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Federal ‘adoption’: Criminal justice on a hunch

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Recently, Attorney General Jeff Sessions announced the reinstatement of a federal program that allows local police officers to seize personal property without so much as a criminal charge. The program is intended to increase the use of civil asset forfeiture in the never-ending War on Drugs.

Federal “adoption,” as it’s referred to, allows local police to seize property without criminal charge — which is forbidden or limited under some state laws — and turn it over to the federal government. Then, under what is known as the “equitable sharing” provision, up to 80 percent of the value of that seized property is returned directly to the local law enforcement agency for certain purposes such as paying for overtime or buying law enforcement equipment.

Attorney General Eric Holder suspended most federal adoptions in 2015 because of stories of abuse — one department used funds to buy a margarita machine — and of innocent owners losing their property to overzealous police departments.

Today’s announcement stands in stark contrast to bipartisan efforts on the state and federal levels to curb this too often-abusive practice. Although the attorney general paid lip service to protections for innocent property owners, the reinstatement of federal adoption incentivizes police to employ tactics that will likely ensnare presumptively innocent people and place burdens on them to prove their property is legal.

Moreover, this may have a disparate impact on ethnic minorities by incentivizing racial profiling and skewing police priorities away from public safety.

Today, asset forfeiture is a process by which the government seizes property — cash, automobiles, real estate, etc. — that allegedly was produced by, or used in, the furtherance of a crime. For example, if a person led an investment scam for several years and made millions of dollars from that fraud, the state could seize his home, bank accounts, and other proceeds that can be tied to the underlying fraud. Assets connected to drug transactions can likewise be seized, such as the car the offender was driving, any cash in the car, or the house from which the drugs were alleged to have been sold.

Before the 1980s, the most common forfeiture used by domestic law enforcement was criminal asset forfeiture. In a criminal forfeiture case, the asset must have been related to a crime that was proven in court, either in a trial or admitted in a guilty plea. Importantly, in criminal forfeiture,

the burden is on the government to prove that the seized property had a direct connection to the underlying criminal act.

However, in 1984, Congress amended the Comprehensive Drug Abuse Prevention and Control Act of 1970 and established the Department of Justice's Asset Forfeiture Fund (AFF) that allowed the Department of Justice (DOJ) to keep the funds it seized, sparking the resuscitation of the once-arcane practice of civil asset forfeiture. Many states followed suit with similar provisions that allowed their agencies to self-fund through property seizures, and they too saw an expansion of civil asset forfeiture.

Unlike criminal forfeiture, civil forfeiture requires no arrest or criminal proceeding for the government to seize and liquidate property that the government claimed was connected to a crime. While there are administrative procedures that must run their course between the time the property is seized and when the government may liquidate the asset, the burden is usually on the property owner to prove that the asset is licit and not tied to a criminal act, turning due process completely upside down.

In many jurisdictions, police don't have to assert more than a hunch to meet the probable cause standard to take a person's money under civil forfeiture. Officers have seized cash not because there were drugs or contraband present, but because it was "way, way" more than a "normal person would carry."

The amount of money does not have to be large, however. A simple wad of cash in a person's pocket can be confiscated under some state laws if the officer says he suspects drug activity. That person then has to go to court to get it back. The process to reclaim the money or property can be time-consuming and expensive, making it truly not worth it for many individuals — particularly poor people — to go to court to recover the asset that was taken by a police officer. Thus, in too many cases, calling civil asset forfeiture "highway robbery" is not hyperbole.

According to the Institute for Justice's extensive study of state and federal forfeiture practices, between 2000 and 2013, the DOJ paid state and local agencies \$4.7 billion in all forfeiture proceeds, the vast majority of which were obtained through civil forfeiture. To put the growth of federal forfeiture in context, the AFF's net assets were \$93.7 million in 1986. In 2014, the number was \$4.5 billion: a 4,667 percent increase.

In 2012, the City of Tenaha and Shelby County, Texas settled an ACLU class action lawsuit that alleged that the department was stopping drivers and, under civil asset forfeiture law, coercing them to sign over cash and property or face arrest on baseless charges. Officers threatened parents with taking custody of their children for non-cooperation, and on one occasion, seized a 16-month-old child from a restaurateur who refused to sign away his rights to \$50,000 in cash he was carrying to make a legitimate business purchase. Horrifying as this is, the practice is worsened because the restaurateur and most of the other people the agencies were shaking down were black and Hispanic.

Although the ACLU suit is a particularly egregious example, the racial disparity in stopping presumably innocent drivers with the intent to search them is not limited to Texas. Virtually

everywhere police stops are counted and measured demographically, black and/or Hispanic drivers are over-represented in those pulled over and subsequently searched for contraband. The vast majority of searches of drivers across ethnicities come up empty, and statistics show that black and Hispanic drivers who are searched are less likely to be carrying contraband than whites who are similarly searched.

Stopping drivers to search for drugs and drug proceeds is much cheaper than developing leads and building cases against large drug organizations through buy-and-bust operations or long-term stings, making interdiction through traffic stops all the more appealing. For that reason, while the disparity in stops almost certainly exists independent of asset forfeiture laws, increasing the use of forfeiture will likely result in an increase of racial profiling.

Due to the challenges of data collection and the lack of transparency about collection practices, it is impossible to know the full extent to which asset forfeiture drives aggressive policing. But profit motives certainly can distort priorities, perpetuating these disparities. One investigative report in Tennessee uncovered that drug interdiction task force officers were ten times more likely to stop, search, and seize drivers on the westbound side of an east-west highway.

This seemingly innocuous detail is relevant because the officers were apparently set up to catch the cash from allegedly Mexican-connected drug couriers. That is, instead of setting on the eastbound lanes where they could try to catch the drugs and guns before they got into the community, the police would look for the cash after the transaction took place. Waiting until the guns and drugs have entered the community to interdict trafficking is the opposite of policing for public safety, it is the definition of “policing for profit.”

Recognizing some of these problems, a growing number of state legislatures have been trying to rein in civil asset forfeiture abuse, curbing officers’ ability to seize property under state law without a conviction, or limiting seizures to high dollar amounts in order to protect the state’s most vulnerable citizens from the arbitrary confiscation of their property. But the new DOJ guidance provides an end-run around some state limitations on asset forfeiture and incentivizes departments with direct payments of cash.

Expanding the already profligate use of civil asset forfeiture is a giant step in the wrong direction for effective criminal justice policy. Indeed, civil asset forfeiture incentivizes police abuse of innocent people — abuse that falls disproportionately on the poor and racial minorities — and undermines good police work and public safety.

Congress should move to end federal civil asset forfeiture entirely and make sure that federal law enforcement officers secure criminal convictions before seizing property from individuals they suspect of criminal wrongdoing. “Innocent until proven guilty” is the touchstone of the American criminal justice system. It’s about time our government lived up to it.

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