Civil Forfeiture in the United States

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Abstract

This article examines how the United States Congress has combated organized crime and attempted reducing the profitability of criminal offenses. One result of the legislation is the civil forfeiture which is based on the superstitious notion arose from the medieval that inanimate items have their own minds. Today, civil forfeiture is used to protect the public from assets involved in or derived from criminal activity. Civil forfeiture requires only probable cause in order to someone's property may be seized, and the legal presumptions are all turned around. In other words, the burden of proof is on the owner of property. As a result, civil forfeiture requires less evidence and provides fewer protection than criminal forfeiture. It can be an advantage for the law enforcement agencies and a major threat to the owners of assets. Moreover, in 88 percent of civil forfeiture cases, the properties are automatically transferred to the law enforcement agencies. Therefore, nowadays civil asset forfeiture is one of the most controversial practices in the American criminal justice system. Furthermore, there are more than 400 federal forfeiture statutes relating to several federal crimes, and each state has own statutory provisions for some form of asset forfeiture, which do not facilitate the defense of property owners. In addition, this essay reviews the history of civil forfeiture in the United States and also analyzes the possible constitutional conflicts of this tool.

Keywords: *asset forfeiture, civil forfeiture, forfeiture without criminal conviction, combating organized crime*

1. Introduction

Starting from the second half of 20th century combating organized crime has been a particularly important issue in the developed countries. Governments recognized the incarceration is not an efficient and sufficient tool to reduce the amount of criminal offenses. The punishments against individuals cannot restrain the members of organized crime groups who have been at large from committing criminal conducts again with use of unseized assets. These properties can be reinvested by other members

of the criminal group that results in an increasing amount of criminal offenses. Ultimately the incarceration without asset forfeiture is beneficial for the criminal enterprises because they can freely use the proceeds of previous crimes to commit new criminal acts in order to gain profit and support the incarcerated group members. Consequently, the replacement of an organized criminal group member is much easier than the replacement of properties which are needed to commit crimes. The forfeiture of proceeds of crimes deprives the criminals of the essence of committing criminal offenses. In other words, this legal practice can play a significant role in the struggle with crimes. On the other hand, the asset forfeiture has been being criticized for a very long time for impacting not only on the offenders but on their family members as well.

It is believed that the only way of combating organized crime is to disrupt and dismantle these criminal enterprises through the deprivation of their financial base, namely the forfeiture of proceeds of crime.

The main purpose of this essay is to introduce the regulation of forfeiture of proceeds of crime in the United States, with particular focus on the civil forfeiture through its employment the law enforcement agencies can seize and keep the asset suspected of involvement in criminal act. This paper briefly reviews the history of civil forfeiture in the United States and the possible constitutional conflicts of this tool as well.

2. Types of asset forfeiture

"The term forfeiture is best defined as the divestiture without compensation of property used in a manner contrary to the laws of the sovereign."[1] This legal tool expresses the criminals cannot retain the unlawful obtained gain, because the government take the profit arose from criminal offenses. The concept of forfeiture of criminal assets can be a very strong disincentive for them who want to commit a criminal conduct in the future.

The asset forfeiture had not been having role in combating crimes in the United States until the 1970s. At that time the federal government observed that they were prosecuting and convicting more members of criminal organizations than before. "Incarcerating these individuals, however, did not necessarily put an end to their criminal activity."[2] The government recognized, criminal enterprises and drug trafficking organizations sometimes continued to conduct business from prison or other criminals stepped into vacant leadership positions despite the risk that they would also face prosecution, unless their ill-gotten empires were dismantled asset by asset.[3]

"In 1970, Congress passed the first criminal forfeiture statutes in the United States history."[4] The purposes of the legislation have been to seize the profit of organized crime figures which are acquired from criminal activities. "In 1978, Congress amended the civil forfeiture sections of federal law to permit the seizure of all monies used in and all proceeds obtained from the illegal drug trade. […] This was the first statute in the

[1] Juan C. Marrero, David B. Smith, Forfeitures, *Volume I: Introduction to Civil Statutes*, U.S. Department of Justice, Criminal Division, Asset Forfeiture Office, 1984, p. iii.

[2] Marrero, Smith, p. v.

[3] *Ibidem*.

[4] Harry L. Myers, Joseph P. Brzostowski, *Drug Agents' Guide to Forfeiture of Assets*, Drug Enforcement Administration, Washington, D.C., 1981, p. 1.

United States to permit the civil forfeiture of the accumulated profits of criminal activity."[5]

Furthermore, the law enforcement agencies can benefit from the forfeitures since they can retain a part of the seized proceeds.

In the 1980s, the Department of Justice increasingly relied on the forfeiture laws to combat and deter crime more effectively.[6] They found that the forfeiture statutes were "powerful economic disincentives to crime."[7] "The government had few law enforcement tools as effective in deterring crime as the forfeiture of assets involved in or derived from criminal activity."[8]

The forfeiture law in the United States has two different types on both the federal and state level. One of them is the criminal forfeiture, the other one is the civil forfeiture. However, a sharp distinction cannot be drawn between the labels "criminal" and "civil."

The U.S. Supreme Court considered that "punitive ends may be pursued in civil proceedings, and, conversely, the criminal process is frequently employed to attain remedial, rather than punitive, ends."[9] This notion was affirmed again when the Supreme Court sustained that "civil proceedings may advance punitive as well as remedial goals, and, conversely, that both punitive and remedial goals may be served by criminal penalties."[10]

In the American criminal justice system, the traditional aims of punishment are the retribution and the deterrence.[11]

"In the United States, asset forfeiture is usually a two-pronged process. First, the assets are seized through either a civil or criminal action. Next, the assets are forfeited through either a civil or criminal proceeding."[12]

In order to employ criminal forfeiture, a person is required and found guilty of committing a criminal offense and this person also must own the property which was either used to commit a crime or derived from a criminal conduct.

"The Constitution applies to people only, which means that for criminal forfeiture, people receive constitutional protections; they cannot have their assets seized until and unless they are actually found guilty of a law violation. Criminal forfeiture requires that a person who is accused of committing a crime has a right to a trial. He or she must be found guilty beyond a reasonable doubt."[13] The burden of proof is on the prosecutor, and only after the accused is proven guilty may the criminal assets be forfeited. Thus, criminal forfeiture is tied to the criminal conviction of an individual, the government must actually demonstrate in court that the owner of property has obtained his or her property unlawful.[14] Criminal forfeiture is a punitive act which takes part after an individual is found guilty and sentenced.[15]

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[5] Myers, Brzostowski, p. 1.

[6] Marrero, Smith, p. v.

[7] *Ibidem*.

[8] *Ibidem*.

[9] United States ex rel. Marcus v. Hess, 317 U.S. 554 (1943).

[10] United States v. Halper, 490 U.S. 447 (1989).

[11] Kennedy v. Mendoza-Martinez, 372 U.S. 168 (1963).

[12] Shaun L. Gabbidon, George E. Higgins, Favian Martin, Matthew Nelson, Jimmy Brown, *An Exploratory Analysis of Federal Litigation in the United States Challenging Asset Forfeiture*, Criminal Justice Policy Review 22 (1), 2011, p. 51.

[13] Daniel Y. Rothschild, Walter E. Block, *Don't Steal; The Government Hates Competition: The Problem with Civil Asset Forfeiture*, The Journal of Private Enterprise 31 (1), 2016, p. 46.

[14] Marian R. Williams, Jefferson L. Holcomb, Tomislav V. Kovandzic, Scott Bullock, *Policing for Profit: The Abuse of Civil Asset Forfeiture*, Institute for Justice, 2010, p. 9.

[15] Gabbidon *et al.*, p. 51.

The standard of proof means how much evidence the government must present at trial and how compelling that evidence must be in order to successfully justify the defendant's guilt. The highest standard is "beyond a reasonable doubt", generally associated with convictions on criminal charges. The lower standard is "probable cause", usually it is needed to justify search warrants and the arrest of suspected person. "Defining 'probable cause' is no easy task. Although it is more than a hunch or even the 'reasonable suspicion' […], the probable cause threshold is not high."[16] This standard means merely that the government has a reasonable belief that the person has committed a criminal offense.[17]

The employment of criminal forfeiture requires higher standards than civil forfeiture, since only humans have rights and objects do not.[18] Upon the criminal forfeiture the person is considered guilty of committing a crime. Civil forfeiture, by contrast, means that the object itself is considered guilty of breaking the law.[19]

Civil forfeiture is a legal fiction that allows law enforcement agencies to take legal action against inanimate objects for participation in alleged criminal activities, regardless whether the owner of the object is guilty or innocent, or even whether the owner is charged with a criminal offense.[20] As Blumenson and Nilsen point out: in nearly 80 percent of civil forfeiture cases the owners of properties were never prosecuted in the 1980s.[21]

Civil forfeiture requires only probable cause in order to someone's property may be seized, and the legal presumptions are all turned around. In this case the defendant needs to prove the innocence instead of prosecutor proving guilt.[22] In other words, the burden of proof is on the owner of property. As a result, civil forfeiture requires less evidence and provides fewer protection than criminal forfeiture. It can be an advantage for the law enforcement agencies and a major threat to the owners of assets.

Consequently, nowadays civil asset forfeiture is one of the most controversial practices in the American criminal justice system.[23]

The basis of modern civil forfeiture is the relation-back doctrine. This concept means that when a property is involved in a criminal act, the title immediately transfers to the government. "Even though the government does not take actual possession until it eventually seizes the property, its ownership rights relate back to the date of the illegal activity."[24] Since the forfeiture actually takes place at the moment of the criminal act, third party cannot acquire a legally cognizable interest in the property after the date of unlawful act. In other words, criminal activity cuts off the rights of third parties to obtain legally protectible interests in the asset. It means that no one can prevail by

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[16] Cecelia Klingele, Keith Findley, *Introduction to Criminal Procedure*, University of Wisconsin Law School, p. 158.

[17] Williams *et al.*, pp. 20-22.

[18] Greg L. Warchol, Brian R. Johnson, *Guilty Property: A Quantitative Analysis of Civil Asset Forfeiture*, American Journal of Criminal Justice, 21 (1), 1996, p. 62.

[19] Rothschild, Block, p. 46.

[20] Williams *et al.*, p. 9-10.

[21] Eric Blumenson, Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, The University of Chicago Law Review, Vol. 65, 1998, p. 40.

[22] Rothschild–Block, p. 46.

[23] Gabbidon *et al.*, p. 51.

[24] Mark A. Jankowski, *Tempering the Relation-Back Doctrine: A More Reasonable Approach to Civil Forfeiture in Drug Cases*, Virginia Law Review 76, 1990, pp. 165-166.

establishing an innocent owner defense if the base of claim arose after the date of the criminal act.[25]

The relation-back doctrine cannot be employed in criminal forfeiture because the right to the property vests in the government only after the owner is found guilty. In other words, in criminal forfeiture the guilt of the individual is the essential element, and the guilt of the asset is not relevant.[26]

3. History of civil forfeiture

The concept of forfeiture has arisen from the Old Testament: "If a bull gores a man or woman to death, the bull is to be stoned to death, and its meat must not be eaten. But the owner of the bull will not be held responsible."[27] It can be pointed out the religious order subjected the bull to the forfeiture without regard to the owner's guilt. Moreover, the owner of the animal could not be held responsible. In other words, the bull that caused death was found guilty and the owner remained innocent. Forfeiture under this verse did not depend on criminally convicting anyone. If a bull gored someone to death, the owner lost his rights to the bull.[28]

The concept of the Roman law from 450 B.C. was similar to the Old Testament, but the need of indemnity also appeared. "If a quadruped causes injury to anyone, let the owner tender him the estimated amount of the damage; and if he is unwilling to accept it, the owner shall, by way of reparation, surrender the animal that caused the injury."[29]

The doctrine of civil forfeiture was used in the common law. The British Navigation Acts in the mid-17th century required import and exports from England to be carried on British ships. If the Acts were violated, the ships or the cargo on board could be forfeited to the crown without regard to the guilt or innocence of the owner.[30]

In the United States, the first statutory provision of civil forfeiture was enacted in the Act of July 31, 1789, ch. 5, entitled, "An Act to regulate the Collection of the Duties imposed by law on the tonnage of ships or vessels, and on goods, wares and merchandises imported into the United States." First United States Congress allowed the government to take parallelly civil forfeiture action against the property and criminal prosecution against the individual based on the same underlying unlawful act (*e.g.*, goods, wares or merchandise which were unloaded at night or without permit were forfeitable, and the perpetrators were subject to punish).[31]

Based on the British model, the United States Congress enacted the first forfeiture statute, namely the Act of 3 March, 1819, c. 75, entitled, "An act to protect the commerce

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[25] Jankowski, pp. 165-177.

[26] *Ibidem*, p. 176.

[27] Exodus, Chapter 21, Verse 28

[28] Myers, Brzostowski, pp. 2-3.

[29] The Laws of the Twelve Tables, Table VII, concerning crimes, Law I.

[30] Williams *et al.*, p. 10.

[31] Act of July 31, 1789, ch. 5, § 12: "That no goods, wares or merchandise, shall be unladen or delivered, from any ship or vessel, but in open day, or without a permit from the collector for that purpose; and if the master or commander of any ship or vessel shall suffer or permit the same, such master and commander, and every other person who shall be aiding or assisting in landing, removing, housing, or otherwise securing the same, shall forfeit and pay the sum of four hundred dollars for every offence; […]".

of the United States and punish the crime of piracy," continued in force by the Act of 15 May, 1820, c. 112. These statutes were upheld by the Supreme Court in 1827.[32]

The Supreme Court allowed the government to enhance the power of forfeiture during the Civil War, nevertheless, civil forfeiture was not an often-employed legal tool in the 20th century until the 1970s with one exception: "It was used extensively during Prohibition against automobiles and other vehicles transporting illegal liquor."[33]

According to Myers and Brzostowski, the ancestors created the concept of forfeiture out of a need for revenge; revenge against the offending thing, if not against its owner.[34] "Over the centuries, the concept of revenge has gradually faded from our laws, but the traditional doctrine of forfeiture remains. Today, forfeiture is used to protect the public from harmful objects, such as adulterated foods and sawed-off shotguns, and it is used to deter crime."[35]

Civil forfeiture is based on the superstitious notion arose from the medieval that inanimate items have their own minds. Consequently, this concept means that the object itself committed the crime, not that person who used this object. According to Rothschild and Block, who are in opposite to this doctrine, this legal fiction can lead the only murderers who killed the victims with their own bodies should be incarcerated. If the murderer used a knife or a gun to kill the victim, he or she should be set free, while the gun or the knife should be imprisoned.[36]

Obviously, the maxim of civil forfeiture cannot be literally interpreted. There is no doubt, this concept can facilitate the law enforcement agencies to deprive criminals of the proceeds of crime.

First, the Comprehensive Drug Abuse Prevention and Control Act of 1970 was enacted to allow the law enforcement agencies to take the profit out of drug money and transfer it to the federal government in order to fund the public services. After that, the Comprehensive Crime Control Act of 1984 was passed in order to allow the state and local law enforcement agencies to forfeit the assets which are used in criminal activity.[37] Federal forfeiture law was reformed by the Civil Asset Forfeiture Reform Act of 2000, although it left unchanged the ability of law enforcement to benefit financially from civil forfeiture.[38]

Nowadays, there are more than 400 federal forfeiture statutes relating to several federal crimes, and each state has statutory provisions for some form of asset forfeiture.[39]

4. Possible constitutional conflicts of civil forfeiture

Forfeiture, which is punitive in character, seemingly violates the Double Jeopardy Clause of the Fifth Amendment. It provides that "... nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb …" One of its meanings is the

[32] The Palmyra, 25 U.S. (12 Wheat.) 1

[33] Williams *et al.*, p. 10.

[34] Myers, Brzostowski, p. 4.

[35] *Ibidem*.

[36] Rothschild, Block, p. 47.

[37] *Ibidem*, p. 48.

[38] Dick M. Carpenter, Lisa Knepper, Angela C. Erickson, Jennifer McDonald, *Policing for Profit: The Abuse of Civil Asset Forfeiture*, Institute for Justice, 2015, p. 10.

[39] Williams *et al.*, p. 11.

prohibition of multiple punishment. Namely, it prohibits the government for punishing twice for the same criminal conduct. However, if the criminal procedure results in not only imprisonment but the forfeiture based on the same offense, forfeiture of properties is seemingly a second punishment for the same law violation.

The U.S. Supreme Court consistently has concluded that "the forfeiture […] is no part of the punishment for the criminal offense"[40] and "the provision of the Fifth Amendment to the Constitution in respect of double jeopardy does not apply."[41] The Court distinguished between *in rem* civil forfeitures and *in personam* civil penalties such as fines: "Though the latter could, in some circumstances, be punitive, the former could not."[42] The Supreme Court made its point absolutely clear: "the forfeiture is not barred by the Double Jeopardy Clause of the Fifth Amendment because it involves neither two criminal trials nor two criminal punishments"[43] and "the forfeiture is not barred by the prior criminal proceeding."[44]

The Supreme Court affirmed only the fact that the behavior was already a crime is "insufficient to turn the forfeiture into a punishment subject to the Double Jeopardy Clause."[45] The Court concluded the Congress has not provided civil forfeiture as such punitive sanction which would result in criminal penalty instead of civil remedy. As a final result of the Supreme Court's inquiry "civil forfeiture is not an additional penalty for the commission of a criminal act, but rather is a separate civil sanction, remedial in nature."[46] Consequently, the Court restated "*in rem* civil forfeiture is a remedial civil sanction, distinct from potentially punitive *in personam* civil penalties such as fines, and does not constitute a punishment under the Double Jeopardy Clause."[47]

The Sixth Amendment provides that "in all criminal prosecutions, the accused shall enjoy the right […] to have the Assistance of Counsel for his defence." This Amendment provides the appointment of legal counsel in every trial for a serious crime but in courts' opinion, civil forfeiture is not a criminal case.[48] Full panoply of constitutional protections afforded criminal defendants have not been deemed to be a requirement in civil forfeitures.[49]

The Supreme Court inquired whether civil forfeiture violates the Excessive Fines Clause of the Eighth Amendment. It provides that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." In essence, this Clause prohibits disproportionate penalties. The text of the Excessive Fines Clause by itself does not answer whether a penalty is proportional or not. The Supreme Court turned to the constitutional question: how proportional to a criminal offense a fine must be. The Court concluded that "the Clause prohibits only the imposition of 'excessive' fines, and a fine that serves purely remedial purposes cannot be considered 'excessive'

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[40] Origet v. United States, 125 U.S. 247 (1888).
[41] Various Items of Personal Property v. United States, 282 U.S. 581 (1931).
[42] United States v. Ursery, 518 U.S. 275 (1996).
[43] *Idem,* 518 U.S. 276 (1996).
[44] *Idem,* 518 U.S. 277 (1996).
[45] *Idem,* 518 U.S. 278 (1996).
[46] *Idem*.
[47] *Idem*.
[48] Douglas Kim, *Asset Forfeiture: Giving up Your Constitutional Rights*, Campbell Law Review 19, 1997, p. 573.
[49] United States of America, Appellee, v. One 1982 Chevrolet Crew-cab Truck Vin 1gchk33m9c143129, Appellant, 810 F.2d 178 (8th Cir. 1987).

in any event."[50] Since the Supreme Court stated civil forfeiture serves not only remedial goals but punitive purposes as well,[51] civil forfeiture can be subject to Excessive Fines Clause of the Eighth Amendment.[52] The Court did not determine whether a forfeiture is excessive based on the value of property and the gravity of the unlawful act; it must be judged case by case.[53] The Supreme Court emphasized that the value of the forfeited property could not be independent from the gravity of the criminal act. "The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish."[54] The Court noted it is unconstitutional if the amount of the forfeiture is grossly disproportional to the gravity of the criminal conduct.[55] In that case, if the full forfeiture does not serve remedial purpose and it is clearly punishment, "in no way suggest that [...] forfeiture is constitutionally proportional."[56]

5. Civil forfeiture in the practice

The use of civil forfeiture has been shown by the increasing of the amount of seized assets. The U.S. Department of Justice's Assets Forfeiture Fund held less than $100 million in 1986, but in 2008 the amount of seized assets rose to more than $1 billion.[57] Moreover, this amount reached $4.5 billion in 2014.[58] Law enforcement agencies clearly take the advantages of civil forfeiture. Between 1987 and 2013, 87 percent of forfeitures were civil forfeitures, while the proportion of criminal forfeitures was only 13 percent.[59]

If the police officer believes that a property was involved in a crime or obtained from an offense, he or she can seize the asset. Thus, for seizure of a property it is sufficient to believe that the cash, car, vessel, real estate or other asset are connected to a criminal conduct. Once the asset is taken, the government will send a notice to the owner letting him or her know that the burden of proof is on him or her to try getting the property back. If the owner does not respond within the proper time frame and in the appropriate manner, the law enforcement agency automatically can keep the seized property. Even though the owner is eligible to attempt to win back the asset in the court, but due to the reverse onus he or she must carry most of the burdens.[60] In other words, the owner must establish his or her innocence in order to take back the property.

Once property had been seized by the law enforcement agency, and the owner already responded to the letter of government, prosecutors file civil action against the asset in order to forfeit it. In that case, prosecutors only need to demonstrate in the court that there is probable cause to believe a connection exists between the asset and the criminal act. In order to employ civil forfeiture, it is not necessary to prove that the owner of asset is guilty of a crime. Moreover, the civil forfeiture can occur even when criminal charges are never filed against the owner of property.[61]

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[50] Austin v. United States, 509 U.S. 622 (1993).
[51] United States v. Halper, 490 U.S. 447 (1989).
[52] Austin v. United States, 509 U.S. 610 (1993).
[53] *Idem*, 509 U.S. 622 (1993).
[54] United States v. Bajakajian, 524 U.S. 334 (1998).
[55] *Idem*, 524 U.S. 337 (1998).
[56] *Idem*, 524 U.S. 344 (1998).
[57] Williams *et al.*, pp. 6-7.
[58] Carpenter *et al.* (2015), p. 5.
[59] *Ibidem*.
[60] Williams *et al.*, p. 9.
[61] *Ibidem*.

Since prosecutors file civil action against the property supposedly involved in or derived from criminal offense, the title of cases became very strange (*e.g.* United States v. Twenty-Two Thousand, Two Hundred Eighty-Seven Dollars ($22,287.00), United States Currency, 709 F.2d 442, 446-47 (6th Cir. 1983); United States v. One Single Family Residence Located at 6960 Miraflores Ave., Coral Gables, Florida, Case No. 88-0349-CIV-SCOTT (S.D. Fla. 1988); United States v. One 1978 Chevrolet Impala, 614 F.2d 983, 984 (5th Cir. 1980)).

In 88 percent of civil forfeiture cases, the property transfer to law enforcement agencies takes place automatically. In these cases, the owners do not respond to the letter of government or fail to file the claim to the court.[62] Its reason could be the lack of owners' knowledge related to their rights or just the lack of financial sources. The other reason can be the owners' inability to afford a lawyer to represent them in the proceeding.

There is another reason which weakens the protection of the property owners. The state and federal courts have consistently ruled that there is no right based on the Constitution to counsel in forfeiture proceedings. Moreover, the Civil Asset Forfeiture Reform Act of 2000 provides legal counsel just in a very limited number of federal forfeiture circumstances. Therefore, some owners are unwilling or unable to finance the attorney's fees from personal resources.[63] Some defense attorneys' fees are more than $10,000, therefore legal representation is not worth if the value of the property is less than this amount.[64]

Furthermore, finding a defense lawyer skilled in civil forfeiture litigation is not an easy issue for the seized property owners. But going without legal representation is not an option due to the responsibility of filing court documents, paying various fees according to a strict timetable, and appearance at least once in the court.[65]

After all, Minnesota's data are not surprising: Only 17 percent of forfeitures were reviewed by the courts in 2010, and in just 10 percent of cases the owners retrieved their seized properties. 51 percent of forfeitures were cash, while only 3 percent of cash seizures were returned to the owners.[66]

According to an analysis by Williams, Holcomb and Kovandzic, 8 out of 50 states do not allow the law enforcement agencies to retain the forfeited properties,[67] 16 states give not less than 50 percent nor more than 95 percent shares of the assets to law enforcement,[68] and in 26 states the entire forfeited proceeds go to the participating agencies.[69, 70] Consequently, only 8 states are exempt but in every other state law enforcement agencies have profit motive to increase the amount of forfeiture, because they can retain the seized property for official use.

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[62] Carpenter *et al.* (2015), p. 5.

[63] Williams *et al.*, p. 116.

[64] Karis Ann-Yu Chi, *Follow the Money: Getting to the Root of the Problem with Civil Asset Forfeiture in California*, California Law Review 90, 2002, p. 1642.

[65] Carpenter *et al.* (2015), p. 12.

[66] Dick M. Carpenter, Lee McGrath, Angela C. Erickson, *A stacked deck: How Minnesota's civil forfeiture laws put citizens' property at risk*, Institute for Justice, 2013, p. 3.

[67] Indiana, Maine, Maryland, Missouri, North Carolina, North Dakota, Ohio, Vermont.

[68] Colorado, Wisconsin, Connecticut, New York, Oregon, California, Nebraska, Louisiana, Mississippi, Florida, Illinois, Minnesota, New Hampshire, Rhode Island, Texas, South Carolina.

[69] Alaska, Alabama, Arkansas, Arizona, Delaware, Georgia, Hawaii, Idaho, Iowa, Kansas, Kentucky, Massachusetts, Michigan, Montana, Nevada, New Jersey, New Mexico, Oklahoma, Pennsylvania, South Dakota, Tennessee, Utah, Virginia, Washington, West Virginia, Wyoming.

[70] Williams *et al.*, p. 17.

Mast, Benson and Rasmussen point out there was a correlation between the law enforcement agencies' incentive and the drug arrests. After the Comprehensive Crime Control Act of 1984, "between 1984 and 1989, drug arrests per 100,000 population rose by 72 percent after a 14-year period of relatively constant drug arrests per capita, suggesting that the law enforcement effort against drugs increased dramatically."[71]

According to the FBI, law enforcement agencies made an estimated 10,662,252 arrests in 2016. The highest number of arrests were estimated 1,572,579 arrests for drug abuse violations[72] which confirm Masts' assumption.

As Rotschild and Block explain the increasing drug arrests cause a substitution effect. When law enforcement agencies enhance the amount of seizures and arrest in a field (*e.g.*, drug sale or manufacture), that field becomes less attractive. Therefore, offenders "move from drug crimes toward those for which they are less likely to be caught."[73] It leads to an increasing rate of violent crimes which causes more victims.

6. Conclusions

The ancient forfeiture of property was based on the guilt of asset, but in the 18th century the main objective of the forfeiture had been changed in order to ensure the customs revenue. In order to combat drug crimes, the Congress enhanced the power of law enforcement in the second half of 20th century. Therefore, statutory provisions were enacted, and the legislation has allowed the law enforcement agencies to obtain and retain a part of or the whole seized assets. The Congress gave a strong incentive to law enforcement which means on the other side a disincentive for the offenders. The main goal of forfeiture is reducing the profitability of crimes but the purpose of employment of forfeiture should not be the enhancement of law enforcement agencies' revenue, because the application of this legal tool should not change the law enforcement agencies into business entrepreneurs. If law enforcement has uncontrolled financial interest in forfeitures, it can result in abuse of the rules.

According to Justice Scalia, civil forfeiture is a confiscation of "property rights based on improper use of the property, regardless of whether the owner has violated the law."[74] Civil forfeiture serves not only remedial goal and deterrence but as the U.S. Supreme Court has stated, it has punitive purpose as well. Therefore, transfers of properties to law enforcement agencies without supervision of court should not be general. According to the Minnesota's data in 2010, 83 percent of forfeitures were not reviewed by the courts. Despite the fact that, these cases were initiated due to alleged criminal offenses, and they ended up in forfeitures which served partially punitive goal, these sanctions were not reviewed by court. In fact, these punitive sanctions were imposed by law enforcement agencies.

Criminal forfeiture is a punitive act which takes part after the individual is found guilty and sentenced. On the contrary, civil forfeiture can occur even when criminal charges are never filed against the owner of property. While criminal forfeiture requires

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[71] Brent D. Mast, Bruce L. Benson, David W. Rasmussen, *Entrepreneurial Police and Drug Enforcement Policy, Public Choice*, Vol. 104, No. 3/4 (2000), p. 285.

[72] https://ucr.fbi.gov/crime-in-the-u.s/2016/crime-in-the-u.s.-2016/topic-pages/persons-arrested.

[73] Rothschild, Block, p. 53.

[74] Austin v. United States, 509 U.S. 624 (1993).

the standard "beyond a reasonable doubt", civil forfeiture accepts the lower standard "probable cause." Civil forfeiture is in contrast with the legal tradition of innocent until proven guilty. The lower evidentiary threshold of civil forfeiture tremendously facilitates the burden of proof of the prosecutor. Moreover, the prosecutor is helped by the reverse onus, as a result the owner carries most of the burden. But for the property owner it is hard to find a defense lawyer skilled in civil forfeiture litigation because there are more than 400 federal forfeiture statutes relating to several federal crimes, and each state has own statutory provisions for some form of asset forfeiture. Consequently, nowadays civil asset forfeiture is one of the most controversial practices in the American criminal justice system.

It is strongly believed there is a tight connection between the criminal offense and the asset involved in or derived from criminal activity. If the defendant is found guilty, at the end of criminal procedure the sentence will be imposed. I consider in most cases the forfeiture should be a part of the sentencing because the forfeiture as a sanction serves partially a punitive goal. I believe criminal forfeiture should be the primary legal tool of forfeitures and civil forfeiture should remain the secondary, subsidiary legal practice in order to deprive the offenders of their unlawful profit.

I agree with the employment of civil forfeiture in some exceptional cases such as when the defendant is not found guilty, but the evidences can meet the standard of civil forfeiture, namely there is a probable cause to believe the property was connected to a criminal offense. In addition, I also consider the employment of civil forfeiture is acceptable when the criminal procedure will be foreseeably protracted.

I believe that 87 percent of civil forfeitures and 13 percent of criminal forfeitures within all forfeitures are disproportionate. It shows in 87 cases out of 100 the owners have less protection and they must establish their innocence instead of proving their guilt by the prosecutor in a criminal procedure.

In criminal forfeiture the right to the property vests in the Government only after the owner is found guilty. Contrary to criminal forfeiture, in civil forfeiture the title immediately transfers to the Government based on the relation-back doctrine. In this case, the Government's ownership right relates back to the date of the criminal conduct. As a result, in civil forfeiture the criminal offense cuts off the rights of third parties to obtain legally protectible interests in the asset. Thus, the rights of third parties depend on the prosecutors' decisions. If the prosecutor files civil action against the property in order to forfeit it, the third party cannot establish an innocent owner defense if the base of claim arose after the date of the criminal act. In that case, when the prosecutor employs the criminal forfeiture to confiscate the asset, the third party has more protection to defend the rights to the property.

There is no doubt, the forfeited properties serve to compensate the law enforcement agencies for the expenses of their activities which obviously can benefit the taxpayers, but I still consider the protection of property owners' rights should be enhanced.

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