

# INDIANA CIVIL FORFEITURE: HOW SHOULD WE PROCEED?

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## INTRODUCTION

In Indiana, an elderly man had his vehicle seized by Indiana authorities because his stepson was pulled over and charged with a marijuana offense while borrowing the man's vehicle.<sup>1</sup> Although the stepson's charges were eventually dropped, the man was forced to fight for eight months to get his vehicle back, which was affixed with a handicapped license plate.<sup>2</sup> The legal process that allows this deprivation of property to occur—Indiana civil forfeiture.

Civil asset forfeiture actions proceed *in rem* and are based on the legal fiction that property can be found guilty based on suspicion of the specific property's use in the commission of criminal activity; the property's guilt is determined independently from the underlying criminal conduct.<sup>3</sup> Neither a criminal conviction nor charge is necessary to initiate civil forfeiture in most jurisdictions.<sup>4</sup> While considered a civil proceeding, civil forfeiture lives in a realm that would not exist without the underlying criminal conduct.<sup>5</sup>

Civil asset forfeiture, an adjunct to the criminal justice system, is a powerful law enforcement tool. Money and property can be seized based on suspicion of its connection to illegal activity then forfeited to the government under the less burdensome civil system. Proponents of civil forfeiture rationalize forfeiture as a strong tool to take the profit out of crime, deter future crime, and weaken organized crime.<sup>6</sup> By taking the profit out of crime, civil forfeiture schemes give law enforcement a strong financial incentive as the value from the forfeited property flows back to law enforcement.<sup>7</sup> Critics of civil forfeiture argue that law enforcement abuses the system for profit while the due process rights of those

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1. Dustin Grove, "I Had Done Nothing Illegal" – Civil Forfeiture Critics Call for Reforms, WTHR (Feb. 12, 2021, 10:11 AM), <https://www.wthr.com/article/news/investigations/13-investigates/civil-forfeiture-fight-lawsuit-reform-police-evidence-indiana-greenfield-indianapolis-abuse-laws-definition/531-2ce8f98a-c3f1-4e9c-af99-693fca9da466/> [<https://perma.cc/4T5W-L2T9>].

2. *Id.*

3. *See, e.g.*, *Serrano v. State*, 946 N.E.2d 1139, 1140-41 (Ind. 2011).

4. 37 C.J.S. *Forfeitures* § 44 (2022).

5. *Id.*

6. Money Laundering and Asset Recovery Section, *Civil Asset Forfeiture: Purposes, Protections, and Prosecutors*, 67 DEP'T JUST. J. FED. L. & PRAC. 3, 8-9 (2019).

7. LISA KNEPPER ET AL., INST. FOR JUSTICE, POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE 9 (3d ed. 2020), <https://ij.org/wp-content/uploads/2020/12/policing-for-profit-3-web.pdf> [<https://perma.cc/99HP-JE2R>].

subject to forfeiture suffer under a civil system.<sup>8</sup> Therein lies the conflict—police view civil forfeiture as a necessary and highly effective crime-fighting tool. In contrast, those subject to forfeiture must deal with a system often tilted in favor of the government. Additionally, the impoverished are targeted and perversely impacted by civil forfeiture.<sup>9</sup>

In response to criticisms of civil forfeiture, reform efforts are emerging on the state and federal levels.<sup>10</sup> The issues at the forefront of reform are law enforcement's profit incentive and the standard of proof necessary to forfeit property.<sup>11</sup> There is variation in solving the issues posed by civil forfeiture among the states.<sup>12</sup>

Indiana falls behind in creating a civil forfeiture system that strives for fundamental fairness. Forfeiture is a statutory civil proceeding in Indiana.<sup>13</sup> Indiana forfeiture proceedings may proceed without a criminal charge or conviction.<sup>14</sup> Law enforcement may seize property related to a crime prior to the State filing a civil forfeiture action.<sup>15</sup> The State is only required to prove by a preponderance of the evidence that a nexus exists between property and criminal conduct or activity.<sup>16</sup> Indiana's civil forfeiture scheme maintains an enormous profit incentive as most forfeited proceeds go to law enforcement and prosecutors.<sup>17</sup> Individuals subject to Indiana civil forfeiture are not entitled to a jury trial.<sup>18</sup> If a litigant is indigent, they are unlikely to be appointed counsel.<sup>19</sup> Thus, fundamental due process concerns remain as those without lawyers face a system that favors the well-equipped and powerful state. Introduced legislation in Indiana aims to alleviate some of the issues presented by civil forfeiture in Indiana, but does it go far enough?

This note explores potential remedies to the issues posed by Indiana's civil forfeiture scheme: the State's profit motive, an insufficient standard of proof,

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8. See Anne Teigen & Lucia Bragg, *Evolving Civil Asset Forfeiture Laws*, NAT'L CONF. STATE LEGISLATURES (Feb. 2018), <https://www.ncsl.org/research/civil-and-criminal-justice/evolving-civil-asset-forfeiture-laws.aspx> [<https://perma.cc/CN4S-5VUU>].

9. Jennifer McDonald, *Civil Forfeiture Hurts America's Poor*, SPOTLIGHT (Apr. 10, 2019), <https://spotlightonpoverty.org/spotlight-exclusives/civil-forfeiture-hurts-americas-poor> [<https://perma.cc/FHA3-95HF>].

10. See Teigen & Bragg, *supra* note 8.

11. See *id.*

12. *Id.*

13. See IND. CODE §§ 34-24-1, -2 (2022).

14. *Id.* § 34-24-1-3 (prescribing the procedure for initiating a forfeiture action without reference to criminal charge or conviction).

15. See *id.* § 34-24-1-1.

16. *Id.* § 34-24-1-4(a); *Katner v. State*, 655 N.E.2d 345, 349 (Ind. 1995).

17. IND. CODE § 34-24-1-4(d)(3)(A)-(D).

18. *Campbell v. State*, 87 N.E. 212, 214-15 (Ind. 1909) (holding forfeitures are statutory proceedings in which the right to trial by jury is not available).

19. IND. CODE § 34-10-1-2(b)(2) (2022) (“[T]he court . . . may, under exceptional circumstances, assign an attorney to defend or prosecute the cause.”).

poor access to counsel, and lack of the right to a jury trial; this note further argues that Indiana falls behind in civil forfeiture reform and then introduces model legislation.

Part I of this note provides an overview of civil forfeiture through a brief history and a discussion of its modern-day use and development in the federal government, the states, and Indiana. This overview provides insight into the function and current State of Indiana civil forfeiture. Part II discusses the core issues in Indiana civil forfeiture law and identifies concerns that future legislation should address. Part III examines approaches taken by other states. In addition, this section introduces Indiana legislation to remedy issues found in Indiana civil forfeiture and offers recommendations for the next steps to alleviate Indiana's core civil forfeiture issues.

## I. OVERVIEW OF CIVIL ASSET FORFEITURE

### *A. History and Development of Civil Forfeiture*

Civil forfeiture is a legal fiction that stands for the proposition that property itself can be guilty of wrongdoing.<sup>20</sup> It is a unique area of law derived from English common law.<sup>21</sup> At common law, property that caused the death of the King's subject was forfeited to the English crown; this was tied to biblical practices.<sup>22</sup> English law further provided statutory forfeiture of property used in violation of customs or revenue statutes.<sup>23</sup> In the United States, statutory forfeiture was also carried over from England.<sup>24</sup> In the last century, civil forfeiture was rarely used, except during the Prohibition Era; after that, governments used civil forfeiture sparingly.<sup>25</sup>

In the 1970s, civil forfeiture re-emerged as a powerful tool to combat increasing drug crimes as the federal government enacted the Comprehensive Drug Abuse Prevention and Control Act ("CDAPCA") of 1970 that allowed for the seizure of drugs and other items used in the commission of drug offenses.<sup>26</sup> In 1974, "contemporary federal and state forfeiture statutes reach[ed] virtually any type of property that might be used in the conduct of a criminal enterprise."<sup>27</sup> In 1978, an amendment to the CDAPCA gave the federal government more expansive forfeiture powers as the government was authorized to forfeit the

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20. *Waterloo Distilling Corp. v. United States*, 282 U.S. 577, 581 (1931).

21. *See generally*, *Civil Forfeiture*, LEGAL INFO. INST., [https://www.law.cornell.edu/wex/civil\\_forfeiture](https://www.law.cornell.edu/wex/civil_forfeiture) [<https://perma.cc/M3LV-NWEQ>] (last visited Oct. 21, 2022).

22. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 680-81 (1974).

23. *Id.* at 682.

24. *See id.* at 682-83.

25. Walter J. Van Eck, *The New Oregon Civil Forfeiture Law*, 26 WILLAMETTE L. REV. 449, 449 (1990).

26. Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, § 511, 84 Stat. 1236 (1970) (codified as amended at 21 U.S.C. § 881).

27. *Calero-Toledo*, 416 U.S. at 683.

proceeds resulting from drug crimes.<sup>28</sup>

As the War on Drugs ramped up in the 1980s, the federal government acquired express power to seize real property in 1984.<sup>29</sup> With the inclusion of real property, the federal government can reach an extensive list of properties.<sup>30</sup> Notably, Congress also instituted the equitable sharing program<sup>31</sup> and allowed the Attorney General to use forfeiture proceeds to reimburse costs.<sup>32</sup> Equitable sharing allows state law enforcement to give the federal government seized assets forfeited through federal procedure, and the police then receive up to eighty percent of the property value back.<sup>33</sup>

Civil forfeiture is not the sole avenue for the federal government to receive tainted property. There are two additional avenues that the government may utilize in forfeiture on the federal level: administrative forfeiture and criminal forfeiture.<sup>34</sup> Administrative forfeiture is available when there is no claim contesting the seizure.<sup>35</sup> A federal agency that seizes property based on probable cause is authorized to initiate procedures that allows the agency to retain the property without court supervision.<sup>36</sup> Criminal forfeiture proceedings are *in personam*, and a conviction is necessary for the disputed property to be forfeited.<sup>37</sup> In criminal forfeiture, the law affords defendants the greater procedural and constitutional rights that accompany criminal proceedings.<sup>38</sup> On the other hand, civil forfeiture merely proceeds *in rem*, and a criminal conviction is entirely irrelevant to a forfeiture determination.<sup>39</sup> Despite the availability of criminal forfeiture, civil forfeiture is utilized more frequently than criminal forfeiture for several reasons: only the culpability of the property is at issue; there is a lower standard of proof; claimants receive limited procedural protections; and

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28. See Jack F. Nevin, *Tellevik v. Real Property: Washington's Constitutional Dilemma*, 29 GONZ. L. REV. 303, 306 (1994); 21 U.S.C. § 881(a)(6).

29. 21 U.S.C. § 853(b)(1); *id.* § 881(a)(7).

30. *Id.* § 881(a) (enumerating various types of property subject to forfeiture).

31. *Id.* § 881(e)(1)-(3); 18 U.S.C. § 981(e)(2); U.S. DEP'T OF JUST. & U.S. DEP'T OF THE TREASURY, GUIDE TO EQUITABLE SHARING FOR STATE, LOCAL, AND TRIBAL LAW ENFORCEMENT AGENCIES 9-10 (2018), <https://www.justice.gov/criminal-afmls/file/794696/download> [<https://perma.cc/9Y4B-7GB7>].

32. 18 U.S.C. § 981(e).

33. 21 U.S.C. § 881(e)(3); Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 51 (1998).

34. *Types of Federal Forfeiture*, U.S. DEP'T OF JUST. (Feb. 17, 2022), <https://www.justice.gov/afms/types-federal-forfeiture#:~:text=Under%20Federal%20law%2C%20there%20are,judicial%20forfeiture%2C%20and%20administrative%20forfeiture.> [<https://perma.cc/JJP3-ATBE>].

35. *Id.*

36. *Id.*

37. See *United States v. Sandini*, 816 F.2d 869, 873 (3d Cir. 1987).

38. See *Comparison of Civil and Criminal Forfeiture*, 3 CRIM. PRAC. MANUAL § 107:4 (2022) (discussing the government's advantage in civil forfeiture actions).

39. *Sandini*, 816 F.2d at 872.

indigent individuals are generally not entitled to appointed counsel.<sup>40</sup> Although federal civil forfeiture reform efforts are aimed at constitutional and procedural protections, comprehensive civil forfeiture regimes maintain "perverse incentives" where property owners do not receive meaningful protections.<sup>41</sup>

Congress attempted to reform civil forfeiture in 2000 when it passed the Civil Asset Forfeiture Reform Act ("CAFRA") "[t]o provide[] a more just and uniform procedure for [f]ederal civil forfeitures, and for other purposes."<sup>42</sup> CAFRA implemented procedural rules for civil forfeiture proceedings,<sup>43</sup> placed a higher standard of proof on the government,<sup>44</sup> provided for an innocent owner defense,<sup>45</sup> and provided court-appointed counsel for indigent homeowners subject to forfeiture of their primary residence.<sup>46</sup> CAFRA, aimed at alleviating concerns lingering from earlier civil forfeiture legislation, was a step forward in improving civil forfeiture. However, concerns linger as forfeitures and stories of their abuse remain prevalent.<sup>47</sup>

The issues stemming from federal civil forfeiture law are also present in states. Data from states and the federal government show that in 2018, governments received more than \$3 billion in value from forfeiture.<sup>48</sup> With this heavy use of civil forfeiture, serious problems emerge. The threshold problem is law enforcement's financial interest in seizing property because they directly benefit from the funds.<sup>49</sup> Another prominent issue is the use of lower standards of proof in civil forfeiture proceedings compared to the criminal standard of beyond a reasonable doubt.<sup>50</sup> Furthermore, those subject to civil forfeiture are not afforded important procedural and substantive rights that accompany criminal proceedings, such as the right to counsel and limited discovery.<sup>51</sup>

Since 2015, thirty-two states and the federal government have enacted civil forfeiture legislation to remedy the deficiencies of civil forfeiture,<sup>52</sup> and more than 100 bills aimed at civil forfeiture reform were introduced in all fifty states in 2017.<sup>53</sup> But as states construct their civil forfeiture schemes, there is considerable variation among state laws.<sup>54</sup> Many states endeavored to improve

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40. *Comparison of Civil and Criminal Forfeiture*, *supra* note 38.

41. Eric Moores, Note, *Reforming the Civil Asset Forfeiture Reform Act*, 51 ARIZ. L. REV. 777, 784 (2009).

42. Civil Asset Forfeiture Reform Act of 2002, H.R. 1658, 106th Cong. (2000).

43. *See* 18 U.S.C. § 983.

44. *Id.* § 983(c).

45. *Id.* § 983(d).

46. *Id.* § 983(b)(2)(A).

47. Moores, *supra* note 41, at 783.

48. KNEPPER ET AL., *supra* note 7, at 5.

49. *Id.* at 34-35.

50. *Id.* at 31.

51. *See Comparison of Civil and Criminal Forfeiture*, *supra* note 38.

52. KNEPPER ET AL., *supra* note 7, at 5.

53. Teigen & Bragg, *supra* note 8.

54. *See id.*

their civil forfeiture systems by increasing the government's standard of proof and removing the profit motive of forfeiture from the hands of law enforcement.<sup>55</sup> It remains to be seen whether these reforms will successfully combat the issues presented by civil forfeiture.

### *B. Civil Forfeiture in Indiana*

Dating back to 1851, Indiana envisioned that value from forfeited property would be allocated to the Indiana Common School Fund as the relevant constitutional provision states that the Common School Fund is entitled to receive funds "from all forfeitures which may accrue."<sup>56</sup> The income of the Common School Fund is designated only for the support of Indiana schools.<sup>57</sup> In 1984, legislators undermined this constitutional provision by allowing law enforcement and prosecutors to deduct value from forfeiture proceeds to reimburse law enforcement costs.<sup>58</sup> In 2018, taxpayers challenged the constitutionality of the Indiana statute permitting law enforcement reimbursement before the Common School Fund receives proceeds.<sup>59</sup> The Supreme Court of Indiana concluded that the text of article 8, section 3 of the Indiana Constitution supports the finding that legislation was necessary to implement its provisions.<sup>60</sup> The court also found historical precedent from 1873 legislation that allowed prosecutors and their assistants to be compensated from the proceeds of fines and forfeitures.<sup>61</sup> Lastly, the court concluded that the structure and purpose of the Indiana Constitution supported the Legislature's power to reimburse law enforcement costs.<sup>62</sup> Thus, law enforcement is authorized to benefit financially from successful forfeitures.

Criminal forfeiture does not exist in Indiana. Rather, forfeitures in Indiana are purely civil proceedings.<sup>63</sup> Indiana does not require the related criminal activity to result in a conviction.<sup>64</sup> "But because forfeitures also have significant criminal and punitive characteristics," the Supreme Court of Indiana remarked that forfeitures "are not favored, and should be enforced only when within both the letter and spirit of the law."<sup>65</sup> Forfeitures in Indiana proceed under two different statutes: General Forfeiture and Racketeering.<sup>66</sup>

1. *General Forfeiture.*—The General Forfeiture statute is utilized more

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55. *See id.*

56. IND. CONST. art. 8, § 2.

57. *Id.* art. 8, § 3.

58. *Fleeing Schools and Turning Law Enforcers into Lawbreakers*, INST. FOR JUST., <https://ij.org/utility/case-print/?case-name=38838> [<https://perma.cc/53H2-K7VV>] (last visited Oct. 23, 2021).

59. *Homer v. Curry*, 125 N.E.3d 584 (Ind. 2019).

60. *Id.* at 599.

61. *Id.* at 602-03.

62. *Id.* at 607.

63. IND. CODE §§ 34-24-1, -2 (2022).

64. *Katner v. State*, 655 N.E.2d 345, 348 (Ind. 1995).

65. *Hughley v. State*, 15 N.E.3d 1000, 1005 (Ind. 2014).

66. IND. CODE §§ 34-24-1, -2 (2022).

commonly than the Racketeering statute.<sup>67</sup> Under the General Forfeiture statute, law enforcement seizes property, and then the filing attorney must file an affidavit of probable cause no later than seven days after the seizure.<sup>68</sup> Subsequently, the local county prosecutor must bring the forfeiture proceeding within twenty-one days after written notice from the owner demanding the property back or within ninety days from the seizure of the property.<sup>69</sup>

The General Forfeiture statute gives the State power to reach various property types. Vehicles are subject to forfeiture if they are used or intended to be used by the driver in connection with dealing, possessing, and manufacturing enumerated controlled substances.<sup>70</sup> Currency may be seized and ultimately forfeited if it is: (1) used or intended to be used in exchange for an act violating a criminal statute; (2) used in facilitating any violation of a criminal statute; or (3) traceable as proceeds of a crime.<sup>71</sup> Currency “found near or on a person who is committing, attempting to commit, or conspiring to commit” enumerated drug offenses can be used as prima facie evidence that the currency was used in violation of a criminal statute or is the proceeds of a crime.<sup>72</sup> Additionally, real property and various types of personal property can be subject to forfeiture.<sup>73</sup> Thus, Indiana’s General Forfeiture statute encompasses a wide range of property.

The State enjoys a minimal burden of proof in forfeiture actions. The prosecuting attorney has the burden of showing that property is forfeitable under the General Forfeiture statute by a preponderance of the evidence.<sup>74</sup> The State must show that a person with an ownership interest in a seized vehicle knew or had reason to know the vehicle was being used in the commission of the enumerated offense.<sup>75</sup> Release of property that is subject to a pending forfeiture determination is available only in limited circumstances.<sup>76</sup> Prosecuting attorneys are authorized to retain an outside attorney to carry out the forfeiture action.<sup>77</sup>

If property is forfeited, the State sells the property at a public sale.<sup>78</sup> Law enforcement and prosecutors then take priority in the allocation of forfeiture funds.<sup>79</sup> Furthermore, Indiana law enforcement is authorized to participate in equitable sharing with the federal government, in which the participating law

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67. Respondent-Appellant’s Opposition to Trans. at 14-15, *Abbott v. State*, 164 N.E.3d 736 (Ind. Ct. App. 2021), *vacated*, 183 N.E.3d 1074 (Ind. 2022), (No. 19A-PL-1635) [hereinafter Brief].

68. IND. CODE § 34-24-1-2(b) (2022).

69. *Id.* § 34-24-1-3(a).

70. *Id.* § 34-24-1-1(a)(1)(A).

71. *Id.* § 34-24-1-1(a)(2).

72. *Id.* § 34-24-1-1(d).

73. *See id.* § 34-24-1-1.

74. *Id.* § 34-24-1-4(a).

75. *Id.*

76. *See id.* § 34-24-1-2(f).

77. *Id.* § 34-24-1-8(a).

78. *Id.* § 34-24-1-4(d)(1).

79. *See id.* § 34-24-1-4(d)(3).

enforcement agency receives funds from the federal government.<sup>80</sup> Indiana law provides limited circumstances in which indigent forfeiture litigants are entitled to counsel.<sup>81</sup> Moreover, there is no right to a jury trial in Indiana civil forfeiture proceedings.<sup>82</sup>

2. *Racketeering*.—Under the Racketeering statute, forfeiture of property used, intended for use, derived from, or realized through an alleged Corrupt Business Influence statute violation is authorized.<sup>83</sup>

The Corrupt Business statute is violated when one knowingly or intentionally receives funds from “a pattern of racketeering activity” and invests such funds in property or an enterprise.<sup>84</sup> Additionally, the statute is violated when, “through a pattern of racketeering activity,” one establishes an interest or control in property or an enterprise or is employed or associated with an enterprise.<sup>85</sup> Further, property that is derived from or realized through “misfeasance, malfeasance, nonfeasance, misappropriation, fraud, or other misconduct that has resulted in a financial loss to the state” may be forfeited.<sup>86</sup> The Racketeering statute allows for the seizure of property by court order upon a showing of probable cause that a violation has occurred.<sup>87</sup> Property may be seized without a court order if the seizure is incident to a lawful arrest or search.<sup>88</sup> The State must prove forfeiture under the Racketeering statute by a preponderance of the evidence.<sup>89</sup> The State is authorized to employ outside counsel to bring the forfeiture action.<sup>90</sup>

3. *Indiana Reform Movement*.—Proponents of Indiana civil forfeiture argue that it is an essential tool of law enforcement and prosecutors.<sup>91</sup> Specifically, law enforcement and prosecutors benefit from forfeiture because Indiana’s laws cripple the economic incentive of crime and serve as a kind of equitable

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80. *Id.* § 34-24-1-9.

81. *See id.* § 34-10-1-2(b)(2).

82. *Campbell v. State*, 87 N.E. 212, 214-15 (Ind. 1909) (holding forfeitures are statutory proceedings in which the right to trial by jury is not available).

83. *Id.* § 34-24-2-2(a).

84. *Id.* § 35-45-6-2(1).

85. *Id.* § 35-45-6-2(2), (3).

86. *Id.* § 34-24-2-2(b).

87. *Id.* § 34-24-2-3.

88. *Id.* § 34-24-2-4(a)(1).

89. *Id.* § 34-24-2-2(d).

90. *Id.* § 34-24-2-8(a).

91. *See* Barbara Brosher, *Do Indiana’s Civil Forfeiture Laws Violate the State Constitution*, WYFI INDIANAPOLIS (Sept. 11, 2018), <https://www.wfyi.org/news/articles/do-indianas-civil-forfeiture-laws-violate-the-state-constitution> [<https://perma.cc/F9WF-JUEQ>]; *see also* Mark Alesia, *Here’s What Happens To Money Seized From a Crime – and How Civil Forfeiture Could Change*, INDYSTAR, (Dec. 6, 2018, 1:11 PM), <https://www.indystar.com/story/news/2018/12/06/civil-asset-forfeiture-neil-gorsuch-us-supreme-court-tyson-timbs/2148863002/> [<https://perma.cc/6NC5-ADEM>].

restitution.<sup>92</sup> Additionally, forfeiture allows law enforcement to offset the costs of drug operations with forfeiture proceeds.<sup>93</sup>

In contrast, critics of civil forfeiture doubt its efficacy in light of its frequent use.<sup>94</sup> Further, they argue that civil forfeiture makes forfeitures easy for the government and burdensome on property owners.<sup>95</sup> Commentators are critical of the strong profit incentive of Indiana law enforcement; a low standard imposed on the state in proving forfeitures; and the lack of sufficient protections for innocent owners.<sup>96</sup> Additionally, the lack of the right to jury trial and insufficient access to counsel creates the concern that property owners are not adequately protected against forfeiture.<sup>97</sup> As the deficiencies of Indiana civil forfeiture become apparent, reform is gaining momentum jurisprudentially and legislatively.

Prior Indiana forfeiture law infringed upon constitutional due process rights. In *Washington v. Marion County Prosecutor*, there was a constitutional challenge to Indiana's civil forfeiture law that allowed law enforcement to seize vehicles incident to a lawful arrest, then hold the vehicle for 180 days or ninety days if the owner demanded the return of the vehicle in writing.<sup>98</sup> The court found that Indiana's statutory scheme that authorized seizure and retention of the vehicle without a pre-forfeiture deprivation hearing was unconstitutional.<sup>99</sup> Specifically, the court concluded that Indiana's civil forfeiture laws violated the due process protections found in the Fifth and Fourteenth Amendments.<sup>100</sup>

In response, 2018 legislation endeavored to remedy due process concerns by focusing on innocent owners, the timeline for forfeiture prosecutions, and disbursements of funds.<sup>101</sup> Specifically, if property is seized incident to a lawful arrest, search, or administrative inspection, then the prosecuting attorney must file an affidavit of probable cause no later than seven days after the seizure.<sup>102</sup> The enacted bill included a provision that allowed innocent owners to petition for release of vehicles and real property during the pendency of a forfeiture action.<sup>103</sup>

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92. Caudill v. State, 613 N.E.2d 433, 437 (Ind. Ct. App. 1993).

93. *Id.*

94. KNEPPER ET AL., *supra* note 7, at 5-6.

95. *Id.* at 6.

96. *Id.* at 88.

97. See Olivia Covington, *Civil Forfeiture Reform Advances, but Concerns Remain*, THE IND. LAW. (Feb. 6, 2018), <https://www.theindianalawyer.com/articles/46082-civil-forfeiture-reform-advances-but-concerns-remain> [<https://perma.cc/7V7J-HBBZ>]; see also Louis S. Rulli, *On the Road to Civil Gideon: Five Lessons from the Enactment of a Right to Counsel for Indigent Homeowners in Federal Civil Forfeiture Proceedings*, 19 J.L. & POL'Y 683, 707 (2011).

98. 264 F. Supp. 3d 957, 961 (S.D. Ind. 2017).

99. *Id.*

100. *Id.* at 980.

101. S.E.A. 99, 120th Gen. Assemb., 2d Reg. Sess. (Ind. 2018); See Covington, *supra* note 97.

102. S.E.A. 99, 120th Gen. Assemb., 2d Reg. Sess. § 1 (Ind. 2018); see IND. CODE § 34-24-1-2(a), (b) (2022).

103. S.E.A. 99, 120th Gen. Assemb., 2d Reg. Sess. § 1 (Ind. 2018); see IND. CODE § 34-24-1-

However, the petitioner must meet several procedural requirements and establish: (1) they are the owner of the record; (2) they benefit from the use of the property; (3) the property is insured; and (4) they had no reason to believe the property would be used for criminal activity to be granted this relief.<sup>104</sup>

Next, the bill made changes to the timeline in forfeiture actions, in which the prosecuting attorney for the county in which property was seized must file a forfeiture action within twenty-one days after receiving a written demand from the owner for the return of the property or within ninety days after the seizure of property.<sup>105</sup> The bill further prescribes the process for disposition of forfeited property,<sup>106</sup> rules for contingency agreements between the State and outside counsel employed to bring a forfeiture action,<sup>107</sup> and prosecuting attorney reporting requirements.<sup>108</sup>

Since 2018, Indiana legislators have attempted to change Indiana civil forfeiture law. Senate Bill 24, which was introduced and died in committee in 2021, attempted to change civil forfeiture by repealing the General Forfeiture statute.<sup>109</sup> Senate Bill 152, introduced and ultimately halted in the 2022 legislative session, focused on altering the disbursement of civil forfeiture proceeds.<sup>110</sup> Lastly, Senate Bill 295, which is no longer being considered, would have replaced civil forfeiture with criminal forfeiture.<sup>111</sup> The Indiana Legislature is attempting to make progress toward civil forfeiture reform.

Indiana's judiciary is also active in changing and challenging civil forfeiture in Indiana. In 2019, the Indiana Supreme Court faced the issue of whether the Indiana Legislature is constitutionally permitted to determine how and when forfeiture proceeds accrue to the Common School Fund.<sup>112</sup> The court found that historical precedent along with the structure and purpose of the Indiana Constitution supported the Legislature's power to reimburse law enforcement costs.<sup>113</sup> The court held that Indiana's statutory scheme allowing law enforcement cost reimbursement before distribution to the Common School Fund was constitutional despite the Indiana Constitution providing that the Common School Fund would receive forfeiture funds.<sup>114</sup>

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2(d).

104. S.E.A. 99, 120th Gen. Assemb., 2d Reg. Sess. § 1 (Ind. 2018); *see* IND. CODE § 34-24-1-2(c) to (f).

105. S.E.A. 99, 120th Gen. Assemb., 2d Reg. Sess. § 2 (Ind. 2018); *see* IND. CODE § 34-24-1-3(a).

106. S.E.A. 99, 120th Gen. Assemb., 2d Reg. Sess. § 3 (Ind. 2018); *see* IND. CODE § 34-24-1-4(d).

107. S.E.A. 99, 120th Gen. Assemb., 2d Reg. Sess. § 5 (Ind. 2018); *see* IND. CODE § 34-24-1-8.

108. S.E.A. 99, 120th Gen. Assemb., 2d Reg. Sess. § 4 (Ind. 2018); *see* IND. CODE § 34-24-1-4.5.

109. S.B. 24, 122d Gen. Assemb., Reg. Sess. (Ind. 2021).

110. S.B. 152, 122d Gen. Assemb., 2d Reg. Sess. (Ind. 2022).

111. S.B. 295, 122d Gen. Assemb., 2d Reg. Sess. (Ind. 2022).

112. *Horner v. Curry*, 125 N.E.3d 584, 587 (Ind. 2019).

113. *Id.* at 607.

114. *Id.* at 587.

In another 2019 challenge, an Indiana civil forfeiture case made its way to the United States Supreme Court.<sup>115</sup> Indiana law enforcement seized a Land Rover SUV purchased with \$42,000 of life insurance proceeds because of the vehicle's connection with the dealing of a controlled substance, a charge which maintained only a \$10,000 maximum fine.<sup>116</sup> Ultimately, the Court held that the Eighth Amendment's Excessive Fines Clause is an incorporated protection under the Fourteenth Amendment.<sup>117</sup> On remand, the Indiana Supreme Court found that the defendant showed gross disproportionality of the forfeiture in light of the underlying offense.<sup>118</sup> Thus, a significant limitation was imposed on forfeitures as any state forfeiture must be proportionate to the underlying offense.<sup>119</sup> In a novel Indiana Court of Appeals decision, a pro se defendant without other means to employ counsel was allowed to use seized cash to pay for an attorney in a civil forfeiture proceeding.<sup>120</sup> But on transfer, the Indiana Supreme Court held that the Indiana Court of Appeals could not order seized funds to the defendant for the purpose of obtaining a defense.<sup>121</sup>

## II. CORE ISSUES IN INDIANA CIVIL FORFEITURE

Despite recent legislation and judicial activity in civil forfeiture, developments in Indiana civil forfeiture correspond with a slow evolution that has left many crucial and ultimately detrimental aspects of civil forfeiture in place. Namely, the core issues that warrant close attention and reform include a robust profit motive, an easily satisfied standard of proof, insufficient access to counsel, and the lack of the right to a jury trial.

### *A. Strong Profit Incentive*

Indiana's civil forfeiture scheme maintains an enormous profit motive. Indiana's profit incentive comes from many angles and has many layers. This entrenched profit motive creates legitimate concerns as to whether the State is forfeiting property in the interest of justice or to benefit financially from successful forfeiture actions.

The State, namely police and prosecutors, directly benefit from the statutory system of allocating forfeited funds.<sup>122</sup> In 2018, as part of legislative reform, the Indiana Legislature explicitly specified the disposition of proceeds derived from forfeited property in Indiana.<sup>123</sup> Indiana's disposition scheme first requires

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115. *Timbs v. Indiana*, 139 S. Ct. 682 (2019).

116. *Id.* at 686.

117. *Id.* at 686-87.

118. *State v. Timbs*, 169 N.E.3d 361, 376 (Ind. 2021).

119. *See id.*

120. *Abbott v. State*, 164 N.E.3d 736, 745-47 (Ind. Ct. App. 2021), *vacated*, 183 N.E.3d 1074 (Ind. 2022).

121. *Abbott v. State*, 183 N.E.3d 1074, 1085 (Ind. 2022).

122. *See KNEPPER ET AL.*, *supra* note 7, at 52.

123. S.B. 99, 120th Gen. Assemb., 2d Reg. Sess. § 3 (Ind. 2018) (codified as amended at IND.

payment of the contingency fees of non-state counsel.<sup>124</sup> Next, one-third of the leftover funds are deposited into the prosecutor's fund for investigation and prosecution costs.<sup>125</sup> Eighty-five percent of the remaining funds are then sent to local or state funds of law enforcement.<sup>126</sup> Lastly, the Common School Fund receives any funds remaining.<sup>127</sup> Thus, law enforcement is authorized to retain a major share of forfeited funds at the expense of the Common School Fund.

To illustrate, for the 2018 fiscal year, local law enforcement agencies and prosecutors received a total of \$5,223,166 from forfeitures, while the Common School Fund received a meager \$13,619.<sup>128</sup> Prosecutors and law enforcement are given priority and entitled to most funds, while the Common School Fund receives a minuscule amount of proceeds.<sup>129</sup> Commentators previously recognized Indiana as a jurisdiction with a minor profit incentive, but the 2018 enactment codified law enforcement's entitlement to up to ninety-three percent of forfeiture proceeds.<sup>130</sup> Notably, current Indiana law does not provide a method for determining law enforcement costs associated with the crime related to the forfeiture of property.

Unlike other states, Indiana allows the State to employ outside counsel to prosecute civil forfeiture cases on a contingency fee basis, in which outside counsel takes home a certain percentage of forfeiture proceeds.<sup>131</sup> Under this scheme, private prosecutors, who often specialize in civil forfeiture prosecution, are incentivized to successfully forfeit the maximum amount of property as they will receive a share of the proceeds from the forfeiture.<sup>132</sup> Private attorneys likely look to have the most value forfeited as possible.<sup>133</sup>

Another source of profit motive stems from federal equitable sharing in Indiana.<sup>134</sup> Equitable sharing allows Indiana law enforcement to work with the federal government to allow property seized in Indiana to be forfeited through federal forfeiture.<sup>135</sup> The cooperating state or local agency directly receives the

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CODE § 34-24-1-4(d)(3)).

124. IND. CODE § 34-24-1-4(d)(3)(A) (2022).

125. *Id.* § 34-24-1-4(d)(3)(B).

126. *Id.* § 34-24-1-4(d)(3)(C), (D).

127. *Id.* § 34-24-1-4(d)(3).

128. IND. LEGIS. SERVS. AGENCY, FISCAL IMPACT STATEMENT S.B. 24, at 2-3 (2020), *available at* <http://iga.in.gov/static-documents/6/8/a/8/68a83eb8/SB0024.01.INTR.FN001.pdf> [<https://perma.cc/4J8J-6ZZC>].

129. *See* IND. CODE § 34-24-1-4(d) (2022).

130. *See id.*; Olivia Covington, *The Next Step: Civil Forfeiture Reform Efforts Continue in Indiana*, THE IND. LAW. (Feb. 3, 2021), <https://www.theindianalawyer.com/articles/the-next-step-civil-forfeiture-reform-efforts-continue-in-indiana> [<https://perma.cc/632K-KHLD>].

131. IND. CODE § 34-24-1-8 (2022).

132. *See* Louis S. Rulli, *Prosecuting Civil Asset Forfeiture on Contingency Fees: Looking for Profit in All the Wrong Places*, 72 ALA. L. REV. 531, 537, 570 (2021).

133. *See id.* at 574-75.

134. *See* IND. CODE § 34-24-1-9(b) (2022).

135. *See id.*

proceeds from the federal government.<sup>136</sup> Once the federal government successfully forfeits the property, the federal government may send up to eighty percent of forfeiture proceeds back to the local or state law enforcement agency that assisted in the forfeiture while keeping a minimum of twenty percent of the proceeds.<sup>137</sup> In addition to forfeiture proceeds realized through Indiana law, the federal government gave Indiana a total of \$9,059,931 from 2016 to 2020.<sup>138</sup>

### *B. Standard of Proof*

The standard of proof is defined as the “level of proof demanded in a specific case.”<sup>139</sup> In criminal proceedings, the State must meet the highest standard of proof, beyond a reasonable doubt.<sup>140</sup> The clear and convincing evidence standard is commonly used in civil cases that involve allegations of fraud or quasi-criminal issues in the case.<sup>141</sup> In civil forfeiture proceedings, the most common standard is a preponderance of the evidence, which the federal government and twenty states utilize.<sup>142</sup> Indiana is in line with the majority of other states, as the State must prove by a preponderance of the evidence that there is a nexus between the enumerated criminal offense and the property used to commit or attempt to commit a crime.<sup>143</sup> To prevail, the State must show a nexus between the property and the crime by the “greater weight of evidence.”<sup>144</sup>

Indiana law does not provide strong protections to vehicle owners who have their vehicle seized due to alleged criminal conduct of another actor. The prosecutor is merely required to show that the owner of the vehicle “knew or had reason to know that the vehicle was being used in the commission of the offense.”<sup>145</sup> There is no method of asserting an innocent owner defense for other property types, such as real property.

Given that civil forfeiture is closely related to criminal proceedings, elevating the standard of proof is a key focus in civil forfeiture reform—a fact which is illustrated by the thirteen states who raised the standard of proof since 2015.<sup>146</sup> In reform efforts, states vary between preponderance of evidence, clear and convincing evidence, and beyond a reasonable doubt.<sup>147</sup> Some states use a higher standard of proof, such as clear and convincing evidence.<sup>148</sup> Other states take an

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136. 18 U.S.C. § 981(e)(2); 19 U.S.C. § 1616a(c)(1)(B)(ii); 21 U.S.C. § 881(e)(1)(A).

137. See U.S. DEP’T OF JUST. & U.S. DEP’T OF THE TREASURY, *supra* note 31, at 9-10.

138. IND. LEGIS. SERVS. AGENCY, *supra* note 128, at 2.

139. *Standard of Proof*, BLACK’S LAW DICTIONARY (11th ed. 2019).

140. *Reasonable Doubt*, BLACK’S LAW DICTIONARY (11th ed. 2019).

141. See, e.g., *Addington v. Texas*, 441 U.S. 418, 424, 431-32 (1979).

142. KNEPPER ET AL., *supra* note 7, at 39.

143. IND. CODE § 34-24-1-4(a) (2022); *Katner v. State*, 655 N.E.2d 345, 349 (Ind. 1995).

144. *Great Atl. & Pac. Tea Co., v. Custin*, 13 N.E.2d 542, 545 (Ind. 1938).

145. IND. CODE § 34-24-1-4 (2022).

146. KNEPPER ET AL., *supra* note 7, at 39.

147. *Id.*

148. E.g., COLO. REV. STAT. § 16-13-307(1.7)(c) (2022).

approach that makes the standard of proof dependent on the type of property potentially subject to forfeiture. For example, in the District of Columbia, the government must generally prove by a preponderance of the evidence that the property is subject to forfeiture.<sup>149</sup> But for real property and vehicles, the government must prove forfeiture by clear and convincing evidence.<sup>150</sup> A minority of states, such as Florida, require that civil forfeitures be proven based on the highest standard of proof—beyond a reasonable doubt.<sup>151</sup> Other states, such as Oregon, utilize a criminal conviction requirement that requires a person be convicted of a crime before the State can initiate a forfeiture action.<sup>152</sup> However, Indiana maintains the most common and lowest standard of proof for all types of property, preponderance of the evidence, which imposes a minimal burden on the State in proving forfeitures.<sup>153</sup>

### *C. Subpar Access to Counsel Versus the Well-Equipped State*

Indiana does not provide meaningful access to counsel for litigants facing civil forfeiture. The Sixth Amendment provides counsel for a criminal defendant, even when they are without means to pay for an attorney.<sup>154</sup> The right to counsel is also a right to effective counsel as competent legal help is key to affording a defendant the ability to protect their interests in the adversarial process and ensuring that the justice system “produce[s] just results.”<sup>155</sup> The right to counsel is fundamental as someone without counsel, despite their intelligence and capability, lacks the competency to navigate the legal system to refute claims made against them.<sup>156</sup> This is particularly important when one considers that civil forfeiture implicates constitutional rights.<sup>157</sup>

Civil forfeiture occupies a place between criminal and civil law and can be punitive.<sup>158</sup> The constitutional protections afforded to criminal defendants may apply if the civil forfeiture proceeding is punitive enough that it should reasonably be considered a criminal proceeding.<sup>159</sup> However, federal courts have

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149. D.C. CODE § 41-308(d)(1)(B) (2022).

150. *Id.*

151. FLA. STAT. § 932.704(8) (2022).

152. OR. REV. STAT. § 131A.255(1) (2022).

153. IND. CODE § 34-24-1-4(a) (2022).

154. U.S. CONST. amend. VI; *Gideon v. Wainwright*, 372 U.S. 335, 340-43 (1963); see *Right to Counsel*, LEGAL INFO. INST., [https://www.law.cornell.edu/wex/right\\_to\\_counsel](https://www.law.cornell.edu/wex/right_to_counsel) [<https://perma.cc/T97K-HQEV>] (last visited Oct. 23, 2021).

155. *Strickland v. Washington*, 466 U.S. 668, 685 (1984).

156. *Powell v. Alabama*, 287 U.S. 45, 69 (1932).

157. See *Timbs v. Indiana*, 139 S. Ct. 682, 686-87 (Eighth Amendment excessive fines clause); see also *United States v. \$39,000.00 in U.S. Currency*, 951 F.3d 740, 741-42 (6th Cir. 2020) (Fifth Amendment privilege against self-incrimination).

158. *Hughley v. State*, 15 N.E.3d 1000, 1005 (Ind. 2014).

159. *Austin v. United States*, 509 U.S. 602, 621-22 (1993).

found that there is not a right to counsel in forfeiture actions.<sup>160</sup> This is significant because civil forfeiture “is a major, underrecognized contributor that systematically extracts wealth from low-income communities by seizing their cash, cars, and homes.”<sup>161</sup> Thus, those who are already impoverished are deprived of property. They are then left without counsel when they do not have the means to contest the forfeiture action. The prospect of facing civil forfeiture is daunting as civil forfeiture laws are complex. An impoverished litigant is no match for the government with plentiful resources to prosecute the forfeiture action. Additionally, property owners often fail to raise constitutional and statutory defenses available to them.<sup>162</sup>

The Indiana Constitution states that “every person, for injury done to him in his person, property, or reputation, shall have remedy by due course of law.”<sup>163</sup> Importantly, the Indiana Constitution aspires to the ideal that “[j]ustice shall be administered freely, and without purchase; completely, and without denial . . . .”<sup>164</sup> There is no right to counsel in civil forfeiture proceedings despite this highly aspirational constitutional provision.<sup>165</sup> Although the lack of the right to counsel is consistent with other states and the federal government, other jurisdictions have created ways to allow for counsel in civil forfeiture proceedings. For example, the federal government allows for the appointment of counsel where an indigent property owner’s primary residence is subject to forfeiture<sup>166</sup> and where the claimant is represented by appointed counsel in the related criminal action.<sup>167</sup>

A small number of states have abolished civil forfeiture, making the proceeding entirely criminal and thus subject to the counsel provision of the Sixth Amendment.<sup>168</sup> As a result, indigent claimants are entitled to the appointment of counsel to protect against charges against the person and property.<sup>169</sup>

No special statutory provisions apply to civil forfeiture litigants in Indiana. Instead, individuals subject to forfeiture may apply for court-appointed counsel.<sup>170</sup> The indigency statute, aimed at preserving limited resources, requires the defendant to meet several demanding requirements before being entitled to

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160. See *United States v. 87 Blackheath Rd.*, 201 F.3d 98, 99 (2d Cir. 2000), *superseded by statute*, Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106-185, 114 Stat. 202, 205, *as recognized in United States v. 777 Greene Ave.*, 609 F.3d 94, 97 (2d Cir. 2010); *United States v. Deninno*, 103 F.3d 82, 86 (10th Cir. 1996).

161. Rulli, *supra* note 132, at 534.

162. *Id.* at 536.

163. IND. CONST. art. 1, §12.

164. *Id.*

165. See *Abbott v. State*, 183 N.E.3d 1074 (Ind. 2022).

166. 18 U.S.C. § 983(b)(2)(A).

167. *Id.* § 983(b)(1)(A).

168. See, e.g., N.M. STAT. § 31-27-4 (2022); *New Mexico Ends Civil Forfeiture*, INST. FOR JUST.: LIBERTY & L. 3 (June 2015), [https://ij.org/wp-content/uploads/2015/07/IL\\_6\\_15.pdf](https://ij.org/wp-content/uploads/2015/07/IL_6_15.pdf) [<https://perma.cc/XY3M-ATM5>].

169. See *Comparison of Civil and Criminal Forfeiture*, *supra* note 38.

170. IND. CODE § 34-10-1-1 (2022).

counsel.<sup>171</sup> The court must find the person has insufficient means for the action and may appoint an attorney only under exceptional circumstances.<sup>172</sup> In determining whether the case presents such circumstances, the court may consider the applicant's chance of prevailing on the merits and their ability to investigate and present their claims without counsel.<sup>173</sup> The court shall deny the appointment of counsel if "[t]he applicant is unlikely to prevail on the applicant's claim or defense."<sup>174</sup> Although Indiana has this method of obtaining counsel, it does not create meaningful access for those facing forfeiture actions. This is because the indigency statute focuses on the litigant's ability to prevail against the government in addition to a means consideration. In a civil forfeiture scheme that favors the State, it is common for a litigant to have a low likelihood of prevailing against the government.

The State exacerbates this problem with its plentiful access to counsel. It goes without saying that Indiana is always represented by counsel in civil forfeiture actions. Furthermore, the State is favored because prosecutors have experience and knowledge in prosecuting civil forfeiture actions. In the cases where the government prevails, the proceeds from such civil forfeiture action further empower prosecutors.

Indiana further tilts the scales towards the government because it allows prosecutors to retain a private attorney to prosecute civil forfeiture actions on contingency fees.<sup>175</sup> In Indiana, "government-funded prosecutors are authorized to expand their ranks by hiring private attorneys who are then rewarded with a healthy percentage of all the property they can forfeit."<sup>176</sup> Such private attorneys, who make a living on the amount of property they can forfeit, are incentivized to specialize in quick and efficient prosecutions.<sup>177</sup> Many times, the litigants will default, deciding to cut their losses.<sup>178</sup> All in all, Indiana does not do enough to provide counsel to those without means in civil forfeiture.

#### *D. The Right to Jury Trial*

The right to a jury trial is a vital component of the criminal justice and civil system, as evidenced by the founders' adoption of the Sixth and Seventh Amendments.<sup>179</sup> The jury trial was envisioned as a meaningful check on government oppression.<sup>180</sup> Furthermore, "the right to have a jury make the

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171. *Id.* § 34-10-1-2(b) to (d).

172. *Id.*

173. *Id.*

174. *Id.* § 34-10-1-2(d)(2).

175. *Id.* § 34-24-1-8.

176. Rulli, *supra* note 132, at 561-62.

177. *See id.*

178. *See id.* at 571.

179. U.S. CONST. amends. VI, VII.

180. *Why Jury Trials are Important to a Democratic Society*, THE NAT'L JUD. COLL. 1 (2020), <https://www.judges.org/wp-content/uploads/2020/03/Why-Jury-Trials-are-Important-to-a->

ultimate determination of guilt has an impressive pedigree.”<sup>181</sup> This is particularly important in civil forfeiture as abuse is prevalent, primarily due to the strong profit incentive of law enforcement and the lack of legal protections for civil forfeiture litigants.<sup>182</sup> Many jurisdictions maintain the right to a jury trial in forfeiture actions.<sup>183</sup>

There is, however, a right to a jury trial in forfeiture actions under the Seventh Amendment on the federal level.<sup>184</sup> In *United States v. One 1976 Mercedes Benz 280S*, the United States Court of Appeals for the Seventh Circuit held that, in 1791, statutory forfeiture actions on land were suits at common law in which the right to a jury trial was available.<sup>185</sup> However, this does not apply to the states, as the Seventh Amendment is not incorporated through the Fourteenth Amendment.<sup>186</sup>

The right to a jury trial in forfeiture actions is also present at the state level for some states. State courts have considered whether the constitutional right to a jury trial attached at common law when their state constitution was adopted.<sup>187</sup> Importantly, these states have constitutional provisions that guarantee the right to a jury trial in civil actions.<sup>188</sup> These state courts held that there was a right to a jury trial at common law when their state constitutions were ratified, and thus the right to a jury trial was preserved.<sup>189</sup> Therefore, a statutory provision prohibiting jury trials in forfeiture actions is unconstitutional where there is a constitutional guarantee of a jury trial.<sup>190</sup> The Supreme Court of Montana noted that federal jurisprudence, state jurisprudence, and American and English common law supported the decision to “join the majority of states and federal courts” in finding a constitutional right to a jury trial in forfeiture proceedings.<sup>191</sup>

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Democratic-Society.pdf [https://perma.cc/DX7M-66MT].

181. *United States v. Gaudin*, 515 U.S. 506, 510 (1995).

182. *See* Rulli, *supra* note 132, at 538.

183. *See, e.g.*, FED. R. CIV. P. G(9); CAL. HEALTH & SAFETY CODE § 11488.4(i)(5) (West 2022); *State v. Items of Real Prop. Owned &/or Possessed by Chilinski*, 383 P.3d 236, 245 (Mont. 2016); *Idaho Dep’t of L. Enft By & Through Cade v. Free*, 885 P.2d 381, 386 (Idaho 1994); *Medlock v. 1985 Ford F-150 Pick Up VIN 1FTDF15YGFNA22049*, 417 S.E.2d 85, 86 (S.C. 1992); *In re Forfeiture of 1978 Chevrolet Van VIN: CGD1584167858*, 493 So. 2d 433, 434 (Fla. 1986).

184. *E.g.*, *United States v. One 1976 Mercedes Benz 280S*, Serial No. 11602012072193, 618 F.2d 453, 456 (7th Cir. 1980); *see also, e.g.*, FED. R. CIV. P. G(9).

185. *One 1976 Mercedes Benz 280S*, 618 F.2d at 458.

186. *McDonald v. City of Chicago*, 561 U.S. 742, 765 n.13 (2010).

187. *E.g.*, *Chilinski*, 383 P.3d at 250 (Mont. 2016); *Free*, 885 P.2d at 384; *Medlock*, 417 S.E.2d at 86; *1978 Chevrolet Van*, 493 So. 2d at 433.

188. MONT. CONST. art. 2, § 26; FLA. CONST. art. 1, § 22; IDAHO CONST. art. 1, § 7; S.C. CONST. art 1, § 14.

189. *E.g.*, *Chilinski*, 383 P.3d at 245; *Free*, 885 P.2d at 386; *Medlock*, 417 S.E.2d at 86; *Chevrolet Van*, 493 So.2d at 436.

190. *See, e.g.*, *Chilinski*, 383 P.3d at 245 (striking a statutory provision prohibiting jury trials in forfeiture actions).

191. *Id.* at 243.

Like other states allowing jury trials, the Indiana Constitution states that “[i]n all civil cases, the right of trial by jury shall remain inviolate.”<sup>192</sup> The Supreme Court of Indiana has found that there is no right to a jury trial because forfeiture actions are statutory proceedings and there is no right to a jury trial in statutory proceedings.<sup>193</sup> There are no current provisions of the General Forfeiture statute that give such a right.<sup>194</sup> Thus, the Indiana Supreme Court and the Indiana Legislature have not extended the right to a jury trial in forfeiture actions, despite a right to a jury trial in other quasi-criminal proceedings.<sup>195</sup>

### III. LOOKING TO OTHERS AND WITHIN FOR SOLUTIONS

#### *A. Mitigation of Profit Incentive*

Indiana can look to other states for suggestions on eliminating or mitigating the profit motive of law enforcement in civil forfeiture. The civil forfeiture laws of other states use schemes that distribute funds without law enforcement taking most of the proceeds. Additionally, proposed Indiana legislation seeks to alter law enforcement’s current entitlement to forfeited funds.

The District of Columbia illustrates that the profit incentive of law enforcement can be mitigated as its statutory scheme directs all proceeds or currency acquired from forfeiture to be deposited in the State’s General Fund. Law enforcement cannot use the property unless law enforcement buys such property at a public auction.<sup>196</sup> The Attorney General of the District of Columbia took issue with this scheme as it deprived law enforcement of financial benefits.<sup>197</sup> However, a legislative committee asserted that police should not be funded “by seizing property and cash from poor residents.”<sup>198</sup> Vermont provides that law enforcement receives a portion of forty-five percent of forfeiture proceeds, but such funds are limited to the costs incurred in the forfeiture and the actual personnel costs.<sup>199</sup> The remaining fifty-five percent of proceeds go to

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192. IND. CONST. art 1, § 20.

193. *Campbell v. State*, 87 N.E. 212, 214-15 (Ind. 1909) (“This is a statutory proceeding, and not a civil case under the common law when the Constitution was adopted . . . and so it has been uniformly held in this state that statutory proceedings parties are not entitled to trial by jury as a constitutional right.”).

194. *See* IND. CODE § 34-24-1 (2022).

195. *See, e.g., Kirts v. State*, 689 N.E.2d 756, 757 (Ind. Ct. App. 1997) (affirming conviction after a jury trial for a traffic infraction).

196. D.C. CODE § 41-310(a), (b) (2022).

197. TOMMY WELLS, COUNCIL OF THE D.C. COMM. ON JUDICIARY & PUB. SAFETY, REPORT ON BILL 20-48, “CIVIL ASSET FORFEITURE AMENDMENT ACT OF 2014” 10 (Nov. 12, 2014), [https://lims.dccouncil.us/downloads/LIMS/29204/Committee\\_Report/B20-0048-CommitteeReport1.pdf](https://lims.dccouncil.us/downloads/LIMS/29204/Committee_Report/B20-0048-CommitteeReport1.pdf) [<https://perma.cc/M4QN-LG5B>].

198. *Id.*

199. VT. STAT. ANN. tit. 18, § 4247(b)(1)(A)-(B) (2022).

Vermont's General Fund.<sup>200</sup>

Indiana legislators introduced three bills that would have affected the profit incentive of the State in forfeitures.<sup>201</sup> Although the following bills are inactive, they are a valuable tool in evaluating methods to mitigate the State's profit motive. Senate Bill 24 attempted to precisely define law enforcement costs as those incurred by law enforcement in arresting and investigating the person who used or possessed the property, prosecution of the forfeiture action, investigating the offense and any other offense related to the property, and the costs of prosecuting the civil forfeiture action.<sup>202</sup> Additionally, the bill set forth a provision ending the equitable sharing program.<sup>203</sup>

Provisions from Senate Bill 295 would prioritize parties other than law enforcement, such as secured interest holders, innocent owners, and crime victims, before distributing up to fifty percent of the remaining forfeiture funds to law enforcement and up to twenty-five percent to prosecutors.<sup>204</sup> Public defenders or court-appointed counsel would be entitled to up to twenty-five percent of funds, with the Common School Fund receiving leftover funds.<sup>205</sup> Forfeiture funds would reimburse law enforcement personnel and prosecutors' salaries, benefits, and overtime pay and the amount expended in their duties.<sup>206</sup>

Under the provisions of Senate Bill 24 and Senate Bill 295, law enforcement would likely receive less in civil forfeiture as there would be a proscribed limit on law enforcement costs. However, it is unknown if the costs incurred would be limited by this language. There is no way to ascertain how much property law enforcement currently retains to reimburse actual costs and how law enforcement calculates costs for reimbursement. However, law enforcement would still stand to benefit from forfeited funds directly, and the profit motive of outside counsel would still be present with their right to take priority in compensation under their contingency agreement.

Indiana Senate Bill 152 would dramatically change the distribution of forfeiture funds.<sup>207</sup> The bill would still give outside counsel and prosecutors priority in payment of their costs of the forfeiture action.<sup>208</sup> However, it would provide for forty-two percent of funds remaining after that disbursement to the United Way organization in the county for use in the community.<sup>209</sup> Additionally, the bill would prevent law enforcement from acquiring military-style equipment with forfeiture proceeds and end the equitable sharing program.<sup>210</sup>

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200. *Id.* § 4247(b)(2).

201. *See supra* notes 109-11 and accompanying text.

202. S.B. 24, 122d Gen. Assemb., Reg. Sess. § 8 (Ind. 2021).

203. *Id.* § 15.

204. S.B. 295, 122d Gen. Assemb., 2d Reg. Sess. § 23 (Ind. 2022).

205. *Id.*

206. *Id.*

207. S.B. 152, 122d Gen. Assemb., 2d Reg. Sess. § 2 (Ind. 2022).

208. *Id.*

209. *Id.*

210. *Id.*

Senate Bill 152 allocates a large percentage of forfeiture proceeds to the United Way in the county responsible for the forfeiture.<sup>211</sup> Not only would this scheme substantially reduce the number of funds that law enforcement may receive, but it would be distributed in such a way to help Hoosiers obtain basic needs necessary for survival.<sup>212</sup> With this substantial revenue stream, impoverished Hoosiers would receive resources from United Way. While civil forfeiture frequently takes from those already impoverished, this scheme would allow civil forfeiture to benefit the impoverished.

The Legislature could also devise a scheme consistent with the Indiana Constitution, which provides for forfeiture proceeds to flow into the Common School Fund. The District of Columbia shows that it is possible to devise a scheme to distribute forfeited property where law enforcement does not stand to retain any of the fruits of forfeiture.<sup>213</sup> However, the Legislature is likely reluctant to devise such a scheme because of the 2018 legislation that explicitly codified law enforcement's entitlement to a massive portion of forfeited funds.<sup>214</sup> Thus, it is unlikely that legislators will enact such a dramatic change. Vermont's approach creates a kind of compromise that would divide forfeited funds nearly equally between the Common School Fund and law enforcement, which is quite similar to Senate Bill 152.<sup>215</sup>

The introduction of these three bills that would affect the distribution of forfeited property and funds reveals that legislators are aware that the profit motive of law enforcement needs to be mitigated to the extent possible. A commonality between Senate Bill 24 and Senate Bill 152, the end of equitable sharing, is a crucial step to take as changes to the disbursement of funds will be meaningless if law enforcement can use federal civil forfeiture to receive funds from forfeitures in Indiana. If this provision were to stay in place, law enforcement would be incentivized to use the federal forfeiture system, ultimately allowing law enforcement to retain more proceeds than available under reformed Indiana law. Consequently, Indiana litigants will not be subject to other aspects of the federal forfeiture system, such as the standard of proof that Indiana legislation may heighten. Federal prosecutors would be tasked with prosecuting forfeiture actions, which would leave Indiana civil forfeiture law moot.

It is important to acknowledge that Indiana reform focusing on mitigation of profit incentive will be severely limited if equitable sharing is left in place as law enforcement could sidestep any limitations imposed by the Indiana Legislature by participating in joint forfeitures with the federal government. Undoubtedly, law enforcement and prosecutors will still need to be entitled to funds. The current scheme has likely created a dependency in law enforcement on the

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211. *Id.*

212. *See Basic Needs*, UNITED WAY CENT. IND., <https://www.uwci.org/basic-needs> [<https://perma.cc/TXX5-VJEK>] (last visited Nov. 17, 2021).

213. *See* D.C. CODE § 41-310 (2022).

214. *See* IND. CODE § 34-24-1-4 (2022).

215. *See* discussion *supra* Section I.B.; *see also* S.B. 152, 122d Gen. Assemb., 2d Reg. Sess. § 2 (Ind. 2022).

proceeds from forfeiture. However, law enforcement can still take priority and have the percentage of funds to which they are entitled reduced from over ninety percent to a lower percentage. The above-mentioned bills would have this effect, with Senate Bill 152 directing the funds for the benefit of the community. None of the proposed legislation seeks to limit the profit motive of outside counsel employed by the State. This issue warrants further attention in future legislation. However, these bills are a step in the right direction by eliminating the profit motive inherent in equitable sharing and the large number of forfeiture proceeds that law enforcement and prosecutors are entitled to retain.

### *B. Alternatives to Indiana's Standard of Proof*

Although civil forfeiture is rooted in history and heavily utilized by the federal government and states over the last century, Maine, New Mexico, North Carolina, and Nebraska abolished civil forfeiture.<sup>216</sup> Instead, these states rely on criminal forfeiture. For example, North Carolina replaced civil forfeiture with criminal forfeiture, in which a conviction must occur before property can be forfeited.<sup>217</sup> This effectively requires that prosecutors prove that property is forfeitable beyond a reasonable doubt.

Closely related to criminal forfeiture is the requirement that a criminal conviction must precede any civil forfeiture action against property. Minnesota utilizes a criminal conviction requirement before the State can initiate forfeiture actions.<sup>218</sup> The State must then prove by clear and convincing evidence that the property is connected to the offense.<sup>219</sup> As of December 2020, fifteen states use a prior conviction provision.<sup>220</sup> After the conviction, a preponderance of the evidence or clear and convincing evidence is the standard that the state must meet to forfeit property.<sup>221</sup>

Indiana legislation embraces the criminal conviction approach. The legislation would change the standard of proof for not abandoned or unclaimed property from a preponderance of evidence to clear and convincing.<sup>222</sup> Under Senate Bill 24, there must be a related criminal prosecution that must result in a conviction.<sup>223</sup> This would add two improvements to the standard of proof by first requiring the government to prove the actor's conduct beyond a reasonable doubt

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216. Nick Sibilla, *Maine Abolishes Civil Forfeiture, Now Requires a Criminal Conviction to Take Property*, FORBES (July 14, 2021, 2:45 PM), <https://www.forbes.com/sites/nicksibilla/2021/07/14/maine-abolishes-civil-forfeiture-now-requires-a-criminal-conviction-to-take-property/?sh=5ca3d70d5cf9> [https://perma.cc/S7TG-2UY6].

217. N.C. GEN. STAT. § 14-2.3(a) (2022).

218. MINN. STAT. § 609.531(6a)(b)(1) (2022).

219. *Id.* § 609.531(6a)(d).

220. KNEPPER ET AL., *supra* note 7, at 40.

221. *E.g.*, MONT. CODE ANN. § 44-12-210(3) (2022); *see also* OR. REV. STAT. § 131A.255(1), (3) (2022).

222. S.B. 24, 122d Gen. Assemb., Reg. Sess. § 4 (Ind. 2021).

223. *Id.*

in the criminal proceeding, followed by the property's guilt by clear and convincing evidence in the subsequent civil forfeiture proceeding.<sup>224</sup> Senate Bill 295 takes a similar approach as a person must be convicted of the charged offense, and then the State must prove that the property is subject to forfeiture by clear and convincing evidence.<sup>225</sup>

Like mitigation of profit motive, the ability of State law enforcement to participate in the federal equitable sharing program severely limits changes to the standard of proof. For example, North Carolina does not use civil forfeiture, yet law enforcement received over \$293 million from federal forfeitures from 2000 to 2019 while reporting no state forfeiture revenues during the same period.<sup>226</sup> North Carolina authorities can circumvent state law by forfeiting property under federal civil forfeiture law with this extensive use of the federal scheme. Although the revenue received yearly fluctuates, North Carolina law enforcement relies on federal law to receive funds from forfeiture.<sup>227</sup> The use of equitable sharing affects other elements of state civil forfeiture. For example, authorities can dodge proving forfeiture beyond a reasonable doubt and use the federal standard of proof—a preponderance of the evidence—to enjoy the fruits of forfeiture. Thus, Indiana must eliminate equitable sharing to ensure a meaningful change in Indiana's standard of proof.<sup>228</sup>

Requiring a criminal conviction is not particularly helpful as it would integrate the criminal standard of proof regarding the person. However, the property would be subject to a civil standard of proof, clear and convincing evidence. Conviction requirements still maintain the bifurcated nature of civil forfeiture in which the standard of proof demanded is drastically lower for the property than the person. Thus, criminal conviction requirements create one more obstacle for the government in forfeiture, but the problems stemming from the civil nature of forfeiture remain constant.<sup>229</sup>

Raising the standard of proof from preponderance of evidence to clear and convincing evidence may not make proving forfeitures more difficult for the government. A study of 159 Indiana civil forfeiture actions in 2018 revealed that property owners did not defeat the government in a single case.<sup>230</sup> It is unclear if a heightened civil standard of proof would significantly improve such outcomes in practice. Elevating the standard of proof from a preponderance of the evidence to clear and convincing will still allow the government to prevail in forfeiture actions by showing “a rational basis which can be supported by direct, circumstantial, or inferential evidence that there were grounds for the seizure.”<sup>231</sup>

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224. *Id.*

225. S.B. 295, 122d Gen. Assemb., 2d Reg. Sess. § 23 (Ind. 2022).

226. KNEPPER ET AL., *supra* note 7, at 126.

227. *Id.*

228. *See, e.g., id.* at 100 (noting Maryland raised the standard of proof and imposed limits on federal equitable sharing).

229. *See id.* at 41 (discussing the deficiencies of criminal conviction requirements).

230. Rulli, *supra* note 132, at 574.

231. Meghan Berkery, Note, *Rethinking the Future of Civil Asset Forfeiture in Michigan: The*

For example, Kentucky is a state that uses a clear and convincing evidence standard.<sup>232</sup> However, the State may satisfy this standard of proof by showing a small degree of traceability between the property and crime.<sup>233</sup> This is similar to Indiana's requirement as Indiana requires a nexus, described as "more than an incidental or fortuitous connection"<sup>234</sup> between the General Forfeiture statute's enumerated crimes and the property subject to forfeiture. The nexus requirement articulates the State's requirement to prove forfeiture by a preponderance of the evidence.<sup>235</sup> For example, suppose law enforcement finds drugs and currency on an individual. In that case, the State will likely be able to prove that the property is subject to forfeiture merely by showing a "nexus" or connection between the money and the drug offense. Further, the State may use the mere proximity of the cash to the drugs as prima facie evidence in proving the "nexus."<sup>236</sup> Like the phenomenon seen in Kentucky, a clear and convincing standard of proof may not increase the difficulty of proving a nexus between the crime and property before Indiana courts.

Implementing a criminal conviction requirement will make forfeitures more difficult for the State. However, once the State secures a criminal conviction, it is unlikely that a clear and convincing evidence standard of proof will make a meaningful impact on the level of proof demanded in proving the guilt of property. Implementing a beyond a reasonable doubt evidentiary standard is the best course of action to ensure that Indiana courts hold the State to a higher standard of proof than what is currently required under a preponderance of the evidence standard.

### *C. Increasing Access to Counsel*

The necessity of counsel in civil forfeiture proceedings was recognized at the federal level as early as 2000 when Congress passed CAFRA.<sup>237</sup> CAFRA created the requirement that an indigent property owner, whose primary residence is subject to forfeiture, must be provided counsel by the court.<sup>238</sup> CAFRA gives federal courts discretionary authority to appoint counsel to an indigent individual who was represented by a public defender in a related criminal case.<sup>239</sup> CAFRA further provides for reimbursement of reasonable attorneys' fees if a forfeiture litigant "substantially prevails" against the government.<sup>240</sup> And in 2020, Congress

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*Impact of an Evidentiary Standard*, 96 U. DET. MERCY L. REV. 329, 348 (2019).

232. KY. REV. STAT. ANN. § 218A.410(1)(j) (West 2022).

233. *Osborne v. Commonwealth*, 839 S.W.2d 281, 283-84 (Ky. 1992).

234. *Katner v. State*, 655 N.E.2d 345, 348-49 (Ind. 1995).

235. *Serrano v. State*, 946 N.E.2d 1139, 1143 (Ind. 2011).

236. *See* IND. CODE § 34-24-1-1(d) (2022).

237. Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106-185, 114 Stat. 202 (codified as amended in scattered sections of 18 U.S.C. and 28 U.S.C.).

238. 18 U.S.C. § 983(b)(2)(A).

239. *Id.* § (b)(1)(A).

240. 28 U.S.C. § 2465(b)(1)(A).

introduced the Due Process Act to give all indigent individuals the right to counsel in civil forfeiture proceedings.<sup>241</sup>

In 2021, Maine abolished civil forfeiture, leaving criminal forfeiture in its place.<sup>242</sup> Moving the proceeding to criminal court gives individuals facing forfeiture strong protections under the Sixth Amendment, which provides the right to counsel for those who cannot afford counsel.<sup>243</sup> Although the right to counsel is not absolute in criminal forfeiture proceedings,<sup>244</sup> the forfeiture action triggers the constitutional guarantee of counsel to indigent individuals in criminal proceedings. Thus, criminal defendants have counsel to defend against conviction and the forfeiture of property related to the proceeding.

Failed Indiana legislation attempted to expand access to counsel for Indiana forfeiture defendants who contest the forfeiture by requiring a criminal conviction of the person who possessed or used the property in the underlying offense.<sup>245</sup> If the public defender represented an indigent defendant in the related criminal case, the public defender could represent the indigent in the civil forfeiture proceeding.<sup>246</sup> This legislation would have entitled defendants to a public defender or court-appointed counsel to defend against forfeiture.<sup>247</sup>

Allowing a public defender to potentially represent the defendant in a subsequent civil forfeiture proceeding is not statutorily authorized by any state. A Pennsylvania appellate court decided that it was in the interest of justice to allow a public defender, who represented a defendant in a prior drug prosecution, to represent a civil forfeiture litigant in the related forfeiture action.<sup>248</sup> However, courts do not commonly authorize such appointments. Thus, the impact of increasing access to counsel in this way is empirically unknown.

Allowing for discretionary authority of the public defender to represent an indigent in the subsequent proceeding will not likely expand access to counsel in a meaningful way. Public defenders are already shorthanded as a recent study revealed that public defenders carry heavy caseloads as is.<sup>249</sup> If a public defender can decide whether they will provide counsel, they will likely decide to focus their efforts on criminal actions because of the right to counsel in criminal actions

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241. Due Process Act, S. 4861, 116th Cong. (2019–2020).

242. See ME. REV. STAT. tit. 15, § 5826 (2022); see also Sibilla, *supra* note 216.

243. U.S. CONST. amend. VI.

244. *United States v. Monsanto*, 491 U.S. 600, 614 (1989) (holding forfeitable assets are not available for the retention of counsel of one's choice).

245. S.B. 24, 122d Gen. Assemb., Reg. Sess. § 4 (Ind. 2021).

246. *Id.*

247. *Id.* § 10.

248. *Commonwealth v. \$519.00 U.S. Currency/Coin*, No. 1403 C.D. 2011, 2012 WL 8685271, at \*3-4 (Pa. Commw. Ct. May 21, 2012).

249. See AM. BAR ASS'N, THE INDIANA PROJECT: AN ANALYSIS OF THE INDIANA PUBLIC DEFENSE SYSTEM AND ATTORNEY WORKLOAD STANDARDS 25-26 (July 24, 2020), <https://www.in.gov/publicdefender/files/FINAL-FINAL-FINAL-WORKLOAD-STUDY.pdf> [<https://perma.cc/CH5L-37KS>].

found in the United States and Indiana Constitution,<sup>250</sup> and the necessity of devoting their time to criminal representation as public defenders are currently stretched thin with massive caseloads.<sup>251</sup> Due to the complexity of forfeiture actions, a forfeiture scheme that is advantageous to the State, and the abundant resources of the government,<sup>252</sup> public defenders are in an unfavorable position to help individuals subject to Indiana forfeiture. Moreover, there is the worry that Indiana public defenders struggle to provide effective assistance of counsel as is.<sup>253</sup>

A public defender will not be in the position to help many litigants fighting against forfeiture. The property owner subject to forfeiture might not be prosecuted for the underlying crime if another person used the property in the commission of the underlying crime.<sup>254</sup> In this scenario, the owner would not have access to a public defender under Senate Bill 24 as they would not be involved with the underlying criminal proceeding. Facially, the legislation gives a method of obtaining counsel, but the practical effect of such appointment is likely to be minimal.

Another means of providing counsel comes from *Abbott v. State*, in which the Indiana Court of Appeals allowed access to seized currency to pay for the legal costs of an indigent's forfeiture action.<sup>255</sup> However, this attempt to expand access to counsel was undermined by the Supreme Court of Indiana.<sup>256</sup>

In *Abbott v. State*, the Indiana Supreme Court held that the Racketeering Statute does not permit a court to release seized cash in a forfeiture action so that the defendant can hire legal counsel in the same action.<sup>257</sup> Additionally, in denying Abbott's request for appointed counsel the trial court did not abuse its discretion in finding that Abbott was unlikely to succeed in the forfeiture action, despite the existence of exceptional circumstances justifying the appointment of counsel.<sup>258</sup>

In April 2015, Indiana law enforcement seized drugs, firearms, and \$6,760

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250. U.S. CONST. amend. VI; IND. CONST. art. 1, § 13.

251. See AM. BAR ASS'N, *supra* note 249, at 25-26.

252. Rulli, *supra* note 132, at 536.

253. See SIXTH AMEND. CTR., THE RIGHT TO COUNSEL IN INDIANA: EVALUATION OF TRIAL LEVEL INDIGENT DEFENSE SERVICES I-IV (2016), [https://sixthamendment.org/6ac/6AC\\_indianareport.pdf](https://sixthamendment.org/6ac/6AC_indianareport.pdf) [<https://perma.cc/L4F2-Z4KW>].

254. See IND. CODE § 34-24-1-4(a) (2022) ("prosecuting attorney must also show by a preponderance of the evidence that [the record owner of a vehicle] knew or had reason to know that the vehicle was being used in the commission of the offense" when the vehicle is seized from a person other than the record owner).

255. *Abbott v. State*, 164 N.E.3d 736, 745-46 (Ind. Ct. App. 2021), *vacated*, 183 N.E.3d 1074 (Ind. 2022) (holding a defendant could use seized funds for a defense).

256. *Abbott v. State*, 183 N.E.3d 1074, 1080-83 (Ind. 2022) (holding that the racketeering forfeiture statute does not permit a court to release seized funds for a defendant's defense).

257. *Id.*

258. *Id.* at 1083-85.

of cash on Abbott's person.<sup>259</sup> Abbott received felony drug charges.<sup>260</sup> During the pendency of Abbott's criminal case, the State filed a forfeiture action under the General Forfeiture statute and the Racketeering Statute.<sup>261</sup> Counsel represented Abbott at the onset of the action; however, Abbott's counsel withdrew in October 2015 because Abbott could not pay legal fees.<sup>262</sup> Abbott subsequently requested court appointment of counsel via the indigency statute, but the trial court denied this request due to Abbott's low likelihood of prevailing on the merits.<sup>263</sup> The State moved for summary judgment on the entirety of the cash in July 2018.<sup>264</sup> In response, Abbott, proceeding pro se, stated that the cash found on his person was to purchase a motorcycle and designated sources of lawful wages that exceeded \$20,000.<sup>265</sup> The trial court granted summary judgment, but the Court of Appeals reversed because Abbott's designations created a genuine issue of fact as to whether the cash was lawfully obtained.<sup>266</sup>

The Court of Appeals also held that Abbott was not entitled to counsel at the public's expense because Abbott had the means to pay for counsel.<sup>267</sup> The court reasoned that the cash belonged to Abbott until the State established a nexus between the cash and corresponding drug crime.<sup>268</sup> In allowing the use of the funds for a defense, the court interpreted the Racketeering statute to authorize the court to order the use of the cash for the purpose of funding a defense.<sup>269</sup>

The Court of Appeals noted that allowing the seized cash for the "limited purpose of funding a defense": (1) "levels the playing field" between forfeiture defendants and the State; (2) ensures property is not "needlessly and unjustly forfeited;" and (3) comports with the Indiana Constitution which states "every person, for injury done to him in his person, property, or reputation, shall have remedy by due course of law."<sup>270</sup> The court stated that allowing use of the seized cash ensures that trained counsel represents both sides in civil forfeiture actions, in which defendants are faced with severe consequences but not afforded the constitutional protections of criminal procedure.<sup>271</sup> Furthermore, the court bolstered their decision by stating that nonlawyers do not have the ability to advocate for constitutional rights implicated by civil forfeiture.<sup>272</sup>

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259. *Id.* at 1077.

260. *Id.*

261. *Id.*

262. *Id.*

263. *Id.* at 1077-78.

264. *Id.* at 1078.

265. *Id.*

266. *Id.*

267. *Abbott v. State*, 164 N.E.3d 736, 745 (Ind. Ct. App. 2021), *vacated*, *Abbott v. State*, 183 N.E.3d 1074 (Ind. 2022).

268. *Id.* at 744-45.

269. *Id.* at 747.

270. *Id.* at 745 (quoting IND. CONST. art. 1 § 12).

271. *Id.* at 746.

272. *Id.*

Nevertheless, the Indiana Supreme Court later found that the structure of the Racketeering statute and the legislative intent behind Indiana's civil forfeiture scheme did not support Abbott's use of the disputed cash for a defense.<sup>273</sup> The court did find that Abbott's case presented exceptional circumstances that warranted civil appointment of counsel.<sup>274</sup> That said, the court found that the trial court did not abuse its discretion in finding that Abbott was unlikely to prevail on the merits, and therefore, properly denied Abbott's request for court appointed counsel.<sup>275</sup> As a result, the court eliminated the option of using disputed seized funds to increase access to counsel.

Although the Indiana Court of Appeals' decision was vacated, it would not have affected many civil forfeiture cases because most forfeiture actions are not initiated under the Racketeering statute that the court applied in *Abbott*.<sup>276</sup> Because *Abbott* was vacated, legislation is the sole remaining option to increase access to counsel by using a defendant's seized funds when there are no other available assets to obtain counsel. For example, New York allows the release of seized property subject to forfeiture to pay reasonable living expenses and bona fide attorney's fees in a forfeiture action provided the defendant shows the lack of availability of other assets.<sup>277</sup> The court is to release the funds without regard to whether the funds are the proceeds or instrumentality of a crime.<sup>278</sup> Enacting such legislation or a variation of such legislation would ensure that more funds are available for litigants facing forfeiture.

The seized funds for a defense approach may be further limited as assets seized may not be liquid or enough to pay for a defense. For example, in 2018, the median amount of cash seized in a study of Marion County civil forfeiture proceedings was \$2,667.00, and approximately twenty-eight percent of seizures involved cash amounts under \$1,000.<sup>279</sup> These cash amounts may not be enough to retain an attorney for civil forfeiture proceedings that will likely be expensive due to their complex nature. This method of obtaining counsel is limited in its application.

Although *Abbott* eliminated a temporary moment of hope for indigent civil forfeiture litigants, Chief Justice Rush provided a dissent in part that opined civil forfeiture actions present special circumstances that should be considered in evaluating requests for counsel under the indigency statute.<sup>280</sup> Specifically, civil forfeiture proceedings have unique characteristics that constrain a civil forfeiture defendant's ability to show a likelihood of success.<sup>281</sup> Such characteristics include

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273. *Abbott v. State*, 183 N.E.3d 1074, 1080-83 (Ind. 2022).

274. *Id.* at 1084-85.

275. *Id.* at 1085.

276. Brief, *supra* note 67, at 14-15.

277. N.Y. C.P.L.R. § 1312(4) (McKINNEY 2022).

278. *Id.*

279. Rulli, *supra* note 132, at 570.

280. *Abbott*, 183 N.E.3d at 1086 (Ind. 2022) (Rush, C.J., concurring in part and dissenting in part).

281. *Id.* at 1086.

civil forfeiture's quasi-criminal nature; the lack of procedural due process protections (compared to its criminal counterpart); no right to counsel; a lower burden of proof; and risk of self-incrimination if a parallel criminal proceeding is ongoing.<sup>282</sup> Chief Justice Rush concluded that the trial court's denial of counsel was an abuse of discretion after a consideration of the abovementioned exceptional circumstances and the fact that Abbott's case was strong enough to proceed to trial.<sup>283</sup> The dissent provides hope that trial courts will consider requests for court appointed counsel with the considerations set forth by Chief Justice Rush, which may result in more access to counsel under the indigency statute.

Given the shortcomings of Indiana legislation and Indiana jurisprudence in expanding access to counsel in Indiana, Indiana can look to CAFRA to fill in some gaps. By providing counsel to indigent individuals who may lose their primary residence, Congress seems to have recognized that it is in the interest of fairness to appoint counsel for someone who may lose real property, which can have a devastating impact on someone already without means. Furthermore, it would be wise to allow for attorneys' fees if a litigant prevails against the government in forfeiture proceedings. This may give defense attorneys more incentive to defend the interests of those without the means to pay counsel initially. However, this approach is limited as well because even a skilled attorney may have difficulty prevailing in a system that is so heavily favored towards the State.

There is no perfect solution to increasing access to counsel in civil forfeiture actions. As seen in Indiana legislation and jurisprudence, providing meaningful access to counsel will likely require creative solutions to increase access to counsel. The presence of legislation that would make forfeitures purely criminal proceedings suggests that Indiana legislators are aware that forfeiture is a civil proceeding intertwined with criminal law in which litigants should enjoy greater access to counsel than they would in a typical civil proceeding. Indiana legislation providing for a public defender in the subsequent civil forfeiture proceeding is progress as it explicitly provides a means of obtaining counsel for those facing civil forfeiture in Indiana.<sup>284</sup> However, future legislation must provide more civil forfeiture-specific provisions, such as access to seized funds and attorneys' fees, to make a meaningful impact.

Senate Bill 295 provides the best solution to inadequate access to counsel in forfeiture actions.<sup>285</sup> Indigent defendants would be entitled to a public defender or court appointed counsel by making forfeitures criminal proceedings. Although worries of overly burdensome public defender caseloads and ineffective representation will persist, a forfeiture defendant would not have to rely on the Indiana indigency statute or discretionary representation by a public defender. Furthermore, creative solutions to increase access to counsel would be

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282. *Id.* at 1086-87.

283. *Id.* at 1086.

284. *See* S.B. 295, 122d Gen. Assemb., 2d Reg. Sess. § 23 (Ind. 2022).

285. *Id.*

unnecessary as there is an absolute entitlement to representation in criminal proceedings. Senate Bill 295 is the best solution to ensuring that trained counsel represents those without means in forfeiture actions.<sup>286</sup>

#### *D. Implementing the Right to Jury Trial*

Under proposed legislation, Indiana would join the majority of states in allowing a right to a jury trial.<sup>287</sup> In a jury trial, an individual convicted of a crime would utilize the same jury, which would reconvene to hear evidence in the forfeiture proceeding.<sup>288</sup> The jury would then have to find that the property is subject to forfeiture by clear and convincing evidence.<sup>289</sup> The legislation would also codify constitutional excessiveness and proportionality considerations.<sup>290</sup> The jury's determination of proportionality and excessiveness would be guided by: (1) the fair market value of the property; (2) the seriousness of the crime; (3) the extent to which the property was used in committing the crime; (4) the sentence to be imposed for committing the crime; (5) whether the crime was completed or attempted; (6) hardship to the defendant; and (7) hardship imposed on the defendant's family.<sup>291</sup> The implementation of this right serves a critical purpose considering excessiveness determinations post *Timbs v. Indiana*.<sup>292</sup> By allowing citizens to make this determination, there is more faith that the system is not unjustly taking property from Hoosiers.

Imposing the right to a jury trial in Indiana will undoubtedly increase the costs of prosecuting forfeiture actions. Judges and attorneys view other means of case resolution as "more predictable, faster, and more cost-effective than jury trials."<sup>293</sup> Compared to the vast amount of funds the State receives in civil forfeiture, the cost imposed on the State by the right to a jury trial will be minimal. Further, jury trials in Indiana have become scarcer as the years go on. From 2014 to 2017, there was a twenty percent decline in jury trials in civil tort cases.<sup>294</sup> There is room for more civil trials as the right to a jury trial in civil tort actions is now "more conceptual than tangible."<sup>295</sup> Importantly, judges and

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286. *See id.*

287. Senate Bill 295 and Senate Bill 24 set forth the same scheme for jury trials in forfeiture actions. *See id.*; S.B. 24, 122d Gen. Assemb., Reg. Sess. § 10 (Ind. 2021).

288. S.B. 295, 122d Gen. Assemb., 2d Reg. Sess. § 23 (Ind. 2022).

289. *Id.*

290. *Id.*

291. *Id.*

292. 139 S. Ct. 682 (2019).

293. Shari Seidman Diamond & Jessica M. Salerno, *Reasons for the Disappearing Jury Trial: Perspectives from Attorneys and Judges*, 81 LA. L. REV. 119, 159 (2020).

294. Louis W. Voelker, *DTCI: Where Have All the Jury Trials Gone, Revisited*, IND. LAW. (Dec. 25, 2019), <https://www.theindianalawyer.com/articles/dtci-where-have-all-the-jury-trials-gone-revisited> [<https://perma.cc/9J86-MBK5>].

295. *Id.*

attorneys view jury trials as the fairest form of case resolution.<sup>296</sup> In a civil forfeiture system, in which fairness is placed in question, the benefit of fairness outweighs any costs that may accompany jury trials.<sup>297</sup> The presence of the right, at a minimum, gives the appearance of more fairness in civil forfeiture actions and may serve as a limiting factor on the State's pursuit of forfeiture as prosecuting forfeitures will become more time consuming and expensive.

The right to a jury trial in civil forfeiture is not a groundbreaking reform. However, the right to a jury trial is essential to improving fundamental issues in civil forfeiture. An important check is placed upon the State by involving Hoosiers in evidentiary and excessiveness determinations. Further, the availability of a jury trial will force the State to consider the feasibility of pursuing forfeitures.

The right to a jury trial will also supplement other safeguards. A heightened standard of proof and increased access to counsel becomes more significant in the context of jury trials. For instance, a clear and convincing standard of proof may be more meaningful if a jury hears the proceeding, and the litigant has an attorney to effectively communicate the State's higher burden in proving that the property is subject to forfeiture. Jury trials in Indiana civil forfeiture would complement other protections and create an additional layer of protection.

#### CONCLUSION

Civil forfeiture schemes are problematic because the schemes are incredibly advantageous to the State and detrimental to individuals facing civil forfeiture. Indiana is not an outlier to this trend. The civil forfeiture landscape is changing for good reason. As Indiana embarks on the road to civil forfeiture reform, the question of whether Indiana has taken appropriate action surfaces.

This note identified and explored solutions to core issues posed by Indiana's civil forfeiture scheme. Understanding the problems presented and potential solutions is essential to this note's evaluation of the current state of civil forfeiture in Indiana and the steps that legislators can take to remediate a system that gives the power to the State while leaving those facing civil forfeiture with minimal protections. This note argued that the core issues contributing to Indiana's flawed civil forfeiture system are: (1) a strong profit motive of the State; (2) an easily satisfied standard of proof; (3) insufficient access to counsel; and (4) the lack of the right to a jury trial.

Indiana's civil forfeiture scheme is likely to continue its slow evolution. Legislative efforts have not yet produced results. The inability of Senate Bill 24, an overhaul of civil forfeiture, to progress through the legislative process suggests that lawmakers are not ready to make drastic changes to Indiana civil forfeiture. Moreover, the lack of success for Senate Bill 152, which would have mitigated law enforcement's profit incentive, reveals that legislators are not yet prepared to remove the substantial revenue source for law enforcement produced by

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296. See Diamond & Salerno, *supra* note 293, at 159.

297. *Id.*

forfeiture. However, provisions of the failed bills that attempted to target core forfeiture issues are necessary to propel Indiana one step closer to achieving fundamental fairness for those facing civil forfeiture in Indiana. Even considering provisions improving civil forfeiture, many issues will persist because of the inevitable consequences of categorizing forfeiture proceedings as civil actions.

The most significant improvement to the issues found in Indiana forfeiture would be the exclusive use of criminal forfeiture. Like other forfeiture legislation, Senate Bill 295 failed to progress in the Legislature.<sup>298</sup> Inferring that legislators are not rushing to make changes to Indiana civil forfeiture, it is even less likely for civil forfeiture to be replaced with criminal forfeiture. Despite the low likelihood that legislators will enact such an extreme change, criminal forfeiture would create a scheme that is less likely to unjustly deprive litigants of their property.

Amending Indiana's forfeiture law will ultimately make forfeitures more burdensome on the State, and thus, forfeitures will bring in less revenue. The first step towards meaningful change should be mitigation of the profit incentive of law enforcement and prosecutors. Once financial dependency is decreased, legislators can create more protections for forfeiture litigants without abruptly depleting a significant state revenue source.<sup>299</sup> Ultimately, this can lead to a criminal forfeiture system, in which litigants are afforded more protections. Reducing law enforcement's profit incentive and dependency on forfeiture revenue is the first reform to be made on the path to creating a forfeiture system premised on fundamental fairness.

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298. See *Indiana Senate Bill 295*, LEGISCAN, <https://legiscan.com/IN/bill/SB0295/2021> [<https://perma.cc/JGN9-GU6R>] (last accessed Oct. 12, 2022).

299. The District of Columbia delayed the effective date of a statutory provision that ended equitable sharing because law enforcement budgeted federal funds from equitable sharing years in advance. This allowed law enforcement to budget with the end of such revenues in mind. See TOMMY WELLS, *supra* note 197, at 24-25.