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Forfeiture Policy in the United States

Is There Hope for Reform?

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The concept of civil forfeiture is an old one that dates back hundreds of years to when the Navigation Acts authorized the British Crown to seize (and keep) the ships used by pirates and smugglers (Doyle, 2007). The ships seized were treated as “prizes” that redounded to the benefit and profit of the agents who seized them, including but not limited to the captains and crews of the Royal Navy (Doyle, 2007; Hingham Heritage Museum, 2013). The United States recognized the legitimacy of such ship seizures, under similar laws, early in U.S. history (Pimentel, 2012).

This hoary history of civil forfeitures gives it an air of legitimacy somehow, and the U.S. Supreme Court has been reluctant to tamper with it, at least in part because of its long history, in two key 20th-century cases. Even in the face of outrageous injustice carried out under state forfeiture laws, the Supreme Court concluded in *Goldsmith-Grant Co. v. United States* (1921) that there was no constitutional violation for police to seize and keep the property of an entirely innocent party, someone not even suspected of wrongdoing. In that case, in 1921, a car had been used for running liquor during Prohibition, and federal agents seized the car. The lender who had financed the purchase of the vehicle—apparently never suspected of involvement in the moonshine operation—challenged the government seizure as it had lost its security interest as a result. The Supreme Court was unmoved: “[W]hether the reason for [the challenged forfeiture scheme] be artificial or real, it is too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced” (*Goldsmith-Grant*).

The holding and its rationale were reaffirmed 75 years later in *Bennis v. Michigan* (1996), involving the seizure of a family car after the husband had been charged with engaging a prostitute in it. The Supreme Court upheld the forfeiture of the wife’s share of the car despite the compelling equities in her favor. By reaffirming *Goldsmith-Grant*

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(1921), the Court stated: “We conclude today, as we concluded 75 years ago, that the cases authorizing actions of the kind at issue are ‘too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced’” (*Bennis v. Michigan*).

The problems with forfeiture have been documented in several critical articles, including a couple of my own (e.g., Chi, 2002; Pimentel, 2012, 2017, 2018; Policing and profit, 2015). The public policy problems with forfeitures are largely two-fold: (1) The seizures end up punishing people who have done nothing wrong, and (2) the seizures reward and, therefore, incentivize law enforcement in ways that distort law enforcement priorities and activity. The former problem should be of concern to civil libertarians (who will see a rights violation here), and the latter should be of concern to economists (who understand how the profit motive shapes human behavior).

Creating an incentive for law enforcement to enforce the law is not itself problematic. The problem comes with the way the prospect of profit distorts law enforcement priorities and encourages overreaching. The ease with which property can be seized, and the procedural presumptions in its favor, make it easy for law enforcement to take property, even if the legal claim to it is tenuous (Pimentel, 2012). And if some police activity is profitable (such as seizing vehicles and cash from people driving a known drug-trafficking route), and another is not (such as responding to domestic violence calls), it stands to reason that police departments will allocate their already limited resources in favor of the profitable activities rather than in favor of the less-lucrative law enforcement priorities (Policing and profit, 2015).

One of the clearest examples of this comes from Tennessee, where a news team tracked the activity of law enforcement on Highway 40 for an extended period. The team found that “rather than working eastbound lanes, where smugglers transport drugs to the East Coast, officers focused on westbound lanes, where smugglers haul cash back to Mexico. A subsequent review of drug task force records indicated that officers made 10 times as many stops on the westbound side of the highway as they did on the eastbound side” (Carpenter, Knepper, Erickson, and McDonald, 2015: “Financial Incentive” section, para. 4). Of course, if the police were interested in ridding their community of drugs, they would want to seize the drugs themselves, to keep them from entering circulation. Here, it seems that the profit motive won out, and the police chose to focus on cash seizures rather than on drug seizures, at the expense of the community they serve and, arguably, in derogation of their highest public duty.

Capitalist economies are built on the concept that the profit motive is the key organizing principle of commercial society. Adam Smith extolled the virtues of a system that leverages incentives for efficient production and distribution (A. Smith, 1776). The profit motive, of the individual and of the firm, provides powerful inducement for efficient market behaviors. A key principle of American public policy, therefore, has been to respect market forces, and to avoid overregulation, because a “command economy” or “planned economy” can never match the efficiency and potential for economic growth that a free market can (e.g.,

DePersio, 2015; Machan, 2002). If the economy is managed by bureaucrats, they must guess at what might be the ideal prices, and at what production targets should be, and they have no comparable incentive to minimize costs or to maximize distribution. At the same time, unlike a free market, a planned or command economy rarely rewards decision makers meaningfully for guessing right or punishes them for guessing wrong. Moreover, what incentives that exist are likely to encourage very conservative choices without any potential for entrepreneurial risk-taking.

The problem becomes much worse, however, when the government officials' judgment is tainted by their *own* profit motive. The use of public office for private gain is a classic definition of corruption; officials with the capacity to gain from their exercise of public duties will face continual temptation to breach the public trust and exploit their power for profit (Arnone and Borlini, 2014; Potter and Tavits, 2011). The profit motive is irrepressible, so it becomes a tremendous challenge to contain corruption and to enforce public integrity (Arnone and Borlini, 2014; Potter and Tavits, 2011). Although the United States has been proud of its anti-corruption successes in the past, recent events surrounding the new administration in 2017 suggest a high degree of vulnerability even in the United States (e.g., Lipton and Fandos, 2017).

The problem of incentives is sufficiently powerful to have created an entire category of ethical violation: that of "the appearance of impropriety" (e.g., U.S. Department of Justice, 2017: Gen. Principle No. 14, p. 2). In the context of a judiciary, for example, we expect judges with an interest in the outcome of the litigation to recuse themselves from hearing the case. It is not enough that the judge handle the case fairly; we believe that profit motives are sufficiently strong that it is an ethical violation for the judge to hear the case at all (Code of Conduct for United States Judges, 2014: Canon 3(C)). Implicit in this rule is the suggestion that we do not, and perhaps cannot, trust an individual decision maker to resist this type of inducement if she or he has a "financial interest . . . however small" in the performance of his or her official duties.

It is curious indeed, therefore, that we would give law enforcement a stake in its operations, allowing it to profit from certain activities. If the system of forfeitures had no history at all, but it were a new idea being proposed today, it is a near certainty that it would be summarily dismissed as contrary to public policy, a bad idea unworthy of adoption or implementation. Nevertheless, the Court has afforded the practice a presumption of legitimacy because of its long history (Doyle, 2007).

To be sure, the forfeiture system does not benefit law enforcement personnel in their individual and personal capacity. Embezzlement of seized assets is, of course, illegal, and a crime. We have to trust law enforcement personnel not to skim money off the top (pocketing cash seized in a drug bust, for example) or to take bribes in their work. The threat of criminal punishment is presumably a meaningful check on this.

But the law enforcement agency may be motivated by its ability to maximize profit, much as the "firm" is so motivated in the private sector economy (see A. Smith, 1776).

Indeed, if profits are to be had, we should expect the public agency to begin to operate as a private sector firm. Like its counterparts in the private sector, the focus of public sector workers will turn to the profitability of the enterprise. Indeed, their livelihoods are likely to depend on the adequacy of their agency's funding. Moreover, a well-funded agency will be in a position to enhance the working lives of its staff in general (providing, e.g., bonuses, benefits, and generous budgets for equipment and travel), as well as to reward those responsible for enhancing the funding in particular.

Part of the lesson of capitalism is that the profit motive is uncontainable. It motivates *everything* it touches. No sense of public-spiritedness, duty, or altruism can match the sharp incentive potential for gain. Where that enhances the efficient production and distribution of resources, society benefits enormously. When that irresistible force points in a direction inconsistent—or uncorrelated—with the public interest, it can do great damage.

This brings us back to civil forfeiture. The findings and conclusions of Jefferson Holcomb, Marian Williams, William Hicks, Tomislav Kovandzic, and Michele Bisaccia Meitl (2018, this issue) should not come as any surprise. Economists might argue that the article was unnecessary, as a starting point for economic analysis is the assumption that parties act in their own self-interest. Indeed, perhaps that may be why the question has not been squarely addressed before now; anyone capable of doing the analysis was likely to treat the outcome of the inquiry as a foregone conclusion. *Of course* law enforcement responds to these incentives. *Of course* if the rewards of forfeiture under state law are restricted, law enforcement activity will shift toward the use of federal law and the promise of equitable sharing payoffs from the Department of Justice (Pimentel, 2018).

But despite persistent criticism of civil forfeiture in America, there has been a remarkable resistance to shutting it down. Reform measures, like the federal Civil Justice Reform Act in 2000, get amended and watered down to such a degree that they take very little bite out of the practice (Pimentel, 2012; D. Smith, 2000). Or they fail to get enacted at all, such as recent legislation in Idaho, which had been heavily diluted to secure passage through the state legislature, only to be vetoed by the governor (Boehm, 2017).

Indeed, the scope of the practice (and, therefore, the problem) seems to be expanding rather than contracting, notwithstanding a few states' attempts at reform. We have reached the point—as of 2015—where each year more property is seized by law enforcement than is seized by burglars (Greenhut, 2015). And the federal Department of Justice is reinvigorating the use of civil forfeiture (Ruiz, 2017). If the pernicious effects of civil forfeiture were so obvious to everyone, the practice would not, perhaps, be so resistant to reform; the problem would not be so resistant to resolution. So this new article by Holcomb et al. (2018) is welcome as it may overcome some of the lingering skepticism over whether, and to what degree, civil forfeiture is a problem for us.

An alternative view is that civil forfeiture is resistant to reform not so much because the jury is out as to its merits but because the financial incentives to perpetuate it are so very strong. States can attempt to restrict it, but law enforcement agencies are highly motivated

to find workarounds to perpetuate it. As demonstrated by Holcomb et al. (2018), one of the workarounds is to resort to federal procedure and equitable sharing to keep the money flowing.

Another workaround has been to resort to municipal law to keep seizing assets even if state law no longer permits it. New Mexico has enacted what is arguably the most sweeping scale-back of civil forfeitures of any state in the union (Sibilla, 2015). Not only did they eliminate civil forfeiture authority under state law, legislators also restricted state authorities from participating in the federal equitable sharing program in a large portion of cases (New Mexico Statutes, 2011: N.M. Stat. § 31-27-11(A)(1)-(3)). But even after this reform, law enforcement continued to seize vehicles in the two largest metropolitan areas of New Mexico—Albuquerque and Santa Fe—under municipal ordinances that sanctioned the practice (Constable, 2016; Kaste, 2016).

The upshot is that even if states could muster the political will to rein in the practice of civil forfeitures, as some states have, to varying and mostly limited degrees, they have to be pretty savvy to shut it down altogether (Pimentel, 2018). The profit motive is powerful enough to inspire creative workarounds, ensuring that police will continue to make asset seizures a priority, which will also continue to distort police behavior. To the extent that the police overreach in these cases and do violence to the private property rights of individuals, their legitimacy and public support will suffer.

Policy prescriptions to solve this problem are hard to come by. Legislative fixes have made minor inroads (Pimentel, 2018). A Supreme Court proclamation that the process is unconstitutional might have the most sweeping impact, but the Supreme Court has been reluctant to find *any* infirmity with the practice other than to suggest that particularly large seizures based on minor infractions could violate the Eighth Amendment's excessive fines clause (*Austin v. United States*, 1993; *Bennis*, 1996; *United States v.ajakajian*, 1998). Justice Clarence Thomas offered a glimmer of hope in April 2017 with a recent opinion accompanying a denial of certiorari in which he expressed his doubts about the constitutionality of the practice. The case is *Leonard v. Texas* (2017), and it

reached the Court after Lisa Leonard sought to overturn Texas's seizure of roughly \$200,000 in cash from a safe in her son's car. In 2013, Liberty County police officers pulled him and his girlfriend over along what the state described as a "known drug corridor," a law-enforcement term that can be applied to most major interstate highways. Officers seized the money and argued in local courts that the state could keep it, alleging it was likely the profits from drug sales.

Leonard, an IRS officer, said the cash was hers, denied it was related to any drug sales, and told the courts it constituted the proceeds from the recent sale of a house she'd owned in Pennsylvania. A bill of sale for the property had been found alongside the cash in the safe. (Ford, 2017: para. 2 and 3)

The Supreme Court declined to hear the case, but Justice Thomas made it clear in an opinion accompanying the denial of certiorari that the only reason he did not vote to hear the case is that the parties failed to preserve the issue for appeal (*Leonard v. Texas*). By failing to raise constitutionality issues at critical stages in the process, the appellant had forfeited the right to Supreme Court review of those issues. No one chose to join Justice Thomas in that opinion.

A couple of months later, in *Honeycutt v. United States* (2017), the Supreme Court voted unanimously to limit the reach of *criminal* forfeitures, holding that a player in a larger criminal enterprise cannot be forced to forfeit assets acquired by others in the joint enterprise that he personally never obtained. The opinion by Justice Sotomayor suggests that there may be a softening of the Court's earlier support for sweeping power to seize assets, although this case dealt with criminal forfeitures rather than with civil ones (*Honeycutt v. United States*). *Leonard* (2017) and *Honeycutt* (2017), taken together, offer some hope that the courts may yet act to scale back the practice at some point in the future.

The Supreme Court's full-throated endorsement of the practice of civil forfeiture in *Goldsmith-Grant* (1921) and *Bennis* (1996) remains the law of the land, however, and that makes it unlikely that any lower court would venture to curtail the practice on constitutional grounds. Until the justices of the Supreme Court choose to reexamine the issue and overturn their earlier cases on the subject, we are unlikely to see a judicial fix to the larger problem (but see Pimentel, 2017, in which it is suggested how the Eighth Amendment might be used by courts to rein in some of the more abusive forfeitures).

Accordingly, our society remains vulnerable to the problems of civil asset forfeiture and the potential for law enforcement to abuse it. Although some states have taken the issue up, almost every one of the reform measures adopted has fallen short of what would be required to correct the problem (Pimentel, 2018). Leaving the door open to federal equitable sharing is, perhaps, one of the most common and most glaring omissions in these reform efforts. In some instances, this may be a mere oversight, but more likely it is the result of lobbying by law enforcement (see, e.g., Ford, 2017), which has the power to brand an incumbent as "anti-police" and "pro-criminal" if a legislator dares to defy it. Until a more general consensus emerges politically to bring civil forfeitures to an end, therefore, the legislative fixes that emerge are likely to be weak and ineffective (Pimentel, 2018), especially against the powerful profit motive that drives police both to lobby against the reforms and to find ways around any new restrictions.

The resulting problem of "police legitimacy" suggests a third possibility: that of voluntary police restraint. Public confidence in the police is important, and doubts have been raised about police practices in recent years, particularly in terms of racial profiling and police violence as highlighted by the "Black Lives Matter" movement (e.g., Carbado, Harris, and Crenshaw, 2013; Lebron, 2017). Some police forces have adopted policies to respond to the concerns of race-based violence in an effort to curtail the perception of abuse and to

restore public confidence (e.g., M. Smith and Williams, 2017). If civil forfeitures become a lightning rod for police criticism, we may see law enforcement moderate its behavior with respect to its pursuit of forfeitures and voluntarily curtail some of its more abusive practices.

As none of these developments seems to be particularly likely in the short run, we will continue to be vulnerable to the problems associated with civil forfeitures: Citizens will be unjustly deprived of their property, and police priorities will be distorted by the profit potential of the practice. Those same incentives do and will continue to fuel resistance to any meaningful reform of the practice, undermining the potential for either the legislative fixes or the voluntary reforms necessary to solve the problems.

In the meantime, advocacy is important, as is empirical research, such as Holcomb et al.'s (2018) article, in which they document the problems and call attention to the issues. As powerful as the pro-forfeiture "market" forces are, the public outcry will need to be particularly strong to counter them, as well as to bring real solutions.

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