁸⁹ The task force would "drive up to an area . . . where they suspected drug activity, jump out of [their] vehicles, and 'just take anything and everything [they] saw on the street corner . . . more or less like a wolf pack.'"⁹⁰ The task force's commander informed the squad they would be coming across a great deal of drug money, and it would not matter if some came up missing.⁹¹ In fact, he reassured the task force they would not get caught, pointing out that suspects would be in no position to complain.⁹² Recognizing the importance of the civil asset forfeiture program to the task force's existence, the sergeant often encouraged his officers before their shifts with comments like "[l]et's go out and kick ass," or "everyone goes to jail tonight for everything, all right?"⁹³ While *Reese* presents what is surely an extreme case of police abuse, it serves as an example of how dangerous an agency can become when no accountability over civil asset forfeitures exists.

2. Flawed Incentives

The current system creates perverse incentives for law enforcement agencies, as it encourages them to focus more on seizing assets than protecting the communities they are charged with serving. Civil asset forfeiture has created what

84. Ronald Fraser, *Police Shouldn't Profit from Drug Raids*, BIRMINGHAM NEWS, Sept. 14, 2008, available at <http://www.mpp.org/states/alabama/news/op-ed-police-shouldnt.html>.

85. Blumenson & Nilsen, *Policing for Profit*, *supra* note 26, at 84. When law enforcement agencies can finance themselves with the proceeds of asset forfeitures and no longer need budgetary funding from the government, there is no reason for them to report or justify their activities through a regular budgetary process. *Id.*

86. *Id.*

87. *Id.* at 94.

88. 2 F.3d 870 (9th Cir. 1993).

89. *Id.* at 874.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

some refer to as a “bounty-hunter system,” where police focus their efforts on the most lucrative forfeiture possibilities rather than more serious criminals.⁹⁴

Opinion polls have shown that Americans prefer more vigorous enforcement of laws that threaten non-consenting parties, such as violence and fraud.⁹⁵ Law enforcement agencies, however, have a greater incentive to pursue those who may be involved in drug crimes, as violent crime arrests produce fewer forfeitable assets than do drug crimes.⁹⁶ For example, drug transactions that occur in houses present officers with the opportunity to seize the entire property.⁹⁷ If they find drugs in an automobile they can pad a department’s budget by selling the vehicle at auction.⁹⁸ And if officers discover a large sum of cash on a suspected drug dealer, the money can be conveniently added directly to the agency’s funds.⁹⁹

Not only is civil asset forfeiture profitable for law enforcement agencies, it can in most cases be relatively easy. This is because only about 20% of property owners who have their property seized ever attempt to get it back.¹⁰⁰ And even if the owner successfully challenges the forfeiture, there is little extra cost or burden to the agency for its “loss.” Thus, asset forfeiture presents law enforcement agencies with a relatively low-risk way to supplement their budgets.

In some law enforcement agencies, leaders encourage officers to pursue targets based on the potential profit they can provide the department, rather than the threat posed to the community.¹⁰¹ This was the approach raised by a Department of Justice report, which suggested that “as asset seizures become more important, ‘it will be useful for task force members to know the major sources of these assets and whether it is more efficient to target major dealers or numerous smaller ones.’”¹⁰² And in Fresno, California, a former Fresno police officer claims the police chief “foster[ed] an environment focused on asset forfeiture.”¹⁰³ According to the whistleblower, the detectives were told their performance was

94. Mara Lynn Krongard, *A Population at Risk: Civil Commitment of Substance Abusers After Kansas v. Hendricks*, 90 CAL. L. REV. 111, 142 (2002).

95. Anita Bernstein, *The Representational Dialectic (With Illustrations from Obscenity, Forfeiture, and Accident Law)*, 87 CAL. L. REV. 305, 336–37 (1999).

96. *Id.*; David B. Smith, *Asset Forfeiture: A Serious Threat to Our Property Rights*, 2 PERSP. ON LEGIS. REG. & LITIG. 10, 13–14 (1998); Hakki Tuncer, *Civil Asset Forfeiture in the Fight Against Drugs* 63 (Aug. 2002) (unpublished M.S. thesis, University of North Texas), available at <http://digital.library.unt.edu/permalink/meta-dc-3204:1>.

97. See, e.g., *United States v. 916 Douglas Ave.*, 903 F.2d 490 (7th Cir. 1990).

98. See, e.g., *United States v. \$493,850*, 518 F.3d 1159 (9th Cir. 2008).

99. See, e.g., *id.*

100. Ross, *supra* note 24, at 265.

101. Eric D. Blumenson & Eva Nilsen, *The Next Stage of Forfeiture Reform*, 14 FED. SENT’G REP. 76, 78 (2001) [hereinafter Blumenson & Nilsen, *The Next Stage*] (quoting JUST. RES. & STAT. ASS’N, MULTIJURISDICTIONAL DRUG CONTROL TASK FORCES: A FIVE-YEAR REVIEW 1988-1992 23 (Oct. 1993)).

102. Blumenson & Nilsen, *Policing for Profit*, *supra* note 26, at 68 (quoting JUST. RES. & STAT. ASS’N, MULTIJURISDICTIONAL DRUG CONTROL TASK FORCES: A FIVE-YEAR REVIEW 1988-1992 23 (Oct. 1993)).

103. Clint Olivier, *Whistle Blower Points to Fresno Chief*, KMPH FOX 26 (Fresno), Feb. 5, 2009, http://www.kmph.com/Global/story.asp?S=9792287&nav=menu612_2_2.

going to be evaluated based on their asset forfeiture productivity.¹⁰⁴ Specifically, the chief stressed to detectives and officers “that he want[ed] seizures to fund other units, specifically the helicopter unit of the police department.”¹⁰⁵ The result was a corrupt environment where “the ends justifi[ed] the means.”¹⁰⁶

The advent of a now common police tactic, called the “reverse sting,” illustrates the shift in priorities from crime control to funding raids.¹⁰⁷ In a reverse sting, an officer attempts to sell drugs to an unsuspecting buyer.¹⁰⁸ The method permits the police to seize the buyer’s cash rather than a seller’s drugs, which have no value to the agency.¹⁰⁹ One reverse sting participant said, “This strategy was preferred by every agency and department with which I was associated because it allowed agents to gauge potential profit before investing a great deal of time and effort.”¹¹⁰

While the government has not yet addressed police use of reverse stings in the civil asset forfeiture context, the U.S. Sentencing Commission apparently recognized their use to enhance drug sentences.¹¹¹ The Commission was aware of cases where officers sold drugs to unsuspecting buyers for well-below market value in an attempt to meet quantity thresholds that triggered harsher sentences.¹¹² As a result, it amended the Sentencing Guidelines to allow for a downward departure for instances when an officer’s conduct approaches entrapment.¹¹³

At its worst, asset forfeiture incentives can lead to potentially violent altercations. Donald Scott was a sixty-one-year-old retired rancher who owned a sizeable plot of land adjacent to Santa Monica Mountains National Park in Malibu, California.¹¹⁴ The land was valuable to the National Park Service, which had been unsuccessful in its previous attempts to buy it from Mr. Scott.¹¹⁵ In 1992, the Los Angeles County Sheriff’s Department, the Drug Enforcement Agency, and other governmental agencies visited the ranch to execute a search warrant that alleged Mr. Scott was growing marijuana plants on the property.¹¹⁶ Hearing his wife’s

104. *Id.*

105. *Id.*

106. *Id.*

107. Blumenson & Nilsen, *Policing for Profit*, *supra* note 26, at 67.

108. *Id.*

109. *Id.* (citing J. Mitchell Miller & Lance H. Selva, *Drug Enforcement’s Double-Edged Sword: An Assessment of Asset Forfeiture Programs*, 11 JUST. Q. 313, 320 (1992)).

110. *Id.*

111. Andrew Carlon, *Entrapment, Punishment, and the Sadistic State*, 93 VA. L. REV. 1081, 1130 (2007).

112. *Id.*

113. *Id.*

114. Jarret B. Wollstein, *How Police Confiscation is Destroying America, Part 2*, FREEDOM DAILY, Nov. 1993, <http://www.fff.org/freedom/1193c.asp>; OFFICE OF THE DIST. ATT’Y, COUNTY OF VENTURA, STATE OF CAL., REP. ON THE DEATH OF DONALD SCOTT 1–2 (1993) [hereinafter REP. ON THE DEATH OF DONALD SCOTT], available at <http://www.fear.org/chron/scott.txt>.

115. Wollstein, *supra* note 114.

116. REP. ON THE DEATH OF DONALD SCOTT, *supra* note 114, at 14–15.

screams at the sight of armed intruders, Mr. Scott emerged from his bedroom armed with a revolver.¹¹⁷ In the confusion, officers shot Mr. Scott dead.¹¹⁸

The search warrant was based on an informant's tip.¹¹⁹ No such plants, however, nor any other drugs, were ever found on the property.¹²⁰ Later, the Ventura County District Attorney conducted a five-month investigation into Mr. Scott's death and concluded the potential seizure of Mr. Scott's \$5 million ranch was a "motivating factor" in the operation.¹²¹ Included in the materials distributed to officers during a pre-raid meeting was a property appraisal of the ranch and a statement that the property would be seized if at least fourteen marijuana plants were found.¹²²

Mr. Scott's death is an extreme example of the risks posed by an overzealous civil asset forfeiture action and is illustrative of the dangers that can arise when armed police enter the home of an unsuspecting property owner. As explained above, this is the type of situation that likely occurs more frequently than necessary due to the incentives built into the civil asset forfeiture system. It also shows just what effect the allure of property forfeiture can have on the police. Law enforcement agencies are charged with serving and protecting the community, and these vital goals should not be clouded by the prospects of obtaining forfeited property.

The incentives created by the system are not limited only to the police. For example, a district attorney in Utah intimated to the press that he prioritized his work based on the profit his agency realized.¹²³ In an attempt to reform the state's civil asset forfeiture laws, voters in Utah passed an initiative in 2000 that mandated that asset-forfeiture funds be deposited into either the state's education fund or an account designed to compensate crime victims.¹²⁴ Three district attorneys, however, refused to comply with the reform initiative.¹²⁵ Rather than deposit the money into one of the chosen funds, they simply kept it.¹²⁶ They eventually surrendered the money, but only after taxpayers brought an action to recover the misappropriated funds.¹²⁷ After finally complying with the initiative—which had passed by a rather large margin—one of the district attorneys justified the popular notion that profit drives law enforcement's asset forfeiture efforts when he told a reporter that "[d]oing forfeitures is now way down the line in my priorities."¹²⁸

117. *Id.* at 18–19.

118. *Id.* at 19–21.

119. *Id.* at 12–13.

120. *Id.* at 23.

121. *Id.* at 33–34.

122. *Id.* at 15; Blumenson & Nilsen, *Policing for Profit*, *supra* note 26, at 75.

123. Scott Bullock, *IJ Helps End Utah's Prosecution for Profit*, LIBERTY & LAW (Institute for Justice, Arlington, Va.), Oct. 2003, available at http://www.ij.org/index.php?option=com_content&task=view&id=1435&Itemid=194.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

As long as civil asset forfeiture lacks accountability and oversight, abuses such as these will fuel public skepticism and mistrust. As discussed above, law enforcement agencies are more effective when they can work with the full cooperation and engagement of their communities.¹²⁹

3. Questionable Use of Civil Asset Forfeiture Proceeds

Law enforcement agencies that operate without budgetary oversight, or even the need for taxpayer money, invite corruption, particularly among their leaders. This can also lead to police use of forfeiture proceeds for questionable purchases. This adds to public skepticism in the system, particularly when individual officers are caught appropriating forfeiture proceeds for personal use.¹³⁰

The incentive and appeal of using seized assets for personal expenditures is obviously present when no accounting controls exist. For example, a sheriff in Camden County, Georgia, is under investigation for various expenditures made with the proceeds of seized assets, including money used for inmate labor to build a weekend home for his personal use.¹³¹ In Arizona, a lieutenant of the South Tucson Police Department pled guilty to embezzling over \$500,000 from the department's asset-forfeiture program over a four-year period.¹³² In North Carolina, the U.S. Department of Justice asked the Town of Mooresville to repay approximately \$5000 in forfeited funds that were improperly used to purchase plane tickets for a youth group's trip to New York City.¹³³ The police chief was fired as a result of the investigation.¹³⁴

At the time of this writing, the city of El Monte, California, was considering a program that would offer home purchase loans to its officers to encourage them to settle in the area.¹³⁵ If approved, the city would offer police officers forgivable interest-free loans, funded by the city's asset-forfeiture program.¹³⁶ Critics of the proposal point out the inherent conflict of interest present in such a program, as a tool designed to be a deterrent against criminal activity would effectively become a personal benefit for individual police officers.¹³⁷ The program would only fuel the perception that asset-forfeiture programs breed corruption.¹³⁸

129. TYLER & HUO, *supra* note 73, at 206.

130. *See, e.g.*, Burnett, *supra* note 81; Pedersen, *supra* note 81.

131. Burnett, *supra* note 81.

132. Pedersen, *supra* note 81.

133. Megan Pillow, *Mooresville Must Return Seized Drug Money to Feds*, MOORESVILLE TRIB., Jan. 14, 2009, available at <http://www2.mooresvilletribune.com/content/2009/jan/14/140758/mooresville-return-seized/news-local>.

134. *Id.*

135. Rob Garver, *City Wants to Give Cops Loans; Might Use Forfeiture Money*, ASSETFORFEITUREWATCH.COM, Dec. 6, 2008, <http://assetforfeiturewatch.com> (search "El Monte"; then select "City Wants to Give Cops Loans" hyperlink) (last visited July 14, 2009).

136. *Id.*

137. *Id.*

138. *Id.*

Even when the proceeds are used for law enforcement purposes, abuse is rampant: “bomber jackets for the Colorado State Patrol; running gear for the police department in Austin, Texas; football tickets for the district attorney's office in Fulton County, [Georgia].”¹³⁹ In an overt endorsement of the link between asset forfeiture and officers’ individual gain, the Bureau of Alcohol, Tobacco, and Firearms (ATF) ordered Leatherman tool kits engraved with the slogan “Always Think Forfeiture (ATF).”¹⁴⁰

In addition to mounting public scrutiny of questionable purchases, law enforcement agencies are beginning to feel a different sort of pressure due to current economic conditions.¹⁴¹ In Hamilton County, Ohio, the county sheriff's office was ordered to trim spending by \$12 million due to the county's budgetary crisis.¹⁴² The result was 201 layoffs and a substantial reduction in the sheriff's patrols.¹⁴³ Critics, however, say some of these measures were unnecessary, arguing that the sheriff could do more to help bridge the budgetary gap by tapping in to the county's asset-forfeiture fund to pay salaries and patrol costs, rather than spending the money on a “[b]agpipe brigade, coloring books, donations to the Boy Scouts, and teddy bears.”¹⁴⁴

Hamilton County is not the only one dealing with a drastically reduced budget.¹⁴⁵ And, when officers are laid off leaving fewer badges “to serve and protect” communities, the Hamilton County Sheriff's Office will surely not be the only law enforcement agency under scrutiny. Critics will likely demand that asset-forfeiture funds be used to pay salaries and other operational expenses. Those that refuse will likely fuel public perception that asset-forfeiture programs are run with the primary motive of padding law enforcement pockets over benefiting the community.

4. Potential Effect of Current Economic Conditions

Law enforcement agencies will surely become even more driven by financial gain as the current economic conditions limit their available resources. At the time of this writing, the United States finds itself in an economic situation that

139. Burnett, *supra* note 81.

140. Mark Frauenfelder, *ATF Leatherman Tool Kits Inscribed: "Always Think Forfeiture"*, BOINGBOING, June 9, 2008, <http://boingboing.net/2008/06/09/atf-leatherman-tool.html> (last visited August 16, 2009); *Sali Questions ATF Account of Motto Change*, IDAHO PRESS-TRIB., May 21, 2008, available at <http://www.idahopress.com/?id=10300>. The ATF eventually halted the program. *Id.*

141. See *infra* Part II.A.4.

142. Mary Spicuzza, *Budget Crunch Sparks Anger Over Sheriff's Forfeiture Fund*, ASSETFORFEITUREWATCH.COM, Dec. 10, 2008, <http://assetforfeiturewatch.com> (search “budget crunch sparks anger”; then select “Budget Crunch Sparks Anger Over Sheriff's Forfeiture Fund” hyperlink) (last visited July 14, 2009).

143. *Id.*

144. *Id.*

145. See *infra* Part II.A.4.

President Obama has referred to as an “economic crisis”¹⁴⁶ and famed Wall Street investor Warren Buffett has dubbed an “economic Pearl Harbor.”¹⁴⁷ Law enforcement agencies are not immune to the troubles, and many have already experienced relatively drastic cuts to their budgets.¹⁴⁸ In a nationwide survey of 200 local police departments conducted in October 2008, 39% indicated their operating budgets had been reduced as a result of economic pressure, and 43% said their ability to deliver services would be affected.¹⁴⁹ Law enforcement agencies constrained by the budgetary process may begin to feel the need to take funding matters into their own hands.

It is completely plausible that law enforcement agencies will shift priorities with a new focus on finding resources to save departmental jobs. This same economic climate, which could push law enforcement to rely more heavily on asset forfeitures, may also have a dire impact on property owners whose assets are seized. At a time when unemployment rates are skyrocketing¹⁵⁰ and economic conditions are drawing comparisons to the Great Depression,¹⁵¹ law enforcement must be mindful of the impact over-enforcing forfeiture laws could have on the community. Taking a family’s home or life savings at a time when they are financially vulnerable is a harsh punishment, especially if they fall into the 80% of owners who have had property seized without being criminally charged.¹⁵² The public would surely perceive such a situation as unfair, potentially fueling disrespect for law enforcement.¹⁵³

B. Constitutional Concerns

Today’s civil asset forfeiture system also raises several constitutional issues. First, the potential for law enforcement to operate independently of the

146. Caren Bohan, *Obama: Financial Crisis a Major Threat to Economy*, REUTERS, Sept. 15, 2008, <http://www.reuters.com/article/topNews/idUSN1551961320080915>.

147. Erik Holm, *Buffett Buys Goldman Stake in ‘Economic Pearl Harbor,’* BLOOMBERG NEWS, Sept. 24, 2008, http://www.bloomberg.com/apps/news?pid=20601087&sid=aRef_DUx6AcU&refer=worldwide.

148. See, e.g., Kevin Bohn, *Police Face Cuts as Economy Falters*, CNN.COM, Oct. 23, 2008, <http://www.cnn.com/2008/CRIME/10/23/police.economy>; Grace Rauh, *Mayor Asking for Another \$1.5 Billion in Budget Cuts*, N.Y. SUN, Sept. 24, 2008, available at <http://www.nysun.com/new-york/bloomberg-orders-15b-in-budget-cuts-over-next-two/86424>; Spicuzza, *supra* note 142; Debbie Williams, *Elberta Police Cuts*, WKRG.COM, Oct. 1, 2008, http://www.wkrg.com/consumer/article/elberta_police_cuts/19608.

149. Bohn, *supra* note 148. Some of the specific moves made in response to the budget cuts include hiring freezes, elimination of overtime shifts, and cutting back on public services, such as responding to medical emergency and non-injury motorcycle accidents. *Id.*

150. Conor Dougherty, *Unemployment Rises in Every State*, WALL ST. J., Jan. 28, 2009, at A3.

151. *Fed’s Yellen: Economy Similar to Great Depression*, CNNMONEY.COM, Feb. 7, 2009, http://money.cnn.com/2009/02/07/news/economy/fed_yellen.reut.

152. See Blumenson & Nilsen, *Policing for Profit*, *supra* note 26, at 77.

153. See *supra* Part II.A.

political process may violate the Constitution's Appropriations Clause.¹⁵⁴ Second, a federally created forfeiture tool called "equitable sharing" effectively permits state and local law enforcement to bypass states' attempts to mandate how proceeds are disbursed, raising federalism concerns.¹⁵⁵ Finally, the increasingly popular use of waivers—whereby the police offer property owners the choice of avoiding criminal charges in exchange for their property—means owners are deprived of the chance to challenge the forfeiture in a proceeding.¹⁵⁶ Agencies that use waivers bypass civil asset forfeiture laws and deprive owners of the protections they provide, raising serious due process concerns.

1. Violation of Constitution's Appropriations Clause

Civil asset forfeiture may violate the Constitution's Appropriations Clause, which vests Congress with exclusive appropriations power.¹⁵⁷ This clause ensures that government income cannot be spent until a specific congressional appropriation releases it.¹⁵⁸

When federal agencies seize assets, proceeds are deposited into the Asset Forfeiture Fund before they are then made available to agencies for law enforcement purposes.¹⁵⁹ This process, according to Eric Blumenson and Eva Nilsen, "bypasses the Treasury, leaving the Justice Department free to determine the contours of its own budget."¹⁶⁰ As a result, federal law enforcement agencies are free to fund themselves in any amount their agents can seize.¹⁶¹

Blumenson and Nilsen point out that this practice conflicts with the Appropriations Clause:¹⁶²

A law enforcement agency can now decide for itself what its size and resources will be, unconstrained by any legislative determination of an appropriate budgetary level. This wholly thwarts [the Appropriations Clause's] function as defined by the Supreme Court, which is "to assure that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good and not according to the individual favor of Government agents"¹⁶³

Blumenson and Nilsen also note that George Mason must have foreseen this type of danger when he warned "the purse and the sword ought never to get

154. See *infra* Part II.B.1.

155. See *infra* Part II.B.2.

156. See *infra* Part II.B.3.

157. U.S. CONST. art. I, § 9, cl. 7.

158. See *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937); *Bradley v. United States*, 98 U.S. 104, 112–13 (1878); *Knote v. United States*, 95 U.S. 149, 154 (1877).

159. 21 U.S.C. § 881(e)(2)(B) (2006).

160. Blumenson & Nilsen, *The Next Stage*, *supra* note 101, at 79.

161. *Id.*

162. *Id.*

163. *Id.* at 80 (quoting *Off. of Personnel Mgmt. v. Richmond*, 496 U.S. 414, 428 (1990)).

into the same hands, whether legislative or executive.”¹⁶⁴ The Supreme Court has not addressed this issue.

2. *Equitable Sharing and the Federal Government’s Role in Helping State Police Avoid State Legislatures*

“Equitable sharing,” a federal provision permitting state and local police to bypass state civil asset forfeiture laws, raises serious federalism concerns.¹⁶⁵ While CAFRA applies to federal law enforcement agencies, states retain the power to control their own state and local law enforcement agencies pursuant to their police power.¹⁶⁶ Federal law, however, has undermined this power through a process called “equitable sharing,” which allows state and local police to bypass their own laws when federal forfeiture terms are more favorable.¹⁶⁷ This results in even less political accountability, as equitable sharing permits state and local police to bypass state legislation mandating how forfeiture money can be spent.¹⁶⁸

In 1984, Congress passed the Comprehensive Forfeiture Act, which vastly expanded the federal government’s forfeiture powers.¹⁶⁹ The Act also created “equitable sharing,” a process by which federal agencies “adopt” forfeiture cases from state law enforcement agencies.¹⁷⁰ Equitable sharing is used when federal forfeiture is more favorable to state and local police, which usually occurs when state law mandates that law enforcement keep a smaller amount than that available under equitable sharing.¹⁷¹ Perhaps of more concern is when it is used to skirt state laws that either prevent forfeiture in a particular case, or direct that all or a portion of the proceeds be deposited into non-law enforcement funds.¹⁷² The federal agency keeps 20% of the recovered amount, while the remainder is returned to the state or local entity that brought the action.¹⁷³

Recognizing the potential for law-enforcement abuse of the asset-forfeiture program, several states enacted laws in an effort to regulate police behavior in this area. For example, around the time CAFRA passed in 2000, Utah voters approved referenda aimed at affecting the forfeiture incentive system.¹⁷⁴

164. *Id.*

165. Barnet, *supra* note 29, at 100.

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.* Hypothetically, State A’s forfeiture statute may mandate that law enforcement keep only 10% of forfeited property, while equitable sharing permits it to keep 25%. In that case, the state police agency has a greater financial incentive to avoid state law by using equitable sharing.

172. 2009 CRIMINAL JUSTICE TRANSITION COAL., SMART ON CRIME: RECOMMENDATIONS FOR THE NEXT ADMINISTRATION AND CONGRESS 75–76 (2008), available at <http://2009transition.org/criminaljustice/>.

173. *Id.*; INSTITUTE FOR JUSTICE, ENDING PROSECUTION FOR PROFIT IN UTAH: CITIZENS DEMAND PROSECUTORS FOLLOW STATE’S CIVIL FORFEITURE LAW, http://www.ij.org/index.php?option=com_content&task=view&id=1063&Itemid=165#_ftnr eF9 (last visited Apr. 12, 2009).

174. Blumenson & Nilsen, *The Next Stage*, *supra* note 101, at 76.

Specifically, the voters chose a process that would redirect forfeiture assets to public education and drug treatment programs.¹⁷⁵ They also specifically prohibited law enforcement agencies from using the equitable sharing program when it would change the disposition of proceeds.¹⁷⁶ The goal in Utah was to eliminate the profit motive for law enforcement agencies.¹⁷⁷

Equitable sharing has frustrated other states' attempts to regulate state and local police. Several jurisdictions have instituted major reforms to their civil asset forfeiture laws, including provisions requiring a criminal conviction prior to forfeiture.¹⁷⁸ Equitable sharing, however, has frustrated these attempts.¹⁷⁹ Despite an increase in reforms aimed at controlling state forfeiture efforts, the equitable sharing arrangement has produced substantially more money in recent years.¹⁸⁰ The Justice Department reports that money distributed to state and local law enforcement agencies through the program has more than doubled in recent years; in 2002, the figure was \$192 million, while in 2007, it stood at \$417 million.¹⁸¹

According to Professor Todd Barnett, equitable sharing rewards abuses of state forfeiture laws by encouraging local and state law enforcement agencies to seize as much property as possible.¹⁸² "Allowing a state law enforcement agency, historically limited by state constitutional provisions prohibiting civil forfeiture, to have the federal government 'adopt' the forfeiture . . . violates state[s'] rights and creates a dangerous and illegal precedent."¹⁸³

3. Denial of Process by Contract or Waiver

In a growing and disturbing trend among state and local police, some law enforcement agencies now use contracts and waivers to obtain property, a practice that permits them to avoid forfeiture proceedings altogether. Generally, owners waive any interest in their property in exchange for the agency's promise not to pursue criminal charges. This practice raises several concerns, the most serious of which is its complete disregard for the procedural guarantees current forfeiture legislation provides.

The story of Delane Johnson illustrates this practice's absurdity. In 2006, Mr. Johnson was standing in front of his Bradenton, Florida, apartment when police approached him during a burglary investigation.¹⁸⁴ After officers noticed Mr. Johnson's large roll of cash—which totaled approximately \$10,000—they

175. *Id.*

176. *Id.*

177. INSTITUTE FOR JUSTICE, *supra* note 173.

178. THE 2009 CRIMINAL JUSTICE TRANSITION COAL., *supra* note 172.

179. *Id.*

180. Garver, *supra* note 71.

181. *Id.*

182. Barnett, *supra* note 29, at 100.

183. *Id.* at 101.

184. *City of Bradenton v. Johnson*, 989 So. 2d 25, 26 (Fla. Dist. Ct. App. 2008); Tom Lyons, *Lawyer Gets 'Paid' for Fighting Bradenton*, HERALD-TRIB. (Sarasota), Sept. 14, 2008, at BN1, available at <http://www.heraldtribune.com/article/20080914/COLUMNIST/809140339>. Johnson was not a suspect. *Id.*

arrested him for violating a rarely enforced state law that requires persons to report business transactions greater than \$10,000.¹⁸⁵

The officers took Johnson to jail, where they presented him with a document entitled “Contraband Forfeiture Agreement.”¹⁸⁶ The “agreement” stated that “[i]n consideration of the department forgoing its right to file an action under the Florida Contraband Forfeiture Act and to avoid the costs, delay and uncertainty of litigation to all parties,” Mr. Johnson would agree to surrender the money to the department and not hold it liable for any claims related to the seizure.¹⁸⁷ It also required him to acknowledge that he “voluntarily agreed to enter into the agreement without benefit of counsel, waived the right to review of the agreement by a court, mediator or arbitrator, and waived the right to a jury trial.”¹⁸⁸ Mr. Johnson alleged he did not remember signing the agreement and disputed that he willfully relinquished \$10,000 to the police.¹⁸⁹ The Bradenton Police Department, however, refused to return the money.¹⁹⁰

Mr. Johnson took his fight against the department to court, where a trial judge found the contract to be unconscionable and concluded police used false pretenses to obtain the agreement.¹⁹¹ As a result of the action and the unfavorable publicity that accompanied it, the city of Bradenton and its police department agreed to stop the waiver practice.¹⁹²

This practice is apparently not limited to Bradenton, Florida; a federal class-action lawsuit claims police in Tenaha, Texas, employ similar tactics. Specifically, the suit alleges many drivers stopped by police are given an ultimatum: face trumped-up criminal charges or agree to give up their property in exchange for their release.¹⁹³ Between 2006 and 2008, local police seized property from at least 140 motorists, most of whom were never charged with a crime.¹⁹⁴ Included in this number is Linda Dorman, a great-grandmother from Ohio who had

185. Lyons, *supra* note 184.

186. *City of Bradenton*, 989 So. 2d at 26.

187. *Id.*

188. *Id.*

189. Lyons, *supra* note 184.

190. *Id.*

191. *Id.* The city appealed the decision on a procedural technicality, where it won. *Id.*; *City of Bradenton*, 989 So. 2d at 26. However, even that decision questioned the strength of the city’s case. *City of Bradenton*, 989 So. 2d at 27. Later, the city voluntarily returned Mr. Johnson’s money and agreed to discontinue the practice. Lyons, *supra* note 184.

192. Lyons, *supra* note 184.

193. Lisa Sandberg, *Property Seizures Seen as Piracy*, SAN ANTONIO EXPRESS NEWS, Feb. 7, 2009, available at http://www.mysanantonio.com/news/Property_seizures_seen_as_piracy_.html; Howard Witt, *Highway Robbery? Texas Police Seize Black Motorists’ Cash, Cars*, CHI. TRIB., Mar. 10, 2009, http://www.chicagotribune.com/news/nationworld/chi-texas-profiling_wittmar10,0,6051682.story.

194. Sandberg, *supra* note 193; Witt, *supra* note 193.

\$4000 seized as she drove through Texas.¹⁹⁵ Police found no evidence linking her to criminal activity and nothing illegal in her van during the stop.¹⁹⁶

The use of asset-forfeiture waivers deprives property owners of due process because there are no forfeiture proceedings. In cases like Delane Johnson's, waiver forms make property owners believe they do not have a right to consult counsel. They also diminish other procedural safeguards, and, perhaps most egregiously, permit the government to seize property without having to prove anything.

Asset-forfeiture waivers permit law enforcement agencies to benefit from the inherent fear of an encounter with the police, opening the door to deceit. When faced with the choice between asset forfeiture and criminal prosecution, scared property owners will likely always sign away a possession in exchange for freedom. Because the process is virtually unregulated, the tactic invites deceit. For example, Mr. Johnson alleges the waiver was not explained to him and he did not know what he was signing.¹⁹⁷

Courts have been unwilling to enforce these "contracts," and owners who challenge this practice have been successful.¹⁹⁸ For example, Mr. Johnson's waiver was deemed an unconscionable agreement by the court,¹⁹⁹ a term defined as one that "no promisor with any sense, and not under a delusion, would make, and that no honest and fair promisee would accept."²⁰⁰ Any practice that a court has described as unconscionable should have no place as a law enforcement tool.

As illustrated by the examples above, many of the due process concerns CAFRA meant to address are still present today. It is unlikely that civil asset forfeiture will go away anytime soon, as the financial benefit to the government is just too great. Indeed, the Department of Justice has made it a goal to "assure that asset forfeiture is an integral part of every investigation and prosecution."²⁰¹ The rest of this Note will introduce changes needed to work toward a fair and constitutionally valid process.

III. PROPOSALS TO IMPROVE CURRENT CIVIL ASSET FORFEITURE LAWS

Change is necessary to remedy some of the problems asset forfeiture has created between law enforcement and property owners. Perhaps the change with the greatest potential for reducing abuse is legislation directing that forfeiture proceeds go into a general treasury fund, rather than directly to law enforcement. Additionally, Congress should increase the government's burden of proof from "preponderance of the evidence" to "clear and convincing evidence," which would

195. Sandberg, *supra* note 193.

196. *Id.*

197. Lyons, *supra* note 184.

198. See, e.g., *id.*; John Burnett, *Cash Seizures by Police Prompt Court Fights*, NAT'L PUB. RADIO, June 16, 2008, <http://www.npr.org/templates/story/story.php?storyId=91555835>.

199. Lyons, *supra* note 184.

200. BLACK'S LAW DICTIONARY 29 (3d Pocket ed. 2006).

201. Garver, *supra* note 71 (emphasis added).

make it more difficult for the government to prevail with flimsy evidence. Also, eliminating “equitable sharing,” and prohibiting law enforcement from using waivers would protect property owners while permitting forfeitures in cases where the government has sufficient evidence of wrongdoing.

A. Redirect the Proceeds of Forfeiture Actions to the General Treasury Fund

The legislature should change the beneficiaries of civil asset forfeiture. Permitting law enforcement to profit from asset forfeitures creates a powerful incentive to seize as much as possible with as little due process as they can get away with.²⁰² In fact, as long as law enforcement agencies continue to profit from criminal activity, they have a disincentive to completely eliminate crime in their communities. But because approximately 80% of forfeitures go uncontested,²⁰³ simply raising the burden of proof may not be enough to ensure a fair civil asset forfeiture system. Changes are needed to discourage law enforcement from frivolously confiscating property in the first place.

Under the current system, law enforcement has the incentive to confiscate property first and ask questions later when there is a doubt as to whether the property is legally subject to forfeiture. From their point of view, there is an 80% chance that an owner will not contest a seizure.²⁰⁴ In the likely event an owner does not contest the forfeiture, whether law enforcement possessed the requisite level of suspicion to seize the property is irrelevant, as it will never become an issue. While it is likely that much of that 80% of cases do involve legitimately forfeited contraband, there is surely a large number of owners who do not contest the seizure either because they are unaware a process exists, or they do not have the means to hire an attorney, especially where the property is not especially valuable.²⁰⁵ For example, the average vehicle seized under the civil forfeiture program is valued at \$4000.²⁰⁶ Some attorneys will not take forfeiture cases where the property at issue is valued at less than \$20,000.²⁰⁷ While CAFRA contains a provision permitting property owners who successfully challenge forfeiture actions to recover attorneys’ fees, many are likely unaware of this requirement.²⁰⁸ Further, this provision has been undermined by multiple courts, which have denied prevailing parties the right to attorneys’ fees or damages from the government.²⁰⁹

Proceeds from civil forfeitures should be deposited into a general treasury account, where the government can spread the money across the programs that need it. Also, preventing agencies from funding themselves would restore full

202. See Fraser, *supra* note 84.

203. Abel, *supra* note 18.

204. *Id.*

205. Burnett, *supra* note 198.

206. Abel, *supra* note 18.

207. *Id.*

208. *Id.* It is likely that an owner would only learn of this provision from an attorney. However, if the owner has already determined he or she cannot afford one or that it is not worth it to hire one, he or she will never learn of the cost-shifting provision. See *id.*

209. See, e.g., *Foster v. United States*, 522 F.3d 1071 (9th Cir. 2008); *United States v. Khan*, 497 F.3d 204 (2d Cir. 2007); *Adeleke v. United States*, 355 F.3d 144 (2d Cir. 2004); Balko, *supra* note 9.

legislative oversight and accountability over their actions and spending. Law enforcement agencies should be acting to serve the public, not themselves. Any incentive that encourages them to act in any other way than for the good of the public should be eliminated.

B. Increase Government's Burden of Proof

The government's burden of proof in civil asset forfeiture proceedings should be raised to clear and convincing evidence. Currently, CAFRA requires that the federal government show by a preponderance of the evidence²¹⁰ that the seized property has a substantial connection to a criminal offense.²¹¹ Before CAFRA, the government only had to show that probable cause existed to believe that property was subject to forfeiture.²¹² Rep. Hyde was deeply concerned about this rather lax standard, and he made raising the burden of proof an important aspect of his proposed changes.²¹³ While CAFRA reflects Rep. Hyde's wishes for a tougher governmental burden,²¹⁴ it does not go as far as he would have liked.²¹⁵ In his proposals, he recommended that the government be required to prove its case by clear and convincing evidence.²¹⁶ The current standard is the result of a compromise.²¹⁷

Unfortunately, the increased burden appears to have done little in terms of making civil asset forfeitures more difficult for the government to obtain, as 80% of forfeitures go uncontested.²¹⁸ For example, David B. Smith, author of a casebook on the subject of asset forfeitures, says courts have mitigated CAFRA's impact since it passed in 2000 by narrowly interpreting the protections it intended to give property owners.²¹⁹ According to Smith, courts are overly deferential to prosecutors in determining if they have met the increased evidentiary standard.²²⁰ As a result, forfeiture actions are not much more difficult for the government to prove than they were under the lesser, pre-CAFRA evidentiary standard.²²¹ While the increased burden has not had the intended effect, a standard of clear and convincing evidence would require the government to present a stronger case before depriving citizens of their property. This step would provide innocent property owners with more procedural protection.

The Constitution's Framers did not intend for the government to have such an easy process by which to take private property. The Fifth Amendment

210. 18 U.S.C. § 983(c)(1) (2006).

211. *Id.* § 983(c)(3).

212. Hyde, *supra* note 52.

213. *Id.*

214. *See id.*

215. Rep. Hyde failed in his fight for a standard of clear and convincing evidence.

Id.

216. *Id.*

217. Thomas M. Nickel, *The Civil Asset Forfeiture Reform Act*, 48 FED. LAW., Feb. 2001, at 24.

218. Abel, *supra* note 18; Balko, *supra* note 9.

219. Balko, *supra* note 9.

220. *Id.*

221. *Id.*

guarantees that “[n]o person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”²²² According to the Supreme Court, the Fifth Amendment’s due process requirement is meant “not only to ensure abstract fair play to the individual . . . [but also] to protect his use and possession of property from arbitrary encroachment—to minimize substantively unfair or mistaken deprivations of property.”²²³

Mara Lynn Krongard examined the processes afforded to property owners for criminal asset forfeitures and eminent domain proceedings.²²⁴ In the former, property cannot be seized until the government obtains a criminal conviction, which requires proof beyond a reasonable doubt.²²⁵ Under eminent domain, property owners are given reasonable notice and an opportunity to be heard and offer evidence in a determination of compensation.²²⁶ In contrast, owners subject to civil forfeitures are subject to a lesser burden of proof than those in criminal forfeitures, and they receive no compensation for the property lost.²²⁷ “[T]he processes required by civil asset forfeiture, especially when compared with other property seizure tactics that satisfy due process, are arguably not sufficient to protect an individual from substantively unfair or mistaken deprivations of property, and do not ensure fair play.”²²⁸

Increasing the evidentiary burden would prevent the government from seizing property based on flimsy evidence, such as the commonly used theory that possession of a large sum of cash itself indicates criminal activity.²²⁹ For example, in 2006 the Eighth Circuit Court of Appeals partially relied on similar reasoning, stating “[p]ossession of a large sum of money is ‘strong evidence’ of a connection to drug activity.”²³⁰ In the case, the court overturned an order denying forfeiture of \$124,700 because it disagreed with the district court’s finding that the property owners’ explanations were “plausible and consistent.”²³¹ But possessing large sums of money is not a crime, and it should not be turned into one by overzealous prosecutors who have no evidence of wrongdoing other than the property, which itself is not illegal. The government should not be permitted to dispossess owners of their property with flimsy evidence.

222. U.S. CONST. amend. V.

223. *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 53 (1993) (internal citations omitted).

224. Krongard, *supra* note 94, at 140.

225. *Id.* at 140, 156.

226. *Id.* at 140.

227. *Id.* at 141. The U.S. Supreme Court has briefly addressed, and rejected, the argument that civil asset forfeiture implicates the Takings Clause. *Bennis v. Michigan*, 516 U.S. 442, 452 (1996). In *Bennis v. Michigan*, the Court concluded that, because the forfeiture proceeding was not unconstitutional and the government rightfully acquired the property, no compensation was due the owner. *Id.*

228. Krongard, *supra* note 94, at 141.

229. *See, e.g.*, *United States v. \$124,700*, 458 F.3d 822, 826 (8th Cir. 2006).

230. *Id.* (quoting *United States v. \$84,615*, 379 F.3d 496, 501–02 (8th Cir. 2004)).

231. *Id.* at 825–26.

Further, the current standard may discourage property owners from contesting claims. Cases like the Eighth Circuit decision may convince property owners it is too difficult to challenge forfeitures, especially when the government's case can succeed based on nothing more than a property owner's possession of a large sum of cash in a suspicious way.²³² Defendants in civil forfeiture proceedings should never be discouraged from having their day in court in cases where the government's evidence is not particularly strong but is enough to meet a burden of a preponderance of the evidence. Instituting a heightened standard of clear and convincing evidence would address this issue.

In addition, some evidence suggests law enforcement personnel occasionally mislead owners to believe they will have a more difficult time proving their case than they actually will. For example, the FBI informed an owner that, in order to get his money back, he would have to prove he earned it legitimately.²³³ This is not exactly true; the government carries the burden of proof to show the money is connected to illegal activity.²³⁴ Then, an owner can overcome this showing by proving she earned it in legitimate ways. Putting a higher burden on the government to prove its case may discourage law enforcement from disseminating this type of false information. A property owner should never be discouraged from using the procedural process and putting the government to its proof.

C. Abolish Equitable Sharing Arrangements Between Federal Agencies and State and Local Agencies

The practice of equitable sharing between state and federal law enforcement agencies should be prohibited. The federal government should not provide local and state law enforcement agencies with a way of bypassing state laws that reflect the will of the citizenry.

Many state courts that have addressed the issue have ruled in favor of states' rights.²³⁵ Recently, a 2007 New Mexico Court of Appeals decision held that state police officers could not bypass state laws²³⁶ by turning forfeiture cases over

232. *See id.*

233. Balko, *supra* note 9.

234. 18 U.S.C. § 983 (2006).

235. *See, e.g.,* United States v. One 1987 Mercedes Benz Roadster, 2 F.3d 241 (7th Cir. 1993); United States v. One 1979 Chevrolet C-20 Van, 924 F.2d 120 (7th Cir. 1991); Johnson v. Johnson, 849 P.2d 1361 (Alaska 1993); *In re* \$3,166,199, 987 S.W.2d 663 (Ark. 1999); DeSantis v. State, 866 A.2d 143 (Md. 2005); Albin v. Bakas, 160 P.3d 923 (N.M. Ct. App. 2007). *But see* Madewell v. Downs, 68 F.3d 1030 (8th Cir. 1995); United States v. Winston-Salem/Forsyth County Bd. of Educ., 902 F.2d 267 (4th Cir. 1990).

236. New Mexico state laws require the government to criminally convict a property owner before the property can be forfeited. *Albin*, 160 P.3d at 928–29. In addition, any proceeds in excess of the cost of storage and restitution to the victim are required to be deposited in a general fund to be used for drug treatment, prevention, and education. Judy Osburn, *New Mexico Court of Appeals Rules That Police Cannot Use Federal Courts to Bypass State Forfeiture Reforms*, FORFEITURE ENDANGERS AMERICAN RIGHTS FOUNDATION, <http://www.fear.org> (select “What’s New at FEAR?” hyperlink located on left; search for “New Mexico court”) (last visited Apr. 12, 2009).

to the federal government: “Just because the officers subsequently decided to transfer the cash to the federal government for the purpose of bringing a federal forfeiture action did not entitle them to ignore New Mexico law.”²³⁷ Congress would be wise to codify this rationale and save property owners from needlessly bringing challenges against forfeitures that would not have occurred under state law but for the practice of equitable sharing.

The 2009 Criminal Justice Coalition²³⁸ prepared a report that identified several issues and proposed changes to key areas in the arena of criminal justice legislation. The report was prepared for the purpose of “identifying key issues and gathering policy advice into one comprehensive set of recommendations for the new administration and Congress.”²³⁹ In its analysis on the subject of civil asset forfeiture, it recommended amending 21 U.S.C. § 881(e) to “curb abuses of federal and state forfeiture powers.”²⁴⁰ It also recommended that Congress “prohibit or restrict the use of Justice Department funds to forfeit property under the equitable sharing law.”²⁴¹

Equitable sharing should be abolished or, at the least, amended. The federal government should not assist state and local law enforcement in undermining state’s efforts to regulate civil asset forfeiture laws.

D. Prohibit Law Enforcement’s Use of Contracts and Waivers Where Owners Relinquish Property Without any Process

Because forfeiture waivers effectively deprive owners of any process, are made during inherently stressful situations without the benefit of counsel, and invite police trickery, their usage should be specifically outlawed.²⁴² At the least, the practice should be regulated to ensure property owners receive some procedural protections. In any event, it is vital that federal and state legislatures address this issue and protect citizens from deceptive law enforcement practices.

CONCLUSION

While CAFRA was a step in the right direction, it has not solved many of the problems it was intended to address. For civil asset forfeiture programs to run fairly, it is essential that basic due process rights are addressed. Media reports about owners losing their life savings or their primary residences without ever being charged with a crime occur far too frequently. In addition, the rise in the use of tactics such as waivers shows that there are new issues that have arisen since

237. *Albin*, 160 P.3d at 930.

238. The coalition was comprised of twenty-five organizations and individuals who “participated in developing policy recommendations across fifteen broad issue areas. They then vetted those recommendations with a broader group of experts, representing a diversity of philosophies and points of view, to assess the substantive and political viability of each recommendation.” THE 2009 CRIMINAL JUSTICE TRANSITION COAL., *supra* note 172, at i.

239. *Id.*

240. *Id.* at 76.

241. *Id.*

242. See, e.g., *City of Bradenton v. Johnson*, 989 So. 2d 25, 26 (Fla. Dist. Ct. App. 2008).

CAFRA that need legislative attention. While other amendments have been proposed and would surely help to ensure a fair and just system,²⁴³ those explored in this Note will likely go far in achieving a system free of corruption.

243. See, e.g., THE 2009 CRIMINAL JUSTICE TRANSITION COAL., *supra* note 172.
