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End Civil Asset Forfeiture to Defund the Drug War

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“It is difficult to get a man to understand something when his salary depends upon his not understanding it,” as Upton Sinclair famously wrote.

Dysfunctional politics and entrenched interests ensure that the many systemic criminal justices issues we face—including structural and overt racism and the dehumanizing War on Drugs—have no quick fix. Yet if we’re choosing prime targets, one among many must be civil asset forfeiture. The total elimination of this funding mechanism—one that undermines justice, corrupts and militarizes law enforcement, and exacerbates racial and economic inequalities—is essential.

Birthed during the 1980s as a crime-fighting tool supposedly designed to strip financial assets from drug-trafficking organizations, federal civil asset forfeiture (unlike criminal forfeiture) permits law enforcement agencies to seize property from individuals *without having to charge them or convict them of a crime*. Think about that for a moment.

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From 1984, the federal “Equitable Sharing Program” enabled state and local law enforcement agencies to subvert state forfeiture laws that previously required either criminal convictions or a higher burden of proof in order for assets linked to criminal activity to be seized. People impacted thereby have far fewer rights than they would in a criminal court. There is no presumption of innocence, for example, nor any right to counsel.

And like the drug war as a whole, civil asset forfeiture disproportionately targets poor and marginalized people—not the drug kingpin money touted by law enforcement.

A Drug Policy Alliance* report on California forfeiture practices, for example, found that the average seizure in 2013 was a mere $8,542. And an investigation by the *Greenville News* and *Anderson Independent Mail*, examining every South Carolina court case involving civil asset forfeiture from 2014 to 2016, found that 65 percent of those subject to the practice were Black men—who comprised only 13 percent of the state’s population.

Among many other examples, a review of the practice in Cook County, Illinois between 2012 and 2017 reflected both of these trends: The median value of cash and property seized was just $1,049, and seizures were “clumped in [Chicago’s] South and West side, overwhelmingly African-American neighborhoods.”

In addition to the inherent, egregious injustices involved, law enforcement agencies are *incentivized* to pursue seizures, creating a blatant and corrupting conflict of interests. The Equitable Sharing Program allows up to 80 percent of the value of seized assets to be returned *to the law enforcement agency that seized them*. Prosecutors' offices can also take a cut in some jurisdictions. So law enforcement agencies can financially reward themselves for unconstitutional policing.

It's part of a pattern. The federal government has for years manipulated state and local law enforcement policing strategies through a system of fiscal incentives, including categorical and block grants which can only be used for defined purposes that meet federal policy goals.

The National Scale of This Injustice

The national scale of civil asset forfeiture has been vast. A *Washington Post* analysis found that police agencies made $2.5 billion in this way between 2008 and 2014.

And how did they spend it? $177 million contributed to the militarization of policing through purchases of weaponry, while electronic surveillance accounted for another $127 million. These figures are likely undercounts, given the popularity of the category "other," to which local officials allocated over $1 billion in seized funds.

In 2015, the *Washington Post* ran an article with the headline, "Law enforcement took more stuff from people then burglars did last year," analyzing the data to confirm that this practice resembles highway robbery more than any strategy to enhance public safety.

That year, the Institute for Justice (IJ) published its report *Policing for Profit: The Abuse of Civil Asset Forfeiture*. Between 1997 and 2013, it found, 87 percent of Department of Justice seizures were from civil forfeiture and just 13 percent were criminal in nature. That means only 13 percent of people whose property was seized were ever charged with a crime.

IJ's 2019 update to that report, headed by Seattle University economist Brian D. Kelly, reflected that increases in "equitable sharing" did not equate either to increasing crime clearance rates, nor "…to a subsequent reduction in drug use."

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But the most striking finding was described by Radley Balko in another article for the *Washington Post*:

"Kelly did find one significant correlation when it comes to civil asset forfeiture. He found that 'a 1 percentage point increase in unemployment was associated with an 8.5 percentage point increase in the value of forfeited assets and a 9.5 percentage point increase in the number of assets seized.' In other words, as unemployment goes up in a community—as more people find hard times and are down on their luck—local police are more likely to target those communities for forfeiture."

IJ's latest report, published in July and appropriately titled *Jetway Robbery*, reflects that the Department of Homeland Security seized $2 billion dollars from travelers in the last two decades—70 percent of the time, just from ordinary travelers failing to fill out documents. IJ

notes that only "one in 10 cases involving a reporting violation leads to an arrest, and a second offense…" only occurs 0.3 percent of the time.

IJ and many others conclude that the federal Equitable Sharing Program enables agencies to circumvent more stringent state laws by working with multi-jurisdictional task forces, including federal agencies such as the Drug Enforcement Administration.

Even a 2017 report by the Department of Justice Office of the Inspector General (OIG) found that the DEA's use of forfeiture interdiction measures from 2007 to 2016 resulted in the seizure of over $3.2 billion, yet 81 percent of all seizures were forfeited administratively without criminal charges. The OIG noted: "…law enforcement creates the appearance, and risks the reality, that it is more interested in seizing and forfeiting cash than advancing an investigation or prosecution."

Scandals and Corruption

Predictably, given the temptations this program dangles in front of law enforcement officers, there have been many examples of federal, state and local agencies monetizing criminal investigations.

One notorious scandal involved the seizure in December 2011 of an office building worth $1.5 million by the City of Anaheim, California and the DEA—over a *$37* medical marijuana transaction.

The owner of the building leased the property to open a clinic that they believed to be operating within state law. The property owners were never charged with any state or federal crime. While the federal government and the city were eventually forced to give the property back, the case highlighted the total lack of adequate procedural safeguards.

Meanwhile in Florida**,** a two-city, 12-strong narcotics task force, posing as money launderers, laundered $71.5 million for drug-trafficking cartels—more than twice the amount it reported taking off the streets. This operation resulted in no local arrests. But it *did* create a slush fund unencumbered by any legislative oversight.

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According to a 2015 *Miami Herald* investigation, when the Glades County Sheriff's Department joined the task force, other members of the organization were elated by "a chance to bring in more revenue."

Items purchased by members of the narcotics task force with this "revenue" included first-class plane tickets, thousand-dollar dinners, five-star hotel stays and submachine guns. In addition, monies were also used to supplement local law enforcement budgets to pay for salaries, in violation of federal guidelines.

These are just two examples of the many abuses of a program that possesses an inherent ability to corrupt law enforcement and prosecutors by giving them a budgetary stake in forfeited property, while victimizing members of the public.

Even John Yoder, the original architect of the federal Equitable Sharing Program, has stated that policing for profit "has turned into an evil itself, with the corruption it engendered among government and law enforcement coming to clearly outweigh any benefits."

I can only agree with the Institute for Justice when it posits:

"The best solution would be to simply abolish civil forfeiture. Short of that, lawmakers should eliminate financial incentives to take property, bolster property rights and due process protections, and demand transparency for forfeiture activity and spending. No one should lose property without being convicted of a crime, and law enforcement agencies should not profit from taking people's property."

Reform Developments and Prospects

In the last several years there has been a growing bipartisan consensus, as well as media focus, recognizing the damage caused by the federal Equitable Sharing Program. State-level reforms—such as those achieved in California, New Mexico and Michigan, among 35 states—have introduced greater accountability and eliminated some conflicts of interest, by stipulating, for example, that any assets seized should go into central state or education funds. And a February 2019 Supreme Court Ruling established the right of people whose property is seized to complain that seizures were "excessive."

None of these reforms have ended civil asset forfeiture, however. And federal legislative efforts to do so have stalled in the past, despite a strong bipartisan congressional coalition, backed by organizations as diverse as the ACLU and the Heritage Foundation.

The "criminal justice" lobby that opposes such reforms has repeatedly demonstrated its power to persuade politicians to stick with the *status quo*—despite the fact that 84 percent of the public oppose civil asset forfeiture, according to a 2016 Cato Institute/YouGov survey.

The self-entrenched lobbying practices of law enforcement interests will continue to create barriers to meaningful criminal justice reform. And this lobbying contributes to perceptions of a law enforcement system that is accountable neither to legislative oversight nor to the people it is sworn to serve.

But federal efforts continue. In June, the Fifth Amendment Integrity Restoration (FAIR) Act was reintroduced by Senator Rand Paul (S4074), seeking to remove perverse incentives by eliminating the "nonjudicial" civil forfeiture that requires no filing of criminal charges. Though introduced as a standalone bill, Sen. Paul is willing to "offer it as an amendment" to any police reform bills introduced in the Senate.

"Policing for profit" needs to disappear overnight.

As the board chair of the Law Enforcement Action Partnership (LEAP**), a group of criminal justice professionals opposed to the War on Drugs, and a 20-year veteran of California law enforcement, I am all too aware of the inevitable outcomes of our failed drug strategy. Our organization has long recognized the link between the over-funding of the criminal justice system and underfunding of critical community resources—such as drug treatment and harm reduction on demand, behavioral health services and violence

disruption programs, all of which are more more efficient and effective in reducing crime than criminalization.

LEAP's National Policing Recommendations call for the reallocation of fiscal resources that have been used to pursue the drug war and to over-police communities of color. These recommendations recognize that American policing carries a legacy of systemic racism, that police officers guilty of serious misconduct are rarely held accountable, and that the police have been tasked with addressing socio-economic problems that we are ill-equipped to solve.

Righting all of these wrongs will take enormous work in the face of formidable opposition—work to which we are committed.

But "policing for profit" needs to disappear overnight. And developments in our legislatures and courts suggest that this is one achievable immediate goal.