HB18-1020 an Economic Analysis

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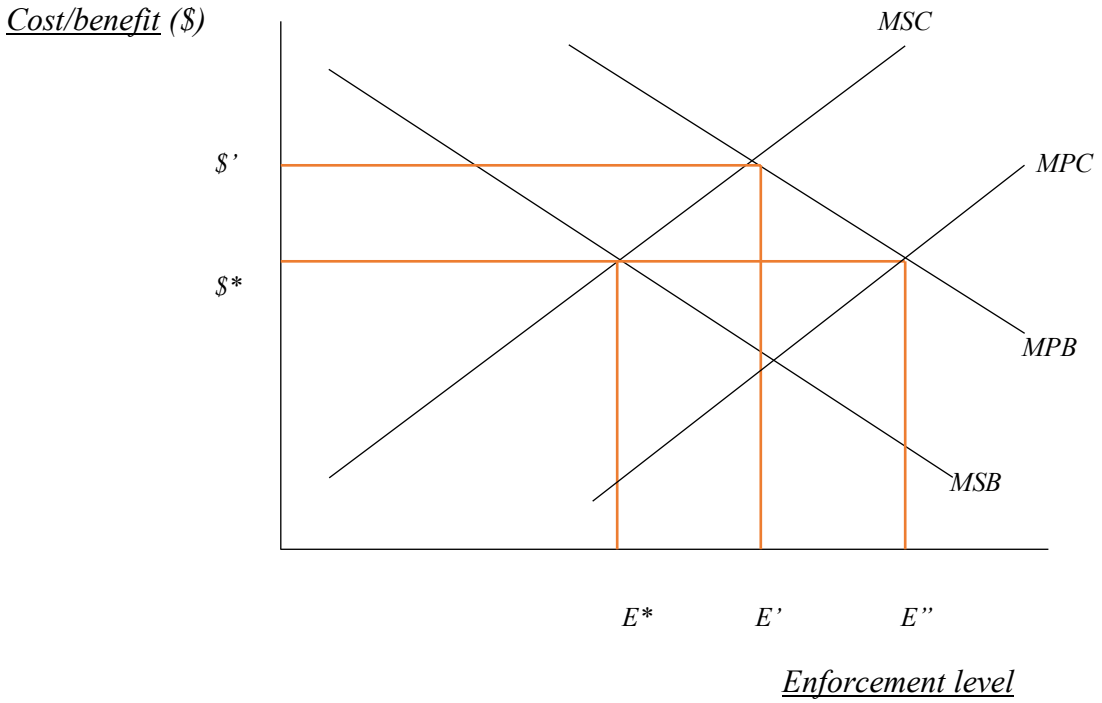
Civil asset forfeiture is the practice of seizing property, or monies, suspected of being utilized to commit a crime, by law enforcement officials. The seized funds are then utilized as a revenue source by the seizing agency in order to fund future operations.

Introduced to the Colorado State House of Representatives, HB18-1020 fails to increase the procedural burdens imposed upon law enforcement when engaging in civil asset forfeiture, and it expands the monetary incentive to engage in forfeitures. This will have the effect of exacerbating overzealousness from the law enforcement community, in regard to the practice.

HB18-1020 has three major elements. It clarifies who must report seizures by shifting the responsibility away from the 'seizing agency' and placing it on a 'reporting agency,' which is ambiguously defined. Next it alters the disbursement formula for forfeiture revenue. Lastly, it creates two grant programs. The law enforcement assistant grant program, funded by marijuana tax revenue, will reciprocate law enforcement agencies for revenue lost due to HB17-1313- which passed last year. While the Law Enforcement Community Services Grant will provide law enforcement and local governments with revenue acquired through the alteration of the disbursement formula.

The intention behind civil asset forfeiture is to deprive criminals of the fruits of their labor in order to discourage engagement in criminal markets (Snead). However, its only burden of proof rests upon the standard of probable cause (Snead). This is significantly more lenient than the burden necessary to convict someone of a crime. When the relatively low costs of seizing property are compounded by the substantial potential monetary gains, it creates a system of perverse incentives that are ripe for abuse.



Law enforcement, like any other goods or services, is subject to the constraints of scarcity and opportunity cost. Thus, any resource used to investigate a crime could have been used to provide another important social service. Therefore, when we discuss the optimum level of enforcement it should be in terms of where the marginal social benefit of police enforcement and the marginal social cost are equal. That is to say, the additional benefit accrued to society from a little more enforcement is equal to the potential gains that would have otherwise been achieved had we not expended these resources on certain types of enforcement (Boudreaux and Pritchard).

The optimum level of enforcement, E* is the level by which we would enjoy the maximum societal benefit from law enforcement agencies, and the most efficient resource allocation. Any point beyond E* indicates an inefficiency because the associated costs of the additional enforcement outweigh the additional societal benefits (Boudreaux and Pritchard).

However, since law enforcement officials get to retain the revenue that they have extracted through forfeiture (Snead), the additional benefit accrued through enforcement

increases the marginal benefit for law enforcement at all levels, as is indicated by the marginal private benefit curve, or MPB. This leads to a socially inefficient outcome because the effective enforcement level for revenue producing transgressions is now greater than the social optimum, and thus a greater amount of law enforcement's resources are being utilized to pursue crimes that net a revenue advantage as opposed to other important goals for which these resources may have been more efficiently allocated.

This issue is further compounded by a relatively low burden of proof required for forfeiture cases. For every other kind of crime, it must be proven beyond a reasonable doubt that the individual in question is guilty of a crime before the state can deprive them of life, liberty or property (Boudreaux and Pritchard).

The issue here is that the incentive structure we would want for society is divergent from that faced by law enforcement. Our burden of proof is a constraint on law enforcement to protect individual rights and ensure, to the best of the state's ability, that those subject to punitive measures are deserving of such coercive practices (Boudreaux and Pritchard). However, in cases where civil asset forfeiture is practiced, the barriers that law enforcement must overcome to gain the benefits of their actions are lower than that of other types of enforcement. This has the effect of reducing the costs associated with prosecuting crimes related to forfeiture, and thus shifts the Marginal Cost curve downward from the MSC to the MPC or Marginal Private Cost, and produces enforcement level E", which is well beyond the social optimal.

HB18-1020's alteration of who must report seizures is at first encouraging. Shifting the responsibility of oversight to a disinterested third party would subject forfeitures to a higher level of scrutiny in order to ensure their legitimacy. Consequently, this would increase the transaction costs faced by law enforcement agencies when engaging in civil forfeiture, and thus shift the

marginal cost curve closer to the MSC. However, due to the ambiguity of the bill, there is no reason to believe that the 'reporting agency' will be sufficiently independent of the 'seizing agency'. Therefore, there is no reason to believe that this will have any tangible influence on the incentive structure faced by law enforcement, and the effects are likely to be null.

The changes in respect to the disbursement formula will have little to no effect on the incentives faced by law enforcement as well, and thus will be insufficient to alter behavior. Prior to this bill, 50% of the revenue generated through forfeitures were distributed to the relevant law enforcement agency and their overarching municipality, while the other 50% went to the relevant MSO that is tied to that municipality. Under HB18-1020 the law enforcement agency and their municipality still retain 50%, thus there is no change to the marginal benefit of pursuing forfeitures, and no incentive to curtail enforcement on infractions with a revenue advantage. The rest of the revenue will be disbursed evenly between the MSO and the Law Enforcement Community Services Grant Program. This will only harm the relevant MSO's who now have less revenue for their operations.

Funded through the change in the disbursement requirement, the Law Enforcement Community Grant Program will substantially incentivize increased enforcement of infractions that net a revenue advantage. This program provides law enforcement, local governments, and community organizations with grants for community services. Since only 5% of the revenue in the fund is allowed to be used for administration costs, at least 95% of the funds generated through forfeiture, will be reinvested in the forms of grants. Law enforcement, being a primary recipient of the grants, will have a stake in contributing to the grant program, because that will increase the amount that must be distributed, and thus increase the amount of revenue for law enforcement generated through forfeitures (albeit indirectly). This pushes the marginal benefit

curve outward, and the effective enforcement level for revenue producing infractions thus increases. The result is a net societal loss as even more resources are being expended to enforce revenue generating infractions at the expense of socially desirable goals that can no longer be achieved.

This bill also fails to address one of the most fundamental issues associated with civil asset forfeiture. Since the burden of proof necessitated by forfeiture law remains unchanged the marginal cost of pursuing forfeitures remains lower than that of pursuing any other variety of criminal misconduct. This preferential advantage keeps the MPC curve below the MSC curve, and thus continues to incentivize a supra-optimal level of enforcement.

This institutional reality also has another deleterious effect. It rewards those who neglect to uphold property rights. Since civil asset forfeiture is independent of standard due process procedures, it becomes incredibly easy to extract revenue from innocent individuals without even charging them with a crime (Sensebrenner). These resources are then considered 'guilty until proven innocent' which places incredible costs on individuals trying to reassert authority over their property (Sensebrenner). The result of this erosion of property rights is the discouragement of productive economic activity that raises the living standards of those involved. This makes us all worse off.

HB18-1020 is a bill that ought to be heavily reformed, or even discarded. The nature of civil asset forfeiture creates deleterious effects through perverse incentives. This bill does nothing to address those costs, and even encourages engagement in the practice. Therefore, it is imperative that HB18-1020 is stopped or heavily amended to address these concerns.

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