

**Civil Asset Forfeiture: Why Law
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Motto from "To Serve and
Protect" to "Show Me the Money"**

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Abstract

Despite its failure to achieve its desired objectives, the War on Drugs continues on into a fourth decade with disastrous effects and extensive collateral damage. The current article explores civil asset forfeiture as one motivation that keeps the current drug policy intact. Specifically, it advances the premise that the current state of civil asset forfeiture law creates goal displacement that motivates law enforcement agencies to implement drug enforcement strategies that aggressively pursue civil asset forfeitures as a means of supplementing their budgets rather than as a legitimate tool for decreasing the supply of illicit drugs. The article explores how this goal displacement not only negatively impacts the progress of the War on Drugs, but also how it leads to disregard for individual due process rights, sometimes with tragic and life-altering consequences for innocent individuals. A brief discussion of the necessary reforms to civil asset forfeiture law is included.

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Civil Asset Forfeiture: Why Law Enforcement Has Changed its Motto from “To Serve and Protect” to “Show Me the Money”

Introduction

The Drug War is now in its fourth decade. Disgusted over revelations of rampant heroin use among U.S. soldiers in Vietnam, Nixon declared drug use, especially that of heroin, to be “the number one public enemy of the United States.” Within five years of Nixon’s declaration of war on illegal drugs, the federal drug-enforcement budget had jumped from \$65 million in 1969 to \$719 million in 1974 (Baum 1996, 61, 75), with the majority of federal drug-enforcement funds allocated to treatment and demand reduction strategies such as methadone treatment (PBS 2005). Future administrations would continue this trend of increased drug-enforcement spending. From 1981 to 2000, the federal domestic drug-enforcement budget, composed of funds allocated for treatment, prevention, and law enforcement strategies, increased almost eight-fold from \$2 billion to \$15 billion (Lock, Timberlake, and Rasinski 2002). More recently, in 2003, the federal government expended \$19 billion on the Drug War, while state governments expended an additional \$30 billion (www.drugsense.org/wodclock.htm). While the amount of funds allocated to each of these strategies increased, the largest increase went to law enforcement and supply reduction strategies. From 1981 to 2000, the domestic budget allocated to law enforcement increased by 62% while the funds allocated to treatment and prevention increased by 18% and 15%, respectively (Lock, Timberlake, and Rasinski 2002).

The increased domestic drug budgets and disparities in budget allocations are reflective of the drug philosophies and policies of the administrations that implemented them. Referring to drugs as a “cancer,” President Reagan endorsed and encouraged an

“outspoken intolerance” towards all illicit drug activity (Baum 1996, 233-34). Reagan further downplayed the sociological root causes of illicit drug activity, emphasizing instead individuals’ morality and individual choice. Participation in illicit drug activities resulted from moral defect and those who partook were, in Reagan’s opinion, deserving of “severe and swift” punishment (149-150). President Bush (Senior) endorsed a “zero tolerance” policy, telling drug dealers, “...whatever we have to do, we’ll do, but your day is over, you’re history” (245). Bush considered drugs a “scourge” on society—one that he fully intended to eradicate (Szasz 2005, 55). President Clinton, toeing the line with his Republican predecessors, continued the trend. Along with firing Jocelyn Elders, the Surgeon General, for comments suggesting that drug legalization would lower the crime rate, Clinton also endorsed a crime bill sanctioning capital punishment for “drug kingpins,” three-strikes-and-your-out life sentencing, and increased budgets for prisons and the DEA (Baum 1996). Finally, President Bush (Junior), continuing the trend of his predecessors, allocated \$19 billion in 2002 to the drug war, two-thirds of which went towards law enforcement, supply reduction, and interdiction (ONDCP 2003).

Much evidence exists to suggest that the Drug War’s focus on law enforcement, supply reduction, and interdiction has failed to achieve its goals of reducing drug use and drug-related consequences. The DEA’s seizure of 22,000 pounds of refined cocaine at Tranquilandia, Colombia failed to have any impact on the availability of cocaine in the United States (Alden 2000). Further failure of interdiction strategies is evidenced by lower cocaine and heroin prices and increased drug purity (Blumeson and Nilsen 1998; Caulkins, Reuter, Iguchi, and Chiesa 2005). Additionally, between 1991 and 2003, the percentage of high school students using marijuana sometime during their lifetime

increased from 31% to 40%; the percentage currently using increased from 15% to 22% (<http://www.albany.edu/sourcebook/pdf/t355.pdf>). Also, increased incarceration of drug offenders has done little to decrease the number of people participating in illicit drug activities. 80 percent of the increase in the federal prison population from 1985 to 1995 can be attributed to drug convictions (USDOJ 1997). At the state level, the number of inmates incarcerated for drug offenses showed an almost three-fold increase from 1986 to 1995 (9% to 23%) (Haney and Zimbardo 1998). Despite these increasing incarceration rates, the number of drug-related arrests increased from less than 500,000 in 1970 to approximately 1.8 million in 2005 (FBI 2005). Miron (2004) estimates that there are more than 28 million drug users in the United States and that most of these users purchase drugs on multiple occasions.

Not only has the Drug War failed to decrease drug consumption, but it has also spawned a host of adverse societal consequences including, but not limited to: (1) the erosion of civil liberties and police integrity (see, Bertram, Bachman, Sharp, and Andreas 1996, for a review); (2) exacerbation of drug-related health concerns such as the spread of HIV infection (Vlahov et al. 2001); and (3) the creation of a host of sanctions adversely affecting families and communities (e.g., family disruption, eviction from public housing, employment restrictions, reduction in political power) (Caulkins et al. 2005). Because the Drug War is predominantly waged in minority communities, these adverse consequences disproportionately affect certain minority groups (Tonry, 1995). For example, even though blacks make up approximately 12% of the total population (U.S. Census Bureau 2001), almost half of the 265,000 inmates serving sentences in state prisons for drug offenses in 2002 were black (Harrison and Beck 2005). Additionally,

Mumola (2000) found that black children are nine times more likely than white children to have a parent incarcerated in prison. This increased incarceration of black parents creates a greater potential in black communities for family disruption and its concomitant consequences. Finally, disproportionate felony drug convictions of black males have disenfranchised 13% of all black males, a rate that is approximately seven times the national average (Fellner and Mauer 1998).

Reflecting upon the Drug War's inability to achieve its objectives and the resulting adverse societal consequences, one is left asking why the U.S. government continues to focus on and utilize the same ineffective strategies year after year.¹ One possible explanation is that the continuation of the Drug War benefits and advances the interests and agendas of certain groups. Reinerman and Levine (1997) discuss in detail how politicians, both Republicans and Democrats, use the Drug War as political currency. They have enlisted full-heartedly in the war, railing against the drug "epidemic" and promising that, if elected, they will "get tough" on those who participate in illicit drug activity. This strategy seems to resonate with voters. Another group that benefits directly from the continuation of the Drug War is the law enforcement apparatus. With the advent and increased use of civil asset forfeiture (AF) laws by law enforcement agencies, fighting the Drug War has become a highly lucrative enterprise (Blumenson and Nilsen 1998). It is this latter aspect of the Drug War that this paper seeks to address.

The remainder of this paper will explore the use of civil AF laws by law

¹ For an alternative perspective on whether the Drug War has failed, see *Smoke and Mirrors*, by Dan Baum, and *Malign Neglect: Race, Crime, and Punishment in America*, by Michael Tonry. These authors suggest that the Drug War has been largely successful if, as they suggest, its objective is to control and repress minority groups. Baum details an interview with John Ehrlichman, domestic policy advisor for Nixon, in which it was made clear that the objective of the Drug War was to control the "hippies" and the "blacks." In Tonry, see Chapter 3 for a detailed discussion of how the Drug War disproportionately impacts minority groups and why policy-makers must have foreseen these consequences when formulating drug policy.

enforcement agencies. A brief summary of the history, philosophy, and legal issues pertaining to civil AF law will be provided. Next, the influence of civil AF on law enforcement strategies for conducting the Drug War will be explored, with special emphasis given to how these strategies negatively impact the Drug War and, in the process, infringe on the due process rights of individuals. Additionally, a section will be devoted to how the abuses precipitated by civil AF negatively impact the lives and livelihoods of ordinary, and often times, innocent individuals. Finally, potential solutions and remedies for these abuses will be examined.

History, Philosophy, and Legal Issues

Ancient in origin, civil AF laws are justified by “personification theory,” which holds that “an object can commit a wrong and can be held guilty for its misdeeds....That punishment is forfeiture” (Hyde 1995, 17). While this theory has been incorporated by numerous groups throughout history to justify the seizure of individuals’ property, one of the better-known examples of this practice is traced back to the medieval English law of “deodand.” This law specified that when an inanimate object (e.g., a sword, an ox) caused the death of an individual, it was to be forfeited to the Crown, which would dispose of the object and use the proceeds for the good of the deceased person’s soul (e.g., pay to have a Mass said for the victim’s soul). Often times, a large portion of the proceeds went to the royal treasury. As one might expect, the process quickly became corrupted, with its main purpose being to gather revenue for the Crown rather than facilitating the salvation of souls.

Modern civil AF laws are predicated on the philosophy that the best strategy for combating the illicit drug trade is to strike at its economic foundation by seizing and

controlling the means of drug production. This prevents replacements from enlisting those same means to continue drug production and distribution (Blumenson and Nilsen 1998). With the passage of the Comprehensive Drug Abuse Prevention Act of 1970, civil AF laws became a weapon in the government's fight against drugs (Hyde 1995). While this original act was narrow in scope, pertaining only to the forfeiture of the actual drugs, raw materials facilitating drug production, and conveyances used to transport the drugs, a series of laws over the next two decades broadened the reach of forfeiture laws. These expanded laws allow for the forfeiture of all monies and real property either proceeding from or "facilitating" drug activity. Of all of these acts, the most controversial is the 1984 Comprehensive Crime Control Act because of two of its amendments. One amendment allows federal law enforcement agencies to retain and use the proceeds from its asset forfeitures rather than depositing them in the General Fund of the U.S. Treasury, while the second amendment established the federal "equitable sharing program," a program allowing individual state and local law enforcement agencies to "federalize" their seizures and, in so doing, retain and utilize the majority (often up to 80%) of what they seize. In federalizing their seizures, state and local law enforcement agencies circumvent state laws that would allow them to keep a smaller percentage of the proceeds from the seizure. Critics fear that these amendments create a system in which law enforcement agencies are motivated to seek profits through the seizures that they make (Blumenson and Nilsen 1998; Mast, Benson, and Rasmussen 2000).

In discussing the legal issues pertaining to civil AF law, it is helpful to contrast it with criminal AF law (Worrall 2001). As with ancient AF law, civil AF law results in an *in rem* proceeding, which designates the forfeited property as the guilty party. Criminal

forfeiture, on the other hand, results in an *in personam* proceeding in which the individual from whom the property is seized is the guilty party. This distinction has beneficial legal ramifications for law enforcement agencies. Because *in rem* proceedings target property rather than individuals, the rules of evidence for civil forfeitures are less stringent than those required in criminal forfeitures. While criminal forfeiture can only occur pursuant to an individual's conviction, civil forfeiture can proceed without an arrest or conviction. One study estimates that 80 percent of civil forfeitures do not result in criminal conviction (Schneider and Flaherty 1991), while another study estimates that 90 percent of civil forfeitures are uncontested by the property owners (Blumenson and Nilsen 1998). Additionally, while criminal forfeiture law requires the government to prove a forfeited asset's drug-related connection "beyond a reasonable doubt," civil forfeitures can occur under the less stringent "probable cause" standard. The burden of proof then shifts to the property owner to provide evidence that the property is not drug-connected (Hyde 1995).

In summary, civil AF laws are rooted in ancient laws that personified property as animate objects capable of wrongdoing and consequently susceptible to punishment through seizure. As applied currently, this "personification theory" allows law enforcement agencies to justify the seizure of property and financial resources that originate from or facilitate illicit drug activity. Unfortunately, the laws establishing and regulating asset forfeiture have been substantially expanded in the last two decades, creating a system that increases the power and motivation of law enforcement agencies to concentrate their efforts on asset forfeitures. The next section will focus on how these expanded powers influence law enforcement drug strategies and how these strategies negatively impact the progress of the Drug War, as well as the due process rights of

targeted individuals.

Goal Displacement and Trampled Due Process Rights

Critics of civil AF laws have been vociferous in expressing their belief that certain aspects of civil AF law, especially the “equitable sharing program,” create goal displacement, a process in which sub-goals take precedence over more significant primary goals. In the Drug War, this occurs when law enforcement agencies emphasize revenue-generating strategies rather than supply-reduction and deterrence strategies (Vecchi and Sigler 2001). The motivation to use civil AF as a revenue-generating strategy holds great appeal for law enforcement agencies (Nelson 1992). Revenues generated through AF can serve as an essential supplement to meager or depleted law enforcement budgets. In some cases, asset forfeitures may be sufficient to allow an agency or task force to become self-sufficient, thus, decreasing its accountability to higher authorities (Blumenson and Nilsen 1998). Additionally, civil AF provides a benchmark for agencies and individual agents to display their agency and individual prowess in fighting the Drug War. This measurable success, in turn, translates into increased funding or prestige for an agency, as well as “reputation, rank, and career opportunities” for individual agents. Finally, law enforcement agencies and their agents benefit materially from AF when forfeited funds are used to procure new equipment and when forfeited assets (e.g., cars, computers) are transferred to an agency for use by its agents (Nelson 1992, 1327).

That law enforcement agencies rely on AF as a means of generating revenue is rarely disputed, even by law enforcement agencies and their administrators. “Revenue for the War on Drugs” is listed as one of the three objectives of the federal forfeiture

program (DOJ 1990) and the Executive Office of the U.S. Attorney General openly encourages its attorneys to meet budget projections by making civil AF a priority and by “develop[ing] ways to make the fullest, appropriate use of forfeiture statutes” (Executive Office for Asset Forfeiture 1991; Reno, Freeh, and Constantine 1996). This reliance on and temptation to utilize AF as a mechanism for generating revenue in order to supplement budgets is not restricted to federal law enforcement agencies.

For example, Worrall (2001), in a survey of 1400 municipal and county law enforcement executives, found that a substantial minority of the agencies surveyed (40%) is dependent on civil AF as a necessary budgetary supplement. Worrall characterizes this reliance on civil AF as an “addiction”—an addiction that is manifested by the extent of its practice, as well as by law enforcement efforts to stymie civil AF reform. The year after the “equitable sharing program” was implemented, total receipts from asset forfeitures increased exponentially from approximately \$27 million in 1985 to an apex of approximately \$875 million in 1992. While the total receipts from AF have fluctuated since 1992, law enforcement still seized approximately \$460 million in 2003 (Maguire and Pastore 2004; Nelson 1992). Of these receipts, a sizeable portion often reverts back to state and local agencies through the “equitable sharing program.” Of the \$644 million seized in 1991, approximately \$280 million, or 43%, was dispersed back to local and state law enforcement agencies (Nelson 1992).

This enormous revenue-generating potential of civil AF motivated law enforcement agencies and their lobbyists to rally in 1988 to prevent the enactment of the Anti-Drug Abuse Act of 1988, an act which would have prevented local and state law enforcement agencies from federalizing their seizures as a way of circumventing less

profitable state civil AF laws (Nelson 1992). Law enforcement support for circumventing state civil AF laws remains strong despite the fact that the practice retains for law enforcement utilization funds that would, under some state civil AF laws, be earmarked for education, drug prevention, and other programs (Ehlers 1999). While children and recipients of state programs suffer, federal, state and local enforcement agencies benefit—federal agencies because they receive something (10-20% of a seizure) where they would have received nothing and the state and local agencies because they receive a larger percentage than they would under their respective state forfeiture laws (Blumenson and Nilsen 1998).

That civil AF allows for the confiscation of assets proceeding from and facilitating illicit drug activity is not the primary issue vexing its critics. As previously discussed, the confiscation of assets was originally viewed as a potent weapon for curtailing illicit drug activity by removing the economic incentives and means to participate in illicit drug-related activities. Unlike current civil AF law, though, early civil AF laws viewed the elimination of the available drug supply as its primary objective. Accordingly, proceeds from asset seizures were not retained and utilized by individual agencies on the scale that they are currently. Instead, they were deposited in the General Fund of the U.S. Treasury. According to critics, expanded civil AF laws, especially the creation of the “equitable sharing program” and its disbursement of seized assets back to participating federal, state, and local enforcement agencies, have transformed the objectives and motivations underlying the increased utilization of civil AF (Blumenson and Nilsen 1998). In the words of Nelson (1992):

...the reasoning behind the forfeiture law—that it was a good way to get at drug crime, with certain collateral benefits for participating law enforcement

agencies—has been to some degree turned on its head, so that the motivation for law enforcement agencies to pursue forfeiture has become that it serves the institutional interests in self-perpetuation, with the possible collateral benefit of helping to fight crime (1327).

It is this distorted motivation and its potential influence on drug-enforcement strategy that agitates critics of civil AF. To these critics, allowing law enforcement agencies to profit directly through civil AF creates a conflict of interest in which agencies are forced to choose between two antithetical drug-enforcement strategies—one focusing on drug supply reduction as its main objective and the other concentrating on revenue-generation as its primary objective (Blumenson and Nilsen 1998; Nelson 1992).

This potential conflict of interest is more than mere speculation. Ethnographic research conducted by Miller and Selva (1994) provides evidence that a conflict of interest between revenue-generation and drug supply reduction objectives does exist and that revenue-generation strategies often win out—many times with consequences detrimental to reducing the supply of available illicit drugs. As a confidential informant for a southern-state narcotics unit, one of the researchers spent a year conducting covert participant observation, during which time he witnessed numerous instances in which revenue-generating objectives motivated law enforcement drug strategies. In one telling instance, law enforcement agents ignored a known drug dealer's efforts to sell 2.5 pounds of marijuana, instead focusing their efforts on a first-time drug offender who was seeking to buy a half-pound of marijuana to resell for a profit. This decision was based on revenue-generation considerations. While arresting the known drug dealer would mean the confiscation of 2.5 pounds of marijuana void of any financial value for law enforcement, arresting the first-time offender would allow for the confiscation of \$700 and a truck. The latter scenario describes exactly what transpired. While the known drug

dealer remained free, assumedly finding buyers for his product, the first-time drug offender was arrested and his funds and automobile confiscated. Law enforcement, apparently apathetic at having left a supply of marijuana on the streets, took the confiscated assets and moved on to their next target.

The incident described above is not an anomaly. According to Miller and Selva (1994), this incident describes a drug-enforcement strategy that, because of its revenue-generating potential, has become increasingly popular since the advent of the “equitable sharing program.” Known as a “reverse” sting, this strategy involves placing agents undercover as sellers rather than buyers. Law enforcement agencies prefer reverse stings to traditional stings for a number of reasons. Firstly, reverse stings allow law enforcement agents to target and groom potential buyers based on their forfeitable assets. In this way, significant resources are not expended on buyers who possess few forfeitable assets. Secondly, while traditional sting operations result in the confiscation of drugs that, beyond their street value, are void of any financial value, reverse stings facilitate the seizure of assets with substantial financial value (e.g., money, automobiles, property). During the researcher’s stint as a confidential informer, “reverses occurred so regularly that the term *reverse* became synonymous with the word *deal*” (Miller and Selva 1994, 325). It also became very clear to the researcher that strategies and goals were predicated on “profit rather than the incapacitation of drug dealers” (325). This profit-seeking motivation is manifested in other drug-enforcement strategies as well. One particularly worrisome strategy observed by the researcher involved allowing known drug dealers to sell their product even while being monitored by police. Even though this strategy facilitates the increased distribution of illicit drugs, it is condoned because it maximizes

the amount of cash seized from a dealer at the time of arrest.

These strategies have an additional corrosive effect. According to critics of civil AF, in their pursuit of revenue, law enforcement agents and prosecutors often violate an individual's 14th-Amendment due process rights (Blumenson and Nilsen 1998; Stahl 1992). The Supreme Court has ruled that an individual's fate should not be placed in the hands of an individual or party who possesses either a bias against the individual or a financial interest in the outcome of a case. When this is allowed to occur, an individual's constitutional right to be treated fairly and impartially by the criminal justice system is violated (e.g., *Bracy v. Gramley* 1997; *Gibson v. Berryhill* 1973; *Tumey v. Ohio* 1927). In illustrating how law enforcement's use of civil AF potentially violates the due process clause of the 14th-Amendment, Blumenson and Nilsen (1998) find it instructional to contrast the rulings and legal reasoning from two Supreme Court cases. These cases are *Tumey v. Ohio* (1927) and *Marshall v. Jerrico* (1980). In addressing the supposed violation of a defendant's or plaintiff's due process rights, these cases provide valuable insights into the factors the Court has considered when distinguishing due process violations from acceptable government behavior. This distinction, in turn, provides a useful standard by which to judge whether law enforcement's use of civil AF as a revenue-generation technique potentially violates an individual's 14th-Amendment rights.

In *Tumey v. Ohio* (1927), the Supreme Court overturned a defendant's conviction and \$100 fine because the judge that had imposed the fine also served as the town's mayor. This, according to the Court, created a conflict of interest sufficient to threaten the defendant's due process rights. This finding was based on two considerations: (1) the mayor/judge was personally compensated contingent on the fines that he imposed (\$12 in

this particular case); and (2) as mayor and financial administrator of the town, the mayor had an incentive to increase the financial resources of his town through the conviction and fining of defendants.

In *Marshal v. Jerrico* (1980), the Court ruled that a provision of the Fair Labor Standard Act allowing a division of the Labor Department to retain and utilize the civil penalties it assessed for child labor violations was constitutional. Rejecting the plaintiff's due process claims that the provision motivated the agency to seek out and impose excessive fines, the Court cited three relevant factors: financial dependence, personal interest, and the funding formula. According to the Court, the provision was written in a manner curtailing the division's ability or motivation to financially benefit from the imposition of penalties. That the division was not financially dependent on or motivated by a personal interest in these penalties was evident by the fact that revenues collected through these penalties made up less than 1% of the division's budget, as well as by the fact that all penalty collections were turned over to the Treasury Department for dispersal. Additionally, the dispersal of these funds was not based on the amount of penalties imposed by an office, but instead on the specific expenses of each individual office. This process prevents individual offices from supplementing their budgets by imposing higher and more frequent penalties.

Law enforcement's current application and utilization of civil AF is more reflective of the behavior ruled unconstitutional in *Tumey* than it is of the behavior ruled constitutional in *Jerrico* (Blumenson and Nilsen 1998). Similar to the mayor/judge in *Tumey*, law enforcement agents and their agencies do benefit directly and materially from the asset forfeitures they make, creating a system in which enforcement decisions and

strategies are potentially based on financial considerations rather than due process considerations. Additionally, law enforcement's current use of civil AF as a tool in the Drug War violates the due process criteria set down by the Supreme Court in *Jerrico*. Many law enforcement agencies' budgets have become increasingly financially dependent on the proceeds of AF (Worrall 2001), giving these agencies a personal interest in vigilantly pursuing asset forfeitures. Finally, unlike the provision ruled constitutional in *Jerrico*, civil AF statutes, especially the amendment establishing the "equitable sharing program," motivate agencies to pursue asset forfeitures by allowing them to retain and utilize the majority of the proceeds from seizures. In other words, the more an agency seizes, the more revenue they generate. Emphasizing civil AF's potential to bias law enforcement decisions and, in the process, threaten the due process rights of individuals, Blumenson and Nilsen (1998) write, "One could hardly design an incentive system better calculated to bias law enforcement decisions than the present forfeiture laws" (62). Despite this potential, the Supreme Court has been reticent to address the negative impact of civil AF on due process guarantees.

In summary, civil AF has redefined how law enforcement agencies approach the Drug War. Strategies with the potential to generate revenue and supplement depleted enforcement budgets now often take precedence over supply reduction strategies. In the pursuit of financial resources, agencies focus their efforts on the forfeitable assets of buyers while allowing drug dealers to sell their product until an arrest becomes maximally profitable. Not only are these strategies cumulatively detrimental to an already-failing Drug War, but they also often violate the due process rights of individuals caught in their snare. The impact of these due process violations on the lives of

individuals, both guilty and innocent, will be the subject matter of the following section.

The Human Face of Civil Asset Forfeiture

Numerous instances can be cited to illustrate how law enforcement's pursuit of financial resources through civil AF negatively impacts the lives of various groups of people and of specific individuals. In some cases, the individuals are completely innocent of any wrongdoing, but are targeted because they possess desirable forfeitable assets. It is the lust for these assets rather than any substantial evidence of wrongdoing that often motivates these seizures. Sometimes the results are tragic.

Take, for instance, the experience of reclusive millionaire, Donald Scott (Gray 2000). Scott owned, but refused to sell, 200 acres of prime real estate in Malibu, California that was coveted by a number of groups, including the National Park Service. Based on flimsy evidence that Scott's new wife had previously been arrested for marijuana possession, as well as reports from an unnamed source of 3000 marijuana plants growing on Scott's property, the Los Angeles Sheriff's Department (LASD) began an investigation that lasted four weeks and failed to corroborate any of the evidence provided by the unnamed source. Undeterred, on the morning of October 2, 1992, 30 agents from myriad agencies broke down the door of the Scotts' home. In the resulting confusion, Donald Scott was shot twice and killed. A thorough search of the residence and its grounds failed to turn up any drugs or drug paraphernalia and the subsequent five-month investigation revealed the financial motivation behind the raid. Most telling was a map found in the lead deputy's case file. A map of Scott's land was accompanied by a note saying, "80 acres sold for \$800,000 in 1991 in same area." Driven by this financial motivation, the LASD hid potentially exculpatory evidence from the judge who signed

the search warrant being served on the morning of Scott's death (Blumensen and Nilsen 1998). According to the investigation report, this fraudulently obtained search warrant would prove to be Donald Scott's death warrant (Office of District Attorney, Ventura County 1993).

The consequences are not always as tragic as those in the Donald Scott case. At times, it is the financial livelihood of innocent individuals that is destroyed by law enforcement's financially motivated over-utilization of civil AF (Ehlers 1999). Jim and Amba Patel had their motel seized because drugs had been distributed on the premises. The seizure occurred despite the couple's efforts to curtail drug distribution on their property by installing floodlights and fences and by calling the police on numerous occasions (Hegeman 1999). William Munnerlynn had his Learjet seized by the DEA after he inadvertently used it to transport a drug dealer. Though charges were dropped against him within 72 hours, the DEA refused to return his Learjet. Only after five years of litigation and tens of thousands in legal fees was he able to procure the return of his jet. When the jet was returned, it had sustained \$100,000 in damage as well as numerous citations from the FFA (Lepsch 1997). Individuals like Munnerlynn whose property is damaged or destroyed while in government custody have no civil recourse because the Federal Tort Claims Act protects the federal government from any liability (Ehlers 1999).

Civil AF does not only negatively impact specific individuals. It also disproportionately impacts certain groups of people. Blumenson and Nilsen (1998) point out that civil AF has created sentencing disparities between the drug "mules" and the drug "kingpins." They support this contention by citing numerous journalistic investigations that have explored this issue (Jackson 1996; Lehr and Butterfield 1995).

These studies suggest that drug kingpins, because of their financial resources, have more plea bargaining powers than the drug mules. Oftentimes, drug kingpins receive significantly reduced sentences by promising not to legally challenge the asset forfeitures initiated against them by law enforcement. This, according to these studies, explains why so many of the individuals serving drug sentences in state and federal prisons play relatively minor roles in drug distribution networks—they, unlike their “bosses,” did not possess the financial resources to plea bargain their way out of significant prison time. It would seem that, in these situations, Lady Justice is not blind. The scales of justice are tipped in favor of those with forfeitable assets coveted by law enforcement.

Critics have also suggested that law enforcement’s use of civil AF disproportionately impacts minority groups. For example, utilizing the Florida Contraband Forfeiture Act, police in Volusia County, Florida used a “probable cause” standard to stop and seize the assets of Floridian drivers. Under the guidelines provided by the Sheriff, “probable cause” was defined as the possession of \$100 or more in cash. All drivers carrying more than \$100 in cash were assumed to be involved in drug trafficking and their cash assets were subsequently seized. A special report by the *Orlando Sentinel* analyzed 1000 traffic stops and reported the following race-related findings: (1) 70 percent of the cars were driven by blacks or Hispanics; (2) Of more than 500 automobile searches, 80 percent had racial-minority drivers; and (3) 90 percent of the drivers from whom cash was confiscated without arrest were black or Hispanic (Brazil and Berry 1992; Hyde 1995). In Seattle, a drug abatement program targeting businesses and homes also disproportionately targeted minorities. Even though minorities comprise only 25 percent of Seattle’s population, 96 percent of drug abatement cases targeted

minorities (Malkin 1999). These findings are especially troubling when one considers that these groups are particularly unlikely to have the necessary resources to legally challenge the asset forfeitures that disproportionately target them.

The examples cited above are only a few of the hundreds, if not thousands, of real-life examples illustrating how law enforcement's reliance on civil AF as a revenue-generating mechanism has negatively impacted the lives and livelihoods of individuals, many of whom are innocent of any drug-related offense. Recognizing this potential, critics have diligently argued and fought for years for reforms and remedies that will decrease the adverse impact of civil AF. The final section will address some of these suggested reforms and remedies

Reforms and Remedies

While some progress has been made in alleviating the negative impact of civil AF, much reform is still needed. The Civil Asset Forfeiture Reform Act of 2000 (CAFRA), signed into law by President Clinton, lessened the negative consequences of civil AF by shifting the burden of proof from the property owner to the government, providing reasonable attorney compensation to individuals who prevail in forfeiture proceedings, and establishing an innocent owner defense for all federal forfeiture proceedings. Despite these positive developments, though, the CAFRA's effectiveness is severely limited. As a federal law, CAFRA applies only to federal agencies, leaving state and local agencies free to continue the practice unfettered. Most importantly, though, CAFRA does not address the "equitable sharing program," effectively leaving law enforcement agencies free to continue to utilize asset forfeiture as a revenue-generating strategy (Worrall 2001).

Critics have suggested that law enforcement's utilization of civil AF in the Drug War and the concomitant negative consequences will not be curtailed until a number of additional reforms are implemented. Blumenson and Nilsen (1998) suggest that the Supreme Court's ruling in *Austin v. United States* (1993) was an important first step. This case unanimously established that the prohibition against excessive fines as established in the 8th-Amendment applies to all types of punishment, both civil and criminal. Previous to this ruling, civil AF laws were used to justify the seizure of all assets proceeding from or facilitating illicit drug activity, even if the seizure (i.e., punishment) was not commensurate with the illegal activity. For example, previous to this ruling and under the auspices of civil AF, a yacht was seized after one marijuana cigarette was found aboard (*Calero-Toledo v. Pearson Yacht Leasing Company*, 1974). Presumably, with the ruling in *Austin*, seizures under civil AF now have to be proportional to the committed illegal behavior. Unfortunately, the Supreme Court dampened the force of the *Austin* ruling by failing to provide a standard by which to judge whether a seizure violates the excessiveness provision of the 8th-Amendment. Until this occurs, it is difficult to gauge the impact that the *Austin* ruling will have on civil AF.

A number of other reforms have been advocated as well. According to Ehlers (1999), civil AF laws were originally intended to target persons outside the jurisdiction of the United States who could not be criminally prosecuted for their crimes prior to having their assets forfeited (e.g., foreign drug dealers with American assets, individuals who have fled the country to avoid prosecution). Individuals who reside within the United States and who are still subject to the routine procedures and protections of the criminal justice system should not be deprived of their property until the following two criteria

have been met: (1) they have been convicted of a drug-related offense; and (2) the forfeited property “can be shown to be substantially involved in facilitating the crime or purchased with the proceeds from criminal acts” (12). This second criterion points to a related necessary reform advocated by Ehlers. While civil AF laws allows for the seizure of any property “which is used, or intended to be used, in any manner or part, to...facilitate the commission” of any drug-related offense [21 U.S.C. § 881 (a)(7)], no legal definition of “facilitation” is provided. This ambiguity allows law enforcement agencies to confiscate assets based on the most tenuous of connections. Ehlers advocates a definition of “facilitation” that can be strictly interpreted by the courts. The reforms advocated in this paragraph would prevent law enforcement agencies from seizing assets prior to conviction and would require them to provide proof of an asset’s integral connection to the illicit drug behavior. With this reform, the approximately 80 percent of civil AFs that occur without a conviction (Schneider and Flaherty 1991) would become a relic of the past.

Finally, but perhaps most importantly, critics emphasize that civil AF reforms will continue to be deficient until they address the problems associated with the “equitable sharing program” (Blumenson and Nilsen 1998; Ehlers 1999). After all, it is the revenue-generating potential of this program that apparently fuels law enforcement’s use of civil AF. It was immediately after the establishment of this program in 1984 that civil asset forfeiture proceeds experienced a thirty-fold increase from \$27 million in 1985 to \$875 million in 1992 (Nelson 1992). Reformers advocate changes at both the federal and state levels (Blumenson and Nilsen 1998). At the federal level, the simplest solution is to remove from law enforcement the ability and motivation to profit directly from the

seizures that they make. This would be most easily accomplished by reestablishing the previous method of requiring proceeds from AF to be deposited in the Treasury's General Fund and dispersed through regular congressional appropriations procedures. Alternatively, reforms could have the same effect by requiring law enforcement agencies to debit any proceeds they acquire and retain through seizures from the annual budgets they receive through congressional appropriations. Either of these methods would serve to prevent law enforcement agencies from directly benefiting from the asset seizures they make. Monies would be dispersed back to agencies based on their need and not on the amount that they have seized. Additionally, under these changes, agencies would be unable to use AF proceeds to supplement their budgets and to, in some cases, become self-sufficient and unaccountable to the higher authorities who typically wield some amount of control through budgetary appropriations. Critics believe that these reforms, if implemented correctly, would decrease law enforcement's motivation and temptation to emphasize revenue-generating strategies over supply reduction strategies.

At the local and state levels, critics advocate reforms that would prevent local and state agencies from "federalizing" their seizures in order to circumvent their states' less profitable asset forfeiture laws (Blumenson and Nilsen 1998). This practice, according to critics, provides enforcement agencies with a "means of manipulative forum shopping without furthering any other, more legitimate purpose" (Blumenson and Nilsen 1998, 109). To decrease this "manipulative forum shopping," legislative reform similar to that attempted with the Anti-Drug Abuse Act of 1988 would have to be passed again—most likely over the vehement protests of law enforcement agencies and their lobbyists. To be successful, such legislation should repeal the adoption clause allowing the "federalizing"

of seizures. If that is unfeasible, new legislation should, at the least, require that money allocated back to the state after an adoptive forfeiture be allocated according to each respective state's forfeiture laws. A third, but less restrictive, alternative would allow the Department of Justice to adopt a seizure, but only after a state court has ruled that there is sufficient cause to bypass a state's civil asset forfeiture laws. Finally, in those states with civil AF laws allowing enforcement agencies to profit directly and substantially from the seizures that they make, reformers suggest that abuses be curtailed by requiring that AF proceeds be deposited in a state's general treasury fund and dispersed according to normal appropriations procedures.

While these reforms are varied in nature, they all share a common thread—the desire to decrease law enforcement's over-utilization of civil AF as a revenue-generating mechanism. These reforms are based on the assumption that the most effective means of realizing this desire is to eliminate law enforcement's ability to directly profit from civil forfeiture seizures. Without this opportunity to directly profit from these seizures, reform proponents believe that the motivation to emphasize revenue-generating techniques and strategies over supply reduction strategies will dissipate. This, in turn, should alleviate a number of the goal displacement and due process problems associated with civil AF.

Conclusion

The title of this paper, while chosen with tongue in cheek, seems very appropriate in light of the material that has been presented above. Ask aspiring police cadets to describe their duties and responsibilities as future police officers and chances are good that a majority will confidently proclaim that it will be their duty, as well as their desire, “to serve and protect” the citizens living in their jurisdictions. The material presented

above suggests that this desire “to serve and protect” may, at times, be overshadowed by the financial and economic benefits afforded law enforcement agencies through civil AF laws. Oftentimes, policies and strategies are chosen based on their ability to generate revenue rather than on their ability to serve the interests of the community through the reduction of the illicit drug supply. This was made abundantly salient through the ethnographic research of Miller and Selva (1994). From the observations of these researchers, it would seem that law enforcement administrators and supervisors are encouraging and even challenging their officers to, in the now popular words of Cuba Gooding, Jr. in *Jerry Maguire*, “Show me the money!”

This is not to say that law enforcement agencies, in their pursuit of forfeitable assets and revenue, have completely abandoned their duty “to serve and protect.” They continue to do a fine and upstanding job of serving, protecting, and increasing their own financial resources. Never mind that in doing so, illicit drugs are often allowed to remain on the streets, innocent individuals’ due process rights are trampled (sometimes with deadly or extreme financial consequences), minority groups and drug mules are unfairly targeted and impacted, and drug kingpins are permitted to buy their way out of serious prison time. It is difficult to think of a situation more in need of reform. Reforms have been suggested. It is time for politicians to recognize the corrosive effects of civil AF laws and to make the necessary reforms.

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