ARIZONA'S CIVIL ASSET FORFEITURE SCHEME: Distorted Justice

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> I used to favor civil forfeiture prior to criminal conviction until I saw so many instances where, because of the money involved, no criminal prosecution ever occurred or was even seriously contemplated.[1]
>
> Former Arizona Attorney General Grant Woods

I. INTRODUCTION

At the age of nineteen, Shamoon Yousif moved from Iraq to Mesa, Arizona, where he opened two grocery stores.[2] After his wife was diagnosed with metastatic breast cancer, Yousif asked his brother Sami to manage one of his grocery stores.[3] Unbeknownst to him, Sami began to stock Yousif's store with stolen goods purchased from "boosters" for resale.[4] In May 2008, police seized much of Yousif's assets—including his home, his car, his two stores, his bank accounts, and his recently-deceased wife's jewelry.[5] Police seized the property pursuant to an ex parte seizure warrant based only on probable cause.[6] His property was seized without prior notice, and he was denied a prompt post-seizure hearing to challenge the seizure.[7]

Yousif was charged with a number of racketeering offenses, including trafficking in stolen property, fraudulent schemes and artifices, and illegally conducting an enterprise.[8] With no constitutional right to counsel due to the

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1. Grant Woods, *Changing Your Mind*, ARIZ. ATT'Y, Mar. 2012, at 92, *available at* http://www.azattorneymag-digital.com/azattorneymag/201203/#pg94.

2. Sarah Stillman, *Taken: The Use and Abuse of Civil Forfeiture*, THE NEW YORKER, Aug. 12, 2013, *available at* http://www.newyorker.com/magazine/2013/08/12/taken.

3. *Id.*

4. *Id.*

5. *Id.*

6. Petition for Review of a Special Action Decision of the Court of Appeals at 3–4, Yousif v. Hon. Keppel, (Nov. 24, 2006) (No. CV-06-0390-PR), *petition for review denied*.

7. *Id.*

8. *Id.* at 2.

civil nature of the forfeiture proceedings,[9] he was forced to mount a defense with virtually no assets at his disposal.[10] Like many who find themselves in this unfortunate scenario, Yousif settled.[11] Today, he is indebted to the State of Arizona and turns over the bulk of his salary to a racketeering fund, which law enforcement agencies have come to depend on to fund future racketeering investigations.[12]

As the case of Shamoon Yousif illustrates, civil asset forfeiture raises grave constitutional concerns. First, and most importantly, civil forfeiture implicates due process concerns because the proceedings necessarily involve the government's seizure and forfeiture of private property. Second, civil forfeiture implicates the legislative branch's plenary authority to make spending decisions because it permits executive agencies to bypass the traditional constitutional appropriations process through racketeering funds. These racketeering funds constitute a significant portion of executive law enforcement agencies' budgets, which undermines the delicate constitutional balance of power between the branches of government.

This comment argues that Arizona's civil asset forfeiture scheme violates both the Constitutions of the State of Arizona and the United States. Specifically, the scheme violates due process and contravenes the express delegation of plenary spending power to the legislature. Part II provides an overview of the historical evolution of federal civil forfeiture in the United States, explores the theoretical underpinnings of forfeiture law, and examines the Arizona civil forfeiture statutory scheme. Part III concludes that Arizona's civil asset forfeiture scheme is unconstitutional as violative of due process and contravenes the express constitutional delegation of plenary spending power to the legislature. Part IV sets forth a number of practical reforms that can be implemented to ameliorate some of the constitutional deficiencies of Arizona's civil asset forfeiture scheme.

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9. Recently, the United States Supreme Court also held that pre-judgment seizure of a *criminal* defendant's assets that would otherwise be used to retain defense counsel does not violate a defendant's right to counsel in criminal proceedings. *See generally* Kaley v. United States, 134 S. Ct. 1090 (2014).

10. Stillman, *supra* note 2.

11. *Id.* ("Why'd we settle? Because I've got no money left. I owe thousands and thousands to my cousins, to my friends, to the bank.").

12. *Id.*

II. BACKGROUND

Civil forfeiture has a long history in the United States. To appreciate the modern civil forfeiture scheme, it is first necessary to distinguish between civil and criminal forfeiture on both a theoretical and a procedural level.[13] In general, civil forfeiture evolved slowly over the course of several hundred years before undergoing a rapid revolution during the latter half of the twentieth century.[14] Each of these periods deserves separate consideration. Finally, the Arizona civil asset forfeiture statutory scheme will be examined in depth.[15]

A. Criminal and Civil Forfeiture: Theory and Procedure

Forfeiture actions generally take two different forms: criminal forfeiture and civil forfeiture.[16] The two forfeiture variants are based on different theoretical justifications, and provide for different procedural protections as a result.[17] In addition to these two types of forfeiture, a variation of civil forfeiture known as substitute asset civil forfeiture merits special attention due to the constitutional concerns raised by substitute asset civil forfeiture.[18]

At the outset, it is important to distinguish between in rem proceedings and in personam proceedings. This distinction is drawn according to the nature and purpose of the action.[19] The object of an action in personam is a judgment against a person, although it may involve the person's right to ownership of a piece of property.[20] In contrast, the object of an action in rem is a judgment against property to determine its status.[21]

Like criminal law generally, criminal forfeiture is premised on punitive theory.[22] Punitive theory is a straightforward theory of punishment that

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13. *See generally* Terrence G. Reed, *On the Importance of Being Civil: Constitutional Limitations on Civil Forfeiture*, 39 N.Y.L. SCH. L. REV. 255, 264–78 (1994).

14. *See generally* Tim Keller & Jennifer Wright, *Policing and Prosecuting for Profit: Arizona's Civil Asset Forfeiture Laws Violate Basic Due Process Protections*, 198 GOLDWATER INSTITUTE POLICY REPORT 1, 4–5 (Nov. 15, 2004), *available at* https://ij.org/images/pdf_folder/other_pubs/Keller_Asset_Forfeiture.pdf.

15. *See generally* ARIZ. REV. STAT. ANN. §§ 13-4301–15 (2014).

16. Reed, *supra* note 13, at 256–57.

17. *Id.* at 257.

18. *Id.* at 274–77.

19. 1 AM. JURISPRUDENCE 2D: A MODERN COMPREHENSIVE TEXT STATEMENT OF AM. LAW, *Actions* § 28 (West 2005).

20. *Id.* at *Actions* §§ 28–29.

21. *Id.* at *Actions* § 29.

22. Reed, *supra* note 13, at 264–65.

justifies imposing punishment on an individual because, and only because, a criminal *deserves* to be punished for his actions.[23] The punishment is viewed as a criminal's just deserts for his immoral or antisocial conduct.[24] Criminal forfeiture is imposed directly against a criminal defendant via an in personam action.[25] The "scope of the criminal forfeiture is measured by the penal objectives of the legislature,"[26] which must determine the extent to which a criminal defendant's assets may be seized and forfeited as well as the procedural protections owed to a criminal defendant. The court need only acquire jurisdiction over the criminal defendant, rather than over the property itself, to assert jurisdiction over the property to be forfeited.[27] Thus, unlike civil forfeiture, a criminal conviction is a prerequisite to criminal forfeiture.[28] In addition, criminal forfeiture also provides for the strong procedural protections due in all criminal proceedings, including criminal rules of evidence and the heavy "beyond a reasonable doubt" burden of proof on the government.[29]

Civil forfeiture, on the other hand, is premised on taint theory.[30] Under taint theory, civil forfeiture laws are "a legal fiction because they are premised on the idea that property itself can be guilty of a crime," and considered tainted assets.[31] Thus, the property owner's guilt is irrelevant because the forfeiture action is directed against the property itself via in rem proceedings.[32] The government must seize the tainted assets at the outset of the forfeiture action for the court to acquire jurisdiction.[33] Although dubbed civil forfeiture, the proceedings are actually quasi-criminal in nature because the proceedings are "in substance and effect" criminal proceedings.[34] Accordingly, courts have selectively incorporated constitutional rights that apply to criminal proceedings on an ad hoc basis to

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23. Michael S. Moore, *The Moral Worth of Retribution*, *in* RESPONSIBILITY, CHARACTER, AND THE EMOTIONS: NEW ESSAYS IN MORAL PSYCHOLOGY 179, 179–82 (Ferdinand Schoeman ed., 1987).
24. Reed, *supra* note 13, at 265.
25. *Id.* at 267.
26. *Id.* at 265.
27. *See id.* at 266–67.
28. *Id.* at 267.
29. *Id.*
30. *Id.* at 259, 268.
31. Eric Moores, *Reforming the Civil Asset Forfeiture Reform Act*, 51 Ariz. L. Rev. 777, 780 (2009).
32. *See* Reed, *supra* note 13, at 259.
33. *Id.* at 266.
34. Boyd v. United States, 116 U.S. 616, 634 (1886).

civil forfeiture proceedings.[35] This process of selective incorporation continues to the present day.[36]

A variant of civil forfeiture is substitute asset forfeiture, which suffers from a lack of a coherent theoretical rationale.[37] Under this form of civil forfeiture, the government is "authorized to seize legitimate untainted assets in lieu of forfeitable assets."[38] Law enforcement seizes substitute assets at the outset of the in rem proceeding to prevent the property owner from destroying, transferring, or otherwise hiding the subject property after the owner learns of the forfeiture proceedings.[39] Taint theory provides an inadequate justification for the seizure of substitute assets because the underlying premise of substitute assets is that the seized property is *untainted*.[40] Proponents argue that the seizure of the assets is justified on the grounds that they are seized *in lieu of* tainted assets due to the intervening wrongful conduct of the property owner in hiding, transferring or otherwise disposing of the tainted assets.[41] However, "lurking behind the articulated desire to impose substitute asset forfeiture in civil in rem actions is the motivating impulse to impose forfeiture in personam upon a guilty property owner, not upon 'guilty' property."[42]

To ground this theoretical discussion of criminal and civil forfeiture, reconsider the case of Shamoon Yousif. The government seized substantially all of Yousif's assets without prior notice, and then denied him a prompt post-deprivation, pre-judgment hearing to challenge the seizure.[43] The government seized his assets because Yousif's brother had sold some stolen goods out of one of his stores.[44] The government instituted in rem civil forfeiture proceedings to recover the tainted property—the proceeds from selling stolen goods and the store from which the goods were sold.[45] However, the government seized substantially all of Yousif's assets,

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35. Reed, *supra* note 13, at 262.
36. *Id.*
37. *Id.* at 277 ("In short, lurking behind the articulated desire to impose substitute asset forfeiture in civil in rem actions is the motivating impulse to impose forfeiture in personam upon a guilty property owner, not upon 'guilty' property.").
38. *Id.* at 276.
39. *Id.*
40. *Id.* at 277.
41. *See id.* at 276.
42. *Id.* at 277.
43. Petition for Review of a Special Action Decision of the Court of Appeals at 10, Yousif v. Hon. Keppel, (Nov. 24, 2006) (No. CV-06-0390-PR).
44. Stillman, *supra* note 2.
45. *Id.*

including assets from his legitimate business.[46] From a theoretical perspective, the seizure of assets via in rem proceedings must be premised on taint theory.[47] However, taint theory is inadequate to justify the seizure of substitute or untainted assets.[48] No parallel in personam criminal forfeiture proceedings were ever filed against Yousif.[49] As such, the seizure of Yousif's legitimate assets appears to be punitive, in the nature of in personam proceedings, but without the corresponding procedural protections.

B. Historical Evolution of Federal Civil Forfeiture

American civil forfeiture initially evolved from British maritime law, which relied on in rem forfeiture as a means of dealing with difficult issues raised by piracy.[50] England enforced its admiralty laws through in rem proceedings against the vessel itself, rather than through in personam proceedings against the vessel's owner, who was often located overseas.[51] This permitted the British government to obtain jurisdiction over the assets to be seized even though the government was unable to locate the vessel's owner.[52] Because the proceedings were in rem, there was no need to prove that the vessel's owner was guilty of any crime before seizing the property.[53] The United States Supreme Court upheld early federal forfeiture statutes modeled after British maritime forfeiture statutes because of the practical necessities associated with enforcing admiralty, piracy, and customs laws.[54]

The federal government's use of civil forfeiture expanded briefly during the Civil War.[55] Under the Confiscation Acts, the Union was authorized to

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46. *Id.*

47. *See* Reed, *supra* note 13, at 259, 277.

48. *Id.* at 277.

49. Petition for Review of a Special Action Decision of the Court of Appeals at 11, Yousif v. Hon. Keppel, (Nov. 24, 2006) (No. CV-06-0390-PR).

50. Keller & Wright, *supra* note 14, at 4–5.

51. Eric Moores, *supra* note 31, at 781.

52. *Id.*

53. Keller & Wright, *supra* note 14, at 4.

54. *Id.* ("Justice Joseph Story wrote that the 'vessel which commits the aggression is treated as the offender, as the guilty instrument or thing to which the forfeiture attaches, without any reference whatsoever to the character of the conduct of the owner." However, Story justified such forfeitures 'from the *necessity* of the case, as the *only* adequate means of suppressing the offence or wrong, or insuring an indemnity to the injured party.'") (quoting United States v. Brig Malek Adhel, 43 U.S. 210, 233 (1844) (emphasis added)).

55. *Id.*

seize and forfeit Confederate property located in the North, as well as the property of those who aided the Confederacy.[56] The Supreme Court addressed the constitutionality of the Confiscation Acts, and of civil forfeiture generally, in *Miller v. United States*.[57] Notably, the Court held that civil forfeiture under the Confiscation Acts was a constitutional exercise of Congress's War Powers.[58] In a prescient dissenting opinion that anticipated many of the problems associated with modern civil forfeiture statutory schemes, Justice Field argued that the Confiscation Acts were actually punitive in nature rather than an exercise of Congressional wartime authority, which requires traditional constitutional protections afforded by right to all criminal defendants.[59] Justice Field further argued that the majority's decision set dangerous precedent that could be used in the future to circumvent vital constitutional protections.[60] The key point of agreement between the *Miller* majority and Justice Field is that "the Constitution forbids the enactment of forfeiture legislation aimed at imposing punishment for a property owner's offense without affording the due process protections secured by the Constitution for criminal prosecutions."[61]

After the conclusion of the Civil War, the Supreme Court once again took up the constitutionality of civil forfeiture in *Boyd v. United States*.[62] In *Boyd*, the Supreme Court had to determine whether civil forfeiture proceedings are similarly constrained by constitutional limitations imposed in criminal proceedings by the Fourth and Fifth Amendments to the Constitution.[63] The Court held that "proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offenses

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56. *Id.*

57. Miller v. United States, 78 U.S. 268 (1870).

58. *Id.* at 307–10.

59. *Id.* at 321–23.

60. *Id.* at 323 ("[I]t would sound strange to modern ears to hear that proceedings *in rem* to confiscate the property of the burglar, the highwayman, or the murderer were authorized, not as a consequence of their conviction upon regular criminal proceedings, but without such conviction, upon *ex parte* proof of their guilt, or upon the assumption of their guilt from their failure to appear to a citation, published in the vicinage of the property, or posted upon the doors of the adjoining court-house, and which they may never have seen. It seems to me that the reasoning, which upholds the proceedings in this case, works a complete revolution in our criminal jurisprudence, and establishes the doctrine that proceedings for the punishment of crime against the person of the offender may be disregarded, and proceedings for such punishment be taken against his property alone, or that proceedings may be taken at the same time both against the person and the property, and thus a double punishment for the same offence be inflicted.").

61. Reed, *supra* note 13, at 261.

62. Boyd v. United States, 116 U.S. 616, 616 (1886).

63. *Id.* at 621.

committed by him, though they may be civil in form, are in their nature criminal."[64] Accordingly, the Court classified civil forfeiture proceedings as quasi-criminal proceedings subject to the constraints of the Fourth and Fifth Amendments to the Constitution.[65] Like Justice Field's dissent in *Miller*, the Court also expressed concerns regarding the opinion's precedential effect on the erosion of constitutional rights over time.[66] Since *Boyd*, courts have been determining which constitutional provisions apply to the quasi-criminal civil forfeiture proceedings on an ad hoc basis.[67]

After a post-Civil War lull, civil forfeiture experienced a brief renaissance during the Prohibition era.[68] The government relied extensively on civil forfeiture during Prohibition to seize and forfeit vehicles used to transport illegal liquor.[69] After the ratification of the Twenty-First Amendment to the United States Constitution, which ended Prohibition by repealing the Eighteenth Amendment, civil forfeiture remained largely dormant until the latter half of the twentieth century.[70]

C. The Federal Civil Forfeiture Revolution

Beginning in the 1970s and accelerating in the 1980s, civil forfeiture proliferated dramatically to become one of law enforcement's most potent tools in the War on Drugs.[71] In 1970, Congress enacted the Racketeering Influenced and Corrupt Organizations Act ("RICO"), which empowered law enforcement to seize and forfeit the property of organized crime syndicates.[72] In that same year, Congress enacted the Comprehensive Drug Abuse Prevention and Control Act, which empowered law enforcement officials to seize and forfeit "drugs, drug manufacturing and storage

64. *Id.* at 633–34.

65. *Id.* at 634.

66. *Id.* at 635 ("It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis*.").

67. Reed, *supra* note 13, at 262.

68. Keller & Wright, *supra* note 14, at 5.

69. *Id.*

70. *Id.*

71. *Id.*; Eric Moores, *supra* note 31, at 781.

72. Reed, *supra* note 13, at 264.

equipment, and items used to transport drugs."[73] Congress subsequently enacted legislation that broadened "forfeiture laws to include proceeds from drug transactions and real property."[74] In 1984, Congress enacted the Comprehensive Crime Control Act, which further expanded law enforcement's ability to seize and forfeit assets.[75]

Although the general trend since 1970 has been towards broadening the scope of law enforcement's civil forfeiture powers, the Civil Asset Forfeiture Reform Act of 2000 ("the CAFRA") imposed additional procedural protections on civil forfeiture thereby making it more difficult for law enforcement to seize and forfeit property.[76] The primary proponent of the CAFRA was Representative Henry Hyde, who was a former chairman of the House Judiciary Committee.[77] Hyde "was troubled by the government's 'abuses of fundamental fairness' and inadequate due process for property owners," and "cited numerous examples of law enforcement's disregard for civil liberties and property rights."[78]

Specifically, the CAFRA shifted the burden of proof from the property owner to the government, who must prove that the property at issue is subject to forfeiture by a preponderance of the evidence.[79] Although this change to the burden of proof undoubtedly made it more difficult for law enforcement to seize and forfeit property, it fell short of Hyde's desired burden of proof of clear and convincing evidence.[80] In addition, the CAFRA established an innocent-owner defense and provided for court-appointed counsel for indigent owners whose primary residences were seized.[81]

D. Arizona's Civil Asset Forfeiture Scheme

Law enforcement regards Arizona's civil asset forfeiture scheme as one of the most favorable civil forfeiture schemes due to its broad scope and limited procedural protections.[82] Like all judicial proceedings, a civil

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73. Eric Moores, *supra* note 31, at 781.
74. *Id.*
75. *Id.* at 781–82.
76. *Id.* at 782–83.
77. *Id.* at 782.
78. *Id.*
79. *Id.* at 783.
80. *Id.* ("While Rep. Hyde fought unsuccessfully for the government to carry a burden of clear and convincing evidence, he settled for a standard of preponderance of the evidence.").
81. *Id.*
82. Reed, *supra* note 13, at 274–75 ("Arizona's statute is attractive to state law enforcement because broadening the scope of forfeiture while narrowing available procedural

forfeiture action may only be commenced in a court that has both personal and subject matter jurisdiction over the parties and the claims.[83] In Arizona, the court vested with subject matter jurisdiction over forfeiture actions is the superior court.[84] The superior court can obtain personal jurisdiction: (1) "if the property for which forfeiture is sought is within [Arizona] at the time of the filing of the action," or (2) "if the courts of [Arizona] have in personam jurisdiction of an owner of or interest holder in the property."[85] In other words, Arizona Revised Statute section 13-4302 authorizes both in rem jurisdiction and in personam personal jurisdiction in civil forfeiture actions.[86] In addition to jurisdictional concerns, the prosecuting entity must initiate the proceedings in the proper venue, which lies in either "the county in which the property is seized," or "any county in which an owner or interest holder could be civilly or criminally complained against for the conduct alleged to give rise to the forfeiture of property."[87]

For property to be subject to civil forfeiture, there must be a statute authorizing its forfeiture, and the property must not fall within one of the enumerated statutory exceptions to forfeiture.[88] Interests in property are also subject to forfeiture, subject to the same limitations as property.[89] There are a wide number of statutes that authorize the forfeiture of property.[90] There are a number of statutory exceptions,[91] as well as an innocent owner exception[92] and a subsequent bona fide purchaser exception.[93]

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protections will undoubtedly strengthen law enforcement. Absent a constitutional barrier to this practice, its future seems bright.").

83. Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp., 549 U.S. 422, 430–31 (2007); State v. Marks, 920 P.2d 19, 21 (Ariz. Ct. App. 1996).

84. ARIZ. REV. STAT. ANN. § 13-4302 (2015).

85. *Id.*

86. *See* State ex rel. Napolitano v. Gravano, 60 P.3d 246, 257 (Ariz. Ct. App. 2002).

87. ARIZ. REV. STAT. ANN. § 13-4303 (2015).

88. *Id.* § 13-4304 (2015).

89. *Id.* § 13-4303.

90. *See, e.g.*, *id.* §§ 13-1802 (2015) (theft), 13-2308 (2015) (participating in or assisting a criminal syndicate), 13-2317 (2015) (money laundering), 13-3303 (2015) (promotion of gambling), 13-3415 (2015) (possession of drug paraphernalia).

91. *Id.* § 13-4304(1) (vehicle used as a common carrier can only be forfeited if the owner or other person in charge "was a consenting party or privy to the act or omission giving rise to the forfeiture or knew or had reason to know of it"), (2) (vehicle unlawfully in the possession of another person), and (3) (property related to small quantities of drugs or related to personal consumption of drugs).

92. *Id.* § 13-4304(4) (establishing the innocent owner defense where "(a) [the property owner] acquired the interest before or during the conduct giving rise to forfeiture; (b) [the property owner] did not empower any person whose act or omission gives rise to forfeiture with legal or equitable power to convey the interest, as to a bona fide purchaser for value, and [the property owner] was not married to any such person or if married to such person, held the

Property subject to forfeiture may be seized by a law enforcement officer.[94] When the forfeiture action is in rem, the property must be seized at the outset of the forfeiture action for the court to obtain jurisdiction over the property.[95] Seizure may occur either by court process or without court process.[96] By court process, seizure may occur either by: (1) court process pursuant to the Arizona Rules of Civil Procedure or pursuant to the provisions of the Arizona Criminal Code, including a seizure warrant; or (2) a search warrant.[97] Without court process, seizure may occur if (1) the seizure for forfeiture is incident to an arrest or search; (2) the property subject to seizure for forfeiture has been the subject of a prior judgment in favor of the government in a forfeiture proceeding; or (3) the law enforcement officer has probable cause to believe that the property is subject to forfeiture.[98] Property may be seized via constructive seizure, which occurs by posting notice of seizure for forfeiture on the property itself or in any appropriate public record relating to the property.[99] Constructive seizure is generally used with real property due to its inability to be moved.[100] In addition, property may be seized ex parte, or without advance notice, "if the state demonstrates that notice and an opportunity to appear would create a risk of harm to the public safety or welfare, including the risk of physical injury or the likelihood of property damage or financial loss."[101] Law enforcement officials must take reasonable efforts to provide

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property as separate property; [and] (c) [the property owner] did not know and could not reasonably have known of the act or omission or that it was likely to occur.").

93. *Id.* § 13-4304(5) (establishing bona fide subsequent purchaser defense where "(a) [the property owner] acquired the interest after the conduct giving rise to forfeiture; (b) [the property owner] is a bona fide purchaser for value not knowingly taking part in an illegal transaction; [and] (c) [the property owner] was at the time of purchase and at all times after the purchase and before the filing of a racketeering lien notice or the provision of notice of pending forfeiture or the filing and notice of a civil or criminal proceeding under this title relating to the property, whichever is earlier, reasonably without notice of the act or omission giving rise to forfeiture and reasonably without cause to believe that the property was subject to forfeiture.").

94. *Id.* § 13-4305(A) (2015).

95. State v. 1810 E. Second Ave., 969 P.2d 166, 168 (Ariz. Ct. App. 1997).

96. ARIZ. REV. STAT. ANN. § 13-4305(A).

97. *Id.* § 13-4305(A)(1), (2).

98. *Id.* § 13-4305(A)(3).

99. *Id.* § 13-4305(B).

100. Damon Garett Saltzburg, Note, *Real Property Forfeitures as a Weapon in the Government's War on Drugs: A Failure to Protect Innocent Ownership Rights*, 72 B.U. L. REV. 217, 222 (1992).

101. ARIZ. REV. STAT. ANN. § 13-4305(C).

notice of a seizure for forfeiture to all persons known to have an interest in the seized property within twenty days of the seizure.[102]

There is a different process for the seizure of substitute assets, which are untainted assets that are to be seized and forfeited in lieu of tainted assets that have been rendered unavailable by an act or omission of a culpable actor.[103] The statute provides: "The court shall determine probable cause for seizure before property may be seized for forfeiture as a substitute asset . . . unless the seizure is pursuant to a constructive seizure or the filing of a racketeering lien or lis pendens."[104] If the court determines that there is probable cause that property is subject to forfeiture and that property is either missing, has been transferred, is outside the court's jurisdiction, has been substantially diminished in value by an act or omission of the property owner, has been commingled with other property that cannot be divided without difficulty, or is subject to any interest that is exempt from forfeiture, the court may issue a seizure warrant for substitute assets for up to the value of the property subject to forfeiture.[105] Probable cause "determinations *shall be made ex parte* unless real property is to be seized" and there is no risk of harm to the public safety or welfare.[106]

In establishing probable cause for seizure for forfeiture, the government may be entitled by statute to a favorable rebuttable presumption or a favorable inference.[107] The government is entitled to a rebuttable presumption that property is subject to forfeiture if the government establishes all of the following by the standard of proof applicable to the proceeding: "(1) Conduct giving rise to forfeiture occurred; (2) The person acquired the property during the period of the conduct giving rise to forfeiture or within a reasonable time after that period; [and] (3) There is no likely source for the property other than the conduct giving rise to the forfeiture."[108] The government is entitled to an inference that money or any negotiable instrument found in close proximity to contraband was the

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102. *Id.* § 13-4306(C).

103. *Id.* § 13-4305(D).

104. *Id.* A "lis pendens" is a "notice, recorded in the chain of title to real property, required or permitted in some jurisdictions to warn all persons that certain property is the subject matter of litigation, and that any interests acquired during the pendency of the suit are subject to its outcome." BLACK'S LAW DICTIONARY 1015 (9th ed. 2009).

105. ARIZ. REV. STAT. ANN. §§ 13-4305(D), 13-4313(A).

106. *Id.* § 13-4305(D) (emphasis added).

107. *Id.* § 13-4305(E), (F).

108. *Id.* § 13-4305(E).

proceeds of contraband or was intended to be used to facilitate commission of the offense.[109]

Once the government has seized property for forfeiture, the government must either commence forfeiture proceedings or release the property.[110] Prior to commencing forfeiture proceedings, the government is required to independently determine whether "it is probable that the property is subject to forfeiture."[111] If not, the attorney is required to "immediately authorize the release of the seizure for forfeiture on the property."[112] If the government fails to institute forfeiture proceedings within seven years after the actual discovery of the last act giving rise to forfeiture, the property shall likewise be released from seizure for forfeiture.[113]

After the government commences judicial forfeiture proceedings, the property owner may be entitled to a prompt post-seizure hearing in limited circumstances.[114] The determining factor is whether there was a prior judicial determination of probable cause.[115] If there was a prior judicial determination of probable cause, even if that determination was made ex parte, the property owner will not be entitled to a post-seizure hearing in which the owner can challenge the seizure prior to the ultimate trial on the merits.[116] An order to show cause hearing is only permitted if there was no prior judicial determination of probable cause.[117] A probable cause determination is not made by a court when a seizure occurred incident to an arrest, the property to be forfeited has been the subject of a prior judgment in favor of the government in a forfeiture proceeding, or when the probable cause determination was made by a law enforcement officer.[118]

The burden of proof applicable to forfeiture proceedings varies according to the type of forfeiture proceeding.[119] In all cases, the government carries the initial burden of proof,[120] although the initial burden can be shifted to the property owner if the state establishes that it is entitled to a rebuttable presumption that the property is subject to forfeiture.[121] With

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109. *Id.* § 13-4305(F).
110. *Id.* § 13-4308(A).
111. *Id.*
112. *Id.*
113. *Id.* § 13-4308(B).
114. *Id.* § 13-4310(B).
115. *Id.*
116. *Id.*
117. *Id.* §§ 13-4305(A)(3), 13-4310(B).
118. *Id.*
119. *Id.* §§ 13-4311(M), 13-4312(G).
120. *Id.*
121. *Id.* § 13-4305(E).

in rem forfeiture proceedings, the government carries the burden of establishing by a "preponderance of the evidence" that the property is subject to forfeiture.[122] Considering the spectrum of standards of proof, "preponderance of the evidence" is the easiest burden to carry.[123] With in personam proceedings, the government carries the burden of establishing "a determination of liability or the conviction of a person for conduct giving rise to forfeiture."[124] To obtain a criminal conviction, which is a prerequisite to the forfeiture of property through in personam forfeiture proceedings, the government must carry the heavy burden of establishing all the requisite elements of the offense "beyond a reasonable doubt."[125]

When the government seizes funds[126] in a civil forfeiture action, the proceeds are deposited in either the Anti-Racketeering Revolving Fund[127] or the County Anti-Racketeering Revolving Fund[128] ("RICO Funds"). The RICO Funds are administered by the Attorney General and the County Attorney, respectively.[129] Law enforcement agencies are permitted to recover the costs of investigation and prosecution, including attorneys fees, from the RICO Funds.[130] The RICO Funds may also be used for gang prevention programs, substance abuse prevention programs, substance abuse education programs, witness protection, for any purpose permitted by federal law, and to investigate and prosecute any offense included in the definition of racketeering,[131] including civil enforcement.[132] The Attorney

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122. *Id.* § 13-4311(M).

123. State v. Renforth, 746 P.2d 1315, 1316 (Ariz. Ct. App. 1987) ("There are three standards of proof: proof by preponderance of the evidence, proof by clear and convincing evidence, and proof beyond a reasonable doubt. The clear and convincing standard is intermediary between the rigorous criminal standard of proof beyond a reasonable doubt and the modest civil quantum of preponderance.").

124. ARIZ. REV. STAT. ANN. § 13-4312(G).

125. State v. Edmisten, 207 P.3d 770, 773 (Ariz. Ct. App. 2007) ("As a general matter, the burden in a criminal trial is on the state to prove the defendant's guilt beyond a reasonable doubt.").

126. When the forfeited property is real or personal property, as opposed to money, there is a statutory process for disposing of the property. *See* ARIZ. REV. STAT. ANN. § 13-4315.

127. *Id.* § 13-2314.01 (2014).

128. *Id.* § 13-2314.03 (2012).

129. *Id.* §§ 13-2314.01(A), 13-2314.03(A).

130. *Id.* §§ 13-2314.01(B), 13-2314.03(B), 13-4315(C).

131. Offenses included within the definition of racketeering include any of the following acts if committed for financial gain: homicide; robbery; kidnapping; forgery; theft; bribery; gambling; usury; extortion; extortionate extensions of credit; prohibited drugs, marijuana or other prohibited chemicals or substances; trafficking in explosives, weapons or stolen property; participating in a criminal syndicate; obstructing or hindering criminal investigations or prosecutions; asserting false claims including, but not limited to, false claims asserted through fraud or arson; intentional or reckless false statements or publications concerning land for sale

General and the County Attorneys are required to file quarterly reports with the Arizona Criminal Justice Commission ("ACJC"), which then compiles the data into publicly available reports[133] that "set forth the sources of all monies and all expenditures."[134]

III. ANALYSIS

Arizona's civil asset forfeiture scheme violates the Constitutions of the State of Arizona and the United States. First, Arizona's civil asset forfeiture scheme violates due process because it is based on a system of distorted financial incentives. Second, Arizona's civil asset forfeiture scheme violates procedural due process because it lacks sufficient procedural protections. Third, Arizona's scheme violates the constitutional directive vesting plenary spending power authority with the legislature. Each of these constitutional issues merits separate consideration.

A. Due Process

Due process is one of the most fundamental individual rights guaranteed by the United States Constitution and the constitutions of all fifty states.[135] The federal government is bound by the Due Process Clause of the Fifth Amendment to the United States Constitution, which states "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law."[136] The individual states are bound by the Due Process Clause of the Fourteenth Amendment to the United States Constitution, which states "nor shall any State deprive any person of life, liberty, or property, without due process of law."[137] Arizona adopted a substantially similar provision in the

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or lease or sale of subdivided lands or sale and mortgaging of unsubdivided lands; resale of realty with intent to defraud; intentional or reckless fraud in the purchase or sale of securities; intentional or reckless sale of unregistered securities or real property securities; a scheme or artifice to defraud; obscenity; sexual exploitation of a minor; prostitution; restraint of trade or commerce; terrorism; money laundering; obscene or indecent telephone communications to minors for commercial purposes; counterfeiting marks; animal terrorism or ecological terrorism; smuggling of human beings; and illegal control of an enterprise. *Id.* §§ 13-2301(D)(4), 13-2312 (2014).

132. *Id.* §§ 13-2314.01(E), 13-2314.03(E).

133. ARIZONA CRIMINAL JUSTICE COMMISSION, RICO REPORTS (2015), *available at* http://www.azcjc.gov/ACJC.Web/finance/ricomain.aspx.

134. ARIZ. REV. STAT. ANN. §§ 13-2314.01(F)–(H), 13-2314.03(F)–(H) (2014).

135. Rochin v. California, 342 U.S. 165, 169 (1952).

136. U.S. CONST. amend. V.

137. *Id.* amend. XIV, § 1.

Arizona Constitution, which states "[n]o person shall be deprived of life, liberty, or property without due process of law."[138]

Due process guarantees protect individuals from the arbitrary exercise of government power.[139] The Supreme Court reiterated that the Due Process Clause promotes the fair exercise of governmental power "[b]y requiring the government to follow appropriate procedures when its agents decide to 'deprive any person of life, liberty, or property.'"[140] Due process also bars certain government actions "regardless of the fairness of the procedures used to implement them . . . to prevent governmental power from being used for purposes of oppression."[141]

Arizona's civil forfeiture statutory scheme violates due process. First, the scheme provides law enforcement with distortionary financial incentives, which promote arbitrary and oppressive governmental action in violation of the Due Process Clauses of the United States Constitution and the Arizona Constitution. Second, the scheme's procedural protections are inadequate to provide due process for the government's deprivation of an individual's property.

1. Distortionary Financial Incentives

Arizona's civil forfeiture scheme is founded on a system of distorted financial incentives, which promotes arbitrary and oppressive governmental action in violation of the Due Process Clauses of the United States Constitution and the Arizona Constitution. Arizona's civil forfeiture scheme features a prosecutorial system in which law enforcement officials and prosecutors have a direct pecuniary interest in the outcome of civil forfeiture proceedings.[142] Because the activities of law enforcement officials and prosecutors are partially funded by the RICO Funds, the system is one in which there are distorted financial incentives.[143] The Supreme Court subjects prosecutorial schemes in which law enforcement officials and

138. ARIZ. CONST. art. II, § 4. *See also* State v. Casey, 71 P.3d 351, 354 (2003) ("The federal and state due process clauses contain nearly identical language and protect the same interests.").

139. Daniels v. Williams, 474 U.S. 327, 331 (1986).

140. *Id.*

141. *Id.* (internal citations and quotations omitted).

142. Keller & Wright, *supra* note 14, at 2–3.

143. *Id.*

prosecutors have a direct pecuniary interest to close judicial scrutiny to determine whether the scheme offends due process.[144]

In *Marshall v. Jerrico*, the Supreme Court analyzed whether civil penalties collected pursuant to the Fair Labor Standards Act offended due process by creating improper financial incentives.[145] In analyzing the scheme, the Supreme Court identified three relevant factors: (1) the financial dependence of law enforcement agencies on the collected revenues; (2) the personal interest of the officials or agencies in the scheme; and (3) the funding formula mandated and used by the government.[146] After analyzing the three factors, the Court upheld the scheme because the "influence alleged to impose bias [was] extremely remote."[147] In particular, the civil penalties only amounted to "substantially less" than one percent of the prosecuting agency's budget.[148] Further, no official's salary was affected by the penalties, the prosecuting agency returned surplus funds to the general fund, and there was no "prospect of institutional gain as a result of zealous enforcement efforts."[149] Although the scheme at issue in *Marshall* was upheld, the court noted that other prosecutorial schemes may offend due process without providing further guidance to identify schemes that violate due process.[150] Arizona courts have adopted the reasoning of *Marshall* when analyzing claims that fiscal issues violate an individual's due process rights through distortionary financial incentives.[151]

Before examining Arizona's civil forfeiture statutory scheme using the *Marshall* factors, it is important to first understand the scope of the distortionary financial incentive attendant to modern civil forfeiture. Law

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144. *See generally* Tumey v. Ohio, 273 U.S. 510 (1927) (invalidating on due process grounds a statutory scheme that provided for a mayor to adjudicate liquor offenses and provided additional salary to the mayor for convictions); Ward v. Vill. of Monroeville, 409 U.S. 57 (1972) (invalidating on due process grounds a statutory scheme that provided for a mayor to adjudicate certain traffic offenses and provided a substantial amount of revenue to the mayor's village). *See also* Harmelin v. Michigan, 501 U.S. 957, 978, n.9 (1991) (plurality opinion of Scalia, J.) ("[I]t makes sense to scrutinize governmental action more closely when the State stands to benefit.").

145. 446 U.S. 238, 239 (1980).

146. *Id.* at 250–51.

147. *Id.* at 250.

148. *Id.* at 245.

149. *Id.* at 245–46, 250.

150. *Id.* at 250 ("In this case, we need not say with precision what limits there may be on a financial or personal interest of one who performs a prosecutorial function, for here the influence alleged to impose bias is exceptionally remote.").

151. *See, e.g.*, Pavlik v. Chinle Unified Sch. Dist. No. 24, 195 Ariz. 148, 985 P.2d 633 (Ariz. Ct. App. 1999) (holding that a fee-shifting statute did not violate an individual's due process rights by providing a distortionary financial incentive).

enforcement agencies are entitled to keep ninety percent of the funds seized via civil forfeiture.[152] In Arizona, forfeiture proceeds totaled nearly $400 million from 2000 to 2011.[153] During that same time period, annual revenues from civil forfeiture increased from $11.8 million in 2000 to $50.1 million in 2011.[154] From the perspective of an individual law enforcement agency, the distortionary effect is even more pronounced. As an example, take the Office of the Attorney General in Arizona. Civil forfeiture revenue accounted for approximately 27.7 percent of the Attorney General's *total budget* in 2010,[155] 28.2 percent in 2011,[156] and 25.9 percent in 2012.[157] There is also some evidence that law enforcement agencies alter their overall enforcement forfeitures to make up for budget shortfalls.[158]

The distortionary financial incentives created by Arizona's civil asset forfeiture statutory scheme are inconsistent with due process when viewed under the *Marshall* rubric. The first *Marshall* factor is the financial dependence of law enforcement agencies on the collected revenues.[159] In

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152. TIM KELLER, ET AL., ARIZONA'S PROFIT INCENTIVE IN CIVIL FORFEITURE: DANGEROUS FOR LAW ENFORCEMENT, DANGEROUS FOR ARIZONA 5 (2012), http://www.ij.org/images/pdf_folder/private_property/forfeiture/az-forfeiture-report.pdf.

153. *Id.* at 6.

154. *Id.* The federal government has experienced similar increases in annual forfeiture revenue. *See* DEPARTMENT OF JUSTICE, DEPARTMENT OF JUSTICE'S REPORTS TO CONGRESS REGARDING THE ASSET FORFEITURE FUND (2014), *available at* http://www.justice.gov/jmd/afp/02fundreport/index.htm (last visited May 27, 2015) (showing increase in reported receipts of forfeiture revenues from $1.3 billion in 2008 to $4.2 billion in 2012).

155. OFFICE OF THE ARIZONA GOVERNOR, THE EXECUTIVE BUDGET: STATE AGENCY BUDGETS FOR FISCAL YEARS 2012 AND 2013 27–28 (Jan. 2011), *available at* http://www.ospb.state.az.us/documents/2011/FY2012-ExecutiveBudget-AgencyDetail.pdf (reporting that in fiscal year 2010, the Arizona Attorney General received $90,329,100 in total appropriated and non-appropriated funds, including $24,991,700 in RICO funds).

156. OFFICE OF THE ARIZONA GOVERNOR, THE EXECUTIVE BUDGET: STATE AGENCY BUDGETS FOR FISCAL YEAR 2013 26–27 (Jan. 2012), *available at* http://www.ospb.state.az.us/documents/2012/FY2013-ExecutiveBudget-AgencyDetail.pdf (reporting that in fiscal year 2011, the Arizona Attorney General received $102,400,100 in total appropriated and non-appropriated funds, including $28,907,500 in RICO funds).

157. OFFICE OF THE ARIZONA GOVERNOR, THE EXECUTIVE BUDGET: STATE AGENCY BUDGETS FOR FISCAL YEARS 2014 AND 2015 42–45 (Jan. 2013), *available at* http://www.ospb.state.az.us/documents/2013/Summary%20Book%20FY14-FY15.pdf (reporting that in fiscal year 2012, the Arizona Attorney General received $96,988,800 in total appropriated and non-appropriated funds, including $25,162,000 in RICO funds).

158. United States v. James Daniel Good Real Prop., 510 U.S. 43, 56 n.2 (1993) (citations omitted) ("The extent of the Government's financial stake in drug forfeiture is apparent from a 1990 memo, in which the Attorney General urged United States Attorneys to increase the volume of forfeitures in order to meet the Department of Justice's annual budget target.").

159. Marshall v. Jerrico, Inc., 446 U.S. 238, 250–51 (1980).

Arizona, law enforcement agencies are extremely dependent on the revenues collected via forfeiture. Unlike the scheme in *Marshall*, which involved revenues that accounted for less than one percent of the law enforcement agency's budget, civil forfeiture revenues account for a significantly higher portion of law enforcement revenues.[160] As illustrated by the budget of the Arizona Attorney General's Office, these revenues can account for nearly thirty percent of an agency's total budget for a given year, which means there is a near-certain institutional gain that results from zealous and over-zealous enforcement of civil forfeiture laws.[161] Whether examined from an absolute or relative perspective, this is a far cry from the nominal amount of revenue at issue in *Marshall*.

The second *Marshall* factor is the personal interest of the officials or agencies in the scheme.[162] As discussed in relation to the first *Marshall* factor, law enforcement agencies in Arizona have a direct pecuniary interest in civil forfeiture in the form of non-appropriated funds that constitute a large share of each agency's budget. Further, Arizona law permits forfeiture funds to be spent directly on law enforcement salaries, a practice forbidden by the federal government and all other states except Texas.[163] The federal government does not permit this practice in order to "protect the integrity" of the forfeiture program by preventing bias or the appearance of bias.[164] In Arizona, thirty-one percent of expenditures from the RICO Funds were spent on salaries and bonuses.[165] Law enforcement officials in Arizona thus have a substantial direct pecuniary interest in the outcome of civil forfeiture actions by way of law enforcement's overall dependence on forfeiture funds generally and through the use of forfeiture funds to pay individual salaries and bonuses.

The third *Marshall* factor is the funding formula mandated and used by the government.[166] In *Marshall*, the Supreme Court found it significant that the law enforcement agency in that case returned surplus funds to the general fund and had no assurance that revenues collected would be returned to it.[167] Under Arizona's scheme, law enforcement agencies are entitled to keep ninety percent of forfeiture revenues.[168] These revenues can

160. *Id.* at 245.
161. *See supra* text accompanying notes 155–57.
162. 446 U.S. at 250–51.
163. Keller et al., *supra* note 152, at 7.
164. *Id.*
165. *Id.* at 9.
166. 446 U.S. at 250–51.
167. *Id.*
168. Keller et al., *supra* note 152, at 5.

constitute a significant portion of a law enforcement agency's total budget, as illustrated by the budget figures for the Arizona Attorney General's Office for fiscal years 2010 through 2012.[169] Thus, the funding formula mandated and used by the government creates a distortionary financial incentive for the law enforcement agencies charged with executing Arizona's civil forfeiture scheme by allowing the agency to supplement its legislatively-provided budget through increased reliance on civil forfeiture.

After examining Arizona's civil asset forfeiture statutory scheme under *Marshall*, it is clear that the scheme violates due process. First, the scheme has engendered a high degree of financial dependence on forfeiture revenues. Second, the law enforcement officials and prosecutors charged with the scheme's execution have a direct pecuniary interest in the outcome of civil forfeiture actions. Finally, the funding formula mandated and used by Arizona's civil forfeiture statutory scheme creates a distortionary financial incentive for the law enforcement agencies.

The significance of this distortionary financial incentive is great. About eighty percent of property owners whose property has been seized are never charged with a crime, which means that the property owners overwhelmingly face civil, rather than criminal, forfeiture actions.[170] Because criminal forfeitures provide for heightened procedural protections, there are lesser constitutional concerns than with civil forfeiture.[171] In addition, property owners only contest about twenty percent of seizures instituted under civil asset forfeiture statutes.[172] Thus, the distortionary incentive for law enforcement to pursue civil forfeiture is greatly amplified by the fact that property owners contest only one of every five civil forfeiture actions.

2. Procedural Due Process

Although Arizona's civil forfeiture scheme provides for a number of procedural protections, it fails to sufficiently protect the individual right to procedural due process. For procedural due process, the Supreme Court has established the "general rule that individuals must receive notice and an opportunity to be heard before the Government deprives them of property."[173] The purpose of prior notice and a hearing is to minimize the

169. *See supra* text accompanying notes 155–57.
170. Moores, *supra* note 31, at 783.
171. Reed, *supra* note 13, at 266–67.
172. Moores, *supra* note 31, at 783.
173. United States v. James Daniel Good Real Prop., 510 U.S. 43, 48 (1993).

risk of erroneous deprivations of property.[174] Crucially, fair procedures are not confined to the innocent—instead, procedural due process is a fundamental constitutional right.[175] Justice Frankfurter affirmed the importance of procedural due process when he declared that "fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights. . . . No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it."[176] Procedural due process protections are particularly important when the government has a direct pecuniary interest in the outcome of the proceedings.[177]

The Supreme Court laid out the test for procedural due process in its landmark *Matthews v. Eldridge* decision.[178] At base, procedural due process requires "the opportunity to be heard at a meaningful time and in a meaningful manner."[179] Due process is "flexible and calls for such procedural protections as the particular situation demands."[180] To determine the appropriate minimal procedural protections required by due process, a court must balance the governmental interests against the private interests at stake.[181] The balancing tests involves three distinct factors: (1) "the private interest that will be affected by the official action;" (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards;" and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[182] The *Eldridge* test has been adopted in Arizona in the civil context to determine the proper procedures due when the government seeks to deprive an individual of his property.[183] The *Eldridge* test frames the procedural due process discussion that follows.

In *James Daniel Good Real Property*, the Supreme Court addressed whether, in the absence of exigent circumstances, the government was

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174. *Id.* at 53 (noting that the purpose of the right to prior notice and a hearing is "to minimize substantively unfair or mistaken deprivations of property").

175. *Id.* at 62.

176. Joint Anti-Fascist Refugee Comm'n v. McGrath, 341 U.S. 123, 170–72 (1951) (Frankfurter, J., concurring) (footnotes omitted).

177. *James Daniel Good Real Prop.*, 510 U.S. at 55–56.

178. 424 U.S. 319, 333–35 (1976).

179. *Id.* at 333.

180. *Id.* at 334.

181. *Id.*

182. *Id.* at 334–35.

183. *See* State v. Wagner, 982 P.2d 270, 273 (Ariz. 1999) (declining to extend the *Eldridge* test to criminal sentencing procedures).

required to provide prior notice before it could seize real property.[184] Prior notice is not required when exigent circumstances justify postponing notice until after the seizure has occurred.[185] Exigent circumstances exist, for example, when the property to be seized and forfeited is easily moved, destroyed, or concealed, such as a yacht.[186] Other situations of "executive urgency" permit the government to circumvent due process guarantees, including wartime seizures of property, seizures of contaminated food that present a threat to public health, and the collection of taxes when the government's continued existence was at risk.[187] The Supreme Court cautions that these exceptions are reserved for "extraordinary situations," a determination made under the *Matthews v. Eldridge* rubric.[188] Analyzing the claims under *Eldridge*, the Court held that the importance of the private interests at risk outweighed the government interests to require prior notice of a seizure of real property in the absence of exigent circumstances.[189] The Court further held that due process also requires a meaningful opportunity to be heard.[190]

In *Krimstock v. Kelly*, the Second Circuit Court of Appeals held that due process requires a prompt post-seizure, pre-judgment hearing to determine whether probable cause for the seizure existed.[191] In *Krimstock*, property owners were denied an opportunity to challenge the government's continued possession of their automobiles that were seized when they were arrested while driving the vehicles under the influence of drugs or alcohol.[192] The "temporal gap" between the initial seizure and the final judgment of forfeiture on the merits could be a period of months or years.[193] Due process protections extend to temporary deprivations of property that occur during the pendency of judicial forfeiture proceedings.[194] Analyzing the procedural protections under *Eldridge*, then-Circuit Judge Sotomayor held that due process requires a prompt post-seizure, pre-judgment hearing

184. United States v. James Daniel Good Real Prop., 510 U.S. 43, 46 (1993).

185. *Id.* at 52.

186. *Id.* at 53 (internal citations omitted) ("We tolerate some exceptions to the general rule requiring predeprivation notice and hearing, but only in 'extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.'").

187. *Id.* at 59–60.

188. *Id.* at 53.

189. *Id.* at 53–62.

190. *Id.* at 62.

191. 306 F.3d 40, 44 (2d Cir. 2002).

192. *Id.* at 44–46.

193. *Id.* at 48.

194. Fuentes v. Shevin, 407 U.S. 67, 97 (1972).

to afford property owners an opportunity to challenge the government's probable cause.[195] The court further held that the government must consider whether there are less restrictive means to accomplish the same objectives, such as through the use of a bond, a restraining order, or a *lis pendens*.[196]

Viewed together, *James Daniel Good* and *Krimstock* establish general due process principles that apply in the forfeiture context. First, forfeiture actions are scrutinized more closely when the government has a direct pecuniary interest in the outcome of the case.[197] Second, ex parte seizures are reserved for extraordinary situations because of the unacceptable risk of error and potential harm to innocent owners.[198] Absent exigent circumstances, the government should provide prior notice of a seizure.[199] Third, any pre-judgment deprivation of property must be accompanied by a meaningful opportunity to be heard at a meaningful time, which generally means a post-deprivation, pre-judgment hearing.[200] Fourth, the government must consider whether there are less intrusive means to accomplish its objectives.[201]

Applying these general principles to Arizona's civil forfeiture scheme using the three factor balancing test set forth in *Eldridge*, due process requires additional procedural protections when the government seizes an individual's property for forfeiture. The first *Eldridge* factor is the private interest that will be affected by the official action.[202] In forfeiture cases, the private interests at stake are private property rights, privacy concerns, and the right to be free from governmental interference, which the Supreme Court has declared to be of "historic and continuing importance."[203] As such, the private interests at stake in forfeiture actions are very strong and weigh heavily in favor of requiring stringent procedural protections before the government may deprive an individual of his private property.

The second *Eldridge* factor is the risk of an erroneous deprivation and the probable value of any additional or substitute procedural safeguards.[204]

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195. 306 F.3d at 60–69.

196. *Id.* at 67.

197. United States v. James Daniel Good Real Prop., 510 U.S. 43, 55–56 (1993).

198. *Id.* at 55, 62.

199. *Id.* at 48.

200. *Krimstock*, 306 F.3d at 69.

201. *James Daniel Good Real Prop.*, 510 U.S. at 62.

202. Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976).

203. *James Daniel Good Real Prop.*, 510 U.S. at 53–54, 61 ("Individual freedom finds tangible expression in property rights. At stake in this and many other forfeiture cases are the security and privacy of the home and those who take shelter within it.").

204. *Eldridge*, 424 U.S. at 334–35.

To determine the probable value of additional or substitute procedural safeguards, an examination of the current procedural safeguards must first be undertaken. Arizona's civil asset forfeiture scheme requires probable cause determinations to be made ex parte unless the property to be seized is real property or there is no likelihood of property damage or financial loss of notice is provided.[205] Arizona's scheme provides a property owner with the opportunity for a post-seizure, pre-judgment hearing to challenge probable cause in most instances.[206] In many cases, an owner whose property has been seized is entitled to an order to show cause hearing if he requests such a hearing within fifteen days of receiving notice of the seizure.[207] When there has been a prior judicial determination of probable cause, however, a property owner whose property has been seized is not entitled to a post-deprivation, pre-judgment hearing to challenge the seizure.[208] This is the case even if the probable cause determination was made ex parte.[209] In this scenario, the property owner has no meaningful opportunity to challenge the ex parte seizure until the final hearing on the merits, which could be months after the initial seizure. Alternatively, the scheme could provide for an order to show cause hearing as a matter of right within fifteen days of any seizure, whether probable cause was determined ex parte or with prior notice. This process could track the process set forth in Arizona Revised Statute section 13-4310(B), except without any qualifiers or limitations. This right to a prompt post-deprivation hearing would help alleviate erroneous deprivations and minimize the resultant constitutional harm from an erroneous, albeit temporary deprivation. Thus, there would be value in imposing additional procedural protections.

The third *Eldridge* factor is the government interest at stake, including the fiscal and administrative burdens that the additional or substitute procedural safeguards would impose.[210] The government interest at issue is generally an increased fiscal and administrative burden that would result from permitting additional order to show cause hearings in situations where a probable cause determination was an ex parte judicial determination. Based on the subset of cases the additional procedural protections would apply to, the fiscal and administrative burden would likely not be excessive.

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205. ARIZ. REV. STAT. ANN. § 13-4305(C), (D) (2014).
206. *Id.* § 13-4310(B) (2014).
207. *Id.*
208. *Id.*
209. *Id.*
210. Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976).

The government interest in minimizing the fiscal and administrative burden weighs against imposing additional procedural protections.

Balancing the three *Eldridge* factors, procedural due process requires imposing the additional procedural safeguard of imposing an absolute right to a prompt post-deprivation, pre-judgment hearing to challenge probable cause determinations. First, the private interests at stake—privacy, private property rights, and the right to be free from government interference—are very strong and of historic and continuing importance. Second, the probable value of additional procedural protections in the form of an absolute right to a prompt post-deprivation, pre-judgment hearing would significantly minimize the risk of erroneous deprivations. Third, the government interest in avoiding fiscal and administrative burdens is slight considering the small subset of cases the additional procedural protection would apply to—namely, seizures which feature an ex parte probable cause determination that was also a judicial determination. On balance, the first and second factors weigh heavily in favor of imposing additional procedural protections, while the third factor mitigates, but does not outweigh, the first two factors.

B. Legislature's Plenary Spending Power

The Arizona civil asset forfeiture scheme presents a number of spending problems. First, the exercise of spending authority by executive agencies is contrary to the Arizona Constitution's express delegation of authority. Second, the legislature's delegation of spending authority to executive law enforcement agencies violates the non-delegation doctrine.[211] Third, there is a lack of accountability between the legislature and the electorate for spending decisions because spending decisions are being made by executive law enforcement agencies.[212] Fourth, there is a lack of oversight in how these executive agencies actually spend monies from the RICO Funds, and in monitoring compliance after the funds are delivered to the law enforcement agencies.[213]

Like its federal counterpart, Arizona's government is one founded on the notion of separation of powers. Article III of the Arizona Constitution divides the powers of the state's government into the legislative, executive, and judicial branches, which are to be "separate and distinct" with no

211. ARIZ. CONST. art. III; *id.* art. IV, pt. 1, § 1, cl. 1; *id.* art. IV, pt. 2, § 20; *id.* art. IX, § 5.
212. Keller et al., *supra* note 152, at 14–15.
213. *Id.*

branch exercising the powers expressly delegated to either of the other branches.[214] The primary purpose of diffusing power among the individual branches of government is to prevent the accumulation of power, which can lead to tyranny and oppression.[215] Further, the doctrine of separation of powers is "part of an overall constitutional scheme to protect individual rights" and prevent any branch from overreaching.[216]

The Arizona Constitution unequivocally vests Arizona's legislature with the state's legislative authority, including plenary power over spending.[217] Like the federal government, Arizona's legislature is vested with the power of the purse,[218] or the plenary power over spending, which encompasses both the power to contract debt[219] and the power to appropriate funds.[220] Appropriation means "the setting aside from the public revenue of a certain sum of money for a specified object, in such manner that the executive officers of the government are authorized to use that money, and no more, for that object, and no other."[221] The legislature sets state policies and priorities through the exercise of its lawmaking authority and gives effect to those policies and priorities through the exercise of its appropriations power.[222]

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214. ARIZ. CONST. art. III ("The powers of the government of the state of Arizona shall be divided into three separate departments, the legislative, the executive, and the judicial; and, except as provided in this constitution, such departments shall be separate and distinct, and no one of such departments shall exercise the powers properly belonging to either of the others.").

215. THE FEDERALIST NO. 47 (James Madison) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny. . . . From these facts, by which Montesquieu was guided, it may be clearly inferred that, in saying 'There can be no liberty where the legislative and executive powers are united in the same person.'").

216. State v. Prentiss, 786 P.2d 932, 935–36 (Ariz. 1989).

217. ARIZ. CONST. art. IV, pt. 1, § 1, cl. 1 ("The legislative authority of the state shall be vested in the legislature."); *see also* Rios v. Symington, 833 P.2d 20, 22–23 (Ariz. 1992); Le Febvre v. Callaghan, 263 P. 589, 591 (Ariz. 1928) ("Under our system of government, all power to appropriate money for public purposes or to incur any indebtedness therefor . . . rests in the legislature.").

218. THE FEDERALIST NO. 78 (Alexander Hamilton) ("The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated."); *see also Rios*, 833 P.2d at 22.

219. ARIZ. CONST. art. IX, § 5 ("No money shall be paid out of the state treasury, except in the manner provided by law."); *see also Le Febvre*, 263 P. at 591.

220. ARIZ. CONST. art. IV, pt. 2, § 20 ("The general appropriation bill shall embrace nothing but appropriations for the different departments of the state, for state institutions, for public schools, and for interest on the public debt. All other appropriations shall be made by separate bills, each embracing but one subject."); *see also Le Febvre*, 263 P. at 591.

221. *Rios*, 833 P.2d at 23.

222. *Id.* at 22–23.

As the Arizona legislature is constitutionally charged with legislative authority and is vested with plenary power over the state's spending, it cannot constitutionally delegate this authority to another branch of government.[223] The Arizona legislature is charged with the constitutional duty to appropriate funds for all three branches of government.[224] Monies in the RICO Funds are public monies that are collected and spent outside of the legislative appropriations process.[225] To that extent, the appropriation of funds by law enforcement agencies, which are executive agencies, violates the plain directives of the Arizona Constitution that endow the Legislature with plenary spending power.[226] To the extent that it is argued that the legislative branch has delegated appropriations authority to these executive agencies, the delegation of this quintessentially legislative power violates the separation of powers doctrine and the non-delegation doctrine.[227] As such, executive agencies' exercise of the legislature's plenary spending is unconstitutional and arguably violates the non-delegation doctrine.

Like all spending determinations, the appropriation of RICO Funds monies is fundamentally a legislative determination that should balance the myriad of competing priorities of government. Arizona RICO Funds have been used for a wide variety of purposes, including for car leases,[228] courtroom presentation technology,[229] prescription medication disposal units,[230] travel expenses to send law enforcement personnel to conferences,[231] public service announcements,[232] badges and coins for law

223. ARIZ. CONST. art. III; *id.* art. IV, pt. 1, § 1, cl. 1; *id.* art. IV, pt. 2, § 20; *id.* art. IX, § 5; *see also* Ariz. Downs v. Ariz. Horsemen's Found., 637 P.2d 1053, 1057 (Ariz. 1981).

224. ARIZ. CONST. art. IV, pt. 2, § 20; *see also Le Febvre*, 263 P. at 591.

225. *See* ARIZ. REV. STAT. ANN. §§ 13-2314.01 (2014), 13-2314.03 (2014).

226. ARIZ. CONST. art. III; *id.* art. IV, pt. 1, § 1, cl. 1; *id.* art. IV, pt. 2, § 20; *id.* art. IX, § 5.

227. ARIZ. CONST. art. III; *id.* art. IV, pt. 1, § 1, cl. 1; *id.* art. IV, pt. 2, § 20; *id.* art. IX, § 5; *see also Ariz. Downs*, 637 P.2d at 1057.

228. *Report: Crime Funds Pay for MCSO Cars*, ASSOCIATED PRESS (Oct. 6, 2009), http://azcapitoltimes.com/news/2009/10/06/report-crime-funds-pay-for-mcso-cars/.

229. *Ranch Hand Convicted of Sexual Conduct with a 4 Year Old*, COPPER BASIN NEWS, Oct. 16, 2013, at 2.

230. *Have Unwanted/Unused Medications? Now There's a Local Place to Dispose of them Safely*, COPPER BASIN NEWS, Nov. 20, 2013, at 12.

231. *Critics Question Arizona Sheriff's Spending*, ASSOCIATED PRESS (Aug. 29, 2011), http://www.fox10phoenix.com/story/18091054/critics-question-arizona-sheriffs-spending.

232. Christian Palmer, *Maricopa County Attorney Says He's Set a National Standard for Law Enforcement*, ARIZ. CAPITOL TIMES (Sept. 19, 2008), http://azcapitoltimes.com/news/2008/09/19/maricopa-county-attorney-says-he8217s-set-a-national-standard-for-law-enforcement/.

enforcement officers,[233] a police crime lab expansion,[234] annual reports,[235] community organizations,[236] tables at fundraising events, polo-style golf shirts and matching bags, speed bumps, computers, personal defense equipment, airplane engines, firearms, overtime pay, funds to pay informants, video cameras, police dogs, crowd control devices, remodeling projects, subscriptions to databases, video enhance equipment, GPS mapping equipment, funeral flowers,[237] a crime-fighting dog costume, a canine bite suit, chairs and furniture,[238] swim lessons,[239] attorneys' fees in civil matters,[240] construction costs for a law enforcement fitness center,[241] extraditions,[242] an armored car for a sheriff,[243] crime-prevention booklets,[244] sponsorship of a talk radio host's book tour,[245] gas for government vehicles,[246] and bottled water delivery expenses.[247] Although many of these expenses are legitimate law enforcement expenses, the legislature is the

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233. Associated Press, *Babeu Spends $35,000 on Badges, Coins*, ARIZ. CAPITOL TIMES (Feb. 13, 2012), http://azcapitoltimes.com/news/2012/02/13/babeu-spends-35000-on-badges-coins/.

234. Editorial, *Ill-conceived Plan Threatens Crime Inquiries*, ARIZ. DAILY STAR (Apr. 30, 2007), http://tucson.com/news/opinion/editorial/ill-conceived-plan-threatens-crime-inquiries/article_476492b9-eee0-5d7c-8b51-dd926fc227fb.html.

235. Erica Meltzer & Kim Smith, *RICO Funds Pay for LaWall Report*, ARIZ. DAILY STAR, (May 3, 2008), http://tucson.com/news/local/crime/rico-funds-pay-for-lawall-report/article_d052f56f-1ad3-5b51-849d-21a9fc3314a7.html.

236. *10 Recipients of Largest RICO Funding*, ARIZ. DAILY STAR, May 4, 2008, at A16.

237. Erica Meltzer, *Seized Funds Often Not Used for Crime War*, ARIZ. DAILY STAR, May 4, 2008, at A1.

238. *Expenditures Can Be Unusual*, ARIZ. DAILY STAR, May 4, 2008, at A16.

239. Veronica Cruz, *Drug Cash Subsidizing Swim Lessons*, ARIZ. DAILY STAR, April 19, 2012, at A2.

240. *County Attorney Stops RICO Fund Investigation*, ARIZ. REPUBLIC, Sept. 8, 2011, at B3, *available at* http://pqasb.pqarchiver.com/azcentral/doc/887953682.html.

241. Caitlin McGlade, *Authorities: Seized Drugs Have Estimated Street Value of $9 million*, ARIZ. REPUBLIC, June 29, 2011, at B1, *available at* http://pqasb.pqarchiver.com/azcentral/doc/874046156.html.

242. Ofelia Madrid, *Team Brings Back Fugitives for Trial*, ARIZ. REPUBLIC, May 9, 2010, at B5, *available at* http://pqasb.pqarchiver.com/azcentral/doc/239258773.html.

243. *Armored Car On Way for Arpaio Security Threat Spurs $70,000 Purchase*, ARIZ. REPUBLIC, Mar. 26, 1999, at B5, *available at* http://pqasb.pqarchiver.com/azcentral/doc/237893128.html.

244. Yvonne Wingett, *Public, RICO Money Paid for Booklets*, ARIZ. REPUBLIC, Jan. 18, 2008, at B1, *available at* http://pqasb.pqarchiver.com/azcentral/doc/238951559.html.

245. Yvonne Wingett, *Thomas' Office Paid to Sponsor Book Tour*, ARIZ. REPUBLIC, July 30, 2008, at B1, *available at* http://pqasb.pqarchiver.com/azcentral/doc/239022090.html.

246. *Sheriff Cars Paid With Crime Funds*, ARIZ. REPUBLIC, Oct. 4, 2009, at A1, *available at* http://pqasb.pqarchiver.com/azcentral/doc/239198842.html.

247. Yvonne Wingett, *County Financial Audit Notes RICO Funds Use*, ARIZ. REPUBLIC, May 27, 2009, at B2, *available at* http://pqasb.pqarchiver.com/azcentral/doc/239145713.html.

branch that is constitutionally charged with making difficult decisions between competing interests. As such, the legislature is constitutionally accountable to the electorate for appropriations decisions.[248] Allowing executive agencies to make these spending decisions breaks the link of accountability between the legislature and the electorate.

In addition to executive agencies' extra-constitutional exercise of the legislature's plenary spending power, there is a severe lack of oversight in how these law enforcement agencies spend RICO Fund monies.[249] In Arizona, the Office of the Auditor General is tasked with auditing the financial expenditures of all state agencies.[250] In September 2002, the Auditor General's Special Investigative Unit issued a report that an employee in the Maricopa County Attorney's Office had embezzled $30,815 from the RICO Funds over a period of four years.[251] The Auditor General conducted an audit of the RICO Funds as part of its Single Audit for fiscal year 2008 and found that some RICO monies were improperly spent or improperly documented, some law enforcement agencies had not reported their use of RICO monies, and there was a general lack of oversight and monitoring.[252] The Auditor General's audit for the period of January 1, 2008 through April 30, 2010, showed that similar oversight problems persisted.[253] Overall, there are systematic accountability and oversight issues with respect to the RICO Funds, which have persisted.

Overall, the RICO Funds have evolved into a shadow system of government spending that operates outside of the system established in the Arizona Constitution. The result is a system that lacks accountability and oversight. Local law enforcement agencies, including county attorneys and

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248. ARIZ. CONST. art. IV, pt. 2, § 20. *See also* Le Febvre v. Callaghan, 263 P. 589, 591 (1928).

249. Keller et al., *supra* note 152, at 14–15.

250. ARIZ. REV. STAT. ANN. § 41-1279.03 (2014).

251. DEBRA K. DAVENPORT, MARICOPA COUNTY ATTORNEY'S OFFICE, THEFT OF PUBLIC MONIES, at 8–10 (Sep. 11, 2002), *available at* http://www.azauditor.gov/sites/default/files/SIU02-9.pdf.

252. DEBRA K. DAVENPORT, SINGLE AUDIT: MARICOPA COUNTY YEAR ENDED JUNE 30, 2008, at 22–24 (Mar. 24, 2009), *available at* http://www.maricopa.gov/finance/PDF/Financial%20Reporting/Grants/Maricopa_County_June_30_2008_Single_Audit.pdf.

253. DEBRA K. DAVENPORT, PROCEDURAL REVIEW: MARICOPA COUNTY RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS (RICO) MONIES JANUARY 1, 2008 THROUGH APRIL 30, 2010, at 6 (Nov. 15, 2010), *available at* http://www.azauditor.gov/sites/default/files/Maricopa_Cty_RICO_Proc_Rev_April2010.pdf ("Consequently, the Office could not demonstrate that monies spent for these programs were in compliance with RICO laws and regulations because the awards were given in advance and there was no evidence of how the monies were spent.").

sheriffs, have usurped quintessential legislative functions and encroached on the legislature's constitutional mandate. In relative terms, the scope of shadow system is large and can account for over twenty-five percent of a law enforcement agency's budget in any given year.[254] In the end, however, the scale of the activity does not matter. The important point is that the system has strayed from that established by the Constitution of the State of Arizona.

IV. PRACTICAL REFORMS

Legislators in Arizona can implement a number of practical reforms to remove the constitutional concerns with the current civil asset forfeiture scheme. First, and perhaps most dramatically, the civil forfeiture scheme should be reformed to permit civil forfeiture only after the government first obtains a criminal conviction, as has been done in North Carolina.[255] This would effectively eliminate in rem civil forfeiture as an independent action. The advantage of this system would be that individuals would be entitled to enhanced procedural protections attendant to criminal proceedings before the government deprives them of their property. Theoretically, all civil forfeiture would fall neatly under the punitive theory rubric, with forfeitures imposed as another means of punishing an individual for his immoral or antisocial conduct. Law enforcement would likely tenaciously oppose this reform because it would deprive them of a revenue stream on which they have grown to depend. However, the deprivation of this shadow revenue has the additional benefit of removing the distortionary financial incentives from law enforcement.

Second, Arizona's civil forfeiture scheme should be reformed to increase the government's burden of proof from the current "preponderance of the evidence" standard.[256] Ideally, the standard of proof would be increased to match that of criminal proceedings—proof "beyond a reasonable doubt." Otherwise, the middle "clear and convincing evidence" standard should be employed. Because civil forfeiture involves the government's deprivation of an individual's fundamental rights, including private property rights, freedom from governmental interference, and privacy, the burden should not be the lowest burden of proof. In all likelihood, an increased burden of proof would only affect a small number of cases at the margin—true

254. *See supra* notes 155–57, and accompanying text.
255. Stillman, *supra* note 2.
256. *See* ARIZ. REV. STAT. ANN. § 13-4311(M) (2014).

borderline cases. In such cases, it seems to be much wiser policy to err on the side of caution than to risk erroneously depriving an individual of fundamental rights. The law should reflect this prudential concern.

Third, the rebuttable presumption should be completely eliminated.[257] By statute, the government is permitted to shift the burden of proof onto the property owner if it establishes that conduct giving rise to forfeiture occurred, the person acquired the property during the relevant time period or within a reasonable time after that period, and there is no likely legal source for the property.[258] In such cases, the owner, or more specifically the owner's property, is treated as tainted until proven untainted. Because civil forfeiture involves the deprivation of fundamental constitutional rights, the government should be put to its proof much like in criminal proceedings. Like with the increased burden of proof, this reform would likely only affect a small number of cases at the margin because the government can likely prove its case without relying on burden shifting in the majority of cases. However, the law should err on the side of caution in such marginal cases in order to prevent the erroneous deprivation of fundamental rights.

Fourth, civil forfeiture proceedings should be accompanied with a guaranteed right to counsel. Civil forfeiture has been dubbed "quasi-criminal" because it is neither purely civil nor purely criminal.[259] Due to the fundamental rights at stake, civil forfeiture cases should come with a right to counsel. Once the government has seized an individual's assets for preservation for forfeiture, he may have a difficult time effectively fighting the government's charges if substantially all of his assets were seized. The government therefore has an incentive to seize a broad array of an individual's assets. This tactic is particularly prone to abuse because it gives the government great leverage to extract a settlement, which the law enforcement agency is entitled to use to fund future forfeiture actions. The Supreme Court recently decided that there is no guaranteed right to counsel in criminal forfeiture cases as a matter of federal constitutional law.[260] However, such a holding in no way precludes a legislative body from statutorily granting such a right in criminal and civil forfeiture matters. To do so would allow individuals to fairly answer the government's charges.

Fifth, civil forfeiture revenues should be deposited in the general fund or in a neutral fund to reduce the distortionary financial incentives that plague

257. Moores, *supra* note 31, at 799–800.
258. ARIZ. REV. STAT. ANN. § 13-4305(E) (2014).
259. Boyd v. United States, 116 U.S. 616, 634 (1886).
260. *See generally* United States v. Kaley, 134 S. Ct. 1090, 1094–1105 (2014).

the current civil forfeiture system.[261] Prosecuting agencies could and should still be allowed to recover their actual expenses and investigative costs from such revenues. However, depositing the excess revenue in the general fund would eliminate the shadow spending system that offends the separation of powers principles embedded in the Constitution of the State of Arizona. By bringing the funds within the ambit of the legislature's spending umbrella, the spending system would satisfy constitutional and prudential mandates.

Finally, the current RICO Funds should be restructured to increase accountability and oversight by requiring accurate reporting and by imposing increased transparency. Currently, agencies receive RICO monies without continued oversight on how the funds are ultimately used.[262] The ACJC should be required to collect additional information from law enforcement agencies, including the number of forfeiture actions filed, the number of civil forfeitures that were accompanied by criminal charges, the number of civil forfeitures that followed criminal convictions, and follow-up information on how RICO monies were spent. Such information would allow greater oversight and ensure that public monies are being spent wisely and in accordance with the priorities set by the legislature.

V. CONCLUSION

Arizona's civil asset forfeiture scheme is unconstitutional. First, the scheme violates due process because of the distortionary financial incentives involved. The scheme also violates due process because of the lack of adequate procedural protections. Second, the scheme violates the Arizona Constitution's separation of powers doctrine that delegates plenary spending power to the legislature by allowing executive law enforcement agencies to wield legislative spending authority. Such a system lacks accountability and suffers from inadequate oversight.

Arizona's current civil asset forfeiture scheme has engendered a system of law enforcement dependence on civil forfeiture funds. This has also allowed executive law enforcement agencies to undermine accountability and to shirk legislative oversight. By enacting the reforms suggested in this comment, Arizona can embark on a path to restore the proper constitutional balance that respects the fundamental rights of individuals while also allowing law enforcement to enforce the state's civil forfeiture laws.

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261. Moores, *supra* note 31, at 798–99; Stillman, *supra* note 2.

262. DAVENPORT, *supra* note 253, at 3–6.