Spreading the Wealth: Is Asset Forfeiture the Key to Enticing Local Agencies to Enforce Federal Drug Laws?

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Introduction

The federal government devotes a significant amount of its money and resources towards fighting what Richard Nixon termed "the war on drugs."[1] One of the most effective legal tools used to further this purpose is asset forfeiture, or the process by which the government seizes and gains title to property obtained through criminal activity or used to further a criminal conspiracy. Criminal asset forfeiture[2] can be used against drug producers and traffickers to cripple their operations and claim their profits. This weapon can also be wielded in civil proceedings.[3] For instance, in states implementing medical cannabis programs, personal property gained from or used

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1. *Timeline: America's War on Drugs*, NATIONAL PUBLIC RADIO (Apr. 2, 2007), http://www.npr.org/templates/story/story.php?storyId=9252490.

2. 18 U.S.C. § 982 (2010); 21 U.S.C. § 881 (2010). These statutes set out both specific federal crimes and generalized types of offenses which may subject the offender to asset forfeiture. The statutes also provide, by cross-reference, procedures for conducting the post-conviction seizures.

3. 18 U.S.C. § 981 (2010); 21 U.S.C. § 881. The forfeiture provisions laid out in § 981 largely resemble those found in § 982 but do not require an antecedent criminal conviction. These provisions also incorporate by reference United States Customs procedures from 19 U.S.C. § 1602, and therefore modify the basis on which the respondent is subject to search and seizure of property.

for the sale of cannabis is subject to seizure due to the supremacy of federal laws prohibiting narcotics sales.[4]

This note will address the ways in which asset forfeiture is and can be used to further federal drug policy goals while reducing the ever-increasing budget demands of those federal agencies responsible for enforcement. As written, the statutes can be used as a carrot or a stick to foster local enforcement of federal laws. Cities and counties can be fiscally rewarded or punished for their local enforcement regimes, especially in the case of cannabis. Cities such as Oakland, California, obtain hundreds of thousands of dollars per year from taxable medical cannabis sales.[5] The state of California recently proposed legalizing cannabis for recreational use to generate a projected $1.4 billion in tax revenue.[6] Whether these same asset forfeiture provisions apply to state and local governments that profit from the sale of medical cannabis has yet to be determined by the courts. Issues of sovereign immunity, federalism, and due process are heavily implicated. Although the use of asset forfeiture to incentivize state and local government action has been established as legally permissible, it has not yet been attempted on an organized large scale.

I. Federal Drug Policy: The Problem of Enforcement

Eradicating drugs in the United States has been a notoriously difficult task. Narcotics use has increased in all categories (with the exception of opium) since the advent of prohibition.[7] National surveys show that recreational drug use has become more socially

4. *See* Memorandum from Deputy Attorney General David W. Ogden on behalf of Attorney General Eric Holder and the U.S. Dep't of Justice for Selected U.S. Attorneys on Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana (October 19, 2009), http://blogs.usdoj.gov/blog/archives/192. Attorney General Eric Holder released a memorandum on October 19, 2009, clarifying the federal government's position on state medical cannabis programs. He acknowledged that these programs violate federal law, but stated that United States Attorneys are vested with "plenary authority with regard to federal criminal matters" and that patients and caregivers who are in "clear and unambiguous" compliance with state law should be a low priority. Because this is a discretionary policy choice, it is non-binding and may be reversed at any time.

5. Zusha Elinson, *City: Medical Pot Sales in Oakland Reach $35 Million This Year*, THE BAY CITIZEN (Dec. 16, 2010), http://www.baycitizen.org/marijuana/story/city-medical-pot-sales-oakland-reach/.

6. Assembly Member Ammiano, *Staff Legislative Bill Analysis for Assembly Bill 390*, STATE BD. OF EQUALIZATION 1, 6 (Feb. 23, 2009), http://www.boe.ca.gov/legdiv/pdf/ab0390-1dw.pdf.

7. *Interview with Dr. Robert DuPont*, FRONTLINE (Jan. 21, 2011), http://www.pbs.org/wgbh/pages/frontline/shows/drugs/interviews/dupont.html.

acceptable than in previous decades.[8] This increased demand has led suppliers to provide ever greater quantities of their black market products to eager consumers.[9]

The Drug Enforcement Administration ("DEA"), under the Department of Justice, is the lead agency responsible for combating drug smuggling and drug use domestically and beyond national borders.[10] Each year the amount of drugs seized and the number of persons incarcerated increases.[11] The budget of the DEA has grown drastically as well. At the time of its creation in 1973, the DEA had a budget of just under $75 million.[12] Its allocation for 2010 was more than $2.6 billion, over thirty-two times greater than its initial budget.[13] However, despite this rapid growth, the DEA's resources still seem limited given that its jurisdiction spans the United States and at times crosses its borders. The agency employs over 10,700 people,[14] about half of whom are special agents.[15] This means there is roughly one special agent for every 58,000 Americans. When one considers that 25.8 million Americans are estimated by the DEA to have used illicit

8. *See, e.g.,* John Burnett, *What if Marijuana Were Legal? Possible Outcomes*, NATIONAL PUBLIC RADIO (Apr. 20, 2009), http://www.npr.org/templates/story/story.php?storyId=103276152; Jessica Macias, *Marijuana Considered as "Socially Accepted" as Alcohol, but Can Still Pose Risks*, THE MIAMI HURRICANE (Mar. 29, 2009), http://www.themiamihurricane.com/2009/03/29/marijuana-considered-as-socially-accepted-as-alcohol-but-can-still-pose-risks/; *Shock at drug and alcohol abuse by under-12s*, BBC NEWS (Aug. 7, 2010), http://www.bbc.co.uk/news/uk-wales-10902558.

9. *See* U.S. DEP'T OF JUSTICE NAT'L DRUG INTELLIGENCE CTR., NAT'L DRUG THREAT ASSESSMENT 2010 1, 3 (2010). Data in this report suggests that 14.2% of Americans twelve years of age and older have used an illicit drug in the last year. In the case of cannabis, the most commonly used illicit drug, 25.8 million individuals report usage in the last year. The DEA also estimated that 2.9 million individuals tried an illicit substance for the first time in 2008.

10. *DEA Mission Statement*, U.S. DRUG ENFORCEMENT ADMIN., http://www.justice.gov/dea/agency/mission.htm (last visited Jan. 22, 2011).

11. *See* HEATHER C. WEST, WILLIAM J. SABOL & SARAH J. GREENMAN, U.S. DEP'T OF JUSTICE BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2009 (2010), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/p09.pdf. Between 2000 and 2008 the number of drug offenders incarcerated in federal prisons has increased by an average of 3.1% per year. Stated differently, this means the number of persons in federal prison for drug offenses increased almost 30% over an eight-year period.

12. *DEA History*, U.S. DRUG ENFORCEMENT ADMIN., http://www.justice.gov/dea/history.htm (last visited Jan. 22, 2011).

13. *Id.*

14. *DEA Staffing & Budget*, U.S. DRUG ENFORCEMENT ADMIN., http://www.justice.gov/dea/agency/staffing.htm (last visited Jan. 22, 2011).

15. *Id.* In 2009 there were 5,233 special agents. The other 5,551 paid employees comprise support staff and do not directly participate in law enforcement.

substances in the previous year,[16] it follows that (at least occasional) drug users outnumber special agents by a ratio of 5,446 to one.[17] It is no surprise, then, that controlling drug use remains a challenge.

Adding to the DEA's difficulties is the fact that it is unable to compel state and local police to enforce federal law. This stems from the anti-commandeering principle, as discussed in the landmark case of *New York v. United States*.[18] In that case, the state of New York challenged certain provisions of the Low-Level Radioactive Waste Policy Amendments Act.[19] The Act's purpose was to encourage the states to deal with radioactive waste by providing monetary incentives for meeting certain disposal requirements.[20] The Act also provided that if states did not comply, they would take legal title to, and liability for, the radioactive waste generated within their borders.[21]

In a 6-3 decision, the United States Supreme Court held that the "take title" provision of the Low-Level Radioactive Waste Policy Amendments Act unconstitutionally commandeered state legislatures for the furtherance of federal purposes.[22] This provision was a violation of the Tenth Amendment's reservation of power to the states,[23] and went against the long-held principle of federalism as written into the structure of the Constitution.[24] Justice O'Connor, writing for the majority, held that "[n]o matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States to regulate."[25]

The Court went on to distinguish the permissible practice of incentivizing compliance with federal law from the impermissible practice of applying sanctions for noncompliance. Although Congress may use its spending power to influence the behavior of the states,[26] it violates the Constitution when it imposes its will via

16. U.S. DEP'T OF JUSTICE NAT'L DRUG INTELLIGENCE CTR., NAT'L DRUG THREAT ASSESSMENT 2010 1, 3 (2010).

17. *DEA Staffing & Budget*, U.S. DRUG ENFORCEMENT ADMIN., http://www.justice.gov/dea/agency/staffing.htm (last visited Jan. 22, 2011) (giving precise number of special agents as 5,233).

18. New York v. United States, 505 U.S. 144 (1992).

19. *Id.* at 149.

20. *Id.* at 152–53.

21. *Id.* at 153–54.

22. *Id.* at 175–76.

23. *Id.* at 177–178.

24. *Id.* at 183.

25. *Id*. at 178.

26. *Id.* at 167.

penalties.[27] The "take title" provision was evaluated on the basis of the two options presented to state governments. Both were deemed to be beyond the scope of Congress' power:

> Because an instruction to state governments to take title to waste, standing alone, would be beyond the authority of Congress, and because a direct order to regulate, standing alone, would also be beyond the authority of Congress, it follows that Congress lacks the power to offer the States a choice between the two. Unlike the first two sets of incentives [provided for in the Act], the take title incentive does not represent the conditional exercise of any congressional power enumerated in the Constitution. . . . Either way, "the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program," an outcome that has never been understood to lie within the authority conferred upon Congress by the Constitution.[28]

Justice O'Connor declared that, "[w]here a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents."[29]

This precedent effectively prevents the federal government from forcing state and local police to act, as no penalty can attach when the mandate is ignored. In the case of localized drug enforcement, Congress instead must either legislate directly (as it did by creating the DEA), or else find some way of enticing the states to enforce drug laws voluntarily.

II. Asset Forfeiture: Killing Two Birds with One Stone

An advantage of asset forfeiture—that is, seizing the property used in a crime—is that it deprives the criminal of his tools while simultaneously providing additional means of law enforcement to the government. For example, a ship confiscated from a convicted pirate could be repurposed as a navy vessel for the hunting of pirates. Asset forfeiture has a long history in the United States, originating in English common law.[30] Early statutes typically allowed for the seizure

27. *Id.* at 175–76.

28. *Id.* at 176 (citing Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 288 (1981)).

29. *New York,* 505 U.S. at 178.

30. *See* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 680–83 (1974); *see also* Austin v. United States, 509 U.S. 602, 611–13 (1993). These cases trace asset

of ships used for customs offenses,[31] and later for piracy[32] and slave trafficking.[33]

The government began to style suits *in rem* when property was to be taken. These suits were based on the legal theory that the property itself was the offender, and the criminal was but a third party claimant.[34] Supreme Court Justice Joseph Story summarized the principle distinguishing *in rem* actions from *in personam* actions in an early pirate-vessel forfeiture case: "The thing is here primarily considered as the offender, or rather the offence is attached primarily to the thing . . . ."[35] Unless the property's owner chooses to file a claim contesting the forfeiture, he or she need not be a party to the action at all.

In rem suits based on this legal theory markedly increased the power of the government because property could be seized before a conviction was obtained, or even in some cases before the owner was identified.[36] The government could take a slave ship floating in territorial waters, notwithstanding the fact that its crew had either fled the jurisdiction of the United States[37] or abandoned the vessel entirely before law enforcement discovered it.[38]

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forfeiture laws to early statutes and common law enforced in the English colonies in America before ratification of the United States Constitution. They also trace the concept of forfeiture to pre-Judeo-Christian practices.

31. *See* United States v. 92 Buena Vista Ave., 507 U.S. 111, 119 (1993) ("The First Congress enacted legislation authorizing the seizure and forfeiture of ships and cargos involved in customs offenses.").

32. *See id.* ("Other statutes authorized the seizure of ships engaged in piracy."); *see also* The Palmyra, 25 U.S. 1, 8 (1827) ("[W]henever any vessel or boat from which any piratical aggression, search, restraint, depredation, or seizure, shall have been first attempted or made, shall be captured and brought into any port of the United States, the same shall and may be adjudged and condemned to their use, and that of the captors, after due process and trial, in any Court having admiralty jurisdiction, and which shall be holden for the district into which such captured vessel shall be brought, and the same Court shall thereupon order a sale and distribution thereof accordingly, and at their discretion.").

33. *See Calero-Toledo*, 416 U.S. at 683. First made subject to forfeiture were those vessels used to transport slaves out of the country, and later those used to deliver slaves to the United States.

34. *See The Palmyra*, 25 U.S. at 14.

35. *Id.*

36. *See* Austin v. United States, 509 U.S. 602, 615 n.9 ("The fictions of in rem forfeiture were developed primarily to expand the reach of the courts, which, particularly in admiralty proceedings, might have lacked in personam jurisdiction over the owner of the property.") (citations omitted).

37. *See* Bennis v. Michigan, 516 U.S. 442, 472 (1996) (Kennedy, J., dissenting) (The prevalence of in rem suits stemmed from "the necessity of finding some source of

The twentieth century marked a further expansion of government power. With the advent of bootlegging, the government used asset forfeiture to seize the land used to distill alcohol and the automobiles used to transport it.[39] The Supreme Court upheld the notion that property used in criminal offenses could be seized regardless of the owner's role in the crime. Cases such as *J.W. Goldsmith, Jr.-Grant Co. v. United States*[40] and *Van Oster v. Kansas*[41] upheld the forfeiture of vehicles used by persons other than their owners to transport alcohol. Twentieth century jurisprudence began to depart from the theory of property as an offender. A new theory emerged that property was subject to forfeiture when used as an "instrumentality" of a crime.[42] Under this theory, the innocence of an owner was irrelevant, as he or she was deemed justly punished for negligently allowing the property to be used in a crime.[43] In this way, the Court managed to sidestep Fifth Amendment due process issues. By the mid-1900s, Congress had codified forfeiture statutes for a wider variety of offenses, including offenses such as gambling.[44]

The most recent and groundbreaking changes in asset forfeiture came in 1978 and 1984, when Congress amended the drug forfeiture statutes. In two critically important moves calculated to aid the war on drugs, Congress first allowed for the forfeiture of the proceeds of the offense,[45] then of the property used to facilitate it.[46] Congress

compensation for injuries done by a vessel whose responsible owners were often half a world away and beyond the practical reach of the law and its processes.").

38. *Id.* at 447 (The owner of the vessel need be found before commencing a forfeiture action, as "the acts of the master and crew . . . bind the interest of the owner of the ship, whether he be innocent or guilty; and he impliedly submits to whatever the law denounces as a forfeiture attached to the ship by reason of their unlawful or wanton wrongs.") (citations omitted).

39. *See, e.g.,* United States v. James Daniel Good Real Prop., 510 U.S. 43, 60 (1993) (Preventing bootlegging and tax evasion was a high priority for the government, as by 1902 "nearly 75 percent of total federal revenues—$479 million out of a total of $653 million—was raised from taxes on liquor, customs, and tobacco.").

40. *See* J.W. Goldsmith, Jr.-Grant Co. v. United States, 254 U.S. 505 (1921).

41. *See* Van Oster v. Kansas, 272 U.S. 465 (1926).

42. *See* United States v. Bajakajian, 524 U.S. 321, 333 n.8 (1998) (Scalia, J., concurring in part and concurring in judgment) ("Although the term 'instrumentality' is of recent vintage, see *Austin v. United States*, it fairly characterizes property that historically was subject to forfeiture because it was the actual means by which an offense was committed.") (internal citations omitted).

43. *See Austin*, 509 U.S. at 615 (explanation of dual purpose of asset forfeiture).

44. *See, e.g.,* United States v. U.S. Coin & Currency, 401 U.S. 715 (1971) (forfeiture utilized for gambling offense).

45. *See* 21 U.S.C. § 881(a)(6) (1978) (concerning forfeiture of drug offense proceeds).

broadened the definition of "facilitate" in 1990 to include property with a substantial connection to the crime,[47] and anything that makes the offense easier to commit or harder to detect.[48] The types of property subject to seizure grew immeasurably larger. Not only could the government now seize a kilogram of cocaine and the car used to transport it, but also the house in which it was stored and packaged, the buildings used to count and launder the money, and almost anything purchased with the profits.

III. Providing Local Enforcement Incentives

Property forfeited to the government can be retained for a number of uses, or turned over to local authorities if they assisted the DEA in seizing the subject property. The attorney general is empowered to "transfer the property to any Federal agency or to any State or local law enforcement agency which participated directly in the seizure or forfeiture of the property . . . ."[49] The amount to be transferred depends directly on the level of involvement of the state or local agency. The value of the property must bear "a reasonable relationship to the degree of direct participation of the State or local agency in the law enforcement effort resulting in the forfeiture, taking into account the total value of all property forfeited and the total law enforcement effort . . . ."[50] Taken to the extreme, this would mean that a local agency enforcing federal drug law could be transferred the full value of the property forfeited. This fact gives rise to a number of interesting and fortuitous implications for the federal government.

First, and perhaps most obviously, these incentives overcome the anti-commandeering principle discussed in *New York v. United States*.[51] In *New York*, the Supreme Court held that, while the punitive elements of the Low Level Radioactive Waste Policy Act were unconstitutional, the provisions providing incentives for

46. *See* 21 U.S.C. § 881(a)(7) (1984) (concerning forfeiture of real property used to commit or to facilitate the commission of a felony drug offense).

47. *See* United States v. Schifferli, 895 F.2d 987, 990 (4th Cir. 1990) (The court had previously used a "substantial connection" test, whereby the property at issue "either must be used or intended to be used to commit a crime, or must facilitate the commission of a crime. At minimum, the property must have more than an incidental or fortuitous connection to criminal activity.").

48. *Id*.

49. 21 U.S.C. § 881(e)(1)(A) (2010).

50. 21 U.S.C. § 881(e)(3)(A) (2010).

51. New York v. United States, 505 U.S. 144 (1992).

compliance posed no such problems.[52] Accordingly, state and local law enforcement agencies can garner huge prizes by making drug busts within their jurisdictions. Once the instrumentalities and proceeds of drug trafficking are uncovered by, for example, the Sheriff's Department in Los Angeles County, it can notify the closest DEA field office to commence a federal asset forfeiture proceeding. The United States attorney general may then reward this initiative on the part of the Sheriff's Department by transferring all of the seized property to it.

This situation is win-win from both the federal and local perspectives. The federal government is able to use local actors to further federal policies in a way that neither violates the Constitution nor incurs additional budget expenses. The asset forfeitures are self-sustaining in that criminals—not taxpayers—finance the rewards to local agencies. The transfer of confiscated property can be conditioned on the successful prosecution of the drug traffickers, thus assuring quality police work and reducing the potential for abuse. The DEA's resources and reach would be drastically increased in an extremely cost-effective manner.

In the hypothetical scenario described above, the Los Angeles County Sheriff's Department could repurpose the forfeited property, or sell the property to purchase new equipment and hire more personnel. In many cases, the value of seized property may be vastly higher than the costs incurred by law enforcement in obtaining it, creating powerful incentives for the Sheriff to enforce federal drug law. For example, the median home value in Los Angeles County is $360,000.[53] Only a fraction of that amount would be spent investigating and effectuating the arrest of a drug distributor who kept drugs in his or her home. Additional funding from the federal government could be an attractive prospect given California's current budget deficits.[54]

52. *Id.* at 173–74 (conditioning grants on attainment of milestones is permissible; conditional exercise of Congress' commerce power is acceptable).

53. *Southern California Home Sale Activity: L.A. Times Sunday Edition Charts – Data for the Year 2010 – corrected*, DATAQUICK INFORMATION SYSTEMS, http://www.dqnews.com/Charts/Annual-Charts/LA-Times-Charts/ZIPLAT10.aspx (last visited Feb. 8, 2011).

54. As of the writing of this note in 2011, California faces some of the largest budgetary crunches in its history. Governor Edmund G. Brown, Jr. in his proposed budget for 2011-2012 notes that "[w]e begin 2011, after the longest budget stalemate in the history of California, with a budget gap of more than $25 billion." EDMUND G. BROWN, JR., GOVERNOR, STATE OF CALIFORNIA, 2011-12 GOVERNOR'S BUDGET SUMMARY iii (2011), *available at* http://www.ebudget.ca.gov/pdf/BudgetSummary/FullBudgetSummary.pdf. He reiterates, "This is a tough budget for tough times." *Id.*

The ability of the Los Angeles County Sheriff's Department to precipitate forfeiture proceedings through the DEA would also increase its ability to abate local nuisances. Local agencies find this attractive because it decreases repetitive enforcement actions and frees up officers and resources. For example, so-called "crack houses" that are continuously revisited by police could be closed down permanently and put to better use.[55] Seizing firearms from drug dealers removes weapons from the street and prevents their use against civilians or officers at a later date.[56] Increased nuisance abatement power could be instrumental to the prevention of future crimes.

The second implication of this system would be a shift towards community standards of drug policy enforcement. The DEA, due to its limited size, can only pursue a relatively small number of drug smugglers and traffickers with its own resources. Targets of the DEA tend to be the "big fish" of the narcotics market, regardless of where in the United States they are operating.[57] As a result, federal busts in areas of California like San Francisco and Santa Cruz have been met with great hostility,[58] whereas other localities with smaller drug trades have actively but unsuccessfully petitioned the DEA for assistance.[59] Transferring the enforcement, as opposed to prosecutorial, duties to local police departments allows communities to determine for themselves what amount of drug use to tolerate. Counties supportive

55. United States v. 141 St. Corp., 911 F.2d 870 (2d Cir. 1990) (building used to sell crack cocaine subject to forfeiture).

56. United States v. One Assortment of 89 Firearms, 465 U.S. 354, 364 (1984) (firearms used illegally or intended for illegal use subject to forfeiture).

57. *See DEA Mission Statement*, U.S. DRUG ENFORCEMENT ADMIN., http://www.justice.gov/dea/agency/mission.htm (last visited Jan. 22, 2011) (The DEA's mission statement declares that one of the agency's primary responsibilities is "the prosecution of major violators of controlled substance laws operating at interstate and international levels.").

58. *See, e.g.,* Maria Alicia Gaura, *Santa Cruz Officials Fume over Medical Pot Club Bust: DEA Arrests Founders, Confiscates Plants*, SAN FRANCISCO CHRONICLE (Sep. 6, 2002), http://www.sfgate.com/cgi-bin/article.cgi?file=/c/a/2002/09/06/MN212302.DTL; *Los Angeles City Council Votes to End Federal DEA Medical Marijuana Raids*, AMERICANS FOR SAFE ACCESS (Jul. 25, 2007), http://www.safeaccessnow.org/article.php?id=4877.

59. U.S. DEP'T OF JUSTICE OFFICE OF THE INSPECTOR GENERAL AUDIT DIVISION, AUDIT OF THE DRUG ENFORCEMENT ADMINISTRATION'S MOBILE ENFORCEMENT TEAM PROGRAM (2010), *available at* http://www.justice.gov/oig/reports/DEA/a1108.pdf. The DEA established a "Mobile Enforcement Team" program in 1995 to help local law enforcement agencies confront drug trafficking problems that were beyond their operational capabilities. The program was cancelled in 1997 due to budget cuts, but since 2008 has reemerged on a limited basis.

of state medical cannabis programs can allow these programs to operate with a decreased risk of federal intervention, whereas counties disfavoring such programs can shut down operations while gaining additional police resources and funding. Local citizens are empowered by their votes for police chief and sheriff to exert control over what happens in their metaphorical backyards.

In this way, community standards will begin to govern drug enforcement policies in much the same way community standards govern obscenity. The three-pronged *Miller* test used by the federal courts in obscenity trials contains a requirement that "'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest."[60] Chief Justice Burger emphasized in *Miller*'s majority opinion that the community standard prong allowed enforcement of the law with some amount of local flavor, so that a contentious law like the regulation of obscenity could meet the standards of the people subject to it. Justice Burger writes, "The adversary system, with lay jurors as the usual ultimate factfinders in criminal prosecutions, has historically permitted triers of fact to draw on the standards of their community, guided always by limiting instructions on the law."[61] Allowing for the same type of guided local control of drug enforcement policies would likely do much to help a community more fully accept a contentious national law.

IV. Requiring Local Compliance with Drug Laws

In addition to providing incentives to cities that enforce federal law, asset forfeiture provisions allow for the punishment of cities that violate it. Sixteen states so far have legalized cannabis for medical use[62] despite its federal classification as a Schedule I drug with no recognized medical value.[63] Medical cannabis sales have become big

60. Miller v. California, 413 U.S. 15, 24 (1973) (internal citations omitted).

61. *Id*. at 30.

62. *See Active State Medical Marijuana Programs*, THE NAT'L ORG. FOR THE REFORM OF MARIJUANA LAWS, http://norml.org/index.cfm?Group_ID=3391 (last accessed Mar. 2, 2011). States that have legalized cannabis for medical use include: Alaska, Arizona, California, Colorado, Hawaii, Maine, Maryland, Michigan, Montana, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington. As of July 2010, the District of Columbia also has a medical cannabis program despite the fact that it exists on federal land.

63. 21 U.S.C. § 812(b)(1) (2010) (listing criteria for placement in schedule I); 21 U.S.C. § 812(c) (listing cannabis, under the antiquated term "marihuana," and its active ingredient tetrahydrocannabinol as schedule I substances).

business in several of these states. California, in particular, has embraced the medical cannabis model with liberal laws that do not permit the courts to second-guess a doctor's recommendation of cannabis for a patient.[64] Medical cannabis dispensaries are established in a number of California cities and counties, increasing patients' access to the drug.[65] These dispensaries are subject to state sales tax like regular businesses, despite the fact that they operate in violation of federal law.[66] Cities like Oakland, California, collect hundreds of thousands of dollars per year in additional municipal sales taxes on medical cannabis.[67] The wording of some asset forfeiture statutes, however, leaves open the possibility that all of these municipal sales taxes are subject to confiscation by the federal government.

The forfeiture statute codified at 21 U.S.C § 881 begins as follows: "The following shall be subject to forfeiture to the United States and no property right shall exist in them . . . ."[68] Sixth on the list of items subject to forfeiture is:

> All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance or listed chemical in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter.[69]

64. CAL. HEALTH & SAFETY CODE § 11362.5(c) (2010) ("Notwithstanding any other provision of law, no physician in this state shall be punished, or denied any right or privilege, for having recommended marijuana to a patient for medical purposes.")

65. California allows medical cannabis dispensaries to operate in the form of patient's collectives or cooperatives. CAL. HEALTH & SAFETY CODE § 11362.775 (West 2011). This effectuates the third goal of the statutory Medical Marijuana Program Act, which is to "[e]nhance the access of patients and caregivers to medical marijuana through collective, cooperative cultivation projects." 2003 Cal. Adv. Legis. Serv. 875, at *1 (Deering).

66. CA. STATE BD. OF EQUALIZATION, SPECIAL NOTICE: IMPORTANT INFORMATION FOR SELLERS OF MEDICAL MARIJUANA 1 (2007), *available at* http://www.boe.ca.gov/news/pdf/medseller2007.pdf.

67. Zusha Elinson, *City: Medical Pot Sales in Oakland Reach $35 Million This Year*, THE BAY CITIZEN (Dec. 16, 2010), http://www.baycitizen.org/marijuana/story/city-medical-pot-sales-oakland-reach/.

68. 21 U.S.C. § 881(a) (2010).

69. *Id.* at § 881(a)(6) (2010).

This phrasing provides for an action *in rem* against any currency or proceeds involved in or traceable to a drug transaction. There is no requirement of a conviction or of any specific criminal intent prior to seizure. The statute essentially provides that no entity, other than the federal government of the United States, can hold title to the proceeds of a drug transaction.

Municipal sales taxes on medical cannabis would almost certainly be encompassed within this definition of moneys subject to forfeiture. The sales tax here is a proceed directly traceable to an exchange of money for cannabis. The tax money would not exist but for the cannabis sale. Furthermore, the city is not being deprived of the money it has collected, so no due process issue could arise. Because the city could not hold title to those funds in the first place, it could not argue that it is being deprived of them.

Tax dollars would not be the only property subject to forfeiture. For example, the City of Oakland recently considered whether growers of medical cannabis within the city limits should be required to use space in four large warehouses licensed by the city.[70] The idea behind the ordinance was that concentrating cannabis cultivation in one small part of the city would curb nonmedical growing operations and allow for more control and security over a drug with high black market value.[71] In addition, an estimated 350 union jobs would be created and $2 million dollars in new annual tax revenue would be realized by the city.[72] The unintended effect of the ordinance would be to subject Oakland's licensed warehouse property to forfeiture. Seventh on the list of items subject to seizure is:

> All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment.[73]

70. Kate McLean, *Oakland Says 'Yes' to Industrial Pot*, THE BAY CITIZEN (Jul. 21, 2010), http://www.baycitizen.org/marijuana/story/oakland-council-say-yes-industrial-pot/.

71. COUNCIL MEMBER REBECCA KAPLAN & COUNCIL MEMBER LARRY REID, CITY OF OAKLAND AGENDA REPORT JULY 13, 2010, 2 (2010), *available at* http://clerkwebsvr1.oaklandnet.com/attachments/25535.pdf.

72. David Downs, *Study: $2 Million in Taxes, 350 Jobs From Oakland-Licensed Cannabis Grow Facility*, EAST BAY EXPRESS (May 24, 2010), http://www.eastbayexpress.com/LegalizationNation/archives/2010/05/24/study-2-million-in-taxes-350-jobs-from-oakland-licensed-cannabis-grow-facility.

73. 21 U.S.C. § 881(a)(7) (2010).

Were Oakland to move forward with its warehouse plan, a property right would cease to exist in both the land and the structure chosen to implement the plan. The federal government could seize and then utilize or sell the real estate for its own purposes without needing to demonstrate anything but the cultivation of cannabis on the premises. Ironically, the DEA could use the warehouse as a site for a new field office if it so desired.

It is an increasingly likely possibility that these government-sanctioned cannabis cultivation and sales schemes will expand from the local level to the state level. California recently voted on a statewide ballot measure to legalize, regulate, and tax cannabis for recreational purposes.[74] The anticipated yearly revenue from taxation, as determined by the state's legislative analyst, would be "hundreds of millions of dollars annually."[75] An early estimate by the State Board of Equalization projected as much as $1.4 billion in new revenues.[76]

While this money is also likely subject to seizure, some additional factors could complicate the situation. The foremost consideration militating against the confiscation of state tax dollars is the doctrine of sovereign immunity for states. Sovereign immunity is "[t]he principle that the sovereign cannot be sued in its own courts or in any other court without its consent and permission; a principle which applies with full force to the several states of the Union."[77] However, Justice Powell stated in the case of *Welch v. Texas Department of Highways and Public Transportation*[78] that "[t]he contours of state sovereign immunity are determined by the structure and requirements of the federal system."[79] He continues, "[T]he United States may sue a State, because that is 'inherent in the Constitutional

74. CALIFORNIA SECRETARY OF STATE, *PROPOSITION 19*, OFFICIAL VOTER INFORMATION GUIDE (2010), *available at* http://www.voterguide.sos.ca.gov/propositions/19/. The ballot initiative would have allowed people twenty-one years or older to possess, cultivate, and transport limited amounts of cannabis for personal use. California's medical cannabis legislation would remain active, so patients would not be constrained by the Proposition 19 possession limits for recreational users.

75. *Id.*

76. Assembly Member Ammiano, *Staff Legislative Bill Analysis for Assembly Bill 390*, STATE BD. OF EQUALIZATION (Feb 23, 2009), http://www.boe.ca.gov/legdiv/pdf/ab0390-1dw.pdf.

77. BALLENTINE'S LAW DICTIONARY (3d ed. 1969).

78. Welch v. Tex. Dep't of Highways and Pub. Transp., 483 U.S. 468 (1987).

79. *Id.* at 487.

plan.' Absent such a provision, 'the permanence of the Union might be endangered.'"[80] Additionally, the *in rem* nature of a civil forfeiture could sidestep the issue of sovereign immunity because, as with the City of Oakland, no state could hold title to the tax money in the first place.

V. Potential for Abuse

Asset forfeiture, like most powerful tools, may be subject to abuse by unscrupulous actors. The prospect of obtaining valuable property and real estate creates powerful incentives for local law enforcement agencies to enforce federal drug law. This goal-focused approach to drug enforcement can distract police from their mission of acting in the public's best interest.

The case of Donald Scott is one example of a situation where a forfeiture-motivated drug enforcement action ended tragically. On October 2, 1992, a drug enforcement task force conducted a surprise early-morning raid of Scott's 250-acre ranch property near Malibu, California.[81] Their warrant was obtained based on a belief that Scott was cultivating somewhere between fifty and several thousand cannabis plants on his property.[82] Officers broke down Scott's door and subdued his wife, who shouted, "Don't shoot me! Don't kill me!"[83] Scott was awakened by his wife's cries and came out of his bedroom carrying a gun over his head.[84] Officers told Scott to put down the weapon, and as he lowered his arm they fatally shot him.[85] At that point, "[d]eputies searched Scott's property for hours after the shooting, but not a single marijuana plant was found."[86]

After a five-month investigation, District Attorney Michael D. Bradbury stated that the raid was unjustified.[87] Despite an

80. *Id.* (citations omitted).

81. Ron Soble, *A Violent Confrontation Ends Man's Colorful Life*, L.A. TIMES, Oct. 12, 1992, at 1, *available at* http://articles.latimes.com/1992-10-12/news/mn-163_1_drug-task-force.

82. Richard Miniter, *Ill-Gotten Gains*, REASON (Aug/Sept 1993), http://reason.com/archives/1993/08/01/ill-gotten-gains. A Sheriff's Department informant claimed that thousands of cannabis plants were growing on Scott's property. A DEA agent conducting an aerial surveillance flyover claimed to have seen fifty plants.

83. Soble, *supra* note 81, at 3.

84. *Id.* at 4.

85. *Id.*

86. *Id.* at 1.

87. Richard Miniter, *Ill-Gotten Gains*, REASON (Aug/Sept 1993), http://reason.com/archives/1993/08/01/ill-gotten-gains.

informant's claim that there were "thousands" of plants on the property, two sets of aerial photographs showed no indication that any cannabis was being grown.[88] Bradbury explained that, without binoculars, it would be impossible to positively identify fifty plants from a plane 1,000 feet in the air, contrary to what an agent had previously claimed.[89] Bradbury also discovered that the Sheriff's Department had obtained its search warrant by withholding evidence and testimony from the judge who signed it.[90]

Nicholas Gutsue, the Scott family's attorney, discovered that Scott had repeatedly refused to sell his land to the National Park Service, which wished to make it part of the Santa Monica Mountains National Recreation Area.[91] He suspected that a forfeiture deal motivated the raid of Scott's property:

> After the raid, the police would seize the $5-million ranch under federal forfeiture law, which allows the government to take property used to commit a drug crime. The Park Service would buy the land, and the other participating agencies would share the proceeds. Gutsue notes that Park Service rangers took part in the raid, along with county, state, and federal drug warriors.[92]

Deputy District Attorney Kevin DeNoce came to the same conclusion as Gutsue in a letter he wrote to District Attorney Bradbury.[93] He found that prior to the search warrant's execution, law enforcement officers in multiple agencies including the Park Service had discussed the possibility of seizing and forfeiting the ranch.[94] Officers at a Sheriff's briefing had received a property

88. *Id.*

89. *Id.* The Court has repeatedly banned searches of the home based only on a line of sight beyond what the naked eye can see. *See* California v. Ciraolo, 476 U.S. 207 (1986); *see also* Kyllo v. United States, 533 U.S. 27 (2001).

90. *Id.* ("Ventura Municipal Court Judge Herbert Curtis III was not told that a federal reconnaissance team had found no drugs on Scott's land when they searched parts of it on two occasions a week earlier. Furthermore, Bradbury said several of the affidavits used to support the request for a search warrant were either false or misleading.")

91. *Id.*

92. *Id.*

93. Letter from Kevin G. DeNoce, Deputy District Attorney, Office of the District Attorney, County of Ventura, State of California, to Michael D. Bradbury, District Attorney, County of Ventura, State of California (Mar. 31, 1993), http://www.fear.org/chron/denoce.txt.

94. *Id.*

appraisal statement of the ranch and a parcel map of the area.[95] The DEA agent conducting flyover surveillance noted on his parcel map that the ranch property was approximately 200 acres, and that an eighty-acre parcel in the area had sold recently for $800,000.[96] DeNoce wrote:

> We can find no reason why law enforcement officers who were investigating suspected narcotics violations would have any interest in the value of the Trail's End Ranch or the value of property sold in the same area other than ff [sic] they had a motive to forfeit that property. As discussed in our report, although there may be other explanations for this information, it is our opinion that the most reasonable explanation is that the law enforcement officers involved in the preparation of the search warrant were motivated, in part, by a desire to forfeit a valuable piece of property.[97]

Donald Scott's death illustrates one of the major potential drawbacks of incentivizing drug enforcement with asset forfeiture: High-value targets may be favored over high-priority targets. This problem is not only limited to cases of police misconduct, as with the raid on Scott's ranch. It exists even in cases where officers act prudently and fully comply with proper police procedures. From a public safety perspective, forfeiting a dilapidated rural trailer where large amounts of methamphetamine are produced should be a much higher priority than forfeiting a gated-community mansion with several cannabis plants growing in the garage. From the perspective of a law enforcement agency with severe budget woes, however, the exact opposite may be true. It is the classic conflict of interest.

VI. Attempts at Reform: The Passage of CAFRA

The largest asset forfeiture reform since Congress strengthened the drug forfeiture statutes in 1978 and 1984 has been the Civil Asset Forfeiture Reform Act of 2000 ("CAFRA").[98] The reform effort was driven by an increasing sentiment that forfeiture procedures were too powerful and were unfair to property owners. Judge Clarence Arlen Beam of the Eight Circuit wrote in a judicial opinion in 1992:

95. *Id.*

96. *Id.*

97. *Id.*

98. 18 U.S.C. § 983 (2010). CAFRA also modifies a number of other U.S. Code provisions to reflect the reforms included in § 983. The most affected of these are 18 U.S.C. §§ 981(g), 983, and 985 and 28 U.S.C. §§ 2466 to 2467 and 2680.

> The government, under the current approach, need not produce any admissible evidence and may deprive citizens of property based on the rankest of hearsay and the flimsiest evidence. This result clearly does not reflect the value of private property in our society, and makes the risk of an erroneous deprivation intolerable.[99]

CAFRA added several new protections for property owners. The new procedures were an attempt to increase the due process afforded to claimants in civil proceedings and remedy the federal government's perceived "abuses of fundamental fairness."[100]

First, and perhaps most significantly, CAFRA shifted the burden of proof to the government.[101] Previously, the owner of property had the burden of proving that he or she did everything possible to prevent the property from being used for illegal activity. In the case of *Calero-Toledo v. Pearson Yacht Leasing Co.*,[102] a boat leasing company had leased a pleasure yacht to two Puerto Rican residents who were later found in possession of cannabis plants on board.[103] Puerto Rican authorities seized the boat after one of the lessees was charged with a violation of the Controlled Substances Act.[104] The Court found that the leasing company was "in no way . . . involved in the criminal enterprise carried on by (the) lessee" and "had no knowledge that its property was being used in connection with or in violation of (Puerto Rican Law)."[105] The seizure was nevertheless upheld on the basis that, "in this case appellee voluntarily entrusted the lesses [sic] with possession of the yacht, and no allegation has been made or proof offered that the company did all that it reasonably could to avoid having its property put to an unlawful use."[106]

CAFRA reversed this standard, such that "the burden of proof is on the Government to establish, by a preponderance of the evidence,

99. United States v. Twelve Thousand, Three Hundred Ninety Dollars ($12, 390.00), 956 F.2d 801, 811 (8th Cir. 1992).

100. Press Release, Rep. Henry Hyde, Chairman, House Judiciary Comm., Forfeiture Reform: Now or Never? (May 3, 1999), http://judiciary.house.gov/legacy/na0618_1.htm.

101. 18 U.S.C. § 983(c) (2010).

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

103. *Id.* at 665.

104. *Id.*

105. *Id.* at 668.

106. *Id.* at 690.

that the property is subject to forfeiture."[107] It also provides that "if the Government's theory of forfeiture is that the property was used to commit or facilitate the commission of a criminal offense, or was involved in the commission of a criminal offense, the Government shall establish that there was a substantial connection between the property and the offense."[108] The substantial connection must now also be proven by a preponderance of the evidence and not merely probable cause.[109]

Second, and also very importantly, CAFRA created a universal "innocent owner" defense for forfeiture proceedings. The statute provides, "An innocent owner's interest in property shall not be forfeited under any civil forfeiture statute. The claimant shall have the burden of proving that the claimant is an innocent owner by a preponderance of the evidence."[110] The language reading "any civil forfeiture statute" means that the innocent owner defense applies to any individual statute the government may use to initiate an *in rem* proceeding, whether it be for drugs, customs violations, or otherwise.

Two types of owners are protected by this defense: owners of property at the time a crime was committed, and owners acquiring property after a crime was committed. If the interest in property belonged to the claimant at the time the crime was committed (such as the owners of hotels, where rented hotel rooms were used to broker drug deals unbeknownst to them), the claimant must show either that there was no knowledge of the illegal conduct[111] or, that upon learning of the illegal conduct, he or she did everything that could reasonably be expected to terminate the unlawful use.[112] If the owner acquired the property interest after the commission of a crime (such as an unknowing purchaser of an automobile that had been used to traffic drugs), the claimant must show that he or she was a bona fide purchaser (or seller) for value,[113] and that he or she did not

107. 18 U.S.C. § 983(c)(1) (2010).

108. *Id.* at §. § 983(c)(3).

109. United States v. Mondragon, 313 F.3d 862, 865 (4th Cir. 2002) ("[T]he government's trial burden was to show probable cause for forfeiture. . . . Now, after CAFRA's enactment, the government must prove by a preponderance of the evidence that the property is subject to forfeiture.") (citations omitted).

110. 18 U.S.C. § 983(d)(1) (2010).

111. *Id.* at § 983(d)(2)(A)(i).

112. *Id.* at § 983(d)(2)(A)(ii).

113. *Id.* at § 983(d)(3)(A)(i).

know, and could not have reasonably known, that the property was subject to forfeiture.[114]

Finally, a number of other changes were enacted to enhance claimants' rights by making civil asset forfeitures more closely resemble criminal trials. Among these were enhanced notice and timing requirements that must be met by the federal government,[115] the availability of legal counsel for claimants who do not have the financial ability to retain a private lawyer,[116] the availability of motions to set aside forfeitures where the owner was not properly notified of the proceeding,[117] and a proportionality requirement intended to prevent seizures that are constitutionally excessive.[118]

While CAFRA was a step in the right direction for curbing abuse of forfeiture statutes, additional protections are still needed before forfeiture can be used as a viable means of incentivizing state and local actors. The most obvious problem still remaining is the issue of mitigating the inherent conflict of interest between seizing high-value versus high-priority targets.

VII. Remaining Problems and Proposed Solutions

One point of unfairness with the current system of *in rem* asset forfeiture is that property is subject to double jeopardy[119] if a criminal proceeding fails. For example, in the case of *United States v. One Assortment of 89 Firearms*,[120] the government charged Patrick Mulcahey with knowingly dealing firearms without a license after seizing a cache of guns from his house.[121] He was subsequently acquitted after a jury trial.[122] Following Mulcahey's acquittal the government instituted an *in rem* action for forfeiture of the firearms

114. *Id.* at § 983(d)(3)(A)(ii).

115. *Id.* at § 983(a).

116. *Id.* at § 983(b).

117. *Id.* at § 983(e).

118. *Id.* at § 983(g).

119. The Double Jeopardy Clause of the United States Constitution reads, "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb. . . ." U.S. CONST. amend. V. While it is impossible to subject property to double jeopardy, as the Double Jeopardy Clause does not apply to civil proceedings, the principles of being subjected twice to punishment for the same crime are very similar. I am referring here to the double jeopardy principle and not the actual double jeopardy forbidden by the United States Constitution.

120. United States v. One Assortment of 89 Firearms, 465 U.S. 354 (1984).

121. *Id.* at 355–56.

122. *Id.* at 356.

they had seized.[123] Mulcahey raised the defenses of collateral estoppel and res judicata on the basis of his acquittal at trial; however, his defenses were struck down.[124] The court's rationale for allowing the forfeiture action to go forward was that asset forfeiture is a remedial civil action, and not a criminal proceeding. Supreme Court Justice Burger wrote, "acquittal on a criminal charge is not a bar to a civil action by the Government, remedial in its nature, arising out of the same facts on which the criminal proceeding was based has long been settled."[125] He then went on to explain that Mulcahey's situation was not true double jeopardy from a constitutional standpoint. He wrote, "Congress may impose both a criminal and a civil sanction in respect to the same act or omission; for the double jeopardy clause prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense."[126]

While Justice Burger carefully distinguishes the punitive criminal action brought against Mulcahey from the remedial civil one, the distinction is purely technical. From a practical standpoint, the purpose of the civil action was punitive in that the government moved to seize the guns from someone it considered to be a criminal. Justice Burger himself unwittingly points this out in the part of his opinion upholding the forfeiture when he states, "an acquittal on criminal charges does not prove that the defendant is innocent; it merely proves the existence of a reasonable doubt as to his guilt."[127] Those words suggest that, because the government could not obtain a conviction beyond a reasonable doubt, it is attempting a limited retrial of the crime with lower stakes (that is, forfeiture of the guns, as opposed to Mulcahey's freedom). Situations such as this strongly implicate double jeopardy principles, even if they do not rise to the level of true double jeopardy.

Disallowing subsequent or concurrent forfeiture actions in conjunction with criminal proceedings would do much to increase the fundamental fairness of the process. Civil trials brought by private actors after a criminal acquittal have the purpose of attempting to

123. *Id.*

124. *Id.*

125. *One Assortment of 89 Firearms*, 465 U.S at 359 (quoting Lewis v. Frick, 233 U.S. 291, 302 (1914)).

126. *Id.* at 359 (quoting Helvering v. Mitchell, 303 U.S. 391, 633 (1938)).

127. *Id.* at 361.

make allegedly wronged parties whole,[128] but civil asset forfeiture proceedings after a criminal acquittal only serve to give the government two bites at the same apple of seized goods.

Increasing the standard of proof required in civil forfeiture actions would similarly increase notions of fundamental fairness and curb potential for abuses. U.S. Representative Henry Hyde originally sought to increase the government's burden to the level of "clear and convincing evidence" when he introduced the legislation in 1993, which would later become CAFRA.[129] Compromise talks eventually set today's current standard at "preponderance of the evidence."[130]

An increase in the burden of proof to "clear and convincing evidence" would make it harder for the government to prevail at trial where the evidence is weak or primarily circumstantial. The government would still be successful where it has strong evidence that seized items were proceeds of a crime or used in furtherance of a crime, and would still face a lower burden than that used in a criminal trial. As demonstrated by the text of the Fifth Amendment, the framers of the Constitution did not intend for the government to be able to take private property without meeting the requirements of due process. The words "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation"[131] would be much better served by a "clear and convincing evidence" standard for civil asset forfeitures.

Conclusion

The use of asset forfeiture as either a carrot or stick for the enforcement of federal drug law shows promise, especially in times of scarce law enforcement funding. Asset forfeiture allows state and local agencies to increase their resources at the cost of criminals,

128. Pam Belluck, *In New York, Many People Anticipated the Verdict*, N.Y. TIMES (Feb. 5, 1997), http://query.nytimes.com/gst/fullpage.html?res=9804E1DC163CF936A35751C0A961958260. Such was the case with the highly publicized O.J. Simpson murder trial. When Simpson was acquitted of killing Nicole Brown Simpson and Ronald Goldman, the families of the victims initiated a civil suit for wrongful death. The jury found Simpson liable for the deaths and awarded the families $8.5 million in compensatory damages.

129. Todd Barnet, *Legal Fiction and Forfeiture: An Historical Analysis of the Civil Asset Forfeiture Reform Act*, 40 DUQ. L. REV. 77, 104 (2001).

130. Thomas M. Nickel, *The Civil Asset Forfeiture Reform Act*, FED. LAWYER, Feb. 2001, at 24.

131. U.S. CONST. amend. V.

while at the same time advancing federal drug policy goals. Residents of cities and counties can determine the level of enforcement they deem acceptable when state and federal laws clash (as with medical cannabis) by using their votes to select law enforcement leaders who are most closely aligned with their viewpoints. Recalcitrant state or local governments can likely be prevented from profiting off of violations of federal law if tax dollars stemming from illegal transactions can be seized.

There are certainly drawbacks and conflicts of interest inherent in the asset forfeiture process, but many of these can be mitigated by reforming aspects of the forfeiture framework. A reduction in opportunities for double jeopardy, in conjunction with an increase in the burden of proof applicable to the government, would allow forfeitures to better comport with principles of fundamental fairness. With some effort and an organized large-scale program, the use of asset forfeiture could revolutionize the enforcement of drug law, while saving taxpayers an incredible amount of money. Why forfeit that opportunity?

* * *