

Notes

Race and Civil Asset Forfeiture: A Disparate Impact Hypothesis

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I. INTRODUCTION: “HIGHWAY ROBBERY” IN TENAHA, TEXAS¹

In 2009, eight plaintiffs brought a civil action lawsuit against the City of Tenaha for violating 42 U.S.C. § 1983 by developing “an illegal ‘stop and seize’ practice of targeting, stopping, detaining, searching, and often seizing property from, apparently non-white citizens and those traveling with non-white citizens,” in or near Tenaha, Texas.² The plaintiffs in *Tenaha* all share one common feature—they appeared to be non-white or were traveling with someone who appeared to be non-white when they were stopped on Highway 59.³ The attorney representing the plaintiffs said that of the forty motorists he contacted in preparing the lawsuit, thirty-nine were Black.⁴

In the complaint, the plaintiffs describe five incidents in which Tenaha police officers illegally stopped, detained, interrogated, and searched drivers.⁵ After the police officers asked the plaintiffs if they were carrying cash, the officers threatened to bring money laundering charges against the plaintiffs unless they permitted the officers to seize their property.⁶ Two plaintiffs allege that the police officers threatened to take their children and put them in foster care if they did not authorize the seizure.⁷

Civil rights law, through 42 U.S.C. § 1983, provides a cause of action for plaintiffs whose right to equal protection of the law under the Fourteenth Amendment⁸ is violated by the state. Few other cases assert a racial component in civil asset forfeiture through a § 1983 claim. For example, in deciding a motion for summary judgment in *Ibarra v. Barrett*, the court denied the equal protection claim of Latino defendants who alleged that the police seized their assets because of their race, but the court did find their Fourth Amendment rights were violated.⁹ However, the small number of § 1983 claims for civil asset forfeiture does not necessarily mean that there are therefore no constitutional

¹ Howard Witt, *Highway Robbery? Texas Police Seize Black Motorists’ Cash, Cars*, CHI. TRIB., Mar. 10, 2009, available at http://www.chicagotribune.com/news/nationworld/chi-texas-profiling_wittmar10,0,6051682.story.

² Complaint at 1–2, *Morrow v. City of Tenaha*, No. 2:08cv288 (E.D. Tex. June 30, 2009); see *Civil Action for Deprivation of Rights*, 42 U.S.C. § 1983 (2006).

³ Complaint, *supra* note 2, at 4.

⁴ MARIAN R. WILLIAMS ET AL., INSTITUTE FOR JUSTICE, *POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE* 16 (2010).

⁵ Complaint, *supra* note 2, at 2–10.

⁶ *Id.*

⁷ *Id.* at 10.

⁸ U.S. CONST. amend. XIV, § 1.

⁹ No. 3:05-0971, 2007 WL 1191003, at *6–12 (M.D. Tenn. Apr. 19, 2007) (finding that the plaintiff could not sufficiently demonstrate the defendants’ discriminatory purpose, although there was sufficient evidence to raise a material issue on the discriminatory effect of the defendants’ actions).

violations through the practice of civil asset forfeiture.¹⁰ Rather, it may imply that the attorneys representing individuals in forfeiture proceedings do not have the time or expertise to bring a § 1983 claim.¹¹ The anecdotal evidence from Tenaha is informed by a great deal of literature concerning the importance of race in other areas of law enforcement. At present, there are no statistics on the racial breakdown of civil asset forfeiture stops and proceedings, but this Note presumes that the story from Tenaha is an indicator of a larger problem: civil asset forfeiture laws have a disparate impact on racial minorities.

Civil asset forfeiture is a tool used in preventing drug trafficking, money laundering, and other crimes. With civil asset forfeiture, as long as the officer suspects that the property is being used in the commission of a crime, a law enforcement agency can seize a person's property without arresting or charging that person with a crime.¹² Most state laws on civil asset forfeiture contain provisions that some or all of the proceeds obtained in a forfeiture go directly to the law enforcement agency that seized the property.¹³ This creates a concern that the police officers' desire for funds for their department might motivate their civil asset forfeiture enforcement, rather than their duty to prevent crime.¹⁴

The legal system's check on the potential abuses in civil asset forfeiture has been difficult to enforce. First, an individual whose property is seized typically must appear in court to prove that the seized assets are not contraband.¹⁵ Court appearances can be difficult for property owners who do not actually live in the jurisdiction where the forfeiture action is proceeding. Some of the plaintiffs in the Tenaha lawsuit do not live in Tenaha but instead were driving through on highways when their property was seized.¹⁶ Besides the difficulty of travel, court appearances require a disruption in the lives of the property owners that can be difficult to overcome. The legislature has also had difficulty with successfully enacting civil asset forfeiture reforms.¹⁷ The fact that civil asset forfeiture is indeed civil, and not criminal, also removes certain constitutional protections afforded to criminal

¹⁰ E-mail from Chloe Cockburn, Attorney, Racial Justice Program, American Civil Liberties Union to author (May 11, 2010) (on file with the author).

¹¹ *Id.*

¹² See *infra* Part II.

¹³ WILLIAMS, *supra* note 4, at 6.

¹⁴ See *infra* Part III.

¹⁵ Eric Blumenson & Eva Nilson, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 47 (1998) (discussing the method for challenging the government's seizure of property); see also American Civil Liberties Union, *Easy Money: Civil Asset Forfeiture Abuse by Police*, ACLU BLOG OF RIGHTS (Feb. 3, 2010), <http://www.aclu.org/blog/racial-justice/easy-money-civil-asset-forfeiture-abuse-police>.

¹⁶ Complaint, *supra* note 2, at 2–3.

¹⁷ See S.B. No. 1529, 81st Leg. (2009) available at <http://www.legis.state.tx.us/tlodocs/81R/billtext/html/SB01529I.htm>; Karis Ann-Yu Chi, *Follow the Money: Getting to the Root of the Problem with Civil Asset Forfeiture in California*, 90 CAL L. REV. 1635, 1649–57 (2002); see also *infra* Part V.

defendants.¹⁸ The government's seizure of property is considered "less serious" than the deprivation of an individual's liberty through a criminal trial, so principles such as due process of law and the right to an attorney are not available for civil asset forfeiture.¹⁹

While a general discussion of potential civil asset forfeiture reform through case law and legislation is important, this Note instead explores the notion that race has a particular impact on law enforcement agencies' incentives when enforcing civil asset forfeiture laws in highway stops. First, Part II discusses the civil asset forfeiture laws in the United States. Then Part III explores some of the present scholarship that critiques civil asset forfeiture laws generally. Part IV explores social science literature regarding racial profiling and explores hypotheses on why civil asset forfeiture might have a disparate impact on racial minorities. Part V presents suggestions for reform of civil asset forfeiture, through legislation, legal challenges, and institutional reform in law enforcement agencies.

II. CIVIL ASSET FORFEITURE LAW

A. Civil Asset Forfeiture Law: History and Today

Civil asset forfeiture has its roots in English common law.²⁰ In the seventeenth century, statutes provided for the legal fiction of prosecution against property without criminal conviction of the property's owner, as "the property itself, without human intervention, caused the harm or violated the law."²¹ In the United States, the expansion of civil asset forfeiture laws began in the 1970s and 1980s with the federal administration's commitment to the "War on Drugs."²² The theory behind the forfeiture laws was that law enforcement agencies could target the drug trade by removing the capital that funded drug producers and dealers.²³

In 1970, Congress passed the Comprehensive Drug Prevention and Control Act, which included a civil asset forfeiture provision allowing "the government to seize and forfeit drugs, drug manufacturing and storage equipment, and conveyances used to transport drugs."²⁴ Since

¹⁸ WILLIAMS, *supra* note 4, at 10; Blumenson & Nilsen, *supra* note 15, at 47.

¹⁹ Blumenson & Nilsen, *supra* note 15, at 47.

²⁰ Donald Boudreaux & A. C. Pritchard, *Civil Forfeiture and the War on Drugs: Lessons from Economics and History*, 33 SAN DIEGO L. REV. 79, 93 (1996).

²¹ *Id.*

²² WILLIAMS, *supra* note 4, at 10–11; *see also* Karis Ann-Yu Chi, Follow the Money: Getting to the Root of the Problem with Civil Asset Forfeiture in California, 90 CAL. L. REV. 1635, 1638–39 (2002) (discussing the history of civil asset forfeiture law in the United States).

²³ Blumenson & Nilsen, *supra* note 15, at 44–45.

²⁴ *Id.* at 44; *see* Controlled Substances Act, 21 U.S.C. § 881 (2006).

1970, the types of property available for seizure have expanded to include any real property or proceeds of a drug transaction, as well as any property of equal value to assets that are no longer available.²⁵ As part of the 1980s increased commitment to the War on Drugs, Congress passed the Comprehensive Crime Control Act of 1984.²⁶ The act included an equitable sharing provision that allows local law enforcement to keep up to eighty percent of the proceeds of forfeited property seized under federal law.²⁷ Today, the forfeiture section of the Controlled Substance Act states that subjected property includes,

[a]ll moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance or listed chemical in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter.²⁸

States also have their own laws on civil asset forfeiture. The Institute for Justice recently published a report on states' civil asset forfeiture laws, cataloguing not only the types of laws, but also how proceeds are distributed among law enforcement agencies.²⁹ Only eight states distribute no portion of proceeds from civil asset forfeiture to law enforcement agencies,³⁰ while twenty-six states send 100% of proceeds to law enforcement agencies.³¹ Most states have a lower standard of proof required for forfeiture of assets than is required for a finding of personal guilt for the criminal activity to which the forfeiture is credited.³² Most states also do not halt forfeiture proceedings against "innocent owners"—property owners who have not been convicted themselves of the crime associated with the forfeiture.³³

The Institute for Justice report also suggested that states "circumvent" their own civil asset forfeiture laws through equitable sharing provisions from the Department of Justice's Asset Forfeiture Program.³⁴ Through equitable sharing, if a local law enforcement agency seizes assets in association with a federal crime, the assets go to

²⁵ Blumenson & Nilsen, *supra* note 15, at 44–45.

²⁶ Pub. L. No. 98-473 (codified as amended at 21 U.S.C. § 881 (2006)).

²⁷ Kyla Dunn, *Reigning in Forfeiture: Common Sense Reform in the War on Drugs*, FRONTLINE, <http://www.pbs.org/wgbh/pages/frontline/shows/drugs/special/forfeiture.html>.

²⁸ 21 U.S.C. § 881(a)(6).

²⁹ See WILLIAMS, *supra* note 4.

³⁰ *Id.* at 17 (states are Indiana, Maine, Maryland, Missouri, North Carolina, North Dakota, Ohio, and Vermont).

³¹ *Id.* (states are Alaska, Alabama, Arkansas, Arizona, Delaware, Georgia, Hawaii, Idaho, Iowa, Kansas, Kentucky, Massachusetts, Michigan, Montana, Nevada, New Jersey, New Mexico, Oklahoma, Pennsylvania, South Dakota, Tennessee, Utah, Virginia, Washington, West Virginia, Wyoming).

³² *Id.* at 22.

³³ *Id.* at 23.

³⁴ WILLIAMS, *supra* note 4, at 37.

the federal government; however, up to eighty percent of the proceeds are returned to the local agency.³⁵ California, Georgia, and Texas were among the many states criticized in the Institute for Justice report, and I will discuss those particular statutes in more detail below.³⁶

California's civil asset forfeiture laws require that the state prove by clear and convincing evidence³⁷ that the property is

moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, or securities used or intended to be used to facilitate any violation of [California law].³⁸

In California, a petition of forfeiture must be filed within one year of the seizure of the property³⁹ and no underlying criminal conviction is necessary for the forfeiture.⁴⁰ Real property cannot be seized without a demonstration of exigent circumstances in a pre-seizure hearing.⁴¹ Innocent property owners may make a claim for the property, which will trigger a forfeiture hearing, decided by a jury within thirty days.⁴²

In accordance with California's Health and Safety Code, the state attorney general publishes an annual civil asset forfeiture report which includes statistical data on the number of cases initiated and the value of the assets seized by the county.⁴³ Sixty-five percent of revenues from assets seized in California go to law enforcement agencies.⁴⁴

Georgia law requires that the state must file a complaint for forfeiture within sixty days of seizing the property,⁴⁵ but there is no additional guarantee of notice regarding the forfeiture to the people present at the seizure.⁴⁶ The state need only show that there was probable cause to seize the property, in which case no process is required.⁴⁷ The burden of proof is on the property owner to show either that the property was never used for an illegal activity at all or that he or she is an innocent owner and committed no crime.⁴⁸ One hundred percent of the proceeds from seized property go to law enforcement

³⁵ Blumenson & Nilsen, *supra* note 15, at 51.

³⁶ WILLIAMS, *supra* note 4, at 49, 54, and 92.

³⁷ CAL. HEALTH & SAFETY CODE § 11488.4(i)(4) (West 2010).

³⁸ *Id.* § 11470(f).

³⁹ *Id.* § 11488.4(a).

⁴⁰ *Id.* § 11488.4(i)(4).

⁴¹ *Id.* § 11471(e).

⁴² CAL. HEALTH & SAFETY CODE § 11488.5(c)(1)–(2) (West 2010).

⁴³ *Id.* § 11495; *see e.g.*, CALIFORNIA DEPARTMENT OF JUSTICE, ASSET FORFEITURE: 2008 ANNUAL REPORT *available at* http://www.ag.ca.gov/publications/2008_af/af.pdf.

⁴⁴ WILLIAMS, *supra* note 4, at 49.

⁴⁵ GA. CODE ANN. § 16-13-49(h)(2) (West 2010).

⁴⁶ *See id.* § 16-13-49(i)(1).

⁴⁷ *Id.* § 16-13-49(g)(2).

⁴⁸ WILLIAMS, *supra* note 4, at 54.

agencies.⁴⁹

Texas civil asset forfeiture laws offer a large amount of discretion to the state.⁵⁰ The evidentiary standard for property is a preponderance of the evidence, rather than beyond a reasonable doubt as it is for a person charged with a crime.⁵¹ On average, Texas receives approximately \$22 million per year in equitable sharing from the U.S. Department of Justice.⁵² Law enforcement agencies report forfeitures valuing, on average, approximately \$20 million per year⁵³ and the state's laws allow agencies to keep up to 90% of proceeds from seized property.⁵⁴

Texas law requires that if property is seized, the forfeiture proceedings must commence within thirty days of the seizure.⁵⁵ An attorney for the state files the forfeiture proceedings with the clerk of a district court, including a sworn statement by the law enforcement officer who conducted the seizure.⁵⁶ The attorney must give notice to the property owner, and if he or she was not in possession of the property at the time of the forfeiture, the person who was in possession is then made party to the proceeding.⁵⁷ The hearing follows the same procedures as civil lawsuits, and the state has the burden of proof by a preponderance of evidence that the property is subject to forfeiture.⁵⁸ Like California and Georgia, Texas does not require a criminal conviction for the forfeiture of property.⁵⁹

B. Legal Challenges to Civil Asset Forfeiture

The United States Supreme Court has considered the legality of civil asset forfeiture from the Court's very inception. The Court held that under admiralty law, forfeiture was civil rather than criminal and due process did not require that a jury be present to hear the case.⁶⁰ The Court also held that the property owner's innocence was no defense⁶¹ and that the claimant, not the government, bore the burden of proof.⁶² These cases were limited to admiralty, customs, and piracy enforcement,

⁴⁹ *Id.*

⁵⁰ *See id.* at 92.

⁵¹ *Id.* at 92.

⁵² *Id.*

⁵³ WILLIAMS, *supra* note 4, at 93.

⁵⁴ *Id.* at 92.

⁵⁵ TEX. CODE CRIM. PROC. ANN. art. 59.04(a) (West 2009).

⁵⁶ *Id.* § 59.04(b).

⁵⁷ *Id.* § 59.04(j).

⁵⁸ *Id.* § 59.05(a)-(b).

⁵⁹ *Id.* § 59.05(d).

⁶⁰ *United States v. La Vengeance*, 3 U.S. 297, 301 (1796).

⁶¹ *The Brig Ann*, 13 U.S. 289, 290-91 (1815).

⁶² *The Langdon Cheves*, 17 U.S. 103, 104 (1819); *Locke v. United States*, 11 U.S. 339, 348 (1813).

whereas civil asset forfeiture laws apply to all criminal enforcement.⁶³ In a challenge to civil asset forfeiture in conjunction with criminal proceedings, the Supreme Court held that in rem forfeitures are not subject to the double jeopardy clause, because they are purely civil and not criminal in nature.⁶⁴

The Court's most recent look at civil asset forfeiture upheld a Michigan state law that gave no protection to innocent owners whose property is used in commission of a crime.⁶⁵ The Court in *Bennis v. Michigan* also considered two important constitutional protections, the Takings Clause and the Due Process Clause.⁶⁶ The Fifth Amendment, applied to the states through the Fourteenth Amendment, establishes the principle of due process.⁶⁷ The Due Process Clause is an essential tenet of the U.S. criminal justice system, which allows criminal defendants the right to trial, the right to be tried by a jury, the right of appeal, and the right to attorneys and also affords property owners the right to due process of law before the government seizes their property, also known as a taking.⁶⁸ The Takings Clause of the Fifth Amendment states that "private property [shall not] be taken for public use, without just compensation."⁶⁹ Even if the state action that takes private property is legitimate—e.g. the effort to prevent drug trafficking—the property owner still retains rights with regard to that property.⁷⁰ The physical taking of real property is considered a per se taking and the property owner is entitled to just compensation, unless the property owner has no right to exclude the state based on some background state law.⁷¹ In *Bennis*, the court held that the owner's intent to use his or her property legally does not negate the government's valid interest in seizing the property if it was used to commit a crime without the owner's knowledge.⁷² Therefore, the government has not committed a taking without due process of law since the property was used in the commission of a crime. The Court in *Bennis* also held that the innocent property owner's rights under takings law were not violated through the civil asset forfeiture, stating that the "government may not be required to compensate an owner for property which it has already lawfully acquired under the exercise of governmental authority other than the power of eminent domain."⁷³

Another method to challenge civil asset forfeiture, and more

⁶³ WILLIAMS, *supra* note 4, at 10.

⁶⁴ *United States v. Ursery*, 518 U.S. 267, 274–80 (1996); *see also* Chi, *supra* note 22.

⁶⁵ *Bennis v. Michigan*, 516 U.S. 442 (1996).

⁶⁶ *Id.*

⁶⁷ U.S. CONST. amends. V, XIV.

⁶⁸ *See* U.S. CONST., amend XIV.

⁶⁹ U.S. CONST. amend. V.

⁷⁰ *See* *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

⁷¹ *Id.*

⁷² *See* *Bennis v. Michigan*, 516 U.S. 442, 446 (1996).

⁷³ *Id.* at 452.

specifically to address underlying issues of race, is through the Equal Protection Clause of the Fourteenth Amendment. Plaintiffs can seek a remedy for the violations of constitutional law through civil rights claims under 42 U.S.C. § 1983. Under the Fourteenth Amendment of the Constitution, no state shall “deny to any person within its jurisdiction the equal protection of the laws.”⁷⁴ The Fourteenth Amendment jurisprudence protects individuals who, on the basis of race, are discriminated against by state law or action. When a law, such as civil asset forfeiture, is facially neutral but has a disparate impact on a racial group, the plaintiffs must show that racially discriminatory animus existed behind the state’s law or policy.⁷⁵ This could be difficult to achieve with civil asset forfeiture because the overzealousness of police officers could be interpreted simply as a policy targeting drug crime, not a policy targeting racial minorities. Although the Court has maintained that racial animus in state action is necessary for a violation of the Equal Protection Clause,⁷⁶ Justice Ginsburg’s dissent in *Ricci v. DeStefano*, citing *Griggs v. Duke Power*,⁷⁷ argues that “[i]n assessing claims of race discrimination, ‘[c]ontext matters.’”⁷⁸ While Ginsburg’s dissent gives little concrete hope for an equal protection claim in civil asset forfeiture, it may be a sign of future progression of the law.

Property owners can also challenge the constitutionality of civil asset forfeiture through a selective prosecution claim under the Equal Protection Clause.⁷⁹ A claim of selective prosecution would show that police officers have chosen to stop based on race: officers could have found illicit materials on others, but chose not to investigate because they were white.⁸⁰ In order for this claim to prevail, a great deal of data would need to be gathered. It would need to make some showing of the percentages of people who were not stopped but could have been.⁸¹ The Court outlined the rule to prove selective prosecution in *United States v. Armstrong*: the prosecutorial policy must have “a discriminatory effect and [be] motivated by a discriminatory purpose.”⁸²

Civil liberties groups and legislators have bemoaned the federal civil asset forfeiture laws in recent years. In 2000, a bipartisan Congress enacted the Civil Asset Forfeiture Reform Act of 2000.⁸³ Congressman Henry Hyde, who authored the bill, stated:

⁷⁴ U.S. CONST. amend. XIV.

⁷⁵ *Washington v. Davis*, 426 U.S. 229, 239 (1976) (holding that a police officer’s test did not violate the Equal Protection Clause because it tended to promote whites over Blacks).

⁷⁶ *Id.*

⁷⁷ 401 U.S. 424 (1971).

⁷⁸ 129 S. Ct. 2658 (2009) (Ginsburg, J., dissenting) (quoting *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003)).

⁷⁹ BREST ET. AL., PROCESSES OF CONSTITUTIONAL DECISION MAKING: CASES AND MATERIALS 1065 (5th ed. 2006).

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² 517 U.S. 456, 457 (1996).

⁸³ 18 U.S.C. § 981 (2010) (codified as amended).

Enlisted 25 years ago as a legitimate auxiliary tool in the so-called war on drugs, the legal doctrines of civil asset forfeiture have since been perverted to serve an entirely improper function in our democratic system of government—official confiscation from innocent citizens of their money and property with little or no due process of law or judicial protection.⁸⁴

The Civil Asset Forfeiture Reform Act included a number of amendments, such as placing the burden of proof on the government rather than on the claimant, and providing representation for indigent defendants.⁸⁵ The Act, however, did not provide guidance or improvement on how proceeds from civil asset forfeiture would be distributed.⁸⁶ Without reforms to the distribution of proceeds, law enforcement agencies will continue to be motivated by money, rather than the enforcement of law, in seizing property.

III. CRITICISM OF CIVIL ASSET FORFEITURE

Civil asset forfeiture is designed to remove the capital involved in money laundering, organized crime, and drug sales from the market.⁸⁷ The underlying concept of civil asset forfeiture is that concentrating efforts on stopping drug dealers only stops individuals, who the industry will simply replace with others for the police to investigate and arrest.⁸⁸ With civil asset forfeiture, law enforcement can focus their investigations on the capital involved in the drug market rather than on individuals. By not developing cases against individuals, who are guaranteed significant constitutional and evidentiary protections, law enforcement saves valuable resources.⁸⁹

Civil asset forfeiture is also a valuable tool for law enforcement agencies to earn revenue. Especially in an economy with strained public resources, civil asset forfeiture allows law enforcement agencies to directly connect their accomplishments to earnings for their department. This direct incentive can motivate law enforcement agencies that will be able to see the fruits of their labors.

In reporting the Tenaha, Texas lawsuit, the press has referred to the

⁸⁴ Alan Schlosser, *Asset Seizure Laws: A Civil Liberties Casualty of the War on Drugs*, ACLU OF NORTHERN CALIFORNIA, Oct. 27, 2000, http://www.aclunc.org/news/opinions/asset_seizure_laws_a_civil_liberties_casualty_of_the_war_on_drugs.shtml.

⁸⁵ WILLIAMS, *supra* note 4, at 11 & 113 n.12; *see also* 18 U.S.C. § 981 (2010).

⁸⁶ *Id.*

⁸⁷ *See* Blumenson & Nilsen, *supra* note 15, at 44.

⁸⁸ *See id.*

⁸⁹ *See id.*

law enforcement agency action as “highway robbery”⁹⁰ and a “shake down.”⁹¹ Because criminal charges are not required for civil asset forfeiture, the process seems counter to the notion that punishment should be meted out only when the individual has culpability. However, culpability cannot be strictly determined by whether a person is charged with a crime or not. Arrests and convictions require evidence. Thus, there may be a number of false negatives, in which the property is seized but the owner is not charged with a crime, although he or she did indeed commit that crime, because of a lack of evidence or the omission of evidence resulting from conflicts in the judicial process. This Note, however, presumes that there are a number of false positives—people who had not used their seized property in connection with a crime. Even if one does presume that all of the property owners are guilty, the principles of Due Process require a stronger showing of guilt than the standard used against seized property.

The first major criticism of civil asset forfeiture laws is that they “may shift law enforcement objectives to maximizing forfeiture proceeds rather than deterring crime.”⁹² In federal forfeiture cases, over 80% of the people whose property is seized are not charged with a crime.⁹³ There is evidence that law enforcement agencies use civil asset forfeiture for the purpose of padding their budgets, rather than strictly enforcing the law.⁹⁴ Criminologists report that up to 40% of law enforcement managers agree or strongly agree that civil asset forfeiture is necessary for their agency’s budget.⁹⁵

The second major criticism is that the burden of proof for finding that the seized property is subject to forfeiture is too low. Within the framework of drug enforcement, the government is entitled to the money from proceeds of drug trafficking, and can use civil asset forfeiture in order to obtain those proceeds.⁹⁶ However, civil asset forfeiture is problematic because the standard of proof required to take the property is lower than the standard of proof required to find the property owner guilty of a crime.⁹⁷ This is in conflict with the criminal justice system’s value of culpability associated with crime, as it allows punishment of an individual who is not guilty in the legal sense of the word.⁹⁸

The third major criticism of civil asset forfeiture laws is the limited

⁹⁰ Witt, *supra* note 1.

⁹¹ Gary Tuchman & Katherine Wojtecki, *Texas Police Shake Down Drivers, Lawsuit Claims*, CNN (May 6, 2009), <http://www.cnn.com/2009/CRIME/05/05/texas.police.seizures/>; WILLIAMS, *supra* note 4, at 16.

⁹² Chi, *supra* note 22, at 1635.

⁹³ *Id.* at 1647 n.99 (citing Barbara Metzler, *State Asset Forfeiture Law Faces Change; Drug Convictions Will Be Needed*, PRESS ENTERPRISE, Nov. 15, 1993, at B3 (citing a 1991 investigation that found “80 percent of those who forfeit property to the government are never charged with a crime”)).

⁹⁴ WILLIAMS, *supra* note 4, at 17–18; *see also* Boudreaux & Pritchard, *supra* note 20.

⁹⁵ WILLIAMS, *supra* note 4, at 17–18.

⁹⁶ Boudreaux & Pritchard, *supra* note 20, at 123–24.

⁹⁷ *Id.* at 80.

⁹⁸ *See* WILLIAMS, *supra* note 4, at 6.

procedural rights of the property owner in these cases.⁹⁹ Because the property owner of the seized property is not an official party to the lawsuit, the property owner does not necessarily have the same procedural guarantees, such as the right to an attorney or to a jury trial.¹⁰⁰ Under the Fifth Amendment of the U.S. Constitution, individuals charged with a crime are entitled to certain procedural guarantees, or “due process.”¹⁰¹ The Fifth Amendment also guarantees procedural protections for individuals who are deprived of property whether or not they were charged with a crime.¹⁰² Benefits jurisprudence in administrative law includes a test to balance the government’s and the individual’s interests in receiving benefits. This test is used when a benefit recipient challenges the administrative procedure used to deny their benefits.¹⁰³ The judiciary uses a balancing test to determine whether there has been a violation of the Fifth Amendment. As explained in *Mathews v. Eldridge*, this civil due process balancing test includes three factors:

- (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and probable value, if any, of additional procedural safeguards; and (3) the Government’s interest, including the fiscal and administrative burdens that the additional or substitute procedures would entail.¹⁰⁴

The complication with civil asset forfeiture is that the property is charged with a crime, a consideration missing from the United States Bill of Rights. The legislature and the judiciary, therefore, largely determine entitlement to procedural rights, with discretion left to the judiciary to determine the requirements of due process.¹⁰⁵ Because these procedural rights are not guaranteed, there are few venues of recourse for property owners.¹⁰⁶

While some states’ laws afford more procedural protections to the property owner, the discretion granted to law enforcement and the judiciary can circumvent these procedural protections. In 1994, California passed forfeiture law reforms that made criminal conviction a predicate of the forfeiture determination, raised the burden of proof to beyond a reasonable doubt, placed the burden of proof on the

⁹⁹ See Chi, *supra* note 22, at 1636–37 (noting that limited procedural rights will not curb civil asset forfeitures because of the financial incentives for police officers).

¹⁰⁰ *Id.* (also noting that some states have passed civil asset forfeiture reforms that do guarantee the right to a jury trial and to an attorney).

¹⁰¹ U.S. CONST. amend. V (“No person shall be held to answer for a capital, or otherwise infamous crime . . . nor be deprived of life, liberty, or property, without due process of law . . .”).

¹⁰² *Id.*

¹⁰³ *Mathews v. Eldridge*, 424 U.S. 319 (1976) (balancing the government and individuals entitlement interests).

¹⁰⁴ *Id.* at 321.

¹⁰⁵ Boudreaux & Pritchard, *supra* note 20, at 118.

¹⁰⁶ See *supra* Part II.

government, and protected innocent owners.¹⁰⁷ However, there are a number of loopholes to avoid the state's restrictions, including equitable sharing with the federal government¹⁰⁸ (so that the local law enforcement can gain proceeds from forfeiture without following state law), and granting sovereignty to municipalities when local law conflicts with the state law.¹⁰⁹

One final criticism of civil asset forfeiture is the political incentives of cities, municipalities, and states to use civil asset forfeiture. The War on Drugs has been an important political issue for years. A 2009 study found that the more politically conservative a population, the more likely asset forfeiture was utilized.¹¹⁰ The study pointed to the "longstanding conservative political emphasis on drug crimes and efforts to enhance law enforcement's mandate relating to drug crime offenses."¹¹¹ It also noted that conservative politics also value conservation in budgetary spending, creating incentives for law enforcement agencies to gain proceeds outside of budgetary restrictions.¹¹²

IV. CIVIL ASSET FORFEITURE AND RACE

Presently, no available data addresses the racial breakdown of civil asset forfeiture actions. However, race might play a part in motivations for civil asset forfeiture as indicated by available data on racial profiling, search and seizure stops in highway interdiction, and the general disparate impact on racial minorities as a result of the War on Drugs—why is this? This Part seeks to provide data on the relevance of race in other areas of law enforcement and then posit some hypotheses of why racial minorities are disproportionately affected by civil asset forfeiture. While the financial incentives may be the primary motivating factor for law enforcement agencies in using civil asset forfeiture, law enforcement agencies also have incentives to target racial minorities.

¹⁰⁷ Chi, *supra* note 22, at 1655–56; WILLIAMS, *supra* note 4, at 49.

¹⁰⁸ Chi, *supra* note 22, at 1662–64; WILLIAMS, *supra* note 4, at 49.

¹⁰⁹ Chi, *supra* note 22, at 1659.

¹¹⁰ Ronald Helms & S. E. Costanza, *Race, Politics and Drug Law Enforcement: An Analysis of Civil Asset Forfeiture Patterns Across U.S. Counties*, 19 POLICING & SOC'Y 1, 15 (2009).

¹¹¹ *Id.*

¹¹² *Id.*

A. Race and Law Enforcement Generally

1. Racial Profiling

The use of profiling in criminal investigation is not on its face a racially biased practice. It is foremost an important tool for law enforcement to narrow fields of suspected criminals. Police officers and organizations “use characteristics associated with either a particular crime or group of crimes to develop a profile of someone likely to engage in illicit behavior.”¹¹³

With proper justification, race may be considered a valid option for profiling. The Second Circuit Court of Appeals considered racial profiling in *Brown v. City of Oneonta*.¹¹⁴ In *Oneonta*, police officers conducted a “roundup” of Black male individuals after an elderly woman claimed that a Black male broke into her home and attacked her, cutting his own hand in the process.¹¹⁵ The police officers conducted the roundup by requesting a list of, and then questioning, the local university’s Black male students.¹¹⁶ After that produced no results, the police officers conducted a “sweep,” which involved stopping non-white individuals on the street and looking for cut marks consistent with the victim’s description of her attacker’s injury.¹¹⁷ Although the police officers exclusively used the suspect’s race as an excuse to stop a group of individuals, the court held that “absent other evidence of discriminatory racial animus, [the police] could act on the basis of that description without violating the Equal Protection Clause.”¹¹⁸

Oneonta upheld racial profiling, but only under the circumstances in which a crime had already been committed. Although police have notably used profiling to more efficiently investigate serial killers, police also use profiling to prevent crimes that have yet to occur.¹¹⁹ For example, the “drug-courier profile” is for “proactive detection of common drug offenses *as yet unknown to the police*.”¹²⁰ This type of drug enforcement is different from investigations of known drug dealers or users, and starts with a suspicion of a crime based on profiles of behaviors not obviously associated with crime rather than the actual knowledge that a crime has been committed.¹²¹ The use of profiles may encourage officers to rely on instinct or hunches when deciding to

¹¹³ DAVID A. HARRIS, PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK 16 (The New Press 2002).

¹¹⁴ *Brown v. City of Oneonta*, 221 F.3d 329 (2d Cir. 1999).

¹¹⁵ *Id.* at 334.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 333–34.

¹¹⁹ HARRIS, *supra* note 113, at 17–21.

¹²⁰ *Id.* at 19 (emphasis in original).

¹²¹ *Id.* at 19–20.

investigate a person or location.¹²²

One justification for targeting racial minorities to conduct searches in person¹²³ or on highways is based on the “hit-rate” theory.¹²⁴ The hit-rate theory of racial profiling implies that in fact, racial minorities are more likely as a group to be trafficking drugs, and therefore police officers are authorized to be more suspicious of them.¹²⁵ However, some available data on highway stops tend to negate that proposition. Data on suspected drug stops in Maryland from 1995 through 1996 indicated that while Blacks comprised 70% of drivers searched, only 28.4% of Black drivers searched were discovered with narcotics, and 28.8% of white drivers searched were discovered with narcotics.¹²⁶ Of the drivers searched, Blacks and whites were equally likely to have narcotics in the car.¹²⁷ New Jersey data from 2000 indicated that while Blacks and Latinos comprised 78% of drivers searched, the hit-rate for whites was 25%, 13% for Blacks, and 5% for Latinos.¹²⁸

Highway stops have been an essential part of the federal government’s focus on preventing drug trafficking. The Drug Enforcement Agency began Operation Pipeline in 1984.¹²⁹ Operation Pipeline is “a nationwide highway interdiction program that focuses on private motor vehicles.”¹³⁰ Operation Pipeline is credited to a Florida Highway Patrol officer, Bob Vogel, who developed a system of “cumulative similarities” among drug-traffickers, which he used to target highway motor vehicle operators.¹³¹

Although Officer Vogel’s system became a national model, the Eleventh Circuit found that some of the individuals who had been stopped by Officer Vogel were entitled to suppress the narcotics discovered in their car.¹³² The court found that the mere fact that the defendants had not made eye contact with the officer’s patrol car and were driving on the highway at 3:00 a.m. did not justify the stop made by Officer Vogel.¹³³ The court stated that though “Trooper Vogel’s ‘hunch’ about the appellants proved correct ... it is not sufficient to justify, *ex*

¹²² *Id.* at 26–28.

¹²³ See *Terry v. Ohio*, 392 U.S. 1, 30 (1968) (police officers are permitted to stop and search an individual if the “police officer observes unusual conduct which leads [him or her] reasonably to conclude in light of [his or her] experience that criminal activity may be afoot.”); see also Stephen Clarke, *Arrested Oversight: A Comparative Analysis and Case Study of How Civilian Oversight of the Police Should Function and How it Fails*, 43 COLUM. J.L. & SOC. PROBS. 1, 29 (2009) (discussing the fact that most complaints made to the New York City Civilian Complaint Review Board involving “stop-and-frisk[s]” are made by young men who are Blacks and Latinos).

¹²⁴ HARRIS, *supra* note 113, at 79.

¹²⁵ *Id.*

¹²⁶ *Id.* at 79–80.

¹²⁷ *Id.* at 80.

¹²⁸ HARRIS, *supra* note 113, at 80.

¹²⁹ U.S. Drug Enforcement Administration, *Operations Pipeline and Convoy*, <http://www.justice.gov/dea/programs/pipecon.htm> (last visited January 2, 2011).

¹³⁰ *Id.*

¹³¹ HARRIS, *supra* note 113, at 21–23.

¹³² *United States v. Smith*, 799 F.2d 704, 707, 712 (11th Cir. 1986).

¹³³ *Id.*

post facto, a seizure that was not objectively reasonable at its inception.”¹³⁴ The court used a reasonableness standard in determining whether the officer’s stop was pretextual (meaning the officer’s evidence for a stop was unrelated to his or her suspicion of criminal activity).¹³⁵ Today, the DEA website describes Operation Pipeline as a profiling system looking at a driver’s “characteristics, tendencies, and methods” that law enforcement uses to consider whether an individual who is *already stopped for traffic violations* might be a drug trafficker.¹³⁶

Although Officer Vogel did not explicitly say that race was a factor in his system of cumulative similarities, the lesson from his conduct creates a concern that relying on officer discretion can lead to a racially disparate effect. The following subsection seeks to analyze possible effects of officer bias on racial minorities. The American Civil Liberties Union’s report on drug enforcement task forces on Texas highways found that there are racial disparities in task forces’ traffic interdiction.¹³⁷ In 2004, the majority of Texas task forces were more likely to search Blacks and Latinos than whites.¹³⁸ By targeting racial minorities for drug crimes, police officers are more likely to conduct an in-person or highway stop. This would make racial minorities more susceptible to civil asset forfeiture for the mere fact that they are more likely to be stopped by police.

2. Officer Bias & Training

An explanation beyond the hit-rate theory for the racial disparity in search and seizure rates is officer bias. In searches resulting from highway or traffic stops, whether for probable cause or by consent, the police officer has a great deal of discretion in identifying and interpreting evidence.¹³⁹ This discretion may permit the personal biases of the police officer to impact his or her actions in stops and searches. These actions may include not only the initial decision to pull a motorist over, but also the decision to search the vehicle, and the decision to pursue civil asset forfeiture.

An officer’s bias might not necessarily be developed from his or

¹³⁴ *Id.* at 708.

¹³⁵ *Id.* at 709. (“We conclude, however, that in determining when an investigatory stop is unreasonably pretextual, the proper inquiry, again, is not whether the officer *could* validly have made the stop but whether under the same circumstances a reasonable officer *would* have made the stop in the absence of the invalid purpose.”)

¹³⁶ U.S. Drug Enforcement Administration, *supra* note 129.

¹³⁷ AMERICAN CIVIL LIBERTIES UNION, *FLAWED ENFORCEMENT: WHY DRUG TASK HIGHWAY INTERDICTION VIOLATES RIGHTS, WASTES TAX DOLLARS, AND FAILS TO LIMIT THE AVAILABILITY OF DRUGS IN TEXAS 14* (May 2004), available at <http://www.aclu.org/racial-justice/flawed-enforcement-report>.

¹³⁸ *Id.*

¹³⁹ See Robin S. Engel & Richard Johnson, *Toward a Better Understanding of Racial and Ethnic Disparities in Search and Seizure Rates*, 34 J. CRIM. JUST. 605, 608 (2006).

her own perceptions of racial minorities. Highway interdiction training, an important aspect of the War on Drugs and Operation Pipeline, describes particular vehicle and occupant characteristics that, supposedly, are more likely to indicate drug couriers.¹⁴⁰ This training provides clues for officers once they have pulled a vehicle over. The officer should look for everything from the odor of marijuana to inconsistencies in the motorists' or occupants' jewelry and socioeconomic status.¹⁴¹ Nonverbal clues by motorists such as nervous behavior, gang symbols in dress, bloodshot eyes, and possession of walkie-talkies all indicate the suspect is a likely drug courier.¹⁴²

Social science research has shown that these clues, while facially neutral, contain racial bias. Marketing research shows that non-criminal Black motorists often use the clothing, jewelry, and vehicles that are described as suspect in highway interdiction training as suspect.¹⁴³ Social psychology studies also show that non-Black police officers are more likely to describe nonverbal communications by Black motorists as "suspicious."¹⁴⁴ A variety of social psychology studies have found that Blacks are more likely than whites to use less eye contact and more smiles, pitch variations, pauses, laughs, and body movements, all synonymous with the highway interdiction training's description of "lying."¹⁴⁵

B. Race and Civil Asset Forfeiture

Racial profiling may be particularly problematic in civil asset forfeiture for a number of reasons. Some of the more general criticisms of civil asset forfeiture are that it gives the government too much power over an individual's private property and limits an individual's ability to contest the seizure. There are a number of specific factors that not only indicate why racial minorities might be targeted in civil asset forfeiture, but also why they may be less likely to successfully contest forfeiture after the property has been seized.

A 2009 study examined four hypotheses of civil asset forfeiture utilization.¹⁴⁶ The study found that in areas of large Black populations, the amount of forfeiture dollars gathered by law enforcement agencies per drug arrest is smaller than in areas of fewer minority residents.¹⁴⁷ The study pointed to theories that law enforcement agencies use a "more

¹⁴⁰ *Id.* at 609–11.

¹⁴¹ *Id.* at 610.

¹⁴² *Id.*

¹⁴³ *See id.* at 612–13.

¹⁴⁴ Engel & Johnson, *supra* note 139, at 611.

¹⁴⁵ *Id.* at 611–12.

¹⁴⁶ Helms & Costanza, *supra* note 110.

¹⁴⁷ *Id.* at 13.

formal and punitive approach in communities with larger [B]lack populations” than an “alternative mechanism” such as civil asset forfeiture.¹⁴⁸

The 2009 study also looked to the correlation between areas of greater income disparity without specific consideration of race and the use of asset forfeiture in drug arrests.¹⁴⁹ The research indicated that the greater the income disparity in an area, the more likely the law enforcement agencies would use civil asset forfeiture.¹⁵⁰ The authors propose that given that social control by law enforcement agencies is more difficult in areas of “expanded inequality,” law enforcement agencies may be more likely to use alternative methods such as civil asset forfeiture to enforce law and order.¹⁵¹ This allows law enforcement agencies to use civil asset forfeiture “to retain the threat of formal trial while imposing a basic fine for the activity.”¹⁵² This method, while within the legal right of the police officer, is coercive. Officers are able to make a threat to obtain the assets civilly, even though the criminal burden of proof would be much harder to meet.

1. Race and Civil Asset Forfeiture Hypothesis: Cash

Police officers might target racial minorities because they are more likely to carry cash due to a lack of access to national banks. Racism in banking is a well-documented occurrence in American society.¹⁵³ Large national banks have historically been reluctant to open branches in minority neighborhoods, and have been known to offer unsatisfactory loans to racial minorities.¹⁵⁴ A report on banking in African- and Asian-American communities in Los Angeles noted that “[r]elatively fewer formal bank branches operate in disproportionately African-American and lower-income communities. In these communities, check-cashing stores, pawnshops, and loan brokers provide transaction and credit services supplied elsewhere by banks.”¹⁵⁵

This could explain why racial minorities are more likely to carry large amounts of cash while traveling for innocent reasons. Because there are fewer banks in Black neighborhoods, Blacks are more likely to

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 13–14.

¹⁵⁰ *Id.*

¹⁵¹ Helms & Costanza, *supra* note 110, at 14.

¹⁵² *Id.*

¹⁵³ See generally Anthony D. Taibi, *Banking, Finance, and Community Economic Empowerment: Structural Economic Theory, Procedural Civil Rights, and Substantive Racial Justice*, 107 HARV. L. REV. 1463 (1994) (discussing the Equal Credit Opportunity Act).

¹⁵⁴ See generally Gary Dymski & Lisa Mohanty, *Credit and Banking Structure: Asian and African-American Experience in Los Angeles*, 89 AMER. ECON. REV. 362 (1999) (discussing the banking and lending structures in African- and Asian-American communities in Los Angeles).

¹⁵⁵ *Id.* at 363.

use cash systems or lending to make purchases. Given that money laundering and the illegal drug trade are cash industries, it is reasonable that police officers might conclude that an individual carrying a large amount of cash might be using it for that purpose. This conclusion, however, disproportionately impacts racial minorities, who are more likely than whites to be carrying large amounts of cash.

2. Race and Civil Asset Forfeiture Hypothesis: Consent to Search

In the *Tenaha* complaint and in most civil asset forfeiture cases, the property owners have consented to a search of their vehicle or person.¹⁵⁶ Although the Supreme Court has upheld the legality of consent searches,¹⁵⁷ some states have banned the use of such searches on highways because of the problem of racial profiling.¹⁵⁸ In 2010, Colorado introduced a law that will create a *Miranda*-like requirement that police officers inform motorists of their Fourth Amendment right not to be searched during a highway stop.¹⁵⁹

However, the concern remains that despite consent, even after specific instructions as to their Fourth Amendment rights, some people may not fully contemplate the meaning of their rights due to extenuating circumstances. This notion is explored within the standard used to determine whether or not consent was obtained for a search: “if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.”¹⁶⁰ This reasonable person standard does not account for racial disparity because it presumes that there is one type of person who has the same experiences and expectations from encounters with the police.¹⁶¹ In fact, racial minorities are more likely to be suspicious of the police, and therefore likely to feel threatened by the police.¹⁶² Thus, racial minorities may consent to searches because they feel threatened, not because they truly are comfortable with the police officer’s search.

¹⁵⁶ E-mail from Chloe Cockburn, *supra* note 10; AMERICAN CIVIL LIBERTIES UNION, *supra* note 137, at 14.

¹⁵⁷ See *United States v. Drayton*, 536 U.S. 194 (2002).

¹⁵⁸ *The Fourth Amendment and Antidilution: Confronting the Overlooked Function of the Consent Search Doctrine*, 119 HARV. L. REV. 2187–88 (2006) (discussing the political problems with consent searches).

¹⁵⁹ Joseph Boven, *Consent-to-Search Bill Takes Aim at Racial Profiling*, COLO. INDEP., Feb. 24, 2010, available at <http://coloradoindependent.com/47988/consent-to-search-bill-takes-aim-at-racial-profiling>; see also H.B. 10-1201, 67 Leg. 2d Sess. (Colo. 2010) available at http://www.leg.state.co.us/clics/clics2010a/csl.nsf/fsbillcont/34BDAFC4BDBE212B872576A8002BC0D3?Open&file=1201_01.pdf; see generally *Miranda v. Arizona*, 384 U.S. 436 (1966).

¹⁶⁰ *INS v. Delgado* 466 U.S. 210, 215 (1984) (quoting *United States v. Mendenhall* 446 U.S. 544, 554 (1980)).

¹⁶¹ Robert V. Ward, *Consenting to Search and Seizure in Poor and Minority Neighborhoods: No Place for a “Reasonable Person”*, 36 HOW. L.J. 239, 241 (1993).

¹⁶² *Id.*

3. Race and Civil Asset Forfeiture Hypothesis: Highway Travel

Highway interdiction training also teaches police officers that motorists driving from Florida, Texas, New Mexico, and Arizona to a northern urban area are more likely to be drug couriers, as those are the states through which the majority of illegal drugs are brought into the United States.¹⁶³ This policy could disproportionately affect Blacks, as approximately 85% live in either a southern state or a more urban area in the north,¹⁶⁴ making them more likely to be traveling to or from these locations.

The southern states do not have an efficient or expansive train system, and air travel is expensive. Thus, all southerners might be more likely to travel on highways rather than by other methods of transportation. It is unlikely that there are more racial minorities on the road than whites based on the demographic breakdown of the nation as a whole, but racial minorities may be more likely to travel on highways than by other means of transportation.

4. Race and Civil Asset Forfeiture Hypothesis: Limited Legal Agency

Racial minorities may have more difficulty effectively petitioning for their property after it has been seized by highway police officers because they may be less likely than whites to have access to defense attorneys. Access to experts, those who have “specialized knowledge not commonly available,” such as lawyers, are a valuable social resource.¹⁶⁵ Experts can connect “individuals to valuable knowledge, elucidating information that would otherwise be incomprehensible or inaccessible for laypersons, and providing specialized services.”¹⁶⁶ A 2004 study found that whites are more likely than racial minorities to have expert contacts.¹⁶⁷ Even controlling for network size, since whites tend to have larger networks than racial minorities, whites were 37% more likely to have an expert contact.¹⁶⁸ Surprisingly, while whites’ access to experts has remained stable over the past twenty years, racial minorities’ probability in access to experts has decreased from 24% to 16%.¹⁶⁹

¹⁶³ Engel & Johnson, *supra* note 139, at 613.

¹⁶⁴ *Id.*

¹⁶⁵ Erin York Cornwell & Benjamin Cornwell, *Access to Expertise as a form of Social Capital: An Examination of Race- and Class-based Disparities in Network Ties to Experts*, 51 SOC. PERSP. 853, 856 (2008).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 864.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* 867

Because racial minorities may be more likely to not have access to civil asset forfeiture lawyers or legal advice than whites, they may not be able to effectively petition the government once their property has been seized.

V. SUGGESTIONS FOR ACTION

This Part looks to protect the innocent motorists whose assets are seized or forfeited without sufficient evidence. Although the exact number of false positives in civil asset forfeiture cannot be determined, the following suggestions look at targeting civil asset forfeiture laws based on principles of justice. Any false positive, in which an innocent person's assets are seized, is detrimental to society, and many would prefer to see criminals go free than to see innocent people burdened by law enforcement action. The implications of race in civil asset forfeiture make these false positives particularly troublesome. The Fourteenth Amendment guarantees equal protection under the law,¹⁷⁰ and any law that has a disparate impact on racial minorities should be carefully considered.

A. Legislative Reforms

The first, and rather unlikely, suggestion proposes to remove the economic incentives for drug-traffickers by legalizing drugs. Civil asset forfeiture, as it is known today, can be an abuse of discretion by police officers, motivated by greed and racial bias rather than zeal for the enforcement of drug laws.¹⁷¹ Scholars have criticized the War on Drugs as an inefficient use of law enforcement resources.¹⁷² Drug offenses can be viewed as a victimless crime, and civil liberty scholarship suggests that a person might have the right to use and even abuse drugs so long as that does not affect others.¹⁷³ The criminalization of drug use creates a black market that results in a number of other crimes, including murder, assault, and robbery. Ending the War on Drugs could free up resources to target the real criminals who kill and abuse others in order to profit from the black market. While drug smuggling would surely continue, and drug couriers would continue to use our nation's highways, perhaps the number of drug couriers would significantly decrease, as economic incentives to participate in the black market would be diminished.

Legislatures could target the culpability problem in civil asset

¹⁷⁰ U.S. CONST. amend XIV, § 1.

¹⁷¹ See *supra* Part III.

¹⁷² See generally, Boudreaux & Pritchard, *supra* note 20.

¹⁷³ *Id.* at 90.

forfeiture by requiring criminal convictions of the property owner or possessor before forfeiture. Only Nebraska and Wisconsin require the burden of proof to be beyond a reasonable doubt.¹⁷⁴ In North Carolina, civil asset forfeiture essentially does not exist—all asset forfeitures are criminal proceedings.¹⁷⁵ On the other hand, seizing property prevents future crimes by removing the property from the market. There is no reason, however, not to require proof beyond a reasonable doubt that the property was indeed being used for a crime. This can be accomplished with a criminal conviction.

Texas, for example, has recently tried and failed to enact legislative changes to civil asset forfeiture. In the 2009 legislative session, State Senator John Whitmire, Chair of the Criminal Justice Committee, suggested amendments to Chapter 59 of the Texas Code of Criminal Procedure.¹⁷⁶ Senator Whitmire’s proposal included an “Audits and Investigation” section, which would allow the state auditor to investigate any law enforcement agency in connection with a seizure.¹⁷⁷ The auditor would look into how the proceeds from the seized property were being spent in the law enforcement agency.¹⁷⁸ Senator Whitmire’s bill also included definitions of how the money could be spent, and specifically prohibited law enforcement agencies from using the money to lobby the judiciary.¹⁷⁹

Federal lawmakers could defer to state laws on civil asset forfeiture by removing the equitable sharing provisions from the Controlled Substances Act.¹⁸⁰ By removing the equitable sharing provisions, the federal government would make local law enforcement agencies accountable only under state laws on civil asset forfeiture. This would allow states that have already restricted civil asset forfeiture to actually protect citizens within their borders.

B. Reforms for the Racial Impact of Civil Asset Forfeiture

While the suggestions for legislative action may be the final tool for radical change in civil asset forfeiture laws, there are a number of minor suggestions that could protect innocent motorists. First, to combat officer bias in highway and *Terry* stops, officers should undergo more training to become familiar with the likelihood that behavior by racial minorities would seem “suspicious” to them. Not all police officers are

¹⁷⁴ WILLIAMS, *supra* note 4, at 22.

¹⁷⁵ *Id.*

¹⁷⁶ TEX. CODE CRIM. PROC. ANN. art. 59 (West 2001).

¹⁷⁷ S.B. 1529, 81st Leg. (Tex. 2009), *available at* <http://www.legis.state.tx.us/tlodocs/81R/billtext/html/SB015291.htm>.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ 21 U.S.C. § 881 (2006).

biased, and not all suspects are racial minorities, but officer training could perhaps bridge the culture gap between some officers and some citizens in order to better protect the rights of these citizens.

Furthermore, law enforcement agencies should collect data on the race of individuals subject to civil asset forfeiture. Although many law enforcement agencies do not collect data on race in law enforcement proceedings, some do.¹⁸¹ The data could inform the public on the relevance of race in civil asset forfeiture, and perhaps create another avenue of reform for this highly criticized practice. The data collection could also make law enforcement officers themselves more aware of the characteristics of the motorists that they pull over. This awareness might improve their cognizance of race while enforcing the law.

This information could also help groups like the property owners in Tenaha. With the ability to recognize and analyze any particular patterns in police action, they could better demonstrate a legal harm by the behavior of the police officers.

Finally, public interest and legal groups could work with civil asset forfeiture attorneys to conduct a broader investigation of the types of clients subject to civil asset forfeiture. With an information exchange between attorneys, they may be able to notice patterns, and then might be able to seek the advice of civil rights attorneys should a § 1983 claim appear appropriate. There are a number of public interest groups already dedicated to ending civil asset forfeiture, but perhaps with the outrage at the racial component, true change can be accomplished.

VI. CONCLUSION

Because civil asset forfeiture laws often include provisions where proceeds go to police officers, they pose a unique and disingenuous incentive for police officers in carrying out forfeiture actions. This incentive might play out along racial lines due to more than just simple discrimination against minorities; racial minorities as a group might have characteristics that make them more likely to be subjected to civil asset forfeiture proceedings. In order to investigate the racial distinctions in civil asset forfeiture proceedings, police departments should keep data on forfeitures by the property owner's race. Through § 1983, property owners could seek a remedy for the violation of their constitutional right of equal protection under the law because of the disparate impact of civil asset forfeiture laws on racial minorities. To prevail in disparate impact claim, a plaintiff need not necessarily show that a facially neutral policy (that has an adverse affect on a particular racial group) have any

¹⁸¹ See Clarke, *supra* note 123 (New York City Police Department); J. Mitchell Pickerill, Clayton Mosher & Travis Pratt, *Search and Seizure, Racial Profiling, and Traffic Stops: A Disparate Impact Framework*, 31 LAW & POL'Y 1 (2009) (Washington state law enforcement).

discriminatory intent behind it.¹⁸² This jurisprudence and the constitutional requirement that laws should affect all citizens equally, regardless of race, indicates that race matters. Race matters because of the potential for police officers to make assumptions about an individual. Although, the assumptions may be false, they make police officers more suspicious and therefore more likely to investigate racial minorities because of their race. This harms racial minorities by making them disproportionately susceptible to police action and therefore more likely to have their property confiscated and their liberty disrupted through civil asset forfeiture proceedings.

¹⁸² See *Washington v. Davis*, 426 U.S. 229, 239 (1976).