Texas Institute for Property Rights

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The Enemies of Property Rights: Civil Asset Forfeiture

In 2014, Philadelphia police seized the home of Christos and Markela Sourovelis. Their son, who lived with them, had been arrested for selling forty dollars of drugs. The Sourovelises were kicked out of their home, the doors were screwed shut, and the utilities were cut off. Though they had done nothing wrong, they were homeless because their home presented an inviting target—it was paid off and the police would retain all of the proceeds when it was sold. Though the Sourvelises were eventually allowed to return to their home, they were the victims of a process called civil asset forfeiture.

According to the website for the Cornell Law School,

> Civil forfeiture occurs when the government seizes property under suspicion of its involvement in illegal activity. Such a proceeding is conducted *in rem*, or against the property itself, rather than *in personam*, or against the owner of the property; by contrast, criminal forfeiture is an *in personam* proceeding.[1]

Civil asset forfeiture (unless otherwise indicated in this paper, the terms "asset forfeiture" and "forfeiture" mean "civil asset forfeiture") is one of those rare issues that unites conservatives, libertarians, and "Progressives." Horror stories abound about innocent owners having their property seized without ever being charged with a crime. Outside of law enforcement, nearly everyone is calling for reform of asset forfeiture laws. And, while a few states have enacted reforms and the Department of Justice has revised some of its policies, the practice continues virtually unabated. Why, despite widespread support for reform, has the practice expanded? The answer lies in the very purpose of civil asset forfeiture.

Civil asset forfeiture has its origins in the British Navigation Acts of the 17th century. The British used forfeiture to seize ships suspected of smuggling and other illegal economic activities. In the United States, asset forfeiture was among the early maritime and customs laws passed by Congress. The laws were seldom used except during the Civil War and Prohibition. During Prohibition, asset forfeiture was used to seize vehicles, cash, equipment, and other property from bootleggers. After Prohibition ended in 1933, civil asset forfeiture was seldom used. However, that began to change in the mid-1980s.

In 1984, as a part of the "war on drugs," Congress passed the Comprehensive Crime Control Act. A provision in that bill allowed law enforcement agencies to keep, use, and sell seized property. Prior to this time, proceeds from seized property went into a general fund. Suddenly, law enforcement agencies could directly and immediately derive financial benefits from seizing property. And they quickly began to do so.

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1. "Civil Forfeiture," Cornell Law School, https://www.law.cornell.edu/wex/civil_forfeiture, accessed March 3, 2019.

The conventional wisdom places much of the blame for asset forfeiture abuse on the financial motivations provided by the practice. Some call it "policing for profits"—civil asset forfeiture allows law enforcement agencies to purchase additional equipment, pay overtime, and provides other financial benefits to those agencies. While financial incentives undoubtedly play a role in how civil asset forfeiture is applied, it is not the fundamental cause of abuse.

In truth, the very purpose for which of civil asset forfeiture is used is the cause of abuse. Even the most conscientious and honest law enforcement officials cannot avoid abusing innocent property owners when civil asset forfeiture is invoked. The fundamental reason for forfeiture abuse is the type of actions that are regarded as a crime, and thus, the laws that forfeiture is used to enforce.

Most critics of forfeiture fail to identify this fact. Instead, they focus on how civil forfeiture is applied. While this is important, it is merely the symptom. Meaningful reform will only occur when a proper view of crime is identified and accepted by legislators and society at large.

Before we identify the proper view of crime, let us first examine how civil asset forfeiture is applied. This will help us understand why abuse is inevitable, as well as provide a framework for identifying which types of actions should be crimes.

The Absence of Due Process

Legally and morally, a criminal should not benefit from his crimes. We do not let the robber keep what he steals. We do not allow the kidnapper to keep the ransom money. The property illicitly taken is returned to its rightful owner.

But before this occurs, a specific process must be followed. The accused criminal must be convicted (or plead guilty) to the crime. And that process is guided by specific rules regarding what evidence can be considered. In addition, the burden of proof is on the State—the State must present evidence that shows, beyond a reasonable doubt, that the accused is guilty. Neither of these applies in civil asset forfeiture.

In civil asset forfeiture, mere suspicion of a crime is sufficient to justify the seizure of property. The seizing agency is not required to present any evidence of a crime or the property's relationship to the alleged crime. All that is needed is a suspicion. The burden of proof then shifts to the property owner to prove his innocence if he wishes to recover his property.

For the government to invoke criminal asset forfeiture, it must charge and convict an individual of a crime. It must prove that the property was used in the crime or acquired because of the crime. And it must do this beyond a reasonable doubt. The burden of proof is on the government to prove that the accused took a particular action and a particular property was connected to that action.

These standards do not apply with civil asset forfeiture. Law enforcement officials can seize property under any number of pretenses. They do not even need to charge anyone with a crime. They can merely suspect that the property was somehow involved in criminal activities, seize the property, and then the owner must prove otherwise if he wishes to have his property returned.

The Institute for Justice found that, from 1997 to 2013, only 13 percent of Department of Justice forfeitures were criminal; the other 87 percent were civil. And of those civil cases, 88 percent were disposed of "administratively"—the cases never reached a courtroom.[2]

An "administrative" civil forfeiture is one in which the defendant does not challenge the seizure. The defendant essentially surrenders his property without a fight. To many, this might seem like an admission of guilt. But the facts provide a very different picture.

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2. "Policing for Profits," The Institute for Justice, http://ij.org/report/policing-for-profit/introduction/, accessed May 25, 2018.

The value of seized property is generally quite low. The Institute for Justice found that the median value of seized property in Minnesota in 2012 was $451. In Utah it was $2,028. And half of the forfeiture cases in Philadelphia between 2011 and 2013 were less than $192. Fighting to recover a few hundred dollars, or even a few thousand dollars, often makes no financial sense. Attorney fees could easily be more than the amount seized. So, the victims don't challenge the seizure, regardless of their guilt or innocence.[3]

Add to this the fact that the police often target vehicles with out-of-state license plates. If an individual has a relatively small amount of money seized far from home, the cost of an attorney, travel expenses to recover one's property, and lost wages can quickly surpass the value of what was seized. As the Institute for Justice puts it,

> In civil forfeiture cases, some owners give up on their property because they cannot find or afford a lawyer, miss one of the often tight deadlines to file a claim or are otherwise stymied by a confusing legal process. Other owners opt not to fight because they conclude that the costs in time, money and aggravation outweigh the value of their property.[4]

Law enforcement agencies know this, and they often use it to their advantage. That is why many of them target out-of-state drivers—such drivers are less likely to challenge a seizure. And in most cases the victim is not charged with a crime.

Civil asset forfeiture is a much easier process for law enforcement agencies than criminal forfeiture. The burden of proof on the government is lower and the property owner must prove his innocence. Few challenge the seizure. Civil asset forfeiture is an invitation for law enforcement officers to shake down innocent citizens.

> Civil forfeiture stacks the deck against property owners from the outset: In most jurisdictions and for most types of property, all police need to seize is "probable cause" to believe that the cash, car or other property is connected to a crime that permits civil forfeiture. And once property is seized, the onus is on owners to file a legal claim to get it back.[5]

In criminal cases, due process must occur before property is seized. In civil asset forfeiture, due process is absent prior to the seizure of the property. And the due process afforded after the fact is stacked against the property owner. This combination of factors—the reluctance of victims to fight, the small amounts that are often involved, the shifted burden of proof, and the financial benefits to seizing agencies—provides a strong incentive to law enforcement agencies to seize property.

The Incentive to Seize

Fiscal restraints often make it difficult for law enforcement agencies to purchase needed vehicles and equipment, pay for overtime, attend training, and much more. Asset forfeiture allows agencies to self-fund—agencies can acquire resources outside of the normal legislative process. Steve Westbrook, the executive director of the Sheriffs' Association of Texas, told *The New Yorker*, "We all know the way things are right now—budgets are tight. It's [asset forfeiture] definitely a valuable asset to law enforcement, for purchasing equipment and getting things you normally wouldn't be able to get to fight crime."[6]

3. Ibid.
4. Ibid.
5. Ibid.
6. Sarah Stillman, "The Rise of Civil Forfeiture," *The New Yorker*, August 12 and 19, 2013, https://www.newyorker.com/magazine/2013/08/12/taken, accessed May 25, 2018.

Indeed, some agencies even create a "wish list" of property that it would like to have, and then it seeks to catch an owner of that property doing something illegal. In 2014, the *New York Times* reported on a seminar given by the Las Cruces, New Mexico city attorney, Harry S. Connelly Jr. Connelly explained that officers were eager to seize one man's "exotic vehicle" outside of a bar.

> "A guy drives up in a 2008 Mercedes, brand new," he explained. "Just so beautiful, I mean, the cops were undercover and they were just like 'Ahhhh.' And he gets out and he's just reeking of alcohol. And it's like, 'Oh, my goodness, we can hardly wait.' "[7]

In 2012, the police chief of Columbia, Missouri, Ken Burton, told the Columbia Citizens Police Review Board, "It's kind of like **pennies from heaven**. It gets ya a **toy or something that ya need**, is the way we typically look at it."[8] Apparently, the police chief, whose job is protecting the lives and property of citizens, sees no contradiction in taking property from citizens so that his department can buy "a toy or something."

While Connelly and Burton may have been unusually forthcoming in acknowledging their motivation, it is a view that is shared by many law enforcement personnel.

Unlike the normal budgeting process for law enforcement agencies, civil forfeiture lacks transparency. The Institute for Justice notes:

> Civil forfeiture laws put the property of innocent citizens at risk—all the more so because most forfeiture activity is hidden from public view. Across the states and the federal government, public reporting on forfeiture activity ranges from poor to nonexistent, and most civil forfeiture laws lack even basic transparency requirements. Such poor public reporting makes it difficult, if not impossible, for lawmakers and the public to hold law enforcement agencies accountable for their forfeiture activity.[9]

In other words, agencies can seize property, use it for whatever purpose they choose, and they don't have to tell anyone what they seized, its value, or what they did with it. If a group of citizens engaged in such activities, it would be considered organized crime. When the police do it, it is called civil asset forfeiture.

While additional transparency won't end abuses, it would make legislators and the public more aware of them.

The secrecy of the entire process invites abuse. Once the police seize property, the onus shifts to the property owner. He must navigate a complex system, often without legal aid, to recover his property. The police and prosecutors do not need to prove that the property owner did anything wrong—they don't even need to charge him with a crime. But if he wants his property back, then he must prove that he did nothing wrong. The property owner must prove a negative, which is logically impossible.

While a number of states have reformed their forfeiture laws to provide more protections to property owners, a federal program called "equitable sharing" allows state and local law enforcement agencies to sidestep these restrictions. Under "equitable sharing," a state or local agency can do most

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7. Shaila Dewan, "Police Use Department Wish List When Deciding Which Assets to Seize," *The New York Times*, November 10, 2014, https://www.nytimes.com/2014/11/10/us/police-use-department-wish-list-when-deciding-which-assets-to-seize.html, accessed May 25, 2018.

8. "'PENNIES FROM HEAVEN': CoMo police chief's remarks raise nationwide hackles ," ColumbiaHeartBeat.com, October 7, 2014, http://www.columbiaheartbeat.com/index.php/crime/932-100714, accessed May 25, 2018.

9. "Policing for Profits."

of the work on a case and then turn the case over to a federal agency. Because federal laws regarding forfeiture are very lax, seizure is easier. And then the federal government will return up to 80 percent of the seized property to the state or local agency.

> While some states demand a relatively high standard of proof that seized property is connected to a crime—with a growing number now requiring a criminal conviction—federal law requires only a preponderance of the evidence. Likewise, while a handful of states put the burden on the government in innocent owner claims, the federal government forces owners to prove that they neither knew about nor consented to a suspected illegal use of their property. Such procedural differences can make forfeiting property under federal law substantially easier than forfeiting it under state law.
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> Equitable sharing thus provides a convenient workaround for state and local law enforcement agencies operating under relatively restrictive state civil forfeiture laws. Forfeitures that may not be successful or provide a financial return under state law can be conducted federally with a higher chance of success.[10]

Interestingly, the Institute for Justice found that in the few states that have substantially reformed their forfeiture laws, the use of "equitable sharing" increased and actually netted agencies more money than before the reforms: "Between 2000 and 2013, annual payments to state and local law enforcement through the DOJ's program more than tripled, growing from $199 million to $643 million…."[11] Many individuals are hesitant to take on local governments to recover their property. That hesitancy is significantly higher when the federal government is involved.

Law enforcement agencies defend asset forfeiture as a way to fight crime and deprive criminals of their ill-gotten property. But is this really true?

Property as the Defendant

In criminal forfeiture, seizure of the defendant's property is a part of the criminal proceedings. But in civil asset forfeiture, an individual is not necessarily charged with a crime and the seizure takes place independent of any criminal charge. As a result, when cases do go to court the defendant is the property. As an example, consider some of the cases that have made it to court: United States v. One Pearl Necklace, United States v. Approximately 64,695 Pounds of Shark Fins, and State of Texas v. $6,037.

Some critics of asset forfeiture argue that an inanimate object cannot act, and therefore, it is ludicrous that property should be named as a defendant. Defenders of asset forfeiture state that this is a shorthand way to style the case. Stefan D. Cassella, former Chief of the Asset Forfeiture and Money Laundering Section of the Department of Justice, once wrote, "If there isn't proof that a person committed a crime, there is no forfeiture. If our normally verbose legal system styled its civil forfeiture cases to set forth the full legal theory, this would be obvious."[12] Using an example from above, the case might be called State of Texas v. $6,037 in Proceeds Earned by John Doe from Selling Cocaine. Cassella concludes, "In short, forfeiture is a way of reaching the property involved in a crime, but the focus is on the crime, without which there can be no forfeiture."[13]

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10. Ibid.
11. Ibid.
12. Stefan D. Cassella, "Forfeiture is Reasonable, and It Works," The Federalist Society, May 1, 1997, https://fedsoc.org/commentary/publications/forfeiture-is-reasonable-and-it-works, accessed May 26, 2018.
13. Ibid.

Why then, even bother with civil forfeiture? If the focus is on the crime, then why not prosecute the criminal and use criminal forfeiture? Cassella argues that criminal forfeiture sometimes isn't available or makes no sense. One reason given by Cassella is,

> criminal forfeiture is limited to the property of *the defendant*. If the defendant uses someone else's property to commit the crime, criminal forfeiture accomplishes nothing. Only civil forfeiture will reach the property. For example, if a drug dealer uses an airplane to smuggle drugs into California, the government has an interest in seizing and forfeiting the plane. But suppose the only person arrested and prosecuted is the pilot. If he owns the plane outright, criminal forfeiture is the way to go. But if the plane is owned by a corporation, or a third-party in South America, or by the pilot jointly with his spouse, criminal forfeiture is pointless.[14]

According to Cassella, if a property is somehow connected to a crime, it can be forfeited, even if the owner did not know about or consent to the criminal activity. If we accept this principle, what happened to Christos and Markela Sourovelis is the logical and predictable result. Even though their son sold drugs away from the home, the fact that he lived there was the tenuous connection law enforcement needed to justify seizing their home.

Consider further how this might be applied: You let your child use your car and he is given a ticket for speeding—a criminal offense. Your car was used in the commission of a crime, and thus could be subject to asset forfeiture. You did not know that your child was speeding and you did not consent to his crime, yet your car could be seized. (And the same would be true if you were driving.)

Cassella and other defenders of civil forfeiture argue that it is an important tool for law enforcement to combat crime. But how does the seizure of property owned by innocent third parties accomplish this? It doesn't penalize the criminal, but it certainly penalizes those who had no involvement in or knowledge of the crime.

Even some critics of civil forfeiture, while decrying the abuses, argue that it is an appropriate tool. John Malcolm, director of the Edwin Meese III Center for Legal and Judicial Studies at the Heritage Foundation, writes that civil forfeiture is

> a means to deprive criminals of the fruits of their nefarious labor, sometimes in cases where it may be clear that particular property was used in a crime, but where the "kingpin"—be it a drug dealer, fraudster, foreign kleptocrat, or terrorist—is impossible to identify or is outside the United States, and to use some of those funds to compensate the victims of crime.[15]

To Malcolm, civil forfeiture serves a laudable goal—combatting crime. The problem, he argues, is that current laws encourage abuse. But is this true? Is civil forfeiture a useful tool gone bad, or is it something else? Before we can answer these questions, we must first identify the purpose for which that tool is being used.

What Should be a Crime?

By definition, a crime is an illegal action. But the fact that something is illegal doesn't mean that it should be. Many actions that are legal today were once prohibited, such as interracial marriage, and actions that were once legal, such as slavery, are now prohited. We can't identify what should be legal or illegal without first identifying the purpose of government.

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14. Ibid.

15. John Malcolm, "Civil Asset Forfeiture: Good Intentions Gone Awry and the Need for Reform," The Heritage Foundation, April 20, 2015, https://www.heritage.org/crime-and-justice/report/civil-asset-forfeiture-good-intentions-gone-awry-and-the-need-reform, accessed May 26, 2018.

The purpose of government is to protect individual rights—the freedom of each individual to live as he chooses, so long as he respects the rights of others to do the same. Individual rights protect our freedom to express unpopular ideas, to live a lifestyle that some find abhorrent, to sell products that some deem silly or dangerous. Individual rights protect our freedom to act on our judgment, no matter who or how many may disagree.

Individual rights can only be violated through the initiation of force (or the threat of force). If someone ties you up, waves a gun in your face, or steals your property, you are being forced to act contrary to your judgement. Indeed, the very purpose of force is to compel you to act differently than you would voluntarily choose.

A burglar deprives you of your property without your consent. A rapist forces you to have sex without your consent. A kidnapper deprives you of your freedom without your consent. Such actions violate your rights, and therefore, they are properly illegal. Retaliatory force—what the government does when it arrests and prosecutes someone who violates individual rights—is a proper and just response to the initiation of force.

A proper government then, identifies those actions that constitute an initiation of force. Only those actions that violate rights through the initiation of force should be illegal—a crime.

But when government declares illegal actions that do not violate anyone's rights—such as drinking alcohol or smoking marijuana—the police have a greater number of crimes to investigate. They must spend their time stopping people from engaging in voluntary and consensual activities. The "war on drugs" is one example.

Though not named such, the "war on drugs" began in 1914 with the Harrison Narcotics Tax Act, which regulated and taxed the production, importation, and distribution of opiates and coca products. The second big step in the "war" was Prohibition, which led to soaring crime rates and ended in absolute failure. It is worth identifying why Prohibition was such a failure.

Prohibition made it illegal for adults to consume a certain product—alcohol—even though drinking alcohol does not violate anyone's rights. Many individuals wanted to consume alcohol, and because the product was illegal, a black market developed. And that market was dominated by gangsters. The gangsters did not "compete" by offering a better product or lower prices. They "competed" with violence. And the millions of Americans who manufactured, sold, or consumed alcohol during Prohibition were criminals.

In the early 1970s, President Nixon declared drugs "public enemy number one," thus launching the modern version of the "war on drugs." In 1973, the Drug Enforcement Agency was created and a new form of Prohibition began to be earnestly enforced.

The "war on drugs" is a revised version of Prohibition, both in principle and in effect. Indeed, the "war on drugs" is Prohibition applied to marijuana, cocaine, opiates, and other products. Both are an attempt to stop individuals from consuming certain products. As in Prohibition, many individuals want to consume these banned products, and so, a black market, dominated by gangsters, has developed for illegal drugs. And like Al Capone, today's drug cartels and street gangs "compete" with violence.

Nothing good happens when government attempts to stop individuals from engaging in non-rights violating activities.

If individuals should be free to act on their own judgment (and they should be), then we must accept the fact that some individuals will make decisions that are self-destructive. Some will choose to abuse alcohol or consume addictive or debilitating drugs. They will make bad career choices, choose to have children with the wrong person, invest their money poorly, and do countless other things that undermine their well-being. So? Does government exist to protect our rights or to protect us from our own decisions?

When government prohibits non-rights violating activities, the inevitable result is further violations of rights. Civil asset forfeiture is not a useful tool that can be abused. It's very purpose—the enforcement of non-rights violating prohibitions—makes "abuse" simply an inevitable part of the process.

A Useful Tool Gone Bad?

It is not a coincidence that the use of civil asset forfeiture escalated when the "war on drugs" was intensified in the mid-1980s. The passage of the Comprehensive Crime Control Act in 1984 allowed law enforcement agencies to keep the proceeds of seized property. As we have seen, this provided those agencies with a financial motivation to seize property. They began doing so in an effort to stop individuals from engaging in voluntary, non-rights violating activities. It is not a coincidence that the most extensive use of civil asset forfeiture has been to enforce prohibitions on non-rights violating activities.

What if Congress declared a "war" on pre-marital sex? What if it were illegal for consenting adults to engage in sex unless they were married? Suddenly, homes, automobiles, hotels, and a wide assortment of property would be subject to seizure for its connection to an illegal activity. If law enforcement personnel suspected that a property was used in connection with pre-marital sex, the property could be seized and the owner would have to prove his innocence. And the property could be seized even if the owner did not know of or consent to the pre-marital sex. Any rational individual will recognize this as absurd, but this is precisely what is happening in the "war on drugs."

Civil asset forfeiture is not a useful tool gone bad. It is a bad tool, and it can only be used for bad purposes. When government seeks to stop individuals from engaging in voluntary, non-rights violating activities, its only recourse is bad tools. The very nature of Prohibition, whether of alcohol or of drugs, is an initiation of force. It should not be a surprise when law enforcement agencies begin acting like gangsters in an effort to enforce the law.

If an individual is suspected of a crime, police and prosecutors should prove it. Civil forfeiture allows police officers to act as judge, jury, and executioner. And they often do it at the side of the road.

Despite the widespread calls for reform, civil forfeiture continues because of deeply flawed premises. Generally, Americans properly support law enforcement and the job that they do. But Americans do not question the laws that they are enforcing. When the police must enforce bad laws, then bad things are going to happen. And civil forfeiture is one of those bad things.

The fundamental issue regarding civil asset forfeiture is not the abuse of the practice. The fundamental issue is what is regarded as a crime. Reform may diminish the abuses, but it will not stop them. Only repeal of civil asset forfeiture laws will do so.

Ending Civil Forfeiture

The only way to end civil asset forfeiture abuse is to abolish the practice. As we have seen, when non-rights violating activities are prohibited, enforcement necessarily entails the further violation of rights.

While civil forfeiture is not going to go away any time soon, there are measures that can be enacted that would reduce the abuse and provide more protections to property owners. Because enforcement of drug laws is the primary use of civil forfeiture, ending the "war on drugs" would bring an immediate and dramatic reduction in the use of the practice.

A second step would be to require law enforcement agencies to report their asset forfeiture activities—what is seized and what is done with that property. Such reporting would make the public more aware of the scope of the practice. Such awareness would be a crucial step in ultimately abolishing civil forfeiture.

A third measure would be for all seized property to go into a general fund, rather than directly benefit the seizing agency. This would dramatically reduce the motivation for seizures.

Finally, ending equitable sharing would strengthen state reform efforts. Currently, law enforcement agencies can sidestep state limits on their use of forfeiture. Ending equitable sharing would eliminate both a motivation and a means to continue the practice.

Ultimately, civil asset forfeiture should be abolished and the seizure of property should only occur in criminal courts. For that to occur, Americans must understand what actions should properly be regarded as crimes. Until that occurs, abuses such as civil asset forfeiture will continue.

The Texas Institute for Property Rights provides analysis, training, and resources for legislators, businesses, organizations, and property owners.

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