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Legislative Reform or Legalized Theft?: Why Civil Asset Forfeiture Must Be Outlawed in Ohio

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LEGISLATIVE REFORM OR LEGALIZED THEFT?: WHY CIVIL ASSET FORFEITURE MUST BE OUTLAWED IN OHIO

ALEX HALLER*

ABSTRACT

Civil asset forfeiture is a legal method for law enforcement to deprive United States citizens of their personal property with little hope for its return. With varying degrees of legal protection at the state level, Ohio legislators must encourage national policy reform by outlawing civil asset forfeiture in Ohio. Ohio Revised Code Section 2981.05 should be amended to outlaw civil asset forfeiture by requiring a criminal conviction prior to allowing the seizure of an individual's property. This Note proposes two plans of action that will restore Ohio resident's property rights back to those originally afforded in the United States Constitution.

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* J.D. expected, Cleveland-Marshall College of Law, December 2019. I would like to extend a huge thank you to my Mom and Grandfather for their endless support and encouragement throughout the years. At the time of this Note's publication, the United States Supreme Court issued an opinion holding that the Eighth Amendment's excessive fines clause is an incorporated protection applicable to the states under the Fourteenth Amendment's Due Process Clause. *See* *Timbs v. Indiana*, 586 U.S. ___, 1 (2019). Additionally, this opinion has yet to affect Ohio civil asset forfeiture laws – the primary focus of this note.

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I. INTRODUCTION

*“[Civil asset forfeiture] has become a tool for unscrupulous law enforcement officials, acting without due process, to profit by destroying the livelihood of innocent individuals, many of whom never recover the lawful assets taken from them. When the rights of the innocent can be so easily violated, no one’s rights are safe.”*¹

In April 2013, police stopped James Leonard in Texas for a traffic violation.² A subsequent search of the vehicle lead law-enforcement officers to a safe in the trunk, which contained \$201,100 and a bill of sale for a Pennsylvania home.³ Law enforcement officials immediately seized the money, citing their belief that the funds were “substantially connected to criminal activity,” including the sale of narcotics, a practice permitted under the state’s civil asset forfeiture laws.⁴ James Leonard’s mother (“Ms. Leonard”) claimed to be the rightful owner of the money from the house sale and sued the government to regain it.⁵ Ms. Leonard appealed an adverse trial court verdict, where unfortunately the Texas Trial Court’s holding was affirmed.⁶ The Appellate Court agreed that Ms. Leonard’s testimony regarding her ownership of the property was not sufficient and she did not meet the criteria for the innocent owner

¹ REPUBLICAN NAT’L COMM., THE REPUBLICAN PARTY PLATFORM 15 (2016), [https://prod-cdn-static.gop.com/media/documents/DRAFT_12_FINAL\[1\]-ben_1468872234.pdf](https://prod-cdn-static.gop.com/media/documents/DRAFT_12_FINAL[1]-ben_1468872234.pdf).

² Ewan Watt & Jordan Richardson, *Justice Thomas Defends Victims of ‘Policing for Profit’*, NAT’L REV. (Mar. 10, 2017), [\\$201,100.00 U.S. Currency v. State](http://www.nationalreview.com/article/445644/civil-asset-forfeiture-clarence-thomas-asks-if-its-constitutional), No. 09-14-00478-CV, 2015 Tex. App. LEXIS 7341, at *1 (Tex. App. July 16, 2015), *cert. denied*, 137 S. Ct. 847 (2017) (Thomas, J., concurring) (agreeing in the judgment on procedural grounds but seriously questioning “whether modern civil –forfeiture statutes can be squared with the Due Process Clause and our Nation’s history”).

³ Watt & Richardson, *supra* note 2; *Leonard*, 137 S. Ct. at 847.

⁴ Watt & Richardson, *supra* note 2; *Leonard*, 137 S. Ct. at 847 (holding the “suspicious circumstances” of the stop and contradictory stories about the money provided by the passengers of the vehicle was sufficient for the government to show “by a preponderance of the evidence that the money was either the proceeds of a drug sale or intended to be used in such a sale”).

⁵ *\$201,000.00 U.S. Currency*, 2015 Tex. App. LEXIS 7341, at *2.

⁶ *Id.* at *10.

defense.⁷ Ms. Leonard subsequently appealed her case to the United States Supreme Court challenging the constitutionality of the procedures used to adjudicate the seizure of her property.⁸ Specifically, Ms. Leonard argued that the Due Process Clause⁹ of the Fourteenth Amendment of the United States Constitution required the state of Texas to carry its burden by clear and convincing evidence rather than by a preponderance of the evidence.¹⁰ Due to procedural issues, the Supreme Court declined to hear her case, leaving her with little recourse to see the money again.¹¹

Although the prior case occurred in Texas, civil asset forfeiture is not a practice Ohioans are fully protected from.¹² In fact, Ohioans are often subjected to the same kind of civil asset forfeiture as Ms. Leonard in Texas. Take Ricardo Fletcher for example. During November 2015, Fletcher attempted to ascertain a friend's whereabouts by leveraging GPS tracking on his phone.¹³ The search ultimately lead Fletcher to a bloody vehicle with its windows broken on a street in Cleveland, Ohio.¹⁴ Immediately upon making this discovery, Fletcher contacted law enforcement.¹⁵ The following day, Fletcher returned to the scene and while conversing with a woman, both of them noticed a gun in their vicinity and subsequently contacted police.¹⁶ When police arrived, Fletcher consented to a search of his vehicle and provided a DNA sample upon law enforcement's request.¹⁷ Following the search of his vehicle, police located and seized \$20,000 in cash that belonged to Fletcher.¹⁸ No indictment or charges of any kind were ever filed.¹⁹ Nor were any forfeiture proceedings, civil or

⁷ *Id.* at *11 (“The innocent owner defense requires a person whose property has been seized for forfeiture to establish, by a preponderance of the evidence, that she: ‘(a) acquired or perfected her ownership interest before or during the act or omission giving rise to forfeiture; and (b) did not know and reasonably should not have known of that act or omission.’”).

⁸ *Leonard*, 137 S. Ct. at 847.

⁹ U.S. CONST. amend. XIV, § 1 (“[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”).

¹⁰ *Leonard*, 137 S. Ct. at 847.

¹¹ *Id.* at 850 (Thomas, J., concurring) (explaining that as Ms. Leonard raised her due process claims for the first time in the Supreme Court, the Texas Court of Appeals lacked the opportunity to address them in the first instance).

¹² See Nick Sibilla, *Ohio Now Requires Criminal Convictions for Many Civil Forfeiture Cases*, FORBES (Jan. 4, 2017), <https://www.forbes.com/sites/instituteofjustice/2017/01/04/ohio-now-requires-criminal-convictions-for-many-civil-forfeiture-cases/#172fbac755cf>.

¹³ *In re Seizure of Approximately \$20,000 U.S. Currency*, No. 104850, 2017 Ohio App. LEXIS 1451, at *2 (Ct. App. Apr. 20, 2017).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at *3.

criminal, initiated against him.²⁰ Fletcher complied with all of law enforcement's demands during the ongoing investigation.²¹ Yet, he still had his life savings seized and found himself navigating Ohio's civil asset forfeiture laws in an attempt to reclaim it.²² After two years in the legal system, Fletcher received an appellate verdict in his favor, affirming the trial court's holding requiring law enforcement to return his \$20,000.²³

Each year, the United States' government seizes hundreds of millions of dollars in cash and property prior to establishing a legal owner's guilt or innocence.²⁴ Law enforcement agencies use federal and state forfeiture laws to perform these seizures and strip American citizens of their property. Civil asset forfeiture, also referred to as civil forfeiture, has become so wide-spread that by 2014, law enforcement officers took more property "legally" than all home and office burglaries combined.²⁵ Under these laws, the government can seize an individual's cash or property on the *mere suspicion* that it is connected to criminal activity; no actual proof is required.²⁶ Additionally, in most cases, no charges or convictions against an individual are required for law enforcement to seize the property.²⁷

Once property has been seized, property owners must traverse through the legal system in their attempt to reclaim it, absent the right to counsel as afforded in a criminal trial.²⁸ A report by the Institute of Justice found that 87% of forfeitures were civil, not criminal, due to dismissed charges.²⁹ "It's troubling that 87% of the time the conviction appears to be irrelevant," declared Lisa Knepper, co-author of the Institute of Justice report.³⁰ The report's statistics illustrate law enforcement's favoritism towards conducting cash and property seizures under the lower standards of evidence

²⁰ *Id.*

²¹ *Id.* at *9 ("[T]he state only made a bare assertion that the investigation was ongoing and that Fletcher was a person of interest, without presenting any evidence of a current ongoing investigation regarding the homicide and Fletcher.").

²² *Id.* at *2.

²³ *Id.* at *9 (holding the trial court properly granted Fletcher's motion for the return of the seized funds).

²⁴ Dick Carpenter et al., *Policing for Profit: The Abuse of Civil Asset Forfeiture*, INSTITUTE FOR JUSTICE 5 (2d ed. Nov. 2015), <https://ij.org/wp-content/uploads/2015/11/policing-for-profit-2nd-edition.pdf>.

²⁵ Alex Emmons, *Jeff Sessions Wants to Make "Legalized Theft" Great Again*, INTERCEPT (July 20, 2017), <https://theintercept.com/2017/07/20/jeff-sessions-wants-to-make-legalized-theft-great-again/>.

²⁶ *Id.*; Carpenter, *supra* note 24, at 2.

²⁷ Emmons, *supra* note 25.

²⁸ *Id.*; *see also* Carpenter, *supra* note 24, at 12.

²⁹ Nathan Pemberton, *Report: Law Enforcement Is on a Property-and-Cash-Seizure Binge and Just Can't Get Enough*, N.Y. MAG. (Nov. 10, 2015), <http://nymag.com/daily/intelligencer/2015/11/police-seizing-more-money-than-ever.html>.

³⁰ *Id.*

required by civil forfeiture proceedings as compared to criminal.³¹ Not surprisingly, the same study found that 88% of Department of Justice civil forfeitures were never challenged.³² Reasons for not challenging a civil forfeiture in court can range from the “inability to afford a lawyer,” to “miss[ing the] deadline to file a claim,” which results in the property in question being presumed “guilty” and permanently taken from its owner.³³ Lawmakers should see a desperate need for civil asset forfeiture policy reform when statistics show for every ten forfeitures, fewer than two property owners ever see a day in court.³⁴

Proponents of civil asset forfeiture see it as a method to thwart criminal enterprises and prevent drug trafficking, as it allows the seizure of cash and other assets.³⁵ It is also arguably an efficient method because it allows law enforcement agencies to use seized proceeds to further battle illegal activity.³⁶ Law enforcement agencies are able to direct the cash and proceeds of property seized towards law enforcement purposes, therefore harming criminals economically and helping law enforcement financially.³⁷ While these goals sound virtuous in theory, statistics show civil forfeiture laws have allowed the spread of an aggressive brand of policing that has spurred the seizure of hundreds of millions of dollars in cash from motorists and others never charged with crimes.³⁸ A Washington Post investigation found that thousands of people have been

³¹ See *supra* text accompanying notes 29–30.

³² Pemberton, *supra* note 29.

³³ *Id.*; see also Carpenter, *supra* note 24, at 12. The report highlights the varying state civil forfeiture litigation processes and argues that citizens do not have much of an option to go without legal representation in a civil forfeiture case:

Illinois offers a particularly egregious example of how civil forfeiture laws discourage people from even trying to get their property back. In Illinois, to challenge a seizure in court, property owners must first pay a bond of \$100 or 10 percent of the property’s value, whichever is greater. The only exceptions are for personal property worth more than \$150,000 and for real property. *Id.* If owners challenge and lose, they must pay the full cost of the civil forfeiture proceedings, including the government’s legal costs, and give up the full value of the bond. Even if they win, they lose 10 percent of the bond on top of whatever attorney costs they accrued.

Carpenter, *supra* note 24, at 12.

³⁴ See Pemberton, *supra* note 29.

³⁵ Michael Sallah et al., *Stop and Seize*, WASH. POST (Sept. 6, 2014), http://www.washingtonpost.com/sf/investigative/2014/09/06/stop-and-seize/?utm_term=.cd5c70cf8cd5.

³⁶ Marian Williams et al., *Policing for Profit the Abuse of Civil Asset Forfeiture*, INSTITUTE FOR JUSTICE 25 (March 2010), https://www.ij.org/images/pdf_folder/other_pubs/assetforfeituretoemail.pdf.

³⁷ German Lopez, *Jeff Sessions Is Letting Police Take More People’s Stuff Even if They Aren’t Convicted of a Crime*, VOX (July 19, 2017), <https://www.vox.com/policy-and-politics/2017/7/18/15985810/jeff-sessions-civil-asset-forfeiture>; see also Sallah, *supra* note 35.

³⁸ Sallah, *supra* note 35; see also Nick Sibilla, *Cops in Texas Seize Millions By ‘Policing for Profit,’* FORBES (June 5, 2014), <https://www.forbes.com/sites/instituteforjustice/2014/06/05/cops-in-texas-seize-millions-by-policing-for-profit/#354c51071a81> (“Between 2001 and 2007, law enforcement agencies seized and kept over 35,000 cars, homes and electronics, forfeiting more than \$280 million. District

forced to fight legal battles that can last more than a year.³⁹ Due to the uncertainty as to whether their money will be returned, most property owners walk away and cut their losses.⁴⁰

Civil asset forfeiture has been employed for centuries under various justifications, providing tens of thousands of Americans little recourse to retrieve lawful property that never should have been the subject of a seizure.⁴¹ Civil asset forfeiture is a violation of an individual's constitutional property rights afforded by the Article I, Section 14 of the Ohio Constitution⁴² and violation of the Due Process Clause⁴³ of the Fourteenth Amendment of the United States Constitution. This practice further violates the procedural presumption of "innocence until proven guilty" afforded in criminal trials, which makes the American justice system so unique. As civil asset forfeiture laws generally place the burden of proof on the owner of the property and impose lower standards on law enforcement officers for seizing property, those who cannot afford to attend court and reclaim their property are more heavily impacted by these practices.⁴⁴ To restore Ohio citizen's property rights to those afforded within the United States Constitution and the Ohio Constitution, various subsections of section 2981 of the Ohio Revised Code, must be further amended to ban civil asset forfeiture by requiring a criminal conviction prior to permitting forfeiture proceedings. Additionally, greater reporting requirements must be imposed on Ohio law enforcement agencies to provide the public with transparency into their forfeiture activities.

This Note proceeds in five parts. Part II provides a brief history of civil asset forfeiture law in the United States and gives a high-level overview of current state of federal and state civil asset forfeiture laws. Part III outlines Ohio's civil asset forfeiture laws under the Ohio Revised Code and highlights the major changes resulting from the legislative reform that took effect in 2017. Although Ohio's forfeiture reform was a step in the right direction, this Note argues Ohio's legislators can go further in their protection of the United States Constitution and Ohio Constitution by further amending these laws. Part IV outlines a proposal for reform to Ohio's civil forfeiture laws that adheres to the constitutional principles outlined by our founding fathers.

attorneys have used these forfeiture funds on ridiculous purchases, including visiting casinos, a vacation to Hawaii and a margarita machine, as seen in the video below.”).

³⁹ Sallah, *supra* note 35.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² OHIO CONST. art. I, § 14 (“The right of the people to be secure in their persons, houses, papers, and possessions, against unreasonable searches and seizures shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched and the person and things to be seized.”). Ohio adopted this identical language from the United States Constitution. *See* U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”).

⁴³ *See supra* text accompanying note 9.

⁴⁴ Sallah, *supra* note 35 (stating that the burden shifts to the owners to regain their property, meaning those who cannot afford attorneys are in trouble).

Lastly, Part V offers a brief conclusion to the Note and encourages Ohio citizens to demand civil asset forfeiture be outlawed in Ohio in an effort to continue paving the way for reform across the United States.

II. BACKGROUND: CIVIL ASSET FORFEITURE IN THE UNITED STATES

A. A Brief History of Civil Asset Forfeiture

Civil asset forfeiture is a legal process employed by law enforcement officers to seize assets from individuals suspected of involvement in criminal activity without necessarily charging the property owners with wrongdoing. The difference between criminal and civil forfeiture proceedings is well described by Supreme Court Justice Thomas in his concurring opinion in *Leonard v. Texas*:

When a state wishes to punish one of its citizens, it ordinarily proceeds against the defendant personally (known as “*in personam*”), and in many cases it must provide the defendant with full criminal procedural protections. Nevertheless, . . . this Court permits prosecutors seeking forfeiture to proceed against the property (known as “*in rem*”) and to do so civilly. *In rem* proceedings often enable the government to seize the property without any predeprivation judicial process and to obtain forfeiture of the property even when the owner is personally innocent (though some statutes, including the one here, provide for an innocent-owner defense). Civil proceedings often lack certain procedural protections that accompany criminal proceedings, such as the right to a jury trial and a heightened standard of proof.⁴⁵

In a civil forfeiture case, the lawsuit is against the property in question not the individual to whom the property actually belongs.⁴⁶ In these cases, the property owner is a third-party claimant and cases are tried in accordance with civil procedure requirements.⁴⁷ A civil forfeiture proceeding is comprised of two separate actions conducted by various government officials.⁴⁸ First, is the actual seizure of the cash or property in question.⁴⁹ Second, is the potential forfeiture of the property based on court proceedings.⁵⁰ Seizure occurs when law enforcement officials confiscate the property suspected to be involved in criminal activity from the property owner.⁵¹ There are very

⁴⁵ *Leonard v. Texas*, 137 S. Ct. 847, 847–48 (2017) (Thomas, J., concurring).

⁴⁶ Jason Snead, *Civil Asset Forfeiture: 7 Things You Should Know*, HERITAGE FOUNDATION (Mar. 26, 2014), <https://www.heritage.org/research/reports/2014/03/civil-asset-forfeiture-7-things-you-should-know>; *see also* Sallah, *supra* note 35 (The seized object is listed as the defendant in the civil action. “Civil asset forfeiture law is among the more unusual areas of American jurisprudence. It does not involve evidence of a crime or criminal charges. It is a civil action against an object, such as currency or a boat, rather than a person.”).

⁴⁷ *See generally* Snead, *supra* note 46.

⁴⁸ Carpenter, *supra* note 24, at 8.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

few limits on what types of property may be seized by law enforcement.⁵² Reports have shown that items seized ranged “from cash, vehicles, airplanes, jewelry, homes, musical instruments, farm implements, home furnishings, electronics, and more.”⁵³ Under federal law, if the owner of the property in question would like to reclaim it, the owner must prove beyond a preponderance of the evidence that the property in question was not used in criminal activity, thus turning the presumption of innocence on its head.⁵⁴ Once a civil asset has been seized, the appropriate prosecutor’s office will file a civil action against the property in order to forfeit it permanently.⁵⁵

Therefore, civil asset forfeiture not only deprives a property owner of the use of his or her personal property, but it also requires the owner to expend time and resources to seek the return of the property in a court of law. When contesting federal forfeiture proceedings, a property owner must meet the preponderance of the evidence standard in proving that the property in question was *not* used in criminal activity.⁵⁶ Failing to appear to contest asset forfeiture proceedings is grounds for permanent removal of the asset from the property owner.⁵⁷ Whether the federal government should be able to take possession of an individual’s property in the absence of a judicial finding of guilt has been debated since before American independence.⁵⁸

Researchers have found that civil asset forfeiture dates back to British maritime laws in the 1600s, where the practice was used as a way to take possession of contraband goods from ships’ owners that were, in many cases, located thousands of miles away and could not be easily prosecuted.⁵⁹ Journalist Michael Krieger noted, “[i]n the Colonial period, the English Crown issued ‘writs of assistance’ that permitted customs officials to enter homes or vessels and seize whatever they deemed contraband.”⁶⁰ Legal scholars have documented how these forfeiture practices angered colonists, who saw the writs as “unreasonable searches and seizures” which deprived

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* Preponderance of the evidence is required in a civil case, as compared with “beyond a reasonable doubt,” which is a more severe test of evidence required to convict in a criminal trial.

⁵⁵ *Id.*

⁵⁶ *Id.* at 16.

⁵⁷ Snead, *supra* note 46.

⁵⁸ Michael Krieger, *Why You Should Never, Ever Drive Through Tenaha Texas*, LIBERTY BLITZKRIEG (Aug. 7, 2013), <https://libertyblitzkrieg.com/2013/08/07/why-you-should-never-ever-drive-through-tenaha-texas/#more-7386>.

⁵⁹ *Id.*; Sarah Stillman, *Taken*, NEW YORKER (Aug. 12, 2013), <https://www.newyorker.com/magazine/2013/08/12/taken>; *see also* Leonard v. Texas, 137 S. Ct. 848, 848–49 (2017) (Thomas, J., concurring) (explaining that an English practice of requiring forfeiture of offending objects used in violation of customs and revenue “took hold in the United States,” where the “First Congress passed laws subjecting ships and cargos involved in customs offenses to forfeiture. Other early statutes also provided for the forfeiture of private ships. These early statutes permitted the government to proceed *in rem* under the fiction that the thing itself, rather than the owner, was guilty of the crime. And, because these suits were *in rem* rather than *in personam*, they typically proceeded civilly rather than criminally.”) (citations omitted).

⁶⁰ Krieger, *supra* note 58.

persons of “life, liberty, or property, without due process” and were among the key grievances that triggered the American Revolution.⁶¹

1. The Comprehensive Crime Control Act of 1984

Forfeiture in its modern form began with federal statutes passed in the 1970s, targeted at organized-crime bosses and drug lords.⁶² Later amendments allowed the seizure of anything thought to have been purchased with tainted funds, whether it was connected to the commission of a crime.⁶³ Even then, forfeiture remained an infrequent resort until 1984 when Congress passed the Comprehensive Crime Control Act of 1984 (“CCCA”).⁶⁴ The CCCA included a provision that permitted local law enforcement agencies to receive up to 80% of the proceeds derived from civil forfeitures obtained in joint operations with federal authorities.⁶⁵ This procedure became known as “equitable sharing.”⁶⁶ Civil forfeiture allowed federal and local governments to “extract swift penalties from white-collar criminals and offer restitution to victims of fraud,” argued Journalist Sarah Stillman.⁶⁷

Prior to the enactment of the CCCA, all proceeds from civil forfeiture proceedings were directed to the general fund of the U.S. Treasury.⁶⁸ After passing the CCCA, all federal forfeiture revenue is returned to the very agencies charged with enforcing the laws, thus heavily incentivizing civil forfeiture efforts.⁶⁹ For the first time, governmental agencies were permitted to receive a substantial financial benefit and use those funds with very limited restrictions.⁷⁰ Additionally, with the creation of “equitable sharing,” state and local agencies coordinating forfeiture efforts with the federal government are entitled to receive a portion of the proceeds resulting from the

⁶¹ *Id.* However, there is still skepticism regarding how heavily this historical practice should influence modern day forfeiture procedures. *See, e.g., Leonard*, 137 S. Ct. at 849 (Thomas, J., concurring) (“In the absence of this historical practice, the Constitution presumably would require the Court to align its distinct doctrine governing civil forfeiture with its doctrines governing other forms of punitive *state* action and property deprivation. I am skeptical that this historical practice is capable of sustaining, as a constitutional matter, the contours of modern practice, for two reasons.”) (citation omitted).

⁶² Stillman, *supra* note 59.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ Shawn Cantor et al., *Civil Asset Forfeiture, Crime, and Police Incentives: Evidence from the Comprehensive Crime Control Act of 1984*, NAT’L. BUREAU OF ECONOMIC RESEARCH (Sept. 2017), <http://www.nber.org/papers/w23873>.

⁶⁶ *Id.*

⁶⁷ Stillman, *supra* note 59.

⁶⁸ Carpenter, *supra* note 24, at 2.

⁶⁹ *Id.* at 5 (“In 1986, the Department of Justice’s Assets Forfeiture Fund took in \$93.7 million in revenue from federal forfeitures. By 2014, annual deposits had reached \$4.5 billion—a 4,667 percent increase. The forfeiture funds of the DOJ and Treasury Department together took in nearly \$29 billion from 2001 to 2014, and combined annual revenue grew 1,000 percent over the period.”).

⁷⁰ *Id.* at 10 (explaining that law enforcement was “using funds to do everything from purchase vehicles to paying overtime”).

forfeited assets.⁷¹ Soon, states began to follow Congress's lead by broadening their own forfeiture laws, while creating incentives to "police for profit."⁷² According to the Department of Justice, in 2013, the Asset Forfeiture Fund collected more than \$2 billion from criminal and civil asset forfeiture.⁷³

B. Attempts at Federal Forfeiture Reform

1. Civil Asset Forfeiture Reform Act of 2000

The CCCA governing forfeited assets has heavily influenced police incentives and granted what some argued to be unconstitutional discretion under the law.⁷⁴ Henry Hyde, the Republican chairman of the House Judiciary Committee, stated, in regard to civil asset forfeiture law, "[u]nfortunately, I think I can say that our civil-asset-forfeiture laws are being used in terribly unjust ways and are depriving innocent citizens of their property with nothing that can be called due process."⁷⁵ Just three years later, on April 25, 2000, the 106th United States Congress passed the *Civil Asset Forfeiture Reform Act of 2000* ("CAFRA"), which modestly revised the Federal criminal code "to establish general rules relating to civil forfeiture proceedings."⁷⁶ Representative Henry Hyde sponsored CAFRA.⁷⁷ Critics of the reform noted that "it left unchanged one of the most troublesome elements of the CCCA, law enforcement's ability to benefit financially from civil forfeiture."⁷⁸

The most significant amendments to federal civil forfeiture proceedings after CAFRA included: the establishment of a 90-day requirement for the Government to file a complaint for forfeiture or return the property; providing enhanced protections for those with standing to contest the forfeiture of the property, but are financially unable to obtain representation by counsel, placing the burden of proof in civil forfeitures on the Government;⁷⁹ declaring that the "innocent owner" defense shall not

⁷¹ *Id.* at 26.

⁷² *Id.* at 10; *see also* Stillman, *supra* note 59.

⁷³ Civil Asset Forfeiture Reform Act of 2014, H.R. 5212, 113th Cong. (2014); *see also* Carpenter, *supra* note 24, at 2 ("The seeds of forfeiture abuse were sown in 1984 when Congress expanded federal civil forfeiture laws and created a financial incentive for law enforcement to forfeit property.").

⁷⁴ Kyla Dunn, *Reining in Forfeiture: Common Sense Reform in the War on Drugs*, FRONTLINE, <https://www.pbs.org/wgbh/pages/frontline/shows/drugs/special/forfeiture.html> (last visited Nov. 27, 2018).

⁷⁵ Stillman, *supra* note 59.

⁷⁶ Civil Asset Forfeiture Reform Act of 2000 (CAFRA), Pub. L. No. 106-85, 114 Stat. 202.

⁷⁷ *Id.*

⁷⁸ Carpenter, *supra* note 24, at 10.

⁷⁹ Federal civil forfeiture proceedings still apply the "preponderance of the evidence test" when determining whether the property in question was used in the commission of a crime. However, CAFRA "[d]irects the Government, if its theory of forfeiture is that the property was used to commit or facilitate the commission of a criminal offense, or was involved in such commission, to establish that there was a substantial connection between the property and the offense." *See* Civil Asset Forfeiture Reform Act of 2000 (CAFRA), Pub. L. No. 106-85, 114 Stat. 202.

be forfeited under any civil forfeiture statute;⁸⁰ directing that all civil forfeitures of real property and interests in real property proceed as judicial forfeitures; and, enhancing Department of Justice reporting requirements to Congress.⁸¹

2. The Civil Asset Forfeiture Reform Act of 2014

Unfortunately, subsequent to the passage of CAFRA, state and local law enforcement agencies continued to operate with lax controls surrounding their officers' forfeiture procedures.⁸² Studies have found when certain states were facing fiscal crises, legislators expanded the reach of the state's forfeiture statutes and enabled law enforcement to use the revenues however they saw fit.⁸³ To respond to criticisms and overbearing evidence of abuse, Congressmen Tim Walberg introduced the *Civil Asset Forfeiture Reform Act of 2014* in the House of Representatives.⁸⁴ The purpose of the bill is to strengthen personal property rights under the Fifth Amendment and to ensure due process of law by reforming civil asset forfeiture laws.⁸⁵ The bill's supporters argue, under current law, that agencies like the Internal Revenue Service and Department of Justice may take property suspected to be in connection with a crime without charging the property owner of a crime—a clear violation of due process.⁸⁶ The bill was introduced “to restore the balance of power away from the government and back to protecting individual rights and due process.”⁸⁷

The bill's most notable change to current asset forfeiture laws would include raising the burden of proof for evaluating a forfeiture from a “preponderance of the evidence,” to “clear and convincing evidence,” requiring the government to have more concrete proof of the property's connection to a crime.⁸⁸ The bill would also shift the burden of proof for the “Innocent Owner Defense” from the owner of the property to the government.⁸⁹ It would further expand the reporting requirements for the Department of Justice's Asset Forfeiture Fund, thereby enhancing the Department's reporting requirements to Congress.⁹⁰ In an attempt to defer to state regulations, the bill requires the Department of Justice to ensure “any equitable sharing with local or state agencies from forfeitures do not violate state laws or limitations.”⁹¹ This effectively bans the Department of Justice from sharing forfeitures with states that

⁸⁰ It is important to note that while CAFRA affirmed a property owner's right to declare the innocent owner defense, under current federal law the burden is still on the claimant to prove that he/she is an innocent owner by a preponderance of the evidence.

⁸¹ Carpenter, *supra* note 24, at 10.

⁸² Stillman, *supra* note 59.

⁸³ *Id.*

⁸⁴ Civil Asset Forfeiture Reform Act of 2014, H.R. 5212, 113th Cong. (2014).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

prohibit civil forfeiture and subjecting the Department of Justice to state guidelines for usage of those funds.⁹² Unfortunately, since being introduced in 2014, the bill only has twenty cosponsors and was assigned for revision to the Crime, Terrorism, Homeland Security, and Investigations Committee by the House Judiciary.⁹³

3. Trump vs. Congress in Forfeiture Reform

In July 2017, the White House took a stance on civil forfeiture at the exact opposite end of the spectrum from CAFRA and the Civil Asset Forfeiture Reform Act of 2014 bill introduced into the House of Representatives.⁹⁴ Donald Trump's Justice Department revived a federal program that gives state and local law enforcement more power to seize property from people who have not been convicted of a crime.⁹⁵ The Justice Department reopened a specific loophole that allows state and local police to sidestep state laws through a practice known as adoptive forfeitures.⁹⁶ The loophole allows state and local law enforcement to continue to pillage the property of citizens even in the face of local bans on the practice, as long as they refer the case to federal agencies after they seize property.⁹⁷ "The loophole" had been a thirty-year policy of the Department of Justice, until the Obama administration banned it in 2015.⁹⁸

In an interesting turn of events, the House of Representatives approved an amendment to the "Make America Secure and Prosperous Appropriations Act" that would roll back the expansions of asset forfeiture under the Trump administration.⁹⁹ The amendment is currently waiting to be voted on by the Senate. As any recent attempt at federal reform has been stalled, States have elected to take regulation of civil asset forfeiture practices into their own hands and continue to amend their asset forfeiture policies and procedures.

C. The Various State Policies Regarding Civil Forfeiture

Almost all states and the District of Columbia have their own civil forfeiture laws, which vary in required procedures and financial incentives.¹⁰⁰ When evaluating the differences, it is most important to consider "the standard of proof that must be met to forfeit the seized property and which party has the burden to prove innocence or guilt."¹⁰¹ State forfeiture laws range from those where nearly forty-percent of law enforcement budgets are derived from forfeitures, to outright banning civil forfeiture

⁹² *Id.*

⁹³ *Id.*

⁹⁴ Emmons, *supra* note 25.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ Zaid Jilani, *In Surprise Vote, House Passes Amendment to Restrict Asset Forfeiture*, INTERCEPT (Sept. 12, 2017), <https://theintercept.com/2017/09/12/in-surprise-vote-house-passes-amendment-to-restrict-asset-forfeiture/>.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

by requiring a criminal conviction before a person's property can be seized.¹⁰² From 2010 to 2015, various news outlets released studies and articles highlighting how wide-spread forfeiture has become in the United States and how most states' laws violated basic citizen property rights.¹⁰³ Thankfully, the investigative research performed by constitutional rights activist groups did not fall on deaf ears and lawmakers began to take note. As of 2015, a study found that "five states (New Mexico, Nevada, Montana, Minnesota, and Michigan) and the District of Columbia had substantively reformed civil asset forfeiture laws" to provide added protection to property owners in accordance with the Constitution.¹⁰⁴ Despite a minority of states electing to reform their civil asset forfeiture laws, the truth remains that federal and a majority of state civil forfeiture regulations continue to put innocent property owners at risk.¹⁰⁵

In a study published in 2015, the Institute for Justice found that civil forfeiture far outpaces criminal forfeiture.¹⁰⁶ The study noted that "[j]ust 13% of Department of Justice forfeitures from 1997 to 2013 were criminal forfeitures; 87 percent were civil forfeitures."¹⁰⁷ Further, among those civil forfeitures, eighty-eight percent took place "administratively."¹⁰⁸ The study further found that "state and local law enforcement participation with the federal government via 'equitable sharing'" skyrocketed in recent years and find it unlikely that this trend will reverse.¹⁰⁹ Lastly, the Institute noted that "most state and federal civil asset forfeiture laws lack even basic transparency requirements, leaving the public in the dark about most forfeiture activity."¹¹⁰

¹⁰² Stillman, *supra* note 59.

¹⁰³ See, e.g., Sallah, *supra* note 35 ("To examine the scope of asset forfeiture since the terror attacks, The Post analyzed a database of hundreds of thousands of seizure records at the Justice Department, reviewed hundreds of federal court cases, obtained internal records from training firms and interviewed scores of police officers, prosecutors and motorists."); Carpenter, *supra* note 23, at 3 ("This second edition of *Policing for Profit* highlights the continued need for forfeiture reform. Updated grades for state and federal civil forfeiture laws find that protections against unjust forfeitures still range from bad to worse, and too many laws incentivize revenue generation over the impartial administration of justice. This edition also shows—with far more extensive data than previously available—that law enforcement's use of forfeiture continues to grow. Furthermore, this second edition shines a spotlight on the appalling lack of transparency in the use of forfeiture and its proceeds.").

¹⁰⁴ Carpenter, *supra* note 23, at 23.

¹⁰⁵ *Id.* at 6.

¹⁰⁶ *Id.* at 5.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* "Administrative forfeitures happen automatically when a property owner fails to challenge a seizure in court," meaning the cases are never heard before a judge and property owners never see a day in court. *Id.*

¹⁰⁹ *Id.* at 6 ("The Department of Justice announced new policies in January 2015 intended to curb one type of equitable sharing—federal 'adoptions' of locally seized assets. But the changes and subsequent clarifications largely left intact another vehicle for equitable sharing—joint task forces and investigations involving federal law enforcement.").

¹¹⁰ *Id.* at 7.

Unfortunately, deriving in-depth state statistics regarding forfeiture activity is impossible due to the lack of public reporting requirements.¹¹¹ However, the Institute determined in 2012 (the last year the most consistent data was available) alone, “state and local agencies in 26 states and the District of Columbia took in more than \$254 million through forfeiture.”¹¹² The state of Texas led the states in forfeiture collections with “\$46 million, followed by Arizona with \$43 million, and Illinois with nearly \$20 million.”¹¹³ Due to the required filings, fee payments, and court appearances required to contest civil asset forfeitures, many property owners never make it to court.¹¹⁴ Another significant reason property owners fail to contest forfeitures relates to the low value of property frequently at stake.¹¹⁵ “For property worth less than \$200, a mere 3 percent of owners attempt to retrieve it, but as the value of seized property increases so do the percentage of owners willing to contest an attempted forfeiture.”¹¹⁶ If property owners choose to take on the daunting task of reclaiming their property in court, state laws often only require prosecutors to meet low standards of evidence due to the civil nature of the lawsuit.¹¹⁷

As part of the study, the Institute assigned grades to each state’s civil forfeiture laws, after evaluating the threat the laws posed to innocent property owners.¹¹⁸ Three fundamental elements of civil forfeiture laws were examined by the Institute when calculating grades: (1) “the financial incentive”; (2) “the standard of proof the government must meet to forfeit the property”; and, (3) “whether the burden to prove innocence or guilt is on the innocent third-party owners or the government.”¹¹⁹ A high grade (*i.e.*, an “A”) from the Institute signified “laws that limit or ban forfeiture proceeds directed to law enforcement and offer strong protections to citizens against unjust forfeitures.”¹²⁰ As a result of investigations performed, an astounding thirty-five states, or seventy-percent, received a grade of D+ or lower.¹²¹ Even worse, the

¹¹¹ *Id.* at 11.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.* at 12.

¹¹⁵ *Id.* (“[T]he Institute for Justice was able to obtain property-level forfeiture data for 10 states from 2012, allowing median property values to be calculated. In those states, the median value of forfeited property ranged from \$451 in Minnesota to \$2,048 in Utah.”).

¹¹⁶ *Id.* (“In Minnesota, for instance, law enforcement took 34,000 pieces of property, including vehicles, cash and homes, between 2003 and 2010—the equivalent of one piece of property from every other family in St. Paul, the state capital. Yet over one six-month period, 66 percent of forfeitures went unchallenged by property owners. Overall, from 2003 to 2010, Minnesotans saw the return of their property in just 10 percent of cases.”).

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 14.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 6.

¹²¹ *Id.*

Institute found that Federal civil forfeiture laws were some of the worst offenders, earning a D-.¹²²

1. Financial Incentives for Law Enforcement

Civil asset forfeiture laws create financial incentives for law enforcement when the proceeds of forfeited property may be used by the agency enforcing the law with little to no restrictions on how those proceeds may be spent.¹²³ As of 2015, only seven states and the District of Columbia prohibit law enforcement from accessing proceeds from forfeited assets.¹²⁴ The remaining forty-three states permit law enforcement to use anywhere from forty-five to one-hundred percent of the proceeds from forfeited property at their total discretion.¹²⁵

2. Standard of Proof

Those property owners who ultimately decide to challenge a pending forfeiture are at a significant disadvantage.¹²⁶ That disadvantage is a direct result of the low standard of proof a prosecutor must meet under civil forfeiture laws.¹²⁷ As of 2015, thirty-one states and the federal government apply the “preponderance of the evidence” standard for proof of all civil asset forfeitures, making it the most common standard nationally.¹²⁸ This standard requires law enforcement to show that the property in question was more likely than not connected to a crime and is often referred to as the “51 percent standard.”¹²⁹ There are two states, namely Massachusetts and North Dakota, that maintain an even lower standard—requiring only probable cause to forfeit an individual’s property.¹³⁰ On the contrary, in an effort to protect their citizen’s constitutional rights, “a growing number of states have begun demanding a higher standard of proof for civil asset forfeitures.”¹³¹ The lower the standard of proof, the

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* Note, at the time the study was performed, Ohio permitted one-hundred percent of the value of forfeited assets to be used at law enforcement discretion.

¹²⁶ *Id.* at 16.

¹²⁷ *Id.* (explaining that the standard of proof is what the government must show to win a civil forfeiture case and dictates how convincing the government’s evidence must be to a judge).

¹²⁸ *Id.*

¹²⁹ *Id.* (“[M]eaning the evidence must be a bit more than 50-50-or slightly better than a coin flip-in favor of the government, a much lower hurdle than beyond a reasonable doubt”).

¹³⁰ *Id.* (“Probable cause is the same low evidentiary standard that police must meet in order to make an arrest, carry out a search or seize property in the first place”).

¹³¹ *Id.* at 17. As Carpenter summarized:

North Carolina requires criminal convictions in most cases. California sets a standard of beyond a reasonable doubt to forfeit most kinds of property, with a conviction required In 2015, New Mexico abolished civil forfeiture. It now requires a criminal conviction with proof beyond a reasonable doubt for all forfeitures; after securing a conviction, the government must prove in the same criminal proceeding that seized property is connected to the crime by ‘clear and convincing evidence,’ a standard lower

easier the civil forfeiture case becomes for the government to win, resulting in a more difficult case for property owners.¹³²

3. Burden to Prove Innocence or Guilt

Currently, only ten states and the District of Columbia actually require the government to prove the property owner was involved in illegal activity prior to forfeiting the property.¹³³ Depending on the state, property owners can be subject to civil asset forfeiture without a criminal conviction or can lose their property when another individual allegedly uses it during the commission of a crime.¹³⁴ In the remaining forty states, the type of property involved determines which party has the burden of proof.¹³⁵

III. OHIO CIVIL ASSET FORFEITURE LAW

This Note specifically proposes reform to Ohio civil asset forfeiture laws, therefore, it is important to highlight the relevant Ohio Revised Code sections and recent amendments thereof. Ohio enacted its first state forfeiture laws in 2007 with Section 2981 of the Ohio Revised Code titled “Forfeiture.”¹³⁶ Ohio legislators made few changes to the forfeiture laws initially enacted until gross abuse of power by law enforcement was uncovered and reported by the media.¹³⁷ A study published in 2015 found that Ohio’s forfeiture laws were among the worst in the country, encouraging legislative reform which passed and became effective in 2017.¹³⁸ The study found “that Ohio law enforcement acquired at least \$25.7 million” in forfeitures based on incomplete records provided by the Attorney General.¹³⁹ Additionally, the study

than reasonable doubt but higher than preponderance of the evidence. Minnesota, Montana, Nevada and Vermont now also demand criminal convictions, followed by civil trials linking seized property to the crime by clear and convincing evidence. Missouri requires a criminal conviction and proof by a preponderance of the evidence that seized property is connected to the crime; Oregon law is similar for forfeitures of personal property (which account for most forfeitures) but sets a higher standard of clear and convincing evidence to forfeit real property. Six states—Colorado, Connecticut, Florida, Michigan, New York and Utah—demand that the government provide clear and convincing evidence of a property’s connection to criminal activity for most or all civil forfeitures. The remaining states and the District of Columbia apply different standards to different types of property or under different circumstances.

¹³² *Id.* at 18.

¹³³ *Id.* at 20.

¹³⁴ *Id.* at 18.

¹³⁵ *Id.* at 20 (when the study was released in 2015, in Ohio the burden to prove innocence was placed on the property owner. Subsequent to reform in Ohio, the burden to prove had subsequently been placed on the government).

¹³⁶ OHIO REV. CODE ANN. § 2981 (West 2017).

¹³⁷ Jackie Borchardt, *Ohio Police Can’t Keep Seized Property Until Charges Are Filed, Under Bill That Passed Senate*, CLEVELAND.COM (Dec. 9, 2016), https://articles.cleveland.com/politics/index.ssf/2016/12/civil_asset_forfeiture_reforms.amp.

¹³⁸ Carpenter, *supra* note 24, at 116.

¹³⁹ *Id.* at 116 (“Data used within the study included forfeitures from state and local agencies provided to the Ohio attorney general and obtained by the Institute for Justice through an Ohio

determined that Ohio law enforcement officials were among the worst offenders of participating in the Department of Justice's equitable sharing program, "ranking the state 43rd nationally."¹⁴⁰

With little-to-no change in civil asset forfeiture laws in the federal realm, Ohio government officials elected to take reform into their own hands.¹⁴¹ In January 2017, Governor Kasich signed various amendments into Ohio law governing asset forfeiture.¹⁴² Under prior law, state and local law enforcement officials were permitted to seize property without convicting or even charging an individual with a crime.¹⁴³ But now, Ohio joined seventeen other states in recent years that have overhauled their civil asset forfeiture laws in response to media investigations and reports from civil liberties groups that revealed shocking numbers of individuals who have had their cash, cars, and homes seized.¹⁴⁴ One of the most notable revisions to Section 2981, is the requirement of a criminal conviction before law enforcement can permanently confiscate property where property is valued under \$15,000, effectively outlawing civil asset forfeiture on property valued below this amount.¹⁴⁵ Ohio's recent reform also switches the burden of proof from the defendant to the government to prove by clear and convincing evidence that the property is connected to a crime.¹⁴⁶

A. Financial Incentives for Ohio Law Enforcement

As previously discussed, financial incentives are created for law enforcement in the civil forfeiture realm when the officials enforcing the laws are permitted to keep the cash and proceeds of forfeited property and use it with little to no restrictions. Recently amended Section 2981.05(D)(1) now bars all civil asset forfeiture proceedings for proceeds¹⁴⁷ less than \$15,000. The Institute of Justice obtained forfeiture for ten states and found the median amount seized in a civil forfeiture case

Public Records Act request. The Institute noted that several state agencies did not report to the attorney general and several reports contained forfeited vehicles for which no value and/or proceeds were listed. The lack of data regarding Ohio forfeitures is a result of the elimination of the reporting requirement to the attorney general in 2012.”)

¹⁴⁰ *Id.* at 117.

¹⁴¹ Nick Sibilla, *Ohio Now Requires Criminal Convictions for Many Civil Forfeiture Cases*, FORBES (Jan. 4, 2017), <https://www.forbes.com/sites/instituteforjustice/2017/01/04/ohio-now-requires-criminal-convictions-for-many-civil-forfeiture-cases/#172fbac755cf>.

¹⁴² *Id.*

¹⁴³ C.J. Ciaramella, *Ohio Legislature Passes Civil Asset Forfeiture Reform*, REASON (Dec. 9, 2016), <http://reason.com/blog/2016/12/09/ohio-legislature-passes-civil-asset-forf> (noting the original bill passed by the Ohio house of representatives would have eliminated asset forfeiture altogether by barring forfeiture in cases where no conviction was obtained but was softened in responses to concerns from law enforcement).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*; OHIO REV. CODE ANN. § 2981.05(D)(1) (West 2017).

¹⁴⁶ OHIO REV. CODE ANN. § 2981.05(D)(3) (West 2017); Ciaramella, *supra* note 143.

¹⁴⁷ OHIO REV. CODE ANN. § 2981.01(A)(11)(a) (West 2017). Section 2981.01 defines “proceeds” as: “[i]n cases involving unlawful goods, services, or activities, ‘proceeds’ means any property derived directly or indirectly from an offense.” *Id.* “‘Proceeds’ may include, but is not limited to, money or any other means of exchange.” *Id.*

“ranged from \$451 in Minnesota to \$2,048 in Utah.”¹⁴⁸ Therefore, this \$15,000 barrier is likely to deter a significant amount of civil forfeiture proceedings that would have otherwise consumed the state court’s time and resources.

Further, the legislature amended Section 2981.14(B) as follows:

A law enforcement agency or prosecuting authority shall not directly or indirectly transfer or refer any property seized by the agency or authority to any federal law enforcement authority or other federal agency for purposes of forfeiture under federal law unless the value of the seized property exceeds one hundred thousand dollars.¹⁴⁹

By forbidding the transfer of property seized to be transferred to federal law enforcement agencies unless it exceeds \$100,000, this amendment actively discourages participation in the “equitable sharing” program under federal law. Surprisingly, Ohio lawmakers elected to not revise Section 2981.13(b) which still allows for law enforcement agencies conducting the forfeitures to transfer all of the cash and proceeds of forfeited property to “the law enforcement trust fund of the prosecutor and to the following fund supporting the law enforcement agency that substantially conducted the investigation.”¹⁵⁰ This leaves room for law enforcement agencies to participate in forfeitures with the federal government exceeding statute thresholds and keep the proceeds for discretionary use.

B. Standard of Proof

The current standard of proof required in Ohio for civil forfeiture proceedings is the “clear and convincing evidence” standard.¹⁵¹ Ohio raised the standard as part of 2017 reform from the “beyond a preponderance of the evidence” standard that is used by a majority of states.¹⁵² The preponderance of the evidence test is what most generally refer to as a “51% test,” requiring a better chance (than not) that the property in question was used in the commission of a crime.¹⁵³ “The clear and convincing evidence test requires the government to prove that it is *substantially* more likely than not that the property seized was used in a crime.”¹⁵⁴ Although there are no strict percentage guidelines, this evidence standard is said to fall somewhere between fifty-one percent and ninety-nine percent certainty.¹⁵⁵

¹⁴⁸ Carpenter, *supra* note 23, at 169 (States for which data was reviewed included: California, Connecticut, Illinois, Minnesota, Missouri, Rhode Island, Tennessee, Utah, Virginia, and Wyoming).

¹⁴⁹ OHIO REV. CODE ANN. § 22981.14(B) (West 2017).

¹⁵⁰ *Id.* § 2981.13(b).

¹⁵¹ *Id.* § 2981.05(D)(3).

¹⁵² Carpenter, *supra* note 24, at 150.

¹⁵³ *What Is “Clear and Convincing Evidence,”* ROTTENSTEIN LAW GROUP LLP, <http://www.rotlaw.com/legal-library/what-is-clear-and-convincing-evidence/>.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

C. The Government's Burden to Prove Guilt

In accordance with Section 2981.05(D)(3), in civil forfeiture proceedings, “the state has the burden to prove by clear and convincing evidence” that the property owner received the proceeds involved, the property owner knew or had reasonable cause to believe the proceeds were derived from the commission of an offense, and that the value of the property in question exceeds \$15,000.¹⁵⁶

D. “Reform” in Ohio – What’s Next?

Speaking on the floor of the Ohio Senate, Senator Kris Jordan said that while abolishing civil forfeiture would be “ideal,” the bill still “moves us in the right direction.”¹⁵⁷ The question is, does it move us *far enough* in the right direction? Is this “policy reform” really in line with the expectations of United States citizens and more specifically Ohio constituents? According to a poll last year by the Cato Institute, eighty-four percent of Americans oppose property seizures from people not convicted of a crime.¹⁵⁸ Federal elected officials are recognizing the concerns of their constituents, but still failing to fully address them in an attempt to appease law enforcement officials.¹⁵⁹

While the reform to Section 2981 of the Ohio Revised Code is a step in the right direction, the solution to restoring Ohio citizen’s property rights to those afforded via the Article I, Section 14 of the Ohio Constitution and the Fourteenth Amendment of the United States Constitution is easy. Ohio must simply outlaw civil asset forfeiture and forbid state officials from participating in “equitable sharing” programs with federal law enforcement agencies. A common pain point lawmakers cite when civil asset forfeiture reform is unsuccessful is the resistance from law enforcement officials killing the bills.¹⁶⁰ It is worth noting that the original bill passed by the Ohio House of Representatives earlier in 2017 would have eliminated civil asset forfeiture altogether, barring forfeiture in cases where no conviction was obtained, but it was softened in response to concerns from law enforcement.¹⁶¹ Part IV of this Note further substantiates the need to ban civil asset forfeiture in Ohio and provides Ohio Lawmakers with a “Plan B.”

IV. PROPOSAL FOR POLICY REFORM

Ohio’s civil asset forfeiture laws, while recently amended with property owner’s rights in mind, do not provide Ohio citizens with sufficient property protections.¹⁶²

¹⁵⁶ OHIO REV. CODE ANN. § 2981.05(D)(3)(a)-(c) (West 2017).

¹⁵⁷ Sibilla, *supra* note 141 (discussing the recent passage of civil asset forfeiture reform passed in Ohio in 2017).

¹⁵⁸ Emmons, *supra* note 25.

¹⁵⁹ Carpenter, *supra* note 23, at 43.

¹⁶⁰ *Id.* at 24; *see also* Ciaramella, *supra* note 143.

¹⁶¹ Emmons, *supra* note 25; *see also* Carpenter, *supra* note 24, at 24 (“A common refrain in the states where reform efforts have been unsuccessful is that resistance from law enforcement leaders killed the bills.”).

¹⁶² Nick Sibilla, *Ohio Now Requires Criminal Convictions for Many Civil Forfeiture Cases*, FORBES (Jan. 4, 2017), <https://www.forbes.com/sites/instituteforjustice/2017/01/04/ohio-now-requires-criminal-convictions-for-many-civil-forfeiture-cases/#8b5853255cfa>.

Not only do they violate Article I, Section 14 of the Ohio Constitution, but further violate the Due Process Clause of the Fourteenth Amendment of the United States Constitution. When an individual is deprived of his or her property temporarily, and most times permanently, based on laws passed to appease law enforcement and evade strict criminal standards of proof, one's right to due process has been violated. To restore fundamental property rights in balance with the Ohio Constitution, the United States Constitution, and to promote judicial efficiency, Ohio must outlaw civil asset forfeiture.

A. Plan A: Outlaw Civil Asset Forfeiture in Ohio

Ohio's civil forfeiture laws pose a significant threat to the property rights of its citizens.¹⁶³ These laws encourage law enforcement "to favor the pursuit of property over the pursuit of justice," and typically make it impossible to recover seized property.¹⁶⁴ Further, without meaningful transparency, the public has no way to hold law enforcement accountable.¹⁶⁵

To further protect Ohioan's constitutional property rights, Ohio legislators should amend Section 2981.05 of the Ohio Revised Code to outlaw civil asset forfeiture by requiring a criminal conviction prior to allowing the seizure of an individual's property. If the property in question is "under suspicion of involvement of criminal activity," to promote due process and judicial efficiency, there should be a crime charged for which the property in question can be tied back to. As The Washington Post's Tim Walberg eloquently stated, "[i]n a country founded on principles of due process and property rights, no one should be comfortable with a system that allows law enforcement to seize personal property without a finding of guilt or, in many cases, even leveling a criminal charge."¹⁶⁶

Additionally, lawmakers should eliminate financial incentives for law enforcement officials to take property. This can be accomplished by banning participation in "equitable sharing" and requiring transparency in reporting of forfeiture activity and spending. Ohio lawmakers should revise Section 2981.14(B) to forbid state and local law enforcement agencies from participating in such programs with the federal government. Lastly, all funds acquired from forfeitures should be directed to a type of State General Fund, as opposed to the current process under Section 2981.13(b), which permits one-hundred percent of forfeiture proceeds to be retained by the law enforcement agency that seized the property. Laws permitting civil asset forfeiture have allowed for corrupt practices to run rampant and have caused innocent individuals to lose their property with little hope of return. Ohio must join the other

¹⁶³ Carpenter, *supra* note 24, at 7.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ Tim Walberg, *Stopping the Abuse of Civil Forfeiture*, WASH. POST (Sept. 4, 2014), https://www.washingtonpost.com/opinions/tim-walberg-an-end-to-the-abuse-of-civil-forfeiture/2014/09/04/e7b9d07a-3395-11e4-9e92-0899b306bbea_story.html?utm_term=.6ffaf3ad6e8c.

two¹⁶⁷ states that have outlawed civil asset forfeiture completely to encourage reform across the country.

1. Unconstitutionality of Section 2981 Under the Ohio Constitution

Using the legal system to evade higher standards of proof required for criminal convictions to seize lawful property is a violation one's right to freedom from unreasonable searches and seizures afforded by the Ohio Constitution.¹⁶⁸ Article I, Section 14 of the Ohio Constitution, which has language almost identical to the Fourth Amendment of the United States Constitution, affords Ohioans coextensive protections against unreasonable searches and seizures.¹⁶⁹ Additionally, prior to the issuance of a search warrant, the judicial officer issuing such a warrant must be supplied with sufficient information to support an independent judgment that probable cause exists for the warrant.¹⁷⁰

With the Constitution's strong declaration of property rights and State constitutions affording similar rights to their citizens, civil asset forfeiture laws seem to be a direct violation of what the framers of the Constitution's intended. Section 2981.05 of the Ohio Revised Code currently permits law enforcement officers to seize property valued at \$15,000 or more if they suspect the property was involved in the commission of a crime or proceeds thereof.¹⁷¹ This means there is no judicial process prior to an individual's asset being seized which is valued at or above that amount and law enforcement officers will commence forfeiture proceedings in an attempt to permanently deprive the individual from his or her asset(s).¹⁷² To prevent the asset(s) from automatically remaining in the government's possession, the property owner must go to court and contest the forfeiture.¹⁷³ Further, because this is a civil proceeding, there is no right to an attorney or trial by jury of one's peers.¹⁷⁴

The ability to deprive an individual of one's property valued at \$15,000 or greater without actually charging anyone with committing a crime clearly constitutes an "unreasonable seizure," in direct violation of the Ohio Constitution.¹⁷⁵ Further, throughout the trial proceedings, the government is only required to prove beyond clear and convincing evidence that the property was used in the commission of a crime.¹⁷⁶ This is a lower standard than the beyond a reasonable doubt standard requires

¹⁶⁷ Scott Shackford, *This Map Details Whether Asset Forfeiture Laws in Your State Are Good or Awful*, REASON (June 9, 2015), <https://reason.com/blog/2015/06/09/this-map-details-whether-asset-forfeiture> (the two states are New Mexico and North Carolina).

¹⁶⁸ See *supra* text accompanying note 42.

¹⁶⁹ See *supra* text accompanying notes 9 and 42.

¹⁷⁰ OHIO CONST. art. I, § 14.

¹⁷¹ OHIO REV. CODE ANN. § 2981.05(D)(1) (West 2017).

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ See *supra* text accompanying note 44.

¹⁷⁵ OHIO CONST. art. I § 14; OHIO REV. CODE ANN. § 2981.05(D)(1) (West 2017).

¹⁷⁶ OHIO REV. CODE ANN. § 2981.05(D)(3) (West 2017).

in criminal cases.¹⁷⁷ The two standards of proof should be aligned, requiring the government to prove the property was used in the commission of a crime beyond a reasonable doubt. If an asset can be seized under civil asset forfeiture law if it is “suspected to be involved in the commission of a crime,” the standard of proof should align with that of a *criminal* trial.¹⁷⁸

2. Unconstitutionality of Section 2981 Under the United States Constitution

Civil asset forfeiture proceedings have long been argued to be violations of due process afforded via the Fourteenth Amendment of the United States Constitution.¹⁷⁹ When faced with due process claims, the Supreme Court in particular has justified its unique constitutional treatment of civil asset forfeiture largely by reference to a discrete historical practice that existed when the United States was founded.¹⁸⁰ As Supreme Court Justice Thomas noted in *Leonard v. Texas*:

An English practice of requiring forfeiture of offending objects used in violation of customs and revenue laws “took hold in the United States,” where the “First Congress passed laws subjecting ships and cargos involved in customs offenses to forfeiture.” Other early statutes also provided for the forfeiture of pirate ships. These early statutes permitted the government to proceed *in rem* under the fiction that the thing itself, rather than the owner, was guilty of the crime. And, because these suits were *in rem* rather than *in personam*, they typically proceeded civilly rather than criminally.¹⁸¹

However, Justice Thomas further noted how the historical forfeiture laws were significantly narrower than modern ones.¹⁸² Based on the large evidence of abuse of power under civil asset forfeiture laws across the country, it is unlikely that the seizure of an individual’s property, without being required or even charging them with a crime, was in line with the Framers of the Constitution’s idea of “property rights.” Americans have a right to presumed innocence, making the idea of the government’s

¹⁷⁷ See *supra* text accompanying notes 119–26.

¹⁷⁸ In *Leonard v. Texas*, Justice Thomas noted, “Whether forfeiture is characterized as civil or criminal carries important implications for a variety of procedural protections, including the right to a jury trial and the proper standard of proof. Indeed, as relevant in this case, *there is some evidence that the government was historically required to prove its case beyond a reasonable doubt.*” *Leonard v. Texas*, 137 S. Ct. 848, 849 (2017) (Thomas, J., concurring).

¹⁷⁹ Paul A. Avron, *Constitutional Issues Concerning Civil Forfeiture*, THE FEDERAL LAWYER (Jan./Feb. 2010), http://www.fedbar.org/Resources_1/Federal-Lawyer-Magazine/2018/JanuaryFebruary/Features/Constitutional-Issues-Concerning-Civil-Forfeiture.aspx?FT=.pdf.

¹⁸⁰ *Leonard*, 137 S. Ct. at 848 (Thomas, J., concurring).

¹⁸¹ *Id.* at 848–49.

¹⁸² *Id.* at 849.

seizing property without due process incompatible with the Constitution and our founding principles.¹⁸³

Civil asset forfeiture proceedings have the potential to entrap innocent citizens, which is always a significant risk lawmakers want to avoid. Further, “forfeiture operations frequently target the poor and other groups least able to defend their interests.”¹⁸⁴ Low income individuals are the same groups most burdened by forfeiture because they are more likely to use cash than alternative forms of payment, such as credit cards, which may be less susceptible to forfeiture.¹⁸⁵ They are also 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.¹⁸⁶

B. Plan B: Implement Further Restrictions within Section 2981 of the Ohio Revised Code

Unjust forfeitures in Ohio continue and existing laws still incentivize law enforcement agencies to focus their efforts on revenue generation.¹⁸⁷ Requiring criminal convictions in Ohio prior to permitting the seizure of an asset will permanently deter Ohio law enforcement officials from further partaking in corrupt forfeiture practices against law abiding citizens. If Ohio lawmakers are unable to fully outlaw civil asset forfeiture in Ohio, the following revisions to Section 2981 of the Ohio Revised Code will move Ohio as far in that direction as possible. The necessary revisions to Section 2981 include removing incentives for Ohio law enforcement officials to perform civil asset forfeitures, raising the burden of proof the government must meet in these proceedings, and enhancing reporting requirements.

1. Remove Incentives for Ohio Law Enforcement

“There’s this myth that they’re cracking down on drug cartels and kingpins,” Lee McGrath, of the Institute for Justice says.¹⁸⁸ “In reality, it’s small amounts, where people aren’t entitled to a public defender, and can’t afford a lawyer, and the only rational response is to walk away from your property, because of the infeasibility of getting your money back.”¹⁸⁹ To discourage civil asset forfeiture in Ohio, lawmakers should ban state and local law enforcement from participating in the “equitable sharing” program created by the CCCA.¹⁹⁰ The current applicable section of the Ohio revised code permits state and local law enforcement to participate in these “equitable sharing” programs when the asset(s) in question are valued at or more than

¹⁸³ Watt & Richardson, *supra* note 2.

¹⁸⁴ Carpenter, *supra* note 23, at 53–54; Sallah, *supra* note 35.

¹⁸⁵ Leonard, 137 S. Ct. at 848.

¹⁸⁶ Nick Sibilla, *Supreme Court Will Decide If Civil Forfeiture Is Unconstitutional, Violates The Eighth Amendment*, FORBES (June 19, 2018), <https://www.forbes.com/sites/nicksibilla/2018/06/19/supreme-court-will-decide-if-civil-forfeiture-is-unconstitutional-violates-the-eighth-amendment/#54f6560c7165>.

¹⁸⁷ Carpenter, *supra* note 24, at 3.

¹⁸⁸ Stillman, *supra* note 59.

¹⁸⁹ *Id.*

¹⁹⁰ See *supra* text accompanying notes 64–68.

\$100,000.¹⁹¹ Permitting participation in the equitable sharing program effectively warrants state and local law enforcement to continue to seize citizens' property even in the face of local bans on the practice, as long as they refer the case to a federal agency after the seizure.¹⁹² Additionally, Ohio legislators should raise the current \$15,000 restriction on civil asset forfeiture to \$100,000 or higher. The current \$15,000 limit is entirely too low and can deprive individuals, of life savings, their only means of transportation, their homes, and large sums of cash saved up for important medical procedures.¹⁹³ The statute should be revised to truly target those drug lords and criminals that civil asset forfeiture laws were directed towards. Lastly, the state's lawmakers should require that all funds law enforcement agencies acquire during forfeiture proceedings be redirected to a general state fund. Thus, removing the incentive to over seize assets to pad budgets.

2. Raise the Burden of Proof

Ohio's recent reform heightened the government's burden of proof to the "clear and convincing evidence" standard.¹⁹⁴ Unfortunately, this increased burden of proof is still not at the level required during a criminal trial. As civil asset forfeiture proceedings are conducted on the premise that the property in question was involved in the commission of a *crime* or is proceeds thereof, the burden of proof should be that required in a *criminal trial*. This is especially important as civil asset forfeiture proceedings do not provide property owners with the right to counsel or trial by jury,¹⁹⁵ therefore, requiring the highest level of proof in these cases is in the best interest of property owner's rights. Expenses could be avoided and judicial efficiency increased by simply outlawing civil asset forfeiture altogether, instead of having to determine the appropriate standard of proof.

3. Promote Transparency

"Most state and federal forfeiture laws lack even the most basic reporting requirements, leaving their constituents in the dark regarding most forfeiture activity."¹⁹⁶ Inadequate reporting standards make it nearly impossible to hold law enforcement agencies accountable.¹⁹⁷ Based on a study conducted by the Institute of Justice, only fourteen states report on forfeiture revenues for an extended period.¹⁹⁸ Ohio eliminated its reporting requirements in 2012.¹⁹⁹ Constituents should demand that lawmakers reinstate these reporting requirements to promote transparency.

¹⁹¹ OHIO REV. CODE ANN. § 2981.14(B) (West 2017).

¹⁹² Stillman, *supra* note 59.

¹⁹³ See *supra* text accompanying note 22; see, e.g., Carpenter, *supra* note 24; Sallah, *supra* note 35; Stillman, *supra* note 59.

¹⁹⁴ OHIO REV. CODE ANN. § 2981.05(D)(3) (West 2017).

¹⁹⁵ See *supra* text accompanying note 42.

¹⁹⁶ Carpenter, *supra* note 24, at 7.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 5.

¹⁹⁹ *Id.* at 116.

V. CONCLUSION: OHIO CITIZENS MUST DEMAND CHANGE

To protect Ohioan's constitutional property rights afforded by Article I, Section 14 of the Ohio Constitution and the Fourteenth Amendment of the United States Constitution, the strongest solution is to outlaw civil asset forfeiture in Ohio. Therefore, Ohio citizens must lobby for lawmakers to amend Section 2981.05 of the Ohio Revised Code to require a criminal conviction prior to allowing forfeiture proceedings to commence, regardless of the value of property in question.

As civil asset forfeiture is a topic that has gained lawmakers attention only recently, with one of the most notorious studies on the subject being published in 2010,²⁰⁰ persuading an entire state legislature to outlaw a practice viewed so favorably by law enforcement may be too daunting a task for Ohio lawmakers. This is especially true after substantial reform occurring only early in 2017. That is not to say additional reform to Section 2981 is not still needed. Ohio constituents must raise these concerns with their local lawmakers and stand up for their constitutional property rights.

²⁰⁰ Williams, *supra* note 36.