

Civil Asset Forfeiture in the States

Policy Report No. 375

by Joshua Latshaw

October 20, 2015

Civil asset forfeiture is an in rem (against the property) proceeding, in which property is seized but no criminal charges are brought against the owner. Critics often point to the lack of evidence necessary to seize assets, because nearly 90 percent of civil forfeiture cases are not accompanied by a criminal prosecution. Opponents have also tagged the practice as “predatory public finance” and “policing for profit,” because state and local law enforcement agencies receive most of the proceeds, distorting the incentives of police and potentially wasting resources.



Dallas Headquarters:
14180 Dallas Parkway, Suite 350
Dallas, TX 75254
972.386.6272

www.ncpa.org

Washington Office:
202.830.0177
governmentrelations@ncpa.org



Executive Summary

In 2014, \$4.2 billion of cash deposits were made to the U.S. Department of Justice’s asset forfeiture fund (AFF) by local and state law enforcement agencies. The federal equitable sharing program, which began in 1984 with enactment of the Comprehensive Crime Control Act (CCCA), allows local and state law enforcement agencies to keep a portion of the funds seized, generally 80 percent. The AFF keeps the rest.

The effect of different state policies on the level of asset forfeiture can be examined using data from the Law Enforcement Management and Administrative Statistics survey (LEMAS) for 1997, 2000 and 2003. Additionally, in 2000, roughly 70 percent of Utah voters approved an initiative which reformed the state’s civil forfeiture laws, eliminating the distribution of proceeds to law enforcement agencies beginning in 2001. The differences in state civil asset forfeiture policies, and the policy change in Utah, were exploited by this author to construct an econometric model in order to estimate the causal effects of the reform. The results:

- As one might expect, a state having a lower burden of proof, other things being equal, has higher levels of forfeitures.
- A 10 percent increase in the number of officers in an agency, other things equal, is associated with a 12 percent increase in the value of forfeitures.
- A 10 percent increase in the use in a state of cocaine, marijuana or other drugs were correlated with an estimated 15 percent increase, 7 percent decrease and 4 percent increase, respectively, in the value of forfeitures.
- Specifically, Utah’s reform was associated with an estimated 90 percent to 99 percent reduction in forfeitures.

These results suggest that law enforcement agencies nearly completely eliminate the use of civil forfeiture as a law

Civil Asset Forfeiture in the States

enforcement tool when they do not stand to benefit from the seizure activities. The facts bear out these results: prior to the civil forfeiture reform, 20 percent of Utah agencies seized assets. After the reform was enacted, less than 5 percent of agencies partook in civil forfeiture, with the average per-agency value of seizures falling to nearly one-fourth of the prereform level.

In order to protect the property rights of citizens and safeguard them from the abuses of forfeiture laws, legislatures ought to follow the recent example of New Mexico's legislature in HB 560, which took effect on July 1, 2015, in removing the incentive for law enforcement to violate property rights and due process. HB 560 ensures that only the property of those found guilty of a crime beyond a reasonable doubt will be subject to forfeit. Moreover, law enforcement agencies will no longer be allowed to keep any of the proceeds of forfeitures.

Joshua Latshaw was a Koch Fellow at the National Center for Policy Analysis. He received a Bachelor of Science degree in Economics from Northern Illinois University and is a candidate for a Master of Arts in Applied Microeconomics from San Diego State University.

Introduction

Civil asset forfeiture is an *in rem* (against the property) proceeding, in which property is seized but no criminal charges are brought against the owner. Legal scholars Eric Blumenson and Eva Nilsen, along with civil libertarians, have criticized such proceedings as violations of constitutionally guaranteed rights forbidding unreasonable searches and seizures, and the deprivation of life, liberty or property without due process.¹ Such claims often point to the lack of evidence necessary to seize assets; nearly 90 percent of civil forfeiture cases are not accompanied by a criminal prosecution.² Opponents of civil forfeiture have also tagged the practice as “predatory public finance” and “policing for profit.”³ That is because state and local law enforcement agencies receive most of the proceeds, distorting the incentives of police and potentially wasting resources.

Following is an examination of how civil forfeiture works in various states and the evidence that the process encourages law enforcement to target the types of crime most lucrative to police agencies. The effects of a change in state policy in Utah are also examined.

How Asset Forfeiture Laws Work

The colloquial definition of forfeiture, or to forfeit, is to voluntarily give up; however, in legal forfeiture, forfeited property is seized by the government without compensation. Criminal forfeiture happens after a person is convicted of a criminal offense, whereas in civil forfeiture the target of the proceeding is the property.

In 2014, \$4.2 billion of cash deposits were made to the U.S. Department of Justice’s asset forfeiture fund (AFF).⁴ These deposits were made by local and state law enforcement agencies as a part of the federal equitable sharing program, which began in 1984 with enactment of the Comprehensive Crime Control Act (CCCA). The program allows local and state law enforcement agencies to keep a portion of the funds seized, generally 80 percent. The AFF keeps the rest.

Federal forfeitures come in two forms: adoptive forfeitures, which are done entirely at the state or local level, and joint forfeitures, where investigations and forfeitures are joint federal and local or state efforts.⁵ Along with the federal equitable sharing program, there are a wide variety of state laws governing civil forfeitures and determining the percentage of proceeds that are distributed to the seizing agency.

The civil forfeiture protocols followed by an agency depend on whether or not the forfeiture is a part of the federal equitable sharing program. Joint forfeitures are governed by the federal protocols. All other forfeitures, except in states that have closed federal loopholes, can be governed by either the federal or state protocols at the discretion of the seizing agency. The judicial process occurs in the state courts when state protocols are followed and in federal courts when the equitable sharing guidelines are followed.⁶

Standard of Proof. There is significant variation among states’ standards of proof necessary for initiating a forfeiture [see Table I]:

- The lowest standard of proof necessary for civil forfeiture is *prima facie* or *probable cause*, a standard of proof that would lead a reasonable person to believe, at first pass, that the claim is true. There are 13 states that have a burden of proof of probable cause.

Table I Burden of Proof by State	
Probable Cause	AL, AK, DE, GA, IL, MA, MO, ND, RI, SC, SD, WA and WY
Preponderance of the evidence	AZ, AR, HI, ID, IN, IA, KS, KY, LA, ME, MD, MI, MS, NH, NJ, NY, OK, OR, PA, TN, TX, VA and WV
Clear and convincing	CA, CO, CT, FL, MN, NV, OH, UT and VT
Beyond a reasonable doubt	MT, NE, NM, NC and WI
Source: Marian Williams, Jefferson Holcomb, Tomislav Kovandzic and Scott Bullock, “Policing for Profit: The Abuse of Civil Asset Forfeiture,” <i>Institute for Justice</i> , March 2010. Available at http://ij.org/policing-for-profit-the-abuse-of-civil-asset-forfeiture .	

- An additional 23 states have a burden of proof requirement of a *preponderance of the evidence*, which can be thought of as a higher burden of proof than probable cause. A preponderance of the evidence is when, in

an instance of civil forfeiture, a law enforcement agent believes that it is more likely than not that the money an individual is carrying has been used to facilitate a drug transaction. Another way to think of a preponderance of the evidence is that there is anywhere from a 50.0001 percent probability to a 100 percent probability that some claim is true.

Civil Asset Forfeiture in the States

- Nine states have a *clear and convincing* burden of proof, which is much stricter than a preponderance of the evidence or probable cause. Clear and convincing means that it is much more likely something is true than not, a level of probability that might be quantified as, for example, an 80 percent likelihood that some fact is true.
- Five states have a burden of proof that is *beyond a reasonable doubt*, meaning that the certainty of a particular point has been established beyond dispute from any reasonable alternative.⁷

Owner Proves Innocence	AK, AZ, AR, CT, DE, GA, HI, ID, IL, IA, LA, MD, MA, MN, MS, MO, NE, NV, NH, NJ, NY, NC, ND, OH, OK, PA, RI, SC, SD, TN, TX, VT, VA, WA, WV, WI, and WY
Depends on Type of Property	AL, IN, KY, ME and UT
Government Proves Guilt	CA, CO, FL, KS, MI, MT, NM and OR

Source: Marian Williams, Jefferson Holcomb, Tomislav Kovandzic and Scott Bullock, "Policing for Profit: The Abuse of Civil Asset Forfeiture," *Institute for Justice*, March 2010. Available at <http://ij.org/policing-for-profit-the-abuse-of-civil-asset-forfeiture>.

The course of action following the seizure of property depends on a states' law. In states which require the government to prove the guilt of the property, a forfeiture action must receive judicial approval. The other states require no judicial process, due to the presumption of guilt, which requires the owner to prove the innocence of the property. There are a few states in which "real" property, such as houses and cars, is presumed to be innocent, while currency is presumed to be guilty [see Table II].⁸

Property Recovery Procedures. In order to recover property, the owner must go through a series of steps. The following procedures apply to forfeitures under federal law. However, state procedures can be thought of as essentially the same. After the property has been seized, a forfeiture notice will be delivered to the owner. The owner of the property then has 30 days to file a verified claim, which is a statement under penalty of perjury, declaring legal ownership and stating defenses to the accusations against the property. State deadlines vary from a minimum of 10 days to a maximum of 90 days; if the claims are not filed before the deadline, the

property is officially forfeited and nothing can be done to recoup it.

Judicial proceedings to determine the legitimacy of the owner's claim begin after the verified claim has been received. The claimants do not have the right to a court-ordered attorney unless a primary residence is forfeited or the proceeding is concurrent with a criminal proceeding. The proceedings take anywhere from a few months to a few years and require numerous court dates; missing a single one will result in forfeiture without the right to appeal.⁹

Sharing the Proceeds of Forfeiture. Under the federal program, local and state law enforcement agencies may use funds for operations and investigations, equipment, travel expenses, per diem pay, awards, memorials, facilities, programs and fees associated with contracting services, training, education, drug and gang education and awareness programs, community-based programs and grant matching.¹⁰ The ability of agencies to profit from seizures is clear whether the program from which they benefit is governed by federal asset forfeiture laws or similar state programs.

As Table III shows, the percentage of proceeds kept by law enforcement varies widely among the states. The permissible uses of proceeds kept by agencies under state laws are, generally, similar to the federal program. The proceeds that are not kept by law enforcement agencies are most often placed in general state funds or general local funds.¹¹

Zero percent	IN, ME, MD, MO, NM, NC, ND, OH, VT
50 percent – 75 percent	CA, CO, CT, NE, NY, OR, WI
80 percent – 95 percent	FL, IL, LA, MN, MS, NH, RI, SC, TX
100 percent	AK, AL, AR, AZ, DE, GA, HI, ID, IA, KS, KY, MA, MI, MT, NV, NJ, OK, PA, SD, TN, UT, VA, WA, WV, WY

Source: Marian Williams, Jefferson Holcomb, Tomislav Kovandzic and Scott Bullock, "Policing for Profit: The Abuse of Civil Asset Forfeiture," *Institute for Justice*, March 2010. Available at <http://ij.org/policing-for-profit-the-abuse-of-civil-asset-forfeiture>.

Previous Research on Asset Forfeiture

Asset forfeiture has been one of the most important

tools used to fight the “war on drugs.” Law enforcement and proponents of asset forfeiture programs espouse their capacity to strike at cash and assets that sustain criminal organizations. By seizing the cash assets through which profits are reaped and capital assets that allow for the transportation and production of final goods, asset forfeitures can lessen the economic incentives facing criminal organizations.

There have been only a few empirical attempts to measure the level of “profiteering” engaged in by law enforcement. When police agencies participate in the federal equitable sharing program they have the capacity to bypass state laws.

Researchers tested whether the decision to partake in the equitable sharing program depends on the friendliness of state laws relative to the federal law.

They found evidence the decisions agencies made were motivated by which avenue resulted in a higher payoff.¹² For instance, researchers studied changes in drug arrest behavior following enactment of the CCCA and found the level of

drug arrests increased rather rapidly, compared to violent and property crimes.¹³

The validity of the conclusions of previous research depends on the ability to control for differences among states. Because there are often unobservable differences specific to each state, such as culture, preferences and social norms, it is highly probable that the estimated effects of a policy are biased due to correlation between policies, outcomes and unobservable factors. The biasing effects of unobservable differences can be controlled for through the use of policy changes within states.

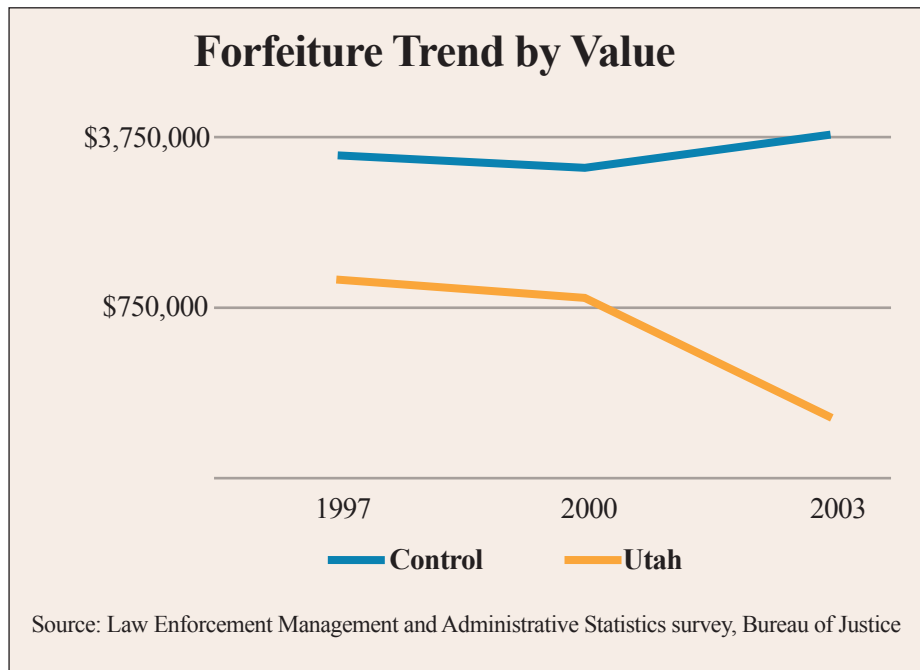
Empirical Examination of the Effects of State Policies on Asset Forfeiture

The effect of different state policies on the level of asset forfeiture can be examined using data from the Law

Enforcement Management and Administrative Statistics survey (LEMAS) for 1997, 2000 and 2003. In addition, during this period, in 2000, Utah made a major policy change. Roughly 70 percent of Utah voters approved an initiative which reformed the state’s civil forfeiture laws, eliminating the distribution of proceeds to law enforcement agencies beginning in 2001. The differences in state civil asset forfeiture policies, and the policy change in Utah, were exploited by this author to construct an econometric model which estimated the causal effect of the reform. The figure plots the trends in forfeitures of the treatment (Utah) and control states during the years examined. The plots appear to be trending in a parallel

manner prior to the reform, but after the reform they trend in opposite directions. [For details on the data, methodology and estimates, see the appendix.]

Results from the Model. The estimates reported on the effect of the reform are the only estimates that can be claimed to be truly causal; however, the correlations associated with some of the control variables are of interest.



- As one might expect, a state having a lower burden of proof, other things being equal, was associated with higher levels of forfeiture.
- A 10 percent increase in the number of officers in an agency, other things equal, was associated with a 12 percent increase in the value of forfeitures.
- The drug crime rates effect on the value of forfeitures was indistinguishable from zero.
- A 10 percent increase in the use in a state of cocaine, marijuana or other drugs were correlated with an estimated 15 percent increase, 7 percent decrease and 4 percent increase, respectively, in the value of forfeitures.

The estimates for cocaine use and other drug use are

Civil Asset Forfeiture in the States

to be expected since these drugs are more aggressively targeted and are associated with higher prices and more concentrated sums of cash. A possible explanation for the inverse relationship between marijuana use and forfeitures is that societal views on the harm of marijuana use shifted, leading to increased use and decreased enforcement. This hypothesis is at least somewhat supported by the passing of medical marijuana laws (MMLs) in two of the control states, Colorado (Amendment 20) and Nevada (Question 9, NRS/NAC 453A), in 2000, along with pending legislation and eventual passage of MMLs in two more control states, New Mexico (SB 523) and Arizona (Prop 203), in the latter half of the 2000s.

The models estimate that Utah's reform was associated with a 90 percent to 99 percent reduction in forfeitures. The estimates are consistent across six model specifications, robust to three falsification tests and not sensitive to control state exclusion [see Appendix Tables I, II and III]. These results suggest that law enforcement agencies nearly completely eliminate the use of civil forfeiture as a law enforcement tool when they do not stand to profit from the seizure activities. Prior to the civil forfeiture reform, 20 percent of agencies seized assets. After the reform was enacted, less than 5 percent of agencies partook in civil forfeiture, with the average per-agency value of seizures falling to nearly one-fourth of the prereform level.

Recent State Policy Changes

In order to protect the property rights of citizens and safeguard them from the abuses of forfeiture laws, legislatures ought to follow the recent example of New Mexico's legislature in HB 560, which took effect on July 1, 2015, removing the incentive for law enforcement to violate property rights and due process. HB 560 ensures that only those found guilty of a crime beyond a reasonable doubt will have their property subject to forfeit. Moreover, law enforcement agencies will no longer be allowed to keep any of the proceeds. Furthermore, New Mexico is not allowing local and state agencies to take part in the federal equitable sharing program unless the seizure is valued at more than \$50,000. The reforms put in place by New

Mexico have realigned the incentives of civil forfeiture in a way to best protect the rights of citizens.

Appendix Data and Methodology

The empirical analysis for this study is based on data from the Law Enforcement Management and Administrative Statistics survey (LEMAS). The LEMAS reports asset forfeiture information in 1993, 1997, 2000, 2003 and 2007. The LEMAS contributes data from all states in the year of the survey, and includes information on the type of agency, the number of sworn full-time employees, the population that the agency oversees, the value of forfeitures for the given year and special units, such as for homicide or drug investigations. Along with agency-specific controls the following state-level controls were used: police officers per 1,000 residents, aggregate police expenditures and aggregate judicial expenditures (Bureau of Justice Statistics); property, violent and drug crime rates (FBI Uniform Crime Report); unemployment rates (Bureau of Labor Statistics); state per-capita incomes (U.S. Census Bureau); the share of population holding a bachelor's degree (U.S. Department of Education); cocaine, marijuana and other drug use rates (National Survey on Drug Use and Health); and finally an index of Eminent Domain seizures (Mercatus Center).

This study uses quasi-experimental empirical methods, specifically, a difference-in-difference (DID) econometric approach, to estimate the effect of this reform on the value of forfeitures. A DID approach attempts to

Variables	Panel I	Panel II	Panel III	Panel IV	Panel V	Panel VI
Average Treatment Effect	-2.477 (0.304)*** -90%	-3.589 (0.255)*** -97%	-4.610 (0.277)*** -99%	-4.592 (0.739)*** -96%	-5.250 (0.330)*** -99%	-4.519 (0.363)*** -93%
Included Controls						
Burden of Proof	X	X	X	X	X	X
State Fixed Effects	X	X	X	X	X	X
Year Fixed Effects	X	X	X	X	X	X
Agency Specific Controls		X	X	X	X	X
State Level Controls		X	X	X	X	X
Drug Crime Rates				X	X	
Drug Use Rates			X	X	X	X
State Linear Time Trend					X	X

mimic scientific experiment by comparing the change in a group that has been “treated” or exposed to a policy change with the change in a “control” group that has not been exposed to the policy change.¹⁴

The sample is restricted to the 1997, 2000 and 2003 LEMAS surveys. The LEMAS contributes data from all states in the year of the survey. The sample is limited to those agencies in Utah and its border states (Arizona, Colorado, Idaho, Nevada, New Mexico and Wyoming). The equation being modeled is as follows:

$$F_{ist} = \beta_0 + \beta_1 Reform_{st} + \delta_{ist} + \gamma_{st} + \theta_s + \tau_t + \varepsilon_{ist}$$

Where F is the dollar value of asset forfeiture seizures in the past year by law enforcement agency i in state s at time t ;

Reform is an indicator equal to one in Utah in the year 2003 and zero otherwise;

δ_{ist} are a set of agency specific controls;

γ_{st} are state level controls in time period t ;

θ_s is a time constant state effect that controls for unobserved differences across states;

τ_t is a year fixed effect that controls for a common time trend among all states.

The coefficient estimate of interest is β_1 , the difference-in-difference estimate. The estimate of the coefficient β_1 is unbiased if the unobserved civil forfeiture trends in the treatment and control states are parallel.

All estimates are weighted by the number of full-time sworn officers in the agency, and the standard errors are clustered on the state. In Appendix Table I the difference-in-difference estimates examining the effect of the civil forfeiture reform are presented. The six different model specifications all estimate a decrease in the value of forfeitures brought about by the civil forfeiture reform in Utah of 90 percent or more. The estimates are robust in their very high degree of significance across all models, with all of them being significant at the 1 percent level.

State Left Out	Average Treatment Effect Panel IV	Semi-Elasticity Panel IV
Arizona	-3.713 (0.290)***	-97%
Colorado	-3.573 (0.166 ***)	97%
Idaho	-2.771 (0.330)***	-93%
Nevada	-2.760 (0.234)***	-93%
New Mexico	-3.143 (0.337)***	-95%
Wyoming	-2.822 (0.248)***	-93%
*p<0.1; **p<0.05; ***p<0.01 Notes: Estimates are from model specification in Panel IV of Table II.		

Moreover, with the inclusion of agency specific and state specific controls the significance increases and the coefficients become more negative. The inclusion of state specific time trends, which controls for any differences in trends specific to an individual state, further strengthens the estimates.

In addition to estimating the effect of the forfeiture reform, a sensitivity check and a falsification test were performed. The average treatment effect from the sensitivity analyses show that the results are not driven by the inclusion of a particular state [see Appendix Table II]. The falsification test is performed by assigning a placebo “treatment” variable for Utah in 2000. The tests support the naïve visual comparison in the figure (see study text), that there were

parallel pretreatment trends [see Appendix Table III]. The parallel pretreatment trends are not a direct measure of the necessary conditions for unbiased estimates that in the counterfactual scenario where Utah did not enact forfeiture reform outcomes would have mirrored the control group; however, checking pretreatment trends is a useful proxy for the necessary condition.

	Panel I	Panel II	Panel III
Pre-Treatment Placebo	-1.27 (1.223)	-8.27 (7.166)	0.799 (1.987)
*p<0.1; **p<0.05; ***p<0.01 Notes: Panel I includes state and year fixed effects along with indicators for the burden of proof; Panel II includes Panel I plus agency specific controls and state level controls; Panel III includes Panel II plus state specific time trends.			

Notes

1. Sarah Stillman, "Taken," *New Yorker*, August 12, 2013. Available at <http://www.newyorker.com/magazine/2013/08/12/taken>.
2. Henry Hyde, "Forfeiting your Property Rights," Cato Institute, 1995.
3. Bruce Benson and David Rasmussen, "Predatory Public Finance and the Origins of the War on Drugs," *Independent Review*, 1996; Eric Blumenson and Eva Nilsen, "Policing for Profit: The drug war's hidden economic agenda," *University of Chicago Law Review*, 1998; John Worrall and Tomislav Kovandzic, "Is Policing for Profit? Answers from asset forfeiture," *Criminology and Public Policy*, 2008.
4. Office of the Inspector General, "Audit of the Asset Forfeiture Fund Fiscal Year 2014," U.S. Department of Justice, January 2015. Available at <https://oig.justice.gov/reports/2015/a1508.pdf>.
5. "Guide to Equitable Sharing for State and Local Law Enforcement Agencies," U.S. Department of Justice, April 2009. Available at <http://www.justice.gov/sites/default/files/criminal-afmls/legacy/2014/07/31/04-2009guide-equit.pdf>.
6. "Guide to Equitable Sharing for State and Local Law Enforcement Agencies," U.S. Department of Justice, April 2009. Available at <http://www.justice.gov/sites/default/files/criminal-afmls/legacy/2014/07/31/04-2009guide-equit.pdf>.
7. Marian Williams, Jefferson Holcomb, Tomislav Kovandzic and Scott Bullock, "Policing for Profit: The Abuse of Civil Asset Forfeiture," *Institute for Justice*, March 2010. Available at <http://ij.org/policing-for-profit-the-abuse-of-civil-asset-forfeiture>.
8. *Ibid.*
9. "What to do when your property has been seized," F.E.A.R. Foundation, August 2002, available at <http://www.fear.org/whatodo-1.html>; and "Civil Asset Forfeiture," CCIM Institute, July 2006, available at http://www.ccim.com/sites/default/files/ccim-briefing-paper_civil-asset-forfeiture.pdf.
10. "Guide to Equitable Sharing for State and Local Law Enforcement Agencies," U.S. Department of Justice, April 2009. Available at <http://www.justice.gov/sites/default/files/criminal-afmls/legacy/2014/07/31/04-2009guide-equit.pdf>.
11. Marian Williams, Jefferson Holcomb, Tomislav Kovandzic and Scott Bullock, "Policing for Profit: The Abuse of Civil Asset Forfeiture," *Institute for Justice*, March 2010. Available at <http://ij.org/policing-for-profit-the-abuse-of-civil-asset-forfeiture>.
12. John Worrall and Tomislav Kovandzic, "Is Policing for Profit? Answers from asset forfeiture"; Marian Williams, Jefferson Holcomb, Tomislav Kovandzic and Scott Bullock, "Policing for Profit: The Abuse of Civil Asset Forfeiture"; Brent Mast, Bruce Benson and David Rasmussen, "Entrepreneurial police and drug enforcement policy," *Public Choice*, 2000; Bruce Benson, David Rasmussen and David Sollars, "Police bureaucracies, their incentives, and the war on drugs," *Public Choice*, 1995.
13. *Ibid.*
14. For further discussion of difference-in-difference, see David Card, "Do minimum wages reduce employment? A case study of California 1987-1989," *Industrial and Labor Relations Review*, 1992; and David Card and Alan Krueger, "Minimum wages and employment: A case study of the fast-food industry in New Jersey and Pennsylvania," *American Economic Review*, 1994.