

## THE PERILS OF CIVIL ASSET FORFEITURE

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My presentation will focus on civil asset forfeiture, which is the law enforcement seizure of private property suspected of involvement in criminal activity and the use of civil or administrative proceedings to forfeit such property to the government.<sup>1</sup> Typically, the actions are brought against the property in rem rather than against the owner in personam,<sup>2</sup> which, combined with the civil classification, allows the government to dispense with a number of rights that are typically provided to defendants in criminal proceedings.<sup>3</sup>

Over the years, this type of forfeiture has generated a series of troubling cases. Let me tell you about one such incident, the case of poor Tina Bennis.<sup>4</sup> One evening, her husband, John Bennis, failed to return home as expected, prompting his worried wife to call a missing persons line.<sup>5</sup> As it turned out, Tina's husband had gone on a forbidden frolic.<sup>6</sup> Police officers had observed a woman flagging down motorists from a street corner until John stopped to pick her up.<sup>7</sup> Further surveillance found the two involved in a sex act, and John Bennis was subsequently convicted of gross indecency.<sup>8</sup>

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1. DRUG POLICY ALL., ABOVE THE LAW: AN INVESTIGATION OF CIVIL ASSET FORFEITURE IN CALIFORNIA 3 (2015), [https://www.drugpolicy.org/sites/default/files/Drug\\_Policy\\_Alliance\\_Above\\_the\\_Law\\_Civil\\_Asset\\_Forfeiture\\_in\\_California.pdf](https://www.drugpolicy.org/sites/default/files/Drug_Policy_Alliance_Above_the_Law_Civil_Asset_Forfeiture_in_California.pdf) [<https://perma.cc/4P5A-X6HW>].

2. *Id.* at 8.

3. *Id.* at 3.

4. Michigan *ex rel.* Wayne Cty. Prosecutor v. Bennis, 527 N.W.2d 483 (Mich. 1994), *aff'd sub nom.* Bennis v. Michigan, 516 U.S. 442 (1996).

5. *Bennis*, 516 U.S. at 468.

6. *Bennis*, 527 N.W.2d. at 486.

7. *Id.*

8. *Id.*

For Tina, it was bad enough that she had been betrayed by her husband, caught with a prostitute in the family car.<sup>9</sup> But then law enforcement sought to take Tina Bennis's secondhand 1977 Pontiac—a car purchased primarily through Tina's babysitting earnings—because it was the site of her husband's illicit sex act.<sup>10</sup> To the state courts, it did not matter that Tina was patently innocent, as the relevant statute did not require any showing with respect to her knowledge of criminal activity.<sup>11</sup>

In a 1996 case, *Bennis v. Michigan*,<sup>12</sup> the U.S. Supreme Court rejected Tina's claim that the forfeiture of her interest in the car was unconstitutional in light of her acknowledged innocence.<sup>13</sup> While recognizing the considerable appeal of Ms. Bennis's claim, the Court reasoned that, "a long and unbroken line of cases holds that an owner's interest in property may be forfeited by reason of the use to which the property is put even though the owner did not know that it was to be put to such use."<sup>14</sup> In effect, the Court placed its imprimatur on a type of strict vicarious liability where an innocent individual can be penalized for the wrongs of someone else. In a dissenting opinion, Justice Stevens argued that "[t]he logic of the Court's analysis would permit the States to exercise virtually unbridled power to confiscate vast amounts of property."<sup>15</sup>

As it turns out, the long line of cases referenced by the *Bennis* majority was based on, among other things, the ancient common law fiction of "deodand," the idea that property itself can be guilty.<sup>16</sup> In a 1974 case, the Supreme Court described this history as follows:

At common law the value of an inanimate object directly or indirectly causing the accidental death of a King's subject was forfeited to the Crown as a deodand. The origins of the deodand are traceable to Biblical and pre-Judeo-Christian

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9. *Id.*

10. *Bennis*, 516 U.S. at 443–45; Brief for Petitioner at 2, *Bennis*, 516 U.S. 442 (No. 94-8729).

11. *Bennis*, 527 N.W.2d. at 495.

12. 516 U.S. 442 (1996).

13. *Id.* at 443.

14. *Id.* at 446.

15. *Id.* at 458 (Stevens, J., dissenting).

16. *See id.* at 472 (Kennedy, J., dissenting).

practices, which reflected the view that the instrument of death was accused and that religious expiation was required. The value of the instrument was forfeited to the King, in the belief that the King would provide the money for Masses to be said for the good of the dead man's soul, or insure that the deodand was put to charitable uses.<sup>17</sup>

Under the deodand fiction, the property—not the property owner—is considered liable.<sup>18</sup> Now, I am a fan of history as much as anyone in this room, but judicial reliance on this particular fiction offers a dubious historical rationale for forfeiture law in the United States. After all, the English Crown's passion for seizing property caused American colonists to view forfeiture with great suspicion.<sup>19</sup>

Worse yet, the deodand fiction allows forfeitures to be characterized as civil remedies rather than criminal penalties. Labeling forfeitures as civil in nature certainly promotes government expedience by freeing the state from the substantial burdens of typical criminal cases. Forfeiture proceedings need not provide property owners many of the constitutional guarantees afforded criminal defendants,<sup>20</sup> including, for instance, the right to counsel and the protection against double jeopardy.<sup>21</sup>

Perhaps the most important consequences stem from dispensing with individual culpability and the government's obligation to prove its case beyond a reasonable doubt.<sup>22</sup> With respect to culpability, as the *Bennis* decision showed, it is acceptable to hold a property owner strictly liable for the acts of others.<sup>23</sup> As for the burden of proof, forfeiture statutes historically provided a mere preponderance of the evidence as the

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17. *Calero v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 680–81 (1974) (footnotes omitted) (citation omitted).

18. See OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 25–26 (Paulo J.S. Pereira & Diego M. Beltran eds., 2011) (1881).

19. See James R. Maxeiner, *Bane of American Forfeiture Law—Banished at Last?*, 62 CORNELL L. REV. 768, 776–79 (1977).

20. Note, *How Crime Pays: The Unconstitutionality of Modern Civil Asset Forfeiture as a Tool of Criminal Law Enforcement*, 131 HARV. L. REV. 2387, 2395–96 (2018) [hereinafter *How Crime Pays*].

21. *Id.* at 2395.

22. Marc B. Stahl, *Asset Forfeiture, Burdens of Proof and the War on Drugs*, 83 J. CRIM. L. & CRIMINOLOGY 274, 278 (1992).

23. See *Bennis v. Michigan*, 516 U.S. 442, 446–47 (1996).

legal standard.<sup>24</sup> To be clear, many of the property owners targeted may, in fact, have been guilty of a crime.<sup>25</sup> But some have done nothing more than carry a lot of cash while traveling through a particularly pro-forfeiture jurisdiction.<sup>26</sup>

None of this is to say that individual law enforcement officers are the problem—almost to a person, police and prosecutors are well-intentioned public servants who are trying to do their best to promote public safety.<sup>27</sup> Instead, the issue is one of incentive structures of a government institution, encouraging federal, state, and local agencies to confiscate billions of dollars in cash, cars, jewelry, real estate, and other private property over the past several decades through the practice of civil asset forfeiture.<sup>28</sup>

Many statutes allow law enforcement agencies to keep all—or a substantial portion—of those proceeds,<sup>29</sup> a practice that is now described as “policing for profit” and has resulted in the vast increase in forfeitures.<sup>30</sup> As detailed in a study by the Institute for Justice, the U.S. Department of Justice took in \$93.7 million

24. Caleb Nelson, *The Constitutionality of Civil Forfeiture*, 125 YALE L.J. 2446, 2484–86 (2016).

25. See, e.g., Press Release, U.S. Dep’t of Justice, Acting Manhattan U.S. Attorney Announces Historic Jury Verdict Finding Forfeiture of Midtown Office Building and Other Properties (June 29, 2017), <https://www.justice.gov/usao-sdny/pr/acting-manhattan-us-attorney-announces-historic-jury-verdict-finding-forfeiture-midtown> [<https://perma.cc/4XDY-YZNA>].

26. See Deanna Paul, *Police seized \$10,000 of a couple’s cash. They couldn’t get it back—until they went public.*, WASH. POST (Aug. 31, 2018, 8:22 PM), <https://beta.washingtonpost.com/nation/2018/09/01/police-seized-couples-cash-they-couldnt-get-it-back-until-they-went-public/?noredirect=on> [<https://perma.cc/4DSA-LEKQ>] (discussing examples of innocent people losing property due to civil forfeiture).

27. See John W. Huber, Opinion, *Civil forfeiture is a useful tool in fighting crime*, SALT LAKE TRIB. (Sept. 30, 2018), <https://www.sltrib.com/opinion/commentary/2018/09/30/commentary-civil/> [<https://perma.cc/V2M2-4DP7>].

28. See Christopher Ingraham, *Law enforcement took more stuff from people than burglars did last year*, WASH. POST (Nov. 23, 2015, 6:00 AM), <https://www.washingtonpost.com/news/wonk/wp/2015/11/23/cops-took-more-stuff-from-people-than-burglars-did-last-year/> [<https://perma.cc/W4AP-ZTLZ>].

29. E.g., 18 U.S.C. § 981(e) (2012) (“Notwithstanding any other provision of the law . . . the Attorney General, the Secretary of the Treasury, or the Postal Service, as the case may be, is authorized to retain property forfeited pursuant to this section . . .”).

30. See generally Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War’s Hidden Economic Agenda*, 65 U. CHI. L. REV. 35 (1998).

from federal forfeitures in 1986.<sup>31</sup> Three decades later, that number climbed to \$4.5 billion in forfeitures.<sup>32</sup> In fact, between 2001 and 2014, the Justice Department and the Treasury Department combined to take in almost \$29 billion through the forfeiture program.<sup>33</sup>

Information from individual states is a little more difficult to come by, but the same Institute for Justice report found that fourteen jurisdictions had a combined forfeiture revenue of more than \$250 million in 2013.<sup>34</sup> Interestingly, state and local law enforcement sometimes work with the federal government to forfeit property.<sup>35</sup> Through a process known as equitable sharing,<sup>36</sup> the federal government can “adopt the seizure” made by state and local officials and then seek to forfeit those proceeds back to the seizing agency through federal law—thus avoiding state and local laws that might be more restrictive than their federal analogs.<sup>37</sup> The federal government takes a cut of those proceeds and gives the rest back to the relevant law enforcement agency.<sup>38</sup> As described by the Institute for Justice report, from 2000 to 2013, the Justice and Treasury Departments’ equitable sharing programs generated over \$5.8 billion in revenue for state and local law enforcement.<sup>39</sup>

All this forfeited property can distort police behavior. By allowing agencies to keep the property they seize, law enforcement can circumvent the processes of legislative budgeting and thereby avoid a primary check wielded by state and local law-

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31. DICK M. CARPENTER II ET AL., INST. FOR JUSTICE, *POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE* 10 (2d ed. 2015), <http://ij.org/wp-content/uploads/2015/11/policing-for-profit-2nd-edition.pdf> [<http://perma.cc/4QFM-EKBR>].

32. *Id.*

33. *Id.*

34. *Id.* at 11 (compiling criminal forfeiture data from Arizona, California, Hawaii, Louisiana, Massachusetts, Michigan, Minnesota, Missouri, New York, Oklahoma, Pennsylvania, Texas, Virginia, and Washington).

35. *Id.* at 25.

36. See Jefferson E. Holcomb, Tomislav V. Kovandzic & Marian R. Williams, *Civil asset forfeiture, equitable sharing, and policing for profit in the United States*, 39 J. CRIM. JUST. 273, 274 (2011); see also Blumenson & Nilsen, *supra* note 30, at 51–52.

37. Holcomb et al., *supra* note 36, at 274.

38. Blumenson & Nilsen, *supra* note 30, at 51–52.

39. CARPENTER ET AL., *supra* note 31, at 25.

makers.<sup>40</sup> This self-funding, as Professor Beth Colgan has written, allows law enforcement agencies to set priorities that counter or impede the goals of those democratically elected officials.<sup>41</sup> On a tangible level, the financial gain from civil asset forfeiture may encourage police departments to shift their practices, as is best seen in the war on drugs.<sup>42</sup> Rather than the conventional drug sting, where an undercover officer poses as a potential buyer of drugs, law enforcement now frequently opts for “reverse stings,” where the undercover officers act as drug dealers who can then seize and seek to forfeit the cash they obtain during the controlled drug buy.<sup>43</sup>

In a somewhat similar fashion, law enforcement agencies have admitted to focusing their interdiction efforts on the southbound lanes of freeways rather than the northbound lanes.<sup>44</sup> Why, you ask? Well, drug traffickers heading north will

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40. See Bruce L. Benson, *Escalating the War on Drugs: Causes and Unintended Consequences*, 20 STAN. L. & POL'Y REV. 293, 306–07 (2009); see also Rachel A. Harmon, *Federal Programs and the Real Costs of Policing*, 90 N.Y.U. L. REV. 870, 944 (2015).

41. Beth A. Colgan, *Fines, Fees, and Forfeitures*, CRIMINOLOGY CRIM. JUST. L. & SOC'Y, Dec. 2017, at 22, 24 (“Allowing law enforcement and prosecutors to retain funds . . . set[s] priorities that may contradict or interfere with crime-control aims of the legislative branch or the public at large.”); see also Nick Sibilla, *Civil Forfeiture Now Requires A Criminal Conviction In Montana And New Mexico*, FORBES (July 2, 2015, 8:45 AM), <https://www.forbes.com/sites/instituteofjustice/2015/07/02/civil-forfeiture-now-requires-a-criminal-conviction-in-montana-and-new-mexico/#62aca9d45ee3> [<http://perma.cc/5H35-DU65>].

42. Benson, *supra* note 40, at 306–07 (“[L]aw enforcement agencies focused more resources on drug control because of the financial gains for the agencies arising from forfeitures. . . . [A]gencies focus on confiscations as opposed to criminal convictions . . .”).

43. See Blumenson & Nilsen, *supra* note 30, at 67 (“The shift in law enforcement priorities, from crime control to funding raids, is perhaps best revealed by the advent of the ‘reverse sting,’ a now common police tactic that rarely was used before the law began channeling forfeited assets to those who seized them.”); see also J. Mitchell Miller & Lance H. Selva, *Drug Enforcement's Double-Edged Sword: An Assessment of Asset Forfeiture Programs*, 11 JUST. Q. 313, 325 (1994) (“This strategy [reverse stings] was preferred by every agency and department . . . because it allowed agents to gauge potential profit before investing a great deal of time and effort.”).

44. See Richard Minitzer, *Ill-Gotten Gains*, REASON, Aug. 1993, at 34 (quoting former New York City Police Commissioner Patrick Murphy that police have “a financial incentive to impose roadblocks on the southbound lanes of I-95, which carry the cash to make drug buys, rather than the northbound lanes, which carry the drugs. After all, seized cash will end up forfeited to the police department, while seized drugs can only be destroyed.” (internal quotation marks omitted)).

be carrying drugs for distribution while those heading south will be in possession of cash proceeds from the drug sales.<sup>45</sup> For law enforcement, any seized drugs must be destroyed, but the cash may be kept pursuant to forfeiture proceedings.<sup>46</sup> More generally, as Professor Colgan and others have argued, the financial benefit from seizing and forfeiting cash and property related to the drug trade may encourage law enforcement to prioritize drug crimes, both big and small, over crimes of violence.<sup>47</sup> This, in turn, may undermine public safety and the community's belief in the legitimacy of law enforcement efforts.<sup>48</sup>

Let me close on a positive note: in the new millennium, civil asset forfeiture has been an area of sustained bipartisan reforms.<sup>49</sup> A majority of U.S. jurisdictions have modified their forfeiture statutes.<sup>50</sup> A few states have abolished civil asset forfeiture altogether,<sup>51</sup> while others now require criminal convictions to precede any civil asset forfeiture actions.<sup>52</sup> Other states have raised the burden of proof in civil asset forfeiture.<sup>53</sup> Here in Arizona, for instance, the burden of proof was increased

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45. See *id.*; Jolie McCullough, Acacia Coronado & Chris Essig, *Texas police can seize money and property with little transparency. So we got the data ourselves.*, TEX. TRIB. (June 7, 2019), <https://apps.texastribune.org/features/2019/texas-civil-asset-forfeiture-counties-harris-webb-reeves-smith/> [<https://perma.cc/2C7A-Y9ZE>] (discussing how local cops keep an eye on the drug proceeds heading south and typically make more cash seizures in southbound lanes than northbound lanes).

46. Minitier, *supra* note 44, at 34.

47. See Colgan, *supra* note 41, at 24.

48. Eric Moores, *Reforming the Civil Asset Forfeiture Reform Act*, 51 ARIZ. L. REV. 777, 784–85 (2009).

49. See, e.g., Nick Sibilla, *Bipartisan Bill in Congress Would Dramatically Reform Civil Forfeiture*, INST. FOR JUST. (Mar. 27, 2019), <https://ij.org/press-release/bipartisan-bill-in-congress-would-dramatically-reform-civil-forfeiture/> [<https://perma.cc/5V5F-6S5L>] (noting that civil asset forfeiture reform transcends party lines and that thirty states and the District of Columbia have enacted such reforms since 2014).

50. JASON SNEAD, AN OVERVIEW OF RECENT STATE-LEVEL FORFEITURE REFORMS 3–9 (Heritage Found. Backgrounder, No. 3132, 2016), <https://thf-reports.s3.amazonaws.com/2016/BG3132.pdf> [<https://perma.cc/D8WL-CM4L>].

51. *Id.* at 9.

52. See, e.g., CAL. HEALTH & SAFETY CODE § 11470.1(c) (West Supp. 2020); see also Anne Teigen & Lucia Bragg, *Evolving Civil Asset Forfeiture Laws*, NAT'L CONF. ST. LEGISLATURES LEGISBRIEF, Feb. 2018, at 2, <https://www.ncsl.org/LinkClick.aspx?fileticket=F0TZDb4JtYs%3d&tabid=32059&portalid=1> [<https://perma.cc/MW4Z-BFZ7>].

53. SNEAD, *supra* note 50, at 5–7.

from preponderance of the evidence to the higher standard of clear and convincing evidence.<sup>54</sup> Today, most jurisdictions have also adopted an innocent owner defense, with some shifting the burden of proof to the government when property owners raise claims of innocence.<sup>55</sup>

In addition, some jurisdictions provide a degree of transparency through law enforcement reporting requirements for seizures and forfeitures.<sup>56</sup> A handful of jurisdictions have also passed laws limiting the practice of equitable sharing, at least when it is done by the process of adoption by federal law enforcement.<sup>57</sup> A few jurisdictions, such as New Mexico, require that the forfeiture proceeds go to the state's general fund rather than to the seizing agency, thereby blunting much of the incentive to police for profit.<sup>58</sup>

All told, however, most jurisdictions have charted a middle course, adding some procedural protections for property owners while retaining civil asset forfeiture as a tool for law enforcement.<sup>59</sup> But if nothing else, the people and their governments are trying to strike a balance in this area, which I believe to be a worthwhile endeavor.

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54. ARIZ. REV. STAT. ANN. § 13-4305(E) (Supp. 2019).

55. See, e.g., 18 U.S.C. § 983(d)(1) (2012) ("An innocent owner's interest in property shall not be forfeited under any civil forfeiture statute."); see also *How Crime Pays*, *supra* note 20, at 2389–90.

56. See, e.g., COLO. REV. STAT. ANN. § 16-13-701(4)(a) (West Supp. 2019).

57. See, e.g., NEB. REV. STAT. § 28-1603 (2016); see also *Civil Forfeiture Reforms on the State Level*, INST. FOR JUST., <https://ij.org/activism/legislation/civil-forfeiture-legislative-highlights/> [<https://perma.cc/2KN5-JYBX>] (last visited Sept. 16, 2019).

58. N.M. STAT. ANN. § 31-27-7(B)(3), (C) (2019); see also Nick Sibilla, *Cops Can't Ignore New Mexico's Ban On Civil Forfeiture, Court Rules*, FORBES (Dec. 19, 2018, 9:35 AM), <https://www.forbes.com/sites/nicksibilla/2018/12/19/cops-cant-ignore-new-mexicos-ban-on-civil-forfeiture-court-rules/#656b484c6a7d> [<https://perma.cc/LT7C-KDQS>].

59. SNEAD, *supra* note 50, 5–8.