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Without Due Process of Law:

The Conservative Case for Civil Asset Forfeiture Reform

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Key Points

- Civil asset forfeiture exists in nearly all states.
- While two states have outlawed the practice entirely, states vary wildly on their use of civil forfeiture.
- States should act immediately to provide protections for innocent property owners.

There is little dispute among the conservative movement that criminals who would threaten the safety of our communities deserve to be divested of the fruits of their illicit enterprise. Drug dealers should lose possession of vehicles used to facilitate offenses in addition to the criminal sanction they face.

However, civil asset forfeiture—the practice of taking ownership of real or personal property allegedly connected to criminal activity but not requiring the criminal activity to be alleged, much less proven—has recently garnered significant outrage in the states. Tales of long-term abuses (such as those in Tenaha, Texas) and unconscionable takings (such as the entirety of Michigan grocer Terry Dehko's bank account containing over $35,000) have taken root in the public conscience as emblematic of what the state, given unchecked authority, is capable of (Cohen).

This affront to central conservative ideals of property rights, due process, and rule of law has prompted several "red" states to enact comprehensive reforms, ranging from removing the incentives to engage in the practice to wholesale abolition. New Mexico, for example, has recently enacted a spate of reforms that essentially abolish civil asset forfeiture and equitable sharing, while remanding the proceeds of criminal forfeiture to a communal fund. Montana now requires a criminal conviction before assets can be forfeited and, in tandem, raised the threshold that the state must meet to perfect the forfeiture post-conviction.

Even when states do pass individual protections such as raising the burden of proof or providing counsel in forfeiture proceedings, "equitable sharing" offers an easy mechanism to skirt these protections. While the majority of forfeitures are conducted under state law, local or state agencies may partner with the federal law enforcement agencies in enforcement efforts and select the least restrictive jurisdiction through which to process the forfeiture. North Carolina has long prohibited the practice, but unfortunately has been subject to above-average equitable sharing use.

While commonsense conservative solutions to reform the practice have been attempted in nearly all states, efforts are stymied by special interests that directly benefit from forfeiture disbursements. These agencies have grown addicted to this unappropriated source of funding, with nearly 40 percent indicating that the money constitutes a necessary income source (Cohen).

This paper highlights the two most comprehensive efforts to catalogue the relative ranking of the protections (or lack thereof) states provide their citizens, discusses commonly used fallacies by proponents of the status quo, and enumerates several reforms that states may implement to ensure criminals are held to account for their misdeeds while sparing the property rights of innocent property owners.

Current State of Forfeiture Laws

Two center-right, liberty-oriented advocacy groups undertook the arduous task of delving into each state's code and assigning a letter grade to the ability of the state to forfeit property absent a criminal conviction. The Institute for Justice (IJ) completed a seminal analysis of both statute and equitable sharing use in 2010, while FreedomWorks conducted its review in 2015.

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IJ's "Policing for Profit" report, conducted by Appalachian State professors Marian Williams and Jeff Holcomb, University of Texas at Dallas professor Tom Kovandzic, and senior attorney Scott Bullock averaged the assigned grades to produce an overall grade for each state (Williams, et al.). FreedomWorks' report, compiled by Michael Greibrok, delves into the state's burden of proof, the quality of "innocent owner" provisions, and the amount of forfeiture proceeds retained by law enforcement (Greibrok).

The Limitations of State Forfeiture Grades

While researchers associated with IJ and FreedomWorks both did an excellent job in calling attention to the paucity of procedural protections the law offers forfeiture abuse victims federally and in the states, abstract grading provides only a simple shorthand by which to represent the prevailing laws of each state. Further, these grades fail to account for many of the dynamic subjective and extra-statutory contexts in which these laws exist.

For example, South Dakota was given an overall grade of C, averaging out its D- in state law and A in equitable sharing use on IJ's grading rubric. This could be due to its sparsity and relative dearth of interstate highway system, preventing state/local federal partnerships and artificially inflating its grade as a shear accident of geography.

There is also little consistency between the summary IJ grade and the FreedomWorks grade, despite only five years and little policy movement in the states. If translated to the traditional 4.0 grading scale, the evaluations produce a statistically insignificant Pearson correlation coefficient of .210. This is likely due to the IJ grade including the practical use of equitable sharing transfers as an input to the final grade, whereas FreedomWorks evaluated the only statutory framework (Williams, et al.; Greibrok).

State Forfeiture Grades

STATE	Institute for Justice	Freedom-Works
Alabama	D	F
Alaska	C	F
Arizona	C	D-
Arkansas	D	D-
California	D	C+
Colorado	C	C
Connecticut	C+	C-
Delaware	D	F
Florida	D	C
Georgia	D-	D-
Hawaii	D	D-
Idaho	D	D-
Illinois	D	D-
Indiana	C+	C
Iowa	C	D-
Kansas	C	D-
Kentucky	D	D-
Louisiana	C-	D-
Maine	A-	C+
Maryland	C+	C
Massachusetts	D	F
Michigan	D-	D
Minnesota	D	B+
Mississippi	D+	D
Missouri	C+	C-
Montana	D+	B+

This is not to suggest that these grades are invalid, without purpose, or conducted in vain. Quite the opposite. This demonstrates how arcane the codification and execution of civil asset forfeiture laws have become, and underscores the need for the members of each state legislature interested in preserving the property rights of its innocent citizens to undertake strong reform efforts for themselves. A state scoring highly in one organization's grading and not the other's illustrates that, respective of methodology, there is still substantial work to be done. The few states that scored highly in both would also do well to evaluate their policies, lest some unaccounted-for nuance be exploited to the detriment of its citizens.

Averaging each of the grading scales produces a national grade of D for the IJ rankings and a D- for the FreedomWorks rankings; two woefully poor grades. States should seek to reform their forfeiture laws to bring them more in line with the vision of personal liberty envisioned by the Founders, while disabusing themselves of the deliberate misconceptions listed below.

STATE	Institute for Justice	Freedom-Works
Nebraska	D	C+
Nevada	D+	D+
New Hampshire	D+	D
New Jersey	C	D-
New Mexico	D+	A
New York	D	C
North Carolina	C+	A-
North Dakota	B+	B-
Ohio	C-	B
Oklahoma	B	D-
Oregon	C+	C
Pennsylvania	D	C-
Rhode Island	C-	F
South Carolina	D+	F
South Dakota	C	F
Tennessee	C	D-
Texas	D-	D
Utah	C-	C-
Vermont	C	B
Virginia	D-	D-
Washington	C+	F
West Virginia	D-	D-
Wisconsin	C+	B
Wyoming	C	F
National Average	**D**	**D-**

Common Misconceptions of Asset Forfeiture

In addition to the frequent conflation of criminal and civil forfeiture, proponents of civil asset forfeiture commonly employ rhetoric misrepresentative of the actual forfeiture process. The parade of horribles that enumerate usually includes an immutable spike in drug use, violence-torn neighborhoods, and the inability for police officers to perform even the most rudimentary elements of their jobs, such as those hinted at in a recent hearing on state forfeiture law in Michigan (Sidorowicz). This simply is not the case.

Seizure versus Forfeiture

Perhaps the most common sleight-of-hand employed in defending the practice of CAF is the deliberate use of "seizure" in lieu of "forfeiture." Both legal terms-of-art and highly specific in application, conflating the two is often the pretext used by opposition to reform to suggest an imminent inability to take drugs and other contraband off of the streets.

Seizure, broadly defined, is the act or an instance of taking possession of a person or property by legal right or process (Black's Law Dictionary). While the nuances surrounding the specific forms of seizures in specific contexts vary, seizure is a wholly immutable function of law enforcement. A seizure may only be challenged *post hoc*, where if the defendant prevails the item of evidence may be excluded from use in a criminal trial or, in the most egregious cases, subject the seizing entity to potential §1983 civil action.

Forfeiture, on the other hand, is "the divestiture of property without compensation" (Black's). This transpires after the seizure has been perfected and often precedes the resolution of a criminal complaint, should one even be filed.

In sum, a seizure occurs when the state takes possession of property; a forfeiture occurs when the state takes ownership.

While it is true that if the rules of evidentiary seizure were to be altered, both law enforcement and prosecutors would find performing their compulsory role in the criminal justice system far more difficult. However, no serious forfeiture reform proposal places any restrictions incumbent on evidentiary procedure. Contraband (e.g., drugs) is by its very nature illegal and eligible for seizure without criminal proceedings.

Property Owners are Given Plenty of Due Process

Another canard commonly used by proponents of the status quo is that since aggrieved parties are given a hearing on the disposition of their property, such parties are given "plenty of due process" in which they can contest the forfeiture. While it is accurate that the mere existence of a formal venue to challenge the forfeiture has been held to ostensibly satisfy procedural due process concerns, this is simply not the case in practice.

As a mental exercise, suppose an individual was traveling to another city to purchase a kitchen table located on an online bulletin board. He has in his possession $800 in currency, the purchase price agreed upon with the seller.

Enroute, he is pulled over for failing to properly signal a lane change. Looking into the truck, the officer notices the currency on the passenger seat and mentions how peculiar it is to be traveling with what he deems a subjectively large amount of cash. He then requests to search the vehicle. Having nothing to hide, the driver consents.

The search is ultimately fruitless, save for a discarded potato chip bag. Still, the officer—suspicious of why the driver was travelling with $800 in loose currency—seizes the cash on the suspicion that it was part of the illegal proceeds of a recent drug sale. After all, in his expert opinion people who consume drugs have been known to also consume potato chips. In protest, the driver produces the printed e-mail thread that contained both the negotiations on the table and directions to the seller's house. "Hold on to that," the officer instructed, "you'll need that for the hearing."

The driver receives his notice in the mail two weeks later, informing him that his case will be heard in three days sometime between 8:30 AM and 5:00 PM. He phones his supervisor and requests the day off so he can contest the forfeiture. At 3:37 PM on the scheduled day, his case is called before the bench.

The attorney representing the jurisdiction making the seizure notices the defendant's presence, and immediately requests a continuance so that he may produce the officer who executed the seizure. This puzzled the attorney as a vast majority of civil forfeiture cases in this jurisdiction are disposed of through default judgments. The judge grants the continuance with the case to be heard in another two weeks.

Regardless of outcome of this case, the driver is already without two days' worth of wages (already half the value of the seized cash if calculated hourly at the United States' median income of $50,500) and his employer is without the value of his work product on those two days. If he were to hire an attorney to represent his property interest under the same set of circumstances, the value of the seized cash (and likely more) would be entirely offset with legal expenses.

This hypothetical scenario is wholly plausible in all but six states in the Union. If one were to disregard parallel criminal standard of "beyond a reasonable doubt" as an analogue for a criminal trial—justifiably so, as the litany of protections that attach to criminal proceedings do not apply to *in rem* proceedings—this could easily happen in all but two states.

The case of the Chris and Markela Sourovelis illustrates just how much "due process" an aggrieved party might receive. The Sourovelis' son was caught selling $40 worth of drugs outside of the family's home. While the owners were never charged with a crime, nor the connection of the property to crime substantiated, Mr. and Mrs. Sourovelis were served with an eviction notice and removed from their home. The Sourovelises have been to court four times already, though they still have yet to see a judge. Of course, if they missed just one of their scheduled appearances, the property could be subject to an immediate default judgment in favor of the state (Sibilla).

Worse, some jurisdictions have taken to billing defendants for the prosecution should they assert their property rights in court and fail to prevail. A case referred to the Arizona Supreme Court asserting an "innocent owner" claim produced the following response from the Pinal County prosecutor to the defense attorney in *Cox v. Voyles et al.*:

> "…I have started to ask for fees in every case. Its [sic] more for the education of the judge who is new to her position/young. I suspect you didn't consider attorney fees when you took the case. By asking for fees, I'm reinforcing to the criminal defense bar the risks associated with making a claim in a forfeiture case. I'm sure you may disparage me to your criminal defense brethren for asking for fees, but they will know the risks and rewards better." (Cameron)

This unreconstructed, cavalier approach to prosecutorial work belies an incomplete legal education devoid of the individual rights and liberties enshrined in this country's founding documents. This is inarguably plenty of "process," but one would be hard pressed to justify it being attended by the individual and property rights which are due.

Civil Asset Forfeiture Helps Protect Communities from the Harms Associated with the Drug Trade

This particular *non sequitur* is commonly used by those with a vested interest in maintaining the status quo in forfeiture policy, but with little functional knowledge of market economics. In truth, the process through which the government is able to divest suspected drug dealers and traffickers of their ownership interest in real and personal property without a criminal conviction has no

identifiable connections to the reductions in harm associated with drugs.

Rather, the totality of scholarly literature has shown the contrary to be true. A 2011 meta-analysis of drug market-associated violence conducted by Werb et al. has shown that roughly 90 percent of the studies analyzed demonstrated a significant, marked increase in violence associated with targeted enforcement. These interventions have also failed to reduce the overall drug supply, and were conducted over a period where drug use remained stagnant.

By increasing the operational overhead and reducing profit margins of the drug trade, both traffickers and their dealers, with no recourse for civil dispute resolution, will often violently take matters into their own hands to secure both supply networks and points of distribution. This is done with little to no regard for the well-being of innocent, unconnected individuals who also reside in these neighborhoods.

While tactical prioritization of drug market enforcement is both well within the boundaries of legitimate police function and the public's best interest, to use it as a justification for the unmerited abridgement of fundamental property and due process rights is wanting defense, indeed.

Raising Standards Would Increase Law Enforcement's Partnering with the Federal Government to Increase Forfeitures
Absent other reforms, this has been statistically proven true. When individual states raise the burden of proof placed on those seeking property forfeiture, there is greater incentive to "partner" with federal law enforcement so as to circumvent the tougher-to-satisfy standard. As a consequence, this leads to a lower percentage of net forfeiture proceeds transferred to state and local agencies as the federal government retains no less than 20 percent of total value for their trouble (U.S. Department of Justice).

However, this misses the greater point that, venue notwithstanding, forfeiture motions seek the path of least resistance. That is, when presented with two procedural paths—one through the state's jurisdiction to an elevated standard and one through federal jurisdiction to a lower standard, but with a marked reduction in net gain—the latter venue is more likely to be used. This suggests that the fact pattern involved in these cases would not satisfy the elevated burden of proof.

In January of 2015, then-U. S. Attorney General Eric Holder issued a first-of-its-kind mandate for Department of Justice agencies, forbidding the "adoption" of property seized by state and local law enforcement agencies. While this prevents the rote practice of the simply using the federal government's jurisdiction for its lack of procedural safeguards, the technique only accounted for roughly 14 percent of all equitable sharing transfers (Balko).

While closing off federal courts to state and local agencies who simply want to sidestep state regulation on property forfeiture is certainly progress (albeit limited), the mandate can be easily undone by a new executive administration or the new Attorney General Loretta Lynch, who during her confirmation hearing called asset forfeiture "a wonderful tool." The only viable long-term solution for curbing civil asset forfeiture abuse is wholesale removal of the statute that empowers it. States are well within their authority to forbid subordinate law enforcement agencies to enter into such agreements, or to define the parameters of such partnerships.

What Can States Do to Curtail Civil Asset Forfeiture Abuse?

Abolish Civil Asset Forfeiture
Prerequisite Context: Any state where a criminal conviction is not required to forfeit property.

Description: The easiest method to prevent civil asset forfeiture abuse would be to do away with the practice wholesale. By requiring a criminal conviction before a state may perfect a forfeiture proceeding, the legislature would functionally eradicate all pernicious incentives that exist outside of the criminal process.

While this process would not prevent criminals from facing the full weight of a criminal conviction and losing their ill-gotten property, this would essentially eliminate the prospect of innocent property owners being unduly burdened. The only state to fully eliminate all avenues of civil asset forfeiture abuse thus far has been New Mexico.

Prohibit or Regulate Equitable Sharing with Federal Authorities
Prerequisite Context: Any state permissive of equitable sharing arrangements.

Description: While equitable sharing has been demonstrated as an easy "end-around" for law enforcement and prosecutors who wish to circumvent strict state forfeiture

restrictions, it is not *per se* illegitimate. Equitable sharing remissions—eclipsing over $433 million in FY 2014 alone—include funds seized as part of a cooperative multijurisdictional task force that may result in a criminal conviction.

However, given the usurpation of individual states' police power forfeitures processed through equitable sharing arrangements should be, at a minimum, held to the procedural standards established by the state in which the seizure occurs. This would stop forfeiture motions taking the path of least resistance and processing through the jurisdiction with the lowest threshold of protection for the property owner.

Implement a "Loser Pays" Model

Prerequisite Context: Any state where attorney's fees cannot be assessed to the state when the respondent substantially prevails in a civil forfeiture proceeding.

Description: Commonly referred to as the "English Rule," a loser-pays system of fee shifting would saddle the unsuccessful party to a civil case with some to all of the expenses associated with the proceeding, up to and including court costs and attorney's fees. This would incentivize lawyers to take strong forfeiture defense claims upon contingency and deter prosecuting attorneys from wanton filing of forfeiture motions.

As an important matter of caveat, this should be limited to only the respondent party in a civil asset forfeiture suit. Failing to include such a provision would lead to horrific abuses such as those illustrated in the Arizona case above.

Transferable Indigence

Prerequisite Context: Any state where a civil forfeiture proceeding can occur in tandem with a criminal proceeding **AND** where a conviction is not required to perfect the forfeiture.

Description: When facing the full brunt of the criminal justice process, current criminal jurisprudence holds that the indigent are to be provided with counsel.

This rationale should translate to civil proceedings where owners may lose a critical component to their livelihood should they not be able to mount an effective legal defense. Currently, most states only afford counsel to the indigent civil respondents in matters of family law, medical commitment, and the like. This approach will allow for the indigent respondents to legally assert their ownership interest in forfeiture proceedings.

Provide a Strong "Innocent Owner" Defense

Prerequisite Context: Any state that does not require prosecuting attorneys to establish the property owner's complicity in crime before forfeiting his or her property.

Description: A small procedural change, by requiring that the state substantiate the property owner's involvement in a crime before forfeiting property, would ensure that those unconnected with the suspected offense are not at risk of losing their property. A proposal before the Texas Legislature in 2015 suggested an additional element to be substantiated in forfeiture proceedings: that innocent property owners need not establish their innocence, but rather that the state must demonstrate a property's owner was in fact complicit, albeit to the same low standard as the forfeiture itself (HB 1975 Bill Analysis, 1).

It bears mentioning that divesting an innocent owner of his or her property subject to the weakened burden of proof found in civil asset forfeiture proceedings raises due process concerns. Legislators interested in reinvigorating the innocent owner defense in their state should also consider raising the burden of proof the state must meet to forfeit property.

Send Proceeds to a Communal Fund

Prerequisite Context: Any state where law enforcement or prosecuting attorneys are allowed to keep a portion of forfeited assets.

Description: One solution that has been proffered to sever the direct pecuniary incentive from the practice of forfeiture is by mandating that the funds received go to an account managed by an external entity with oversight on the forfeiting agency. Whether this is a general fund managed by a city council, a state's attorney general, or a comptroller, this would stop the direct benefit to agencies making the seizure in hopes of forfeiting the property.

While this reform would not prevent abusive seizures or forfeitures directly, removing the direct profit incentive would provide a strong disincentive to perfect a forfeiture motion on dubious grounds.

Bolster Reporting Requirements

Prerequisite Context: Any state that does not require reporting or publishing the value of property forfeited.

Description: Few states mandate both collection and publication, granularly or in aggregate, of the forfeited proceeds subordinate agencies collect each year. Those that do often fail to delineate between forfeitures made in

relation to a criminal complaint or conviction and those forfeited in a solely civil capacity.

As Justice Brandeis stressed in his 1913 *Harper's Weekly* column "What Publicity Can Do," sunlight truly is the best disinfectant. Much like body cameras and recorded custodial interrogations, accurate public reporting of criminal and civil forfeiture stands is just as likely to vindicate the good actors who preserve proper constitutional safeguards while laying bare the detrimental misdeeds of those who do not.

Conclusion

The current practice of civil asset forfeiture represents a repugnance to the time-honored tenets of the American criminal justice system. Not only do bad actors run roughshod over the rights of innocent property owners, Americans are frequently denied the totality of due process envisioned in the framing of the Constitution. Worse yet, reform efforts are blunted by well-connected interest groups that directly benefit from the lack of scrutiny placed on the practice.

Simply put, the existence of civil asset forfeiture is wholly anathema to any Westernized, adversarial criminal justice system. To hold the practice as an "important tool in fighting crime" in an intellectually honest debate is to unabashedly want for the return to the inquisitorial justice systems of antiquity. The U.S. Constitution—as direct progeny of the Enlightenment and a reaction to the horrendous abuses of the Star Chamber—holds no justification of the practice of civil asset forfeiture as it is currently used. States wishing to proffer a conservative legal system couched in property rights, due process, and the rule of law should move swiftly to ensure their citizens are protected and criminals are properly punished. ✯

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