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Forfeiting Due Process: How Adjudicative Reform Fails Property Owners

Claire Johnson Raba

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FORFEITING DUE PROCESS: HOW ADJUDICATIVE REFORM FAILS PROPERTY OWNERS

*Claire Johnson Raba**

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* Assistant Professor of Law, University of Illinois Chicago School of Law and co-Principal Investigator, the Debt Collection Lab at Princeton University. This Article was workshopped in fall 2022 at the Chicagoland Junior Scholars Conference and with the Debt Collection Lab. Professor Stephanie Campos-Bui of the UC Berkeley Policy Advocacy Clinic, UIC Law Professor Yelena Duterte, and UIC Law Associate Dean of Experiential Education Kim Ricardo provided essential guidance and edits. Many thanks to UIC Law student Oliver Kassenbrock for research assistance, to the student editors at the *Fordham Urban Law Journal*, and to the author’s Bay Area Legal Aid and University of California, Irvine Consumer Law Clinic clients, whose labyrinthine experiences trying to navigate the civil asset forfeiture process in California are among the many reasons to reform the system.

INTRODUCTION

This Article tells the story of a civil asset forfeiture case that the University of California, Irvine Consumer Law Clinic took to trial. Mr. F. was stopped in his car, in the Santa Ana-Anaheim-Garden Grove metropolitan area of Orange County, California, on his way to a job interview with cash from casino winnings in the trunk.¹ He dropped by a friend's house to change into a suit for his interview and the police pulled him over as he got back into the car.² Mr. F. served 14 months in state prison on drug possession charges, and upon his release, spent more than two years in litigation to prove that the money seized from his car was not related to his crime.³ This Article presents the story of how rules of procedure place a heavy burden on those least likely to be able to assert their rights. Specifically, this Article focuses on California, where the forms and methods for providing notice of civil asset forfeiture appear, on their face, to be reasonably calculated to provide notice to property owners; but, as actually carried out, the processes are woefully insufficient. Civil asset forfeiture is prevalent in urban areas that are overpoliced, disproportionately placing the burden of forfeiture on predominantly non-white urban neighborhoods.⁴

In 2016, the California Legislature passed Senate Bill 443, a civil asset forfeiture reform bill drafted and supported by criminal legal system reform advocates. Focused on civil trials held in opposed forfeitures, the drafters of the bill attempted to heighten the burden of proof and create additional evidentiary requirements in civil asset matters.⁵ Unfortunately for most

1. See *infra* Part III.

2. See *infra* Part III.

3. See *infra* Part III.

4. See C.J. Ciaramella, *Poor Neighborhoods Hit Hardest by Asset Forfeiture in Chicago, Data Shows*, REASON (June 13, 2017, 8:00 AM), <https://reason.com/2017/06/13/poor-neighborhoods-hit-hardest-by-asset/> [<https://perma.cc/A9DW-NELQ>] (reporting that in an analysis of 23,000 seizures by law enforcement in Cook County over five years, mapped data shows that seizures in the Chicago area are overwhelmingly in African-American neighborhoods). Cities have created, and courts have upheld, local ordinances that increase civil asset forfeiture, such as the Oakland, California ordinance, which explicitly permitted local police officers to seize vehicles allegedly involved in prostitution or drug activity. See *Horton v. City of Oakland*, 82 Cal. App. 4th 580, 584, 372 (Cal. Ct. App. 2000); Alexandra D. Rogin, Note, *Dollars for Collars: Civil Asset Forfeiture and the Breakdown of Constitutional Rights*, 7 DREXEL L. REV. ONLINE 45, 69 (2014) (describing the connection between forfeiture and the War on Drugs targeted at low-income minority populations primarily in inner cities).

5. See *Hearing on S.B. 443 Before the Assemb. Comm. on Pub. Safety – July 14, 2015*, Leg. Sess. 2015–16 (Cal. 2015) (Bill Analysis) (“[T]his bill: . . . [r]equires a conviction on the related, specified criminal charge to forfeit property in every case in which a claim is filed to contest the forfeiture of property, unless the defendant in the related criminal case willfully fails to appear for court [and] [r]equires proof beyond a reasonable doubt in all forfeiture cases which are contested.”).

claimants, these issues arise only when a property owner initiates the adjudicative process by starting a case in the civil court system. California's focus on adjudicative reform did not appreciate or fully understand the barrier to access to the court system that the notice and default system in civil asset cases creates.⁶

Data analysis in this Article finds that of \$351,160,652 in assets that were seized over the seven-year study period, claims were filed to oppose forfeiture for a total \$193,575,630 in assets, or 55% of the dollar value of assets, resulting in forfeiture by default for 45% of the overall value of assets seized.⁷ Of seizures initiated in the California counties studied, claims opposing forfeiture were filed only in between 21–25% of matters.⁸

Barriers to asserting a civil claim opposing forfeiture are exacerbated by the involvement of law enforcement and the criminal legal system. Because forfeitures are often initiated through a seizure of assets by law enforcement at a search-and-seizure traffic stop or concurrent with a warrant to search a home or person based on probable cause, many people whose property is the target of civil asset forfeiture are arrested. This leaves claimants to initiate a court case for return of their property while simultaneously trying to navigate a criminal case. This imposition of administrative burden on the claimant places property owners at both a structural disadvantage in access to civil courts and a psychological disadvantage in a system that leaves criminal defendants powerless to assert their right to seized property.⁹

6. Cf. Emily S. Taylor Poppe, *Why Consumer Defendants Lump It*, 14 Nw. J.L. & Soc. POL'Y 149, 156–57 (2019) (explaining that low-income litigants who view themselves as “defendants” in a civil matter are more likely to fail to engage with the litigation process). Although civil asset forfeiture claimants are tasked with initiating the case, the property owner is in a defensive posture attempting to prove a negative — that the property has no nexus to a criminal offense. In an analogous role, consumer defendants in debt collection and judicial foreclosure cases also often fail to assert their rights within the civil litigation court process. See PEW CHARITABLE TRUSTS, *HOW DEBT COLLECTORS ARE TRANSFORMING THE BUSINESS OF STATE COURTS 15* (2020) (noting default rates). In California, debt collection cases result in default judgments about 57% of the time, and defendants file a responsive pleading in less than 9% of cases. CLAIRE JOHNSON RABA, *ONE-SIDED LITIGATION: LESSONS FROM CIVIL DOCKET DATA IN CALIFORNIA DEBT COLLECTION LAWSUITS 4* (2023), <https://debtcollectionlab.org/research/one-sided-litigation> [<https://perma.cc/3EW6-VJGK>].

7. See *infra* Fig. 6.

8. See *infra* Fig. 3.

9. See JENNIFER McDONALD & DICK M. CARPENTER II, *FRUSTRATING, CORRUPT, UNFAIR: CIVIL FORFEITURE IN THE WORDS OF ITS VICTIMS*, INST. FOR JUST. 4 (2021), https://ij.org/wp-content/uploads/2021/09/Frustrating-Corrupt-Unfair_Civil-Forfeiture-in-the-Words-of-Its-Victims-2.pdf [<https://perma.cc/Q4YH-7EXL>] (“As one victim described, ‘[the District Attorney] told me, “If you beat your [criminal] case, you can get some of your money back — if not, you won’t get any of it back.” When I did beat the case, they only gave me half of my money back, which I didn’t understand.’ As another victim put it, ‘I was blindsided when I went to court. I’m not illiterate, but I didn’t understand the legalese.’”). See Karin D. Martin et al., *Monetary Sanctions: Legal Financial Obligations in US Systems of*

This Article begins from the premise that civil asset forfeiture is fundamentally unjust as it disproportionately impacts those least able to access a complex civil legal system to assert their rights. As most civil asset forfeitures result from seizures at traffic stops, the disproportionate rates of over-policing of individuals and communities of color implicates disparate racial impacts of seizure and subsequent forfeiture.¹⁰ Civil asset forfeiture should be eliminated because it creates an incentive for law enforcement agencies to seize the property of persons accused of a crime, because it strips assets from low-income people, and because it does not have a measurable effect on reducing crime rates.¹¹ However, for jurisdictions that intend to retain a state-sponsored civil forfeiture process, this Article makes the arguments that: 1) the procedural burden of initiating a case should not lie with the property owner, but must be shifted to the state, and 2) the proportionality test under the Eighth Amendment to the U.S. Constitution, incorporated against the states through the Fourteenth Amendment in *Timbs v. Indiana*, should require an ability-to-pay analysis, balancing the harm of deprivation with the state's interest in forfeiture.¹² These reforms would

Justice, 1 ANN. REV. CRIMINOLOGY 471, 474 (2018) (discussing the imposition of court-imposed debt on those least able to pay). See generally ALEXES HARRIS, A POUND OF FLESH: MONETARY SANCTIONS AS A PERMANENT PUNISHMENT FOR THE POOR (2016). This Article uses the concept of administrative burden as a framework for the deliberate choice of legislators and courts to place the initiative for beginning a forfeiture case on the property owner. Herd and Moynihan define administrative burdens as “an individual’s experience of a policy’s implementation as onerous.” PAMELA HERD & DONALD P. MOYNIHAN, ADMINISTRATIVE BURDEN: POLICYMAKING BY OTHER MEANS 22 (2018). “Administrative burdens are [constructed as] the product of administrative and political choices.” *Id.* at 8.

10. See CALIFORNIA RACIAL AND IDENTITY PROFILING ADVISORY BOARD, ANNUAL REPORT 2023 at 8–9 (2023), <https://oag.ca.gov/system/files/media/ripa-board-report-2023.pdf> [<https://perma.cc/6FF5-8B3M>] (finding that Black individuals in California had the highest proportion of stops resulting as reasonable suspicion, leading to searches of vehicles, and that officers detained and searched more than 20% of drivers they perceived to be Black); McDonald & Carpenter II, *supra* note 9, at 12 (“Forfeited cash was disproportionately seized from areas of Philadelphia with low median incomes and high percentages of Black and Hispanic residents.”).

11. Cf. Daniel Y. Rothschild & Walter E. Block, *It Is Not Armed Robbery When Government Takes People’s Stuff, It Is Civil Asset Forfeiture*, 3 J. SOC. & ADMIN. SCIS. 219, 226 (2016) [hereinafter *Armed Robbery*] (suggesting that civil asset forfeiture increases crime rates).

12. 139 S. Ct. 682, 689 (2019) (affirming that the Eighth Amendment’s prohibition on excessive fines and fees is incorporated against the states through the Fourteenth Amendment, applying a proportionality test to the seizure and forfeiture of Tyson Timbs’s vehicle, and remanding to the Indiana state courts). The Indiana Supreme Court remanded to the trial court for a determination on gross proportionality and in May 2020, the state trial court determined the seizure to be a disproportional excessive fine and the vehicle was returned to Mr. Timbs. See *State v. Timbs*, 134 N.E.3d 12, 40 (Ind. 2019). The Supreme Court’s seminal case on ability to pay is *Bearden v. Georgia*, 461 U.S. 660 (1983). The Court evaluated the ability to pay fines imposed as part of criminal sentencing through an equal protection and due process framework. See *id.* at 674; see also *Browning-Ferris Indus. v. Kelco Disposal*, 492 U.S. 257,

ensure that the intended impact of California’s S.B. 443, that “the state or local governmental entity shall have the burden of proving beyond a reasonable doubt that the property for which forfeiture is sought was used, or intended to be used, to facilitate a [penal code] violation”¹³ actually has the intended effect and would place more litigants before a judge where courts could consider ability to pay in the proportionality calculation.

Based on the findings from the empirical analysis of civil asset forfeiture claims filed in California from 2014–2020, this Article makes the recommendation that if a jurisdiction chooses to continue to engage in civil asset forfeiture, procedural due process requires placing the burden on the state to initiate a case in state court. Substantive due process and the Eighth Amendment of the U.S. Constitution require the implementation of an ability-to-pay analysis to ensure that the government’s use of a seizure as a criminal fine does not constitute an excessive fine.

This Article proceeds in four parts. Part I describes the process of civil asset forfeiture, discusses historical constitutional challenges to this system, and applies a constitutional law analysis to California’s statutory civil asset forfeiture framework. Part II examines the implementation of California’s S.B. 443 and reports findings from an empirical study of court record data for 16 California counties of claims filed opposing forfeiture from 2014–2020. Part III recounts the story of a client my students and I represented in the Consumer Law Clinic at the University of California, Irvine School of Law in a fight against the procedural deficiencies in due process under California civil procedure laws. In Part IV, based on the findings from the empirical study and the takeaways from my client’s experience, this Article recommends three reforms: i) State civil asset forfeiture statutes should shift the procedural burden from the claimant to the state to initiate a forfeiture action; ii) Courts should adopt a substantive due process proportionality

265 (1989) (explaining that when the Eighth Amendment was drafted, “the word ‘fine’ was understood to mean a payment to a sovereign as punishment for some offense”); *United States v. Bajakajian*, 524 U.S. 321, 327–28 (1998) (noting that the overarching principle of the excessive fines clause is proportionality and that the clause covers “payments, whether in cash or in kind,” and concluding that “[f]orfeitures — payments in kind — are thus ‘fines’ if they constitute punishment for an offense”). In *Timbs v. Indiana*, the Court formally incorporated the excessive fines clause of the Eighth Amendment through the due process clause of the Fourteenth Amendment. 139 S. Ct. at 687. After the Court’s decision in *Timbs*, California state courts apply both proportionality and due process analyses in fines and fees cases. *See* *People v. Duenas*, 30 Cal. App. 5th 1157, 1166 (Cal. Ct. App. 2019); *People v. Cowan*, 47 Cal. App. 5th 32, 48 (Cal. Ct. App. 2020) (opining that proportionality is likely the key in a forfeiture case, while ability to pay is likely the most important factor for monetary fines); *People v. Cota*, 45 Cal. App. 5th 786, 801 (Cal. Ct. App. 2020) (finding a defendant has the right to a hearing on his ability to pay under either the excessive fines clause, due process, or both).

13. S.B. 443 § 3, 2016 Leg. Sess. 2015–2016 (Cal. 2016).

framework premised on the ability-to-pay jurisprudence of the court fines-and-fees movement; and iii) State legislatures should implement proven successful reforms to civil asset forfeiture that reduce the profit motive for law enforcement and strengthen protections for property owners.

A. Methodology

This Article takes a qualitative and quantitative approach to the issue of procedural due process, using California's statutory framework as a case study. For the qualitative research, data consists of case notes and documents filed in a civil asset forfeiture matter in a case my students and I took for representation during my time as a clinical teaching fellow. I interviewed the former client by email, phone, and text 18 months and 24 months after the conclusion of the case to obtain an update on his financial and housing stability and resolution of issues with the Internal Revenue Service for the funds that were seized and forfeited. He provided informed consent to share his anonymized story in this Article.¹⁴ This case was selected because it is representative of how low-income claimants experience the civil asset forfeiture system, and how it reveals the barriers and burdens placed on individuals with little knowledge of the legal system as they attempt to navigate the limits of procedural due process afforded in civil asset cases. A summary of the Orange County Superior Court public case records filed demonstrates the impact of the current requirements of notice and lack of pre-deprivation procedural due process rights in the face of asset seizure by state law enforcement agencies and forfeiture by the local District Attorney. Coupled with the background on the client's case, the court documents and client story demonstrate the impact of the procedural barriers faced by the low-income property owner claimant.¹⁵ The procedures in place to challenge forfeiture are confusing for unrepresented claimants but can also be hard to understand for attorneys involved in the case, as shown when Mr. F.'s case was made more complex for the certified law students representing

14. This case commenced in 2019 in Orange County Superior Court and proceeded through to trial in April 2021. To preserve the confidentiality of the client, citations to court documents do not include identifying information, such as case number or claimant name, or exact dates of court filings, and the client's name is anonymized. All case documents are on file with the University of California Irvine Consumer Law Clinic [hereinafter *UC Irvine Case Documents*]. See Telephone Interviews with Mr. F., Claimant (Sept. 9, 2022; Feb. 15, 2023) (interview notes on file with author); Informed Consent Letter Signed by Mr. F., Claimant (Feb. 23, 2023) (on file with author).

15. See *UC Irvine Case Documents*, *supra* note 14.

him due to an incorrect filing by the deputy public defender assigned to the underlying criminal case.¹⁶

Acknowledging the work of criminal legal system reform advocates who co-sponsored a new bill aimed at reform to strengthen state protections in civil asset cases, this paper set out to determine whether the passage and implementation of California Senate Bill 443 resulted in an increase in the filing of claims opposing civil asset forfeiture cases.¹⁷ The filing of a claim opposing forfeiture is the vehicle through which the civil legal system becomes involved in a seizure and forfeiture proceeding. If a claimant does not initiate a claim by filing a document with the court, the seizure proceeds to forfeiture through an administrative default process executed by the Office of the District Attorney.¹⁸ S.B. 443 also included language requiring the District Attorney to serve a “notice stating that any interested party may file a verified claim with the superior court of the county in which the property was seized . . . to be served by personal service or by registered mail upon any person who has an interest in the seized property”¹⁹ However, if no claim has been filed within 30 days “of the receipt of the claim,” then the forfeiture proceeds with no additional notice or claim to be filed, by the District Attorney or any other entity.²⁰

The empirical analysis of court record data in this project was designed to evaluate whether S.B. 443’s notice requirement would measurably increase the percentage of forfeiture cases in which a claim opposing forfeiture was filed. As implemented, the notice requirement in the legislation still places the burden on the person whose property was seized to initiate the court

16. The Office of the Public Defender filed a Motion for Return of Property instead of a Claim Opposing Forfeiture, which complicated the question of whether Mr. F. had notice of the forfeiture prior to sentencing. *UC Irvine Case Documents*, *supra* note 14.

17. S.B. 443 was co-sponsored by the ACLU of California, CHIRLA-Coalition for Humane Immigrant Rights of Los Angeles, the Drug Policy Alliance, the Ella Baker Center for Human Rights, and the Institute for Justice. Press Release, ACLU, Gov. Brown Signs Historic Bill to Rein in Asset Forfeiture Abuse, Paving Way for Other States (Sept. 29, 2016), <https://www.aclusocal.org/en/press-releases/gov-brown-signs-historic-bill-rein-asset-forfeiture-abuse-paving-way-other-states> [<https://perma.cc/S9BE-LPTX>].

18. CAL. HEALTH & SAFETY CODE § 11488.4(j)(5)(B) (Deering 2023).

19. CAL. HEALTH & SAFETY CODE § 11488.4(c) (Deering 2023); *see also* CAL. HEALTH & SAFETY CODE § 11488.4(f) (Deering 2023) (requiring that the notices “shall explain in plain language what an interested party must do and the time in which the person must act to contest the forfeiture in a hearing”); S.B. 443 § 3, 2016 Leg. Sess. 2015–2016 (Cal. 2016).

20. CAL. HEALTH & SAFETY CODE § 11488.4(j)(5)(C) (Deering 2023) (governing this process for claims not exceeding \$25,000 in value and requiring an additional written declaration of forfeiture to be served on the persons listed in the receipt given at the time of seizure). For forfeitures of property valued between \$25,000 and \$40,000, the bill also increases the burden of proof on the government to prove beyond a reasonable doubt that the property was used to facilitate a violation of one of the enumerated offenses. *See* CAL. HEALTH & SAFETY CODE § 11488.4(i) (Deering 2023).

process which requires an affirmative step on the part of the claimant to invoke the additional protections in the adjudicative process required under the new law.

The quantitative research design used a set of court record data scraped from the public-facing website portals of 16 counties in California, including the 15 most populous counties comprising more than 80% of the state's population ("court data"), allowing for a sample size that comprised the full set of case records for each year from each available county. I obtained the docket-level data through a third-party data vendor for all cases coded as "civil asset forfeiture" on the California state court civil case cover sheet for the California trial courts that make their records available online from January 1, 2014, through December 31, 2020.²¹ I combined the court-record data with data self-reported by county law enforcement agencies to the state Office of the Attorney General ("AG Report").²² I extracted the total number of asset forfeitures initiated each year from the AG Report, along with the total dollar value of assets seized. I then used regular expressions against each case name to extract the value of the assets seized, and coded them as seizures of currency, vehicles, or other kinds of property.²³ I then analyzed the number of filings, and the value of the assets seized in these filings against the total number of forfeitures initiated by county, by year.²⁴ The research for this article produced findings that indicate adjudicative reform that retains the default process resulted in little change in the number of claims initiated between the pre-S.B. 443 years of 2014-2016 and the years following the implementation of the new law on January 1, 2017.

21. California's CM-010, the Civil Case Cover Sheet, has a designation for case type of "civil asset forfeiture," distinguishing these cases from criminal forfeitures or other types of in rem actions. CIVIL CASE COVER SHEET (CM-010), CAL. CTS. SELF HELP GUIDE (2021) <https://selfhelp.courts.ca.gov/jcc-form/CM-010> [<https://perma.cc/URE8-FS44>]. Although the claimant initiates the case by filing a Claim Opposing Forfeiture, the District Attorney then responds by filing an in rem case against the property, to which a Civil Case Cover Sheet is appended with the asset forfeiture designation marked. *Id.*

22. The California Office of the Attorney General publishes an annual report on civil asset forfeitures by county. These reports for 2014 to 2020 are available under the Asset Forfeiture heading on the Publications page of the agency website. *See Publications*, ST. CAL. DEP'T OF JUST., <https://oag.ca.gov/publications> [<https://perma.cc/K8HG-QDF5>] (last visited July 21, 2023).

23. In a few instances, multiple claimants asserted claims to the same set of seized property. The data set contains some records that reflect more than one case initiated against a forfeiture. Data on file with author.

24. Data analysis was conducted using R, version 4.1.2. Data visualization used Tableau.

I. BACKGROUND

A. Civil Asset Forfeiture, A Primer

Civil asset forfeiture is a statutory process in place at both the federal and state level in the United States that allows government agencies to seize property believed to be involved in criminal activity. Property with a presumed nexus to enumerated crimes is seized by state or federal law enforcement agencies, usually taken on the basis of probable cause before anyone is charged with a crime.²⁵ This system places the procedural and evidentiary burdens on a property owner to assert innocence and prove a negative — that the property was not involved in a crime.²⁶ Civil asset forfeiture is an *in rem* proceeding against the property itself.²⁷ As such, constitutional protections, including the right to a trial, the right to counsel, and a presumption of innocence, do not apply.²⁸ Stories abound of innocent property owners facing forfeiture, such as a single mother who had two different cars seized by the Detroit Police Department, a retiree’s life savings seized by the Transportation Security Administration, and a Burmese tour manager stopped by an Oklahoma sheriff’s deputy who seized \$53,000 in concert proceeds intended to support Burmese and Thai refugees.²⁹ Across

25. See Stefan D. Cassella, *The Civil Asset Forfeiture Reform Act of 2000: Expanded Government Forfeiture Authority and Strict Deadlines Imposed on All Parties*, 27 J. LEGIS. 97, 109 (2001). The federal Civil Asset Forfeiture Reform Act of 2000 (CAFRA) amended the government’s burden of proof at hearing to a preponderance of the evidence, and some state statutes, including California’s S.B. 443 have similarly heightened burdens once a forfeiture is contested. See *id.* at 108–09; S.B. 443 § 3, 2016 Leg. Sess. 2015–2016 (Cal. 2016). The burden for the initial seizure remains probable cause on the part of the law enforcement agency, and as most forfeitures proceed uncontested, it is rare that evidence must be presented to meet the higher burden. See Cassella, *supra*.

26. See Daniel Y. Rothschild & Walter E. Block, *Don’t Steal; The Government Hates Competition: The Problem with Civil Asset Forfeiture*, 31 J. PRIV. ENTER. 45, 46 (2016) [hereinafter *Don’t Steal*] (noting that criminal forfeiture requires a person be convicted of a crime before assets involved in that crime can be seized and forfeited and explaining that civil asset forfeiture has no such requirement because the Constitution only applies to people, not property); *Armed Robbery*, *supra* note 11; Eric Moores, *Reforming the Civil Asset Forfeiture Reform Act*, 51 ARIZ. L. REV. 777, 779 (2009).

27. In case names for civil asset forfeiture proceedings, property descriptions are used instead of the names of individual defendants. See, e.g., *United States v. Eight Thousand Eight Hundred and Fifty Dollars (\$8,850) in United States Currency*, 461 U.S. 555 (1983); *United States v. Approximately 64,695 Pounds of Shark Fins*, 520 F.3d 976 (9th Cir. 2008); *United States v. Article Consisting of 50,000 Boxes of Clacker Balls*, 413 F. Supp. 1281 (E.D. Wis. 1976).

28. See *Don’t Steal*, *supra* note 26, at 46; see also KNEPPER ET AL., INST. FOR JUST., POLICING FOR PROFIT, 36–37 (3d ed. 2020) [hereinafter *POLICING FOR PROFIT*].

29. See *POLICING FOR PROFIT*, *supra* note 28, at 9 (telling the stories of nursing student Stephanie Wilson whose two cars were seized in one year, the airport seizure of Terry Rolin’s life savings of \$82,373 from his daughter on her way to open a joint bank account, and Eh

21 states, data shows that the median currency forfeiture averaged just \$1,276, while in some states the median value was in the hundreds of dollars.³⁰

If property, such as a car, cash, or other valuables, is located during a stop or other search of a suspect's person or property, the law enforcement agency conducting the search may seize property found, not as evidence, but as suspected ill-gotten gains from criminal activity.³¹ This property may be as small as a few hundred dollars in the pocket of a person subject to a stop and frisk, or it may be a home owned in the name of an individual accused of a crime.³² While the majority of seizures are individual small-dollar values, these seizures add up — governmental agencies such as Wayne County, where the Detroit Police Department is located, added \$1.2 million over two years to its budget from the seizure and forfeiture of 2,600 cars.³³ Particularly egregious seizures have been reported in popular news outlets, such as Last Week Tonight with John Oliver, highlighting that over the last twenty years, federal agencies have seized \$2.5 billion dollars in 61,998 cash seizures of people not charged with a crime.³⁴

Forfeiture permanently terminates the property rights of the owner, transferring the rights to personal or real property to the state and allowing law enforcement agencies to retain the value of assets seized.³⁵ Because the proceeds from forfeiture go to law enforcement budgets, forfeiture statutes create an incentive for the seizure of property.³⁶ As the data in this Article shows, and as reflected in national data collected by the Institute for Justice, while individual forfeitures are often small, amounting to no more than a few hundred or thousand dollars, the burden on a property owner to contest a

Wah, the tour manager for a Burmese Christian band, whose donations and concert proceeds were seized; none were convicted of a crime).

30. POLICING FOR PROFIT, *supra* note 28, at 6.

31. *See Don't Steal*, *supra* note 26, at 46; POLICING FOR PROFIT, *supra* note 28, at 9.

32. *See Don't Steal*, *supra* note 26, at 46, 51; POLICING FOR PROFIT, *supra* note 28, at 18.

33. POLICING FOR PROFIT, *supra* note 28, at 9. Law enforcement agencies sell at auction the personal property seized and forfeited, adding the proceeds to their budget. *See* POLICING FOR PROFIT, *supra* note 28, at 34.

34. LastWeek Tonight, *Civil Forfeiture: Last Week Tonight with John Oliver (HBO)*, YOUTUBE (Oct. 6, 2014), <https://www.youtube.com/watch?v=3kEpZWGgJks> [<https://perma.cc/C8FW-MF8T>].

35. POLICING FOR PROFIT, *supra* note 28, at 10 (noting that in “allowing agencies to self-fund outside the normal appropriations process . . . [forfeiture] invites questionable expenditures [by law enforcement agencies], such as \$70,000 for a muscle car in Georgia, \$250,000 for lavish travel and meals in New York, and \$300,000 for an armored vehicle in Iowa”).

36. *Armed Robbery*, *supra* note 11, at 225–26 (noting that “civil asset forfeiture reveals that since police keep seized assets by making more drug arrests, their resources are devoted to increasing drug arrests,” and that the low rate at which property owners challenge forfeiture incentivizes police departments to engage in high-volume, low-dollar forfeitures).

forfeiture is high and returns for law enforcement agencies add up.³⁷ Although forfeiture often begins under the protection of the Fourth Amendment when a police department or other law enforcement agency stops a vehicle, or searches a location based on probable cause that a crime has been committed, once there is probable cause to search, seizure pursuant to civil asset forfeiture proceeds without additional constitutional protection for the property owner. Persons making a legal claim to forfeit property are called “claimants” in the language of civil asset cases, as a person asserting property rights following a seizure may be a criminal defendant or may be a non-defendant property owner.

Forfeiture has its roots in English law, in which the threat of forfeiture compelled compliance with statutes and was intended to deter future crime. Under English law, forfeitures were initiated through in rem proceedings against property such as imports from the colonies and ships and vessels used to transport cargo.³⁸ The early United States Congress adopted similar forfeiture statutes at law and admiralty, before the adoption of the Due Process Clause, leading to holdings by the U.S. Supreme Court finding existing forfeiture statutes to be constitutional under the Fifth Amendment’s Takings Clause.³⁹ Despite strong roots in English and American law and originalist jurisprudence, forfeiture draws strong opposition across the political spectrum. Conservative and Libertarian advocacy organizations object to the imposition by the state on private property interests.⁴⁰ Left-leaning civil liberties and social justice advocates challenge forfeiture in part due to racial justice issues stemming from over-policing of non-white neighborhoods and the high burden imposed by forfeiture on low-income individuals involved in the criminal legal system resulting in loss of resources, assets, and property.⁴¹

Forfeitures may proceed through either the civil or criminal systems. Criminal asset forfeiture allows for forfeiture only after a criminal conviction

37. POLICING FOR PROFIT, *supra* note 28, at 9; *infra* Figs. 7–8.

38. See Caleb Nelson, *The Constitutionality of Civil Forfeiture*, 125 YALE L.J. 2446, 2461–63, (2016) (describing the British Navigation Act of 1660, which prohibited the import and export of certain goods from and to the colonies, and the Revenue Act of 1764 which imposed forfeiture of property used in connection with smuggling).

39. See *id.* at 2467; *cf.* Ostipow v. Federspiel, 824 F. App’x. 336, 341–42 (6th Cir. 2020). See generally *Bennis v. Michigan*, 516 U.S. 442 (1996).

40. See Nelson, *supra* note 38, at 2452 (listing advocates for reform as including the American Civil Liberties Union project on civil asset forfeiture, the Institute for Justice, the National Association of Criminal Defense Lawyers, and the Heritage Foundation).

41. See *Civil Asset Forfeiture, FINES & FEES JUST. CTR.*, <https://finesandfeesjusticecenter.org/?s=civil+asset+forfeiture> [https://perma.cc/FY3C-ZFFH] (last visited July 21, 2023); see also NAOMI JOHNSON ET AL., CHICAGO APPLESEED CENTER FOR FAIR COURTS, I DON’T KNOW WHY I’M HERE: OBSERVATIONS FROM COOK COUNTY’S CIVIL ASSET FORFEITURE COURTROOMS 7 (2023).

against the defendant.⁴² Processes for criminal forfeiture follow criminal burdens of proof and have a constitutionally-guaranteed right to counsel and to a jury trial as they are conducted alongside a criminal case.⁴³ For seizures that proceed as civil asset forfeitures in rem against the property itself, significantly fewer procedural protections are in place.⁴⁴ Following seizure by a law enforcement agency, law enforcement turns over the matter to the appropriate prosecutorial department (county district attorney at the county level, or state or federal attorney general's office), which generally retains physical possession of the property pending the outcome of forfeiture.⁴⁵ A seizure becomes a forfeiture when a property owner fails to assert a timely claim for the property, or when a claim is asserted and a hearing is held to adjudicate the seizure under the state or federal statute governing the jurisdiction under which the law enforcement agency that conducted the seizure operates. A person from whom property is seized, and persons that law enforcement have reason to believe have a property interest, are provided some form of statutorily required notice with a limited time to respond.⁴⁶

Although processes vary by jurisdiction, the commonality in civil asset forfeiture is that seizures can turn into forfeitures by operation of default. This means that if property owners do not assert their right to a hearing by a deadline, the property is lost through administrative default. There is no adjudication on the merits, and there is no right to overturn the default. For individuals caught up in the criminal legal system, who often have a distrust of courts, these features of civil asset forfeiture turn seizure into forfeiture without the input, perspective, or argument of the property owner. Law enforcement has an incentive to engage in civil asset forfeiture because the funds and property seized are turned over to the very agencies that seized

42. 18 U.S.C. § 982.

43. *See id.*; Jennifer Levesque, Note, *Property Rights — When Reform Is Not Enough: A Look Inside the Problems Created by the Civil Asset Forfeiture Reform Act of 2000*, 37 W. NEW ENG. L. REV. 59, 77 (2014) (noting that CAFRA raised the standard in hearings from probable cause to a preponderance of the evidence); *see also* Vanita Saleema Snow, *From the Dark Tower: Unbridled Civil Asset Forfeiture*, 10 DREXEL L. REV. 69, 87 (2017) (noting that the CAFRA provides for a right to counsel in federal forfeitures). No states have extended this right to counsel to civil asset forfeitures, although a few county public defender's offices provide pre-charging diversion programs that assist with challenges to forfeiture. *Id.*

44. *See, e.g.*, 18 U.S.C. § 985; CAL. HEALTH & SAFETY CODE § 11488 (Deering 2023).

45. *See, e.g.*, 725 ILL. COMP. STAT. 150 *et seq.* (West 2023).

46. *See Dusenbery v. United States*, 534 U.S. 161, 170 (2002) (holding that actual notice is not required, and requiring only a process that meets the *Mullane* standard for notice); *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950) (providing what is now known as the *Mullane* standard for giving notice through actions that are reasonably calculated to apprise the recipient of the pendency of the action). Efforts at reform, such as California's S.B. 443 and Illinois' H.B. 303 have attempted to strengthen the notice provided to property owners by designating the method by which notice is to be provided and information required to be provided in the notice. *See infra* Section I.B.5.

them. Data shows that in joint state and federal actions, state law enforcement agencies receive up to 80% of the proceeds seized, with agencies allocating funds to operating expenses.⁴⁷ In 2018, 13 states spent no money on victim restitution, and less than 10% of proceeds funded community programs.⁴⁸

Opponents of civil asset forfeiture have styled this “policing for profit,” in showing that civil asset forfeiture leads law enforcement agencies to engage in a higher number of low-dollar-value forfeitures.⁴⁹ Asset forfeiture is intended as a deterrent to criminal activity, but data from New Mexico, a state that halted its state civil asset forfeiture process in 2015, shows that eliminating forfeiture had no effect on the crime rate.⁵⁰ Forfeiture as a policy to deter crime makes little sense, and places a burden on families and communities when rent money, cars, and legally obtained property and money are seized.⁵¹ Forfeiture places a burden on property owners to prove their property’s innocence, entirely bypassing the duty on the state to prove liability for the crimes in which the property is allegedly implicated, in a system that incentivizes the seizure of property by law enforcement.

The federal Civil Rights Division of the United States Department of Justice report on the Ferguson, Missouri Police Department began a national conversation about the way that the state unfairly imposes governmental debt on those who can least afford it in order to fund the operating budgets of state agencies, like the courts and police departments.⁵² Civil asset forfeiture as a

47. *Don’t Steal*, *supra* note 26, at 54; *POLICING FOR PROFIT*, *supra* note 28, at 6.

48. *POLICING FOR PROFIT*, *supra* note 28, at 6.

49. *See Armed Robbery*, *supra* note 11, at 225–26 (noting that law enforcement agencies increase forfeiture activity to make up for tight budgets); BRIAN D. KELLY, DOES FORFEITURE WORK? 7 (2022), <https://ij.org/report/does-forfeiture-work/> [<https://perma.cc/BJY3-FG4J>] [hereinafter DOES FORFEITURE WORK?] (showing that the economic squeeze associated with a 1% increase in unemployment correlated with an 11% to 12% increase in forfeiture activity).

50. DOES FORFEITURE WORK?, *supra* note 49, at 11 (outlining how when New Mexico abolished civil asset forfeiture in 2015 “the state experienced no meaningful increase in crime or decrease in arrest rates compared to neighboring Colorado and Texas, which served as control states”).

51. *See* Christopher Ingraham, *How Police Took \$53,000 from a Christian Band, an Orphanage and a Church*, WASH. POST (Nov. 24, 2021), <https://www.washingtonpost.com/news/wonk/wp/2016/04/25/how-oklahoma-cops-took-53000-from-a-burmese-christian-band-a-church-in-omaha-and-an-orphanage-in-thailand/> [<https://perma.cc/5EF5-DTXB>] (sharing the story of Eh Wah, the music director of a Christian group, carrying charitable donations and concert proceeds, who had \$53,000 seized from him by the Muskogee County Sheriff’s Department without any criminal charges ultimately pursued against him). Mr. Wah, who speaks English as a second language was baffled and confused by the police stop, search, and seizure. *See id.* In charges that were later dropped, he was accused of “acquiring proceeds from drug activity, a felony.” *Id.*

52. *See* U.S. DEP’T OF JUST. CIV. RTS. DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 4, 57 (2015); *see also* ALEX BENDER ET AL., NOT JUST A FERGUSON PROBLEM: HOW TRAFFIC COURTS DRIVE INEQUALITY IN CALIFORNIA 6 (2015).

public policy imposes a similarly harmful burden, and while some of the individuals from whom assets are seized may be involved in criminal activity, the burden of government seizure of private property often falls on those who are not actually guilty of any crime, or those who only accused of minor, non-violent crimes, often related to drug possession and use.⁵³ This Article challenges the structure of civil asset forfeiture and uses a quantitative analysis to explain why adjudicative reform focused on an evidentiary hearing that rarely happens fails to adequately protect low-income property owners and their communities.

B. Challenging the Constitutionality of Civil Asset Forfeiture

1. Federal Asset Forfeiture

Civil asset forfeiture is authorized under both state and federal statutes. Federal forfeitures are conducted subject to the Civil Asset Forfeiture Reform Act of 2000 (CAFRA), which creates a uniform process for opposing forfeitures as a property owner claimant in federal court.⁵⁴ Almost all U.S. states and the federal government have statutes that permit the government to seize property that is believed to be used in the furtherance of, or was obtained with illegal proceeds of, illegal drug activity.⁵⁵ Civil forfeiture differs from criminal forfeiture, where a criminal conviction and a judicial process is required to take the property of the defendant, and as described above in Section I.A, has roots in English and early American law permitting the forfeiture of vessels and cargo used in trade that was non-compliant with the law.⁵⁶ Scholars have noted the existence of civil forfeiture in English

53. See POLICING FOR PROFIT, *supra* note 28, at 4–6.

54. See *Don't Steal*, *supra* note 26, at 48 (outlining how widespread federal civil forfeiture was jumpstarted by the “War on Drugs”). See generally 18 U.S.C. §§ 981, 983–85. The first major federal legislation enabling civil forfeiture was the Comprehensive Drug Abuse Prevention and Control Act of 1970, which limited forfeitures to drug related offenses and property. See *Don't Steal*, *supra* note 26, at 52. The Comprehensive Crime Control Act of 1984 broadened forfeiture powers at the state and federal levels. See *Don't Steal*, *supra* note 26, at 48. In 2000, to address concerns that the civil forfeiture powers had grown too broad, the Civil Asset Forfeiture Reform Act (CAFRA) was passed. See *Don't Steal*, *supra* note 26, at 51.

55. See Jefferson E. Holcomb, Tomislav V. Kovandzic & Marian R. Williams, *Civil Asset Forfeiture, Equitable Sharing, and Policing for Profit in the United States*, 39 J. CRIM. JUST. 273, 273 (2011); see also POLICING FOR PROFIT, *supra* note 28, at 32 (noting that in 2015, New Mexico became the first state to effectively abolish civil forfeiture, with additional legislation and case law continuing to strengthen that position since).

56. 18 U.S.C. § 982; U.S. DEP'T OF JUST., JUSTICE MANUAL § 9-112.000 (2023), <https://www.justice.gov/jm/jm-9-112000-administrative-and-judicial-forfeiture> [<https://perma.cc/7BXG-N96R>]; see also Nelson, *supra* note 38, at 2461–63.

law, the law of the colonies, and that taking the property of a defendant as a punitive practice is even found in the Bible.⁵⁷

The passage of the CAFRA in 2020 was an attempt to strengthen procedural safeguards for property owners subjected to federal civil asset forfeiture.⁵⁸ CAFRA was intended to modernize civil asset forfeiture but it reinforced the system as it built on the existing statutory framework for forfeiture, and “did not amend or repeal the procedures in the existing law.”⁵⁹ In addition to adding new procedural tools for law enforcement, CAFRA was intended to provide additional procedural protections for claimants. As described by the Assistant Chief of the Asset Forfeiture and Money Laundering Section of the Federal Department of Justice, “CAFRA revises centuries old civil forfeiture practice, places new burdens and time limits on the government, creates a uniform ‘innocent owner’ defense, allows claimants to recover interest and attorneys fees, expands forfeiture into new areas, resolves ambiguities and issues that have split the courts, and gives the government new procedural tools that will enhance its ability to use asset forfeiture as a weapon against crime.”⁶⁰

Highlights of CAFRA include strict deadlines on both sides in a forfeiture proceeding, giving the seizing agency only 60 days to provide notice to property owners, and providing claimants with only 30 days to file a claim.⁶¹ CAFRA eliminated the requirement that claimant file a bond, except in forfeitures governed by customs laws.⁶² CAFRA also allows claimants to petition for temporary possession of their property pending trial, by filing a hardship motion for the return of property pending adjudication.⁶³ Section 983, added by CAFRA, codifies the holding of the Supreme Court in *United States v. Bajakajian* which held that a forfeiture that is “grossly disproportional to the gravity of the offense” violates the Eighth Amendment prohibition on excessive fines and fees.⁶⁴ Federal forfeiture statutes only guarantee a right to counsel when a primary residence is subject to forfeiture, a remnant of a much broader proposal to require appointment of counsel in all federal civil asset forfeiture cases.⁶⁵ This provision arises from the

57. See Jill Wieber Lens, *Justice Thomas, Civil Asset Forfeitures, and Punitive Damages*, 51 U.C. DAVIS L. REV. ONLINE 33, 38 (2017).

58. See Cassella, *supra* note 25, at 97.

59. *Id.* at 102.

60. *Id.* at 97.

61. *Id.* at 105; see also 18 U.S.C. § 893(a).

62. Cassella, *supra* note 25, at 105; see also 18 U.S.C. § 983(a); 19 U.S.C. § 1608.

63. Cassella, *supra* note 25, at 106; see also 18 U.S.C. § 983(f).

64. Cassella, *supra* note 25, at 109; *United States v. Bajakajian*, 524 U.S. 321, 334 (1998).

65. See Snow, *supra* note 43, at 72 n.14; 18 U.S.C. §§ 983, 985; 28 U.S.C. §§ 2466–67 (providing a comprehensive authority for civil asset forfeiture). Claimants have a right to

distinction in CAFRA between forfeitures of personal property worth over \$500,000 and forfeitures of real property, which proceed through a judicial forfeiture, in which a hearing on the merits is held.⁶⁶ High-value seizures by federal law enforcement agencies cannot be administratively forfeited and require a determination by a judge; for these cases alone, the procedural process does not rely on the property claimant asserting their rights, and instead shifts this burden to initiate the case to the state.⁶⁷

Criticisms that CAFRA did not go far enough to protect the rights of property owners followed. Federal asset seizure and forfeiture often serves to increase the budgets of state and local law enforcement agencies through the mechanism of equitable sharing of the proceeds of civil forfeiture, which permits allocation of the assets seized from federal agencies to local and state agencies.⁶⁸ An area of focus for forfeiture reform is reining in abuses arising from equitable sharing partnerships between local and federal law enforcement agencies.⁶⁹ This practice, while permitted by statute, has been suspended and reinstated by executive order and policy of the U.S. Department of Justice in each of the last three presidential administrations. The Department of Justice under President Obama denounced the practice of equitable sharing in January 2015, but the practice was reinstated under the Trump administration, and then revoked again by Executive Order 14074 under President Biden.⁷⁰ Recommendations to strengthen protections for

appointed counsel if the forfeiture involves a claimant's residential home. 18 U.S.C. § 983(b)(2)(A); Cassella, *supra* note 25, at 110–12.

66. See Cassella, *supra* note 25, at 127; 18 U.S.C. § 985 (requiring that all real property forfeitures proceed judicially).

67. See Cassella, *supra* note 25, at 127–28 (noting that the 60-day rule of notice only applies to non-judicial forfeitures, and permitting additional time “promptly or within such time as may be allowed by the court” to initiate a judicial forfeiture proceeding under Rule C(4) of the Supplemental Rules).

68. Equitable sharing is a process permitted by 18 U.S.C. § 981(e) which allows “equitable transfer . . . of any forfeited property to the appropriate State or local law enforcement agency so as to reflect generally the contribution of any such agency participating directly in the acts which led to the seizure or forfeiture of such property.” 18 U.S.C. § 981(e)(7).

69. See generally Holcomb et al., *supra* note 55 (evaluating the extent to which state law enforcement circumvents statutory limits on civil forfeiture through the mechanism of equitable sharing and concluding that states with more restrictive civil forfeiture laws have more participation in equitable sharing).

70. See Alexandra D. Rogin, *Dollars for Collars: Civil Asset Forfeiture and the Breakdown of Constitutional Rights*, 7 DREXEL L. REV. ONLINE 45, 69; Exec. Order No. 13,688, Federal Support for Local Law Enforcement Equipment Acquisition, 80 Fed. Reg. 3451 (Jan. 16, 2015); Press Release, U.S. Dep't of Just., Attorney General Sessions Issues Policy and Guidelines on Federal Adoption of Assets Seized by State or Local Law Enforcement (July 19, 2017), <https://www.justice.gov/opa/pr/attorney-general-sessions-issues-policy-and-guidelines-federal-adoptions-assets-seized-state> [<https://perma.cc/EX7S-H5SS>]; Exec. Order No. 14,074, Advancing Effective Accountable Policing and Criminal

property owners include improved notice, changes to the burden of proof, permanently eliminating equitable sharing with states, implementation of judicial forfeiture processes for all federal seizures, a right to counsel, and better data collection and public disclosure as to the allocation of forfeiture funds.⁷¹

2. State Forfeiture Statutes

State statutes permitting local and state law enforcement agencies to seize vary in their provision of due process protections, as a 50-state survey conducted by non-profit advocacy organization the Institute for Justice, showed in assigning “report card grades” to each state.⁷² In the third edition of this report, in 2020, 35 states earned a grade of a D+ or worse, signifying very few due process protections for claimants, with New Mexico and Wisconsin rated the highest in due process protections.⁷³ The report gives the federal government civil asset forfeiture scheme a D- as well, and reports that among 42 states and the federal Department of Justice, over \$3 billion in assets were taken under civil asset forfeiture authority in 2018.⁷⁴

Between the publication of the second and third editions of the Policing for Profit 50-state survey, 32 states adopted some form of forfeiture reform, but yet there has been little change in the amount of assets seized and the number of individuals impacted.⁷⁵ California implemented S.B. 443 with the approval of criminal justice system reform advocates throughout the state, yet California is among the top five states that took in civil asset forfeiture revenue in 2018, and received a grade of C from the Institute for

Justice Practices to Enhance Public Trust and Public Safety, 87 Fed. Reg. 32960–61 (May 25, 2022).

71. Law student notes demonstrate that civil asset forfeiture reform is an area of interest for future lawyers who write frequently on the topic proposing ideas for reform. See Daniel Reed, Note, *The Next Step in Civil Asset Forfeiture Reform: Passing the Civil Asset Forfeiture Reform Act of 2014*, 66 CATH. U.L. REV. 933, 942 (noting the argument that the time to respond to a federal complaint is unreasonably short at 35 days); Levesque, *supra* note 43, at 86; Adam Crepelle, Note, *Probable Cause to Plunder: Civil Asset Forfeiture and the Problems It Creates*, 7 WAKE FOREST J.L. & POL’Y 315, 357–59 (proposing a floor on forfeiture values, requiring a warrant for seizure, and eliminating the profit motive for law enforcement agencies).

72. POLICING FOR PROFIT, *supra* note 28, at 5.

73. POLICING FOR PROFIT, *supra* note 28, at 5, 42.

74. POLICING FOR PROFIT, *supra* note 28, at 5, 15.

75. POLICING FOR PROFIT, *supra* note 28, at 31. The report notes that of these 32 states enacting reform, “relatively few reforms have tackled the central problems with civil forfeiture laws” — about half introduced reforms that did not directly affect the grading metric employed, including new reporting requirements, limits on equitable sharing, or procedural updates.

Justice.⁷⁶ Only New Mexico, which has effectively abolished civil forfeiture, received a grade of “A.” Wisconsin received an “A-” grade, followed by a collection of five states assigned a “B+.”⁷⁷

Each state with the exception of New Mexico,⁷⁸ has a statutory framework for the seizure of assets once law enforcement has probable cause to believe the property has a sufficient relationship to an enumerated crime or crimes.⁷⁹ Scholarship studying civil asset forfeiture in multiple states demonstrates the impact of forfeiture on urban areas and specific demographic groups, including disparate impact analysis showing racial justice implications of forfeiture.⁸⁰

3. Takings Clause

Early scholarship focused on procedural due process issues with federal seizures utilizing a framework of the Fifth Amendment Takings Clause; however, the U.S. Supreme Court rejected this approach in 1996 in *Bennis v. Michigan*.⁸¹ In ruling that a failure to protect innocent property owners

76. POLICING FOR PROFIT, *supra* note 28, at 42. Among the co-sponsors for S.B. 443 were the Institute for Justice, the California chapter of the ACLU, and the Drug Policy Alliance. *Hearing on S.B. 443 Before the Assemb. Comm. on Pub. Safety – July 14, 2015*, Leg. Sess. 2015–16 (Cal. 2015) (Bill Analysis)

77. POLICING FOR PROFIT, *supra* note 28, at 42.

78. The Policing for Profit report assigned an “A” grade to New Mexico following the passage of H.B. 312 in 2019 which effectively abolished civil asset forfeiture by state and municipal law enforcement agencies in New Mexico, a legislative move that followed the state court rulings in *Espinoza v. City of Albuquerque*, 435 P.3d 1270, 1272 (N.M. Ct. App. 2018) (holding that the city’s forfeiture ordinance was pre-empted by state law) and in *Harjo v. City of Albuquerque*, 326 F. Supp. 3d 1145, 1193 (D.N.M. 2018) (holding that the state statute violated the due process rights of property owners). POLICING FOR PROFIT, *supra* note 27, at 122; *see also* DOES FORFEITURE WORK?, *supra* note 49, at 11 (noting that the end of civil forfeiture in New Mexico has resulted in “no meaningful increase in crime or decrease in arrest rates compared to neighboring Colorado and Texas”).

79. *See generally* POLICING FOR PROFIT, *supra* note 28 (performing a state-by-state evaluation of the protections afforded property owners by forfeiture statutes).

80. *See* Rachel Jones, *Excessively Unconstitutional: Civil Asset Forfeiture and the Excessive Fines Clause in Virginia*, 25 WM. & MARY BILL RTS. J. 1393, 1406 (analyzing state forfeiture statutes in Virginia); Andrew Crawford, *Civil Asset Forfeiture in Massachusetts: A Flawed Incentive Structure and Its Impact on Indigent Property Owners*, 35 B.C. J.L. & SOC. JUST. 257, 272 (looking at the impact of forfeiture in Massachusetts); Rachel Stuteville, *Reverse Robin Hood: The Tale of How Texas Law Enforcement Has Used Civil Asset Forfeiture to Take from Property Owners and Pad the Pockets of Local Government — the Righteous Hunt for Reform Is On*, 46 TEX. TECH L. REV. 1169, 1188 (highlighting the disparate impact of civil forfeiture laws across Texas’s big-city and rural state agencies); Mary Murphy, *Race and Civil Asset Forfeiture: A Disparate Impact Hypothesis*, 16 TEX. J.C.L. & C.R. 77, 83 (describing the disparity in discretion afforded to local governments by their forfeiture regimes in Texas, California, and Georgia).

81. *See Bennis v. Michigan*, 516 U.S. 442, 443 (1996); *see, e.g.*, Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles Part II — Takings as Intentional*

was outweighed by the federal government's interest in deterrence of illegal acts, the *Bennis* Court rejected a Fifth Amendment claim by an innocent co-owner who did not know her car was used in criminal activity.⁸² Prior to 1996, academic scholars examining the structure and impact of civil asset forfeiture statutes on property owners approached the issue through a constitutional law analysis under the Takings Clause of the Fifth Amendment, under the theory that the innocent owner defense was mandated by the Constitution.⁸³

The Supreme Court has consistently upheld the constitutionality of civil asset forfeiture based on its deep roots in English and American jurisprudence, although Justice Thomas has questioned whether the current manner in which forfeiture is used actually mirrors historical practice, noting that historically, laws limited “the type of property” that could be forfeited to matters “such as customs or piracy.”⁸⁴ Despite consistently finding the lack of due process in forfeiture cases constitutional, Justice Thomas noted in *Bennis v. Michigan* that “[o]ne unaware of the history of forfeiture laws and 200 years of this Court’s precedent regarding such laws might well assume that such a scheme is lawless — a violation of due process.”⁸⁵ Despite Justice Thomas’s misgivings, he voted with the majority to uphold civil asset forfeiture in *Bennis*, holding that the Takings Clause does not protect property owners when the property is used to commit a criminal

Deprivations of Property Without Moral Justification, 78 CALIF. L. REV. 53, 143 (1990); J. Kelly Strader, *Taking the Wind Out of the Government’s Sails?: Forfeitures and Just Compensation*, 23 PEPP. L. REV. 449, 450 (1996); Sandra Guerra, *Family Values?: The Family as an Innocent Victim of Civil Drug Asset Forfeiture*, 81 CORNELL L. REV. 343, 365 (referencing dicta from *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 689–90 (1974), in which the Supreme Court “opened the door slightly for innocent property owners to raise a defense based on the Fifth Amendment’s takings clause”).

82. See *Bennis*, 516 U.S. at 453 (upholding Michigan’s forfeiture statute given the state’s interest in “deter[ing] illegal activity that contributes to neighborhood deterioration and unsafe streets”).

83. See Levesque, *supra* note 43, at 71 (noting Chief Justice Rehnquist’s rejection of a basis for the innocent owner defense in either the Fifth or Fourteenth Amendments in *Bennis*); Barclay Thomas Johnson, *Restoring Civility — the Civil Asset Forfeiture Reform Act of 2000: Baby Steps Towards a More Civilized Civil Forfeiture System*, 35 IND. L. REV. 1045, 1054 (2002) (“Based on [*Calero-Toledo*, 416 U.S. at 668, 689–90] most interested parties assumed an innocent owner defense was based on the Constitution; that is, until 1996, when the Supreme Court decided [*Bennis*, 516 U.S. at 442].”).

84. See Lens, *supra* note 57, at 40; *Leonard v. Texas*, 137 S. Ct. 847, 849 (2017); *Austin v. United States*, 509 U.S. 602, 611–13 (1993); *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 81 (1993) (Thomas, J., concurring) (expressing concern “by the breadth of new civil forfeiture statutes”).

85. See Lens, *supra* note 57, at 39–40; *Bennis*, 516 U.S. at 454 (Thomas, J., concurring). In the same concurrence, Justice Thomas also expressed concern over the use of civil asset forfeiture more to “raise revenue from innocent but hapless owners . . . or a tool wielded to punish those who associate with criminals, than a component of a system of justice.” *Bennis*, 516 U.S. at 456.

offense even absent a showing of consent or even knowledge of the use of the illegal use of the property.⁸⁶

The U.S. Supreme Court's ruling in *Bennis v. Michigan* created an impetus to reform the federal civil asset forfeiture process, culminating in the passage of CAFRA, discussed above in Section I.B.1.⁸⁷ Post-*Bennis* scholarship challenging the constitutionality of civil asset forfeiture focuses on the myriad ways in which pre-hearing deprivation of property denies a claimant procedural due process and making the argument that the profit motive behind forfeiture creates an unconstitutional conflict of interest for law enforcement agencies.⁸⁸

4. *Timbs v. Indiana and the Excessive Fines Evaluation*

Following the 2019 case of *Timbs v. Indiana*, in which the United State Supreme Court held that the Eighth Amendment prohibition on excessive fines and fees is incorporated against the states through the Fourteenth Amendment, state courts hearing an excessive fines challenge to civil asset forfeiture are to apply the Eighth Amendment's proportionality test.⁸⁹ The jurisprudence of the current U.S. Supreme Court on civil asset forfeiture does not overturn *Bennis*, but instead takes a substantive due process approach,

86. *See id.* at 454.

87. *See id.*; Stefan D. Cassella, *The Uniform Innocent Owner Defense to Civil Asset Forfeiture: The Civil Asset Forfeiture Reform Act of 2000 Creates a Uniform Innocent Owner Defense to Most Civil Forfeiture Cases Filed by the Federal Government Developments in Asset Forfeiture Law*, 89 KY. L.J. 653, 655 (2000) (noting that *Bennis* "served to highlight what forfeiture practitioners had long known: that the federal innocent owner provisions were ambiguous in their language and scope, and inconsistent in their application to different crimes").

88. *See How Crime Pays: The Unconstitutionality of Modern Civil Asset Forfeiture as a Tool of Criminal Law Enforcement*, 131 HARV. L. REV. 2387, 2393 (2018) (noting that "scholars have suggested that civil forfeiture deprives owners of procedural due process when applied to conduct beyond its historic scope"); Crepelle, *supra* note 71, at 355 (commenting on the specific due process issues with forfeiture waivers and the profit-driven motivations behind them). *But see* Nelson, *supra* note 38, at 2468 (arguing for the constitutionality of forfeiture statutes based on interpretations of in rem jurisdiction over the seized property and applying an originalist reading to the historical application of civil asset forfeiture as a "category of civil punishment").

89. *See Timbs v. Indiana*, 139 S. Ct. 682, 689 (noting that "all 50 states have a constitutional provision prohibiting the imposition of excessive fines either directly or by requiring proportionality"). *See also* recent civil asset forfeiture cases that have applied *Timbs*: *Property Clerk, N.Y. City Police Dep't v. Nurse*, 185 A.D.3d 459, 461 (N.Y. App. Div. 2020) (remanding dismissal of civil forfeiture complaint for proportionality analysis in line with *Timbs*); *City of Seattle v. Long*, 493 P.3d 94, 107 (Wash. 2021) (noting the recent Supreme Court extension of the excessive fines clause to state actions); *State v. Timbs*, 169 N.E.3d 361, 366, 369 (Ind. 2021) (Indiana Supreme Court deciding on remand that the seizure of Timbs's SUV was "grossly disproportionate to the gravity of Timbs's underlying dealing offense").

with Justice Thomas noting the due process concerns with forfeiture in *Leonard v. Texas*.⁹⁰ Thomas questioned in concurrence in *Leonard* whether modern civil asset forfeiture laws “can be squared with the Due Process Clause and our Nation’s history.”⁹¹ Justice Thomas observes the relationship between civil asset forfeiture and profitability for law enforcement agencies, citing to the Institute for Justice’s Policing for Profit report.⁹²

Claimant Tyson Timbs pled guilty to a drug charge, and following the resolution of the criminal case, the Indiana trial court adjudicated the state’s forfeiture of his vehicle, a Land Rover with a value of \$42,000, that he had purchased with money from an insurance policy he received after the death of his father.⁹³ The value of the vehicle greatly exceeded the state-imposed maximum \$10,000 monetary fine, effectively subjecting Mr. Timbs to a four-fold fine through statutorily-permitted deprivation of his property.⁹⁴ A majority of the Supreme Court extended the holding of *Austin v. United States*, which held that civil asset forfeitures fall within the Eighth Amendment’s protection when they are at least partially punitive, as such forfeitures “constitute payment to a sovereign as a punishment for some offense,” and “cannot fairly be said solely to serve a remedial purpose.”⁹⁵ Declining to overturn *Austin*, the *Timbs* Court affirmatively extended the protection of the Eighth Amendment in civil asset forfeiture cases to forfeitures carried out pursuant to state statutory authority, as occurred in the underlying action in Indiana.⁹⁶

In incorporating the Eighth Amendment against the states through the Fourteenth Amendment, the Court in *Timbs* held, “[p]rotection against excessive punitive economic sanctions secured by the Clause is, to repeat, both ‘fundamental to our scheme of ordered liberty’ and ‘deeply rooted in this Nation’s history and tradition.’”⁹⁷ The Court’s phrasing, citing to *McDonald v. City of Chicago*, a Second Amendment case, uses the language of substantive due process in the incorporation of fundamental rights against the states.⁹⁸ As discussed below in Section IV.B, a framing of civil asset forfeiture rights as a substantive due process issue is consistent with the

90. See 137 S. Ct. 847, 849 (2017) (Thomas, J., concurring).

91. *Id.* at 847.

92. See *id.* at 848 (citing POLICING FOR PROFIT, *supra* note 28).

93. See *Timbs*, 139 S. Ct. at 686.

94. See *id.* Indiana’s forfeiture statute permits the seizure of property for violations of enumerated statutes, including IND. CODE § 34-24-1-1(a)(1)(A) (2023).

95. See *Austin v. United States*, 509 U.S. 602, 621–22 (1993) (citations omitted).

96. See *Timbs*, 139 S. Ct. at 689–90.

97. See *id.* at 686–87.

98. See *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010).

nationwide advocacy to halt unjust government-imposed fines and fees. By characterizing the forfeiture of Tyson Timbs' car as a fine, the Court opened the door to an application, in civil asset forfeiture matters, of a line of cases that are interpreted by state courts to prohibit the imposition of unjust fines and fees where the defendant is unable to afford to pay.⁹⁹

5. *Procedural Due Process*

In the landmark case of *Goldberg v. Kelly*, the U.S. Supreme Court held that persons are entitled both to a level of notice sufficient to place them on notice of the intended deprivation and to a hearing prior to deprivation of property.¹⁰⁰ Moreover, the Court held that the fundamental right to a pre-deprivation opportunity to be heard is especially crucial when the property owner "may be 'condemned to suffer grievous loss . . .'"¹⁰¹ The Court modified this holding in *Mathews v. Eldridge*, with the implementation of a sliding scale multi-factor test, holding that courts must consider three factors in determining the level of procedural due process required: the private interest affected by the state action; the risk of erroneous deprivation through the procedures used; and the government's interest, including burdens imposed by providing additional procedural protection.¹⁰²

However, in civil asset forfeiture cases, including those decided in the era of *Goldberg* and *Mathews*, the Supreme Court has consistently held that property owners subject to forfeiture are not entitled to the same procedural protections as other property owners, and has affirmed the constitutionality of federal and state forfeiture statutes that provide for seizure without prior notice and do not afford access to a pre-deprivation hearing.¹⁰³

99. See *People v. Kopp*, 38 Cal. App. 5th 47, 98 (Cal. Ct. App. 2019) (granting petition for review for defendant Hernandez, 254 Cal. Rptr. 3d 637 (Cal. 2019)). This case is fully briefed but has not been yet set for oral argument. The issues before the court in *Kopp* are: 1) Must a court consider a defendant's ability to pay before imposing or executing fines, fees, and assessments; and 2) if so, which party bears the burden of proof regarding the defendant's inability to pay? *Id.*

100. See *Goldberg v. Kelly*, 397 U.S. 254, 261–63 (1970).

101. See *id.* at 262–63.

102. See 424 U.S. 319, 335 (1976).

103. See *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971); *United States v. Eight Thousand Eight Hundred & Fifty Dollars (\$8,850) in U.S. Currency*, 461 U.S. 555, 562 n.12, 563 (1983) (affirming that no pre-seizure hearing is required by due process and addressing the question of "when a postseizure delay may become so prolonged that the dispossessed property owner has been deprived of a meaningful hearing at a meaningful time," and affirming the holding in *Pearson Yacht* that "the seizure serves important governmental purposes [and] a pre-seizure notice might frustrate the statutory purpose"). Compare *Fuentes v. Shevin*, 407 U.S. 67, 67, 96 (1972) (invalidating Florida and Pennsylvania prejudgment replevin statutes for a failure to provide due process of law in the form of a "fair prior hearing"), with *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 679 (1974) (holding that no pre-seizure notice and hearing was required by due process because the property could be concealed by its owner,

The statutory requirement that a claimant initiate an action in court to oppose a forfeiture, as is the case in California, appears not to comport with the long line of procedural due process cases requiring notice and a pre-deprivation hearing before the state takes an individual's property.¹⁰⁴ The in rem nature of civil asset forfeiture proceedings forms much of the historical basis for a seizure without a pre-deprivation hearing.¹⁰⁵ For in personam actions, constructive notice is insufficient, but in civil asset forfeiture matters, because the defendant is the property itself, state statutes that provide for constructive notice have been deemed constitutional.¹⁰⁶ The current due process protections afforded claimants reflect that historically, "actions in rem did not require personal service of process on any particular individual."¹⁰⁷ Although *Mullane* holds that the Due Process Clause requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections," attempts to seek judicial declarations regarding the constitutionality of civil asset forfeiture under procedural due process have not been successful.¹⁰⁸ State civil asset forfeitures in more than a dozen states proceed through an administrative forfeiture, with notice provided after the assets are in the possession of law enforcement and the burden placed on the claimant to initiate a claim in the

predicating the holding on the government interest, and holding that this case is one of the "‘extraordinary’ situation[s] in which postponement of notice and hearing until after seizure did not deny due process").

104. California is also a non-judicial foreclosure state in which banks foreclosed on approximately 1.7 million homes between 2008 and 2013, with homeowners lacking a forum in which to present arguments opposing foreclosure. See CTR. FOR POPULAR DEMOCRACY ET AL., CALIFORNIA IN CRISIS 6 (2013), <https://www.populardemocracy.org/sites/default/files/California-in-Crisis-Final-Report-compressed.pdf> [<https://perma.cc/U46Y-297M>].

105. See *Leonard v. Texas*, 137 S. Ct. 847, 847 (2017) (Thomas, J., concurring) (noting that "[i]n rem proceedings often enable the government to seize the property without any predeprivation judicial process and to obtain forfeiture of the property even when the owner is personally innocent . . ."); Nelson, *supra* note 38, at 2488 (discussing the historical context for constitutional protections applicable in criminal proceedings but exempt from application in in rem forfeiture actions).

106. This distinction goes back as far as the seminal case on personal jurisdiction, *Pennoyer v. Neff*, in which the Supreme Court distinguished the in personam due process requirement of personal notice, in asserting that the Court's rule would not necessarily apply were the action in rem such as an action for forfeiture, "that is, by a direct proceeding against the property for that purpose" and stating that constructive "service may answer in all actions which are substantially proceedings in rem." 95 U.S. 714, 722, 727 (1877).

107. Nelson, *supra* note 38, at 2482.

108. See Nelson, *supra* note 38, at 2482–83; *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *Calero-Toledo*, 416 U.S. at 677–80 (holding "seizure for purposes of forfeiture is one of those 'extraordinary situations that justify postponing notice and opportunity for a hearing'" (quoting *Fuentes*, 407 U.S. at 90)).

court system, through which the seizure can be opposed and the grounds for forfeiture adjudicated.¹⁰⁹

In *Dusenbery v. United States*, the Court applied *Mullane* to a civil asset matter where the claimant was incarcerated, finding reasonably calculated notice where the government “sent certified mail addressed to petitioner at the correctional facility where he was incarcerated.”¹¹⁰ Over the objections of Justice Ginsberg in dissent, the majority held that certified mail addressed to the facility in which the claimant was held, coupled with notice to the last known address of the property owner, and a third address (of his mother), was sufficient to find that the method was “itself reasonably certain to inform those affected.”¹¹¹ The treatment of notice in *Dusenbery* stands in contrast to the non-forfeiture in rem case *Greene v. Lindsey*, in which the U.S. Supreme Court held that the Due Process Clause required more than mere constructive notice in an in personam action for eviction and possession of rental property. The Court noted that “[p]ersonal service guarantees actual notice of the pendency of a legal action; it thus presents the ideal circumstance under which to commence legal proceedings against a person, and has traditionally been deemed necessary in actions styled in personam.”¹¹² However, in light of the fact that the litigants were deprived of a significant property right when evicted from their homes, the Court held that “[t]he sufficiency of notice must be tested with reference to its ability to inform people of the pendency of proceedings that affect their interests.”¹¹³

The California Supreme Court has not weighed in on the issue of procedural due process in civil asset forfeiture cases. However, in *Nasir v. Sacramento County Office of the District Attorney*, the court adopted and affirmed federal jurisprudence guiding procedural due process rights under the Fourteenth Amendment.¹¹⁴ *Nasir* holds, “prior to an action which will affect an interest in life, liberty, or property protected by the Due Process Clause of the Fourteenth Amendment, a State must provide ‘notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to

109. POLICING FOR PROFIT, *supra* note 27, at 23 (describing the process by which property may be subject to administrative forfeiture at both the state and federal levels).

110. *See Dusenbery v. United States*, 534 U.S. 161, 168–69 (2002).

111. *See id.* at 170 (quoting *Mullane*, 339 U.S. at 315). *But see Jones v. Flowers*, 547 U.S. 220, 238 (2006) (holding that notice by certified mail was not adequate where two certified letters were returned to the government office marked “unclaimed” so that the government had reason to know that notice was not received).

112. *See Greene v. Lindsey*, 456 U.S. 444, 449 (1982) (invalidating posted notices of eviction by deputies who later removed the eviction notices).

113. *See id.* at 451.

114. *See Nasir v. Sacramento Cnty. Off. Dist. Att’y*, 11 Cal. App. 4th 976, 985 (Cal. Ct. App. 1992).

present their objections.”¹¹⁵ California case law on procedural due process adopts federal guidance in *Mullane*, embracing the doctrine that “process which is a mere gesture is not due process.”¹¹⁶ The holding of *Mullane* has been interpreted by California courts to require strict construction of forfeiture laws “in favor of the persons against whom they are sought to be imposed” in interpreting procedural steps necessary before executing an administrative forfeiture.¹¹⁷

The court stated in *Nasir* that administrative forfeiture is “the most draconian part of the harshest of all our laws respecting the private ownership of personal property” where “certain legal safeguards are called into play.”¹¹⁸ Indeed, the *Nasir* court adopted a strict interpretation of the forfeiture statutes, requiring that notice of forfeiture and the process for filing a claim be personally served to the property owner.¹¹⁹ However, under the United States Supreme Court holding in *Dusenbery*, for an incarcerated person, or a person in the custody of law enforcement, processes may meet the reasonableness standard of due process even where service is not shown to be completed and actual notice is not required.¹²⁰

115. *See id.* (quoting *Menonite Bd. of Missions v. Adams*, 462 U.S. 791, 795 (1983)).

116. *See Mullane*, 339 U.S. at 315; *Nasir*, 11 Cal. App. 4th at 985–86 (citation omitted) (holding that “forfeiture statutes must ‘afford due process of law to those persons who are subject to their provisions and provide them with an adequate remedy to protect their property rights’”); *Dusenbery*, 534 U.S. at 168–69; *Miller v. Superior Ct. Cal.*, 22 Cal. 3d 923, 945 (Cal. 1978).

117. *See Nasir*, 11 Cal. App. 4th at 986 (noting that the “law abhors a forfeiture”); *People v. Superior Ct.*, 103 Cal. App. 4th 409, 418 (Cal. Ct. App. 2d 2002) (quoting *People v. Twenty-Eight Thousand & Five Hundred Dollars (\$28,500) U.S. Currency*, 51 Cal. App. 4th 447, 463 (Cal. Ct. App. 5th 1996)) (“Statutes imposing forfeitures are disfavored and are to be ‘strictly construed in favor of the persons against whom they are sought to be imposed.’”); *see also Cuevas v. Superior Ct.*, 221 Cal. App. 4th 1312, 1320 (Cal. Ct. App. 5th 2013), *as modified on denial of reh’g* (Dec. 24, 2013); *Ramirez v. Tulare Cnty. Dist. Att’y’s Off.*, 9 Cal. App. 5th 911, 929 (Cal. Ct. App. 2017); *City of San Diego v. Kevin B.*, 118 Cal. App. 4th 933, 941 (Cal. Ct. App. 2004) (quoting *Bryte v. City of La Mesa*, 207 Cal. App. 3d 687, 689 (Cal. Ct. App. 1989)) (“[D]ue process clauses of the federal and state Constitutions apply to their seizure.”)

118. *See Nasir*, 11 Cal. App. 4th at 985.

119. *See id.* at 980; *Ramirez*, 9 Cal. App. 5th at 927 (citing CAL. HEALTH & SAFETY CODE §§ 11488.4, 11488.5 (Deering 2023)) (holding that courts require strict compliance with the law). Section 11488.4(c) states, “a notice stating that any interested party may file a verified claim with the superior court of the county in which the property was seized . . . to be served by personal delivery or by registered mail upon any person who has an interest in the seized property” CAL. HEALTH & SAFETY CODE § 11488.4(c) (Deering 2023).

120. *See Dusenbery*, 534 U.S. at 171 (2002) (“[A]s we have noted above, our [civil asset forfeiture] cases have never required actual notice.”).

II. FINDINGS

A. California's Legislative Reform

California's S.B. 443 was intended to provide additional due process protections for claimants.¹²¹ Supporters of the bill included the ACLU of California, the Drug Policy Alliance, the Ella Baker Center for Human Rights, and the Institute for Justice.¹²² The bill, co-authored by state Senator Holly Mitchell and Assemblyman David Hadley, was widely touted as a way to ensure that California would reduce the amount of assets seized from people not convicted of criminal charges.¹²³ The goals of S.B. 443 were to extend existing protections under state law requiring a criminal conviction before engaging in equitable sharing with federal law enforcement agencies, and increasing the threshold to \$40,000 for equitable sharing seizures.¹²⁴ However, in closing this "loophole," advocates and bill authors failed to address injustices in the structure of state forfeiture laws, which continue to allow forfeiture of property, including cash, the family vehicle, or the family home.¹²⁵

S.B. 443 did nothing to protect claimants subjected to the draconian default processes in place in California. California Health and Safety Code section 11488.4(k) states:

121. See *Hearing on S.B. 443 Before the Assemb. Floor*, Leg. Sess. 2015–16 (Cal. 2015) (Bill Analysis) (noting that S.B. 443 "[r]equires additional due process protection in cases where the State of California seeks to forfeit assets in connection with specified drug offenses").

122. See *End Policing for Profit: SB 443 (Mitchell)*, ACLU CAL., <https://www.aclu-sdc.org/sites/default/files/wp-content/uploads/2016/05/SB443-FactSheet-2SIDED.pdf> [<https://perma.cc/P4QU-M44U>] (last visited Oct. 19, 2023).

123. See Nick Sibilla, *California Governor Signs New Criminal Conviction Requirement for Civil Forfeiture*, FORBES (Sept. 29, 2016), <https://www.forbes.com/sites/instituteforjustice/2016/09/29/california-governor-signs-new-criminal-conviction-requirement-for-civil-forfeiture/> [<https://perma.cc/5GM2-QM7C>] ("From 2000 to 2013, California agencies collected \$696.2 million in equitable-sharing funding . . . according to data compiled for IJ's *Policing for Profit* report . . . [while] agencies received \$279.6 million from forfeitures conducted under state law during that same period.").

124. Notes from the August 4, 2016, meeting of the entire senate summarized the amended bill as: "Requires a conviction on the related, specified criminal charge to forfeit property in every case in which a claim is filed to contest the forfeiture of property, unless the defendant in the related criminal case willfully fails to appear for court, or if the value of the assets is in excess of \$40,000, as specified." *Hearing on S.B. 443 Before the Sen. Assemb.*, Leg. Sess. 2015–16 (Cal. 2016) (Bill Analysis).

125. Although CAL. HEALTH & SAFETY CODE § 11488(a) (Deering 2023) requires notice to the Franchise Tax Board when the seizure exceeds \$5,000, smaller values go unreported to the FTB, there is no state statute placing a minimum on the value of property seized by local law enforcement agencies for violations of state law.

If in any underlying or related criminal action or proceeding, *in which a petition for forfeiture has been filed* pursuant to this section, and a criminal conviction is required before a judgment of forfeiture may be entered, the defendant willfully fails to appear as required, *there shall be no requirement of a criminal conviction as a prerequisite to the forfeiture*. In these cases, forfeiture shall be ordered as against the defendant and judgment entered upon default, upon application of the state or local governmental entity.¹²⁶

If a claimant never files the claim opposing forfeiture or fails to appear in court after filing a claim, the protections under S.B. 443 are not applicable. Although Health and Safety Code section 11488.4 mandates that the District Attorney or Attorney General “shall make service of process regarding this petition upon every individual designated in a receipt issued for the property seized,” under *Dusenbery*, a law enforcement agency carrying out service on behalf of the District Attorney is held only to a reasonable procedures standard, rather than actual service.¹²⁷

California law requires a copy of the default forfeiture be provided to the attorney representing the claimant in the associated criminal matter; however, this section does not require that the notice be provided to the criminal defense attorney within 30 days of the seizure of the property.¹²⁸ By the time the criminal defense attorney receives notice, the time may have already passed for the property owner to file a claim opposing forfeiture. The California Rules of Court require that service of documents to a represented party be made to a party’s attorney when a litigant is represented by counsel, but a criminal defense attorney is usually assigned to a case after an arrest and seizure of property, which means that the initial notice goes to an unrepresented claimant.¹²⁹ The statute as drafted does not require additional service within 30 days and thus, claimants have no guarantee of receiving timely notice of intent to forfeit property, contravening the plain language of the statute requiring notice.¹³⁰

126. CAL. HEALTH & SAFETY CODE § 11488.4(k) (Deering 2023) (emphasis added). This code section also notes “[i]n its application for default, the state or local governmental entity shall be required to give notice to the defendant’s attorney of record, if any, in the underlying or related criminal action, and to make a showing of due diligence to locate the defendant.” *Id.* However, notice to a public defender who does not represent the claimant in the matter of the forfeiture is inadequate and does not comport with due process. *Id.*

127. *See* CAL. HEALTH & SAFETY CODE § 11488.4(c) (Deering 2023); *Dusenbery v. United States*, 534 U.S. 161, 170 (2002).

128. CAL. HEALTH & SAFETY CODE § 11488.4(k) (Deering 2023).

129. *See* CAL. R. CT. 1.21(a).

130. *See* CAL. HEALTH & SAFETY CODE § 11488.4(k) (Deering 2023). California courts have followed the *Dusenbery* standard finding reasonable procedures even where the state could not show actual notice. *See* *People v. One Hundred Seventy-Three Thousand Three Hundred Fifteen Dollars (\$173,315) in U.S. Currency*, No. 34-2018-00232755-CU-AF-GDS,

While California law provides that, for forfeitures of property with a value less than \$25,000 where the forfeiture is contested, the government “shall have the burden of proving beyond a reasonable doubt that the property” is subject to forfeiture, this right is reliant on the state providing adequate due process to ensure that claimants are able to contest the forfeiture in the first place.¹³¹ In matters where the forfeiture is contested, California law mandates a criminal conviction related to the forfeit property, requiring, “that a defendant be convicted in an underlying or related criminal action of an offense specified . . . which offense occurred within five years of the seizure of the property subject to forfeiture or within five years of the notification of intention to seek forfeiture.”¹³²

California goes a step further in requiring that the notice of forfeiture be personally served on the claimant, including a provision that the time to file a claim opposing forfeiture be 30 days from the date of actual notice or notice by publication.¹³³ Upon first read, this might seem to provide sufficient due process and opportunity to request a hearing on the issue of forfeiture, but it belies the reality of how most people tangled up in forfeiture proceedings must engage with the police and with the notice itself. Notice by publication is not a sufficient means to reach known individuals, particularly those who are being held involuntarily by the very entity charged with providing notice. As the United States Supreme Court held in *Dusenbery v. United States*, notice by publication is insufficient to provide notice to an individual who is incarcerated, citing favorably to *Mullane* for the proposition that publication by notice is “constitutionally defective as to known persons whose whereabouts were also known,” as this is not “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”¹³⁴

2019 Cal. Super. LEXIS 93645, at *5 (Cal. Super. Ct. July 17, 2019) (applying the *Dusenbery* standard and concluding that notice was not reasonably calculated to apprise an interested party of the action); *People v. Forty-Seven Thousand Six Hundred Thirty-Eight Dollars (\$47,638) in U.S. Currency*, No. B243007, 2014 Cal. App. Unpub. LEXIS 3425, at *9 (Cal. Ct. App. May 15, 2014) (citing to *Dusenbery* in deciding that due process was satisfied even if there was no actual notice).

131. CAL. HEALTH & SAFETY CODE §§ 11470, 11488.4(i)(1)–(2) (Deering 2023) (enumerating property subject to forfeiture).

132. CAL. HEALTH & SAFETY CODE § 11488.4(i)(3) (Deering 2023).

133. CAL. HEALTH & SAFETY CODE § 11488.5 (Deering 2023).

134. *Dusenbery v. United States*, 534 U.S. 161, 161–62 (2002) (citing *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)) (holding that the processes in place in a federal penitentiary to process certified mail and deliver it inmates were adequate to meet the requirements of due process, in the absence of evidence showing actual notice was effected). *Cf.* \$173,315 in U.S. Currency, 2019 Cal. Super. LEXIS 93645, at *5 (applying the *Dusenbery* standard and concluding that notice was not reasonably calculated to apprise an interested party of the action); \$47,638 in U.S. Currency, 2014 Cal. App. Unpub. LEXIS 3425,

Although *Dusenbery* holds that actual notice is not required, the processes in place to receive, document, and route registered mail in the federal detention facility in *Dusenbery* were more “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections” than California’s processes of providing notice to claimants under arrest.¹³⁵

Although these provisions appear on their face to provide strong components of due process for a property owner claimant, constitutional protections evaporate for a claimant who fails to file a timely claim opposing forfeiture. As described in Part III, *infra*, claimants may end up incarcerated following their encounters with law enforcement agencies, processed through the system from the local holding cell to an arraignment and plea deal, and complete time served in the state penitentiary before they have access to the notice of seizure of their property. If a person has no opportunity to read a notice of forfeiture because they are incarcerated, then they have not received actual notice.¹³⁶

S.B. 443, as drafted and implemented, makes assumptions about due process and notice in retaining the California requirement for personal notice and imposing a 30-day limit to file a claim opposing forfeiture. However, the notice requirements in S.B. 443 are not reasonably calculated to apprise people under arrest or incarcerated of the next steps necessary to begin the legal process. S.B. 443 requires notice provided of the seizure, with a claim form attached, and takes the additional step of requiring that the “notices shall explain, in plain language, what an interested party must do and the time in which the person must act to contest the forfeiture in a hearing.”¹³⁷ However, the burden still lies on the claimant to go to the courthouse and initiate the legal process. A claimant who fails to visit a courthouse and pay a filing fee or fill out a fee waiver application (for property valued over \$5,000) loses their property by default.¹³⁸ The forfeiture proceeds

at *9 (citing to *Dusenbery* in deciding that due process was satisfied even if there was no actual notice).

135. *Dusenbery*, 534 U.S. at 168, 173 (quoting *Mullane*, 339 U.S. at 314, 319); *see also infra* Part III.

136. *See infra* Part III; *Dusenbery*, 534 U.S. at 169–70.

137. CAL. HEALTH & SAFETY CODE § 11488.4(f) (Deering 2023).

138. CAL. HEALTH & SAFETY CODE § 11488.5(b)(1) (Deering 2023) (“If at the end of the time set forth in subdivision (a) there is no claim on file, the court, upon motion, shall declare the property seized or subject to forfeiture . . . forfeited to the state. In moving for a default judgment pursuant to this subdivision, the state or local governmental entity shall be required to establish a prima facie case in support of its petition for forfeiture. There is no requirement for forfeiture thereof that a criminal conviction be obtained in an underlying or related criminal offense.”).

administratively, with no hearing scheduled and no further notice provided.¹³⁹

This default process stands in contravention to the purpose of the bill — to provide additional due process protections — because a claimant who fails to initiate the court process is cut off from the additional protections intended by the legislature.¹⁴⁰ Although the U.S. Supreme Court’s holding in *Mullane* requires notice of “the pendency of the action,” in California’s civil asset forfeiture process, there is no judicial action pending that entitles a claimant to a hearing until the court case is initiated by the claimant.¹⁴¹ This is problematic given the intersection of civil asset forfeiture with the criminal legal system, as people who are incarcerated are least able to avail themselves of the civil legal system, particularly in the 30 days following an arrest when detention is likely to be in a county jail pending plea bargaining and sentencing.¹⁴²

This analysis, however, assumes that a person receives the notice at all. A person whose property is seized may not be able to physically receive and retain possession over a notice when placed in handcuffs and stripped of their clothing and possessions. The data gathered from civil court records on claims opposing forfeiture filed in California from 2014–2020 shows that S.B. 443 did not appear to make a statistically significant difference in access to the court system, as the percentage of claims opposing forfeiture decreased following the implementation of the new law, despite the reduction in overall forfeitures initiated. The findings support the hypothesis that adjudicative reform that retains a procedural process for administrative default forecloses access to due process rights.

B. Court Record Data Analysis

Figure 1 shows the number of claims opposing forfeiture filed in California each year over the 16 counties studied. The findings from the analysis of seven years of court record data, from 2014–2020, show that the number of claims filed dropped in the years after the implementation of S.B. 443 on January 1, 2017.

139. *See id.*

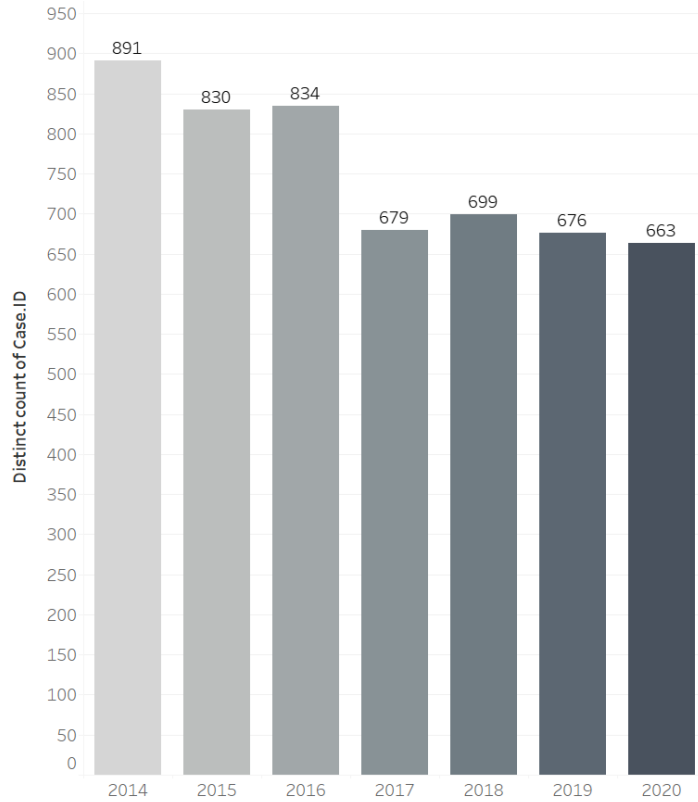
140. *See id.*

141. *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950).

142. California criminal defendants may be held for months or years before being convicted or arranging a plea bargain. *See generally* Robert Lewis, *Waiting for Justice*, CALMATTERS (Mar. 31, 2021), <http://calmatters.org/justice/2021/03/waiting-for-justice/> [https://perma.cc/3SMB-X8W4].

Fig. 1: California Civil Asset Forfeiture Annual Filings of Claims Opposing Forfeiture

California Civil Asset Forfeiture Claims Opposing Forfeiture
Filed 2014-2020 by Year



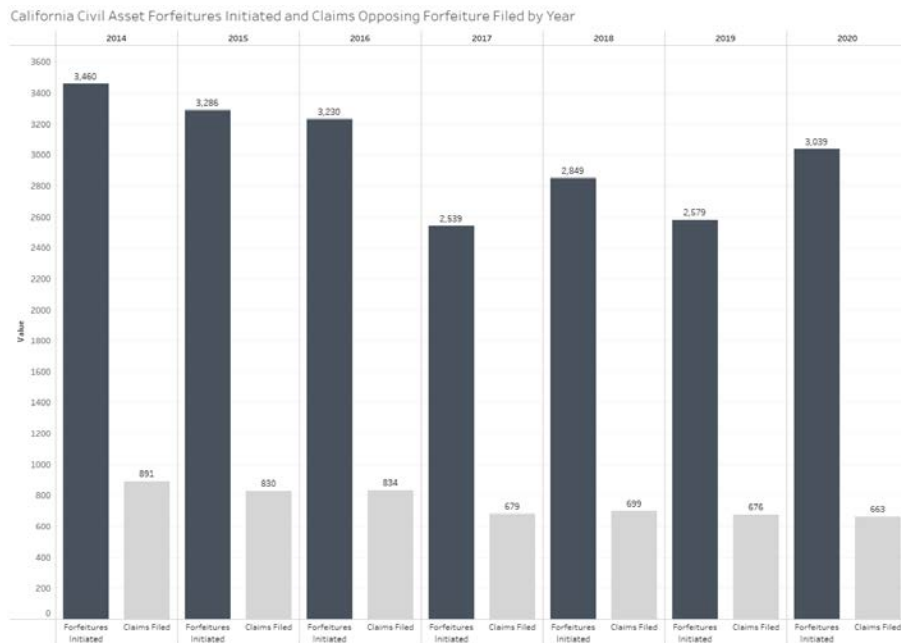
The total number of claims filed in the 16 counties studied over the seven-year study period was 5,272. Prior to the passage of S.B. 443, there were, on average, 851 claims filed per year. Following the implementation of S.B. 443 on January 1, 2017, claims filed averaged 679 annually, a reduction of 20%.

As the goal of the legislative reform was to “reign in abuses surrounding the practice to [sic] civil asset forfeiture, and reestablish the most basic tenets of Constitutional law and values,”¹⁴³ it might follow that the data would show an increase in the number of claims filed because of the additional

143. *Hearing on S.B. 443 Before the Assemb. Comm. on Pub. Safety – July 14, 2015*, Leg. Sess. 2015–16 (Cal. 2015) (Bill Analysis).

evidentiary protections created by S.B. 443. But the data from the Attorney General’s annual reports and the court record data do not support that theory. Figure 2 shows the number of civil asset forfeitures initiated in California each year during the study period along with the number of claims filed opposing forfeiture. California counties self-reported forfeitures to the Office of the Attorney General for each year, which were extracted from the annual reports and analyzed alongside the court record data for the number of claims filed.¹⁴⁴

Fig. 2: California Forfeitures Initiated and Claims Opposing Forfeiture Filed by Year



The court record data contains the 16 largest counties in California and captures over 80% of civil asset forfeiture filing data.¹⁴⁵ The percentage of claims filed remains consistent over the study period as percentage of forfeitures in which a claim was filed. Figure 3 shows the number of claims filed as a percentage of total forfeitures initiated. Prior to S.B. 443 taking

144. See Methodology, *supra* Introduction Section A. To view counties’ self-reported forfeitures, see generally *Asset Forfeiture Annual Reports*, OFF. OF THE ATT’Y GEN., <https://oag.ca.gov/publications#asset> [<https://perma.cc/UDL8-HHPY>] (last visited Oct. 15, 2023).

145. See Methodology, *supra* Introduction Section A (data on file with author extrapolating the volume of total filings based on the available 17 counties in the vendor dataset); see also Claire Johnson Raba, *Low-Income Litigants in the Sandbox: Court Record Data and the Legal Technology A2J Market*, ST. JOHN’S L. REV. (forthcoming 2023) (manuscript at 18), <https://ssrn.com/abstract=4069023> [<https://perma.cc/QG8F-AB82>].

effect on January 1, 2017, there were claims opposing forfeiture filed in 25% of cases.

Fig. 3: Claims Opposing Forfeiture Filed by Year as a Percentage of Forfeiture

Year	Forfeitures Initiated	Claims Filed	Percent
2014	3,460	891	25.75%
2015	3,286	830	25.26%
2016	3,230	834	25.82%
2017	2,539	679	26.74%
2018	2,849	699	24.53%
2019	2,579	676	26.21%
2020	3,039	663	21.82%

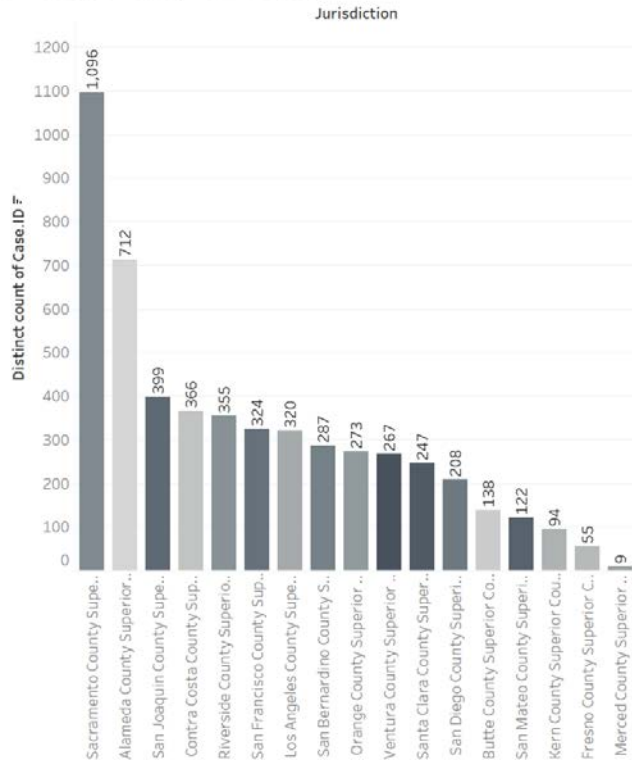
Figure 3 demonstrates that the number of claims filed remains at a similar percentage of the number of forfeitures initiated, with 2020 an outlier, not because more claimants asserted their rights — but because it appears that during the COVID-19 pandemic, law enforcement agencies stepped up their rate of initiating civil asset forfeitures. Following the implementation of S.B. 443, the number of claims filed only deviated from this average by 1% in either direction for the three years following the new law.

The number of overall forfeitures initiated went down in the first three years after S.B. 443 went into effect. In the three years prior to S.B. 443, law enforcement initiated an average of 3,325 forfeitures per year. In 2017 and 2019, that number was down by about 24% and in 2018 they were down 15% compared to the pre-S.B. 443 average, but in 2020 law enforcement agencies forfeitures showed an uptick in the number of seizures, with numbers only 10% lower than the number of forfeitures completed during the years before legislative reform. The data does not show an increase in the percentage of property owners filing claims opposing forfeiture after the passage of the S.B. 443. Court case participation by pro se litigants has been shown to have been significantly impacted by the COVID-19 pandemic-related court closures, so it is unsurprising that the percentage of claims filed went down in 2020.¹⁴⁶

146. See generally Erika Rickard & Qudsiya Naqui, *Pandemic Spurs Technology Revolution in State Civil Courts*, PEW (Dec. 1, 2021), <https://pew.org/3Eg3OoY> [<https://perma.cc/P7GN-UC85>]; Claire Johnson Raba, *Going Remote: Due Process and Self-Represented Debt Collection Defendants During the COVID-19 Pandemic* (Nov. 10, 2021) (unpublished article), <https://ssrn.com/abstract=4064918> [<https://perma.cc/5JSS-VZUL>].

Fig. 4: Civil Asset Forfeiture Claim Opposition Filings by County

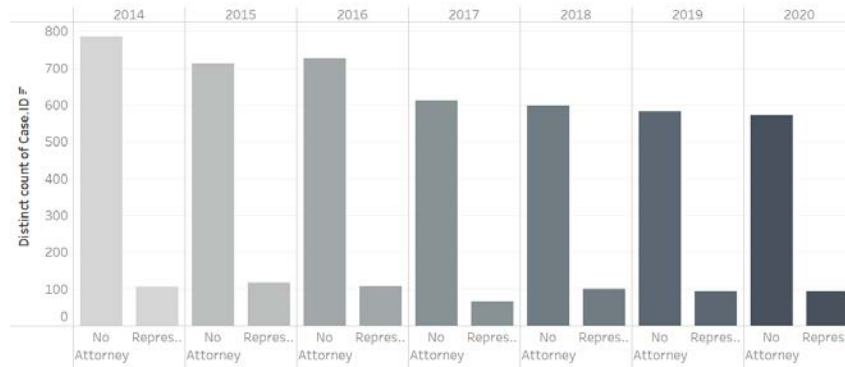
California Civil Asset Forfeiture Claims Opposing Forfeiture
Filed by County 2014-2020



Sacramento County shows a much higher number of forfeitures, at 4,528, and a proportionally higher number of claims opposing forfeiture filed, at 1,096, filed than in any other county. However, the rate of claims filed in Sacramento County is 24% of seizures, which is consistent with the rest of the state. As Sacramento is not a highly populous county, it would be valuable for future research to look more closely into the disproportionate number of seizures and forfeitures taking place in Sacramento County.

Fig. 5: Civil Asset Forfeiture Claimants Represented by an Attorney

California Civil Asset Forfeiture Claims Opposing Forfeiture
Representation Rates



The data also demonstrates that very few of the claimants are represented by an attorney, with Figure 5 showing unrepresented claimants on the left bar, and claimants with an attorney, by year, on the right bar. The data shows that the passage of S.B. 443 resulted in no significant increase in interest by the private bar, or resource availability of legal aid, to represent civil asset forfeiture claimants, despite the additional adjudicative due process protections created by S.B. 443.

An analysis of the in rem case names enabled a look into the values of the claims filed for returns of cash and cars. As shown in Figure 6, very few cases were filed seeking the return of cars.¹⁴⁷ The reporting data held by the Office of the Attorney General does not include the type of asset forfeiture, but it is remarkable to note that the number of people who initiated a claim for the return of their vehicles was so low.

147. Conversely, in the court-watching report published by the Chicago Appleseed Center for Fair Courts, vehicles were by far the most common type of property for which claims were filed. Over 90% of the claims where the type of property was identified involved vehicles in that observation. NAOMI JOHNSON ET AL., *I DON'T KNOW WHY I'M HERE: OBSERVATIONS FROM COOK COUNTY'S CIVIL ASSET FORFEITURE COURTROOMS 1* (2023).

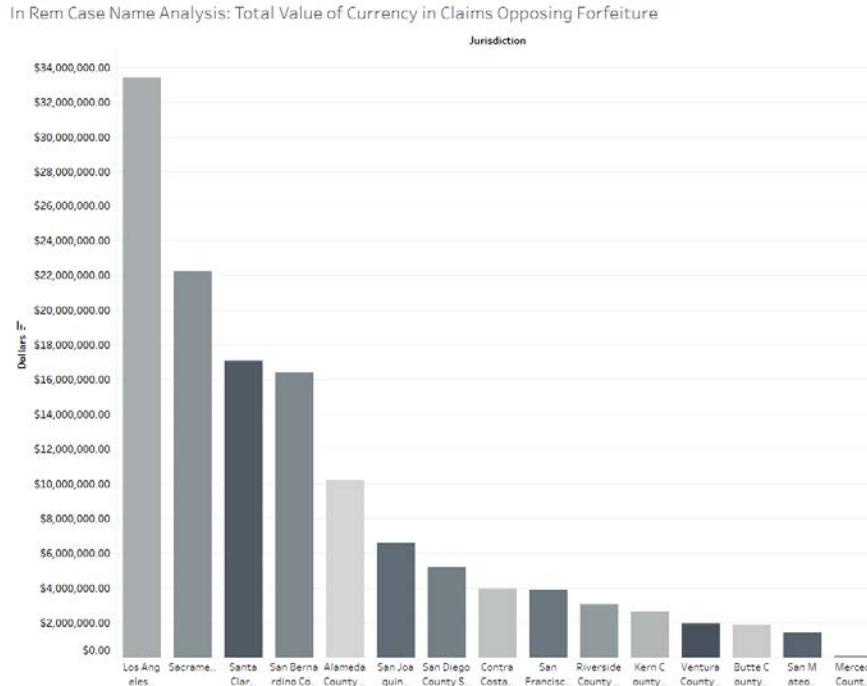
Fig. 6: Total Claims Filed Opposing Forfeiture of Vehicles 2014-2020

In Rem Defendant Name Analysis: Total Claims
Opposing Forfeiture Filed for Return of Vehicle

Jurisdiction	Claims Filed
Sacramento County Superior Courts	24.00
Contra Costa County Superior Courts	20.00
Alameda County Superior Courts	17.00
Butte County Superior Courts	12.00
San Joaquin County Superior Courts	11.00
Los Angeles County Superior Courts	9.00
Santa Clara County Superior Courts	8.00
San Diego County Superior Courts	7.00
Kern County Superior Courts	5.00
Orange County Superior Courts	3.00
Ventura County Superior Courts	2.00
San Francisco County Superior Courts	2.00
San Mateo County Superior Courts	1.00
San Bernardino County Superior Courts	1.00
Riverside County Superior Courts	1.00
Fresno County Superior Courts	1.00

An analysis of the in rem case names listing currency values shows a distribution by county of the total dollar value of the claims opposed. The information reported by law enforcement to the Office of the Attorney General shows that \$351,160,652 in assets were seized over the seven-year study period. The court record data shows that claims were filed against \$193,575,630 in assets, or 55% of the dollar value of assets. That means that 45% of assets seized were forfeited by default. Figure 7 shows the value of claims opposing forfeiture in California for U.S. currency over the study period by county.

Fig. 7 Total Value of Currency in Claims Opposing Forfeiture by County 2014-2020



The data supports the hypothesis that a large number of civil asset forfeitures are not contested by property owners, and that the percentage of claimants' filings actions in state court has remained static, despite the California Legislature's best intentions with the passage and implementation of S.B. 443. An average of 75% of currency seizures initiated never find their way into a courthouse, resulting in a default seizure of 45% of the property value of seizures. Of the 25% of claimants who filed claims opposing forfeiture in court, an average of 14% were represented by an attorney. These findings show that the current system of civil asset forfeiture fails property owners who do not receive notice or are not able to navigate the system to initiate a civil case and avail themselves of the protections created by S.B. 443. The findings herein provide much-needed context for the discussion of the constitutional rights of property owners, particularly individuals who are low-income, innocent owners not accused of a crime, and those who are incarcerated immediately following seizure of their property.¹⁴⁸ The solutions proposed in Part IV, *infra*, take steps to ensure

148. See *supra* Section I.B.

that due process protections are afforded in civil asset cases for those property owners least likely to be able to navigate the civil legal system to pursue a claim opposing forfeiture and fight a forfeiture petition.

III. A CLINIC CASE ON THE QUESTION OF NOTICE

In the Santa Ana-Anaheim metro area of Orange County, California, Mr. F. was on his way to a job interview.¹⁴⁹ He stopped at a friend's house to change into his suit and was unaware that the local municipal police department had his friend's house under surveillance for drug activity.¹⁵⁰ Mr. F. concedes that at the time of his arrest he had an addiction, and that there were drugs in the trunk of his car, but when the police also seized the \$12,000 that he had won at the casino the previous weekend, he was baffled and confused.¹⁵¹ This money was in the form of clean new bills from the casino cashier window, and he had a 1098 tax form to show that the winnings were legally his.¹⁵² He objected to the officers who told him that they were going to seize his cash, and the officers forcibly restrained him, resulting in injuries that required treatment at the hospital before he was transported to jail late at night.¹⁵³

Following his arrest, Mr. F. pled guilty to possession of drugs, was sentenced to two years in state prison, and was released after 14 months with credit for good behavior.¹⁵⁴ As soon as he was released, Mr. F. looked through his possessions and among his clothes and other items taken by the booking department at the local police department and found a Notice of Forfeiture.¹⁵⁵ This form asserted the right of the state of California to take his \$12,000 and instructed him to file a claim opposing forfeiture within 30 days of notice. Mr. F. promptly went to the local county courthouse and, with the assistance of the self-help desk, filed the correct claim form and a fee waiver.¹⁵⁶

149. Intake interview with Mr. F., by the University of California Irvine Consumer Law Clinic (Oct. 2019) (data on file with the University of California Irvine Consumer Law Clinic).

150. *Id.*

151. *Id.*

152. Exhibit appended to Mr. F.'s Opposition to Motion for Summary Judgment (data on file with the University of California Irvine Consumer Law Clinic).

153. Intake interview with Mr. F., *supra* note 149.

154. *Id.*

155. *Id.*

156. California has an automatic fee waiver for claims opposing forfeiture of property worth less than \$5,000, but requires the claimant to pay a filing fee for claims above this amount unless they qualify for a fee waiver. CAL. HEALTH & SAFETY CODE § 11488.5(a)(3) (Deering 2023). The fee for filing first paper in a civil action or proceeding is \$355, as defined by CAL. GOV'T CODE § 70611 (Deering 2023). Full and partial fee waivers for court costs are available under CAL. GOV'T CODE §§ 68631 et seq. (Deering 2023).

Shortly thereafter, Mr. F. reached out the University of California, Irvine Consumer Law Clinic for help when he received a confusing document he did not understand.¹⁵⁷ It was a motion for summary judgment with an upcoming hearing date.¹⁵⁸ The District Attorney filed the motion claiming that Mr. F.'s claim was late and that his claim was time-barred because it was not filed within 30 days of notice, although from Mr. F.'s perspective, he received notice upon his release and promptly filed his claim.¹⁵⁹ The Consumer Law Clinic agreed to represent Mr. F. in his opposition to the motion for summary judgment because it seemed like he had a reasonable interpretation of the notice statute — a party was entitled to bring his claim within thirty days of notice, and if a person did not receive this notice until after their release from jail, the 30-day deadline should be calculated from the date of actual notice.¹⁶⁰

This case presented an important legal question as to how a court should interpret the plain language of the notice statute. California Health & Safety Code section 11488.4 states that if a person does not assert their right to oppose a forfeiture, the property is deemed forfeited after 30 days.¹⁶¹ Notably, S.B. 443, for all of its attempts at reform, retains this default process, stating that if no claims are filed, the government shall, in an application for forfeiture by default, make “a prima facie case in support of its petition for forfeiture.”¹⁶² “There is no requirement for forfeiture that a criminal conviction be obtained in an underlying or related criminal offense.”¹⁶³

157. Intake interview with Mr. F., *supra* note 149; Motion for Summary Judgment (data on file with the University of California Irvine Consumer Law Clinic).

158. *See supra* note 157 and accompanying text.

159. Intake interview with Mr. F., *supra* note 149.

160. Intake interview with Mr. F., *supra* note 149.

161. California Health & Safety Code § 11488.4(j) governs the forfeiture of assets, such as Mr. F.'s that are valued at less than \$25,000. If a timely claim is filed, then the District Attorney files a petition of forfeiture, initiating the in rem proceeding against the property. CAL. HEALTH & SAFETY CODE § 11488.4(j)(5)(C) (Deering 2023). No additional notice is required upon the filing of this petition. *Id.* If no claims are filed within 30 days of notice, the forfeiture proceeds administratively pursuant to the written declaration of forfeiture and no case is opened with the California Superior Court. CAL. HEALTH & SAFETY CODE § 11488.4(j)(5)(B) (Deering 2023).

162. CAL. HEALTH & SAFETY CODE § 11488.5(b)(1) (Deering 2023) (“In moving for a default judgment pursuant to this subdivision, the state or local governmental entity shall be required to establish a prima facie case in support of its petition for forfeiture.”). The S.B. 443 bill analysis from the August 4, 2016 Senate floor meeting notes that the bill “Requires proof beyond a reasonable doubt *in all forfeiture cases which are contested.*” *Hearing on S.B. 443 Before the Sen. – Aug. 4, 2016*, Leg. Sess. 2015–16 (Cal. 2016) (emphasis added) (Third Reading Bill Analysis).

163. CAL. HEALTH & SAFETY CODE § 11488.5(b)(1). The general procedure for forfeiture actions is laid out in CAL. HEALTH & SAFETY CODE § 11488.4 *et seq.* (Deering 2023).

Mr. F's case is an example of how the procedural due process protections enshrined in the notice statute fail property owners by placing the onus on the individual and not the state to begin the court process. Although S.B. 443 amended section 11488.5 to say a person may file a claim "within 30 days from the date of the last publication of the notice of seizure, if that person was not personally served or served by mail, or within 30 days after receipt of actual notice," these amendments did not protect Mr. F. from administrative default forfeiture of his casino winnings while he was incarcerated.¹⁶⁴ The clinic's legal argument as to the plain language of the statute was that the law was clearly drafted with an "or," allowing that a filing 30 days after receipt of actual notice would be a timely claim, and the clinic filed an opposition to the motion for summary judgment on Mr. F.'s behalf.¹⁶⁵

Mr. F. was represented by a team of student attorneys and supervising attorneys at no cost, but if he were not, it would have been next to impossible to have proceeded as a self-represented litigant. He would have been stymied by a myriad of procedural tactics designed to dispose of the case before reaching the structural parameters of the trial in which he, as a claimant, would have the opportunity to prove the facts of his case. A self-represented forfeiture claimant is at a disadvantage in trying to make the complex legal arguments as to the constitutionality of the service of process, to argue the standard for a motion for summary judgment, and to present arguments that the claimant is entitled to an evidentiary trial.¹⁶⁶

The clinic students' summary judgment opposition brief and oral argument prevailed, persuading the court that there was a disputed issue of material fact as to whether Mr. F. had received notice under the statute.¹⁶⁷ The court held that there was a disputed issue of material fact as to whether

164. CAL. HEALTH & SAFETY CODE § 11488.5(a)(1). S.B. 443 bill analysis indicates that the intent of the amendment was to "[a]llow[] more time to make a claim contesting forfeiture." *Hearing on S.B. 443 Before the Assemb. Comm. on Pub. Safety – July 14, 2015*, Leg. Sess. 2015–16 (Cal. 2015) (Bill Analysis).

165. Opposition to Motion for Summary Judgment; case notes (data on file with the University of California Irvine Consumer Law Clinic).

166. See *infra* Fig. 5 (showing that between 13% and 16% of California forfeiture claimants had counsel). Even where litigants may have access or are able to afford representation, it may not make financial sense. The estimated cost of hiring an attorney for a straightforward state forfeiture case — \$3,000 — is significantly higher than the median cash forfeiture in 20 out of the 21 states with available data. POLICING FOR PROFIT, *supra* note 28, at 20.

167. "The motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CAL. CIV. PROC. CODE § 437c(c) (Deering 2023). Opposition to Motion for Summary Judgment (data on file with the University of California Irvine Consumer Law Clinic).

personal service was executed in compliance with the statutory requirements.¹⁶⁸ Mr. F. was excited to learn that he would have the opportunity to present his arguments on the merits regarding the source of the seized funds, relying in part on our explanation to him that California's law would require the District Attorney to show beyond a reasonable doubt that there was a nexus between the cash and the drugs found in the car.¹⁶⁹ The Clinic's position was that upon prevailing on summary judgment, the matter should be set for trial on both the threshold issue of notice as well as an adjudication on the merits of the forfeiture with an opportunity to present live testimony and cross examine witnesses, but the District Attorney's office posited that the matter should proceed to only another hearing, or at least, a limited civil bench trial with witness testimony by affidavit.¹⁷⁰ It seemed clear to the litigation team that the statute permitted witnesses, and the Consumer Law Clinic briefed this issue, with the judge agreeing that an evidentiary hearing was required.¹⁷¹ The judge set the matter for a two-day bench trial, to be held over videoconference due to the pandemic.¹⁷² At the pre-trial conference, the District Attorney's office proposed a stipulation that we would proceed to trial on the issue of notice only.¹⁷³ The stipulation stated that if notice was found to be improper, the forfeiture was also improper, and the funds would be returned to Mr. F.¹⁷⁴ If notice was found to be adequate, the parties agreed that the claim was untimely filed, subjecting the property to administrative seizure on default.¹⁷⁵ On this narrow legal issue, the matter proceeded to trial.

168. Court order denying Motion for Summary Judgment in Mr. F's case. *See UC Irvine Case Documents*, *supra* note 14.

169. S.B. 443 "[r]equires proof beyond a reasonable doubt in all forfeiture cases which are contested." *Hearing on S.B. 443 Before the Assemb. Comm. on Pub. Safety – July 14, 2015*, Leg. Sess. 2015–16 (Cal. 2015) (Bill Analysis). "With respect to property . . . for which forfeiture is sought and as to which forfeiture is contested, the state or local governmental entity shall have the burden of proving beyond a reasonable doubt that the property for which forfeiture is sought was used, or intended to be used, to facilitate a violation of one of the offenses enumerated." CAL. HEALTH & SAFETY CODE § 11488.4(i)(1) (Deering 2023); client interview notes (data on file with the University of California Irvine Consumer Law Clinic).

170. CAL. HEALTH & SAFETY CODE § 11488.5(e) states, "[t]he forfeiture hearing shall be conducted in accordance with . . . Sections 631 to 636, inclusive, of the Code of Civil Procedure, if by the court." Case notes (data on file with the University of California Irvine Consumer Law Clinic).

171. Student briefs (data on file with the University of California Irvine Consumer Law Clinic).

172. Pre-trial order (data on file with the University of California Irvine Consumer Law Clinic).

173. Case notes and stipulation (data on file with the University of California Irvine Consumer Law Clinic).

174. *Id.*

175. *Id.*

The Consumer Law Clinic argued that the defective notice practices of the Orange County District Attorney's Office, as carried out by its agents, local law enforcement, served to deprive Mr. F. of due process and of personal service as required by statute.¹⁷⁶ Although the California statute also allows for notice by certified mail, the statute is drafted in the disjunctive, providing for notice by personal service or certified mail on individuals whose property rights are at risk of deprivation.¹⁷⁷

Mr. F.'s trial brief asserted that his claim was timely because it came within 30 days of receipt of the statutorily required notice and attached claim form.¹⁷⁸ As in *Dusenbery*, Mr. F. was incarcerated in a correctional facility and his location was known to the state, yet he did not lay eyes on the claim form necessary to initiate a court process on the forfeiture of his property until fourteen months after it was seized; and, as in *Dusenbery*, the court held that the procedures of the state were reasonable, even without proof of actual service.¹⁷⁹

During the two-day trial, the Assistant District Attorney did not put on the stand any witness who testified that Mr. F. received actual notice in jail.¹⁸⁰ The officer who allegedly provided the notice document testified that he showed it to Mr. F. through the glass window of the holding cell, in which Mr. F. and other people were held together.¹⁸¹ The officer testified that he summarized the notice, but that Mr. F. did not actually read it.¹⁸² Mr. F. testified that he felt out of it after being hospitalized and was medicated following the altercation with the police, and that he had no recollection of seeing the forfeiture notice while incarcerated.¹⁸³

At trial, the state prevailed through the testimony of an officer at the state prison who said that upon transfer, incarcerated people were given a chance

176. Claimant's Trial Brief (data on file with the University of California Irvine Consumer Law Clinic).

177. CAL. HEALTH & SAFETY CODE § 11488.4(c) (Deering 2023). "[T]he Attorney General or district attorney shall cause a notice of the seizure, if any, and of the intended forfeiture proceeding . . . to be served by personal delivery or by registered mail upon any person who has an interest in the seized property or property subject to forfeiture other than persons designated in a receipt issued for the property seized." Claimant's Trial Brief (data on file with the University of California Irvine Consumer Law Clinic).

178. CAL. HEALTH & SAFETY CODE § 11488.4 (Deering 2023). Claimant's Trial Brief (data on file with the University of California Irvine Consumer Law Clinic).

179. *Dusenbery v. United States*, 534 U.S. 161, 172–73 (2002).

180. Trial transcript (data on file with the University of California Irvine Consumer Law Clinic).

181. *Id.*

182. *Id.*

183. *Id.*

to look at their belongings.¹⁸⁴ Mr. F. testified that this did not occur and he did not see the notice of forfeiture until he was released, but the court ultimately believed an officer's testimony about the practices and procedures of the state prison despite the absence of any testimony that those practices were followed in this case.¹⁸⁵ The court found that under the *Dusenbery* standard, the procedures of the prison were reasonable and that actual notice was not required.¹⁸⁶

Mr. F., who works full time for minimum wage on the night shift at a motel and is in recovery for his addiction, still owes taxes to the casino on the \$12,000 seized by the state.¹⁸⁷ The clinic provided referrals for low-income taxpayer clinics that may be able to help him with an offer in compromise, but this situation does not meet the IRS standards for offer-in-compromise relief.¹⁸⁸ Mr. F. filed his back tax returns from before his incarceration and is in a payment plan with the IRS.¹⁸⁹ Each year, Mr. F. pays off part of the tax bill for his seized assets as the IRS takes the outstanding taxes owed out from his Earned Income Tax Credit and tax refund.¹⁹⁰

Reports by deputy public defenders in California support Mr. F.'s account that individuals who are arrested have statutorily required notifying documents placed within their possessions, and that such documents are not made available to them until release from jail or prison.¹⁹¹ In cases such as Mr. F.'s, the claimant may not see the notice and claim form until months or years after the seizure, long after the administrative forfeiture process has been completed.

184. *Id.* In *Dusenbery*, the Supreme Court held that actual notice was not required to satisfy due process if the method of giving notice was reasonably certain to inform the affected parties. 534 U.S. at 170. California courts have followed the *Dusenbery* standard. See *People v. \$173,315.00 in U.S. Currency*, No: 34-2018-00232755-CU-AF-GDS, 2019 Cal. Super. LEXIS 93645, at *5 (Cal. Super. Ct. July, 17, 2019) (applying the *Dusenbery* standard and concluding that notice was not reasonably calculated to apprise an interested party of the action); *People v. Forty-Seven Thousand Six Hundred Thirty-Eight Dollars (\$47,638) in U.S. Currency*, No. B243007, 2014 Cal. App. Unpub. LEXIS 3425, at *9 (Cal. App. 2d. May 15, 2014) (citing to *Dusenbery* in deciding that due process was satisfied even if there was no actual notice).

185. Trial transcript on file with the University of California Irvine Consumer Law Clinic.

186. *Id.*

187. Telephonic interviews conducted with claimant Mr. F. (Sept. 9, 2022; Feb. 15, 2023) (interview notes on file with author).

188. *Id.*

189. *Id.*

190. *Id.*

191. Email correspondence with Contra Costa Deputy Public Defender Blanca Hernandez. (Dec. 2021); Presentation by Blanca Hernandez and Claire Johnson Raba to the City and County of San Francisco Financial Justice Project, Office of the Treasurer and Tax Collector (Jan. 13, 2021) (on file with author).

Mr. F.'s challenge to the procedural process was unsuccessful, with the court holding that the processes described by the state prison officer were sufficient to comply with the requirements of notice and due process under the law. S.B. 443 was intended to "reign in abuses surrounding the practice of civil asset forfeiture and reestablish the most basic tenets of Constitutional law and values."¹⁹² Thus, the purpose of S.B. 443 was to improve due process protections for claimants like Mr. F. — those whose property is worth less than \$25,000 and who would benefit from notification in everyday language. But for those who do not receive the notice, or do not understand the steps necessary to initiate a court case to oppose a forfeiture, the reforms ring hollow.¹⁹³ Mr. F. never had the opportunity to have his claim adjudicated on the merits. Once the court ruled that the county's procedures for providing notice met the statutory requirements, the case was over, despite Mr. F.'s meritorious defense that he had won the cash in question at the casino.¹⁹⁴ Although the legislature's intent was to lessen law enforcement's unfair advantage in forfeiture proceedings and increase due process protections for claimants, because claimants must jump through procedural hoops in order to initiate the forfeiture adjudication process in the court system, few claimants avail themselves of the additional protections.¹⁹⁵ As shown in Part II, the findings from the quantitative analysis of over 5,000 claims filed in about 50,000 forfeitures show no increase in the percentage of claims filed after the implementation of S.B. 443.¹⁹⁶

California is not alone in having a civil asset forfeiture process that proceeds by administrative default against property owners, and a 50-state survey shows that the rate of opposition to forfeiture is dismally low.¹⁹⁷ Because the state places the burden on a claimant to initiate the civil court

192. *Hearing on S.B. 443 Before the Assemb. Appropriations Comm. – Aug. 19, 2015*, Leg. Sess. 2015–16 (Cal. 2015) (Bill Analysis).

193. *Hearing on S.B. 443 Before the Sen. Floor – Aug. 19, 2015*, Leg. Sess. 2015–16 (Cal. 2015) (Third Reading Bill Analysis) (stating that S.B. 443 "requires additional due process protection in cases where the State of California seeks to forfeit assets in connection with specified drug offenses").

194. Court Order after Trial (data on file with the University of California Irvine Consumer Law Clinic).

195. *Hearing on S.B. 443 Before the Sen. Floor – Aug. 4, 2016*, Leg. Sess. 2015–16 (Cal. 2016) (Third Reading Bill Analysis) (stating that S.B. 443 "requires additional due process protection in cases where the State of California seeks to forfeit assets in connection with specified drug offenses").

196. *See supra* Part II.

197. "Many forfeitures are processed administratively or end in default judgments because no one fights back." POLICING FOR PROFIT, *supra* note 28, at 30. 51 scorecard and state profiles are also provided. POLICING FOR PROFIT, *supra* note 28, at 59–186. The report notes that not all states consistently collect data on default rates, but it can range as low as 1% of forfeitures being contested in Colorado. POLICING FOR PROFIT, *supra* note 28, at 30.

process opposing forfeiture, like thousands of other property owners who missed a short deadline to initiate legal process, Mr. F. had no recourse.¹⁹⁸

IV. ENSURING DUE PROCESS

In this Part, I propose changes to civil asset forfeiture system to ensure that substantive and procedural due process rights of property owners are protected, with a specific focus on low-income and criminal legal system-involved claimants. First, I recommend that the state bear the burden to initiate a civil forfeiture court case for each seizure of property, eliminating default administrative forfeiture. Second, I argue that both the substantive due process rights of low-income people and the proportionality analysis under the Eighth Amendment of the United States Constitution require an ability-to-pay analysis that considers the harm imposed on a claimant through seizure and forfeiture of their property. Third, I propose that states pass legislative reforms that have proven results in reducing policing for profit and protecting the rights of property owners in a data-driven approach to reducing or eliminating civil asset forfeiture.

A. The State Should Initiate the Forfeiture Case

A significant reason that procedural due process rights are lacking in the current state of civil asset forfeiture laws is the administrative forfeiture process. Permitting forfeitures to proceed by default through an administrative process if no case is initiated in the civil court system by a person laying claim to the property results in deprivation of property from those least able to access an attorney or other resources to make sense of the civil justice system. As the *Dusenbery* case and the example of Mr. F.'s case both show, notice to an individual who is incarcerated may have trouble effecting actual notice, and the processes in place are subject to significant criticism.¹⁹⁹

A straightforward solution to the problem of notice and default administrative forfeiture is to shift the burden from the claimant to the agency tasked with enforcement to initiate the case in court. In California, this would bring existing procedural due process protections for civil asset

198. Stipulation and Court Order after Trial (on file with the University of California Irvine Consumer Law Clinic).

199. See Justice Ginsburg's dissent in *Dusenbery*, which does not require proof of actual notice but would hold that the Due Process Clause requires that the federal prison system track more closely the receipt and delivery of certified mail to inmates in matters as important as civil asset cases where there is a risk of deprivation of property. 534 U.S. 161, 173 (2002) (Ginsburg, J., dissenting). Justice Ginsburg argues that a higher bar for notice should be employed for incarcerated persons due to the "Government's total control of a prison inmate's location, and the evident feasibility of tightening the notice procedure." *Id.*

forfeiture claimants and traditional civil litigants into alignment. Today, a litigant in California is entitled to personal or substitute service of a summons and complaint and is given 30 or 40 days to respond.²⁰⁰ A summons may also be served by mail with a receipt and acknowledgement of summons attached for return; notice is considered effective as of the date that the acknowledgement is executed.²⁰¹ Moreover, unlike the Notice of Forfeiture and Receipt for Seizure of Property form currently used, the notice and summons forms used in California are approved by the Judicial Council of California and are standard throughout the state. In addition, using the existing rules of notice and service for civil litigation would ensure that personal service, or proof of service by registered mail, would be effectuated.

Requiring the state to initiate the forfeiture proceeding in court would inure the benefits of laws like S.B. 443 to all property owners. Under the solution proposed here, notice would meet the requirements of the Due Process Clause under *Mullane* because it would be reasonably calculated to apprise the litigant of the pendency of the action and the opportunity to present their case in an evidentiary tribunal.²⁰² As in *Greene*, the property owners in civil asset forfeiture cases face loss of their homes, cars, cash and other significant property interests. The current process, service of a notice that places the burden on them to initiate a court process, does not meet the requirements of due process under the framework set forth in *Greene*.²⁰³

If a petition for civil asset forfeiture is required to be filed in every forfeiture case, then the default processes that apply to civil litigation will protect the due process rights of property owners. Although shifting the burden to initiate a civil asset forfeiture case in the courts would place a moderate administrative burden on county District Attorney's Offices, and may require legislative funding for additional personnel time due to increases in dockets for Superior Court judges, the protection of constitutional rights should not be outweighed by economic concerns. By providing each

200. CAL. CIV. PROC. CODE §§ 415.10; 415.20 (Deering 2023) (allowing service by a combination of first-class mail and delivering a copy to a person at least 18 years of age at a person's regular dwelling, only if "a copy of the summons and complaint cannot with reasonable diligence be personally delivered to the person to be served"); CAL. CIV. PROC. CODE § 430.40 (Deering 2023) (specifying time to respond to a complaint).

201. CAL. CIV. PROC. CODE § 415.30 (Deering 2023) (allowing service by mail where the recipient executes and returns an acknowledgement of receipt of the summons to indicate that actual notice has been received).

202. *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950) (citing *Milliken v. Meyer*, 311 U.S. 457 (1940); *see, e.g., Grannis v. Ordean*, 234 U.S. 385, 395–96 (1914); *Priest v. Las Vegas*, 232 U.S. 604, 616–17 (1914); *Roller v. Holly*, 176 U.S. 398, 409, 412–13 (1900); *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 800 (1983) (holding that published notice is insufficient to inform interested parties whose names and addresses were known); *Greene v. Lindsey*, 456 U.S. 444, 449 (1982).

203. *Greene*, 456 U.S. at 449–50.

claimant notice and an opportunity to be heard, a revised civil asset forfeiture process in which all claims are processed through the court would ensure that all claimants are treated equally and would permit better collection of data on seizures and forfeitures. Currently, collection of forfeiture data relies on reporting by law enforcement agencies, with most seizures resulting in forfeiture through default. Processing claims through the court would require law enforcement to prove the relationship between criminal activity and the property for each forfeiture and would ensure that the public would have access to the proceedings.

Moreover, a filing in state court of each civil asset case would bring into the public record a list of all assets seized, as the actions are titled in rem against the property. As shown in Figures 6 and 7 above, much can be gleaned about the value of the assets seized through an analysis of the names of the defendant property. Court processes in place for entry of default are more rigorous than the administrative default process in civil asset forfeiture. Entries of default judgment in civil cases are mailed by the court to the notice address at which a defendant was served. To extend this process to all civil asset cases, it would be necessary to amend the state code of civil procedure to ensure that all known persons with an interest in the property receive notice of entry of default judgment.

Although this may still result in notice not reaching a property owner, California's Code of Civil Procedure has mechanisms to allow for the set aside of entries of default. If a person misses a court date or fails to file a responsive pleading or other required documents, they may move the court within 180 days from the entry of judgment for an order setting aside and vacating a default judgment.²⁰⁴ In a case where the litigant asserts a lack of service and that service did not result in actual notice, the defaulted defendant has two years to move to set aside a default judgment.²⁰⁵ If these protections were in place in Mr. F.'s case, he could have moved to set aside the default judgment and had the opportunity to defend his case on the merits. Finally, there is no time limit for a collateral attack on a judgment void for lack of personal jurisdiction, so if a person were incarcerated for a long period of time and only learned of a forfeiture upon release, they could file an action seeking to invalidate the judgment. However, under current law

204. See CAL. CIV. PROC. CODE § 473(b) (Deering 2023) (“The court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect.”).

205. See CAL. CIV. PROC. CODE § 473.5 (Deering 2023) (“When service of a summons has not resulted in *actual notice* to a party in time to defend the action and a default or default judgment has been entered against him or her in the action, he or she may serve and file a notice of motion to set aside the default or default judgment and for leave to defend the action.” (emphasis added)).

allowing administrative forfeitures by default, none of these rights may be exercised. If California and other states are serious about affording the due process rights required under the constitution, a bill should be adopted requiring a filing of a petition for forfeiture initiating an action in state court for each seizure of assets.

B. Substantive Due Process and Proportionality Require Consideration of Ability to Pay

State-court jurisprudence on government-imposed debt and court fines and fees is rapidly evolving, driven in part by a nationwide network of advocates committed to the eradication of court- and government-imposed debt on those least able to pay.²⁰⁶ This movement, catalyzed by reports such as the Department of Justice's Civil Rights Division 2015 report on the Ferguson, Missouri municipal court and police practices, seeks to eliminate unnecessarily punitive debt imposed on individuals for minor infractions, including eliminating the practice of suspending driver's licenses and building court budgets based on anticipated revenue.²⁰⁷ The Department of Justice identified a plethora of constitutional violations in the state-sanctioned practices in Ferguson, including violations of the Equal Protection Clause through discriminatory intent and disparate impact.²⁰⁸ Similar findings have been published in California and other states on the disparate impact of court fines and government-imposed debt on communities of color.²⁰⁹

206. See, e.g., FINES & FEES JUST. CTR., <https://finesandfeesjusticecenter.org/> [<https://perma.cc/P68F-DS8V>] (last visited July 28, 2023) (describing a nationwide coalition working to eliminate fines and fees in the justice system and end abusive collection practices); *Hidden Taxes Don't Belong Anywhere, Least of All in Our Justice System*, ACLU (Oct. 6, 2022), <https://www.aclu.org/news/smart-justice/hidden-taxes-dont-belong-anywhere-least-of-all-in-our-justice-system> [<https://perma.cc/E6RM-C7TR>] (discussing the ACLU's End Justice Fees campaign to eliminate fees charged to people in the criminal legal system).

207. See INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT, *supra* note 52, at 9, 102 (concluding that "The City has budgeted for, and achieved, significant increases in revenue from municipal code enforcement over the last several years," and noting increasing budgetary expectations for incoming fines and fees from 2010 to 2015, with the amount more than doubling in that timespan).

208. See INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT, *supra* note 52, at 62–70 (stating that "[r]acial bias and stereotyping is evident from the facts, taken together. This evidence includes: the consistency and magnitude of the racial disparities throughout Ferguson's police and court enforcement actions; the selection and execution of police and court practices that disproportionately harm African Americans and do little to promote public safety; the persistent exercise of discretion to the detriment of African Americans; the apparent consideration of race in assessing threat; and the historical opposition to having African Americans live in Ferguson, which lingers among some today").

209. See, e.g., BENDER ET AL., *supra* note 52, at 6 (discussing the grievous loss suffered by low-income Californians and people of color when driver's licenses are suspended due to inability to pay fines); *Civil Assessments: The Hidden Court Fee that Penalizes Poverty*, DEBT

The procedural deficiencies in California’s notice scheme result in a deprivation of substantive rights. Not only are property owners deprived of their property without due process of law, they are stripped of the fundamental right to be free from Sisyphean mountains of government-imposed debt. In framing government-imposed debt within a framework of substantive due process, this Article argues that procedural deficiencies inherent in civil asset forfeiture rise to the level of a deprivation of fundamental rights.²¹⁰

Before June 8, 2015, California’s traffic courts required people cited by police for traffic violations to post as “bail” the full cost of the citation penalty to challenge a traffic ticket.²¹¹ This led to a significant number of default convictions, and a high rate of failures to appear and failures to pay. Under California law prior to 2017, a driver’s license suspension by the Department of Motor Vehicles was processed upon receipt from the court of a notice of failure to appear or failure to pay.²¹² Advocates brought litigation to challenge the unlawful suspension of driver’s licenses, alleging not only inadequate procedural due process protections, but also violations of substantive due process because the state was engaged in depriving primarily low-income drivers of the fundamental property right to a driver’s license, causing irreparable and grievous harm.²¹³

FREE JUST. CAL. 1, 12–13 (Mar. 2022), https://lccrsf.org/wp-content/uploads/2022/03/Civil-Assessments-Issue-Brief_v3.pdf [<https://perma.cc/8GBX-Z7XL>] (“Racially skewed infraction enforcement in turn produces a racially skewed demography of civil assessments.”); Brittany Friedman et al., *What Is Wrong with Monetary Sanctions? Directions for Policy, Practice, and Research*, 8 RUSSEL SAGE FOUND. J. SOC. SCI. 221, 226 (2022) (“Monetary sanctions amplify the disparities in criminal legal system contact along the lines of race and wealth.”).

210. See *Washington v. Marion Cnty. Prosecutor*, 916 F.3d 676, 679 (7th Cir. 2019). As stated by the Seventh Circuit in a case heard the day after oral argument in *Timbs v. Indiana*, “[o]bviously, vehicle forfeitures are economically painful. Many Americans depend on cars for food, school, work, medical treatment, church, relationships, arts, sports, recreation, and anything farther away than the ends of their driveways. Cars extend us. Cars manifest liberty. A person released on bond, retaining a presumption of innocence, might suffer virtual imprisonment if he cannot regain his vehicle in time to drive to work.” *Id.*

211. See Sam Levin, *The High Cost of Driving While Poor*, E. BAY EXPRESS (May 6, 2015), <https://eastbayexpress.com/the-high-cost-of-driving-while-poor-2-1/> [<https://perma.cc/YAX8-JCZP>] (“[C]ourts routinely require defendants to post the full bail before granting a trial date. That means a defendant who is innocent, but missed one court deadline, can’t make a case in front of a judge unless he or she can pay all the fines and fees upfront. For someone with a \$100 base fine, that would be more than \$800.”).

212. See *id.* (finding that from 2007 to 2015, there were 4.2 million driver’s license suspensions based on failure to pay or failure to appear, representing an estimated 17% of adult Californians).

213. See generally *Complaint for Declaratory and Injunctive Relief, Rubicon Programs et al. v. Superior Ct. of Cal., Cnty. of Solano*, No. FCS047212 (Cal. Super. Ct. June 15, 2016); *Hernandez v. Cal. Dep’t Motor Vehicles*, 49 Cal. App. 5th 928 (Cal. App. 2020); see also *Hernandez v. Dep’t Motor Vehicles*, 30 Cal. 3d 70, 81 n.12 (Cal. Sup. Ct. 1981) (noting that

Driven in part by the issues raised in the Not Just a Ferguson Problem report²¹⁴ and the advocacy of a coalition of legal aid and social justice organizations, California Supreme Court Chief Justice Cantil-Sakauye issued an order halting the traffic court pre-trial bail system in 2015.²¹⁵ Following closely after this change, advocates sued the Solano County Superior Court on a writ of mandate, seeking an order enjoining the court from sending orders to the Department of Motor Vehicles to suspend driver's licenses for drivers with a failure-to-pay (FTP) or failure-to-appear (FTA) adjudication on their traffic citations.²¹⁶ Advocates then filed a case against the Department of Motor Vehicles seeking a the cessation of license suspensions without a demonstration that the FTP or FTA was willful, alleging violations of due process and equal protection rights for low-income Californians who lacked the means to pay their traffic fines.²¹⁷ Legislative advocacy proceeded concurrently, with the passage in 2020 of Assembly Bill 103, halting the suspension of driver's licenses for minor traffic violations in California.²¹⁸

After prevailing on the issue of driver's license suspension and pre-trial bail for traffic citations, California advocates turned their sights to

“under the California Constitution ‘freedom from arbitrary adjudicative procedures is a substantive element of one’s liberty’ so that “when an individual is subjected to deprivatory governmental action, he always has a due process liberty interest both in fair and unprejudiced decision-making and in being treated with respect and dignity”); Comm. Budget Pub. Safety Assemb. B. 103 (Cal. 2017) (eliminating automatic court notifications to the Department of Motor Vehicles solely because a driver had failed to pay a fine).

214. See BENDER ET AL., *supra* note 52, at 9.

215. *Council Adopts Rule on Contesting Traffic Infractions*, CAL. CRTS. (June 8, 2015), <https://www.courts.ca.gov/32426.htm> [<https://perma.cc/9VK5-JUA9>]; see also Maura Dolan, *People Can Fight Traffic Tickets without Paying Fine First, Judicial Council Says*, L.A. TIMES, (June 8, 2015), <https://www.latimes.com/local/california/la-me-traffic-fines-20150608-story.html> [<https://perma.cc/BE5H-B2F2>].

216. See generally *Complaint for Declaratory and Injunctive Relief, Rubicon Programs et al. v. Superior Ct. of Cal., Cnty. of Solano*, No. FCS047212 (Cal. Super. Ct. June 15, 2016) (settling with the Superior Court after filing of verified complaint, resulting in the implementation of an ability-to-pay process, including standardized forms for traffic cites to assert indigency).

217. See *Hernandez*, 49 Cal. App. 5th at 931–32 (appealing to the California First District Court of Appeals on the issue of willfulness on the FTA issue; the court held that suspending driver's licenses without sufficient notification to the driver violated California law).

218. This reform was converted from an Assembly bill to a budget trailer and was passed through reconciliation by the California Legislature with the approval of the California budget for 2017–2018. See *Public Safety*, CAL. STATE BUDGET 2017–2018, at 29, 35 <https://www.ebudget.ca.gov/2017-18/pdf/Enacted/BudgetSummary/PublicSafety.pdf> [<https://perma.cc/7Y57-8SUT>]; CALIFORNIA AB 103 – PUBLIC SAFETY OMNIBUS (BUDGET TRAILER BILL – ENDS DRIVER'S LICENSE SUSPENSION FOR UNPAID FINES AND FEES), FINES & FEES JUST. CTR. (June 27, 2017), <https://finesandfeesjusticecenter.org/articles/california-ab-103-public-safety-omnibus-budget-trailer-bill-ends-drivers-license-suspension-for-unpaid-fines-and-fees/> [<https://perma.cc/RNM5-9NKY>].

challenging court-imposed debt, particularly when it is imposed without consideration for the defendant's ability to pay. Using a framework of substantive due process and asserting the right to be free of fines and fees when unable to pay, the cases that followed asserted the right to an ability-to-pay hearing before the imposition of court fees and punitive fines. In 2019, a California appellate court held in *People v. Dueñas* that the imposition of court fines and fees on a defendant without an evaluation of the defendant's ability to pay violates the fundamental equal protection and due process rights of indigent defendants.²¹⁹ The court in *Dueñas* held that the structure of using court fines and fees to fund the court system without consideration for the impact of the fines on those unable to pay violated the due process and equal protection rights of criminal defendants.²²⁰ Advocates building on the constitutional structure of *Dueñas* subsequently brought challenges to court-imposed and government-imposed debt, utilizing both procedural and substantive due process claims, with mixed outcomes.²²¹

Currently pending before the California Supreme Court is the case of *People v. Kopp*. The issues before the court are: “(1) Must a court consider a defendant's ability to pay before imposing or executing fines, fees, and assessments? (2) If so, which party bears the burden of proof regarding the defendant's inability to pay?”²²² The brief of the California Office of the Attorney General concedes that there are due process and potentially equal

219. See *People v. Dueñas*, 30 Cal. App. 5th 1157, 1166–68 (Cal. Ct. App. 2019) (holding that just as “a state may not inflict punishment on indigent convicted criminal defendants solely on the basis of their poverty,” the imposition of court fees on those who cannot pay creates a two-tiered system, as “without a determination that the defendant is able to pay, [court assessments] are thus fundamentally unfair; imposing these assessments upon indigent defendants without a determination that they have the present ability to pay violates due process under both the United States Constitution and the California Constitution”).

220. See *id.* at 1166 (finding that “a state may not inflict punishment on indigent convicted criminal defendants solely on the basis of their poverty”).

221. See *People v. Son*, 49 Cal. App. 5th 565, 578 (Cal. Ct. App. 2020) (holding an ability-to-pay hearing is necessary with respect to court facilities and operation assessments); *People v. Taylor*, 43 Cal. App. 5th 390, 398–99 (Cal. Ct. App. 2019) (following *Dueñas*); *People v. Belloso*, 42 Cal. App. 5th 647, 649 (Cal. Ct. App. 2019) (following *Dueñas*); *People v. Santos*, 38 Cal. App. 5th 923, 939 (Cal. Ct. App. 2019) (finding that *Dueñas* correctly assessed the disproportionate burden of court fines on the very poor and following *Dueñas*); *People v. Castellano*, 33 Cal. App. 5th 485, 491 (Cal. Ct. App. 2019) (remanding for an ability-to-pay hearing on fines). *But see* *People v. Cowan*, 47 Cal. App. 5th 32, 35 (Cal. Ct. App. 2020) (remanding for ability to pay hearing based on excessive fines clause rather than the *Duenas* due process framework); *People v. Aviles*, 39 Cal. App. 5th 1055, 1059 (Cal. Ct. App. 2019) (finding *Dueñas* was wrongly decided and the constitutional challenge should have been made under the excessive fines clause of the Eighth Amendment); *People v. Greeley*, 70 Cal. App. 5th 609, 625 (Cal. Ct. App. 2020) (holding that *Dueñas* was wrongly decided and no ability-to-pay hearing is required).

222. *People v. Kopp Case No. S257844*, CAL. CTS. APP. CTS. CASE INFO., <https://bit.ly/PeoplevKopp> [<https://perma.cc/23DZ-MJ9Y>] (last visited July 28, 2023).

protection concerns with the imposition of court fees on defendants in the criminal legal and traffic court systems, but opposes the constitutional challenge as to fines designated as punitive.²²³ The outcome in *Kopp* will be crucial to the legal arguments of advocates throughout the United States working to end unjust fines and fees.²²⁴

After the U.S. Supreme Court decision in *Timbs*, which affirmed that civil asset forfeitures fall under the definition of a fine for purposes of the Eighth Amendment, California courts began to issue rulings advising litigants that court fines and fees cases should be brought under Eighth Amendment challenges.²²⁵ This overlap in constitutional jurisprudence, and the inclusion of civil asset forfeiture matters in the definition of fines under which a proportionality analysis is appropriate, builds the groundwork for a substantive due process and ability-to-pay argument in civil asset forfeiture cases — particularly in California appellate districts where courts have been open to these arguments.²²⁶ “[T]he touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality,” which courts assess by considering “(1) the defendant’s culpability; (2) the relationship between the harm and the penalty; (3) the penalties imposed in similar statutes; and (4) the defendant’s ability to pay.”²²⁷

Substantive due process for civil asset forfeiture cases requires an ability-to-pay hearing before a low-income person is subjected to deprivation of their property. Consideration of the harm caused to the claimant is even more important when a person is an innocent property owner and not a criminal defendant in the case. In such cases, the risk of erroneous

223. Respondent’s Answering Brief on the Merits at 13, *People v. Kopp*, 254 Cal. Rptr. 3d 637 (Cal. 2019) (No. S257844).

224. Despite the California Supreme Court’s consideration of an ability-to-pay framework in *Kopp*, California advocates see an elimination of court-imposed fines and fees as the ultimate goal, noting that even with due process protections like ability to pay, monetary sanctions are unjust and have disproportionate impacts by race. *See* CALIFORNIA RACIAL AND IDENTITY PROFILING ADVISORY BOARD, *supra* note 10, at 104–05.

225. *See, e.g., Cowan*, 47 Cal. App. 5th at 63 (finding “the imposition of unpayable court-funding assessments without considering ability to pay exposes the person assessed to summary deprivation of property (i.e., money demanded by the state that would otherwise be used to pay for that person’s basic necessities of life)”); *Aviles*, 39 Cal. App. 5th at 1061, 1073 (rejecting a *Dueñas* due process argument and imposing restitution fees); *Belloso*, 42 Cal. App. 5th at 661 (holding that the challenge to the imposition of fines and fees should be brought under the Excessive Fines Clause and not a due process analysis).

226. *Compare Belloso*, 42 Cal. App. 5th at 654–56 (following *Dueñas* and applying due process analysis in allowing an ability to pay analysis for non-punitive court fees), *with Cowan*, 47 Cal. App. 5th at 42–43 (holding that a restitution fee is more properly analyzed under the Eighth Amendment Excessive Fines clause analysis).

227. *Lent v. Cal. Coastal Comm’n*, 62 Cal. App. 5th 812, 856 (Cal. Ct. App. 2021) (citation omitted); *see also* *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.*, 37 Cal. 4th 707, 727–28 (Cal. Sup. Ct. 2005); *United States v. Bajakajian*, 524 U.S. 321, 334 (1998).

deprivation is great, the loss is significant, and there is no proportionality between the loss of property and any action of the claimant.

Finally, California courts hesitant to extend the equal protection-substantive due process analysis of *Dueñas* to all court-imposed fines have been more accepting of the Eighth Amendment Excessive Fines Clause framework, which requires a constitutional basis to mandate an ability-to-pay analysis based on proportionality prior to the imposition or collection of court-imposed fines and fees.²²⁸ Accordingly, it is conceivable that California courts may be open to an application of the proportionality analysis in civil asset forfeiture cases when an indigent property owner is facing the loss of a car, home, or other assets that constitute the so-called basic necessities of life.²²⁹ It follows that the substantive due process right to be free of excessive fines should necessitate consideration of the claimant's ability to pay a fine in the form of asset forfeiture.

C. State Legislative Reforms

Civil asset forfeiture and state legislative solutions evaluated by policy advocacy organizations such as the Institute for Justice and the American Civil Liberties Union show promise beyond the adjudicative reforms implemented in California. New Mexico effectively eliminated civil asset forfeiture in 2019 with the passage of H.B. 312, which extended a judicial bar on civil asset forfeiture to municipalities.²³⁰ New Mexico has seen no

228. *See, e.g.*, *People v. Pack-Ramirez*, 56 Cal. App. 5th 851, 859–61 (Cal. Ct. App. 2020) (rejecting due process and excessive fines arguments for an ability to pay hearing); *People v. Cota*, 45 Cal. App. 5th 786, 794–95 (Cal. Ct. App. 2020) (quoting *People v. Hicks*, 40 Cal. App. 5th 320, 327 (Cal. Ct. App. 2019)) (reaffirming that “*Dueñas* ‘is inconsistent with the purposes and operation of probation’” and finding no need for an ability to pay hearing); *People v. Lowery*, 43 Cal. App. 5th 1046, 1053–55 (Cal. Ct. App. 2020) (“*Dueñas* is distinguishable and it has no application in this matter.”); *People v. Allen*, 41 Cal. App. 5th 312, 326–30 (Cal. Ct. App. 2019) (distinguishing a restitution fee paid directly to repay welfare fraud rather than general court fees); *Aviles*, 39 Cal. App. 5th at 1067–69 (disagreeing with the statutory interpretation employed by the *Dueñas* court). Cases that have encouraged or adopted an excessive fines analysis include *Cowan*, 47 Cal. App. 5th at 42–43 and *Belloso*, 42 Cal. App. 5th at 654–56. *See also* *People v. Castellano*, 33 Cal. App. 5th 485 (Cal. Ct. App. 2019) (extending the holding of *Duenas*); *People v. Montes*, 59 Cal. App. 5th 1107, 1125 (Cal. Ct. App. 2021) (Poochigian, Acting P.J., dissenting) (rejecting *Dueñas* in favor of an Eighth Amendment analysis).

229. *See Cowan*, 47 Cal App. 5th at 63 (i.e., the “means to obtain essential food, clothing, housing, and medical care” (quoting *Goldberg v. Kelly*, 397 U.S. 254 (1970))).

230. *See* H.B. 312, 53rd Legislature (N.M. 2019) (“ensure that only criminal forfeiture is allowed in this state and only pursuant to state law”); *Espinoza v. City of Albuquerque*, 435 P. 3d 1270, 1272 (N.M. Ct. App. 2018), *cert. denied*, 2017 N.M. Lexis 259; *Harjo v. City of Albuquerque*, 326 F. Supp. 3d 1145, 1180 (D.N.M. 2018).

impact on crime rates.²³¹ New Mexico is the only state that has done so, replacing civil asset forfeiture with a criminal-forfeiture-only statute.²³² In criminal asset forfeiture, a defendant is entitled to an attorney, ensuring that claimants are not left to navigate the system unassisted.²³³ New Mexico criminal asset forfeiture requires a conviction in the underlying criminal matter and proof by clear and convincing evidence that the property is traceable to the criminal offense, acquired through the commission of the offense, or an instrumentality used in the commission of the offense.²³⁴

In 2018, a federal court in *Harjo v. City of Albuquerque* ruled that the City of Albuquerque's vehicle forfeiture processes were unconstitutional because of the incentive for law enforcement to seize vehicles and because the ordinance forced property owners to prove their innocence, creating a risk of erroneous deprivation.²³⁵ Shortly thereafter, a state court ruling held that the City of Albuquerque's forfeiture ordinance was preempted by the New Mexico Forfeiture Act, invalidating the city ordinance under state law.²³⁶ The Act, which was amended in 2015, limits forfeitures by state law enforcement agencies to criminal forfeiture, which requires both the filing of a criminal case against a defendant and proof by clear and convincing evidence of a relationship between the property and the crime, and eliminates the profit motive by directing all forfeiture proceeds to the general fund.²³⁷ New Mexico passed H.B. 312 in 2019, which formally extended the abolition of civil forfeiture to municipal law enforcement agencies and strengthened transparency requirements.²³⁸ Prior to the reforms, New Mexico law enforcement agencies forfeited \$51.1 million in property, averaging close to \$3 million annually; after the elimination of civil forfeiture, these values

231. See DOES FORFEITURE WORK?, *supra* note 49, at 5; POLICING FOR PROFIT, *supra* note 28, at 5.

232. See POLICING FOR PROFIT, *supra* note 28, at 122 (stating that “New Mexico has only criminal forfeiture”). The fifty-state scorecard and state profiles show that only New Mexico has eliminated civil asset forfeiture. POLICING FOR PROFIT, *supra*, at 59–186.

233. See *supra* note 166 and accompanying text; 18 U.S.C. § 982 (governing criminal forfeiture, which does not allow forfeiture unless a criminal sentence is imposed). The forfeiture case proceeds alongside the criminal case, and claimants have a constitutional right to counsel and to a jury trial for both matters. 18 U.S.C. § 982.

234. N.M. STAT. ANN. §§ 31-27-4 (2002, as amended 2015) (stating “[a] person’s property is subject to forfeiture pursuant to state law if: (1) the person was arrested for an offense to which forfeiture applies; (2) the person is convicted by a criminal court of the offense; and (3) the state establishes by clear and convicting evidence that the property is subject to forfeiture . . .”).

235. 326 F. Supp. 3d at 1207–11.

236. *Espinoza v. City of Albuquerque*, 435 P.3d 1270, 1275 (N.M. Ct. App. 2018).

237. N.M. STAT. ANN. §§ 31-27-1-11 (2002, as amended 2015).

238. See H.B. 312, 53rd Legislature (N.M. 2019) (stating reasoning to “ensure that only criminal forfeiture is allowed in this state and only pursuant to state law”).

dropped dramatically, to \$429,523 in 2018.²³⁹ While New Mexico still permits criminal forfeitures, the state courts and Legislature have definitively asserted that these cases may not be decoupled from criminal charges and convictions.²⁴⁰

Other states have taken a more incremental approach, recognizing that there are flaws in the civil asset forfeiture process and attempting to bring state forfeiture processes in line with CAFRA in recognition of documented abuses of the system. Reforms underway in Illinois reflect this trend. The ACLU of Illinois and Institute for Justice supported Illinois' H.B. 303 in 2016, legislation that has some elements in common with California's S.B. 443 in that the bill heightened the procedural and evidentiary requirements necessary to forfeit property.²⁴¹ However, Illinois's H.B. 303 took the additional step of placing a floor on the value of property that can be seized by the state, ensuring that very small-dollar seizures were halted.²⁴² Illinois provides a process by which a person can assert a hardship created by the seizure of a vehicle and petition the court for return through filing of a hardship motion.²⁴³ In cases where real property is seized, Illinois civil procedure statutes follow federal reforms in CAFRA by requiring a judicial forfeiture and placing the procedural burden to initiate the case on the state for real property and high-value seizures, ensuring that such cases proceed with the full protection and due process of the civil legal system.²⁴⁴ In those cases, individuals whose property is forfeited by default have the opportunity

239. POLICING FOR PROFIT, *supra* note 28, at 122.

240. See H.B. 312, 53rd Legislature (N.M. 2019); *Harjo*, 326 F. Supp. 3d at 1207–11; *Espinoza*, 435 P.3d at 1270.

241. See H.B. 303, 100th Gen. Assem. (Ill. 2016).

242. See 720 ILL. COMP. STAT. 570/505(d) (LexisNexis 2023) (“With regard to possession of controlled substances offenses only, a sum of currency with a value of less than \$500 shall not be subject to forfeiture under this Act. For all other offenses under this Act, a sum of currency with a value of less than \$100 shall not be subject to forfeiture under this Act.”); Ben Ruddell, *Illinois Has a New Civil Asset Forfeiture Law. But Will It Stop Policing for Profit?*, ACLU ILL. (Aug. 15, 2018, 2:00 PM), <https://www.aclu-il.org/en/news/illinois-has-new-civil-asset-forfeiture-law-will-it-stop-policing-profit> [<https://perma.cc/XRE4-8R48>].

243. See 725 ILL. COMP. STAT. 150/3.5(e) (LexisNexis 2023) (“For seizures of conveyances, . . . the registered owner or other claimant may file a motion in writing supported by sworn affidavits claiming that denial of the use of the conveyance during the pendency of the forfeiture proceedings creates a substantial hardship and alleges facts showing that the hardship was not due to his or her culpable negligence If the court determines that the hardship outweighs the State’s interest in safeguarding the conveyance, the court may temporarily release the conveyance to the registered owner or the registered owner’s authorized designee.”); see also *Approved Statewide Forms — Civil Asset Forfeiture*, ILL. CTS., <https://www.illinoiscourts.gov/documents-and-forms/approved-forms/circuit-forms/civil-asset-forfeiture> [<https://perma.cc/L22G-58TW>] (last visited Oct. 29, 2023).

244. H.B. 303, 725 ILL. COMP. STAT. 150/4 (LexisNexis 2023) (updated to indicate that a complaint or other notice of pending forfeiture shall be served to the property owner or interest holder within 28 days of the law enforcement agency’s reporting of the seizure).

to move the court to set aside the entry of default judgment; however, for lower value forfeitures, the burden remains on the claimant to assert their rights and challenge the forfeiture.²⁴⁵

Whether the new law has yet had an impact on the number of forfeitures challenged has not been analyzed. Although the Illinois reform bill includes a data collection component in which law enforcement agencies must report aggregate data on forfeitures, this reporting data does not include any information about civil actions initiated by claimants for the return of seized property.²⁴⁶ Additional years of data are likely necessary before findings will issue as to the efficacy of the Illinois reform effort. Illinois provides an opportunity to compare reform of pre-trial civil procedure processes with reforms in California, which were aimed solely at the trial level, with a nod to notice.

Illinois, like California, places the burden on a claimant to file an initial claim for seized property with the State's Attorney's Office.²⁴⁷ However, Illinois has significantly increased the procedural due process protections in the steps required to provide notice to property owners.²⁴⁸ The Illinois civil code, at 725 ILCS 150/4, has more rigorous notice requirements than in California, requiring two attempts at service using return receipt certified mail.²⁴⁹ If no return receipt is received from the second attempt at service by mail, the State's Attorney must attempt personal service, and if three

245. See 725 ILL. COMP. STAT. 150/14 (LexisNexis 2023) (stating that "If property has been declared forfeited . . . any person who has an interest in the property declared forfeited may, within 30 days of the effective date of the notice of the declaration of forfeiture, file a claim [to begin judicial forfeiture proceedings under the act]").

246. See H.B. 303, 100th Gen. Assem. (Ill. 2016) ("[T]he Department of State Police shall establish and maintain on its official website a public database that includes annual aggregate data for each law enforcement agency that reports seizures of property."); *Asset Seizure & Forfeiture*, ILL. STATE POLICE, <https://isp.illinois.gov/Finance/AssetSeizure> [https://perma.cc/2GH4-KSH9] (last visited Oct. 19, 2023) (reporting the aggregate data beginning in 2020).

247. See 725 ILL. COMP. STAT. 150/4 (1)(B)(ii), (3) (LexisNexis 2023).

248. See 725 ILL. COMP. STAT. 150/4 (LexisNexis 2023). Under this statute, the government must use personal service or certified mail with a return receipt requested for any property owner with a known address. *Id.* If the first attempt is unsuccessful, the government must make additional attempts at both mail and personal service before posting a notice at the address. *Id.*; see also Benjamin G. Ruddell & Khadine Bennett, *Reform Civil Asset Forfeiture: Support HB 303 (Guzzardi/Harmon)*, ACLU, https://www.aclu-il.org/sites/default/files/hb_303_fact_sheet.pdf [https://perma.cc/F2PQ-GV6R] (last visited Jan. 27, 2023).

249. See 725 ILL. COMP. STAT. 150/4 (LexisNexis 2023) ("If notice is sent by certified mail and no signed return receipt is received by the State's Attorney within 28 days of mailing, and no communication from the owner or interest holder is received by the State's Attorney documenting actual notice by said parties, then the State's Attorney shall, within a reasonable period of time, mail a second copy of the notice by certified mail, return receipt requested, and first class mail to that address.").

attempts at personal service fail, must post a notice “in a conspicuous manner.”²⁵⁰ Finally, if there is no address known, constructive notice is provided by publication.²⁵¹ Notably, the Illinois statute also contains a provision considering the situation that Mr. F. found himself in. If a person is incarcerated and the State’s Attorney “reasonably should know [they are] incarcerated within the State,” the statute requires mailing a copy of the notice by certified mail, return receipt requested, and first-class mail, to the detention facility.²⁵² However, Illinois does not include with notice a model “verified claim” for claimants to send to the State’s Attorney’s Office, which presents an opportunity for reform to increase due process rights and simplify the process of asserting a claim opposing forfeiture.

Illinois legislative reforms impose a reporting duty on law enforcement agencies to collect data to report total values of property seized, but do not require reporting of court record data related to forfeitures; H.B. 3038, introduced in the 2022 legislative session, seeks more granular reporting, including about claims filed opposing forfeiture and criminal cases related to seized property.²⁵³ In an effort to bring multiple stakeholders to the table, Illinois H.B. 303 was a negotiated solution coordinated among advocacy organizations and enforcement agencies.²⁵⁴ Bipartisan bills passed in California and Illinois stand in contrast to unsuccessful reforms in South Carolina and Minnesota, where bills that would have mirrored New Mexico’s ban on civil asset forfeiture failed to pass.²⁵⁵ Other states have sought to rein in the profit motive in forfeiture, but have failed in passing

250. *See id.* (stating that these attempts at service must also be documented by the government official attempting to give notice).

251. *See id.* at (2) (stating that if the owner’s or interest holder’s address is not known, and is not on record, then notice shall be served by publication for three successive weeks in a newspaper of general circulation in the county in which the seizure occurred).

252. *See id.* at (7).

253. 5 ILCS 810, the Illinois Seizure and Forfeiture Reporting Act, requires law enforcement agencies to report limited information about each seizure and aggregate data on the total number and value of annual seizures. H.B. 3038 103d Gen. Assem. (Ill. 2023) was a bill that did not pass, seeking to improve data collection through amendments to the Seizure and Forfeiture Act.

254. *See generally* Ruddell & Bennett, *supra* note 248 (stating that the bill was the result of a cooperative effort from the Illinois State Police, Chicago Police Department, Illinois State’s Attorney’s Association, Illinois Association of Chiefs of Police, Illinois Drug Enforcement Officers Association, Cabrini Green Legal Aid, the Illinois State Bar Association, and the ACLU).

255. POLICING FOR PROFIT, *supra* note 28, at 56. Federal reform has also failed to pass out of committee, although the Fifth Amendment Integrity Restoration, or FAIR Act was introduced in June 2020, seeking to strengthen protections against federal forfeiture. POLICING FOR PROFIT, *supra* note 28, at 56.

bills to eliminate equitable sharing.²⁵⁶ In Texas in 2017 alone, 15 forfeiture reform bills were introduced but none of them were brought before the Legislature for a vote.²⁵⁷

Among state reforms, the recent legislative changes in California and Illinois stand out as steps in the right direction in the movement toward providing adequate and sufficient notice, and toward protecting the procedural and substantive rights of property owners. However, these bills are only the beginning, and further reform is needed to ensure the due process rights of property owners are adequately protected.

CONCLUSION

Civil asset forfeiture results in deprivation of property for millions of people every year through a system designed to strip individuals of their property rights through administrative default. Forfeiture as a governmental and legislative policy has unjust and racially disparate impacts on communities, individuals, and families who can least afford to lose a car or a few thousand dollars, while disproportionately burdening communities of color targeted by over-policing. States should eliminate this method of funding law enforcement out of the pockets of the poor. For states that choose to proceed with civil asset forfeiture, a reasonable, just, and equitable move would be to place the burden of initiating each civil asset forfeiture case on the state and to permit claimants to raise ability to pay as a factor in the proportionality analysis. Reform focused on the adjudicative stage of litigation, when it fails to provide adequate notice and places the administrative burden on property owners to initiate a civil case, allows states to bypass the due process rights of litigants in the civil legal system and results in the unconstitutional deprivation of property.

256. See POLICING FOR PROFIT, *supra* note 28, at 56–57. A “quiet lobbying campaign by law enforcement” was responsible for killing the bill in Missouri. See POLICING FOR PROFIT, *supra* note 28, at 56–57. In Oklahoma, concerns were raised that reform was “an affront to law enforcement.” See POLICING FOR PROFIT, *supra* note 28, at 56–57. In Minnesota, a local prosecutor who held legislative office converted the bill into a study committee. See POLICING FOR PROFIT, *supra* note 28, at 56–57. Hawaii passed a reform bill, but it was vetoed by the governor. See POLICING FOR PROFIT, *supra* note 28, at 56–57.

257. See POLICING FOR PROFIT, *supra* note 28, at 56 (highlighting that in Texas, the bills faced “strident opposition from law enforcement and local prosecutors”).