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Economic analysis of the removal of illegal gains

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Abstract

The purpose of the present paper is to explore both the motivation for confiscating illegal gain and also to look at some of its legal aspects and economic effects. It is argued that the removal of illegal gain may be able to play a significant complementary role, if only by closing the gap between the maximum punishment the law will allow and fines sufficient to represent a credible deterrent. The paper develops a deterrence model and applies it to confiscation powers introduced to help combat drug trafficking. © 2000 Elsevier Science Inc. All rights reserved.

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1. Introduction

The removal of illegal gain is a sanction which has been widely adopted in many countries. Powers available to courts range from the confiscation of the proceeds from drug trafficking to the imposition on polluting firms of a requirement that they clean up polluted soil. The idea of the sanction in each case is that the offender should not be left with the profits he has made by committing a crime or a series of crimes. The purpose of the present

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paper is to explore both the motivation for confiscating illegal gain and also to look at some of its legal aspects and economic effects. We consider how it fits into the deterrence model of crime (Becker, 1968; Garoupa, 1997) and we also look at the way the sanction has developed in legal terms and how effective it has been.

In the economic analysis of crime a key finding is that under normal assumptions an optimal enforcement policy will entail the use of monetary sanctions, usually in the form of maximal fines. There are, however, some significant circumstances (such as when the wrongdoer is judgment proof) in which fines may not lead to optimal deterrence. In this case authors such as Shavell (1985) have advocated the use of nonmonetary sanctions, most commonly imprisonment. But imposing a prison sanction is costly. As a result many modern statutes regulating trade, markets, environmental pollution, crime and so on provide for alternative types of sanctions which may be imposed at lower cost. Sometimes these measures take a direct, nonmonetary form such as the shut down of a company. Some legislatures also give the judge the possibility to order that the judgment should be published through mass media. But another direction taken by legislators searching for alternatives to conventional criminal sanctions has been the development of powers to confiscate or seize assets or, more generally, the removal of illegal gain.

A flavor of the argument in favor of confiscation of illegal gain can be found in the following assertion by the Drug Enforcement Agency of the US Department of Justice:

‘Most Americans agree that criminals should not be allowed to benefit financially from their illegal acts. Federal Law provides that the profits and proceeds of designated crimes, as well as property used to facilitate certain crimes, are subject to forfeiture to the government. Asset forfeiture is one of law enforcement’s most effective weapons against drug trafficking because it takes the profit out of crime.’

To the economist this argument does not, on the face of it, look very compelling. Unless detection is virtually certain the prospect of confiscation of the proceeds from an offense may reduce, but will certainly not eliminate, its *ex ante* profitability. Our principal objective in this paper is to argue that there are certain circumstances, such as where there are limitations on the size or application of fines or where fines are costly to enforce, in which the removal of illegal gain may become an especially attractive and significant sanction. Using the narrower legal definition of fines, it is very common to find limits on the multiple by which a fine can exceed the social cost of an offense or the benefit derived by the criminal. Constitutional protections for citizens against oppressive punishments, or against punishments viewed as disproportionate to the crime, may be such that the probability of detection (and thus the cost of enforcement) has to be increased if deterrence is to be maintained. The removal of illegal gain may therefore be able to play a significant complementary role, if only by closing the gap between the maximum punishment the law will allow and fines sufficient to represent a credible deterrent.

The paper is structured as follows. Section 2 develops a model demonstrating the role removal of illegal gain might play and how it can be fitted into the optimal deterrence approach. The first part of section 3 of the paper sketches briefly the use of the sanction of removal of illegal gain in legal practice and reviews its increasing popularity with legislators

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