

GENERATING REVENUE THROUGH CIVIL FORFEITURE

DICK M. CARPENTER II*

Civil forfeiture is a mechanism by which law enforcement can seize and keep property purportedly connected to a crime absent the arrest, formal charging, or even conviction of the property owner. Forfeiture laws also allow law enforcement to keep a portion, and sometimes all, of the seized property for agency use and, in some jurisdictions, even for the salaries and benefits of law enforcement personnel directly. In the past several decades, forfeiture laws have distorted law enforcement priorities by shifting the focus away from other activities and toward revenue generation. Civil forfeiture illustrates Professor Atuahene’s theory of stategraft: state agents transferring property from residents “to the state in violation of the state’s own laws or basic human rights,” often during times of budgetary austerity. But this Essay identifies important elements of forfeiture that do not comport with the theory. It suggests ways in which the conceptualization of stategraft may be expanded to encompass laws, regulations, and systems that legally, although arguably unjustly, allow or encourage state actors to exploit their fellow residents for the benefit of the bureaucrat’s budget. The Essay concludes with recommendations for reform of civil forfeiture laws and stategraft more generally.

INTRODUCTION	205
I. DEFINING FORFEITURE	207
II. THE FORFEITURE TAKE	213
III. CIVIL FORFEITURE AND PERVERSE INCENTIVES	218
IV. WHAT CIVIL FORFEITURE MEANS FOR STATEGRAFT	220
CONCLUSION	224

INTRODUCTION

In February 2021, Stephen Lara—a former Marine and combat veteran—was driving from his parents’ home in Lubbock, Texas, to visit his daughters in a small California town outside Reno, Nevada.¹ Until shortly before the start of the COVID-19 pandemic, Stephen lived near his ex-wife and two daughters, but at the beginning of the pandemic, he was laid off from his job at a local hospital and moved into his parents’ home. A devoted

* Copyright © 2023 by Dick M. Carpenter II, Ph.D., Senior Director of Strategic Research, Institute for Justice, Professor Emeritus, University of Colorado, Colorado Springs.

¹ See Matt Zepotosky, *A Former Marine Was Pulled Over for Following a Truck Too Closely. Police Took Nearly \$87,000 of His Cash.*, WASH. POST (Sept. 1, 2021, 10:30 AM), https://www.washingtonpost.com/national-security/stephen-lara-nevada-asset-forfeiture-adoption/2021/09/01/6f170932-06ae-11ec-8c3f-3526f81b233b_story.html [https://perma.cc/R8LR-DWSX].

father, Stephen returned to California for a weekend each month to spend time with his daughters, sometimes taking his life savings in cash with him. During that February trip, his life was turned upside down.

On his drive from Texas to California, a Nevada Highway Patrol officer engineered a reason to pull Stephen over, saying that he passed too closely to a tanker truck. The officer who stopped Stephen complimented his driving but nevertheless prolonged the stop and asked a series of questions about Stephen's life and travels. Stephen told the officer that his life savings were in the trunk. Another group of officers arrived, and Stephen gave them permission to search his car. They found a backpack with Stephen's money, just where he said it would be, along with receipts showing all his bank withdrawals. After a debate among the officers, which was recorded on body camera footage, they decided to seize his life savings.

As the body camera footage revealed, the officers knew they had no evidence of any wrongdoing—in fact, they never arrested him or charged him with any crime—but they took Stephen's money anyway to hand over to the U.S. Drug Enforcement Administration.² If not for a lawsuit Stephen brought against the Highway Patrol and a court motion he filed to get his money back, the federal agency would, in all likelihood, have taken and kept Stephen's money and kicked back a portion of the proceeds to the Highway Patrol. This is civil forfeiture in the United States of America.

Stephen's experience is not idiosyncratic but emblematic of a widespread phenomenon: government officials violating citizens' rights by manipulating the law to pursue revenue. Were the seizure of Stephen's money an isolated incident, it might be attributable to "bad apples," but as detailed below, civil forfeiture is routinely invoked by law enforcement officials across the United States, generating billions of dollars annually. In recent articles, Professor Atuahene identifies civil forfeiture as an example of stategraft, which she defines as state agents transferring property from residents to the state in violation of the state's own laws or basic human rights.³ This Essay discusses how the (ab)use of civil forfeiture in many ways fits within Atuahene's definition, except for one important distinction: Law enforcement's manipulation of civil forfeiture is entirely legal—albeit, arguably, unjust and unconstitutional—whereas the behavior of state agents in stategraft is illegal. This distinction suggests Atuahene's definition of stategraft may benefit from some expansion to encompass systems of revenue generation that are legal but nonetheless unjust.

This Essay begins by defining and describing civil forfeiture in Part I. Part II then details the scope of forfeiture at all levels of law enforcement (local, state, federal, and a combination of these). Part III discusses the

² *Id.*

³ See Bernadette Atuahene, *Predatory Cities*, 108 CALIF. L. REV. 107, 170 (2020); Bernadette Atuahene & Timothy R. Hodge, *Stategraft*, 91 S. CAL. L. REV. 263, 297 (2018).

perverse incentives in forfeiture and the distorting effects of such incentives. This Essay ends with suggestions as to how civil forfeiture might alter the definition of stategraft.

I DEFINING FORFEITURE

Civil forfeiture is a mechanism by which law enforcement can seize and keep property purportedly connected to a crime.⁴ Forfeiture laws exist in all states and at the federal level, but, as discussed in more detail below, the requirements to seize and forfeit are not particularly onerous in most jurisdictions. In general, a law enforcement officer need only suspect a connection between property—not necessarily contraband—and a crime to seize it. The forfeiture is perfected when a prosecutor files an in rem action against the property and presents evidence according to a “standard of proof,” most often the preponderance of the evidence, that the property was associated with a crime.⁵ In contrast to *criminal* forfeiture, where property is taken only after a criminal conviction, *civil* forfeiture allows law enforcement to take property from innocent people like Stephen—who have never been arrested or formally charged with or convicted of a crime. This evasion of the criminal justice system is based on a legal fiction in which the government proceeds against the property directly, as if the property itself somehow assisted in the commission of a crime.⁶

America’s civil forfeiture laws can be traced back to seventeenth-century English maritime law, which permitted courts to obtain jurisdiction over property when it was virtually impossible to obtain jurisdiction over owners such as pirates who had violated the law.⁷ Although civil forfeiture remained a relative backwater in American law for much of the nation’s history, its use expanded greatly during the early 1980s with the War on

⁴ See Karis Ann-Yu Chi, Comment, *Follow the Money: Getting to the Root of the Problem with Civil Asset Forfeiture in California*, 90 CALIF. L. REV. 1635, 1635 (2002) (defining civil forfeiture).

⁵ See LISA KNEPPER, JENNIFER McDONALD, KATHY SANCHEZ & ELYSE SMITH POHL, INST. FOR JUST., POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE 9–10 (3d ed. 2020), <https://ij.org/wp-content/uploads/2020/12/policing-for-profit-3-web.pdf> [<https://perma.cc/7DBT-F7ZK>] (describing low standards of proof prosecutors must meet to connect property to a crime and the in rem nature of civil forfeiture proceedings).

⁶ See Todd Barnet, *Legal Fiction and Forfeiture: An Historical Analysis of the Civil Asset Forfeiture Reform Act*, 40 DUQ. L. REV. 77, 94–95 (2001) (describing the legal fiction inherent in civil forfeiture whereby property is ascribed the qualities of a person and can therefore be capable of culpability).

⁷ See Donald J. Boudreaux & A.C. Pritchard, *Civil Forfeiture and the War on Drugs: Lessons from Economics and History*, 33 SAN DIEGO L. REV. 79, 96–98 (1996) (outlining early Supreme Court cases that laid the legal foundation for current forfeiture practice in the United States).

Drugs.⁸ Today, unmoored from the practical necessities of enforcing maritime law, civil forfeiture is a popular tool of law enforcement.⁹

Proponents argue with scant empirical support¹⁰ that civil forfeiture fights crime, both by confiscating the assets required for certain criminal activities and by reducing the profitability of crime.¹¹ But reducing the profitability of crime for alleged violators of the law can itself be profitable for the enforcers of that law. Forfeiture laws allow law enforcement agencies to keep a portion, and sometimes all, of the property they seize for agency use,¹² and the laws in some jurisdictions allow for seized property to be used for the direct benefit of law enforcement personnel in the form of salaries and benefits.¹³ This can distort law enforcement priorities, shifting the focus away from other activities and toward revenue generation.¹⁴

“Law enforcement agencies face tremendous financial incentives to

⁸ See Marc B. Stahl, *Asset Forfeiture, Burdens of Proof and the War on Drugs*, 83 J. CRIM. L. & CRIMINOLOGY 274, 274–75 (1992) (providing statistics that detail the increased employment of civil forfeiture schemes during the War on Drugs).

⁹ See George Rainbolt & Alison F. Reif, *Crime, Property, and Justice: The Ethics of Civil Forfeiture*, 11 PUB. AFFS. Q. 39, 40 (1997) (describing the increase in civil forfeiture actions following the Comprehensive Forfeiture Act of 1984 which permitted law enforcement agencies to retain civilly forfeited objects for their own use).

¹⁰ See, e.g., BRIAN D. KELLY, INST. FOR JUST., FIGHTING CRIME OR RAISING REVENUE?: TESTING OPPOSING VIEWS OF FORFEITURE 14–15 (2019), <https://ij.org/wp-content/uploads/2019/06/Fighting-Crime-or-Raising-Revenue-7.20.2020-revision.pdf> [<https://perma.cc/FS8A-J3AX>] (finding no meaningful empirical relationship between forfeiture and crime fighting and no evidence for forfeiture proceeds leading to reductions in drug use).

¹¹ The U.S. Department of Justice (DOJ) states that the primary mission of its Asset Forfeiture Program is “to prevent and reduce crime by disrupting, damaging, and dismantling criminal organizations through the use of the forfeiture sanction. This is accomplished by means of depriving drug traffickers, racketeers, and other criminal syndicates of their ill-gotten proceeds and instrumentalities of their trade.” OFF. OF THE INSPECTOR GEN., U.S. DEP’T OF JUST., ASSETS FORFEITURE FUND AND SEIZED ASSET DEPOSIT FUND ANNUAL FINANCIAL STATEMENT FISCAL YEAR 2007, at 3 (2008), https://www.justice.gov/sites/default/files/afp/pages/attachments/2015/04/21/fy2007_afs_report.pdf [<https://perma.cc/JYY4-AVSL>]. Another forfeiture proponent maintains that asset forfeiture allows the government to be more effective in prosecuting major offenders and removing their sources of income. See HOWARD E. WILLIAMS, ASSET FORFEITURE: A LAW ENFORCEMENT PERSPECTIVE (2002) (listing, among several functions of forfeiture laws, the provision of additional legal tools for prosecuting major offenders and allowing the government to seize illicit investment assets and remove them as supplemental sources of income).

¹² KNEPPER ET AL., *supra* note 5, at 9.

¹³ See, e.g., ARIZ. REV. STAT. ANN. § 13-2314.01(D) (through 2022 Legis. Sess.) (effective Sept. 29, 2021); HAW. REV. STAT. ANN. § 712A-16(2)–(4) (West, Westlaw through 2022 Reg. Sess.) (distributing a quarter of all forfeited property and the sale proceeds thereof to units of state or local government effecting the seizure of the property for forfeiture); KNEPPER ET AL., *supra* note 5, at 52–53 (providing comprehensive data on states that have expended forfeiture proceeds on personnel costs).

¹⁴ See Chi, *supra* note 4, at 1645–46 (describing an array of police behaviors—such as targeting drug buyers rather than dealers—that reveal distorted law enforcement policies resulting from the incentive to maximize forfeiture funds).

‘police for profit.’”¹⁵ At the time of this writing, only six states and the District of Columbia bar the use of state forfeiture proceeds by law enforcement.¹⁶ In the other states, agencies are entitled to at least 45% of proceeds,¹⁷ and in thirty-two states and at the federal level, between 80% and 100% of forfeiture proceeds go to funds controlled by law enforcement.¹⁸ “This provides opportunities for self-generating substantial agency resources.”¹⁹

These financial incentives are not the only problem with civil forfeiture laws: They also turn the presumption of innocence on its head for innocent property owners whose properties are involved in criminal activities without their knowledge.²⁰ In *Bennis v. Michigan*,²¹ for example, Michigan law enforcement forfeited a car co-owned by Tina Bennis after her husband—without her knowledge—solicited a prostitute in it.²² Despite the Court’s acknowledgment that she did not know that her car would be used in an illegal activity that would subject it to forfeiture, it maintained that the Due Process Clause of the Fourteenth Amendment did not protect her interest against government forfeiture.²³ In a criminal case, the government must prove its case against the accused, who is presumed innocent. If it cannot, the accused goes free. The burden of proof is on the government. But in civil forfeiture in most states and at the federal level, an innocent owner bears the burden of proving that he did not know about or consent to the illegal use of his property.²⁴ The owner is, in effect, guilty until proven innocent.

A quintessential example is what happened to Terry and Ria Platt, an elderly couple in Washington State who had their car seized after police in Arizona pulled over their son—who was driving but did not own the car—for a window tint violation.²⁵ Cash and a small amount of marijuana were

¹⁵ MARIAN R. WILLIAMS, JEFFERSON E. HOLCOMB, TOMISLAV V. KOVANDZIC & SCOTT BULLOCK, *INST. FOR JUST., POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE* 17 (1st ed. 2010), <http://ij.org/wp-content/uploads/2015/03/assetforfeituretoemail.pdf> [<https://perma.cc/2S7G-DMV7>].

¹⁶ KNEPPER ET AL., *supra* note 5, at 35.

¹⁷ *Id.*

¹⁸ *Id.* at 34.

¹⁹ WILLIAMS ET AL., *supra* note 15, at 17.

²⁰ *See* KNEPPER ET AL., *supra* note 5, at 36 (describing how, under most civil forfeiture laws, innocent property owners bear the burden of proving their innocence to secure the return of their property).

²¹ *Bennis v. Michigan*, 516 U.S. 442 (1996).

²² *Id.* at 443–44.

²³ *Id.* at 446–49.

²⁴ *See* KNEPPER ET AL., *supra* note 5, at 37 (observing that the burden is on property owners to prove their own innocence in twenty-nine states and under federal law).

²⁵ *See* Perry Vandell, *Appeals Court Rules in Favor of Pair Challenging Arizona Civil Forfeiture as Unconstitutional*, AZCENTRAL (Oct. 6, 2021, 11:21 AM), <https://www.azcentral.com/story/news/local/arizona/2021/10/06/appeals-court-rules-favor-terry-ria-platt-fighting-arizona-civil-forfeiture-case/6013326001> [<https://perma.cc/YK8M-PAXY>].

found during the search, both of which the Platts' son said were his.²⁶ Arizona law does not allow forfeiture of property for having cash and a small amount of recreational marijuana.²⁷ Moreover, Terry and Ria committed no crime and had no knowledge of their son's activities, which took place more than 1,000 miles away. Nonetheless, the county asset forfeiture attorney moved to forfeit the car.²⁸

Another troublesome feature of forfeiture law is the low standard of proof federal officials and most state officials must meet to forfeit property.²⁹ "Standard of proof" refers to how much evidence the government must present and how compelling that evidence must be in order to successfully forfeit—that is, permanently retain—seized property.³⁰ To seize the property in the first place typically requires nothing more than mere suspicion that it has a connection to criminal activity.³¹ In practice, suspicious activity has taken the form of nervous behavior of suspects during police encounters; air fresheners, energy drinks, and litter in cars involved in traffic stops; and the possession of large amounts of cash.³² The higher the standard of proof, the harder it is for the government to forfeit and the more the law protects property owners.

²⁶ See *Arizona Forfeiture*, INST. FOR JUST., <https://ij.org/case/arizona-forfeiture> [<https://perma.cc/AH4J-A3NE>].

²⁷ See ARIZ. REV. STAT. ANN. § 13-3401(36)(h) (Westlaw through 2022 Legis. Sess.) (defining threshold amount of marijuana to be two pounds); *id.* § 13-4304(D)(1) (stating that property may not be forfeited if the conduct giving rise to the seizure did not involve an amount of unlawful substance greater than the threshold amount as defined in § 13-3401).

²⁸ See Tim Cushing, *Appeals Court Says Couple's Lawsuit over Bogus Vehicle Forfeiture Can Continue*, TECHDIRT (Oct. 19, 2021, 3:55 PM), <https://www.techdirt.com/2021/10/19/appeals-court-says-couples-lawsuit-over-bogus-vehicle-forfeiture-can-continue> [<https://perma.cc/YLR4-6AUV>] (reporting that the county's asset forfeiture attorney ignored plaintiffs' petition for remission of forfeiture and proceeded as though the forfeiture were uncontested). The Platts sued, after which the forfeiture attorney returned the car. *Id.* The Arizona district court in the Ninth Circuit is reviewing the legality of Arizona's forfeiture law. *Id.*

²⁹ KNEPPER ET AL., *supra* note 5, at 39 (documenting the low standard of proof the government must meet to deprive people of their property in civil forfeitures, generally far below the reasonable doubt standard).

³⁰ *Id.*

³¹ See David Pimentel, *Civil Asset Forfeiture Abuses: Can State Legislation Solve the Problem?* 25 GEO. MASON L. REV. 173, 178 (2017) (describing civil forfeiture abuse where seizures of cash were made on suspicion of drug activity based entirely or almost entirely on the existence of the cash itself).

³² See Kyla Dunn, *Reining in Forfeiture: Common Sense Reform in the War on Drugs*, PBS, <https://www.pbs.org/wgbh/pages/frontline/shows/drugs/special/forfeiture.html> [<https://perma.cc/27W5-M8JS>] (describing cases where people have been suspected of drug trafficking for carrying significant amounts of cash); Michael Sallah, Robert O'Harrow, Jr., Steven Rich & Gabe Silverman, *Stop and Seize*, WASH. POST (Sept. 6, 2014), <http://www.washingtonpost.com/sf/investigative/2014/09/06/stop-and-seize> [<https://perma.cc/R48T-KENR>] (reviewing 400 cases across seventeen states and finding that law enforcement studied drivers for signs of nervousness and looked for supposed indicators of criminal activity such as trash on a vehicle's floor, air fresheners hanging from rearview mirrors, and energy drinks).

The highest standard is “beyond a reasonable doubt,” commonly associated with criminal convictions. Twenty states and the federal government, however, employ a “preponderance of the evidence” standard for forfeiture of some property.³³ It is often referred to as the “51% standard” because it only requires a showing that it is more likely than not that the property is related to criminal conduct and thus subject to forfeiture.³⁴

Thus, in the vast majority of states and at the federal level, the standard of proof required to subject an individual’s property to forfeiture is lower than the standard required to prove that an individual is guilty of criminal activity. Taken together with the fact that most states also burden innocent owners with the task of proving their innocence, this element of forfeiture laws puts owners at a significant disadvantage and makes the process of seizing and forfeiting property easier for law enforcement.

Prosecutors are well aware of the advantages such low hurdles afford them and show a clear preference for civil procedures over criminal ones.³⁵ Between 2000 and 2019, 84% of federal forfeitures through the U.S. Department of Justice (DOJ) were processed as civil rather than criminal

³³ KNEPPER ET AL., *supra* note 5, at 39 (visually depicting standards of proof for civil forfeiture across all fifty states and the federal government). A practical example of meeting this standard is illustrated in *United States v. \$174,206.00 in U.S. Currency*, 320 F.3d 658, 662 (6th Cir. 2003). After Thomas Richard (Richard) and Dacia Love (Love) were convicted on drug charges in state court, the federal government filed a civil forfeiture action against cash (\$174,206) found in safe deposit boxes owned by Richard and Love, both of whom filed a claim for the property in the forfeiture proceedings. Under the preponderance of the evidence standard, the government showed that the claimants’ legitimate income was insufficient to explain the large amount of currency found in their possession. That evidence went un rebutted by Richard and Love, and the forfeiture was perfected. Another example of the government’s showing is *United States v. \$21,000 in U.S. Postal Money Orders*, 298 F. Supp. 2d 597, 603–05 (E.D. Mich. 2003). There, the defendant’s property (money orders and currency) was seized from its owner upon his arrest for being in the country illegally, to which he pled guilty. The government moved to forfeit the money as proceeds of illegal drug transactions, even though the owner was not charged with or convicted of drug charges. To meet the preponderance of the evidence standard for the forfeiture, the government proffered evidence of: (1) the owner’s prior drug convictions, (2) the owner’s use of aliases, (3) the manner in which the owner acquired the money orders, and (4) the owner’s lack of reported income sufficient to explain the large amount of money seized.

³⁴ KNEPPER ET AL., *supra* note 5, at 39.

³⁵ Only a few states—Nebraska, New Mexico, and North Carolina—require all forfeitures to be processed criminally. *Id.* at 39. Elsewhere, forfeitures can be perfected as civil proceedings. In recent years, a growing number of states have adopted so-called conviction requirements. Such reforms are, however, nominal in effect. To begin, they maintain a two-track system that tries property in civil court and people in criminal court. Moreover, the conviction requirement usually applies only if owners contest the forfeiture, whereas in criminal forfeiture, the government must initiate the process by filing charges. If, for any reason, owners fail to contest, the government can forfeit the property without a conviction. The reform is even more limited by the fact that most conviction provisions apply to *any person*, not necessarily the property owner. In practice, this means the government can convict someone—say, a person who borrows a car from a friend and commits a crime with the car—in criminal court and still forfeit the owner’s car in civil court. Thus, conviction requirements adopted in recent years are not analogous to and do not function like the one-track process of criminal forfeiture that determines criminal culpability and loss of property. *See id.* at 41 (describing in detail the problem and the ineffectiveness of conviction requirements).

actions.³⁶ When the civil cases are further disaggregated, yet another troublesome element is revealed: Of civil forfeitures, 93% were processed administratively rather than judicially.³⁷

Administrative forfeitures occur when seizures are uncontested by property owners as part of the forfeiture process.³⁸ Systematic evidence concerning reasons for uncontested forfeitures is lacking. One logical possibility is that the property owner is guilty of a crime that gave rise to the seizure and lets the property go rather than invite further scrutiny. Equally plausible is the possibility that because the process of fighting a forfeiture is so difficult, owners choose not to fight for the return of their property. There may be at least two reasons for this. First, the practical burden of fighting a forfeiture includes finding and hiring an attorney. For most Americans, retaining a defense lawyer skilled in forfeiture litigation is not a familiar task. Even if they can afford legal representation, owners may still decide that it makes more financial sense to let the property go. As a conservative estimate,

³⁶ *Id.* at 24.

³⁷ *Id.* Similarly, data from the U.S. Treasury Department shows that 96% of Treasury forfeiture cases were processed administratively. *Id.*

³⁸ Federal administrative forfeiture is provided for by 18 U.S.C. § 983 and 19 U.S.C. § 1607. D.C.'s administrative forfeiture procedure is set out in D.C. CODE ANN. § 41-305 (West, Westlaw through Oct. 22, 2022). The states that have administrative forfeiture are Alaska (ALASKA STAT. ANN. § 17.30.116 (West, Westlaw through 2022 Legis. Sess.)), Arizona (ARIZ. REV. STAT. ANN. § 13-4309 (Westlaw through 2022 Legis. Sess.)), California (CAL. HEALTH & SAFETY CODE § 11488.4(j) (West, Westlaw through ch. 997 of 2022 Reg. Sess.)), Delaware (DEL. CODE ANN. tit. 16, § 4784 (West, Westlaw through ch. 535 of 2021–2022 Legis. Sess.)), Georgia (GA. CODE ANN. § 9-16-11 (West, Westlaw through 2022 Reg. Sess.)), Hawaii (HAW. REV. STAT. ANN. § 712A-10 (West, Westlaw through 2022 Reg. Sess.)), Illinois (725 ILL. COMP. STAT. ANN. 150 / 6 (West, Westlaw through Pub. Act 102-1107 of 2022 Reg. Sess.)), Iowa (IOWA CODE ANN. §§ 809A.8, .11, .16 (West, Westlaw through 2022 Reg. Sess.)), Kansas (KAN. STAT. ANN. §§ 60-4109, -4110, -4111, -4116 (West, Westlaw through 2022 Reg. Sess.)), Louisiana (LA. STAT. ANN. §§ 40:2605, :2608, :2609, :2610, :2615 (Westlaw through 2022 Reg. Sess.)), Michigan (MICH. COMP. LAWS ANN. §§ 333.7523, 600.4707 (West, Westlaw through Pub. Act 241 of 2022 Reg. Sess.)), Minnesota (MINN. STAT. ANN. § 609.5314 (West, Westlaw through 2022 Reg. Sess.)), Oregon (OR. REV. STAT. ANN. §§ 131A.105, .150, .165, .200, .225 (West, Westlaw through 2022 Reg. Sess.)), Rhode Island (21 R.I. GEN. LAWS ANN. § 21-28-5.04.2(h) (West, Westlaw through ch. 442 of 2022 Reg. Sess.)), Tennessee (TENN. CODE ANN. §§ 40-33-201 to -217, 53-11-201 (West, Westlaw through 2022 Reg. Sess.)), Washington (WASH. REV. CODE ANN. § 69.50.505 (West, Westlaw through 2022 Reg. Sess.)), and West Virginia (W. VA. CODE ANN. § 60A-7-705a (West, Westlaw through 2022 Reg. Sess.)). While administrative forfeiture procedures lack any judicial involvement, Arizona, Delaware, Iowa, Kansas, Louisiana, and Oregon involve the courts for the very limited purpose of obtaining a court order of forfeiture. Such an order is based on little more than an affidavit signed by the prosecutor. ARIZ. REV. STAT. ANN. § 13-4314(A) (Westlaw through 2022 Legis. Sess.); DEL. CODE ANN. tit. 16, § 4784(j) (West, Westlaw through ch. 535 of 2021–2022 Legis. Sess.); IOWA CODE ANN. § 809A.16(3) (West, Westlaw through 2022 Reg. Sess.) (for property worth more than \$5,000); KAN. STAT. ANN. § 60-4116(a) (West, Westlaw through 2022 Reg. Sess.); LA. STAT. ANN. § 40:2615(A) (Westlaw through 2022 Reg. Sess.); OR. REV. STAT. ANN. § 131A.200(1) (West, Westlaw through 2022 Reg. Sess.). Mississippi and New Hampshire used to have administrative forfeiture. However, Mississippi passed a bill in 2015 that allowed administrative forfeiture to sunset in 2018. S.B. 2159, 2015 Leg., Reg. Sess. (Miss. 2015). New Hampshire repealed administrative forfeiture in 2016. S.B. 522, 2016 Leg., Reg. Sess. (N.H. 2016).

hiring an attorney to fight a relatively simple state forfeiture case costs at least \$3,000.³⁹ This is more than double the national median forfeiture sum of \$1,276.⁴⁰ Second, trying to regain property often requires at least one, if not multiple, court appearances. This can come with significant opportunity and monetary costs, such as lost wages from missing work to appear in court.⁴¹ Faced with these hurdles, a rational property owner may decide that fighting a forfeiture is too much trouble. When no claim on the property is made, the forfeiture generally occurs through a simple paperwork shuffle, with no judicial review. It is only if the forfeiture is contested that a judge reviews a case.⁴²

The same general rules apply under state law, and where data has been made available, procedural trends have been found consistent with those of DOJ cases. In Arizona, Connecticut, and Oregon—rare states possessing the requisite data to allow such an analysis—similar patterns are found. Ninety-three percent of forfeitures in Arizona were processed civilly in 2018 and 2019, as were 71% in Connecticut and 74% in Oregon.⁴³ In Minnesota, the only state that disaggregates administrative forfeiture data from civil and criminal forfeiture data, 76% of forfeitures were processed administratively.⁴⁴

II THE FORFEITURE TAKE

The relative ease of forfeiting property has arguably led to substantial financial awards for law enforcement. At the federal level, from 2002 to 2018, deposits to the DOJ and U.S. Department of the Treasury asset forfeiture funds exceeded \$42 billion, with \$2.5 billion in 2018 alone.⁴⁵ Not all of this is retained by law enforcement, but most is. DOJ data from 2015 to 2019, for example, indicates that only 29% of expenditures from forfeiture funds go to third-party compensation such as victim restitution, with the remainder funding various law enforcement functions such as operation,

³⁹ KNEPPER ET AL., *supra* note 5, at 21.

⁴⁰ *Id.*

⁴¹ See JENNIFER MCDONALD & DICK M. CARPENTER, II, INST. FOR JUST., FRUSTRATING, CORRUPT, UNFAIR: CIVIL FORFEITURE IN THE WORDS OF ITS VICTIMS 20–21 (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/RN9F-EQSE>] (surveying Philadelphia forfeiture victims, several of whom responded that they gave up fighting for their property because they were unable to get time off work to go to court).

⁴² See KNEPPER ET AL., *supra* note 5, at 23 (describing the administrative forfeiture process where, if no claim contesting the forfeiture is filed, the property is automatically forfeited without judicial involvement).

⁴³ *Id.* at 27.

⁴⁴ *Id.*

⁴⁵ *Id.* at 15.

investigation, and equipment costs.⁴⁶

Unfortunately, the full extent of forfeiture use at the state level is not well known at this time, as not every state requires law enforcement agencies to track or report their forfeiture activity.⁴⁷ However, based on the data available, the incentives created by forfeiture laws are as real at the state level as they are at the federal. Among states that make usable data available,⁴⁸ the forfeiture take is substantial. In 2018, the latest year for which consistent data is available, state and local agencies in forty-two states and D.C. took in \$500 million through forfeiture.⁴⁹ In twenty states for which relevant data is available, total forfeiture revenue totaled \$21 billion from 2002 to 2018.⁵⁰

Local and state law enforcement also benefit from forfeiture proceeds generated through a federal scheme called equitable sharing.⁵¹ Equitable sharing finds its genesis in the Comprehensive Crime Control Act of 1984,⁵² which allows state and local law enforcement agencies to cooperate with federal law enforcement to seize and forfeit property under federal law. Federal law enforcement officials can take possession of property and initiate federal forfeiture actions as long as the “conduct giving rise to the seizure is in violation of federal law and where federal law provides for forfeiture.”⁵³ Like property seized under the laws of most states, seized assets

⁴⁶ *Id.* at 163 (finding that, from 2015 to 2019, close to a third of the \$7 billion from the DOJ’s forfeiture funds were spent on third-party compensation).

⁴⁷ See Angela C. Erickson, Jennifer McDonald & Mindy Menjou, *Forfeiture Transparency & Accountability: State by State and Federal Report Cards*, INST. FOR JUST. (Dec. 9, 2022), <https://ij.org/report/forfeiture-transparency-accountability> [<https://perma.cc/5RJE-ACFG>] (finding that many states require little to no tracking of seized property and fail to monitor agencies’ forfeiture fund spending).

⁴⁸ In preparing our report on civil forfeiture, KNEPPER ET AL., *supra* note 5, my colleagues at the Institute for Justice found that forfeiture data available from some states were unusable because they were sparse, unclear, unreliable, or incomplete. A request for data from Vermont, for example, produced a list of forfeitures so small as to make its completeness or representativeness questionable. *See id.* at 151 (noting that records obtained from the Vermont State Treasurer were sparse and unusable). Data from New Hampshire included contradicting information about how much agencies obtained from forfeiture. Data from other states suffered from integrity issues, such as failing to indicate whether a given property had been forfeited or returned.

⁴⁹ *Id.* at 15.

⁵⁰ *Id.*

⁵¹ 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, 274 (2011) (examining federal equitable sharing and the various reasons for its use by state and local law enforcement).

⁵² Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 318, 98 Stat. 1837, 2055–56 (1984).

⁵³ ASSET FORFEITURE & MONEY LAUNDERING SECTION, U.S. DEP’T OF JUST., GUIDE TO EQUITABLE SHARING FOR STATE AND LOCAL LAW ENFORCEMENT AGENCIES 6 (2009) [hereinafter 2009 GUIDE TO EQUITABLE SHARING], <https://www.justice.gov/sites/default/files/usao-ri/legacy/2012/03/26/esguidelines.pdf> [<https://perma.cc/FH96-6A6X>].

transferred to the federal government through equitable sharing can be forfeited regardless of whether an individual is charged with, let alone convicted of, a crime at either the state or federal level. If the assets are successfully forfeited to the federal government, the proceeds are deposited in the appropriate federal asset forfeiture fund—either the DOJ’s or the Treasury’s⁵⁴—and state and local agencies receive a percentage back, often as much as 80%.⁵⁵

Agencies at all levels of government enjoy the fruits of forfeiture through equitable sharing. From 2000 to 2019, states received more than \$8.8 billion in equitable sharing payments.⁵⁶ Moreover, equitable sharing activity has grown greatly since 2000. In that year, payments totaled around \$275 million.⁵⁷ In 2013, the number peaked at more than \$779 million; six years later, in 2019, it decreased to \$333.8 million, but still remained above the revenue recorded in 2000.⁵⁸ While there is likely no single cause of this trend, the Great Recession may have played a role. Tax revenues declined during the recession even as demand for social services increased, squeezing state and local governments.⁵⁹ Although the recession officially ended in 2009,⁶⁰ local governments only began to feel the effects in 2010,⁶¹ and it took until 2013 to 2014 for the U.S. economy to recover.⁶² Equitable sharing trends

⁵⁴ The DOJ Assets Forfeiture Fund accepts funds from the majority of federal law enforcement agencies, including the Federal Bureau of Investigation, Drug Enforcement Administration, and Bureau of Alcohol, Tobacco, Firearms and Explosives. *Asset Forfeiture Program Participants and Roles*, U.S. DEP’T OF JUST. (Aug. 12, 2022), <https://www.justice.gov/afms/asset-forfeiture-program-participants-and-roles> [<https://perma.cc/9SNB-EQ7K>]. The Treasury Forfeiture Fund accepts deposits from Treasury agencies, such as the Secret Service and financial and consumer agencies within the federal government. *Treasury Executive Office for Asset Forfeiture (TEOAF)*, U.S. DEP’T OF THE TREASURY, <https://home.treasury.gov/policy-issues/terrorism-and-illicit-finance/treasury-executive-office-for-asset-forfeiture-teoaf> [<https://perma.cc/CT3W-BKVU>].

⁵⁵ U.S. DEP’T OF JUST. & U.S. DEP’T OF THE TREASURY, *GUIDE TO EQUITABLE SHARING FOR STATE, LOCAL, AND TRIBAL LAW ENFORCEMENT AGENCIES 9* (2018) [hereinafter 2018 GUIDE TO EQUITABLE SHARING], <https://www.justice.gov/criminal-afmls/file/794696/download> [<https://perma.cc/E5UB-E8YG>].

⁵⁶ KNEPPER ET AL., *supra* note 5, at 6.

⁵⁷ *Id.* at 47.

⁵⁸ *Id.*

⁵⁹ See Adam H. Langley, *Local Government Finances Before and After the Great Recession 1* (Lincoln Inst. of Land Pol’y, Working Paper No. WP14AL1, 2014); Tracy Gordon, *State and Local Budgets and the Great Recession*, BROOKINGS INST. (Dec. 31, 2012), <https://www.brookings.edu/articles/state-and-local-budgets-and-the-great-recession> [<https://perma.cc/SHG9-GF5W>].

⁶⁰ Robert Rich, *The Great Recession*, FED. RSRV. HIST. (Nov. 12, 2013), <https://www.federalreservehistory.org/essays/great-recession-of-200709> [<https://perma.cc/5GE7-MD8Z>].

⁶¹ Langley, *supra* note 59, at 24.

⁶² See, e.g., *U.S. Economic Recovery Scorecard*, WIKIMEDIA COMMONS (Jan. 22, 2018), https://commons.wikimedia.org/wiki/File:U.S._economic_recovery_scorecard.png#filelinks [<https://perma.cc/G93N-Q9P9>] (demonstrating trends in employment levels, real GDP per capita, household and nonprofit net worth, and federal surplus or deficit). The charts were created using data from the Federal Reserve Bank of St. Louis. *Id.*

largely track with this timeline, and as a 2019 study suggests, agencies may have turned to equitable sharing during that time.⁶³

Such numbers provide an indication of the scope of state and local agencies' equitable sharing activity, but that is only part of the story. The other part is why agencies pursue forfeiture under equitable sharing rather than under their own states' laws. A predominant—and thus far unrebutted—theory is that agencies in states whose laws make forfeiting property more burdensome and less profitable (as measured by the percentage of proceeds agencies can keep) use equitable sharing to get around these laws.⁶⁴

There are two types of equitable sharing. The first is “joint investigative” forfeiture, which involves federal and state or local law enforcement agencies cooperating on a case and sees the federal government returning up to 80% of proceeds to state and local agencies.⁶⁵ (The exact percentage of funds each state or local agency receives depends on its role and effort in a particular seizure.⁶⁶) This cooperative structure gives local agencies the opportunity to work with federal agencies to seize and forfeit property under federal law, even if a forfeiture could be processed under state law alone—and to potentially receive a greater share of the proceeds than what they would be entitled to under state law. For example, in *United States v. 434 Main Street*, the Tewksbury Police Department in Massachusetts worked with the DOJ, although the police could have worked alone under state law, in an attempt to seize and forfeit a local motel worth more than a million dollars, even though the owner had never been arrested for, charged with, or convicted of a crime.⁶⁷ The advantage to local police of using equitable sharing was the promise of a greater take than the 50% they could have received under Massachusetts law.⁶⁸

The second type of equitable sharing is “adoptive” forfeiture, which occurs when state or local agencies seize assets as the result of their own investigations of state crimes.⁶⁹ If the original crime alleged is also a federal crime, the property is forfeitable under federal law. This means agencies can

⁶³ See KELLY, *supra* note 10, at 15–16 (“[P]olice do make greater recourse to forfeiture when local budgets are tight”). For further support, see John L. Worrall, *Addicted to the Drug War: The Role of Civil Asset Forfeiture as a Budgetary Necessity in Contemporary Law Enforcement*, 29 J. CRIM. JUST. 171, 175–76 (2001).

⁶⁴ See Holcomb et al., *supra* note 51, at 275–76.

⁶⁵ 2009 GUIDE TO EQUITABLE SHARING, *supra* note 53, at 1, 6, 12 (describing the authority under federal law for cooperation between federal and state or local agencies).

⁶⁶ *Id.* at 12.

⁶⁷ The owner, Russ Caswell, who had never been arrested for, charged with, or convicted of any crime, eventually prevailed but only after a costly trial. See *Massachusetts Forfeiture*, INST. FOR JUST., <http://www.ij.org/massachusetts-civil-forfeiture-background> [<https://perma.cc/3B7G-DSJH>].

⁶⁸ Massachusetts law requires that proceeds from property forfeited under state law be distributed 50% to police departments and 50% to prosecutors involved in the forfeiture. MASS. GEN. LAWS ANN. ch. 94C, § 47(d) (West 2022).

⁶⁹ KNEPPER ET AL., *supra* note 5, at 46.

transfer it to federal law enforcement, which can elect to “adopt” it for federal forfeiture proceedings. Federal agents do not have to be, and often are not, involved directly in the investigations giving rise to adoptive forfeitures.⁷⁰ State and local agencies are eligible to receive up to 80% of the assets obtained from adoptive forfeitures, while the federal government retains the remaining percentage to offset costs associated with federal operations. Again, according to the circumvention theory, agencies in states whose laws make forfeiting property more burdensome and less profitable (as measured by the percentage of proceeds agencies can keep) see adoptive equitable sharing as a way to get around state laws that are not as efficient or profitable as federal law.

Tony Jalali’s case is an example of how adoptive equitable sharing circumvents state law:

Jalali rented space in his small office building [in Anaheim, California] to various tenants, including a dental office, an insurance company and two medical marijuana dispensaries. The dispensaries were entirely legal under California state law. Anaheim authorities nevertheless sought to rid the city of medical marijuana businesses and targeted Jalali’s property. The authorities faced two hurdles, however: Not only is medical marijuana legal in California, but state law also prohibits the civil forfeiture of real property, such as a home, businesses, or land, without a conviction. In other words, under state law, Anaheim could neither charge Jalali with a crime nor take his property.⁷¹

Federal equitable sharing, however, provided the mechanism to circumvent state law.

In August 2012, Anaheim police teamed up with federal prosecutors and used equitable sharing to seize Jalali’s building under federal civil forfeiture law. After more than a year of fighting in federal court, the government finally agreed to drop the forfeiture case. But had it succeeded, Anaheim police could have received up to 80% of the proceeds of Jalali’s property, valued at \$1.5 million—funds they could never have received under state law.

Holcomb et al. tested this “circumvention theory” by examining the relationships between the burdens and incentives created by states’ laws and the amount of equitable sharing proceeds states received.⁷² Their results indicated that agencies in jurisdictions with more restrictive state forfeiture laws receive more proceeds through federal equitable sharing, which

⁷⁰ *Id.*

⁷¹ DICK M. CARPENTER II, LISA KNEPPER, ANGELA C. ERICKSON & JENNIFER McDONALD, *POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE* 28 (2d ed. 2015), <https://ij.org/report/policing-for-profit-2> [<https://perma.cc/Q8A7-DEQC>].

⁷² See Holcomb et al., *supra* note 51, at 278; Jefferson E. Holcomb, Marian R. Williams, William D. Hicks, Tomislav V. Kovandzic & Michele Bisaccia Meitl, *Civil Asset Forfeiture Laws and Equitable Sharing Activity by the Police*, 17 *CRIMINOLOGY & PUB. POL’Y* 101, 118 (2018).

suggests state and local law enforcement agencies do, in fact, use the scheme to circumvent states' forfeiture laws when they are more burdensome or less financially rewarding. This is yet another example of how forfeiture laws shape law enforcement behavior and encourage "policing for profit."⁷³

III

CIVIL FORFEITURE AND PERVERSE INCENTIVES

Holcomb et al.'s results are not too surprising. It is an important tenet of economics that people respond to incentives.⁷⁴ Law enforcement is not immune from such incentives.⁷⁵ The issue of concern here is *how* those in law enforcement respond to the incentives created by forfeiture laws. Evidence suggests the incentives codified in forfeiture laws facilitate and encourage policing for profit.

In allowing agencies to self-fund or pay personnel using forfeiture proceeds, forfeiture laws undermine accountability mechanisms built into routine appropriations processes, such as oversight by elected officials, public transparency and opportunity for public comment, and electoral consequences for public officials who oversee budgets. Self-funding also can distort law enforcement priorities, shifting the focus to revenue generation and away from other activities.⁷⁶ This problem is not lost on some in law enforcement. For example, although state laws often allow forfeiture funds to be used to pay personnel, federal rules prohibit the use of federal forfeiture revenue (i.e., equitable sharing) to "pay the salaries and benefits of sworn or non-sworn law enforcement personnel."⁷⁷ The reason offered by the DOJ for this prohibition is telling: "The purpose of this rule is to protect the integrity of the Asset Forfeiture and Equitable Sharing Programs so that the prospect of receiving equitable sharing funds does not influence, or appear to influence, law enforcement decisions."⁷⁸

State forfeiture laws, some of which do not include the same prohibitions as in the DOJ's rules, leave their bad incentives in place, making these laws ripe for abuse. This abuse is most visible along the nation's interstates, where officers also often take advantage of routine traffic stops

⁷³ See Holcomb et al., *supra* note 51, at 282.

⁷⁴ See generally Samuel Bowles & Sandra Polania-Reyes, *Economic Incentives and Social Preferences: Substitutes or Complements?*, 50 J. ECON. LITERATURE 368 (2012) (analyzing the relationship between economic incentives and prosocial behavior to demonstrate the important public policy implications associated with the use of incentives).

⁷⁵ See Brian Kelly, *An Empirical Assessment of Asset Forfeiture in Light of Timbs v. Indiana*, 72 ALA. L. REV. 613, 617 (2021) (explaining the role that incentives play in encouraging forfeitures).

⁷⁶ See Chi, *supra* note 4, at 1647–48.

⁷⁷ 2018 GUIDE TO EQUITABLE SHARING, *supra* note 55, at 18. The exceptions include matching funds in grant programs, overtime, new or one-year appointments, and salaries of officers hired to replace any officers assigned to a task force. *Id.*

⁷⁸ *Id.*

to scout for forfeitable property—mainly, atypically large amounts of cash.⁷⁹ Upon discovery of such property, officers can seize it with no evidence or charges of wrongdoing. Stephen Lara’s case was a quintessential example. Were his case an isolated incident, the troopers’ behavior could possibly be explained as that of a few “bad apples.” However, Stephen is only one of many innocent people who have had their property taken from them under such circumstances.⁸⁰

New research also suggests that these perverse incentives are exacerbated during times of economic stress. Two separate studies—one at the national level⁸¹ and one at the state level⁸²—analyzing the relationship between forfeiture revenue and (a) overall economic conditions and (b) crime rates and drug use, found increased forfeiture revenue did not correlate with more crimes solved or lower levels of drug use, but it did correlate with fiscal stress, suggesting forfeiture use increases under weak economic conditions when law enforcement budgets are likely to suffer cuts. Specifically, using nationwide unemployment and equitable sharing data, “a 1 percentage point increase in unemployment”—a common indicator of fiscal stress—“was associated with an 8.5 percentage point increase in the value of forfeited assets and a 9.5 percentage point increase in the number of

⁷⁹ See Sallah et al., *supra* note 32.

⁸⁰ See, e.g., Chloe Cockburn, *Easy Money: Civil Asset Forfeiture Abuse by Police*, ACLU (Feb. 3, 2010, 1:16 PM), <https://www.aclu.org/blog/criminal-law-reform/easy-money-civil-asset-forfeiture-abuse-police> [<https://perma.cc/C4BY-MTK5>] (detailing the experience of Shukree Simmons, an individual whom the ACLU represented after his money was unjustly seized in Georgia); *Civil Liberties in Arizona: What One Letter Can Do*, ACLU OF ARIZ., Spring 2012, at 2, http://acluaz.org/sites/default/files/documents/web%20aclunews_spring2012_06_view_red.pdf [<https://perma.cc/Z7RB-ESA4>] (sharing the story of Demouriee Franklin, whose “entire life savings” were unjustly seized in Arizona); John Burnett, *Cash Seizures by Police Prompt Court Fights*, NPR (June 16, 2008, 2:04 PM), <https://www.npr.org/templates/story/story.php?storyId=91555835> [<https://perma.cc/W55T-47F6>] (describing unjust seizures from two other individuals, Javier Gonzales and Christopher Hunt, under local forfeiture laws); Lisa Sandberg, *Property Seized by East Texas Police Called ‘Highway Piracy,’* HOUSTON CHRON. (Feb. 7, 2009), <https://www.chron.com/news/houston-texas/article/Property-seized-by-E-Texas-police-called-1732387.php> [<https://perma.cc/PQX4-R789>] (reporting on the prevalence of property seizures in East Texas); Gary Tuchman & Katherine Wojtecki, *Texas Police Shake Down Drivers, Lawsuit Claims*, CNN (May 6, 2009, 9:00 AM), <http://edition.cnn.com/2009/CRIME/05/05/texas.police.seizures/index.html> [<https://perma.cc/9BYR-HFMC>] (referencing numerous individuals who were the victims of highway robberies in Texas); Howard Witt, *Stretch of Texas Highway Has Its Own Judge and Jury; Suit Says Police Single Out Passing Motorists for Shakedowns*, L.A. TIMES, Mar. 11, 2009, at A1 (noting that highway seizures are often committed against innocent individuals, most of them nonwhite); Sarah Stillman, *Taken*, NEW YORKER (Aug. 12, 2013), <https://www.newyorker.com/magazine/2013/08/12/taken> [<https://perma.cc/4QHH-LMWL>] (describing the use of civil forfeiture laws for “targeting the workaday homes, cars, cash savings, and other belongings of innocent people who are never charged with a crime”).

⁸¹ KELLY, *supra* note 10.

⁸² BRIAN D. KELLY, INST. FOR JUST., DOES FORFEITURE WORK?: EVIDENCE FROM THE STATES (2021), <https://ij.org/report/does-forfeiture-work> [<https://perma.cc/5FKN-UEHX>].

assets seized.”⁸³ State-level data aggregated from five states (Arizona, Hawaii, Iowa, Michigan, and Minnesota) indicate a similar association.⁸⁴ A 1% increase in unemployment was associated with a 12% increase in value of state and local forfeiture proceeds.⁸⁵ Such results provide yet another example of perverse incentives driving civil forfeiture.

IV

WHAT CIVIL FORFEITURE MEANS FOR STATEGRAFT

In some ways, the use of civil forfeiture by law enforcement officials seems to illustrate Atuahene’s stategraft framework. Indeed, Atuahene has previously identified the abuse of civil forfeiture specifically as an example of stategraft.⁸⁶ In brief, Atuahene defines stategraft as state agents transferring property from residents “to the state in violation of the state’s own laws or basic human rights,”⁸⁷ often during times of budgetary austerity. With civil forfeiture, public officials use their power to take property from people, transfer the property to the state, and use the proceeds to fill their agency accounts. Moreover, they seem to do so to a greater extent during periods of economic distress. However, civil forfeiture diverges from Atuahene’s conceptualization of stategraft in some important ways.

First, the actions of law enforcement officials vis-à-vis civil forfeiture are statutorily authorized, except in situations where police officials take and keep forfeited property for their own personal use.⁸⁸ This is, of course, corruption as conventionally defined,⁸⁹ but not stategraft, as Atuahene

⁸³ KELLY, *supra* note 10, at 16.

⁸⁴ KELLY, *supra* note 82, at 21.

⁸⁵ *Id.* These results are, strictly speaking, correlational and not causal, but the methods used by the author provide causal estimates much stronger than conventional correlational analyses.

⁸⁶ *See, e.g.*, Atuahene, *supra* note 3, at 170.

⁸⁷ Bernadette Atuahene, *A Theory of Stategraft*, 98 N.Y.U. L. REV. 1, 3 (2023).

⁸⁸ *See, e.g.*, ANDREW M. LUGER & JOHN PATRICK EGELHOF, MINN. DEP’T OF PUB. SAFETY, REPORT OF THE METRO GANG STRIKE FORCE REVIEW PANEL (2009), https://dps.mn.gov/divisions/co/about/Documents/final_report_mgsf_review_panel.pdf [<https://perma.cc/K79P-39N9>] (describing police officers’ abuse of civil forfeiture laws within the Minnesota Metro Gang Strike Force); ERIN NORMAN & ANTHONY SANDERS, INST. FOR JUST., FORFEITING ACCOUNTABILITY: GEORGIA LAW ENFORCEMENT’S HIDDEN CIVIL FORFEITURE FUNDS (2011), <https://ij.org/wp-content/uploads/2015/03/forfeitingaccountabilityfinal.pdf> [<https://perma.cc/48Y4-WLAD>] (describing misuse of civil forfeiture laws in Georgia); Jan Reid, *Highway Robbery*, TEX. OBSERVER (May 16, 2008), <https://www.texasobserver.org/2760-highway-robbery> [<https://perma.cc/8P6S-4FN5>] (describing the prevalent practice of asset forfeitures on Texas highways); Mauricio Julian Cuellar, Jr., *State Asks for Audit of DA’s Forfeiture Fund*, ALICE ECHO-NEWS J., July 14, 2009, at 1 (explaining that police officers and state officials in South Texas used forfeiture funds for their own benefits); Mauricio Julian Cuellar, Jr., *More Details Emerge from DA Forfeiture Fund*, ALICE ECHO-NEWS J., Aug. 5, 2009, at 1 (same); Jaime Powell & Denise Malan, *Jim Wells Probes Drug-Fund Use*, CORPUS CHRISTI CALLER-TIMES, May 28, 2009, at B17 (same).

⁸⁹ *What is Corruption?*, TRANSPARENCY INT’L, <https://www.transparency.org/en/what-is->

describes it. Whereas Atuahene defines stategraft, in part, as illicit activity by public officials, seizing and keeping property without arresting, charging, or convicting a property owner is and has been licit for hundreds of years.

Second, agency avarice on the part of public officials *appears* to play an important role in Atuahene's framework. That is, ignoring statutory or constitutional prohibitions, officials, seemingly driven in part by personal, moral dysfunction (they are breaking the law, after all), prey on their own citizens in the quest to fill state coffers. With civil forfeiture, however, law enforcement in most jurisdictions faces few legal prohibitions, and officials arguably pursue forfeiture actions less from personal disobedience than the incentives forfeiture laws create.

Indeed, Preciado and Wilson conducted an experiment to test the extent to which the financial incentives inherent in most forfeiture laws altered the behavior of those in law enforcement roles.⁹⁰ Results showed financial incentives universally distorted "helping" behaviors into "mercenary" ones.⁹¹ Importantly, Preciado and Wilson made a point of focusing on the law as the wrong actor, not the people: "Civil forfeiture is not a problem of 'bad apples,' but of bad laws that encourage bad conduct."⁹²

What does all this mean for Atuahene's definition of stategraft? Perhaps one implication is that the definition is too narrow since it would exclude civil forfeiture or other mechanisms that are statutorily authorized yet induce largely unethical behavior on the part of government officials—and still are motivated by monetary gain. As I stated in *When Legal is Not Ethical: The Case of Civil Forfeiture*,

[T]he U.S. is a nation built on the premise that individuals and their rights[—prominently property rights—]come first, and government and its powers come second In a free society, individuals may pursue their rights provided they do not take what belongs to others, including the public. In the event that someone violates the rights of others (including the public), the purpose of remedies is to ensure that violators return what they have taken. Forfeiture in the general sense, therefore, is a remedial scheme aimed at securing rights by restoring a pre-violation status quo.⁹³

corruption [<https://perma.cc/HH2B-NJMS>] ("We define corruption as the abuse of entrusted power for private gain"); *Corruption*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/corruption> [<https://perma.cc/W89D-ERDA>] (defining corruption as "a dishonest or illegal behavior especially by powerful people (such as government officials or police officers)"). This also aligns with Atuahene's conventional definition of corruption in Atuahene & Hodge, *supra* note 3, at 295.

⁹⁰ Michael Preciado & Bart J. Wilson, *The Welfare Effects of Civil Forfeiture*, 4 REV. BEHAV. ECON. 153, 162–63 (2017).

⁹¹ *Id.* at 172–77.

⁹² *Id.* at 177.

⁹³ Dick Carpenter, *When Legal is Not Ethical: The Case of Civil Forfeiture*, 10 INT'L J. ETHICS

Yet, when property owners are never charged or convicted of a crime but nonetheless lose their property to the state, the notion of forfeiture as remedy is corrupted.

A second implication is that there is an apparent tension in Atuahene's stategraft framework. In Atuahene's description of the term, the role of "bad apples" seems inescapable: "In addition to property tax overcharges, judges, police, and other public officials also supplement public budgets by illegally extracting funds from residents."⁹⁴ And,

the two primary features of predatory cities [i.e., stategraft] are (1) that the routinized actions of public officials are illegal and (2) that these illegal actions directly augment public coffers. So in order to transition from a legitimate city into a predatory city, the illegal takings must be systematic rather than a one-off occurrence.⁹⁵

Further still, "in their unofficial capacity, state agents promote the state's financial interests without explicit permission from lawmakers, who either look the other way or support their actions without directly authorizing them."⁹⁶

Yet, elsewhere Atuahene dismisses the role of "bad apples" as part of the problem, which she attributes instead to "evil systems":

It is easy to attribute the genesis of a predatory city and its attendant structural violence to political corruption. For instance, some commentators blame Kwame Kilpatrick—Detroit's disgraced former mayor who is now serving twenty-eight years in a federal penitentiary—for the City's woes. Although Hollywood narratives that identify an evil villain are attractive, they are rarely true. The surge of unconstitutional tax assessments and the resulting property tax foreclosure crisis in Detroit is due to evil systems. Not evil individuals. A system, however, makes for an exceedingly poor villain because you cannot place a black cape or horns on a system. Nevertheless, it is important to resist simple explanations that pin the blame for the evolution of a predatory city on a few scoundrels because doing so masks deeper truths.⁹⁷

Professor Atuahene wants stategraft to be a term that describes a systemic and systematic problem amenable to structural reform, rather than merely bureaucrats behaving badly, but perhaps the definition of stategraft—and the problem it describes—need not be an either-or proposition. Perhaps the concept can include laws and regulations—and the systems they create—that unconstitutionally allow or encourage state actors to exploit their fellow residents for the benefit of the bureaucrat's budget, with civil forfeiture

215, 224 (2014) (citing Roger Pilon, *Can American Asset Forfeiture Law Be Justified?*, 39 N.Y.L. SCH. L. REV. 311, 330 (1994)).

⁹⁴ Atuahene, *supra* note 3, at 111.

⁹⁵ *Id.* at 170.

⁹⁶ Atuahene & Hodge, *supra* note 3, at 299.

⁹⁷ Atuahene, *supra* note 3, at 173.

arguably being one of those.⁹⁸ *And*, stategraft could also be institutionally motivated corruption by state actors,⁹⁹ who, as Atuahene describes, “intentionally or unintentionally use illicit [or licit, to address the point above] means to fix budget shortfalls.”¹⁰⁰ Graft is corruption for personal gain. Stategraft is corruption for agency gain.

This, then, leads to a third implication: policy responses. A broader definition of stategraft is still amenable to structural reform. As an example, thinking of civil forfeiture merely as a problem of “bad apples” will inevitably lead to policy responses focused more on people than policy. But, as Preciado and Wilson suggest, the greater problem is the flawed and corrupt laws with perverse incentives to which law enforcement officials are inevitably responding.¹⁰¹ Their behavior is distorted for agency gain in response to corrupt laws.

Conventional definitions of corruption focus on people, but general definitions of corruption can accommodate abstractions such as laws. Merriam-Webster’s definition of “corrupt,” for instance, includes “adulterated or debased by change from an original or correct condition.”¹⁰² If we accept the argument above about the corruption of forfeiture policies (i.e., the distortion of a remedy for rights violations), then the appropriate and perhaps efficacious policy response is to change the law. In the case of forfeiture, this would mean, principally, (a) abolishing civil forfeiture except in very narrow circumstances and keeping only criminal forfeiture and (b) requiring that all (criminal) forfeiture proceeds go into neutral funds rather than agency accounts.¹⁰³ Such a response would enjoy at least two benefits. First, it would restore protections to property owners. Second, it would remove the incentives currently inherent in forfeiture laws that encourage law enforcement officers to seize proceeds for agency budget expansion.

This response is, of course, specific to civil forfeiture, and seems to

⁹⁸ See generally Christine A. Budasoff, *Modern Civil Forfeiture Is Unconstitutional*, 23 TEX. REV. L. & POL. 467 (2018) (arguing that modern-day civil forfeiture laws violate the Due Process Clause of the Constitution, as they allow the government to deprive individuals of their property without granting them due process of law); Deborah Duseau & David Schoenbrod, *Overbroad Civil Forfeiture Statutes Are Unconstitutionally Vague*, 39 N.Y.L. SCH. L. REV. 285 (1994) (arguing that civil forfeiture statutes are unconstitutionally vague and overbroad).

⁹⁹ The emphasis on institutional motivation ignores, of course, the personal or professional motivations of people working in their capacities as state agents. See Illoong Kwon, *Motivation, Discretion, and Corruption*, 24 J. PUB. ADMIN. RSCH. & THEORY 765, 766 (2014). Funding an agency budget, for example, means job preservation. Or state actors may be rewarded through performance pay or other mechanisms tied to agency budgets. Thus, the motivation to engage in stategraft may not entirely be in the service of the state.

¹⁰⁰ Atuahene, *supra* note 3, at 169.

¹⁰¹ Preciado & Wilson, *supra* note 90, at 177.

¹⁰² *Corrupt*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/corrupt> [https://perma.cc/8NMQ-L24N].

¹⁰³ Examples of a neutral fund include a state general fund or a local school fund, neither of which would benefit law enforcement agencies directly.

elide state agents acting illicitly. But this reform concept can be applied more generally to a broader conceptualization of Atuahene's framework. For example, as Atuahene describes, stategraft may be, in part, a response to budget austerity.¹⁰⁴ If so, an appropriate and potentially more efficacious policy remedy would be to alter the incentives in budgetary policy, rather than make prohibitory or punitive policies, which are already being ignored in the execution of corrupt actions, even stricter. Even more generally, when considering the actions of public officials, one would ask: To what policy-based incentives are officials responding? What types of behaviors are laws rewarding, formally and informally? And when creating and adopting new policies, officials would ask: What incentives are we creating with this policy?

CONCLUSION

As a veteran of largely futile attempts to create a theory¹⁰⁵ and coin a new term,¹⁰⁶ I appreciate Professor Atuahene's effort to tackle both (a new theory *and* a new term) all in one effort. It is not a task suited to someone thin-skinned or intellectually inflexible. She has identified a real void in how we name and define the phenomenon of state agents exploiting their fellow residents in the quest to fill state coffers. My efforts here are not summative criticism but formative critique, because how we name and define something influences what we do with (and to) it. I suggest the definition of stategraft might include both laws/systems and behavior. Corruption need not be limited only to the acts of (a) people for (b) personal gain. It seems entirely possible to encompass "evil laws," as Atuahene puts it, and institutionally motivated actions, all of which realize the same result: the unjust pursuit of lucre at the expense of liberty.

¹⁰⁴ Atuahene, *supra* note 87, at 2–3.

¹⁰⁵ See, e.g., DICK M. CARPENTER II, PLAYING TO TYPE (2006), <https://fordhaminstitute.org/national/research/playing-type-2006> [<https://perma.cc/86Z2-3W5C>] (developing a typology and theoretical framework for distinguishing among charter schools); Dick Carpenter, *Modeling the Charter School Landscape*, 1 J. SCH. CHOICE 47 (2006) (same).

¹⁰⁶ See generally Dick M. Carpenter II, *Bottleneckers: The Origins of Occupational Licensing and What Can Be Done About Its Excesses*, 18 FEDERALIST SOC'Y REV. 14, 14–15 (2017) (coining the term "bottleneckers" to refer to "those who seek to co-opt government for their own ends," for example, by creating anticompetitive licenses, thereby bottlenecking economic growth); Dick Carpenter & William "Chip" Mellor, *Breaking Down 'Bottleneckers'*, WALL ST. J., Nov. 21, 2016, at A17 (same); WILLIAM "CHIP" MELLOR & DICK M. CARPENTER II, BOTTLENECKERS: GAMING THE GOVERNMENT FOR POWER AND PRIVATE PROFIT (2016) (same).