

A MODEST PROPOSAL: ASSET FORFEITURE LITIGATION AND
STRATEGIC DIVESTMENT

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ABSTRACT

Continued law enforcement abuses and high-profile and unjustified police killings of unarmed people of color have renewed call for law enforcement and criminal justice reform. Whether the change is called reform, defund, or abolish the police, the goal is systemic change. How do we create meaningful change in a system where people joke that the safest place to hide after a murder is behind a badge?

Collective action, accountability, curtailing police immunity, reform minded prosecutors, and engaged legislators are part of the solution and have been extensively covered by the news and academics. But the historical and, for many, emotional role of law enforcement in the United States makes change difficult and regionally specific. This paper evaluates one of the most common reform proposals, defunding in an unexplored light: cutting law enforcement's autonomous budget by systemically challenging asset forfeiture through litigation. I propose a model based on the infrastructure of legal aid organizations or public defender offices to represent people in civil asset forfeiture cases to achieve strategic investment.

The well-known problem with defunding the police through budget cuts is political. In some places, budget reductions are politically feasible, but in others law enforcement support is politically entrenched. Beyond political obstacles, defunding a police budget may lead to more aggressive policing because law enforcement can self-fund through asset forfeiture.

The litigation approach proposed solves this two-fold problem. Defunding the worst forms of policing by challenging the civil asset forfeiture process. My proposal bypasses political issues like gridlock and eliminates worries that budget cuts will lead to unintended consequences.

Drawing on existing asset forfeiture, which has only examined the subject through the lens of property rights or excessive fees and fines, criminal justice scholarship and extensive litigation experience, I consider the current proposals for law enforcement reform, and analyze how to implement a workable way to challenge asset forfeitures using existing legal infrastructure. Along with identifying a novel reform approach, I confront its hurdles, consider the ethical loopholes that permit prosecutors to litigate civil asset forfeiture cases, and evaluate how challenging asset forfeitures can significantly and safely defund police departments. A successful asset forfeiture defense model can reduce police budgets and lead to better outcomes for criminal (most often indigent) defendants and reduce mass incarceration.

INTRODUCTION

On Saturday, April 23, 2016, Arlene Harjo's son borrowed her car so that he could "take a trip to the gym with a friend."² Arlene agreed and expected her son to return within a few hours.³ While out, her son had been arrested for DWI while returning from a rendezvous with his girlfriend.⁴ Along with her son's arrest, Arlene also learned the City of Albuquerque had seized her car.⁵ Albuquerque's city prosecutor tried to extract over \$4,000 from Arlene to return her car, and her story and subsequent litigation revealed the city ran an organized and lucrative vehicle forfeiture program.⁶ Albuquerque planned its budget, evaluated and paid city employees based on forfeiture proceeds, and awarded bonuses to city officials working in the forfeiture program, including allowing personal use of seized cars.⁷

Arlene litigated her case through the city's forfeiture hearings, but failed to meet her burden to establish that she was an innocent owner.⁸ The City filed a forfeiture complaint in state court, and continued to litigate her case *pro se*.⁹ Ultimately, Albuquerque returned Arlene's car because it eventually determined that the car was outside the city limits when it was seized.¹⁰ As she argued, "both the hearing officer and the city attorney could have determined that the seizure did not occur within city limits, if they had consulted a map."¹¹ While her car sat in impound for eight months while she litigated her case, Arlene continued to make her car payments.¹² Eventually, a federal court determined Albuquerque's civil forfeiture program was unconstitutional because it created an institutional incentive to prosecute.¹³

² Harjo v. City of Albuquerque, 326 F. Supp. 3d 1145, 1162 (D.N.M. 2018).

³ *Id.*

⁴ *Id.* at 1163.

⁵ *Id.*

⁶ *Id.* at 1159-1165.

⁷ *Id.*

⁸ *Id.* at 1164.

⁹ *Id.*; see generally Maureen Carroll, *Civil Procedure and Economic Inequality*, 69 DEPAUL L. REV. 269 (2020) (discussing the relationship between economic inequality and civil procedure and situations when indigent defendants are disadvantaged).

¹⁰ *Id.* at 1165.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 1193 (citing *Marshall v. Jerrico* 446 U.S. 238, 250 (1980)) ("ruling that an institutional incentive exists when there is 'a realistic possibility that the [prosecutor's] judgment will be distorted by the prospect of institutional gain as a result of zealous enforcement efforts.'").

Arlene’s story is common. Asset forfeiture allows law enforcement agencies to seize money and property from people during a *criminal* investigation as part of the investigation, or in a related *civil* or administrative on the “belief” that property or assets were connected to a crime in.¹⁴ Many of these seizures are by undercover drug enforcement units.¹⁵ Most defendants are not able to hire or receive appointed counsel and left to litigate their cases *pro se*. The moral hazard and abuse of power created by asset forfeiture programs has been well studied.¹⁶ While the abuses of asset forfeiture are known, scholars and practitioner guides have overlooked asset forfeiture litigation as a form of impact litigation.¹⁷

Within the police reform movement, asset forfeiture is overlooked in calls to defund the police even though the militarization of police forces has been commonly linked to the beginning of the war on drugs in the 1970s¹⁸. The amount of assets seized by federal and state authorities is staggering, and has been a source of focus for current reform proposals that view the police as an “institution that exists as an obstruction to justice.”¹⁹

Existing scholarship on civil asset forfeiture has looked at the militarization of police forces beginning with drug enforcement in the 1970s or evaluated the constitutionality of civil asset forfeiture under the

¹⁴ Rachel L. Stuteville, *Reverse Robin Hood: The Tale of How Texas Law Enforcement Has Used Civil Asset Forfeiture to Take from Property Owners and Pad the Pockets of Local Government-the Righteous Hunt for Reform Is On*, 46 *Tex. Tech L. Rev.* 1169, 1177 (2014) (discussing the three types of asset forfeiture).

¹⁵ See Elizabeth Joh, *Breaking the Law to Enforce It: Undercover Police Participation in Crime*, 62 *STAN L. REV.* 155 (2009) (describing the moral hazard and perverse incentives of undercover policing).

¹⁶ See e.g., Christopher Coyne and Yuliya Yatsyshina, *Police State, U.S.A.* (2021) (discussing the growth from SWAT teams to the transfer of military weapons to forces beginning during the “war on drugs” increasing during the “war on terror” and characterizing the effect as changing police officers from peace officers to domestic soldiers).

¹⁷ See generally, Dan Alban, *The Impact Litigation Campaign to End Civil Forfeiture*, *LITIGATION*, 41, 43 (Winter 2019) (“Over 300 editorials in major newspapers have editorialized against civil forfeiture, and a large majority of Americans-84 percent in a December 2016 poll conducted by the Cato Institute and YouGov-oppose civil forfeiture and support reforms.”); see also (David. Smith & Elizabeth Franklin-Best, *Harjo v. City of Albuquerque: A Road Map for Challenging Government Forfeiture Programs*, *NACDL’s Champion*, at 22, 27 (May 2019) (discussing in a leading criminal defense magazine that asset forfeiture challenges may lead to more transparency on cases, but overlooking the ability to create systemic change).

¹⁸ Mychal Smith, *Incremental Change is a Moral Failure: Mere Reform Won’t Fix Policing*, *ATLANTIC* (September, 2020) (defining justice “as a proactive commitment to providing each person with the material and social conditions in which they can both survive and thrive as a healthy and self-actualized human being.”).

Takings Clause²⁰ with a focus on protecting property rights or the Eighth Amendment²¹. While these historical evaluations and constitutional analysis are useful, no scholarship has focused on how impact litigation to defend people from asset forfeiture can check police abuses, support police department reforms, and strategically divest funds from the most troubling forms of policing in America.

The existence of asset forfeiture allows law enforcement to self-fund in defiance of defunding efforts.²² Fear exists that law enforcement will use more aggressive police tactics to make up any budget shortfalls is an obstacle to reform efforts.²³ Unless there is a check on asset forfeiture, efforts to reform police forces through defunding or budget mandates will be deficient.

I offer a modest proposal to solve this problem.²⁴ I frame the architecture of a model to challenge asset forfeiture to leverage police reform and support defunding proposals. Beyond re-evaluating asset forfeiture and proposing a litigation approach to challenge it, the ethical implications for law enforcement and prosecutors' offices from asset forfeiture programs are addressed. The intersection of challenging asset forfeiture and criminal defense is evaluated to identify how asset forfeiture litigation can lead to better client outcomes.

Clients who litigate asset forfeiture cases can reclaim seized funds, hold prosecutors to the civil burden of proof, or use forfeiture challenges to bargain for better outcomes. As James Baldwin observed, “it is not

²⁰ See Caleb Nelson, *The Constitutionality of Civil Forfeiture*, 125 YALE L.J. 2446, 2448 (2016)

²¹ See Jill Wieber Lens, *Justice Thomas, Civil Forfeitures, and Punitive Damages*, 51 U.C. DAVIS L. REV. ONLINE 33 (2017).

²² See Ella Fassler, *Federal Asset Forfeiture May Undermine Efforts to Defund Police*, Shadow Proof (July 14, 2020), <https://t.ly/6s5o>.

²³ See *Defunding the Police: Cutting American Police Budgets Might Have Perverse Effects*, ECONOMIST *July 9, 2020), <https://t.ly/i2NT>.

²⁴ This proposal is not satirical, like Swift's, but does challenge institutional injustice. See JOHNATHAN SWIFT, A MODEST PROPOSAL: FOR PREVENTING THE CHILDREN OF POOR PEOPLE FROM BEING A BURTHEN TO THEIR PARENTS OR COUNTRY, AND FOR MAKING THEM BENEFICIAL TO THE PUBLICK [1729] (describing in a satirical essay the heartless attitudes of the British government to the poor during the Irish Famine that argued for beneficial government policies and led to serious aristocratic backlash from anti-reformers); See also TONI MORRISON, THE SOURCE OF SELF-REGARD, viii (Vintage ed. [2019] 2020) ([D]espots, are often, but not always fools. But none is foolish enough to give perceptive, dissident writers free range to publish their judgments or follow their creative instincts. They know they do so at their own peril. They are not stupid enough to abandon control (overt or insidious) over media . . . that is their peril.”

permissible that the authors of devastation be innocent. It is the innocence which constitutes the crime.”²⁵

Part I of this article describes the history and current state of asset forfeiture in the United States. Part II describes the architecture of an asset forfeiture litigation model. Part III addresses the benefits of challenging asset forfeiture to defendants’ outcomes and police reform. Part IV concludes.

I. A Brief History of Asset Forfeiture

The first police forces were organized groups that became known as slave patrols.²⁶ Deliberate racial discrimination defined law enforcement in all regions.²⁷ The police existed to ensure that poor people, especially Black people and immigrants, had just enough freedom to build infrastructure and drive the economy.²⁸ Asset forfeiture emerged in the twentieth century.

1. The Police and Protest – The State v. New Reform and Defunding Efforts

The political praise and entrenchment of law enforcement continued through the nation’s history. In 1961, Congress authorized President John F. Kennedy to designate May 15 as Peace Officers Memorial Day, which the President signed into law in 1962.²⁹ Robust protests have existed, however, especially following incidents of police brutality.³⁰

In the last decade police reform has focused on electing nontraditional, reform-minded prosecutors who will focus on rehabilitation and reign in police abuses and not prosecute defendants under laws that are unjust.³¹ To many, the reform-minded prosecutor is an exception to the

²⁵ JAMES BALDWIN, *THE FIRE NEXT TIME*, 5-6 (Vintage, [1963] (1993)).

²⁶ See Ailsa Chang, *The History Of Police In Creating Social Order In The U.S.*, NPR ALL THINGS CONSIDERED (June 5, 2020), <https://t.ly/xlcc>.

²⁷ See Chang, *supra* note .

²⁸ See Throughline, NPR, *supra* note.

²⁹ H.R.J. Res. 730, 87th Cong. (1962) (authorizing the President to proclaim May 15 as Peace Officers Memorial Day).

³⁰ See Aya Gruber, *Police and Bluelining*, 58 HOUSTON L. REV. __ (2021) (discussing how law enforcement was created to systemically enforce social castes). See e.g., *1943 Harlem Riot Killed 5, Hurt 500: It Began When a Policeman Shot Negro Soldier*, N.Y. TIMES (July 19, 1964), <https://t.ly/KJzq> (reporting on the Harlem Riots in 1943, which started after a white policeman shot a Black World War II veteran); see also Anjali Sastry & Karen Grigsby Bates, *When LA Erupted In Anger: A Look Back At The Rodney King Riots*, NPR (April 26, 2017), <https://t.ly/h9Jz> (reporting on the Los Angeles riots following the acquittal of police officers who beat Rodney King).

³¹ See The Harvard Law Review Association, *The Paradox of “Progressive*

rule, since they are outnumbered by prosecutors with a traditional approach.³²

Public demand for immediate law enforcement were reignited in 2020 following the police killings of George Floyd and Breonna Taylor with organized protests and campaigns to defund or abolish the police.³³ Defunding the police is subjectively defined, but has become a catch all phrase for re-examining law enforcement's role, oversight, and budgets.³⁴

2. The Role of Asset Forfeiture in Injustice

While the discourse about how to end police brutality has focused on defunding the police, asset forfeiture has often been overlooked. Some argue that the concept of asset forfeiture goes “back to the Old Testament.”³⁵ According to the FBI, asset forfeiture began as the practice of defending against piracy through the seizure of vessels and contraband.³⁶ After the adoption of the Constitution, ships and cargoes involved in customs offense and vessels used to deliver slaves were made subject to under federal law.³⁷ The Supreme Court has observed that the enactment of forfeiture statutes has not abated, but rather modern forfeiture statutes reach “virtually any type of property that might be used in the conduct of a criminal enterprise.”³⁸

Congress refocused on asset forfeiture and used it as a tool in the war on drugs with the Comprehensive Drug Abuse Prevention and Control Act of 1970.³⁹ The intent was that, under the belief that traditional criminal sanctions of fine and imprisonment were not working, asset forfeiture

Prosecution”, 132 HARV. L. REV. 748 (2018) (discussing the efforts to reform law enforcement through prosecutorial leadership).

³² *Id.* at 759 (“Tweaking the criminal legal system by introducing nontraditional prosecution methods ignores the fundamental truth that this system was never intended to keep marginalized people safe.”); see also Josie Duffy Rice, *Cyrus Vance and the Myth of the Progressive Prosecutor*, NY TIMES (Oct. 16, 2017), <https://t.ly/xuan> (discussing several prominent prosecutors who campaigned as reformers but continued existing policies once elected).

³³ Josh Wood and Tim Craig, *As Breonna Taylor Protests Stretch into 12th Week, Calls for Officers' Arrests Intensify*, WASHINGTON POST (August 18, 2020), <https://t.ly/4Iqn>.

³⁴ See Andrew Ferguson, *Defund the Police Does Not Mean Defund the Police. Unless It Does*, THE ATLANTIC (June 14, 2020), <https://t.ly/bz42>.

³⁵ Lydia Ellsworth, Note, *Pennies from Heaven or Excessive Fines from Hell? Commonwealth v. 1997 Chevrolet Keeps Civil Asset Forfeiture's Threat to Homeownership in Purgatory*, 63 VILL. L. REV. 125, 130 (2018).

³⁶ FBI Fact Sheet, <https://www.fbi.gov/investigate/white-collar-crime/asset-forfeiture>

³⁷ *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 683 (1974).

³⁸ *Id.*

³⁹ Pub. L. No. 91-513, 84 Stat. 1236 (1970) (codified at 21 U.S.C. § 881).

would act as a deterrent for drug crimes.⁴⁰ The Comprehensive Crime Control Act of 1984 established the equitable sharing program solidifying the profits of policing drug users by memorializing a profit sharing arrangement between federal and state agencies when civil assets are seized.

3. Civil Asset Forfeiture Reform Proposals

Civil asset forfeiture issues have largely escaped scrutiny. Defunding efforts have focused on decreasing police department budgets. Reforms have focused on expanding funding for public defense or eliminated qualified immunity.⁴¹ The leading organization advocating for reforming state civil asset forfeiture laws is the Institute for Justice, a libertarian think tank that publishes a yearly survey of states' civil asset forfeiture laws. The Institute for Justice also drafts bills for state legislators largely advocating for a shift from civil asset forfeiture to criminal asset forfeiture.

II. Asset Forfeiture Litigation – The Architecture of a New Model

Instead of abandoning civil asset forfeiture for criminal asset forfeiture, a better approach is establishing or expanding representation using a legal aid model to represent indigent litigants in civil asset forfeiture cases. The benefit of representation helps individual defendants, and provides a systemic check on police agencies that are incentivized to increase arrests, especially of drug users, to expand budgets.

Where legal aid organizations are restricted from representing defendants, such as in the case of people who are non-citizens, legal clinics and pro bono counsel can fill in the representation gap. In states with criminal asset forfeiture or in places where legal aid organizations provide public defense services, offices can assign attorneys to represent people facing asset forfeiture.

⁴⁰ *Id.*

⁴¹ Qualified immunity reforms are outside the scope of this article, but having litigated Section 1983 cases in our legal clinic I have noticed two issues that are largely unexamined and have been obstacles even when qualified immunity is overcome. The first is that there is an access to justice gap because federal district courts cannot appoint attorneys for indigent litigants under the CJA Act and instead must appoint counsel under 28 U.S.C. Section 1915, which does not provide explicit statutory authority for funding, although some federal courts have provided funding or appointed expert witnesses under Federal Rule of Evidence 706. The second issue is that Section 1988, which provides for fees to victorious 1983 plaintiffs excludes expert witness fees from attorneys fees. The result is that 1983 Plaintiffs often do not have the funding needed to adequately litigate their claims.

In this way, litigating civil asset forfeiture cases is strategic divestment by obstructing police department's ability to self-fund and reducing the incentive to police low-income communities and people with substance use disorders. This is the strategic defense to the profit incentive that perpetuates the war on drug users.⁴²

Several legal aid organizations and a handful of public defender offices already handle asset forfeiture cases.⁴³

Prosecutors are permitted to take a financial stake in the outcome of civil forfeiture cases even though ethics rules typically prohibit attorneys from taking a financial interest in the outcome of cases. A fee shifting provision could help with funding for legal aid or public defender's office, and while not ideal may be better than charging user fees or relying on traffic ticket revenues.

III. Benefits for Criminal Justice Reform and Clients

The initial benefit from preventing default judgments is that the funding from forfeitures for police agencies is significantly slowed and reduced when people's assets are defended. On an individual level, defendants gain leverage in their criminal proceedings and may avoid forfeiture and reclaim their assets if their case does not lead to a conviction or

Litigating asset forfeiture cases avoids the hurdles of legislation and the budgeting process, and ensures any money removed from traditional policing does not lead to more aggressive policing. More specifically, it directly challenges policing for profit and strikes at law enforcement's financial incentive for any arrests.

If we are most concerned about for-profit policing, rogue undercover police units, and checking police department's interest in policing people with substance use disorders or drug crimes, attacking their ability to self-fund by increasing arrests may have tremendous benefits to clients and promote criminal justice reform, or at least prevent any unintended consequences from defunding measures.

IV Conclusion

Problems with policing are where the current defunding and reform debate, and this paper, started. It is not where it should end. In a work describing the Siege of Sarajevo, where the city's society turned against

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⁴³ Legal aid of New York and public defenders in Michigan and Ohio handle asset forfeiture cases. [need to check and cite this]

one another, a person asked how the society can rebuild and how will the new design look:

How do you build it all up again? Do the people who destroyed the city also rebuild it? Is the city reconstructed so that it can be wiped away again someday, or do people believe this will be the last time such a project will be necessary, that from now on things will last forever? Though he can't quite put his finger on the specifics of this question, he believes that the character of those who will build the city again is more important than the makeup of those who destroyed it.⁴⁴

The United States is left with the same questions about law enforcement. Should it be torn down? Can it be rebuilt? Will we be able to rebuild it in an equitable and safe way?

James Baldwin wrote in a letter to his nephew in 1963, "you know and I know, this country is celebrating one hundred years of freedom one hundred years to soon."⁴⁵ Baldwin, in context, was exposing the myth of incremental progress.⁴⁶ The proposals in this paper cannot solve these questions by itself, but our survey of the problems shows that challenging police funding by litigating asset forfeiture is part of the solution for immediate law enforcement reform.

The safest and most pragmatic way to reduce or redistribute law enforcement funding is guarding against their self-funding tool, asset forfeiture. The model I propose to challenge asset forfeiture guards against policing for profit, is cost-effective, bypasses legislative hurdles, and can lead to better outcomes for defendants who are arrested.

⁴⁴ Steven Galloway, *The Cellist of Sarajevo* at 48 (Riverhead Books 2008).

⁴⁵ Baldwin, *supra* note, at 10.

⁴⁶ *See generally*, Smith, *supra* note (arguing that incremental thinking has already diluted calls for abolition, defunding, and substantial reform by "threaten[ing] to suck up the energy that was forming around defunding the police and divert it toward minor reforms that would have little impact on levels of police violence.").