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# A Comparison of Federal Civil and Criminal Forfeiture Procedures: Which Provides More Protections for Property Owners?

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**Abstract**

*The current civil forfeiture procedural protections for property owners, though inadequate, are often much stronger than protections in criminal forfeiture cases. Most states have only civil forfeiture statutes or criminal forfeiture statutes that are seldom used. Few of those state-originated cases end up as criminal forfeitures because they are so weak that no prosecutor would bring a criminal charge. This partly explains why reform groups have neglected the pressing need for criminal forfeiture reform. However, if one can afford to pay for a competent attorney, the reformed civil forfeiture process is considerably more protective of property owners than the unreformed criminal forfeiture process. Thus, reformers should focus at least as much of their efforts on long-overdue reforms of the criminal forfeiture process.*

Unlike civil forfeiture, U.S. criminal forfeiture laws have never been reformed at the federal level. Congressman Henry Hyde (R–IL), who served as chairman of the House Committee on the Judiciary from January 1995 to January 2001, decided to focus solely on civil forfeiture reform—a decision made to avoid a new round of fights with the Department of Justice (DOJ) that would have held up enactment of Hyde's reform bill, the Civil Asset Forfeiture Reform Act of 2000 (CAFRA).[1]

CAFRA actually expanded the scope of criminal forfeiture as part of the compromise with the DOJ that was necessary to secure passage of the bill in both houses of Congress through the unanimous consent procedure.[2] Not coincidentally, the DOJ pushed major changes in criminal forfeiture procedure (found in Rule 32.2 of the Federal Rules of Criminal Procedure) through the Advisory

## Key Points

- Supporters of forfeiture reform have focused their attention on abuses of civil forfeiture while ignoring the abuses of federal criminal forfeiture.
- Criminal forfeiture, unlike civil forfeiture, requires a criminal conviction of the offense giving rise to the forfeiture, and it affords the right to appointed counsel.
- In every other way, the procedural protections available at the federal level to the property owner are much greater in a civil *in rem* forfeiture proceeding than in a criminal forfeiture proceeding.
- Prosecutors often use both civil and criminal forfeiture proceedings in the same case in a way that deprives the property owner of important procedural protections.
- Civil forfeiture procedure was modernized and substantially reformed in the Civil Asset Forfeiture Reform Act of 2000 (CAFRA), but rules changes promulgated by the Advisory Committee on Rules of Criminal Procedure have greatly expanded the scope of criminal forfeiture without congressional approval.

This paper, in its entirety, can be found at **http://report.heritage.org/lm158**

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Committee on Rules of Criminal Procedure in 2000, just as CAFRA was nearing enactment.

The above-noted rule changes consistently reduced or eliminated procedural rights and protections for defendants—including the right to have the forfeiture issue decided by a jury—and for innocent third parties with interests in the property subject to criminal forfeiture. These alterations also tilted the criminal forfeiture "playing field" sharply in favor of the prosecution. Since then, criminal forfeiture has steadily become more oppressive thanks to other amendments to Rule 32.2 in 2009 and unwarranted judicial lawmaking sought by DOJ prosecutors.[3]

Some federal judges have engaged in tortured readings of criminal forfeiture statutes to expand prosecutorial power. This might be explained in part by the U.S. Supreme Court's overly deferential attitude toward the criminal law.[4] In fact, the High Court has declined to review most of these criminal forfeiture issues, so erroneous lower court decisions have been left standing.[5]

Despite the many problems with civil forfeiture, federal and state laws now provide considerably more due process safeguards to a property owner than is the case with criminal forfeiture.[6] The biggest problem with civil forfeiture is that most owners cannot afford—or cannot even find—competent counsel or any counsel to defend the case.[7] In criminal forfeiture cases at the federal level, an indigent defendant (but not an indigent third party) is entitled to appointed counsel. However, few appointed counsel are competent or have the time and resources to litigate complex criminal forfeiture issues. Criminal defendants are easily buffaloed into signing plea agreements by prosecutors who are forfeiture specialists, and these plea agreements often expressly waive all of the defendant's rights to resist what often turns into an overly broad or excessively punitive forfeiture order.

Many years ago, the Supreme Court observed that "broad [criminal] forfeiture provisions carry the potential for Government abuse and 'can be devastating when used unjustly.'"[8] Regrettably, the government is now abusing criminal forfeiture on a daily basis to raise money earmarked for law enforcement, to deprive defendants of the wherewithal to retain counsel,[9] and to bully defendants into harsh and unfair plea agreements, and no one but underresourced defense counsel is trying to stop it.

## Procedural Protections and Substantive Rights

What follows is a comparison of the procedural protections and substantive rights available to property owners facing civil and criminal forfeiture proceedings. With the major exceptions of a conviction being required and the right to appointed counsel, civil forfeiture offers superior protections for the property owner.

### 1. Civil forfeiture generally affords greater procedural rights than criminal forfeiture affords.

If property is seized pursuant to a warrant of seizure under 21 U.S.C. § 853(f), there is no time limit except the criminal statute of limitations (typically five years) for seeking criminal forfeiture. If the property is restrained under 21 U.S.C. § 853(e)(1)(B), the order is effective for not more than 90 days unless extended by the court "for good cause shown or unless an indictment or information...has been filed."

In a "nonjudicial civil forfeiture proceeding"[10] under CAFRA, by contrast, the government must comply with two separate deadlines.

*First,* under 18 U.S.C. § 983(a)(1)(A)(i), the government must send written notice to interested parties "as soon as practicable, and in no case more than 60 days after the date of the seizure."[11] A supervisory official in the headquarters of the seizing agency may extend the 60-day period for up to 30 days, and a court thereafter can grant further extensions of time under certain conditions on an ex parte basis pursuant to 18 U.S.C. § 983(a)(1)(B)–(D). The courts have been liberal in granting such extensions, thereby undermining the effectiveness of the 60-day notice provision. Moreover, although the government suffers no real penalty if it misses the 60-day deadline, it is still a substantive limitation on the government that is not present in the criminal context.

*Second,* if a claimant sends an administrative claim to the seizing agency, the government has 90 days from the date when the claim is received in which to file a complaint for civil forfeiture in court *or* to obtain a criminal indictment alleging that the property is subject to criminal forfeiture; otherwise, the property must be released. If the government fails to do any of these things, forfeiture is barred under 18 U.S.C. § 983(a)(3).

### 2. Civil asset forfeiture generally affords no right to counsel, whereas criminal forfeiture generally does.

In a criminal forfeiture case, an indigent defendant has a right to appointed counsel under the Criminal Justice Act (CJA), but an indigent third party who wishes to contest a criminal forfeiture in an "ancillary proceeding" under 21 U.S.C. § 853(n) has no right to appointed counsel. Further, if the third-party claimant prevails against the government, CAFRA does not authorize a fee award for the third party.

In a civil forfeiture case, an indigent property owner generally has no statutory right to appointed counsel except in one narrowly defined situation: where the government is seeking to forfeit the owner's "primary residence."[12] A court has discretion to appoint an attorney already representing a criminal defendant under the CJA to be counsel in a related civil forfeiture case under section 983(b)(1). The courts appear to exercise this authority only seldom, perhaps because defense counsel commonly are unaware of the statutory provision in question and therefore fail to ask for such an appointment. The court may also appoint *pro bono* counsel for an indigent claimant under 28 U.S.C. § 1915(d), but few claimants are aware of this statutory provision, and courts have rarely used it in civil forfeiture cases.

Under 28 U.S.C. § 2465(b)(1), if the claimant prevails against the government, CAFRA requires that the government pay the "reasonable" attorney fees of the claimant. This fee-shifting provision is no substitute for appointed counsel—a critical reform provided in the House-passed CAFRA bill in 1999 that was removed from the final Senate bill in order to obtain passage by unanimous consent of both houses in 2000.

### 3. The ability to obtain dismissal of a forfeiture action is greater in the civil context than it is in the criminal context because there is an early opportunity for discovery and the filing of a dispositive motion.

It is well known that discovery is severely limited in federal criminal cases, while some states have far more generous criminal discovery rules. So a defendant who is faced with a boilerplate, wholly opaque criminal forfeiture allegation in the indictment cannot use criminal discovery to determine what the government's contentions really are and what evidence the government has to support them.

In civil forfeiture cases, discovery proceeds under the Federal Rules of Civil Procedure, which allow a party to discover everything relevant to the case unless it is privileged. Because the government typically has much greater investigative resources than a private party has, civil discovery serves to level the playing field, at least where a claimant can afford competent counsel. A claimant can require the government to state all of the evidence known to the government that supports each allegation in the civil forfeiture complaint, and all of the government's witnesses can be deposed before trial.

The discovery process often produces evidence that leads to an early settlement or to a successful motion for summary judgment, thereby avoiding the expense of a trial. By contrast, it is seldom possible to obtain dismissal of criminal forfeiture charges before trial, and it is practically impossible to settle a criminal forfeiture charge before trial, outside of a plea agreement.

### 4. Civil asset forfeiture often provides greater opportunity to be heard promptly than criminal asset forfeiture provides.

In a criminal forfeiture proceeding, the defendant does not have a meaningful opportunity to be heard on the forfeiture aspect of the case until after he has been convicted. Under 21 U.S.C. § 853(k)(1), third parties are barred by statute from intervening in the criminal forfeiture case until after there is a preliminary order of forfeiture against the defendant and notice of that order is sent to them by the government.[13] Third parties are also barred under section 853(k)(2) from "commencing an action at law or equity against the United States concerning the validity of [their] alleged interest in the property." A 1983 Senate report says that this provision "is not intended to preclude a third party with an interest in property that is or may be subject to a restraining order from participating in a hearing regarding the order, however."[14]

In a civil forfeiture proceeding, all persons with an interest in the property may appear as parties and be heard in a timely fashion once the complaint for forfeiture is filed. A claimant may quickly file a motion to dismiss the complaint or a motion for summary judgment. Even before then, a person with a possessory interest in property suffering substantial hardship from the seizure may seek the release

of the property under certain conditions pursuant to 18 U.S.C. § 983(f). However, this provision has so many exceptions that it has not served its intended purpose.

By contrast, third parties have very limited rights under the criminal ancillary hearing procedures. The criminal forfeiture statutes provide only two bases for third parties to exempt their property interest from forfeiture. Specifically, the third party must establish that he had a legal right, title, or interest in the forfeited property that was superior to the defendant's interest at the time the property became subject to forfeiture (section 853(n)(6)(A)) or that, after the property became subject to forfeiture, he acquired it as a bona fide purchaser for value who was without reason to know that the property was subject to forfeiture (section 853(n)(6)(B)).

The courts are split on whether the preliminary order of forfeiture is binding on third parties. Elementary due process principles would seem to require that third parties have an opportunity to litigate the factual or legal basis for the forfeiture of their property.[15]

The narrowly defined exemptions from forfeiture leave many third parties out in the cold—for example, wives who have child support orders and employees who are owed wages.[16]

## 5. Criminal forfeiture should go to a jury but usually does not do so, whereas property owners have a constitutional right to a jury trial in every civil forfeiture action.

The criminal forfeiture statutes clearly contemplated trial by jury of the forfeiture issue and requiring the government to prove its case beyond a reasonable doubt. That is the way the statutes were interpreted and applied for many years. Under former Rule 31(e), the jury was also required to find that the defendant was the owner of the property.

In 2000, however, everything was changed for the worse by the Advisory Committee on Rules of Criminal Procedure without any input from Congress. The committee rubber-stamped amendments submitted to it by the DOJ that sharply tilted the playing field in favor of the government. After initially deciding to abolish jury trial altogether, the committee reached a compromise whereby the former right to a jury trial embodied in Rule 31(e) was substantially cut back.

These amendments were codified in the new Rule 32.2. Under Rule 32.2(b)(5)(B), the jury is restricted to determining "whether the government has established the requisite nexus between the property and the offense committed by the defendant." There is no right to a jury trial if the government seeks what is known as a "money judgment" instead of the forfeiture of specific property, and the jury no longer determines whether the defendant or someone else owns the property. That is determined by the court in the ancillary proceeding if some third party requests that the court adjudicate its rights.

The government seeks a "money judgment" in the vast majority of forfeiture cases today because it affords the government many advantages over a traditional forfeiture of specific property items. Avoiding a jury trial is only one of those advantages. As explained below, there is no statutory basis for "money judgments" in criminal forfeiture cases. It is an improper piece of judicial legislation that has extended the scope and harshness of criminal forfeiture and diminished the defendant's procedural protections.

It is well established by a long line of cases that a party in a civil forfeiture case against property seized on land has a right to trial by jury under the Seventh Amendment to the Constitution.[17] In fact, the abrogation of that right in civil forfeiture cases by King George III was listed in the Declaration of Independence as one of the infringements on American liberty justifying this nation's break with Britain.[18]

A third party in a criminal forfeiture "ancillary hearing" should also have a right to a jury trial under the Seventh Amendment because the ancillary hearing is treated as civil in nature and closely resembles a civil *in rem* forfeiture proceeding, but the criminal forfeiture statute (21 U.S.C. § 853(n)(2)) directs that the hearing "shall be held before the court alone, without a jury." Surprisingly, this important issue has been addressed by only a few courts, which have unpersuasively found no constitutional infirmity.

## 6. In court, the Federal Rules of Evidence are fully applicable in a civil forfeiture case but not in a criminal forfeiture case.

As already noted, the criminal forfeiture statutes contemplate—although they do not explicitly state—that the forfeiture issue will be tried before a jury under the traditional "beyond a reasonable doubt"

burden of proof.[19] They likewise contemplated that the Federal Rules of Evidence would apply to the forfeiture trial. When the Advisory Committee on Rules of Criminal Procedure abolished those rights, it also opened the door to otherwise inadmissible evidence. Rule 32.2(b)(1)(B) allows forfeiture to be proven by any "information" the court considers "relevant and reliable." It does not say whether such "information" is also admissible *before the jury* when it is hearing evidence, but that is the way the government interprets Rule 32.2.

In a civil forfeiture case, the Federal Rules of Evidence are fully applicable.

## 7. In the many Customs cases exempted from the CAFRA reforms, the unfair pre-CAFRA burden of proof still applies.

Although Congress intended that the government have to prove criminal forfeiture beyond a reasonable doubt, and although that burden was originally applied by the courts, the courts later decided that because forfeiture is part of the sentence in a case, the burden of proof should logically be by a preponderance of the evidence, the normal burden on the government at sentencing. In so holding, the courts simply ignored congressional intent—as if it did not matter.[20] Those decisions were embodied in Rule 32.2 in 2000.

In civil forfeiture cases covered by the CAFRA reforms, the government's burden of proof is by a preponderance of the evidence as well. However, in the many Customs cases exempted from the CAFRA reforms (see 18 U.S.C. § 983(i), the Act's "Customs carve-out" provision), the pre-CAFRA and blatantly unfair burden of proof codified in 19 U.S.C. § 1615 still applies.

Under that statute, which dates back to colonial times (1740), the government merely has the burden of showing probable cause for the forfeiture and may use otherwise inadmissible hearsay evidence to do so. Then the property owner has the burden of proving by a preponderance of the evidence (no hearsay allowed for the owner's case) that the property is not subject to forfeiture. A number of courts had concluded that this absurd allocation of the burden of proof violated due process, but the issue has not received the attention it deserves since the enactment of CAFRA in 2000, despite its continuing presence in Title 19 and in 26 cases "carved out" of the CAFRA reforms.

## 8. Criminal forfeiture, unlike civil forfeiture, does require a criminal conviction.

A criminal forfeiture requires that the defendant be convicted of the crime triggering the forfeiture. However, innocent third parties (*i.e.*, persons claiming a property interest in the assets who have not been charged with a crime) may have their property forfeited even though they have done nothing wrong. Ironically, the third party has even fewer protections than the criminal defendant has.

In a civil forfeiture proceeding, there is no requirement that anyone be charged with a crime, much less convicted. This opens the door to abuse since the government is able to civilly forfeit property where it could not possibly charge someone with a crime. But complete abolition of civil forfeiture—sought by many reformers, such as the Institute for Justice—would likely lead to an increase in otherwise unwarranted criminal prosecutions solely for the purpose of obtaining forfeitures. That is a big price to pay, particularly when criminal forfeiture procedures and substantive law remain so unfair to property owners.

## 9. Criminal forfeiture affords the government many "substantive" advantages in comparison with civil forfeiture.

*In a criminal forfeiture, unlike in the civil context, "clean" assets may be substituted for missing forfeitable assets.* One important difference between criminal and civil forfeiture is the prosecution's ability to criminally forfeit untainted (clean) "substitute assets" if, "as a result of any act or omission of the defendant" the directly forfeitable tainted property:

> (1) cannot be located upon the exercise of due diligence; (2) has been transferred or sold to, or deposited with, a third party; (3) has been placed beyond the jurisdiction of the court; (4) has been substantially diminished in value; or (5) has been commingled with other property which cannot be divided without difficulty.[21]

In a civil forfeiture proceeding, by contrast, there is no authority to substitute "clean" property for "dirty" property that is not available for forfeiture.[22] It is believed that the very nature of an *in rem* forfeiture proceeding, where the tainted

property is the defendant, does not allow for substitute asset forfeiture.

*Similarly, money judgments are allowed in the criminal context but not in the civil forfeiture context.* Despite Congress's enactment of the substitute asset provision in 1986, courts continued to allow their earlier invention of the concept of "money judgments" in lieu of the forfeiture of specific property, to be used for further expansion of the government's criminal forfeiture powers.[23]

The concept of a personal money judgment, which looks and acts like a criminal fine, departs from the basic nature of a forfeiture, whether civil or criminal. It is deemed a "forfeiture" of sorts, but no specific property is forfeited. More important, this judicial lawmaking violates the principle of separation of powers[24] as well as an important rule of statutory construction.[25] As discussed below, money judgments allow the government to avoid the need to trace. They provide a way for the government to exaggerate the amount of proceeds generated by the offense of conviction through erroneous extrapolations. They allow for joint and several liability among co-defendants through an additional judicial invention. They produce forfeiture judgments that hang over a defendant for the rest of his life, regardless of his ability to pay, thus interfering with his rehabilitation.

The use of a money judgment also has the advantage of precluding the need for a jury to determine the facts on which the forfeiture rests because Rule 32.2 arbitrarily denies the jury any role in determining the amount of a money judgment.

*Due to money judgments and substitute assets in criminal forfeiture, the requirement that property seized must be traceable to an alleged crime is often absent.* In a civil forfeiture case, the government bears the sometimes heavy burden of tracing the seized property back to the crime that triggered the forfeiture. For example, if a car is used to smuggle narcotics and then sold to a bona fide purchaser, and if the sale proceeds are then used to buy furniture and a computer, the government will be able to forfeit only the furniture and the computer—assuming it wants those items—and must prove that the money from the sale of the car was used to purchase those things.

In a criminal forfeiture case, the government previously was required to trace the property it wants to forfeit back to the crime: *i.e.*, to show that the money used to buy the property was the proceeds of the crime. Even if the government attempts to forfeit "substitute assets," it must still prove that the directly forfeitable ("tainted") property, which is no longer available, is traceable to the crime of conviction. With a money judgment, however, the government no longer has to trace the proceeds of the crime into any particular property. It just has to estimate the amount of proceeds that the defendants obtained from the offenses of conviction. These estimates can be wildly exaggerated by the use of faulty extrapolation techniques.[26]

*Joint and several liability often produces oppressive criminal forfeiture judgments that are far beyond the defendant's ability to pay.* The imposition of joint and several liability on co-conspirators and co-schemers is another improper judicial invention that has grown progressively more oppressive.

As in the case of the money judgment, the first court to legislate this harsh additional punishment was the United States Court of Appeals for the Eleventh Circuit, in 1986.[27] Employing the same result-oriented analysis employed in *Conner*, the money judgment case, the court of appeals declared that joint and several liability was necessary—at least in some cases—to carry out the purpose of the Racketeer Influenced and Corrupt Organizations (RICO) Act's criminal forfeiture provision.

Without delving into their authority for imposing joint and several liability absent any statutory basis to do so, other circuits have likewise authorized this remedy in the run-of-the-mill criminal forfeiture cases merely by citing prior decisions that have done so. That is also the way in which money judgments have been judicially legislated.

Initially, this remedy was thought of as discretionary, but a few of the later decisions appear to treat joint and several liability as something that a court *must* impose on all co-conspirators and co-schemers, regardless of the facts or the unfairness of doing so.[28] This is what the prosecutors tell district court judges, and few of the courts or defense counsel know enough to resist the prosecutor's demand for full and automatic joint and several liability. Some courts hold that the actions of co-schemers generating the proceeds must be reasonably foreseeable to the defendant in order to hold him jointly and severally liable for all of the proceeds obtained; other courts reject even that limitation.[29]

*CAFRA generally provides for mandatory fee-shifting, whereas criminal forfeiture at best provides*

*limited, discretionary fee-shifting.* The original version of CAFRA, which the House of Representatives approved overwhelmingly in 1999, had a very important provision requiring the appointment of counsel, under the Criminal Justice Act, for indigent claimants in every civil forfeiture case. This provision was anathema to the DOJ and was removed by the Senate in order to reach a compromise that could be adopted by unanimous consent in 2000, an election year.

The Senate crafted a good fee-shifting provision as a substitute for Chairman Henry Hyde's much more effective appointment-of-counsel provision. The fee-shifting provision, like CAFRA as a whole, applies only to *in rem* civil forfeiture cases.[30] It has been held not to apply to third-party claims in the ancillary hearing, which is treated as a civil proceeding. But the discretionary Equal Access to Justice Act fee-shifting provision still applies to third-party claims in criminal forfeiture cases.[31]

*CAFRA provides for compensation where the government damages seized property, but there is no analogue in the criminal forfeiture context.* CAFRA also amended 28 U.S.C. § 2680(c), a provision of the Federal Tort Claims Act, to provide a damage remedy for property owners who prevail in a civil forfeiture case where the law enforcement agency has lost, destroyed, or damaged the property.

There is no such remedy in criminal forfeiture cases. Even the civil forfeiture remedy has been rendered nugatory by absurd court decisions holding that the damage remedy is available only if the property was seized *solely* for the purpose of civil forfeiture and not as possible evidence of a crime or for some other reason.[32]

## Conclusion

Both civil and criminal forfeiture need many reforms at both the state and federal levels. The most critical reform, and the one that is currently being pushed at the state and federal levels, is the limiting or abolition of the notorious bounty-hunting system that provides an irresistible incentive for some law enforcement officials to pursue unjust and unlawful seizures of property. In spite of this push for reform of civil forfeiture law, however, it would be a mistake to leave our criminal forfeiture laws untouched. The profit motive would remain, and such reform would merely shift the abuse further into the criminal forum.

Although the requirement of a criminal conviction and the right to appointed counsel are very important procedural safeguards lacking in civil forfeiture, federal criminal forfeiture is otherwise less protective of property rights than civil forfeiture is. Perversely, then, civil asset forfeiture reform could lead to a tougher time for many property owners in the future.

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# Endnotes

1. H.R. 2417, 103d Cong. (1993).
2. The compromise also required some of the most important civil forfeiture reforms to be abandoned, including the appointment of counsel for indigent claimants and raising the government's burden of proof to clear and convincing evidence.
3. Fed. R. Crim. P. 32.2 (effective Dec. 1, 2009).
4. *See, e.g.*, United States v. Lanier, 520 U.S. 259, 267 n.6 (1997) ("Federal crimes are defined by Congress, not the courts...."); Dowling v. United States, 473 U.S. 207, 213–14 (1985) ("It is the legislature, not the Court, which is to define a crime.").
5. For example, the High Court has never agreed to review either the lower courts' invention of the "money judgment" as a substitute for criminal forfeiture of actual property or their unauthorized imposition of joint and several criminal forfeiture liability on co-conspirators and co-schemers.
6. In fact, the DOJ is currently undertaking a "top-to-bottom" review of its civil asset forfeiture practices and has recently limited its use of adoptive forfeiture. *See* Robert O'Harrow, Jr., *Lawmakers Urge End to Program Sharing Forfeited Assets with State and Local Police,* Wash. Post, Jan. 9, 2015; *see also* Office of the Attorney General, Prohibition on Certain Federal Adoptions of Seizures by State and Local Law Enforcement Agencies (Jan. 16, 2015), *available at* http://www.justice.gov/file/318146/download.
7. Few people realize that only about a dozen lawyers in the entire country regularly defend civil forfeiture cases. People ask why that is so. There are probably many reasons. One is that law school professors are not familiar with forfeiture law, either criminal or civil, so this important subject is not covered in any criminal law classes. Professors would rather teach a course on the insanity defense, which is interesting but rarely encountered in the actual practice of criminal law. Many law school libraries, full of obscure material that no one reads, do not have a single book on the subject either.
8. Libretti v. U.S., 516 U.S. 29, 43 (1995) (quoting Caplin & Drysdale v. U.S., 491 U.S. 617, 634 (1989)). Ironically, this pious statement was made in a decision that deprived defendants of their Sixth Amendment right to a jury trial on the forfeiture issue and lowered the burden of proof from beyond a reasonable doubt—clearly intended by Congress—to a mere preponderance of the evidence.
9. *See*, *e.g.*, Kaley v. United States, 134 S. Ct. 1090 (2013).
10. A "nonjudicial" proceeding is one commenced through the administrative forfeiture process as opposed to the judicial forfeiture process. The vast majority of civil forfeiture cases are commenced nonjudicially. Because Congress, through an oversight, failed to provide specific time limits for a civil forfeiture commenced *judicially* (typically the cases with high-value properties), the DOJ takes the position that there are no time limits other than the statute of limitations for filing the civil complaint. *But see* Langbord v. United States Dep't of the Treasury, 783 F.3d 441, 450 (3d Cir. 2015) (rejecting the DOJ's view, the court holds that the 90-day filing deadline of section 983(a)(3) applies to all civil forfeiture cases and that a claimant may start the 90-day clock by filing a claim whether or not he received a notice of seizure letter). The government's position would render this important CAFRA reform nugatory with respect to the more significant civil forfeiture cases. This is a problem that Congress can readily fix. *See* David B. Smith, Prosecution and Defense of Forfeiture Cases, § 9.02[4] (June 2015 ed.).
11. The federal seizing agencies have never complied with the "as soon as practicable" requirement, but claimants' counsel have rarely raised an issue about it, so there is little or no reported case law on the point.
12. 18 U.S.C. § 983(b)(2). There is a good argument that, at least in some situations, the interests at stake, including protection against self-incrimination, may require appointment of counsel for an indigent claimant under the Due Process Clause. *See* David B. Smith, Prosecution and Defense of Forfeiture Cases, § 11.02[1] (June 2015 ed.) (examining due process cases). The U.S. Congress and some states are now considering providing appointed counsel for indigents in civil forfeiture proceedings.
13. The courts have recognized that if delay in getting heard would cause irreparable harm to a third party, due process may require that he be permitted to intervene in the criminal case at an earlier time, but the courts are very reluctant to find that such an exigent situation is present. *See, e.g.*, United States v. Holy Land Found. for Relief & Dev. 493 F.3d 469 (5th Cir. 2007) (*en banc*); United States v. Lazarenko, 476 F.3d 642, 650-51 (9th Cir. 2007).
14. S. Rep. No. 225, 98th Cong., 1st Sess. 206 n.42 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3389 n.42. However, many courts have ignored this legislative history and have barred third parties from seeking relief from the burdens imposed by a restraining order affecting their property, and almost all courts have prohibited the third party from litigating the issue of who owns the property until the ancillary hearing following the preliminary order of forfeiture.
15. *See* United States v. Reckmeyer, 836 F.2d 200, 206 (4th Cir. 1987) ("Serious due process questions would be raised, however, if third parties asserting an interest in forfeited assets were barred from challenging the validity of the forfeiture."); United States v. Emor, 785 F.3d 671 (D.C. Cir. 2015) (recognizing "due process concerns associated with stripping third parties of property rights based on proceedings in which they had no prior opportunity to participate.").
16. It is idiotic to allow the government to forfeit property that should go to pay child support, leaving innocent mothers and their children no option but to apply for welfare. Under bankruptcy law, by contrast, child support obligations are non-dischargeable, 11 U.S.C. 523(a)(5). Thus, a child support obligation is a form of super-priority lien on all of the bankrupt's assets.
17. C.J. Hendry Co. v. Moore, 318 U.S. 133, 63 S. Ct. 499, 87 L. Ed. 663 (1943). State supreme courts, with few exceptions, have found that there is a constitutional right to trial by jury of a civil forfeiture case under their state constitutions.
18. "This was 'the most effective, and therefore the most disliked' of all the methods adopted [by the British] to enforce the acts of trade 'because it deprived the defendant of the right to be tried by a jury which was almost certain not to convict him.'" United States v. One 1976 Mercedes Benz 280S, 618 F.2d 453, 464 (7th Cir. 1980) (quoting Holdsworth, A History of English Law (1838) XI, 110).

19. David B. Smith, 2 Prosecution and Defense of Forfeiture Cases, para. 14.03A (Matthew Bender, June 2015).
20. This line of cases was affirmed by the Supreme Court in Libretti v. United States, 516 U.S. 29 (1995). The Court rejected Libretti's cogent argument that forfeiture was not simply an aspect of sentencing, but rather was a unique hybrid that shares elements of both a substantive charge and a punishment. The *Libretti* decision also held that a defendant has no Sixth Amendment right to jury trial with respect to the factual basis for forfeiture. To the extent that *Libretti* relies upon treating forfeiture as an aspect of sentencing, that decision has now been completely undermined by the *Apprendi-Booker* line of cases, which require certain important facts used in the sentencing phase to be proved beyond a reasonable doubt. *See* Apprendi v. New Jersey, 530 U.S. 466 (2000); *see also* United States v. Booker, 543 U.S. 220 (2005). Further, in Southern Union Co. v. United States, 132 S. Ct. 2344 (2012), the Court held that where a fine is substantial enough to trigger the Sixth Amendment's jury-trial guarantee, *Apprendi* applies in full and requires the jury to determine, beyond a reasonable doubt, any facts that set a fine's maximum amount. The Court held that there was no principled basis under *Apprendi* to treat criminal fines differently from imprisonment or a death sentence. 132 S. Ct. at 2350. At oral argument, Deputy Solicitor General Michael Dreeben conceded that there was no basis for distinguishing criminal forfeitures from fines for *Apprendi* purposes. Tr. Of Oral Argument at 37. It is just a matter of time until the Court gets around to explicitly overruling *Libretti*. Until that time, the lower courts will continue to apply *Libretti*. In the meantime, Congress could enact legislation restoring the rights that *Libretti* took away.
21. 21 U.S.C. § 853(p); 18 U.S.C. § 1963(m). The Fourth Circuit, contrary to all other circuits, has held that the forfeiture of substitute assets "relates back" to the time when the criminal offense was committed. *In re* Billman, 915 F.2d 916 (4th Cir. 1990), cert. denied, 590 U.S. 952 (1991). This incorrect interpretation of the statute has had a devastating effect on defendants' ability to retain counsel and support their families during their struggle with the government. It gives the prosecution the ability to pauperize many white-collar defendants at the outset of the case.
22. There is one important exception, provided by 18 U.S.C. § 984, that allows the civil forfeiture of "any identical property found in the same place or account" as the tainted property involved in the offense. This provision was designed to deal with cases in which a bank account containing forfeitable money has been "zeroed out," thereby preventing tracing of the tainted money under the "lowest intermediate balance" test adopted by the courts. The use of section 984 is circumscribed by a special one-year statute of limitations found in section 984(c).
23. The case that invented the money judgment is U.S. v. Conner, 752 F.2d 566, 575–57 (11th Cir.), *cert. denied*, 474 U.S. 821 (1985). The decision predates Congress's creation of the similar, but more limited, substitute asset remedy by one year.
24. The authority to construe a statute is fundamentally different from the authority to fashion a new rule or to provide a new remedy which Congress has decided not to adopt. Northwest Airlines, Inc. v. Transport Workers Union, AFL–CIO, 451 U.S. 77, 95 (1981). *See also* Flores-Figueroa v. United States, 556 U.S. 646, 129 S. Ct. 1886, 1893 (2009) ("concerns about practical enforceability are insufficient to outweigh the clarity of the text"); Burrage v. United States, 134 S. Ct. 881, 892 (2014) ("The role of this Court is to apply the statute as it is written—even if we think some other approach might 'accord with good policy.'").
25. There is a long line of Supreme Court cases holding that "[t]he comprehensive character of the remedial scheme expressly fashioned by Congress strongly evidences an intent not to authorize additional [judicially inferred] remedies." Northwest Airlines, Inc. v. Transport Workers Union, AFL–CIO, 451 U.S. 77, 93–94 (1981). *Accord, e.g.*, National Railroad Passenger Corp. v. National Ass'n of Railroad Passengers, 414 U.S. 453, 458 (1974) ("[W]hen legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies."); Mertens v. Hewitt Assocs., 508 U.S. 248, 254 (1993) (same). At least two circuits initially recognized that it was impermissible to authorize "money judgments" after the 1986 enactment of the more limited but similar substitute asset remedy, but those circuits later ignored their own decisions with no explanation as to why they had become "inoperative." *See* U.S. v. Ripinsky, 20 F.3d 359, 365 n.8 (9th Cir. 1994) (*Conner* line of cases creating money judgment remedy cannot be relied on after enactment of substitute asset provision); U.S. v. Voigt, 89 F.3d 1050, 1085–86 (3d Cir. 1996) (same). None of the decisions that continue to authorize money judgments makes the slightest effort to explain what authority the courts have to engage in judicial lawmaking in this criminal area, in which Congress has created a comprehensive remedial scheme.
26. *See, e.g.*, United States v. Morrison, 656 F. Supp.2d 338 (E.D.N.Y. 2009) (government sought $172 million money judgment from wholesale marketer of untaxed cigarettes based on erroneous extrapolation from unrepresentative same and erroneous theory that all proceeds generated by enterprise were subject to forfeiture, whether or not they were derived from racketeering activity; court awarded forfeiture of only $6,120,268, a tiny fraction of the amount sought by the government, which claimed that its estimate was "conservative.").
27. United States v. Caporale, 806 F.2d 1487, 1508 (11th Cir. 1986).
28. Few defense counsel or courts realize that the restitution statute, 18 U.S.C. 3664(h), *does* have a joint and several liability provision but sensibly makes the remedy discretionary and allows the court to "apportion liability among the defendants to reflect the level of contribution to the victim's loss and economic circumstances of each defendant."
29. *See, e.g.*, United States v. Browne, 505 F.3d 1229, 1277–82 (11th Cir. 2007); United States v. Spano, 421 F.3d 599, 603 (7th Cir. 2005) (declining to impose any reasonable foreseeability limitation); *but see* United States v. Contorinis, 692 F.3d 136, 147 (2d Cir. 2012) (actions generating the proceeds must be reasonably foreseeable to the defendant); United States v. Elder, 682 F.3d 1065, 1073 (8th Cir. 2012) (same).
30. 28 U.S.C. § 2465(b).
31. 28 U.S.C. § 2412(d).
32. *See, e.g.*, Foster v. United States, 522 F.3d 1071, 1075 (9th Cir. 2008); Smoke Shop, LLC v. United States, 2014 U.S. App. LEXIS 14990 (7th Cir. Aug. 4, 2014).