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Forfeiture Laws, Practices and Controversies in the US

To many law enforcement officials, asset forfeiture is the most important crime control development in many years. It deprives offenders of their gains, serves as a deterrent, disrupts drug markets and organized crime, and provides as much as one billion dollars each year to supplement law enforcement budgets. To critics, asset forfeiture is a Frankenstein’s monster that fails to provide minimum procedural protections to suspects, deprives innocent people of their property, and creates perverse incentives to law enforcement agencies to target suspects on the basis of their wealth rather than their criminality.

American forfeiture laws are very different from those in Europe. The most widely used are civil, not criminal, proceedings, on the basis of which property used in crimes or obtained from crime can be declared forfeit. No criminal charge need ever be filed and accordingly, of course, no criminal conviction is required. In civil forfeiture proceedings, the conventional burden of proof is shifted, and the property owner must prove that the property was not used in crime or acquired from crime.

By contrast, in most European countries, property can be declared forfeit only after a conviction and the property must be traceable from the crimes for which convictions were entered (Kilchling and Kaiser 1997). This is because of the widespread views that forfeitures related to crime are punitive and that the presumption of innocence expressed in Article 6(2) of the European Convention on Human Rights prohibits use of punitive measures except against people convicted of crimes.

The presumption of innocence is not a hindrance in the United States because it is an evidentiary, and not a substantive, presumption, or so the US Supreme Court held in Bell v. Wolfish, 441 US 520 (1979). In that case, pre-trial detainees argued that detainees are presumptively innocent citizens who retain all rights of citizenship except those unavoidably lost by confinement. The Supreme Court rejected that argument, holding the presumption of innocence to be a mere evidentiary rule.

1. GENERAL INTRODUCTION

Extensive use of forfeiture in criminal law enforcement dates from the enactment by the US Congress in 1970 of the Racketeer Influenced and Corrupt Organizations statute, ‘RICO’ as it is commonly called (18 U.S.C. 1961-68), the Comprehensive Drug Abuse Prevention and Control Act (21 U.S.C. 801 et seq.), and the Bank Secrecy Act (31 U.S.C. 5411-22). Nearly 100 other federal statutes also authorize forfeiture, most importantly the Comprehensive For-

1.1. Procedures

The United States is a federal jurisdiction with overlapping state and federal legal and court systems. For simplicity, I ignore the state systems because state law enforcement agencies often refer cases to federal prosecutors to take advantage of more favorable federal forfeiture laws.

Here is how an ordinary drug trafficking charge would be processed. A law enforcement agent brings evidence to a US attorney’s office that shows that an individual has sold drugs, usually after an arrest has been made. If an assistant prosecutor finds the evidence persuasive, he initiates formal charges in a federal court. A hearing must be held within a few hours before a judge or magistrate. The prosecution must show ‘probable cause’ to believe that an offence has occurred and that the suspect has done it. The defendant need not testify or present evidence. Formal rules of evidence do not apply, but the suspect is entitled to all constitutional procedural protections (e.g., representation by counsel, appointment of state-provided counsel for indigent defendants, notice of charges, freedom from self-incrimination). If probable cause is found, the defendant is arraigned (informed of the charges and asked to plead guilty or not guilty), and the matter proceeds from there. Guilt must be proven by a ‘beyond reasonable doubt’ standard.

Forfeiture procedures cannot be described so simply. Forfeiture exists in both criminal and civil forms, and under many different statutes that sometimes prescribe distinctive procedures. There are also often different procedural and legal rules for different kinds of property—personalty (chattels), realty (land and buildings), cash, and intangibles (e.g., securities). For simplicity I describe a civil forfeiture of an automobile under the most commonly used federal civil forfeiture law. (Smith 1995 provides full details.)

Here is how civil forfeiture of an automobile allegedly used in drug trafficking would work. Law enforcement agents, having first obtained a search warrant, appear at a suspect’s house, announce that a $45,000 BMW is believed to have been used in a drug deal, and take it. There is no requirement that a criminal charge has been or ever will be filed. If FBI officials wish to keep the car they must at some time (there is no time limit) send known claimants a ‘Notice of Seizure’ and place an advertisement in a local newspaper. The owner or any other claimant (e.g., a financing bank) must within twenty days file a claim and post a bond of 10% of the property’s value or $5,000, whichever is less. Here the claimant would have to post a $4,500 bond. If no claim is filed, the FBI may administratively declare the BMW forfeit, and keep it without the matter ever coming before a judge. (Unless the property claimed was worth more than $100,000, in which case a judge would have to review the file and order the forfeiture.)

If a claim and bond are filed, in drug cases the government must file a forfeiture complaint in a federal court within sixty days. The judge then issues an arrest warrant for the property (which usually is already in the hands of a law enforcement agency). The prosecution must advertise the pendency of the forfeiture in a newspaper and claimants have twenty days to file an answer to the government’s complaint. If the deadlines are missed, a default is entered and the property is forfeit.