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THE WAR ON DRUGS AND TAXES: HOW TAX EXPENDITURE ANALYSIS CAN SHED LIGHT ON CIVIL ASSET FORFEITURE

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INTRODUCTION

The goal of the United States War on Drugs is to eradicate recreational drug use in America.[1] But the federal government has a

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[1] This article ignores the desirability of the drug war. For substantial moral, ethical, and consequentialist arguments against the War on Drugs, *see e.g.* Matthew A. Christiansen, *A Great Schism: Social Norms and Marijuana Prohibition*, 4 HARV. J.L. & PUB. POL'Y. 229, 248 (2010); Andrew D. Black, *"The War on People": Reframing "The War on Drugs" by Addressing Racism Within American Drug Policy Through Restorative Justice and Community Collaboration,* 46 U. LOUISVILLE L. REV. 177, 178 (2007); Ross C. Anderson, *We Are All Casualties of Friendly Fire in the War on Drugs*, UTAH B.J. 10

problem achieving that goal—it lacks the manpower and local police knowledge to effectively wage the drug war.[2] It cannot directly force local law enforcement to comply with federal anti-drug policies without violating principles of federalism.[3] Two major incentive programs solve this issue by generating voluntary enforcement by local governments and police: (1) the Edward Byrne Memorial Grant ("Memorial Grant") and (2) equitable sharing via federal civil asset forfeiture. Police obtain more financing from equitable sharing than the Edward Byrne Memorial Grant.[4]

This paper argues (a) that civil asset forfeiture in general is a tax and (b) that equitable sharing is a tax expenditure from the federal perspective. The paper's purpose is to show how the tax expenditure literature provides insights about the practice of civil asset forfeiture.

In Part I, I describe the history of civil asset forfeiture, explain how it functions today, and survey the Edward Byrne Memorial

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(2000). Moreover, it is likely the War on Drugs has failed. *See* Susan Stuart, *War as Metaphor and the Rule of Law in Crisis: The Lessons we Should have Learned from the War on Drugs*, 36 S. ILL. U. L.J. 1, 13-14 (2011).

[2] David T. Gibson, Note, *Spreading the Wealth: Is Asset Forfeiture the Key to Enticing Local Agencies to Enforce Federal Drug Laws?*, 39 HASTINGS CONST. L.Q. 569, 578-79 (2012); Michael M. O'Hear, *Federalism and Drug Control*, 57 VAND. L. REV. 783, 810 (2005).

[3] *See* Gibson, *supra* note 2, at 572.

[4] *Cf.* Awards Made for "BJA FY 13 Edward Byrne Memorial Justice Assistance Grant (JAG) Program: State", http://grants.ojp.usdoj.gov:85/selector/title? solicitationTitle=BJA%20FY%2013%20Edward%20Byrne%20Memorial%20Justice%20Assistance%20Grant%20%28JAG%29%20Program:%20State&po=BJA (last visited Mar. 14, 2015) (Memorial Grant Program spent approximately 195 million dollars) *with* Brent Skorup, Note, *Ensuring Eighth Amendment Protection From Excessive Fines in Civil Asset Forfeiture Cases*, 22 GEO. MASON U. C.R. L.J. 427, 438 (2012); *but see* O'Hear, *supra* note 2, at 814-16 (in 2005, the Edward Byrne Grant Program provided more funds to police forces). This change is expected. As Mr. O'Hear explains, the Grant Program starts up multijurisdictional police forces. These start-ups then generate financing via equitable sharing. As a result, over time the funding source of multijurisdictional police units shifts from the grant to equitable sharing, as the successful units self-finance. *Id*. at 818.

Grant. In Part II, I explain why it is appropriate to view civil asset forfeiture through tax analysis, survey the tax expenditure literature, and connect equitable sharing to tax expenditures. In Part III, I explore how the tax expenditure literature can provide some unique perspectives about equitable sharing. In Part IV I provide a brief summary of the paper and ask where we go from here.

I. CIVIL ASSET FORFEITURE REVIEW

This section examines the historical evolution of civil asset forfeiture. It explains the differences between federal and state civil asset forfeiture statutes, explains why a federal statute is needed, describes the mechanics of modern civil asset forfeiture with a focus on equitable sharing, and highlights some of the chief criticisms of civil asset forfeiture. This section focuses heavily on the federal development of asset forfeiture and equitable sharing because the tax expenditure connection is related to equitable sharing by the federal government.

A. HISTORICAL EVOLUTION

Civil asset forfeiture is rooted in the ancient legal fiction of the deodand[5] that originated in ancient Israel.[6] The deodand required objects used in crime to be destroyed.[7] This destruction was explained either as punishing the instrument used in the crime for

[5] Eric Moores, Note, *Reforming the Civil Asset Forfeiture Reform Act*, 51 ARIZ. L. REV. 777, 780 (2009).

[6] *See* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 681 (1974). Civil asset forfeiture may have some roots in a similar Athenian practice. *See* Todd Barnet, *Legal Fiction and Forfeiture: An Historical Analysis of the Civil Asset Forfeiture Reform Act*, 40 DUQ. L. REV. 77, 88 (2001).

[7] Jewish leaders found scriptural basis for this in Exodus 21:28. Moores, *supra* note 5.

being intrinsically evil[8] or as destroying the means for committing a crime.

This legal tradition continued in medieval England. However, the punishment was not destruction.[9] Instead, the English Crown initially gave the guilty object to charity or the wronged party. Eventually the Crown recognized the potential income stream and kept the "evil" object for its coffers.[10] Once the deodand became "a useful revenue-generating device for the English crown … [the] tradition [continued] for many centuries."[11] The ability to keep the forfeited property was transformational and is the root of modern American civil asset forfeiture regimes.[12]

The United States rejected the deodand as used in England,[13] replacing it with a similar device that came to be known as civil asset forfeiture. In simple terms, civil asset forfeiture permits an uncompensated state seizure of private property that the state believes was used in a crime, regardless of whether the disposed owner is criminally convicted.

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[8] *Calero-Toledo,* 416 U.S. at 681; *but see* Barnet, *supra* note 6, at 87-88.

[9] *Calero-Toledo,* 416 U.S. at 681; Barnet, *supra* note 6, at 88-89.

[10] *Calero-Toledo,* 416 U.S. at 681. The theory the Crown used for keeping the forfeited objects was that the sovereign gave the forfeited property to charity for the benefit of the wronged party (the one harmed by the object). This theory as quasi-compensation for crime became a dead end in American jurisprudence. However, it is worth considering that this impulse persists. Maybe the property owner is compensating the public for causing the police to utilize resources, which are a public good? This might explain why civil asset forfeiture exists today despite the Supreme Court recognizing its legal footing is shaky. *See* J.W. Goldsmith Grant Co. v. U.S., 254 U.S. 505, 510-11 (1921); Bennis v. Michigan, 516 U.S. 442, 454 (1996) (Thomas, J., concurring).

[11] Barnet, *supra* note 6, at 89.

[12] Barnet thought this English tradition was the true genesis of American civil asset forfeiture. Barnet, *supra* note 6, at 89. This historical practice is important because the Supreme Court rests the continuing validity of civil asset forfeiture based on its historical use rather than any endogenous explanation. *See J.W. Goldsmith Grant Co.,* 254 U.S. at 510-11; *Bennis,* 516 U.S. at 454 (Thomas, J., concurring).

[13] *Calero-Toledo,* 416 U.S. at 682.

The Supreme Court today justifies civil asset forfeiture not on grounds of principle but history.[14] Some Justices have raised constitutional issues with the practice,[15] but because of its historical development and widespread use, the Supreme Court accepts it as a law enforcement tool. Under the federal regime, law enforcement can seize property if the police can prove by a preponderance of the evidence that the property was used in or facilitated a crime.[16] As this is an *in rem* proceeding, the Bill of Rights does not fully apply.[17]

B. FORFEITURE IN PRESENT DAY AMERICA

This section examines how forfeiture works in the United States today, focusing on its development within the context of equitable sharing.

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[14] *See e.g.*, J.W. Goldsmith Grant Co. v. United States, 254 U.S. 505, 510-11 (1921); Bennis v. Michigan, 516 U.S., 453 (1996) ("[civil asset forfeiture is] too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced") (quoting *J.W. Goldsmith Grant Co.*, 254 U.S. at 510); *Bennis*, 516 U.S. at 454 (Thomas, J., concurring); *cf*. United States v. Bajakajian, 524 U.S. 321, 330-32 (1998) *with Bajakajian*, 524 U.S. at 336 (Kennedy, J., dissenting) (discussing how Justice Thomas's attempt to carve out certain forfeiture procedures as remedial and others as punitive, and thereby unconstitutional if excessive, ignores years of historical practice); Civil asset forfeiture was historically important in admiralty cases. Ship owners accused of crimes were often outside the reach of US due to lack of personal jurisdiction. Civil asset forfeiture permitted United States authorities to side step personal jurisdiction flaws by attacking the property of the ship owner – the ship – via an in rem proceeding. *See* Skorup, *supra* note 4, at 433 (discussing why historically civil asset forfeiture developed in America).

[15] *See Calero-Toledo,* 416 U.S. at 694 (Douglas, J., dissenting).

[16] *See* Stefan D. Cassella, *The Civil Asset Forfeiture Reform Act of 2000: Expanded Government Forfeiture Authority and Strict Deadlines Imposed on All Parties*, 27 J. LEGIS. 97, 108-09 (2001). Note that states have different legal requirements: some are more stringent whereas others are less so. *See* Higgins, *infra* note 59.

[17] *See* Mary Murphy, Note, *Race and Civil Asset Forfeiture: A Disparate Impact Hypothesis*, 16 TEX. J. C.L. & C.R.. 77, 88 (2010). However, the Court has been increasing civil rights protection. For example, in *Austin v. United States*, the Court applied the Eighth Amendment to civil asset forfeiture. 509 U.S. 602,604 (1993).

i. State and Federal Forfeiture

State governments have their own respective forfeiture statutes distinct from the federal government's statute. Some provide fewer protections to owners, be it substantively or procedurally, than the federal statute.[18] Other states provide stronger protections against civil forfeitures as compared to the federal statute.[19] State civil forfeiture actions can only be based on purported violations of state crime – not federal crime.

This creates a civil asset forfeiture regime that sometimes operates concurrently (when either the state or federal government criminalizes something the other does not) and other times congruently (when state and federal criminal law are in concurrence). However, the government agent pursuing the forfeiture must belong to the government branch whose forfeiture statute is applicable.[20] For example, if federal civil asset forfeiture is used, then an agent of the federal government – specifically an agent of the attorney general – must initiate the forfeiture action.[21] This is paramount when the systems act concurrently rather than congruently.

ii. How Equitable Sharing Permits Federal Agents to Commandeer Local Police

The "loophole" that upends this system is equitable sharing — a federal law permitting United States Attorneys to share civil asset forfeiture proceeds with the local law enforcement that assisted in securing the forfeiture.[22] In practice, this expands state law enforcement's ability to pursue civil forfeiture claims when *either* the state or federal law permits it, even if the underlying action leading

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[18] Higgins, *infra* note 59.
[19] O'Hear, *supra* note 2, at 834-35.
[20] *See e.g.,* ALA. CODE § 20-2-93(d).
[21] *Infra* I.B.iv.
[22] *See* Section I.B.iv for a discussion of the legal mechanics of equitable sharing.

to forfeiture was legal under state law.[23] This occurs because local police can *de jure* initiate state forfeiture proceedings and *de facto* initiate federal forfeiture proceedings. The latter occurs when local police search for and find sufficient evidence of a violation of federal law. They then contact the AUSA, who initiates the seizure and provides much of the forfeiture bounty to the local police department.[24] By form, the federal government initiates the action, but by substance, local law enforcement drives it. The federal government benefits by co-opting local police forces to enforce federal goals and local police benefit by obtaining forfeiture proceeds.

iii. Why Use Equitable Sharing to Commandeer Local Agents?

The United States government enacts policies it cannot possibly carry out on its own, due to lack of resources and knowledge.[25] It, naturally, desires to enlist the help of states to fill in the resource and knowledge gaps. But in the landmark case *New York v. United States*,[26] the Supreme Court limited the ability of the federal government to control the agents of state and local governments. The Court articulated an anti-commandeering principle, whereby the federal government could not treat the states or subdivisions as agents.[27] If the federal government desired states to follow certain

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[23] The legalization of marijuana at state levels implicates this issue and creates interesting federalism concerns for federal civil asset forfeiture. *See* Gibson, *supra* note 2, at 570.

[24] Gibson, *supra* note 2, at 577.

[25] Gibson, *supra* note 2, at 578-79; Friedrich A. Hayek, *The Use of Knowledge in Society*, 3 AM. ECON. REV., 519 (1945), *available at* http://www.econlib.org/library/Essays/hykKnw1.html; RANDY E. BARNETT, THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW 34-37 (2004). Both Hayek and Barnett demonstrate the benefit of using a de-centralized decision-making process because of its ability to use local knowledge.

[26] 505 U.S. 144 (1992).

[27] *Id*. at 166.

actions, it could either offer financial incentives or preempt state law.[28]

This anti-commandeering rule prevents the federal government from compelling state and local agents to prosecute the War on Drugs.[29] Historically, this was a problem for Washington's pro-drug war policy, as many states shied away from what they viewed as a "too law-and-order" federal approach to drugs.[30] Moreover, without the help of local law enforcement, the federal government would lack needed local knowledge to prosecute the drug war.[31]

So, the federal government faced two problems: (1) it could not force local law enforcement to assist the federal government in the drug war and (2) the drug policies of states and localities diverged from the federal government's War on Drugs. The federal government solved both problems by (a) giving money directly to states that adopted federal drug policies and (b) sending money indirectly to states via the equitable sharing of property forfeited under the federal civil asset forfeiture statute.[32]

This caused a few major policy changes. First, state legislatures by-and-large adopted the federal government's law-and-order approach to drug policy. This is because (a) those policies were being subsidized by the federal government and (b) public opinion at the time shifted toward a law-and-order approach to drugs.[33] Second, equitable sharing generated substantial revenue for local and state police forces. In some cases, they became financially independent of state legislatures.[34] As a result, the police became a strong faction

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[28] *Id*. at 167-68.

[29] *See* Gibson, *supra* note 2, at 572. The federal government has specifically rejected pre-empting local laws regarding drugs. *See* O'Hear, *supra* note 2, at 807.

[30] O'Hear, *supra* note 2, at 807-08, 821.

[31] O'Hear, *supra* note 2, at 811-12; Hayek, *supra* note 25; Barnett, *supra* note 25.

[32] O'Hear, *supra* note 2, at 814-18.

[33] O'Hear, *supra* note 2, at 816-17.

[34] *See infra* I.C. Not surprisingly, these financial incentives altered policing methods. *See infra* I.C.

within states agitating for a law-and-order approach to drug policy. This strengthened the policy hold the federal government had on state governments.[35] Third, equitable sharing led to multi-jurisdictional policing units.[36] These are policing units made up of federal and local law enforcement or local law enforcement from different jurisdictions. This union helped ameliorate the knowledge problem for federal agents. Fourth, the forfeiture scheme encouraged local police agents to investigate federal crime *suo motu*. Now, once the local police uncover sufficient evidence, they simply involve a federal officer who, under the aegis of the Attorney General, provides much of the forfeiture bounty to the local police department.[37] This structure enables the federal government to prosecute the War on Drugs more efficiently and ferociously, because local agents are incentivized to investigate federal crimes on their own initiative absent federal oversight, hoping to receive the forfeiture proceeds.[38] Crucially, this incentive raises no anti-commandeering issue.[39]

Finally, equitable sharing blocks state efforts to modify civil asset forfeiture abuse,[40] which can be seen as strengthening federal control over policing priorities. This is because if the offense occurs when federal and state law is congruent, the local police can effectively choose which forfeiture asset regime they want to apply. They can work with the United States Attorney in order to use the federal forfeiture statute and thereby circumvent the more stringent state forfeiture statute. Alternatively, if the federal forfeiture law is less favorable to law enforcement, they simply utilize the local law. As such, under equitable sharing the federal law can be viewed as a

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[35] O'Hear, *supra* note 2, at 817-18.
[36] O'Hear, *supra* note 2, at 818-19.
[37] Gibson, *supra* note 2, at 577.
[38] Gibson, *supra* note 2, at 578-79.
[39] Gibson, *supra* note 2, at 576
[40] Murphy, *supra* note 17, at 89.

floor – state law can make forfeiture easier and applicable to more crimes, but state law cannot easily curtail asset forfeiture abuses or change the type of crimes wherein forfeiture applies below the federal standard.

As a result, state lawmakers are beginning to see equitable sharing as an infringement on their policy turf. Oregon and Utah effectively forbid law enforcement to participate in equitable sharing.[41] More states may follow.

iv. How Federal Civil Asset Forfeiture Functions Today

This section first examines the federal law behind civil asset forfeiture and equitable sharing. It then addresses a recent equitable sharing policy change by Attorney General Eric Holder.

1. Federal Statute

Federal asset forfeiture is permitted whenever there is an alleged violation of almost any serious federal crime.[42] If there is a contention regarding whether the forfeiture is proper, the government carries the burden of persuasion by a preponderance standard.[43]

21 U.S.C. 881 governs federal civil asset forfeiture. The Attorney General is entrusted to seize subject property. The forfeiture statute also permits the Attorney General to share the forfeiture proceeds with local and state law enforcement agencies that participate directly in seizing the forfeited property.[44] The Attorney General's primary limitation on sharing with state and local law enforcement is proportionality.[45] This proportionality rule requires that the dis-

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[41] O'Hear, *supra* note 2, at 834-35.
[42] Cassella, *supra* note 16, at 115-17.
[43] Cassella, *supra* note 16, at 115-17.
[44] 21 U.S.C. 881(d)(1)(A) (2002).
[45] 21 U.S.C. 881(d)(3)(A) (2002).

tributed property must bear "a reasonable relationship to the degree of direct participation of the State or local agency in the law enforcement effort resulting in the forfeiture, taking into account the total value of all property forfeited and the total law enforcement effort with respect to the violation of law on which the forfeiture is based."[46] This proportionality rule provides the Attorney General substantial leeway in divvying up forfeiture proceeds. Congress further increased the Attorney General's flexibility by allowing him to distribute disproportionate proceeds to local and state law enforcement, provided it "will serve to encourage [the] future cooperation" of the recipient with the federal government.[47]

2. Holder Policy

Attorney General Eric Holder recently released a memo curtailing equitable sharing.[48] While this is an admirable reform, this memo permits certain exceptions that leave major pieces of equitable sharing in place. It permits multijurisdictional police forces and those working closely with federal attorneys to continue using equitable sharing.[49] These loopholes leave significant equitable sharing proceeds on the table for state police.[50] Further, this policy can be reversed at any time.

The policy's biggest change prohibits local police seizing property *suo motu* and then obtaining AUSA ratification of the seizure. It

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[46] *Id*.

[47] 21 U.S.C. 881(d)(3)(B) (2002).

[48] Robert O'Harrow et al., *Holder Limits Seized-Asset Sharing Process that Split Billions with Local, State Police*, WASH POST (Jan. 16, 2015), *available at* http://www.washingtonpost.com/investigations/holder-ends-seized-asset-sharing-process-that-split-billions-with-local-state-police/2015/01/16/0e7ca058-99d4-11e4-bcfb-059ec7a93ddc_story.html.

[49] Radley Balko, *More Fallout from Eric Holder's Changes to Civil Asset Forfeiture Law,* WASH. POST (Jan. 19, 2015), *available at* http://www.washingtonpost.com/news/the-watch/wp/2015/01/19/more-fallout-from-eric-holders-changes-to-civil-asset-forfeiture-law/.

[50] *Id.*

is unclear if the policy will prohibit police from receiving AUSA support prior to seizure.[51] That is, the policy may allow police to investigate federal crime, report it to the AUSA, and then seize the property.

C. CRITICISMS OF CIVIL ASSET FORFEITURE

There has been significant criticism regarding civil asset forfeiture generally and equitable sharing specifically. This section does not attempt to list all critiques. Instead, it illustrates the main concerns within the literature. These concerns are: (1) it perverts policing, (2) it undermines property protection, and (3) it violates legislative control of the police.

i. Perverted Policing

Eric Blumenson and Eva Nilsen argue that civil asset forfeiture incentivizes police to pursue profits over good policing.[52] In short, the direct benefit from civil asset forfeiture creates improper policing incentives, which leads to suboptimal allocation of police resources.[53]

Because of this direct benefit, police are encouraged to target potential illicit activity the forfeiture of which would be very profitable for the police. Empirically, the facts support this thesis as police often direct resources away from violent crimes toward crimes that are non-violent, but that line the pockets of the local police.[54]

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[51] *Id.*

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

[53] *Id*. at 57.

[54] *Id*. at n.165. This is likely sub-optimal if the population's preferences reflect optimal preferences. In addition, there are anecdotal examples of police chiefs rewarding subordinates for bringing in forfeiture proceeds. *Id* at 66-67. In addition, civil asset forfeiture shifts police resources from less profitable drugs, such as heroin, to more lucrative drugs such as cocaine. *Id*. at 79-80.

Civil asset forfeiture has caused some police forces to alter their methods of policing. They began undercover operations known as "reverse stings."[55] The traditional sting involves the police attempting to purchase a black-market item, such as drugs, from a seller. Upon purchasing the illicit goods, the police arrest the seller. Inversely, reverse stings place the police in the role of the seller. The police arrest the buyer after the sale. Civil asset forfeiture explains the switch.[56] Police were required to destroy the contraband acquired via stings. However, they were not required to destroy cash obtained through reverse stings. Therefore, reverse stings were more profitable. The police adopted these methods, despite occasionally having the perverse effect of flooding the market with the contraband they were selling.[57]

ii. Limited Property Rights

The inviolability of property rights is threatened by civil asset forfeiture. Historically, police could seize property easily.[58] In some states, that bar is still low,[59] leading to numerous property seizures without any criminal prosecution.[60] Critics, including Congressman Henry Hyde, have pushed for more robust property rights.[61] Con-

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[55] *Id*. at 68.

[56] *Id*. at 68-69. Reverse stings may offend the just desert theory of criminal punishment. Instead of targeting the distribution network, police target buyers who generally are viewed as less dangerous and less culpable. *See id*. at n.119.

[57] *Id*. at 69.

[58] *Id*. at 48-49.

[59] Kasey L. Higgins, Note "*Shiver Me Timbers!" Civil Asset Forfeiture: Crime Deterrent or Incentive for Government Pillage and Plunder of Property*, 4 PHOENIX L. REV. 771, 789-93 (2011) (explaining how Illinois, Delaware, Alabama, and Arizona still offer limited procedural protections to property owners, including forfeiture based on probable cause and limited innocent owner defenses).

[60] Blumenson & Nilsen, *supra* note 52, at 40-41.

[61] Rhonda McMillion, *Getting a Grip On Seizure Laws: Bill Seeks Greater Due Process Protections in Civil Asset Forfeiture Cases*, A.B.A. J. 92 (Sept. 1999); Michele M. Jochner, *From Fiction to Fact: The Supreme Court's Re-Evaluation of Civil Asset Forfeiture,* 82 ILL.

gressman Hyde was particularly animated by innocent owners losing their property because of the illicit activity of either a spouse or third parties on their property, unbeknownst to the innocent owners.[62]

iii. Lack of Legislative Control

Finally, civil asset forfeiture provides police self-sufficiency. One lucrative bust can fund a police department for a long time.[63] This self-sufficiency can obviate legislative control, because the police are no longer dependent upon the legislature for funding. This criticism has a federalism component. As discussed earlier, the nature of the federal civil asset forfeiture scheme encourages multijurisdictional police forces to enforce federal law, sometimes in direct opposition to state law.[64] Local governments might be able to reign in police from participating in these multijurisdictional police forces if they (a) knew what the police were doing[65] and (b) had more financial control over the police. But civil asset forfeiture provides current funding to the police, while also incentivizing law enforcement to seize more funds for their own use, sometimes in opposition to local governments' desires.

II. FEDERAL CIVIL ASSET FORFEITURE: A TAX EXPENDITURE

In this section, I present the central thesis of this paper: equitable sharing and tax expenditures possess similar procedural and substantive problems. First, I demonstrate that civil asset forfeiture

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B. J. 560, 566-67 (1994); Higgins, *supra* note 59, at 786; H.R. 3347, 103d Cong., 1st Sess. (1993).

[62] *See e.g.*, Bennis v. Michigan, 516 U.S. 442 (1996).

[63] Blumenson & Nilsen, *supra* note 52, at 86.

[64] Blumenson & Nilsen, *supra* note 52, at 97-98; *see* O'Hear, *supra* note 3, at 810-11, 816-18.

[65] Very little is actually known about the tactics of multijurisdictional policing. Blumenson & Nilsen, *supra* note 52, at 98.

is conceptually akin to a general tax. I then provide a brief review of tax expenditure analysis. Finally, I explain how equitable sharing functions like a tax expenditure and explore the problems common to both.

A. CIVIL ASSET FORFEITURE AND TAXATION

Defining what a tax is can be difficult. It must raise public revenue. This revenue pays for public goods. The obvious example is our income tax. Less obvious examples are tolls paid for the maintenance of public roads. Nevertheless, a toll generates revenue, which pays for public goods. And we have dual-purpose (or regulatory) taxes that attempt to limit behavior while also raising revenue — cigarette taxes are an example of such regulatory taxes. The three broad categories of taxation are: (1) ability to pay (income tax), (2) benefit taxation (tolls), (3) and regulatory taxation (cigarette tax). Civil asset forfeiture likely does not fit into ability to pay or benefit taxation, but neatly fits into regulatory taxation.

i. Civil Asset Forfeiture Generates Revenue

Civil asset forfeiture provides substantial revenue generation, one of the dual functions of a regulatory tax.[66] Modern legislatures see civil asset forfeiture as a revenue generator,[67] and police departments are heavily dependent upon it for their budgets.[68] In fact, some police forces alter their policing methods to keep the money coming in,[69] and the federal government uses civil asset forfeiture as a means of financing its War on Drugs.[70] Absent the money generated via civil asset forfeiture, the federal government would need

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[66] Skorup, *supra* note 4.

[67] Of note, English Monarchs saw the deodand, civil asset forfeiture's ancestor, as a revenue generator. *Supra* section I.A.

[68] Blumenson & Nilsen, *supra* note 52, at 96-103.

[69] *Supra* section I.C.

[70] *See* Gibson, *supra* note 2, at 577; O'Hear, *supra* note 2, at 816.

either to apportion large sums to the Memorial Grant or curtail the drug war. There is a clear and strong connection to revenue generation, despite civil asset forfeiture's *de jure* purpose as a deterrent against illicit activity.[71]

This revenue funds law enforcement. Therefore, civil asset forfeiture generates revenue to pay for a public good.

ii. Civil Asset Forfeiture as a Regulatory Tax

To determine whether civil asset forfeiture is properly regarded as a regulatory tax — one that simultaneously discourages certain behavior while generating revenue — it is important to distinguish a tax from a penalty.

The Supreme Court has addressed questions about whether regulatory taxes are actually taxes or just penalties. In *U.S. v. Kahriger,*[72] the Court addressed the issue of whether a tax on lottery tickets was not actually a tax because its goal was primarily to regulate behavior and therefore intruded on the police powers of states.[73] The Court held that it was a bona fide tax – even if its primary purpose was to regulate behavior – because it raised revenue for the government.[74] Indeed, the Court held this to be true, despite the fact that the tax generated little actual revenue.[75] Recently in *NFIB v. Sebelius*, Chief Justice Roberts articulated a broad idea of regulatory taxation.[76] He described the ACA fee for failure to pur-

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[71] *Supra* section I. It is worth questioning whether the official explanation for civil asset forfeiture (fighting the War on Drugs) is today also the de facto justification. Given how dependent the police are on civil asset forfeiture proceeds, their strong political clout, and the potential failure of the War on Drugs it is arguable the primary purpose of civil asset forfeiture is revenue generation. However, it may be politically unfeasible to admit that civil asset forfeiture is about revenue generation.

[72] 345 U.S. 22 (1953).

[73] *Id.* at 25

[74] *Id.* at 27-28.

[75] *Id.*

[76] NFIB v. Sebelius, 13 S. Ct. 2566, 2596 (2012).

chase qualifying healthcare as a tax.[77] Roberts ignored the form of the fee (the legislation describes it as a penalty) to look at the fee's substance.[78] He provided some indicia for defining regulatory taxes: it *must* raise revenue,[79] it is collected through the IRS,[80] it is based on "familiar factors as taxable income,"[81] it should not impose "an exceedingly heavy burden,"[82] and it should not have a scienter requirement.[83]

Under the rubric of these two cases, civil asset forfeiture is properly viewed as a regulatory tax. Its *de jure* goal is to lower illicit activity. However, it raises a substantial sum of money.[84] Indeed, it raises a sum much larger – even when accounting for inflation – relative to the lottery tickets at issue in *Kahriger*.[85]

Roberts's factors do not all cut in favor of treating civil asset forfeiture as a regulatory tax. Forfeiture is not based on "familiar factors [such] as taxable income" and the IRS does not collect the fee. However, federal civil asset forfeiture has no scienter requirement[86] and it does raise substantial revenue. It is unclear which way the heavy burden factor cuts. It seems the factors cutting against treatment as a regulatory tax are relatively less important because (a) they likely collapse into one requirement, since fees imposed by the IRS probably will use familiar factors for imposing the tax, (b) Roberts cites more authority for the scienter and revenue generation

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[77] *Id.* at 2600.
[78] *Id*. at 2594.
[79] *Id.*
[80] *Id.*
[81] *Id*.
[82] *Id.* at 2595.
[83] *Id*.
[84] Moores, *supra* note 5.
[85] *Cf*. United States v. Kahriger, 345 U.S. at 28, n.4 *with* Moores, *supra* note 5.
[86] *See* Cassella, *supra* note 16, at 110-11. Innocent owners, while having some protection, can have their property seized absent an intent to commit a crime. Moreover, the overall structure of civil asset forfeiture does not require scienter. There is no requirement that the owner intended to use property in crime.

requirements compared to the familiar factor and collecting body requirements,[87] and (c) the only necessary condition is that the fee must raise revenue, which suggests that condition is more important relative to the other four conditions.

The work of Professors Cooter and Siegel[88] provides a theoretical framework for differentiating between a penalty and a regulatory tax. Pure penalties often raise little revenue, because they seek to prohibit certain behavior.[89] Moreover, penalties tend to escalate for repeat behavior.[90] In addition, the penalty's language describes moral wrongdoing.[91] On the other hand, pure taxes often raise revenue, as they do not prevent behavior.[92] They do not escalate based upon repeat behavior.[93] They also insure that gains from a certain action are preserved – that is, taxes leave the fee payer with some profit, whereas penalties often eliminate all profit from the fee payer.[94] In the middle are mixed penalties/taxes. The Cooter-Siegel framework argues for treating mixed exactions as taxes, provided the penalty only diminishes the targeted behavior and therefore does not prevent revenue generation.[95]

Civil asset forfeiture is not a pure tax. Its expressive language mirrors that of a pure penalty. But it is also not a penalty – it has hardly ended the action it seeks to punish and therefore does not in any meaningful way prevent the undesired activity. Under the Cooter-Siegel analysis, civil asset forfeiture is a mixed exaction that

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[87] For revenue generation, Roberts cites *Kahriger*. He cites Bailey v. Drexel Furniture Co., 259 U.S. 20 (1922) for both scienter and the collecting agency requirements. He provides no authority for the familiar factors requirement.

[88] *See generally* Robert D. Cooter & Neil S. Siegel, *Not the Power to Destroy: An Effects Theory of the Tax Power*, 98 VA. L. REV. 1195 (2012).

[89] *Id*. at 1224.

[90] *Id*. at 1222.

[91] *Id*.

[92] *Id*. at 1223-24.

[93] *Id*.

[94] *Id*.

[95] *Id*. at 1226.

should be treated as a tax, because its effect is not to destroy the undesirable action but to diminish the frequency of the action while raising revenue from it. The large revenue streams civil asset forfeiture generates justify this treatment.

One other relevant inquiry is whether civil asset forfeiture is properly viewed as a regulatory tax ex ante — that is, in light of its purpose rather than just its effect. Seemingly, the legislature intends civil asset forfeiture as a deterrent against crime. Moreover, its goal is to eliminate crime, not diminish-yet-profit-from crime. Legislatures would seemingly choose to forgo the civil asset forfeiture revenue in order to eliminate crime. As such, ex ante the legislature intends civil asset forfeiture to act as a penalty. Yet in practice, it acts like a tax.

There are three responses to this ex ante criticism. First, civil asset forfeiture has been operating for a long time. Legislatures cannot therefore be surprised by how it functions. Thus, when they modify the legislation, such as CAFRA in 2000, they must intend for it to be a tax. They may wish they had the choice of (a) civil asset forfeiture or (b) no crime, but they know civil asset forfeiture at best merely decreases the frequency of crimes while raising revenue. As such, it is reasonable to presume how civil asset forfeiture functions is in fact the intent of the legislature *because when civil asset forfeiture legislation passed the legislature knew what its effects would be.*

Second, there is a public choice problem. Some of the key players in the civil asset forfeiture system receive direct benefits from the system. As already mentioned, police departments receive substantial funds from civil asset forfeiture, allowing many of them to self-fund and creating an incentive to seize as much as they can, knowing that it will all go into their own coffers. AUSAs in turn can utilize local police without paying for them, allowing them to prosecute more citizens. This may enhance the career paths of AUSAs. Both of these institutional players possess lobbying strength. They may prefer civil asset forfeiture as a tax to civil asset forfeiture as a penalty. Given the salience of the issue, it would not be surprising if the views of the police and AUSAs dominate the legislative discussion of civil asset forfeiture.

Finally, civil asset forfeiture punishes suspicious activity, not crimes themselves. The burden of proof for a civil forfeiture is the preponderance standard at the federal level, whereas with criminal prosecution the standard burden of proof is beyond a reasonable doubt. Therefore, it is likely that not all civil asset forfeitures actually involve crime. Instead, civil forfeitures occur in a grey area between illicit and legal activity. Legislators might think applying a regulatory tax to this grey area is sensible, as the activity may be undesirable but not necessarily illegal. The tax should decrease the level of the activity, while funding police to further deter actual illegal activity.

B. TAX EXPENDITURE HISTORY

Professor Stanley Surrey developed modern tax expenditure analysis in the 1960s and 1970s. Surrey's basic insight was that government can effectively spend money through the tax code by providing deductions, credits, more favorable tax rates, deferral, and other mechanisms.[96]

The analysis underpinning Surrey's work is the recognition of a "pure" tax base. The common iteration is the Haig-Simons definition of income.[97] Once the pure tax base is defined, any deviation from that tax base with the goal of incentivizing action[98] is a tax expenditure.

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[96] Stanley A. Surrey, *Tax Incentives As A Device for Implementing Government Policy: A Comparison With Direct Government Expenditures*, 83 HARV. L. REV. 705, 715 (1970) [hereinafter Surrey, *Tax Incentives*].

[97] Christopher H. Hanna, *Tax Theories and Tax Reform*, 59 SMU L. REV. 435, 436-37 (2006). Income = Consumption + Change in Wealth. This equation, while very simple to describe, is incredibly difficult to apply.

[98] Administrative ease, concerns about liquidity, or perhaps an idea that certain items are not truly income may justify some deviations from the pure tax base. One example could be homegrown vegetables. It is quite clear the grower of vegetables made an investment (buying seeds to plant vegetables) that created an economic benefit (the vegetable). Under Haig-Simons, this is a positive change in wealth, thereby resulting in an increase of income. However, this would be incredibly diffi-

One tax expenditure is the charitable deduction. By providing a deduction for charitable giving, the government is essentially spending money on charities through its citizenry. By way of example, assume taxpayer *X* makes 100 dollars, taxable at the rate of 20%. *X* donates 10 dollars to charity. There are no deductions for charity. After charitable giving and taxes, *X* will have 70 dollars.[99] Compare this with taxpayer *Y*, who possesses the same attributes except *Y* receives a deduction for every dollar donated to charity. After charitable giving and taxes, *Y* ends up with 72 dollars.[100] To calculate the tax expenditure, we treat *Y* as paying his tax liability absent the tax expenditure for the charitable deduction. The government then spends two dollars by paying *Y* two dollars. This payment to *Y* by the government is the tax expenditure.[101]

Surrey argued that tax expenditures could be effectively replaced with a grant system.[102] This system would have the same decentralized decision-making process but would not "pollute" the tax system with expenditures.[103] Either method limits the local knowledge problem that centralized planning faces.[104] However,

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cult to police or to value, the gardener may lack liquidly because he is not engaging in any market activity, and finally maybe gardening as a hobby is not something we want to tax. Professor Bittker offers a strong critique of tax expenditures utilizing this strand of logic. *See* Boris I. Bittker, *A "Comprehensive Tax Base" as A Goal of Income Tax Reform*, 80 HARV. L. REV. 925, 934-981 (1967).

[99] Taxable income = 100. Applying a 20% rate to that leaves *X* with 80 dollars. *X* spends 10 dollars on charity, leaving *X* with 70 dollars.

[100] Taxable income = 100. *Y* owes 20 dollars in tax. The tax expenditure equals 2 dollars (10 dollar charitable deduction multiplied by the 20% tax rate). So, *Y* starts out with 100 dollars, spends 20 dollars in taxes (100 x 20%), 10 dollars on charitable giving, and receives 2 dollars from the government (10 dollar deduction x 20%). This leaves *Y* with 72 dollars (100-20-10+2).

[101] STANLEY S. SURREY & PAUL R. MCDANIEL, TAX EXPENDITURES 25 (1985) [hereinafter SURREY, TAX EXPENDITURES].

[102] Surrey, *Tax Incentives*, *supra* note 96, at 706.

[103] Surrey, *Tax Incentives*, *supra* note 96, at 731-32, 727.

[104] *See* Hayek, *supra* note 25; Barnett, *supra* note 25. The basic concept is that decentralized decision making permits and incentivizes local actors to act on knowledge central authorities lack and therefore to allocate resources more efficient-

Surrey explained that the mechanisms for spending government money through taxes and grants are very different.[105] Surrey claimed the method for spending dollars through the tax code was inferior compared to normal budgetary methods, because, *inter alia*, tax expenditures face less procedural review,[106] hide spending from political pressure,[107] generally lack sun-setting provisions,[108] lack a cap,[109] and entrust implementation to the IRS, instead of agencies with subject matter expertise.[110]

C. FEDERAL CIVIL ASSET FORFEITURE IS SIMILAR TO TAX EXPENDITURES

Under federal civil asset forfeiture, equitable sharing compensates local government agencies for services to the federal government via the receipt of the asset forfeiture – property acquired by the federal government via a regulatory tax. Tax expenditures occur when the government transfers tax proceeds via deductions or credits to private actors in exchange for actions taken by the private actor. The federal government taxes through forfeitures and then fictionally expends the forfeited assets to the police to induce action via equitable sharing. It is important to note that the express purpose of equitable sharing is to induce actions by local law enforcement.[111] This bears a striking resemblance to how the charitable deduction is designed to induce charitable giving. In both cases, the

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ly throughout society. Because the government still decides which private acts are funded, both grants and tax expenditures retain elements of centralized planning. Nevertheless, both grants and tax expenditures include greater de-centralized decision-making compared to government controlled spending. It is unclear to me which model enhances local decision-making more, though I do not think that answer is necessary for this paper.

[105] Surrey, *Tax Incentives*, *supra* note 96, at 728-29.

[106] SURREY TAX EXPENDITURES, *supra* note 101, at 47-48.

[107] SURREY TAX EXPENDITURES, *supra* note 101, at 104-05.

[108] *See* SURREY TAX EXPENDITURES, *supra* note 101, at 54-58

[109] SURREY TAX EXPENDITURES, *supra* note 101, at 112.

[110] SURREY TAX EXPENDITURES, *supra* note 101, at 111-12.

[111] *Supra* I.B.iii.

federal government transfers tax proceeds to the local agent as compensation for certain action the federal government deems beneficial.

The key criticism of tax expenditures is that they suffer from certain procedural defects that direct spending avoids. In the same vein, equitable sharing is plagued with procedural shortcomings that the Memorial Grant lacks. It is important to understand that equitable sharing and the Memorial Grant are two sides of the same coin; they accomplish the same purpose by directing federal funds to local law enforcement in an effort to incentivize action. However, the method of transferring funds in each is very different. And it is in that difference that the tax expenditure analysis can help shed light on flaws in accomplishing federal goals via equitable sharing.

Certainly, there are differences between Surrey's tax expenditure analysis and the civil asset forfeiture tax expenditure analysis. Principally, Congress writes (and therefore spends) all expenditures in the tax code, which is appropriate under our federal structure. In contrast, the executive spends civil asset forfeiture proceeds[112] because the executive is tasked with deciding what and how much is taxed via civil asset forfeiture. Once the executive decides how much is taxed, it then decides how it is spent. Another difference is that private citizens initiate tax expenditures, whereas this tax expenditure is *de jure* initiated by the executive and *de facto* by state law enforcement.[113]

Nonetheless, Surrey's insights about tax expenditures apply with substantial force to equitable sharing. In the next section, I explain in some detail how some tax expenditure criticisms apply to equitable sharing. But here I want to highlight broad problems with tax expenditures that also exist with equitable sharing. Both ex-

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[112] The discretional, non-mechanical decision to disburse civil asset forfeiture proceeds lies with the United States Attorneys who are in the Department of Justice, which is an executive branch agency. *Supra* I.D.iv

[113] *Supra* I.B.ii.

penditures are politically hidden, open-ended in terms of sunset clauses and revenue streams, lack other budgetary procedural protections, and seem like illegitimate methods of expending resources compared to direct or normal spending methods. The basic connection between the two concepts is simple: both are off-budget methods for the federal government to spend money that create problems and inefficiencies compared to direct expenditures.

Eric Holder's policy[114] does not significantly affect the comparison to tax expenditures. The goal is still to incentivize action by local police units. The only thing the Holder policy does is eliminate one avenue for funding the police. It is still an open-ended, under-supervised, under-noticed expenditure. While it is good that Eric Holder placed some restraints on these expenditures, the core of the program still exists and therefore civil asset forfeiture's tax expenditure problem still exists.

III. APPLYING TAX EXPENDITURE ANALYSIS TO CIVIL ASSET FORFEITURE

The previous sections explained modern federal civil asset forfeiture and connected it to tax expenditures. This section applies some tax expenditure analysis to modern federal civil asset forfeiture practice. The goal is not to explore every way tax expenditure analysis can inform the civil asset forfeiture literature, but instead provide examples of how the tax expenditure and civil asset forfeiture connection can shape the civil asset forfeiture regime.

A. PROCEDURAL CRITIQUES

One procedural difference between tax bills and spending bills is the committee process the respective bills go through. Spending bills (as opposed to tax bills) must go through two committees in

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[114] *Supra* I.B.iv.

both houses of Congress.[115] Congress's committee process is one of many choke points for legislation. Moreover, appropriation bills occur annually. Therefore, spending programs must be re-authorized. By altering the form of the spending from outlays to tax expenditures, the legislature avoids certain procedural roadblocks.

This change in form also makes a large difference for equitable sharing. As it stands now, once Congress authorizes the civil asset forfeiture statute, it will be law until Congress decides to alter the law (or the courts find it unconstitutional). However, block grants must continue to go through the appropriation process. Therefore, this difference in procedure creates an easier legislative path for equitable sharing because unlike appropriations, it need not be reviewed annually or go through multiple committees. This might explain, in part, why the federal government seemingly prefers equitable sharing to the grant system. Both of these roadblocks to direct expenditures likely make equitable sharing more long-lasting compared to the Memorial Grant. As a result, state and local actors benefiting from equitable sharing are encouraged to lobby at the state level for federal drug policy more vigorously compared to when the funding was from a direct grant. By doing so, they can spread lobbying costs out over a longer time, as they will receive benefits for a longer time. And state legislatures can pass federal friendly anti-drug laws confident that the federal equitable sharing law is less likely to change. Understanding this, therefore, could be a tool for those wishing to end the War on Drugs. Switching from an equitable sharing system to a largely grant system would likely decrease shared federal funds, thereby reducing the incentive for state actors to enforce or support federal drug laws.

Another important procedural theme developed in the tax expenditure analysis is that of legislator/executive expertise. As men-

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[115] Robert Lepore, Note, *Bringing Balance to the Budget Debate: Challenging the Privileged Procedural Status of Regressive Tax Expenditures Over Progressive Discretionary Spending Programs*, 17 GEO. J. ON POVERTY L. & POL'Y 103, 122-24 (2010).

tioned previously, tax bills go through a different legislative process than spending bills. Tax bills start in the House Ways and Means Committee and in the Senate Finance Committee. Typically, tax bills do not go through other committees.[116] In contrast, direct expenditures originate in a special committee based on subject matter. After passing through the relevant subject matter committee, the bill passes through either Ways and Means or the Finance Committee.[117] In addition, subject-matter executive agencies typically oversee direct expenditures once approved by Congress. However, the IRS oversees tax expenditures. Like its legislative counterparts (Ways and Means and the Finance Committees), the IRS lacks the topical expertise compared to subject-matter agencies.[118]

These procedural differences have led commentators to suggest direct expenditures are superior *a priori* to tax expenditures. Subject-matter committees/agencies in theory possess greater expertise[119] about the relevant subject matter compared to the committees/IRS, who are experts in budgets and tax codes.[120] The subject matter expertise hopefully ensures that experts review programs, thereby eliminating waste and ensuring that the programs are well thought-out. As tax expenditures never pass through the relevant subject matter committee and are not administered by experts, it is fair to presume that they are more likely to be poorly designed and wasteful.[121] Professor Zelinsky argues that this technocratic explanation

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[116] Edward A. Zelinsky, *James Madison and Public Choice at Gucci Gulch: A Procedural Defense of Tax Expenditures and Tax Institutions*, 102 YALE L.J. 1165, 1175-77 (1993).

[117] *Id*.

[118] *Id*.

[119] This expertise develops in Committee Staff, who are likely there for the long haul. However, Professor Zelinksy questions the expertise of these committees relative to tax committees. *Id*. at 1185.

[120] *See e.g.*, Edward Yorio, *Equity, Efficiency, and the Tax Reform Act of 1986*, 55 FORDHAM L. REV. 395, 425 (1987); Surrey, *Tax Incentives*, *supra* note 96, at 728-29.

[121] Surrey, *Tax Incentives*, *supra* note 120.

ignores public choice theory.[122] As such, policymakers should not *a priori* favor one procedure compared to the other.

If we accept the technocratic argument *prima facie,* this argument might actually cut in favor of rejecting direct expenditures for drug enforcement; that is, in this situation the tax expenditure is *a priori* superior. United States Attorneys likely have greater expertise regarding these programs than congressional representatives in Washington. Under my analysis, the United States Attorneys are equivalent to the IRS, but with subject matter expertise. On the other hand, United States Attorneys are likely more frequently captured.[123] Therefore, under Professor Zelinsky's analysis, it may actually be preferable to have fewer experts involved and provide funding through a general grant. While the answer (at least to me) is indeterminate, the question of a trade-off is very real and something the tax expenditure analysis elucidates.

B. SUBSTANTIVE CRITIQUE

i. Disguising the Expenditure Limits Political Oversight of Civil Asset Forfeiture

One chief criticism of tax expenditures is that by burying the expenditure in the tax code, the legislature is hiding the expenditure from the public.[124] This analysis applies with some force to civil

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[122] Professor Zelinksy explains expert led legislation and execution is more likely subject to capture compared to more general expenditure systems, such as the tax code. This is because factions seeking to capture a committee or agency may face an easier time when the subject matter is fixed. For example, a single farming lobby may have different incentives vis-à-vis other farming lobbies, but all farming lobbies are likely more monolithic about farming policy relative to the energy lobby. In the general committee, energy and farming might need to compete for rents, whereas in the Agriculture Committee farming need not compete with energy. Zelinsky, *supra* note 116, at 1175-78.

[123] The civil asset forfeiture literature suggests capture is likely, given that AUSAs directly benefit from increased civil asset forfeiture.

[124] Surrey, *Tax Incentives*, *supra* note 96, at 733-34.

asset forfeiture.[125] Equitable sharing creates hundreds of millions of dollars yearly for the police.[126] Given current budget austerity,[127] exposing civil asset forfeiture to typical budgetary pressures (including general taxation) may cause a second look at the size of the converted equitable sharing program.

Alternatively, perhaps the public fails to understand the scope of the program. Perhaps they support law-and-order, anti-drug policies (and therefore support civil asset forfeiture), but prefer robust federalism compared to law-and-order policies. As such, they might prefer eliminating equitable sharing, even if they are unmoved by the plight of disposed property owners. By transforming civil asset forfeiture into a direct expenditure, the public may become more aware of the policy in general, and therefore allow proper policy preferences to shine through.

Further, federal representatives often are busy and cannot be policy experts on all bills. By putting all equitable sharing into the grant system, it may cause legislators to pay more attention to it and actually drive constituent policy discussions. This is because currently the scope of the program is buried – possibly to both the

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[125] It is generally accepted that the poor have less access, knowledge, and political capital regarding legislative issues than other groups. *See* Herbert Hovenkamp, *Legislation, Well-Being, and Public Choice*, 57 U. CHI. L. REV. 63, 108-09 (1990). Civil asset forfeiture falls disproportionately on the poor. *See* ACLU, *Civil Asset Forfeiture,* https://www.aclu.org/criminal-law-reform/civil-asset-forfeiture (last visited Mar. 30, 2014). Therefore, the poor likely would not be able to effectively politicize their plight. Moreover, because the majority of civil asset forfeiture impacts the poor, the wealthy are generally not exposed to civil asset forfeiture, or its abuses. Therefore, it is less likely that they are aware of the issue. As such, even though many people suffer from civil asset forfeiture, it is likely not a well-known issue politically.

[126] Department of Justice, *Audit of the Assets Forfeiture Fund and Seized Asset Deposit Fund Annual Financial Statements Fiscal Year 2013*, 51 (Feb. 2014), *available at* http://www.justice.gov/oig/reports/2014/a1408.pdf.

[127] Zachary A. Goldfarb, *With 2015 Budget Request, Obama Will Call for an End to Era of Austerity*, WASH. POST (Feb. 20, 2014), *available at* http://www.washingtonpost.com/business/economy/with-2015-budget-request-obama-will-call-for-an-end-to-era-of-austerity/2014/02/20/332808c2-9a6e-11e3-b931-0204122c514b_story.html.

public and many legislators. By combining all spending into one bill, legislators may take more notice of civil asset forfeiture because it is less hidden.

ii. Civil Asset Forfeiture is an Open-Ended Grant

The open-ended nature of tax expenditures is a problem that plagues civil asset forfeiture as well. When the legislature pays for programs via tax expenditures, it lacks specificity regarding how much is spent.[128] This is because the amount spent is determined based on how private citizens react to the expenditure. In a similar manner, the legislature does not cap the amount of civil asset forfeiture proceeds. Instead, the executive determines the amount of proceeds.

Of course, there are important differences. Under tax expenditure analysis, the government is delegating its spending powers to private citizens under (narrowly?) tailored rules for what triggers a tax expenditure. In contrast, under equitable sharing the legislature delegates its spending power to its intergovernmental sibling, the executive, without narrowly tailored rules[129] for what should trigger a regulatory tax. However, these differences do not change the common problem; they go to the degree of the problem. In both cases, the legislature, by adopting an open-ended spending program, is writing a somewhat-limited "blank check" to other parties. These parties replace the legislature in deciding how much is spent. Maybe these parties should not possess such spending powers under this federal republic?

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[128] *See e.g.*, 26 U.S.C. § 170 (2013). This section permits a charitable deduction. While there is a limitation on how much each individual can deduct relative to his or her taxable income, there is no country aggregate ceiling or floor for this deduction. Congress can predict the size of the expenditure, but cannot narrowly control the amount.

[129] *Supra* I.B.iv. The executive can seize almost any property it believes to be connected to almost any federal crime. It then has substantial leeway to share those proceeds with state police agents.

iii. The Fusion of Taxing and Spending Asset Forfeiture Proceeds Creates Problems

Tax expenditures are sometimes viewed as an inappropriate co-mingling of revenue generation and expenditures. That is, the method the government uses to collect revenue should not be the same method the government uses to spend outlays, because both features risk corruption. In the same way, how the government discourages crime via regulatory taxes should perhaps not be the same way the government expends funds to encourage local police to assist the federal government. These two different goals within the same operating law sometimes create conflict. For example, equitable sharing may encourage the AUSA and police to concentrate on crimes with high asset value instead of deterring the crimes that harm society the most.[130]

CONCLUSION

Given its direct link to revenue generation, civil asset forfeiture is best viewed as a regulatory tax. The federal government spends this tax via equitable sharing to buy local law enforcement support for the War on Drugs. Viewing equitable sharing as a tax expenditure opens up new avenues for improving the asset forfeiture scheme.

This paper has not exhaustively identified how the tax expenditure literature applies to civil asset forfeiture. Instead, it has strived to demonstrate both the connection between the two and provided a few examples of how the tax expenditure analysis can inform the civil asset forfeiture literature. Going forward, several questions remain. How can the tax expenditure analysis further inform the civil asset forfeiture literature, and vice versa? Are there other tax specialties that can inform civil asset forfeiture in general?

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[130] *Supra* section I.C.

What are the major ramifications of thinking about civil asset forfeiture as a tax?[131] In short, the nexus between tax analysis and critiques of the civil asset forfeiture scheme can improve our understanding of how to better shape both systems.

[131] For example, applying takings analysis to civil asset forfeiture qua tax could be fruitful. The relationship between taxation and takings is an oft-ignored subject matter in modern tax discourse. Nevertheless, a tax could constitute a taking provided the tax applies only to a small minority. Eric Kades, *Drawing the Line Between Taxes and Takings: The Continuous Burdens Principle, and Its Broader Application*, 97 NW. U. L. REV. 189, 190 (2002). The courts generally do not see civil asset forfeiture as takings but their examination rarely sees civil asset forfeiture through the lens of revenue generation; instead it is viewed as a policing mechanism. *See* Bennis v. Michigan, 516 U.S. 442, 453 (1996). When viewed through revenue generation, it looks like an excessive levy that applies to only a small group of people that pays for a general benefit – the police.