

Where, Oh Where Has My Property Gone?: The Case For Revising Iowa’s Recently Reformed Asset Forfeiture Law

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ABSTRACT: Asset forfeiture is a key tool to combat criminal activity. As a result of federalism, forfeiture law in the United States proceeds independently through two regimes—one at the state level and another at the federal level. State forfeiture is especially salient because ordinary citizens most often interact with state law enforcement officials. As the national dialogue about police funding continues, it is important to obtain a more complete understanding of the role asset forfeiture plays in financing state law enforcement agencies, such as police precincts, sheriffs’ offices, county prosecutors, and the Iowa Department of Justice. This Note argues that Iowa’s recent attempt to reform its asset forfeiture law was insufficient. This Note also outlines the context surrounding and leading up to that reform, identifies civil in personam forfeitures and perverse profit incentives as the two primary problems in Iowa’s recently reformed asset forfeiture statute, and supplies five normative recommendations for improving Iowa’s asset forfeiture laws.

I. INTRODUCTION.....	788
II. BACKGROUND	790
A. THE FEDERAL ASSET FORFEITURE LANDSCAPE	790
1. Theories Justifying Forfeiture	790
2. Asset Forfeiture Doctrine at Common Law and in Early America	791
3. The Types of Asset Forfeiture Under Federal Law	793
i. Summary Forfeiture.....	793
ii. Administrative Forfeiture	793

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iii. <i>Civil Forfeiture</i>	794
iv. <i>Criminal Forfeiture</i>	795
4. The Purpose of Federal Asset Forfeiture	795
B. <i>THE ASSET FORFEITURE LANDSCAPE IN IOWA</i>	796
1. The History of Asset Forfeiture in Iowa	796
2. Iowa's Asset Forfeiture Law: The Forfeiture Reform Act	797
i. <i>An Overview of the Forfeiture Reform Act</i>	798
ii. <i>Similarities to Federal Forfeiture Laws</i>	800
iii. <i>New Provisions in the Forfeiture Reform Act</i>	800
3. The Post-Reform State of Asset Forfeiture in Iowa	802
C. <i>A BRIEF OVERVIEW OF IOWA'S CRIMINAL MISDEMEANOR STATUTE</i>	802
III. AN APPRAISAL OF THE PROBLEMS IN IOWA'S REFORMED FORFEITURE LAW	804
A. <i>PROBLEMS IN THEORY: CIVIL IN PERSONAM JURISDICTION</i>	804
B. <i>PROBLEMS IN PRACTICE: PROFIT INCENTIVES</i>	806
IV. RECOMMENDATIONS FOR REFORM	807
A. <i>MODERNIZE THE NOTIFICATION PROVISIONS OF SECTION 809A.8</i>	808
B. <i>REPLACE CIVIL IN PERSONAM FORFEITURE WITH CRIMINAL FORFEITURE</i>	810
C. <i>PROHIBIT LAW ENFORCEMENT FROM PROFITING FROM FORFEITURES</i>	811
D. <i>FURTHER LIMIT FORFEITURE'S SCOPE TO CERTAIN CATEGORIES OF CRIMES</i>	813
E. <i>CLARIFY THE PROPORTIONALITY LIMIT OF SECTION 809A.12B</i>	813
V. CONCLUSION	815

I. INTRODUCTION

If “asset forfeiture” means anything to the typical Iowan, it probably conjures images of palettes of shrink-wrapped “dirty money” or cars with secret compartments stuffed with illegal drugs.¹ The reality, though, is that

1. See Christopher Woody, *San Diego's Largest Cash Seizure Ever May Shed Light on an Overlooked Aspect of the Drug Trade*, BUS. INSIDER (Aug. 29, 2016, 10:08 AM), <https://www.businessinsider.com/san-diego-record-cash-seizure-and-drug-cartel-money-laundering-2016-8> [<https://perma>.

asset forfeiture, which is the government divestiture of an individual's property without compensation,² bears heavily on the rights of individuals. Indeed, asset forfeiture touches the heart of many citizens' most pressing concerns about interactions with law enforcement—what the police can do to them and their property. Because of federalism, both the federal government and the states enact asset forfeiture laws. Those laws play an integral role in the operations and funding of law enforcement agencies, such as police precincts, sheriffs' offices, prosecutors' offices, justice departments, etc., across the nation. As the national conversation about policing grows,³ Americans want to understand the way that states fund their law enforcement agencies. After all, under American federalism, general police powers belong to the states,⁴ and Americans' quotidian encounters with law enforcement are overwhelmingly with state, not federal, officers. Consequently, the time is right to re-examine Iowa's recently reformed asset forfeiture statute.

This Note argues that Iowa's 2017 asset forfeiture reform was insufficient. The state should enact five additional reforms to address the theoretical and practical problems inherent in the concept of civil in personam forfeitures and the allocation of forfeiture profits to state law enforcement operations. The five recommended reforms are: (1) modernize the notification provisions of Iowa Code Section 809A.8; (2) replace civil in personam forfeiture with criminal forfeiture; (3) prohibit law enforcement from profiting from forfeitures; (4) further limit the scope of forfeitures to certain categories of crimes; and (5) clarify the proportionality limit of Iowa Code Section 809A.12B.

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2. *Forfeiture*, BLACK'S LAW DICTIONARY (11th ed. 2019). Forfeiture is an entirely different concept from seizure. *Seizure vs. Forfeiture: A Crucial Distinction*, INST. FOR JUST. (Sept. 22, 2016), <https://ij.org/seizure-vs-forfeiture-crucial-distinction> [<https://perma.cc/Z3MR-NMMG>]. In asset forfeiture, the government takes title to an individual's property, whereas in seizure, the government merely takes custody of an individual's property. *Id.* The Fourth Amendment governs the law of seizures: "If an officer has probable cause that the property is associated with a possible crime, then the officer can seize and take physical possession of the property." *Id.* Seizures precede forfeitures, *id.*, except in cases of summary forfeitures, which divest an individual of contraband property by operation of law. *See infra* Section II.A.3.i.

3. Dionne Searcey, *What Would Efforts to Defund or Disband Police Departments Really Mean?*, N.Y. TIMES (Dec. 10, 2020), <https://www.nytimes.com/2020/06/08/us/what-does-defund-police-mean.html> [<https://perma.cc/384Y-SKJM>]; Kendall Karson, *64% of Americans Oppose 'Defund the Police' Movement, Key Goals: Poll*, ABC NEWS (June 12, 2020, 4:30 AM), <https://abcnews.go.com/Politics/64-americans-oppose-defund-police-movement-key-goals/story?id=71202300> [<https://perma.cc/7223-GT4T>].

4. *See generally* U.S. CONST. art. I (enumerating Congress' powers); U.S. CONST. amend. X (reserving unenumerated powers, such as general police and public health powers, for state governments).

II. BACKGROUND

States have patterned their asset forfeiture statutes after the federal government's asset forfeiture statutes. Reviewing federal asset forfeiture, therefore, helps to illuminate Iowa's asset forfeiture statute. Section II.A first provides an overview of the landscape of federal asset forfeiture law; Section II.B then uses that foundation to explain the details of Iowa's asset forfeiture laws.

A. THE FEDERAL ASSET FORFEITURE LANDSCAPE

The concept of asset forfeiture has ancient roots in the Law of Moses.⁵ The common law also provided for asset forfeiture, and it is helpful to trace asset forfeiture's conceptual roots back to its origin here. To that end, this section: (1) describes the four theories justifying forfeiture law; (2) reviews the asset forfeiture doctrine at common law and in early American law; (3) explains the purpose of current federal asset forfeiture law; (4) outlines the four types of modern federal asset forfeitures; and (5) discusses the contemporary effects of federal asset forfeiture law.

1. Theories Justifying Forfeiture

There are four different theories that underlie and justify federal forfeiture law in its modern form.⁶ The first is contraband and derivative contraband.⁷ The second is proceeds forfeiture, and it calls for the forfeiture of profits obtained through illegal transactions.⁸ Both the contraband (including derivative contraband) and proceeds theories evidence a remedial concept of federal forfeiture law.⁹ The third theory is facilitation, which posits that the property used in committing a crime or the instruments used to facilitate crime is forfeitable as punishment.¹⁰ Both the proceeds and facilitation theories raise questions about the nexus between a crime and its

5. GREGORY M. VECCHI & ROBERT T. SIGLER, *ASSETS FORFEITURE: A STUDY OF POLICY AND ITS PRACTICE* 41–45 (2001). One particularly ancient asset forfeiture practice appears in the Law of Moses and is based on the idea that an object, because of its use in effecting wrongdoing, deserves punishment. *See id.* at 41–42; *see also Exodus* 21:28 (King James) (“If an ox gore a man or woman, that they die: then the ox shall be surely stoned, and his flesh shall not be eaten; but the owner of the ox shall be quit.”); *but see* LEONARD W. LEVY, *A LICENSE TO STEAL: THE FORFEITURE OF PROPERTY* 8–9 (1996) (distinguishing ancient Biblical and Greek practices from deodand). Modern civil in rem forfeitures descended from this idea; *see* ROBERT F. MESSNER, *UNDERSTANDING FORFEITURE AND RELATED CIVIL ACTIONS IN CRIMINAL LAW: PADLOCK PROCEEDINGS; NUISANCE ABATEMENT ACTIONS; EVICTIONS* 10–11 (1992). But they have continued in their current form for the sake of administrative convenience. *See* STEFAN D. CASSELLA, *ASSET FORFEITURE LAW IN THE UNITED STATES* § 1-4(c), at 15 (2d ed. 2013).

6. *See* DEE R. EDGEWORTH, *ASSET FORFEITURE: PRACTICE AND PROCEDURE IN STATE AND FEDERAL COURTS* 11 (3d ed. 2014).

7. *Id.* at 11–12.

8. *Id.* at 12–13.

9. *Id.* at 17.

10. *Id.* at 13–16.

proceeds or instrumentalities: the closer the connection, the more justified the forfeiture is.¹¹ Finally, the enterprise theory “permits the government to forfeit the interest or control of any enterprise that a person has conducted or operated in conjunction with the criminal offense giving rise to the forfeiture.”¹²

2. Asset Forfeiture Doctrine at Common Law and in Early America

Under English common law, asset forfeiture took three forms.¹³ The first was known as forfeiture consequent to attainder.¹⁴ It “inflicted on felons and traitors the complete forfeiture of all real and personal property.”¹⁵ The forfeiture penalties for treason were severe, yet emblematic of the forfeiture penalties levied on felons¹⁶: Individuals convicted of treason not only forfeited all their property (real and personal) to the Crown,¹⁷ but also suffered “corruption of blood,”¹⁸ which barred any heirs from inheriting property from a convicted traitor.¹⁹ Taken together, these two penalties were known as forfeiture of estate.²⁰ The law did not merely forfeit particular property that was associated with or used in committing the treason; rather, *all* of a traitor’s property was subject to forfeiture.²¹ In a broader sense, though, the penalties for treason demonstrate the in personam nature of forfeiture consequent to attainder because the forfeiture consequent to attainder directed punishment to an individual, not to an individual’s property.²²

However, the opposite is true for deodand—the second type of common law forfeiture.²³ Deodand provided “for forfeiture of property used in a

11. See *id.* at 12–16.

12. *Id.* at 16.

13. James R. Maxeiner, Note, *Bane of American Forfeiture Law—Banished at Last?*, 62 CORNELL L. REV. 768, 770 (1977); accord HOWARD E. WILLIAMS, ASSET FORFEITURE: A LAW ENFORCEMENT PERSPECTIVE 7 (2002).

14. Maxeiner, *supra* note 13, at 770.

15. *Id.*

16. See *id.*

17. LEVY, *supra* note 5, at 25–26.

18. *Id.* at 31 (“Another consequence of attainder in treason cases was ‘corruption of blood,’ meaning that the individual could neither inherit any property, keep it, nor transmit it to heirs.”).

19. JIMMY GURULÉ & SANDRA GUERRA, THE LAW OF ASSET FORFEITURE § 1-1 (b) (1998).

20. *Id.*; WILLIAMS, *supra* note 13, at 7.

21. WILLIAMS, *supra* note 13, at 7.

22. *Id.* (“Forfeiture for felonies or treason was a punishment the court directed against a person who engaged in acts that offended the Crown.”).

23. *Id.* at 7–8. Williams mentions deodand third in his list of the three types of common law forfeiture. *Id.* at 7 (“English law allowed forfeiture under only three conditions: (1) upon conviction of treason, traitors forfeited their estates to the Crown, and their land reverted to their lord; (2) by statute, the Crown could seize some property as punishment for certain crimes other than treason; and (3) an instrument used in committing a murder was itself considered guilty and was forfeited to the sovereign.”).

murder, or property that had caused the death of someone, either intentionally or accidentally.”²⁴ While deodand faded from the common law by the early 1800s, it was an early example of *in rem* forfeiture actions—that is, a forfeiture action not brought against a person, but a personified piece of property that, by virtue of its involvement in some wrongdoing, was said to deserve forfeiture.²⁵

The third common law forfeiture was statutory forfeiture.²⁶ Of the various forfeiture statutes Parliament passed,²⁷ the Navigation Acts proved especially consequential²⁸ because they specifically applied to the American colonies.²⁹ The Navigation Acts also

could direct customs violation proceedings four ways: (1) against the smuggler *in personam*; (2) against the offending ship *in personam* as a result of a smuggling conviction; (3) against the offending ship *in rem* because the ship had been used as a conveyance of contraband; or (4) against the offending cargo *in rem*.³⁰

These manifold forfeiture options in the Navigation Acts provided the baseline for the evolution of American forfeiture law. The early American republic demonstrated an aversion to forfeiture laws³¹ and provided for forfeiture only by statute and in the realm of admiralty, customs, and piracy.³² These statutes “provided the framework for modern American forfeiture law and procedure.”³³ As a result, “[c]ommon-law forfeiture does not exist in the United States.”³⁴

In sum, the *in personam* and *in rem* nature of modern statutory forfeiture is rooted in English common law. Broadly speaking, English common law reveals two general asset forfeiture propositions that are true of the modern statutory forfeiture scheme today: in *in rem* forfeiture, property is forfeited because of its relation to crime; in *in personam* forfeiture, though, is the result of property forfeited because of its relation to a criminal.³⁵

24. *Id.* at 8.

25. *See id.*;13 VECCHI & SIGLER, *supra* note 5, at 42; *see also supra* note 5 and accompanying text (describing the connections between antiquated and modern *in rem* forfeitures).

26. Maxeiner, *supra* note 13, at 770.

27. *Id.*; and VECCHI & SIGLER, *supra* note 5, at 44.

28. WILLIAMS, *supra* note 13, at 8.

29. Maxeiner, *supra* note 13, at 777.

30. WILLIAMS, *supra* note 13, at 9.

31. *See Austin v. United States*, 509 U.S. 602, 613 (1993) (“[T]he First Congress also abolished forfeiture of estate as a punishment for felons.”).

32. WILLIAMS, *supra* note 13, at 8–9.

33. *Id.* at 9.

34. *Id.* at 6; *see CASSELLA, supra* note 5, § 1-3, at 4 (“There is neither a common law of forfeiture nor a single provision authorizing forfeiture in all cases.”).

35. *See VECCHI & SIGLER, supra* note 5, at 42–43.

3. The Types of Asset Forfeiture Under Federal Law

Federal law employs four types of asset forfeitures: (1) summary; (2) administrative; (3) criminal; and (4) civil.³⁶ Summary and administrative forfeitures are nonjudicial forfeitures,³⁷ while criminal and civil are judicial forfeitures.³⁸ The following four subparts explain the contours of each of the four federal forfeitures.

i. Summary Forfeiture

Summary forfeiture rests on the notion that no one can make an ownership claim to contraband property because it has no recognized legal or lawful use.³⁹ “[Summary] forfeiture works by operation of law.”⁴⁰ Additionally, summary forfeiture is “generally effectuated without formal legal process.”⁴¹ This means the government can confiscate contraband “without formal procedures such as notice or opportunity for a hearing,”⁴² and “the legality of the seizure . . . is irrelevant.”⁴³ Illegal drugs are one common example of contraband that law enforcement summarily forfeits.

ii. Administrative Forfeiture

“The vast majority of all federal forfeitures are administrative forfeitures”⁴⁴ They occur “when a federal law enforcement agency with statutory authority in a given area . . . seizes property discovered in the course of an investigation.”⁴⁵ Federal law requires that the seizing agency both have probable cause to initiate an administrative forfeiture⁴⁶ and notify potential interest holders that they must contest the seizure within a certain window of time or else forever lose their claim to the property.⁴⁷ If anyone contests the forfeiture, the government must then initiate a judicial forfeiture.⁴⁸ The

36. WILLIAMS, *supra* note 13, at 26–27; EDGEWORTH, *supra* note 6, at 2. *But see* CASSELLA, *supra* note 5, § 1-4, at 9 (“Federal law gives the Government three procedural options: administrative forfeiture, civil forfeiture and criminal forfeiture.”).

37. EDGEWORTH, *supra* note 6, at 2.

38. *Id.*

39. *See id.* at 3; WILLIAMS, *supra* note 13, at 28.

40. EDGEWORTH, *supra* note 6, at 3.

41. *Id.*

42. WILLIAMS, *supra* note 13, at 28.

43. VECCHI & SIGLER, *supra* note 5, at 47.

44. CASSELLA, *supra* note 5, § 1-4(a), at 10.

45. *Id.*

46. EDGEWORTH, *supra* note 6, at 3.

47. *Id.*; CASSELLA, *supra* note 5, § 1-4(a), at 10.

48. CASSELLA, *supra* note 5, § 1-4(a), at 11.

federal government cannot administratively forfeit real or non-cash personal property worth more than \$500,000.⁴⁹

iii. Civil Forfeiture

Civil forfeiture, the first of the two types of judicial forfeiture, is authorized by a variety of federal statutes.⁵⁰ It operates in rem, independently of criminal proceedings, and against a preponderance standard of proof.⁵¹ In contrast, the standard of proof in a criminal forfeiture proceeding is beyond a reasonable doubt. In addition, “[e]ven if the defendant is acquitted of the underlying criminal case, the government can still proceed on the related civil forfeiture case provided it has sufficient evidence.”⁵² Federal civil forfeitures, because they are in rem, are identifiable by seemingly unconventional case names such as *United States v. One Oil Painting Entitled “Femme en Blanc” by Pablo Picasso*⁵³ or *United States v. Undetermined Amount of U.S. Currency*.⁵⁴

Potential innocent holders of an interest in property subject to civil forfeiture (except contraband)⁵⁵ may invoke an innocent owner’s defense under 18 U.S.C. Section 983(d).⁵⁶ Claimants shoulder the burden of proving the defense by a preponderance of the evidence.⁵⁷ To prove the defense, claimants must prove they “(i) did not know of the conduct giving rise to forfeiture; or (ii) upon learning of the conduct giving rise to forfeiture, did all that reasonably could be expected under the circumstances to terminate such use of the property.”⁵⁸ If the government proves its case “and no claimant . . . prov[es] the elements of an innocent owner defense, the court will enter judgment for the [g]overnment and title to the property will pass to the

49. See *id.* (citing 19 U.S.C. § 1607 (2018), which contains the \$500,000 limit, and 18 U.S.C. § 985(a) (2018), which contains the prohibition against administrative forfeitures of real property).

50. See, e.g., 18 U.S.C. §§ 545, 981, 983–985; 19 U.S.C. §§ 1602, 1607; 21 U.S.C. § 881.

51. See CASSELLA, *supra* note 5, § 1-4(c), at 14.

52. EDGEWORTH, *supra* note 6, at 8.

53. *United States v. One Oil Painting Entitled “Femme en Blanc” by Pablo Picasso*, 362 F. Supp. 2d 1175 (C.D. Cal. 2005).

54. *United States v. Undetermined Amount of U.S. Currency*, 376 F.3d 260 (4th Cir. 2004).

55. 18 U.S.C. § 983(d)(4).

56. CASSELLA, *supra* note 5, § 1-4(c), at 16.

57. 18 U.S.C. § 983(d)(1).

58. *Id.* § 983(d)(2)(A)(i)–(ii). The innocent owner defense is available to bona fide purchasers and sellers for value who “did not know and [were] reasonably without cause to believe that the property was subject to forfeiture.” *Id.* § 983(d)(3)(A). Individuals seeking to invoke the innocent owner defense may meet the burden of proof by relaying to law enforcement information about the conduct that is the basis for forfeiture, and either revoking or making “a good faith attempt to revoke permission for those engaging in such conduct to use the property,” or taking “reasonable actions in consultation with a law enforcement agency to discourage or prevent the illegal use of the property.” *Id.* § 983(d)(2)(B)(i). A person seeking to claim the innocent owner defense need not “take steps that the person reasonably believes would be likely to subject any person (other than the person whose conduct gave rise to the forfeiture) to physical danger.” *Id.* § 983(d)(2)(B)(ii).

United States.”⁵⁹ The court system does not appoint counsel to represent individuals whose property is subjected to a civil forfeiture because the Sixth Amendment right to counsel pertains to only criminal cases.⁶⁰

iv. Criminal Forfeiture

As with civil forfeiture, a variety of federal statutes authorize criminal forfeiture.⁶¹ Unlike civil forfeiture, however, “[c]riminal forfeitures are in personam actions, part of the penalty that the government exacts upon conviction of a criminal offense.”⁶² Just like any criminal case, a successful criminal forfeiture case lives by a conviction and dies from an acquittal.⁶³ The in personam nature of the forfeiture, though, has several important consequences. First, the government need not seize any property to initiate a criminal forfeiture.⁶⁴ Second, “criminal forfeiture . . . may be entered as a money judgment against the defendant, directly against the defendant’s interest in specific assets, or against the defendant’s substitute assets.”⁶⁵ Third, before the federal government can complete a criminal forfeiture, it must hold an ancillary hearing to protect the rights of any third parties who may have an ownership interest in the forfeitable property.⁶⁶

4. The Purpose of Federal Asset Forfeiture

Federal asset forfeiture policy is both punitive and remedial.⁶⁷ On the punitive side, the Supreme Court “consistently has recognized that forfeiture serves, at least in part, to punish the owner.”⁶⁸ In *Austin v. United States*, the Supreme Court stated that federal asset forfeiture is partly punitive and not purely remedial. It arrived at this conclusion based on the historical understanding that forfeitures are punishments, the fact that conduct giving rise to forfeiture is wrongful, and the legislative history showing that Congress contemplated both forfeiture’s deterrent and punitive effects.⁶⁹ Indeed, federal forfeiture does punish criminals by divesting them of the profits and benefits of crime: “accouterments of an expensive lifestyle, or the items that

59. CASSELLA, *supra* note 5, § 1-4(c), at 17.

60. U.S. CONST. amend. VI.

61. *See, e.g.*, 18 U.S.C. § 1963; and 21 U.S.C. § 853.

62. WILLIAMS, *supra* note 13, at 56.

63. *See* VECCHI & SIGLER, *supra* note 5, at 51, 54.

64. EDGEWORTH, *supra* note 6, at 5.

65. *Id.* at 6.

66. *Id.* at 5–6.

67. *Id.* at 16–17.

68. *Austin v. United States*, 509 U.S. 602, 618 (1993).

69. *Id.* at 619–20.

gave [them] the leverage, prestige or wherewithal to commit a criminal act.”⁷⁰ In that light, forfeiture can mete out punishment.⁷¹

On the remedial side, asset forfeiture seeks to redress the injuries illegal activities inflict on society.⁷² “The United States Supreme Court has consistently upheld the use of asset forfeiture to prevent illegal activity by stripping offenders of their operating tools and economic base . . . and to ensure that persons do not profit from their illegal acts.”⁷³ Furthermore, asset forfeiture policy is remedial because federal forfeiture statutes provide for civilly and criminally forfeited property to fund restitution for victims of the crimes the forfeitures are predicated on.⁷⁴ In addition, forfeitures generally deter would-be wrongdoers from criminal activity because “the incentive to engage in economic crime is diminished if persons contemplating such activity understand that there is [a] high likelihood that they will not be allowed to retain any profits that might flow from their temporary success.”⁷⁵

B. THE ASSET FORFEITURE LANDSCAPE IN IOWA

With that understanding of asset forfeiture’s foundations in mind, this Section considers the overall condition of the statutory asset forfeiture scheme in the state of Iowa. This Section first traces the history of asset forfeiture in Iowa. It then discusses the specifics of Iowa’s existing asset forfeiture statute, the Forfeiture Reform Act, and concludes by explaining the post-reform state of asset forfeiture in Iowa.

1. The History of Asset Forfeiture in Iowa

Iowa’s asset forfeiture statute is currently codified in chapter 809A of the Iowa Code.⁷⁶ Iowa enacted its first asset forfeiture statute by 1991, a few years after the federal government enacted the Comprehensive Crime Control of 1984.⁷⁷ Around that time, “[m]any states, including Iowa . . . followed the federal government’s lead and created state forfeiture laws aimed at attacking organized crime at its roots—profits.”⁷⁸ Since that first statute, Iowa has

70. CASSELLA, *supra* note 5, § 1-2, at 3.

71. *Id.*

72. EDGEWORTH, *supra* note 6, at 17.

73. *Id.* at xxiv (citations omitted).

74. See 18 U.S.C. § 981(e)(6) (2018) (civil forfeiture); 21 U.S.C. § 853(i) (2018) (criminal forfeiture); see also CASSELLA, *supra* note 5, § 1-2, at 2 (“Indeed, restoration of property to victims in white collar cases is the first priority of law enforcement when it comes to disbursing forfeited property, and much time and effort is expended in such cases to ensure that the wrongdoer’s assets are preserved pending trial so that they remain available for this purpose once the case is over.”).

75. CASSELLA, *supra* note 5, § 1-2, at 2-3.

76. IOWA CODE § 809A (2021).

77. J. Bradley Horn, Note, *The Reach of Iowa’s Civil Forfeiture Statute: How Far Is Too Far?*, 42 DRAKE L. REV. 661, 661 (1993); see also IOWA CODE § 809 (1991).

78. Horn, *supra* note 77, at 662 (footnotes omitted).

reformed its asset forfeiture laws on a few occasions.⁷⁹ In 2017, after repeated criticisms and calls for reform,⁸⁰ the Iowa General Assembly enacted the Forfeiture Reform Act to revamp Iowa's asset forfeiture practices.⁸¹

2. Iowa's Asset Forfeiture Law: The Forfeiture Reform Act

The Forfeiture Reform Act of 2017 reshaped Iowa's asset forfeiture laws. The Iowa Senate voted unanimously in favor of the reform, the Iowa House of Representatives passed the proposal by a vote of 95 against 1, and the governor signed the bill into law on May 9, 2017.⁸² The reforms, though, were insufficient. This Section lays the foundation for why Iowa should once again reform this law. It begins with an overview of the Forfeiture Reform Act's key provisions and then discusses the Act's similarities to federal forfeiture law before concluding with a summary of the new provisions incorporated into the law by the 2017 reform effort.

79. See *id.* at 662 nn.8–9. One notable reform took place between 1996 and 1997, as evidenced by the first appearance of Iowa's Forfeiture Reform Act in the 1997 edition of the Iowa Code. Compare IOWA CODE § 809A (1997) (separating seizure and forfeiture into two different chapters of the Iowa Code, with Chapter 809 relating to "Disposition of Seized Property" and 809A instantiating Iowa's "Forfeiture Reform Act"), with IOWA CODE § 809 (1995) (outlining Iowa's asset forfeiture law sections 809.6–809.21 in Chapter 809, "Disposition of Seizable and Forfeitable Property").

80. See Jason Clayworth, *Lawsuit Alleges Widespread Iowa Forfeiture Violations*, DES MOINES REG. (Apr. 17, 2016, 10:10 AM), <https://www.desmoinesregister.com/story/news/2015/11/13/iowa-forfeiture-king/75726170> [<https://perma.cc/U5NN-R9U8>] (quoting a Des Moines attorney who said Iowa's asset forfeitures are "[a] truly shameful legacy for law enforcement"); Charles Schneider, *Schneider: State Must Reform Asset Forfeiture Law*, DES MOINES REG. (Feb. 19, 2016, 6:35 PM), <https://www.desmoinesregister.com/story/opinion/2016/02/19/charles-schneider-asset-forfeiture-law/80637096> [<https://perma.cc/YK6V-K7BQ>] (criticizing Iowa asset forfeiture policy for offending the Fourteenth and Fifth Amendments, "incentiv[izing] . . . law enforcement to seize property whenever possible," and failing to provide for public accountability); *Editorial: Patrol Forfeitures Target Out-of-State Drivers*, DES MOINES REG. (Dec. 17, 2015, 11:05 PM), <https://www.desmoinesregister.com/story/opinion/editorials/2015/12/18/editorial-patrol-forfeitures-target-out-state-drivers/77479336> [<https://perma.cc/HGG6-DAUJ>] (arguing against policing agencies keeping the profits from the forfeitures they initiate); Kurt Johnson, *Why Out-of-State Drivers are Targeted*, DES MOINES REG. (Dec. 31, 2015, 7:48 PM), <https://www.desmoinesregister.com/story/opinion/readers/2015/12/31/why-out-state-drivers-targeted/78143958> [<https://perma.cc/4V5X-8ZHK>] (encouraging Iowa residents to contact the Iowa Senate Judiciary Committee chairperson to revive the asset forfeiture reform proposal that died in committee during the previous legislative session).

81. See Nick Sibilla, *Iowa Supreme Court Rules Civil Forfeiture Laws Violate Fifth Amendment, Upholds Pleading the Fifth*, FORBES (May 30, 2018, 2:02 PM), <https://www.forbes.com/sites/institute-for-justice/2018/05/30/iowa-supreme-court-rules-civil-forfeiture-laws-violate-fifth-amendment-upholds-pleading-the-fifth/#2f5e900e1655> [<https://perma.cc/4Y4H-Q3HC>] ("Spurred by . . . abuses, last year, Iowa legislators strengthened due process protections for innocent owners, and required a criminal conviction to forfeit property valued at under \$5,000.").

82. James Q. Lynch, *Civil Asset Forfeiture Limits Signed into Law*, GAZETTE (May 9, 2017, 6:55 PM), <https://www.thegazette.com/government-politics/civil-asset-forfeiture-limits-signed-into-law> [<https://perma.cc/29GK-B9XF>].

i. An Overview of the Forfeiture Reform Act

The Forfeiture Reform Act gives Iowa broad power to effect civil forfeitures.⁸³ The law first specifies three broad categories of conduct that give rise to forfeiture in Iowa: (1) conduct that “is a serious or aggravated misdemeanor or felony”; (2) conduct that would be a serious or aggravated misdemeanor or felony in Iowa but occurs outside Iowa and is punishable by imprisonment for a year or more in the place the conduct occurred; or (3) conduct committed in furtherance of a serious or aggravated misdemeanor or felony, including inchoate crimes.⁸⁴

The Forfeiture Reform Act also specifies what property is subject to forfeiture in Iowa.⁸⁵ In general, the law permits forfeiture of contraband;⁸⁶ property, including real property, that is “[f]urnished or intended to be furnished by a person in an exchange that constitutes conduct giving rise to forfeiture” or is “[u]sed or intended to be used in any manner or part to facilitate conduct giving rise to forfeiture”;⁸⁷ proceeds from “any conduct giving rise to forfeiture”;⁸⁸ weapons that were “possessed, used, or available for use in any manner to facilitate conduct giving rise to forfeiture”;⁸⁹ and property interests and contractual rights in an enterprise or business “that a person has established, operated, controlled, conducted, or participated in the conduct or through conduct giving rise to forfeiture.”⁹⁰ Law enforcement must have probable cause to initiate a forfeiture without a seizure warrant.⁹¹

83. See IOWA CODE § 809A (2021). The Act grants broad powers and then makes exceptions and carve outs to narrow the broad powers. Conceptually this is very different from authorizing limited powers. The Iowa General Assembly presumably took this approach to empower the state’s efforts to enforce the law and combat crime. Interestingly, this choice is probably a calculated policy tradeoff that distills down to a preference to ensnare the innocent over letting the guilty go free. The federal government employs a similar strategy in taxation. See 26 U.S.C. § 61 (2018) (defining gross income as “all income from whatever source derived”). Congress defined income for income tax purposes in the broadest terms but then carved out exceptions to that definition throughout, and the Code goes on to make exceptions to that general rule. This is a calculated policy tradeoff: Congress would rather over-include income (i.e., to tax income that it might prefer not to tax) than under-include it (i.e., to leave on the table untaxed income that it might prefer to tax).

84. IOWA CODE § 809A.3(1). The statute also provides that driving-related offenses, even if they qualify as a serious or aggravated misdemeanor or felony, are not grounds for forfeiture except in two cases. *Id.* § 809A.3(2). The first is the sale, operation, or possession of speed detection jamming devices, *id.* §§ 809A.3(2)(a), 321.232(1), and the second is driving an impounded vehicle or driving under a suspended, denied, revoked, or barred license, *id.* §§ 809A.3(2)(b), 321J.4B(6), (9)–(10).

85. See *id.* § 809A.4.

86. *Id.* § 809A.4(1) (contraband forfeiture).

87. *Id.* § 809A.4(2)(a) (facilitation forfeiture).

88. *Id.* § 809A.4(3) (proceeds forfeiture).

89. *Id.* § 809A.4(4) (derivative contraband forfeiture).

90. *Id.* § 809A.3(5) (enterprise forfeiture).

91. *Id.* § 809A.6(2).

Further, the Forfeiture Reform Act tells the state how to handle forfeited property, including any proceeds from the sale of forfeited property.⁹² In general, the Forfeiture Reform Act requires law enforcement to deliver forfeited property to the Iowa Department of Justice.⁹³ The Iowa Attorney General may instead, under other provisions of section 809A.17, destroy the forfeited property, sell it, or deliver it to an agency (such as the Iowa Department of Public Safety⁹⁴ or the Natural Resource Commission⁹⁵) for disposal.⁹⁶ The Iowa Department of Public Safety or any law enforcement agency may requisition unused forfeited property “for use in enforcing the criminal laws of [Iowa].”⁹⁷ Additionally, the Forfeiture Reform Act provides that contraband, including controlled substances and obscene materials, must be destroyed.⁹⁸ Contraband weapons, on the other hand, may be disposed of, held for use by law enforcement, destroyed, or sold in certain situations.⁹⁹

Special rules govern the allocation of proceeds from sales of forfeited property.¹⁰⁰ For real property, the law allocates no more than ten percent of sale proceeds to the Iowa Department of Justice, reserving any remainder for the seizing agency.¹⁰¹ The seizing agency may keep the proceeds for its own use or share proceeds according to any agreement it has made with other

92. *See id.* § 809A.17.

93. *Id.* § 809A.17(2) (“Forfeited property not needed as evidence in a criminal case shall be delivered to the department of justice, or, upon written authorization of the attorney general or the attorney general’s designee, the property may be destroyed, sold, or delivered to an appropriate agency for disposal in accordance with this section.”).

94. *Id.* § 809A.17(5)(b) (“Forfeited property which is a weapon or ammunition shall be deposited with the department of public safety to be disposed of in accordance with the rules of the department.”).

95. *Id.* § 809A.17(5)(d) (“Property subject to the rules of the natural resource commission shall be delivered to that commission for disposal in accordance with its rules.”).

96. *Id.* § 809A.17(2).

97. *Id.* § 809A.17(4).

98. *Id.* § 809A.17(5)(a), (c). Chapter 728 of the Iowa Code codifies Iowa’s obscenity law, which, among other things, regulates the dissemination of obscene and pornographic materials, prohibits indecent exposure, criminalizes the sexual exploitation of minors, and outlaws creating pornographic depictions of minors. *Id.* § 728.

99. *Id.* § 809A.17(5)(b) (“Forfeited property which is a weapon or ammunition shall be deposited with the department of public safety to be disposed of in accordance with the rules of the department. All weapons or ammunition may be held for use in law enforcement, testing, or comparison by the criminalistics laboratory, or destroyed. Ammunition and firearms which are not illegal and are not offensive weapons as defined by section 724.1 may be sold by the department as provided in section 809.21.”).

100. *Id.* § 809A.17(5)(e).

101. *Id.* § 809A.17(5)(e)(1) (“The department of justice shall not retain more than ten percent of the gross sale of any forfeited real property. The balance of the proceeds shall be distributed to the seizing agency for use by the agency or for division among law enforcement agencies and county attorneys pursuant to any agreement entered into by the seizing agency.”).

agencies or county attorneys.¹⁰² The law imposes the same rules for cash forfeitures that are in the amount of \$400,000 or less.¹⁰³ If a cash forfeiture exceeds \$400,000, the Iowa Department of Justice keeps ten percent,¹⁰⁴ “[f]orty-five percent shall be retained by the seizing agency,”¹⁰⁵ and the remaining “forty-five percent shall be distributed to other law enforcement agencies within the region of the seizing agency.”¹⁰⁶

ii. Similarities to Federal Forfeiture Laws

Iowa forfeiture law parallels federal forfeiture in many ways. For one, asset forfeiture in Iowa is also a creature of statute, not common law. In addition, Iowa’s asset forfeiture statute provides for summary forfeiture of contraband materials.¹⁰⁷ In contrast to federal law, however, Iowa forfeiture law provides for civil forfeiture only—the law does not provide for criminal forfeiture, though the minimum civil forfeiture amount in section 809A.5 resembles criminal forfeiture.¹⁰⁸ Iowa also provides for both in rem¹⁰⁹ and in personam civil forfeiture,¹¹⁰ whereas civil in personam forfeiture is not a feature of federal law.¹¹¹

iii. New Provisions in the Forfeiture Reform Act

The 2017 reform introduced key new features to Iowa’s asset forfeiture statute. The first significant change is that the law now requires a serious or aggravated misdemeanor or felony conviction before consummating civil forfeitures¹¹² of property valued below \$5,000.¹¹³ This limit is called the minimum civil forfeiture amount,¹¹⁴ and it represents a hybridization of

102. *Id.*

103. *Id.* § 809A.17(5)(e)(2)–(3).

104. *Id.* § 809A.17(5)(e)(3)(c).

105. *Id.* § 809A.17(5)(e)(3)(a).

106. *Id.* § 809A.17(5)(e)(3)(b).

107. *Compare* IOWA CODE § 809A.1(21) (“Controlled substances included in chapter 124 which are contraband and any controlled substances whose owners are unknown are summarily forfeited to the state.”), *with* 21 U.S.C. § 881(f) (2018) (providing for the forfeiture and destruction of schedule I and schedule II controlled substances), *and* 19 C.F.R. § 162.45a (2021) (“[A]ll controlled substances in Schedule I and Schedule II (as defined in 21 U.S.C. 802(6) and 812) that are possessed, transferred, sold, or offered for sale in violation of the [Controlled Substances] Act will be deemed contraband, seized and summarily forfeited to the United States . . .”).

108. *See generally* IOWA CODE § 809A (providing for convictions for civil forfeitures below a minimum civil forfeiture amount while not otherwise conditioning forfeitures on criminal convictions).

109. *Id.* § 809A.13.

110. *Id.* § 809A.14.

111. *See* EDGEWORTH, *supra* note 6, at 11; *id.* at 21 n.1 (noting a single provision of federal law that the author describes as a civil in personam forfeiture).

112. IOWA CODE § 809A.5(2)(b).

113. *Id.* § 809A.1(4).

114. *Id.*

criminal and civil forfeiture. It is not a categorical limit, however, because the Forfeiture Reform Act makes several notable exceptions to the minimum civil forfeiture requirement.¹¹⁵ In addition, the state shoulders the burden of “prov[ing,] by clear and convincing evidence[,] that the value of the property is or exceeds the minimum civil forfeiture amount.”¹¹⁶

Additionally, the law now imposes a proportionality limit.¹¹⁷ This limit forbids the forfeiture of an instrument of a public offense¹¹⁸ “to the extent that the amount or value of the property is grossly disproportionate to the severity of the offense.”¹¹⁹ This proportionality limit applies to property that is an “instrumentality” of crime;¹²⁰ it does not apply to contraband and proceeds.¹²¹

A third new feature of the Forfeiture Reform Act is the implementation of record keeping requirements.¹²² Principally, Section 809A.18A mandates any law enforcement agency that has custody of forfeited property to establish a written internal control policy.¹²³ This internal control policy must include “detailed records as to the amount of property acquired by the agency and the date property was acquired”¹²⁴ and “detailed records of the disposition of the property,” including the manner of its disposition, the date of disposition, financial records in the event the agency sells the forfeited property, and an itemized list of the agency’s use of proceeds from forfeited property sales.¹²⁵ The public can, during regular business hours, inspect both the agency’s written internal control policy and the records maintained under that policy.¹²⁶ None of the records may “identify or enable identification of the individual officer who seized any item of property or the name of any person or entity who received any item of property”¹²⁷ or “provide for or permit the identification of any specific expenditure that is made in an ongoing investigation.”¹²⁸

Finally, the Forfeiture Reform Act raised the state’s burden of proof in civil asset forfeiture cases.¹²⁹ Previously, the law obliged the state to prove the elements of forfeiture under a preponderance standard.¹³⁰ Now, the state

115. *See id.* § 809A.12A.

116. *Id.* § 809A.12A(2).

117. *See id.* § 809A.12B(1).

118. *See id.* § 809A.1(2).

119. *Id.* § 809A.12B(1).

120. *See* § 809A.1(2) (“‘Instrumentality’ means property otherwise lawful to possess that is used in or intended to be used in a public offense.”).

121. *Id.* § 809A.12B(2).

122. *See id.* § 809A.18A.

123. *Id.* § 809A.18A(1).

124. *Id.* § 809A.18A(1)(a).

125. *Id.* § 809A.18A(1)(b).

126. *Id.* § 809A.18A(2).

127. *Id.* § 809A.18A(1)(b)(1).

128. *Id.* § 809A.18A(1)(b)(2).

129. *See id.* §§ 809A.13(7), .14(7)(d).

130. IOWA CODE §§ 809A.13(7)–(8), .14(7)(d) (2017).

must prove its forfeiture cases by “clear and convincing evidence,”¹³¹ which is a higher standard (yet not as high as the criminal law’s standard of proof).

3. The Post-Reform State of Asset Forfeiture in Iowa

Public sentiment suggests the Forfeiture Reform Act represents progress.¹³² Champions of the Forfeiture Reform Act point out that, based on data from 2016, the \$5,000 minimum civil forfeiture limit protects defendants in most Iowa forfeiture cases because the average cash value of forfeitures was \$3,217, and there were only eight cases where the forfeited property was valued above \$5,000.¹³³

Still, the law needs additional reforms. For example, prominent voices are “call[ing] for the Legislature to remove the ‘profit incentive[.]’ for law enforcement that allows agencies to keep whatever it takes from motorists and others.”¹³⁴ Indeed, forfeiture critics claim that this profit incentive creates a “perverse” or even “shameful” conflict of interest, which “warp[s] law enforcement priorities” by encouraging police “to pursue cash instead of criminals.”¹³⁵ Likewise, the Institute for Justice (“IJ”), a nonprofit law firm, made the following statement after Iowa enacted the Forfeiture Reform Act: “Iowa has some of the worst civil forfeiture laws in the nation, and we hope this legislation will build momentum for further reforms . . . [W]e will keep fighting until Iowa’s rigged system is abolished, once and for all.”¹³⁶

C. A BRIEF OVERVIEW OF IOWA’S CRIMINAL MISDEMEANOR STATUTE

Finally, it is important to understand the basic structure of Iowa’s distinctive criminal misdemeanor statute because serious and aggravated misdemeanors are predicate conduct for forfeiture.¹³⁷ Iowa’s criminal misdemeanor statute¹³⁸ features a three-tiered scheme.¹³⁹ In addition to the

131. IOWA CODE §§ 809A.12(7)–(8), .12A(2), .13(7), .14(7)(d), .15(1), .16(2) (2021).

132. See Lynch, *supra* note 82.

133. William Petroski & Jason Clayworth, *Iowa Senate OKs Changes in Controversial Civil Asset Forfeiture Law*, DES MOINES REG. (Mar. 28, 2017, 2:42 PM), <https://www.desmoinesregister.com/story/news/politics/2017/03/28/iowa-senate-oks-changes-controversial-civil-asset-forfeiture-law/99727850> [<https://perma.cc/CTN6-VFBD>].

134. See Lynch, *supra* note 82.

135. *Id.*

136. Nick Sibilla, *Iowa Governor Signs New Conviction Requirement for Civil Forfeiture*, INST. FOR JUST. (May 9, 2017), <https://ij.org/press-release/iowa-governor-signs-vital-flawed-conviction-requirement-civil-forfeiture> [<https://perma.cc/A2VU-NLQZ>].

137. IOWA CODE § 809A.3(1)(a), (b) (2021).

138. See generally *id.* § 903.1 (setting forth punishments for simple misdemeanors, serious misdemeanors, and aggravated misdemeanors).

139. *Id.*

simple misdemeanor,¹⁴⁰ the penal code also establishes serious misdemeanors¹⁴¹ and aggravated misdemeanors.¹⁴² Simple misdemeanors are not grounds for asset forfeiture.¹⁴³

Some examples of serious and aggravated misdemeanors illustrate how the two categories of crimes differ. Examples of serious misdemeanors include the following: some assaults;¹⁴⁴ falsely claiming academic degrees, grades, or honors;¹⁴⁵ falsely attributing antiquity or rarity to objects that do not possess those qualities;¹⁴⁶ communicating intelligence data for non-criminal purposes;¹⁴⁷ committing second-degree harassment;¹⁴⁸ causing a serious bodily injury while hazing someone;¹⁴⁹ placing a GPS on someone without permission;¹⁵⁰ and falsely imprisoning another person.¹⁵¹ Likewise, examples of Iowa's aggravated misdemeanors are forging, destroying, misusing, or tampering with legal documents;¹⁵² certain acts of domestic abuse;¹⁵³ certain "invasion[s] of privacy";¹⁵⁴ "solicit[ing] another person to commit an aggravated misdemeanor";¹⁵⁵ "manufactur[ing], deliver[ing], or possess[ing] with the intent to manufacture or deliver" certain controlled substances;¹⁵⁶ certain repeat controlled substance offenses;¹⁵⁷ involuntary

140. *Id.* § 903.1(1)(a) (defining a simple misdemeanor as a crime punishable by a fine ranging from \$105 to \$850 with a discretionary additional or alternative punishment of 30 days' imprisonment).

141. *Id.* § 903.1(1)(b) (defining a serious misdemeanor as a crime punishable by a fine ranging from \$430 to \$2,560 with a discretionary additional punishment of no more than one year's imprisonment).

142. *Id.* § 903.1(2). Aggravated misdemeanors are generally punishable by a maximum of two years' imprisonment and a fine ranging from \$855 to \$8,540. *Id.*

143. *Id.* § 809A.3.

144. *See id.* § 708.2.

145. *See id.* § 715A.6A(2).

146. *Id.* § 715A.3.

147. *Id.* § 692.7(2).

148. *Id.* § 708.7(3)(b).

149. *Id.* § 708.10(3).

150. *Id.* § 708.11A(2).

151. *Id.* § 710.7.

152. *See id.* § 715A.2(2)(b) (forging "a will, deed, contract, release, commercial instrument, or other document . . . affecting legal relations"); *see also id.* § 715A.4 ("destroy[ing], remov[ing], or conceal[ing] a will, deed, mortgage, security instrument," or publicly recordable document); *id.* § 715A.5 ("falsif[y]ing, destroy[ing], remov[ing], or conceal[ing] a writing or record"); *id.* § 715A.6(1), (2)(c) (using a stolen, forged, revoked, canceled or otherwise unauthorized credit card for a transaction valued at \$1,500 or below); *id.* § 715A.8(1), (3)(c) (using another person's identification information for fraudulent purposes valued at \$1,500 or below); *id.* § 715A.10(2) (using a scanning device to obtain information encoded on a debit or credit card).

153. *See id.* § 708.2A(2)(c)-(d), (3)(a)-(b).

154. *See id.* § 709.21.

155. *Id.* § 705.1(3).

156. *Id.* § 124.401(1).

157. *Id.* § 124.401(5).

manslaughter when unintentional death results from “an act [that is] likely to cause death or serious injury”;¹⁵⁸ and some assaults.¹⁵⁹

III. AN APPRAISAL OF THE PROBLEMS IN IOWA’S REFORMED FORFEITURE LAW

The Forfeiture Reform Act certainly corrected some deficient policies in Iowa’s forfeiture statute, but it still suffers from major defects. These defects are best understood as belonging to one of two categories. The first category concerns problems with the legal theory underlying Iowa’s civil asset forfeiture provision in section 809A.13. This problem is not at all unique to Iowa, though its effects reverberate across the state, affecting both visitors and residents alike. The second category pertains to practical problems with Iowa’s asset forfeiture laws. As with the theoretical problems, other states experience these same practical problems. Both sets of problems are equally important and expose a pressing need for additional reforms.

A. PROBLEMS IN THEORY: CIVIL IN PERSONAM JURISDICTION

In personam civil forfeitures are conceptually problematic in Iowa. As explained previously, early American forfeiture law borrowed from the Navigation Acts to craft asset forfeiture laws that exert in rem jurisdiction over smuggled property in the admiralty, customs, and piracy contexts.¹⁶⁰ In the eighteenth century, the law purported to subject property to its jurisdiction because the property was standing in the place of its owner—an individual located hundreds or thousands of miles across the ocean, far removed from the power of American courts. The legal fiction at play in such cases makes sense: The law treats the property as “guilty,” thereby instituting legal proceedings against it, because the law is simply unable to reach the truly culpable party. These in rem proceedings are invariably civil in nature, not criminal, because subjecting property to criminal process strains credulity. Ultimately, the maritime shipping, smuggling, and piracy contexts justify the legal forfeiture fictions at play. It is not clear, though, why the law entertains either civil in personam or civil in rem jurisdiction on travelers and residents in Iowa, a landlocked state. Currently, the Forfeiture Reform Act establishes two duplicative but alternative paths to obtain the same legal end,¹⁶¹ and

158. *Id.* § 707.5(1)(b).

159. *See id.* § 708.2(1), (3).

160. *See supra* text accompanying notes 28–34.

161. IOWA CODE § 809A.13(1) (“A judicial in rem forfeiture proceeding may be brought by the prosecuting attorney in addition to, or in lieu of, civil in personam forfeiture procedures, and is also subject to the provisions of this section.”); *id.* § 809A.14(1) (“If a forfeiture is authorized by this chapter, it shall be ordered . . . in addition to or in lieu of in rem forfeiture procedures.”).

prosecutors may bring both types of actions against an individual for a single instance of misconduct.¹⁶²

Even more, the use of civil in personam jurisdiction is not just theoretically redundant; it is unprincipled and problematic. The burden of proof in civil forfeiture cases, even though the Forfeiture Reform Act raised it from a preponderance standard to a clear and convincing evidence standard, still falls below the higher “beyond a reasonable doubt” standard enshrined in American criminal law.¹⁶³ Additionally, defendants in civil litigation do not enjoy the right to an attorney.¹⁶⁴ As a result, Iowa law allows law enforcement to effect criminal sanctions on anyone subject to Iowa’s jurisdiction without extending them the law’s most cherished, elementary protections for criminal defendants. At bottom, then, civil in personam forfeiture represents a dubious prosecutorial shortcut for the state, allowing it to skirt the constitutional rights of Iowans and upend a core principle of American criminal law: the presumption of innocence.

These theoretical problems produce questionable outcomes in practice.¹⁶⁵ In 2014, Samantha Thao was driving from Minnesota to Oklahoma in a rental car.¹⁶⁶ Her rental car had New York license plates.¹⁶⁷ A deputy from the Pottawattamie County Sheriff’s Office pulled Samantha over for driving 68 miles per hour in a 65 miles-per-hour zone, just about eight miles from the Iowa–Nebraska border.¹⁶⁸ After smelling marijuana, the deputy sheriff searched the car.¹⁶⁹ He found a pistol, extensive drug paraphernalia, and \$69,590.06 in cash.¹⁷⁰ The officer seized the cash but did not issue a speeding citation, and the state later initiated forfeiture proceedings.¹⁷¹ The district court entered an order forfeiting the cash,¹⁷² which the Iowa Court of Appeals upheld.¹⁷³ Notably, the Court of Appeals mentioned the controversy that attends Iowa’s asset forfeiture statute. It suggested the forfeiture in this case seemed unconscionable, probably because the state imposed a criminal sanction—divestiture or forfeiture of property—without ever charging or

162. See *id.* §§ 809A.13(1), .14(1).

163. See *supra* notes 129–31 and accompanying text.

164. See *supra* note 60 and accompanying text.

165. See generally *In re Prop. Seized for Forfeiture from Thao*, No. 14–1936, 2016 WL 1130280 (Iowa Ct. App. Mar. 23, 2016) (affirming a district court order forfeiting \$69,590.06 after an officer pulled the defendant over, but did not cite her, for driving three miles per hour over the speed limit).

166. *Id.* at *1–3.

167. *Id.* at *1.

168. *Id.*

169. *Id.* at *1–2.

170. *Id.* at *2.

171. *Id.*

172. *Id.* at *3.

173. *Id.* at *9.

convicting the defendant of a crime.¹⁷⁴ While this case predates Iowa's 2017 asset forfeiture reform, the central injustice in Thao's case—the government permanently confiscating Thao's property without charging or convicting her—persists.

B. PROBLEMS IN PRACTICE: PROFIT INCENTIVES

Overall, the law enforcement agencies of the State of Iowa keep 100 percent of the profits from asset forfeitures.¹⁷⁵ This creates a perverse yet powerful incentive for law enforcement: more forfeitures mean more funding for law enforcement.¹⁷⁶ The Forfeiture Reform Act also makes plain that the seizing agency is most often the primary beneficiary of forfeiture profits.¹⁷⁷ This intensifies the incentive because the specific seizing agency is most likely to benefit from forfeiture proceeds, not merely a state-wide law enforcement fund. For example, if the Linn County Attorney's Office forfeits \$10,000 in drug money, then the Iowa Department of Justice might take \$1,000 for itself, and the remaining \$9,000 or \$10,000 would go to Linn County law enforcement, according to any sharing agreements the county has made. Accordingly, the Linn County Sheriff's Office benefits *directly* from asset forfeitures and therefore has an even stronger forfeiture incentive than if forfeiture profits went into a state-wide police fund.

In contrast, confiscating contraband property, such as drugs or obscene materials, is not profitable. That is because Iowa law requires law enforcement to destroy those types of forfeited property.¹⁷⁸ Confiscating the non-contraband property, however, such as the proceeds from completed drug sales, is extremely profitable because the seizing law enforcement agency keeps the proceeds (or distributes them according to the sharing agreements it has made with other seizing agencies, the Iowa Department of Justice, and county attorneys offices).¹⁷⁹ This is troubling because the criminalization and confiscation of controlled substances rests on the notion that confiscating drugs before they are sold reduces supply.¹⁸⁰ According to fundamental economic principles, reducing supply when demand remains constant (or when demand increases) yields an increase in price. Consequently, inflated prices and scarce availability naturally dampen the drug market.

174. *Id.*

175. See *supra* text accompanying notes 99–106, 133.

176. Katherine Baicker & Mireille Jacobson, *Finders Keepers: Forfeiture Laws, Policing Incentives, and Local Budgets*, 91 J. PUB. ECON. 2113, 2114 (2007) (“[F]orfeitures have become a major revenue source for some local police and prosecutors, giving them an incentive not just to deter crime but also to raise funds.”).

177. See *supra* text accompanying notes 99–106.

178. See *supra* note 98 and accompanying text.

179. See *supra* text accompanying notes 92–106.

180. Christopher J. Coyne & Abigail R. Hall, *Four Decades and Counting: The Continued Failure of the War on Drugs* 3–4 (Cato Inst., Policy Analysis No. 811, 2017).

If, however, law enforcement has an incentive to police the back end of drug transactions, then it is possible that law enforcement will take advantage of the opportunities that inhere in that incentive. Thus, when forfeiture profits law enforcement, law enforcement may decide to police the back end of drug transactions instead of the front end. Policing the back end of drug transactions means law enforcement acts on the knowledge of the general flow of controlled substances through states and intervenes only after drug transactions are completed—when the forfeitable property is valuable cash, not contraband drugs.

Such policing can produce deleterious consequences: increased addiction, decreased public safety, increasingly militarized police forces, less productive employment, more family struggles, strained interpersonal relationships, and more. Furthermore, back-end policing conflicts with the basic supply and demand rationale for outlawing drugs in the first place.¹⁸¹ It is not clear to what extent law enforcement in Iowa polices this way, though the IJ reports that a multiyear investigation in Tennessee revealed state law enforcement was ten times more likely to obtain proceeds over controlled substances than to confiscate controlled substances.¹⁸² Additional empirical research is needed to ascertain whether Iowa law needs to be recrafted to combat this potential problem.

IV. RECOMMENDATIONS FOR REFORM

This Part outlines five key reforms to remedy the various defects in the Forfeiture Reform Act. The first four recommendations focus on remedying the theoretical and practical problems outlined in Part III, and the remaining recommendation addresses a separate miscellaneous issue inherent in the Act. These five reforms speak to some the Act's most ponderous and problematic deficiencies. Undoubtedly, though, the Forfeiture Reform Act would benefit from other reforms. For that reason, Iowa's General Assembly should promptly enact each of these five reforms during its next legislative session.

181. From an economics perspective, the purpose of outlawing drugs is to decrease the supply of drugs. A decreased supply causes the price of drugs to rise. Higher prices, in turn, make drugs less available.

182. DICK M. CARPENTER II, LISA KNEPPER, ANGELA C. ERICKSON & JENNIFER McDONALD, INST. FOR JUST., *POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE* 16 (2d ed. 2015), <https://ij.org/report/policing-for-profit-2> [<https://perma.cc/U2R3-RU2Z>] (“The news team found that rather than working eastbound lanes, where smugglers transport drugs to the East Coast, officers focused on westbound lanes, where smugglers haul cash back to Mexico. A subsequent review of drug task force records indicated that officers made 10 times as many stops on the westbound side of the highway as they did on the eastbound side.”).

A. MODERNIZE THE NOTIFICATION PROVISIONS
OF SECTION 809A.8

First, the Iowa state legislature should modernize the Forfeiture Reform Act's forfeiture notification provision by instituting online notification requirements. Property owners may not even know when the state government initiates a forfeiture against their property. The Forfeiture Reform Act, by dint of the procedural demands of due process,¹⁸³ requires the state to publish a pending forfeiture notice "in one issue of a newspaper of general circulation in the county in which the seizure occurred."¹⁸⁴ Newspaper notice is undeniably outmoded and probably highly ineffective,¹⁸⁵ yet such notification requirements are quite common in Iowa statutes.¹⁸⁶ The Pew Research Center reports that U.S. weekday newspaper circulation hovered at about 40.4 million in 2014.¹⁸⁷ In sharp contrast, the Center estimates that weekday newspaper circulation as of 2020 is about 24.3 million.¹⁸⁸ A recent opinion piece in the Des Moines Register suggests that newspapers' decline in Iowa is especially acute because three newspapers, under the pandemic's financial strain, ceased operations in a single week.¹⁸⁹

Given these problems with newspapers, newspaper notice is simply not good enough to satisfy the revered and rigorous demands of due process. The Iowa General Assembly should update all its notification provisions across the entire Iowa Code, especially the notice provision in the forfeiture statute. The

183. See *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950) ("An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."). The Federal Constitution's due process guarantees are generally understood to apply to the states because of the doctrine of incorporation. See *Zinermon v. Burch*, 494 U.S. 113, 125 (1990) (explaining that the Fourteenth Amendment, via its due process guaranties, "incorporates many of the specific protections defined in the Bill of Rights").

184. IOWA CODE § 809A.8(2)(a)(3) (2021).

185. Even in their electronic forms, the principal Iowa newspapers do an insufficient job of providing judicial notice. Both the Des Moines Register and Cedar Rapids Gazette use browser cookies to limit the number of free articles any particular user can view, which could prevent users from accessing the forfeiture notifications in the newspapers' online forums.

186. See, e.g., IOWA CODE § 6B.2A(2); *id.* § 203D.6(3); *id.* § 297.22(1)(c); *id.* § 321.89(3)(b); *id.* § 364.2(4)(c); *id.* § 372.13(6); *id.* § 384.26(3), (5)(a); *id.* § 462.A.31(4); *id.* § 479.7(1); *id.* § 535.2(3)(a)(2); *id.* §§ 633.230(1), .304(2); *cf.* IOWA CODE § 556F.4 (2020) (requiring finders of lost property worth more than \$20 to advertise the found property on notices posted on the county courthouse door and in the three additional most-public places in the county and in some newspaper printed in the state).

187. *Newspaper Fact Sheet*, PEW RSCH. CTR. (June 29, 2021), <https://www.journalism.org/fact-sheet/newspapers> [https://perma.cc/ZY55-6Y8R].

188. *Id.* The decrease in circulation between 2014 and 2020 represents a 40 percent decline. *Id.*

189. Julie Gammack, 3 *Iowa Newspapers Disappear in a Week. The Pandemic Threat Is Real for the Industry, and for Iowans*, DES MOINES REG. (May 18, 2020, 12:17 PM), <https://www.desmoinesregister.com/story/opinion/columnists/iowa-view/2020/05/15/iowa-newspapers-vanish-underscoring-threat-industry-and-readers/5191549002> [https://perma.cc/GY4B-F2FK].

requirement to publish newspaper notices within the county where law enforcement seized the forfeitable property is especially troublesome because a large proportion of forfeitable property is easily transported and Iowa has an especially large number of counties.¹⁹⁰

Moreover, Iowans need this particular reform because it concerns a sacrosanct principle of American constitutional law—the due process of law. In broad terms, due process constrains government action, usually by forcing the government to jump through a set of procedural hoops before taking citizens' lives, liberties, or property from them.¹⁹¹ But what does due process mean? What hoops must the government jump through before executing people, before locking them in a prison cell, or seizing their property? Some pundits have argued that certain rights and liberties are so inviolate and sacred that there is no legitimate process whereby government may deprive them of those rights and liberties.¹⁹² Indeed, the U.S. Supreme Court's jurisprudence has occasionally adopted this view.¹⁹³ By contrast, civil asset forfeiture laws, like Iowa's previous civil forfeiture law, too frequently require governments to undertake slim, flimsy processes before seizing a citizen's property. Legislatures, courts, and society struggle to find the right balance in civilized society, but the newspaper notification provisions of Iowa's asset forfeiture statute are outdated and have not yet obtained that balance.

The state can, however, easily fix the due process concerns implicated here by providing for forfeiture notices on the internet. The state of Iowa already does something similar on the state Attorney General's webpage. The office frequently posts news stories about high-impact state civil suits, settlements, and criminal prosecutions.¹⁹⁴ In addition, the federal

190. *Does Iowa Need 99 Counties?*, GAZETTE (Nov. 19, 2009, 12:19 PM), <https://www.thegazette.com/2009/11/19/does-iowa-need-99-counties> [<https://perma.cc/H836-EP24>]. This unsigned article points out some additional problems caused by having a high number of relatively small counties. *Id.* In the article, Len Hadley, a former CEO of Maytag, points out how consolidating counties, especially in rural areas, would reduce county payroll expenses, which would commensurately lower rural Iowans' property taxes. *Id.* As of 1990, the average number of counties in a state is approximately 62. U.S. CENSUS BUREAU, *States, Counties, and Statistically Equivalent Entities*, in GEOGRAPHIC AREAS REFERENCE MANUAL 4-11 (rev. 2021) (estimating the average number of counties by dividing 3,141 by 51). Utah, a state that is about 1.5 times bigger than Iowa, has only 29 counties. See *County Histories*, UTAH ASS'N OF CNTYS. (2021), <https://olduacnet.org/utahs-29-counties> [<https://perma.cc/P8EG-VNRR>].

191. See U.S. CONST. amend. V (requiring that the federal government respect citizens' rights to due process); U.S. CONST. amend. XIV, § 1 (requiring that the state governments respect citizens' rights to due process).

192. See generally Natalie M. Banta, *Substantive Due Process in Exile: The Supreme Court's Original Interpretation of the Due Process Clause of the Fourteenth Amendment*, 13 WYO. L. REV. 151 (2013) (discussing various views of substantive due process and the doctrine's history in the jurisprudence of the U.S. Supreme Court).

193. See *Lochner v. New York*, 198 U.S. 45, 62–64 (1905); *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391–92 (1937); *Griswold v. Connecticut*, 381 U.S. 479, 481–82 (1965).

194. See *Newsroom*, IOWA DEP'T JUST. OFF. ATT'Y GEN., <https://www.iowaattorneygeneral.gov/newsroom> [<https://perma.cc/88KJ-DEX4>].

government recently created a website, “forfeiture.gov,” to provide a comprehensive list of all notices for administrative, civil, and criminal federal forfeitures.¹⁹⁵ It is increasingly unacceptable for state governments to purport to comply with the state and federal constitutional requirements of due process¹⁹⁶ when using the customary mechanism of modern communication—the internet—is cost-effective and simple.

B. REPLACE CIVIL IN PERSONAM FORFEITURE WITH
CRIMINAL FORFEITURE

Second, the Iowa General Assembly should replace civil in personam forfeiture with criminal forfeiture. As the law stands, the state of Iowa can essentially mete out criminal punishments on citizens using civil asset forfeiture without extending basic criminal protections to those citizens. North Carolina, New Mexico, and Nebraska, in an effort to solve this problem, “have abolished civil forfeiture entirely and only use criminal law to forfeit property.”¹⁹⁷ Ending at least civil in personam forfeitures will help Iowa harmonize its laws with time-honored criminal law protections, such as the presumption of innocence,¹⁹⁸ proving conviction by the high standard of beyond a reasonable doubt,¹⁹⁹ and providing attorneys to indigent defendants.²⁰⁰ In the first instance, a person who is an indigent defendant in a civil asset forfeiture dispute with the state of Iowa are not entitled to a public defender, even though the very same person could qualify for a state public defender in a criminal case. In addition, the clear-and-convincing standard of proof in asset forfeiture cases somehow still falls short of the criminal law’s venerable standard. This was even more troubling before the Forfeiture Reform Act when the civil asset forfeiture standard of proof was a preponderance of the evidence standard. Also, citizens defending an asset

195. See *Forfeiture.gov*, U.S. DEP’T JUST., <https://www.forfeiture.gov> [<https://perma.cc/JLC9-NJ9E>].

196. See IOWA CONST. art. I, § 9 (“[N]o person shall be deprived of life, liberty, or property, without due process of law.”); U.S. CONST. amend. V (“No person shall . . . be deprived of life, liberty, or property, without due process of law . . .”).

197. *Civil Forfeiture Reforms on the State Level*, INST. FOR JUST. (2021), <https://ij.org/activism/legislation/civil-forfeiture-legislative-highlights> [<https://perma.cc/4RRY-N2AE>]. North Carolina abolished civil forfeiture in 1985—36 years ago, and New Mexico, Nebraska, and Maine followed suit in 2015, 2016, and 2021, respectively. *Id.*

198. See *Coffin v. United States*, 156 U.S. 432, 459 (1895) (“[E]very man is presumed to be innocent until his guilt is proved beyond a reasonable doubt.”).

199. *Patterson v. New York*, 432 U.S. 197, 210 (1977) (“We therefore will not disturb the balance struck in previous cases holding that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged.”); see also Thomas P. Gallanis, *Reasonable Doubt and the History of the Criminal Trial*, 76 U. CHI. L. REV. 941, 941–42 (2009) (reviewing JAMES Q. WHITMAN, *THE ORIGINS OF REASONABLE DOUBT: THEOLOGICAL ROOTS OF THE CRIMINAL TRIAL* (2008)).

200. See generally *Gideon v. Wainwright*, 372 U.S. 335 (1963) (incorporating the Fifth Amendment’s right to counsel provision against the states for felony cases).

forfeiture dispute with the state of Iowa are not entitled to a presumption of non-liability (or “innocence”) as criminal defendants are. So long as civil in personam forfeiture persists in Iowa, the state government will have a tool to exact criminal sanctions on individuals who lack foundational criminal protections enshrined in American law.

Civil in rem forfeitures pose a more complex problem. As the Navigation Acts revealed, there are circumstances where civil in rem forfeitures not only accord with traditional notions of justice²⁰¹ but also are necessary to effect the primary goals of forfeiture: to make sure that crime does not profit criminals, punish wrongdoers, and compensate society for the injuries it suffered from the conduct giving rise to the forfeiture.²⁰² Nevertheless, it is not needful or appropriate to exert civil in rem jurisdiction over a defendant’s property when the state already has in personam jurisdiction of the defendant. If Iowa retains civil in rem forfeitures, then it should limit the state’s use of such forfeitures only to circumstances where the state does not have in personam jurisdiction over a defendant. An example of such a circumstance may be an individual who abandons contraband and proceeds from criminal activity, or other forfeitable property, that is later found and seized by the state. Armed with only in personam forfeiture powers, it is not clear how the state, after seizing the property, could take title to it legally and within a reasonable period.²⁰³ While such a situation is probably uncommon, the possibility that it arises, or situations substantially like it, is high enough to consider preserving civil in rem forfeitures in a limited form.²⁰⁴

C. PROHIBIT LAW ENFORCEMENT FROM PROFITING
FROM FORFEITURES

Third, Iowa should adopt legislation that redirects all forfeiture proceeds to a state-wide fund. The law enforcement agency that seizes and forfeits property should not receive a direct financial benefit from its forfeitures. While it is important to acknowledge that the mere existence of perverse incentives does not necessarily mean that law enforcement acts inappropriately, the best course of action is to eliminate even the possibility and appearance of these incentives. Numerous states have employed this

201. See generally *Pennoyer v. Neff*, 95 U.S. 714 (1878) (explaining the fundamental concept of in rem jurisdiction in American law); *Int’l Shoe Co. v. Washington*, 326 U.S. 310 (1945) (setting the “traditional notions of fair play and substantial justice” standard to establish civil in personam forfeiture).

202. See *supra* notes 72–75 and accompanying text.

203. See generally IOWA CODE § 556 (2021) (providing for the disposition of unclaimed property, including abandoned property, under the common law doctrine of escheat).

204. But see CRIM. FORFEITURE PROCESS ACT: MODEL LEGIS. § 100 (INST. FOR JUST. 2021). IJ opposes civil forfeiture in all its forms, and its model asset forfeiture reform legislation provides for only criminal forfeiture. *Id.*

approach,²⁰⁵ and the approach makes intuitive sense because the remedial justification for forfeitures posits that forfeitures rectify the harm that the underlying offenses inflict on society.²⁰⁶

The recordkeeping requirements of the Forfeiture Reform Act do not require disclosure retroactively.²⁰⁷ As a result, publicly available forfeiture data goes back only as far as 2016.²⁰⁸ Nonetheless, empirical research that investigates the available forfeiture data is needed to determine the extent to which law enforcement agencies police the back end of controlled substance transactions. Moreover, the inter-agency sharing provisions of Section 809A.17 are problematic because they do not provide for public disclosure of the sharing agreements. The public appears to have no way of knowing whether the City of Iowa City Police Department shares forfeiture profits with the City of Coralville Police Department.

This uncertainty complicates the big picture of asset forfeiture in Iowa. Still, the most prudent course of action is to redirect all forfeiture profits away from law enforcement and to a state-wide fund. This solves the underlying incentive problems, effaces the need to legislate for the disclosure of cross-agency sharing agreements, and simplifies forfeiture recordkeeping and disclosure by law enforcement. The state-wide nature of the fund that receives forfeiture proceeds diffuses the benefits that any given law enforcement agency might experience even indirectly. Indeed, a state-wide, non-law enforcement fund attenuates the profits and law enforcement sufficiently to resolve the perception of perverse incentives.

There are many potential state funds that would be appropriate candidates to receive forfeiture profits. A crime victim's fund seems particularly appropriate because the many types of offenses that give rise to forfeiture produce individual injuries.²⁰⁹ Iowa already has a Crime Victim Compensation Fund that would be a prime candidate to receive forfeiture profits.²¹⁰ Alternatively, the legislature could direct forfeiture proceeds to the state education fund.

205. See, e.g., MO. ANN. STAT. § 166.131 (West 2021) (“The clear proceeds of all forfeitures collected for any breach of the penal laws of the state distributed for education shall be transferred to the school building revolving fund.”).

206. See *supra* notes 72–75 and accompanying text.

207. See *supra* notes 122–28 and accompanying text.

208. See *State of Iowa Forfeiture Cases*, IOWA DATA (Aug. 30, 2021), <https://data.iowa.gov/Law-Enforcement/State-of-Iowa-Forfeiture-Cases/wenv-4h8b> [<https://perma.cc/2D54-BQ4C>].

209. See *Crime Victim Compensation Program*, IOWA DEP'T JUST., [https://www.iowaattorneygeneral.gov/for-crime-victims/crime-victim-compensationprogram#:~:text=If%20you%20or%20a%20loved,criminals%20\(not%20by%20taxpayers\)](https://www.iowaattorneygeneral.gov/for-crime-victims/crime-victim-compensationprogram#:~:text=If%20you%20or%20a%20loved,criminals%20(not%20by%20taxpayers)) [<https://perma.cc/VRP4-6BTv>].

210. *Id.*

D. FURTHER LIMIT FORFEITURE'S SCOPE TO CERTAIN
CATEGORIES OF CRIMES

The Iowa General Assembly should further limit asset forfeiture to aggravated misdemeanor and felony cases. As mentioned, the current asset forfeiture statute allows for forfeiture for serious and aggravated misdemeanors, but it is doubtful that law enforcement should be able to forfeit assets in cases of serious misdemeanors.²¹¹ There are two reasons why Iowa's serious misdemeanors should not be predicates for asset forfeitures.

First, Iowa's serious misdemeanors do not appear to be "serious" enough to justify state seizure of a misdemeanant's property. This is especially the case when considering the conduct Iowa has designated as "serious."²¹² When a predicate crime is comparatively minor, seizing title to private citizens' property—a significant intrusion of individual liberties—is not necessary because the theories that justify forfeiture²¹³ cannot carry the weight of the forfeitures. Serious misdemeanors in Iowa do not involve criminal enterprises that would implicate the enterprise theory, and they do not involve contraband or instrumentalities either.²¹⁴ Indeed, the Iowa legislature's choice to categorically allow forfeitures for all serious and aggravated misdemeanors seems problematic. Truly, most Iowans would question the logic of the state being able to initiate forfeiture proceedings in a case where an individual falsely claimed to have a degree or an academic honor.

Second, Iowa's serious misdemeanors should not be predicates for asset forfeitures because these forfeitures are not especially helpful in terms of punishing offenders or remedying the consequences of their bad acts. The statutory punishment for serious misdemeanors is probably by itself sufficient to condemn and deter future serious misdemeanors. From a remedial perspective, asset forfeiture simply does not make sense for serious misdemeanors because confiscating the types of property at issue in serious misdemeanors does not compensate society for any injuries incident to the serious misdemeanor. Instead, only felonies and specific aggravated misdemeanors for which forfeiture is a sensible and fair penalty should be predicate forfeiture crimes. Traffic offenses that carry a scheduled fine under Iowa Code Section 805 should never be predicate crimes for asset forfeiture.

E. CLARIFY THE PROPORTIONALITY LIMIT OF
SECTION 809A.12B

Finally, the Iowa General Assembly should add a nonprescriptive list of proportionality factors to the Forfeiture Reform Act's proportionality review

211. See *supra* notes 144–59 and accompanying text.

212. See discussion *supra* Section II.C.

213. See discussion *supra* Section II.A.1.

214. Citizens may legally possess the objects in the serious misdemeanors examples; the serious misdemeanor merely prohibits a particular use of those objects.

provision.²¹⁵ The current statute provides no guidance as to what “grossly disproportionate” means,²¹⁶ so this particular provision does no more than codify an extant Iowa Supreme Court precedent.²¹⁷ As a result, Iowa courts are left to construe the term “grossly disproportionate” without guidance from the legislature. Legislators understandably fear unintended consequences of supplying rigid criteria in situations like this one, but, in this case, some guidance is better than none. Indeed, the contours of proportionality are decidedly a question of public policy, and it is the task of legislators, not courts, to make such policies.²¹⁸ For the asset forfeiture statute, the General Assembly can avoid unintended consequences by including a nonprescriptive multifactor test for courts to consider in determining whether a specific forfeiture is grossly disproportionate to the seriousness of the underlying criminal offense. Examples of possible factors include how often the defendant used the property for criminal purposes; how often the defendant used the property for non-criminal purposes; the extent to which an individual can use the property for non-criminal purposes; how crucial a role the property played in the defendant’s crime; the severity of the crime; and the value of the forfeitable property.²¹⁹ Amending the asset forfeiture

215. See IOWA CODE § 809A.12B (2021) (“Property shall not be forfeited as an instrumentality under this chapter to the extent that the amount or value of the property is grossly disproportionate to the severity of the offense. Contraband and any proceeds obtained from the offense are not subject to proportionality review under this section.”).

216. *Id.*

217. See *In re Prop. of Flores*, No. 05-0217, 2006 WL 132086, at *2–4 (Iowa Ct. App. Jan. 19, 2006) (“We apply a multi-factor balancing test in our assessment of whether the contemplated forfeiture is grossly disproportionate. These factors include (1) the extent and duration of the criminal conduct, (2) the gravity of the offense weighed against the severity of the criminal sanction, and (3) the value of the property forfeited. ‘Other helpful inquiries might include an assessment of the personal benefit reaped by the defendant, the defendant’s motive and culpability and, of course, the extent that the defendant’s interest and the enterprise itself are tainted by criminal conduct.’” (citations omitted)).

218. Compare IOWA CONST. art. III, 1st, § 1 (“The powers of the government of Iowa shall be divided into three separate departments—the legislative, the executive, and the judicial: and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any function appertaining to either of the others, except in cases hereinafter expressly directed or permitted.”), *with id.* art. III, 2nd, § 1 (“The legislative authority of this state shall be vested in a general assembly, which shall consist of a senate and a house of representatives . . .”), *and id.* art. V, § 1 (“The judicial power shall be vested in a supreme court, district courts, and such other courts, inferior to the supreme court, as the general assembly may, from time to time, establish.”).

219. See U.S. DEP’T OF JUST., ASSET FORFEITURE POLICY MANUAL 87 (2021) (listing relevant factors that the Money Laundering and Asset Recovery Section of the Department of Justice’s Criminal Division considers in evaluating whether a forfeiture is “grossly disproportional” under federal law); see also 18 U.S.C. § 983(g) (2018) (instructing “court[s] to determine whether [a] forfeiture [is] constitutionally excessive” by “compar[ing] the forfeiture to the gravity of the offense giving rise to the forfeiture”). The Policy Manual is not law, but it does present a snapshot of the practices and policies of the U.S. Justice Department.

statute in this way will guide Iowa courts and mitigate unintended consequences by balancing certainty with flexibility.

V. CONCLUSION

In Iowa, crime should not be profitable, and the state government should not use civil in personam jurisdiction to skirt the key protections afforded to criminal defendants under American law. To be sure, criminal activities should neither profit criminals nor law enforcement, but the state of Iowa needs to reform its forfeiture laws to more artfully balance the need to fight crime with the need to respect both constitutional and property rights of anyone who is subject to the jurisdiction of the Hawkeye state. The Forfeiture Reform Act of 2017 leaves unsolved two central problems. First, the Act failed to abolish civil in personam jurisdiction. Second, it failed to remove the direct profit incentive that law enforcement agencies in Iowa currently enjoy.

As a result, the Iowa General Assembly should enact the following reforms: (1) replace civil in personam forfeiture with criminal forfeiture; (2) prohibit law enforcement from directly profiting from asset forfeitures by redirecting forfeiture profits to a state-wide fund, such as a crime victims' fund or a public education fund; (3) further limit forfeiture's scope to aggravated misdemeanors and felonies, not simple or serious misdemeanors; (4) modernize the notification provisions, as required by the due process doctrines of notice, to comport with the widespread efficiency and availability of internet resources and the dwindling availability of newspapers; and (5) clarify the gross proportionality limitation with a nonprescriptive list of factors to weigh proportionality so as to spare the Iowa court system from having to make public policy. These five reforms will help more fully protect the rights of Iowans and enhance the national conversation about how law enforcement agencies receive funding.