

USING INSURANCE TO REGULATE CIVIL FORFEITURE

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I. INTRODUCTION

Civil forfeiture¹ is a powerful tool that allows law enforcement to seize property if there is probable cause that it is related to, or proceeds from, criminal activity, without regard for the guilt or innocence of the owner. This can be beneficial in some circumstances because it simultaneously deprives criminals of the tools they need to operate while providing law enforcement with resources to combat crime.² However, concomitant with this power is the potential for abuse, especially in the context of shrinking budgets, since law enforcement agencies that seize assets are often allowed to keep and use them.³

Although forfeitures may be challenged, in many cases the cost is prohibitive compared to the value of the property seized.⁴ This often makes surrender the rational choice when compared to challenging, even in the case of wrongful seizures. Although forfeiture can be a valuable tool for law enforcement and the incidence of wrongful seizures is unclear because the vast majority go unchallenged, it is clear that abuses have occurred and continue to occur. Many familiar with the practice consider civil forfeiture abuse to be one of the largest social ills in the United States.⁵

Forfeiture reform has proved difficult because it implicates several important, and in many ways, opposing policy goals. Further-

1. "Civil forfeiture" is sometimes shortened to "forfeiture." "Criminal forfeiture" is always spelled out.

2. See *infra* note 27 and accompanying text.

3. See, e.g., 21 U.S.C. § 881(e) (2012) (granting the United States Attorney General the power to disburse property and proceeds obtained in a civil forfeiture).

4. "The Justice Department's principal spokesman for forfeiture has claimed that 80 percent of forfeitures are uncontested." Michael van den Berg, Comment, *Proposing a Transactional Approach to Civil Forfeiture Reform*, 163 U. PA. L. REV. 867, 888 n.106 (2015) (quoting *Oversight of Federal Asset Forfeiture: Its Role in Fighting Crime: Hearing Before the Subcomm. on Criminal Justice Oversight of the S. Comm. on the Judiciary*, 106th Cong. 90 (1999) (statement of Roger Pilon, Dir., Cato Ctr. for Constitutional Studies)).

5. See Sarah Stillman, *Taken*, NEW YORKER (Aug. 12 & 19, 2013), <http://www.newyorker.com/magazine/2013/08/12/taken>; Kyla Dunn, *Reining in Forfeiture: Common Sense Reform in the War on Drugs*, FRONTLINE, <http://www.pbs.org/wgbh/pages/frontline/shows/drugs/special/forfeiture.html> (last visited Feb. 12, 2017); *Civil Forfeiture: A Threat to Private Property and the Impartial Pursuit of Justice*, END CIVIL FORFEITURE, <http://endforfeiture.com/what-is-forfeiture-more> (last visited Feb. 12, 2017) ("Civil forfeiture . . . is one of the greatest threats to property rights in the nation today."); Editorial Board, *When Police Play Bounty Hunter: Our View: Civil Asset Forfeiture is Government at its Absolute Worst*, USA TODAY (Nov. 20, 2014, 2:44 PM), <http://www.usatoday.com/story/opinion/2014/11/19/police-civil-asset-forfeiture-profit-drug-trafficking-editorials-debates/19299879>; John R. Emshwiller & Gary Fields, *Federal Asset Seizures Rise, Netting Innocent With Guilty*, WALL ST. J. (Aug. 22, 2011), <http://www.wsj.com/articles/SB10001424053111903480904576512253265073870>; Michael Sallah et al., *Stop and Seize: Aggressive Police Take Hundreds of Millions of Dollars From Motorists Not Charged With Crimes*, WASH. POST (Sept. 6, 2014), <http://www.washingtonpost.com/sf/investigative/2014/09/06/stop-and-seize>.

more, the interaction of state and federal regimes limits the effectiveness of reforms at either level. For instance, state-level reforms accomplish little because federal forfeiture statutes can still be used by state agencies—even in cases where the underlying conduct is legal under the laws of that state.⁶ To make matters worse, significant changes to forfeiture would impact police budgets, and states would either have to accept that fact, or allocate other money to make up the difference.

This Article proposes a fundamentally different approach to curbing forfeiture abuse: using insurance to create a powerful repeat player opposite law enforcement in forfeiture proceedings.⁷ By adding coverage for the defense of civil forfeiture proceedings to common insurance products—either through a legislative mandate or through a voluntary insurance market—insurers could help protect people from wrongful asset seizures. This provides several advantages over existing reform efforts. First, and perhaps most importantly, it would allow law enforcement the flexibility to continue using forfeiture against criminals while simultaneously protecting the rights of innocent people. Second, although government action would likely be the most effective method for implementation, it is not required.⁸ Third, with strategic marketing, voluntary implementation might actually be profitable for insurers. Finally, it would produce large amounts of data, which would illuminate the nature and scope of the problem posed by civil forfeiture.⁹

This Article proceeds in three parts. Section II provides a brief history of civil forfeiture in the United States, describes its current operation, and explains the need for reform. Section III explains how insurance could be used to regulate civil forfeiture. Subsection III.A explains that the risk is indeed insurable, and describes the problems of moral hazard and adverse selection. Subsection III.B describes the advantages and disadvantages of two potential models for implantation: a legislative mandate or a voluntary market for forfeiture coverage. It then addresses moral hazard and pricing. Section IV attempts to predict how insuring against forfeiture would affect proceedings,

6. *See infra* notes 24-25 and accompanying text.

7. Some reform-minded individuals have proposed government-funded counsel as a way to balance the scales between claimants and government. However, this would have immediate upfront costs that make implementation less likely. The advantage of using insurance is that there would be no direct costs to states.

8. *See infra* notes 95-102 and accompanying text.

9. For instance, it might reveal that forfeiture abuse is so anomalous that further reform is unnecessary or undesirable. On the other hand, it might illuminate harmful patterns such as racial discrimination. The lack of data prevents the reconciliation of these differing viewpoints.

how police would respond to the changing financial incentives, and other potential impacts.

II. CIVIL FORFEITURE IN THE UNITED STATES

A. HISTORY

The idea that inanimate objects and other property can be guilty of a crime has a long history.¹⁰ In the United States, however, the practice was so offensive to American Colonists that it contributed to the Revolution and motivated the framers of the Constitution to include a provision explicitly banning forfeiture of estate.¹¹ This constitutional provision did not stop the occasional use of statutory forfeiture, however, which was considered a legitimate enforcement and revenue-raising tool.¹²

Two centuries later, the opening salvos of the War on Drugs led to a dramatic expansion of civil forfeiture.¹³ The Comprehensive Drug Abuse Prevention and Control Act of 1970¹⁴ permitted police to use forfeiture to combat drug trafficking.¹⁵ When combined with the Comprehensive Crime Control Act of 1984¹⁶ (“CCCA”)—which al-

10. Civil forfeiture—which is rooted in the idea that objects can be found guilty—dates back to Biblical times. *See Exodus* 21:28 (“When an ox gores a man or a woman to death, the ox shall be stoned, and its flesh shall not be eaten; but the owner of the ox shall not be liable.”); *see also* van den Berg, *supra* note 4, at 873 (citing Alan Nicgorski, *The Continuing Saga of Civil Forfeiture, the “War on Drugs,” and the Constitution: Determining the Constitutional Excessiveness of Civil Forfeitures*, 91 *Nw. U. L. REV.* 374, 378 (1996)) (explaining that the idea of a guilty object stems from Exodus). The concept expanded in England under various names as it began to generate revenue for the Crown, until it was eventually expunged from the common law in the early nineteenth century. *See* van den Berg, *supra* note 4, at 873.

11. The property of a person convicted of treason can be confiscated, but it remains inheritable to the person’s descendants upon their death. *See* U.S. CONST. art. III, § 3, cl. 2 (“[N]o Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.”).

12. Forfeiture statutes were distinguished from common law forfeiture and upheld by the Supreme Court, because they proceeded in rem—as opposed to common law forfeiture, which proceeded in personam—directly against property, which was “here primarily considered as the offender . . .” *The Palmyra*, 25 U.S. 1, 14 (1827). Initially, forfeiture statutes targeted smugglers and were limited to cases in admiralty, which blunted their impacts. *See* van den Berg, *supra* note 4, at 874. Over the next two centuries or so, civil forfeiture was used sparingly, with the exception of the Confiscation Acts during the Civil War and the National Prohibition Act in the early twentieth century. *Id.* at 875.

13. Nicgorski, *supra* note 10, at 375-76.

14. Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (codified as amended in scattered sections of 18 U.S.C., 19 U.S.C., 21 U.S.C., 26 U.S.C., 28 U.S.C., 31 U.S.C., 40 U.S.C., 42 U.S.C.).

15. Comprehensive Drug Abuse Prevention and Control Act of 1970 § 408, 21 U.S.C. § 848 (2012).

16. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1885 (codified as amended in scattered sections of 2 U.S.C., 5 U.S.C., 7 U.S.C., 8 U.S.C., 10 U.S.C., 12 U.S.C., 14 U.S.C., 15 U.S.C., 16 U.S.C., 18 U.S.C., 19 U.S.C., 20 U.S.C., 21

lowed police themselves to use forfeited funds¹⁷—law enforcement use of forfeiture exploded.¹⁸ Concerns about the practice¹⁹ led to the passage of the Civil Asset Forfeiture Reform Act²⁰ (“CAFRA”) in 2000; however, in many ways CAFRA did not go far enough, and forfeiture abuse remains problematic.²¹

B. CURRENT OPERATION AND THE NEED FOR REFORM

Civil forfeiture is authorized by a variety of state and federal statutes. Depending on whether the alleged offense is a violation of state or federal law (or both), state or federal statutes (or both) might be triggered.²² The agent pursuing the forfeiture must belong to the branch of the statute being used.²³ This would seem to limit the ability of state and local agencies to use federal forfeiture statutes; however, a practice called equitable sharing allows “United States Attorneys to share civil asset forfeiture proceeds with the local law enforcement that assisted in securing the forfeiture.”²⁴ In practice, this empowers state and local law enforcement agencies to seize assets even if the underlying action leading to forfeiture was legal under state law. This occurs because local police can *de jure* initiate state forfeiture proceedings and *de facto* initiate federal forfeiture proceedings. The latter occurs when local police search for and find sufficient evidence of a violation of federal law. They then contact the [Assistant United States Attorney], who initiates the seizure and provides much of the forfeiture bounty to the local police department. By form, the federal government initiates the action, but by substance, local law enforcement drives it. The federal government benefits by co-opting local police forces to enforce federal goals and local police benefit by obtaining forfeiture proceeds.²⁵

U.S.C., 22 U.S.C., 23 U.S.C., 25 U.S.C., 26 U.S.C., 28 U.S.C., 29 U.S.C., 30 U.S.C., 31 U.S.C., 33 U.S.C., 37 U.S.C., 40 U.S.C., 42 U.S.C., 43 U.S.C., 48 U.S.C., 50 U.S.C., 52 U.S.C.).

17. 21 U.S.C. § 881(e) (2012).

18. Nicgorski, *supra* note 10, at 382-83.

19. *See, e.g.*, *Bennis v. Michigan*, 516 U.S. 442 (1996) (holding that innocence was not a defense in a forfeiture action and denying recovery of a vehicle by an innocent co-owner spouse after her husband used their car to solicit prostitutes).

20. Civil Asset Forfeiture Reform Act, Pub. L. No. 106-185, 114 Stat. 202 (codified as amended in scattered sections of 8 U.S.C., 18 U.S.C., 19 U.S.C., 21 U.S.C., 28 U.S.C., 31 U.S.C., 42 U.S.C.).

21. *See infra* notes 22-55 and accompanying text.

22. *See* Isaiah M. Hunter, *The War on Drugs and Taxes: How Tax Expenditure Analysis Can Shed Light on Civil Asset Forfeiture*, 9 N.Y.U. J.L. & LIBERTY 549, 554 (2015).

23. *Id.*

24. *Id.*

25. *Id.* at 554-55 (footnotes omitted).

Supporters of civil forfeiture argue that it is a necessary tool to combat crime and raise revenue.²⁶ It makes it easier to target organized crime and drug trafficking because property does not receive the same level of protection as human defendants in the criminal justice system. It is also advantageous in that it deprives criminals of the resources they need to operate while simultaneously providing additional resources to law enforcement.²⁷ Furthermore, supporters of the War on Drugs see equitable sharing as an important incentive for state and local police to participate in the enforcement of federal drug laws.²⁸

On the other side, critics argue that it is unfair to seize property with little or no evidence that the owner was involved in a crime.²⁹ Some say that this should constitute a due process violation; however, courts have disagreed, holding instead that due process is satisfied by post-seizure proceedings where claimants can recover their property.³⁰ Unfortunately, these proceedings are often difficult to navigate without an attorney, and hiring an attorney is often more expensive than the value of the property seized. Rational claimants whose property is worth less than it would cost to retrieve it are effectively afforded no process. There is also evidence that civil forfeiture

26. See, e.g., Craig Gaumer, *A Prosecutor's Secret Weapon: Federal Civil Forfeiture Law*, 55 ASSET FORFEITURE (EOUSA, Washington, D.C.), no. 6, 2007, at 59 ("Federal civil forfeiture law is a prosecutor's secret weapon, a valuable tool used to guarantee that wrongdoers do not reap the financial benefits of criminal activity or continue to use the tools of their illegal trade.").

27. See David T. Gibson, *Spreading the Wealth: Is Asset Forfeiture the Key to Enticing Local Agencies to Enforce Federal Drug Laws?*, 39 HASTINGS CONST. L.Q. 569, 573 (2012).

28. The incentive structure is important because the federal government cannot compel state and local police to enforce federal laws. See *id.* at 572 (explaining the anti-commandeering principle articulated in *New York v. United States*, 505 U.S. 144 (1992)).

29. See CHARLES DOYLE, CONG. RESEARCH SERV., 7-5700, CRIME AND FORFEITURE 15 (2015) ("[C]ivil forfeiture treats the property as the defendant, confiscating the interests of the innocent and guilty alike . . ."); John L. Worrall, *Asset Forfeiture*, PROBLEM-ORIENTED GUIDES FOR POLICE RESPONSE GUIDES SERIES (Center for Problem-Oriented Policing), no. 7, 2008, at 4 ("[I]t is estimated that as many as 90 percent of civil forfeitures are not accompanied by criminal charges, either intentionally or due to insufficient evidence to support a criminal prosecution." (footnote omitted)); see also Larry Salzman, *Assault By Civil Forfeiture: Column*, USA TODAY (Sept. 25, 2013, 6:10 PM), <http://www.usatoday.com/story/opinion/2013/09/25/grocery-store-detroit-irs-column/2868797> ("Civil forfeiture is now one of the most serious assaults on individual rights in America.").

30. See Catherine E. McCaw, *Asset Forfeiture as a Form of Punishment: A Case for Integrating Asset Forfeiture into Criminal Sentencing*, 38 AM. J. CRIM. L. 181, 190 (2011) (noting that roughly 80% of forfeiture actions are uncontested and theorizing that litigation costs are a contributing factor when they exceed the value of the property).

is employed disproportionately against poor people and in minority communities, where people are less likely to challenge seizures.³¹

Supporters of the War on Drugs may also have cause for concern, because allowing law enforcement to use the proceeds of civil forfeiture has caused “some agencies [to] become more interested in confiscating cash than drugs.”³² When illegal drugs are seized, they are held in evidence and eventually destroyed.³³ When cash is seized, it may be added to the seizing agency’s budget. As a result, police have an incentive to allow illegal drugs to reach the streets, and intervene only after cash has been collected.³⁴ This incentive structure is problematic because it has the potential to undermine the entire stated purpose of the War on Drugs, which is keeping illegal drugs off the streets.³⁵ Finally, the current regime is problematic because the use of state and local agents to enforce federal laws creates major federalism concerns where the underlying conduct is legal under state law.³⁶

31. *Civil Asset Forfeiture*, ACLU (Mar. 2, 2015), <http://www.leg.state.nv.us/Session/78th2015/Exhibits/Senate/JUD/SJUD415E.pdf> (“Asset forfeiture practices often go hand-in-hand with racial profiling and disproportionately impact low-income African-American or Hispanic people . . .”); Chloe Cockburn, *Easy Money: Civil Asset Forfeiture Abuse by Police*, ACLU (Feb. 3, 2010, 1:16 PM), <https://www.aclu.org/blog/easy-money-civil-asset-forfeiture-abuse-police> (“[P]olice do not seize assets from all equally. Instead, they target those persons they associate with criminal behavior and drug trafficking. The result is a regime of racial profiling of black and Latino drivers on the highways, who are stopped and stripped of their money based on minimal or non-existent evidence.”).

32. *Seized Drug Assets Pad Police Budgets*, NAT’L PUB. RADIO, at 1:15 (June 16, 2008, 12:01 AM), <http://npr.org/templates/story/story.php?storyId=91490480>; see also Eric Blumenson & Eva S. Nilsen, *Policing for Profit: The Drug War’s Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 67-68 (1998) (describing how some tactics—which are preferred by many agencies—to maximize police profits can actually result in *more drugs* reaching the streets, including the use of “reverse stings” or deferring sting operations of targeted dealers until the drugs had already been sold).

33. See *How Are Authorities Destroying Seized Drugs*, CBS NEWS (May 26, 2014, 12:01 PM), <http://www.cbsnews.com/news/how-are-authorities-destroying-seized-drugs> (explaining how different law enforcement agencies destroy seized illegal drugs).

34. See *Seized Drug Assets*, *supra* note 32, at 5:37 (“If a cop stops a car going north with a trunk full of cocaine, that makes great press coverage, makes a great photo. Then they destroy the cocaine . . . If they catch ‘em going south with a suitcase full of cash, the police department just paid for its budget for the year.”).

35. John Woolley & Gerhard Peters, *Ronald Reagan: Remarks Announcing Federal Initiatives Against Drug Trafficking and Organized Crime*, THE AM. PRESIDENCY PROJECT (Oct. 14, 1982) (transcript available at <http://www.presidency.ucsb.edu/ws/?pid=43127>) (“For the sake of our children, for the sake of all the magnificent accomplishments of the American past, today I ask for your support and the support of our people in this effort to fight the drug menace . . .”). Some may argue that police are strategically targeting cash and letting some drugs go in an effort to reduce overall drug imports. However, that does not explain why the number of forfeitures exploded following the passage of the CCCA in 1984. See *supra* note 18 and accompanying text. Furthermore, if seizing cash is a strategic decision designed to reduce the availability of illegal drugs, it is ineffective because decades later, illegal drugs are still readily available.

36. See Hunter, *supra* note 22, at 555 n.23.

Reforming forfeiture has proved difficult. Public sentiment favoring harsh drug laws and powerful police lobbies make it difficult to generate the political will to upend a system that generates substantial revenue.³⁷ Even where such will exists, equitable sharing effectively places a floor on forfeiture: if a state makes it more difficult to pursue forfeiture under state law, state and local officials can work with federal prosecutors to pursue federal forfeiture.³⁸ For example, North Carolina completely banned civil forfeiture in rem,³⁹ but state and local law enforcement agencies still make extensive use of equitable sharing.⁴⁰

At the federal level, reforms have been limited. The only major federal legislative attempt was CAFRA, which was passed in 2000 and hailed as “the most comprehensive revision of the civil asset forfeiture laws . . . since the first forfeiture statutes were enacted in 1789.”⁴¹ It created the innocent-owner defense, which had been rejected by the Supreme Court in *Bennis v. Michigan*,⁴² and codified the proportional-

37. *See id.* at 556.

38. *Id.* at 557-58; *see also* Michael J. Duffy, Note, *A Drug War Funded with Drug Money: The Federal Civil Forfeiture Statute and Federalism*, 34 SUFFOLK U. L. REV. 511, 537 (2001) (concluding that state legislatures have no choice but to participate in federal forfeiture programs); Dick M. Carpenter et al., *Inequitable Justice: How Federal “Equitable Sharing” Encourages Local Police and Prosecutors to Evade State Civil Forfeiture Law for Financial Gain*, INST. FOR JUST. (Oct. 2011), <https://www.ij.org/inequitablejustice> (explaining how the practice of equitable sharing encourages state and local police to “circumvent the civil forfeiture laws of their states for financial gain.”).

39. Property can only be forfeited under North Carolina state law if the owner is convicted of a crime. N.C. GEN. STAT. ANN. §§ 90–112 (West 2013). Other states have also experimented with reform. *See, e.g.*, Ilya Somin, *Minnesota Adopts Law Curbing Asset Forfeiture Abuse*, WASH. POST (May 10, 2014), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/05/10/minnesota-adopts-law-curbing-asset-forfeiture-abuse> (discussing Minnesota law SF 874, which prohibits civil forfeiture except where the owner has been convicted of, or pleaded guilty to, a crime).

40. *Federal Equitable Sharing*, INST. FOR JUST., <https://www.ij.org/report/policing-for-profit/federal-equitable-sharing> (last visited Feb. 12, 2017) (noting that although civil forfeiture does not exist under North Carolina law, state and local police “participate[] extensively in equitable sharing”). This is consistent with research indicating that in states where civil forfeiture “is more difficult and less rewarding, law-enforcement agencies take in more equitable-sharing payments. In other words, police and prosecutors use equitable sharing as an easier and more profitable way to secure forfeiture funds.” *Asset Forfeiture Oversight: Hearing Before the Subcomm. on Crime, Terrorism, Homeland Security and Investigations of the H. Comm. on the Judiciary*, 114th Cong., 2015 WL 556180, at 8 (statement of Darpana M. Sheth, Attorney, Institute for Justice).

41. Stefan D. Cassella, *The Civil Asset Forfeiture Reform Act of 2000: Expanded Government Forfeiture Authority and Strict Deadlines Imposed on All Parties*, 27 J. LEGIS. 97, 97 (2015).

42. 516 U.S. 442, 453 (1996) (concluding that cases authorizing forfeiture of property owned by innocent individuals are “too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced”) (internal quotation omitted).

ity requirement introduced in *United States v. Bajakajian*.⁴³ CAFRA also increased the government's burden of proof in forfeiture proceedings to the preponderance standard⁴⁴ and added a hardship provision, which (in some instances) allows the release of seized property to the claimant pending trial.⁴⁵ However, these reforms apply only to forfeitures brought under CAFRA and they help only people who actually challenge seizures.⁴⁶ Actions brought under other federal statutes are not subject to CAFRA's reforms, including the innocent-owner defense.⁴⁷

In January 2015, then-Attorney General Eric Holder decided to limit a form of equitable sharing called adoption.⁴⁸ This was praised by some as a great reform,⁴⁹ but critics were quick to point out that it was limited in scope and did not affect the majority of equitable shar-

43. 524 U.S. 321 (1998) (determining that forfeiting the entire sum of \$357,144 for violating customs reporting requirements violated the Eighth Amendment prohibition on excessive fines).

44. 18 U.S.C. § 983(c)(1) (2012).

45. The hardship provision has limitations, and does not apply to most cash seizures. See Cassella, *supra* note 41, at 106-07.

46. CAFRA did provide that the government must pay attorney's fees to successful claimants. 28 U.S.C. § 2465(b)(1)(A) (2012). However, this is a risky up-front investment that many cannot or do not wish to make, and others simply forego hiring an attorney because they are unaware of the provision. Eric Moores, Note, *Reforming the Civil Asset Forfeiture Reform Act*, 51 ARIZ. L. REV. 777, 798 (2009). Furthermore, the fee-shifting provision can be avoided entirely if the government voluntarily dismisses the case. See, e.g., *United States v. 2007 BMW 335I Convertible*, 648 F. Supp. 2d 944, 947 (N.D. Ohio 2009) (holding that claimants who recover their property as a result of the government's voluntary dismissal have not "substantially prevailed" and are not entitled to recover attorney's fees, even after significant litigation has already occurred). Thus the government is free to press its case until it appears unwinnable, and then voluntarily dismiss it to avoid paying attorney's fees.

47. See, e.g., *United States v. Davis*, 648 F.3d 84, 94 (2d Cir. 2011) (noting that there is no innocent owner defense under customs forfeiture provisions).

48. See Press Release, U.S. Dep't of Just., Attorney General Prohibits Federal Agency Adoptions of Assets Seized by State and Local Law Enforcement Agencies Except Where Needed to Protect Public Safety (Jan. 16, 2015), <http://www.justice.gov/opa/pr/attorney-general-prohibits-federal-agency-adoptions-assets-seized-state-and-local-law-limiting-adoption—the-process-by-which-state-and-local-police-request-federal-agencies-to-take-seized-assets-and-forfeit-them-under-federal-law—under-certain-circumstances-but-leaving-other-methods-of-equitable-sharing-intact>.

49. See Jay Symopoulos, *Breaking: U.S. Department of Justice Ends Civil Forfeiture Program for State and Local Police*, FREE THOUGHT PROJECT (Jan. 16, 2015), <http://thefreethoughtproject.com/breaking-u-s-department-justice-ends-civil-forfeiture-program-state-local-police>; Robert O'Harrow, Jr. et al., *Holder Limits Seized-Asset Sharing Process that Splits Billions with Local, State Police*, WASH. POST (Jan. 16, 2015), https://www.washingtonpost.com/investigations/holder-ends-seized-asset-sharing-process-that-split-billions-with-local-state-police/2015/01/16/0e7ca058-99d4-11e4-bcfb-059ec7a93ddc_story.html ("Holder's decision allows limited exceptions . . . [but] would eliminate virtually all cash and vehicle seizures made by local and state police from the program.").

ing.⁵⁰ Then, in December 2015, the Department of Justice suspended all equitable sharing payments to state law enforcement agencies.⁵¹ Once again, this was praised by some as an important reform;⁵² in reality it was merely a temporary shutdown due to budget constraints,⁵³ and the program was restarted in March 2016.⁵⁴ Even if equitable sharing was shut down at the federal level, forfeiture would continue unabated in states that have not taken steps to reform it.

Other proposed reforms⁵⁵ are likely to fail for the same reasons. Fixing forfeiture requires a fundamentally different approach—one that recognizes and allows the advantages it brings in certain situations, while simultaneously making the process more transparent and reducing the potential for abuse.

50. See Radley Balko, *How Much Civil Asset Forfeiture Will Holder's New Policy Actually Prevent?*, WASH. POST (Jan. 20, 2015), <http://www.washingtonpost.com/news/the-watch/wp/2015/01/20/how-much-civil-asset-forfeiture-will-holders-new-policy-actually-prevent> (noting that adoption accounts for less than 14% of equitable sharing); see also Jacob Sullum, *Despite Holder's Forfeiture Reform, Cops Still Have A License To Steal*, FORBES (Jan. 22, 2015, 4:04 PM), <http://www.forbes.com/sites/jacobsullum/2015/01/22/despite-holders-forfeiture-reform-cops-still-have-a-license-to-steal> (explaining that 86% of seizures from 2008 to 2013 would not have been covered by Holder's new policy according to Justice Department figures, and that state and local police can still use equitable sharing in investigations "assisted by or coordinated with 'federal authorities'"); Jacob Sullum, *How the Press Exaggerated Holder's Forfeiture Reform*, REASON: HIT & RUN BLOG (Jan. 19, 2015, 10:34 PM), <http://reason.com/blog/2015/01/19/how-the-press-exaggerated-holders-forfeiture> (noting that Justice Department numbers indicate the vast majority of equitable sharing will continue).

51. See Letter from M. Kendall Day, Chief, U.S. Dep't of Just. Asset Forfeiture and Money Laundering Section, to State, Local and Tribal Law Enforcement Agencies (Dec. 21, 2015), <http://www.theiacp.org/portals/0/documents/pdfs/rescissionimpactonequitablesharing122115.pdf>.

52. See Christopher Ingraham, *The Justice Department Just Shut Down a Huge Asset Forfeiture Program*, WASH. POST: WONKBLOG (Dec. 23, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/12/23/the-feds-just-shut-down-a-huge-program-that-lets-cops-take-your-stuff-and-keep-it>.

53. See Day, *supra* note 51 ("By deferring equitable sharing payments now, we preserve our ability to resume equitable sharing payments at a later date should the budget picture improve.").

54. See Letter from M. Kendall Day, Chief, U.S. Dep't of Just. Asset Forfeiture and Money Laundering Section, to State, Local and Tribal Law Enforcement Agencies (Mar. 28, 2016), https://fop.net/CmsDocument/Doc/ltr_2016-0328.pdf (announcing the resumption of equitable sharing payments); Christopher Ingraham, *The Feds Have Resumed a Controversial Program That Lets Cops Take Stuff and Keep It*, WASH. POST: WONKBLOG (Mar. 28, 2016), <https://www.washingtonpost.com/news/wonk/wp/2016/03/28/the-feds-have-resumed-a-controversial-program-that-lets-cops-take-stuff-and-keep-it>.

55. Current reform proposals include banning civil forfeiture in rem actions completely, ending all federal equitable sharing, and increasing government transaction costs through various procedural hoops. See, e.g., van den Berg, *supra* note 4, at 919-23; Moores, *supra* note 46, at 797-802; Scott Bullock, *Foreword to the Second Edition of Dick M. Carpenter II et al., Policing for Profit: The Abuse of Civil Asset Forfeiture*, INST. FOR JUST. (Nov. 10, 2015), <https://www.ij.org/foreword-2>.

III. USING INSURANCE TO REGULATE CIVIL FORFEITURE

Using insurance to regulate civil forfeiture would allow law enforcement to continue seizing assets from criminals while simultaneously protecting innocent owners at no direct cost to taxpayers. This could be accomplished in one of two ways. First, and most effectively, legislatures seeking to reform forfeiture could mandate a provision in common insurance policies (such as homeowner's or auto) that would provide a defense against forfeiture actions. The second option would be somewhat less effective, but has the advantage that it could be pursued even in states that do not wish to curb forfeiture. This option would involve insurers making available a civil forfeiture rider to attach to common policies. Both options would improve the situation by increasing the number of questionable forfeitures that are challenged.

Law enforcement agencies that are unable to keep the proceeds of wrongful forfeitures due to successful challenges will still be able to seize assets from criminals, but will be less likely to abuse the practice. Even in states where successful claimants are repaid from general tax funds—thus allowing police to retain the financial benefit of wrongful seizures—insurance will have a positive impact, because the increased number of successfully challenged forfeitures will both (1) spread the cost of policing to the entire tax base, which is the appropriate population to fund police activity (as opposed to single individuals whose assets are wrongfully seized), and (2) draw increased taxpayer and legislative scrutiny to asset forfeiture programs.

This Section begins by examining whether the risk of having assets seized by police is of the sort that can be covered by insurance and describes the problems of moral hazard and adverse selection. After concluding that the risk is insurable, it discusses potential models for implementation: a legislative mandate or a voluntary market. It concludes that a legislative mandate would be the most effective option, but that a voluntary market might also be profitable, and is therefore worthy of consideration by insurers.

A. INSURABILITY

As a threshold matter, the risk of having assets seized must be insurable and there must be a way to ameliorate moral hazard and adverse selection. This subsection argues that forfeiture has the characteristics of an insurable risk under the traditional model of insurability. Furthermore, although moral hazard and adverse selection are problematic, insurers have a variety of tools at their disposal to prevent them from undermining the market for forfeiture insurance.

1. Characteristics of Insurable Risks

Insurable risks have traditionally been defined by five characteristics.⁵⁶ First, the risk must present “a large, homogeneous group of exposure units.”⁵⁷ Second, the risk should be definite, so the insured cannot pretend to have suffered a covered loss.⁵⁸ Third, the occurrence of the risk should be accidental or fortuitous.⁵⁹ Fourth, “the loss must be big enough to produce hardship, but not so big as to be catastrophic.”⁶⁰ Finally, “the cost of the risk run must be calculable.”⁶¹ Comparing the risk of wrongful forfeiture against these criteria reveals that it is insurable.

TABLE 1: INSURABILITY OF CIVIL FORFEITURE

Insurability Criteria	Forfeiture Characteristic
Large Number Exposed	Every property owner in the United States is at risk
Definite Risk	Claimants are given a receipt when a forfeiture occurs
Fortuitous	The loss is fortuitous from the perspective of the insured
Hardship, Not Catastrophe	The loss is sufficient to produce a hardship but is not catastrophic
Calculable Loss	The value of the loss is easily calculated

First, there is a large homogeneous group of exposure units: every individual with property in the United States is at risk of having it wrongfully forfeited. For example, if a person has money in his or her pocket, it is likely that it is tainted with drug residue.⁶² Despite its

56. Thomas O. Farrish, “Diminished Value” in *Automobile Insurance: The Controversy and Its Lessons*, 12 CONN. INS. L.J. 39, 64 (2005) (describing the “conventional conception” of insurability as turning on five traits) (citations omitted). There is a trend toward expanding insurability, but that discussion is not germane here because forfeiture is insurable even under the traditional, narrower conception of insurability. *See id.* at 67.

57. *Id.* at 64 (“[T]he accuracy of loss forecasts improves as the number of exposure units in the [group] increases.”) (emphasis in original).

58. *Id.*

59. If an insurer knows that a risk is certain to occur, the premium will always be greater than the cost of the risk, so insurance would provide no advantage. *Id.* at 64-65. The fortuity requirement also protects insurers from losses that are easily produced by the insured. *Id.* at 65.

60. *See id.* (explaining that insuring inconsequential risks is not profitable, and insuring catastrophic risks is too risky even for insurers) (emphasis in original).

61. *See id.* at 65-66 (noting that losses such as sentimental value cannot be expressed mathematically, which makes them difficult or impossible to insure).

62. *United States v. \$53,082.00 in United States Currency*, 985 F.2d 245, 250 n.5 (6th Cir. 1993) (noting that as much as 96% of currency is tainted with drug residue); *United States v. \$80,760.00 in United States Currency*, 781 F. Supp. 462, 475 (N.D. Tex. 1991) (stating the same); *see also* Mark Curriden, *Courts Reject Drug-Tainted Evidence: Studies Find Cocaine-Soiled Cash So Prevalent That Even Janet Reno Had Some*, 79 ABA J., Aug. 1993, at 22 (testing eleven bills held by prominent figures including Janet

ubiquity, if a police canine alerts on that drug residue, police may seize the money.⁶³

The second factor of definite risk is easily satisfied. When a seizure occurs, claimants are given a receipt for their property. Although one can imagine scenarios involving inaccurate receipts, fraud, or collusion, it seems unlikely given the process officers must go through to turn in seized property. If fraud was involved, it could be sorted out in the adjudication and the penalties would be severe. This coverage would not create an easy target for people looking to commit insurance fraud.

Third, the risk should be accidental or fortuitous. This is the only factor that invites in-depth consideration because some seizures are clearly the result of wrongful conduct and are therefore not fortuitous.⁶⁴ At the outset, however, it is worth noting that many non-random risks are in fact insured today.⁶⁵ It is also worth noting that although insurance companies generally do not indemnify losses that result from intentional wrongful acts, insurers can and do sell products that provide a legal defense for intentional wrongful acts.⁶⁶ That some civil forfeiture actions will result from the wrongful conduct of the insured does not prevent the risk from being insurable,⁶⁷ because clear policy language can reduce the negative impacts of moral hazard and risk classification can do the same for adverse selection.⁶⁸ Furthermore, some seizures do seem to have a random component.⁶⁹

Reno, Jeb Bush, and Miss America Kylene Barker Brandon, and finding ten of the eleven tainted by “significant traces of cocaine”).

63. Leslie A. Shoebottom, *Off the Fourth Amendment Leash?: Law Enforcement Incentives to Use Unreliable Drug-Detection Dogs*, 14 *LOY. J. PUB. INT. L.* 251, 264-65 (2012).

64. This factor addresses moral hazard and adverse selection. See *infra* notes 79-91.

65. Christian Lahnstein, *The Insurability of New Liability Risks*, 29 *THE GENEVA PAPERS ON RISK & INS. ISSUES & PRACTICE* 343, 515 (2004).

66. Insurance contracts that “immunize . . . wrongdoer[s] against the prescribed penalties for [their] criminal conduct” are illegal on their face. *Flintkote Co. v. Lloyd’s Underwriters*, 1976 WL 16591, at *4 (N.Y. Sup. Ct. July 27, 1976), *aff’d*, 391 N.Y.S.2d 1005 (N.Y. Sup. Ct. App. Div. 1977). However, public policy favors insurability of defense costs, whether or not the individual is found guilty of a crime. *Flintkote Co.*, 1976 WL 16591, at *4.

67. Because civil forfeiture is not technically a penalty imposed on an individual for his or her wrongful conduct, it may be the case that indemnification of even legitimate civil forfeitures is not per se illegal. Public policy favors requiring law enforcement to use criminal forfeiture statutes—thus affording claimants the procedural safeguards to which they are entitled when subjected to punishment by the state—when punishing wrongful conduct.

68. See *infra* notes 96-103 and accompanying text.

69. See, e.g., Stillman, *supra* note 5 (recounting several seemingly random seizures including, for example, one which began when officers pulled a vehicle over for driving in the left lane without passing for “more than half a mile” and ended with a seizure despite a complete lack of evidence of any wrongdoing).

There are clearly risk factors, such as living in a state with robust forfeiture laws or engaging in criminal activity, but often the individual whose property is seized has done nothing wrong.⁷⁰ Becoming a target without doing anything wrong does have an element of fortuity from the perspective of the insured, and therefore, this factor is satisfied.⁷¹

The fourth factor—that the harm produces a hardship but not be catastrophic—is also satisfied. Wrongful forfeiture is relatively unlikely to occur,⁷² but for claimants who sustain such a loss, it clearly produces a hardship.⁷³ The risk is also far from catastrophic.⁷⁴ Although the total dollar value of forfeitures under federal law is in the billions,⁷⁵ the average forfeiture is quite small.⁷⁶

The final factor is also easily satisfied, because the loss is easily calculated. When cash is seized the amount will be listed on the receipt.⁷⁷ It might be more complicated if seized objects have sentimental value, but in that case, the object itself can be returned if the claimant is successful.⁷⁸

70. See Worrall, *supra* note 29, at 4.

71. Seizures result from the intentional conduct of the police officers involved, but in the context of insurability, a fortuitous event is “an event which so far as the parties to the contract are aware, is dependent on chance.” Leo P. Martinez, *A Unified Theory of Insurance Risk*, 74 U. PITT. L. REV. 713, 740 (2013).

72. In 2010 for example, there were roughly eleven thousand noncriminal forfeiture cases. See Emshwiller & Fields, *supra* note 5. Although that is a problem from an individual rights perspective, from a statistical perspective the odds of being targeted are extremely low in a country of over three hundred million people.

73. See generally, Stillman, *supra* note 5.

74. “[C]atastrophes are infrequent events that cause severe loss, injury or property damage to a large population.” CATASTROPHE MGMT. WORK GRP., AM. ACAD. OF ACTUARIES, CATASTROPHE EXPOSURES AND INSURANCE INDUSTRY CATASTROPHE MANAGEMENT PRACTICES 1, 5 (2001), http://www.actuary.org/pdf/casualty/catastrophe_061001.pdf.

75. See *Asset Forfeiture Oversight*, *supra* note 40, at 6 (noting that annual deposits of forfeited cash and property regularly exceed \$1 billion, and that “[i]n 2013, the most recent year with publicly reported data, that figure had swollen to \$2 billion . . .”). The actual figure is unknown because many states do not collect or report forfeiture data. See Scott Bullock, *Executive Summary to Policing for Profit: The Abuse of Civil Asset Forfeiture*, INST. FOR JUST. (Mar. 2010), <http://ij.org/report/policing-for-profit-first-edition> (noting that only twenty-nine states clearly require data to be collected and reported, and only nineteen of those states responded to freedom-of-information requests with usable data).

76. Bullock, *supra* note 75, at 34-35 (reporting the average and median value of vehicles seized at less than \$6,000, and the average amount of a cash seizure in Maine and Virginia at between \$600 and \$2,500); Stillman, *supra* note 5, at 23-24 (reporting that in Georgia in 2011, more than half of items taken were worth less than \$650).

77. See, e.g., TENN. CODE ANN. § 40-33-203 (West 2014) (requiring officers to give receipts for property being seized).

78. 28 U.S.C. § 2465(a)(1) (“Upon the entry of a judgment for the claimant . . . such property shall be returned forthwith . . .”).

2. *Threats to a Viable Insurance Pool*

Selling insurance invites the risks of moral hazard and adverse selection.⁷⁹ These risks are common, and creating safeguards against them is a familiar challenge for insurers. As with other forms of insurance, adverse selection can be ameliorated by a legislative mandate.⁸⁰ Alternatively, companies wishing to sell forfeiture insurance in a voluntary market can overcome moral hazard and adverse selection by using, for example, deductibles, exclusions, thorough claim investigation, and good underwriting.

a. Moral Hazard

Moral hazard is the idea that people who do not fully experience a loss are less likely to take precautions to prevent it.⁸¹ It exists both before (*ex ante*) and after (*ex post*) a harm occurs.⁸² *Ex ante* moral hazard means that people who have insurance are more likely to behave carelessly because they will not bear the full cost of the insured's harm.⁸³ *Ex post* moral hazard refers to the insured's lack of incentive to minimize the loss once the harm has occurred.⁸⁴

b. Adverse Selection

“Adverse selection’ refers to the theoretical tendency for low risk individuals to avoid or drop out of insurance pools, with the result that, absent countervailing efforts by administrators, insurance pools can be expected to contain a disproportionate percentage of high risk individuals.”⁸⁵ Techniques such as risk classification and binding risks can help minimize the impact of adverse selection on the insurance pool.⁸⁶

Risk classification is achieved by pricing insurance—or in some cases even refusing to sell coverage—based on the characteristics of the potential insured.⁸⁷ For example, a person who smokes pays

79. See Tom Baker, *Containing the Promise of Insurance: Adverse Selection and Risk Classification*, 9 *CONN. INS. L.J.* 371, 373 (2003) (citing moral hazard and adverse selection as explanations commonly given for the limits on the promise of insurance).

80. The most salient example of this in recent memory is the Patient Protection and Affordable Care Act, which mandates insurance coverage precisely to prevent adverse selection. See Ronen Avraham, *The Economics of Insurance Law-A Primer*, 19 *CONN. INS. L.J.* 29, 51-52 (2012).

81. See Tom Baker, *On the Genealogy of Moral Hazard*, 75 *TEX. L. REV.* 237, 270 (1996).

82. *Id.*

83. *Id.*

84. *Id.*

85. Baker, *supra* note 79, at 373.

86. *Id.* at 376.

87. *Id.* at 376-78.

higher health insurance premiums than a person who does not, and a person with cancer might be unable to purchase life insurance, and thus would be completely excluded from the insurance pool. As Professor Baker explains, however, the problem is not so simple, because acting to prevent adverse selection on the consumer side of an insurance relationship can promote it on the insurer side, reducing the degree to which insurance spreads overall risk.⁸⁸

Binding risks to the insurance pool through government intervention is an alternative for controlling adverse selection that targets both sides of the insurance relationship.⁸⁹ It limits the ability of low-risk insureds to opt out of the insurance pool while simultaneously limiting the ability of insurers to deny insurance or charge different prices on the basis of risk.⁹⁰ This can be accomplished simply by mandating universal insurance through a single insurer, by requiring everyone to purchase insurance while prohibiting insurers from charging prices or underwriting on the basis of risk, or by limiting risk-based pricing without requiring the purchase of insurance.⁹¹

B. POTENTIAL MODELS FOR IMPLEMENTATION

Having established that the risk of having assets seized by police is insurable, the next step is finding an effective model for implementation. The first and best option from an efficiency perspective would be for legislatures to mandate forfeiture insurance be bundled with auto and homeowner's policies. This would help with adverse selection and significantly reduce premiums. The second option would be for insurance companies to offer a civil forfeiture rider to be sold with common policies. This option is only feasible if there is a large enough market, if there are mechanisms to control moral hazard and adverse selection, and if it is profitable when sold at a cost consumers find attractive.

1. *Legislative Mandate*

There are three main reasons for a mandatory plan.⁹² First, people—especially those who abide by the law—are likely to underestimate the risk of having their assets seized.⁹³ Second, a legislative

88. *Id.* at 378-79.

89. *Id.* at 379.

90. *Id.* at 380.

91. *Id.*

92. *Cf.* Jennifer Wriggins, *Domestic Violence Torts*, 75 S. CAL. L. REV. 121, 157-61 (2001) (explaining the benefits of mandatory insurance coverage in the context of domestic violence torts).

93. Everyone with property in the United States is potentially at risk. *See supra* notes 62-63 and accompanying text. Despite that fact, consumers are likely to underes-

mandate would prevent adverse selection from increasing the cost of coverage beyond what consumers would be willing to pay.⁹⁴ Finally, given that the problems associated with civil forfeiture were created by statute, and that the potential benefits and long history of forfeiture make its elimination unlikely, it makes sense to pursue a legislative solution that would allow law enforcement the flexibility to continue seizing assets from criminals while protecting innocent claimants from wrongful seizures.⁹⁵

2. *Optional Purchase by Consumers*

Giving consumers an option to purchase forfeiture insurance has the advantage of being voluntary. However, if insurers are to offer this product voluntarily, it must be profitable. To be profitable, there must first be a market of consumers who perceive a sufficient risk to justify the expenditure. Second, there must be a way to prevent moral hazard and adverse selection from ruining the insurance pool. Third, insurers must be able to offer the product at a price consumers are willing to pay.

This subsection contends that although marketing and adverse selection could be problematic, the idea is worthy of further examination by insurers because forfeiture insurance could indeed be profitable. First, the insurance could be marketed in communities that are at a higher risk of having assets seized. For example, insurers might find a market for forfeiture insurance in minority communities, where people have an increased risk of being stopped by police and having assets seized.⁹⁶ Second, the problems of moral hazard and adverse selection can be controlled by, for example, deductibles, exclusions, thorough claim investigation, and good underwriting. Finally, although calculation of actual premiums is beyond the scope of this Article, some rough math demonstrates that insurers should be able to provide forfeiture insurance at an attractive price.⁹⁷

timate their risk. *Cf.* Wriggins, *supra* note 92, at 158 n.206 (citing Michael H. Schill, *An Economic Analysis of Mortgagor Protection Laws*, 77 VA. L. REV. 489, 524-30 (1991)) (suggesting that people underestimate the costs of low probability, high loss events and so may not buy optimal amounts of insurance).

94. A legislative mandate has the clear advantage of eliminating the adverse selection problem. *See supra* notes 89-92 and accompanying text.

95. Another potential solution would be for the government to provide counsel to people whose assets are seized. This would bring about many of the benefits discussed here, but the upfront costs are unattractive to cash-strapped states. The legislative approach outlined here has the advantage that it imposes no direct cost on the government (although there may be an indirect cost in the need for increased police budgets).

96. *See Civil Asset Forfeiture, supra* note 31; Cockburn, *supra* note 31.

97. *See infra* notes 104-107 and accompanying text.

In the voluntary model, insurance companies would have to control adverse selection through risk classification.⁹⁸ The classic problem may arise where the people who are most in need are uninsurable or unable to afford the higher premiums that come with their classification. If at-risk individuals⁹⁹ are not insured against forfeiture, then the entire idea collapses because police will target those communities with even greater frequency, not less.

There are several reasons why this will not happen. First, the premiums for insuring against forfeiture will likely be extremely low.¹⁰⁰ Second, instead of denying coverage completely or raising premiums for high-risk individuals, insurers will be able to combat adverse selection and keep costs down by carefully drafting policies and limiting up-front indemnification when claims are made. Third, insurer transaction costs in defending forfeiture actions will be relatively small, so providing a defense even to high-risk individuals will not significantly affect the insurance pool.¹⁰¹ Finally, insurers will have an incentive to provide a defense to as many claimants as possible because it will affect police behavior, reduce the number of seizures, and ultimately increase profits.¹⁰²

3. *Controlling Moral Hazard*

Insuring civil forfeiture under either model could give rise to both ex ante and ex post moral hazard. There is a risk of ex ante moral hazard because people might be more likely to engage in criminal activity if they think they will not bear the cost of having their property seized. This can be guarded against by carefully drafting coverage provisions and exclusions to ensure that only wrongful forfeitures are covered. For example, if there is a broad civil forfeiture coverage provision, there could be an exclusion restricting coverage to cases where the insured is not charged with a crime related to the seizure. This exclusion, coupled with thorough claims investigations, would prevent people from shifting the risk of their criminal activity to the larger insurance pool.

Insurers must also be wary of ex post moral hazard. If the insurer fully indemnifies the insured prior to challenging the seizure, the insured will have no incentive to assist the insurer in bringing the claim. There are several potential ways to deal with this problem.

98. See Baker, *supra* note 79, at 376-79.

99. In the context of civil forfeiture, that could mean people in poor and minority communities, people with prior criminal convictions, or people with prior civil forfeiture actions against them.

100. See *infra* notes 104-107 and accompanying text.

101. See *infra* notes 108-114 and accompanying text.

102. See *infra* notes 115-116 and accompanying text.

The policy might provide partial indemnification immediately, and fully indemnify the claimant only after he has fulfilled his duty to cooperate in bringing the claim. Or, the policy could partially indemnify the claimant immediately, and provide no further indemnification unless the claim is successful. Finally, the option that minimizes the risk of moral hazard is for the insurer to defend the claim but provide no indemnification. The only compensation for the insured would be the return of his or her property following a successful challenge. Not only is this the cheapest option, but it also virtually eliminates the possibility that an insured will be indemnified for an intentional wrongful act.¹⁰³ Following a successful defense, the state would return the property directly to the insured. There is a danger that this option might create an incentive for insurers to refuse to defend covered claims to save money. However, given how expensive the consequences of such a refusal might be in a breach of contract action relative to the cost of simply defending the claims, insurers are likely to employ this tactic sparingly.

4. Pricing

Calculating premiums is beyond the scope of this Article. However, a brief comparison with auto insurance premiums illustrates that forfeiture insurance premiums should be low relative to the insurance products to which they might be attached.

TABLE 2: 2012 AUTO INSURANCE AND FORFEITURE DATA¹⁰⁴

Average Auto Premium	\$815
Total Cost of Auto Accidents	\$120,178,142,000
Total Federal Seizures	\$4,200,000,000

FIGURE 1: RATIO ESTIMATING FORFEITURE PREMIUM¹⁰⁵

$$\frac{\text{Average Auto Premium}}{\text{Total Cost of Accidents}} = \frac{\text{Average Forfeiture Premium}}{\text{Total Federal Seizures}}$$

103. Although insurers can provide a legal defense even in the case of criminal prosecution, indemnification of intentional wrongful acts is disallowed for public policy reasons. It is unclear whether public policy would forbid indemnification for losses stemming from civil forfeiture. See *supra* notes 66-67 and accompanying text.

104. *Auto Insurance: Costs and Expenditures*, INSURANCE INFO. INST., <http://www.iii.org/fact-statistic/auto-insurance> (last visited Feb. 12, 2017); Stillman, *supra* note 5, at 13.

105. This Figure is not intended to be precise. Instead, it is meant to facilitate discussion by providing a rough estimate of what forfeiture premiums might look like.

Plugging the figures from Table 2 into the equation in Figure 1 and solving for Average Forfeiture Premium returns an estimate of \$28 annually, or \$2.33 per month. Actual premiums should be much lower because this estimate assumes that insurers will indemnify all claimants for all their losses, challenge every seizure, lose every challenge, and duplicate the administrative costs of selling auto insurance. In reality, insurers will only challenge wrongful seizures, and will win at least some of the time. Furthermore, full up-front indemnification of claimants is not required for this insurance to be successful.¹⁰⁶ Administrative costs will not be duplicated because the insurance will be attached to policies that already exist. Finally, over time the number of seizures should decline, which will allow insurers to reduce premiums.¹⁰⁷

IV. CLAIMANTS GET A POWERFUL REPEAT PLAYER ON THEIR SIDE

A. MORE FORFEITURES WILL BE CONTESTED

Although the vast majority of forfeitures are not accompanied by criminal charges,¹⁰⁸ eighty percent are uncontested.¹⁰⁹ Some potential claimants probably decline to bring challenges because they fear losing; however, it is likely that many people who would probably prevail decline to mount challenges, because challenging a seizure can take years and cost thousands of dollars.¹¹⁰ Where the cost of bringing a challenge would exceed the value of the property, it is rational for claimants to capitulate, even when they are innocent.

One of the main advantages police and prosecutors have over claimants is that they are repeat players with procedures in place to maximize efficiency.¹¹¹ For example, some departments use waivers to avoid adjudicating seizures in court.¹¹² The use of drug dogs also

106. The critical part of this proposal is the defense of claims. *See infra* notes 108-114 and accompanying text.

107. Once the profit motive for civil forfeiture has been reduced, the number of seizures should decline. *See infra* notes 115-116 and accompanying text.

108. Ninety percent of forfeitures are not accompanied by criminal charges. *See Worrall, supra* note 29, at 4. A lack of criminal charges does not necessarily mean a forfeiture action is unjustified, but it is a good indication that increased scrutiny is warranted.

109. *See van den Berg, supra* note 4, at 888 n.106.

110. *See, e.g., Erin Fuchs, Here's Why The Government Is Filing Lawsuits Against Huge Piles Of Money*, BUS. INSIDER (Oct. 21, 2014, 2:29 PM), <http://www.businessinsider.com/the-bizarre-world-of-civil-forfeiture-lawsuits-2014-10>; Robert O'Harrow Jr. et al., *They Fought the Law. Who Won?*, WASH. POST (Sept. 8, 2014), <http://www.washingtonpost.com/sf/investigative/2014/09/08/they-fought-the-law-who-won>.

111. *See van den Berg, supra* note 4, at 915-16.

112. Police can induce potential claimants to waive their rights by threatening to arrest them or take their children away. *See Moores, supra* note 46, at 795-97. Some

makes seizures faster and easier.¹¹³ Prosecutors are experts in the proceedings, and their salaries are paid by taxpayers, not by the seizing agencies that reap the benefits of forfeitures.

Unlike the government, most claimants only play the seizure game once. Some are coerced into signing waivers that preclude any challenge. Others are left in the unfamiliar and uneasy position of attempting to locate an attorney within their price range, which can be difficult for several reasons. Because few forfeitures are challenged, few private attorneys have the expertise required to navigate the proceedings quickly and efficiently, and every hour that an attorney spends learning is billable to the claimant.¹¹⁴ Furthermore, because the relationship is limited to a single transaction, attorneys have no incentive to reduce fees to attract repeat business from the claimant. Transaction costs for claimants are high because they are one-shot players with no opportunity to reduce costs by implementing efficient procedures.

All of that would change if people had forfeiture insurance. Unlike individual claimants, insurance companies would retain attorneys who would become experts in forfeiture proceedings. Instead of each claimant spending their time finding an attorney to go to court to challenge one seizure on their behalf, insurance companies could send one attorney to court to challenge all seizures currently facing their policyholders. The resulting gains in efficiency would drastically reduce claimant-side transaction costs, which would allow for lower premiums.

B. MORE CHALLENGES, FEWER WRONGFUL FORFEITURES, LOWER PREMIUMS

Sometimes the mere existence of insurance reduces the likelihood that a harm will occur. This kind of insurance is very inexpensive to

departments go so far as to pre-notarize the waivers to make the process even more efficient. Stillman, *supra* note 5, at 54.

113. van den Berg, *supra* note 4, at 915. Some critics have even argued that law enforcement agencies have incentives to use unreliable drug-detection dogs that alert even when no drugs are present. See Shoebottom, *supra* note 63, at 252. This is especially troubling given that courts have concluded that a sniff by a drug-detection dog is not a search, and a positive alert creates an exception to the Fourth Amendment warrant requirement. *Id.* at 252-53.

114. Even if a claimant can afford an attorney, he or she will probably have difficulty locating one who specializes in asset forfeiture. *Asset Forfeiture Oversight: Hearing Before the Subcomm. on Crime, Terrorism, Homeland Security and Investigations of the H. Comm. on the Judiciary*, 114th Cong., 2015 WL 556180, at 2 (statement of David B. Smith, Attorney, Smith & Zimmerman, PLLC) (“There are only about ten lawyers in the entire United States who regularly defend civil forfeiture cases. They practice largely on the East and West Coasts. So even if you have the ability to retain counsel, you often can’t find a qualified lawyer.”).

administer, because its very existence causes a reduction in potential payouts. For example, the Federal Deposit Insurance Company (“FDIC”) was created to reduce the risk of bank runs. Bank runs are now a thing of the past because people are confident they will get their money back even if their bank becomes insolvent. The security provided by the existence of the FDIC has virtually eliminated the risk of bank runs, which significantly reduces the cost of insuring against them.

Similarly, forfeiture insurance will actually lead to fewer wrongful seizures. Once a sufficient number of people are insured against forfeiture,¹¹⁵ law enforcement behavior will change.¹¹⁶ Once the profit motive for wrongful forfeiture is gone—and in fact, seizing assets wrongfully will consistently become a net loss—law enforcement agencies will have incentives to change their behavior. Once the number of wrongful forfeitures declines, forfeiture insurance premiums can be reduced even further.

C. POTENTIAL IMPACTS OF INSURING AGAINST FORFEITURE

1. *The Benefits of Data Collection*

One of the problems with civil forfeiture is the absence of data. Although it is not possible to ascertain how many federal forfeitures are wrongful, at least we know the number and dollar value of assets seized. In contrast, reporting of forfeitures under state law varies drastically by state, with some states declining to track it at all.¹¹⁷ Even in states with tracking mechanisms, data is often incomplete and not easily available to the public.¹¹⁸

Insurance companies processing claims would collect a massive amount of data on forfeitures to more accurately price premiums. This could include the time, place, and circumstances of every seizure—including, among other things, the identities of the seizing officer and the targeted individual—as well as whether, and why, a challenge succeeded or failed.

115. Every individual need not be protected by forfeiture insurance to change law enforcement behavior. The effect will be similar to herd immunity in biology. For an explanation of herd immunity, see T. Jacob John & Reuben Samuel, *Herd Immunity and Herd Effect: New Insights and Definitions*, 16 EUR. J. OF EPIDEMIOLOGY 601, 601 (2000) (describing herd immunity as “[t]he resistance of a group to attack by a disease because of the immunity of a large proportion of the members . . .”).

116. Forfeiture in general was much less common before legislatures made it profitable for law enforcement—and wrongful forfeitures were even rarer. By forcing the government to adjudicate more forfeitures and reducing the seized assets retained by law enforcement, forfeiture will once again become less profitable for police—just as it was before the CCCA.

117. Bullock, *supra* note 75, at 8.

118. *Id.*

Although this data would not be available to the public (unless an insurance company decides to release it), insurers would be able to conduct statistical analyses to determine, for example, whether minorities are being unfairly targeted. If they are, insurers could use the data to pressure agencies to change their policies, or to show a pattern of discrimination in civil rights litigation.

2. *Potential Backlash?*

Many police departments around the country rely heavily on forfeiture to fund operations.¹¹⁹ When this revenue stream is reduced, they will need to adapt or persuade legislatures to increase their budgets. While it is conceivable that legislatures could respond by banning the sale of this form of insurance, such a move is unlikely. Inaction by lawmakers in the face of forfeiture abuse is the status quo, and it is really only a problem for people who have taken the time to educate themselves on the issue. Affirmative steps by legislators to prevent people from protecting themselves against wrongful forfeitures, however, would be an entirely different matter from a political standpoint. Such an action would likely be extremely unpopular and trigger the kind of backlash most lawmakers would like to avoid.

V. CONCLUSION

Civil asset forfeiture is one of the most controversial social issues in the United States. The Comprehensive Crime Control Act of 1984 gave law enforcement a profit motive to seize more assets. Although ninety percent of individuals targeted by civil forfeiture are never charged with a crime, eighty percent do not mount a legal challenge to reclaim their property. A system has emerged where law enforcement can seize the property of innocent individuals and afford them essentially zero process if the value of that property is less than what it costs to challenge the seizure. Due to the relatively small number of individuals targeted by civil forfeiture, political action has been lacking. Efforts at reform have occasionally been made through legislatures and courts, but more work is needed to protect the property rights of innocent people. It is time for a fundamentally different approach.

That approach might be insurance. By adding civil forfeiture coverage to existing insurance products, people would be able to protect themselves from wrongful forfeitures. Insurers battling seizures in court would achieve the repeat-player efficiencies that are currently

119. See *id.* at 12 (“[N]early 40 percent of police agencies reported that civil forfeiture proceeds were a *necessary* budget supplement.”); see also Hunter, *supra* note 22, at 556 (“In some cases, [police] became financially independent of state legislatures.”).

enjoyed only by the government in seizure proceedings. With a powerful repeat player on their side, claimants would be able to get their property back without risking huge amounts of time and money. As more forfeitures are challenged, police would have an incentive to ensure that only criminals are targeted for forfeiture. Overall, this approach could prove to be a good middle ground, because it would allow police to continue the important work of keeping the public safe, while at the same time strengthening the private property rights of the law-abiding public.