

THE CYCLE OF POVERTY AND ASSET FORFEITURE: A  
CONSTITUTIONALLY FLAWED SYSTEM AND HOW IT  
CAN BE FIXED

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Abstract

Asset forfeiture is one of the many ways that the American criminal justice system attempts to guarantee that crime does not pay. However, little work has been done to change asset forfeiture from the system used in the past. This Article seeks to find ways to update and change the archaic forfeiture system to bring it more in line with the rights enshrined in the U.S. Constitution, while still ensuring that criminals cannot reap the fruits of their criminal activity once caught. The asset forfeiture system in West Virginia, a system that ranks similarly to most states, is picked apart, piece by piece, and put back together with all the appropriate considerations given for the rights of those accused of a crime.

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## INTRODUCTION

As of 2018, the federal government has made more than a billion dollars in asset forfeiture proceedings.<sup>1</sup> This money comes in the form of cars, boats, paintings, and even cold hard cash.<sup>2</sup> Some might glance at this issue and proclaim it the fair result of those who are willing to engage in criminal activity. Others might decree that asset forfeiture acts as further proof that crime does not pay. But asset forfeiture presents a troubling and increasingly prevalent violation of civil rights that has received very little attention in legal academic circles.

Imagine for a moment that you own an air charter service. You do not go out of your way to learn the businesses your clients are undertaking, as this would be detrimental to your business, but you also do not accept or abide by illegal activity. You quite legitimately fly clients from one side of the country to the other for 9,000 flights. While on one such trip, your client is arrested when you land, and the Drug Enforcement Agency (DEA) finds 2.7 million dollars in the client's bag on your plane. You are arrested along with your passenger and charged with drug trafficking. One million dollars is set as your bail. Luckily, three days later the charges are dropped, and you walk out a free person.

Unfortunately, the DEA informs you they have seized your plane as an asset forfeiture. You immediately mount a defense—something that is relatively rare in the criminal process—pointing out that you were ultimately not found guilty or even charged with drug trafficking. The

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1. Sheldon Gilbert, *Asset Forfeiture: Rap Albums and Hard-Earned Cash are the Government's 'Little Goodies'*, USA TODAY (Mar. 13, 2018, 7:00 AM), <https://www.usatoday.com/story/opinion/2018/03/13/asset-forfeiture-rap-albums-shkreli-hard-earned-cash-governments-little-goodies-column/415018002/>.

2. *Id.*

government says that they do not need to prove you committed a crime, only that they have probable cause. You are elated when a jury rules on your behalf, but the government keeps your plane and continues to argue that the witnesses you put on the stand in the trial were lying. You present fifty-one affidavits to prove the validity of your witnesses' testimony. The government still refuses to return the plane and demands that *you* pay a settlement to *them*. In the meantime, you manage to see your plane and find out the government completely ruined its internal cabin in their effort to find drugs. You are forced to pay \$6,500 to get this largely useless plane back from the government even though a jury of your peers found they should not have taken it in the first place. You are forced to declare bankruptcy and become a truck driver.

As might be obvious, this is a true story. Billy Munnerlyn experienced this situation and had his entire life uplifted for nothing more than being in the wrong place at the wrong time.<sup>3</sup> While most asset forfeiture cases are not as extreme as Mr. Munnerlyn's 1989 case, the system that is in place today allows for victims like Mr. Munnerlyn to fall through the cracks of the criminal process.<sup>4</sup> Indeed, contemporary stories highlight how, despite a gradual change in the laws, asset forfeiture is still often used to violate constitutional rights.<sup>5</sup>

Why is the government able to take property attached to ongoing criminal proceedings with minimal judicial oversight? Why can the government take property from those who have not been found guilty by a jury of their peers? Why can it take this personal property without any kind of just compensation? The Supreme Court has yet to be presented with many of these issues, although it has taken up an asset forfeiture case and found it to be wanting.<sup>6</sup> So long as these flaws remain intact, the

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3. *Review of Fed. Asset Forfeiture Program: Hearing Before the Legis. & Nat'l Sec. Subcomm. of the H. Comm. on Gov't Operations*, 103d Cong., 1st Sess. 340–44 (1993); LEONARD W. LEVY, *A LICENSE TO STEAL: THE FORFEITURE OF PROPERTY* 5 (1996).

4. Gilbert, *supra* note 1.

5. Lindsay Kee, *Police in Tennessee Legally Steal a Veteran's Car Because of His Son's Alleged Misdeeds*, ACLU (June 11, 2018), <https://www.aclu.org/blog/criminal-law-reform/reforming-police/police-tennessee-legally-steal-veterans-car>; David Loy, *The Justice Department Wants to Strip the Mongols Biker Club of Its Logo*, ACLU (Feb. 8, 2019), <https://www.aclu.org/blog/free-speech/intellectual-property/justice-department-wants-strip-mongols-biker-club-its-logo>; Chelsea Voronoff, *Uncle Sam Is Helping Missouri Cops Steal From the State's Public Education Fund*, ACLU (May 21, 2018), <https://www.aclu.org/blog/criminal-law-reform/reforming-police/uncle-sam-helping-missouri-cops-steal-states-public>; Kanya Bennett, *Jeff Sessions Is Aiding and Abetting Police Departments Who Want to Seize Property of People Convicted of No Crime*, ACLU (July 19, 2017), <https://www.aclu.org/blog/criminal-law-reform/reforming-police/jeff-sessions-aiding-and-abetting-police-departments-who>.

6. *See Timbs v. Indiana*, 139 S. Ct. 682, 686 (2019) (vacating the reversal of the trial court's decision that forfeiture of petitioner's Land Rover, which was valued at more than four times the \$10,000 maximum fine assessable against the petitioner for his drug conviction, was unconstitutional under the Excessive Fines Clause of the Eighth Amendment).

criminal system continues to violate vital constitutional rights against people who might end up being innocent.

This Article will argue that asset forfeiture is an unconstitutional system that requires immediate change on every level of the criminal system. To begin, the origins and purposes of asset forfeiture will be explained. By looking into the history of forfeiture, insight into the nature of the system can be gained and used to interpret the contemporary system. Next, the asset forfeiture system in West Virginia, including the laws that allow for it and the judicial decisions that have affected it, will be outlined. West Virginia presents an ideal candidate for analysis because the Institute of Justice grades the asset forfeiture system as being a “D-,” like most states in the country.<sup>7</sup> By looking into the laws and jurisprudence of West Virginia, this Article creates a guide for those states that are performing similarly and can highlight the specific ways in which states can improve. Finally, using the West Virginia asset forfeiture system as an example, this Article will show how many asset forfeiture systems violate the Due Process and Takings Clauses of the Fifth Amendment, the right to counsel under the Sixth Amendment, and the excessive fines prohibition in the Eighth Amendment. While most of this Article will focus on the flaws of asset forfeiture, this Article shall conclude by making substantive recommendations on how the asset forfeiture system can be changed to fix these flaws.

## I. ASSET FORFEITURE ORIGINS

Asset forfeitures have a possible place of origin in the Bible.<sup>8</sup> The Book of Exodus commands: “If an ox gore a man or a woman, that they die: then the ox shall be surely stoned, and his flesh shall not be eaten.”<sup>9</sup> This was, at the time, called a “deodand” and was viewed as a way to banish demons from living creatures.<sup>10</sup> At the time, a deodand was deemed necessary even when the owner of that object was innocent because people believed that it was actually the object that committed the crime.<sup>11</sup> Thus, because the object embodied the guilt or fault, that item would need to be destroyed and given over to God.<sup>12</sup>

While the demonic considerations of this early law did not prevail in England, English common law did retain the idea that inanimate objects

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7. LISA KNEPPER ET AL., INST. FOR JUST., POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE 42 (3d ed. Dec. 2020), <https://ij.org/wp-content/uploads/2020/12/policing-for-profit-3-web.pdf>.

8. LEVY, *supra* note 3, at 7.

9. *Exodus* 21:28 (King James).

10. LEVY, *supra* note 3, at 9.

11. *Id.*

12. *Id.*

could carry out wrongdoing.<sup>13</sup> The English believed objects had the power to commit crimes, and they often found that the person was innocent of wrongdoing but required owners to relinquish the objects to make penance for what was done.<sup>14</sup> The English gave up the property to the King for “retribution” of the property’s (and not its owner’s) crimes.<sup>15</sup> The King, in a sense, replaced God as the source of forgiveness that resided within chattel.<sup>16</sup> The preeminent legal scholar Blackstone theorized that the public had original ownership of all property and thus, when a property owner committed an offense, the property should be forfeited to the King “as the one visible person in whom the majesty of the public resides.”<sup>17</sup> This practice traveled to the American colonies, in the form of statute, but was not implemented often at first.<sup>18</sup> It would eventually become the bedrock for the asset forfeiture system that many states use to this day.<sup>19</sup>

Asset forfeiture did not become widely used by the federal government until the War on Drugs created an incentive to take the property of drug users.<sup>20</sup> The idea was that taking the drugs and paraphernalia of drug dealers would slow down their ability to participate in the trade, even upon release from prison.<sup>21</sup> Slowly, Congress granted prosecutors the ability to take more using this system.<sup>22</sup> Forfeiture power expanded to include property that was not illegal paraphernalia—private property begotten by proceeds from illicit income could be forfeited as well.<sup>23</sup>

Contemporary civil asset forfeiture begins with the government making a claim to property.<sup>24</sup> The government must show two things: (1) the property is tied to criminal activity in some way, and (2) the property

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13. Vanita Saleema Snow, *From the Dark Tower: Unbridled Civil Asset Forfeiture*, 10 DREXEL L. REV. 69, 76–77 (2017); see Paul Schiff Berman, *An Anthropological Approach to Modern Forfeiture Law: The Symbolic Function of Legal Actions Against Objects*, 11 YALE J.L. & HUMANS. 1, 25 (1999) (“[T]he guilty object was given to the kin not as compensation for the loss suffered, but rather as an object upon which their vengeance must be wrought before the dead person could lie in peace.”).

14. Snow, *supra* note 13.

15. LEVY, *supra* note 3, at 9.

16. *Id.*

17. *Id.* at 15.

18. *Id.* at 14.

19. *Id.* at 20.

20. Andrew Crawford, *Civil Asset Forfeiture in Massachusetts: A Flawed Incentive Structure and Its Impact on Indigent Property Owners*, 35 B.C. J. L. & SOC. JUST. 257, 261 (2015).

21. *Id.* at 262.

22. 21 U.S.C. § 853 (2009).

23. *Id.*

24. Catherine E. McCaw, *Asset Forfeiture as a Form of Punishment: A Case for Integrating Asset Forfeiture into Criminal Sentencing*, 38 AM. J. CRIM. L. 181, 191 (2010).

is forfeitable because of that crime.<sup>25</sup> The first prong of this test often requires the most argument, which comes in three forms.<sup>26</sup> First, the government can stipulate that the property was procured as a result of a crime.<sup>27</sup> For instance, if a drug dealer used money from a drug deal to purchase a TV, the government might stipulate that the TV was a proceed of the criminal activity. Second, the government might also argue that the property was an instrumentality of a crime.<sup>28</sup> This argument is closely tied to the third: that the property facilitated the crime.<sup>29</sup> These two arguments can be illustrated by analogy to the criminal system, where the prosecutor explicitly shows that the property being taken is either the exact thing being used to commit a crime—such as possession of a handgun by a prohibited person—or was used to make the crime occur—for example, a car that a drug dealer used to drive to a deal.

Thus far in its jurisprudence, the U.S. Supreme Court has been relatively silent on asset forfeiture.<sup>30</sup> Most of its case law on forfeiture relates to excessive fines, notice rights of defendants, or the rights of innocent owners.<sup>31</sup> The Court has largely failed to look at broader problems with asset forfeiture.

## II. PURPOSES OF ASSET FORFEITURE

Part II of this Article addresses the underlying rationales for using asset forfeiture in the criminal justice system. Section A describes how asset forfeiture stands apart from other forms of punishment, and Section B explores philosophical justifications for forfeiture.

### A. *Asset Forfeiture in the Criminal Justice System*

Perhaps the most important initial question about asset forfeiture is: why is it used? The answer is to defund organized crime, prevent new

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25. *Id.* at 186.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. A search of “civil forfeiture” on LexisNexis brings back only forty-three results when limited to Supreme Court decisions. A similar search of “asset forfeiture” lists eight results.

31. *See Alexander v. United States*, 509 U.S. 544, 558–59 (1993) (holding that the appellate court should have considered whether forfeiture of petitioner’s business, in addition to his six year prison sentence and \$100,000 fine, constituted an excessive fine under the Eighth Amendment); *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 59 (1993) (“In the usual case, the Government . . . has various means, short of seizure, to protect its legitimate interests in forfeitable real property. There is no reason to take the additional step of asserting control over the property without first affording notice and an adversary hearing.”); *Bennis v. Michigan*, 516 U.S. 442, 449 (1996) (“[Petitioner] did not know that her car would be used in an illegal activity that would subject it to forfeiture. But under these cases the Due Process Clause of the Fourteenth Amendment does not protect her interest against forfeiture by the government.”).

crimes from being committed, and weaken criminal cartels.<sup>32</sup> However, this answer leads to many other questions. What purpose does asset forfeiture serve in comparison to jail time? Or fines? To make suggestions for how the asset forfeiture system should work, it is vital to understand its innate purpose.

The question of how asset forfeiture relates to fees is perhaps the easiest question to answer. “Fines do not communicate that a certain activity is forbidden but rather communicate that offenders may commit the crime provided that they are willing to pay a certain price . . . Many people believe that fines allow rich offenders to buy their way out of real punishment.”<sup>33</sup> Asset forfeiture, however, does not convey this message. Forfeiture only involves taking property that the individual already owns and therefore applies an “equal fine” to individuals regardless of their personal wealth. Of course, taking a car from a wealthy person is significantly different than taking the same car from an impoverished person. For an indigent defendant, a car might be their only means to get to work, to visit their family, or to meet other various obligations. While asset forfeiture does not solve the perceived inequality of fees, it does present a positive to the criminal justice system: directed takings. A fee cannot be pointed or direct—it is a monetary amount that all perpetrators of a crime may or may not be charged.<sup>34</sup> Asset forfeiture, however, allows the police to explicitly target the means that criminals use to commit criminal acts.<sup>35</sup>

To demonstrate how forfeiture can be more useful than fines, consider the example of a drug dealer named Dan. Dan makes around \$25,000 a year, and because he primarily operates in a cash society, he has very little in the way of savings.<sup>36</sup> He is arrested while his supply is low; he is only holding fifty grams of heroin. The prosecutor suggests no adjustments and a sentence within the guidelines. Therefore, according to Section 2D1.1(c) of the Sentencing Guidelines, Dan’s offense level is eighteen.<sup>37</sup> The judge, when forming a sentence, looks to Section 5E1.2

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32. Anne Teigan & Lucia Bragg, *Evolving Civil Asset Forfeiture Laws*, NAT’L CONF. OF STATE LEGISLATORS (Feb. 2018), <https://www.ncsl.org/research/civil-and-criminal-justice/evolving-civil-asset-forfeiture-laws.aspx>.

33. McCaw, *supra* note 24, at 184.

34. *Fee*, THE WOLTERS KLUWER BOUVIER LAW DICTIONARY: DESK EDITION (Stephen Sheppard ed., 2012).

35. See McCaw, *supra* note 24, at 186 (“The second theory the government may advance is that the property was an ‘instrumentality’ of a crime, meaning that someone used the property while committing the crime.”).

36. See Steven D. Levitt & Sudhir Alladi Venkatesh, *An Economic Analysis of a Drug-Selling Gang’s Finances*, 115 Q. J. ECON. 755, 756 (Aug. 2000) (finding that drug sellers have mean annual incomes in the range of \$20,000 to \$30,000).

37. U.S. Sent’g Guidelines Manual § 2D1.1(c) (U.S. Sent’g Comm’n 2016).

of the Guidelines.<sup>38</sup> Section 5E1.2 mandates that a fine be imposed against a defendant unless they show they are unable to pay.<sup>39</sup> The court, believing that Dan is a drug dealer and should have money to pay for a fine, determines Section 5E1.2(c) requires a minimum fine of \$10,000 and institutes that fine.<sup>40</sup> Dan, now in prison, has absolutely no way to pay that fine. But, if Dan was arrested with \$10,000 on his person, that money could be easily forfeited as ill-gotten proceeds.<sup>41</sup> Thus, a system of asset forfeiture can better operate within a criminal system that primarily functions on cash and physical goods.

The prison issue relates more to the very nature of asset forfeiture. When someone goes to prison, there is a possibility that they might lose some of the criminal skills they needed to participate in criminal activity (assuming they are not putting those skills to use inside the prison), but they can likely quickly relearn the trade.<sup>42</sup> Asset forfeiture, on the other hand, allows the police to physically remove a criminal's capability to commit crimes.<sup>43</sup> Consider Dan the drug dealer again. For this example, assume that Dan is higher up in his organization than the prosecutors were aware. Dan must produce a certain amount of heroin, and his lab sits in plain view in his basement. Dan goes to prison for possession with intent to distribute, and because the prosecutors make no moves for asset forfeiture, his lab goes untouched. While in prison, he operates as a dealer to the general population of the prison, for the same organization that he worked for on the outside. After his release, Dan goes right back to his basement and begins producing and selling drugs again. Prison cannot stop him from being a criminal, and studies have shown it does the exact opposite.<sup>44</sup> But, by way of asset forfeiture, taking the property that allows him to be a criminal can, at least, slow him down.<sup>45</sup>

Asset forfeiture has many aspects that make it an attractive counterpart or replacement to other methods of punishment in the criminal system. Aside from the advantages asset forfeiture has over fines and prison time, it also has the very real consequence of making crime

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38. *Id.* § 5E1.2.

39. *Id.* § 5E1.2(a).

40. *Id.* § 5E1.2(c).

41. See McCaw, *supra* note 24, at 186 (“The government might also argue that large sums of cash seized from individuals who seem to be drug couriers constitute criminal proceeds.”).

42. See MARIEL ALPER ET AL., 2018 UPDATE ON PRISONER RECIDIVISM: A 9-YEAR FOLLOW-UP PERIOD (2005-2014) 1 (U.S. DEP’T OF JUST. 2018) (finding that 44% of U.S. prisoners released in 2005 were arrested at least once during their first year after release).

43. See McCaw, *supra* note 24, at 186–87 (detailing how a farmer growing marijuana on his property was required to forfeit the land on which the drug was grown as well as the surrounding land that facilitated his criminal activities).

44. ALPER ET AL., *supra* note 42.

45. McCaw, *supra* note 24, at 186.

less profitable for criminals.<sup>46</sup> In addition, asset forfeiture takes criminal proceeds and transfers them to the state, making crime pay for the state.<sup>47</sup> Therefore, it seems barely worth arguing that asset forfeiture should not be a part of the criminal justice system. Instead, the focus must be on reforming the system of asset forfeiture.

### B. *Asset Forfeiture in Criminal Justice Philosophy*

The remaining question about the purpose of asset forfeiture is: where does it currently, and where should it, fit into the purposes of criminal punishment? It seems fair to say that retribution, incapacitation, and deterrence all play a role in the asset forfeiture system. Asset forfeiture is retributive because it punishes individuals for their crimes. It is arguable that asset forfeiture, as it currently stands, is retributive to property and not to criminals because innocent owners are often impacted by the system.<sup>48</sup> The system is also a means to incapacitate criminals, by taking away their means of performing illegal activities.<sup>49</sup> Finally, asset forfeiture acts as a deterrent because it adds to the cost of committing a crime.<sup>50</sup>

What is not necessarily maximized in the current asset forfeiture system is its rehabilitative capability.<sup>51</sup> In fact, when asset forfeiture is used as a means to confiscate the product of illegal activity, rather than the means of that activity, it misses out on the possibility of helping reform offenders. When the government uses asset forfeiture to take an individual's TV instead of taking the means of criminal activity, the government only facilitates the cycle of poverty.<sup>52</sup> When the accused

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46. *See id.* at 184 (“Fines do not communicate that a certain activity is forbidden but rather communicate that offenders may commit the crime provided that they are willing to pay a certain price.”).

47. *Id.* at 198.

48. *See id.* at 201 (“Commentators have . . . objected that forfeiture of . . . property is likely to punish the innocent rather than criminal offenders.”); *see also* *Bennis v. Michigan*, 516 U.S. 442, 443, 449 (1996) (finding that petitioner’s vehicle, jointly owned with her husband, could be forfeited even though she had no knowledge that her husband used the vehicle to engage in sexual activity with a prostitute).

49. *Id.* at 198 (“Asset forfeiture can also incapacitate criminals, even after they leave prison.”).

50. *See id.* at 197 (“For some, the threat of prison time may be a sufficient deterrent, but others may consider the prison time to be worth the risk—a cost of doing business. If they know that the financial gain, the reason why they commit crimes, may be taken away, they might be less eager to commit crimes.”).

51. David J. Fried, *Rationalizing Criminal Forfeiture*, 79 J. CRIM. L. & CRIMINOLOGY 328, 331 n.15 (1988).

52. *See* Rebecca Vallas et al., *Forfeiting the American Dream: How Civil Asset Forfeiture Exacerbates Hardship for Low-Income Communities and Communities of Color*, CTR. FOR AM. PROGRESS (Apr. 1, 2016), <https://www.americanprogress.org/article/forfeiting-the-american->

criminal returns to their life, whether innocent or guilty, they will almost definitely go about replacing the property that was taken. The lack of that property will not diminish their capability to commit crimes. In fact, they might be more driven to commit crimes to raise the necessary funds to procure the lost property. Meanwhile, if only that property which directly enabled the crime were forfeited, offenders' return to their normal life would find them without the ability to commit crimes. In theory, this could contribute to an offender's ability to return to the community as a law-abiding citizen, rather than as a criminal ready to commit crime again.

Many authors are critical of the forfeiture system. Some make the valid claim that it creates an economic incentive for police to make indictments they might not actually intend to see through to the end.<sup>53</sup> Similarly, scholars make the point that it becomes financially convenient for prosecutors and police to use forfeiture as a way to shore up their budget, instead of focusing on preventing or decreasing crime.<sup>54</sup> Other authors go so far as to say that asset forfeiture is nothing more than court-sanctioned robbery.<sup>55</sup>

In "Rationalizing Criminal Forfeiture," David Fried thoroughly considers rationalizations of asset forfeiture. Fried highlights five rationales for the system and comes to the conclusion that they are all faulty except for the last rationale: "[t]he retributive advantages of the forfeiture of criminal profits as a penalty which is and is seen to be precisely tailored to the offense."<sup>56</sup> Fried rejects the justifications regarding the utility of forfeiture as a means to finance law enforcement activities, the deterrent effect forfeiture has on criminals who are not necessarily afraid of imprisonment, the general deterrent of having steep forfeiture for relatively small crimes, and the ability of forfeiture to "disrupt[] the organization continuity of racketeering."<sup>57</sup> He implies that prosecutors to use forfeiture as nothing but profiteering on the part of the government.<sup>58</sup> While his writing focuses primarily on organized and white collar crime, he points out that breaking up these criminal activities has been primarily successful by the use of imprisonment.<sup>59</sup> He decried the steep penalties that many people have faced, even pointing to the

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dream/ ("Loss of a vehicle through forfeiture can thus not only hamper families' efforts to get ahead; it can quickly drive them deeper into poverty.").

53. Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 40 (1998).

54. *Id.*

55. Kai Sedgwick, *Civil Forfeiture Is State-Sanctioned Theft*, BITCOIN.COM (Jan. 28, 2019), <https://news.bitcoin.com/civil-forfeiture-is-state-sanctioned-theft/>.

56. Fried, *supra* note 51, at 359.

57. *Id.*

58. *Id.*

59. *Id.* at 367–68.

actions of New York City in the 1980s, in which many parents' cars were forfeited because their children had used them to buy drugs.<sup>60</sup> The only aspect of forfeiture that Fried leaves mostly unscathed is its ability to make forfeiture conform perfectly to crimes, but even that aspect creates additional problems when fines are levied on top of forfeiture.<sup>61</sup>

These critiques are incredibly valid, demonstrating the desperate need for reform in the asset forfeiture system. With greater constitutional protections in the forfeiture system, the system would more closely align with what criminal justice should truly be about: preventing crime through deterrence and rehabilitation. By using forfeited funds to support rehabilitation efforts, prosecutorial agents can increase the rehabilitative quality of forfeiture and guard against abuses by certain members of the criminal justice system.

### III. WEST VIRGINIA'S ASSET FORFEITURE SYSTEM

West Virginia's asset forfeiture system is representative of the asset forfeiture systems in place in America. Unfortunately, the state's system is not a great one. The Institute for Justice currently gives the West Virginia asset forfeiture system a "D-".<sup>62</sup> This is by no means the worst grade in the country (that honor falls to Massachusetts, which received an "F") but is in fact the score given to most states and the federal government.<sup>63</sup> This makes West Virginia the perfect example to show the flaws in the asset forfeiture system. If one analyzed a system that was wholly flawed, such as Massachusetts,<sup>64</sup> it would seem hyperbolic to the states which do not share some of its problems. A state like West Virginia, however, will face issues similar to most other states. Therefore, the suggestions herein for how West Virginia can change its system can be applied to other jurisdictions as a means of improvement.

One of the largest problems with the West Virginia system also makes it incredibly hard to critique the system: there is no centralized information system in the state.<sup>65</sup> County prosecutors are locally elected and receive a great deal of autonomy from the state level, thus they are not required to submit any data about the property they have seized in any given year.<sup>66</sup> Because of this, it is hard to say exactly how frequently the

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60. *Id.* at 372–73.

61. Fried, *supra* note 52, at 367, 384, 411, 431.

62. KNEPPER ET AL., *supra* note 7.

63. *Id.* Twenty-eight states and the federal government received a "D-" for their asset forfeiture systems. *Id.*

64. *See id.* at 42, 102 (assigning Massachusetts the lowest grade out of all the states and the federal government).

65. *Id.* at 156–57.

66. CASSIE BYRNE HESSICK, UNC SCHOOL OF LAW, THE PROSECUTORS AND POLITICS PROJECT: NATIONAL STUDY OF PROSECUTOR ELECTIONS 335 (Feb. 2020).

asset forfeiture system is used in West Virginia. Based on the Author's personal experience, prosecutors and former prosecutors claim to seize property through this system fairly regularly. One former prosecutor claimed to have taken property ranging from boats to cars. So, there is no doubt that the system is at least used in the state. While beyond the scope of this Article's constitutional analysis, the Author would like to note that it would behoove the West Virginia asset forfeiture system to implement a standardized and centralized reporting method in the state. This would allow for oversight of abuses to the process and would better educate those whose jobs it is to reform forfeiture systems.

In West Virginia, forfeiture primarily applies to drug crimes.<sup>67</sup> Property taken using forfeiture is not subject to replevin, which means it is incredibly difficult for owners to get their property back if it was taken illicitly.<sup>68</sup> When a prosecutor is seeking to seize property, they have ninety days to petition for forfeiture.<sup>69</sup> The petition must include: a description of the seized property; a statement of who is currently responsible for the property; a statement of when and where the seizure occurred; the identity of the owner(s) if they are known; who was in possession of the property when it was taken; the facts that lend themselves to showing probable cause that forfeiture is appropriate; the identity of the people who have an interest in the property other than the owner; and a request for an order directing forfeiture.<sup>70</sup> The prosecutor is required to serve this notice on the owner of the property, if they are known.<sup>71</sup> If they are unknown, or even if they are known, the prosecutor must also post a class two legal notice, which is defined as publication in a West Virginia newspaper "to which the general public resorts for passing events of a political, religious, commercial and social nature, and for current happenings, announcements, miscellaneous reading matters, advertisements and other notices"<sup>72</sup> that occurs "once a week for two successive weeks."<sup>73</sup> If, within thirty days of this notification, no one makes a claim to the property, it is forfeited.<sup>74</sup> However, if someone does make a claim to the property, then a hearing is scheduled to determine whether the true owner plans to contest the forfeiture.<sup>75</sup> The prosecutor

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67. W. VA. CODE § 60A-7-703 (2022); Jake Zuckerman & Lacie Pierson, *Groups Come Together to Lobby Against Civil Asset Forfeiture in WV*, CHARLESTON GAZETTE-MAIL (Jan. 11, 2018), [https://www.wvgazette.com/news/politics/groups-come-together-to-lobby-against-civil-asset-forfeiture-in-wv/article\\_d2a6cd42-de04-5ec7-a615-5cc3efd44d60.html](https://www.wvgazette.com/news/politics/groups-come-together-to-lobby-against-civil-asset-forfeiture-in-wv/article_d2a6cd42-de04-5ec7-a615-5cc3efd44d60.html).

68. W. VA. CODE § 60A-7-704(d) (2022).

69. *Id.* § 60A-7-704(c).

70. *Id.* §§ 60A-7-705(a)(4)(i)–(viii).

71. *Id.* § 60A-7-705(b).

72. *Id.* §§ 59-3-1(b)(1)–(2).

73. *Id.* § 59-3-2(a).

74. W. VA. CODE § 60A-7-705(b) (2022).

75. *Id.* § 60A-7-705(d).

has the burden to prove, by a preponderance of the evidence, that the property being forfeited is indeed forfeitable.<sup>76</sup> The West Virginia Code allows for the forfeiture of: all controlled substances; all raw materials that can be used to create, contain, or deliver drugs; all money which has been garnered from drug deals; vehicles that are used to transport drugs, not including vehicles that are used without the knowledge of a true owner; all records of drug deals or business; and any other property that facilitated the breaking of the controlled substance laws of West Virginia.<sup>77</sup> Pursuant to Section (a)(7), the prosecutor may petition for forfeiture of money that the prosecutor reasonably believes is connected to criminal activity.<sup>78</sup> In addition, Sections (a)(5) and (a)(8) allow for the prosecutor to take vehicles and real property owned by the accused.<sup>79</sup>

Forfeiture proceedings apply the preponderance of the evidence standard.<sup>80</sup> The prosecutor need only prove that it is more likely than not that the items are forfeitable.<sup>81</sup> Preponderance of the evidence is not the standard used in most criminal cases in West Virginia. In fact, the standard is proof beyond a reasonable doubt—a much higher standard.<sup>82</sup> The asset forfeiture system, perhaps, escapes this level of scrutiny because forfeiture is considered a civil proceeding.<sup>83</sup> This is despite the fact that, in a majority of cases, the party claiming the property is a criminal defendant and the party attempting to seize the property is the prosecutor.<sup>84</sup> The system also limits the property that can be forfeited to property connected to an illegal act.<sup>85</sup>

In an initial forfeiture hearing, there exists no right to counsel.<sup>86</sup> The right to counsel only applies if the owner of the property conveys their intent to contest the forfeiture.<sup>87</sup> Unfortunately, because of the dearth of data in the West Virginia system, there is no real way to know how often

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76. *Id.* § 60A-7-705(e).

77. *Id.* §§ 60A-7-703(a)(1)–(2), (4)–(5).

78. *Id.* § 60A-7-703(a)(7).

79. *Id.* §§ 60A-7-703(a)(5), (8).

80. W. VA. CODE § 60A-7-705(e) (2022).

81. Hock Lai Ho, *The Legal Concept of Evidence*, STAN. ENCYC. OF PHIL. (Nov. 13, 2015), <https://plato.stanford.edu/entries/evidence-legal/>.

82. Ruth Maurice, *Legal Standards of Proof*, NOLO, <https://www.nolo.com/legal-encyclopedia/legal-standards-proof.html> (last visited Nov. 10, 2022).

83. W. VA. CODE § 60A-7-705(a)(1) (2022).

84. *Id.*

85. *See id.* §§ 60A-7-703(a)(1)–(8), (g) (making clear lines between what can and cannot be forfeited and explicitly disallowing the forfeiture of an innocent owner's property).

86. *Id.* §§ 60A-7-705(d)–(e); *Goldwater Institute Is Fighting to Protect Your Property from Being Seized*, GOLDWATER INST., [https://goldwaterinstitute.org/stopcivilforfeiture/?gclid=Cj0KCQjw0PWRBhDKARIsAPKHFG-g-2i0MFLiqh1k4tWYS9oWFVnaNP3fdQR98oBS-umn9YLOBiOSegZiaAtMLEALw\\_wcB](https://goldwaterinstitute.org/stopcivilforfeiture/?gclid=Cj0KCQjw0PWRBhDKARIsAPKHFG-g-2i0MFLiqh1k4tWYS9oWFVnaNP3fdQR98oBS-umn9YLOBiOSegZiaAtMLEALw_wcB) (last visited Mar. 25, 2022).

87. W. VA. CODE § 29-21-2(2) (2022).

forfeiture is contested.<sup>88</sup> However, based on the Author's personal experience with the West Virginia legal system, this happens infrequently.

Consider the following example illustrating the gravity of having no right to counsel in the forfeiture context. Imagine you have been convicted of distribution and possession of a controlled substance for the first time. You are sitting in a regional jail, waiting for trial, when you receive a notice that says something about the government taking your car.<sup>89</sup> The notice asks you to indicate whether you plan to contest the forfeiture.<sup>90</sup> You are not entirely sure what a forfeiture is, so you just say you do plan to contest it, because it is your car, after all. Then, you are dragged into court, where the judge is present with the prosecutor, and they ask you if you plan to contest the forfeiture. You have never been in a court room before, have never seen a judge before, and have no idea what kind of person the prosecutor is. A description of a forfeiture is not given, but you are informed that if you contest the forfeiture, there will be a trial and your timeline will be extended.<sup>91</sup> There is no one there to tell you what ramifications, if any, a contest will have on your case or what will happen if you do not contest the forfeiture.<sup>92</sup> The only information you have is that it might increase the timeline of your case. This information is presented by two people who, perhaps more than anyone else, can directly impact the results of your conviction. Does it not seem logical to let the car go for fear that to refuse would directly prejudice your case?

Assuming the accused did contest the forfeiture at the hearing, West Virginia code guarantees them a jury trial.<sup>93</sup> These trials, unfortunately, are still civil in nature and, thus, the accused is only afforded a preponderance of the evidence standard.<sup>94</sup>

#### A. *West Virginia Judicial Interpretation*

The West Virginia Supreme Court of Appeals, for the most part, has been quiet on the issue of asset forfeiture.<sup>95</sup> Many of the cases the court has decided relate to the double jeopardy argument against asset

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88. KNEPPER ET AL., *supra* note 7, at 156–57.

89. *See* W. VA. CODE § 60A-7-705(b) (2022) (“Any copy of petition for forfeiture so served shall include a notice.”).

90. *See id.* (“You have the right to file an answer to this petition.”).

91. *See id.* § 60A-7-705(a)(3) (“Any civil trial stemming from a petition for forfeiture . . . shall be by jury.”).

92. *See Goldwater Institute Is Fighting*, *supra* note 86 (explaining that no attorney is provided in forfeiture proceedings).

93. W. VA. CODE § 60A-7-705(a)(3) (2022).

94. *Id.* §§ 60A-7-705(a)(3), (g).

95. A LexisNexis search of “civil forfeiture” limited to West Virginia brings back only twenty-six results. Refining the search to begin in 2010 limits the results down to eleven cases.

forfeiture, which is not a part of this Article’s analysis.<sup>96</sup> In the remaining relevant cases, the court has been unwilling to carve out any protections for owners of potentially forfeited property that are not explicitly given by West Virginia Code. In *State v. Forty-Three Thousand Dollars and No Cents in Cashier’s Checks*, the state supreme court held that the circuit court’s ruling on the merits of the case showed, by a preponderance of the evidence, that the money in question resulted from illegal activity.<sup>97</sup> This decision was made despite the government showing little, if any, proof that the money came from illegal activity.<sup>98</sup> The government’s argument rested on the idea that there was no alternative source from which the money could have originated—in essence, the lack of evidence on the defendant’s alternative income sources made the case for the government.<sup>99</sup> This, of course, flies in the face of the burden placed on the prosecutor by the legislature.<sup>100</sup> When one side of a legal battle has the burden to prove a legal issue, they should not be able to point to a lack of proof as their sole form of proof. Yet, the West Virginia Supreme Court expressly allowed just that.<sup>101</sup>

The issue of the right to counsel for indigent defendants made an appearance in *State ex rel. Lawson v. Wilkes*.<sup>102</sup> The West Virginia Supreme Court ruled that public defenders need not represent an indigent client on appeal in a forfeiture case.<sup>103</sup> Albeit, the client in *Wilkes* did not want a public defender to defend them in the first place based on the misplaced sentiment that public defenders are biased because they are employed by the state.<sup>104</sup> In addition, it must be noted that the attorney for the public defenders believed that the appeal would be a useless endeavor and could result in sanctions under West Virginia Rule of Civil Procedure 11.<sup>105</sup> While these specific facts might differentiate *Wilkes* from other cases, it remains good law that public defenders are not required to defend their clients in forfeiture cases on appeal.<sup>106</sup>

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96. See *State v. Greene*, 473 S.E.2d 921, 922 (W. Va. 1996) (“We find that the civil forfeiture of appellant’s property did not constitute punishment, and, therefore, appellate was not subjected to double jeopardy.”); *State v. One 1994 Dodge Truck Auto.*, 478 S.E.2d 118, 120 (W. Va. 1996) (“Mr. Corder’s claim that the seizure of his Dodge truck violated the double jeopardy provisions of the United States Constitution is without merit.”); *State v. Miller*, 459 S.E.2d 114, 123 n.14 (W. Va. 1995).

97. *State v. Forty-Three Thousand Dollars & No Cents (\$43,000.00) In Cashier’s Checks*, 591 S.E.2d 208, 215 (W. Va. 2003).

98. *Id.* at 214.

99. *Id.*

100. W. VA. CODE § 60A-7-705(e) (2022).

101. *Forty-Three Thousand Dollars*, 591 S.E.2d at 214.

102. *State ex rel. Lawson v. Wilkes*, 501 S.E.2d 470, 476 (W. Va. 1998).

103. *Id.*

104. *Id.* at 473.

105. *Id.*

106. *Id.* at 476.

In *Dean v. State*, the West Virginia Supreme Court ruled that the forfeiture was restrained by the Excessive Fines Clause of both the West Virginia Constitution and the Eighth Amendment to the U.S. Constitution.<sup>107</sup> The supreme court stopped short of saying that the circuit court erred but did say the circuit court needed to review its decision based on the supreme court's finding that the state and federal Excessive Fines Clause might apply.<sup>108</sup> The court in *Messer v. Skeen* further applied the principle outlined in *Dean*.<sup>109</sup> In *Messer*, the State claimed:

[It] could potentially charge hundreds, if not thousands, of counts of "Delivery of a Controlled Substance — Schedule II Narcotic", in violation of West Virginia Code, § 60A-4-401(a)(i), for which *each count* would carry a possible penalty of imprisonment in the state correctional facility for not less than one nor more than fifteen years, or fined not more than \$25,000.00, or both imprisonment and fine. Assuming Mr. Messer was charged with merely two hundred fifty counts of individual deliveries of controlled substances (a fraction of the number of deliveries testified to by the aforementioned witnesses), the maximum fine to which Mr. Messer would be subjected is six million two hundred fifty thousand dollars (\$6,250,000.00), and *easily* exceeds the value of the property forfeited to the State in the underlying action.<sup>110</sup>

Essentially, the State was attempting to argue that the defendant could have been charged with many more crimes but was not.<sup>111</sup> Totaling up all the fees the defendant could have been sentenced to pay, the State surmised, the forfeiture of the defendant's house was proportional and not excessive.<sup>112</sup> The court rejected this argument outright—refusing to imagine what might have been—and instead looked at the charges in question and the accompanying fines to determine reasonableness.<sup>113</sup> Ultimately, the court chose to protect the defendant by restricting the amount of forfeiture.<sup>114</sup>

### B. West Virginia Constitutional Protections

The final inquiry about the West Virginia system centers on the state constitution. To begin, the West Virginia Constitution disallows takings by the government without just compensation.<sup>115</sup> The West Virginia

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107. *Dean v. State*, 736 S.E.2d 40, 50 (W. Va. 2012).

108. *Id.* at 52.

109. *Messer v. Skeen*, No. 14-0926, 2015 W. Va. LEXIS 1096, at \*19–20 (W. Va. Nov. 6, 2015).

110. *Id.* at \*19 (emphasis in original).

111. *Id.*

112. *Id.*

113. *Id.* at \*19–20.

114. *Id.*

115. W. VA. CONST. art. 3, § 9.

Supreme Court has interpreted this clause to mandate judicial identification of what constitutes “just compensation.”<sup>116</sup> The constitution also protects citizens from the deprivation of “life, liberty, or property, without due process of law, and the judgment of [their] peers.”<sup>117</sup> The West Virginia Supreme Court has ruled this right protects the presumption of innocence.<sup>118</sup> The West Virginia Constitution also guarantees the right to counsel.<sup>119</sup> This has been interpreted to be an essential right for every step of a criminal proceeding.<sup>120</sup> The West Virginia Constitution also covers excessive fines in criminal cases, and the West Virginia Supreme Court ruled on this issue in *Dean*.<sup>121</sup>

#### IV. THE FLAWS IN THE SYSTEM

With an understanding of an average asset forfeiture system, this Article will move on to an analysis of the constitutional problems of the system. Part III dealt entirely with the West Virginia forfeiture system, whereas the forthcoming analysis relates not only to the states but also to federal asset forfeiture. The solutions that are suggested are made with any state in mind, not merely West Virginia. The protections that are considered in Part IV come from the U.S. Constitution and the rulings of the U.S. Supreme Court. However, Part IV will still rely on the West Virginia system to show how a standard state system violates federal protections.

##### A. *The Takings Clause*

When James Madison spoke on the government taking property from its citizenry, he was quite clear about his beliefs: “Government is instituted to protect property of every sort; as well that which lies in the various rights of individuals, as that which the term particularly expresses. This being the end of government, that alone is a just government, which impartially secures to every man, whatever is his own.”<sup>122</sup> Later, when Madison wrote the Bill of Rights, he once again made his sentiments clear: “nor shall private property be taken for public use, without just compensation.”<sup>123</sup> In standard cases, the government is

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116. State *ex rel.* United Fuel Gas Co. v. De Berry, 43 S.E.2d 408, 414 (W. Va. 1947).

117. W. VA. CONST. art. 3, § 10.

118. State v. Boyd, 233 S.E.2d 710, 716 (W. Va. 1977).

119. W. VA. CONST. art. 3, § 14.

120. State *ex rel.* Riffle v. Thorn, 168 S.E.2d 810, 813 (W. Va. 1969); State *ex rel.* Waugh v. Boles, 142 S.E.2d 62, 63 (W. Va. 1965); State *ex rel.* Wine v. Bordenkircher, 230 S.E.2d 747, 750 (W. Va. 1976).

121. W. VA. CONST. art. 3, § 5; Dean v. State, 736 S.E.2d 40, 50, 52 (W. Va. 2012).

122. JAMES MADISON, 29 Mar. 1792, Document 23, Ch. 16: Property, in THE PAPERS OF JAMES MADISON 266–68 (William T. Hutchinson et al. eds., 1962–77).

123. U.S. CONST. amend V.

sued because they restricted the right of a citizen to use property. While this could be a physical taking, it could also simply be a restriction to such a degree that the value of the property is lowered.<sup>124</sup> The plaintiffs in such cases are required to show that the property was taken by the government and was used for public use.<sup>125</sup> The Supreme Court has issued many rulings on the Takings Clause.<sup>126</sup> Early on, the rights of the government to take property were expanded under a theory of sovereign right.<sup>127</sup> Eminent domain was approved as a method for the government to take what it needed to maintain this sovereignty.<sup>128</sup> Early decisions, regardless of the rationale, led to the government taking property so long as the former property owners were offered just compensation.<sup>129</sup> Just compensation is usually based on the standard market value of the property.<sup>130</sup> As is true with other fundamental rights, the Fourteenth Amendment incorporates the Takings Clause to the states.<sup>131</sup>

### 1. How Takings Fit in with Asset Forfeiture

The Takings Clause should apply to forfeiture cases. The Necessary and Proper Clause, while granting the federal government great bounds of power, should not give the government free rein to take property from those who are charged with a crime. Just as the Supreme Court actively supports the rights of convicted criminals, the state should not obfuscate the rights of certain people simply because the police charge them with a crime.<sup>132</sup> The issue with asset forfeiture is quite simple—the government takes private property from a citizen and does not give any kind of compensation in return.<sup>133</sup> The consent the government obtains is received only after the threat of jail time is already levied against citizens.<sup>134</sup> In the current forfeiture system, the government takes property from presumed innocent citizens and gives them absolutely

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124. Ann K. Wooster, Annotation, *What Constitutes Taking of Property Requiring Compensation Under Takings Clause of Fifth Amendment to United States Constitution — Supreme Court Cases*, 10 A.L.R. FED. 2d § 231(2) (2006).

125. *Id.*

126. *Id.*

127. *Id.* § 231(47); *United States v. Carmack*, 329 U.S. 230, 238 (1946).

128. *Carmack*, 329 U.S. at 236.

129. Wooster, *supra* note 124, § 231(2).

130. *Horne v. U.S. Dep't of Agric.*, 750 F.3d 1128, 1138 (9th Cir. 2014), *rev'd*, 576 U.S. 350 (2015).

131. *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot.*, 560 U.S. 702, 707 (2010).

132. *See Criminal Procedure, Search and Seizure, and Due Process*, BILL OF RIGHTS INST., <https://www.billofrightsinstitute.org/resources/criminal-procedure> (last visited Nov. 11, 2022) (detailing the copious protections the Court, rightfully, has granted to not only innocent people but also convicted criminals).

133. Wooster, *supra* note 124.

134. *See supra* Part III.

nothing in return. It seems wholly implausible to say that forfeiture does not fall under the Takings Clause. The government might argue that the Necessary and Proper Clause gives it the power to take the property, stating an invested interest in stopping crime. However, there are several counterarguments that would likely overpower a sovereignty argument.

The primary counter argument is that asset forfeiture is not only used on the guilty. Rather, it often affects innocent individuals who either co-own property with criminals or whose property is used by criminals without their consent.<sup>135</sup> To say that taking an innocent person's property, which was used in a crime against that person's wishes, will decrease crime is illogical. One of the primary flaws with asset forfeiture is that it punishes the property and not the criminal. An innocent person should not be punished for the actions of a criminal. It is a clear and direct violation of their Fifth Amendment rights.

In *Bennis v. Michigan*, the Supreme Court outright rejected the ability of an innocent property owner to contest asset forfeiture using the Takings Clause.<sup>136</sup> The Court's reasoning was that the State had an interest in "deter[ring] illegal activity that contributes to neighborhood deterioration and unsafe streets."<sup>137</sup> This is a legal fiction, however, and should be abandoned to protect the property rights enshrined in the Fifth Amendment. To say that the government's interest in reducing crime allows it to overpower an innocent person's Fifth Amendment right to not having their property confiscated seems ludicrous.

This interpretation of forfeiture could lead to, and has very likely resulted in, the government misusing its power to seize property. All the government needs to do in West Virginia and many other states is charge someone with a crime and then forfeit their property with only a rational basis of proof. While a jury trial might be an option, it is quite often not a *real* option for defendants who do not have the legal expertise, time, or money to mount a defense.<sup>138</sup> In the example from the beginning of this Article,<sup>139</sup> Billy Munnerlyn fought the forfeiture, but by the time his case was won, the government had already destroyed his plane.<sup>140</sup> Even after he obtained a ruling in his favor, the government refused to return the plane until receiving compensation for it.<sup>141</sup>

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135. *E.g.*, *Bennis v. Michigan*, 516 U.S. 442, 443, 449 (1996) (upholding the government's forfeiture of petitioner's vehicle, which petitioner co-owned with her husband, even though she had no knowledge that her husband used the vehicle to engage in sexual activity with a prostitute).

136. *Id.* at 452.

137. *Id.* at 453.

138. John Pfaff, *Why Public Defenders Matter More Than Ever in a Time of Reform*, THE APPEAL (Apr. 18, 2018), <https://theappeal.org/why-public-defenders-matter-more-than-ever-in-a-time-of-reform-9b018e2184fe/>.

139. *See supra* INTRODUCTION.

140. *Review of Fed. Asset Forfeiture Program*, *supra* note 3, at 343–44.

141. *Id.*

Furthermore, asset forfeiture is not the least restrictive way for the government to prevent crime. The government locks people in prison, levies heavy fines, and infringes privacy in order to prevent crime.<sup>142</sup> These methods have become increasingly used in America.<sup>143</sup>

## 2. Takings Solutions

To fix the problem, the government needs to simply provide just compensation for the forfeited property. As applied to criminal defendants, just compensation is obvious: recommendations for lighter sentences. If a West Virginian prosecutor wants to take the car of a suspected drug dealer, the prosecutor should offer to recommend a reduced prison sentence to the judge. It is possible that the judge will not accept the recommendation. However, it is not the reduced sentence itself that should constitute the just compensation but rather the *suggestion* of a lighter sentence. If the prosecutor is unable to convict the defendant, then the property should not be taken because no just compensation can be given in return (unless the state attorney's office is willing to pay for the property). This method would have many positive consequences: (1) defendants who are found not guilty or whose charges are dropped will not have their property forfeited; (2) prosecutors will be less likely to bring forfeiture actions against defendants who have better cases; and (3) prosecutors will not take property before a trial begins.

The suggested method has few negative consequences. A prosecutor might argue that this method would allow criminals to get out of prison sooner. However, if prosecutors think prison time is more important than asset forfeiture, they are welcome to stop relying on asset forfeiture. A prosecutor might also argue that in some instances, it is unwieldy to provide just compensation to an innocent person who is found guilty of a crime they did not commit. If an individual is wrongfully convicted, then the compensation they received (time off their suggested sentence) would be without value, as they should not have been sent to prison in the first place. In this situation, the innocent person will have to seek redress in court.

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142. See Emily Widra & Tiana Herring, *States of Incarceration: The Global Context 2021*, PRISON POL'Y INITIATIVE (Sept. 2021), <https://www.prisonpolicy.org/global/2021.html> (showing America uses incarceration at an exceedingly high rate compared to other countries); see also COUNCIL OF ECON. ADVISERS, FINES, FEES, AND BAIL: PAYMENTS IN THE CRIMINAL JUSTICE SYSTEM THAT DISPROPORTIONATELY IMPACT THE POOR *passim* (Dec. 2015), [https://obamawhitehouse.archives.gov/sites/default/files/page/files/1215\\_cea\\_fine\\_fee\\_bail\\_issue\\_brief.pdf](https://obamawhitehouse.archives.gov/sites/default/files/page/files/1215_cea_fine_fee_bail_issue_brief.pdf) (detailing the many fees that criminal defendants pay in the American judicial system).

143. See COUNCIL OF ECON. ADVISERS, *supra* note 142, at 2–3 (explaining that incarceration rates increased by 61 percent from 1990 to 2014 and that use of fines and fees has “increased substantially over time”).

## B. *Due Process Violations*

In the American criminal justice system, it is widely assumed and demanded that defendants be presumed innocent until they are proven guilty by a jury of their peers.<sup>144</sup> This standard has been protected time and time again, for hundreds of years.<sup>145</sup> However, there has been a subtle erosion of this right.<sup>146</sup>

### 1. How the West Virginia Asset Forfeiture System Violates Due Process

The West Virginia asset forfeiture system violates due process because it takes away the presumption of innocence until proof of guilt arises. It does this in two ways. First, the government must prove by only a preponderance of the evidence that the property was involved in a crime.<sup>147</sup> This requirement does not mean that the defendant is guilty of the crime or that a jury of their peers will decide that they were.<sup>148</sup> Even if a defendant is guilty, it is easier for the government to take their property in a forfeiture action than to convict them of a crime. This lower criminal standard also relates back to the issue that many defendants do not contest the asset forfeiture—if the cards are stacked against you, why would you bother to fight it at trial?

Second, the asset forfeiture system allows prosecutors to bypass the judicial process and a finding of guilt.<sup>149</sup> Because forfeiture can—and often does—happen before a finding of guilt, a prosecutor can charge an individual with a crime, make use of the preponderance of the evidence standard to take the individual's property, and then drop the charge, knowing that they would not have been able to prove the crime was committed beyond a reasonable doubt.<sup>150</sup> Indeed, even if the prosecutor took the underlying criminal case to trial and lost, there is no guarantee that the now proven innocent person would get their property back. They receive a punishment as if they were guilty (a punishment that might be harsher than the standard punishment for the crime they were charged with), even though they have demonstrable proof that they are innocent.<sup>151</sup>

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144. Coffin v. United States, 156 U.S. 432, 452 (1895).

145. Joseph C. Cascarelli, *Presumption of Innocence and Natural Law: Machiavelli and Aquinas*, 41 AM. J. JURIS. 229, 230–33 (1996).

146. Shima Baradaran, *Restoring the Presumption of Innocence*, 72 OHIO ST. L.J. 723, 738–39 (2011).

147. W. VA. CODE § 60A-7-704 (2022).

148. Ho, *supra* note 81.

149. W. VA. CODE § 60A-7-704 (2022).

150. *Id.*

151. See W. VA. CODE § 60A-7-703 (2022) (providing no procedure for defendants proven innocent).

## 2. Due Process Solutions

The simple solution to this issue is to require prosecutors wait to begin asset forfeiture proceedings until there is a finding of guilt either by jury or plea. Pursuant to the solutions considered in Part IV, Section A of this Article, the prosecutor should motion for forfeiture after the verdict but before sentencing. This way, the West Virginia judicial system will rest easy knowing that anyone who goes through the forfeiture system has been found guilty beyond a reasonable doubt and will be justly compensated for their property at sentencing. This change would have few, if any, negative consequences on the judicial system. A prosecutor might be concerned about the property escaping the control of the government before forfeiture can be conducted. However, the government could still take possession of the property, with proper owner notification, and then return the property if forfeiture is not granted. These forfeiture conferences are already happening—this Article is simply recommending that they happen post-trial and not pretrial. There will be no additional incurred cost or any increase in workload for courts.

### C. *Violation of the Sixth Amendment*

Since *Gideon v. Wainwright*, the right to counsel in the Sixth Amendment has been considered a fundamental right in the American judicial system. In *Gideon*, the Supreme Court determined that “in our adversary system of criminal justice, any person hauled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.”<sup>152</sup> The right stems from the absolute necessity for counsel in our increasingly convoluted and confusing judicial system. A person cannot be expected to understand the system with absolutely no legal assistance to alert them of its complexities.<sup>153</sup> To condemn the indigent defendant to pro se proceedings would, for all intents and purposes, condone a system of justice in which the rich are able to buy their way out of punishment through good lawyers and the poor are forced to work off of the goodwill of whoever is charitable enough to give them their time.

Generally, the Supreme Court has decided that the right to counsel does not extend to civil cases, including asset forfeiture actions.<sup>154</sup> Indeed, the Sixth Amendment explicitly applies to criminal cases and therefore the right to counsel extends to those cases.<sup>155</sup> The Court has,

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152. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

153. *Id.*

154. *See United States v. 7108 W. Grand Ave.*, 15 F.3d 632, 635 (7th Cir. 1994) (“[T]he Supreme Court has so far been unwilling to deem forfeiture proceedings ‘criminal’ for the purpose of counsel . . . the sixth amendment does not entitle owners to counsel at public expense whenever the government lays claim to their property.”).

155. U.S. CONST. amend. VI.

however, carved out certain exceptions for those who are completely unable to represent themselves, such as a minor or a non-competent party. These exceptions include juvenile delinquency,<sup>156</sup> transporting a prison inmate to a state prison for the mentally ill,<sup>157</sup> loss of parental rights,<sup>158</sup> and civil contempt.<sup>159</sup> In addition, even in criminal cases, the Court has ruled that the right to counsel only extends to those parts of the case that are deemed “critical” to guaranteeing a fair trial.<sup>160</sup> In *Coleman v. Alabama*, the Court was willing to recognize that preliminary hearings are a critical stage of criminal proceedings and warrant the presence of counsel.<sup>161</sup>

### 1. How the Sixth Amendment Relates to Asset Forfeiture

When an individual appears before a West Virginia circuit court judge for a forfeiture proceeding, they do not receive counsel.<sup>162</sup> They are given a notice beforehand, intended to explain the process to them, but no actual legal counsel.<sup>163</sup> A West Virginia prosecutor would likely argue that providing counsel is unnecessary because asset forfeiture is in rem, and therefore the person is not on trial—the property is.<sup>164</sup> The Sixth Circuit implied this logic in *United States v. \$100,375.00 in U.S. Currency*,<sup>165</sup> as did the Seventh Circuit in *United States v. 7108 West Grand Avenue*.<sup>166</sup> Technically, such logic is not flawed. The property is the thing that is on trial, and the defendant is simply attempting to prove the innocence of the property, not of themselves. However, allowing this legal fiction to stand between an individual and one of the most fundamental rights of the American court system is ridiculous. In antiquated legal systems, this fiction would have been supported by the belief that the property was

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156. *In re Gault*, 387 U.S. 1, 41 (1967).

157. *Vitek v. Jones*, 445 U.S. 480, 484 (1980).

158. *Lassiter v. Dep’t of Soc. Servs. of Durham Cnty., N.C.*, 452 U.S. 18, 20 (1981).

159. *Turner v. Rogers*, 564 U.S. 431, 435 (2011).

160. *United States v. Wade*, 388 U.S. 218, 224–25 (1967).

161. *Coleman v. Alabama*, 399 U.S. 1, 7 (1970).

162. *Goldwater Institute Is Fighting*, *supra* note 86. However, counsel will be present if the defendant conveys their intent to contest the forfeiture. See W. VA. CODE § 29-21-2(2) (2022).

163. W. VA. CODE § 60A-7-705(b) (2022); *Goldwater Institute Is Fighting*, *supra* note 86.

164. *Forfeiture Overview*, U.S. DEP’T OF TREASURY, <https://home.treasury.gov/policy-issues/terrorism-and-illicit-finance/asset-forfeiture/forfeiture-overview#:~:text=Civil%20judicial%20forfeiture%20is%20an,against%20the%20owner%20is%20necessary> (last visited Nov. 12, 2022).

165. See *United States v. \$ 100,375.00 in U.S. Currency*, 70 F.3d 438, 440 (1995) (rejecting claimant’s argument that forfeiture is “quasi-criminal in character” and thus should require the presence of counsel).

166. See *United States v. 7108 W. Grand Ave.*, 15 F.3d 632, 635 (7th Cir. 1994) (noting that the claimants were not the accused in a civil forfeiture action).

possessed or bewitched.<sup>167</sup> In today's system, no person should be deprived of their property without counsel. In rem proceedings might make sense in some subset of cases, but not in asset forfeiture.

A prosecutor might also argue that asset forfeiture in West Virginia is a civil proceeding and, therefore, the defendant has no right to counsel. A prosecutor would likely argue that a person in a civil case should not be afforded the same rights that a criminal defendant might. This argument is flawed for three reasons. First, the term "civil forfeiture" is entirely a misnomer based on the idea that the item is on trial and not the person. In reality, asset forfeiture is nothing more than an extension of a criminal trial.<sup>168</sup> The Supreme Court recognized that forfeiture is a criminal sanction in *Libretti v. United States*.<sup>169</sup> Second, Section 29-21-2(2) of the West Virginia Code defines "appropriate cases" for public defenders to participate in and includes asset forfeiture proceedings.<sup>170</sup> This suggests that the West Virginia Legislature, at some point, recognized that forfeiture proceedings may require counsel. Third, even if one does consider forfeiture to be a civil proceeding, there is a possibility that forfeiture might fit into the scheme of other civil cases that fall within the purview of the Sixth Amendment.<sup>171</sup> These cases usually involve either a serious punishment or a person who cannot possibly represent themselves.<sup>172</sup> To argue that asset forfeiture cannot possibly fall within the purview of the Sixth Amendment because it is arbitrarily labelled a civil proceeding is simply not in line with Supreme Court jurisprudence.

## 2. Sixth Amendment Solution

The solution to the lack of legal representation in forfeiture proceedings is simple: courts must appoint counsel to those who are unable to provide one for themselves. The attorney would preferably be the individual's counsel throughout the entirety of their criminal proceedings, which will be easier when the asset forfeiture process happens after trial. Counsel should make necessary efforts to explain the asset forfeiture process to their clients and how contesting or acquiescing affects their client's sentence. Whether West Virginia needs to convert to a criminal forfeiture system is immaterial—so long as defendants get

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167. See LEVY, *supra* note 3, at 9 ("The sophisticated Greeks of Periclean Athens . . . believe[d] that inanimate objects had personalities and could be possessed by *Erinyes*, the Furies.").

168. The forfeiture action must necessarily involve a criminal defendant, who often appears before the same judge who will hear their criminal case, and the action is usually brought by the prosecutor who will handle the criminal matter.

169. *Libretti v. United States*, 516 U.S. 29, 40 (1995).

170. W. VA. CODE § 29-21-2(2) (2001).

171. See *supra* notes 156–59.

172. *Id.*

their representation it does not truly matter if the system is deemed criminal or civil in nature.

It will be costly for the courts to appoint counsel to more cases. Indeed, if attorneys advise clients to contest forfeitures, there might be a great uptick in court costs and in the time courts spend on forfeiture cases. This problem, however, has three counterarguments. First, expenses should not matter when ensuring a person has the assistance of counsel. Second, if judges are worried about costs, then they should use their broad authority to minimize the amount of frivolous forfeiture claims that prosecutors bring. Third, prosecutors make the decision to initiate forfeiture proceedings. The fact that they do not do so in every criminal case implies that there is some ulterior motive. Namely, prosecutors might bring forfeiture actions to increase the amount of money in the public coffers. If this is true, prosecutors should undertake cost-benefit analyses to determine if forfeiture cases are truly worthwhile for the public. If the West Virginia judicial system is seriously concerned about the rise in cost, a potential fix might be to use the money begotten from asset forfeiture in paying public defenders who act as counsel in these cases.

#### D. Eighth Amendment Violation

The Eighth Amendment bars excessive fines.<sup>173</sup> The Supreme Court recently ruled, in *Timbs v. Indiana*, that the Excessive Fines Clause applies to asset forfeiture cases.<sup>174</sup> In that case, the defendant was charged with dealing in a controlled substance and conspiracy to commit theft.<sup>175</sup> The maximum fine was \$10,000, but the government sought forfeiture of the defendant's SUV, which was estimated to cost at least \$42,000.<sup>176</sup> The defendant had purchased the car with insurance money following his father's death.<sup>177</sup> The Court ruled that forcing the forfeiture of more than four times the maximum fine for the offense violated the Eighth Amendment's Excessive Fines Clause.<sup>178</sup> The Court overruled the argument that the Excessive Fines Clause could not apply to an in rem proceeding.<sup>179</sup> However, the Court did not specify what should constitute "excessive" in the context of forfeiture.

##### 1. Excessive Fines in West Virginia Asset Forfeiture System

West Virginia courts have recognized that asset forfeiture should not

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173. U.S. CONST. amend. VIII.

174. *Timbs v. Indiana*, 139 S. Ct. 682, 689–90 (2019).

175. *Id.* at 686.

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.* at 690.

be excessive.<sup>180</sup> This is a positive aspect of the state's forfeiture system. Although *Timbs* recognized that asset forfeiture can be unconstitutional if excessive,<sup>181</sup> a test should be created to properly determine what an excessive fine is in the forfeiture world. Luckily, West Virginia has already begun to formulate an analysis of what forfeitures constitute an excessive fine.<sup>182</sup> Other states should follow suit.

## 2. New Legal Standard

In both *Timbs* and *United States v. Bajakajian*, the U.S. Supreme Court used a standard of the forfeiture being proportionate to the crime.<sup>183</sup> But, to quote Justice Scalia's description of a different test, the proportionality standard is "flabby."<sup>184</sup> It leaves no clear judiciable standard for lower courts to follow, leaving much discretion in the hands of circuit court judges—many of whom were prosecutors before they were judges. A more reasonable standard—the standard implemented in West Virginia—would be to use the fines predetermined by the legislature as guideposts.<sup>185</sup> While it is true that the legislature does not, in and of itself, define what a reasonable fine might be, those fines which remain in place are the product of legislative deliberation and judicial review. To go above the level set by the legislature and use asset forfeiture in a "fee plus" manner is excessive. Thus, a prosecutor should be able to move for forfeiture of property only up to the value that the legislature has set as a fine. For instance, in *Timbs*, the prosecutor should

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180. *Messer v. Skeen*, No. 14-0926, 2015 W. Va. LEXIS 1096, at \*16 (W. Va. Nov. 6, 2015).

181. *Timbs v. Indiana*, 139 S. Ct. 682, 689–90 (2019).

182. *E.g., Messer*, 2015 W. Va. LEXIS 1096, at \*15–20 (remanding the case for the lower court to "conduct an evidentiary hearing to take evidence of the value of the seized property and to analyze the constitutionality of the forfeiture"); *Dean v. State*, 736 S.E.2d 40, 50 (W. Va. 2012) ("[W]e hold that a forfeiture of real property under West Virginia Code . . . violates the Excessive Fines Clause found in article III, section 5 of the West Virginia Constitution and the Eighth Amendment to the United States Constitution if the amount of the forfeiture is grossly disproportionate to the gravity of a defendant's offense. Factors to be considered in assessing whether the amount of the forfeiture is grossly disproportionate to the gravity of an offense, include: (1) the amount of the forfeiture and its relationship to the authorized penalty; (2) the nature and extent of the criminal activity; (3) the relationship between the crime charged and other crimes; and (4) the harm caused by the charged crime.").

183. *See Timbs v. Indiana*, 139 S. Ct. 682, 689 (2019) ("[A]ll 50 States have a constitutional provision prohibiting the imposition of excessive fines either directly or by requiring proportionality."); *United States v. Bajakajian*, 524 U.S. 321, 334 (1998) ("The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish.").

184. *Tennessee v. Lane*, 541 U.S. 509, 557 (2004) (Scalia, J., dissenting).

185. *See Messer*, 2015 W. Va. LEXIS 1096, at \*24 (Loughry II, J., concurring) ("I agree that only state penalties associated with violations of the West Virginia Uniform Controlled Substances Act . . . may be considered in the circuit court's proportionality analysis as the [West Virginia Contraband Forfeiture Act] is currently written.").

only have been able to take \$10,000 worth of property since the defendant could only receive a maximum \$10,000 fine for his underlying drug conviction.<sup>186</sup>

This standard will no doubt have detractors. One potential critique is that the legislature could change the fee scheme to allow for prosecutors to generate more money from asset forfeiture claims. If this became the case, however, judges could strike down the fees for being excessive. If the fees are not excessive by themselves, then the parallel asset forfeiture claims would not be excessive either. Another criticism might be that the proposed standard will severely limit a prosecutor's ability to take real property. But if this standard limits prosecutor's ability to take real property, then prosecutors never had the right to take the property that they did in the past.

## V. RECOMMENDATIONS FOR CHANGE

It is incredibly important to note that asset forfeiture is a reasonable and valuable way to prevent and reduce crime. It is easy to look at a system to find flaws, and even easier to look at a flawed system and condemn it in its entirety as unsalvageable or untenable. It is much harder to look at a system for the innate value it does hold and suggest solutions to those problems. Part V of this Article will present several ways that the West Virginia asset forfeiture system can be improved. These suggestions are directed at West Virginia, but they should be considered in every state where they are applicable.

First and foremost, the West Virginia Legislature should explicitly define asset forfeiture as a criminal proceeding. Its inclusion in the civil system creates many of the problems discussed in this Article. The idea that asset forfeiture, an action that is only taken in criminal cases, is considered a civil issue is ridiculous. The West Virginia Legislature should amend the state code to recognize asset forfeiture for what it is: a vital part of the criminal justice system. In the same way, the legislature should indicate that asset forfeiture is against criminal defendants and not against property.

Another general change the legislature can make is to mandate that all prosecutors in the state report their yearly forfeiture gains to a centralized body, which would then publish the figures. This data should be granular to the case level and should show the number of forfeiture proceedings that were successful and unsuccessful. The West Virginia Prosecuting Attorneys Institute would make a great centralized body to collect and present this information. This approach would have many benefits. The first is that local constituents would be able to see their local prosecutors' legal tactics more clearly. Since prosecutors are elected locally in West

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186. *Timbs*, 139 S. Ct. at 686.

Virginia,<sup>187</sup> it is democratically preferable for voters to have such information. Some voters might wish to vote against prosecutors who use forfeiture proceedings too often, and others might wish to vote against prosecutors who use it often enough but seem to fail more frequently. Next, transparency would enable lawmakers at both the state and local level to know the amount of resources that prosecutors are garnering from forfeiture. This information would be pertinent to budgeting plans which lawmakers decide yearly. Finally, the reporting of such data would make oversight infinitely easier for watchdog organizations like the Institute for Justice. Currently, it is difficult, if not impossible, for these organizations to know how much counties in West Virginia gain from forfeiture. There is almost no route for determining if prosecutors are abusing the forfeiture system, and thus it is impossible to watch for unethical behavior. Adding a reporting mechanism would greatly benefit the forfeiture system as a whole.

Further, the legislature should make necessary adjustments to the proceedings themselves. First, asset forfeiture should not occur before a finding of guilt by either plea or jury. To initiate a forfeiture action before a finding of guilt allows the state incredible leeway for misuse. Prosecutors can open criminal cases against a person, begin a forfeiture, and then drop the criminal charge after the forfeiture is over. There is no recourse for the innocent owner to recover their property because replevin is barred.<sup>188</sup> Thus, a prosecutor should have to wait until they have already received a guilty verdict before they file for forfeiture. This will greatly alleviate the burden on innocent owners.

Requiring a finding of guilt will help with the next two issues that need to be remedied. First, the counsel that the defendant retained in their underlying criminal trial should stay on throughout the forfeiture process, including the first appeal. To allow public defenders to abandon clients when they appeal forfeiture decisions is to fail to recognize the importance of the forfeiture process. Forfeiture, as this Article has discussed, can result in the loss of quite a bit of money. In *Timbs*, the defendant lost his Land Rover worth \$42,000.<sup>189</sup> Plus, to lose one's car is to lose one's ability to drive to work, job interviews, the grocery store, and so on. In *Forty-Three Thousand Dollars*, \$43,000 in cashier's checks was subject to forfeiture.<sup>190</sup> Even if a defendant is sentenced to prison, they might rest easy knowing the money they earned before their incarceration would continue to support their family. Yet, as the possibility of retaining these sources of wealth shrinks, the easier it

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187. W. VA. CODE §§ 7-4-1(a), (c) (2022).

188. W. VA. CODE § 60A-7-704(d) (2022).

189. *Timbs*, 139 S. Ct. at 686.

190. *State v. Forty-Three Thousand Dollars & No Cents (\$43,000.00) in Cashier's Checks*, 591 S.E.2d 208, 210 (W. Va. 2003).

becomes for prosecutors to use their broad oversight to initiate forfeiture proceedings. Defendants lacking counsel are more likely to give up their property without contest because they do not understand their rights or the proceedings before them.

A finding of guilt would also assist in the following proposed change: the legislature should codify the giving of just compensation for asset forfeiture. Just compensation should come in the form of reducing the sentence the prosecutor recommends to the judge. Recommendations, while not mandatory for judges to follow, at least encourage judges to take the forfeiture into account when a sentence is formed. Some might argue that this is outside the purview of the justice system. Nonetheless, if the asset forfeiture system is to be folded into the criminal process, happening after a finding of guilt and with counsel to help in negotiating a sentence, the only way for a prosecutor to justify a taking is to provide compensation. In addition, the judge would not raise the matter of forfeiture on their own, but rather they would simply be rejecting or accepting the advice of the prosecution, as they currently do. This would mean that when a person is wrongfully convicted, as is inevitable in the criminal system, the innocent individual should be given the right to use replevin to retrieve their property. The just compensation they received was worthless to them, as they should not have been convicted in the first place.

Finally, the legislature should explicitly set the cap of forfeitures as equivalent to the fine imposed by statute for the underlying crime. While the West Virginia Supreme Court of Appeals has adopted this approach,<sup>191</sup> the state legislature would decrease the number of excessive forfeiture proceedings if it passed a law indicating the standard for the cap.

After making these requisite changes, the legislature could expand forfeiture to other crimes besides drug offenses. In West Virginia, forfeiture is primarily used in controlled substance cases.<sup>192</sup> In fact, the forfeiture guidelines are written into the Uniform Controlled Substances Act of the West Virginia Code.<sup>193</sup> With extra protections built into the system, however, there is no reason for the forfeiture system to not incorporate the entirety of the criminal code. Why should a drug dealer have their property taken by prosecutors but not a bank robber? It would be logically consistent for the West Virginia Legislature to expand forfeiture to include more crimes.

Thus, the average criminal case in West Virginia should proceed as follows. First, the defendant is charged with a crime. Their court appointed attorney begins the plea negotiation process, which can include

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191. *See supra* Part IV, Section D, Subsection ii.

192. Zuckerman & Pierson, *supra* note 67.

193. W. VA. CODE § 60A-1-101 to -11-6 (2022).

forfeiture considerations. If the defendant enters a plea of guilty, as most do in the criminal system, the prosecutor can begin forfeiture proceedings.<sup>194</sup> The usual forfeiture proceedings should go forward, with the defendant retaining the same court appointed attorney. After a conclusion to the proceedings, the prosecutor will include an adjustment in the proposed sentence to the judge based on the results of the forfeiture proceedings. The judge can choose to accept or reject the sentencing adjustments.

### CONCLUSION

The American asset forfeiture system is broken. It effectively allows the government to tread on the rights of criminal defendants. Not only that, as it currently stands, it leaves open a window to extreme abuse against those who are entirely innocent. Indeed, the asset forfeiture system does not even require a finding of guilt before forfeiture occurs. Allowing the government to take property from citizens (even those who have been charged with a crime) without just compensation practically encourages the overuse of forfeiture. What does the prosecution have to lose? The weak proportionality standard for excessive fines exacerbates the problem. Not only do prosecutors have nothing to lose by commencing asset forfeiture proceedings, but there is also no reason for them not to seek the maximum amount of forfeiture that they feasibly can. Finally, throughout this process, defendants may be left without counsel.

Luckily, the flaws in the system are easily rectified with minimal change to the judicial process. Changing when forfeiture happens, what is required of prosecutors, and what can actually be forfeited will solve almost all issues. And, with these changes, the West Virginia criminal system will become a shining example of forfeiture in the nation. Criminal defendants, especially innocent ones, will no longer have their rights trampled by overzealous prosecutors. Prosecutors will have more freedom to engage in forfeiture without fear that their actions will have unintended unconstitutional consequences. Forfeiture will no longer be a murky secret within the criminal process, but a transparent and lawful way to decrease recidivism and make sure that crime truly does not pay.

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194. Gaby Del Valle, *Most Criminal Cases End in Plea Bargains, Not Trials*, THE OUTLINE (Aug. 7, 2017, 3:05 PM), <https://theoutline.com/post/2066/most-criminal-cases-end-in-plea-bargains-not-trials>.