

Kansas Standard Asset Seizure and Forfeiture Act: An Ancient and Failing Approach

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I. INTRODUCTION

A “D-” is not the grade anyone wishes to receive; yet, it is the grade that the Institute for Justice¹ (“IJ”) awarded Kansas for its civil asset forfeiture statutes.² In a national survey of forfeiture approaches, the IJ assigned each jurisdiction an overall system grade based on the jurisdiction’s individual grades in three categories: “the financial incentive for law enforcement to seize, the government’s standard of proof to forfeit, and who bears the burden in innocent owner claims.”³ If Kansas’ low grade does not demonstrate that there are problems with Kansas’ civil forfeiture system, consider the American Civil Liberties Union’s (“ACLU”) determination that the Kansas civil asset forfeiture laws are “among the worst in the nation.”⁴ Kansas’ civil forfeiture laws are known collectively as the Kansas Standard Asset Seizure and Forfeiture Act (“KSASFA”).⁵ Kansas’ forfeiture problems begin with its use of a civil forfeiture approach.

Civil asset forfeiture is a civil action in which the government pursues forfeiture, of real or personal property, based on the fictional idea that the property itself committed a wrong.⁶ Civil forfeiture actions proceed

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1. The Institute for Justice is a national law firm that focuses on economic liberty, property rights, educational choice, and free speech. *About Us*, INST. FOR JUST., <http://ij.org/about-us/> (last visited Apr. 5, 2018).

2. DICK M. CARPENTER II ET AL., INST. FOR JUST., *POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE* 22 (2nd ed. 2015), <http://ij.org/wp-content/uploads/2015/11/policing-for-profit-2nd-edition.pdf>.

3. *Id.*

4. DeAnn Smith, *Audit in Kansas Proves Civil Asset Forfeiture Laws Need Reform*, ACLU KAN. (Aug. 18, 2016), <https://www.aclukansas.org/en/press-releases/audit-kansas-proves-civil-asset-forfeiture-laws-need-reform>.

5. KAN. STAT. ANN. §§ 60-4104–60-4126 (2005 & Supp. 2017).

6. Charles Basler, Note, *Reforming Civil Asset Forfeiture: Ensuring Fairness and Due Process for Property Owners in Massachusetts*, 49 NEW ENG. L. REV. 665, 668–69 (2015).

against the property alone, not the owners.⁷ As such, the action proceeds under *in rem* jurisdiction.⁸ Kansas, like many other jurisdictions, uses its civil asset forfeiture statutes for the governmental purpose of ensuring that illegal activity is not profitable.⁹ However, in pursuing this purpose, Kansas disregards a property owner's constitutional rights and allows for substantial governmental abuse and overreach.

Under the U.S. Constitution, a person is entitled to certain protections from the government in regard to his property. People are "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures,"¹⁰ and no person shall "be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."¹¹ These provisions, found in the Bill of Rights, are applicable to the states by incorporation under the Fourteenth Amendment's Due Process Clause: "nor shall any State deprive any person of life, liberty, or property, without due process of law."¹² While these Amendments seem to imply that a property owner is entitled to constitutional protections when the government seizes his property, these protections are actually inapplicable to civil asset forfeiture cases.¹³

The Kansas Legislature must reform KSASFA from a civil forfeiture system to a criminal forfeiture system to better effectuate its purpose, to protect individuals' property rights, and to curb governmental overreach and abuse. Part II of this Comment examines the history of civil asset forfeiture and three different approaches to forfeiture. Part III will then focus on the problems caused by KSASFA's current form and will propose necessary reforms that address these problems.

II. BACKGROUND

An examination of the history of civil forfeiture and of the different forfeiture approaches taken by other jurisdictions will clarify how KSASFA falls short of other forfeiture systems. Part A of this section

7. Marcel Krzystek, Article, *The Recent Congressional Reform of Federal Civil Forfeitures*, 9 KAN. J.L. & PUB. POL'Y 669, 670 (2000).

8. *Id.*

9. KAN. STAT. ANN. §§ 60-4104–60-4126; *State v. Yeoman*, 951 P.2d 964, 966 (Kan. Ct. App. 1997).

10. U.S. CONST. amend. IV.

11. U.S. CONST. amend. V.

12. U.S. CONST. amend. XIV.

13. Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 47–50 (1998).

examines civil asset forfeiture’s evolution from its inception to its current use. Part B describes Kansas’ civil asset forfeiture system and compares it to two other forfeiture systems.

A. *History of Civil Asset Forfeiture*

Civil asset forfeiture is a process based on the fictional idea that property itself commits wrongs.¹⁴ Because of the property’s purported wrongs, the government brings a civil action against the property.¹⁵ The action proceeds against the property, as the defendant, with no mention of the owner.¹⁶ The purpose of civil forfeiture is to prevent people from either profiting from criminal activity or from using property to facilitate crime.¹⁷ The legal fiction, of property committing wrongs, derives from biblical times.¹⁸

Adopted by English common law, the legal fiction inspired and justified three different types of forfeitures.¹⁹ The first type of forfeiture required a person to forfeit any property that caused the death of one of the King’s subjects.²⁰ The property owner relinquished the property to the King, as a “deodand.”²¹ The second type of forfeiture required a person to forfeit his estate upon conviction of a felony or treason.²² The third type of forfeiture, found in English statutes, called for the forfeiture of property used to violate the English revenue and customs laws.²³ The third type of forfeiture codified a merging of the justifications behind the other two types of common law forfeiture: that property itself can commit a wrong and that a wrongdoer does not deserve to retain property.²⁴

14. Krzystek, *supra* note 7, at 671.

15. Andrew Crawford, *Civil Asset Forfeiture in Massachusetts: A Flawed Incentive Structure and its Impact on Indigent Property Owners*, 35 B.C. J.L. & SOC. JUST. 257, 260 (2015).

16. *Id.*

17. Basler, *supra* note 6, at 668–69.

18. Rachel L. Stuteville, Comment, *Reverse Robin Hood: The Tale of How Texas Law Enforcement Has Used Civil Asset Forfeiture to Take from Property Owners and Pad the Pockets of Local Government—The Righteous Hunt for Reform Is on*, 46 TEX. TECH L. REV. 1169, 1178 (2014) (noting that the Bible commands people to “give to God any item or animal used or acquired in furtherance of a wrongdoing”). Various sources cite Biblical passages for in support of this proposition. See, e.g., *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 681 n.17 (1974) (citing *Exodus* 21:28) (“[I]f an ox gore a man or a woman, and they die, he shall be stoned: and his flesh shall not be eaten.”).

19. See *Calero-Toledo*, 416 U.S. at 680–81.

20. *Id.*

21. *Id.* “Deodand” comes from a Latin phrase meaning “to be given to God.” *Id.* at 681 n.16.

22. *Id.* at 682.

23. *Id.*

24. *Id.*

The third approach, what is now called civil asset forfeiture, carried over to the United States and its use predates the Constitution's adoption.²⁵ The United States did not incorporate the other two types of common law forfeiture into American law.²⁶ Like England's forfeiture statutes, early American federal forfeiture laws targeted customs and revenue violations.²⁷ The early laws only applied in limited circumstances: for forfeiture of ships and cargo connected to piracy, the slave trade, or smuggling.²⁸

Over time, the federal government expanded the applicability of civil forfeiture law. The government first expanded the civil forfeiture laws during prohibition.²⁹ The prohibition expansion permitted civil forfeiture of property used to manufacture and transport alcohol.³⁰ But, the real catalyst for large scale expansion of civil forfeiture began with President Nixon's "war on drugs."³¹ In 1970, Congress enacted the Comprehensive Drug Abuse Prevention and Control Act,³² which included a provision on civil forfeiture.³³ Specifically, 21 U.S.C. § 881 calls for forfeiture of any equipment associated with manufacturing or transporting controlled substances.³⁴

Through subsequent amendments to the Comprehensive Drug Abuse Prevention and Control Act, Congress again expanded civil asset forfeiture.³⁵ Congress now permitted forfeiture of any "proceeds" related to drug offenses and any property that "facilitated" a drug offense.³⁶ The word "facilitated" is broadly construed and includes any property that makes any drug offense "less difficult and laborious."³⁷ The broad construction allows the government to seize an entire lot of property if a

25. *Id.* at 683.

26. *Id.* at 682–83.

27. Stuteville, *supra* note 18, at 1178.

28. Stefan D. Cassella, *The Uniform Innocent Owner Defense to Civil Asset Forfeiture: The Civil Asset Forfeiture Reform Act of 2000 Creates a Uniform Innocent Owner Defense to Most Civil Forfeiture Cases Filed by the Federal Government*, 89 KY. L.J. 653, 656 (2001).

29. Karis Ann-Yu Chi, Comment, *Follow the Money: Getting to the Root of the Problem with Civil Asset Forfeiture in California*, 90 CALIF. L. REV. 1635, 1638 (2002).

30. *Id.*

31. James Simon, Note, *Civil Asset Forfeiture in Virginia: An Imperfect System*, 74 WASH. & LEE L. REV. 1295, 1303–04 (2017).

32. Comprehensive Drug Abuse Prevention and Control Act, Pub. L. No. 91-513, 84 Stat. 1236 (1970) (codified as amended in scattered sections of 18, 21, 26, 31, 40, 42, 46, and 49 U.S.C. (2012)).

33. *Id.* § 511, 84 Stat. 1276 (current version at 21 U.S.C. § 881 (2012)); Blumenson & Nilsen, *supra* note 13, at 44.

34. 21 U.S.C. § 881(a); Blumenson & Nilsen, *supra* note 13, at 44.

35. Blumenson & Nilsen, *supra* note 13, at 44, 50.

36. *Id.* at 45.

37. *United States v. One 1980 BMW 320*, 559 F. Supp. 382, 384 (E.D.N.Y. 1983).

drug offense occurs anywhere within the lot's boundaries, because the lot "facilitated" a drug offense.³⁸ In 1984, Congress encouraged states to help the federal government seize property through the Comprehensive Crime Control Act of 1984.³⁹ The Comprehensive Crime Control Act created an "equitable sharing program" that allows for federal and state law enforcement agencies to share the proceeds from forfeitures effectuated jointly.⁴⁰ The government, using these provisions, extensively pursued forfeitures; for instance, in 1986 alone, the Department of Justice ("DOJ") deposited \$93.7 million of forfeiture profits into its forfeiture fund.⁴¹

By the late 1980s and 1990s, the public and many interest groups began to question the federal government's expansive use of civil forfeiture.⁴² People also challenged the constitutionality of civil forfeiture, but the U.S. Supreme Court held that because civil forfeiture is remedial in nature, few constitutional protections actually apply.⁴³ Specifically, the U.S. Supreme Court held that *in rem* forfeiture did not violate the Double Jeopardy Clause nor the takings clause of the Fifth Amendment.⁴⁴ Other protections that are inapplicable in civil forfeiture actions include the presumption of innocence, the right to counsel, and the bar on hearsay evidence.⁴⁵ The precedent, at the time, also consistently held that "an owner's interest in property may be forfeited by reason of the use to which the property is put even though the owner did not know that it was to be put to such use."⁴⁶

38. Iian D. Jablon, Note, *Civil Forfeiture: A Modern Perspective on Roman Custom*, 72 S. CAL. L. REV. 247, 264 (1998). Russ Caswell, a motel owner, experienced the government's expansive reach in 2009 when the government initiated civil asset forfeiture proceedings against his hotel because "15 people had been arrested for drug crimes at his hotel during a 20-year period." Erin Fuchs, *Guy Describes the 'Living Nightmare' of the US Government Trying to Seize His Family's Motel*, BUS. INSIDER (Apr. 16, 2015, 3:28 PM), <http://www.businessinsider.com/russ-caswell-speaks-at-civil-forfeiture-hearing-2015-4>. When testifying in front of the U.S. Senate about this forfeiture, Caswell said, "I have never been charged with or convicted of a crime my entire life. No one in my family, or any of our employees, has ever been involved in a crime at the motel concerning drugs . . . To us, the forfeiture case seemed ludicrous." *Id.*

39. Comprehensive Crime Control Act of 1984, Pub. L. 98-473, 98 Stat. 1976 (codified as amended in scattered sections of 18, 19, 21, 28, 29, 31 & 42 U.S.C. (2012)); Crawford, *supra* note 15, at 262.

40. Crawford, *supra* note 15, at 262.

41. CARPENTER, *supra* note 2, at 5.

42. Rachel Jones, Note, *Excessively Unconstitutional: Civil Asset Forfeiture and the Excessive Fines Clause in Virginia*, 25 WM. & MARY BILL OF RTS. J. 1393, 1400 (2017).

43. See *United States v. Ursery*, 518 U.S. 267, 278 (1996); *Bennis v. Michigan*, 516 U.S. 442, 452-53 (1996).

44. *Ursery*, 518 U.S. at 276; *Bennis*, 516 U.S. at 452.

45. Michael van den Berg, Comment, *Proposing a Transactional Approach to Civil Forfeiture Reform*, 163 U. PA. L. REV. 867, 893 (2015).

46. *Bennis*, 516 U.S. at 446.

Due to these rulings, people complained about the lack of protection for property owners in the government's current forfeiture regime.⁴⁷ Interest groups on both sides of the political spectrum called for forfeiture reform to remedy this problem, including both the ACLU and National Rifle Association.⁴⁸ In response to the criticism, Congress enacted the Civil Asset Forfeiture Reform Act of 2000 ("CAFRA").⁴⁹ CAFRA is the current federal approach to civil asset forfeiture, which Congress enacted to "provide a more just and uniform procedure for federal civil forfeitures."⁵⁰

The biggest change CAFRA implemented, to address growing concerns from the owner, is the "innocent owner defense."⁵¹ The innocent owner defense provides that an owner's property cannot be forfeited if the owner "did not know of the conduct giving rise to forfeiture" or "upon learning of the conduct giving rise to the forfeiture, [the owner] did all that reasonably could be expected under the circumstances to terminate such use of the property."⁵² It also prevents forfeiture if the owner acquired the property after the conduct giving rise to the forfeiture occurred.⁵³ Another change CAFRA implemented requires the government to establish a "substantial connection between the property and the offense" giving rise to forfeiture.⁵⁴ Facially this provision appears to provide added protection for owners, but in practice a substantial connection showing only requires the government show that the property made the prohibited conduct "easy or less difficult."⁵⁵ Congress notably did not change the financial incentive inherent in forfeiture, which allowed the government to continue to profit from forfeitures.⁵⁶ By 2014, the DOJ's Forfeiture Fund's "annual deposits had reached \$4.5 billion—a 4,667 percent increase" from the profits deposited in 1986.⁵⁷

47. CARPENTER, *supra* note 2, at 2.

48. Marc S. Roy, *United States Federal Forfeiture Law: Current Status and Implications of Expansion*, 69 MISS. L.J. 373, 419 (1999).

49. Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106-185, 114 Stat. 202 (codified at 18 U.S.C. §§ 983, 985 (2012); 28 U.S.C. §§ 2465-67 (2012)); Stuteville, *supra* note 18, at 1180.

50. Stuteville, *supra* note 18, at 1180; Jones, *supra* note 42, at 1400.

51. Stuteville, *supra* note 18, at 1180.

52. 18 U.S.C. § 983(d)(2)(A)(i)-(ii).

53. *Id.* § 983(d)(3)(A).

54. *Id.* § 983(c)(3).

55. *United States v. Approximately 50 Acres of Real Property etc.*, 920 F.2d 900, 902 (11th Cir. 1991) ("the courts agree that property is used to 'facilitate' a crime when it makes the illegal activity 'easy or less difficult'").

56. CARPENTER, *supra* note 2, at 2, 5.

57. *Id.* at 5.

While civil forfeiture developed and expanded on the federal level, civil forfeiture also grew locally. By the 1970s even the U.S. Supreme Court acknowledged the expansive reach of state forfeiture statutes: “state forfeiture statutes reach virtually any type of property that might be used in the conduct of a criminal enterprise.”⁵⁸ States followed the federal government’s expansive forfeiture approach and also brought in large profits from forfeitures.⁵⁹ For example, in 2012, twenty-six states and the District of Columbia collectively brought in more than \$254 million in forfeiture profits.⁶⁰ In recent years expansive forfeiture on both a state and federal level has prompted another surge of public concern and demands for reform.⁶¹ Some states responded by enacting reforms to their forfeiture systems with a focus on providing more protection for individual property rights.⁶² While others, like Kansas, have maintained forfeiture statutes that mirror CAFRA.⁶³

B. Current Approaches to Forfeiture

An effective way to grasp KSASFA’s deficiencies is to examine other approaches to forfeiture. Part 1 of this section details KSASFA’s current form. Part 2 presents Missouri’s approach which will be considered a “middle” approach to forfeiture for the purposes of this Comment. Missouri is a middle approach because it provides more protections than KSASFA but not as many protections as the best jurisdiction. Part 3 examines New Mexico’s criminal forfeiture approach, which is currently hailed as one of the best approaches to forfeiture in the nation.

1. Among the Worst: The Kansas Approach

Kansas’ use of civil asset forfeiture laws can be traced back to its territorial days.⁶⁴ The Kansas legislature nearly unanimously enacted KSASFA in 1994.⁶⁵ On April 2, 2018, the Kansas Legislature passed

58. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 683 (1974).

59. *See* CARPENTER, *supra* note 2, at 11.

60. *Id.* The twenty-six states include: Arizona, California, Colorado, Connecticut, Hawaii, Illinois, Iowa, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Missouri, New York, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, Washington and Wyoming. *Id.* at 11 n.21.

61. Basler, *supra* note 6, at 667.

62. *Id.*

63. Colin D. Wood, “*When Good Property Goes Bad*” *A Primer on Kansas Asset Forfeiture Law and Procedure*, J. KAN. B. ASS’N, Mar. 2001, at 24, 24.

64. *Id.* at 25.

65. The Kansas House of Representatives passed KSASFA 117-5, and the Kansas Senate passed

House Bill 2459, which sought to address some concerns with the prior version of KSASFA.⁶⁶ KSASFA provides for civil *in rem* forfeiture proceedings based on certain enumerated offenses.⁶⁷ Thirty-one offenses give rise to civil forfeiture—the list covers a wide array of conduct including “violations involving controlled substances,” “violations of the banking code,” and “attempting to elude a police officer.”⁶⁸ KSASFA states that conduct constituting any of the thirty-one offenses gives rise to forfeiture “whether or not there is a prosecution or conviction related to the offense.”⁶⁹ Kansas allows for initial seizure of property with or without a warrant if the law enforcement officer finds probable cause that the property is subject to forfeiture based on its connection to one of the enumerated offenses.⁷⁰ With numerous offenses giving rise to forfeiture and no conviction required, the result is that “everything, no matter its form, no matter its value” is forfeitable under KSA SFA.⁷¹

Within ninety days of seizing the property, the law enforcement agency must file a “notice of pending forfeiture” with the court to initiate the forfeiture action against the seized property.⁷² Once the law enforcement agency initiates the action, the burden is then on the property owner⁷³ to prove that his property is exempt from forfeiture.⁷⁴ If the owner does not contest the action within thirty days, then the government can ask the court for an order of forfeiture.⁷⁵ The court will enter an order of forfeiture if the government establishes that it had probable cause to seize the property, and it properly filed the notice of forfeiture.⁷⁶

it 38-1. Colin D. Wood & Gaten T. Wood, *Unfairly Maligned: The Myths Surrounding the Kansas Civil Asset Forfeiture Debate*, J. KAN. B. ASS’N, Mar. 2017, at 44, 45 n.8, 48.

66. H.B. 2459, 87th Leg., Reg. Sess. (Kan. 2018). The updated provisions are effective July 1, 2018. *Id.* The changes implemented by House Bill 2459 are reflected, when applicable, throughout the remainder of this Comment.

67. See KAN. STAT. ANN. § 60-4104 (2005 & Supp. 2017).

68. *Id.*

69. *Id.*

70. *Id.* § 60-4107(a) & (b) (2005 & Supp. 2017). Probable cause is “[a] reasonable ground to suspect that a person has committed or is committing a crime . . . which amounts to more than a bare suspicion but less than evidence that would justify a conviction.” *Probable Cause*, BLACK’S LAW DICTIONARY (10th ed. 2014).

71. Wood, *supra* note 63, at 25.

72. KAN. STAT. ANN. § 60-4109(a)(1) (2005 & Supp. 2017).

73. KSASFA only allows an owner of, or an interest holder in, the property to contest the forfeiture. State *ex rel.* Kan. Highway Patrol v. One 1995 Chevrolet Caprice Classic/Impala SS VIN 31G1BL52P8SR191732, 382 P.3d 476, 478 (Kan. Ct. App. 2016) (quoting KAN. STAT. ANN. § 60-4111(a) (2005 & Supp. 2017)).

74. See KAN. STAT. ANN. § 60-4110(a)(1)–(2) (2005).

75. *Id.* § 60-4116(a) (2005 & Supp. 2017).

76. *Id.*

If, on the other hand, the owner does contest the forfeiture, the property owner must file a “petition for recognition of exemption” within sixty days of the notice of pending forfeiture.⁷⁷ KSASFA requires that the property owner’s petition include:

- (1) The caption of the proceedings and identifying number, if any, as set forth on the notice of pending forfeiture or complaint, the name of the claimant, and the name of the plaintiff’s attorney who authorized the notice of pending forfeiture or complaint;
- (2) The address where the claimant will accept mail;
- (3) The nature and extent of the claimant’s interest in the property; and
- (4) When and how the claimant obtained an interest in the property.⁷⁸

Once the petition is filed, the matter is set for a bench trial where the court alone will decide whether the property is subject to forfeiture.⁷⁹ At the hearing, the burden is first on the government to prove that the owner “engaged in conduct giving rise to forfeiture” and that the seized property was involved in that conduct.⁸⁰ The government must establish that the property is subject to forfeiture by a preponderance of the evidence.⁸¹

KSASFA contains a few provisions that help the government carry its burden. KSASFA states that if the government seized the property on the theory that the property was “proceeds of conduct giving rise to forfeiture” then the government does not have to pinpoint the specific transaction the property derived from.⁸² KSASFA, prior to passage of House Bill 2459, contained many rebuttable presumptions that, if the preliminary fact was proven, created the presumption that the property was subject to forfeiture.⁸³ However, House Bill 2459 did away with the rebuttable

77. *Id.* § 60-4110(a)(1)–(2) (2005); H.B. 2459, 87th Leg., Reg. Sess. (Kan. 2018).

78. KAN. STAT. ANN. § 60-4111(b)(1)–(7) (2005 & Supp. 2017); H.B. 2459. The newly enacted legislation decreased the necessary requirements in the property owner’s petition from seven specific requirements to the four cited above. *Id.*

79. KAN. STAT. ANN. § 60-4113(g) (2005 & Supp. 2017).

80. *Id.* § 60-4112(k) (2005 & Supp. 2017). H.B. 2459.

81. 2017 KAN. STAT. ANN. § 60-4113(g). In Kansas, as in most jurisdictions, a “[p]reponderance of evidence” is defined as “evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it[.]” . . . [it] means that evidence which shows a fact is more probably true than not true.” *Ortega v. IBP, Inc.*, 874 P.2d 1188, 1197 (Kan. 1994) (quoting *Preponderance of Evidence*, BLACK’S LAW DICTIONARY (6th ed. 1990)). Kan. H. B. 2459 recodifies this requirement as KAN. STAT. ANN. § 60-4113(h).

82. 2017 KAN. STAT. ANN. § 60-4112(j); H.B. 2459 recodifies this as KAN. STAT. ANN. § 60-4112(k). H.B. 2459, 87th Leg., Reg. Sess. (Kan. 2018)

83. *See* 2017 KAN. STAT. ANN. § 60-4112(s), (j); *City of Hoisington v. \$2,044 in U.S. Currency*, 8 P.3d 58, 62 (Kan. Ct. App. 2000) (finding that money found in a person’s pocket was presumed forfeitable because controlled substances were found in her purse which was “never more than an arm’s reach away” thereby fulfilling the “close proximity” requirement); *State v. 1978 Chevrolet Auto.*, 835 P.2d 1376, 1378–79 (Kan. Ct. App. 1992) (finding that money found on a person and seized

presumption approach.⁸⁴ Instead, the court is to look at “the totality of the circumstances [to] determine if the property of a person is subject to forfeiture.”⁸⁵ The proximity of the property to contraband is now treated simply as one factor for forfeiture, instead of a rebuttable presumption commanding forfeiture.⁸⁶

Once the government establishes that the property is forfeitable, then the burden shifts to the property owner to prove that his property is exempt from forfeiture.⁸⁷ KSASFA provides a few narrow reasons that a property owner’s property is exempt from forfeiture—for example, if the owner received the property after the conduct that would qualify the property for forfeiture occurred.⁸⁸ The property owner must prove the property is exempt by a preponderance of the evidence.⁸⁹ In other words, in Kansas the property owner’s “property is guilty until [the property owner] prove[s] it innocent.”⁹⁰ Due to the heavy burden—of proving their property innocent—that KSASFA thrusts on property owners, Kansas earned a “F” in the owner’s burden category.⁹¹

KSASFA also earned a “F” in the financial incentives category.⁹² The financial incentives come into play when the government meets its burden, and the claimant does not. In that case, the court will issue an order transferring title of the forfeited property to the law enforcement agency.⁹³ The law enforcement agency is then free to decide whether to keep and use the property, sell the property and keep the profits, or destroy the property.⁹⁴

was presumed forfeitable because it was considered in “close proximity” to drugs found inside the vehicle).

84. H.B. 2459.

85. *Id.*

86. *Id.*

87. Wood, *supra* note 63, at 28.

88. KAN. STAT. ANN. § 60-4106(a) (2005).

89. *Id.* § 60-4113(h) (2005 & Supp. 2017).

90. Jonathan Shorman, *Kansas Asset Forfeiture Legislation Creates Unlikely Allies in Support*, TOPEKA CAP.-J. ONLINE (Jan. 24, 2017, 7:47 AM), <http://cjonline.com/news/state-government/2017-01-24/kansas-asset-forfeiture-legislation-creates-unlikely-allies-support> (quoting Representative Gail Finney).

91. CARPENTER, *supra* note 2, at 151.

92. *Id.*

93. KAN. STAT. ANN. § 60-4116(b) (2005 & Supp. 2017).

94. *Id.* § 60-4117(a)(1)–(3) (2005 & Supp. 2017). The only evident restrictions on the law enforcement agency’s discretion in choosing how to use the property is that if it is a controlled substance or other contraband, it must be “destroy[ed] or use[d] for investigative or training purposes” and if they choose to sell the property, it must “not [be property] required by law to be destroyed.” *Id.* § 60-4117(a)(2)–(3).

Other states allow for law enforcement to keep all (or more than 95%) of the forfeiture proceeds including: Alabama, Arizona, Arkansas, Delaware, Georgia, Hawaii, Idaho, Iowa, Kentucky, Massachusetts, Michigan, Montana, Nevada, New Jersey, North Dakota, Ohio, Oklahoma, Pennsylvania, South Dakota, Tennessee, Utah, Virginia, West Virginia, and Wyoming.⁹⁵ Many of these same states, like Kansas, place the burden on the owner not the government.⁹⁶ Most of these other states received an overall grade of “D+” or lower for their approach to forfeiture.⁹⁷ KSASFA’s approach to forfeiture is among the worst; it provides little protection to owners and creates a high potential for abuse.

2. A Middle Approach: Missouri

In contrast, Missouri receives a “B+” for its approach to forfeiture by providing additional protections that KSASFA lacks.⁹⁸ Missouri’s asset forfeiture statutes are known as the Criminal Activity Forfeiture Act (“CAFA”).⁹⁹ CAFA received higher grades than KAFSA in two categories: standard of proof and financial incentive category.¹⁰⁰ In relation to the burden of proof category, CAFA, unlike KSASFA, requires a criminal conviction before forfeiture is permitted: “no property shall be forfeited unless the person charged is found guilty of or pleads guilty to a felony substantially related to the forfeiture.”¹⁰¹ After a criminal conviction is secured, CAFA requires the government to prove that the property is subject to forfeiture by a preponderance of the evidence.¹⁰² In practical effect, CAFA requires a high standard of proof—requiring proof beyond a reasonable doubt that a crime has occurred and then proof that the property is forfeitable by a preponderance of the evidence. CAFA earned a “B” for its high standard of proof.¹⁰³ In regard to the financial incentive category, Missouri law enforcement agencies do not get to keep any of the funds or property from forfeitures.¹⁰⁴ Instead, CAFA provides

95. CARPENTER, *supra* note 2, at 151.

96. *Id.*

97. *See id.* at 22. The IJ assigned each jurisdiction an overall grade based on the jurisdiction’s individual grades in three categories: financial incentive to seize, the government’s standard of proof to forfeit, and the burden on property owners. *Id.* at 14.

98. *Id.* at 22.

99. MO. REV. STAT. § 513.600–513.645 (West 2002).

100. CARPENTER, *supra* note 2, at 150–51.

101. MO. REV. STAT. § 513.617.1. (West 2002).

102. *Id.*; CARPENTER, *supra* note 2, at 17.

103. CARPENTER, *supra* note 2, at 150.

104. *Id.* at 14.

that forfeiture profits will be used to fund Missouri schools.¹⁰⁵ CAFA earned an “A” for its approach to curbing the financial incentives of forfeiture.¹⁰⁶

CAFA also includes a few other protective provisions that KSASFA does not. First, CAFA allows for any party to demand a jury trial instead of only permitting a bench trial.¹⁰⁷ Second, CAFA requires annual reporting of the forfeitures.¹⁰⁸ While KSASFA only provides for reporting to the legislature, CAFA requires centralized reporting to the Missouri Department of Public Safety.¹⁰⁹ These centralized reports are considered “open record[s].”¹¹⁰ CAFA also contains a separate provision requiring law enforcement agencies, who were involved in federal forfeitures, to file reports in the same manner.¹¹¹ Missouri, though not required to by statute, published the 2015 federal report on the State Auditors website allowing the public to freely access this information.¹¹² CAFA, unlike KSASFA, also includes an enforcement mechanism to ensure compliance with the reporting requirements: “[i]ntentional or knowing failure to comply with any reporting requirement . . . shall be a class A misdemeanor, punishable by a fine of up to one thousand dollars.”¹¹³ CAFA, through these provisions, provides a few additional protections that are not found in KSASFA.

However, the CAFA forfeiture approach still has flaws. First, CAFA’s reach extends even further than KSASFA by allowing forfeiture of “[a]ll property of every kind . . . used or intended for use in the course of, derived from, or realized through criminal activity.”¹¹⁴ This means that forfeiture is not limited to a list of certain enumerated offenses like in KSASFA. Instead any criminal activity that leads to a conviction can provide the basis for forfeiture. Second, like KSASFA, CAFA earned an “F” in the burden on the property owner category because CAFA also requires the property owner to prove their property is not subject to

105. MO. CONST. Art. IX, § 7; MO. REV. STAT. § 513.623 (West 2002).

106. CARPENTER, *supra* note 2, at 151.

107. MO. REV. STAT. § 513.612 (West 2002).

108. *Id.* § 513.607.8.–9. (West 2002).

109. *Id.* § 513.607.8.

110. *Id.*

111. *Id.* § 513.653.1. (West 2002).

112. See NICOLE GALLOWAY, CPA, OFFICE OF MO. ST. AUDITOR, REPORT NO. 2016-034, COMPILATION OF 2015 FEDERAL FORFEITURE REPORTS (2016), <https://app.auditor.mo.gov/Repository/Press/2016034412491.pdf>; CARPENTER, *supra* note 2, at 35.

113. MO. REV. STAT. § 513.607.10.

114. *Id.* § 513.607(1).

forfeiture.¹¹⁵ Overall, CAFA can be considered a middle approach to forfeiture—solving some of the problems associated with civil forfeiture but still leaving many unaddressed.

3. A National Leader: New Mexico

New Mexico is on the opposite end of the forfeiture spectrum from KSASFA. In 2015, New Mexico completely overhauled its forfeiture statutes in order to make its standards more uniform and to better “protect people’s constitutional rights.”¹¹⁶ It is now the only state to receive an “A-” from the IJ for its forfeiture laws out of all fifty states and the federal government,¹¹⁷ and it is considered one of the strictest approaches to forfeiture in the nation.¹¹⁸ New Mexico is a “clear example for other states to follow in protecting people from unjust forfeitures.”¹¹⁹ New Mexico’s forfeiture law overhaul came after it garnered national attention from a 2014 civil asset forfeiture conference held in Las Cruces, New Mexico.¹²⁰ The conference included presentations and tips on how to write deceptive forfeiture complaints—with one attorney describing his filings as “a masterpiece of deception”—as well as tips on how law enforcement could target and seize “good car[s].”¹²¹ Even more flagrant, one Las Cruces City Attorney described how law enforcement could manipulate drug laws to seize expensive houses:

You liberalize marijuana so somebody can sell it, they sell the marijuana out of the house, then you seize the house, which is like 10 bucks of marijuana and you [the police] get a \$300,000 house. What a deal. That’s really exciting. They get what they want, and you get what you want.¹²²

In response, the New Mexico Legislature reformed New Mexico’s

115. CARPENTER, *supra* note 2, at 150–51; MO. REV. STAT. § 513.615 (West 2002).

116. See N.M. STAT. ANN. § 31-27-2.A. (West 2013, Westlaw through 2018); *Forfeiture Act*, N.M. ST. TREASURER’S OFF., <http://www.nmsto.gov/forfeiture/> (last visited Apr. 10, 2018).

117. CARPENTER, *supra* note 2, at 22 (giving New Mexico an A- grade and ranking it the highest jurisdiction in regard to civil forfeiture laws).

118. Mary Hudetz, *Forfeiture Reform Aligns Likes of Billionaire Charles Koch*, ACLU, TOPEKA CAP.-J. ONLINE (Oct. 15, 2016, 5:49 AM), <http://www.cjonline.com/news/2015-10-15/forfeiture-reform-aligns-likes-billionaire-charles-koch-aclu>.

119. CARPENTER, *supra* note 2, at 23.

120. Nick Sibilla, “*If in Doubt. . . Take It!*” *Behind Closed Doors, Government Officials Make Shocking Comments About Civil Forfeiture*, BUZZFEED (Nov. 10, 2014 7:04 AM), <https://www.buzzfeed.com/nicks29/aif-in-doubtatake-ita-behind-closed-doors-4y3w>.

121. *Id.*

122. *Id.* (discussing how even if a state legalizes marijuana, under the federal equitable sharing program, law enforcement could still reap the profits of a forfeiture for mere possession of marijuana since it is a federal offense).

Forfeiture Act (“Forfeiture Act”)¹²³ from a civil forfeiture act to a criminal forfeiture act which only allows forfeiture when: “(1) the person was arrested for an offense to which forfeiture applies; (2) the person is convicted by a criminal court of the offense; and (3) the state establishes by clear and convincing evidence that the property is subject to forfeiture.”¹²⁴ The Forfeiture Act explicitly states that its purpose is to “ensure that only criminal forfeiture is allowed in this state.”¹²⁵ Criminal forfeiture differs from civil forfeiture because the forfeiture action is based on a person’s criminal conviction, and it imposes forfeiture of the property as part of the sentence.¹²⁶ Criminal forfeiture, unlike civil forfeiture, allows the defendant to exercise all of his constitutional rights during the criminal proceeding.¹²⁷ Effectively, property will not be forfeited in a criminal forfeiture action unless the government proves beyond a reasonable doubt that the defendant committed the charged crime and the government proves that the seized property is connected to that crime.¹²⁸

Due to the Forfeiture Act’s criminal forfeiture approach, it differs in significant ways from KSASFA’s civil forfeiture approach. First, in criminal forfeiture actions the burden to prove that the property is subject to forfeiture is on the government, not on the property owner: the seizing law enforcement agency must file a forfeiture complaint to initiate the action,¹²⁹ and the owner then files an answer to the complaint.¹³⁰ The forfeiture action occurs after the criminal proceeding.¹³¹ In the forfeiture action, the government must prove that the seized property is subject to forfeiture by a clear and convincing evidence standard.¹³² Consequently, the government’s burden is substantial: it must first prove the criminal conduct beyond a reasonable doubt to secure a conviction and then it must prove that the property is forfeitable by a clear and convincing evidence standard. New Mexico earned an “A” for the burden on an owner category since it placed the heavy burden on the government.¹³³ The second

123. N.M. STAT. ANN. § 31-27-1 (West 2013, Westlaw through 2018).

124. *Id.* § 31-27-4.A.(1)–(3) (West 2013, Westlaw through 2018).

125. *Id.* § 31-27-2.A.(6) (West 2013, Westlaw through 2018).

126. Stuteville, *supra* note 18, at 1175–76.

127. *Id.* at 1176.

128. *Id.*

129. N.M. STAT. ANN. § 31-27-5.A. (West 2013, Westlaw through 2018).

130. *Id.* § 31-27-6.A. (West 2013, Westlaw through 2018).

131. *Id.* § 31-27-6.C.

132. CARPENTER, *supra* note 2, at 151. “[C]lear and convincing evidence is something stronger than a mere ‘preponderance’ and yet something less than ‘beyond a reasonable doubt.’ . . . when weighed against the evidence in opposition and the fact finder’s mind is left with an abiding conviction that the evidence is true.” *In re Sedillo*, 498 P.2d 1353, 1355 (N.M. 1972).

133. CARPENTER, *supra* note 2, at 151.

significant difference is that the criminal forfeiture approach provides more protection for the property owner.¹³⁴ For example, the Forfeiture Act states that a property owner may have an attorney appointed in the forfeiture proceeding if the criminal defendant was appointed a public defender for his criminal case.¹³⁵

In addition to the protections provided by adopting a criminal forfeiture approach, the Forfeiture Act contains other provisions that narrow the potential for governmental abuse. The Forfeiture Act takes the financial incentive away from law enforcement. Under the Forfeiture Act, the money from the sale of forfeited property must be deposited into the State's "general fund."¹³⁶ It also explicitly states that law enforcement agencies may not keep any forfeited or abandoned property.¹³⁷ These provisions curb the financial incentive for law enforcement to seize property—since the law enforcement agency does not get any of the property or money from forfeitures made—and earned New Mexico an "A" in the financial incentive category.¹³⁸

The Forfeiture Act also prevents local agencies from profiting from forfeiture under the federal equitable sharing program unless: the property's value is at least \$50,000, the conduct giving rise to forfeiture is "interstate in nature and sufficiently complex[,] and the property is only forfeitable under federal law."¹³⁹ In case the purpose of the ban on using the federal equitable sharing program is unclear, the provision explicitly states that "[t]he law enforcement agency shall not transfer property to the federal government if the transfer would circumvent the protections of the Forfeiture Act that would otherwise be available to a putative interest holder in the property."¹⁴⁰ The Forfeiture Act, through this section, ensures that local law enforcement will not receive profits from forfeiture by simply circumventing the strict state forfeiture process and taking advantage of the federal forfeiture program.¹⁴¹

134. Stuteville, *supra* note 18, at 1176.

135. N.M. STAT. ANN. § 31-27-6.C.

136. *Id.* § 31-27-7.B. (West 2013, Westlaw through 2018). The general fund is where "all revenues not otherwise allocated by law" are deposited and expenditures from the fund must be "authorized by the legislature." *Id.* § 6-4-2 (West 2012).

137. *Id.* § 31-27-8.D. (Westlaw through 2018).

138. CARPENTER, *supra* note 2, at 151.

139. N.M. STAT. ANN. § 31-27-11.A. (Westlaw through 2018).

140. *Id.* § 31-27-11.B.

141. See *supra* Section II.A. The equitable sharing program was implemented in an amendment that expanded civil forfeiture. Crawford, *supra* note 15, at 262. It allows for federal and state agencies to share the profits of any joint forfeitures. *Id.*

Additionally, the Forfeiture Act ensures public transparency. It requires detailed, centralized annual reporting by all law enforcement agencies.¹⁴² Each law enforcement agency must submit an annual report that includes the number of seizures of property, the number of seizure of cash, and the quantity of each.¹⁴³ Further, each agency must include the “class of crime” that prompted the seizure.¹⁴⁴ These reports are submitted to the New Mexico Department of Public Safety and the district attorney’s office in that agency’s jurisdiction.¹⁴⁵ The Department of Public Safety is then tasked with compiling those reports into an aggregate report.¹⁴⁶ Then, the Department of Public Safety is required to publish that aggregate report on its website by April 1 of the next year, allowing free public access.¹⁴⁷

While New Mexico exemplifies the most comprehensive approach to forfeiture reform, it is not the only state that has taken action to heighten its forfeiture standards. For instance, some other states also require a conviction before property can be forfeited, including: California, Minnesota, Montana, Nebraska, Nevada, North Carolina, and Vermont.¹⁴⁸ A handful of jurisdictions reformed their laws to ensure the government carries the burden in forfeiture actions: California, Colorado, Connecticut, Florida, Mississippi, Montana, New York, Oregon, Utah, and the District of Columbia.¹⁴⁹ Other jurisdictions have taken the entire financial incentive away from law enforcement: Indiana, Maine, Missouri, North Carolina, Wisconsin, and the District of Columbia.¹⁵⁰ Currently, forgoing a civil forfeiture system for a criminal forfeiture system is a minority view, but adopting a criminal forfeiture approach solves many problems.

III. ANALYSIS

The Kansas Legislature must reform KSASFA from a civil forfeiture system to a criminal forfeiture system to better effectuate its purpose, protect individuals’ property rights, and curb governmental overreach and abuse. The necessity of such reform is clear when examining the problems created by KSASFA’s current approach. These problems can be broken up into two broad categories: (1) disregard for individuals’ property rights

142. See N.M. STAT. ANN. § 31-27-9 (Westlaw through 2018).

143. *Id.* § 31-27-9.A.(1)–(2).

144. *Id.* § 31-27-9.A.(4).

145. *Id.* § 31-27-9.B.

146. *Id.* § 31-27-9.C.

147. *Id.* § 31-27-9.D.

148. CARPENTER, *supra* note 2, at 17.

149. *Id.* at 20.

150. *Id.* at 14.

and due process and (2) governmental abuse and overreach. Section A will focus on KSASFA's disregard for individuals' property rights and due process. Section B will address KSASFA's high potential for governmental abuse and overreach. Each Section will first address the problems caused and then propose necessary reforms to remedy the problems discussed.

A. Property Rights and Due Process

Theoretically, Americans are constitutionally entitled to certain protections from the government in regard to their property.¹⁵¹ However, these constitutional rights, to be secure in property and to be afforded due process of law, are actually inapplicable to civil asset forfeiture cases.¹⁵² Part 1 will illustrate the problems caused by KSASFA's civil forfeiture approach in relation to individuals' property rights and due process. Part 2 will then discuss how the Kansas Legislature needs to reform KSASFA to give Kansas property owners security in their property and afford Kansans due process of law when the government seizes their property.

1. Deprivation of Property and Due Process Rights Caused by KSASFA's Current Approach

On a conceptual level, the inapplicability of certain constitutional protections in civil forfeiture cases is unjust. The United State Supreme Court's decision that civil forfeiture is remedial¹⁵³ is arbitrary because the ultimate legal effect of a civil forfeiture case and a criminal forfeiture case is virtually identical. In a civil forfeiture action, it is clear that an inanimate object cannot take any action, so the underlying conduct that civil asset forfeiture is concerned with is actually conduct perpetrated by an individual (presumably the property owner). The property cannot defend itself, so a civil forfeiture action requires the owner to contest the forfeiture of the property.¹⁵⁴ Perhaps most important, civil asset forfeiture ultimately results in the forfeiture of the owner's property.

151. See U.S. CONST. amends. V (requiring due process for any criminal proceeding denying a citizen's property), IV (protecting citizens' property from unreasonable searches and seizures), XIV § 1 (prohibiting states from depriving any person of property without due process).

152. Blumenson & Nilsen, *supra* note 13, at 48–50.

153. *United States v. Ursery*, 518 U.S. 267, 278 (1996).

154. See, e.g., KAN. STAT. ANN. § 60-4110(a)(1)–(2) (2005).

In comparison, criminal forfeiture also focuses on the individual's criminal conduct.¹⁵⁵ Criminal forfeiture requires any objection to forfeiture to come from the property owner.¹⁵⁶ Ultimately, criminal forfeiture also results in the forfeiture of the owner's property as part of the individual's sentence.¹⁵⁷ Comparing civil forfeiture and criminal forfeiture actions in these broad strokes demonstrates that the action required and the legal effect is the same in both: an individual's criminal conduct leads to asset seizure, the individual must contest the seizure, and the individual forfeits his property if the action is successful. In both actions the property owner is effectively punished because he loses his property.¹⁵⁸ Since the actions and the result are the same, choosing to distinguish between civil and criminal forfeiture, and allow only property owners to exercise their rights in civil forfeiture action, is a judicial misstep that should promptly be abandoned.

Aside from the distinction itself being arbitrary, there are also serious consequences associated with the U.S. Supreme Court's decision that property deprivation is only considered punishment if the action proceeded against the owner.¹⁵⁹ *People* have the right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures,"¹⁶⁰ and no *person* shall "be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."¹⁶¹ These Constitutional protections only protect "a person" from the government.¹⁶² Therefore, when the government proceeds against the property itself, in a civil forfeiture action, these rights are theoretically not implicated. The U.S. Supreme Court's decision to classify civil forfeiture as remedial allows for a complete circumvention of an individual's property rights and due process rights. Such a circumvention is contrary to the rights given to

155. Stuteville, *supra* note 18, at 1176.

156. *Id.*

157. *Id.* at 1175–76.

158. Roy, *supra* note 48, at 417.

159. See *United States v. Ursery*, 518 U.S. 267, 278 (1996).

160. U.S. CONST. amend. IV. This provision applies to state action by incorporation under the Fourteenth Amendment's Due Process Clause: "nor shall any State deprive any person of life, liberty, or property, without due process of law[.]" U.S. CONST. amend. XIV; *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

161. U.S. CONST. amend. V. This provision applies to state action by incorporation under the Fourteenth Amendment's Due Process Clause: "nor shall any State deprive any person of life, liberty, or property, without due process of law[.]" U.S. CONST. amend. XIV; *Chicago, Burlington & Quincy Railroad Co. v. City of Chicago*, 166 U.S. 226, 235 (1897).

162. U.S. CONST. amends. V, XIV.

citizens in the Constitution and is inherently unjust considering that the deprivation is based on fiction (that the property is the defendant).

KSASFA, by calling for civil forfeiture in an *in rem* proceeding,¹⁶³ takes full advantage of the U.S. Supreme Court’s approved process to disregard most individual rights and due process protections. First, KSASFA does not provide representation to the indigent owner, forcing owners who want to contest the forfeiture to act *pro se* or pay for counsel.¹⁶⁴ Usually, an individual accused of criminal activity is guaranteed the right to counsel.¹⁶⁵ However, in a civil forfeiture case, this right does not apply because the action is technically a civil case and the property owner is classified as some type of third party to the action.¹⁶⁶ This deprivation is unjust considering the entire forfeiture action is based on the alleged criminal activity of the property owner. To deprive an owner of property based on his criminal activity, but not provide him an attorney, based solely on a technicality—that rights apply to people and not property—is contrary to the constitutional protections to which an individual is entitled.

While the deprivation of counsel may seem minor, it carries expansive legal consequences and is exacerbated since the property owner carries the burden in civil asset forfeiture actions. KSASFA places a heavy burden on the property owner. The owner must (1) be the actual owner or interest holder of the property; (2) file a written claim within thirty days of notice of the forfeiture action; (3) file the claim and all supporting documents under oath and in proper form; and (4) establish that the property in question is not subject to forfeiture.¹⁶⁷ Any property owner who wants to defend his property, but cannot afford an attorney, must file the papers himself, meet all filing deadlines, and conform to all substance and form requirements. This requires substantial, specific action from the owner and one misstep could result in major consequences—forfeiture of the property. The burden is magnified since the government is well

163. *State v. Yeoman*, 951 P.2d 964, 966 (Kan. Ct. App. 1997).

164. *See Shorman*, *supra* note 90 (“Often . . . a claim isn’t made because the individuals can’t afford an attorney, argues Micah Kubic, director of ACLU of Kansas. Individuals don’t have the right to an attorney in asset forfeiture proceedings. . . and sometimes the money that they could have used to pay for legal aid is what has been seized.”).

165. U.S. CONST. amend. VI.

166. Krzystek, *supra* note 7, at 670 (discussing the federal civil asset forfeiture approach but KSASFA is so similar to the federal approach that the general proposition applies KSASFA as well).

167. *State ex rel. Kan. Highway Patrol v. One 1995 Chevrolet Caprice Classic/Impala SS VIN 31G1BL52P8SR191732*, 382 P.3d 476, 478–79 (Kan. Ct. App. 2016). H.B. 2459 attempts to lessen the burden on the property owner by stating that “substantial compliance with [the requirements for filing a claim] shall be deemed sufficient,” however, the effect of such a provision is yet to be seen. H.B. 2459, 87th Leg., Reg. Sess. (Kan. 2018) (to be codified as KAN. STAT. ANN. § 60-4111(c)).

represented in these actions.¹⁶⁸ Assuming the property owner meets all the deadlines and substance requirements, he must then, with no legal training or experience, out-advocate an experienced attorney who likely has previous experience representing the government in forfeiture actions.

One of the heaviest burdens the owner carries is proving the property is exempt from forfeiture.¹⁶⁹ This means that “with [Kansas’] current civil asset forfeiture act, [Kansans’] property is guilty until [the property owners] prove it innocent.”¹⁷⁰ This is completely contrary to the normal presumption in our justice system that one is innocent until proven guilty. Further, this presumption of guilt is easily established considering the government’s low burden of proof to seize and forfeit the property. KSASFA only requires the government to show the property is subject to forfeiture by a preponderance of the evidence.¹⁷¹

The U.S. Supreme Court, in discussing different standards of proof, stated that a “standard of proof ‘serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.’”¹⁷² In regard to a preponderance of the evidence, the Court said that “[b]ecause the preponderance-of-the-evidence standard results in a roughly equal allocation of the risk of error between litigants, we presume that this standard is applicable in civil actions between private litigants unless ‘particularly important individual interests or rights are at stake.’”¹⁷³ The Constitution states that “life, liberty, and property” cannot be deprived without due process of law.¹⁷⁴ This would seem to indicate that property should be considered an important individual interest. Requiring high standards for the owner and low standards for the government circumvents the ideals of due process and protecting property owners’ interests. Such disregard for an individual’s due process rights should not be tolerated when a person’s property is at stake regardless of who (or what) is officially named as the defendant.

168. Krzystek, *supra* note 7, at 680 (discussing the federal civil asset forfeiture approach but KSASFA is so similar to the federal approach that the general proposition applies KSASFA as well).

169. Wood, *supra* note 63, at 28; *see* KAN. STAT. ANN. §§ 60-4110(b)(1), 60-4106(a)(1)–(5) (2005).

170. Shorman, *supra* note 90 (quoting Kansas Representative Gail Finney).

171. KAN. STAT. ANN. § 60-4113(g) (2005 & Supp. 2017); *State ex rel. Love v. One 1967 Chevrolet El Camino Bearing Vin #136807Z141367*, 799 P.2d 1043, 1046 (Kan. 1990).

172. *Herman & Maclean v. Huddleston*, 459 U.S. 375, 389 (1983) (quoting *Addington v. Texas*, 411 U.S. 418, 423 (1979)).

173. *Grogan v. Garner*, 498 U.S. 279, 286 (1991) (quoting *Herman & Maclean*, 459 U.S. at 389–90).

174. U.S. CONST. amend. V. This provision applies to state action by incorporation under the Fourteenth Amendment’s Due Process Clause: “nor shall any State deprive any person of life, liberty, or property, without due process of law.” U.S. CONST. amend. XIV.

It would be unfair to say that no constitutional protections apply to civil asset forfeiture. The U.S. Supreme Court held the Excessive Fines Clause of the Eighth Amendment applies to civil forfeiture actions.¹⁷⁵ KSASFA codified this requirement as a proportionality finding.¹⁷⁶ However, KSASFA's proportionality protection is virtually meaningless in practice. The protection requires that the forfeiture not be grossly disproportionate to "the nature and severity of the owner's conduct."¹⁷⁷ KSASFA permits forfeiture regardless of whether there is a conviction or even charges filed.¹⁷⁸ The effect of such language is that any proportionality analysis is based on the "nature and severity" of the *alleged* offense. It is not hard to imagine that the alleged criminal activity could actually be of a higher severity and nature than what actually occurred. For instance, in a drug offense it could be alleged that the contraband and property seized were used to facilitate drug trafficking and distribution, when in actuality it was only used for personal use. Such a distinction is irrelevant under KSASFA, so long as the law enforcement agency can prove they had probable cause to seize the items for drug trafficking.¹⁷⁹ KSASFA effectively renders the proportionality protection of the Excessive Fines Clause of the Eighth Amendment meaningless.

The U.S. Supreme Court's decision to differentiate between civil and criminal forfeiture is arbitrary and based on a legal fiction. Using this fictitious distinction, the U.S. Supreme Court ruled many constitutional protections inapplicable to civil forfeiture actions. The Court's decision deprives property owners of the protections guaranteed to individuals when the government tries to seize and forfeit their property. KSASFA's civil forfeiture approach allows for these deprivations at the expense of individual property owners. The Kansas Legislature must address these problems to ensure that forfeitures are just and that property owners can exercise their rights.

2. Protecting Property Rights and Due Process

Because the U.S. Supreme Court distinguishes civil forfeiture from criminal forfeiture and only applies constitutional protections in the latter, the Kansas Legislature must change KSASFA to a criminal forfeiture system. Changing to a criminal forfeiture system is the best solution to

175. *Austin v. United States*, 509 U.S. 602, 622 (1993).

176. KAN. STAT. ANN. § 60-4106(c) (2005).

177. *Id.*

178. *Id.* § 60-4104 (2005 & Supp. 2017).

179. *See id.* § 60-4107(a)-(b) (2005 & Supp. 2017).

ensure that property owners are able to exercise all of their constitutional rights when the government seizes their property. To effectuate this change, KSASFA must, first and foremost, remove the language “whether or not there is a prosecution or conviction related to the offense.”¹⁸⁰

KSASFA must adopt language that explicitly requires a conviction against the property owner and a finding that the property was related to a convicted offense before property can be forfeited. Such a requirement will ensure that seized property is actually connected to a criminal offense, not just connected to some speculative, vague criminal conduct. Requiring a conviction prior to forfeiture is an approach that other states have taken such as: California, Minnesota, Missouri, Montana, Nevada, New Mexico, North Carolina, Oregon, and Vermont.¹⁸¹ Notably, New Mexico took this approach¹⁸² and is now hailed as having one of the strictest forfeiture laws.¹⁸³ Other states are also currently considering bills that would make a conviction a prerequisite to forfeiture.¹⁸⁴

Requiring a conviction prior to forfeiture solves many of the due process and individual rights concerns created by civil forfeiture. First, by requiring a conviction prior to forfeiture, property owners are afforded the opportunity to exercise their constitutional rights in the criminal proceeding: the accused is afforded counsel, given the right to a jury trial, and permitted to refrain from incriminating himself.¹⁸⁵ Second, by requiring a conviction prior to forfeiture, the burden is put on the government. To secure a conviction the government must present evidence that convinces a jury that the criminal activity was perpetrated by the defendant beyond a reasonable doubt:

180. *Id.* § 60-4104.

181. CARPENTER, *supra* note 2, at 17 fig.7; LEGISLATIVE DIV. OF POST AUDIT, PERFORMANCE AUDIT REPORT, SEIZED AND FORFEITED PROPERTY: EVALUATING COMPLIANCE WITH STATE LAW AND HOW PROCEEDS ARE TRACKED, USED, AND REPORTED, 12 figs.1-2 (2016) [hereinafter PERFORMANCE AUDIT REPORT], <http://www.kslpa.org/media/files/reports/media/files/temp/r-16-009.pdf>.

182. N.M. STAT. ANN. § 31-27-4.A.(1)–(3) (West 2013, Westlaw through 2018).

183. Hudetz, *supra* note 118.

184. Hawaii and West Virginia are both considering bills that would require conviction prior to forfeiture. See S.B. 180, 29th Leg. (Haw. 2017), https://www.capitol.hawaii.gov/session2018/bills/SB180_.pdf (introduced in 2017 and referred to the Senate Ways and Means Committee in January 2018); H.B. 2992, 83rd Leg., 2d Reg. Sess. (W. Va. 2018), http://www.wvlegislature.gov/Bill_Text_HTML/2017_SESSIONS/RS/bills/hb2992%20intr.pdf (introduced on March 14, 2017 and referred to the Committee on the Judiciary).

185. U.S. CONST. amends. V, VI. This provision applies to state action by incorporation under the Fourteenth Amendment’s Due Process Clause: “nor shall any State deprive any person of life, liberty, or property, without due process of law[.]” U.S. CONST. amend. XIV.

Guilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined to that which long experience in the common-law tradition, to some extent embodied in the Constitution, has crystallized into rules of evidence consistent with that standard. These rules are historically grounded rights of our system, developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property.¹⁸⁶

Then, the government must present evidence that the seized property is connected to the crime of conviction.¹⁸⁷ Consequently, the government's burden is substantial: it must prove the criminal conduct beyond a reasonable doubt—resulting in a conviction—then, prove that the property is forfeitable by whatever standard is adopted. Placing the burden on the government also ensures that the property owner is presumed innocent, which is more in line with the traditional notions of justice in our legal system.

Third, requiring a conviction ensures that the proportionality analysis of the Excessive Fines Clause is meaningful. If the property owner is convicted of a crime, there is a definite offense on which to base the analysis. There will no longer be uncertainty or dispute as to the “nature and severity” of the offense. Overall, the Kansas Legislature must adopt a criminal forfeiture approach to ensure that property owners are able to exercise their constitutional rights.

B. Governmental Abuse and Overreach

Aside from a lack of due process and individual rights concerns, KSASFA's approach to forfeiture also creates many opportunities for governmental abuse and overreach. Part 1 will examine the provisions in KSASFA that allow for governmental abuse and overreach. Part 2 will discuss changes that the Kansas Legislature must implement to ensure that Kansas property owners are protected from the government.

1. Problems Caused by KSASFA's Current Form

This section focuses on two major problems caused by KSASFA that allow governmental abuse and overreach: financial incentives and governmental favoritism. These problems derive from many sources

186. *Brinegar v. United States*, 338 U.S. 160, 174 (1949).

187. *See, e.g.*, N.M. STAT. ANN. § 31-27-6.C. (West 2013, Westlaw through 2018); *see also* CARPENTER, *supra* note 2, at 16–17 (showing that some states' burden is “beyond a reasonable doubt/clear and convincing” while others are “beyond a reasonable doubt/preponderance of the evidence”).

including KSASFA itself, judicial interpretation of KSASFA, and the law in practice. This section will discuss each of these problems in turn.

a. Financial Incentives

KSASFA is ripe with opportunities for governmental abuse due to the state legislature's broad wording or, in some cases, lack of wording. The quintessential example of this permissive drafting is Section 60-4117.¹⁸⁸ The most substantial issue with this provision is that it allows law enforcement to keep the profits from the forfeitures that law enforcement officers effectuate.¹⁸⁹ Facially, it appears to be a good fiscal move to allow extra proceeds to be allotted to law enforcement budgets without costing taxpayers, but it also creates a high risk for abuse.¹⁹⁰ By allowing law enforcement agencies to keep the proceeds of forfeitures they initiate, the Kansas Legislature created a "policing for profit" system.¹⁹¹ The "policing for profit" concern is that because law enforcement benefits from forfeitures, there is a financial incentive for law enforcement to actively and aggressively pursue forfeitures.¹⁹²

Encouraging forfeiture through a policing for profit system is problematic. First, it is counterintuitive that an officer should be fiscally rewarded for completing a task that is part of his normal job duties. The counterintuitive nature of this system can be seen when imagining other analogous situations in which society recognizes that financial incentives should not be given to an officer for doing his job. For example, when a reward is offered for information in a case and a law enforcement officer finds that information, he is not given the reward. But KSASFA rewards law enforcement for effectuating forfeitures, something that is part of law enforcement's daily duties.

Second, a policing for profit system encourages law enforcement to target expensive or desirable assets. AC Bushnell, a program director for DKT Liberty Project,¹⁹³ says "[i]t looks like [the Kansas Highway Patrol

188. See KAN. STAT. ANN. § 60-4117 (2005 & Supp. 2017).

189. *Id.*

190. CARPENTER, *supra* note 2, at 78 ("Kansas law enforcement agencies keep 100 percent of forfeiture proceeds. Although the Kansas attorney general has ruled that forfeiture funds may only be used for special law enforcement projects and not to meet normal operating expenses, this still provides considerable incentive to seize.").

191. See Simon, *supra* note 31, at 1309 (terming abuses for financial gain as "policing for profit").

192. *Id.*

193. DKT Liberty Project is a non-profit located in Washington D.C. that is focused on protecting "individual liberty against encroachment by all levels of government" and government overreach. DKT Liberty Project, *About Us*, <http://dklibertyproject.org/about/> (last visited Apr. 10, 2018).

is] just looking for money.”¹⁹⁴ Bushnell made this statement after the Kansas Highway Patrol seized three large sums of cash from out-of-state motorists and no criminal charges were ever brought.¹⁹⁵ Other jurisdictions, which allowed law enforcement to keep the profits of forfeiture, also saw law enforcement target high value assets. Prior to changing its forfeiture approach, New Mexico held a conference on civil asset forfeiture.¹⁹⁶ At this conference, the speaker stated that they “always try to get . . . a good car.”¹⁹⁷ He continued that officers on a stakeout noticed a 2008 Mercedes-Benz and decided that it would go for a large profit at public auction, so the officers seized it.¹⁹⁸

This targeting of expensive assets means that law enforcement is not really effectuating the KSASFA’s purpose: to ensure that property was not used for illegal purposes and to make illegal conduct unprofitable.¹⁹⁹ Instead, law enforcement is seizing property that makes their seizures profitable and provides their agencies with funding. The profits from forfeiture can be substantial. For example, in 2015, Kansas Highway Patrol deposited \$842,041 from forfeitures into their agency forfeiture fund.²⁰⁰ Additionally, in 2015, the Kansas Highway Patrol “received more than \$1.65 million” from the federal government based on their participation with federal law enforcement in effectuating federal forfeitures through the equitable sharing program.²⁰¹

The large profits from civil forfeitures cause even more problems considering KSASFA’s lack of oversight regarding proper use of those funds. Regarding the use of forfeiture funds, KSASFA contains a general statutory restriction that forfeiture funds cannot be used for “normal operating expenses.”²⁰² The legislature drafted this provision to ensure that law enforcement agencies do not come to rely on forfeitures as a source of department funding.²⁰³ However, the July 2016 Kansas forfeiture audit—conducted upon the request of Kansas State

194. Katie Moore, *Accusations of Asset Seizure Pattern by Kansas Highway Patrol Raise Concerns*, TOPEKA CAP.-J. ONLINE (Jan. 2, 2017, 1:47 PM), <http://www.cjonline.com/news/crime-courts/2017-01-02/accusations-asset-seizure-pattern-kansas-highway-patrol-raise-concerns>.

195. *Id.*

196. Sibilla, *supra* note 120.

197. *Id.*

198. *Id.*

199. *State v. Yeoman*, 951 P.2d 964, 966 (Kan. Ct. App. 1997).

200. PERFORMANCE AUDIT REPORT, *supra* note 181, at 16.

201. Moore, *supra* note 194.

202. KAN. STAT. ANN. § 60-4117(e)(1) (2005 & Supp. 2017); PERFORMANCE AUDIT REPORT, *supra* note 183, at 28.

203. PERFORMANCE AUDIT REPORT, *supra* note 181, at 28.

Representative Gail Finney, who is an advocate for reforming KSASFA—found that the Kansas Highway Patrol appeared to spend some of its forfeiture funds on normal operating expenses in 2015.²⁰⁴ Specifically, the audit found that Kansas Highway Patrol spent \$412,900 in forfeiture proceeds on employee salaries from December 1, 2012 through June 30, 2015.²⁰⁵

Because “normal operating expense” is not defined by statute, it is unclear whether salaries fall under the statutory prohibition. However, applying forfeiture funds to employee salaries seems to be in direct opposition to the legislature’s intent in drafting this restriction. If forfeiture funds are being used for salaries, then it stands to reason that the law enforcement agencies have an incentive to ensure that they seize at least the same amount of property every year or salaries (or perhaps jobs) may decrease. This use of funds, to supplement the budget in providing salaries, is directly contrary to the law and makes the potential for “policing for profit” abuses more palpable.²⁰⁶

House Bill 2459 added new subsections to § 60-4117 that enumerate how forfeiture funds should be used.²⁰⁷ While it is not clear how these provisions will work in practice, some of the requirements are likely too broad to effectively restrict the misuse of funds. For instance, the provision that is to be codified as § 60-4117(e)(2)(F) states that the funds can be used to cover “the costs associated with a contract for a specific service that supports or enhances law enforcement.”²⁰⁸ Another “restriction,” to be codified as § 60-4117(e)(2)(A), states that funds may be used for “the support of investigations and operations that further the law enforcement agency’s goals or missions.”²⁰⁹ These supposed “restrictions” on the use of funds seem so broad that arguably anything with a connection to a law enforcement purpose would be permissible. Therefore, while it appears at first glance that House Bill 2459 addresses some of the policing for profit abuses, upon further examination it

204. *Id.* at 24–25, 28–29, 35.

205. *Id.* at 28.

206. *See id.* at 33 (“In this audit we found instances where agencies used their forfeiture proceeds for what appear to be normal operating expenses, but which are allowable due to the considerable discretion given under state law. This increases the risk that these monies can be used to help augment agency budgets, and could create an incentive to seize more property in the future.”).

207. H.B. 2459, 87th Leg., Reg. Sess. (Kan. 2018) (to be codified as KAN. STAT. ANN. § 60-4117(e)(2)).

208. *Id.*

209. *Id.*

becomes clear that the enacted “restrictions” are still far too broad and leave the potential for abuse wide open.²¹⁰

The large profits derived from forfeiture also cause problems due to KSASFA’s bare minimum approach to reporting requirements and a lack of enforcement for violations of the meager reporting requirement. KSASFA’s language, prior to House Bill 2459, required law enforcement agencies to compile annual reports that detail the value of property received and how the proceeds were used.²¹¹ This report is to be submitted to the legislature.²¹² While this seems like a good approach to curbing possible forfeiture abuse, any positive value this provision lends to KSASFA’s forfeiture approach is severely undermined since the law in practice does not conform to this provision.

The 2016 audit found that out of the six agencies audited, only two agencies—the Kansas Highway Patrol and Kansas Bureau of Investigation—complied with the statutory reporting requirements.²¹³ The other four agencies were local agencies and none of them prepared or submitted the statutorily required report.²¹⁴ What is more troubling is that this noncompliance with the reporting requirement is not new. A 2000 audit of Kansas civil asset forfeiture “also found that most local law enforcement agencies did not submit [the required] annual report.”²¹⁵ This consistent lack of compliance makes the reporting requirement virtually meaningless.

The lack of compliance with the reporting requirement is substantially more troubling considering that the Kansas Legislature is the body that is supposed to be ensuring compliance. The legislature appointed itself as the overseer of the forfeiture reports.²¹⁶ Therefore, it stands to reason that if the legislature is supposed to be receiving reports and agencies have not been submitting reports, then the legislature has been and is aware of the agencies’ noncompliance with the reporting requirement. In practice, the legislature’s lack of oversight and the agencies’ lack of compliance means that forfeitures are going unchecked in Kansas.

210. As of the writing of this Comment, the provisions of House Bill 2459 have not gone into effect, therefore there is a possibility that the provisions will be interpreted narrower than the language appears to permit.

211. KAN. STAT. ANN. § 60-4117(g) (2005 & Supp. 2017).

212. *Id.* § 60-4117(g)(1).

213. PERFORMANCE AUDIT REPORT, *supra* note 181, at 26.

214. *Id.*

215. *Id.* at 8.

216. KAN. STAT. ANN. § 60-4117(g)(1).

Allowing the government to be the only entity that knows the extent of forfeitures in Kansas heightens the potential for abuse and cover up of extensive forfeiture. For instance, in assembling its national comparison of forfeiture systems, in 2010, the IJ was unable to collect forfeiture data from Kansas because the government, the only one who has the forfeiture data, would not respond to requests.²¹⁷ If the government is the only entity with information on forfeitures, the people of Kansas have no way of reviewing the forfeiture system in place or comparing it to other forfeiture systems.

House Bill 2459 attempts to address a few of these concerns by creating a new section that purports to implement more stringent reporting requirements. One major change is that the legislature is no longer responsible for gathering information on seizures; instead, the Kansas Bureau of Investigation (“KBI”) is tasked with creating and overseeing the “Kansas asset seizure and forfeiture repository.”²¹⁸ The provisions state that each law enforcement agency shall submit reports to the Kansas asset seizure and forfeiture repository starting July 1, 2019.²¹⁹ Finally, the provisions state that KBI “shall report to the legislature any law enforcement agencies in the state that have failed to come into compliance with the reporting requirements.”²²⁰

While these additions seem to be a step in the right direction, the same potential for abuse, as discussed above, will continue to exist. The new provision does not implement penalties for agencies that do not comply with the reporting requirements. Instead, it just states that KBI is to report noncompliance to the legislature. This “solution” for noncompliance is concerning given the legislature’s history of not taking action in the face of systemic noncompliance with the reporting requirements. The effect of this provision is to simply add an agency, the KBI, between the seizing agency and the legislature. This new system could simply create more plausible deniability for the Legislature, instead of addressing the actual problems of noncompliance with the reporting requirements. As discussed above, since reports were due to the Legislature, if there was noncompliance then it is clear the Legislature was aware of it. Whereas now, if noncompliance occurs, the Legislature can simply state that it was unaware of any noncompliance because KBI did not inform them of the noncompliance.

217. John Kramer, *Kansas Earns “D” in “Policing for Profit” Report*, INST. FOR JUST. (Mar. 26, 2010), <http://ij.org/press-release/kansas-earns-acanadacana-in-acanapolicing-for-profitacana-report/>.

218. H.B. 2459, 87th Leg., Reg. Sess. (Kan. 2018).

219. *Id.*

220. *Id.*

It is also concerning that the agency the Legislature appointed to oversee forfeitures is one of the agencies that effectuates forfeitures. Whether abuse occurs by KBI or not, there will be an appearance of impropriety and self-interest by allowing an agency that effectuates forfeiture to be the one monitoring forfeitures. While the actual effect of the provision in practice is not known at this time, from its face it does not appear to address the underlying issues of KSASFA's policing for profit system.

The Kansas Legislature, through KSASFA's financial incentives for law enforcement, created a high potential for governmental abuse. The financial incentive and lack of reporting create a "policing for profit" system that encourages forfeitures. The lack of stringent reporting requirements and the history of noncompliance further allow the substantial profits from forfeitures to go unchecked and unsupervised. The Kansas Legislature needs to address these problems to limit the potential for governmental abuse and overreach.

b. Government Favoritism

KSASFA, through its language and interpretation, also gives the government a clear advantage in civil forfeiture cases. From the first stages of forfeiture actions, KSASFA "permit[s] massive government overreach, [by] letting the government permanently take the property of private citizens based only on their vague suspicions."²²¹ The problem stems directly from the language that allows forfeiture "whether or not there is a prosecution or conviction related to the offense."²²² The language effectively provides a loophole that allows the government to forfeit property that it would otherwise be unable to if it was forced to prove the criminal activity beyond a reasonable doubt.²²³ The fact that the government can still deprive an owner of property even when they cannot prove criminal conduct makes civil asset forfeiture an attractive consolation prize for the government to at least get something from purported criminal activity.²²⁴

KSASFA provides other provisions that favor the government and put the owner at a disadvantage. One such example is the blatant unfairness

221. Smith, *supra* note 4.

222. KAN. STAT. ANN. § 60-4104 (2005 & Supp. 2017).

223. See Stuteville, *supra* note 18, at 1182 (discussing the benefit of allowing government to get property when they do not know who would or could be charged, the person is on the run, or the person has passed away).

224. See van den Berg, *supra* note 45, at 895.

of §§ 60-4112(o) and (g).²²⁵ Section 60-4112(o) states that an acquittal or dismissal in criminal proceedings will not preclude proceedings under the civil forfeiture act and that it will not “give rise to any presumption adverse or contrary to any fact alleged by the seizing agency.”²²⁶ On the other hand, § 60-4112(g) states that if there is a criminal proceeding, an owner is precluded from denying the essential allegations of the offense for which he is convicted.²²⁷ These two provisions read together preclude the owner from asserting collateral estoppel in a forfeiture case based on a favorable outcome for the owner in a prior criminal proceeding but hold collateral estoppel applicable against the owner if the criminal proceeding resulted in a conviction.²²⁸

Through §§ 60-4112(o) and (g),²²⁹ the government is given a second chance to punish an owner when the owner escapes criminal liability and, in the alternative, it allows the government to use the owner’s conviction against him. Such unfairness would be moot if a conviction was required because then collateral estoppel could only apply in the case of a conviction, and a forfeiture would not proceed if the criminal proceeding resulted in an acquittal or dismissal. The Kansas Legislature, through the drafting of KSASFA, explicitly gives the government the edge and precludes the owner from using any favorable advantage he may have. This is an abuse of power that gives the government an advantage in forfeiture actions at the owners’ expense.

Even when KSASFA’s words do not clearly create an advantage for the government, the courts’ interpretation of KSASFA gives the government an advantage. One example of KSASFA’s poor construction and judicial interpretation leading to governmental overreach can be seen in § 60-4115(a), which allows for the seizure and forfeiture of property in place of other forfeitable property.²³⁰ The Kansas Court of Appeals explained “[b]y its very nature, substituted property under [K.S.A. §] 60-4115(a) is otherwise nonforfeitable property taken in place of forfeitable property.”²³¹ In other words, if the government cannot seize property that would otherwise be eligible for forfeiture, such as the homestead²³² or if

225. KAN. STAT. ANN. § 60-4112(o), (g) (2005 & Supp. 2017).

226. *Id.* § 60-4112(o).

227. *Id.* § 60-4112(g).

228. *State I-135/I-70 Drug Task Force v. 1990 Lincoln Town Car*, 145 P.3d 921, 927–28 (Kan. Ct. App. 2006) (Greene, J., concurring).

229. KAN. STAT. ANN. § 60-4112(o), (g).

230. *Id.* § 60-4115(a) (2005).

231. *State ex rel. Riley Cty. Police Dep’t v. \$1,489.00 U.S. Currency*, 59 P.3d 1045, 1049 (Kan. Ct. App. 2002).

232. *Id.* at 1047, 1049.

the property is missing,²³³ then the government can pick any other property, comparable in value, and take that regardless of its relation to the underlying criminal activity.

For example, in *State ex rel. Riley County Police Department v. \$1,489.00 United States Currency*, the Kansas Court of Appeals permitted a night vision scope and \$1,489.00 cash found in the defendant's pocket to be forfeited in lieu of the defendant's house, even though neither the scope nor the cash was connected to criminal activity.²³⁴ The aggregate effect of such an expansive provision is that once criminal activity is suspected, the government can take any property it wants regardless of its connection to the criminal activity that provided the basis for forfeiture. Allowing for the forfeiture of substitute property also undermines the "legal fiction" civil forfeiture is based on because the property that "committed" the wrong is not actually being taken. This is too broad a provision that allows the government to reach any property regardless of its actual connection to criminal activity.

Another example of judicial interpretation expanding KSASFA's reach can be seen in the Kansas Court of Appeals' interpretation of certain time limits in favor of the government. One example of a time limit that the court construed in the government's favor is found in K.S.A. § 60-4109(a)(1):

If 90 days pass after the seizure of the property, and the State fails to file a notice of pending forfeiture and an owner or interest holder requests the property's release, that owner or interest holder may receive the property and hold it as custodian for the court, pending further proceedings under the [KSASFA].²³⁵

In this case, the district court released the property in question back to the owner because the government's failure to act within the ninety days stripped the court of continued jurisdiction over the property.²³⁶ The Kansas Court of Appeals found that this was an incorrect interpretation of the provision because of its "pending further proceedings" language.²³⁷ The court found that even if property is released, it is still subject to further proceedings and within the court's jurisdiction for the five-year statute of

233. KAN. STAT. ANN. § 60-4115(a)(1).

234. *\$1,489.00 U.S. Currency*, 59 P.3d at 1049.

235. *State ex rel. Lawrence/Douglas Co. Drug Enforcement Unit v. \$17,023 in U.S. Currency (More or Less)*, 329 P.3d 551, 554 (Kan. Ct. App. 2014).

236. *Id.* at 555–56.

237. *Id.* at 555 (stating that such language "would be rendered meaningless" if it really ended the court's jurisdiction).

limitations allowed under KSASFA.²³⁸ The wording, as interpreted by the Kansas Court of Appeals, makes the ninety-day limit requiring the government to file a notice of forfeiture virtually meaningless unless the owner has filed for release of the property. It is unclear why the owner must assert his rights to the property before the government must comply with statutorily mandated time limits.

The Kansas Court of Appeals also interpreted § 60-4113(g) as a loose time requirement stating that “the hearing on the claim shall be held within 60 days after service of the petition,” which is discretionary, not mandatory.²³⁹ The court cited that this timeline was discretionary because the hearing is a matter of convenience and no injury can result from it.²⁴⁰ Finding that the time for a hearing is discretionary is a complete disregard for the process of forfeitures and also seems to circumvent any due process for the individual property owner. There is injury to the owner because he is improperly deprived of his property when the courts allow the seizing party to hold that property even longer than the statute’s text allows.

In the same opinion, the court explained that a mandatory provision would be one in which “the legislature intended a compliance with such provision to be essential to the validity of the act or proceeding, or when some antecedent and prerequisite conditions must exist prior to the exercise of power or must be performed before certain other powers can be exercised.”²⁴¹ The point of the provision is to require disposition of the property in a timely manner. As such, the owner’s right to regain control of his property depends on the hearing, which could easily fit the definition of a mandatory provision. Stripping away mandatory measures is a relaxation of the already relaxed forfeiture laws and only hurts property owners.

In contrast, the Kansas Court of Appeals has not extended the same relaxed interpretation of KSASFA’s wording to owners. Section 60-4111(b) discusses the form that an owner’s response to forfeiture must take and outlines seven pieces of information to be included.²⁴² The court, using the same distinction of mandatory versus discretionary provisions, determined that the seven requirements in this provision are mandatory because it involves substance.²⁴³ That means that while the government

238. *Id.*

239. KAN. STAT. ANN. § 60-4113(g) (2005 & Supp. 2017); *State v. \$6,618.00 U.S. Currency*, 128 P.3d 413, 416 (Kan. Ct. App. 2006).

240. *\$6,618.00 U.S. Currency*, 128 P.3d at 416.

241. *Id.*

242. KAN. STAT. ANN. § 60-4111(b)(1)–(7) (2005 & Supp. 2017).

243. *\$6,618.00 U.S. Currency*, 128 P.3d at 416.

does not have to timely file its notice of forfeiture or even timely set and conduct a hearing, a property owner is required to strictly comply with these requirements. If the property owner fails to do so, then he is deprived of standing to contest the seizure, and his property is forfeited.²⁴⁴ This inherent tendency to strictly enforce the language of the statute against the owner but to interpret it looser in favor of the government gives the government the clear advantage.

KSASFA provisions allow for massive governmental abuse and overreach at the expense of Kansas property owners. First, KSASFA provides financial incentives that encourage aggressive and extensive forfeiture. Second, the Kansas Legislature provides no effective oversight or enforcement of the statutory reporting requirements. Third, KSASFA, in substance and interpretation, favors the government in forfeiture actions. These abuses are further exacerbated by the Kansas property owner's inability to exercise his due process rights to protect his property from the government.

2. Reducing Governmental Abuse and Overreach

To eliminate the pervasive potential for governmental abuse and overreach, the Kansas Legislature must make changes to KSASFA. As mentioned previously, adopting a criminal forfeiture approach will ensure that the property owner can exercise his constitutional protections that are inapplicable in a civil forfeiture. Such a change would also remove the burden from the owner and place it on the government. While adopting a criminal forfeiture approach would give the property owner some protection from the government in forfeiture actions, these protections do not remedy the potentials for governmental abuse and overreach caused by KSASFA's financial incentives and government favoritism.

To address the financial incentive, the Kansas Legislature must completely overhaul K.S.A § 60-4117, even the amendments implemented by House Bill 2459 do not go far enough. The Kansas Legislature, first and foremost, must change who benefits from forfeitures. There are many options of where to put the forfeiture proceeds. For instance, Missouri requires the funding to go to schools,²⁴⁵ and New Mexico places the money in the state's general fund.²⁴⁶ Taking the financial benefits of forfeiture away from law enforcement will ensure that policing for profit concerns are eliminated from Kansas' forfeiture approach.

244. *Id.*

245. MO. CONST. Art. IX, § 7; MO. REV. STAT. § 513.623 (West 2002).

246. N.M. STAT. ANN. § 31-27-7.C. (West 2013, Westlaw through 2018).

Making such a change, however, will not occur without some pushback. A legislative liaison for the Kansas Association of Chiefs of Police argues that “[w]ithout these funds going back to the [law enforcement] agency the activity funded would either require additional tax dollars or the loss of investigative ability.”²⁴⁷ However, this argument is flawed and moot in a criminal forfeiture system. In a criminal forfeiture system, the investigation into criminal charges and the forfeiture of property would be one transaction which would, in theory, save investigative costs. Further, if effectuating forfeitures is such an expense on the law enforcement budget, perhaps forfeitures should not be a priority. Until law enforcement is not given the benefit of forfeiture funds, Kansas will continue to have a policing for profit structure which encourages law enforcement to seizure property.

The Kansas Legislature also needs to reform the reporting requirements. First, the legislature needs to implement enumerated penalties for agencies that do not comply with reporting requirements. Second, the Kansas Legislature should consider appointing a neutral body to oversee forfeitures instead of giving that power to one of the agencies that is also effectuating forfeitures itself. Third, KSASFA must adopt centralized reporting and publication. House Bill 2459 states that KBI must create a website in connection with the Kansas asset seizure and forfeiture repository.²⁴⁸ However, it is unclear if this means that forfeiture reports will be publicly reported on that website. House Bill 2459 also introduced a new section that states each agency is charged with adopting its own procedure for providing public access to the records.²⁴⁹ This approach still appears decentralized and disjointed. Requiring centralized reporting and publication will allow for a comprehensive picture of forfeitures in Kansas and provide public accountability. Other states, including New Mexico and Missouri, implemented centralized, online forfeiture reporting.²⁵⁰

Finally, the Kansas Legislature needs to reevaluate its clear favoritism for the government in forfeiture proceedings. Some of this favoritism will be resolved by adopting a criminal forfeiture approach because the burden will be on the government and it will be substantial. However, the Kansas Legislature must decide whether time limits in forfeiture proceeds are discretionary or mandatory and the effect of either choice should be applied equally to both parties. KSASFA currently allows too much

247. Moore, *supra* note 194.

248. H.B. 2459, 87th Leg., Reg. Sess. (Kan. 2018).

249. *Id.*

250. CARPENTER, *supra* note 2, at 31.

potential for governmental abuse and overreach due to its construction, interpretation, and action in practice.

IV. CONCLUSION

Kansas, through KSASFA, earned its place among the worst forfeiture laws in the nation. The Kansas Legislature must reform KSASFA from a civil forfeiture system to a criminal forfeiture system to better effectuate its purpose, protect individuals' property rights, and curb governmental overreach and abuse. Civil forfeiture and its "legal fiction" have no place in our justice system and after such expansive use, it must be laid to rest. Other states are starting to take this approach or are at least providing more protections to property owners to address some of the problems created by civil forfeiture.

Allowing forfeiture of an individual's property without requiring a conviction allows for massive governmental overreach and violates the American ideals regarding property rights and due process of law. Modern day civil forfeiture, expanded by the government from its limited form in English law, now seems to resemble the deodand forfeiture that was not adopted into American law.²⁵¹ Civil forfeiture is a source of revenue for law enforcement and the government based on the idea that if property is connected to crime, then a person does not deserve to keep it. This mirrors the U.S. Supreme Court's description of English deodands: "the deodand became a source of Crown revenue, the institution was justified as a penalty for carelessness."²⁵² America should reject civil forfeiture because in its current form, it mirrors forfeiture systems not originally adopted into American law.

While Kansas recently took action to reform KSASFA, the amendments do not go far enough. The amendments addressed law enforcement's use of forfeiture funds, implemented additional reporting requirements, and tasked the KBI with creating a forfeiture repository.²⁵³ However, these provisions may, as a practical matter, not be that much of a change from KSASFA's previous form. Most importantly, House Bill 2459 does not address the main problem with KSASFA: it still allows the

251. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 681 (1974).

252. *Id.*

253. H.B. 2459, 87th Leg., Reg. Sess. (Kan. 2018) (introduced in January 2018 and referred to Committee on Judiciary in February 2018); Katie Bernard, *Kansas House Bill Touted as First Step to Reforming Civil Asset Forfeiture*, TOPEKA CAP.-J. ONLINE (last updated Jan. 25, 2018, 4:07 PM), <http://www.cjonline.com/news/20180125/kansas-house-bill-touted-as-first-step-to-reforming-civil-asset-forfeiture>.

government to seize Kansas property owners' property without ever securing a conviction or even filing charges.²⁵⁴ If Kansas continues to avoid addressing the real problem of civil forfeiture by passing bills that only facially address ancillary problems, such as reporting requirements, then Kansas' forfeiture system will rightfully continue to be regarded as among the worst in the nation.

254. H.B. 2459; Bernard, *supra* note 253.