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# PROPERTY RIGHTS—WHEN REFORM IS NOT ENOUGH: A LOOK INSIDE THE PROBLEMS CREATED BY THE CIVIL ASSET FORFEITURE REFORM ACT OF 2000

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PROPERTY RIGHTS—WHEN REFORM IS NOT ENOUGH: A LOOK  
INSIDE THE PROBLEMS CREATED BY THE CIVIL ASSET FORFEITURE  
REFORM ACT OF 2000<sup>1</sup>

Imagine you own a million-dollar piece of property free and clear, but then the federal government and local law enforcement agents announce that they are going to take it from you, not compensate you one dime, and then use the money they get from selling your land to pad their budgets—all this even though you have never so much as been accused of a crime, let alone convicted of one.<sup>2</sup>

INTRODUCTION

When Congress passed the Civil Asset Forfeiture Reform Act of 2000 (hereinafter “Act” or “CAFRA”),<sup>3</sup> it was seen as “a major step toward reforming the federal forfeiture system.”<sup>4</sup> However, it is important to caution against such a general assertion in the face of the ongoing abuses of civil forfeiture that have continued to plague innocent property owners fourteen years after enactment of the Act.<sup>5</sup> Civil forfeiture allows the government to seize property that it suspects has been involved in the facilitation of a crime and has long been intended “to take the ‘offending property’ away from the malefactor, thereby depriving the wrongdoer of his or her incentive and ability to commit future crimes or other misdeeds.”<sup>6</sup> While the Act was intended to

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1. The author cautions that this Note provides examples of egregious abuse of the practice of civil asset forfeiture, on which calls for reform are based. There are plenty of legitimate exercises of civil asset forfeiture proceedings that law enforcement officials carry out on a regular basis. See *United States v. \$159,880.00 in U.S. Currency, More or Less*, 387 F. Supp. 2d 1000 (S.D. Iowa 2005); *United States v. Six Thousand Two Hundred Seven (\$6,207) Dollars in United States Currency*, 757 F. Supp. 2d 1155 (M.D. Ala. 2010).

2. *United States v. 434 Main Street, Tewksbury, Mass. (The Motel Caswell) Federal & Local Law Enforcement Agencies Try to Take Family Motel from Innocent Owners*, INST. FOR JUST., <http://www.ij.org/massachusetts-civil-forfeiture> [hereinafter *The Motel Caswell*] (last visited Mar. 10, 2015).

3. Civil Asset Forfeiture Reform Act of 2000, 18 U.S.C. § 983 (2012).

4. Steven L. Kessler, *The Civil Asset Forfeiture Reform Act of 2000*, KESSLER ON FORFEITURE, [www.kessleronforfeiture.com/civil-asset-forfeiture-reform-act-of-2000/](http://www.kessleronforfeiture.com/civil-asset-forfeiture-reform-act-of-2000/) (last visited Mar. 10, 2015).

5. See Sarah Stillman, *Taken*, THE NEW YORKER, Aug. 12, 2013, available at <http://www.newyorker.com/magazine/2013/08/12/taken>.

6. Arthur W. Leach & John G. Malcolm, *Criminal Forfeiture: An Appropriate Solution to the Civil Forfeiture Debate*, 10 GA. ST. U. L. REV. 241, 241 (1994). See also *Civil*

subject the ill-gotten gains of drug cartel members to forfeiture, its ultimate effect has been to subject the property of everyday citizens to civil asset forfeiture.<sup>7</sup> Such forfeiture can occur even when the property owners themselves have not been involved in any illegal activity.<sup>8</sup>

Take, for example, the story of the Caswell family, who owns the Motel Caswell in Tewksbury, Massachusetts.<sup>9</sup> The Caswells have owned the motel for two generations and previously worked with members of state and local law enforcement in an effort to prevent, and in some cases report, crime that occurred on their property.<sup>10</sup> With that as a backdrop, imagine the Caswells' surprise when they learned that their local police department partnered with the Department of Justice to seize and sell the Motel Caswell simply because a small percentage of their guests had been arrested for drug-related crimes while staying on their property.<sup>11</sup> In reality, over the fourteen-year period in question, there were more than one hundred and ninety-six thousand rooms rented at the Motel Caswell, and only fifteen drug-related arrests were made.<sup>12</sup>

Why would the local law enforcement officials, with whom the Caswells had worked with in the past, target and seize a locally owned and run piece of property that had such a minimal connection to crime? The answer seems to be purely profit driven.<sup>13</sup> If the government were

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*Forfeiture the Grabbing Hand of the Law: How Prosecutors Seize the Assets of the Innocent*, ECONOMIST, Nov. 2, 2013, available at <http://www.economist.com/news/usa/21588915-how-prosecutors-seize-assets-innocent-grabbing-hand-law> (highlighting that, “[i]n criminal cases, the government can confiscate assets only after a conviction. Under ‘civil forfeiture’, however, it can grab first and ask questions later. Property can be seized merely on the suspicion that it has been involved in a crime.”).

7. See Stephen J. Dunn, *Nothing Civil About Asset Forfeiture*, FORBES, Feb. 18, 2013, available at [www.forbes.com/sites/stephendunn/2013/02/18/asset-forfeiture-is-anything-but-civil/](http://www.forbes.com/sites/stephendunn/2013/02/18/asset-forfeiture-is-anything-but-civil/).

8. See *Id.* (“[i]t is clear from the legislative history of CAFRA that Congress intended to limit civil forfeitures to alleged structuring connected with an underlying offense of drug trafficking or money laundering”).

9. *The Motel Caswell*, *supra* note 2.

10. *Id.*

11. *Id.*

12. *United States v. 434 Main St.*, 961 F. Supp. 2d 298, 310 (D. Mass. 2013); see also *Fighting Civil Forfeiture Abuse: Federal & Local Law Enforcement Agencies Try to Take Family Motel from Innocent Owners*, INST. FOR JUST., <http://www.ij.org/massachusetts-civil-forfeiture-background> (last visited Mar. 10, 2015) (the number of arrests that the government based their case upon represented less than .05 percent of the total rooms rented at the Motel Caswell over the period of time in question).

13. *Civil Forfeiture Abuse Case to be Argued Today before Federal Court in Boston*, INST. FOR JUST., <http://www.ij.org/massachusetts-civil-forfeiture-release-2-13-2012> (last visited Mar. 10, 2015) (quoting Larry Salzman, one of the Caswell's attorneys, “[w]hat the government is doing amounts to little more than a grab for what they saw as quick cash under the guise of [civil] forfeiture”).

to succeed in obtaining the Motel Caswell through civil forfeiture, the Tewksbury Police Department would receive almost one million dollars through their work with the Department of Justice.<sup>14</sup> The police department would obtain this revenue through the sale of the property, while the rest of the profit would remain with the federal government.<sup>15</sup>

The Caswells, whose main source of income derived from the hotel itself, had devoted their careers to owning and managing the motel.<sup>16</sup> With the property's seizure, they began to question how they would afford the legal fight to retain their property.<sup>17</sup> Unlike the case for most property owners in similar situations, a public interest law firm that specializes in fighting against the abuse of civil asset forfeiture nationwide stepped in to aid the Caswells in their fight against the forfeiture of their property.<sup>18</sup> The Caswells were eventually successful in their opposition to the forfeiture, as a federal judge found that law enforcement had grossly exaggerated the evidence and ruled that the property was not subject to forfeiture.<sup>19</sup> While this victory was deemed successful for the Caswell family, the real issues surrounding this case plague innocent property owners across the nation.<sup>20</sup> The simple fact is that based on the minimal amount of evidence produced by state and federal officials, the property should never have been subjected to potential forfeiture in the first place.<sup>21</sup>

Another example of the abuse of civil forfeiture laws is the story of Rochelle Bing, a forty-two-year-old grandmother who spends her time working as a home health aide and as a babysitter for her grandchildren.<sup>22</sup> Bing purchased her home with the intention that it

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14. *Fighting Civil Forfeiture Abuse Federal & Local Law Enforcement Agencies Try to Take Family Motel from Innocent Owners*, *supra* note 12.

15. *Id.* ("Civil forfeiture creates a perverse incentive for police to target innocent owners and their assets rather than aiming for justice and public safety."); *see also* George F. Will, *When Government is the Looter*, WASH. POST, May 18, 2012, available at [http://www.washingtonpost.com/opinions/when-government-is-the-looter/2012/05/18/gIQAUIKVZU\\_story.html](http://www.washingtonpost.com/opinions/when-government-is-the-looter/2012/05/18/gIQAUIKVZU_story.html).

16. *The Motel Caswell*, *supra* note 2.

17. *Id.*

18. *Id.* *See generally* Stillman, *supra* note 5 (because the cost of litigation often far exceeds the value of the property seized, those who have had their property wrongfully seized through civil forfeiture are more likely not to pursue using the legal system as a remedy to retain their property).

19. *United States v. 434 Main St.*, 961 F. Supp. 2d 298, 315 (D. Mass. 2013); *see also The Motel Caswell*, *supra* note 2.

20. *See* Stillman, *supra* note 5.

21. *434 Main St.*, 961 F. Supp. 2d at 319-20.

22. Isaiah Thompson, *Forfeiture Laws Ruin Lives*, PROPUBLICA: JOURNALISM PUB. INT. (Aug. 5, 2013), [http://www.salon.com/2013/08/05/government\\_seizes\\_homes\\_of\\_the\\_](http://www.salon.com/2013/08/05/government_seizes_homes_of_the_)

would become a safe haven for her children and grandchildren if any one of them were to fall upon tough times.<sup>23</sup> Unfortunately for Bing, an incident in October of 2009 derailed her plans.<sup>24</sup> After one of her children was caught selling crack cocaine to an undercover police informant on Bing's property on two occasions, police searched Bing's home.<sup>25</sup> Bing was never charged with a crime and was not present at the time of the encounter between her son and the police informant.<sup>26</sup> Even so, police sought to seize her home simply because it was the site of the alleged drug deal.<sup>27</sup> Bing was sent a letter informing her that she had just thirty days to convince a judge to allow her to keep her home, and if she was unable to do so she would be forced to vacate the premises.<sup>28</sup>

Bing was appalled by the injustice, and, unlike many property owners in her situation, she sought to fight back against the forfeiture of her home.<sup>29</sup> She soon realized why such a large percentage of property owners who have had their property seized through civil forfeiture choose not to oppose the seizure when it became apparent that the fight to retain her property would be long and expensive.<sup>30</sup> Over the course of the next two years, Bing's attorney appeared in court on her behalf twenty-three times before the prosecutor agreed to settle her case.<sup>31</sup> In the end, Bing was allowed to keep her home as long as she agreed to not allow her son in the house when she was not present.<sup>32</sup> Ironically, after being dragged through court for two years and constantly faced with the fear of losing her home, Bing said if she could do it again, she would have consented to that agreement in the first place.<sup>33</sup>

Stories such as that of the Caswell family and Rochelle Bing are all too common under civil forfeiture laws today.<sup>34</sup> This Note addresses

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innocent\_under\_forfeiture\_laws\_partner/.

23. *Id.*

24. *Id.*

25. *Id.* Following the arrest of her son, no additional drugs were found during the search of Bing's home. However, unused packaging, suspected to be what the drugs were placed in for sale, was found in a bedroom.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* Fortunately for Bing, who was unable to afford legal counsel, her case was referred to the legal clinic at the University of Pennsylvania, where she was represented by law students free of charge.

31. *Id.*

32. *Id.*

33. *Id.*

34. See, e.g., Nick Sibilla, *Florida Cops Made Millions Dealing Cocaine: The Latest Asset Forfeiture Outrage*, FORBES, Oct. 30, 2013, available at <http://www.forbes.com/sites/>

some of the lingering issues following the implementation of CAFRA<sup>35</sup> and advocates for further reform.<sup>36</sup> Many questions still remain about the way enforcement of the Act is established and carried out, which is contrary to Congress' intent in implementing the Act.<sup>37</sup>

This Note examines the shortcomings of the CAFRA, highlighting the injustices that innocent property owners are subjected to through the practice of civil asset forfeiture.<sup>38</sup> Specifically, this Note addresses the problems under the Act with the preliminary burden of proof on the government currently required to perform an initial seizure of property. This Note also advocates for a change in the preliminary burden of proof that would require the government to overcome a higher burden.

Section I traces the history of civil forfeiture laws in this country. Specifically, this section addresses the evolution of attributing guilt to the property itself along with the right of the government to acquire the property through seizure. Furthermore, Section I discusses how the system has now reached the point of requiring reform to civil asset forfeiture laws.

Section II confronts the lingering questions that have resulted from CAFRA. This Note argues that the government's preliminary burden of proof remains too low, and that such a standard enables questionable motives of law enforcement's seizures of property. This Note also

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[instituteofjustice.com/2013/10/30/florida-cops-made-millions-dealing-cocaine-the-latest-asset-forfeiture-outrage/](http://instituteofjustice.com/2013/10/30/florida-cops-made-millions-dealing-cocaine-the-latest-asset-forfeiture-outrage/) (highlighting that law enforcement in Sunrise, Florida, "conduct 'reverse' sting operations, posing as drug dealers to lure buyers with promises of cheap cocaine. Once the deals go down, cops bust the buyers, and using state and federal forfeiture laws, seize their cash and cars."); Joi Elizabeth Peake, Note, *Bound By the Sins of Another: Civil Forfeiture and the Lack of Constitutional Protection for Innocent Owners in Bennis v. Michigan*, 75 N.C. L. REV. 662, 663-64 (1997). Portraying a similar scenario:

In an unfortunate example, Florida officials seized \$19,000 from Selena Washington, a South Carolina Citizen who was carrying cash on her trip to buy building materials . . . [a]fter stopping Ms. Washington as she traveled down a Florida Interstate . . . police seized the cash as suspected drug money. The officer did not take Ms. Washington's name or give her a receipt; he merely took the money and sped away. After lengthy negotiations, Ms. Washington settled with the officials, an alternative cheaper than an extended legal battle; the sheriff kept \$4,000, her attorney got \$1,200 and Ms. Washington got back only \$13,800.

*Id.* at 663-64; Robert O'Harrow Jr. & Michael Sallah, *They Fought the Law. Who Won?*, THE WASHINGTON POST, Sept. 8, 2014, available at <http://www.washingtonpost.com/sf/investigative/2014/09/08/they-fought-the-law-who-won/>.

35. 18 U.S.C. § 983 (2012).

36. *See id.* (establishing the statutory language set forth by Congress under CAFRA).

37. *See* Louis S. Rulli, *The Long Term Impact of CAFRA: Expanding Access to Counsel and Encouraging Greater Use of Criminal Forfeiture*, 14 FED. SENT'G REP. 87, 87 (2001). ("Civil forfeiture practices drew sharp criticism because they did not contain basic safeguards required in criminal cases, thereby placing ordinary citizens at substantial risk for the loss of their property without any evidence of criminal wrongdoing").

38. 18 U.S.C. § 983.

addresses the fact that the “equitable sharing” program in place under CAFRA allows for state and local law enforcement officials to bypass stricter state civil forfeiture laws in favor of easier to fulfill federal standards which allow for potential profit.<sup>39</sup> Section II also discusses the dangers associated with profits made from civil forfeiture going undocumented in law enforcement budgets. Finally, it illustrates that the current system relies heavily on incentives that are directly adverse to public policy, and which further public mistrust of government officials when it comes to civil asset forfeiture.<sup>40</sup>

Section III of this Note suggests how further reform of CAFRA will serve to legitimize the practice of civil forfeiture. It recommends that establishing a higher preliminary burden of proof for the government will provide greater protection for the general public, and ensures that doing so will result in more legitimate cases being brought to court. This Note also proposes the elimination of the controversial “equitable sharing” program so that state and local law enforcement officials would no longer be able to bypass tougher state laws in favor of federal laws that provide them with an easier burden. Finally, Section III recommends requiring full disclosure of where the funds from civilly forfeited property are allocated within law enforcement budgets. Doing so will eliminate the practice of “policing for profit[.]”<sup>41</sup> and will abolish the incentive-based system that raises questions as to the motives of law enforcement in such cases.<sup>42</sup>

#### I. THE STATE OF CIVIL ASSET FORFEITURE LAWS: WHY REFORM OF ESTABLISHED LAWS WAS NECESSARY

Although civil asset forfeiture has long been a staple practice within this country,<sup>43</sup> until recently it has not garnered enough attention to generate concern from the general public. Just prior to Congress’s

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39. 18 U.S.C. § 983(e) (2012).

40. See Dick M. Carpenter II, Larry Salzman & Lisa Knepper, *Inequitable Justice: How Federal “Equitable Sharing” Encourages Local Police and Prosecutors to Evade State Civil Forfeiture Law for Financial Gain*, INST. FOR JUST. (Oct. 2011), [http://www.ij.org/images/pdf\\_folder/private\\_property/forfeiture/inequitable\\_justice-mass-forfeiture.pdf](http://www.ij.org/images/pdf_folder/private_property/forfeiture/inequitable_justice-mass-forfeiture.pdf).

41. See Marian R. Williams, Jefferson E. Holcomb, Tomislav V. Kovandzic & Scott Bullock, *Policing for Profit: The Abuse of Civil Asset Forfeiture*, INST. FOR JUST. 7 (Mar. 2010), [http://www.ij.org/images/pdf\\_folder/other\\_pubs/assetforfeituretoemail.pdf](http://www.ij.org/images/pdf_folder/other_pubs/assetforfeituretoemail.pdf) (establishing that “policing for profit” occurs, “when state laws make forfeiture more difficult and less rewarding, [therefore] law enforcement instead takes advantage of easier and more generous federal forfeiture laws.”).

42. See *infra* Section III.

43. See generally Michele M. Jochner, *The Supreme Court Turns Back the Clock on Civil Forfeiture in Bennis*, 85 ILL. B. J. 314 (2002).

adoption of CAFRA,<sup>44</sup> there came public cries for a change in the type of assets that could be subjected to this practice.<sup>45</sup> However, CAFRA has not done enough to quell the concern over the state of civil asset forfeiture law in this country, as many have voiced worry as to whether the Act goes far enough to protect innocent property owners.<sup>46</sup>

This section of the Note traces the history of civil asset forfeiture within the United States and establishes what led to Congress adopting more defined standards under CAFRA.<sup>47</sup> Part I.A, of this Note, provides a broad overview of how civil asset forfeiture works, and how law enforcement agencies are able to confiscate property through the practice. Part I.B highlights the earliest evidence of the exercise of civil asset forfeiture in this country and traces the practice to its roots in British jurisprudence. Part I.C works to analyze the state of modern civil asset forfeiture law prior to CAFRA reform and outlines the many issues that made reform necessary in the first place. Part I.D establishes the legislative history leading to the proposal for civil asset forfeiture reform and highlights the concessions that both the House of Representatives and the Senate made in order to pass the Act. Additionally, Part I.D focuses on the initial reaction to CAFRA reform and illustrates that it is possible that CAFRA, while a step in the right direction, did not do enough to respond to concerns over potential abuses of the practice.

#### A. *Broad Overview of a Civil Asset Forfeiture Proceeding*

There are two routes that may be taken to effectuate the seizure of property through a forfeiture action: an *in rem* proceeding or an *in personam* proceeding.<sup>48</sup> Any crime can trigger a forfeiture action.<sup>49</sup> In

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44. 18 U.S.C. § 983 (2012).

45. See *The Civil Asset Forfeiture Reform Act: Hearing on H.R. 1916 Before the H. Comm. on the Judiciary*, 104th Cong. (1996) (statement of Roger Pilon, Senior Fellow at the Cato Institute), available at <http://www.cato.org/publications/congressional-testimony/civil-asset-forfeiture-reform-act-0> (“About the only people who defend forfeiture law today are those in law enforcement who benefit from it, either as a ‘tool of their trade’ or, more directly, by keeping the goods they seize—a conflict of interest so stark that it takes us to another age. In fact, that is just the problem with modern forfeiture law: in practice as well as in theory, its roots are in notions that have no place whatever in our legal system, animistic and authoritarian notions that countless people have died over the ages to bury and replace with the rule of law.”).

46. *Id.*

47. 18 U.S.C. § 983.

48. CHARLES DOYLE, CONG. RESEARCH SERV., RS22005, CRIME AND FORFEITURE (2013) at 2 (establishing that modern forfeiture can take place in one of two ways: an *in rem* proceeding which establishes the offending property as the defendant or an *in personam* proceeding in which forfeiture occurs on conviction of the property owner).

49. *Id.* at 3 (“Virtually every kind of property, real or personal, tangible or intangible, may be subject to confiscation under the appropriate circumstances.”).

each particular incident, the character of the offense that prompted the forfeiture will determine whether the property or property owner will face civil or criminal forfeiture.<sup>50</sup> In an *in rem* civil forfeiture proceeding, the property is “treated as the offender” and becomes the defendant in the case.<sup>51</sup> In fact, in an *in rem* civil forfeiture proceeding, the fact that property in question was involved in a crime, which calls for forfeiture, is enough to subject it to a forfeiture proceeding.<sup>52</sup> On the other hand, in the case of a criminal forfeiture, the property in question may only be surrendered upon a conviction of the property owner on a charge relating to the confiscation of the property.<sup>53</sup>

With civil asset forfeiture, as the action is brought against the property itself and the property owner need not be convicted of a crime to have his or her property seized; the proceeding is not subjected to the more challenging criminal procedure standard.<sup>54</sup> When the property is seized through civil forfeiture,

[s]worn statements (affidavits) concerning the circumstances of the seizure are typically prepared by government employees, such as police officers or FBI agents. These statements (explaining, for example, the legal basis for an initial vehicle stop and what the officer observed such as the smell of burning marijuana) are presented to courts to link the property in question to the underlying criminal behavior, thus allowing forfeiture. Forfeiture challenges are costly and time consuming. Some travelers have reported threats of unjustified or highly suspect criminal charges and other actions unless they surrendered property on the spot with a signed waiver.<sup>55</sup>

When assets are seized through civil forfeiture, the burden of proof is on the property owner to prove that the property has no connection to illegal activity or that the owner was unaware that the property was tied to the activity in question.<sup>56</sup> Also, there are a number of procedural deadlines that a property owner faces in an attempt to retain his or her property under current civil asset forfeiture laws,<sup>57</sup> which could potentially lead to the property owner forfeiting the seized assets by

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50. *Id.* at 5.

51. *Id.*

52. *Id.* at 5-6.

53. *Id.* at 6.

54. Brad Reid, *An Overview of Civil Asset Forfeiture and Recent Cases*, HUFF. POST (Aug. 14, 2013, 7:03 PM) [http://www.huffingtonpost.com/brad-reid/civil-asset-forfeiture-ch\\_b\\_3745209.html](http://www.huffingtonpost.com/brad-reid/civil-asset-forfeiture-ch_b_3745209.html).

55. *Id.*

56. *Id.*

57. 18 U.S.C. § 983 (2012).

default.<sup>58</sup>

### B. *The Origin of Civil Asset Forfeiture in the United States*

Today's version of asset forfeiture law can be linked directly to its foundations in the laws of early England.<sup>59</sup> It stems from "three early English procedures: deodands, forfeiture of estate or common law forfeiture, and statutory or commercial forfeiture."<sup>60</sup> Under English law, "a chattel (be it an animal or inanimate object) was deemed to be a deodand whenever a coroner's jury decided that it had caused the death of a human being. [And also established that] [d]eodands were automatically forfeit[ed] to the crown."<sup>61</sup> History suggests that though the colonists in the American colonies were not subjected to the deodand rules, these rules had a significant impact on influencing the distinct qualities of modern civil asset forfeiture laws.<sup>62</sup>

The second of the English procedures that influenced the American practice, forfeiture of estate or common law forfeiture, focused less on the property in question.<sup>63</sup> Instead, English procedure concentrated on the property owner as the offender, stating "[a]t common law, anyone convicted and attained for treason or a felony forfeited all his lands and personal property."<sup>64</sup> The final procedure of early English common law that had an impact on modern day civil asset forfeiture was statutory or commercial forfeiture, which was used extensively in the American colonies and again pegged the property in question as the offending party instead of the property's owner.<sup>65</sup>

History establishes that even at that time, colonists did not agree with the practice of statutory or commercial forfeiture, suggesting that, "American colonists, particularly business owners, objected to general 'writs of assistance' issued by British authorities that allowed broad searches and the subsequent seizures of discovered property suspected of

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58. *Reid*, *supra* note 54.

59. DOYLE, *supra* note 48, at 1.

60. *Id.*; see The Merriam-Webster Dictionary describes the term deodand as "a thing that by English law before 1846 was forfeited to the crown and thence to pious uses because it had been the immediate cause of death of a person." The Merriam-Webster Dictionary available at <http://www.merriam-webster.com/dictionary/deodand>; see also DOYLE, *supra* note 48, at 1 (establishing, "[a]t early common law, the object that caused the death of a human being—the ox that gored, the knife that stabbed, or the cart that crushed—was confiscated as a deodand.").

61. Anna Pervukhin, *Deodands: A Study in the Creation of Common Law Rules*, 47 AM. J. LEGAL HIST. no. 3, 237, 237 (2005).

62. DOYLE, *supra* note 48, at 1.

63. *Id.* at 2.

64. *Id.*

65. *Id.*

being associated with smuggling or other crimes.”<sup>66</sup> However, regardless of the colonists’ displeasure for the procedure, this type of asset forfeiture in connection with crimes had a tremendous impact on modern asset forfeiture laws.

Civil asset forfeiture has a long history within this country, but the practice played an insignificant role in the United States’ justice system until the early 1970s.<sup>67</sup> With the passage of the Comprehensive Drug Abuse Prevention and Control Act of 1970,<sup>68</sup> the United States embraced statutory forfeiture and revived these types of common law proceedings.<sup>69</sup>

C. *Modern Civil Asset Forfeiture Law Prior to the Introduction of CAFRA*

Civil asset forfeiture was brought to the forefront due, in part, to the nation’s sweeping interest in the “War on Drugs.”<sup>70</sup> Such forfeitures were made possible under § 881(a) of the Comprehensive Drug Control Act of 1970.<sup>71</sup> The earliest version of the statute was narrow, and “provided for the forfeiture of conveyances only; it did not permit the forfeiture of money, negotiable securities, or real property.”<sup>72</sup> However, as the years progressed, a number of amendments to the original statute served to help the law become a much more powerful tool for law enforcement officials.<sup>73</sup> The revision significantly increased the amount of property subject to forfeiture under § 881(a), including:

- (4) All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment

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66. Reid, *supra* note 54.

67. Alice Marie O’Brien, *Caught in the Crossfire: Protecting the Innocent Owner of Real Property from Civil Forfeiture Under 21 U.S.C. S 881(A)(7)*, 65 ST. JOHN’S L. REV. 521, 524-25 (1991).

68. 21 U.S.C. § 881 (2012).

69. See Barclay Thomas Johnson, Note, *Restoring Civility- The Civil Asset Forfeiture Reform Act of 2000: Baby Steps Towards a More Civilized Civil Forfeiture System*, 35 IND. L. REV. 1045, 1048 (2002) (citing *U.S. v. Bajakajian*, 524 U.S. 321, n. 7 (1998) (establishing that, with the passing of the Comprehensive Drug Abuse Prevention and Control Act, “Congress resurrected the English common law of punitive forfeiture to combat organized crime and major drug trafficking. . . . the Senate Judiciary Committee admitted that the revival of these common law proceedings ‘represents an innovative attempt to call on our common law heritage to meet an essentially modern problem.’”)).

70. *Id.*; see also, for a brief history into the coining of the term “War on Drugs,” *A Brief History of the Drug War*, DRUG POL’Y ALLIANCE (2014), <http://www.drugpolicy.org/new-solutions-drug-policy/brief-history-drug-war> (last visited Sept. 21, 2014).

71. Johnson, *supra* note 69. See also 21 U.S.C. § 881.

72. Johnson, *supra* note 69, at 1049 (citing 21 U.S.C. § 881(a) (1970)).

73. *Id.*

of property.

....

(6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance or listed chemical in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter.

(7) All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, *which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter* punishable by more than one year's imprisonment.<sup>74</sup>

With these revisions came increased criticism over the state of the civil asset forfeiture laws.<sup>75</sup> Specifically, the statute drew criticism over the lack of a notice requirement, the lack of Constitutional protection for innocent owners, and the low preliminary burden of proof on the government required for the initial seizure of the property.<sup>76</sup>

The inclusion of § 881(a)(7) in the revision of the statute drew major opposition,<sup>77</sup> because under this section all real property could be seized without prior notice if law enforcement deemed that it had been used or it had intended to be used in the facilitation of a crime.<sup>78</sup> The Supreme Court did not address this issue until 1993, in *United States v. James Daniel Good Real Property*, when the Court ruled,

that the seizure of real property under § 881(a)(7) is not one of those extraordinary instances that justify the postponement of notice and hearing. Unless exigent circumstances are present, the Due Process Clause requires the Government to afford notice and a meaningful opportunity to be heard before seizing real property subject to civil forfeiture.<sup>79</sup>

However, the Court's ruling in *Good*, that notice is required for the seizure of property, is not as broadly interpreted and applied as it may seem.<sup>80</sup> Consequently, under the revised Controlled Substances Act,<sup>81</sup>

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74. 21 U.S.C. § 881 (emphasis added).

75. Johnson, *supra* note 69 at 1052.

76. *Id.* at 1054-55; *see also* Bennis v. Michigan, 516 U.S. 442, 453-54 (Thomas, concurring) (1996).

77. Johnson, *supra* note 69 at 1057-58.

78. 21 U.S.C. § 881.

79. 510 U.S. 43, 62 (1993).

80. *Id.*

81. 21 U.S.C. § 881.

property was still regularly seized by law enforcement officials with no notice whatsoever.<sup>82</sup>

Additional criticism of the Act stemmed from the lack of protection given to innocent owners who were unaware of, or could not reasonably foresee, any criminal activity that their property may be involved in.<sup>83</sup> Such owners, however, could still have their property forfeited based on the conduct of a third party.<sup>84</sup> Initially, it seemed as though § 881(a) of the Controlled Substances Act would provide greater protection to the innocent property owner, as there has been an innocent owner provision included in the Act since its implementation.<sup>85</sup> Moreover, the Supreme Court alluded to this protection as a constitutional mandate in *Calero-Toledo v. Pearson Yacht Leasing Co.*<sup>86</sup> The Court stated that it would be tough to refuse a constitutional claim when,

[a]n owner . . . proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property; for, in that circumstance, it would be difficult to conclude that forfeiture served legitimate purposes and was not unduly oppressive.<sup>87</sup>

Many interpreted the Supreme Court ruling as establishing that the Constitution mandated such an “innocent owner” defense when all elements for the status of “innocent owner” were met.<sup>88</sup>

The idea that that the innocent owner defense was mandated by the Constitution prevailed until 1996, when the Court, in *Bennis v. Michigan*, ruled that the innocent owner defense was not required by the Constitution.<sup>89</sup> Writing for the majority, Chief Justice Rehnquist

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82. Johnson, *supra* note 69, at 1052.

83. *Id.* at 1054.

84. *Id.*

85. *Id.*

86. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974); *see also* Johnson, *supra* note 69, at 1054 (“In *Calero-Toledo*, the Puerto Rican government initiated forfeiture proceedings against a \$19,800 rental yacht following the discovery of one marijuana cigarette that belonged to the individual renting the yacht. The Court upheld the forfeiture even though all parties conceded the owner ‘had no knowledge that its property was being used in connection with or in violation of (Puerto Rican Law).’”) (quoting *Calero-Toledo*, 416 U.S. at 668).

87. *Calero-Toledo*, 416 U.S. at 689-90.

88. Johnson, *supra* note 69, at 1054.

89. *Bennis v. Michigan*, 516 U.S. 442 (1996). For the facts of the case *see* Peake, *supra* note 34, at 666 (establishing that, “Michigan officials sought the forfeiture of an automobile after it was used in prostitution in violation of Michigan’s indecency statutes. John Bennis was arrested after police saw him engaging in sexual activity with a prostitute in a parked car. The car was owned jointly by John Bennis and his wife, Tina Bennis. Tina Bennis entrusted the car to her husband for transportation to and from work, but did not know that he would use

established that forfeiture laws, without the inclusion of an innocent owner defense, were not in violation of the Fourteenth Amendment's Due Process Clause,<sup>90</sup> nor were they in violation of the Fifth Amendment's Takings Clause.<sup>91</sup> Chief Justice Rehnquist "grounded the decision on the historical legal fiction that 'the thing is here primarily considered as the offender'. . . . The majority reasoned that the failure to protect innocent owners was justified by the important governmental interest in deterring illegal activity."<sup>92</sup> Thus, the ruling in *Bennis* seemingly became the cause of greater confusion as to what types of property could or could not be protected under the innocent owner defense, and many still saw room for abuse of the statute under the Court's decision.<sup>93</sup>

The final pre-forfeiture reform problem that impacted the state of civil asset forfeiture law concerns the preliminary burden of proof that the government had to meet in order to seize the property.<sup>94</sup> Prior to CAFRA, under the Controlled Substances Act, "all property was deemed forfeit[ed] once the government showed *probable cause* that that property was used to facilitate a narcotics crime or was derived from a narcotics crime."<sup>95</sup> With such a low preliminary burden of proof upon the government<sup>96</sup> the potential for abuse of the statute soared.<sup>97</sup>

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it to violate the indecency laws. After John Bennis' conviction for gross indecency, the State of Michigan sued to have the car abated as a public nuisance, calling for forfeiture of the car to the state.").

90. U.S. CONST. amend. XIV.

91. U.S. CONST. amend. V; *see also* Peake, *supra* note 34 at 667; *Fifth Amendment: An Overview*, LEGAL INFO. INST., available at [http://www.law.cornell.edu/wex/fifth\\_amendment](http://www.law.cornell.edu/wex/fifth_amendment) (describing the Fifth Amendment's Takings Clause as "[w]hile the federal government has a constitutional right to 'take' private property for public use, the Fifth Amendment's Just Compensation Clause requires the government to pay just compensation, interpreted as market value, to the owner of the property.").

92. Peake, *supra* note 34, at 667-68 (quoting *Bennis*, 516 U.S. at 447).

93. *See id.* at 668-69 (*Bennis*, 516 U.S. at 456 (Thomas, J., concurring) (highlighting Justice Thomas's concurring opinion which stated, "[i]mproperly used, forfeiture could become more like a roulette wheel employed to raise revenue from innocent but hapless owners whose property is unforeseeably misused, or a tool wielded to punish those who associate with criminals, than a component of a system of justice.")). *But see Bennis*, 516 U.S. at 458 (Stephens, J., dissenting) (Justice Stephens saw the need for a wide-ranging innocent owner defense, stating that "[t]he logic of the Court's analysis would permit the States to exercise virtually unbridled power to confiscate vast amounts of property where professional criminals have engaged in illegal acts.").

94. Johnson, *supra* note 69, at 1058.

95. *Id.* (emphasis added); *see also* 21 U.S.C. § 881 (2012).

96. An anonymous tip was generally held to be enough to constitute probable cause. *See* H.R. REP. NO. 106-192, at 16 n. 67 (1999).

97. *See* Johnson, *supra* note 69 at 1058-59 (exemplifying the potential for abuse under such a low burden, "[f]or example, in Boston, thirteen members of the S.W.A.T. team raided Rev. Accelynne Williams' apartment searching for drugs and guns, but found none. Rev.

Once the government has met the burden of probable cause, the burden then shifts to the property owner to establish that his or her property is not subject to forfeiture, which is a much more challenging standard to meet.<sup>98</sup> By default, it is simply more difficult to prove that something did not happen or that property was not involved in a crime than to meet the preliminary probable cause burden.<sup>99</sup> The ever-growing concern over the preliminary burden of proof placed upon the government was an important part of the call for asset forfeiture reform, and such concerns were addressed in the earliest versions of reform proposals.<sup>100</sup>

#### D. *The Introduction of Civil Asset Forfeiture Reform*

As early as the first part of the 1990s, it became clear that federal civil asset forfeiture laws were primed and ready for large-scale reform.<sup>101</sup> Though former President Bill Clinton did not sign the Civil Asset Forfeiture Reform Act of 2000 into law until April 25, 2000, early versions of the Act were first introduced well before then.<sup>102</sup> Representatives Henry Hyde, a Republican, and John Conyers, a Democrat, were the first to initiate civil asset forfeiture reform. Representative Hyde was concerned with the fact that very little had been done to protect innocent property owners and stated, “startling abuses of fundamental fairness [have not] ceased to occur.”<sup>103</sup> Further, Representative Hyde expressed apprehension over the fact that abuse of civil asset forfeiture laws has a negative impact on public policy, and does not serve to further the objectives of policy decisions of the

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Williams, who was seventy-five years old, died of a heart attack after being ‘secured’ on the floor by three police officers. As it turned out, the confidential informant who provided the probable cause had been drunk the night he visited a drug den and was mistaken about the identity and location of the malefactors. The police, of course, not being required to meet a higher standard of proof than probable cause, did not investigate further.”); *see also* Sara Rimer, *Minister Who Sought Peace Dies in a Botched Drug Raid*, N.Y. TIMES, Mar. 28, 1994, <http://www.nytimes.com/1994/03/28/us/minister-who-sought-peace-dies-in-a-botched-drug-raid.html>.

98. 18 U.S.C. § 983 (2012).

99. *See* Johnson, *supra* note 69, at 1059 (noting that, “[i]t is much easier for the government to prove that such an event might (the statute only required probable cause) have happened than for the owner to prove, by a preponderance of evidence, that this chain of events never happened.”).

100. *Id.*

101. Kessler, *supra* note 4.

102. *See id.*

103. Henry Hyde, *Statement of Rep Henry Hyde, “Forfeiture Reform: Now, or Never?”*, ACLU (May 3, 1999), <https://www.aclu.org/technology-and-liberty/statement-rep-henry-hyde-forfeiture-reform-now-or-never>.

government.<sup>104</sup> Additionally, Representative Conyers was further concerned with the ability of police forces to funnel forfeited funds into their budgets.<sup>105</sup>

In the early drafts of the proposal, the Representatives wanted to impose strict regulations on law enforcement officials in potential asset forfeiture situations.<sup>106</sup> Representatives Hyde and Conyers initially called for a “clear and convincing” evidentiary burden on the government,<sup>107</sup> which would mark a stark increase in the evidentiary requirement from the original “probable cause” burden under the then current standards.<sup>108</sup> The Representatives were concerned with the fact that under the forfeiture laws at the time, the government was required to prove almost nothing, while the higher burden landed squarely on the property owner who opposes and must defend against the forfeiture of his or her property.<sup>109</sup>

It soon became clear, however, that the Senate was not willing to pass a bill that called for the government to meet a “clear and convincing” preliminary burden of proof.<sup>110</sup> Shortly thereafter, Representatives Hyde and Conyers settled upon the “preponderance of the evidence” evidentiary burden, which was more stringent than previous asset forfeiture law requirements, but not quite as strict as a “clear and convincing” burden would have required.<sup>111</sup>

With the bill, the Representatives also sought to tackle other controversial aspects of civil asset forfeiture laws that were in effect.<sup>112</sup>

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104. *Id.*

105. Cornell University Law School, *Forfeiture*, LEGAL INFO. INST., <http://www.law.cornell.edu/wex/forfeiture>.

106. Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106-185, § 3, 114 STAT. 202, 212 (2000).

107. Cornell University Law School, *Clear and Convincing Evidence*, LEGAL INFO. INST., [http://www.law.cornell.edu/wex/clear\\_and\\_convincing\\_evidence](http://www.law.cornell.edu/wex/clear_and_convincing_evidence) (defining “clear and convincing” as, “a medium level of burden of proof . . . In order to meet the standard and prove something by clear and convincing evidence, a party must prove that it is substantially more likely than not that it is true.”).

108. Cornell University Law School, *Probable Cause*, LEGAL INFO. INST., [http://www.law.cornell.edu/wex/probable\\_cause](http://www.law.cornell.edu/wex/probable_cause) (establishing that courts, “usually find probable cause when there is a reasonable basis for believing that a crime may have been committed (for arrest) and that evidence of the crime is present in the place to be searched (for search.”); Civil Asset Forfeiture Reform Act § 5, 114 STAT. at 213.

109. See Hyde, *supra* note 103 (stating that, “[i]n civil forfeiture cases, where claimants are required to go forward with evidence and exculpate their property by a preponderance of the evidence, all risks are squarely on the claimant. The government, under the current approach, need not produce any admissible evidence and may deprive citizens of property based on the rankest of hearsay and the flimsiest evidence.”).

110. H.R. REP. NO. 106-192, at 12.

111. *Id.*

112. Hyde, *supra* note 103.

Another of their proposals was to provide a blanket innocent owner defense for all property owners involved in federal civil asset forfeiture situations.<sup>113</sup> Representative Hyde stated,

An innocent owner defense is required by fundamental fairness. My bill provides that an innocent owner's interest in property shall not be forfeited in any civil forfeiture action. An owner would be considered innocent if he did not know of the conduct giving rise to the forfeiture or upon learning of such conduct, did all that reasonably could be expected under the circumstances to terminate such use. An owner is considered to have taken all the steps that a reasonable person would take if the owner, to the extent permitted by law (1) gave timely notice to an appropriate law enforcement agency of information that led the owner to know that the conduct giving rise to forfeiture would occur or has occurred, and (2) in a timely fashion, revoked or attempted to revoke permission for those engaging in such conduct to use the property or took reasonable steps in consultation with a law enforcement agency to discourage or prevent the illegal use.<sup>114</sup>

The innocent owner defense, which Representative Hyde believed would go a long way in the protection of innocent property owners, was accepted.<sup>115</sup> Subsequently, CAFRA contains a specific innocent owner provision: noting that property owners who have undertaken reasonable precautions in the prevention of illegal activities cannot be subject to asset forfeiture under the Reform Act.<sup>116</sup>

While Congress billed CAFRA as a widespread solution to limiting past abuses of civil forfeiture laws, it has been far from limiting.<sup>117</sup> Instead of the extensive reform that Representatives Hyde and Conyers sought to accomplish with the bill, the Act took the shape of a much more restricted reform.<sup>118</sup> In reality, it addressed only specific issues in areas of the law that were frequently encountered by both the government in prosecuting the case and the defense in representing the property owners.<sup>119</sup>

Issues stemming from this restricted reform are largely prevalent and it is generally believed that, "to return forfeiture to its pure and proper form, where the motivation underlying the process is not one of

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113. *Id.*

114. *Id.*

115. 18 U.S.C. § 983(d) (2012). Kessler, *supra* note 4.

116. *Civil Asset Forfeiture*, CCIM INST. (July 2006), [http://www.ccim.com/sites/default/files/ccim-briefing-paper\\_civil-asset-forfeiture.pdf](http://www.ccim.com/sites/default/files/ccim-briefing-paper_civil-asset-forfeiture.pdf).

117. Kessler, *supra* note 4.

118. *Id.*

119. *Id.*

greed and fund-raising, requires revision of the system itself, an agenda left unaddressed by the tweakings to the statutes made by the Reform Act.”<sup>120</sup> While seemingly providing greater protection to property owners than civil asset forfeiture laws had previously, the Act itself does little to hinder law enforcement’s ability to seize property that may have been used in the facilitation of a crime.<sup>121</sup>

## II. THE ISSUES THAT HAVE ARISEN FROM THE CIVIL ASSET FORFEITURE REFORM ACT OF 2000

The following two sections of this Note address issues that citizens face under the current standards set forth in CAFRA and propose further reform that the government should implement to avoid continued abuse of civil asset forfeiture statutes. This section of the Note argues that the current standards under CAFRA are not as limiting on law enforcement’s ability to seize property, which may have been involved in a crime, as Congress intended when changing the civil asset forfeiture reform laws.<sup>122</sup> As evidenced by the district court’s decision in *United States v. 434 Main Street*, innocent property owners continue to face a nearly insurmountable burden in order to retain the rights to their seized property.<sup>123</sup> The current practices of federal, state, and local law enforcement agencies undermine the intentions of CAFRA sponsors in proposing the Act.<sup>124</sup> Such practices hinder the ability of state governments to establish stricter standards of their own, which would provide greater protection for property owners, under state laws, against civil asset forfeiture.<sup>125</sup> The conflict between state and federal civil asset forfeiture laws has arisen because of the ability of state and local law enforcement officials to bypass stricter state laws in order to reap the

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120. *Id.*

121. *See id.* (“For the moment, as with any compromise, the Act leaves both sides somewhat dissatisfied. Prosecutors and police organizations, reaping the benefits of the law prior to this Act, adopted the adage ‘if it ain’t broke, don’t fix it,’ while the defense bar often felt it was conceding too much for little in return. In the end, the Act appears to carry through a large part of the reform agenda without limiting law enforcement’s use of forfeiture as an effective tool against crime.”).

122. *See* 18 U.S.C. § 983 (2012); *see also* *United States v. 434 Main St.*, 961 F. Supp. 2d 298, 318 (D. Mass. 2013) (citations omitted) (“CAFRA ‘heightens the government’s evidentiary burden in civil forfeitures.’ Previously, the government only had to demonstrate probable cause that a property was subject to forfeiture, at which time the burden shifted to the claimant ‘to demonstrate by a preponderance of the evidence that the property was not subject to forfeiture.’ The government’s burden of showing probable cause was ‘a relatively light burden.’”).

123. *United States v. 434 Main St.*, 961 F. Supp. 2d at 323.

124. *Carpenter II*, Salzman & Knepper, *supra* note 40, at 13.

125. *Id.*

benefits of the more easily attained federal standard under CAFRA.<sup>126</sup>

Part II.A of this Note reviews the preliminary burden of proof on the government required to seize property under CAFRA and highlights the potential for abuse of the statute by federal, state, and local law enforcement officials under this current standard. Part II.B scrutinizes the “equitable sharing” program established under CAFRA and explores how state and local authorities are able to bypass tougher state and local laws to implement the more revenue friendly federal program. Part II.C establishes the negative impact the Act has on public policy and illustrates that CAFRA is an incentive-based system that encourages law enforcement to seize innocent property for the benefit of federal, state and local budgets.<sup>127</sup> Part II.D details the practice of allowing CAFRA-seized funds to go undocumented in law enforcement budgets and the widespread negative impact of this type of system.

A. *Government’s Preliminary Burden of “Preponderance of the Evidence” Allows for Seizure of Assets with Little to No Connection to a Crime*

With the implementation of CAFRA, the Senate and the House of Representatives compromised on the initial burden of proof required for law enforcement to seize the property in question.<sup>128</sup> The relevant language of the statute reads:

(c) *Burden of proof.*—In a suit or action brought under any civil forfeiture statute for the civil forfeiture of any property—  
 (1) the burden of proof is on the Government to establish, by a *preponderance of the evidence, that the property is subject to forfeiture*; (2) the Government may use evidence gathered after the filing of a complaint for forfeiture to establish, by a preponderance of the evidence, that property is subject to forfeiture. . . .<sup>129</sup>

126. *Id.*

127. The term “innocent” property refers to the long held legal fiction, used in civil asset forfeiture proceedings, “that the property itself is the defendant in the case—and not the owner. Because the property is ‘guilty’, the fiction goes, it can be forfeited without respect to the rights of its owner(s), because property, not being a person, has no constitutional rights.” See Brenda Grantland, *The Department of “Justice” and Other Legal Fictions*, 1 F.E.A.R. CHRONICLES 3 (Aug. 1992) available at [http://www.fear.org/chron/editorial\\_3.txt](http://www.fear.org/chron/editorial_3.txt).

128. See Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106-185, § 3, 114 STAT. 202, 212 (2000) (the proposed House of Representatives bill called for a preliminary “clear and convincing” burden on the government); see also H.R. REP. NO. 106-192, at 11 n. 47 (revised report that established the “preponderance of the evidence” standard once it was clear that the House of Representatives and the Senate were not going to come to an agreement on a “clear and convincing” standard of proof).

129. 18 U.S.C. § 983 (2012) (emphasis added).

After satisfying the preliminary burden that the disputed property is “more likely than not” connected to drug activity, the property is subject to forfeiture and the burden subsequently shifts to the property owner to disprove the accusations.<sup>130</sup> Raising the preliminary burden on the government from the pre-CAFRA “probable cause” standard to the post-CAFRA “preponderance of the evidence” standard was supposed to ensure that law enforcement officials would be required to make a more substantial connection between the property and the suspected crime.<sup>131</sup> In reality, this change has done little to provide greater protection to property owners.<sup>132</sup>

In early 2013, the federal government seized the entire bank account of a family-run grocery store in Michigan without giving warning to the owners because the government alleged that the owners had been structuring their deposits to avoid tax liability.<sup>133</sup> However, only nine months prior, the Internal Revenue Service (“IRS”) conducted an investigation into the grocery store and cleared the owners of any wrongdoing.<sup>134</sup> The IRS established that the family frequently made smaller deposits not to avoid tax liability, but because they held a typical small business insurance policy that significantly limited their insurance coverage if a theft were to occur.<sup>135</sup>

Although the owners were cleared of any wrongdoing and were never charged with a crime in connection with any government investigation, the preliminary burden of proof on the government, that it was more likely than not that the money in the bank account seized by the government was attained through the facilitation of a crime, was met.<sup>136</sup> In the ongoing litigation, the owners of the grocery store now bear the burden of proving, at their own expense, that the money was not used in the facilitation of a crime.<sup>137</sup>

With the increase of the preliminary burden to a “preponderance of

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130. See Carpenter II, Salzman & Knepper, *supra* note 30, at 4 (“[W]ith civil forfeiture, property owners are effectively guilty until proven innocent. The increased burden (including substantial legal costs) of proving one’s innocence can result in owners abandoning rightful claims to seized property. And if owners do not fight civil forfeiture and the government wins by default, law enforcement agencies are more likely to engage in it.”).

131. Randy Balko, *Forfeiture Folly: Cover Your Assets*, REASON (Apr. 2008), available at <http://reason.com/archives/2008/03/07/forfeiture-folly>.

132. *Id.*

133. *Michigan Forfeiture Victims To Get Their Day in Court: IRS Must Produce Witnesses to Explain Forfeiture Practices*, INST. FOR JUST. (Nov. 8, 2013), <http://ij.org/michigan-civil-forfeiture-release-11-08-2013>.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

the evidence” standard under CAFRA, it was widely assumed that the heightened burden would result in fewer seizures.<sup>138</sup> However, that has not been the case, as “courts have been steadily mitigating the 2000 bill’s impact, both by narrowly interpreting the protections it grants defendants and by being overly deferential to prosecutors when determining if they’ve met the new evidentiary standard.”<sup>139</sup> Allowing seizures in such cases where the court has been deferential in determining if the preponderance standard has been met sets forth a slippery slope for the future of civil asset forfeiture cases.

Permitting cases to go forward under the current CAFRA evidentiary burden only serves to benefit the government in its seizure of goods, and inexcusably shifts a higher burden to property owners.<sup>140</sup> Requiring such a low preliminary burden of proof, even though it was seemingly increased under CAFRA, will further serve to burden innocent property owners.<sup>141</sup>

If such a minimal burden of proof remains, a continued potential for abuse will exist. In recent years the revenue generated through civil asset forfeiture in this country has grown exponentially.<sup>142</sup> Considering how the preponderance standard has been interpreted post-CAFRA, law enforcement officials may have the ability to create faulty scenarios in order to seize property that they know to be innocent.<sup>143</sup>

Such schemes may be made possible simply by allowing law enforcement to meet the low burden of proof that it is more likely than not that the property in question is connected to a crime.<sup>144</sup> Eighty percent of all forfeitures go uncontested.<sup>145</sup> As officials are aware that many forfeitures are uncontested, they can reasonably assume that the property they seize will not be sought after in court.<sup>146</sup> The cost of

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138. Balko, *supra* note 131.

139. *Id.*

140. Williams, Holcomb, Kovandzic & Bullock, *supra* note 41.

141. *Id.*

142. *Id.* at 6-7 (“In 2008, for the first time in history, the U.S. Department of Justice’s Assets Forfeiture Fund (AFF) held more than \$1 billion in net assets— that is, money forfeited from property owners and now available for federal law enforcement activities after deducting various expenses. A similar fund at the U.S. Treasury Department held more than \$400 million in net assets in 2008. By contrast, in 1986, the year after the AFF was created, it took in just \$93.7 million in deposits.”).

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.* (Note that eighty percent of all forfeitures go uncontested by property owners not because the property owners do not have legitimate cases to retain their property. Instead, such a large amount of forfeitures go uncontested because the cost (in time, effort, and money) to defend against a seizure is high and oftentimes the effort to retain the property may end up costing the wronged property owner more than the property itself is worth).

litigation is often too much for the property owners to fight the seizure.<sup>147</sup> In such situations, it is likely that law enforcement officials would be willing to take their chances in the seizing of the property, in the hopes of obtaining the revenue gained through the seizure.

B. *The “Equitable Sharing” Program Assists State and Local Law Enforcement in Bypassing Tougher State Civil Forfeiture Laws*

With CAFRA, the federal government established the federal civil asset forfeiture preliminary burden of proof as a “preponderance of the evidence” standard.<sup>148</sup> However, states have retained the right to establish their own standards through the police powers granted under the Constitution.<sup>149</sup> Nevertheless, through the federal government’s questionable “equitable sharing” program, state and local law enforcement have the ability to bypass state law that is less favorable to their intentions. Therefore, state and local officials have the ability to satisfy the preponderance standard of proof if their state requires a stricter preliminary burden such as a “clear and convincing” or a “beyond reasonable doubt” standard.<sup>150</sup>

The “equitable sharing” program was first introduced under the Comprehensive Crime Control Act of 1984.<sup>151</sup> The program enables state and local law enforcement agencies to seize property that may not

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147. *Id.*

148. 18 U.S.C. § 983 (2012).

149. U.S. CONST. amend. X; *see* Carpenter II, Salzman & Knepper, *supra* note 40; *see also* Mass. Gen. Laws ch. 94C, § 47 (2014) (However, there are states that have a preliminary standard of proof even lower than the federal standard set forth in CAFRA. The Massachusetts civil forfeiture statute requires, “the commonwealth shall have the burden of proving to the court the existence of probable cause to institute the action, and any such claimant shall then have the burden of proving that the property is not forfeitable.”).

150. *See* Carpenter II, Salzman & Knepper, *supra* note 40, at 1 (“[W]ith equitable sharing, state and local law enforcement can take and profit from property they might not be able to under state law. If a state provides owners greater protections or bars law enforcement from directly benefiting from forfeitures, agencies can simply turn to federal law.”); *see also* Williams, Holcomb, Kovandzic & Bullock, *supra* note 41 (“[F]ederal civil forfeiture laws encourage abuse by providing a loophole to law enforcement in states with good laws for property owners: ‘equitable sharing.’ With equitable sharing, state law enforcement can turn over seized assets to the federal government, or they may seize them jointly with federal officers. The property is then subject to *federal* civil forfeiture law—not state law.”). *See generally* Cornell University Law School defines the “clear and convincing” evidentiary burden as, “a party must prove that it is substantially more likely than not that it is true,” LEGAL INFO. INST., *available at* [http://www.law.cornell.edu/wex/clear\\_and\\_convincing\\_evidence](http://www.law.cornell.edu/wex/clear_and_convincing_evidence). *See generally* NOLLO’s *Plain-English Law Dictionary*, NOLLO, <http://www.nolo.com/dictionary/reasonable-doubt-term.html> (last visited Mar. 10, 2015) (defining the beyond reasonable doubt evidentiary burden as, “the prosecutor must prove . . . guilt ‘beyond a reasonable doubt.’”).

151. Williams, Holcomb, Kovandzic & Bullock, *supra* note 41.

meet the preliminary burden to be seized under their own state laws and subsequently transfer it to federal agencies to apply the federal preponderance burden.<sup>152</sup> In addition, the incentive for state and local authorities to use the “equitable sharing” program stems from the financial benefits that may be provided to these law enforcement officials under the Act.<sup>153</sup>

State and local authorities may transfer the seized property to federal officials in the event that “the ‘conduct giving rise to the seizure is in violation of federal law and where federal law provides for forfeiture.’”<sup>154</sup> In situations where state and local authorities transfer the seized property to federal authorities, under the federal “equitable sharing” program, they are entitled to as much as eighty percent of the profits made from the seized property, even if relevant state law limits or prohibits profit-based incentives.<sup>155</sup>

Moreover, the incentive for state and local officials to avoid state law and apply federal law is great.<sup>156</sup> If property is seized through the “equitable sharing” program, “the federal government *requires* that any funds distributed through equitable sharing arrangements be used solely to fund law enforcement activities, even for agencies in states where law enforcement receives *none* of the proceeds from state forfeitures.”<sup>157</sup> Additional provisions of the “equitable sharing” program allow for profits made from seizure of assets through the program to pay for state and local taskforce officer salaries, even if the laws of the particular state would prohibit forfeiture profits from funding such a position.<sup>158</sup>

With such incentives for state and local officials to bypass the provisions set forth by their own states and enforce the federal “equitable sharing” provisions, the Constitutional powers of the states are infringed upon and such a system undermines the power regulated to the states.<sup>159</sup> For example,

law enforcement agencies in states where at least a portion of forfeiture proceeds must be used for non-law enforcement purposes had significantly higher levels of equitable sharing payments than agencies where law enforcement could keep the proceeds. The results suggest that law enforcement agencies in states that require

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152. *Id.* at 12.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.* at 25.

157. *Id.*

158. *Id.*

159. *Id.* at 26-27.

law enforcement to share forfeiture proceeds are more likely to engage in equitable sharing in order to avoid state restrictions.<sup>160</sup>

The program encourages both state and local officials to abandon stricter state policies simply because of financial incentives provided by the federal system.<sup>161</sup> Additionally, it forces agencies to abandon the idea of protecting innocent property owners and instead encourages them to become solely revenue-driven entities.

C. *Incentive-Based System Encourages Civil Asset Forfeiture and Hinders Public Policy*

Under CAFRA, law enforcement authorities involved in the seizure of the assets in question are entitled to keep a portion, and in some cases, all of the proceeds collected through the seizure.<sup>162</sup> In fact, “given the structures and incentives of civil forfeiture law, a substantial number of law enforcement agencies are now dependent on civil forfeiture proceeds and view civil forfeiture as a necessary source of income.”<sup>163</sup> This incentive of authorities getting to keep large portions of the funds generated through the seizure of assets creates concern that the authorities involved may act in such a way that they are “policing for profit.”<sup>164</sup> Such a practice essentially means that law enforcement agencies may actively chase forfeitures to pad their budgets at the expense of more legitimate enforcement behavior.<sup>165</sup> This theory hinges on the idea that because incentives such as increased paychecks, larger budgets, new equipment, and specialized training, among others, are threatened without the proper funding, law enforcement officials are not going to be in a position to go above and beyond their standard duty to

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160. *Id.* at 26-27; *see also id.* at 7 (“Law enforcement agencies in states with no profit motive (no forfeiture profits to law enforcement) will receive more in equitable sharing than agencies in states with a 100-percent profit motive—an increase of \$30,000 per year for an average-sized law enforcement agency, representing an increase of 25 percent of equitable sharing dollars.”).

161. *See Guide to Equitable Sharing for State and Local Law Enforcement Agencies*, U.S. DEP’T OF JUST. (2009), <http://www.justice.gov/usao/ri/projects/esguidelines.pdf> (last visited Sept. 21, 2014).

162. Williams, Holcomb, Kovandzic & Bullock, *supra* note 41, at 6.

163. *Id.* at 12; *see also id.* (“[According] to a survey of nearly 800 law enforcement executives. . . nearly 40 percent of police agencies reported that civil forfeiture proceeds were a *necessary* budget supplement. . . . [T]his dependency is also present at the federal level, where the Department of Justice in the past has urged its lawyers to increase their civil forfeiture efforts so as to meet the Department’s annual budget targets.”).

164. Williams, Holcomb, Kovandzic & Bullock, *supra* note 41.

165. *Id.*

protect the best interests of the public at large.<sup>166</sup>

Instead, officials are incentivized to seize the opportunity to acquire some additional funds, and when it arises, they can confiscate any and all potentially forfeitable assets, largely at the expense of proper justice.<sup>167</sup> This theory alone identifies a significant public policy issue through the use of civil forfeiture. The use of such laws creates tension between the objectives of law enforcement officials and the public that they are sworn to protect. When law enforcement officials are dependent on civil asset forfeiture funds, it undermines the very foundation upon which they serve. Their mission is protecting the rights of the public, and their duty as public service officers is significantly hindered by such profit-driven motives.<sup>168</sup>

The incentive-based system of “policing for profit” under current civil asset forfeiture laws has grown exponentially in recent years, largely due in part to the economic crisis in this country.<sup>169</sup> As federal, state, and local law enforcement budgets get tighter and more precarious due to a lack of funding,<sup>170</sup> it is only natural that these agencies turn to other programs to try to raise revenue.

The idea that such agencies have turned to civil asset forfeiture as a means of raising revenue is exemplified by the fact that, “in 1986, the second year after the creation of the Department of Justice Assets Forfeiture Fund, the Fund took in \$93.7 million in proceeds from forfeited assets. By 2008, the Fund for the first time in history topped \$1 billion in net assets.”<sup>171</sup> As of 2011, the Fund had grown as large as \$1.8 billion.<sup>172</sup> It is important to note that, “[i]n addition to the fund’s size, payments from the fund to local law enforcement agencies totalled [sic] \$445 million in 2011, another all-time high.”<sup>173</sup> Increased dependence

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166. Scott Bullock & Vanita Gupta, *End Policing for Profit*, HUFF.POST, (June 12, 2010, 5:12 AM), [http://www.huffingtonpost.com/scott-bullock/end-policing-for-profit\\_b\\_534553.html](http://www.huffingtonpost.com/scott-bullock/end-policing-for-profit_b_534553.html).

167. *Id.*

168. Williams, Holcomb, Kovandzic & Bullock, *supra* note 41.

169. *See id.* at 12 (“The difference between self-interest in the public and private spheres is that the private citizen must *persuade* to achieve his ends, while the government official can employ force. It is therefore a constant threat that those in positions of power will use that force to serve their own self-interest at the expense of the broader populace. This concern reaches its zenith when government officials stand to aggrandize themselves by seizing individuals’ private property for their own benefit.”).

170. *Id.* at 11.

171. *Id.*

172. Mike Riggs, *Federal Asset Forfeiture Continues to Skyrocket Under Obama*, REASON (July 31, 2012), <http://reason.com/blog/2012/07/31/federal-asset-forfeiture-skyrockets-unde>.

173. *Id.*

on such funds only further serves to guarantee federal, state, and local law enforcement abuse of CAFRA requirements, which largely hinders the public policy incentive of such agencies to provide a protective service to the general public.<sup>174</sup>

D. *Funds Seized Through CAFRA Go Largely Undocumented in Law Enforcement Budgets*

Another troubling aspect of civil asset forfeiture arises once the government has seized the property in question. The federal, state, and local law enforcement authorities involved in the seizure under CAFRA are entitled to some, if not all, of the profits that stem from the seized property.<sup>175</sup> Even more troubling, however, is that once the profit is obtained, state and local law enforcement officials are largely not required to report how the money was obtained, to which parts of the budget the profit was allocated, or how the funds were spent by the department.<sup>176</sup> It is difficult to determine where the money comes from and where it goes in such budgets because as it stands, there are only twenty-nine states that require such information on civil asset forfeiture funds be documented.<sup>177</sup> Of the data that has been collected, however, it is clear that federal, state, and local law enforcement officials use profits collected through asset forfeiture extensively.<sup>178</sup>

With very little regulation as to how federal, state, and local forfeiture assets are spent; law enforcement agencies are afforded the opportunity to use these funds in any manner that they deem to be necessary.<sup>179</sup> For example, a 2007 audit of a Georgian district attorney's office highlighted a number of potential abuses of allowing agencies seemingly free reign:

According to auditor's reports, almost one-third of the 376 checks written out of the asset forfeiture account in 2006 were either

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174. See Williams, Holcomb, Kovandzic & Bullock, *supra* note 41, at 18, 20 ("An example of how law enforcement maintains its 'addiction' to forfeiture funds is the practice of 'reverse stings,' in which police pose as drug sellers rather than buyers. Forfeiture advocates' claims of 'preventing crime and putting major offenders away' are inconsistent with [such practices]. . . . Instead, law enforcement targets buyers rather than sellers because buyers tend to have more cash on hand subject to forfeiture.") (footnote omitted).

175. *Id.* at 9.

176. *Id.* at 8, 13 ("Public accountability over civil asset forfeiture in the states is extremely limited. Only 29 states clearly require law enforcement to collect and report forfeiture data, and just 19 of those states responded to freedom-of-information requests with usable data—and the data provided were often meager. In most states, we know nothing or next-to-nothing about the use of civil forfeiture or its proceeds.")

177. *Id.* at 27.

178. *Id.*

179. *Id.* at 13.

questionable or not allowed under federal guidelines. Those questionable expenses totaled more than \$2 million. Under federal asset forfeiture laws, money seized by the feds and handed over to state law enforcement may only be used for law enforcement purposes. But [the] [d]istrict [a]ttorney . . . has a very expansive view of just what that means. . . . [The] asset forfeiture fund spending included: . . . \$5,150 for benefits, dinners, football tickets, fundraisers, and balls sponsored by various civic organizations – none of them directly related to law enforcement; \$5,500 spent on rent and catering for a staff Christmas party; \$89 for a Superman-style red cape with “Super Lawyer” printed on it that an assistant prosecutor was encouraged to wear at the Christmas party; \$150 for a dinner party to celebrate the conviction of a murderer; and \$9,100 for Howard’s perfect attendance program for students in Atlanta’s public elementary schools.<sup>180</sup>

Furthermore, the district attorney justified the questionable spending of the asset forfeiture funds by arguing that they were effective crime fighting expenditures that benefited the purposes of law enforcement and provided an increase in office morale, stating, “[w]e cannot pay our employees bonuses. We can’t pay overtime. . . . I tried to come up with ways to increase morale.”<sup>181</sup> The problem that the auditors had in trying to determine if the spending of the funds was in violation of federal civil asset forfeiture laws was that it was impossible to determine exactly where the funds originated.<sup>182</sup> There were a number of federal funds intermingled in one bank account, making it difficult to determine which of the funds had been spent on each expense.<sup>183</sup>

By allowing federal, state, and local law enforcement officials continued opportunities for abuse, as exemplified in Georgia,<sup>184</sup> exploitation of civil asset forfeiture will continue to run rampant among law enforcement agencies. Furthermore, public perception of spending of forfeiture-seized funds will only grow more negative in the years to come.<sup>185</sup>

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180. Phillip Smith, *Law Enforcement: Asset Forfeiture Funds Spent on Banquets, Balls, and Balloons in Atlanta*, DRUG WAR CHRONICLE (Sept. 14, 2007), [http://stopthedrugwar.org/chronicle/2007/sep/14/law\\_enforcement\\_asset\\_forfeiture](http://stopthedrugwar.org/chronicle/2007/sep/14/law_enforcement_asset_forfeiture).

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *See id.*

### III. REFORMING CAFRA: ENHANCING THE REQUIREMENTS SET FORTH BY CAFRA WILL LEGITIMIZE CONGRESS'S INTENTIONS FOR THE ACT

This section of the Note focuses on potential options for CAFRA reform. Though Congress's intent in passing the Act was to impose tougher civil asset forfeiture standards, in practice this has not taken effect.<sup>186</sup> Part III.A asserts the need to raise the government's preliminary burden of proof to a "clear and convincing" standard, which would provide more protection for property owners, as it requires the government to provide more substantial evidence before seizing any property in question.

Part III.B explains that requiring a higher preliminary standard of proof on the government would serve to eliminate the questionable "equitable sharing program" because state and local authorities would no longer simply be able to bypass more stringent state laws in favor of a more forgiving federal law. Part III.C proposes requiring federal, state, and local authorities to disclose where and how funds collected through civil asset forfeiture will be distributed and applied.

#### A. *Raising the Government's Preliminary Burden of Proof Provides More Protection to the Public*

This Section discusses how different states have approached the preliminary standard of proof required of the state in civil forfeiture cases.<sup>187</sup> Analysis of individual state statutes and practices supports the assertion that raising the government's preliminary burden of proof in federal civil asset forfeiture cases will help to eliminate law enforcement's abuse of CAFRA.<sup>188</sup> As it stands, North Carolina is the only state in the country that does not allow for civil forfeiture, allowing forfeiture only after the owner of a property has been convicted of a crime.<sup>189</sup> Only two states, Wisconsin and Nebraska, require the criminal burden that the property be connected to the crime "beyond a reasonable doubt" before the property can be seized.<sup>190</sup> However, there are a number of states that have adopted the "clear and convincing"

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186. See Stefan D. Cassella, *The Civil Asset Forfeiture Reform Act of 2000: Expanded Government Forfeiture Authority and Strict Deadlines Imposed on All Parties*, 27 J. LEGIS. 97 (2001) (discussing the initial intent of both the Senate and the House of Representatives in their proposed bills prior to the adoption of the Act).

187. Williams, Holcomb, Kovandzic & Bullock, *supra* note 41, at 109 (discussing and grading the civil asset forfeiture laws for every state, and establishing how they apply their standard and how effective the state's statute has been in practice).

188. *Id.* at 41.

189. *Id.* at 80. See N.C. GEN. STAT. § 14-2.3 (2014).

190. Williams, Holcomb, Kovandzic & Bullock, *supra* note 41, at 74, 101; see Wis Stat.. § 961.555 (2014).

evidentiary burden, which requires that the government show that it is “substantially more likely than not” that the property in question was involved in the facilitation of a crime.<sup>191</sup> This evidentiary standard provides greater protection to the public.<sup>192</sup> It requires a more substantial showing that the property in question has been involved in a crime and would make it harder for law enforcement officials to seize property with limited proof.<sup>193</sup>

The “clear and convincing” evidentiary burden is the standard of proof originally advocated for by the Representatives introducing civil asset forfeiture reform.<sup>194</sup> They did so because they recognized the widespread potential for abuse of forfeiture laws if a low preliminary burden of proof were utilized.<sup>195</sup> Since the introduction of the Act, the abuses of the current standard have only grown more rampant, and therefore support for an increased “clear and convincing” standard is likely to be more widespread.

#### B. *Eliminate the Revenue Based “Equitable Sharing Program”*

In order for the proposed increase of the preliminary evidentiary burden to a “clear and convincing” standard of proof to be successful, the federal government would also have to phase out the controversial “equitable sharing” program. Because the “equitable sharing” program encourages state and local officials to circumvent their state’s own laws in favor of seizure of the property under federal regulations, increasing the federal burden of proof under CAFRA would be ineffective unless the “equitable sharing” program is eliminated.<sup>196</sup> Under the program, state and local officials have the ability to work with federal officials to seize property under federal law, based solely on the fact that they are seeking to bypass stricter state laws and attain greater revenue based incentives.<sup>197</sup> Eliminating the program altogether would end such practices, as there would be no financial incentives to hand over the seized assets to the federal government.

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191. See Williams, Holcomb, Kovandzic & Bullock, *supra* note 41, at 22 (establishing that ten states currently place a preliminary “clear and convincing” evidentiary burden on law enforcement officials before seizure of the property in question). For the definition of “clear and convincing” see Cornell University Law School, LEGAL INFO. INST., available at [http://www.law.cornell.edu/wex/clear\\_and\\_convincing\\_evidence](http://www.law.cornell.edu/wex/clear_and_convincing_evidence).

192. See Williams, Holcomb, Kovandzic & Bullock, *supra* note 41, at 22.

193. See “Clear and Convincing Evidence,” *supra* note 107.

194. Hyde, *supra* note 103.

195. *Id.*; see also Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106-185, § 2, 114 STAT. 202, 205-06 (2000).

196. Williams, Holcomb, Kovandzic & Bullock, *supra* note 41, at 6, 12.

197. Carpenter II, Salzman & Knepper, *supra* note 40, at 1.

C. *Require Full Disclosure as to the Apportionment of Civil Forfeiture Funds to Help Eliminate Incentive-Based System*

As it stands, there is very little regulation as to how civil asset forfeiture funds are apportioned and accounted for within federal, state, and local budgets.<sup>198</sup> This lack of specific accountability leads to questions about how much money and other assets are actually acquired through such practices.<sup>199</sup> Mandatory disclosure of the location of such assets would bring more attention to the fact that civil asset forfeiture standards have been abused in the recent past and will help to limit such abuse in the future. Requiring all federal, local, and state agencies to document, track, and report all profit and how such profit is distributed amongst agencies is the only way to ensure that abuse of civil asset forfeiture laws does not continue.<sup>200</sup>

Some states have already created, or are in the process of attempting to create, strict regulations about how such funding should be accounted for, and they also seek to address how any and all profit should be spent.<sup>201</sup> For example, proposed legislation in Massachusetts attempts to fairly carve out who should be entitled to such gains:

The final order of the court shall provide that said monies and the proceeds of any such sale shall be distributed in the following manner: thirty-four percent shall be distributed to the Senator Charles E. Shannon, Jr. Community Safety Initiative Fund created pursuant to section 35U of chapter 10 of the general laws, thirty-three percent to the prosecuting district attorney or attorney general, and thirty-three percent to the city, town, state, or metropolitan district police department involved in the seizure, provided, however, that more than one department was substantially involved in the seizure, the court having jurisdiction of the forfeiture proceeds shall equitably distribute said proceeds among those departments.<sup>202</sup>

By providing explicit instructions as to how civil asset forfeiture funds should be allocated, and how they should be able to be used by law enforcement officials, state and federal officials can work to guarantee that the funds are spent legitimately in the future.

#### CONCLUSION

Without reform, law enforcement's abuse under CAFRA will

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198. *Id.* at 3.

199. *Id.*

200. Williams, Holcomb, Kovandzic & Bullock, *supra* note 41, at 14.

201. See H.R. 188 No. 1238, 188th Gen. Court (Mass. 2013).

202. *Id.*

potentially increase exponentially. If such potential is acted upon, a larger number of innocent property owners will have their property wrongfully seized. The House of Representatives saw this potential for abuse when the initial reform was introduced; however, compromise led to a more lenient standard of proof on the government when it comes to the initial hurdle that it must overcome to seize the assets in question.<sup>203</sup> Under the current version of CAFRA, there are glaring issues that need to be addressed in order to hinder abuse of the law against the drafter's intentions and protect the American public.

The preliminary burden on the government requiring a "preponderance of the evidence" that the asset in question is subject to forfeiture is not a high enough standard and encourages law enforcement's continued abuse of the intentions of the Act. Additionally, allowing for an "equitable sharing" program that helps state and local law enforcement officials circumvent stricter or less profitable state laws in favor of a more lenient federal law undermines the rights of the states. Further, it encourages officials to cherry-pick the course of action that is most beneficial to their revenue based policing efforts. Allowing for such incentive driven policing violates public policy. Finally, the practice of permitting revenue that is raised through civil asset forfeiture to remain undocumented in local, state, and, federal budgets only further encourages questionable behavior of law enforcement.

Reform of civil asset forfeiture laws must be undertaken if the public ever hopes to obtain treatment that is to be considered fair under the law in regard to such forfeitures. The preliminary burden of proof on the government needs to be raised from the preponderance standard to a stricter "clear and convincing" standard. Heightening the preliminary burden will require law enforcement to produce additional evidence to prove that the asset in question is subject to forfeiture. It will additionally serve to protect indigent property owners who do not have the means to oppose such wrongful seizures, which can occur under such a low burden of proof.

Additionally, the "equitable sharing" program must be discontinued. It encourages state and local agencies to circumvent legitimate state laws in hopes of acquiring more revenue. Such actions violate the very principles that our law enforcement agencies were established to promote. Finally, the allocation of civil forfeiture acquired revenue needs to be documented and made public knowledge.

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203. Cassella, *supra* note 186.

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If law enforcement agencies continue to be given the opportunity to conceal the revenue that they acquire through civil asset forfeiture in budgets, salaries, and new equipment the practice of abusing the law will continue and reform will be largely unsuccessful.

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