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CRIMINAL FORFEITURE: AN APPROPRIATE SOLUTION TO THE CIVIL FORFEITURE DEBATE

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INTRODUCTION

Forfeitures have become an increasingly prevalent, significant, and controversial federal law enforcement tool in the past several years. While the government can seek forfeiture of property through either the civil or criminal process, in this country property may only be forfeited if its forfeiture is specifically authorized by statute.¹ Therefore, if an appropriate criminal forfeiture statute does not exist, the government must resort to use of an available civil forfeiture statute. The civil forfeiture statute is thus used to take the “offending property” away from the malefactor, thereby depriving the wrongdoer of his or her incentive and ability to commit future crimes or other misdeeds.

While criminal forfeiture statutes are of relatively recent vintage, civil forfeiture has existed in the United States since the

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¹ United States v. Farrell, 606 F.2d 1341, 1344 (D.C. Cir. 1979); United States v. Lane Motor Co., 199 F.2d 495, 497 (10th Cir. 1952), aff'd, 344 U.S. 630 (1953); United States v. Charles D. Katsier Co., 61 F.2d 160, 162 (3d Cir. 1932).
First Congress.\textsuperscript{2} Even when both civil and criminal forfeiture are available, prosecuting attorneys frequently defer to the civil forfeiture process.\textsuperscript{3} Much of the current criticism of the federal government's forfeiture efforts stem from the government's reliance upon (some contend abuse of) the civil forfeiture process to fight crime. However, as we shall see, from a prosecutor's perspective, inclusion of a criminal forfeiture charge, which usually must be accompanied by a money laundering charge, will oftentimes significantly increase the complexity of a criminal prosecution.

Critics of the government's use of civil forfeiture are legion. They note that the government can use a civil forfeiture as a pre-indictment discovery device, and to subject a potential criminal defendant to undesirable publicity and notoriety.\textsuperscript{4} They also note that the government's burden of proof is substantially less than it is in a criminal forfeiture action and that the government can get the added benefit of collateral estoppel if the defendant is convicted of the underlying criminal activity before the civil forfeiture is adjudicated.\textsuperscript{5}

The government gains other procedural advantages in the civil context as well. For instance, in a criminal case, a defendant can exercise his Fifth Amendment right against compelled self-incrimination, and a factfinder may draw no adverse inference from the fact that a defendant chooses to exercise that right.\textsuperscript{6} In a civil forfeiture case, however, adverse inferences may be made against a claimant who asserts his Fifth Amendment privilege.\textsuperscript{7} Therefore, a claimant who also faces potential criminal exposure is put in the difficult situation of either waiving his Fifth Amendment privilege and risking making inculpatory statements that may be admitted against him in a subsequent criminal

\textsuperscript{2} See infra note 23.
\textsuperscript{3} In non-drug cases, the primary criminal forfeiture provision is set forth in 18 U.S.C. § 982 (Supp. IV 1992). The civil forfeiture provisions are set forth in 18 U.S.C. § 981 (1988). As will be discussed, other than drug cases, criminal forfeiture provisions are most frequently utilized in money laundering cases.
\textsuperscript{4} See infra notes 9, 50, 104.
\textsuperscript{5} See infra note 104.
\textsuperscript{7} See Baxter v. Palmigiano, 425 U.S. 303, 318 (1976) (holding that the Fifth Amendment does not prohibit adverse inferences against parties in civil actions who refuse to testify in response to probative evidence offered against them).
prosecution, or exercising his Fifth Amendment privilege and summarily losing his property in a civil forfeiture action.

Critics have also remarked that, at times, the government appears to be more concerned with increasing its own coffers, the Assets Forfeiture Fund, than with returning money to identifiable victims of crime. They point to the government's aggressive pursuit of property used to "facilitate" criminal activity in addition to its pursuit of the proceeds of crime as evidence of the government's haste to enlarge the Assets Forfeiture Fund. A typical example of forfeiture of both proceeds and facilitating property would be a case in which, following a marijuana sale, the government seeks forfeiture of both the money that the drug dealer was paid for the drugs (the proceeds) and the automobile that transported the dealer and the marijuana to the site of the transaction (the facilitating property).

While few would criticize the forfeiture of the proceeds in this case, there are those who argue that forfeiture of the facilitating property can lead, in certain circumstances, to inequitable results. For instance, in the marijuana example above, if the amount of marijuana were small and if the car were expensive or if it belonged to someone else, some would argue that forfeiting the car is unjust even though the government has clear statutory authority to seek its forfeiture.

The government's excessive reliance on the civil forfeiture process is in part due to the cumbersome nature of the primary criminal forfeiture statute, 18 U.S.C. § 982, in non-drug cases. Most criminal forfeitures in non-drug cases must now be effected through the use of the money laundering statutes, which

8. The Assets Forfeiture Fund is the account into which all proceeds of forfeitures are deposited. 28 U.S.C. § 524(c) (Supp. IV 1992) establishes the Fund and sets forth the authorized uses for forfeited funds. Although most of the funds are allocated by Congress, more than $75 million is left over annually for discretionary equipment purchases directed by the Attorney General. 1991 U.S. DEPT OF JUST., ANN. REP. OF THE DEP'T OF JUST. ASSET FORFEITURE PROG. 56 ($78.8 million in surplus).


10. The rightful owner could, of course, assert an "innocent owner" defense at the ancillary proceeding. See infra notes 68-71 and accompanying text.

11. As discussed at infra note 45 and accompanying text, in the area of drug-related crimes, the criminal forfeiture statute, 21 U.S.C. § 853 (1988), is straightforward, clearly written, and relatively simple to use.
are confusing. Furthermore, in instances where money laundering has not occurred, criminal forfeiture is not currently available even though federal criminal laws have been violated and the wrongdoers have profited.

Congress began taking tentative steps towards correcting this problem in 1992 when it amended § 982 to include direct criminal forfeiture of proceeds for thirty different federal crimes. We believe that Congress should go much further and amend the criminal forfeiture statute to include across-the-board direct forfeiture for the proceeds of all federal felony offenses. Our proposed amendments to § 982, set forth and discussed below incorporate such a change.

The sweeping criminal forfeiture of proceeds provision we propose is not only simpler for prosecutors to understand and to use, but also closes loopholes in the current scheme that enable certain wrongdoers to profit from the crimes they commit. Proceeds, by definition, are entirely traceable to illicit activity. Thus, few should object to the forfeiture of proceeds. The proposed amendments focus solely on the proceeds of crime, thus avoiding the far more problematic and contentious area of facilitating property forfeitures.

Our proposed amendments would result in fewer civil forfeiture actions and more criminal forfeiture actions. Critics should consider this to be a salutary development because of the greater procedural and substantive safeguards attendant with the latter action, but which are lacking in the former.

Furthermore, the proposed amendments would increase judicial efficiency by decreasing the number of time-consuming civil forfeiture cases. Additionally, our proposal would save governmental resources. In those instances in which the government institutes separate criminal prosecutions and civil forfeiture actions, a criminal assistant United States Attorney typically handles the prosecution while a civil assistant United States Attorney handles the civil forfeiture action. This results

15. This is because criminal prosecutions and civil actions constitute different areas
in a needless duplication of effort. Finally, in light of recent Supreme Court cases, it may soon become necessary to resolve forfeiture issues at the same time as the substantive criminal issues in order to avoid potential constitutional problems of double jeopardy.

A provision allowing for direct criminal forfeiture of proceeds could also be tailored to make it easier than the current system for the victims of crime to recover property that was wrongfully taken from them. Currently, victims have only limited avenues of redress. If the victim can establish a direct ownership interest in the property, the victim can seek relief either in the forfeiture action itself, through the petition for remission or mitigation process, or under the Victim and Witness Protection Act. Each of these options require action and a degree of legal sophistication on the part of the victim. For victims who cannot establish such an ownership interest in the property, their ability to get their money back is nonexistent.

Under our proposed amendments, the prosecutor handling the criminal case has the authority to file a motion with the court that enables the court to return property to the victims of the crime. Hence, all victims, owners and non-owners alike, would have a chance to recover their losses.

Prosecutors are generally driven by a desire both to punish the wrongdoer and to vindicate the rights of the victims of crime. Our proposed amendments provide prosecutors a mechanism allowing the prosecutor to file a motion with the court for return of forfeited property directly to the victims of crime. Thus, our proposed amendments better enable the prosecutor to make the victims whole at the expense of the criminal by making criminal forfeiture easier and more available, and by enabling victims to get their property back faster and more efficiently. Correspondingly, this also gives a prosecutor the added impetus to seek forfeiture in appropriate cases, thus leading to some

of expertise requiring thorough knowledge of a completely different set of rules and procedures. It is extremely unusual for assistant United States attorneys to engage in both civil and criminal practice.

18. This would be the case, for example, in a telemarketing fraud scheme in which the wrongdoer purchases property with money (or other fungible property) provided by hundreds of victims. In such circumstances, no one victim would be able to establish an ownership interest in that property.
much needed public support for the government's forfeiture efforts.

I. CIVIL FORFEITURE: HISTORICAL PERSPECTIVE

The earliest forfeiture statutes in this country were in rem. That is, they were directed against property rather than against individuals. In The Common Law, Justice Oliver Wendell Holmes, Jr. traces the origins of in rem forfeitures to humankind's predilection for personifying inanimate things. Holmes noted that "[t]he hatred for anything giving us pain, which wreaks itself on the manifest cause... leads even civilized man to kick a door when it pinches his finger...."19 In the civil context, the forfeiture action focuses on whether the property itself was used during the commission of a crime or whether the property constitutes proceeds from a crime. In this context, the government may seek to proceed against the res administrativamente20 or by way of a civil suit.

Except in cases involving real property, which, according to current Department of Justice policy, must be judicially forfeited, administrative procedures eliminate over fifty percent of what would otherwise result in judicial forfeiture actions.21 Once an administrative action has been filed, the case will not result in a judicial proceeding unless someone files a claim and a request for a judicial determination, accompanied by either a cost bond of $250 or 10% of the value of the property up to a maximum of $5000, whichever is larger, or an in forma pauperis affidavit.22

20. Customs laws specifically authorize administrative forfeiture of property that does not exceed $500,000 in value, monetary instruments without limitation as to value, conveyances that are used to transport controlled substances, and illegally imported goods. 19 U.S.C. § 1607 (1988 & Supp. IV 1992); see also 21 U.S.C. § 881(d) (1988) (incorporating customs laws into the drug statute); 26 U.S.C. § 7325 (1988) (providing for administrative forfeiture of seized property under Internal Revenue Code procedures where property is valued at less than $100,000).
22. Regulations found at 28 C.F.R. § 9 provide for the administrative forfeiture process. As well, numerous federal agencies have their own administrative forfeiture regulations. See, e.g., 8 C.F.R. § 274 (1993) (Immigration and Naturalization Service); 39 C.F.R. § 233 (1993) (Postal); 19 C.F.R. § 171 (1993) (Customs). The intent behind
Only upon filing such a claim is the case referred to the United States Attorney's office for judicial action or declination.\textsuperscript{23}

The tradition of civil forfeiture, which is traceable to biblical times,\textsuperscript{24} was carried over to the American colonies from English law.\textsuperscript{25} These statutes served vital national interests during the

\begin{footnotesize}
24. \textit{See Exodus} 21:28 (New Oxford) ("When an ox gores a man or a woman to death, the ox shall be stoned, and its flesh shall not be eaten.").
25. One source of English forfeiture law was the medieval English institution of the deodand, whereby any object causing death could be forfeited to the Crown. Deodand is derived from the latin term "deo dandum" meaning a thing to be "given to God." \textit{Black’s Law Dictionary} 436 (6th ed. 1990). \textit{But see James R. Maxine, Note, \textit{Bane of American Forfeiture Law—Banished at Last?}, 62 Cornell L. Rev. 768, 772 n.31 (1977) (casting doubt that deodand served as basis for forfeiture in early English law). The deodand was not technically a criminal action since it applied only in cases of what would be referred to today as wrongful death. The deodand was imposed even if the death-causing implement belonged to the victim, and even if no other human agency was involved in the death. Jacob J. Finkelstein, \textit{The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Western Notation of Sovereignty}, 46 Temp. L.Q. 169, 182 (1973). The law was clear, however, that only the offending property, and not more, was to be forfeited.

Thus, if a man was killed by a moving cart, the cart and its horses were deodands, but if the man died when he fell from a wheel of an immobile cart, only the wheel was treated as a deodand, since only the wheel could be regarded as the cause of death.

\textbf{Austin v. United States}, 113 S. Ct. 2801, 2815 (1993) (Scalia, J., concurring in part) (citing 1 M. Hale, \textit{Plea of the Crown} 419-22 (1st ed. 1847); 1 Blackstone, Commentaries 301-02; \textit{Law of Deodands}, 34 Law Mag. 188, 190 (1845)). Designating the Crown as the beneficiary was justified because the King's interest in purchasing masses for the soul of the recently-departed subject was said to outweigh any claims by the decedent's kin. It was soon widely recognized, however, that the deodand was little more than an additional source of public revenue. \textit{See United States v. Schmalfeldt}, 657 F. Supp. 385, 387-89 (W.D. Mich. 1987) (explaining the development of deodand). The deodand was abolished in England in 1846. 9 & 10 Vict., ch. 62 (1846) (Eng.). That same year, the Act for Compensating Families of Persons Killed by Accidents," also known as "Lord Campbell's Act," was enacted creating a private cause of action for wrongful death. 9 & 10 Vict., ch. 93 (1846) (Eng.); Calero-Toledo v. Pearson Yacht Co., 416 U.S. 663, 681-82 n.19 (1974) (upholding the constitutionality of a forfeiture provision permitting the forfeiture of property belonging to a person who was innocent of wrongdoing and not negligent with respect to the property's misuse). At the time of the deodand's abolition, Lord Campbell remarked that it was a "wonder that a law so extremely absurd and inconvenient should have remained in force . . . ." 77 \textit{Hansard}, Parliamentary Debates 1027 (1845). Lord Campbell's comments notwithstanding, at least one commentator has suggested that the theory behind the deodand's utility lay in the philosophy of legal positivism, that the State has the right to secure the general moral and physical well-being for its people, including the sacrifice of property rights by individuals to effect the common good. Finkelstein, \textit{supra} at 183-212 (1973); \textit{see also} Calero-Toledo, 416 U.S. at 681 ("When application of the deodand to religious or
\end{footnotesize}
early days of our Republic. Forfeiture provisions were used during wartime to maintain American neutrality and to destroy the maritime activities of our enemies by, among other things, justifying the seizure of hostile ships. 26 Indeed, much of the
eleemosynary purposes ceased, and the deoland became a source of Crown revenue, the institution was justified as a penalty for carelessness. 27 A second source of English forfeiture law that the colonists had available was forfeiture upon conviction for a felony or treason, also known as forfeitures of the estate. See Calero-Toledo, 416 U.S. at 682 ("The convicted felon forfeited his chattels to the Crown and his lands escheated to his lord; the convicted traitor forfeited all of his property, real and personal, to the Crown."). The principle behind this type of forfeiture, punishing a wrongdoer, is the same one that underlies modern-day criminal forfeiture statutes. Id. However, forfeiture of an estate upon mere conviction of a felony does not exist in this country. Id. The First Congress abolished forfeiture of estate as an automatic punishment for felons. Act of Apr. 30, 1790, ch. 9, § 24, 1 Stat. 117. Although Article III, Section 8, Clause 2 of the Constitution specifically prohibits "Corruption of Blood, or Forfeiture [of estate] except during the Life of the Person attained," it is well established that this constitutional provision is meant to preclude only forfeiture of all of a wrongdoer's property and total disinheritance of that person's heirs as a result of criminal acts. U.S. CONST. art III, § 3, cl. 2. Thus, forfeiture statutes that allow the government to forfeit only the fruits and instrumentalities of illegal activity have been deemed to pass constitutional muster. See generally Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. at 680-84; United States v. Grande, 620 F.2d 1026, 1039 (4th Cir.), cert. denied sub nom. Berg v. United States, 449 U.S. 919 (1980); United States v. L'Hoste, 609 F.2d 796, 813 n.15 (5th Cir.), cert. denied, 449 U.S. 813 (1980); United States v. Huber, 603 F.2d 387, 397 (2d Cir. 1979), cert. denied, 445 U.S. 927 (1980). In addition to these first two sources of forfeiture law, the colonies could also resort to specific statutes under English admiralty law for examples of causes of action against property itself, without regard to the guilt or innocence of the property's owner. It is clear that

[long before the adoption of the Constitution the common law courts in the Colonies—and later in the states during the period of Confederation—were exercising jurisdiction in rem in the enforcement of . . . forfeiture statutes, which provided for the forfeiture of commodities and vessels used in violations of customs and revenue laws. Calero-Toledo, 416 U.S. at 683 (citing C.J. Hendry Co. v. Moore, 318 U.S. 133, 139 (1943)) (quotation marks omitted). The Navigation Acts of 1660, which required the shipping of commodities in English vessels, were a major component of English policy to promote dominance at sea. These Acts were made applicable to the colonies, and enforced in its courts. Thus, any vessel found to be in violation of the Acts was forfeited to the Crown. Almost immediately after the Constitution was adopted, a similar federal statute was enacted making ships involved in customs offenses subject to forfeiture, in addition to the offending goods. Id. at n.21 (citing Act of July 31, 1789, §§ 12, 36, 1 Stat. 39, 47 and Act of Aug. 4, 1790, §§ 13, 22, 27, 28, 67, 1 Stat. 157, 161, 163, 176); see also L. Harper, THE ENGLISH NAVIGATION LAWS (1939). It is this third source, statutory forfeiture, which caught hold in the colonies, and serves as the foundation for modern forfeiture law.

development of asset forfeiture in the United States parallels developments in the common law of admiralty.\textsuperscript{27}

Forfeiture statutes were used to enforce the payments of customs duties, a major source of revenue during the nineteenth century.\textsuperscript{28} Such provisions were also utilized during the Revolutionary War to seize Tory property and later to stem the tide of slave-running and to seize Confederate property during the Civil War.\textsuperscript{29} It is no exaggeration to say that were it not for these forfeitures our country might not exist in its current form today.

II. THE DEVELOPMENT OF CRIMINAL FORFEITURE

Congress first recognized in October of 1970 that the traditional crime fighting strategy of incarceration alone was inadequate to deter the criminal. In that month, Congress enacted the Racketeer Influenced and Corrupt Organizations Act (RICO),\textsuperscript{30} the Currency and Foreign Transactions Reporting Act,\textsuperscript{31} and the Continuing Criminal Enterprise statute.\textsuperscript{32} Each of these acts featured criminal forfeiture sections as new and powerful weapons with which to fight crime.\textsuperscript{33}

In testimony before the Senate subcommittee considering the RICO statute, Attorney General John Mitchell stated:


\textsuperscript{28} Id. at 940.

\textsuperscript{29} SMITH, PROSECUTION AND DEFENSE, supra note 19, ¶ 2.01; see also Miller v. United States, 78 U.S. (11 Wall.) 20 (1870) (upholding as a non-penal war measure, a statute forfeiting all property owned by Confederate officers and office holders); The Prize Cases, 67 U.S. (2 Black) 635 (1863) (upholding forfeitures of Confederate vessels as a valid exercise of war powers).


\textsuperscript{31} This statute was enacted as Title II of the Bank Records and Foreign Transaction Act, more commonly known as the Bank Secrecy Act. Currency and Foreign Transaction Reporting Act, ch. 1, § 201-213, 84 Stat. 1118 (1970).


While the prosecution of organized crime leaders can seriously curtail the operations of the Cosa Nostra, as long as the flow of money continues, such prosecutions will only result in a compulsory retirement and promotion system as new people step forward to take the place of those convicted.\textsuperscript{34}

The final Senate Report on RICO echoed this same perspective on crime fighting:

What is needed here . . . are new approaches that will deal not only with individuals, but also with the economic base through which those individuals constitute such a serious threat to the economic well-being of the nation. In short, an attack must be made on their source of economic power itself, and the attack must take place on all available fronts.\textsuperscript{35}

This new methodology towards law enforcement was a salutary development for a variety of reasons. Depriving criminals of their ill-gotten bounty, in addition to depriving them of their liberty, reinforces the message that crime does not pay. Of course, in addition to purchasing luxury items such as expensive homes and cars, criminals also use criminally-derived proceeds to reinvest in additional criminal ventures, and to corrupt otherwise legitimate enterprises. Seizure of such proceeds can, therefore, prevent additional crime and prevent the disruption of legitimate commerce. Moreover, incarceration is expensive, and society appears to be increasingly unwilling to expend the funds necessary to build more prisons to house increasing numbers of offenders for longer and longer periods of incarceration.\textsuperscript{36} For a society searching for a creative alternative (or supplement) to

\textsuperscript{35} Id. at 79.
\textsuperscript{36} The problem of the growing prison population in the federal system appears to be getting more severe with the advent of the United States Sentencing Guidelines in November of 1987, mandatory minimum penalties, and the career offender provisions in the Anti-Drug Abuse Act of 1986, with no signs of abatement in sight. U.S. SENTENCING COMM., SUPPLEMENTARY REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY SUPPLEMENTS ch. 7 (1987). Based solely on sentencing trends from 1982 to 1986, the United States Sentencing Commission estimated that the federal prison population would increase from 42,000 inmates in 1987 to 78,000 inmates by 1997. Id. The Commission estimates, however, that the advent of the Sentencing Guidelines, the imposition of mandatory minimum sentences, and career offender provisions could increase this total to as many as 118,000 inmates by 1997. Id.
incarceration, asset forfeiture may prove to be an attractive solution.\textsuperscript{37}

In times of fiscal constraint, forfeitures can be earmarked to help fund additional law enforcement activities. For instance, in 1989, Attorney General Richard Thornburgh announced that $229 million from the Justice Department's Assets Forfeiture Fund would be used to build more than 3000 federal prison cells.\textsuperscript{38} At that time, he stated that, "it's satisfying to think that it's now possible for a drug dealer to serve time in a forfeiture-financed prison after being arrested by agents driving a forfeiture-provided automobile while working in a forfeiture-funded sting operation."\textsuperscript{39} Indeed, the notion that proceeds and property forfeited from criminals can be used to help catch more criminals, having the criminal hoist with his own petard,\textsuperscript{40} is an attractive and a relatively unobjectionable concept.

Congress continued this trend toward a new approach to crime fighting with the Crime Control Act of 1984, which contained new forfeiture provisions and strengthened previously existing ones.\textsuperscript{41} In 1986, Congress enacted a host of new civil and

\textsuperscript{37} The Department of Justice Assets Forfeiture Fund has committed over $500 million of forfeited funds to the construction, operation and maintenance of the federal prison system. \textit{Asset Forfeiture Fact Sheet, EXECUTIVE OFFICE FOR ASSET FORFEITURE}, Nov. 18, 1993. Of this amount, $376.5 million was dedicated in 1988 and 1989 for prison construction. \textit{Id.} Another $115 million reached prison use in 1992 through the Special Forfeiture Fund, controlled by the Director of the Office of National Drug Control Policy, more popularly known as the Drug Czar. \textit{Id.} Finally $27.6 million was allocated from the fund in 1992 to support federal prisoners in the United States Marshal's custody. \textit{Id.}


\textsuperscript{39} \textit{Id. But see Hiles, T.J., Civil Forfeitures of Property for Drug Offenders Under Illinois and Federal Statute: Zero Tolerance, Zero Exceptions, 25 J. MARSHALL L. REV. 389, 420 (1992) (citing "strong incentive" by federal officials to bring forfeiture actions even if results are inequitable); U.S.A. TODAY, Apr. 11, 1990, at 3A ("Law enforcement agencies can become so dependent on the millions of dollars in cash and other assets they get forfeited from drug dealers that the seizures become more important than fighting drug abuse . . . ."); David Anderson, \textit{Mixed Messages From a Drug Bust}, N.Y. TIMES, Apr. 1, 1991, at A10 ("[A]lthough there is superficial justice in rewarding local initiative, the law, perversely, makes police departments financially dependent on the drug dealing they are supposed to curtail.").}

\textsuperscript{40} \textit{WILLIAM SHAKESPEARE, HAMLET} act 3, sc. 4.

\textsuperscript{41} The Comprehensive Forfeiture Act of 1984, Pub. L. No. 98-473, § 301-23, 98 Stat. 2040-57 (1984) added section 881(a)(7) to Title 21 of the United States Code. See 21 U.S.C. § 881(a)(7) (1988) where § 881(a)(7) is currently codified. This section provided for the forfeiture of real property used to facilitate drug activity which, until then, had not been subject to forfeiture. \textit{Id.} That statute also codified the "relation back" doctrine so that property subject to forfeiture vested in the government at the
criminal forfeiture provisions as part of the Anti-Drug Abuse Act of 1986. These included forfeitures attached to new money laundering offenses and the substitute assets provision. That same year, Congress enacted legislation providing for criminal forfeiture of proceeds derived from espionage activities. Two years later, Congress enacted provisions for the criminal forfeiture of property and profits connected with child pornography.

In 1989 and again in 1990, in the wake of the Savings and Loan crisis, Congress dramatically expanded criminal forfeiture in the area of fraud affecting financial institutions. These amendments provided for direct criminal forfeiture of proceeds. However, its scope was limited to cases involving specified crimes that affect financial institutions.

In general, the criminal forfeiture statute that has evolved in the area of drug-related crimes, 21 U.S.C. § 853, is straightforward, clearly written, and relatively simple to use. The drug forfeiture statute was an appropriate response to the need to attack forcefully an illicit industry worth literally billions of dollars. As a result of Congress' focused effort against illegal and
dangerous narcotics, the drug forfeiture statute has been used quite effectively by criminal prosecutors.

Prosecutors dealing with other areas of criminal endeavor have not had the benefit of an equally-straightforward forfeiture statute. For non-drug-related crimes, the primary forfeiture statute tends to be overly complicated to follow and, in most cases, needlessly tied to money laundering offenses. This has resulted in unnecessary confusion by prosecutors in attempting to determine under what circumstances criminal forfeiture is available and what must be proven in order to achieve the forfeiture. As is often the case, confusion with the statutory scheme leads to non-use of the statutes involved.

In 1992, Congress took a little-noticed but dramatic step in the right direction in the criminal forfeiture area. In that year, Congress amended § 982 to provide for direct criminal forfeiture of proceeds for a series of crimes, regardless of whether those crimes affected a financial institution and regardless of whether the criminal activity also involved money laundering.49

Our thesis is that while this recent development in the area of direct criminal forfeiture is laudatory, Congress should go much further and enact an across-the-board direct criminal forfeiture provision for the proceeds of all federal felony offenses. By both simplifying and expanding the scope of criminal forfeiture, Congress can provide prosecutors with an effective and powerful tool with which to deprive both drug and non-drug defendants of their ill-gotten gains, while at the same time eliminating many of the criticisms and inefficiencies that exist in the current system.

III. CIVIL AND CRIMINAL FORFEITURES: COMPARISONS AND CRITICISMS

Civil forfeiture statutes have been subjected to criticism on grounds of fairness.50 Many contend that, in the civil forfeiture context, the government is given many unfair advantages.51

51. See supra notes 3-11 and accompanying text.
Some of these government advantages are discussed below. Additionally, critics of civil forfeiture statutes contend that, despite the civil appellation, these statutes seem to serve few purposes beyond enforcing criminal law.\textsuperscript{52} Although civil forfeitures are supposed to be predominantly "remedial" in nature (i.e., to deter negligent or wrongful conduct or to remunerate the victims of such conduct), critics contend that the "civil" label cannot obscure clear punitive intent in enacting such legislation.\textsuperscript{53} These critics charge that the government can and does use the civil forfeiture process to exact an economic sanction against individuals who are either beyond the reach of the criminal justice system or against whom there is simply insufficient evidence to convict them of a crime.

As with other civil actions, the burden of proof is generally placed on the party bringing the lawsuit to prove its case by a preponderance of the evidence. However, because of the peculiarities of history, civil forfeiture statutes specifically incorporate procedures from admiralty and customs laws.\textsuperscript{54} Generally, these admiralty and customs laws only require the government to show probable cause for forfeiture; the burden then shifts to the party seeking to retain custody of the property to establish by a preponderance of the evidence that the property


\textsuperscript{53} See In re Winship, 397 U.S. 358 (1970) (holding that government must prove guilt beyond a reasonable doubt at a "civil" juvenile delinquency hearing); In re Gault, 387 U.S. 1 (1967) (holding that civil label and good intentions cannot obviate the need for procedural safeguards in accordance with the Due Process Clause); see also Austin v. United States, 113 S. Ct. 2801 (1993) (discussed infra notes 78-83 and accompanying text); United States v. Halper, 490 U.S. 435 (1990) (holding "civil" fine imposed following a criminal conviction to be a criminal sanction in violation of Double Jeopardy Clause).

is not subject to forfeiture.\textsuperscript{55} Probable cause for forfeiture has generally been defined by the courts to mean a reasonable ground for belief of guilt, supported by less than prima facie proof but more than mere suspicion.\textsuperscript{56}

Critics contend that the inequity of this procedure is enhanced by the fact that the government can use hearsay evidence to establish probable cause.\textsuperscript{57} The claimant, however, cannot rely on such evidence in rebuttal.\textsuperscript{58} It is only after the claimant has presented his case that the government need respond with trial-quality evidence.\textsuperscript{59} The claimed unfairness with this procedure is that the government can, upon a minimal showing, avail itself of various pretrial mechanisms, such as motions for summary judgment, and can challenge the claimant's proof at trial before ever having to present trial-quality evidence to support its case.

Although rarely recognized by critics, it is worth noting that this procedure has drawbacks for the government as well, particularly in civil forfeiture jury trials. The government is often prohibited from presenting its evidence proving probable cause to the jury on the theory that a lay jury would be incapable of disregarding otherwise inadmissible evidence in determination of the issues properly before them, such as the innocent ownership defense.\textsuperscript{60} Typically, the government presents its evidence

\textsuperscript{55} See United States v. Parcel of Land and Residence Located Thereon at 5 Bell Rock Rd., Freetown, Mass., 886 F.2d 605, 608 (1st Cir. 1990); United States v. One 1987 Mercedes 560 SEL, 919 F.2d 327, 331 (5th Cir. 1990); United States v. Trotter, 912 F.2d 964, 965 (8th Cir. 1990); United States v. Santoro, 866 F.2d 1538, 1540-43 (4th Cir. 1989); United States v. 3639-2nd St., N.E., Minneapolis, Minn., 869 F.2d 1093 (8th Cir. 1989); United States v. A Single Family Residence Located at 900 Rio Vista Blvd., Ft. Lauderdale, Fla. (Heidi), 803 F.2d 625, 629 (11th Cir. 1986).

\textsuperscript{56} See, e.g., United States v. One 1987 Mercedes 560 SEL, 919 F.2d at 331; United States v. 1982 Yukon Delta Houseboat, 774 F.2d 1432, 1434 (9th Cir. 1985); United States v. $4,255,629.39, 762 F.2d 895, 903 (11th Cir. 1985), cert. denied, 474 U.S. 1056 (1986); United States v. One 1975 Mercedes 280S, 590 F.2d 196, 199 (6th Cir. 1978); Ted's Motors v. United States, 217 F.2d 777, 780 (8th Cir. 1954).

\textsuperscript{57} See infra note 104.

\textsuperscript{58} See United States v. One Parcel of Property Located at 15 Blackledge Drive, Marlborough, Conn., 897 F.2d 97 (2d Cir. 1990); United States v. One 1986 Nissan Maxima GL, 895 F.2d 1083, 1085 (5th Cir. 1989); United States v. Property Known as 6109 Grubb Road, 886 F.2d 618 (3d Cir. 1989); United States v. $250,000 in United States Currency, 803 F.2d 895, 899 (1st Cir. 1987); United States v. 1964 Beechcraft Baron Aircraft, 691 F.2d 725, 728 (5th Cir. 1982), cert. denied sub nom. Preston v. United States, 461 U.S. 914 (1983).

\textsuperscript{59} That is to say, evidence that would be admissible under the Federal Rules of Evidence and the Federal Rules of Civil Procedure.

\textsuperscript{60} United States v. Parcel of Real Estate at 1012 Germantown Road, Palm Beach County, Fla., 963 F.2d 1496 (11th Cir. 1992).
establishing probable cause to the judge outside of the jury's presence. The judge then makes a legal determination as to whether probable cause has been established. If the judge determines that probable cause has been established, he will so inform the jury and the case will proceed with the claimant getting the first opportunity to present evidence in front of the jury.

Thus, the evidence at such a trial is presented counterintuitively from most other civil suits, with the government getting little more than an opening statement to the jury to the effect that probable cause has been established and that the claimant will now present evidence to establish his claim before the government presents its evidence to rebut that claim. Hence, at trial, a claimant will usually get the first opportunity to sway the jury's sympathy through the presentation of his or her evidence before the government gets its opportunity to present evidence to rebut the claim. From the government's perspective, this procedure permits a disjointed presentation of the evidence to the jury.

One great advantage to the government is that it need not definitively establish a connection between illegal activity and the property in question. The government need only show a reasonable belief that such a connection exists, and the government can use hearsay evidence to make such a showing. The claimant must then establish, through non-hearsay evidence, and by a preponderance of the evidence, that forfeiture is not permissible.

This seeming "guilty-until-proven-innocent" procedure has been upheld repeatedly against challenges to its constitutionality. Courts have generally held that civil forfeiture statutes are not sufficiently criminal in nature to prevent Congress from shifting the burden in this way in accordance with due process.\footnote{61. See, e.g., Boyd v. United States, 116 U.S. 616, 634-35 (1886); United States v. $250,000 in United States Currency, 808 F.2d at 900; United States v. $2,500, 689 F.2d 10, 12 (2d Cir. 1982), cert. denied, 466 U.S. 1099 (1984); United States v. One 1970 Pontiac GTO, 2-Door Hardtop, 529 F.2d 65, 66 (9th Cir. 1976); Bramble v. Richardson, 498 F.2d 968, 969 (10th Cir. 1974), cert. denied, 419 U.S. 1069 (1974).} In general, therefore, in the civil forfeiture context, as opposed to in the criminal forfeiture context, the property owner has the burden of proving that the property was not "guilty."
Furthermore, in the absence of statutory authority to the contrary, a defense of owner innocence, as opposed to property innocence, is not deemed to be a valid defense. Thus, traditionally, if property was used in an impermissible manner so subjecting it to forfeiture, a claimant could not prevail if his only defense is that he did not sanction its impermissible use.

In Calero-Toledo v. Pearson Yacht Leasing Co., the Supreme Court in dicta opined that it might be unconstitutional to deprive an "exceptionally innocent" owner of his property based on the wrongdoing of others. However, in order to fall within this limited exception, the Court stated that the claimant must establish not only that he was unaware of the unlawful conduct that gave rise to the forfeiture but also that he had taken all reasonable precautions to prevent the wrongful use of the property.

Most civil forfeiture statutes, however, provide greater protection than the Calero-Toledo defense and allow a claimant to prevail if he can establish that his property had been stolen at the time of its illegal use, or that he did know about or

62. See, e.g., United States v. One 1957 Rockwell Acro Commander 680 Aircraft, 671 F.2d 414, 417 (10th Cir. 1982); United States v. Andrade, 181 F.2d 42, 46 (9th Cir. 1950). Recently, however, in Austin, the Supreme Court strongly suggested that owner culpability, at least negligence if not outright criminality, lies at the heart of all forfeiture actions, whether in rem or in personam. Austin v. United States, 113 S. Ct. 2801 (1993). The Austin Court noted that "recent cases have expressly reserved the question whether the fiction [of punishing the guilty property] could be employed to forfeit the property of a truly innocent owner." Id. at 2809. In his partial concurrence in Austin, Justice Kennedy, joined by Chief Justice Rehnquist and Justice Thomas, further stated that "[a]t some point, we may have to confront the constitutional question whether forfeiture is permitted when the owner has committed no wrong of any sort, intentional or negligent. That for me would raise a serious question." Id. at 2816.


64. Id. at 689-90.

65. Id.; see, e.g., United States v. 141st Street Corp. by Herch, 911 F.2d 870 (2d Cir. 1990); United States v. One 1982 28' Int'l Vessel, 741 F.2d 1319, 1322 (11th Cir. 1984); United States v. One Tintoretto Painting Entitled "The Holy Family with Saint Catherine and Honored Donor," 691 F.2d 603, 607 (2d Cir. 1982). Courts interpreting this dicta have also held that simple lack of awareness of wrongdoing is insufficient to invoke this defense. See, e.g., United States v. One 1977 Cherokee Jeep, 639 F.2d 212, 213 (5th Cir. 1981). For an interesting article discussing the effect of the Calero-Toledo standard on lending institutions, see M.D. Weiss, Note, The Poor Tax Revisited: The Effects of Shifting the Burden of Investigating Drug Crimes to Lenders, 70 Tex. L. Rev. 717 (1992).

consent to the property's illegal use.\footnote{7} Therefore, typically, a claimant in a forfeiture action can assert a defense of either property innocence or owner innocence.

"Innocent owner" issues exist in the civil forfeiture context,\footnote{8} but not in the criminal forfeiture context because the action in criminal forfeiture cases is against the culpable individual's interest in the property rather than against the property itself. It is only after the criminal trial and conviction that there is an ancillary proceeding to establish the government's claim to the subject property vis-à-vis other claimants who can claim at such a proceeding that they have a superior right, title, or interest or were bona fide purchasers.\footnote{9} It is worth noting that while claimants with a superior right, title, or interest and bona fide purchasers may fall within the category of "innocent owners,"\footnote{10} not all "innocent owners" have a superior right, title, or interest or are bona fide purchasers. Thus, it is clear that "innocent owners" that do not fall into these categories cannot prevail at an ancillary proceeding.\footnote{11}

Courts have even held that a civil forfeiture can be instituted against the property of a defendant who has been acquitted in a prior criminal prosecution without violating the Double Jeopardy Clause of the Fifth Amendment.\footnote{12} Because of the higher burden

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\footnote{67}{See id. § 881(a)(6)-(7).}
\footnote{69}{The standard which must be established by claimants in criminal and civil forfeitures differs widely. In the criminal setting, the claimant must establish at the ancillary hearing that he either has a superior right, title or interest in the property or that he is a bona fide purchaser for value. In the civil context, the standard varies depending upon the type of asset and the forfeiture provision utilized. See generally David F. Axelrod, "Innocent Owners" Meet "Relation Back" Doctrine, in \textit{CIVIL REMEDIES IN DRUG ENFORCEMENT REPORT}, Aug.-Sept. 1992, at 10.}
\footnote{70}{While bona fide purchasers, by definition, are "innocent owners," it is possible that a claimant may have a superior right, title, or interest in property, because it predates or is independent of the convicted owner's interest, and yet not be an "innocent owner." 21 U.S.C. § 883(a)(6)(A) (1988). For instance, the claimant may have been a co-owner of the property with the convicted defendant and known about and consented to its illegal use. \textit{Id.} In such a case where the claimant is not prosecuted, yet probable cause exists to forfeit the remaining interest in the property, a civil action must be utilized in order to determine the government's interests and priorities vis-à-vis this claimant. \textit{Id.}}
\footnote{71}{See infra note 125 and accompanying text.}
of proof and different elements involved in a criminal proceeding, the prior acquittal has no collateral estoppel effect.\textsuperscript{73} Additionally, under principles of collateral estoppel, once the government secures a criminal conviction for illegal conduct that serves as the basis for the civil forfeiture, a claimant may not relitigate matters that were dealt with in the criminal case, such as the defendant's guilt, the proof of which may also conclusively establish the unlawful use of the property in question.\textsuperscript{74}

Even owner absence is not an obstacle to a civil forfeiture action.\textsuperscript{75} In an \textit{in rem} forfeiture action, "[i]t is the property which is proceeded against, and, by resort to a legal fiction, held guilty and condemned as though it were conscious instead of inanimate and insentient."\textsuperscript{76}

In addition to the shifting burden and relaxed rules of evidence, most civil forfeiture provisions are extraordinarily broad. Some civil forfeiture laws, such as 21 U.S.C. § 881, permit the government to seek forfeiture of all property that was used or intended to be used "in any manner to facilitate" a violation.\textsuperscript{77}


\textsuperscript{73} United States v. One Assortment of 89 Firearms, 465 U.S. at 354.

\textsuperscript{74} United States v. All Right, Title & Interest in Real Property & Bldg. Known as 303 West 116th Street, New York, New York, 901 F.2d 288 (2d Cir. 1990); United States v. "Monkey," 725 F.2d 1007, 1010 (5th Cir. 1984); United States v. $31,697.59 Cash and $2,850.00 Cash, 665 F.2d 903, 906 (9th Cir. 1982); United States v. United States Currency Amounting to the Sum of Thirty Thousand Eight Hundred Dollars ($30,800.00), 555 F. Supp. 280, 282 (E.D.N.Y. 1983), \textit{aff'd}, 742 F.2d 1444 (2d Cir. 1982).

\textsuperscript{75} \textit{See} United States v. One Parcel of Real Estate, Dade County, Fla., 868 F.2d 1214 (11th Cir. 1989). One explanation for this may be the fact that much of civil forfeiture law has been developed from admiralty law. Piety, supra note 27, at 935. It has been suggested that admiralty law developed \textit{in rem} procedures as a way to provide compensation to the victims or to the sovereign for wrongful conduct in situations in which the vessel and its cargo are within the appropriate jurisdiction but the owner of the vessel is far away. \textit{See} Finkelstein, supra note 25, at 231.

\textsuperscript{76} Various Items of Personal Property v. United States, 282 U.S 577, 581 (1931).

\textsuperscript{77} \textit{See} United States v. Real Estate Known as 916 Douglas Ave., 903 F.2d 490, 494 (7th Cir. 1990) (requiring that connection between property and drug-related activity need only be more than incidental or fortuitous to make property subject to forfeiture); United States v. Littlefield, 821 F.2d 1385 (9th Cir. 1987) (ordering forfeiture of entire parcel of land even though only part was used for drug-related activity); United States v. One 1977 Lincoln Mark V Coupe, 643 F.2d 154, 157 (3d Cir.), \textit{cert. denied}, 454 U.S. 818 (1981) (using car hood to camouflage drug transaction
This can sometimes lead to harsh, and possibly inequitable, results.\textsuperscript{78} Just last term, in \textit{Austin v. United States},\textsuperscript{79} the Supreme Court recognized that the Excessive Fines Clause of the Eighth Amendment applies to \textit{in rem} civil forfeiture actions,\textsuperscript{80} concluding that civil forfeiture statutes often serve both remedial and punitive ends,\textsuperscript{81} as forfeiture critics had long contended.\textsuperscript{82}

renders car subject to forfeiture); United States v. One 1974 Cadillac Eldorado Sedan, 548 F.2d 421, 426-27 (2d Cir. 1977) (allowing forfeiture of car used by defendants to travel to first drug negotiation even though no deal consummated until three days later). But see United States v. McKeithen, 822 F.2d 310, 313-14 (2d Cir. 1987) (holding that only portion of land used for drug-related activity is forfeitable).

78. \textit{See, e.g.}, Calero-Toledo v. Pearson Yacht Co., 416 U.S. 663 (1974) (forfeiture of $20,000 yacht where two marijuana cigarettes found on board); United States v. One 1985 Mercedes, 917 F.2d 415 (9th Cir. 1990) (allowing civil forfeiture of car valued at over $40,000 even though charges against owner found in possession of $75 worth of cocaine were subsequently dismissed); United States v. One Red Ferrari, 875 F.2d 186, 188 (8th Cir. 1989) (upholding civil forfeiture of car even though owner found guilty of cocaine possession and only fined $1000, less than one-fortieth the value of the car); United States v. One 1986 Mercedes Benz, 846 F.2d 2 (2d Cir. 1988) (forfeiture of Mercedes after remains of marijuana cigarette found in car); One Blue 1977 AMC Jeep CJ-5 v. United States, 783 F.2d 759 (8th Cir. 1986) (allowing forfeiture of mother’s car after son used it to drive to location to discuss drug deal, even though mother did not know of its use); United States v. Certain Real Property Located at 116 and 118 Sandy Beach Road in Auburn, Maine, 711 F. Supp. 660 (D. Me. 1989) (allowing forfeiture of house because owner used house as a decoy to mislead others as to actual location of cocaine, which was hidden in adjacent house); United States v. Real Property and Resident, 3097 S.W. 111th Avenue, Miami, Florida, 699 F. Supp. 287 (S.D. Fla. 1988) (allowing forfeiture of house when a single drug transaction took place between two cars parked in the driveway). \textit{See} Ian A.J. Pitz, \textit{Letting the Punishment Fit the Crime: Proportional Forfeiture Under Criminal RICO’s Source of Influence Provision}, 75 MINN. L. REV. 1223 (1991) (suggesting proportional forfeiture approach in RICO cases based on degree of “source of influence” of property in question to underlying conduct).


80. This conclusion had already been reached by numerous courts that had considered the issue. \textit{See, e.g.}, United States v. 3639-2nd St., N.E., 869 F.2d at 1098 (Arnold, J., concurring) (“We are not today foreclosing the possibility that a given use of forfeiture statutes may violate the Excessive Fines Clause of the Eighth Amendment.”); United States v. $173,061.04 in U.S. Currency, 835 F.2d 1141, 1143 n.6 (5th Cir. 1988) (suggesting that disproportionately penal civil forfeiture may violate Eighth Amendment); United States v. Busher, 817 F.2d 1409, 1414-15 (9th Cir. 1987); United States v. One 1982 28’ Int’l Vessel, 741 F.2d 1319 (11th Cir. 1984); United States v. Huber, 603 F.2d 387, 397 (2d Cir. 1979), cert. denied, 445 U.S. 927 (1980); United States v. One 1975 Mercedes 280S, 590 F.2d 196, 198 (6th Cir. 1978); United States v. One Clipper Bow Ketch NISKU, 548 F.2d 8, 11 (1st Cir. 1977); United States v. Bonnano Organized Crime Family, 683 F. Supp. 1411, 1460 (E.D.N.Y. 1988) (allowing court to decline civil forfeiture of real property where only a portion of the property was used for the improper conduct and forfeiture would effect a disproportionate penalty).

81. Forfeiture is remedial because it protects the community by removing
The *Austin* Court remanded the case, however, without any instructions to the lower court about what standards it should use to guide it in its determinations regarding the constitutional excessiveness of forfeiture.\(^8^3\) While the situation will no doubt change in light of *Austin*, no court has yet disallowed a civil forfeiture on this ground. In fact, many courts, albeit prior to *Austin*, have held that forfeiture provisions do not permit court discretion over the amount of property forfeited when a crime is committed that triggers the forfeiture, regardless of the seriousness of the offense or the degree of blameworthiness of the owner.\(^8^4\)

Another significant aspect of both civil and criminal asset forfeiture that deserves to be mentioned is the "relation back" doctrine.\(^8^5\) Prior to *United States v. A Parcel of Land Known as*

dangerous instrumentalities from the stream of commerce and because it compensates the government for its expenditures on law enforcement activities and on other societal problems resulting from the offending instrumentalities. Forfeiture is punitive because it involves a real transfer of value from the wrongdoer to the sovereign precisely because the wrongdoer has done wrong.

82. The Supreme Court had previously touched on this issue in Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963), in which the Court listed some of the factors to consider when analyzing whether an act of Congress is sufficiently punitive so as to negate Congress' expressed intention that an act be labelled civil in nature. These factors included: whether the sanction had historically been regarded as punishment, whether the sanction involved an affirmative disability or restraint, whether the sanction is dependent upon a finding of scienter, whether the sanction promotes traditional aims of punishment, whether the behavior to which it applies is a crime, whether there is a non-punitive purpose to which the sanction may be rationally connected, and whether the sanction appears excessive in relation to that non-punitive purpose. *Id.*

83. In a footnote, the Court stated, "[w]e do not rule out the possibility that the connection between the property and the offense may be relevant, but our decision today in no way limits the Court of Appeals from considering other factors in determining whether the forfeiture of Austin's property was excessive." 113 S. Ct. at 2812 n.15.


92 Buena Vista Ave., Rumson, N.J., it had been widely assumed that the government’s right to forfeited property, either civilly or criminally, vested at the time of its illegal use, rather than at the time a forfeiture judgment was obtained or when the property was seized. The government could cite to both statutory and common law to support this claim. From this, it had been argued that the government had superior title to anyone acquiring an interest in the property after the illegal act. However, in Buena Vista, Justice Stevens; the three justices who joined Justice Stevens’ plurality opinion; Justice Scalia, who wrote a concurring opinion; and, Justice Thomas, who joined Justice Scalia’s opinion, dispelled that assumption.

In Buena Vista, the government filed an in rem forfeiture action against a home that had been purchased by Beth Ann Goodwin, the girlfriend of an alleged drug dealer, with money derived from his drug importation business. Ms. Goodwin asserted that she was an “innocent owner” of the property in question. The government asserted, inter alia, that Ms. Goodwin never owned the property. The government also asserted that even if she did own the property, the government’s interest was superior to hers because, under the “relation back” doctrine the government obtained title to the property the moment the property was purchased with tainted money, before her interest ever arose. Six justices disagreed with the government’s argument.

While Justice Stevens’ plurality opinion and Justice Scalia’s concurring opinion disagree as to precisely how the common law and the statute permit an “innocent owner” to prevail over the government, it is clear that Justices Stevens and Scalia agree

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86. 113 S. Ct. 1126 (1993).
88. 113 S. Ct. at 1130.
89. Id.
90. Id.
91. Id.
92. Justice Stevens interprets 21 U.S.C. § 881(a)(6) to exempt an entire category of property, i.e., property or proceeds owned by innocent owners from the category of otherwise forfeitable property subject to the “relation back” doctrine. Id. at 1136. Justice Scalia, on the other hand, concludes that while property or proceeds owned by innocent owners are not necessarily exempt from otherwise forfeitable property, the statute permits innocent owners to “perfect” their title to the property by innocently acquiring it before the government is able to perfect its title by obtaining an order of
on how the “relation back” doctrine should be applied. Following a forfeiture proceeding, while the government may assert that its title to the property in question dates back to the time of the illegal transaction or to the time when the proceeds of illegal activity were used to purchase the property in question, this title is not self-executing and does not become extant until after a judicial order of forfeiture. In other words, any delay by the government in “perfecting” its title, i.e., obtaining a forfeiture order may cause it to lose the property if it is acquired by “innocent owners” (either donees or bona fide purchasers for value) during the interim time period between the illegal activity and the decree of forfeiture.

Although severely weakened, the “relation back” doctrine still applies in both the civil and criminal context. Furthermore, with few exceptions, the analysis regarding the “relation back” doctrine is the same for both civil and criminal forfeitures.

An order of forfeiture in favor of the government following a civil action grants the government clear title to the property against all other claimants. This would include not only the owner or the person who “misused” the property, but also non-“innocent owners” who purchased or otherwise acquired an interest in the property prior to the institution of the civil forfeiture action.

This is not the case, however, in the criminal context, in which the action is in personam and only determines the property rights of the defendant against whom forfeiture is sought. As discussed above, the government cannot get clear title to the property unless and until it prevails against all other claimants at the ancillary proceeding which follows the criminal conviction. While losing claimants can still file a petition for

forfeiture. Id. at 1142. Both Justices reach the same conclusions under the common law analysis.

93. Id. at 1137.
94. Id. at 1134.
95. See infra notes 117-25 and accompanying text for a discussion regarding one of those few exceptions.
96. See Austin v. United States, 113 S. Ct. 2801 (1993); United States v. $5,644,540.00 in U.S. Currency, 799 F.2d 1357, 1364-65 (9th Cir. 1986); United States v. One 1967 Chris-Craft 27 Foot Fiber Glass Boat, 423 F.2d 1293, 1294 (5th Cir. 1970).
97. See supra notes 68-71 and accompanying text.
98. In enacting the Comprehensive Crime Control Act of 1984, Congress chose to diminish the impact of the “relation back” doctrine vis-à-vis the rights of third-party
remission or mitigation following a civil or criminal forfeiture,\textsuperscript{99} the government has complete discretion over whether to grant such petitions.\textsuperscript{100}

IV. ADVANTAGES OF CRIMINAL FORFEITURE AND PROPOSED DEVELOPMENTS

A criminal forfeiture, as an \textit{in personam} proceeding, focuses on the individual or group of individuals who commit a crime. The forfeiture process in the criminal context provides the government with a statutory vehicle for locating and confiscating the fruits and, in some cases, the instrumentalities of criminal activity.

Unlike civil forfeitures, however, criminal forfeitures are only instituted in connection with criminal charges against particular individuals. In such cases, the government would include in the indictment itself the requisite allegations of forfeitability of property involved in the commission of the crimes charged.\textsuperscript{101}

As with the rest of the charges contained in the indictment, the government must prove the forfeitability of the property in question beyond a reasonable doubt.\textsuperscript{102} Before a judge can enter

\begin{itemize}
\item Congress provided that the relation back provisions may not result in the forfeiture of property acquired by "a bona fide purchaser for value of such property who at the time of the purchase was reasonably without cause to believe that the property was subject to forfeiture." S. REP. NO. 225, 98th Cong., 1st Sess. 200-01 (1983); see also 18 U.S.C. § 1963(c) (1988); 21 U.S.C. § 853(c) (1988). Such a bona fide purchaser for value must establish the legitimacy of his or her claim at the ancillary proceeding. 18 U.S.C. § 1963(m) (1988); 21 U.S.C. § 853(n) (1988).
\item A petition for remission or mitigation, filed pursuant to 19 U.S.C. § 1618, is, in essence, a request for an executive pardon based not on the validity of the forfeiture, but on the interests of the petitioner in the property in question as well as his or her good faith or other extenuating circumstances vis-à-vis the events that led to the forfeiture. 19 U.S.C. § 1618 (1988).
\item See, e.g., One 1977 Volvo 242 DL v. United States, 650 F.2d 660, 662 (5th Cir. 1981).
\item See FED. R. CRIM. P. 7(c)(2) (requiring that notice of forfeiture be included in the indictment); FED. R. CRIM. P. 31(e) (requiring that special verdicts be rendered on the extent of the interests forfeited). But note that such notice can be of a general nature, tracking the statutory language of the forfeiture statute, followed by a particularized notice. United States v. Cauble, 706 F.2d 1322 (5th Cir. 1983), \textit{cert. denied}, 465 U.S. 1005 (1984) (barebones pleading sufficient); United States v. Grammatikos, 633 F.2d 1013 (2d Cir. 1980) (notice followed by bill of particulars sufficient); United States v. Ruple, 706 F. Supp. 751 (D. Nev. 1989) (concluding that the government is not precluded from seeking forfeiture of all property subject to the sanction simply because some assets are named with particularity in the indictment).
\item The exception to this rule is found in 21 U.S.C. § 853(d) (1988), the narcotics forfeiture provision. See also United States v. Eldersma, 971 F.2d 690 (11th Cir.)
\end{itemize}
an order of criminal forfeiture, the trier of fact must first convict the defendant and then return a special verdict against the property by making a finding of forfeiture.

Because of the cumbersome nature of § 982 and the money laundering statutes, both in terms of complexity of understanding and complexity of use, prosecutors too often choose either to forego criminal forfeiture or to rely upon the civil forfeiture process to forfeit property after they have completed their criminal prosecutions against the wrongdoers. In those cases in which the prosecutor chooses to forego forfeiture, the villain will not have been justly deprived of the fruits of his crime.

Pursuit of a civil forfeiture remedy in lieu of a more direct criminal forfeiture is woefully inefficient. With a criminal prosecution followed by a civil forfeiture action, taxpayers fund dual proceedings which further encumber an already overburdened federal judicial system. Moreover, in most criminal cases, federal prosecutors are involved from the inception of the criminal investigation and know the facts of the case quite well by the time it goes to trial.103 Since these facts are not likely to change, and since this prosecutor knows the facts necessary to prove the forfeiture better than anyone, current practice of a subsequent and separate forfeiture proceeding by a civil assistant United States Attorney does not make sense.

Institution of a civil forfeiture action following a criminal prosecution of an individual,104 or at the same time as the criminal prosecution,105 will, almost by necessity,106 involve

1992) (en banc) for a recitation of the debate over whether the lower standard can be utilized in criminal forfeiture cases.

103. Another reason why the prosecutor is likely to know the facts of the case quite well is that prosecutors know that they are going to have to convince each member of the jury of the defendant's guilt beyond a reasonable doubt.

104. In addition to being inefficient, civil forfeiture actions following criminal prosecutions are frequently criticized on the basis that it appears to the public at large that innocent parties are being punished for the convicted individual's sins. See, e.g., Where the Innocent Lose, NEWSWEEK, Jan. 9, 1993, at 42; Forfeiture: Seizing of America, Part I, HIGH TIMES, Nov. 1992, at 46; Dianna Hunt, Legal Larceny?: Innocent Bystanders Stung by Drug War Property Seizures, HOUS. CHRON., May 17, 1992, at 1A; Some Win Back Assets After Drug Forfeiture, THE PITTS. PRESS, Dec. 22, 1991, at A1; Presumed Guilty: Government Seizes Victimize Innocent, THE PITTS. PRESS, Aug. 11, 1991, at A1. When the forfeiture issues are handled as part of the criminal prosecution, it is clear to all concerned that the property in question belongs to the criminal, and that these so-called innocent parties may, in fact, merely be nominees of the wrongdoer. See 21 U.S.C. § 853(c) (1988) (third-party transfer interests subject to criminal forfeiture).

105. Another problem that results when a civil forfeiture action is undertaken
both a criminal prosecutor and a civil government attorney. At
the very least, the criminal prosecutor will have to provide
relevant information to the civil government attorney involved
in the civil action.\textsuperscript{107} This transfer of information may be
complicated by certain restrictions that prevent the civil
assistant from being privy to the same information that is or was
available to the criminal assistant.\textsuperscript{108} Moreover, once the civil
government attorney learns about the case, there are many
expensive and time-consuming procedural devices that are
integral to civil cases, such as depositions, interrogatories,
motions for summary judgment, and pretrial orders, that do not
exist in the criminal context.

If the civil forfeiture action is undertaken after the criminal
prosecution has been completed, the wrongdoer himself will have
less of an incentive to clear up all of his legal problems at one
time. The defendant might be more cooperative in the interest of
striking an advantageous plea bargain agreement that includes
disposition of the forfeiture issues involved, if done at the same
time that the remainder of the criminal case is resolved.\textsuperscript{109}

\begin{footnotes}
\footnotetext[106]{Simultaneously with the criminal action against the defendant is that the criminal case may be jeopardized by the more liberal civil discovery rules if the court refuses to stay the civil case. Although 21 U.S.C. \textsection 881(d) (1988) provides that upon the filing of an indictment or information related to the civil forfeiture proceeding, the court shall upon motion of the government stay the civil proceeding, some courts have made obtaining stays of discovery in parallel civil forfeiture actions exceedingly difficult. \textit{See In re Ramu Corp.}, 903 F.2d 312 (5th Cir. 1990); United States v. One Parcel of Real Estate at 1303 Whitehead, Key West, Fla., 729 F. Supp. 98 (S.D. Fla. 1990).}

\footnotetext[107]{Although it is possible for a criminal assistant United States attorney to litigate a civil forfeiture action, and for a civil assistant United States attorney to prosecute a criminal forfeiture action, see United States v. John Doe, Inc. I, 481 U.S. 102 (1987), as a practical matter, this is rarely, if ever, done. With few exceptions, civil and criminal assistants do not perform each other's functions. In large part, this is because there are unique aspects to civil forfeiture that are foreign to the everyday practice of criminal assistants, and because the civil assistant has neither the time nor the expertise to conduct criminal investigations and to delve into the substantive aspects of criminal prosecutions and forfeitures.}

\footnotetext[108]{This may be complicated by the fact that the prosecutor involved in the criminal case will most likely have his attention diverted to other ongoing matters that seem more pressing to him.}

\footnotetext[109]{For example, a criminal assistant may be in possession of grand jury information that cannot be reviewed by a civil assistant in the absence of a court order. \textit{FED. R. CRIM. P.} 6. As well, a criminal assistant may be receiving pertinent information from a confidential informant, whose identity may be needlessly divulged if the facts unfold through the civil discovery process.}

\end{footnotes}
Furthermore, by coming before the judge at the time of his sentencing after having agreed to forfeit the proceeds of his crime, the defendant may be in a better position to argue for leniency. Thus, it can be advantageous to both sides to wrap up all of the defendant’s troubles in one proceeding.

_Onwubiko v. United States_,110 illustrates the pitfalls to the government of not pursuing criminal forfeiture and addressing the forfeiture issues at the time of the plea negotiations. The defendant in that case, a Nigerian claiming to be a used-clothing dealer, was arrested in September of 1990 at John F. Kennedy International Airport in New York when it was discovered that he had swallowed 72 balloons filled with 557 grams of heroin.111 At the time of his arrest, the defendant also had in his possession $2483 in United States currency.112

Onwubiko was indicted for the substantive drug importation charge, but the government did not seek criminal forfeiture of the money.113 It would have been a relatively simple matter at that point to add a forfeiture count for the money on the theory that the money was going to be used to “facilitate” the drug crime in that Onwubiko was most likely going to have to pay for a hotel room and wait for nature to take its course before he could extract the heroin to deliver it to its ultimate destination.

By adding a forfeiture count to the indictment, the fate of the defendant’s money would be left in the hands of the same criminal jury that would ultimately hear the substantive evidence against Onwubiko. In all likelihood, given the strength of the underlying case, Onwubiko would have, as part of his plea agreement, willingly admitted that the true purpose of the money he was carrying was to facilitate his drug dealings and would have agreed to its forfeiture in order to ameliorate his sentence. Once the plea bargain agreement was struck, the opportunity to negotiate with the defendant when he had the greatest incentive to cooperate with the government was lost, and there was less of

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of responsibility pursuant to Section 3E1.1(b) of the United States Sentencing Guidelines, as well as some other favorable recommendations from the government such as a recommendation that he receive a custodial sentence at the lower end of the applicable sentencing guideline range.

110. 969 F.2d 1392 (2d Cir. 1992).
111. _Id._ at 1394.
112. _Id._
113. _Id._
an incentive for Onwubiko to be anything but obstreperous regarding forfeiture of the money.

Unfortunately for the government, that is precisely what happened. In fact, approximately one week after he entered a guilty plea to one count of illegal importation of heroin, Onwubiko wrote a letter to the judge in which he claimed that the $2483 that he had at the time of his arrest was a short-term loan from a friend in Nigeria to enable him to live while he was in the United States and to buy an industrial sewing machine for his wife.\(^{114}\) In his letter, Onwubiko requested that the Drug Enforcement Administration return the money and the rest of his property to family members in Nigeria.\(^{115}\)

Following the trial judge's denial of this request, Onwubiko appealed to the Second Circuit, which reversed the trial court and remanded the case for a civil forfeiture trial.\(^{116}\) Furthermore, the appellate court ordered the trial judge to appoint counsel for Onwubiko to help him defend his property from forfeiture.\(^{117}\) Therefore, by failing to include a forfeiture charge in the original indictment, the government may have caused the unnecessary use of a civil assistant's time, litigated an appeal, and faced the prospect of a civil forfeiture trial, not to mention spending additional taxpayer money to pay for an attorney to represent Onwubiko during that civil trial, all in an endeavor to forfeit $2483.

Similarly, in *Buena Vista*,\(^{118}\) the government filed a civil forfeiture against a home that it claimed had been purchased with drug money.\(^{119}\) The civil action against the property followed the return of an indictment against Joseph Anthony Brenna alleging that, beginning in January of 1982, he and others engaged in a continuing criminal enterprise and that Brenna and others imported more than 1000 kilograms of

114. *Id.*
115. *Id.*
116. *Id.* at 1400.
117. In dictum, the *Onwubiko* court also opined that the government's facilitation theory regarding use of the money to support Onwubiko until he passed the pellets would be unavailing. 969 F.2d at 1400. We disagree with the court's conclusion in this regard.
118. 113 S. Ct. 1126 (1993). *Buena Vista* is most often discussed because of its effect on the "relation back" doctrine. This aspect of the case is discussed *supra* notes 84-99 and accompanying text.
119. *Id.* at 1130.
marijuana into the United States.\textsuperscript{120} It was undisputed that the home in question was purchased in November of 1982 by Beth Ann Goodwin, Brenna’s longtime girlfriend,\textsuperscript{121} with $240,000 that Brenna had wire transferred to Goodwin’s attorneys.

In the civil action, Goodwin filed a motion for summary judgment, claiming that she did not know that the money she had received as a gift from her paramour constituted drug trafficking proceeds and that she was an “innocent owner” of the property, rather than a nominee owner protecting the assets of her drug-dealing boyfriend.\textsuperscript{122} The Supreme Court decided, \textit{inter alia}, that since the civil forfeiture proceeding was governed by 21 U.S.C. § 881, the civil forfeiture statute, a donee could assert an innocent owner defense.\textsuperscript{123}

The Court reached this conclusion because 21 U.S.C. § 881(a)(6) states that “no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.”\textsuperscript{124} The Court interpreted the word “owner” broadly to include people who come to “own” property by way of a gift.\textsuperscript{125}

It seems clear, however, that had this issue been litigated in the context of a criminal forfeiture case, Goodwin would not have been able to avail herself of this defense. Such a proceeding would have been governed by 21 U.S.C. § 853, the criminal forfeiture statute, which provides protection only to a transferee who was a “bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.”\textsuperscript{126} Whatever else Ms. Goodwin may have been, it was undisputed that she was not a bona fide purchaser for value. Hence, she would have had to rely upon the petition for remission process in order to prevail.\textsuperscript{127}

\textsuperscript{120} 937 F.2d 98, 100 (3d Cir. 1991), aff’d 113 S. Ct. 1126 (1993).
\textsuperscript{121} It was undisputed that Brenna and Goodwin “shared a close personal relationship, akin to marriage, from the late 1970’s until 1987.” \textit{Id.}
\textsuperscript{122} 113 S. Ct. at 1128.
\textsuperscript{123} \textit{Id.} at 1134.
\textsuperscript{124} \textit{Id.}
\textsuperscript{125} Note that \textit{Buena Vista} was decided on a motion for summary judgement by the district court. 937 F.2d at 105. The case was remanded for trial as to whether Goodwin could establish an innocent ownership defense based on her alleged gift from Brenna. \textit{Id.}
\textsuperscript{127} The property could have been included in Brenna’s indictment because he was
Furthermore, had this issue been handled in the criminal context, the prosecutor could have availed himself of the grand jury process prior to indictment to test the truthfulness of Ms. Goodwin's claim by calling upon her to testify before the grand jury subject to penalties of perjury. This powerful investigative tool is, of course, unavailable to the government in the civil context. Once more, the forfeiture issues in nominee cases such as Buena Vista would have been dealt with more efficiently and more effectively if brought within the context of a criminal forfeiture action rather than in a civil forfeiture action.

Another problem with instituting a civil forfeiture action after the completion of a criminal trial is that it is possible that such an action may be barred by the Double Jeopardy Clause of the Fifth Amendment. This specter was raised by the Supreme Court's decisions in United States v. Halper and Austin v. United States.

In Halper, the Supreme Court held that a defendant who has already been subjected to a criminal prosecution could not be subjected to an additional civil sanction to the extent that such a civil action is deemed to be punitive, rather than remedial, without running afoul of the Double Jeopardy Clause. In that case, Halper, a manager of a medical laboratory that provided services to patients eligible for benefits under the federal Medicare program, was convicted of sixty-five counts of violating the false claims statute and sixteen counts of violating the mail fraud statute. Halper was sentenced to two years imprisonment and fined $5000.

Following Halper's criminal prosecution, the government filed a civil suit under the civil False Claims Act against Halper seeking over $130,000. The trial court ruled that the

the true owner of the property. Section 853(c) provides specifically that property transferred to a third party is subject to a criminal special verdict of forfeiture. 21 U.S.C. § 853(a) (1988).

128. "Nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . ." U.S. CONST. amend. V.
130. 113 S. Ct. 2801 (1993).
131. 490 U.S. at 451.
136. The statute called for a civil sanction of $2000 for each separate violation of
additional civil penalty of this magnitude would violate the Double Jeopardy Clause. Ultimately, the Supreme Court affirmed this ruling.\textsuperscript{137}

In so ruling, the \textit{Halper} Court held that the subsequent civil action was tantamount to an attempt by the government to impose multiple punishments upon Halper for the same conduct.\textsuperscript{138} In light of the Supreme Court's more recent decision in \textit{Austin},\textsuperscript{139} explicitly recognizing that, under certain circumstances, a civil forfeiture action may be deemed punitive in nature, there is now a real risk that a court may bar a civil forfeiture action that follows a criminal prosecution as violative of the Double Jeopardy Clause. Indeed, the \textit{Austin} Court seemed to recognize and countenance this possibility.\textsuperscript{140} If that is the case, then there is, obviously, a compelling need, beyond simple efficiency, to resolve forfeiture issues at the same time as the remaining substantive criminal matters.

Another reason why current criminal forfeiture statutes do not meet the needs of federal prosecutors is that, with few exceptions,\textsuperscript{141} federal prosecutors have to charge a money laundering violation in order to recover in a criminal action the proceeds of criminal activity or other property involved in the violation.\textsuperscript{142} While the creation of the money laundering statutes was a dramatic step forward for federal prosecutors, money laundering transactions usually occur \textit{after} the criminal activity that the federal prosecutor is primarily investigating.

Typically, the criminal activity that preceded the money laundering is complex even without considering the money laundering transactions. For instance, many fraud cases require reviewing thousands of documents and interviewing scores of

\footnotesize{the False Claims Act plus an amount equal to two times the actual damages suffered by the government, as well as the costs of the civil litigation. 31 U.S.C. § 3729 (1982).
137. 490 U.S. at 442-43.
138. The Court stated that the "Double Jeopardy Clause protects against three distinct abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense." 490 U.S. at 440.
139. See discussion supra notes 78-83 and accompanying text.
140. 113 S. Ct. at 2804 n.4.
witnesses in order to prove the illegality. The addition of money laundering charges for the sole purpose of enabling the prosecutor to access the criminal forfeiture statute in such cases seems illogical and adds unnecessary complexities to an already complex case.

In many cases, it would be unnecessary to add money laundering charges were it not for the fact that federal prosecutors have no other criminal mechanism for forfeiting the proceeds of the underlying crime. The money laundering statute, therefore, often forces federal prosecutors to prove not only underlying criminal activity, but also requires proof of related events occurring after the proceeds were acquired by the target of the investigation. The additional proof required and the added complexity involved causes many prosecutors to steer clear of further complicating an already complex case. The result is that, other than in narcotics cases, criminal forfeiture is an underutilized law enforcement tool.

Furthermore, the way criminal forfeiture statutes are currently written may lead to anomalous results. For instance, suppose that a criminal engages in a mail fraud scheme and induces his victim to send $250,000 in cash under false pretenses. Under current forfeiture law, if the perpetrator of this crime simply keeps the money, the money may not be forfeitable. However, if the same perpetrator takes the money and places it in a bank account he has opened under an assumed name in an effort to conceal his control of those funds, the money would unquestionably be subject to forfeiture.

This bizarre differential occurs because, under the former example, the perpetrator arguably engaged solely in mail fraud, a crime which would not subject him to criminal forfeiture. While in the latter example, the wrongdoer definitely engaged in money laundering which would subject him to criminal and civil forfeiture. In both examples, the crime against the victim is the same and the defendant’s ill-gotten gains are clearly traceable to identifiable property. Yet the results are dramatically different.

In those cases in which prosecutors do seek criminal forfeiture, current forfeiture provisions may also work to the detriment of the defendant. To use the example set forth in the preceding paragraph, in order to seek forfeiture, the prosecutor would have to allege and prove a money laundering offense, in addition to simple mail fraud, even though the effect on the victim is the same and even though the money laundering, while a separate
crime, really appears to have taken place after-the-fact. Nonetheless, under the current United States Sentencing Guidelines, assuming no other sentencing adjustments and assuming that the perpetrator has no prior record, and that there are no grounds warranting either a downward or upward departure, the sentencing range under the fraud guideline\(^{143}\) would be fifteen to twenty-one months and the sentencing range under the money laundering guideline\(^{144}\) would be forty-one to fifty-one months.

Under these circumstances, both the government and the perpetrator might well prefer to permit the wrongdoer to forfeit his ill-gotten gains and to plead guilty to mail fraud. However, because forfeiture must be supported by a specific authorizing statute, the defendant does not have that option.

In order to get the property through the criminal prosecution, the prosecutor would have to prove the money laundering violation. Thus, under § 982, as it is currently written, the government is often forced to subject the defendant to a greater term of incarceration in order to purge the defendant of his ill-gotten gains. This entails the expenditure of additional prosecutorial resources to investigate the money laundering aspect of the case. This often results in a trial and the concomitant expenditure of judicial resources, simply because no acceptable compromise exists that enables the government to forfeit property.

Conviction and loss of assets sends a powerful message: crime does not pay and the criminal will not leave prison as a wealthy man because of his criminal activity. Prosecutors should be encouraged to pursue the proceeds of a defendant’s illegal activity, not discouraged by the complexity of the statutes involved. It is our belief that many prosecutors do not even consider criminal forfeiture, preferring instead to rely on the civil forfeiture process, if the government seeks forfeiture at all, precisely because of the confusing and complex nature of § 982 and the money laundering statutes.

To better explain the complexity of the statutory scheme, a review of the prosecutorial process is in order. Consider a prostitution ring encompassing several states in which the leader


\(^{144}\) Id. § 2S1.1.
of the ring deposits the illicit funds into a bank account of a local cleaning business owned by his brother. After the proceeds clear the bank account, the money is distributed to several close friends of the ringleader. These friends hold title in their own names to various assets purchased with this money.

In order to determine the forfeitability of the money in the cleaning business bank account and of the assets purchased by the friends, the criminal assistant United States Attorney first turns to 18 U.S.C. § 982, the general criminal forfeiture statute. A quick perusal of that statute will not provide a

145. Note that a zealous prosecutor might also seek forfeiture of the remaining funds in the bank account on the theory that these funds helped "facilitate" the crime by helping to conceal the source of the illicit funds. However, for the sake of simplicity, we will assume that the prosecutor is only interested in forfeiting the proceeds themselves, and not facilitating property.


(a)(1) The court, in imposing sentence on a person convicted of an offense in violation of section 5313(a), 5316 or 5324 of title 31, or of section 1956, 1957, or 1960 of this title, shall order that the person forfeit to the United States any property, real or personal, involved in such offense, or any property traceable to such property. However, no property shall be seized or forfeited in the case of a violation of section 5313(a) of title 31 by a domestic financial institution examined by a Federal bank supervisory agency or a financial institution regulated by the Securities and Exchange Commission or a partner, director, or employee thereof.

(2) The court, in imposing sentence on a person convicted of a violation of, or a conspiracy to violate—

(A) section 215, 656, 657, 1005, 1006, 1007, 1014, 1341, 1343, or 1344 of this title, affecting a financial institution, or

(B) section 471, 472, 473, 474, 476, 477, 478, 480, 481, 485, 486, 487, 488, 501, 502, 510, 542, 545, 842, 844, 1028, 1029, or 1030 of this title,

shall order that the person forfeit to the United States any property constituting, or derived from, proceeds the person obtained directly or indirectly, as the result of such violation.

(3) The court, in imposing a sentence on a person convicted of an offense under—

(A) section 666(a)(1) (relating to Federal program fraud);

(B) section 1001 (relating to fraud and false statements);

(C) section 1031 (relating to major fraud against the United States);

(D) section 1032 (relating to concealment of assets from conservator, receiver, or liquidating agent of insured financial institution);

(E) section 1341 (relating to mail fraud); or

(F) section 1343 (relating to wire fraud),

involving the sale of assets acquired or held by the Resolution Trust Corporation, the Federal Deposit Insurance Corporation, as
ready answer to the problem. A diligent prosecutor who is keen on forfeiture must continue to dig to find the answer.

conservator or receiver for a financial institution or any other conservator for a financial institution appointed by the Office of the Comptroller of the Currency or the Office of Thrift Supervision, or the National Credit Union Administration, as conservator or liquidating agent for a financial institution, shall order that the person forfeit to the United States any property, real or personal, which represents or is traceable to the gross receipts obtained, directly or indirectly, as a result of such violation.

(4) With respect to an offense listed in subsection (a)(3) committed for the purpose of executing or attempting to execute any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent statements, pretenses, representations, or promises, the gross receipts of such an offense shall include any property, real or personal, tangible or intangible, which is obtained, directly or indirectly, as a result of such offense.

(5) The court, in imposing sentence on a person convicted of a violation or conspiracy to violate—

(A) section 511 (altering or removing motor vehicle identification numbers);

(B) section 553 (importing or exporting stolen motor vehicles);

(C) section 2119 (armed robbery of automobiles);

(D) section 2312 (transporting stolen motor vehicles in interstate commerce); or

(E) section 2313 (possessing or selling a stolen motor vehicle that has moved in interstate commerce);

shall order that the person forfeit to the United States any property, real or personal, which represents or is traceable to the gross proceeds obtained, directly or indirectly, as a result of such violation.

(b)(1) Property subject to forfeiture under this section, any seizure and disposition thereof, and any administrative or judicial proceeding in relation thereto, shall be governed—

(A) in the case of a forfeiture under subsection (a)(1) of this section, by subsections (c) and (e) through (p) of section 413 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 853); and

(B) in the case of a forfeiture under subsection (a)(2) of this section, by subsections (b), (c), (e), and (g) through (p) of section 413 of such Act.

(2) The substitution of assets provisions of subsection 413(p) shall not be used to order a defendant to forfeit assets in place of the actual property laundered where such defendant acted merely as an intermediary who handled but did not retain the property in the course of the money laundering offense unless the defendant, in committing the offense or offenses giving rise to the forfeiture, conducted three or more separate transactions involving a total of $100,000 or more in any twelve month period.

Id.
Of significance for our hypothetical example is the fact that subparagraph (a)(1) provides that a "court, in imposing sentence on a person convicted of an offense in violation of... section 1956... of this title, shall order that person to forfeit to the United States any property, real or personal, involved in such offense, or any property traceable to such property."\(^{147}\) The prosecutor who is not already frustrated by his inability to get a ready answer to his question may now turn to 18 U.S.C. § 1956, the money laundering statute.\(^{148}\)

\(^{147}\) Id. § 982(a)(1).


(a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity—

(A)(i) with the intent to promote the carrying on of specified unlawful activity; or

(ii) with intent to engage in conduct constituting a violation of section 7201 or 7206 of the Internal Revenue Code of 1986; or

(B) knowing that the transaction is designed in whole or in part—

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or

(ii) to avoid a transaction reporting requirement under State or Federal law, shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both.

(2) Whoever transports, transmits, or transfers, or attempts to transport, transmit, or transfer a monetary instrument or funds from a place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States—

(A) with the intent to promote the carrying on of specified unlawful activity; or

(B) knowing that the monetary instrument or funds involved in the transportation, transmission, or transfer[ ] represent the proceeds of some form of unlawful activity and knowing that such transportation, transmission, or transfer[ ] is designed in whole or in part—

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or

(ii) to avoid a transaction reporting requirement under State or Federal law, shall be sentenced to a fine of $500,000 or twice the value of the monetary instrument or funds involved in the
transportation, transmission, or transfer[,] whichever is greater, or imprisonment for not more than twenty years, or both. For the purpose of the offense described in subparagraph (B), the defendant's knowledge may be established by proof that a law enforcement officer represented the matter specified in subparagraph (B) as true, and the defendant's subsequent statements or actions indicate that the defendant believed such representations to be true.

(3) Whoever, with the intent—
   (A) to promote the carrying on of specified unlawful activity;
   (B) to conceal or disguise the nature, location, source, ownership, or control of property believed to be the proceeds of specified unlawful activity; or
   (C) to avoid a transaction reporting requirement under State or Federal law,
conducts or attempts to conduct a financial transaction involving property represented to be the proceeds of specified unlawful activity, or property used to conduct or facilitate specified unlawful activity, shall be fined under this title or imprisoned for not more than 20 years, or both. For purposes of this paragraph and paragraph (2), the term “represented” means any representation made by a law enforcement officer or by another person at the direction of, or with the approval of, a Federal official authorized to investigate or prosecute violations of this section.

(b) Whoever conducts or attempts to conduct a transaction described in subsection (a)(1), or a transportation, transmission, or transfer[,] described in subsection (a)(2), is liable to the United States for a civil penalty of not more than the greater of—
   (1) the value of the property, funds, or monetary instruments involved in the transaction; or
   (2) $10,000.

(c) As used in this section—
   (1) the term “knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity” means that the person knew the property involved in the transaction represented proceeds from some form, though not necessarily which form, of activity that constitutes a felony under State, Federal, or foreign law, regardless of whether or not such activity is specified in paragraph (7);
   (2) the term “conducts” includes initiating, concluding, or participating in initiating, or concluding a transaction;
   (3) the term “transaction” includes a purchase, sale, loan, pledge, gift, transfer, delivery, or other disposition, and with respect to a financial institution includes a deposit, withdrawal, transfer between accounts, exchange of currency, loan, extension of credit, purchase or sale of any stock, bond, certificate of deposit, or other monetary instrument, use of a safe deposit box, or any other payment, transfer, or delivery by, through, or to a financial institution, by whatever means effected;
   (4) the term “financial transaction” means (A) a transaction which in any way or degree affects interstate or foreign commerce (i) involving the movement of funds by wire or other means, or (ii) involving one or more monetary instruments, or (iii) involving the transfer of title to any real
property, vehicle, vessel, or aircraft, or (B) a transaction involving the use of a financial institution which is engaged in, or the activities of which affect, interstate or foreign commerce in any way or degree;

(5) the term “monetary instruments” means (i) coin or currency of the United States or of any other country, travelers' checks, personal checks, bank checks, and money orders, or (ii) investment securities or negotiable instruments, in bearer form or otherwise in such form that title thereto passes upon delivery;

(6) the term “financial institution” has the definition given that term in section 5312(a)(2) of title 31, United States Code, and the regulations promulgated thereunder;

(7) the term “specified unlawful activity” means—

(A) any act or activity constituting an offense listed in section 1961(1) of this title except an act which is indictable under subchapter II of chapter 53 of title 31;

(B) with respect to a financial transaction occurring in whole or in part in the United States, an offense against a foreign nation involving—

(i) the manufacture, importation, sale, or distribution of a controlled substance (as such term is defined for the purposes of the Controlled Substances Act);

(ii) kidnapping, robbery, or extortion; or

(iii) fraud, or any scheme or attempt to defraud, by or against a foreign bank (as defined in paragraph 7 of section 1(b) of the International Banking Act of 1978(D));

(C) any act or acts constituting a continuing criminal enterprise, as that term is defined in section 408 of the Controlled Substances Act (21 U.S.C. 848);

(D) an offense under section 152 (relating to concealment of assets; false oaths and claims; bribery), section 215 (relating to commissions or gifts for procuring loans), any of sections 500 through 503 (relating to certain counterfeiting offenses), section 513 (relating to securities of States and private entities), section 542 (relating to entry of goods by means of false statements), section 545 (relating to smuggling goods into the United States), section 549 (relating to removing goods from Customs custody), section 641 (relating to public money, property, or records), section 656 (relating to theft, embezzlement, or misapplication by bank officer or employee), section 657 (relating to lending, credit, and insurance institutions), section 658 (relating to property mortgaged or pledged to farm credit agencies), section 666 (relating to theft or bribery concerning programs receiving Federal funds), section 793, 794, or 798 (relating to espionage), section 875 (relating to interstate communications), section 1005 (relating to fraudulent bank entries), 1006 (relating to fraudulent Federal credit institution entries), 1007 (relating to Federal Deposit Insurance transactions), 1014 (relating to fraudulent loan or credit applications), 1032 (relating to concealment of assets from conservator, receiver, or liquidating agent of financial institution), section 1201 (relating to kidnapping), section 1203 (relating to hostage taking), section 1708 (theft from the mail), section 2113 or 2114 (relating to bank and postal robbery and theft), or section 2319 (relating to copyright...
infringement), of this title, a felony violation of the Chemical Diversion and Trafficking Act of 1988 (relating to precursor and essential chemicals), section 590 of the Tariff Act of 1930 (19 U.S.C. 1590) (relating to aviation smuggling), section 422 of the Controlled Substances Act (relating to transportation of drug paraphernalia), section 38(c) (relating to criminal violations) of the Arms Export Control Act, section 11 (relating to violations) of the Export Administration Act of 1979, section 206 (relating to penalties) of the International Emergency Economic Powers Act, section 16 (relating to offenses and punishment) of the Trading with the Enemy Act, any felony violation of section 9(c) of the Food Stamp Act of 1977 (relating to food stamp fraud) involving a quantity of coupons having a value of not less than $5,000, or any felony violation of the Foreign Corrupt Practices Act; or


(5) the term “State” includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

(d) Nothing in this section shall supersede any provision of Federal, State, or other law imposing criminal penalties or affording civil remedies in addition to those provided for in this section.

(e) Violations of this section may be investigated by such components of the Department of Justice as the Attorney General may direct, and by such components of the Department of the Treasury as the Secretary of the Treasury may direct, as appropriate and, with respect to offenses over which the United States Postal Service has jurisdiction, by the Postal Service. Such authority of the Secretary of the Treasury and the Postal Service shall be exercised in accordance with an agreement which shall be entered into by the Secretary of the Treasury, the Postal Service, and the Attorney General. Violations of this section involving offenses described in paragraph (c)(7)(E) may be investigated by such components of the Department of Justice as the Attorney General may direct, and the National Enforcement Investigations Center of the Environmental [sic] Protection Agency.

(f) There is extraterritorial jurisdiction over the conduct prohibited by this section if—

(1) the conduct is by a United States citizen or, in the case of a non-United States citizen, the conduct occurs in part in the United States; and

(2) the transaction or series of related transactions involves funds or monetary instruments of a value exceeding $10,000.

(g) Notice of conviction of financial institutions.—If any financial institution or any officer, director, or employee of any financial institution has been found guilty of an offense under this section, section 1957 or 1960 of this title, or section 5322 of title 31, the Attorney General shall provide written notice of such fact to the appropriate regulatory agency for the financial institution.
It is relatively easy to glean from the facts of the hypothetical that the ringleader, who knows the source of the funds, has engaged in a financial transaction (by depositing the money into the bank account for his brother's cleaning business\(^\text{149}\) or, alternatively, by taking money out of the bank account to purchase assets held by nominees) and that this transaction was designed, at least in part, "to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds..."\(^\text{150}\)

It is less clear, however, whether the proceeds in question constitute proceeds "of specified unlawful activity"\(^\text{161}\) so as to be subject to criminal forfeiture. A quick perusal of the definition of "specified unlawful activity" set forth in subparagraph (c)(7) again does not yield a ready answer. Once again, many prosecutors will choose to stop looking at this point and to forego criminal forfeiture. The zealous prosecutor must continue to dig.

Among the activities that fall within the ambit of "specified unlawful activity" is "any act or activity constituting an offense listed in section 1961(1) of this title except an act which is indictable under subchapter II of chapter 53 of title 31..."\(^\text{162}\)

Hence, our stout-hearted prosecutor will first turn to title 31 of the United States Code to verify that the crime in question is not

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\(\text{g)}\) Any person who conspires to commit any offense defined in this section or section 1957 shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.—[Author's Note: Congress, no doubt in error, enacted two subsection (g)'s.]

\textit{Id.}

\textsuperscript{149}. It should be noted that some courts have held that merely depositing money that has been derived from specified unlawful activity simply completes that crime, and, hence, is "merged" with it. These courts have held that this initial deposit would not, by itself, constitute a "financial transaction" to support a money laundering charge. \textit{See United States v. Johnson}, 971 F.2d 562, 569-70 (10th Cir. 1992) (ruling that wire transfer by victim into defendant's account constituted completion of the mail fraud, not a financial transaction for purposes of money laundering statute). \textit{But see United States v. Sutera}, 933 F.2d 641 (8th Cir. 1991) (concluding that deposit of check representing gambling proceeds was money laundering offense); \textit{United States v. Montoya}, 945 F.2d 1068 (9th Cir. 1991) (same regarding bribe proceeds). There is no doubt, however, that the subsequent removal of the funds and disbursement to nominees would constitute a qualifying "financial transaction" within the parameters of the money laundering statute.


\textsuperscript{151}. \textit{Id.}

\textsuperscript{152}. \textit{Id.} § 1956(c)(7)(A) (Supp. IV 1992).
indictable under subchapter 53. Then, he will turn to 18 U.S.C. § 1961, which lists the so-called predicate offenses for RICO.153

As used in this chapter—

(1) “racketeering activity” means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1029 (relating to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), sections 2251-2252 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States, or (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act.

(2) “State” means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;
Once more, a quick review of this statute does not provide a ready answer to the question of whether the criminal proceeds involved in the above hypothetical are forfeitable. In all likelihood, only a diehard prosecutor intent on criminal forfeiture will proceed any further. In order to determine the answer, the prosecutor will have to review 18 U.S.C. § 1952, which deals with interstate and foreign travel or transportation in aid of racketeering enterprises.\textsuperscript{154} This statute, one of the myriad

\begin{itemize}
\item[(3)] "person" includes any individual or entity capable of holding a legal or beneficial interest in property;
\item[(4)] "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;
\item[(5)] "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;
\item[(6)] "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;
\item[(7)] "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;
\item[(8)] "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;
\item[(9)] "documentary material" includes any book, paper, document, record, recording, or other material; and
\item[(10)] "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, the Associate Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.
\end{itemize}

\textit{Id.}

predicate offenses set forth in subsection 1961(1),\textsuperscript{155} makes it a crime for anyone, \textit{inter alia}, to travel or conduct business interstate to promote, manage, or facilitate "any unlawful activity."\textsuperscript{156} That statute further provides that "unlawful activity" includes "any business enterprise involving... prostitution offenses in violation of the laws of the State in which they are committed or of the United States. . . ."\textsuperscript{157} Thus, before the prosecutor can reach a definitive answer, the prosecutor must turn to state law to verify that prostitution is illegal within the particular jurisdiction in question.

Assuming that prostitution is illegal within the jurisdiction in question, then voilà! The answer is in the affirmative. The proceeds of the interstate prostitution ring are forfeitable.

\textsuperscript{155} 18 U.S.C. § 1952 states:

Interstate and foreign travel or transportation in aid of racketeering enterprises

(a) Whoever travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section (i) "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics or controlled substances (as defined in section 102(6) of the Controlled Substances Act), or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States, or (3) any act which is indictable under subchapter II of chapter 53 of title 31, United States Code, or under section 1956 or 1957 of this title and (ii) the term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

(c) Investigations of violations under this section involving liquor shall be conducted under the supervision of the Secretary of the Treasury.

\textit{Id.}

\textsuperscript{156} \textit{Id.} § 1952(a)(3) (1988).

\textsuperscript{157} \textit{Id.} § 1952(b)(i)(1) (Supp. IV 1992).
However, in order to determine that the property in question is indeed forfeitable, the assiduous prosecutor had to wade through no fewer than five remarkably complicated federal statutes and one state statute. Many prosecutors, unfortunately, would have given up along the way.

Furthermore, those prosecutors who do endeavor to forfeit these proceeds will have to attempt to craft charges and jury instructions explaining the inter-relationships among six complicated state and federal statutes, a daunting task to say the least. Such charges are likely to confuse both judges and juries. Sadly, the result may well be that although the prostitution ringleader ends up spending some time in jail, he will emerge from jail a rich man as a result of his unlawful activity.

The answer to the question of forfeitability is not always in the affirmative. Prosecutors who are diligent and resourceful enough to seek forfeiture must sometimes resort to the civil forfeiture process because of the unavailability of a criminal forfeiture statute. For instance, in a prosecution under 18 U.S.C. § 1955, a statute which deals with illegal gambling businesses, the government has no option but to proceed with civil forfeiture of property. This is because forfeiture for this activity is provided for within the statute itself, specifically § 1955(d), a civil forfeiture provision. A prosecutor seeking criminal forfeiture in an illegal gambling enterprise case would have to prove a violation of RICO. This may or may not be possible depending on the facts of the case.

Furthermore, there are cases in which a prosecutor cannot utilize either criminal or civil forfeiture. There is no forfeiture provision, for instance, for the murder-for-hire statute, 18 U.S.C. § 1958. Therefore, if the government were to prosecute a contract killer who had been paid $25,000 to complete his job, it would have no statutory vehicle, with the possible exception of RICO, with which to forfeit the money that the killer had been paid.


159. See also 18 U.S.C. § 641 (1988) (theft of government property). The only way to recover stolen government assets through the forfeiture process is through a money laundering charge, which may or may not be available depending on the facts of the case.

160. See United States v. John G. Price, Cr. No. 93-057-N (M.D. Ala. 1993), in
Therefore, in those cases where criminal forfeiture is theoretically available, the prosecutor must review a myriad of complicated statutes and craft complicated criminal charges, a task the prosecutor may decide not to do. This is both unfortunate and unnecessary. And in cases in which criminal forfeiture is not available even though it is clear that a defendant has engaged in illegal conduct and profited by that conduct, justice will not have been served. This is also unfortunate and unnecessary. Proceeding with civil forfeiture, as discussed above,\(^{161}\) creates its own set of problems.

V. PROPOSED AMENDMENTS

Our proposed solution is a simple, across-the-board criminal forfeiture provision for the proceeds of all illegal activity. This goal could be accomplished by amending, simplifying, and expanding the scope of 18 U.S.C. § 982. The following is our proposed revision of § 982.\(^{162}\)


(a)(1) The court, in imposing sentence on a person convicted of an offense in violation of section 5313(a), 5316 or 5324 of title 31, or of section 1956, 1957 or 1960 of this title, shall order that the person forfeit to the United States any property, real or personal, involved in such offense, or any property traceable to such property. However, no property shall be seized or forfeited in the case of a violation of section 5313(a) of title 31 by a domestic financial institution examined by a Federal bank supervisory agency or a financial institution regulated by the Securities and Exchange Commission or a partner, director, or employee thereof.

(2) The court, in imposing sentence on a person convicted of any felony offense in violation of the United States Code, shall order that the person forfeit any

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which the defendants paid $35,000 to an undercover agent in order to murder several people, including an Internal Revenue Service revenue agent. The $35,000 would not be subject to forfeiture as either proceeds or facilitating property since there is no applicable forfeiture statute. Nor would these funds qualify for forfeiture under the money laundering statute because there was no identifiable financial transaction in the case.

161. See supra notes 103-39 and accompanying text.

property constituting, or derived from, proceeds the person obtained, directly or indirectly, as a result of such violation.

(2) The court, in imposing sentence on a person convicted of a violation of, or a conspiracy to violate—
   (A) section 215, 656, 657, 1005, 1006, 1007, 1014, 1341, 1343, or 1344 of this title, affecting a financial institution, or
   (B) section 471, 472, 473, 474, 476, 477, 478, 479, 480, 481, 485, 486, 487, 488, 501, 502, 510, 542, 545, 842, 844, 1028, 1029, or 1030 of this title, shall order that the person forfeit to the United States any property constituting, or derived from, proceeds the person obtained directly or indirectly, as the result of such violation.

(3) The court, in imposing sentence on a person convicted of an offense under—
   (A) section 666(a)(1) (relating to Federal program fraud);
   (B) section 1001 (relating to fraud and false statements);
   (C) section 1031 (relating to major fraud against the United States);
   (D) section 1032 (relating to concealment of assets from conservator, receiver, or liquidating agent of insured financial institution);
   (E) section 1341 (relating to mail fraud); or
   (F) section 1343 (relating to wire fraud), involving the sale of assets acquired or held by the Resolution Trust Corporation, the Federal Deposit Insurance Corporation, as conservator or receiver for a financial institution or any other conservator for a financial institution appointed by the Office of the Comptroller of the Currency or the Office of Thrift Supervision, or the National Credit Union Administration, as conservator or liquidating agent for a financial institution, shall order that the person forfeit to the United States any property, real or personal, which represents or is traceable to the gross receipts obtained, directly or indirectly, as a result of such violation.

(4) With respect to an offense listed in subsection (a)(3) committed for the purpose of executing or attempting to execute any scheme or artifice to defraud, or for obtaining money or property by means of false or
fraudulent statements, pretenses, representations, or promises, the gross receipts of such an offense shall include any property, real or personal, tangible or intangible, which is obtained, directly or indirectly, as a result of such offense.

(5) The court, in imposing sentence on a person convicted of a violation or conspiracy to violate—

(A) section 511 (altering or removing motor vehicle identification numbers);

(B) section 553 (importing or exporting stolen motor vehicles);

(C) section 2119 (armed robbery of automobiles);

(D) section 2312 (transporting stolen motor vehicles in interstate commerce); or

(E) section 2313 (possessing or selling a stolen motor vehicle that has moved in interstate commerce);

shall order that the person forfeit to the United States any property, real or personal, which represents or is traceable to the gross proceeds obtained, directly or indirectly, as a result of such violation.

(b)(1) Property subject to forfeiture under this section, any seizure and disposition thereof, and any administrative or judicial proceeding in relation thereto, shall be governed—

(A) in the case of a forfeiture under subsection (a)(1) of this section, by subsections (c) and (e) through (p) of section 413 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 853); and

(B) in the case of a forfeiture under subsection (a)(2) of this section, by subsections (b), (c), (e), and (g) through (p) of section 413 of such Act.

(2) The substitution of assets provisions of subsection 413(p) shall not be used to order a defendant to forfeit assets in place of the actual property laundered where such defendant acted merely as an intermediary who handled but did not retain the property in the course of the money laundering offense unless the defendant, in committing the offense or offenses giving rise to the forfeiture, conducted three or more separate transactions involving a total of $100,000 or more in any twelve month period.

(3) Victims of criminal activity, who can demonstrate a direct ownership interest in property, the proceeds of
which are seized and forfeited under this provision, may
directly apply to the court pursuant to the provision of
subsection (n) of section 413 of the Comprehensive Drug
Abuse Prevention and Control Act of 1970 for the return
of said property or proceeds. Any other victim may only
be recognized by the court upon motion by the
government in which the United States Attorney
acknowledges the victim's claims. No such motion shall
be filed until notice has been completed and the time for
filing claims has closed.

(A) Any amounts paid to victims pursuant to an
order of restitution shall be set off against any
amount later recovered as compensatory damages
by such victims in—

(i) any Federal civil proceeding; and
(ii) any State civil proceeding, to the extent
provided by the law of that State.

(B) The court may, in the interest of justice,
order restitution to any person who has
compensated any victim for the loss which the
victim has received to the extent that such person
paid the compensation.

As revised, § 982 in essence includes the following. Subsection
(a)(1) of § 982 remains unchanged. This is because, as currently
written, this subsection envisions the potential forfeiture of
facilitating property ("property . . . involved in such offense") in
addition to proceeds for violations of the five statutes contained
therein. Since this is a legislative compromise that Congress has
already chosen to enact, we see no reason to amend it. Once
again, our proposed revisions deal solely with the proceeds of
illicit activity, not the more controversial issue of facilitating
property.

Subsection (a)(2) provides for the criminal forfeiture of the
proceeds of all federal felony offenses. This both expands upon,
and eliminates the need for, subsections (a)(2) through (a)(5) of
the current version, which provide for the forfeiture of proceeds
for some, but not all, felony offenses.

Subsections (b)(1) and (b)(2) remain unchanged. Subsection
(b)(1) simply references the drug forfeiture statute, 21 U.S.C. §
853, which sets out the procedures to be used to effect criminal
forfeitures for money laundering violations and for other
violations. Subsection (b)(2), another legislative compromise, sets
out certain circumstances under which the government cannot
seek substitute assets when it is no longer possible to trace the illegally-used or derived property.

Subsection (b)(3) represents a new addition to the statute which, for the reasons discussed below, is an improvement over the current scheme in terms of the government's ability to return the fruits of crime to the victims of crime. Basically, this provision enables victims who can establish a direct ownership interest in forfeitable property to petition the court for a return of that property. The provision also permits the criminal prosecutor to make such a request on behalf of all other victims in appropriate circumstances. This provision further states that any amounts recovered by victims must be offset by amounts recovered in either a state or federal civil action.

It is our belief and hope that such a statute would be simple to understand and to use. In all likelihood, prosecutors would use this statute with the same diligence and zeal that prosecutors of drug-related crimes use the narcotics forfeiture statute.

An across-the-board direct criminal forfeiture provision for proceeds is not only more efficient, but also avoids the more difficult issues found in the forfeiture of facilitating instrumentalities. Congress would then be free to consider forfeiture of facilitating property, as opposed to proceeds, on a statute-by-statute basis. However, there should be no disagreement that if the government can establish the illegal receipt of assets, at the very least the proceeds should be taken from the wrongdoer. This should be the case for all illegal activity, regardless of the type of crime involved. Further, substitution of assets for those assets which have been removed, destroyed or placed beyond the jurisdiction of the court, should be authorized for all criminal proceeds forfeitures.\textsuperscript{164}

\textsuperscript{163} Although such victims, as "owners," currently have the right to present such a claim during the ancillary proceeding of the criminal forfeiture process, our proposed provision makes the procedural mechanism clearer to all prosecutors and victims.

\textsuperscript{164} In the event the target removes the assets from the reach of the court, current criminal forfeiture statutes provide for this substitution of apparently legitimate assets in the place of forfeited assets. \textit{See} 21 U.S.C. \textsection \textsuperscript{853(p)} (1988). This concept is most important in complex cases involving well-educated criminals or criminals who hire the finest laundering experts. Frequently such individuals are successful in their laundering efforts. Substitute asset orders permit the removal of the apparently legitimate asset which can then be liquidated and returned to victims or placed in the Justice Department's Assets Forfeiture Fund. Because criminal forfeitures are \textit{in personam} or directed against the defendant personally, the substitute assets provision also gives the government the ability to receive, in essence, a general judgment.
Heretofore, Congress has pursued a path of incremental growth for forfeiture provisions. In large part, this is because Congress has considered expanding both civil and criminal forfeiture authority in the same legislation. An unfortunate byproduct of this mode of procession is that the arguments asserted against the more controversial civil forfeiture procedures end up retarding the progress of the less controversial and more appropriate criminal provisions. Hence, our proposed revision deals only with criminal forfeiture. By permitting criminal forfeiture of proceeds across the board for all felony violations of federal criminal law, Congress would advance, and the Department of Justice would, by necessity, pursue criminal forfeitures in cases where there is no civil forfeiture authority.

With the October 1992 amendments to 18 U.S.C. § 982, Congress made an important step in increasing the efficiency of federal forfeitures. In its amendments to subsection 982(a)(2)(B), Congress authorized direct forfeiture for twenty-four federal violations. For these violations, a money laundering charge is no longer necessary if the violation occurred after October 28, 1992. While this is a salutary development, our proposed

against the defendant. When a certain sum is alleged in the indictment as the amount of criminal proceeds and those proceeds can not be found after the jury enters a special verdict against that sum, the government can then execute against any other property belonging to the defendant. The advantage to the government from this device is that the difficult, sometimes impossible, task of tracing the proceeds of illicit activity to a particular asset is not an issue. Through the substitute assets procedure, the wrongdoer who has successfully laundered his proceeds is still divested of his ill-gotten gains.


166. 18 U.S.C. § 982(a)(2), as amended, reads as follows:

(2) The court, in imposing sentence on a person convicted of a violation of, or a conspiracy to violate—

(A) section 215, 656, 657, 1005, 1006, 1007, 1014, 1341, 1343, or 1944 of this title, affecting a financial institution, or
amendments represent an appropriate extension of the path that Congress is currently pursuing.

VI. PROPOSED SOLUTION BETTER FOR VICTIMS

One area of emphasis within the Department of Justice Asset Forfeiture Program, which administers the Assets Forfeiture Fund, has been the generation of dollars for expanding law enforcement resources nationwide and worldwide. Critics claim that the Department has paid more attention to drug cases because in these cases, since there are no identifiable victims, the Department gets to retain the forfeited money. Critics further claim that in non-drug cases, the Department of Justice has pursued forfeiture less vigorously for a variety of reasons, including a concern about whether the entire forfeiture process in non-drug cases will generate enough dollars to cover the additional costs associated with returning the money to the victims.

We believe that another area of emphasis should be on taking money away from wrongdoers and returning it to victims of their crimes. Under the current scheme, the chances of getting restitution in the absence of forfeiture may be an idle hope because the defendant may claim that he has no money and because the government will have no mechanism with which to seize assets, which it can convert to money, to return to the victims.

Currently, the petition for remission regulations envision that, under certain circumstances, forfeited property can be returned to “innocent” owners of that property who were not involved in...

...
the property's illegal use. However, while such owners may, in fact, have been victims of the crime in question, this is not necessarily the case. Furthermore, there may be victims of criminal activity who have lost money to the perpetrator who may not be able to establish a direct ownership interest in the forfeited property, and who may, therefore, not be able to avail themselves of the petition for remission process.

Furthermore, those claimants who can file a petition for remission must still wade through the regulations that govern such petitions. Finding, understanding, and complying with these regulations requires a degree of legal sophistication that many would-be claimants simply do not have, assuming that they are aware of the regulations at all. As well, the innocent owner who chooses to file a petition for remission must wait for the requisite approvals from the Asset Forfeiture Office in Washington, D.C. to take place before getting his or her property back. As with any centralized bureaucracy, this approval process can take quite a bit of time.

Under the Victims of Crime Act of 1984, the government must inform a victim, inter alia, "of any restitution or other relief to which the victim may be entitled under this or any other law and manner in which such relief may be obtained. It is unclear, however, whether this statute can be used as a means to return forfeited funds to non-owner victims. Further, while the Victim and Witness Protection Act provides that a criminal restitution order entered by a judge may provide for the return of assets to victim-owners, in fungible property cases where tracing ownership to the defendant's property is impossible, this provision will be of little assistance to the victims of the crime.

An across-the-board criminal forfeiture statute aimed at proceeds of criminal conduct would give prosecutors a mechanism

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170. Id. § 10607(c)(1)(B).
172. See supra note 18.
173. Furthermore, there is no provision in the Victim and Witness Protection Act that allows for the seizure of substitute assets or for the return of substitute assets to the victims. By amending § 982 in the manner we propose, the government could take advantage of the substitute asset mechanism incorporated by reference in subsection 982(b)(1). This would further increase the likelihood that the government will be able to get money from the wrongdoer to give to victims.
whereby the victims of crime could be given paramount consideration. Under our proposed amendments, prosecutors would be able to forfeit the proceeds of the crime and ask the court to return property to the victims.\textsuperscript{174} This entire process could be handled relatively expeditiously.

Specifically, subsection (b)(3) of our proposed amendments enables the prosecutor most familiar with the facts of the case to file an appropriate motion with the court requesting that the court order that funds be returned to the victims of the crime. Similarly, having the issue of return of property litigated immediately in the aftermath of the criminal prosecution by the prosecutor who handled the case will better enable the government to sort through claims filed by alleged victims whom the government suspects should not be recompensed for their loss. Additionally, in cases involving large numbers of victims, the prosecutor could craft his motion to provide for equitable distribution of the proceeds available.

Attempting to recover ill-gotten gains for victims is particularly appropriate for federal prosecutors because the powerful tools at the prosecutors' disposal ought to be utilized to seize, forfeit and return assets to victims who lack resources to bring any investigation to bear on the wrongdoer. Such a change will not only serve the ends of justice, but will also surely engender public support for the government's forfeiture efforts.

CONCLUSION

Incarceration alone does not provide a sufficient deterrent to criminals and would-be criminals. This is because incarcerating the wrongdoer does not deprive the wrongdoer of the money and other valuable property obtained through illicit activity. Over the past several years, Congress has attempted to remedy this situation by enacting various civil and criminal forfeiture provisions. Unfortunately, with the exception of the drug forfeiture statute, the current criminal forfeiture statutes are unnecessarily complicated. As a result, criminal forfeiture has

\textsuperscript{174} We are not suggesting that our proposed amendments should replace the petition for remission process. Rather, we are suggesting that our proposed amendments would be a suitable supplement to the petition for remission process. Indeed, there may be advantages, such as uniformity of decisions, to having all petitions decided by one centralized organization.
not been used to full advantage by federal prosecutors, at least in non-narcotics cases.

Because of the complicated nature of these statutes, those prosecutors who have not opted to forego forfeiture altogether have placed excessive reliance on the civil forfeiture process. This is inefficient both from the standpoint of prosecutorial resources and from the standpoint of claimants who face various procedural and substantive disadvantages in the civil forfeiture process not present in the criminal forfeiture process.

In addition to being complicated linguistically, those criminal forfeiture statutes that do exist are also deficient in that they only provide for the forfeiture of ill-gotten gains of certain criminal activity. Criminals who engage in other illicit activity are left free to enjoy the fruits of their labor, although that enjoyment may be deferred until the completion of a custodial sentence.

Our proposed solution is an across-the-board criminal forfeiture provision for the proceeds of all felony violations of federal law. Such a change from current forfeiture law would send the powerful signal to all would-be wrongdoers that, if they are caught, they will not profit from their illegal activity, no matter what that activity is.

Such a revision to current forfeiture law would be simple to apply by federal prosecutors, far simpler than the current morass of forfeiture statutes. By being simpler to understand and apply, more criminal prosecutors would seek criminal forfeiture of proceeds, an improvement on the current system of either foregoing criminal forfeiture altogether or seeking civil forfeiture.

This result is not only more just, but is also more efficient. Such a mode of procedure not only saves scarce prosecutorial and judicial resources, but also obviates constitutional concerns regarding double jeopardy.

Furthermore, when the government’s forfeiture efforts are refocused towards criminal forfeiture rather than civil forfeiture, defendants and claimants would be able to avail themselves of greater procedural and substantive safeguards than they currently enjoy in the civil arena, which is a criticism of the government’s current practice.

Lastly, our proposed revision to forfeiture law also attempts to make it easier for the victims of crime to recover the money and property that was taken from them. Currently, it is exceedingly difficult for victims to recover the money and other property that
was wrongfully taken from them. The procedures set forth in the current forfeiture statutes make it far easier for the government to channel forfeited funds and property into the Assets Forfeiture Fund than to return it to victims. While not an altogether unsound system in these times of budgetary constraints, our proposed amendments shift the focus of forfeiture law back to the more laudable goal of making victims whole. Such a change would go a long way toward restoring and then maintaining the public's faith and trust in the criminal justice system.