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Rob Poggenklass  
*ACLU of Virginia*

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## REFORM VIRGINIA'S CIVIL ASSET FORFEITURE LAWS TO REMOVE THE PROFIT INCENTIVE AND CURTAIL THE ABUSE OF POWER

*Rob Poggenklass* \*

*"In theory, asset-forfeiture seizures make excellent sense. They deprive criminal syndicates of the tools of their trade, and they provide much-needed funds for law-enforcement agencies. In reality, they're a hot mess."*

—*Editorial, Richmond Times-Dispatch*<sup>1</sup>

In November 2011, a trooper from the Virginia State Police pulled over a car on Interstate 95 near Emporia, Virginia, for traffic violations.<sup>2</sup> The trooper, who alleged that the driver was both traveling 86 mph in a 70 mph zone and following another vehicle too closely, never issued a citation or pressed charges against either of the two men inside the car.<sup>3</sup> Instead, the trooper seized \$28,500 in cash.<sup>4</sup> Lawyers for Victor Guzman, the passenger in the car, had to convince a U.S. Attorney that the money consisted of cash donations to help build a church in El Salvador.<sup>5</sup> Guzman and his brother-in-law, the driver, were transporting the funds to Atlanta at the church's request when the trooper stopped

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\* Tony Dunn Legal Fellow, ACLU of Virginia. J.D., William & Mary Marshall-Wythe School of Law; B.A., Cornell College. Funding for the fellowship that allowed me to research and write this paper at the ACLU of Virginia was provided by the Tony Dunn Foundation. Invaluable research assistance was provided by Thomas Okuda Fitzpatrick, a former Dunn Fellow and a fellow 2010 graduate of William & Mary Law School. I am also grateful for the comments and encouragement of Rebecca Glenberg and Claire Guthrie Gastañaga.

1. Editorial, *Law Enforcement: Inexcusable*, RICH. TIMES-DISPATCH, June 29, 2010, at A6 [hereinafter Editorial, *Law Enforcement: Inexcusable*].

2. Editorial, *Forfeiture Without Due Process*, WASH. POST (Jan. 2, 2012), [http://www.washingtonpost.com/opinions/forfeiture-without-due-process/2011/12/22/gIQAckn3WP\\_story.html](http://www.washingtonpost.com/opinions/forfeiture-without-due-process/2011/12/22/gIQAckn3WP_story.html).

3. *Id.*

4. *Id.*

5. *Cases: Some Forfeiture Cases Which David Smith Defended or for Which He Provided Counsel or Expert Testimony: 2012 Highway Robbery*, SMITH & ZIMMERMAN (2015), <http://smithzimmerman.com/cases/>.

them.<sup>6</sup> The trooper had not accepted their attempts to explain the situation, in part because they said—honestly and accurately—that the money was not their own. Four months later, in March 2012, federal immigration authorities finally cut a \$28,500 check to the church, returning the money seized by state police.<sup>7</sup>

Virginia's civil asset forfeiture scheme for drug-related crimes is overdue for reform. Under Virginia law, the government can seize an individual's car, cash, or other property without bringing corresponding criminal charges by filing a civil lawsuit alleging that the property is related to a criminal act.<sup>8</sup> In fact, even if criminal charges are brought, an acquittal will not necessarily prevent the government from seizing and keeping the assets. If it is probable the property is related to drug dealing, then most of the revenue from the forfeited property goes to the local law enforcement agency that seized the property.<sup>9</sup> These laws have resulted in a civil asset forfeiture regime that is considered one of the worst in the nation for property rights and due process protection.<sup>10</sup> For the government, however, it is immensely profitable. Since July 1991, more than \$105 million in asset forfeiture funds have been distributed to Virginia law enforcement agencies.<sup>11</sup>

The precursors to today's asset forfeiture laws date back centuries and were used in different forms throughout the history of our country. The current iterations of civil asset forfeiture laws were adopted, however, primarily in the 1980s as law enforcement tools in the war on drugs. Many states adopted asset forfeiture laws that allowed law enforcement agencies to seize property and money used in the drug trade.<sup>12</sup> These measures were sold to the public primarily as crime fighting tools to deprive drug dealers of resources needed for the illegal drug trade and as punitive

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6. *Id.*

7. *Id.*

8. VA. CODE ANN. § 19.2-386.22 (Repl. Vol. 2015).

9. Jarret B. Wollstein, *The Government's War on Property*, FOUND. FOR ECON. EDUC. (July 1993).

10. MARIAN R. WILLIAMS ET AL., INST. FOR JUST., POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE 96–97 (Mar. 2010), [http://www.ij.org/images/pdf\\_folder/other\\_pubs/assetforfeituretoemail.pdf](http://www.ij.org/images/pdf_folder/other_pubs/assetforfeituretoemail.pdf).

11. VA. DEPT OF CRIM. JUST. SERVS., PROGRAM STATISTICS, <http://www.dcjs.virginia.gov/fasp/stats.cfm> (last visited Mar. 7, 2016).

12. J.F., *What Civil Asset Forfeiture Means*, ECONOMIST (Apr. 14, 2014), <http://www.economist.com/node/21598852>.

measures to deprive criminals from the spoils of drug dealing.<sup>13</sup> They also allowed for the seized cash and proceeds from the sale of other seized property to be used in crime fighting efforts.<sup>14</sup>

Heralded as a valuable tool to counter the moneyed power of drug gangs and drug dealers, the implementation of civil asset forfeiture laws for illegal narcotics garnered significant criticism by civil liberties and property rights advocates from the outset. Property rights and due process concerns resulted in reforms of the federal forfeiture scheme in the 1990s and early 2000s. In Virginia, however, the low burden of proof required to confiscate property permanently and the award of forfeiture proceeds to local law enforcement agencies have resulted in an unjust civil asset forfeiture scheme in need of reform. The laws in Virginia have devolved from a purely utilitarian tool in the war on drugs to a revenue cow for cash-strapped local law enforcement agencies.

Part I of this article will review the historical roots of civil asset forfeiture law. Part II will provide a more modern history of these laws and an overview of Virginia's current asset forfeiture scheme. Part III will examine the criticism of Virginia's drug-related civil asset forfeiture laws and highlight due process concerns, risk of abuse of power, and misallocation of priorities due to the structure of these laws in Virginia. Finally, Part IV will provide recommendations to reform Virginia's civil asset forfeiture laws.

## I. HISTORY AND OVERVIEW OF ASSET FORFEITURE LAWS

### A. *In Rem We Trust*

Although the application of civil asset forfeiture has ballooned since the war on drugs started in the 1980s, the Supreme Court has noted that forfeiture of property is a time-honored method to prevent illegal activity.<sup>15</sup> Modern asset forfeiture jurisprudence is based on English common law theories that the government can

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13. See JIMMY GURULÉ ET AL., *THE LAW OF ASSET FORFEITURE* 229–30 (2d ed. 2004).

14. WILLIAMS ET AL., *supra* note 10, at 15.

15. See *General Motors Acceptance Corp. v. United States*, 286 U.S. 49, 56 (1932) (“Forfeiture of vehicles bearing smuggled goods is one of the time-honored methods adopted by the government for the repossession of the crime of smuggling.”).

seize property associated with criminal acts.<sup>16</sup> This legal theory, in turn, has roots in the Old Testament. According to Exodus 21:28, “If an ox gores a man or a woman to death, the ox shall surely be stoned and its flesh shall not be eaten; but the owner of the ox shall go unpunished.”<sup>17</sup> The implication of this biblical story is that “an ox can be a moral agent” of the injustice, even in the absence of any corresponding criminal culpability of the owner.<sup>18</sup> Similar concepts existed in the ancient Greek and Roman traditions of noxal surrender, “which involved the surrendering of the agent or instrument causing damage or death to the victim or his or her kin.”<sup>19</sup>

The notion that property, rather than an individual, could be held responsible evolved into the English common law concept of deodand. “Derived from the Latin phrase *Deo Dandum*, meaning to be given to God,” deodand involved forfeiting to the King personal property of the killer that was considered the imminent cause of an individual’s death. The practice was based on the view that the property that caused the death was guilty of an offense against God and that “religious atonement was required.”<sup>20</sup> The collection of guilty property eventually evolved<sup>21</sup> into the accepted theory that property could be taken from an owner regardless of whether the owner was actually convicted of a crime.<sup>22</sup> In fact, by some accounts, “[f]or the royal deodand collectors, the guilt or innocence of the object’s owner in relation to the accident had little or no relevance to the forfeiture of the property.”<sup>23</sup> The deodand’s biblical roots were eventually usurped and transformed by the mid-nineteenth century “into a revenue-raising device for the Crown.”<sup>24</sup>

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16. HOWARD E. WILLIAMS, *ASSET FORFEITURE: A LAW ENFORCEMENT PERSPECTIVE* 8 (2002).

17. *Exodus* 21:28 (New American Standard Bible).

18. HENRY J. HYDE, *FORFEITING OUR PROPERTY RIGHTS: IS YOUR PROPERTY SAFE FROM SEIZURE?* 17 (1995).

19. GURULÉ ET AL., *supra* note 13, at 4.

20. HOWARD E. WILLIAMS, *ASSET FORFEITURE: A LAW ENFORCEMENT PERSPECTIVE* 8 (2002).

21. *Id.*

22. GREGORY M. VECCHI & ROBERT T. SIGLER, *ASSETS FORFEITURE: A STUDY OF POLICY AND ITS PRACTICE* 42 (2001).

23. HYDE, *supra* note 18, at 18.

24. GURULÉ ET AL., *supra* note 13, at 8; *see also* *Parker-Harris Co. v. Tate*, 188 S.W. 54, 55 (Tenn. 1916) (“Needless to say, historians record that the ‘pious uses’ under the control of the king and his almoner became a scandal which moderns would describe as being

The notion that property could be guilty and subject to legal proceedings was similarly applied in early English statutory forfeitures used to enforce the Navigation Acts of 1660.<sup>25</sup> These laws required that most commodities be transported in English vessels.<sup>26</sup> Illegally carried goods were subject to forfeiture and resulted in legal proceedings in the common law Court of the Exchequer.<sup>27</sup> These statutory forfeitures were most often enforced against the offending ship or cargo under in rem procedures.<sup>28</sup> The principles of in rem jurisdiction allow the court to obtain jurisdiction against the property, rather than against the property owner,<sup>29</sup> thereby creating a legal fiction in which the property becomes party to the judicial proceedings. This fictitious assumption, or legal sleight of hand, that the property itself could be guilty of English customs and navigation laws, was similarly adopted in early American jurisprudence.<sup>30</sup>

Adoption of in rem jurisdiction was particularly important in American admiralty law to allow for the forfeiture of ships and cargo to enforce customs violations and to punish piracy when in personam jurisdiction over property owners may have been impossible to establish.<sup>31</sup> In two early 19th century Supreme Court cases regarding the forfeiture of vessels whose crews were engaged in piracy, the Court upheld the government's practice of bringing civil forfeiture actions in rem against the vessels rather than first obtaining in personam jurisdiction or a criminal conviction of the owner.<sup>32</sup> Recognizing that foreign owners of vessels would otherwise not be held accountable, the Court noted that:

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graft.”).

25. *Austin v. United States*, 509 U.S. 602, 612 (1993); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 682 (1974) (“English Law provided for statutory forfeitures of offending objects used in violation of the customs and revenue laws—likely a product of the confluence and merger of the deodand tradition and the belief that the right to own property could be denied the wrongdoer.”)

26. *See Austin*, 509 U.S. at 612.

27. *See* HOWARD E. WILLIAMS, *ASSET FORFEITURE: A LAW ENFORCEMENT PERSPECTIVE* 8 (2002).

28. *See Calero-Toledo*, 416 U.S. at 682.

29. Black's Law Dictionary defines in rem jurisdiction as “[a] court's power to adjudicate the rights to a given piece of property, including the power to seize and hold it.” *BLACK'S LAW DICTIONARY* (8th ed. 2004).

30. *See Austin*, 509 U.S. at 616.

31. *GURULÉ ET AL.*, *supra* note 13, at 13; *WILLIAMS*, *supra* note 27, at 9; *see, e.g.*, *Harmony v. United States*, 43 U.S. (2 How.) 210, 233 (1844).

32. *The Palmyra*, 25 U.S. (12 Wheat) 1, 14–15 (1827); *United States v. Cargo of the Brig Malek Adhel*, 42 U.S. (2 How.) 210 (1844).

It is not an uncommon course in the admiralty, acting under the law of nations, to treat the vessel in which or by which, or by the master or crew thereof, a wrong or [offense] has been done as the offender, without any regard whatsoever to the personal misconduct or responsibility of the owner thereof. And this is done from the necessity of the case, as the only adequate means of suppressing the [offense] or wrong, or insuring an indemnity to the injured party. The doctrine also is familiarly applied to cases of smuggling and other misconduct.<sup>33</sup>

The courts allowed for this legal fiction of in rem proceedings in which “[t]he thing is here primarily considered as the offender, or rather the offense is attached primarily to the thing”<sup>34</sup> as an extraordinary measure when the courts lacked personal jurisdiction over foreign owners of vessels.<sup>35</sup> Similarly, Virginia’s courts upheld as constitutional statutory forfeiture provisions that were not contingent on a criminal conviction, noting that the

property is unlawfully used by the owner himself, or by some other person with whom he has intrusted it; that it is so used in violation of law, and to the detriment of public and private interests, which can only be effectually protected by confiscating the property itself as the offender.<sup>36</sup>

Asset forfeiture laws were later expanded to include tax fraud and criminal racketeering in the early 20th century.<sup>37</sup> During the prohibition era of the 1920s, the federal government also used asset forfeiture to enforce temperance laws<sup>38</sup> and to combat illegal distilleries.<sup>39</sup>

## II. ASSET FORFEITURE LAW IN VIRGINIA

Virginia’s asset forfeiture laws developed piecemeal during the 20th century and have included provisions in the Alcoholic Beverages Control Act and various sections of the criminal procedure

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33. *United States v. Cargo of the Brig Malek Adhel*, 42 U.S. (2 How.) 210, 233 (1844).

34. *The Palmyra*, 25 U.S. (12 Wheat) 1, 14 (1827).

35. *See GURULÉ ET AL.*, *supra* note 13, at 14.

36. *Boggs v. Commonwealth*, 76 Va. 989, 995 (1882).

37. DEE R. EDGEWORTH, *ASSET FORFEITURE: PRACTICE AND PROCEDURE IN STATE AND FEDERAL COURTS* 23–24 (3d ed. 2014).

38. *See generally, e.g.*, *United States v. One Ford Coupe Auto.*, 272 U.S. 321 (1926); *Dodge v. United States*, 272 U.S. 530 (1926); Donald J. Boudreaux & A.C. Pritchard, *Innocence Lost: Bennis v. Michigan and the Forfeiture Tradition*, 61 MO. L. REV. 593, 627 (1996) (“Prohibition brought forfeiture into common use in the United States.”).

39. EDGEWORTH, *supra* note 37, at 23–24.

and crimes and offenses titles of the Virginia Code. Numerous revisions, additions, and substitutions have scattered asset forfeiture provisions throughout the code in a confusing labyrinth of laws.<sup>40</sup>

#### A. *Virginia Alcoholic Beverages Control Act*

Virginia's Alcoholic Beverages Control Act, first adopted in 1934 and subsequently recodified and amended several times in different forms, provides for the forfeiture of illegal "stills and distilling apparatus and materials for the manufacture of alcoholic beverages."<sup>41</sup> The provision also calls for the forfeiture of all weapons used by or found on individuals engaged in the unlawful manufacturing, transporting, or selling of alcoholic beverages, and all vehicles used in the unlawful manufacturing of alcoholic beverages that are "found in the immediate vicinity of any place where alcoholic beverages are being unlawfully manufactured."<sup>42</sup>

The law provides that when items are seized under this provision, notice that the items were seized shall be provided by posting a copy of the warrant "on the door of the buildings or room where the articles were found, or if there is no door, then in any conspicuous place upon the premises."<sup>43</sup> A hearing is held between ten and thirty days after the warrant is returned to determine if the seized items were used or possessed unlawfully.<sup>44</sup> The owner of the property or any person claiming an interest in the property may appear at the hearing and file a written claim setting forth his or her interest in the property. The code does not require a criminal conviction to forfeit property under this section.<sup>45</sup> All items forfeited under this section are turned over to the Alcoholic Beverages Control Board, and the net proceeds from the sale of

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40. Warren Fiske, *Proposals Delayed, But on the Way*, POLITIFACT VIRGINIA (Oct. 3, 2011, 8:35 AM), <http://www.politifact.com/virginia/promises/bob-o-meter/promise/1002/consolidate-asset-forfeiture-laws/>.

41. VA. CODE ANN. § 4.1-336 (Cum. Supp. 2015); 1934 Va. Acts 100, 105-06 (codified as amended at VA. CODE ANN. § 4.1-336 (Cum. Supp. 2015)).

42. VA. CODE ANN. § 4.1-336 (Cum. Supp. 2015).

43. *Id.* § 4.1-338(B) (Repl. Vol. 2010).

44. *Id.* § 4.1-338(C) (Repl. Vol. 2010).

45. *Id.*



the forfeited items are paid into the state's Literary Fund, as required by the Virginia Constitution.<sup>46</sup>

*B. Civil Forfeiture for Property Connected to the Illegal Distribution and Sale of Narcotics*

The war on drugs ushered in a dramatic change to Virginia's asset forfeiture scheme. Before a 1990 amendment to the Virginia Constitution, all proceeds from assets forfeited to the Commonwealth were constitutionally required to be paid to the Commonwealth's Literary Fund.<sup>47</sup> In 1990, as part of the war on drugs, the Virginia Constitution was amended to allow for proceeds from certain drug offenses to circumvent the Literary Fund and instead be used to promote law enforcement.<sup>48</sup> Specifically, the constitutional provision provides:

The General Assembly may provide by general law an exemption from this section for the proceeds from the sale of all property seized and forfeited to the Commonwealth for a violation of the criminal laws of this Commonwealth proscribing the manufacture, sale or distribution of a controlled substance or marijuana. Such proceeds shall be paid into the state treasury and shall be distributed by law for the purpose of promoting law enforcement.<sup>49</sup>

Acting on this authority, the General Assembly amended the asset forfeiture provisions of the Virginia Code in 1991 to allow for

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46. VA. CONST. art. VIII, § 8; VA. CODE ANN. § 4.1-338(D) (Repl. Vol. 2010). Interestingly, the code provides that if alcoholic beverages cannot be sold, the alcoholic beverages may be gifted to mental health hospitals and elderly houses for medicinal purposes. Likewise, foodstuffs that cannot be sold but are usable may be gifted to local jails and correctional facilities. VA. CODE ANN. § 4.1-338(D) (Repl. Vol. 2010).

47. VA. CONST. art. VIII, § 8. "The Literary Fund is a permanent and perpetual school fund established in the Constitution of Virginia. Revenues to the Literary Fund are derived primarily from criminal fines, fees, and forfeitures, unclaimed and escheated property, unclaimed lottery winnings and repayments of prior Literary Fund loans. The Literary Fund provides low-interest loans for school construction, grants under the interest rate subsidy program, debt service for technology funding, and support for the state's share of teacher retirement required by the Standards of Quality." *Literary Fund Loans*, VA. DEP'T OF EDUC., [http://www.doe.virginia.gov/support/facility\\_construction/literary\\_fund\\_loans/index.shtml](http://www.doe.virginia.gov/support/facility_construction/literary_fund_loans/index.shtml) (last visited Mar. 7, 2016); see also VA. CODE ANN. § 22.1-142 (Cum. Supp. 2015).

48. JOHN DINAN, *THE VIRGINIA STATE CONSTITUTION* 208 (2014).

49. VA. CONST. art. VIII, § 8. This provision was ratified on November 6, 1990, and became effective January 1, 1991.

proceeds from drug-related forfeitures to flow back to the law enforcement agencies involved with the seizures and forfeitures of the assets.<sup>50</sup>

The 1990 constitutional amendment and corresponding revision of the Virginia Code were proposed and adopted as a budgetary fix to combat drug trafficking by allowing law enforcement agencies to keep the proceeds from the forfeiture of drug-related assets.<sup>51</sup> Before the constitutional amendment, law enforcement agencies could use federal asset forfeiture procedures to bypass the state requirement that forfeiture proceeds be channeled to the Literary Fund. Local law enforcement agencies rarely used Virginia's seizure and forfeiture laws, preferring instead to use the federal drug asset forfeiture sharing regime.<sup>52</sup> In 1988, federal lawmakers proposed reforms requiring forfeitures under the federal system to follow state laws on the distribution of forfeiture proceeds.<sup>53</sup> Fearing a budgetary constraint, lawmakers in Richmond pushed for a constitutional amendment that would allow the forfeiture proceeds in state court to revert back to local law enforcement efforts.<sup>54</sup> The U.S. Attorney for the Eastern District of Virginia at the time, Henry E. Hudson, revealed the true intent of the constitutional amendment when he said that the proposed federal reforms "could have a dramatic effect on state and local police who have harvested a great deal of money through this program."<sup>55</sup> By changing the Virginia Constitution, law enforcement agencies were able to continue to "harvest" funds from civil forfeiture.

Additionally, before the constitutional amendment, Virginia's asset forfeiture scheme was rarely used in some localities due to local court practices of requiring a criminal conviction before the courts would entertain forfeiture proceedings.<sup>56</sup> The amended for-

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50. *Id.*; 1991 Va. Acts. 995-96; VA. CODE ANN. § 19.2-386.14 (Repl. Vol. 2015).

51. VA. STATE CRIME COMM'N, ASSET SEIZURE AND FORFEITURES, H. 60-7, Reg. Sess., at 2, 16-17 (Va. 1989).

52. *Id.* at 13-14.

53. Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 107 (1998).

54. Robert F. Howe, *Law Imperils Va. Drug Effort; Assets Seized in Investigations Must Now Go to Literary Fund*, WASH. POST, Oct. 3, 1989, at B3.

55. *Id.*

56. VA. STATE CRIME COMM'N, ASSET SEIZURE AND FORFEITURES, *supra* note 51, at 6. Although a criminal conviction was not required, as a matter of law, the Virginia State Crime Commission found that as a practical matter, courts in many jurisdictions required

feiture provisions ended this bifurcated system and clearly prescribed that civil asset forfeiture trials are independent of any criminal proceeding and do not require a criminal conviction.<sup>57</sup> The Virginia Association of Chiefs of Police even opposed the state law reforms enacted in 1990 and 1991 because, the chiefs argued, the state asset forfeiture program would not work as fast as the federal system.<sup>58</sup>

In conjunction with the constitutional amendment, the General Assembly added Chapter 22.1 of Title 19.2 (Va. Code Ann. §§ 19.2-386.1 *et seq.*) to provide specifically for the forfeiture of assets related to drug cases. The “comprehensive drug forfeiture” statute was adopted on the recommendation of the Virginia State Crime Commission to clarify forfeiture procedures specifically for drug-related forfeitures.<sup>59</sup> It codified that “forfeiture is a civil proceeding independent of any criminal action” and explicitly set the standard of proof as “a preponderance of the evidence.”<sup>60</sup> The change in the allocation of proceeds from the Literary Fund to law enforcement agencies, as well as the corresponding procedural changes, drastically altered the landscape of civil asset forfeiture in Virginia and ushered in an era of aggressive forfeiture actions and the corresponding criticism illustrated in Part III.<sup>61</sup>

### C. 2012 Reforms

In addition to the provisions of Chapter 22.1 and the Alcohol Beverages Control Act, the Virginia Code also included forfeiture procedures for other crimes in Chapter 22.0 of Title 19.2. The scattered forfeiture rules created several distinct sets of procedures for civil asset forfeiture, depending on the underlying criminal activity. In 2012, the General Assembly consolidated the procedures outlined in Title 19.2, repealed Chapter 22.0, and adopted the drug-related forfeiture procedures of Chapter 22.1 as

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a criminal conviction in order for the state to forfeit assets. *Id.*

57. VA. CODE ANN. § 19.2-386.10(B) (Repl. Vol. 2015).

58. See Leslie Postal, *Police Oppose Proposal: Many Dislike Plan to Return Drug Assets*, DAILY PRESS (Jan. 24, 1991), [http://articles.dailypress.com/1991-01-24/news/9101250257\\_1\\_drug-raids-million-in-drug-assets-chiefs-association](http://articles.dailypress.com/1991-01-24/news/9101250257_1_drug-raids-million-in-drug-assets-chiefs-association) (explaining police chiefs' plans to circumvent state law by using federal agents in raids as a result of their distaste for the unnecessary delays created by the proposed legislation).

59. VA. STATE CRIME COMM'N, ASSET SEIZURE AND FORFEITURES, *supra* note 51, at 2.

60. *Id.*

61. See *infra* Part III.

the default procedures for all forfeitures not otherwise specifically provided by law.<sup>62</sup> This newly renamed “Enforcement of Forfeitures” Chapter<sup>63</sup> was trumpeted by Delegate Jackson Miller as a significant reform that “removes confusion for Virginia’s law enforcement officials, Commonwealth’s attorneys, judges, defense attorneys, and citizens and ensures that criminal activity does not pay for its perpetrators.”<sup>64</sup> Unfortunately, the reforms did little to protect property rights or curb the potential abuse of power permitted by, if not embodied in, the civil asset forfeiture scheme.

#### D. *The Mechanics of Forfeiture: Chapter 22.1*

The statutory procedures in Chapter 22.1 provide a fast and efficient means for the Commonwealth to confiscate and keep property with limited protections to property owners. The Commonwealth must prove the connection between the asset and the offense only by a preponderance of the evidence.<sup>65</sup> Once a court makes that finding, the burden shifts to the claimant of the property to prove that the claimant’s interest in the property is exempt from forfeiture.<sup>66</sup>

After each seizure, the law enforcement agency must notify the Commonwealth’s Attorney in writing.<sup>67</sup> The Commonwealth’s Attorney has twenty-one days to file a notice of seizure with the clerk of the court, which, *inter alia*, specifically describes the property seized and identifies all owners and lienholders.<sup>68</sup> The

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62. 2012 Va. Acts 473, 476 (codified as amended at VA. CODE ANN. § 19.2-386.1 (Repl. Vol. 2015)).

63. *Id.*

64. Dan Telvock, *Gov. McDonnell Signs Public Safety Bills in Stafford*, PATCH.COM (July 18, 2012), <http://patch.com/virginia/fredericksburg/gov-mcdonnell-signs-public-safety-bills-in-stafford>.

65. VA. CODE ANN. § 19.2-386.10(A) (Repl. Vol. 2015). The statutory provisions for whether property is subject to forfeiture depend on the nature of the property and of the criminal act and are still codified in provisions scattered throughout the criminal code and in Chapter 22.2. *Id.* § 19.2-386.1 (Repl. Vol. 2015).

66. *Id.* § 19.2-386.10 (A) (Repl. Vol. 2015). The code provides several exceptions: an owner or lienholder’s interest may not be forfeited if the court finds that the owner or lienholder “did not know and had no reason to know of the conduct giving rise to the forfeiture,” or if the owner or lienholder “was a bona fide purchaser for value without notice.” *Id.* § 19.2-386.8 (Repl. Vol. 2015). Additionally, if “the conduct giving rise to forfeiture occurred without” the owner or lienholder’s expressed or implied consent or connivance, then the property may not be forfeited. *Id.*

67. *Id.* § 19.2-386.3(A) (Repl. Vol. 2015). The timeframe for notifying the Commonwealth is not specified and merely requires that it take place “forthwith.” *Id.*

68. *Id.*

clerk then mails notice of the seizure to the last known address of all identified owners and lienholders.<sup>69</sup> Within ninety days of the written notice by law enforcement (and within three years of the “actual discovery by the Commonwealth of the last act giving rise to the forfeiture”<sup>70</sup>) the Commonwealth’s attorney must file an information, which commences the judicial action against the seized property.<sup>71</sup> The information describes the property, names the known owners or lienholders of the property, and states the grounds for the forfeiture.<sup>72</sup> It also asks that all persons concerned or interested be notified to appear and show cause why the property should not be forfeited.<sup>73</sup>

Both the notice of seizure and the information are designed to “protect[ ] the property rights of the property owners or lienholders who have an interest in the seized property.”<sup>74</sup> Still, failure by the Commonwealth to file a notice of seizure with the clerk of the court within twenty-one days does not deprive the Circuit Court of jurisdiction.<sup>75</sup> If the Commonwealth fails to file an information within ninety days, however, the property is released to the owner or the lien holder.<sup>76</sup> This ninety-day period allows for the property to “be seized and secured for criminal investigative purposes.”<sup>77</sup>

After the Commonwealth files an information, the clerk of the court “shall forthwith mail by first-class mail notice of seizure for forfeiture to the last known address of all identified owners and lien holders.”<sup>78</sup> All identified owners and lien holders are served with a copy of the information and notice to appear, in accordance with the same service procedures generally used for all civil actions.<sup>79</sup> Virginia’s civil process procedures require service on the

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69. *Id.*

70. *Id.* § 19.2-386.1 (Repl. Vol. 2015).

71. *Id.* § 19.2-386.3 (Repl. Vol. 2015).

72. *Id.* § 19.2-386.1 (Repl. Vol. 2015).

73. *Id.*

74. *Commonwealth v. Wilks*, 530 S.E.2d 665, 667 (2000).

75. *Id.*

76. VA. CODE ANN. § 19.2-386.3(A) (Repl. Vol. 2015). Additionally, if the Commonwealth fails to file within ninety days, courts lose jurisdiction over the forfeiture. *Commonwealth v. Brunson*, 448 S.E.2d 393, 397 (1994).

77. *Mallory v. City of Richmond*, No. CH-05-688, 2005 WL 2548494, at \*3 (Va. Cir. Ct. Sept. 23, 2005).

78. VA. CODE ANN. § 19.2-386.3(A) (Repl. Vol. 2015).

79. *Id.* § 19.2-386.3(B) (Repl. Vol. 2015); *Id.* § 8.01-296 (Repl. Vol. 2015).

individual or substituted service if the person is not found at his usual place of abode.<sup>80</sup>

Within thirty days of receiving service of the notice, the property owner must file an answer to demonstrate why the property should not be forfeited.<sup>81</sup> The answer should, *inter alia*, clearly set forth the owner's right of ownership and "the reason, cause, exception or defense he may have against the forfeiture of the property."<sup>82</sup> An owner who does not file an answer will be found in default.<sup>83</sup>

After property is seized, the Commonwealth may return the property to the owner if the attorney for the Commonwealth believes that the property is exempt from forfeiture. But even this provision, which seems designed to protect the interest of property owners, requires that the property owner first pay "costs incident to the custody of the seized property."<sup>84</sup>

### E. *Crimes Punishable by Forfeiture*

Although Virginia's current asset forfeiture scheme was first adopted for the seizure of assets related to narcotics possession and distribution, the law has been expanded to allow for the forfeiture of assets related to numerous other criminal acts. For example, moneys and property that are used in "substantial connection with an act of terrorism," including interest or profits derived from such invests, are subject to forfeiture.<sup>85</sup> The computers used and profits derived from violations of the Virginia Computer

80. *Id.* § 8.01-296(2) (Repl. Vol. 2015). As in most other states, substitute service can be achieved by delivering the documentation with another family member who is sixteen years or older and lives at the house, or by posting a copy of the process at the front door and mailing copies of the documents at least ten days before judgment by default may be entered. *Id.* If neither of these substitute service options can be effected, then service can be performed by order of publication. *Id.* § 8.01-296(3) (Repl. Vol. 2015).

81. *Id.* § 19.2-386.3 (Repl. Vol. 2015); *see also id.* § 19.2-386.1 (Repl. Vol. 2015). (The information shall "ask that all persons concerned or interested be notified to appear and show cause why such property should not be forfeited.")

82. *Id.* § 19.2-386.9; *see also id.* § 19.2-386.3 (Repl. Vol. 2015) (using similar language to describe what the answer should state).

83. *Id.* § 19.2-386.10 (Repl. Vol. 2015). A property owner can obtain possession of the property while the matter is pending before the court by posting a bond. VA. CODE ANN. § 19.2-386.6 (Repl. Vol. 2015). If the owner fails to file an answer and is found in default, the code provides an owner one last chance to prove one of the exceptions to the Department of Criminal Justice Services. *Id.* § 19.2-386.10 (Repl. Vol. 2015).

84. *Id.* § 19.2-386.5 (Repl. Vol. 2015).

85. *Id.* § 19.2-386.15 (Repl. Vol. 2015).

Crimes Act, including embezzlement using a computer,<sup>86</sup> sending spam emails,<sup>87</sup> and using a computer to gather identifying information by trickery or deception,<sup>88</sup> are subject to forfeiture.<sup>89</sup> Virginia's forfeiture laws are also used to combat money laundering,<sup>90</sup> illegal gambling,<sup>91</sup> and bribery of government officials,<sup>92</sup> by making the profits and moneys obtained from the illegal acts subject to forfeiture.

Vehicles that are knowingly used for the transpiration of stolen goods valued at over \$200 or any property stolen as a result of robbery (regardless of the value) are subject to forfeiture.<sup>93</sup> Motor vehicles are also subject to forfeiture if the vehicle is used by the owner or with his knowledge during the commission or attempted commission of abduction of a minor or prostitution of a minor.<sup>94</sup> Similarly, vehicles are subject to forfeiture if used "during the commission of, or in an attempt to commit a second or subsequent offense" of certain sex crimes.<sup>95</sup> Finally, vehicles are subject to forfeiture for felony violations of the state's driving while intoxicated law, unless an immediate family member of the defendant can prove that a significant hardship to the family will result if the vehicle is confiscated.<sup>96</sup>

In 2014, the General Assembly again expanded the number of crimes that can result in asset forfeiture. Under this most recent law, police may seize the person or real property involved in the crime of attempting to solicit a prostitute.<sup>97</sup> Thus, if a law enforcement agency were to set up an operation in which they posted a fake online advertisement for prostitution services and a person answered that ad from his or her own house, police could seize the house and keep it upon obtaining a conviction.

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86. *See id.* § 18.2-152.3 (2) (Supp. 2015).

87. *See id.* § 18.2-152.3:1(A)(1) (Supp. 2015).

88. *See id.* § 18.2-152.5:1(A) (Supp. 2015).

89. *See id.* § 19.2-386.17 (Repl. Vol. 2015).

90. *See id.* § 19.2-386.19 (Repl. Vol. 2015).

91. *See id.* § 19.2-386.30 (Repl. Vol. 2015).

92. *See id.* § 2.2-3124 (Supp. 2015).

93. *See id.* § 19.2-386.16(A) (Repl. Vol. 2015). The vehicle forfeiture procedure that was previously contained in the Alcoholic Beverages Act, VA. CODE ANN. § 4.1-340 (Repl. Vol. 1993), was repealed in 2012. 2012 Va. Acts 1609, 1614, 1618.

94. *See* VA. CODE ANN. § 19.2-386.16(B) (Repl. Vol. 2015).

95. *Id.* § 19.2-386.16(A) (Repl. Vol. 2015).

96. *See id.* § 19.2-386.34 (Repl. Vol. 2015).

97. *See id.* § 19.2-386.35 (Repl. Vol. 2015).

The revenue generated from these non-drug-related forfeitures goes to the Commonwealth's Literary Fund and does not revert back to the localities.<sup>98</sup> A 2015 Virginia State Crime Commission report noted that data collection for non-drug related forfeitures "is not captured in a reliable, transparent manner."<sup>99</sup> In a statewide survey, Crime Commission staff were unable to determine how much cash had been forfeited to the state this way and for which crimes, though fifteen law enforcement agencies reported non-drug related forfeiture amounts in fiscal year 2014 that totaled \$159,972.<sup>100</sup>

### III. CRITICAL ANALYSIS OF VIRGINIA'S DRUG-RELATED ASSET FORFEITURE SCHEME

Much like the deodand of English common law, Virginia's drug-related civil asset forfeiture scheme can fairly be viewed as a means to fill the coffers of struggling localities rather than a tool to combat the scourge of predatory drug dealers. By allowing asset forfeitures from drug cases to bypass the Literary Fund and instead to fund state or local law enforcement agencies,<sup>101</sup> the General Assembly created a profit incentive for law enforcement agencies to prioritize seizure of drug-related assets over other policing initiatives. Limited safeguards for property owners stack the deck for the government to keep seized property and make it difficult for property owners to fight to keep their property. The vast sums of money and assets seized by law enforcement in Virginia encourage corruption or prosecutorial abuse.

#### A. *A System Ripe for Abuse*

According to a comprehensive study published by the Institute for Justice in 2010 that analyzed the civil asset forfeiture laws of all fifty states, Virginia's forfeiture laws (along with Georgia, Michigan, Texas, and West Virginia) received the worst ranking for potential forfeiture abuse and poor property owner protec-

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98. VA. CONST. art. VIII, § 8; see VA. CODE ANN. § 19.2-386.14 (Repl. Vol. 2015).

99. VA. STATE CRIME COMM'N, ASSET FORFEITURE (SB 684/HB 1287) 86 (Oct. 27, 2015), [http://vscc.virginia.gov/Asset%20Forfeiture\\_FINAL-1.pdf](http://vscc.virginia.gov/Asset%20Forfeiture_FINAL-1.pdf).

100. See *id.* at 84.

101. VA. CONST. art. VIII, § 8; see VA. CODE ANN. § 19.2-386.14 (Repl. Vol. 2015).



tion.<sup>102</sup> The report specifically cited the low burden of proof required of the government for the forfeiture of property and the burden on owners to establish their own innocence.<sup>103</sup> By holding the proceedings in civil court rather than criminal court, Virginia has created a system that allows for the forfeiture of property under a significantly lower standard of proof than is required for a criminal conviction. Whereas a criminal conviction requires proof beyond a reasonable doubt,<sup>104</sup> the Commonwealth must merely demonstrate by a preponderance of the evidence that the property is related to a crime and subject to forfeiture.<sup>105</sup>

Echoing the Institute for Justice report, a Richmond Times-Dispatch editorial noted, “the system remains ripe for abuse.”<sup>106</sup> At times, the moneys have been used for inappropriate and potentially unconstitutional activities.<sup>107</sup> In addition, limited oversight has also incentivized law enforcement agencies to engage in criminal embezzlement.

In Loudoun County, Sheriff Steve Simpson used proceeds from asset forfeiture for what appeared to be self-promoting causes rather than “promoting law enforcement,” as required by the Virginia Constitution.<sup>108</sup> He used proceeds to rebrand a privately developed computer software program (the “ComputerCOP” program) with his picture and a personal message “from the sheriff.”<sup>109</sup> The Sheriff’s Office then distributed the ComputerCOP program to families in Loudoun County to allow parents to moni-

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102. WILLIAMS ET AL., *supra* note 10, at 96. A subsequent assessment by the Institute for Justice rendered a similarly dire assessment: Virginia received another D- grade, while only two states (Mass. and N.D.) received an F. DICK M. CARPENTER ET AL., INST. FOR JUST., *POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE* 22 (2d ed. Nov. 2015).

103. WILLIAMS ET AL., *supra* note 10, at 96.

104. See *Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993); *Green v. Young*, 571 S.E.2d 135, 138 (Va. 2002); see also VA. CODE ANN. § 19.2-258.1 (Repl. Vol. 2015) (requiring proof beyond a reasonable doubt for traffic infractions).

105. VA. CODE ANN. § 19.2-386.10 (Repl. Vol. 2015).

106. Editorial, *Law Enforcement: Inexcusable*, *supra* note 1.

107. See Crystal Owens, *Law Enforcement Distributed Software Puts Personal Data at Risk, Report Alleges*, LOUDOUN TIMES-MIRROR (Oct. 3, 2014), [http://www.loudountimes.com/news/article/law-enforcement\\_distributed\\_software\\_puts\\_personaldataat\\_riskreport\\_alle898](http://www.loudountimes.com/news/article/law-enforcement_distributed_software_puts_personaldataat_riskreport_alle898).

108. *Id.*; see VA. CONST. art. VIII, § 8.

109. *Loudoun Co. Parents Have New Tool in Internet Safety*, NBC WASHINGTON (Oct. 19, 2011), [www.nbcwashington.com/news/local/Loudoun-Co-Parents-Have-New-Tool-in-Internet-Safety-132205833.html](http://www.nbcwashington.com/news/local/Loudoun-Co-Parents-Have-New-Tool-in-Internet-Safety-132205833.html).

tor and block their children's internet activity.<sup>110</sup> In a nationwide study, the Electronic Frontier Foundation concluded that "ComputerCOP is actually just spyware" with significant security issues that leave everyone using the program exposed.<sup>111</sup>

In 2010, the Department of Criminal Justice Services reprimanded the Richmond Police Department for spending several thousand dollars in forfeiture funds to buy birthday gifts for employees.<sup>112</sup> In 2009, the city manager of Norfolk publicly criticized Police Chief Bruce Marquis for spending \$3,000 in forfeiture funds to buy coffee mugs as gifts for attendees of a conference for law enforcement executives.<sup>113</sup>

There is also limited accountability in some jurisdictions over the money provided to the local law enforcement agencies. An investigation by the Virginia State Police into the embezzlement and misappropriation of forfeiture funds by Halifax County Sheriff Stanley Noblin revealed that the Sheriff appeared to have broad authority to access the funds with little oversight, and no outside authorization required.<sup>114</sup> While the Criminal Justice Board recommends that localities require a prosecutor or partnering law enforcement agency to co-authorize withdrawals of cash used in drug busts and other investigations, Halifax County did not require such co-authorization.<sup>115</sup> According to local news accounts, from May 2009 to March 2011, Sheriff Noblin withdrew about \$48,500 from the asset forfeiture funds for undercover drug buys, informant tips, and testimony.<sup>116</sup> These cash withdrawals, among other allegations, prompted the Virginia State Police to investigate alleged embezzlement charges against the sheriff.<sup>117</sup>

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110. Owens, *supra* note 107.

111. Dave Maass, *ComputerCOP: The Dubious 'Internet Safety Software' That Hundreds of Police Agencies Have Distributed to Families*, ELEC. FRONTIER FOUND. (Oct. 1, 2014), <https://www.eff.org/deeplinks/2014/09/computercop-dangerous-internet-safety-software-hundreds-police-agencies>.

112. Editorial, *Law Enforcement: Inexcusable*, *supra* note 1.

113. Harry Minium Jr., *Norfolk Police Chief's Fund-Raising Is Investigated*, VIRGINIAN-PILOT (Aug. 14, 2009), [http://pilotonline.com/news/norfolk-police-chief-s-fund-raising-is-investigated/article\\_a274d4db-c5ac-5462-bd68-81b74ee4117e.html](http://pilotonline.com/news/norfolk-police-chief-s-fund-raising-is-investigated/article_a274d4db-c5ac-5462-bd68-81b74ee4117e.html).

114. Tom McLaughlin, *Cash on Hand: Not Just Noblin*, SOVANOW.COM (Nov. 3, 2011), [http://www.sovanow.com/index.php?news/article/cash\\_on\\_hand\\_not\\_just\\_noblin/](http://www.sovanow.com/index.php?news/article/cash_on_hand_not_just_noblin/); Doug Ford, *Noblin Pleads Guilty*, UNION STAR (July 23, 2013), [http://www.theunionstar.com/article\\_88ac86ca-f3a6-11e2-aca5-0019bb2963f4.html](http://www.theunionstar.com/article_88ac86ca-f3a6-11e2-aca5-0019bb2963f4.html).

115. McLaughlin, *supra* note 114.

116. *Id.*

117. Tom McLaughlin, *State Police Search Halifax County Sheriff's Office, Vehicle*,

According to an affidavit filed by the Virginia State Police investigator, there were no records in ledgers or bank statements to account for the use of the cash withdrawals, and during the same period Sheriff Noblin deposited thousands of dollars in cash into bank accounts under his exclusive control.<sup>118</sup>

Former Middlesex County Sheriff Guy Abbott also misappropriated money from the sheriff's office's asset forfeiture fund from 2003 to 2008.<sup>119</sup> In August 2012, he was found guilty of using asset forfeiture funds to bribe two of his subordinates. During Abbott's trial, the judge struck several counts of misusing forfeiture funds to procure two boats and hand out "Christmas bonuses" to twenty-one employees, on the grounds that the money spent "could be viewed as related to law enforcement purposes."<sup>120</sup>

### B. *The Profit Incentive*

Returning money to localities also creates an incentive for elected Commonwealth's Attorneys to turn asset forfeiture into a political platform, and reinforces the perception that it is used primarily as a means to fund cash-strapped law enforcement agencies.<sup>121</sup> Arthur Goff, the Rappahannock County Commonwealth's Attorney, defends the use of drug-related asset forfeitures as "important sources of funding for the policing of drug dealing, and help to relieve the burden on taxpayers."<sup>122</sup> Likewise,

SOVANOW.COM (Dec. 8, 2011), [http://www.sovanow.com/index.php?/news/article/state\\_police\\_search\\_sheriff\\_noblins\\_office\\_vehicle/](http://www.sovanow.com/index.php?/news/article/state_police_search_sheriff_noblins_office_vehicle/).

118. *Id.*

119. Matt Sabo, *Former Middlesex Sheriff Guilty on Two Bribery Counts*, DAILY PRESS (Aug. 15, 2012), [http://articles.dailypress.com/2012-08-15/news/dp-nws-middlesex-abbott-trial-day5-wrap-0816-20120815\\_1\\_sheriff-guy-abbott-judge-paul-f-sheridan-bribery-conviction](http://articles.dailypress.com/2012-08-15/news/dp-nws-middlesex-abbott-trial-day5-wrap-0816-20120815_1_sheriff-guy-abbott-judge-paul-f-sheridan-bribery-conviction).

120. Matt Sabo, *Judge Throws out 10 Felony Counts Against Former Middlesex Sheriff*, DAILY PRESS (Aug. 14, 2012), [http://articles.dailypress.com/2012-08-14/news/dp-nws-middlesex-abbott-trial-day4-wrap-0815-20120814\\_1\\_sheriff-guy-abbott-middlesex-sheriff-judge-paul-f-sheridan](http://articles.dailypress.com/2012-08-14/news/dp-nws-middlesex-abbott-trial-day4-wrap-0815-20120814_1_sheriff-guy-abbott-middlesex-sheriff-judge-paul-f-sheridan).

121. See, e.g., Debra McCown, *Nicole Price Seeking GOP Nomination for Washington County Commonwealth's Attorney*, BRISTOL HERALD COURIER (May 23, 2011), [http://www.tricities.com/news/article\\_a66d8ced-7377-548f-a0cf-3979ac50a9b7.html](http://www.tricities.com/news/article_a66d8ced-7377-548f-a0cf-3979ac50a9b7.html) (noting that if elected, Price "would take advantage of alternative revenue sources, such as forfeiture assets"); Vince Donaghue for Essex County Commonwealth's Attorney, <http://www.vinceforca.com/issues.htm> (pledging to use that office to "aggressively pursue asset forfeitures for Essex County") (last visited March 7, 2016).

122. Arthur L. Goff, *Letter: Commonwealth's Attorney Clarifies Asset Forfeiture*, RAPPNEWS.COM (Oct. 8, 2015), <http://www.rappnews.com/2015/10/08/letter-commonwealths-attorney-clarifies-asset-forfeiture/145090/>.

Amanda McDonald Wiseley, a candidate for Shenandoah County Commonwealth's Attorney, proposed pursuing asset forfeitures more aggressively to "offset some costs to the taxpayers."<sup>123</sup>

The revenue-raising incentives of the current drug-related asset forfeiture scheme also create a conflict of interest between revenue generation for police departments and strategic narcotics policing, resulting in distorted prioritization by some law enforcement agencies and individual officers. Given the potential windfall, police administrators can be enticed easily to prioritize targeting revenue-bearing criminal activity.

This is not merely a theoretical hypothesis made by asset forfeiture critics, but has been substantiated with both ethnographic studies of police departments engaged in asset forfeiture and by economic analyses of crime data for law enforcement agencies that retain profits from seized assets and those that do not. In a 1994 study published in *Justice Quarterly*, researchers documented police officers targeting lesser value, first-time drug dealers in order to seize vehicles, rather than apprehend asset-poor drug dealers slinging significantly larger quantities of narcotics.<sup>124</sup> A study published by economists from the American Enterprise Institute and Florida State University raised similar concerns and revealed that those agencies that retain drug-related assets disproportionately allocate resources to narcotics policing.<sup>125</sup> Controlling for drug usage, the study found that "[l]egislation permitting police to keep a portion of seized assets raises drug arrests as a portion of total arrests by about 20 percent and drug arrest rates by about 18 percent."<sup>126</sup>

The purpose of asset forfeiture as a strategic drug-supply reduction tool and crime deterrent has been altered by the revenue-raising goal. Asset forfeiture is no longer viewed primarily as a strategic tool to combat narcotics distribution. Instead, "the moti-

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123. Preston Knight & Sally Voth, *Sparks Fly in Final Week of Shenandoah County Prosecutor's Race*, NORTHERN VIRGINIA DAILY (Nov. 3, 2011), <http://www.nvdaily.com/news/2011/11/sparks-fly-in-final-week-of-shenandoah-county-prosecutors-race/>; Sally Voth, *Commonwealth's Attorney Candidates Face Off*, NORTHERN VIRGINIA DAILY (July 25, 2011), <http://www.nvdaily.com/news/2011/07/commonwealths-attorney-candidates-face-of/>.

124. See J. Mitchell Miller & Lance H. Selva, *Drug Enforcement's Double-Edged Sword: An Assessment of Asset Forfeiture Programs*, 11 JUST. Q. 313, 325 (1994).

125. Brent D. Mast et al., *Entrepreneurial Police and Drug Enforcement Policy*, 104 PUB. CHOICE 285, 301 (2000).

126. *Id.* at 301-03.

vation for law enforcement agencies to pursue forfeiture has become that it serves the institutional interests in self-perpetuation, with the possible collateral benefit of helping to fight drug crime.”<sup>127</sup>

Over the last decade, law enforcement agencies in Virginia have received \$32,561,236 in drug-related asset forfeitures through the state’s asset forfeiture program.<sup>128</sup> As illustrated by Table 1, all parts of the state’s asset forfeiture program have increased significantly from 2006 to 2015. The vast majority of the seized assets are motor vehicles and currency, accounting for 89% of all items seized between fiscal years 2010 and 2015.<sup>129</sup> Certain localities were able to supplement their budgets with windfall one-day hauls of hundreds of thousands of dollars in cash. For example, the Henrico Police Department seized about \$725,000 of cash in one day in March 2009.<sup>130</sup> The City of Newport News similarly added to the Police Department and Sheriff’s Department’s budgets in May 2011 with two hauls equaling more than half a million dollars.<sup>131</sup>

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127. William P. Nelson, *Should the Ranch Go Free Because the Constable Blundered? Gaining Compliance with Search and Seizure Standards in the Age of Asset Forfeitures*, 80 CAL. L. REV. 1309, 1327 (1992).

128. STATE CRIME COMM’N, ASSET FORFEITURE (SB 684/HB 1287) 75 (Oct. 27, 2015), [http://vscc.virginia.gov/Asset%20Forfeiture\\_FINAL-1.pdf](http://vscc.virginia.gov/Asset%20Forfeiture_FINAL-1.pdf). These figures do not include assets received through the federal government’s equitable sharing program, which total more than \$107 million for the 2004–14 period. *Id.* at 71.

129. *Id.* at 75.

130. Dep’t of Crim. Just. Serv. Property Nos. 09-FS11205-01 and 09-FS11206-01 (data compiled by ACLU of Virginia through Freedom of Information Act requests).

131. Dep’t of Crim. Just. Serv. Property Nos. 11-FS17801-01 and 12-FS31202-05 (data compiled by ACLU of Virginia through Freedom of Information Act requests).

*Table 1: Value of Asset Forfeitures in Virginia*<sup>132</sup>

Fiscal Year	Total Items Seized	Value of Items Seized	Total Disbursements
2006	189	\$639,152	\$110,899
2007	219	\$991,263	\$235,460
2008	365	\$2,020,786	\$266,128
2009	582	\$2,639,639	\$780,855
2010	2,464	\$10,134,559	\$4,957,627
2011	2,346	\$10,258,608	\$5,350,350
2012	2,457	\$11,576,315	\$5,820,171
2013	2,369	\$11,546,672	\$5,253,183
2014	2,412	\$10,624,949	\$4,185,594
2015	2,123	\$10,250,119	\$5,600,969
TOTAL	15,526	\$70,682,062	\$32,561,236

Virginia's drug-related forfeiture laws have shifted from what was proposed as a benign revenue-raising mechanism to help fund local law enforcement agencies into a potentially corruption-inducing scheme used to "harvest" funds. The need to fund law enforcement should not override corruption concerns and due process failures. As the *Richmond Times-Dispatch* noted, "[i]f police departments around the state lack sufficient resources, then their city councils and boards of supervisors are falling down on the job. Local governments should raise the funds needed to pay for local services, including law enforcement—the most important local service of all."<sup>133</sup>

132. VA. STATE CRIME COMM'N, ASSET FORFEITURE (SB 684/HB 1287) 75 (Oct. 27, 2015), [http://vscc.virginia.gov/Asset%20Forfeiture\\_FINAL-1.pdf](http://vscc.virginia.gov/Asset%20Forfeiture_FINAL-1.pdf). Data for FY 2015 was collected through Sept. 8, 2015. *Id.*

133. Editorial, *Law Enforcement: Inexcusable*, *supra* note 1.

#### IV. PROPOSED REFORMS

Much of the criticism levied against Virginia's civil asset forfeiture scheme, specifically the scheme for forfeiture of drug-related assets, can be negated by implementing several simple reforms. Four reforms are essential to improving Virginia's current scheme: (1) the requirement of a criminal conviction for all asset forfeitures; (2) the elimination of the profit incentive for law enforcement agencies; (3) limits on the ability of law enforcement agencies to forum shop in federal court; and (4) increased accountability through improved reporting requirements for localities that collect forfeitures. In the alternative, if Virginia cannot summon the will to make these substantial reforms, it must at a bare minimum increase the burden of proof in civil asset forfeiture actions.

##### A. *Require a Criminal Conviction for All Forfeitures*

The first reform is to tie the forfeiture of assets to criminal prosecution. Allowing for forfeiture in civil court without any corresponding criminal charges, let alone conviction, is anathema to fundamental notions of justice. Virginia should require the stay of all asset forfeiture proceedings until a finding of guilt is entered on the alleged offense that prompted the seizure. The Commonwealth should first have to secure a criminal conviction, and then use the conviction as a basis for criminal forfeiture proceedings.

Advocates for civil asset forfeiture claim that asset forfeiture laws are needed to dismantle drug rings by not only targeting the criminal actors but also the criminal enterprise. This argument fails, however, because the goal can still be achieved by tying the asset forfeiture to the criminal prosecution. Criminal forfeiture, not civil forfeiture, should become the norm.

As Congress recognized when it reformed federal asset forfeiture laws in 2000,<sup>134</sup> removing assets without criminal prosecutions will not cease drug activity.<sup>135</sup> Congressman Henry Hyde

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134. See Civil Asset Forfeiture Reform Act of 2000 (CAFRA), Pub. L. No. 106-185, 114 Stat. 202 (2000) (codified as amended in 20 U.S.C. § 981 (2012)).

135. See, e.g., Eric Blumenson & Eva Nilsson, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 37 (1998) (noting the "extraordinary failure" of the war on drugs despite "record numbers of drug seizures, asset forfeitures, and prosecutions."); Alison R. Solomon, *Drugs and Money: How Successful Is the Seizure and Forfeiture*

noted that “[i]n more than 80 percent of asset forfeiture cases the property owner is not even charged with a crime, yet the government officials can and usually do keep the seized property.”<sup>136</sup> While similar data is not available in Virginia, the current scheme allows for comparable abuse of forfeiture laws. In Richmond, civil forfeiture cases are generally brought in conjunction with criminal charges.<sup>137</sup> Such practices, however, are at the discretion of each Commonwealth’s Attorney. Virginia should follow the lead of other states<sup>138</sup> and require that a defendant be convicted of an underlying or related criminal action in order for property to be subject to forfeiture.

The nebulous realm of civil asset forfeiture and the legal fiction created to justify its use have resulted in a twisted logic to remove procedural safeguards that are fundamental to the American criminal justice system. Although the stated targets of asset forfeiture are “criminals and their associates,”<sup>139</sup> the Virginia courts have noted that,

Forfeiture is, however, not a criminal proceeding but a “civil” action against “res” unlawfully employed by its owner or other person. Although related to criminal activity, forfeiture is neither “penalty” nor “punishment” for an offense and remains entirely separate and distinct from a prosecution of its owner or other individual.<sup>140</sup>

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*ture Program at Raising Revenue and Distributing Proceeds?*, 42 EMORY L.J. 1149, 1188–89 (1993) (noting that “[t]he government does not appear to be any closer to winning the drug war with forfeiture than it was without it.”). As the first article, in particular, suggests, there is good reason to doubt that criminal prosecutions of drug offenses are a useful enterprise at all. The efficacy of the American war on drugs is beyond the scope of this article.

136. HYDE, *supra* note 18, at 6.

137. See Jim Nolan, *New Drug-War Tack in Richmond*, RICH. TIMES-DISPATCH (June 11, 2007), [http://www.richmond.com/news/article\\_4654e3f5-21d3-5bec-ac31-fe48b6ac33b4.html](http://www.richmond.com/news/article_4654e3f5-21d3-5bec-ac31-fe48b6ac33b4.html).

138. See, e.g., N.M. STAT. ANN. § 31-27-4 (LexisNexis 2016) (providing that “[a] person’s property is subject to forfeiture if . . . the person is convicted by a criminal court of the offense”); 2015 MONT. LAWS 421 (providing that “a court may not order forfeiture of real or personal property of any kind . . . unless: (a) the owner of the property has been convicted of a criminal offense”); CAL. HEALTH & SAFETY CODE § 11488.4(i)(3) (Deering 2016) (requiring that as a condition precedent to a forfeiture action, the subject of the forfeiture “be convicted in an underlying or related criminal action of an offense . . . [that] occurred within five years of the seizure” or within five years of the notice to seek forfeiture).

139. U.S. DEP’T OF JUST., OVERVIEW OF ASSET FORFEITURE PROGRAM, <http://www.justice.gov/jmd/afp/> (last visited Mar. 7, 2016).

140. *Jenkins v. Commonwealth*, 411 S.E.2d 841, 842 (Va. App. 1991) (internal citations omitted).



The strained reasoning required to create the legal fiction of in rem jurisdiction for asset forfeiture makes a mockery of forfeiture jurisprudence. The Virginia legislature and the courts have created an absurd reality, sanctioning the confiscation of property related to criminal conduct yet denying that the forfeiture is punishment for crimes committed. Treating forfeiture as a pseudo non-punishment opens the door to disregard of due process concerns and property rights. This door can easily be shut, and property rights reaffirmed, by linking asset forfeiture to the criminal justice system.

In 2015, legislation was proposed to require a criminal conviction for asset forfeitures in Virginia.<sup>141</sup> House Bill 1287, introduced by Delegate Mark Cole, would have required a stay of all forfeiture proceedings “until conviction” of the offense authorizing the forfeiture and “the exhaustion of all appeals.”<sup>142</sup> The bill passed the House 92–6,<sup>143</sup> but died in the Senate Finance Committee.<sup>144</sup> Delegate Cole reintroduced similar legislation for the 2016 session.<sup>145</sup> House Bill 48, which would have required a stay of forfeiture proceedings until the owner of the property is found guilty,<sup>146</sup> was defeated on a 50–47 vote. Senator Chap Petersen filed similar legislation in the Senate,<sup>147</sup> but the Senate Finance Committee did not approve it. Senator Petersen later brought the issue to a floor vote by amending another asset forfeiture bill, but the measure failed, 24–16.<sup>148</sup>

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141. H.B. 1287, Va. Gen. Assemb. (Reg. Sess. 2015); S.B. 684, Va. Gen. Assemb. (Reg. Sess. 2015). The Senate bill was withdrawn at the request of the patron.

142. H.B. 1287, Va. Gen. Assemb. (Reg. Sess. 2015).

143. Morgan White, *Asset Forfeiture Reforms Pass the House*, FREE LANCE-STAR (Feb. 6, 2015), [http://www.fredericksburg.com/news/local/asset-forfeiture-reforms-pass-the-house/article\\_b9a49cec-b595-5271-85f9-1444e3fba29e.html](http://www.fredericksburg.com/news/local/asset-forfeiture-reforms-pass-the-house/article_b9a49cec-b595-5271-85f9-1444e3fba29e.html).

144. Patrick Wilson, *Senate Committee Kills Police Asset Forfeiture Bill*, VIRGINIAN-PILOT (Feb. 18, 2015), [http://www.pilotonline.com/news/government/politics/virginia/senate-committee-kills-police-asset-forfeiture-bill/article\\_77883941-f509-50cb-b222-74a6777a4d62.html](http://www.pilotonline.com/news/government/politics/virginia/senate-committee-kills-police-asset-forfeiture-bill/article_77883941-f509-50cb-b222-74a6777a4d62.html).

145. Mike Maharrey, *Virginia Bill Would Curb “Policing for Profit” via Asset Forfeiture, But Federal Loophole Remains*, TENTH AMENDMENT CTR. (Nov. 30, 2015), <http://blog.tenthamendmentcenter.com/2015/11/virginia-bill-would-curb-policing-for-profit-via-asset-forfeiture-but-federal-loophole-remains/>.

146. H.B. 48, Va. Gen. Assemb. (Reg. Sess. 2016), <https://lis.virginia.gov/cgi-bin/legp604.exe?161+sum+HB48>.

147. S.B. 108, Va. Gen. Assemb. (Reg. Sess. 2016), <https://lis.virginia.gov/cgi-bin/legp604.exe?161+sum+SB108>.

148. S.B. 457, Va. Gen. Assemb. (Reg. Sess. 2016), <http://lis.virginia.gov/cgi-bin/legp604.exe?161+vot+SV0398SB0457+SB0457>.

### B. *Eliminate the Profit Incentive for Law Enforcement Agencies*

The biggest reform needed to ensure trust in the asset forfeiture program is to eliminate the profit incentive for law enforcement agencies to target certain crimes and properties. The government's pecuniary interest in seizing assets gives the appearance—and sometimes creates the reality—that asset forfeiture is more of a police fund raiser than a legitimate drug enforcement tool. As one law enforcement official stated, “[i]n tight budget periods, and even in times of budget surpluses, using asset forfeiture dollars to purchase equipment and training to stay current with the ever-changing trends in crime fighting helps serve and protect the citizens.”<sup>149</sup> The Virginia State Police alone received asset forfeitures totaling \$44 million from a 2007 settlement, as a reward for its role in a three-year investigation.<sup>150</sup> The agency used the funds to complete a driving track, build a new forensics laboratory, update and expand its communications networks, and make capital improvements to its aviation program, among other items.<sup>151</sup>

So “long as these incentives remain, law enforcement agents are motivated by profit; they lose sight of the due process and private property rights principles involved.”<sup>152</sup> Even law enforcement officials have admitted that monetary gains cloud the forfeiture system. The director of the Department of Justice's Asset Forfeiture Office under the George H.W. Bush Administration stated, “[w]e had a situation in which the desire to deposit money into the asset forfeiture fund became the reason for being of forfeiture, eclipsing in certain measure the desire to effect fair enforcement of the laws.”<sup>153</sup>

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149. Robert O'Harrow Jr. et al., *Asset Seizures Fuel Police Spending*, WASH. POST (Oct. 11, 2014), <http://www.washingtonpost.com/sf/investigative/2014/10/11/cash-seizures-fuel-police-spending/>.

150. *Virginia State Police Dedicate State-of-the-Art Driver Training Complex*, KBS (Sept. 28, 2012), <http://www.kbsgc.com/news/virginia-state-police-dedicate-state-of-the-art-driver-training-complex/>.

151. *Drugmaker Settlement Money*, WHSV3 (Oct. 5, 2007), <http://www.wHSV.com/home/headlines/10264422.html>.

152. Kasey L. Higgins, Comment, “*Shiver Me Timbers!*” *Civil Asset Forfeiture: Crime Deterrent or Incentive for the Government to Pillage and Plunder Property?*, 4 PHOENIX L. REV. 771, 795 (2011).

153. HYDE, *supra* note 18, at 29.

The purchase of needed equipment, protective gear, computers, and vehicles should not rely on raising funds from property seizures. Even if municipal budgets do not explicitly account for forfeiture proceeds, the dialogue in political campaigns for more aggressive forfeiture programs gives the perception that police priorities are set by the potential financial gains. Instead, the money should revert back to the Literary Fund or should go directly to providing for victims of crimes and rehabilitative programs for offenders. In Pennsylvania, forfeiture proceeds are used for drug abuse programs and the witness relocation and protection programs.<sup>154</sup> This allows for the proceeds to remain in the criminal justice system without the perverse incentive of the law enforcement agency to receive profits for their policing endeavors.

### C. *Limit Access to Equitable Sharing and Federal Adoptive Forfeitures*

Unfortunately, as procedures for asset forfeitures under Virginia law become less enticing to law enforcement than federal procedures, localities will likely forum shop to federal court.<sup>155</sup> Under the federal equitable sharing program, a participating state or local law enforcement agency may petition a federal agency to assist either through a joint investigation or by federal adoption of a local or state seizure.<sup>156</sup> So long as the property is subject to forfeiture under federal law, a federal agency such as the FBI, DEA, or ATF may assist with the forfeiture.<sup>157</sup> In adoptive forfeitures, the federal government will generally return 80% of the proceeds to the local or state law enforcement agency that requested the assistance.<sup>158</sup> The federal equitable sharing program has expanded rapidly: the Department of Justice paid \$681 million to state and local law enforcement agencies in fiscal year 2012, up from \$440 million in 2011.<sup>159</sup>

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154. 42 PA. STAT. AND CONS. STAT. ANN. § 6801(h) (West 2006).

155. See Frans J. von Kaenel, *Missouri Ups the Ante in the Drug Forfeiture "Race to the Res,"* 72 WASH. U. L.Q. 1469, 1469 (1994) (noting that state and local law enforcement agencies are the principal beneficiaries of the "federal forfeiture bounty.").

156. U.S. DEP'T OF JUST., GUIDE TO EQUITABLE SHARING FOR STATE AND LOCAL LAW ENFORCEMENT AGENCIES 6 (Apr. 2009).

157. *Id.* at 1–2.

158. *Id.* at 12.

159. Michael E. Horowitz, *Top Management and Performance Challenges Facing the Department of Justice—2013*, OFFICE OF THE INSPECTOR GENERAL (Dec. 11, 2013), <http://www.oig.dhs.gov>.

In other states that have attempted to tighten their asset forfeiture laws, state and local law enforcement agencies have increasingly turned to federal equitable sharing. Missouri first enacted asset forfeiture reforms in 1993,<sup>160</sup> with the goals of limiting abuse, ending participation in federal adoptive forfeitures, and increasing the state's share of forfeiture assets relative to the federal government.<sup>161</sup> A 1999 report by the state auditor found that 85% of all forfeitures in Missouri still went through the federal government.<sup>162</sup> In 2001, the state legislature passed a new reform bill, this time with the goals of eliminating both the profit incentive and the circumvention of a state law that requires forfeited assets to be deposited into the state's education fund.<sup>163</sup> Yet by 2008, Missouri law enforcement agencies were taking in more forfeiture dollars—more than \$10 million in fiscal year 2008—than they did before the 2001 reforms.<sup>164</sup>

Reforms in other states suggest, however, that ties to equitable sharing can be cut. The federal government suspended Oregon and Utah from the equitable sharing program after those states passed reforms that forced asset forfeiture funds out of law enforcement budgets.<sup>165</sup> City council members in the District of Columbia, who recently passed similar reforms, noted that the possibility of getting suspended from equitable sharing is a “benefit of the legislation, not a detriment.”<sup>166</sup>

The federal equitable sharing program recently encountered a stumbling block: in December 2015, the Department of Justice suspended payments because of budget cuts in a 2015 spending bill.<sup>167</sup> This temporary defunding of the program may significantly

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[www.justice.gov/oig/challenges/2013.htm](http://www.justice.gov/oig/challenges/2013.htm).

160. MO. ANN. STAT. § 513.647(1) (West 1994).

161. Von Kaehel, *supra* note 155, at 1482–83.

162. Kyla Dunn, *Reining in Forfeiture: Common Sense Reform in the War on Drugs*, PBS, <http://www.pbs.org/wgbh/pages/frontline/shows/drugs/special/forfeiture.html> (last visited Mar. 7, 2016).

163. Press Release, American Civil Liberties Union, MO's Asset Forfeiture Reform Bill Closes \$32 Million Loophole That Let Police Divert Education Funds (May 17, 2001), <https://www.aclu.org/technology-and-liberty/mos-asset-forfeiture-reform-bill-closes-32-million-loophole-let-police-divert>.

164. WILLIAMS ET AL., *supra* note 10, at 71.

165. COUNCIL OF THE DIST. OF COLUMBIA COMM. ON THE JUDICIARY AND PUB. SAFETY, REP. ON BILL 20–48, “CIVIL ASSET FORFEITURE ACT OF 2014,” at 24 (Nov. 12, 2014).

166. *Id.*

167. Christopher Ingraham, *The Justice Department Just Shut Down a Huge Asset Forfeiture Program*, WASH. POST (Dec. 23, 2015), <https://www.washingtonpost.com/news/wonk>

limit the ability of Virginia law enforcement agencies to receive funds from the federal civil asset forfeiture program. The Department of Justice intends to restart equitable sharing payments, however, as soon as “there are sufficient funds in the budget.”<sup>168</sup>

Nevertheless, to permanently eliminate the equitable sharing forum-shopping problem, Virginia should require that any funds received from the federal government through equitable sharing, adoptive forfeitures, or other civil asset forfeiture programs shall go directly to the Literary Fund. This would require a reworking of the law governing sharing of forfeited assets for Virginia law enforcement agencies.<sup>169</sup> State law should also prohibit Virginia law enforcement agencies from applying for equitable sharing funds from the federal government without first obtaining a criminal conviction in the case.

#### D. *Adopt Clear and Transparent Reporting Requirements*

In order to engender trust in the system, the Commonwealth should adopt clear and transparent reporting requirements and publish them for public view. Each locality should be required to publish a list of asset forfeiture cases and the corresponding criminal charges. The localities are already required to report all asset forfeitures to the Department of Criminal Justice Services (DCJS).<sup>170</sup> Until 2016, there was no requirement that DCJS compile this data or publish it in a useful form, leaving the burden on Virginia residents to file Freedom of Information Act requests if they want to see the data, and then find experts to help them make the data useful. A new law partially addresses the prob-

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/wp/2015/12/23/the-feds-just-shut-down-a-huge-program-that-lets-cops-take-your-stuff-and-keep-it/.

168. Letter from M. Kendall Day, Chief of the Asset Forfeiture and Money Laundering Section at the U.S. Dep’t of Just. to State, Local, and Tribal Law Enforcement Agencies (Dec. 21, 2015), [http://www.policeforum.org/assets/docs/Web\\_Uploads/doj%20asset%20forfeiture%20letter.pdf](http://www.policeforum.org/assets/docs/Web_Uploads/doj%20asset%20forfeiture%20letter.pdf).

169. See VA. CODE ANN. § 19.2-386.14 (Repl. Vol. 2015).

170. *Id.* § 19.2-386.4 (Repl. Vol. 2015); VA. DEPT OF CRIM. JUST. SERVS., FORFEITED ASSET SHARING PROGRAM MANUAL 2 (2015), [www.dcjs.virginia.gov/fasp/faspManual.pdf](http://www.dcjs.virginia.gov/fasp/faspManual.pdf). By regulation, DCJS requires each agency to submit a copy of the court order, a petition for in-kind property, a list of costs incurred to manage seized assets, and a cashier’s check or money order payable to the state treasury for the forfeited assets. 6 VA. ADMIN. CODE § 20-150-40 (2014).

lem.<sup>171</sup> In December 2015, the Virginia State Crime Commission voted to recommend several changes, including a requirement that DCJS compile an annual report of all asset forfeitures for the General Assembly.<sup>172</sup> Based on that recommendation, House Bill 771 provides that DCJS must submit an annual report of asset forfeitures, including the amounts distributed to each law enforcement agency and to the Literary Fund.<sup>173</sup>

The law does not, however, require law enforcement to report whether a seizure corresponds to a criminal case. This additional requirement of reporting a corresponding criminal charge would not be an onerous task for the law enforcement agency and could provide for significant public accountability.

### E. *Increase the Burden of Proof*

If asset forfeiture remains a civil action, then the standard of proof must be increased to protect property owners. Although the stated purpose of civil asset forfeiture laws is to deter criminal behavior, prosecutors seeking forfeitures are allowed to operate under civil rules.<sup>174</sup> With these rules come a series of problems for property owners, not least of which is the government's significantly reduced burden of proof. While the Commonwealth must prove beyond a reasonable doubt that an individual is guilty of a criminal activity to secure a criminal conviction, the Commonwealth needs to prove only by a preponderance of the evidence that property is eligible for asset forfeiture.<sup>175</sup> The preponderance of the evidence standard is generally satisfied when the proposition "is made to appear more likely or probable in the sense that actual belief in its truth, derived from the evidence, exists in the mind or minds of the tribunal, notwithstanding any doubts that

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171. See H.B. 771, Va. Gen. Assemb. (Reg. Sess. 2016) (requiring DCJS to publish an annual report detailing the distribution of forfeiture assets). The governor signed H.B. 771 into law on March 1, 2016; it will take effect on July 1, 2016. *Id.*

172. Frank Green, *Va. State Crime Commission Declines to Support Legislation on Asset Seizures*, RICH. TIMES-DISPATCH (Dec. 3, 2015, 10:30 PM), [http://www.richmond.com/news/virginia/government-politics/article\\_b41c2a22-5093-57d0-b0c5-fc06f7b32aa1.html](http://www.richmond.com/news/virginia/government-politics/article_b41c2a22-5093-57d0-b0c5-fc06f7b32aa1.html); see also VA. STATE CRIME COMM'N, POLICY OPTIONS AND RECOMMENDATIONS 9 (Dec. 3, 2015), <http://vscc.virginia.gov/December%20Policy%20Options%20Final-1.pdf>.

173. H.B. 771, Va. Gen. Assemb. (Reg. Sess. 2016).

174. Tamara R. Piety, Comment, *Scorched Earth: How the Expansion of Civil Forfeiture Doctrine Has Laid Waste to Due Process*, 45 U. MIAMI L. REV. 911, 920 (1991).

175. VA. CODE ANN. § 19.2-386.10 (2015).

may linger there.”<sup>176</sup> In comparison, a “clear and convincing” standard, while still lower than proof beyond a reasonable doubt, would require the Commonwealth to “produce evidence that creates in” the mind of the judge or jury “a firm belief or conviction that [the Commonwealth] have proved the issue.”<sup>177</sup> Even if no other reform is adopted, Virginia should join the sixteen other states that use “clear and convincing” or “beyond a reasonable doubt” standards to confiscate property permanently.<sup>178</sup>

Civil cases are subject to a lesser burden of proof than criminal cases because “the consequence of losing a case, although serious enough in many cases, is not considered to be” so severe as to require proof beyond a reasonable doubt.<sup>179</sup> While this rationale makes sense for most civil litigation, the relinquishment of property rights to the government is a sufficiently serious consequence to require a higher standard of proof.

For example, when Fairfax County police pulled over Mandrel Stuart in August 2012 for tinted windows and a video playing in his sightline, they did not charge him with a crime but seized \$17,550 in cash.<sup>180</sup> Stuart, who is black, maintained that he was taking the cash to Washington D.C. to buy supplies for his restaurant, but an officer found less than one hundredth of a gram of marijuana and kept the money.<sup>181</sup> After a day-long trial, a jury took thirty-five minutes to find that the federal government must return Stuart’s money and pay his legal fees of \$11,825.40.<sup>182</sup> In

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176. *Lamar Co., LLC v. Bd. of Zoning Appeals*, 620 S.E.2d 753, 756 n.5 (2005).

177. VIRGINIA MODEL JURY INSTRUCTIONS, Instruction No. 3.110 (Matthew Bender & Company, Inc. 2016).

178. WILLIAMS ET AL., *supra* note 10, at 22; CAL. HEALTH & SAFETY CODE § 11488.4(i)(4) (West 1994). In July 2014, Representative Tim Walberg of Minnesota and Senator Rand Paul of Kentucky introduced separate bills in the House and Senate that would, among other things, increase the burden of proof in federal asset forfeiture cases from a preponderance of the evidence to clear and convincing evidence. Civil Asset Forfeiture Reform Act of 2014, H.R. 5212, 113th Cong. (2nd Sess. 2014); Fifth Amendment Integrity Restoration Act of 2014, S. 2644, 113th Cong. (2nd Sess. 2014). In January 2016, Senator Bill Carrico introduced a bill to raise the burden of proof in Virginia asset forfeiture cases to clear and convincing evidence. S.B. 457, Va. Gen. Assemb. (Reg. Sess. 2016).

179. CHARLES HERMAN KINNANE, *A FIRST BOOK ON ANGLO-AMERICAN LAW* 562 (2d ed. 1952).

180. Robert O’Harrow, Jr. et al., *They Fought the Law. Who Won?*, WASH. POST (Sept. 8, 2014), <http://www.washingtonpost.com/sf/investigative/2014/09/08/they-fought-the-law-who-won/>.

181. *Id.*

182. *Id.*

the meantime, however, Stuart lost his barbeque restaurant business in Staunton.<sup>183</sup>

Further diminishing the rights of property owners is the shift of the burden of proof to the property owner after the government establishes that the property is subject to forfeiture, requiring property owners to prove that the property is exempt from forfeiture.<sup>184</sup> This shift in the burden of proof essentially requires property owners to prove their innocence and flies in the face of the presumption of innocence principle embedded in our criminal justice system. Innocent property owners who are unable to afford an attorney are at significant disadvantage due to this onerous requirement. Even for property owners who can afford an attorney, the costs of an attorney may not justify challenging the forfeiture of property valued at only a couple thousand dollars. In order to bolster due process protections for property owners, Virginia should remove the burden-shifting requirement.

### CONCLUSION

Virginia's asset forfeiture laws are deeply ingrained in the judicial history of the Commonwealth. Reforms adopted twenty-five years ago to combat the distribution of narcotics significantly changed the landscape, however, creating a profit incentive scheme for law enforcement agencies and taking property from individuals without adequate procedural safeguards. As law enforcement revenues have climbed into the millions, civil asset forfeiture has become policing for profit rather than public safety. Importantly, some policymakers have recognized how civil asset forfeiture compromises fundamental principles of American justice.<sup>185</sup> Virginia must do more to end this abusive practice.

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183. *Id.*

184. VA. CODE ANN. § 19.2-386.10(A) (2015); see WILLIAMS ET AL., *supra* note 10, at 23.

185. Delegate Mark Cole remarked, "I just think it's fundamentally un-American that the government can seize your property without ever having to prove that you are in collusion to criminal acts." Jeff Branscome, *Cole Bill Puts Limits on Police Seizures*, FREE LANCE-STAR (Oct. 25, 2014), [http://www.fredericksburg.com/news/cole-bill-puts-limits-on-police-seizures/article\\_4a6687f4-bd64-5919-8bb9-e074f274f320.html](http://www.fredericksburg.com/news/cole-bill-puts-limits-on-police-seizures/article_4a6687f4-bd64-5919-8bb9-e074f274f320.html).



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