

Predators, Not Protectors: How Asset Forfeiture Undermines the Legitimacy of Government

Timothy Sandefur
Vice President for Litigation
The Goldwater Institute

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On a Friday in May 2020, Tucson-area handyman Kevin McBride was at work when his girlfriend asked if she could borrow his Jeep. She promised to bring him back a soda from a nearby convenience store. But when she hadn't returned 20 minutes later, Kevin became worried. He got a ride to the store to check on her—just in time to see his Jeep being towed away by Pima County sheriff's officers. They had arrested his girlfriend for selling \$25 worth of marijuana, and were impounding his \$15,000 car under Arizona's civil asset forfeiture laws.

When Kevin asked for his Jeep back, county lawyers told him that “an outright return of the vehicle is inappropriate in this case,” despite the fact that they did not suspect him of being involved in any crime, and that the Jeep was worth 600 times the value of the drugs. Still, they offered a compromise: he could have the car back, they said, if he gave them \$1,900.¹

Kevin balked. He got a lawyer, who sent the county a letter demanding the immediate return of the Jeep and pledging to fight the taking of Kevin's property to the Supreme Court if necessary. In less than a week, the county dropped its ultimatum and simply returned the car.² They never explained why

they had demanded \$1,900 before—or why they were giving up that requirement now.

Kevin's story is a small victory, but it's impossible to say how many other people finding themselves in his position would have given up. Lacking access to legal representation and intimidated by law enforcement and the vague threat of prosecution, most people would have simply paid the \$1,900 or abandoned their property.

Nor is this abuse of power an isolated incident. Across the United States, government officials routinely use asset forfeiture laws to confiscate cars, cash, and other things from people who are never convicted or even accused of crimes. In fact, federal, state, and local governments now confiscate some \$3 billion annually.³ And because forfeiture laws don't require proof that the owner broke the law—and because prosecutors and law enforcement officers are allowed to keep the proceeds of these takings—forfeiture can be immensely profitable for the government.

Asset forfeiture has come under increasing criticism in recent years, from lawyers, judges, and legal scholars who argue that it violates basic principles of due process, encourages unaccountable

and sometimes corrupt government activities, and fails to deter crime. What is less well recognized is the way the practice of seizing property without proof of wrongdoing contradicts basic principles of constitutional government and leads citizens to view public officials as predators instead of protectors. As political thinkers have recognized since ancient times, that tendency has dangerous consequences for government's legitimacy. Civil asset forfeiture contravenes some of our Constitution's most fundamental values and undermines not only the effectiveness of law enforcement but also the commitment to impartial justice that serves as the foundation of all valid government.

The Difference between Government and Gangsterism

It may be the oldest question in politics: what makes government legitimate? Or as the Christian thinker St. Augustine put it some 1,500 years ago, what distinguishes a state from a gang of criminals? After all, a gang resembles a government in many ways: both have rules, power, leaders, and systems of organization. But the difference, Augustine answered, was that government, properly speaking, uses its powers to benefit the people, whereas a band of criminals use their power to benefit themselves.⁴ A government serves justice, not the private advantage of those in charge.

This was not a new idea even in Augustine's day. Seven centuries earlier, Aristotle contrasted the relationship between masters and slaves with the relationship between citizens in a constitutional government. Slaves serve their master's welfare, he said, but citizens do not exist to serve the government; on the contrary, a "true" government is "constituted in accordance with strict principles of justice" to ensure that it serves "the common interest." Only in a "defective and perverted" government do officials use their authority to enrich those in power.⁵ In the 17th century, philosopher

John Locke put the point starkly when he criticized another writer who claimed that kings have absolute power over the people. If that were true, Locke asked facetiously, did kings also have the right to *eat* their subjects?⁶

Such questions get to the heart of what political scholars call *legitimacy*—a term that refers to the characteristics that cause citizens to accept the government as exercising *rightful* authority, instead of simply imposing its dictates on them by force. Legitimacy has two dimensions: philosophical principle and public attitudes. As political theorist Anna Stilz puts it, the state is legitimate if it protects essential rights of the people and reflects popular attitudes about how government should function.⁷ When it fails these tests, it loses its validity and becomes a system of arbitrary commands, instead of law. When America's founders announced in the Declaration of Independence that King George III was "totally unworthy" of being "the head of a civilized nation," they were saying that his government was illegitimate: it was not protecting their rights and it no longer represented their view of proper rule.

Philosophers—from Aristotle and Locke to the present day—have disagreed about many things, but they have largely shared this belief that government, to be legitimate, must rule for the benefit of all, instead of pillaging the people to enrich itself. America's founders took this idea seriously, and it explains many different aspects of the Constitution, including its promises of due process, its prohibition on bills of attainder, its protections against cruel and unusual punishments and excessive fines, and its guarantee of compensation whenever officials take property for public use.

In writing these and other protections into the nation's fundamental law, the founders had in mind a particular historical experience: the reign of the Stuart kings (James I, Charles I, Charles II, and

James II), who ruled Britain from 1603 to 1688. These monarchs claimed that they had absolute power, not limited by the authority of Parliament, and they used that power to benefit themselves and their friends instead of promoting the public good. Their actions sparked a series of crises that led to civil war in England from 1642-1651, and also to the “Glorious Revolution” of 1688 that ended with the Stuarts being expelled from the British throne. When the authors of the U.S. Constitution began their work a century after that, they included several provisions designed specifically to prevent the kinds of abuses the Stuarts had committed—and to ensure that the new government would not sacrifice its legitimacy by prioritizing its own interests over those of the people.

Consider, for example, the Constitution’s prohibition on “excessive fines,” and its requirement that taxes and spending be approved by Congress.⁸ These were copied from the English Bill of Rights, which was written after the Glorious Revolution brought an end to the Stuart monarchy. According to the English Bill of Rights, King James II was overthrown for, among other things, “levying money for and to the use of the Crown... in other manner than the same was granted by Parliament”⁹—in other words, taking money for the government by means other than taxation approved by the legislature—as well as for levying “excessive fines” upon political enemies, often with the same revenue-generating goal.¹⁰ For example, he had fined the Earl of Devonshire £30,000 for hitting a man with a cane,¹¹ and fined the Speaker of the House of Commons £10,000 for printing a pamphlet deemed libelous.¹² (This was at a time when the average family lived on about £50 per year.¹³) In these and other ways, the Stuart monarchs exploited their power to enrich the state and expand their authority instead of protecting the people. The Constitution’s rules against excessive fines or unapproved taxes were designed to prevent such abuses.

The Constitution’s prohibition against “cruel and unusual punishments” had a similar aim.¹⁴ It was also based on the English Bill of Rights, and it was intended to prevent government from operating for the personal gratification of the leaders rather than for the public benefit. As law professor John Bessler observes, the use of the word “cruel” was significant because “the concept of *cruelty*” was “specifically associated with tyrants and tyrannical behavior.”¹⁵ To be cruel was not just to be unfeeling, but more specifically to exploit a position of power for the gratification of one’s own will or desire. Cruelty rendered a ruler unfit by definition. Thus Locke—whose influential *Two Treatises of Civil Government* were published in part to justify the revolution against the Stuarts—argued that if a king “sets himself against the body of the commonwealth” and “cruelly tyrannize over the whole, or a considerable part of the people,” the people “have a right to resist and defend themselves.”¹⁶

When the Constitutional Convention met in Philadelphia in 1787, the delegates wrote into the Constitution protections intended to bar the government from using its powers to enrich itself at the expense of the citizens. These included not only prohibitions against cruel punishments and excessive fines, but also limits on the taxing power—requiring, for instance, that all tax laws originate in the House of Representatives, which is elected every two years by the people¹⁷—as well as prohibitions against bills of attainder,¹⁸ limits on government’s power to punish treason,¹⁹ guarantees of due process,²⁰ and the requirement that government pay “just compensation” when it takes private property.²¹ Together, these clauses were intended to preserve government’s legitimacy. They represented a rejection of what James Madison called “the impious doctrine [of] the Old World, that the people were made for kings, not kings for the people.”²²

Bills of Attainder

Another way in which the British government often abused its authority, and operated as the master, rather than the servant, of the people, was through bills of attainder. Attainder was an ancient practice whereby Parliament could bypass the judicial process (where evidence is presented to an impartial judge who determines a person's guilt or innocence) and simply declare a person guilty of a crime. The consequences of attainder were extreme: as the word implies, "attainder" meant the person was "tainted"—and consequently deprived of all property, which was forfeited to the government—and the same "taint" was passed on to the person's family through a process called "corruption of blood." In other words, if a father were attainted, all of his children would lose their property and be rendered outlaws as well.

Under English law, treason automatically resulted in attainder and corruption of blood, although Parliament could also attain people for other crimes. And because "treason" was vaguely defined under English law, the king or Parliament could declare people guilty simply because they opposed the government's actions. It's no surprise that monarchs often abused their authority to enrich themselves by accusing their political enemies of treason. But Parliament often did the same. The most famous such incident before the American Revolution involved the Earl of Strafford, an ally of the Stuarts, whose support for King Charles I angered Parliament so much that he was put on trial for treason. When he defended himself so ably that he could not be convicted, Parliament simply passed a bill of attainder instead and executed him in 1641.

To America's founders, the Strafford case symbolized one of their most pressing fears. The new nation's democratic experiment was based, after all, on the idea that the people could govern

themselves—meaning they could both *make* the law and *obey* it. For generations, political philosophers had thought this impossible. They had concluded that the majority would simply ignore any law that stood in its way, as had happened in the ancient Greek democracies, where voters often stripped people of their property or even executed them for displeasing the majority.²³ Incidents such as the Strafford case suggested that elected legislatures were just as likely to simply vote away the rights of unpopular individuals and ignore the rule of law.

In the years surrounding the Revolution, many American state legislatures did just that. During the war, Pennsylvania lawmakers passed bills of attainder that banished nearly 500 people from the state and seized their property—about 40,000 acres of land—for opposing the break with Britain. Several other states did likewise.²⁴ Maryland confiscated some 200,000 acres from loyalists. Even Patrick Henry and Thomas Jefferson wrote a bill of attainder for their home state of Virginia in 1778.²⁵ A year later, New York passed the Forfeiture Act, which commandeered a million acres of property from "enemies of the state" and sold it at auction for the benefit of the treasury.²⁶ These actions "disgraced" the state "by injustice too palpable to admit even of palliation," wrote New York's chief justice, John Jay, who later became the first chief justice of the United States.²⁷ His colleague Alexander Hamilton agreed. The Forfeiture Act "substitut[ed] a new and arbitrary mode of prosecution [for] that ancient and highly esteemed one, recognized by the laws and the constitution of the state," wrote Hamilton. "I mean the trial by jury."²⁸

In other words, arbitrary seizures of property absent judicial conviction of a crime undermined the new government's claim to legitimacy. Hamilton thought New York's Confiscation Act made the United States "the scorn of other nations" and endangered the country's long-term stability by

making the public fear and resent the government instead of respecting it.²⁹ When the war ended, he argued that the Confiscation Act was both unjust and unwise. It would be in everyone's best interests for the now-independent United States to protect property rights and honor the tradition of trial by jury, even for people who had opposed the Revolution, because that would encourage former loyalists to become "friends to the new government, by affording them not only protection, but a participation in its privileges." By contrast, a "disorderly or violent government" would "disgust the best citizens and make the body of the people tired of their independence."³⁰ In other words, it would sacrifice its legitimacy.

It was with these thoughts in mind that the Constitution's authors chose to include *three* separate prohibitions on attainder—more than on any other single subject, which is all the more remarkable because these provisions were included even *before* the Bill of Rights was added. "Bills of attainder," wrote Madison in *The Federalist*, "are contrary to the first principles of the social compact and to every principle of sound legislation."³¹ Future Chief Justice John Marshall agreed in a speech he gave in favor of the adoption of the Constitution.³² The "favorite maxims of democracy," he said, were "strict observance of justice and public faith," but bills of attainder violated these principles and punished people "without a trial by jury—without examination—without being confronted with [their] accusers and witnesses—without the benefits of the law of the land." If such things were permitted, "[w]here is our safety[?]"³³ This view was even shared by those who opposed the Constitution. "It is proper that the legislature should be deprived of the exercise of this power," declared the writer known as "Brutus," who was among the Constitution's sharpest critics, "because it is seldom exercised to the benefit of the community, but generally to its injury."³⁴

But it was another future Supreme Court justice, James Wilson—one of the few men to sign both the Declaration of Independence and the Constitution—who provided the best explanation of why attainder was not only contrary to the rule of law but also dangerous to government's legitimacy. Such extreme punishments, he wrote, often *encouraged* lawbreaking because the government sometimes profited so much by forfeitures that those in power found ways to *allow* people to break the law, in order to seize the proceeds afterwards. British kings had even been known to work in partnership with criminals by selling pardons because the forfeiture would enrich the monarch, who would then give a kickback to the convicted lawbreaker. "When crimes were the sources of princely wealth," Wilson noted, "it is no wonder if they were objects of princely indulgence."³⁵

Wilson also argued that excessive punishments can be counterproductive. For one thing, they create a perverse incentive since a criminal facing a relatively mild punishment might change his mind and turn himself in, whereas a criminal who knows he will suffer a truly extreme penalty (or in the case of attainder, that his family would also lose their property) is more likely to try as hard as possible to succeed at his crime. Attainder and confiscation also encouraged the public to sympathize with criminals. Because such forfeitures would render even the convicted person's innocent relatives destitute, bystanders sometimes helped criminals out of compassion toward their families.

And it was indeed wrong to punish innocent families. As Wilson's contemporary, the legal reformer Cesare Beccaria, asked in 1764, "what more afflicting sight could there be than that of a family which is brought into disgrace and destitution by the crimes of its head, when their legally decreed submission to him prevented them from averting his crimes, even if there had been a way of doing

so!”³⁶ A decade later, when Thomas Jefferson was working on a project to revise Virginia’s criminal laws, he cited Beccaria when he proposed reducing the number of crimes for which forfeiture was inflicted. Suicide, for example—regarded then as a crime—was punishable by forfeiture. But confiscating property from a grieving family whose loved one had just killed himself was so callous, Jefferson noted, that juries usually just pretended the victim of suicide had done so in a state of insanity “because they have no other way of [avoiding] the forfeiture.”³⁷ This led Jefferson to argue that it was best to just eliminate the punishment entirely.

In short, James Wilson concluded, attainder and forfeiture were likely to inspire citizens with “sentiments of a deadly feud against the state which has adopted, and, perhaps against the citizens who have also enforced [such penalties].”³⁸ Such severity was less likely to deter crime than to undermine government’s legitimacy in the first place.

Alongside its prohibitions on attainder, the Constitution included provisions that limited the government’s power to take people’s property as punishment for crimes. For instance, it expressly defined the crime of treason so that neither the president nor Congress could alter that definition to suit their desires. The Eighth Amendment also banned “excessive fines” in order to close what would otherwise be a loophole in the Constitution: without it, the government could evade the constitutional rule against forfeitures by simply imposing crushing fines for minor infractions. And another provision specified that if the government ever did impose a forfeiture, it would only be effective “during the life of the person attainted”—thus forbidding the government from penalizing whole families.³⁹ In addition, the Fifth Amendment pledged that government would not take away a person’s life, liberty, or property, except through “due process of law”—a requirement that memori-

alized one of the most important and time-honored principles in our legal system, by not only requiring that government give an accused person a fair trial, but also prohibiting the government from acting arbitrarily in ways that deprive people of their rights.⁴⁰ In short, by the time the Constitution was ratified, American lawyers had come to regard forfeiture—in the words of one state court—as “utterly inconsistent with the principles of public justice, and the rights of innocent unoffending individuals.”⁴¹

But there was one exception: forfeiture was a traditionally accepted practice in *admiralty*, a distinct area of law dealing with ships and crimes taking place at sea.

This practice was rooted in convenience. Since sailing ships and their crews could easily escape before a judge could decide a lawsuit, it was easier to create a special rule for cases involving maritime matters. English courts therefore borrowed a device from ancient Roman law, which gave judges jurisdiction over the ship itself—or in the Latin, to proceed *in rem* instead of *in personam*, on the theory that the vessel was itself somehow culpable. “The law treated the ship as if it were alive,” writes Leonard Levy in *A License to Steal: The Forfeiture of Property*,⁴² and therefore *in rem* cases named the boat itself as the defendant—leading to cases with names such as *United States v. The Betsey and Charlotte*, in which the ship was named *The Betsey and Charlotte*.⁴³

Because *in rem* admiralty cases were not considered criminal cases, they were not governed by the same standards of fairness that apply to criminal law. Courts could simply confiscate a ship belonging to an owner who had committed no crime or was unaware that a crime had been committed. Owners were not entitled to the presumption of innocence or to jury trials. Thus, as Levy notes, the “personification fiction” of treating

a boat like a guilty person “rationalized punishment of the vessel as a means of diverting attention from the practical fact that in the real world criminal punishment had been summarily inflicted on the innocent owner without allowing him the rights enjoyed by a common felon.”⁴⁴

America’s Founding Fathers regarded admiralty law with suspicion for just this reason.⁴⁵ Many of them experienced its harshness themselves. In the 1760s, when the Parliament adopted the Stamp Act, the Sugar Act, and the Townshend Acts, all of which imposed burdensome taxes on the American colonies, it also expanded the power of the British admiralty courts to enforce these measures. This meant admiralty courts could preside over cases *not* involving the high seas—with the result that Americans would be denied the procedural rights they were usually entitled to, would not be entitled to trial by jury, and would be presumed guilty until they proved themselves innocent. Admiralty judges were even paid commissions based on the forfeitures they imposed, meaning that if they upheld the confiscation, they received a cut of the property.

The American patriots objected that expanding the admiralty system violated the Magna Carta’s protections for due process, and they even referred to these courts in the Declaration of Independence itself when they complained that the British monarchy had “subject[ed] us to a jurisdiction foreign to our constitution^[46] and unacknowledged by our laws,” and had “depriv[ed] us, in many cases, of the benefits of trial by jury.”⁴⁷ In fact, John Adams called the expansion of the admiralty courts “the most grievous” of all the abuses the crown imposed before the Revolution.⁴⁸

Yet after the Revolution, the Founding Fathers did not entirely eliminate admiralty law or its practice of forfeiture. The Constitution gave the federal courts authority to hear admiralty cases, and they continued to follow the traditional *in rem*

rules, including confiscation. Still, they adhered to the principle that admiralty law only applied to shipping. Not until the mid-19th century were similar confiscation procedures applied to cases not involving the sea.

That began during the Civil War, when Congress—in retaliation for a Confederate law that seized property belonging to people in the North—adopted the Confiscation Act of 1862.⁴⁹ The Act used the *in rem* theory to seize property from Confederates, even when that property was not related to shipping. In 1870, when the Supreme Court finally ruled on the Act’s constitutionality, it upheld the Act on the grounds that the government can seize an enemy’s property during wartime as a military tactic. That does not technically qualify as “punishment,” the Court said, which means the constitutional safeguards of due process—and rules against forfeiture—do not apply.⁵⁰

Justice Stephen Field wrote a powerful dissent, arguing that this made no sense. The Confiscation Act obviously *did* impose punishment—specifically, punishment for treason. After all, the property was not being taken on the theory that *it* was involved in a crime, as was traditional in admiralty cases; it was being taken as a consequence of the owner’s wrongdoing. Nor were these seizures being used against foreign invaders; they were being imposed on Americans who had rebelled against the government. Wrong as their actions might be, they did not justify ignoring the rules of due process. If Congress could get away with taking property from people because they did something wrong (as opposed to the property itself being involved in a crime), then “all the safeguards provided by the Constitution for the protection of the citizen against punishment, without previous trial and conviction, and after being confronted by the witnesses against him, would be broken down and swept away.”⁵¹

Congress had carefully designed the Confiscation Act to get around the Constitution’s prohibition on attainder, Field added, but it was still an unconstitutional attainder.⁵² And by upholding it, the Court was setting a dangerous precedent—one that “works a complete revolution in our criminal jurisprudence.” The Court’s theory could apply to “any other offence”—meaning that the government might try “to confiscate the property of the burglar, the highwayman, or the murderer ... without [a] conviction ... upon the assumption of their guilt.”⁵³

Field’s prediction proved correct. As the 20th century began, forfeiture became increasingly common as a tool against various types of criminal activity, particularly the transportation of liquor during the Prohibition era.⁵⁴ Legal decisions during Prohibition “allowed *in rem* forfeiture to evolve from its origins in admiralty and customs enforcement to become a general tool for government to suppress criminal activity through civil procedures ... [even] against people who had committed no crime,” write law professors Donald Boudreaux and A.C. Pritchard.⁵⁵

In the 1970s, two forces combined to make forfeiture an everyday feature of American law: the War on Drugs, declared by President Richard Nixon in 1971, and a series of Supreme Court decisions that reduced legal protections for property rights—a process that began in the 1930s but expanded rapidly in this decade. Under these precedents, courts generally do not consider government actions that deprive people of private property to be significant intrusions on their constitutional rights. Thus, when Nixon and his successors began massive new investments in combatting drug possession and sale, prosecutors ramped up their use of *in rem* proceedings to take private property connected with the transportation or sale of illegal drugs.

The first steps were taken under newly enacted laws providing for *criminal* forfeiture. But

these laws proved too cumbersome for prosecutors. For example, they only allowed the government to seize “profits” rather than proceeds of criminal activities, and required the government to prove that a defendant acted along with at least five other people before the government could confiscate property. These and other irregularities made *criminal* forfeiture laws more difficult and time-consuming than the long-standing rules of *civil* forfeiture. So by the early 1980s, federal and state prosecutors were turning to *civil* forfeiture, instead—a system far more profitable to the government because it is exempt from so many fundamental constitutional safeguards.

“Policing for Profit”

The use of forfeiture in the Drug War has largely been a function of its immense profitability. Unlike the prosecution of crimes such as rape or murder, prosecutions of crimes involving forfeiture can, so to speak, pay for themselves. This has long been one of its selling points, according to prosecutors who often celebrate the aggressive use of forfeiture as a tool to punish drug suppliers with their own assets. Because forfeiture does not require a criminal conviction, or even the bringing of criminal charges, the government does not have to invest as much time and money as it would if it brought accused people to trial. With lower costs and great potential rewards, forfeiture prosecutions can prove highly lucrative.⁵⁶

But this also means that more than 80% of forfeitures are not accompanied by any criminal prosecution.⁵⁷ Property is simply commandeered without charges being brought against owners, let alone proven in court. Even where officers cannot actually prove a case against a suspect, they can seize belongings and then demand payment for returning them to the rightful owner. This has led to forfeiture being labeled “policing for profit” and “a constitutional kleptocracy.”⁵⁸

When Pima County officers seized Kevin McBride’s Jeep in the summer of 2020, they made no effort to charge him with a crime, or to even claim that he knew a crime had occurred. And the crime itself was remarkably trivial—the sale of \$25 worth of marijuana, a value 1/600th the value of the Jeep itself. But when challenged for taking the Jeep, they initially refused to return it, instead demanding a \$1,900 “mitigation” payment for its return—a dollar figure they appear to have simply manufactured. As journalist Jacob Sullum noted, “Arizona assigns 100 percent of forfeiture proceeds to the law enforcement agencies responsible for the seizure,” so the \$1,900 demand appeared to be “tantamount to demanding a bribe for the return of stolen property.”⁵⁹

It’s not clear what Pima County does with the proceeds of forfeitures or “mitigation fees.” As the *Arizona Republic* observed in 2017, there is little government oversight regarding how officials spend such income. Much of it goes to pay the salaries of county employees, but the county spent millions of forfeiture proceeds on a plane and a helicopter as well.⁶⁰ In short, Pima County uses forfeiture as a means of extracting wealth from citizens to fund its own expenses.

It is hardly alone. The amounts involved in forfeiture nationwide are staggering: approximately \$3 billion is taken by law enforcement annually in the United States,⁶¹ more than the amount of money stolen in all burglaries.⁶² Most proceeds go to the agencies that seized the property; they typically spend it on their own operating expenses—for weapons, vehicles, buildings, or equipment, and sometimes on frivolous or improper expenditures, given the lack of accountability. Only about 9% of forfeiture proceeds is ever returned to crime victims or spent on community programs.⁶³ And the typical forfeiture is small. Although prosecutors often imply that their main targets are drug kingpins and crime bosses, in reality the average target

for forfeiture is someone like Kevin McBride: a middle-income or poor individual. The median amount of a cash forfeiture is slightly over \$1,000, and in some places, it’s far smaller—about \$400 in Michigan and Pennsylvania.⁶⁴ These figures suggest that forfeiture is more often used against people who can’t afford to defend themselves, and who are involved only in small-scale crimes or not involved in crimes at all.

The process of forfeiture is designed to prevent property owners from reclaiming their belongings, and statistics show they rarely try. A forfeiture begins with police impounding the property and informing the owner that if she wants it back, she must file a claim—that is, initiate a lawsuit against the government. That’s often too difficult, expensive, or time-consuming for people to try—and filing such a case also amounts to a waiver of a person’s Fifth Amendment right against self-incrimination, meaning that if the owner does file a claim, she can be forced to testify against herself in court. At the same time, she is not entitled to a lawyer, and is not presumed innocent. And because forfeiture is technically considered a lawsuit against the property itself, the fact that the owner did nothing wrong does *not* mean the government can’t take it. In 1996, the Supreme Court allowed state officers to confiscate a woman’s car when her husband picked up a prostitute in it—even though she, of course, had not authorized him to do so.⁶⁵

Taking these factors together, it’s clear that civil asset forfeiture has essentially revived the system of confiscation that America’s Founding Fathers found so objectionable in the case of British admiralty courts—and on a scale far beyond anything imaginable in the 18th century. Americans are now regularly subjected to confiscation without being charged with crimes, and money pours into federal and state government accounts while the victims are denied their basic rights to due process through an antique legal fiction.

Conservatives and liberals alike have objected to these injustices since the mid-1980s. Republican Congressman Henry Hyde, chairman of the House Judiciary Committee, denounced forfeiture as a Kafkaesque practice and wrote a book condemning it in 1995.⁶⁶ The ACLU has also protested against asset forfeiture for decades, pointing out, among other things, that it is disproportionately used against racial minorities and the poor.⁶⁷ And in 1993, the U.S. Supreme Court acknowledged that forfeiture can violate the constitutional prohibition against “excessive fines” in some cases⁶⁸ (which was small comfort, given that until 2019, the court also said states did not have to obey the “excessive fines” prohibition⁶⁹).

What’s more, forfeiture’s critics point out that there’s little evidence that it is an effective crime-fighting tool.⁷⁰ After almost half a century of vigorous use of the process by state and federal prosecutors, drug sales and drug use remain relatively unchanged,⁷¹ and crime rates remain about the same after laws are changed to restrict forfeiture.⁷² Research also shows that forfeiture does not significantly improve the effectiveness of policing.⁷³ Most forfeitures are not imposed on major crime bosses, but on small-scale suspects who each lose a few hundred dollars and who aren’t even jailed. So the impact on drug trafficking appears to be negligible as well.

Yet critics have rarely noted that forfeiture also has deleterious consequences for government’s *legitimacy*—that is, it undermines the government’s claim to moral validity, a consequence more elusive but in the long run more dangerous than its mere ineffectiveness.⁷⁴

Forfeiture and Legitimacy

Political legitimacy cannot be quantified. It’s partly a function of abstract principles of justice and partly a function of perception—that is, of

social attitudes about right and wrong government action. Alexis de Tocqueville called these attitudes “mores,” which he defined as “habits of the heart ... the sum of ideas that shape mental habits.”⁷⁵ Although harder to articulate than the formal rules of law, mores are also more pervasive and more powerful, especially in a democracy, because they express what the people think makes for a *proper* or *decent* government and what they consider beyond the pale.

Writing in the 1830s, Tocqueville observed that democracy gives Americans tremendous potential powers for good but also for bad. Mores were what kept them from abusing that power. Americans could do terrible things if they chose, but their mores “prevent them from imagining and forbid them to dare” doing so.⁷⁶ If that ever changed, Tocqueville warned—if Americans ever “dared” to use democratic power in self-interested ways—they would find it all too easy to exploit the political process for evil or even disastrous purposes.

America’s founders were aware of this danger. That is why they often emphasized the importance of *virtues*, and specifically “justice, moderation, temperance, frugality,” as well as what they called the “frequent recurrence to fundamental principles” as essential to the functioning of healthy democracy.⁷⁷ They did not use these words to refer to *personal* morality, but to describe the social attitudes necessary to prevent America’s legitimate government from degenerating into a vulgar and dangerous scramble for personal advantage, as had happened in the Roman and British empires. The word they used for the dangerous tendency to abuse government power for personal gain was “ambition.” Without cultivating public virtues or mores, wrote John Adams in 1798, “avarice” and “ambition” would “break the strongest cords of our Constitution as a whale goes through a net.”⁷⁸

The Constitution’s prohibitions on bills of attainder, excessive fines, cruel punishments, and the like, were meant to prevent the government from degenerating into the sort of self-interested system of exploitation that ancient political philosophers had warned about. And the Founding Fathers understood that this threat could come from either political leaders or the people themselves. Thomas Jefferson expressed this worry in his book *Notes on Virginia*, when he warned that after the war for independence was won, ambitious politicians might realize that government’s powers are “sources of wealth and dominion to those who hold them”—specifically because they can use those powers to acquire the tools they need to expand their power still further. Recalling a quotation attributed to the man who had destroyed Rome’s liberty, Jefferson wrote, “With money we will get men, said Caesar, and with men we will get money.”⁷⁹ If American officials were to adopt the same mercenary mindset, he added, and use their authority to enrich and expand the government itself, then “they will purchase the voices of the people, and make them pay the price.”⁸⁰ In other words, ambitious politicians would fund themselves off the backs of citizens, and then use that revenue to find new ways to extract wealth from the people. That would make political leaders indistinguishable in principle from a gang of robbers.

Adams agreed. “Self-interest,” he wrote, “will exist in every state of society, and under every form of government.” That meant there was always a risk that the rulers would grant benefits to their friends “until they establish such a system of hopes and fears throughout the state as shall enable them to carry a majority in every fresh election. ... The judges will be appointed by them and their party and of consequence will be obsequious enough to their inclinations. The whole judicial authority, as well as the executive, will be employed, perverted, and prostituted to the purposes of electioneering.” He thought “the only remedy” was “to

take away the power.”⁸¹

Today’s asset forfeiture regime threatens the stability of American mores in just the way the founders feared. “Policing for profit” is already corroding government’s claims to legitimacy among a large segment of the population. As a result, it is growing increasingly dangerous to the long-term health of American society—in part for the reasons James Wilson warned about when discussing forfeiture two centuries ago: it undermines confidence in the rule of law, encourages public officials to approach their jobs with a mercenary mindset, and leads citizens to sympathize with lawbreakers instead of with the established legal system.

Police Legitimacy and Political Legitimacy

As a philosophical matter, government sacrifices its legitimacy when it goes beyond its role as impartial law-enforcer and uses its powers to benefit the rulers. This is true whether it does so in the relatively crude manner of a banana republic—where politicians simply embezzle wealth directly from the treasury—or in the more sophisticated manner of a bureaucratic state, in which career officials exert power under the pretense of public benefit but in reality for their own interests. The specifics hardly matter; government’s legitimacy is lost whenever people come to see government as a pillager rather than a protector.

Scholars have long recognized that abusive and discriminatory police tactics can undermine what they call “police legitimacy,” and that this can make it harder for law enforcement to keep the peace.⁸² When people view the police as a legitimate institution, they are more likely to obey the law and resort to the public justice system to resolve disputes instead of engaging in private retaliation. They are also more likely to cooperate with officers investigating crimes. On the other

hand, the diminishment of police legitimacy makes people less likely to approach the police with their problems or work with them to catch criminals or prevent crimes. Citizens who fear or resent law enforcement will either passively accept being crime victims as a fact of life or resort to vigilantism instead—and they will tend to view lawbreakers with sympathy. Thus, as criminal law scholar Jonathan Blanks observes, “improving police legitimacy may be just as important to the communities as it is to the relationship between those communities and the police.”⁸³

But a breakdown in *police* legitimacy can also threaten the legitimacy of government as a whole—as the Justice Department indicated in its 2015 report on the riots in Ferguson, Missouri. Although that report did not discuss forfeiture specifically, it found that city leaders had spent years pressuring police officers to increase the city’s financial income through everything from traffic tickets to court fees. “In Ferguson,” the report concluded, “individual officer behavior is largely driven by a police culture that focuses on revenue generation” instead of keeping the peace.⁸⁴ As a result, “law enforcement is seen as illegitimate, and the partnerships necessary for public safety are, in some areas, entirely absent.”⁸⁵

The same phenomenon is occurring in cities across the United States, thanks to asset forfeiture programs. Forfeiture enriches the government itself—specifically prosecutors and police departments—at the expense of citizens who are not even charged with crimes, and typically cannot afford the cost of reclaiming their property. It functions like taxation without representation, since it funds government operations and the salaries of public officials without meaningful review by public representatives. In fact, many law enforcement agencies have come to view themselves as dependent upon forfeiture—thus reversing cause and effect and enforcing the law in order to gain revenues,

rather than using revenues in order to enforce the law.⁸⁶ And whereas the burden of actual taxation is spread across the whole population, forfeiture is not—meaning that it has the effect of a random and arbitrary tax on whichever individuals officers choose to target. This encourages a public perception that officers are raiders who profit off the people, rather than peacekeepers who act in the public interest.

What’s more, the lack of oversight as to how forfeiture proceedings are *spent* results in improper expenditures and sometimes even extreme acts of corruption. A 2014 *Washington Post* study found that police spent most seized funds on computers and building improvements—items that should have been paid for through taxation.⁸⁷ It also revealed such questionable expenditures as a \$637 coffee maker and a \$225 on a clown for a party.⁸⁸ The sheriff of Camden County, Georgia, spent seized money on a sports car, a boat, and buying gas for his employees’ personal vehicles.⁸⁹ Officers in Bal Harbor, Florida, spent tens of thousands of dollars on trips to Chicago, Las Vegas, and Los Angeles, where they rented luxury cars, attended banquets, and held beach parties.⁹⁰ Such practices inevitably undermine public respect for police agencies. And when police are viewed as illegitimate, that encourages a broader belief that the government itself is illegitimate.

More than 25 years ago, an outstanding but little-known report in the journal *Justice Quarterly* described this breakdown of legitimacy by reporting first-hand how forfeiture works. After spending a year pretending to be a confidential drug informant in order to interact with officers engaged in forfeiture, the author described how “the operational goal was profit rather than the incapacitation of drug dealers.”⁹¹ Officers sometimes delayed arresting drug dealers until after they sold drugs because seizing the proceeds was more lucrative to the agency than preventing the illegal sales would

have been.⁹² On one occasion, the author observed officers persuading a suspect to use his own car as collateral to get a loan from a bank to buy some marijuana—so that the officers could seize the car. This sort of behavior the author concluded, “not only victimizes ordinary people but also affects the conduct of police and their function in society.”⁹³

More conscientious detectives sometimes found their supervisors uninterested in investigating crimes that seemed unlikely to result in revenues—which “promoted cynicism among officers.”⁹⁴ It also promotes cynicism among the public because a legal process “whereby law enforcement agencies share the wealth of drug trafficking under the guise of ‘service’ to society” inevitably substitutes “the image and the reality of the private soldier over those of the public servant.”⁹⁵ In short, “a focus on revenue requires police to compromise law enforcement in a manner that may harm rather than protect society.”⁹⁶

When such an ethos takes hold, it’s almost inevitable that citizens develop what some scholars call “legal cynicism”—that is, the belief that government is antagonistic to the public’s interests. As law professor Rachel Harmon notes, that cynicism has economic and social consequences “closely analogous to the costs of fear of crime.”⁹⁷ For instance, it forces people to spend their time protecting themselves from crime when that should be law enforcement’s job. It also encourages people to look to other sources to provide social order—sources that can include vigilantes or gangs.⁹⁸ “The code of the street,” writes sociologist Elijah Anderson, “is actually a cultural adaptation to a profound lack of faith in the police and the judicial system.”⁹⁹

Recent years have seen a disturbing trend of public distrust toward police departments, which is likely a function of policing for profit as well as other policing problems. One 2019 poll of more

than 800 residents of American cities found that many participants “characterize police as contradictory—everywhere when surveilling people’s everyday activity and nowhere if called upon to respond to serious harm.”¹⁰⁰ This attitude, the authors noted, “directly flowed into more general conception of government. . . . For those who described distorted responsiveness, their conception of government, then, was predicated on this dual position of being abandoned and overseen, unprotected and occupied. They were ‘up for the taking’ and regularly ‘fleeced.’”¹⁰¹ Police, said one participant in the survey, “are a legalized gang on their own.”¹⁰²

While many scholars have discussed the ways in which arbitrary and harsh police tactics can worsen society’s racial divisions¹⁰³—leading minorities to feel a sense of resentment and exclusion from the larger community—the threat to *government* legitimacy that forfeiture creates goes beyond even these troubling limits. When government fails to serve the community’s needs but profits off of citizens instead, it harms its own credibility and contributes to systemwide breakdown.¹⁰⁴

It was a similar crisis of legitimacy that drove the American Founding Fathers to rebel against Great Britain. Practices such as admiralty court forfeitures led them to view King George III and his allies as administering the government for their own benefit instead of the public good. One Rhode Island patriot, Silas Downer, expressed this perception eloquently in a speech in 1768. British officers, he complained, “will seize a vessel without showing any other cause than their arbitrary will,” and “where there happens to be a judge of admiralty to their purpose, [they] can seize and get condemned any vessel or goods they see fit.” Owners were “utterly deprived” of a jury trial, with the result that a person’s entire fortune would depend on the decision of “a single, base, and infamous tool of a violent, corrupt, and wicked administration.” And the whole process was done for

profit rather than for the protection of the people. “Very few [admiralty judges] have any regard to the interest of the Crown,” he said, “which is only a pretense they make in order to accomplish their avaricious purposes.” In short, Downer concluded, British officials “seem to be born with long claws.”¹⁰⁵

The Danger of Legal Cynicism

What James Wilson said of attainder two centuries ago is true of forfeiture today: it often penalizes innocent people and their families, stimulates criminals to try their best to succeed at their crimes, encourages law enforcement to collude with outlaws or to prioritize profitmaking over crime-fighting, and weakens government’s legitimacy by giving citizens good reason to view police and prosecutors as mercenaries. The modern system of forfeiture undermines government’s legitimacy both in philosophical terms—because it makes government less of a protector of basic rights, and more of a threat to those rights¹⁰⁶—and in the court of public opinion because it encourages people to view law enforcement with cynicism, resentment, and distrust.

“Legal cynicism” may be hard to cure, but fixing forfeiture is not. Some 15 states have adopted laws in recent years that restrict the use of forfeiture in the absence of a criminal conviction.¹⁰⁷ Some of these laws still need to be strengthened. California and Michigan, for example, do not require a conviction to seize property above a certain dollar amount, but they represent a welcome first step. Other legislation would require that the government bear the burden of proof and show that the property was involved in a crime, which would protect not only innocent owners but also their innocent families.¹⁰⁸ Other states have taken some initial steps by requiring the government to report to the public how much property is seized through forfeiture.

At the same time, judges have begun to express concerns about the abuse of forfeiture. In 2019, the U.S. Supreme Court reviewed a case involving a man convicted of a relatively minor drug crime; the official punishment was a fine of \$1,203, but officers seized his \$42,000 Land Rover. The Court ruled that the state’s judges should have considered whether such a disproportionate penalty violated the Constitution’s rule against excessive fines.¹⁰⁹ In another case, Justice Clarence Thomas wrote an opinion questioning whether or not forfeiture could be reconciled with the principles of due process.¹¹⁰ A year later, Illinois Supreme Court Justice Lloyd Karmeier objected when the state confiscated a \$35,000 motorcycle from a woman who accompanied her husband on a ride while he was intoxicated. The husband, wrote Karmeier, “could have been sentenced to up to three years in the Department of Corrections and fined up to \$25,000,” so “I fail to see what legitimate governmental purpose is served by going after his wife’s \$35,000 vehicle as well.”¹¹¹ Shortly after that, a South Carolina judge declared the state’s forfeiture laws unconstitutional because they violate the rule against excessive fines, force people to prove their innocence, deny victims their day in court, and “create an institutional incentive for forfeiture program officials to vigorously pursue forfeitures even where there is no basis for forfeiture and when leniency would be more appropriate.”¹¹²

These developments are long overdue. When government officials enjoy power to deprive people of their property without fair legal procedures and to keep that property for themselves, it crosses a crucial boundary. In law professor Bernadette Atuahene’s words, such activity “deconsecrates the state,” and marks a “transition from protector to predator.” Not only does this violate basic principles of legitimacy, but it also encourages the rise of “institutional avenues for resistance”—such as violent, below-ground political organizations.¹¹³ The abuse of official power thus becomes a long-

term threat to the state's survival.

Two centuries ago, James Wilson warned that in places where forfeiture is commonplace, “an insult to society becomes a pecuniary favor to the [government]; the appointed guardian of the public security becomes [financially] interested in the violation of the law; and the hallowed ministers of justice become the rapacious agents of the treasury.”¹¹⁴ Such a society cannot expect the citizens to support it.

Our constitutional system—with its prohibitions on excessive fines, cruel punishments, attainder, corruption of blood, and other abusive practices—was designed to ensure that public officials exercise their power for the benefit of the citizenry rather than for the benefit of the government. That is the most crucial element of the government's claim to our allegiance. By contradicting that basic principle, civil asset forfeiture threatens the very foundation of government legitimacy.

ENDNOTES

1. Letter from Matt Miller to Pima County Deputy County Attorney Kevin Krejci, August 20, 2020, <https://goldwaterinstitute.org/wp-content/uploads/2020/08/Letter-regarding-mitigation-final.pdf>.
2. Jacob Sullum, “Tucson Handyman Gets His Jeep Back After He Threatens to Fight the Forfeiture,” Reason.com, August 27, 2020, <https://reason.com/2020/08/27/tucson-handyman-gets-his-jeep-back-after-he-threatens-to-fight-the-forfeiture/>.
3. Knepper, et al., 5.
4. R.W. Dyson, ed., *Augustine: The City of God Against the Pagans* (New York: Cambridge University Press, 2002), 147-48.
5. Aristotle, *Politics*, 1279a, in Richard McKeon, ed., *Basic Works of Aristotle* (New York: Random House, 1941), 1185. The Roman statesman Cicero gave the same answer when he wrote that a country without justice, might have “the appearance of a most flourishing state,” but “in strict truth” it would be “no [state] at all.” Cicero, *Republic* book 3 § 31, in C.D. Yonge, trans., *Cicero’s Tusculan Disputations* (New York: Harper & Bros., 1877), 441.
6. John Locke, *First Treatise of Civil Government* §27, in Peter Laslett, ed., *John Locke: Two Treatises of Civil Government* (New York: Oxford University Press, 2nd ed. 1963), 195.
7. Anna Stiliz, “Legitimacy and Self-Determination,” *Nomos LXI* (New York: NYU Press, 2019).
8. U.S. Const. amend. VIII; art. I § 9 cl. 7.
9. English Bill of Rights ¶ 6 (1689).
10. English Bill of Rights ¶¶ 13, 14 (1689).
11. John D. Bessler, “A Century in the Making: The Glorious Revolution, the American Revolution, and the Origins of the U.S. Constitution’s Eighth Amendment,” *William & Mary Bill of Rights Journal* 27 (2019), 1023-25.
12. Bessler, 1032-33.
13. Robert D. Hume, “The Value of Money in Eighteenth-Century England: Incomes, Prices, Buying Power—and Some Problems in Cultural Economics,” *Huntington Library Quarterly* 77 (4) (2014), 376.
14. U.S. Const. amend. VIII.
15. Bessler, 1034.
16. Locke, *Second Treatise* § 233, in Laslett, 469. Locke was quoting the Catholic theologian William Barclay.
17. U.S. Const. art. I § 7 cl. 1.
18. U.S. Const. art. I § 9 cl. 3; art. I § 10 cl. 1; art. III § 3.
19. U.S. Const. art. III § 3.
20. U.S. Const. amend. V.
21. U.S. Const. amend. V.
22. James Madison, *The Federalist* No. 45 (J. Cooke, ed., Middletown: Wesleyan University Press, 1961), 309.
23. The most famous were the Mytilenian Decree of 428 B.C. and the ostracism of Alcibiades in 416 B.C. In the former case, the people of Athens, angered by the rebellion of their colony at Mytilene, voted to dispatch troops to destroy that city and kill and enslave its population. The next day, they regretted their decision and dispatched messengers to stop the arm—which just barely arrived in time. In the latter case, political opponents of the talented general Alcibiades used falsified evidence to get him banished from the city, whereupon he joined the army of the Spartans and led troops in battle against Athens. Incidents like these illustrated the fact that one of the greatest weaknesses of democracy was the unpredictable and often unprincipled behavior of the majority.
24. Leonard Levy, *Origins of the Bill of Rights*

- (New Haven: Yale University Press, 1999), 71.
25. Jacob Reynolds, “The Rule of Law and the Origins of the Bill of Attainder Clause,” *St. Thomas Law Review* 18 (2005), 195-97.
26. Marcus Gallo, “Property Rights, Citizenship, Corruption, and Inequality: Confiscating Loyalist Estates during the American Revolution,” *Pennsylvania History* 86(4) (Autumn 2019): 474-510.
27. William Jay, *The Life of John Jay* (New York: J. & J. Harper, 1833), vol. 1, 112.
28. Second Letter from Phocion Apr. 1784, *The Papers of Alexander Hamilton* (New York: Columbia University Press, 1962), vol. 3, 544.
29. Letter from Phocion, Jan. 1784, *Hamilton: Writings*, 129.
30. *Ibid.*, 137.
31. *Federalist* No. 44, 301.
32. *Federalist* No. 43 (J. Cooke, ed., Middletown, CT: Wesleyan University Press, 1961), 290.
33. Charles F. Hobson, ed., *John Marshall: Writings* (New York: Library of America, 2010), 20-21.
34. Bernard Bailyn, ed., *Debate on the Constitution* (New York: Library of America, 1993), vol. 1, 41.
35. Kermit L. Hall & Mark David Hall, eds., *Collected Works of James Wilson* (Indianapolis: Liberty Fund, 2007), vol. 2, 1111.
36. Richard Bellamy, ed., *Beccaria: “On Crimes and Punishments” And Other Writings* (Cambridge: Cambridge University Press, 1995), 58-59.
37. Merrill Peterson, ed., *Jefferson: Writings* (New York: Library of America, 1984), 354.
38. *Ibid.*, 1112-13.
39. U.S. Const. art. III § 3.
40. Timothy Sandefur, *The Conscience of the Constitution* (Washington, D.C.: Cato Institute, 2016), 71-94.
41. *Wells v. Martin*, 2 S.C.L. 20, 21 (S.C. Const. App. 1796).
42. Leonard W. Levy, *A License to Steal* (Chapel Hill: University of North Carolina Press, 1996), 43.
43. 8 U.S. 443 (1808).
44. Levy, 51. It has long been said that the idea of *in rem* litigation has its roots in ancient religious customs about inanimate objects or animals having committed crimes. This appears to be untrue; as Levy explains, some influential legal scholars such as William Blackstone believed this and included it in their writings, which perpetuated this mistake, but in fact today’s forfeiture laws have more in common with the admiralty law principle of *in rem* forfeiture than with any religious tradition.
45. Adam Creppelle, “Probable Cause to Plunder: Civil Asset Forfeiture and the Problems It Creates,” *Wake Forest Journal of Law and Policy* 7 (2017): 318-19.
46. This reference to “foreign” jurisdiction alludes to the fact that admiralty law is based in Roman law instead of the English common law. Among other things, civil law courts are “inquisitorial,” meaning that the judge asks questions and combines an investigative role with an adjudicative role. In a common law system, by contrast, the lawyers representing the parties ask questions and the judge decides the case based on the evidence they choose to present.
47. Donald J. Boudreaux and A.C. Pritchard, “Innocence Lost: *Bennis v. Michigan* and the Forfeiture Tradition,” *Missouri Law Review* 61 (1996): 608.
48. Gordon Wood, ed., *Adams: Revolutionary Writings 1755-1775* (New York: Library of America, 2011), 126.
49. See James Oakes, *Freedom National* (New York: Norton, 2013), 226-39.
50. *Miller v. United States*, 78 U.S. 268 (1870).

51. *Id.* at 323 (Field, J., dissenting).
52. *Id.* at 320-21 (Field, J., dissenting).
53. *Id.* at 323 (Field, J., dissenting).
54. Boudreaux & Pritchard, 627-31.
55. *Ibid.*, 629.
56. Eric Blumenson and Eva Nilsen, “Policing for Profit: The Drug War’s Hidden Economic Agenda,” *University of Chicago Law Review* 65 (1998), 63 n.102.
57. *Ibid.*, 77.
58. Lisa Knepper, et al., *Policing for Profit* (Institute for Justice, 3d ed. 2020), Stefan B. Herpel, “Toward A Constitutional Kleptocracy: Civil Forfeiture in America,” *Michigan Law Review* 96 (1998): 1910-46.
59. Jacob Sullum, “The Cops Took This Guy’s \$15,000 Jeep Because His Girlfriend Allegedly Used It for a \$25 Marijuana Sale,” Reason.com, August 21, 2020, <https://reason.com/2020/08/21/the-cops-took-this-guys-15000-jeep-because-his-girlfriend-allegedly-used-it-for-a-25-marijuana-sale/>.
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61. Knepper, et al., 5.
62. Christopher Ingraham, “Law Enforcement Took More Stuff from People Than Burglars Did Last Year,” *Washington Post*, November 23, 2015, <https://www.washingtonpost.com/news/wonk/wp/2015/11/23/cops-took-more-stuff-from-people-than-burglars-did-last-year/+&cd=1&hl=en&ct=clnk&gl=us>.
63. Knepper, et al., 6; J.F., “Fighting Crime through Superior Steak,” *The Economist*, October 15, 2013, [https://www.economist.com/blogs/de-](https://www.economist.com/blogs/de-mocracyinamerica/2013/10/asset-forfeiture)
64. Knepper, et al., 20.
65. *Bennis v. Michigan*, 516 U.S. 442 (1996). Specifically, because the solicitation of prostitution occurred in the car, the court held that the car was involved in the offense and could be confiscated notwithstanding the co-owner’s innocence.
66. Henry Hyde, “Forfeiture Reform: Now, or Never?” (Remarks at the Cato Institute, May 3, 1999); Henry Hyde, *Forfeiting Our Property: Is Your Property Safe from Seizure?* (Washington, D.C.: Cato Institute, 1995).
67. Nadine Strossen, Statement before the House Judiciary Committee, June 11, 1997, <https://www.aclu.org/other/nadine-strossens-congressional-testimony-civil-asset-forfeiture-reform>.
68. *Austin v. United States*, 509 U.S. 602, 612 (1993).
69. *Timbs v. Indiana*, 139 S.Ct. 682 (2019).
70. Brian D. Kelly, *Does Forfeiture Work?: Evidence from the States* (Institute for Justice, Feb. 2021), <https://ij.org/wp-content/uploads/2021/02/does-forfeiture-work-web.pdf>
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72. Knepper, et al., 5.
73. Brian D. Kelly and Maureen Kole, “The Effects of Asset Forfeiture on Policing: A Panel Approach,” *Economic Inquiry* 54(1) (2016): 558-75; Brian D. Kelly, “Fighting Crime or Raising Revenue: Testing Opposing Views of Forfeiture” (Institute for Justice, June 2019), [https://ij.org/re-](https://ij.org/report/fighting-crime-or-raising-revenue/)
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- the Police,” *Criminology & Public Policy* 17(1) (2018): 101-27. See also Jonathan Blanks, “Thin Blue Lies: How Pretextual Stops Undermine Police Legitimacy,” *Case Western Reserve Law Review* 66 (2016): 931-946.
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76. *Ibid.*, 292.
77. Virginia Declaration of Rights ¶ 15.
78. Letter to Officers of the First Brigade of the Third Division of the Massachusetts Militia, October 11, 1798, 9; Charles Francis Adams, ed., *Works of John Adams* 229 (Boston: Little, Brown, 1854).
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80. *Ibid.*
81. Gordon Wood, ed., *John Adams: Writings from the New Nation 1784-1826* (New York: Library of America, 2016), 123-24.
82. Tom R. Tyler, *Why People Obey the Law* (New Haven: Yale University Press, 1990), ch. 3.
83. Jonathan Blanks, “Thin Blue Lies: How Pretextual Stops Undermine Police Legitimacy,” *Case Western Reserve Law Review* 66 (2016): 933.
84. *Investigation of the Ferguson Police Department* (U.S. Department of Justice, March 4, 2015), p. 2, 88.
85. *Ibid.*, 6.
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87. In 1795, Supreme Court Justice William Patterson wrote that “every person ought to contribute his proportion for public purposes and public exigencies; but no one can be called upon to surrender or sacrifice his whole property, real and personal, for the good of the community, without receiving a recompense in value. This would be laying a burden upon an individual, which ought to be sustained by the society at large.” *VanHorne’s Lessee v. Dorrance*, 2 U.S. 304, 310 (C.C.D. Pa. 1795). More than 150 years later, the Supreme Court reiterated the point that the Constitution “was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” *Armstrong v. United States*, 364 U.S. 40, 49 (1960).
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97. Rachel A. Harmon, “Federal Programs and the Real Costs of Policing,” *New York University Law Review* 90 (2015): 923.

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99. Elijah Anderson, *Code of the Street: Decency, Violence and the Moral Life of the Inner City* (New York: Norton, 1999), 43.
100. Gwen Prowse, et al., "The State from Below: Distorted Responsiveness in Policed Communities," *Urban Affairs Review* 56(3) (2019), 1.
101. *Ibid.*, 6.
102. *Ibid.*, 25.
103. See Jeffrey Fagan and Tracey L. Meares, "Punishment, Deterrence and Social Control: The Paradox of Punishment in Minority Communities," *Ohio State Criminal Law Journal* 6 (2008), 215-22; Tracey Meares, "The Legitimacy of Police Among Young African-American Men," *Marquette Law Review* 92 (2009): 651-666.
104. As Anderson writes, "cynicism about the effectiveness of the police mixed with community suspicion of their behavior" prevents citizens "from embracing the notion that they must rely heavily on the formal means of social control to maintain even the minimum freedom of movement they enjoy on the streets." Elijah Anderson, *Race, Class, and Change in an Urban Community*, (Chicago: University of Chicago Press, 1990), 205.
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500 East Coronado Road | Phoenix, Arizona 85004

Office (602) 462-5000 | Fax (602) 256-7045

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