Civil Asset Recovery: The American Experience

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Introduction

In the United States, federal prosecutors routinely employ asset recovery as a tool of law enforcement. The approach takes two forms. In criminal cases, the prosecutor may seek to recover, or “forfeit”, property as part of the defendant’s sentence, if the defendant is convicted. Alternatively, the prosecutor may commence a civil proceeding, naming the property as the defendant and seeking to forfeit the property independent of any criminal proceeding.

This chapter discusses the American experience with civil, or non-conviction-based, asset recovery. It discusses the prosecutor’s motivations for seeking to forfeit assets, the types of property that may be forfeited, the procedures that govern civil asset forfeiture, the advantages of civil or non-conviction-based asset forfeiture over criminal forfeiture, and the ways in which the United States, through judicial decisions and legislation, has reconciled the non-conviction-based approach with the requirements of basic human rights and civil liberties.

Terminology

In the United States, the term “civil forfeiture” refers to non-conviction-based forfeiture proceedings. It contrasts with “criminal forfeiture”, which requires a criminal conviction and is imposed as part of a criminal sentence. Experience shows, however, that the term “civil forfeiture” can be confusing when employed in the international context.

The term “civil” means different things in different contexts. It evokes the distinction between civil and common law jurisdictions; it implies that the action is brought in a civil court as opposed to a criminal court; it suggests that the action is between private parties instead of between a private party and the Government, or that the Government is merely seeking compensation for a loss, instead of imposing a sanction for wrongdoing; and it implies that the process does not provide protections for human rights.

None of those connotations applies to the American civil forfeiture process. In the United States, civil forfeiture is a tool of law enforcement; it is an action commenced by the

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1 The views expressed in this chapter are solely those of the author and do not necessarily reflect the views of the United States Department of Justice or any of its agencies. This chapter is an expanded version of a presentation made by the author at the seminar entitled “Civil Asset Forfeiture: Exploring the Possibilities for an EU Model”, sponsored by the Max Planck Institute and the University of Tromso, Sammaroy, Norway, June 1–2, 2012.
Government in the same court where a criminal action would be filed—often in parallel with an actual criminal action—as both a sanction and as a remedial device. Though the procedures may be civil in nature, with some important exceptions, the same constitutional protections apply in civil cases as in criminal cases. Civil forfeiture is simply a procedural device that the criminal prosecutor uses to recover property in a situation in which all of the interests of the potential property owners may be adjudicated at one time, without the necessity of obtaining a criminal conviction of the property owner or of anyone else.

To avoid the confusion and the unnecessary distraction created by the use of the term “civil forfeiture” when discussing asset recovery in the international context, I will use the term “non-conviction-based” forfeiture from this point forward.

**Why Do Forfeiture?**

The prosecutor may have multiple reasons for seeking to recover the assets involved in the commission of a criminal offense. Indeed, it would be the rare case when only one of the following motives would apply. Frequently, they are overlapping and mutually reinforcing.

First, forfeiture serves the non-punitive purpose of taking the profit out of crime. Whatever benefit the wrongdoer obtained or retained as a consequence of his offense is simply forfeited to the Government.

Second, forfeiture is seen as a form of punishment. Incarceration is a form of punishment, but so is forcing the wrongdoer to disgorge the accouterments of the lavish lifestyle he acquired through his criminal acts. Indeed, many prosecutors relate that it was the loss of the luxury items acquired through a life of crime, not the period of time to be spent behind bars, that most distressed defendants.

Third, forfeiture serves as a deterrent. If one fraudster, child pornographer, corrupt politician, or drug dealer is not permitted to retain the fruits of his crime, perhaps the next person will be less likely to travel the same road.

Fourth, forfeiture is used as a form of prevention; it allows the Government to deprive wrongdoers of the tools of their trade and the economic resources they would employ to commit similar or more serious crimes in the future. In drug cases, for example, the prosecutor does not want the drug dealer to keep the airplane that might be used again to smuggle drugs, or the land where he could produce another load of marijuana. The benefit of using the forfeiture laws to

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2 See United States v. Ursery, 518 U.S. 267, 291 (1996) (“[Forfeiture] serves the additional nonpunitive goal of ensuring that persons do not profit from their illegal acts“).

3 See von Hofe v. United States, 492 F.3d 175, 184 (2d Cir. 2007) (“Like imprisonment, which incapacitates convicted criminals, forfeiture may be said to incapacitate contraband“).
intercept the flow of guns to Mexico or the export of a flight simulator to a government that sponsors terrorism is obvious.

Fifth, another form of prevention is the disruption of criminal organizations. Money is the glue that holds organized criminal enterprises together; they have to recycle the money to keep the scheme going—to lull more victims into the fraud scheme, to buy more drugs, to finance acts of terrorism, or to pay bribes to corrupt officials. Moreover, it is often noted that it is harder for a drug organization to replace the money that is seized by law enforcement after the drugs have been distributed than it is to replace the drugs if they are seized beforehand. Thus, taking the money does more to interrupt the cycle of drug distribution than any number of buy/bust arrests of street dealers, or seizures of drugs as they are being imported.

Sixth, forfeiture is used in the United States as a means of recovering property that has been taken from victims, and restoring it through processes known as “restitution” and “restoration”. The United States has a robust set of restitution laws, but for a simple procedural reason forfeiture is a more effective way of recovering money for victims than ordering the defendant to pay restitution. Restitution orders may only be imposed after a defendant has been convicted, whereas forfeiture laws allow the Government to seize and hold the property at the outset of the case, thus ensuring that it remains available to the victims as the case progresses.

Seventh, forfeiture is used to protect the community and to demonstrate to the community that law enforcement is working in its interest. If the police are able to use the forfeiture laws to shut down a crackhouse and turn it into a shelter for battered women, they have at once removed a hazard to public health and safety, provided a much-needed resource to a community, and created a visible demonstration of the effectiveness of the local law enforcement agency’s efforts.

Finally, forfeiture is used as a way of encouraging cooperation between state and federal law enforcement agencies and focusing their resources on the economic aspects of crime. Through a program called “equitable sharing”, state and local law enforcement agencies that assist federal law enforcement in investigating and prosecuting federal offenses that lead to the forfeiture of assets are allowed to use a portion of those assets to supplement their budgets—though not to pay the salaries of the agents or officers who handle the cases—and thereby are given an incentive to dedicate resources to matters that have the highest federal priority.  

4 See Caplin & Drysdale v. United States, 491 U.S. 617, 630 (1989) (“[A] major purpose motivating congressional adoption and continued refinement of the racketeer influenced and corrupt organizations (RICO) and [continuating criminal enterprise] forfeiture provisions has been the desire to lessen the economic power of organized crime and drug enterprises”).

Non-Conviction-Based Forfeiture

All of these motives apply equally to criminal forfeiture and to non-conviction-based forfeiture as well. The difference between the two approaches is procedural.

In a criminal case, forfeiture is part of the defendant’s sentence. After the defendant is found guilty beyond a reasonable doubt, the court determines on a balance of the probabilities whether the property the Government is seeking to forfeit was derived from, used to commit, or was otherwise connected to the crime a way that allows it to be forfeited to the Government. If the property is unavailable, the Government may obtain a personal money judgment against the defendant, and may satisfy that judgment out of any assets of equal value that the defendant may own—property known as “substitute assets”. Finally, the Government must give notice of the forfeiture order to any third parties with an interest in the forfeited property and afford them an opportunity to contest the forfeiture on the ground that it belongs to the third party and not to the defendant.

In a non-conviction-based forfeiture proceeding, there is no requirement of a criminal conviction or even of a criminal investigation. The Government brings the action against the property as the defendant in rem, and any person seeking to oppose the forfeiture action must intervene to do so. That is why, in the United States at least, non-conviction-based forfeiture

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7 See Fed. R. Crim. P. 32.2(b); see, e.g., United States v. Bader, 678 F.3d 858, 893 (10th Cir. 2012) (“A forfeiture judgment must be supported by a preponderance of the evidence.”) (quoting STEFAN D. CASSELLA, ASSET FORFEITURE LAW IN THE UNITED STATES § 15-3(d) (New York, Juris 2007) [hereinafter ASSET FORFEITURE LAW]).

8 See, e.g., United States v. Vampire Nation, 451 F.3d 189, 201–03 (3d Cir. 2006) (rejecting the argument that a forfeiture order must order the forfeiture of 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).


10 Criminal forfeiture procedure is discussed in detail in Chapters 15–24 of ASSET FORFEITURE LAW, supra note 7.


12 See United States v. One-Sixth Share of James J. Bulger in All Present and Future Proceeds of Mass Millions Lottery Ticket No. M246233, 326 F.3d 36, 40 (1st Cir. 2003) (“Because civil forfeiture is an in rem proceeding, the property subject to forfeiture is the defendant. Thus, defenses against the forfeiture can be brought only by third
cases have such unusual names, such as United States v. $65,000 and $4,180 in U.S. Currency, or United States v. 2005 Mercedes Benz E500.

The forfeiture process is straightforward and is described in detail in statutes and rules. Basically, the Government seizes the property and must provide notice to the owner and any other interested party of the forfeiture action and the right to intervene. If the property owner—universally referred to at this stage as the “claimant”—chooses to intervene by filing a proper claim, the case proceeds through various stages in which the parties can conduct discovery to obtain evidence, the claimant may move to suppress evidence or to dismiss the Government’s case, and the Government may move to strike the claim for lack of standing (i.e., the lack of a sufficient interest in the property). Finally, if the case goes to trial, the Government has the burden of establishing on a balance of the probabilities that a crime occurred and that the property was derived from, used to commit, or was otherwise involved in the offense in terms of the particular statute authorizing forfeiture. If the Government meets that burden, the claimant then has the burden of establishing that he or she was an “innocent owner”, or that the forfeiture of the property would be “grossly disproportionate to the gravity of the offense” on which the forfeiture is based.

In older cases, the rationale for non-conviction-based forfeiture was that the property itself had done something wrong, but that is not the modern view. The property is not being punished because it did something wrong; it is being confiscated because it represents the proceeds of a crime or property that was used to commit a crime, and should for those reasons be taken out of the stream of commerce and out of the hands of those who committed the wrong or would use it to commit a wrong in the future. The Government could, of course, try to recover the property in a criminal case in which the underlying criminal act is established, but as we will see, that is not always possible or desirable. Alternatively, it could bring a separate in personam civil action against each party with an interest in the property, but that would be cumbersome: the Government would have to locate and serve all of them and conduct separate trials as to each person’s interest before it could obtain clear title to the property.

13 884 F.2d 1396 (9th Cir. 1989).
16 18 U.S.C. § 983(g).
Thus, as Supreme Court Justice Anthony Kennedy has explained, non-conviction-based forfeiture—as an in rem action against the property—is simply a procedural device that allows the Government to litigate the interests of all persons with an interest in the property at the same time, and to obtain clear title when the proceeding is complete.\(^\text{17}\)

### What Can Be Forfeited

Forfeiture actions in the United States may be brought against contraband, the proceeds of crime, and any property that is used to commit or facilitate the commission of a criminal offense. There are, however, statutes that sweep more broadly. In money laundering cases, for example, the Government may forfeit all property involved in a money laundering offense, including untainted property that is commingled with the criminal proceeds at the time the money laundering offense takes place.\(^\text{18}\) In racketeering cases brought under the RICO statute, the Government may forfeit all property affording the defendant a “source of influence” over the racketeering enterprise, whether the property is tainted by the offense or not.\(^\text{19}\) And in terrorism cases, the Government is entitled to the forfeiture of every item of property that the terrorist owns.\(^\text{20}\)

Though there are nuances and exceptions, the scope of the forfeiture statutes is generally the same whether the forfeiture is brought as part of a criminal case or as a non-conviction-based forfeiture action. Moreover, within each procedural construct—criminal or civil—the procedures for forfeiting property are the same, regardless of the Government’s theory of forfeiture, and regardless of the motive the Government may have had for bringing the forfeiture action. So, if a defendant is convicted of a criminal offense, the procedure for forfeiting the property derived from or used to commit the offense is the same, regardless of the nature of the crime, the connection between the property and the crime, or the motive for seeking the forfeiture. Similarly, in a non-conviction-based forfeiture action, the Government would have the same burden of proof, and would follow the same procedural steps, whether it was seeking to forfeit property as criminal proceeds, facilitating property, or property involved in a money laundering offense, and regardless of whether it viewed the forfeiture as punitive or remedial.

\(^{17}\) Ursery, 518 U.S. at 295–96 (1996) (Kennedy, J. concurring) (discussing how 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).


\(^{19}\) 18 U.S.C. § 1963(a)(2)(D) (2009); see also United States v. Anderson, 782 F.2d 908, 918 (11th Cir. 1986) (“A defendant’s conviction under the RICO statute subjects all his interests in the enterprise to forfeiture regardless of whether those assets were themselves tainted by use in connection with the racketeering activity.”) (emphasis added) (internal quotation marks omitted).

The reasons are largely pragmatic. Suppose, for example, a drug dealer uses a false name to purchase an automobile with drug proceeds, and then uses the automobile to commit a further drug offense. From the property owner’s point of view, it does not matter whether the Government’s forfeiture action is based on the theory that the automobile constitutes the proceeds of a crime, is property used to facilitate a crime, or is property involved in a money laundering offense. Nor does it matter that the Government brought the action to punish the property owner for committing the offense and to prevent him from using the same automobile to commit similar crimes in the future.

Moreover, if the procedures governing forfeiture were different depending on the Government’s theory or motive there would be endless litigation over exactly what theory or motive applied in a given case, with the prosecutor arguing that he was proceeding under the theory that invoked the less burdensome procedures and the claimant arguing the reverse. Given the overlapping and mutually reinforcing motives and theories that apply in forfeiture cases, determining which procedures apply in a given case based on the Government’s motive or theory would be a prescription for chaos in the courtroom.

History of Forfeiture in the United States

Forfeiture laws in the United States have been evolving for a long time. In the late 1700s, the United States had a serious problem with pirate ships and slave traders who operated out of lawless regions of the Caribbean. There were times when the ship, the crew, and the cargo could be seized, but rarely was there an opportunity to bring the ship owner to justice. Accordingly the First Congress of the United States passed laws allowing the Government to bring a forfeiture action against the ship itself—or its cargo—thereby forcing the owner to come forward to defend his property if he would do so. That is why the forfeiture cases decided throughout the 1800s arose for the most part in admiralty practice and have names like United States v. The Brig Ann. Indeed, the modern rules of procedure for non-conviction-based asset forfeiture actions are still found in the Supplemental Rules for Admiralty and Maritime Cases and Asset Forfeiture Actions of the Federal Rules of Civil Procedure.

Later, in the late 19th and early 20th Centuries, the United States used its forfeiture laws to collect taxes due on the production of alcoholic beverages and then to enforce the prohibition
on the consumption of alcohol altogether. This gave rise to another series of cases involving
distilleries and vehicles used to transport bootleg whiskey or other illegal spirits.23

What brought non-conviction-based forfeiture into common use in the 1980s were drug
cases. Just as it was often hard to find the owner of a slave ship in the 1790s and bring him to
justice, it is often hard to find or lay hands on the mastermind behind an international drug
organization, yet law enforcement still wants to confiscate his proceeds, his airplanes, his money
laundering operation, or whatever else he might use to perpetuate his scheme and gain entry into
the legitimate economy.

Beginning in 1978 and continuing through the following decade, Congress enacted a
series of laws expanding the use of civil forfeiture with regards to drugs. As discussed below,
this led to a great deal of litigation regarding the procedures necessary to ensure that basic civil
liberties were protected, as it became apparent that the laws and procedures that were designed
originally to deal with pirate ships and slave traders were ill-suited to dealing with the seizure
and forfeiture of houses, cars, businesses, and bank accounts.

As these issues were resolved, the forfeiture laws were expanded, so that they now apply
to most federal crimes. One of the problems with the piecemeal development of the law over
two hundred years, however, is that instead there being one broadly applicable statute, there are
separate forfeiture statutes dealing with a wide variety of federal crimes spread throughout the
U.S. Code. Inevitably, the scope of the legislation is inconsistent: some statutes authorize the
forfeiture of the proceeds of the offense and nothing more; others authorize the forfeiture of
facilitating property; still others authorize both; and some contain exemptions from the
procedural changes that were enacted at the turn of the 21st Century.24 That is why U.S. forfeiture
law is often confusing to the novice practitioner, but for the purposes of the discussion of non-
conviction-based forfeiture in this chapter, the basic concepts are the same.

Statistics

To get a sense of the current scope of forfeiture in the United States, a few statistics may
be useful. The figures given below are only from the forfeiture program administered by the U.S.
Department of Justice. That is by far the largest forfeiture program in the United States, but it is
not the only one. Each of the 50 states has a forfeiture program, and so do several other federal
agencies, such as the Internal Revenue Service and the Department of Homeland Security, which
are not part of the Justice Department.

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23 See, e.g., Van Oster v. Kansas, 272 U.S. 465 (1926); J.W. Goldsmith, Jr.-Grant Co. v. United States, 254 U.S. 505
(1921); Dobbins’s Distillery v. United States, 96 U.S. 395 (1877).

24 For example, there is no “innocent owner defense” in cases brought under the Customs laws. See, e.g., United
States v. Davis, 648 F.3d 84, 93–95 (2d Cir. 2011) (holding that there is no innocent owner defense to the forfeiture
The Justice Department’s analysis is divided into three categories of forfeiture: criminal, civil (i.e., non-conviction-based) and administrative. The administrative forfeitures are really non-conviction-based forfeitures that are uncontested. In those cases, the property is seized, notice is given, no one files a claim, and the property is forfeited by default. In the United States, the vast majority of forfeitures (in terms of raw number of cases) are resolved that way.

<table>
<thead>
<tr>
<th>Forfeiture Type</th>
<th>JUSTICE FUND</th>
</tr>
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<tbody>
<tr>
<td></td>
<td>Number of Cases</td>
</tr>
<tr>
<td>Administrative</td>
<td>9,787</td>
</tr>
<tr>
<td>Civil/Judicial</td>
<td>1,351</td>
</tr>
<tr>
<td>Criminal</td>
<td>2,030</td>
</tr>
<tr>
<td>Total</td>
<td>13,168</td>
</tr>
</tbody>
</table>

The data illustrate a number of things. First, the forfeiture program in the U.S. is large—exceeding $2.1 billion in asset recoveries in 2011—and it is mature, but it is still growing. Second, non-conviction-based forfeitures (judicial and administrative) are an enormous part of the success of the program; of the 17,000 cases in 2011, 14,000 were non-conviction-based, and they accounted for the forfeiture of $1.5 billion of the $2.1 million forfeited, which is roughly 70 percent. Third, non-conviction-based forfeiture—with its administrative forfeiture component—is an enormously efficient use of time and resources; fully 80 percent of the cases are uncontested, and those account for 30 percent of the money forfeited.

Law enforcement agencies in the United States do not measure the success of the asset forfeiture program solely in terms of dollars or assets: the real issue is how many crimes were deterred, wrongdoers punished, and victims compensated. The metrics set forth in these charts do not necessarily tell that story, but they do suggest some measure of success in those hard-to-quantify areas.
Advantages of Non-Conviction-Based Forfeiture

We now turn to some examples of when asset recovery would not be possible were it not for the availability of non-conviction-based forfeiture proceedings, or where non-conviction-based forfeiture is at least the superior option.

1) Where the Forfeiture is Uncontested

If the Government files a forfeiture action directly against the property, and no one files a disputing claim, the property may be forfeited to the Government directly without any judicial forfeiture proceeding. In effect, at the cost of providing proper notice of the forfeiture to interested parties, who chose not to file a claim 80 percent of the time, the Government recovered over $600 million in criminal proceeds and other forfeitable property. In many of those cases there was a parallel criminal prosecution, but the defendant nevertheless did not contest the forfeiture and the property was recovered without having to invest time and resources as part of the criminal case.

2) Where the Defendant has Died

The Government can only obtain a forfeiture order as part of the sentence in a criminal case if the defendant lives long enough to be tried, convicted, and sentenced. In the prosecution connected to the Enron case, a massive fraud perpetrated by an energy company in Houston, Texas, the Government obtained a criminal conviction against CEO Kenneth Lay. However, Lay died before a criminal forfeiture order could be imposed, thereby abating his conviction and leaving the Government with no way of recovering the proceeds of his crime in the criminal case. Thus, non-conviction-based forfeiture became the principal means of recovering property that could be traced to the underlying crime.

3) Where the Wrongdoer is Unknown

In the United States, law enforcement agents commonly find criminal proceeds in the hands of a courier—a person who was not himself involved in the commission of the crime. It is often clear from the circumstances that the money at issue are criminal proceeds, but neither the Government nor (in most cases) the courier, knows who the money belongs to or who committed the underlying criminal offense. In such cases, there is no chance of bringing a criminal prosecution, yet it is still desirable for the Government to recover the money. Thus it is not unusual in the United States to file a forfeiture case against a very large sum of currency that was

25 The advantages and disadvantages of criminal and non-conviction-based forfeitures under U.S. federal law are discussed in more detail in Chapter 1 of ASSET FORFEITURE LAW, supra note 7. See also Stefan D. Cassella, The case for civil forfeiture: Why in Rem proceedings are an essential tool for recovering the proceeds of crime, 11 J. of Money Laundering Control 8 (2008).
seized from a courier. Many of these are drug cases, but the scenario appears in other contexts as well (the financing of terrorism being one prominent example).

4) Where the Property Belongs to a Third Party

It is quite common, of course, for a person to commit an offense using property that belongs to a third party. For example, a robber may carry out a robbery using someone else’s gun.

In a criminal case, the Government cannot forfeit property that belongs to a third party if the third party has been excluded from the proceeding, as this would violate the third party’s right to due process. In fact, criminal forfeiture laws have a procedure specifically designed to exclude the property of third parties from a criminal forfeiture order, even if the third party knew about or was even complicit in the commission of the crime. Yet if the third party was aware that his property was being used for a criminal purpose—or was willfully blind to that fact—he should be made to forfeit the property. The procedural device for forfeiting property held by a non-innocent third party is civil forfeiture.

To share just one example, in United States v. Collado, the Government sought the forfeiture of a grocery store in New York where a drug dealer had conducted $20 million worth of drug transactions over a one-year period. Indeed, law enforcement agents had monitored 646 narcotics-related conversations that were held on the property over a three-month period. The problem was that the grocery store didn’t belong to the drug dealer but to his mother. Nevertheless, the Government filed a civil forfeiture action and was able to forfeit the grocery store because the mother was not an innocent owner: she knew of her son’s history of narcotics trafficking, admitted that she suspected her son was selling drugs again because his associates from jail had been calling and stopping by the property frequently, and warned her son’s

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26 See United States v. $124,700 in U.S. Currency, 458 F.3d 822, 824–26 (8th Cir. 2006) (holding that a large quantity of concealed currency, defendant’s implausible story and false statements, travel itinerary, and dog alert were sufficient to establish a substantial connection between currency seized from a courier and drug trafficking).

27 See De Almeida v. United States, 459 F.3d 377, 381 (2d Cir. 2006) (holding that 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) (emphasis added) (internal quotations omitted); ASSET FORFEITURE LAW, supra note 7, at Chapter 23 (explaining the ancillary proceeding in a criminal forfeiture case).

28 348 F.3d 323, 325 (2d Cir. 2003) (per curiam).

29 Id.

30 Id. at 325.
associates to speak to him in person and not to use the phone on her property to avoid being monitored by the police.\textsuperscript{31}

5) When the Interests of Justice do Not Require a Criminal Conviction

There are many cases where the interests of justice do not require a criminal conviction on the offense giving rise to the forfeiture. Some of these are relatively minor cases, such as the case of the teenager who uses his home computer to create counterfeit currency to spend at the shopping mall. In such cases, forfeiture of the computer, not incarceration of the teenager, is probably the appropriate law enforcement action.

In other cases, the defendant’s spouse may have played a minor role in the commission of the crime. In such cases, the forfeiture of her interest in the property used to commit the offense in a separate non-conviction-based forfeiture action—and not her prosecution and conviction in a criminal case—is probably the best way to recover the property.

Finally, there are very serious cases where the criminal defendant will admit to committing a particular offense, but will not admit to other conduct that gave rise to the lion’s share of his criminal proceeds. For example, a defendant may admit to perpetrating a fraud scheme, but will not admit to laundering the proceeds of the fraud by commingling those proceeds with some legitimately acquired assets. In that case, if the defendant will plead guilty only to the fraud offense, criminal forfeiture will yield the forfeiture only of the proceeds of the fraud and nothing more; non-conviction-based forfeiture is needed to recover the much larger body of assets involved in the money laundering scheme.

In all of these instances, the point is the same: because criminal forfeiture is imposed as part of the defendant’s sentence, there can be no forfeiture if no one is convicted or if the property belongs to a person who was not convicted. So, where the interests of justice do not require a conviction, non-conviction-based forfeiture provides a means of imposing a punishment that fits the crime.

6) When the Wrongdoer is a Fugitive

Criminal forfeiture is available only when there is a conviction, but there can be no conviction as long as the accused is a fugitive from justice. But non-conviction-based forfeiture allows the Government to file an action against the assets that the fugitive left behind.

The fugitive retains the right to contest the forfeiture, of course, but only if he is willing to surrender to face the criminal charges; he cannot ignore the process of the court in the criminal

\textsuperscript{31} Id. at 325–28.
case and ask the court to protect his property interests in the civil one.\textsuperscript{32}

For example, in \textit{United States v. $6,976,934.65 Plus Interest}, the defendant and a corporation that he controlled were indicted on money laundering and other charges stemming from an off-shore internet gambling operation based in Antigua.\textsuperscript{33} The defendant, who was living in Antigua when the indictment was returned, renounced his U.S. citizenship and chose not to return to the United States to face the criminal charges. He was a fugitive, but the Government learned that the defendant had deposited nearly $7 million in criminal proceeds from his offense in a bank in Guernsey. Using the law that allows the United States to recover criminal proceeds by filing a non-conviction-based forfeiture action against the correspondent account of a foreign bank, the Government filed a forfeiture action against the $7 million; successfully denying the defendant’s attempt to contest the forfeiture until he surrendered to face the criminal charges.

\textbf{7) When the Criminal Case is Prosecuted by Another Sovereign}

Finally, federal prosecutors use non-conviction-based forfeiture when the defendant has already been prosecuted elsewhere—in one of the 50 states or in a foreign country—and thus will not be prosecuted federally, but there are assets related to the crime that may be recovered under federal law. For example, if someone commits an offense in Norway or Nigeria and conceals the proceeds of the crime in the United States, a federal prosecutor can use the non-conviction-based forfeiture laws to recover that property, even though the defendant has already been convicted of the offense in a Norwegian or Nigerian court. This can often be a more efficient way of recovering the property than trying to register and enforce a foreign confiscation order.

\textbf{Civil liberties and Due Process Concerns}

In most instances, the protection afforded to property owners’ civil liberties in non-conviction-based forfeiture cases are the same as they are in criminal cases. In both proceedings, for example, the property owner can seek to suppress evidence obtained in violation of the Fourth Amendment protection against unreasonable searches and seizures; is entitled to fair notice and an opportunity to be heard as guaranteed by the Fifth Amendment Due Process Clause; is entitled to cross-examine witnesses and insist on the application of the Rules of Evidence; and is protected from the imposition of a forfeiture that is grossly disproportionate to the gravity of the offense under the Excessive Fines Clause of the Eighth Amendment. There is also a right to a trial by jury, which is actually more robust under the Seventh Amendment in the

\textsuperscript{32} See 28 U.S.C. § 2465 (codifying the fugitive disentitlement doctrine).

non-conviction-based context then it is in the criminal context.\textsuperscript{34} In neither case is the defendant or the property owner entitled to use property subject to forfeiture to finance his defense.\textsuperscript{35}

For other purposes, however, the non-conviction-based proceeding does not contain the same constitutional protections for basic human rights that are available in a criminal proceeding. In non-conviction-based proceedings, the Government’s burden is to establish the forfeitability of the property by a balance of the probabilities (not beyond a reasonable doubt), there is no right to remain silent; and there is no right to the provision of counsel at Government expense if the claimant is unable to afford counsel of his or her own choosing. As the Supreme Court held in \textit{Ursery}, non-conviction-based forfeiture proceedings are not criminal proceedings for purposes of invoking the provisions of the Bill of Rights that are reserved for the protection of criminal defendants whose liberty is placed in jeopardy by the filing of criminal charges.\textsuperscript{36}

The process of determining which constitutional protections would apply in non-conviction-based forfeiture proceedings and which would not has evolved piecemeal over many years. As I have mentioned, the procedures governing civil forfeiture practice were borrowed from 18th Century admiralty practice and needed to be modified to fit modern usage and the concept of due process. Many of the constitutional issues were addressed by the Supreme Court in the decade from 1992–2002; others were addressed legislatively in the Civil Asset Forfeiture Reform Act of 2000 (CAFRA).\textsuperscript{37}

The following is a brief discussion of how some of the most prominent issues were resolved.\textsuperscript{38}

\textbf{1) Presumption of Innocence and the Burden of Proof}

The practice in admiralty included a reverse burden of proof: once the Government showed that it had a reasonable basis to believe the property was subject to forfeiture—what the courts in the United States call “probable cause”—the burden was on the property owner to prove that it was not.\textsuperscript{39} The Supreme Court repeatedly held that this was constitutional: the

\textsuperscript{34} \textit{Compare} Fed. R. Civ. P. Rule G(9) \textit{with} Fed. R. Crim. P. 3.22(b)(5).

\textsuperscript{35} \textit{See} Caplin & Drysdale, 491 U.S. at 630.

\textsuperscript{36} 518 U.S. at 291–92 (setting forth the test for determining if a forfeiture proceeding constitutes punishment for purposes of applying the Double Jeopardy Clause of the Fifth Amendment).


\textsuperscript{38} For a complete discussion of the development of asset forfeiture law in the United States, including the application of constitutional protections embodied in the Bill of Rights to non-conviction-based proceedings, see Chapter 2 of \textit{Asset Forfeiture Law, supra} note 7.

\textsuperscript{39} \textit{See} 19 U.S.C. § 1615.
presumption of innocence embodied in the Bill of Rights applies only in criminal cases. But the presumption of innocence is so ingrained in American practice and culture, and in the expectations of the jurors who will decide civil cases if they go to trial, that it made sense to modernize the procedure by placing the burden on the Government to establish the connection between the property and a criminal offense in the first instance. This was accomplished with CAFRA.

In practice, placing the burden of proof on the Government has made very little difference in the outcome of cases. Generally, the Government’s evidence is fairly strong, and the number of cases where the evidence was evenly divided such that the allocation of the burden of proof mattered were few. Indeed, the amount of property forfeited has more than tripled since CAFRA was enacted.

2) The Innocent Owner Defense (Bennis)

Finding a way to deal with innocent third parties who have an interest in the property subject to forfeiture was more controversial. In Bennis v. Michigan, the Supreme Court affirmed two centuries of precedent and held that imposing strict liability on third parties does not violate their due process rights. But in CAFRA, the Justice Department proposed, and Congress enacted, a uniform innocent owner defense. By statute, the defense gives third parties the opportunity to protect their property from forfeiture, even if it was derived from or used to commit a crime, if (1) they did not know of, or took all reasonable steps to prevent, the illegal use of the property; or (2) they acquired the property interest as a bona fide purchaser for value without reason to know that it was subject to forfeiture.

3) Due Process and Notice (Dusenbery)

There was also a great deal of litigation over the steps the Government must take to provide notice of the forfeiture action to interested parties. In an in rem action, it is not always immediately apparent that the property owner is aware that a forfeiture action has been

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40 See, e.g., United States v. One “Piper” Aztec “F” Deluxe Model 250 PA 23 Aircraft Bearing Serial No. 27-7654057, 321 F.3d 355, 360–61 (3d Cir. 2003) (explaining that there was no constitutional infirmity in the pre-CAFRA allocation of the burden of proof on the claimant).

41 See 18 U.S.C. § 983(c).


43 See United States v. One 1990 Beechcraft, 619 F.3d 1275, 1278 (11th Cir. 2010) (explaining that § 983(d) was enacted in response to the Supreme Court’s decision in Bennis, holding that an innocent owner defense is not constitutionally required, and to bring uniformity to federal forfeiture law which contained a variety of inconsistent innocent owner provisions prior to CAFRA). The uniform innocent owner defense, codified at 18 U.S.C. § 983(d), is discussed in detail in Stefan D. Cassella, The Uniform Innocent Owner Defense to Civil Asset Forfeiture, 89 Ky. L.J. 653 (2001).
commenced. The rule that emerged, and was eventually codified, is that the Government must send written notice to any person who appears to have an interest in the property within 60 days of its seizure, and must also publish notice on the internet on an official Government website.\textsuperscript{44}

In \textit{Dusenbery v. United States}, the Supreme Court held that this rule applies to prisoners; the notice must be sent to the prison where the prisoner is incarcerated or to his attorney, and not to the prisoner’s home address or the place where he was residing when he was arrested.\textsuperscript{45}

4) The Eighth Amendment and the Excessive Fines Clause (\textit{Bajakajian})

Another controversial issue—and the subject of three separate Supreme Court cases in the 1990s—involved the proportionality of the forfeiture to the seriousness of the crime. A forfeiture may potentially be large enough to implicates the Excessive Fines Clause of the Eighth Amendment, making the forfeiture unconstitutional. Thus, in \textit{United States v. Bajakajian}, when a traveler leaving the Los Angeles airport with $347,000 concealed in his luggage committed the relatively minor offense of not reporting the currency on his Customs form, the Supreme Court held that the forfeiture of the entire $347,000 was unconstitutional because it was “grossly disproportional to the gravity of the offense”.\textsuperscript{46} However, the Court did not say how much could be forfeited without being unconstitutional; lower courts have been wrestling with this question ever since.

Generally, the forfeiture of the actual proceeds of a crime is never problematic—it is difficult to envision how the forfeiture of a crime’s proceeds could disproportional, let alone grossly disproportional, to the gravity of the offense. But the situation may be different when valuable property—such as a person’s home—is used to facilitate the commission of an offense. At what point, for example, does the forfeiture of the home become disproportional to the offense of collecting child pornography, or manufacturing child pornography, or subjecting children to sexual abuse?\textsuperscript{47}

5) Self-incrimination, the Right to a Stay, and Adverse Inferences

Another set of issues arises when there is a non-conviction-based forfeiture action and a parallel criminal investigation or trial.

\textsuperscript{44} See Fed. R. Civ. P G(4).


\textsuperscript{47} See, e.g., United States v. Hull, 606 F.3d 524, 530 (8th Cir. 2010) (holding that the forfeiture of the farm where defendant distributed child pornography was not excessive). The caselaw on the application of the Excessive Fines Clause to civil and criminal forfeiture is discussed in detail in Chapter 28 of \textit{Asset Forfeiture Law}, supra note 7.
Under the Fifth Amendment to the Bill of Rights, a criminal defendant has the right to remain silent and put the Government to its proof. When the Government files a parallel civil forfeiture action, however, the defendant is presented with a Hobson’s choice: does he invoke his right to remain silent so that what he says cannot be used against him in his criminal case—but in doing so foregoes his opportunity to defend his property—or does he give evidence in the forfeiture case. There are various ways to deal with that problem, but the choice that was made in CAFRA was to allow defendant who is subject to criminal liability in a related case to ask that a related non-criminal case be stayed until the criminal case is over, thus making it unnecessary for him to make the choice between his property and his right to remain silent.48

6) The Sixth Amendment Right to Counsel

A criminal defendant has the right to court-appointed counsel in a criminal case under the Sixth Amendment, but as mentioned earlier, that right does not extend to civil cases. In CAFRA, however, Congress created a limited right to court-appointed counsel where the property subject to forfeiture is the claimant’s primary residence. The view was that no one should be at risk of losing his home without having counsel to defend him.49

The right to counsel also arises when the defendant in a criminal case claims that he needs property that the Government has seized or restrained under the forfeiture laws to pay for counsel of his choice in the criminal case. The Supreme Court has held that there is no constitutional right to exempt criminally derived property from forfeiture so that a defendant may use it to hire counsel;50 but criminal defendants who first demonstrate that they lack other funds with which to retain counsel do have a right to a pre-trial hearing at which the Government must establish probable cause to believe that the property is likely to be forfeited.51

7. Double Jeopardy (Ursery)

Finally, there is one other issue that, for a time in the 1990s, threatened to derail the non-conviction-based forfeiture program.

In 1994, an appellate court in California held that because civil forfeiture is a form of punishment, forfeiting a person’s property would necessarily prevent the Government from


51 See United States v. Farmer, 274 F.3d 800, 804–05 (4th Cir. 2001) (outlining the two-part test that applies when the property that the defendant needs to hire counsel in a criminal case has been seized or restrained in related civil forfeiture case).
bringing criminal charges against that same person in a later criminal action. Doing so, the court said, would constitute double jeopardy. Almost overnight, forfeitures dropped by 40 percent in the United States as prosecutors feared that a forfeiture order in a civil forfeiture case would constitute a Get Out of Jail Free card for a criminal defendant.

Two years later, however, the Supreme Court held in *Ursery*, that forfeiture is not punishment for committing a crime, but is either a remedial measure (as it is when the Government is recovering proceeds), or is punishment for allowing one’s property to be used to commit a crime, and so does not constitute punishment for purposes of the Double Jeopardy Clause of the Fifth Amendment.

**Conclusion**

The American experience with civil, or non-conviction-based, asset forfeiture spans more than two centuries. In that time, it has become an essential tool of law enforcement, resulting annually in the recovery of over $2 billion is assets derived from or used to commit federal crimes. As the use of non-conviction-based forfeiture has expanded, enormous attention has been given to the protection of individual rights and civil liberties by the courts and the national legislature, with the result that litigants now have a high level of confidence that their rights will be protected regardless of what form the Government’s forfeiture action may take.

The process of refining the forfeiture laws and procedures is not complete. Matters of significance are litigated daily, and new cases are pouring from the trial and appellate courts. But the major issues having been resolved, it is certain that non-conviction-based forfeiture will continue to play a significant role in efforts to deprive criminals of the fruits of their crimes, and to take the instruments of crime out of the hands of those who would use them to violate the law. Indeed, with the globalization of the financial system and the resulting ease with which criminals of all persuasions are able to move criminal proceeds across international borders, it is highly likely that non-conviction-based forfeiture will assume an even greater role in recovering the proceeds of crime that are generated in one nation and transferred to another, particularly where the Government has little likelihood of bringing the wrongdoer to justice through a traditional criminal trial.

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52 *United States v. $405,089.23 in U.S. Currency*, 33 F.3d 1210 (9th Cir. 1994).

53 *Id.* at 1222

54 518 U.S. at 291–92.