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# POLICE OR PIRATES? REFORMING WASHINGTON'S CIVIL ASSET FORFEITURE SYSTEM

Jasmin Chigbrow\*

*Abstract:* Civil asset forfeiture laws permit police officers to seize property they suspect is connected to criminal activity and sell or retain the property for the police department's use. In many states, including Washington, civil forfeiture occurs independent of any criminal case—many property owners are never charged with the offense police allege occurred. Because the government is not required to file criminal charges, property owners facing civil forfeiture lack the constitutional safeguards normally guaranteed to defendants in the criminal justice system: the right to an attorney, the presumption of innocence, the government's burden to prove its case beyond a reasonable doubt, and protection from double jeopardy, among others.

Washington's civil forfeiture laws currently provide minimal legal protection for property owners and contain a profit motive for police to pursue property forfeiture. Washington agencies need only prove property is connected to illegal activity by a preponderance of the evidence to forfeit, or permanently keep, the item. This is the second lowest burden of proof for civil forfeiture in the country. Moreover, Washington state law allows agencies to retain 90% of the proceeds from forfeited property. Washington also utilizes administrative forfeitures, which are nonjudicial proceedings handled by an officer of the seizing agency. These provisions combine to create serious due process concerns in Washington's civil forfeiture system.

This Comment addresses these concerns and proposes a reform of the statutory scheme to eliminate civil forfeiture completely by replacing it with a criminal forfeiture system like New Mexico's. Under New Mexico law, property owners must be convicted of a crime before their property can be forfeited and all forfeiture proceeds are transferred to the state's general fund. By funneling forfeitures through the criminal system and eliminating any profit motive, New Mexico property owners are provided with legal protections that are severely lacking in Washington's current civil forfeiture system. Washington should implement similar reforms to protect the due process rights of property owners and prevent forfeiture abuse by law enforcement.

## INTRODUCTION

*Enlisted . . . as a legitimate auxiliary tool in the so-called war on drugs, the legal doctrines of civil asset forfeiture have since been perverted to serve an entirely improper function in our democratic system of government—official confiscation from*

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*innocent citizens of their money and property with little or no due process of law or judicial protection.*<sup>1</sup>

An elderly man keeps his entire life savings in cash around his home. His parents lived through the Great Depression and instilled in him a deep distrust of banks. At age seventy-nine, the man finally decides to open a bank account because he worries about the disastrous consequences of a home invasion. He gives his daughter a Tupperware container with over \$82,000 in neatly stacked bills inside and asks her to deposit the cash into a joint account for the two of them. The daughter verifies it is legal to carry such a large amount of cash on to her domestic flight home the next day. But as she makes her way through airport security, she is stopped and questioned about the cash. She explains it is her father's life savings he gave her to bring home to deposit. The security agents suspect the daughter is lying. They call her father for corroboration, but he gives details that do not quite match the daughter's story. She tries to explain her father's fragile mental health. Unconvinced, the agent simply says "[w]e're seizing the cash."<sup>2</sup> The daughter is frightened as she watches strangers walk away with every dollar her father saved. Worst of all, she later receives a letter from the government notifying her of its intent to permanently keep the cash. Neither the daughter nor her father did anything wrong; they broke no law. Yet, civil asset forfeiture statutes gave the agents full legal justification to retain the cash.<sup>3</sup>

These events occurred at the Pittsburgh International Airport in August 2019.<sup>4</sup> Terry Rolin asked his daughter to deposit his life savings in a bank for safekeeping when federal agents from the Drug Enforcement Agency (DEA) seized the money.<sup>5</sup> This set off an exhaustive legal battle to regain

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1. HENRY HYDE, FORFEITING OUR PROPERTY RIGHTS: IS *YOUR* PROPERTY SAFE FROM SEIZURE? 6 (1995).

2. Justin Jouvenal, *The DEA Seized Her Father's Life Savings at an Airport Without Alleging Any Crime Occurred, Lawsuit Says*, WASH. POST (Jan. 15, 2020, 8:00 AM), [https://www.washingtonpost.com/local/public-safety/the-dea-seized-her-fathers-life-savings-at-an-airport-without-alleging-any-crime-occurred-lawsuit-says/2020/01/15/1d9986e6-36e6-11ea-bb7b-265f4554af6d\\_story.html](https://www.washingtonpost.com/local/public-safety/the-dea-seized-her-fathers-life-savings-at-an-airport-without-alleging-any-crime-occurred-lawsuit-says/2020/01/15/1d9986e6-36e6-11ea-bb7b-265f4554af6d_story.html) [<https://perma.cc/FZS3-DEGY>].

3. *DEA Asset Forfeiture*, U.S. DRUG ENF'T ADMIN., <https://www.dea.gov/operations/asset-forfeiture> [<https://perma.cc/2B85-6MEH>] ("To seize property, DEA agents must have probable cause (the same legal standard needed to arrest someone) and obtain a warrant from a judge (*with some exceptions*).") (emphasis added).

4. See Jouvenal, *supra* note 2; Torsten Ove, *Retiree's \$82,000 Seized by Feds at Airport to Be Returned, but Lawsuit Continues*, PITT. POST-GAZETTE (Mar. 4, 2020, 7:59 AM), <https://www.post-gazette.com/news/crime-courts/2020/03/04/Retiree-s-82-000-seized-by-feds-at-airport-to-be-returned-but-lawsuit-continues/stories/202003040116> [<https://perma.cc/33GT-UXNP>].

5. See Jouvenal, *supra* note 2.

possession of the cash.<sup>6</sup> Fortunately for Mr. Rolin, a non-profit organization stepped in to advocate on his behalf.<sup>7</sup> Still, seven months passed before the federal government finally agreed to return Mr. Rolin's cash;<sup>8</sup> however, others are not so lucky.

Criminals should not profit off their wrongdoing.<sup>9</sup> This is the oft-repeated reasoning behind civil asset forfeiture laws that permit law enforcement agencies to take and keep property they believe is connected to a crime. At first, this reasoning appears logical: taking away profits derived from criminal activity is punitive and should disincentivize lawbreaking behavior. When police suspect an individual committed a crime, civil forfeiture laws allow police to seize property they believe "either facilitated a crime or was acquired as a result of criminal activity."<sup>10</sup> This often includes cash, weapons, electronics, and vehicles, but it can involve houses and real property as well.<sup>11</sup> Generally, if property owners are unable to successfully contest forfeiture or if they do not respond to an agency's notice of forfeiture before a given deadline, the property and all of its ownership rights are officially forfeited to the government.<sup>12</sup>

However, on closer inspection, the reasoning behind civil forfeiture falters. The irony of lauding asset forfeiture for its punitive and crime deterrent effects is that property owners facing these proceedings may have never committed a crime. This was the case for Mr. Rolin and his daughter. As the name implies, civil asset forfeiture is considered a *civil* proceeding.<sup>13</sup> Unlike a criminal case, no arrest is required for civil

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6. *See id.*; Ove, *supra* note 4.

7. Ove, *supra* note 4.

8. The government did not agree to pay interest on the cash. *See id.*

9. *See, e.g.,* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 687 (1974) ("Forfeiture of conveyances that have been used—and may be used again—in violation of the narcotics laws fosters the purposes served by the underlying criminal statutes, both by preventing further illicit use of the conveyance and by imposing an economic penalty, thereby rendering illegal behavior unprofitable.").

10. *Civil Forfeiture*, BLACK'S LAW DICTIONARY (11th ed. 2019).

11. LISA KNEPPER, JENNIFER McDONALD, KATHY SANCHEZ & ELYSE SMITH POHL, POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE 19 (Mindy Menjou ed., 3d ed. 2020).

12. For a sampling of various civil forfeiture standards and requirements, see 18 U.S.C. § 983(c); GA. CODE ANN. § 9-16-12 (2021); HAW. REV. STAT. ANN. § 712A-10 (West 2021); LA. STAT. ANN. § 40:2612 (2020); ME. REV. STAT. ANN. tit. 15, § 5822 (2021); S.C. CODE ANN. § 44-53-530 (2021); TEX. CODE CRIM. PROC. ANN. art. 59.05 (West 2021); VA. CODE ANN. § 19.2-386.1 (2021); WASH. REV. CODE § 69.50.505 (2020); W. VA. CODE § 60A-7-705 (2021); WIS. STAT. ANN. § 961.555 (West 2021); WYO. STAT. ANN. § 35-7-1049 (2021).

13. *See Civil Law*, COLLINS DICTIONARY, <https://www.collinsdictionary.com/us/dictionary/english/civil-law> [<https://perma.cc/4BMT-9SE7>] ("Civil law is the part of a country's set of laws which is concerned with the private affairs of citizens, for example, marriage and property ownership, rather than with crime.").

forfeiture to occur.<sup>14</sup> The government does not need to file formal criminal charges, let alone prove them beyond a reasonable doubt.<sup>15</sup> For example, Massachusetts police only need probable cause to forfeit property they believe is connected to illegal drug activity.<sup>16</sup> Probable cause is the lowest burden of proof to forfeit in the country<sup>17</sup> and requires “more than a bare suspicion but less than evidence that would justify a conviction.”<sup>18</sup> The probable cause standard allows law enforcement agencies to confiscate property based on minimal grounds. In Washington, the burden of proof is just slightly higher: officers must show the property at issue is connected to unlawful enterprise by a preponderance of the evidence.<sup>19</sup> The preponderance of the evidence standard is the second lowest standard of proof for forfeiture in the country and requires that it is “more probably true than not true” that property is connected to illegal activity.<sup>20</sup> Essentially, the government has to show a 51% likelihood that the property is connected to wrongdoing to divest ownership.<sup>21</sup>

The ease with which police can take property combines with a problematic profit motive to increase agency reliance on civil forfeiture.<sup>22</sup> Law enforcement agencies may choose to sell forfeited property at a public auction (frequently conducted online) or keep the property for department use.<sup>23</sup> If an agency auctions the property, it typically retains between 80–100% of the proceeds.<sup>24</sup> Agencies use auction proceeds to

14. Rishi Batra, *Resolving Civil Forfeiture Disputes*, 66 U. KAN. L. REV. 399, 401 (2017).

15. Adam Creppelle, *Probable Cause to Plunder: Civil Asset Forfeiture and the Problems It Creates*, 7 WAKE FOREST J.L. & POL'Y 315, 315 (2017).

16. See MASS. GEN. LAWS ch. 94C, § 47(d) (West 2021); *Policing for Profit: Massachusetts*, INST. FOR JUST., <https://www.ij.org/report/policing-for-profit-3/?state=MA> [https://perma.cc/9GMR-KVKG] [hereinafter *IJ MA*].

17. *IJ MA*, *supra* note 16.

18. *Probable Cause*, BLACK'S LAW DICTIONARY (11th ed. 2019).

19. See, e.g., WASH. REV. CODE § 69.50.505(5) (2020) (setting the burden of proof for forfeiture related to illegal drug activity). Washington has several different civil forfeiture statutes governing different areas of unlawful behavior, but they all impose a preponderance of the evidence standard. See *infra* notes 236–241 and accompanying text.

20. 6 WASH. PATTERN JURY INSTR. – CIV. § 21.01 (7th ed. 2019).

21. See *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wash. 2d 593, 608, 260 P.3d 857, 865 (2011) (“[T]he standard of confidence required is a ‘preponderance,’ or more likely than not, or more than 50 percent.”).

22. See Creppelle, *supra* note 15, at 334–35.

23. See, e.g., WASH. REV. CODE § 69.50.505(7)(a)–(b) (giving agencies the choice to retain or sell forfeited property); see also Elisabeth Leamy, *How to Score Big at Government Auctions, on Everything from Real Estate to Bugles*, WASH. POST (Dec. 29, 2017), [https://www.washingtonpost.com/lifestyle/home/how-to-score-big-at-government-auctions-on-everything-from-real-estate-to-bugles/2017/12/28/cfd9a2d0-e415-11e7-833f-155031558ff4\\_story.html](https://www.washingtonpost.com/lifestyle/home/how-to-score-big-at-government-auctions-on-everything-from-real-estate-to-bugles/2017/12/28/cfd9a2d0-e415-11e7-833f-155031558ff4_story.html) [https://perma.cc/E7TQ-FK3F].

24. See KNEPPER ET AL., *supra* note 11, at 34.

supplement their budgets, so higher value items are lucrative for police.<sup>25</sup> These proceeds can then be applied toward anything from bonuses, trainings, and travel costs, to squad cars, helicopters, and military-style tactical vehicles.<sup>26</sup> If an agency elects to keep the property (typically in the case of a vehicle), it can use this new asset for undercover operations and training exercises.<sup>27</sup> Often, the only limitation set by the law is that retained property must be put to “official use.”<sup>28</sup> This feature promotes application of civil forfeiture laws because it rewards agencies for successful seizures.<sup>29</sup>

Recognizing the potential for abuse, over half the states in the country recently reformed their forfeiture laws.<sup>30</sup> Changes include reducing profit motives by decreasing the percentage of forfeiture proceeds that agencies are allowed to retain, improving legal protections for property owners, raising the burden of proof on the government, closing loopholes that allow state and local agencies to circumvent state law by forfeiting property via federal programs, and increasing agency reporting requirements.<sup>31</sup> New Mexico currently leads the country in reform after completely abolishing civil forfeiture and replacing it with a criminal forfeiture system in 2015.<sup>32</sup> This means that property owners in New Mexico must be convicted of the underlying crime to justify forfeiture of their property.<sup>33</sup> These reforms help protect owners’ rights and prevent

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25. *Id.*

26. See William Freivogel, *No Drugs, No Crime and Just Pennies for School: How Police Use Civil Asset Forfeiture*, PULITZER CTR. (Feb. 18, 2019), <https://pulitzercenter.org/reporting/no-drugs-no-crime-and-just-pennies-school-how-police-use-civil-asset-forfeiture> [<https://perma.cc/SML5-J2AY>]; Sarah Stillman, *Taken*, NEW YORKER (Aug. 5, 2013), <https://www.newyorker.com/magazine/2013/08/12/taken> [<https://perma.cc/ABB4-YUMU>].

27. Bill Bird, *Cars Seized in Crimes Generate Lucrative Income for Police, Governments*, CHI. TRIB.: NAPERVILLE SUN (July 23, 2016, 10:46 AM), <https://www.chicagotribune.com/suburbs/naperville-sun/ct-nvs-naperville-vehicle-seizure-law-st-0717-20160723-story.html> [<https://perma.cc/C2P C-8RCW>].

28. See, e.g., WASH. REV. CODE § 69.50.505(7)(a) (“When property is forfeited under this chapter the board or seizing law enforcement agency may . . . [r]etain it for official use or upon application by any law enforcement agency of this state release such property to such agency for the exclusive use of enforcing the provisions of this chapter.”).

29. See Creppelle, *supra* note 15, at 315–16 (“Placing law enforcement in a revenue generating role is problematic because it creates tension between raising money and protecting the public.”).

30. See KNEPPER ET AL., *supra* note 11, at 31 (“[Since 2015,] 32 states and the federal government have adopted measures limiting forfeiture or altering its procedures.”).

31. See *id.*

32. See *Policing for Profit: New Mexico*, INST. FOR JUST., <https://www.ij.org/report/policing-for-profit-3/?state=NM> [<https://perma.cc/2X2C-Z2ZC>] [hereinafter *IJ NM*] (grading New Mexico’s forfeiture laws with an A—the highest grade of any state—due to its enhanced protections and higher burden of proof requirements).

33. See N.M. STAT. ANN. § 31-27-4(2) (LexisNexis 2021).

forfeiture abuse.<sup>34</sup>

Although many states are making progress with forfeiture reform, some still enforce laws that encourage agencies to take property for their own benefit—frequently at the expense of innocent property owners with no involvement in criminal activity.<sup>35</sup> This Comment proposes a major restructuring of Washington law to abolish civil forfeiture entirely, implement a strict criminal forfeiture system, and eliminate financial incentives to forfeit. In Part I, this Comment traces the history of civil forfeiture laws and describes its modern application. Part II addresses current criticisms of civil forfeiture laws. In Part III, Washington’s approach to civil forfeiture is contrasted against New Mexico’s Forfeiture Act.<sup>36</sup> In Part IV, this Comment proposes Washington reform its laws to adopt a criminal forfeiture system like New Mexico’s. These proposed changes will protect the due process rights of property owners and prevent forfeiture abuse by law enforcement.<sup>37</sup>

## I. CIVIL FORFEITURE THROUGHOUT HISTORY

Civil forfeiture is not a new concept, although its current application differs significantly from historical practice.<sup>38</sup> The philosophical roots of forfeiture law extend back to Old Testament scripture.<sup>39</sup> The idea that “[i]f a bull gores a man or woman to death, the bull is to be stoned to death . . . [b]ut the owner of the bull will not be held responsible”<sup>40</sup> became the basis for the theory that property itself may be guilty.<sup>41</sup> Medieval Britain then incorporated the theory of “guilty” property into its common law with the requirement of a deodand.<sup>42</sup> A deodand was confiscated property that caused a person’s death, the proceeds of which

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34. See KNEPPER ET AL., *supra* note 11, at 7.

35. See Crepelle, *supra* note 15, at 330.

36. H.B. 560, 52d Leg., Reg. Sess. (N.M. 2015).

37. Rob Poggenklass, *Reform Virginia’s Civil Asset Forfeiture Laws to Remove the Profit Incentive and Curtail the Abuse of Power*, 50 U. RICH. L. REV. 75, 99 (2016).

38. See, e.g., *Leonard v. Texas*, \_\_\_ U.S. \_\_\_, 137 S. Ct. 847, 848–50 (2017) (Thomas, J., respecting the denial of certiorari) (describing how modern civil forfeiture differs from its historical background).

39. See *United States v. Bajakajian*, 524 U.S. 321, 330 n.5 (1998) (citing *Exodus* 21:28) (“The ‘guilty property’ theory behind *in rem* forfeiture can be traced to the Bible, which describes property being sacrificed to God as a means of atoning for an offense.”).

40. *Exodus* 21:28.

41. See, e.g., *In re Various Items of Pers. Prop.*, 282 U.S. 577, 581 (1931) (describing the legal fiction of guilty property).

42. See John L. Worrall, *Addicted to the Drug War: The Role of Civil Asset Forfeiture as a Budgetary Necessity in Contemporary Law Enforcement*, 29 J. CRIM. JUST. 171, 173–74 (2001).

were forfeited to the royal family.<sup>43</sup>

Over time, forfeiture diverged from its biblical origins and became a popular enforcement mechanism in British trade and navigation laws.<sup>44</sup> The American colonies followed suit and enacted laws authorizing forfeiture for maritime transgressions involving customs, piracy, and various admiralty laws.<sup>45</sup> Maritime and trade-related violations remained the basis for civil forfeiture for centuries until legislators began enacting new forfeiture statutes targeting illegal drug networks in the late twentieth century to combat the “War on Drugs.”<sup>46</sup> Drug crime prevention continues to be the purported objective of most modern civil forfeiture laws.<sup>47</sup> To facilitate these developments in forfeiture application, federal and state laws incorporated clauses allowing police agencies to retain proceeds and simplify the forfeiture process through administrative action.<sup>48</sup> These laws paved the way for a major expansion in forfeiture usage and enabled American law enforcement agencies to bring in nearly \$70 billion dollars in forfeiture revenue since 2000.<sup>49</sup>

#### A. *Origins of Civil Forfeiture*

The genesis of civil forfeiture laws traces back to the scriptural notion of a deodand.<sup>50</sup> As United States Supreme Court Justice William J. Brennan described in *Calero-Toledo v. Pearson Yacht Leasing Co.*,<sup>51</sup> “[t]he origins of the deodand are traceable to Biblical and pre-Judeo-Christian practices, which reflected the view that the instrument of death was accused and that religious expiation was required.”<sup>52</sup> The word deodand comes from “deodandum,” which essentially means “given to

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43. Teresa Sutton, *The Nature of the Early Law of Deodand*, 30 CAMBRIAN L. REV. 9, 9 (1999).

44. See Caleb Nelson, *The Constitutionality of Civil Forfeiture*, 125 YALE L.J. 2446, 2461 (2016).

45. *Id.* at 2464–65.

46. *Id.* at 2450.

47. Donald J. Boudreaux & A.C. Pritchard, *Civil Forfeiture and the War on Drugs: Lessons from Economics and History*, 33 SAN DIEGO L. REV. 79, 79 (1996).

48. See KNEPPER ET AL., *supra* note 11, at 9.

49. See *id.* at 15.

50. See Sean M. Grove, Comment, *How the Government Can ‘Come and Take It’: Asset Forfeiture and How Texas Should Change Its Practice*, 3 TEX. A&M J. PROP. L. 121, 123 (2016).

51. 416 U.S. 663 (1974).

52. *Id.* at 681. It is worth noting that some critics take issue with Justice Brennan’s historical association between the deodand and modern civil forfeiture, preferring instead to cabin deodands to their specific religious application in accidental deaths and pointing to some evidence that English courts reject a connection between the two concepts. See, e.g., Boudreaux & Pritchard, *supra* note 47, at 94 (“There is little evidence, however, that modern forfeiture law descended from deodand . . .”). The merits of this historical debate are beyond the scope of this Comment.

God.”<sup>53</sup> Under English common law, when an accidental death occurred, the value of the object that caused the death would be forfeited to the Crown as a deodand.<sup>54</sup> The object owner’s personal liability was immaterial.<sup>55</sup> For example, if a person accidentally sustained a fatal fall off their neighbor’s horse in medieval England, the horse’s value would have been appraised and transferred as a deodand to the King.<sup>56</sup> Described as the “price of blood,”<sup>57</sup> the Crown would then apply the deodand towards funeral proceedings for the victim or towards other charitable purposes.<sup>58</sup> Although the deodand tradition went on for centuries, the religious underpinnings were eventually excised so the object’s value would be forfeited to the Crown as a “penalty for carelessness” to provide royal revenue.<sup>59</sup>

The late United States Supreme Court Justice Oliver Wendell Holmes described forfeiture as the last vestige of the common law concept of the deodand.<sup>60</sup> Similar to its historical applications, modern applications of civil forfeiture view the object used in or derived from a criminal act as “guilty,” rather than the object’s owner.<sup>61</sup> This is why forfeiture is established through *in rem* proceedings against the property itself rather than *in personam* proceedings against the property owner.<sup>62</sup> *In rem* proceedings derive from the Latin phrase meaning “against a thing” and they “determin[e] the status of a thing, and therefore the rights of persons generally with respect to that thing.”<sup>63</sup> *In rem* forfeiture actions concern the status of the property police allege is connected to a crime.<sup>64</sup> Forfeiture

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53. WILLIAM WALLER HENING, *THE NEW VIRGINIA JUSTICE, COMPRISING THE OFFICE AND AUTHORITY OF A JUSTICE OF THE PEACE, IN THE COMMONWEALTH OF VIRGINIA* 156 (1795).

54. *State v. One 1990 Honda Accord*, N.J. Registration No. HRB-20D, VIN No. 1HGCB7659LA063293 & Four Hundred Twenty Dollars, 695 A.2d 303, 305 (N.J. Super. Ct. App. Div. 1997).

55. *Id.*

56. *See Sutton, supra* note 43, at 12–13.

57. *Id.* at 9.

58. *See Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 687 (1974).

59. *Id.*

60. *One 1990 Honda Accord*, 695 A.2d at 305 (citing O.W. HOLMES, JR., *THE COMMON LAW* 25–30 (1923)).

61. Jack F. Nevin, *Tellevik v. Real Property: Washington’s Constitutional Dilemma*, 29 GONZ. L. REV. 303, 306 (1993) (“Civil forfeiture is an *in rem* civil proceeding in which property is proceeded against as the defendant premised on the legal fiction that the property is guilty.”).

62. David Benjamin Ross, *Civil Forfeiture: A Fiction that Offends Due Process*, 13 REGENT U. L. REV. 259, 269 n.80 (2000) (“An action *in personam* is one that seeks to determine the rights and interests of the parties involved, whereas an action *in rem* proceeds against the property itself to determine whether the property has ‘committed’ an act of which it is guilty.”).

63. *In rem*, BLACK’S LAW DICTIONARY (11th ed. 2019) (internal quotation marks omitted).

64. *See Commonwealth v. 605 Univ. Drive*, 104 A.3d 411, 423 (Pa. 2014).

case names include the government agency pursuing forfeiture and a description of the property itself—for example, *City of Walla Walla v. \$401,333.44*<sup>65</sup> or *State v. One 1970 2-Door Sedan Rambler*.<sup>66</sup> The property owner’s name is not included because “[t]he thing is here primarily considered as the offender, or rather the offence is attached primarily to the thing.”<sup>67</sup> This twist of legal fiction accounts for why property owners challenging forfeiture may have to defend the object by convincing an adjudicator the property was not connected to illegal activity.<sup>68</sup> Essentially, they are arguing their property should be found “not guilty.”<sup>69</sup>

While modern civil forfeiture laws appear to descend from the deodand tradition, the United States never officially adopted this common law concept.<sup>70</sup> The forfeiture laws in the American colonies and later the United States were more directly influenced by the Navigation Acts of England.<sup>71</sup> English courts strictly construed these mid-seventeenth century admiralty statutes to protect the English maritime industry.<sup>72</sup> Statutory violations justified forfeiture of an entire ship and its cargo through in rem proceedings.<sup>73</sup>

Similar to English law, pre-twentieth century American law authorized forfeiture of ships and the goods they transported when their captain or crew violated maritime or customs laws.<sup>74</sup> Consistent with modern applications of civil forfeiture, early American courts did not require a criminal conviction for forfeiture<sup>75</sup> and common law expressly held that courts should pay “[no] regard whatsoever to the personal misconduct or responsibility of the owner thereof.”<sup>76</sup> This disregard for the property

65. 164 Wash. App. 236, 262 P.3d 1239 (2011).

66. 215 N.W.2d 849 (Neb. 1974).

67. *The Palmyra*, 25 U.S. (12 Wheat.) 1, 14 (1827).

68. The qualifier “may” is used here because in some jurisdictions, the burden of proof is on the government to prove the property is subject to forfeiture, i.e., “guilty” through its relationship to illegal activity, rather than on the property owner to prove the property’s innocence. *See, e.g.*, WASH. REV. CODE § 69.50.505(5) (2020) (“In all cases, the burden of proof is upon the law enforcement agency to establish, by a preponderance of the evidence, that the property is subject to forfeiture.”).

69. Boudreaux & Pritchard, *supra* note 47, at 93.

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

71. *See* Navigation Act 1660, 12 Car. 2 c. 18 (Eng.). The Navigation Act of 1660 was just one of several trade-related acts enacted in the United Kingdom during the seventeenth century that permitted forfeiture. *See* Boudreaux & Pritchard, *supra* note 47, at 95–98 (describing the impact English forfeiture laws had on early American forfeiture laws).

72. Boudreaux & Pritchard, *supra* note 47, at 95–96.

73. *Id.*

74. *See Calero-Toledo*, 416 U.S. at 683.

75. *See* Boudreaux & Pritchard, *supra* note 47, at 93.

76. *The Malek Adhel*, 43 U.S. (2 How.) 210, 233 (1844).

owner's personal liability stemmed "from the necessity of the case, as the only adequate means of suppressing the offence or wrong, or insuring an indemnity to the injured party."<sup>77</sup> The courts believed that in these maritime cases (frequently involving piracy), where vessel owners were often unknown or located abroad, forfeiting the ship and cargo was the sole method of enforcing the law.<sup>78</sup>

Eventually, courts began utilizing forfeiture in cases arising outside of maritime and customs laws. In *Dobbins's Distillery v. United States*,<sup>79</sup> the federal government seized a "distillery, the distilled spirits, and distilling apparatus" as well as the parcel of land the items were located on after the lessee of the property committed fraud and evaded paying federal taxes on the liquor he was distilling.<sup>80</sup> The Supreme Court of the United States upheld forfeiture of the seized items and the real property to penalize the lessee for their liquor tax violations.<sup>81</sup> This case laid the groundwork for the modern expansion of civil forfeiture by using forfeiture as a punishment for domestic law violations.

#### B. *Civil Forfeiture in Modern America*

Unlike civil forfeiture prior to the 1970s, modern applications typically target property owners suspected of drug crimes.<sup>82</sup> For example, a college student had \$11,000 in cash seized from his luggage at an airport in Kentucky.<sup>83</sup> The student tried explaining to officials that the money was for his tuition, but the mere presence of a large amount of cash allowed them to initiate forfeiture under suspicion of drug trafficking.<sup>84</sup> The federal government never brought formal drug charges and only agreed to return the money after a three year-long legal battle.<sup>85</sup> In another example of modern forfeiture, police in Oklahoma stopped a driver for a broken taillight and seized \$50,000 cash after a police dog indicated the possible

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77. *Id.*

78. See Rachel L. Stuteville, Comment, *Reverse Robin Hood: The Tale of How Texas Law Enforcement Has Used Civil Asset Forfeiture to Take from Property Owners and Pad the Pockets of Local Government—The Righteous Hunt for Reform Is on*, 46 TEX. TECH L. REV. 1169, 1178–79 (2014).

79. 96 U.S. 395 (1877).

80. *Id.* at 397.

81. *Id.* at 399.

82. See Stillman, *supra* note 26.

83. Nick Wing, *Feds Swiped \$11,000 from an Innocent Student. Now, They're Paying Him Back with Interest.*, HUFFINGTON POST (Nov. 30, 2016, 4:57 PM), [https://www.huffpost.com/entry/charles-clarke-civil-forfeiture\\_n\\_583f2470e4b0c68e047e52ec](https://www.huffpost.com/entry/charles-clarke-civil-forfeiture_n_583f2470e4b0c68e047e52ec) [<https://perma.cc/YZ3X-7ZRP>].

84. *Id.*

85. *Id.*

presence of drugs in the driver's car.<sup>86</sup> The driver explained he was the manager of a Christian rock band raising money for schools and orphanages in Asia.<sup>87</sup> Even though this story was fully corroborated, the government initiated forfeiture proceedings to retain the money and charged the band manager with a felony for acquiring proceeds from drug activity.<sup>88</sup> After a legal non-profit stepped in to represent the band manager, the prosecutor dismissed the felony charge for lack of evidence and returned the cash several months later.<sup>89</sup> In Arizona, a seventy-six year-old man pleaded guilty to possession of marijuana with intent to sell for having fifteen cannabis plants on his property.<sup>90</sup> Although he paid a \$25,000 fine and served six days in jail, he still faced the loss of his twenty-six acre ranch, house, two vehicles, and other personal property to civil forfeiture.<sup>91</sup> Pro-forfeiture legislation significantly increased the frequency of situations like these and turned modern forfeiture into a multi-billion-dollar industry for law enforcement agencies across the country.<sup>92</sup>

### 1. *Current Federal and State Legislation*

Although civil forfeiture laws have been on the books since America's founding, stories like those above were not common until the later decades of the twentieth century when the government began using forfeiture as a tool to fight drug crime.<sup>93</sup> Beginning in the 1970s and extending into the 1980s, federal and state governments ramped up forfeiture legislation as part of the "War on Drugs."<sup>94</sup> New statutes gave law enforcement the

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86. Darpana Sheth, *Police Are Seizing Billions in Property from People Never Charged with Crimes. It Must End*, TIME (July 28, 2017, 1:30 PM), <https://time.com/4878195/civil-asset-forfeiture-jeff-sessions/> [<https://perma.cc/E4E8-HFZ4>].

87. *Id.*

88. Chris Fuchs, *Months After \$53,000 Seized, Oklahoma County Returns Donations to Christian Band*, NBC NEWS (May 2, 2016, 8:21 AM), <https://www.nbcnews.com/news/asian-america/months-after-53-000-seized-charity-donations-returned-christian-band-n565871> [<https://perma.cc/7T7H-YU8C>].

89. *Id.*

90. Ariz. Ctr. for Investigative Reporting, *Arizona: Civil Asset Forfeiture*, VIMEO (Jan. 2, 2017, 6:23 PM), <https://vimeo.com/197829505> [<https://perma.cc/6ZKL-SYC2>].

91. *Id.*

92. J. Justin Wilson, *New Report Finds Civil Forfeiture Rakes in Billions Each Year, Does Not Fight Crime*, INST. FOR JUST. (Dec. 15, 2020), <https://ij.org/press-release/new-report-finds-civil-forfeiture-rakes-in-billions-each-year-does-not-fight-crime-2/> [<https://perma.cc/LQW4-D76W>].

93. See Worrall, *supra* note 42, at 172 ("During the *height* of the drug war the Asset Forfeiture Program routinely oversaw amounts larger than half a billion dollars each year.") (emphasis in original) (citation omitted).

94. David Osgood, Comment, *Crime and Punishment and Punishment: Civil Forfeiture, Double Jeopardy and the War on Drugs*, 71 WASH. L. REV. 489, 489 (1996).

ability to seize and forfeit property to hit alleged drug traffickers where it hurt—their wallets.<sup>95</sup> The new statutes also allowed seizing agencies to retain the proceeds derived from forfeited assets.<sup>96</sup> This profit motive incentivizes officers to seize high value items like cash, cars, and homes.<sup>97</sup>

To further promote application, modern legislation tends to make the civil forfeiture process easy for the seizing agency. Seventeen states<sup>98</sup> (including Washington),<sup>99</sup> the District of Columbia,<sup>100</sup> and the federal government<sup>101</sup> utilize “administrative forfeiture.” In these nonjudicial civil actions, the agency seeking forfeiture is not required to formally file a complaint or petition the court for review.<sup>102</sup> Instead, the agency must notify the property owner of its intent to forfeit, explain the relevant administrative procedure, and identify the statutory deadline to contest forfeiture.<sup>103</sup> If owners do not contest, they forfeit their property by default—automatically transferring their ownership rights to the seizing agency without ever stepping foot in a courtroom or involving a judicial officer.<sup>104</sup> When owners do contest forfeiture, they are channeled through a relatively informal administrative hearing. A member of the seizing agency or a government attorney may determine the outcome of the hearing.<sup>105</sup> This raises the potential for bias in the proceedings because the adjudicator is affiliated with the party seeking forfeiture. Additionally, some jurisdictions do not allow appeals from these hearings due to conflicting deadlines for judicial and administrative forfeiture review.<sup>106</sup>

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95. Mary Murphy, Note, *Race and Civil Asset Forfeiture: A Disparate Impact Hypothesis*, 16 TEX. J.C.L. & C.R. 77, 80 (2010).

96. See Batra, *supra* note 14, at 401–02.

97. See Stillman, *supra* note 82.

98. See KNEPPER ET AL., *supra* note 11, at 196 n.76.

99. WASH. REV. CODE § 69.50.505(5) (2020).

100. D.C. CODE § 41-305 (2021).

101. 18 U.S.C. § 983; 19 U.S.C. §§ 1607–09.

102. See KNEPPER ET AL., *supra* note 11, at 23.

103. *Id.*

104. See, e.g., WASH. REV. CODE § 69.50.505(4) (“If no person notifies the seizing law enforcement agency in writing of the person’s claim of ownership or right to possession of items specified in subsection (1)(d), (g), or (h) of this section within forty-five days of the service of notice from the seizing agency in the case of personal property and ninety days in the case of real property, the item seized shall be deemed forfeited.”).

105. See, e.g., *id.* § 69.50.505(5) (explaining the claim will be heard before the “chief law enforcement officer of the seizing agency” or an administrative law judge, but allowing the property owner the option of removing the matter to a circuit court); HAW. REV. STAT. §§ 712A-10(6)–(8) (West 2021) (assigning the attorney general the power to hear and decide administrative forfeiture hearings).

106. See, e.g., HAW. REV. STAT. § 712A-10(4); *In re Forfeiture of \$34,905.00 in U.S. Currency*,

Without the ability to appeal, these property owners are left without further legal recourse.<sup>107</sup>

Every jurisdiction has its own procedural requirements for property owners contesting forfeiture. For example, the federal government requires owners facing administrative forfeiture to file a claim with the seizing agency that identifies the property and states their interest under oath.<sup>108</sup> Once an owner asserts their claim, the federal agency must initiate the formal judicial process by filing a civil complaint in the appropriate federal district court within ninety days or the property will be released back to the property owner.<sup>109</sup> Other jurisdictions require owners to pay a fee when they file their claim<sup>110</sup> or to post a cost bond of either a specified statutory amount or a percentage of the disputed property's value.<sup>111</sup> This bond covers the government's expenses accrued in defending the forfeiture if the property owner is unsuccessful in their challenge.<sup>112</sup> If the property owner prevails on their claim, the bond money is typically returned to the owner.<sup>113</sup>

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96 F. Supp. 2d 1116, 1120 (D. Or. 2000) (“This case is a belated challenge to a completed administrative forfeiture by a claimant who failed to comply with the claim and cost bond requirements [for judicial forfeiture review].”).

107. *See, e.g., Forfeiture of \$34,905.00*, 96 F. Supp. 2d at 1120 (holding that a property owner had “relinquished his right to file a forfeiture claim” after failing to comply with procedural requirements and dismissing the owner’s claim).

108. 18 U.S.C. § 983(a)(2)(C).

109. *Id.* §§ 983(a)(3)(A)–(B). The federal government may also choose to add the forfeiture allegation to a criminal indictment and proceed with forfeiture through the criminal justice system. *See id.* § 983(a)(3)(C).

110. *See, e.g., MINN. STAT. § 169A.63, subdiv. 8* (2020) (requiring law enforcement to give notice to owners that their seized vehicle will be automatically forfeited if they do not file a lawsuit to claim it and serve the prosecuting attorney within sixty days). Minnesota’s current filing fee for vehicles worth less than \$15,000 is \$65; their current filing fee for vehicles worth more than \$15,000 is \$285. *See District Court Fees*, MINN. JUD. BRANCH, <https://www.mncourts.gov/Help-Topics/Court-Fees/District-Court-Fees.aspx> (last visited Aug. 20, 2021). A proposed bill currently under consideration by the Minnesota Legislature that would eliminate the forfeiture filing fee for property owners states that “an average of \$226,022 in forfeiture filing fee revenue is collected each fiscal year” by Minnesota courts. KELLY MOLLER, JUDICIARY FIN. & CIV. L. COMM., HF75 - 0 - FORFEITURE LIMITED, INNOCENT OWNER RECOVERY, PUB. SAFETY DEP’T (2021), <https://www.house.leg.state.mn.us/comm/docs/q0YI3BcSmUiAkqZ3mAe2MQ.pdf> [<https://perma.cc/GJQ9-FGEW>].

111. *See, e.g., Asset Forfeiture Frequently Asked Questions*, STATE OF HAW. CRIM. JUST. DIV., <https://ag.hawaii.gov/cjd/faqs/> [<https://perma.cc/M2X9-2GHN>]. The State of Hawaii, for example, requires property owners who choose to contest forfeiture by filing a claim with the presiding circuit court to pay “a cost bond in the amount of \$2500 or 10% of the estimated value of the property, whichever is greater.” *Id.*

112. *See, e.g., id.* (explaining that unsuccessful claimants must “pay the State’s costs and expenses, including reasonable attorneys fees incurred in connection with the judicial proceeding”).

113. *See* Michael Sean Devereux, *Civil Asset Forfeiture*, AVVO (Apr. 16, 2021),

Additionally, law enforcement officers can persuade property owners to “consensually forfeit” their property and release all ownership interest to the agency.<sup>114</sup> Often referred to as “roadside waivers”<sup>115</sup> due to their frequent use during traffic stops, these forms may state something to the effect of “I, \_\_\_\_\_, . . . the owner of the property or currency described below, desire to give this property or currency, along with any and all interests and ownership that I may have in it, to the [government agency].”<sup>116</sup> By signing the waiver, the owner releases their property to police and limits their ability to contest forfeiture in the future.<sup>117</sup> Owners may be asked to sign these waivers without an opportunity to confer with an attorney or consider the long-term consequences of their actions.<sup>118</sup> Critics have accused police of using high pressure, coercive tactics to bully motorists into signing these waivers by threatening worse repercussions if they do not.<sup>119</sup> Fearful of potential abuse, Texas,<sup>120</sup> Virginia,<sup>121</sup> and Wyoming<sup>122</sup> enacted policies expressly banning the use

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<https://www.avvo.com/legal-guides/ugc/civil-asset-forfeiture> [https://perma.cc/PR4A-YNB4]. Ultimately, it is up to the adjudicator overseeing the forfeiture proceeding whether a prevailing property owner gets their bond money returned. *See id.*

114. *See* KNEPPER ET AL., *supra* note 11, at 44.

115. *Id.*

116. The quoted language is adapted from a waiver form used by the Wyoming Highway Patrol. German Lopez, “*It’s Been Complete Hell’: How Police Used a Traffic Stop to Take \$91,800 from an Innocent Man*,” VOX (Mar. 20, 2018, 11:05 AM), <https://www.vox.com/policy-and-politics/2017/12/1/16686014/phillip-parhamovich-civil-forfeiture> [https://perma.cc/XXL5-MGD3].

117. *See* George Leef, *Another Ugly Civil Asset Forfeiture Tactic—Highway Stop ‘Waivers’*, FORBES (Dec. 4, 2017, 1:15 PM), <https://www.forbes.com/sites/georgeleef/2017/12/04/another-ugly-civil-asset-forfeiture-tactic-highway-stop-waivers/?sh=6b908dd42fa7> [https://perma.cc/6SFB-865R].

118. *Id.*

119. *See, e.g., id.*; Stillman, *supra* note 26 (describing instances in which police threaten serious criminal charges or removal of children from parents’ custody unless they agree to sign a waiver relinquishing their property to police).

120. Edgar Walters & Jolie McCullough, *Texas Police Made More than \$50 Million in 2017 from Seizing People’s Property. Not Everyone Was Guilty of a Crime.*, TEX. TRIB. (Dec. 7, 2018, 12:00 AM), <https://www.texastribune.org/2018/12/07/texas-civil-asset-forfeiture-legislature/> [https://perma.cc/T4D6-2BX8] (“Gov. Rick Perry in 2011 signed legislation prohibiting the use of such waivers, forcing all forfeitures to go through court.”).

121. In 2015, the Virginia State Crime Commission recommended prohibiting waivers, reporting that “[h]aving law enforcement directly ‘negotiate’ with a property owner, without the direct involvement of a prosecutor and/or an attorney for the owner, can raise the appearance of unfair dealing or coercion. In other states where this practice became widespread, there have been reports that the process was abused.” VA. STATE CRIME COMM’N, ASSET FORFEITURE (SB 684/HB 1287) 102 (2015), [http://vscc.virginia.gov/Asset%20Forfeiture\\_FINAL-1.pdf](http://vscc.virginia.gov/Asset%20Forfeiture_FINAL-1.pdf) [https://perma.cc/5BL6-CTN7]. The following year, the Governor of Virginia reformed state law to prohibit roadside waivers. *See* 2016 Va. Acts ch. 203, § 19.2-386.2 (codified at VA. CODE ANN. § 25.1-203).

122. German Lopez, *Citing Vox Story, Wyoming Bans Practice that Police Used to Take Innocent*

of roadside waivers to forfeit property.

Because the Sixth Amendment to the United States Constitution<sup>123</sup> does not provide the right to an attorney in civil actions, property owners often attempt to represent themselves in forfeiture challenges.<sup>124</sup> However, federal jurisdictions do appoint counsel for low-income property owners who cannot afford to hire an attorney—but only when the civil forfeiture is connected to a charged criminal offense<sup>125</sup> or when the property owner is facing the loss of their primary residence.<sup>126</sup> Some jurisdictions also allow property owners who hire private counsel to recover reasonable attorneys’ fees from the government if they are successful in challenging the forfeiture.<sup>127</sup>

If a property owner brings their case before an adjudicator, the burden of proof standards vary widely across jurisdictions. Twenty states (including Washington)<sup>128</sup> and the federal government<sup>129</sup> apply the preponderance of the evidence standard of proof in forfeiture proceedings.<sup>130</sup> The burden of meeting this standard may be on the government, meaning the government must produce enough proof to show by a preponderance of the evidence the property *is* subject to forfeiture.<sup>131</sup> However, in some jurisdictions the burden may be on the property owner to produce enough proof to show by a preponderance of

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*Man’s \$91,800*, VOX (Mar. 20, 2018, 11:00 AM), <https://www.vox.com/policy-and-politics/2018/3/20/17142526/wyoming-waiver-forfeiture-phil-parhamovich> [<https://perma.cc/F7AC-97LJ>] (“The new law . . . bans officers from getting people to sign waivers that give up their rights to property, including cash, without a hearing and without establishing probable cause. Any waivers in violation of the law are declared ‘null and void.’”).

123. U.S. CONST. amend. VI.

124. *See, e.g.*, *United States v. 777 Greene Ave.*, 609 F.3d 94, 95 (2d Cir. 2010) (“[C]laimants in civil forfeiture proceedings lack a Sixth Amendment right to counsel . . . .”); *see also State ex rel. Eikenberry v. Frodert*, 84 Wash. App. 20, 32, 924 P.2d 933, 940 (1996) (quoting *State v. Long*, 104 Wash. 2d 285, 292, 705 P.2d 245, 249 (1985)) (“[T]here is no federal or state constitutional requirement that an indigent defendant receive the assistance of appointed counsel where there is no possibility of incarceration.”).

125. *See* 18 U.S.C. § 983(b)(1)(A). The statute allows the defendant’s appointed counsel in their criminal proceedings to also represent them in their forfeiture proceedings. *Id.*

126. *See id.* § 983(b)(2)(A).

127. *See, e.g.*, WASH. REV. CODE § 69.50.505(6) (2020) (“In any proceeding to forfeit property under this title, where the claimant substantially prevails, the claimant is entitled to reasonable attorneys’ fees reasonably incurred by the claimant.”). Importantly, none of Washington’s other civil forfeiture statutes contain this provision.

128. *See* KNEPPER ET AL., *supra* note 11, at 39.

129. 18 U.S.C. § 983(c).

130. *See supra* notes 20–21 and accompanying text.

131. *See, e.g.*, WASH. REV. CODE § 69.50.505(5) (“In all cases, the burden of proof is upon the law enforcement agency to establish, by a preponderance of the evidence, that the property is subject to forfeiture.”).

the evidence their property *is not* subject to forfeiture.<sup>132</sup> Regardless of which party bears the burden of proof, the preponderance standard requires a relatively low evidentiary showing.

Not all legislation simplifies the forfeiture process for law enforcement. Ten states and the District of Columbia utilize some form of a clear and convincing standard of proof.<sup>133</sup> This is an intermediate requirement between the preponderance standard and beyond a reasonable doubt.<sup>134</sup> Sixteen states require a criminal conviction, where the government must prove guilt beyond a reasonable doubt<sup>135</sup> before property can be forfeited in civil proceedings.<sup>136</sup> Maine, Nebraska, New Mexico, and North Carolina have abolished civil forfeiture entirely and require agencies seeking forfeiture to proceed through the criminal system.<sup>137</sup> The criminal process places more demanding requirements on the government and is more protective of individual rights. These heightened evidentiary requirements prevent due process violations against property owners and reduce forfeiture abuse by making it more challenging for law enforcement to successfully forfeit property.<sup>138</sup>

## 2. *The Equitable Sharing Program*

The recent increase in progressive forfeiture reforms at the state level may be frustrated by legislative loopholes that permit seizing agencies to circumvent their state's stricter forfeiture laws. This is because a significant number of civil forfeitures are processed through what is known as the federal government's "Equitable Sharing Program"

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132. See, e.g., 21 R.I. GEN. LAWS § 21-28-5.04.2(p) (2021) ("In any action brought under this section, the state shall have the initial burden of showing the existence of probable cause for seizure or arrest of the property. Upon that showing by the state, the claimant shall have the burden of showing by a preponderance of evidence that the property was not subject to forfeiture under this section.").

133. See KNEPPER ET AL., *supra* note 11, at 39.

134. *Clear and Convincing Evidence*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("Evidence indicating that the thing to be proved is highly probable or reasonably certain. This is a greater burden than preponderance of the evidence, the standard applied in most civil trials, but less than evidence beyond a reasonable doubt, the norm for criminal trials.").

135. *Reasonable Doubt*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("'Beyond a reasonable doubt' is the standard used by a jury to determine whether a criminal defendant is guilty.>").

136. See *Civil Forfeiture Reforms on the State Level*, INST. FOR JUST., <https://ij.org/activism/legislation/civil-forfeiture-legislative-highlights/#:~:text=Today%2C%20three%20states%E2%80%94North%20Carolina,criminal%20law%20to%20forfeit%20property> [<https://perma.cc/5FVW-KZK2>].

137. See *id.*; Nick Sibilla, *Maine Abolishes Civil Forfeiture, Now Requires a Criminal Conviction to Take Property*, FORBES (July 14, 2021, 2:45 PM), <https://www.forbes.com/sites/nicksibilla/2021/07/14/maine-abolishes-civil-forfeiture-now-requires-a-criminal-conviction-to-take-property/?sh=4eeb65af5cf9> [<https://perma.cc/ZWC7-SC44>].

138. See KNEPPER ET AL., *supra* note 11, at 39–40.

(ESP).<sup>139</sup> Created by the Comprehensive Crime Control Act of 1984,<sup>140</sup> the ESP is driven by the familiar “criminals should not profit off their wrongdoing” rationale. The ESP website states that forfeiture “remove[s] the tools of crime from criminal organizations, deprive[s] wrongdoers of the proceeds of their crimes, recover[s] property that may be used to compensate victims, and deter[s] crime.”<sup>141</sup> The program shares federal forfeiture proceeds with state agencies in two ways: (1) when the state agency works with a federal agency in a joint investigation that results in federal forfeiture of property;<sup>142</sup> and (2) when a federal agency “adopts” a state agency’s seizure for federal forfeiture (as long as the underlying criminal activity that justifies the forfeiture is illegal under federal law).<sup>143</sup> The state agency transfers seized property to the federal agency and the federal agency initiates forfeiture proceedings using federal law requirements.<sup>144</sup> The state agency receives 80% of the funds generated from the adopted federal forfeiture.<sup>145</sup>

Proponents of the ESP argue it enhances cooperation and coordination between different jurisdictions and allows for more efficient forfeiture processing, but critics argue the ESP is used as a loophole to allow state agencies to bypass their state laws.<sup>146</sup> This is because once a state agency transfers seized property to a federal agency, the federal preponderance of the evidence standard applies regardless of the burden of proof under state law.<sup>147</sup> The ESP also allows state agencies to evade their state’s statutory

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139. Rachel A. Harmon, *Federal Programs and the Real Costs of Policing*, 90 N.Y.U. L. REV. 870, 929–30 (2015) (“Local departments have sought adoption and received money under the Equitable Sharing Program even when state laws would not have permitted forfeiture under the circumstances or would not have given funds to the police department if the state forfeited the property. Many thousands of law enforcement agencies have participated in the Equitable Sharing Program, and more than \$4.5 billion has been shared.”).

140. Pub. L. No. 98-473, 98 Stat. 2055 (codified as amended at 19 U.S.C. § 1616a).

141. U.S. DEP’T OF JUST. & U.S. DEP’T OF THE TREASURY, GUIDE TO EQUITABLE SHARING FOR STATE, LOCAL, AND TRIBAL LAW ENFORCEMENT AGENCIES 1 (2018), <https://www.justice.gov/criminal-afmls/file/794696/download> [<https://perma.cc/L8M6-RZV7>].

142. Press Release, Drug Enforcement Administration, Equitable Sharing Program “Takes the Profit Out of Crime and Benefits Public Safety” (May 19, 2017), <https://www.dea.gov/press-releases/2017/05/19/equitable-sharing-program-takes-profit-out-crime-and-benefits-public> [<https://perma.cc/UDJ5-XGVZ>]. The amount of proceeds shared with the state or local agency varies depending on their amount of effort and participation in the case. *Id.*

143. See Jefferson E. Holcomb, Tomislav V. Kovandzic & Marian R. Williams, *Civil Asset Forfeiture, Equitable Sharing, and Policing for Profit in the United States*, 39 J. CRIM. JUST. 273, 274 (2011).

144. See Stuteville, *supra* note 78, at 1185.

145. Holcomb et al., *supra* note 143, at 274.

146. *Id.*

147. *Id.* at 274–75.

limitations on how forfeiture funds can be used and distributed.<sup>148</sup> Over the last five fiscal years alone, the ESP paid out over \$1.5 billion to state and local agencies across the country.<sup>149</sup> The ESP provides large amounts of revenue to state agencies despite minimal requirements or oversight.<sup>150</sup>

## II. MODERN CRITICISMS OF CIVIL FORFEITURE

Civil forfeiture creates two serious legal issues: (1) agencies can permanently take and keep property from innocent people while providing minimal legal protections;<sup>151</sup> and (2) agencies are incentivized to forfeit property to fund their own budgets.<sup>152</sup> These issues have led to widespread doubt regarding the constitutionality of civil forfeiture laws.<sup>153</sup>

A 2016 poll found that 84% of Americans oppose civil asset forfeiture.<sup>154</sup> Issues related to law enforcement rarely garner such bipartisan support, yet Republicans and Democrats appear to have found common ground in their opposition to civil forfeiture.<sup>155</sup> Some critics label the current sentiment as “[t]he national revulsion against abusive civil asset forfeiture.”<sup>156</sup> This opposition is exemplified in strong statements such as “[w]hen criminals take property, the law calls it theft. When law enforcement confiscates property, the process is called civil asset forfeiture.”<sup>157</sup>

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148. *Id.* at 275.

149. U.S. DEP’T OF JUST., GRAND TOTAL OF EQUITABLE SHARING PAYMENTS (FISCAL YEARS 2016–2020), <https://www.justice.gov/afp/reports-0> [<https://perma.cc/H5K2-5SSR>] (follow the hyperlinks for each fiscal year under the “Reports to Congress” subheading; then select the report labeled “Grand Total of Equitable Sharing Payments”). In 2020, Washington state and local agencies received nearly \$7.6 million in forfeiture proceeds through the ESP. U.S. DEP’T OF JUST., EQUITABLE SHARING PAYMENTS OF CASH AND SALE PROCEEDS BY RECIPIENT AGENCY FOR WASHINGTON (FISCAL YEAR 2020), <https://www.justice.gov/afms/page/file/1361911/download> [<https://perma.cc/M65B-K9SK>] [hereinafter EQUITABLE SHARING PAYMENTS OF CASH 2020].

150. *See* Harmon, *supra* note 139, at 948–49.

151. *See* Nelson, *supra* note 44, at 2517.

152. KNEPPER ET AL., *supra* note 11, at 7.

153. *See, e.g.,* Note, *How Crime Pays: The Unconstitutionality of Modern Civil Asset Forfeiture as a Tool of Criminal Law Enforcement*, 131 HARV. L. REV. 2387, 2393–96 (2018) (describing a variety of due process concerns surrounding forfeiture).

154. Emily Ekins, *84% of Americans Oppose Civil Asset Forfeiture*, CATO INST. (Dec. 13, 2016, 1:33 PM), <https://www.cato.org/blog/84-americans-oppose-civil-asset-forfeiture> [<https://perma.cc/F9C9-6KVM>].

155. *Id.*

156. Leef, *supra* note 117.

157. Crepelle, *supra* note 15, at 315.

### A. *Lack of Constitutional Safeguards*

In many jurisdictions, forfeiture laws provide nominal legal protections for property owners.<sup>158</sup> Some commentators label civil forfeiture “an anomaly” because “it is an exclusively civil remedy based upon criminal facts.”<sup>159</sup> Because of this unusual legal classification, many constitutional protections that would otherwise be provided in a criminal proceeding are absent in a forfeiture proceeding: the right to an attorney,<sup>160</sup> heightened proof requirements,<sup>161</sup> and protection from double jeopardy.<sup>162</sup> Judges justify the lack of protections by pointing to the “civil” nature of forfeitures. Because forfeitures are handled through in rem proceedings against the property itself, property owners are not afforded many of the due process rights held by a defendant in a criminal case.<sup>163</sup> Critics argue the lack of protections for property owners violates due process and stacks the deck in favor of the seizing agency.<sup>164</sup>

Complicating the issue further is the fact that a forfeiture challenge can take years before the matter is resolved—and law enforcement may keep the seized property for the duration of the case.<sup>165</sup> In *Serrano v. Customs & Border Patrol*,<sup>166</sup> a vehicle owner waited over two years for a forfeiture hearing before his vehicle was returned.<sup>167</sup> In 2015, federal agents at the United States-Mexico border seized Mr. Serrano’s 2014 Ford F-250 pickup truck after finding five low-caliber bullets and a handgun magazine inside.<sup>168</sup> The federal government claimed the items were evidence of an attempt to export “munitions of war” and retained

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158. See KNEPPER ET AL., *supra* note 11, at 9.

159. Nevin, *supra* note 61, at 307; *see also* Deeter v. Smith, 106 Wash. 2d 376, 378, 721 P.2d 519, 520 (1986) (holding that the Fourth Amendment exclusionary rule applies to an automobile forfeiture proceeding because it is “quasi-criminal in nature”).

160. See KNEPPER ET AL., *supra* note 11, at 9.

161. See Note, *supra* note 153, at 2389 (comparing the requirements for criminal, civil, and administrative forfeitures).

162. See, e.g., *United States v. Ursery*, 518 U.S. 267, 270–71 (1996) (holding that civil forfeitures do not constitute punishment so as to trigger double jeopardy concerns).

163. See Ross, *supra* note 62, at 263.

164. See, e.g., David Pimentel, *Forfeiture Policy in the United States: Is There Hope for Reform?*, 17 CRIMINOLOGY & PUB. POL’Y 129, 130 (2018) (citation omitted) (“The ease with which property can be seized, and the procedural presumptions in its favor, make it easy for law enforcement to take property, even if the legal claim to it is tenuous.”).

165. See Michael Sallah, Robert O’Harrow, Jr., Steven Rich & Gabe Silverman, *Stop and Seize*, WASH. POST, Sept. 7, 2014, at A1.

166. 975 F.3d 488 (5th Cir. 2020), *cert. denied*, \_\_ U.S. \_\_, 209 L. Ed. 2d 546 (2021).

167. See *id.* at 492, 494.

168. *Id.* at 492–93.

possession of the truck pending forfeiture proceedings.<sup>169</sup> Despite Mr. Serrano's repeated status inquiries and requests for information, "[f]or 23 months, [the government] failed to institute forfeiture proceedings and Serrano was deprived of his property without a hearing to challenge the seizure or the continued retention of his vehicle."<sup>170</sup> The government did not return his truck until Mr. Serrano filed a civil lawsuit against Customs and Border Patrol in 2017.<sup>171</sup> The civil suit made it before the Fifth Circuit Court of Appeals, where the court held due process does not require prompt post-seizure hearings.<sup>172</sup> Particularly after a year filled with COVID-19 related court closures, *Serrano* raises an important issue regarding the duration agencies can retain seized property pending forfeiture proceedings. Courts across the country are experiencing a backlog of cases that will likely result in increased delays in civil forfeiture proceedings while property is held captive in legal limbo.<sup>173</sup>

The United States Supreme Court recently offered some constitutional protection against a different aspect of forfeiture abuse. In *Timbs v. Indiana*,<sup>174</sup> the Court held state civil forfeitures must not violate the Eighth Amendment's ban on excessive fines.<sup>175</sup> The case originated after police seized a \$42,000 Land Rover in connection with a criminal charge for dealing a controlled substance.<sup>176</sup> Although the vehicle's owner, Timbs, proved that the car was bought with funds from an insurance payout—a fully legal purchase unconnected to narcotic sales—the police seized it anyway because Timbs used the car to transport the drugs he sold.<sup>177</sup> This occurred despite the fact the maximum fine for Timbs's criminal charge was \$10,000.<sup>178</sup> A unanimous Court incorporated the Eighth Amendment's Excessive Fines Clause to the states via the Fourteenth Amendment's Due Process Clause and held a civil forfeiture cannot be grossly disproportionate to the underlying criminal offense.<sup>179</sup> However,

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169. *Id.* at 493–94.

170. *Id.* at 494.

171. *Id.*

172. *See id.* at 500. In April 2021, the Supreme Court of the United States denied Mr. Serrano's petition for review. *See Serrano v. Customs & Border Prot.*, \_\_ U.S. \_\_, 209 L. Ed. 2d 546 (2021).

173. *See* Jenni Bergal, *Some States Halt Jury Trials Again, Leaving Staggering Backlogs and 'a Lot of People Sitting in Jail'*, USA TODAY (Dec. 8, 2020, 1:39 PM), <https://www.usatoday.com/story/news/nation/2020/12/08/jury-trials-stopped-some-states-backlogs-build-amid-covid-19/6491162002> [<https://perma.cc/7QXX-KLMN>].

174. 586 U.S. \_\_, 139 S. Ct. 682 (2019).

175. *See id.* at 690.

176. *Id.* at 686.

177. *Id.*

178. *Id.*

179. *Id.* at 687, 690.

the Court failed to provide clear guidance on what constitutes an excessive forfeiture.<sup>180</sup> The Court also did not address any of the other constitutional safeguards missing in forfeiture proceedings.

### B. Profit Motive

Civil forfeiture is a highly lucrative enterprise that has brought in multi-billion-dollar revenues over the last two decades to law enforcement agencies across the country, and this creates concern regarding the possibility of profit motives.<sup>181</sup> Many jurisdictions allow agencies to retain “most or all” of the proceeds derived from forfeitures.<sup>182</sup> These proceeds fund a variety of departmental needs, including training, operations, bonuses, and equipment.<sup>183</sup> However, agencies have also applied proceeds to purchase an office margarita machine<sup>184</sup> and a \$600 coffee maker.<sup>185</sup> The profit potential provides a financial incentive for law enforcement agencies to forfeit property to benefit their department’s bottom line.<sup>186</sup> The United States Supreme Court recently acknowledged the potential for abuse when forfeiture law provides financial impetus to forfeit by noting that “it makes sense to scrutinize governmental action more closely when the State stands to benefit.”<sup>187</sup>

The concerns regarding a profit motive in civil asset forfeiture are not illusory. An Illinois deputy affiliated with highway interdiction training programs recently published a book advocating to “turn[] our police forces into present-day Robin Hoods” by taking valuable property from

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180. The Supreme Court found a forfeiture constitutionally excessive just once, in *United States v. Bajakajian*, when the federal government attempted to forfeit \$357,144 in cash after the defendant failed to declare it in violation of customs laws. See 524 U.S. 321, 324 (1998).

181. See KNEPPER ET AL., *supra* note 11, at 5.

182. See *id.* at 34. In Washington, the seizing agency can keep 90% of forfeiture proceeds to fund their drug interdiction efforts. WASH. REV. CODE § 69.50.505(9)(a), (10) (2020). State records show civil forfeiture brought in an annual statewide average of over \$9.2 million in 2016, 2017, and 2018. See *Policing for Profit: Washington*, INST. FOR JUST., <https://ij.org/report/policing-for-profit-3/?state=WA> [<https://perma.cc/BB6R-8J94>] [hereinafter *IJ WA*].

183. See Freivogel, *supra* note 26; Stillman, *supra* note 26.

184. John Clarke, *Washington, D.C., Approves Landmark Civil Asset Forfeiture Law*, REUTERS (Nov. 18, 2014, 2:09 PM), <https://www.reuters.com/article/us-usa-districtofcolumbia-forfeiture/washington-d-c-approves-landmark-civil-asset-forfeiture-law-idUSKCN0J22J920141118> [<https://perma.cc/BG4N-8GZ4>].

185. Erin Fuchs, *Here Are the Ridiculous Things Cops Bought with Cash ‘Seized’ from Americans*, BUS. INSIDER (Oct. 14, 2014, 12:53 PM), <https://www.businessinsider.com/heres-what-police-bought-with-civil-forfeiture-2014-10> [<https://perma.cc/Y9UF-6MA7>].

186. See Ross, *supra* note 62, at 272–73.

187. See *Timbs v. Indiana*, 586 U.S. \_\_\_, 139 S. Ct. 682, 689 (2019) (quoting *Harmelin v. Michigan*, 501 U.S. 957, 979 n.9 (1991)).

owners to fund police budgets.<sup>188</sup> This emphasis on forfeiture has impacted how departments plan their operations.<sup>189</sup> For example, studies show that Texas law enforcement agencies concentrate traffic stops along the southbound interstate rather than the northbound.<sup>190</sup> These agencies are operating under the assumption that cars traveling south towards the United States-Mexico border are more likely to contain large amounts of cash, while cars driving north are more likely to be carrying drugs.<sup>191</sup> Similar tactics were found in studies of law enforcement agencies in Missouri and Tennessee.<sup>192</sup> Seizing and forfeiting cash is more beneficial to law enforcement because unlike drugs—which must be destroyed—cash seizures can be forfeited to increase department revenue.<sup>193</sup> One former DEA agent referred to large cash seizures as “the gift that keeps on giving.”<sup>194</sup> This belief pervades cash-strapped agencies across the country who see civil forfeiture as a quick and easy way to maintain cash flow.<sup>195</sup>

With the recent calls for defunding police,<sup>196</sup> law enforcement agencies will be under increased pressure to boost funds through alternative sources like civil forfeiture.<sup>197</sup> Nearly 300 police departments across the country seize property worth 20% or more of their annual budgets.<sup>198</sup> Studies show that “a substantial proportion of law enforcement agencies reported that

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188. Sallah et al., *supra* note 165.

189. *See, e.g.*, Freivogel, *supra* note 26 (describing law enforcement methods focusing on forfeiture).

190. *See* Jolie McCullough, Acacia Coronado & Chris Essig, *Texas Police Can Seize Money and Property with Little Transparency. So We Got the Data Ourselves.*, TEX. TRIB. (June 7, 2019), <https://apps.texastribune.org/features/2019/texas-civil-asset-forfeiture-counties-harris-webb-reeves-smith/> [<https://perma.cc/TWR7-TSGZ>].

191. *See id.* (“Webb County agencies made two seizures . . . from northbound stops after finding drugs in both vehicles, compared with 16 cash seizures from southbound lanes.”); Harmon, *supra* note 139, at 932–33.

192. *See* Freivogel, *supra* note 26 (“Police in Missouri, Tennessee and other states focus their interdiction on the westbound lanes of interstates where cash from drug sales is returning to the cartels. Far fewer stops occur on the eastbound lanes where the drugs could be seized before they are sold to users.”).

193. *See* Harmon, *supra* note 139, at 932–33.

194. Sallah et al., *supra* note 165.

195. *See* Holcomb et al., *supra* note 143, at 275.

196. *See* Andy Rose & Hollie Silverman, *Seattle’s Mayor Is Set to Sign a New City Budget Cutting the Police Department’s Funding by 18%*, CNN (Nov. 25, 2020, 4:03 AM), <https://www.cnn.com/2020/11/25/us/seattle-police-budget-cut/index.html> [<https://perma.cc/728J-6HE9>].

197. *See* David Crockett & Jennifer Earl, *Defunding the Police Could Increase Policing if Cuts Are Too Modest*, NEWSWEEK (July 1, 2020, 6:00 AM), <https://www.newsweek.com/defunding-police-could-increase-policing-if-cuts-are-too-modest-opinion-1514519> [<https://perma.cc/A8PR-6GVR>].

198. Sallah et al., *supra* note 165.

they are coming to *depend* on civil forfeiture” to supplement their budgets, which may increase the potential for abuse.<sup>199</sup>

### C. *Due Process Concerns*

As a civil proceeding, forfeiture has minor due process protections in place despite the major implications it has on an owner’s property rights.<sup>200</sup> This is compounded by the fact that victims of forfeiture tend to identify with Black, Indigenous, and People of Color (BIPOC) communities and low-income communities.<sup>201</sup> The Fifth Amendment to the United States Constitution unequivocally states that “[n]o person shall be . . . deprived of life, liberty, or property, without due process of law” in the federal system.<sup>202</sup> The Fourteenth Amendment places the same requirement on the states.<sup>203</sup> Together, the Fifth and Fourteenth Amendments guarantee all citizens due process of law.

There are two types of due process: procedural and substantive.<sup>204</sup> Courts explain that procedural due process “is not a technical conception with a fixed content.”<sup>205</sup> Instead, it “is flexible and calls for such procedural protections as the particular situation demands.”<sup>206</sup> Substantive due process requirements ensure that government actions do not “‘shock[] the conscience’ or interfere[] with rights ‘implicit in the concept of ordered liberty.’”<sup>207</sup> Due process concerns arise in the civil forfeiture context because forfeiture inherently involves deprivation of property.

In 2017, Justice Clarence Thomas of the United States Supreme Court wrote an opinion openly questioning the constitutionality of modern civil forfeiture laws under the due process clause.<sup>208</sup> The case arose after police officers in Texas stopped James Leonard for a traffic violation.<sup>209</sup> The stop led to a vehicle search and police eventually discovered \$201,100 and a

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199. Worrall, *supra* note 42, at 179 (emphasis in original).

200. *See* Ross, *supra* note 62, at 263.

201. *See* Christine A. Budasoff, *Modern Civil Forfeiture Is Unconstitutional*, 23 TEX. REV. L. & POL. 467, 480 (2019).

202. U.S. CONST. amend. V.

203. U.S. CONST. amend. XIV, § 1.

204. *See* United States v. Salerno, 481 U.S. 739, 746 (1987) (describing procedural and substantive due process).

205. *Cafeteria & Rest. Workers Union, Local 473 v. McElroy*, 367 U.S. 886, 895 (1961).

206. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

207. *Salerno*, 481 U.S. at 746 (citations omitted).

208. *See* Leonard v. Texas, \_\_\_ U.S. \_\_\_, 137 S. Ct. 847, 849 (2017) (Thomas, J., respecting the denial of certiorari).

209. *Id.* at 847.

bill of sale for a house in a safe inside the vehicle's trunk.<sup>210</sup> After conflicting explanations of the safe's contents, James stated the safe belonged to his mother, Lisa Leonard.<sup>211</sup> Finding the circumstances suspicious, police seized and forfeited the \$201,100.<sup>212</sup> The police believed the cash was "substantially connected to criminal activity, namely, narcotics sales," despite Lisa's insistence that the cash came from a home she had recently sold (hence the bill of sale).<sup>213</sup>

Justice Thomas agreed with the Court's decision not to accept the case for review, but opined that modern civil forfeiture had outgrown its historical maritime roots and likely extended beyond what the United States Constitution would permit under the Due Process Clause.<sup>214</sup> He pointed out civil forfeiture is penal in nature yet does not provide property owners the procedural and constitutional safeguards owed to criminal defendants.<sup>215</sup> He also highlighted the profit incentive in civil forfeiture laws and discussed some high-profile abuses of the civil forfeiture system.<sup>216</sup> He paid particular attention to cases in which law enforcement targeted low-income and BIPOC communities.<sup>217</sup> Justice Thomas closed by saying "[w]hether this Court's treatment of the broad modern forfeiture practice can be justified by the narrow historical one is certainly worthy of consideration in greater detail."<sup>218</sup>

Justice Thomas's opinion in *Leonard* has increased doubt surrounding the constitutionality of civil forfeiture in the modern era.<sup>219</sup> Federal District Court Judge Brian S. Miller "agree[s] with Justice Thomas's position in *Leonard* that civil forfeiture has gotten out of hand and that it needs to be [reined] in so it is at least loosely tethered to its founding principles."<sup>220</sup> Justice Geoffrey G. Slaughter of the Indiana Supreme Court identified "serious concerns with the way Indiana carries out civil forfeitures" and commented that he is "await[ing] another case—brought

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210. *Id.*

211. *Id.*; see also Jason Snead, *Clarence Thomas Casts Doubt on the Constitutionality of Civil Forfeiture*, HERITAGE FOUND. (Mar. 10, 2017), <https://www.heritage.org/courts/commentary/clarence-thomas-casts-doubt-the-constitutionality-civil-forfeiture> [<https://perma.cc/YMQ3-KSCM>] (discussing *Leonard v. Texas* in further detail).

212. *Leonard*, 137 S. Ct. at 847.

213. *Id.*

214. *Id.* at 849.

215. *Id.* at 847–48.

216. *Id.* at 848.

217. *See id.*

218. *Id.* at 850.

219. *See Note, supra* note 153, at 2388.

220. *United States v. \$284,950 in U.S. Currency*, No. 4:16-CV-00168 BSM, 2018 U.S. Dist. LEXIS 241486, at \*10 (E.D. Ark. May 22, 2018).

by the State or by a private party with a concrete, particularized injury—to address the important constitutional questions that this and other civil-forfeiture cases implicate.”<sup>221</sup>

Other critics highlight the disparate impacts civil forfeiture laws have on BIPOC communities.<sup>222</sup> It is difficult to precisely pinpoint the impacts civil forfeiture has on these communities due to inconsistent reporting requirements;<sup>223</sup> nevertheless, it is likely civil forfeiture significantly impacts BIPOC communities through its application in the highly racialized “War on Drugs.”<sup>224</sup> For example, studies show Black drivers are nearly 20% more likely to be pulled over than White drivers and, once pulled over, Black drivers are searched one-half to two times more often than White drivers.<sup>225</sup> Higher levels of police interaction with BIPOC communities increase the likelihood of property seizure because many forfeitures originate with minor traffic stops.<sup>226</sup>

Frequent police interactions result in highly impactful forfeitures for BIPOC community members. BIPOC individuals are more likely to carry cash due to long-standing racism in the banking industry<sup>227</sup> and employment positions that pay in cash.<sup>228</sup> A 2019 report on forfeitures in South Carolina found that seven out of ten individuals who had property seized were Black, and 65% of all cash seizures were taken from Black males.<sup>229</sup> The simple act of carrying what police consider to be a large amount of cash is deemed a red flag and may be suspicious enough to

221. *Horner v. Curry*, 125 N.E.3d 584, 612 (Ind. 2019) (Slaughter, J., concurring) (arguing the plaintiff lacked standing to bring their constitutional challenges to forfeiture).

222. Rebecca Vallas, Tracey Ross, Todd A. Cox, Jamal Hagler & Billy Corriher, *Forfeiting the American Dream*, CTR. FOR AM. PROGRESS (Apr. 1, 2016, 6:00 AM), <https://www.americanprogress.org/issues/criminal-justice/reports/2016/04/01/134495/forfeiting-the-american-dream/> [https://perma.cc/8CZ4-UM6M].

223. *See, e.g.*, Murphy, *supra* note 95, at 79 (noting the lack of studies tracking racial statistics in civil forfeitures).

224. *See* Stillman, *supra* note 26.

225. *Research Shows Black Drivers More Likely to Be Stopped by Police*, N.Y.U. (May 5, 2020), <https://www.nyu.edu/about/news-publications/news/2020/may/black-drivers-more-likely-to-be-stopped-by-police.html> [https://perma.cc/SH3V-AGUF].

226. *See, e.g.*, Sallah et al., *supra* note 165 (describing the “aggressive brand of policing that has spurred the seizure of hundreds of millions of dollars in cash from motorists and others not charged with crimes”).

227. *See* Murphy, *supra* note 95, at 94 (“Large national banks have historically been reluctant to open branches in minority neighborhoods, and have been known to offer unsatisfactory loans to racial minorities.”).

228. *See* Nathaniel Cary & Mike Ellis, *65% of Cash Seized by SC Police Comes from Black Men. Experts Blame Racism.*, GREENVILLE NEWS (Jan. 17, 2020, 4:29 PM), <https://www.greenvilleonline.com/story/news/taken/2019/01/27/south-carolina-racism-blamed-civil-forfeiture-black-men-taken-exclusive-investigation/2459039002/> [https://perma.cc/H3X8-5HCS].

229. *Id.*

prompt seizure.<sup>230</sup> Once their property is seized, BIPOC individuals are less likely than White individuals to have access to attorneys to successfully challenge forfeiture proceedings.<sup>231</sup> Despite the dearth of standardized reporting across race and ethnicity statistics, it can be reasonably presumed that civil forfeiture has a disproportionate impact on BIPOC communities.<sup>232</sup> This racial effect further damns civil forfeiture on due process grounds.

### III. CIVIL FORFEITURE: WASHINGTON VS. NEW MEXICO

Unlike New Mexico, which utilizes a criminal forfeiture system,<sup>233</sup> Washington mainly utilizes a civil forfeiture system.<sup>234</sup> Washington has several civil forfeiture statutes, but the law relied on most frequently is RCW 69.50.505.<sup>235</sup> This statute grants forfeiture authority over money, vehicles, realty, and other property traceable to drug law violations.<sup>236</sup> Other Washington laws authorize civil forfeiture of property connected to illegal gambling,<sup>237</sup> sexual exploitation of minors,<sup>238</sup> fish and wildlife law violations,<sup>239</sup> tax evasion,<sup>240</sup> and unlicensed sale of tobacco products,<sup>241</sup> among others. This Comment focuses on RCW 69.50.505 because the Supreme Court of Washington decides all major civil forfeiture challenges under this statute.<sup>242</sup> However, much of the procedural language and requirements apply equally to all civil forfeiture laws in

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230. See, e.g., Sallah et al., *supra* note 165 (“For many innocents caught in the seizure net, the biggest misstep was carrying more cash than police thought was normal for law-abiding citizens.”).

231. See Murphy, *supra* note 95, at 96–97.

232. *Id.* at 79 (using anecdotal evidence showing racial bias in forfeiture application to presume a general disparate impact on racial minorities).

233. See N.M. STAT. ANN. §§ 31-27-1 to 31-27-11 (LexisNexis 2021).

234. See, e.g., WASH. REV. CODE § 69.50.505 (2020) (Washington’s most cited forfeiture statute).

235. *Id.*

236. *Id.* § 69.50.505(1).

237. WASH. REV. CODE § 9.46.231 (2020).

238. *Id.* § 9.68A.120.

239. WASH. REV. CODE § 77.15.070 (2020).

240. WASH. REV. CODE § 82.32.670 (2020).

241. *Id.* § 82.26.230.

242. For a variety of precedential Washington State Supreme Court cases decided under WASH. REV. CODE § 69.50.505, see *Tellevik v. 31641 W. Rutherford St.*, 125 Wash. 2d 364, 884 P.2d 1319 (1994); *State v. Clark*, 124 Wash. 2d 90, 875 P.2d 613 (1994); *State v. Cole*, 128 Wash. 2d 262, 906 P.2d 925 (1995); *State v. Catlett*, 133 Wash. 2d 355, 945 P.2d 700 (1997); *Guillen v. Contreras*, 169 Wash. 2d 769, 238 P.3d 1168 (2010); *Olympic Peninsula Narcotics Enf’t Team v. 115 Freeman Lane*, 191 Wash. 2d 654, 424 P.3d 1226 (2018) (all involving interpretations of WASH. REV. CODE § 69.50.505). Researching Washington case law did not produce any precedent-setting cases under any civil forfeiture statute except WASH. REV. CODE § 69.50.505.

Washington.

Conversely, New Mexico abolished all civil forfeiture when it enacted the 2015 New Mexico Forfeiture Act.<sup>243</sup> To nullify concerns over the lack of due process protections in civil forfeiture proceedings, this revolutionary legislation requires the government to process forfeitures through the criminal justice system.<sup>244</sup> Thus, a property owner in New Mexico must be criminally convicted—with all the constitutional protections afforded to criminal defendants—before they can be permanently deprived of any property traceable to their crime.<sup>245</sup> These new laws also close federal equitable sharing loopholes<sup>246</sup> and eliminate any profit motive driving forfeiture by requiring forfeiting agencies to transfer forfeiture proceeds to the state’s general fund instead of retaining the funds in-house as revenue.<sup>247</sup> Washington’s minimal legal protections for property owners navigating the civil forfeiture system and profit-incentivizing provisions fall far short of New Mexico’s forward-looking Act.

#### A. *Civil Forfeiture in Washington*

Washington authorized forfeiture for property involved in drug crime violations in the 1970s.<sup>248</sup> Over the last two decades, Washington generated nearly \$145 million in forfeiture revenue under state law and an additional \$87 million in forfeitures processed through the federal government’s ESP.<sup>249</sup> This has caused some departments to rely on forfeiture funds to supplement their budget<sup>250</sup> and created some concern among justices on the Supreme Court of Washington bench.<sup>251</sup>

##### 1. *History of RCW 69.50.505*

Washington’s primary civil forfeiture statute, RCW 69.50.505, was enacted in 1971 as part of the state’s Uniform Controlled Substances Act

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243. N.M. STAT. ANN. §§ 31-27-1 to 31-27-11 (LexisNexis 2021).

244. *Id.* § 31-27-4.

245. *Id.*

246. *Id.* § 31-27-11.

247. *Id.* § 31-27-7(C).

248. Uniform Controlled Substances Act, ch. 308, § 69.50.505, 1971 Wash. Sess. Laws 1794, 1817–19.

249. See KNEPPER ET AL., *supra* note 11, at 154. These figures include criminal and civil forfeiture totals. *Id.*

250. CITY OF SEATTLE, WASH., *Law Department, in 2019–2020 PROPOSED BUDGET 288* (2018), <https://www.seattle.gov/Documents/Departments/FinanceDepartment/19proposedbudget/LAW.pdf> [<https://perma.cc/3TKF-D93Q>].

251. See *City of Sunnyside v. Gonzalez*, 188 Wash. 2d 600, 617, 398 P.3d 1078, 1085 (2017).

(UCSA).<sup>252</sup> This statute is used as a deterrent in the War on Drugs and permits forfeiture of all property connected to or derived from a violation of the UCSA<sup>253</sup>—including vehicles,<sup>254</sup> cash,<sup>255</sup> and homes.<sup>256</sup> Originally, the only high-value personal property the law allowed agencies to forfeit were vehicles.<sup>257</sup> However, the statute was amended in 1982 to include forfeiture of money<sup>258</sup> and again in 1989 to reach real property.<sup>259</sup> The 1989 legislative findings state that forfeiting real property

where a substantial nexus exists between the commercial production or sale of the substances and the real property will provide a significant deterrent to crime by removing the profit incentive of drug trafficking, and will provide a revenue source that will partially defray the large costs incurred by government as a result of these crimes.<sup>260</sup>

To this day, crime deterrence and punishment remain the policy goals of Washington’s forfeiture laws.<sup>261</sup>

Additionally, Washington law provides for an administrative forfeiture process.<sup>262</sup> RCW 69.50.505 allows police to seize property once they have probable cause to believe the property is connected to illegal drug sales or manufacturing.<sup>263</sup> Once an agency seizes property, it must serve a notice upon the property owner within fifteen days that informs them of their

252. See § 69.50.505, 1971 Wash. Sess. Laws at 1817–19.

253. See, e.g., *Gonzalez*, 188 Wash. 2d at 615–16, 398 P.3d at 1085 (“[The government] was required to prove, by a preponderance of the evidence, that [the property owner’s] car and money were specifically connected to drug manufacturing, transactions, or distribution.”).

254. WASH. REV. CODE § 69.50.505(1)(d) (2020).

255. *Id.* § 69.50.505(1)(g).

256. *Id.* § 69.50.505(1)(h).

257. *Id.* § 69.50.505(a)(4), 1971 Wash. Sess. Laws at 1817 (“The following are subject to forfeiture . . . all conveyances, including aircraft, vehicles or vessels, which are used, or intended for use, to transport, or in any manner to facilitate the transportation, for the purpose of sale or receipt of [illegal controlled substances and/or related materials and equipment].”).

258. Controlled Substances—Forfeiture, Seizure of Property—Imitation Controlled Substances, ch. 171, sec. 1, § 69.50.505(a)(7), 1982 Wash. Sess. Laws 684, 685.

259. Omnibus Alcohol and Controlled Substances Act, ch. 271, sec. 212, § 69.50.505(a)(8), 1989 Wash. Sess. Laws 1266, 1300.

260. *Id.* at 1298–99.

261. See, e.g., *City of Sunnyside v. Gonzalez*, 188 Wash. 2d 600, 608, 398 P.3d 1078, 1081 (2017) (identifying drug crime deterrence and punishment as the intended result of forfeiture).

262. See *supra* section I.B.1.

263. See WASH. REV. CODE § 69.50.505(2)(d) (2020); see also *Valerio v. Lacey Police Dep’t*, 110 Wash. App. 163, 176–77, 39 P.3d 332, 339 (2002) (quoting *Barlindal v. City of Bonney Lake*, 84 Wash. App. 135, 141, 925 P.2d 1289, 1292 (1996) (“Under Washington forfeiture law, probable cause requires the existence of reasonable grounds for suspicion supported by circumstances sufficiently strong to warrant a person of ordinary caution in the belief that the property was used or intended to be used in violation of the Uniform Controlled Substances Act (UCSA).”).

right to challenge the forfeiture.<sup>264</sup> If the owner elects to challenge the forfeiture, the agency's chief law enforcement officer or an appointed administrative law judge will hear the case.<sup>265</sup> A representative from the seizing agency must prove by a preponderance of the evidence that the property is subject to forfeiture.<sup>266</sup> If forty-five days have lapsed since service and no one has claimed a possessory interest in the seized items, they are forfeited by default and officially become property of the seizing agency.<sup>267</sup> The window of time before default on real property is extended to ninety days from the date the notice was served.<sup>268</sup> The agency may sell, destroy, or retain the property for official use once forfeited.<sup>269</sup>

## 2. *Application of Civil Forfeiture Laws in Washington*

Washington law enforcement agencies are candid about their financial reliance on civil forfeiture. For example, in the 2019–2020 proposed budget for the City of Seattle Law Department, the agency requested to create a new staff position in their civil forfeiture unit.<sup>270</sup> The budget proposal allocated nearly \$59,000 for the half-time position and stated “[i]n 2018 the Seattle Police Department (SPD) increased efforts to seek forfeitures of real and personal property in civil forfeiture cases. This increase is expected to continue in 2019. . . . Forfeiture cases provide revenue to SPD and support for this position is available from these funds.”<sup>271</sup> Moreover, in 2020, the Seattle Police Department received over \$1.2 million in payments from the ESP.<sup>272</sup> This figure does not include proceeds from the agency's local, non-ESP forfeitures.

Smaller Washington agencies also profit considerably from civil forfeiture. From 2012 to 2015, the Spokane Police Department in eastern Washington brought in an annual average of \$170,000 from local forfeiture proceeds.<sup>273</sup> One Spokane councilman stated “if someone was using a vehicle to sell drugs, you get the vehicle. If they were using the

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264. WASH. REV. CODE § 69.50.505(3).

265. *Id.* § 69.50.505(5).

266. *Id.* Property owners may also elect to remove the case to the local district court. *See id.*

267. *Id.* § 69.50.505(4).

268. *Id.*

269. *Id.* § 69.50.505(7).

270. CITY OF SEATTLE, WASH., *supra* note 250, at 288.

271. *Id.* at 288, 289.

272. EQUITABLE SHARING PAYMENTS OF CASH 2020, *supra* note 149 (totals for fiscal year 2020).

273. Thomas Clouse, *U.S. Supreme Court Ban on Excessive Forfeitures Likely Will Affect Spokane Police*, SPOKESMAN-REV. (Feb. 21, 2019), <https://www.spokesman.com/stories/2019/feb/20/court-constitutional-ban-on-high-fines-applies-to/> [<https://perma.cc/7RUC-Q83R>].

house, you get the house.”<sup>274</sup> In northern Washington, the Whatcom County Sheriff’s Office received \$894,993 from the ESP in 2019—the highest of any agency in the state that year.<sup>275</sup> This is a significant amount for a department with less than 200 people on staff.<sup>276</sup>

While Washington law enforcement agencies bolster their budgets with forfeiture proceeds, property owners are left in the lurch. A 2001 study found that in King County, 20% of individuals who had property seized were never charged with a crime.<sup>277</sup> Of those who did have formal charges brought against them, nearly 25% of the cases were eventually dropped.<sup>278</sup> In total, almost 40% of all asset seizures did not result in a conviction.<sup>279</sup> Nevertheless, most property owners do not get their items back from police.<sup>280</sup> The preponderance of the evidence standard is extremely deferential to the agency and sets a low bar for justifying forfeiture.<sup>281</sup> Additionally, the process to reclaim property is long, confusing, and expensive.<sup>282</sup> Challenging forfeiture often costs more in attorneys’ fees than what the property itself is worth.<sup>283</sup> Low-income individuals facing forfeiture do not have the right to an attorney for assistance in these civil proceedings.<sup>284</sup> For many, the legal battle is simply not feasible.<sup>285</sup>

### 3. *Interpretation of Civil Forfeiture Laws in Washington*

Despite the recent push for civil forfeiture reform in other jurisdictions, Washington courts have not significantly addressed the constitutionality of civil forfeiture in the twenty-first century. The judiciary has previously waffled on constitutional challenges to RCW 69.50.505. For example, in

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274. *Id.*

275. U.S. DEP’T OF JUST., *EQUITABLE SHARING PAYMENTS OF CASH AND SALE PROCEEDS BY RECIPIENT AGENCY FOR WASHINGTON: FISCAL YEAR 2019* (2019), <https://www.justice.gov/afp/page/file/1250761/download> [<https://perma.cc/4HCN-4KEC>].

276. *See* WHATCOM CNTY. SHERIFF’S OFF., *WHATCOM COUNTY SHERIFF’S OFFICE PATROL DEPUTY*, <https://www.whatcomcounty.us/DocumentCenter/View/32744/Patrol-Recruitment-Brochure?bidId=> [<https://perma.cc/JSQ2-BX6F>].

277. Sam Skolnik, *Critics Target Drug Raid Seizures*, SEATTLE POST-INTELLIGENCER, Dec. 13, 2001, at A1.

278. *Id.*

279. *Id.*

280. *Id.*

281. *See supra* section I.B.1.

282. *See* KNEPPER ET AL., *supra* note 11, at 30.

283. *See id.* at 6.

284. *See State ex rel. Eikenberry v. Frodert*, 84 Wash. App. 20, 32, 924 P.2d 933, 940 (1996) (quoting *State v. Long*, 104 Wash. 2d 285, 292, 705 P.2d 245, 249 (1985)).

285. *See* KNEPPER ET AL., *supra* note 11, at 6.

*Deeter v. Smith*<sup>286</sup> the Supreme Court of Washington stated civil forfeiture proceedings are “quasi criminal in nature since their purpose is to penalize individuals who participate in the illegal transportation of controlled substances.”<sup>287</sup> Because of this quasi-criminal label, the *Deeter* Court unanimously held the Fourth Amendment exclusionary rule applies to exclude illegally seized evidence from admission in a forfeiture proceeding.<sup>288</sup> Conversely, in *State v. Catlett*<sup>289</sup> the Court held that “RCW 69.50.505 is not so punitive as to constitute criminal punishment for purposes of double jeopardy analysis.”<sup>290</sup>

In yet another swing of the pendulum, the Washington Court of Appeals held forfeiture of real property under the “knowledge provision” of RCW 69.50.505(1)(h) is considered a “punishment” under the Eighth Amendment.<sup>291</sup> This means Washington courts must assess the proportionality between the alleged criminal activity and the value of the seized property for excessiveness, among other factors.<sup>292</sup> The Supreme Court of Washington also held a seizure pursuant to civil forfeiture does not violate procedural due process requirements despite the fact that seizure occurs without notice or a prior opportunity to be heard.<sup>293</sup> The Court reasoned that a balancing test tilted in favor of the significant governmental interests at stake.<sup>294</sup> These decisions have sat undisturbed for over two decades now.

Although the Supreme Court of Washington has not directly addressed the constitutionality of civil forfeiture in recent years, the 2017 case of *City of Sunnyside v. Gonzalez*<sup>295</sup> provides some hope to those seeking forfeiture reform.<sup>296</sup> In a unanimous opinion, the Court cabined civil forfeiture by specifying RCW 69.50.505 is meant to address drug manufacturing, sales, and distribution—not minor-level drug

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286. 106 Wash. 2d 376, 721 P.2d 519 (1986).

287. *Id.* at 378, 721 P.2d at 520–21.

288. *Id.*

289. 133 Wash. 2d 355, 945 P.2d 700 (1997).

290. *Id.* at 368–69, 945 P.2d at 706.

291. *See Tellevik v. 6717 100th St. S.W.*, 83 Wash. App. 366, 375–76, 921 P.2d 1088, 1093–94 (1996); U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).

292. *See 6717 100th St. S.W.*, 83 Wash. App. at 375–76, 921 P.2d at 1093–94.

293. *See Tellevik v. 31641 W. Rutherford St.*, 120 Wash. 2d 68, 87, 838 P.2d 111, 121 (1992).

294. *See id.*

295. 188 Wash. 2d 600, 398 P.3d 1078 (2017).

296. *See Ronald Farley, Not So Fast! Washington’s Supreme Court Takes a Critical Look at Civil Forfeiture Under the Uniform Controlled Substances Act*, 71 NWLAWYER 14 (2017).

possession.<sup>297</sup> Mr. Gonzales was initially pulled over for speeding.<sup>298</sup> However, the police seized his vehicle and \$5,940 in cash after they found a “user amount” of cocaine.<sup>299</sup> Based on the cash, the drugs, and the fact that Mr. Gonzalez’s car was registered to an out-of-state owner, police believed they had enough evidence to forfeit the cash and vehicle as property connected to a drug transaction.<sup>300</sup> The Court disagreed and found “no evidence” the cash or the vehicle were connected to drug production or sales.<sup>301</sup> The Court repudiated forfeiture based on possession of small amounts of controlled substances.<sup>302</sup> The Court added that robust appellate review “is particularly important in the forfeiture context because an individual may lose valuable property even where no drug crime has actually been committed.”<sup>303</sup> The Court acknowledged the profit motive in forfeiture and stated “the government has a strong financial incentive to seek forfeiture because the seizing law enforcement agency is entitled to keep or sell most forfeited property.”<sup>304</sup>

More recently, the Supreme Court of Washington handed down a decision in *State v. Blake*<sup>305</sup> that could have significant implications for RCW 69.50.505’s constitutionality. The issue before the Court in *Blake* was whether Washington’s simple drug possession statute violated due process because of its associated “substantial penalties for . . . innocent, passive conduct.”<sup>306</sup> The defendant in the case, Blake, had a small quantity of methamphetamine in the coin pocket of her jeans.<sup>307</sup> Blake and other witnesses testified the jeans were given to her by a friend and she denied any knowledge of the drugs.<sup>308</sup> The trial court held Blake “had not met her burden to prove that her possession was unwitting” and found her guilty of felony drug possession.<sup>309</sup> However, the Supreme Court of Washington vacated Blake’s conviction and held the trial court erred because penalizing “innocent nonconduct” by someone who lacks any guilty intent

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297. *Gonzalez*, 188 Wash. 2d at 608, 398 P.3d at 1081.

298. *Id.* at 603, 398 P.3d at 1079.

299. *Id.* at 603–04, 398 P.3d at 1079.

300. *Id.* at 604, 398 P.3d at 1079.

301. *Id.* at 609, 398 P.3d at 1082.

302. *Id.* at 616, 398 P.3d at 1085.

303. *Id.* at 617, 398 P.3d at 1085.

304. *Id.*

305. 197 Wash. 2d 170, 481 P.3d 521 (2021).

306. *Id.* at 173, 481 P.3d at 524.

307. *Id.* at 174, 481 P.3d at 524.

308. *Id.* at 175, 481 P.3d at 524.

309. *Id.*

violates due process of law.<sup>310</sup> Forfeiture could be analogized as similarly punishing “innocent nonconduct” because the Court has already acknowledged that property owners may face forfeiture despite never committing a crime.

In its opinion in *Blake*, the Court underscored the disproportionate impact Washington’s drug laws (including RCW 69.50.505) have on young men of color. The Court cited a 2012 report which “attribute[ed] Washington’s racially disproportionate criminal justice system to disparity in drug law enforcement and drug-related asset forfeiture, among many other causes.”<sup>311</sup> The report unequivocally found “Washington’s drug-related asset forfeiture laws reinforce drug-related law enforcement tactics that have a disparate impact on racial minorities.”<sup>312</sup> Moreover, the report calls attention to the conflict created by the profit motive inherent in Washington’s forfeiture laws and how it affects the way agencies make operational decisions.<sup>313</sup> The report also criticizes the preponderance of the evidence standard of proof by describing it as “one of the lowest in the country, and . . . highly deferential to law enforcement.”<sup>314</sup> This recognition of the potential for abuse is a promising step toward following New Mexico’s lead and abolishing Washington’s civil forfeiture system.

#### *B. Abolishment of Civil Forfeiture in New Mexico*

Over the last twenty years, the New Mexico legislature enacted major changes to its forfeiture laws to better protect property owners and prevent abuse of the forfeiture system.<sup>315</sup> These changes culminated in the passage of the Forfeiture Act<sup>316</sup> in 2015 (hereinafter referred to as “the 2015 Act”), in which the legislature fully abolished civil forfeiture and replaced it with a strict criminal forfeiture system that requires a conviction prior to forfeiture.<sup>317</sup> Although opponents of the 2015 Act predicted a major increase in crime following implementation, recent studies show this has

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310. *Id.* at 188, 481 P.3d at 531.

311. *Id.* at 192, 481 P.3d at 533.

312. Rsch. Working Grp., Task Force on Race and the Crim. Just. Sys., *Preliminary Report on Race and Washington’s Criminal Justice System*, 35 SEATTLE U. L. REV. 623, 655 (2012).

313. *Id.* at 653–54.

314. *Id.* at 654.

315. *Compare* N.M. STAT. ANN. §§ 31-27-1 to 31-27-8 (LexisNexis 2002) (including very few legal protections for property owners facing forfeiture), *with* N.M. STAT. ANN. §§ 31-27-1 to -11 (LexisNexis 2021) (including some of the strongest forfeiture-related legal protections for property owners in the country).

316. N.M. STAT. ANN. §§ 31-27-1 to -11 (LexisNexis 2021).

317. H.B. 560, 52d Leg., Reg. Sess. (N.M. 2015).

not come to pass.<sup>318</sup> New Mexico's current forfeiture laws provide the strongest protections for property owners in the country and serve as a model for fellow states with an eye for reform.<sup>319</sup>

### *1. History of Forfeiture Reform in New Mexico*

At the close of the twentieth century, the Supreme Court of New Mexico took a close look at the state's forfeiture laws to address due process concerns surrounding the burden of proof in forfeiture proceedings.<sup>320</sup> In *State v. Nunez*,<sup>321</sup> the Court held that “[t]he fact that the State bears a low burden of proof—be it either probable cause or preponderance of the evidence—when it initiates the deprivation of a fundamental constitutional right raises grave due process concerns.”<sup>322</sup> At that time, New Mexico's forfeiture statute was ambiguous as to whether the government or the property owner bore the burden of proof in forfeiture proceedings.<sup>323</sup> The Court examined different interpretive arguments and found the law could have been plausibly interpreted to only require the government to show probable cause that the property in question was connected to a crime.<sup>324</sup> The property owner would then be forced to prove by a preponderance of the evidence that their property was not subject to forfeiture.<sup>325</sup> This interpretation, coupled with the lack of “protections that are indispensable in a criminal setting—such as proof beyond a reasonable doubt, the right to counsel, presumption of innocence, [and] the right to confront one's accusers,”<sup>326</sup> spurred the Court to shift the burden onto the state to prove by clear and convincing evidence that the seized property is subject to forfeiture.<sup>327</sup>

After the Court's ruling in *Nunez* at the end of 1999 and its codification in 2002,<sup>328</sup> New Mexico's forfeiture laws required forfeiture and criminal

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318. Nick Sibilla, *When New Mexico Abolished Civil Forfeiture 5 Years Ago, Cops Predicted Crime Would Soar. It Didn't*, FORBES (Dec. 17, 2020, 2:00 PM), <https://www.forbes.com/sites/nick-sibilla/2020/12/17/when-new-mexico-abolished-civil-forfeiture-5-years-ago-cops-predicted-crime-would-soar-it-didnt/?sh=5c88f0512729> [<https://perma.cc/BL35-PB9J>].

319. See KNEPPER ET AL., *supra* note 11, at 122–23.

320. See *State v. Nunez*, 2000-NMSC-013, ¶ 108, 129 N.M. 63, 90, 2 P.3d 264, 291 (1999).

321. 2000-NMSC-013, 129 N.M. 63, 2 P.3d 264 (1999).

322. *Id.* at ¶ 108, 129 N.M. at 90, 2 P.3d at 291.

323. *Id.* at ¶ 107, 129 N.M. at 90, 2 P.3d at 291.

324. *Id.*

325. *Id.*

326. *Id.* at ¶ 109, 129 N.M. at 90, 2 P.3d at 291.

327. *Id.* at ¶ 110, 129 N.M. at 90, 2 P.3d at 291.

328. See N.M. STAT. ANN. §§ 31-27-1 to -8 (LexisNexis 2002).

charges to “be brought in a single, bifurcated proceeding,”<sup>329</sup> allowed public defenders appointed in criminal proceedings to defend property owners in their forfeiture proceedings, set the burden of proof for the government at clear and convincing, and enabled safeguards to protect against excessive forfeitures in proportion to the alleged criminal offense.<sup>330</sup>

Despite these turn-of-the-century enactments, the Institute for Justice rated New Mexico’s forfeiture laws just slightly higher than Washington’s current rating.<sup>331</sup> In 2010, New Mexico scored a D+ on the Institute’s forfeiture law grading scale because the state still allowed law enforcement agencies to retain 100% of the proceeds derived from forfeiture and because they placed the burden on property owners to prove their “innocent owner” defense.<sup>332</sup> Additionally, the New Mexico legislature did not do enough to curb participation in the federal ESP.<sup>333</sup> Between 2001 and 2002, when the stricter state laws were enacted, the funds paid to New Mexico by the federal government via the ESP nearly doubled.<sup>334</sup>

The New Mexico legislature recognized the shortcomings in its early reform efforts and went even further to curb civil forfeiture abuse by abolishing its usage entirely in the 2015 Act.<sup>335</sup> The new legislation “require[s] a criminal conviction to forfeit property, shift[s] the burden of proof from innocent owners onto the government, and set[s] up court hearings to better ensure due process.”<sup>336</sup> The 2015 Act also mandates that forfeiture proceeds are deposited into the state’s general fund rather than remain with the seizing agency.<sup>337</sup> The stated purposes of the 2015 Act

329. Michelle R. Haubert-Barela, Note, *Complying with Nunez: The Necessary Procedure for Obtaining Forfeiture of Property and Avoiding Double Jeopardy After State v. Esparza*, 34 N.M. L. REV. 561, 567 (2004).

330. *Id.* at 567–68.

331. Compare IJ *WA*, *supra* note 182 (grading Washington’s 2020 forfeiture laws with a D-), with MARIAN R. WILLIAMS, JEFFERSON E. HOLCOMB, TOMISLAV V. KOVANDZIC & SCOTT BULLOCK, *POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE* 78 (1st ed. 2010) (grading New Mexico’s 2010 forfeiture laws with a D+).

332. WILLIAMS ET AL., *supra* note 331, at 78.

333. *Id.*

334. *Id.* (totaling New Mexico’s 2001 equitable sharing proceeds at \$1,157,905 and 2002’s equitable sharing proceeds at \$2,272,066).

335. H.B. 560, 52d Leg., Reg. Sess. (N.M. 2015); see also Nick Sibilla, *Cops Can’t Ignore New Mexico’s Ban on Civil Forfeiture, Court Rules*, FORBES (Dec. 19, 2018, 9:35 AM), <https://www.forbes.com/sites/nicksibilla/2018/12/19/cops-cant-ignore-new-mexicos-ban-on-civil-forfeiture-court-rules/?sh=48f4f0396a7d> [<https://perma.cc/4V5L-Q6BC>] (describing New Mexico’s abolishment of civil forfeiture and switch to a criminal forfeiture system).

336. Sibilla, *supra* note 335.

337. *Id.*

are to:

- (1) make uniform the standards and procedures for the seizure and forfeiture of property subject to forfeiture;
- (2) protect the constitutional rights of persons whose property is subject to forfeiture and of innocent owners holding interests in property subject to forfeiture;
- (3) deter criminal activity by reducing its economic incentives;
- (4) increase the pecuniary loss from criminal activity;
- (5) protect against the wrongful forfeiture of property; and
- (6) ensure that only criminal forfeiture is allowed in this state and only pursuant to state law.<sup>338</sup>

Under the new laws, a property owner must first be criminally convicted—beyond a reasonable doubt—of an “offense to which forfeiture applies.”<sup>339</sup> The same judge and/or jury<sup>340</sup> will decide the forfeiture matter in an ancillary proceeding if the defendant property owner’s criminal trial ends in a guilty verdict.<sup>341</sup> The government then has to establish by clear and convincing evidence that the seized property was used to commit the criminal offense, was acquired by way of the offense, or is “directly traceable to property acquired through the commission of the offense.”<sup>342</sup> Ultimately, the government must prove the following elements by clear and convincing evidence: (1) the property is subject to forfeiture; (2) the property owner was convicted of the underlying crime; and (3) the value of the property is not unreasonably disproportionate to the crime.<sup>343</sup>

Once forfeited, the property is sold by the state treasurer at public auction.<sup>344</sup> The proceeds are used to reimburse the forfeiting agency’s reasonable expenses incurred in the “storage, protection, . . . transfer, . . . [and] dispos[al] of the property” and the remaining balance is deposited into the state’s general fund.<sup>345</sup> The drafters of the 2015 Act also made sure to prevent backdoor civil forfeiture via the ESP. Thus, agencies can only transfer property to the

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338. N.M. STAT. ANN. § 31-27-2(A) (LexisNexis 2021).

339. *Id.* § 31-27-4(A). The 2015 Act also allows for forfeiture inclusion in plea agreements. *See id.* § 31-27-4(C).

340. Only forfeiture proceedings where the property is valued at \$20,000 or more are eligible for a jury. *See id.* § 31-27-6(E).

341. *Id.* § 31-27-6(C).

342. *Id.* § 31-27-4(A) to (B).

343. *Id.* § 31-27-6(G).

344. *Id.* § 31-27-7(B).

345. *Id.*

federal government for forfeiture under the ESP if the property is worth over \$50,000 and the underlying crime was interstate and complex, or if “the seized property may only be forfeited under federal law.”<sup>346</sup> The 2015 Act expressly states “law enforcement agenc[ies] shall not transfer property to the federal government if the transfer would circumvent the protections of the Forfeiture Act.”<sup>347</sup> These provisions taken together provide much-needed due process protections and make New Mexico the leading state in the nation on civil forfeiture reform.<sup>348</sup>

## 2. *Implications of the 2015 Act*

Despite critics’ predictions to the contrary, the 2015 Act’s legal advancements have not increased New Mexico’s crime rate.<sup>349</sup> New Mexico’s Department of Public Safety argued losing the significant revenue stream from civil forfeiture would negatively affect law enforcement’s ability to investigate criminal activity.<sup>350</sup> They anticipated the change would have “a direct impact on the public safety of NM citizens.”<sup>351</sup> The Chairman of the New Mexico Sheriff’s Association warned that passage of the bill would mean New Mexico citizens would “get less law enforcement.”<sup>352</sup> Multiple police agencies across the state sent letters to the governor requesting a veto of the legislation.<sup>353</sup> Yet in a recent study comparing the crime rate in New Mexico to those of neighboring states, “no significant increase in crime rates” was found.<sup>354</sup> This research supports the conclusions that “the reforms had no negative effect on public safety” and “civil forfeiture is not an essential crime-fighting tool.”<sup>355</sup>

Although New Mexico’s forfeiture reform is a model for other states, it is not perfect. Some of the main areas for improvement are forfeiture

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346. *Id.* § 31-27-11(A).

347. *Id.* § 31-27-11(B).

348. *See* KNEPPER ET AL., *supra* note 11, at 31.

349. *See* Sibilla, *supra* note 318.

350. N.M. LEGIS. FIN. COMM., FISCAL IMPACT REPORT, H.B. 52-560, 1st Sess., at 4 (2015), <https://www.nmlegis.gov/Sessions/15%20Regular/firs/HB0560.PDF> [<https://perma.cc/69GK-UZUK>].

351. *Id.*

352. Ryan Boetel & Dan Boyd, *Bill Would Kill ‘Policing for Profit’*, ALBUQUERQUE J. (Mar. 28, 2015, 12:05 AM), <https://www.abqjournal.com/561411/bill-on-seizures-would-kill-policing-for-profit.html> [<https://perma.cc/B9NY-PZWH>].

353. *Id.*

354. KNEPPER ET AL., *supra* note 11, at 32.

355. *Id.*

tracking and reporting.<sup>356</sup> The 2015 Act has a clear mandate to annually report all seizures and forfeitures to the Department of Public Safety,<sup>357</sup> but many law enforcement agencies have refused to comply.<sup>358</sup> Securing compliance has proven difficult because the 2015 Act did not include enforcement provisions.<sup>359</sup> While these are valid concerns, they do not detract from the major due process milestones the New Mexico courts and legislature have achieved over the last two decades.

#### IV. ABOLISHMENT OF WASHINGTON'S CIVIL FORFEITURE SYSTEM

Civil forfeiture is an abusive practice that harms innocent property owners and incentivizes police departments to forfeit property for their own pecuniary gain. The forfeiture statutes in Washington are “civil” in name only. In reality, they are highly punitive criminal statutes yet they provide only a fraction of the due process protections normally guaranteed to criminal defendants.<sup>360</sup> Therefore, Washington should abolish civil forfeiture entirely. The Washington legislature should follow New Mexico’s lead to create a criminal forfeiture system by expanding on Washington’s current criminal forfeiture statute. This new system must increase police accountability and eliminate any profit motive by requiring forfeiting agencies to deposit proceeds in the state’s general fund. Any ESP loopholes must be closed with explicit statutory language. Lastly, Washington legislators should improve upon the identified weaknesses in New Mexico’s criminal forfeiture laws by including strict enforcement provisions and reporting requirements.

The first step toward abolishing Washington’s civil forfeiture system begins with acknowledging that RCW 69.50.505 violates due process and should be found unconstitutional. However, Washington statutes are afforded a presumption of constitutionality.<sup>361</sup> This means that a person

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356. *See id.* at 12 (grading New Mexico’s tracking of seized property at a D-).

357. N.M. STAT. ANN. § 31-27-9 (LexisNexis 2021).

358. In 2020, not one single forfeiture was officially reported to the state. *See* N.M. DEP’T OF PUB. SAFETY, SEIZURES AND FORFEITURES DETAIL REPORT 1 (2020), <https://www.dps.nm.gov/images/NMForfeiture/2020-Forfeiture-Detail-Report.pdf> [<https://perma.cc/R2W4-R3M4>].

359. *See, e.g.*, Phaedra Haywood, *New Mexico Agencies Fail to Report Forfeited Assets as Law Requires*, SANTA FE NEW MEXICAN (July 22, 2018), [https://www.santafenewmexican.com/news/local\\_news/new-mexico-agencies-fail-to-report-forfeited-assets-as-law-requires/article\\_cd7b5b77-7a19-5941-9145-739ef9803f75.html](https://www.santafenewmexican.com/news/local_news/new-mexico-agencies-fail-to-report-forfeited-assets-as-law-requires/article_cd7b5b77-7a19-5941-9145-739ef9803f75.html) [<https://perma.cc/C9NV-YUXZ>] (reporting on compliance issues among New Mexican jurisdictions); KNEPPER ET AL., *supra* note 11, at 14 (grading New Mexico’s penalties for reporting violations with an F).

360. *See supra* Part II.

361. *See* State v. Walter Bowen & Co., 86 Wash. 23, 27, 149 P. 330, 331 (1915).

who challenges a statute on constitutional grounds must “demonstrate its invalidity *beyond a reasonable doubt*.”<sup>362</sup> RCW 69.50.505 does *not* set the government’s burden of proof at guilty beyond a reasonable doubt. For this reason, it should be found constitutionally invalid. Rather than continuing to rely on the “‘legal fiction’ that ‘[i]t is the *property* which is proceeded against, and . . . held guilty and condemned as though it were conscious instead of inanimate and insentient,’”<sup>363</sup> which “prevents courts from applying constitutional rules that ‘are expressly limited to criminal cases,’”<sup>364</sup> Washington’s civil forfeiture laws should be found unconstitutional and reformed to eliminate any potential for profit motive and provide property owners the legal protections that due process requires.

Over the years, Washington courts have repeatedly acknowledged that civil forfeiture is “quasi criminal,” but this equivocating label does not accurately portray its punitive effect. Both Washington state courts and federal courts have held that a legislative body’s decision on where to include a statute (whether in a civil or criminal section of legislation) is suggestive of the statute’s nature.<sup>365</sup> RCW 69.50.505’s location in the UCSA is evidence of its criminal nature.<sup>366</sup> Forfeiture is inherently connected to illegal activity and its placement among Washington’s drug laws is further proof of this.<sup>367</sup>

RCW 69.50.505 is overwhelmingly punitive, both in purpose and in effect. Despite its “civil” label, this law functions as a criminal statute—yet it is not accompanied by the procedural and constitutional protections afforded to criminal defendants.<sup>368</sup> The Supreme Court of Washington has admitted “[t]he civil label is not always dispositive” and that “[w]here a

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362. *Hontz v. State*, 105 Wash. 2d 302, 306, 714 P.2d 1176, 1178–79 (1986) (emphasis added).

363. *Olympic Peninsula Narcotics Enf’t Team v. 115 Freeman Lane*, 191 Wash. 2d 654, 666–67, 424 P.3d 1226, 1233 (2018) (emphasis in original) (quoting *United States v. Ursery*, 518 U.S. 267, 275 (1996)).

364. *Id.* at 667, 424 P.3d at 1233 (quoting *Austin v. United States*, 509 U.S. 602, 607 (1993)).

365. *See, e.g., In re Pers. Restraint of Young*, 122 Wash. 2d 1, 19, 857 P.2d 989, 996 (1993) (attaching weight to the fact the state legislature placed a statute allowing for civil commitment of sexually violent predators in RCW Title 71, a *civil* chapter of the Revised Code of Washington); *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997) (finding that “Kansas’ objective to create a civil proceeding is evidenced by its placement of the [Sexually Violent Predator] Act within the Kansas probate code, instead of the criminal code”).

366. *See, e.g., State v. Catlett*, 133 Wash. 2d 355, 375, 945 P.2d 700, 710 (1997) (Sanders, J., dissenting) (“RCW 69.50.505 is part and parcel of the controlled substances act, and it is an overtly criminal statute which imposes harsh felony penalties for possession and/or distribution of illegal drugs.”).

367. *See, e.g., Lowery v. Nelson*, 43 Wash. App. 747, 750, 719 P.2d 594, 596 (1986) (“[The] government’s right to seize and forfeit . . . vests at the time of the illegal conduct.”).

368. *See supra* Part II.

defendant has provided ‘the clearest proof’ that ‘the statutory scheme [is] so punitive either in purpose or effect as to negate [the State’s] intention’ that the proceeding be civil, it must be considered criminal.”<sup>369</sup> When Washington courts succinctly state that “[t]he purpose of forfeiture proceedings is to punish individuals who participate in the illegal dealing of controlled substances,”<sup>370</sup> they cannot claim that civil forfeiture laws are truly “civil.”

Because Washington improperly categorizes forfeiture as civil and continues to adhere to the “guilty property” legal fiction, its forfeiture laws currently rank as some of the worst in the nation.<sup>371</sup> Washington’s minimal legal protections for property owners are mediocre in comparison to New Mexico’s progressive criminal forfeiture laws. New Mexico’s forfeiture laws are currently ranked number one in the nation.<sup>372</sup> Although Washington’s laws do contain some reporting requirements<sup>373</sup> and allow a successful forfeiture challenger to recover reasonable attorneys’ fees,<sup>374</sup> the low standard of proof, minimal safeguards for property owners, and high incentive for profit (through both state forfeiture laws and the ESP) render Washington’s civil forfeiture regime in need of major reform.<sup>375</sup>

Washington should adopt a criminal forfeiture regime like New Mexico’s and prohibit civil asset forfeiture entirely. Interestingly, Washington already has a law that requires a criminal conviction before property can be forfeited.<sup>376</sup> However, because the government can choose which statute to seek forfeiture under, the criminal forfeiture statute is used much less frequently than civil forfeiture under RCW 69.50.505.<sup>377</sup> The criminal forfeiture statute mandates that “[n]o property may be forfeited under this section until after there has been a superior court conviction of the owner of the property for the felony in connection with which the property was employed, furnished, or acquired.”<sup>378</sup> This framework is a start but not enough on its own to protect property owners. As the relative rarity of forfeiture under Washington’s

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369. *Young*, 122 Wash. 2d at 19, 857 P.2d at 997 (emphasis omitted) (quoting *Allen v. Illinois*, 478 U.S. 364, 369 (1986)).

370. *Valerio v. Lacey Police Dep’t*, 110 Wash. App. 163, 176, 39 P.3d 332, 338 (2002) (citing *Deeter v. Smith*, 106 Wash. 2d 376, 378, 721 P.2d 519, 521 (1986)).

371. *See IJ WA*, *supra* note 182.

372. *See IJ NM*, *supra* note 32.

373. WASH. REV. CODE § 69.50.505(8) (2020).

374. *Id.* § 69.50.505(6).

375. *See IJ WA*, *supra* note 182.

376. WASH. REV. CODE § 10.105.010 (2020).

377. The “Citing References” listed for WASH. REV. CODE § 69.50.505 on Westlaw total 547; the “Citing References” for WASH. REV. CODE § 10.105.010 total 49.

378. WASH. REV. CODE § 10.105.010(1).

criminal forfeiture statute shows, law enforcement will continue to process forfeitures through the less restrictive civil system unless it is declared unconstitutional and replaced with a more protective criminal forfeiture statutory scheme.

Like New Mexico, Washington should reform its laws to always require a criminal conviction before a defendant's property can be forfeited. This will prevent innocent owners from losing property under the low preponderance standard currently in place and ensure that law enforcement uses forfeiture for its stated goals of deterring and punishing *criminals*. If the Supreme Court of Washington can recognize that penalizing someone who unknowingly possessed illegal drugs violates due process,<sup>379</sup> then it should also recognize that permitting the government to deprive an individual of their property without having to prove a crime has been committed also violates due process. Reforming the law to require a criminal conviction or guilty plea and bifurcated criminal/forfeiture proceedings will demonstrate that Washington's justice system values individual rights over state agency profit. This change will also provide low-income criminal defendants the assistance of their assigned counsel at the ancillary forfeiture proceeding, further preventing governmental abuse.

The new forfeiture policy should also require that law enforcement agencies deposit proceeds from criminal forfeiture into the state's general fund. This would eliminate improper profit motives while providing much-needed resources for Washington schools, because a majority of Washington's general fund is spent on public school education.<sup>380</sup> Directing proceeds to benefit schools would align with the historical requirements laid down by the framers of the original Washington Constitution of 1889 that said the state's public education fund "shall be derived<sup>381</sup> from . . . the proceeds of lands and other property which revert to the state by . . . forfeiture," among other sources.<sup>382</sup> The 10% presently

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379. See *State v. Blake*, 197 Wash. 2d 170, 188, 481 P.3d 521, 531 (2021).

380. See *McCleary v. State*, 173 Wash. 2d 477, 495, 269 P.3d 227, 236 (2012) (internal citations omitted) ("The state general fund, the largest fund within the state budget, provides the primary means for operating the state government. In the 2005–07 biennium, the legislature appropriated approximately \$11 billion, or 39.7 percent of the state general fund, to support the 295 school districts that make up the State's K-12 system."). In the 2019–2021 biennium, 51.1% of the state general fund was spent on public schools. See OFF. FIN. MGMT., A GUIDE TO THE WASHINGTON STATE BUDGET PROCESS 6 (2019), <https://ofm.wa.gov/sites/default/files/public/legacy/reports/budgetprocess.pdf> [<https://perma.cc/8TSB-QNYB>].

381. The mandatory use of the phrase "shall be derived" was changed to "may be derived" in the forty-third amendment to the Washington State Constitution. See S.J. Res. 22, 39th Leg., Extraordinary Sess., 1965 Wash. Sess. Laws 2817.

382. WASH. CONST. art. IX, § 3 (1889) (amended 1965).

allocated to the general fund does Washingtonians a double disservice.<sup>383</sup> This provision not only encourages police to forfeit property for their own pecuniary gain, but it also deprives schools (as well as other state-funded programs) from millions of dollars in revenue every year. Washington can ameliorate this issue by requiring agencies to deposit 100% of forfeiture proceeds into the general fund.<sup>384</sup>

Additionally, Washington lawmakers must be conscientious about closing loopholes that would allow state and local agencies to bypass Washington forfeiture law through the ESP. Washington agencies currently take in millions of dollars in ESP funds every year.<sup>385</sup> If agencies can continue to bypass state law by transferring seized property to the ESP for federal forfeiture, state enacted protections for property owners and requirements placed on law enforcement become irrelevant.<sup>386</sup> Any new legislation must contain a clear directive that the criminal forfeiture laws may not be circumvented.

Finally, Washington legislators should learn from and improve upon the identified shortcomings in New Mexico's criminal forfeiture laws.<sup>387</sup> Any new policy needs to include strict enforcement provisions to ensure compliance with the law. There also should be enhanced transparency and reporting requirements. Agencies should be required to track multiple data points within forfeiture actions, including but not limited to the date of property seizure, the seizing agency, the type of property seized, the assessed value of the property, the underlying crime connected to the seizure, the property owner's race/ethnicity, the case outcome, and the date of property return or transfer of proceeds to the general fund. This information should be published annually and easily accessible by the public.

By incorporating the above proposals, Washington would lead the nation in civil forfeiture reform. First, property owners would be afforded their constitutional right to due process. Second, law enforcement would no longer be allowed to funnel property into their department to supplement their bottom line. Third, the general fund and Washington schools would benefit from a significant revenue increase. Washington's

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383. WASH. REV. CODE § 69.50.505(9) (2020).

384. Similar to New Mexico's law, costs and fees incurred by law enforcement associated with storage and transportation of property should be deducted from the proceeds to reimburse the seizing agency. *See* N.M. STAT. ANN. § 31-27-7(B) (LexisNexis 2021).

385. *See* EQUITABLE SHARING PAYMENTS OF CASH 2020, *supra* note 149.

386. *See* Stuteville, *supra* note 78, at 1184 (“[E]ven with state laws that better protect property owners, a loophole exists through which state law enforcement agencies can continue to fuel civil forfeiture abuse by joining in the federal forfeiture system: equitable sharing.”).

387. *See supra* section III.B.2.

entire forfeiture system would be more equitable, regulated, and transparent.

## CONCLUSION

Modern civil forfeiture regimes have been repeatedly criticized for their lack of constitutional safeguards for property owners and dubious profit motives. Justice Clarence Thomas has expressed clear doubt that the modern practice of civil forfeiture can withstand a due process claim<sup>388</sup> and the Supreme Court of Washington has cast a wary eye toward Washington's forfeiture laws in dicta.<sup>389</sup> In less than ten years, civil forfeiture laws across the country have undergone major upheavals as many states enact more demanding restrictions in response to these criticisms.<sup>390</sup> Thus, the future of civil forfeiture appears to be on shaky legal ground. This presents a promising opportunity for meaningful forfeiture reform in Washington. There has never been a better time for Washington to sound the death knell for civil forfeiture and join the states who have banned this unjust procedure.

Criminals should not profit off their wrongdoing. However, that is the crux of the argument against civil asset forfeiture—an individual should have to be *criminally convicted* before their property can be forfeited. Law enforcement should not be able to permanently deprive anyone of their money, vehicle, or home under a mere preponderance standard, without ever attempting to bring formal charges. Innocent people like Mr. Rolin should not have to battle the government for their own property when they have done nothing wrong. The historical application of forfeiture as a punishment for piracy has evolved and turned police departments into marauding bands of officers searching for a profitable property haul. Police are now more akin to modern day pirates than public servants.

Washington must remedy these abuses by abolishing civil forfeiture. Washington should implement a criminal forfeiture system based off New Mexico's model 2015 Act that requires police agencies to prove guilt beyond a reasonable doubt, transfer forfeiture proceeds to the state common fund, and follow strict compliance and reporting policies. These changes would eliminate any profit motive, comport with the

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388. See *Leonard v. Texas*, \_\_\_ U.S. \_\_\_, 137 S. Ct. 847, 847 (2017) (Thomas, J., respecting the denial of certiorari).

389. In both *State v. Blake*, 197 Wash. 2d 170, 192, 481 P.3d 521, 533 (2021) and *City of Sunnyside v. Gonzalez*, 188 Wash. 2d 600, 617, 398 P.3d 1078, 1085 (2017), the Supreme Court of Washington highlighted potential issues with civil forfeiture.

390. Anne Teigen & Lucia Bragg, *Evolving Civil Asset Forfeiture Laws*, NAT'L CONF. STATE LEGISLATURES: LEGISBRIEF (Feb. 2018), <https://www.ncsl.org/research/civil-and-criminal-justice/evolving-civil-asset-forfeiture-laws.aspx> [<https://perma.cc/5JDB-2YNH>].

Constitution's due process requirements, and provide a more equitable system for Washington property owners. With a criminal forfeiture system, convicted criminals will not profit off their wrongdoing—but neither will police profit off “innocent nonconduct.”<sup>391</sup>

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391. *Blake*, 197 Wash. 2d at 188, 481 P.3d at 531.