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Asset Forfeiture: An Effective Tool for Law Enforcement

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ABSTRACT

Police departments across the nation face various struggles every day. These struggles range from dealing with a surge of criminal activity in a certain area of a city to a citizen complaining to the city council that the police department is not doing enough to combat criminal activity. Most police departments are going to find a way to satisfy the citizen even if one of the factors possibly leading to a surge in crime is a recently reduced budget, which has strained the police department and its resources. In order to offset a reduced budget with increased criminal activity, law enforcement agencies must file civil suits against those who commit certain crimes, especially those crimes that have affected the livelihood of the community in which they serve. This could vary from narcotic distribution to street racing to prostitution. There are countless crimes that law enforcement are allowed to seize the assets that were derived from a crime; after all, these are probably the crimes the citizens are complaining about. This is why law enforcement agencies should actively pursue civil asset seizure and use the proceeds from those seizures to help pay for the investigation of crimes the criminals committed. Police departments must be cautious when seeking assets to seize and understand that the seizures must be legitimate and legal. The seizure of these items or funds will allow departments to supplement budget shortfalls in tougher economic times.

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INTRODUCTION

Civil asset forfeiture can be seen as a dirty word to some and a “savior” to others. How the civil asset forfeiture is perceived depends on which side of the fence one sits on, which depends on many variables. These vary from the size of a law enforcement agencies’ budget to how the funds were seized, how much the forfeiture “cost” the department, and how the property or funds were seized. Civil asset forfeiture gives law enforcement officers the authority to seize property when it is believed that the property was involved in a criminal activity. The benefit to civil asset forfeiture is that person who the property was seized from does not have to be found guilty of the crime in a court of law (Snead, 2014). In other words the asset and how the asset was used or obtained is the subject of the civil hearing, not the person being charged with the criminal charge; some examples are profits from drug sales, a vehicle used to commit a kidnapping, or a house used to facilitate prostitution (Snead, 2014). Asset forfeiture in the United States may seem relatively new to most, but it can actually be traced as far back to the Prohibition era of the 1920s. Those who were discovered in violation of producing or buying alcohol during the Prohibition era risked having their profits and alcohol seized (McKenna, n.d.). Another aspect of asset forfeiture during this time frame was to seize and destroy vehicles that were used to transport illegal alcohol.

Fast forward to the 1980s and the war on drugs greatly expanded the civil asset forfeiture aspect of law enforcement. Law enforcement began to seize the profits of drug dealers in an attempt to remove the profit from the drug world (The Heritage Foundation, n.d.). In 1984, Congress created the Assets Forfeiture Fund, also known as equitable sharing, which gave the seizing law enforcement agency a portion, up to 80%

of what was seized (The Heritage Foundation, n.d.). Equitable sharing has become a vital piece of how some agencies have supported budget shortfalls, in fact over \$5 billion in forfeited funds have been dispersed since the program began in 1984 (The Heritage Foundation, n.d.). Prior to this, states were dependent on their respective state laws. Now they can team up with federal government agencies for enforcement of crimes.

The success of the equitable sharing program generated numerous sources of criticism over the next 20 years. One main critique was that equitable sharing had caused law enforcement agencies a conflict-of-interest due to the fact that the agency was the benefactor of the seizure (Worrall, 2004). Congressman Henry Hyde was the House Judiciary Chairman in 1995 and the most vocal opponent of how the federal government utilized asset forfeiture. In 1999, Congressman Hyde was able to get the Civil Asset Forfeiture Reform Act (CAFRA) passed in June of that year by the House of Representatives. CAFRA faced many more months of legislative session, but was signed by President Bill Clinton on April 25, 2000 and put in to effect (Worrall, 2004). According to Worrall (2004), CAFRA had several noteworthy points that were important accomplishments. A few of these included the following: a shift to the burden of proof; a uniform innocent owner defense; a provision requiring the release of property pending forfeiture if its seizure constitutes an undue hardship; an amendment to the federal Tort claims Act to allow property owners to sue to the government for wrongful forfeitures. CAFRA was signed into place in an attempt to protect citizens who were parties to civil seizure forfeitures.

There is no doubt that the war on drugs is not really working. What is known is drug trafficking is a lucrative business. In 2012, the US White House Office of National Drug Control Policy was given estimates of the four illicit drugs: cocaine, heroin, marijuana and methamphetamine by the RAND Corporation (2014). RAND (2014) discovered that between 2000 and 2010, \$100 billion (in 2010 dollars) was spent annually in the United States on the four included drugs. In fact, RAND (2014) showed that the amount of spending held steady every year over that ten year period. This is why all law enforcement agencies should actively participate in civil asset forfeiture and hold criminals financially responsible for the cost to investigate their crimes. This is not only a great benefit to departments but also the communities in which they serve.

Law enforcement can seize a variety of things, but they must generate from one of three sources. These include contraband, proceeds from illegal activity, and tools or instruments used in the commission of a crime (LII, n.d.). Contraband is described as the illegally sold or traded items, such as drugs or weapons (LII, n.d.). Proceeds are defined under civil seizure law as any type of tangible property that was derived from a criminal activity (LII, n.d.). This can include money, homes cars, etc. Finally tools used in the commission of a crime are explained as anything that helped facilitate a crime (LII, n.d.). These can include a variety of items from cars to homes to weapons. This paper will show that all three types of civil asset seizure offer financial benefits and how civil asset forfeiture provides a deterrent to crime, which benefits the community.

POSITION

Law enforcement agencies must utilize every effort possible to seize proceeds/profits that were obtained from illegal means to expand their shrinking

budgets. In fact according to Burnett (2008), every year about \$12 billion in drug profits returns to Mexico from the United States. Law enforcement must take steps to stop and seize as much of these illegally obtained funds as possible.

Law enforcement agencies can utilize these funds to offset some of the budget cuts that they have faced over the years. In fact according to a survey by Schoen (2013), at least half of the police chiefs in the United States have seen budget reductions and cuts to training and specialized units, and in some instances, officers were laid off. Law enforcement agencies need to realize even though budgets may be dropping, the crime rate is not. In fact the crime rate has begun to go back up across the board since dropping steadily in 2006 (Schoen, 2013). Law enforcement agencies need to take steps to begin to offset these reductions in budget while maintaining their current staffing and levels of service. Law enforcement agencies must take steps to effectively and lawfully seize contraband, proceeds, and tools used in the commission of a crime. These items can generate revenue from the sell of the items and the currency can be placed into use by law enforcement agencies. These funds, when properly managed, can be utilized to offset the loss of budget and in some instances keep officers on the street. In an article published by Sallah, O'Harrow, Rich, & Silverman (2014), the authors found that hundreds of agencies are using seized funds to supplement the budgets of their departments, which primarily included paying salaries.

Law enforcement agencies are not limited to using these funds to just to pay salaries to supplement their respective budgets; in fact, they are allowed to purchase items that they normally would not be able to afford to buy. These items can be as large as the \$3.8 million the Phoenix Police Department used to purchase new

computer and communication equipment to a down payment of \$40,000 the Sierra Vista Police Department put toward the purchase of an armored vehicle (Philip & Mahoney, 2015). These civil asset seizure funds can also be used to pay for anything within reason. Asset seizure funds may and have been used to pay confidential informants, pay reward money, repair buildings, and even make donations to law enforcement charities (Philip & Mahoney, 2015).

The monetary benefit of asset civil forfeiture is a great one. Another benefit is when law enforcement agencies decide to put the seized property into use by the seizing law enforcement agency. A great example of this across the United States is the utilization of seized vehicles for the Drug Abuse Resistance Education (D.A.R.E.) program. The D.A.R.E program usually uses “flashy” or high end vehicles to gain the attention of youth. The Morristown (TN) Police Department’s D.A.R.E. officers used a 2005 Cadillac Escalade that was seized from a convicted drug dealer to gain the children’s attention, and they have seen a rapport built with the children they meet due to the vehicle (Stambaugh, 2009). Law enforcement agencies can also put a seized vehicle into use by an undercover or specialized unit. The utilization of seized vehicles in this sense is a budget boost for law enforcement agencies and may help offset some of the budget shortfalls that were previously mentioned.

Another important and beneficial by-product of asset forfeiture is that asset forfeiture provides a deterrent against crime. As previously stated, there are definite monetary incentives to asset forfeiture, but there is a hidden gem that goes hand in hand with increasing the amount of asset forfeitures by law enforcement agencies -

more drug arrests. Drug arrests are by far the leading crime mostly tied to asset forfeiture (Worrall, 2008).

Drug arrest may be leading the way in civil asset forfeiture, but other crimes that are targeted also benefit from civil asset forfeiture laws. These range from federal crimes to city ordinance violations. San Diego has taken a tough stance on street racing. This ordinance in San Diego allows law enforcement to seize vehicles involved in illegal street racing, with certain restrictions. This ordinance had a positive effect on the reduction of street racing in the city of San Diego (Worrall, 2008).

There are numerous other proven ways that asset forfeiture has deterred crime. These include tough drinking and driving laws in places such as Ohio, California, and New York City that allowed for civil seizure of the vehicles that were used in the commission of the offense. The forfeiture of vehicles in these cases has led some to conclude that it has discouraged people from drinking and driving (Worrall, 2008). Prostitution is another dirty crime that attracts some of the worst criminals, including murderers and drug dealers. Prostitution is not just a problem for large municipalities, but also small rural areas. There are many aspects of prostitution that law enforcement can focus on and use asset forfeiture to deter crime. One of the main targets in prostitution that law enforcement should focus on are the "johns". The "johns" are the men or women that are seeking out the services of a prostitute. This practice was put into place by Albuquerque (NM) Police Department in 2013, in which APD actively targeted to seize the "john's" vehicles in an effort to reduce prostitution and the crimes associated with prostitution (McKay, 2013). These are just a few examples out of thousands of success stories in which civil asset forfeiture has deterred crime across

cities in the United States. In theory, if a law enforcement agency is making more civil seizures, then more arrests are being made as well. This increase in arrests should be one of the main reasons why law enforcement agencies choose to aggressively seek asset forfeitures.

COUNTER POSITION

Civil asset forfeiture is not without its critics and opposition. One of the biggest arguments that enters the realm of asset civil seizure is that of “innocent owners”. This is seen by critics that family members or the owners of the property, who are not participants in the crime that caused the property to be seized, are actually punished for the crime as well. The most noteworthy claim of “innocent owner” is the United States Supreme Court decision of *Bennis v. Michigan* (1996). In this case the plaintiff’s husband hired the services of a prostitute while using the plaintiff’s car. The plaintiff’s husband was subsequently arrested, and the vehicle was seized. The US Supreme Court ruled against the plaintiff in this case. The ruling in this case did not put asset forfeiture in a favorable light. In order to combat the way law enforcement was seen as making questionable forfeitures that affected “innocent owners” the federal legislature incorporated the “innocent owner” claim as part of CAFRA (Holcomb, Kovandzic, & Williams, 2011).

The “innocent owner” problem as mentioned was included as part of the CAFRA to limit “innocent owner’s” in federal civil asset seizures. Law enforcement can respond in a couple of ways to keep the “innocent owner” provision from being too burdensome. For instance, law enforcement agencies are allowed to file the civil asset seizure with their respective jurisdictions following their state laws. Most states shift the burden to

prove the owner of the property is an “innocent owner” to the party making the claim. According to Holcomb et al. (2011), 34 states have this requirement. This is a deterrent that will keep the majority of individuals from filing a claim against the seized property. Keeping this in mind is why law enforcement officers should continue to legally seize contraband, proceeds, and tools used to commit crimes.

Another opposition that civil asset forfeiture faces is the term “policing for profit”. This term is derived from opponents of civil asset forfeiture in which law enforcement officers are accused of actively looking for assets to seize from citizens as opposed to looking for criminals. This has been an issue across the United States. One of the most recognizable cases of “policing for profit” was in the small east Texas town of Tenaha, Texas, which has just a population of 1172 according to U.S. Census Bureau (2012). The police department in Tenaha was accused of stopping hundreds of drivers between 2006 and 2008 and seizing approximately \$3 million in cash and assets from drivers (Mukherjee, 2012). The majority of these drivers were never charged with a crime, and a lot of the drivers were allowed to waive their interest in the property to keep from facing charges (The Heritage Foundation, n.d.). The acts by the Tenaha Police Department resulted in the city settling a class action lawsuit in 2012 (Mukherjee, 2012). This is just one example of “policing for profit”, and as it so frequent the case in law enforcement, the actions of a few are seen as the dominant style of all law enforcement agencies.

There are many ways to combat “policing for profit”; the Texas Legislature amended chapter 59 of the Texas Code of Criminal Procedure (CCP) . This chapter deals only with the forfeiture of contraband. In 2011, lawmakers amended CCP chapter

59.03 (d) which states at the time of the seizure the person who the property was seized from can claim interest or rights to the property. The section further states that at no time may any peace officer attempt or get a person who claims to have interest in the property to waive said interest (TXCCP 59.03). This amendment to the CCP should prevent law enforcement agencies from practicing the actions that were being carried out in Tenaha, waiving assets in lieu of criminal charges. In addition to the amendment to the CCP, law enforcement agencies need to be transparent with what they seize each year. This is an easy task that can be carried out annually is required by all law enforcement agencies that participate in the equitable sharing program in most states.

RECOMMENDATION

Law enforcement agencies across the country face hurdles and criticism every day. The one thing that law enforcement agencies should not do is stop civil asset forfeitures of contraband, proceeds of criminal activity, or tools used in the commission of a crime. If law enforcement were to stop these seizures, it would have an adverse effect on the crime rate. One of the biggest benefits of civil asset seizure is deterrence of crime. If law enforcement allows criminals to keep the profits of the criminal acts, then the criminals will do risk versus reward analysis of their own. In other words, it may be worth the risk to get caught with narcotics if the criminal has the potential to make money. How many people that commit crimes are actually caught during the commission of the crime anyway? This is why so many choose to sell narcotics or commit other profitable crimes; the reward for them far outweighs the risk. So why not go after criminals that are committing these profitable crimes, take the profit from them, and in the process, hopefully deter others from committing the same crimes.

This is why law enforcement should actively pursue civil asset forfeiture and utilize the funds and/or items that are seized from criminals to offset the cost of fighting their crimes. This may mean supplementing a law enforcement budget to pay for enhanced training, buying new equipment for a specialized unit, or possibly using a seized high end vehicle for a drug awareness program. Whatever the reason, using civil asset forfeiture funds for a law enforcement budget should not be something that law enforcement strays away from.

There will always be the critics of civil asset forfeiture. These will include those that claim civil asset forfeiture affects too many “innocent owners”, or the family of those who were not involved in the seizure is affected. The fact of the matter is that there have been safeguards put into place to protect these claims. This was the basis for inserting an “innocent owners” clause into CAFRA. This has shifted the burden of proof in federal civil asset seizures (Holcomb et al., 2011).

There, of course, are the “policing for profit” claims that are being made routinely against law enforcement. There is no doubt that this occurs by overzealous law enforcement agencies and officers. The good news is that there are ways to fight these claims. The legislature in Texas took it upon themselves to enact an amendment that would not allow any law enforcement officer to get a person to waive their interest in property that was seized (TXCCP 59.03). This keeps the due process in the seizure.

In order for civil asset forfeiture to be successful in the United States, law enforcement agencies need to reevaluate their policies and procedures on any and all civil asset seizures. It is recommended that law enforcement agencies make sure that they train their officers on proper protocol and laws on civil asset seizures. The main

thing that law enforcement agencies need to do is be transparent with what happens with these seizures and how they are used to benefit the law enforcement agency and mostly the community as a whole.

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