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Comment: The Unjust Side of Civil Asset Forfeiture in Illinois: Innocent Victims and Corrupted Incentives

Sarah Farwick

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Comment: The Unjust Side of Civil Asset Forfeiture in Illinois: Innocent Victims and Corrupted Incentives

SARAH FARWICK[†]

Under the broad scope of modern civil asset forfeiture, law enforcement agencies routinely deprive citizens of their property without ever formally charging them with a crime. This system diminishes the ideal values of American justice, yet the Supreme Court has long held that civil asset forfeiture is constitutional, leaving prospects of judicial reform unlikely. Therefore, it is crucial that individual states take action to protect their citizens by abolishing the use of civil asset forfeiture. In 2017, the Illinois General Assembly attempted to reform its civil asset forfeiture system, but upon close analysis and application of the statute, it is evident that many of the most troubling aspects of civil forfeiture remain intact.

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INTRODUCTION

“How is it that someone not even accused, let alone convicted, of a crime can lose their property to the government?”¹ On December 8, 2021, Malinda Harris asked this question before the U.S. House Oversight Committee’s Subcommittee on Civil Rights and Civil Liberties.² In 2015, police ambushed Harris, a grandmother of two from Springfield, Massachusetts, and demanded the keys to her vehicle.³ Unbeknownst to Harris, her son was suspected of using her car in connection with criminal activity.⁴ Police proceeded to seize Harris’ property, leaving her without the car for six years.⁵ Harris described the process to regain possession of her vehicle as “confusing” and “terrifying.”⁶ Unfortunately, Harris’ experience is not unique. Under modern civil asset forfeiture, similar injustices happen to people across the United States every day.⁷ Property owners are often unable to regain

1. Malinda Harris, *Civil Asset Forfeiture Laws Hurt People Like Me*, WASH. EXAM’R. (Dec. 10, 2021, 12:00 AM), <https://www.washingtonexaminer.com/restoring-america/fairness-justice/civil-asset-forfeiture-laws-hurt-people-like-me> [https://perma.cc/AG8F-Y8TH].

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. Harris, *supra* note 1.

7. *E.g.*, Rich Schapiro, ‘Highway robbers’: How a Trip to Buy Farmland Ended with Police Taking all his Cash, NBC NEWS (Oct. 16, 2021, 4:01 AM), <https://www.nbcnews.com/news/us-news/highway-robbers-how-trip-buy-farmland-ended-police-taking-all-n1281629> [https://perma.cc/55H9-PFTL]; Matt Zaposky, *A Former Marine was Pulled Over for Following a Truck too Closely. Police Took Nearly \$87,000 of his Cash*, WASH. POST (Sept. 1, 2021, 10:30 AM), <https://www.washingtonpost.com/national->

possession of their property, which is largely due to the complex and deceptive nature of the forfeiture process combined with the low burden of proof required for law enforcement to successfully seize the property.⁸ When property is successfully forfeited, the law enforcement agency responsible for the forfeiture keeps the proceeds with little transparency on how the profits are used.⁹ Modern civil asset forfeiture has resulted in a system known as “policing for profit.”¹⁰ Not only are police departments benefiting from civil forfeiture, but in many jurisdictions, prosecutors also keep a percentage of forfeiture proceeds, further incentivizing the use of civil forfeiture over criminal proceedings.¹¹

The Supreme Court has long upheld the constitutionality of civil forfeiture.¹² In recent years, some Justices of the Supreme Court have cast their doubts on the validity of modern civil forfeiture practices, but radical reform remains unlikely.¹³ At the legislative level, civil asset forfeiture reform is one of the few political topics that receives widespread bipartisan support. Despite this, there has been no major federal reform to civil forfeiture since the passage of the Civil Asset Forfeiture Reform Act in 2000, which left many problematic aspects of civil asset forfeiture intact.¹⁴ State civil forfeiture laws vary significantly in the protection they provide their citizens. Between 2015 and 2020 there was a wave of forfeiture reform across the states, but research shows that most of those states failed to enact adequate, meaningful reform.¹⁵

Among these states is Illinois. In 2017, the Illinois General Assembly unanimously passed the Seizure and Forfeiture Reporting Act.¹⁶ Most notably, the Act reformed Illinois law by shifting the burden of proof from property owners to the government to show that property is subject to forfeiture, it required the government to prove the owners’ guilt or negligence at forfeiture trial, it removed the bond requirement for owners to challenge

security/stephen-lara-nevada-asset-forfeiture-adoption/2021/09/01/6f170932-06ae-11ec-8c3f-3526f81b233b_story.html [https://perma.cc/UJY2-XS8G].

8. See LISA KNEPPER ET AL., *POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE* 30 (Institute for Justice, 3d ed. 2020).

[I]t is likely that the difficulty and expense of fighting forfeiture, paired with the low value of most forfeitures, deter many owners from fighting for return of their property. Without the right to legal counsel, to say nothing of other protections available in criminal proceedings, property owners must hire their own attorney or attempt to navigate the confusing civil forfeiture process, with its many procedural traps, on their own.

Id.

9. See *id.* at 9.

10. See generally *id.* at 5.

11. See KNEPPER ET AL., *supra* note 8, at 29.

12. Kevin Arlyck, *The Founders’ Forfeiture*, 119 COLUM. L. REV. 1449, 1450 (2019).

13. See discussion *infra* Section I.C.

14. See DICK M. CARPENTER II ET AL., *POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE* 2 (Institute for Justice, 2d ed. 2015).

15. See KNEPPER ET AL., *supra* note 8, at 5–7.

16. See 5 ILL. COMP. STAT. 810/1 (2021).

administrative forfeitures, and it increased transparency requirements for police departments.¹⁷ Though these were positive changes, it is now apparent the Act fell significantly short in implementing meaningful reform. This is troubling because Illinois has some of the highest rates of civil asset forfeiture across the country.¹⁸ That said, in the past four years the Illinois General Assembly has passed sweeping criminal justice reform. In the spring of 2019, Illinois passed the Cannabis Regulation and Tax Act resulting in the expungement of almost 500,000 non-felony cannabis offense records by the end of 2020.¹⁹ In 2021, Illinois passed the Statewide Use of Force Standardization Act, becoming the first state in the country to ban cash bail.²⁰ The Act also “require[ed] that all police officers wear body cameras by 2025, and [banned] all police chokeholds.”²¹ To continue the trend of progressive criminal justice reform, Illinois should now take action to entirely abolish civil asset forfeiture and restrict state and local law enforcement agencies’ participation in the federal equitable sharing program.

This Article will first discuss the history of civil forfeiture throughout the United States. Next, it will explore civil asset forfeiture laws specific to Illinois and highlight how the changes from 2017 prove to be inadequate. Finally, it will compare Illinois’ civil forfeiture system to other states that have enacted effective reform and highlight the emerging data suggesting that abolishing civil asset forfeiture does not increase crime.

I. THE HISTORY OF CIVIL ASSET FORFEITURE IN THE UNITED STATES

Modern civil asset forfeiture has expanded far beyond its origins in early U.S. history. The introduction of civil forfeiture in the United States stems from English admiralty law.²² The British government used in rem forfeiture as a tool to fight piracy and enforce trade laws.²³ Before civil forfeiture, foreign merchants could violate trade and customs regulations and then return to the sea with little recourse from the English government because the owner

17. KNEPPER ET AL., *supra* note 8, at 86.

18. *Id.* at 5.

19. 410 ILL. COMP. STAT. 705/1–1 (2019); Ryan Grenoble, *Illinois Expunges Nearly 500,000 Cannabis Arrest Records*, HUFFPOST (Jan. 1, 2021, 1:08 PM), https://www.huffpost.com/entry/illinois-cannabis-arrest-records_n_5fef49d6c5b65a92290e4b41 [<https://perma.cc/6V97-AD6F>].

20. 5 ILL. COMP. STAT. 845/1-2 (2021).

21. *See HB 3653: Here’s a Look at What’s Included*, NBC CHIC. (Jan. 13, 2021, 4:45 PM), <https://www.nbcchicago.com/news/local/chicago-politics/hb-3653-heres-a-look-at-whats-included/2415933/> [<https://perma.cc/8AGL-D3BE>].

22. *See* Nicholas Hallock, Comment, *Removing Interpretative Barnacles: Counterclaims and Civil Forfeiture*, 88 U. CHI. L. REV. 937, 942 (2021).

23. *Id.* at 943.

of the ship was often located abroad.²⁴ Civil forfeiture allowed British authorities to instantly seize the ship and bring an action against the vessel and its cargo, rather than the owner.²⁵ Consequently, the property was seized without charging the owner of a crime because the owner was beyond the reach of the English court system, making civil forfeiture one of the only adequate remedies.²⁶ Early American settlers adopted a similar use of civil forfeiture which was largely constrained to maritime cases involving admiralty, customs, and piracy offenses.²⁷

Civil forfeiture marginally expanded beyond maritime cases during the Civil War.²⁸ Between 1861 and 1864 Congress passed several bills which authorized the seizure of rebel soldiers' property.²⁹ These laws were known as the Confiscations Acts.³⁰ But even under the intense political climate of the Civil War, there was strong skepticism surrounding the expansion of civil forfeiture. Nonetheless, the Supreme Court approved the constitutionality of the Confiscation Act of 1862 under Congress' war time powers.³¹ President Abraham Lincoln questioned the constitutionality of the Act and expressed concern over the ability to use in rem forfeiture of property, without a criminal conviction or a personal hearing.³²

Following the War, the expansion of civil forfeiture was stagnant until the Prohibition era, when civil forfeiture began to morph into the law enforcement tool it is today.³³ In *Dobbins's Distillery v. United States*, the Supreme Court held that the forfeiture of chattels and real property to punish the defendants for liquor tax violations was constitutional.³⁴ *Dobbins's Distillery* "laid the groundwork for the modern expansion of civil forfeiture by using forfeiture as a punishment for domestic law violations."³⁵ This was a significant shift from the customary maritime application and special war time power authorization of civil forfeiture. Not only was the application of civil forfeiture expanding, but so was the justification for its use. In *J.W. Goldsmith, Jr.-Grant Co. v. United States*, the Supreme Court upheld the

24. See *id.* See also Jasmin Chigbrow, Comment, *Police or Pirates? Reforming Washington's Civil Asset Forfeiture System*, 96 WASH. L. REV. 1147, 1156 (2021).

25. Hallock, *supra* note 22, at 942.

26. *Id.*; See Chigbrow, *supra* note 24, at 1156-57; *Harmony v. United States*, 43 U.S. 210, 233 (1844).

27. CARPENTER II ET AL., *supra* note 14, at 10.

28. *Id.*

29. Adam Creppelle, *Probable Cause to Plunder: Civil Asset Forfeiture and the Problems it Creates*, 7 WAKE FOREST J. L. & POL'Y 315, 323 (2017).

30. *Id.*

31. *Id.*

32. *Id.*; James G. Randall, *Some Legal Aspects of the Confiscation Acts of the Civil War*, 18 AM. HIST. REV. 79, 83 (1912).

33. CARPENTER II ET AL., *supra* note 14, at 10; Creppelle, *supra* note 29, at 324.

34. See *Dobbins's Distillery v. United States*, 96 U.S. 395 (1877).

35. Chigbrow, *supra* note 24, at 1156.

civil forfeiture of a vehicle that was used for bootlegging without the owner's knowledge or consent.³⁶ In its opinion, the Court also observed the profit producing potential of civil forfeiture.³⁷ After the passage of the Twenty-First Amendment repealing prohibition, civil forfeitures declined.³⁸

Civil forfeiture's major transformation occurred throughout the 1970s and 1980s during the "War on Drugs" era.³⁹ In 1970, Congress passed the Comprehensive Drug Abuse Prevention and Control Act,⁴⁰ which allowed law enforcement to use civil forfeiture as a tool against the production and manufacturing of illegal drugs.⁴¹ At first, the government could only forfeit illegal drugs and the property used to produce and distribute them, but several years later the Act was amended to also allow the forfeiture of money that could be connected to illegal drug sales.⁴² In 1984, Congress further expanded the scope of civil forfeiture with the passage of the Comprehensive Crime Control Act of 1984.⁴³ Most notably, the Act created the Department of Justice's Assets Forfeiture Fund, which opened the door to the federal equitable sharing program which is largely criticized by opponents of civil forfeiture today.⁴⁴ This provision "[a]llowed the federal government to 'adopt' property seized by state and local law enforcement and then transfer the bulk of the money back to the seizing agencies. Equitable sharing was designed to incentivize states to adopt the federal government's drug policies."⁴⁵ State Agencies were able to receive a percentage of the proceeds they deposited to the fund, using the money "to do everything from purchase vehicles to pay overtime."⁴⁶

In 1989, then Attorney General, Richard Thornburgh, famously quoted that "[i]t'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."⁴⁷ State legislatures across the country followed "the federal government's lead and amended their states' civil forfeiture laws to give local and state agencies a

36. See *J.W. Goldsmith, Jr.-Grant Co. v. United States*, 254 U.S. 505 (1921).

37. *Id.* at 510-11; *Crepelle*, *supra* note 29, at 324 ("The Court admitted forfeiting the property of innocent people conflicted with principles of justice, but affirmed the forfeiture based on government revenue generation and forfeiture's history in the United States.").

38. *Crepelle*, *supra* note 29, at 324.

39. *Hallock*, *supra* note 22, at 943; *Chigbrow*, *supra* note 24, at 1157.

40. *Crepelle*, *supra* note 29, at 324; 21 U.S.C. § 801 (2012).

41. *Crepelle*, *supra* note 29, at 324.

42. *Id.* at 324-25.

43. 18 U.S.C. § 981(e) (2012); 28 U.S.C. § 524(c)(1) (2012).

44. *CARPENTER II ET AL.*, *supra* note 14, at 10; *Crepelle*, *supra* note 29, at 325.

45. *Crepelle*, *supra* note 29, at 325.

46. *CARPENTER II ET AL.*, *supra* note 14, at 10.

47. *Hallock*, *supra* note 22, at 943 (citing Sarah Stillman, *Taken*, *NEW YORKER* (Aug. 5, 2013)).

direct financial stake in the forfeiture process.”⁴⁸ Consequently, over time many police departments began to rely on forfeiture proceeds to fill funding gaps.⁴⁹ Civil asset forfeiture originated under the limited conditions of admiralty law, but now could be used by law enforcement in a wide range of circumstances. The justification for the change stemmed from the misconception that civil forfeiture would be a vital tool for law enforcement in fighting the “War on Drugs,” making it easier for the government to take down major drug operations. But over time this proved to be untrue. The typical forfeiture proceeding is “hardly the stuff of drug kingpins or major fraudsters” with the average civil forfeiture proceeding valuing under \$2,000.⁵⁰ This suggests the broad scope of modern civil asset forfeiture is unjustified, and just like many of the other criminal justice policies coming from the War on Drugs Era, has led to unjust results.

A. THE CONSTITUTIONALITY OF MODERN CIVIL ASSET FORFEITURE

In the early 1990s, the Supreme Court began to address some of the constitutional issues surfacing under the new scope of civil forfeiture.⁵¹ In *Austin v. United States*, defendant Richard Austin was arrested for selling cocaine.⁵² After pleading guilty, the government filed an in rem civil proceeding to forfeit Austin’s auto body shop and mobile home.⁵³ Austin contested the forfeiture, arguing that it violated the Excessive Fines Clause of the Eighth Amendment.⁵⁴ The Supreme Court held that the Excessive Fines Clause applied to in rem forfeitures of property.⁵⁵ The Court explained that the issue wasn’t dependent on whether the forfeiture was civil or criminal in nature, but rather if forfeiture of property was a form of punishment against the owner.⁵⁶ The Court concluded that in rem forfeiture of property was intended, at least partially, as a form of punishment against the owner, and remanded the case to the circuit court to determine whether the forfeiture was excessive.⁵⁷

48. CARPENTER II ET AL., *supra* note 14, at 10.

49. See Note, *How Crime Pays: The Unconstitutionality of Modern Civil Asset Forfeiture as a Tool of Criminal Law Enforcement*, 131 HARV. L. REV. 2387, 2391-92 (2018) (“The Cook County, Illinois state’s attorney’s office’s 2016 budget anticipated \$4.96 million in forfeiture revenues, which it earmarked to pay forty-one full-time employees’ salaries and benefits.”).

50. See KNEPPER ET AL., *supra* note 8, at 20.

51. Hallock, *supra* note 22, at 943-44.

52. *Austin v. United States*, 509 U.S. 602, 604-605 (1993).

53. *Id.*

54. *Id.*

55. *Id.* at 621-22.

56. *Id.* at 610.

57. *Austin*, 509 U.S. at 621-23.

In *United States v. James Daniel Good Real Property*, the defendant was also indicted on drug charges.⁵⁸ James Daniel Good pleaded guilty and was sentenced to one year in jail and five years of probation.⁵⁹ Almost five years after his arrest, the U.S. government initiated a civil forfeiture action against Good's home on the basis that it was used to facilitate the commission of a federal drug crime.⁶⁰ Good contested the forfeiture arguing it violated the Fifth Amendment's Due Process Clause.⁶¹ The Court agreed, and ruled that a property owner must be notified and a hearing must take place before the forfeiture of real property could occur.⁶² Though the Court had previously ruled that seizures could occur without notice, the Court explained that, because this was the forfeiture of real property, there was little chance the property could be moved or easily disposed of.⁶³ Additionally, "[T]he Government seized property not to preserve evidence of wrongdoing, but to assert ownership and control over the property itself," which warranted due process protection.⁶⁴ The Court reversed Good's claim regarding the timeliness of the action.⁶⁵ Chief Justice Rehnquist, writing for the dissent stated:

Our historical treatment of civil forfeiture procedures underscores the notion that the Fourth Amendment specifically governs the process afforded in the civil forfeiture context, and it is too late in the day to question its exclusive application . . . [t]here is no need to look beyond the Fourth Amendment in civil forfeiture proceedings involving the Government because ex parte seizures are "too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced."⁶⁶

Justice Thomas, concurring in part and dissenting in part, highlighted the alarmingly broad scope of modern civil asset forfeiture:

[L]ike the majority, I am disturbed by the breadth of new civil forfeiture statutes . . . which subjects to forfeiture *all* real property that is used, or intended

58. *United States v. James Daniel Good Real Prop.*, 510 U.S. 43 (1993).

59. *Id.* at 46.

60. *Id.*

61. *Id.* at 47.

62. *James Daniel Good Real Prop.*, 510 U.S. at 62.

63. *See id.* at 57-60.

64. *Id.* at 52.

65. *Id.* at 64.

66. *James Daniel Good Real Prop.*, 510 U.S. at 69 (Rehnquist, J., dissenting) (quoting *J. W. Goldsmith, Jr.-Grant Co. v. United States*, 254 U.S. 505 (1921)).

to be used, in the commission, or even the *facilitation*, of a federal drug offense. . . . [s]ince the Civil War we have upheld statutes allowing for the civil forfeiture of real property. A strong argument can be made, however, that [the new civil forfeiture statute] is so broad that it differs not only in degree, but in kind, from its historical antecedents.⁶⁷

In *Bennis v. Michigan*, the Supreme Court held that an owner's interest in property can be forfeited even without the owner's knowledge of illegal activity taking place.⁶⁸ Police arrested John Bennis for solicitation of prostitution which took place in the car co-owned by him and his wife, Tina Bennis.⁶⁹ After Mr. Bennis was convicted, a Michigan court ordered the car to be forfeited as a public nuisance.⁷⁰ Mrs. Bennis contested the forfeiture, arguing that she should not be deprived of her ownership interest in the car because she was unaware that her husband was using the car for illegal activity.⁷¹ The Court rejected Mrs. Bennis's argument relying on the long line of precedent justifying such forfeitures, including its reasoning in *J.W. Goldsmith*. Even though Mrs. Bennis was unaware of the criminal activity taking place in her vehicle, her lack of knowledge was irrelevant because the action was against the property itself, not her.⁷²

The Supreme Court in *United States v. Ursery*, ruled that civil forfeiture does not implicate double jeopardy in violation of the Fifth Amendment.⁷³ The United States challenged two consolidated appeals where the appellate court barred the government from bringing both a criminal prosecution and a civil forfeiture action against a defendant for the same criminal offense.⁷⁴ The Court held in favor of the United States, relying on established precedent holding that civil forfeiture is not punishment for double jeopardy reasons.⁷⁵ The Court further explained that the forfeiture proceedings in this case was not "so punitive in form and effect" that Congressional intent should be overridden.⁷⁶

In one of the only cases to limit the use of civil forfeiture, the Supreme Court held that the forfeiture of \$357,144 violated the Excessive Fines Clause

67. *James Daniel Good Real Prop.*, 510 U.S. at 81-82 (Thomas, J., concurring in part and dissenting in part).

68. *Bennis v. Michigan*, 516 U.S. 442 (1996).

69. *Id.* at 443.

70. *Id.*

71. *Id.* at 444.

72. *See id.* at 446-50.

73. *United States v. Ursery*, 518 U.S. 267 (1996).

74. *Id.* at 270.

75. *Id.* at 291-92.

76. *Id.* at 290.

of the Eighth Amendment.⁷⁷ In *United States v. Bajakajian*, defendant Hosep Bajakajian tried leaving the United States without reporting that he was carrying over \$10,000 with him as required by federal law.⁷⁸ Customs inspectors at Los Angeles International Airport seized the money from Bajakajian, as him and his family were about to board a flight to Italy.⁷⁹ The statute stated that persons in violation of its provisions must forfeit any property involved in the offense to the U.S. Government.⁸⁰ The Supreme Court held that fully forfeiting Bajakajian's money would be grossly disproportionate to the gravity of his offense, making it a violation of the Excessive Fines Clause.⁸¹

These cases illustrate the Court's unwillingness to address the more outrageous aspects of modern civil forfeiture. Instead, the Court heavily relied on the long-standing history of civil forfeiture, despite its new range of applications.

B. THE CIVIL ASSET FORFEITURE ACT OF 2000

Notably, the Supreme Court's ruling in *Bennis* sparked public outrage, and there was increased pressure on Congress to enact better protections against the perils of civil forfeiture.⁸² In 2000, Congress attempted to address these issues by passing the Civil Asset Forfeiture Reform Act (CAFRA).⁸³ CAFRA removed the bond requirement needed for property owners to challenge a civil forfeiture in court.⁸⁴ It shifted the burden of proof to the government and added notice and filing deadline requirements.⁸⁵ CAFRA also provided a "innocent owner defense" if a claimant could prove their innocence by a preponderance of the evidence.⁸⁶ Under limited circumstances, CAFRA allowed attorneys' fees and a right to counsel for indigent property owners and for certain forfeitures of real property.⁸⁷ Further, CAFRA "applie[d] the Eighth Amendment's excessive fines framework to civil forfeitures and expand[ed] Fourth Amendment protections."⁸⁸

Despite these positive changes, CAFRA left many negative aspects of civil asset forfeiture in place, and it even increased the profit incentives for law enforcement agencies by allowing them to pocket all of the revenue

77. *United States v. Bajakajian*, 524 U.S. 321 (1998).

78. *Id.* at 324.

79. *Id.*

80. *Id.*

81. *Id.*

82. *CARPENTER II ET AL.*, *supra* note 14, at 2.

83. Civil Asset Forfeiture Reform Act, Pub. L. No. 106-185, 114 Stat. 202 (2000).

84. *CARPENTER II ET AL.*, *supra* note 14, at 2.

85. Note, *supra* note 49, at 2390.

86. *Id.*; *Crepelle*, *supra* note 29, at 325.

87. *Crepelle*, *supra* note 29, at 325.

88. Note, *supra* note 49, at 2390.

derived from forfeiture proceedings.⁸⁹ The statute also broadened the scope of forfeiture by allowing “the forfeiture of ‘fungible property’ without having to trace the property to the illegal activity”⁹⁰ Previously, this provision was only applicable to money laundering cases, but after CAFRA, it applied to all civil forfeitures.⁹¹ The burden of proof for law enforcement to successfully forfeit property remained at a preponderance of the evidence.⁹² Civil forfeiture opponents were also unhappy that Congress did little to counter the Supreme Court’s ruling in *Bennis*.⁹³

Prior to CAFRA there were various forfeiture laws that applied to federal crimes.⁹⁴ Instead of consolidating them into a uniform body of statutory law:

CAFRA . . . create[d] three new statutes--18 U.S.C. §§ 983 and 985, and 28 U.S.C. § 2465(b)--that override the older provisions where they are inconsistent, while otherwise leaving the older provisions alone. In other words, CAFRA does not replace, but is superimposed upon, the existing procedures in the customs laws, the Supplemental Rules, and the forfeiture statutes themselves.⁹⁵

Therefore, although there are still dozens of miscellaneous federal forfeiture laws, civil forfeiture generally occurs pursuant to CAFRA at the federal level.⁹⁶ CAFRA was the last major federal reform of civil asset forfeiture. Now over twenty years since its passage, it is evident that much more reform is needed. On December 8, 2021, the House Oversight and Reform Subcommittee on Civil Rights and Liberties met to discuss the need for further civil forfeiture reform.⁹⁷

Over the past decade, the Department of Justice’s stance on the use of “adoptions” through the equitable sharing program has varied depending on which administration is in the White House. For example, in 2015 then-

89. Crepelle, *supra* note 29, at 325; CARPENTER II ET AL., *supra* note 14, at 2.

90. Stefan D. Cassella, Article, *The Civil Asset Forfeiture Reform Act of 2000: Expanded Government Forfeiture Authority and Strict Deadlines Imposed on All Parties*, 27 J. LEGIS. 97, 115 (2001).

91. *Id.*

92. Crepelle, *supra* note 29, at 326.

93. CARPENTER ET AL., *supra* note 14, at 2.

94. *Id.*

95. Cassella, *supra* note 90, at 102-103.

96. Crepelle, *supra* note 29, at 326.

97. *Forfeiting our Rights: The Urgent Need for Civil Asset Forfeiture Reform, Hearing Before the H. Subcomm. on C.R. & C.L.*, 117th Cong. (2021-2022), <https://www.congress.gov/event/117th-congress/house-event/114293?s=1&r=43> [https://perma.cc/H34L-R9BZ].

Attorney General Eric Holder, under the Obama administration, prohibited the adoption of property seized by state and local law enforcement agencies, unless the seizure involved property related to public safety concerns.⁹⁸ This included property linked with child pornography, explosives, ammunition, and guns.⁹⁹ The order did not apply to seizures resulting from joint task forces between state and federal law enforcement, nor did it apply to property originally seized under state law, but obtained by the federal government pursuant to a federal proceeding.¹⁰⁰

Though it was a step in the right direction, without accompanying action by Congress, Holder's order was easily subject to change by future administrations.¹⁰¹ Under the Trump administration in 2017, then-Attorney General Jeff Sessions reinstated the adoption practices that had been prohibited by Holder.¹⁰² Thus far, current Attorney General, Merrick Garland, has yet to make changes to the equitable sharing program. The interim nature of the changes made by the executive branch combined with Congress's failure to reform civil forfeiture since the passage of CAFRA in 2000, suggest the prospect of meaningful reform is most likely to occur through the action of state legislatures.

C. RECENT SUPREME COURT CASES

In 2017, Supreme Court Justice Clarence Thomas raised his concern that the scope of modern civil asset forfeiture has gone too far.¹⁰³ In *Leonard v. Texas*, defendant James Leonard was pulled over by police officers for a traffic violation.¹⁰⁴ Police proceeded to search Leonard's car and found a safe inside the trunk.¹⁰⁵ Leonard and the passenger of the car gave officers inconsistent statements regarding the contents of the safe.¹⁰⁶ The police received a search warrant to open the safe and found a bill of sale for a Pennsylvania home, and over \$200,000 inside the safe.¹⁰⁷ The state of Texas initiated a civil forfeiture proceeding against the money, claiming it was "substantially

98. See KNEPPER ET AL., *supra* note 8, at 46. See also OFF. OF THE ATT'Y GEN., ORDER ON PROHIBITION ON CERTAIN FEDERAL ADOPTIONS OF SEIZURES BY STATE AND LOCAL LAW ENFORCEMENT AGENCIES (Jan. 16, 2015) [hereinafter PROHIBITION], <https://www.justice.gov/file/318146/download> [<https://perma.cc/HP9W-W6LF>].

99. PROHIBITION, *supra* note 98.

100. *Id.*

101. KNEPPER ET AL., *supra* note 8, at 46.

102. *Id.*

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

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

connected to criminal activity, namely, narcotics sales.”¹⁰⁸ The justification for believing the money was connected to criminal activity was that police pulled Leonard over on a highway that was a “known drug corridor” and because Leonard and the passenger provided the officers with inconsistent statements regarding the contents of the safe.¹⁰⁹ The trial court ordered the forfeiture of the money. Leonard appealed, arguing that the money was from the sale of the Pennsylvania home, not from narcotic sales.¹¹⁰ The circuit court affirmed the trial court’s order, holding that the “suspicious circumstances” surrounding the traffic stop were sufficient to conclude the government met its burden of proof of a preponderance of the evidence, that the money was proceeds from the sale of drugs or was intended for such purposes.¹¹¹ Leonard filed a petition for writ of certiorari challenging the constitutionality of the forfeiture procedures. Specifically, Leonard argued that the Due Process Clause of the Fifth Amendment required the government to carry its burden by clear and convincing evidence, not by a preponderance of the evidence.¹¹²

Leonard failed to raise her Due Process claims until she appealed to the Supreme Court.¹¹³ As a result, the Texas Court of Appeals lost its opportunity to first address the issue, and the Supreme Court denied certiorari.¹¹⁴ Justice Thomas filed a concurring opinion stating that “[w]hether this Court’s treatment of the broad modern forfeiture practice can be justified by the narrow historical one is certainly worthy of consideration in greater detail.”¹¹⁵

Justice Thomas provided two reasons to support this contention.¹¹⁶ First, Thomas highlighted that the scope of civil asset forfeiture in early American history was much narrower than its widespread use today.¹¹⁷ Specifically, Thomas referenced the historical use of civil forfeiture in admiralty law cases, and he noted that civil forfeiture was limited to the instrumentalities of crimes rather than the earnings.¹¹⁸ Second, Thomas argued that historically, it’s uncertain if forfeiture proceedings were able to proceed as civil actions under all circumstances.¹¹⁹ Thomas stated that early cases suggest that forfeiture was in the nature of a criminal proceeding, and “[t]here is some evidence that the government was required to prove its case beyond a

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

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Leonard*, 137 S. Ct. at 850.

114. *Id.*

115. *Id.*

116. *Id.* at 849.

117. *Id.*

118. *Leonard*, 137 S. Ct. at 849.

119. *Id.*

reasonable doubt.”¹²⁰ Justice Thomas also highlighted the troubling statistics showing the abuse of civil forfeiture in indigent communities:

These forfeiture 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 a home.¹²¹

The Court has not yet addressed the issue of whether modern civil forfeiture can be aligned with its historical origins and the Due Process Clause of the Fifth Amendment.¹²²

Alternatively, in 2019 the Supreme Court addressed a separate constitutional issue involving the use of modern civil asset forfeiture, in *Timbs v. Indiana*.¹²³ The Court held that the Eighth Amendment’s Excessive Fines Clause was incorporated by the Due Process Clause of the Fourteenth Amendment.¹²⁴ Defendant Tyson Timbs pleaded guilty to drug charges and was sentenced to one year of house arrest and five years of probation.¹²⁵ As part of his sentence, Timbs was also required to pay \$1,203 in fees.¹²⁶ There was a \$10,000 cap on monetary fines that could be charged against Timbs for his drug conviction.¹²⁷ When Timbs was arrested, police also seized his car, a Land Rover SUV. Timbs had purchased the car for approximately \$42,000, with money he acquired from an insurance policy after the passing of his father.¹²⁸

The state of Indiana hired a private law firm to bring a civil action to forfeit Timb’s vehicle, arguing that it should be forfeited because it was used to distribute drugs.¹²⁹ At a hearing, the court denied the forfeiture, stating that because the Land Rover was purchased for \$42,000, it exceeded the \$10,000 cap on fines that could be brought against Timbs for his drug offense.¹³⁰

120. *Id.* at 849.

121. *Id.* at 848.

122. *Id.* at 847.

123. *Timbs v. Indiana*, 139 S. Ct. 682 (2019).

124. *Id.* at 689.

125. *Id.* at 686.

126. *Id.*

127. *Id.*

128. *Timbs*, 139 S. Ct. at 686.

129. *Id.*

130. *Id.*

Therefore, the forfeiture of Timbs vehicle would be disproportionate to the gravity of the drug offense and a violation of the Excessive Fines Clause of the Eighth Amendment.¹³¹ The appellate court affirmed the decision, but the Supreme Court of Indiana reversed on the grounds that the Excessive Fines Clause of the Eighth Amendment was not incorporated to the States and was only a restraint on the federal government.¹³² The Supreme Court granted certiorari, and held that the Eighth Amendment's Excessive Fine's Clause was "a safeguard 'fundamental to our scheme of ordered liberty,' with 'deep roots in our nation's history and tradition.'"¹³³ As a result, the Excessive Fine's Clause was incorporated by the Due Process Clause of the Fourteenth Amendment.¹³⁴ The Court rejected Indiana's argument, declining to overrule its holding in *Austin* that civil forfeitures are protected by the Excessive Fines Clause when they are punitive in nature.¹³⁵ Following this decision, the Court has yet to overrule its decision in *Austin*.

II. INTRODUCTION TO CIVIL ASSET FORFEITURE IN ILLINOIS

With discussion of civil asset forfeiture resurfacing in Illinois politics, it's important to highlight the significant dangers civil asset forfeiture poses to property owners compared to the purported benefits it provides law enforcement agencies in fighting crime.¹³⁶ From 2000 to 2019, "Illinois law enforcement agencies seized more than \$676 million in assets under state law and generated an additional \$364 million from federal equitable sharing, for a total of at least \$1 billion in forfeiture revenue—averaging more than \$50 million a year."¹³⁷ Given the large incentive for state and local law enforcement agencies to "police for profit," it is crucial to bring awareness to the injustices of the civil asset forfeiture system, and educate property owners of their limited rights throughout the process.¹³⁸ The following section analyzes how the civil forfeiture system functions in Illinois, how the Seizure and Forfeiture Reporting Act of 2017 failed to create meaningful reform, and what

131. *Id.*

132. *Id.*

133. *Timbs*, 139 S. Ct. at 686-87.

134. *Id.* at 687.

135. *Id.*

136. *Opposing the Proposed City of Chicago "Victims' Justice Ordinance,"* ACLU ILL. (Oct. 25, 2021, 10:15 AM), <https://www.aclu-il.org/en/news/opposing-proposed-city-chicago-victims-justice-ordinance> [<https://perma.cc/2ZR5-LVHL>]. "In September 2021, Mayor Lori Lightfoot publicly proposed allowing the City of Chicago to by-pass the Cook County State's Attorney Office and directly file civil asset forfeiture lawsuits against individuals alleged to be gang members, seeking to seize property and cash of those accused in civil, not criminal court." *Id.*

137. KNEPPER ET AL., *supra* note 8, at 86.

138. *See generally id.*

Illinois must do to adequately protect its citizens from the abuse of civil asset forfeiture.

A. TYPES OF FORFEITURE IN ILLINOIS

Before jumping into the nuances of civil asset forfeiture, it's helpful to first understand the different types of forfeiture in Illinois. First, forfeiture is defined as “the divestiture of property without compensation,”¹³⁹ or “the loss of a right, privilege, or property because of a crime, breach of obligation, or neglect of duty.”¹⁴⁰ Forfeiture is often associated with criminal law. In Illinois, “[c]riminal forfeiture laws provide that forfeiture proceedings are part of, or ancillary to, a criminal prosecution, often before the same judge and jury, and require the defendant to be found guilty of the charged offense beyond a reasonable doubt before the court orders the forfeiture of property.”¹⁴¹

Civil forfeiture, on the other hand, can occur without a property owner ever being charged with a crime.¹⁴² Civil forfeiture is defined as “[a]n in rem proceeding brought by the government against property that either facilitated a crime or was acquired as a result of criminal activity.”¹⁴³ It should be noted that in civil forfeiture, the government (i.e., police officers) only need to suspect that the seized property is connected to criminal activity to start a civil forfeiture proceeding. Because the civil forfeiture is an in-rem action, “[a] complaint usually pits ‘the People of the State of Illinois’ against an amount of currency or asset. The state’s attorney in the county of seizure brings the complaint for forfeiture.”¹⁴⁴ Accordingly, because the “defendant” is the property believed to be connected to criminal activity, the property owner has no right to counsel during the civil forfeiture proceeding.¹⁴⁵ However, civil forfeiture proceedings are deemed “quasi criminal” because these

139. *Forfeiture*, BLACK’S LAW DICTIONARY (11th ed. 2019).

140. *Id.*

141. Ben Ruddell & Bryant Jackson-Green, *Asset Forfeiture in Illinois: What it is, where it Happens, and reforms the state needs*, ILL. POL’Y., https://www.illinoispolicy.org/reports/asset-forfeiture-in-illinois/#_ednref22 [<https://perma.cc/B7RJ-LDTF>].

142. *Id.*

143. *Forfeiture (civil forfeiture)*, BLACK’S LAW DICTIONARY (11th ed. 2019).

144. William James Haddad, *Challenging Property Seizures under Illinois Civil Asset Forfeiture Law*, 92 ILL. BAR J. 365, 366 (2004).

145. Ruddell & Jackson-Green, *supra* note 141.

Federal forfeiture law provides a narrow exception, under which the court has discretion to appoint counsel for a property owner if there is a related criminal matter in which that person is represented by the federal defender. The federal system also gives a person the right to have counsel appointed if he or she is using the property as a primary residence.

Id.

proceedings are granted some criminal and constitutional protections.¹⁴⁶ For example, the Fourth Amendment's exclusionary rule applies to civil forfeiture proceedings which prohibits the use of unlawfully obtained evidence from being used against the defendant at trial.¹⁴⁷ The Fifth Amendment's protections against self-incrimination also apply to civil forfeiture proceedings, which prevents the government from forcing a person to give testimony against themselves.¹⁴⁸ Additionally, the Eighth Amendment's excessive fines clause applies to civil forfeitures, which restricts the government's ability to demand disproportionate or excessive punishment for crimes, as well as "equitable principles forbidding disproportional enrichment that deprives good faith equitable owners of their property rights."¹⁴⁹

On top of criminal and civil forfeiture laws, there are also different types of forfeiture proceedings, including judicial forfeiture and non-judicial forfeiture.¹⁵⁰ "Judicial forfeiture proceedings, whether civil or criminal, involve the determination by a judge that the government has met, or has failed to meet, its evidentiary burden of proving that the property is subject to forfeiture under the relevant law."¹⁵¹ Under Illinois law, there are two statutes that give courts the duty to carry out forfeiture proceedings:¹⁵² the Seizure and Forfeiture of Vessels, Vehicles, and Aircraft article of the Criminal Code,¹⁵³ and the Drug Asset Forfeiture Procedure Act.¹⁵⁴ The Seizure and Forfeiture of Vessels, Vehicles, and Aircraft article of the Criminal Code, "is devoted largely to the seizure of vehicles and other conveyances used to facilitate the commission of specified felonies and driving offenses."¹⁵⁵ The Drug Asset Forfeiture Procedure Act, "[m]ostly concerns money, vehicles, and realty used in drug offenses that are seized under the Illinois Controlled Substances Act¹⁵⁶ . . . and the Cannabis Control Act¹⁵⁷"¹⁵⁸

Non-judicial forfeiture proceedings are also referred to as administrative forfeitures.¹⁵⁹ Despite the alarming lack of oversight in these procedures, Illinois is one of seventeen states that still authorizes administrative

146. Haddad, *supra* note 144, at 365. "[T]he supreme court [of Illinois] has ruled that forfeiture is not 'punishment' for double jeopardy purposes and the laws are civil, not penal, in nature." *Id.* (citing *People v. P.S.* 175 Ill. 2d 79 (1997)).

147. *See generally id.* at 365.

148. *See generally id.*

149. *Id.*

150. *See generally* Ruddell & Jackson-Green, *supra* note 141.

151. *Id.*

152. Haddad, *supra* note 144, at 366.

153. 720 ILL. COMP. STAT. 5/36-1 (2021).

154. 725 ILL. COMP. STAT. 150/2 (2021).

155. Haddad, *supra* note 144, at 365.

156. 720 ILL. COMP. STAT. 570/100 (2021).

157. 720 ILL. COMP. STAT. 550/1 (2021).

158. Haddad, *supra* note 144, at 365.

159. *See* Ruddell & Jackson-Green, *supra* note 141.

forfeiture.¹⁶⁰ Under an administrative forfeiture proceeding, “[t]he government is never required to present evidence that the property is subject to forfeiture; rather, the property is forfeited by default unless the owner acts swiftly to take the correct legal steps required to contest the forfeiture in court.”¹⁶¹ As a result, unwitting property owners are further disadvantaged under the administrative forfeiture system.

[T]he seizing agency or prosecutor need only send notice to owners informing them of (1) the government’s intent to forfeit their property administratively and (2) the statutory time window (which can be as short as 20 days) during which they can ask the court to get involved. If no one files a claim, the property is automatically forfeited.¹⁶²

Thus, receiving timely notice of the pending forfeiture is crucial given the time sensitive nature of administrative forfeiture. But even then, it is on the property owner to take the extra steps to ensure that they receive the notice. “If the police know[s] your address, the notice will be sent to you by personal service or by certified mail. If the police do[es] not know your address, they will publish the notice in the newspaper for 3 weeks.”¹⁶³

Moreover, Illinois also participates in the United States Department of Justice and the United States Department of the Treasury’s equitable sharing program.¹⁶⁴ “Equitable sharing allows state and local law enforcement agencies to partner with the federal government to seize and forfeit property under federal law—and receive up to 80% of the proceeds—regardless of state law.”¹⁶⁵ In Illinois:

[p]roperty [is] subject to equitable sharing if it is seized by a joint task force that includes both federal and state or local officers, or if it is seized as part of a joint investigation by federal and state or local authorities. Federal agencies can “adopt” property

160. See KNEPPER ET AL., *supra* note 8, at 196 n.76; See also 725 ILL. COMP. STAT. 150/6 (2021).

161. Ruddell & Jackson-Green, *supra* note 141.

162. KNEPPER ET AL., *supra* note 8, at 23.

163. *Getting Back My Forfeited Property*, ILL. LEGAL AID ONLINE (Feb. 8, 2021), <https://www.illinoislegalaid.org/legal-information/getting-back-my-forfeited-property> [<https://perma.cc/L23S-NAJR>].

164. See generally U.S. DEP’T OF JUST. & U.S. DEP’T OF TREAS., GUIDE TO EQUITABLE SHARING FOR STATE, LOCAL, AND TRIBAL LAW ENFORCEMENT AGENCIES (2018), <https://www.justice.gov/criminal-afmls/file/794696/download> [<https://perma.cc/C334-V8MA>].

165. KNEPPER ET AL., *supra* note 8, at 46.

seized by state authorities, and local law enforcement can turn over property they seize for forfeiture under federal law, as long as federal law authorizes forfeiture based on the conduct giving rise to the seizure.¹⁶⁶

Therefore, unless state legislatures also restrict the use of equitable sharing, any attempts to reform abusive civil forfeiture practices can easily be circumvented by state and local law enforcement agencies through the federal equitable sharing loophole.¹⁶⁷ As stated below, the Illinois legislature has failed to place any restrictions on law enforcement's ability to participate in the federal equitable sharing program.

B. RECENT CHANGES TO ILLINOIS CIVIL ASSET FORFEITURE LAWS

In 2017, the Illinois General Assembly attempted to fix some of the issues involved in civil asset forfeiture with the passage of the Seizure and Forfeiture Reporting Act.¹⁶⁸ The law was acclaimed for reforming Illinois' civil asset forfeiture system in the following ways: (1) the law shifted the burden of proving the property owners' guilt onto the government, (2) it created an "expedited process" allowing property owners to have their cases heard more quickly, (3) the government's burden of proof changed to a preponderance of the evidence rather than probable cause, (4) the new law eliminated the bond required to be paid by property owners before their case can be heard in court, (5) the law no longer allows small amounts of cash or drugs to be a sufficient reason for seizing property, and, lastly, (6) it enhanced public reporting required by law enforcement agencies.¹⁶⁹ Despite improvements, the changes to Illinois' civil forfeiture system by the Seizure and Forfeiture Reporting Act fall short in many ways.

166. Ruddell & Jackson-Green, *supra* note 141.

167. KNEPPER ET AL., *supra* note 8, at 6.

168. See 5 ILL. COMP. STAT. 810/1 (2021).

169. Ben Ruddell, *Illinois has a New Civil Asset Forfeiture, But Will it Stop 'Policing for Profit?'*, ACLU ILL. (Aug. 15, 2018, 2:00 PM), <https://www.aclu-il.org/en/news/illinois-has-new-civil-asset-forfeiture-law-will-it-stop-policing-profit> [https://perma.cc/55UQ-6NFB]. See also *Asset Seizure & Forfeiture*, ISP ILL., <https://isp.illinois.gov/Finance/AssetSeizure> [https://perma.cc/3EYG-AKT6].

Pursuant to the "Seizure and Forfeiture Reporting Act" (5 ILCS 810/10) all agencies (including but not limited to law enforcement agencies, a drug task force, Metropolitan Enforcement Group (MEG), State's Attorney office and the Appellate Prosecutor's office) which receives proceeds from forfeitures subject to reporting under this Act shall file an annual report with the Illinois State Police no later than 60 days after December 31 of that year.

Id.

In December 2020, the Institute for Justice—the leader of civil asset forfeiture reform in the United States—graded Illinois’ civil asset forfeiture laws a “D-” in a report that compares state civil asset forfeiture laws throughout the country.¹⁷⁰ Specifically, the report addressed the changes Illinois made in the Seizure and Forfeiture Reporting Act, stating that the law:

Removed burden on owners to prove property is not subject to forfeiture; required government to prove owners’ culpability or negligence—which is not a crime—at forfeiture trial, though innocent owners still bear the burden of proving their own innocence at pretrial innocent owner hearings; eliminated bond requirement for owners challenging administrative forfeiture; strengthened transparency requirements.¹⁷¹

Essentially, under the Seizure and Forfeiture Reporting Act, Illinois only removed its bond requirement for owners challenging administrative forfeiture.¹⁷² The law still imposes bond requirements for property owners challenging forfeiture in judicial proceedings. Additionally, the property owner still bears the burden of proof at pretrial hearings, and if the forfeiture proceeding goes to trial, the government is required to prove that the property owner was only culpable or negligent, which is not even a crime.¹⁷³ This report highlights that despite the claims made from the proponents of the Seizure and Forfeiture Reporting Act, the law does not reform the civil asset forfeiture system as extensively as it is led on to be, and there are still many flaws in Illinois’ civil asset forfeiture system that put property owners at risk.

C. A BREAKDOWN OF THE AVERAGE CIVIL FORFEITURE PROCEEDING IN ILLINOIS

In Illinois, civil asset forfeiture proceedings begin when police officers seize property they suspect is involved in criminal activity.¹⁷⁴ After the police confiscate the property, the court has fourteen days to determine whether there was probable cause, and forty-five days to notify the owner that the property is being held.¹⁷⁵ Next, a preliminary review will occur within fourteen days of the seizure. If the court finds there was probable

170. See generally KNEPPER ET AL., *supra* note 8, at 86-87.

171. *Id.*

172. *Id.* at 44.

173. *Id.* at 174.

174. See Ruddell & Jackson-Green, *supra* note 141. See also *Getting Back My Forfeited Property*, *supra* note 163.

175. *Getting Back My Forfeited Property*, *supra* note 163.

cause to show the property was linked to criminal activity, a notice will be sent to the owner letting them know of the pending forfeiture on their property, or if the owner's address is unknown, an advert will be published in the newspaper.¹⁷⁶ The notice contains the following information: a description of the property that is subject to forfeiture; the approximate value of the property; when and where the property was seized; the reason for seizing the property; an explanation of the process to ask for the property back; and the property owner's rights during the forfeiture process.¹⁷⁷

After receiving notice of the pending forfeiture, the property owner has forty-five days to respond with a verified answer, otherwise the property will automatically become forfeited.¹⁷⁸ The property owner's answer is what officially begins the process to regain possession of the property. How to properly draft a verified answer depends on several factors including, "what kind of property was taken, what kind of criminal activity caused the property to be taken, and how much that property costs."¹⁷⁹ For example, a property owner is not required to file a claim and the court is required to begin the process if the property involved is: real property; property worth more than \$150,000 and not taken because of a crime related to drugs; or property worth more than \$20,000 and taken because of a crime related to drugs; personal property; and property worth less than \$150,000.¹⁸⁰ In all other situations, the property owner is required to provide the State's Attorney's Office with the following information:

their name; address; the caption of the proceedings; their interest in the property; when they obtained the property; how the property was obtained; who (if anyone) gave them the property; the names of anyone else with an interest in the property; proof that they didn't know or assist with criminal activity at all; additional facts to help prove that they didn't know or assist the criminal activity; a request for the property returned to them.¹⁸¹

On top of filing the claim, property owners must also post a bond before contesting the forfeiture of their property.¹⁸² The bond is "either 10% of the

176. *Id.*

177. *Id.*

178. Ruddell & Jackson-Green, *supra* note 141.

179. *Getting Back My Forfeited Property*, *supra* note 163.

180. *Id.*

181. *Id.*

182. *Id.*

reasonable value of the property or \$100, whichever is greater.”¹⁸³ The bond ensures that if the property owner loses their case, they will be responsible for paying the costs and fees of the forfeiture proceeding.¹⁸⁴ However, even if the property owner wins their case, only 90% of the bond will be returned to them; the court clerk gets to keep the remaining 10% of the bond.¹⁸⁵ Again, if the property owner loses, the bond will not be returned.¹⁸⁶ The bond is required in most judicial forfeiture proceedings, but is not required in an administrative forfeiture.

After the claim is filed and the bond is posted, the State’s Attorney will file their complaint within forty-five days.¹⁸⁷ After the State’s complaint is filed, the property owner must file an answer to the State’s complaint.¹⁸⁸ The property owner must provide the same information that was required in the property owner’s claim, in their answer to the State’s complaint.¹⁸⁹ Again, the property owner risks the automatic forfeiture of their property if they fail to file their answer to the State’s complaint within forty-five days.¹⁹⁰ Once the answer is filed, a hearing will typically occur within sixty days.¹⁹¹

During the hearing, the State is first required to argue and prove that there is probable cause to show that the property attempting to be forfeited is connected to criminal activity.¹⁹² After this, the property owner must prove by a preponderance of the evidence that even though there is a possibility the property in question was connected to criminal activity, the property owner was not involved in the criminal activity, didn’t assist in the criminal activity, nor were they aware of the criminal activity.¹⁹³ Additionally, property owners may have the option of settling their civil forfeiture case.¹⁹⁴ In this situation, the property owner must reach a mutual agreement with the State’s Attorney, and the agreement must be put in writing.¹⁹⁵ In some situations, the property is returned to the owner upon payment.¹⁹⁶ Just like the rest of the steps in the civil forfeiture proceeding, it is up to the property owner to navigate and initiate this process without the right of counsel.

183. *Getting Back My Forfeited Property*, *supra* note 163. If the property owner cannot afford to pay the bond, they have the option of filing an “indigency affidavit.” *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. *Getting Back My Forfeited Property*, *supra* note 163.

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *Getting Back My Forfeited Property*, *supra* note 163.

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

D. HOW ILLINOIS COMPARES TO OTHER STATES

To date, New Mexico has taken the most radical steps to reform its civil asset forfeiture system amongst the states.¹⁹⁷ In 2015, the New Mexico legislature passed the Forfeiture Act which entirely abolished the state's use of civil asset forfeiture.¹⁹⁸ Under the new law, the state must first successfully convict the property owner of a criminal offense (i.e., beyond a reasonable doubt) before proceeding with a forfeiture action.¹⁹⁹ If the state can prove the defendant is guilty of the offense beyond a reasonable doubt, then the same judge and jury from the criminal trial will hear the forfeiture action in an ancillary proceeding.²⁰⁰ Here, the government must prove the following factors by clear and convincing evidence: "(1) the property is subject to forfeiture; (2) the property owner was convicted of the underlying crime; and (3) the value of the property is not unreasonably disproportionate to the crime."²⁰¹ These changes ensure that property owners in New Mexico have all the constitutional safeguards provided to them by the criminal justice system, compared to the minimal protections provided in civil proceedings.

In addition, the New Mexico law redirects any profits that are derived from the forfeiture proceeding to the state's general fund, rather than to the law enforcement agency responsible for the seizure.²⁰² After a successful forfeiture proceeding, "the property is sold by the state treasurer at public auction. The proceeds are used to reimburse the forfeiting agency's reasonable expenses incurred in the 'storage, protection, . . . transfer, . . . [and] dispos[al] of the property' and the remaining balance is deposited into the state's general fund."²⁰³ This removes any potential financial incentives for police departments and prosecutors that could lead to an abusive and excessive use of forfeiture.²⁰⁴ Most importantly, the New Mexico law also restricts the use of the federal equitable sharing program by state and local law enforcement agencies, to ensure that they are not able to easily circumvent the new reforms through the federal equitable sharing loophole.²⁰⁵ Law enforcement agencies can only utilize the federal equitable sharing program for property valued at \$50,000 or more.²⁰⁶ The crime connected to the forfeiture must also be "interstate and complex," or the property must independently be eligible for forfeiture under federal law.²⁰⁷

197. See KNEPPER ET AL., *supra* note 8, at 31.

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

199. See Chigbrow, *supra* note 24, at 1182.

200. *Id.*

201. *Id.*

202. See KNEPPER ET AL., *supra* note 8, at 122.

203. Chigbrow, *supra* note 24, at 1182 (quoting N.M. STAT. ANN. §§ 31-27-7(B)).

204. See KNEPPER ET AL., *supra* note 8, at 31.

205. *Id.*

206. Chigbrow, *supra* note 24, at 1183.

207. See Chigbrow, *supra* note 24, at 1182-83.

Currently, New Mexico is the only state in the country graded at an “A” under the Institute for Justice’s state ranking system.²⁰⁸ Under their ranking system, the Institute for Justice takes three factors into consideration: “(1) standard of proof, (2) innocent owner burden[,] and (3) financial incentive.”²⁰⁹ Therefore, the higher the standard of proof, the lower the burden on innocent property owners to contest the forfeiture, and the lower the financial incentive for law enforcement agencies to forfeit property, the higher the overall grade a state will have.²¹⁰ The Institute for Justice uses a grade point average on the 4.0 scale to give states an overall rank.²¹¹

After states were assigned their respective grades, the standard of proof and innocent owner burden grades were combined into a single “burden” grade by creating a weighted average, where standard of proof accounted for 66% of the grade and innocent owner burden for 33%. These weights reflect the relative difficulty each process represents for law enforcement agencies in forfeiting seized properties. The burden grades were then combined with financial incentive grades into a single weighted grade by assigning a weight of one to the burden grades and a weight of three to the financial incentive grades, based on the premise that law enforcement agencies are more encouraged to pursue forfeiture by the percentage of forfeiture proceeds directed to law enforcement accounts than by the relative ease of the forfeiture process.²¹²

Wisconsin closely follows New Mexico in overall grades receiving an “A-.”²¹³ Similar to New Mexico, Wisconsin deters any financial incentives for law enforcement and prosecutors by redirecting forfeiture proceeds to school funding.²¹⁴ Additionally, seizing agencies are only able to retain up to fifty percent of the forfeiture proceeds to cover their forfeiture related cost.²¹⁵ Wisconsin also has strong protections for third-party owners, requiring the state to prove that the third-party owner was aware that their property was

208. See KNEPPER ET AL., *supra* note 8, at 42.

209. KNEPPER ET AL., *supra* note 8, at 166.

210. *See id.* at 42, 166.

211. *Id.* at 42.

212. *Id.* at 169.

213. *See id.* at 42.

214. KNEPPER ET AL., *supra* note 8, at 158.

215. *Id.*

being used in connection to criminal activity.²¹⁶ Compared to New Mexico, Wisconsin falls short in that “[i]t does not require conviction of the owner, [but] only of ‘a person,’ . . . [o]nce the conviction provision is satisfied, property must be linked to the crime by clear and convincing evidence.”²¹⁷ Furthermore, Wisconsin limits the ability of state and local law enforcement to use federal equitable sharing as a loophole around state laws.²¹⁸ Wisconsin and New Mexico are the only states in the country ranked within the “A” range for “overall” state law grades. Thirty-four states, including Illinois, are ranked within the “D” range.²¹⁹

E. HOW ILLINOIS CAN IMPROVE

After examining the civil forfeiture laws of other states, it is clear that Illinois can do much more to protect its citizens against the dangers of civil asset forfeiture.²²⁰ As explained by the Institute for Justice’s report, meaningful state reform must address three central problems with civil asset forfeiture: (1) the low standard of proof, (2) the “innocent owner” burden, and (3) the financial incentives for law enforcement that created the policing for profit problem.²²¹ In addition, all reform must be accompanied by restrictions on law enforcement agencies’ ability to use the federal equitable sharing program as a loophole to thwart attempts at meaningful state reform.²²²

To achieve this Illinois should altogether abolish civil forfeiture, opting instead to rely on criminal forfeiture similar to the system in New Mexico.²²³ This will ensure that property owners in Illinois have all the constitutional safeguards provided to them by the criminal justice system before they are deprived of their property. Illinois needs to strengthen “innocent owner” protections by placing the burden of proof on the state, rather than the property owner at pretrial hearings.²²⁴ Lastly, it is crucial that Illinois directs all forfeiture proceeds—including those from other jurisdictions, such as federal equitable sharing proceeds—to the state’s general fund and place restrictions on the ability to participate in the federal equitable sharing program.²²⁵ Directing forfeiture proceeds to the state’s general fund will prevent the issue of policing for profit, and will allow proceeds to be better used for needed state funding. Illinois can further strengthen its transparency and accountability requirements, though the state currently is graded at an “A” for

216. *Id.*

217. *Id.*

218. *Id.* at 158-59.

219. See KNEPPER ET AL., *supra* note 8, at 42.

220. *Id.* at 42, 46.

221. *Id.* at 31.

222. *Id.*

223. *Id.* at 86.

224. See KNEPPER ET AL., *supra* note 8, at 86.

225. *Id.* at 31.

financial audits of forfeiture accounts, and accessibility of forfeiture records.²²⁶ However, while important, these actions do nothing to stem the tide of unfair forfeitures.

F. POLICY CONCERNS: THE IMPACT OF REFORM ON CRIME RATES

Opponents to reform fear that abolishing civil forfeiture will result in an increase in crime and make it more difficult for law enforcement to fight crime.²²⁷ Although this is a valid concern, so far these claims appear to be untrue.²²⁸ In a recent study analyzing crime rates in New Mexico after abolishing civil forfeiture, the Institute for Justice found that New Mexico's crime rates did not increase from abolishing civil forfeiture. The study compared New Mexico to its neighboring states Colorado and Texas, and the results show "[c]ompared to Colorado and Texas, New Mexico's overall crime rate did not rise following the implementation of strong forfeiture reform in 2015, nor did arrest rates drop. These findings are contrary to forfeiture proponents' predictions."²²⁹ The study suggests that civil forfeiture may not be as essential of a tool in fighting and preventing crime as forfeiture proponents believe it to be.²³⁰ Thus far, law enforcement agencies in New Mexico are able to fulfill their missions without it.²³¹

A separate study conducted by the Institute for Justice in 2019 explored the conflicting claims made by civil forfeiture opponents and proponents.²³² Among other things, the study concluded that "increased forfeiture funds had no meaningful effect on crime fighting. However, forfeiture was strongly linked to worsening economic conditions . . . [which] suggests law enforcement agencies pursue forfeiture less to fight crime than to raise revenue."²³³ The study also suggested that, "[i]f all forfeiture has little effect on crime fighting, civil forfeiture alone—which requires neither convictions nor even charges—is likely to be even further removed."²³⁴ This data is encouraging, and further supports the notion that Illinois should abolish the use of civil forfeiture.

In September 2021, Chicago Mayor Lori Lightfoot proposed the Victims' Justice Ordinance, which aimed to decrease gang violence by allowing

226. See *id.* at 86-87.

227. *Id.* at 5.

228. See *id.* at 32-33; Brian D. Kelly, *Fighting Crime or Raising Revenue? Testing Opposing Views of Civil Forfeiture*, INSTITUTE FOR JUSTICE 3 (Jun. 2019) <https://ij.org/wp-content/uploads/2019/06/Fighting-Crime-or-Raising-Revenue-7.20.2020-revision.pdf> [<https://perma.cc/B5UV-U4YJ>].

229. KNEPPER ET AL., *supra* note 8, at 32.

230. *Id.* at 5.

231. *Id.*

232. See KELLY, *supra* note 228.

233. *Id.*

234. *Id.*

the City to bring civil forfeiture actions against the property of those identified as gang members.²³⁵ Opponents to the ordinance point out the flawed nature of policies like civil asset forfeiture in preventing crime:

Policies like the one Lightfoot is pursuing misleadingly claim that the root causes of gun violence are ‘gang money’ and gang members. They misunderstand the contemporary state of Chicago’s gangs that are no longer run by ‘kingpins’ but instead by fragmented groups of disaffected young people. And they also deflect[sic] responsibility for the real factors at play in Chicago’s gangs and associated violence: more than four decades of mass incarceration that have deprived Black and Hispanic communities of hundreds of thousands of family members, deficient investments in educational and job-training opportunities, rampant unemployment among young people . . . poor housing conditions and accessibility, and a lack of trust in police and city authorities who many of Chicago’s residents know primarily through oppression and ongoing histories of abuse.²³⁶

These factors suggest that civil forfeiture policies not only fail to prevent crime, but they also promote the factors that have long contributed to criminal violence in cities like Chicago.²³⁷ By abolishing civil asset forfeiture and redirecting forfeiture proceeds to the state’s general fund, Illinois can develop “cash-transfer programs” that direct resources to affected communities that will have a longstanding impact in fixing these issues at their core.²³⁸

III. CONCLUSION

Based on Congress’s and the Supreme Court’s unwillingness to reform civil asset forfeiture, the Illinois Legislature must take action to protect its citizens against the abuse of civil asset forfeiture. This can most effectively be accomplished by outright abolishing civil forfeiture and opting instead to

235. See *Opposing the Proposed City of Chicago “Victims’ Justice Ordinance”*, *supra* note 136; see also Lea Hoefler et al., *The Little-Known Violence Prevention Tool Cropping Up in Cities Across the Country*, SLATE (Mar. 2, 2022, 11:18 AM), <https://slate.com/news-and-politics/2022/03/how-cash-transfer-programs-prevent-violent-crime.html> [<https://perma.cc/6REK-WZWS>].

236. Hoefler et al., *supra* note 235.

237. See *id.*

238. See *id.*

rely on criminal forfeiture. This ensures that property owners in Illinois have all the constitutional safeguards provided to them by the criminal justice system before they are deprived of their property. Additionally, Illinois must direct all forfeiture proceeds to the state's general fund and place restrictions on the ability of law enforcement agencies to participate in the federal equitable sharing program. This will prevent the financial incentive for law enforcement to abuse civil asset forfeiture and give the state additional resources to fund programs that actually prevent crime.