



4-1-2017

Civil Asset Forfeiture in Virginia: An Imperfect System

James Simon

Washington and Lee University School of Law

Follow this and additional works at: <https://scholarlycommons.law.wlu.edu/wlulr>



Part of the [Law Commons](#)

Recommended Citation

James Simon, *Civil Asset Forfeiture in Virginia: An Imperfect System*, 74 Wash. & Lee L. Rev. 1295 (2017).

Available at: <https://scholarlycommons.law.wlu.edu/wlulr/vol74/iss2/24>

This Note is brought to you for free and open access by the Washington and Lee Law Review at Washington and Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Washington and Lee Law Review by an authorized editor of Washington and Lee University School of Law Scholarly Commons. For more information, please contact christensena@wlu.edu.

Civil Asset Forfeiture in Virginia: An Imperfect System

James Simon*

Table of Contents

I. Introduction	1296
II. History of Civil Asset Forfeiture	1303
A. Development	1303
B. Different Types of Forfeiture.....	1305
1. Administrative Forfeiture	1305
2. Criminal Forfeiture	1306
3. Civil Forfeiture	1307
C. Beginnings of Abuse	1309
III. Various State Approaches to Civil Asset Forfeiture	1311
A. Distributions of Seized Assets and Burdens of Proof.....	1311
B. State Protections for Innocent Owners	1314
IV. Virginia's Civil Asset Forfeiture Laws	1319
A. Property Generally	1319
1. Overview of Virginia Laws	1319
2. Concerns with Virginia's Personal Property Regulations	1322
a. The Virginia Waiver System and the Lack of Appointed Counsel.....	1323
b. Lack of Oversight in Agency Expenditure of Asset Forfeiture Proceeds.....	1325
B. Real Property	1328
1. Uniqueness of Real Property	1329
2. Varying State Safeguards for Real Property.....	1330
3. Recommended Protections for Real Property....	1331

* Candidate for J.D. May, 2017, Washington and Lee University School of Law.

V. Proposed Solutions to Virginia’s Civil Asset Forfeiture Programs	1332
A. Legislative Efforts	1332
B. Virginia State Crime Commission Recommendations.....	1333
1. Recommendations	1334
2. Items for Consideration	1335
C. Legislative Success in 2016.....	1335
1. Reforms of Virginia’s Personal Property Forfeitures	1337
2. Reforms of Virginia’s Real Property Forfeitures.....	1339
VI. Conclusion.....	1340

I. Introduction

It is a Wednesday afternoon in rural Virginia and a police officer pulls over a black sedan for speeding on the highway. Upon approaching the vehicle, the officer makes the standard request for license and registration and, while the driver is retrieving those documents, the officer notices a black duffel bag in the front seat. The officer asks the driver what is in the bag and the driver opens it and displays \$11,000 in cash, explaining that he owns a car dealership and is driving to the bank to deposit the proceeds from a recent sale. He explains that the dealership is located in a rough area of town, that he always feels uncomfortable holding large amounts of cash there, and that he has made a practice of immediately depositing money from cash sales. The officer returns to his patrol vehicle and conducts a background check, discovering that the driver has two previous criminal convictions for possession of marijuana, both dating back roughly ten years. He goes back to the sedan, requests the duffel bag from the driver, and informs him that there is probable cause to suspect that he intended to use the money for a drug transaction and that the officer is seizing it pursuant to the laws of Virginia. The surprised driver asks if this means he is under arrest. The police officer calmly informs him that, no, he is free to go, but the \$11,000 is now the property of the state of Virginia. Indignant, the driver protests the seizure and tells the officer

that he cannot take his money without even charging him with a crime. The officer smiles and tells the driver that yes, under the laws of Virginia he certainly can, and that if the driver wants the money back he can contest the seizure in court.

Consider another hypothetical. John Smith lives in Lynchburg, Virginia, but inherited his childhood home in Lexington, Virginia, from his parents in 2013 when they both unfortunately died in a car crash. Rather than selling the house, John started renting it out to college students. The house is on a small plot of land that includes a small wooded area in the back. John works in Lynchburg but occasionally visits the house to conduct repairs, such as fixing the gutters on the roof or power-washing the sidewalk out front. One day, he receives a phone call from the Lexington police department, informing him that the tenants of the house have been arrested for growing marijuana in the wooded lot and selling cocaine inside the house to other college students. Naturally, John expresses dismay that such nefarious activities have been taking place on his land and assures the officer that he never participated in any of the drug-related activities. The officer allays his fears and assures him that he is not under investigation for any connection to the crime. “However,” the officer tells him, “the Lexington police department is initiating seizure proceedings against the house and land because it was being used to facilitate the manufacture and sale of controlled substances.” Shocked, John asks the officer what that means. The officer tells him that he will be receiving a notice in the mail shortly advising him of his rights. Two weeks later, John receives a letter from the clerk of court, officially informing him of the seizure of his land and advising him of his rights to contest the forfeiture and appear in court.

Both the car dealership owner and John Smith have fallen victim to one of the most common law enforcement techniques for generating revenue.¹ Neither was charged with a crime, neither

1. See U.S. DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL, AUDIT REPORT 15-08, AUDIT OF THE ASSETS FORFEITURE FUND AND SEIZED ASSET DEPOSIT FUND ANNUAL FINANCIAL STATEMENTS: FISCAL YEAR 2014 (2015) (stating that, for the past nine years, United States law enforcement agencies have seized over \$1 billion worth of assets); see also MATTHEW J. HICKMAN & BRIAN A. REAVES, BUREAU OF JUST. STATISTICS, SHERIFFS' OFFICES 2003, at 16 (2006) (explaining that, as early as 2002, over half of all sheriffs' offices in the United States benefited financially from civil asset forfeiture).

was investigated by the police department for possible criminal activity, but both suddenly lost significant assets during what was otherwise a perfectly normal day. Fortunately for them, there are procedures in place by which they can fight against the seizure and possibly get their property back.² Unfortunately for them, once that state claims probable cause to forfeit their property, the owners have the burden to prove that an exemption applies that would save their property from asset forfeiture or else lose their property permanently to the state government.³ They would also be surprised to find out that, in both cases, the seizure was effectively a financial windfall for the local police departments.⁴ Under Virginia law, the police departments will be able to keep up to 90% of the cash or the proceeds from the sale of the house, with the other 10% going to the Virginia Department of Criminal Justice Services (DCJS).⁵ If these property owners have the financial wherewithal to pursue the case in court (many do not),⁶ they may have to litigate against the state for several years⁷ to affirmatively

2. See DEP'T OF CRIM. JUST. SERV. OF VA., FORFEITED ASSET SHARING MANUAL (2015) (explaining that, after the Commonwealth's Attorney initiates forfeiture by filing an Information with the Circuit Court, the owner of the property has thirty days to file an answer laying claim to the property and stating why forfeiture should not occur).

3. See VA. CODE ANN. § 19.2-386.8 (2015) (listing exemptions that the claimant must prove apply, such as a landlord not knowing or having reason to know of illegal activity).

4. See VA. STATE CRIME COMM'N, ASSET FORFEITURE 75 (2015) (recording that in 2014, Virginia law enforcement agencies received a total of over \$4,000,000 in proceeds from seized assets at the state level, with approximately \$6,000,000 more coming from federal programs).

5. See VA. CODE ANN. § 19.2-386.14 (2012) (stating that the DCJS automatically keeps 10% of the proceeds for an administrative fund and then distributes the remaining 90% among the departments that participated in the seizure).

6. See Sarah Stillman, *Taken*, NEW YORKER (Aug. 12, 2013), <http://www.newyorker.com/magazine/2013/08/12/taken> (last visited May 1, 2017) (detailing how law enforcement officers target minorities in part because they are unlikely to have the resources to litigate the cases in court) (on file with the Washington and Lee Law Review).

7. See Jacob Sullum, *How Cops Got a License to Steal Your Money*, FORBES (Sept. 11, 2014), <http://www.forbes.com/sites/jacobsullum/2014/09/11/how-cops-got-a-license-to-steal-your-money/> (last visited May 1, 2017) (discussing the case of Mandrel Stuart, in which it took so long to get his seized money back that he lost his restaurant) (on file with the Washington and Lee Law Review); see also

prove their innocence.⁸ If they cannot do this, the police department will be able to keep the property without having obtained a single criminal conviction.⁹ This is civil asset forfeiture.

Civil asset forfeiture, firmly established in the 1990s, has become increasingly criticized, particularly on the state level.¹⁰ It has had some beneficial effects such as enabling law enforcement to seize the assets of known drug dealers when criminal convictions are not forthcoming.¹¹ But there are also genuine concerns due to less stringent standards of proof.¹² For instance, in criminal cases, guilt must be proven beyond a reasonable doubt.¹³ The majority of civil asset forfeiture cases, however, require only preponderance of the evidence.¹⁴ In addition,

Commonwealth v. Brunson, 448 S.E.2d 393, 394 (Va. 1994) (noting that in two cases, *Brunson* and *Commonwealth v. \$1950 U.S. Currency and One Hi-Tech Pager*, Record No. 931658, faulty seizures had occurred three years before and yet the owners had still not won their property back in court).

8. See VA. CODE ANN. § 19.2-386.8 (1989) (stating that the claimant must affirmatively prove innocence through a listed exception, and providing a non-exhaustive list of exemptions that can be argued).

9. See *id.* (describing how the property is forfeited if the claimant cannot prove an exemption).

10. See Michael Sallah, Robert O'Harrow Jr., Steven Rich & Gabe Silverman, *Stop and Seize*, WASH. POST (Sept. 6, 2014), <http://www.washingtonpost.com/sf/investigative/2014/09/06/stop-and-seize/> (last visited May 1, 2017) (detailing criticisms against applications of civil asset forfeiture, particularly on the state level) (on file with the Washington and Lee Law Review).

11. See VA. STATE CRIME COMM'N, *supra* note 4, at 32 (relating the case of a woman who kept buying cars for her drug dealer connections with no logical explanation).

12. See Sallah et al., *supra* note 10 (reporting on the different burdens of proof required under state civil forfeiture laws, almost all of which are less than beyond a reasonable doubt).

13. See James Q. Whitman, *The Origins of "Reasonable Doubt,"* YALE FACULTY SCHOLARSHIP SERIES (2005), http://digitalcommons.law.yale.edu/fss_papers/1 (last visited May 1, 2017) (explaining that, while the phrase "reasonable doubt" is not located anywhere in the Constitution, the Supreme Court has repeatedly read it into case law since the 1970s (citing *In re Winship*, 357 U.S. 358 (1970))) (on file with the Washington and Lee Law Review).

14. See DICK M. CARPENTER II, LISA KNEPPER, ANGELA C. ERICKSON & JENNIFER McDONALD, *POLICING FOR PROFIT* 16 (2d ed. 2016) (recording that most states use the preponderance of the evidence standard, while others use higher standards such as clear and convincing or lower standards such as probable cause).

evidence suggests a type of “perverse incentive” for many police officers to seize property they would not have ordinarily taken.¹⁵ This result occurs because many states, including Virginia, allow local law enforcement agencies to keep some or all of the property that they confiscate.¹⁶ Furthermore, a large number of property owners do not have the time, resources, or knowledge to contest the forfeitures of their property.¹⁷ Thus, the law essentially creates a numbers game in which officers can play the odds by seizing as much property as possible, even when they know they would likely lose the cases in court.¹⁸ In doing so, they are relying on the likelihood that affected property owners will not contest the seizure of their property.¹⁹ These are the types of concerns that are often present in personal property cases as in the first hypothetical.

Real property cases—like the second hypothetical—pose two additional concerns: innocent co-owners and the irreplaceability of property. Problems with innocent co-owners arose early in the civil asset forfeiture era, and the Supreme Court initially ruled in *Bennis v. Michigan*²⁰ that no protections extended to these individuals.²¹ In response to the public outcry following this

15. See Sallah et al., *supra* note 10 (providing data that law enforcement agencies drastically increased their number of seizure cases once asset forfeiture started aiding their budgets).

16. See VA. STATE CRIME COMM’N, *supra* note 4, at 74 (explaining how local law enforcement agencies in Virginia are permitted to keep up to 90% of the drug-related assets they seize).

17. See Stillman, *supra* note 6 (pointing out that many property owners and particularly minorities lack the funds to litigate for the return of their property).

18. See VA. STATE CRIME COMM’N, *supra* note 4, at 81 (reporting that less than one percent of civil forfeiture cases actually went to trial, with most owners choosing not even to try to get their property back).

19. See *id.* (referencing a study which showed that most persons who fell victim to asset forfeiture were minorities, immigrants, or poor individuals).

20. 516 U.S. 442 (1996).

21. See *id.* at 446 (holding that due process was not violated when the innocent petitioner was deprived of her property interest in the forfeited asset). In *Bennis*, the Court addressed whether the innocent co-owner of a vehicle was deprived of due process when the state seized the vehicle due to her husband’s illegal activity. *Id.* at 443. John and Tina Bennis jointly owned an automobile; John was arrested for sexual conduct with a prostitute inside this vehicle on a public street. *Id.* Following John’s arrest, the state sued to seize the vehicle as a public nuisance. *Id.* at 443–44. Tina Bennis argued before the court that,

decision, Congress passed legislation allowing a defense for innocent co-owners, and most states followed suit.²² The burden, however, is still on the innocent co-owner (or landlord-owner) to actively prove that he did not know and had no reason to know about the criminal activity.²³ While this may seem reasonable on the surface, complications often arise in cases like the John Smith rental property hypothetical. For example, a court might ask whether an absentee landlord should have been able to discover cocaine in the house or marijuana growing in a back lot.²⁴ Combine this with the lower standard of proof requirement, and one can see how it would be all too easy for an innocent landowner to lose his property.²⁵

The uniqueness of real property adds a further wrinkle to these concerns. Property law establishes the principle that no two pieces of real property are exactly the same—people develop

because she had no knowledge that her husband was using the car for illegal activities, the state would be violating her due process interests if the court eliminated her property rights because of her husband's actions. *Id.* at 444. In considering the case, the Supreme Court looked to a long line of historical asset forfeiture cases and reached the conclusion that a property interest can be eliminated if the property is used for illegal ends, even if the owner had no knowledge of it. *Id.* Analogizing the forfeiture laws to dangerous driving laws, in which an owner may be held responsible for the actions of a driver to which he lent a vehicle, the Court concluded that because the petitioner would have been liable for her husband's dangerous driving actions, there was no precedent showing that she should escape liability for his public indecency actions. *Id.* at 452. The vehicle both "facilitated and was used for criminal activity," and the Court decided that, given the weight of historical precedent to the contrary, the Constitution did not provide an innocent owner defense. *Id.* at 453.

22. See 18 U.S.C. § 983(d) (2009) (establishing the innocent owner defense for federal asset forfeiture cases); see, e.g., VA. CODE ANN. § 19.2-386.8 (2015) (stating that the criteria for an innocent owner defense under Virginia law is usually no knowledge or reason to know of the criminal activity).

23. See VA. CODE ANN. § 19.2-386.8 (2015) ("No owner's interest may be forfeited under this chapter if the court finds that: [h]e did not know and had no reason to know of the conduct giving rise to forfeiture.").

24. See *id.* (stating that a landlord may be held liable for a tenant's criminal conduct if the landlord had reason to know of the conduct).

25. For a disturbing example of how easily this can happen, see Pamela Brown, *Parents' House Seized After Son's Drug Bust*, CNN (Sept. 8, 2014), <http://www.cnn.com/2014/09/03/us/philadelphia-drug-bust-house-seizure/> (last visited May 1, 2017) (reporting how a family was literally forced onto the streets after their son was arrested for selling forty dollars' worth of heroin out of the home without his parents' knowledge) (on file with the Washington and Lee Law Review).

personal connections to land and houses, and these connections cannot simply be replaced.²⁶ If the state seizes a large amount of cash from an individual, the money can easily be replaced with similar bills and coins. If law enforcement seizes a house, however, the individual must temporarily create a home elsewhere during the proceedings, perhaps even permanently.²⁷ Because of these problems with civil asset forfeiture in the context of real property, several states have added special protections.²⁸ While these protections do help, many states, including Virginia, either do not have any protections or very limited protections.²⁹

This Note evaluates the current state of American civil asset forfeiture laws on both the federal and state level. It focuses on modern problems with the system and corrective approaches that have been taken across the fifty states.³⁰ Part II provides the background for civil asset forfeiture in the United States, starting from its conception in the mid-1980s.³¹ Part III examines the

26. See Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 958 (1982) (explaining how a person's identity can get bound up in property—particularly land, requiring stronger property protections). Personal property like engagement rings can also affect a person's identity in the same way; however, due to the inherent difficulty of addressing such exceptions, this Note proceeds on the premise that real property possesses the main personhood elements. See *id.* (listing wedding rings among items that can affect an individual's identity).

27. See Isaiah Thompson, *How the DA's Forfeiture Program Made a Family Homeless*, PHIL. CITY PAPER (Aug. 15, 2013), <https://mycitypaper.com/News/How-the-DAs-forfeiture-program-made-a-family-homelessltbr/gltbr/gt> (last visited May 1, 2017) (relaying the story of a family who was forced to leave their home for a motel, then the backwoods, and then finally a relative's house, all because their house was seized during a flawed asset forfeiture case) (on file with the Washington and Lee Law Review).

28. Maine is one of the states providing special protections for civil asset forfeiture of real property. See 15 M.R.S.A. § 5821 (1987) (placing the burden of proof on the state to prove knowledge or complicity with criminal actions when it comes to the forfeiture of real property).

29. Virginia provides some limited protections. See VA CODE ANN. § 19.2-386.22 (2014) (stating that real property cannot be seized unless the alleged crime carries a minimum of five years imprisonment).

30. See *infra* Part III (explaining the various modern approaches that different states have taken to regulate civil asset forfeiture).

31. See *infra* Part II (giving a history of the development of civil asset forfeiture in America, particularly in regards to the modern connection between forfeited assets and local law enforcement funding).

various state forfeiture laws across the United States, including the different ways in which states handle burdens of evidence, equitable sharing, and task force combinations with federal agents.³² Part IV focuses on Virginia's civil asset forfeiture statutes, particularly in regard to the various protections (or lack thereof) provided to owners of personal and real property.³³ Part IV.A addresses the existing concerns with Virginia's current laws on civil forfeiture and personal property.³⁴ It also discusses the need for better oversight in regards to how law enforcement spends the funds from asset forfeiture.³⁵ Part IV.B examines Virginia statutes regarding the forfeiture of real property.³⁶ In doing so, it looks at the limited protections that Virginia laws do offer and whether or not more protections would be workable given the current system.³⁷ Finally, Part V explains legislative proposals to fix the Virginia system and solutions suggested by the Virginia State Crime Commission and advocates for further reforms.³⁸

II. History of Civil Asset Forfeiture

A. Development

While civil asset forfeiture can trace its origins back to English common law, the United States did not begin to seriously

32. See *infra* Part III (describing the different state approaches to civil asset forfeiture and the variations on procedural matters such as burdens of proof).

33. See *infra* Part IV (explaining Virginia's procedures and the few protections offered to personal property owners, and limited protections provided to real property owners).

34. See *infra* Part IV.A (noting the potential for abuse, particularly with the waiver system).

35. See *infra* Part IV.A (discussing how the current system fails to provide oversight when it comes to agency expenditure of asset forfeiture funds).

36. See *infra* Part IV.B (explaining current limitations on law enforcement's seizure of real property).

37. See *infra* Part IV.B (pointing out the statutory protection regarding real property seized in relation to drugs and the limited role that real property plays in Virginia forfeiture today).

38. See *infra* Part V (examining HB 1287, the 2015 VSCC report, and the 2016 reforms enacted in Virginia).

use it until the war on drugs reached the forefront of the political theater.³⁹ Congress began the widespread use of asset forfeiture with the Comprehensive Crime Control Act of 1984,⁴⁰ which established the Assets Forfeiture Fund as a “repository of the proceeds of forfeitures.”⁴¹ This fund opened up channels for law enforcement agencies to not only seize personal and real property connected to crimes, but also to keep some or all of the seized assets.⁴² Civil asset forfeiture started out as a federal program and quickly spread to the state level, with almost every state today having individualized forfeiture laws.⁴³ States picked up on civil asset forfeiture so quickly due to the establishment of equitable sharing programs with the federal government.⁴⁴ These sharing programs allowed state law enforcement to keep property seized under both state laws and federal statutes, such as drug laws.⁴⁵

39. See John Malcolm, *Civil Asset Forfeiture: When Good Intentions Go Awry*, HERITAGE FOUNDATION (Oct. 26, 2015), <http://cf.heritage.org/research/testimony/civil-asset-forfeiture-when-good-intentions-go-awry> (last visited May 1, 2017) (stating that civil asset forfeiture was established to combat the cash flows and business enterprises of drug kingpins) (on file with the Washington and Lee Law Review).

40. See Pub. L. No. 98-473, 98 Stat. 1837 (1984) (stating that all seized assets or the proceeds thereof should be transferred into the Assets Forfeiture Fund for later distribution).

41. U.S. DEP'T OF JUST. ASSETS FORFEITURE FUND, FY 2013 PERFORMANCE BUDGET (2013).

42. See *What Civil Asset Forfeiture Means*, ECONOMIST (Apr. 14, 2014, 11:50 PM), <http://www.economist.com/blogs/economist-explains/2014/04/economist-explains-7> (last visited May 1, 2017) (discussing how quickly states implemented asset forfeiture laws after Congress expanded civil asset forfeiture during the war on drugs) (on file with the Washington and Lee Law Review).

43. See CARPENTER ET AL., *supra* note 14, at 112 (recording that North Carolina is the only state that generally does not permit civil forfeiture, with the exception of racketeering cases).

44. See 21 U.S.C. § 881(e)(3) (2012) (allowing state and local law enforcement agencies to retain property seized under federal laws, splitting the proceeds with participating federal agencies).

45. See CARPENTER ET AL., *supra* note 14, at 71 (detailing how state agencies can keep up to 80% of proceeds seized under federal law through equitable asset sharing).

B. Different Types of Forfeiture

Law enforcement can seize property in the United States through three different processes: administrative, criminal, and civil forfeiture.⁴⁶ Administrative forfeiture proceedings often precede criminal or civil forfeiture and can morph into one of the other two during the judicial process.⁴⁷

1. Administrative Forfeiture

Administrative forfeiture begins when law enforcement investigates potential criminal activity, discovers property linked to that activity, and seizes it during the course of the investigation.⁴⁸ Statutorily, federal agencies must base such seizures on probable cause;⁴⁹ state requirements vary from “slight evidence of traceability”⁵⁰ to clear and convincing evidence.⁵¹ The seizing agency must then notify any potential owners of the property of its intent to forfeit the property and publish a public notice.⁵² When the owner receives notice, he can contest the seizure by filing a claim to the property within a certain period of

46. See Stefan D. Cassella, *Overview of Asset Forfeiture Law in the United States*, U.S. ATTORNEYS’ BULLETIN 12 (2007) [hereinafter Cassella, *Overview of Asset Forfeiture Law*], <http://www.justice.gov/sites/default/files/usao/legacy/2007/12/21/usab5506.pdf> (listing the different types of forfeiture laws and explaining their varied uses by United States law enforcement agencies).

47. See *id.* at 12–13 (explaining how administrative forfeiture can become either criminal or civil forfeiture if the property’s owner contests the seizure).

48. See *id.* (noting that administrative forfeitures are often uncontested and are considered “nonjudicial” proceedings).

49. See 18 U.S.C. § 981(b)(2)(B) (2012) (stating that federal agencies must possess probable cause to seize the property during lawful arrest or search proceedings).

50. See *infra* note 211 and accompanying text (noting Kentucky’s dual evidentiary standard system, in which real property has a clear and convincing evidence standard but non-real property only has a “slight evidence of traceability” standard).

51. See, e.g., CONN. GEN. STAT. §§ 54-36h(b), 54-36p(b) (2016) (“[T]he state shall have the burden of proving all material facts by clear and convincing evidence.”).

52. See 18 U.S.C. § 981(b)(2)(B)(e) (2012) (detailing the notification proceedings that the seizing agencies must follow).

time.⁵³ If the owner does not contest the seizure, the agency can terminate his ownership interest without any judicial involvement.⁵⁴ If the owner files a claim to the property, however, and the agency desires to pursue the forfeiture further, the administrative forfeiture proceeding transitions to either criminal or civil forfeiture proceedings.⁵⁵

2. Criminal Forfeiture

During criminal forfeiture proceedings, the government confiscates property as part of a criminal sentence.⁵⁶ The agency may commence criminal forfeiture instead of administrative forfeiture when property is directly linked to a crime, such as when law enforcement arrests bank robbers and simultaneously seizes their getaway vehicle.⁵⁷ In those instances, the officers directly link the vehicle to the criminal proceedings and the seizure can bypass administrative forfeiture.⁵⁸ The agency also has the option of beginning with administrative forfeiture and then transitioning into criminal forfeiture⁵⁹—for example, if the officers find the bank robbers' vehicle first, then arrest the robbers two weeks later. In that case, the agency would seize the vehicle, commence administrative forfeiture, and transition to

53. See 18 U.S.C. § 983 (2016) (explaining the various sixty- and ninety-day time periods for contesting seizures).

54. See Cassella, *Overview of Asset Forfeiture Law*, *supra* note 46, at 13 (likening administrative forfeiture to an abandonment, as opposed to an actual judicial proceeding); see also § 983(a)(1) (noting that the owner must file a claim within the deadline specified in the notice letter, or else administrative forfeiture proceedings will continue).

55. See § 983(a)(1) (stating that the government has ninety days after an owner files a claim to either return the property or commence civil or criminal forfeiture proceedings).

56. See *Libretti v. United States*, 516 U.S. 29, 39–41 (1995) (ruling that criminal forfeiture is an “element” of a criminal conviction and composes part of the punishment).

57. See § 982(a)(1) (detailing how the Government can criminally forfeit the property of a person convicted of certain offenses).

58. See *id.* (providing that property can be criminally forfeited if it is directly traceable to the offense).

59. See § 983(a)(1) (noting that the Government can terminate administrative forfeiture proceedings and institute criminal forfeiture proceedings).

criminal forfeiture upon arresting the felonious owners.⁶⁰ After this transition, the court handles all forfeiture proceedings judicially, terminating the robbers' ownership interest in the vehicle upon criminal conviction.⁶¹

Courts consider criminal forfeiture of property to be part of the in personam criminal action against the defendant.⁶² This enables law enforcement to use criminal forfeiture rather painlessly, because it becomes part of the standard judicial proceedings.⁶³ Difficulties arise, however, when a third party retains an ownership interest in this property⁶⁴—for instance, if the bank robbers' vehicle belonged to one of their wives. In that case, the property cannot be criminally forfeited without violating the due process rights of the non-convicted person.⁶⁵ At this point, if the agency wants the property, it must now pursue a different avenue of seizure: civil forfeiture.⁶⁶

3. Civil Forfeiture

Civil forfeiture permits the confiscation of property based solely upon the property's connection to criminal activity.⁶⁷ Naturally, this makes civil forfeiture quite useful in situations

60. See *id.* (explaining that the agency has sixty days to provide notice of the seizure but can transition to criminal forfeiture within that time period).

61. See 18 U.S.C. § 982 (2012) (stating that the court can forfeit the property as part of the criminal sentence).

62. See *United States v. Nava*, 404 F.3d 1119, 1124 (9th Cir. 2005) (observing that criminal forfeiture is an in personam action that ties the property directly to the defendant).

63. See § 982 (describing the different ways that criminal forfeiture is incorporated into trials for various offenses).

64. See Cassella, *Overview of Civil Asset Forfeiture Law*, *supra* note 46, at 14 (explaining the difficulties that arise when innocent owners or co-owners are involved).

65. See *United States v. Totaro*, 345 F.3d 989, 993 (8th Cir. 2003) (stating that, due to the in personam nature of criminal forfeiture, due process dictates that the government cannot forfeit third-party property).

66. See Cassella, *Overview of Civil Asset Forfeiture Law*, *supra* note 46, at 14 (relaying the usefulness of civil asset forfeiture when property interests of non-convicted individuals are involved); see generally 18 U.S.C. § 983 (2016) (outlining the contours of civil forfeiture).

67. See *id.* (“[T]he *in rem* nature of the [civil forfeiture] proceeding allows the court to order the forfeiture of *any* property involved in the offense.”).

like the bank robber hypothetical, where law enforcement cannot criminally reach the wife of the defendant.⁶⁸ Civil forfeiture therefore occupies a unique position of straddling both criminal and civil law: while civil forfeiture necessarily relates back to criminal action, the government must file a separate civil action against the property, wholly unrelated to any criminal conviction.⁶⁹

Federal civil forfeiture follows the procedure of most civil cases.⁷⁰ The Government files a complaint against the property and provides notice to the owners.⁷¹ The owners file claims to the property and an answer to the complaint.⁷² After this, the normal procedures of discovery and pretrial motions take place, followed by the eventual trial.⁷³ State forfeiture actions vary, but they generally follow these procedures; this Note examines the procedural laws of Virginia in Part IV.⁷⁴

While law enforcement often uses civil forfeiture in conjunction with criminal cases, criminal charges are not required.⁷⁵ To begin civil forfeiture proceedings, the seizing agency only needs to prove a possible connection between the property and criminal activity.⁷⁶ Sometimes this is quite useful,

68. See *id.* (explaining that, while criminal forfeiture certainly has its uses, civil forfeiture is much more useful in the realm of third-party property).

69. See 18 U.S.C. § 983 (2016) (establishing procedures for the Government to file a civil complaint against a piece of property, separate from the criminal action).

70. See Cassella, *Overview of Civil Asset Forfeiture Law*, *supra* note 46, at 16 (explaining how civil forfeiture resembles most civil actions).

71. See § 983(a)(1)(A)(ii) (requiring the Government to file an action against the seized property and to provide such notice as is required by law).

72. See § 983(a)(2) (providing that the owner's claim must "(i) identify the specific property being claimed; (ii) state the claimant's interest in such property; and (iii) be made under oath, subject to penalty of perjury").

73. See generally § 983 (outlining civil forfeiture procedures); see also Cassella, *Overview of Civil Asset Forfeiture Law*, *supra* note 46, at 16 (describing how a civil forfeiture case moves through the usual litigation procedures).

74. See *infra* Part IV (detailing Virginia's statutory provisions for civil asset forfeiture).

75. See *United States v. Cherry*, 330 F.3d 658, 666 n.16 (4th Cir. 2003) ("[T]he owner's culpability is irrelevant in deciding whether property should be forfeited").

76. See 18 U.S.C. § 981(b)(2)(B) (2012) (stating that property can be seized based upon probable cause suggesting a direct or indirect connection to criminal activity).

such as when law enforcement finds marijuana farms but is unable to find the growers themselves.⁷⁷ Civil forfeiture enables the government to seize the land and put an end to the criminal activity without having to successfully find and prosecute the criminals.⁷⁸ However, potential for abuse exists whenever law enforcement can seize assets without proving that the owners are guilty of a crime, and a look at the history behind civil asset forfeiture shows how quickly such abuses began to occur.⁷⁹

C. Beginnings of Abuse

It is important to note the federal government's original intention behind asset forfeiture: to cripple drug dealers by attacking their finances.⁸⁰ In fact, the stated goals of civil asset forfeiture are still to seize "guns, airplanes and cars . . . used for drug smuggling," to shut down marijuana farms and crack houses, and to end companies used for fraud and Ponzi schemes.⁸¹ Unfortunately, because law enforcement was allowed to keep seized proceeds, overzealous law enforcement officers began to abuse the system.⁸² These abuses for financial gain have been termed "policing for profit."⁸³

77. See § 981(a)(1)(C) (allowing the forfeiture of land connected to crimes (such as marijuana farms) without requiring the conviction of the owners).

78. See Cassella, *Overview of Civil Asset Forfeiture Law*, *supra* note 46, at 9–10 (explaining the importance of confiscating any property connected to criminal activity, particularly as a message to other criminals with assets to lose).

79. See *infra* Part II (describing the abuses that have occurred across the United States); see also CARPENTER ET AL., *supra* note 14, at 14–15 (reporting on the widespread abuse of the civil asset forfeiture system, especially in states that return the proceeds of confiscated assets to local law enforcement).

80. See MALCOLM, *supra* note 39 ("[T]he goal [of civil asset forfeiture] was to empower federal law enforcement officials to go after the illegal profits and ill-gotten property of drug kingpins and criminal organizations, thereby undercutting the profit incentives of the illegal drug trade.").

81. Cassella, *Overview of Civil Asset Forfeiture Law*, *supra* note 46, at 8.

82. See MARIAN R. WILLIAMS, JEFFERSON E. HOLCOMB, TOMISLAV V. KOVANDZIC & SCOTT BULLOCK, *POLICING FOR PROFIT* (2010) (describing how, after 1984, federal agencies were given a "direct financial stake in generating forfeiture funds," resulting in abuses of the system by officers blurring the law to get financial revenue).

83. DRUG POLICY ALLIANCE, *ABOVE THE LAW: AN INVESTIGATION OF CIVIL*

One such abuse that reached Congress's attention was the shooting of Donald Scott, a millionaire who owned a 250-acre estate in Ventura County, California.⁸⁴ Scott had steadfastly refused to sell his land to the government, despite several offers from local officials, and tensions escalated.⁸⁵ On October 2, 1992, DEA and Park Service agents shot Scott while raiding his land in search of marijuana plants.⁸⁶ Allegations quickly arose that the search had been a pretextual attempt to seize Scott's land.⁸⁷ Park Service agents who wanted Scott's land had been present for unknown reasons and had neither found marijuana plants nor notified Ventura County Police.⁸⁸ In addition, a 1993 report on the shooting written by Michael Bradbury, the Ventura County District Attorney, stated that "at least one of the motivating factors in obtaining the search warrant was to forfeit the Trail's End Ranch [Donald Scott's property]."⁸⁹ The district attorney also recorded that DEA agents had appraised the value of Scott's land and compared it to the price of other properties sold in the area.⁹⁰ He concluded:

We can find no reason why law enforcement officers who were investigating suspected narcotics violations would have any interest in the value of the Trail's End Ranch or the value of property sold in the same area other than [i]f they had a motive to forfeit that property It is our opinion that the most reasonable explanation is that the law enforcement

ASSET FORFEITURE IN CALIFORNIA 6 (2014).

84. See Stillman, *supra* note 6 (explaining how the law enforcement fiasco surrounding Scott's killing catalyzed Congressional reforms).

85. See *id.* (noting that the Park Service had repeatedly tried to buy Scott's land).

86. See Brenda Grantland, *L.A. Forfeiture Squads Kill California Millionaire*, F.E.A.R. CHRONICLES (Nov. 1992), <http://www.fear.org/scott15.html> (last visited Apr. 27, 2017) (describing the circumstances behind Scott's death) (on file with the Washington and Lee Law Review).

87. See *id.* (describing the local outcry against the suspicious factors that were present before and during the raid).

88. See *id.* (detailing the allegations of asset forfeiture incentives behind the shooting of Donald Scott).

89. Michael Bradbury, *Report on the Death of Donald Scott*, F.E.A.R. CHRONICLES (Mar. 31, 1993), <http://www.fear.org/chron/denoce.txt> (last visited Apr. 27, 2017) (on file with the Washington and Lee Law Review).

90. See *id.* (noting DEA agents' handwritten documents that recorded the values of surrounding properties and the estimated value of Scott's property).

officers involved in the preparation of the search warrant were motivated, in part, by a desire to forfeit a valuable piece of property.⁹¹

As a result of this scandal and several others, there was an outcry for civil asset forfeiture reform.⁹² Congress responded with the Civil Asset Forfeiture Reform Act of 2000 (CAFRA),⁹³ which required the government to prove that there was a “substantial connection between the property and the offense.”⁹⁴ This allowed innocent property owners to contest federal forfeitures with relative success; however, under most current state laws, the property owner still must affirmatively prove that his property had no connection to illegal activity.⁹⁵ Thus, while CAFRA helped to reduce the level of federal forfeiture abuses and allowed more property owners to litigate for and regain their property from the government, it was only a stopgap measure.⁹⁶ Individual state legislatures still had to pass their own laws to provide property owners with methods to fight against wrongful asset seizures.⁹⁷

III. Various State Approaches to Civil Asset Forfeiture

A. Distributions of Seized Assets and Burdens of Proof

While states have taken varied approaches to civil asset forfeiture, many legislative approaches are either identical or very similar.⁹⁸ Currently, law enforcement agencies in forty-three states are allowed to keep between 45% and 100% of the

91. *Id.*

92. See Stillman, *supra* note 6 (recording that the chairman of the House Judiciary Committee decried the abusive use of civil asset forfeiture in 1997 after the Scott shooting had transpired).

93. H.R. 1658, 109th Cong. 1999–2000.

94. *Id.*

95. See CARPENTER ET AL., *supra* note 14, at 18–20 (reporting that in most states the owner of the property must prove innocence).

96. See Cassella, *Overview of Civil Asset Forfeiture Law*, *supra* note 46, at 12 (stating that, after the passage of CAFRA allowed some relief to property owners, administrative forfeitures decreased from 85% to 80%).

97. See Stillman, *supra* note 6 (detailing the different state legislative responses to civil asset forfeiture).

98. See CARPENTER ET AL., *supra* note 14, at 45–150 (recording the different state approaches to civil asset forfeiture, many of which are highly similar).

assets seized.⁹⁹ In fact, most of the states that allow law enforcement to keep a percentage of the assets permit the agencies to keep the full 100%.¹⁰⁰ Of the remaining seven states, most put the assets seized through civil forfeiture into either the state's general fund or its education fund.¹⁰¹ Standards of proof for civil forfeiture vary from probable cause, as seen in North Dakota and Massachusetts,¹⁰² to beyond a reasonable doubt in Nebraska,¹⁰³ North Carolina,¹⁰⁴ and New Mexico.¹⁰⁵ Most states and the federal government, however, use the preponderance of the evidence standard, with some providing a different standard for real property.¹⁰⁶

Even if a state has a higher burden of proof than preponderance of the evidence, local law enforcement can circumvent the burden of proof standard and take advantage of the federal government's standard through the practice of equitable sharing.¹⁰⁷ Equitable sharing, or the practice of working in conjunction with federal agencies during the forfeiture process, allows the state to process the forfeiture of property through

99. *See id.* at 25–30 (explaining that the proceeds from seized assets are distributed back to law enforcement agencies based upon their level of involvement in asset forfeiture programs).

100. *See id.* (noting that, even when the seizing agency does not keep a full 100% of forfeiture proceeds, the remainder often goes to the state's general law enforcement needs).

101. *See, e.g.,* ME. STAT. tit. 15, §§ 5822(4), 5824 (2015) (sending all forfeiture proceeds to Maine's general fund, with limited exceptions).

102. *See* N.D. CENT. CODE § 19-03.1-36.6 (1989) (setting the burden of proof at forfeiture hearings at probable cause); MASS. GEN. LAWS ch. 94C, § 47(d) (2015) (establishing probable cause as the burden of proof).

103. *See* NEB. REV. STAT. §§ 28-431(4), 28-1111 (2015) (requiring the state to prove its case beyond a reasonable doubt, except in gambling-related seizures, at which point the burden is preponderance of the evidence).

104. *See* N.C. GEN. STAT. §§ 75D-5, 90-112 (2015) (maintaining that a criminal conviction and proof beyond a reasonable doubt are required for all forfeitures, with the exception of property related to racketeering).

105. *See* N.M. STAT. ANN. § 31-27-4 (2015) (requiring a criminal conviction, with the burden of proof beyond a reasonable doubt, followed by a civil case at which the standard will be clear and convincing evidence).

106. *See* CARPENTER ET AL., *supra* note 14, at 17 (recording that twenty-seven states use the preponderance of the evidence standard and several states use varying evidentiary standards based on the property types).

107. *See id.* at 28 (observing that, when property is seized through equitable sharing, the federal government's evidentiary standard applies).

other channels besides state law.¹⁰⁸ If a local law enforcement agent wants to seize assets that fall outside of his state's jurisdiction, he can notify a federal agency such as the Drug Enforcement Administration (DEA) or Immigration and Customs Enforcement (ICE) and have the assets seized under their jurisdiction.¹⁰⁹ Doing so allows local law enforcement to seize assets that it could not otherwise take under state law¹¹⁰ or to take advantage of the lower burden of proof at the federal level if the officer works in a state that generally has a higher burden of proof.¹¹¹ States that have legalized marijuana have seen an uptick in such cases because local law enforcement can seize property through equitable sharing for violations of federal law, even though the actions were perfectly legal at the state level.¹¹²

While situations exist where combined task forces of federal and state agents are necessary,¹¹³ experts have acknowledged

108. See U.S. DEP'T OF JUST., CRIM. DIV., GUIDE TO EQUITABLE SHARING FOR STATE AND LOCAL LAW ENFORCEMENT AGENCIES 3–6 (2009) (providing regulations for state and local agencies to participate in equitable sharing); see also Nick Sibilla, *The Shame of Equitable Sharing*, SLATE (Apr. 2, 2014, 1:03 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2014/04/equitable_sharing_legalized_marijuana_and_civil_forfeiture_the_scheme_that.html (last visited Apr. 27, 2017) (explaining that local law enforcement can collaborate with federal agencies to adopt a forfeiture case, bringing it under the purview of federal laws and regulations) (on file with the Washington and Lee Law Review).

109. See U.S. DEP'T OF JUST., *supra* note 108, at 2 (explaining how federal agencies can “adopt” cases or seizures so that they can apply federal jurisdiction); see also Sallah et al., *supra* note 10 (detailing how a local law enforcement officer contacted Immigrations and Customs Enforcement to aid in the seizure of assets from a Hispanic individual).

110. See Sibilla, *supra* note 108 (explaining how, in states that have legalized marijuana, state law enforcement can seize property related to marijuana through equitable sharing because marijuana is still illegal on the federal level).

111. See WILLIAMS ET AL., *supra* note 82 (“The most reasonable explanation is that it is in the financial interests of many state and local agencies to process forfeitures through the federal government rather than to use their own existing state legal framework.”).

112. See *id.* (recording that over the course of one year in the Central District of California, thirty forfeiture actions were filed through equitable sharing against property owners and over 525 marijuana dispensaries were threatened, all under the guise of federal laws).

113. See DEP'T OF CRIM. JUST. SERV. OF VA., FORFEITED ASSET SHARING MANUAL (2015) (explaining that task forces of two or more agencies are often required during narcotics drug busts).

that equitable sharing has been used far too often as a way to avoid more restrictive state laws.¹¹⁴ Fortunately, as of January 2015, Attorney General Eric Holder ended most of the equitable sharing practice, with certain limited exceptions.¹¹⁵ While this will hopefully curb some of the abuses committed by state law enforcement by ending the federal “umbrella-style” seizures,¹¹⁶ it will have a minimal effect on states that already allow law enforcement to keep most seized assets.¹¹⁷

B. State Protections for Innocent Owners

In all civil asset forfeiture cases, underlying concerns exist as to how best to protect innocent owners when law enforcement erroneously seizes their property.¹¹⁸ As a result of these concerns,

114. See, e.g., Sibilla, *supra* note 108 (explaining the litany of abuses that equitable sharing has caused in California and other states where state laws permit actions that are illegal on the federal level); see also Jonathan Blanks, *Eric Holder’s Asset Forfeiture Decision Won’t Stop the Widespread Abuse of Police Power*, NEW REPUBLIC (Jan. 19, 2015), <https://newrepublic.com/article/120799/holder-ends-most-equitable-sharing-civil-asset-forfeiture-program> (last visited Apr. 27, 2017) (reporting that criminal justice reporters, press members, and congressmen protested to Eric Holder about the abuses seen with equitable sharing) (on file with the Washington and Lee Law Review).

115. See Robert O’Harrow Jr., Sari Horwitz & Steven Rich, *Holder Limits Seized-Asset Sharing Process that Split Billions with Local, State Police*, WASH. POST (Jan. 16, 2015), https://www.washingtonpost.com/investigations/holder-ends-seized-asset-sharing-process-that-split-billions-with-local-state-police/2015/01/16/0e7ca058-99d4-11e4-bcfb-059ec7a93ddc_story.html (last visited Apr. 27, 2017) (noting that cash and vehicle seizures, which made up the majority of equitable sharing, can no longer be shared between federal and local agencies, with the only remaining exceptions being illegal firearms, explosives, and materials used to make child pornography) (on file with the Washington and Lee Law Review).

116. Because Attorney General Holder terminated most equitable sharing practices between federal and state law enforcement, local police agencies will no longer be able to team up with federal agencies to use civil forfeiture to intimidate individuals like marijuana growers in states where marijuana is legal. See Sibilla, *supra* note 108 (reporting that the only way California law enforcement could threaten marijuana dispensaries was by teaming up with the DEA and prosecuting the dispensaries under federal law).

117. See Blanks, *supra* note 114 (“States that already allow police [to] keep up to 100% of forfeiture proceeds will be largely unaffected by the changes announced Friday.”).

118. See Stefan D. Cassella, *The Uniform Innocent Owner Defense to Civil Asset Forfeiture*, 89 KY. L.J. 653, 658 (2000) [hereinafter Cassella, *Uniform*

all states have some type of innocent owner defense.¹¹⁹ Innocent owner defenses are laws that allow property owners to regain their property in court if they can prove that they had no connection to the crime.¹²⁰ These laws came about as a result of the 1996 Supreme Court case *Bennis v. Michigan*, which ruled that no such defense constitutionally existed.¹²¹ The public and media reacted very negatively to this ruling, prompting Congress to incorporate an innocent owner defense into CAFRA.¹²² All states subsequently established their own defenses as well.¹²³

Despite the existence of innocent owner defenses, most states require the contesting party to assert the defense affirmatively.¹²⁴ This effectively creates a guilty until proven innocent standard for regaining seized property.¹²⁵ In fact, only six states require the government to prove guilt in all cases, with another six states determining the burden depending on the nature of the property.¹²⁶ Because the cases are in rem proceedings against

Innocent Owner Defense] (noting that, since the 1970s, the judiciary and lawmakers alike had been concerned about how to adequately protect innocent owners and co-owners).

119. See WILLIAMS ET AL., *supra* note 82 (explaining that CAFRA established an innocent owner defense for federal seizures, and that all states have passed legislation establishing this defense as well).

120. See 18 U.S.C. § 983 (2009) (listing federal regulations for how an innocent property owner can assert this defense to regain property).

121. See *Bennis v. Michigan*, 516 U.S. 442, 443 (1996) (stating that the innocent co-owner's interest could be terminated without due process violations).

122. See WILLIAMS ET AL., *supra* note 82 (reporting that a federal innocent owner defense now exists for all seizure cases).

123. See *id.* (explaining the evolution of the innocent owner defense from the federal level down to the state level).

124. See *id.* (noting that very few states require the government to first prove that the owner is not innocent). New Mexico passed legislation in 2015 that removed the property's innocent owner of the burden of proving innocence at trial. See N.M. STAT. ANN. § 31-27-4 (2015) (requiring the government to prove that the owner asserting innocent had knowledge of the underlying offense).

125. See WILLIAMS ET AL., *supra* note 82 (reiterating that the property owner must affirmatively prove that no criminal connection exists, as opposed to criminal cases where the state has the burden to prove the criminal act).

126. See *id.* (listing California, Colorado, Florida, Kansas, Michigan, and Oregon as the states where the government must prove guilt, and Alabama, Indiana, Kentucky, Maine, New Mexico, and Utah as the states where the burden depends on the property involved).

specific property (often resulting in interesting case names such as *United States v. \$557,933.39, More or Less, in U.S. Funds*¹²⁷ or *United States v. One 1992 Ford Mustang GT*¹²⁸), the law places the owner in the position of being an advocate in favor of his own property, instead of the position of a defendant. Despite this phenomenon, due process protections still exist, as seen in *Austin v. United States*,¹²⁹ which prohibited disproportionate forfeitures.¹³⁰ And although these existing protections theoretically apply, the Virginia State Crime Commission pointed out that “in practice, forfeitures are almost never found to have violated the Eighth Amendment.”¹³¹ Fourth Amendment and Fifth Amendment due process protections also cover ownership interests for in rem property, as the Supreme Court ruled in *United States v. James Daniel Good Real Property*.¹³²

127. 287 F.3d 66 (2d Cir. 2002).

128. 73 F. Supp. 2d 1131 (C.D. Cal. 1999).

129. 509 U.S. 602 (1993).

130. *See id.* (holding that the Eighth Amendment, particularly the excessive fines clause, protects against overly harsh in rem civil forfeitures). In *Austin*, the petitioner pled guilty to one count of possessing cocaine with the intent to distribute. *Id.* at 604. After his conviction, the United States attempted to seize his mobile home and auto body shop due to their connection with the crime. *Id.* at 604–05. Austin argued that such a seizure would violate the Eighth Amendment due to the seizure’s disproportionality, but both the District Court and the Eighth Circuit disagreed, finding that the Eighth Amendment was limited to criminal proceedings. *Id.* at 605. The Supreme Court overruled the lower courts, extending the Eighth Amendment to civil proceedings and noting that the government can punish criminals through civil, as well as criminal, means. *Id.* at 611. After determining that civil asset forfeitures qualify as punishment (particularly because the legislative history behind asset forfeiture laws confirms their punitive nature), the Court concluded that the Excessive Fines Clause applied to civil asset forfeiture, but declined to establish any type of multifactor test. *Id.* at 620–22.

131. VA. STATE CRIME COMM’N, *supra* note 4, at 33.

132. *See United States v. James Daniel Good Real Property*, 510 U.S. 43, 48–49 (1993) (holding that both the Fourth and Fifth Amendments apply to in rem forfeiture proceedings). In *James Daniel Good*, Good was sentenced to one year in jail and five years of probation after law enforcement discovered eighty-nine pounds of marijuana and drug paraphernalia on his property. *Id.* at 46. Over four years later, the government seized Good’s house and land without prior notice or a hearing prior to the termination of Good’s property rights. *Id.* at 47. Good filed a claim for his property alleging a lack of timeliness and a violation of his due process rights; the District Court summarily dismissed his claim, but the Ninth Circuit reversed in regards to the due process allegations. *Id.* This created a circuit split about the application of due process in asset

Despite these constitutional due process protections, the property owner must still affirmatively prove innocence.¹³³ This weighty burden of proof has resulted in a large percentage of property owners not even attempting to regain their property.¹³⁴ Even after Congress passed CAFRA and established this defense, there was only a 5% increase of owners contesting the seizures of their property.¹³⁵ Of course, the burden of proof on the innocent owner comprises only one part of this situation. There are undoubtedly many instances in which the owner was indeed involved in criminal activity and chose not to waste his time or resources attempting to get the property back.¹³⁶

There are legitimate law enforcement goals for allowing the burden to be placed on the owner, such as “when [the government] can prove that the property was involved in a crime, but cannot prove who the wrongdoer was.”¹³⁷ This burden, however, also creates negative societal effects with race- and

forfeiture proceedings and the Supreme Court granted certiorari. *Id.* at 48. The Court disagreed with the Government’s argument that only the Fourth Amendment applies to such proceedings, citing *Soidal v. Cook County*, 506 U.S. 56, 70 (1992), in establishing that property seizure implicates both the Fourth and Fifth Amendments. *Id.* at 49–50. Analyzing the proceedings under the *Matthews v. Eldridge*, 424 U.S. 319 (1976) balancing test, the Court noted Good’s weighty interest in his property and the dangers of ex parte proceedings when the Government seeks to seize such property, and decided that the Government had no pressing need that could justify ex parte seizures in the civil forfeiture context, absent exigent circumstances. *Id.* at 55–56. That being said, the Supreme Court distinguished between an ex parte seizure of real property that is necessarily stationary and personal property that can be moved or hidden, implying that ex parte seizures may be justified through exigency when dealing with personal property that the defendant can conceal. *Id.* 60–61. The Court also ruled that any timing requirements, such as statutes of limitations, were internal proceedings and did not violate timeliness concerns so long as the statute was satisfied. *Id.* at 65.

133. See WILLIAMS ET AL., *supra* note 82 (reporting that, in most states, the property owner must still prove innocent owner status, with the exception of a few jurisdictions).

134. See VA. STATE CRIME COMM’N, *supra* note 4, at 81 (recording that, in Virginia alone, 61% of owners defaulted on their property and 28% signed a settlement or waiver relinquishing their rights).

135. See Cassella, *Overview of Asset Forfeiture Law*, *supra* note 46, at 12 (providing a DEA estimate of a decrease in uncontested forfeitures from 85% to 80% after the passage of CAFRA).

136. See *id.* (stating that many times individuals simply do not contest forfeiture for unknown reasons ranging from guilt to lack of resources).

137. *Id.* at 17.

class-discrimination implications.¹³⁸ A study by *The Washington Post* reported that out of 400 contested cases, most individuals faced with civil asset forfeiture were minorities.¹³⁹ To explain this finding, some experts posit that less scrupulous law enforcement officers target individuals who are less likely to fight in court to get their assets back.¹⁴⁰ These experts further note that poorer citizens were also more likely to be targeted than well-off persons.¹⁴¹ A 2009 study examining the connection between law enforcement's use of civil asset forfeiture and the socioeconomic or racial status of individuals whose property was seized discovered a number of disturbing trends.¹⁴² Specifically in regards to the targeting of the apparently indigent, the study concluded that law enforcement officers used civil asset forfeiture more frequently in areas with large amounts of income disparity.¹⁴³ Additionally, the study found other factors that increase the disparate impact civil forfeiture has on minorities, such as the propensity for minorities to carry larger amounts of cash than white individuals,¹⁴⁴ the propensity for minorities to

138. See Stillman, *supra* note 6 (listing concerns with the number of minorities and indigent who fall victim to civil asset forfeiture, in comparison to non-minorities).

139. See Sallah et al., *supra* note 10 (noting that such a study was necessary because the Bureau of Justice does not keep race-related statistics in regard to asset forfeitures on either the state or federal level).

140. See Stillman, *supra* note 6 (stating that law enforcement officers often target minorities for possible asset forfeiture with the implication that there is a higher success rate for keeping the seized assets).

141. See *id.* (pointing out that often people faced with civil asset forfeiture are too poor to fight back or they are immigrants who wish to stay out of court).

142. See Mary Murphy, *Race and Civil Asset Forfeiture: A Disparate Impact Hypothesis*, 16 TEX. J. ON C.L. & C.R. 77, 89–90 (2010) (describing how law enforcement targets minorities and those of low social class (citing Ronald Helms & S. E. Costanza, *Race, Politics and Drug Law Enforcement: An Analysis of Civil Asset Forfeiture Patterns Across U.S. Counties*, 19 POLICING & SOC'Y 1 (2009))).

143. See *id.* at 94 (“The research indicated that the greater the income disparity in the area, the more likely the law enforcement agencies would use civil asset forfeiture.” (citations omitted)).

144. See *id.* (describing racism in banking and explaining how, because national banks are less likely to have branches in minority neighborhoods, minorities are more likely to be carrying around large amounts of cash for innocent reasons than non-minorities are).

consent to vehicles searches out of fear of the police,¹⁴⁵ and the lack of minority access to legal counsel in comparison to whites.¹⁴⁶

IV. Virginia's Civil Asset Forfeiture Laws

The problems and concerns with civil asset forfeiture discussed above have been seen on the federal level and in most states.¹⁴⁷ However, almost every state has enacted their own civil asset forfeiture provisions and, thus, has unique problems associated with those laws.¹⁴⁸ The remainder of this Note focuses on Virginia laws and the issues that arise out of them. As Virginia has different civil asset forfeiture laws for personal property and real property, this Note analyzes those laws separately. This Note also compares and contrasts common abuses associated with those laws.

A. Property Generally

1. Overview of Virginia Laws

Under current Virginia law, assets forfeited for drug-related reasons are recycled through the system and returned to the confiscating agency, while assets forfeited for non-drug-related purposes are sent to the Commonwealth's Literary Fund.¹⁴⁹ This

145. See *id.* at 95 (pointing out that “racial minorities may consent to searches because they feel threatened, not because they truly are comfortable with the police officer’s search”).

146. See *id.* at 96 (stating that, to properly exercise one’s legal rights in court against the government, contact with experts in the field is an absolute necessity, and non-minorities are 37% more likely than minorities to possess such contact (citing Erin York Cornwell & Benjamin Cornwell, *Access to Expertise as a Form of Social Capital: An Examination of Race- and Class-based Disparities in Network Ties to Experts*, 51 SOC. PERSP. 853, 856 (2008))).

147. See Sallah et al., *supra* note 10 (listing these concerns as appearing on a national level among most or all of the states).

148. See WILLIAMS ET AL., *supra* note 82 (describing how state-enacted asset forfeiture laws vary widely from each other in some areas, while remaining very similar in others).

149. See VA. STATE CRIME COMM’N, *supra* note 4, at 14 (relating the current state of the law in Virginia and justifying current legislation as a way to recompense the government and law enforcement agencies for costs sustained

is a somewhat recent change: before 1991, all seized assets went to the Literary Fund and none went to law enforcement agencies.¹⁵⁰ Drug-related seizures comprise only one area in which law enforcement can seize assets under Virginia law; many other crimes—for example, production or possession of child pornography or the sale and distribution of counterfeit cigarettes—can also result in seized assets.¹⁵¹ However, most assets that Virginia law enforcement seizes involve the production, possession, or distribution of narcotics or other drugs.¹⁵² In 2015, the Literary Fund received \$339,964 from non-drug-related asset forfeiture, whereas law enforcement agencies received \$5,600,969 from their drug seizures.¹⁵³ Virginia law does require that certain assets be connected with certain crimes, but for the most part the laws are similar to other states' legislation.¹⁵⁴ Within twenty-one days of seizure, the Commonwealth's Attorney must file a notice of seizure with the circuit court, at which point the clerk of court mails a notice of seizure to the affected property owner.¹⁵⁵ The property owner must then invoke his right to contest the seizure by filing an

while prosecuting crime).

150. See VA. CONST. art. V, § 8 (allowing drug-related assets to be “distributed by law for the purpose of promoting law enforcement,” instead of going directly to the Literary Fund).

151. See VA. STATE CRIME COMM'N, *supra* note 4, at 38–40 (listing the following offenses as sufficient for asset forfeiture: terrorism, computer crimes, unlawful sale of cigarettes, money laundering, drug-offenses, gambling, use of cars to transport stolen goods or for prostitution-related reasons, and the use of property in connection with the abduction or exploitation of children); see also VA. CODE ANN. § 19.2-386 (2012) (codifying the various criminal actions that may result in property forfeiture).

152. See VA. STATE CRIME COMM'N, *supra* note 4, at 75–77 (showing that law enforcement confiscated approximately 16.5 times more property related to drug offenses than for other charges).

153. See *id.* at 12–13 (giving the above figures and comparing the \$339,964 that the Literary Fund received from asset forfeiture to the \$88,771,048 that the Literary Fund received from other sources).

154. See *id.* at 88 (stating that Virginia is similar to thirty-three other states as well as the federal government in allowing forfeiture without a criminal conviction). Some states take a “blended” approach, in which conviction is only sometimes necessary, usually for certain crimes. *Id.*

155. See VA CODE ANN. § 19.2-386.3 (2012) (requiring the seizing agency to notify an attorney for the Commonwealth, who is then required to file a seizure notice with the clerk of the circuit court that has jurisdiction over the matter).

answer to the complaint, at which point he has the option of choosing a bench trial or trial by jury.¹⁵⁶

Upon the initial seizure of property, the law enforcement agency must state a substantial connection between the property and criminal activity in the forfeiture complaint filed against the property.¹⁵⁷ Virginia statutes do not define “substantial connection,” but the phrase has generally been interpreted in Virginia to mean probable cause.¹⁵⁸ At that point, the burden shifts to the property owner to prove to the Department of Criminal Justice Services (DCJS), by a preponderance of the evidence, that either no such connection exists or that he had no knowledge of the fact that his property was being used for criminal ends.¹⁵⁹ If the DCJS finds in favor of the property owner, it either returns the property to the owner or orders the State Treasury to pay the owner the value of his interest in the property.¹⁶⁰ If the owner fails to convince the DCJS, he can take the case to trial.¹⁶¹ If the claimant wins his suit, he is entitled to reimbursement for attorney’s fees.¹⁶² No state provision exists to

156. *See id.* (stating that an owner must file an answer within thirty days establishing the nature of his claim, his ownership interest, and the reasons or exemptions he is pleading before the court). Certain exemptions exist, mostly for innocent owners, but this list is not exhaustive. *See* VA. CODE ANN. § 19.2-386.8 (2012) (listing exemptions including the owner not knowing or having reason to know that his property was being used in an illegal manner).

157. *See* VA. CODE ANN. § 19.2-386.1 (2012) (requiring that the Commonwealth’s Attorney state “in general terms the grounds for forfeiture of the property”); *see also* VA. CODE ANN. § 19.2-386.22 (2014) (stating that a substantial connection to drug crimes must be proven). Virginia has not defined the burden of proof for initial seizure of non-drug related property, but the Virginia State Crime Commission has interpreted this statute to apply to all asset seizures. *See* VA. STATE CRIME COMM’N, *supra* note 4, at 34 (listing probable cause as the standard of proof for initial seizure).

158. *See* VA. STATE CRIME COMM’N, *supra* note 4, at 34 (“In general, a probable cause standard, or something beyond mere suspicion, must be used.”).

159. *See* VA. CODE ANN. § 19.2-386.10(A) (2016) (requiring a preponderance of the evidence standard); *see also* VA. STATE CRIME COMM’N, *supra* note 4, at 91 (pointing out that most states either use a preponderance of the evidence standard like Virginia or incorporate it into their blended approaches).

160. VA. CODE ANN. § 19.2-386.10(A) (2016).

161. *Id.*

162. *See* VA. CODE ANN. § 19.2-386.12(B) (2012) (stating that, if a claimant chooses to contest his property’s seizure and successfully does so in court, he is entitled to “reasonable attorney’s fees and costs” to be paid by the Commonwealth out of the state’s Criminal Fund).

appoint counsel to indigent owners of property; they must hire an attorney out of their own pocket or seek pro bono counsel.¹⁶³ Over the past four years, twenty-two individuals have successfully won such suits in Virginia and have been reimbursed for a total sum of \$22,478 from Virginia's Criminal Fund.¹⁶⁴ If the claimant loses his case, or does not attempt to win back his property, the DCJS places 10% of the funds in the Asset Sharing Administrative Fund and returns the rest to participating law enforcement agencies.¹⁶⁵ The law enforcement agency does not necessarily keep all 90%, as the local Commonwealth Attorney's office can receive shares of up to 45% if the asset was real estate or went to trial.¹⁶⁶ According to the DCJS, currency and vehicles make up the majority of seizures, at 89%.¹⁶⁷

2. Concerns with Virginia's Personal Property Regulations

Many of the problems with civil asset forfeiture that have been seen nationwide exist in Virginia as well; in addition,

163. See VA. CODE ANN. § 19.2-386 (2012) (listing no provisions for appointing counsel). Federal law does allow the court to appoint counsel to individuals during asset forfeiture cases, but only when they are also defendants in ongoing criminal proceedings. See 18 U.S.C. § 983(b) (2016) (providing that the court may appoint counsel to an indigent defendant who already has counsel appointed for the criminal charge).

164. See VA. STATE CRIME COMM'N, *supra* note 4, at 64 (reporting data obtained from the Office of the Executive Secretary of the Supreme Court of Virginia). The number of individuals successfully winning litigated cases and being reimbursed by the state for expenses was five in 2012, six in 2013, four in 2014, and seven in 2015 (as of late October). *Id.*

165. See VA. CODE ANN. § 19.2-386.14(A1) (2012) (establishing the Asset Sharing Administrative Fund of the DCJS as a resource to pay for any expenses incurred through the operation and management of the asset sharing program).

166. See *id.* § 19.2-386.14(B) (allowing the DCJS to distribute either the forfeited asset or the proceeds from the sale of said asset to the law enforcement agency/agencies that contributed to the seizure, based upon the degree of participation). If more than one agency was involved, DCJS retains final control over determining the share distribution. See *id.* (providing that DCJS can distribute assets based upon percentages of agency contribution to the seizure).

167. See VA. STATE CRIME COMM'N, *supra* note 4, at 76 (revealing data from reporting agencies that showed currency seizures as being the most frequent (comprising 9,034 of 14,171 seizures during 2010–2015, or 64%) and vehicle seizures following in a distant second (making up 3,479 of 14,171 seizures during 2010–2015, or 25%)).

unique concerns also exist due to Virginia's particular forfeiture laws.¹⁶⁸ These issues are (1) the use of an abusive police waiver system, in conjunction with the lack of appointed counsel for indigent property owners,¹⁶⁹ and (2) a profound lack of oversight over law enforcement spending of asset forfeiture funds.¹⁷⁰

a. The Virginia Waiver System and the Lack of Appointed Counsel

The first glaring problem of Virginia's forfeiture program is that, while Virginia maintains a waiver system, it fails to adequately protect property owners by granting them the protections of counsel throughout these proceedings.¹⁷¹ Virginia, along with several other states, uses a waiver system in which law enforcement is permitted to pressure property owners into signing waivers that forfeit their ownership rights to their property.¹⁷² A police officer can tell the property owner why he suspects a crime was committed and then offer to let him go if he gives up the property—which, in Virginia, is most often cash.¹⁷³ These highway negotiations take place outside the presence of counsel and target minorities, many of whom are very afraid of government-related threats.¹⁷⁴ Law enforcement can also offer direct settlements to property owners, offering to return a percentage of the seized money if the owner gives up the rest of it.¹⁷⁵ Without being melodramatic, this system of threatening

168. *Infra* Part IV.A.2.

169. *Infra* Part IV.A.2.a.

170. *Infra* Part IV.A.2.b.

171. *See* VA. STATE CRIME COMM'N, *supra* note 4, at 99, 102 (noting that Virginia uses a waiver system, in contrast to states like Texas that ban the practice of allowing law enforcement to request waivers from citizens).

172. *See id.* at 81 (noting that 28% of cases were settled by some type of waiver or settlement).

173. *See id.* at 76 (reporting that cash was seized 64% of the time); *see also* Sallah et al., *supra* note 10 (relating a case in which the interrogating officer pressured the owner of \$25,180 that had been seized to sign a waiver, threatening drug charges and jail time if the waiver was not signed).

174. *See* Sallah et al., *supra* note 10 (reporting on the case of a Hispanic church treasurer in Sterling, Virginia, who signed a waiver giving up the church's money after law enforcement called Immigrations and Customs Enforcement and interrogated him on the scene).

175. *See id.* (telling the story of Mandrel Stuart, a restaurant owner who

arrest unless the citizen hands over money is closer to highway robbery than actual good faith policing.

The problems of the waiver system are magnified when the owner is indigent, cannot afford counsel, and is being pressured by law enforcement officers and the Commonwealth's Attorneys to sign away his property.¹⁷⁶ Given all that is required to contest forfeiture—the initial filings of documents that assert ownership rights, the discovery process, the pre-trial motions procedure, the trial—a person without an attorney can hardly be expected to contest the forfeiture on his own.¹⁷⁷ Add the factor of a uniformed officer threatening criminal charges unless the indigent owner signs away his property, and it becomes clear why so few individuals contest forfeitures in Virginia.¹⁷⁸ Virginia does provide for the eventual recompense of attorney's fees to individuals that successfully contest their property seizures in court,¹⁷⁹ but this does nothing to help a person who lacks the funds to hire an attorney in the first place, or who is pressured into signing a waiver form.

Even the Virginia State Crime Commission (VSCC) expressed strong concern with this system.¹⁸⁰ While it did not address the lack of appointed representation, the VSCC opined that the waiver system outside of the presence of counsel “can raise the appearance of unfair dealing or coercion” and noted that

had \$17,550 seized during a routine traffic stop). The state offered him a 50% settlement, which he refused. Stuart eventually won the case. *See id.* (relaying the above facts and pointing out that Stuart lost his restaurant due to how long it took to get his money back).

176. *Compare* Cornwell et al., *supra* note 146, at 856 (explaining that minorities often simply do not possess the financial capital or the connections to properly hire representation), *and* Sallah et al., *supra* note 10 (reporting on how the vast majority of seizures affect minorities), *with* VA. STATE CRIME COMM'N, *supra* note 4, at 99, 102 (admitting that abuses of the waiver system have been clearly seen in other states, and providing the example of Texas, which forbade any property seizure-related officer negotiation with property owners).

177. *See* VA. CODE ANN. § 19.2-386.12 (2015) (entitling a successful contestant to attorney's fees and costs *after* the trial, but necessarily requiring any owner or attorney to front the expenses until that point).

178. *See* VA. STATE CRIME COMM'N, *supra* note 4, at 81 (reporting that less than 1% of civil forfeitures resulted in a trial).

179. VA. CODE ANN. § 19.2-386.12 (1991).

180. *See* VA. STATE CRIME COMM'N, *supra* note 4, at 102 (recommending that the use of waivers be prohibited).

there are reports of abuses in other states where this system was used.¹⁸¹ In fact, it recommended that the waiver system be abolished as a whole, if only to restore public faith in Virginian policing.¹⁸²

b. Lack of Oversight in Agency Expenditure of Asset Forfeiture Proceeds

A second problem exists in states like Virginia that return most of the forfeited assets to law enforcement: frequently, the state exercises limited to no oversight as to the expenditure of these funds.¹⁸³ News agencies like *The Washington Post* have documented many instances where local law enforcement has treated asset forfeiture revenue as a windfall to be spent on whatever it desires—not just law enforcement-related needs.¹⁸⁴ One police chief, after admitting that there was no oversight to how his department spends forfeiture funds, said that they usually decided to spend on the money on things that were “nice to have” and that they “try not to use it on things that they need to depend on . . . it’s kinda like pennies from Heaven, you know, it gets you a toy or something that you need.”¹⁸⁵ Toys are an apt analogy—in 2012, the Commonwealth of Massachusetts’ State Auditor released a report showing that the Worcester County District Attorney’s office expended over \$56,000 of forfeiture

181. See *id.* (recommending the abolition of the waiver system and noting a lack of public faith in the current asset forfeiture system).

182. *Id.*

183. See WILLIAMS ET AL., *supra* note 82 (decrying the practice of returning forfeited assets back to the confiscating agencies, and noting that many agencies use such funds as an opportunity to “pad their budgets”).

184. See Robert O’Harrow, Jr., Steven Rich & Shelly Tan, *Asset Seizures Fuel Police Spending*, WASH. POST (Oct. 11, 2014), <http://www.washingtonpost.com/sf/investigative/2014/10/11/asset-seizures-fuel-police-spending/> (last visited Apr. 27, 2017) (quoting a former director of the Justice Department’s asset forfeiture program as saying that it appears that asset forfeiture is becoming a “free floating slush fund” for police agencies) (on file with the Washington and Lee Law Review).

185. LastWeekTonight, *Civil Forfeiture: Last Week Tonight with John Oliver (HBO)*, YOUTUBE (Oct. 5, 2014), <https://www.youtube.com/watch?v=3kEpZWGgJks> (last visited Apr. 6, 2017) (on file with the Washington and Lee Law Review).

funds without proper documentation (invoices, receipts, or records of where the purchases went).¹⁸⁶

Virginia has seen its own share of scandals when it comes to spending forfeiture funds.¹⁸⁷ In 2012, Middlesex Sheriff Guy Abbott faced trial over twenty-five counts of embezzlement and misuse of funds in connection with civil asset forfeiture.¹⁸⁸ During the trial, testimony emerged showing that Abbott had used asset forfeiture funds to buy cars and boats, including an expensive boat used by the Navy SEALs, as well as bonuses for staff and non-training meals.¹⁸⁹ However, Abbott's eventual convictions came down to instances where he had solicited bribes from the Middlesex Chief Deputy, Michael Sampson II, and the Middlesex

186. See Suzanne M. Bump, *Official Audit Report*, COM. OF MASS. OFFICE OF THE STATE AUDITOR (Feb. 15, 2013), <http://www.mass.gov/auditor/docs/audits/2013/201212623j.pdf> (noting that one of these undocumented purchases was a \$985 Zamboni machine used for resurfacing ice rinks). The State Auditor went on to pointedly state that “we could not find where this item is located or what law enforcement purpose it serves.” *Id.*; see also Renee C. Lee, *Montgomery DA Says Funds Used for Margarita Machine at Cook-Off*, HOUSTON CHRON. (Mar. 18, 2008, 5:30AM), <http://www.chron.com/neighborhood/humble-news/article/Montgomery-DA-says-funds-used-for-liquor-at-1757341.php> (last visited Apr. 27, 2017) (reporting that the Montgomery County District Attorney used forfeiture funds to buy liquor, kegs, and a margarita machine for an office cook-off party, chalking up the expenditure as a law enforcement expense) (on file with the Washington and Lee Law Review).

187. See, e.g., *Virginia Sheriff Bribed Police with Asset Forfeiture Funds*, INST. FOR JUST. (Aug. 25, 2012), <http://ij.org/action-post/virginia-sheriff-bribed-police-with-asset-forfeiture-funds/> (last visited Apr. 27, 2017) (reporting that Guy Abbott, a Virginia sheriff, was charged with twenty-five felonies including eighteen counts of misusing forfeiture funds).

188. See Matt Sabo, *Former Middlesex Sheriff Guilty on Two Bribery Counts*, DAILY PRESS (Aug. 15, 2012), http://articles.dailypress.com/2012-08-15/news/dp-nws-middlesex-abbott-trial-day5-wrap-0816-20120815_1_sheriff-guy-abbott-judge-paul-f-sheridan-bribery-conviction (last visited Apr. 27, 2017) (stating that, while the district attorney threw out three charges against Abbott, and the court dismissed or found Abbott not guilty on twenty other charges, he was still convicted on two counts of bribing officers with asset forfeiture funds) (on file with the Washington and Lee Law Review).

189. See Eric Gillard, *Second Day of Trial of Former Middlesex County Sheriff Focuses on Procurement of Items*, DAILY PRESS (Aug. 10, 2012), http://articles.dailypress.com/2012-08-10/news/dp-nws-middlesex-abbott-trial-day2wrap-0811-20120810_1_guy-abbott-nova-marine-david-bushey (last visited Apr. 27, 2017) (noting testimony from David Bushey, the current sheriff, stating that he would have to track down these items, and Betty Bray, the Middlesex County Treasurer, saying that she “[didn’t] think they should be paying for [meals and bonuses]”) (on file with the Washington and Lee Law Review).

Sheriff's Lieutenant, James Ellis.¹⁹⁰ In both instances, Abbott paid the men using forfeiture funds and then asked for a portion of it back.¹⁹¹ In Ellis's case, Abbott paid him a bonus using forfeiture money, then later asked for money back, and advised him to report the money that Ellis paid him back as "overtime" working for the Sheriff's Office, so that Ellis could get reimbursed as well.¹⁹² This allowed both Abbott and Ellis to get payoffs from the system without troublesome red tape—all because of their handy asset forfeiture fund at the Sheriff's Office.¹⁹³ However, Abbott's convictions were later reversed over uncertainties about whether Abbott's state of mind fulfilled all the elements of the bribery statute, or whether he instead acted in a merely questionable manner based upon a career of operating without proper oversight.¹⁹⁴ Regardless of whether Abbott acted in a truly criminal manner or not, this case would not have even occurred and "torn [the local community] into factions"¹⁹⁵ if the state had implemented oversight procedures.

The Virginia State Crime Commission (VSCC) itself has acknowledged that law enforcement needs oversight to ensure proper expenditure of funds.¹⁹⁶ Its 2015 report stated that "if not properly overseen or monitored, direct funding of law

190. See Sabo, *supra* note 188 (relating a statement from Judge Paul F. Sheridan that both Sampson and Ellis felt "uncomfortable" with what Abbott was doing and that Ellis "knew it wasn't right").

191. See Amanda Kerr, *Testimony Details Former Middlesex Sheriff's Alleged Misuse of Funds*, DAILY PRESS (Aug. 13, 2012), http://articles.daily.press.com/2012-08-13/news/dp-nws-middlesex-abbott-trial-day3wrap-0814-2012-0813_1_misuse-or-misappropriation-middlesex-sheriff-guy-abbott-asset-forfeiture (last visited Apr. 6, 2017) (stating that Abbott paid Sampson and Ellis \$1,900 and \$100 from forfeiture funds, respectively, then asked for the two men to pay him back approximately \$1,220–1,250 combined) (on file with the Washington and Lee Law Review).

192. See Sabo, *supra* note 188 (describing how Abbott coached Ellis to gain back the money that Abbott solicited from him).

193. See Kerr, *supra* note 191 (noting that all these bribery instances began with Abbott paying off employees with asset forfeiture funds).

194. See Gillard, *supra* note 189 (reporting Judge Sheridan's statements that he felt uncomfortable convicting Abbott based upon unspoken agreements between Abbott and the two employees that Assistant Attorney General Shannon Dion said felt compelled to comply with Abbott's requests).

195. *Id.*

196. See VA. STATE CRIME COMM'N, *supra* note 4, at 29 (noting that abuses have occurred elsewhere in regards to the spending of such funds).

enforcement through asset forfeiture can lead to inappropriate purchases.”¹⁹⁷ While the VSCC stated that it did not discover a systemic pattern of improper expenditures in Virginia, it acknowledged that no statewide recording of expenditure existed and that when it requested information from law enforcement agencies and Commonwealth’s Attorneys’ Offices, a significant percentage did not even respond.¹⁹⁸ In addition, while the Department of Criminal Justice Services (DCJS) collects “comprehensive” information for large forfeitures relating to drug crimes, for other forfeitures such information is not collected.¹⁹⁹ For drug-related seizures, agencies must submit reports regarding how much money is in their asset forfeiture fund and an itemized list of how such funds are spent.²⁰⁰ However, for non-drug-related seizures, or drug-related seizures of less than \$500, such reports are not required.²⁰¹ This lack of data-reporting and oversight is unacceptable when the state is dealing with the personal assets of its own citizens.

B. Real Property

The above-cited problems with Virginia’s system apply to all forfeitures of property in Virginia.²⁰² While Virginian law enforcement usually seizes personal property such as cash or cars, it does occasionally seize real property.²⁰³ This subpart discusses (1) why real property needs more protections than personal property, (2) Virginia’s existing protections for real

197. *Id.*

198. *See id.* at 67 (stating that seventeen “primary law enforcement agencies” and twenty-one Commonwealth’s Attorney’s Offices did not respond).

199. *See id.* at 72 (explaining that balance sheets, such as those required for drug-related funds, are not required of non-drug related funds).

200. *See id.* at 73 (noting that the agencies must report 1) the beginning balance of their drug-related forfeiture funds, 2) the balance at the end of the fiscal year, and 3) how these funds were spent).

201. *See id.* at 86 (“Data for non-drug related [asset forfeiture] is not captured in a reliable, transparent manner like drug-related [asset forfeiture].”).

202. *Supra* Part IV.A.

203. *See* VA. STATE CRIME COMM’N, *supra* note 4, at 79 (reporting that Virginia rarely seizes real property compared to how often it seizes cash or vehicles).

property, and (3) further protections that Virginia should implement.²⁰⁴

1. Uniqueness of Real Property

The personhood theory of property states that the identity of an individual can become bound up in a particular item, thus giving the item an irreplaceable value inherent to its uniqueness.²⁰⁵ Real property often falls within the category of personhood property, due to the effect that growing up in a house or on a piece of land can have upon a person's identity.²⁰⁶ Renowned property scholar Margaret Jane Radin divided up property into two different categories: personal and fungible.²⁰⁷ She referred to irreplaceable items (such as a house) as personal property, whereas money is fungible property held purely as an instrument of value.²⁰⁸ While Radin conducted a very detailed analysis of different types of property,²⁰⁹ for the purposes of clarity this Note focuses on the accepted doctrine that courts generally consider real property as being unique and irreplaceable.²¹⁰

204. *Infra* Parts IV.B.1–3.

205. *See* Radin, *supra* note 26, at 960 (1982) (reflecting upon the significance of certain objects to the identity of their owners).

206. *See id.* at 959 (referencing houses as common items that people “feel are almost a part of themselves”).

207. *See id.* at 961 (referring to property, such as houses or wedding rings that are bound up with one's identity, as personal property, in contrast to property “held purely instrumentally,” which would be fungible property).

208. *See id.* at 960 (differentiating between irreplaceable personal property, such as houses or rings, and replaceable property, such as money or cars on a dealer's lot).

209. *See id.* at 987 (noting that personal items such as wedding rings or photo albums can also develop an individual's personhood much like a house can).

210. *See, e.g.,* Norfolk S. Ry. Co. v. E. A. Breeden, Inc., 756 S.E.2d 420, 464 (Va. 2014) (pointing out that the court often grants injunctions when real property is concerned because “the violation of a real property interest is deemed irreparable and the owner [sic] protected in the enjoyment of his property whether his interest be sentimental or pecuniary” (citing *Levisa Coal Co. v. Consolidation Coal Co.*, 662 S.E.2d 44, 54 (Va. 2008) (quoting *Boerner v. McAllister*, 89 S.E.2d 23, 25 (Va. 1955))).

2. Varying State Safeguards for Real Property

While states vary widely in their procedures for civilly forfeiting real property,²¹¹ several have recognized the necessity for heightened requirements because of the uniqueness of real property.²¹² Virginia's laws governing this issue occupy a unique place among the fifty states, taking up a hybrid position on the matter.²¹³ On one hand, Virginia's standard of proof regarding forfeiture of real property remains the same as that required to forfeit other property.²¹⁴ Virginia's lack of recognition of the unique value of real property keeps it on the same level as most other states.²¹⁵ On the other hand, Virginia has a specific statute governing the forfeiture of real property involved in drug transactions: VA. CODE § 19.2-386.22.²¹⁶ This statute requires that the drug allegations associated with the property be severe enough that a conviction would result in a minimum punishment of five years in prison.²¹⁷

This provision in Virginia law safeguards against some of the most egregious civil asset forfeiture abuses seen in other

211. *Compare, e.g.*, KY. REV. STAT. ANN. § 218A.410(1)(j) (2012) (applying a clear and convincing evidence standard to real property forfeiture), *with* *Robbins v. Kentucky*, 336 S.W.3d 60, 64–65 (Ky. 2011) (requiring only a “slight evidence of traceability” to seize non-real property), *and* N.D. CENT. CODE § 19-03.1-36.6 (1989) (mandating only probable cause for the government to initiate forfeiture proceedings, applied across the board to all types of property).

212. While many states are currently reforming their civil asset forfeiture laws, the ones with current provisions specifically protecting real property are Alabama, Kentucky, Maine, and California. *See* ALA. CODE § 20-2-93(h) (1990) (requiring the government to bear the burden of proof when the asset is real property); KY. REV. STAT. ANN. § 218A.410(1)(j) (2012) (requiring clear and convincing evidence to forfeit real property); ME. STAT. tit. 15, §§ 5821(7)(A), 5822(3) (1987) (providing that the government must prove knowledge or consent on the part of the owner or family members to forfeit the family's primary residence); CAL. HEALTH & SAFETY CODE § 11488.4(i) (1994) (mandating a criminal conviction before real property can be seized).

213. *See* VA. CODE ANN. § 19.2-386.22 (2014) (establishing specific protections for real property related to drug transactions).

214. *See* VA. STATE CRIME COMM'N, *supra* note 4, at 91 (stating the applicable burden of proof for all civil forfeitures in Virginia).

215. *See id.* (observing that thirty-three other states use the same burden of proof).

216. VA. CODE ANN. § 19.2-386.22 (2014).

217. *Id.*

states.²¹⁸ By having this statute in place *specifically* for drug-related forfeitures, Virginia prevents the loss of one's home for a minor drug offense, as has been frequently seen in other states such as Pennsylvania, where innocent owners have lost their residences after a relative made a small drug sale.²¹⁹ While this is certainly a step in the right direction, Virginia's protections for real property are still vastly less than those of California, for example, which require an actual conviction before one's home or land can be taken.²²⁰

3. Recommended Protections for Real Property

Real property protections can be added with a minimal effect to Virginia law enforcement because, compared to other types of property seizures, real property occupies a very small portion of Virginia's asset forfeiture programs.²²¹ According to VSCC's most recent data, "property"²²² seizures comprised only 36 of the 14,171 seizures that took place from 2010 to September 8, 2015.²²³ In 2014, real estate seizures only occurred twice.²²⁴ Exact values for the real property seizures were not provided, but they undoubtedly accounted for only a small portion of the \$31,167,594 of asset forfeiture funds that Virginia returned to state and local law enforcement agencies in the years 2010–2015.²²⁵ Given the

218. See *id.* (allowing the owner or innocent co-owner of real property to retain that property, even if there was a slight criminal drug connection to it).

219. See Brown, *supra* note 25 (relating the story of a Philadelphia family that lost its home after the son was caught selling \$40 worth of drugs); see also Thompson, *supra* note 27 (telling the story of another family that had its home seized in conjunction with accusations that the husband was selling painkillers which he legally owned due to an injured back).

220. See CAL. HEALTH & SAFETY CODE § 11488.4(i) (1994) (protecting an owner's interest in real property by requiring that the owner actually be convicted of a crime before the asset can be seized).

221. See VA. STATE CRIME COMM'N, *supra* note 4, at 79 (listing only two seizures of real estate in 2014).

222. See *id.* at 77 (showing the other categories besides "property" as currency (9,034 seizures), vehicles (3,479 seizures), electronics (610 seizures), jewelry (291 seizures), firearms (251 seizures), boats (16 seizures), and other (454 seizures)).

223. *Id.*

224. *Id.* at 79.

225. See *id.* at 75 (totaling the amount of asset forfeiture proceeds returned

irreplaceable nature of real property to its owners, no excuse exists as to why further real property protections should not be added to the current system.²²⁶

V. Proposed Solutions to Virginia's Civil Asset Forfeiture Programs

At this point, this Note's analysis of the current civil forfeiture system in Virginia ends, and the question arises: What should be done to correct the demonstrated problems? Both the Virginia House of Delegates and the Virginia State Crime Commission have suggested their own answers.²²⁷ These shall be addressed below, followed by a look at recent reforms and a proposal for further reform.²²⁸

A. Legislative Efforts

In 2014, two reform bills were introduced into the Virginia House of Delegates: HB 1287 and HB 1468.²²⁹ On September 23, 2014, Delegate Mark Cole introduced HB 1287, which established that any civil forfeiture proceedings be stayed until the owner of the assets had been convicted and had exhausted all appeals.²³⁰ On December 30, 2014, Delegate Robert G. Marshall filed another bill, HB 1468, which created a cause of action for anyone who had

to agencies in the past decade).

226. See *supra* Part IV.B (describing the need for real property protections, and how such protections would have a minimal impact on law enforcement's revenue).

227. *Infra* Part V.A–B.

228. *Infra* Part V.

229. *HB 1287 Forfeiture of Property Used in Connection with Commission of Crimes; Conviction Required*, LEGIS. INFO. SYS., <http://lis.virginia.gov/cgi-bin/legp604.exe?151+sum+HB1287> (last visited Apr. 27, 2017) (on file with the Washington and Lee Law Review).

230. The co-patrons of the bill were: Scott A. Surovell (chief co-patron), Richard L. Anderson, Jeffrey L. Campbell, Betsy B. Carr, Peter F. Farrell, Hyland F. "Buddy" Fowler, Jr., Daun S. Hester, Timothy D. Hugo, Terry G. Kilgore, Dave A. LaRock, James M. LeMunyon, L. Scott Lingamfelter, Robert G. Marshall, Jennifer L. McClellan, John M. O'Bannon, III, Robert D. Orrock, Sr., Brena L. Pogge, David I. Ramadan, Sam Rasoul, and R. Lee Ware). *Id.* HB 1287 only had one Senate patron, Charles W. Carrico, Sr. *Id.*

property seized by the state and was acquitted, had the case dismissed, or otherwise was not charged and convicted.²³¹ The subcommittee recommended that HB 1468 be incorporated into HB 1287, and the Courts of Justice did so on January 28, 2015.²³² The final draft of the legislation retained the body of HB 1287, with additional provisions that the property could only be forfeited absent a conviction if the forfeiture composed part of a plea agreement, or if a year passed after the seizure and the owner had still failed to submit a written demand for the property.²³³

The Virginia House of Delegates passed HB 1287 by a vote of 92–6 and sent it on to the Virginia Senate.²³⁴ It was there that the bill met its demise, with the Senate Finance Committee deciding not to approve it and instead voting 9–5 to send the bill on to the Virginia State Crime Commission (VSCC) for analysis.²³⁵

B. Virginia State Crime Commission Recommendations

The VSCC considered the bill and conducted an in-depth analysis of Virginia’s civil asset forfeiture, ultimately refusing to

231. *HB 1468 Asset Forfeiture; Civil Action*, LEGIS. INFO. SYS., <http://lis.virginia.gov/cgi-bin/legp604.exe?151+sum+HB1468> (last visited Apr. 6, 2017) (on file with the Washington and Lee Law Review).

232. *See id.* (noting that the bill had been handed down to the Criminal Law Subcommittee of the House Courts of Justice).

233. *See id.* (reporting that the House read HB 1287 three times (January 30, February 2, and February 3, 2015) before passing the bill).

234. *See* Morgan White, *Asset Forfeiture Reforms Pass the House*, CAP. NEWS SERV. (Feb. 6, 2015, 12:00 AM), http://www.fredericksburg.com/news/local/asset-forfeiture-reforms-pass-the-house/article_b9a49cec-b595-5271-85f9-1444e3fba29e.html (last visited Apr. 27, 2017) (detailing the passage of the bill and noting that Senator Charles W. Carrico, whose identical Senate bill, SB 684, had failed in the Senate in January, co-sponsored this bill as well) (on file with the Washington and Lee Law Review).

235. *See* Patrick Wilson, *Senate Committee Kills Police Asset Forfeiture Reform Bill*, VIRGINIAN-PILOT (Feb. 18, 2015), http://pilotonline.com/news/government/politics/virginia/senate-committee-kills-police-asset-forfeiture-bill/article_77883941-f509-50cb-b222-74a6777a4d62.html (last visited Apr. 6, 2017) (reporting that, while the bill had passed the Senate Courts of Justice Committee 11–2, the Finance Committee killed the bill on what Delegate Mark Cole referred to as pretextual grounds) (on file with the Washington and Lee Law Review).

endorse the bill.²³⁶ However, the VSCC issued a number of recommendations for immediate changes to the system, as well as items for consideration.²³⁷

1. Recommendations

The VSCC's recommendations encompassed a wide variety of issues and potential issues seen with the current system, most of which hinged upon transparency.²³⁸ The VSCC's first relevant recommendation was that the waiver system be abolished, as it was prone to abuse and retained the appearance of coercion.²³⁹ Second, due to a lack of public faith in Virginia's civil forfeiture system, the Commission advocated that the DCJS be required to submit annual reports on every seizure, drug-related or not, which would be available for public use.²⁴⁰ Third, the report acknowledged a dearth of data regarding non-drug related seizures and suggested an across-the-board requirement for law enforcement agencies to submit information on all seizures conducted.²⁴¹ Fourth, the VSCC recommended that data be maintained on the numbers of civil forfeitures and criminal

236. See *2015 Studies*, VA. STATE CRIME COMM'N, <http://vscc.virginia.gov/studies.asp> (last visited Apr. 27, 2017) (stating that a comprehensive study of Virginia's civil asset forfeiture statutes will be conducted) (on file with the Washington and Lee Law Review); see also Caleb Kershner, *Virginia State Crime Commission Rejects Asset Forfeiture Reform*, SIMMS SHOWERS LLP (Jan. 4, 2016), <http://www.simsshowerslaw.com/virginia-state-crime-commission-rejects-asset-forfeiture-reform/> (last visited Apr. 6, 2017) (reporting that the VSCC voted against endorsing HB 1287) (on file with the Washington and Lee Law Review).

237. See VA. STATE CRIME COMM'N, *supra* note 4, at 101 (listing seven recommendations and five items for consideration).

238. See *id.* (noting many times throughout the report about how there is a current lack of transparency in these proceedings, and that such transparency is needed). This Note considers only those recommendations that are relevant to the issues that this Note addresses, although the VSCC did identify other recommendations.

239. See *id.* at 102 (noting that the waiver system has been frequently abused by other states and that it smacks of undue influence).

240. See *id.* (suggesting again that this type of transparency would aid in public regard for Virginia law enforcement).

241. See *id.* (pointing out that there are approximately twenty other crimes in which assets can be seized and for which no records are kept).

convictions, stating that “the ability to match criminal convictions with civil forfeiture proceedings is not readily available.”²⁴²

2. *Items for Consideration*

The VSCC also listed a number of additional items for consideration, noting that they would provide additional protections for citizens.²⁴³ The VSCC did not endorse these considerations, however, claiming a lack of “direct evidence of a systemic pattern of abuse.”²⁴⁴ The items applicable to civil asset forfeiture consisted of the following: staying civil forfeiture until any criminal proceedings were resolved,²⁴⁵ increasing the burden of proof to “clear and convincing,”²⁴⁶ requiring a criminal conviction before forfeiture,²⁴⁷ and finally, requiring a criminal conviction and exhaustion of all appeals before forfeiture, as was seen in HB 1287.²⁴⁸

C. *Legislative Success in 2016*

Both HB 1287 and the VSCC report provided very different solutions to Virginia’s civil asset forfeiture problems.²⁴⁹ HB 1287 proposed ending all civil forfeitures unless the property could be directly tied to a criminal conviction.²⁵⁰ While this would solve many of the problems in Virginia, it would also likely end most of law enforcement’s seizures.²⁵¹ Perhaps realizing this, the VSCC

242. *Id.* at 106.

243. *Id.* at 109.

244. *Id.*

245. *See id.* at 110–11 (tying this consideration into the initial House bill).

246. *See id.* at 113 (stating this after noting throughout the report that other states use this burden of proof).

247. *See id.* at 114–15 (noting that the greater majority of law enforcement agencies oppose this plan).

248. *See id.* at 116 (listing this measure as a possible consideration, while still refusing to endorse HB 1287 as a valid option).

249. *See supra* Part V.A and V.B (explaining the two proposals and the provisions contained therein).

250. *See supra* Part V.A (detailing the components of HB 1287).

251. *See* VA. STATE CRIME COMM’N, *supra* note 4, at 81 (reporting how most

refused to endorse HB 1287, and instead proffered more limited changes, such as ending the waiver system and requiring agencies to report more data.²⁵²

Both HB 1287 and the VSCC recommendations had advantages and disadvantages, and in early 2016 Senator Bill Carrico introduced SB 457, a reform bill that fell in the middle of the two of them.²⁵³ SB 457 left most of Virginia's civil asset forfeiture system in place (including the waiver system, ignoring the VSCC recommendations), but raised the Commonwealth's burden of proof to clear and convincing evidence.²⁵⁴ A proposed amendment to require a criminal conviction before forfeiture failed to pass the Senate.²⁵⁵ However, the original version of SB 457 successfully passed both the Virginia Senate and House of Delegates and was signed into law on April 1, 2016.²⁵⁶

Senate Bill 457 was an important reform bill that will help restore property rights to Virginians.²⁵⁷ However, other elements of Virginia's system still need to be changed so that the property

asset forfeitures in Virginia occur without a criminal conviction).

252. See *id.* at 102–08 (relating the official recommendations of the VSCC).

253. See *SB 457 Asset Forfeiture; Changes Burden of Proof*, LEGIS. INFO. SYS., <https://lis.virginia.gov/cgi-bin/legp604.exe?161+sum+SB457> (last visited Apr. 27, 2017) [hereinafter LEGIS. INFO SYS., *SB 457 Asset Forfeiture*] (introducing the bill on January 12, 2016) (on file with Washington and Lee Law Review).

254. See *id.* (“Chang[ing] the Commonwealth’s burden of proof to clear and convincing evidence from preponderance of the evidence in proving that the property is subject to forfeiture in civil asset forfeiture cases.”).

255. See Christina Delgado, *Legislation in Virginia Protects Property Owners from Government Overreach*, FREEDOMWORKS (Feb. 17, 2016), <http://www.freedomworks.org/content/legislation-virginia-protects-property-owners-government-overreach> (last visited Apr. 27, 2017) (explaining that the proposed amendment failed after it met unanimous Republican opposition in the Senate) (on file with Washington and Lee Law Review).

256. LEGIS. INFO. SYS., *SB 457 Asset Forfeiture*, *supra* note 253; see also Tony Bergida, *Virginia General Assembly Unanimously Passes Civil Asset Forfeiture Reform*, AM. LEGIS. EXCHANGE COUNCIL (Mar. 11, 2016), <https://www.alec.org/article/virginia-general-assembly-unanimously-passes-civil-asset-forfeiture-reform/> (last visited Apr. 27, 2017) (noting how the passage of SB 457 signals a shift in attitudes toward Virginian civil asset forfeiture laws) (on file with Washington and Lee Law Review).

257. See Delgado, *supra* note 255 (“Requiring the state to prove a stronger argument in court before acquiring an owner’s assets helps Virginia move in the right direction.”); Bergida, *supra* note 256 (“SB 457 is nevertheless sure to improve [Virginia’s] ‘D-’ grade.”).

rights of Virginians can be properly protected.²⁵⁸ The remainder of this Note addresses the further changes that are necessary in personal property and real property forfeitures to create a just and equitable system.

1. Reforms of Virginia's Personal Property Forfeitures

First, the waiver system needs to be abolished, and Virginia should explore options for providing counsel to indigent property owners who seek to contest the forfeiture of their property. Virginia's waiver system, which allows law enforcement officers to cut deals with property owners, presents a distasteful situation at best and a highly coercive situation at worst.²⁵⁹ Serious due process concerns also exist due to the waiver system because it allows law enforcement to bypass completely all existing protections for innocent owners under the civil asset forfeiture laws.²⁶⁰ When a law enforcement officer convinces a property owner to sign over property to avoid criminal charges, all protections are terminated—there is no innocent owner defense in court, no appeals process, and no requirement that the state prove by clear and convincing evidence that the property was used in connection with the crime.²⁶¹ Rather, the incident ends there, and the officer returns with the assets (often just currency) that will later be returned to his department²⁶² and possibly to him as a bonus.²⁶³ As the Virginia State Crime Commission reported, no justification exists for retaining the waiver system in

258. See Delgado, *supra* note 255 (observing that “full restoration of citizens’ property rights against law enforcement is an ongoing struggle”).

259. See VA. STATE CRIME COMM’N, *supra* note 4, at 102 (noting that the process has been abused and can present the appearance of undue influence).

260. See Eric Moores, *Reforming the Civil Asset Forfeiture Reform Act*, 51 ARIZ. L. REV. 777, 797 (2009) (explaining that the waiver system “permit[s] law enforcement agencies to benefit from the inherent fear of an encounter with the police, opening the door to deceit”).

261. See *id.* (pointing out that if a person signs a waiver, all forfeiture proceedings end immediately).

262. See VA. STATE CRIME COMM’N, *supra* note 4, at 65 (stating that DCJS keeps 10% of the revenue from the forfeited assets and returns the rest to the contributing law enforcement agencies).

263. See Gillard, *supra* note 189 (reporting that law enforcement employees were paid bonuses out of asset forfeiture funds).

place, and quite a lot of good could be accomplished if it were ended.²⁶⁴ Unfortunately, SB 457 ignored the advice of the VSCC and left the problem of waivers to be addressed another day.²⁶⁵

The problems of the waiver system—forcing an often inexperienced owner to negotiate for his legal rights with the state—are reflected in the lack of statutes allowing appointment of counsel for indigent owners.²⁶⁶ The individuals that sign over their property to law enforcement are often the same ones that cannot afford representation: lower class minorities.²⁶⁷ If these owners wish to contest the forfeiture of their property, they likely cannot afford to do so out of pocket and are therefore faced with the options of either giving up their ownership rights or trying to represent themselves in court.²⁶⁸ Virginia repays attorney's fees for citizens who successfully contest forfeitures in court, but this requires the owner to find *pro bono* representation or to pay for his attorney up front.²⁶⁹ If Virginia does not wish to end the waiver system entirely, due process concerns could be addressed by appointing representation to indigent owners and requiring that waiver negotiations be conducted between appointed counsel and the Commonwealth's Attorney.²⁷⁰

Second, more oversight and data-reporting should be implemented statewide to prevent local abuses of forfeiture. Virginia laws do require record-keeping of civil forfeiture funds in regards to drug seizures, but the state requires much less

264. See VA. STATE CRIME COMM'N, *supra* note 4, at 102 (“The use of ‘waivers’ by law enforcement . . . should be prohibited.”).

265. See LEGIS. INFO. SYS., *SB 457 Asset Forfeiture*, *supra* note 253 (increasing the burden of proof standard but neglecting to reform the waiver system in Virginia).

266. See VA. CODE ANN. § 19.2-386 (2015) (detailing Virginia's civil asset forfeiture system and never providing for appointment of representation for indigent property owners seeking to contest forfeiture).

267. See *supra* note 139 and accompanying text (reporting how a Washington Post survey discovered that minorities comprise a large percentage of civil forfeiture actions).

268. See *supra* note 146 and accompanying text (explaining how minorities generally lack legal counsel more frequently than non-minorities do).

269. See § 19.2-386.12 (requiring that the Commonwealth recompense these owners from the Criminal Fund).

270. See *supra* Part IV.A.2.b (discussing the ongoing issues with the waiver system and lack of representation, and proposing a solution that could resolve this conundrum).

detailed reports of non-drug related forfeitures or forfeitures of less than \$500.²⁷¹ On the local level, particularly, civil seizures are often worth less than \$500.²⁷² In addition, bribes and other mismanagement of funds have occurred in the realm of small sums, which can be easily concealed under the existing reporting bar of \$500.²⁷³ These forfeited assets are or were the property of American citizens, guilty or not, and when law enforcement is permitted the use of them, Virginia should require that an adequate accounting be made of their expenditure, just like any other business.²⁷⁴

2. Reforms of Virginia's Real Property Forfeitures

Fortunately for Virginians, existing law in the Commonwealth provides that egregious forfeitures of real property for minor drug offenses will not occur.²⁷⁵ That being said, further protections for real property are warranted due to the unique, irreplaceable nature of real property.²⁷⁶ Given the limited number of real property forfeitures and the grave impact that an errant forfeiture can have on Virginia citizens, reforms in this area would have a minimal effect on law enforcement priorities and would have an extremely beneficial effect for real property owners.²⁷⁷ While Oregon boasts the strictest protections

271. See VA. STATE CRIME COMM'N, *supra* note 4, at 72 (noting that data is not collected for items seized in connection with non-drug related criminal acts).

272. See *id.* at 76 (reporting that seizures in the past five years have been as low as \$71).

273. See Kerr, *supra* note 191 (observing that several of the bribe amounts were only a few hundred dollars); see also Lee, *supra* note 186 (detailing forfeiture funds as being incorrectly spent on smaller items such as bottles of liquor and keg taps).

274. See *supra* Part II (examining the history of civil asset forfeiture and explaining how such assets are seized from the personal belongings of American citizens).

275. See *supra* notes 223–24 and accompanying text (mandating that real property connected with drugs can only be seized when the underlying drug offense is serious enough to warrant a sentence of at least five years).

276. See *supra* Part IV.B.1 (explaining Radin's analysis of how a person's identity becomes intertwined with possession of real property such as a house or farm).

277. See *supra* Part IV.B.3 (describing the relatively small position that real property occupies in the grand scheme of Virginia's civil asset forfeiture).

for real property, mandating a criminal conviction before forfeiture followed by clear and convincing evidence that the property was related to the crime,²⁷⁸ even smaller changes—such as the Californian approach of solely requiring a criminal conviction²⁷⁹—would aid in protecting citizens from losing an irreplaceable possession.

VI. Conclusion

Problems with civil asset forfeiture extend across the United States, and Virginia is no exception.²⁸⁰ Fortunately, many states have enacted reform measures to better protect their citizens from mistaken property seizures.²⁸¹ Virginia's congressmen have produced reform bills of their own, but although these efforts produced positive results, further reform is still necessary.²⁸² Unfortunately, until recently, very little information about Virginia's forfeitures had been compiled for either the public or for oversight groups.²⁸³ As reporters, statisticians, and agencies continue to collect such data, further revelations may arise that would call for even more reforms.²⁸⁴ For example, the ultimate reform of returning Virginia back to 1991—when all forfeited assets were given to the Virginia Literary Fund, rather than to law enforcement—may be required if further research unearths

278. OR. REV. STAT. § 131A.255(1) (2009).

279. CAL. HEALTH & SAFETY CODE § 11488.4(i).

280. See *supra* Part IV (describing the problems seen in Virginia, many of which are also seen on the national level).

281. See, e.g., *supra* note 174 (reporting on the recent reform measures seen in other states).

282. See *supra* Part V.A (explaining the progression of reform bills through the Virginia House of Delegates).

283. See VA. STATE CRIME COMM'N, *supra* note 4, at 66–67 (noting that the VSCC, in order to complete its report, conducted a thorough investigation, requesting data from six different Virginia agencies, departments, and court systems, as well as all law enforcement agencies and Commonwealth's Attorney's Offices); see also *id.* at 103–06 (stating that information on civil asset forfeitures should be compiled in a manner accessible to the public to increase Virginians' confidence in their criminal justice system).

284. See *id.* at 105 (revealing that, currently, the Department of Criminal Justice Services does not require information on non-drug asset forfeiture, a category that encompasses approximately twenty other offenses).

more evidence Virginia law enforcement's funds mismanagement.²⁸⁵ For the time being, however, a commonsense approach is needed that addresses the waiver system, the appointment of counsel, and the direct oversight of law enforcement.²⁸⁶ Fortunately for Virginians, however, it appears that the Commonwealth is heading in the right direction.²⁸⁷

285. *See id.* at 10 (explaining how the current system of returning asset proceeds to law enforcement did not exist in Virginia until 1991).

286. *See supra* Part V.C (proposing a compromise plan to resolve current issues with Virginia's forfeiture system).

287. *See* Bergida, *supra* note 258 ("Although the Virginia Senate rejected a proposed amendment requiring a criminal conviction for the state to secure a judgement [sic] of forfeiture, SB 457 is nevertheless sure to improve that 'D'-grade. The bipartisan sponsorship and support of the bill is a good sign moving forward.").