

# CRIMINAL FORFEITURE AND THE SIXTH AMENDMENT: THE ROLE OF THE JURY AT COMMON LAW

*Richard E. Finneran & Steven K. Luther*<sup>†</sup>

*Throughout its recent jurisprudence after Apprendi v. New Jersey, the Supreme Court has emphasized that its analysis of the Sixth Amendment jury trial right centers upon the historical role of the jury at common law. Just last year, in Southern Union Co. v. United States, the Court extended the Sixth Amendment jury trial right to criminal fines after concluding that the jury's verdict determined the maximum fine that could be imposed at common law. The Court remained silent, however, with regard to another financial penalty commonly applied in the federal system: criminal forfeitures. Given that the Supreme Court has previously recognized that criminal forfeitures are "fines" within the meaning of the Eighth Amendment, it might be argued that the Sixth Amendment should likewise extend to criminal forfeitures under a formal application of Southern Union. Criminal forfeitures, however, draw from a distinct, complex, and largely unexplored historical tradition in which juries played little or no role. This Article, the first to provide a definitive account of that tradition, explains why the unique history of criminal forfeiture dictates that facts supporting forfeiture need not be found by a jury under the Sixth Amendment, insofar as those facts are not the sort traditionally given to juries at common law.*

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<sup>†</sup> Richard E. Finneran is an Adjunct Professor of Law at Washington University School of Law, Assistant United States Attorney for the Eastern District of Missouri (Asset Forfeiture Unit), and Special Attorney to the United States Attorney General under the supervision of the United States Attorney's Office for the Western District of Missouri. Steven K. Luther is an Associate at Lewis Brisbois Bisgaard & Smith LLP, Los Angeles, California. The views expressed in this Article are those of the authors and do not necessarily reflect the views or policies of the United States Department of Justice or the United States Attorney's Offices for the Eastern or Western Districts of Missouri. The authors give their sincerest thanks to David Dean, Giles Howard, and Mary Treanor, each J.D. '14, Washington University School of Law, who greatly assisted in the historical research that forms the backbone of this Article. The authors also owe a debt of gratitude to Professor John H. Langbein, a renowned authority on the English common law, and to Stefan D. Cassella, who literally wrote "the book" on asset forfeiture, each of whom graciously offered his critique of this Article prior to its publication.

## TABLE OF CONTENTS

INTRODUCTION .....	2
I. SOUTHERN UNION AND THE NEED FOR A HISTORICAL ANALYSIS.....	6
A. <i>Apprendi and Its Progeny</i> .....	7
1. The Origin of the <i>Apprendi</i> Rule.....	7
2. The <i>Apprendi</i> Line Advances.....	9
3. A “High Water Mark” in <i>Ice</i> ?.....	11
4. Enter <i>Southern Union</i> .....	13
B. <i>The Potential Impact of the Apprendi Line on Criminal Forfeiture</i> .....	15
1. The Jurisprudential Rationale: <i>Libretti</i> and <i>Booker</i> Control .....	16
2. The Formalist Rationale: Forfeitures Have No Statutory Maximum .....	19
II. THE HISTORY OF CRIMINAL FORFEITURE.....	23
A. <i>The Common Law Origins of Criminal Forfeiture in England</i> .....	24
B. <i>Criminal Forfeiture in the Colonies and the New Republic</i> .....	32
C. <i>The Rebirth of Criminal Forfeiture</i> .....	43
III. MODERN CRIMINAL FORFEITURE.....	47
A. <i>The Limited Reach of Modern Forfeiture Statutes</i> .....	47
1. Forfeiture of Criminally Derived Property .....	49
2. Forfeiture of Criminally Involved Property.....	52
3. Forfeiture of “Substitute” Property .....	53
B. <i>Procedures Applicable to Criminal Forfeiture</i> .....	56
IV. CRIMINAL FORFEITURE AND THE SIXTH AMENDMENT .....	64
A. <i>Modern Limitations on Criminal Forfeiture</i> .....	65
B. <i>Bajakajian and the Forfeiture of Criminally Involved Property</i> .....	70
C. <i>Is the Forfeiture of Criminally Derived Property Even         “Punishment”?</i> .....	73
CONCLUSION.....	76

## INTRODUCTION

In the recent case of *Southern Union Co. v. United States*,<sup>1</sup> the Supreme Court extended its holding in *Apprendi v. New Jersey*<sup>2</sup> by ruling that, under the Sixth Amendment,<sup>3</sup> any fact that increases the

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<sup>1</sup> 132 S. Ct. 2344 (2012).

<sup>2</sup> 530 U.S. 466 (2000).

<sup>3</sup> The Sixth Amendment provides, in pertinent part:

maximum fine set by statute must be found by a jury beyond a reasonable doubt.<sup>4</sup> Affirming its prior holding in *Oregon v. Ice*<sup>5</sup> that “the scope of the constitutional jury right must be informed by the historical role of the jury at common law,”<sup>6</sup> the Court found the Sixth Amendment preserved the historical role of the jury in assessing criminal fines.<sup>7</sup> The Court was silent, however, with respect to *Apprendi*’s application to another common financial penalty imposed at sentencing: criminal forfeitures.<sup>8</sup> Although the Court has previously

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In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation . . . .

U.S. CONST. amend. VI.

<sup>4</sup> *S. Union*, 132 S. Ct. at 2350–51.

<sup>5</sup> 555 U.S. 160 (2009).

<sup>6</sup> *S. Union*, 132 S. Ct. at 2353 (quoting *Oregon v. Ice*, 555 U.S. 160, 170 (2009)).

<sup>7</sup> *Id.* at 2352.

<sup>8</sup> The Court was also mute with respect to the application of *Apprendi* to restitution, another mandatory financial burden imposed against defendants under the federal sentencing scheme. *See id.* As with criminal forfeiture, the Court’s decision in *Southern Union* has already rekindled challenges to judicial fact-finding relating to restitution. *See, e.g.*, *United States v. Green*, Nos. 10–50519, 10–50524, 2013 WL 3467098, at \*5 (9th Cir. July 11, 2013) (to be published in the *Federal Reporter*); *United States v. Wolfe*, 701 F.3d 1206, 1218 (7th Cir. 2012); *United States v. Day*, 700 F.3d 713, 732 (4th Cir. 2012); *United States v. El-Fallal*, No. 12-mc-51376, 2013 WL 4012891, at \*3 (E.D. Mich. Aug. 6, 2013); *United States v. Bengis*, No. S1 03 Crim. 0308, 2013 WL 2922292, at \*7 n.40 (S.D.N.Y. June 14, 2013); *United States v. Pacheco*, No. 07–CR–20546, 2013 WL 1976118, at \*13 (E.D. Mich. May 13, 2013); *State v. Brown*, No. 2 CA–CR 2012–0049, 2013 WL 2302068, at \*4–5 (Ariz. Ct. App. May 24, 2013); *People v. Coneal*, No. H037716, 2013 WL 4537504, at \*5 (Cal. Ct. App. Aug. 27, 2013); *People v. Craig*, No. C070999, 2013 WL 4522084, at \*3 (Cal. Ct. App. Aug. 26, 2013); *People v. Sedillo*, No. C072684, 2013 WL 4407830, \*6 (Cal. Ct. App. Aug. 15, 2013); *People v. Castro*, No. B237742, 2013 WL 3818104, at \*5 (Cal. Ct. App. July 23, 2013); *People v. Carranza*, No. B239697, 2013 WL 3357941, at \*13 (Cal. Ct. App. July 2, 2013); *People v. Amaya*, No. B241108, 2013 WL 3242496, at \*10–11 (Cal. Ct. App. June 27, 2013); *People v. Herrarte*, No. B240315, 2013 WL 2368851, at \*4 (Cal. Ct. App. May 31, 2013); *People v. Roman*, No. B241040, 2013 WL 2304022, at \*2 (Cal. Ct. App. May 28, 2013); *People v. McCarroll*, No. F064953, 2013 WL 2298588, at \*2 (Cal. Ct. App. May 24, 2013); *People v. Murphy*, No. B238006, 2013 WL 2242449, at \*5–6 (Cal. Ct. App. May 20, 2013); *People v. Leon*, No. B232418, 2013 WL 1716011, at \*8 (Cal. Ct. App. Apr. 22, 2013); *People v. Pangan*, 152 Cal. Rptr. 3d 632, 640 (Ct. App. 2013); *People v. Kramis*, 147 Cal. Rptr. 3d 84, 87 (Ct. App. 2012); *Smith v. State*, No. 49A02–1212–CR–1017, 2013 WL 3480295, at \*3–4 (Ind. Ct. App. July 11, 2013) (to be published in the *North Eastern Reporter*); *People v. McKinley*, No. 307360, 2013 WL 2120278, at \*7–8 (Mich. Ct. App. May 16, 2013). The Supreme Court recently requested that the Department of Justice respond to the petition for certiorari in *Wolfe*, which challenged the application of *Apprendi* to restitution. *See* Brief for the United States in Opposition, *Wolfe v. United States*, 133 S. Ct. 2797 (2013) (No. 12–1065), 2013 WL 1945146. As the government’s response pointed out, however, *Wolfe* had failed to preserve the issue below, *see id.* at 4, 6, leading the Court to deny the petition. *See* *Wolfe v. United States*, 133 S. Ct. 2797 (2013) (denying petition for certiorari). The petition in *Fumo v. United States* has brought the issue once again to the Court’s attention, *see* Petition for Writ of Certiorari, *Fumo v. United States*, 2013 WL 5203642, at \*18 (U.S. Sept. 3, 2013) (No. 13–336), but *Fumo* likewise failed to preserve the error in the district court, Second-Step Brief for Vincent Fumo,

suggested that criminal forfeitures are not problematic after *Apprendi*,<sup>9</sup> it has not yet engaged in the sort of detailed historical analysis carried out in *Southern Union* and *Ice* in order to determine what (if any) role the jury played in criminal forfeitures at common law. This Article seeks to bridge that gap.<sup>10</sup>

Criminal forfeiture, which refers to a court's power to confiscate a defendant's property as part of his sentence,<sup>11</sup> has become an increasingly prevalent form of punishment in federal criminal law.

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United States v. Fumo, 2012 WL 3686331, at \*3 (3d Cir. Aug. 15, 2012) (Nos. 11-4499, 11-4621).

Prior to *Southern Union*, cases entertaining *Apprendi* challenges unanimously found that the Sixth Amendment does not require jury findings for restitution orders, on varying rationales. See *United States v. Carruth*, 418 F.3d 900, 904 (8th Cir. 2005) ("Those circuits which have squarely addressed the question of whether *Apprendi* and *Blakely* apply to restitution orders have decided that they do not because there is no 'prescribed statutory maximum.' . . . We agree that neither *Apprendi* nor *Blakely* prohibit[s] judicial fact finding for restitution orders."); accord *United States v. Milkiewicz*, 470 F.3d 390, 403 (1st Cir. 2006); *United States v. Reifler*, 446 F.3d 65, 118 (2d Cir. 2006); *United States v. Williams*, 445 F.3d 1302, 1310–11 (11th Cir. 2006); *United States v. Leahy*, 438 F.3d 328, 337 (3d Cir. 2006) (en banc); *United States v. Garza*, 429 F.3d 165, 170 (5th Cir. 2005); *United States v. Sosebee*, 419 F.3d 451, 462 (6th Cir. 2005); *United States v. Bussell*, 414 F.3d 1048, 1060–61 (9th Cir. 2005); *United States v. George*, 403 F.3d 470, 473 (7th Cir. 2005); *United States v. Wooten*, 377 F.3d 1134, 1144 (10th Cir. 2004). The application of *Apprendi* and *Southern Union* to restitution is, however, beyond the scope of this Article.

<sup>9</sup> See *United States v. Booker*, 543 U.S. 220, 258 (2005); *infra* notes 59–64 and accompanying text.

<sup>10</sup> As used in this Article, "forfeiture" refers to the ceding of title in property to the government as a result of the commission of an illegal act. This Article does not consider the altogether unrelated doctrine of forfeiture in the context of appellate review, which refers to a litigant's abandonment of a point of error on appeal as a consequence of her failure to raise the issue below. See *United States v. Olano*, 507 U.S. 725, 733 (1993) (defining forfeiture of issue as "the failure to make the timely assertion of a right"); *United States v. Lewis*, 673 F.3d 758, 761–62 (8th Cir. 2011) (noting that forfeiture of issue limits appellate review to plain error); 24 C.J.S. *Criminal Law* § 2351 (2013) (collecting cases).

<sup>11</sup> This Article focuses on so-called "criminal forfeiture"—i.e., forfeiture accomplished as part of a criminal case. The body of the Article therefore deliberately shies away from discussing the related but independent concept of *civil* forfeiture, which, since it occurs outside of the context a criminal case, is presumably not subject to the Sixth Amendment. See U.S. CONST. amend. VI ("In all *criminal prosecutions*, the accused shall enjoy the right to . . . trial, by an impartial jury . . .") (emphasis added). These annotations, however, frequently highlight relevant points of similarity and contrast between criminal and civil forfeiture where appropriate. See *infra* note 156 (describing common law origins of civil forfeiture); *infra* note 251 (noting early American application of civil forfeiture); *infra* note 252 (discussing civil character of forfeitures under Confiscation Act of 1862); *infra* note 258 (identifying origins of "taint theory" as justification for civil forfeitures); *infra* notes 267, 288 (noting overlap between criminal and civil forfeiture authority in modern statutes); *infra* note 290 (discussing burden of proof applicable to civil forfeitures); *infra* note 308 (distinguishing elements of "innocent ownership" in civil forfeiture context); *infra* note 341 (comparing procedures applicable to civil forfeiture); *infra* note 416 (describing historical distinction between criminal and civil forfeiture and noting absence of jury right in civil forfeiture trials). For a comprehensive overview of civil forfeiture, see STEFAN D. CASSELLA, *ASSET FORFEITURE LAW IN THE UNITED STATES*, chs. 6–12 (2d ed. 2013).

Although criminal forfeiture was not an authorized punishment under federal law until 1970,<sup>12</sup> Congress has steadily expanded its availability as a criminal punishment, such that more than 200 federal felonies are now punishable by some sort of forfeiture.<sup>13</sup> While the extent of the courts' forfeiture authority varies from crime to crime, a conviction under most federal statutes requires the court to order the forfeiture of any property *derived from* the offense,<sup>14</sup> and certain statutes mandate the forfeiture of property *involved in* the offense in one respect or another.<sup>15</sup> Where a defendant has dissipated or hidden property related to the offense, federal law also permits the forfeiture of any other property owned by the defendant as "substitute property"<sup>16</sup> and the imposition of a "money judgment" for any deficiency.<sup>17</sup>

Although the Supreme Court has previously analogized criminal forfeitures to criminal fines,<sup>18</sup> modern criminal forfeiture in fact springs from a distinct historical tradition.<sup>19</sup> At common law, the forfeiture of one's estate was an automatic penalty imposed against anyone convicted of a felony—so automatic, in fact, that some early commentators defined "felony" as any crime for which forfeiture was part of the penalty.<sup>20</sup> Unlike modern American criminal law, however, the common law did not limit criminal forfeiture to property bearing a relationship to the offense of conviction;<sup>21</sup> rather, the offender's entire estate was forfeited, either to his lord or to the Crown.<sup>22</sup> This practice largely continued in colonial America.<sup>23</sup> While there is evidence that some early colonial American petit juries served an administrative role in reporting the existence of an offender's property to the court, they found no additional facts (other than those required for conviction), and their failure to identify an offender's property did not preclude later inquest and seizure of the property by government authorities.<sup>24</sup> Shortly after the nation's founding, however, the First Congress banned criminal forfeiture as a penalty for federal crimes.<sup>25</sup> As a result, there is

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<sup>12</sup> See *infra* notes 251–53 and accompanying text.

<sup>13</sup> See *infra* note 293 and accompanying text.

<sup>14</sup> See *infra* Part III.A.1.

<sup>15</sup> See *infra* Part III.A.2.

<sup>16</sup> See *infra* Part III.A.3.

<sup>17</sup> See *infra* note 335 and accompanying text.

<sup>18</sup> See *United States v. Bajakajian*, 524 U.S. 321, 327–28 (1998). For an in-depth discussion of the impact of *Bajakajian* on the Sixth Amendment jury trial right, see *infra* Part IV.B.

<sup>19</sup> See *infra* Part II.

<sup>20</sup> See *infra* note 158 and accompanying text.

<sup>21</sup> See *infra* Part IV.A (discussing limits on scope of modern criminal forfeiture).

<sup>22</sup> See *infra* notes 160–63 and accompanying text.

<sup>23</sup> See *infra* Part II.B.

<sup>24</sup> See *infra* notes 240–44 and accompanying text.

<sup>25</sup> See *infra* note 251 and accompanying text.

nothing in the English common law tradition of trial by jury, nor in the colonial American tradition, to indicate that the common law gave defendants the right to have any facts supporting criminal forfeiture found by a jury (beyond the facts supporting the conviction itself).<sup>26</sup>

In order to give context to the historical analysis that follows, this Article begins with a discussion of the Supreme Court's post-*Apprendi* cases and the role that history has begun to play in the Court's application of the Sixth Amendment right to trial by jury.<sup>27</sup> It then offers a detailed history of the evolution of criminal forfeiture, from its origins in early English and colonial law to its reincarnation in modern American statutes, emphasizing the absence of any role for the jury in finding facts supporting criminal forfeiture at common law.<sup>28</sup> Next, it contrasts the wide historical breadth of criminal forfeiture with the relatively narrow scope of modern federal forfeiture laws, confined as they generally are to property bearing some relationship to the offense of conviction.<sup>29</sup> Finally, it assesses the likely influence of this historical account upon the Supreme Court's Sixth Amendment jurisprudence, ultimately concluding that the Sixth Amendment does not guarantee criminal defendants the right to have the facts supporting criminal forfeiture found by a jury beyond a reasonable doubt.<sup>30</sup>

### I. *SOUTHERN UNION* AND THE NEED FOR A HISTORICAL ANALYSIS

In a line of cases beginning with its 2000 decision in *Apprendi v. New Jersey*,<sup>31</sup> the Supreme Court has established a new rule for determining which facts must be submitted to a jury under the Sixth Amendment, namely, those "fact[s] that increase[] the penalty for a

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<sup>26</sup> See *infra* Part II.

<sup>27</sup> See *infra* Part I.

<sup>28</sup> See *infra* Part II.

<sup>29</sup> See *infra* Part III.

<sup>30</sup> See *infra* Part IV. As discussed *infra* at notes 91 and 140, *Southern Union* has conflated what should be two distinct constitutional inquiries. The first question, which arises under the Sixth Amendment, is whether the common law provided a right to trial by jury on a given issue. The separate question of what standard of proof should apply to such determinations, however, is governed by the Due Process Clauses of the Fifth and Fourteenth Amendments. Because this Article concludes that the common law jury had no role in finding facts relating to criminal forfeitures, see *infra* Part II, and thus there is no jury trial right under the Sixth Amendment, see *infra* Part IV.A, the second question does not arise. Before *Southern Union*, several courts upheld the preponderance standard applicable to criminal forfeitures against Due Process Clause challenges. See, e.g., *United States v. Messino*, 382 F.3d 704, 713–14 (7th Cir. 2004); *United States v. Elgersma*, 971 F.2d 690, 694 (11th Cir. 1992); see also *infra* note 349 (collecting cases holding preponderance standard applies).

<sup>31</sup> 530 U.S. 466 (2000).

crime beyond the prescribed statutory maximum” for the offense.<sup>32</sup> Thus, the Supreme Court has determined that any fact that increases the statutory maximum term of imprisonment,<sup>33</sup> that permits the application of the death penalty,<sup>34</sup> or, most recently, that increases the statutory maximum fine,<sup>35</sup> must be submitted to the jury and found beyond a reasonable doubt. The Court has shied away, however, from requiring juries to find facts that authorize consecutive sentences.<sup>36</sup> Throughout the *Apprendi* line of cases, the Court has emphasized that its analysis centers upon the role of the common law jury at the time of the Sixth Amendment’s ratification.<sup>37</sup> This Part summarizes the most relevant Supreme Court cases in the *Apprendi* line to justify the claim that a historical analysis of the jury’s role in criminal forfeitures is essential to determining whether the jury is required, under the Sixth Amendment, to find the facts supporting criminal forfeiture.

#### A. *Apprendi and Its Progeny*

##### 1. The Origin of the *Apprendi* Rule

In *Apprendi v. New Jersey*,<sup>38</sup> the Supreme Court held that any fact (other than the fact of a prior conviction) that increases the statutory maximum punishment available to the sentencing court must be found by a jury beyond a reasonable doubt.<sup>39</sup> The statute at issue in *Apprendi* applied enhanced penalties if a judge found, by a preponderance of the evidence, that the crime was committed “with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity.”<sup>40</sup> The defendant contended that the Sixth and Fourteenth Amendments required that

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<sup>32</sup> *Id.* at 490.

<sup>33</sup> *Id.* at 495–97; *see also infra* Part I.A.

<sup>34</sup> *See* *Ring v. Arizona*, 536 U.S. 584, 609 (2002); *infra* notes 50–54 and accompanying text.

<sup>35</sup> *See* *S. Union Co. v. United States*, 132 S. Ct. 2344, 2353 (2012); *see also infra* Part I.A.4.

<sup>36</sup> *See* *Oregon v. Ice*, 555 U.S. 160, 171–72 (2009); *infra* Part I.A.3.

<sup>37</sup> *See* *Alleyne v. United States*, 133 S. Ct. 2151, 2161 (2013) (noting that requirement that juries find facts authorizing mandatory minimums “preserves the historic role of the jury as an intermediary between the State and criminal defendants”); *S. Union*, 132 S. Ct. at 2353–54; *Ice*, 555 U.S. at 167 (“Our application of *Apprendi*’s rule must honor the ‘longstanding common-law practice’ in which the rule is rooted.” (quoting *Cunningham v. California*, 549 U.S. 270, 281 (2007))); *United States v. Booker*, 543 U.S. 220, 239 (2005) (emphasizing historical foundation of *Apprendi* rule); *Ring*, 536 U.S. at 599 (discussing historical role of jury in application of death penalty); *Apprendi*, 530 U.S. at 481–83 (discussing historical sentencing practice).

<sup>38</sup> 530 U.S. 466 (2000).

<sup>39</sup> *Id.* at 490.

<sup>40</sup> *Id.* at 468–69 (quoting N.J. STAT. ANN. § 2C:44-3(e) (West 2000) (deleted by amendment 2001)).

any such determination be made not by a judge, but by a jury and beyond a reasonable doubt.<sup>41</sup> New Jersey, meanwhile, maintained that the Sixth Amendment required only that the jury find the “elements” of the offense beyond a reasonable doubt, not so-called “sentencing factors.”<sup>42</sup>

The Court began its analysis of the constitutional question by discussing the common law right to trial by jury, which the Court deemed the Sixth Amendment to have incorporated.<sup>43</sup> The Court recognized that, at common law, courts largely lacked discretion in sentencing but were instead required to impose a particular penalty specified by statute.<sup>44</sup> The common law jury was therefore required to find all of the facts that were necessary to sustain the punishment inflicted by law.<sup>45</sup> The Court found New Jersey’s sentencing scheme to be a historic novelty in that it “remove[d] the jury from the determination of a fact that, if found, exposes the criminal defendant to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone.”<sup>46</sup> New Jersey could not, the Court said, curtail the historic right to trial by jury simply by labeling facts authorizing additional prison time as “sentencing factors” instead of “elements.”<sup>47</sup> Although it did not then doubt that innovation in sentencing practice was possible under the Constitution, the Court held that any such innovations “must at least adhere to the basic principles undergirding the requirements of trying to a jury all facts necessary to constitute a statutory offense, and proving those facts beyond reasonable doubt.”<sup>48</sup> It therefore set down what has since come to be known as the “*Apprendi* rule”: “Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”<sup>49</sup>

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<sup>41</sup> *Id.* at 469.

<sup>42</sup> *Id.* at 471.

<sup>43</sup> *Id.* at 476–77.

<sup>44</sup> *Id.* at 479–80 (citing John H. Langbein, *The English Criminal Trial Jury on the Eve of the French Revolution*, in *THE TRIAL JURY IN ENGLAND, FRANCE, GERMANY 1700–1900*, at 13, 36–37 (Antonio Padoa Schioppa ed., 1987)).

<sup>45</sup> *Id.* at 483.

<sup>46</sup> *Id.* at 482–83.

<sup>47</sup> *Id.* at 494.

<sup>48</sup> *Id.* at 483–84. The Court did however acknowledge that there is a constitutionally important distinction “between facts in aggravation of punishment and facts in mitigation.” *Id.* at 490 n.16. The former, it said, must be found by a jury, while even a common law judge had the power to mitigate a sentence. *See id.* at 479.

<sup>49</sup> *Id.* at 490.



## 2. The *Apprendi* Line Advances

In the decade after *Apprendi*, the Supreme Court steadily expanded its holding to invalidate state statutory schemes that permitted the imposition of increased punishment on the basis of judge-found facts. First, in the 2002 case of *Ring v. Arizona*,<sup>50</sup> the Court found that *Apprendi* required that any facts that determined a defendant's eligibility for the death penalty be found by the jury beyond a reasonable doubt.<sup>51</sup> Its opinion cited Justice Stevens's dissent twelve years earlier in *Walton v. Arizona*,<sup>52</sup> where he had noted that "the jury's role in finding facts that would determine a homicide defendant's eligibility for capital punishment was particularly well established" at the time of the adoption of the Bill of Rights.<sup>53</sup> It went on to overrule its holding in *Walton*, in which the Court had upheld Arizona's capital sentencing scheme using the same element/sentencing-factor dichotomy that it later rejected in *Apprendi*.<sup>54</sup>

The Court dramatically broadened the impact of *Apprendi* in 2004 in *Blakely v. Washington*<sup>55</sup> when it invalidated a state sentencing scheme that permitted judges to exceed otherwise mandatory sentencing ranges upon finding "substantial and compelling reasons justifying an exceptional sentence."<sup>56</sup> Since, by definition, such reasons had to go beyond the statutory elements of the crime, the Court found that judges could not aggravate the sentence unless those reasons were found by a jury.<sup>57</sup> In dissent, Justice O'Connor expressed her concern that the Court's decision would put numerous determinate sentencing schemes

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<sup>50</sup> 536 U.S. 584 (2002).

<sup>51</sup> *Id.* at 609. The same day it decided *Ring*, the Supreme Court also decided *Harris v. United States*, 536 U.S. 545 (2002), where it considered whether Congress could constitutionally dictate a mandatory *minimum* sentence based upon judge-found facts. A majority of the Court found that, because "[t]here was no comparable historical practice of submitting facts increasing the mandatory minimum to the jury . . . the *Apprendi* rule did not extend to those facts." *Id.* at 563. Justice Breyer agreed that mandatory minimums could be imposed without specific factfinding by the jury, but concurred only in the judgment to reinforce his disagreement with the Court's decision in *Apprendi*. *See id.* at 569 (Breyer, J., concurring). The Supreme Court recently overruled *Harris* in *Allelyne v. United States*, 133 S. Ct. 2151 (2013), with Justice Breyer again casting the decisive vote, this time to "erase [the] anomaly" created by *Harris*. *See Allelyne*, 133 S. Ct. at 2167 (Breyer, J., concurring).

<sup>52</sup> 497 U.S. 639 (1990).

<sup>53</sup> *Ring*, 536 U.S. at 599 (emphasis omitted) (quoting *Walton*, 497 U.S. at 710 (Stevens, J., dissenting)); *see also* Welsh S. White, *Fact-Finding and the Death Penalty: The Scope of a Capital Defendant's Right to Jury Trial*, 65 NOTRE DAME L. REV. 1, 10–11 (1989), *cited in Walton*, 497 U.S. at 710–11 (Stevens, J., dissenting).

<sup>54</sup> *See Walton*, 497 U.S. at 648; *see also Ring*, 536 U.S. at 603 (concluding that *Walton* was incorrectly decided in light of *Apprendi*).

<sup>55</sup> 542 U.S. 296 (2004).

<sup>56</sup> *Id.* at 299.

<sup>57</sup> *Id.* at 309.

across the country, including the federal Sentencing Guidelines, into “constitutional doubt.”<sup>58</sup>

Justice O’Connor’s fears were confirmed the next year in *United States v. Booker*,<sup>59</sup> where a majority of the Supreme Court ruled that the federal Sentencing Reform Act and the U.S. Sentencing Guidelines were unconstitutional insofar as they permitted judges to enhance prison sentences based upon facts not found by the jury.<sup>60</sup> Under the majority’s reasoning, since the Sentencing Guidelines placed mandatory restrictions on judges’ sentencing discretion in the absence of judicially found facts, the Guidelines created a comprehensive scheme of statutory maximums that, under *Apprendi*, could not be exceeded without findings by the jury.<sup>61</sup> That same majority could not, however, agree on the appropriate remedy for the constitutional violation.<sup>62</sup> Instead, a separate majority excised the provisions of the Sentencing Reform Act that made the Guidelines mandatory upon judges, thereby rendering the Guidelines merely “advisory” and restoring the preexisting statutory maximums for *Apprendi* purposes.<sup>63</sup> In so doing, the so-called “remedial majority” expressly held that the remainder of the Sentencing Reform Act was constitutionally unobjectionable, including, notably, the section pertaining to criminal forfeiture.<sup>64</sup>

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<sup>58</sup> *Id.* at 323 (O’Connor, J., dissenting). The oral argument in *Blakely* focused largely on the impact of *Apprendi* to the Sentencing Guidelines, in anticipation of the forthcoming challenge in *Booker*. See Transcript of Oral Argument, *Blakely v. Washington*, 542 U.S. 296 (2004) (No. 02-1632).

<sup>59</sup> 543 U.S. 220 (2005).

<sup>60</sup> *Id.* at 243–45.

<sup>61</sup> *Id.* at 238–39.

<sup>62</sup> Justices Stevens, Scalia, Souter, Thomas, and Ginsburg all agreed that the Sentencing Guidelines were unconstitutional as applied. See *id.* at 225. Justice Ginsburg, however, parted company from her colleagues in the majority to join Chief Justice Rehnquist and Justices Breyer, Kennedy, and O’Connor in holding that the proper remedy for any arguable unconstitutionality was to sever certain provisions of the Sentencing Reform Act so as to make the Sentencing Guidelines advisory. See *id.* at 244; cf. *infra* note 80 (discussing changes in composition of Supreme Court before *Southern Union*).

<sup>63</sup> *Booker*, 543 U.S. at 245–66.

<sup>64</sup> *Id.* at 258 (“Most of the statute is perfectly valid. See, e.g., . . . § 3554 (forfeiture) . . .”). Section 3554 reads as follows:

The court, in imposing a sentence on a defendant who has been found guilty of an offense described in section 1962 of this title or in title II or III of the Comprehensive Drug Abuse Prevention and Control Act of 1970 shall order, in addition to the sentence that is imposed pursuant to the provisions of section 3551, that the defendant forfeit property to the United States in accordance with the provisions of section 1963 of this title or section 413 of the Comprehensive Drug Abuse and Control Act of 1970.

18 U.S.C. § 3554 (2012).

### 3. A “High Water Mark” in *Ice*?

The Supreme Court put an unexpected twist on the *Apprendi* rule in 2009 when it decided *Oregon v. Ice*.<sup>65</sup> In *Ice*, the defendant challenged the imposition of consecutive sentences based upon judge-found facts under Oregon’s sentencing law.<sup>66</sup> As the Court noted, Oregon was one of the few states in the country that constrained judges’ traditional discretion to impose consecutive sentences by requiring them to find certain facts before they imposed sentences consecutively.<sup>67</sup> Most states continued the common law practice that permitted judges to impose either consecutive or concurrent sentences solely in the exercise of their discretion.<sup>68</sup> Other states authorized judges to impose consecutive sentences by default, but dictated that sentences must run concurrently in certain circumstances identified by statute.<sup>69</sup>

The defendant in *Ice* conceded that the latter two sentencing schemes were constitutional under *Apprendi*.<sup>70</sup> Because neither permitted an increase in the maximum sentence based upon judge-found facts, there could be no *Apprendi* violation.<sup>71</sup> But Oregon’s scheme was different.<sup>72</sup> Since the judge possessed no statutory power to impose consecutive sentences in the absence of certain judicial findings, the defendant argued that those findings “increase[d] the maximum punishment authorized” for the offense within the meaning of *Apprendi*

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<sup>65</sup> 555 U.S. 160 (2009). *Ice* came as a surprise to many, in part because the Court had generally strengthened and reinforced its holding in *Apprendi* in the four years since *Booker*. In *Cunningham v. California*, 549 U.S. 270 (2007), the Court struck down yet another state sentencing scheme that relied upon judge-found facts to set applicable ranges. *Id.* at 294. In *Rita v. United States*, 551 U.S. 338 (2007), the Court held that the federal circuit courts may presume that sentences within the Guidelines range are reasonable, *id.* at 347, but the Court went on to hold in *Gall v. United States*, 552 U.S. 38 (2007), that they may not presume a sentence outside the Sentencing Guidelines to be unreasonable, *id.* at 47. The Court did, however, limit the retroactive impact of *Booker* by affirming that *Apprendi* errors are subject to harmless error review. See *Washington v. Recuenco*, 548 U.S. 212, 222 (2006) (holding failure to submit to jury facts that increased statutory maximum is not structural and thus is subject to harmless error review); see also *United States v. Cotton*, 535 U.S. 625, 633 (2002) (applying harmless error analysis to failure to allege drug quantity in indictment where drug quantity increased statutory maximum).

<sup>66</sup> *Ice*, 555 U.S. at 166.

<sup>67</sup> *Id.* at 163–64.

<sup>68</sup> *Id.* at 163.

<sup>69</sup> *Id.* at 163–64.

<sup>70</sup> *Id.* at 164.

<sup>71</sup> See *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (“Other than the fact of a prior conviction, any fact that increases the penalty for a crime *beyond the prescribed statutory maximum* must be submitted to a jury, and proved beyond a reasonable doubt.” (emphasis added)); cf. *S. Union Co. v. United States*, 132 S. Ct. 2344, 2353 (2012) (“Nor . . . could there be an *Apprendi* violation where no maximum is prescribed.”).

<sup>72</sup> See OR. REV. STAT. § 137.123 (2013); *Ice*, 555 U.S. at 164–66.

and therefore needed to be found by the jury beyond a reasonable doubt.<sup>73</sup>

The Court, however, disagreed.<sup>74</sup> Whether or not the Sixth Amendment grants a right to trial by jury on a particular question depends in part, it said, upon “the historical role of the jury at common law.”<sup>75</sup> Because it found that the historical record showed that the common law gave juries “no role in the decision to impose sentences consecutively or concurrently” but instead left the question “exclusively with the judge,” Oregon’s effort to restrain the discretion of judges could not have enlarged the defendant’s Sixth Amendment right to trial by jury.<sup>76</sup> The Court said:

There is no encroachment here by the judge upon facts historically found by the jury, nor any threat to the jury’s domain as a bulwark at trial between the State and the accused. Instead, the defendant—who historically may have faced consecutive sentences by default—has been granted by some modern legislatures statutory protections meant to temper the harshness of the historical practice.<sup>77</sup>

The Court therefore upheld the imposition of consecutive sentences based upon judge-found facts as consistent with historical jury trial right protected by the Sixth Amendment.<sup>78</sup> The Solicitor General would later claim that *Ice* represented a “high water mark” for the *Apprendi* rule<sup>79</sup>—but the Court would soon disagree.

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<sup>73</sup> See *Ice*, 555 U.S. at 163.

<sup>74</sup> *Id.* at 170.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 168.

<sup>77</sup> *Id.* at 169.

<sup>78</sup> *Id.* at 170. At the oral argument in *Ice*, Justice Breyer specifically asked counsel for Oregon whether forfeiture would be subject to the *Apprendi* rule if the defendant’s argument were accepted. Transcript of Oral Argument at 17, *Oregon v. Ice*, 555 U.S. 160 (2009) (No. 07-901). Justice Scalia suggested in response that such complications could be avoided by limiting the *Apprendi* rule to terms of incarceration. *Id.* at 18. (As we will see in Part I.A.4, however, Justice Scalia did not adopt such a limitation in *Southern Union*, where he joined the majority. See *infra* note 80.) Justice Breyer later asked counsel for *Ice* whether forfeitures would have to be tried to a jury under *Apprendi*, to which *Ice*’s counsel responded in the affirmative. *Id.* at 31. Justice Breyer offered the suggestion that perhaps they would not be because the forfeiture might be considered “an *in rem* proceeding.” *Id.* at 32 (*italics added*). If that is Justice Breyer’s view, it differs from the repeat pronouncements of the Supreme Court that criminal forfeiture is an *in personam* penalty against the defendant himself. See, e.g., *United States v. Bajakajian*, 524 U.S. 321, 332 (1998) (“Section 982(a)(1) thus descends not from historic *in rem* forfeitures of guilty property, but from a different historical tradition: that of *in personam*, criminal forfeitures.”).

<sup>79</sup> Transcript of Oral Argument at 29, *S. Union Co. v. United States*, 132 S. Ct. 2344 (2012) (No. 11-94).

4. Enter *Southern Union*

Three years later,<sup>80</sup> the Court decided *Southern Union Co. v. United States*,<sup>81</sup> which extended the rule of *Apprendi* to facts supporting the imposition of criminal fines. The defendant in *Southern Union* was a corporation that had been convicted of illegally storing hazardous chemicals.<sup>82</sup> The statute authorized the imposition of a fine of \$50,000 per day of violation.<sup>83</sup> The case was charged, however, in a single count, and the jury therefore merely had to find that the defendant engaged in a violation on a single day in order to convict.<sup>84</sup> The district court judge, assessing the evidence from trial, concluded that the violations had occurred for 762 days and the maximum fine was therefore \$38.1 million.<sup>85</sup> He ultimately imposed a fine of \$6 million and a community service obligation of \$12 million.<sup>86</sup> The defendant argued that these penalties exceeded the “prescribed statutory maximum” because they depended upon a finding—the number of days of violation—that had not been found by the jury beyond a reasonable doubt.<sup>87</sup>

As in *Ice*, the Court engaged in a historical analysis to determine whether the jury had a role in determining the facts that authorized the imposition of criminal fines.<sup>88</sup> Although the dissent strongly protested the majority’s historical account,<sup>89</sup> the Court believed that the best historical evidence suggested that fines were decided by the jury at common law,<sup>90</sup> and therefore the Sixth Amendment’s jury trial right included the right to have any facts affecting the maximum fine to be

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<sup>80</sup> The intervening three years saw important changes in the composition of the Court. The five-justice majority that decided *Apprendi* had suffered the loss of *Apprendi* author Justice John Paul Stevens, who retired in 2010, and Justice David Souter, who retired the year before. *Biographies of Current Justices of the Supreme Court*, SUP. CT. OF THE U.S., <http://www.supremecourt.gov/about/biographies.aspx> (last visited Sept. 23, 2013). Justice Alito, who filled the seat of *Apprendi* dissenter Justice Sandra Day O’Connor, had joined the 5-4 majority that halted *Apprendi*’s expansion in *Ice*. See *Ice*, 555 U.S. at 162; *Biographies*, *supra*. It therefore came as a surprise to some that the new Justices, Sonia Sotomayor and Elena Kagan, both joined the *Southern Union* majority, swelling the support for *Apprendi* to six and forming the first supermajority favoring the expansion of *Apprendi* since *Ring*. See Mark Chenoweth, *Using Its Sixth Sense: The Roberts Court Revamps the Rights of the Accused*, 2009 CATO SUP. CT. REV. 223, 225–46 (discussing impact of recent changes in composition of Supreme Court on the *Apprendi* line).

<sup>81</sup> 132 S. Ct. 2344 (2012).

<sup>82</sup> *Id.* at 2349.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 2349–50.

<sup>88</sup> *Id.* at 2353–56.

<sup>89</sup> *Id.* at 2361 (Breyer, J., dissenting).

<sup>90</sup> *Id.* at 2353–56 (majority opinion).

found by the jury.<sup>91</sup> In other words, even though there was no determinate maximum on the total punishment that could be imposed (as one would find in any statute authorizing less than life imprisonment), the Court determined that the judge's finding of the number of days nonetheless subjected the defendant to greater punishment than it could have received based on the jury's verdict alone.<sup>92</sup> At the same time, however, the Court elaborated the theory of *Apprendi*, affirming that, where no statutory maximum is prescribed, there can be no *Apprendi* violation.<sup>93</sup> Thus, the Court implied, a sentencing scheme which gave the judge unfettered discretion to set a fine amount would not be unconstitutional.<sup>94</sup>

As the dissent pointed out, the Court's reasoning represents a significant expansion in the application of *Apprendi*.<sup>95</sup> The dissent inferred from the Court's holding that any fine that was keyed to a finding of fact would now have to be submitted to a jury.<sup>96</sup> It expressed particular concern about the alternative maximum fine provision of 18 U.S.C. § 3571(d), which provides that a court may impose a fine up to double a defendant's gain or a victim's loss as an alternative to any

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<sup>91</sup> *Id.* at 2356. Although the *Southern Union* majority engaged in a historical analysis to assess whether the jury determined the maximum fine at common law, it did not separately address the standard of proof employed by the common law jury in making any such findings. *See id.* Rather, once it found that the common law jury found fine-related facts, it formalistically applied the *Apprendi* rule to such facts without inquiring further as to the standard of proof. *See id.* at 2357. Such an analysis obscures the fact that the *Apprendi* rule actually protects two separate constitutional rights: (1) the right to have any facts that increase the statutory maximum determined by a jury, and (2) the right for those facts to be found beyond a reasonable doubt. *See Apprendi v. New Jersey*, 530 U.S. 466, 476–78 (2000). The first of these rights emanates from the Sixth Amendment, which protects the right to trial by jury. *See id.* But the second derives not from the Sixth Amendment, but from the Fifth and Fourteenth Amendments, whose Due Process Clauses protect the right to a fair trial. *See id.*; *see also In re Winship*, 397 U.S. 358, 364 (1970) (holding that “the *Due Process Clause* protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged” (emphasis added)), *cited in Apprendi*, 530 U.S. at 477. As such, while neither amendment is sufficient on its own to sustain the *Apprendi* rule, “[t]aken together, these rights . . . entitle a criminal defendant to a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.” *Apprendi*, 530 U.S. at 477 (second alteration in original) (emphasis added) (internal quotations marks omitted). The *Southern Union* majority, however, sidestepped any Due Process Clause analysis, failing even to mention the Fifth or Fourteenth Amendments. *See S. Union*, 132 S. Ct. 2344. As a result, the Supreme Court reached its holding without considering the historical possibility that, even if the common law jury found the facts supporting criminal fines, it may have reached its determinations under some less onerous standard than beyond-a-reasonable-doubt. *See infra* note 140 (discussing the impact of the Court's conflation).

<sup>92</sup> *S. Union*, 132 S. Ct. at 2352, 2355.

<sup>93</sup> *Id.* at 2353.

<sup>94</sup> *Id.*; *cf. Oregon v. Ice*, 555 U.S. 160, 174 (2009).

<sup>95</sup> *S. Union*, 132 S. Ct. at 2360–61 (Breyer, J., dissenting).

<sup>96</sup> *Id.* at 2370.

otherwise applicable statutory maximum.<sup>97</sup> The dissent suggested that, under the majority's reasoning, a court could not impose such a fine without the jury first finding the gain or loss from the crime.<sup>98</sup> Such implications, the dissent argued, had senselessly exceeded the original scope of *Apprendi*, which pertained only to terms of imprisonment and was designed to identify the functional "elements" of the crime.<sup>99</sup> The Solicitor General had repeatedly raised similar concerns about an adverse decision's impact on criminal forfeiture at oral argument, but neither the majority nor the dissent addressed the issue.<sup>100</sup>

### B. *The Potential Impact of the Apprendi Line on Criminal Forfeiture*

Although *Southern Union* has created new complications, the application of *Apprendi* to criminal forfeitures is not exactly a novel question. In the wake of *Apprendi*, federal and state courts repeatedly confronted the question whether facts supporting criminal forfeiture were constitutionally required to be found by a jury beyond a reasonable doubt.<sup>101</sup> These courts were unanimous in finding that *Apprendi* did not apply to the facts that supported criminal forfeitures,<sup>102</sup> for two principal reasons: first, because controlling Supreme Court precedent holds that there is no jury trial right for criminal forfeitures under the Sixth

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<sup>97</sup> See *id.* Section 3571(d) provides:

If any person derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss, unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process.

18 U.S.C. § 3571(d) (2012).

<sup>98</sup> *S. Union*, 132 S. Ct. at 2370. Two courts interpreting *Southern Union* have already concluded that the statute does indeed require such a finding by the jury. See *United States v. CITGO Petroleum Corp.*, 908 F. Supp. 2d 812, 815 (S.D. Tex. 2012); *United States v. Sanford Ltd.*, 878 F. Supp. 2d 137, 147 (D.D.C. 2012).

<sup>99</sup> *S. Union*, 132 S. Ct. at 2359–60.

<sup>100</sup> See Transcript of Oral Argument, *supra* note 79, at 27, 36–37, 47–48.

<sup>101</sup> For an overview of the circuit court reaction to *Apprendi* in criminal forfeiture cases, see CASSELLA, *supra* note 11, § 18-5(d). See also Stefan D. Cassella, *Does Apprendi v. New Jersey Change the Standard of Proof in Criminal Forfeiture Cases?*, 89 KY. L.J. 631 (2001); *supra* notes 30, 91 and *infra* note 140 (discussing conflation between Sixth Amendment and Due Process Clause questions in Supreme Court's post-*Apprendi* jurisprudence).

<sup>102</sup> Several courts have also avoided the necessity of reaching the issue by finding that the defendant's waiver of his statutory right to have a jury on forfeiture issues implicitly waived or forfeited any *Apprendi* or *Blakely* error. See, e.g., *United States v. Ortiz-Cintrón*, 461 F.3d 78, 82 (1st Cir. 2006) (recognizing that defendant's express consent to have forfeiture issues tried by judge precluded claim that jury verdict was necessary under *Apprendi*); *United States v. Hively*, 437 F.3d 752, 763 (8th Cir. 2006) (noting that defendant's failure to invoke jury right waived *Booker* and *Blakely* challenges to forfeiture).

Amendment,<sup>103</sup> and second, because criminal forfeitures are not constrained by any statutory maximum.<sup>104</sup> This Section assesses the continued viability of each of these rationales after *Southern Union*.

### 1. The Jurisprudential Rationale: *Libretti* and *Booker* Control

First, courts addressing the application of *Apprendi* to criminal forfeitures have considered themselves bound by the Supreme Court's holdings in *Libretti v. United States*<sup>105</sup> and *United States v. Booker*<sup>106</sup> to find that the facts supporting criminal forfeiture did not have to be found by a jury.<sup>107</sup> *Libretti*, which was decided five years before *Apprendi*, confronted the question whether the Sixth Amendment required a jury trial on forfeiture issues in the context of reviewing a defendant's jury trial waiver.<sup>108</sup> The *Libretti* Court held that any right to a jury in the forfeiture phase of the trial is "merely statutory in origin" and as such "does not fall within the Sixth Amendment's constitutional protection."<sup>109</sup> Likewise, in *Booker*, which was decided after *Apprendi*, the Court expressly declined to excise the forfeiture provisions of the Sentencing Reform Act, finding that those provisions suffered from no

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<sup>103</sup> See *infra* Part I.B.1.

<sup>104</sup> See *infra* Part I.B.2.

<sup>105</sup> 516 U.S. 29 (1995).

<sup>106</sup> 543 U.S. 220 (2005).

<sup>107</sup> See *supra* notes 59–64 and accompanying text (discussing *Booker*). In addition to *Libretti* and *Booker*, two other significant Supreme Court cases relating to criminal forfeiture—*United States v. Bajakajian*, 542 U.S. 321 (1998), and *Austin v. United States*, 509 U.S. 602 (1993)—are discussed *infra* Part IV.B. Other notable forfeiture cases decided by the Supreme Court but not considered here in detail include *United States v. Ursery*, 518 U.S. 267 (1996) (addressing constitutionality of parallel criminal and civil forfeiture proceedings), *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617 (1989) (addressing constitutionality of forfeiture of attorneys' fees), and *United States v. Monsanto*, 491 U.S. 600 (1989) (addressing due process challenge to pretrial restraint of assets intended by defendant to pay attorney).

<sup>108</sup> *Libretti*, 516 U.S. at 48.

<sup>109</sup> *Id.* at 49. On appeal, *Libretti* argued that there was insufficient evidence to support the forfeiture order and that his jury trial waiver below was also inadequate "absent specific advice from the district court as to the nature and scope of this right and an express, written agreement to forgo the jury determination on forfeitability." *Id.* at 48. The Supreme Court rejected both arguments upon its finding that forfeiture was "an element of the sentence imposed following conviction" and "not . . . a separate substantive offense." *Id.* at 38–39. In reaching this conclusion, the Court rejected the assumption of the Advisory Committee that drafted Rule 31 that "the amount of the interest or property subject to criminal forfeiture is an element of the offense to be alleged and proved." *Id.* at 41 (quoting FED. R. CRIM. P. 31 advisory committee's note). As the Court indicated, "[t]he Committee's assumption runs counter to the weighty authority . . . which indicates that criminal forfeiture is an element of the sentence imposed for a violation of certain drug and racketeering laws." *Id.* at 41.



constitutional infirmity.<sup>110</sup> Since the Supreme Court has not overruled *Libretti* or *Booker*, several courts have concluded that they are bound to hold that there is no constitutional right to a jury in the forfeiture phase of a criminal trial.<sup>111</sup>

This first rationale has almost certainly survived *Southern Union*. As the Supreme Court emphasized in *United States v. Ursery*,<sup>112</sup> circuit courts (and state courts, for that matter) are not free to disregard specific holdings of the Supreme Court simply because of tension with subsequent Supreme Court cases.<sup>113</sup> Lower courts therefore remain bound to follow *Libretti* and *Booker*.<sup>114</sup>

It is uncertain, however, whether stare decisis would cause the Supreme Court to do the same. The force of stare decisis is at its weakest in constitutional matters to begin with,<sup>115</sup> and the Supreme Court has noted that it is free to “overrul[e] a previous decision where there has been a significant change in, or subsequent development of, our constitutional law.”<sup>116</sup> Multiple cases in the *Apprendi* line have explicitly

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<sup>110</sup> See *Booker*, 543 U.S. at 258–59; see also *United States v. Alamoudi*, 452 F.3d 310, 315 n.2 (4th Cir. 2006) (noting that *Booker* specifically exempted forfeitures from the *Apprendi* rule); *supra* note 64 and accompanying text.

<sup>111</sup> See, e.g., *United States v. Leahy*, 438 F.3d 328, 331 (3d Cir. 2006) (en banc) (holding that regardless of any tension between *Booker* and *Libretti*, Court of Appeals lacks power “to ignore the Supreme Court’s holding in *Libretti*” or “to declare that the Supreme Court has implicitly overruled one of its own decisions”); see also *United States v. Ortiz-Cintrón*, 461 F.3d 78, 82 (1st Cir. 2006); *Alamoudi*, 452 F.3d at 314; *United States v. Mertens*, 166 F. App’x 955, 958 (9th Cir. 2006); *United States v. Fruchter*, 411 F.3d 377, 382 (2d Cir. 2005); *United States v. Washington*, 131 F. App’x 976, 977 (5th Cir. 2005); *United States v. Hall*, 411 F.3d 651, 654–55 (6th Cir. 2005); *United States v. Tedder*, 403 F.3d 836, 841 (7th Cir. 2005); *United States v. Cabeza*, 258 F.3d 1256, 1257 (11th Cir. 2001); *State v. Key*, 239 P.3d 796, 802 (Idaho 2010).

<sup>112</sup> 518 U.S. 267 (1996).

<sup>113</sup> *Id.* at 288 (reversing lower court determination that Supreme Court had impliedly overruled previous decision: “It would have been quite remarkable for this Court both to have held unconstitutional a well-established practice, and to have overruled a long line of precedent, without having even suggested that it was doing so.”). Defendants, however, have already begun to argue that the Supreme Court’s holding in *United States v. Bajakajian*, that criminal forfeiture qualifies as a “fine” under the Eighth Amendment’s Excessive Fines Clause, dictates that *Southern Union* applies to criminal forfeiture as well. See *United States v. Sigillito*, 899 F. Supp. 2d 850, 857 (E.D. Mo. 2012). (Professor Finneran, one of this Article’s authors, represented the United States in *Sigillito*.) Yet as discussed *infra*, this formalistic argument fails because it ignores the role of history in the Supreme Court’s Sixth Amendment analysis. See *infra* Part IV.B.

<sup>114</sup> Several courts have recognized that they remain bound by *Libretti* and *Booker* in the wake of *Southern Union*. See, e.g., *United States v. Phillips*, 704 F.3d 754, 769–70 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 2796 (2013); *United States v. Day*, 700 F.3d 713, 733 (4th Cir. 2012); *Sigillito*, 899 F. Supp. 2d at 857.

<sup>115</sup> *Agostini v. Felton*, 521 U.S. 203, 235 (1997).

<sup>116</sup> *Id.* at 235–36; see also *Arizona v. Gant*, 556 U.S. 332, 348 (2009) (“The doctrine of *stare decisis* . . . does not compel us to follow a past decision when its rationale no longer withstands ‘careful analysis.’” (quoting *Lawrence v. Texas*, 539 U.S. 558, 577 (2003))). Among the factors that the Court considers in applying the doctrine of stare decisis are “whether related principles of law have so far developed as to have left the old rule no more than a remnant of an

overruled prior Supreme Court precedents in order to bring them into line with *Apprendi*, indicating a willingness by the Court to revisit its prior cases in light of its new interpretation of the Sixth Amendment.<sup>117</sup> In no case was that more clearly displayed than the recent decision in *Alleyne v. United States*,<sup>118</sup> where the Court overruled its eleven- and twenty-seven-year-old holdings in *Harris v. United States*<sup>119</sup> and *McMillan v. Pennsylvania*,<sup>120</sup> respectively, while paying lip service to *stare decisis* in a single footnote.<sup>121</sup>

In addition, the reasoning of *Libretti* mimics the element/sentencing-factor dichotomy that the Court rejected in *Apprendi*.<sup>122</sup> And although *Booker* was decided after *Apprendi*, its passing reference to the forfeiture provisions of the Sentencing Reform Act is unlikely to be persuasive when the Court faces a direct challenge

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abandoned doctrine” and “whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification.” *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 855 (1992) (citing sources).

<sup>117</sup> See, e.g., *Ring v. Arizona*, 536 U.S. 584, 589 (2002) (“*Apprendi*’s reasoning is irreconcilable with *Walton*’s holding . . . and today we overrule *Walton* in relevant part.”); see also *United States v. Cotton*, 535 U.S. 625, 631 (2002) (overruling prior case indicating defective indictment deprived court of jurisdiction).

<sup>118</sup> 133 S. Ct. 2151 (2013).

<sup>119</sup> 536 U.S. 545 (2002).

<sup>120</sup> 477 U.S. 79 (1986).

<sup>121</sup> See *Alleyne*, 133 S. Ct. at 2163 n.5 (“The force of *stare decisis* is at its nadir in cases concerning procedural rules that implicate fundamental constitutional protections.”). Three of the Justices in the majority wrote separately to defend their holding against a vitriolic dissent from Justice Alito, who sharply criticized the majority’s willingness to abandon its recent precedents “simply because a majority of this Court now disagrees with them.” *Id.* at 2172 (Alito, J., dissenting); see also *id.* at 2173 n.\* (“[O]ther than the fact that there are currently five Justices willing to vote to overrule *Harris*, and not five Justices willing to overrule *Apprendi*, there is no compelling reason why the Court overrules the former rather than the latter.”). Joined by Justices Ginsburg and Kagan, Justice Sotomayor argued that, where “procedural rules are at issue that do not govern primary conduct and do not implicate the reliance interests of private parties . . . *stare decisis* does not compel adherence to a decision whose ‘underpinnings’ have been ‘eroded’ by subsequent developments of constitutional law.” *Id.* at 2164 (Sotomayor, J., concurring) (citations omitted); see also *id.* at 2165–66 (Sotomayor, J., concurring) (discussing Court’s decision in *Ring v. Arizona*, 536 U.S. 584 (2002), which overruled pre-*Apprendi* decision in *Walton v. Arizona*, 497 U.S. 639 (1990)).

<sup>122</sup> See *Apprendi v. New Jersey*, 530 U.S. 466, 494 (2000). Multiple courts have recognized the apparent tension between *Libretti* and the *Apprendi* line. See, e.g., *United States v. Leahy*, 438 F.3d 328, 331 (3d Cir. 2006) (en banc) (recognizing tension between *Booker* and *Libretti*); *Sigillito*, 899 F. Supp. 2d at 860 (same). This tension is arguably heightened by the Supreme Court’s prior statements in *United States v. Bajakajian*, 524 U.S. 321 (1998), and *Austin v. United States*, 509 U.S. 602 (1993), where it analogized criminal forfeiture to fines for purposes of analysis under the Eighth Amendment. See *Bajakajian*, 524 U.S. at 328 (“Forfeitures—payments in kind—are thus ‘fines’ [under the Eighth Amendment] if they constitute punishment for an offense.”); *Austin*, 509 U.S. at 604. The potential impact of *Austin* and *Bajakajian* on the Sixth Amendment jury trial right is considered at length *infra* Part IV.B.

to *Libretti* on *Apprendi* grounds.<sup>123</sup> The Court is far more likely, as it did in *Ice* and *Southern Union*, to conduct the sort of historical analysis of the Sixth Amendment suggested by this Article.<sup>124</sup>

## 2. The Formalist Rationale: Forfeitures Have No Statutory Maximum

Those courts addressing the constitutional issue on its own terms have also recognized that forfeiture differs from other types of criminal sanctions in that it is “indeterminate and open-ended” and therefore distinguishable from terms of imprisonment.<sup>125</sup> As the Second Circuit succinctly stated in *United States v. Fruchter*:<sup>126</sup>

*Blakely* and *Booker* prohibit a judicial increase in punishment beyond a previously specified range; in criminal forfeiture, there is no such previously specified range. A judge cannot exceed his constitutional authority by imposing a punishment beyond the statutory maximum if there is no statutory maximum. Criminal forfeiture is, simply put, a different animal from determinate sentencing.<sup>127</sup>

To put this reasoning in the language of *Southern Union*, there cannot be “an *Apprendi* violation where no maximum is prescribed.”<sup>128</sup> Under this line of reasoning, forfeiture differs from the determinate fines examined in *Southern Union* in precisely that respect: its upper limit is not determined by any determinate statutory maximum. Forfeiture is thus more like those punishments at common law that were imposed “apparently without limit except insofar as it was within the expectation on the part of the court that [they] would be paid.”<sup>129</sup>

It is uncertain, however, whether the Supreme Court would accept this second rationale in light of its holding in *Southern Union*. Although it is true that criminal forfeiture is “indeterminate” in that it lacks a

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<sup>123</sup> See *United States v. Booker*, 543 U.S. 220, 258 (2005) (mentioning forfeiture in string citation in upholding most of Sentencing Reform Act).

<sup>124</sup> Cf. *S. Union Co. v. United States*, 132 S. Ct. 2344, 2350 (2012); *Oregon v. Ice*, 555 U.S. 160, 168–70 (2009).

<sup>125</sup> See, e.g., *United States v. Alamoudi*, 452 F.3d 310, 314 (4th Cir. 2006); see also *United States v. Fruchter*, 411 F.3d 377, 383 (2d Cir. 2005); *United States v. Tedder*, 403 F.3d 836, 841 (7th Cir. 2005); *United States v. Messino*, 382 F.3d 704, 713 (7th Cir. 2004); *United States v. Gasanova*, 332 F.3d 297, 301 (5th Cir. 2003); *United States v. Vera*, 278 F.3d 672, 673 (7th Cir. 2002).

<sup>126</sup> 411 F.3d 377 (2d Cir. 2005).

<sup>127</sup> *Id.* at 383.

<sup>128</sup> *S. Union*, 132 S. Ct. at 2353.

<sup>129</sup> *Id.* (quoting Kathryn Preyer, *Penal Measures in the American Colonies: An Overview*, 26 AM. J. LEGAL HIST. 326, 350 (1982)); see also *id.* at 2352 n.5 (“[T]he routine practice of judges’ imposing fines from within a range authorized by jury-found facts . . . poses no problem under *Apprendi* because the penalty does not exceed what the jury’s verdict permits.”).

defined numerical maximum, the same could have been said of the fine in *Southern Union*. The district court in *Southern Union* did not “exceed the statutory maximum” in the sense that it imposed “more than \$50,000 for each day of violation”;<sup>130</sup> rather, it made its own finding as to the *number* of days rather than submit that question to the jury for decision.<sup>131</sup> Yet even the dissenters in *Southern Union* agreed that “[t]he number of days (beyond one) on which the defendant violated this criminal statute” was a “fact[] that increase[d] the penalty for a crime beyond the prescribed statutory maximum.”<sup>132</sup> Their conclusion was no doubt based on *Blakely*’s recognition that “[t]he ‘statutory maximum’ for *Apprendi* purposes” is not the maximum penalty available under the statute in the abstract, but rather “the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.”<sup>133</sup> In this sense, criminal forfeitures may indeed be constrained by a “statutory maximum” as that term is defined in *Blakely*, at least where their imposition depends on factual findings by the district court.<sup>134</sup>

On the other hand, *Southern Union* itself explicitly recognized that there can be no *Apprendi* violation “where no maximum is prescribed.”<sup>135</sup> Unlike a finding of gross gain or loss under the fine provision of 18 U.S.C. § 3571(d),<sup>136</sup> when a sentencing court considers the forfeiture of specific property, the court does not make any finding as to the total value of any property; it merely determines whether the property to be forfeited bears the requisite connection to the offense.<sup>137</sup> As such, “there is no statutory . . . maximum limit on forfeitures,” in the sense of an ultimate numerical limit.<sup>138</sup> It would therefore be consistent with the reasoning of *Southern Union* for the Court to hold, as the circuit courts have, that criminal forfeiture is not subject to *Apprendi*

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<sup>130</sup> See 42 U.S.C. § 6928(d) (2012).

<sup>131</sup> See *S. Union*, 132 S. Ct. at 2349.

<sup>132</sup> *Id.* at 2360 (Breyer, J., dissenting) (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)).

<sup>133</sup> *Id.* at 2350 (majority opinion) (quoting *Blakely v. Washington*, 542 U.S. 296, 303 (2004)).

<sup>134</sup> *Cf. id.* at 2352 (“*Apprendi* guards against[] judicial factfinding that enlarges the maximum punishment a defendant faces beyond what the jury’s verdict or the defendant’s admissions allow.”); *id.* at 2350 (“Thus, while judges may exercise discretion in sentencing, they may not ‘inflic[t] punishment that the jury’s verdict alone does not allow.’” (alteration in original) (quoting *Blakely*, 542 U.S. at 304)).

<sup>135</sup> *Id.* at 2353.

<sup>136</sup> See *supra* notes 97–98 and accompanying text.

<sup>137</sup> *Cf. S. Union*, 132 S. Ct. at 2370 (Breyer, J., dissenting) (suggesting that majority’s reasoning would subject determination of “gross gain” under Alternative Minimum Fines provision to *Apprendi* rule).

<sup>138</sup> *United States v. Alamoudi*, 452 F.3d 310, 314 (4th Cir. 2006).

because it is not constrained by any determinate statutory maximum.<sup>139</sup> Such a holding would also be reflective of the underlying fear that motivated the adoption of the *Apprendi* rule in the first place: that legislatures could, by relabeling elements of a crime as “sentencing factors,” withdraw from the jury its historic role in determining each element of a crime beyond a reasonable doubt.<sup>140</sup> No such concern is present in the case of criminal forfeiture, which can only be imposed once a jury has convicted the defendant of the underlying crime.<sup>141</sup>

While it is therefore uncertain whether criminal forfeitures are constrained by a statutory maximum in any constitutionally relevant

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<sup>139</sup> See *supra* notes 93–94 and accompanying text. Indeed, this rationale has been accepted by several courts that have considered the application of *Apprendi* to forfeiture even after *Southern Union*. See *United States v. Phillips*, 704 F.3d 754, 769 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 2796 (2013); *United States v. Day*, 700 F.3d 713, 733 (4th Cir. 2012), *cert. denied*, 133 S. Ct. 2038 (2013); *United States v. Sigillito*, 899 F. Supp. 2d 850, 861 (E.D. Mo. 2012); *United States v. Crews*, 885 F. Supp. 2d. 791, 803 (E.D. Pa. 2012).

<sup>140</sup> See *Apprendi v. New Jersey*, 530 U.S. 466, 483–84 (2000) (noting that sentencing schemes “must at least adhere to the basic principles undergirding the requirements of trying to a jury all facts necessary to constitute a statutory offense, and proving those facts beyond reasonable doubt”); see also *Alleyne v. United States*, 133 S. Ct. 2151, 2156 (2013) (“The Sixth Amendment . . . requires that each element of a crime be proved to the jury beyond a reasonable doubt. The substance and scope of this right depend upon the proper designation of the facts that are elements of the crime.” (citations omitted)); *S. Union*, 132 S. Ct. at 2350 (noting that *Apprendi* rule “preserves the ‘historic jury function’ of ‘determining whether the prosecution has proved each element of an offense beyond a reasonable doubt’” (quoting *Oregon v. Ice*, 555 U.S. 160, 163 (2009))).

As Justice Breyer argued in his dissent, *Southern Union* has arguably already expanded the *Apprendi* rule beyond *Apprendi*’s original concern with identifying the functional elements of a crime and has morphed into a formal rule that involves the jury whenever the maximum punishment is increased. See *S. Union*, 132 S. Ct. at 2357, 2359–60 (Breyer, J., dissenting). In so doing, the Court has obscured the separate historical question of what standard of proof was employed by the common law jury in determining such questions. See *supra* note 91. Indeed, the development of the beyond-a-reasonable-doubt standard is itself a matter of great scholarly interest and some historical controversy. See generally BARBARA J. SHAPIRO, “BEYOND REASONABLE DOUBT” AND “PROBABLE CAUSE”: HISTORICAL PERSPECTIVES ON THE ANGLO-AMERICAN LAW OF EVIDENCE 1–26 (1991); Anthony A. Morano, *A Reexamination of the Development of the Reasonable Doubt Rule*, 55 B.U. L. REV. 507 (1975) (questioning Supreme Court’s historical understanding of beyond-a-reasonable-doubt standard). For its part, the Supreme Court has noted that the beyond-a-reasonable-doubt standard may not even have been clearly articulated at the time the Bill of Rights was adopted. See *Apprendi*, 530 U.S. at 478 (“The demand for a higher degree of persuasion in criminal cases was recurrently expressed from ancient times, [though] its crystallization into the formula beyond a reasonable doubt seems to have occurred as late as 1798.” (alteration in original) (quoting *In re Winship*, 397 U.S. 358, 361 (1970) (internal quotations marks omitted))). The Supreme Court’s express holdings under the Due Process Clause, meanwhile, have only required “proof beyond a reasonable doubt of every fact necessary to constitute the crime with which [the defendant] is charged.” *In re Winship*, 397 U.S. at 364 (emphasis added). It would therefore go well beyond these precedents for the Court to hold that facts supporting criminal forfeiture must be determined not only by a jury, but beyond a reasonable doubt. See *Libretti v. United States*, 516 U.S. 29, 38–39 (1995) (holding that “[criminal] [f]orfeiture is an element of the sentence imposed following conviction” and not “a separate substantive offense”).

<sup>141</sup> See *infra* notes 288–90 and accompanying text.

sense, such an analysis ultimately asks the wrong question. The Supreme Court has emphasized throughout the *Apprendi* line that the scope of the Sixth Amendment's jury trial right is not determined by formalistic labels like "element," "sentencing factor," or even "statutory maximum," but rather by a historical examination of the jury trial right as it existed at common law.<sup>142</sup> Yet the circuit courts to review the issue so far have refrained from delving into that history, relying instead on the pre-*Southern Union* arguments described above. In the next Part, this Article will fill that void by demonstrating that criminal forfeitures have a distinct common law lineage that exempts them from the *Apprendi* rule.<sup>143</sup>

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<sup>142</sup> See *S. Union*, 132 S. Ct. at 2353; *Oregon v. Ice*, 555 U.S. 160, 170 (2009).

<sup>143</sup> It might be suggested that the Sixth Amendment question is merely academic because the Federal Rules of Criminal Procedure already grant the defendant a right to have the jury determine the forfeiture of his property. See FED. R. CRIM. P. 32.2(b)(5); see also *infra* notes 345–54 and accompanying text. This view is misplaced for at least four reasons.

First, the jury's statutory role with respect to the determination of forfeiture is limited. The only question presented to the jury in a criminal trial is whether the property bears the required connection to the offense. See *infra* note 348 and accompanying text. The jury has no role in determining the forfeiture of substitute property from the defendant nor the imposition of any money judgment against the defendant. See *infra* notes 350–51 and accompanying text. Moreover, there is no requirement that the jury be reassembled to judge the connection to the offense for any subsequently discovered property, which is always forfeited on the basis of judicially found facts. See *infra* notes 366–69 and accompanying text. If the Court were to deem the right to a jury trial on criminal forfeitures to be constitutional as opposed to statutory in origin, the validity of such statutory limitations might very well be called into question.

Second, even where the jury does make findings to support the forfeiture, it makes those findings by a preponderance of the evidence—not beyond a reasonable doubt. See *infra* note 349 and accompanying text. If *Apprendi* were applied to criminal forfeitures formalistically and without modification, the jury's forfeiture findings would have to be made beyond a reasonable doubt, which might seriously imperil the government's ability to obtain forfeiture in some cases. (Any such application would, however, rely upon the questionable historical assumption that the beyond-a-reasonable-doubt standard applied to such determinations at common law. See *supra* notes 30, 91, 140.)

Third, even if the statutory right to a jury trial on forfeiture were coextensive with any arguable constitutional right under *Apprendi*, the recognition of any such right as being constitutional in nature would elevate the standard for finding a knowing and voluntary waiver of the right by the defendant. See *Libretti*, 516 U.S. at 49–50 (1995). The consequences of such a holding would be far-reaching, since defendants most often waive their statutory right to have the jury determine facts relating to forfeiture, either at plea or trial. See *infra* note 346 and accompanying text.

Finally, circuit courts interpreting *Apprendi* have held that any facts that aggravate the statutory maximum punishment must be expressly alleged in the indictment. See *United States v. Promise*, 255 F.3d 150, 157 (4th Cir. 2000) (collecting cases). Under the Federal Rules of Criminal Procedure, however, an indictment need only give the defendant notice of the government's intention to pursue forfeiture under the applicable statutes; the indictment need not provide any facts to support the forfeitability of any specific property or specify the amount of any money judgment. See *infra* note 343 and accompanying text. If *Apprendi* were applied to criminal forfeitures, then such allegations would presumably need to be specifically included in criminal indictments, which would, in turn, necessitate that the government put on evidence to

## II. THE HISTORY OF CRIMINAL FORFEITURE

As established in the previous Part, the Supreme Court has recognized that a proper inquiry into the meaning of the Sixth Amendment requires consideration of the nature and extent of the jury trial right as it historically existed.<sup>144</sup> This Part endeavors to produce a comprehensive account of that right throughout the history of criminal forfeiture, from its origins in the English common law to its modern reincarnation in federal criminal statutes.

As set forth below, criminal forfeiture in English common law deprived a defendant of title to all his property, even reaching life estates vested in his heirs.<sup>145</sup> Because the penalty was automatic upon judgment and total in scope, the jury had no role in finding any facts to support the forfeiture.<sup>146</sup> Colonial law maintained this general rule, except in those few cases where statutory reforms departed from the common law practice.<sup>147</sup> These reforms generally did not, however, involve the participation of the jury.<sup>148</sup> Although some juries in colonial New York evidently had a role in reporting the defendant's holdings in order to facilitate their identification, their failure to make such a report did not preclude the later seizure and forfeiture of the defendant's property by government authorities.<sup>149</sup> In other words, like their English counterparts, colonial juries had no legal power to constrain the forfeiture of the defendant's property through factfinding.<sup>150</sup>

Criminal forfeiture did not live long in federal law after the ratification of the Bill of Rights.<sup>151</sup> The Constitution itself limited forfeitures to a defendant's life estate in cases of treason,<sup>152</sup> and in 1790 the First Congress banned forfeiture altogether as a penalty for federal crimes.<sup>153</sup> It was not until the passage of the RICO statute in 1970 that

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support them before the grand jury. This implication might be the most significant, considering the dramatic effect that it would likely have on the scope and length of grand jury proceedings.

<sup>144</sup> See *supra* notes 37, 75–78, 88–94 and accompanying text. The development of the criminal jury trial system is itself a fascinating academic subject that sadly is beyond our consideration here. For an excellent summary of the growth of the criminal trial from its origins in ordeal and trial by battle, see FREDERIC W. MAITLAND & FRANCIS C. MONTAGUE, A SKETCH OF ENGLISH LEGAL HISTORY 45–73 (James F. Colby ed., 1915).

<sup>145</sup> See *infra* Part II.A.

<sup>146</sup> See *infra* Part II.A.

<sup>147</sup> See *infra* Part II.B.

<sup>148</sup> See *infra* notes 207–28 and accompanying text.

<sup>149</sup> See *infra* notes 240–44 and accompanying text.

<sup>150</sup> See *infra* note 278 and accompanying text.

<sup>151</sup> See *infra* notes 249–51 and accompanying text.

<sup>152</sup> See *infra* note 250 and accompanying text.

<sup>153</sup> See *infra* note 251 and accompanying text.

Congress resurrected forfeiture as a federal criminal penalty.<sup>154</sup> Since that time, it has steadily expanded the availability of criminal forfeiture, such that forfeiture is now a mandatory penalty for most major federal crimes.<sup>155</sup>

A. *The Common Law Origins of Criminal Forfeiture in England*

Forfeiture is one of the oldest criminal punishments known to the common law.<sup>156</sup> Even before imprisonment became the norm for criminal punishment in England,<sup>157</sup> forfeitures were so prevalent that some commentators defined “felony” as any crime for which forfeiture was the penalty.<sup>158</sup> Forfeiture of realty was one of two primary criminal

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<sup>154</sup> See *infra* Part II.C.

<sup>155</sup> See *infra* Part II.C.

<sup>156</sup> See James R. Maxeiner, Note, *Bane of American Forfeiture Law: Banished at Last?*, 62 CORNELL L. REV. 768, 770 (1977) (“Forfeiture of property is one of the oldest sanctions of Anglo-American law, originating with the beginnings of public wrongs during the Anglo-Saxon period. . . . The oldest and best known was forfeiture consequent to attainder, which inflicted on felons and traitors the complete forfeiture of all real and personal property.”). Blackstone points out that the doctrine of “forfeiture of lands and tenements to the crown for treason is by no means derived from the feudal policy . . . but was antecedent to the establishment of that system in [England]; being transmitted from our Saxon ancestors, and forming a part of the ancient Scandinavian constitution.” 4 WILLIAM BLACKSTONE, COMMENTARIES \*383 (footnotes omitted).

Forfeiture consequent to attainder (i.e., criminal forfeiture) must be distinguished from the similar but historically distinct concept of civil forfeiture, which may have origins even more ancient than those of criminal forfeiture. See *United States v. Ursery*, 518 U.S. 267, 275–76 (1996) (discussing historical distinction between civil and criminal forfeiture); *supra* note 11. Oliver Wendell Holmes traced the lineage of civil forfeitures to the English doctrine of “deodand” (literally, “that which ought be given to God”), whereby any chattel causing a death was forfeit to the King by divine right. See O. W. HOLMES, JR., *THE COMMON LAW* 7, 34–35 (Boston, Little, Brown, & Co. 1881); see also 2 FREDERIC POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I*, at 473 (2d ed. 1899) (“[A]ny animate or inanimate thing which caused the death of a human being should be handed over to the king and devoted by his almoner to pious uses . . .”). More recent commentators dispute Holmes’s history and suggest that modern civil forfeitures find their origins in statutory forfeitures in the early admiralty courts. See Jacob J. Finkelstein, *The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty*, 46 TEMP. L.Q. 169, 231–32 (1973); Michael Schecter, Note, *Fear and Loathing and the Forfeiture Laws*, 75 CORNELL L. REV. 1151, 1153 (1990); see also *One Lot of Emerald Cut Stones & One Ring v. United States*, 409 U.S. 232, 237 (1972). For a fuller discussion of the history of civil forfeiture, see CASSELLA, *supra* note 11, ch. 2.

<sup>157</sup> See J. H. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 584 (3d ed. 1990). Even in the colonies, “[i]mprisonment, although provided for as a punishment in some colonies, was not a central feature of criminal punishment until a later time.” Preyer, *supra* note 129, at 329.

<sup>158</sup> See, e.g., 2 POLLOCK & MAITLAND, *supra* note 156, at 466 (“[E]very crime that causes a loss of both lands and goods . . . is a felony.”); HAROLD POTTER, *OUTLINES OF ENGLISH LEGAL HISTORY* 159 (A. K. R. Kiralfy ed., 5th ed. 1958) (noting that felonies were defined in part by the forfeiture that accompanied them); cf. 2 JAMES FITZJAMES STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 192 (1883) (“It is usually said that felony means a crime which



sanctions that together followed from the “legal death” of the offender—also known as attainder.<sup>159</sup>

Unlike forfeiture of chattels, which occurred upon conviction, forfeiture of realty occurred only upon judgment by the court, from which attainder followed automatically by operation of law.<sup>160</sup> While an offender convicted of a felony could potentially obtain relief from his conviction prior to judgment (e.g., by pardon or because of an error in his indictment), once judgment had been pronounced against him, “both law and fact conspire to prove him completely guilty,” and he is attainted.<sup>161</sup> Blackstone describes this practice in detail in his *Commentaries on the Laws of England*:

Forfeiture is twofold; of real and personal estates. First, as to real estates: by attainder of high treason a man forfeits to the king all his lands and tenements of inheritance, whether fee-simple or fee-tail,

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involved the punishment of forfeiture, but this definition would be too large, for it would include misprision of treason which is a misdemeanour.”).

<sup>159</sup> See BLACK’S LAW DICTIONARY 146 (9th ed. 2009) (“On the attainder, the defendant is disqualified to be a witness in any court; he can bring no action, nor perform any of the legal functions which before he was admitted to discharge; he is, in short, regarded as dead in law.” (quoting 1 JOSEPH CHITTY, PRACTICAL TREATISE ON THE CRIMINAL LAW 724 (London, Samuel Brooke 2d ed. 1826))). Aside from forfeiture consequent to attainder, English common law also recognized statutory forfeiture and the deodand. Maxeiner, *supra* note 156, at 770; *see also* 4 BLACKSTONE, *supra* note 156, at \*380.

This doctrine is not to be confused with the concept of a “bill of attainder,” which is a legislative declaration of the legal death of an individual, without trial. *See* BLACK’S LAW DICTIONARY, *supra*, at 188. The Constitution expressly banned the practice of bills of attainder. U.S. CONST. art. I, § 9, cl. 3 (prohibiting Congress from passing bills of attainder); *id.* art. I, § 10, cl. 1 (prohibiting the states from passing bills of attainder). Nor should it be mistaken for the attainder of the jury, a doctrine by which a court had the power to punish a jury whose verdict it disagreed with. *See* David J. Seipp, *Jurors, Evidences and the Tempest of 1499*, in *THE DEAREST BIRTH RIGHT OF THE PEOPLE OF ENGLAND: THE JURY IN THE HISTORY OF THE COMMON LAW* 85 (John W. Cairns & Grant McLeod eds., 2002) (describing English practice); *see also, e.g.*, SEVERAL LAWS AND ORDERS MADE AT THE GENERAL COURT, HOLDEN AT BOSTON THE 16TH OF MAY 1672, at 1–2 (Edward Rawson ed., 1672), *reprinted in* CITY COUNCIL OF BOSTON, *THE COLONIAL LAWS OF MASSACHUSETTS* 201–02 (William H. Whitmore ed., 1887) (indicating similar colonial practice).

<sup>160</sup> *See* 4 BLACKSTONE, *supra* note 156, at \*387 (“Lands are forfeited upon *attainder*, and not before: goods and chattels are forfeited by *conviction*. Because in many of the cases where goods are forfeited, there never is any attainder; which happens only where judgment of death or outlawry is given: therefore in those cases the forfeiture must be upon conviction, or not at all; and, being necessarily upon convictions in those, it is so ordered in all other cases, for the law loves uniformity.”). This distinction persisted into the colonial period. *See infra* note 222.

<sup>161</sup> *See* 4 BLACKSTONE, *supra* note 156, at \*380–81. A defendant’s chattels in all cases were forfeited to the King. In cases of felony, the defendant’s lands escheated to his lord, while in cases of treason, they were forfeited to the Crown. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 682 (1974) (“The convicted felon forfeited his chattels to the Crown and his lands escheated to his lord; the convicted traitor forfeited all of his property, real and personal, to the Crown.”); *see also* *The Palmyra*, 25 U.S. (12 Wheat.) 1, 14 (1827) (“It is well known, that at the common law, in many cases of felonies, the party forfeited his goods and chattels to the crown.”); 2 POLLOCK & MAITLAND, *supra* note 156, at 500.

and all his rights of entry on lands and tenements, which he had at the time of the offence committed, or at any time afterwards, to be forever vested in the crown: and also the profits of all lands and tenements which he had in his own right for life or years, so long as such interest shall subsist.

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In petit treason and felony, the offender also forfeits his chattel interests absolutely, and the profits of all estate of freehold during life; and, after his death, all his lands and tenements in fee simple (but not those in tail) to the crown . . . for a year and a day . . . .

....

The forfeiture of goods and chattels accrues in every one of the higher kinds of offense: in high treason or misprision thereof, petit treason, felonies of all sorts whether clergyable or not, self-murder or felony *de se*, petit larceny, standing mute, and the above-mentioned offenses of striking, &c. in Westminster-hall. For *flight* also, on an accusation of treason, felony, or even petit larceny, whether the party be found guilty or acquitted, if the jury find the flight, the party shall forfeit his goods and chattels: for the very flight is an offence, carrying with it a strong presumption of guilt, and is at least an endeavour to elude and stifle the course of justice prescribed by the law.<sup>162</sup>

Thus, while the precise extent of the forfeiture depended on the offense for which the defendant was convicted, it followed automatically from his attainted status.<sup>163</sup>

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<sup>162</sup> 4 BLACKSTONE, *supra* note 159, at \*381, \*385–87 (footnotes omitted). Blackstone also specifically recognizes that criminal forfeiture is automatic upon attainder (or, in the case of chattels, upon conviction, *see supra* note 160) and thus distinct from statutory forfeiture. *Id.* at \*386 (“These are all the forfeitures of real estates, created by the common law, as consequential upon attainders by judgment of death or outlawry. I here omit the particular forfeitures created by the statutes *praemunire* and others: because I look upon them rather as a *part* of the judgment and penalty, inflicted by the respective statutes, than as *consequences* of such judgment; as in treason and felony they are.”); *see also* 1 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 353–70 (Philadelphia, Robert H. Small, 1st Am. ed. 1847).

<sup>163</sup> Although in cases concerning realty the forfeiture did not take effect until judgment, the forfeiture was deemed to “relate back” to the time of the commission of the offense itself. *See* 4 BLACKSTONE, *supra* note 156, at \*381 (“This forfeiture relates backwards to the time of the treason committed: so as to avoid all intermediate sales and incumbrances, but not those before the fact: and therefore a wife’s jointure is not forfeitable for the treason of her husband; because settled upon her previous to the treason committed.”). The same rule applied in cases of felony. *Id.* at \*386. If, however, the defendant died before judgment was pronounced, the attainder would not go into effect. *See id.* at \*381. Blackstone elsewhere notes that the relation-back doctrine applied at common law only to lands, not to chattels, which became subject to forfeiture upon conviction. *Id.* at \*387; *see supra* note 160. Thus, a defendant could sell his chattels prior to conviction; if, however, the property were “collusively and not *bona fide* parted with, merely to defraud the crown, the law . . . will reach them.” 4 BLACKSTONE, *supra* note 156,

The second consequence of attainder was “corruption of the blood.” Under this doctrine, the offender’s heirs would lose any vested interest they might hold in his property and would themselves be unable to pass such property to their heirs.<sup>164</sup> In other words, no descendant would be permitted to trace a line of inheritance through an attainted ancestor.<sup>165</sup> The blood was corrupted “upward and downward,” so that “if there be a grandfather, father, and son, the father is attainted, and dies in the life of the grandfather, the son cannot inherit the grandfather.”<sup>166</sup> Corruption of the blood, then, was potentially an even harsher aspect of attainder than forfeiture, as it directly affected not only the attainted offender but also his heirs.<sup>167</sup>

Similarly, under the doctrine of “outlawry,” a person accused of a felony who fled before trial was likewise regarded as “dead in law,” such that he could not bring suit, give testimony, or hold public office.<sup>168</sup> The theory behind both outlawry and attainder upon judgment of a felony, at least as defended by Blackstone, was that a felon, by committing a serious crime, had broken the social contract and forfeited his right of protection from the Crown and his lord.<sup>169</sup>

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at \*388. This doctrine bears a striking resemblance to the “bona fide purchaser” defense applicable to modern criminal forfeitures. *See infra* note 360.

<sup>164</sup> 4 BLACKSTONE, *supra* note 156, at \*388 (“Another immediate consequence of attainder is the *corruption of blood*, both upwards and downwards; so that an attainted person can neither inherit lands or other hereditaments from his ancestors, nor retain those he is already in possession of, nor transmit them by descent to any heir; but the same shall escheat to the lord of the fee, subject to the king’s superior right of forfeiture: and the person attainted shall also obstruct all descents to his posterity, wherever they are obliged to derive a title through him to a remoter ancestor.”).

<sup>165</sup> THOMAS PITT TASWELL-LANGMEAD, ENGLISH CONSTITUTIONAL HISTORY FROM THE TEUTONIC CONQUEST TO THE PRESENT TIME 89 (Philip A. Ashworth ed., 6th ed. 1905) (“[A]ttainder also worked ‘corruption of blood,’ the effect of which was to prevent any inheritance being claimed from or *through* the attainted person.”).

<sup>166</sup> 1 HALE, *supra* note 162, at 356.

<sup>167</sup> Maxeiner, *supra* note 156, at 773–74. (“[T]he vicarious aspect of attainder was not the harshest consequence to befall innocent third parties. Attainder of felony meant that children could not inherit the forfeited property of their attainted parents, but it also brought about corruption of the blood—*i.e.*, no descendant could ever trace a line of inheritance through the attainted ancestor.”).

<sup>168</sup> 4 BLACKSTONE, *supra* note 156, at \*381 (“[T]he attainder of a criminal commences . . . upon such circumstances as are equivalent to judgment of death; as judgment of outlawry on a capital crime, pronounced for absconding or fleeing from justice, which tacitly confesses the guilt. And therefore . . . upon judgment of outlawry . . . a man shall be said to be attainted.”).

<sup>169</sup> *Id.* at \*381–82 (“The natural justice of forfeiture or confiscation of property, for treason, is founded on this consideration: that he who hath thus violated the fundamental principles of government, and broken his part of the original contract between king and people, hath abandoned his connections with society; and hath no longer any right to those advantages, which before belonged to him purely as a member of the community: among which *social* advantages the right of transferring or transmitting property to others is one of the chief.”). Blackstone also noted that criminal forfeiture promoted deterrence of criminal activity. *See id.* (“Such forfeitures moreover, whereby his posterity must suffer as well as himself, will help to

Forfeiture was considered a grave penalty, in part because of its impact on the family of the offender. The prospect of his children's disinheritance motivated many a defendant to avoid trial through the common law practice known as "*peine forte et dure*," whereby an offender who refused to plead was tortured to death.<sup>170</sup> By making such an election, the defendant lost his life but saved his children's inheritance, since he would have died unattainted.<sup>171</sup> Over time, judicial decisions and statutory enactments limited the scope of criminal forfeiture in order to preserve some of the defendant's property for the use of his family,<sup>172</sup> as well as to protect the interests of unrelated third parties, such as lienholders and the like.<sup>173</sup>

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restrain a man, not only by the sense of his duty, and dread of personal punishment, but also by his passions and natural affections; and will interest every dependent and relation he has, to keep him from offending . . .").

<sup>170</sup> Literally translated from the French, the phrase means "hard and forceful punishment." This was achieved most commonly by a technique called "pressing." See MAITLAND & MONTAGUE, *supra* note 144, at 60 ("No, no one can be tried by jury who does not consent to be so tried. But what we can do is this—we can compel him to give his consent, we can starve him into giving his consent, and, again, we can quicken the slow action of starvation by laying him out naked on the floor of the dungeon and heaping weights upon his chest until he says that he will abide by the verdict of his fellows. And so we are brought to the pedantic cruelty of the *peine forte et dure*."); John H. Langbein, *The Origins of Public Prosecution at Common Law*, 17 AM. J. LEGAL HIST. 313, 332 (1973) (describing a defendant who "refused to plead at the assizes, in order to preserve his property from forfeiture, and was pressed to death"). "All this—and until 1772 men might still be pressed to death—takes us back to a time when the ordeal seems the fair and natural mode of ascertaining guilt and innocence, when the jury is still a new-fangled institution." MAITLAND & MONTAGUE, *supra* note 144, at 61; see also *id.* at 45–73 (describing the precursors to jury trial, including trial by battle and ordeal); POTTER, *supra* note 158, at 126–27. This practice occurred even in the latter part of the colonial period. Preyer, *supra* note 129, at 333 n.12 ("[O]ne person accused of witchcraft in the Salem outbreak in 1691 was pressed to death in an effort to force him to enter a plea to the charge.").

<sup>171</sup> These remarkable defendants, evidently, regarded it a harsher punishment to be "dead in law"—than dead in fact. See MAITLAND & MONTAGUE, *supra* note 144, at 60–61 ("Even in the seventeenth century there were men who would endure the agony of being pressed to death rather than utter the few words which would have subjected them to a trial by jury. They had a reason for their fortitude. Had they been hanged as felons their property would have been confiscated, their children would have been penniless; while, as it was, they left the world obstinate indeed, but unconvicted."); see also JOHN H. LANGBEIN, TORTURE AND THE LAW OF PROOF: EUROPE AND ENGLAND IN THE ANCIEN RÉGIME 75 (1977) ("A defendant who died under the *peine forte et dure* was not convict, and his estate descended to his heirs. A propertied defendant had, therefore, an incentive to refuse jury trial." (footnote omitted) (italics added)).

<sup>172</sup> See 1 HALE, *supra* note 162, at 359 (noting that statutes had been enacted to protect the dower of the felon's wife from forfeiture).

<sup>173</sup> "As early as the fourteenth century, the Crown was able to expand the definition of an attainted's property to include goods held as bailee. . . . Thereafter, common-law forfeiture normally took only the interest the attainted traitor or felon had in the property." Maxeiner, *supra* note 156, at 773 (footnote omitted). "Nevertheless, vicarious liability was still possible through the doctrine of relation back; forfeiture of real estate, but not chattels, related back to reach all property held by the attainted at the date of the offense, overcoming subsequent transfers to even bona fide purchasers." *Id.* at 773 n.37; see *supra* note 163 (discussing common law relation-back doctrine).

The imposition of forfeiture in the first instance fell exclusively within the province of the judge.<sup>174</sup> The petit jury—the body of persons responsible for rendering a verdict in a given case—had no role in determining the scope or effect of the forfeiture. Its conviction, standing alone, was enough for the court to adjudge the defendant guilty and cause him to be attainted; no further findings were required.<sup>175</sup> Rather, forfeiture of chattels was automatic upon conviction and forfeiture of lands upon judgment,<sup>176</sup> as was corruption of the blood.<sup>177</sup> As such, the petit jury did not have any role in determining what portion of a defendant’s property would be forfeited: once he had been convicted and adjudged, everything the defendant owned was automatically forfeited by operation of law.<sup>178</sup>

After judgment was entered, the task of identifying precisely what property the defendant owned fell to a different governmental authority altogether: the county coroner.<sup>179</sup> The duties of the coroner at common law were many:

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<sup>174</sup> See Maxeiner, *supra* note 156, at 770; see also *The Palmyra*, 25 U.S. (12 Wheat.) 1, 14 (1827) (“The forfeiture did not, strictly speaking, attach *in rem*; but it was a part, or at least a consequence, of the judgment of conviction.”); 1 JOEL PRENTISS BISHOP, COMMENTARIES ON THE CRIMINAL LAW § 975 (7th ed. 1882) (“[C]ommon-law forfeiture, [results] neither from the mere crime, nor from the plea or verdict of guilty, nor from the punishment, nor from the infamous nature of the punishment, but from the *final judgment of the court*.” (emphasis added) (footnotes omitted)); 4 BLACKSTONE, *supra* note 156, at \*386. This stands in contrast to modern forfeiture, where the forfeiture is considered part of the sentence. See *infra* note 289 and accompanying text. At English common law, forfeiture was not a part of the judgment, but rather its consequence—akin in that respect to the modern proscription against the possession of firearms by felons. Cf. 18 U.S.C. § 922(g) (2012).

<sup>175</sup> *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 682–84 (1974); see also *The Palmyra*, 25 U.S. (12 Wheat.) at 14; Maxeiner, *supra* note 156, at 770. It is important to recognize the distinction between the jury’s verdict (i.e., the conviction) and the judgment of the court. During the colonial period, judgment was commonly reserved after conviction to delay attainer, often to permit time for the king to pardon the offender. See *infra* note 222 and accompanying text.

<sup>176</sup> See *supra* note 174 and accompanying text.

<sup>177</sup> See EDWARD COKE, 1 THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND \*84b (London, W. Clarke & Sons 17th ed. 1817) (“And therefore if the father be attainted of felonie, &c. then cannot the sonne or daughter be an heire apparent, because the bloud is corrupted betweene them, and consequently in the life of the father his sonne in that case shall be in ward.”).

<sup>178</sup> See Terry Reed, *Criminal Forfeiture Under the Comprehensive Forfeiture Act of 1984: Raising the Stakes*, 22 AM. CRIM. L. REV. 747, 748 (1985) (“In medieval times, the scope of an *in personam* forfeiture was absolute, depriving the offender of all personalty and realty.” (italics added)); Note, *A Proposal to Reform Criminal Forfeiture Under RICO and CCE*, 97 HARV. L. REV. 1929, 1937–38 (1984) [hereinafter Harvard Note] (“[T]he jury had no legal power to protect the defendant against an excessive forfeiture.”); see also *State v. Key*, 239 P.3d 796, 803 (Idaho 2010) (citing Harvard Note, *supra*).

<sup>179</sup> The term “coroner” literally means “officer of the Crown.” MERRIAM WEBSTER’S COLLEGIATE DICTIONARY 259 (10th ed. 1993). As Holdsworth reports, the coroner initially had the duty of keeping the “pleas of the Crown,” i.e., those causes of action in which the Crown was the complaining party. 1 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 83 (3d ed.

The [coroner's] office was established for the purpose of safeguarding the pecuniary interests of the crown, and more especially its pecuniary interests arising from the administration of the criminal law. He must keep a roll which was of great value to the justices in eyre, because it enabled them to check the verdicts of the juries of the hundreds, and to provide for the king a plentiful crop of amercements. . . . He had many various duties to perform in relation to the criminal law. Thus he must receive and enter the appeals or criminal accusations of those who wish to accuse another of felony; he must keep a record of outlawries; he must receive the confession and abdication of criminals who had taken sanctuary.<sup>180</sup>

In keeping with these core functions, the coroner took a central role with regard to the enforcement of criminal forfeitures.<sup>181</sup> In particular, once a defendant had been attainted of a felony, the coroner was then required to hold an inquest, assembling what was called a "coroner's jury," to ascertain the existence of any property owned by the attainted defendant.<sup>182</sup>

The coroner's jury "is interesting historically because it is the most important modern survival of the many juries which were once employed to answer questions which related rather to the administrative than the judicial work of government."<sup>183</sup> Such bodies would be unrecognizable to modern eyes as "juries."<sup>184</sup> Rather, they were

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1922); *see also* THE NEW SHORTER OXFORD ENGLISH DICTIONARY 515 (5th ed. 1993) (tracing origin of "coroner" to the Latin *custos placitorum coronae* ("guardian of the pleas of the Crown")). Holdsworth tells us there were in fact many kinds of coroners beyond the county coroner, including "a coroner for the king's household" and "a coroner for the Admiralty." 1 HOLDSWORTH, *supra*. County coroners were unpaid until the reign of Henry VII, where a commission for each inquest of death was instituted. *Id.* at 84.

<sup>180</sup> 1 HOLDSWORTH, *supra* note 179, at 84 (footnotes omitted).

<sup>181</sup> *See id.* at 84–86.

<sup>182</sup> *Id.* at 85 ("The duty which was imposed upon the coroner to hold an inquest followed from the fact that he was especially bound to safeguard the rights of the crown. In order to safeguard these rights he was obliged, in many cases to impanel a jury and hold a court, which was a court of record, to [i]nquire into their existence. Thus he must hold inquests as to wreck, royal fish, as to the finding of treasure trove, and as to unexplained death, because in all these matters the crown was pecuniarily interested. By its prerogative it was entitled to wreck, royal fish, and treasure trove; and the death of a man might bring the crown revenue in many ways. The hundred was liable to a fine if Englishry could not be proved; the thing which caused the death was forfeit to the crown as a deodand; the chattels of the man, if a suicide or convicted of felony, were likewise forfeited." (footnotes omitted)). In the thirteenth and fourteenth centuries, the coroner's jury would consist of twelve men taken from neighboring townships. *Id.* Later, the coroner's jury was chosen from the county in which it was constituted. *Id.* at 86. Over time, "[c]hanges in the judicial system and changes in substantive law rendered obsolete many of the duties of the coroner. . . . The Coroner's Act of 1885 expressly abolished others." *Id.* (footnote omitted).

<sup>183</sup> *Id.* at 86.

<sup>184</sup> A brief history of the petit jury is necessary to understand why both bodies would have been denominated as "juries." Unlike modern petit juries, which are designed (and indeed,

essentially inquests, boards of citizens tasked with uncovering certain facts—in this case, identifying the defendant’s property.<sup>185</sup> Such a function is reminiscent of the operation of the earliest criminal petit juries, where the jury itself was an investigative body,<sup>186</sup> and of both early and modern grand juries.<sup>187</sup>

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constrained through the voir dire process) to be ignorant of the facts of the case prior to their service, *see* *Morgan v. Illinois*, 504 U.S. 719, 729–30 (1992), early petit juries were chosen precisely because of their knowledge of the community, the defendant, and even the facts of the case itself. In ancient common law trials, it was the jury that brought the evidence upon which it determined the guilt of the defendant. MAITLAND & MONTAGUE, *supra* note 144, at 56 (“Originally the jurors are called in, not in order that they may hear, but in order that they may give, evidence. They are witnesses. They are the neighbours of the parties; they are presumed to know before they come into court the facts about which they are to testify.”); *see also* POTTER, *supra* note 158, at 121–22 (identifying origins of criminal jury in Frankish inquests). As Professor Langbein tells us:

The Angevin system of self-informing juries had required no outside officer to investigate crime and to inform the jurors of the evidence. Jurors “were men chosen as being likely to be already informed;” the vincinage requirement, the rule that jurors be drawn from the neighborhood where the crime had been committed, was meant to produce jurors who might be witnesses as well as triers. Denunciation (to the jury of accusation) and proof of guilt (to the jury of trial) operated informally, that is, out of court and in advance of the court’s sitting. In the thirteenth century “it is the duty of the jurors, so soon as they have been summoned, to make inquiries about the facts of which they will have to speak when they come before the court. They must collect testimony; they must weigh it and state the net result in a verdict.” Medieval juries came to court more to speak than to listen.

Langbein, *supra* note 170, at 314 (footnotes omitted). It “is among the greatest mysteries of English legal history” how these “active medieval juries” took on their modern character as “passive courtroom triers.” *Id.*; *see also* POTTER, *supra* note 158, at 124 (describing historical evidence surrounding evolution of petit jury). Langbein theorizes that the modern petit jury, which receives evidence rather than discovers it, arose as a consequence of the growth of modern society: “the medieval system of self-informing juries . . . presupposed a static populace and forms of communal social organization which were dissolving.” Langbein, *supra* note 170, at 315. Langbein explains that, over time, the function of investigation transitioned to the justice of the peace, who investigated crimes and reported his findings to the jury, from which it arrived at its verdict. *Id.* at 317–21. Langbein thus identifies justices of the peace as the ancestors of the modern public prosecutor. *See id.* at 322–24.

<sup>185</sup> The origins of inquests are described in MAITLAND & MONTAGUE, *supra* note 144, at 51–58.

<sup>186</sup> *See supra* note 184.

<sup>187</sup> In modern practice, as at common law, the grand jury remains an investigative body tasked with searching out and indicting criminals. *See* SARA SUN BEALE ET AL., GRAND JURY LAW AND PRACTICE § 4:14 (2d ed. 2012). Today, it is generally the prosecutor who presents evidence to the grand jury, and upon which evidence the grand jury returns indictments. *See id.* § 4:15. At an earlier time, the grand jury, like the petit and coroner’s juries, would have made its findings on the basis of information personally known to the grand jurors by virtue of their membership in the community. JOHN H. LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL 64 (2003) (“In medieval times both the jury of accusation (the forerunner of the grand jury) and the trial jury were self-informing.”); *see supra* note 184. As Maitland and Montague describe:

The Frankish kings . . . employed [inquests in criminal cases] for the purpose of detecting crime. Do you suspect any of murder, robbery, larceny, or the like? This

Criminal forfeiture appears to have fallen into relative disuse in England in the period leading up to the American Revolution, possibly due to the poverty of many defendants rendering the forfeiture penalty a dead letter.<sup>188</sup> As a matter of law, however, criminal forfeiture continued as a penalty in English common law until it was abolished by statute in 1870.<sup>189</sup>

### B. *Criminal Forfeiture in the Colonies and the New Republic*

While the English common law of criminal forfeiture is firmly established in our history, the practice in colonial America cannot be ascertained so easily.<sup>190</sup> Although the colonies generally appear to have adopted most of the English criminal law either implicitly or through legislation,<sup>191</sup> certain colonies instituted statutory reforms designed to

question was addressed by royal officers to selected representatives of every neighbourhood, and answered upon oath, and the suspected persons were sent to “the judgment of God.”

... [Henry II] ordained that it should be used upon a very large scale and as a matter of ordinary practice, both by the justices whom he sent to visit the counties and by the sheriffs. From his time onward a statement made upon oath by a set of jurors representing a hundred, to the effect that such an [sic] one is suspected of such a crime, is sufficient to put a man upon his trial. It is known as an indictment. . . . It is but an accusation . . . .

MAITLAND & MONTAGUE, *supra* note 144, at 58–59.

<sup>188</sup> JULIUS GOEBEL JR. & T. RAYMOND NAUGHTON, *LAW ENFORCEMENT IN COLONIAL NEW YORK* 712 (1944) (noting that, by the eighteenth century, “the Crown’s year and day in escheats had been abandoned, and . . . chattel forfeiture was insignificant because most felons had nothing to forfeit”).

<sup>189</sup> See Forfeiture Act, 1870, 33 & 34 Vict. c. 23 (Eng.), available at [http://www.legislation.gov.uk/ukpga/1870/23/pdfs/ukpga\\_18700023\\_en.pdf](http://www.legislation.gov.uk/ukpga/1870/23/pdfs/ukpga_18700023_en.pdf); see also *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 682 n.20 (1974) (discussing abolition of forfeiture as a penalty for treason and felony in England).

<sup>190</sup> To identify any single “colonial practice” would, of course, be an oversimplification. As Preyer points out:

Simple descriptions of punishments inflicted during the colonial period, with illustrative examples drawn from one colony alone or from a variety of colonies often scattered widely over time, are no substitute for more systematic analyses which would help us toward greater understanding of penal measures in their relationship to colonial society.

Preyer, *supra* note 129, at 328. Such a systematic analysis, of course, is not always possible. This Section therefore seeks to identify any available evidence on the role of juries in the colonial period with respect to the determination of criminal forfeitures.

<sup>191</sup> See PATRICIA SEETS WATSON & WILLIAM SHEPARD MCANINCH, *GUIDE TO SOUTH CAROLINA CRIMINAL LAW AND PROCEDURE* 13 (3d ed. 1990) (“America, of course, inherited the English law; the colonies adopted the English common and statutory law as it stood at the time of the American revolution (or earlier, depending on the particular state) as far as it was applicable to conditions in America. . . . The English criminal law was certainly applicable to the conditions in the colonies, and every part of it was enforceable until the separation in



soften the punitive effect of the traditional English rules relating to criminal forfeiture.<sup>192</sup> These reforms, however, were ordinarily directed at mitigating the extent of criminal forfeiture and the offenses for which it was a penalty, not the role of the judge or jury in imposing the penalty itself.<sup>193</sup>

Colonial reforms to the English criminal law were driven by a variety of social and economic forces. On the one hand, puritan ideals of redemption had prompted a variety of reforms directed at the rehabilitation, as opposed to the punishment, of criminal defendants.<sup>194</sup> At the same time, many colonists objected to the perceived injustice that

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1776.”); see, e.g., Act of May 31, 1718, ch. XXXII, § 1, reprinted in *THE GENERAL LAWS OF PENNSYLVANIA, FROM THE YEAR 1700, TO APRIL 1849*, at 67 (James Dunlop ed., Philadelphia, King & Baird 2d ed. 1849); ARTHUR P. SCOTT, *CRIMINAL LAW IN COLONIAL VIRGINIA* 109 (1930); DONNA J. SPINDEL, *CRIME AND SOCIETY IN NORTH CAROLINA, 1663–1776*, at 117 (1989) (“Until 1749, substantive law provided that ‘the laws of England’ were to be ‘the Laws’ of the colony [of North Carolina] ‘so far as they are compatible with our way of living.’ In that year, the assembly recognized some two hundred English statutes relating to law enforcement that, according to their usefulness and practicality, would be observed in the colony.”); WATSON & MCANINCH, *supra*, at 15–16 (“During more than one hundred years prior to the Revolutionary War, South Carolina, more than any other colony, was governed by the laws of England, and there was little statutory criminal law enacted by the Colonial Assembly, which was the colony’s law-making body.”); see also Joseph H. Smith, *The English Criminal Law in Early America*, in JOSEPH H. SMITH & THOMAS G. BARNES, *THE ENGLISH LEGAL SYSTEM: CARRYOVER TO THE COLONIES I* (1975). Smith argues that the view that the colonies were subject to English law (both its benefits and punishments) evolved over the course of the colonial period. *Id.* at 6–12. As to English criminal law, most colonies operated on a presumption that it was in effect, or enacted positive laws that were often consistent with English criminal law. *Id.* at 22–41.

<sup>192</sup> See HUGH F. RANKIN, *CRIMINAL TRIAL PROCEEDINGS IN THE GENERAL COURT OF COLONIAL VIRGINIA* 67 (1965) (“Originally, the proceedings of [Virginia’s General Court] were based on English judicial customs, but throughout the years legal practices underwent a number of alterations to meet the exigencies of the local environment.”); Maxeiner, *supra* note 156, at 776 (“In the American colonies the criminal law did not automatically follow that of England; it depended on local adoption, except as Parliament specifically directed. As a result, the law of forfeiture varied substantially from colony to colony.” (footnote omitted)); see also RICHARD B. MORRIS, *STUDIES IN THE HISTORY OF AMERICAN LAW: WITH SPECIAL REFERENCE TO THE SEVENTEENTH AND EIGHTEENTH CENTURIES* 225–30 (2d ed. 1958); Kathryn Preyer, *Crime, the Criminal Law and Reform in Post-Revolutionary Virginia*, 1 *LAW & HIST. REV.* 53, 57–62 (1983).

<sup>193</sup> See *infra* notes 207–30 and accompanying text.

<sup>194</sup> Preyer, *supra* note 129, at 333 (“The departure from English norms reflects Puritan determination to eliminate the harsh capriciousness of English penal measures and to replace these with a system of sanctions in accord with Puritan conceptions of righteousness implicit in the law of God. Equating crime with sin and regarding the state as the instrument of God on earth, the Puritan criminal code represents in certain respects a formal break with traditional English law.”). Nonetheless, Preyer reports that forfeiture of estate remained a punishment under colonial law as late as the eighteenth century. *Id.* at 337 (“Rape was punishable by 39 lashes, seven years imprisonment and forfeiture of the entire estate of a single man, half of the estate if the convicted were married . . .”).

criminal forfeitures worked against innocent third parties,<sup>195</sup> a complaint echoed by contemporary commentators across the pond.<sup>196</sup> In addition, since criminal forfeitures resulted in added revenue either for the Crown or the royal governments, colonial opposition to criminal forfeiture may have been symptomatic of the broader, brewing rebellion against the economic oppression of the colonists' foreign overlords.<sup>197</sup>

While there is some evidence that these sentiments may have resulted in relative nonenforcement of forfeitures consequent to attainder during the colonial period,<sup>198</sup> only a few colonies appear to have taken any affirmative steps to rein in the common law practice.<sup>199</sup> Instead, the legislative enactments, case reports, and writings of the colonists suggest that criminal forfeiture generally remained an available punishment during the colonial period;<sup>200</sup> it was simply applied in varying degrees in each of the colonies, typically as a result of specific statutory reforms or practical avoidance of the common law rules.<sup>201</sup> With a singular exception, however, none of the colonies altered the

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<sup>195</sup> Joseph Cramer, *Civilizing Criminal Sanctions—A Practical Analysis of Civil Asset Forfeiture Under the West Virginia Contraband Forfeiture Act*, 112 W. VA. L. REV. 991, 993 (2010); Maxeiner, *supra* note 156, at 774, 779.

<sup>196</sup> 4 BLACKSTONE, *supra* note 156, at \*383–84 (“Yet many nations have thought[] that this posthumous punishment favours hardship to the innocent; especially for crimes that do not strike at the very root and foundation of society, as treason against the government expressly does.”).

<sup>197</sup> Maxeiner, *supra* note 156, at 773 (“Forfeiture appealed to the English Crown both because forfeited estates of attainted traitors and felons added substantially to the Crown domain . . .”). Commentators appear to disagree as to whether the revenues from criminal forfeitures redounded to the Crown or to the royal colonial governments. Maxeiner suggests that revenues from criminal forfeitures would have gone to the colonial governments and not to the Crown, but he cites no support for this claim. *See id.* at 777. Weiner, meanwhile, suggests to the contrary, that “criminal forfeiture [did not] enjoy[] widespread use in the American colonies” because, in part, “colonial governments did not wish to see American property forfeited to the Crown in Great Britain.” Edward C. Weiner, *Crime Must Not Pay: RICO Criminal Forfeiture in Perspective*, 1 N. ILL. U. L. REV. 225, 231 (1981). He likewise cites no support for his supposition. Preyer makes the same claim as Weiner but, again, cites no support. Kathryn Preyer, *supra* note 192, at 58. Because the resolution of the issue is inconsequential to the constitutional question addressed herein, we let it pass.

<sup>198</sup> Some modern commentators claim that criminal forfeiture fell into nearly total disuse during the colonial period, but none cite evidence sufficient to make such a sweeping claim, which is contradicted by our analysis. *See, e.g.*, Cramer, *supra* note 195, at 993; Maxeiner, *supra* note 156, at 774.

<sup>199</sup> *See infra* notes 207–30 and accompanying text.

<sup>200</sup> *See, e.g.*, SPINDEL, *supra* note 191, at 121 (noting that, in colonial North Carolina, “[a]ll felonies, with the exception of petit larceny, a crime penalized by whipping, required forfeiture of property or a sentence of death”); WATSON & MCANINCH, *supra* note 191, at 15 (noting that forfeiture of estate was a penalty in colonial Pennsylvania for incest and rape).

<sup>201</sup> *See infra* notes 207–30 and accompanying text.

division of responsibility between judge and jury in the imposition of criminal forfeiture.<sup>202</sup>

The New England colonies were the most active in their attempts to modify the English common law by statute,<sup>203</sup> but even these colonies ultimately accepted forfeiture as a criminal punishment. For example, in colonial Massachusetts, criminal forfeiture was largely abolished with the passage of the Massachusetts Body of Liberties in 1641. That legislation decreed that the estate of a convicted felon, including all “lands and heritages,” would thereafter be free from forfeiture.<sup>204</sup> The Body of Liberties, however, was no longer in effect after Massachusetts was reorganized under its second charter in 1691, at which time the King had reasserted his authority over Massachusetts by disallowing<sup>205</sup> colonial statutes “not conformable to the laws of England.”<sup>206</sup> Subsequently, Massachusetts enacted a less sweeping statute that specified that the dower<sup>207</sup>—which was subject to forfeiture for felonies at English common law<sup>208</sup>—could be retained by the widow of a felon.<sup>209</sup> That same statute, however, provided that the dower would remain subject to forfeiture in cases of treason.<sup>210</sup>

Connecticut enacted several of its own criminal laws, particularly with regard to “capital” offenses, and often departed from English common law tradition regarding criminal forfeiture.<sup>211</sup> Still, criminal forfeiture remained a viable penalty, and conviction alone was sufficient

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<sup>202</sup> The exception is New York, whose practice is discussed *infra* at notes 240–44 and accompanying text.

<sup>203</sup> See Smith, *supra* note 191, at 22–29 (providing overview of criminal law in colonial New England).

<sup>204</sup> See A Coppie of the Liberties of the Massachusetts Colonie in New England § 10, reprinted in WILLIAM H. WHITMORE, A BIBLIOGRAPHICAL SKETCH OF THE LAWS OF THE MASSACHUSETTS COLONY FROM 1630 TO 1686, at 35 (1890).

<sup>205</sup> During the colonial period, most colonies were required to submit their laws to the English Crown, which had the authority to “disallow” those laws. Such disallowance had the effect of a legislative repeal. OLIVER MORTON DICKERSON, AMERICAN COLONIAL GOVERNMENT 1696–1765: A STUDY OF THE BRITISH BOARD OF TRADE IN ITS RELATION TO THE AMERICAN COLONIES, POLITICAL, INDUSTRIAL, ADMINISTRATIVE 225–27 (1912). Typically, any colonial law that “affected the material interests of the [C]rown” or that directly conflicted with an English law would be disallowed. *Id.* at 233–35.

<sup>206</sup> See Smith, *supra* note 191, at 23–24. Several other acts of the Massachusetts legislature were also “disallowed” because they failed to comport with English norms. *Id.*

<sup>207</sup> At common law, the dower was “a wife’s right, upon her husband’s death, to a life estate in one-third of the land that he owned in fee.” BLACK’S LAW DICTIONARY, *supra* note 159, at 565.

<sup>208</sup> 1 HALE, *supra* note 162, at 359. Even in England, however, this harsh result had been abrogated by statute. *Id.*

<sup>209</sup> MORRIS, *supra* note 192, at 160 (citing MASS. ACTS AND RESOLVES, I, 90, 91 and LAWS RESOLUTIONS, p. 152).

<sup>210</sup> *Id.* at 160.

<sup>211</sup> Smith, *supra* note 191, at 26–27; see also 1 ZEPHANIAH SWIFT, A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT 339–40 (Windham, John Byrne 1795).

to effect it. For instance, a 1719 law prohibiting manslaughter required that all persons convicted of the crime forfeit all goods and chattels belonging to them at the time of the offense.<sup>212</sup> As specified in a 1775 act, a person committing the offense of treason was required to “forfeit all his estate, which shall be accordingly seized by order of said court for the use of this Colony.”<sup>213</sup> State archives referencing criminal proceedings confirm that court-ordered criminal forfeiture had been the practice in Connecticut for many years prior.<sup>214</sup> Thus, despite the various reforms made in Connecticut to confine the use of criminal forfeiture, when it did apply, courts had the authority to order forfeiture without the participation of the jury.

While New Hampshire passed several of its own criminal laws in an apparent attempt to modify the English common law, its reforms do not appear to have abrogated English practices relating to criminal forfeiture. For example, a 1777 statute expressly affirmed that any person guilty of misprision of treason or outlawry would be required to forfeit his realty and personalty.<sup>215</sup> Similarly, a 1781 statute, which outlined multiple criminal offenses to be judged in the Superior Courts, specifically stated that “every conviction of any of the aforesd Crimes shall work a forfeiture to this State of all the estate real & personal of the person or persons so convicted.”<sup>216</sup>

In colonial Rhode Island, by contrast, the English common law, including the tradition of criminal forfeiture, was embraced. In 1700, the colonial assembly enacted a law providing that, if the colony had passed no law regarding a particular matter, English common law would apply.<sup>217</sup> Similar provisions are contained in collected laws of 1719, 1730, and 1745.<sup>218</sup> A 1749 law expressly stated that English criminal law

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<sup>212</sup> ACTS AND LAWS OF HIS MAJESTIES COLONY OF CONNECTICUT IN NEW-ENGLAND: PASSED BY THE GENERAL ASSEMBLY MAY 1716 TO MAY 1749, at 246 (A.C. Bates ed., 1919).

<sup>213</sup> Act of Dec. 14, 1775, in 11 THE PUBLIC RECORDS OF THE COLONY OF CONNECTICUT: FROM MAY, 1775, TO JUNE, 1776, INCLUSIVE 192 (Charles J. Hoadly ed. Hartford, Case, Lockwood & Brainard Co. 1890).

<sup>214</sup> See, e.g., 10 THE PUBLIC RECORDS OF THE COLONY OF CONNECTICUT: FROM MAY, 1768, TO MAY 1772, INCLUSIVE 101 (Charles J. Hoadly ed., Hartford, Case, Lockwood & Brainard Co. 1885) (discussing case of Archibald Phipany, who was convicted counterfeiting, “by force of which conviction the estate of the said Phipany became forfeit to [the] Colony”).

<sup>215</sup> Act of Jan. 17, 1777, reprinted in 4 LAWS OF NEW HAMPSHIRE: REVOLUTIONARY PERIOD 1776–1784, at 71–74 (Henry Harrison Metcalf ed., 1916). In the case of outlawry, New Hampshire law provided that any real property forfeited would be “deemed and adjudged to be seized and possessed without any Office found of the same.” *Id.* at 73.

<sup>216</sup> Act of Apr. 6, 1781, reprinted in 4 LAWS OF NEW HAMPSHIRE, *supra* note 215, at 384–85.

<sup>217</sup> Act of Apr. 30, 1700, reprinted in LAWS AND ACTS OF HER MAJESTIES COLONY OF RHODE-ISLAND, AND PROVIDENCE-PLANTATIONS MADE FROM THE FIRST SETTLEMENT IN 1636 TO 1705, at 89 (Providence, Sidney S. Rider & Burnett Rider 1896).

<sup>218</sup> Smith, *supra* note 191, at 21.

procedures would also apply absent a colonial statute to the contrary.<sup>219</sup> No such conflict arose with regard to criminal forfeiture, as the laws of colonial Rhode Island accorded almost uniformly with the English common law.<sup>220</sup>

The middle and southern colonies were even more receptive to English common law traditions regarding criminal forfeiture, enacting only minor statutory exceptions. In Virginia, for example, legislators passed a law in 1656 providing that the estate of a criminal who had been executed would remain in the possession of his family and for their use.<sup>221</sup> Prior to that time, the felon's estate would have been forfeited under the English common law rule.<sup>222</sup> When the legislature failed to reenact that law in 1660, however, Virginia reverted to the English common law practice with respect to criminal forfeiture.<sup>223</sup> Following Bacon's rebellion in 1676, many of those involved were convicted of treason, adjudged, and attainted; however, the king elected to pardon several of the rebels after conviction but before judgment, thus sparing

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<sup>219</sup> ACTS AND LAWS OF HIS MAJESTY'S COLONY OF RHODE-ISLAND, AND PROVIDENCE-PLANTATIONS, IN NEW-ENGLAND, IN AMERICA: FROM ANNO 1745, TO ANNO 1752, at 70–71 (Newport, J. Franklin 1752).

<sup>220</sup> See, e.g., LAWS AND ACTS OF HER MAJESTIES COLONY OF RHODE-ISLAND, AND PROVIDENCE-PLANTATIONS MADE FROM THE FIRST SETTLEMENT IN 1636 TO 1705, *supra* note 217, at 1–5 (noting that felonies such as homicide, treason, and misprision of treason were automatically punishable with forfeiture); see also Smith, *supra* note 191, at 29.

<sup>221</sup> SCOTT, *supra* note 191, at 109; see also Act of Mar. 10, 1655, reprinted in 1 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE IN THE YEAR 1619, at 397–98 (William Waller Hening ed., New York, R. & W. & G. Bartow 1823) (“*And be it further enacted*, That all prisoners be kept by the sherriffs of the county where the crime is committed until the first day of the quarter court or Assembly, & there be delivered unto the sherriffs of James Cittie according to an act of Assembly now in force dated in March, 1642; And in case the person on his tryall be condemned and executed there, his estate to remaine in the possession and to the use of his wife and children until further order.”).

<sup>222</sup> SCOTT, *supra* note 191, at 109; see, e.g., Extract from the Minutes of the Judicial Proceedings of the Governor and Council of Virginia (1630), reprinted in 1 STATUTES AT LARGE, *supra* note 221, at 145–46 (stating that even though a defendant was found guilty of stealing cattle, judgment would be withheld “till the king's pleasure known”). This case is an example of the English common law distinction that, even when a defendant had been convicted, his lands were not forfeited until judgment was entered. See *supra* note 160 (noting common law distinction between lands, which were forfeited upon attainder, and chattels, which were forfeited upon conviction); see also GOEBEL & NAUGHTON, *supra* note 188, at 710–11 (noting that chattels would be forfeit upon conviction, while lands would only be forfeit upon attainder); 1 HALE, *supra* note 162, at 343 (stating that if an offender “died after conviction and before judgment, there ensued neither attainder nor forfeiture of lands” (citation omitted)). The king could thus pardon the offender after conviction but prior to judgment, relieving him of the consequence of attainder and forfeiture. *Id.* at 368; J. M. BEATTIE, CRIME AND THE COURTS IN ENGLAND: 1660–1800, at 87 (1986). This authority may have been extended to some colonial governments as well. See, e.g., GOEBEL & NAUGHTON, *supra* note 188, at 713 (describing how New York colonial government afforded relief from forfeiture in certain circumstances).

<sup>223</sup> SCOTT, *supra* note 191, at 109.

the forfeiture of their lands.<sup>224</sup> Later, in the mid-eighteenth century, when creating a new felony, the Virginia legislature expressly limited the punishment for the offense by precluding forfeiture of land, chattels, or the dower and prohibiting corruption of the blood as penalties, suggesting that the traditional punishments would otherwise have applied.<sup>225</sup>

In Pennsylvania, the original charter expressly decreed that the laws of England regarding felonies would remain in effect unless altered by the colonial legislature.<sup>226</sup> After numerous piecemeal attempts at reforming English criminal law over the years, in 1718 Pennsylvania enacted a comprehensive penal code that restored English common law.<sup>227</sup> Specifically, the penal code required that all trials for high treason would be conducted “according to the due order and course of the common law, observing the directions of statute laws of Great Britain, relating to the trials, proceedings, and judgments in such cases.”<sup>228</sup> It also explicitly preserved the English common law with respect to attainder:

And when any person or persons shall be so as aforesaid convicted or attainted of any of the said crimes, they shall suffer as the laws of Great Britain now do, or hereafter shall, direct and require in such cases respectively. And it shall and may be lawful for the justices of the court, where any of the said attainders or convictions shall happen, to give and pronounce judgment or sentence against the persons so attainted or convicted, as their crimes respectively require, according to the manner, form and direction, of the laws of that part of Great Britain called England, in the like cases, and thereupon to award and order execution to be done accordingly.<sup>229</sup>

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<sup>224</sup> *Id.* at 109–10; *see also* Act of June 8, 1680, *reprinted in* 2 STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA FROM THE FIRST SESSION OF THE LEGISLATURE IN THE YEAR 1619, at 458–64 (William Waller Hening ed., New York, R. & W. & G. Bartow 1823).

<sup>225</sup> Act of Feb. 27, 1752, *reprinted in* 6 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE IN THE YEAR 1619, at 250 (William Waller Hening ed., Richmond, Franklin Press 1819). The fact that the legislature felt the need to add the proviso with regard to forfeiture and corruption of the blood further confirms that the English common law rule was still in effect at this time. Had Virginia common law modified or abridged the English rule, it would have been unnecessary to specifically preclude these penalties.

<sup>226</sup> *See* Smith, *supra* note 191, at 31.

<sup>227</sup> *See id.* at 31–33.

<sup>228</sup> Act of May 31, 1718, ch. XXXII, § 1, *reprinted in* THE GENERAL LAWS OF PENNSYLVANIA, *supra* note 191.

<sup>229</sup> *Id.* § 6, *reprinted in* THE GENERAL LAWS OF PENNSYLVANIA, *supra* note 191, at 68. Accessories to felonies also faced forfeiture under the penal code. *Id.* § 14, *reprinted in* THE GENERAL LAWS OF PENNSYLVANIA, *supra* note 191, at 69.

Several years later, Pennsylvania reined in slightly its criminal forfeiture laws by requiring that restitution of stolen goods be made by robbers or burglars to their victims prior to any forfeiture taking place.<sup>230</sup>

Unlike Pennsylvania, the colonists of New Jersey did not attempt to create any comprehensive penal code prior to the revolution, with only scattered statutes relating to criminal punishment.<sup>231</sup> In 1677, provision was made for the New Jersey *legislature* to determine sentencing for treason and murder; the petit jury, however, was not given sentencing discretion.<sup>232</sup> Indeed, the provision expressly distinguished between the finding of guilt—traditionally a function of the petit jury—and the imposition of sentence, which is traditionally a judicial function.<sup>233</sup> With this peculiar exception, it appears that the common law of England otherwise remained in force.<sup>234</sup>

The laws of the remaining colonies, meanwhile, evince no significant efforts to reform the English criminal law, either generally or specifically in regard to criminal forfeiture. Positive statutes affirming the application of English common law were passed in Delaware,<sup>235</sup> Maryland,<sup>236</sup> North Carolina,<sup>237</sup> and South Carolina.<sup>238</sup> The lack of any

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<sup>230</sup> Act of Sept. 23, 1791, § 9, reprinted in THE GENERAL LAWS OF PENNSYLVANIA, *supra* note 191, at 185.

<sup>231</sup> Smith, *supra* note 191, at 30–31.

<sup>232</sup> THE CONCESSIONS AND AGREEMENTS OF THE PROPRIETORS, FREEHOLDERS AND INHABITANTS OF THE PROVINCE OF WEST NEW JERSEY, IN AMERICA, ch. 31 (1677), available at <http://www.westjersey.org/ca77.htm>. While this was an unusual break from the English common law tradition, it does not evidence any expanded role for the petit jury in sentencing or the imposition of criminal forfeiture. Significantly, the finding of guilt (a finding to be made by the petit jury) was separate from the legislative sentencing procedure that would follow.

<sup>233</sup> *Id.*; see *supra* Part II.A.

<sup>234</sup> A review of colonial New Jersey's enactments during the eighteenth century shows no evidence of any law designed to supersede the English common law rules regarding criminal forfeiture. See generally ACTS OF THE GENERAL ASSEMBLY OF THE PROVINCE OF NEW-JERSEY: FROM THE SURRENDER OF THE GOVERNMENT TO QUEEN ANNE, ON THE 17TH DAY OF APRIL, IN THE YEAR OF OUR LORD 1702, TO THE 14TH DAY OF JANUARY 1776 (Samuel Allinson ed., Burlington, Isaac Collins 1776); see also Smith, *supra* note 191, at 30–31.

<sup>235</sup> LAWS OF THE GOVERNMENT OF NEW-CASTLE, KENT AND SUSSEX, UPON DELAWARE 30–42 (Philadelphia, B. Franklin & D. Hall 1741).

<sup>236</sup> 1 ARCHIVES OF MARYLAND: PROCEEDINGS AND ACTS OF THE GENERAL ASSEMBLY OF MARYLAND 23 (William Hand Browne ed., Baltimore, Historical Soc'y 1883) (“And whereas by an Act of Generall Assemblie held at St Maries on the six and twentieth day of Febr[uar]y 1634 among other wholesome law[is] and ordinances then made and provided for the welfare of this Province, it was enacted, that the Offenders in all murthers and felonies should suffer such paines, losses and forfeitures as they should or ought to have suffered in the like crimes in England.”). Although there was a subsequent dispute about the applicability of English penal law in Maryland, it does not appear to have altered the application of English common law with regard to criminal forfeitures. See Smith, *supra* note 191, at 17–19, 35–37.

<sup>237</sup> Act of Oct. 16, 1749, ch. 1, § VI, reprinted in 23 THE STATE RECORDS OF NORTH CAROLINA 317, 327 (Walter Clark ed., 1904).

enactments relating to criminal forfeiture in these colonies further confirms the applicability of the English common law tradition, with the accompanying lack of any role for the jury in determining the extent of criminal forfeiture.<sup>239</sup>

The only evidence of the petit jury taking on any role with regard to criminal forfeiture arises in colonial New York. Unlike the other colonies, in New York petit juries assumed the role, occupied in England by the coroner's jury, of reporting the defendant's property holdings with the verdict, in anticipation of their forfeiture.<sup>240</sup> Some juries would attempt to subvert the forfeiture by making a return of "no lands; no chattels," falsely indicating that the defendant owned nothing.<sup>241</sup> This return, however, did not prevent a later inquest into the defendant's property or the seizure and forfeiture thereof.<sup>242</sup> For example, in the 1766 case of Roger Dawson, a merchant convicted of manslaughter, even though the jury made a return of no chattels, its report was disregarded and Dawson's property was ultimately forfeited.<sup>243</sup> This result is consistent with the English common law rule

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<sup>238</sup> Act of Dec. 12, 1712, reprinted in 2 THE STATUTES AT LARGE OF SOUTH CAROLINA 401 (Thomas Cooper ed., Columbia, A. S. Johnston 1837); see also Smith, *supra* note 191, at 39–40, 59 n.231.

<sup>239</sup> See generally Smith, *supra* note 191.

<sup>240</sup> GOEBEL & NAUGHTON, *supra* note 188, at 713–18.

<sup>241</sup> Preyer, *supra* note 129, at 346 ("Even when it was clear that property existed, juries invariably reported that no lands or chattels were owned by those convicted.") (citing GOEBEL & NAUGHTON, *supra* note 188, at 710–18). Blackstone called the related practice of juries mitigating punishment by finding the defendant guilty of a lesser offense "pious perjury." 4 BLACKSTONE, *supra* note 156, at \*238. For a thorough discussion of the concept of "pious perjury," which the modern literature calls a "partial verdict," see LANGBEIN, *supra* note 187, at 57–60.

<sup>242</sup> See GOEBEL & NAUGHTON, *supra* note 188, at 710–18; see also Harvard Note, *supra* note 178, at 1937 ("Although it is true that at common law the jury customarily reported the size of the defendant's holdings after announcing the verdict in a felony case, this jury report was simply one of a number of bookkeeping devices used to facilitate collection of the forfeiture penalty."). Several commentators have incorrectly read Goebel and Naughton to claim that New York juries had the power to void forfeitures by failing to make a return of lands or chattels. See, e.g., Preyer, *supra* note 129, at 344 ("Juries often voided the forfeiture penalties, finding, either accurately or piously, that the convicted had no goods or chattels."). That is not the case. As Goebel and Naughton made clear, the failure of the petit jury to make a report did not preclude the later inquest and seizure of the defendant's property. See GOEBEL & NAUGHTON, *supra* note 188, at 710–18; Harvard Note, *supra* note 178, at 1937 n.47 ("In colonial New York, . . . the few forfeitures actually carried out often occurred in the face of a jury finding that the defendant owned nothing.").

<sup>243</sup> GOEBEL & NAUGHTON, *supra* note 188, at 715–16. The case of Mr. Dawson contained one other interesting twist. After his goods were forfeited, Dawson petitioned for pardon of the forfeiture and restitution of the goods and chattels that had been forfeited to the crown. The Council of New York determined that the king had vested in the governor the authority to pardon colonists and relieve them of forfeiture for all crimes except murder and treason. It appears, then, that New York lawmakers sometimes subverted the traditional rules of forfeiture,



that the judgment of conviction itself legally entailed the forfeiture of the defendant's property, without necessity of any jury determination of what property the defendant owned.<sup>244</sup>

Colonial modifications to the English common law of forfeiture appear to have been accomplished almost exclusively through statutes such as those described above.<sup>245</sup> Indeed, the very fact that some colonies found it necessary to pass such statutes suggests that the English common law rules otherwise applied.<sup>246</sup> Regardless, none of these reforms involved giving petit juries a role in determining the nature or extent of forfeiture after conviction. Instead, colonial juries, like their English counterparts, lacked any legal power to pardon a convicted felon from the penalty of forfeiture.<sup>247</sup> Thus, as a general rule, it appears that colonial petit juries continued the English common law practice, leaving the task of uncovering the defendant's property to the coroner.<sup>248</sup>

It was against the background of this colonial experience that our Constitution was drafted. The Framers were understandably bothered by the harshness of the English system of criminal penalties, especially the impact on innocent heirs of the corruption of the blood.<sup>249</sup> They provided in the Constitution that conviction for treason may not result in forfeiture of property or corruption of the blood except during the

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but did so by finding ways to ameliorate its effect within the context of the English common law tradition, without the participation of the jury.

<sup>244</sup> See Maxeiner, *supra* note 156, at 770 ("The exact property forfeit was specified in the sentence of judgment."); *supra* note 160 and accompanying text.

<sup>245</sup> See *supra* notes 207–30 and accompanying text.

<sup>246</sup> See SCOTT, *supra* note 191, at 109 (noting "stray" 1656 Virginia statute that temporarily abrogated the English common law rule of criminal forfeiture).

<sup>247</sup> See 2 STATUTES AT LARGE, *supra* note 224. The pardons following Bacon's rebellion had to come from the king; this was the only recourse to prevent forfeiture after the rebels had been convicted of treason.

<sup>248</sup> See SCOTT, *supra* note 191, at 107–08 & n.193; see also GOEBEL & NAUGHTON, *supra* note 188, at 713.

<sup>249</sup> A similar reform occurred in England in 1708. See 4 BLACKSTONE, *supra* note 156, at \*384 ("[I]n order to abolish such hereditary punishment entirely, it was enacted by statute 7 Ann. c. 21. that after the decease of the late pretender, no attainder of treason should extend to the disinheriting of any heir, nor to the prejudice of any person, other than the traitor himself."). Yet, Blackstone complained, corruption of the blood still endured. See *id.* at \*388 ("[Corruption of the blood] is one of those notions which our laws have adopted from the feudal constitutions, at the time of the Norman conquest . . . . And therefore, as every other oppressive mark of feudal tenure is now happily worn away in these kingdoms, it is to be hoped, that this *corruption of blood*, with all it's [sic] connected consequences, not only of present escheat, but of future incapacities of inheritance even to the twentieth generation, may in process of time be abolished by act of parliament . . . ."). Blackstone's view was vindicated by a bill passed in 1814 at the urging of Sir Samuel Romilly, by which corruption of the blood was abolished except in cases of murder. 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW \*387 (William M. Lacy ed., Philadelphia, Blackstone Publ'g Co., new & thoroughly rev. ed. 1889) (citing 54 Geo. III ch. 145).

lifetime of the offender.<sup>250</sup> The First Congress followed suit shortly thereafter by banning forfeiture and corruption of the blood altogether as penalties for federal crimes.<sup>251</sup> As a result, no federal law of criminal forfeiture developed in the period immediately after ratification, and criminal forfeiture thereafter became unknown in the federal system for almost two centuries.<sup>252</sup>

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<sup>250</sup> U.S. CONST. art. 3, § 3, cl. 2 (“The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.”).

<sup>251</sup> Act of Apr. 30, 1790, ch. 9, § 24, 1 Stat. 112, 117 (“[N]o conviction or judgment . . . shall work corruption of blood, or any forfeiture of estate.”); *United States v. Bajakajian*, 524 U.S. 321, 332 & n.7 (1998) (“Although *in personam* criminal forfeitures were well established in England at the time of the founding, . . . [t]he First Congress explicitly rejected *in personam* forfeitures as punishments for federal crimes . . .”). Some states followed suit by banning *in personam* forfeitures altogether, while others largely continued the English practice. See Maxeiner, *supra* note 156, at 780 n.73 (1977) (collecting state cases and statutes involving criminal forfeitures); *id.* at 795 n.162 (collecting state statutes and constitutional provisions parroting language of First Congress’s provision). At the same time, the distinct practice of civil forfeiture, *see supra* note 11, was approved by the Founding Fathers. A year earlier, the First Congress also passed statutes authorizing the seizure and civil forfeiture of items involved in customs offenses. See CASSELLA, *supra* note 11, § 2-2, at 29 (describing early statutes).

<sup>252</sup> Numerous commentators (and at least one court) have mistakenly claimed that the Confiscation Act of 1862 authorized the criminal forfeiture of property of Confederate rebels. See, e.g., *United States v. Nichols*, 841 F.2d 1485, 1487 (10th Cir. 1998); Todd Barnett & Ivan Fox, *Trampling on the Sixth Amendment: The Continued Threat of Attorney Fee Forfeiture*, 22 OHIO N.U. L. REV. 1, 4 n.16 (1995); Drew J. Fossum, *Criminal Forfeiture and the Attorney-Client Relationship: Are Attorneys’ Fees Up for Grabs?*, 39 SW. L.J. 1067, 1071 (1986); William J. Hughes & Edward H. O’Connell, Jr., *In Personam (Criminal) Forfeiture and Federal Drug Felonies: An Expansion of a Harsh English Tradition into a Modern Dilemma*, 11 PEPP. L. REV. 613, 619–20 (1984); Bruce J. Winick, *Forfeiture of Attorneys’ Fees Under RICO and CCE and the Right to Counsel of Choice: The Constitutional Dilemma and How to Avoid It*, 43 U. MIAMI L. REV. 765, 768 (1989); Vernon M. Winters, *Criminal RICO Forfeitures and the Eighth Amendment: ‘Rough’ Justice Is Not Enough*, 14 HASTINGS CONST. L.Q. 451, 458 n.55 (1987). Forfeitures under the Confiscation Act, however, were not criminal forfeitures, but rather, as the Supreme Court recognized in *Miller v. United States*, 78 U.S. (11 Wall.) 268 (1870), civil forfeitures. See *id.* at 289; *see also* Confiscation Act, Pub. L. 37-160, § 7, 12 Stat. 589, 591 (1862); *Miller*, 78 U.S. at 296 (noting that the act required “judicial proceedings, *in rem*, to be instituted” (italics added)). The Court expressly held that forfeitures under the Confiscation Acts were not criminal in nature, but instead were enacted under the war powers of the government. *Id.* at 304; *see also Nichols*, 841 F.2d at 1511 (Logan, J., dissenting). Indeed, contemporary commentators justified the Act by distinguishing its civil forfeitures from criminal forfeitures and bills of attainder. L. MADISON DAY, *THE CONSTITUTIONALITY AND LEGALITY OF CONFISCATIONS IN FEE* 55, 56 (New Orleans 1870) (“Proceedings *in rem*, then, for a forfeiture, although the forfeiture is intended as a punishment by the law-maker for the violation of law, are not to be regarded as criminal, but as *civil* proceedings. . . . [H]ere no one is accused of any crime; in fact, it is not a proceeding against any person.”). For more information regarding civil forfeitures, *see supra* note 11.

### C. *The Rebirth of Criminal Forfeiture*

Congress reinstated criminal forfeiture in 1970 when it enacted the Racketeer Influenced and Corrupt Organizations Act (RICO).<sup>253</sup> Perhaps the widest-ranging criminal law ever passed, RICO arose as part of a Congressional effort to combat organized crime, most notably the Mafia.<sup>254</sup> In addition to expanding criminal liability for individuals who advanced the purposes of criminal organizations, RICO also permitted the government to seize and forfeit the criminal proceeds that supported the economic infrastructure of those organizations.<sup>255</sup> Recognizing that such organizations regard their individual members as relatively dispensable, Congress sought to sever the root that motivated the criminal enterprise and gave it continued life: its assets.<sup>256</sup>

As Congress recognized, RICO forfeitures “represent[ed] an innovative attempt to call on our common law heritage to meet an essentially modern problem.”<sup>257</sup> Yet in developing the modern forfeiture scheme, Congress significantly altered the character of criminal forfeiture from its common law origins. The common law did not consider it relevant whether property subject to criminal forfeiture was connected in any respect with underlying criminal activity; rather, the

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<sup>253</sup> Pub. L. 91-452, § 901, 84 Stat. 941 (1970) (codified as amended at 18 U.S.C. §§ 1961–1968 (2012)); see *United States v. L’Hoste*, 609 F.2d 796, 813 n.15 (5th Cir. 1980) (“By enacting [the criminal forfeiture provisions of RICO], Congress revived the concept of forfeiture as a criminal penalty against the individual, since the proceeding is *in personam* against the defendant and the forfeiture is part of the punishment.” (italics added)).

<sup>254</sup> See *United States v. Ginsburg*, 773 F.2d 798, 802 (7th Cir. 1985) (en banc) (“As virtually every court that has interpreted any provision of RICO has recognized, RICO’s legislative history clearly demonstrates that the statute was intended as a comprehensive and unprecedented attack on organized crime and its economic bases.”).

<sup>255</sup> See 18 U.S.C. § 1963(a) (2012) (authorizing forfeiture of proceeds of RICO enterprise).

<sup>256</sup> *Caplin & Drysdale, Chartered 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 CCE forfeiture provisions has been the desire to lessen the economic power of organized crime and drug enterprises.”); *Russello v. United States*, 464 U.S. 16, 26–27 (1983) (describing legislative history indicating Congressional purpose to make “an attack . . . on [racketeers’] source of economic power itself” (quoting S. REP. NO. 91-617, at 79 (1969)); *United States v. Gilbert*, 244 F.3d 888, 909 (11th Cir. 2001) (“The RICO statute . . . was intended to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime. One such weapon in the RICO arsenal was the forfeiture scheme, which sought to strike at the heart of an illegal enterprise by confiscating tainted property and proceeds in hopes of putting the criminal enterprise out of business.” (citations omitted) (quoting another source) (internal quotation marks omitted)); *Ginsburg*, 773 F.2d at 802 (“The goal of RICO’s forfeiture provision was ‘to remove the profit from organized crime by separating the racketeer from his dishonest gains.’” (quoting *Russello*, 464 U.S. at 28)).

<sup>257</sup> S. REP. NO. 91-617, at 79 (1969).

offender's entire estate was forfeited on account of his being a felon.<sup>258</sup> Yet in RICO, for the first time in history, whether property could be criminally forfeited came to depend upon its relationship to the offense itself.<sup>259</sup> Congress also departed from the common law tradition by providing a right under the Federal Rules of Criminal Procedure to have that relationship found by the jury.<sup>260</sup>

Realizing that its utility was not limited to combatting Mafia-type organizations, Congress soon saw fit to employ criminal forfeiture to address another perennial law enforcement challenge: drug crime. In the Comprehensive Drug Abuse Prevention and Control Act of 1970, Congress provided the government with limited forfeiture authority for property involved in the production of drugs and any vehicles involved in their transportation.<sup>261</sup> Congress amended the statute in 1978 to authorize the criminal forfeiture of drug proceeds<sup>262</sup> and, in 1984, expanded it to encompass real property that facilitated drug-related offenses.<sup>263</sup> To address situations where the government was unable to locate any such property due to the actions of the defendant, Congress next provided for the criminal forfeiture of so-called "substitute property," i.e., criminally uninvolved property owned by the defendant that could be forfeited in place of any assets that the defendant had

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<sup>258</sup> See *supra* notes 156–63 and accompanying text. Historically, the connection of forfeitable property to a criminal offense has been a hallmark of civil (as opposed to criminal) forfeiture. See *supra* note 11. See generally Terrence G. Reed, *On the Importance of Being Civil: Constitutional Limitations on Civil Forfeiture*, 39 N.Y.L. SCH. L. REV. 255, 256–73 (1994) (discussing "taint theory" as the distinguishing feature of civil forfeiture laws).

<sup>259</sup> See CASSELLA, *supra* note 11, § 2-4, at 33–34 ("The idea of forfeiting the proceeds of crime was entirely new, and forfeiting facilitating property meant that the Government could confiscate not only the instrument actually used to commit the offense . . . but also any property that made the crime easier to commit or harder to detect."); see also 1 BISHOP, *supra* note 174, § 944 ("We have no precedents [at common law] for a general practice of sentencing prisoners to forfeit particular articles of property, instead of, or in addition to, a fine of a specified sum of money. But such forfeitures are sometimes required by statutes . . ."). Unlike most criminal forfeitures, RICO forfeiture is not strictly limited to property that is related to the offense of conviction; it also reaches any ownership interest that the defendant has in the underlying criminal enterprise. See *United States v. Segal*, 495 F.3d 826, 838–39 (7th Cir. 2007); *United States v. Busher*, 817 F.2d 1409, 1413 (9th Cir. 1987); *United States v. Anderson*, 782 F.2d 908, 917–18 (11th Cir. 1986).

<sup>260</sup> The jury trial right of former Rule 31(e) was initially adopted by the Supreme Court at the suggestion of the Advisory Committee in April 1972 and went into effect three months later as a result of Congressional inaction. See Order of April 24, 1972, Orders of the Supreme Court of the United States Adopting and Amending Rules, reprinted in ALAN WRIGHT ET AL., 19A FED. PROC. PROC. JURIS. APP. SUP. CT. ORDERS (2d ed. 2013).

<sup>261</sup> Pub. L. 91-513, § 511(a), 84 Stat. 1236, 1276 (codified as amended at 21 U.S.C. § 881(a) (2012)).

<sup>262</sup> Psychotropic Substances Act of 1978, Pub. L. 95-633, § 301(a), 92 Stat. 3768, 3777 (codified at 21 U.S.C. § 881(a) (2012)); see CASSELLA, *supra* note 11, § 2-4, at 33.

<sup>263</sup> Comprehensive Forfeiture Act of 1984, Pub. L. 98-473, §§ 302–03, 98 Stat. 2040, 2040–46 (codified as amended at 18 U.S.C. § 1963, 21 U.S.C. § 853 (2012)); see CASSELLA, *supra* note 11, § 2-4, at 33.

disposed of or otherwise squirreled away.<sup>264</sup> Congress also empowered third-party owners by giving them a statutory right to challenge the forfeiture on the ground that the property belonged to them prior to the commission of the illegal act, or, alternatively, that they were bona fide purchasers of the property who had no notice of the illegal activity.<sup>265</sup>

In the four decades since RICO, Congress has consistently expanded the number of offenses for which forfeiture was an available penalty.<sup>266</sup> Congress made its most significant expansion when it passed the Civil Asset Forfeiture Reform Act of 2000 (CAFRA).<sup>267</sup> Prior to CAFRA, the piecemeal enactment of the forfeiture statutes had led to unprincipled inconsistency in which crimes permitted criminal forfeiture and which did not. Through CAFRA and subsequent amendments, Congress has made criminal forfeiture an available penalty for most major federal felonies.<sup>268</sup> While the court's forfeiture authority still varies from crime to crime, the court can almost always criminally forfeit the proceeds of crime,<sup>269</sup> can often forfeit property that facilitated or was otherwise involved in the crime,<sup>270</sup> and may forfeit substitute property in any case where property related to the offense has been placed beyond its reach by the defendant.<sup>271</sup> It may not, however, forfeit any property in excess of the total value of the property involved in or derived from the offense.<sup>272</sup>

Also in 2000, at the same time that it expanded the criminal offenses for which forfeiture was a penalty, Congress sought to

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<sup>264</sup> See Anti-Drug Abuse Act of 1986, Pub. L. 99-570, § 1153, 100 Stat. 3207 (codified as amended at 18 U.S.C. § 1963(m), 21 U.S.C. § 853 (2012)); see also *infra* Part III.A.3. Congress had previously rejected a provision authorizing the forfeiture of substitute property in the Comprehensive Crime Control Act of 1984. See Reed, *supra* note 258, at 276 (summarizing legislative history).

<sup>265</sup> See Comprehensive Forfeiture Act of 1984 §§ 302–03. These third-party defenses to criminal forfeitures are codified at 18 U.S.C. § 1963(m) and 21 U.S.C. § 853(n) and discussed in greater detail *infra* at note 360.

<sup>266</sup> See CASSELLA, *supra* note 11, § 2-4, at 36.

<sup>267</sup> Pub. L. No. 106-185, 114 Stat. 202 (codified as amended in scattered sections of 18, 28 U.S.C. (2012)). CAFRA modified procedural and substantive forfeiture law in numerous ways, but arguably its most important innovation was contained in 28 U.S.C. § 2461(c) (2012). That provision states that any property whose civil forfeiture is authorized by statute may also be recovered in a criminal case, and that the procedures set forth in the Controlled Substances Act, including those pertaining to substitute property and third-party ownership, apply in all criminal forfeiture proceedings. *Id.*; see also 21 U.S.C. § 853 (2012) (setting forth procedures applicable to criminal forfeiture).

<sup>268</sup> See CASSELLA, *supra* note 11, § 1-3(a), at 5 (stating that forfeiture is a penalty for more than 200 federal felonies).

<sup>269</sup> See *infra* Part III.A.1.

<sup>270</sup> See *infra* Part III.A.2.

<sup>271</sup> See *infra* Part III.A.3.

<sup>272</sup> Unless, of course, that very property has increased in value since it was obtained by the defendant. See CASSELLA, *supra* note 11, § 25-4(c), at 908 n.39 (collecting cases).

standardize the procedures applicable to criminal forfeiture through its approval of Rule 32.2 to the Federal Rules of Criminal Procedure.<sup>273</sup> Notably, subsection (b)(4) of the Rule preserved the defendant's limited right to obtain a jury determination as to whether any specifically identified property bore the necessary relationship to the offense.<sup>274</sup> It also affirmed the rule that ownership issues were for the judge to decide,<sup>275</sup> and it expressly disclaimed any role for the jury in adjudicating the forfeiture of substitute or subsequently discovered property.<sup>276</sup>

As the foregoing history suggests, the common law origins of criminal forfeiture are distant indeed. The English common law concept of criminal forfeiture involved abolishing the offender's property rights *in toto*, leaving him and even his heirs penniless.<sup>277</sup> The jury lacked any legal power to mitigate the scope of forfeiture, or even its impact on innocent third parties.<sup>278</sup> Despite the patchwork efforts of the American colonists to mollify the harsh consequences of traditional criminal forfeiture, the English common law practice persisted until expressly abolished by statute in the early days of the republic.<sup>279</sup> The next Part will compare that historical practice with the modern criminal forfeiture statutes described above, which are generally limited to those items that are related to the offense, or, in the case of substitute property, that are

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<sup>273</sup> FED. R. CRIM. P. 32.2. The new rule "consolidate[d] a number of procedural rules governing the forfeiture of assets in a criminal case." FED. R. CRIM. P. 32.2 advisory committee's note. Before Rule 32.2, the provisions pertaining to criminal forfeiture were scattered among Federal Rules of Criminal Procedure 7, 31, 32, and 38. *See id.*

<sup>274</sup> The provision, originally enacted as subsection (b)(4), was later moved to subsection (b)(5)(A) of Rule 32.2. FED. R. CRIM. P. 32.2(b)(5)(A); *see also* FED. R. CRIM. P. 32.2 advisory committee's note ("Although an argument could be made under *Libretti*, that a jury trial is no longer appropriate on any aspect of the forfeiture issue, which is a part of sentencing, the Committee decided to retain the right for the parties, in a trial held before a jury, to have the jury determine whether the government has established the requisite statutory nexus between the offense and the property to be forfeited. The jury, however, would not have any role in determining whether a defendant had an interest in the property to be forfeited.").

<sup>275</sup> *See* FED. R. CRIM. P. 32.2(c) ("If . . . a third party files a petition asserting an interest in the property to be forfeited, *the court* must conduct an ancillary proceeding . . ." (emphasis added)); *see also id.* advisory committee's note ("A more sensible procedure would be for the court, once it (or a jury) determines that property was involved in the criminal offense for which the defendant has been convicted, to order the forfeiture of whatever interest a defendant may have in the property without having to determine exactly what that interest is. If third parties assert that they have an interest in all or part of the property, those interests can be adjudicated at one time in the ancillary proceeding."); *infra* note 352. The committee's approach appears to be consistent with the latter practice of the English common law. *See supra* note 173 and accompanying text.

<sup>276</sup> FED. R. CRIM. P. 32.2(e)(3).

<sup>277</sup> *See supra* Part II.A.

<sup>278</sup> *See supra* Parts II.A, II.B.

<sup>279</sup> *See supra* Part II.B.

forfeited in place of such items.<sup>280</sup> Modern criminal forfeiture, therefore, represents a statutory innovation on its common law foundations, one that reins in the powers of the government from what was permitted under English and colonial common law.<sup>281</sup>

### III. MODERN CRIMINAL FORFEITURE

As discussed in the preceding Part, common law criminal forfeiture was essentially without limits.<sup>282</sup> The penalty of attainder upon conviction of a felony entailed the total deprivation of the offender's property rights, reaching even hereditary interests.<sup>283</sup> But unlike common law attainder, modern statutory criminal forfeiture generally does not reach all of the defendant's property.<sup>284</sup> Instead, the court's forfeiture authority is ordinarily limited to certain specified categories of property that bear some connection to the offense.<sup>285</sup> Modern forfeiture statutes have also given the jury a role it never had at common law in determining the relationship of the property to the offense.<sup>286</sup> This Part describes the current state of criminal forfeiture in the federal system<sup>287</sup> in order to illuminate the measurable differences with the historical practice described above, with particular emphasis on the limited role of the jury in the modern statutory scheme.

#### A. *The Limited Reach of Modern Forfeiture Statutes*

In modern criminal practice,<sup>288</sup> forfeiture is a mandatory part of the sentence imposed upon a defendant convicted of committing a

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<sup>280</sup> See *infra* Part III.A.

<sup>281</sup> See *infra* Part IV.A.

<sup>282</sup> See *supra* Part II.

<sup>283</sup> See *supra* notes 156–73 and accompanying text.

<sup>284</sup> See *infra* Part III.A. The notable exception is 18 U.S.C. § 981(a)(1)(G), which authorizes the forfeiture of all property of a person engaged in terrorism. 18 U.S.C. § 981(a)(1)(G) (2012).

<sup>285</sup> See *infra* Parts III.A.1, III.A.2. The concept of forfeitable property bearing a relationship to the offense likely arises from the similar but historically distinct practice of civil forfeiture. See *supra* note 258.

<sup>286</sup> See *infra* Part III.B.

<sup>287</sup> For an exhaustive overview of criminal forfeiture in the federal system, see CASSELLA, *supra* note 11, chs. 15–24.

<sup>288</sup> This Section discusses the authority available for criminal forfeiture in the federal system. Although it is important to distinguish between criminal forfeiture and civil forfeiture for many purposes, see *supra* note 11, there is no distinction in the scope of modern criminal and civil forfeiture that would be relevant to the instant analysis. Thanks to 28 U.S.C. § 2461, which authorizes criminal forfeiture for any statute that provides for civil forfeiture, there are no longer any offenses that authorize civil but not criminal forfeiture. See CASSELLA, *supra* note 11, § 15-4, at 576.

federal crime.<sup>289</sup> As such, criminal forfeiture is only available after the defendant's guilt has been proven beyond a reasonable doubt.<sup>290</sup> Due, however, to the haphazard enactment of the federal forfeiture statutes,<sup>291</sup> there is no single statute that defines the reach of forfeiture for all federal crimes.<sup>292</sup> While most major felonies in the United States Code involve some kind of forfeiture as a penalty,<sup>293</sup> ascertaining the precise authorizing statutes for a particular offense often requires embarking upon a sort of legislative safari.<sup>294</sup> For present purposes, however, it will

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<sup>289</sup> See *Alexander v. United States*, 509 U.S. 544, 562 (1993) (“A RICO conviction subjects the violator not only to traditional, though stringent, criminal fines and prison terms, but also mandatory forfeiture under § 1963.”); *United States v. Monsanto*, 491 U.S. 600, 607 (1989) (“Congress could not have chosen stronger words to express its intent that forfeiture be mandatory in cases where the statute applied . . .”); see also *United States v. McGinty*, 610 F.3d 1242, 1246 (10th Cir. 2010) (holding that issuance of money judgment is mandatory under § 982(a)(2)); *United States v. Alamoudi*, 452 F.3d 310, 314 (4th Cir. 2006) (recognizing that the forfeiture of substitute property is likewise mandatory); CASSELLA, *supra* note 11, § 20-2, at 708 & n.4 (collecting circuit court cases).

<sup>290</sup> The same is not true in civil forfeiture cases. See *supra* note 11. In civil forfeiture cases, the elements of the government's case, including any underlying criminal or regulatory violation, may be established merely by a preponderance of the evidence, or in certain cases, on a bare showing of probable cause. See 18 U.S.C. § 983(c) (2012) (specifying burden of proof in actions under “any civil forfeiture statute” to be preponderance); *id.* § 983(i) (exempting certain offenses, including any violations of the customs laws, from the definition of “civil forfeiture statute”); 19 U.S.C. § 1615 (2012) (establishing burden of proof in customs cases as being probable cause); see also CASSELLA, *supra* note 11, § 11-2, at 453–56 (discussing impact of §§ 983(c) and 983(i) on burden of proof in civil forfeiture cases). In part because of this lower burden of proof, prosecutors will often utilize civil forfeiture in cases where the government is able to establish a particular property's connection to criminal activity but cannot establish the identity of the perpetrator of the crime beyond a reasonable doubt (or, in some cases, where they simply cannot apprehend him). See *id.* § 1-5(a)(1) (explaining procedural advantages of civil forfeiture); 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. MONEY LAUNDERING CONTROL 8, 10 (2008) (detailing other circumstances where civil forfeiture is necessary to reach criminally derived property).

<sup>291</sup> See *supra* Part II.C.

<sup>292</sup> See CASSELLA, *supra* note 11, § 1-3, at 4. This stands in stark contrast to the laws of other countries, where a single statute typically provides broad forfeiture authority for felonies. See *id.*

<sup>293</sup> See *id.* § 1-3(a), at 5 (noting that a conviction for more than 200 federal felonies and numerous state crimes carries with it the forfeiture of criminal proceeds).

<sup>294</sup> To take an example, consider the legislative cross-references required to determine the forfeiture authority for a violation of 21 U.S.C. § 331, which prohibits the distribution of misbranded or adulterated drugs. See 21 U.S.C. § 331 (2012). One must first make reference to 18 U.S.C. § 981(a)(1)(C), which permits the civil forfeiture of all proceeds traceable to “any offense constituting ‘specified unlawful activity.’” See 18 U.S.C. § 981(a)(1)(C) (2012). That term is in turn defined in 18 U.S.C. § 1956(c)(7) to include “any act or activity constituting an offense involving a Federal health care offense.” 18 U.S.C. § 1956(c)(7)(F) (2012). “Federal health care offense” is defined by 18 U.S.C. § 24, which includes any violation of 21 U.S.C. § 331, but only if the violation “relates to a health care benefit program,” a term defined in the same section of title 18. 18 U.S.C. § 24 (2012). Because civil forfeiture of proceeds is therefore authorized for certain violations of 21 U.S.C. § 331, criminal forfeiture is likewise permitted pursuant to 28 U.S.C. § 2461(c). See 28 U.S.C. § 2461(c) (2012). While this example may be extreme, it is not a gross exaggeration from the typical case. See, e.g., *United States v. St. Pierre*,



be useful to group these statutes into three broad categories: (1) those which authorize the forfeiture of *criminally derived* property, (2) those which authorize the forfeiture of *criminally involved* property, and (3) those which authorize the forfeiture of so-called “substitute” property.<sup>295</sup> Except where property falling into these categories happens to constitute the offender’s total net worth, modern criminal forfeiture does not permit the forfeiture of an offender’s entire estate, as would have been the case at common law.<sup>296</sup>

### 1. Forfeiture of Criminally Derived Property

Nearly all major federal crimes carry with them the forfeiture of any property derived from the offense, thanks primarily to 18 U.S.C. § 981(a)(1)(C), which is the nearest thing to a comprehensive forfeiture provision in the United States Code.<sup>297</sup> Thanks to a tortured series of cross-references,<sup>298</sup> that provision authorizes the criminal forfeiture of “[a]ny property, real or personal, which constitutes or is derived from

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809 F. Supp. 2d 538, 542 nn.2 & 3 (E.D. La. 2011) (explaining how § 981(a)(1)(C) authorizes forfeiture for violations of §§ 666 and 1343).

<sup>295</sup> Stefan D. Cassella has further delineated the second category of criminally involved property by distinguishing what he calls forfeitures of “facilitating property” from forfeitures of property that is merely “involved in” an offense. See CASSELLA, *supra* note 11, § 25-1, at 894. As Cassella notes, some statutes, such as 21 U.S.C. § 853, limit their reach to the forfeiture of property “used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, the offense.” See *id.* § 26-2, at 940 (emphasis omitted). These statutes are narrower in scope than 18 U.S.C. § 982(a)(1), discussed *infra* notes 309–14, which permits the forfeiture of any property “involved in” certain offenses. 18 U.S.C. § 982(a)(1) (2012). While Professor Finneran can testify, as a forfeiture practitioner, that it is of immense practical importance to distinguish between “involved in” property and “facilitating” property forfeitures, such a distinction is unimportant for the present discussion. This Article therefore adopts the label “criminally involved property” to include both “involved in” property and “facilitating” property, as Cassella defines the terms.

<sup>296</sup> See *supra* notes 160–63 and accompanying text. The notable exception is 18 U.S.C. § 981(a)(1)(G), which authorizes the forfeiture of all property of a person engaged in terrorism. 18 U.S.C. § 981(a)(1)(G) (2012).

<sup>297</sup> CASSELLA, *supra* note 11, § 1-3(a), at 5 (“The closest Congress has come to enacting one all-powerful forfeiture statute is 18 U.S.C. § 981(a)(1)(C), which authorizes the forfeiture of the proceeds of more than 200 different state and federal crimes.”).

<sup>298</sup> Section 981(a)(1)(C) authorized the civil forfeiture of any property traceable to the proceeds of a “specified unlawful activity,” a term defined in 18 U.S.C. § 1956(c)(7) to encompass more than 200 federal crimes through its cross-reference to 18 U.S.C. § 1961(1). Although section 981 pertains directly to civil forfeiture, 28 U.S.C. § 2461(c) makes criminal forfeiture available for all statutes under which civil forfeiture is authorized. See *United States v. Newman*, 659 F.3d 1235, 1239 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 1817 (2012); *supra* note 294 (giving an example of statutory cross-references necessary to determine forfeiture authority associated with sale of misbranded or adulterated drugs).

proceeds traceable to” most major federal crimes.<sup>299</sup> “Proceeds” is further defined by 18 U.S.C. § 981(a)(2)(A) to include “property of any kind obtained directly or indirectly, as the result of the commission of the offense giving rise to forfeiture, and any property traceable thereto.”<sup>300</sup> Property is “traceable” to criminal proceeds if it is acquired through an exchange or series of transactions involving those proceeds.<sup>301</sup> As a general rule, any proceeds must be traced to the specific illegal act from which they were derived in order to be subject to forfeiture.<sup>302</sup> When the government charges a conspiracy or so-called “scheme” offense, however, the proceeds must be traced merely to the conspiracy or scheme as a whole.<sup>303</sup>

Of particular importance in the forfeiture of criminal proceeds is what courts have termed the “relation-back doctrine.” According to that principle, the government’s interest in forfeitable property vests the moment the illegal act occurs, and therefore is prior and superior to the interest of any subsequent owner.<sup>304</sup> In the case of proceeds, application

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<sup>299</sup> 18 U.S.C. § 981(a)(1)(C). The term “proceeds” is broadly defined to encompass any property that would not have been obtained or retained if not for the illegal activity. *United States v. Simmons*, 154 F.3d 765, 770 (8th Cir. 1998).

<sup>300</sup> 18 U.S.C. § 981(a)(2)(A) (2012). That provision, which applies to cases “involving illegal goods, illegal services, unlawful activities, and telemarketing and health care fraud schemes,” also provides that the term “proceeds . . . is not limited to the net gain or profit realized from the offense.” *Id.* The statute provides a different definition for cases “involving lawful goods or lawful services that are sold or provided in an illegal manner,” in which case the term “proceeds” is limited to “the amount of money acquired through the illegal transactions resulting in the forfeiture, less the direct costs incurred in providing the goods or services.” *Id.* § 981(a)(2)(B). The subject of when and to what extent the costs of a criminal enterprise should be deducted from any order of forfeiture is considered in detail in CASSELLA, *supra* note 11, § 25-4(d).

<sup>301</sup> See CASSELLA, *supra* note 11, § 25-4(b), at 904–05 & nn. 29–31 (collecting cases).

<sup>302</sup> *Id.* § 25-4(b), at 904. In drug cases, a rebuttable presumption exists that property of the defendant is traceable to criminal proceeds if it was acquired during the period of the illegal activity and has no other likely source. See 21 U.S.C. § 853(d) (2012) (creating presumption); 28 U.S.C. § 2461(c) (2012) (exempting the § 853(d) presumption from application to non-drug cases). At least one court has explicitly recognized that a lack of legitimate income is likewise prima facie evidence that the property is traceable to criminal proceeds in the context of a criminal fraud. See *United States v. Melrose E. Subdivision*, 357 F.3d 493, 507 n.18 (5th Cir. 2004).

<sup>303</sup> *United States v. Elder*, 682 F.3d 1065, 1073 (8th Cir. 2012) (“A conspirator’s forfeiture liability is not limited to the amount the government proves he personally obtained. He is jointly and severally liable to forfeit the proceeds of the criminal enterprise.”); *United States v. Venturella*, 585 F.3d 1013, 1015, 1017 (7th Cir. 2009) (noting that forfeiture in mail fraud case “is not limited to the amount of the particular mailing but extends to the entire scheme”).

<sup>304</sup> See *United States v. 92 Buena Vista Ave.*, 507 U.S. 111, 126–27 (1993) (plurality opinion) (“By the settled doctrine of this court, whenever a statute enacts that upon the commission of a certain act specific property used in or connected with that act shall be forfeited, the forfeiture takes effect immediately upon the commission of the act; the right to the property then vests in the United States, *although their title is not perfected until judicial condemnation*; the forfeiture constitutes a statutory transfer of the right to the United States at the time the offence is committed; and the condemnation, *when obtained*, relates back to that time, and avoids all

of the relation-back doctrine means that the government's interest in forfeitable property is always prior to the interest of any other claimants, since its interest vests at the time the property is acquired by the offender.<sup>305</sup> In the case of criminally involved property, by contrast, the government may have to compete for its claim against third parties who had title prior to the commission of the illegal act.<sup>306</sup> Since the criminal forfeiture statutes permit third-party interests to be forfeited only in limited circumstances,<sup>307</sup> a claim of ownership that predates the acts for

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intermediate sales and alienations, even to purchasers in good faith.” (quoting *United States v. Stowell*, 133 U.S. 1, 16–17 (1890)); *see also* *United States v. Nava*, 404 F.3d 1119, 1124, 1129 (9th Cir. 2005); *United States v. Totaro*, 345 F.3d 989, 993, 996 (8th Cir. 2003); *Rashid v. Powell (In re Rashid)*, 210 F.3d 201, 209 (3d Cir. 2000). The relation-back doctrine has ancient common law origins. *See supra* note 163.

<sup>305</sup> *United States v. Timley*, 507 F.3d 1125, 1130 (8th Cir. 2007) (“[A] third party can never have a successful claim under § 853(n)(6)(A) if the property was the proceeds of an offense. . . . [T]he proceeds of an offense do not exist before the offense is committed, and when they come into existence, the government’s interest under the relation-back doctrine immediately vests.” (citing *United States v. Hooper*, 229 F.3d 818, 821–22 (9th Cir. 2000)); *see also* *United States v. Erpenbeck*, 682 F.3d 472, 477 (6th Cir. 2012) (noting that interest in “tainted property . . . vest[s] in the government at the time of” the offense); CASSELLA, *supra* note 11, § 23-15(b); *id.* § 23-15(f), at 846.

<sup>306</sup> *See* CASSELLA, *supra* note 11, § 23-15(a), at 838–40.

<sup>307</sup> It is sometimes said that the *in personam* nature of criminal forfeiture implies that the property of a third party cannot be forfeited as part of a criminal case. *See, e.g., Totaro*, 345 F.3d at 997 (claiming that *in personam* forfeiture is limited to a defendant’s own interest in property to be forfeited). But that is an overstatement. There are at least three circumstances in which property belonging to someone other than the defendant can be forfeited in a criminal case.

The first two are set out expressly in 21 U.S.C. § 853(n)(6)(B), which provides that property may be criminally forfeited from a third party if the third party either (1) was not a bona fide purchaser for value or (2) acquired title at a time when he had reasonable cause to believe the property was subject to forfeiture. 21 U.S.C. § 853(n)(6)(B) (2012); *see infra* note 360 (discussing third-party claims in criminal forfeiture cases). This provision is designed to prevent fraudulent transfers of property and therefore may be understood, consistent with the *in personam* character of criminal forfeiture, as a prophylactic against such transfers. *See* *United States v. Gilbert*, 244 F.3d 888, 903 n.38 (11th Cir. 2001) (describing legislative purpose of subsequent transfer rule “to close a potential loophole in current law whereby the criminal forfeiture sanction could be avoided by transfers that were not ‘arms’ [sic] length.” (quoting S. REP. NO. 98-225, at 200–01 (1984) (internal quotation marks omitted), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3383–84); *see also supra* note 163 (discussing similar rule at common law).

But there is yet a third (and rather common) circumstance where the property of a third party can be forfeited in a criminal case—namely, where the third party fails to lay claim to it. Critically, a defendant lacks standing to challenge the criminal forfeiture of property on the ground that it does not belong to him: under the statutory scheme (and principles of Article III standing), that challenge is reserved for the party who holds any such competing interest. *United States v. Andrews*, 530 F.3d 1232, 1236 (10th Cir. 2008) (stating that when the court determines the forfeitability of property, it “does not—and, indeed, may not—determine the rights of . . . third parties . . . in the property,” as the ownership issue is deferred to the ancillary proceeding). Yet not all claimants who in fact have such an interest will intervene to assert a claim, and others may have valid claims but procedurally default. Nonetheless, those third parties’ interests are extinguished by the completion of the forfeiture proceedings. In this respect, the ancillary proceeding bears a strong resemblance to a common law quiet title action, which likewise proceeds *in personam*. *See* 74 C.J.S. *Quieting Title* § 7 (“The fundamental

which the defendant was convicted will almost invariably bar criminal forfeiture of the property.<sup>308</sup>

## 2. Forfeiture of Criminally Involved Property

Numerous federal statutes also authorize the forfeiture of property that is involved in (as opposed to derived from) a criminal offense.<sup>309</sup> Exemplary among these is 18 U.S.C. § 982(a)(1), which provides that “[a] court, in imposing sentence on a person convicted of [a money laundering offense] shall order that the person forfeit to the United States any property, real or personal, involved in such offense, or any property traceable to such property.”<sup>310</sup> As interpreted by federal courts, property “involved in” an offense may include property that forms the subject matter of the offense,<sup>311</sup> that facilitates the offense by concealing, disguising, or otherwise furthering it,<sup>312</sup> or that is involved in an exchange connected to the offense,<sup>313</sup> including property that is

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doctrine of equity, that every action in equity is purely an action *in personam*, applies to actions to remove clouds from title unless it is abrogated by statute.” (italics added)); *infra* notes 359, 387.

<sup>308</sup> That is not to say that the government is without recourse in such cases. If the government has reason to believe that the claimant knowingly permitted the illegal use of his property, it may elect to bring a civil forfeiture complaint against the property itself. *See supra* note 11. Although it is enough in a criminal forfeiture proceeding for a petitioner to show that he had title prior to the commission of the illegal act, in order for a civil forfeiture claimant to avoid the forfeiture, he must additionally establish that his ownership was “innocent,” i.e., that he did not know that the illegal activity was occurring. *See* 18 U.S.C. § 983(d)(2) (2012). The procedures applicable to such a proceeding are discussed *infra* at note 341.

<sup>309</sup> *See, e.g.*, 18 U.S.C. § 982(a)(1) (2012) (authorizing forfeiture of property “involved in” money laundering offenses); 21 U.S.C. § 853(a)(2) (2012) (authorizing forfeiture of property facilitating a drug offense).

<sup>310</sup> 18 U.S.C. § 982(a)(1) (2012). Numerous other statutes speak less broadly than § 982(a)(1). For example, 21 U.S.C. § 853(a)(2), is limited to property that *facilitates* the offense. Other statutes are even more specific. *See infra* note 315 and accompanying text. While the distinctions among these various statutes will be critical in a given case, it is useful to our inquiry to group all such statutes as permitting the forfeiture of “criminally involved” property. *See supra* note 295.

<sup>311</sup> *See* CASSELLA, *supra* note 11, § 27-7, at 978 (“[C]ourts have held unanimously that the term ‘property involved’ should be read broadly to include the money or other property being laundered (the ‘corpus’ or ‘subject matter’ of the . . . offense) . . . .”); *see also id.* § 27-9, at 983.

<sup>312</sup> *See id.* § 26-2, at 941 (“[F]acilitating property’ . . . refer[s] to any property that makes a crime easier to commit or harder to detect.”); *id.* § 26-3, at 942 n.16 (collecting cases); *id.* § 27-7, at 978 (noting that property “involved in” a money laundering offense includes property used to facilitate its commission). Cassella distinguishes “instrumentalities and facilitating property” from property “involved in” the offense, a distinction which, while important in practice, is inconsequential to the instant analysis. *See supra* note 295.

<sup>313</sup> *See* CASSELLA, *supra* note 11, § 27-9(b), at 986 (discussing ability of government to forfeit property on both sides of money laundering transaction).

commingled with other forfeitable property.<sup>314</sup> Other statutes do not describe the available forfeiture authority as broadly, instead delineating specific types of criminally involved property whose forfeiture is authorized.<sup>315</sup> As in the case of criminally derived property, the government's interest in criminally involved property vests at the time of the commission of the illegal act.<sup>316</sup>

In comparison to statutes authorizing the forfeiture of criminally derived property, statutes authorizing forfeiture of criminally involved property are relatively few and far between.<sup>317</sup> Forfeiture of such property is generally permitted in certain specific classes of cases, such as drug and human trafficking,<sup>318</sup> intellectual property crimes,<sup>319</sup> money laundering,<sup>320</sup> and production of child pornography,<sup>321</sup> and often is further limited to particular types of property involved in the offense.<sup>322</sup> Notably absent from this list are most federal fraud offenses, for which a court's forfeiture authority is generally limited to property derived from the offense.<sup>323</sup>

### 3. Forfeiture of "Substitute" Property

A court typically cannot forfeit a defendant's property unless it falls into one of the two categories described above, i.e., unless it bears the statutorily required relationship to the offense of conviction. But when the government is unable to locate the property that was involved in or derived from the offense, it may then pursue other available property of the defendant up to the value of the missing property.<sup>324</sup> The forfeiture

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<sup>314</sup> See *id.* § 27-9(d), at 991.

<sup>315</sup> See, e.g., 18 U.S.C. § 492 (2012) (authorizing forfeiture of currency and other materials involved in counterfeiting offense); 18 U.S.C. § 924(d)(1) (2012) (authorizing forfeiture of "firearm or ammunition involved in" or "intended to be used in" violation of felon-in-possession law); 18 U.S.C. § 2344(c) (2012) (authorizing forfeiture of contraband cigarettes involved in cigarette trafficking).

<sup>316</sup> See 21 U.S.C. § 853(c) (2012).

<sup>317</sup> Compare CASSELLA, *supra* note 11, § 26-2, at 939-40 (listing statutes authorizing forfeiture of property facilitating a criminal offense), with *id.* § 1-3(a), at 5 (noting that more than 200 federal crimes carry forfeiture as a penalty).

<sup>318</sup> See 18 U.S.C. § 1594(e)(1)(A) (2012) (human trafficking); 21 U.S.C. § 853(a) (2012) (drug trafficking).

<sup>319</sup> See 18 U.S.C. § 2323(a)(1)(B) (2012).

<sup>320</sup> See 18 U.S.C. § 982(a)(1) (2012).

<sup>321</sup> See 18 U.S.C. § 2253(a)(3) (2012).

<sup>322</sup> See *supra* note 315 and accompanying text.

<sup>323</sup> See, e.g., 18 U.S.C. § 981(a)(1)(C) (2012) (authorizing, through cross-reference to § 1956(c)(7), forfeiture of proceeds of mail fraud, wire fraud, and bank fraud, but not permitting forfeiture of property involved in those offenses).

<sup>324</sup> See CASSELLA, *supra* note 11, § 22-3, at 763. If sought by the government, forfeiture of substitute property is mandatory. *United States v. Alamoudi*, 452 F.3d 310, 314 (4th Cir. 2006)

of such “substitute” property is governed by 21 U.S.C. § 853(p),<sup>325</sup> which provides that the court shall order the forfeiture of “any other property of the defendant, up to the value of any property” that has been placed beyond the court’s reach by “any act or omission of the defendant.”<sup>326</sup>

In order to be entitled to the forfeiture of substitute property, the government must show that the otherwise forfeitable property “cannot be located upon the exercise of due diligence,”<sup>327</sup> “has been transferred or sold to, or deposited with, a third party,”<sup>328</sup> “has been placed beyond the jurisdiction of the court,”<sup>329</sup> “has been substantially diminished in value,”<sup>330</sup> or “has been commingled with other property which cannot

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(“Section 853(p) is not discretionary . . . [W]hen the Government cannot reach the property initially subject to forfeiture, federal law requires a court to substitute assets for the unavailable tainted property.”), *cited in* United States v. Garza, 407 F. App’x 322, 324 (10th Cir. 2011); *see, e.g.*, United States v. Bollin, 264 F.3d 391, 417–19 (4th Cir. 2001).

<sup>325</sup> A functionally identical provision applying to RICO forfeitures appears at 18 U.S.C. § 1963(m). The Title 18 provision is redundant in light of 28 U.S.C. § 2461(c), which makes the Title 21 forfeiture procedures applicable to all criminal forfeitures. 28 U.S.C. § 2461(c) (2012).

<sup>326</sup> 21 U.S.C. § 853(p)(1)–(2) (2012). As discussed above, the government’s interest in property involved in or derived from an offense vests at the time of the commission of the illegal act. *See supra* notes 304–08 and accompanying text. There is no clear consensus among the courts, however, whether the government’s interest in substitute property vests at the time of the commission of the criminal act, as it would in the case of criminally involved or derived property, or at some later time. According to the Fourth Circuit, whose approach has been followed by district courts outside that circuit, the government’s interest in substitute property vests upon the commission of the illegal act, just as it would for traceable proceeds. *See* United States v. McHan, 345 F.3d 262, 271 (4th Cir. 2003); *see also* United States v. Derochemont, No. 8:10-cr-287-T-24-MAP, 2011 WL 6319293, at \*2–3 (M.D. Fla. Dec. 15, 2011) (following *McHan*), *motion for relief from judgment denied*, No. 8:10-cr-287-T-24-MAP, 2012 WL 13510 (M.D. Fla. Jan. 4, 2012); United States v. Gallion, No. 2:07-39-S-DCR, 2010 WL 3620257, at \*12 (E.D. Ky. Sept. 10, 2010) (same); United States v. Wittig, 525 F. Supp. 2d 1281, 1288 (D. Kan. 2007) (same); United States v. Loren-Maltese, No. 01 CR 348, 2006 WL 752958, at \*1 (N.D. Ill. March 21, 2006) (same). This reasoning appears to be in accord with the common law rule, whereby the forfeiture extended to property owned by the defendant at the time of the commission of the offense. *See supra* note 163. Other authorities, meanwhile, hold that the government’s interest does not vest until some later time, such as the entry of an order of forfeiture or the return of an indictment identifying the property. *See* United States v. Erpenbeck, 682 F.3d 472, 477–78 (6th Cir. 2012) (holding that relation-back doctrine does not apply to substitute property); United States v. Peterson, 820 F. Supp. 2d 576, 584–85 (S.D.N.Y. 2011) (collecting cases and finding that interest in substitute property vests upon return of indictment). Resolution of such issues becomes critical in the context of addressing third-party petitions, where certain claims of ownership may rise or fall based upon whether the government’s interest vested before or after that of the petitioning party. *See infra* note 360 (discussing law applicable to third-party petitions in criminal cases).

<sup>327</sup> 21 U.S.C. § 853(p)(1)(A). The government’s burden of showing due diligence is not onerous. *See, e.g.*, United States v. Seher, 562 F.3d 1344, 1373 (11th Cir. 2009); *Alamoudi*, 452 F.3d at 315–16; United States v. Candelaria-Silva, 166 F.3d 19, 42 (1st Cir. 1999).

<sup>328</sup> 21 U.S.C. § 853(p)(1)(B); *see* United States v. Marmolejo, 89 F.3d 1185, 1197–98 (5th Cir. 1996) (noting that transfer to third parties was established in part by government’s inability to trace defendant’s assets), *aff’d sub nom.* Salinas v. United States, 522 U.S. 52 (1997).

<sup>329</sup> 21 U.S.C. § 853(p)(1)(C).

<sup>330</sup> *Id.* § 853(p)(1)(D).

be divided without difficulty.”<sup>331</sup> Taken together, these provisions mean that if the government has exercised due diligence but finds itself unable to reach all of the property involved in or derived from the offense, then the court may forfeit any other available assets of the defendant in place of the missing property.<sup>332</sup>

Often, at the time of sentencing, the government has not yet been able to identify any property of the defendant that might be forfeited in substitution for the missing forfeitable property. (By that time, the defendant typically has spent much of his available capital, in some cases by paying his lawyers,<sup>333</sup> in others having spent it, in the immortal words of one court, “on wine, women, and song.”)<sup>334</sup> In such cases, the government may obtain a money judgment equal to the value of any

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<sup>331</sup> *Id.* § 853(p)(1)(E).

<sup>332</sup> See *United States v. Turner*, 460 F. App’x 346, 347 (5th Cir. 2012) (per curiam) (denying request for hearing on forfeiture of substitute property because government “was not required to prove that the [property] derived from [the] criminal offense to seize it under [21 U.S.C.] § 853(p)”; *United States v. Bryson*, 105 F. App’x 470, 475 (4th Cir. 2004) (per curiam) (“Because the properties listed in the forfeiture order were designated as substitute assets, the government was not required to show that the specific seized assets were acquired with . . . tainted funds.”). Even where a court determines that a particular piece of property is not forfeitable on account of its being derived from or involved in the offense, the court may go on to forfeit that property in substitution for the missing property. *United States v. Saccoccia*, 564 F.3d 502, 506–07 (1st Cir. 2009); *United States v. Voigt*, 89 F.3d 1050, 1088 (3d Cir. 1996); *United States v. Henry*, 64 F.3d 664, 1995 WL 478635, at \*4 (6th Cir. 1995) (per curiam) (unpublished table decision) (“[T]he jury verdict indicating that the [property] should not be forfeited does not prevent the forfeiture of the property as a substitute asset. . . . [T]he very nature of a substitute asset requires that it is not property which is directly forfeitable.”).

<sup>333</sup> The Supreme Court has held that a defendant has no Sixth Amendment right to retain a lawyer using funds that are subject to criminal forfeiture. See *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 626 (1989). The government may be required, under certain circumstances, to provide the defendant an opportunity to challenge the pre-trial restraint of forfeitable property if it can be shown that property is required to retain an attorney. See *CASSELLA*, *supra* note 11, § 17-7 (discussing circuit court case law surrounding probable cause hearing). The Supreme Court has recently granted certiorari to determine whether the defendant’s right to a hearing includes a right to challenge the grand jury’s determination of probable cause for the underlying offense. See *Kaley v. United States*, 133 S. Ct. 1580 (2013), *granting cert. to* 677 F.3d 1316 (11th Cir. 2012).

<sup>334</sup> *United States v. Ginsburg*, 773 F.2d 798, 802 (7th Cir. 1985) (en banc). The *Ginsburg* court’s phrase is one of the most colorful—and most quoted—lines in all of federal forfeiture law. See *United States v. Olguin*, 643 F.3d 384, 400 (5th Cir.) (quoting *Ginsburg* court’s phrase), *cert. denied*, 132 S. Ct. 439 (2011); *United States v. Hall*, 434 F.3d 42, 59 (1st Cir. 2006) (same); *United States v. Nichols*, 841 F.2d 1485, 1501 (10th Cir. 1988) (same); *United States v. Amend*, 791 F.2d 1120, 1127 n.6 (4th Cir. 1986) (same). The phrase was attributed by Bartlett to the poet Johann Heinrich Voss, in the couplet “Who does not love wine, women, and song / Remains a fool his whole life long.” JOHN BARTLETT, *FAMILIAR QUOTATIONS* 1003 (Nathan Haskell Dole ed., 10th ed. 1914). Another source attributes a similar couplet to Martin Luther on account of its being “inscribed in the Luther room in the Wartburg, but with no proof of authorship.” See *OXFORD DICTIONARY OF QUOTATIONS* 480 (Elizabeth Knowles ed., 5th ed. 1999) (“Who loves not woman, wine, and song / Remains a fool his whole life long.”).

such unrecovered property.<sup>335</sup> The government may then employ both conventional debt collection methods and the seizure and forfeiture of the defendant's property in order to satisfy the judgment.<sup>336</sup> In all cases, however, the judgment is limited to the total value of any unrecovered property that was either involved in or derived from the criminal offense.<sup>337</sup>

### B. *Procedures Applicable to Criminal Forfeiture*

As the Supreme Court held in *Libretti*, there is no constitutional right to a jury on forfeiture questions.<sup>338</sup> Congress has, however, given the jury such a role through legislation.<sup>339</sup> Federal criminal forfeitures are administered through a specialized set of procedures that are collected in 21 U.S.C. § 853 and Rule 32.2 of the Federal Rules of

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<sup>335</sup> See, e.g., *United States v. Smith*, 656 F.3d 821, 826–28 (8th Cir. 2011) (holding that any property of the defendant may be forfeited as substitute property, including property that defendant has not yet acquired but may acquire in the future through a money judgment), *cert. denied*, 132 S. Ct. 1586 (2012); *Olguin*, 643 F.3d at 396–97; *United States v. Awad*, 598 F.3d 76, 78 (2d Cir. 2010); *United States v. Padron*, 527 F.3d 1156, 1162 (11th Cir. 2008); *United States v. Day*, 524 F.3d 1361, 1378 (D.C. Cir. 2008); *United States v. Mislal-Aldarondo*, 478 F.3d 52, 73–74 (1st Cir. 2007); *United States v. Vampire Nation*, 451 F.3d 189, 202–03 (3d Cir. 2006); *United States v. Casey*, 444 F.3d 1071, 1074 (9th Cir. 2006); *United States v. Carroll*, 346 F.3d 744, 749 (7th Cir. 2003) (noting a defendant may be ordered to forfeit “every last penny” he owns as substitute property to satisfy a money judgment); see also FED. R. CRIM. P. 32.2(a), (b)(1)(A), (b)(2)(A), (b)(2)(C), (c)(1) (creating procedures for imposition of money judgments). *But see* FED. R. CRIM. P. 32.2 advisory committee’s note (“A number of cases have approved use of money judgment forfeitures. The Committee takes no position on the correctness of those rulings.”).

<sup>336</sup> See, e.g., *United States v. Hall*, 434 F.3d 42, 58 n.7 (1st Cir. 2006) (“Substitute property may be seized by the government to satisfy a forfeiture order where, by an act or omission, the defendant has prevented the government from tracing his illegally obtained assets.”); *United States v. Bermudez*, 413 F.3d 304, 306–07 (2d Cir. 2005) (affirming forfeiture of substitute property to satisfy money judgment); *United States v. Baker*, 227 F.3d 955, 967 n.1, 971 (7th Cir. 2000) (affirming imposition of money judgment defendant and noting that “the government [may] obtain ‘substitute assets’ if it cannot find property ‘involved in’ or ‘traceable to’ the offense for which a defendant was convicted”); *United States v. Candelaria-Silva*, 166 F.3d 19, 42 (1st Cir. 1999) (upholding forfeiture of substitute property to satisfy money judgment). In the view of Judge Loken of the Eighth Circuit, a defendant’s challenge to a money judgment is not ripe until the government attempts to collect upon the judgment. See *United States v. Elder*, 682 F.3d 1065, 1073 n.5 (8th Cir. 2012) (citing *United States v. Covey*, 232 F.3d 641, 650 (8th Cir. 2000) (Loken, J., concurring)).

<sup>337</sup> It is not, however, limited to the property then owned by the defendant. Courts have expressly held that the government may pursue a defendant’s later acquired assets. See, e.g., *Smith*, 656 F.3d at 828.

<sup>338</sup> See *supra* Part I.B.1.

<sup>339</sup> See FED. R. CRIM. P. 32.2(b)(5).



Criminal Procedure.<sup>340</sup> This Section will briefly outline those procedures in order to provide the reader with a basic understanding of the jury's role in the statutory scheme.<sup>341</sup>

Before criminal forfeiture can occur, the government must provide notice in the charging instrument that it intends to seek forfeiture as part of the penalty for the offense.<sup>342</sup> There is no requirement that the indictment specify with exactitude the property the government will seek to forfeit; it is enough if the indictment cites the applicable statute and recites the nature of its forfeiture authority under the statute.<sup>343</sup>

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<sup>340</sup> The forfeiture provisions of Title 21 have been made applicable to all federal criminal forfeitures. 18 U.S.C. § 982(b)(1) (2012); 28 U.S.C. § 2461(c) (2012); *see also* United States v. Kirschenbaum, 156 F.3d 784, 789–90 (7th Cir. 1998).

<sup>341</sup> For an exhaustive overview of criminal forfeiture procedure in the federal system, see CASSELLA, *supra* note 11, chs. 15–24. *See also* United States v. Davenport, 668 F.3d 1316, 1320–21 (11th Cir.) (summarizing criminal forfeiture procedures), *cert. denied*, 132 S. Ct. 2731 (2012); United States v. Lazarenko, 476 F.3d 642, 647–48 (9th Cir. 2007) (same). The body of this Section considers only the procedures applicable to criminal forfeiture. An entirely separate set of procedures pertain to civil forfeitures, *see supra* note 11, which are set forth in Supplemental Rule G of the Federal Rules of Civil Procedure. A civil forfeiture action commences when the government files a complaint against the property to be forfeited. *See* FED. R. CIV. P. SUPP. R. G(2). The proceeding is an *in rem* proceeding against the property itself. *See* The Palmyra, 25 U.S. (12 Wheat.) 1, 14 (1827). Once the complaint is filed, the government must publish notice of the complaint and send direct written notice to anyone reasonably appearing to have standing to contest the forfeiture. FED. R. CIV. P. SUPP. R. G(4). Any such claimants may then intervene in the case by filing a verified claim and answer to the forfeiture complaint. *Id.* G(5). The government may then conduct discovery to ascertain the claimant's standing to intervene before moving to the merits of the case. *Id.* G(6). If the claimant establishes standing, then the case proceeds like any other civil case, with the burden on the government to establish the forfeitability of the property, and the burden on the claimant to show the innocence of her ownership, each by a preponderance of the evidence. *See* 18 U.S.C. § 983(c) (2012) (placing initial proof on government); *id.* § 983(d) (placing burden of demonstrating innocent ownership on claimant); *see also supra* note 290 (discussing distinct burden allocation in customs and other particular cases). For a comprehensive discussion of the procedures applicable to civil forfeitures, *see* CASSELLA, *supra* note 11, chs. 6–12.

<sup>342</sup> FED. R. CRIM. P. 32.2(a) (“A court must not enter a judgment of forfeiture in a criminal proceeding unless the indictment or information contains notice to the defendant that the government will seek the forfeiture of property as part of any sentence in accordance with the applicable statute.”). This requirement can be waived by the defendant, as often occurs in the case of a plea, to avoid the necessity of obtaining a new indictment or filing an information simply to add a forfeiture allegation.

<sup>343</sup> *Id.* (“The indictment or information need not identify the property subject to forfeiture or specify the amount of any forfeiture money judgment that the government seeks.”); *id.* advisory committee's note (noting that the rule “is not intended to require that an itemized list of the property to be forfeited appear in the indictment or information itself”). Indeed, an indictment need not specify that the government is seeking a money judgment at all: an allegation that the defendant must forfeit an amount of money equal to the proceeds of his offense is sufficient. United States v. Kalish, 626 F.3d 165, 169 (2d Cir. 2010); *accord* United States v. Smith, 656 F.3d 821, 827 (8th Cir. 2011), *cert. denied*, 132 S. Ct. 1586 (2012). *See generally* CASSELLA, *supra* note 11, § 16-2, at 581, 583, § 16-3.

Like other aspects of sentencing, forfeiture essentially becomes a non-issue after indictment until the defendant is convicted.<sup>344</sup> Before the jury is charged at the conclusion of the guilt phase, the defendant (as well as the government) has the right to request that the jury determine the forfeiture of any property identified by the government.<sup>345</sup> Most defendants waive this right, reasoning (probably correctly) that the same jury that has just convicted them is unlikely to be charitable with respect to the forfeiture of their property.<sup>346</sup> In those rare cases where the defendant does request a jury, the court conducts a second, bifurcated forfeiture proceeding after the jury returns a guilty verdict.<sup>347</sup> The jury's role in that proceeding is limited to identifying whether the required nexus exists between the specific property and the offenses of

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<sup>344</sup> The government may be required to litigate whether there is probable cause to restrain forfeitable property if the defendant makes a prima facie showing that he is unable to afford an attorney without access to said property. *See supra* note 333.

<sup>345</sup> FED. R. CRIM. P. 32.2(b)(5)(A) ("In any case tried before a jury, if the indictment or information states that the government is seeking forfeiture, the court must determine before the jury begins deliberating whether either party requests that the jury be retained to determine the forfeitability of specific property if it returns a guilty verdict."). The rule places the burden on the court to determine whether a jury is requested by either party. The text does not make clear what if any consequences follow from the judge's failure to observe the rule. The emerging view seems to be that any party who fails to make a request prior to jury beginning deliberations waives (or, more precisely, forfeits) his right to have a jury determine any forfeiture issues. *See United States v. Valdez*, 2013 WL 4051784, at \*11 (5th Cir. Aug. 12, 2013) (to be published in the *Federal Reporter*) (finding plain error standard precluded reversal where defendant had not requested jury be retained and sufficient evidence supported the forfeiture); *United States v. Williams*, 720 F.3d 674, 701–02 (8th Cir. 2013) (holding that Rule 32(b)(5)(A) is a "time-related directive" that does not require forfeiture to be vacated when it is disobeyed); *United States v. Poulin*, 461 F. App'x 272, 288 (4th Cir.) (per curiam) ("By not requesting a jury determination until a subsequent proceeding, . . . [defendant] waived this right [to a jury on forfeiture issues]."), *cert. denied*, 132 S. Ct. 2448 (2012); *United States v. Nichols*, 429 F. App'x 355, 356 (4th Cir. 2011) (per curiam) ("[A]lthough a defendant has a right to have a jury decide a forfeiture issue, the defendant must affirmatively assert that right."), *cert. denied*, 132 S. Ct. 1093 (2012); *United States v. Hively*, 437 F.3d 752, 763 (8th Cir. 2006); *United States v. Anderson*, No. 8:04CR167, 2005 WL 1027174, at \*1 (D. Neb. May 2, 2005) ("Defendant waived any right to a jury determination . . . by remaining silent when the jury was excused."); *United States v. Davis*, 177 F. Supp. 2d 470, 483 (E.D. Va. 2001) ("[A] party who stands silent while the jury is dismissed following publication of the guilty verdict . . . waives the right to a jury determination of forfeiture under [former] Rule 32.2(b)(4)." (citing authority under former Rule 31(e))), *aff'd*, 63 F. App'x 76 (4th Cir. 2003). *But see United States v. Mancuso*, 718 F.3d 780, 799 (9th Cir. 2013) (finding harmless error from court's failure to advise defendant of jury trial right).

<sup>346</sup> CASSELLA, *supra* note 11, § 18-4(a), at 652 ("[T]he defendant may be loath[] to have the same twelve jurors who just found him guilty of a criminal offense be the arbiters of what is to become of his property.").

<sup>347</sup> Compare FED. R. CRIM. P. 32.2(b)(1)(A) (requiring forfeiture determination after guilty verdict is returned), with *id.* 32.2(b)(5) (requiring jury be retained after jury verdict if requested by a party). *See United States v. Meffert*, No. 09–374, 2010 WL 2360776, at \*17 (E.D. La. June 7, 2010) (noting that bifurcation is automatic under Rule 32.2); *United States v. Dolney*, No. 04-CR-159 (NGG), 2005 WL 1076269, at \*10 (E.D.N.Y. May 3, 2005) (denying defendant's motion to combine guilt and forfeiture phases).

conviction, i.e., whether it was in fact involved in or derived from the crime, as the case may be.<sup>348</sup> In making these determinations, it applies a preponderance-of-the-evidence standard, not the beyond-a-reasonable-doubt standard applied during the guilt phase.<sup>349</sup>

It is more important, however, to emphasize what the jury does *not* find in the forfeiture phase. First, it does not consider the total value of any property that is not specifically identified by the government.<sup>350</sup> In other words, it does not make a finding as to the total value of the property derived from or involved in the offense. The jury also does not make any findings with respect to the forfeiture of substitute property or the imposition of a money judgment.<sup>351</sup> Nor does it determine any issue regarding the ownership of property subject to forfeiture: ownership issues are deferred to a separate ancillary proceeding where the court adjudicates third party claims,<sup>352</sup> on the theory that it is the third party,

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<sup>348</sup> CASSELLA, *supra* note 11, § 18-4, at 653 (“Rule 32.2(b)(5) gives the parties the right to a jury determination on only one issue: whether the Government has established the requisite nexus between the property and the criminal offense on which the defendant has been convicted. There is no right under the rule or any other provision of law to have a jury determine whether the defendant is the owner of the property . . .”).

<sup>349</sup> Although no statute or rule specifies the burden of proof in criminal forfeiture proceedings, the circuits are unanimous in holding that a preponderance standard applies. See *United States v. Bader*, 678 F.3d 858, 893 (10th Cir.) (“A forfeiture judgment must be supported by a preponderance of the evidence.”), *cert. denied*, 133 S. Ct. 355 (2012); *United States v. Martin*, 662 F.3d 301, 307 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 1953 (2012); *United States v. Leahy*, 438 F.3d 328, 331–33 (3d Cir. 2006) (en banc); *United States v. Gaskin*, 364 F.3d 438, 461–62 (2d Cir. 2004); *United States v. Gasanova*, 332 F.3d 297, 301 (5th Cir. 2003); *United States v. Keene*, 341 F.3d 78, 85–86 (1st Cir. 2003); *United States v. Dicter*, 198 F.3d 1284, 1289–90 (11th Cir. 1999); *United States v. Garcia-Guizar*, 160 F.3d 511, 517–19 (9th Cir. 1998); *United States v. Patel*, 131 F.3d 1195, 1200 (7th Cir. 1997); *United States v. DeFries*, 129 F.3d 1293, 1312 (D.C. Cir. 1997); *United States v. Myers*, 21 F.3d 826, 829 (8th Cir. 1994); *United States v. Smith*, 966 F.2d 1045, 1050–53 (6th Cir. 1992).

<sup>350</sup> See FED. R. CRIM. P. 32.2(b)(1)(A) (“If the government seeks a personal money judgment, the court must determine the amount of money that the defendant will be ordered to pay.” (emphasis added)); *United States v. Gregoire*, 638 F.3d 962, 972 (8th Cir. 2011) (recognizing that money judgment may be determined by court without jury); *United States v. Tedder*, 403 F.3d 836, 841 (7th Cir. 2005) (recognizing that jury trial right under Rule 32.2 does not extend to money judgment); see also *Gonzalez v. United States*, Nos. 2:09-cv-786-FTM-29DNF, 2:05-cr-119-FTM-29DNF, 2011 WL 5080343, at \*7 (M.D. Fla. Oct. 25, 2011); *United States v. Roberts*, 631 F. Supp. 2d 223, 226 (E.D.N.Y. 2009); *United States v. Delgado*, No. 8:05-CV-533-T-24TGW, 2006 WL 2460656, at \*1–2 (M.D. Fla. Aug. 23, 2006); *United States v. Reiner*, 393 F. Supp. 2d 52, 54–57 (D. Me. 2005). *But see* *United States v. Candelaria-Silva*, 166 F.3d 19, 43 (1st Cir. 1999) (noting that district court asked jury to return special verdict regarding amount of proceeds in support of money judgment).

<sup>351</sup> See FED. R. CRIM. P. 32.2(e)(3); *United States v. Saccoccia*, 564 F.3d 502, 507 (1st Cir. 2009).

<sup>352</sup> FED. R. CRIM. P. 32.2(b)(2)(A) (“The court must enter the [preliminary] order [of forfeiture] without regard to any third party’s interest in the property. Determining whether a third party has such an interest must be deferred until any third party files a claim in an ancillary proceeding . . .”); see also *United States v. Ramunno*, 599 F.3d 1269, 1273 (11th Cir. 2010) (“A court’s preliminary forfeiture order does not consider third-party interests.”); *United*

not the defendant, who has standing to assert a competing ownership interest.<sup>353</sup>

If the jury returns a verdict of forfeiture with respect to specific property (or, as is more typically the case, the defendant forgoes his jury right and the court makes its own findings), the court then enters a preliminary order of forfeiture.<sup>354</sup> The order is preliminary in two senses: first, it does not become final as to the defendant until he is

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States v. Cox, 575 F.3d 352, 358 (4th Cir. 2009) (“Rule 32.2 *requires* the issuance of a preliminary order of forfeiture when the proper nexus is shown, whether or not a third party claims an interest in the property . . .”); United States v. Andrews, 530 F.3d 1232, 1236 (10th Cir. 2008) (“In issuing a preliminary order of criminal forfeiture . . . the court does not—and, indeed, may not—determine the rights of any third parties who assert an interest in the property.” (citation omitted)); United States v. Lazarenko, 476 F.3d 642, 648 (9th Cir. 2007) (“Upon a finding that the property involved is subject to forfeiture, a court must promptly enter a preliminary order of forfeiture without regard to a third party’s interests in the property.”).

Congress consciously adopted this approach in order to conserve judicial resources and protect the rights of third parties, recognizing that the defendant’s ownership is functionally a non-issue in the criminal case. As the Advisory Committee noted in drafting Federal Rule of Criminal Procedure 32.2, “the requirement [of the prior] Rule 31(e) that the court (or jury) determine the extent of the defendant’s interest in the property as part of the criminal trial has become an unnecessary anachronism that leads more often than not to duplication and a waste of judicial resources.” See FED. R. CRIM. P. 32.2 advisory committee’s note. The Advisory Committee found “no . . . reason to delay the conclusion of the criminal trial with a lengthy hearing over the extent of the defendant’s interest in property when the same issues will have to be litigated a second time in the ancillary proceeding if someone files a claim challenging the forfeiture.” *Id.* Thus, Rule 32.2 now commands a court “to order the forfeiture of whatever interest a defendant may have in the property without having to determine exactly what that interest is.” *Id.*; see also *supra* note 173 (describing similar practice at later English common law). If a third party files a claim, then the court can separately adjudicate that party’s ownership without having to first determine the defendant’s interest. FED. R. CRIM. P. 32.2 advisory committee’s note. The defendant simply lacks standing to complain that the property forfeited in his case did not in fact belong to him. See United States v. Padilla-Galarza, 351 F.3d 594, 600 (1st Cir. 2003) (noting that defendant’s ownership of property was not relevant to acceptance of his guilty plea; third parties retain ability to challenge forfeiture in ancillary proceeding). Although the Advisory Committee suggested that when no third parties make claims, “the court must nonetheless determine that the defendant, or combination of defendants, had an interest in the property,” FED. R. CRIM. P. 32.2 advisory committee’s note, several courts have diverged from their view, requiring only that the statutorily required nexus to the *offense* be shown. See, e.g., De Almeida v. United States, 459 F.3d 377, 381 (2d Cir. 2006); see also CASSELLA, *supra* note 11, § 18-4, at 653 (“There is no right under [Rule 32.2(b)(5)] or any other provision of law to have a jury determine whether the defendant is the owner of the property . . .”). For a further discussion of the relevance of ownership in criminal forfeiture proceedings, see *infra* note 387.

<sup>353</sup> See 18 U.S.C. § 1963(l)(2) (2012) (“Any person, *other than* the defendant . . . may . . . petition the court for a hearing to adjudicate the validity of his alleged interest in the property.” (emphasis added)); 21 U.S.C. § 853(n)(2) (2012) (same); United States v. Pelullo, 178 F.3d 196, 202 (3d Cir. 1999) (“[T]he defendant generally has no standing to participate in the ancillary proceeding . . .”); CASSELLA, *supra* note 11, § 23-13(b), at 815.

<sup>354</sup> FED. R. CRIM. P. 32.2(b)(2).

sentenced;<sup>355</sup> second, it does not affect the interest of any third parties who might claim an interest in the property to be forfeited.<sup>356</sup>

Once the preliminary order is issued, the government is required to issue public notice and to send notice of the order to any persons reasonably appearing to have standing to contest the forfeiture of the property,<sup>357</sup> i.e., record owners and others the government has reason to know might have a cognizable claim of ownership.<sup>358</sup> If any such claims are made, the court holds an ancillary proceeding<sup>359</sup> to determine

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<sup>355</sup> *Id.* 32.2(b)(4). The preliminary order of forfeiture may be made final prior to sentencing with the defendant's consent. *Id.*

<sup>356</sup> See *Ramunno*, 599 F.3d at 1273 (“A court’s preliminary forfeiture order does not consider third-party interests. But the court must amend the final order of forfeiture to exempt the *qualifying* interests of third-parties.”); *infra* note 360 (discussing law applicable to third-party claims).

<sup>357</sup> FED. R. CRIM. P. 32.2(b)(6)(A); see *United States v. Erpenbeck*, 682 F.3d 472, 476–77 (6th Cir. 2012) (discussing notice requirements under Rule 32.2); *United States v. Davenport*, 668 F.3d 1316, 1322–23 (11th Cir.) (same), *cert. denied*, 132 S. Ct. 2731 (2012). Prior to the 2000 enactment of Federal Rule of Criminal Procedure 32.2, the Fourth Circuit, relying on the permissive language of 21 U.S.C. § 853(n)(1), held that direct notice was not required, but merely optional. *United States v. Phillips*, 185 F.3d 183, 186–87 (4th Cir. 1999), *cert. denied*, 133 S. Ct. 2796 (2013). That rule, however, has been superseded by the enactment of Rule 32.2(b)(6)(A), which states that “the government *must* . . . send notice to any person who reasonably appears to be a potential claimant with standing to contest the forfeiture in the ancillary proceeding.” FED. R. CRIM. P. 32.2(b)(6)(A); see also *United States v. Miller*, 448 F. Supp. 2d 860, 871 (N.D. Ohio 2006) (noting that government must send written notice to any potential claimants whose names and addresses are known or “very easily ascertainable”). *But see United States v. Rosga*, 864 F. Supp. 2d 439, 446 (E.D. Va. 2012) (applying *Phillips* rule notwithstanding amendment to Rule 32.2).

<sup>358</sup> See *United States v. Carmichael*, 440 F. Supp. 2d 1280, 1282 (M.D. Ala. 2006) (holding that government was not required to send notice to creditor who had not recorded any judgment lien against property); see also *United States v. Hanson*, No. 3:09-cr-139, 2012 WL 5033235, at \*3 (W.D.N.C. Oct. 17, 2012) (holding that government was not required to send notice to fraud victim, who was unsecured creditor); *United States v. Loria*, No. 3:08cr233-2, 2009 WL 3103771, at \*1 (W.D.N.C. Sept. 21, 2009) (holding that government was not required to send written notice to defendant’s wife where no documents indicated she had a cognizable claim).

<sup>359</sup> See FED. R. CRIM. P. 32.2(c)(1); 21 U.S.C. § 853(n)(2)–(5) (2012); 18 U.S.C. § 1963(l)(2)–(5) (2012); *United States v. Oregon*, 671 F.3d 484, 491–93 (4th Cir. 2012) (summarizing procedure applicable to ancillary proceeding); see also *United States v. Cone*, 627 F.3d 1356, 1358–59 (11th Cir. 2010); *United States v. Nolasco*, 354 F. App’x 676, 680 (3d Cir. 2009); *United States v. Totaro*, 345 F.3d 989, 993–94 (8th Cir. 2003); *United States v. McHan*, 345 F.3d 262, 275 (4th Cir. 2003). The ancillary proceeding is a special procedural device designed to serve two distinct purposes: first, to protect the due process rights of third parties by permitting them to assert their claims ownership before the forfeiture becomes final, and, second, to quiet title with respect to forfeitable property so it may be properly disposed of by the government. See *McHan*, 345 F.3d at 270, 275 (so stating and analogizing ancillary proceeding to equitable quiet title action); CASSELLA, *supra* note 11, § 1-4(b), at 12–13 (noting that purpose of ancillary proceeding is to protect due process rights of third parties who were barred from participation in the criminal case itself). For a discussion of the legislative history leading to the institution of the ancillary proceeding, see *United States v. Gilbert*, 244 F.3d 888, 909–10 (11th Cir. 2001). For an overview of the law relating to the ancillary proceeding, see generally CASSELLA, *supra* note

whether those third parties' interests are sufficient to overcome the government's interest.<sup>360</sup> There is no right to a jury in the ancillary proceeding,<sup>361</sup> nor is any ancillary proceeding required if the government does not seek to forfeit specific property but instead pursues only a money judgment.<sup>362</sup> Once any claims are resolved,<sup>363</sup> or if no such claims are made, the court enters a final order of forfeiture that

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11, ch. 23, and Stefan D. Cassella, *Third-Party Rights in Criminal Forfeiture Cases*, 32 CRIM. L. BULL. 499 (1996).

<sup>360</sup> A third party claiming an interest in property to be forfeited in a criminal case may petition the court for recognition of her superior interest in the property. 21 U.S.C. § 853(n)(2). A claimant can prevail under either of two circumstances. First, if the claimant can demonstrate that she has a property interest that predates the vesting of the government's interest under the relation-back doctrine (i.e., an interest that existed before the illegal activity took place), then the property cannot be forfeited as part of the criminal case. *Id.* § 853(n)(6)(A). Second, even if the government's interest is prior to the claimant's, the claimant will prevail if she can demonstrate that she acquired an interest in the property as a bona fide purchaser for value at a time when she was without reasonable cause to believe that the property was subject to forfeiture. *Id.* § 853(n)(6)(B). To make this latter showing, the claimant must demonstrate that she neither knew that the property was involved in illegal activity nor that the government had made a claim against the property. *See, e.g.*, *United States v. Cox*, 575 F.3d 352, 356–57 (4th Cir. 2009); *Pacheco v. Serendensky*, 393 F.3d 348, 353 (2d Cir. 2004); *United States v. Frykholm*, 362 F.3d 413, 416 (7th Cir. 2004); *United States v. Barnette*, 129 F.3d 1179, 1184–85 (11th Cir. 1997). To be a bona fide purchaser, a claimant must have given something of value in exchange for her property right. *See, e.g.*, *Cox*, 575 F.3d at 356; *United States v. McCorkle*, 321 F.3d 1292, 1294–95 & n.4 (11th Cir. 2003); *see also* CASSELLA, *supra* note 11, § 23-15(c), at 843 n.164 (collecting cases); *Gilbert*, 244 F.3d at 902 n.38 (describing legislative purpose of subsequent transfer rule “to close a potential loophole in current law whereby the criminal forfeiture sanction could be avoided by transfers that were not ‘arms’ [sic] length” (quoting S. REP. NO. 98-225, 200–01 (1984) (internal quotation marks omitted), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3383–84)); *cf. supra* note 163 (noting that, at common law, chattels sold to third parties could be forfeited if they were transferred “collusively and not *bona fide* parted with, merely to defraud the crown” (quoting 4 BLACKSTONE, *supra* note 156, at \*388)). Regardless of the method of proof employed, the burden is on the claimant to establish her superior ownership by a preponderance of the evidence. 21 U.S.C. § 853(n)(6). The claimant lacks standing to challenge the underlying determinations in the criminal case, either of guilt or forfeitability. *United States v. White*, 675 F.3d 1073, 1077–78 (8th Cir. 2012).

<sup>361</sup> *See* 18 U.S.C. § 1963(l)(2) (“The hearing shall be held before the court alone, without a jury.”); 21 U.S.C. § 853(n)(2) (same); *see also* *McHan*, 345 F.3d at 276 (holding that there is no Seventh Amendment right to a jury trial in the ancillary proceeding: ancillary proceeding is not separate civil action at law, but a procedure for protecting valid third party interests from *in personam* forfeiture in criminal cases, analogous to an equitable action to quiet title). Courts have also recognized that the ancillary proceeding is essentially civil in nature for a variety of other purposes. *See* *United States v. Moser*, 586 F.3d 1089, 1093–94 (8th Cir. 2009) (collecting cases).

<sup>362</sup> FED. R. CRIM. P. 32.2(c)(1) (“[N]o ancillary proceeding is required to the extent that the forfeiture consists of a money judgment.”); *see also* *United States v. Zorrilla-Echevarria*, 671 F.3d 1, 10 (1st Cir. 2011); *Nolasco*, 354 F. App'x at 679.

<sup>363</sup> Litigants in the ancillary proceeding may avail themselves of most civil litigation tools, including ordinary civil discovery, motions to dismiss claims for lack of standing, and motions for summary judgment. FED. R. CRIM. P. 32.2(c)(1)(A)–(B); *see also* *United States v. BCCI Holdings (Luxembourg) S.A.*, 69 F. Supp. 2d 36, 54–55 (D.D.C. 1999) (permitting filing of motion to dismiss under FED. R. CIV. P. 12(b) and motion for summary judgment under FED. R. CIV. P. 56); CASSELLA, *supra* note 11, § 23-7, at 799.

declares the property forfeited to the government.<sup>364</sup> If asked by the government, the court must also issue a money judgment in the amount of any unrecovered forfeitable property.<sup>365</sup>

The procedure does not necessarily end there. Whether the court imposes a money judgment or not, the government may continue its efforts to recover both the property involved in or derived from the crime and other property of the defendant to substitute for any such missing property.<sup>366</sup> If the government discovers any such property, it may move to amend the final order of forfeiture to include the newly discovered property.<sup>367</sup> In such an event, the government must again issue notice to any potential third parties, and the court must conduct an ancillary proceeding to address any resulting claims,<sup>368</sup> again without a jury.<sup>369</sup> The defendant lacks standing to contest such forfeitures, since his own interest has been extinguished by the original forfeiture order, and any third party's claim is not his to advance.<sup>370</sup>

Third-party owners and victims alike are entitled to petition the Attorney General for remission of the forfeiture.<sup>371</sup> If the petition is granted, then the Attorney General returns the proceeds of any sale (or, occasionally, the forfeited property itself) to the petitioning party.<sup>372</sup> The prosecutor may also initiate this process by requesting restoration of forfeited property from the Attorney General to the victims listed in the criminal restitution order.<sup>373</sup> If such a request is granted (as it almost

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<sup>364</sup> FED. R. CRIM. P. 32.2(c)(2).

<sup>365</sup> *United States v. McGinty*, 610 F.3d 1242, 1246 (10th Cir. 2010) (holding that issuance of money judgment is mandatory under 18 U.S.C. § 982(a)(2)); CASSELLA, *supra* note 11, § 19-4(c), at 691.

<sup>366</sup> See 21 U.S.C. § 853(p); FED. R. CRIM. P. 32.2(e)(1).

<sup>367</sup> FED. R. CRIM. P. 32.2(e)(2).

<sup>368</sup> See *United States v. Soreide*, 461 F.3d 1351, 1352 n.1 (11th Cir. 2006) (citing *United States v. Morgan*, 24 F.3d 339, 341 (4th Cir. 2000)).

<sup>369</sup> FED. R. CRIM. P. 32.2(e)(3).

<sup>370</sup> See *United States v. Stark*, No. 03-CR-30190-MJR, 2011 WL 5444057, at \*1-2 (S.D. Ill. Nov. 9, 2011); *United States v. Mahaffy*, No. CR-05-613 (JG)(SMG), 2010 WL 5772889, at \*5 (E.D.N.Y. Nov. 2, 2010); *United States v. Gallion*, No. 2:07-39-DCR, 2009 WL 2242413, at \*3 (E.D. Ky. July 24, 2009); *United States v. Tremblay*, No. S1 05 CR.783 JFK, 2008 WL 4571548, at \*2 (S.D.N.Y. Oct. 10, 2008); *United States v. Weidner*, No. 02-40140-01-JAR, 2004 WL 432251, at \*5 (D. Kan. Mar. 4, 2004); *United States v. Saccoccia*, 62 F. Supp. 2d 539, 541 (D.R.I. 1999).

<sup>371</sup> See 19 U.S.C. § 1618 (2012) (permitting remission of customs forfeiture by Secretary of Treasury); 21 U.S.C. § 853(i)(1) (authorizing Attorney General to remit forfeitures); 21 U.S.C. § 881(d) (2012) (same); 28 C.F.R. §§ 9.1-9.9 (2013); see also *United States v. Ortiz-Cintrón*, 461 F.3d 78, 82 (1st Cir. 2006) (recognizing that the power to remit forfeitures lies in the discretion of the Attorney General); U.S. DEP'T OF JUSTICE, RETURNING FORFEITED ASSETS TO CRIME VICTIMS: AN OVERVIEW OF REMISSION AND RESTORATION 2-4, 6 [hereinafter REMISSION AND RESTORATION], available at <http://www.justice.gov/usao/mn/petters/pdfs/Overview%20of%20Remission%20Process.pdf>.

<sup>372</sup> See 18 U.S.C. § 981(e)(6) (2012); 28 C.F.R. § 9.7.

<sup>373</sup> See REMISSION AND RESTORATION, *supra* note 371, at 4-5.

invariably is), then the government pays the proceeds of the sale of any forfeited property to the clerk of the district court for distribution to victims on a pro rata basis.<sup>374</sup> In cases where there are no victims, the proceeds of the sale of forfeitable assets are collected in a national fund for use in law enforcement and other governmental operations.<sup>375</sup>

In sum, the jury's role in modern criminal forfeiture practice is limited. It is tasked only with determining whether the property bears the necessary connection to the offense, either because it was involved in or derived from the offense of conviction.<sup>376</sup> It does not adjudicate the forfeiture of substitute property, nor does it decide the amount of any money judgment imposed against the defendant.<sup>377</sup> The determination of ownership is likewise deferred to the ancillary proceeding, where the judge, not the jury, resolves any claims against the property by third parties.<sup>378</sup> Thus, while the jury plays a far greater part in modern criminal forfeiture than it historically would have at common law, its role is nonetheless circumscribed.<sup>379</sup>

#### IV. CRIMINAL FORFEITURE AND THE SIXTH AMENDMENT

The critical question after *Southern Union* is whether and to what extent jury findings were necessary at common law to permit a particular increase in punishment beyond any applicable statutory maximum.<sup>380</sup> The foregoing analysis shows that criminal forfeiture was applied much more comprehensively at common law than it is today, and without any factual findings by the jury beyond its judgment of guilt.<sup>381</sup> Therefore, just like the consecutive sentences considered by the Supreme Court in *Ice*, modern criminal forfeiture is a moderation of a "harsh[er] . . . historical practice"<sup>382</sup> because it is generally limited to property that is itself derived from or involved in criminal activity.<sup>383</sup>

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<sup>374</sup> See *id.*; see also 18 U.S.C. § 3664 (2012) (stating procedures for distribution of funds through restitution).

<sup>375</sup> See 21 U.S.C. § 853(i)(1); 28 U.S.C. § 524(c) (2012); 31 U.S.C. § 9703 (2012); H.R. REP. 106-192, at 4 (1999) ("[T]he monies realized from federal forfeitures . . . go to the Department of Justice's Assets Forfeiture Fund and the Department of the Treasury's Forfeiture Fund. The money is used for forfeiture-related expenses and various law enforcement purposes.").

<sup>376</sup> See *supra* note 348 and accompanying text.

<sup>377</sup> See *supra* note 350 and accompanying text.

<sup>378</sup> See *supra* notes 360-62 and accompanying text.

<sup>379</sup> Compare notes 174-87 and accompanying text (discussing English common law), and notes 193-248 and accompanying text (discussing colonial common law), with notes 345-70 and accompanying text (discussing modern jury trial right).

<sup>380</sup> See *supra* note 142 and accompanying text.

<sup>381</sup> See *supra* Part II.

<sup>382</sup> *Oregon v. Ice*, 555 U.S. 160, 169 (2009); see *supra* Part I.A.3.

<sup>383</sup> See *supra* Parts III.A.1, III.A.2.



Only when that property is unavailable does federal law permit the forfeiture of other property of the defendant, and even then the forfeiture is limited to the total value of the property derived from or involved in the offense.<sup>384</sup> At common law, by contrast, the defendant's property would have been forfeited *in toto*, without any limitation on the basis of jury-found facts.<sup>385</sup> Viewing this common law history through the lens of *Ice* and *Southern Union* leads to the conclusion that the Sixth Amendment does not give criminal defendants a right they never enjoyed at common law, i.e., the right to have any facts supporting criminal forfeiture found by a jury beyond a reasonable doubt.<sup>386</sup>

This Part elaborates on the foregoing analysis by discussing the application of *Southern Union* to the various forms of criminal forfeiture available in the federal system. In so doing, it considers the potential differences in application to property that is derived from crime and that which is merely involved in the offense.

#### A. Modern Limitations on Criminal Forfeiture

As at common law, modern criminal forfeiture is an *in personam* penalty imposed against the offender himself, to the exclusion of third parties.<sup>387</sup> Indeed, through the institution of the “ancillary proceeding,”

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<sup>384</sup> See *supra* Part III.A.3.

<sup>385</sup> See *supra* notes 160–73 and accompanying text.

<sup>386</sup> A similar (albeit more cursory) analysis of the law of common law criminal forfeitures at the time of the adoption of the Idaho constitution appears in *State v. Key*, 239 P.3d 796 (Idaho 2010). See *id.* at 802–07. The Idaho Supreme Court reached the same conclusion as we do—that the common law did not grant defendants any jury trial right on forfeiture issues. *Id.* at 806.

<sup>387</sup> The Supreme Court has repeatedly emphasized that it construes criminal forfeiture as an *in personam* penalty that is part and parcel of a criminal sentence. See, e.g., *United States v. Bajakajian*, 524 U.S. 321, 332 (1998) (“Section 982(a)(1) thus descends not from historic *in rem* forfeitures of guilty property, but from a different historical tradition: that of *in personam*, criminal forfeitures. Such forfeitures have historically been treated as punitive, being part of the punishment imposed for felonies and treason in the Middle Ages and at common law.”); *Libretti v. United States*, 516 U.S. 29, 38–39 (1995) (emphasizing forfeiture as aspect of sentencing). That characterization is certainly accurate from the perspective of the criminal defendant: a preliminary order of forfeiture, once incorporated in the judgment of the court, operates to extinguish whatever interest the criminal defendant might have had in the property to be forfeited. See FED. R. CRIM. P. 32.2 advisory committee’s note (noting that, at sentencing, court should “order the forfeiture of whatever interest a defendant may have in the property without having to determine exactly what that interest is”); cf. *supra* notes 359, 361 (noting equitable and civil characteristics of ancillary proceeding). That is not to say, however, that criminal forfeiture is limited to property in which the defendant can be shown to have an interest; rather, it reaches all property connected to the crime of conviction as set forth in the applicable statute. See *De Almeida v. United States*, 459 F.3d 377, 381 (2d Cir. 2006) (holding that criminal forfeiture is not limited to the property of the defendant, but rather reaches any property bearing the required relationship to the offense, subject only to third parties’ claims in

Congress has taken pains to provide judicial redress for third parties who claim ownership of property derived from or involved in criminal activity.<sup>388</sup> Rather, the purpose of criminal forfeiture is to punish a defendant by depriving him of any interest he may have in forfeitable property.<sup>389</sup>

But unlike the common law, modern criminal forfeiture generally does not reach all of a defendant's property.<sup>390</sup> Instead, it is narrower in scope, being limited to property that was either derived from the offense or involved in it.<sup>391</sup> Except in cases where the value of the property to be forfeited constitutes or exceeds the defendant's total net worth,<sup>392</sup> modern criminal defendants are given lenient treatment relative to what would have been the norm at common law, insofar as they retain ownership of property they have acquired legitimately.<sup>393</sup> Even in cases where the defendant's net worth is swallowed by the forfeiture, such a punishment is no more punitive than what would have imposed at common law, without any jury findings.<sup>394</sup>

The forfeiture of substitute property, meanwhile, probably bears the closest resemblance to common law criminal forfeiture.<sup>395</sup> Property forfeited as a substitute asset is not itself traceable to criminal activity; to the contrary, it is assumed that the property is clean.<sup>396</sup> The defendant is nonetheless required to forfeit such legitimately acquired assets in place of the forfeitable property that he has alienated, hidden, or otherwise placed beyond the reach of the court.<sup>397</sup> Thus, as at common law, the

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ancillary proceeding); *see also supra* note 352 (discussing Congressional purpose in deferring ownership questions to ancillary proceeding).

<sup>388</sup> *See supra* notes 357–60 and accompanying text.

<sup>389</sup> *See* *United States v. Lazarenko*, 476 F.3d 642, 647 (9th Cir. 2007); *United States v. Vampire Nation*, 451 F.3d 189, 202 (3d Cir. 2006).

<sup>390</sup> The notable exception is 18 U.S.C. § 981(a)(1)(G), which authorizes the forfeiture of all property of a person engaged in terrorism. 18 U.S.C. § 981(a)(1)(G) (2012).

<sup>391</sup> *See supra* Parts III.A.1, III.A.2; *see also Libretti*, 516 U.S. at 42 (“As Libretti properly observes, § 853 limits forfeiture by establishing a factual nexus requirement: Only drug-tainted assets may be forfeited.”).

<sup>392</sup> Tragically, such cases are by no means uncommon. In cases of drug dealers, for example, criminal forfeiture of the defendant's property is often established by demonstrating that the defendant lacks any legitimate source of income from which the property might have been derived. *See* 21 U.S.C. § 853(d) (creating rebuttable presumption that property acquired by drug dealer during time period of criminal conduct is subject to forfeiture). Likewise, in many non-drug cases, defendants have spent the vast majority of their illegal proceeds prior to the institution of criminal proceedings and often have insufficient legitimate assets to cover a money judgment. *See, e.g., United States v. Baker*, 227 F.3d 955, 970 (7th Cir. 2000) (noting that the defendant “does not now have anywhere near [the] amount” of the \$4.4 million money judgment ordered against him).

<sup>393</sup> *Cf. supra* notes 160–73 and accompanying text.

<sup>394</sup> *Cf. supra* notes 160–73 and accompanying text.

<sup>395</sup> *Cf. supra* notes 160–73 and accompanying text.

<sup>396</sup> *See supra* Part III.A.3.

<sup>397</sup> *See supra* notes 327–33 and accompanying text.

defendant must forfeit his property regardless of whether it bears any connection to the offense.<sup>398</sup> Yet, unlike the common law, the total value that may be forfeited from the defendant is still limited to the value of the property that was involved in or derived from the offense.<sup>399</sup> Such contemporary limitations underscore Congress's moderation of the historical practice of forfeiting the defendant's entire estate.<sup>400</sup>

Federal Rule of Criminal Procedure 32.2 also contemplates that the court make a finding as to the total amount of any prospective recovery of substitute property in the form of a money judgment.<sup>401</sup> Such judgments are likewise unproblematic from a Sixth Amendment standpoint. At common law, the attainder of the defendant upon judgment would have entailed the forfeiture of all of the defendant's property.<sup>402</sup> Thus, even if a money judgment had that same effect, it would be no more punitive than attainder would have been at common law, where it would have been imposed without any jury findings at all.<sup>403</sup> But the effect of a money judgment is far more moderate than the common law practice.<sup>404</sup> A money judgment is limited to a finite sum; it does not reach property that the defendant may acquire in excess of the value of his ill-gotten gain.<sup>405</sup> As such, money judgments likewise represent a moderation of the harsh historical practice with respect to a defendant's ability to maintain ownership of legitimately acquired property.<sup>406</sup>

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<sup>398</sup> Cf. Weiner, *supra* note 197, at 230 ("Common law criminal forfeiture . . . was merely an added penalty imposed *in personam* against a defendant convicted of a felony. The nature of the property subject to the forfeiture was immaterial. The sanction did not require that the property itself be used in the crime or be otherwise 'tainted.'").

<sup>399</sup> Cf. United States v. Alamoudi, 452 F.3d 310, 315 (4th Cir. 2006) (noting that, because the forfeiture of substitute property "does not at all increase the amount of forfeiture," it presents no *Apprendi* problem).

<sup>400</sup> Of course, in some cases the forfeiture of the defendant's ill-gotten gains will result in the forfeiture of his entire estate, such as where all his property is derived from criminal proceeds, but in such event the punishment is still no more severe than what have been mandated by the common law without jury findings. Cf. *supra* notes 160–73 and accompanying text.

<sup>401</sup> See *supra* note 335 and accompanying text.

<sup>402</sup> See *supra* notes 160–73 and accompanying text.

<sup>403</sup> Cf. *supra* notes 160–73 and accompanying text.

<sup>404</sup> Cf. *supra* notes 160–73 and accompanying text.

<sup>405</sup> See *supra* note 337 and accompanying text.

<sup>406</sup> Cf. Oregon v. Ice, 555 U.S. 160, 169 (2009). It might be argued, however, that a money judgment is simply a fine by another name. Unlike common law criminal forfeiture, which was limited to property owned by the defendant or his heirs at the time of conviction, see *supra* note 163, modern money judgments are forward-looking, potentially reaching property that the defendant will acquire in the future. See United States v. Smith, 656 F.3d 821, 828 (8th Cir. 2011), *cert. denied*, 132 S. Ct. 1586 (2012). From this aspect, it might appear that forfeiture money judgments are a species of fine and should be subject to the *Apprendi* rule just as the criminal fine at issue in *Southern Union*. Cf. United States v. Bajakajian, 524 U.S. 321, 328 (1998).

At the same time that it has reined in the scope of criminal forfeiture, Congress has also given defendants another privilege not granted to them at common law: the right to request that a jury determine the connection of the property to the offense.<sup>407</sup> Since the existence or absence of such a connection was not a relevant consideration at common law, defendants obviously had no right to have a jury make any such determination.<sup>408</sup> Because the Sixth Amendment did not give criminal defendants any jury trial rights they did not enjoy at common law, the right to a jury on forfeiture issues therefore remains, as *Libretti* recognized, “merely statutory in origin.”<sup>409</sup>

The statutory jury trial right that Congress has provided, however, is limited.<sup>410</sup> Congress has not, for example, deemed fit to require a jury determination as to the forfeiture of substitute property or subsequently discovered property,<sup>411</sup> presumably recognizing the administrative difficulty of retaining a jury for such purposes.<sup>412</sup> In this respect, the

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Such concerns, however, overlook the principal means by which money judgments are enforced, i.e., through the forfeiture of specific property owned by the defendant. Most typically, the government satisfies money judgments by seizing property of the defendant for criminal forfeiture. Federal Rule of Criminal Procedure 32.2(e) instructs the court to amend an existing order of forfeiture to include such substitute and/or subsequently discovered property. If the money judgment is conceived of merely as a judicial finding as to the total amount of property that may be forfeited from the defendant, there is no punishment until the property of the defendant is seized and forfeited—in which case the criminal forfeiture of the property is consistent with what would have been permitted at common law even in the absence of any jury findings. Such an analysis is consistent with the view of Judge Loken of the Eighth Circuit that a challenge to a money judgment is not ripe until the government seeks to enforce it through the forfeiture of specific property. *See* *United States v. Elder*, 682 F.3d 1065, 1073 n.5 (8th Cir. 2012) (citing *United States v. Covey*, 232 F.3d 641, 650 (8th Cir. 2000) (Loken, J., concurring)); *supra* note 336.

<sup>407</sup> *See supra* notes 344–53 and accompanying text.

<sup>408</sup> *See supra* notes 174–87 and accompanying text (discussing English common law); notes 193–202 and accompanying text (discussing colonial common law); *see also supra* note 398.

<sup>409</sup> *See* *Libretti v. United States*, 516 U.S. 29, 49 (1995); *see also supra* note 109.

<sup>410</sup> *See supra* notes 350–53 and accompanying text.

<sup>411</sup> Likewise, most courts hold that it is for the court, not the jury, to determine the amount of any money judgment to be imposed. *See supra* note 350 and accompanying text. Assigning this task to the jury would lead to numerous complications. Determinations of the amount of a forfeiture money judgment can often be complex, relying upon detailed financial calculations. In an insider trading case, for example, the jury might be called upon to determine what portion of a defendant’s gain on a stock sale or purchase could be attributed to the inside information. *See, e.g.,* *United States v. Contorinis*, 692 F.3d 136, 145 n.3 (2d Cir. 2012). Such implications echo the concerns of Justice Breyer’s dissent in *Southern Union*, where he lamented the application of the Court’s holding to the alternative maximum fine statute. *See supra* notes 97–99 and accompanying text.

<sup>412</sup> Since, by definition, subsequently discovered property has not been found at the time of the trial, it will ordinarily be impossible to reassemble the trial jury to pass upon its forfeiture. Nor would it be practical to empanel a different jury to adjudicate the issue—the new jury’s lack of familiarity with the underlying criminal conduct would necessitate that the government or the judge rehash the trial evidence in order to permit the jurors to determine the connection

modern rule is no different from the historical (and therefore constitutional) practice.<sup>413</sup>

In confining the scope of criminal forfeiture from its broad reach at common law and giving criminal defendants a limited statutory right to a jury, Congress has certainly “temper[ed] the harshness of the historical practice” with respect to criminal forfeiture.<sup>414</sup> But it has not (nor could it have) expanded the jury trial rights of criminal defendants under the Sixth Amendment.<sup>415</sup> Because criminal defendants did not enjoy any right to a jury trial on forfeiture issues at common law, no such protection is granted to them by the Sixth Amendment.<sup>416</sup>

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of the property to the offense, which, in complex cases, could prove a monumental waste of judicial and government resources.

<sup>413</sup> If, however, the Supreme Court were to nonetheless apply the *Apprendi* rule to criminal forfeitures, it could produce an ironic reversal of Congress’s intent. Under the existing statutory scheme, the jury determines the connection of any specific property to the offense of conviction, but it does not find the total value of the property to be forfeited. If the Court were to affirm that the forfeiture of specific property presents no *Apprendi* problem (because it does not involve enhancement above any statutory maximum, *see supra* Part I.B.2) and yet hold that money judgments do require jury findings (since they depend upon a numerical finding of total “value”), then the Court would have reached the surprising conclusion that the Sixth Amendment requires a jury where Congress did not (money judgments), and that Congress required one where the Sixth Amendment does not (specific property).

<sup>414</sup> *Oregon v. Ice*, 555 U.S. 160, 169 (2009). To turn the phrase from *Ice*, “the defendant—who historically may have faced [forfeiture of *all* of his property] by default—has been granted by some modern legislatures statutory protections meant to temper the harshness of the historical practice.” *See id.*

<sup>415</sup> *See S. Union Co. v. United States*, 132 S. Ct. 2344, 2353 (2012) (citing *Ice*, 555 U.S. at 170).

<sup>416</sup> A recent unsigned Harvard Law Review commentary suggests that the historical approach adopted in *Ice* and *Southern Union* should be rejected in favor of a more formalistic approach that would seek to characterize the various aspects of criminal punishment as being either “punitive” or “quasi-civil,” the latter being presumably exempt from the strictures of *Apprendi*. *See The Supreme Court 2011 Term—Leading Cases*, 126 HARV. L. REV. 256, 257 (2012) [hereinafter *Leading Cases*]. Such a “purposive” approach, it claims, is necessary in part because the historical record will “fail[] to provide satisfactory resolution of future cases,” citing forfeiture as its prime example. *Id.* at 261–62; *see also id.* at 264 (proposing “purposive” approach). In defending this claim, it makes the puzzling assertion that “the historical record is ambiguous regarding the role of a jury in forfeiture proceedings, since at common law such proceedings were brought against the rem [sic] and there was no criminal defendant that could assert a constitutional right.” *Id.* at 261 n.50. Such a claim fails to appreciate the historical distinction, long recognized by the Supreme Court, between *civil* forfeiture, which proceeds *in rem*, and *criminal* forfeiture, which is a criminal penalty imposed *in personam* against the defendant. *See United States v. Bajakajian*, 524 U.S. 321, 332 (1998) (“[Criminal forfeiture] descends not from historic *in rem* forfeitures of guilty property, but from a different historical tradition: that of *in personam*, criminal forfeitures. Such forfeitures have historically been treated as punitive, being part of the punishment imposed for felonies and treason in the Middle Ages and at common law.”); *supra* note 11. As this Article proves, the petit jury unambiguously lacked any role in determining the scope of criminal forfeiture at common law. *See generally* notes 174–87 and accompanying text (discussing English common law); notes 193–202 and accompanying text (discussing colonial common law).

There is also reason to question the authors’ claim that their “purposive approach” would permit principled application of the *Apprendi* rule across the panoply of criminal penalties. The

B. *Bajakajian and the Forfeiture of Criminally Involved Property*

Although the *Libretti* Court rejected any constitutional role for the jury in assessing criminal forfeitures under the Sixth Amendment, the Supreme Court has recognized constitutional limitations on criminal forfeiture under the Excessive Fines Clause of the Eighth Amendment.<sup>417</sup> Its precedents have analogized criminal forfeitures to criminal fines, in recognition of their mutual character as *in personam* punishments against an offender.<sup>418</sup> While some defendants have already begun to argue that these cases dictate that *Southern Union* should apply to criminal forfeitures,<sup>419</sup> they ultimately do not affect the Sixth Amendment analysis offered above, because they do not address the role of the jury in imposing such punishments.<sup>420</sup>

The Supreme Court's most thorough analysis of criminal forfeitures under the Eighth Amendment appears in its 1998 decision *United States v. Bajakajian*.<sup>421</sup> *Bajakajian* concerned the forfeiture of \$357,144 in cash that the defendant had failed to declare upon entry into the United States, which the government sought to forfeit as property

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formalism promoted by the authors will find itself ill-equipped to evaluate criminal penalties whose purposes are neither wholly punitive nor wholly remedial, but which instead serve both masters. The best example is one cited by the authors themselves: the "community service obligation" imposed in *Southern Union*, which the authors characterize as "restitutionary" but which the Supreme Court evidently regarded as punitive. Compare *Leading Cases*, *supra*, at 264, with *S. Union*, 132 S. Ct. at 2349; see also *United States v. S. Union Co.*, No. 07-134 S., 2013 WL 1776028, at \*6 (D.R.I. Apr. 25, 2013) (holding on remand that community service obligation was subject to *Apprendi* rule in light of Supreme Court's holding above). Their distinction also has the undesirable potential to engross numerous non-criminal penalties within the ambit of *Apprendi*, including most notably punitive damages, which, though not criminal in nature, are unquestionably "punitive." Compare *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 260 (1989) (holding that constitutional prohibition on excessive fines does not reach punitive damages imposed in a civil case between private parties), with JOHN J. KIRCHER & CHRISTINE S. WISEMAN, PUNITIVE DAMAGES: LAW AND PRACTICE §§ 3.3, 3.6 (2d ed. 2013) (arguing that punitive damages constitute "punishment" under the Excessive Fines and Due Process Clauses). As the authors themselves concede, their approach likewise "would not conclusively answer . . . whether the rule extends to civil forfeiture proceedings, whose complicated case law vacillates on whether forfeiture is a punitive sanction." *Leading Cases*, *supra*, at 265. Such consequences, however, would be easily avoided through an examination of the historical record, since the common law would not necessarily have required a jury in either instance, and our tradition has certainly never required proof beyond a reasonable doubt of the facts supporting such sanctions. See *United States v. La Vengeance*, 3 U.S. (3 Dall.) 297, 301 (1796) (holding that civil *in rem* forfeitures do not require a jury); *supra* note 140 (discussing historical evolution of beyond-a-reasonable doubt standard).

<sup>417</sup> See, e.g., *Bajakajian*, 524 U.S. at 331-32; *Austin v. United States*, 509 U.S. 602, 609-10 (1993).

<sup>418</sup> *Bajakajian*, 524 U.S. at 328; *Austin*, 509 U.S. at 609-10.

<sup>419</sup> See, e.g., *United States v. Sigillito*, 899 F. Supp. 2d 850, 857, 859 (E.D. Mo. 2012).

<sup>420</sup> See *infra* notes 434-46 and accompanying text.

<sup>421</sup> 524 U.S. 321 (1998).

“involved in” a criminal offense.<sup>422</sup> The defendant argued that so large a forfeiture for such a minor offense violated the Excessive Fines Clause of the Eighth Amendment.<sup>423</sup> Noting that the Court had “had little occasion to interpret, and ha[d] never actually applied, the Excessive Fines Clause,”<sup>424</sup> the Court began its analysis by reciting its statement five years earlier in *Austin v. United States*<sup>425</sup> that the Clause “limits the government’s power to extract payments, whether in cash or kind, as punishments for some offense.”<sup>426</sup> It deduced that criminal forfeitures, being payments in kind, would constitute fines under the Eighth Amendment if they constituted punishment for a criminal offense.<sup>427</sup>

The Court had “little trouble concluding” that the forfeiture of the property involved in a currency reporting transaction was punishment in the relevant sense:<sup>428</sup> the forfeiture followed from a criminal conviction; it was imposed as part of a criminal sentence; “innocent owners” were statutorily exempt from such forfeitures.<sup>429</sup> It also emphasized that criminal forfeitures were historically considered an aspect of criminal punishment, “being part of the punishment imposed for felonies and treason in the Middle Ages and at common law.”<sup>430</sup> Ultimately, the Court found that the forfeiture of \$357,144 was “grossly disproportional” to the gravity of the currency reporting offense at issue and affirmed the judgment of the courts below reducing the forfeiture to \$15,000.<sup>431</sup>

*Bajakajian* thus stands for the proposition that criminal forfeitures, being analogous to criminal fines, are subject to the Excessive Fines Clause.<sup>432</sup> As some defendants have already argued, one might infer that, because *Southern Union* requires that facts supporting criminal fines be

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<sup>422</sup> *Id.* at 325.

<sup>423</sup> *See id.* at 326–27.

<sup>424</sup> *Id.* at 327.

<sup>425</sup> 509 U.S. 602 (1993).

<sup>426</sup> *Bajakajian*, 524 U.S. at 328 (quoting *Austin*, 509 U.S. at 609–10) (internal quotation marks omitted).

<sup>427</sup> *Id.*

<sup>428</sup> *Id.*

<sup>429</sup> *Id.* at 328, 331–32.

<sup>430</sup> *Id.* at 332.

<sup>431</sup> *Id.* at 324, 344; *see also id.* at 325–27 (reciting decisions of lower courts). The Court analyzed the question by comparing the gravity of the offense to the amount of the forfeiture. *Id.* at 337–38. To perform this comparison, the Court considered the harm caused by the offense, the relationship of the property to any other illegal activities, and the possible sentences available for the underlying offense. *Id.* at 338–40. Because the currency was not derived from or intended for use in any other illegal activity, the harm caused was minimal, and the available fine under the then-mandatory Sentencing Guidelines was only \$5,000, the court found that the forfeiture of the full amount of the undeclared cash would be grossly disproportional to the offense of conviction. *Id.* at 338–39.

<sup>432</sup> *Id.* at 337.

tried to a jury, and criminal forfeiture constitutes a “fine” under *Bajakajian*, *Southern Union* and *Bajakajian* should be read together to require a jury determination of criminal forfeiture issues.<sup>433</sup> But as explained below, this view suffers from several infirmities of reasoning.

First, *Bajakajian* is an Eighth Amendment decision, not a Sixth Amendment decision.<sup>434</sup> In the context of the Excessive Fines Clause, the Court has adopted what is essentially a functional approach: whether a payment constitutes a fine depends on whether its purpose is punitive.<sup>435</sup> Yet in interpreting the right to a jury trial under the Sixth Amendment, the Court has employed not a functional approach, but a historical one.<sup>436</sup> As such, it is not sufficient under the Sixth Amendment merely to determine that criminal forfeiture constitutes “punishment”; rather, the relevant question is whether criminal forfeiture is the *sort* of punishment whose imposition was decided by the jury at common law.<sup>437</sup> As the foregoing history explains, the answer to that question is an emphatic “no.”<sup>438</sup>

Second, *Bajakajian* itself recognized that “criminal forfeitures” and “fines” are not simply two names for the same rose.<sup>439</sup> The statutory maximum fine in *Bajakajian* was \$5,000.<sup>440</sup> The Court did not, however, reduce the criminal forfeiture to meet the statutory maximum fine;

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<sup>433</sup> See, e.g., *United States v. Sigillito*, 899 F. Supp. 2d 850, 859 (E.D. Mo. 2012).

<sup>434</sup> See *Bajakajian*, 524 U.S. at 327.

<sup>435</sup> See *id.* at 328; *Austin v. United States*, 509 U.S. 602, 609–10 (1993).

<sup>436</sup> See *supra* note 37 and accompanying text. In addition to the difference in approach, the Supreme Court has also noted the significance in the difference in the language of the Sixth and Eighth Amendments, only the former of which is limited by its express terms to “criminal cases.” See *Austin*, 509 U.S. at 607–08 (1993) (“Some provisions of the Bill of Rights are expressly limited to criminal cases. . . . The protections provided by the Sixth Amendment are explicitly confined to criminal prosecutions. The text of the Eighth Amendment includes no similar limitation.” (citation omitted) (internal quotation marks omitted)). *But see* *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 262 (1989) (noting that Court’s prior precedents had “understood [the Excessive Fines Clause] to apply primarily, and perhaps exclusively, to criminal prosecutions and punishments”).

<sup>437</sup> This proposition is evident from a comparison of *Southern Union* and *Ice*. *Southern Union* found that the jury did play a role in imposing criminal fines and therefore held that the right to have facts supporting those fines found by the jury was preserved under Sixth Amendment. *S. Union Co. v. United States*, 132 S. Ct. 2344, 2355 (2012). *Ice*, however, found that common law judges possessed unfettered discretion to impose consecutive sentences and therefore held that the jury was not required under the Sixth Amendment to find any facts supporting the imposition of such sentences. *Oregon v. Ice*, 555 U.S. 160, 163–64, 168 (2009).

<sup>438</sup> See *supra* Part II.

<sup>439</sup> See WILLIAM SHAKESPEARE, *ROMEO AND JULIET* act 2, sc. 2 (London, J. Pattie, 1839) (“What’s in a name? that which we call a rose / By any other name would smell as sweet.”). *But see* *Austin*, 509 U.S. at 623–24 (Scalia, J., concurring) (arguing that fines and forfeitures were indistinguishable at common law). *Cf. Browning-Ferris*, 492 U.S. at 265 n.6 (discussing common law definition of fine); *id.* at 295–96 (O’Connor, J., concurring in part and dissenting in part).

<sup>440</sup> *Bajakajian*, 524 U.S. at 326 (noting that, by virtue of then-mandatory Sentencing Guidelines, \$5,000 was maximum fine that could be imposed).



instead, it affirmed the district court's imposition of a criminal forfeiture three times that amount.<sup>441</sup> Indeed, the proportionality analysis called for by *Bajakajian* itself recognizes that fines and criminal forfeitures are conceptually distinct:<sup>442</sup> in determining whether a forfeiture is excessive, a court is to ask whether the forfeiture is *proportional* to the statutory maximum fine, not simply whether the forfeiture exceeds it.<sup>443</sup>

A formalistic application of *Southern Union* to criminal forfeitures by way of *Bajakajian*<sup>444</sup> would disregard the Court's recurring command throughout the *Apprendi* line: look to the common law.<sup>445</sup> As such, *Bajakajian* is of limited utility in assessing the proper treatment of criminal forfeitures under the Sixth Amendment. Neither its comparison of forfeiture to fines nor its holding that forfeitures of criminally involved property are punitive answers the historical question of what the jury's role was in adjudicating such forfeitures at common law.<sup>446</sup>

### C. *Is the Forfeiture of Criminally Derived Property Even "Punishment"?*

As *Bajakajian* held, forfeiture of criminally involved property owned by the defendant is punitive: it is a punishment, imposed against the defendant *in personam*, as a penalty for the commission of the underlying criminal offense.<sup>447</sup> But it is questionable whether the same reasoning would apply to property that is not simply involved in crime, but actually derived from it. Indeed, courts interpreting *Bajakajian* have concluded that its reasoning is inapplicable where the government does not seek to forfeit property that is merely involved in an offense but instead seeks to forfeit the proceeds of the offense itself.<sup>448</sup> These courts

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<sup>441</sup> *Id.* at 327, 344.

<sup>442</sup> Several cases have emphasized that criminal fines and criminal forfeitures are separate penalties. *See, e.g.*, *United States v. Judge*, 413 F. App'x 340, 342 (2d Cir. 2011); *United States v. Trotter*, 912 F.2d 964, 965 (8th Cir. 1990); *United States v. McCormick*, No. 04-X-73701-DT, 2006 WL 1722197, at \*3 (E.D. Mich. June 22, 2006).

<sup>443</sup> *See Bajakajian*, 524 U.S. at 338–40; *supra* note 431.

<sup>444</sup> Indeed, the very structure of the argument betrays its formalism: because forfeitures are fines (or resemble fines), and fines require a jury trial, so do forfeitures. Such formalistic reasoning obscures the textual and historical meaning of the Sixth Amendment.

<sup>445</sup> *See supra* note 37 and accompanying text.

<sup>446</sup> *See supra* Part II.

<sup>447</sup> *See Bajakajian*, 524 U.S. at 328; *supra* notes 437–39 and accompanying text.

<sup>448</sup> *See United States v. Betancourt*, 422 F.3d 240, 250–51 (5th Cir. 2005) (“[T]he Eighth Amendment has no application to forfeiture of property acquired with . . . proceeds.”); *United States v. 22 Santa Barbara Drive*, 264 F.3d 860, 874–75 (9th Cir. 2001); *United States v. Powell*, 2 F. App'x 290, 294 (4th Cir. 2001) (citing *United States v. Wild*, 47 F.3d 669, 675–76 (4th Cir. 1995) and distinguishing *Bajakajian*); *United States v. Miller*, No. 06–40151–JAR, 2009 WL 2949784, at \*8–9 (D. Kan. Sept. 10, 2009) (finding it unnecessary to decide if forfeiture of

recognize that it cannot be “grossly disproportional to the gravity of [the] offense” to require a defendant to forfeit his ill-gotten gain.<sup>449</sup> But separate and apart from its excessiveness, there is yet a more fundamental question: can the forfeiture of criminally derived property even be considered “punishment” if the defendant has no rightful claim to it in the first instance?

Unlike the forfeiture of criminally involved property, which destroys an ownership interest that the defendant had before he committed the crime, the forfeiture of criminally derived property merely forces him to part with property he would have never owned but for the illegal activity.<sup>450</sup> In that regard, forfeiture of criminal proceeds seems less punitive than remedial, insofar as it merely seeks to part the offender from his ill-gotten gains.<sup>451</sup> Indeed, by operation of the relation-back doctrine, whatever interest the defendant acquires in criminal proceeds<sup>452</sup> is always inferior to the government’s claim to the

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proceeds can ever be excessive because forfeiture of \$2.67 million in gross proceeds of bank fraud was not excessive); *United States v. Rudaj*, No. 04 CR. 1110(DLC), 2006 WL 1876664, at \*8 (S.D.N.Y. July 5, 2006) (collecting cases and noting that “[s]everal courts of appeal concluded since *Bajakajian* that the forfeiture of proceeds, as opposed to legally acquired property later involved in a criminal offense, does not implicate Eighth Amendment concerns of disproportionality”); *see also* *United States v. Alexander*, 32 F.3d 1231, 1236 (8th Cir. 1994) (deciding, pre-*Bajakajian*, that forfeiture of proceeds could not be excessive as a matter of law). The same analysis applies where the government seeks to forfeit substitute property in place of the direct proceeds. *United States v. Shepherd*, 171 F. App’x 611, 616 (9th Cir. 2006).

<sup>449</sup> *See Bajakajian*, 524 U.S. at 324; *supra* note 448.

<sup>450</sup> *See* David Pimentel, *Forfeitures Revisited: Bringing Principle to Practice in Federal Court*, 13 NEV. L.J. 1, 37 (2012) (“[T]he policy [behind forfeiture of proceeds] is not punitive in nature but is nonetheless rooted in deterrence. It deters not by threatening punishment but by denying the would-be criminal certain benefits of his or her crime.” (footnote omitted)); *id.* at 48 (“The forfeiture [of proceeds] is not punishment per se but denial of the benefit of the crime. For both proceeds and contraband forfeitures, the amount forfeited is precisely what the property holder was never legally entitled to have in the first place.”); *cf.* *United States v. 92 Buena Vista Ave.*, 507 U.S. 111, 121 n.15 (1993) (recognizing even before the rule was expanded to include evidence that Fourth Amendment permitted seizure of contraband and fruits of crime).

<sup>451</sup> The Supreme Court has twice rejected the argument that a criminal forfeiture was remedial, but in each case the Court was examining the forfeiture of criminally *involved* property. *See Bajakajian*, 524 U.S. at 329 (1998) (rejecting government argument that forfeiture of undeclared currency served the remedial purpose “of compensating the government for a loss”); *Austin v. United States*, 509 U.S. 602, 620–21 (1993) (rejecting argument that forfeiture of “instruments” of drug trade was remedial because it “protect[ed] the community from the threat of continued drug dealing” and compensated government for cost of enforcing drug laws). It has yet to determine whether the forfeiture of criminally derived property should likewise be considered punitive.

<sup>452</sup> Whether a defendant acquires any property interest in criminal proceeds at all (beyond mere possession) depends on the nature of the crime. In cases involving the sale of illegal goods, such as drugs or counterfeit merchandise, the defendant does obtain title to the funds acquired. *See* 53A AM. JUR. 2D *Money* § 21; *see also* 92 *Buena Vista Ave.*, 507 U.S. at 142 (Kennedy, J., dissenting). In fraud cases, where a victim is induced to part with her money by false representations or promises, the defendant acquires title, but his title is voidable. 67 AM. JUR. 2D *Sales* § 404; *see also* 27 WILLISTON ON CONTRACTS § 69:52 (4th ed. 2013). In cases of

property, which vests at the time of the crime's commission.<sup>453</sup> Arguably, then, when the government seeks to forfeit criminally derived property, it is not so much depriving the defendant of any existing property interest as enforcing its own property interest that is prior and superior to any possible claim of the defendant's.<sup>454</sup> Such a sanction might be better called "divestiture" than "forfeiture," because it requires the defendant to part with property to which he never had a lawful right, and in some cases where he merely has voidable title.<sup>455</sup>

The Supreme Court has yet to distinguish between forfeitures of criminally involved and criminally derived property in assessing whether such forfeitures are punitive or remedial.<sup>456</sup> *Bajakajian* painted with a broad brush in declaring the criminal forfeiture of property involved in an offense to be punitive on account of its being part of a criminal sentence.<sup>457</sup> But as applied to criminal proceeds, that analysis obscures the antecedent question of what (if any) property interest the defendant legitimately holds in the property to be forfeited, such that he would even have standing to contest its forfeiture. Indeed, it would be strange for the Supreme Court to require a jury determination of facts supporting the forfeiture of property to which the defendant—whose jury trial right the Sixth Amendment protects—has no legally cognizable claim in the first place.

These considerations counsel a nuanced approach to determining whether the defendant has any legal interest in property to be forfeited in order to assess whether the forfeiture might even be considered a "penalty" under *Apprendi*.<sup>458</sup> A court engaging in such an analysis

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theft, however, the defendant gains no title to the property he steals. 67 AM. JUR. 2D *Sales* § 409; RESTATEMENT (SECOND) OF TORTS § 229 cmt. d (1965); see also Pimentel, *supra* note 450, at 36–41 (discussing "unjust enrichment" principles underlying proceeds forfeitures). To the extent, meanwhile, that the criminal proceeds are themselves contraband (e.g., drugs, or counterfeit currency), the defendant, like any other party, lacks any cognizable ownership interest in such property. See 68 AM. JUR. 2d *Searches and Seizures* § 315; see also *United States v. Jeffers*, 342 U.S. 48, 52–53 (1951) (finding claimant was not entitled to return of contraband narcotics because of statute providing that "no property rights shall exist" in such contraband); *United States v. 37.29 Pounds of Semi-Precious Stones*, 7 F.3d 480, 485 (6th Cir. 1993) ("For items that are contraband per se, such as illegal drugs, no forfeiture proceeding is necessary.").

<sup>453</sup> See *supra* notes 304–08 and accompanying text.

<sup>454</sup> Cf. *supra* note 326 (discussing relation-back doctrine with respect to third-party interests).

<sup>455</sup> Cf. BLACK'S LAW DICTIONARY, *supra* note 159, at 722 (defining "forfeiture" as "divestiture of property without compensation"); see *supra* note 452.

<sup>456</sup> See *supra* note 451; see also Pimentel, *supra* note 450, at 34–52 (illuminating distinction between punitive and remedial forfeitures and discussing restitutionary and equitable justifications for forfeiture of proceeds).

<sup>457</sup> See *United States v. Bajakajian*, 524 U.S. 321, 328 (1998).

<sup>458</sup> *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) ("Other than the fact of a prior conviction, any fact that increases the *penalty* for a crime beyond the prescribed statutory

would need to ascertain (1) whether the defendant asserts an interest that would be recognized under federal and state law; and (2) the timing of his acquisition of any alleged interest relative to the vesting of the government's interest.<sup>459</sup> In cases where the court determines that the defendant's alleged interest is either invalid under applicable law or inferior to that of the government (as is always true in cases of criminally derived property), the court should find that the forfeiture is not punitive and that *Apprendi* does not apply under its own terms.<sup>460</sup>

Such an analysis would be unnecessary, of course, if one accepts our thesis that the Sixth Amendment does not grant the defendant a right to have criminal forfeiture issues tried to the jury in the first place.<sup>461</sup> But if a court were to reach a contrary conclusion and hold that *Apprendi* does apply to criminal forfeitures, then it would have to face the complex task of determining whether the forfeiture is punitive or remedial in a given case.

#### CONCLUSION

Criminal fines and criminal forfeitures differ not merely in name: they involve distinct factual considerations,<sup>462</sup> employ distinct procedures,<sup>463</sup> and, most importantly for Sixth Amendment purposes, arise out of distinct historical traditions.<sup>464</sup> *Southern Union* and the other cases in the *Apprendi* line, meanwhile, teach us that the scope of the Sixth Amendment jury trial right is determined neither by formalism nor contemporary policy considerations, but rather by the historical scope of the jury trial right as it existed at common law.<sup>465</sup> As

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maximum must be submitted to a jury, and proved beyond a reasonable doubt." (emphasis added)).

<sup>459</sup> See *supra* notes 304–08 (discussing relation-back doctrine).

<sup>460</sup> A parallel is available here to the circuit courts' interpretation of *Bajakajian* in the context of proceeds. *Bajakajian* instructs the court to examine whether the forfeiture is disproportionate to the offense of conviction. See *supra* note 431. Numerous courts have held that the forfeiture of criminal proceeds is not excessive under *Bajakajian* as a matter of law. See *supra* note 448. Similarly, since the forfeiture of criminal proceeds only affects property to which the defendant has no legal right, the Sixth Amendment should not require a jury trial as a matter of law. See Pimentel, *supra* note 450, at 47 ("The threat of a proceeds forfeiture promises the would-be criminal no profit from his crime. Because any and all financial benefit from the crime is forfeitable—no more and no less—the degree of deterrence is neither random nor arbitrary. Rather, it is calibrated precisely to deny the wrongdoer any and all benefit from his crime, and no more.").

<sup>461</sup> See *supra* Part IV.A.

<sup>462</sup> See *supra* Part III.A.

<sup>463</sup> See *supra* Part III.B.

<sup>464</sup> See *supra* Part II.

<sup>465</sup> See *supra* Part I.

established above, the common law jury had no role in determining the extent of the forfeiture imposed against a criminal defendant;<sup>466</sup> at common law, criminal forfeiture was total and automatic.<sup>467</sup> In “call[ing] on our common law heritage to meet an essentially modern problem,”<sup>468</sup> Congress has moderated that historical tradition, first, by limiting criminal forfeiture to property involved in or derived from the offense of conviction,<sup>469</sup> and second, by giving the defendant the right to have that connection determined by a jury.<sup>470</sup> But it did not enlarge the historical jury trial right incorporated by the Sixth Amendment, which gave the jury no role in adjudicating criminal forfeitures.<sup>471</sup> Thus, even after *Southern Union*, the criminal defendant’s right to a jury determination on forfeiture issues remains, as the Supreme Court recognized in *Libretti*, “merely statutory in origin.”<sup>472</sup>

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<sup>466</sup> See *supra* Part IV.A.

<sup>467</sup> See *supra* Part II.

<sup>468</sup> S. REP. NO. 91-617, at 79 (1969).

<sup>469</sup> See *supra* Part III.A.

<sup>470</sup> See *supra* Part III.B.

<sup>471</sup> See *supra* Part II.

<sup>472</sup> *Libretti v. United States*, 516 U.S. 29, 49 (1995).