

LEGALIZED THEFT: AN ANALYSIS OF CIVIL ASSET FORFEITURE AND REFORM IN NEW JERSEY

*Bobbi Taylor**

I. INTRODUCTION

What if I told you that law enforcement took more “stuff” from Americans than burglars?¹ And that it was all legal?² This is absolutely true, and there are many examples. As recently as September 2021, Nevada state troopers pulled over Stephen Lara, a thirty-nine-year-old former U.S. Marine, while on his way to see his daughters with \$87,000 of cash in his car.³ He was pulled over under the guise of the patrol “educating drivers ‘about violations they may not realize they’re committing,’” but in reality, the troopers were attempting to stop the smuggling of illegal drugs and weapons into the state.⁴ Lara had no drugs or weapons in his car, but the police seized his cash, insisting that their drug-sniffing dog had “detected something.”⁵

This happens all over the country. In Newark, police stopped a man, identified only by the pseudonym “Andrew,” outside of his home after the officers had arrested someone buying marijuana a few blocks away.⁶ “Andrew” matched the description of the seller (a black man in

*J.D. Candidate, 2023, Seton Hall University School of Law; B.S. University of Pittsburgh.

¹ See Christopher Ingraham, *Law Enforcement Took More “Stuff” From People than Burglars Did Last Year*, WASH. POST (Nov. 23, 2015, 6:00 AM), <https://www.washingtonpost.com/news/wonk/wp/2015/11/23/cops-took-more-stuff-from-people-than-burglars-did-last-year>.

² See *id.* (This figure is based on *federal* seizures only).

³ Matt Zaptosky, *A Former Marine Was Pulled Over For Following a Truck Too Closely. Police Took Nearly \$87,000 of His Cash*, WASH. POST (Sept. 1, 2021, 10:30 AM), https://www.washingtonpost.com/national-security/stephen-lara-nevada-asset-forfeiture-adoption/2021/09/01/6f170932-06ae-11ec-8c3f-3526f81b233b_story.htm.

⁴ *Id.*

⁵ *Id.*

⁶ Liza Weisberg, *The Use of Civil Asset Forfeiture in New Jersey Is Broken*, ACLU (Dec. 12, 2018), <https://www.aclu.org/blog/criminal-law-reform/reforming-police/use-civil-asset-forfeiture-new-jersey-broken>.

dark clothing) and he had \$750 in cash on him at the time.⁷ He told the officers that the source of the money was his social security check.⁸ The prosecutor seized it, skeptical that “it turned it into cash” so quickly.⁹

Both Lara and “Andrew” drew the attention of public interest groups and will have help reclaiming their stolen cash,¹⁰ but what happens to those whose stories remain in the shadows? These examples, illustrating what is effectively theft, are legal under the practice of civil asset forfeiture. Civil asset forfeiture provides a means for the government to confiscate property if it has reason to believe that the property was used in facilitating a crime.¹¹ It is a legitimate tool often used in preventing drug trafficking, money laundering, and other similar crimes,¹² but it is not without its problems. Most state laws contain provisions allowing law enforcement agencies to retain the funds, leading to questionable police activity.¹³ Further, an individual whose property is seized typically must appear in court to get it back. This causes problems for low-income residents who often cannot afford the time or money that it takes to fight for the return of their property, or who do not live in the jurisdiction where their property was seized.¹⁴

The New Jersey legislature, perhaps recognizing the problems with the practice, recently passed new legislation as part of Governor Phil Murphy’s criminal justice reform aims.¹⁵ This Comment will examine the recent civil asset forfeiture reforms the New Jersey legislature passed in January 2020 and argue that while a step in the right direction, these reforms may not be enough to effectively curtail

⁷ *Id.* (the name has been changed to protect identity).

⁸ *Id.*

⁹ *Id.*

¹⁰ *See id.*; see also *Highway Robbery in Reno: Nevada Cops Use Civil Forfeiture to Steal Veteran’s Life Savings*, INST. FOR JUST., <https://ij.org/case/nevada-civil-forfeiture> (last visited Jan. 2, 2023).

¹¹ Mary Murphy, *Race and Civil Asset Forfeiture: A Disparate Impact Hypothesis*, 16 TEX. J. ON C.L. & C.R. 77, 79 (2010).

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Press Release, Insider NJ, Governor Murphy Signs Criminal Justice Reform Legislation (Jan. 21, 2020), <https://www.insidernj.com/press-release/governor-murphy-signs-criminal-justice-reform-legislation>.

civil asset forfeiture abuses.¹⁶ This Comment will also recommend further steps that the legislature should take.

Part II will focus on the legal justification and background for the practice at both the federal and state level. Although federal civil asset forfeiture is largely outside the scope of this Comment, Part II will also discuss the federal Equitable Sharing Program, which impacts New Jersey's state and local law enforcement forfeiture actions. Part III of this Comment will argue that the practice of civil asset forfeiture has a disparate impact on low-income and minority communities and can incentivize bad policing both here in New Jersey and nationwide. Part IV will focus on the background of the recent statutory measures taken by the New Jersey legislature in response to the problems uncovered in a recent study by the American Civil Liberties Union and compare New Jersey's policies to other states. Finally, Part V will argue that New Jersey's policies are still not among the best, and more can—and should—be done. Abolition of civil asset forfeiture has widespread public support, but there are countervailing concerns about law enforcement budgets and burdens on taxpayers that make abolition unlikely. This Comment will argue, however, that short of abolishing civil asset forfeiture, New Jersey should consider allocating a smaller percentage of the seized funds to local law enforcement, limiting participation in the federal Equitable Sharing Program, and placing a higher burden on the government before assets can be seized.

II. THE LEGAL JUSTIFICATION FOR CIVIL ASSET FORFEITURE: A HISTORY AND BACKGROUND

It is helpful to first understand the legal justification for the practice of civil asset forfeiture because, despite its many negative impacts and the many calls for abolition from various groups, the practice remains legal on both a federal and state level. This Part first explains federal civil asset forfeiture laws and the Equitable Sharing Program, then examines a variety of state statutes, ranging in scope and application.

A. *Federal Justification for the Practice*

Criminal forfeiture allows the government to seize an owner's property only when that owner was charged with a crime.¹⁷ Civil asset

¹⁶ See *infra* Part V.

¹⁷ See STEVEN L. KESSLER, § 3.01 *Criminal Forfeiture*, in NEW YORK CRIMINAL AND CIVIL FORFEITURES (2021).

forfeiture, by contrast, allows the government to seize property if it suspects the property was involved in a crime, regardless of whether or not the owner of the property was convicted of any crime.¹⁸ The practice of civil asset forfeiture is rooted in The Racketeer Influenced and Corrupt Organizations Act (RICO) Statute.¹⁹ This statute, 18 U.S.C. § 1962(a), provides that it “shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt . . . to use or invest . . . any part of such income”²⁰

Directed at only one method by which organized crime infiltrated legitimate business—investment of ill-gotten gains—this statute made it illegal to retain the financial fruits of a crime but drew little attention from prosecutors because it was difficult to enforce or prove.²¹ To seize these funds, Congress enacted 21 U.S.C. § 881(a)(4):

The following property shall be subject to forfeiture to the United States and no property right shall exist in them all conveyances, including aircraft, vehicles, or vessels, which are used, or intended for use, to transport or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property.²²

Congress defined property subject to forfeiture in 21 U.S.C. § 881(a)(6) as “all moneys . . . [and] all proceeds traceable to such an exchange, and all moneys . . . used to facilitate any violation of this title.”²³

Congress did include provisions in the federal statute to constrain abuse of the practice. For example, Section (e)(3)(A)–(B) provides that the Attorney General shall assure that any property transferred to a state or local law enforcement agency “has a value that bears a reasonable relationship to the degree of direct participation [and] . . . will serve to encourage further cooperation between the recipient State or local agency and Federal law enforcement agencies.”²⁴ Further, 18 U.S.C. § 981(b) requires a warrant for seizure unless there

¹⁸ See STEVEN L. KESSLER, § 3.02 *Civil Forfeiture*, in NEW YORK CRIMINAL AND CIVIL FORFEITURES (2021).

¹⁹ See generally DAVID B. SMITH & TERRANCE G. REED, 1 CIVIL RICO ¶ 5.02 (2022).

²⁰ 18 U.S.C. § 1962(a).

²¹ See SMITH & REED, *supra* note 19 (“A careful racketeer may be able to escape prosecution . . . by disguising the source of the funds . . .”).

²² 21 U.S.C. § 881(a)(4).

²³ § 881(a)(6).

²⁴ § 881(e)(3)(A)–(B).

is probable cause to believe that the property is subject to forfeiture and the seizure is made pursuant to a lawful arrest or search.²⁵ Yet, as mentioned in the introduction to this Comment and several of the examples below, abuse of the practice persists.

B. *The Federal Sharing Program*

Federal law also authorizes the Attorney General to share federally forfeited property with the participating state and local law enforcement agency. The seized property must have “a value that bears a reasonable relationship to the degree of direct participation of the State or local agency in the law enforcement effort . . . as a whole.”²⁶ The justification is to encourage further cooperation, but the federal Equitable Sharing Program can lead to bad policing.

The program distributed \$1.7 billion to local and state police departments between 2001 and 2004.²⁷ Distributions like this incentivize local law enforcement to perform these forfeitures because the money must be spent to increase or supplant their budgets.²⁸

The state forfeiture law limits this practice because participation in state law controls participation in the federal Equitable Sharing Program.²⁹ Therefore, one way to limit abuse of the federally approved program is to enact more restrictive state laws. This Comment argues that New Jersey should limit its participation in this program to

²⁵ *Id.* § 981(b); § 981(b)(2)(A)–(C).

²⁶ U.S. DEP’T OF JUST. & U.S. DEP’T OF THE TREASURY, GUIDE TO EQUITABLE SHARING FOR STATE AND LOCAL LAW ENFORCEMENT AGENCIES 2 (2018), <https://www.justice.gov/criminal-afmls/file/794696/download>.

²⁷ Carimah Townes, *How to End Civil Forfeiture*, SLATE (July 27, 2017, 4:55 PM), <https://slate.com/news-and-politics/2017/07/how-nebraska-and-new-mexico-banned-civil-forfeiture.html>.

²⁸ U.S. DEP’T OF JUST. & U.S. DEP’T OF THE TREASURY, *supra* note 26, at 13; *see generally* *United States v. 434 Main St.*, 862 F. Supp. 2d 24 (D. Mass. 2012). The Equitable Sharing program motivated the local police department to cooperate with federal officials in a drug ring conviction, as they would be eligible to receive up to 80 percent of the proceeds. *Id.* at 26. As part of their investigation, the department seized a motel and property owned by defendant. *Id.* at 26–28. Defendant argued that the motel was his only way to support his family, but the seizure was successful, despite the fact that the people who were arrested or convicted only “visited or temporarily resided” at the property. *Id.* Local law enforcement seized the property, and defendant fought to get it back, citing Eighth and Tenth Amendment violations. *Id.* He was unsuccessful, despite the fact that no “state or local authorities have ever accused defendant of any wrongdoing.” *Id.*

²⁹ *See* U.S. DEP’T OF JUST. & U.S. DEP’T OF THE TREASURY, *supra* note 26, at 7.

minimize the incentive for local law enforcement to cooperate in wrongfully seizing property.

C. *State Statutes*

There is a considerable disparity in state forfeiture laws.³⁰ States differ in how they handle tracking seized property and accounting for forfeiture funds.³¹ States also diverge in the burden that they place on innocent owners attempting to recover their property and in the percentage of funds that can be retained by law enforcement.³²

For example, New Mexico has abolished the practice completely, requiring a criminal conviction for any forfeiture.³³ New Mexico also limits participation in the federal Equitable Sharing Program to seized property over \$50,000, where the crime is interstate in nature, and a violation of federal law.³⁴

As another example, Nebraska allows the practice but subject to an “innocent owner” defense, where the government must prove by clear and convincing evidence that the property was used in violation of a crime.³⁵ Nebraska also allows local law enforcement agencies to keep only “a small quantity of the seized property” for use with training or enforcement and requires tracking of seized property.³⁶

Some states adopt a more middle-ground approach. Like New Mexico, Colorado only allows participation in the federal Equitable Sharing Program for assets with a net value greater than \$50,000 where there is a filed criminal case.³⁷ Colorado also requires tracking of seized assets and limits the amount that can be retained by law enforcement to 50 percent, with the remainder going to the “Department of Human Services for mental health and substance abuse services.”³⁸ But despite these measures and its tracking requirements enacted in 2017, Colorado still allows forfeiture of

³⁰ See generally LISA KNEPPER ET. AL., *POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE* (3d ed. 2020).

³¹ *Id.* at 12.

³² *Id.* at 36–37.

³³ H.B. 0560, Reg. Sess. (N.M. 2015).

³⁴ *Id.* at § 13.

³⁵ NEB. REV. STAT. § 28-431(6) (2016).

³⁶ *Id.* at §§ 3, 8(a).

³⁷ CONRAD IMEL & KATIE RUEDEBUSCH, COLORADO LEGISLATIVE COUNCIL STAFF ISSUE BRIEF: CIVIL ASSET FORFEITURE, NUMBER 17–30 2 (2017), <https://leg.colorado.gov/publications/civil-asset-forfeiture>.

³⁸ *Id.* at 1.

property without a criminal conviction unless the forfeiture is less than \$50,000.³⁹

Pennsylvania and New York allow civil and criminal forfeiture but raise the burden for the government to clear and convincing evidence if there has not been a criminal conviction.⁴⁰ Pennsylvania's recent legislation, passed in 2017, raised the standard of proof for the government. The government now must show clear and convincing evidence that the property is connected to the crime if the owner of the property is not convicted of a crime.⁴¹ Under the New York statute, the government must prove the existence of a pre-conviction forfeiture crime by clear and convincing evidence.⁴² Courts have interpreted this to mean that the state must prove (1) that the property was used in a crime and (2) that the owner knew or should have known of the criminal activity.⁴³

Civil asset forfeiture in New Jersey is authorized by statute. The New Jersey statute allows seizure of "all property which has been, or is intended to be, utilized in furtherance of an unlawful activity . . . "[No] property right shall exist".⁴⁴ Prior to the legislation enacted in January 2020, the civil asset forfeiture statutes were "some of the worst" in the nation.⁴⁵ Prior to the recent legislation, a person "need not be suspected of having committed a crime to have their property seized," regardless of value.⁴⁶ Even now, if seized, the owner must prove that she did not have a reason to believe the property was involved in a crime—the state does not bear the burden of proving innocence.⁴⁷

³⁹ See *id.*; H.B. 17-1313, 74th Gen. Assemb., Reg. Sess. (Colo. 2017).

⁴⁰ N.Y. C.P.L.R. § 1311(b) (CONSOL. 2021); see also John Latimer, *Asset Seizures Face Higher Burden of Proof*, LEBANON DAILY NEWS (June 30, 2007, 12:37 PM), <https://www.ldnews.com/story/news/local/2017/06/30/asset-seizures-face-higher-burden-proof/440699001>; see also S.B. No. 8, 201st Gen. Assemb., Reg. Sess. (Pa. 2017).

⁴¹ See Latimer, *supra* note 40.

⁴² N.Y. C.P.L.R. § 1311-B (CONSOL. 2022).

⁴³ See *Morgenthau v. A.J. Travis Ltd.*, 708 N.Y.S. 2d 827 (N.Y. Sup. Ct. 2000) (the property owner was not convicted of a crime).

⁴⁴ N.J. REV. STAT. § 2C:64-1 (2020).

⁴⁵ Nick Sibilla, *New Jersey Is Now the 16th State to Require Convictions for Civil Forfeiture*, FORBES (Jan. 28, 2020, 9:30 PM), <https://www.forbes.com/sites/nicksibilla/2020/01/28/new-jersey-is-now-the-16th-state-to-require-convictions-for-civil-forfeiture/?sh=56f3190b77fd>.

⁴⁶ Andrew Olesnycky, *NJ Legislature Seeks to Rein in Civil Forfeitures*, STAHL CRIM. DEF. LAWS. (Jan. 4, 2017), <https://stahlesq.com/civil-forfeiture-punishment-no-guilt-necessary>.

⁴⁷ *Id.*

Also, New Jersey allows full participation in the federal Equitable Sharing Program, and there is no limit on how much of the seized funds can be spent on law enforcement.⁴⁸

Understanding the structure and variation of these state statutes informs how to most effectively reform the process. Reform should take place at the state level since it is typically state and local law enforcement involved in the seizures. Left unchecked, the process can lead to negative outcomes that far outweigh its benefits.

III. AN ARGUMENT THAT CIVIL ASSET FORFEITURE AS CURRENTLY APPLIED LEADS TO A DISPARATE IMPACT ON MINORITY COMMUNITIES, INCENTIVIZES BAD POLICING, AND HAS LITTLE BENEFIT

Despite its legal justification, the practice of civil asset forfeiture as it has been applied has more drawbacks than benefits. This Part examines evidence showing that the practice is disparately applied to minority and low-income communities, not just in New Jersey but nationwide. Next, this Part provides evidence showing that the practice can incentivize “policing for profit” rather than for protection. Finally, this Part examines data concluding that civil asset forfeiture does little to prevent or solve crimes.

A. *Disparate Impact*

Minority populations are more likely to be negatively affected by forfeitures, as illustrated by alarming national statistics. The American Civil Liberties Union (ACLU) of California reports that half of the seizures involve people with “Latino surnames,” and 70 percent of the forfeiture proceeds in 2015 went to agencies where more than 70 percent of the residents are people of color.⁴⁹ In Alabama, 64 percent of civil asset forfeitures were assessed against African Americans, who make up only 27 percent of the population.⁵⁰

A 2015 ACLU study found that 63 percent of Philadelphia seizures involved money taken from Black residents, although they made up only 43 percent of the population.⁵¹ Low-income communities are

⁴⁸ See S.P. Sullivan, *N.J. Laws Allowing Cops to Seize Assets Among ‘Worst in Country,’ Report Finds*, NJ.COM, (Nov. 14, 2015, 4:27 PM), https://www.nj.com/politics/2015/11/nj_cops_seize_millions_a_year_re.html.

⁴⁹ Dawn Fritz, *Timbs v. Indiana: Civil Asset Forfeiture, Racism, and the War on Drugs*, 98 DE. L. REV. ONLINE 1, 31 (2021).

⁵⁰ *Id.*

⁵¹ *Civil Asset Forfeiture*, NAT’L POLICE ACCOUNTABILITY PROJECT, <https://www.nlg-npap.org/civil-asset-forfeiture> (last visited Sept. 8, 2021).

adversely affected because defendants must travel, appear in court, and pay counsel. This disrupts lives in a way that can be difficult to overcome.⁵²

In New Jersey, there is also evidence suggesting that the practice has a similar disparate impact on minority and low-income communities. For example, in 2018, an ACLU study found that “Black and Latinx New Jerseyans” are more likely to be stopped by police and therefore tend to have higher numbers of seizures.⁵³ The largest volume of forfeiture actions took place in Hudson County, where Black people are arrested at a rate 9.6 times higher than white people.⁵⁴ The same study posits that the people in these communities are less likely to challenge the forfeiture of their assets given the high costs of litigation and the lack of access to counsel.⁵⁵ Filing fees alone can even sometimes be prohibitive.⁵⁶

Using data from civil asset forfeiture actions through May 2016, the ACLU sought to identify correlations between population demographics and the number of seizures. Not only did areas with greater minority populations have a higher number of seizures, but the data shows a higher number of seizures involving minorities, even in areas where the population was the same.⁵⁷ Of the ten cities with the highest number of seizures in New Jersey, eight are among the poorest in the state.⁵⁸

These statistics are jarring but true, and they help to illustrate the alarmingly disparate impact that civil asset forfeiture has on low-income communities and minority communities. Efforts can—and should—be made to curtail the negative impacts of this practice on all communities, but particularly those that it affects the most. For reasons explained *infra*, the change needs to come from the legislature, rather than law enforcement.

⁵² Murphy, *supra* note 11, at 79.

⁵³ *ACLU-NJ Report Reveals Abuse and Overuse of Civil Asset Forfeiture in New Jersey*, ACLU N.J., (Dec. 11, 2018) [hereinafter *Abuse and Overuse*], <https://www.aclu-nj.org/news/2018/12/11/aclu-nj-report-reveals-abuse-and-overuse-civil-asset-forfeit>.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*; see also KNEPPER, *supra* note 30, at 20 (graph illustrates that the estimated costs of hiring an attorney are often higher than amount seized).

⁵⁷ *Abuse and Overuse*, *supra* note 53.

⁵⁸ Lisa Weisberg, *Forfeiting Fairness: New Jersey's Broken Civil Asset Forfeiture System*, AM. ACLU (Dec. 11, 2018), <https://www.aclu-nj.org/news/2018/12/11/forfeiting-fairness-new-jerseys-broken-civil-asset-forfeiture>.

B. *Bad Policing*

Most state laws allow for the proceeds obtained in a forfeiture to go directly to law enforcement. This creates concern that the “police officers’ desire for funds . . . might motivate their civil asset forfeiture enforcement, rather than their duty to prevent crime.”⁵⁹ Many argue that giving law enforcement a financial stake in civil asset forfeiture “distorts law enforcement priorities,” incentivizing these agencies to focus more on increasing the budget rather than protecting its citizenry.⁶⁰

This concern is not unfounded. From 2009 to 2016, the Chicago Police Department seized \$72 million in funds, keeping most of that for itself.⁶¹ The department does not keep detailed records of its forfeiture activities, and is not required to, but documents show that some of the funds were used to purchase controversial surveillance equipment without public scrutiny or oversight.⁶²

The Journal of Legal Studies’ recent examination of revenue generating from law enforcement sheds some light on why forfeiture can lead to bad policing.⁶³ In municipalities like Ferguson, Missouri, city officials urge the Police Chief to generate revenue through law enforcement, including both fines and forfeitures.⁶⁴ This revenue-driven model predicts that police will focus on crimes that produce more revenue.⁶⁵

All else equal, police are less likely to focus their attention on groups with “countervailing power.”⁶⁶ For example, drug crimes committed at a university where wealthy parents pay tuition will be investigated differently than drug crimes in low-income African

⁵⁹ See, e.g., Murphy, *supra* note 11, at 79.

⁶⁰ Joshua Lewellyn, Note, *Losing Your Navigator: Why the Exclusionary Rule Should Not Apply to Civil Asset Forfeiture Proceedings*, 13 LIBERTY U. L. REV. 153, 158 (2018) (citing DICK M. CARPENTER II ET AL., POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE 11 (2d ed. 2015), <http://www.ij.org/report/policing-for-profit/>).

⁶¹ Joel Handley et. al, *Inside the Chicago Police Department’s Secret Budget*, CHI. READER (Sept. 29, 2016), <https://www.chicagoreader.com/chicago/police-department-civil-forfeitureinvestigation/Content?oid=23728922>.

⁶² *Id.* (explaining that exact forfeitures are not available as many states are not required to track or publicly disclose this information).

⁶³ See generally Michael D. Makowsky et al., *To Serve and Collect: The Fiscal and Racial Determinants of Law Enforcement*, 48 J. LEGAL STUD. 189 (2019).

⁶⁴ *Id.* at 190.

⁶⁵ *Id.* at 193.

⁶⁶ *Id.* at 196

American neighborhoods.⁶⁷ The study concludes that policing will in fact be influenced by the opportunity and incentive to generate revenues through fines and forfeiture rather than the “optimal deterrence” motivation that law enforcement should have.⁶⁸

Even in states like Missouri, where 100 percent of seized funds are supposed to be allocated to schools instead of law enforcement, the federal Equitable Sharing Program loophole allows for abuse of this rule. A 2019 investigation found that less than 2 percent of forfeited funds from the federal program actually make it to Missouri schools.⁶⁹

In New Jersey, former Governor Chris Christie vetoed a 2017 transparency measure that would have provided taxpayers with a way to trace seized funds, and prior to the 2020 reforms, there was no transparency requirement for New Jersey law enforcement.⁷⁰ Both houses of the state legislature unanimously passed the 2017 bill, and Governor Christie vetoed the bill, explaining that it was “bad for law enforcement.”⁷¹ In effect, the veto continued to allow law enforcement to withhold information from the public regarding what was seized and how the proceeds were spent.⁷² As such, a high potential for abuse remained.

Even when law enforcement is transparent regarding what is seized and how it is spent, forfeitures remain difficult—if not impossible—to challenge because of the financial burden for owners. A total of \$5.5 million was seized in civil asset forfeiture cases by the state during the first five months of 2016, with only 3 percent of the cases being contested.⁷³ This means that 97 percent of these funds go directly to law enforcement, regardless of how many of those

⁶⁷ *Id.*

⁶⁸ *Id.* at 211.

⁶⁹ KNEPPER, *supra* note 30, at 35, 49.

⁷⁰ Cory Doctorow, *Chris Christie Vetoes Unanimous Bill that Would Make NJ Cops Disclose What They Seize Through Asset Forfeiture*, BOINGBOING (Feb. 14, 2017, 7:02 AM), <https://boingboing.net/2017/02/14/chris-cchristie-vetoes-unanimou.html>.

⁷¹ Tim Cushing, *Chris Christie Says Asset Forfeiture Transparency Is Bad for Law Enforcement, Vetoes Unanimously-Supported Bill*, TECHDIRT (Feb. 13, 2017, 9:22 AM), <https://www.techdirt.com/articles/20170208/16002436671/chris-christie-says-asset-forfeiture-transparency-is-bad-law-enforcement-vetoes-unanimously-supported-bill.shtml>.

⁷² *Id.*

⁷³ Carly Sitrin, *Decrying it as ‘Policing for Profit,’ Critics Want Reform of NJ’s Civil Asset Forfeiture*, NJ SPOTLIGHT NEWS (Dec. 13, 2018), <https://www.njspotlight.com/2018/12/18-12-12-decrying-it-as-policing-for-profit-critics-want-reform-of-civil-asset-forfeiture-in-nj>.

individuals were charged with a crime.⁷⁴ Police have seized amounts of \$100–\$500 in vast quantities.⁷⁵ In most cases, the cost to retain counsel to fight these seizures is cost prohibitive.⁷⁶ Filing fees alone are \$50–\$75.⁷⁷ Public defenders are not permitted to represent clients in civil matters, and most legal service providers do not offer assistance in forfeiture cases.⁷⁸ Therefore, with the filing fee and attorney’s fees, a seizure of up to \$500 is typically not worth challenging. Prosecutors consequently rely on default judgements.⁷⁹

Police and prosecutors argue that there are benefits to the current forfeiture procedures and to prosecutors’ ability to rely on default judgments. For example, former Morris County prosecutor Robert Bianchi explained that if the forfeiture procedure is being used appropriately, asset seizure “offers a significant savings to the taxpayer” by allowing law enforcement to use seized funds to pay for things like software upgrades.⁸⁰ Bianchi goes on to say, however, that the federal Equitable Sharing Program is a benefit because “next thing you know, you get a check, just because you had a guy assigned there.”⁸¹ With no transparency, the taxpayers have no idea why these “checks” are arriving, and therefore any proposed benefit to the taxpayer is likely offset by instances of abuse to the system. Jersey City’s Municipal Prosecutor said that he approached these “property return requests” with the presumption of returning property to others, but the data suggests otherwise.⁸²

The benefits of civil asset forfeiture are far outweighed by the negative effects. The practice incentivizes law enforcement to police for revenue generation, but any perceived benefit to the taxpayer is outweighed by the evidence of abuse. The “policing for profit” motive is likely to again have a disparate impact on minority and low-income

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ AM. C. L. UNION, PRIVATE PROPERTY, POLICE PROFIT: EXPLAINING AND REFORMING CIVIL ASSET FORFEITURE IN NEW JERSEY 2 (2018) [*hereinafter* PRIVATE PROPERTY], https://www.aclu-nj.org/sites/default/files/field_documents/2018_aclunj_civil_asset_forfeiture.pdf.

⁷⁸ See Weisberg, *supra* note 6.

⁷⁹ *Id.*

⁸⁰ Sullivan, *supra* note 48.

⁸¹ *Id.*

⁸² Sitrin, *supra* note 73. (Hudson County has the highest number of seizures in New Jersey). See PRIVATE PROPERTY, *supra* note 77, at 2, 5 (just under 3 percent of seizures are contested, and even less are successful).

communities because those departments are likely strapped for cash, and those citizens cannot afford counsel to contest the forfeiture.

C. *Failure to Stop Crime*

Perhaps the negative effects of civil asset forfeiture, and its unquestionable impact on low-income communities and minority citizens, could be excused or supported if the practice did help solve or prevent crimes. This is not the case. Studies indicate that the practice of civil asset forfeiture does not stop crime, and its benefits are questionable especially in relation to its drawbacks noted above.⁸³

A recent study showed that crime “clearance” rates—rates at which crimes are solved—do rise as forfeiture proceeds rise, but the benefits are minimal.⁸⁴ Using data from 2000, 2003, 2007, and 2012, this study compared crimes cleared by arrest per year with forfeiture funds. The results suggest that additional forfeiture revenue does not translate into more crimes solved, and at best, its benefit is not substantial.⁸⁵ But even if the results were significant, the relationship between forfeiture and crime clearance would be vanishingly small.⁸⁶ Data for municipal police suggests a \$1,000 increase in equitable sharing funds per officer would mean solving just 2.4 more crimes per 1,000 reported offenses.⁸⁷ Moreover, such miniscule improvements in clearance rates would diminish as forfeiture revenue increases; for example, the first \$500 per officer in a given year would have a greater impact than the second \$500 per officer. These results suggest claims about forfeiture’s crime-fighting importance are, at best, overstated.⁸⁸

Data collected in New Mexico, where civil forfeiture has been essentially abolished, shows that the reforms had virtually no impact on crime in the state.⁸⁹ In fact, comparing New Mexico to states like

⁸³ See, e.g., BRIAN D. KELLY, INST. FOR JUST., FIGHTING CRIME OR RAISING REVENUE? TESTING OPPOSING VIEWS OF FORFEITURE 14 (2019), <https://ij.org/wp-content/uploads/2019/06/Fighting-Crime-or-Raising-Revenue-7.20.2020-revision.pdf>; KNEPPER, *supra* note 30.

⁸⁴ KELLY, *supra* note 83.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ KNEPPER, *supra* note 30, at 52; see also Nick Sibilla, *When New Mexico Abolished Civil Forfeiture 5 Years Ago, Cops Predicted Crime Would Soar. It Didn't*, FORBES (Dec. 17, 2020, 2:00 PM), <https://www.forbes.com/sites/nicksibilla/2020/12/17/when-new-mexico-abolished-civil-forfeiture-5-years-ago-cops-predicted-crime-would-soar-it-didnt>

Texas and Colorado, which both still allow the practice, shows that there was no significant increase in crime that could be attributed to New Mexico's reform, and no negative effect on public safety.⁹⁰ Data collected in Pennsylvania shows evidence that, despite stepping up their seizure efforts and the high conviction rates, neither the seizures nor the equitable sharing participation advanced a DEA investigation.⁹¹ In Nebraska, when the legislature attempted to abolish civil asset forfeiture, law enforcement put forth an opposition that focused on the law's effect on the agency's bottom line.⁹² They were unable to convince supporters of abolition (and legislators) that forfeiture was "necessary to stop crime."⁹³

Although civil asset forfeiture is legal in most states, and arguments can be made that the process is necessary, the data shows that the practice of civil asset forfeiture has a disparate impact on minority and low-income communities both here and nationwide. It also serves to incentivize policing for profit rather than protection. There is very little evidence of the benefits of this practice, especially when weighed against the negative effects. Because the data indicates that civil asset forfeiture largely does more harm than good, reform efforts are needed and justified.

IV. NEW JERSEY'S RECENT REFORMS

Perhaps in reaction to the decisions by the courts on a federal and state level, and the 2018 ACLU study, New Jersey enacted statutory reforms, showing the state's willingness to recognize and remedy the problems posed by the practice of civil asset forfeiture. Citing the problems above, the New Jersey legislature took action in early 2020 by enacting two pieces of legislation aimed at curbing civil asset forfeiture abuses. This Part analyzes the United States Supreme Court and New Jersey Supreme Court decisions and statutory measures leading up to these reforms, discusses the reforms in general, and compares them to examples of statutory reforms in other states.

[/?sh=a32c5202729](https://www.washingtonexaminer.com/politics/new-mexico-only-state-with-a-grade-for-civil-asset-forfeiture-practices) (New Mexico data indicated no significant increase in crime rates that could be attributed to the reforms).

⁹⁰ Derek Draplin, *New Mexico Only State With 'A' Grade for Civil Asset Forfeiture Practices*, WASH. EXAMINER (Dec. 28, 2020, 2:00 PM), <https://www.washingtonexaminer.com/politics/new-mexico-only-state-with-a-grade-for-civil-asset-forfeiture-practices>.

⁹¹ KNEPPER, *supra* note 30, at 51–52.

⁹² Townes, *supra* note 27.

⁹³ *Id.*

A. *From 2018–2020: What Led to New Jersey’s Reform*

Courts struggle with civil asset forfeiture proceedings because they involve proceedings against a person’s property, and it is difficult for courts and law enforcement to avoid constitutional rights violations.⁹⁴ The leading recent federal case on civil asset forfeiture is *Timbs v. Indiana*, decided in 2018.⁹⁵ In that case, Tyson Timbs pled guilty to dealing a controlled substance, and at the time of his arrest, the local police seized his \$42,000 Land Rover SUV (which, as the Court pointed out, he paid for with money he received from an insurance policy when his father died).⁹⁶ Timbs challenged the forfeiture of the vehicle based on the excessive fines clause of the Eighth Amendment, arguing that the value of the vehicle was grossly disproportionate to the maximum monetary fine assessable (\$10,000 in this case).⁹⁷ The United States Supreme Court agreed, holding that even under a state statute, the excessive fines clause of the Eighth Amendment was incorporated by the Fourteenth Amendment as applicable to the states.⁹⁸

Although *Timbs* is not cited as a reason for the enactment of the New Jersey reforms, the case arguably brought “needed scrutiny to the issue.”⁹⁹ It also signaled to local judges that the courts should not tolerate excessive abuses.

The New Jersey Supreme Court addressed the state’s civil asset forfeiture procedure in 2020 in *State v. Melendez*.¹⁰⁰ While investigating drug sales, police found \$2,928 in cash in Melendez’s apartment and seized it.¹⁰¹ Defendant Melendez sought to get it back, but as the court observed, like all claimants in a civil forfeiture action who are defendants in a parallel criminal case, Melendez faced an unfair choice: forfeit his property or incriminate himself.¹⁰²

The New Jersey Supreme Court held that asserting an interest in property cannot in itself be used as evidence in the parallel criminal

⁹⁴ Lewellyn, *supra* note 60, at 155.

⁹⁵ See 139 S. Ct. 682 (2018).

⁹⁶ *Id.* at 686.

⁹⁷ *Id.*

⁹⁸ *Id.* at 689–90.

⁹⁹ See Adam Liptak & Shaila Dewan, *Supreme Court Limits Police Powers to Seize Private Property*, N.Y. TIMES (Feb. 20, 2019), <https://www.nytimes.com/2019/02/20/us/politics/civil-asset-forfeiture-supreme-court.html>.

¹⁰⁰ See 222 A.3d 639 (N.J. 2020).

¹⁰¹ *Id.* at 641.

¹⁰² *Id.*

case.¹⁰³ The court also highlighted the dicta in the trial court's ruling urging the state to avoid "deliberately manipulating a civil procedure in order to obtain evidence against a criminal defendant."¹⁰⁴ This New Jersey Supreme Court case is consequential to the state's progress as a whole because although the conviction was not overturned, the court addressed problems in the current civil asset forfeiture statute, and the court's referral to the Civil and Criminal Practice Committees¹⁰⁵ arguably may have helped spur the new legislation.

Pressure for reform did not come from the courts alone. Interest groups were largely critical of New Jersey's civil asset forfeiture practices as well. In 2015, the Clergy for a New Drug Policy gave New Jersey's civil asset forfeiture practices a failing grade.¹⁰⁶ The criteria included abolition, requirement of a criminal conviction, burden of proof for innocent owner claims, percentage of funds that go to law enforcement, and participation in equitable sharing, among others.¹⁰⁷ New Jersey's failing grade was likely because a criminal conviction was not required, but also because of the burden of proof, the percentage of funds allocated to law enforcement, and our full participation in the federal Equitable Sharing Program.¹⁰⁸

As mentioned above, in 2018 the ACLU also conducted a study that found that New Jersey's then-current civil asset forfeiture procedures created a multitude of problems for many New Jersey citizens and disproportionately harmed people of color. As a result, the ACLU recommended the following reforms:¹⁰⁹

1. Prohibit forfeiture absent criminal convictions
2. Provide for right to counsel

¹⁰³ *Id.* at 646–49 (citing *Garrity v. New Jersey*, 385 U.S. at 494, 497 (1967)) (holding the civil forfeiture statute unconstitutional because it requires a claimant to timely file a notice of interest in the property—thus, tie themselves to the property and implicate themselves in the supposed crime).

¹⁰⁴ *Melendez*, 222 A.3d at 648 (citing *State v. Melendez*, 186 A.3d 284, 301 (N.J. Super. Ct. App. Div. 2018) (quoting *State v. Kobrin Securities, Inc.*, 544 A.2d 833, 838 (N.J. 1988))).

¹⁰⁵ *Melendez*, 222 A.3d at 649 ("We also refer these issues to the Civil and Criminal Practice Committees for their consideration.").

¹⁰⁶ Civil Asset Forfeiture Grade – New Jersey, CLERGY FOR A NEW DRUG POL'Y, <https://49b.cfd.myftpupload.com/civil-asset-forfeiture-state-grading-map/> (last visited Feb. 22, 2023).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Abuse and Overuse*, *supra* note 53.

3. Raising the burden of proof to “beyond a reasonable doubt”
4. Meaningful transparency measures
5. Remove the profit motive by directing the proceeds of forfeiture into the state general fund¹¹⁰

New Jersey legislators took this criticism to heart and implemented two of the recommendations. Arguably, the poor grades from special interest groups, the *Melendez* decision, and the 2018 change in Governor helped lead to the recent reforms. Those reforms are analyzed in detail below.

B. *Overview of New Jersey’s Recent Reforms*

The transparency and reporting requirement (“transparency requirement”) was enacted first in early January 2020. The goal of the bill was to establish “asset forfeiture reporting and transparency requirements.”¹¹¹ The new bill required county prosecutors to compile and submit to the attorney general a quarterly report pertaining to each seizure and forfeiture of funds.¹¹² The report must contain specific information on each seizure of property, including the agency that seized, the amount of funds or estimated value of the seized property, and the exact law violated. The bill also required the attorney general to establish and maintain a case tracking system and annually submit a summary report to the legislature.¹¹³

Governor Murphy’s intent in signing the transparency bill into law was to boost confidence in the justice system by requiring county prosecutors to track and report data, allowing the public to understand how assets are being seized and how seized funds are being allocated and spent.¹¹⁴ The law also had the overwhelming support of the legislature. Assemblywoman Angela McKnight commented that with the passage of this law, the people of New Jersey will finally have access to much-needed data concerning agencies that are profiting from seizures.¹¹⁵ Assemblyman Erik Peterson went a step further, calling the

¹¹⁰ *Id.*

¹¹¹ S. 1963, 218th Leg., Reg. Sess. (N.J. 2018).

¹¹² *Id.* at § 2(a).

¹¹³ *Id.* at § 3(a)–(c).

¹¹⁴ See Press Release, Off. Site State N.J., Governor Murphy Signs Legislation Mandating Comprehensive Disclosure and Transparency Requirements for Civil Asset Forfeiture (Jan. 13, 2020) [hereinafter Governor Murphy Signs], <https://nj.gov/governor/news/news/562020/approved/20200113a.shtml>.

¹¹⁵ *Id.*

practice of civil asset forfeiture “un-American,” and felt that this legislation ensures this money is being used to benefit taxpayers.¹¹⁶ Special interest groups seemed pleased as well. ACLU policy director Sarah Farjardo commented that the law “moves [the] state closer to curtailing . . . the use of civil forfeiture and the racially disparate over-policing . . . and we commend the Legislature for passing it.”¹¹⁷

In theory, with the passage of these requirements, the citizens of New Jersey can now hold their local law enforcement accountable by seeing what officers are seizing and how the money is allocated. Although there may still be an incentive for revenue generating policing, the law enforcement agencies will now know that the people are watching.

The second piece of legislation came one week later. On January 20, 2020, Governor Murphy signed the criminal conviction requirement statute (“conviction requirement”) as part of a sweeping criminal justice reform package. The goal of this statute was to revise the law governing forfeiture of certain seized property.¹¹⁸ The conviction requirement statute requires a conviction in criminal court before property can be forfeited in civil court. Prosecutors will need a conviction to civilly forfeit \$1,000 or less in cash and \$10,000 or less in property.¹¹⁹ The attorney general cited this bill as part of a number of bills passed on that day to “ensure fairness and equity in our criminal justice system.”¹²⁰ With “limited exceptions,” the bill bans forfeiture of these small amounts if there are no criminal charges or if the prosecution ends without a conviction.¹²¹ Legislators recognized that in cases of this nature, citizens face the task of reclaiming their property at a higher cost of the property itself. This measure is designed to ensure that owners can reclaim their property more readily and fairly, barring a criminal conviction.¹²² These reforms signaled a positive shift in New Jersey’s attitude toward civil asset forfeiture abuses and a willingness to respond to the problems created by abuse of the practice.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ Assemb. 4970, 218th Leg., Reg. Sess. (N.J. 2019).

¹¹⁹ *See id.* at § (k)(1)–(2).

¹²⁰ Press Release, Off. Site of the State of N.J., On Martin Luther King, Jr. Day, Governor Murphy Signs Criminal Justice Reform Legislation (Jan. 20, 2020), <https://www.nj.gov/governor/news/news/562020/approved/20200120a.shtml>.

¹²¹ *Id.*

¹²² Sibilla, *supra* note 45.

C. *Comparison to Reforms in Other States*

New Jersey is not the only state to recently enact reforms to its civil asset forfeiture practice. A review of other states' reform legislation is beneficial to seeing how New Jersey compares and what other measures the state may be able to take.

Like New Jersey, New York enacted reforms in 2018, which strengthened transparency requirements and placed a heavier burden of proof on the law enforcement agency; but unlike New Jersey, these requirements were not passed through the legislature. Rather, they were enacted as part of the governor's budget.¹²³ According to then Governor Cuomo's office, the budget requires:

all seized assets to be held in an independently overseen and administered account from which detailed records regarding each disbursement must be maintained. Law enforcement will also be prohibited from freezing a person's cash during a prosecution unless a connection between that money and the alleged illicit conduct can be shown.¹²⁴

Also, New York allocates only 60 percent of forfeiture proceeds to law enforcement, whereas New Jersey allocates 100 percent.¹²⁵

Pennsylvania enacted reforms in 2017 that, among other things, raised the standard of proof for prosecutors seeking to complete the seizure of a person's assets to "clear and convincing evidence."¹²⁶ Even with these reforms, Pennsylvania still allows law enforcement to retain 100 percent of the seized proceeds and allows participation in the federal Equitable Sharing Program, so seizures from 2000 to 2019 accounted for \$459 million in revenue.¹²⁷

Nebraska's 2016 statute was perhaps the most aggressive reform measure taken. The statute struck "civil" from their statute, allowing only criminal forfeiture.¹²⁸ The state also raised the standard of the burden of proof on the government to show that the property is subject

¹²³ Press Release, State of N.Y. Div. of the Budget, Governor Andrew Cuomo Announces Highlights of the FY 2020 State Budget (Apr. 1, 2019), <https://www.budget.ny.gov/pubs/press/2019/pr-enactfy20.html>.

¹²⁴ *Id.*

¹²⁵ See KNEPPER, *supra* note 30, at 120, 124 (New Jersey law enforcement receives 100 percent of the proceeds, clarifying that 95 percent of the proceeds are retained when the seizure is done by the attorney general).

¹²⁶ Charles Thompson, *Bill Tightening Rules for Civil Asset Forfeiture in Pennsylvania Goes to Gov. Wolf's Desk*, PENN LIVE (June 20, 2017, 6:28 PM), https://www.pennlive.com/news/2017/06/bill_tightening_rules_for_civi.html.

¹²⁷ KNEPPER, *supra* note 30, at 136.

¹²⁸ See Leg. B. 1106, 104th Leg., 2d. Sess. §1(1)(a) (Neb. 2016).

to forfeiture from a “preponderance of the evidence” to a “clear and convincing” evidentiary burden.¹²⁹ Further, like New Jersey, Nebraska’s statute implemented enhanced transparency and tracking requirements.¹³⁰ Even prior to this legislation, Nebraska had limited participation in the federal Equitable Sharing Program to seizures over a certain threshold amount.¹³¹

Like Nebraska, New Mexico has only criminal forfeiture since 2015. A 2019 bill extended the abolition of civil forfeiture to cover municipalities.¹³² As an end run around these limits, New Mexico allows participation in the federal Equitable Sharing Program, and they do take advantage of it. Between 2015 and 2018, New Mexico law enforcement agencies acquired more than \$377,000 in assets forfeited under state law.¹³³ “Between 2000 and 2019, [the state] generated an additional \$50.8 million from federal equitable sharing, for a total of at least \$51.1 million”¹³⁴

Other states, like Texas, are refusing to reform the practice altogether. After then-U.S. Attorney General Jeff Sessions moved to strengthen law enforcement’s ability to seize assets as a way to “clamp down on drug traffickers,” Texas declined to pass comprehensive reforms in 2017, despite the fact that it has “one of the worst civil forfeiture records in the country.”¹³⁵ The proposed legislation, “would have required a conviction before property was seized . . . and forced the state to prove seized property was related to a crime.”¹³⁶ “The main opposition to the bills came from district and county attorneys” who defended the forfeiture practice as a “public safety imperative.”¹³⁷

Jeff Sessions is no longer in office, and current Attorney General Merrick Garland has not yet made clear what direction he will

¹²⁹ *Id.* at § 1(12)(b).

¹³⁰ *Id.* at § 2.

¹³¹ KNEPPER, *supra* note 30, at 49.

¹³² See H.B. 312, 54th Leg., Reg. Sess. § 3(A) (N.M. 2019) (seizure is only allowed upon conviction of a crime); *id.* § (2)(I)(1) (defining law enforcement officer to include municipal officer).

¹³³ KNEPPER, *supra* note 30, at 122.

¹³⁴ *Id.*

¹³⁵ Townes, *supra* note 27; see also KNEPPER, *supra* note 30, at 146.

¹³⁶ Townes, *supra* note 27 (referencing H.B. 1364, 85th Leg., Reg. Sess. (Tex. 2017)). The Texas legislature proposed House Bill 1364, introduced this bill on January 30, 2017, and left this bill pending in the subcommittee. *Texas House Bill 1364*, LEGISCAN, <https://legiscan.com/TX/bill/HB1364/2017> (last visited Mar. 9, 2023).

¹³⁷ Townes, *supra* note 27.

recommend that states go on this issue.¹³⁸ But even without Sessions's influence, Texas has not implemented recent reforms to the practice, even though it uses forfeiture "most extensively."¹³⁹

Unlike Texas, the New Jersey legislature clearly recognized a problem and took corrective action. Although these measures are new,¹⁴⁰ and their success remains to be seen, the criminal conviction requirement and transparency requirements alone should boost the confidence of New Jersey citizens that our legislature sees the practice as a problem and wants to help. Raising the minimum-seizure requirement to \$1,000 in cash will eliminate the "vast quantities" of small-dollar seizures and provide more incentive for owners to challenge the seizures in court.¹⁴¹ New Jersey still allows forfeitures without criminal convictions above the recently passed thresholds.¹⁴² Additionally, the burden of proof is more restrictive to property owners than states like Pennsylvania, which raised the burden on prosecutors to "clear and convincing evidence."¹⁴³ Therefore, there is still the potential for abuse, and more work can be done.

V. AN ARGUMENT FOR NEW JERSEY TO CONSIDER FURTHER REFORMS

The measures already taken by the New Jersey legislature should curtail the abuse of civil asset forfeiture. This Comment will analyze the arguments for and against further reform and conclude by recommending that New Jersey take the following actions to further reduce the disparate impact and policing-for-profit incentives of civil asset forfeiture:

1. Setting limits on the state's participation in the federal Equitable Sharing Program.
2. Allocating less of the seized funds to law enforcement.
3. Consider raising the burden of proof on the government in civil forfeiture cases.

¹³⁸ Dan King, *How Joe Biden and Merrick Garland Can Help States with Justice Reform*, BULWARK (Feb. 25, 2021), <https://www.thebulwark.com/how-joe-biden-and-merrick-garland-can-help-states-with-justice-reform>.

¹³⁹ KNEPPER, *supra* note 30, at 17, 146 (using data from 2018).

¹⁴⁰ See LAWRENCE L. LUSTBERG ET AL., N.J. ADVISORY COMM., CIVIL RIGHTS IMPACTS OF CIVIL AND CRIMINAL ASSET FORFEITURE IN NEW JERSEY 14 (2021), <https://www.usccr.gov/files/2021-10/combined-nj-forfeiture-report.pdf> (as of October 2021, forfeiture data was available through 2019, which is prior to the passage of the legislation).

¹⁴¹ See Sitrin, *supra* note 73.

¹⁴² Sibilla, *supra* note 45.

¹⁴³ KNEPPER, *supra* note 30, at 120; Thompson, *supra* note 126.

A. *The 2020 Reforms: A Step in the Right Direction*

The conviction-requirement statute should alleviate some of the impact on low-income and minority communities. The typical forfeiture is not “targeting kingpins or major financial fraudsters.”¹⁴⁴ In fact, “[i]n the . . . states with available data, most currency forfeited in recent years was under \$2,000 . . . an average of \$1,276 across all states.”¹⁴⁵ “For example, half of Michigan’s currency forfeitures were less than \$423; [and] half of Pennsylvania’s were less than \$369.”¹⁴⁶ Therefore, even a modest limit on the amount of cash that can be seized without a conviction will help ease some of the burden on minorities and low-income communities.

For New Jersey, the conviction requirement eliminates the “sweet spot” between \$100 and \$500 responsible for the uncontested forfeitures by requiring a conviction to seize under \$1,000 in cash, which should dramatically curtail the potential for police to prey on the poorest and most vulnerable New Jersey citizens for revenue.¹⁴⁷ Data nationwide shows people in low-income communities are more likely to carry cash, leaving them more vulnerable to unfair forfeiture.¹⁴⁸ The cash forfeitures also disproportionately affect people of color.¹⁴⁹ Increasing the dollar threshold for a police officer’s ability to confiscate cash without a criminal conviction should help provide more protection for low-income and minority citizens.

New Jersey’s transparency requirements can serve as a model for other jurisdictions, if implemented properly. The newly enacted legislation requires that the state attorney general track and make forfeiture information available to the public, specifying the law enforcement agency involved, date of seizure, description and amount of property seized, and the criminal offense associated.¹⁵⁰ The legislation’s goal is to “make New Jersey a national leader in asset forfeiture transparency.”¹⁵¹ Indeed, even the Institute for Justice, which has been critical of New Jersey’s practices in the past, called the

¹⁴⁴ KNEPPER, *supra* note 30, at 6.

¹⁴⁵ KNEPPER, *supra* note 30, at 20 (footnote omitted) (in most individual instances of seizure, less than \$2,000 is seized).

¹⁴⁶ *Id.*

¹⁴⁷ *See* Sitrin, *supra* note 73.

¹⁴⁸ *Asset Forfeiture Reform*, DRUG POL’Y ALL., <https://drugpolicy.org/issues/asset-forfeiture-reform> (last visited Jan. 3, 2023).

¹⁴⁹ *Id.*

¹⁵⁰ Governor Murphy Signs, *supra* note 114.

¹⁵¹ *Id.*

recent legislation “one of the best forfeiture transparency laws in the country.”¹⁵²

If the tracking is enacted as planned according to the bill, the new law should allow the public to see what assets are being seized, where the funds are being spent, and ultimately “boost confidence in our justice system.”¹⁵³ As of October 2020, it was unclear when the public could see the data.¹⁵⁴ Citing struggles during the COVID-19 pandemic, the attorney general’s office had not yet released the database to the public.¹⁵⁵ Governor Murphy extended the deadline for the database and the reporting requirements to “[three] months after the last day of the public health emergency,”¹⁵⁶ and the attorney general’s directives “relax[ed] . . . general reporting . . . deadlines” so that law enforcement officers could be better prepared to respond to the emergencies created by the pandemic.¹⁵⁷ The portal was finally launched in April of 2022, allowing prosecutors and law enforcement to input data.¹⁵⁸ Eventually, the information will “create a publicly accessible, searchable database, although [it is not yet clear] when [the] database will be up and running.”¹⁵⁹

¹⁵² See Dave Fidlin, *New Jersey Receives ‘D-’ for Civil Asset Forfeiture Laws in Recent Report*, CTR. SQUARE (Jan. 11, 2021), https://www.thecentersquare.com/new-jersey/new-jersey-receives-d—for-civil-asset-forfeiture-laws-in-recent-report/article_24946564-544b-11eb-9bb7-9783e7445aac.html.

¹⁵³ Governor Murphy Signs, *supra* note 114.

¹⁵⁴ Ashley Balcerzak, *Pressure Is on for More Police Transparency. But NJ Delayed Database Showing Seized Property*, NORTHJERSEY.COM (Oct. 4, 2020, 4:27 PM), <https://www.northjersey.com/story/news/new-jersey/2020/10/02/nj-police-transparency-state-delayed-database-showing-seized-property/5494310002>.

¹⁵⁵ *Id.*

¹⁵⁶ N.J. Exec. Order No. 170 (July 31, 2020), https://www.nj.gov/infobank/eo/056murphy/pdf/EO-170_APPENDIX.pdf (appendix to executive order).

¹⁵⁷ Letter from Gurbir S. Grewal, N.J. Att’y Gen., to All Chief L. Enf’t Execs. (Mar. 20, 2020), <https://www.nj.gov/oag/dcj/agguide/directives/ag-Directive-2020-2-Deadlines.pdf>.

¹⁵⁸ See Matt Katz, *How Much Property and Cash Does Each New Jersey Police Department Seize? We Will Soon Find Out.*, GOTHAMIST (Apr. 7, 2022), <https://gothamist.com/news/how-much-property-and-cash-does-each-new-jersey-police-department-seize-we-will-soon-find-out>; see also Press Release, State of N.J. Off. of the Att’y Gen., Acting AG Platkin Announces Launch of Online Portal Allowing County Prosecutors to Report Asset Seizures and Forfeitures (Apr. 5, 2022), <https://www.njoag.gov/acting-ag-platkin-announces-launch-of-online-portal-allowing-county-prosecutors-to-report-asset-seizures-and-forfeitures>.

¹⁵⁹ Dana DiFilippo, *State Moves to Make Controversial Civil Forfeiture More Transparent*, N.J. MONITOR (Apr. 6, 2022, 6:44 AM), <https://newjerseymonitor.com/2022/04/06/state-moves-to-make-controversial-civil-forfeiture-more-transparent>.

Advocates hope that in addition to transparency, the database will provide a way for the attorney general to closely scrutinize forfeiture practices and “take action” against those that “do not advance the interest of justice.”¹⁶⁰ Both transparency and action will be essential to the success of the program and to the legislative aim of maintaining goodwill and trust in law enforcement.¹⁶¹

B. *Arguments For and Against Further Reforms*

Civil asset forfeiture is generally not a partisan issue. After the *Timbs v. Indiana* decision, one commentator analyzing abuses in Philadelphia remarked: “When two ideologically opposed justices, Neil Gorsuch and Sonia Sotomayor, are both equally appalled by this practice, you know something is wrong.”¹⁶² The ACLU (a typically left-leaning organization) and the Institute for Justice (a libertarian-leaning organization) both recommend that states should follow New Mexico and Nebraska and eliminate civil forfeiture altogether.¹⁶³ After its 2018 study, but prior to the 2020 legislation, the ACLU argued that “civil asset forfeiture operates as a form of punishment,” and for this reason, “no forfeiture should take place absent of a criminal conviction.”¹⁶⁴

Upon the passage of the 2020 transparency requirements, Sarah Fajardo, Policy Director at ACLU-NJ, praised the legislation but also encouraged further action, saying, “[t]his law moves our state closer to curtailing and ultimately ending the use of civil forfeiture and the

¹⁶⁰ *Id.*

¹⁶¹ See generally Governor Murphy Signs, *supra* note 114.

¹⁶² Brittany Hunter, *Philadelphia’s Perverse Civil Asset Forfeiture Machine Has Finally Come to an End*, FEE (Dec. 12, 2018), <https://fee.org/articles/philadelphias-perverse-civil-asset-forfeiture-machine-has-finally-come-to-an-end>.

¹⁶³ See Jonathan H. Adler, *A Vast Right-Wing Conspiracy*, LEGAL AFFS. (May–June 2005), https://legaffairs.org/issues/May-June-2005/review_adler_mayjun05.msp (calling the Institute for Justice a “libertarian law firm”); Alan M. Dershowitz, *The Final Nail in the ACLU’s Coffin*, HILL (June 11, 2018, 4:00 PM), <https://thehill.com/opinion/civil-rights/391682-the-final-nail-in-the-aclus-coffin> (calling the ACLU a “hard-left political advocacy group”); Disha Raychaudhuri, *N.J. Will Now Track How Much Money and Property Cops Seize from Residents*, NJ.COM (Jan. 15, 2020, 1:39 PM), <https://www.nj.com/data/2020/01/nj-will-now-track-how-much-money-and-property-cops-take-using-asset-forfeiture.html> (indicating that the Policy Director of ACLU-NJ argued for New Jersey to eliminate civil forfeiture); Press Release, Nick Sibilla, Inst. for Just., New Jersey Governor Signs New Conviction Requirement for Civil Forfeiture (Jan. 21, 2020), <https://ij.org/press-release/new-jersey-governor-signs-new-conviction-requirement-for-civil-forfeiture> (urging New Jersey to end civil forfeiture).

¹⁶⁴ Weisberg, *supra* note 58.

racially disparate over-policing it encourages, disproportionately occurring in communities that are already some of New Jersey's most vulnerable."¹⁶⁵ Even after the 2020 legislation was enacted, the Institute for Justice Senior Legislative Counsel, Lee McGrath, praised the Governor's actions but went on to say: "[i]n the next session, we urge the New Jersey Legislature to end civil forfeiture and replace it with criminal forfeiture. . . . Ending the arbitrary practice of litigating the same alleged crime in two different court systems is the only real means to address this abuse."¹⁶⁶ A senior research analyst at the Institute for Justice, Jennifer McDonald, called the reforms "fantastic" but then said, "[w]e want them to continue to push forward for ending civil forfeiture entirely and replacing it with criminal forfeiture."¹⁶⁷

Despite the reforms having bipartisan support, and the support of most Americans,¹⁶⁸ arguments from law enforcement agencies against eliminating civil asset forfeiture are numerous as well. "A 2010 survey of 800 police departments found that nearly 40 [percent]" argued proceeds from asset forfeiture were a "necessary budget supplement."¹⁶⁹ New Mexico law enforcement, in response to the potential abolition of civil forfeiture, argued that the legislation would "hand the bad guys a win and put public safety at risk."¹⁷⁰ They argued that cartels would "ramp up their money laundering," and crime would rise by extension.¹⁷¹

¹⁶⁵ Raychaudhuri, *supra* note 163.

¹⁶⁶ Sibilla, *supra* note 163.

¹⁶⁷ C.J. Ciaramella, *New Jersey Passes Civil Asset Forfeiture Reforms*, REASON (Jan. 14, 2020, 5:20 PM), <https://reason.com/2020/01/14/new-jersey-passes-civil-asset-forfeiture-reforms>.

¹⁶⁸ See Nick Sibilla, *Poll: Most Americans Want Congress to Abolish Civil Forfeiture*, FORBES (Nov. 12, 2020, 4:15 PM), <https://www.forbes.com/sites/nicksibilla/2020/11/12/poll-most-americans-want-to-defund-civil-forfeiture/?sh=3b99ef5557b5> ("59 [percent] of Americans oppose 'allowing law enforcement agencies to use forfeited property . . . for their own use.'").

¹⁶⁹ Emma Coleman, *Civil Asset Forfeiture Under New Scrutiny Amid Calls for Police Reform*, ROUTE-FIFTY (July 14, 2020), <https://www.route-fifty.com/public-safety/2020/07/civil-asset-forfeiture-reform/166868>.

¹⁷⁰ Ian MacDougall, *Police Say Seizing Property Without Trial Helps Keep Crime Down. A New Study Shows They're Wrong*, PROPUBLICA (Dec. 14, 2020, 2:33 PM), <https://www.propublica.org/article/police-say-seizing-property-without-trial-helps-keep-crime-down-a-new-study-shows-theyre-wrong>.

¹⁷¹ *Id.* (of note, these fears remain unrealized five years after New Mexico abolished civil asset forfeiture).

Even in New Jersey, support for law enforcement was a main reason for Governor Christie's veto of the 2017 transparency statute.¹⁷² He argued that "suppressing public disclosure of seizures was necessary to 'protect law enforcement.'"¹⁷³ One New Jersey prosecutor argued that abolition of the practice would be a burden on the taxpayers.¹⁷⁴ One former prosecutor argues that "[s]tate law prohibits police departments from paying salaries and operational expenses [from] forfeiture money," but funds can be used to make equipment upgrades, which Morris County did in 2015.¹⁷⁵ Because of this support for law enforcement, total abolition of civil asset forfeiture in New Jersey is unlikely. Despite the arguments supporting civil asset forfeiture, however, evidence shows there is overwhelming public support for abolition.¹⁷⁶ Therefore, it is worth discussing additional reforms that New Jersey's legislature should consider to further curtail the abuse of the practice.¹⁷⁷

C. *Further Reforms that New Jersey Should Consider*

Ultimately, New Jersey should end civil asset forfeiture altogether and require a criminal conviction before property can be seized, but since such drastic reform seems unlikely, I will propose several further reforms to combat the "bad policing" and disparate-impact trends. First, New Jersey should consider setting dollar limits on participation in the federal Equitable Sharing Program. The federal Equitable Sharing Program is one of the reasons civil asset forfeiture is as widespread as it is. Limiting participation in this program should curtail abuses. "Five states—Arizona, Maryland, Nebraska, New Mexico and Ohio—have prohibited state and local agencies from transferring property to the federal government for forfeiture unless the property is worth more than a threshold amount."¹⁷⁸ These threshold amounts range from \$25,000 to \$100,000,¹⁷⁹ amounts—much higher than the amount likely to punish the vulnerable New Jersey citizens most impacted by the current civil asset forfeiture

¹⁷² Doctorow, *supra* note 70.

¹⁷³ *Id.*

¹⁷⁴ See Sullivan, *supra* note 48.

¹⁷⁵ *Id.* (law enforcement "can use forfeiture funds to make equipment upgrades, provide additional training for their officers or pay for community programs.").

¹⁷⁶ See, e.g., Sibilla, *supra* note 168.

¹⁷⁷ See generally Sibilla, *supra* note 163.

¹⁷⁸ KNEPPER, *supra* note 30, at 49.

¹⁷⁹ *Id.*

practices—that will likely target more sophisticated criminal activity. New Jersey should consider raising its thresholds as well to similar amounts.

Left unchecked, the federal Equitable Sharing Program can provide an opportunity for revenue generation through overzealous policing. For example, “North Carolina participates in the Equitable Sharing Program more than all but six states”.¹⁸⁰ “In 2020, [the] DOJ gave North Carolina police departments more than \$6.5 million through the [federal] Equitable Sharing Program.”¹⁸¹ “By contrast, South Dakota, the state that uses equitable sharing the least, only brought in \$2,670 worth of forfeited goods.”¹⁸²

For those concerned about law enforcement budgets, note that in New Mexico civil asset forfeiture has been abolished at the state level, and there is a threshold level for equitable sharing,¹⁸³ but participation in the program makes the practice still widely used and lucrative for law enforcement.¹⁸⁴ By setting a higher dollar amount and not stopping, but limiting, participation in the federal Equitable Sharing Program, the New Jersey legislature can protect vulnerable citizens as well as maintain its law enforcement budgets.

New Jersey should also consider allocating less of the seized funds to law enforcement. When law enforcement keeps 100 percent of the proceeds, there is a “unique and disingenuous incentive” for police carrying out these actions.¹⁸⁵ When local agencies carry out the forfeitures, New Jersey allocates 100 percent of seized funds to law enforcement.¹⁸⁶ By contrast, in New York, only 60 percent of funds go to law enforcement, but they have one of the highest forfeiture revenues,¹⁸⁷ and their forfeiture revenue from 2000 to 2019 was over \$19 billion.¹⁸⁸

¹⁸⁰ King, *supra* note 138.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ KNEPPER, *supra* note 30, at 49.

¹⁸⁴ *Id.* at 122 (“Between 2015 and 2018, New Mexico law enforcement agencies forfeited more than \$377,000 under state law[, and b]etween 2000 and 2019, they generated an additional \$50.8 million from federal equitable sharing, for a total of at least \$51.1 million.”).

¹⁸⁵ See Murphy, *supra* note 11, at 99.

¹⁸⁶ KNEPPER, *supra* note 30, at 120 (clarifying that 95 percent is allocated to law enforcement when the attorney general does the seizure).

¹⁸⁷ *Id.* at 5 (based on states with data from 2018).

¹⁸⁸ *Id.* at 124.

Allocating less of the seized funds to law enforcement and more to a “general fund” like Maine, New Hampshire, and New Mexico do,¹⁸⁹ or to schools like North Carolina and Wisconsin do,¹⁹⁰ could help curtail abuses. Additionally, transparency requirements could help to curtail abuses while maintaining some level of revenue for law enforcement, like New York does.¹⁹¹ New Hampshire, for example, allocates only revenues over a certain amount to the state’s general fund while retaining some for law enforcement.¹⁹² The percentage not allocated to law enforcement could be spent on school funding, healthcare, social programs, or tax relief, particularly in the counties most affected by the forfeitures. If civil asset forfeiture must continue, its results should benefit the communities it has historically harmed.

If New Jersey elects to distribute any percentage of the proceeds to the general fund, the state government should take measures to ensure the money is distributed appropriately.¹⁹³ In Maine, lawmakers and others suggested that general funds should be allocated to fund “initiatives such as medical-assisted recovery with FDA-approved drugs like methadone, harm-reduction services such as clean needle exchanges, and HIV and hepatitis testing, as well as diversionary programs for opioid users involved in the criminal justice system.”¹⁹⁴ Allocating the money to similar causes in New Jersey could be another way for these forfeitures to benefit a community they have historically harmed. These measures taken together—allocating less of the seized funds to law enforcement, limiting participation in federal equitable sharing to amounts over certain dollar thresholds, and assuring forfeiture funds are spent on communities—should lessen the financial incentive for law enforcement to unjustly seize property and allow them to focus on protection and deterrence.

¹⁸⁹ *Id.* at 176, 179–80.

¹⁹⁰ *Id.* at 126, 158.

¹⁹¹ *Id.* at 124 (showing that in New York, 60 percent of forfeiture proceeds are allocated to law enforcement and forfeiture revenues are in the millions).

¹⁹² KNEPPER, *supra* note 30, at 179 (“Local law enforcement can keep no more than \$225,000 from a single forfeiture, and amounts in the state drug forfeiture fund above \$1,000,000 must be turned over to the state general fund.”).

¹⁹³ See Dan Neumann, *Maine Law Enforcement Is Keeping Drug Bust Money Meant for State General Fund*, BEACON (Oct. 26, 2018), <https://mainebeacon.com/maine-law-enforcement-is-keeping-drug-bust-money-meant-for-state-general-fund> (Maine law enforcement is “failing to account for property and cash,” and very little money is going into the general fund.).

¹⁹⁴ *Id.*

New Jersey should also consider following our neighboring states of New York and Pennsylvania¹⁹⁵ and enact legislation increasing the burden of proof standard for the government to clear and convincing evidence rather than the existing preponderance of the evidence standard. The Fifth Amendment Integrity Restoration Act (FAIR Act) is currently a piece of pending federal legislation that would raise the burden of proof for federal seizures.¹⁹⁶ The legislative intent of this act is “[t]o help curb actual and potential abuses and restore the balance of power back to individual citizens.”¹⁹⁷ The FAIR Act proposes changing 18 U.S.C. § 983 to state that “if the Government’s theory of forfeiture is that the property was used [in the commission of a crime,] . . . the Government shall establish, by *clear and convincing evidence*,” that “there was a *substantial* connection between the property and the offense” and that the owner knew or should have known about the property’s connection with the offense.¹⁹⁸ This bill was introduced but did not pass the committee.¹⁹⁹ Nonetheless, the wording could serve as a model for further legislation at the state level.

If New Jersey implemented this wording, they would join the ten states that have raised the standard of proof to clear and convincing evidence.²⁰⁰ This slightly higher burden on the government, although it did not pass at the federal level,²⁰¹ can be implemented in New Jersey and would likely receive support from the ACLU and the public.²⁰² It would also lessen the burden on innocent parties that have to fight in court to reclaim their property by forcing the government to prove it

¹⁹⁵ See *supra* Part II.C.

¹⁹⁶ *Civil Asset Forfeiture Reform*, CONGRESSMAN TIM WALBERG, <https://walberg.house.gov/civil-asset-forfeiture> (last visited Sept. 10, 2021).

¹⁹⁷ *Id.*

¹⁹⁸ Fifth Amendment Integrity Restoration Act of 2021, H.R. 2857, 117th Cong. (2021), <https://www.congress.gov/bill/117th-congress/house-bill/2857/text?r=7&s=1> (emphasis added). This bill was introduced in the House on April 26, 2021. H.R. 2857, CONGRESS.GOV (emphasis added), <https://www.congress.gov/bill/117th-congress/house-bill/2857/text?r=7&s=1> (last visited Mar. 9, 2023).

¹⁹⁹ Fifth Amendment Integrity Restoration Act of 2021, H.R. 2857, 117th Cong. (2021), 117 H.R. 2857 (LEXIS).

²⁰⁰ KNEPPER, *supra* note 30, at 39.

²⁰¹ Fifth Amendment Integrity Restoration Act of 2021, H.R. 2857, 117th Cong. (2021), 117 H.R. 2857 (LEXIS).

²⁰² See *Civil Asset Forfeiture Reform*, *supra* note 196 (“The FAIR Act has been endorsed by the Institute for Justice, the National Association of Criminal Defense Lawyers, and the ACLU showing the wide ideological spectrum that supports reform. Civil asset forfeiture reform is also supported by groups like the Heritage Foundation and the CATO Institute.”).

has a claim to the property, rather than the current standard, which is unfair to those whose property has been unjustly seized.

VI. CONCLUSION

Civil asset forfeiture is a problem. As currently implemented, it disproportionately and negatively impacts minorities and low-income Americans, incentivizes policing-for-profit rather than for protection, and provides a legal means for the government to steal from its citizens. Ultimately, the practice should be abolished, and abolition has widespread public support. Recent reforms taken by the New Jersey legislature to curtail abuses of the practice are a step in the right direction and should ensure that low income and minority New Jersey citizens—the ones most affected by this practice—are better protected. Even with these reforms, however, New Jersey can take further steps to ensure that law enforcement agencies are not motivated by profit, and innocent owners have an easier time reclaiming their stolen property. Short of abolishing the practice altogether, the state should consider limiting participation in the federal Equitable Sharing Program, assuring the funds that are seized are spent on communities, and making it easier for owners to reclaim their property by raising the standard of proof for the government. Taken together, these steps will help vulnerable New Jersey citizens and ensure law enforcement serves to protect, not profit.