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Elizabeth Weaver

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## NOTE

### **Money Doesn't Grow on Trees: Civil Asset Forfeiture Reform is a Necessary Precursor to Police Reform**

*Elizabeth Weaver\**

#### I. INTRODUCTION

Communities are scrutinizing the credibility of law enforcement as concerns associated with unfair treatment and police misconduct mount.<sup>1</sup> Despite ever-present demands for reform, law enforcement policy and practices continue to undercut efforts to build community relationships.<sup>2</sup> Calls to defund police, whether by abolitionists or those who argue that modern policing encompasses job duties law enforcement should never

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\*B.S., Boise State University, 2018; J.D. Candidate, University of Missouri School of Law, 2022; Associate Member, *Missouri Law Review*, 2020–21; Note and Comment Editor, *Missouri Law Review*, 2021–22. I am grateful for the insight and guidance provided by Associate Dean Ben Trachtenberg and the assistance of the *Missouri Law Review* staff during the editing process.

<sup>1</sup> Brandon Turchan, *A high-profile police-involved shooting, civil unrest, and officers' perceptions of legitimacy: insights from a natural experiment*, 17 J. EXPERIMENTAL CRIMINOLOGY 507, 508 (2021) (“Legitimacy involves a willingness of those subjected to an authority to recognize exercises of power and voluntarily comply with orders and rules of society.”).

<sup>2</sup> “If the public judges that the police exercise their authority using fair procedures . . . the public will view the police as legitimate and will cooperate with policing efforts. However, unfairness in the exercise of authority will lead to alienation, defiance, and noncooperation.” Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 LAW & SOC’Y REV. 513, 514 (2003). Positive nonenforcement contact with law enforcement can improve public attitudes toward police, including perceived legitimacy and willingness to cooperate. Kyle Peyton et al., *A field experiment on community policing and police legitimacy*, 116 (40) PROC. NAT’L ACAD. SCIS. 19894, 19894 (2019), <https://www.pnas.org/content/pnas/116/40/19894.full.pdf> [https://perma.cc/R2YD-EPFF].

perform,<sup>3</sup> entered mainstream conversations about police reform after the death of Eric Garner in 2014, and reemerged when George Floyd was murdered in 2020.<sup>4</sup> While it is true that financial constraints can force policy change, defunding the police could have unintended negative consequences to the public by increasing police reliance on revenue from civil asset forfeiture.<sup>5</sup> At present, the United States Department of Justice's Asset Forfeiture Program provides a way for state and local police departments to supplement budgets by seizing property from individual citizens.<sup>6</sup>

Through civil asset forfeiture, law enforcement agencies can seize cash, real estate, vehicles, and other property *without* filing criminal charges against the property owner, much less securing a conviction.<sup>7</sup> Civil asset forfeiture only requires probable cause – a reasonable belief that the property in question was or could be used in the commission of a crime.<sup>8</sup> Forfeiture is lucrative for law enforcement agencies, and the problem is growing. Between 1986 and 2014, federal forfeitures grew by 4667%, reaching \$4.5 billion per year.<sup>9</sup> In general, the agency responsible for the seizure can keep up to 100 percent of the seized property or, more

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<sup>3</sup> A foundation of Abolitionist ideology is the belief that “procedural reforms cannot fix policing because it is an inherently racist tool of social control.” Jamiles Lartey & Annaliese Griffin, *The Future of Policing*, MARSHALL PROJECT: THE SYS. (Oct. 23, 2020), <https://www.themarshallproject.org/2020/10/23/the-future-of-policing> [<https://perma.cc/6R2Z-WVDW>]. Abolitionists envision a society in which the police are unnecessary because basic human needs like a living wage, safe affordable housing and access to mental healthcare are universal.” *Id.*

<sup>4</sup> Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CAL. L. REV. 1781, 1814–15 (2020); Evan Hill et al., *How George Floyd Was Killed in Police Custody*, N.Y. TIMES, <https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html> [<https://perma.cc/L8KG-LAR7>] (last updated Nov. 1, 2021).

<sup>5</sup> Akbar, *supra* note 4, at 1793.

<sup>6</sup> *About the Asset Forfeiture Program (AFP)*, U.S. DEP’T JUST. ASSET FORFEITURE PROGRAM, <https://www.justice.gov/afms/about-asset-forfeiture-program-afp> [<https://perma.cc/Q9K4-MU89>] (last updated Oct. 26, 2021).

<sup>7</sup> Nick Sibilla, *Poll: Most Americans Want Congress To Abolish Civil Asset Forfeiture*, FORBES (Nov. 12, 2020, 4:15 PM EST), <https://www.forbes.com/sites/nicksibilla/2020/11/12/poll-most-americans-want-to-defund-civil-forfeiture/?sh=5e67e4a057b5>.

<sup>8</sup> JONAH ENGLE, DRUG POL’Y ALL., ABOVE THE LAW: AN INVESTIGATION OF CIVIL ASSET FORFEITURE IN CALIFORNIA 3 (2015), [https://drugpolicy.org/sites/default/files/Drug\\_Policy\\_Alliance\\_Above\\_the\\_Law\\_Civil\\_Asset\\_Forfeiture\\_in\\_California.pdf](https://drugpolicy.org/sites/default/files/Drug_Policy_Alliance_Above_the_Law_Civil_Asset_Forfeiture_in_California.pdf) [<https://perma.cc/EPW5-53BK>].

<sup>9</sup> Isaac Safier, *We Need to Talk About Civil Asset Forfeiture*, NEW AM. (Sept. 10, 2020), <https://www.newamerica.org/weekly/we-need-talk-about-civil-asset-forfeiture/> [<https://perma.cc/7TKH-MPL6>].

often, the proceeds from its sale.<sup>10</sup> For communities to view law enforcement officers as legitimate actors who maintain order and administer justice, officers' actions must appear fair in the eyes of the community;<sup>11</sup> policies and procedures like civil asset forfeiture, however, continue to erode public confidence in police.

Part II of this Note discusses the legal background of civil asset forfeiture, including the United States Department of Justice and Department of the Treasury's Equitable Sharing Program. Part III explores recent developments in civil asset forfeiture law, considering the Supreme Court's decision in *Timbs v. Indiana* and explaining why the decision does not solve existing problems.<sup>12</sup> Part IV explains the relationship between budget reductions and increases in civil asset forfeiture activity and explores the effectiveness of legislative roadblocks to the misuse of civil forfeiture. Current policy motivates law enforcement to pursue civil forfeiture. While defunding the police to push reform is popular among abolitionists,<sup>13</sup> until and unless civil forfeiture procedure is reformed, such action will only negatively impact the public.

## II. LEGAL BACKGROUND

October 2020 exhibited the fourteenth annual 'Operation Rolling Thunder,'<sup>14</sup> a highway interdiction event in Spartanburg County, South Carolina.<sup>15</sup> Each year, for a week, officers focus their efforts on a stretch of Interstate 85, hoping to seize drugs, guns, and money from drivers committing minor traffic violations.<sup>16</sup> Operation Rolling Thunder seized

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<sup>10</sup> Sibilla, *Poll: Most Americans Want Congress To Abolish Civil Asset Forfeiture*, *supra* note 7.

<sup>11</sup> Jacinta M. Gau, *Consent Searches as a Threat to Procedural Justice and Police Legitimacy: An Analysis of Consent Requests During Traffic Stops*, 24 CRIM. JUST. POL'Y REV. 759, 760 (2013).

<sup>12</sup> 139 S. Ct. 682 (2019).

<sup>13</sup> See Akbar, *supra* note 4, at 1814.

<sup>14</sup> The strategy of highway interdiction was created to counter the drug trafficking organizations using the highway system to distribute contraband throughout the county. Kevin M. Hood, *Policy Safeguards and the Legitimacy of Highway Interdiction* (Dec. 2016) (Master's thesis, Naval Postgraduate School) (on file with Calhoun: The NPS Institutional Archive).

<sup>15</sup> *Only on 7: A behind-the-scenes look at Operation Rolling Thunder*, WSPA NEWS (Oct. 17, 2020, 10:21 AM), <https://www.wspa.com/news/crime/spartanburg-co-sheriffs-office-to-give-update-on-operation-rolling-thunder/> [<https://perma.cc/M2LW-RX64>].

<sup>16</sup> *Id.* (Only drivers committing traffic violations were pulled over. "Many were caught speeding, following too closely, or improperly changing lanes.").

\$319,595.00 in that one week.<sup>17</sup> Officers extolled the fun they had participating in Operation Rolling Thunder,<sup>18</sup> noting that “nearly everyone does something illegal if you follow them long enough.”<sup>19</sup> Projects like Operation Rolling Thunder rely heavily on civil asset forfeiture.<sup>20</sup> To initiate a forfeiture proceeding, law enforcement need only show probable cause that the property in question was used in the commission of a crime;<sup>21</sup> it is not necessary to actually charge the owner of the property with that crime. Forfeiture “inflicts the harsh punishments associated with criminal proceedings without the constitutional protections guaranteed by a criminal trial.”<sup>22</sup> Even more concerning, participating agencies are generally able to keep the property or, more often, the proceeds from its sale.<sup>23</sup>

#### *A. Sticky Fingers or the Midas Touch: Civil Asset Forfeiture Policy and Procedure*

Civil asset forfeiture exists to punish and deter criminal activity by depriving criminals of property used in or acquired through illegal activities.<sup>24</sup> While *criminal* forfeiture happens after an individual has been convicted of a crime as part of a criminal sanction,<sup>25</sup> *civil* forfeiture is not attached to a criminal proceeding.<sup>26</sup> Supporters of civil asset forfeiture

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<sup>17</sup> Daryl James, *Civil Liberty Suffers Bad Week on Interstate 85*, INSIDE SOURCES (Nov. 4, 2020), <https://insidesources.com/civil-liberty-suffers-bad-week-on-interstate-85/> [<https://perma.cc/RC33-C4V2>].

<sup>18</sup> “It’s been a blast,” stated Deputy Danny Swanger of the Cherokee County Sheriff’s Office, explaining that he hopes to be part of the effort in the future. WSPA NEWS, *supra* note 15.

<sup>19</sup> BRIAN D. KELLY, PH.D., FIGHTING CRIME OR RAISING REVENUE? TESTING OPPOSING VIEWS OF FORFEITURE 4 (2019), <https://ij.org/wp-content/uploads/2019/06/Fighting-Crime-or-Raising-Revenue-7.20.2020-revision.pdf> [<https://perma.cc/LN96-MW84>].

<sup>20</sup> Rachel J. Weiss, *The Forfeiture Forecast After Timbs: Cloudy with a Chance of Offender Ability to Pay*, 61 B.C. L. REV. 3073, 3077 (2020); Sibilla, *Poll: Most Americans Want Congress To Abolish Civil Asset Forfeiture*, *supra* note 7.

<sup>21</sup> ENGLE, *supra* note 8, at 3.

<sup>22</sup> *Id.*

<sup>23</sup> Cassie Miller, *Civil asset forfeiture: Unfair, undemocratic, and un-American*, S. POVERTY L. CTR. 1 (Oct. 30, 2017), [https://www.splcenter.org/sites/default/files/com\\_policybrief\\_civil\\_asset\\_forfeiture\\_web.pdf](https://www.splcenter.org/sites/default/files/com_policybrief_civil_asset_forfeiture_web.pdf) [<https://perma.cc/C8F3-YMY2>].

<sup>24</sup> *About the Asset Forfeiture Program (AFP)*, *supra* note 6.

<sup>25</sup> Weiss, *supra* note 20, at 3078.

<sup>26</sup> *Id.*

“believe that if the government were able to deprive narcotics dealers of significant portions of the illegal gains they realize, this would have an important deterrent effect and would stem the growth of drug trafficking.”<sup>27</sup> Since the beginning of the War on Drugs,<sup>28</sup> “law enforcement agencies have used civil asset forfeiture laws to strip Americans of billions of dollars in cash, cars, real estate and other assets.”<sup>29</sup>

In theory, forfeiture stalls crime by removing capital from individuals participating in criminal activity.<sup>30</sup> In reality, “increased forfeiture funds ha[ve] no meaningful effect on crime fighting.”<sup>31</sup> Instead, forfeiture distorts the relationship between the police and the public, encouraging law enforcement to engage in behavior that maximizes profit rather than ensuring public safety.<sup>32</sup> In recent years, civil asset forfeiture has become unquestionably profitable.<sup>33</sup> States and the federal government have seized a combined total of at least \$68.8 *billion* over the last twenty years through civil asset forfeiture.<sup>34</sup> Because the law enforcement agency responsible for seizing the property often keeps it, there is a strong motivation to pursue forfeiture.<sup>35</sup>

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<sup>27</sup> *Subcommittee on Crime of the Committee on the Judiciary, U.S. House of Representatives on Criminal Forfeiture*, 97th Cong. 4 (March 9, 1982) (statement of Jeffrey Harris, Deputy Assoc. Att’y Gen.) <https://www.ojp.gov/pdffiles1/Digitization/83805NCJRS.pdf> [<https://perma.cc/9THM-F6N8>].

<sup>28</sup> MICHELLE ALEXANDER, *THE NEW JIM CROW* 5 (2010) (“Most people assume the War on Drugs was launched in response to the crisis caused by crack cocaine in inner-city neighborhoods. This view holds that the racial disparities in drug convictions and sentences, as well as the rapid explosion of the prison population, reflect nothing more than the government’s zealous—but benign—efforts to address rampant drug crime in poor, minority neighborhoods ... While it is true that the publicity surrounding crack cocaine led to a dramatic increase in funding for the drug war (as well as to sentencing policies that greatly exacerbated racial disparities in incarceration rates), there is no truth to the notion that the War on Drugs was launched in response to crack cocaine.”).

<sup>29</sup> Miller, *supra* note 23.

<sup>30</sup> *About the Asset Forfeiture Program (AFP)*, *supra* note 6.

<sup>31</sup> Kelly, *supra* note 19, at 3.

<sup>32</sup> Miller, *supra* note 23.

<sup>33</sup> *Leonard v. Texas*, 137 S. Ct. 847, 848 (2017) (noting that in 2014 alone, the Department of Justice Assets Forfeiture Fund took in \$4.5 billion).

<sup>34</sup> LISA KNEPPER ET AL., *INST. FOR JUST., POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE* 5 (3d ed. 2020) (noting that “because not all states provided full data, this figure drastically underestimates forfeiture’s true scope.”).

<sup>35</sup> *Leonard*, 137 S. Ct. at 848 (noting that the Federal Government and many States permit 100 percent of forfeiture proceeds to flow directly to law enforcement).

Ordinarily, when a state seeks to sanction an individual citizen, it will proceed *in personam* by filing criminal charges.<sup>36</sup> With civil forfeiture, however, a state proceeds *in rem*, directly against the property.<sup>37</sup> The Supreme Court of the United States has routinely upheld *in rem* proceedings that “enable the government to seize the property without any pre-deprivation judicial process and to obtain forfeiture of the property even when the owner is personally innocent.”<sup>38</sup> Because forfeiture proceedings are civil, certain due process protections that would accompany a criminal prosecution are missing, including “the right to a jury trial and a heightened standard of proof.”<sup>39</sup> Civil asset forfeiture generally requires only that the state show, by a preponderance of the evidence, that the property at issue was, *or might be* used in the commission of a crime.<sup>40</sup> Because there is no criminal charge requirement, eighty percent of individuals whose assets are seized by law enforcement are not charged with a crime.<sup>41</sup>

When a civil forfeiture action is initiated, the state files an *in rem* action against real or personal property, essentially accusing the property of a crime.<sup>42</sup> Historical forfeitures were vastly different than those allowed under modern statutes.<sup>43</sup> The evolution of criminal justice and asset forfeiture statutes is now far removed from the “ancient notion of civil forfeiture.”<sup>44</sup> These historical statutes applied only to a few specific offenses, such as customs violations and piracy,<sup>45</sup> proceeding against property when an individual responsible for a crime was outside the personal jurisdiction of the United States.<sup>46</sup> These statutes also typically included only the instrumentalities of the crime, “not the derivative proceeds of the crime.”<sup>47</sup>

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<sup>36</sup> *Id.* at 847.

<sup>37</sup> *Id.*

<sup>38</sup> *Leonard v. Texas*, 137 S. Ct. 847, 847 (2017) (Statement of Thomas, J., respecting the judgment).

<sup>39</sup> *Id.* at 847–48.

<sup>40</sup> 18 U.S.C. § 981.

<sup>41</sup> *Miller*, *supra* note 23.

<sup>42</sup> *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 80 (1993) (O’Connor, J., concurring in part and dissenting in part).

<sup>43</sup> *Id.* at 85 (Thomas, J., concurring in part and dissenting in part.).

<sup>44</sup> *Id.*

<sup>45</sup> *Leonard v. Texas*, 137 S. Ct. 847, 849 (2017) (Statement of Thomas, J., respecting the judgment).

<sup>46</sup> *Id.* (Statement of Thomas, J., respecting the judgment).

<sup>47</sup> *Id.* (Statement of Thomas, J., respecting the judgment).

Current civil forfeiture laws are written, at least partially, to punish property owners whose property has been used for criminal purposes.<sup>48</sup> These statutes, passed by Congress under the 1970 Comprehensive Drug Abuse Prevention and Control Act, are one part of the larger War on Drugs.<sup>49</sup> Originally, Congress limited seizures to “drugs and all equipment used in their manufacture and transit.”<sup>50</sup> As Congress expanded the types of assets subject to civil forfeiture, the connections between assets and crime became more questionable.<sup>51</sup> The 1984 Comprehensive Crime Control Act further expanded civil forfeiture and earmarked all proceeds from seizures for law enforcement purposes.<sup>52</sup> In doing so, the law “created a financial incentive for policing agencies to prioritize anti-drug law enforcement.”<sup>53</sup>

Also missing from civil asset forfeiture, the concept of “innocent until proven guilty.” Instead of the government having to prove that the property was involved in a crime, the burden is on the property owner to prove that the property is not guilty of a crime.<sup>54</sup> Often, the value of the seized property is less than the cost of hiring an attorney and paying court fees,<sup>55</sup> and challenging a cash seizure takes at least a year on average.<sup>56</sup> As a result, almost ninety percent of forfeitures are never challenged.<sup>57</sup>

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<sup>48</sup> Austin v. United States, 509 U.S. 602, 618–19 (1993).

<sup>49</sup> Miller, *supra* note 23, at 2.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> ENGLE, *supra* note 8, at 3 (“Federal civil asset forfeiture violates due process and property rights in numerous ways. There is no presumption of innocence; the legal threshold for seizing private property is very low; the onus is on the owner to reclaim their property; and no conviction is required for the government to forfeit private property once it has been seized.”).

<sup>55</sup> An investigation into civil forfeiture in Philadelphia revealed that half of all seizures of cash were less than \$192, but taking off the four days required, on average, to attend court to resolve a forfeiture challenge would cost a minimum wage-earner \$232 in lost income. AM. C.L. UNION PA., GUILTY PROPERTY: HOW LAW ENFORCEMENT TAKES \$1 MILLION IN CASH FROM INNOCENT PHILADELPHIANS EVERY YEAR — AND GETS AWAY WITH IT 8 (June 2015), [https://www.aclupa.org/sites/default/files/Guilty\\_Property\\_Report\\_-\\_FINAL.pdf](https://www.aclupa.org/sites/default/files/Guilty_Property_Report_-_FINAL.pdf) [<https://perma.cc/XX6V-7NTB>].

<sup>56</sup> Miller, *supra* note 23, at 2.

<sup>57</sup> Miller, *supra* note 23, at 2 (“At the federal level, 88% of forfeitures go uncontested.”).



*B. Do You Have Cash in the Vehicle: Targets of Civil Asset Forfeiture*

People who deal primarily in cash are at increased danger of falling victim to forfeiture. After the stock market crash in 2008, Lisa Olivia Leonard, an agent for the Internal Revenue Service, began storing money in safes.<sup>58</sup> In 2013, Ms. Leonard sent a safe containing more than \$200,000 and a bill of sale for a property in Pennsylvania with her son to purchase a home in Texas.<sup>59</sup> The safe never made it.<sup>60</sup> Ms. Leonard's son was pulled over and arrested for a traffic violation and suspicion of money laundering when a police officer discovered the safe in the trunk of the car.<sup>61</sup> The officer contacted Ms. Leonard upon learning that the safe belonged to her, but she refused him permission to open it.<sup>62</sup> The officer obtained a warrant and at later forfeiture proceedings, testified that in his experience, "carrying large amounts of U.S. currency is commonly associated with the illegal narcotics trade."<sup>63</sup> A Texas trial court awarded the more than \$200,000 to the state in a forfeiture proceeding, finding "a substantial connection exist[ed] between the \$201,100.00 and criminal activity."<sup>64</sup>

The Court of Appeals of Texas upheld the verdict, noting that under a legal sufficiency standard, it would evaluate the evidence in the light most favorable to the verdict and consider whether the evidence "would enable reasonable and fair-minded people to reach the verdict under review."<sup>65</sup> The court held that the state presented "sufficient circumstantial evidence to satisfy its burden" of proving that the money was used *or intended to be used* in the commission of a felony.<sup>66</sup> The Supreme Court denied Ms. Leonard's request for certiorari because her attorneys argued, for the first time, that the seizure violated the Due Process Clause.<sup>67</sup> Justice Clarence Thomas, respecting the denial of certiorari because the case was not yet ripe, nonetheless penned an excoriating six-page indictment of modern civil asset forfeiture

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<sup>58</sup> \$201,100.00 U.S. Currency v. State, No. 09-14-00478-CV, 2015 WL 4312536, at \*1 (Tex. App. July 16, 2015).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* James Leonard was convicted of narcotics-related crimes in 2008 and 2011. *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at \*2 (quoting *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex.2005)).

<sup>66</sup> *Id.*

<sup>67</sup> *Leonard v. Texas*, 137 S. Ct. 847, 847 (2017).

procedure.<sup>68</sup> “This system – where police can seize property with limited judicial oversight and retain it for their own use – has led to egregious and well-chronicled abuses.”<sup>69</sup>

Civil forfeiture is not limited to drug kingpins and cartels and does not prioritize only netting high-dollar seizures and dismantling criminal enterprises.<sup>70</sup> Instead,

[F]orfeiture operations frequently target the poor and other groups least able to defend their interests in forfeiture proceedings... Perversely, these same groups are often the most burdened by forfeiture. They are more likely to use cash than alternative forms of payment, like credit cards, which may be less susceptible to forfeiture. And they are more likely to suffer in their daily lives while they litigate for the return of a critical item of property, such as a car or home.<sup>71</sup>

Police have broad discretion in choosing which property to seize, which results in a disproportionate impact on racial minorities.<sup>72</sup> In 2016, the Nevada Policy Research Institute studied forfeitures in Las Vegas, noting that sixty-six percent of the forfeitures analyzed happened in one-quarter of the zip codes in Las Vegas: neighborhoods that were “predominantly minority and low-income.”<sup>73</sup> The average value of a state seizure in California in 2013 was just over \$5,000.<sup>74</sup> In 1992, ninety-four percent of California forfeitures were valued at \$5,000 or less.<sup>75</sup> Forfeiture can even strip owners of their homes. In Philadelphia, where nearly 300 homes are seized each year, African Americans make up less than half of

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<sup>68</sup> *Id.*

<sup>69</sup> “According to one nationally publicized report, for example, police in the town of Tenaha, Texas, regularly seized the property of out-of-town drivers passing through and collaborated with the district attorney to coerce them into signing waivers of their property rights. In one case, local officials threatened to file unsubstantiated felony charges against a Latino driver and his girlfriend and to place their children in foster care unless they signed a waiver. In another, they seized a black plant worker's car and all his property (including cash he planned to use for dental work), jailed him for a night, forced him to sign away his property, and then released him on the side of the road without a phone or money. He was forced to walk to a Wal-Mart, where he borrowed a stranger's phone to call his mother, who had to rent a car to pick him up.” *Id.* at 848 (Statement of Thomas, J., respecting the judgment).

<sup>70</sup> GUILTY PROPERTY, *supra* note 55.

<sup>71</sup> *Leonard*, 137 S.Ct at 848 (Statement of Thomas, J., respecting the judgment).

<sup>72</sup> *Miller*, *supra* note 23, at 2.

<sup>73</sup> *Safier*, *supra* note 9.

<sup>74</sup> *ENGLE*, *supra* note 8.

<sup>75</sup> *Id.*

the population but suffer sixty-three percent of home seizures and seventy-one percent of cash forfeitures unaccompanied by a conviction.<sup>76</sup>

*C. Pennies from Heaven: Law Enforcement Use of Forfeiture Funds*

The federal government and most states allow law enforcement agencies to retain up to 100% of the proceeds from forfeiture property.<sup>77</sup> Allowing law enforcement to “self-finance without legislative approval or oversight” creates a clear incentive to pursue forfeiture,<sup>78</sup> with agencies viewing forfeiture funds as “pennies from heaven.”<sup>79</sup> The Departments of Justice and the Treasury encourage use of the Equitable Sharing Program (“the Program”) to supplement and enhance law enforcement agency resources.<sup>80</sup> The Program allows agencies in states with restrictive forfeiture laws to circumvent state law and retain seized funds through a procedure called adoption.<sup>81</sup> According to the Department of Justice, an adoption “occurs when a state or federal law enforcement agency seizes property under state law, without federal oversight or involvement, and requests that a federal agency take the seized asset into its custody and proceed to forfeit the asset under federal law.”<sup>82</sup>

Research shows that law enforcement agencies in states with restrictive forfeiture laws are more likely to participate in the equitable sharing program.<sup>83</sup> In 2015, then-Attorney General Eric Holder limited the scope of the DOJ’s equitable sharing program, prohibiting most adoptions of state-seized property.<sup>84</sup> Those reforms were short-lived;

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<sup>76</sup> Miller, *supra* note 23, at 2.

<sup>77</sup> Sibilla, *Poll: Most Americans Want Congress To Abolish Civil Asset Forfeiture*, *supra* note 7.

<sup>78</sup> *Id.*

<sup>79</sup> Former Columbia Missouri Chief of Police Ken Burton, describing using forfeiture funds, “it’s kind of like pennies from heaven, you know it gets you a toy or something. . . .” Citizens For Justice, “*Pennies From Heaven; Police Chief Talks Asset Forfeiture*,” YOUTUBE (Nov. 19, 2012), <https://www.youtube.com/watch?v=ipHUN-xLLms> [<https://perma.cc/BU2H-93SZ>].

<sup>80</sup> U.S. DEP’T JUST. & U.S. DEP’T TREASURY, GUIDE TO EQUITABLE SHARING FOR STATE, LOCAL AND TRIBAL LAW ENFORCEMENT AGENCIES 13 (2018), <https://www.justice.gov/criminal-afmls/file/794696/download> [<https://perma.cc/243R-KD5K>].

<sup>81</sup> ASSET FORFEITURE POLICY MANUAL, at ch. 3 § II (2021).

<sup>82</sup> *Id.*

<sup>83</sup> Miller, *supra* note 23, at 3.

<sup>84</sup> *Id.*

Attorney General Jeff Sessions completely reversed them within months of his appointment.<sup>85</sup>

According to the Department of Justice, “[a]sset forfeiture is a powerful tool that provides valuable resources to state and local law enforcement that may not have otherwise been available.”<sup>86</sup> Touting the additional benefits of forfeiture, the Departments of Justice and the Treasury encourage use of the Program to “enhance cooperation amongst federal, state, local and tribal law enforcement by providing valuable additional resources to state and local law enforcement agencies.”<sup>87</sup> To receive Program payments, state and local law enforcement agencies must assist in a law enforcement effort that results in a federal forfeiture, either by cooperating with a federal agency or by pursuing adoption.<sup>88</sup> Regardless of the division of effort between state and federal agencies related to a seizure, under the Program, the minimum federal share is 20 percent.<sup>89</sup>

Even in states that have tried to reduce abusive forfeiture practices, federal law allows agencies to partner with a federal agency and still retain up to eighty percent of the forfeited property.<sup>90</sup> Missouri, for example, designates forfeiture proceeds “for school purposes only.”<sup>91</sup> Because of equitable sharing, however, law enforcement agencies can circumvent this restriction by allowing a federal agency to “adopt” the forfeiture and proceeding under federal law.<sup>92</sup> Between 1993 and 2001, Missouri gained forty-one million dollars from forfeiture actions, but only twelve million made it to schools.<sup>93</sup> Missouri took steps to close the forfeiture loophole and prevent policing for profit, but the United States government incentivizes departments to ignore state regulations by partnering with federal agencies.<sup>94</sup>

Equitable sharing “undermines states’ attempts to regulate forfeiture, and its extensive use, according to criminologists, shows that police

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<sup>85</sup> *Id.* at 3–4.

<sup>86</sup> 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, *supra* note 80.

<sup>87</sup> *Id.* at 1.

<sup>88</sup> *Id.* at 7.

<sup>89</sup> *Id.* at 9.

<sup>90</sup> Sibilla, *Poll: Most Americans Want Congress To Abolish Civil Asset Forfeiture*, *supra* note 7.

<sup>91</sup> Miller, *supra* note 23, at 3.

<sup>92</sup> ASSET FORFEITURE POLICY MANUAL, *supra* note 81.

<sup>93</sup> Miller, *supra* note 23, at 3.

<sup>94</sup> *Id.*

agencies ‘engage in forfeiture practices that maximize their potential for revenue generation.’”<sup>95</sup> Between 2014 and 2020, the Justice Department distributed more than \$1.5 billion in equitable sharing funds to local and state law enforcement agencies.<sup>96</sup> Police departments have become increasingly reliant on profits from civil asset forfeiture, with devastating results.<sup>97</sup> In a study of 1,400 municipal and county law enforcement agencies, more than sixty percent reported that forfeiture revenue was a necessary part of their budgets, suggesting that these departments themselves had become “addicted to the drug war.”<sup>98</sup>

### III. RECENT DEVELOPMENTS

States have taken action to combat the pervasive abuse of civil asset forfeiture with varying levels of success. When a forfeiture is at least partially punitive,<sup>99</sup> the Supreme Court has held that it is a fine for purposes of the Excessive Fines Clause of the Eighth Amendment.<sup>100</sup> The Court addressed contemporary issues related to civil forfeiture in 2019 with *Timbs v. Indiana* but focused only on whether the Excessive Fines Clause was incorporated against the states.<sup>101</sup>

The Fourteenth Amendment fundamentally altered America’s federalist system, extending federal protections to individuals prosecuted by the states.<sup>102</sup> A protection provided in the Bill of Rights is applicable to the states, or incorporated, if it is “fundamental to our scheme of ordered liberty,” or “deeply rooted in this Nation’s history and tradition.”<sup>103</sup> Rights that are incorporated are “enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal

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<sup>95</sup> *Id.*

<sup>96</sup> Sibilla, *Poll: Most Americans Want Congress To Abolish Civil Asset Forfeiture*, *supra* note 7.

<sup>97</sup> Miller, *supra* note 23, at 2.

<sup>98</sup> *Id.* The percentage of police budgets that derive from civil asset forfeiture varies widely. *See id.* at 4. Fontana, Calif. is a typical example. Safier, *supra* note 9. In 2019 the Fontana police department received \$3.14 million in equitable sharing payments in fiscal year 2019, roughly 5 percent as much as from the city budget. *Id.* (data regarding local police or sheriff’s department collections from participating in equitable sharing programs in 2019 available at Justice.gov).

<sup>99</sup> *Austin v. United States*, 509 U.S. 602, 610 (1993) (stating that “a civil sanction, like *in rem* forfeiture is punitive when it cannot ‘fairly be said solely to serve a remedial purpose.’”).

<sup>100</sup> *Timbs v. Indiana*, 139 S. Ct. 682, 689 (2019); *Austin*, 509 U.S. at 604.

<sup>101</sup> *Timbs*, 139 S. Ct. at 686.

<sup>102</sup> *Id.* at 687.

<sup>103</sup> *McDonald v. Chicago*, 561 U.S. 742, 767 (2010).

rights against federal encroachment.”<sup>104</sup> When a Bill of Rights protection is incorporated, “there is no daylight between the federal and state conduct it prohibits or requires.”<sup>105</sup>

#### A. *Timbs v. Indiana*

In 2013, Tyson Timbs was arrested in Marion, Indiana.<sup>106</sup> He pleaded guilty to drug and theft-related charges.<sup>107</sup> The court could have fined Mr. Timbs up to \$10,000, but instead “sentenced him to one year of home detention and five years of probation, which included a court-supervised addiction treatment program.”<sup>108</sup> Mr. Timbs was required to pay fees and court costs totaling just over \$1200.<sup>109</sup> Shortly before his arrest, Mr. Timbs received a large payout from his father’s life insurance policy.<sup>110</sup> With the money he received, Mr. Timbs purchased a Land Rover SUV for approximately \$42,000.<sup>111</sup>

When Mr. Timbs was arrested, Indiana seized the Land Rover and hired a private law firm to bring a civil forfeiture action against the SUV, alleging that it had been used to transport heroin.<sup>112</sup> Once Mr. Timbs pleaded guilty in the criminal case, the trial court considered the forfeiture demand, finding that although Mr. Timbs’s vehicle was used to facilitate criminal activity, it could not be forfeited because the value of the vehicle was more than four times the maximum monetary fee that could have been levied against Mr. Timbs for his criminal conviction.<sup>113</sup> The trial court noted that the forfeiture of the Land Rover would have been “grossly disproportionate to the gravity of Mr. Timbs’s offense, hence unconstitutional under the Eighth Amendment’s Excessive Fines Clause.”<sup>114</sup> The Indiana Court of Appeals upheld the trial court’s ruling, but the Indiana Supreme Court reversed, stating that the Excessive Fines

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<sup>104</sup> *Id.* at 765; *Timbs*, 139 S. Ct. at 687.

<sup>105</sup> *Timbs*, 139 S. Ct. at 687.

<sup>106</sup> Sam Gedge, *Tyson Timbs Gets His Car Back!*, INST. FOR JUST. (Aug. 2020), <https://ij.org/ll/august-2020-issue-29-volume-4/tyson-timbs-gets-his-car-back/> [<https://perma.cc/VV8Q-GXZU>].

<sup>107</sup> *Timbs*, 139 S. Ct. at 686.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

Clause constrained only federal action and was inapplicable to state actions.<sup>115</sup>

The Supreme Court of the United States granted certiorari to determine whether the Eighth Amendment's Excessive Fines Clause is an "incorporated" protection applicable to the states under the Fourteenth Amendment's Due Process Clause.<sup>116</sup> The Court determined that the protection against excessive fines, like that against excessive bail and cruel and unusual punishment, "guards against abuses of government's punitive or criminal-law-enforcement authority."<sup>117</sup> Holding that the safeguard against excessive fines is "fundamental to [a] scheme of ordered liberty," the Court deemed the Excessive Fines Clause incorporated by the Due Process Clause of the Fourteenth Amendment.<sup>118</sup>

The Court explained that the Eighth Amendment placed limitations on the "power of those entrusted with the criminal-law function of government."<sup>119</sup> The main issue in *Timbs* was the phrase "nor excessive fines imposed," which the Court said "limits the government's power to exact payments, whether in cash or in kind, 'as punishment for some offense.'"<sup>120</sup> Indiana argued not that the Excessive Fines Clause was not incorporated against the states, but rather that the Excessive Fines Clause did not apply to civil *in rem* forfeitures because the Clause's application to such forfeitures is neither fundamental nor deeply rooted.<sup>121</sup> The Court previously held that the Clause does apply to civil *in rem* procedures when those procedures are at least partially punitive.<sup>122</sup> Given the lack of Supreme Court precedent related to civil asset forfeiture, the decision in *Timbs* brought with it a flurry of speculation about a possible end to the practice.<sup>123</sup> However, the Court did not address whether civil forfeiture in

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<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 686. When ratified, the Bill of Rights applied only to the Federal Government. *Id.* at 687. Amendments adopted after the Civil War changed the federal system, incorporating the protections contained in the Bill of Rights against the states. *Id.* A protection laid out by the Bill of Rights is applicable to the states when it is "fundamental to our scheme of ordered liberty" or "deeply rooted in this Nation's history and tradition." *Id.*

<sup>117</sup> *Id.* at 686.

<sup>118</sup> *Id.* at 684.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 687; *United States v. Bajakajian*, 524 U.S. 321, 327–28 (1998).

<sup>121</sup> *Timbs*, 139 S. Ct. at 689.

<sup>122</sup> *Id.* (citing *Austin v. United States*, 509 U.S. 602 (1993)).

<sup>123</sup> See *Timbs v. Indiana: The End of Civil Asset Forfeiture?*, HARVARD. C.R.-C.L. L. REV. AMICUS BLOG (Oct. 4, 2018), <https://harvardcrcl.org/timbs-v-indiana-the-end-of-civil-asset-forfeiture> [<https://perma.cc/U9LD>].

its current state was a facially unconstitutional overreach.<sup>124</sup> The Court in *Timbs* did not decide that “civil forfeitures are tantamount to fines—thereby leaving it for another court, in another case to further develop Excessive Fines Clause jurisprudence.”<sup>125</sup>

Given that “the onus is on lower courts to breathe life into the Excessive Fines Clause by developing rules to determine when economic sanctions, including forfeitures, are unconstitutionally excessive,”<sup>126</sup> the Indiana Supreme Court, on remand, created a new standard to inform its state courts.<sup>127</sup> Because Indiana’s forfeiture statute is punitive,<sup>128</sup> placing it firmly under the purview of the Excessive Fines Clause, the court refused to agree with the State’s arguments that “if the property was an instrument of crime, then its forfeiture is not excessive—full stop.”<sup>129</sup> Instead, the court agreed with Mr. Timbs, and earlier U.S. Supreme Court precedent,<sup>130</sup> that the Excessive Fines Clause “includes both an instrumentality limitation and a proportionality limitation.”<sup>131</sup> The Indiana Supreme Court created a test for determining if a forfeiture violates the Excessive Fines Clause by asking (1) whether the property was an instrumentality of the crime in question, and (2) whether the value of the forfeited property is proportional to the criminal offense in question.<sup>132</sup> Ultimately, the court determined that “an instrumentality forfeiture is excessive if—based on the totality of the circumstances—the harshness of punishment is grossly disproportional to the gravity of the offenses and the claimant’s culpability.”<sup>133</sup>

The Indiana Supreme Court remanded Timbs’s case to the trial court to determine, under the new instrumentality and proportionality test,

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<sup>124</sup> Weiss, *supra* note 20, at 3076.

<sup>125</sup> *Id.*

<sup>126</sup> *Sidebar: Curbing “Excessive” Forfeitures*, INST. FOR JUST., <https://ij.org/report/policing-for-profit-3/pfp3content/forfeiture-is-lucrative-for-governments-nationwide/curbing-excessive-forfeitures/> [https://perma.cc/5ZX4-LTM6] (last visited Nov. 20, 2021).

<sup>127</sup> *State v. Timbs*, 134 N.E. 3d 12, 27 (2019); KNEPPER ET AL., *supra* note 34, at 22.

<sup>128</sup> IND. CODE § 34-24-1-1 (2021).

<sup>129</sup> *Timbs*, 134 N.E.3d at 24.

<sup>130</sup> See *Austin v. United States*, 509 U.S. 602, 622–23 (1993); *United States v. Bajakajian*, 524 U.S. 321, 343–43 (1998).

<sup>131</sup> *Timbs*, 134 N.E.3d at 24.

<sup>132</sup> *Id.* at 28–35.

<sup>133</sup> *Id.* at 35. The court noted as well that while the gross-disproportionality inquiry for an *in personam* forfeiture considers the whole amount of the forfeiture, the inquiry for *in rem* forfeitures focuses only on the harshness of the punishment that the forfeiture imposes. *Id.*



whether the forfeiture of Timbs's vehicle was excessive.<sup>134</sup> Once again, the trial court ruled in favor of Timbs, that the forfeiture of his \$42,000 Land Rover was grossly disproportionate to the maximum \$10,000 fine he could have, but did not, receive as punishment for his offense.<sup>135</sup> On May 26, 2020, Indiana law enforcement returned Mr. Timbs's vehicle to him, nearly seven years after it was first seized.<sup>136</sup>

*B. Change You Can Take to the Bank: Elimination of Civil Forfeiture in New Mexico*

In 2015, New Mexico completely and unequivocally abolished civil asset forfeiture, requiring law enforcement agencies to secure a criminal conviction before forfeiting property.<sup>137</sup> The state made statutory changes to "ensure that only criminal forfeiture is allowed in [New Mexico] and only pursuant to state law."<sup>138</sup> Not only did New Mexico restrict its use of forfeiture to criminal cases; it also raised the burden of proof on the state from a preponderance of the evidence, now requiring clear and convincing evidence that the property is substantially related to the commission of a criminal offense.<sup>139</sup>

Most importantly, New Mexico effectively disqualified state and local law enforcement agencies from participating in the Federal Equitable Sharing Program.<sup>140</sup> Before this change, New Mexico participated heavily in the Program.<sup>141</sup> Between 2000 and 2013, New Mexico received \$41,239,856 in equitable sharing funds from the Department of Justice and

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<sup>134</sup> *Id.* at 39.

<sup>135</sup> Findings of Fact, Conclusions of Law and Judgment at 10–12, *State v. Timbs*, 134 N.E.3d 12 (Ind. 2019) (No. 27D01-1308-MI-92), available at <https://ij.org/wp-content/uploads/2018/01/Findings-of-Fact-Conclusions-an.pdf> [<https://perma.cc/PN79-9ES3>].

<sup>136</sup> John Kramer, *Indiana Returns Vehicle in Landmark Civil Forfeiture Case, But Government Continues its Appeal*, INST. FOR JUST. (May 27, 2020), <https://ij.org/press-release/indiana-returns-vehicle-in-landmark-civil-forfeiture-case-but-government-continues-its-appeal/> [<https://perma.cc/3UKW-2J3A>].

<sup>137</sup> 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/nicksibilla/2020/12/17/when-new-mexico-abolished-civil-forfeiture-5-years-ago-cops-predicted-crime-would-soar-it-didnt/?sh=63bb3c1f2729>.

<sup>138</sup> N.M. STAT. ANN. § 31-27-2(A)(6) (2019).

<sup>139</sup> N.M. STAT. ANN. § 31-27-4(A)(3).

<sup>140</sup> DICK M. CARPENTER ET AL., *POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE* 109 (Inst. for Just., 2d ed. 2015).

<sup>141</sup> *Id.*

another \$29,170,000 from the Department of the Treasury.<sup>142</sup> Now, law enforcement is prohibited from transferring property valued at less than \$50,000 to federal agencies for adoption, and state law requires that all proceeds go to the state general fund.<sup>143</sup> Because the Program requires that monies disbursed through equitable sharing be spent only by the law enforcement agency that participated in the forfeiture, New Mexico's state laws essentially prohibit its law enforcement agencies from participating in the Program.<sup>144</sup>

#### IV. DISCUSSION

Although civil forfeiture was originally established as a tool to aid law enforcement in the War on Drugs, it has provided little assistance. Narcotics are widely available, and overdose deaths reach new highs every year; drugs have won.<sup>145</sup> Instead of allowing civil asset forfeitures to continue unchecked, state and federal law should place conditions on equitable sharing procedures to force state and local departments to make meaningful change and to create more consistent police policy nationwide. State agencies have the ability to circumvent state law, and because they are powerful opponents to legislative change at the state level, the Department of Justice should place conditions on equitable sharing that constrain police behavior that negatively impacts public trust in law enforcement.

##### *A. Belt Tightening Gone Wrong: Collateral Consequences of Police Budget Reduction*

When police budgets are reduced, civil asset forfeiture increases.<sup>146</sup> Equitable sharing gives law enforcement a mechanism by which agencies can “make up” for budget shortfalls without the stricture created by a governing body. In some cases, local governments actually reduce police budgets by the amount generated in forfeiture revenue in prior years, expecting the revenue to continue.<sup>147</sup> A comprehensive study of forfeiture in Southern California cities noted that “forfeiture revenue spike[d]

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<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *See Drugs Win Drug War*, THE ONION, January 10, 1998.

<sup>146</sup> *Learn About the Impact of Civil Asset Forfeiture*, NAT'L POLICE ACCOUNTABILITY PROJECT, <https://www.nlg-npap.org/civil-asset-forfeiture/> (last visited Mar. 13, 2021).

<sup>147</sup> *Id.*

immediately after police budgets were cut.”<sup>148</sup> Regardless of why police budgets might be reduced, under the current statutory scheme, law enforcement agencies can simply replace lost funding by aggressively pursuing civil asset forfeiture.<sup>149</sup>

Forfeiture operations often target areas with high levels of poverty, likely because citizens are disempowered from advocating for themselves, police departments in those areas have limited funding, and forfeiture can generate needed revenue.<sup>150</sup> “When local economies suffer, equitable sharing activities increase, suggesting that police make greater use of forfeiture when local budgets are tight.”<sup>151</sup> As a result, civil forfeiture has fundamentally restructured law enforcement priorities.<sup>152</sup> Instead of focusing effort and resources on dangerous criminals, law enforcement agencies often look for opportunities to seize assets that promise lucrative returns.<sup>153</sup> Public statements expressing a desire to compensate for budgetary shortages by implementing enforcement-based profit generation further complicate the relationship between police and the public.<sup>154</sup> Law enforcement personnel exercise a great deal of discretion when deciding which vehicles to stop and which to search.<sup>155</sup> The unfortunate reality is that broad discretion in highway interdiction efforts results in a disparate impact on people of color.<sup>156</sup> The link between increased forfeiture and worsening economic conditions suggests that law enforcement agencies use forfeiture less to fight crime than to raise revenue, with the most vulnerable communities feeling the squeeze.<sup>157</sup>

As cities consider reducing law enforcement funding, a 2020 poll shows that Americans largely disfavor policies that allow police

<sup>148</sup> ENGLE, *supra* note 8.

<sup>149</sup> Sibilla, *Poll: Most Americans Want Congress to Abolish Civil Forfeiture*, *supra* note 7.

<sup>150</sup> Miller, *supra* note 23, at 4.

<sup>151</sup> Kelly, *supra* note 19.

<sup>152</sup> Miller, *supra* note 23, at 3.

<sup>153</sup> *Id.*

<sup>154</sup> U.S. DEP’T OF JUST., C.R. DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 2 (2015), [https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report.pdf](https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf) [<https://perma.cc/WE4Z-JYH5>]; Courtney Flynn, *Local Police Officials Warn Against Drug Interdiction Team in Chesterfield*, THE VOICE (Sept. 23, 2013), [http://voicenews.com/articles/2013/09/23/news/doc523c910b4\\_2e4608664965.txt](http://voicenews.com/articles/2013/09/23/news/doc523c910b4_2e4608664965.txt).

<sup>155</sup> Scott Henson, *Flawed Enforcement*, AM. C.L. UNION TEX. (May 2004), <https://www.aclu.org/sites/default/files/FilesPDFs/flawed%20enforcement.pdf> [<https://perma.cc/HGC8-WSM7>].

<sup>156</sup> *Id.*

<sup>157</sup> Kelly, *supra* note 19.

departments to “self-fund” through asset seizure.<sup>158</sup> Nevertheless, fines and fees are “politically easier to impose” than new or increased taxes, so state and local governments have become increasingly dependent on them as a way to generate revenue.<sup>159</sup>

The protection against excessive fines has been a constant shield throughout Anglo-American history: Exorbitant tolls undermine other constitutional liberties. Excessive fines can be used, for example, to retaliate against or chill the speech of political enemies. Even absent a political motive, fines may be employed in a measure out of accord with the penal goals of retribution and deterrence, for fines are a source of revenue, while other forms of punishment cost a state money.<sup>160</sup>

Some states, like Missouri, require forfeiture funds to be directed to public education.<sup>161</sup> However, federal programs allow law enforcement agencies to skirt state law to reap profits off the backs of citizens.<sup>162</sup>

### *B. The New Mexico Example*

Contrary to unsupported claims that New Mexico's elimination of civil asset forfeiture would increase crime, rates of arrest and crime remained steady after the reform.<sup>163</sup> These data strongly suggest that forfeiture is “not an essential crimefighting tool and law enforcement agencies can fulfill their mission without it.”<sup>164</sup> When the state legislature unanimously approved these reforms, New Mexico law enforcement predicted a rise in crime, but none came.<sup>165</sup> If those predictions had been accurate, data would show “(1) a significant increase in the number of

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<sup>158</sup> Sibilla, *Poll: Most Americans Want Congress to Abolish Civil Forfeiture*, *supra* note 7.

<sup>159</sup> Brief for American Civil Liberties Union et al. as Amici Curiae Supporting Petitioner, *Timbs v. Indiana*, 139 S. Ct. 682 (2019) (No. 17-1091).

<sup>160</sup> *Id.*; *Harmelin v. Michigan*, 501 U.S. 957, 979 n.9 (1991) (opinion of Scalia, J.) (it makes sense to scrutinize governmental action more closely when the State stands to benefit).

<sup>161</sup> Chelsea Voronoff, *Uncle Sam Is Helping Missouri Cops Steal From the State's Public Education Fund*, ACLU (May 21, 2018, 6:00 PM), <https://www.aclu.org/blog/criminal-law-reform/reforming-police/uncle-sam-helping-missouri-cops-steal-states-public> [<https://perma.cc/V3ZG-TRPL>].

<sup>162</sup> *How Crime Pays: The Unconstitutionality of Modern Civil Asset Forfeiture as a Tool of Criminal Law Enforcement*, 131 HARV. L. REV. 2387, 2392 (2018).

<sup>163</sup> KNEPPER ET AL., *supra* note 34.

<sup>164</sup> *Id.*

<sup>165</sup> Sibilla, *When New Mexico Abolished Civil Forfeiture 5 Years Ago, Cops Predicted Crime Would Soar. It Didn't.*, *supra* note 137.

crimes committed because forfeiture is no longer deterring crime, and (2) a significant decrease in the number of arrests because police are less able to solve crimes without forfeiture.”<sup>166</sup> Instead, data comparing monthly crime rates in New Mexico to those in Colorado and Texas, both before and after reform, shows no significant increase in crime that could be associated with civil forfeiture reforms.<sup>167</sup>

These results fly in the face of claims that forfeiture reform jeopardizes community safety and undercuts law enforcement efforts.<sup>168</sup> Based on the results in New Mexico, it is likely that law enforcement agencies can accomplish their missions of crime control and public safety without the additional revenue generated by civil asset forfeiture.<sup>169</sup> State legislatures nationwide should take New Mexico’s success as a cue to implement similar changes. The Equitable Sharing Program can provide funds to state and local law enforcement agencies only when state law permits such disbursement.<sup>170</sup>

### *C. Passing the Buck: How Defunding the Police will Increase Civil Asset Forfeiture*

Without practical constraints, simply defunding the police at the state or local level will likely increase civil asset forfeiture. As an alternative, Congress can place conditions on federal funding disbursed through the Program to force policy change. As municipalities feel the squeeze of economic stress, federal funding will become more important than ever. Grant programs from federal departments like the Department of Justice and the Department of Agriculture provide communities with funds to hire more police, upgrade law enforcement facilities, and purchase

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<sup>166</sup> KNEPPER ET AL., *supra* note 34.

<sup>167</sup> The Institute for Justice performed a difference-in-differences analysis, comparing the average change in crime rates in the two years before and after the reforms were implemented. KNEPPER ET AL., *supra* note 34. Additionally, it performed an interrupted time series analysis, comparing the change in crime rates during each month in the periods before and after reform. *Id.* Each analysis employed data from the FBI’s Uniform Crime Reporting Program showing five measures of crime: the total number of crimes committed, all arrests, arrests for driving under the influence of alcohol and drugs, drug possession arrests, and drug sales arrests. *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> U.S. DEP’T JUST. & U.S. DEP’T TREASURY, GUIDE TO EQUITABLE SHARING FOR STATE, LOCAL AND TRIBAL LAW ENFORCEMENT AGENCIES, *supra* note 80.

equipment.<sup>171</sup> Many of those grant programs are designed in ways that “incentivize harmful policing and undermine local and state political accountability;”<sup>172</sup> however, the Federal Government can choose to place restrictions on federal funds. Congress has limited authority to compel change to state and local law enforcement policy, but it can exert influence by attaching conditions to funds.<sup>173</sup> Short of abolishing civil forfeiture completely, congress should place “strings” on federal equitable sharing funds.

Congress should implement change to the Program in four important ways: enforcing prohibitions against budget supplanting, raising the minimum amount of cash eligible for seizure, requiring transparent forfeiture reporting, and ensuring that the value of seized property does not exceed the maximum fine for the criminal violation the property is allegedly associated with, even if the property owner is not charged with a crime. All forfeitures should be connected to criminal activity in an unambiguous and meaningful way, even if they are civil rather than criminal.

The ongoing national debate about police practices should create an imperative among legislators to facilitate efforts to build public confidence in law enforcement.<sup>174</sup> States generally have broad authority to create policy to regulate state and local law enforcement agencies.<sup>175</sup> Congress, on the other hand, can only create legislation under an enumerated power contained in the Constitution.<sup>176</sup> Federal legislation aimed at improving community trust in police, however, can still work to improve police-community relations.<sup>177</sup>

Congress has historically used the spending power and Section 5 of the Fourteenth Amendment to address local law enforcement issues.<sup>178</sup> Through the Spending Clause,<sup>179</sup> Congress may influence policy by

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<sup>171</sup> Brian Naylor, *How Federal Dollars Fund Local Police*, NPR (June 9, 2020, 5:10 AM), <https://www.npr.org/2020/06/09/872387351/how-federal-dollars-fund-local-police> [<https://perma.cc/64TT-ZHWB>].

<sup>172</sup> *Id.*

<sup>173</sup> See generally CONG. RSCH. SERV., PUBLIC TRUST AND LAW ENFORCEMENT—A DISCUSSION FOR POLICYMAKERS (July 13, 2020), <https://sgp.fas.org/crs/misc/R43904.pdf> [<https://perma.cc/2Y9B-P9QE>].

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*; see *Bond v. United States*, 572 U.S. 844, 854 (2014).

<sup>176</sup> CONG. RSCH. SERV., PUBLIC TRUST AND LAW ENFORCEMENT—A DISCUSSION FOR POLICYMAKERS, *supra* note 173.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> CONST. art. I, § 8, cl. 1.1

attaching conditions to the grant of federal funds.<sup>180</sup> Generally, these conditions require compliance with “statutory or administrative directives,” and they could apply to any entity using forfeiture funds.<sup>181</sup> The conditions placed on federal funding must be “in pursuit of the general welfare,”<sup>182</sup> unambiguous,<sup>183</sup> “germane” to the federal interest or aim,<sup>184</sup> and not otherwise prohibited by the Constitution.<sup>185</sup> Because funding through the Program is already limited as to its uses, and strictly prohibits budgetary supplanting, adding requirements for compliance with the Excessive Fines Clause and raising the minimum amount eligible for federal adoption would not be unconstitutionally coercive.<sup>186</sup>

## V. CONCLUSION

Police reform is a lofty goal that must be achieved through small, manageable, and politically favorable steps. Ideally, state legislatures will prioritize citizens’ ability to be secure in their property above the “pennies from heaven” that civil forfeiture provides. Changing the way federal funds are disbursed to state and local police departments can not only serve as an impetus for change but also create more congruent law enforcement policies across the country.

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<sup>180</sup> *S. Dakota v. Dole*, 483 U.S. 203, 206 (1987).

<sup>181</sup> CONG. RSCH. SERV., PUBLIC TRUST AND LAW ENFORCEMENT—A DISCUSSION FOR POLICYMAKERS, *supra* note 173.

<sup>182</sup> *Dole*, 483 U.S. at 207.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 210.

<sup>186</sup> *Id.* at 211.