

HOW THE GOVERNMENT CAN ‘COME AND TAKE IT’: ASSET FORFEITURE AND HOW TEXAS SHOULD CHANGE ITS PRACTICE

Sean M. Grove[†]

| | | |
|------|--|-----|
| I. | INTRODUCTION..... | 121 |
| II. | WHAT IS ASSET FORFEITURE AND HOW IS IT PREDOMINANTLY IN USE TODAY? | 123 |
| | A. <i>History of Asset Forfeiture</i> | 123 |
| | B. <i>Asset Forfeiture in America</i> | 124 |
| | 1. Different Asset Forfeiture Methods..... | 124 |
| | 2. From Alcohol Prohibition to the “War on Drugs” | 126 |
| III. | THE GOOD AND THE BAD OF ASSET FORFEITURE..... | 128 |
| | A. <i>The Good</i> | 129 |
| | B. <i>The Bad</i> | 130 |
| | 1. Innocent Owner Burden | 130 |
| | 2. No Appointed Counsel | 131 |
| | 3. Financial Incentives | 132 |
| | 4. Burden of Proof | 133 |
| | 5. Arbitrary Punishment..... | 134 |
| | 6. A “Double Bite of Apple” | 134 |
| IV. | WHAT STATES ARE DOING WITH ASSET FORFEITURE . | 135 |
| | A. <i>States That are Doing it Well</i> | 136 |
| | 1. New Mexico | 136 |
| | 2. Missouri | 137 |
| | 3. California | 138 |
| | B. <i>What Texas is Doing</i> | 139 |
| V. | WHAT TEXAS SHOULD DO | 143 |
| | A. <i>Get Rid of Civil Asset Forfeiture and Increase the Burden of Proof</i> | 143 |
| | B. <i>Provide Guaranteed Counsel for Indigent Property Owners</i> | 144 |
| | C. <i>Place the Seized Assets in General Funds</i> | 144 |
| VI. | CONCLUSION | 146 |

I. INTRODUCTION

Since the 1970s, federal, state, and local governments have confiscated money and personal property in an effort to curtail crime while also providing a pipeline for law enforcement revenue. The crimes

[†] J.D. Candidate, Texas A&M University School of Law, May 2017; B.A. Criminal Justice, B.A. History, Kansas Wesleyan University, 2014. The author would like to thank Professor Sobol for his direction and revisions, and Rebecca Lyne for her unending support.

range from drug distribution to money laundering, yet the punishment remains the same. While proponents claim that the process allows extra funds to be devoted to the growing cost in combating organized crime, opponents contend that the policy allows for an incentive-based system that provides law enforcement agencies the ability to directly impact the amount of money in their bank accounts. With the growing suspicion of police activity in the twenty-first century and the vast amount of money these law enforcement agencies bring in from asset forfeiture programs, the proponents have had their hands full in warding off the growing public support for forfeiture reform.

Most commonly, law enforcement agencies use civil asset forfeiture to curtail the trafficking of illicit drugs and controlled substances while simultaneously aiding in the law enforcement's effort by providing equipment and funds to law enforcement agencies. Although there is support for the use of asset forfeiture in this arena of law enforcement, as well as support for dismissing it completely, this Comment acknowledges the need for a balance in using asset forfeiture. It would be irresponsible to eliminate the practice of asset forfeiture altogether since it provides benefits to law enforcement agencies while also creating a disincentive to criminals in committing the crimes. This Comment, however, will show where the need is to curtail the practice and will further highlight ways in which the process should be changed without removing a valid tool from law enforcement.

As a model of review, this Comment will use Texas's laws—juxtaposed against state laws that are providing more protections—to compare what Texas is doing wrong in light of what other states are doing right. First, this Comment will give a brief history of asset forfeiture in general and provide the status of civil asset forfeiture in the twenty-first century. Part II will discuss the benefits of some asset forfeiture programs while highlighting the shortcomings and burdens that civil asset forfeiture brings. Part III will show state legislation aimed at curtailing civil asset forfeiture and the factors that make Texas's laws (arguably) among the worst in the country. Finally, Part IV will discuss what Texas and similar states should do to improve the protections afforded to property owners and also improve the use of forfeiture overall.¹

1. This is a highly contested topic, and there is a breadth of literature in support and against forfeiture. This Comment sets out to add to the discussion of asset forfeiture reform, focusing on shifting the use of civil forfeiture in favor of criminal forfeiture. There is much more discussion to have regarding other judicial forfeitures as well as administrative forfeitures; thus, this Comment does not set out to discuss every problem with forfeiture, nor does it attempt to provide solutions to the whole system.

II. WHAT IS ASSET FORFEITURE AND HOW IS IT PREDOMINANTLY IN USE TODAY?

A. *History of Asset Forfeiture*

Targeting a defendant through his property has a long tradition in civil disputes between citizens and governments alike.² Like many aspects of our judicial system, the use of asset forfeiture in the United States is a holdover from British common law.³ The United States federal government has used the practice in two notable instances: alcohol prohibition from 1920 to 1933 and the “War on Drugs” since the 1980s.⁴

Asset forfeiture in the United States sprang, in some way or another, from the English law of deodands,⁵ with even further roots as far back as biblical times.⁶ The purpose of the deodands was to punish the property that was guilty of an act against God.⁷ Eventually the practice of deodands was abolished, and by the mid-seventeenth century, the practice had transformed into forfeiture of property as a tool to raise revenue for the King.⁸ The forfeitures started out following most of the deodand rationale and property was taken as punishment for felonies and treason;⁹ however, with the passage of the Navigation Acts of 1600, forfeiture for other crimes continued long after the previous methods were outlawed.¹⁰ From the beginning, forfeiture was never *purely* a punishment for crime; even the early rationale was grounded in a desire to raise revenue.

The Navigation Acts took form over several years and were designed to curtail the use of foreign ships bringing goods back and forth from the British Colonies.¹¹ The Acts required that any ship importing or exporting to and from the British Colonies must fly the British flag.¹² If any ship operating out of the British ports had allegiance to another country, the British navy could confiscate the cargo and the ship.¹³ Thus, the beginning of civil asset forfeiture (as we know it today) began. Instead of the Crown charging a *person* with a crime and

2. Chip Mellor, *Civil Forfeiture Laws and the Continued Assault on Private Property*, FORBES (June 8, 2011, 5:30 PM), <http://www.forbes.com/2011/06/08/property-civil-forfeiture.html>.

3. *Id.*

4. *Id.*

5. JIMMY GURULÉ & SANDRA GUERRA, *THE LAW OF ASSET FORFEITURE* 3 (Lexis Law Publ'g) (1998).

6. *Id.* (citing *Exodus* 21:28–30) (confiscating chattel that lead to a person's death, such as an ox goring a man).

7. GURULÉ & GUERRA, *supra* note 5, at 4–5.

8. *Id.* at 8.

9. *Id.* at 9.

10. *Id.* at 10–11.

11. *Navigation Acts*, ENCYC. BRITANNICA, <http://www.britannica.com/event/Navigation-Acts> (last updated April 23, 2015).

12. Mellor, *supra* note 2.

13. *Id.*

going through criminal proceedings, the government could go after *property* in a civil action. Civil asset forfeiture allowed a means of curtailing crimes against the Crown when access to the individual perpetrator was limited. It also allowed the British government to keep the “proceeds” of the crime against the Crown. These two aspects still drive forfeiture in the United States today.

From the passage of the British Navigation Acts, civil asset forfeiture has been a means of punishing the guilty owner by confiscating his property. Early on, the reasoning was that property was culpable of the underlying crime and could be “arrested” or seized.¹⁴ Since the property was involved in the crime, the property could also be guilty of facilitating that crime.¹⁵

B. *Asset Forfeiture in America*

Prior to alcohol prohibition, asset forfeiture in the United States was very similar to England’s maritime laws. The United States confiscated property and vessels that engaged in different illegal activity, such as piracy and smuggling.¹⁶ The practice was enforced relatively few times,¹⁷ and except for the confiscation of Southern property during the Civil War,¹⁸ it was not until the Eighteenth Amendment that the United States government seized property on a wide scale.¹⁹ Now, civil asset forfeiture is the main tool for enforcing laws against illegal drugs.²⁰

1. Different Asset Forfeiture Methods

There are three types of asset forfeiture currently used in the United States: (1) criminal, (2) administrative, and (3) civil. Although this Comment will focus on civil forfeiture, and partially posit an all-out shift to criminal forfeiture, it is important to understand all three.

First, criminal asset forfeiture is an *in personam*²¹ action that takes place in formal criminal proceedings against a defendant property owner.²² Criminal forfeiture requires proof beyond a reasonable doubt, and consists of multiple stages where all property owners can

14. Jarret B. Wollstein, *The Government’s War on Property*, FOUNDATION FOR ECONOMIC EDUCATION (July 1, 1993), <http://fee.org/articles/the-governments-war-on-property/>.

15. *Id.*

16. GURULÉ & GUERRA, *supra* note 5, at 11–13.

17. Mellor, *supra* note 2.

18. GURULÉ & GUERRA, *supra* note 5, at 15.

19. *Id.* at 16.

20. *Id.* at 19.

21. *In personam* jurisdiction is a lawsuit against an individual where the prosecuting authority has jurisdiction over the individual. See DEE R. EDGEWORTH, *ASSET FORFEITURE: PRACTICE AND PROCEDURE IN STATE AND FEDERAL COURTS* 1–2 (3d ed. 2014).

22. *Types of Federal Forfeiture*, U.S. DEP’T OF JUST., <http://www.justice.gov/afp/types-federal-forfeiture> (last updated March 9, 2015).

defend their interest against the government's claim.²³ Criminal forfeiture provides property owners the same protections defendants have in the criminal proceedings. These forfeitures are less common because it is either: (a) hard to find a property owner to pursue in a criminal action, or (b) because the lower burden of proof in civil proceedings is more expedient and overall more appealing for agencies.

The second method of forfeiture is through administrative agencies. Though government agencies seize assets and property involved in crimes, not every agency is solely in the business of law enforcement. Some agencies, such as the Drug Enforcement Agency ("DEA"); the Bureau of Alcohol, Tobacco, Firearms, and Explosives; the Federal Bureau of Investigation ("FBI"); the Department of Treasury; and the United States Postal Inspection Service²⁴ enforce laws but also play an administrative role. Administrative forfeiture is an *in rem*²⁵ proceeding that allows the agency to confiscate assets without having to go through a formal judicial process.²⁶ Through administrative forfeitures, property owners are not given the opportunity to keep any item seized, and the seizing agency only has to show probable cause to finalize the forfeiture.²⁷ This provides a low evidentiary bar for forfeiture, as probable cause is the burden needed to seize the property in the first place. These seizures are few in number because typically only federal agencies have the opportunity to seize property through administrative seizures, and state and local law enforcement agencies perform the majority of forfeitures. Additionally, when agencies, such as the DEA, perform seizures they are often on high-level offenders²⁸ (partially due to the type of investigations those agencies do), which prevents administrative searches from garnering some of the same criticism that applies to civil forfeiture. Likewise, with the high-level offenders, it is more likely the forfeiture will attach to criminal pro-

23. *Id.*

24. U.S. DEP'T OF JUSTICE, GUIDE TO EQUITABLE SHARING FOR STATE AND LOCAL LAW ENFORCEMENT AGENCIES 2 (2009) [hereinafter EQUITABLE SHARING], <http://www.justice.gov/criminal-afmls/file/794696/download>. There are several more agencies involved in forfeiture; the list was only an example.

25. An *in rem* proceeding occurs when the court has jurisdiction over the property and during *in rem* forfeiture proceedings the property itself is subject to penalty (i.e., forfeiture). See EDGEWORTH, *supra* note 21, at 2, 6–8.

26. *Types of Federal Forfeiture*, *supra* note 22.

27. *Asset Forfeiture*, DRUGWARFACTS.ORG 13 (Jan. 09, 2008, 5:04 PM), <http://www.drugwarfacts.org/cms/node/42/pdf>.

28. See *Statistics and Facts*, DRUG ENFORCEMENT ADMIN., <http://www.dea.gov/resource-center/statistics.shtml>; High-level offenders are those at the top of the distribution chain, who have direct control of the flow of drugs into the market and do not typically engage in the small retail operations, see also William A. Galston & Elizabeth McElvein, *Criminal Justice Reform: The Facts About Federal Drug Offenders*, BROOKINGS (Feb. 13, 2016, 9:00 AM), <http://www.brookings.edu/blogs/fixgov/posts/2016/02/13-criminal-justice-reform-galston-mcelvein> (defining a high-level offender as a “[s]upplier/importer, organizer/leader, grower/manufacture, wholesaler, manager/supervisor.”).

ceedings against the offender because of the nature of such proceedings.

Finally, civil asset forfeiture, like administrative forfeiture, is an *in rem* proceeding where the government charges the property as the defendant.²⁹ However, unlike administrative forfeitures, civil forfeitures require formal civil proceedings. There is no need to prove ownership guilt, and the burden of proof to confiscate property seized is typically only by the preponderance of the evidence.³⁰ This type of forfeiture is the focal point of this Comment; therefore, further explanation of the process is in the discussion below.³¹ Simply put, civil forfeiture attacks the property independent of a finding of the owner's guilt.

2. From Alcohol Prohibition to the “War on Drugs”

Alcohol prohibition was the first time the United States government used asset forfeiture in a concerted effort to combat a particular type of organized crime. After the passage of the Eighteenth Amendment, laws were enacted that allowed law enforcement agencies to confiscate the vehicles—and other property—used by bootleggers.³² This was key to combating the illegal distribution of alcohol, as it allowed law enforcement to take the means the bootleggers had of distribution. Compared to the influx of laws at the beginning of the “War on Drugs,” the laws passed during alcohol prohibition were miniscule. Once the Twenty-first Amendment came into effect, the federal government no longer needed asset forfeiture to help combat crime on such a large scale—and for almost fifty years, asset forfeiture fell by the wayside.

Today, asset forfeiture is predominantly used in an attempt to combat the sale and manufacturing of illicit drugs and other controlled substances. In 1970, Congress passed the Comprehensive Drug Abuse Prevention and Control Act (“the Act”).³³ The Act gave the federal government broad powers in regulating drugs. The Act is predominantly known by one section—the Controlled Substances Act—which categorizes drugs into schedules of regulations based on a variety of

29. *Types of Federal Forfeiture*, *supra* note 22.

30. *Id.*

31. *See infra* Part III.B.

32. John G. Malcom, *Civil Asset Forfeiture: Good Intentions Gone Awry and the Need for Reform*, Legal Memorandum No. 151 on Legal Issues, HERITAGE FOUND. (April 20, 2015), <http://www.heritage.org/research/reports/2015/04/civil-asset-forfeiture-good-intentions-gone-awry-and-the-need-for-reform>.

33. In 1970, Congress also passed the Racketeering Influenced and Corrupt Organizations Act (“RICO”), which gave narrow guidelines on what actions constitute organized crime. *See* Wollstein, *supra* note 14. The federal government uses RICO to seize the property of people suspected of contributing to a variety of crime, including: money laundering, gambling, racketeering, prostitution, and others. *Id.* The federal government predominantly uses the Comprehensive Drug Abuse Prevention and Control Act for confiscation of property related to drug crimes. *Id.*

factors. However, the Act also provides guidelines for confiscating property. Over the past three decades, provisions were added to the Act that allowed the government to seize almost any property that could be tied to illegal drug activity.³⁴

Over the years, there have been significant additions to the Act. In 1978, Congress amended the Act to allow the seizure of “all profits from the drug trade and all assets purchased with such proceeds.”³⁵ For people who are involved in the illegal drug trade, this amendment allows for the seizure of virtually all their possessions. Additionally, at the time of arrest it is often hard for the police to determine all the evidence pertaining to the crime; nevertheless, this amendment allows officers to confiscate all items that *could* be associated with the crime if probable cause exists to seize the items at the moment of the lawful search. In 1984, Congress approved another notable amendment to the Act that allows for the confiscation of real property.³⁶ This amendment increases the property that law enforcement can confiscate because if the entire building or dwelling is subject to forfeiture, everything inside the building typically goes along with it. Additionally, through this amendment, Congress highlighted the necessity to confiscate the controlled substances that are in violation of the code.³⁷ This amendment is important for two main reasons: first, permitting real property forfeiture opened the door for the seizure of any property with the smallest connection to controlled substances,³⁸ and second, it was fourteen years after the original passage that Congress wanted to ensure seizing the drugs themselves.

Another act passed in 1984, the Comprehensive Crime Control Act (“CCCA”), strengthened the government’s power in seizing property related to the illegal drug trade.³⁹ The CCCA contains twenty-three chapters,⁴⁰ one of which pertains to civil asset forfeiture. Even more, the CCCA created the Department of Justice Assets Forfeiture Fund,⁴¹ which provides a means for the federal government to hold on to proceeds from forfeitures to pay the court costs of the forfeiture

34. 21 U.S.C. § 881 (2012).

35. Marc B. Stahl, *Asset Forfeiture, Burdens of Proof and the War on Drugs*, 83 J. CRIM. L. & CRIMINOLOGY 274, 277 (1992).

36. *Id.*

37. § 881(a)(8).

38. For instance, the Caswell family’s motel was seized and sold for \$1.5 million because thirty tenants from 1994 were arrested on drug-dealing charges. See George F. Will, *When Government is the Looter*, WASH. POST (May 18, 2012), https://www.washingtonpost.com/opinions/when-government-is-the-looter/2012/05/18/gIQAUIK-VZU_story.html. No one in the Caswell family was arrested; however, their motel was confiscated because it was a location for repeated drug sales. *Id.*

39. See Scott Ehlers, *Policy Briefing: Asset Forfeiture*, DRUG POL’Y FOUND. (1999), http://www.drugpolicy.org/docUploads/Asset_Forfeiture_Briefing.pdf.

40. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837.

41. *The Fund*, U.S. DEP’T JUST., <http://www.justice.gov/afp/fund> (last updated March 16, 2015).

proceedings and future investigative expenses.⁴² In addition, the CCCA provided the “equitable sharing” provision between federal law enforcement agencies and state and local enforcement agencies.⁴³ With “equitable sharing,” law enforcement agencies get proceeds and property that is forfeited in proportion to the role they played with the forfeiture investigation and seizure.⁴⁴ Equitable sharing provides a means for cooperation between the different levels of law enforcement; however, with this increase in cooperation, opponents argue the incentives also increase for officers to seize as much as they can because laws guarantee the agencies receive a percentage of the profits.

As mentioned above, criminal and civil forfeiture are the two main pathways for seizure of personal property. While criminal asset forfeiture mirrors other forms of criminal punishment—the defendant must be convicted of a crime prior to the defendant’s property to be confiscated—civil asset forfeiture not only mimics civil disputes (the burden of proof is much lower), but also, civil asset forfeiture can occur independent of a criminal proceeding.⁴⁵ Civil asset forfeiture is an entirely *in rem* proceeding, meaning it targets *property*.⁴⁶ The guilt of the property owner is not relevant to the determination of whether the property is, itself, attached to crime.

The equitable sharing program occurs with both civil and criminal asset forfeiture. One problem that arises is “forum shopping.” As more jurisdictions are enacting laws to curb the use of civil forfeiture, law enforcement agencies move forfeiture to federal jurisdiction. This form of “forum shopping” occurs not because the local law enforcement believes the federal agency provides a better chance of convicting a defendant, but because the agencies know that even with laws limiting what the state agency can do, there is a better chance the property seized will be successfully forfeited in the federal case.

III. THE GOOD AND THE BAD OF ASSET FORFEITURE

The asset forfeiture process has the chance to provide benefits to both the law enforcement agencies engaging in the forfeiture and the community in which the forfeiture occurs. Acknowledging the benefits, some agencies do not often take the opportunity to make the program as effective for *good*. This Section will highlight what needs to change with asset forfeiture to help the property owner access equitable forms of justice; however, it is also important to discuss and under-

42. *Id.*

43. *Id.*

44. 28 U.S.C. § 524 (2012).

45. John L. Worrall, *Asset Forfeiture: Origins and Present Status*, in *DRUGS, CRIMES, AND JUSTICE: CONTEMPORARY PERSPECTIVES* 360, 362 (Larry Gaines & Janine Kremling, 3d ed. 2014).

46. *Id.*

stand the benefits the program can provide to law enforcement agencies.

A. *The Good*

It's now possible for a drug dealer to serve time in a forfeiture-financed prison after being arrested by agents driving a forfeiture-provided automobile while working in a forfeiture-funded sting operation.

—Richard “Dick” Thornburgh, 1989⁴⁷

Asset forfeiture allows a state to minimize the burden on the taxpayer as it relates to police funding. The process also frees up funds in the already-allotted budget that the various levels of government can spend on other programs outside of policing. Although there is a completely separate discussion to be had about the necessities of certain police equipment,⁴⁸ as a society we want those who put their lives on the line for our safety to be safe while doing so.

The aforementioned “equitable sharing” provision in the CCCA allows for law enforcement agencies to share the proceeds from forfeiture similar to how they share in the enforcement of the drug laws. This allows local law enforcement agencies to receive some money for their efforts when the drug crime is removed to federal jurisdiction for federal prosecution. Drug laws, much like immigration laws, are an area of dual sovereignty—both the state and the federal government have independent concerns in curtailing the sale and manufacturing of drugs. As such, federal and state agencies are allowed to work together to achieve common goals. Both states and the federal government have separate laws enacted to deter and punish drug crimes; therefore, it logically follows that in regards to drug law enforcement, there ought to be a process that allows the different agencies to benefit from their cooperative efforts. With the dual sovereignty approach to equitable sharing, the federal government can encourage cooperation with its state and local counterparts because of the tangible benefits associated with those efforts.

Additionally, it is sometimes difficult to access defendants to bring criminal charges against them. Asset forfeiture allows a prosecutor's office to go after someone who would otherwise be unreachable through normal criminal proceedings. Today's reasoning, much like the justification for the practice in the mid-seventeenth century and during alcohol prohibition, is simple. If a criminal can constantly

47. Sarah Stillman, *Taken*, NEW YORKER, Aug. 12 & 19, 2013, <http://www.newyorker.com/magazine/2013/08/12/taken> (Richard “Dick” Thornburgh served as President Ronald Reagan's Attorney General from 1988–1991).

48. See, e.g., J. Berkeley Bentley & Arthur Rizer, *The Militarization of Police: Is it a Battle of Equipment or Mentality? (Part 1 of 3)*, HUFFPOST CRIME, http://www.huffingtonpost.com/arthur-rizer/the-militarization-of-the-police_b_7425432.html (last updated May 22, 2016).

evade jurisdiction of criminal prosecution, the property acquired at the risk of the public should not remain in the criminal's possession.

B. *The Bad*

There are several arguments against civil asset forfeiture. Opponents of civil forfeiture have varying reasons for their stance; ranging from a lack of property owner protection to the “policing for profit”⁴⁹ mantra that law enforcement agencies are provided too much direct power over their potential budget—or at least the proceeds that go into that budget.

Under equitable sharing, federal law enforcement agencies are allowed to share the proceeds of asset forfeiture with their state and local counterparts.⁵⁰ The Department of Justice considers this program as a means to “provide valuable additional resources to state and local law enforcement agencies.”⁵¹ Even with laws that limit the scope of equitable sharing,⁵² and with no requirement that the federal government participate,⁵³ most joint investigations and federal adoptions of state and local seizures are eligible for equitable sharing.⁵⁴

However, there are certain limitations on the use of equitable sharing, notably: limiting the use of funds for most salary allocations;⁵⁵ continuing education costs for law enforcement officers; prohibiting any use that is contrary to laws of the jurisdiction where the seizure took place; purchase of food and beverage for officers or the department; and “extravagant” expenditures.⁵⁶ For this discussion, it is important to keep in mind that in every problem of civil asset forfeiture, the equitable sharing doctrine has the potential to further exacerbate the harm done.

1. Innocent Owner Burden

Many civil forfeiture statutes, both federal and state, place a burden on the owner of the property to prove that the property is not associated with any criminal activity. As mentioned above, the process of civil asset forfeiture is much different than any criminal proceeding.⁵⁷ Laws in thirty-five states,⁵⁸ as well as federal laws codified in the

49. See Dick Carpenter et al., *Policing For Profit: The Abuse Of Civil Asset Forfeiture*, 2nd Ed., INST. FOR JUST. (Nov., 2015), <http://ij.org/report/policing-for-profit/#1>.

50. EQUITABLE SHARING, *supra* note 24, at Forward.

51. *Id.*

52. 21 U.S.C. § 881(e)(1)–(3) (2012).

53. EQUITABLE SHARING, *supra* note 24, at 1.

54. *Id.* at 6.

55. Specialized salaries, overtime pay, and pay for temporary positions are allowed. See *id.* at 19.

56. EQUITABLE SHARING, *supra* note 24, at 19–21.

57. See *supra* Part II.B.

58. Carpenter et al., *supra* note 48, at 20 (Alaska, Arizona, Arkansas, Delaware, Georgia, Hawaii, Idaho, Illinois, Iowa, Kansas, Louisiana, Maryland, Massachusetts,

United States Code, place the burden on the property owner to prove that the property is not tied to any criminal activity.⁵⁹ Essentially, in the majority of jurisdictions in the United States, the property is considered attached to the criminal activity prior to the beginning of any proceeding, placing an undue burden on property owners to prove otherwise and recover their property.⁶⁰ Only in ten states⁶¹ and the District of Columbia, are agencies forced to *prove* the property owners are guilty of a crime prior to the property being seized.⁶² This process makes it harder for the property owner to contest the forfeiture. In a criminal proceeding, the defendant's rights are protected by a magistrate and the government must prove the defendant is guilty. However in a civil setting, the property owner must know what to challenge, how to challenge it, when to make the challenge, and may sometimes be "forced" to do so without the assistance of counsel.

2. No Appointed Counsel

Another right afforded to defendants in criminal trials that property owners in civil asset forfeiture proceedings do not receive is the right to an attorney. The Sixth Amendment requires appointed counsel for an indigent defendant during any proceeding that the government is seeking a jail sentence.⁶³ Furthermore, the Sixth Amendment provides a remedy for defendants who believe they had constitutionally ineffective assistance of counsel.⁶⁴ Criminal asset forfeiture has this Constitutional guarantee because criminal forfeiture is attached to—or dependent on—another criminal proceeding. However, few states have extended this right to civil asset forfeiture. Since the Sixth Amendment does not afford the right to counsel in civil settings, an indigent property owner does not have the same protections that would otherwise be afforded to him if the seizure occurred as a criminal forfeiture.

Additionally, it is often difficult to challenge a seizure, and if property owners wait too long, they can risk losing everything due to statutorily defined time parameters. Those worries vanish with appointed counsel because attorneys will either know of the statutorily defined parameters or be subject to liability for malpractice if attorneys fail to exercise their duty of care and their lack of knowledge caused actual

Michigan, Minnesota, Montana, Nebraska, Nevada, New Hampshire, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming).

59. *Id.*

60. *Id.*

61. *Id.* (California, Colorado, Connecticut, Florida, Mississippi, Montana, New Mexico, New York, Oregon, and Utah).

62. *Id.*

63. *See generally* Gideon v. Wainwright, 372 U.S. 335 (1963).

64. *See generally* Strickland v. Washington, 466 U.S. 668 (1984).

harm to the defendant.⁶⁵ Not only could the attorney be held civilly liable, but also if civil asset forfeiture has the same guarantee as criminal forfeiture, then the property owner might be given another trial as a remedy for the ineffectiveness of his counsel.⁶⁶ In a criminal forfeiture setting, property owners would be provided counsel who must represent them competently and diligently; whereas in a civil forfeiture setting, there is no such protection.

Furthermore, for indigent offenders, the cost of hiring an attorney to get their property back often outweighs the benefits of actually receiving their property back. For instance, if a property owner had less than a thousand dollars seized by police, it would not be cost effective to fight the forfeiture in court because the attorney's fees would exceed the amount of money that is recoverable. Again, the protections afforded in a criminal proceeding give a greater advantage to the indigent property owner than those afforded in civil forfeiture proceedings because criminal forfeiture entitles the property owner to full representation regardless of the expense to fight the forfeiture.

3. Financial Incentives

In civil asset forfeiture, law enforcement agencies have direct control of the amount of money in their agency's treasury. In forty-three states⁶⁷ and the federal jurisdiction, the law enforcement agencies can keep 45%–100% of the proceeds from civil asset forfeiture.⁶⁸ In twenty-four states,⁶⁹ law enforcement agencies can keep up to 100% of the forfeiture proceeds.⁷⁰ In all, only seven states⁷¹ and the District of Columbia completely “block law enforcement access to forfeiture proceeds.”⁷²

With the significant financial incentives, opportunities for some law enforcement agencies to misuse the power naturally arise. There are different reports from several jurisdictions showing the abuse of the forfeiture system. For example, in Tenaha, Texas, the infamous civil

65. *See id.* at 694–96.

66. *See id.*

67. Carpenter et al., *supra* note 48, at 14 (Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, and Wyoming).

68. *Id.*

69. *Id.* (Alabama, Arizona, Arkansas, Delaware, Georgia, Idaho, Iowa, Kansas, Kentucky, Massachusetts, Michigan, Montana, Nevada, New Jersey, North Dakota, Ohio, Oklahoma, Pennsylvania, South Dakota, Tennessee, Utah, Virginia, West Virginia, and Wyoming).

70. *Id.*

71. *Id.* (Indiana, Maine, Maryland, Missouri, New Mexico, North Carolina, and Wisconsin).

72. *Id.*

forfeiture scheme netted the local law enforcement agency “millions of dollars through highway traffic stops.”⁷³ The local law enforcement officers would stop cars on the highway, and once cash or other valuable assets were discovered, the officers would threaten the property owners with criminal charge if the owners did not waive their ownership rights.⁷⁴ Motorists were threatened with crimes such as money laundering,⁷⁵ and one family was forced to forfeit over six thousand dollars in fear that the police would take the two children to Child Protective Services.⁷⁶ Though this is just one extreme example, it is easy to see the various ways police agencies can abuse their power over asset forfeiture.

The old mantra “power corrupts and absolute power corrupts absolutely” is true with civil forfeiture. When law enforcement agencies are in direct control over any amount of money that their budget has, it is human nature that the “bad eggs” will go to great lengths to abuse the system. Thus, the argument flows that most seizures occur, in part, because the law enforcement officers know the end result with forfeiture.

4. Burden of Proof

The burden of proof the government has to seize property is an area of heightened criticism. Nationwide, preponderance of the evidence is the most common burden of proof, with thirty-one states and the federal jurisdiction using it.⁷⁷ With this burden, the government only has to show that there is more than a 50% chance that the property in question was attached to criminal acts.⁷⁸ The burden of proof for a successful forfeiture, nationwide, ranges from probable cause—the same burden that law enforcement agents have to prove a valid seizure—to preponderance of the evidence, to clear and convincing evidence, and even proof beyond a reasonable doubt⁷⁹ as required by two states.⁸⁰ Proof beyond a reasonable doubt is the burden of proof used for criminal proceedings, the reasoning being that, as a society, we want a high standard of proof before taking away someone’s life or liberty.⁸¹ However, there are a substantial number of jurisdictions that

73. *Id.* at 16.

74. *Id.*

75. Howard Witt, *Highway Robbery? Texas Police Seize Black Motorists’ Cash, Cars*, CHI. TRIB. (Mar. 10, 2009), http://www.chicagotribune.com/news/nationworld/chi-texas-profiling_wittmar10-story.html.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* at 16–17 (Nebraska and South Carolina).

80. *Id.*

81. *Id.* at 16.

place a lower threshold on taking away someone's property through civil forfeiture not predicated on a criminal conviction.⁸²

The low standard of proof throughout most of the country makes it simultaneously easier for the government to seize the property while making it harder for the property owners to protect their interests. Additionally, civil forfeiture is used as a simpler means to an end instead of going through criminal proceedings.⁸³ Since civil forfeiture does not require that any person be held criminally responsible, law enforcement agencies are seemingly allowed to confiscate property at will where the jurisdictional policies allow civil forfeiture as an alternative to criminal proceedings.

5. Arbitrary Punishment

Civil asset forfeiture also promotes arbitrary punishments by attempting a "one size fits all" approach to justice. Civil forfeiture statutes provide blanket access to property believed to be associated with criminal activity. For instance, if law enforcement officers are issuing multiple arrest warrants on defendants located in a house known for drug activity and drugs are found, the officers can seize all the vehicles on the property, even if one car cost \$500 and another cost \$35,000.

Likewise, for indigent property owners, the amount of money seized, or the particular asset that is forfeited, might equate to more time than if they were punished criminally and served jail time. A simple possession charge of cannabis in the state of Texas can end with a person spending no time in jail;⁸⁴ however, a seizure with the same possession charge could leave that same person without his car, money, and any other item deemed to be "attached" to the crime of possession. With these simple examples, it is possible to see how the punishment of asset forfeiture—completely losing the property—outweighs the punishment if the person was only charged as a criminal defendant through the penal code.

6. A "Double Bite of Apple"

Civil asset forfeiture can operate completely independent of criminal proceedings. Opponents argue this process does one of two things: it either (1) provides a "second chance" for the prosecution to punish the criminal; or (2) allows the prosecution to forgo the criminal proceedings when it is unlikely those proceedings will be successful. As mentioned above, the lower burden of proof in the majority of jurisdictions throughout the country allows law enforcement agencies to

82. *See generally id.*

83. *Id.* at 18.

84. In Texas, a possession charge for less than two ounces of Cannabis is a Class B Misdemeanor punishable by either a fine of \$2,000 and a maximum sentence of 180 days in jail. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.121 (West 2006); TEX. PENAL CODE ANN. § 12.22 (West 2006).

choose which path to forfeiture is the “best” for each individual situation. If a prosecutor does not believe criminal proceedings will be successful, his or her office can simply go after the property in a civil forfeiture proceeding to punish the defendant. Much like how asset forfeiture began (as a means to access defendants that were not available), now the prosecutor can use civil forfeiture to access the otherwise inaccessible defendant because criminal charges either cannot be brought against defendant in the first place, or it is likely that the criminal proceeding will not be successful.⁸⁵ Just as there is criticism that prosecutors are more focused on the conviction than justice, the system of civil asset forfeiture allows the prosecutor’s office to go after someone’s property when the person cannot otherwise be convicted.

C. *The Middle Ground*

Put simply, we can have criminal asset forfeiture without practicing civil asset forfeiture. There is no law that *requires* civil asset forfeiture; instead, it is simply one tool at the prosecutor and agency’s disposal to seize the property tied to crime. The positive outcomes that are provided through asset forfeiture⁸⁶ can still be realized without the negatives of *civil* forfeiture.

Some states are already taking steps to fix the status quo. As the next Section will discuss, there are states moving to curb the propensity for bad forfeitures, but Texas still falls behind in providing property owner protections through the forfeiture process. Texas is not completely alone in its approach to forfeiture, as currently only nine states⁸⁷ require the property owner to be convicted of a crime prior to being subject to most asset forfeiture.⁸⁸

IV. WHAT STATES ARE DOING WITH ASSET FORFEITURE

There are many reports on the different procedures that exist from one jurisdiction to another. Some states are doing a good job of curbing the “bad” of asset forfeiture that was discussed above, while some states are still lagging behind. A brief overview of three, slightly varying, better state models for dealing with asset forfeiture is required before this Comment highlights what is going wrong in Texas. The discussion in this Section will show what states do to increase

85. The Model Rules of Professional Conduct prohibit a prosecutor from bringing a charge that he knows is not supported by probable cause. MODEL RULES OF PROF’L CONDUCT R. 3.8(a) (2013).

86. Benefits include removing the burden from the taxpayer, disrupting the proceeds of criminal activities, and removing incentives for criminals to continue their operations. *See supra* Part III.A.

87. Carpenter et al., *supra* note 48, at 17 (California, Minnesota, Missouri, Montana, Nevada, New Mexico, North Carolina, Oregon, and Vermont).

88. *Id.*

property rights, and juxtapose what those states are doing with what Texas does and fails to do.

A. *States That are Doing it Well*

This Section will use the model provided by three states: (1) New Mexico, (2) Missouri, and (3) California. Two of these states, California and New Mexico, share the status of a “border state” with Texas, and all three states have similar “drug corridors” as Texas does. All three states have varying degrees of protecting property rights, and all three states are ranked higher than Texas by the Institute for Justice.

1. New Mexico

On April 10, 2015, New Mexico Governor Susana Martinez signed into law House Bill 560, which requires a person to be convicted of an underlying crime before his property can be seized and subjected to forfeiture.⁸⁹ This act includes many purposes such as “protect[ing] the constitutional rights of persons . . . protect[ing] against the wrongful forfeiture of property . . . and ensur[ing] that only criminal forfeiture is allowed in the state.”⁹⁰ Another purpose of the act includes reducing the economic incentive of criminal activity.⁹¹ Fully codified, the New Mexico statute allows the confiscation of property only if the property owner was arrested and convicted of a criminal offense. Even then, the state must prove by clear and convincing evidence that the property is subject to forfeiture.⁹² Additionally, for a law enforcement officer to seize property without a prior court order, the officer must have either: (1) probable cause that the property is subject to forfeiture, and that the person named in the search or arrest warrant is the owner of the property; (2) proof the property is subject to forfeiture from a previous judgment for the state; or (3) probable cause that the property is subject to forfeiture and the delay in getting a proper order will result in the destruction of evidence.⁹³

This differs from other models where the presumption is that the property is tied to the underlying illegal act. In the second edition of “Policing for Profit”—the Institute for Justice’s report on civil asset forfeiture in the United States—New Mexico earned the highest grade, an “A-” for its civil forfeiture laws.⁹⁴ The Institute for Justice highlighted numerous reasons as to why New Mexico is the best state for asset forfeiture protections, which include: New Mexico’s higher

89. *New Mexico Governor Signs Historic Property Rights Protections into Law*, DRUG POL’Y ALLIANCE (April 10, 2015), <http://www.drugpolicy.org/news/2015/04/new-mexico-governor-signs-historic-property-rights-protections>.

90. N.M. STAT. ANN. § 31-27-2(A)(2), (5)–(6) (1978 & Supp. 2015).

91. § 31-27-2(A)(3) (1978 & Supp. 2015).

92. § 31-27-4(A)(3) (1978 & Supp. 2015).

93. § 31-27-4(E).

94. Carpenter et al., *supra* note 48, at 108.

standard for forfeiture, the requirement that the property owner be convicted of a crime prior to the assets being forfeited, protections for innocent property owners, and the distribution of proceeds from forfeiture.⁹⁵

Additionally, New Mexico explicitly provides protections for innocent property owners within the statutes. The State must immediately return all property to the innocent owner if the state cannot meet the additional burdens outlined in the statute.⁹⁶ To assert the innocent-owner defense, property owners must show (1) that they hold a legal right or interest in the property, and (2) that they held the ownership interest in the property at the time of the criminal conduct or were bona fide purchasers following the illegal conduct.⁹⁷ For the State to be successful in the forfeiture proceedings, the State must show that the innocent owner had actual knowledge of the underlying crime.⁹⁸

New Mexico has taken steps to ensure asset forfeiture is used only as a tool to combat economic activity surrounding crime, and is limited in scope to only target property in situations that the owner has been convicted of a serious crime—ensuring a more balanced result. New Mexico is able to increase the burden for forfeiture proceedings and protect innocent property owners, virtually doing away with the harms inherent in the civil forfeiture system.

2. Missouri

Missouri's Criminal Activity Forfeiture Act ("CAFA") controls the State's asset forfeiture procedure.⁹⁹ CAFA has both a civil and a criminal side to it, but if the forfeiture arises from the same events that a criminal charge arises from, then no property is forfeited unless the criminal-defendant property owner is found guilty of a felony that substantially relates to the forfeiture.¹⁰⁰ The Institute for Justice gave Missouri a "B+" grade for its forfeiture laws.¹⁰¹ The report highlighted Missouri's conviction requirement and the state policy that law enforcement agencies do not receive any proceeds as a direct result from their asset forfeiture programs. However, the poor protections for property owners were a factor that led to Missouri not scoring as high as New Mexico.¹⁰² While Missouri requires a criminal conviction prior to the forfeiture of assets, it is still a low standard of connecting property to the criminal act post conviction.¹⁰³ This means that although there is a provision in place requiring the property owner to be crimi-

95. *Id.*

96. N.M. STAT. ANN. § 31-27-7.1 (1978 & Supp. 2015).

97. § 31-27-7.1(B).

98. § 31-27-7.1(D), (F).

99. MO. ANN. STAT. § 513.600 (West 2002).

100. MO. ANN. STAT. § 513.617(1) (West 2002).

101. Carpenter et al., *supra* note 48, at 96.

102. *Id.*

103. *Id.*

nally convicted, once the owner is convicted, the State can easily attach the owner's interest in the property. Additionally, third-party property owners must enter into the proceedings and prove: (1) they had no knowledge of the underlying criminal act; and (2) they did not know their property would be used or associated with any crime.¹⁰⁴ Without doing so, the property of the innocent third party could be completely forfeited because the burden is on the property owner—not the State.

Missouri, like New Mexico, also affords protection for innocent property owners; defining those owners who did not have actual knowledge of the property's connection with the criminal activity as "innocent."¹⁰⁵ Missouri allows innocent property owners to assert their claim to the property by entering the forfeiture proceeding at any time before the final judgment.¹⁰⁶ Furthermore, any valid claim by an innocent property owner supersedes the State's or county's claim on the same property.¹⁰⁷ In Missouri, innocent property owners have the opportunity to assert their property interest during the forfeiture proceedings. If the assertion is a valid claim that the owner did not have actual knowledge of the criminal activity, the property will be released to the owner regardless of any outcome against the criminal defendant.

3. California

The state of California has taken the first steps to enact legislation to curtail the ability of local agencies to remove cases to federal jurisdiction to take advantage of the lower evidentiary standard.¹⁰⁸ Similar to the New Mexico law, the California bill requires defendants be found guilty of a crime before their property can be permanently forfeited. However, the Institute for Justice gave California a "C+" grade.¹⁰⁹ Although California has taken steps to protect innocent property owners, California's local and state law enforcement agencies participate in the federal equitable sharing program at a large rate—ranking 50th out of all United States jurisdictions for federal forfeiture.¹¹⁰ Even though California has taken strides to limit the problems with civil asset forfeiture, the agencies within the state have no bar against removing seizures to federal jurisdiction.¹¹¹

104. *Id.*

105. MO. ANN. STAT. § 513.615 (2002).

106. *Id.*

107. *Id.*

108. *California Forfeiture Bill Passes Through the Senate*, DRUG POL'Y ALLIANCE (June 3, 2015), <http://www.drugpolicy.org/news/2015/06/bill-rein-asset-forfeiture-abuses-california-sails-through-senate-38-1-vote>.

109. Carpenter et al., *supra* note 48, at 54.

110. *Id.* at 54–55.

111. *See generally id.* at 55.

In California, the Health and Safety Code codifies asset forfeiture laws. Following the standard as passed in the Uniform Controlled Substances Act, California allows agencies to seize drug contraband and property used to facilitate the contraband.¹¹² California also offers protections for innocent property owners. Third parties may enter the forfeiture proceedings at any time to claim their interest in the property subject to forfeiture.¹¹³ If an innocent owner comes forward, the State has the burden to show that the owner consented to the property being used and had actual knowledge of the criminal activity.¹¹⁴ Once actual knowledge is shown, the State still has to meet the burden of proof to forfeit the property. The State must show proof beyond a reasonable doubt to forfeit the property, and for most property—vehicles, negotiable instruments, securities, and real property¹¹⁵—there must be a criminal conviction attached to the forfeiture.¹¹⁶ The only property that is subjected to a lower burden of proof is cash or equivalents of \$25,000 or more. This type of property is subject to clear and convincing evidence,¹¹⁷ mainly because large sums of money are easy to tie to criminal activity.

Additionally, California has determined how state agencies may use the proceeds from forfeiture. For instance, the law mandates that no state agencies can use seized or forfeited property in their regular day-to-day service.¹¹⁸ Also, unless another rule allows (and few do), all forfeiture proceeds must be maintained in a separate account and is subject to accounting controls and financial audits of all deposits and expenditures.¹¹⁹ Not only are there the above measures, but the Attorney General must also compile an aggregate forfeiture report using the data that each state and local agency must provide.¹²⁰

B. *What Texas is Doing*

Texas, on the other hand, has a very low rank for property-owner protection in terms of asset forfeiture, with the Institute for Justice giving Texas a “D+” grade.¹²¹ In Texas, the burden of proof that the government must overcome to confiscate property is only by preponderance of the evidence, and after the initial seizure, the property owner has the burden of proving the property has no link to criminal

112. Compare CAL. HEALTH & SAFETY CODE § 11472 (West 2007 & Supp. 2016) with 21 U.S.C.A. § 853(h)–(q) (West 2016).

113. CAL. HEALTH & SAFETY CODE § 11488.5(a)(1) (West 2007 & Supp. 2016).

114. § 11488.5(d).

115. CAL. HEALTH & SAFETY CODE § 11488.4(i)(1) (West 2007 & Supp. 2016).

116. § 11488.4(i)(3).

117. § 11488.4(i)(4).

118. CAL. HEALTH & SAFETY CODE § 11469(g) (West 2007 & Supp. 2016).

119. § 11469(h).

120. CAL. HEALTH & SAFETY CODE § 11495(c)–(e) (West 2015).

121. Carpenter et al., *supra* note 48, at 132.

activity.¹²² This directly links into the discussion above,¹²³ where the lowest and worst burden of proof required is the one used in Texas. Additionally, Texas law enforcement agencies collect, on average, over \$41 million through civil asset forfeiture per year.¹²⁴ Of course, Texas has a large amount of assets for potential forfeiture because of the State's size and location as a border state. However, Texas also ranks 47th in terms of the equitable sharing between local law enforcement agencies and their federal counterparts.¹²⁵ Unlike California where property owners have more rights under the state model, in Texas property owners are not afforded more protections in one jurisdiction over the other.

In Texas, Chapter 59 of the Texas Code of Criminal Procedure ("TX-CCP") governs civil and criminal forfeiture. Every law enforcement agency has the authority to seize property suspected of ties to criminal activity.¹²⁶ Seizure can occur with the authorization from a valid warrant; consent from a person with control over the property; or through any lawful arrest, lawful search, or a lawful search incident to an arrest.¹²⁷ Normally the probable cause necessary to search and arrest a suspect or search a place requires the use of a warrant.¹²⁸ In civil forfeiture, once the officer is lawfully in place, the probable cause necessary to seize *contraband* is merely whether there is "reasonable belief that a substantial connection exists" between the property and the underlying crime.¹²⁹ Texas has added a provision protecting the right to counsel, stating that Chapter 59 of the TX-CCP "is not intended to abridge an accused person's right to counsel in a criminal case."¹³⁰ Although on the face it seems that this would extend the right to appointed counsel for indigent defendants in the civil forfeiture proceedings, the meaning of the application of Article 59.09 is as a reiteration of the right to counsel in *criminal* proceedings.

The TX-CCP also explicitly states that a conviction is not required for property to be eligible for forfeiture proceedings.¹³¹ Not only this, but even if a defendant is acquitted in his criminal suit, that acquittal only raises a presumption that the property is not eligible for forfeiture.¹³² The prosecuting agency can overcome this presumption by applying a constructive knowledge test to the property owner. That is,

122. *Id.*

123. *See supra* Part III.B.4.

124. Carpenter et al., *supra* note 48, at 132.

125. *Id.* at 133.

126. *See* TEX. CRIM. PROC. CODE ANN. art. § 59.03 (West 2011 & Supp. 2015).

127. § 59.03(a)–(b).

128. *See generally* TEX. CRIM. PROC. CODE ANN. art. §§ 14-15, 18 (West 2011 & Supp. 2015).

129. 1991 Nissan Pickup v. State, 896 S.W.2d 344, 345 (Tex. App.—Eastland 1995, no writ).

130. TEX. CRIM. PROC. CODE ANN. art. § 59.09 (West 2015).

131. TEX. CRIM. PROC. CODE ANN. art. § 59.05(d) (West 2015).

132. *Id.*

the property is still subject to forfeiture if the owner should have known that the property was tied to criminal activity.¹³³

For a successful forfeiture, the State must do two things. First, the prosecution must show the probable cause standard addressed above—that there is a substantial connection between the crime and the property. Second, the prosecution must show by a preponderance of the evidence that the property is contraband.¹³⁴ Sometimes it is easier to show the connection between the crime and the property. For instance, if contraband is found inside a backpack, then it is easy to draw the line between the crime (possession of the contraband) and the property used to further that crime (the backpack). For other items, such as currency, it is more difficult. Texas courts found five factors to determine if currency is connected to drug trafficking: (1) proximity of the money to the drugs; (2) evidence the money was used with drugs; (3) suspicious activity; (4) the amount of money; and (5) testimony that there was probable cause to seize the money, and a substantial connection exists between the money and the criminal activity.¹³⁵ Although Texas courts created a balancing test to determine the connection between currency and drugs, the factors themselves are no more than minor inferential conclusions. For instance, if someone has a couple hundred dollars in the backpack with the drugs or contraband, then all the factors are met without ever having to prove the money was used to facilitate the flow of drugs.

Texas does provide a quasi-innocent owner defense. Seized property is not subject to forfeiture if owners acquired their property interest before or during the crime, and did not know (actually or constructively) of the criminal act leading to the forfeiture.¹³⁶ In application, this is a heavy burden for property owners to take on, especially compared with the easy burden the State has in forfeiting the property. If all the State has to do is show a reasonable connection between the property and the crime, it is difficult for the owner to come forward and claim that he still has a valid interest.

The majority of seizures in Texas come under the jurisdiction of the Department of Public Services (“DPS”) along the “drug corridors” of interstates I-40, I-20, I-35, US-59, and US-77.¹³⁷ When the DPS encounters a seizure case, they have one of two options; either (1) file the case with the District or County Attorney where the offense occurred; or (2) DPS can send the case to a federal agency, which is

133. *Id.*

134. \$132,265 v. State, 409 S.W.3d 17, 23 (Tex. App.—Houston [1st Dist.] 2013, no pet.).

135. *Id.* at 25.

136. \$18,800 v. State, 961 S.W.2d 257, 260 (Tex. App.—Houston [1st Dist.] 1997, no writ).

137. AUSTIN CLEMENS ET AL., OFFICE OF COURT ADMIN., ASSET FORFEITURE IN TEXAS: DPS AND COUNTY INTERACTIONS 5–6 (Pub. Policy Research Inst. ed., 2014), <http://www.txcourts.gov/media/782473/sting-report-final.pdf>.

often the Department of Justice or the Department of Commerce.¹³⁸ The path that the DPS chooses will determine where the proceeds of the forfeiture will end up. It could either be split between the federal government and the state, which requires an equitable sharing petition, or between the state and local agencies.¹³⁹

Often, the DPS chooses to work with the local authorities, and in 2012, only 17% of DPS forfeiture cases were sent to federal jurisdiction.¹⁴⁰ Even so, with seizures valued at \$500,000 or more, the DPS is quick to use federal agencies.¹⁴¹ This is a double-edged sword. First, since the majority of forfeitures are shared between the DPS and local agencies, the incentive to increase the amount of forfeitures remains because the DPS gets a larger cut from cooperation with local agencies. Additionally, the opportunity cost that is associated with more involvement of local agencies is alive as local authorities have a financial incentive in joining forfeiture cases that does not exist when pursuing other law enforcement operations.¹⁴² Second, DPS is more inclined to use local agencies because DPS is guaranteed a piece of the proceeds. Although it is advantageous to use the federal government due to increased investigation techniques, experience in the crimes, and the availability of more money to devote to the process,¹⁴³ the DPS prefers local agencies. The DPS only uses the federal government when there is a large sum of money involved, in part because it is more likely the DPS will get more property or funds. Not only is there an increased incentive to use the local agencies, which in turn decreases police focus on other crimes, but there is also a financial incentive to not use the federal government's expertise, personnel, and budget—creating a “log jam” amongst the local agencies while alternatives exist.

Of course, this problem with the DPS choosing which jurisdiction to file its cases with only involves forfeitures that originate with DPS operations. Even though the majority of forfeitures occur through DPS Highway Patrol and Texas Rangers, there are still forfeitures that—from start to finish—are wholly concentrated within a single agency. The rest of the forfeitures not covered under the DPS are administered by local prosecuting agencies, predominantly, Criminal District Attorney offices and County Prosecutor offices. These local agencies do not typically have the discretion afforded to the DPS. If those local agencies want help in investigating or prosecuting forfeiture-applica-

138. *Id.* at 10.

139. *Id.*

140. *Id.* at 11.

141. *See id.* at 12.

142. For a discussion of opportunity cost as it relates to law enforcement, *see* GEORGE GASCÓN & TODD FOGLESONG, MAKING POLICING MORE AFFORDABLE: MANAGING COSTS AND MEASURING VALUE IN POLICING, (Nat'l Inst. of Justice ed., 2010), <https://www.ncjrs.gov/pdffiles1/nij/231096.pdf>.

143. *See* CLEMENS ET AL., *supra* note 132, at 13–14.

ble crimes, they are directly hit with the decrease in funds. Whereas the DPS can prosecute independently, use local agencies, or remove the case to federal jurisdiction, local prosecutors are only given the option of going solo or calling the feds.

Currently, there is an inherent barrier to passing asset forfeiture reform in Texas. In the last congressional session, Representative David Simpson of the Texas House of Representatives proposed a bill that would require a conviction requirement prior to the State moving forward with forfeiture proceedings.¹⁴⁴ The reason for the bill's demise? A lack of support from law enforcement agencies in Representative Simpson's district.¹⁴⁵ Not only did Representative Simpson's bill require a criminal conviction for forfeiture proceedings, but it also proposed an all-out shift from the civil asset forfeiture route,¹⁴⁶ requiring law enforcement to *always* move forward with criminal proceedings against a person defendant. With large police officer unions in Texas, it is difficult to get this type of reform passed through the legislature.

V. WHAT TEXAS SHOULD DO

Many proposed changes to asset forfeiture programs follow the same general idea. This Section furthers the discussion as to what should be done in Texas. Below are proposed changes, some of which have support behind them, and some are specifically tailored for this Comment.

A. *Get Rid of Civil Asset Forfeiture and Increase the Burden of Proof*

First, Texas should get rid of civil asset forfeiture altogether. As mentioned above, every benefit of civil asset forfeiture can be attained through criminal forfeiture, with none of the burdens on the property owner.¹⁴⁷ If a property owner is found to be guilty by a court of law, then the government can prove that the property was acquired through the illegal conduct. However, with civil asset forfeiture, truly innocent property owners are suffering losses due to a system that is built to work against them, and courts have to take a larger inferential leap to attach and forfeit the property.

Moreover, simply removing civil forfeiture from the law enforcement agencies' arsenals is not enough because the federal equitable sharing program allows the local agencies to move the drug cases to the federal jurisdiction and use federal civil asset forfeiture laws. Unless Texas simultaneously passes legislation forbidding local and state

144. Glenn Evans, *Simpson Asset Bill Dies on Law Enforcement Objection*, LONGVIEW NEWS-J. (June 5, 2015), <http://www.news-journal.com/news/2015/jun/05/simpson-asset-bill-dies-on-law-enforcement-objecti/>.

145. *Id.*

146. *Id.*

147. *See supra* Part III.A–B.

agencies from removing the drug case to federal jurisdiction, Texas will face the same problems that California is having now. It is likely Texas will pass a state law meant to curtail the use of civil asset forfeiture—or at least limit the major problems with civil forfeiture—that is easily circumvented by use of the federal equitable sharing program.

B. *Provide Guaranteed Counsel for Indigent Property Owners*

Alternatively, if Texas does not end the use of civil forfeiture, which does have an inherent barrier in the current makeup of the Texas Legislature,¹⁴⁸ the State should extend the right to counsel to the civil cases where someone's property is forfeited. Currently, indigent property owners in Texas are not provided the assistance of counsel in civil forfeiture proceedings. As mentioned above, although Texas purports to afford the right to counsel in the civil proceedings, there is no *guaranteed* right for indigent property owners.¹⁴⁹ Without the guaranteed right to counsel, there is effectively no way an indigent property owner can successfully fight a contested forfeiture proceeding. If Texas cannot pass legislation getting rid of civil asset forfeiture entirely, one step shy of that is to provide guaranteed counsel. In a civil forfeiture scheme, guaranteed counsel might be enough to protect the property interest for those owners who currently cannot afford counsel.

C. *Place the Seized Assets in General Funds*

Currently in Texas, anywhere from 70% to 100% of all proceeds, as a result of civil asset forfeiture, are given to the individual law enforcement agencies that ran the forfeiture or aided in it as part of the federal equitable sharing program.¹⁵⁰ Texas should follow other states, such as New Mexico, and remove the direct control law enforcement agencies have over extra money in their budget.

There are two popular methods of diverting the funds away from law enforcement agencies. First, the proceeds can be put in a state general fund, where allocation of extra money goes through a bidding process. Through this method, law enforcement agencies would not automatically get a percentage of proceeds from civil forfeiture. Instead, money can be allocated to where it is needed the most. The money would only go to the law enforcement agency if no other government department needs the funding. If the Texas Legislature finds that certain law enforcement agencies will benefit from extra money,

148. The Texas Legislature is a body known to “kill” legislation, where some legislators believe the process is meant to defeat bills. See Madlin B. Mekelburg, *Dozens of Prominent Bills Died in Texas' Legislative Session*, HOUS. CHRON., June 1, 2015, <http://www.chron.com/news/politics/article/Texas-bills-that-died-this-legeslative-session-6299466.php>.

149. See *supra* Part IV.B.

150. Carpenter et al., *supra* note 48, at 132.

then the legislature can decide on that by reading petitions from the agencies themselves. This small degree of separation might be enough to curtail the “policing for profit” system currently in place. Furthermore, agencies are supposed to go to Congress for more funding, as the legislative branch has traditionally had the “power of the purse.” By changing the way agencies gain the money from forfeiture, we can further the necessary separation of powers policy in our government.

Secondly, the proceeds from civil forfeiture can go to offender education, rehabilitation programs, and prison programs that can help the certificate of rehabilitation be more than just a stamp. Not all of these programs will be completely beneficial because not every program has a high success rate, but the money can be allocated here based on the same argument that expands asset forfeiture. If there are certain crimes against society that place a higher burden on society than others, then a more cost effective way of eradicating the particular crime may not be an increase in enforcement practices, but may be in an increase of offender education. Money can go to the programs that make it less likely to see the same people go in and out of the judicial system, which would in turn decrease the burden on law enforcement. Most of asset forfeiture is done as a tool for the “War on Drugs”; however, with the high recidivism rates, particularly amongst drug offenders,¹⁵¹ the more beneficial method of lowering the crime—and as such, lowering the burden on society the crime causes—might be in education, not enforcement.

Not all of the proceeds have to go to general funds for the benefit of other state and local programs. An alternative to general funds is to put the money in programs that provide victim assistance. One program that Texas already utilizes is the Crime Victims’ Compensation program. This program is implemented through the Office of the Attorney General and is provided to support victims of violent crimes by providing financial assistance for the crime-related expenses.¹⁵² The victims must first seek reimbursement through other sources such as insurance, Medicare or Medicaid, and workers compensation. But if those other venues are not successful, then victims can qualify for assistance from \$50,000–\$75,000.¹⁵³ Texas should open the door and allow funds acquired through forfeiture programs to attribute to the Crime Victims’ Compensation. Since the policy behind drug law enforcement (and other crimes that are subjected to forfeiture) is that

151. For a general discussion on the recidivism rates, see *Recidivism*, NAT’L INST. OF JUST., <http://www.nij.gov/topics/corrections/recidivism/pages/welcome.aspx> (last updated June 17, 2014); For a discussion on the recidivism rates for drug offenders, see Ryan S. King & Marc Mauer, *Distorted Priorities: Drug Offenders in State Prisons*, SENT’G PROJECT (Sept., 2002), <http://www.sentencingproject.org/wp-content/uploads/2016/01/Distorted-Priorities-Drug-Offenders-in-State-Prisons.pdf>.

152. *Crime Victims’ Compensation*, ATT’Y GEN. TEXAS, <https://texasattorneygeneral.gov/cvs/crime-victims-compensation> (last visited Feb. 20, 2016).

153. *Id.*

society is victimized, there is not a group of victims for these crimes (other than society itself). If forfeiture proceeds were added to funds such as the Crime Victim's Compensation, then there is the potential that more victims could be included in the programs and those victims that are part of the program can receive more money. Instead of channeling the majority of the forfeiture proceeds to law enforcement programs, the above ways show the money can go to the benefit of society and take away the financial incentive.

VI. CONCLUSION

Civil asset forfeiture is used throughout the United States as a tool to enforce the law, combat the economy behind crime, and create a disincentive in engaging in criminal activity. In Texas, the program is used on a wide scale to help enforce the "War on Drugs," among other programs. Due to a lower burden of proof, lack of appointed counsel, and other burdens placed on property owners, it is not only hard for innocent property owners to protect their property, but it is equally as easy for law enforcement agencies to misuse civil forfeiture to increase the money in their treasury. Some states—such as New Mexico, Missouri, and California—should act as leaders in the reform movement. Texas has a lot of work to do to create a more equitable process, that includes: getting rid of civil asset forfeiture completely; increasing the State's burden of proof; providing guaranteed counsel; and diverting the funds away from law enforcement agencies. There are ways to fix the current system of civil asset forfeiture, without removing the seizure of assets from the arsenal that law enforcement agencies can rely on. Forfeiture can still be an effective tool to combat criminal activity, without creating the unnecessary burdens that are currently placed on property owners. The good news: Texas has nowhere to go but up, and any step the State takes will be an improvement on the current system.