

STORY

# No Drugs, No Crime and Just Pennies for School: How Police Use Civil Asset Forfeiture

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Missouri police have spent money acquired through civil asset forfeiture on expenses including renovated jails, new police cars, exercise equipment, courtrooms, military equipment and helicopter equipment. Image by David Kovaluk. 2019.

In the past two decades, the federal government took in \$36.5 billion in assets police seized from people on America's roads and in its poorer neighborhoods, many of whom never were charged with a crime or shown to have drugs.

Most of the money seized by this civil asset-forfeiture process returns to the law-enforcement agencies that seized it, providing funds for a variety of law-enforcement needs and desires, including exercise equipment, squad cars, jails, military equipment and even a margarita maker.

Many of the seizures occur along corridors that carry drugs east to big cities and cash back west. The Interstate-44 corridor through southern Missouri, Interstate 70 through St. Charles County and the network of interstates that connect in Illinois across from the Gateway Arch are prime locations for asset forfeiture and drug traffic.

Civil asset forfeiture is a controversial law-enforcement tactic that is based on a legal fiction dating back to the days of the pirates. The fiction is that property can be a “criminal.” Police can seize property they think is connected to a crime, even if they don’t charge the owner of the property with a crime — just as navies seized pirate ships in colonial days.

The practice skirts the Fourth Amendment's guarantee that Americans are free from unreasonable searches and seizures, and it provides a potentially corrupting incentive for police to circumvent the law to fund their departments.

An unusual alliance of libertarians and liberals — from the ACLU to Cato and the Koch brothers — says civil asset forfeiture often amounts to highway robbery. The alliance is crusading for reform in court, Congress and the state legislatures.

The Institute for Justice, a libertarian organization, said in its report “Policing for Profit” that the “civil forfeiture laws pose some of the greatest threats to property rights in the nation today — too often making it easy and lucrative for law enforcement to take and keep property, regardless of the owner’s guilt or innocence.”

### **Investigative findings**

St. Louis Public Radio is investigating civil asset forfeiture in collaboration with a media team led by the Pulitzer Center on Crisis Reporting in Washington, D.C. That investigation has found:

- No criminal charges: Most highway seizures of cash do not lead to criminal charges, but law enforcement still keeps the money.
- Money for police: The local law-enforcement agencies that seize cash on the nation's highways get to keep most of what they seize and spend it.
- Federal Loophole: Law-enforcement agencies can circumvent state restrictions on the use of forfeited property through the federal Equitable Sharing Program, under which the Justice Department adopts a forfeiture and sends up to 80 percent of the money back to local law enforcement to spend.
- Police not schools: States such as Missouri have laws directing forfeited funds to schools. But by using the federal Equitable Sharing loophole, law enforcement holds onto almost all of the money. The same thing happens in Indiana, Maine, Maryland, North Carolina, South Dakota, Ohio and Vermont.
- State reforms circumvented: More than half the states have passed forfeiture-reform laws in the past five years, yet police circumvent many of the reforms through the federal Equitable Sharing loophole. Channeling money through that federal program washes away state reform requirements.
- Reforms unenforced: Many state reform laws haven't been enforced. The District of Columbia didn't produce required reports for the three years after passage of a 2015 law. Ninety percent of Kentucky law-enforcement agencies didn't report required seizure information from 2013-17. New Mexico abolished state asset forfeiture, but local police still seize property under dubious local laws.
- No drugs, no charges: In Missouri, St. Charles and Phelps counties seize about \$1 million a year, mostly by taking in cash in highway stops where no state criminal charges are filed and no drugs seized.
- Military vehicle purchase: The St. Louis County Police Department used \$170,000 in asset forfeiture money to buy a BEAR (Ballistic Engineered

Armored Response) tactical vehicle in 2001. It was in use at the time of the Ferguson protests. The county also spent \$400,000 in forfeited money on helicopter equipment in 2011. The Missouri Highway Patrol spent more than \$2 million in forfeited funds on vehicles between 2010 and 2014.

- Interagency squads invisible: Eighteen interagency drug task forces — with acronyms such as Maverick, Comet and Nitro — seize property in Missouri but often try to hide from public scrutiny. Some task forces claim not to exist; others claim to be exempt from the state Sunshine Law. A judge disagreed last year with the St. Louis Police Department's effort to avoid releasing information on its task force.
- Cash before drugs: Police in Missouri, Tennessee and other states focus their interdiction on the westbound lanes of interstates where cash from drug sales is returning to the cartels. Far fewer stops occur on the eastbound lanes where the drugs could be seized before they are sold to users.
- Desert Snow: A cottage industry of current and former officers has grown up to train police on seizure techniques. Desert Snow — a private firm headquartered in Oklahoma — provides this training and runs a private “Black Asphalt” computer system that gives officers private information that can help identify people in suspicious vehicles.
- Targeting minorities: Asset forfeitures often target minority and low-income groups. Many of those stopped in Phelps County, Missouri, for example, have Spanish surnames.



Phelps County, Missouri. Image by Brian Muñoz. USA, 2018.

## **Highway robbery?**

David B. Smith is the nation's leading expert on civil asset forfeiture. He assisted Congress in drafting asset-forfeiture laws and has written a legal treatise on the topic.

The Virginia lawyer said in an interview that the root of the “problem with civil forfeiture is the earmarking of the sale proceeds for law enforcement. Once police got used to it, they became addicted to it and had to have it.” The Great Recession deepened the dependence of law enforcement on asset forfeiture, because police budgets were cut, Smith said.

“The Equitable Sharing Program became the clearest problem child of the federal government’s deeply troubled asset-forfeiture program,” he said. “As local police and sheriffs’ department budgets grew increasingly dependent

on equitable sharing money, blatantly illegal seizures mounted. Many were nothing more than thinly disguised highway robberies of motorists, usually minority group members.”

A 2017 audit by the Justice Department’s Inspector General criticized the lack of safeguards in federal oversight and said the department wasn’t keeping track of whether the seizures were helping criminal drug investigations.

The IG said the department had failed to develop a method to “evaluate fully and oversee their seizure operations, or to determine whether seizures benefit criminal investigations or the extent to which they pose potential risks to civil liberties ... the risks to civil liberties are particularly significant when seizures that do not relate to a criminal investigation are conducted without a court-issued warrant, the presence of illicit narcotics, or subsequent judicial involvement ...”

### **Here’s how civil asset forfeiture works:**

Police watch for suspicious cars with out-of-state license plates and stop them for minor traffic violations, such as changing lanes without a blinker or touching the fog line on the edge of the road. If police find occupants with suspicious stories or mannerisms, they ask to search the vehicle. If they find large amounts of cash and other suspicious circumstances, they seize the cash as drug-related, send it along to the federal government for forfeiture, getting back 80 percent to buy new equipment, computers, jail cells, guns and ammunition.

Meanwhile, the suspect usually goes down the road with no criminal charges filed or drugs seized. If citizens try to get the money back, they face obstacles. They are not entitled to a free lawyer, nor is it easy to find a lawyer equipped to handle such cases. Many attempts to get funds back are rejected for technical reasons.

By sending property seized through the federal Equitable Sharing Program, officers don't have to meet the high standard of proof required by state laws such as Missouri's.

Missouri law appears to require a criminal conviction for a forfeiture. But officers going the federal route can seize the cash, release the suspect and keep the money as long as there is a preponderance of the evidence that it is related to a crime. That means more than 50 percent of the evidence, a far lower bar than beyond a reasonable doubt.

A person traveling in rental car with a large amount of money who seems nervous and isn't telling a straight story is viewed by police as meeting the preponderance of the evidence standard, even though there isn't enough evidence to file a criminal charge, much less obtain a conviction.

## **Defenders**

Law-enforcement agencies and the Trump administration stoutly defend the importance of civil asset forfeiture. They say it plays an important role in weakening drug cartels, watching out for terrorists and funding cash-strapped police and sheriff's departments that would otherwise be driving old, worn-out police cars and buying their own guns and holsters.

One vocal defender of civil asset forfeiture to fund police needs in Illinois is Kane County Sheriff Ron Hain. In 2010, he wrote a self-published book on Desert Snow, under the pseudonym Charles Haines: "Inroads: A Working Solution to America's War on Drugs." It featured an unnamed "Sicilian" deputy in Phelps County, Missouri, and another anonymous officer in an Illinois village across from the Arch and celebrated them as heroes in the interdiction effort.

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In the book, Hain called for “turning our police forces into present-day Robin Hoods,” with expanded highway interdiction. “All of our hometowns are sitting on a tax-liberating gold mine,” he wrote.

Smith, the legal expert and critic, acknowledged that much of the cash seized along the highway is taken from people connected with drug activity. But he said many of the motorists initially stopped as suspicious are innocent. The victims of those unjustified stops based on minor traffic violations are uncounted and faceless victims, Smith said.

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### **From Oxen to Pirates**

The Desert Snow group of law-enforcement veterans who train officers for highway interdictions has an insignia with a black knight in armor on horseback carrying a shield with a cross. It’s an appropriate symbol for a legal tool that goes back to medieval times and before.

Smith traces asset forfeiture to the Biblical saying, “If an ox gore a man, the ox shall be killed.” In the Middle Ages, there were even trials of insects that had caused plagues. Later, during the height of the British Empire, and the

birth of the United States, navies had to defend against pirates on the high seas; treating the ships as the criminals and seizing them was more effective than locking up pirates.

Today, the way the legal fiction works is to designate the property, not the person, as the criminal. That justifies seizing the property even when the owner is innocent.

In 1996, the U.S. Supreme Court embraced the ancient notion of property as the offender. The case involved a woman named Tina Bennis (<https://www.law.cornell.edu/supct/html/94-8729.ZS.html>), whose husband, John, had been caught by the Detroit police having sex with a prostitute in the family car. The authorities declared the car to be a public nuisance and seized it. Tina Bennis, who knew nothing of her husband's escapades, claimed she shouldn't lose her half of the car. The Supreme Court disagreed, 5-4.

Chief Justice William H. Rehnquist based the decision on an early 19th-century precedent involving the Palmyra, a ship commissioned as a privateer by the King of Spain to attack U.S. vessels. A 19th-century court ruled "the thing is here considered as the offender." The ship would be seized even if the owner was innocent of the privateering. In the same way, Michigan could seize the Bennis family auto even though Tina Bennis didn't know about her husband's illegal use to cheat on her.

### **Misgivings on the court**

Some of the most conservative justices on the Supreme Court have expressed misgivings about the court's acceptance of the fiction that the property is the criminal and can be seized from an innocent owner.

Justice Clarence Thomas wrote in 2017 that the court "should not tolerate ... harsh and unfair historical practice" from the colonial era.

“These forfeiture operations frequently target the poor and other groups least able to defend their interests,” he wrote. “Perversely, these same groups are often the most burdened by forfeiture. They are more likely to use cash than alternate forms of payment, like credit cards.”

Late last year, the Supreme Court took up a case from Indiana where it appears ready to require states to abide by the 8th Amendment’s prohibition of “excessive fines” in asset-forfeiture cases.

Tyson Timbs had bought a \$42,000 Land Rover with money from his father’s life-insurance policy. Twice he drove the car when selling a small amount of heroin. The maximum fine for the heroin sales was \$10,000. Timbs claimed it would be an excessive fine to require him to give up the \$42,000 car when the fine would be a fraction of that amount.

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Indiana’s Supreme Court claimed the excessive fines clause of the 8th Amendment has never been incorporated against the states — in other words that the states don’t have to abide by it. Justice Neil Gorsuch ridiculed that view saying during oral argument, “Here we are in 2018 still litigating incorporation of the Bill of Rights. Really? Come on.”

That comment and others made it clear the court will recognize the right to be free of excessive fines imposed by state and local government. What is not clear is how broad that right will be, and whether it will protect Timbs’ Land Rover.

Justice Sonia Sotomayor, from the court's liberal wing, seemed ready to go that far. "If we look at these forfeitures that are occurring today," she said, "many of them seem grossly disproportionate to the crimes being charged."

### **The Kochs — Moving the needle**

Two conservative values drive the support of civil asset-forfeiture reform: the belief that law should protect private property from government overreach, and the federalist belief that the Justice Department's dominance of civil asset forfeiture runs roughshod over federalism by nullifying the effectiveness of state forfeiture-law reforms.

The law that earmarked civil asset-forfeiture funds for law enforcement passed with bipartisan support in 1984 during the height of the anti-crime, anti-drug era.

One senator influential in passing the law was a young Democrat named Joe Biden, who sat on the Judiciary Committee.

Leading members of Congress came to have reservations. The late Rep. Henry Hyde, a rock-ribbed conservative from Illinois, said later that the practice "has allowed police to view all of America as some giant national K-Mart, where prices are not just lower but nonexistent — a sort of law-enforcement pick-'n-don't-pay. Forfeiture should be a crime-fighting weapon, not a money-making machine for law enforcement."

Hyde and his allies passed reform legislation in 2000, but it hasn't stopped local law enforcement from capturing the lion's share of proceeds from civil asset forfeiture.

Today, libertarian conservatives such as Sen. Rand Paul, R-Kentucky, lead the reform effort. Sen. Charles Grassley, the conservative Iowa Republican who chaired the Judiciary Committee, also sponsored reform legislation.

In 2014, Grassley made a major effort to reform civil asset forfeiture, but Democrats didn't show up for the hearings. Pro-law-enforcement Democrats such as Sen. Dianne Feinstein, D-California, made no effort to pass the law, said Smith and congressional aides who worked on the reform.

### **Holder reform; Sessions retrenchment**

Obama Attorney General Eric Holder reformed the Federal Equitable sharing program in 2015 to require criminal charges or warrants before federal adoptions of forfeited property in many cases.

But after President Trump's election, chances for reform evaporated. Former Attorney General Jeff Sessions reversed Holder. He said, "Our law-enforcement partners will tell you, and, as President Trump knows well, asset forfeitures is a key tool that helps law enforcement defund organized crime, take back ill-gotten gains and prevent new crimes from being committed, and it weakens the criminals and the cartels."

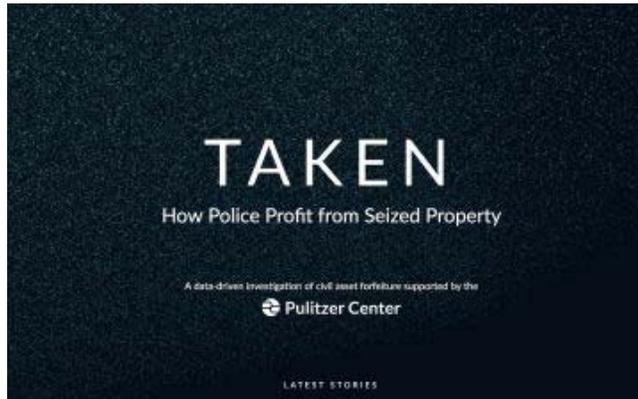
Trump underlined his administration's opposition to civil asset reform when a Texas sheriff complained to him at a White House meeting in 2017 that an unnamed state senator in Texas wanted to require a conviction before money could be forfeited, according to a Texas Tribune report.

(<https://www.texastribune.org/2017/02/07/trump-invites-speculation-after-offering-destroy-state-senator/>)

Sheriff Harold Eavenson said he had told the senator that "the cartels would build a monument to him in Mexico" if the asset-forfeiture bill passed.

"Who's the state senator?" Trump shot back. "Want to give his name? We'll destroy his career."

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