

DOLLARS FOR COLLARS: CIVIL ASSET FORFEITURE AND THE BREAKDOWN OF CONSTITUTIONAL RIGHTS

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“Property is surely a right of mankind as real as liberty. The moment the idea is admitted into society that property is not as sacred as the laws of God, and that there is not a force of law and public justice to protect it, anarchy and tyranny commence.”¹

ABSTRACT

Civil asset forfeiture is a tool used by local government and police officers to fight against crime and drug use by targeting the offenders’ economic incentives. Ironically though, this tool spawned new financial incentives for law enforcement. The current federal and local regulations, which implement the Civil Asset Forfeiture Reform Act, take advantage of individuals by limiting their rights in proceedings and treating their property as guilty until proven innocent. Some families and individuals who fall victim to these forfeiture laws are losing their homes, money, and assets without ever being charged with a crime. This Note argues that these laws create an inherent conflict of interest, and thus inappropriately over-incentivize police officers and governments to profit from individuals because of the economic gain involved with seizing assets. Officers are more likely to pursue drug users but not dealers because police can confiscate the users’ petty cash to be used to subsidize police budgets and salaries; meanwhile, the dealer’s drugs have to be destroyed. “Policing for profit” puts vulnerable individuals at risk to be victimized by the system, as they are often unable to challenge or meet the procedural requirements of a forfeiture proceeding.² Although civil asset forfeiture laws have been scrutinized and reformed at the federal level, this Note

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1. HENRY HYDE, FORFEITING OUR PROPERTY RIGHTS 20 (1995) (quoting John Adams).

2. See Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War’s Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 47-49 (1998) (labeling the civil asset forfeiture phenomenon as “policing for profit”).

illustrates that further reform is necessary to align the practices with constitutional standards and ideals.³

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3. Scholars have proposed reformation of the Civil Asset Forfeiture Reform Act before. *See, e.g.,* Eric Moores, Note, *Reforming the Civil Asset Forfeiture Reform Act*, 51 ARIZ. L. REV. 777 (2009). This Note, however, will provide an updated perspective following recent cases and government intervention, settlement agreements, and stories of individuals, with an emphasis on the impact of forfeiture on indigent, minority, and burdened individuals, as well as the War on Drugs. *See Alvarez v. Smith*, 558 U.S. 87 (2009); Press Release, Dep't of Justice, Attorney General Prohibits Fed. Agency Adoptions of Assets Seized by State and Local Law Enforcement Agencies Except Where Needed to Protect Public Safety (Jan. 16, 2015), available at <http://www.justice.gov/opa/pr/attorney-general-prohibits-federal-agency-adoptions-assets-seized-state-and-local-law>; Elora Mukherjee, *Settlement Means No More Highway Robbery in Tenaha, Texas*, ACLU (Sept. 2, 11:22 AM), <https://www.aclu.org/blog/criminal-law-reform-racial-justice/settlement-means-no-more-highway-robbery-tenaha-texas>; Sarah Stillman, *Taken*, THE NEW YORKER, Aug. 12, 2013, http://www.newyorker.com/reporting/2013/08/12/130812fa_fact_stillman?currentPage=all.

INTRODUCTION

In West Philadelphia, August 2013, an elderly couple, Mary and Leon Adams, were finishing breakfast when several vans filled with heavily armed police officers pulled up to their red brick home.⁴ An officer announced, “we’ll give you ten minutes to get your things and vacate the property.”⁵ Leon, Sr. was recovering from surgery when he was suddenly startled by the uproar.⁶ “I thought the house was blowing up,” he recalled.⁷ The police “had some sort of big, long club and four guys hit the door with it, and knocked the whole door right down.”⁸ The Adamses were under raid by a team of SWAT officers in riot gear.⁹ The officers surrounding the Adams’ home had been authorized to enter, seize, and seal the premises, without any prior notice.¹⁰ Leon explained the family’s attachment and connection to the home: “1966,” he said, “it’s been our home since 1966.”¹¹

According to the Philadelphia Police Department, the Adams’ son, Leon, Jr., “allegedly sold twenty dollars worth of marijuana to a confidential informant, on the porch of his parents’ home [on July 10, 2012].”¹² Leon, Jr. was staying in the family home to help out after his father suffered a stroke and had been diagnosed with cancer.¹³ After the raid, Leon, Jr. was placed into handcuffs and an officer proclaimed, “apologize to your father for what you’ve done.”¹⁴ Leon, Jr., was taken off to jail, where he remained, awaiting trial.¹⁵

Mary and Leon lived in their home for over fifty years together before police entered without notice and took it right out from under their feet.¹⁶ To afford that home, Leon worked two jobs, in a factory and as a janitor, and Mary worked as a patient care assistant at Bryn Mawr Hospital.¹⁷ In retirement, Mary tended to her marigolds in the

4. Stillman, *supra* note 3.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *See id.*

17. *Id.*

front yard and enjoyed chatting on the porch with her neighbors.¹⁸ A month later, however, the state auctioned off the Adams' home due to the allegations against Leon, Jr.¹⁹ The proceeds were to be split between the District Attorney's office and the police department. It was of no consequence that the Adamses were never charged or implicated in their son's alleged criminal activity, nor was the guilt of Leon, Jr. relevant to the seizure and sale of his parents' home.²⁰ Mr. and Mrs. Adams had their home of over fifty years auctioned off before Leon, Jr. ever stood trial.²¹ Indeed, Mr. and Mrs. Adams had their home of over fifty years seized and auctioned off despite the fact that they had never committed a crime.

Mr. and Mrs. Adams are not alone in this experience. For example, Philadelphia resident Christos Sourvelis had his home seized after his son was arrested for drug possession.²² After being evicted, Mr. and Mrs. Sourvelis were "brought to a hearing without a judge or jury and told by an assistant district attorney that they would have to relinquish any defense that they were innocent owners of the property, and would have to bar [their son] from entering the home" to be permitted to re-enter.²³ Almost exactly a year after SWAT team officials showed up in the Adams' home, the Sourvelis joined a class of similarly situated individuals in a suit against the Philadelphia District Attorney's Office, the Mayor, and the Police Commissioner alleging that the City unconstitutionally seizes property without a hearing and sells homes without due process, all to raise millions of dollars to pay employee salaries.²⁴ Until a court rules otherwise, however, the City is merely acting in accordance with state and federal civil asset

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. See Andrew Thompson, *Class Claims Philadelphia Abuses Forfeiture*, COURTHOUSE NEWS SERVICE (Aug. 12, 2014, 10:55 AM), <http://www.courthousenews.com/2014/08/12/70291.htm>.

23. *Id.*

24. See *id.* As of December 29, 2014, in light of media attention, public backlash, and a precedential court ruling, the District Attorney's Office has agreed to drop the forfeiture proceeding involving Christos Sourvelis. See Chris Mondics, *Appeals Court Restricts Use of Civil Forfeiture to Seize Homes Used by Drug Dealers*, Philly.com (December 29, 2014, 6:39 PM), http://www.philly.com/philly/business/20141230_Appeals_court_restricts_use_of_civil_forfeiture_to_seize_homes_used_by_drug_dealers.html; see also *Pennsylvania v. 1997 Chevrolet*, No. 1990 C.D. 2012 (Pa. Commw. Ct. 2014) (expanding the protections for forfeiture claimants in contested proceedings).

forfeiture laws.²⁵

What happened to these families was made possible by civil asset forfeiture laws and regulation. Although the laws were predicated on combating large and dangerous drug cartels, unfortunately, law enforcement has managed to expand the scope of use beyond what legislators intended.²⁶ Because law enforcement agencies and governments are able to keep funds and profit from seized forfeiture assets, an inherent conflict of interest arises, which allows law enforcement to take advantage of citizens by circumventing the constitutional safeguards prevalent in criminal courts by attacking an individual's property. A problem arises when there is an incentive for law enforcement not only to make drug related stops, but also to keep the proceeds coming in.

At their core, these forfeiture laws create an inherent conflict of interest for police departments at an institutional level. Police officers swear an oath to uphold and enforce the laws as a duty unto itself;²⁷ yet, police departments – and police officers – are all too cognizant of the financial realities and expenses of maintaining and operating a police force.²⁸ More money means more resources, more manpower, and more support. These forfeiture laws authorize financial rewards – financial incentives²⁹ – not to arrest those individuals who subsequently may be proven guilty in a court of law, but instead, to merely make an arrest, regardless of guilt or innocence. Moreover, the incentive – under these laws: the reward for making the arrest – is the property of the person arrested, and the arresting departments are the ones keeping that property. Scholars have termed this practice, “policing for profit.”³⁰

25. See Thompson, *supra* note 22 (“Most states have [civil forfeiture] laws. But [] Philadelphia . . . has used civil asset forfeiture so wantonly and has made reclaiming the property so onerous that it outstrips the value of property seized, the complaint states.”).

26. See Daniel H. Cicchini, Note, *From Urbanization to Globalization: Using the Federal Money Laundering and Civil Asset Forfeiture Statutes in the Twenty-First Century Drug War*, 41 RUTGERS L.J. 741, 753 (2010) (“Finance disruption [by civil asset forfeiture] strikes at the flow of capital between global networks of cartels and drug-traffickers.”).

27. See, e.g., *Law Enforcement Oath of Honor*, VIRGINIA ASSOCIATION OF CHIEFS OF POLICE, http://www.vachiefs.org/index.php/programs/oath_of_honor/ (last visited Sept. 2, 2014).

28. See OFFICE OF CMTY. ORIENTED POLICING SERVS., U.S. DEP'T OF JUSTICE, *THE IMPACT OF THE ECONOMIC DOWNTURN ON AMERICAN POLICE AGENCIES 2* (Oct. 2011), available at http://www.cops.usdoj.gov/files/RIC/Publications/e101113406_Economic%20Impact.pdf.

29. See Blumenson & Nilsen, *supra* note 2, at 40 (“This bureaucratic stake is financial, deriving from the lucrative rewards available to police and prosecutorial agencies that make drug law enforcement their highest priority.”).

30. MARIAN R. WILLIAMS ET AL., INST. FOR JUSTICE, *POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE 7* (March 2010), available at http://www.ij.org/images/pdf_folder/

Part I of this Note describes the history and origin of forfeiture laws in the United States. Part II addresses the problems with the current statutes and regulations. Part III explicates potential solutions to some of the problems presented in Part II.

This Note argues that Congress should further reform the federal statute authorizing civil asset forfeitures, the Civil Asset Forfeiture Reform Act. Congress should (1) expressly preempt conflicting state statutes and local ordinances;³¹ (2) increase the burden of proof on the government and require criminal conviction before permitting asset forfeitures;³² (3) afford all indigent individuals a right to legal counsel;³³ (4) expand the innocent owner defense; and (5) reallocate financial incentives to prevent conflicts of interests.³⁴

I. WHAT IS CIVIL ASSET FORFEITURE?

The United States has recognized the importance of property rights since the Framers drafted the Constitution.³⁵ John Adams once said, “Property is surely a right of mankind as real as liberty. The moment the idea is admitted into society that property is not as sacred as the laws of God, and that there is not a force of law and public justice to protect it, anarchy and tyranny commence.”³⁶ John Locke considered property as significant as “life” and “liberty.”³⁷ To highlight its importance, the Framers embedded this notion into the Fourteenth and Fifth Amendments’ Due Process Clauses—“nor shall any state deprive any person of life, liberty, or property, without due process of law.”³⁸

While the United States has historically emphasized property rights, forfeiture laws can be traced back to biblical times.³⁹ Greek,

other_pubs/assetforfeituretoemail.pdf; see, e.g., Blumenson & Nilsen, *supra* note 2 (titled their work “Policing for Profit”).

31. See *infra* Part III.A.

32. See *infra* Part III.B.

33. See *infra* Part III.C.

34. See *infra* Part III.D.

35. See David Benjamin Ross, *Civil Forfeiture: A Fiction that Offends Due Process*, 13 REGENT U. L. REV. 259, 262–63 (2000) (quoting John Adams).

36. *Id.* at 262.

37. *Id.* at 262–63 (citing POLITICAL WRITINGS OF JOHN LOCKE 264–65, 325 (David Wooton ed., 1993)).

38. *Id.* (citing U.S. CONST. amend. XIV, § 1).

39. See *id.* at 260.

Roman, and early English law utilized various forms of civil asset forfeiture.⁴⁰ The United States Supreme Court traced the biblical origin of forfeiture in *Calero-Toledo v. Pearson Yacht Leasing Co.*, explaining that, “if an ox gore a man or a woman, and they die, [the cow] shall be stoned and [its] flesh shall not be eaten.”⁴¹ In medieval England, objects of property were subjected to punishment of forfeiture if the property had caused the death of a person.⁴²

In America, the earliest cases of civil forfeiture involved *in rem* actions against ships.⁴³ Civil forfeiture is accomplished through an “*in rem* proceeding brought by the government against property that either facilitated a crime or was acquired as a result of criminal activity.”⁴⁴ This type of maritime *in rem* action has its roots in English law.⁴⁵ “Under English law, owners of vessels were often located overseas and ‘thus not subject to the jurisdiction of English courts.’ Styling the action *in rem* enabled England [and the United States] to enforce its admiralty laws against the vessel.”⁴⁶

In 1970, at the forefront of the “War on Drugs,” President Nixon’s administration passed the Comprehensive Abuse Prevention and Control Act, allowing for the forfeiture of drugs and property relating to those drugs.⁴⁷ With a goal of removing economic incentives from heavy hitting drug offenders like Mexican cartels,⁴⁸ the Act officially authorized drug related civil asset forfeiture.⁴⁹ The Comprehensive Crime Control Act further expanded seizure regulations.⁵⁰ More recently, however, under the premise of the “War on Drugs,” federal and state governments have used forfeiture to strip private citizens

40. *See id.*

41. *Id.* (citing *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 681 n.17 (1974) (quoting *Exodus* 21:28)).

42. *Id.*

43. *See id.* at 261.

44. *Diamond v. O’Connor*, 2008 U.S. Dist. LEXIS 60818, at *26 (D. Vt. Aug. 7, 2008) (quoting BLACK’S LAW DICTIONARY 661, 1363 (7th ed. 1999)).

45. *See Ross, supra* note 35 at 261 (“The earliest American cases justifying a civil forfeiture proceeding *in rem* involved actions for the forfeiture of ships The *in rem* posture of the admiralty forfeiture proceeding is another inheritance from English law.”) (quoting Scott A. Nelson, Comment, *The Supreme Court Takes a Weapon from the Drug War Arsenal: New Defenses to Civil Drug Forfeiture*, 26 ST. MARY’S L.J. 157, 163 (1994)).

46. *Id.* (citing 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)).

47. *See* 21 U.S.C. §§ 801, 881 (2012).

48. Cicchini, *supra* note 26, at 752-53.

49. *See* 21 U.S.C. § 801 (2012).

50. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976.

of their property by taking anything and everything proximately related to criminal conduct.⁵¹ Despite legislative intentions, forfeiture laws have targeted low level drug offenders, minority groups, and at risk individuals.⁵²

In the 1990s, an Illinois representative, Henry Hyde, warned Congress, “our civil asset-forfeiture laws are being used in terribly unjust ways.”⁵³ Congressional members saw the need to reform these laws due to the wide sweeping and overarching effects.⁵⁴ In response, Congress passed the Civil Asset Forfeiture Reform Act of 2000 (“CAFRA”) as a way to more fairly carry out President Nixon’s “War on Drugs.”⁵⁵ Before Congress passed CAFRA, “[t]he government . . . [did not] need [to] produce any admissible evidence and [could] deprive citizens of property based on the rankest of hearsay and the flimsiest evidence. This result clearly [did] not reflect the value of private property in our society.”⁵⁶ To address the statute’s weakness, CAFRA amended the process of forfeitures.⁵⁷

CAFRA covers items forfeitable through the Controlled Substances Act.⁵⁸ The Controlled Substances Act authorizes forfeiture for drug-related offenses of “all proceeds traceable to [a drug] exchange, and all money[] . . . negotiable instruments, and securities used or intended to be used to facilitate any [drug related] violation.”⁵⁹ When an officer has probable cause for search and seizure under the Fourth Amendment, the items become subject to forfeiture under these laws.⁶⁰ If the value of the seized property is under \$500,000, it can be administratively forfeited, and the government must give notice of such intentions to the property owner within sixty days.⁶¹ The property owner must file a claim to contest the forfeiture before the date

51. *See id.*

52. *See Forfeiture: Small Victims Suffer*, CHARLESTON GAZETTE (West Virginia), Aug. 16, 2013, at 4A, available at www.wvgazette.com/Opinion/201308150069.

53. *Id.*

54. *See Moores, supra* note 3, at 782 (noting Rep. Hyde’s concern with forfeiture’s effect on due process, economic development in low income areas, and unfairness to innocent owners).

55. *See id.* at 781; *see also* Joy Chatman, *Losing the Battle, but Not the War: The Future Use of Civil Forfeiture by Law Enforcement Agencies After Austin v. United States*, 38 ST. LOUIS U. L.J. 739, 747 (1994).

56. Moores, *supra* note 3, at 783 (citing *United States v. \$12,390.00*, 956 F.2d 801, 811 (8th Cir. 1992)).

57. *See id.*

58. 18 U.S.C. § 981(a)(B)(i) (2012).

59. 21 U.S.C. § 881(a)(6) (2012).

60. 18 U.S.C. § 981(b)(2)(B).

61. *See United States v. Weimer*, No. 01-272-01, 2006 U.S. Dist. LEXIS 8919, at *6 n.1 (E.D. Pa. Mar. 7, 2006) (providing an overview of the forfeiture procedure).

indicated in the notice letter, or within thirty days of publication if the letter is never received.⁶² After filing to contest the forfeiture, “the government has ninety days under § 983(a)(3) to file a civil judicial action.”⁶³ If the designated time period lapses, however, the seized property is automatically forfeited to the government.⁶⁴ If the individual does not contest the forfeiture, he or she “loses all recourse for judicial review of the administrative proceeding’s merits.”⁶⁵

When the claimant does bring a civil claim, CAFRA raises the initial standard of proof on the government in a forfeiture hearing to a preponderance of the evidence.⁶⁶ The claimant, however, does not have the presumption of innocence, because forfeiture proceedings are a civil issue.⁶⁷ Due to a burden-shifting framework, the burden is then placed on the claimant to prove a negative.⁶⁸ The claimant must show that he or she and the property are not linked to a crime.⁶⁹ Additionally, CAFRA added the possibility of an innocent owner defense in some scenarios.⁷⁰ CAFRA also provided for court-appointed counsel, but only for those who have had their homes seized.⁷¹

Despite amendments to CAFRA, civil asset forfeiture laws still create a conflict of interest brought on by financial incentive for police officers to profit from law enforcement.⁷² Officers can seize property, cars, cash, jewelry, and bank accounts, all without the owner ever being charged with a crime.⁷³ The proceeds of these seizures can fund

62. *See id.*

63. *Id.*

64. *Id.*

65. *Id.* (quoting *Longenette v. Krusing*, 322 F.3d 758, 761 n.4 (3d Cir. 2003)).

66. *See Moores*, *supra* note 3, at 782–83.

67. *See* Karis Ann-Yu Chi, *Follow the Money: Getting to the Root of the Problem with Civil Asset Forfeiture in California*, 90 CALIF. L. REV. 1635, 1636 (2002) (explaining claimants’ limited procedural rights in forfeiture proceedings given that the proceeding is characterized as a government action against the property and not the property owner; also noting that the property owner does not have the presumption of innocence and may not always be appointed counsel).

68. *Id.*

69. *See id.* (“[The property owner] may bear the burden of proving that the seized property is not connected to criminal activities.”).

70. *Id.*

71. *See id.* at 1656, 1641; Louis S. Rulli, *On the Road to Civil Gideon: Five Lessons from the Enactment of a Right to Counsel for Indigent Homeowners in Federal Civil Forfeiture Proceedings*, 19 J.L. & POL’Y 683, 710–11 (2011).

72. *See* Blumenson & Nilsen, *supra* note 2, at 40 (“This bureaucratic stake is financial, deriving from the lucrative rewards available to police and prosecutorial agencies that make drug law enforcement their highest priority.”).

73. *Id.* at 45.

police departments' budgets and salaries.⁷⁴ This creates a dangerous catch-22 scenario: "choose a free country or a drug free one, but not both."⁷⁵

In 2009, the United States Supreme Court had the chance to address civil forfeiture in *Alvarez v. Smith*.⁷⁶ Without addressing the merits of the case, the Court unanimously held that the case was moot because the parties had settled outside the courtroom.⁷⁷ The case involved property seized from an automobile without a warrant and the question of whether Illinois' forfeiture law provided a sufficiently speedy opportunity to contest the lawfulness of seizure under the Due Process Clause.⁷⁸ Because the federal forfeiture statute authorized the state law, a ruling on the merits could have addressed the constitutionality of the burdens and the pre- and post-seizure requirements of the federal statute.⁷⁹ With incredible financial incentives and kick-backs going toward governments and police forces, though, the Court's decision suggests that the judiciary is not yet ready to address forfeiture.⁸⁰ Because of the financial incentives at stake for government and law enforcement, pressure from federal and state governments may have contributed to the Court's hesitation to rule on the merits.⁸¹

CAFRA has served as a bulwark to protect the rights and interests

74. See *id.* at 40. Congress conferred these financial benefits to state and local law enforcement both directly, through block grants earmarked for drug law enforcement, and indirectly, through forfeiture provisions authorizing law enforcement agencies to seize "drug-related" assets, such as a house in which marijuana plants have been grown, and use the proceeds for their budgetary needs. *Id.* See also 1 DAVID B. SMITH, PROSECUTION AND DEFENSE OF FORFEITURE CASES ¶ 1.01 (2014) (citing a Dallas news story in which "[m]ost of the salaries of the [North Central Texas Narcotics Police Force] are paid with federal grants which require that a portion of the task force's budget be paid by the local agencies.").

75. Robert Sharpe & Kirk Muse, *Choose a Free Country or a Drug-Free One, but Not Both*, SUN-SENTINEL (Fort Lauderdale, Fla.), Oct. 27, 2013, at 20A, available at http://articles.sun-sentinel.com/2013-10-27/news/fl-online-letter1-20131027_1_free-country-drug-war-random-drug-testing.

76. 558 U.S. 87, 87 (2009).

77. *Id.* at 89.

78. *Id.*

79. *Id.*

80. See Blumenson & Nilsen, *supra* note 2, at 40 (explaining how "law enforcement agencies increasingly have turned to asset seizures and drug enforcement grants to compensate for budgetary shortfalls, at the expense of other criminal justice goals").

81. See, e.g., Brief for the State of Illinois et al. as Amici Curiae in Support of Petitioner, *Alvarez v. Smith*, 558 U.S. 87 (2009) (No. 08-351), 2009 U.S. S. Ct. Briefs LEXIS 397 at *54 (citing civil asset forfeiture statutes from forty seven states on behalf of twenty states arguing for the validation of Illinois' forfeiture statute).

of citizens at the federal level,⁸² but CAFRA did not solve all of the issues surrounding forfeiture laws. Problems still arise at both the state and federal levels. First, operating under their own sovereignty and police powers, states have created their own legislation and regulations regarding asset forfeiture, some of which fail to provide procedural safeguards implemented by CAFRA.⁸³ Second, the burden of proof related to forfeiture laws is still much too low.⁸⁴ Third, individuals subject to forfeiture laws, especially those who are indigent, face procedural and substantive barriers to the release of their property.⁸⁵ Finally, as stated above, the danger of law enforcement's financial stake and incentivized interest in forfeiture creates a conflict of interest.⁸⁶

II. THE CURRENT STATE OF CIVIL ASSET FORFEITURE

CAFRA still has much room for improvement. Legislators could revise the statute to address preemption, burdens, barriers to release of property, and law enforcement's incentivized interest in forfeiture.

A. Lack of Federal Preemption of Conflicting State and Local Ordinances

Although CAFRA, the federal act, did much to remedy the injustices of civil forfeiture laws, the law does not entirely bind individual

82. See Moores, *supra* note 3, at 783 ("CAFRA was a step in the right direction towards a civil asset forfeiture system that respects property rights and due process.").

83. See *infra* Part II.A.

84. See *infra* Part II.B.

85. See *infra* Part II.C. See also Chi, *supra* note 67, at 1636 (explaining that claimants have limited procedural rights in forfeiture proceedings given that the proceeding is characterized as a government action against the property and not the property owner; also noting that the property owner does not have the presumption of innocence and may not always be appointed counsel).

86. See *infra* Part II.D. See also Blumenson & Nilsen, *supra* note 2, at 40 (explaining how "law enforcement agencies increasingly have turned to asset seizures and drug enforcement grants to compensate for budgetary shortfalls, at the expense of other criminal justice goals"), see also Brant C. Hadaway, Comment, *Executive Privateers: A Discussion on Why the Civil Asset Forfeiture Reform Act Will Not Significantly Reform the Practice of Forfeiture*, 55 U. MIAMI L. REV. 81, 81-84 (2002) (describing incidents in which victims were shot and killed in forfeiture raids that turned up empty handed).

states.⁸⁷ States still retain individual powers guaranteed by the United States' system of federalism, which recognizes state sovereignty.⁸⁸ Therefore, although state law must not conflict with federal law in areas where the federal government has express powers to regulate, states can still have leeway to vary their laws without being preempted by the Supremacy Clause.⁸⁹ This is true even in the case of local ordinances dealing with forfeiture.⁹⁰ Many state forfeiture laws allow cities to create their own ordinances.⁹¹ For example, in *Horton v. City of Oakland*, the city of Oakland, California was allowed to create an ordinance permitting local police officers to seize cars involved in prostitution or the acquisition of drugs.⁹² The procedural require-

87. See, e.g., David Pimentel, *Forfeitures Revisited: Bringing Principle to Practice in Federal Court*, 13 NEV. L.J. 1, 23 n.143 (2012) (referring to *Bennis v. Michigan*, 516 U.S. 442, 443 (1996), where the Court held that the innocent owner defense was not available to Mrs. Bennis because she forfeited her car as a result of her husband's criminal activity under state law).

88. See *id.* For a definition and discussion of federalism, also see CORNELL UNIV. LAW SCH. LEGAL INFO. INST., *Federalism*, <http://www.law.cornell.edu/wex/federalism> (last visited Sept. 7, 2014).

The U.S. Constitution grants the federal government with power over issues of national concern, while the state governments, generally, have jurisdiction over issues of domestic concern. While the federal government can enact laws governing the entire country, its powers are enumerated, or limited; it only has the specific powers allotted to it in the Constitution. . . . For example, the federal government can regulate interstate commerce pursuant to the Commerce Clause of the Constitution but has no power to regulate commerce that occurs only within a single state. . . . In contrast, state power is not limited to express grants of power. Under the Tenth Amendment of the Constitution, States have all powers that are not specifically granted to the federal government, or forbidden to them under the Constitution. For example, although the Constitution grants the federal government the power to tax, state governments are also able to levy taxes to support themselves, because that power is not forbidden to them by the Constitution. State governments manage matters of local concern, such as child protective services, public schools, and road maintenance and repair.

Id.

89. *United States v. Wagoner Cnty. Real Estate*, 278 F.3d 1091, 1096 (10th Cir. 2002) (citing 21 U.S.C. § 903) (“[F]ederal forfeiture law should not be ‘construed as indicating an intent on the part of Congress to occupy the field in which that provision operates, . . . unless there is a positive conflict’ between federal and state law.”).

90. See, e.g., *Chi*, *supra* note 67, at 1659 (describing the conflicting local and state law issue in *Horton v. City of Oakland*, 98 Cal. Rptr. 2d 371 (Cal. Ct. App. 2000), *abrogated by O’Connell v. City of Stockton*, 162 P.3d 583 (2007)).

91. See, e.g., *id.*

92. 98 Cal. Rptr. 2d at 372 (Cal. Ct. App. 2000).

ments of Oakland's seizure law were far less rigid than state or federal law.⁹³ The appellate court found that the law was not preempted in that it did not directly conflict with state law, which in turn was not preempted by federal law.⁹⁴

Furthermore, for the time being, states can create forfeiture laws that afford less protection than the federal regulations.⁹⁵ For example, some states have made use of claim waivers in order to prevent forfeiture hearings.⁹⁶ Claim waivers are used to prevent individuals from challenging their forfeitures. At a point of interdiction, an officer may give an individual the option to sign a claim waiver, agreeing that he or she will not bring any action regarding the situation to court, and in return, the officer will not press charges or will release the individual.⁹⁷ Federal law may preempt the use of claim waivers, but again, the Supreme Court has yet to address this issue on the merits.⁹⁸

As an example, in 2005, Javier Gonzalez drove from Austin to Brownsville, Texas with \$10,032 in cash to buy a gravestone for his recently deceased aunt.⁹⁹ He was pulled over ninety miles north of the Mexican border for driving without a front license plate.¹⁰⁰ The deputies searched the car because Gonzalez and his passenger seemed "nervous" and they received a positive signal from their drug-sniffing canine.¹⁰¹ When the deputies asked Gonzalez to explain the origin of the \$10,000, the officers did not believe Gonzalez when

93. See Chi, *supra* note 67, at 1658–59 (citing *Horton*, 98 Cal. Rptr. 2d at 375 nn.8–9 (contrasting the procedural requirements of forfeiture under state law and under the Oakland ordinance)).

94. See *Horton*, 98 Cal. Rptr. 2d at 372–76.

95. See Joel A. Beck, Comment, *The Per Se Rule of Civil Forfeiture of Money Found in "Close Proximity" to Controlled Substances*, 37 IDAHO L. REV. 641, 650 (2001) (describing Idaho's conflicting, yet unchallenged, forfeiture law). *But see* *United States v. Wagoner Cnty. Real Estate*, 278 F.3d 1091, 1096–97 (10th Cir. 2002) (holding that Oklahoma state homestead exemption was preempted by the federal Drug Abuse and Control Act).

96. See Mukherjee, *supra* note 3; Stillman, *supra* note 3 (explaining that the City of Tenaha used claim waivers to keep victims from challenging their forfeitures in court). A case against the city was certified as a class action but settled before it was heard on the merits, so the Supreme Court set no new precedent. *Id.*

97. See Moores, *supra* note 3, at 793.

98. See, e.g., *Alvarez v. Smith*, 558 U.S. 87 (2009). See also Mukherjee, *supra* note 3.

99. See John Burnett, *Cash Seizures by Police Prompt Court Fights*, second installment of *Dirty Money: Asset Seizures and Forfeitures*, NPR (June 16, 2008), <http://www.npr.org/templates/story/story.php?storyId=91555835> (recounting the story of Javier Gonzalez who was profiled and subject to forfeiture as a minority having a large amount of cash on him in order to buy a gravestone for his deceased aunt).

100. *Id.*

101. *Id.*

he told them that he was a business owner.¹⁰² After searching the car, however, the deputies found no drugs in the vehicle or on either passenger.¹⁰³ In fact, the deputies could not link Gonzalez to any criminal activity, but his cash was still subject to forfeiture because the deputies had probable cause to search the car and take the cash in the first place.¹⁰⁴ The officers told Gonzalez he had two options: sign a waiver to relinquish his funds, or be arrested for money laundering despite the lack of present evidence.¹⁰⁵ Gonzalez signed the waiver to relinquish his rights to his money.¹⁰⁶

Unlike most individuals subject to forfeiture, Gonzalez was one of the 20% of people who decided to fight the forfeiture and the claim waiver.¹⁰⁷ He hired an attorney, filed a lawsuit to challenge the waiver, and the county returned his cash.¹⁰⁸ Unfortunately, 80% of forfeiture victims do not have the money, time, resources, or energy to challenge claim waivers or forfeitures.¹⁰⁹ Eighty percent of the time, law enforcement agents walk away with the cash, regardless of whether the forfeiture is valid.¹¹⁰

B. The Inconsistent and Disadvantageous Burden of Proof in Forfeiture Proceedings

In a forfeiture hearing, the government must show probable cause for forfeiture by a preponderance of the evidence.¹¹¹ However, the government does not need a warrant to seize the property, and it is allowed to use after-acquired evidence, gathered after the filing of the

102. *Id.*

103. *Id.*

104. *See id.* (Officer Escamilla says, "If you can't prove that it's been a criminal activity, reasonably suspicious, probable cause, you don't want to take it, 'cause it'll look bad in court.' And that's what happened in the case of Javier Gonzalez — it looked bad in court."); Jan Reid, *Highway Robbery*, TEXAS OBSERVER, May 16, 2008, <http://www.texasobserver.org/2760-highway-robbery/> ("Javier says that after he was served with this affidavit, one of the officers warned he was going to be charged with felonies including money laundering and possession of contraband, and that his employer's car would be confiscated as well, if Javier did not sign an 'agreed judgment' that forfeited all his rights to the \$10,032.").

105. *Id.*

106. *Id.*

107. *See id.*; Pimentel, *supra* note 87, at 8 n.176 ("[S]ince CAFRA, 80% of forfeitures in DEA drug cases were uncontested, and other seizing agencies were reporting similar figures.").

108. Burnett, *supra* note 99.

109. *See* Pimentel, *supra* note 87, at 8 n.176.

110. *See id.*

111. 18 U.S.C. § 983(c)(1) (2012).

complaint in the hearing, to meet its burden.¹¹² That means it can take first and build a case later, at which point an individual may decide it is not worth it to challenge the claim for financial, emotional, or any number of other reasons.

During its case in chief for a challenged forfeiture, the government is not required to demonstrate a *direct* connection between the property and the illegal activity, just a *substantial* connection.¹¹³ CAFRA requires only that “[i]f the government’s theory of forfeiture is that the property was used to commit or facilitate the commission of a criminal offense, or was involved in the commission of a criminal offense, the government shall establish that there was a ‘substantial connection’ between the property and the offense.”¹¹⁴ However, a substantial connection is not the same as a direct connection.¹¹⁵ A direct connection is a higher burden to meet, because there must actually be a direct link or nexus between the property and the criminal activity.¹¹⁶ A substantial connection means only that the property is somehow involved in the crime.¹¹⁷ For example, if “John” drove his friend “Mark” to a party where Mark then distributed illegal substances, John’s car is substantially related to the distribution crime because it helped to facilitate the illegal activity.¹¹⁸ However, given the same scenario, John’s car would probably not be subject to forfeiture under the direct connection standard because Mark did not directly use the car to carry out his crime.

112. Barbara J. Van Arsdale, *Validity, Construction, and Application of Civil Asset Forfeiture Reform Act of 2000 (CAFRA)*, 195 A.L.R. FED. 349 (2004) (citing 18 U.S.C. § 983(c)(2)). Note also that the seizure elements and procedures of forfeiture raise serious Fourth Amendment issues. These issues will not be addressed in this Note.

113. See *United States v. One 1998 Tractor*, 288 F. Supp. 2d 710, 714 (W.D. Va. 2003) (“The government failed to establish a substantial connection between the trailer and the offense, as required by CAFRA, and the trailer is not subject to forfeiture.”).

114. Van Arsdale, *supra* note 112.

115. See *One 1998 Tractor*, 288 F. Supp. 2d at 713 (describing the substantial connection test).

116. See Robert Hayes, Case Note, *Enough is Enough: The Law Court’s Decision to Functionally Raise the “Reasonable Connection” Relevancy Standard in State v. Mitchell*, 63 ME. L. REV. 532, 537 (2011) (describing a parallel direct connection doctrine used for admissibility of evidence and explaining that to find a direct connection, one should “look to the strength of the nexus between the proffered evidence and the guilt of the third party for the crime charged”) (quoting Stephen Michael Everhart, *Putting a Burden of Production on the Defendant Before Admitting Evidence that Someone Else Committed the Crime Charged: Is It Constitutional?*, 76 NEB. L. REV. 272, 279 (1997)).

117. Van Arsdale, *supra* note 112 (“The court in *U.S. v. One 1998 Tractor*, 288 F. Supp. 2d 710 (W.D. Va. 2003), held that the use of property as a situs for conducting illegal activities establishes a ‘substantial connection’ between the property and the underlying criminal activity, so as to support forfeiture of the property under CAFRA, 18 U.S.C. § 983(c).”).

118. “John” and “Mark” are fictional characters used to explicate a hypothetical scenario.

Some states place an even lower burden on the government to prove a connection between the property and illegal activity.¹¹⁹ For example, Idaho requires showing a mere “close proximity” between property and the illegal activity.¹²⁰ Satisfying the “close proximity” test can be enough to prove that there is a connection between the property and the illegal activity.¹²¹ Idaho’s statute is even more lax regarding the government’s burden of proof than CAFRA is in allowing the State to prove an item’s connection to controlled substances by showing its proximity to controlled substances, without showing an actual connection to the substances.¹²² The government must only show that the property and crime are in proximity, even if there is no other connection.¹²³

To illustrate how this law affects some people, consider an international student travelling across state lines.¹²⁴ International students living in the United States are not provided a social security number, and therefore, many cannot open a bank account or credit card in the United States.¹²⁵ Therefore, they carry cash; often, they carry a large amount of cash because they cannot charge anything to a credit card. If a student in this situation were to travel to see a friend or relative in another state, he or she would most likely carry several hundred dollars—or more—of cash with them, depending on how long he or she was staying. If this student got pulled over for a routine traffic stop, a large amount of cash would give the officer probable cause to seize the cash for fear of money laundering, especially if this student

119. See, e.g., Beck, *supra* note 95, at 648 (describing Idaho’s conflicting, yet unchallenged, forfeiture law setting a mere close proximity standard for relation to criminal activity).

120. IDAHO CODE ANN. § 37-2744(a)(6) (2014).

121. See Beck, *supra* note 95, at 648.

122. See *id.*

123. See *id.* at 649 (“[T]he provision is a vast extension of the scope of forfeiture as it read prior to amendment, since all money found within a physical distance is now forfeitable.”).

124. Many thanks to Dr. Donald Tibbs for his insight regarding this hypothetical and the far-reaching effects of civil asset forfeiture.

125. Bank of America is one of the only banks in the United States that allows students to open an account without a social security number. See Alex Missick, *College Connect: How to Open a Bank Account in the U.S.*, SOC’Y OF AM. BUS. EDITORS & WRITERS, <http://www.sabew.org/2011/05/how-to-open-a-bank-account-in-the-u-s/> (last visited Sept. 7, 2014). If there is no Bank of America available to the student, it will be hard for the student to have funds on credit in the United States. *Id.* An individual might be able to use an Individual Taxpayer Identification Number (ITIN) to open a bank account, as well, but if the student is only visiting, he or she may choose not to apply for one of these numbers. *Immigration and Financial Matters*, CAPITAL ONE, <http://www.capitalone.com/financial-education/life-events/immigration/> (last visited Sept. 7, 2014).

is a minority.¹²⁶ The officer has to have probable cause to take the money, but he does not need a warrant.¹²⁷ Because the officer knows his department gets to keep the money, it is possible that his judgment may be impaired by the inherent conflict of interest. Moreover, it is unlikely that an international student with limited resources, and limited cash, is going to challenge this forfeiture. Therefore, the government may not need to defend its actions by building a case of proximate relation after the fact.

C. Due Process and Equal Protection Concerns

Representative Deborah Pryce of Ohio recognized that “civil asset forfeiture laws, at their core, deny basic due process, and the American people have reason to be both offended and concerned by the abuse . . . which happens sometimes under these laws.”¹²⁸ Forfeiture victims are at risk of losing their property. The Fifth Amendment “guarantees procedural protections for individuals who are deprived of property whether or not they were charged with a crime.”¹²⁹ Courts use three factors when conducting a civil due process analysis.¹³⁰ When determining if there has been a violation of due process, courts balance: (1) the private interest and “degree of potential deprivation that may be created,” (2) procedural safeguards, and (3) the public’s interest, which includes that of the government.¹³¹ Forfeiture laws (1) create a high “degree of potential deprivation,” (2) lack procedural safeguards, and (3) greatly concern both the public and the government’s interests.¹³² Yet, these laws disadvantage certain groups more than others.¹³³

126. See Burnett, *supra* note 99 (recounting the story of Javier Gonzalez who was profiled and subjected to forfeiture because he was a minority individual having a large amount of cash on him in order to buy a gravestone for his deceased aunt).

127. See 18 U.S.C. § 981(b)(2)(B) (2012).

128. 145 CONG. REC. H4851-01 (daily ed. June 24, 1999) (statement of Rep. Pryce).

129. Mary Murphy, Note, *Race and Civil Asset Forfeiture: A Disparate Impact Hypothesis*, 16 TEX. J. C.L. & C.R. 77, 88 (2010) (referencing U.S. CONST. amend. V (“No person shall be held to answer for a capital, or otherwise infamous crime . . . nor be deprived of life, liberty, or property, without due process of law . . . ”)).

130. See *Mathews v. Eldridge*, 424 U.S. 319, 341–48 (1976).

131. *Id.*

132. See *id.* (applying the *Mathews v. Eldridge* balancing factors).

133. See *Forfeiture: Small Victims Suffer*, *supra* note 52, at A4; Murphy, *supra* note 129, at 86–89 (exploring social science literature regarding racial profiling and hypotheses regarding why civil asset forfeiture has a disparate impact on racial minorities).

1. Disparate impact theory in the realm of civil forfeiture

Scholars accept that race is an important factor within policing and law enforcement.¹³⁴ This is evidenced by anecdotal evidence of discrimination and profiling in the headlines around the country.¹³⁵ Furthermore, studies have shown that highway officers stop minority drivers much more often than white drivers.¹³⁶ Despite a higher rate of interdiction, though, studies indicate that in many states, when interdicted, officers actually seize contraband at a lower percentage for Black and Latino drivers than for Caucasian drivers.¹³⁷ These findings suggest “a pervasive pattern . . . in which minority motorists and their vehicles are searched more often than Caucasians, even though they are less likely than Caucasians to be found in possession of illegal contraband.”¹³⁸ However, minority groups still face the greater risk of search and seizure.¹³⁹

Not only is race a factor in interdiction, but age and class also play a role.¹⁴⁰ Younger and poorer individuals are at a higher risk of being stopped by an officer.¹⁴¹ Young and poor minority groups often lack resources.¹⁴² Therefore, the same groups facing a higher rate of interdiction are also more likely to be indigent, and they may have a

134. See Murphy, *supra* note 129, at 79 (“The anecdotal evidence from Tenaha is informed by a great deal of literature concerning the importance of race in other areas of law enforcement.”).

135. See, e.g., *id.* (describing the Tenaha case in which groups of minorities were interdicted and subject to forfeiture); *Arizona’s SB 1070*, ACLU, <https://www.aclu.org/arizonas-sb-1070> (last visited Sept. 7, 2014) (describing Arizona’s hotly debated anti-immigrant law); *Stop and Frisk Campaign: About the Issue*, NYCLU, <http://www.nyclu.org/issues/racial-justice/stop-and-frisk-practices> (last visited Sept. 7, 2014) (explaining racial profiling in stop and frisk cases).

136. Samuel R. Gross & Katherine Y. Barnes, *Road Work: Racial Profiling and Drug Interdiction on the Highway*, 101 MICH. L. REV. 651, 660 (2002) (referring to a study of highway stops along the I-95 corridor).

137. See Robin S. Engel & Richard Johnson, *Toward a Better Understanding of Racial and Ethnic Disparities in Search and Seizure Rates*, J. CRIM. JUST., Nov.–Dec. 2006, at 605, 608.

138. *Id.*

139. See *id.*

140. See Brandon Garrett, *Standing While Black: Distinguishing Lyons in Racial Profiling Cases*, 100 COLUM. L. REV. 1815, 1833–34 (2000) (pointing out that many stops involve compounding factors of race, youth, and low financial status).

141. *Id.* (“The equal protection harm is further compounded by the fact that most of these stops single out young, teenage men in discrete, usually poor, neighborhoods.”).

142. See Stephanie Kodish, *Balancing Representation: Special Representation Mechanisms Addressing the Imbalance of Marginalized Voices in African Legislatures*, 30 SUFFOLK TRANSNAT’L L. REV. 1, 20–21 (explaining that marginalized minority groups can be characterized by low literacy and lack of skills and a lack of resources, among other things).

harder time navigating the justice system.¹⁴³ This creates an even greater risk that certain underprivileged groups will experience due process violations because it is more likely they will be unable to provide themselves with an adequate defense or that they will suffer due to the extent of their inability to pay for representation.¹⁴⁴

2. Access to counsel for indigent claimants

Despite the state and federal attempts to safeguard individuals from unjust laws and proceedings, forfeiture claimants still have limited procedural rights and defenses throughout the process.¹⁴⁵ For example, because the person affected is not named in the suit, he or she is not guaranteed counsel.¹⁴⁶ Forfeiture proceedings are characterized as the government versus the property at issue, rather than the individual; therefore, the interested party has limited procedural rights.¹⁴⁷ This can place a substantial burden on indigent individuals who are not guaranteed counsel in a forfeiture proceeding.¹⁴⁸

CAFRA requires appointment of counsel to indigent individuals who have had their homes seized, but it does not guarantee that this will be the case for indigent people who lose their cars, money, jewelry, or other forms of property.¹⁴⁹ Those individuals are forced to make a decision; they are forced to ask themselves whether it is worthwhile to spend hundreds on an attorney to get back the \$250.00 that was taken from them while riding in a car with someone who had marijuana on them, or forego the funds altogether.¹⁵⁰

143. See *Forfeiture: Small Victims Suffer*, *supra* note 52, at A4; see also Murphy, *supra* note 129, at 91 (exploring social science literature regarding racial profiling and hypotheses on why civil asset forfeiture has a disparate impact on racial minorities).

144. See *Forfeiture: Small Victims Suffer*, *supra* note 52, at A4; see also Murphy, *supra* note 129, at 96 (“Racial minorities may have more difficulty effectively petitioning for their property after it has been seized by highway police officers because they may be less likely than whites to have access to defense attorneys.”).

145. See Murphy, *supra* note 129, at 87–88; Chi, *supra* note 67, at 1636 (explaining claimants’ limited procedural rights in forfeiture proceedings given that the proceeding is characterized as a government action against the property and not the property owner; also noting that the property owner does not have the presumption of innocence and may not always be appointed counsel).

146. Chi, *supra* note 67, at 1636.

147. *Id.*

148. See 18 U.S.C. § 983(b)(2) (2012) (CAFRA requires appointment of counsel only for those who have their residences seized).

149. See *id.*

150. See Beck, *supra* note 95, at 643 (describing hypothetical scenario of two men subject to Idaho’s forfeiture provision).

This is also an issue when the funds required to hire an attorney are the same funds seized in the forfeiture.¹⁵¹ The United States Court of Appeals denied a claimant's motion to release funds in a forfeiture action finding that although the claimant asserted that he needed funds to retain an attorney in the criminal case associated with the forfeited funds, the government satisfied its burden of showing probable cause to believe that property was subject to forfeiture.¹⁵²

In the Ninth Circuit, the court held that "no Sixth Amendment right to counsel attached in [the] case because imprisonment is not authorized by any of the civil forfeiture statutes invoked."¹⁵³ Although the proceeding has a criminal feel, and the claimant is faced with showing his or her innocence, the hearing is civil, making the Sixth Amendment inapplicable. For claimants who do choose to proceed *pro se*, without an attorney, it may be difficult as a layperson to meet the procedural requirements to challenge the forfeiture, especially for the targeted group of underprivileged individuals most susceptible to interdiction.¹⁵⁴

Once the property is seized, property owners have [thirty to sixty] days to hire an attorney, post a cost bond amounting to the lesser of \$5,000 or ten percent of the item's value, and file a claim contesting the forfeiture. If an owner does not comply with these procedural hurdles, the action ends in a default for the government. Under the current procedure, eight out of every ten forfeitures are uncontested.¹⁵⁵

It is no surprise that so many forfeitures go uncontested when the layperson targeted by interdiction must meet such specific procedural requirements.¹⁵⁶ Although this number might suggest that law enforcement is "correct" 80% of the time, Roger Pilon, Vice President for Legal Affairs at the Cato Institute, addressed this argument when speaking in front of the United States Senate on civil forfeiture reform. Pilon noted:

151. *See, e.g.*, *United States v. Melrose E. Subdivision*, 357 F.3d 493 (5th Cir. 2004) (noting that claimant was denied motion to release forfeited funds needed to hire an attorney).

152. *Id.* at 507-08.

153. *United States v. \$292,888.04 in U.S. Currency*, 54 F.3d 564, 569 (9th Cir. 1995).

154. *See* *Murphy*, *supra* note 129, at 96 ("Racial minorities may have more difficulty effectively petitioning for their property after it has been seized by highway police officers because they may be less likely than whites to have access to defense attorneys.").

155. *See* *Ross*, *supra* note 35, at 265.

156. *See id.* (describing the procedural requirements of contesting forfeiture).

[O]nce the owner contests the seizure the government can respond with an outright indictment. In some ways, of course, the owner would be better off under those circumstances: the burden of proof would be on the government; the standard of proof would be beyond a reasonable doubt; and forfeiture, where it is included as a count in the indictment, would follow only upon conviction. But who wants to face a criminal indictment and trial just to get his property back? At the same time, who wants to go through a civil action either, against the government, just to get his property back, especially at the risk of ultimately being indicted? Faced with that dilemma, is it any wonder that owners often simply walk away from their loss when the government seizes their property? Is that the kind of dilemma we want to put often innocent citizens in?¹⁵⁷

3. *Innocent owner defense*

The burden-shifting framework of CAFRA allows the claimant to make an innocent owner defense to forfeiture.¹⁵⁸ This defense, however, is an uphill battle. After the government's case in chief, the burden shifts to the defendant to prove, by a preponderance of the evidence, that he or she and the property are not linked to a crime.¹⁵⁹ This is similar to the difficult burden of challenging a conviction by making a claim of innocence, or lack of involvement in a crime.¹⁶⁰ However, courts do not place this type of burden on a criminal defendant at trial.¹⁶¹ For the criminal defendant, there is a presumption

157. *Oversight of Federal Asset Forfeiture: Its Role in Fighting Crime: Testimony before the Subcomm. on Criminal Justice Oversight, on the S. Comm. on the Judiciary* (July 21, 1999) (statement of Roger Pilon, Vice President for Legal Affairs at the Cato Institute), available at <http://www.cato.org/publications/congressional-testimony/oversight-federal-asset-forfeiture-its-role-fighting-crime>.

158. See 18 U.S.C. § 983(d)(2)(A) (2012) (explicating the innocent owner defense).

159. See *id.* § 983(d)(1).

160. See Keith A. Findley, *Defining Innocence*, 74 ALB. L. REV. 1157, 1161 (2010) (arguing that claims of innocence in non-DNA cases are inherently difficult and ambiguous because of the need to prove a negative).

161. See *In re Winship*, 397 U.S. 358, 362–63 (1970) (finding that the government must prove its case beyond a reasonable doubt in criminal cases). The exception is when the criminal defendant offers an affirmative defense to the court. See *Medina v. California*, 505 U.S. 437 (1992) (holding that petitioner had the burden to establish the defense of incompetence and that burden did not offend his rights under the Due Process Clause).

of innocence,¹⁶² and therefore, the government must prove the criminality beyond a reasonable doubt.¹⁶³

The civil forfeiture claimant is in the same position in many respects as a criminal defendant, but is required to prove innocence—that is, to prove a negative—in that he must prove the absence of his connection to a crime to win his proceeding.¹⁶⁴ Civil forfeiture's burden-shifting framework directly defies our justice system's presumption of innocence that places the burden of proof on the government.¹⁶⁵ However, the civil forfeiture claimant does have the option of an innocent owner defense under federal law, if the claimant can prove so by a preponderance of the evidence.¹⁶⁶ To use the defense, though, an innocent owner must have done everything in his or her power to affirmatively stop the alleged crime from occurring.¹⁶⁷ This puts parents and loved ones in a very hard position: call the cops and

162. *Taylor v. Kentucky*, 436 U.S. 478, 483 (1978) (quoting *Coffin v. United States*, 156 U.S. 432, 453 (1895)) (“The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.”).

163. *Winship*, 397 U.S. at 362 (citing *Leland v. Oregon*, 343 U.S. 790, 802–03 (1952) (Frankfurter, J., dissenting)).

Mr. Justice Frankfurter stated that ‘it is the duty of the Government to establish . . . guilt beyond a reasonable doubt. This notion—basic in our law and rightly one of the boasts of a free society—is a requirement and a safeguard of due process of law in the historic, procedural content of ‘due process.’”

Id.

164. *See* 18 U.S.C. § 983(d)(2)(A) (explicating the innocent owner defense).

165. *See generally* Shima Baradaran, *Restoring the Presumption of Innocence*, 72 OHIO ST. L.J. 723, 727–28 (describing the historical notions of the presumption of innocence in American criminal law).

Historically, in the United States, the presumption of innocence and due process required a legal determination at trial to punish a defendant for a crime. Due process demanded that a person maintain liberty and not be imprisoned or punished without appropriate legal action. In addition, the presumption of innocence, a fundamental principle of American criminal law, presumed bail for all noncapital cases. Also, since the primary purpose of bail was to ensure a defendant's presence at trial, the presumption of innocence did not allow judges to detain defendants because they were likely to commit a crime while released, or to weigh the evidence against defendants before trial, in deciding whether they should be released.

Id. Although the notions of the presumption of innocence stem from American criminal law, the aspects of civil asset forfeiture are strikingly similar in that the individual is treated as a criminal.

166. *See* 18 U.S.C. § 983(d)(1).

167. *See* *United States v. One 1988 Checolet 410 Turbo Prop Aircraft*, 282 F. Supp. 2d 1379, 1382 (S.D. Fla. 2003) (holding that a property owner may not “turn a blind eye” toward such evidence and still claim “innocent owner” status).

send your child to jail, or risk losing your home when the officer out front finds twenty dollars worth of marijuana in your child's pocket? The duty to take affirmative action is usually not required by civil or criminal law, but a claimant cannot use the innocent owner defense otherwise.¹⁶⁸

Furthermore, depending on the jurisdiction, innocence is not always dispositive. The United States District Court for the District of Columbia held that "absence of a criminal conviction does not in and of itself establish the claimant's burden because such an absence is irrelevant in a civil forfeiture proceeding, which is directed against the property, not the owner."¹⁶⁹ Therefore, in some cases an owner's actual innocence is not enough to win in a forfeiture proceeding.¹⁷⁰

Although federal law allows for an innocent owner defense, not every state recognizes the same protections.¹⁷¹ Because of the principles of federalism, Congress must make explicit with legislation that conflicting state regulations would be preempted.¹⁷² The Supreme Court also has the governing authority to find these laws preempted.¹⁷³ Before the passage of CAFRA, the Supreme Court held that an innocent owner has no right to an innocent-owner defense under the Fifth or Fourteenth Amendments.¹⁷⁴ The Supreme Court had the chance to readdress this issue after CAFRA in *Alvarez*, but the Court failed to address the merits of the case.¹⁷⁵

168. See Gabriela D. M. Ciociola, *Misprision of Felony and its Progeny*, 41 BRANDEIS L.J. 697, 701 (2003) ("[T]he prosecution for misprision of a felony has never proceeded against a defendant for his or her failure to stop a felony or arrest a felon; and contemporary American authorities acknowledge that the duty imposed by the offense is limited to disclosure of knowledge."); see generally Steven J. Heyman, *Foundations of the Duty to Rescue*, 47 VAND. L. REV. 673 (1994) (discussing the historical absence of a duty to rescue in both tort and criminal law).

169. *United States v. Funds from Prudential Sec.*, 362 F. Supp. 2d 75, 81 (D.D.C. 2005).

170. See, e.g., *United States v. Ferro*, 681 F.3d 1105, 1113 (9th Cir. 2012) (holding that a wife who "knew that her husband had been convicted of a felony . . . and that he possessed . . . firearms after his conviction" could not use the innocent owner defense because she knew of the illegal activity giving rise to the felony possession infraction despite her own actual innocence).

171. See Ross, *supra* note 35, at 276 ("[W]hile the Act does provide an innocent-owner defense in federal suits, Congress does not have the power to require that states provide an innocent-owner defense in their forfeiture statutes.").

172. Frans J. von Kaenel, *Missouri Ups the Ante in the Drug Forfeiture "Race to the Res,"* 72 WASH. U. L. Q. 1469, 1484 (1994) ("In *Capital Cities Cable, Inc. v. Crisp*, the Supreme Court identified the three ways in which federal law may preempt state law: (1) if Congress expresses a clear intent to preempt state law; (2) if Congress intends to occupy an entire field of law; and (3) if due to an inherent conflict, compliance with both state and federal law is impossible.").

173. See Ross, *supra* note 35, at 276.

174. *Id.* (citing *Bennis v. Michigan*, 516 U.S. 442 (1995)).

175. See *Alvarez v. Smith*, 558 U.S. 87 (2009).

D. Permissive Conflict of Interest: Enforcing the Law or Padding the Coffers?

The cards seem to be stacked against forfeiture claimants throughout the proceeding. However, the real problem starts before individuals have even been stopped, pulled over, or even met by a police officer. A major concern with civil asset forfeiture is law enforcement's interest to keep seizing property and making forfeitures.¹⁷⁶ With kickbacks going directly to its local budget and salaries, why would a fiscally aware department want the drug war to stop?¹⁷⁷

Civil asset forfeiture in America is intended to further the War on Drugs by "attacking the economic viability of drug trafficking enterprises."¹⁷⁸ However, although "federal forfeiture [funds have been] inadequate to stifle a \$50 billion drug trade . . . [they have been] more than enough to reward police and government officials for their efforts."¹⁷⁹ Despite a premise of waging the War on Drugs, it is widely recognized that the War on Drugs has been a failure, though.¹⁸⁰ Rates of drug use and crime have not declined.¹⁸¹ Taxpayers and the United States have spent over one trillion dollars on the War on Drugs.¹⁸² Mass incarceration rates for low-level drug offenses have skyrocketed with an over 1,100% increase since 1980.¹⁸³ Low-level violations result in collateral consequences on employment, housing and food stamp eligibility, financial aid, and education.¹⁸⁴ Moreover, the drug war further perpetuates racial disparities with African Americans making

176. See generally Blumenson & Nilsen, *supra* note 2 (describing law enforcement's incentivized interest in forfeiture).

177. See *id.* at 78, 88-94.

178. *Id.* at 55.

179. *Id.*

180. See *id.* at 39; Hon. Juan R. Torruella, *Déjà Vu: A Federal Judge Revisits the War on Drugs, or Life in a Balloon*, 20 B.U. PUB. INT. L.J. 167, 199 (2011) (citing Gary Fields, *Whitehouse Czar Calls for End to 'War on Drugs'*, WALL ST. J., May 14, 2009, <http://online.wsj.com/article/SB124225891527617397.html> ("That the war on drugs has been a complete failure is not even a question anymore.")); see also Eva Bertram & Kenneth Sharpe, *War Ends, Drugs Win*, THE NATION, Jan. 6, 1997, at 11; see generally William F. Buckley, Jr. et al., Symposium, *The War on Drugs is Lost*, 48 NAT'L. REV. 34 (1996).

181. See Blumenson & Nilsen, *supra* note 2, at 37-38.

182. *Wasted Tax Dollars*, DRUG POL'Y ALLIANCE, <http://www.drugpolicy.org/wasted-tax-dollars> (last visited Nov. 23, 2014).

183. MICHELLE ALEXANDER, *THE NEW JIM CROW* 59 (2010).

184. DRUG POL'Y ALLIANCE, *AFTER THE DRUG WAR: TOWARD A HEALTH AND PUBLIC SAFETY APPROACH 1*, available at http://www.drugpolicy.org/sites/default/files/FactSheet_War%20on%20Drugs_Toward%20a%20Health%20and%20Public%20Safety%20Approach.pdf (last visited Sept. 2, 2014).

up 13% of drug users, but 59% of those convicted for drug offenses.¹⁸⁵ African Americans are also more than 10% more likely to be sent to prison for drug offenses than Caucasians.¹⁸⁶ Therefore, it can be argued that forfeiture laws are not adding anything to this War, yet forfeitures continue because of their lucrative profits.¹⁸⁷

Despite the failure of the “War on Drugs,” officers can still use forfeiture laws as a means to take cash, bank accounts, cars, and more, all under the guise of waging the War on Drugs.¹⁸⁸ “Asset seizures play an important role in the operation of multijurisdictional drug task forces. One ‘big bust’ can provide a task force with the resources to become financially independent. Once financially independent, a task force can choose to operate without Federal or state assistance.”¹⁸⁹

Before the Justice Department officially denounced the program on January 16, 2015¹⁹⁰, assets could even be dispersed between local and federal police departments through equitable sharing deals.¹⁹¹ The federal statute’s equitable sharing provisions allowed state officers “who turn[ed] [seized] assets over to the Justice Department . . . [to] receive [back] up to eighty percent of the assets’ value, to be used exclusively for law enforcement purposes.”¹⁹² This created an incredible financial incentive for state police officers to make forfeitures and perhaps abuse those powers. Moreover, it allowed officers—when it was more favorable to do so—to opt into the federal standards and receive kickbacks, or to otherwise follow state forfeiture regulations.¹⁹³

In suspending the equitable sharing program, the United States government recognized that law enforcement agents should not be able to choose which law is more advantageous¹⁹⁴, just as the Su-

185. *Id.*

186. HUM. RIGHTS WATCH, TARGETING BLACKS: DRUG LAW ENFORCEMENT AND RACE IN THE UNITED STATES 3 (May 2008), available at http://www.hrw.org/sites/default/files/reports/us0508_1.pdf.

187. See Blumenson & Nilsen, *supra* note 2, at 36.

188. See generally *id.* (describing law enforcement’s incentivized interest in forfeiture).

189. *Id.* at 36 (citing JUSTICE RESEARCH AND STATISTICS ASSOCIATION (“JRSA”), MULTIJURISDICTIONAL DRUG CONTROL TASK FORCES: A FIVE-YEAR REVIEW 1988-1992, at 9 (1993)).

190. See Press Release, Dep’t of Justice, *supra* note 3.

191. Pimentel, *supra* note 87, at 14-15.

192. Blumenson & Nilsen, *supra* note 2, at 51.

193. See *id.* at 45-54 (describing the incentives for state law enforcement to “federalize” forfeiture to receive kickbacks through the equitable sharing program).

194. See Press Release, Dep’t of Justice, *supra* note 3.

preme Court advised attorneys against forum shopping and the silver platter doctrine.¹⁹⁵ In essence, with the silver platter doctrine, evidence could be handed from the state to the federal government on “a silver platter.”¹⁹⁶ However, in reference to the Fourth Amendment, the Supreme Court rejected the silver platter doctrine noting that:

Free and open cooperation between state and federal law enforcement officers is to be commended and encouraged. Yet that kind of cooperation is hardly promoted by a rule that implicitly invites federal officers to withdraw from such association and at least tacitly to encourage state officers in the disregard of [federally] protected freedom.¹⁹⁷

Equitable sharing allowed federal law enforcement agencies to receive kickbacks from state agencies enforcing civil forfeiture under expanded state laws.¹⁹⁸ In this way, it was strikingly similar to the silver platter doctrine rejected by the Supreme Court, and the Justice Department found it necessary to suspend the equitable sharing aspects of CAFRA;¹⁹⁹ that decision alone, however, was not enough to solve the problems associated with burdens on disadvantaged and minority individuals, the failed regulation of the War on Drugs, or policing for profit.

Because law enforcement agents are over-incentivized by profit, they may ignore signs of innocence purposely or unconsciously.²⁰⁰ Ironically, they are incentivized to seize assets, but not to destroy the drug market or trade.²⁰¹

195. Under the twin aims of the Erie doctrine, the Supreme Court discouraged forum shopping and the inequitable administration of the laws. *See generally* *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). The silver platter doctrine allowed illegally seized evidence from the state level to be admitted in federal court as long as state officers were not acting under federal law. *See* David Gray et al., *The Supreme Court's Contemporary Silver Platter Doctrine*, 91 TEX. L. REV. 7, 10 (2012) (“The silver platter doctrine was rejected by the Court in *Elkins v. United States* out of concern that it was compromising states’ efforts to guarantee constitutional protections for their citizens by creating incentives for state and local police officers to violate the Fourth Amendment.”).

196. *See* David Gray et al., *The Supreme Court's Contemporary Silver Platter Doctrine*, 91 TEX. L. REV. 7, 10 (2012) (“The silver platter doctrine was rejected by the Court in *Elkins v. United States* out of concern that it was compromising states’ efforts to guarantee constitutional protections for their citizens by creating incentives for state and local police officers to violate the Fourth Amendment.”).

197. *Elkins v. United States*, 364 U.S. 206, 221–22 (1960).

198. *See* Pimentel, *supra* note 87, at 14.

199. *See* Press Release, Dep’t of Justice, *supra* note 3.

200. *See* Pimentel, *supra* note 87, at 14–15.

201. *See* Blumenson & Nilsen, *supra* note 2, at 56.

Some police departments now prefer to arrest drug buyers rather than dealers because buyers are sure to have seizable cash with them. Although profitable to the agencies involved, this agenda greatly undermines crime control because arresting buyers rather than sellers does little to reduce the supply of drugs in a community.²⁰²

Drugs have to be destroyed, but local government can keep cash.²⁰³ This means that, in order to keep profiting, officers need to keep seizing assets, and they need to keep drug use happening. What would happen if the town ran dry, though? What would happen if local government did in fact “win” the War on Drugs? Without drug busts, law enforcement agencies lose a revenue stream. Officers should be impartial and operate on good faith, but this conflict of interest impairs impartiality.

III. PROPOSED SOLUTIONS

The history behind forfeiture laws treats property itself as guilty.²⁰⁴ This notion helps to “explain[] courts’ continued rejection of an owner’s innocence as a defense to forfeiture.”²⁰⁵ More importantly it provides a basis for reframing and challenging the laws. Because “civil asset forfeiture . . . originally . . . relied heavily upon authoritarian practices and superstitious notions for its justification,”²⁰⁶ courts and lawmakers should reconsider their current reasoning and ideology. Civil asset forfeiture infringes upon the constitutional right to own and maintain property.²⁰⁷ Thus, in the interest of “fair play and

202. *Id.*

203. Richard Minitzer, *Ill-Gotten Gains*, REASON (Aug./Sept. 1, 1993), <http://reason.com/archives/1993/08/01/ill-gotten-gains>.

[F]ormer New York City police commissioner Patrick V. Murphy told Congress last fall, “The large monetary value of forfeitures . . . has created a great temptation for state and local police departments to target assets rather than criminal activity.” Murphy cited the example of a local police department that “has a financial incentive to impose roadblocks on the southbound lanes of I-95, which carry the cash to make drug buys, rather than the northbound lanes, which carry the drugs. After all, seized cash will end up forfeited to the police department, while seized drugs can only be destroyed.”

Id.

204. Ross, *supra* note 35, at 260.

205. *Id.* at 262.

206. *Id.*

207. *See id.* at 263.

justice,” these laws must be scrutinized.²⁰⁸ As early as 1886 the Supreme Court noted that “[i]t is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.”²⁰⁹ The Court referenced the “sanctity of a man’s home and the privacies of life” and the “indefeasible right of personal security, personal liberty and private property.”²¹⁰

In the words of Justice Holmes:

[I]t is revolting to have no better reason for a rule than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.²¹¹

A. Preempt Conflicting State Law and Local Ordinances

A major concern with forfeiture laws is that states are able to create their own statutes and local ordinances that can vary from already reformed federal regulations.²¹² Federal law still does not offer necessary protections, and states can further make their own laws. States offer less protection than federal laws; therefore, the state laws need to be reformed as well. In effect, some states have regressed from the procedural and substantive protections implemented by CAFRA.²¹³

208. *Id.*

209. *Mapp v. Ohio*, 367 U.S. 643, 647 (1961) (quoting *Boyd v. United States*, 116 U.S. 616, 635 (1886)).

210. *Id.* at 646–47.

211. See Ross, *supra* note 35, at 263 (citing Tamara R. Piety, *Scorched Earth: How the Expansion of Civil Forfeiture Doctrine Has Laid Waste to Due Process*, 45 U. MIAMI L. REV. 911, 941 (1991) (quoting Oliver W. Holmes, *The Path of Law*, 10 HARV. L. REV. 457, 469 (1897))).

212. See Michael J. Duffy, *A Drug War Funded with Drug Money: The Federal Civil Forfeiture Statute and Federalism*, 34 SUFFOLK U. L. REV. 511, 537 (2001) (“The result of preemption of inconsistent state law under the federal forfeiture statute is the type of commandeering the Supreme Court expressly renounced in *New York* and *Printz*.”). Duffy further notes:

Courts do not usually presume invalidity of state regulations absent congressional intent favoring preemption. When Congress has not displaced state regulation in a given area, federal law preempts state law to the extent that it conflicts with federal law. Such a preemption likely results when compliance with both a state and federal regulatory regime is impossible, or when the state program stands as an obstacle to the accomplishment of the federal objective. . . . The Court has on numerous occasions ruled that the federal civil forfeiture regime preempts conflicting state law.

Id. at 533–34.

213. See 18 U.S.C. § 981 (2012); *cf.* Beck, *supra* note 95, at 650 (describing Idaho’s “close proximity” provision).

One proposed solution is for procedures, like the claim waiver signed by Gonzalez, to be found preempted at all times by federal law.²¹⁴ If this were possible, it would make it *per se* illegal for Javier Gonzalez to have been asked to sign his rights away.²¹⁵

A Texas case was recently settled on this very issue.²¹⁶ Thousands of people, mostly Latinos, were interdicted and forced to sign claim waivers or risk losing their children, assets, or property.²¹⁷ One woman was threatened with intervention by social services to give up her child unless she signed the waiver.²¹⁸ None of the individuals were arrested, charged with a crime, or linked to criminal activity.²¹⁹ Law enforcement agents used the forfeited funds to build a new police station.²²⁰ The group brought a class action suit out of Tenaha, Texas, but the case settled before trial.²²¹ Following the settlement, police will now have to follow stricter forfeiture regulations.²²² Because the case did not go to trial, however, the higher courts did not rule on the merits or create any binding precedent.²²³

If courts will not address overarching forfeiture issues, federal regulation must make it explicit that unjust practices like claim waivers conflict with federal statutes. States cannot be permitted to create and enforce laws like this against the people of Tenaha, the Adamases, or Mr. Gonzalez.²²⁴ Federal statutes like CAFRA and the Comprehensive Abuse and Prevention Act should be amended to make their intentions explicit to preempt conflicting state law.²²⁵ Congress should specifically preempt claim waivers, and express a clear intent to do so.²²⁶ Congress must make clear that it has the intention to protect

214. See *supra* Section II.A (describing Javier Gonzalez's forfeiture case).

215. See generally Burnett, *supra* note 99 (recounting the story of Javier Gonzalez who was profiled and subjected to forfeiture as a minority having a large amount of cash on him in order to buy a gravestone for his deceased aunt).

216. See Mukherjee, *supra* note 3.

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

224. See, e.g., Burnett, *supra* note 99 (recounting the story of Javier Gonzalez, who was profiled and subjected to forfeiture as a minority having a large amount of cash on him in order to buy a gravestone for his deceased aunt); Mukherjee, *supra* note 3; Stillman, *supra* note 3.

225. See 21 U.S.C. § 801 (2012); see also 18 U.S.C. § 981 (2012).

226. United States v. Wagoner Cnty. Real Estate, 278 F.3d 1091, 1096 (10th Cir. 2002).

Congress has the power to preempt state law under Article VI of the Supremacy Clause, which provides that the laws of the United States are "the

citizens from improper forfeitures and unjust procedures.

*B. Raise the Burden of Proof and Require Criminal Conviction
Before Forfeiture Proceedings*

Currently, under federal law, the government needs only probable cause to seize assets.²²⁷ If the forfeiture is challenged, the government must establish a substantial connection between the assets and a crime.²²⁸ Unfortunately, 80% of forfeiture cases go uncontested for fear of prosecution, self-incrimination, or intimidation factors.²²⁹ Uncontested proceedings do not require the government to meet any sort of burden or bring evidence to support the forfeiture; uncontested forfeitures require only that the government recite facts leading up to the seizure.²³⁰ Many individuals are concerned with fighting the civil action for fear of opening themselves, or people they know, up to criminal liability.²³¹ Therefore, they may let their challenges

supreme Law of the Land; . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." U.S. Const. Art. VI, cl. 2. Federal law preempts state law in three circumstances: (1) when Congress explicitly defines the extent to which the enacted statute preempts state law; (2) when state law actually conflicts with federal law; or (3) when state law attempts to regulate "conduct in a field that Congress intended the Federal Government to occupy exclusively." (citation omitted) (providing that federal forfeiture law should not be "construed as indicating an intent on the part of Congress to occupy the field in which that provision operates, . . . unless there is a positive conflict" between federal and state law) (emphasis added). In any preemption analysis, congressional intent is the "ultimate touchstone."

Id.

227. See Pimentel, *supra* note 87, at 26 ("Law enforcement can still seize money based on probable cause . . .").

228. See 18 U.S.C. § 983(c)(3) (2012).

229. See Pimentel, *supra* note 87, at 8 n.176, 27-30.

230. *Id.* at 7.

231. See *id.* at 29-30.

The gambit . . . allows the government to use the threat of criminal prosecution to intimidate property owners into waiving their rights to a hearing on the forfeitability of their property. Procedural due process, of course, is an important right shared by the guilty and innocent alike; denial of a fair hearing cannot be excused on the grounds that the defendant would not have prevailed on her claim anyway. Moreover, there is no reason to assume that the claims that owners are waiving are meritless. Even if the claimant is guilty of a criminal offense, the property may not be forfeitable: the property may not actually bear a substantial connection to the crime or may be the proceeds of the criminal's legal business activities. Regardless of the issue of guilt, property owners will be victimized by a procedure that

go.²³² Finally, procedural requirements may make it difficult for a potential claimant to prepare for a hearing.²³³ Therefore, because the government can take first and build a case later, the burden on the government in uncontested and contested hearings should be raised to protect the interested parties from abuse of power.

Furthermore, federal law should require a criminal conviction before bringing a forfeiture action. This would take the burden off the government to prove a connection between the person and the criminal activity, and the claimant would feel less threat from potential criminal liability. More importantly, if the government cannot take property from individuals found “not guilty,” there is less of a concern for abuse of power. As it stands now, innocent and guilty parties may lack resources to challenge the forfeiture, and this type of requirement would help ensure they are all provided an adequate defense.

C. Afford All Indigent Individuals Access to Counsel

It is no coincidence that 80% of forfeitures go uncontested when minorities, indigent, and young people are the primary targets.²³⁴ Federal and state law should align to afford protections to indigent forfeiture claimants. These individuals are less likely to have the resources and funds to bring a lawsuit against the government.²³⁵ Therefore, an attorney should be afforded to any person who cannot obtain one. An attorney should not be reserved only for those who are already represented by court-appointed counsel in related criminal proceedings, or for those who have lost their primary residences.²³⁶ There should be no reason a claimant does not deserve counsel, especially when entire bank accounts and property are at

seizes such property, circumventing the due process guarantees by extorting waivers of those rights.

Id.

232. *See id.*

233. *See* Ross, *supra* note 35, at 265.

234. *See Forfeiture: Small Victims Suffer*, *supra* note 52, at A4; Nick Sibilla, *Seize First, Ask Questions Later: Philadelphia Police Take Over \$6 Million a Year in Civil Asset Forfeiture*, INST. FOR JUSTICE, <http://ij.org/seize-first-ask-questions-later-philadelphia-police-take-over-6-million-a-year-in-civil-asset-forfeiture> (last visited Dec. 2, 2014); Murphy, *supra* note 129, at 80 (exploring social science literature regarding racial profiling and hypothesizing on why civil asset forfeiture has a disparate impact on racial minorities).

235. *See* Kodish, *supra* note 142, at 13 (explaining that marginalized minority groups can be characterized by low literacy, lack of skills, and lack of resources, among other things).

236. *See* 18 U.S.C. § 983(b)(2)(A) (2012).

stake and proceedings turn on the individual's criminality.²³⁷

Although there is a difference between civil and criminal proceedings – in that property rather than liberty is at stake – courts have recognized that the Constitution mandates due process protections in both arenas.²³⁸ For example, under the Fourth Amendment, when searching or seizing property, the property itself is subject to police activity.²³⁹ The standard for a warrant to search property is “probable cause.”²⁴⁰ Liberty is at stake when making an arrest. Some have argued that the standard for searching property should be lower than for making an arrest because only property is at stake, and yet, the standard for an arrest warrant is still “probable cause.”²⁴¹ There is no distinguishing characteristic between property and liberty under the Fourth Amendment in these types of cases.²⁴² Therefore, it should not matter that an individual's property and not his liberty is at stake with civil forfeiture; taking away a person's entire bank account or home strips him of his personal freedoms. Either way, the person is being robbed of “life, liberty, or property.”²⁴³

With civil asset forfeiture, the potential for deprivation is great. Applying the *Mathews v. Eldridge* balancing test: (1) a person could lose their house, bank account, car, or more, without ever being charged of a crime; (2) because the suit is not characterized as a criminal action and the individual is not a named party, these victims are not awarded procedural safeguards; and finally, (3) both the public and

237. See Murphy, *supra* note 129, at 81.

Today, the forfeiture section of the Controlled Substance Act states that subjected property includes “all moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance or listed chemical in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter.”

Id. (quoting 21 U.S.C. § 881(b)(6) (2012)).

238. See, e.g., *Illinois v. Gates*, 462 U.S. 213, 239 (1983) (requiring probable cause for a search warrant); *Payton v. New York*, 445 U.S. 573, 585 (1980) (requiring probable cause for an arrest and finding that “[t]he simple language of the [Fourth] Amendment applies equally to seizures of persons and to seizures of property.”).

239. See generally, U.S. CONST. amend. IV (providing limitations on search and seizure of property).

240. See *id.* (“[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”).

241. See *id.*

242. See *id.*

243. U.S. CONST. amend. V (“No person shall be held to answer for a capital, or otherwise infamous crime . . . nor be deprived of life, liberty, or property, without due process of law.”).

the government have a great interest in protecting innocent citizens from undue punishment and unfair treatment at the stake of law enforcement's financial gain.²⁴⁴ For these reasons, because of the unique circumstances, it should be found to offend due process not to afford counsel to an indigent individual at any forfeiture proceeding.

D. Revise the Innocent Owner Defense

By affording counsel to more people who experience forfeiture, more of these proceedings may be contested.²⁴⁵ If the individuals do go to trial, the innocent-owner defense should be expanded.²⁴⁶ Scholars have argued "that seizing a blameless individual's property does not serve the intended goals of civil forfeiture."²⁴⁷ Under CAFRA, there is the possibility that owners will not be subject to forfeiture if they can prove their innocence.²⁴⁸ If the owner suspects illegal activity, to invoke the defense, however, a person must do "all that reasonably could be expected under the circumstances to terminate such [criminal activity]."²⁴⁹ The requirement to prove innocence is flawed, and the requirement to actively counteract illegal activity must be removed.

Creating a burden on the defendant to prove innocence runs counter to constitutional ideologies. Our justice system does not operate

244. See generally *Mathews v. Eldridge*, 424 U.S. 319, 341–48 (1976) (referencing due process balancing factors).

245. See *Murphy*, *supra* note 129, at 87 (noting only 20% of forfeiture proceedings are currently contested).

246. See *Moore*, *supra* note 3, at 782–83 (describing the possibility, but also the pitfalls, of an innocent owner defense); see also 18 U.S.C. § 983(d) (2012).

247. Mathew A. Martel, Note, *Bennis v. Michigan: Forfeiting the Family Car Under Public Nuisance Laws*, 47 CATH. U. L. REV. 283, 285 (1997); see also Julie Barnes, *Fifth and Fourteenth Amendments – Takings Clause and Due Process – Forfeiture of an Innocent Owner's Property Interest as an Abatable Public Nuisance Under State Law Violates Neither the Takings Clause Nor the Due Process Clause – Bennis v. Michigan*, 64 U.S.L.W. 4124, 6 SETON HALL CONST. L.J. 1267, 1273 (1996) (explaining that seizing a wholly innocent owner's property does not serve the punitive goals of civil forfeitures); Noah Eliezer Yanich, *Court Abdicates Its Role Against Tyranny*, DETROIT NEWS, Apr. 11, 1996, at 13A (warning that civil forfeiture statutes and court decisions require "wives [to] betray their husbands to the police or risk losing their property").

248. See 18 U.S.C. § 983(d)(2)(A)(i)–(ii) (stating property is not forfeitable if the owner "(i) did not know of the conduct giving rise to forfeiture; or (ii) upon learning of the conduct giving rise to the forfeiture, did all that reasonably could be expected under the circumstances to terminate such use of the property").

249. 18 U.S.C. § 983(d)(2)(A)(ii).

on the presumption of guilt before proven innocence.²⁵⁰ Generally, no finding of innocence is required for a “not guilty” verdict if guilt cannot be proven beyond a reasonable doubt.²⁵¹ Moreover, it seems inherently flawed to effectually attempt to prove a negative. Also, it is difficult to prove a negative, especially when it pertains to a crime in which an individual is normally not obliged to prove anything at all. The government is the one that dispossessed the claimant of his or her property, and therefore, the burden should remain with the state. In reference to search and seizure, Justice Brennan wrote, “[o]bviously . . . the assignment of the burden of proof on an issue where evidence does not exist and cannot be obtained is outcome determinative. [The] assignment of the burden is merely a way of announcing a predetermined conclusion.”²⁵² Therefore, albeit a civil dispute, it seems counterintuitive to force a forfeiture claimant to prove innocence as a defense in order to avoid punishment in the form of lost property or wages.

Furthermore, the innocent owner defense’s affirmative requirement to stop criminal activity puts groups like significant others and parents in an extremely tough situation, which is contrary to general legal custom. Namely, civil forfeiture punishes for omissions based on criminal law, which has historically been extremely rare given the ideological justifications for criminal law.²⁵³ The defense requires that the claimant prove by a preponderance of the evidence that he or she is an innocent owner, or took all necessary steps to prevent the illegal conduct.²⁵⁴ To use the defense, a relative must call the police on a loved one or risk losing his own property without ever committing a

250. William S. Laufer, *The Rhetoric of Innocence*, 70 WASH. L. REV. 329, 332 (1995). As noted in 1657, “in the eye of the law every man is honest and innocent, unless it be proved legally to the contrary.” *Id.* (quoting Records of Massachusetts, iii, 434–35).

251. See Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?*, 49 RUTGERS L. REV. 1317, 1322–23 (1997) (describing actual innocence versus a finding of “not guilty”).

252. *United States v. Leon*, 468 U.S. 897, 943 (1984) (Brennan, J., dissenting) (quoting Ronald B. Dworkin, *Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering*, 48 IND. L.J. 329, 332–33 (1973)).

253. See, e.g., Todd S. Aagaard, *A Fresh Look at the Responsible Relation Doctrine*, 96 J. CRIM. L. & CRIMINOLOGY 1245, 1250 (2006).

Justice Murphy noted that it was ‘inconsistent with established canons of criminal law to rest liability on an act in which the accused did not participate and in which he had no personal knowledge,’ and opined that such canons should not be overridden without a clear indication from Congress that it intended vicarious liability for corporate officers.

Id. (internal citations omitted).

254. See 18 U.S.C. § 983(d)(1)–(2) (2012).

crime himself. A Court of Appeals ruling held that a wife who “knew that her husband had been convicted of a felony . . . and that he possessed . . . firearms after his conviction” could not use the innocent owner defense because she knew of the illegal activity giving rise to the felony possession infraction.²⁵⁵ Yet, although she did nothing illegal, this ruling asks a wife, or loved one, to either take the gun from her husband or turn him in in order to escape forfeiture herself.

This is contrary to privileges in court and admissibility of evidence, for example, spousal privilege.²⁵⁶ This ruling forces a partner to choose between the law and his or her relationship, and it even risks personal safety.

This affirmative duty on loved ones and bystanders also encourages a public police force. It can be very dangerous to require the public to police each other.²⁵⁷ Although scientific evidence has shown that citizen involvement in law enforcement can be beneficial, “neighborhood watch and unfocused community policing programs . . . are not effective in preventing and controlling crime and disorder”²⁵⁸ As an example, much controversy has amounted over neighborhood watch and community policing programs that allow citizens to “stand [their] ground.”²⁵⁹ These laws “allow individuals to use deadly force if the individual feels threatened without exploring other options, such as retreating to a safe location and evading the

255. *United States v. Ferro*, 681 F.3d 1105, 1113 (9th Cir. 2012).

256. See Jennifer Kelly, Note, *He Said, She Said: Sex Crime Prosecutions and Spousal Privileges Under the Federal Rules of Evidence*, 86 ST. JOHN'S L. REV. 637, 640 (2012) (explaining spousal privilege and noting that “[b]oth the spousal communications privilege and the adverse testimonial privilege are rooted in ancient evidentiary principles favoring the promotion of marital intimacy and privacy”).

257. See generally *State v. Zimmerman*, No. 2012-CF-001083, (Fla. Cir. Ct. 2012). George Zimmerman was acquitted after facing trial for killing an African American teenager, Trayvon Martin, while under the guise of carrying out town watch duties. *Id.* The case received significant nationwide criticism for racial profiling and allowing such a “neighborhood watch” police force to take a life into its own hands. See generally, Jonathan Feingold & Karen Lorang, *Defusing Implicit Bias*, 59 UCLA L. REV. DISCOURSE 210 (2012) (discussing racial implicit bias, shooter bias, and violence associated with the Trayvon Martin case).

258. Michael S. Scott, *Community Justice in Policing*, 42 IDAHO L. REV. 415, 422 (2006); see also LAWRENCE W. SHERMAN ET AL., UNIVERSITY OF MARYLAND, PREVENTING CRIME: WHAT WORKS, WHAT DOESN'T, WHAT'S PROMISING: A REPORT TO THE UNITED STATES CONGRESS (1997), available at <https://www.ncjrs.org/works/wholedoc.htm>.

259. See Alex Berger, “I’ll Never See My Son’s Prom Picture,” ACLU (Oct. 31, 2013), <https://www.aclu.org/blog/racial-justice-criminal-law-reform/ill-never-see-my-sons-prom-picture> (describing a mother’s account of the violence behind stand your ground laws that took her son’s life).

conflict all together.”²⁶⁰ Allowing community members to police their neighborhoods, affirmatively acting to stop illegal activity to evade their own forfeitures, could create even more violence. Citizens would not be served by a system that forces its own people to form a militia against each other. Therefore, an innocent owner should never be forced to actively counteract illegal activity.

E. Reallocate Incentives

Most importantly, the lucrative financial incentives of civil asset forfeiture must be reallocated away from law enforcement. “Criminologists report that up to 40% of law enforcement managers agree or strongly agree that civil asset forfeiture is necessary for their agency’s budget.”²⁶¹ The conflict of interest that this type of funding creates to seize assets, promote drug activity, and look past innocence, must be counteracted.

The most obvious solution to curbing the conflict of interest is to prevent money from flowing into law enforcement budgets. It has been suggested that forfeiture proceeds could fund public education programs instead, but this has not been successful in some places that have tried to implement such programs.²⁶² Another solution would be to put the money toward social welfare incentives like rehabilitation and substance abuse programs. Funding these types of programs holds true to the ideology civil asset forfeiture was founded on—curbing drug use and fighting the War on Drugs.²⁶³ As criticism of the War on Drugs mounts,²⁶⁴ legislatures could look for ways to further

260. *Id.*

261. Murphy, *supra* note 129, at 87.

262. See Chi, *supra* note 67, at 1671 (“The Missouri Constitution requires that proceeds from drug-related forfeitures go to public education. In 1999, an audit revealed that 85% of drug-case forfeitures were going through the federal system and bypassing the Missouri constitutional allocation.”).

263. See *id.* at 1639 (“[T]he purpose of the forfeiture provision was to strike at the economic roots of the drug trade by divesting drug lords of the capital used to fund and operate the drug trade, rather than by going after individual sellers who easily could be replaced.”); see also Blumenenson & Nilsen, *supra* note 2, at 44.

264. See, e.g., Andrew Cohen, *Documenting the Failed ‘War on Drugs’*, NAT’L J. (Dec. 28, 2012), <http://www.nationaljournal.com/domesticpolicy/documenting-the-failed-war-on-drugs-20121228>.

[T]he war on drugs has failed and must be thrown on the ash heap of history as a kind of accident from which we must move on...[W]hat was wrong with it from the start must be corrected—namely, that it took a public health concern, drug abuse, and treated it instead as a criminal matter,

reform federal forfeiture legislation. For example, with the movement toward decriminalization of minor drug offences, CAFRA and other forms of legislation could be amended to apply only to felony offenses.

Finally, and perhaps most radically, the cash that officers seize could be destroyed along with the drugs. This would completely destroy any incentive police would have to confiscate property from an undeserving individual. This would keep our local and federal government clean of “dirty money.” Although the money would not be used to prosper any beneficial program, if it is in fact laundered, cartels and drug dealers would no longer fund our public programs.

CONCLUSION

In his address to Congress about civil asset forfeiture reform, Roger Pilon testified:

[I]n a free society, not any forfeiture law or practice will do. To state the point most generally, in our society, law enforcement officials may not use any means they wish in their efforts to reduce or remedy crime. After all, a police state would doubtless reduce crime. But we cannot have a police state in this nation because we have a Constitution and a body of law promulgated under it that limits what police, prosecutors, courts, and Congress may do—both substantively and procedurally.²⁶⁵

The disadvantages and costs placed on individuals by current forfeiture laws are not justified by the War on Drugs. State and local laws conflict with federal legislation, setting back any progress the federal government has created. Minorities and lower-class individuals are most impacted by scales that tilt in favor of the government. Indigent claimants deserve counsel for an action that punishes them by treating their property as guilty before proven innocent. Furthermore, the

and by doing so has made an explosion in our prison population of incarcerating the nonviolent as through they were violent.

Id.

265. *Oversight of Federal Asset Forfeiture: Its Role in Fighting Crime: Testimony Before the Subcomm. on Criminal Justice Oversight, S. Comm. on the Judiciary* (July 21, 1999) (statement of Roger Pilon, Vice President for Legal Affairs, Cato Institute), available at <http://www.cato.org/publications/congressional-testimony/oversight-federal-asset-forfeiture-its-role-fighting-crime>.

burden on individuals to prove their innocence is misplaced and unconstitutional at its core. Finally, financial incentives for law enforcement create an incurable conflict of interest.

“[W]hat the Framers understood then remains true today – that the task of combating crime and convicting the guilty will in every era seem of such critical and pressing concern that we may be lured by the temptations of expediency into forsaking our commitment to protecting individual liberty and privacy.”²⁶⁶ However, it is unacceptable to forgo the principles of individual liberty that the United States was founded on.

The efforts of the courts and [federal] officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land.²⁶⁷

The argument for civil forfeiture as a deterrent to criminal activity is not sound when citizens are taken advantage of by both law enforcement and the justice system. Justice Brennan explains that society pays a price for enjoying “the freedom and privacy safeguarded by [the Constitution].”²⁶⁸ “Thus, some criminals will go free *not* . . . ‘because the constable has blundered,’ but rather because official compliance with [the Constitution] makes it more difficult to catch [or punish] criminals.”²⁶⁹ The Constitution requires not that criminals go free, however, because it requires a presumption of innocence before proven guilt. The Constitution requires merely that we do not punish those who have not been charged with a crime. “[T]herefore, it is [the Constitution] itself that has imposed this cost [to society].”²⁷⁰ It is the Constitution itself that requires protecting citizens from the corruption and disadvantages of civil asset forfeiture laws.

266. *United States v. Leon*, 468 U.S. 897, 929–30 (1984) (Brennan, J., dissenting).

267. *Id.* at 937.

268. *Id.* at 941 (referencing the Fourth Amendment protections of the Constitution).

269. *Id.* (emphasis added) (quoting *People v. Defore*, 150 N.E. 585, 587 (N.Y. 1926)).

270. *Id.* (referencing specifically the search and seizure protections of the Constitution).