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Why Cops Should Be Chasing the Bad Guys, Not the Big Bucks

A Former Prosecutor Explains How Civil Forfeiture Undermines America's Criminal Justice System.

Foreword

Viewers who have seen the classic TV detective show *Dragnet* will recall the lines that introduced each episode: “The story you are about to hear is true. The names have been changed to protect the innocent.” That warning also applies to the story you are about to read—a story that describes the ethical difficulties that civil forfeiture creates for the administration of justice and the rule of law.

The author, a career prosecutor, has changed a few names and identifying details in the account he provides. But these changes should not obscure the central narrative of this autobiographical account: the terrible consequences of the civil forfeiture system for law enforcement and the pursuit of justice.

One way to understand civil forfeiture is as an additional method of taxation, albeit one that distributes burdens on taxpayers quite inequitably. Unfortunately, few people appreciate the impact of the burdens that civil forfeiture places on prosecutors and other law enforcement personnel—whose budgets now regularly depend, in one way or another, on the seizure and forfeiture of cash from large numbers of people who have never been found guilty of any offense.

That budgetary fact creates a set of troubling consequences that most people rarely consider. More precisely, civil forfeiture creates a number of perverse incentives:

- It encourages law enforcement officers to focus more on revenue generation than on fighting crime when carrying out their duties;
- It encourages elected officials and other policymakers to avoid budgetary decisions by delegating funding choices to law enforcement personnel;
- It contributes to the erosion of constitutional norms by allowing for an end run around the standard procedures of legislative authorization and appropriation of budgets; and
- Perhaps most troubling of all, it incentivizes public officials to suspect mass wrongdoing by everyday citizens and then to profit institutionally from that suspicion.

The message of this autobiographical account, in a nutshell, is: When the machinery of civil forfeiture diverts cops and prosecutors away from fighting crime and toward the collection of revenue, it is a recipe for the miscarriage of justice.

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Chapter 1

Civilized society rests on law—and law enforcement. We can dream of a place where nobody hurts anyone else, but that isn't the world we live in. People commit crimes, and those people deserve punishment. Just as we need doctors to cure the sick, we need cops to capture criminals. I've spent much of my life as a prosecutor. For most of my professional career, I worked in tandem with cops to stop crimes and put bad guys in jail. I loved my job—even though, at times, it forced me to face some ugly realities.

I began my prosecutorial career as an assistant district attorney in a southern state, covering four different counties. I wasn't able to spend much time behind a desk. When it's your job to prove that someone is guilty beyond a reasonable doubt, you live in court. The nature of the job involved plenty of visits to courthouses scattered across the district and a lot of time behind the wheel. Keeping the public safe was exciting and satisfying—but, at times, a bit exhausting, because new cases never stopped coming in.

I want to note, though, that most of my work didn't involve prosecuting suspects at trial. In fact, most criminal cases are resolved through plea deals. Like many other professions, prosecution has become something of a volume business. The vast majority of the cases I was handed were ultimately resolved through plea bargains. That is, the defendant's lawyer and I would confer, come to an agreement, recommend punishment to the judge, and the judge would usually approve it. The realities of limited resources require everyone in the system, myself included, to accept imperfect outcomes. For instance, sometimes I would need to plead down offenses to misdemeanors, because felony offenses would require an

indictment, which itself would require a second court visit. The system is simply not capable of letting every felony case go to trial. That means prosecutors have to make hard choices.

It was as simple as this: I would walk into court, I'd be given a metal bin of case folders, and I couldn't leave until I had resolved all of them. Each folder contained information on one case, and in each case, I had several options: I could dismiss the case, I could settle the case, or I could send the particulars of the case to a grand jury. Every district attorney carries a high volume of cases every day—that's the job. For every case I tried, I pled out or dismissed somewhere between 10 and 100 cases. The justice that most defendants received came from negotiations between prosecutors and defense counsel, not from a jury of the defendant's peers. By necessity, you must set priorities and whittle down the cases you send up to a grand jury.

In retrospect, I think my work as an assistant DA was something like the work of a doctor in an emergency room. Many patients who enter the emergency room need minor care, like stitches and aspirin, and so the goal there is to get them the minor care they need. A few emergency room clients are perfectly healthy and shouldn't be there at all, so the goal there is to get them to walk out as soon as possible. The patients who need significant and specialized care may need something that an emergency room doctor can't provide immediately; the goal there is to triage the patient into a situation where he or she can get the care that is needed from the personnel who can provide it.

Although the workload was sometimes heavy and punishing, I loved it. My colleagues were smart and pleasant to work with, and my supervisors set a high standard of integrity. We always had the resources we needed to incarcerate dangerous or repeat criminals. The leadership in our office regularly urged us to use appropriate prosecutorial judgment in each defendant's case, rather than—as happens in some jurisdictions—suggesting that we should meet artificial numerical targets for indictments or convictions. None of my colleagues ever told me that budget concerns should affect the way that we made prosecutorial decisions.

Eventually, though, I heard a different message.

Chapter 2

It's a blessing to have a job where you are asked to do one thing only: to serve the interests of the public by doing work that is as professional and conscientious as possible. Not all jobs are like this. We all know that there are plenty of jobs where the employee is judged on something beside the quality of his or her work. In fact, there are plenty of jobs where it's clear that what really matters is how much revenue the business and its people bring in. That wasn't the case in the prosecutor's office where I served. My colleagues and I got a regular paycheck from the state—and we had no internal pressure to hit a set number of charges or convictions. Our office had a given number of prosecutors on staff and a given number of cases to handle, and we simply managed the caseload with the resources we had. Businesspeople in the private sector have to think about budgets and revenue streams all the time. Although resources were not abundant, I almost never had to think about budgets at all.

However, our office also contained a specialized law enforcement unit known as a drug task force (DTF). The funding of the DTF didn't come directly from the state; the way we put it was that DTFs are, in no small part, “self-funded.” That funding came from two revenue streams.

First, funds from assets seized from criminal defendants were forfeited into the DTF's budget.

Second, funds from specially designated fines—which we euphemistically referred to as “contributions”—acquired through drug-offense plea bargains also flowed into DTF's budget.

Although I did not realize it at the time, I now believe that the nature of the DTF's funding mechanism had some effect on its officers' behavior. I recall an instance in which I was called in for a prosecution in a quiet little town. The town consisted of a few thousand residents, but drug trafficking attracted an inordinate amount of police attention there—largely because a small stretch of interstate highway cuts through the town's northern end, which raised the possibility of drug seizures.

The police had interdicted the driver of a shiny late-model Lexus with a load of dope and money in it. Everything about the stop screamed: "This guy is part of a major drug trafficking organization." The defendant was obviously no criminal mastermind, just a mule hauling product from point A to point B. He was caught carrying tens of thousands of dollars in currency, plus tens of thousands of dollars' worth of cocaine, though, so he was the only target we had. From a crime control perspective, the mission was obvious: We should have tried to get the defendant to roll on his boss, and then try to get the higher-up target to roll on *his* boss, and so forth. That would have required the cooperation of the mule: To do that, you squeeze him. If he's not going to talk, he's the highest value target. Under either scenario, the right call is to fully and fairly prosecute him.

But here's what happened. An immaculately dressed lawyer entered an appearance at the court. I had never seen him before; he was not a regular member of this small bar. His proposal for a guilty plea involved forfeiture of the car, the cash, and the contraband—plus a generous "contribution." In hindsight, the lawyer's goal was clear: to get his client out of jail as soon as possible, and above all else, to ensure that his client felt no pressure to cooperate with any prosecutorial interviews or investigations. To state the obvious, that lawyer's central goal—no jail time for the client—was inconsistent with what one might think our central goal should have been: the preservation of a source of information for future investigations.

Whenever I negotiated significant plea deals, I was careful to take the preferences of the arresting officers into account—they were my colleagues and I worked with them daily. The officers in this case strongly endorsed accepting the defense lawyer's offer. Much later, when I had gained more perspective on the job, I realized how anomalous it was that the arresting officers, who typically advocate maximum punishment, were eager to accept fines over jail time. I now think it would have been better for our office if we had, at the very least, looked at the officers' recommendations more critically than we did.

In retrospect, I regret that we accepted this outcome. The mule got an easy way out. In my opinion, here is what was likely going on: A drug organization succeeded in derailing a potentially valuable investigation simply by dangling the tantalizing prospect of cash in front of law enforcement personnel who were excited about what that cash contribution could do for their budget. Once we accepted the offer, whoever the higher-up was in the criminal organization never had to worry about the prospect of his underling facing a difficult choice. Because we had our eye on his cash, the drug courier never had to choose between accepting heavy punishment or rolling over on his boss. There is no question that my inexperience factored into this situation; there is no way I would have accepted this outcome as a more mature prosecutor. But at that point, no one had ever explained why I should be wary of such arrangements. Eventually, I ended up figuring it out myself—but as the great speculative fiction author Harlan Ellison once wrote, it's easy to be smart, later.

Sadly, there was nothing unusual about a plea agreement of this sort. A fish doesn't spend a lot of time thinking about what life would be like out of water. The cops I worked with were good guys, and I certainly wanted to support their efforts to have the resources they need to perform. It was just understood that it was part of the job for the DTF to take in fines and revenues.

But there was something different about drug cases. None of my colleagues ever said anything like, "Make sure you collect the appropriate fine for your burglary case." In every non-drug case, fines are more of an afterthought. Generally speaking, fines are the sort of punishment that prosecutors, judges, and defense attorneys all agree are counterproductive. They aren't really effective punishment. Poor people can't pay them. Rich people shouldn't get to pay them in lieu of incarceration. And anyone leaving prison has a better chance of successfully returning to society if they aren't saddled with fines. So no one really bothers much with fines in ordinary cases where they go to the state's general fund, and it was certainly not part of my job to worry about such matters.

To state the obvious, forfeiture revenues function a lot like fines—even though the dynamics of forfeiture make the amount of the penalty much more discretionary. Nonetheless, when a drug case created the prospect of revenue, things were different. In those cases, there was a heavy office-wide emphasis on ensuring that the plea agreement designated any resultant revenue to be sent to the drug task force.

Revenue from drug cases really is different. This is the cash—and, sometimes, other property—that is seized by police and forfeited as part of a plea agreement. It can be separately designated to the DTF budget—the budget of the guys you work with. Because those revenues, as discussed above, were more or less the lifeblood of the DTF’s budget, you can see how paying attention to them might become an inescapable part of the job. Everyone knew that, and everyone knew that prosecutors were expected to dedicate drug revenues to the DTF.

This budgetary fact makes DTF agency financing different from that of most other government agencies. The supervisory authority that elected officials hold through the power of the purse is absent for self-funded agencies. Most government agencies are funded through legislative appropriations. A typical law enforcement agency relies on funding that is determined by a city council, a county government, or a state or federal legislature. DTF agency financing is different in that DTF leaders don’t have to go to elected officials to ask for funding. Instead, the more money they take off the streets, the bigger their budgets.

I wasn’t the only person who noticed this dynamic; criminal defense attorneys were well aware of it. When it came time for plea bargains, defense attorneys would regularly approach me with counteroffers that should have raised more red flags than they did. For instance, a suspect in a drug case who got an initial offer of six days in jail and a \$500 fine might counter with an offer consisting of half the jail time and double the monetary fine. That is the sort of option that might look acceptable to everyone in the culture I worked in. To be clear, I don’t blame defense lawyers for doing everything that they’re allowed to do for their clients; they have a professional obligation to serve their client’s best interests.

I look back on that kind of thing now with real concern, but back then nothing seemed especially out of the ordinary or unusual about it to me or my colleagues. Fines were viewed as an acceptable form of punishment. And it is most assuredly is the way that business is still being done today. But there is something that troubles me now. It rests on the fact that the duties of a prosecutor are categorically different from those of a defense lawyer. When I negotiated plea deals, I didn’t have the duties of a defense lawyer. My duty was different; it was a duty to the public, not to any one particular person, to seek justice.

Chapter 3

Shortly thereafter, I became a federal prosecutor, or an Assistant United States Attorney. In some ways, it was a culture change for me.

In a federal Department of Justice (DOJ) prosecution, there is no way for defendants to buy their way out of criminal jeopardy. The only thing that anybody cared about in my office when negotiating a plea was legitimate sentencing factors, not budgetary concerns. An offer to throw in a higher fine that would reduce the time or severity of a sentence would have been inconceivable. Several of my colleagues also had state-level prosecutorial experience, and I think each one of us had previous experiences with the peculiar dynamics of forfeiture. Accepting the offers of criminal defendants who sought to trade cash for a shorter sentence had rubbed us all the wrong way. Such an offer would not have been viewed positively at DOJ, either. If I took an offer of a bigger fine for a smaller sentence to my superiors for their approval, they would have questioned my judgment—and possibly my employment. Even if we were to enter into such an agreement, the fine wouldn't have made its way into the coffers of any law enforcement entity. At the federal level, there was no institutional way for a criminal defendant to get a bigger payment-for-smaller sentence agreement approved.

Furthermore, we had a culture that emphasized meaningful prosecutions and was focused on crime fighting. You'd think that was a given, but it is easy for governmental offices to focus on numerical measurements to gauge performance. This has implications that we don't always think about. It means, among other things, that the prosecutor who is running for reelection and brags about how many criminals he or she put behind bars may be using an imperfect yardstick. It's easy to quantify charging instruments or sentence lengths, but it's very hard to measure protection of the public—which is the value that really should be advanced by prosecutorial decisions. Measurement is important, but so is ensuring that we're measuring the right things.

Too often, the embrace of metrics leads decision makers to pursue low-hanging fruit. It's much easier to get your numbers up by putting low-level drug dealers behind bars—even though that can assign too little weight to investigating, capturing, and eliminating commercial drug networks. Yet, the prosecutor who sends convict after convict to prison, while leaving intact the criminal conspiracies that these defendants serve, may be short-changing the public. If the goal is to shut down McDonald's, you're not going to do it by arresting a couple of cashiers and fry cooks. It takes a lot more time and effort to get to the people who really make McDonald's run.

As I described above, just about every day I showed up in court as a state prosecutor, I was given a bucket of cases to resolve. For a federal prosecutor, there is no bucket of cases. A federal prosecutor has a great deal more discretion to decide which cases are worth pursuing. If I determined that some particular case was insufficiently strong or important, I was free to decline to accept the case. In effect, this decision kicked the case downstairs, putting it in the hands of state prosecutors. There was no need to take quick hits or settle for cash seizures. You can take your time and let the investigation dictate the pace. The option of a "contribution" to a drug task force fund to use as part of, but in lieu of, punishment did not exist.

I was impressed by the professionalism of the office culture. I worked with capable prosecutors and dedicated law enforcement officers, both state and federal. Since I regularly worked with the Organized Crime and Drug Enforcement Task Force (OCDETF), I worked with some of the best. OCDETF cases were typically worked up by joint task forces made up of combined local law enforcement coming under the umbrella of a federal agency, either the Drug Enforcement Administration (DEA) or the Federal Bureau of Investigation. The strong management in our office schooled us on the

right way to run a drug investigation. You do not settle for low-hanging fruit. Bottom-rung targets like couriers are a means to an end. You get the supplier. Then you get his supplier. You run it up the ladder as high as you can go. And almost invariably—if you are doing it right—that takes you to a drug cartel in Mexico.

And you really want to destroy as much of the cartel as you can. It doesn't matter how you feel about the war on drugs. I think it is reasonable to understand drug cartels as, in essence, terrorist organizations. These groups are able to tap into the vast wealth of Mexico, a country that shares a 2,000-mile border with the United States. These cartels have embedded themselves into positions of power in Mexican law enforcement offices. They often resort to extraordinary violence—against competitors and against law enforcement officers and their allies—to achieve their ends. Even today, I worry that far too few Americans appreciate how much drug commerce and trafficking have fragmented and destabilized the nation and government of Mexico. An honest law enforcement officer in Mexico will likely face violent death. A dishonest one gets richly rewarded. We all learned that eventually a Mexican officer will be asked by someone in a cartel if he prefers silver (money) or lead (bullets) (It sounds better in Spanish: “plata o plomo”). Those are the choices they often face, and we should never lose sight of what Mexican law enforcement officials risk.

We were all crystal clear on the importance of the mission, and I saw the team I worked with regularly deliver high-value cartel targets to face justice.

Being adequately funded matters a lot if you want to bring quality investigations and prosecutions, because those take time and money. Those are things that local and state governments have often not provided to their local officers, so naturally they have a concern of patching the budget holes. Facing massive shortfalls, local governments tell their police forces to do more with less. But underfunded police offices cannot always do more with less. Sometimes they end up doing less with less. So they end up patching budget holes with the proceeds from asset forfeiture.

We had no need for money; that didn't affect our prosecutorial decisions. What we did need was bodies. After we uncovered drug networks, we needed local law enforcement personnel to help us take them down. Sometimes these combinations create their own difficulties, because they can lead to a blending or blurring of responsibility and accountability. They can lead to controversies about who gets the credit for law enforcement actions and which agency should take possession of seized property. (Technically, the fruits of forfeiture cases involving both federal and either state or local authorities are known as "equitable sharing," under which the locals take up to 80 percent of any forfeiture proceeds and property under joint task force authority. It is an underappreciated aspect of how money infiltrates federal prosecutions.) Before we involved our local partners, though, we needed to investigate the networks.

Chapter 4

The critical tool in a good drug investigation is the wiretap. Getting a wiretap running is like turning on the light and seeing everything that was once behind the scenes. Once you can hear your target's conversations, you quickly learn everything about the operation. And what you want to do is identify the target's bosses and suppliers. You want to use that information to go up on those guys' phones, then rinse and repeat. Go as high as you can until the trail stops. Hopefully that ends with indictments of cartel figures abroad.

Wiretap investigations are delicate but essential tools. Doing them right requires a tremendous amount of money and time. When it works, the payoff is massive. It provides the best chance for dismantling an operation and capturing the suppliers. When you have evidence that one of your targets has been discussing commercial transactions with another possible target several times a day, that can be enough to move from reasonable suspicion into proof beyond a reasonable doubt. And there simply is no other way to take down a serious drug operation that is likely multinational. It's an exacting and sometimes exhausting job. You need to have someone listening to wiretaps in real time. To protect privacy, once you've determined that the call is personal business and unrelated to criminal conduct, you have to stop listening. It's labor-intensive, and it's made harder still because a quality wire is often in Spanish, and not all federal prosecutors are bilingual. Someone has to be sitting around listening in a secure room at all hours of the day for a minimum of 30 days. That involves considerable time and patience.

For a wiretap to work, at no point can any target know that he or she is under investigation. The second that there is any kind of an arrest or a seizure of anyone in the organization, any group worth its salt knows to drop their phones. They all get new numbers; it's a hassle for them, but it throws an investigation back to square one. Discarding their phones lets them thwart the wiretap investigation they all fear. It's an effective and widely employed countersurveillance technique.

Thus, wiretap investigations take up a lot of time and resources. Before a judge will even authorize your first one, you must devote enormous energy to show that a suspect is engaged in drug trafficking activity and uses his phone in furtherance of the crime. Supporting affidavits alone might be 40 pages or more. That may take three or even six months. And that's just to get off the ground.

A lot of waiting and watching is involved. That means that law enforcement officers must forego tempting, short-term targets like large sums of currency—the sort of things that entice those concerned about patching police budgets—even if they are easy pickings.

In short, adequate funding empowers DOJ-led drug investigations to do things in a way that state and local law enforcement cannot, but it doesn't mean that asset seizure isn't a problem. On the contrary, it remains a huge problem because it was a priority for state and local task force officers. The difference is that, as a fed, you are on the other side of it; you can see how forfeiture seizures compromise what you are trying to do, because you're working with colleagues at different levels of government every day.

Federal drug task forces are still staffed heavily with local law enforcement officers. Locals are encouraged to staff a federal investigation by the dynamics of federal equitable sharing, essentially because, as described above, local governments ultimately get the lion's share of money that is seized under this program. The feds need the bodies more than the money. The locals need the money badly enough to send over bodies. That's the bargain. It is a bargain that forces bad incentives on law enforcement officers, even in a federal investigation.

Chapter 5

During drug investigations, there are many times you know that cash is on the move. That didn't matter to federal agents, but it did to the locals on the joint task forces. Sometimes it was hard to convince the ones staffing the wire to stand down in the name of advancing the investigation. Sometimes they simply wouldn't do it, because they preferred to take the money. If someone heard on the wire that \$10,000, a trifling sum to a large drug operation, was moving and reported it up the chain, the locals might seize it—even though it would put the investigation back at its starting point. So we had to regularly instruct local officers who joined wiretap investigations that their duty of confidentiality included not sharing information with their ordinary chain of command if their higher-ups were not part of the investigation's circle of communication. It was all about preventing future cash seizures from burning the wire. Sometimes our agents and their colleagues did a good job of keeping information within our four walls. Sometimes they didn't.

I recall one particularly fruitful DEA-led investigation in which I participated. It was clear that we had tapped into a major operation. Over the course of many months, a sharp young DEA agent had worked the investigation to the point that we were able to obtain a wiretap on our primary target's phone. With the aid of the wiretap, we figured out that our drugs were coming into the city from El Paso, Texas. More importantly, we identified the phone number of our target's seller. Everything was going according to plan.

At that point, the case became multi-district. My local DEA office handed the information off to DEA-El Paso and I began working with a great prosecutor there who got a wiretap off the primary supplier. The El Paso target was supplying a large national syndicate, sending out drugs all across the country.

Just as we were ready to get our indictments and hit doors, DEA-Dallas took a look at the information obtained from the El Paso wire and decided that it also wanted to wiretap the individuals in its area. This made sense and was part of the protocol—you want to root out as much of an organization as you can, so it cannot regroup. This delayed our takedown date. It also put us in a tight spot because our targets frequently traveled internationally, and it was vital for them to be inside the country when everything went down. Still, we agreed to place the interests of the mission ahead of the interests of our particular department. Everyone was still doing things the right way.

Then the awful temptation of cash seizure reared its head.

Shortly after DEA-Dallas' wire went live, their people identified a large shipment of currency on the move. Without notifying any of us in advance, Dallas hit it. I was informed of Dallas' actions by one of my agents; both of us were horrified. This violated all the rules. Everyone is supposed to do a coordinated takedown. If there are conflicting priorities, the originating district—namely, us—is supposed to take precedence. You certainly don't burn the wire without at least giving us notice. That all goes double when we had put our takedown on standby to give Dallas a chance.

It's a lot like deer hunting; once the first shot is fired, the deer start running. Dallas' actions caused chaos throughout the operation. All the targets were dropping phones, destroying evidence, and trying to flee. No one was more adversely impacted than us. Our major target was in South America. We had planned to hold all the takedowns until the target returned, and, as the originating district, we should have called the shots. Instead, after more than a year on the case, the original target was able to avoid the day of reckoning (for a time; we ultimately were able to extradite him, but that's another story).

I still don't know why the Dallas DEA office decided to jump the gun. I don't know if the agents there were facing upward pressure from their local law enforcement colleagues, who stood to benefit through equitable seizure by receiving the vast majority of any funds seized. I don't know if they were more motivated by the desire to claim credit by being the first law enforcement agency to burst through the door, even at the cost of burning down a long-running investigation.

But I do think it's reasonable to conclude that money was dictating the pace of our international drug trafficking investigation. Everyone had to scramble to react to an unplanned seizure, and it hobbled our efforts. After all this time working the case the right way, patiently foregoing opportunities for cash seizures, we were ultimately beholden to someone else's self-interested decision. The reason we try to stick to cooperation and coordination was demonstrated—if one party to the investigation jumps out ahead of everyone else, it ruins things for all of us.

Ultimately, the hard work of many law enforcement professionals was undermined.

Chapter 6

It only got worse from there, and again, money was the problem.

When DEA-El Paso executed its search warrants on the supplier, they discovered upwards of a million dollars in cash. The problem was that, at least for our local police leadership, the money was not included in our equitable sharing program because it had been seized in a different district. And when the local police force heard that they were going to be excluded from this pot of money, they concluded, erroneously, that the feds had breached the terms of the deal and downgraded their participation in the joint task force. They thought they were getting cheated on equitable sharing. They were wrong, but their decision nonetheless undercut our manpower for our D-Day.

This happened right as we were preparing to execute search warrants. It wasn't just bad law enforcement; it was downright dangerous. The execution of search warrants is one of the most dangerous tasks that law enforcement officers must perform. You need an overwhelming show of force to lock down a scene so that law enforcement agencies can control it. When you're looking to break down doors with armed drug dealers behind them, you need your team to be fully staffed and prepared.

By the time we realized what was happening, we were monitoring a warrant squad that had shrunk to a bare minimum. I was getting status alerts from an agent who had to go through doors with nothing like appropriate personnel support; the coworkers he needed were just not there. It is difficult to contain my anger when I think about how extraordinarily dangerous this was when executing multiple warrants. Everyone came home safe, but it was a terribly frightening day for me. I am very grateful that all of the targets surrendered peaceably; some of them were extremely well-armed. Years later, it is still unpleasant for me to think about how this small group of brave men had been placed in such pointless jeopardy.

Chapter 7

I'm no longer faced with the daily realities of prosecution. I do not miss having to see how cash forfeitures and seizures affect the way we investigate drug crimes. Although it was not evident to me when I first became a prosecutor, funding law enforcement operations in this way creates a host of incentives that harm both public safety and law enforcement goals. By allowing such financial incentives to exist, we ask law enforcement officers to compromise their core mission by expecting them to handle their own funding. That responsibility should be placed on elected officials. Policymakers are escaping hard budgetary choices by offloading their funding responsibility to the police.

Every prosecutor I worked with hated civil asset forfeiture. Every one of us understood the horrible downstream effects it has on law enforcement behavior and compromised investigations. We all had tales like these. We all saw cases get compromised or tanked because of money. Every one of us understands that law enforcement agencies should be funded through proper budgeting, so that we can focus on the pursuit of justice, not trading charges for cash. Every one of us feels that something has gone wrong when we see civil forfeiture proceeds become revenue streams for police officers, sheriffs, and fellow prosecutors. Yet we regularly saw law enforcement officials publicly argue that asset forfeiture is a critical law enforcement tool, despite the negative effects it has had on actually fighting crime.

I am proud of the work that I did as a prosecutor. The things I have seen have forced me to this position. If you care about the police and crime, you should be disturbed at the prospect of burdening cops with funding obligations. Cops should focus on one thing only: investigating crimes. They ought to be chasing bad guys, not big bucks. It is our responsibility as citizens to make sure they are adequately funded. Instead, far too often—and to the detriment of their mission and to public safety—we place heavy burdens on cops because we expect them to make up for inadequate budget decisions made by legislators and other policymakers. I suspect that most Americans are unaware that forfeiture is used to prop up law enforcement budgets. And I have concluded that law enforcement budgets should be funded in just the same way we fund streets and sewer systems—through taxation and legislation. It is, quite simply, a matter of justice.

Afterword

In Gilbert and Sullivan's *Mikado*, one of the opera's characters, Pooh-Bah, is criticized about the inaccurate things he says. He replies that his statements are "merely corroborative detail, intended to give artistic verisimilitude to an otherwise bald and unconvincing narrative." I am unsure if this defense applies here, but the rules of ethics that I must follow have compelled me to change some of the facts in the narrative account above.

Because federal law and relevant ethical rules prevent me from discussing "non-public" information in matters in which I acted as a prosecutor, I have changed some of the specifics regarding the events described in the preceding account. The characters and events are all based on true experiences, but the actual events and the names of persons, places, and offices in which I worked have been altered to preserve confidentiality. For example, when I refer to DEA-Dallas, I am not actually discussing what DEA-Dallas did. In fact, everything I say about DEA-Dallas is a reference to another office. This means that the reader who is alarmed at the anecdotes I describe above should bear in mind that I have changed certain identifying details that describe the actors. Furthermore, I have chosen to publish this essay under the pseudonym of Anthony Finch; this measure is intended to create another barrier to disclosure of the identities of the people who were part of the events I have described here.

Finally, because I have written above about the moral responsibility of prosecutors and defense attorneys in our system, I want to underscore that those responsibilities are not symmetrical. This is a subtle point that I fear is sometimes overlooked. I do not fault defense attorneys for doing their

jobs. When an agreement is reached between a prosecutor and a defense attorney that benefits the accused, the defense attorney has succeeded in carrying out his or her duties, even if the result might be adverse to public safety. Perhaps the wisest thing that has ever been written about this asymmetry of responsibilities in the American system is a passage from a 1935 Supreme Court case, *Berger vs. United States*:

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

In other words, prosecutors have a special duty to the public that is not shared by defense attorneys. If a prosecutor sees a tension between the public interest and the prosecution of a defendant, he or she must give the public interest great weight—and that might even lead to ending the prosecution. But if a defense attorney sees a tension between the public interest and the defense of the client, the defense attorney is ethically required to ignore any public interest and attend only to the client's defense. These are asymmetrical duties. That is why the defense attorney who induces a jury to impose a sentence that he or she personally believes to be too light is doing his or her duty, but a prosecutor who induces a jury to impose a sentence that he or she personally believes to be too heavy has betrayed his or her duty.

Prosecutors have a special responsibility in our system to ensure that justice is done. As *Berger* explains, prosecutors must abstain from making improper arguments for the guilt of the accused in court. Similarly, prosecutors must ensure that courts are free of improper systems that deprive people of their liberty and property. I hope the reader will conclude that, in writing this account, I have been faithful to these prosecutorial duties.



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