

# Don't Steal; The Government Hates Competition: The Problem with Civil Asset Forfeiture

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## Abstract

Governments originally meant for civil asset forfeiture laws to take the profit out of crime and show that crime literally does not pay. Since governments keep the seized assets for themselves, however, these laws lead to perverse incentives. Instead of police using resources to fight crime that has actual victims, police go after drug buyers to find assets to seize to increase the police budget. This paper attempts to show that police are ordinary, rational people who attempt to maximize their welfare. Police unions lobby to block regulations that limit forfeiture laws; seized assets and drug arrests have gone up while drug usage has not. Instead of trying to reduce crime, the police become the criminals by taking honest people's belongings. This paper also shows the effect of forfeiture on drug prices and how law enforcement has no incentive to reduce arrests for victimless crimes.

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*“Vices are those acts by which a man harms himself or his property. Crimes are those acts by which one man harms the person or property of another. Vices are simply the errors which a man makes in his search after his own happiness. Unlike crimes, they imply no malice toward others, and no interference with their persons or property. In vices, the very essence of crime—that is, the design to injure the person or property of another—is wanting. It is a maxim of the law that there can be no crime without a criminal intent; that is, without the intent to invade the person or property of another. But no one ever practices a vice with any such criminal intent. He practices his vice for his own happiness solely, and not from any malice toward others. Unless this clear distinction between vices and crimes be made and recognized by the laws, there can be on earth no such thing as individual right, liberty, or property; no such things as the right of one man to the control of his own person and property, and the corresponding and coequal rights*

of another man to the control of his own person and property. For a government to declare a vice to be a crime, and to punish it as such, is an attempt to falsify the very nature of things. It is as absurd as it would be to declare truth to be falsehood, or falsehood truth.”

—Lysander Spooner (from his 1875 article, “Vices are not Crimes”)

## I. Introduction

There are two types of forfeiture laws. Criminal forfeiture requires a person charged with committing a crime to give up property used to commit the crime or obtained in the act. It is known as an *in personam* crime, which means that the person is considered guilty of breaking the law.<sup>1</sup> Civil forfeitures, by contrast, are *in rem*, which means that the object itself is considered guilty of committing a crime.<sup>2</sup> Criminal forfeitures require higher standards of proof than civil forfeitures, since only humans have rights and objects do not (Warchol and Johnson 1996, p. 62).<sup>3</sup>

The Constitution applies to people only, which means that for criminal forfeiture, people receive constitutional protections; they cannot have their assets seized until and unless they are actually found guilty of a law violation. Criminal forfeiture requires that a person who is accused of committing a crime has a right to a trial. He or she must be found guilty beyond a reasonable doubt. It is up to the prosecutor to prove guilt, and only after the accused is proven guilty may the assets that were involved in the criminal act be seized. Civil forfeiture, on the other hand, does not require such “high standards” (Kelly and Kole 2013, p. 3). This type of confiscation requires only probable cause for one’s property to be seized, and the usual legal presumptions are all turned around: the accused has to prove innocence instead of the prosecutor proving guilt.<sup>4</sup> Since civil forfeiture requires less evidence and offers fewer protections than criminal forfeiture, the former is more vulnerable to abuse than the latter. This paper focuses on civil forfeiture and its consequences. In section 2, we look at the history of this legal practice. Section 3 discusses modern developments. In section 4, we analyze equitable sharing; in section 5, conflicts of interest. We conclude in section 6.

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<sup>1</sup> *In personam* is Latin for “against a person.”

<sup>2</sup> *In rem* is Latin for “against a thing.”

<sup>3</sup> It is a sorry state of affairs that we feel obligated to cite such a claim.

<sup>4</sup> The protections of civil forfeiture differ from state to state (Worrall 2008, p. 9).

## II. History

The legal practice of civil forfeiture arose in medieval times.<sup>5</sup> It was based on the superstitious notion that it was the object itself that had committed the crime, and the object was forfeited to the king. For example, the crown could seize an object that resulted in someone's death in order to pay for the victim's funeral (Williams, Holcomb, and Kovandzic 2010, p. 10). The common idea that guns cause crime and not the person pulling the trigger is a contemporary example of such a superstitious belief. Civil forfeiture is based on the notion that inanimate items have minds of their own. Taken to its logical conclusion, the only murderers who should be incarcerated are those who killed victims with their own bodies; if a man used a knife or a gun to murder someone, the murderer should be set free, while the gun and knife are imprisoned.<sup>6</sup>

Civil forfeiture is an old concept that existed in the common law (Doyle 2008, p. 2). However, its employment in the United States is based on the British Navigation Acts (BNA) of the mid-seventeenth century, which required that imports and exports to and from Britain be carried on ships bearing that nation's flag. If the acts were violated, then "the ships or the cargo on board could be seized and forfeited to the crown regardless of the guilt or innocence of the owner" (Williams, Holcomb, and Kovandzic 2010, p. 10). The justifications for such laws were to ensure protection against pirates seizing cargo and to collect customs duties. The government justified taking ownership because it was impossible to seek justice against property owners, since they were overseas.<sup>7</sup> Former US Supreme Court justice Joseph Story defended this practice, stating that the "vessel which commits the aggression is treated as the offender, as the guilty instrument or thing to which forfeiture attaches, without any reference whatsoever to the character or conduct of the owner . . . from the necessity of the case, as the only adequate means of suppressing the offense or wrong, or insuring an indemnity to the injured party" (Williams, Holcomb, and Kovandzic 2010, p. 10). The justification for adopting this practice was that it was going to be used in a limited manner, in cases where it was almost impossible to locate the victim.

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<sup>5</sup> Note, we say "legal," not licit nor appropriate.

<sup>6</sup> It is difficult to come up with a sillier *reductio ad absurdum*, and yet, as we shall see later, this practice also occurs in the modern era.

<sup>7</sup> Well, justice at least in the interpretation of the authors of the BNA.

Throughout most of US history, the use of civil asset forfeiture was a rarity. It was utilized during the War between the States of 1861 and during alcohol prohibition (Pimentel 2012, p. 10). Unfortunately, civil asset forfeiture has been common practice since 1984 (Kelly and Kole 2013, p. 4).

### **III. The Modern Era**

In order to take the profit out of drug money, the Comprehensive Drug Abuse Prevention and Control Act of 1970 was passed (Blumenson and Nilsen 1998, p. 44). The funds the police seized were deposited in the Treasury's general fund. The money would go to the federal government and be distributed among different departments to fund various public services. The Comprehensive Crime Control Act of 1984 allowed state and local law enforcement to seize assets used for illegal activity. Before the Comprehensive Crime Control Act, seized assets were considered property of the government and were placed in a general fund, but subsequently the proceeds are taken over by the police agencies themselves (Chi 2002, p. 1639).

The goal of the Comprehensive Crime Control Act was to give police incentives to pursue drug crimes by allowing them to keep the seized assets. As Joseph W. Dean of the North Carolina Department of Crime Control and Public Safety bluntly admitted, "The United States Attorney General . . . requires that all shared property be used by the transfer for law enforcement purposes. The conflict between state and federal law would prevent the federal government from adopting seizures by state and local agencies . . . If local and state law enforcement agencies cannot share, the assets will in all likelihood not be seized and forfeited. Thus no one wins but the drug trafficker . . . If this financial sharing stops, we will kill the goose that laid the golden egg" (Benson, Rasmussen, and Sollars 1995, p. 31).

Another goal of the Comprehensive Crime Act was to add resources to the police budget. This would supposedly have two beneficial effects: (1) to take the profit out of crime by seizing drug money and (2) to increase the police budget, making more funds available to fight crime. Funding the police budget in this way also reduces the taxes needed to finance the constabulary, saving the taxpayer money.

The Comprehensive Crime Act allows "equitable" sharing, which permits state and local law enforcement agencies to seize assets and transfer them to their federal counterparts; the latter then share some

of the proceeds with the former. This so called “equitable” sharing only applies when the “object” itself is accused of violating a federal law (United States Department of Justice 2009, p. 6).

Not all states have enacted such laws, and some have stricter ones than others. For example, in Delaware, the government only needs to show probable cause to seize someone’s assets. It is up to the owner to prove his innocence. If he or she cannot, then law enforcement keeps 100 percent of the assets seized (Williams, Holcomb, and Kovandzic 2010, p. 52).<sup>8</sup> Maine has stricter requirements: it employs the preponderance of evidence test. But the accused still has to prove innocence. Unlike Delaware, all forfeiture proceeds go into Maine’s general fund instead of the Department of Justice Assets Forfeiture Fund, thus providing less of a conflict of interest for police (Williams, Holcomb, and Kovandzic 2010, p. 63).

#### **IV. Equitable Sharing**

Under equitable sharing, the seized assets are subject to the federal government standard of forfeiture law: the preponderance of evidence. As well, up to 80 percent of the property taken goes to the Department of Justice fund (Worrall 2008, p. 8).<sup>9</sup> Equitable sharing allows the state and local police in jurisdictions with greater limits to override them by being subject to the federal government’s lower legal requirements.

If police are interested in maximizing their wealth, the evidence should show that equitable sharing is done more in states that have higher standards of proof and that allow police to keep fewer of the seized assets than the federal government. Since the latter allows police to keep the seized property, there should be more equitable sharing in states that do not allow law enforcement to keep all of the seized assets.<sup>10</sup> This is exactly what the empirical results confirm. For example, as Williams, Holcomb, and Kovandzic (2010, p. 37) reveal:

Results indicate law enforcement agencies in generous forfeiture states receive significantly lower equitable sharing

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<sup>8</sup> Thus, the legal maxim “innocent until proven guilty” no longer applies.

<sup>9</sup> For another type of critique of this practice, one consistent with our analysis, see Epstein (1985).

<sup>10</sup> We make this claim with extreme trepidation. Were this an attempt to explain and understand business behavior in the private market, we would have no such compunctions. For in that arena, if a firm does not engage in profit-maximizing behavior, it tends to go bankrupt. There is no such mechanism at work in the statist sector of the economy.

payments from the Department of Justice. For example, each 25 percentage point decrease in the state profit motive (say, from 100 percent to 75 percent) boosts federal equitable sharing by \$7,500 per year. This is for a law enforcement agency serving an average-sized population of 300,000. Thus . . . law enforcement agencies in states with no profit motive will receive, on average, four times that amount—\$30,000—compared to agencies in states where 100 percent of proceeds go to law enforcement. Put another way, 26 states permit law enforcement to use all civil forfeiture proceeds. If these states were to do away with the profit motive, they could expect law enforcement to turn more to equitable sharing, with the average-sized agency taking in \$30,000 more in equitable sharing proceeds.

Not only should we see greater equitable sharing in states where not all of the proceeds go to law enforcement, but there should also be more of this in states with higher standards of proof than the federal government. As Williams, Holcomb, and Kovandzic (2011, p. 280) show:

Per capita equitable sharing payments for agencies located in states where the burden in innocent owner defenses is on the government can be expected to increase by 3-cents [ $10 \times .001 + 10 \times 1 \times (.002) = .03$ ] for every 10 percent increase in state proceeds returned to law enforcement. On the other hand, a similar 10 percent increase can be expected to reduce per capita equitable sharing proceeds by 1-cent per person [ $10 \times .001 + 10 \times -1 \times (.002) = 0.01$ ] when the burden of proof standard is on the claimant. Simply put, for agencies expecting large returns on forfeiture activity, placing the burden of proof on the owner to establish his or her innocence equates to less reliance on federal forfeiture programs. . . . Specifically, in states where the owners are presumed innocent (i.e. the burden is on the government to establish an owner's guilt), raising the standard of proof by one unit has the net effect of increasing per capita equitable-sharing payments by .057 cents per person [ $1 \times .030 + 1 \times 1 \times (.027) = .057$ ] as compared to only .003 cents per person [ $1 \times .030 + 1 \times -1 \times (.027) = .003$ ] when the burden switches from the government to the owner.

The alleged justification for applying civil forfeiture to drugs is to take the profit out of this victimless crime.<sup>11</sup> Yet, instead of the police going after drug dealers, they pursue buyers. The police use a “reverse sting,” where they pose as drug sellers. This is because our forces of “law and order” would rather have money than drugs. As Miller and Selva (1994, p. 252) explain, “The reverse sting is the preferred approach because agents can control and calculate the amount of money a deal will involve before they can commit time and resources.”

What are the incentives for individual police officers to seize assets from innocent victims? As Steven L. Kessler, the former head of the Bronx District Attorney’s forfeiture unit, points out, “The NYPD uses confusion about the code to take money from people who didn’t do anything. There is a cash incentive for the NYPD to take the money—it goes to their pension, it can even be used to buy equipment, to throw parties. You see a nice car parked outside of a precinct? That’s the result of civil forfeiture. Now it’s theirs” (Rivlin-Nadler 2014).

A case that shows the perverse incentives of civil asset forfeiture is that of Gerald Bryan. Police burst into his home and took \$4,800, which they suspected of being drug money. Bryan is one of the few people who have fought back against a civil forfeiture lawsuit, and he got his money back. The money reimbursed to him came out of New York City’s general fund instead of its police pension fund. Hence, even though Bryan got back the money that was wrongly seized from him, the taxpayers footed the bill. The police officer kept the money he improperly seized for his pension (Balko 2014).

Representative Henry Hyde wanted to reform forfeiture laws by making it harder for police to seize people’s assets. Hyde sponsored the Civil Asset Forfeiture Reform Act of 2000 (CAFRA). The goal of this bill was to require higher standards before government employees could seize a person’s property. CAFRA shifted the burden of proof from the accused to the prosecutor. Instead of just probable cause, Hyde’s law required a preponderance of the evidence in order to take away assets, counsel for the accused, and the award of “attorney’s fees to litigants who have substantially prevailed

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<sup>11</sup> For the case in favor of legalizing narcotic drugs (not an urging of their use, a very different matter) see Block (1993, 1996); Block, Wingfield, and Whitehead (2003); Cussen and Block (2000); Friedman (1992); Szasz (1985, 1992); and Thornton (1991).

against the government in civil forfeiture proceedings” (Rulli 2001, p. 88).

While CAFRA’s goal is to offer more protection against the accused, Hyde did not add provisions to eliminate equitable sharing from the bill because of political lobbying from the police bureaucracy. Law enforcement engaged in booty seeking by lobbying against any efforts that would reduce the amount of money they could keep from a seizure.<sup>12</sup> CAFRA also led to a substantial increase in forfeiture since it boosted the number of offenses subject to civil asset forfeiture at the federal level (Kelly and Kole 2013, pp. 6–7).

## V. Conflicts of Interest

Because of police efforts, bills such as CAFRA have had no real effect in eliminating the conflict of interest that stems from keeping seized assets. This initiative still allows “the taint doctrine” (aka the relation-back doctrine), which says that any object that was used (or merely *accused* of being used) in a criminal act belongs to the government even if the actual owner of the property did not commit the act (Worrall 2004, p. 222). Consider in this regard *Bennis v. Michigan*, where Tina Bennis jointly owned a car with her husband. The police took the automobile since Mr. Bennis had sex with a prostitute in it. Even though Mr. Bennis is the one who committed the “crime,” it doesn’t matter: according to civil forfeiture, it is the object—the vehicle—that is “guilty,” not the person (Chi 2002, p. 1642).

Mast, Benson, and Rasmussen (2000, p. 287) point out that police devote more resources to drug arrests than to other crimes. Since the men in blue are interested in padding their budgets, economic theory (Mises 1944; Niskanen 2007; Tullock 1987) suggests an increase in drug arrests relative to other types of crimes. When the Comprehensive Drug Abuse Prevention and Control Act of 1970 was passed, subsequent drug arrests per capita from 1970 through 1984 were relatively constant. But then came the Comprehensive Crime Control Act of 1984. After its passage, “drug arrests per 100,000 population rose by 72 percent” from 1984 through 1989 (Mast, Benson, and Rasmussen 2000, p. 287). According to the FBI (2012), the highest number of arrests is for drug abuse violations (estimated at 1,552,432 arrests in 2012 alone).

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<sup>12</sup> In the public choice literature, this is often called “rent-seeking.” We refuse to employ this term for reasons given by Block (2000a, 2000b).

Civil forfeiture means that police resources are not being used in other areas. For every cop seizing assets, there is one fewer available to arrest real criminals for violent crimes. Victimless crime arrests lead to an increase in violent crimes in two main ways: given limited resources, there are fewer gendarmes available to stop violent crimes, and just as police attempt to maximize their utility, criminals do so as well (Becker 1974; Ehrlich 1972, 1973, 1974). One of the main reasons for arresting people is deterrence. Criminals are more apt to commit “crimes” when the odds of getting arrested are lower (Benson and Rasmussen 1998, p. 78). When police increase the amount of seizures and arrests in one field (drug dealing and selling), that field becomes less appealing. Raising the odds of punishment for drug offenses causes a substitution effect, as criminals move from drug crimes toward those for which they are less likely to be caught. This means there should be more violent crimes being committed.<sup>13</sup> As comedian George Carlin understood, having prisons in your neighborhood reduces crime since all the criminals are locked up and if some do escape, “What do you think they’re gonna do? Hang around? Check real estate prices? Bull! They’re . . . gone! That’s the whole idea of breakin’ out of prison: to get as far away as you possibly can” (Carlin 2002, pp. 110–11).

## VI. Conclusion

Civil asset forfeiture law is both immoral and a failure. The stated goal was to take the profit out of crime, but instead of going after dealers, most police efforts aim at buyers. According to Eric Sterling, the director of the Criminal Justice Policy Foundation, “Only 11 percent of drug offenders in federal prison are high-level traffickers, while more than 50 percent are low-level” (Blumenson and Nilsen 1998, p. 71). Further, as former San Jose, California, police chief Joseph McNamara points out, drug prohibition inflates the cost of drugs (since supply is artificially suppressed), which not only causes an increase in shady characters willing to take the risk of supplying drugs, but even causes some policeman to become drug gangsters. When the men in blue are not busy seizing money from innocent people (remember, it is supposedly the object, not the person, that is guilty), thousands of them are selling narcotics as a side job in order to get a bigger budget. One of the most famous examples is

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<sup>13</sup> Violent crimes—defined by the FBI (2012) as murder and nonnegligent manslaughter, forcible rape, robbery, and aggravated assault—have actual victims.

Lieutenant Colonel James C. Hiatt, a twenty-four-year Army veteran whose wife shipped \$700,000 worth of cocaine and heroin through the US Embassy in Bogota and sold it in the United States (McNamara 2011, p. 112).

Since police are able to obtain 80 percent of seized assets due to so-called equitable sharing, they have less incentive to take the profit out of crime, since for them, crime is profitable.<sup>14</sup> People's property is being taken away from them without a trial. Police seize their assets, trump up criminal charges, and agree to drop those charges if property is relinquished.

The gendarmes lobby to weaken any changes to the law that would decrease the amount of assets earmarked for their department. Instead of reducing crime, forfeiture increases crimes that have actual victims, since police resources are being directed toward victimless drug offenses instead. Violent crimes increase as the risk of being caught goes down.

The solution we propose is a radical one. Any alternatives and attempts at a compromise have been shown to fail. We suggest not reform, but a repeal of forfeiture laws. Equitable sharing must be ended. Objects do not commit crimes: people do. Civil forfeiture has not taken the profit out of crime; rather, it places profit in crime and gives the real criminals—the police—legal immunity. Civil forfeiture reveals the hypocrisy of the state for all to see, and it is not a pretty sight.

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<sup>14</sup> As Milton Friedman (1992) explained, "If you look at the drug war from a purely economic point of view, the role of the government is to protect the drug cartel. That's literally true."

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