I. Introduction

Asset recovery plays a significant role in the enforcement of the criminal laws in the United States. Though the degree of enforcement differs widely from state to state, virtually all of the states have some form of asset recovery legislation, and the federal government has a robust set of forfeiture provisions that apply to the great majority of serious crimes that may be enforced at the federal level.

Because the case law is well-developed at the federal level, because federal enforcement is uniform across the country, and because it is federal law that foreign courts, legislatures, academics and practitioners generally look to when referencing asset recovery in the United States, this chapter will focus exclusively on federal law.

It begins with a discussion of the purposes that asset recovery is intended to serve as part of the prosecutor’s arsenal of weapons in the enforcement of the criminal laws. Next, it discusses the categories of property that are subject to forfeiture – i.e., the proceeds of the crime, facilitating property, and so forth. Third, it compares the alternative ways in which property may be recovered in conviction-based and non-conviction based proceedings. And finally, it discusses in some detail the procedures that apply in a criminal case when the prosecutor seeks to recover criminally-tainted assets as part of the defendant’s sentence.1

II. Why make forfeiture part of the criminal case?

In Kaley v. United States, Justice Elena Kagan, writing for the Supreme Court, listed the commonly-accepted reasons why asset recovery – almost always referred to as “asset forfeiture” in the United States – is viewed as an important part of criminal law enforcement. Forfeiture, she wrote, serves to punish the wrong-doer, to deter future illegality, to lessen the economic power of criminal enterprises, to compensate victims, to improve conditions in crime-damaged communities, and to support law enforcement activities such as police training.2
It is worth spending a moment to view each of those in turn.

1. Punish the wrongdoer

Prosecutors are often told, “don’t just put the defendant in jail; take away the fruits of the crime.” In a fraud case, it would make no sense to convict the defendant of committing the fraud but allow him to keep the fraud proceeds; in a money laundering case, it would make no sense to convict the defendant of money laundering but allow him to keep the money. In such cases, the confiscation or forfeiture of the criminal proceeds is simply the logical complement to the other aspects of a criminal sentence.

Moreover, most prosecutors report that the defendant is often far more concerned about the loss of his property than he is about the temporary loss of his freedom. Having the money or other property available once he is released from incarceration, or available to his family while he is incarcerated, was often the criminal’s primary goal in committing the criminal offense. If punishment is the Government’s goal, it must include depriving the criminal of that opportunity.

2. Deter other wrongdoers

Punishment, of course, serves multiple purposes. One is to force the wrongdoer to face the consequences of his crime; but another is to deter others from following him down the same path.

The point of committing crimes involving property is to make money. The criminal who gets to enjoy a lavish and notoriously open lifestyle based on the fruits of his criminal wrongdoing serves as a role model for would-be followers. Conversely, if a given defendant does not get to keep the money he obtained when committing a particular offense, there is less incentive for the next person to commit the same offense.3

3. Take away the tools of the trade and the economic resources

A third purpose of punishment is incapacitation. Generally, when we speak of incapacitation, we are thinking about protecting society from future harm by keeping the individual defendant locked up behind bars for some period of time. But asset forfeiture is another form of incapacitation.
Depriving the criminal of the “tools of his trade,” and of his economic resources, makes it more difficult for him – or his associates – to perpetrate similar acts while he is incarcerated or on probation or once he is released. We don’t want drug dealers to keep the airplane that they used to smuggle drugs, or the armed felon to keep the gun that he used to commit the robbery, because we don’t want them to use that property again to commit a similar crime in the future.

4. Disrupt the organization

If asset forfeiture can disrupt an individual’s ability to commit an offense, it can do the same to a large criminal organization. Money is the glue that holds organized criminal enterprises together; they have to recycle their illegally-derived money to keep the scheme going. Take the money or other economic resources away, and the organization must start over.

Criminals who become cooperating witnesses in drug cases, for example, routinely report that the law enforcement activity that was most effective in disrupting their operations was not the arrest of a given supplier or courier, or even the seizure of a given load of drugs, but the seizure of the large sum of money that was needed to pay for the next load, and to compensate the organization’s employees.

For the same reasons, figuring out how terrorism is financed, and taking away the money before it can be used, is a critical part of the anti-terrorism effort.

5. Get money back to the victim

For a number of reasons, forfeiture is almost always a more effective way of recovering money for victims than ordering the defendant to pay restitution. In the US, restitution is ordered only at the conclusion of a criminal case, after the defendant has been convicted. Under the restitution laws, however, there is no way to seize, restrain, or otherwise preserve property prior to conviction so that it is available for that purpose. In contrast, the forfeiture laws allow the Government to act affirmatively, prior to trial, and in many cases, prior to indictment, to preserve assets that will ultimately be used to compensate victims.

Moreover, as one appellate court has observed, the Government’s far greater resources make it more likely that the victims will be compensated if the Government uses its tools to preserve and recover property than if the victims were left to their own private remedies.\(^4\)
6. Protect the community

Forfeiture provides law enforcement agencies with the opportunity to demonstrate to the community in a highly visible way that crime does not pay, and that criminals will receive their just desserts. It also provides a vehicle for shutting down a dangerous, on-going operation – a place where young women are held for service in the sex trade, or where drug are openly bought and sold -- that threatens the public health and safety.

Perhaps most important, forfeiture allows the Government to ensure that the economic playing field is level, so that people trying to run businesses honestly don’t have to compete with those whose capital investment is derived, tax-free, from illegal sources. Forfeiting the restaurant that a drug dealer opened with the proceeds of his drug sales allows other would-be entrepreneurs to compete, whereas failing to forfeit the restaurant would convince many that the only way to amass the resources necessary to run a successful restaurant is to be a drug dealer.

7. Recycle the money

Finally, forfeited property can be put to socially-desirable uses, whether it be converting a drug-infested motel into a shelter for battered women or refugees, or sharing the money with law enforcement agencies to be used to fund training and other law enforcement programs. Care must be taken in designing such programs to ensure that they do not cross the line between putting criminal proceeds to socially-desirable uses and causing police agencies to engage in what is called “policing for profit.” But it can be done.

For all of these reasons, the federal law enforcement agencies in the US have made asset forfeiture part of the enforcement of most serious federal crimes, ranging from investment fraud and insider trading to drug trafficking, public corruption, and the production of child pornography. In the years since 2008, gross federal forfeiture receipts have generally exceeded $2 billion a year, with the total in some years being much greater due to the influx of money recovered in some of the more notorious cases, such as the fraud committed by Bernie Madoff.

II. What Can You Forfeit?

Most countries have enacted asset recovery laws that provide, in fairly simple terms, that the proceeds and the property used to commit any crime –
foreign or domestic – are subject to forfeiture or confiscation. That, unfortunately, is not the case in the United States.

In the US, there is no uniform description of the property subject to forfeiture that applies to all crimes. To the contrary, what property is subject to forfeiture depends on the offense being committed and the statute being violated. What can be forfeited in a fraud case, for example, is different from what can be forfeited in a drug case, or a child pornography case, or a case involving wildlife trafficking. To the regret of judges and practitioners, this is the consequence of different federal statutes being drafted by different committees of Congress at different times over many decades.

For most crimes, federal law enforcement agencies can forfeit the proceeds of the offense. For many crimes, they can forfeit facilitating property; that is, property used to make the crime easier to commit. And for some, they can forfeit much more.

In money laundering cases, for example, the Government may forfeit all property “involved in” the financial transaction;\(^5\) in racketeering cases (prosecuted under the RICO statute) it can forfeit the defendant’s entire interest in the RICO enterprise;\(^6\) and in terrorism cases, it can forfeit virtually everything the terrorist owns, whether it is connected to the offense or not.\(^7\)

On the other hand, for some offenses, the Government’s forfeiture authority is limited to particular categories of property – such as the vehicles, vessels and aircraft used to smuggle illegal aliens, or the vehicles and equipment used to steal cultural property from federal or Indian land. And for still other offenses, there is no federal forfeiture authority at all. Accordingly, the prosecutor or law enforcement agent needs to check the applicable statute to see what can be forfeited in a particular case, and may have to make charging decisions based on the need to invoke a particular forfeiture law.

Unfortunately, the forfeiture provisions are spread all over the US Code. For some crimes, the forfeiture provision is part of the statute setting forth the criminal offense itself.\(^8\) Others appear in list of forfeiture provisions in the general criminal forfeiture statute, 18 U.S.C. § 982.\(^9\) And others require the Government to rely on the catch-all forfeiture provision in 18 U.S.C. § 981(a)(1)(C) which authorizes the forfeiture of the proceeds – and only the proceeds – of a list of some 250 crimes incorporated by cross-reference to other statutes.\(^10\) That is, for example, where one would find the forfeiture authority for all of the most common white collar crimes, such as mail and wire fraud, bank fraud, bankruptcy fraud, securities fraud, bribery, embezzlement and theft.\(^11\)
It can be tedious to explain to the court how to find the forfeiture authority for a given offense, but fortunately there are a number of cases that explain the nested cross-references.\textsuperscript{12}

**What are “proceeds”**

What constitute the proceeds of a criminal offense is fairly obvious in most cases: it is whatever the defendant acquired or retained as a result of having committed his particular crime. If he robbed a bank, the money that he took from the bank would be the proceeds of the offense. But experience shows that “proceeds” is often much broader in scope than that example would suggest.\textsuperscript{13}

One way to approach this is with a “but for” test: what property would the defendant not have obtained or retained but for having committed the crime. For example, if the defendant would not have been able to acquire stock, make an investment, or obtain a contract but for having committed extortion, bribery or fraud, the property obtained would be considered the proceeds of the criminal offense.\textsuperscript{14} In fact, under the “but for” test, an entire business and all of its revenue and assets, would be subject to forfeiture if the business would not exist but for the investment of criminal proceeds to start the business or to keep it going.\textsuperscript{15}

Notice that “proceeds” is not limited to property that is newly acquired but may include “cost savings” and other property retained as a result of an offense. If a person succeeds in having a debt reduced by paying a bribe, the money saved by not paying the full debt would be considered the proceeds of the bribe.\textsuperscript{16} Similarly, if someone qualifies for a subsidized rental apartment because she submitted a false application, the money saved on the rent would be the proceeds of the false statement.\textsuperscript{17}

“Proceeds” also includes property that was obtained not by the defendant personally, but by others who acted in concert with him, or by a corporation that served as the defendant’s alter ego. In such cases, the property is said be to proceeds that the defendant obtained “indirectly”.\textsuperscript{18}

When a defendant uses the proceeds of his offense to make a purchase, or converts it to another form, the newly-acquired property is considered to be the proceeds of the original crime. Thus, if the defendant buys a boat with his fraud proceeds, the boat constitutes the proceeds of the fraud; and if he later sells the boat, or uses the boat as the security for a loan, the sale or loan proceeds would be the proceeds of the fraud as well.\textsuperscript{19}
Moreover, if the proceeds of the crime are used to acquire an asset that appreciates in value over time, the appreciation is forfeitable as property traceable to the original offense. A well-known example of this concerns a drug dealer in Texas who invested one dollar of his drug proceeds in a lottery ticket and saw it appreciate greatly in value when he hit the jackpot. Because his good fortune was traceable to the proceeds of his drug offense, it accrued thereafter to the benefit of the Government which became the proud holder of the winning ticket when it was forfeited as drug proceeds.

Finally, while forfeiture in a criminal case is generally limited to the property derived from the offense of conviction, if the crime is charged as a “scheme” or a “conspiracy” and not as an isolated event, the Government would be entitled to forfeit the proceeds of the entire course of conduct, and would not be limited to the proceeds of the particular execution of the scheme that was alleged in the defendant's indictment.

The gross v. net controversy

There is one other issue that arises frequently when the Government seeks to forfeit criminal proceeds: does “proceeds” mean “gross revenue” or only “net profits.” Unfortunately, this issue has generated a great deal of litigation in the United States but remains unresolved.

Depending on the nature of the underlying crime, a court may hold that the defendant is entitled to offset the forfeiture to reflect the costs he incurred in committing the offense – or it may not. In general, the courts apply the no-offset rule to activity that is considered “inherently illegal” – drug trafficking is the most obvious example – but are inclined to limit the forfeiture to net profits if the defendant committed an illegal act in the course of running an otherwise legal business. The problem is that it is not always clear when something is inherently illegal.

One court might say that an investment fraud scheme was inherently illegal because it was entirely unlawful from the beginning, and accordingly require the defendant to forfeit the gross revenue that he obtained in the course of the offense. But another court might say that handling investments or buying and selling securities is not an inherently illegal activity, and thus allow the defendant to take an offset to reflect his costs.

This issue arises frequently in Government contracting cases: is it inherently illegal to obtain a contract through bribery, or by misrepresenting one's
eligibility to participate in the bidding process? If so, the contractor should be required to forfeit all of the money that he received under the contract. But if being a Government contractor is not inherently illegal activity, the contract might expect to be given credit for the costs of the goods and services that he did provide.\textsuperscript{25}

\textbf{Facilitating Property}

In addition to authorizing the forfeiture of "proceeds," some federal statutes authorize the forfeiture of property "used to commit or to facilitate the commission" of the criminal offense. This is usually referred to as "facilitating property."\textsuperscript{26}

In the cases involving the criminal offenses for which the forfeiture of facilitating property is authorized, the phrase "property used . . . to facilitate the commission of the offense" is interpreted broadly as anything that makes the crime easier to commit or harder to detect. This may include such obvious examples as the gun used to commit a crime of violence, the vehicle used to transport drugs, or the warehouse where contraband items are stored. But it also includes property whose nexus to the crime is not as obvious.

The classic example concerns a heroin operation that was being conducted on what was ostensibly a cattle ranch. To create a false aura of legitimacy, the defendant populated his ranch with cows and horses. When the time came to forfeit the property the defendant had used to commit the drug trafficking offense, the defendant objected that these were "innocent" cows and horses that had played no role in the heroin operation. But the court held that because the defendant used the animals to make his property appear to be an actual ranch and not a heroin operation, they would be forfeited as property that made his offense easier to commit.\textsuperscript{27}

The forfeiture of facilitating property is not without its limits, however. When seeking the forfeiture of property under a facilitation theory, the Government is required to show that there was a "substantial connection" between the property and the offense \textit{-- i.e.}, that the connection was not "merely incidental or fortuitous."\textsuperscript{28}

Moreover, all forfeitures of facilitating property are limited by the Excessive Fines Clause of the Eighth Amendment, which bars the courts from ordering a forfeiture that would be "grossly disproportional to the gravity of the offense."\textsuperscript{29}
Money Laundering

As mentioned earlier, forfeiture under the money laundering statutes is broader than it is for most other offenses. It includes all property “involved in” the money laundering transaction, which may include the criminal proceeds being laundered, property used to commit or to facilitate the commission of that transaction, or any other property that is the subject of the illegal transaction, including any “clean” money that is commingled with the criminal proceeds when the money laundering offense takes place.30

Again, this is limited by the Excessive Fines Clause of the Eighth Amendment.31

IV. Forfeiture Procedure

Federal law in the United States authorizes three ways of forfeiting property that is implicated in a criminal offense: administrative (or non-judicial) forfeiture, civil (or non-conviction based) forfeiture, and criminal forfeiture. We will look briefly at each of these in turn.

Administrative forfeiture

As its name implies, administrative forfeitures are handled exclusively by a federal law enforcement agency without the involvement of the court, and in most cases, without the participation of a prosecutor.

The administrative forfeiture process begins when the property is seized – generally with a warrant, but without a warrant if there are exigent circumstances – based on probable cause to believe that the property is subject to forfeiture – e.g., because it is the proceeds of a criminal offense for which forfeiture is authorized, or was used to commit such an offense. The agency is required to send notice of the seizure and of the property owner’s right to contest it forfeiture within 60 days, and the property owner – or anyone else with a legal interest in the property – then has 30 days to respond.32 If no one files a claim to the property, it is forfeited administratively when the agency files a document called a Declaration of Forfeiture that extinguishes all interests in the property and vests title in the United States.33

The property eligible for administrative forfeiture includes currency in any amount and other personal property up to a value of $500,000. Real property, however, is not eligible for administrative forfeiture.34
Which agency seizes the property and processes the administrative forfeiture depends on the nature of the underlying criminal offense: drug cases are handled by the Drug Enforcement Administration (DEA); immigration and customs cases by Immigration and Customs Enforcement (ICE); credit card fraud by the Secret Service; firearms cases by the Bureau of Alcohol, Tobacco and Firearms (ATF), and so forth. Most white collar cases are handled by the Federal Bureau of Investigation (FBI) or the Internal Revenue Service (IRS). These can be purely federal cases that involve only federal law enforcement agencies, task force cases in which federal, state and local agencies participate jointly, or purely state cases that the federal agency adopts from state or local law enforcement so that the forfeiture can be processed under federal law. Most federal forfeitures start out as administrative forfeitures and the vast majority – 80 percent – are resolved that way. That is because 80 percent of the time no one files a claim to the seized property, and it is forfeited by default.

Critics cite this statistic as evidence of the unfairness of the administrative forfeiture procedure, but prosecutors and other law enforcement officials disagree. They point out that a great many criminal prosecutions involve a parallel administrative forfeiture of the seized property that the criminal defendant simply chooses not to contest – and with good reason. A notice advising that the Government has seized $65,000 in bundled cash, a kilo of cocaine and a loaded handgun prompts few to come forward to proclaim, “Yes, that is mine.”

As the courts have recognized, administrative forfeiture is good way for the Government to save time and resources in uncontested cases. If no one is going to contest the forfeiture of the property, there may be no need to involve the court in the process even if there is a pending parallel criminal prosecution. If someone does file a timely claim contesting the forfeiture, however, the administrative forfeiture proceeding must stop, and the case must be referred by the seizing agency to the federal prosecutor’s office for forfeiture in a judicial proceeding.

**Civil judicial forfeiture**

When a contested case is referred by a seizing agency, the United States Attorney – the federal prosecutor – has two alternatives: to commence a civil (or non-conviction based) forfeiture action against the property, or to include the property in a criminal indictment. The law requires the prosecutor to take one of these steps – or seek a judicial extension of time – within 90 days of the date when the person contesting the forfeiture – the “claimant” – filed his or her claim with the seizing agency.36
Civil forfeiture cases are in rem actions in which the property itself is named as the defendant, which is why the cases tend to have funny names: for example, United States v. Approximately 600 Sacks of Green Coffee Beans, 381 F. Supp. 2d 57 (D.P.R. 2005); United States v. One Etched Ivory Tusk of African Elephant, 871 F. Supp. 2d 128 (E.D.N.Y. 2012); or United States v. 160 Cartons of Glass Water Pipes, 2014 WL 936293 (C.D. Cal. Mar. 10, 2014) -- which were cases involving the importation of contraband items such food, endangered species, and drug paraphernalia, respectively.

The concept of in rem forfeiture originated in American law in the Eighteenth Century as a means of taking title to contraband items – such as pirate ships and slave-trading vessels – when the owners of those assets were outside the borders of the United States and thus were beyond the reach of its courts and law enforcement agencies.37

The older cases were based on the legal fiction that the property itself had committed the crime giving rise to the forfeiture, but that is not the contemporary view. Rather, as Justice Anthony Kennedy explained it in United States v. Ursery, civil forfeiture today is viewed merely as a procedural device that names the property as the defendant so that all persons claiming an interest in the property can make their claims and have them resolved in a single proceeding.38 The alternative – requiring the Government to file a separate in personam civil action against every person with a potential interest in the property – would be impossibly cumbersome to pursue.

The important thing to know about civil forfeiture is that it does not require a criminal conviction or even a criminal case.39 Indeed, as we will see in a moment, the primary role of civil forfeiture is to fill the gap that occurs when the Government is not able to bring a criminal case but nevertheless has a legitimate reason for wanting to take title to the property.

Moreover, civil forfeiture is available whether the property belongs to the wrongdoer or to a third party: the focus is on the nexus between the property and the criminal offense, not the nexus between the property and the criminal offender.

So, for example, if someone uses his wife’s car to commit a crime, the car would be subject to forfeiture in a civil case even though the wife was not charged with any crime.40 She would be entitled, by statute, to assert an innocent owner defense, but if she was aware of her husband’s illegal use of her property and failed to take all reasonable steps to prevent it, that defense would not succeed.41
If civil forfeiture is so wonderful, one may ask, why doesn’t the Government use civil forfeiture in every case instead of forfeiting the property as part of the defendant’s sentence in its criminal cases.

First, as a practical matter, filing a civil forfeiture action involves a great deal of unnecessary extra work for something that can be done easily if there is a criminal case. But also, civil forfeiture has a serious limitation: because it is an *in rem* action against specific property, there are no substitute assets or money judgments in civil forfeiture cases. The forfeiture is limited to property directly traceable to the offense.

Accordingly, the Government typically reserves civil forfeiture for cases where the criminal forfeiture is not possible or is not appropriate, or where a criminal case is not ready to indict. In particular, the prosecutor will choose to file a civil forfeiture action in the following situations:

- the defendant is dead, a fugitive or incompetent to stand trial;[42]
- the crime is a violation of foreign law, but the property is in the US or is subject to the jurisdiction of a US court;[43]
- the defendant has already been convicted in a state, foreign or tribal court, making a second criminal prosecution unnecessary;[44]
- the defendant pleads guilty to a different offense than the one giving rise to the forfeiture;
- the property subject to forfeiture as facilitating property belongs not to the defendant but to a non-innocent third party (such as his spouse);
- the Government could file a criminal case but the interests of justice militate in favor of a lesser punishment.

The last example has proven to be unexpectedly controversial. Critics of law enforcement argue that if the Government really has sufficient evidence to prove a case beyond a reasonable doubt, it should file criminal charges and not seek to forfeit the wrongdoer’s property under the lesser preponderance of the evidence standard that applies in civil forfeiture cases. Prosecutors and law enforcement professionals respond, however, that not every violation of the criminal law merits a full-blown criminal prosecution resulting, if the Government is successful, in a criminal conviction and sentence. Sometimes, in the exercise
of prosecutorial discretion, it is appropriate for the Government to seek a civil remedy for a criminal act.

For example, in *United States v. 6 Firearms, Accessories and Ammunition*, an elderly woman violated the federal firearms laws when she purchased guns and ammunition for her son knowing that, as a convicted felon, he was not lawfully permitted to possess them. In that case, the Government had three choices: to do nothing; to file criminal charges against the mother; or to file a civil forfeiture action to confiscate the guns. It chose the latter option.45

**Civil forfeiture procedure**

The procedure in civil forfeiture cases is governed by Supplemental Rule G of the Federal Rules of Civil Procedure. Briefly stated, the procedure works like this: The Government files a complaint naming the property as the defendant *in rem* and setting forth the legal and factual grounds for seeking its forfeiture in terms of the applicable federal statute. It must then send notice of the forfeiture action, including a copy of the complaint, to all persons appearing to have an interest in the property.

Persons wishing to contest the forfeiture – “claimants” – have 30 days to intervene in the forfeiture action by filing a claim stating under oath that they have a legal interest in the property and are opposed to its forfeiture. The claimant must then file an answer to the Government’s complaint admitting or denying the Government’s allegations and setting forth his affirmative defenses.

The case then proceeds to litigation, beginning with civil discovery under the rules that apply in all federal civil cases. If the Government suspects that the claimant does not really have a bona fide interest in the property, it may challenge his standing to contest the forfeiture. Otherwise, the Government must establish the forfeitability of the property at trial (which may be a trial by jury if the claimant so elects) by a preponderance of the evidence. If the Government succeeds in meeting its burden, the burden then shifts to the claimant to establish an innocent owner defense, if he wishes to do so.46

Finally, if the property is found to be subject to forfeiture, the claimant has the option of asking the court nevertheless to mitigate or reduce the forfeiture all together if the forfeiture would be grossly disproportional to the gravity of the underlying offense.47

At the end of the day, the entry of a civil forfeiture judgment by a federal court extinguishes all property interests that may have existed in the property, and gives the Government clear title to it.48
Criminal Forfeiture

Criminal forfeiture is part of the defendant’s sentence, not an element of the underlying crime, and not a collateral sanction that occurs in a separate proceeding. Many things flow from that, but these are a few of the most important points.

Because criminal forfeiture is part of the defendant’s sentence, there is no forfeiture unless the defendant is convicted; and if the conviction is vacated, the forfeiture order is vacated as well. This is one reason why it is useful for the Government to have a parallel civil forfeiture case available as an option.

Because criminal forfeiture is part of the defendant’s sentence, the forfeiture is limited to the property connected to the particular crime for which the defendant was convicted. If the defendant is convicted of Crime A, the forfeiture is limited to the property connected to Crime A. It doesn’t matter that the defendant could have been convicted of Crimes B and C. To avoid this problem and to establish a basis for the forfeiture of the property involved in the entire course of conduct, the Government must charge the defendant with a conspiracy or an offense involving a “scheme to defraud.”

Most important, because criminal forfeiture is part of the defendant’s sentence, it is an in personam punishment directed against the defendant, not his property. This is why, in criminal cases, the Government is not limited to forfeiting property directly traceable to the offense as it is in civil forfeiture cases. To the contrary, it can obtain a forfeiture order in the form of a money judgment, and can enforce it by forfeiting “substitute assets” that are not connected in any way to the defendant’s crime.

This last point is what makes criminal forfeiture such a powerful law enforcement tool, and is the primary reason why prosecutors favor criminal forfeiture over civil forfeiture. On the other hand, from the Government’s perspective, criminal forfeiture has a serious limitation.

The criminal forfeiture statutes allow the court to order the forfeiture of any property derived from or used to commit the offense. Thus, in the forfeiture phase of the criminal case the Government does not have to prove that the property belonged to the defendant; it only has to prove the connection between the property and the offense. But because third parties are excluded from the criminal case, facilitating property that belongs to third parties cannot be forfeited. Indeed, it would violate the due process rights of a property owner to forfeit his property in a proceeding in which he was not allowed to participate.
Accordingly, after a criminal forfeiture order is imposed as part of the defendant’s sentence, the Government is required to give notice of the forfeiture to all third parties with a possible interest in the forfeited property, and provide them with an opportunity to contest the forfeiture in a post-trial ancillary proceeding. If the third party succeeds in establishing his superior interest in the property in that proceeding, the forfeiture order must be modified to exempt that interest.

From the Government’s perspective, this is the major disadvantage to criminal forfeiture. There is, of course, a procedure for forfeiting the property of third parties who knowingly allowed their property to be used to commit a crime: it’s called civil forfeiture.

**Obtaining a criminal forfeiture order step-by-step**

The following is a brief discussion of the steps that a prosecutor in the United States must take to make a forfeiture order part of the defendant’s sentence in a criminal case.

1. Include Forfeiture in the Indictment.

   The indictment or other charging document must give the defendant notice that the Government intends to seek the forfeiture of his property as part of his sentence. The notice, however, does not need to list the specific items to be forfeited nor set forth the amount of the money judgment that the Government will be seeking.

2. Preserve the Property Pending Trial.
Often the property subject to forfeiture will already be in the Government’s possession when the indictment is returned, but if it is not, the prosecutor may ask the court to issue a pre-trial restraining order or seizure warrant to preserve the property pending trial. To obtain the restraining order or warrant, the Government simply files an *ex parte* application stating that an indictment has been returned and that there is probable cause to believe that the property in question will be subject to forfeiture if the defendant is convicted. If the grand jury that returned the indictment did not name the property in the indictment, the application must contain an affidavit setting forth the facts establishing the connection between the property and the offense.

3. Plea Agreements / Order of Forfeiture

The defendant may agree to the forfeiture as part of a plea agreement, which should be as specific as possible in naming the property the defendant is agreeing to forfeit and/or the amount of the money judgment the defendant is agreeing to pay. It should also say that the defendant is waiving all of his rights to contest the forfeiture under the procedural rules, and provide a factual basis for the forfeiture.

Because the forfeiture order will be part of the defendant’s sentence, the court must enter a “preliminary order of forfeiture” as soon as practicable after the entry of the guilty plea – or after the return of a guilty verdict at trial – and provide that the order will become final as to the defendant at sentencing. The idea is that the defendant is entitled to have all aspects of his sentence imposed at one time -- *i.e.*, as part of a single package. The easiest way for the prosecutor to comply with this requirement is to have the defendant sign a Consent Order of Forfeiture at the time he enters his guilty plea.

4. Money judgments and substitute assets

If the defendant no longer has the proceeds of his offense, or any property traceable to it, at the time he is convicted, the court must enter an order of forfeiture in the form of a money judgment. The Government may then move to satisfy the money judgment by forfeiting substitute assets. Like the directly-forfeitable property and the money judgment, the forfeiture of substitute assets is mandatory, and can include any property the defendant owns, even though it is not traceable to the offense.
All co-defendants are jointly and severally liable for the full amount obtained by them as a group, without regard to how much was personally obtained by any one of them.\textsuperscript{66}

5. The forfeiture phase of the trial

If the case goes to trial, the forfeiture does not come up until the jury has returned a guilty verdict, at which point there is a post-verdict forfeiture hearing. There is no constitutional right to a jury in the forfeiture phase of the trial,\textsuperscript{67} but there is a statutory right to have the jury determine the forfeiture if the Government is seeking specific assets.\textsuperscript{68} In that case, the prosecutor must prepare jury instructions and special verdict forms geared to the particulars of the property the Government is seeking to forfeit and its connection to the offense for which the defendant has been convicted.\textsuperscript{69}

6. Sentencing

The forfeiture order must be included in the oral announcement of the sentence and included in the judgment.\textsuperscript{70}

7. Third parties

Finally, as mentioned earlier, the forfeiture order must be entered without regard to the ownership of the property. Determining the ownership of the property is deferred to the post-trial ancillary proceeding, and is necessary only if a third party files a claim asserting a legal interest in the property.

V. Conclusion

The forfeiture statutes in the federal criminal code provide prosecutors with a robust set of procedures that allow them to recover the proceeds of crime and other property involved in the commission of a criminal offense in a variety of ways. What the statutes lack in uniformity and simplicity, they compensate for in terms of scope and enforcement. They have, in all of their forms and applications, become an essential part of the enforcement of the criminal laws.
For a more complete discussion of these issues, see Stefan D. Cassella, *Asset Forfeiture Law in the United States* (2d ed. 2013) and 2016 Supplement.


3 See *United States v. Martin*, 662 F.3d 301, 309 (4th Cir. 2011) (Criminal forfeiture is part of the defendant’s sentence; its purpose is “to deprive criminals of the fruits of their illegal acts and deter future crimes”).

4 *United States v. Blackman*, 746 F.3d 137, 143 (4th Cir. 2014) (“The Government’s ability to collect on a [forfeiture] judgment often far surpasses that of an untutored or impecunious victim of crime . . . Realistically, a victim’s hope of getting paid may rest on the Government’s superior ability to collect and liquidate a defendant’s assets” under the forfeiture laws).

5 18 U.S.C. §§ 981(a)(1)(A) and 982(a)(1).


8 See, e.g., 7 U.S.C. § 2024(f) (forfeiture of property used to commit food stamp fraud); 18 U.S.C. § 1028(b)(5) (forfeiture of personal property used to commit identity theft); 18 U.S.C. § 1029(c)(1)(C) (forfeiture of personal property used to commit access device fraud); 18 U.S.C. § 1030(i) (forfeiture of proceeds of computer fraud, and personal property used to commit computer fraud); 18 U.S.C. § 1037 (forfeiture of proceeds of email fraud, or “equipment, software or other technology” used to commit the offense).


11 Section 981(a)(1)(C) is a civil forfeiture statute but it authorizes criminal forfeiture as well through 28 U.S.C. § 2461(c). Cases explaining this include the following: *United States v. Razmilovic*, 419 F.3d 134, 136 (2d Cir. 2005) (§ 2461(c) “authorizes criminal forfeiture as a punishment for any act for which civil forfeiture is authorized, and allows the Government to combine criminal conviction and criminal forfeiture in a consolidated proceeding”); *United States v. Black*, 526 F. Supp. 2d 870, 878 (N.D. Ill. 2007) (Congress enacted section 2461(c) to allow the Government to seek forfeiture through
an indictment rather than commencing a separate civil action); *United States v. Evanson*, 2008 WL 3107332, *1 (D. Utah Aug. 4, 2008) (§ 2461(c) was enacted to encourage greater use of criminal forfeiture by giving the Government the option of using criminal forfeiture whenever civil forfeiture is authorized; the Government make seek criminal forfeiture of the proceeds of a conspiracy to commit any offense covered by § 981(a)(1)(C)); *United States v. Rudaj*, 2006 WL 1876664, *3-4 (S.D.N.Y. July 5, 2006) (§ 2461(c) authorizes the criminal forfeiture of any property that could be forfeited civilly, including property involved in illegal gambling; forfeitures under § 2461(c), like other criminal forfeitures, are mandatory).


13 For a full discussion of the forfeiture of criminal proceeds, see *Asset Forfeiture Law in the United States*, supra note 1, at Chap. 25.

14 See *United States v. Clark*, 2016 WL 361560, *4 (S.D. Fla. Jan. 27, 2016) (forfeiture of specific assets defendant would not have been able to “obtain, maintain or retain” but for the fraud scheme and his obstruction of the investigation); *United States v. Galemmo*, 2015 WL 4450669 (S.D. Ohio July 20, 2015) (because the right to purchase stock was limited to existing stock holders, 15 shares acquired with legitimate funds was “proceeds” because it could not have been purchased “but for” the original investment of fraud proceeds to purchase 30 initial shares); *United States v. Lustyik*, 2015 WL 1467260 (D. Utah Mar. 30, 2015) (an investment in an energy company that would not have been made “but for” the intent to bribe one of the company’s silent partners was the proceeds of the bribery conspiracy); *United States v. Cekosky*, 171 Fed. Appx. 785, 2006 WL 707129 (11th Cir. 2006) (because defendant would not have been able to open his bank account but for having committed an identity theft offense, the interest he earned on the deposits in that bank account represented the proceeds of the offense, even though the deposits themselves were made with legitimate funds).

15 See *United States v. Warshak*, 631 F.3d 266, 329-330 (6th Cir. 2010) (all proceeds of defendant’s business are forfeitable because the business was “permeated with fraud;” but even if a part of the business was legitimate, the proceeds of that part are nevertheless forfeitable if the legitimate side of the business would not exist but for the “fraudulent beginnings” of the entire operation); *United States v. Smith*, 749 F.3d 465, 488-89 (6th Cir. 2014) (following Warshak; if business is so pervaded by fraud that its revenue stream would not have existed but for the fraud, any asset derived from that revenue stream is forfeitable as proceeds); *United States v. Daugerdas*, 2012 WL 5835203, *3 (S.D.N.Y. Nov. 7, 2012) (applying the “but for” test, all income to law firm was proceeds of tax shelter scheme).

16 See *United States v. Esquenazi*, 752 F.3d 912, 931 (11th Cir. 2014) (money defendant retained by having its debt reduced in exchange for promise to pay a bribe
was the proceeds of the bribery offense).

17 See United States v. Torres, 703 F.3d 194, 204 (2d Cir. 2012) (recipient of subsidized housing must pay a forfeiture order equal to the amount saved by her fraudulent application). See also United States v. Wong, 2014 WL 6976080, *2 (C.D. Cal. Dec. 9, 2014) (money defendant saved on import fees by paying others to undervalue and misclassify goods is the “proceeds” of his offense; following Torres); United States v. Tyson Foods, Inc., 2003 WL 8118660 (E.D. Tenn. Feb. 4, 2003) (“cost savings” realized by an employer who aids illegal aliens in obtaining false documents so that they can work in the employer’s factory may constitute the proceeds of the false document offense).

18 See United States v. Peters, 732 F.3d 93, 102 (2nd Cir. 2013) (because the statute makes defendant liable for property obtained “directly or indirectly,” he is liable for proceeds obtained by a corporation that he dominates or controls, even if he did not obtain the money himself); United States v. George, 2010 WL 1740814, *1 (E.D. Va. Apr. 26, 2010) (property obtained “directly or indirectly” includes property defendant obtained herself as well as property obtained by third parties acting in concert with her).

19 See United States v. Swanson, 394 F.3d 520, 529 n.4 (7th Cir. 2005) (a change in the form of the proceeds does not prevent forfeiture; property traceable to the forfeitable property is forfeitable as well); United States v. Schlesinger, 396 F. Supp. 2d 267, 273 (E.D.N.Y. 2005) (if property subject to forfeiture in a money laundering case has been sold, the proceeds of the sale are forfeitable under § 982(a)(1) as property traceable to the offense); United States v. Miller, 2009 WL 2949784, *7 (D. Kan. Sept. 10, 2009) (where defendant made down payment on boat and airplane with untainted funds and then made loan payments with fraud proceeds, the portion traceable to the latter is forfeitable under § 982(a)(2)).

20 See United States v. Hill, 46 Fed. Appx. 838, 839 (6th Cir. 2002) (stock that appreciates in value is forfeitable as property traceable to the originally forfeitable shares); United States v. Kalish, 2009 WL 130215, at *5-6 (S.D.N.Y. Jan. 13, 2009) (Government properly relied on defendant’s lack of other sources of income to show that property was purchased with fraud proceeds; any appreciation in value of the traceable property was also traceable to the offense); United States v. Vogel, 2010 WL 547344, *4 (E.D. Tex. Feb. 10, 2010) (following Betancourt; if defendant buys property with criminal proceeds and it appreciates before he sells it, the portion of the sale proceeds attributable to the appreciation is forfeitable as property traceable to the offense).

21 United States v. Betancourt, 422 F.3d 240 (5th Cir. 2005) (following Hill; if defendant buys a lottery ticket with drug proceeds, the lottery winnings are traceable to the offense even though the value of the ticket appreciated enormously when it turned out to contain the winning number).
See United States v. Venturella, 585 F.3d 1013, 1015, 1016-17 (7th Cir. 2009) (forfeiture in a mail fraud case “is not limited to the amount of the particular mailing but extends to the entire scheme;” defendant’s guilty plea to one substantive count involving $477 rendered her liable for money judgment of $114,000); United States v. Hailey, 887 F. Supp. 2d 649 (D. Md. 2012) (although only $2.9 million was obtained from the 8 substantive counts on which defendant was convicted, he was required to forfeit the $9.1 million obtained from the entire scheme); United States v. Newman, 659 F.3d 1235, 1244 (9th Cir. 2011) (if the crime is part of a conspiracy, the proceeds equal the total amount of the proceeds obtained by the conspiracy as a whole).

See United States v. Sigillito, 899 F. Supp. 2d 850, 864-65 (E.D. Mo. 2012) (defendant in an investment fraud scheme must forfeit the gross amount he took from investors, without credit for his use of the later investments to pay the early investors because the scheme was entirely unlawful).

See United States v. Contorinis, 692 F.3d 136, 145 n.3 (2d Cir. 2012) (buying and selling securities is not inherently unlawful; therefore in an insider trading case, forfeiture is limited to the net gain after deducting the costs pursuant to § 981(a)(2)(B)).


For a full discussion of the forfeiture of facilitating property, see Asset Forfeiture Law in the United States, supra note 1, at Chap. 26.

See United States v. Rivera, 884 F.2d 544, 546 (11th Cir. 1989) (defining facilitating property broadly). See United States v. Schifferli, 895 F.2d 987, 990-91 (4th Cir. 1990) (dentist’s office “provided an air of legitimacy and protection from outside scrutiny,” and thus made the crime of writing false prescriptions less difficult to commit and “more or less free from obstruction or hindrance”; United States v. Huber, 404 F.3d 1047 (8th Cir. 2005) (facilitating property is anything that “makes the prohibited conduct less difficult or more or less free from hindrance”); United States v. Puche, 350 F.3d 1137 (11th Cir. 2003) (“facilitation occurs when the property makes the prohibited conduct less difficult or more or less free from obstruction or hindrance”); United States v. Thornton, 2012 WL 2866467, *2 (S.D. Miss. July 2, 2012) (defendant’s residence forfeited as facilitating property under § 1028(b)(5) because defendant used the address to perpetrate the identity theft).


United States v. Bajakajian, 524 U.S. 321, 323 (1998) (full forfeiture of unreported currency in a CMIR case would be “grossly disproportional to the gravity of the offense” unless the currency was involved in some other criminal activity); 18 U.S.C. § 983(g)
(codifying the Bajakajian decision for civil forfeiture cases). For a full discussion of the proportionality issue under the Excessive Fines Clause of the Eighth Amendment, see Asset Forfeiture Law in the United States, supra note 1, at Chap. 28.

30 See United States v. Huber, 404 F.3d 1047, 1056, 1058 (8th Cir. 2005) (“Forfeiture under section 982(a)(1) in a money laundering case allows the Government to obtain a money judgment representing the value of all property ‘involved in’ the offense, including the money or other property being laundered [the corpus], and ‘any property used to facilitate the laundering offense’; the corpus includes untainted, commingled property); United States v. Coffman, 2014 WL 354632, *3 (E.D. Ky. Jan. 31, 2014) (following McGauley; third party cannot complain that the forfeited funds include money not derived from the defendant’s fraud; the Government’s theory is that the defendant used the money to facilitate the money laundering offense); United States v. Tencer, 107 F.3d 1120, 1135 (5th Cir. 1997) (entire bank account balance is forfeitable even though less than half the balance was criminal proceeds if the purpose of the deposit was to conceal or disguise proceeds among legitimate funds; distinguishing cases where commingling of SUA proceeds with untainted funds was merely fortuitous).

31 See United States v. Stanford, 2014 WL 7013987, *4-6 (W.D. La. Dec. 12, 2014) (declining to forfeit residence when defendant pays down mortgage with commingled funds in violation of § 1957 drug proceeds were a relatively small part of the commingled funds). For a full discussion of forfeiture under the money laundering statutes, see Asset Forfeiture Law in the United States, supra note 1, at Chap. 27.

32 18 U.S.C. § 983(a)(1) and (2).


35 See Malladi Drugs and Pharmaceuticals, Ltd. v. Tandy, 552 F.3d 885, 889-90 (D.C. Cir. 2009) (administrative forfeiture efficiently settles disputes over seized property, “serving the agency’s interest in finality and the owner’s interest in expeditious return of
its property”); United States v. Ninety-Three (93) Firearms, 330 F.3d 414, 422 (6th Cir. 2003) (administrative forfeitures are “favored” because they proved “a mechanism for the Government and private parties to resolve their forfeiture-related disputes without the need for judicial actions”); United States v. Miscellaneous Firearms, 376 F.3d 709, 713 (7th Cir. 2004) (administrative forfeitures are favored because they “provide the potential for remission which can obviate the need for judicial proceedings); In re: Application for Warrant to Seize One 1988 Chevrolet Monte Carlo, 861 F.2d 307, 310 (1st Cir. 1988) (administrative forfeitures conserve judicial resources by allowing Government to use “simpler, quicker, less expensive administrative procedure[s]”).


37 See Asset Forfeiture Law in the United States, supra note 1, at Chapter 2 for a history of the development of forfeiture law in the United States.

38 United States v. Ursery, 518 U.S. 267, 295-96 (1996) (Kennedy, J. concurring) (proceedings in rem are simply structures that allow the Government to quiet title to criminally-tainted property in a single proceeding in which all interested persons are required to file claims contesting the forfeiture at one time).

39 See United States v. One Assortment of 89 Firearms, 465 U.S. 354, 361-62 (1984) (acquittal on gun violation under section 922 does not bar civil forfeiture under section 982(d)); One Lot Emerald Cut Stones v. United States, 409 U.S. 232, 234-35 (1972) (acquittal on criminal smuggling charge does not bar later civil forfeiture); Paret-Ruiz v. United States, 827 F.3d 167 (1st Cir. 2016)(“civil forfeiture may occur without a finding of criminal liability;” reversal of defendant’s criminal conviction had no effect on the administrative forfeiture of personal property that was completed when defendant did not file a timely claim); United States v. $6,190.00 in U.S. Currency, 581 F.3d 881, 885 (9th Cir. 2009) (the district court’s jurisdiction over a civil forfeiture case does not depend on there being a related criminal case; it depends solely on the existence of a federal statute authorizing civil forfeiture).

40 See Bennis v. Michigan, 516 U.S. 442, 446 (1996) (innocent property owners have no protection from civil forfeiture under the Due Process Clause; unless the legislature enacts an innocent owner defense by statute, property may be forfeited based solely on its use in the commission of an offense).

41 18 U.S.C. § 983(d) (creating a statutory innocent owner defense for civil forfeiture cases).

Okla. May 5, 2016 (owner of medical clinic providing worthless treatment to terminally ill cancer patients flees to Mexico after being indicted); United States v. One Gray 2007 Dodge RAM Truck, 2015 WL 8362399 (S.D. Ind. Dec. 8, 2015) (civil forfeiture of vehicle used to facilitate drug sales by drug dealer who was arrested but died before trial).

43 See United States v. One Gulfstream G-V Jet Aircraft, 941 F. Supp.2d 1, 10 (D.D.C. 2013) (the U.S. has the right to use forfeiture to enforce its money laundering laws and to prevent its becoming the repository of the proceeds of foreign crimes).


46 For a detailed discussion of civil forfeiture procedure, see Asset Forfeiture Law in the United States, supra note 1, at Chapters 6-14. See also United States v. $133,420.00 in U.S. Currency, 672 F.3d 629, 634-35 (9th Cir. 2012) (setting out the procedures for commencing a civil forfeiture action under § 983 and Rule G).

47 18 U.S.C. § 983(g).

48 See United States v. Real Property Located at 475 Martin Lane, 545 F.3d 1134,1144 (9th Cir. 2008) (“in rem actions are generally considered proceedings against the world” in which “the court undertakes to determine all claims that anyone has to a thing in question”); In re Matthews, 395 F.3d 477, 481 (4th Cir. 2005) (“the purpose of an in rem forfeiture action is to conclusively determine ownership rights in the seized property”).

49 See Libretti v. United States, 516 U.S. 29, 39 (1995) (“criminal forfeiture is an aspect of punishment imposed following conviction of a substantive criminal offense”); see Rule 32.2(b)(3) (the order of forfeiture “shall be made part of the sentence and included in the judgment”); United States v. Christensen, 828 F.3d 763 (9th Cir. 2015) (“forfeiture is an aspect of the sentence, not an element of the underlying crime”; citing Libretti); United States v. Smith, 770 F.3d 628, 637 (7th Cir. 2014) (“Criminal forfeiture is considered to be punishment and therefore is part of the sentencing process;” therefore, the Government’s burden at the forfeiture hearing is preponderance of the evidence, and the rules of evidence do not apply).

50 See United States v. Harris, 666 F.3d 905, 910 (5th Cir. 2012) (reversal of defendants’ money laundering conviction means that $1.5 million money judgment must be reversed as well).

51 See United States v. Capoccia, 503 F.3d 103, 110, 114 (2nd Cir. 2007) (notwithstanding prefatory language in the indictment stating that the defendant’s acts were part of a larger scheme, defendant who was convicted of an ITSP offense under’
2314 may be made to forfeit only the proceeds of the specific acts alleged in the indictment; if the Government wants to forfeit property involved in other acts that were part of the scheme (but not alleged because of venue issues) it should have charged a conspiracy or another offense of which a scheme is an element).

52 See United States v. Venturella, 585 F.3d 1013, 1015, 1016-17 (7th Cir. 2009) (forfeiture in a mail fraud case "is not limited to the amount of the particular mailing but extends to the entire scheme").

53 See United States v. Vampire Nation, 451 F.3d 189, 202 (3d Cir. 2006) (a criminal forfeiture order is a judgment in personam against the defendant; this distinguishes the forfeiture judgment in a criminal case from the in rem judgment in a civil forfeiture case); United States v. Lazarenko, 476 F.3d 642, 647 (9th Cir. 2007) (criminal forfeiture operates in personam against a defendant; it is part of his punishment following conviction); United States v. Roberts, 696 F. Supp.2d 263, 270 (E.D.N.Y. 2010) (forfeiture order may take the form of a money judgment because the forfeiture order is an in personam judgment).

54 See F.R.Crim.P. 32.2(b)(2). De Almeida v. United States, 459 F.3d 377, 381 (2d Cir. 2006) (criminal forfeiture is not limited to property owned by the defendant; it reaches any property that is involved in the offense; but the ancillary proceeding serves to ensure that property belonging to third parties who have been excluded from the criminal proceeding is not inadvertently forfeited); United States v. Watts, 477 Fed. Appx. 816, 817-18 (2d Cir. 2012) (following De Almeida; property may be forfeited based on its nexus to the offense, regardless of ownership; the purpose of the ancillary proceeding is to allow third parties to challenge the forfeiture on ownership grounds); United States v. Dupree, 919 F. Supp.2d 254, 274-275 (E.D.N.Y. 2013) (criminal forfeiture is not limited to property of the defendant; it reaches any property derived from or used to commit the offense; in the case of proceeds, the in personam nature of forfeiture is satisfied if the property is the proceeds of the crime the defendant committed; older cases such as O'Dell and Gilbert were based on former Rule 31(e) which was replaced by Rule 32.2 and are no longer good law); United States v. Molina-Sanchez, 298 F.R.D. 311, 312-13 (W.D.N.C. 2014) (same).

55 Rule 32.2(c); 21 U.S.C. § 853(n). The post—trial ancillary proceeding is explained in detail in Asset Forfeiture Law in the United States, supra note 1, at Chapter 23.

56 For a complete discussion of criminal forfeiture procedure, see Asset Forfeiture Law in the United States, supra note 1, at Chapters 15-24.
Rule 32.2(a). See United States v. Hampton, 732 F.3d 687, 690 (6th Cir. 2013) (it was proper, under Rule 32.2(a), for the indictment to say that the Government was seeking a money judgment and not to identify any specific assets subject to forfeiture); United States v. Lazarenko, 504 F. Supp. 2d 791, 796-97 (N.D. Cal. 2007) (Rule 32.2(a) requires only that the indictment give the defendant notice of the forfeiture in generic terms; that the Government did not itemize the property subject to forfeiture until much later was of no moment; older cases like Gilbert, holding that property had to be listed in the indictment, are no longer good law); United States v. Galestro, 2008 WL 2783360, at *10-11 (E.D.N.Y. 2008) (Rule 32.2(a) does not require an itemized list of the property subject to forfeiture; older cases requiring such an itemization ‘appear to reflect an outmoded, minority view’); United States v. Woods, 730 F. Supp.2d 1354, 1372-73 (S.D. Ga. 2010) (forfeiture notice that tracks the language of 2253 is sufficient to give defendant notice of what property will be forfeited if he is convicted of a child pornography offense); United States v. Clemens, 2011 WL 1540150, *4 (D. Mass. Apr. 22, 2011) (declining to dismiss forfeiture notice on the ground that it did not itemize the property subject to forfeiture; such “placeholders” are neither improper nor prejudicial).

21 U.S.C. §§ 853(e) and (f).

See Kaley v. United States, ___ U.S. ___, 134 S. Ct. 1090 (2014) (property may be restrained pre-trial based on a showing of probable cause; there are two parts to the probable cause determination: probable cause to believe the defendant committed the underlying crime, and probable cause to believe the property has the requisite connection to that crime; the grand jury’s finding of probable cause suffices for the first requirement); United States v. Cosme, 796 F.3d 226 (2nd Cir. 2015) (where Government concedes grand jury did not actually vote on the probable cause for the forfeiture of the property listed in the indictment, the district court erred in relying solely on the indictment to enter a restraining order; remanded for a judicial determination of probable cause); United States v. Holy Land Foundation for Relief and Development, 493 F.3d 469, 475 (5th Cir. 2007) (en banc) (“a court may issue a restraining order without prior notice and a hearing”).

See United States v. Beltramea, 785 F.3d 287 (8th Cir. 2015) (defendant’s consent to the entry of a forfeiture order without a factual stipulation does not relieve the Government of its obligation to establish the nexus between the property and the offense of conviction; without any factual support in the records, forfeiture order vacated as plain error).

Rule 32.2(b). See United States v. Marquez, 685 F.3d 501, 510 (5th Cir. 2012) (failure to enter forfeiture order as soon as practical after guilty plea was error, but caused no prejudice).

See United States v. Yeje-Cabrera, 430 F.3d 1 (1st Cir. 2005) (Rule 32.2(b)(3)’s requirement that the forfeiture be part of the sentence ensures that all aspects of the defendant’s sentence are part of a single package that is imposed at one time).
See United States v. Vampire Nation, 451 F.3d 189, 202 (3d Cir. 2006) (expressly rejecting the argument that a forfeiture order must be limited to specific property; as an in personam order, it may take the form of a judgment for a sum of money equal to the proceeds the defendant obtained from the offense, even if he no longer has those proceeds, or any other assets, at the time he is sentenced); United States v. Hampton, 732 F.3d 687, 691-92 (6th Cir. 2013) (following all other circuits and holding that forfeiture being a mandatory part of the defendant’s sentence, the court may enter a money judgment in the amount of the proceeds of the offense even though the defendant has dissipated the traceable property and has no other funds with which to satisfy the judgment); United States v. Viloski, 814 F.3d 104, 110 n. 11 (2nd Cir. 2016) (“As long as the factual predicate for the application of [the forfeiture statutes] has been satisfied, ... a district court has no discretion not to order forfeiture in the amount sought. The court’s only role is to conduct the gross disproportionality inquiry required by Bajakajian.”); United States v. Blackman, 746 F.3d 137, 143 (4th Cir. 2014) (§ 2461(c) makes criminal forfeiture mandatory in all cases; “The word ‘shall’ does not convey discretion... The plain text of the statute thus indicates that forfeiture is not a discretionary element of sentencing. ... Insofar as the district court believed that it could withhold forfeiture on the basis of equitable considerations, its reasoning was in error.”).

21 U.S.C. § 853(p); Rule 32.2(e).

See United States v. Fleet, 498 F.3d 1225, 1231 (11th Cir. 2007) (Congress chose broad language providing that any property of the defendant may be forfeited as a substitute asset; it is not for the courts “to strike a balance between the competing interests” or to carve out exceptions to the statute; thus, defendant’s residence can be forfeited as a substitute asset notwithstanding state homestead and tenancy by the entirety laws); United States v. Carroll, 346 F.3d 744, 749 (7th Cir. 2003) (defendant may be ordered to forfeit “every last penny” he owns as substitute assets to satisfy a money judgment); United States v. Alamoudi, 452 F.3d 310, 314 (4th Cir. 2006) (“Section 853(p) is not discretionary...[W]hen the Government cannot reach the property initially subject to forfeiture, federal law requires a court to substitute assets for the unavailable tainted property”).

See United States v. Beecroft, 825 F.3d 991 (9th Cir. 2016) (applying Pinkerton and holding that all conspirators in a mortgage fraud scheme are jointly and severally liable for the loan proceeds obtained by the conspiracy, but limiting the defendant’s liability under the Eighth Amendment); United States v. Honeycutt, 816 F.3d 362 (6th Cir. 2016) (applying Corrado: if there is joint and several liability under RICO, there must be under § 853 as well; no need to consider the D.C. Circuit’s reasoning in Cano-Flores); United States v. Wolford, ___ Fed. Appx. ___, 2016 WL 3878213 (6th Cir. July 18, 2016) (following Honeycutt and Corrado); United States v. Nagin, 810 F.3d 348 (5th Cir. 2016) (“As a general matter, co-conspirators subject to criminal forfeiture are held jointly and severally liable for the full amount of the proceeds of the conspiracy”). But see United States v. Cano-Flores, 796 F.3d 83 (D.C. Cir. 2015) (declining to follow all other circuits and holding that neither rationale for joint and several liability – Pinkerton liability and
the language authorizing forfeiture of property obtained “indirectly” – justifies holding a defendant liable for more than the amount of money he obtained personally).

67 See Libretti v. United States, 516 U.S. 29, 49 (1995) (“the nature of criminal forfeiture as an aspect of sentencing compels the conclusion that the right to a jury verdict on forfeitability does not fall within the Sixth Amendment’s constitutional protection”); United States v. Valdez, 726 F.3d 684, 699 (5th Cir. 2013) (“There is no constitutional right to a jury determination of forfeiture,” following Libretti).

68 Rule 32.2(b)(5).

69 See United States v. Armstrong, 2007 WL 809508, *2 (E.D. La. Mar. 14, 2007) (noting that the special verdict form required the jury to make detailed findings as to whether the property was forfeitable as facilitating property or proceeds and as property involved in a money laundering offense); United States v. Phillips, 704 F.3d 754, 771 (9th Cir. 2012) (there is no statutory right to a jury under Rule 32.2(b)(5) when the Government is seeking only a money judgment).

70 Rule 32.2(b)(4). See United States v. Smith, 656 F.3d 821, 828 (8th Cir. 2011) (district court’s failure to make the previously-entered preliminary order of forfeiture part of the judgment until two weeks after sentencing was a clerical error that may be corrected under Rule 36); United States v. Holder, 2010 WL 478369, *3 (M.D. Tenn. Feb. 4, 2010) (under new Rule 32.2(b)(4), the court’s failure to make the order of forfeiture part of the judgment at sentencing may be corrected at any time as a clerical error, as long as the defendant was aware at sentencing that forfeiture would be part of his sentence).