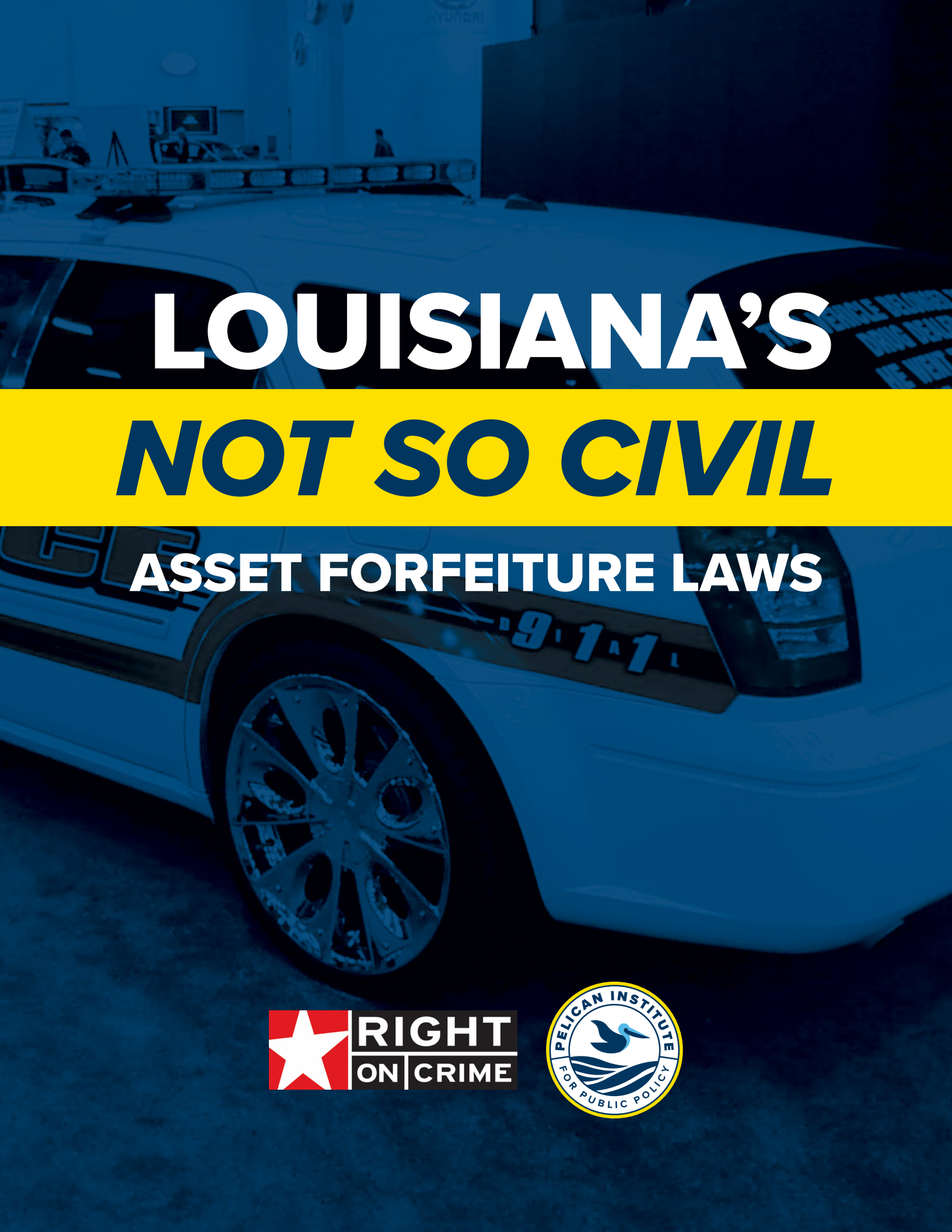


LOUISIANA'S

NOT SO CIVIL

ASSET FORFEITURE LAWS

RIGHT ON CRIME

PELICAN INSTITUTE FOR PUBLIC POLICY

EXECUTIVE SUMMARY

Civil asset forfeiture enables police officers to seize, and prosecutors to take ownership of private property without arresting, charging, or much less, convicting anyone of a crime. Almost every state and the federal government have civil asset forfeiture laws; however, Louisiana's laws are among the nation's worst.

Louisiana's civil asset forfeiture laws are poorly ranked because the state's forfeiture laws give law enforcement an incentive to prioritize pursuing crimes that include the forfeiture of property over other crimes. Indeed, Louisiana law enforcement has collected nearly $180 million from state and federal forfeitures since 2000. Not only do police and prosecutors reap financial rewards from civil forfeiture, Louisiana law allocates 20 percent of forfeiture proceeds to the criminal court fund which pays judicial staff salaries—thus giving judges an incentive to rule against property owners.

In terms of fair processes due to every citizen of Louisiana, the state's forfeiture laws also come up short. The process is divorced from the prosecution of suspects for crimes. In other words, a property owner could be acquitted in criminal court but still lose his property in civil court because state laws allow district attorneys to prosecute and litigate two types of cases in two different judicial systems. Specifically, they are prosecuting the person in criminal court but litigating title to his property in civil court.

Making the process even worse, the government has a lower standard of proof in civil forfeiture cases than the standard of beyond a reasonable doubt that is needed for a criminal conviction. By separating the litigation over property from criminal prosecution, government attorneys face significantly lower standards of proof to gain title to property.

If those dynamics were not bad enough, state law puts the burden of proof on claims filed by the suspect's spouse or another innocent owner claimant. In essence, a person with no involvement in the alleged crime has to prove a negative. She must show that she did not know or consent to the suspect's action. Needing to overcome this burden makes it exceedingly difficult for innocent property owners to prevail in civil forfeiture proceedings, never mind the cost of litigating to get back her property in the first place.

Civil asset forfeiture's low standard of proof, burden on the innocent property owner and incentive for law enforcement to profit from seizing and forfeiting property undermine property rights and Louisianans due process rights.

In recent years, many states have taken steps to reform or end civil asset forfeiture. Louisiana should take note. This paper recommends that state legislators enact two major reforms: (1) abolishing civil asset forfeiture and replacing it with criminal forfeiture that requires a criminal conviction before an individual's property is forfeited and (2) redirecting forfeiture proceeds from law enforcement's budgets to a neutral account such as the state education budget or the general fund.

Short of these changes, Louisiana can make its civil asset forfeiture laws less loathsome by implementing the following reforms:

- Raising the government's standard of proof to at least clear and convincing evidence- this wouldn't interfere with law enforcement 'seizing' property suspected of being involved in a crime or ill gotten gains.;
- Enacting standardized reporting of seizures, forfeitures and the use of forfeiture proceeds on a publicly available website;
- Setting a threshold amount of currency that can be subjected to forfeiture at $5,000 cash;
- Prohibiting seizure and forfeiture of homesteaded property and old vehicles (say, older than 10 model years);
- Creating a prompt post-seizure hearing in which property owners can challenge the constitutionality of seizure and innocent owners may raise claims to get back their property;
- Providing indigent property owners with representation and providing all other property owners, who prevail in forfeiture proceedings, with reimbursement of their attorney's fees and court costs; and
- Closing the federal equitable-sharing loophole.

I. INTRODUCTION

Civil forfeiture is the process that allows the government to first take possession and then title to private property without prosecutors charging, much less convicting, property owners of any crimes.

Every state and the federal government have civil asset forfeiture laws, but the Pelican State's civil forfeiture laws are among the nation's worst, earning a "D+" from the Institute for Justice's latest report[1] and "D" from Freedom Works.[2] Louisiana received low grades because the state's current law makes it easy for the government to forfeit property and gives police, prosecutors, and even judges a direct financial incentive to forfeit property.

1 http://www.ij.org/pfp-state-pages/pfp-Louisiana/
2 https://www.scribd.com/document/267761329/Civil-Asset-Forfeiture-Grading-the-States at 9

II. DISTINGUISHING BETWEEN CIVIL AND CRIMINAL ASSET FORFEITURE

Asset forfeiture can occur through proceedings against a person or property. Criminal asset forfeiture is a proceeding against an individual (in personam) that occurs when the government forfeits an individual's property in one process following a criminal conviction.[3] Crime should not pay. The forfeiture of assets is intended to punish the convicted criminal.[4]

By contrast, civil forfeiture is a proceeding against property (in rem) that occurs irrespective of the owner's guilt or innocence because the object itself—not the owner—is "charged" with the criminal activity.[5] Civil asset forfeiture is not intended as a penalty; rather, it is a remedial action that removes the offending object from society.[6] Most importantly, the rationale for using civil asset forfeiture is based on the state not being able to find and arrest a suspect.[7] This is rarely ever the case in Louisiana, thus undermining the legitimacy of the state's use of civil asset forfeiture.[8]

3 http://apps.americanbar.org/buslaw/blt/content/2012/06/article-02-dery.shtml; https://harvardlawreview.org/2018/06/how-crime-pays-the-unconstitutionality-of-modern-civil-asset-forfeiture-as-a-tool-of-criminal-law-enforcement/ ("Criminal forfeiture occurs pursuant to an in personam action and requires a conviction").

4 http://apps.americanbar.org/buslaw/blt/content/2012/06/article-02-dery.shtml; Alexander v. United States, 509, U.S. 544, 558-559 (1993) ("The in personam criminal forfeiture at issue here is clearly a form of monetary punishment no different, for Eighth Amendment purposes, from a traditional 'fine.'"); United States v. Ursery, 518 U.S. 267, 293 (1996) (Kennedy, J., concurring) ("We held that the 'fundamental nature of criminal forfeiture' is punishment.").

5 http://apps.americanbar.org/buslaw/blt/content/2012/06/article-02-dery.shtml; https://wfulawpolicyjournaldotcom.files.wordpress.com/2017/06/crepelle_probable_cause_to_plunder.pdf at 341 ("Today, civil asset forfeiture routinely targets those who have never been charged with a crime.")

6 http://apps.americanbar.org/buslaw/blt/content/2012/06/article-02-dery.shtml; Karis Ann-Yu Chi, Follow the Money: Getting to the Root of the Problem with Civil Asset Forfeiture in California, 90 Calif. L. Rev. 1635, 1641 (2002) ("the Court relied on the legal fiction that in rem forfeiture is a remedial action against the property, rather than a punitive sanction against the property owner."); Christine Meyer, Zero Tolerance for Forfeiture: A Call for Reform of Civil Forfeiture Law, 5 Notre Dame J.L. Ethics & Pub. Pol'y 853, 859 (1991) ("Civil forfeiture was created and traditionally used for remedial, as opposed to punitive, purposes.").

7 Karis Ann-Yu Chi, Follow the Money: Getting to the Root of the Problem with Civil Asset Forfeiture in California, 90 Calif. L. Rev. 1635, 1638 (2002) ("English law also employed actions, known as in rem proceedings, against vessels to enforce admiralty laws when shipowners were overseas and beyond the jurisdiction of the English courts. America inherited this tradition."); http://ij.org/wp-content/uploads/2015/11/policing-for-profit-2nd-edition.pdf at 10 ("Although the laws were upheld in early Supreme Court cases, their use was limited to the maritime contexts of admiralty, piracy and customs—circumstances where commencing criminal proceedings was difficult, if not impossible, because property owners were overseas or otherwise outside of U.S. jurisdiction".)

8 Other states that have reformed their forfeiture laws have implemented exceptions in these extraordinary cases of a defendant absconding.

III. LOUISIANA'S CIVIL ASSET FORFEITURE LAWS

Civil asset forfeiture applies to numerous offenses;[9] however, controlled substances violations are likely the source of most civil forfeitures in Louisiana. Under Louisiana law, "all property" that is used or intended to be used to facilitate a controlled substances violation is subject to civil forfeiture.[10] Law enforcement can seize property without process upon probable cause that the property is subject to civil asset forfeiture.[11] The district attorney has 45 days to initiate a civil proceeding after the property is seized by notifying the owner, or if the forfeiture is tied to a related criminal proceeding, the forfeiture must be commenced within 45 days of the proceeding's disposition.[12] Once notice of intent to forfeit property is published, the owner or an interest holder has only 15 days to file a claim and attempt to regain her property.[13]

Owners who choose to contest a civil forfeiture face an uphill battle. Acquittal of all criminal charges is not sufficient for the property owner to prevail in a civil forfeiture proceeding.[14] When a civil forfeiture is contested, the state must prove its case by a preponderance of the evidence, and in uncontested civil forfeitures, the state only has to show probable cause to confiscate the property.[15] Probable cause and the preponderance of the evidence are much lower standards than the beyond a reasonable doubt standard applied in criminal cases which makes it much easier for the government to take title to property in civil litigation.[16]

Moreover, civil forfeiture claimants do not have the right to an attorney. Although a claimant who defeats the state's civil forfeiture action is eligible to have his attorney's fees covered by the seizing agency, this is not guaranteed.[17]

The government profits when it wins civil asset forfeiture cases. After bona fide interests in the property—such as banks that have liens on vehicles—and court costs are paid, the funds from forfeited property are split three ways.[18] Sixty percent of the funds go to the seizing law enforcement, and twenty percent go to district attorney's offices involved in the forfeiture.[19] The remaining twenty percent is credited to the criminal court fund,[20] which pays some judicial costs.[21] Should the forfeited item become lost, substantially diminish in value, or if the item cannot be procured for another reason, the court is obliged to order the forfeiture of the claimant's other property worth the value of the judgment.[22] Civilly forfeited motor vehicles can

9 E.g., LSA-R.S. 14:218; LSA-R.S. 14:54.4; LSA-R.S. 15:1405.2.
10 LA RS 40:2604(2).
11 LA RS 40:2606(B).
12 LA RS 40:2608(1)(a).
13 LA RS 40:2612(E).
14 LA RS 40:2611(J); State v. Johnson, 667 So.2d 510, 518 (La. 1996) (holding civil asset forfeiture does not violate double jeopardy because "the civil forfeiture of contraband per se or derivative contraband is not 'punishment' for the purposes of double jeopardy analysis. The government's taking of property in which the 'owner' has never actually had a legal interest does not deprive the individual of property or any other rights without compensation and thus is not deemed 'punishment' within the ambit of double jeopardy protections.").
15 LA RS 40:2612(G).
16 Brent Ashley, Uncivil Asset Forfeiture: An Analysis of Civil Asset Forfeiture and Virginia H.B. 48, 20 Rich. Pub. Int. L. Rev. 293, 301-302 (2017); Alex Stein, Evidence, Probability, and the Burden of Proof, 55 Ariz. L. Rev. 557, n52 (2013)(" Probability thresholds for these burdens can be set at any appropriate level, for example: 0.95 ('beyond a reasonable doubt') and 0.75 ('clear and convincing evidence')".); Lavinia M. Weizel, The Process That is Due: Preponderance of the Evidence as the Standard of Proof for University Adjudications of Studenton-Student Sexual Assault Complaints, 53 B.C.L. Rev. 1613, 1639-1640 (2012) ("The clear and convincing standard falls between preponderance of the evidence and beyond a reasonable doubt in the certainty it requires of the fact-finder.").
17 LA RS 40:2611(L).
18 LA RS 40:2616(B).
19 LA RS 40:2616(B)(1)(3).
20 LA RS 40:2616(B)(2).
21 https://www.google.com/?gws_rd=ssl#q=louisiana+criminal+court+fund (see LA Audit Guide)
22 LA RS 40:2614.

be used by the seizing agency in drug crime investigations.[23] All other forfeited property that is not harmful to the public is sold at a public sale or auction.[24]

The amount forfeited must be reported annually.[25] Louisiana's proceeds gained under state forfeiture law amounted to more than $120 million from 2000 to 2016 for an average of $7,202,457 per year.[26] Table 1 below displays the forfeiture total for each year.

Table 1. Louisiana Forfeiture Total from 2000 to 2016.

YEAR	TOTAL
2000	$4,483547
2001	$3,110,305
2002	$4,800,448
2003	$4,635,863
2004	$7,928,592
2005	$4,992,414
2006	$8,242,709
2007	$7,439,137
2008	$6,665,129
2009	$8,925,206
2010	$6,387,866
2011	$7,902,235
2012	$8,396,656
2013	$8,356,684
2014	$10,427,326
2015	$6,984,766
2016	$12,762,901
Total	**$122,441,784**

Data Sources: Institute for Justice 2015 (http://www.ij.org/pfp-state-pages/pfp-Louisiana/) & Pelican Institute Public Records Request

Louisiana law enforcement can also obtain proceeds from civil forfeiture actions in partnership with the federal law enforcement by participating in the Equitable Sharing Program. There are two ways that Louisiana law enforcement perform forfeitures with the federal government. One is through a joint investigation with the federal government.[27] The other is by independently seizing property under state law and then requesting that the federal government "adopt" the seizure.[28] Additionally, adoptive forfeitures are usually only allowed if the property exceeds a value threshold: $5,000 for vehicles, $2,000 for currency, though firearms can be adopted regardless of their value.[29] Table 2 shows, that from 2000 to 2013, Louisiana collected nearly $60,000,000 in federal equitable sharing proceeds.

Table 2. Federal Equitable Sharing Proceeds from 2000 to 2013

YEAR	TOTAL
2000	$3,722,260
2001	$1,200,422
2002	$5,520,816
2003	$2,104,684
2004	$1,665,119
2005	$2,658,030
2006	$2,930,528
2007	$3,351,793
2008	$3,804,194
2009	$3,251,124
2010	$3,241,934
2011	$8,209,356
2012	$3,312,013
2013	$2,550,621
2014	$2,026,222
2015	$3,435,787
2016	$4,221,652
Total	**$57,206,555**

Data Source: Institute for Justice 2015 (http://www.ij.org/pfp-state-pages/pfp-Louisiana/)

23 LA RS 40:2616(A)(2).
24 LA RS 40:2616(A)(1).
25 LA RS 40:2616(D).
26 http://www.ij.org/pfp-state-pages/pfp-Louisiana/.
27 http://www.justice.gov/criminal-afmls/file/794696/download at 6.
28 http://www.justice.gov/criminal-afmls/file/794696/download at 6.
29 http://www.justice.gov/criminal-afmls/file/794696/download at 7.

IV. PROBLEMS WITH LOUISIANA'S CIVIL ASSET FORFEITURE LAWS

Civil asset forfeiture is problematic for several reasons. It undermines private property rights; it distorts law enforcement's priorities by incentivizing the pursuit of forfeiture funds; and it puts undue burdens on innocent property owners. This section discusses some of the problems with civil asset forfeiture.

1. Property Rights

The United States was founded on the sanctity of private property rights.[30] Accordingly, the United States Constitution categorizes property with life and liberty.[31] The Louisiana Constitution classifies property with life and liberty as well.[32] Indeed, the Louisiana Constitution of 1974, as originally written, granted private property rights even greater protection than its federal counterpart.[33] It afforded greater protection to property rights than any other state constitution.[34] Thus, the Louisiana Supreme Court has noted that "Louisiana law has traditionally looked with disfavor upon forfeitures"[35] because "[a] forfeiture statute necessarily diminishes rights of ownership in private property."[36] That changed in 1989 when Louisiana amended the constitution to weaken property rights in order to facilitate civil asset forfeiture.[37]

As a result of the 1989 amendment, the government's standard of proof in civil forfeiture cases was reduced.[38] The preponderance of the evidence standard that currently applies in Louisiana's civil asset forfeiture proceedings means all the government needs is to prove that there is slightly more than a 50 percent chance the property was or was going to be used as an instrument of a crime or was the proceed of a crime.[39] This is little more than a coin flip.[40] And it is a vastly lower burden of proof than is required in criminal cases to convict the same property owner of the alleged crime. In that case, the standard of proof is beyond a reasonable doubt.[41] In fact, the standard of

30 For example, James Madison wrote, "Government is instituted to protect property of every sort," (http://press-pubs.uchicago.edu/founders/documents/v1ch16s23.html) and John Adams declared, "The moment the idea is admitted into society that property is not as sacred as the laws of God, and that there is no force of law and public justice to protect it, anarchy and tyranny commence." (http://press-pubs.uchicago.edu/founders/documents/v1ch16s15.html)

31 The due process clauses of the Fifth Amendment states, "No person shall be...deprived of life, liberty, or property, without due process of law." The Fourteenth Amendment's due process clause states, "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

32 La. Const. Art. 1, Sec. 2.

33 State v. Manuel, 426 So.2d 140, 147 (La. 1983) (stating, " Our survey of their decisions indicates to us that constitutional review under the Fourteenth Amendment and the Fifth Amendment is less exacting than Louisiana constitutional inspection because of the different, more detailed safeguards for property rights contained in our state charter.").

34 State v. Spooner, 520 So.2d 336, 366 (La. 1988) (Dennis, J., concurring).

35 State v. Spooner, 520 So.2d 336, n2 (La. 1988).

36 State v. Manuel, 426 So.2d 140, 145 (La. 1983).

37 State v. Edwards, 787 So.2d 981, 989-990 (La. 2001) ("This amendment was intended to overrule Spooner, which examined forfeiture laws in the context of criminal proceedings and placed a heavy onus on the state in proving that property should be forfeited. The amendment did this by allowing forfeiture of contraband drug property by means of a civil proceeding. Furthermore, the amendment suppressed the traditional rationale employed in Spooner, that the forfeiture of drug tainted property was disfavored and that the defendant in the forfeiture proceeding must receive the same due process considerations as in a criminal proceeding. In keeping with this intent, the legislature also passed new forfeiture provisions, La. R.S. 40:2601 et seq., setting forth less onerous burdens of proof directly in the statute and treating forfeitures as civil matters.") (internal citations omitted).

38 Edwards, at 989-990.

39 LA Rev Stat § 40:2612(G) ("In a forfeiture case, wherein a claim is timely filed pursuant to the provisions of this Chapter, the burden of proof required to forfeit the defendant's property shall be a preponderance of the evidence.").

40 http://ij.org/wp-content/uploads/2015/11/policing-for-profit-2nd-edition.pdf at 16

41 http://ij.org/wp-content/uploads/2015/11/policing-for-profit-2nd-edition.pdf at 16

proof to reverse a college football call is higher than the government's burden to strip a Louisianan of her property as reversing a college football official's call requires "indisputable visual evidence."[42] Applying the lowly preponderance of the evidence standard in civil forfeiture proceedings diminishes the property rights of all Louisianans.

2. Burden on Innocent Owners

Innocence is not sufficient to stop a civil asset forfeiture proceeding in Louisiana. In fact, the Louisiana Revised Statutes openly state, "An acquittal or dismissal in a criminal proceeding shall not preclude civil proceedings under [the Seizure and Controlled Dangerous Substances Property Forfeiture Act of 1989]."[43] Accordingly, the Louisiana Supreme Court has ruled that a property owner's innocence does not matter in civil asset forfeiture cases asserting:

> There is no prerequisite that a crime be proved before property is subject to confiscation. In fact, the government not only has no duty to prove beyond a reasonable doubt that a crime was committed, it also has no duty to prove a crime by clear and convincing evidence or even by a preponderance of the evidence. The government must only prove that there was probably cause to believe that the property was used in connection with a crime. This burden of proof is made possible by the legal fiction that the property itself is guilty.[44]

The Court went on to state, "In many senses, the raison d'etre of civil forfeitures lies in their reduction of the government's burden for a successful prosecution."[45]

A Louisiana Appellate Court stated, "That forfeiture is a punishment, is a common sense fact…[b]ut it is not appropriate to subordinate forfeiture to every constitutional provision that deals with criminal rights."[46] Thus, the constitutional right to an attorney in criminal cases[47] does not apply in civil asset forfeiture proceedings.[48] Likewise, the forfeiture's alleged civil nature makes the constitutional prohibition against double jeopardy inapplicable in civil forfeiture cases.[49] This means an individual can be acquitted in a criminal case but still have the government institute a proceeding to forfeit the individual's property.[50]

It is worth noting that the value of the property subject to forfeiture is often less than the cost of hiring an attorney; consequently, many civil asset forfeitures go uncontested.[51] Moreover, hearsay is sufficient for the government to initiate a civil forfeiture proceeding.[52] Although some, including government interests, pretend that civil asset forfeiture is not criminal in nature, this is a flagrant falsehood. In fact, the plain text of Louisiana's law requires that civil asset forfeitures occur in criminal court.[53]

3. Cash Register Justice

Law enforcement keeps eighty percent of the proceeds of civil asset forfeiture, and this gives law enforcement an incentive to pursue forfeiture cases over cases where law enforcement does not reap financial rewards, possibly to the detriment of other public safety endeavors. Numerous reports show that law enforcement devotes more resources to

42 http://assets.espn.go.com/SEC/football/2015/2014%20SEC%20FOOTBALL%20VIDEO%20REPLAY(CLEAN).pdf
43 La. R.S. 40:2611(J).
44 State v. Edwards, 787 So.2d 981, 991 (La. 2001).
45 Id.
46 State v. Clark, 670 So.2d 493, 500 (La. App. 3 Cir. 2/21/96).
47 U.S. Const. Amendment VI. and LA Const. Art. 1., Sec. 13.
48 http://www.theadvocate.com/baton_rouge/opinion/article_0c-29de2c-e259-11e6-974d-7b35e03cb87c.html (stating, "To make matters worse, property owners do not have the right to an attorney in civil forfeitures.").
49 State v. Johnson, 667 So.2d 510 (La. 1996).
50 LA RS 40:2611(J).
51 http://www.theadvocate.com/baton_rouge/opinion/article_0c-29de2c-e259-11e6-974d-7b35e03cb87c.html.
52 E.g., State v. Property Seized from Terrence martin, 37 So.3d 1021, 1028 (La.App. 1 Cir. 3/30/10) (stating, "[Probable cause] may be established by demonstrating, by some credible evidence, the probability that the money was in fact drug related. Probable cause can be established by circumstantial or hearsay evidence.");State v. Albritton, 610 So.2d 209, 213 (La.App. 3rd 12/9/1992) (stating, "Probable cause can be established by circumstantial or hearsay evidence."); State v. One (1) 1991 Pontiac Trans Sport Van, Vin # 1GMCU06D3MT208532, 716 So.2d 446, 449 (La.App. 5 Cir 7/9/1998) (stating, "At trial defense counsel objected to hearsay evidence. The trial judge reasoned that under the probable cause standard such evidence was admissible.").
53 42:2602(c)(noting that the proper venue for civil forfeitures brought in Orleans Parish is criminal district court).

interdicting cash than contraband in order to collect civil forfeiture proceeds.[54] As New York City Police Commissioner Patrick Murphy stated, "The large monetary value of forfeitures . . . has created a great temptation for state and local police departments to target assets rather than criminal activity." He went on to state the New York City Police Department "has a financial incentive to impose roadblocks on the southbound lanes of I-95, which carry the cash to make drug buys, rather than the northbound lanes, which carry the drugs. After all, seized cash will end up forfeited to the police department, while seized drugs can only be destroyed."[55] A report from the Libertas Institute discussing Utah's civil asset forfeiture reform found, "With the financial incentive gone, civil forfeitures almost entirely stopped."[56]

Federal courts have noted that civil asset forfeiture presents law enforcement with a "built-in conflict of interest."[57] Another federal court explained that civil asset forfeiture "inevitably gives the government an incentive to investigate criminal activity in situations involving valuable property, regardless of its seriousness, but to ignore more serious criminal activity that does not provide financial gain for the government."[58] Even the United States Supreme Court has stated that financial gain drives civil asset forfeiture.[59] Indeed, law enforcement routinely seeks loopholes around constraints on their ability to obtain forfeiture proceeds.[60]

4. Judges Have Skin in the Game

The criminal court fund receives twenty percent of the proceeds of civil asset forfeitures.[61] Although judges' salaries are set by statute,[62] the judicial system clearly benefits from the money placed in the criminal court fund. For example, money in the criminal court fund can be used to pay the entire salary of law clerks.[63] Money deposited into the criminal court fund from civil asset forfeiture can also be used to pay the salary of a judge's secretary[64] as well as the salaries of other employees in the judge's office.[65] The criminal court fund can also be used to pay a judge's "other expenses."[66]

The judge alone determines the fate of property in civil asset forfeitures,[67] and the judge's interest in the case is clearly problematic. The United States Supreme Court has held that due process is violated when a judge could be enticed to rule a certain way because of personal benefit.[68] Judges unequivocally benefit from having law clerks and secretaries—whose salaries may depend on money being placed in the criminal court fund. This patently violates civil forfeiture claimants' right to due process.

5. Lack of Transparency

Louisiana law requires that district attorneys submit an annual report providing the estimated value of assets and the total value of cash seized in the district attorney's jurisdiction.[69] The reports, however, are not easily available—a public records request is required to obtain them.[70] Moreover, the report does not state whether an arrest accompanied the seizure nor does the report provide how forfeiture funds are spent.[71]

54 https://wfulawpolicyjournaldotcom.files.wordpress.com/2017/06/crepelle_probable_cause_to_plunder.pdf at 339 (referencing the numerous reports of police targeting assets rather than crime).
55 https://wfulawpolicyjournaldotcom.files.wordpress.com/2017/06/crepelle_probable_cause_to_plunder.pdf at 339.
56 https://libertasutah.org/policy-papers/civil_asset_forfeiture.pdf at 3
57 US v. That Certain Real Property, 798 F.Supp. 1540, 1551 (N.D. Ala. 1992).
58 US v. 6625 Zumirez Drive, 845 F.Supp. 725, 735 (C.D. Cal. 1994).
59 US v. James Daniel Good Real Property, 510 US 43, n9 (1993).
60 https://wfulawpolicyjournaldotcom.files.wordpress.com/2017/06/crepelle_probable_cause_to_plunder.pdf at 333-334.
61 LA RS 40:2616(B)(3)(b).
62 State v. Clark, 670 So.2d 493, 501 (La.App. 3 Cir. 2/21/96) (stating "Salaries of judges are fixed by law and paid out of funds annually appropriated for that purpose by the legislature.").
63 LA RS 15.571.11(G)(I)(J).
64 LA RS 15.571.11(B)
65 LA RS 15.571.11(F)(H)(J).
66 LA RS 15:571.11(A).
67 LA RS 40:2612(G)
68 Tumey v. Ohio, 273 U.S. 510, 532 (1927) (stating, "Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused denies the latter due process of law."); Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980) (The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases… it preserves both the appearance and reality of fairness, 'generating the feeling, so important to a popular government, that justice has been done,' by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him.").
69 LA RS 40:2612(D).
70 http://ij.org/pfp-state-pages/pfp-Louisiana/
71 http://ij.org/pfp-state-pages/pfp-Louisiana/

V. EXAMPLES OF STATE REFORMS

Over the last several years, momentum has built for reforming this broken system. Since 2014, 29 states have passed civil asset forfeiture reform, and the federal government has also enacted reform measures. Some examples include the following:

1. NEW MEXICO

In 2015, New Mexico abolished civil asset forfeiture and replaced it with criminal forfeiture. Now, a person must first be convicted of a crime before their property is forfeited, and then the state must prove by clear and convincing evidence that the property was involved in illicit activity.[72] The law also requires proceeds derived from the sale of forfeited assets to be placed in the state's general fund.[73] New Mexico requires law enforcement to report property that is seized and forfeited as well.[74] Additionally, the New Mexico reform prevents state officers from teaming up with the federal government to circumvent the state's forfeiture laws.[75] New Mexico's civil asset forfeiture reform was signed into law by a Republican former prosecutor.[76]

As is often the case, law enforcement sought ways to bypass New Mexico's civil asset forfeiture reform.[77] However, a federal court recently concluded that the City of Albuquerque's attempt to circumvent New Mexico's statewide forfeiture reform creates "an unconstitutional institutional incentive to prosecute forfeiture cases," and that "there is a 'realistic possibility' that forfeiture officials' judgement 'will be distorted by the prospect of institutional gain'—the more revenues they raise, the more revenues they can spend."[78]

2. MONTANA

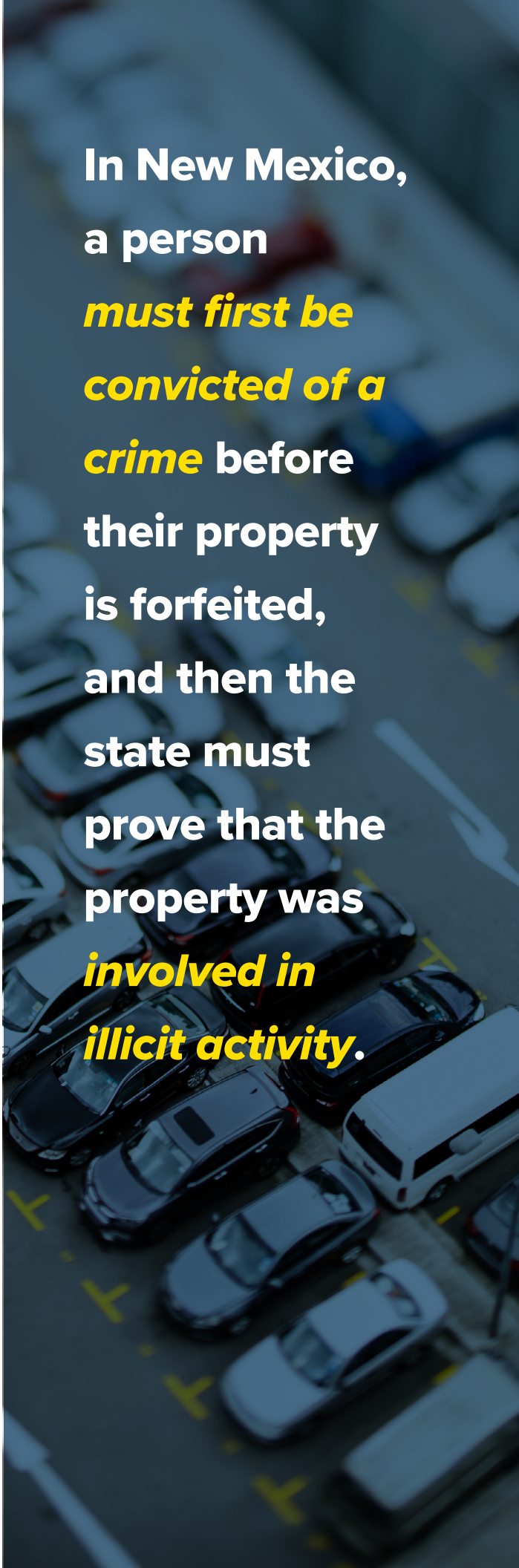
Montana enacted civil asset forfeiture reform in 2015.[79] Private property cannot be forfeited unless the property's owner has been convicted of a crime that allows for property forfeiture, and the property is connected to or derived from a crime by clear and convincing evidence.[80] The reform also forbids the government from forfeiting an innocent owner's property unless the state proves by clear and convincing evidence the owner had "actual knowledge" of the offense subjecting the property to forfeiture.[81] However, Montana's reform did not address law enforcement's profit incentive or include reporting requirements either.[82] Montana's reform also failed to address participation in the federal forfeiture program.

3. FLORIDA

The Florida legislature unanimously approved a civil asset forfeiture reform bill that was signed by

72 HB 560 2015; 31-27-4(A). http://www.nmlegis.gov/Sessions/15%20Regular/final/HB0560.pdf
73 Id at 31-27-7(B-C).
74 HB 560 Section 11; http://www.nmlegis.gov/Sessions/15%20Regular/final/HB0560.pdf
75 HB 560 Section 13(B); http://www.nmlegis.gov/Sessions/15%20Regular/final/HB0560.pdf
76 http://www.susanamartinez.com/bio/
77 https://wfulawpolicyjournaldotcom.files.wordpress.com/2017/06/crepelle_probable_cause_to_plunder.pdf at 333-334
78 https://ij.org/wp-content/uploads/2016/08/Browning-Decision-July-2018-IJ098313xA6322.pdf at 2
79 http://laws.leg.mt.gov/legprd/LAW0203W%24BSRV.ActionQuery?P_SESS=20151&P_BLTP_BILL_TYP_CD=HB&P_BILL_NO=463&P_BILL_DFT_NO=&P_CHPT_NO=&Z_ACTION=Find&P_ENTY_ID_SEQ2=&P_SBJT_SBJ_CD=&P_ENTY_ID_SEQ=
80 http://leg.mt.gov/bills/2015/billpdf/HB0463.pdf at 1; Sec.1(1)(a-c).
81 http://leg.mt.gov/bills/2015/billpdf/HB0463.pdf at p4, Sec. 5; also Sec.11(8).
82 http://www.ij.org/pfp-state-pages/pfp-Montana/

Governor Rick Scott on April 1, 2016.[83] Under the reform, property can be seized only if the owner of the property is arrested for a crime that may give rise to forfeiture unless the property owner cannot be identified; is deceased or a fugitive from justice; or if the property owner had knowledge of criminal activity relating to the property while the property was in another's possession.[84] However, cash and other monetary instruments can be seized even if the owner is not arrested.[85] The reform requires that the law enforcement agency seeking the civil forfeiture pay a $1,000 filing fee and post a $1,500 bond, and the bond must be paid to the claimant if she prevails.[86] Florida forfeiture law now permits courts to award prevailing civil asset forfeiture claimants attorney's fees and costs.[87] Also if the forfeiture claimant prevails, Florida law states, "The trial court shall also require the seizing agency to pay to the claimant any loss of income directly attributed to the continued seizure of income-producing property during the trial or appellate process."[88] Furthermore, the reform increased the standard of proof from "clear and convincing evidence" to the "beyond a reasonable doubt" standard used in criminal proceedings.[89]



83 https://www.flsenate.gov/Session/Bill/2016/1044
84 https://www.flsenate.gov/Session/Bill/2016/1044/BillText/er/PDF at 932.703(1)(a)(1-3).
85 https://www.flsenate.gov/Session/Bill/2016/1044/BillText/er/PDF at 932.703(1)(a)(5).
86 https://www.flsenate.gov/Session/Bill/2016/1044/BillText/er/PDF at 932.704(4)
87 http://www.leg.state.fl.us/statutes/index.cfm?App_mode=Display_Statute&URL=0900-0999/0932/Sections/0932.704.html (10).
88 http://www.leg.state.fl.us/statutes/index.cfm?App_mode=Display_Statute&URL=0900-0999/0932/Sections/0932.704.html (9)(b).
89 https://www.flsenate.gov/Session/Bill/2016/1044/BillText/er/PDF at 932.704(8). ; http://www.leg.state.fl.us/statutes/index.cfm?App_mode=Display_Statute&URL=0900-0999/0932/Sections/0932.704.html (8).

VI. PROPOSED REFORMS FOR LOUISIANA

The state legislature should repeal Louisiana's civil asset forfeiture statutes and replace them with criminal forfeiture. The Louisiana legislature should also redirect all forfeiture proceeds to a neutral account like the K-12 education fund or the state's general fund. Short of major reforms, several minor reforms can be made to Louisiana's civil asset forfeiture law, and they are listed below.

1. Increase the Standard of Proof

Louisiana needs to increase the standard of proof to forfeit property. At present, Louisiana can strip citizens of their property on the mere preponderance of the evidence. This low standard undermines the property rights of all Louisianans. Indeed, the United States Supreme Court has stated, "In cases involving individual rights, whether criminal or civil, '[t]he standard of proof [at minimum] reflects the value society places on individual liberty.'"[90]

If Louisiana is serious about respecting property rights, it must increase the standard of proof to forfeit property. Maryland and Michigan have recently increased the government's burden to forfeit property from a "preponderance of the evidence" to "clear and convincing evidence."[91] Florida enhanced property rights even further by increasing the government's burden of proof from "clear and convincing evidence" to "beyond a reasonable doubt" in civil forfeiture proceedings.[92] Louisiana should increase the standard of proof to at least "clear and convincing evidence" in order to strengthen property rights.

2. Set De Minimis Value to Forfeit Property

The civil forfeiture of low value property presents suspects and innocent property owners with a conundrum; that is, law enforcement has wrongfully taken the property but contesting the civil forfeiture will cost more than the property is worth. Civil forfeiture is a complex process; accordingly, property owners will almost certainly need an attorney to contest the forfeiture. Since the proceeding is civil rather than criminal, property owners must pay for an attorney out of their own pocket. In Louisiana, the average cost of hiring an attorney to contest a civil forfeiture ranges from a low of $2,500 to over $20,000. Thus, innocent owners are making an economically rational decision to let the government forfeit their property—though they are innocent—if the property is worth less than the price of hiring a lawyer.[93]

The U.S. Department of Justice has a policy of not participating in adoptive forfeitures unless the value of the property meets certain thresholds. For

90 Addington v. Texas, 441 U.S. 418, 425 (1979).
91 MD Code, Criminal Procedure, § 12-312; M.C.L.A. 333.7521(2).
92 Fla. Stat. Ann. § 932.704(8).

93 David Benjamin Ross, Civil Forfeiture: A Fiction That Offends Due Process, 13 REGENT U. L. REV. 259, 267 (2001) (noting the property at issue is often worth less than the cost of hiring an attorney and other procedural hurdles one encounters when contesting a civil asset forfeiture); Louis S. Rulli, On the Road to Civil Gideon: Five Lessons from the Enactment of a Right to Counsel for Indigent Homeowners in Federal Civil Forfeiture Proceedings, 19 J.L. & POL'Y 683, 729 (2011) (noting that citizens are often deprived of their property because "[t]he cases [are] often too expensive to litigate in relation to the value of property at stake"); Chloe Cockburn, Easy Money: Civil Asset Forfeiture Abuse by the Police, ACLU (Feb. 3, 2010, 1:16 PM), https://perma.cc/N35A-MWEA ("It is unlikely that regular folks whose money is taken will be equipped to seek out the appropriate statute and comply with the requirements for making a claim. While lawyers are available to do this work, the price is high — in Georgia, a standard retainer fee is $5,000. Many people lack the resources to pay that price, and even if they had them, it would not make sense to pay more than the value of the seized funds.").

example, the DOJ will not adopt the forfeiture of a car unless it is worth $5,000 or at least $2,000 worth of currency.[94] The DOJ, however, will waive these requirements if there is a "compelling law enforcement interest" that is explained in the case file by a supervisory official.[95]

Louisiana should follow the feds lead on this one. Civil asset forfeiture was designed to incentivize the pursuit of drug lords, and civilly forfeiting small amounts of cash and low value property does not further this end.[96] Plus, the minimum forfeiture value can be eschewed if the property owner is convicted of a crime.

Finally, applying its own financial incentives, the state should ban the seizure and forfeiture of vehicles that are older than 10 model years. It is uneconomical to confiscate and attempt to sell such vehicles.

3. Winner Always Gets Court Costs and Attorney's Fees Reimbursed

In Louisiana, even if a civil asset forfeiture claimant wins, she may lose. Despite prevailing, the forfeiture claimant still may be on the hook for attorney's fees and other costs. The court, at its discretion, may choose to award a prevailing forfeiture claimant "reasonable attorney fees."[97] Louisiana law provides no respite for property owners who have had an income generating asset seized. This needs to change.

Florida lawmakers acknowledged the injustice of depriving business owners of an asset and did something about it. Thanks to Florida's civil forfeiture reform, prevailing forfeiture claimants can recover legal fees as well as lost income related to the seized property. Louisiana would be wise to follow in the Sunshine State's reform footsteps. Moreover, federal civil asset forfeiture claimants have the right to counsel if their primary residence is the subject of the forfeiture proceeding and may receive court appointed counsel if the forfeiture stems from a related criminal case.[98] Louisiana legislators should allow public defenders to represent indigent property owners in forfeiture cases that correspond to their defense of suspects in criminal prosecutions and should guarantee individuals the right to counsel when the government is seeking to deprive them of their home.

4. Improve Reporting Requirements

Louisiana has civil forfeiture reporting requirements, but they leave much to be desired. The reports vary in format by judicial district and lack key information such as the type of property seized. Georgia found itself in a similar situation and took action to improve transparency in the civil forfeiture process. Other states, like Colorado and Arizona, have reporting requirements too. Louisiana should strive to make the forfeiture process more transparent and implement reforms that improve the state's current reporting requirements.

5. Close the Equitable Sharing Loophole

Reforming Louisiana's civil asset forfeiture laws will be a symbolic gesture if state law enforcement can sidestep the reforms by turning to federal law. Consequently, Louisiana must close the equitable sharing loophole. New Mexico, the gold standard in the civil asset forfeiture reform, placed restrictions on equitable sharing.[99] Louisiana would be wise to do the same by prohibiting adoptions and limiting forfeiture of assets from joint task forces to seizures above $50,000.

94 https://www.justice.gov/criminal-afmls/file/794696/download at 7
95 https://www.justice.gov/criminal-afmls/file/794696/download at 7
96 https://wfulawpolicyjournaldotcom.files.wordpress.com/2017/06/crepelle_probable_cause_to_plunder.pdf at 358 ("a major goal of forfeiture laws is encouraging the pursuit of drug kingpins. Forfeiting small amounts of money and low-value property do not advance this objective.").
97 LA RS 40:2611(L).
98 18 U.S.C. 983(b).
99 https://www.nmlegis.gov/Sessions/15%20Regular/final/HB0560.pdf at 13(B). For an updated version of the Institute for Justice's model anti-circumvention language, see https://ij.org/activism/legislation/model-legislation/model-anti-circumvention-forfeiture-law/

VII. CONCLUSION

In 1996, a Louisiana Appellate Court refused to declare Louisiana's civil asset forfeiture laws unconstitutional because the court could "perceive no trend in that direction in the latest expression of the Supreme Court."[100] The trend is clearly changing. More than half of the states have passed civil asset forfeiture reform laws since 2014. Even the United States Supreme Court's most conservative Justice, Clarence Thomas, expressed dismay at the current state of civil asset forfeiture in a recent dissenting opinion stating:

> Partially as a result of this distinct legal regime, civil forfeiture has in recent decades become widespread and highly profitable. And because the law-enforcement entity responsible for seizing the property often keeps it, these entities have strong incentives to pursue forfeiture.[101]

Likewise, recently appointed Fifth Circuit Court of Appeals Judge Don Willett likened the injustices created by civil asset forfeiture to something out of a Kafka tale[102] noting:

> [Civil asset forfeiture] has a distinctive "Alice in Wonderland" flavor, victimizing innocent citizens who've done nothing wrong. To some critics, 21st-century excesses are reminiscent of pre-Revolutionary America, when colonists chafed under the slights and indignities inflicted by King George III and Mother England — among them, "writs of assistance" that empowered government to invade homes and seize suspected contraband. Legal scholars have declared these writs "among the key grievances that triggered the American Revolution."[103]

If not enough, even Mississippi has awoken to the injustice of civil asset forfeiture and is making progress towards reforming its civil asset forfeiture laws. In 2016, Mississippi created a task force to study the state's asset forfeiture laws.[104] Mississippi enacted a law the following year establishing a public website to improve transparency and accountability in forfeiture cases.[105]

Reforming civil asset forfeiture will strengthen the property rights of innocent Louisianans. Eliminating law enforcement's ability to keep what they snatch will erase allegations of policing for profit; likewise, prohibiting civil forfeiture funds from being deposited into the criminal court fund will reduce the appearance of judicial impropriety. Enhancing civil forfeiture reporting requirements will improve transparency and increase faith in government. The time is now for Louisiana to reform its civil asset forfeiture laws.

100 State v. Clark, 670 So.2d 493, 497 (La.App. 3 Cir. 2/21/96).
101 Leonard v. Texas, 137 S.Ct. 847 (2017) (Thomas, J., dissenting) (internal citations omitted).
102 El-Ali v. State, 428 SW.3d 824, 825 (Tx. 2014) (Willett, J., dissenting) ("This is the story of a Chevrolet truck, but to some observers it evokes less Chevy than Kafka.").
103 Id. at 827.
104 Mississippi Legislature, H.B. 1410, Asset Forfeiture Task Force Act, 2016 Regular Session, http://www.documentcloud.org/documents/2839371-Mississippi-HB1410SG.html
105 http://billstatus.ls.state.ms.us/documents/2017/pdf/HB/0800-0899/HB0812SG.pdf at Sec. 1.

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