Civilizing Criminal Sanctions - A Practical Analysis of Civil Asset Forfeiture under the West Virginia Contraband Forfeiture Act

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CIVILIZING CRIMINAL SANCTIONS – A PRACTICAL ANALYSIS OF CIVIL ASSET FORFEITURE UNDER THE WEST VIRGINIA CONTRABAND FORFEITURE ACT

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I. INTRODUCTION

It is becoming more and more common for state and national legislatures to attempt to create civil penalties for criminal behavior.\(^1\) Punishment through civil sanction rather than fine or imprisonment allows for the avoidance of many of the strict due process requirements that normally apply in a criminal prosecution. This Note examines one civil penalty frequently used by those prosecuting the war on drugs — Civil Asset Forfeiture. Civil Asset Forfeiture is a tool commonly deployed by law enforcement agencies around the country to seize private property that has been used to facilitate violations of various drug laws. Within the State of West Virginia, civil forfeiture is carried out under the West Virginia Contraband Forfeiture Act (WVCFA).\(^2\) The WVCFA allows law enforcement agencies to seize private property,\(^3\) have that property forfeited through a civil proceeding,\(^4\) and then use the property to supplement their own budgets.\(^5\)

Civil forfeiture is utilized by law enforcement as a means to deter criminal activity and to ensure that criminals are not rewarded for illegal conduct. While the goals of civil asset forfeiture are legitimate, the means chosen to achieve those goals pose a threat to both property rights and the right to due process of law. This Note examines the policy implications of civil forfeiture schemes like the WVCFA, which create incentives for law enforcement agencies to engage in “for profit” policing. This Note will examine relevant issues surrounding the use of civil forfeiture within West Virginia and suggest amendments that should be considered in order to protect important constitutional rights and eliminate the improper monetary incentive that forfeiture statutes currently create for law enforcement.

Part II of this Note examines the history of government forfeiture of private property. This section also examines the difference between civil and criminal asset forfeiture and explores why the government prefers to pursue private assets through civil rather than criminal forfeiture. Part III examines the modern procedure courts and law enforcement agencies employ when pursuing a civil forfeiture case. Part IV examines the available defenses a person may

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\(^1\) See, e.g., Haislop v. Edgell, 593 S.E.2d 839, 846 (W. Va. 2003) (holding that the West Virginia Sex Offender Registration Act (codified at W. VA. CODE § 15-12-1 to -12-10 (2009), which requires lifetime registration in public sex offender registry upon conviction of certain enumerated crimes, is civil and non punitive in nature). See also W. VA. CODE § 17C-5A-1 (2008) (provides for the revocation of a driver’s license through a civil proceeding for the criminal offense of driving under the influence); West Virginia Contraband Forfeiture Act (codified at W. VA. CODE § 60A-7-701 to -707) (allows for the civil forfeiture of private property used to facilitate criminal conduct).

\(^2\) W. VA. CODE §§ 60A-7-701 to -707.

\(^3\) Id. § 60A-7-704.

\(^4\) Id. § 60A-7-703.

\(^5\) Id. § 60A-7-706 to -707.
raise in a civil forfeiture proceeding. Part V considers the constitutional protections afforded a litigant defending against a civil forfeiture. Part VI examines settlement of asset forfeiture litigation and looks at the role civil forfeiture settlement can play in plea bargaining criminal convictions. Part VII examines some of the potential problems created by the WVCFA. Finally, part VIII offers a solution to some of the problems created by asset forfeiture legislation whereby the current goals of forfeiture statutes can be realized without sacrificing core American values.

II. HISTORY OF FORFEITURE IN THE UNITED STATES

Early English law recognized three forms of forfeiture: forfeiture consequent to attainder, deodand, and statutory forfeiture.\(^6\) Forfeiture consequent to attainder, the oldest and most widely used form of forfeiture, called for the divestiture of a felon or traitor’s entire estate.\(^7\) Persons convicted of treason forfeited all their real and personal property to the Crown.\(^8\) Those convicted of felony offenses forfeited their chattels to the Crown, while their real property escheated to the local lord.\(^9\) An additional consequence of conviction for treason or felony was the “corruption of blood.” The commission of treason or felony was said to have “corrupted” or voided the original grant of chattel or real property from the King or lord to his subject; thus, an offender’s heirs were prohibited from inheriting any of the offender’s property or chattels.\(^10\) Forfeiture consequent to attainder had a dramatic impact on innocent family members and descendants and for that reason was widely rejected in the American Colonies.\(^11\)

Deodand forfeiture was employed by the King to confiscate animate and inanimate objects that had directly or indirectly caused the death of one of the King’s subjects.\(^12\) In deodand forfeiture, the property owner’s culpability was irrelevant. It was believed that the object, by causing the death of a person, was itself guilty of an offense against God.\(^13\) In order to prevent the object from causing future harm, and as a form of biblical restitution, the offending object was seized, sold, and the proceeds “paid in alms to the poor,” to be applied “for

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\(^8\) Id.

\(^9\) Id.

\(^10\) See Gurule & Guerra, supra note 6, at 9–10.

\(^11\) See, e.g., U.S. Const. art. III, § 3, cl. 2 (“[N]o Attainer of Treason shall work corruption of Blood or Forfeiture except during the Life of the person attained.”). Many state constitutions also contain provisions abolishing corruption of blood and forfeiture of estate. See, e.g., W.Va. Const. art. III, § 18 (“No conviction shall work corruption of blood or forfeiture of estate.”).

\(^12\) See Gurule & Guerra, supra note 6, at 5.

\(^13\) Id.
the appeasing of God’s wrath.”\textsuperscript{14} Deodand’s superstitious and religious foundation led early American colonists to reject it, like attainder, as inconsistent with their developing concepts of justice.\textsuperscript{15}

Statutory forfeiture authorized the government and private individuals to confiscate properties persons had used to commit particular crimes.\textsuperscript{16} The WVCFCA is a modern form of statutory forfeiture. Early statutory forfeiture commonly involved a violation of one of the many navigation acts. Throughout the seventeenth century, the English Parliament passed various acts of trade and navigation. The purpose of these various acts was to make the British Empire more economically self-sufficient by requiring that British and colonial goods be shipped in British ships crewed by predominantly British and colonial citizens.\textsuperscript{17} Collectors of customs were vested with the authority to enforce the trade and navigation acts. Any violation of a trade or navigation act regulation could result in forfeiture of ship and cargo to the Crown.\textsuperscript{18}

Civil forfeiture in relation to navigation act violations was often accomplished through an \textit{in rem} proceeding in which the sovereign proceeded directly against the property sought to be forfeited.\textsuperscript{19} A vessel suspected of involvement in a trade or navigation act violation would be arrested and prosecuted by name.\textsuperscript{20} The vessel was treated as if it were a living, breathing defendant accused of crime. Often the owners of offending vessels were unknown, unavailable, or out of the court’s jurisdiction; accordingly, it made sense for the court to proceed civilly against the vessel itself. The government sold the offending property at public auction with the proceeds divided amongst the governor, the king, and any informer that may have led to the seizure.\textsuperscript{21}

After independence, forfeiture of vessels and cargo for violation of state revenue laws through \textit{in rem} proceedings continued. Civil \textit{in rem} forfeiture statutes subjected ship owners to loss of their vessels for regulatory violations committed by captains and crew.\textsuperscript{22} In 1787, the first Congress enacted a statute subjecting to forfeiture any ships and cargoes violating customs legislation.\textsuperscript{23} This first federal forfeiture statute became a model upon which subsequent statutes were drafted and expanded civil \textit{in rem} forfeiture to cases involving smug-

\textsuperscript{14} Parker-Harris Co. v. Tate 188 S.W. 54, 56 (Tenn. 1916) (quoting Sir Edward Coke).
\textsuperscript{15} \textit{Id.} at 55 (“The doctrine [of deodand forfeiture] was deemed to be so repugnant to our ideas of justice as not to be included as a part of the common law of this country.”).
\textsuperscript{16} \textit{See} GURULE & GUERRA, supra note 6, at 10–11.
\textsuperscript{17} \textit{Id.} at 11–14.
\textsuperscript{18} \textit{Id.}
\textsuperscript{19} \textit{Id.}
\textsuperscript{20} \textit{Id.}
\textsuperscript{21} \textit{Id.}
\textsuperscript{22} GURULE & GUERRA, supra note 6, at 11–14.
\textsuperscript{23} Act of July 31, 1789, ch. 5, §§ 5, 12, 36, 1 Stat. 29, 36–37, 39, 43, 47 (repealed 1790).
gling, piracy, the slave trade, and violations of various revenue measures. Early in rem forfeiture proceedings were an effective and efficient way to punish and deter conduct in situations where a court might not otherwise have been able to exercise personal jurisdiction over an offending foreign ship owner.

Modern forfeiture statutes have clearly built upon the historical foundation created by deodand and statutory forfeiture. Modern civil in rem forfeiture has much in common with its ancient predecessors. Modern forfeiture is utilized in an effort to achieve many of the same goals, including prevention of criminal profiteering, abatement of nuisance through seizure of property, providing financial restitution to the community, and deterring criminal conduct. Modern civil forfeiture also shares many of the drawbacks of ancient forfeiture, including reduced protection for innocent owners, potential hardship to family and descendants, reduced due process protection, and lessened focus on owner culpability.

During the Prohibition Era, the government used forfeiture as a means of enforcing various liquor laws. As the war on drugs began to intensify in the 1970s and 1980s, law enforcement and legislators came to rely more and more on civil asset forfeiture as a tool to fight narcotics trafficking. Prior to 1978, the only assets that could be forfeited under federal civil drug asset forfeiture law were illegal substances themselves and the instruments by which they were manufactured or distributed. Beginning in 1978, federal law provided for the forfeiture of all drug proceeds and property acquired with proceeds from drug sales. In 1984, Congress again expanded the reach of federal forfeiture statutes by providing for the forfeiture of real property involved in drug sales or distribution.

Federal contraband forfeiture statutes became a template upon which many states based forfeiture statutes of their own. In 1988, West Virginia enacted the WVCFA. The West Virginia statute is similar to the federal statute and invites state law enforcement agencies to get in on the forfeiture action.

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25 GURULE AND GUERRA, supra note 6, at 13.
26 See National Prohibition Act, ch. 85, 41 Stat. 305 (provides criminal penalties for possession of liquor, as well as civil forfeiture of intoxicating liquor and conveyances used to transport them).
28 Id.
29 Id.
31 W. VA. CODE §§ 60A-7-701 to -707.
Forfeiture is defined as the divestiture of property without compensation.\textsuperscript{32} The government has at its disposal two types of forfeiture: criminal forfeiture and civil forfeiture.\textsuperscript{33} While both types of forfeiture achieve the same end result, criminal and civil forfeiture are worlds apart in respect to the manner in which they operate to divest a person of property.

Criminal forfeiture is defined as “a governmental proceeding brought against a person as punishment for the person’s criminal behavior.”\textsuperscript{34} Criminal forfeitures are in personam actions filed in conjunction with criminal charges\textsuperscript{35} and require that defendants first be convicted of an underlying criminal offense.\textsuperscript{36} Criminal forfeiture is considered during sentencing and may be proven by a preponderance of the evidence only after a criminal conviction has been plea bargained or proved beyond a reasonable doubt.\textsuperscript{37} By requiring a predicate criminal conviction, criminal forfeiture affords a property owner all the constitutional rights provided a criminal defendant and requires the state to prove guilt beyond a reasonable doubt.

Civil forfeiture is accomplished through an “in rem proceeding brought by the government against property that either facilitated a crime or was acquired as a result of criminal activity.”\textsuperscript{38} In recent years, civil forfeiture has become the preferred method by which government agencies divest private citizens of their property.\textsuperscript{39}

There are a myriad of reasons why the government favors civil forfeiture over criminal forfeiture. While criminal forfeiture requires the government to first obtain a criminal conviction against a property owner, a criminal conviction is irrelevant in a civil forfeiture proceeding.\textsuperscript{40} In fact, a property owner may be acquitted of a criminal charge that later forms the basis for a successful civil forfeiture action.\textsuperscript{41} The standard of proof in a civil forfeiture proceeding is a

\textsuperscript{32} BLACK’S LAW DICTIONARY 661 (7th ed. 1999).
\textsuperscript{33} See generally 3 CRIM. PRAC. MANUAL § 107:4 (2008).
\textsuperscript{34} Id.
\textsuperscript{35} Id.
\textsuperscript{36} DEE R. EDGEWORTH, ASSET FORFEITURE, PRACTICE AND PROCEDURE IN STATE AND FEDERAL COURTS 5 (2nd ed. 2008).
\textsuperscript{37} FED. CRIM. P. 32.2(b).
\textsuperscript{38} BLACK’S LAW DICTIONARY 661.
\textsuperscript{39} See GURULE & GUERRA, supra note 6, at 21.
\textsuperscript{40} See, e.g., United States v. Cherry, 330 F.3d 658, 668 n.16 (4th Cir. 2003) (“The most notable distinction between civil and criminal forfeiture is that civil forfeiture proceedings are brought against property, not against the property owner; the owner’s culpability is irrelevant in deciding whether property should be forfeited.”); State v. Forty-Three Thousand Dollars & No Cents in Cashier’s Checks, 591 S.E.2d 208, 214 (W. Va. 2003) (“The forfeiture of items under the WVCFRA does not depend upon the guilt of the owner of the items. Instead, in a forfeiture action, the question is whether the items themselves may be associated with criminal activity related to controlled substances.”).
\textsuperscript{41} See, e.g., United States v. One Assortment of 89 Firearms, 465 U.S. 354, 362 (1984) (“[T]he difference in the relative burdens of proof in the criminal and civil actions [permits the govern-
preponderance of the evidence rather than proof beyond a reasonable doubt.\textsuperscript{42} Forfeiture through a civil proceeding also allows the government to take advantage of civil discovery. The government can request that a property owner answer interrogatories, appear for depositions, and respond to requests for admissions.\textsuperscript{43} By proceeding directly against the property itself rather than a property owner, \textit{in rem} civil forfeiture allows the government to avoid many of the constitutional protections that a criminal defendant would ordinarily be entitled to receive.\textsuperscript{44} Civil forfeiture also allows the government to seize property before a final disposition on the property or underlying criminal behavior is rendered.\textsuperscript{45} In essence, civil forfeiture has virtually replaced criminal forfeiture as an easier and more efficient way of divesting private citizens of property.\textsuperscript{46}

III. FORFEITURE UNDER THE WEST VIRGINIA CONTRABAND FORFEITURE ACT

A. Property Subject to Forfeiture Under the WVCF

The WVCF codifies a system of civil forfeiture within the State of West Virginia. The Act specifies the types of property subject to forfeiture and basically provides that any property used to facilitate a violation of the West Virginia Uniform Controlled Substances Act,\textsuperscript{47} or any property acquired using proceeds of drug sales, may be subject to forfeiture.\textsuperscript{48} Included within the categories of forfeitable property are: contraband substances, raw materials or equipment used to manufacture controlled substances,\textsuperscript{49} and containers used to store controlled substances.\textsuperscript{50} Motor vehicles which are used to transport controlled substances or are intended for use in transporting controlled substances are also subject to forfeiture.\textsuperscript{51} “Money, negotiable instruments, and securities furnished . . . in exchange for a controlled substance, [and] all proceeds traceable to the exchange” are all subject to forfeiture.\textsuperscript{52}  

\textsuperscript{42} See, e.g., Forty-Three Thousand Dollars & No Cents in Cashier’s Checks, 591 S.E.2d at 209.
\textsuperscript{44} See generally Jay Rosenberg, Constitutional Rights and Civil Forfeiture Actions, 88 COLUM. L. REV. 390 (1988).
\textsuperscript{45} W. VA. CODE § 60A-7-704.
\textsuperscript{47} West Virginia Uniform Controlled Substances Act, W.VA. CODE §§ 60A-1-101 to-11-6.
\textsuperscript{48} W. VA. CODE § 60A-7-703.
\textsuperscript{49} Id. § 60A-7-703(a)(2).
\textsuperscript{50} Id. § 60A-7-703(a)(4).
\textsuperscript{51} Id. § 60A-7-703(a)(5).
\textsuperscript{52} Id. § 60A-7-703(a)(6).
The WVCFA allows for the forfeiture of money, automobiles, securities, and other forms of personal property upon a showing that the property has in some way been used to facilitate a violation of the uniform controlled substances act.\textsuperscript{53} Even a misdemeanor, simple possession, or violation of the Uniform Controlled Substances Act could result in the forfeiture of a citizen’s automobile, money, and other personal property.\textsuperscript{54}

The WVCFA also allows for the forfeiture of real property, but only when that property has been used in furtherance of a felony violation of the Controlled Substances Act.\textsuperscript{55} Thus, real property will usually only be subject to forfeiture if that property has been used in furtherance of a scheme to manufacture or distribute controlled substances.\textsuperscript{56} Essentially, a person’s real property should only be subject to forfeiture on showing that the property was used to deal drugs or was purchased with proceeds from illegal drug sales.

\textbf{B. Procedures for Seizure of Property Under the WVCFA}

The WVCFA provides that property subject to forfeiture may be seized upon process issued by a court having jurisdiction over the property, or seizure may be made without process if specifically enumerated circumstances exist.\textsuperscript{57} Property may be seized without process if (1) the seizure is incident to a lawful arrest or pursuant to a search under a search warrant,\textsuperscript{58} (2) the property subject to seizure has been the subject of a prior judgment in favor of the state in a prior WVCFA proceeding,\textsuperscript{59} (3) the appropriate person has probable cause to believe that the property is directly or indirectly dangerous to health or safety,\textsuperscript{60} or (4) the appropriate person has probable cause to believe that the property was used or intended for use in violation of the West Virginia Uniform Controlled Substances Act.\textsuperscript{61} In the case of property seized pursuant to a determination that probable cause exists to believe that the property was used or intended for use in violation of the West Virginia Controlled Substances Act, the West Virginia Supreme Court has defined probable cause as “more than a mere suspicion; there must be reasonable grounds for believing that the property is subject to

\begin{itemize}
\item\textsuperscript{53} Id.
\item\textsuperscript{54} W. VA. CODE § 60A-7-703(a)(6).
\item\textsuperscript{55} Id. at (a)(8) (providing for the forfeiture of any real property that has been used, or intended to be used to commit or to facilitate the commission of a violation of the controlled substances act punishable by more than one year imprisonment).
\item\textsuperscript{56} See, e.g., W. VA. CODE § 60A-4-401 (prohibiting the manufacture, delivery, or possession with intent to deliver a controlled substance and stating that a person convicted of violating the section is guilty of a felony and may be imprisoned for up to fifteen years).
\item\textsuperscript{57} W. VA. CODE § 60A-7-704.
\item\textsuperscript{58} Id. § 60A-7-704(b)(1).
\item\textsuperscript{59} Id. § 60A-7-704(b)(2).
\item\textsuperscript{60} Id. § 60A-7-704(b)(3).
\item\textsuperscript{61} Id. § 60A-7-704(b)(4).
\end{itemize}
forfeiture." If a seizure is made without process, then forfeiture proceedings must be instituted within 90 days of the seizure.

C. Procedures for Forfeiture Under the WVCFA

Due process requires that a party receive notice and have an opportunity to be heard before being deprived of his or her property. The WVCFA requires that "at the time of filing or as soon as practicable thereafter, a copy of the petition for forfeiture shall be served upon the owner or owners of the seized property, as well as all holders of a perfected security interest or lien . . . if known." The state is required to make a "diligent effort" to locate all persons having an interest in property subject to forfeiture. A failure on behalf of the state to notify a property owner could result in "dismissal of ongoing forfeiture proceedings or the vacation of any orders entered in such proceedings." If no owner can be located through diligent efforts, then the state may satisfy the notification requirement through a class II legal publication in the county "wherein such property was located at the time of seizure and the county wherein the petition for forfeiture is filed." A defending property owner has thirty days from the date of service to file a response to a forfeiture petition. Failure to respond within thirty days will result in a default judgment forfeiting the property to the state. If a response is filed within thirty days, then the court will set a date for a hearing on the merits of the case.

If a claimant fails to file a response within the required thirty days, the circuit court is under a mandatory obligation to enter a default judgment in favor

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62 Frail ex rel. State Dep’t of Pub. Safety v. $24,900.00 in U.S. Currency, 453 S.E.2d 307, 311 (W. Va. 1994) ("[P]robable cause to believe that the property seized is subject to the forfeiture provisions of W. Va. Code, 60A-7-701 et seq., must exist at the time the petition for forfeiture is filed.").
63 W. VA. CODE § 60A-7-704(c).
65 W. VA. CODE § 60A-7-704(b).
66 Id.
67 Games-Neely ex rel. West Virginia State Police v. Real Property, 565 S.E.2d 358, 360 (W. Va. 2002) ("The State’s failure to effect service of a forfeiture petition upon all the owners of property subject to such a petition . . . may result in either dismissal of ongoing forfeiture proceedings or the vacation of any orders entered in such proceedings, barring the State’s inability to identify all such owners despite diligent efforts to identify the property owners.").
68 A class II legal publication is defined as a legal advertisement published once a week for two successive weeks in a qualified newspaper published in the publication area. W. VA. CODE § 59-3-2.
69 W. VA. CODE § 60A-7-705(b).
70 Id. § 60A-7-705(d).
71 Id.
72 Id.
of the state.\textsuperscript{73} However, the circuit court has discretion under Rule 60(b) of the West Virginia Rules of Civil Procedure to set aside a judgment by default entered due to a failure to file an answer within the required thirty day period.\textsuperscript{74}

The WVCFA provides that a proceeding for forfeiture shall be characterized as a civil proceeding.\textsuperscript{75} “A forfeiture action brought under the [WVCFA] is an action in rem that is brought against the item(s) sought to be forfeited, and not an action against the owner of such item(s).”\textsuperscript{76} “A petition for forfeiture may be filed on behalf of the state and any law-enforcement agency making a seizure under [the WVCFA] by the prosecuting attorney of a county, or duly appointed special prosecutor.”\textsuperscript{77} The WVCFA allows for the filing of the forfeiture petition in the circuit court of any county where “[1] the seizure was made, [2] the real property subject to forfeiture is situated, or [3] . . . any owner of the property subject to forfeiture may reside.”\textsuperscript{78} The WVCFA guarantees the right to trial by jury upon demand of either party.\textsuperscript{79}

At trial, the state bears the burden of proving by a preponderance of the evidence “that the seized property is subject to forfeiture pursuant to the provisions of [the WVCFA].”\textsuperscript{80} The West Virginia Supreme Court explained the state’s burden as a requirement to “demonstrate by a preponderance of the evidence that there is a substantial connection between the property seized and the illegal drug transaction. This finding is in addition to the initial finding of probable cause that an illegal act under the drug law has occurred.”\textsuperscript{81}

In order to forfeit the interest of a holder of a bona fide security interest or other valid lien in any conveyance, the state must prove “by a preponderance of the evidence that the holder of the security interest or lien either knew, or had reason to know, that the conveyance was being used or was likely to be used in a violation of [the controlled substances act].”\textsuperscript{82}

IV. DEFENSES TO A FORFEITURE ACTION

A. Insufficient Nexus Defense

A person having an interest in property subject to forfeiture can raise a number of defenses to the forfeiture. One method of defeating a forfeiture ac-

\textsuperscript{73} Games-Neely ex rel. West Virginia State Police, 565 S.E.2d at 365.
\textsuperscript{74} Id. at 367.
\textsuperscript{75} W. VA. CODE § 60A-7-705(a)(1).
\textsuperscript{76} State ex rel. Lawson v. Wilkes, 501 S.E.2d 470, 475 (W. Va. 1998).
\textsuperscript{77} W. VA. CODE § 60A-7-705(a)(1).
\textsuperscript{78} Id. § 60A-7-705(a)(2).
\textsuperscript{79} Id. § 60A-7-705(a)(3).
\textsuperscript{80} Id. § 60A-7-705(e).
\textsuperscript{81} Forty-Three Thousand Dollars & No Cents in Cashier’s Checks, 591 S.E.2d at 213.
\textsuperscript{82} W. VA. CODE § 60A-7-703(a)(5)(iii).
tion is by demonstrating that there is insufficient evidence to prove that the property was involved in criminal activity. “The State, in forfeiting property, is required to demonstrate by a preponderance of the evidence that there is a substantial connection between the property seized and the illegal drug transaction.” Factors that may lead to a finding of insufficient nexus between property and illegal activity can include the following:

(1) absence of prior criminal arrests, convictions, or criminal charge filed;
(2) no contraband, paraphernalia, or weapons seized;
(3) controlled substance amounts seized are consistent with personal use;
(4) insufficient connection to criminal activity;
(5) lack of a connection between the claimant and any known criminal suspect or organization;
(6) canine alert was unreliable.

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84 Forty-Three Thousand Dollars & No Cents in Cashier’s Checks, 591 S.E.2d at 213. See also Frail, 453 S.E.2d at 317 (Courts “have been careful to require that there be some nexus between the items seized and proof that an illegal offense had been committed or was intended.”).
87 Under the WVCFA, evidence that the amount of controlled substance found was consistent with personal use and therefore misdemeanor simple possession would only work as a defense to forfeiture of real property. W. Va. CODE § 60A-7-703(a)(8). As discussed above, personal property can be forfeited for misdemeanor violations of the controlled substances act; therefore, showing that the amount of controlled substance found is insignificant would not prevent forfeiture of personal property if it could be shown that the property is in some way used to facilitate a violation of the controlled substances act. Id. § 60A-7-703(a)(6).
88 See State v. Giles, 29,695 (La. App. 2 Cir. 6/18/97); 697 So. 2d 699, 706 (insufficient connection to drugs); Jackson v. State ex rel. Miss. Bureau of Narcotics, 591 So. 2d 820, 823 (Miss. 1991) (vehicle not used in illegal transaction).
90 Many courts have found evidence of a drug dog alerting to the presence of trace amounts of narcotics on currency insufficient to establish a nexus between currency and illegal activity. See Frail, 453 S.E.2d at 316 (A drug dog alert on currency “may demonstrate that the currency is contaminated, but it does not demonstrate a substantial connection to any illegal activity on the part of its possessor.”).
(7) large amount of currency were insufficient,\textsuperscript{91} or

(8) insufficient tracing of proceeds to criminal activity.\textsuperscript{92}

While the state is required to show a “substantial connection” between the property sought to be forfeited and criminal activity,\textsuperscript{93} exactly what constitutes a “substantial connection” is difficult to define with any real precision. In one West Virginia Supreme Court opinion, Justice Maynard, writing about the substantial connection burden, stated that “at some point there must be a common sense evaluation of the facts.”\textsuperscript{94} A civil forfeiture litigant can attempt to adduce evidence showing that there is no substantial connection, but ultimately this is an issue that will probably be resolved by the finder of fact.

B. Legitimate Sources Defense

In a “legitimate sources defense,” a claimant attempts to show that the seized funds or property had an independent, innocent source and are not traceable to criminal activity.\textsuperscript{95} Where forfeiture of property is based on the premise that the property represents the fruits of criminal activity, the state bears the initial burden of adducing sufficient evidence of a “monetary or other substantial connection” between the property and the criminal activity that would allow a jury to properly conclude that the property in fact represented the fruits of illegal activity.\textsuperscript{96} Examples of evidence that a property owner could offer as innocent sources for a defense to a proceeds theory forfeiture case include the following:

(1) employment income,\textsuperscript{97}

(2) business income.\textsuperscript{98}

\textsuperscript{91} See id. (“The possession of large amounts of cash is not more indicative of drug sales than it is of weapon sales, gambling, or a myriad of other illegal activities.” (quoting United States v. $31,990 in U.S. Currency, 982 F.2d 851, 854 (2d Cir. 1993))).

\textsuperscript{92} See Burgraff, 542 S.E.2d 909 (W. Va. 2000) (real property).

\textsuperscript{93} Forty-Three Thousand Dollars & No Cents in Cashier’s Checks, 591 S.E.2d at 213 (W. Va. 2003).

\textsuperscript{94} Id.

\textsuperscript{95} See generally Michael A. DiSabatino, Annotation, Evidence Considered in Trading Currency, Bank Account, or Cash Equivalent to Illegal Drug Trafficking so as to Permit Forfeiture, or Declaration as Contraband, Under State Law — Explanation or Lack Thereof, 4 A.L.R. 6th 113 (2005).

\textsuperscript{96} Burgraff, 542 S.E.2d at 911.


(3) gambling proceeds,\(^9\) 

(4) loans,\(^{10}\) 

(5) inheritance,\(^{101}\) 

(6) gift,\(^{102}\) and 

(7) sale of property.\(^{103}\)

Proving property derives from a legitimate source may not always save the property from forfeiture. Property derived from innocent sources can still be subject to forfeiture if the property was used or was intended to be used to facilitate a violation of the controlled substances act.\(^{104}\)

C. Innocent Owners and Bona Fide Purchasers

The WVCFA provides a property owner with a number of affirmative defenses to a forfeiture action depending on the property sought and the owner’s interest therein. One defense provided by the WVCFA is the “innocent owner” defense.\(^{105}\) The innocent owner defense can be raised by a person having an interest in a motor vehicle, money, negotiable instruments, or real property being sought by the government.\(^{106}\) In the case of an automobile, the WVCFA, in addition to some protections for innocent common carriers and lien holders, provides that a vehicle “shall not be forfeited under the provisions of [the WVCFA] if the person owning the conveyance establishes that he or she neither knew, nor had reason to know, that the conveyance was being employed or was likely to be employed in a violation of this chapter.”\(^{107}\) In the case of money, negotiable instruments, and real property, the WVCFA provides that “no property may be forfeited under this subdivision, to the extent of an interest of an

\(^{9}\) See United States v. Thomas, 913 F.2d 1111, 1118 (4th Cir. 1990).

\(^{10}\) See United States v. Yukon Delta, 774 F.2d 1432, 1435 (9th Cir. 1985); State v. $29,177.00 U.S. Currency, 93-592 (La. App. 3 Cir. 2/2/94); 638 So. 2d 653, 655.

\(^{101}\) See United States v. 1998 BMW “I” Convertible, 235 F.3d 397, 399 (8th Cir. 2000).


\(^{103}\) See Frail, 453 S.E.2d at 316.

\(^{104}\) The state is only required to prove “that there was a substantial connection between the property seized and an illegal drug transaction.” State v. Forty-Three Thousand Dollars & No Cents in Cashier’s Checks, 591 S.E.2d 208, 214 (W. Va. 2003).

\(^{105}\) W. VA. CODE § 60A-7-703(a).

\(^{106}\) Id.

\(^{107}\) Id. § 60A-7-703(a)(5)(ii) (emphasis added).
owner, by reason of any act or omission established by that owner to have been committed or omitted without his or her knowledge or consent.”  

The statutory language seems to indicate that the innocent owner defense is an affirmative defense that places the burden on the innocent owner to establish that they are in fact an innocent owner. In the case of an automobile, an innocent owner would be required to establish that they neither knew nor had reason to know that their vehicle would be used in violation of the controlled substances act. In the case of money and real property, the burden on the innocent owner is less substantial and requires an innocent owner only to prove that she had no actual knowledge that her property was being used in violation of the controlled substances act. Therefore, it would appear that while a truly innocent but unobservant owner might succeed in a forfeiture action against real property, money, or negotiable instruments, that same unobservant owner might not be so successful in the case of an automobile forfeiture.

The WVCFA also provides protection for innocent, bona fide purchasers. In a case involving a bona fide purchaser, the state is required to prove much more than a mere “substantial connection” between property and illegal conduct. The WVCFA states that the interest of a bona fide purchaser of real or personal property may not be forfeited unless “the state establishes by clear and convincing proof that the bona fide purchaser knew or should have known that the property had in the previous three years next preceding the sale been used in violation of [the West Virginia Uniform Controlled Substances Act].” The protection for bona fide purchases would serve to protect truly innocent buyers, but would not prevent forfeiture in cases of collusive or bad faith transfers.

D. **Bankruptcy Defense and the West Virginia Homestead Exemption**

Some litigants have attempted to avoid state and federal forfeiture actions by filing for bankruptcy protection. While the issue has not been definitively resolved in all jurisdictions, the filing of a bankruptcy petition will probably not protect private property from forfeiture under the WVCFA. Ordinarily, the filing of a bankruptcy petition acts as an automatic stay to actions brought against the debtor or property of the bankruptcy estate. One exception to the automatic stay involves exercises of a government or agency’s police power. The majority view is that a civil forfeiture action falls within the police power

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108 Id. § 60A-7-703(a)(7), (8).
109 Id. § 60A-7-703(a)(5)(ii).
110 Id. § 60A-7-703(a)(7), (8).
111 W. VA. CODE § 60A-7-703(g).
exception to the automatic stay; therefore, filing a bankruptcy petition will not stay a pending civil forfeiture action.\(^{115}\)

One defense that does not appear in any published West Virginia Supreme Court opinion is the “homestead exemption.” Many states, including West Virginia, provide residents with a homestead exemption in their state constitutions.\(^{116}\) A homestead exemption allows a property owner to exempt a certain amount of property from forced sale to satisfy debt.\(^{117}\) The West Virginia Constitution provides that:

Any husband or parent, residing in this state, or the infant children of deceased parents, may hold a homestead of the value of five thousand dollars, and personal property to the value of one thousand dollars, exempt from forced sale, subject to such regulations as shall be prescribed by law.\(^{118}\)

An exemption for $5000 in real property and $1000 in personal property probably would not provide much relief for most forfeiture litigants, and that may be the reason why the issue has not been raised in West Virginia. However, other states have addressed this issue. A few states have found that their homestead exemptions do apply in civil forfeiture cases and allow residents to exempt certain property from civil forfeiture.\(^{119}\) Other states have determined that state homestead exemptions do not apply in civil forfeiture cases.\(^{120}\) A state homestead exemption will also not protect property from federal forfeiture due to federal preemption.\(^{121}\) This issue remains unresolved within the State of West Virginia.

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115 See In re Brewer, 209 B.R. at 577; see also In re Chapman 264 B.R. 565, 571 (B.A.P. 9th Cir. 2001) (“Because the government is a governmental unit exercising its police or regulatory power against the Property in accordance with the requirements of § 362(b)(4), it can proceed against the Property.”).

116 See W. VA. CONST. art. VI, § 48.

117 See W. VA. CODE § 38-9-1 to -9-6.

118 W. VA. CONST. art. VI, § 48; see also W. VA. CODE § 38-9-1 to -9-6 (similar).

119 See, e.g., State ex rel. Braun v. 918 North County Line Road, 840 P.2d 453, 455 (Kan. 1994); People v. 1403 East Parham Street, 621 N.E.2d 1026, 1031 (Ill. App. 1993); Butterworth v. Caggiano, 605 So. 2d 56, 61 (Fla. 1992); In re Bly, 456 N.W.2d 195, 200 (Iowa 1990).

120 See e.g., In re Forfeiture of 5118 Indian Garden Road, 654 N.W.2d 646, 650 (Mich. App. 2002); In re Smith, 176 B.R. 221, 223 (Bankr. N.D. Ala. 1995); In re 1632 North Santa Rita, 801 P.2d 432, 437 (Ariz. App. 1990).

121 See United States v. 817 Northeast 29th Drive, 175 F.3d 1304, 1311 (11th Cir. 1999); United States v. Lot 5, 23 F.3d 359, 363 (11th Cir. 1994).
V. CONSTITUTIONAL RIGHTS IN A CIVIL ASSET FORFEITURE CASE

A. Constitutional Protections That Sometimes Apply in Civil Forfeiture

One of the most attractive aspects of civil forfeiture, from the government’s perspective, is the ability to obtain title to property without adherence to many of the constitutional protections normally afforded a defendant in a criminal prosecution. Which constitutional protections apply in a civil forfeiture proceeding often depends on whether the proceeding is characterized as “remedial” or “punitive.”122 A punitive forfeiture is considered to be a form of punishment for crime.123 As such, many of the rights protecting a criminal defendant will apply in a punitive forfeiture.124 A remedial forfeiture is not considered punishment for crime, and as such, many of the constitutional protections normally afforded a criminal defendant will not apply in a remedial forfeiture.125

While civil asset forfeiture is called a civil proceeding, in some circumstances the forfeiture could be so punitive as to constitute punishment which grants the property owner constitutional protections normally afforded a criminal defendant.126 In determining whether a civil forfeiture constitutes punishment, the West Virginia Supreme Court has adopted the two-prong test set forth by the United States Supreme Court in United States v. One Assortment of 89 Firearms.127 The two-prong test asks:

1. whether the Legislature, in establishing the penalizing mechanism, indicated either expressly or impliedly that the statutory penalty in question was intended to be civil or criminal; and

2. where we find that the Legislature has indicated an intention to establish a civil penalty, whether the statutory scheme was so punitive either in purpose or effect as to negate that intention.128

In answering the first prong, the Court determined that the Legislature intended for the WVCFA to establish a civil penalty.129 In meeting the second prong, the Court declared that “‘only the clearest proof’ that the purpose and

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123 Id. at 608.
124 Id.
125 Id.
128 Id.
129 Id. See also W. Va. CODE § 60A-7-705(a)(1) (“Any proceeding wherein the state seeks forfeiture of property subject to forfeiture under this article shall be a civil proceeding.”).
effect of the forfeiture are punitive will suffice to override the Legislature’s manifest preference for a civil sanction.\textsuperscript{130}

In determining whether the purpose and effect of a forfeiture statute is punitive, a court will consider the following factors:

Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment — retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned. . . \textsuperscript{131}

While the West Virginia Supreme Court has never found any portion of the WVCFA to constitute a punitive forfeiture, presented with the right case, forfeiture under the WVCFA could potentially be found to be punitive.

The type of property sought to be forfeited and the reason for forfeiture can be important to consider when determining if the forfeiture is punitive or remedial. Certain types of forfeitures are always considered to be remedial and can never be considered punitive. Forfeitures involving (1) contraband,\textsuperscript{132} (2) instrumentalities,\textsuperscript{133} (3) proceeds,\textsuperscript{134} and (4) smuggled goods\textsuperscript{135} are never punitive. Forfeitures predicated on a facilitation theory are the only types of forfeitures that can usually be found to be punitive for purposes of determining which constitutional protections attach.\textsuperscript{136} Facilitation property is property that is not unlawful to possess, property that was not purchased with the proceeds from criminal activity, and property that has not been directly used to commit an offense.\textsuperscript{137} Because the property was legal to possess and was not purchased with

\textsuperscript{130} Greene, 473 S.E.2d at 924 (quoting One Assortment of 89 Firearms, 465 U.S. at 365).

\textsuperscript{131} Id. (quoting One Assortment of 89 Firearms, 465 U.S. at 365 n.7).

\textsuperscript{132} See One Assortment of 89 Firearms, 465 U.S. at 364. Contraband forfeitures are always remedial and can never be punitive because they merely remove dangerous or illegal items from society. See id.

\textsuperscript{133} See United States v. Ahmad, 213 F.3d 805, 814 (4th Cir. 2000). Instrumentality forfeitures are always remedial because they are limited to the actual property used to commit the offense, such as money in a money laundering scheme. Id.

\textsuperscript{134} See United States v. Ursery, 518 U.S. 267, 291 (1996). Proceeds forfeitures are never punitive because they merely take away illicit profits which a person has no legal right to possess. Id.

\textsuperscript{135} See Lot of Emerald Cut Stones v. United States, 409 U.S. 232, 237 (1972). Forfeiture of illegally smuggled goods is never punitive because forfeiture “provides a reasonable form of liquidated damages for violation of inspection provisions and serves to reimburse the Government for investigation and enforcement expenses.” Id.

\textsuperscript{136} See Austin v. United States, 509 U.S. 602, 613 (1993).

\textsuperscript{137} See GURULE & GUERRA, supra note 6, at 149.
proceeds from criminal activity, courts are more willing to consider “facilitation” forfeiture to constitute punishment.\textsuperscript{138} Facilitation forfeiture often involves situations where the government is attempting to forfeit an automobile used to transport contraband\textsuperscript{139} or real property where contraband was stored or distributed.\textsuperscript{140}

1. Double Jeopardy

The Fifth Amendment Double Jeopardy Clause prevents multiple punishments for the same offense\textsuperscript{141} and applies only when a sanction is considered to be punitive.\textsuperscript{142} The West Virginia Supreme Court has ruled that certain portions of the WVCFA are not punitive;\textsuperscript{143} therefore, the Double Jeopardy Clause will not bar civil forfeiture actions under those portions of the statute. The Court has determined that forfeitures involving raw materials, manufacturing equipment, and conveyances used to transport contraband are not subject to double jeopardy guarantees.\textsuperscript{144} The West Virginia Supreme Court left unanswered the question of whether forfeiture under other parts of the WVCFA could be considered punitive and thus subject to Double Jeopardy protection.

Of particular importance, the Court did not determine if forfeiture involving money\textsuperscript{145} or real property\textsuperscript{146} could be considered punitive for purposes of double jeopardy analysis. While the West Virginia Supreme Court has not decided whether a forfeiture action involving real property or money could be considered punitive, such a question has been presented in other states with foreign courts usually finding that such actions are not punitive and are thus not constrained by Fifth Amendment Double Jeopardy Clause protections.\textsuperscript{147}

\textsuperscript{138} See \textit{Austin}, 509 U.S. at 613.
\textsuperscript{139} See, e.g., \textit{United States v. One 1986 Mercedes Benz}, 846 F.2d 2 (2d Cir. 1988).
\textsuperscript{140} See, e.g., \textit{United States v. Two Tracts of Real Prop.}, 998 F.2d 204 (4th Cir. 1993).
\textsuperscript{142} \textit{One Assortment of 89 Firearms}, 465 U.S. at 361 ("[N]either collateral estoppel nor double jeopardy bars a civil, remedial forfeiture proceeding initiated following an acquittal on related criminal charges.").
\textsuperscript{143} \textit{Greene}, 473 S.E.2d at 922 ("West Virginia Code §§ 60A-7-703(a)(2) and (4) are not punitive for the purposes of the guarantees against double jeopardy as expressed in the United States and West Virginia Constitutions.").
\textsuperscript{144} \textit{Id.}
\textsuperscript{145} \textit{See W. VA. CODE} § 60A-7-703(a).
\textsuperscript{146} \textit{Id.} § 60A-7-703(8).
\textsuperscript{147} See \textsc{Edgeworth}, supra note 36, at 270–74 (compiling a list of cases from various states); \textit{see also} \textit{Commonwealth v. Wingait Farms}, 690 A.2d 222, 226 (Pa. 1997); \textit{State v. Blackmon}, 984 S.W.2d 389, 392 (Tenn. 1998). For examples of cases where courts have found double jeopardy protections applicable in civil forfeitures, see \textit{State v. Nunez}, 2 P.3d 264, 273 (N.M. 1999); \textit{State v. One 1987 Toyota Pickup}, 447 N.W.2d 243, 249 (Neb. 1989).
2. Eighth Amendment and Excessive Fines

Another constitutional protection that applies only in punitive proceedings is the prohibition against excessive fines. The Eighth Amendment Excessive Fines Clause applies in federal civil actions if they are, in part, a punishment. The United States Supreme Court has determined that some portions of federal asset forfeiture legislation are partially punitive and therefore subject to Eighth Amendment restrictions. Drafted in a similar manner with the intent of achieving similar goals, it would be reasonable to assume that parts of the West Virginia statute could receive similar treatment by the courts, and forfeiture proceedings in state court under the WVCFA could also be subject to excessive fines limitations.

The United States Supreme Court has never held that the Eighth Amendment Excessive Fines Clause applies to the states through the Fourteenth Amendment. State forfeiture will never be considered excessive unless the state forfeiture statute itself is amended to contain a prohibition against excessive forfeiture or the state constitution is amended to prohibit excessive fines. While the WVCFA itself provides no protection against excessive forfeitures, the West Virginia Constitution contains an excessive fines clause similar to the Eighth Amendment of the United States Constitution. Article III, Section 5 of the West Virginia Constitution states that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted. Penalties shall be proportioned to the character and degree of the offence.”

WVCFA forfeitures predicated on a facilitation theory could be challenged as excessive under Article III, Section 5 of the West Virginia Constitution. Like prohibitions against double jeopardy, constitutional prohibitions against excessive fines and disproportionate penalties generally apply only in criminal proceedings and not civil proceedings. While the West Virginia Supreme Court has not yet determined whether the Excessive Punishment Clause could apply in a WVCFA forfeiture, the Court has found the Excessive Punish-

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149 Id.
150 See Browning-Ferris Indus. v. Kelco Disposal, 492 U.S. 257, 276 n.22 (1989) (Court declines to answer question whether Eighth Amendment excessive fines clause applies to states through Fourteenth Amendment). Earlier Supreme Court decisions have held that the Eighth Amendment excessive fines clause does not apply to the states. See Knapp v. Schweitzer, 357 U.S. 371, 379 n.5 (1958); Walters-Pierce Oil Co. v. Texas, 212 U.S. 86, 111 (1909); Pervear v. Commonwealth, 72 U.S. 475, 480 (1867).
151 See W. VA. CONST. art. III, § 5.
152 Id.
153 See State ex rel. Rufus v. Easley, 40 S.E.2d 827, 830 (W. Va. 1946). A civil action is not subject to the constitutional prohibition against cruel and unusual punishment nor to the Double Jeopardy Clause of the Constitution. Because there is no fine or punishment involved, a bastardy proceeding is not criminal in nature and therefore constitutional prohibitions against cruel and unusual punishment do not apply. Id.
ment Clause of the state constitution applicable in other civil forfeiture cases.\textsuperscript{154} In \textit{West Virginia Public Employees Retirement System} v. \textit{Dodd},\textsuperscript{155} the Court held that the civil forfeiture of a pension under the West Virginia pension forfeiture statute\textsuperscript{156} was penal in nature and thus subject to prohibitions against disproportionate punishment.\textsuperscript{157} The importance of the \textit{Dodd} case in relation to WVCFA forfeitures lies in the Court’s recognition that constitutional prohibitions against disproportionate punishment can apply in civil forfeiture proceedings.

While in \textit{Dodd} the Court failed to explain why the civil forfeiture of a pension was penal in nature, the forfeiture was triggered by the pensioner’s criminal conduct. It would therefore be reasonable to assume that the Court could find that forfeiture under the WVCFA is likewise “penal in nature” as WVCFA forfeitures are also triggered by criminal conduct. Once a court determines that a forfeiture is penal in nature the court will apply a two part test to determine if the penalty is disproportionate to the character of the offense.\textsuperscript{158} The first part asks if the penalty “shocks the conscience of the court.”\textsuperscript{159} A court will consider “all of the circumstances surrounding an offense” to determine if the penalty imposed shocks the conscience of the court.\textsuperscript{160} If a penalty is found to “shock the conscience of the court[.]” then the inquiry is over and the penalty is unconstitutional.\textsuperscript{161} If the court determines that a penalty does not shock the conscience of the court, then the court examines the objective circumstances surrounding the penalty to determine if the penalty is constitutionally disproportionate.\textsuperscript{162} The West Virginia Supreme Court has explained this objective test as follows:

In determining whether a given sentence violates the proportionality principle found in Article III, Section 5 of the West Virginia Constitution, consideration is given to the nature of the offense, the legislative purpose behind the punishment, a comparison of the punishment with what would be inflicted in other ju-

\textsuperscript{154} See, \textit{e.g.}, W. Va. Pub. Employees Ret. Sys. v. Dodd, 396 S.E.2d 725, 732 (W. Va. 1990). The Court was asked to determine if the pension forfeiture statute imposed an unconstitutionally disproportionate punishment. The Court ultimately upheld the statute and found that it did not impose an unconstitutionally disproportionate punishment.

\textsuperscript{155} 396 S.E.2d 725 (W. Va. 1990).

\textsuperscript{156} W. VA. CODE §§ 5-10A-1 to -10.

\textsuperscript{157} \textit{Dodd}, 396 S.E.2d at 732.


\textsuperscript{159} \textit{Id}.

\textsuperscript{160} \textit{Id}.

\textsuperscript{161} \textit{Id}.

\textsuperscript{162} \textit{Id}.
risdictions, and a comparison with other offenses within the same jurisdiction.\textsuperscript{163}

Where the state is seeking to confiscate property that has been used to facilitate a violation of the Controlled Substances Act, the property owner could seek to show that the forfeiture is disproportionate to the gravity of the offense committed; it thus would constitute a violation of Article III, Section 5 of the West Virginia Constitution.

B. Constitutional Protections That Always Apply in Civil Forfeiture

While the constitutional protections discussed above apply only if a forfeiture is found to be punitive, some constitutional protections apply in a civil forfeiture case, regardless of whether the forfeiture is characterized as remedial or punitive.

The United States Supreme Court has held that Fourth Amendment protections always apply in civil forfeiture cases.\textsuperscript{164} The exclusionary rule applies in civil asset forfeiture proceedings barring the use of evidence obtained in violation of the Fourth Amendment.\textsuperscript{165} However, the government may forfeit property that is illegally seized if the government has sufficient independent evidence to support the forfeitability of the property.\textsuperscript{166} “The mere fact of the illegal seizure, standing alone, does not immunize the goods from forfeiture.”\textsuperscript{167}

Another constitutional right that always applies in civil forfeiture cases is the Fifth Amendment privilege against self-incrimination. The Fifth Amendment can be asserted in a civil proceeding,\textsuperscript{168} but its effect in a civil proceeding is slightly different than in a criminal trial. While a defendant in a criminal trial has an absolute right to remain silent and no negative inference can be drawn from that silence,\textsuperscript{169} a civil litigant is not afforded such broad protection. In a civil forfeiture proceeding, the Fifth Amendment does not bar the government from requiring a claimant to establish standing by asserting a valid property

\textsuperscript{163} Id.

\textsuperscript{164} One 1958 Plymouth Sedan v. Commonwealth, 380 U.S. 693, 702 (1965) (“[T]he exclusionary rule is applicable to forfeiture proceedings.”) (cited with approval in Austin v. United States, 509 U.S. 602, 608 (1993)).

\textsuperscript{165} Id.

\textsuperscript{166} See John Bacall Imps., Ltd. v. United States, 412 F.2d 586, 588 (9th Cir. 1969); see also United States v. Twenty-Two Thousand, Two Hundred Eighty-Seven Dollars, 709 F.2d 442, 446 (6th Cir. 1983).

\textsuperscript{167} John Bacall Imps., Ltd., 412 F.2d at 588.

\textsuperscript{168} Kastigar v. United States, 406 U.S. 441, 444–45 (1972). The Fifth Amendment Privilege against self incrimination “can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory; and it protects against any disclosures that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used.” Id.

\textsuperscript{169} Griffin v. California, 380 U.S. 609, 614 (1965).
interest in the seized items.\textsuperscript{170} Also, the Fifth Amendment cannot be used as a substitute for a burden of proof that belongs to the claimant.\textsuperscript{171} One of the most significant differences in the application of the Fifth Amendment in a civil proceeding is the ability of the court to draw an adverse inference from a claimant’s assertion of the privilege.\textsuperscript{172} When a claimant does decide to assert the Fifth Amendment privilege, he may also assume an evidentiary burden or restriction. For example, a claimant may not invoke the Fifth Amendment during discovery and then attempt to produce the same testimony at trial.\textsuperscript{173}

VI. SETTLEMENT OF ASSET FORFEITURE LITIGATION

Asset forfeiture cases are often resolved through settlement agreements. The federal government has a policy favoring resolution of forfeiture cases through settlement agreements.\textsuperscript{174} A property owner might agree to settle a forfeiture case and give up a portion of his or her property in order to avoid a costly legal battle.\textsuperscript{175} Sometimes, a civil forfeiture case and a criminal prosecution are resolved through a single, global plea agreement. A combined plea agreement might allow a criminal defendant to plead guilty to lesser charges in exchange for agreeing to forfeit certain property.

Criminal plea agreements resolving civil asset forfeiture claims raise numerous ethical concerns. Criminal plea agreements should be based on the severity of the criminal offense, a defendant’s criminal history, and the danger an individual poses to the community.\textsuperscript{176} Allowing a criminal defendant to use property as part of the consideration in a plea agreement creates an inference that a defendant may have been given preferential treatment by giving up personal assets. Because the prosecutor’s office and local law enforcement agencies will be the direct beneficiaries of any forfeited property,\textsuperscript{177} criminal plea agreements resolving civil forfeiture litigation also raise conflict of interest is-

\textsuperscript{170} See Baker v. United States, 722 F.2d 517, 519 (9th Cir. 1983).

\textsuperscript{171} Forty-Three Thousand Dollars & No Cents in Cashier’s Checks, 591 S.E.2d at 214 (“While...[a claimant] certainly has the right to assert his Fifth Amendment privilege with regard to the origin of [funds subject to forfeiture action], it is disingenuous to then ask this Court to merely assume the funds are not from his illegal drug distribution business when [claimant] refuses to offer any other alternate source for these monies.”).

\textsuperscript{172} See Baxter v. Palmigiano, 425 U.S. 308, 318 (1976) (“[T]he Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them...”).

\textsuperscript{173} See In re Edmond, 934 F.2d 1304, 1306 (4th Cir. 1991).


\textsuperscript{175} See, e.g., LEONARD W. LEVY, A LICENSE TO STEAL: THE FORFEITURE OF PROPERTY 2–3 (1996).


\textsuperscript{177} See W. VA. CODE §§ 60A-7-706 to -707.
sues. A prosecutor has a duty to pursue criminal sanctions against those who violate the law and to protect the public from those who pose a danger.178 A global plea agreement resolving criminal charges and civil forfeiture litigation creates a conflict for prosecutors between their duty to protect the public and their desire to supplement the budgets of their own offices and the budgets of law enforcement agencies through forfeited property.

The U.S. Department of Justice Asset Forfeiture Policy Manual, while permitting settlement of criminal charges and civil forfeiture cases in a single global settlement agreement, places some restrictions on how combined settlements are conducted.179 The most important restriction imposed by the federal policy manual is that government attorneys “should not agree to release property subject to forfeiture (civil or criminal) in order to coerce a guilty plea on the substantive charges, nor should the Government agree to dismiss criminal charges in order to coerce a forfeiture settlement.”180 While this may be the written policy of the Department of Justice, it is difficult to know what the subjective intentions are of parties entering into global settlement agreements.

The State of West Virginia has no written policy specifically addressing the settlement of asset forfeiture cases through criminal plea bargains. Prosecutors in criminal cases have wide discretion in deciding who to charge, what charges to bring, and the manner in which charges are pursued.181 Prosecutorial discretion extends to deciding the terms of plea agreements and few hard and fast rules exist to govern plea bargaining. The only real check on prosecutorial discretion in making plea offers is the power of the court to reject a plea agreement.182 The court may sua sponte reject a plea agreement if the court feels that an agreement is improper in some respect.183 Thus far, courts have been willing to accept global plea agreements.

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178 See W. VA. CODE § 7-7-2.
180 Id. at 70.
181 See, e.g., West Virginia v. Satterfield, 387 S.E.2d 832, 833 (W. Va. 1989) (“The prosecuting attorney is vested with discretion in the management of criminal causes, which discretion is committed to him or her for the public good and for vindication of the public interest. Thus, the prosecutor may decide which of several possible charges to bring against an accused.”).
182 See State v. Waldron, 624 S.E.2d 887, 889 (W. Va. 2005). That case stated:

There is no absolute right under either the West Virginia or the United States Constitutions to plea bargain. Therefore, a circuit court does not have to accept every constitutionally valid guilty plea merely because a defendant wishes so to plead. . . . A primary test to determine whether a plea bargain should be accepted or rejected is in light of the entire criminal event and given the defendant’s prior criminal record whether the plea bargain enables the court to dispose of the case in a manner commensurate with the seriousness of the criminal charges and the character and background of the defendant.

Id.
183 Id.
While state law may not provide any real check against potential abuse, some ethical guidelines exist to govern the pursuit of private assets through civil forfeiture. The National District Attorney’s Association (“NDAA”) publishes a list of prosecutorial guidelines that cover issues involving plea agreements and resolution of civil asset forfeiture cases. While NDAA guidelines do not specifically prohibit global plea agreements, they do urge that availability of forfeiture funds not “affect the proper exercise of the prosecutor’s discretion in the enforcement of forfeiture or criminal statutes.” In 1996, the American Bar Association (ABA) adopted a Statement of Principles Regarding Asset Forfeiture. The thirteen ABA principles stress the need for simplicity of procedures, a uniform innocent owner defense, enhanced burden of proof, and increased use of criminal forfeiture. Federal civil forfeiture statutes have since been amended in order to incorporate virtually all of the changes suggested by the ABA.

VII. POTENTIAL PROBLEMS CREATED BY THE WVCFA

A. Disposition of Forfeited Property Under the WVCFA

This Note attempts to identify several potential problems with civil forfeiture under the WVCFA. The first potential problem involves the distribution of forfeiture proceeds. The WVCFA specifies how forfeited property is to be distributed and places some limitations on how forfeiture proceeds may be spent. The Act requires that ten percent of forfeiture proceeds be given to the prosecuting attorney’s office that initiated the forfeiture proceeding. The remaining funds must be deposited in a special law enforcement investigation fund “administered by the chief of the law-enforcement agency that seized the forfeited property.” The WVCFA also provides for the equitable sharing of proceeds when more than one law enforcement agency was “substantially involved in effecting the seizure and forfeiture of property.”

The WVCFA places some restrictions on the use of forfeiture funds in an effort to discourage abuse, but these limitations may not go far enough. Forfeiture funds placed in the special investigation fund may be expended only to “defray the costs of protracted or complex investigations, to provide additional technical equipment or expertise, to provide matching funds to obtain federal

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184 See generally NAT’L DIST. ATTORNEYS ASSOC., supra note 176.
185 Id. § 49.4.
186 See EDGEWORTH, supra note 36, at 303–05.
188 See W. VA. CODE § 60A-7-706 to -707.
189 W. VA. CODE § 60A-7-706(a)(1). See also id. § 60A-7-706(d)(1).
190 W. VA. CODE § 60A-7-706(d)(1).
191 See id. § 60A-7-706(d)(3).
grants or for such other law-enforcement purposes as the chief of the law-enforcement agency may deem appropriate; however, these funds may not be utilized for regular operating needs." The law enforcement agency making the seizure is the ultimate recipient of ninety percent of the forfeited property with few real limitations or oversight on how the monies may be spent.

The policing-for-profit system created by the WVCFA is virtually without precedent. Various laws and regulations call for law enforcement agencies to issue civil fines or to seize private property without the proceeds derived theretofore directly benefiting the agency making the seizure or issuing the civil citation. For example, police officers often issue traffic citations requiring the payment of a fine. The proceeds derived from the payment of traffic tickets are not given directly to the agency that wrote the citation. Another example can be seen in the disposition of property seized by conservation officers for violation of state game regulations. Under certain circumstances a game warden can seize property involved in violations of state game laws. The seized property may be sold with the proceeds given to the state. The game commission receives no direct monetary benefit from the seizure.

One of the central themes behind asset forfeiture was that forfeited property and proceeds from drug crimes could be seized by police and used to assist in apprehending other violators of drug laws. In this way, the assets of drug dealers could be used by law enforcement against other dealers. While virtually every state and the federal government pursue asset forfeiture as a tool in combating drug crime, the effectiveness of these programs seems doubtful. Drug dealers are willing to accept the possibility of lengthy prison sentences and even death to ply their trade, yet forfeiture of their assets is supposed to serve as an effective deterrent? Law enforcement has used asset forfeiture as a tool in the war on drugs for more than twenty years. Despite seizing billions in assets nationwide, the government seems to have had little impact on the drug trade or the availability of illicit drugs. According to a 2008 national survey, eighty-four percent of high school seniors reported that they could obtain illicit drugs “easily or very easily.” Despite this ease of access, the same national survey indicated that less than twenty percent of high school seniors had actually used illicit drugs in the month preceding the survey. While law enforce-

192   Id. § 60A-7-706(d)(2).
193   See W. Va. CONST. art. XII, § 5 (requiring the net proceeds of all forfeitures and fines be allocated to support public schools).
194   See W. Va. CODE § 20-7-8.
195   Id.
196   See Gurule & Guerra, supra note 6, at 17–21.
198   http://bjs.ojp.usdoj.gov/content/dcf/du.cfm
199   Id.
ment has seemingly failed to prevent access to illicit drugs, something has worked to deter many young people from actually engaging in illicit drug consumption.

While there are many theories as to what works and what does not work in the war on drugs, it seems clear that law enforcement has failed in its effort to put dealers out of business. In the war on drugs, resources should be directed toward programs that deliver real results. Determining which programs are worthy of additional funding is a job for local commissioners and state legislators. Should the state legislature or county commissions decide that allocating more resources to law enforcement agencies is an effective way to combat illegal drug use, then more funding should be allocated out of state and local treasuries complete with the controls and oversight traditionally exercised by state legislatures and county commissions.

Perhaps the most troubling aspect of the WVCFA is the total lack of accountability for forfeiture proceeds. Allowing an agency to create its own funding through asset forfeiture removes many of the controls and oversight typically associated with public funding of government agencies. When a legislature or county commission decides to allocate public resources, policy determinations are made by elected officials as to what level of funding is appropriate for various agencies. Budgetary needs can be periodically reevaluated and decisions can be made to agency and program effectiveness. Elected officials can then make determinations as to whether a particular agency or government program is worthy of additional public resources. Allowing a law enforcement agency to raise funds on its own through private asset forfeiture completely circumvents this budgetary process and prevents evaluation of agency effectiveness. The proceeds of asset forfeitures are spent with little true oversight or accountability. Law enforcement agencies are not accountable to the people of their communities for the expenditure of forfeiture funds because forfeiture funds are not derived from public coffers. Citizens and their elected representatives have no say in how these funds are spent, or whether it might be more effective to use forfeiture funds to support other public programs such as drug treatment or drug prevention.

B. Problems Experienced in Other Jurisdictions Relating to Civil Asset Forfeiture

Virtually every state in the nation, and the federal government, have statutes that permit law enforcement agencies to reap a direct monetary benefit by seizing property used in violation of drug laws. This monetary incentive has the potential to encourage agencies to investigate and pursue individuals based on the amount of property they possess rather than on the threat they pose to public safety. While this Author was unable to locate any case of record within

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200 See EDGEWORTH, supra note 36, at 225–33 (compiling a list of state statutes on asset forfeiture and how the various states allocate forfeiture revenue).
the state of West Virginia where a law enforcement agency was shown to have been driven primarily by a desire to seize a citizen’s property, the incentive for this behavior remains, and it is impossible to determine what internal motivations might affect the expenditure of discretionary law enforcement resources. Allowing law enforcement agencies to keep property they seize creates an obvious potential for abuse and there have been documented incidents in other jurisdictions where law enforcement agencies have abused their power in an effort to supplement agency budgets through civil forfeiture.201

On January 3, 1997, Dateline NBC ran a story on asset forfeiture abuse in Louisiana.202 The program focused on cases in which motorists were stopped, arrested, and had their property seized without evidence of drugs in their cars.203 Most of the misconduct occurred along Interstate 10 in southwestern Louisiana and often involved out-of-state, minority drivers.204 Hidden cameras used to record searches and seizures showed police officers stopping the television crew for “violations” they did not commit and asking crew members how much money they had.205 Louisiana law dictated that sixty percent of forfeiture proceeds would be given to the agency making the seizure.206 Local prosecutors were in the habit of settling forfeiture cases by returning a third or half of the property.207 Often property owners reluctantly accepted these pleas rather than endure the expense and hassle of drawn out litigation.208

Probably one of the most shocking cases of asset forfeiture abuse occurred in 1992 when California Rancher, Donald Scott, was shot to death during a drug raid on his 200-acre ranch.209 While authorities insisted the raid was conducted on the basis of reliable information that Scott was growing marijuana, the local district attorney later concluded that there never was any marijuana growing on the ranch and the raid was “motivated, at least in part, by a desire to seize and forfeit the ranch for the government.”210 Similar to the WVCF, both California and Louisiana’s forfeiture statutes permit law enforcement agencies to keep the proceeds derived from the seizure of private property. The policy of permitting an agency to reap the full monetary benefit of private property sei-

203 Id.
204 Id.
205 Id.
207 Louisiana Law Enforcement Stops Innocent Motorists and Seizes Their Property, Reports NBC’s “Dateline” available at, http://ndsn.org/FEB97/LOUSIANA.html
208 Id.
210 Id.
izes has clearly proven to be a corrupting influence on some law enforcement agencies.

C.  Forfeiture Proceeds and the West Virginia Constitution

While allowing a law enforcement agency to supplement its own budget through private asset forfeiture may be poor public policy, within the state of West Virginia, it may also be unconstitutional. The provision of the WVCFA, which allows a law enforcement agency to keep forfeiture proceeds, may violate Article XII, Section 5 of the West Virginia Constitution. Article XII, Section 5 of the West Virginia Constitution provides that “[t]he legislature shall provide for the support of free schools by appropriating thereto the interest of the invested ‘school fund,’ the net proceeds of all forfeitures and fines accruing to this State under the laws thereof. . . .”

The notion that the property distribution scheme of the WVCFA is unconstitutional finds support in several West Virginia Supreme Court opinions. In State v. Parkins,212 the West Virginia Supreme Court found a statute unconstitutional that provided for the deputy game and fish wardens to “receive for their services the fines accruing from such prosecutions as may be instituted by them.”213 Finding that the statute violated the West Virginia Constitution, the West Virginia Supreme Court reasoned:

The Constitution commands that these fines go to the free schools. The act is directly to the reverse, diverting them from the free schools, and giving them entire to the deputy fish wardens — a glaring conflict. Whether, as the Constitution says that the “net proceeds” shall go to free schools, the Legislature could give a portion to the deputy warden, we do not decide, as this statute gives them all of the fines, much or little, adequate compensation or not. The schools get none of these many fines. If only a fair part were given the informant, it might be said that such part is cost, and the residue “net proceeds.” But, when all is taken, how can we consider it cost? A different construction might cripple the schools.214

While the Parkins case involved a fine, the reasoning and the ultimate conclusion in Parkins would be just as applicable in a case involving a forfeiture. The West Virginia Constitution specifically provides that “the net proceeds of all forfeitures and fines” be allocated to support public schools.215

211 W. VA. CONST. art. XII, § 5.
212 61 S.E. 337, 337 (W. Va. 1908).
213 Id.
214 Id. (internal citations omitted).
215 W. VA. CONST. art. XII, § 5.
The agency making a seizure under the WVCFA could be allowed to recoup necessary costs, but the state Constitution seems to require that the remainder or net proceeds be allocated to the public school fund.

The Legislature, perhaps anticipating a constitutional attack, provided within the WVCFA a legislative findings section which states that the “seizure and sale of items under the provisions of [the WVCFA] is not contemplated to be a forfeiture as the same is used in Article XII, Section 5 of the West Virginia Constitution.”216 While the Legislature may not have intended for forfeitures under the WVCFA to constitute “forfeiture” within the meaning of the West Virginia Constitution, whether or not WVCFA forfeitures ultimately are “constitutional forfeitures” is a question for the courts to decide.217

While the West Virginia Supreme Court has not yet had occasion to address the constitutionality of the WVCFA as it pertains to distribution of forfeiture proceeds, the legislative finding that forfeitures under the Act are not constitutional forfeitures has been directly questioned in at least one West Virginia Supreme Court opinion. In Games-Neely ex rel. West Virginia State Police v. Real Property,218 Justice Albright wrote separately to express his opinion that “the language of Article XII, Section 5 [of the West Virginia Constitution] requiring the net proceeds of all forfeitures and fines accruing to this State under the laws thereof could possibly extend to and include proceeds realized through forfeitures accomplished under the [West Virginia Contraband] Forfeiture Act.”219 Justice Albright merely raised the possibility that WVCFA forfeitures could be constitutional forfeitures; the question ultimately remains unresolved.

VIII. SUGGESTED AMENDMENTS TO THE WVCFA

Many of the problems created by the WVCFA could be remedied without significantly detracting from the Act’s overall goals. This Note suggests two specific amendments that the West Virginia Legislature should consider. The first amendment involves a change in the process employed to affect a seizure and forfeiture. The Legislature should consider replacing the current civil in rem forfeiture system with criminal in personam forfeiture. While civil in rem forfeiture may have previously been an appropriate way to deal with smuggling and piracy, when employed as a tool in the modern war on drugs, civil forfeiture poses a threat to some of our most cherished rights. The circumstances that justified use of civil in rem forfeiture in the past to seize ships used by pirates and smugglers are not present in most modern day drug cases within

216 W. VA. CODE § 60A-7-702.
217 See W. VA. CONST. art. V, § 1 (division of powers); see also Kessel v. Monongalia County General Hosp. Co., 648 S.E.2d 366, 380 (W. Va. 2007) (“[F]undamental principles of separations of powers preclude the Legislature from requiring the courts of this State to construe or interpret a statutory enactment in a particular manner.”).
219 Id.
the state of West Virginia. Today, most property owners can be located through public records and courts can more easily obtain jurisdiction over those individuals. While ship owners and others involved in smuggling and piracy were a small portion of the overall population, today, persons involved with illegal drugs make up a much greater part of our society.220 Even entirely innocent Americans could suffer property loss due to the actions of family or friends, or at the very least, could be forced to endure costly and time consuming litigation to defend their property from forfeiture. While it may have been appropriate to hold a ship owner accountable for all activities that took place on board a commercial vessel, that same rationale does not always extend to modern day owners of family homes or automobiles.

Forfeiture of property under the WVCFA requires an underlying criminal act to have been committed before property may be forfeited. It therefore makes sense that forfeiture should be done through in personam criminal forfeiture. Criminal forfeiture is a tool currently used in the enforcement of criminal statutes.221 A judge can consider whether to impose forfeiture as a penalty after the state has proven beyond a reasonable doubt that a property owner has violated the provisions of the West Virginia Controlled Substances Act. Criminal forfeiture would still achieve the goals of deterring criminal conduct and preventing criminal profiteering while at the same time ensuring that property owners are afforded appropriate due process and innocent owners are not deprived of their property rights.

The most important change in the WVCFA that the Legislature should consider involves the disposition of forfeited property. Currently, forfeited property is given almost entirely to the law enforcement agency that conducted the seizure, with forfeiture proceeds being expended on future law enforcement.222 As discussed above, allowing a law enforcement agency to supplement its own budgets through private asset forfeiture is poor public policy for a number of reasons. The WVCFA should be amended to prevent the seizing agency from becoming the direct recipient of forfeiture proceeds. The West Virginia Constitution requires that the net proceeds derived from WVCFA forfeitures be deposited in the public school fund. The Legislature should consider amending the WVCFA in order to comply with Article XII, Section 5 of the West Virginia Constitution. The West Virginia Constitution requires only that net proceeds be deposited in the public school fund. Therefore, the seizing agency and prosecuting attorney could be allowed to recover reasonable expenses incurred in conducting the seizure with the remainder given to support public schools.

221 See W. VA. R. CRIM. PRO. 32(d)(2).
222 W. VA. CODE § 60A-7-706 to -707.
While the benefits of increased drug enforcement are at best unknown, there cannot be any dispute as to the positive benefits derived from a high quality education. Diverting forfeiture funds toward public education could serve to help bolster struggling public schools throughout the state. According to United States Department of Education statistics, West Virginia public schools rank near the bottom of virtually every national survey comparing various aspects of public education throughout the country.\textsuperscript{223} The salary for an average teacher within the state is $10,000 below the national average.\textsuperscript{224} Clearly, West Virginia public education can use all the financial assistance it can get.

The Legislature’s intent in allowing law enforcement to keep forfeiture proceeds appears to have been to allow those funds to be used in combating illegal drug use. Forfeiture funds given to the public schools could still be expended toward that end. Forfeiture proceeds could be used by local schools to hire highly qualified teachers, create after school programs,\textsuperscript{225} or to fund drug and violence prevention programs.\textsuperscript{226} After school programs and effective drug prevention programs can be at least as effective as law enforcement in deterring young people from using illicit drugs.

While the West Virginia Constitution seems to require that forfeiture funds be deposited in the public school fund, even if the Legislature fails to bring the WVCFA into compliance with the state Constitution, the Legislature should, nonetheless, still consider creating some form of political oversight over forfeiture proceeds. At the very least, forfeiture funds should be given over to state legislatures or county commissions that could decide how funds are to be spent. One of the most effective ways for citizens to hold government agencies accountable is through legislative control of agency budgets. Underperforming or inefficient government agencies can be “punished” by having their funding reduced or eliminated. Agencies making efficient use of public resources can be “rewarded” by having their funding increased. Through this budgetary process public resources can be allocated to their highest use and government agencies can be encouraged to produce results. Allowing agencies to create their own funding circumvents this budgetary process and removes an important control citizens have over government officials.

\textsuperscript{223} \textsc{Nat’l Ctr. for Educ. Statistics}, \url{http://nces.ed.gov/nationsreportcard/states} (click on West Virginia; select subject, grade level, and year; click “compare”).

\textsuperscript{224} \textsc{Associated Press}, \textit{WV State of the State: Proposed Teacher Pay Boost May Not Satisfy Unions}, \textsc{WSAZ News Channel}, Jan. 9, 2008, \url{http://www.wszaz.com/political/headlines/13573337.html}.

\textsuperscript{225} Studies have shown that afterschool programs can help keep at risk kids away from drugs, reduce dropout rates, and improve students’ grades. \textsc{See After School Alliance, Afterschool Programs: Making a Difference in America’s Communities by Improving Academic Achievement, Keeping Kids Safe and Helping Working Families}, Feb. 2008, \url{http://www.afterschoolalliance.org/outcomes%20summary%20february%202008_FINAL.pdf}.

\textsuperscript{226} \textsc{See W. Va. Code § 18-2-7b} (requires the state board of education to create drug prevention and violence reduction programs).
Allowing legislative control over forfeiture funds does not necessarily mean seizing agencies lose out entirely on forfeiture funds. Local commissions or state legislatures could make evaluations of agency need and effectiveness and could re-allocate funding back to a seizing agency if it is determined that such funding is a wise use of public resources. In this way, funding could be directed to agencies or areas of the state where funds are most needed and law enforcement agencies could be encouraged to produce results that would warrant further support.

IX. CONCLUSION

Most property rights are created through state law, and property is held subject to reasonable restrictions imposed by state legislatures. It is certainly reasonable for a state to impose restrictions on property ownership whereby property rights will be lost if property is used to facilitate criminal conduct or has been acquired using ill gotten gains. This Note does not suggest that drug dealers should be permitted to keep the proceeds derived from illegal activity. The central theme behind the WVCFA is valid — no person should be permitted to profit from engaging in criminal activity. This Note merely suggests that the means employed to achieve that goal should be modified slightly.

Forfeiture revenues are public resources and should not be retained in their entirety by a single law enforcement agency fortunate enough to have stumbled upon the assets of a drug dealer in their jurisdiction. Forfeitures conducted in state court, pursuant to state law, are done in the name of all residents of the state, and the proceeds from those forfeitures should be spent like any other public funds complete with the same political oversights. Altering the manner in which forfeitures are conducted and the way in which forfeiture funds are spent could serve to strengthen the ultimate goals sought to be achieved by forfeiture law while at the same time ensuring that fundamental American values are respected.

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