Civil Asset Forfeiture and the Production of Tenuous Notions in Courts

A growing body of empirical works examines the use of punishment outside the criminal codes and its implications for power and rights distribution. My work contributes to this literature from a distinct angle. I examine how the limits of the state's power to punish outside the criminal framework are constructed, legitimized, and negotiated in courts. To do so, I focus on civil forfeiture.

Civil asset forfeiture—a legal innovation of the war on drugs—occurs when the state seizes a property because of its alleged connection to illegal activities. These laws allow the government to seize property without having to charge or convict the owner of unlawful activity.

As we can imagine, this is a controversial figure**.** For many scholars, civil forfeiture is a criminal punishment even if it is called "civil" (Pimentel 2018; Cheh 1998; Gray 2012); for Judge Ginsburg, it is, in Timbs v. Indiana (2019), a double punishment that violates the excessive fines clause of the Eighth Amendment; for others, it is what "picks up where traditional punishments leave off" (Worrall 2008, 7); for police and federal agencies, it is a central source of funding; for a rare convergence of liberal and libertarian organizations—from the American Civil Liberties Union to the Cato Institute—it is at the very least an affront to due process and property rights. Civil forfeiture can be all of that at once.

In this paper, I tackle civil forfeiture as a case of *legal* punishment—imposed by the state using the apparatus of law—but an *extrapenal* one—originated outside the criminal codes. I investigated how, in the courts, judges and prosecutors argue for this type of punishment.

Next, I briefly present the ABC's of civil forfeiture to situate my research questions better. Then, I stage the research methodology and my preliminary findings before closing by pointing out this research's practical and analytical relevance.

Background: Civil Forfeiture Laws

In a civil forfeiture action, the government only has to prove with a preponderance of the evidence that the assets in question were used or obtained in connection with illegal activity and are therefore subject to forfeiture. Virtually all property types, real or personal, tangible or intangible, may be subject to forfeiture. Civil forfeiture can proceed on three grounds: against contraband; against the proceeds of criminal activity; or against an instrument to facilitate criminal activity (Cheh 1998; Moores 2010.) Smuggling is illegal and, as such, is subject to confiscation. Proceeds of criminal activity can be any income, interest, dividends, or property derived from the unlawful transaction. An instrument to facilitate criminal activity may be any property that "is used or intended to be used in any manner or part to commit or facilitate the commission of an offense. "

Asset forfeiture on the basis of "facilitation" is one of the most controversial aspects of confiscation (Pimentel 2018; Moores 2010; Cheh 1998). First, it implies that law enforcement agencies can seize high-value assets such as real estate without establishing that they are derived from illegality. Second, the criteria for its application are ambiguous: the law provides for the forfeiture of property that "facilitated" an illegal activity, but the courts have not developed precise criteria to define what "facilitated" means (Cheh 1998; Moores 2010).

According to Austin v. the United States (1993), when confiscation proceeds on the basis of facilitation, it is because there is a notion that the owner has been negligent in allowing his property to be misused.

Research Questions

When empirical studies have analyzed civil forfeiture, they have focused on law enforcement. These studies have found that civil forfeiture can distort law enforcement priorities, encouraging "policing for profit" (Blumenson and Nilsen 1998; Holcomb, Kovandzic, and Williams 2011; Letnos and Minzner 2014; Worrall and Kovandzic 2008; Miller and Selva 1994.) This is a relevant matter, but the emphasis on law enforcement agencies' role has left the courts' part virtually unexamined. To date, we know little about the prosecutorial and defense arguments deployed in the courts when civil forfeiture is at work. My research tackles that void. Concretely, my paper examines how courts negotiate and produce tenuous notions such as "facilitation of crime" or "negligence" when they work with the legal fiction that property itself may be guilty of *facilitating* illegality. In addition to inquiring, "why does the confiscation proceed and against whom?" I examine interpretations of *individuals'* responsibility—for example, concerning other individuals' actions—and the state's responsibility in contexts where crime and violence are an issue.

My work seeks to capture what is at stake when civil forfeiture is at work, illuminating what makes it unique as a punishment outside the criminal codes. What innovations does it introduce? How does it transgress the traditional boundaries of penal punishment, and how is that legitimated? Can it be classified along with other monetary sanctions, or how it differs from them?

Methods and Data

I analyze the *argumentative staging* of civil forfeiture when used on the grounds of facilitation by examining real estate cases heard by lower federal courts between 1984—when Congress allowed for real estate forfeiture—and 2016—date of the last report to Congress on federal seizures. I work with an extended frame of time to capture temporal variations. Notably, this frame allows us to capture how the shift in the burden of proof from the property owner to the government—introduced in 2000 through the Civil Forfeiture Reform Act—translates into reality.

From recent work, we know that we must pay attention to states' particularities and their interaction with federal institutions and policies if we are to understand patterns and variations in punishment in the United States. With this in mind, I work with a purposive sample of six states: the three states in which the number of adoptive (i.e., federal) seizures is highest (New York, California, and Florida) and the three in which the number of seizures is lowest (Kentucky, Alabama, and Wyoming[1].) I work with all the identifiable real estate cases within each state proceeding on the grounds of facilitation on Bloomberg Law.

[1] Acoording to the DOJ Office of the Inspector General's Audit of the Assets Forfeiture Fund and Seized Asset Deposit Fund Annual Financial Statements, and Department of the Treasury Office of the Inspector General's Treasury Forfeiture Fund Accountability Report.

I chose to work with real estate cases for three reasons. First, civil lawsuits against real estate always go to trial; second, real estate is often co-owned, loaned, leased, or shared, so the state's attempt to seize the property is likely to collude with someone else's property rights; third, all real estate is part of a socio-spatial context and my work asses if the courts consider it—for instance, in areas where crime and violence are issues.

Preliminary Findings

The literature on punishment outside criminal codes has classified forfeiture as another monetary sanction that, along with bail and fines, are selective financial extraction tools that disproportionately affect the poor (e.g., Harris et al. 2017; Kirk and Wakefield 2018). I argue that such classification ignores the complexity of this legal figure. Some work has found that administrative forfeiture, i.e., forfeiture against personal property or property valued at less than $500,000, disproportionately affects communities of color in disadvantaged areas (Lee, Cary, and Ellis 2019; Helms and Costanza 2009). However, in the case of civil proceeding cases, which occur before a judge, similar to a trial, and apply to real property or assets over $500,000, we encounter another socioeconomic composition, including homeowners and the middle classes. In addition to the mere question of on whom it falls, there are analytical reasons why it is inappropriate to classify forfeiture alongside other monetary sanctions.

First, civil forfeiture introduces a novelty in how the law interprets the liability of individuals concerning the actions of other individuals. Forfeiture introduces a stretching of the individual's responsibility and novel ways of holding individuals responsible for what they do not do or what others do on their property.

Let us consider, for example, the case of The Taylors.

> On August 31, 1989, a helicopter pilot on a marijuana eradication flight for the Alabama Department of Public Safety observed what he believed were marijuana plants growing on the Taylors' property in rural Chilton County. After obtaining a search warrant, deputies inspected the Taylors' fields and found 49 plants of marijuana there.
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> Shawn Williams, the Taylors' nephew who lived with them at the time, admitted that he grew marijuana without his uncles' knowledge and tried to hide the plants from them. At the inspection time, the Taylors claimed that they knew nothing about this and "had never seen a marijuana plant except on television."
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> The government then initiated civil forfeiture proceedings against the Taylors' property, alleging that it had been used to violate the law. The Taylors and the Texas Farm Credit Bank, the bank that held a mortgage on the property, filed a suit claiming an "innocent owner" defense, which allows the owners to contest the seizure. Both the Taylors and the bank argued that the illegal acts happened without their actual knowledge. The government did not contest the bank's case, but it did the Taylors' one: the government argued that even if the Taylors' did not really know about the marijuana, "they should have known about the illegal use" of their property and that the seizure should proceed because "they did not take reasonable steps to prevent the illegal activity." (U.S. v. Prop. at Rt. 1 Box 137 Randolph, 743 F. Supp. 802 (M.D. Ala. 1990)

To argue in favor of forfeiting the property, the prosecutor relies on the notion of negligence. The Taylors did not take enough measures to prevent the illegal activity. The Taylors could not oppose forfeiture only by asserting ignorance of the wrongdoing. Instead, they should have provided a "negative," i.e., an element showing that they not only did not know but could not have known what was happening on the property. When argued using the notion of negligence, forfeiture is a punishment that is closer to the logic of risk, where precautionary and damage prevention measures become enforceable (Loughnan 2019), than to the logic of substitution—which is the logic of monetary sanctions.

Second, unlike monetary sanctions, forfeiture can be used as a tool—or rather, a threat—to govern space, which is especially true in the case of real estate forfeiture. My partial results suggest that in contexts of high crime and violence, civil forfeiture operates a redistribution of responsibility for maintaining order by promoting informal policing by property owners-or "place managers" (Mazerolle and Ransley 2005).

Implications and Conclusions

Although there are several theories about what separates or should separate crimes from civil torts, in practice, legislators decide what is and is not a crime (Stuntz 1996.) Given the individual protections that apply to criminal proceedings, there are at least incentives for the government to devise strategies to avoid them in times of political "crisis," "emergencies," or for any other reason. It should not be a surprise that civil remedies imposing enormous difficulties while avoiding the criminal framework's cumbersome limitations proliferate. (Cheh 1998; Stuntz 1996; Gray 2012.) Yet, to date, we lack empirical studies describing and explaining the argumentative and institutional dimensions of these strategies. My research contributes to tackling that void.

This knowledge is theoretically and practically relevant because measures combining elements of civil and criminal law tend to shift the burden of proof and restrict rights in ways that benefit the state to the detriment of the individuals affected. And this, of course, is something that we must better understand if we are to capture the evolution of the state's power to punish.

Beyond the immediate contribution, as side effects, my research contributes to developing *a richer interpretation of the war on drugs*. If we agree that civil forfeiture laws have introduced a "new" logic of responsibility distribution that conditions property rights, it will become clear that the war on drugs does not exhaust itself as a project of "social control" of racial minorities or the poor. This position would echo recent literature on punishment questioning the more traditional interpretation of the war on drugs as a crusade against users (e.g., Hinton 2016). According to this literature, the war on drugs is best interpreted as a strategy for accumulating power by the U.S. federal government to gain leverage on terrain that by law is the states' province: the response to crime. Although this interpretation is more comprehensive, it still reproduces the idea of "a" war on drugs. Further study of concrete measures, such as civil forfeiture laws, will help us move beyond the slogan.

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