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### Prosecuting Civil Asset Forfeiture on Contingency Fees: Looking for Profit in All the Wrong Places

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PROSECUTING CIVIL ASSET FORFEITURE ON  
CONTINGENCY FEES: LOOKING FOR PROFIT IN  
ALL THE WRONG PLACES

*Louis S. Rulli*

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## PROSECUTING CIVIL ASSET FORFEITURE ON CONTINGENCY FEES: LOOKING FOR PROFIT IN ALL THE WRONG PLACES

*Louis S. Rulli\**

*Civil asset forfeiture has strayed far from its intended purpose. Designed to give law enforcement powerful tools to combat maritime offenses and criminal enterprises, forfeiture laws are now used to prey upon innocent motorists and lawful homeowners who are never charged with crimes. Their only sins are that they are carrying legal tender while driving on busy highways or providing shelter in their homes to adult children and grandchildren who allegedly sold small amounts of low-level drugs. Civil forfeiture abuses are commonplace throughout the country with some police even armed with legal waivers for property owners to sign on the spot, permanently handing over their cash under intimidating and coercive conditions.*

*These widespread abuses are attributable to many factors. Backed by strong law-enforcement lobbies, civil forfeiture laws place low burdens of proof on government prosecutors while providing weak protections for property owners. No state provides for a right to counsel in civil forfeiture cases, and default judgments abound, resulting in high percentages of takings that are never tested in the courts. But, most significantly, it is civil forfeiture's built-in profit motive that fuels persistent abuses as prosecutorial and police budgets benefit directly from the huge amount of forfeiture proceeds amassed each year. So long as civil forfeiture laws direct that all, or most, forfeiture proceeds flow to prosecutors who make the decisions on whether to pursue forfeiture, modest Americans will wrongfully lose their hard-earned property.*

*While many states have enacted recent reforms at the margins of civil forfeiture, most states still retain a strong profit motive that is embedded in their laws. Some states, like Indiana, have supersized this profit motive by authorizing private lawyers to prosecute civil forfeiture cases on contingency fees, winning as much as they can for themselves from the property they can successfully forfeit. What was once billed as a weapon needed to fight crime is now a voracious grab of property for budgetary gain.*

*This Article reviews the ethical prohibition on the use of contingency fees in criminal cases and argues that the same reasoning should apply to quasi-criminal cases such as the prosecution of civil forfeiture cases. In support of this argument, the Article examines court data in civil forfeiture cases prosecuted by government lawyers in Indiana's most populous county and compares it to cases prosecuted by a well-known private attorney on behalf of multiple Indiana counties who is compensated exclusively by contingency fees. The data, though limited, raises troubling concerns. In cases prosecuted by the private attorney, the data reveals much higher default rates, significantly lower settlement rates, and a marked decrease in the amount of property returned to owners. Moreover, it is not only property owners who lose. The data suggests that the Indiana Common School Fund is also a big loser when the pursuit of profit prevails over the interests of justice.*

*Immediate action is needed to prohibit contingency fees in the prosecution of civil forfeiture cases as they are unethical and compromise the prosecutor's sworn obligation to pursue justice above all. Courts, as well, should refuse to enforce contingency contracts presented by private lawyers for prosecuting civil*

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\* Practice Professor of Law, University of Pennsylvania Law School. I especially want to express my deep gratitude to a wonderful research team consisting of Bradie R. Williams, a Penn Law graduate from the Class of 2019 and now an associate at Morgan Lewis in Philadelphia, and Penn Law students Jacob Bell and Jordan Konell, Class of 2022. I owe them all a deep debt of gratitude. No one could ask for a more talented or collaborative team.

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*forfeiture cases as they violate public policy. Unless this bounty system is ended, innocent property owners—largely from low-income families and communities of color—will continue to lose their lawful property to the pursuit of profit.*

## INTRODUCTION

Over the past fifty years, the nation's war on drugs<sup>1</sup> and tough-on-crime policies<sup>2</sup> have transformed the criminal justice system into a profitable revenue-producer at the expense of low-income families and communities of color.<sup>3</sup> Reluctant to raise taxes to pay for criminal justice needs, state and local governments have turned to fines, court costs, probationary supervision charges, and user fees to raise revenues.<sup>4</sup> The financial burdens imposed by these costs have driven families deeper into debt and have imposed formidable barriers to emerging from poverty.<sup>5</sup> When criminal justice fees are unpaid, individuals remain under state supervision for longer than necessary and are often prevented from benefitting from legislative reforms designed to wipe

1. On June 17, 1971, President Nixon announced a new top national priority: the war on drugs. See Chris Barber, *Public Enemy Number One: A Pragmatic Approach to America's Drug Problem*, RICHARD NIXON FOUND. (June 29, 2016), <https://www.nixonfoundation.org/2016/06/26404>.

2. See Arit John, *A Timeline of the Rise and Fall of 'Tough on Crime' Drug Sentencing*, ATLANTIC (Apr. 22, 2014), <https://www.theatlantic.com/politics/archive/2014/04/a-timeline-of-the-rise-and-fall-of-tough-on-crime-drug-sentencing/360983> (discussing the history of "tough on crime" legislation beginning with the Anti-Drug Abuse Act of 1986).

3. Beth A. Colgan, *Fines, Fees, and Forfeitures*, 4 REFORMING CRIM. JUST. 205, 212 (2017) ("Fines, fees, and forfeitures can have devastating consequences on those who are financially vulnerable, particularly in low-income communities and communities of color that are most likely to be heavily policed." (footnote omitted)).

4. See Mike Maciag, *Addicted to Fines*, GOVERNING (Sept. 2019), <https://governing.com/archive/gov-addicted-to-fines.html> (citing a large national analysis of fine revenues and the extent to which they fund budgets). The study found that "in hundreds of jurisdictions throughout the country, fines are used to fund a significant portion of the budget"; "[r]ural areas with high poverty have especially high rates" as do jurisdictions with "limited tax bases or those with independent local municipal courts." *Id.* The report found that "[t]here's a culture that's built up over time of tolerance and normalization of this idea that courts are there for revenue generation," quoting Lisa Foster, co-director of the Fines and Fees Justice Center. *Id.* In rural Dooly County, Georgia, for example, the report found that the county realized "\$4 million in fines and forfeitures in fiscal [year] 2018, [representing] just over a quarter of its general fund revenues." *Id.*; see also U.S. DEP'T OF JUST., CIV. RTS. DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT (2015) (following the high-profile police shooting of Michael Brown by the Ferguson, Missouri Police Department, the Department of Justice found that Ferguson police prioritized generating revenue from writing tickets, drawing sharp focus to the practice); Beth A. Colgan, *The Excessive Fines Clause: Challenging the Modern Debtors' Prison*, 65 UCLA L. REV. 2, 22 (2018) ("Across the country, many lawmakers use economic sanctions in order to avoid increasing taxes while maintaining governmental services, with some lawmakers even including increases [to revenues generated from economic sanctions] in projected budgets." (footnote omitted)); *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 258 (1989) ("[T]he government of Vermont has not . . . used the civil courts to extract large payments or forfeiture[s] for the purpose of raising revenue or disabling some individual.").

5. See *Developments in the Law: Policing*, 128 HARV. L. REV. 1706, 1728 (2015) ("In many jurisdictions, debt from criminal courts carries interest and late fees, thereby multiplying the financial burden solely on those debtors who are least able to pay . . . . When coupled with these debilitating collateral consequences, these debts impose an enduring burden that can exceed the penalty imposed for a crime." (footnote omitted)).

clean minor offenses and promote successful reentry into society.<sup>6</sup> Communities of color disproportionately bear the burden of these financial legal obligations.<sup>7</sup>

The criminalization of poverty has many contributing streams. Civil asset forfeiture is a major, underrecognized contributor that systematically extracts wealth from low-income communities by seizing their cash, cars, and homes. For many years, civil forfeiture operated in the shadows of our justice system. Under the banner of fighting crime, civil forfeiture has emerged as a major revenue-producer for law enforcement, netting billions of dollars yearly for police and prosecutors.<sup>8</sup> The lucrative nature of civil forfeiture has incentivized widespread abuses perpetrated against communities of color and vulnerable individuals, fueled by direct payoffs to budgets of prosecutors and police from forfeited proceeds.

In fact, civil forfeiture is big business. Between 2001 and 2014, deposits in the U.S. Department of Justice and Treasury forfeiture accounts totaled almost \$29 billion.<sup>9</sup> In a single year, law-enforcement “agencies in 26 states and the District of Columbia took in more than \$254 million” through their forfeiture activities.<sup>10</sup> Between 2001 and 2014, local police alone seized over \$2.5 billion using federal civil forfeiture laws, more than 80% of which came from people who were not charged with a crime.<sup>11</sup>

Despite such enormous grabs of private property, Americans remain largely unaware that confiscatory laws permit the government to seize their cars and cash, and even their homes, without ever being charged with a crime.<sup>12</sup>

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6. Clean Slate legislation in Pennsylvania is one example: reforms enacted to wipe old, minor offenses from criminal records were blocked if costs and fines were not paid in full. See Laurie Mason Schroeder, *In One Year, Pa.'s Clean Slate Law Has Erased 35 Million Crimes. What's Next?*, MORNING CALL (June 30, 2020), <https://www.mcall.com/news/breaking/mc-nws-pennsylvania-clean-slate-law-one-year-20200630-ges77qb3ffahhiznbjzjtclq7q-story.html>. Another example involves voting rights in which reform legislation permits citizens with certain prior criminal offenses to be eligible for voting, but only if they have paid off their costs and fines. See, e.g., FLA. CONST. art. VI, § 4.

7. See U.S. DEP'T OF JUST., *supra* note 4, at 9 (“Ferguson law enforcement efforts are focused on generating revenue.”); see also *id.* at 62 (noting that law-enforcement practices “disproportionately harm African American[]” residents).

8. See Dick Carpenter et al., *Policing for Profit: The Abuse of Civil Asset Forfeiture*, 2015 INST. FOR JUST.; see also *Developments in the Law: Policing*, *supra* note 5, at 1731 (“[C]ivil forfeiture has become more a way to fund supposed crime-fighting than a way to actually fight crime.”).

9. Carpenter et al., *supra* note 8, at 5.

10. *Id.* at 11 (footnote omitted). According to the Institute for Justice, Texas alone “took in \$50 million in 2017 through criminal and civil asset forfeiture.” See Brad Polumbo, *New Hope for Civil Forfeiture Reform*, DISPATCH (July 2, 2020), <https://thedispatch.com/p/new-hope-for-civil-forfeiture-reform>.

11. See *Developments in the Law: Policing*, *supra* note 5, at 1732 n.67 (citing Robert O’Harrow Jr. et al., *Asset Seizures Fuel Police Spending*, WASH. POST (Oct. 11, 2014), <http://www.washingtonpost.com/st/investigative/2014/10/11/asset-seizures-fuel-police-spending>).

12. See *The Palmyra*, 25 U.S. (12 Wheat.) 1 (1827) (holding that a criminal conviction is not necessary for the government to seize private property). Until the war on drugs, the use of civil forfeiture was largely limited to maritime operations.

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Based upon a legal fiction that the property has done wrong, the government seizes and forfeits private property without any obligation to pay compensation to the lawful owner. This fiction is usually met in disbelief by innocent Americans who lose their property at disturbing rates.<sup>13</sup> While there are many different federal and state civil forfeiture laws, most ordinary Americans encounter civil forfeiture at the state and local level while driving on busy highways or in connection with allegations of minor drug activity in their neighborhoods.<sup>14</sup> As studies have documented, traffic stops and drug-related interventions disproportionately impact people of color, and therefore, civil forfeiture of private property has its greatest impact upon low-income and minority communities.<sup>15</sup>

Civil forfeiture laws give prosecutors substantial power when fighting crime while, at the same time, minimizing basic safeguards for property owners.<sup>16</sup> Unlike criminal cases, civil forfeiture laws do not provide a right to counsel for the poor,<sup>17</sup> leaving low-income families to defend against the loss of their property without any legal help. And even when property owners are able to afford a lawyer, the government's seizure of modest amounts of cash and vehicles often make it economically infeasible to hire a lawyer because legal fees often exceed the value of seized property.<sup>18</sup>

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13. Congressional hearings leading up to the enactment of the Civil Asset Forfeiture Reform Act of 2000 (CAFRA) revealed default rates in civil forfeiture as high as 80%. See Louis S. Rulli, *The Long Term Impact of CAFRA: Expanding Access to Counsel and Encouraging Greater Use of Criminal Forfeiture*, 14 FED. SENT'G REP. 87, 88 (2001) ("One of the most disturbing aspects of civil forfeiture practice is the extraordinarily high rate of uncontested forfeitures. By most accounts, 80% of all forfeitures are uncontested.").

14. This Article focuses primarily on state and local forfeiture laws and law-enforcement practices related to drug offenses as this is where most ordinary Americans confront civil asset forfeiture.

15. For example, a Cook County, Illinois review of 23,000 seizures found that the overwhelming number of civil forfeiture cases were in the city's poor and black neighborhoods. See C.J. Ciaramella, *Poor Neighborhoods Hit Hardest by Asset Forfeiture in Chicago, Data Shows*, REASON (June 13, 2017), <https://reason.com/2017/06/13/poor-neighborhoods-hit-hardest-by-asset>. See also Louis S. Rulli, *Seizing Family Homes from the Innocent: Can the Eighth Amendment Protect Minorities and the Poor from Excessive Punishment in Civil Forfeiture?*, 19 U. PA. J. CONST. L. 1111, 1141 (2017) ("[A]n array of analyses conducted by media outlets and advocacy organizations [indicates] that people of color are disproportionately impacted by civil asset forfeiture."); Brian D. Kelly, *Fighting Crime or Raising Revenue? Testing Opposing Views of Forfeiture*, 2019 INST. FOR JUST 16 (finding from a decade's worth of data from the U.S. Department of Justice's forfeiture program that "the linkage between unemployment and forfeiture is at least highly suggestive, indicating a worsening economic environment leads to greater reliance on forfeiture and an improving economic environment to less").

16. See *Leonard v. Texas*, 137 S. Ct. 847, 849 (2017), *denying cert. to* \$201,100.00 U.S. Currency v. State, No. 09-14-00478-CV, 2015 WL 4312536, at \*1 (Tex. App. July 16, 2015) (Thomas, J., concurring) ("Whether forfeiture is characterized as civil or criminal carries important implications for a variety of procedural protections, including the right to a jury trial and the proper standard of proof.").

17. See Rulli, *supra* note 13, at 88–89 (noting that no states provide for such a right and that the federal right under CAFRA is limited to homes that are the primary residences of indigent homeowners).

18. See Radley Balko, Opinion, *Study: Civil Asset Forfeiture Doesn't Discourage Drug Use or Help Police Solve Crimes*, WASH. POST (June 11, 2019), <https://www.washingtonpost.com/opinions/2019/06/11/study-civil-asset-forfeiture-doesnt-discourage-drug-use-or-help-police-solve-crimes>. Studies have shown that the average forfeiture amount in Washington, D.C. is \$141 and the median forfeiture amount in Philadelphia is \$178. *Id.* A Mississippi seizures review of 315 cases found only six instances where the property was valued at more than \$60,000. *Id.* The small amounts show that police and prosecutors are pursuing the bulk of civil

Civil forfeiture laws are complex. Without legal help, unrepresented property owners are intimidated and overmatched by superior government resources. Unknowingly, property owners routinely waive constitutional and statutory defenses that should protect their property.<sup>19</sup> Many individuals are unable to attend multiple court hearings about their property because they cannot jeopardize their employment or afford to lose wages from missed work. As a result, many individuals simply give up and walk away from their property even though they may have meritorious defenses. This is reflected in unacceptably high default rates that have plagued civil forfeiture over several decades.<sup>20</sup>

Nonetheless, prosecutors and judges readily accept such one-sided court outcomes that stand untested. Without property owners present, trial judges rubber-stamp forfeiture claims and rarely require prosecutors to offer a *prima facie* showing that there is sufficient evidence to justify the permanent taking of private property.

When property owners do present a defense, they learn that civil forfeiture laws are designed to make it as easy as possible for the government to prevail. Backed by influential lobbies in state capitals, prosecutors have routinely secured the passage of forfeiture laws that place only the lowest evidentiary burden of proof upon the government, deny indigent property owners a right to counsel, and shift the burden of proving innocence to property owners. Most civil forfeiture laws do not require that property owners be convicted of, or even charged with, a crime, and they rarely set minimum thresholds for cash forfeitures.<sup>21</sup> Unless constitutional defenses are expressly raised, trial courts silently permit their unknowing waiver and routinely approve forfeitures without ascertaining whether a property's fair value is grossly disproportionate to the gravity of the underlying criminal offense.<sup>22</sup>

This is all troubling enough. But, perhaps most concerning is that civil forfeiture laws generally direct all, or almost all, forfeited funds to prosecutors

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forfeiture cases for amounts that make it economically infeasible to hire counsel to fight to get their property back. *Id.*

19. There are important affirmative defenses to civil forfeiture petitions that are waived if not properly asserted. They include statutory defenses such as the innocent owner defense and constitutional defenses under the Excessive Fines Clause of the Eighth Amendment.

20. See Rulli, *supra* note 13, at 88 (“By most accounts, 80% of all forfeitures are uncontested.”).

21. Since 2014, more than thirty-four states have enacted varying reforms to their state forfeiture laws. Three states have now abolished civil forfeiture, several others require a criminal conviction, and a few others impose a minimum threshold. See *Civil Forfeiture Reforms on the State Level*, INST. FOR JUST., <https://ij.org/activism/legislation/civil-forfeiture-legislative-highlights> (last visited Feb. 9, 2021).

22. While *Timbs v. Indiana*, 139 S. Ct. 682 (2019), held that the Eighth Amendment's Excessive Fines Clause applies to the states, this constitutional guarantee is not serving its protective purpose as long as unrepresented parties are unaware of this defense and courts do not, on their own, examine whether the government's taking is disproportionate to the gravity of the alleged offense.

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and police with little transparency or accountability.<sup>23</sup> This has led law-enforcement agencies to rely on forfeiture proceeds to pay significant portions of their budgets.<sup>24</sup> While civil forfeiture laws differ among states, most embed this profit incentive and tilt the scales of justice heavily in the government's favor, thereby encouraging abuses that distort prosecutorial decision-making and undermine public confidence in our justice system. For too long, we have justified punitive forfeitures of private property from ordinary citizens without compensation on the rationalization that these are considered merely civil cases and therefore do not require stronger protections that we demand in criminal cases. Where prosecutors have a choice to pursue either civil or criminal forfeiture, it is not surprising that they overwhelmingly pursue civil forfeiture because of its easy path.<sup>25</sup> This remains true for federal forfeitures, as well, even though Congress intended greater use of criminal forfeiture when it enacted the Civil Asset Forfeiture Reform Act of 2000.<sup>26</sup>

With civil forfeiture practices now deeply entrenched, this Article briefly reviews widespread forfeiture abuses perpetrated on highways and in minority neighborhoods that net law enforcement huge amounts of revenue each year. These abuses can be laid squarely at the feet of forfeiture laws that direct all, or most, forfeiture funds to the very prosecutorial offices which make decisions whether to pursue forfeiture in the first place. This misdirection of forfeiture proceeds breeds a strong profit motive that raises serious conflicts of interest and encourages self-dealing that undermine the integrity and fairness of law enforcement's actions.

To make matters worse, some states, such as Indiana, have taken this profit motive a step farther. Indiana authorizes government prosecutors to hire private lawyers to prosecute civil forfeiture cases who are then paid on a contingency-fee basis.<sup>27</sup> As a result, the more property a private lawyer can forfeit, the more money the lawyer can make for personal gain. In this system, a lawyer's drive for private profit supersedes the government's obligation to pursue justice.

In this Article, I contend that contingency fees have no place in the prosecution of civil forfeiture actions. To support this contention, this Article reviews several patterns of abusive civil forfeiture practices that are motivated by law enforcement's voracious appetite for new revenues. I then look at

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23. See *Civil Forfeiture Reforms on the State Level*, *supra* note 21 (noting that only seven states and the District of Columbia do not direct forfeiture proceeds to law enforcement and that all federal forfeiture proceeds are directed to law enforcement).

24. See Note, *How Crime Pays: The Unconstitutionality of Modern Civil Asset Forfeiture as a Tool of Criminal Law Enforcement*, 131 HARV. L. REV. 2387, 2405–06 (2018) (citing a national study that found over sixty percent of surveyed agencies relied on forfeiture proceeds for their budgets).

25. Carpenter et al., *supra* note 8, at 12.

26. See Rulli, *supra* note 13, at 91 (“Although CAFRA does not attempt to reform criminal forfeiture, it does attempt to encourage greater use of criminal forfeiture as an alternative to civil forfeiture.”).

27. See *infra* pp. 130–37.



professional responsibility rules that prohibit the use of contingency fees in criminal cases and question why the same ethical considerations should not apply explicitly to quasi-criminal cases, such as civil forfeiture, where private property is punitively forfeited in the name of the sovereign. To examine this question more closely, this Article looks at Indiana's practice of permitting contingency fees in civil forfeiture cases and examines court data in civil forfeiture cases prosecuted by government prosecutors and compares it to forfeiture cases prosecuted by a private attorney on a contingency-fee basis. The comparative data raises troubling questions that merit further study and scrutiny by the state attorney general and state legislature. Based upon this review, the Article calls upon the American Bar Association to amend its *Model Rules of Professional Conduct* to prohibit explicitly the use of contingency fees in the prosecution of civil forfeiture cases and urges courts to refuse to enforce contingency fee contracts in civil forfeiture cases on the basis that they violate public policy. Finally, as the state of Georgia has already done in response to its own disturbing experience,<sup>28</sup> the Indiana legislature should prohibit the use of contingency fees when prosecuting civil forfeiture cases.

#### I. SYSTEMIC FORFEITURE ABUSE

The strong profit motive embedded in civil forfeiture laws coupled with a paucity of legal protections for property owners have resulted in an explosion of civil forfeiture abuses. For many years, the public was unaware of these abuses as they were largely hidden from view.<sup>29</sup> However, through a series of investigative studies and national reporting, the repeated victimization of innocent property owners has been exposed.<sup>30</sup> These abusive practices target cash carried by unsuspecting motorists on highways and shamelessly snatch cars and homes of the poor, even when owners are never charged with a crime. While abuses are now widely reported, this Article highlights several examples to demonstrate the severity of the problem.

The small town of Tenaha, Texas, is now legendary for civil forfeiture abuse on the highways. In 2007, the town was ground zero for a drug interdiction

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28. See *infra* p. 136.

29. See Carpenter et al., *supra* note 8, at 7.

30. See, e.g., Balko, *supra* note 18; Sarah Stillman, *Taken*, NEW YORKER (Aug. 5, 2013), <https://www.newyorker.com/magazine/2013/08/12/taken> (detailing how state laws “designed to go after high-flying crime lords are routinely targeting the workaday homes, cars, cash savings, and other belongings of innocent people who are never charged with a crime”); Anna Lee et al., *Taken: How Police Departments Make Millions by Seizing Property*, GREENVILLE NEWS (Apr. 22, 2020), <https://www.greenvilleonline.com/in-depth/news/taken/2019/01/27/civil-forfeiture-south-carolina-police-property-seizures-taken-exclusive-investigation/2457838002>.

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program of the Tenaha Police Department.<sup>31</sup> Under the program, Tenaha officials pulled over predominantly Black and Latinx motorists for minor traffic violations in pursuit of any evidence of drug trafficking.<sup>32</sup> These stops led to the seizure of cash, jewelry, electronics, and vehicles, often without any evidence of drug activity.<sup>33</sup>

Jennifer Boatright, her two young sons, and her boyfriend, Ron Henderson, were driving through the town of Tenaha, Texas when they were pulled over by a local officer.<sup>34</sup> The officer asked if they knew that they had been driving in the left lane without passing another vehicle for a half a mile.<sup>35</sup> A consensual search of the car led to the finding of a glass pipe and \$6,000 in cash. The officer and district attorney coerced the couple to sign a waiver to hand over the cash, threatening felony prosecution or even the removal of their kids from their custody.<sup>36</sup> Ultimately, Boatright, Henderson, and other victims of Tenaha's highway interdiction program filed a class-action lawsuit against the city in which they alleged an abusive system that defied any law-enforcement purpose.<sup>37</sup> After the court granted class certification, the case settled, with Tenaha officials agreeing to policy changes to curb such abusive practices.<sup>38</sup>

Highway interdiction programs routinely use minor traffic infractions as a pretext for vehicle stops. These stops often do not result in criminal charges, but they do result in the government's seizure of cash, contractual waivers of owners' rights, and threats of incarceration or even the removal of children from families.<sup>39</sup> After making a traffic stop, police often search the vehicle with consent purportedly obtained from an intimidated driver under duress. If cash is found during the search, police may present motorists with a *cash-for-freedom* waiver: surrender permanently your property immediately on the spot or face serious consequences.<sup>40</sup> Under such coercive conditions, many motorists sign

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31. This interdiction program was led by Barry Washington, a Tenaha Police Officer. Stillman, *supra* note 30.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* In the case of Jennifer Boatright and Ron Henderson, the evidence allegedly pointing to drug trafficking was that they were driving from Houston, "a known point for distribution of illegal narcotics," to Linden, Texas (where Henderson was from), "a known place to receive illegal narcotics." *Id.* The police also claimed that their children's presence in the car could have been strategic to distract police as decoys. *Id.*

37. *Morrow v. Washington*, 277 F.R.D. 172, 178 (E.D. Tex. 2011).

38. The lawsuit revealed that seized forfeited property funded such things as Halloween costumes, a popcorn machine, a \$1,000 donation to a church the District Attorney considered to be important to her reelection, and \$40,000 in bonuses to Officer Barry Washington, who ran the interdiction program. Stillman, *supra* note 30.

39. See Marian R. Williams et al., *Policing for Profit: The Abuse of Civil Asset Forfeiture*, 2010 INST. FOR JUST. 15–17.

40. See Note, *supra* note 24, at 2391. See also Robert O'Harrow Jr. et al., *Asset Seizures Fuel Police Spending*, WASH. POST (Oct. 11, 2014), <https://www.washingtonpost.com/sf/investigative/2014/10/11/asset-seizures-fuel-police-spending/> ("In September, The Post reported that police across the country became more aggressive in their use of federal civil asset forfeiture laws after the Sept. 11, 2001, terrorist attacks. Officials

waivers to their property because they see no other option.<sup>41</sup> Few question why the police come armed with contractual waivers or who prepared these legal documents for this specific use.

The Tenaha highway interdiction program was not an outlier. In South Carolina, law enforcement created their own interagency highway interdiction program called Operation Rolling Thunder that lasted over a decade.<sup>42</sup> Once a year, local, state, and federal agencies collaborated in multiday sting operations on highways I-85 and I-26 in Spartanburg and Cherokee counties. During each operation, officers pulled vehicles over for minor traffic infractions so that they could conduct searches and potentially seize property. After such an operation, the agencies petitioned for forfeiture and divided up the assets among themselves. Officers who seized the most property were acknowledged with awards.<sup>43</sup> One deputy involved in the operation told a news organization that “[n]early everyone does something illegal if you follow them long enough.”<sup>44</sup>

The *Greenville News* conducted a three-year investigation of civil forfeiture operations known as Rolling Thunder in South Carolina that was published in 2019.<sup>45</sup> This study found that the program was co-opted by local authorities as a steady revenue stream, resulting in significant racial disparities without a connection to fighting crime. The study noted that Black men comprised only 13% of South Carolina’s population but 65% of the victims of civil forfeiture.<sup>46</sup> One-fifth of civil forfeiture victims were not charged with a crime or arrested; another one-fifth who were charged were not convicted.<sup>47</sup> Fifty-five percent of the time, police seized cash in amounts less than \$1,000, making it economically

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at Justice and the Department of Homeland Security encouraged a technique known as highway interdiction to help in the fight against drugs and terror. There have been 61,998 cash seizures on highways and elsewhere since 9/11 without search warrants or indictments and processed through the Equitable Sharing Program, according to an analysis of Justice data obtained by The Post.” (citation omitted).

41. The *Washington Post* published an extensive series on civil forfeiture in 2014. This reporting documented aggressive policing practices in highway interdictions that resulted in the seizure of hundreds of millions of dollars in cash from motorists and passengers not charged with a crime. Property owners were required to fight lengthy court battles to prove that the possessions were lawfully acquired in order to get their property back. While only one out of six property seizures resulted in a legal challenge, when a challenge did occur the government voluntarily returned seized cash in 41% of the cases. Michael Sallah et al., *Stop and Seize: Aggressive Police Take Hundreds of Millions of Dollars from Motorists Not Charged with Crimes*, WASH. POST (Sept. 6, 2014), <https://www.washingtonpost.com/sf/investigative/2014/09/06/stop-and-seize>.

42. Nathaniel Cary, *Inside Look: How SC Cops Swarm I-85 and I-26, Looking for ‘Bad Guys,’* GREENVILLE NEWS (Feb. 3, 2019), <https://www.greenvilleonline.com/in-depth/news/2019/02/03/operation-rolling-thunder-sc-civil-forfeiture-interstate-95-26/2458314002>.

43. *See id.*

44. *Id.*

45. *Id.*

46. Nathaniel Cary & Mike Ellis, *65% of Cash Seized by SC Police Comes from Black Men. Experts Blame Racism*, GREENVILLE NEWS (Jan. 17, 2020), <https://www.greenvilleonline.com/story/news/taken/2019/01/27/south-carolina-racism-blamed-civil-forfeiture-black-men-taken-exclusive-investigation/2459039002>.

47. Cary, *supra* note 42.

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infeasible to hire legal help.<sup>48</sup> For property owners too poor to afford counsel, there was no right to counsel and thus no available legal help. Ninety-five percent of forfeiture proceeds went to law enforcement with only 5% directed to the state's general fund.<sup>49</sup> As a result, forfeiture profits amounted to approximately 12% of annual operating budgets of participating law-enforcement agencies.<sup>50</sup>

The modern story of civil forfeiture is replete with similar abusive practices perpetrated by law enforcement on the nation's highways. In LaSalle County, Illinois, the state's attorney created his own police force called the LaSalle County State's Attorney Felony Enforcement (SAFE) Unit.<sup>51</sup> After being sworn in as special investigators, veteran state troopers hired for SAFE were deployed to Interstate 80 to engage in motorist stops.<sup>52</sup> After stopping a driver, an officer would alert a canine unit to sniff the car.<sup>53</sup> Over four years, the unit seized a total of \$1.7 million, with almost half of all forfeiture cases not connected to a criminal charge.<sup>54</sup> The funds derived from forfeitures covered the salaries of officers, expenses, vehicles, weapons, and nearly \$100,000 to travel to conferences, including two trips to Las Vegas.<sup>55</sup> The SAFE unit was finally disbanded in 2017 after the Illinois Supreme Court found the unit to be an illegal use of prosecutorial authority.<sup>56</sup> The LaSalle County state's attorney in charge of the program faced criminal charges for misconduct and misappropriating public funds after he allegedly spent asset forfeiture funds on an SUV, Wi-Fi service for his home, and for local youth sports programs.<sup>57</sup>

Unfortunately, many states share in similar predatory stories. In Michigan, a study found that more than 700 innocent people had their assets forfeited in 2016 alone.<sup>58</sup> During that year, 523 individuals had their cash, cars, and other

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48. Lee et al., *supra* note 30.

49. *Id.*

50. *Id.*

51. See Nick Sibilla, Inst. for Just., *Prosecutor Can't Create Drug Squad to Seize Cash from Innocent Drivers, Illinois Supreme Court Rules*, FORBES (July 17, 2017), <https://www.forbes.com/sites/instituteofjustice/2017/07/17/prosecutor-cant-create-drug-squad-to-seize-cash-from-innocent-drivers-illinois-supreme-court-rules/#6e33385777fd>.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. On June 29, 2017, the Illinois Supreme Court ruled in *People v. Ringland*, 89 N.E.3d 735 (Ill. 2017), that there was no authority for LaSalle County State's Attorney Felony Enforcement (SAFE) Unit, which confiscated more than \$1.7 million from drivers. The SAFE Unit operated from 2011 through 2015 and patrolled Interstate 80 in Illinois. Veteran state troopers were sworn in as "special investigators" to stop and arrest people for drug offenses (mostly marijuana). The agency then filed civil forfeiture cases, even though almost half were not tied to a criminal charge. See Sibilla, *supra* note 51.

57. See C.J. Ciaramella, *Manhattan D.A. Spent \$250K in Asset Forfeiture Funds on Fine Dining and Luxurious Travel*, REASON (Apr. 4, 2019), <https://reason.com/2019/04/04/manhattan-da-spent-250k-in-asset-forfeit>.

58. See Jarrett Skorup, *Civil Asset Forfeiture Reform Is Sweeping the Nation*, HILL, (Mar. 7, 2018), <https://thehill.com/opinion/civil-rights/376961-civil-asset-forfeiture-reform-is-sweeping-the-nation>.

property taken without any criminal charges filed against them, while another 196 individuals were charged, but found innocent, of criminal activity.<sup>59</sup> Behind each such story was an insatiable drive for revenue.

The *Washington Post* published an extensive series on police seizures and forfeitures in 2014 that focused on the federal government's adoption of state forfeitures.<sup>60</sup> The series documented aggressive policing practices in highway interdiction programs resulting in the seizure of hundreds of millions of dollars in cash from motorists and passengers not charged with a crime.<sup>61</sup> As a result, property owners were required to fight lengthy court battles to prove that their possessions were lawfully acquired to get their property back.<sup>62</sup> Behind the scenes, police employed private training companies, such as Black Asphalt and Desert Snow, to train them on how to seize even greater amounts of cash on the nation's highways. These training programs underscored the revenue-seeking purpose of civil forfeiture despite public claims of fighting crime.<sup>63</sup>

This underlying drive for profit led prosecutors in Philadelphia to seize hundreds of homes owned primarily by low-income families and people of color. Over a twelve-year period from 2002 through 2014, Philadelphia prosecutors forfeited 1,248 homes.<sup>64</sup> Many of these homes were owned by aging parents whose adult children (or grandchildren) allegedly sold small amounts of low-level drugs, usually marijuana, from or near their homes. These homes were overwhelmingly located in communities of color with parents usually not charged with any wrongdoing.<sup>65</sup> As disturbing as these cold numbers are, they barely convey the grievous harm felt by families when the pursuit of

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59. *See id.*

60. *See, e.g.,* O'Harrow et al., *supra* note 40; Sallah et al., *supra* note 41. According to this study, the federal government adopted \$2.5 billion in cash seizures from state and local law-enforcement agencies between 2001 and 2014, with roughly \$1.7 billion returning to state and local law enforcement under the federal equitable sharing program. Nick Sibilla, Inst. for Just., *This Federal Program Lets Cops Seize Cash, Evade State Laws and Keep over a Billion Dollars*, FORBES (Sept. 29, 2014), <https://www.forbes.com/sites/instituteforjustice/2014/09/29/highway-cash-seizures-civil-forfeiture/?sh=62d92033561b>.

61. Sallah et al., *supra* note 41.

62. *See* O'Harrow et al., *supra* note 40. Only one out of six property seizures were legally challenged, but when a challenge did occur the government voluntarily returned seized cash in 41% of the cases. Sallah et al., *supra* note 41.

63. *See* Shaila Dewan, *Police Use Department Wish List When Deciding Which Assets to Seize*, N.Y. TIMES (Nov. 9, 2014), <https://www.nytimes.com/2014/11/10/us/police-use-department-wish-list-when-deciding-which-assets-to-seize.html>; *see also* Sallah et al., *supra* note 41; Rulli, *supra* note 15, at 1122 n.71 ("Many law enforcement departments have come to rely heavily on proceeds from forfeitures, with several hundred leaning on forfeiture revenues to account for 20% or more of their annual budgets between 2008 and 2014.").

64. *Philadelphia's Civil Forfeiture Machine Facts and Figures*, INST. FOR JUST., <https://ij.org/philadelphia-facts-and-figures> (last modified Jan. 1, 2020). In addition to forfeiting 1,248 homes, Philadelphia prosecutors also forfeited 3,531 vehicles and over \$50 million in cash during this same ten-year period. *Id.*

65. *SB 869 Proposed Reforms to the Civil System of Asset Forfeiture in P.A.: Hearing on SB 869 Before the Sen. Judiciary Comm.*, 2015 Leg., 2015–2016 Sess. 11 (Pa. 2015) (statement of Louis S. Rulli, Practice Professor of Law and Director of Clinical Programs, University of Pennsylvania Law School).

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profit overrides a solemn obligation to serve justice. The following two Philadelphia home forfeiture cases provide a brief window into that harm.

Mary and Leon Adams, an African-American couple residing in West Philadelphia, owned their home for over forty-five years when police seized it in 2012.<sup>66</sup> A month earlier, their adult son was arrested for allegedly selling three packets of marijuana for twenty dollars each to a confidential police informant on the porch of their home.<sup>67</sup> At ages sixty-eight and seventy respectively, the Adams couple faced the loss of their home without ever being charged with a crime.<sup>68</sup> Neither had ever been involved with the law before.<sup>69</sup> Now, in retirement, they faced the threat of losing their family home to civil forfeiture with no prospect of where they would go.<sup>70</sup>

It did not matter to prosecutors that the Adams couple were upstanding members of the community. Mrs. Adams was a former saleswoman and block captain in her neighborhood; Mr. Adams was a retired shipbuilder who was battling pancreatic cancer.<sup>71</sup> Mrs. Adams, who was working part-time to pay the bills and help her husband, stated, “With [the seizure] hanging over our head, it’s devastating.”<sup>72</sup> Fortunately, Mr. and Mrs. Adams obtained free legal help from a law school clinic and after more than two years of litigation and national attention highlighted in the *New Yorker* magazine, the prosecutor’s office withdrew the forfeiture petition prior to trial.<sup>73</sup>

Elizabeth Young is an elderly, African-American homeowner who purchased her Philadelphia home in the 1970s and worked for Amtrak for more than twenty-five years.<sup>74</sup> She retired in 1995, and at age seventy, after her husband’s death, she remained in her West Philadelphia home while being active in her church. As her health began to fail, she purchased a used Chevrolet Venture for transport to her medical appointments.<sup>75</sup> At this time, Ms. Young’s adult son of almost fifty years of age came to live with her to assist her with her medical appointments and to help raise two grandchildren who resided in her home.

In 2011, Ms. Young’s adult son was arrested for selling several small packets of marijuana for twenty dollars each to confidential informants assisting police

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66. Stillman, *supra* note 30.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. Mary and Leon Adams were represented by the author of this Article along with law students enrolled in the University of Pennsylvania Law School’s Civil Practice Clinic.

74. Notes of Testimony at 56–57, 59, Commonwealth v. 416 S. 62nd St., No. CP–51–MD–0002972–2010 (Ct. C.P. Phila. Cty. May 1, 2012) (on file with author).

75. *Id.* at 60, 72–73.

narcotics officers.<sup>76</sup> Each marijuana sale was initiated by a phone call from a confidential informant working with the police to Ms. Young's son on his cell phone (not on a house phone), offering to buy marijuana and arranging to meet him at or near his mother's residence. After purchasing marijuana and then arresting her son for these drug offenses,<sup>77</sup> prosecutors filed a civil forfeiture petition against Ms. Young's home and car, alleging that each had facilitated her son's marijuana sales. Ms. Young was not charged with a crime and was certainly not suspected of any criminal wrongdoing.

While Ms. Young was fortunate to obtain pro bono legal help from a large Philadelphia law firm, the court rejected her defenses at trial.<sup>78</sup> At age seventy and innocent of any criminal wrongdoing, Ms. Young lost both her home and car to the state. She and her grandchildren were physically thrown out of their home. This is what civil forfeiture looks like in poor and minority neighborhoods.<sup>79</sup>

The widespread use of civil forfeiture against innocent property owners has caused many to question whether civil forfeiture has strayed too far from its intended purpose and has become a grab for revenue rather than a tool to protect public safety.<sup>80</sup> In *Leonard v. Texas*, Justice Thomas voiced this concern when he suggested that current forfeiture practices may not comport with the Due Process Clause and the historical justification for civil forfeiture.<sup>81</sup> Noting that civil forfeiture had become "widespread and highly profitable" in recent decades, Justice Thomas stated:

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76. *Id.* at 16–22.

77. The criminal prosecution resulted in a conviction and incarceration for Young's son, but no fine was imposed (other than standard court costs). Docket, *Commonwealth v. Graham*, No. CP-51-CR-0000643-2010, (Ct. C.P. Phila. Cnty. Jan. 15, 2010).

78. *Commonwealth v. 1997 Chevrolet*, 160 A.3d 153, 160–62 (Pa. 2017).

79. After several years of appeals, Ms. Young won her appeal in the Pennsylvania Supreme Court where her case established groundbreaking precedent on the proper application of the Excessive Fines Clause of the U.S. and Pennsylvania Constitutions to civil forfeiture cases. *See id.* at 158–59. A more detailed description of both the Adams and Young cases can be found in a previous article of the author. *See* Rulli, *supra* note 15, at 1134–38. In addition, the Institute for Justice challenged abusive forfeiture practices in Philadelphia in a federal class action lawsuit that resulted in a favorable class-wide settlement reforming abusive city practices. *See Sourovelis v. City of Philadelphia*, Civil Action No. 14-4687 (E.D. Pa.); *Sourovelis v. City of Philadelphia*, 103 F. Supp. 3d 694 (E.D. Pa. 2015) (denying the City of Philadelphia's motion to dismiss).

80. *See, e.g., Kelly*, *supra* note 15, at 1128–29 (noting that many forfeitures are for small amounts of cash that people are not willing to spend months fighting to retrieve). The Institute for Justice accumulated forfeiture data from ten states in 2012, showing that the median value of forfeited property ranged from \$451 in Minnesota to \$2,048 in Utah. *Carpenter et al.*, *supra* note 8, at 12. In Philadelphia between 2011 and 2013, more than half of cash-only forfeiture cases involved less than \$192. For property worth less than \$200, just 3% of owners fought to retrieve their goods. *See also* Brief of the American Civil Liberties Union et al. as Amici Curiae in Support of Petitioners at 7, *Timbs v. Indiana*, 139 S. Ct. 682, 689 (2019) (No. 17-1091) ("Perhaps because they are politically easier to impose than generally applicable taxes, state and local governments nationwide increasingly depend heavily on fines and fees as a source of general revenue").

81. *See Leonard v. Texas*, 137 S. Ct. 847, 849 (2017), *denying cert. to* \$201,100.00 U.S. Currency v. State, No. 09-14-00478-CV, 2015 WL 4312536, at \*3 (Tex. App. July 16, 2015) (Thomas, J., concurring).

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This system—where police can seize property with limited judicial oversight and retain it for their own use—has led to egregious and well-chronicled abuses . . . . These forfeiture operations frequently target the poor and other groups least able to defend their interests in forfeiture proceedings. Perversely, these same groups are often the most burdened by forfeiture. They are more likely to use cash than alternative forms of payment, like credit cards, which may be less susceptible to forfeiture. And they are more likely to suffer in their daily lives while they litigate for the return of a critical item of property, such as a car or a home.<sup>82</sup>

Similarly, in *Timbs v. Indiana*, Justice Ginsburg expressed concern that the imposition of excessive fines may carry a political motive that undermines other constitutional rights or may be used as “a source of revenue” that is “out of accord with the penal goals of retribution and deterrence.”<sup>83</sup> Justice Ginsburg cautioned that unlike other forms of punishment that impose costs upon a state, fines are a source of revenue.<sup>84</sup>

As abusive forfeiture practices have become increasingly exposed to the public, a growing number of states have enacted legislative reforms. Since 2014, at least thirty-four states and the District of Columbia have amended their civil forfeiture laws. Three states have abolished civil forfeiture entirely.<sup>85</sup> Some states have heightened the government’s burden of proof to clear and convincing evidence, such as Wisconsin and Pennsylvania, while others have shifted the burden of proof from the property owner to the government when claims of innocent ownership are raised.<sup>86</sup> Other states now require a criminal conviction before property may be forfeited,<sup>87</sup> while others, such as Wyoming and Virginia, have banned roadside waivers at traffic stops and many other states have required enhanced reporting requirements following forfeitures.<sup>88</sup> Additionally, some states have prohibited equitable sharing with federal authorities in an attempt to prevent local police from evading state reforms.<sup>89</sup>

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82. *Id.* (citations omitted).

83. *Timbs v. Indiana*, 139 S. Ct 682, 689 (2019) (holding that the Eighth Amendment’s Excessive Fines Clause applies to the states through the Due Process Clause).

84. *Id.* at 689 (opinion of Scalia, J.) (citing *Harmelin v. Michigan*, 501 U.S. 957, 979, n.9 (1991)) (“[I]t makes sense to scrutinize governmental action more closely when the State stands to benefit.”).

85. North Carolina, New Mexico, and Nebraska have abolished civil forfeiture. However, this does not mean that civil forfeiture does not occur in these states. For example, while North Carolina has abolished civil forfeiture and now requires that state forfeitures proceed criminally, federal and state authorities engage in equitable sharing that results in more than \$11 million each year to state authorities for their participation in the equitable sharing program. Equitable sharing allows states with restrictive laws to bypass reforms enacted by state legislatures. *See Kelly, supra* note 15, at 11.

86. At least thirteen states have enacted burden of proof reforms, including California, Colorado, Connecticut, Florida, Iowa, Mississippi, New York, Pennsylvania, and Wisconsin. *See id.*

87. More than fifteen states now require a criminal conviction, including Connecticut, Minnesota, Missouri, New Hampshire, Oregon, Vermont, and Wisconsin. *See id.*

88. Approximately twenty-five states have enhanced reporting requirements, including Arizona, Colorado, Kansas, Maryland, Michigan, and Pennsylvania. *Id.*

89. These states include Arizona, California, Colorado, Maryland, Nebraska, New Mexico, Ohio, Pennsylvania, and the District of Columbia. In equitable sharing, local law-enforcement agencies call upon



While these reforms are important steps in restraining civil forfeiture's overreaching, no state has yet enacted a right to counsel for indigent property owners, and most states still direct all, or most, forfeiture proceeds to law enforcement with too little accountability or transparency. Unless civil forfeiture's profit motive is eliminated and the scales of justice are balanced in obtaining access to legal help, these legislative reforms will not be enough to eliminate systemic abuses that plague civil forfeiture and cause so much harm to innocent Americans.

#### A. *Civil Forfeiture's Profit Motive*

The undeniable truth is that civil forfeiture is highly profitable.<sup>90</sup> With strong lobbies in Congress and in state capitals, law enforcement has positioned itself to be the direct recipient of civil forfeiture proceeds. In this way, forfeiture proceeds bypass general treasuries and evade meaningful public accountability and decision-making. One key to curbing systemic abuse is to remove the structural financial incentives that are embedded in civil forfeiture laws.

Current civil forfeiture laws divide loyalties by financially rewarding prosecutorial offices for the forfeitures they obtain. This conflict of interest distorts prosecutorial priorities and smacks of an appearance of impropriety that undermines public confidence in the neutrality of law enforcement and the fairness of courts. In addition, transparency is sorely lacking over such large amounts of funds, leading to public skepticism and distrust.<sup>91</sup> A report by the Institute for Justice (IJ) found that twenty-six states have little to no transparency requirements for asset forfeiture. According to the IJ report, fourteen states “do not appear to require any form of property tracking, leaving in doubt even such basic questions as what was seized and how much it was

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the federal authorities to adopt local-originated forfeitures so that federal authorities may prosecute these actions under federal law. In this way, local prosecutors bypass more restrictive state laws knowing that as much as 80% of forfeiture proceeds will ultimately be returned to them upon the successful conclusion of the case. Legitimate concerns for federalism are cast aside to maximize local profit. Moreover, a recent empirical study of equitable sharing practices has called into doubt the frequent claim that civil forfeiture is necessary to fight crime as opposed to simply raising revenue. *Id.*; see also Jefferson E. Holcomb et al., *Civil Asset Forfeiture Laws and Equitable Sharing Activity by the Police*, 17 CRIMINOLOGY & PUB. POL'Y 101, 112–17 (2018) (finding in a 2018 study that states with more restraints were twice as likely to use adoption as those states without such restrictions). Attorney General Eric Holder in the Obama Administration ended the program in 2015, but Attorney General Jeff Sessions reinstated the program in 2017 during the Trump Administration. Kelly, *supra* note 15, at 6.

90. See Note, *supra* note 24, at 2390 (“Forfeiture is profitable. While a lack of reporting requirements makes it difficult to fully account for its revenues, the Justice and Treasury departments alone received nearly \$4.5 billion in forfeiture proceeds in 2014; individual states have taken in as much as \$46 million in a single year from the practice.”); see also *Developments in the Law: Policing*, *supra* note 5, at 1730–33. It is therefore unsurprising that forfeiture is an attractive tool for law enforcement.

91. See Balko, *supra* note 18 (describing how difficult it is to get and make sense of the data and how law enforcement routinely resists FOIA and right-to-know requests).

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worth, who seized it, when it was seized, where it was seized, and why it was seized.”<sup>92</sup> As investigative journalists quickly learn, formal information requests, and sometimes litigation, are needed to compel the release of even basic information.<sup>93</sup> Meanwhile, prosecutors and police have openly espoused a mantra of “forfeit, forfeit, forfeit,”<sup>94</sup> especially as salaries, bonuses, and office budgets have increasingly become dependent on forfeiture proceeds. One scholar has suggested that forfeiture may be governed not by justice, but by “department wish lists.”<sup>95</sup>

Several jurisdictions have responded by abolishing civil forfeiture entirely or by redirecting forfeiture proceeds to a general fund. For example, North Carolina, New Mexico, and Nebraska have abolished civil forfeiture, while New Hampshire and the District of Columbia redirect forfeiture proceeds to a general fund that provides legislators with decision-making authority over the use of the proceeds.<sup>96</sup> Until more states abolish civil forfeiture or, at a

92. Angela C. Erickson et al., *Forfeiture Transparency & Accountability*, INST. FOR JUST. (Nov. 3, 2020), <https://ij.org/report/forfeiture-transparency-accountability>.

93. See *Pennsylvania Forfeiture FOIA*, INST. FOR JUST., <https://ij.org/case/pa-forfeiture-foia> (last visited Feb. 9, 2021) (“When Carter appealed the DA’s denial of his request to Pennsylvania’s Office of Open Records, it concluded that the records should be public under the RTKL. But now the Lancaster District Attorney is appealing that decision in court. Carter and LNP are now teaming with the Institute for Justice to make forfeiture records in Lancaster County and the neighboring Berks County available to the public.”); see also Jocelyn Brumbaugh, *Investigatory Information’ at Issue: Cambria Judge Orders DA’s Financial Records Concerning Drug Forfeiture Accounts Be Made Public*, TRIBUNE-DEMOCRAT (Dec. 2, 2018), [https://www.tribdem.com/news/investigatory-information-at-issue-cambria-judge-orders-da-s-financial/article\\_92ddcf14-f5e9-11e8-8787-83e36ffcb74a.html](https://www.tribdem.com/news/investigatory-information-at-issue-cambria-judge-orders-da-s-financial/article_92ddcf14-f5e9-11e8-8787-83e36ffcb74a.html) (detailing the ruling by Cambria County President Judge directing the county district attorney to release financial records concerning drug forfeiture funds handled by her office following allegations that forfeiture funds were spent on a laptop, restaurant meals, a country club membership, and flowers). New York City is currently facing a class action by the Bronx Defenders for failing to turn over documents requested under freedom of information laws about how it tracks assets seized by the New York Police Department. Although the Bronx Defenders requested forty documents, the NYPD turned over just two accounting summaries and a copy of the NYPD patrol guide. But those documents already showed the NYPD may be sitting on millions of dollars in forfeiture funds. See Matt Powers, *Judge Calls Out NYPD’s Deceptive Forfeiture Record Keeping*, INST. FOR JUST. (May 25, 2017), <https://ij.org/judge-calls-nypds-deceptive-forfeiture-record-keeping>; Memorandum of Law in Support of Petitioner’s Application for a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules, *Bronx Defs. v. N.Y.C. Police Dep’t*, 2017 NYLJ LEXIS 1412 (N.Y. Sup. Ct. May 19, 2017) (No. 156520/2016).

94. See Erik Grant Luna, *Fiction Trumps Innocence: The Bennis Court’s Constitutional House of Cards*, 49 STAN. L. REV. 409, 433 (1997); see also Stephen Labaton, *Seized Property in Crime Cases Causes Concern*, N.Y. TIMES (May 31, 1993), <https://www.nytimes.com/1993/05/31/us/seized-property-in-crime-cases-causes-concern.html> (quoting former Justice Department chief Michael Zeldin as saying that the Department “had a situation in which the desire to deposit money into the asset forfeiture fund became the reason for being of forfeiture, eclipsing in certain measure the desire to effect fair enforcement of the laws as a matter of pure law enforcement objectives”).

95. Note, *supra* note 24, at 2392 (quoting Shaila Dewan, *Police Use Department Wish List When Deciding Which Assets to Seize*, N.Y. TIMES (Nov. 9, 2014), <https://www.nytimes.com/2014/11/10/us/police-use-department-wish-list-when-deciding-which-assets-to-seize.html>). In addition, a 2010 survey of 800 police departments found that nearly 40% said that civil forfeiture proceeds were a “necessary budget supplement.” Emma Coleman, *Civil Asset Forfeiture Under New Scrutiny Amid Calls for Police Reform*, ROUTE FIFTY (July 14, 2020), <https://www.route-fifty.com/public-safety/2020/07/civil-asset-forfeiture-reform/166868> (citing Marian R. Williams et al., *Policing for Profit: The Abuse of Civil Forfeiture*, 2010 INST. FOR JUST.).

96. See *Civil Forfeiture Reforms on the State Level*, *supra* note 21.

minimum, remove its profit incentive, we can expect widespread abuses to persist. Unfortunately, Indiana has made matters worse by authorizing private attorneys to prosecute civil forfeiture cases and to be compensated by contingency fees.

## II. CONTINGENCY FEES

A contingency fee is a contractual means by which a client obtains legal services and is not obligated to pay the lawyer until a particular goal is achieved.<sup>97</sup> It is popularly marketed to the public under the banner of “no recovery, no fee.”<sup>98</sup> Typically, a lawyer agrees to accept a fixed percentage (often one-third) of the ultimate financial recovery in the case. If the case is not won, the client is not required to pay the attorney for work performed.<sup>99</sup> Lawyers generally accept a contingency fee in cases where money is claimed, most often in personal injury or workers’ compensation cases.<sup>100</sup> Contingency fees accomplish several important purposes: they expand access to courts to assert rights for those who cannot afford counsel, they provide incentive to a lawyer to seek the client’s success in meritorious claims, and they share the risk of loss based upon the lawyer’s assessment and ability to absorb loss when handling multiple cases on contingencies.<sup>101</sup>

Historically, contingency fees were considered unethical and illegal.<sup>102</sup> Both the English rule and the early American rule regarded contingent fee arrangements as “champertous and therefore improper.”<sup>103</sup> In 1908, the ABA adopted thirty-two Canons of Professional Ethics that did not ban contingent fees in criminal cases but instead advised that permissible contingency fees

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97. *Contingency Fee*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/contingency-fee> (last visited Feb. 9, 2021).

98. Black’s Law Dictionary defines a contingent fee to be “a fee stipulated to be paid to an attorney for his services in conducting a suit or other forensic proceeding only in case he wins it; it may be a percentage of the amount recovered.” *Contingent Fee*, BLACK’S LAW DICTIONARY (4th ed. 1968); see also *No Fee If No Recovery: What Does This Mean?*, LAW DICTIONARY, <https://thelawdictionary.org/article/no-fee-no-recovery-mean> (last visited Feb. 9, 2021) (“Because contingent fee arrangements mean that the attorney only gets paid when money is at stake that means that contingency fee arrangements are usually only practical when damages are being pursued, most often in personal injury or workers [sic] compensation cases. The actual contingency fee will vary from attorney to attorney, but generally it ranges between 25–40% of the settlement amount.”).

99. See *When You Need a Lawyer*, AM. BAR ASS’N (Mar. 18, 2013), [https://www.americanbar.org/groups/public\\_education/resources/law\\_issues\\_for\\_consumers/lawyerfees\\_contingent](https://www.americanbar.org/groups/public_education/resources/law_issues_for_consumers/lawyerfees_contingent).

100. *Id.*

101. See generally MODEL RULES OF PRO. CONDUCT r. 1.5(c)–(d) (AM. BAR ASS’N 1983).

102. See Lindsey N. Godfrey, Note, *Rethinking the Ethical Ban on Criminal Contingent Fees: A Commonsense Approach to Asset Forfeiture*, 79 TEX. L. REV. 1699, 1701–02 (2001) (detailing evolving arguments that contingent fees are both unethical and illegal, and noting that early cases focused on whether they were legally enforceable, while in later ones, objections were raised in habeas corpus petitions claiming ineffective legal counsel).

103. ABA Comm. on Ethics & Pro. Resp., Informal Op. 86-1521 (1986).

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should be examined under the supervision of a court to protect clients.<sup>104</sup> As the Canons grew in number<sup>105</sup> and were superseded in 1969 by the *Model Code of Professional Responsibility*, the ABA instructed that a contingency fee, when permitted by law, should be reasonable under all the circumstances of the case and always subject to the supervision of the Court.<sup>106</sup>

In 1965, the ABA Committee on Professional Ethics was asked to provide guidance on whether a criminal defense lawyer could ethically charge a contingency fee.<sup>107</sup> The Committee issued an informal opinion advising that the Canon's reasonableness standard applied to criminal cases if contingent fees were deemed lawful in criminal cases.<sup>108</sup> Since the ABA's Professional Ethics Committee does not pass on questions of law, it did not opine on whether a contingency fee in criminal cases was lawful. Instead, the Committee recommended that the lawyer consult a report on contingency fees issued previously by the American Bar Foundation.<sup>109</sup> On this question, the Foundation report stated:

The third area of practice in which the use of the contingent fee is generally considered to be prohibited is the prosecution and defense of criminal cases. However, there are so few cases, and these are predominantly old, that it is doubtful that there can be said to be any current law on the subject . . . In the absence of cases on the validity of contingent fees for defense attorneys, it is necessary to rely on the consensus among commentators that such a fee is void as against public policy.<sup>110</sup>

The ABA Foundation report specifically referenced a 1920 case in which the New Mexico Supreme Court refused to enforce a contingent fee agreement that provided a lawyer assisting a prosecuting attorney with a larger fee if the defendant was convicted. The court found this fee arrangement to be violative of public policy because "it tended to bring about [a] conviction regardless of the prosecutor's primary duty to see that justice was done."<sup>111</sup>

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104. CANONS OF PROFESSIONAL ETHICS Canon 13 (AM. BAR ASS'N 1908).

105. The canons grew to a total of forty-seven between 1908 and 1969.

106. Canon 13 stated: "Contingent fees, where sanctioned by law, should be under the supervision of the Court in order that clients may be protected from unjust charges." *Id.*

107. ABA Comm. on Ethics & Pro. Resp., Informal Op. A337 (1965). Specifically, the inquiring lawyer sought ethical guidance on whether he could charge a set fee if the criminal case was won, with no fee if the case was lost, or in the alternative whether the lawyer could charge a set retainer fee, with additional compensation if the defense was successful. *Id.*

108. *See id.*

109. ABA Comm. on Ethics & Pro. Resp., Informal Op. 832 (1965) (citing F. B. MACKINNON, CONTINGENT FEES FOR LEGAL SERVICES: A STUDY OF PROFESSIONAL ECONOMICS AND RESPONSIBILITIES 52 (1964)).

110. MACKINNON, *supra* note 109 (footnotes omitted).

111. *Id.* (citing *Baca v. Padilla*, 190 P. 730 (N.M. 1920)). The MacKinnon text also cites the Basic California Practice Handbook, which recommends that "[i]n criminal practice, it is unethical to have a fee contingent upon a specific result: acquittal, probation, fine, or minimum term of punishment . . . Fee setting in a criminal case should be on the basis of the time necessary to render proper service." *Id.* at 52 (citing Basic California Practice Handbook 388 (1959)).

In the *Model Code of Professional Responsibility*, first adopted in 1969, the ABA explicitly banned contingent fees when representing a defendant in a criminal case.<sup>112</sup> While the *Model Code*<sup>113</sup> recognized the importance of allowing contingency fees in certain types of civil cases to expand access to legal help,<sup>114</sup> it prohibited such fees in criminal matters. Disciplinary Rule 2-106 prohibited excessive attorney's fees in general and also expressly banned contingency-fee agreements when representing a defendant in a criminal case.<sup>115</sup> The disciplinary rule relied in part upon a Pennsylvania Supreme Court decision that noted that contingent fees in criminal cases posed a special concern requiring stricter limitations because of the "danger of corrupting justice."<sup>116</sup> Contingent fees are prohibited in criminal cases because they "may present the risk of giving the lawyer an interest that is in conflict either with the client's interests or with important public interests."<sup>117</sup> For similar reasons, prosecutors are required to disqualify themselves from any proceedings in which they have a financial interest in the subject matter in controversy.<sup>118</sup>

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112. MODEL CODE OF PRO. RESP. DR 2-106(C) (AM. BAR ASS'N 1969). DR 2-106(C) prohibited "a contingent fee for representing a defendant in a criminal case." Before the adoption of the Model Rules of Professional Conduct, ethical rules were defined by the 1908 Canons of Professional Ethics (last amended in 1963) and replaced by the 1969 Model Code of Professional Responsibility. *See also* Peter Lushing, *The Fall and Rise of the Criminal Contingent Fee*, 82 J. CRIM. L. & CRIMINOLOGY 498, 500 (1992).

113. The Model Code was organized into canons, ethical considerations, and disciplinary rules. The canons were a general directive to lawyers about the law of professional responsibility, while ethical considerations were more detailed in discussing factual situations arising under each canon. Ethical considerations were aspirational, while disciplinary rules were requirements that lawyers had to follow to avoid disciplinary action. *See Preface to MODEL RULES OF PRO. CONDUCT* (AM. BAR ASS'N 1983). Ethical Consideration 2-20 noted that contingent fee arrangements in civil cases have long been commonly accepted to enforce claims based on the fact that they are often the "only practical means by which one having a claim against another can economically afford, finance, and obtain the services of a competent lawyer to prosecute his claim," and the successful prosecution of the claim produces a *res* from which fees can be obtained. MODEL CODE OF PRO. RESP. EC 2-20 (AM. BAR ASS'N 1980).

114. Although ethical canons also expressed concern about a lawyer acquiring a proprietary interest in the cause of his client or otherwise becoming financially interested in the outcome of the client's litigation, they justified a contingent fee arrangement in many civil cases on the basis that it may be the "only means by which a layman can obtain the services of a lawyer of his choice." MODEL CODE OF PRO. RESP. EC 5-7 (AM. BAR ASS'N 1980).

115. *See* MODEL CODE OF PRO. RESP. DR 2-106(C) (AM. BAR ASS'N 1980); *see also* MODEL CODE OF PRO. RESP. DR 5-103(A)(2) (AM. BAR ASS'N 1980) (permitting a lawyer to contract with a client for a reasonable contingent fee in a civil case).

116. *Peyton v. Margiotti*, 156 A.2d 865, 867 (Pa. 1959) ("A bargain to conduct a criminal case . . . in consideration of a promise of a fee contingent on success is illegal . . ." (citing RESTATEMENT (FIRST) OF CONTRACTS § 542 (AM. L. INST. 1932))).

117. ABA Comm. on Ethics & Pro. Resp., Formal Op. 93-373 (1993) (holding that the Model Rules do not prohibit contingent fee agreements for representation of defendants in civil cases based on the amount of money saved a client, assuming it is reasonable). The opinion states that in criminal representation contingent fees may promote unscrupulous representation or discourage plea bargaining and, as a practical matter, present difficult issues of what constitutes a successful outcome. *Id.*

118. MODEL CODE OF PRO. RESP. EC 8-8 (AM. BAR ASS'N 1980); *see also* ABA Comm. on Ethics & Pro. Resp., C-64 n.10; Ian T. Ramsey & Vonda F. Kirby, *Contingency Fee Counsel in Forfeiture Proceedings*, GAMING

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Over time, contingent fees in some types of civil cases obtained acceptance as a means of expanding greater public access to legal help and to the courts,<sup>119</sup> as long as the lawyer did not acquire a proprietary interest in the client's cause of action.<sup>120</sup> Many jurisdictions still prohibit the use of contingency fees in situations that conflict with, or appear to conflict with, the integrity of public institutions. For example, state and local governments generally prohibit payment of contingency fees to lobbyists for their efforts to influence legislation.<sup>121</sup> This ban reflects serious concerns that lobbyists may overreach, or at least create unfavorable appearances of overreaching, that will taint the integrity of the legislative process. In fact, one state not only makes contingency payments to lobbyists illegal but also makes any contingency fees paid to a lobbyist forfeitable to the state.<sup>122</sup>

To protect against lawyer overreaching, contingency fees are governed by stricter ethical requirements than fees paid on an hourly or fixed basis. The ABA's *Model Rules* require that contingency fees be reasonable and not clearly excessive.<sup>123</sup> Lawyers must document contingent fee arrangements with clients.<sup>124</sup> Some states require enhanced notice of contingency fees to clients,

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L. MINEFIELD C-55 (Feb. 23, 2010) (citing John D. Bessler, *The Public Interest and the Unconstitutionality of Private Prosecutors*, 47 ARK. L. REV. 511, 516–21 (1994)).

119. See Godfrey, *supra* note 102, at 1702 (citing Lushing, *supra* note 112, at 503).

120. ABA Comm. on Ethics & Pro. Resp., Informal Op. 86-1521 n.1 (1986).

121. Most states prohibit contingency fees to lobbyists. However, a handful of states, including Louisiana, Missouri, New Hampshire, West Virginia, and Wyoming, do not. *Lobbying Contingency Fees in the U.S.A.*, ASS'N ACCREDITED PUB. POL'Y ADVOCs. TO EUR. UNION (Apr. 1, 2015), <http://www.aalep.eu/lobbying-contingency-fees-usa>; see also Robert Wechsler, *Contingency Fees and Lobbying and Contracting with Attorneys General*, CITY ETHICS (Dec. 22, 2014), <http://www.cityethics.org/content/contingency-fees-and-lobbying-and-contracting-attorneys-general> (quoting two state attorneys general as saying that “[f]arming out the police powers of the state to a private firm with a profit incentive is a very, very bad thing” and that the practice “seriously threatens the perception of integrity and professionalism of the office, as it raises the question of whether attorneys are taking up these cases because they are important public matters, or they are being driven more by potential for private financial gain”).

122. N.C. GEN. STAT. ANN. § 120C-300 provides as follows:

Contingency fees prohibited.

(a) No individual shall act as a lobbyist and receive payment for lobbying that is dependent upon the result or outcome of any legislative or executive action.

(b) This section shall not apply to an individual doing business with the State who is engaged in sales with respect to that business with the State whose regular remuneration agreement includes commissions based on those sales. For purposes of this subsection, the term “regular remuneration” means any money, thing of value, or economic benefit conferred on or received by the individual in return for services rendered or to be rendered by that individual or another.

(c) Any payment to a lobbyist in violation of this section is subject to forfeiture and shall be paid into the Civil Penalty and Forfeiture Fund.

N.C. GEN. STAT. ANN. § 120C-300 (West 2019).

123. See MODEL RULES OF PRO. CONDUCT r. 1.5(a) (AM. BAR ASS'N 2017); MODEL CODE OF PRO. RESP. DR 2-106A (AM. BAR ASS'N 1980). There is a continuing debate about the propriety or wisdom of contingent fees, with proponents arguing that they are needed to promote justice and access to courts while opponents charge that they result in unwarranted and unmeritorious litigation. See ABA Comm. on Ethics & Pro. Resp., Formal Op. 94-389 (1994).

124. See MODEL RULES OF PRO. CONDUCT r. 1.5(c) (AM. BAR ASS'N 2017).

impose greater specificity in contingency-contract provisions, place limits on the division of fees, and prohibit client waivers of rights.<sup>125</sup>

Model Rule 1.5 addresses contingency fees directly and prohibits lawyers from accepting contingency fees in domestic relations and criminal cases.<sup>126</sup> Rule 1.5(d) provides that:

- (d) A lawyer shall not enter into an arrangement for, charge, or collect:
  - (1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or
  - (2) a contingent fee for representing a defendant in a criminal case.<sup>127</sup>

All fifty states have adopted Model Rule 1.5(d)'s subject-matter prohibitions on contingency fees with only minor changes.<sup>128</sup>

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125. These variations are detailed in the ABA's table showing state rule provisions compared to the model rules. CPR Pol'y Implementation Comm., *Variations of the ABA Model Rules of Professional Conduct*, AM. BAR ASS'N (Dec. 11, 2018).

126. While the Model Rules prohibit contingency fees in both domestic relations and criminal cases, this Article addresses only the prohibition applicable to criminal cases. Notably, contingency fees in criminal cases have long been prohibited by courts. *See, e.g.*, *Baca v. Padilla*, 190 P. 730, 732 (N.M. 1920) ("To permit and sanction the appearance on behalf of the state of a private prosecutor, vitally interested personally in securing the conviction of the accused . . . in order that the private purse of the prosecutor may be fattened, is abhorrent to the sense of justice . . ."); *Price v. Caperton*, 62 Ky. (1 Duv.) 207, 208 (1864) (barring contingent fees for supporting prosecution, which the court considers a civic duty).

127. MODEL RULES OF PRO. CONDUCT r. 1.5(d) (AM. BAR ASS'N 2017).

128. To the extent that states have modified Model Rule 1.5(d)'s language, most changes relate to the domestic relations prohibition. In those instances, some states have changed terminology in the rule to match their own jurisdiction's language and usage. For example, Connecticut replaced the word "divorce" with "dissolution of marriage or civil union," Missouri added "dissolution of the marriage" after the word "divorce," and Montana replaced the word "alimony" with "maintenance." CONN. RULES OF PRO. CONDUCT r. 1.5(d)(1) (1998); MO. RULES OF PRO. CONDUCT r. 4-1.5(d)(1) (2020); MONT. RULES OF PRO. CONDUCT r. 1.5(d)(1) (2003). Some states added child custody to the domestic relations prohibition (IND. RULES OF PRO. CONDUCT r. 1.5(d)(1) (2021); MD. RULES OF PRO. CONDUCT r. 19-301.5(d) (2016)), while others clarified that the prohibition did not apply to post-judgment collection actions for support arrears (for example, KY. RULES OF PRO. CONDUCT r. SCR3.130(1.5)(d)(1) (2021) and IND. RULES OF PRO. CONDUCT r. 1.5(d) (2021)). Still others, such as Kentucky, expanded the phrase "alimony or support" to include "alimony, maintenance, support, or property settlement." KY. RULES OF PRO. CONDUCT r. SCR3.130(1.5)(d)(1) (2021). One state, New Hampshire, added to the domestic-relations prohibition efforts to obtain any specific nonfinancial relief. N.H. RULES OF PRO. CONDUCT r. 1.5(d)(1)(c). One notable exception includes the District of Columbia, which eliminated entirely the prohibition on contingency fees in domestic-relations matters without adopting a replacement provision. The seventh comment to DC Rule 1.5 states: "Contingent fees in domestic relations cases, while rarely justified, are not prohibited by Rule 1.5. Contingent fees in such cases are permitted in order that lawyers may provide representation to clients who might not otherwise be able to afford to contract for the payment of fees on a noncontingent basis." D.C. RULES OF PRO. CONDUCT r. 1.5 (2009). Another exception includes North Carolina, which eliminated all reference to the domestic-relations prohibition, replacing it with general language prohibiting "a contingent fee in a civil case in which such a fee is prohibited by law." *See* N.C. RULES OF PRO. CONDUCT r. 1.5 (2021). Maine added a third category of prohibition restricting contingency fees on "any fee to administer an estate in probate, the amount of which is based on a percentage of the value of the estate." *See* ME. RULES OF PRO. CONDUCT r. 1.5(d)(3) (2020).

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Notably, the *Model Rules* say little about this prohibition in criminal cases; the text of the rule simply prohibits a contingent fee for representing a defendant in a criminal case. The rule does not provide guidance in an explanatory comment nor does it define the types of matters that fall within the overall criminal case category.<sup>129</sup> Interestingly, the rule does not explicitly state that the ethical ban also applies to a prosecutor in a criminal case, presumably because it is self-evident that a criminal prosecutor cannot be paid on such a basis. Otherwise, it would certainly be very difficult to understand why ethical rules would prohibit contingency fees for a criminal defense lawyer but not for a criminal prosecutor.

The ethical prohibition on contingency fees in criminal cases reflects concerns that a defense lawyer may be unwilling to properly counsel a client to accept a favorable plea bargain or might fail to take steps at trial that would result in a conviction of a lesser offense because financial incentives from contingency fees would push the lawyer to seek an acquittal at trial.<sup>130</sup> This conflict, actual or perceived, helps to explain why all fifty states and the District of Columbia have adopted Model Rule 1.5(d)(2)'s prohibition on contingency fees.<sup>131</sup> Moreover, when criminal defense lawyers have occasionally provided

129. The Model Rules offer no guidance in the text of Rule 1.5(d) or in the comment to the rule about the prohibition on contingency fees in criminal cases.

130. Additionally, the ban reflects that there is no body of funds generated by a criminal case from which a contingent fee could be obtained. See Lester Brickman, *Contingent Fees Without Contingencies: Hamlet Without the Prince of Denmark?*, 37 UCLA L. REV. 29, 41 (1989) (“[L]egal services in criminal cases do not produce a *res* with which to pay the fee.”).

131. See CPR Pol’y Implementation Comm., *supra* note 125. Some states have added to the prohibition. For example, Wisconsin makes it unethical to use contingency fees in “any proceeding that could result in deprivation of liberty.” *Id.* Wisconsin Rule 1.5(d) provides:

- (d) A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee:
  - (1) in any action affecting the family, including but not limited to divorce, legal separation, annulment, determination of paternity, setting of support and maintenance, setting of custody and physical placement, property division, partition of marital property, termination of parental rights and adoption, provided that nothing herein shall prohibit a contingent fee for the collection of past due amounts of support or maintenance or property division.
  - (2) for representing a defendant in a criminal case or any proceeding that could result in deprivation of liberty.

WIS. RULES OF PRO. CONDUCT r. 1.5(d) (2020). North Carolina’s version of Rule 1.5(d)(2) provides that a lawyer may charge and collect a contingent fee for representation in a criminal or civil asset forfeiture proceeding if not otherwise prohibited by law. N.C. RULES OF PRO CONDUCT r. 1.5(d) (2021).

A lawyer shall not enter into an arrangement for, charge, or collect:

- (1) a contingent fee for representing a defendant in a criminal case; however, a lawyer may charge and collect a contingent fee for representation in a criminal or civil asset forfeiture proceeding if not otherwise prohibited by law; or
- (2) a contingent fee in a civil case in which such a fee is prohibited by law.

*Id.* In addition, forfeiture under North Carolina law is only permitted when the owner of the property in question has been convicted of a crime, which requires proof beyond a reasonable doubt. N.C. GEN. STAT. ANN. § 14-2.3 (West 2008). However, North Carolina is still subject to federal forfeiture laws, which only require the government to prove that it is “more likely than not” that the property has criminal associations. Finally, it is interesting that North Carolina has placed both civil and criminal forfeitures in the same category when applying this prohibition, reflecting the similarities between the two when applying the prohibition. It



representation on a fee contingent basis, their clients have sometimes later sought habeas relief, alleging ineffective assistance of counsel based upon a claimed conflict of interest.<sup>132</sup>

The *Restatement of the Law Governing Lawyers*<sup>133</sup> provides additional guidance on the prohibition in criminal cases by stating that a lawyer may contract with a client for a contingent fee that is reasonable, unless payment is contingent on the “success in *prosecuting* or defending a criminal proceeding.”<sup>134</sup> The *Restatement* concludes that a contingent fee for prosecuting a criminal case violates public policy because a prosecutor may be tempted to seek conviction more than justice, and in any event, the government does not need contingent fees to obtain legal representation or to transfer the risk of loss.<sup>135</sup> The *Restatement’s* position draws support from the *ABA Criminal Justice Standards*, which provide that a prosecutor should avoid conflicts of interest regarding official duties and not permit professional judgment or obligation to be affected by political, financial, business, property, or personal interests.<sup>136</sup> This is necessary because

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should also be noted that there is academic discussion about whether contingency-fee representation of *defendants* in civil forfeiture cases should be permitted in ethical rules to expand access to counsel, especially since there is no right to counsel in most civil forfeiture matters. This suggestion arguably finds support based upon an interpretation of the U.S. Supreme Court’s decision in *Caplin & Drysdale, Chartered v. United States*, in which the Court seemed to approve of contingency-fee arrangements when it held that attorneys’ fees owing to defense counsel are subject to forfeiture, and the Court justified the harsh impact of its holding by suggesting that some lawyers may be willing to provide representation on the basis that their fees will be paid upon acquittal (and concerns about plea bargaining against the client’s interest to preserve a fee would constitute ineffective assistance of counsel). 491 U.S. 617, 620 (1989).

132. See Godfrey, *supra* note 102, at 1701 n.16; see also *United States ex rel. Simon v. Murphy*, 349 F. Supp. 818, 823–24 (E.D. Pa. 1972) (finding a defense lawyer’s advice to his client—a woman accused of murdering her husband—that she not accept a plea bargain to a lesser homicide charge constituted an impermissible conflict of interest because the payment arrangement provided for payment of the lawyer’s fee out of the deceased husband’s life insurance proceeds). Pennsylvania had a “slayer rule” at that time that only permitted payment of insurance proceeds to an accused if she was acquitted. *Id.* at 820–21; see also *United States v. Magini*, 973 F.2d 261, 264–65 (4th Cir. 1992) (endorsing the petitioner’s argument that his attorney’s “private, pecuniary interest” in forfeitable assets led him to negotiate a higher sentence than he would have recommended if he had been willing to include a forfeiture in the deal); *State v. Labonville*, 492 A.2d 1376, 1379 (N.H. 1985) (“An attorney should not defend a criminal defendant pursuant to a contingent fee agreement because such an arrangement can create a conflict between the interests of the client and those of the attorney.”); *People v. Winkler*, 523 N.E. 2d 485, 487 (N.Y. 1988) (“The conflict between a client’s interest in effective assistance of counsel and an attorney’s financial inducements to satisfy the contingent fee qualifying terms creates an atmosphere for risky compromise of the client’s best interests on the gamble that the contingency might produce a bonus to the attorney rather than justice to the client.”).

133. The *Restatement*, published by the American Law Institute in 2000, addresses contingency fees in Section 35 of Chapter 3. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 35 (AM. L. INST. 2000).

134. *Id.* § 35(1)(a) (emphasis added). It also states in § 35(1)(b) that a contingency fee is prohibited in a divorce proceeding or a proceeding concerning custody of a child. *Id.* at § 35(1)(b).

135. *Id.* § 35 cmt. f(ii); see also *id.* at § 97.

136. AM. BAR ASS’N, CRIMINAL JUSTICE STANDARDS: PROSECUTION FUNCTION § 3-1.7(a), (f) (4th ed. 2017), [https://www.americanbar.org/groups/criminal\\_justice/standards/ProsecutionFunctionFourthEdition](https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition). The ABA Standards for Criminal Justice began in 1964 as a project of a Special Committee on Standards for the Administration of Criminal Justice. The standards governing the prosecution function were

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prosecutors possess a dual role; they are responsible for obtaining convictions of the guilty in criminal cases, but they also shoulder the responsibility to see that no innocent person is prosecuted, convicted, or punished.<sup>137</sup> This dual responsibility differs sharply from the obligation of a private advocate who owes a duty of loyalty to the client and to the protection of that client's interests above all.<sup>138</sup>

The *Model Rules of Professional Conduct* underscore the prosecutor's special responsibility to be a minister of justice and not simply an ordinary advocate.<sup>139</sup> This responsibility includes solemn "obligations to see that the defendant is accorded procedural justice . . . [and] that guilt is decided upon the basis of sufficient evidence."<sup>140</sup> For these reasons, a prosecutor is held to "a higher standard of behavior" than defense counsel.<sup>141</sup> Moreover, a prosecutor has an obligation to further the public interest. In return for these heightened responsibilities, a prosecutor is cloaked with absolute immunity in recognition of the public trust placed in this role that is essential to the proper functioning of the criminal justice system.<sup>142</sup> For these reasons, a prosecutor's role is "much nearer that of a judicial officer than that of partisan advocate."<sup>143</sup>

To meet this solemn responsibility, prosecutors are prohibited from representing the government in any matter in which they, their family, or their

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last revised and approved by the ABA House of Delegates in 1992. The criminal codes of many states have been influenced by the ABA standards.

137. See John D. Bessler, *The Public Interest and the Unconstitutionality of Private Prosecutors*, 47 ARK. L. REV. 511, 543 (1994).

138. See MODEL RULES OF PRO. CONDUCT r. 1.7 cmt. (AM. BAR ASS'N 2017) ("Loyalty and independent judgment are essential elements in the lawyer's relationship to a client.").

139. See *id.* at r. 3.8 cmt. (AM. BAR ASS'N 2017) ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate."); see, e.g., *Berger v. United States*, 295 U.S. 78, 88 (1935) (holding that an attorney for the state "is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all").

140. MODEL RULES OF PRO. CONDUCT r. 3.8 cmt (AM. BAR ASS'N 2017).

141. *United States v. Young*, 470 U.S. 1, 25 (1985) (Brennan, J., concurring in part and dissenting in part) (emphasis omitted).

142. See *Imbler v. Pachtman*, 424 U.S. 409, 427 (1976).

143. Bessler, *supra* note 137, at 544 (citing CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 13.10.1, at 759 (1986)); see also MODEL CODE OF PRO. RESP. EC 7-13 (AM. BAR ASS'N 1983) ("The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict. This special duty exists because: (1) the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of governmental powers, such as in the selection of cases to prosecute; (2) during trial the prosecutor is not only an advocate but he also may make decisions normally made by an individual client, and those affecting the public interest should be fair to all; and (3) in our system of criminal justice the accused is to be given the benefit of all reasonable doubts." (footnote omitted)); AM BAR ASS'N, *supra* note 136, § 3-1.2(b) ("The primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict."); AM. BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION § 3-1.2 cmt. (3d ed. 1993) ("[I]t is fundamental that the prosecutor's obligation is to protect the innocent as well as to convict the guilty, to guard the rights of the accused as well as to enforce the rights of the public."); see also *Donnelly v. DeChristoforo*, 416 U.S. 637, 648-49 (1974) (Douglas, J., dissenting) ("The function of the prosecutor under the Federal Constitution is not to tack as many skins of victims as possible to the wall. His function is to vindicate the right of people as expressed in the laws and give those accused of crime a fair trial.").

business associates have any interest.<sup>144</sup> Accordingly, a prosecutor may not participate in a case in which the prosecutor has a pecuniary interest in the outcome,<sup>145</sup> and a prosecutor may be disqualified for a personal interest or financial stake in the outcome of the criminal prosecution.<sup>146</sup> As Justice Brennan noted in *Young v. United States ex rel. Vuitton et Fils S.A.*,<sup>147</sup> a case involving claims of prosecutorial conflicts, an error is fundamental if it undermines confidence in the integrity of the criminal proceeding.<sup>148</sup> Dismissing a claim that there was no actual prejudice in that case, Justice Brennan underscored that such an argument “misses the point . . . [as] ‘justice must satisfy the appearance of justice,’ . . . and a prosecutor with conflicting loyalties presents the appearance of precisely the opposite.”<sup>149</sup>

#### A. *The Private Lawyer as Prosecutor*

On occasion, law-enforcement agencies hire private lawyers to litigate on the public’s behalf. State attorney-general offices sometimes engage a private law firm to temporarily expand their resources to handle a complex case, bring on special expertise, or obtain needed help during temporary periods of time.<sup>150</sup> In these instances, private counsel are often called “special assistants” and perform specified litigation tasks enumerated by contract. Special assistants are compensated on an hourly basis or for a flat amount that is set in relation to salaried members of the office. In some states, however, this traditional form of compensation has been replaced by contingency fees in which special assistants assume a personal financial stake in the outcome of the cases they handle on behalf of the public.<sup>151</sup>

There is serious question as to whether private lawyers are constitutionally permitted to prosecute criminal cases, regardless of the manner of payment. Some states prohibit the practice, while others permit it as long as a district attorney retains strict control over the prosecution.<sup>152</sup> In some jurisdictions, trial

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144. 18 U.S.C. § 208(a) (1988).

145. *United States v. Heldt*, 668 F.2d 1238, 1276 (D.C. Cir. 1981) (per curiam), cert. denied sub nom. *Hubbard v. United States*, 456 U.S. 926 (1982).

146. *State v. Marshall*, 586 A.2d 85, 178–79 (N.J. 1991) (holding that a court may disqualify a prosecutor for possessing a personal interest or financial stake in the outcome of a criminal prosecution).

147. *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 809–11 (1987) (noting appointment of an interested prosecutor is so “fundamental and pervasive that they require reversal without regard to the facts or circumstances of the particular case” (citing *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986))).

148. *Id.* at 810.

149. *Id.* at 811–12 (citing *Offutt v. United States*, 348 U.S. 11, 14 (1954)) (footnote omitted).

150. See David Edward Dahlquist, *Inherent Conflict: A Case Against the Use of Contingency Fees by Special Assistants in Quasi-Governmental Prosecutorial Roles*, 50 DEPAUL L. REV. 743, 745 (2000).

151. See *id.* at 746.

152. See Bessler, *supra* note 137, at 521 (noting a split of authority on the matter).

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courts possess discretion to determine whether private attorneys may assist a district attorney when prosecuting a criminal case.<sup>153</sup> Some scholars contend that the hiring of private prosecutors should be strictly prohibited in order to ensure the reliability of criminal convictions.<sup>154</sup> Additionally, part-time private prosecutors bring an increased risk of outside conflicts arising from their nongovernmental lawyering.<sup>155</sup>

These concerns are heightened when special assistants are compensated with contingency fees. Indeed, permitting a private lawyer serving as a special assistant to profit from a contingency fee has been called “as absurd as allowing the Attorney General himself to receive a payoff for each fraudulent business he successfully challenges or each criminal conviction obtained.”<sup>156</sup>

### B. Contingency Fees in Civil Forfeiture Cases

The ethical prohibition on contingency fees in criminal cases prompts the important question of whether contingency fees are ethical when used to compensate government prosecutors or special assistants in civil forfeiture proceedings. Civil forfeiture actions are quasi-criminal proceedings that are disfavored in the law.<sup>157</sup> While civil in form, civil forfeiture actions are by their nature criminal and in their presentation closely resemble criminal cases (without the accompanying safeguards).<sup>158</sup> In state drug forfeiture cases, for example, civil forfeiture actions are filed by prosecutors in the name of the state,

153. *See id.* (citing case law in which trial courts have exercised discretion when determining whether private counsel could assist a district attorney in prosecutions).

154. *See id.* at 569 (“[T]o ensure the reliability of criminal convictions, the use of private prosecutors must be strictly prohibited. Such prosecutors have strong incentives to please their private clients, and consequently, the potential for prosecutorial misconduct is particularly high.”).

155. *See, e.g.,* Ganger v. Peyton, 379 F.2d 709, 714–15 (4th Cir. 1967) (finding a due process violation where a part-time prosecutor was prosecuting a man for assaulting his wife while simultaneously representing the wife in a divorce proceeding); *see also* Wright v. United States, 732 F.2d 1048, 1055 (2d Cir. 1984), *cert. denied*, 469 U.S. 1106 (1985) (finding that the mere appearance of impropriety must be sufficient to establish a due process violation).

156. Dahlquist, *supra* note 150, at 780 (citing Daniel J. Capra et al., *The Tobacco Litigation and Attorneys’ Fees*, 67 *FORDHAM L. REV.* 2827, 2832 (1999) (comments of Professor Brickman)).

157. *See* *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 700 (1965) (stating that “a forfeiture proceeding is quasi-criminal in character” (citing *Boyd v. United States*, 116 U.S. 616, 634 (1886))). Its object, like a criminal proceeding, is to penalize for the commission of an offense against the law. *See also* *Commonwealth v. \$259.00 Cash U.S. Currency*, 860 A.2d 228, 232 (Pa. Commw. Ct. 2004) (stating that forfeiture is not favored under Pennsylvania law), *abrogated by* *Commonwealth v. \$34,440.00 U.S. Currency*, 174 A.3d 1031, 1046 (Pa. 2017).

158. *One 1958 Plymouth Sedan*, 380 U.S. at 697–98 (“In holding that the Fourth Amendment applied and barred such attempted seizure, Mr. Justice Bradley, for the Court stated: ‘We are also clearly of opinion that proceedings instituted for the purpose of declaring the forfeiture of a man’s property by reason of offenses committed by him, though they may be civil in form, are in their nature criminal . . . . The information, though technically a civil proceeding, is in substance and effect a criminal one. As, therefore, suits for penalties and forfeitures incurred by the commission of offenses against the law, are of this quasi criminal nature, we think that they are within the reason of criminal proceedings for all the purposes of the fourth amendment of the constitution.’” (quoting *Boyd v. United States*, 116 U.S. 616, 633–34 (1886))).

and the action arises after police have seized private property allegedly connected to a crime. The evidence in the case usually relies upon testimony from police witnesses based upon information often obtained from confidential informants. Evidence improperly seized by police is subject to exclusion upon a motion to suppress, and the taking of property in civil forfeiture falls within the protection of the Eighth Amendment's Excessive Fines Clause.<sup>159</sup>

These similarities have led some courts and professional guidance committees to apply contingency fee prohibitions in criminal matters to civil forfeiture and other related civil actions. In *People ex rel. Clancy v. Superior Court*, the California Supreme Court unanimously disqualified an attorney representing the City of Corona, California, on a contingent fee basis from prosecuting a nuisance action, noting that government attorneys pursuing eminent domain against property owners must be unaffected by personal interests.<sup>160</sup> The California Supreme Court's reasoning is particularly instructive:

Occupying a position analogous to a public prosecutor, [the government attorney] is "possessed . . . of important governmental powers that are pledged to the accomplishment of one objective only, that of impartial justice . . ." The duty of a government attorney in an eminent domain action, which has been characterized as "a sober inquiry into values, designed to strike a just balance between the economic interests of the public and those of the landowner, is of high order."<sup>161</sup>

The court emphasized that a prosecutor has a "duty of neutrality . . . [and w]hen a government attorney has a personal interest in the litigation, the neutrality so essential to the system is violated."<sup>162</sup> The court continued, "[N]eutrality [is not only] essential to a fair outcome for the litigants . . . it is essential to the proper function of the judicial process as a whole."<sup>163</sup> As a result, the court ruled that the attorney could not represent the city because of a personal financial interest in the outcome.<sup>164</sup> The public obligations inherent in pursuing eminent domain are similar to those involved in prosecuting

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159. *Austin v. United States*, 509 U.S. 602, 622 (1993) (holding that when civil forfeitures are at least partially punitive, they fall within the protection of the Excessive Fines Clause); *see also* *Timbs v. Indiana*, 139 S. Ct. 682 (2019) (holding that the Eighth Amendment's Excessive Fines Clause is incorporated through the Fourteenth Amendment's Due Process Clause and applicable to the states).

160. *People ex rel. Clancy v. Superior Court of Riverside Cnty.*, 705 P.2d 347, 352 (Cal. 1985).

161. *Id.* (alterations in original) (citation omitted) (quoting *City of Los Angeles v. Decker*, 558 P.2d 545, 551 (1977)).

162. *Id.* at 350–51.

163. *Id.* at 351.

164. *Id.* at 353; *see also* *Ramsey & Kirby*, *supra* note 118, at n.42; *cf.* *Berger v. United States*, 295 U.S. 78, 88 (1935). Citing *Clancy*, some courts have upheld contingency-fee arrangements where private counsel is simply assisting the government or is under close control and supervision of the government. *See, e.g.*, *City & Cnty. of San Francisco v. Philip Morris, Inc.*, 957 F. Supp 1130, 1135 (N.D. Cal. 1997); *Philip Morris Inc. v. Glendening*, 709 A.2d 1230, 1242–43 (Md. 1998).

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criminal and quasi-criminal cases: they demand that the prosecuting attorney be neutral.<sup>165</sup>

The California Supreme Court's holding underscores the fundamental principle that a prosecutor is not a representative of an ordinary party to a controversy. The prosecutor is a public official representing a sovereign entity whose obligation is to govern impartially and whose primary interest is to see that justice is done.<sup>166</sup> Our ethical rules have long recognized this special role. The *Model Code* instructed that a lawyer who is a full-time or part-time public officer should not engage in activities in which personal or professional interests may reasonably conflict with official duties.<sup>167</sup> The *Model Rules* underscore that a prosecutor possesses the "responsibility of a minister of justice and not simply that of an advocate."<sup>168</sup> This public responsibility requires that a prosecutor undertake procedural and remedial measures as a matter of obligation that, if not taken, may subject the prosecutor to professional discipline.<sup>169</sup>

Accordingly, lawyers holding public office must refrain from conduct that might reasonably lead the public to believe that they are using their public obligations to further their professional success or personal interests.<sup>170</sup> The decisions of a prosecutor must be made not solely as an advocate but must meet the public's overall interest in ensuring that decisions are fair to all.<sup>171</sup> Prosecutors must act evenhandedly and with impartiality<sup>172</sup> to assure fair outcomes and to maintain the public's confidence in the rule of law and in the justness and impartiality of our justice system.<sup>173</sup> For these reasons, prosecutors must disqualify themselves from any proceedings in which they have a financial interest in the subject matter of the controversy.<sup>174</sup>

This obligation of neutrality is undermined when there is a personal interest in the litigation regardless of whether the prosecutor is a full-time government lawyer or a private lawyer hired as a special assistant to stand in the shoes of the

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165. *Clancy*, 39 P.2d at 353.

166. *See Berger*, 295 U.S. at 88–89 (holding that a U.S. prosecutor overstepped the bounds of propriety and fairness required of representatives of a sovereignty).

167. MODEL CODE OF PRO. RESP. EC 8-8 (AM. BAR ASS'N 1980).

168. MODEL RULES OF PRO. CONDUCT r. 3.8 cmt. (AM. BAR ASS'N 1983) ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons.").

169. *Id.* ("Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.").

170. MODEL CODE OF PRO. RESP. EC 8-8 n.11 (AM. BAR ASS'N 1980).

171. MODEL CODE OF PRO. RESP. EC 7-13 (AM. BAR ASS'N 1980).

172. *People ex rel. Clancy v. Superior Ct. of Riverside Cnty.*, 705 P.2d 347, 350 (Cal. 1985).

173. *Id.*

174. *See* MODEL CODE OF PRO. RESP. EC 8-8 (AM. BAR ASS'N 1980); Ramsey & Kirby, *supra* note 118, at C-56 n.10 (citing MODEL CODE OF PRO. RESP. EC 8-8) (AM. BAR ASS'N 1980)); *see also* Lushing, *supra* note 112, at 515.

government prosecutor. When acting in this special capacity, private attorneys should be held to the same heightened ethical responsibilities of prosecutors, governed by an obligation to ensure that justice is pursued and the public interest is properly served.<sup>175</sup> As the California Supreme Court underscored in *Clancy*, “[t]he responsibility follows the job . . . [A lawyer] performing tasks on behalf of and in the name of the government to which greater standards of neutrality apply . . . must adhere to those standards.”<sup>176</sup>

When the government hires private lawyers to represent the state in traditional civil litigation,<sup>177</sup> lawyers are typically compensated on a flat fee or an hourly basis. By providing fixed compensation, governmental authorities limit conflict risks associated with contingency-fee compensation because attorney compensation is not dependent upon the outcome of the litigation. In contrast, contingency fees introduce a personal profit motive that threatens public obligations and distorts neutral decision-making.

It is axiomatic that we do not permit judges or criminal prosecutors to be compensated for their official duties by taking a financial percentage of awards generated in their cases. Unquestionably, personal financial rewards tied to outcomes have a corrupting influence upon the exercise of official behavior.<sup>178</sup> One of the most notorious examples in recent times of such corruption involved Pennsylvania’s “Kids for Cash” scandal in which two trial court judges personally profited from their own sentencing decisions to incarcerate juveniles.<sup>179</sup> Once these conflicts were exposed, the judges’ unethical conduct tainted every decision they had made on the bench and undermined community respect and confidence in the neutrality and fairness of the justice system.

To avoid both actual conflicts and the appearance of conflicts, contingency fees for all prosecutors—in criminal and quasi-criminal matters—should be prohibited as unethical and arguably unconstitutional.<sup>180</sup> The American Bar Association’s *Standards Relating to the Prosecution Function* has already

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175. *Berger v. United States*, 295 U.S. 78, 88 (1935); see also Ramsey & Kirby, *supra* note 118, at C-55 n.3 (citing Bessler, *supra* note 137, at 516–21).

176. *Clancy*, 705 P.2d at 351.

177. See Bessler, *supra* note 137, at 516–21.

178. See Dahlquist, *supra* note 150, at 781 n.268 (“[W]e do not allow judges or prosecutors to take a percentage of the award because we know how that will impact on their behavior.” (quoting Daniel J. Capra et al., *The Tobacco Litigation and Attorneys’ Fees*, 67 *FORDHAM L. REV.* 2827, 2827 (1999))).

179. See Jon Schuppe, *Pennsylvania Seeks to Close Books on “Kids for Cash” Scandal*, NBC NEWS (Aug. 12, 2015), <https://www.nbcnews.com/news/us-news/pennsylvania-seeks-close-books-kids-cash-scandal-n408666> (“One of the biggest corruption scandals to hit America’s juvenile justice system started to unfold in 2007, when parents in a central Pennsylvania county began to complain that their children had been tossed into for-profit youth centers without a lawyer to represent them. Over the past eight years, the kickback scheme, known as ‘kids for cash,’ has resulted in prison terms for two Luzerne County judges and two businessmen – and convictions of thousands of juveniles have been tossed out.”).

180. See *Clancy*, 705 P.2d at 352 (citing F.B. MACKINNON, *CONTINGENT FEES FOR LEGAL SERVICES* 52 (1964)).

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acknowledged the serious ethical considerations of such practices and has called for their elimination.<sup>181</sup> Though not binding, these standards establish best practices for prosecutors in the exercise of their professional responsibilities.<sup>182</sup> In short, a prosecutor's compensation that is contingent upon a successful outcome in a particular case directly conflicts with broader interests to represent the state and the public interest.<sup>183</sup>

### III. CONTINGENCY FEES IN CIVIL FORFEITURE PROSECUTION IN INDIANA

These important concerns have led many states to avoid using contingency fees when hiring private lawyers to litigate on behalf of the public.<sup>184</sup> The state of Indiana, however, is a defiant outlier. It explicitly authorizes contingency-fee compensation for private attorneys who are hired to prosecute civil forfeiture actions.<sup>185</sup> While low-income property owners in Indiana have no right to an

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181. AM. BAR ASS'N, *supra* note 136, at 3-2.2(d). For a history of the Criminal Justice Standards, see Martin Marcus, *The Making of the ABA Criminal Justice Standards: Forty Years of Excellence*, 23 AM. BAR ASS'N (2009) [https://www.americanbar.org/content/dam/aba/publications/criminal\\_justice\\_magazine/making\\_ofstandards\\_marcus.pdf](https://www.americanbar.org/content/dam/aba/publications/criminal_justice_magazine/making_ofstandards_marcus.pdf).

182. The Standards are written and intended to be entirely consistent with the ABA's *Model Rules of Professional Conduct* and are not intended to modify a prosecutor's obligations under applicable rules, statutes, or the Constitution. They are aspirational or described as "best practices" and are not intended to serve as the basis for the imposition of professional discipline, to create substantive or procedural rights for accused or convicted persons, to create a standard of care for civil liability, or to serve as a predicate for a motion to suppress evidence or dismiss a charge. See AM. BAR ASS'N, *supra* note 136, at 3-1.1(b).

183. See Dahlquist, *supra* note 150, at 781, n.269 (citing *EPA v. Pollution Control Bd.*, 372 N.E.2d 50 (Ill. 1977)). It is of note that, when applied to the defense of a civil forfeiture action, a Pennsylvania bar ethics committee concluded that the ethical prohibition on contingent fees in criminal cases would likely apply to the defense of a drug forfeiture petition. See Pa. Bar. Ass'n. Comm. on Legal Ethics & Pro. Resp., Op. 89-174 (1989) (opining that Pennsylvania's Rule of Professional Conduct 1.5(d)(2) would in all likelihood apply to drug forfeiture petitions because forfeiture petitions, though "civil in form," are "criminal in character" (citing *Commonwealth v. Landy* 362 A.2d 999, 1005 (Pa. Super. Ct. 1976))). The special nature of civil forfeiture that makes it quasi-criminal distinguishes it from traditional civil cases that may arise out of criminal activity. For example, a lawyer may represent a client on a contingency-fee basis in a tax appeal where criminal charges are threatened but not yet brought, see ABA Comm. on Ethics & Pro. Resp., Formal Op. 93-373 (1993) (permitting a reverse contingency-fee arrangement), or in a civil qui tam action where a recovery will provide funds for defending a related fraud prosecution, see Pa. Bar Ass'n. Comm. on Legal Ethics & Pro. Resp., Informal Op. 2004-17.

184. See Richard O. Faulk & John S. Gray, *Alchemy in the Courtroom? The Transmutation of Public Nuisance Litigation*, 2007 MICH. ST. L. REV. 941, 971-72 (2007) (raising instances of potential conflicts of interest when governments hire private lawyers on a contingency-fee basis); see also Ramsey & Kirby, *supra* note 118, at C-55 (addressing the impropriety of utilizing contingency-fee contracts to compensate special assistants in civil forfeiture cases). In civil forfeiture cases, the risk of success for the government is low, the property owner is often unrepresented, and the procedural safeguards associated with criminal cases are not present in these quasi-criminal cases. This Article takes no position on compensation methods for special assistants who are hired to litigate large, high-risk, traditional personal injury litigation against well-resourced entities, especially in matters in which the private bar traditionally has special expertise that prosecutors may lack.

185. IND. CODE § 34-24-1-8 (2018) (permitting civil forfeiture cases to be prosecuted by private lawyers on a contingency-fee basis); see also Nick Sibilla, *Indiana Senate Passes Constitutionally Dubious Scheme to Let Police Profit from Civil Forfeiture*, INST. FOR JUST. (Jan. 31, 2018), <https://ij.org/press-release/indiana-senate-passes-constitutionally-dubious-scheme-let-police-profit-civil-forfeiture> ("In Indiana, not only can the



attorney and frequently default in civil forfeiture proceedings without counsel, government-funded prosecutors are authorized to expand their ranks by hiring private attorneys who are then rewarded with a healthy percentage of all the property they can forfeit.

This practice conflicts sharply with the U.S. Justice Department's policy prohibiting government lawyers from having a personal stake in forfeiture proceedings. The Justice Department's *Code of Ethical Conduct* provides that a prosecutor's employment or salary shall not depend upon the level of seizures or forfeitures obtained.<sup>186</sup> Some commentators have long criticized Indiana's practice of permitting contingency fees for private prosecutors in civil forfeiture actions.<sup>187</sup> One scholar analogized Indiana's practice to bounty hunters: "The biggest scandal of all is Indiana's institutionalized bounty hunter system in which state DA's contract with private attorneys to handle all of the county's civil forfeiture cases for a contingent fee of a quarter or a third of all the property they forfeit."<sup>188</sup>

The reason for such strong language is clear. In civil forfeiture actions, prosecutors are duty bound to return property and not pursue forfeiture of seized property when forfeiture is not legally warranted or if justice so demands. A prosecutor who learns that there is no nexus between the seized property and an alleged crime (or that there is no crime at all), or that a property owner is an innocent owner under the law, is duty-bound to withdraw the action and return the seized property. But in delegating this obligation to a private attorney whose compensation is tied only to what can be successfully forfeited, the private prosecutor is unlikely to abandon their only path to a fee.

The danger of permitting contingency fees in civil forfeiture cases is hardly speculative. Indiana experienced this danger directly in the notorious Mark McKinney case. McKinney was a salaried deputy prosecutor for approximately ten years, during which he prosecuted many drug offenses.<sup>189</sup> At the very same time, he was a part-time private lawyer prosecuting civil forfeiture cases in which he obtained hefty contingency fees from the property he was able to

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government use civil forfeiture to confiscate private property without filing criminal charges, law enforcement agencies have routinely funneled millions in forfeiture funds to pad their budgets.").

186. U.S. DEPT OF JUST., ASSET FORFEITURE POLICY MANUAL (2019); *see also* NAT'L DIST. ATT'Y'S ASS'N, NATIONAL DISTRICT ATTORNEYS ASSOCIATION GUIDELINES FOR CIVIL ASSET FORFEITURE 4 (1992) ("Salaries and personal benefits of any person influencing or controlling the selection, investigation, or prosecution of forfeiture cases must be managed in such a way that employment or salary does not depend upon the level of seizures or forfeitures in which they participate."); CAL. HEALTH & SAFETY CODE § 11469 (West 2020) ("Potential revenue must not be allowed to jeopardize the effective investigation and prosecution of criminal offenses, officer safety, the integrity of ongoing investigations, or the due process rights of citizens.").

187. *See* DAVID B. SMITH, PROSECUTION AND DEFENSE OF FORFEITURE CASES 66 (2017) (ebook); *see also* Heather Gillers et al., *Cashing in on Crime*, INDIANAPOLIS STAR, Nov. 14, 2010, at A1.

188. SMITH, *supra* note 187 (emphasis omitted).

189. *In re McKinney*, 948 N.E.2d 1154, 1156 (Ind. 2011).

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forfeit. This dual (and conflicting) role was carried out in open view under Indiana state law, which permits contingency fees in civil forfeiture cases.<sup>190</sup> Moreover, McKinney engaged in these actions with the full knowledge and approval of the county's lead prosecutor, who personally approved McKinney to receive a 25% contingency fee from the forfeitures he obtained.

McKinney's engagement in self-dealing lasted over ten years. McKinney and a co-prosecutor opened a private bank account as signatories to what was called the "Asset Forfeiture Attorney Fee Account."<sup>191</sup> The 25% contingency fees they derived from forfeited funds were deposited into this account and then disbursed to them. McKinney routinely used confidential settlement agreements to transfer seized property and cash from criminal defendants to a local governmental subdivision by agreement of the parties and without court supervision. He then invoiced and collected from the subdivision his 25% contingency fee even though these were private settlements and did not constitute court judgments.<sup>192</sup>

At times, the criminal drug cases and civil forfeiture actions that McKinney prosecuted were open contemporaneously.<sup>193</sup> These practices persisted despite concerns voiced to the lead prosecutor by the State Board of Accounts' auditor.<sup>194</sup> Incredibly, the state attorney general issued an advisory opinion permitting such payments and finding no conflict of interest.<sup>195</sup> As McKinney's practices persisted, more public officials called for an investigation into his actions. The local mayor even filed a request with the Commission on Judicial Qualifications requesting a special prosecutor to investigate the matter, and a local circuit-court judge brought an action leading to the issuance of a local rule that required reimbursement of fees received in forfeiture cases.

Ultimately, the Indiana Supreme Court's disciplinary commission brought charges against McKinney alleging that he violated conflict-of-interest rules and engaged in conduct prejudicial to the administration of justice.<sup>196</sup> A hearing

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190. IND. CODE § 34-24-1-8 (subsequently amended).

191. *McKinney*, 948 N.E.2d at 1157.

192. *Id.*

193. *Id.*

194. *Id.* at 1158.

195. The court stated:

The auditor of the State Board of Accounts ("Board") raised the issue with [lead p]rosecutor Reed in 1998. The Board sought a[n] advisory opinion from the Indiana Attorney General on the issues of whether various attorneys within a prosecutor's office could be paid in excess of their state minimum salary from funds generated by the prosecution of forfeiture and other cases; and if so, whether Indiana Code § 36-2-5-14 prohibited such compensation in excess of \$5,000. The Attorney General's advisory opinion, dated November 18, 1998, said that such payments could be made and that the statutory cap applied only to full-time prosecuting attorneys but not to others, including DPAs [deputy prosecuting attorneys]. The opinion did not address any conflict of interest issues.

*Id.*

196. *Id.* at 1158. The Commission brought charges against McKinney alleging violations of several Indiana professional conduct rules, including Rule 1.7(b) (representing a client—here the State—when his

officer concluded that McKinney acted to protect his private interest over his public duties by personally profiting from forfeiture property in open criminal cases in which he was involved. The hearing officer found that McKinney steadfastly chose his private financial interests over the public's interest even when confronted with serious objections expressed by leading public officials.<sup>197</sup> On appeal and based upon stipulated facts, the Indiana Supreme Court determined that McKinney's misconduct was serious and warranted a suspension from the practice of law.<sup>198</sup>

The McKinney case was both disturbing and revealing. It exposed the unethical, self-dealing actions of one prosecutor but, more importantly, it revealed a prosecutorial culture that subjugated public obligations to the pursuit of profit. McKinney's actions were not the singular actions of one prosecutor gone astray. The lead prosecutor set up and approved the procedure that permitted McKinney to retain 25% of civil forfeiture judgments at the same time that he was prosecuting criminal drug cases.<sup>199</sup> Neither McKinney nor his fellow prosecutors abandoned this practice even when openly challenged by public officials. As the Indiana Supreme Court stated, "At no time did [McKinney take] . . . a critical look at the system . . . [He] essentially turned a blind eye to these now-conceded ethical violations for well over a decade."<sup>200</sup>

McKinney's proffered defense to disciplinary charges was itself revealing. McKinney argued that the asset-forfeiture program was created by the lead prosecutor before he joined the office, and he was simply relying on office policy with his supervisors' full knowledge and approval. McKinney cited the approval obtained from a state board of accounts, a circuit judge, and the state prosecutors' council—which all found nothing unethical in this conduct—as well as a special prosecutor's review that cleared him of criminal wrongdoing.<sup>201</sup>

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representation may have been materially limited by his own self-interest), 1.7(a)(2) (representing a client where there is a concurrent conflict of interest), 1.8(1) (representing a client as a private attorney in a matter where he has official prosecutorial authority or responsibilities), and 8.4(d) (engaging in conduct prejudicial to the administration of justice). *Id.*

197. *Id.* at 1159.

198. *Id.* at 1161 (holding that McKinney "violated the Indiana Professional Conduct Rules by representing the State when the representation could have been materially limited by his own self-interest in receiving compensation as a private attorney from property forfeited in civil forfeiture actions and under [Confidential Settlement Agreements]").

199. Although the stipulated facts state that lead prosecutor Reed set up the contingency-fee procedure for judgments from which McKinney benefited, Reed claimed that he did not know about the existence of confidential settlement accounts until after he left office. *See id.* at 1157 n.2.

200. *Id.* at 1159.

201. *See* Jennifer Nelson, *Prosecutor Files Answer to Disciplinary Charges*, IND. LAW. (Jan. 1, 2010), <https://www.theindianalawyer.com/articles/22060-prosecutor-files-answer-to-disciplinary-charges>.

The verified complaint filed by the Indiana Supreme Court's Disciplinary Commission in May 2009 claims McKinney violated four of Indiana's Rules of Professional Conduct – 1.7(b), 1.7(a)(2), 1.8(j), and 8.4(d). The allegations state that his profiting in drug forfeiture cases – he was

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McKinney's defense was a serious indictment of an entire system that amply illustrated the danger of permitting prosecutors to pursue civil forfeiture cases on contingency fees.

The Indiana Supreme Court suspended McKinney from the practice of law for 120 days, and a circuit judge later ordered him to repay \$168,092 in attorneys' fees he obtained in drug-related civil forfeiture cases.<sup>202</sup> In so doing, the Indiana Supreme Court stated that the people of Indiana were entitled to McKinney's "undivided loyalty."<sup>203</sup> McKinney's pursuit of personal gain compromised the exercise of his prosecutorial discretion and diminished public confidence in the neutrality and integrity of the justice system.<sup>204</sup> The McKinney case amply demonstrates why contingency-fee lawyering in civil forfeiture is not compatible with prosecutorial duties.

The McKinney case does not stand alone. In Georgia, state law permitted a district attorney to appoint special assistants in certain legal matters.<sup>205</sup> Pursuant to this authority, a lead prosecutor appointed two private Georgia lawyers as special assistants to pursue RICO claims<sup>206</sup> against eight convenience stores engaged in illegal gaming practices.<sup>207</sup> The contract with the lawyers provided that they would receive fees of at least one-third of the gross amount recovered by them on behalf of the state by either settlement or suit, and in the event of an appeal, 40% of the gross amount of any recovery.<sup>208</sup> The police seized gaming machines from these convenience stores, and Georgia authorities

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paid 25 percent of the money forfeited by or seized from drug defendants per fee agreements – impeded the state's criminal cases that he was involved in prosecuting.

Before becoming prosecutor in January 2007, McKinney was a deputy prosecutor beginning in 1995 and worked with the now-disassembled Muncie-Delaware Drug Task Force. He was personally involved in drug investigations of many of the resulting criminal cases. From 2000 to 2007, he also profited through compensation based on the value of contracts with defendants and attorney fees for his private practice work of suing for the forfeitures of criminal defendants' property, according to the complaint . . . . The State Board of Accounts, Delaware Circuit Judge Richard Dailey, and the Indiana Prosecuting Attorney's Council also found nothing to suggest there was an ethical problem, according to McKinney's response.

*Id.*

202. Professor Joel Schumm of the Indiana University Robert H. McKinney School of Law expressed concern that McKinney's suspension was not a warning to other prosecutors because, while his case was extreme, his punishment was fairly light. See Matt Clarke, *Indiana Prosecutor Disciplined for Conflict of Interest*, PRISON LEGAL NEWS, (Apr. 15, 2012), <https://www.prisonlegalnews.org/news/2012/apr/15/indiana-prosecutor-disciplined-for-conflict-of-interest>.

203. *McKinney*, 948 N.E.2d at 1160 (quoting *In re Ryan*, 824 N.E.2d 687, 689 (Ind. 2005)).

204. *Id.* at 1161 ("Respondent's misconduct created an environment in which, at the very least, the public trust in his ability to faithfully and independently represent the interests of the State was compromised."); see also *Indiana Prosecutors Under Fire for Handling of Forfeiture Funds*, CRIME REP. (June 17, 2011), <https://thecrimereport.org/2011/06/17/2011-06-pros-forfe> ("Delaware County Prosecutor Mark McKinney was suspended from practicing law for 120 days for professional misconduct in his work on forfeiture cases as a deputy prosecutor from 1995 to 2006.")

205. GA. CODE ANN. § 15-18-20 (West 2019).

206. GA. CODE ANN. §§ 16-14-1 to -14-12 (West 2015).

207. *Greater Ga. Amusements, LLC v. State*, 728 S.E.2d 744, 745 (Ga. Ct. App. 2012).

208. *Id.*

filed for forfeiture against the in rem defendants, including the gaming machines. On appeal to the Court of Appeals of Georgia, the property owners challenged the legality of the contingency-fee contract on the basis that it violated Georgia public policy.<sup>209</sup>

Although this presented a question of first impression in Georgia, the court of appeals found that the Supreme Court of Georgia had previously disapproved of contingency-fee arrangements for public employees who were responsible for acting in the public interest.<sup>210</sup> In that prior case, the Supreme Court of Georgia held that contingency compensation paid to private entities for assisting local tax assessors by locating and appraising unreturned properties was void against public policy.<sup>211</sup> There, the court concluded that “[f]airness and impartiality are threatened where a private organization has a financial stake in the amount of tax collected as a result of the assessment it recommends.”<sup>212</sup>

Following this precedent, the Court of Appeals of Georgia reasoned that similar public policy concerns applied to district attorneys who are entrusted with an obligation to seek justice. The Court of Appeals quoted a Supreme Court of Georgia decision that opined on this obligation, stating:

In our criminal justice system, the district attorney represents the people of the state in prosecuting individuals who have been charged with violating our state’s criminal laws. The responsibility of a public prosecutor differs from that of the usual advocate; *his duty is to seek justice, not merely to convict*. This special duty exists because the prosecutor represents the sovereign and should exercise restraint in the discretionary exercise of governmental powers. Therefore, the district attorney is *more than an advocate* for one party and has *additional professional responsibilities as a public prosecutor to make decisions in the public’s interest*.<sup>213</sup>

As a result, the Court of Appeals struck down the district attorney’s contingency-fee arrangement, reasoning that it “guarantee[d] at least the appearance of a conflict of interest between his public duty to seek justice and

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209. *Id.* In this case, the appellant also challenged the district attorney’s authority to hire special assistants in this matter, but that claim was rejected by the Court of Appeals of Georgia; the two lawyers were hired only for the specific purpose of this case and as such, the limited nature of their employment comported with state law. *Id.* at 746.

210. *Id.* (citing *Sears, Roebuck & Co. v. Parsons*, 401 S.E.2d 4, 5 (Ga. 1991) (holding that contingency compensation for private entities hired to assist board of tax assessors by locating and appraising unreturned properties was void against public policy)).

211. *Id.*

212. *Id.*

213. *Id.* at 747 (quoting *State v. Wooten*, 543 S.E.2d 721, 723 (Ga. 2001)); *Frazier v. State*, 362 S.E.2d 351, 357 (Ga. 1987). Notably, the *Frazier* case cited ABA Canon 7 for the principle that a government lawyer “does not have the financial interest in the success of departmental representation that is inherent in private practice” and therefore is required “to seek just results rather than the result desired by a client.” 362 S.E.2d at 357.

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his private right to obtain compensation for his services.”<sup>214</sup> “Such an arrangement is all the more repugnant,” the Court stated, “in the context of Georgia RICO forfeiture actions, which can be brought only by the State and are ‘disfavored’ under Georgia law.”<sup>215</sup> By making attorneys’ fees contingent upon the outcome of the forfeiture case, the Court held that the private attorney’s financial interest in being compensated for his services conflicted with the prosecutor’s sworn public duty to seek justice.<sup>216</sup> Soon after this case, the Georgia legislature banned the practice of compensating special assistants with contingency fees derived from forfeiture proceeds.<sup>217</sup>

The payment of a contingency fee to a special assistant for official duties has been characterized as a betrayal of impartiality and of a system designed to protect the public,<sup>218</sup> rendering the assistant “incapable of performing his duty as an impartial state officer.”<sup>219</sup> The public has a right to question how a special assistant can act neutrally and impartially in a civil forfeiture case when compensation depends entirely on the amount of property that can be successfully forfeited. Even if a special assistant acts with absolute integrity, this conflict creates an appearance of impropriety that is unavoidable. Some may contend that close oversight by a lead prosecutor will adequately protect the public’s interest. However, as the *McKinney* case amply demonstrates, there is little reason for confidence in assurances of official oversight, and in any event, oversight does nothing to eliminate the appearance of impropriety.

Rather than eliminate contingency fees in forfeiture actions, as Georgia did, Indiana responded meekly to the abuses exposed in the *McKinney* case. The

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214. *Greater Ga. Amusements, LLC*, 728 S.E.2d at 747.

215. *Id.* (citing *Patel v. State*, 713 S.E.2d 381, 384 (Ga. 2011)); *Pabey v. State*, 585 S.E.2d 200, 201 (Ga. Ct. App. 2003). In a footnote, the court of appeals also noted that recently enacted legislation applicable to contracts entered into on or after July 1, 2011 prohibited contingency-fee compensation in forfeiture actions under this title. *See Greater Ga. Amusements, LLC*, 728 S.E.2d at 747 n.2 (referencing GA. CODE ANN. § 16-1-12 (2011)); *see also Sears, Roebuck & Co.*, 401 S.E.2d at 5 (holding that independent contractors hired by a board of tax assessors may not be paid a percentage of the taxes collected because “[f]airness and impartiality are threatened where a private organization has a financial stake in the amount of tax collected as a result of the assessment it recommends”).

216. *Greater Ga. Amusements, LLC*, 728 S.E.2d at 747.

217. GA. CODE ANN. § 16-1-12 (2011) (“Restrictions on contingency fee compensation of attorney appointed to represent state in forfeiture action[;] (a) In any forfeiture action brought pursuant to this title, an attorney appointed by the Attorney General or district attorney as a special assistant attorney general, special assistant district attorney, or other attorney appointed to represent this state in such forfeiture action shall not be compensated on a contingent basis by a percentage of assets which arise or are realized from such forfeiture action. Such attorneys shall also not be compensated on a contingent basis by an hourly, fixed fee, or other arrangement which is contingent on a successful prosecution of such forfeiture action.”); *see also* H.B. 103, 155th Gen. Assemb., Reg. Sess. (Ga. 2019). At the time of this publication, the bill sits in the judiciary committee. Greg Land, *Legislative Package Takes Another Stab at Rewriting State’s Civil Forfeiture Laws*, DAILY REP. (Feb. 19, 2019), <https://www.law.com/dailyreportonline/2019/02/19/legislative-package-takes-another-stab-at-rewriting-states-civil-forfeiture-laws> (detailing a Georgia lawmaker’s efforts to chip away at state forfeiture laws).

218. *See* Dahlquist, *supra* note 150, at 781 (citing Daniel J. Capra et al., *The Tobacco Litigation and Attorneys’ Fees*, 67 FORDHAM L. REV. 2827, 2832 (1999) (comments of Professor Brickman)).

219. *Id.* at 781.

Indiana legislature merely prohibited any attorney paid with contingency fees from serving as a deputy prosecuting attorney,<sup>220</sup> and it required future contingency fees to be in writing and approved by the state attorney general.<sup>221</sup> As a result, Indiana prosecutors continue to hire private lawyers to prosecute civil forfeiture actions in the name of the state while, at the same time, those private attorneys draw handsome contingency fees from their court winnings. The pursuit of profit remains the name of the game. It is no wonder that a Pennsylvania appellate court once cautioned that civil forfeiture, without proper protections, amounts to little more than “state-sanctioned theft.”<sup>222</sup>

With Indiana’s continued approval of contingency fees to pay private lawyers hired to prosecute civil forfeiture cases, this Article now examines court data from civil forfeiture cases prosecuted by a well-known Indiana private attorney paid with contingency fees and compares that data to cases handled by government prosecutors.

#### *A. Private Lawyer Contingency Fees and Court Data Findings*

Using Indiana’s statewide Odyssey case management system,<sup>223</sup> we first reviewed all civil forfeiture cases filed in calendar year 2018 in Marion County, Indiana. This revealed a total of seventy-two cases. We selected Marion County because it is the state’s most populous county and because the prosecutor’s office in that county litigated their own civil forfeiture cases during 2018. Therefore, there were no contingency fees involved. By selecting Marion County, we hoped to make general observations about civil forfeiture litigation conducted by full-time government prosecutors as well as to establish a “norm” against which we might compare civil forfeiture cases handled by private attorneys on a contingency-fee basis for other Indiana counties. We selected calendar year 2018 because we wanted to review a full year of civil forfeiture cases in which most of the filed cases had already concluded so that our study could also look at case outcomes.

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220. IND. CODE § 34-24-1-8(c)–(d) (2018). In addition, the amended statute required that the compensation agreement be in writing and approved by the attorney general.

221. IND. CODE § 34-24-1-8(b).

222. *See* Commonwealth v. Younge, 667 A.2d 739, 747 (Pa. Super. Ct. 1995). Given the quasi-criminal nature of the forfeiture proceeding, Pennsylvania courts have stated that notice and opportunity to be heard as provided for in the Forfeiture Act guard against those proceedings from “amount[ing] to little more than state-sanctioned theft.” *Id.*; *see also* Commonwealth v. Mosley, 702 A.2d 857 (Pa. 1997); Commonwealth v. \$1155.00 Cash, 909 A.2d 12 (Pa. Commw. Ct. 2006); Commonwealth v. All That Certain Lot or Parcel of Land Located at 605 Univ. Drive, 61 A.3d 1048, 1054 (Pa. Commw. Ct. 2012), *rev’d sub nom.* Commonwealth v. All That Certain Lot or Parcel of Land Located at 605 Univ. Drive, 104 A.3d 411 (Pa. 2014).

223. *Case Search*, MYCASE.IN.GOV, <https://public.courts.in.gov/mycase/#/vw/Search> (last visited Feb. 10, 2021).

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For comparative purposes, we selected all Indiana civil forfeiture cases filed in the same calendar year in which private attorney J. Gregory Garrison appeared as counsel of record. Our study revealed a total of eighty-seven cases filed in 2018 by Garrison in multiple Indiana counties other than Marion County.<sup>224</sup> We selected attorney Garrison's cases because he has handled civil forfeiture cases in Indiana on a contingency-fee basis for many years. We first learned of Garrison's involvement from a 2010 *Indianapolis Star* article that reported Garrison was a "high-profile member of the legal community" who had taken in around \$777,000 from his Indiana forfeiture work during 2009.<sup>225</sup>

The two data sets we obtained enabled us to compare a full year of forfeiture cases and to discern the prevalence of public, private, or pro se defense counsel; the property types and cash amounts seized; the outcomes of the cases; the extent to which property was returned to defendants; and the distribution of forfeited property to law enforcement and other public funds. Since we have data sets from only one calendar year, we want to be careful not to overstate our observations and conclusions. Certainly, more empirical research is needed. Still, this limited data analysis suggests troubling concerns about civil forfeiture generally and, most significantly, about those forfeiture cases handled by private counsel on a contingency-fee basis.

To assist us in this review, we obtained a copy of the contract between Garrison Law Firm, LLP and the Morgan County Prosecutor's Office<sup>226</sup> that gave us additional information on private counsel's scope of work and responsibilities in asset forfeiture cases.<sup>227</sup> In all forfeiture actions, Garrison agreed to provide the full range of legal services—including drafting and filing

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224. According to court data in the Odyssey case management system, Garrison did not handle any civil forfeiture cases filed in Marion County in 2018. *Id.* The *Indianapolis Star* previously reported that Garrison had estimated that he received \$125,000 from his forfeiture and racketeering work in Marion County in 2009. Gillers et al., *supra* note 187. At some later time, Garrison ceased handling forfeiture cases for Marion County while continuing to do so for other Indiana counties. In 2018, all of Marion County's forfeiture cases, according to the statewide database, were handled by government prosecutors from the county prosecutor's office. *Case Search*, *supra* note 223. In response to formal requests for records, we obtained contracts between Morgan, Rush, Wabash, Hancock, Fayette, and Shelby counties and the Garrison Law Firm. These contracts are essentially identical, and they include a provision requiring that the private prosecutor hold "no conflict of interest (as that term is defined in the *Indiana Rules of Professional Conduct*) that will preclude Counsel from providing the Legal Services." *E.g.*, Contract between Garrison Law Firm, LLC and the Morgan Cnty. Prosecuting Attorney 2 (June 26, 2007) (on file with author). The contracts also direct Garrison and his associates to immediately inform the prosecutor's office if a conflict of interest exists in handling a forfeiture action. *Id.* As such, these contracts recognize the potential emergence of conflicts of interest by outside part-time attorneys on a case-by-case basis but do not address the systemic concern that contingency fees in the prosecution of civil-forfeiture cases are unethical per se.

225. See Gillers et al., *supra* note 187.

226. Morgan County is one of thirteen Indiana counties in which attorney Garrison litigated civil forfeiture cases filed in calendar year 2018. *Case Search*, *supra* note 223.

227. The contract between the Morgan County Prosecutor's Office and Garrison Law Firm, LLP was obtained through a request for records, filed pursuant to the Indiana Access to Public Records Act § 5-14-3. We sent this request to the Morgan County Records Department and then forwarded it to the Morgan County Prosecutor's Office. The contract is on file with the author. Thereafter, we received contracts from Rush, Wabash, Hancock, Fayette, Shelby, and Grant counties, and these contracts are also on file with the author.



post-seizure probable cause affidavits, complaints, subsequent pleadings, and settlements, as well as managing depositions, pretrial conferences, hearings, and trials. According to the contract, the prosecutor's office reviews forfeiture recommendations and other case records from law-enforcement agents and then forwards those recommendations directly to Garrison for handling.<sup>228</sup>

The contract gives Garrison discretion to settle cases, share seized assets with property owners, or proceed to trial without consulting the prosecutor's office. As compensation for his contractual legal services, Garrison is entitled to thirty percent of the first \$10,000 of proceeds or money obtained through settlement or judgment; twenty percent of proceeds or money obtained through a settlement or judgment that falls between \$10,000 and \$100,000; and fifteen percent of proceeds or money obtained through a settlement or judgment that is over \$100,000.<sup>229</sup> The contract does not provide for a fixed fee or an hourly rate of compensation. Instead, Garrison's compensation is calculated based entirely upon an agreed-upon percentage of the forfeiture proceeds that Garrison is able to obtain.<sup>230</sup>

To begin this analysis, we extracted 2018 civil forfeiture data from the Indiana Odyssey case management system for Marion County and for cases handled by Garrison. We noted that the number of civil forfeiture cases handled by Marion County's government prosecutors was roughly equivalent to the number of cases that Garrison handled in other Indiana counties.<sup>231</sup> However, while the number of seizures was comparable, the amount of cash seized by law enforcement was vastly different.

#### Cash Seized by Law Enforcement in 2018

	<b>Total Amount of Cash Seized</b>	<b>Average Amount of Cash Seized</b>	<b>Median Amount of Cash Seized</b>	<b>Percentage of Seizures \$1,000 or Less</b>
Marion County	\$738,295.26	\$10,254.10	\$2,667.00	28.17%
Garrison's Cases	\$292,277.24	\$3,699.71	\$927.00	53.01%

228. The contract reserves the right of the prosecutor's office to not refer individual cases, and it also reserves the right of Garrison and his associates to decline representation in individual cases. Contract between Garrison Law Firm, LLC and the Morgan Cnty. Prosecuting Attorney, *supra* note 224, at 3.

229. The contract also entitles Garrison to thirty percent of all proceeds or money obtained through the prosecution of corrupt business-influence violations. Under the contract, contingency fees cover all expenses incurred during the fulfillment of legal services. Contract Between Garrison Law Firm, LLC and the Morgan Cty. Prosecuting Attorney, *supra* note 224, at 3.

230. *See id.*

231. There were seventy-two Marion County forfeiture cases and eighty-seven Garrison forfeiture cases across multiple Indiana counties. Some of the cases involved multiple seizures and multiple defendants. *Case Search*, *supra* note 223.

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There may be many explanations for the large difference in total amount of cash seized. Marion County is the most populous county in Indiana and home to the state's capital city, Indianapolis, while Garrison's cases involved seizures across thirteen smaller counties. Motorists in Indiana's largest county with robust economic activity may, for legitimate reasons, be travelling with more cash in their possession. What is significant, however, is that the median value of seizures in Garrison's cases was less than \$1,000. As the median value of seized cash decreases, and especially when it falls below \$1,000, it can have a profound impact upon the economic feasibility to hire a lawyer to defend against the loss of property. Put simply, it will cost more to hire an attorney to defend against civil forfeiture than the amount of seized cash. As a result, motorists in this situation often lack counsel and face a substantial disadvantage in trying to protect their property in a complex legal system. Understandably, property owners give up even though they are not charged with a crime, did nothing wrong, and have unasserted statutory and constitutional defenses to forfeiture available to them.<sup>232</sup>

This may also help to explain, in part, a huge disparity in the default rate between civil forfeiture cases in Marion County and those cases handled by Garrison, along with a disparity in the percentage of cases in which a defendant appears pro se in the forfeiture action.

#### Default Rate and Percentage of Cases with *Pro Se* Defendants

	Default Rate	Percentage of Cases with <i>Pro Se</i> Defendants
Marion County	21.25%	44.44%
Garrison's Cases	64.84%	85.06%

One of the most troubling aspects of civil forfeiture has long been its high default rates. In such cases, the taking of private property is not tested in the courts. Property owners simply walk away from their property. In some cases, they may feel that it is not in their best interests to contest because they may not want to invite criminal charges when none have been brought, or there may be criminal charges pending and they do not want to claim ownership over cash that might be ill-gotten. However, too frequently, the reason is not strategic at

232. For these reasons, some jurisdictions impose a minimum cash threshold under which forfeiture is not permitted or require a criminal conviction if the amount sought to forfeit is below \$1,000. *See, e.g.*, Civil Asset Forfeiture Amendment Act of 2014, § 108(d)(1)(C), 62 D.C. Reg. 1920, 1930 (Feb. 13, 2015) ("There shall be a rebuttable presumption that currency totaling \$1000 or less was not used or intended to be used in furtherance of a forfeitable offense, are not the proceeds of a forfeitable offense, and therefore are not subject to forfeiture . . ."); S. 4970, 218th Leg., Reg. Sess. (N.J. 2018) (requiring police departments to make quarterly reports on forfeiture activities).

all. It is pragmatic. It costs too much to hire a lawyer in relation to the value of the seized property, and lacking counsel, property owners are intimidated and overwhelmed by a complex legal system in which the full resources of the state are against them. For those unable to afford a lawyer, there is no right to counsel and many are unable to miss work or lose wages in order to attend multiple court hearings. Without legal help, property owners are unaware of statutory and constitutional defenses available to protect their property.

High default rates may also signal serious deficiencies with notice to property owners, service of legal process, or a meaningful opportunity to be heard. The default rate in Garrison's cases is three times the default rate of government prosecutors' cases in Marion County. This is a troubling disparity that cannot be fully explained by a lower percentage of defense lawyers appearing in his cases. This high default rate warrants a closer look at systemic issues in Garrison's cases, especially as they relate to service of process and initial communications with property owners, to understand the reasons for this disparity. A system that permits police and prosecutors to seize and forfeit property from innocent citizens, without any court scrutiny, is ripe for abuse.

#### Civil Forfeiture Outcomes

	<b>Default Rate</b>	<b>Withdrawal Rate</b>	<b>Settlement Rate</b>	<b>Dispositive Motion Rate</b>	<b>Trial Rate</b>
Marion County	21.25%	17.50%	58.75%	0%	0%
Garrison's Cases	64.84%	17.58%	10.99%	1.09%	5.50%

There are also troubling disparities when we compare outcome data between Marion County's civil forfeiture cases and Garrison's civil forfeiture cases handled on behalf of other counties. This outcome data shows that withdrawal and dispositive motion rates are comparable, but there is a large disparity in settlement rates and default rates. Government prosecutors in Marion County settle well more than half of their forfeiture cases with property owners, while Garrison settles only one out of every ten cases. If defaults are excluded in calculating settlement rates, the settlement disparity rate is still substantial: Government prosecutors settle 74.60% of their nondefaulting cases while Garrison settles only 31.25% of nondefaulting cases. This tells us that Garrison is more likely to refuse to settle and instead proceed to trial where the amount of forfeiture payoff is greatest (and the amount of attorney's fees are greatest). On the other hand, government prosecutors are more likely to settle

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their cases by negotiating a 50-50 split of seized cash.<sup>233</sup> While a higher settlement rate suggests a willingness to be fair and pursue justice, rather than profit, it also presents a troubling dynamic. If police properly seized cash under circumstances warranting forfeiture, why are government prosecutors so quick to split the cash with owners? Does this suggest that in many cases there is simply no legal basis for the forfeiture of seized private property? If so, are prosecutors not duty-bound to return all of the seized cash, rather than just half? In both subsets of data, there are troubling ethical issues warranting further study.

While the Indiana civil forfeiture cases reviewed mostly involved seizures of cash, police also seized vehicles in 2018.<sup>234</sup> The number of seized vehicles is relatively small, but it is still informative to compare the return rate of seized vehicles between Marion County and Garrison's cases.

#### Return Rates of Seized Vehicles

	Vehicles Seized	Vehicles Returned	Return Rate
Marion County	17	17	100%
Garrison's Cases	9	2	22.22%

Once again, we see a significant disparity, this time in the return of seized vehicles. Marion County prosecutors always returned seized vehicles to their owners (so long as owners paid an assessed fee of \$450 for towing and storage costs in most cases), while Garrison failed to return seized vehicles in roughly 80% of his cases. Once again, Garrison was much less likely than government prosecutors to negotiate with property owners.

In examining 2018 outcome data, it is particularly helpful to look at the ultimate disposition of seized cash. We looked at how much cash is returned to owners and how much is permanently forfeited. We wanted to examine outcome differences, if any, between cases prosecuted by government attorneys and those prosecuted by private counsel with contingency fees, and what that might suggest about civil forfeiture. This review began with a comparison of forfeiture rates and cash return rates:

233. Almost all settlements in Marion County involved an equal split of seized property between the prosecutor and the property owner.

234. Court data also revealed that police occasionally seized other items of property, such as jewelry and firearms. This study did not attempt to value those items or include them in this review.

### Forfeiture and Return Rates of Seized Cash

	Amount of Cash Seized	Amount of Cash Forfeited	Forfeiture Rate of Cash Seized	Amount of Cash Returned	Return Rate of Cash Seized
Marion County	\$738,295.26	\$253,937.37	34.40%	\$481,715.76	65.60%
Garrison's Cases	\$292,277.24	\$245,840.24	84.11%	\$46,437.00	15.89%

The outcome data revealed large disparities in both forfeiture and cash return rates. While government prosecutors in Marion County returned almost two-thirds of all cash seized by police, private counsel returned less than 16%. Garrison forfeited in absolute dollars almost the same amount of cash as government prosecutors did in Marion County, but this meant that Garrison's forfeiture rate was well more than double the forfeiture rate of government prosecutors. Is this disparity attributable to differences in the legality of seizures in Marion County compared to the legality of those in counties represented by Garrison? Or is this disparity due to something else, such as a different understanding and commitment to public obligations required of prosecutors?

One thing is absolutely clear from outcome data in civil forfeiture cases prosecuted by both Marion County prosecutors and Garrison on behalf of multiple counties: out of a combined total of 159 civil forfeiture cases filed in 2018, not one case resulted in a court judgment in favor of the property owner.<sup>235</sup> Property owners infrequently went to trial to challenge the taking of their property, regardless of the facts. This fact may reflect the reality that forfeiture laws are stacked against property owners and that it is simply too expensive to litigate a civil forfeiture case with counsel when the amount of money at stake is relatively low. For the poor, there is no right to counsel, and therefore, there is little chance of obtaining free legal help. It is hard to have confidence in the fairness of a civil justice system in which property owners cannot point to even one case during an entire year in which they prevailed in court and obtained a judgment against the forfeiture of their property.

We also examined the disbursement of forfeited proceeds to gain insights into who benefits most from civil forfeitures and whether there are differences between cases litigated by government prosecutors and private counsel. Indiana law provides for how forfeited monies are to be disbursed, with attorney's fees

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235. Of cases decided after a hearing or upon dispositive motion, all court judgments were entered in favor of the plaintiff (government). In cases that were settled by agreement, judgment was entered for the plaintiff regarding any property retained by the government, but no judgment was entered for the defendant regarding any property returned to the property owner.

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for private counsel given first priority and the Indiana Common School Fund last in line.<sup>236</sup> This data reveals that the hiring of private attorney Garrison to handle forfeiture cases pumped substantially more forfeited funds into the pockets and budgets of both public and private prosecutors. The following table illustrates this disbursement:

#### Forfeiture Disbursements to Public and Private Prosecutors

	<b>Attorney's Fees to Private Counsel (Garrison)</b>	<b>Forfeited Cash to Local Prosecutor's Office</b>	<b>Total Forfeited Cash to Prosecutors Forfeiture Fund</b>	<b>Percentage of Forfeited Cash Directed to Prosecutors</b>
Marion County	\$0.00	\$51,909.96	\$51,909.96	20.44%
Garrison Cases	\$71,513.91	\$108,698.37	\$180,212.28	73.30%

If any monies remain after distribution of forfeited funds to outside counsel and the local prosecutor's forfeiture fund, there are three potential recipients under Indiana law: the general funds of the state for reimbursement costs, the general fund of the local police department responsible for the seizure, or the county fund supporting the county drug task force, as selected by the local court.<sup>237</sup> Only after all attorney's fees and reimbursement costs to offset

236. [T]he proceeds of the sale or the money be distributed as follows:

(A) To pay attorney's fees, if outside counsel is employed under section 8 of this chapter.

(B) After payment of attorney's fees under clause (A), one third (  $\frac{1}{3}$  ) of the remaining amount shall be deposited into the forfeiture fund established by the prosecuting attorney to offset expenses incurred in connection with the investigation and prosecution of the action.

(C) Except as provided in clause (D), after distribution of the proceeds described in clauses (A) and (B), if applicable, eighty-five percent (85%) of the remaining proceeds shall be deposited in the: (i) general fund of the state; (ii) general fund of the unit that employed the law enforcement officers that seized the property; or (iii) county law enforcement fund established for the support of the drug task force; as determined by the court, to offset expenses incurred in the investigation of the acts giving rise to the action.

(D) After distribution of the proceeds described in clauses (A) and (B), if applicable, eighty-five percent (85%) of the remaining proceeds shall be deposited in the general fund of a unit if the property was seized by a local law enforcement agency of the unit for an offense, an attempted offense, or a conspiracy to commit a felony terrorist offense (as defined in IC 35-50-2-18) or an offense under IC 35-47 as part of or in furtherance of an act of terrorism. The court shall order that the proceeds remaining after the distribution of funds to offset expenses described in subdivision (3) be forfeited and transferred to the treasurer of state for deposit in the common school fund.

IND. CODE § 34-24-1-4(d)(3) (2019).

237. In Marion County, funds are directed to two individual components of the City of Indianapolis Law Enforcement Fund: the Indianapolis Metropolitan Police Department (IMPD) portion and the Marion County Prosecutor's Office (MCPO) portion. *Id.* In the vast majority of cases, orders of distribution allocate 70% of forfeited cash to the former and 30% to the latter.

law-enforcement expenses are satisfied may a court order that forfeited funds be deposited in the Indiana Common School Fund.<sup>238</sup>

Once again, a comparison of disbursements of forfeited cash is instructive:

**Cash Forfeiture Disbursements to Police and Common School Fund**

	<b>Forfeited Cash to Local Police Departments</b>	<b>Percentage of Forfeited Cash to Local Police Departments</b>	<b>Forfeited Cash to Indiana Common School Fund</b>	<b>Percentage of Forfeited Cash Directed to Common School Fund</b>
Marion County	\$84,291.01	33.19%	\$14,465.37	5.70%
Garrison's Cases	\$56,438.06	22.96%	\$1,729.35	0.70%

The data confirms that prosecutors and police are the big winners when cash is forfeited. Interestingly, prosecutors overall (public and private) took in much more money for themselves when a private attorney was hired to prosecute their cases on contingency fees. On the other hand, the Indiana Common School Fund was the big loser when civil forfeiture cases were handled by a private attorney. In these cases, very little was left over to deposit into the Common School Fund after statutory shares were distributed to prosecutors and police.<sup>239</sup> Despite legislative intent to “ensure that the Common School Fund would receive a minimal amount for each case in which assets are seized and forfeited,”<sup>240</sup> only twenty-one of Garrison’s sixty-three

238. If a forfeiture involves a terrorist offense, funds will be directed to offset those expenses as well before funds can be deposited in the Common School Fund. *See id.* § 34-24-1-4(d)(3)(D).

239. In 2019, the Indiana Supreme Court rejected a state constitutional challenge to the diversion of civil-forfeiture proceeds away from the Common School Fund and instead being used to reimburse law-enforcement costs. *Horner v. Curry*, 125 N.E.3d 584, 607 (Ind. 2019). Article 8, Section 2 of the Indiana Constitution provides that the School Fund shall consist of all forfeitures which may accrue. IND. CONST. art. 8 § 2. While the court agreed, based on prior precedent, that this constitutional provision applies to civil forfeitures, it held that a proper interpretation of the clause permits the state legislature to determine how and when forfeiture proceeds accrue to the state. *See Horner*, 125 N.E.3d at 588–607.

240. *See* LEGIS. SERVS. AGENCY OF OFFICE OF FISCAL & MGMT. ANALYSIS, FISCAL IMPACT STATEMENT, L.S. 6112, 2d Sess., at 2 (Ind. 2018). The Indiana legislature amended the required allocation formula for disbursement of forfeiture funds, effective July 1, 2018. IND. CODE § 34-24-1-4 (*as amended by* P.L. 47-2018). Most forfeiture cases analyzed in this section were subject to this legislative change: sixty-two of Garrison’s cases and sixty-eight Marion County cases were closed on or after June 30, 2018. *Case Search*, *supra* note 223. The legislature also enacted several additional minor amendments, effective July 1, 2019. IND. CODE § 34-24-1-4 (*as amended by* P.L. 66-2019).

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cash forfeitures (one-third) resulted in a distribution to the Common School Fund. In contrast, forty-eight of Marion County's fifty-one cash forfeitures (94%) provided monies to the Common School Fund.<sup>241</sup>

The 2018 court data, though limited, provides support that civil forfeiture's profit motive adversely influences prosecutorial behavior, especially when contingency fees for private lawyers are permitted. The data reveals troublesome disparities between private and public prosecutors when considering rates of default and settlement as well as outcomes and disbursements. Even apart from these disparities, the strong appearance of a conflict of interest requires prompt action to end contingency-fee compensation in the prosecution of civil forfeiture cases. Smaller counties may contend that they need a private lawyer to handle civil forfeiture cases because of their scarce resources. The data suggests otherwise. Of Garrison's eighty-seven cases handled across multiple counties, fifty-nine cases were default judgments which should have required only pro forma administrative resources and little, if any, attorney time or expertise.<sup>242</sup> There is no reason that a full-time government prosecutor acting on behalf of multiple counties could not handle Garrison's workload for less money and without conflicting concerns. Moreover, if there is a compelling need for a private lawyer to step in on a temporary basis, the lawyer should always be compensated on a flat fee or on an hourly basis to avoid both actual conflicts and the appearance of conflicts.

#### CONCLUSION

Courts are duty bound to refuse to enforce contracts that are illegal or against public policy.<sup>243</sup> One hundred years ago, the New Mexico Supreme Court struck down a contingency-fee arrangement in a criminal case between a prosecutor and a private lawyer that provided for one fee in the event of the accused's acquittal and a larger fee in the event of a conviction.<sup>244</sup> The court found that a fee arrangement dependent on the outcome of the case distorted

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241. Despite the significant difference between cases handled by private and government prosecutors, the total amount of funds distributed to the Common School Fund from all civil forfeiture cash proceeds proved to be quite small. Out of a total of \$499,777.61 in forfeited cash from 2018 cases, the Common School Fund received only \$16,194.72, or just 3.24% of all forfeited cash. Prosecutors and police kept 96.76% of all forfeited cash.

242. *Case Search*, *supra* note 223.

243. RESTATEMENT (SECOND) OF CONTRACTS, intro. note (AM. LAW INST. 1981).

244. *Baca v. Padilla*, 190 P. 730, 731 (N.M. 1920) ("Unlike a civil suit where the ability of the plaintiff to pay any fee might depend upon the establishment of his cause of action, here, under no conceivable aspect of the case, could the party's ability to employ a private prosecutor in a criminal case be increased or diminished by the outcome of the prosecution. On the other hand, we have injected into the prosecution of a criminal case a prosecutor whose personal interests would be subserved best by securing the conviction of the defendant, and this regardless of the question as to whether or not the defendant were guilty or innocent; that is to say, the size of his fee, or possibly whether he receive any fee at all, would be dependent upon the conviction of the defendant, however innocent he might be. This is contrary to the policy of our law.").



the obligation to seek justice by incentivizing a conviction regardless of innocence.<sup>245</sup> Similarly, in a Pennsylvania criminal case involving a contingency fee negotiated between a defense lawyer and his client, a federal court stated, “It is hard to imagine a more striking example of blatant conflict between personal interest and professional duty.”<sup>246</sup>

Conflicting interests from contingency fees in criminal matters have similarly plagued civil forfeiture prosecutions. The nation’s experience with abusive civil forfeiture practices over the past several decades has taught us that lucrative forfeiture proceeds directed to prosecutors and police incentivize bad behavior.<sup>247</sup> As law enforcement has increasingly relied upon forfeiture monies for equipment, salaries, and bonuses, the drive to forfeit property has often overridden their sworn obligation to pursue justice.<sup>248</sup> Civil forfeiture trainings

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245. *Id.* at 731–32; *see also* MODEL CODE OF PRO. RESP. EC 2-20 (AM. BAR ASS’N 1980); AM. BAR ASS’N, CRIM. JUST. STANDARDS: DEFENSE FUNCTION § 4-3.4(k) (4th ed. 2017), [https://www.americanbar.org/groups/criminal\\_justice/standards/DefenseFunctionFourthEdition](https://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition) (“Defense counsel should not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case or in a criminal forfeiture action.”).

246. *United States ex rel. Simon v. Murphy*, 349 F. Supp. 818, 823 (E.D. Pa. 1972). In this case, there was a contingency-fee contract for representation of a defendant who killed her husband and provided that the lawyer’s fee would come from insurance proceeds that would only be paid out in the event of acquittal. The lawyer’s behavior was directly affected by the inherent conflict: the lawyer never communicated to his client (until he knew it was too late) the prosecutor’s offer to cap the charge at second degree murder if she pled guilty prior to trial. *Id.*; *see also* *Ibn-Tamas v. United States*, 407 A.2d 626, 640–41 (D.C. Cir. 1979) (noting the lower court’s finding of ineffective assistance of counsel when the lawyer never discussed plea-bargaining negotiations with the client where the contingency fee was based upon acquittal).

247. In addition to abusive practices briefly described earlier in this Article, there are also widespread reports of abuse in the expenditure of forfeiture proceeds by prosecutors. For example, in 2019, Manhattan District Attorney Cy Vance was reported to have spent nearly \$250,000 of forfeiture funds over five years on fine dining, first-class airfare, and luxurious hotels. *See* Zack Budryk, *Manhattan DA Spent \$250K in Civil Asset Forfeitures on Travel, Dining: Report*, HILL (Apr. 4, 2019), <https://thehill.com/briefingroom-blogroll/437398-manhattan-da-spent-250000-in-civil-asset-forfeitures-on-travel-dining> (based upon review of public records obtained by The City, a nonprofit news outlet in New York City); Reuven Blau, *High-Flying Cy: How Manhattan DA Vance Spent \$250K on Travel and Food*, CITY (Apr. 3, 2019), <https://www.thecity.nyc/2019/4/3/2121117/high-flying-cy-how-manhattan-da-vance-spent-250k-on-travel-and-food> (reporting that the Manhattan District Attorney’s office controls more than \$600 million in funds seized by law enforcement in civil and criminal cases). According to the Village Voice, the Manhattan District Attorney has \$734 million in forfeiture funds at his disposal that it characterized as a slush fund of “off-budget” proceeds obtained from asset forfeiture. Jake Offenhartz, *Cy Vance Has a \$734 Million Slush Fund of Forfeiture Cash*, VILL. VOICE (Feb. 15, 2018), <https://www.villagevoice.com/2018/02/15/cy-vance-has-a-734-million-slush-fund-of-forfeiture-cash>.

248. *See* Note, *supra* note 24, at 2391 (“The toxic relationship between criminal enforcement and civil forfeiture is further exacerbated by the lack of regulations on spending forfeiture proceeds.”); Carpenter et al., *supra* note 8, at 7 (“When expenditures were provided by category, most known spending by state and local agencies was listed under equipment, ‘other,’ and salaries and overtime. Only tiny fractions went toward substance abuse or crime prevention programs.”); Stillman, *supra* note 29 (detailing how police budgets depend on forfeiture revenues to fund crime-fighting equipment, salaries, and officer bonuses and explaining that in some Texas counties, forfeitures fund nearly 40% of police budgets); *see also* C.J. Ciaramella, *New York Prosecutors Gave Themselves \$3.2 Million in Bonuses with Asset Forfeiture Funds*, REASON (Nov. 28, 2017), <https://reason.com/2017/11/28/new-york-prosecutors-gave-themselves-32> (“The Suffolk County District Attorney’s Office in New York doled out \$3.25 million in bonuses to prosecutors from its asset forfeiture

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that provide police and prosecutors with detailed instruction on “defeating the objections of so-called ‘innocent owners’ . . . and keeping the proceeds in the hands of law enforcement” certainly bolster this contention.<sup>249</sup>

There is no reason to expect better results when we authorize private lawyers to stand in the shoes of government prosecutors. States, like Indiana, compound this problem when they authorize prosecutors to delegate their official functions to part-time private lawyers whose compensation is tied to how much private property they can forfeit. The time is long overdue for this unethical practice to be prohibited in professional conduct rules and for courts to refuse to enforce such contingency-fee contracts as violative of public policy. Ultimately, all states should amend their civil forfeiture laws to explicitly prohibit contingency fees for all prosecutors, public or private.

The stakes are simply too high, especially for low-income and minority property owners, to lose hard-earned property to private lawyers pursuing personal gain while standing in the shoes of the sovereign. Decades of experience confirm that “[p]rofit motives . . . distort the discretion of police, prosecutors, courts, and local officials” and that “[w]hen courts are used to raise money, officials have less incentive to make adjudications fair.”<sup>250</sup> With no right to counsel for indigent property owners, the proverbial fox has been placed in charge of the hen house while contingency fees compromise the neutrality, impartiality, and integrity of our justice system.

To be clear, small legislative fixes cannot remedy these conflicts. Indiana’s requirement that contingency fee contracts be reviewed and approved by the state attorney general does little to restore public confidence. The court data analyzed in this Article, though limited, provides additional evidence that contingency fees adversely affect prosecutorial conduct to the detriment of property owners. This data reveals higher default rates, lower settlement rates, and a diversion of public funds into private pockets when contingency fees

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fund since 2012 . . .”); J.F., *Fighting Crime Through Superior Steak*, *ECONOMIST* (Oct. 15, 2013), <https://www.economist.com/blogs/democracyinamerica/2013/10/asset-forfeiture> (noting that forfeiture proceeds are not just used for policing activities; with little accountability, law-enforcement officials have also spent them on extravagancies like expensive dinners, parties, and personal expenses); Joel Handley et al., *Inside the Chicago Police Department’s Secret Budget*, *CHI. READER* (Sept. 29, 2016), <https://www.chicagoreader.com/chicago/police-department-civil-forfeiture-investigation/Content?oid=23728922> (reporting that the Cook County, Illinois state’s attorney’s office’s 2016 budget anticipated \$4.96 million in forfeiture revenues, which it earmarked to pay forty-one full-time employees’ salaries and benefits); O’Harrow et al., *supra* note 40 (“Police agencies have used hundreds of millions of dollars taken from Americans under federal civil forfeiture law in recent years to buy guns, armored cars and electronic surveillance gear. They have also spent money on luxury vehicles, travel and a clown named Sparkles . . . . The spending also included a \$5 million helicopter for Los Angeles police; a mobile command bus worth more than \$1 million in Prince George’s County; an armored personnel carrier costing \$227,000 in Douglasville, Ga., population 32,000; \$5,300 worth of ‘challenge coin’ medallions in Brunswick County, N.C.; \$4,600 for a Sheriff’s Award Banquet by the Doña Ana County (N.M.) Sheriff’s Department; and a \$637 coffee maker for the Randall County Sheriff’s Department in Amarillo, Tex.”).

249. See Note, *supra* note 24, at 2392 (asserting that “the decision to pursue a forfeiture is often governed not by justice, but by ‘department wish lists’”).

250. *Developments in the Law: Policing*, *supra* note 5, at 1734.

compensate private prosecutors. Simply put, contingency fees have no place in the prosecution of criminal or quasi-criminal matters. As long as Indiana retains a bounty system to prosecute civil forfeiture cases, we can expect that innocent property owners—and especially the poor and people of color—will continue to lose their lawfully acquired property to the pursuit of profit.