good for purposes of the criminal law. Each person must, as part of social interactions, endure threats, which a reasonable person would disregard. Those who feel their freedom has been limited by such threats may not make use of the protection of the criminal law precisely because of their over-sensitivity.

The victim-centric principle performs a “bridging function” between the general and specific parts, because, analytically speaking, it provides interpretation guidelines for all offenses and is, in that sense, general. Unlike mens rea, it is not a concept, which classifies, and the characteristics of which are used to test various factual constellations in the same manner (although admittedly, the way in which this is to be done is a matter of further interpretation84). Instead, it is an open principle, which must be individually concretized for each offense, depending on its specific features.

The Forfeiture of Property Involved in Money Laundering Offenses

Stefan D. Cassella†

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84. For an explanation that the present definitions of intent have only led to an apparent determination of a particular psychological set of facts, but, in truth, cannot exist with a typological concretization, see Bernd Schünemann, Vom philologischen zum typologischen Vorsatzbegriff, in Festschrift für Hirsch 363 (1999).
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The forfeiture statutes for money laundering offenses have given prosecutors the authority to confiscate not only the proceeds of crime, but also property that is commingled with the proceeds or is used to facilitate the money laundering offense.

INTRODUCTION

Most federal criminal statutes now authorize the forfeiture of assets as part of the punishment that may be imposed when a defendant is convicted of a criminal offense. But not all forfeiture provisions are created equal. Most statutes authorizing forfeiture are narrow provisions that allow the government to confiscate the proceeds of the crime giving rise to the forfeiture, and the property that is directly traceable to it, but nothing more. A person who engages in corporate fraud or makes off with public funds may have to forfeit the ill-gotten gains, but in most cases, he cannot be made to part with the untainted property that he used to commit the crime. Other statutes go a step further, permitting the forfeiture of “facilitating property,” like the drug smuggler’s car or the counterfeiter’s computer, that made the crime easier to commit or harder to detect.

In money laundering cases, however, the statutes are broader still, authorizing the forfeiture of any “property involved” in the money laundering offense.1 As we shall see, that means that in the appropriate circumstances the government can recover the money being laundered, the money or other property that is commingled with it or obtained in exchange for it when the money laundering transaction takes place, and other property that facilitates the money laundering offense. Examples include clean money the defendant used to conceal or disguise laundered funds, the legitimate business he used as a front for his money laundering operations, and real property, securities,

and luxury items in which he invested the laundered funds to keep them hidden from view. Only the forfeiture statutes for RICO and terrorism offenses provide the government with a law enforcement tool that is so sweeping in scope or so powerful in application.  

To appreciate the difference between the money laundering statutes and their narrower cousins, consider a case in which the government is prosecuting a defendant for mail or wire fraud. Under the forfeiture statute for fraud offenses, the government can only recover the proceeds of the fraud itself and the property directly traceable to it. If the defendant hides his fraud proceeds by investing them in a ranch, or uses the dirty money along with other funds to buy a bag of diamonds, the government can forfeit only the portion of the property traceable to the underlying crime. The ranch, in other words, would have to be sold, with the proceeds of the sale divided between the government and the defendant. The diamonds likewise would have to be apportioned so that the government took those traceable to the crime, and the defendant retained those acquired with clean money. But if the government prosecuted the investment of the fraud proceeds in the ranch or the diamonds as a money laundering offense, it could forfeit the property in its entirety as “property involved” in the money laundering violation, and the defendant would have no basis to object that the forfeiture should be cabined within the bounds of the narrower statute.


4. See United States v. One 1980 Rolls Royce, 905 F.2d 89, 90 (5th Cir. 1990) (only the portion of the property traceable to the proceeds of the criminal offense is subject to forfeiture); United States v. 352 Northup St., 40 F. Supp. 2d 74 (D.R.I. 1999) (in “proceeds” cases, forfeiture is limited to portion of property purchased with drug money; the portion traceable to the subsequent investment of legitimate funds is not forfeitable; the property is apportioned after the sale).

5. See United States v. Hawkey, 148 F.3d 920, 927 (8th Cir. 1998) (when the defendant is convicted of both § 1957 and the underlying UA, forfeiture is properly imposed under the broader money laundering statute, § 982(a)(1), and is not limited to the forfeiture of “proceeds” under § 982(a)(2)); United States v. Mcgauve, 279 F.3d 62 (1st Cir. 2002) (distinguishing forfeiture under § 982(a)(1) from a “proceeds” forfeiture; the money laundering forfeiture is broader and is not limited to the proceeds being laundered).

6. The focus of this article is on what can be forfeited in a money laundering case, not on how the forfeiture is accomplished. Thus, the article does not attempt to deal with procedural issues such as the form of a forfeiture allegation in an indictment, the trial procedure and burden of proof, the duty of the government to trace assets, the availability of money judgments and substitute assets, and the myriad of other procedural issues that arise in money laundering and other criminal and civil forfeiture cases.

7. 31 U.S.C. § 5317(c) (2003). Section 5317(c) was enacted in its present form by § 372 of the USA Patriot Act, 115 Stat. 338 (2001). Aside from the language relating to conspiracies, however, the new statute is simply a re-codification of pre-existing forfeiture provisions that were found in the older version of § 5317(c), and in 18 U.S.C. §§ 981(a)(1)(A), 982(a)(1) (2003). The text of § 5317(c) is as follows:

(c) Forfeiture.—

(1) Criminal Forfeiture.—

(A) In General.—The court in imposing sentence for any violation of section 5313, 5316, or 5324 of this title, or any conspiracy to commit
First, under the Bank Secrecy Act, banks and other financial institutions are required to file currency transaction reports (CTRs) for all cash transactions in excess of $10,000. Banks and other financial institutions are also subject to certain record-keeping and reporting requirements with respect to transactions involving more than $3,000 in bank checks, travelers checks, or money orders. Financial institutions that fail to comply with these requirements are guilty of a criminal offense. Moreover, it is an offense for anyone either inside or outside of the financial institution to cause the institution not to file a required report, to file a false report, or to structure currency transactions for the purpose of evading the reporting requirements.

So, for example, if John Smith walks into a bank with a pedlar’s pack of cash flung over his back and seeks to deposit $50,000, the bank has to file a CTR. If the bank fails to do so, it violates § 5313. If the teller, through act or omission, causes the bank to fail to file, she violates § 5324(a)(1). If Smith does something to cause the bank to fail to file, or gives the bank false information, he violates § 5324(a)(1) or (2). And if Smith, after learning of the reporting requirement, leaves the bank and returns once a day for several days with just under $10,000 in cash, until all the cash is deposited, he is guilty of a structuring offense under § 5324(a)(3).

Those offenses all relate to the reporting of domestic currency transactions involving financial institutions. Similarly, it is an offense for any person to transport or transfer more than $10,000 in currency or bearer instruments into or out of the United States without filing a Currency and Monetary Instrument Report (CMIR) with the U.S. Customs Service. And it is an offense for any person to cause another to fail to file that report, to file a false report, or to structure transactions to evade the reporting requirement.

Thus, if John Smith takes his pile of cash and boards an airplane at JFK Airport in New York bound for Amsterdam, he must file a CMIR report because he is carrying more than $10,000 in currency out of the country. The failure to file the report constitutes a violation of §§ 5316 and 5324(c)(1), and filing a false report would be a violation of § 5324(c)(2).

Finally, any person engaged in a trade or business must file a report with the Internal Revenue Service, commonly called a Form 8300, regarding any sale of goods or services involving more than $10,000 in cash. This is similar to the CTR report that banks and other financial institutions must file, and it is an offense for any person either inside or outside of the trade or business to fail to file, or to cause someone to fail to file a report, to file a false report, or to structure a transaction to evade the reporting requirement.

So, if the infamous John Smith takes his pedlar’s pack not to a bank but to his friendly car dealership, and pays $50,000 in cash for a luxury automobile, the dealership is required to file a Form 8300. If the sales manager causes the dealership to fail to file the report, he is guilty of a violation of § 5324(b)(1). If Smith gives false information to

the manager so that the dealership files a false report, he commits a violation of § 5324(b)(2). And if the sales manager and Smith agree to allow Smith to break up the cash into amounts under $10,000 to evade the Form 8300 requirement, they are guilty of conspiring to violate § 5324(b)(3).

Before 2001, civil and criminal forfeiture authority for these offenses was scattered over the U.S. Code, or in the case of the Form 8300 requirement, did not exist at all. But in 2001, Congress placed the authority to forfeit the property involved in all of these violations in 31 U.S.C. § 5317(c), and made them applicable, for the first time, to conspiracies as well as to substantive offenses. A chart summarizing the three categories of currency reporting violations for which forfeiture is authorized by § 5317(c) appears in figure 1. The criminal forfeiture statute is § 5317(c)(1), and the civil forfeiture statute is § 5317(c)(2). Both statutes say the same thing: the government can forfeit all “property involved” in the currency reporting offense.

<table>
<thead>
<tr>
<th>CTRs</th>
<th>CMIRs</th>
<th>Form 8300s</th>
</tr>
</thead>
<tbody>
<tr>
<td>§ 5313</td>
<td>§ 5316</td>
<td>§ 5324(b)</td>
</tr>
<tr>
<td>§ 5324(a)</td>
<td>§ 5324(c)</td>
<td>§ 5331</td>
</tr>
<tr>
<td>§ 5325</td>
<td></td>
<td></td>
</tr>
<tr>
<td>§ 5326</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**Figure 1**

B. What Property Is “Involved in” a Currency Reporting Offense?

There is nothing complicated about what constitutes the “property involved” in a currency reporting violation. If someone fails to report a currency transaction, or files a false or incomplete report regarding that transaction, the government is entitled to forfeit all of the unreported or falsely reported funds (or property traceable thereto). Likewise, in a structuring case, the government may forfeit the entire sum that was divided up into smaller parts to evade the reporting requirement16 (or property traceable thereto).17

In the above examples, the government could forfeit the $50,000 that John Smith deposited in his bank account in violation of the CTR requirement. In United States v. $557,933.89, More or Less, in U.S. Funds,18 the government seized more than half a million dollars in money orders from a traveler at LaGuardia Airport in New York when an alert airport security guard spotted enormous bundles of money orders in the traveler’s carry-on luggage. The money orders were in small denominations, bore no payor or payee information, and had been purchased over two or three days at various locations in New York. The government’s theory was that someone had purchased the money orders in small amounts in order to avoid providing the identification required when a buyer purchases more

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16. See United States v. Funds in the Amount of $170,926.00, 985 F. Supp. 810 (N.D. Ill. 1997) (denying motion to dismiss complaint alleging funds were the subject of structured cash deposits into bank account).

17. See United States v. Ahmad, 213 F.3d 805 (4th Cir. 2000) (amount directly traceable to structured deposits is forfeitable); United States v. 874 Gartel Drive, 79 F.3d 918 (9th Cir. 1996) (forfeiture of real property purchased with ten cashier’s checks in amounts under $10,000); United States v. 1988 Oldsmobile Cutlass Supreme, 983 F.2d 670 (5th Cir. 1993) (cars purchased with cashier’s checks acquired in structured transaction forfeited); United States v. Rogers, No. 94-CR-138(FJS), 93-CV-156(FJS), 1996 WL 252659 (N.D.N.Y. 1996) (same); United States v. 5709 Hillington Rd., 919 F. Supp. 863 (W.D.N.C. 1996) (forfeiture of property traceable to thirty-three structured deposits, rev’d on other grounds, United States v. Leak, 123 F.3d 787 (4th Cir. 1997)).

18. 287 F.3d 66 (2d Cir. 2002).
than $3,000 in money orders from the same seller in contemporaneous transactions. 19

It is an offense under § 5324(a) to structure the purchase of money orders with the intent to evade the requirements of § 5325. Thus, the $557,993.89 in money orders was subject to forfeiture as property involved the violation of § 5324(a). 20

Figure 2

C. Forfeiture for CMIR Violations

Similarly, there is nothing complicated about forfeiture for violating the CMIR reporting requirement when transporting or transferring more than $10,000 in currency into or out of the United States. The entire amount of unreported currency is subject to forfeiture as "property involved" in the offense. 21

20. See fig. 2.

21. Forfeitures for violating the currency reporting statutes, including the CMIR requirement, of course, like all other civil and criminal forfeitures, are subject to the Excessive Fines Clause of the Eighth Amendment. The leading

One wrinkle that applies to CMIR cases concerns a person who transports a given sum of money into or out of the United States and, for whatever reason, reports some, but not all, of the money to the Customs Service. In such cases, the person who fails to file the report receives no credit for the fraction that was reported. All of the money is forfeitable as property involved in the reporting violation. 22

There are also several points worth noting with respect to civil forfeiture cases based on a CMIR violation. First, in such cases, it is not necessary for the government to prove that the person transporting the currency knew about the reporting requirement or willfully intended to violate it. It is only necessary to show that the person knew he had the currency and did not disclose it. Even an acquittal on the underlying criminal charge under § 5316 would not bar the civil forfeiture of the unreported currency. 23

Second, in civil forfeiture cases, it is unnecessary for the government to show that the person carrying the money to or across the border—i.e., the courier—was the person guilty of committing the CMIR offense. It is

Eighth Amendment case in the forfeiture field, United States v. Bajakajian, 524 U.S. 321 (1998), was, in fact, based on a CMIR violation. But the discussion here concerns what is forfeitable under the applicable statute. The limitations that the Excessive Fines Clause places on forfeitures based on currency reporting violations will be discussed in a moment. 22. See United States v. $173,081.04 in U.S. Currency, 835 F.2d 1141 (5th Cir. 1988) (even though misstatement applied to only a portion of the reported currency, all of it was subject to forfeiture); United States v. Six Negotiable Checks, 207 F. Supp. 2d 677 (E.D. Mich. 2002) (claimant gets no credit for the $8,500 in cash that she declared on the CMIR form); United States v. U.S. Currency ($883,506), No. 96-CV-1004 (CBA) (E.D.N.Y. July 23, 1997) (unpublished) (no credit given for the $60,000 that defendant did declare on the CMIR form), following United States v. U.S. Currency in the Amount of $80,320.00, More or Less, No. CV 90-2722 (RJD), 1992 WL 72987 (E.D.N.Y. 1992).

23. United States v. $100,438 U.S. Currency, 354 F.3d 1110, 1116 (9th Cir. 2004); see also Six Negotiable Checks, 207 F. Supp. 2d 677 (whatever the requirement in criminal cases may be, ignorance of the reporting requirement is no defense to civil forfeiture under § 5317(c); the traveler only needs to know that she is carrying more than $10,000); United States v. Three Monetary Instruments, No. 99-1173-FR (D. Or. Oct. 2, 2003) (unpub.) (there is no need to show claimant "violated section 5316 willfully or had knowledge of the reporting requirement").
sufficient to show that someone committed the offense, and that the property in the courier’s possession was the property involved in that offense. For example, in a recent case, the government was able to forfeit more than $1.7 million concealed in a truck when the driver stated that he intended to cross the border into Mexico but denied any knowledge of the currency. In that case, it was clear that someone was attempting to cause the courier to fail to file a CMIR, making the money forfeitable as property involved in a violation of 5324(c). 24

Finally, a relatively new issue concerns the application of the Innocent Owner Defense, 18 U.S.C. § 983(d), to CMIR forfeitures in civil forfeiture cases. 25 The issue arises when the owner of the currency being transported into or out of the United States claims that he did not realize that his courier—i.e., the person physically transporting the currency across the border—would fail to comply with the reporting requirement.

Prior to the enactment of the Civil Asset Forfeiture Reform Act of 2000 (CAFRA), 26 there was no innocent owner provision for forfeitures based on a failure to file a CMIR report. Thus, property involved in a CMIR offense was forfeitable to the United States whether the owner of the money was aware of the courier’s failure to file the report or not. 27 But under § 983(d)(2)—which was enacted as part of CAFRA and applies to all civil forfeitures except

---


27. See United States v. $124,813 in U.S. Currency, 53 F.3d 108 (5th Cir. 1995) (the Supreme Court’s decision in Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974), did not create a general innocent owner defense applicable to § 5317 forfeitures); United States v. $83,132.00 in U.S. Currency, No. 95-CV-2844, 1996 WL 599725 (E.D.N.Y. 1996) (under the Supreme Court’s decision in Bennis v. Michigan, 516 U.S. 442 (1996), there is no innocent owner defense in CMIR cases); but see United States v. $69,292.00 in U.S. Currency, 62 F.3d 1161 (9th Cir. 1995) (even though § 5317 does not contain an innocent owner provision, owner who took all reasonable steps to prevent illegal use may defeat forfeiture).

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29. See 31 C.F.R. § 103.23(d) (2004) which provides, in pertinent part, as follows:

This section does not require that more than one report be filed covering a particular transportation, mailing or shipping of currency or other monetary instruments with respect to which a complete and truthful report has been filed by a person. However, no person required by paragraph (a) or (b) of this section to file a report shall be excused from liability for failure to do so if, in fact, a complete and truthful report has not been filed.

31 C.F.R. § 103.23(a), provides that:

Each person who physically transports, mails, or ships, or causes to be physically transported, mailed, or shipped, or attempts to physically transport, mail or ship, or attempts to cause to be physically transported, mailed or shipped, currency or other monetary instruments in an aggregate amount exceeding $10,000 at one time from the United States to any place outside the United States, or into the United States from any place outside the United States, shall make a report thereof. A person is deemed to have caused such transportation, mailing or shipping when he aids, abets, counsels, commands, procures, or requests it to be done by a financial institution or any other person.

(Emphasis added).
himself, even if he is not the person physically transporting the currency.\textsuperscript{30} A person who is himself guilty of the act or omission giving rise to the forfeiture, or who could have taken reasonable steps to prevent the offense, cannot be an innocent owner of the property involved in that offense.\textsuperscript{31} Thus, even with the advent of § 983(d), it seems unlikely that there will be many cases where the owner of unreported currency is able to defend against its forfeiture by claiming that he was unaware that his courier would fail to comply with the reporting requirement.

D. Form 8300 Forfeitures

Forfeiture authority for Form 8300 offenses did not exist before 2001. That was because the filing requirement was previously codified in title 26, § 6050I, and there was no statutory forfeiture authority for such title 26 offenses. But the USA Patriot Act recodified the Form 8300 filing requirement at 31 U.S.C. § 5331,\textsuperscript{32} which, through a somewhat convoluted process, makes it possible for the government to use § 5317(c) to forfeit property involved in Form 8300 cases. That process is illustrated by figure 3.

\begin{figure}
\centering
\includegraphics[width=\textwidth]{figure3.png}
\caption{Figure 3}
\end{figure}

It works like this. Section 5317(c) doesn’t say anything about forfeitures for Form 8300 violations or about § 5331. But the USA Patriot Act amended 31 U.S.C. § 5324(b) to make it a crime to cause a trade or business to fail to file a report on a $10,000 cash transaction in violation of § 5331. So, if causing a business to fail to file a Form 8300 is an offense under § 5324(b), and if § 5317(c) authorizes the forfeiture of any property involved in any violation of § 5324, the government can use § 5317(c) to bring a criminal or civil forfeiture action against unreported currency or the merchandise traceable thereto.

Thus, if John Smith uses his $50,000 in cash to buy his luxury automobile, and he and the sales manager agree that the dealership will not file a Form 8300, the government can forfeit both the cash used to buy the car and the car itself under § 5317(c), because both are involved in the violation of § 5324(b). (If either Smith or the dealership qualifies as an innocent owner under § 983(d), of course, they would have an affirmative defense to the forfeiture.)

\begin{itemize}
\item \textsuperscript{30} See 31 C.F.R. § 103.27(a)(3) (2004); United States v. $170,000, 903 F. Supp. 373 (E.D.N.Y. 1995) (property becomes forfeitable at the time the owner leaves it with a common carrier and fails to file CMIR form).
\item \textsuperscript{31} Six Negotiable Checks, 207 F. Supp. 2d at 687 (person required to file CMIR who fails to file cannot be an innocent owner because she is clearly aware of the involvement of her property in the violation).
\item \textsuperscript{32} The Treasury Department’s Financial Crimes Enforcement Network (FinCEN) promulgated regulations for filing Form 8300’s under title 31 in January 2002. See 31 C.F.R. § 103.33 (2004). The reporting requirement codified at 31 U.S.C. § 5331 has been in effect since that time.
\end{itemize}
Note, however, that as originally enacted, § 5324(b) contained a typographical error making reference to a nonexistent "§ 5333" instead of § 5331. As of this writing, Congress had not yet fixed this problem. Nevertheless, as the legislative history makes it absolutely clear that the reference was intended to be to § 5331, the typographical error should not affect the validity of enforcement actions under the new statute.

E. Application of the Excessive Fines Clause

If all that the court had to be concerned about was whether the forfeiture of the property involved in a currency reporting violation was authorized by statute, forfeitures for CTR, CMIR, and Form 8300 violations would be a simple matter. The unreported or structured currency is obviously "involved" in the reporting offense. But finding that the property is subject to forfeiture under the applicable statute does not end the inquiry. In every forfeiture case, civil or criminal, the court must also determine whether a forfeiture that is authorized by statute would nevertheless violate the Excessive Fines Clause of the Eighth Amendment. This has become a critical issue in forfeiture cases involving the currency reporting offenses.

In United States v. Bajakajian, a traveler leaving Los Angeles International Airport was stopped with $557,000 in currency concealed in his luggage, and was charged with a criminal violation for failing to file the required CMIR form. He was convicted, but the district court declined to order the forfeiture of the full amount of the unreported currency on the ground that the forfeiture would constitute an excessive fine. When Court of Appeals for the Ninth Circuit agreed, the government sought review by the Supreme Court. Ultimately, the Supreme Court held that because a CMIR offense is not a very serious crime, and because the unreported currency is not, in any event, the corpus delicti of the crime, the full forfeiture of the unreported currency would be "grossly disproportional to the gravity of the defendant's offense," unless the currency was involved in some other criminal activity.

Accordingly, since Bajakajian was decided in 1998, courts imposing either civil or criminal forfeiture in a currency reporting case have had to conduct a post-forfeiture analysis to determine whether the forfeiture of the full amount of the unreported currency would violate the Excessive Fines Clause of the Eighth Amendment. To date, there has been no consensus on how the constitutional analysis should be applied, but some rules are beginning to emerge.

First, as already mentioned, although Bajakajian was a criminal case, it is clear that the proportionality analysis applies equally to civil cases.

Second, it is clear that Bajakajian does not apply when the undeclared money is the proceeds of another offense, or is intended to be used to commit another offense.

33. United States v. Bajakajian, 524 U.S. 321 (1998) (applying the Eighth Amendment to a criminal forfeiture); see United States v. Ahmad, 213 F.3d 805 (4th Cir. 2000) (Bajakajian applies equally to criminal forfeitures and to civil forfeitures of non-instrumentalities); United States v. $359,500 in U.S. Currency, 25 F. Supp. 2d 140 (W.D.N.Y. 1998) (civil forfeiture under § 5317(c) is subject to same excessive fines analysis as the Supreme Court applied in Bajakajian). For civil forfeiture cases, the Eighth Amendment analysis has been codified at 18 U.S.C. § 983(g).

34. 524 U.S. 321.

35. Id. at 337-38.

36. See United States v. Beras, 183 F.3d 22 (1st Cir. 1999) (criminal forfeiture of entire $138,794 defendant failed to declare on a CMIR form was unconstitutional under Bajakajian); on remand, district court must consider the harm caused by Defendant's conduct, whether the money was derived from an illegal source, and what the maximum fine would be under the Sentencing Guidelines); United States v. $273,969.04 U.S. Currency, 164 F.3d 462 (9th Cir. 1999) (Bajakajian applies to civil CMIR forfeiture under § 5317; remanded for gross disproportionality analysis); but see Olascu v. United States, No. 97-CV-5219 (TLO), 1998 WL 661459 (E.D.N.Y. 1998) (Bajakajian held that the forfeiture or $357,000 would be excessive; it does not follow that the forfeiture of $57,280 is excessive, and the court holds that it is not).

37. See supra note 33.

Therefore, in every CTR, CMIR, or Form 8300 forfeiture case, the first issue is whether there is a connection between the unreported currency and another crime. If there is, there is no constitutional violation in forfeiting 100% of the currency as § 5317(c) provides.

Third, even if the money is unrelated to any other crime, *Bajakajian* only requires that the forfeiture be mitigated to avoid the Eighth Amendment violation. It does not require that the forfeiture be reduced to zero; nor is the Court free simply to set aside the forfeiture statute and impose any amount of forfeiture that it sees fit. In enacting the forfeiture statutes, Congress has provided that all of the property involved in the offense is subject to forfeiture—limited only by the constitutional proscriptions embodied in the Excessive Fines Clause. In other words, the congressional mandate that all of the property involved in an offense be forfeited to the United States remains in effect, up to the point where any additional forfeiture would be constitutionally excessive.

Forfeiture statutes are therefore entirely unlike statutes that set forth a maximum civil or criminal fine and

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Amendment violation where CMIR violation was in furtherance of tax evasion; United States v. U.S. Currency in the Sum of $97,253.00, No. 95-CV-3982(JG), 2000 WL 194683 (E.D.N.Y. 2000) (if the undeclared funds in a CMIR case are drug proceeds there is nothing disproportional about forfeiting the entire amount, either because *Bajakajian* does not apply to the nonpunitive forfeiture of proceeds, or if it does apply, because the court compares the forfeiture to the gravity of the drug offense, not to the gravity of the CMIR violation); cf. United States v. Suarez, 225 F.3d 777, 780 (7th Cir. 2000) (sentencing case: manner in which money was packaged to avoid detection; defendant's false statement that she was not carrying more than $10,000 and further false statement as to the source of the money and lack of legitimate income supported conclusion that money was from an illegal source; "Lying about the source gives rise to an inference that the source is illegitimate.").

39. See United States v. $100,348, 354 F.3d 1110, 1122 (9th Cir. 2004) (applying the four *Bajakajian* factors, the court holds that reducing $100,000 forfeiture to $10,000 did not violate the Eighth Amendment); United States v. U.S. Currency in the Amount of $119,984.00, 304 F.3d 165, 175 n.7 (2nd Cir. 2002) (noting that *Bajakajian* does not bar forfeiture of some amount less than 100 per cent of the seized currency but greater than zero when there is no connection to other illegal activity); United States v. 6380 Little Canyon Rd., 59 F.3d 974, 986-87 (9th Cir. 1995) (the court must limit a civil forfeiture to an appropriate portion of the asset to avoid an Eighth Amendment violation).

40. Cf. 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 . . ."); United States v. Corrado, 227 F.3d 543 (6th Cir. 2000) (criminal forfeiture is a mandatory aspect of the defendant's sentence); United States v. Hill, 167 F.3d 1055 (6th Cir. 1999) (court may not ignore mandatory language of forfeiture statute and give defendant option of substituting cash for forfeited items, unless § 853(p) applies). The foregoing cases involved criminal forfeiture. There is no reason to believe that civil forfeiture is any different, and there does not appear to be any case holding that a court has the discretion to mitigate a civil forfeiture other than on Eighth Amendment grounds. If the rule were otherwise, *Bajakajian* would apply differently in civil and criminal cases whereas, to the contrary, the courts uniformly hold that it applies equally in both contexts.

41. See fig. 4.
related to a separate question: who is the person who is contesting the forfeiture on Eighth Amendment grounds? In *United States v. $100,348*, the Court of Appeals for the Ninth Circuit held that a courier who was stopped at the Los Angeles airport carrying $100,348 in currency for a third party, and who did not file the required CMIR form, had standing to contest the forfeiture action on the ground that the forfeiture violated the Excessive Fines Clause. The court then applied the *Bajakajian* analysis and reduced the forfeiture to $10,000.

On the narrow issue of standing, the decision is unexceptional: if a bailee in possession of currency has Article III standing to contest a forfeiture action at all, it follows that such a person can contest the forfeiture on any legal grounds that might be available, including unconstitutional excessiveness. The Eighth Amendment analysis that applies in that case, however, is very different if the person asserting the claim is not the owner of the property and hence cannot possibly suffer any economic harm if the property is forfeited.

The Eighth Amendment creates a personal right that protects individuals from the imposition of an excessive fine. Thus, the core of the Eighth Amendment analysis is a balancing test between the gravity of the wrongdoer's offense and the magnitude of the punishment imposed. Depriving a courier of currency that belonged to someone else punishes the courier not at all. Yet, in *$100,348*, the Ninth Circuit applied the Eighth Amendment analysis from *Bajakajian* without taking into account the relationship of the courier to the money, or the fact that the forfeiture would not have any economic consequence as far as the courier was concerned.

42. *United States v. $100,348*, 354 F.3d 1110, 1119 (9th Cir. 2004).
43. *$100,348*, 354 F.3d at 1119 (noting that under CAFRA, 18 U.S.C. § 983(g), any claimant has standing to contest a civil forfeiture action on Eighth Amendment grounds).
This approach seems to be clearly wrong. The Eighth Amendment analysis is not a one-size-fits-all test that can be applied blindly in every case without taking into account the relationship of the wrongdoer to the property to be forfeited. In affirming the reduction of the forfeiture in $100,348 to $10,000, the court accounted for the gravity of the offense, the harm it caused, the relationship of the offense to other criminal conduct, and the other penalties that could have been imposed. But it did not take into account the fact that the property belonged to a third party who did not file a timely claim! The proper approach would have been to consider whether the forfeiture of the $100,348 in unreported currency would have deprived the non-owner courier of any significant property interest, and to conclude that inasmuch as it would have deprived him of no property interest at all, the forfeiture of the entire $100,348 could not have violated his rights under the Eighth Amendment. Thus, the entire amount should have been forfeited—just as the forfeiture statute prescribes.

45. Id.
46. The Ninth Circuit’s decision in $100,348 represents a 180 degree turnaround from the same court’s pro-Bajakajian Eighth Amendment analysis, which relied heavily on “subjective factors,” such as how the forfeiture would affect the person asserting the Eighth Amendment claim, and his family. See United States v. Real Property Located in El Dorado County, 59 F.3d 974 (9th Cir. 1995) (court must compare tangible and intangible/subjective value of the property—e.g., whether it is the family home—and the hardship to the defendant—including effect on family and on defendant’s financial condition—against the culpability of the owner and the harm caused by the illegal activity). That approach, which represents the other extreme in Eighth Amendment jurisprudence, has been discredited, and rightly so. A forfeiture cannot be unconstitutional in one case and constitutional in another just because the wrongdoer in one case was poor—and so felt a greater loss on account of the forfeiture—and the wrongdoer in the other case was wealthy—and so could afford the loss of his forfeited property. See United States v. 817 N.E. 29th Drive, Wilton Manors, 175 F.3d 1304 (11th Cir. 1999) (the personal characteristics of the owner, the character of his/her property, and the value of any remaining assets are irrelevant); United States v. Dieter, 198 F.3d 1284 (11th Cir. 1999) (the personal impact of the forfeiture on a specific defendant is not one of the factors the court considers in determining if a forfeiture is excessive under Bajakajian); United States v. Two Parcels of Real Property . . . 101 North Liberty Street, 80 F. Supp. 2d 1298 (M.D. Ala. 2000) (defendant’s wealth and the effect of the forfeiture on the defendant are irrelevant to the Eighth Amendment). But that does not mean that the court should grant a windfall in the guise of vindicating the rights protected by the Eighth Amendment to a person with no economic connection to the forfeited property.

47. 213 F.3d 805 (4th Cir. 2000).
49. Ahmad, 213 F.3d at 814, 815 n.3 (Bajakajian limits Austin’s application of the Excessive Fines Clause to all civil forfeitures that are punitive to some degree; the Eighth Amendment does not apply to the civil forfeiture of instrumentalties; the presence of an innocent owner provision in the forfeiture statute does not supersede the “instrumentality inquiry”).
50. Ahmad, 213 F.3d at 817; see United States v. Contents of Account Number 901121707, 36 F. Supp. 2d 614 (S.D.N.Y. 1999) (where claimant structured over
II. BULK CASH SMUGGLING: 31 U.S.C. § 5332

The distinction that the Supreme Court drew between smuggling cases and currency reporting cases in Bajakajian has led lower courts to conclude that the excessive fines analysis does not apply to traditional smuggling cases where the smuggled goods being forfeited represent the instrumentalities of the crime. The same reasoning led directly to the enactment of a new “bulk cash smuggling” statute, 31 U.S.C. § 5332, as part of the USA Patriot Act in 2001.

In the Patriot Act, Congress found that smuggling currency in the form of “bulk cash” is a favored device of drug traffickers, money launderers, tax evaders, and persons financing terrorist operations, and that it “is the equivalent of, and creates the same harm as, the smuggling of goods.” Moreover, Congress found that “only the confiscation of smuggled bulk cash can effectively break the cycle of criminal activity of which the laundering of the bulk cash is a critical part.” Finally, picking up on the distinction between instrumentalities and non-instrumentalities in forfeiture law, Congress noted that as long as bulk cash smuggling was considered only a currency reporting offense, the penalties, as limited by Bajakajian, could not “adequately provide for the confiscation of smuggled currency.” In contrast, Congress concluded, “if the smuggling of bulk cash were itself an offense, the cash could be confiscated as the corpus delicti of the smuggling offense.”

These findings are summarized in the Committee Report accompanying the money laundering provisions of the Patriot Act:

The Committee believes . . . that bulk cash smuggling is an inherently more serious offense than simply failing to file a Customs report. Because the constitutionality of a forfeiture is dependent on the “gravity of the offense” under United States v. Bajakajian, it is anticipated that the full forfeiture of smuggled money will withstand constitutional scrutiny in most cases. For the confiscation to be reduced at all, the smuggler will have to show that the money was derived from a legitimate source and not intended to be used for any unlawful purpose. Even then, the court’s duty will be to reduce the amount of confiscation to the maximum that would be permitted in accordance with the Eighth Amendment and the aggravating and mitigating factors set forth in the statute.

In short, Congress found that the clandestine movement of bulk cash across the border is really more like a smuggling offense than like the simple failure to file a currency transaction report. Smuggling currency, after all, does more than deprive the government of information that may be used to create a paper trail. It is an integral part of the recycling of drug proceeds, the financing of terrorism, the evasion of income taxes, and other crimes that rely on extracting currency from, or injecting foreign funds into, the U.S. economy without using the traditional banking or wire transfer systems. In fact, smuggling currency creates the same type of harm as other forms of smuggling, including the smuggling of firearms, counterfeit goods, adulterated foods, and unapproved medicines.

Thus, Congress enacted § 5332 which makes it an offense to smuggle currency into or out of the United States without filing a CMIR form, and expressly provided that all of the smuggled currency would be subject to civil and criminal forfeiture whether the government is able to

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52 million, forfeiture of $210,000 was not excessive, even though the money was not derived from an illegal source).
51. See United States v. $273,969.04 U.S. Currency, 164 F.3d 462 (9th Cir. 1999) (19 U.S.C. § 1497 forfeiture for smuggling offenses lies outside scope of excessive fines analysis; Bajakajian does not apply).
53. Id.
54. Id.
55. Id.
establish a nexus between the currency and another crime or not.\textsuperscript{57} Accordingly, if Mr. Bajakajian were to try to depart from LAX today with $357,000 in currency concealed in the false bottom of his suitcase, he could be prosecuted under § 5332 and 100\% of the currency could be forfeited as the instrumentality of the smuggling offense.\textsuperscript{58}

A. The Missing “Subsection (d)”

There is one oddity in § 5332: both the civil and the criminal forfeiture provisions state that the property shall be forfeited “subject to subsection (d) of this Section.”\textsuperscript{59} However, no “subsection (d)” was enacted.

The language proposed as subsection (d), which is set forth in the margin,\textsuperscript{60} was part of § 5332 when it passed the Senate and when the bill was reported out of the House Financial Services Committee, but it was dropped on the

\textsuperscript{57} 31 U.S.C. § 5332(b)-(c) (2003). Effective November 1, 2002, the United States Sentencing Commission has set the offense level for violations of § 5332 two levels above the offense level for CMIR offenses to reflect the greater seriousness of the offense. See U.S.S.G. § 2S1.3 (2003).


\textsuperscript{60} H. Rep. No. 107-250, supra note 56.

\textsuperscript{61} Proportionality of Forfeiture.—

(1) In General.—Upon a showing by the property owner by a preponderance of the evidence that the currency or monetary instruments involved in the offense giving rise to the forfeiture were derived from a legitimate source, and were intended for a lawful purpose, the court shall reduce the forfeiture to the maximum amount that is not grossly disproportional to the gravity of the offense.

(2) Factors to Be Considered.—In determining the amount of the forfeiture, the court shall consider all aggravating and mitigating facts and circumstances that have a bearing on the gravity of the offense, including the following:

(A) The value of the currency or other monetary instruments involved in the offense.

(B) Efforts by the person committing the offense to structure currency transactions, conceal property, or otherwise obstruct justice.

(C) Whether the offense is part of a pattern of repeated violations of Federal law.

\textsuperscript{62} See § 1960(b)(1)(A) & (B) (2003). Money transmitting businesses are required by statute to register with FinCEN even if they are already licensed to do business by the State in which they operate. See 31 U.S.C. § 5330 (2003) and regulations promulgated thereunder, 31 C.F.R. § 103.41 (2004).

\textsuperscript{63} See fig. 5.
commonly employed by drug traffickers who need to move bulk cash domestically without using the banking system. Thus, if a police officer stops a courier carrying a large quantity of cash as part of such a money-movement operation, and the evidence shows that the courier was aware that the money was derived from an illegal source or intended for an unlawful purpose, the courier can be prosecuted under § 1960, and the money can be seized and forfeited under § 981(a)(1)(A) or 982(a)(1).\footnote{See 18 U.S.C. §1960(b)(2) defining “money transmitting” to include “transferring funds on behalf of the public by any and all means including but not limited to transfers . . . by . . . courier . . . .” See also H.R. Rep. No. 107-250, at 54 (2001): \[This Section\] expands the definition of an unlicensed money transmitting business to include a business engaged in the transportation or transmission of funds that the defendant knows are derived from a criminal offense, or are intended to be used for an unlawful purpose. Thus, a person who agrees to transmit or to transport drug proceeds for a drug dealer, or funds from any source for a terrorist, knowing such funds are to be used to commit a terrorist act, would be engaged in the operation of an unlicensed money transmitting business. It would not be necessary for the Government to show that the business was a storefront or other formal business open to walk-in trade. To the contrary, it would be sufficient to show that the defendant offered his services as a money transmitter to another. (Emphasis added.)}


The entire discussion thus far of forfeiture for money laundering offenses has been the overture before the main event. We now turn to what is forfeitable for violations of the principal money laundering statutes in title 18—§§ 1956 and 1957.

A. The Money Laundering Statutes

makes it a crime to conduct a financial transaction involving "dirty money" in a way that makes the money appear "clean," or to be only slightly more technical, in a way that conceals or disguises the source, nature, location, ownership, or control of the dirty money. 67 In this case, "dirty money" is the layman's term for what the statute calls "the proceeds of specified unlawful activity" ("SUA"). 68 In other words, it is not a crime to launder just any criminal proceeds, but only to launder the proceeds of one of the 250 or so state, federal, and foreign crimes designated as SUA offenses in the statute. 69 That is quite a long list of crimes, and it covers all of the most commonly prosecuted offenses from drug trafficking to mail fraud to public corruption; but it does not include everything—the omission of tax evasion and foreign fraud offenses being the most glaring examples.

In any event, for obvious reasons, this type of money laundering is called "concealment money laundering." A person who puts his fraud proceeds in his wife's bank account to conceal his connection to the money, or who puts his drug proceeds in the operating account of his pizzeria to make the money look like the proceeds of selling pizzas, commits concealment money laundering. 70

That's one part of § 1956(a)(1). The other important part of the domestic money laundering statute makes it an offense to use the dirty money to commit or facilitate another SUA offense, or to continue the scheme that generated the dirty money in the first place. 71 This is called "promotion money laundering." A person who takes the proceeds he earns from defrauding one victim of his

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68. § 1956(a)(1).
70. See, e.g., United States v. Miles, 290 F.3d 1341 (11th Cir. 2002) (evidence that defendant purchased house in sister's name and gave sister money to pay mortgage in her name sufficient to show purpose to conceal or disguise SUA proceeds); United States v. Hunt, 272 F.3d 488 (7th Cir. 2001) (defendant laundered drug dealer's money by buying car in name of his own business and giving it to drug dealer for cash).
financial transaction involving dirty money. But there is an important difference. A defendant can be convicted of a § 1957 offense even if he had no intent to promote another offense, or to conceal or disguise anything about the dirty money. Simply spending, depositing or transferring the dirty money is sufficient, provided that at least $10,000 was involved. Thus, § 1957 is often called the “money spending statute.” Its purpose is to make the criminal’s money worthless, by making it a felony for him to spend it, or for anyone else to take it, if he knows of its illegal source.

B. What Property Is Involved in a Violation of § 1956 or § 1957?

Sections 981(a)(1)(A) and 982(a)(1) make all “property involved” in a violation of either § 1956 or § 1957 subject to civil and criminal forfeiture, respectively. So, what property is “involved” in such a money laundering offense?

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77. See United States v. Brown, 186 F.3d 661, 670 (5th Cir. 1999) (§ 1956 is not a money “spending” statute; it is a money laundering statute that requires specific intent; in contrast, § 1957 is a money spending statute.).
78. See United States v. Rutgard, 116 F.3d 1270, 1291 (9th Cir. 1997) (§ 1957 is designed to freeze criminal proceeds out of the banking system); United States v. Allen, 129 F.3d 1159 (10th Cir. 1997) (Congress’s primary concern in enacting § 1957 may have been with third parties who give criminals opportunity to spend ill-gotten gains, but the statute nevertheless reaches conduct of wrongdoers who conduct transactions with fruits of their own criminal acts.); United States v. Johnson, 971 F.2d 562, 568 (10th Cir. 1992) (the statute criminalizes the actions of third parties who have aided drug dealers by allowing them to dispose of drug proceeds but whose conduct is not covered by conspiracy law.).
79. Section 981(a)(1)(A) provides as follows: (a)(1)(A) The following property is subject to forfeiture to the United States:
(A) Any property, real or personal, involved in a transaction or attempted transaction in violation of section 1956, 1957 or 1960 of this title, or any property traceable to such property.
Section 982(a)(1) provides as follows: (a)(1) The court, in imposing sentence on a person convicted of an offense in violation of section 1956, 1957, or 1960 of this title, shall order that the person forfeit to the United States any property, real or personal, involved in such offense, or any property traceable to such property.

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The legislative history says the following, in pertinent part: “It is the intent of Congress that a person who conducts his financial transactions in violation of the anti-money laundering statutes forfeits his right to the property involved . . . . [T]he term "property involved" is intended to include the money or other property being laundered (the corpus), any commissions or fees paid to the launderer, and any property used to facilitate the laundering offense.” 134 Cong. Rec. S17365 (daily ed. Nov. 10, 1988) (statement of Sen. Biden).
involved in, or used to commit, the SUA offense.\textsuperscript{81} We will discuss each of these categories in turn.

Four Theories of Money Laundering Forfeiture

1. The proceeds of the SUA offense.

2. The subject matter of the transaction:
   a. Section 1956(a)(2)(A) property.
   b. Property obtained in a sale or exchange.
   c. "Commingled" property.

3. Facilitating property.

4. Property involved in or used to commit the SUA.

Figure 6

1. The proceeds of the SUA offense

We begin with the simplest case: forfeiture of the SUA proceeds that the defendant is using to commit the money laundering offense.

In United States v. Trost,\textsuperscript{82} the defendant was a public official who stole money from the county government where he worked. Specifically, he deposited more than $57,000 in checks intended for the county into his personal bank account, transferred approximately $23,000 of that amount to the joint account he held with his wife, and then spent that money on personal expenses.\textsuperscript{83} The underlying theft, or "specified unlawful activity," was charged as a violation

of 18 U.S.C. § 666 (theft or bribery concerning programs receiving federal funds),\textsuperscript{84} and the transfer of the $23,000 from the first bank account to the second was charged as a money laundering offense in violation of § 1956(c)(1)(B)(i). In other words, the financial transaction—the actus reus of the money laundering offense—was the transfer of $23,000.

\textbf{Figure 7}

Under § 982(a)(1), the government was entitled to the forfeiture of all property involved in the money laundering offense. What property was involved in the transfer of $23,000 from one account to another? Obviously, $23,000. So at the very least, the government was entitled to the forfeiture of that amount. In other words, Trost illustrates the unsurprising proposition that in a money laundering case under §§ 1956 and 1957, the government can always forfeit the proceeds of the underlying SUA offense that are being laundered. Moreover, as other courts have held in conspiracy and attempt cases, the government can forfeit

\textsuperscript{81} See fig. 6.
\textsuperscript{82} 152 F.3d 715 (7th Cir. 1998).
\textsuperscript{83} See fig. 7.
\textsuperscript{84} Section 666 is an SUA because it is listed in 18 U.S.C. § 1956(c)(7)(D) (2003).
the proceeds that the defendant conspired or attempted to launder, even if the offense was not completed. Such forfeitures are fairly common and rarely generate much discussion.

Nevertheless, this used to be very exciting: Until CAPRA took effect on August 23, 2000, there was no forfeiture provision for most of the SUA offenses. There was no forfeiture for mail or wire fraud, or bribery, or extortion, or theft from a government program. Trost was laundering the proceeds of a § 666 violation, but there was no forfeiture for a § 666 violation when all of this occurred. So the only way for the government to recover the proceeds of that offense was to convict Trost of money laundering and forfeit the proceeds as property involved in that crime.

Indeed, before 2000, it was commonplace for a federal prosecutor to include a money laundering count in a criminal indictment as the means to get a forfeiture judgment and recover the proceeds of an offense so that they could be restored to the victim. But now, the government can forfeit the proceeds of any SUA offense directly—that is, without proving a money laundering offense—by using the forfeiture provision in § 981(a)(1)(C). Accordingly, the use of the money laundering statute for this purpose has decreased, but the SUA proceeds being laundered can still be forfeited when a defendant is convicted of money laundering.

a. Applying the Excessive Fines Clause

In light of our discussion of the Excessive Fines Clause of the Eighth Amendment, and the Supreme Court's decision in Bajakajian, however, we must ask: What happens to a forfeiture of the SUA proceeds in a money laundering case if we apply the Excessive Fines Clause? But the answer is simple. The forfeiture of the proceeds of an offense is never disproportional—never mind "grossly disproportional"—to the gravity of the offense that generated the proceeds. The forfeiture of criminal proceeds simply deprives the defendant of something that he had no right to possess in the first place. Thus, no court has ever held that the forfeiture of

85. See United States v. Hasson, 333 F.3d 1264 (11th Cir. 2003) (forfeiture for money laundering conspiracy is not limited to proceeds derived from substantive offenses on which defendant was convicted, but includes amount derived from uncharged conduct and conduct on which defendant may have been acquitted); Baker, 227 F.3d 955 (in a conspiracy case, defendant forfeits total amount of SUA proceeds involved in the conspiracy, not just amount involved in substantive offenses or overt acts); United States v. $15,270,885.69 Formerly on Deposit in Account No. 89008261137, 2000 WL 1234563, No. 99 Civ. 1055(RCC) (S.D.N.Y. 2000) (money in a bank account can be forfeited as property involved in an attempt to commit a money laundering offense).
86. See, e.g., United States v. Moyer, 313 F.3d 1082 (8th Cir. 2002) (affirming forfeiture of the amount defendant embezzled from his pension plan and used to pay personal creditors in violation of § 1957); United States v. Stewart, 185 F.3d 112 (3d Cir. 1999) ($3 million in fraud proceeds forfeited as property involved in § 1957 violation); United States v. Ladum, 141 F.3d 1328 (9th Cir. 1998) (property concealed from bankruptcy court was SUA proceeds and was forfeited as property involved in subsequent money laundering designed to conceal and disguise true ownership); United States v. Millet, 123 F.3d 268 (5th Cir. 1997) (defendant ordered to forfeit amount equal to bribe money he received and then laundered; no discussion); United States v. Iacaboni, 221 F. Supp. 2d 104 (D. Mass. 2002) (gambling proceeds paid as salaries to co-defendants and as winnings to successful bettors promoted the gambling offense and so was "involved" in the money laundering); United States v. Cleveland, 1997 WL 537707, No. CRIM.A 96-207 (E.D. La. 1997) (property "involved" includes the proceeds being laundered; the Government entitled to money judgment in that amount); In re McCorkle, 972 F. Supp. 1423 (M.D. Fla. 1997) (finding probable cause for seizure; bank accounts containing fraud proceeds deposited with intent to promote continuation of a Ponzi scheme are forfeitable under §§ 981 and 1956(a)(1)(A)(i)).
87. 18 U.S.C. § 981(a)(1)(C) (2003) (making the proceeds of any SUA offense, or a conspiracy to commit an SUA offense, subject to civil forfeiture); see 28 U.S.C. § 2461(c) (2003) (making any property subject to civil forfeiture likewise subject to criminal forfeiture).
88. Because the ex post facto clause applies to criminal forfeiture, it is still necessary for the government to use the money laundering statutes to forfeit proceeds of SUA offenses in criminal cases if the offense occurred before August 23, 2000, unless the offense continued beyond, or "straddled," that date. See United States v. Colon-Munoz, 192 F.3d 210 (1st Cir. 1999) (§ 982(a)(2) cannot be applied to conspiracy that ended before effective date of the forfeiture statute); United States v. Sudeen, 2002 WL 1897095, No. C.R.A. 02-062 (E.D. La. 2002) (whether forfeiture of proceeds of fraud conspiracy that straddles effective date of CAPRA would violate ex post facto will be determined if there is a conviction; pretrial motion is premature).
89. See United States v. Lot 41, Berryhill Farm Estates, 128 F.3d 1386 (10th Cir. 1997) (collecting cases).
the SUA proceeds being laundered in a money laundering case constituted a violation of the Excessive Fines Clause.  

2. Property That Is the Subject Matter of the Money Laundering Offense

The second category of property subject to forfeiture in a money laundering case is what Congress called the “corpus” and I call the “subject matter” of the money laundering transaction. Obviously the SUA proceeds being laundered (Category One) are part of the subject matter of the offense. What I’m referring to in Category Two, however, is property, other than the SUA proceeds, that was part of, or integral to, the money laundering transaction. As we will see, this includes “clean” money being used to commit a criminal offense in a reverse money laundering transaction; property that is the subject of a purchase, sale or exchange constituting a money laundering offense; and property that is commingled with the SUA proceeds in the course of the money laundering transaction.


As already mentioned, § 1956(a)(2)(A) is the international money laundering statute that does not require proof that the property transported or transferred to or from the United States involved SUA proceeds. It's enough that the money was transported or transferred with the intent to promote such an offense. Thus, § 1956(a)(2)(A) is really a “reverse money laundering” statute. Instead of making it a crime to launder dirty money to make it clean, it makes it a crime to use clean money for an unlawful purpose, thus making the money dirty.

If all the government could forfeit in a money laundering case were the SUA proceeds, there would be nothing to forfeit in a § 1956(a)(2)(A) case. But because the government can forfeit all property involved in a violation of § 1956(a)(2)(A), it can forfeit the untainted funds that are transferred or transported to the United States for some unlawful purpose. So if John Smith brings $100,000 into the United States to buy an airplane to be used in his drug smuggling operation, he commits a violation of § 1956(a)(2)(A), and the $100,000 in previously untainted money can be forfeited as property involved in that offense.

Of course, the government has to prove that the intent behind the movement of the funds into or out of the United States was to promote one of the crimes listed in the definition of “specified unlawful activity” in 18 U.S.C. § 1956(c)(7). But that list is ever-expanding. In fact, nearly fifty new offenses—mostly dealing with potential terrorist acts and other crimes of violence, but also including a number of other foreign crimes—were added by the USA Patriot Act in 2001.

The way in which this was done was somewhat indirect, and so might not be obvious to the practitioner. But it works like this: 18 U.S.C. § 2332b(g)(5)(B) contains a long list of federal crimes ranging from the use of chemical weapons to attacks against transportation systems that might be committed by terrorists. In the Patriot Act, Congress amended 18 U.S.C. § 1961(1)(G) to make all of the offenses listed in § 2332b(g)(5)(B) RICO predicates. Pursuant to 18 U.S.C. § 1956(c)(7)(D), of course, all RICO

90. See Moyer, 313 F.3d 1082 (forfeiture of the amount defendant embezzled from his pension plan and used to pay personal creditors in violation of § 1957 not disproportional, even though forfeiture was double the amount of loss to victims); United States v. Loe, 248 F.3d 449 (5th Cir. 2001) (forfeiture of portion of property traceable to laundered SUA proceeds is not disproportional at all, never mind “grossly disproportional”); Ladum, 141 F.3d 1328 (forfeiture of laundered proceeds of bankruptcy fraud not excessive because forfeiture deprives defendant of property he had no right to retain anyway); United States v. One 1988 Prevost Liberty Motor Home, 952 F. Supp. 1180 (S.D. Tex. 1996) (forfeiture of motor home purchased in the transaction in which SUA proceeds were laundered cannot be excessive).

91. See legislative history quoted at supra note 80.


predicates are automatically SUA offenses for money laundering purposes. Thus, a person who brings $100,000 into the United States to finance any crime listed in §2332b(g)(5)(B) commits a violation of §1956(a)(2)(A), making the $100,000 forfeitable under §§981(a)(1)(A) and 982(a)(1) as property involved in the money laundering offense.  

**Forfeiture of Section 1956(a)(2)(A)**

Property

§ 981(a)(1)(A) and § 982(a)(1)

Authorize forfeiture for violations of...

§ 1956(a)(2)(A)

Which makes it a crime to bring money into the U.S. to promote any offense listed in...

§ 1956(g)(7)(A)

Which incorporates...

§ 1951(1)(G)

§ 2332b(g)(5)(B)

**Figure 8**

The reason that this comes up in a discussion of forfeitures of property involved in reverse money laundering violations is that virtually none of the terrorism-related offenses listed in §2332b(g)(5)(B) are likely to generate proceeds. Unlike criminals who commit mail and wire fraud offenses, persons who plan to blow up a subway system or contaminate the water supply of a small city do not do so to make money. So a forfeiture statute that only allows the government to confiscate the proceeds of such an offense would be of little use. Much more important is to be able to confiscate the money that is used or intended to be used to plan and carry out that offense before it takes place.

That is where the authority to forfeit any property involved in a violation of §1956(a)(2)(A) comes into play. While the property transported into or out of the United States for the purpose of promoting an SUA offense does not constitute the “proceeds” of that crime, it nevertheless represents the subject matter of the money laundering offense, and so is subject to forfeiture.  

b. *Property Involved in a Purchase, Sale, or Exchange*

Reverse money laundering cases constitute an important but rare application of the forfeiture provisions in §§981(a)(1)(A) and 982(a)(1). Let’s return now to the more typical cases in which the defendant is using dirty money to conduct a financial transaction.

As we saw in Trost, such transactions can be simple one-way transfers of the SUA proceeds from one account to another. But money laundering offenses often involve more than just the dirty money. If a person launderers his criminal proceeds by buying a car, the car is involved in the offense. If he launderers stolen goods by trading them for jewels, the jewels are involved in the offense. And if he launderers fraudulently obtained securities by selling them for cash, the cash is involved in the offense. Indeed, any time the money laundering offense is committed through a purchase, sale, or exchange, the subject matter of the transaction—the thing being purchased or sold or obtained in the exchange—is

96. In terrorism cases, an amendment made in 2002 gives the government another option. 18 U.S.C. § 2339C (2003) (financing terrorist activity) is an SUA offense. Thus, any money raised internationally or domestically to finance terrorism may now be forfeited as the proceeds of a §2339C offense, pursuant to § 981(a)(1)(C) (authorizing the forfeiture of all SUA proceeds). However, for non-terrorism offenses, the ability to forfeit the property involved in a reverse money laundering offense under §1956(a)(2)(A) remains the principal way to confiscate clean funds intended for an unlawful purpose.
“involved” in the offense and constitutes part of the subject matter of the crime that can be forfeited.97 In *United States v. Hawkey*,98 the defendant misappropriated $140,450 in funds intended as charitable contributions and used the money to purchase a number of items for his personal use, including a motor home.99 He was convicted of mail fraud and money laundering100 and was ordered to forfeit $140,450 (in a money judgment) and the motor home as part of his criminal sentence.

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98. 146 F.3d 920 (6th Cir. 1998).
99. See fig. 9.
represent the subject matter of the financial transaction, and both are therefore "involved" in the money laundering offense.

Now, can the government forfeit either one? The answer is yes. If the motor home has been trashed, and is no longer worth anything, the government can get a money judgment for the full purchase price, because that was the amount of money involved in the money laundering offense. But if the government would prefer to take the motor home, and not worry about the money judgment, it can do that too.

Suppose the motor home has appreciated in value, can the government forfeit the property as it finds it? Or is it entitled only to the value that the property had when it was involved in the money laundering offense? In Hawkey, the Eighth Circuit held that the government was entitled to the appreciated value, irrespective of whether the appreciation was due to wise investment, effort expended by the defendant, or the infusion of untainted funds. In other words, once the motor home is involved in the money laundering offense, the government gets the motor home, whatever its value turns out to be at the time the forfeiture judgment is entered.

i. Digression: Double Recovery

We've said that the property involved in the offense—the "subject matter property"—includes both the purchase money and the thing being purchased. Both are the subject matter of the offense, and the government can forfeit either one. In Hawkey's case, it could get a money judgment for the purchase money, or it could forfeit the motor home. But if the purchase money is involved in the offense, and the thing being purchased is also involved in the offense, could the government forfeit both?

Hawkey says no: forfeiting both the purchase money and the property purchased would be double counting. Fair enough: there can be situations where it might be unfair to make the same defendant pay twice. But suppose in a two-way transaction both the buyer and the seller are convicted of money laundering? For example, suppose Joe Doper gives drug proceeds to Arnold Goldfinger, and Goldfinger gives Doper gold bars in return. If both Doper and Goldfinger are convicted of money laundering, shouldn't the government be able to forfeit the gold from Doper and the cash from Goldfinger?

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101. 148 F.3d at 928 (the purchase price reflects the amount "involved in" the money laundering offense and is subject to forfeiture even if the defendant's investment turns out to have been unwise). Other cases in which the amount of money involved in a money laundering offense was forfeitable as a money judgment include the following: United States v. Puche, 350 F.3d 1137 (11th Cir. 2003) (money judgment for the value of the property used to facilitate the money laundering offense); United States v. Baker, 227 F.3d 955 (7th Cir. 2000) (a forfeiture order may include a money judgment for the amount of money involved in the money laundering offense); the money judgment acts as a lien against the defendant personally for the duration of his prison term and beyond); United States v. Voigt, 89 F.3d 1050, 1084, 1088 (3d Cir. 1996) (the government is entitled to a personal money judgment equal to the amount of money involved in the money laundering offense); United States v. Iacaboni, 221 F. Supp. 2d 104 (D. Mass. 2002) (court enters money judgment equal to sum of amounts involved in all money laundering transactions making up the conspiracy to launder gambling proceeds); United States v. Cleveland, 1997 WL 537707, No. CRIMA 96-207, at 11 (E.D. La. 1997) (the government is entitled to a money judgment equal to the amount of money that defendant laundered in money laundering case, adjusted to eliminate double counting).

102. Hawkey, 148 F.3d at 928.

103. Id. (motor home purchased in violation of § 1957 is forfeitable in its entirety as property traceable to the money laundering offense, irrespective of whether the appreciation is due to wise investment, effort expended by the defendant, or the infusion of untainted funds); see United States v. Loi, 49 F. Supp. 2d 514 (E.D. Tex. 1999) (the government entitled to forfeit appreciated value of real property purchased with laundered funds); United States v. Hill, 31119692, No. 01-6322, 01-6353 (6th Cir. 2002) (Table) (following Hawkey; stock that appreciates in value is forfeitable as property traceable to the originally forfeitable shares); United States v. Vedder, 2003 WL 23204849 (W.D. Wis. 2003) (earnings on laundered funds are forfeitable as property involved in the offense); United States v. Young, 2001 WL 1644658, No. 5:96-CR-2 (DF) *2 n.3 (M.D. Ga. 2001) (defendant, whose residence was forfeited upon his conviction, cannot complain that in the year between the conviction and the time the order of forfeiture became final he continued to make repairs to the residence).

104. Hawkey, 148 F.3d at 928 (government may get a money judgment for the amount involved in the conversion of SUA proceeds to consumer goods, or it may forfeit the converted property itself, but it cannot forfeit both).

105. See fig. 10.
would be left in the position he was in before the offense was committed, and would suffer no punishment at all.

In the case of the gold bars, it would simply make no sense for Joe Doper to say, "You've already taken the money from Goldfinger; I should get to keep the gold." Nor should Goldfinger, who knowingly placed his property at risk by participating in a money laundering offense, be permitted to say, "You've already taken the gold from Doper, I should get to keep his drug money." There are only a few cases, however, that touch on this issue.\textsuperscript{107}

ii. Forfeiture is not limited to net profits

Figure 10, which I used to illustrate the double-counting issue, comes from \textit{United States v. Hendrickson.}\textsuperscript{108} That case actually serves to illustrate a larger point: because all property constituting the subject matter of a money laundering offense is subject to forfeiture, the forfeiture is not limited to the net profits realized from a sale or exchange, but includes any property that was involved in the offense.

In \textit{Hendrickson}, the defendant gold dealer gave gold that he had purchased with legitimate funds to a drug dealer in exchange for more than $700,000 in drug proceeds. The net gain to the defendant was only $10,000; but when it came time to calculate the amount of money subject to forfeiture, the court found that the entire $700,000 was involved in the offense, and Hendrickson had to forfeit that amount.\textsuperscript{109}

\textsuperscript{107}. See United States v. Covey, 232 F.3d 641 (8th Cir. 2000) (dissenting opinion) (where two co-defendants conduct a two-way transaction, government may not recover the amount exchanged twice; majority did not reach this issue).

\textsuperscript{108}. 22 F.3d 170 (7th Cir. 1994).

\textsuperscript{109}. 22 F.3d at 173, 175 (dealer who sells gold for $742,555 in drug proceeds in
Again, the reason is that just as the forfeiture statute is not limited to the proceeds being laundered, it is not limited to the proceeds of the laundering offense itself. If it were, Hendrickson might plausibly have argued that proceeds means net profit, and that therefore he was only required to forfeit the profit he made on the exchange. But §§ 981(a)(1)(A) and 982(a)(1) say that all property, not all proceeds, involved in the offense is subject to forfeiture. When Hendrickson used his gold bars to commit a money laundering offense, he placed them and any property he received in exchange at risk of forfeiture. When he was caught, he lost it all.

If the law were otherwise, of course, there would be no economic risk to the merchant who was willing to use his merchandise to perpetrate a money laundering scheme. The worst that could happen was that he might lose the profit he hoped to make. No matter what happened, he could always count on recovering the value of the gold or jewels or automobiles that he sold to the criminal if he tried to launder his dirty money. But crime has its risks, and one of those is that money launderers lose the property that they use to launder money, not just the profit they might make on the deal. There is no doubt that Congress intended exactly that result.110

c. Commingled Property

In each of the examples I've used so far, all of the money involved in at least one side of the transfer, purchase or exchange consisted of SUA proceeds. None of the money that Trust transferred to his second bank account, or that Hawkey used to buy the motor home, or that Hendrickson received in exchange for his gold included any untainted funds. Moreover, in all of these cases the

money laundering transaction constituted the entire payment for the item being purchased or sold. None was only a down payment followed by the later infusion of clean funds.

But suppose the SUA proceeds were commingled with other funds when the transaction took place. Or suppose the defendant made later payments on the property with clean funds. Could we still forfeit the property involved in the offense in its entirety? The answer is yes: if property is "involved" in a money laundering offense it is subject to forfeiture. That the offense was committed using commingled funds is irrelevant.

The money laundering statutes themselves contain no requirement that the offense be committed only with tainted funds. To the contrary, a great many cases hold that a money laundering transaction can involve commingled money. Section 1956 requires only that the financial transaction "involve" SUA proceeds. Thus, if the other elements of the offense are satisfied, a transaction involving as little as one dollar in tainted funds can be a money laundering offense.111

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111. See United States v. Rodriguez, 278 F.3d 486 (5th Cir. 2002) (jury was free to convict alien smuggler of money laundering despite evidence that he used commingled funds to conduct his financial transactions); United States v. McGauley, 279 F.3d 62 (1st Cir. 2002) (transfer of $49,000, of which only $155 is fraud proceeds, is a money laundering offense; there is no de minimus rule requiring proof that a given fraction of the funds be SUA proceeds); United States v. Braxtonbrown-Smith, 278 F.3d 1348 (D.C. Cir. 2002) (sufficient for government to show defendant withdrew funds from commingled account; strict tracing would be impossible given the fungible nature of money, and requiring such tracing would lead to nonsensical results); United States v. Abbell, 271 F.3d 1286 (11th Cir. 2001) (evidence that defendant had some legitimate income showed, at best, that his money laundering transactions involved commingled funds, which was sufficient for conviction); United States v. Ward, 197 F.3d 1076, 1083 (11th Cir. 1999) ("there is no requirement that a 'substantial portion' of the funds be derived from a [SUA]"; "the government must prove only that the tainted proceeds were commingled with other funds"); United States v. Stroh, 176 F.3d 439 (8th Cir. 1999) (notwithstanding evidence that wire transfers involved personal funds from a legitimate source, conviction was properly based on testimony that such transfers also included drug proceeds); United States v. Wilkinson, 137 F.3d 214, 222 (4th Cir. 1998) (where money is drawn on a commingled account, the government is entitled to presume that funds "up to the full amount originally derived from crime" were involved in the transaction); United States v. Tencer,
For § 1957 cases, the rule is a little different: there must be at least $10,000 in tainted funds. But it is still true that not all of the money needs to be SUA proceeds.

So, suppose Hawkey had commingled clean money with the fraud proceeds before he purchased the motor home. Or suppose he made a down payment with dirty money and later paid off the balance with clean funds. The transaction would still have been a money laundering offense under § 1957. And what property would have been involved in that offense? The answer would be the same as before: the purchase money plus the motor home. The point is this: if a money laundering offense can be committed with commingled funds, then it follows that for forfeiture purposes the "property involved" in the offense can be commingled funds. Indeed, the ability to forfeit commingled funds constituting the corpus of the money laundering transaction is what makes the subject matter theory so powerful a law enforcement tool.

A good illustration of this comes from a civil forfeiture case called United States v. 1700 Duncanville Road. In that case, when the defendant deposited $452,000 into a bank account, 82% of the money was the proceeds of a food stamp fraud offense. He then moved $133,000 from this commingled account into a custodial account held in the name of his minor child, where it was commingled with more untainted money. Next the defendant used $144,000 of these commingled funds to make the down payment on the real property at Duncanville Road. Finally, he paid the balance of the purchase price of $300,000 with money from an unknown source.

107 F.3d 1120, 1131 (5th Cir. 1997) (where defendant deposited $451,000 in fraud proceeds and $2.2 million in other funds into accounts, subsequent transfers from those accounts involved SUA proceeds); United States v. Habhab, 132 F.3d 410 (8th Cir. 1997) (check written on account into which fraud proceeds were deposited involved SUA proceeds); United States v. Canelas, 69 F.3d 1116, 1120 (11th Cir. 1995) (the government met burden of showing check drawn on account involved SUA proceeds by showing that $80,000 in proceeds was deposited into the account and commingled with other funds; strict tracing not required); United States v. Suba, 132 F.3d 662, 674 n.23 (11th Cir. 1998) (following Canelas); transfer of $1.7 million involved SUA proceeds even though defendant had obtained only $1.4 million in fraud proceeds); United States v. Rosario, 53 F.3d 1439 (7th Cir. 1995) (purchase of house involved SUA proceeds even though only $1,000 of $17,000 payment was drug money); United States v. Garcia, 37 F.3d 1359, 1365 (9th Cir. 1994) ("it is sufficient to prove that the funds in question came from an account in which tainted proceeds were commingled with other funds"); United States v. English, 92 F.3d 909 (9th Cir. 1996) (following Garcia); United States v. Marbella, 73 F.3d 1479 (9th Cir. 1996) (once SUA proceeds are commingled in an account, any withdrawal from that account involves proceeds—even if the balance in the account drops to zero between the time the proceeds are deposited and the time of the withdrawal); United States v. Rutgard, 116 F.3d 1270 (9th Cir. 1997) ("if § 1956 required tracing of specific funds, it could be wholly frustrated by commingling"); United States v. Benes, 28 F.3d 555 (6th Cir. 1994) (money launderer may not escape liability by commingling drug proceeds with other assets); United States v. Jackson, 935 F.2d 832, 840 (7th Cir. 1991) (transactions drawn on account containing commingled funds involve proceeds of SUA); United States v. Jackson, 983 F.2d 757 (7th Cir. 1993) (jury instruction that "substantial portion" of laundered funds had to be SUA proceeds was unnecessarily favorable to defendant; only some of commingled funds need be proceeds).

112. See United States v. Rutgard, 108 F.3d 1041 (9th Cir. 1997) (withdrawal of commingled money does not meet $10,000 threshold if the remaining balance exceeds the amount of the tainted funds; dirty money is presumed to be "last out"; § 1956 case law, holding that the transaction need only "involve" criminal proceeds, is not applicable to § 1957).

113. 90 F. Supp. 2d 737 (N.D. Tex. 2000), aff'd 250 F.3d 738 (5th Cir. 2001).

114. 90 F. Supp. 2d at 739-40.
In other words, the court held that the real property was forfeitable in its entirety because the purchase itself was a violation of § 1957: “Since the purchase of the subject properties was itself a money laundering transaction under section 1957,” the court said, “it is immaterial that claimants may have also used untainted funds for its purchase.”117 The defendant argued strenuously that the forfeiture should be limited to the portion of the real property that was traceable to the food stamp fraud offense—as it would be if the forfeiture were based on a “proceeds” theory. But on appeal, the Fifth Circuit had no problem sustaining the forfeiture of the entire parcel.118

Again, the notion that the court can order the forfeiture of the property involved in the offense in its entirety is what makes the “subject matter” theory so appealing to prosecutors. If forfeiture in money laundering cases were limited to the proceeds involved in the financial transaction, the government would only be able to forfeit the portion of the property that was traceable to the SUA proceeds. But if the money laundering offense is a purchase, sale, or exchange, the property involved in that transaction is the subject matter of the offense, and can be forfeited without regard to whether any clean money was commingled with the dirty money involved in the transaction.

So if Joe Doper buys a car with $10,000 in dirty money and $10,000 from his grandmother, and the government charges the purchase of the car as the money laundering offense, the car, as the subject matter of the transaction, is “property involved” in the offense and can be forfeited in its entirety.119

117. 90 F. Supp. 2d at 741.
118. 250 F.3d 738 (affirming judgment of the district court without written opinion).
119. See also United States v. All Funds on Deposit at Dime Savings Bank, 255 F. Supp. 2d 56 (E.D.N.Y. 2003) (if defendant uses commingled funds to acquire the equity in his house, and then uses that equity to secure a mortgage, the mortgage proceeds would be forfeitable in their entirety); United States v. One 1987 Mercedes Benz 300E, 820 F. Supp. 248, 252 (E.D. Va. 1993) (where § 1956 and § 1957 financial transaction is car payment, car is “involved in” the money
i. Using the “Subject Matter” Theory to Moot Out Tracing Issues

Prosecutors like to use this aspect of the subject matter theory to eliminate tracing issues that otherwise pop up in forfeiture cases. If the government is seeking forfeiture of property on a “proceeds” theory, and the original proceeds have moved from asset to asset in a series of transactions, the government is required to trace the money through each transaction, so that it can, in the end, establish that the last asset represents the proceeds of the underlying offense. But if the government can use the subject matter theory in a money laundering case, all of that is unnecessary. The best example of this is what happened in United States v. Voigt.

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[Diagram: Stolen Money $1.6 Million → Jewelry U.S. v. Voigt]

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In Voigt, the defendant received $1.6 million in fraud proceeds and laundered it by transferring the money from Account A to Account B where it was commingled with other funds. Then the defendant withdrew the money from Account B and used it to purchase jewelry. The government charged the transfer from Account A to Account B as the money laundering offense. When Voigt was convicted, the question before the court was, what theory would support the forfeiture of the jewelry?

First, the court held that the government was entitled to a money judgment for the $1.6 million, because that was the amount of money involved in the money laundering offense; but a money judgment doesn’t let the government seize anything: it is simply a personal judgment against the defendant that the government must try to enforce by levying against the defendant’s assets as any other creditor might do, or by forfeiting substitute assets.

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120. See United States v. 170 Westfield Drive, 34 F. Supp. 2d 107 (D.R.I. 1999) (applying “last out” and “first out” principles of accounting to trace money through bank accounts containing commingled funds; the government may elect which rule to apply depending on the circumstances).
121. 89 F.3d 1050 (3d Cir. 1996). See fig. 12.
122. Id. at 1084.
123. Id. at 1088.
If it wanted to forfeit the jewelry under the substitute assets theory, it could do so, the court said, but the government's goal was to forfeit the jewelry not as a substitute asset, but as property traceable to the money laundering offense. In short, the government argued that because the funds used to buy the jewelry came from the account that was involved in the money laundering offense when the criminal proceeds were moved from Account A to Account B, the jewelry was forfeitable as "traceable property." But the Third Circuit held that because of the commingling of clean money with the laundered money in Account B, the jewelry was not traceable to the money laundering offense. There was no way the government could establish, the court said, that the defendant had used the laundered money and not the commingled clean funds to make the purchase.

There are a number of reasons to disagree with the panel's conclusion on that point; but the nuances of tracing money through a commingled bank account is a topic unto itself that we need not address here. The point is that the government could have avoided the tracing issue all together if it had charged the money laundering violation another way and relied on the subject matter theory of forfeiture.

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124. Id.
125. There are a number of reasons why the government prefers to forfeit property directly rather than as substitute assets. Most important, in most circuits, directly forfeitable property is subject to pre-trial restraint but substitute assets are not. Moreover, the point at which the government's interest in the forfeited property vests vis-a-vis third parties may occur earlier with respect to directly forfeitable property than it does with respect to substitute assets. Taken together, these problems make it much easier for the government to prevent a defendant from transferring his property to a third party if the property is directly traceable to the offense than if it is forfeitable only as substitute asset.
126. 89 F.3d at 1087. See also United States v. Lee, 49 F. Supp. 2d 514 (E.D. Tex. 1999) (where 52.6% of the money used to buy real property was SUA proceeds, and the rest was clean money, the government was entitled only to forfeit 52.6% of the property, because instead of charging the purchase of the property as the money laundering offense, it charged an earlier transaction as money laundering and sought forfeiture of the house as property "traceable to" that offense).
127. United States v. 1700 Duncanville Road, 90 F. Supp. 2d, 737, 742 (N.D. Tex. 2000) (forfeiture of $300,000 real property not grossly disproportional, even though less than half the value was traceable to fraud proceeds, because the total loss to the victims exceeded $369,000).
128. See United States v. Moyer, 313 F.3d 1082 (8th Cir. 2002) (forfeiture of amount fraudulently taken from pension plan and then laundered was not grossly disproportional to the offense, even though defendant was lawfully entitled to more than half of the money in the plan); United States v. Hurley, 63 F.3d 1, 23
courts have regularly upheld forfeitures of commingled money under the even more aggressive facilitation theory (Category Three) that we will talk about in a moment. But this is clearly an area in which the government’s authority to carry out a forfeiture that is authorized by statute is limited by the Excessive Fines Clause of the Eighth Amendment. For example, if the defendant uses $100 in dirty money and a $1 million in clean money to buy a marina in South Florida, it is unlikely that the government would be able to forfeit the entire marina as the subject matter of the money laundering offense. It is likely the analysis would turn, in some fashion, on the ratio of the clean money to the dirty money. But so far there have been no cases striking a money laundering forfeiture on these grounds, and therefore no one knows where the dividing line might be.

On the other hand, if the forfeiture is limited to the property comparable in value to the criminal proceeds that were laundered, there will be no Eighth Amendment problem. If the forfeiture of the proceeds themselves would not be grossly disproportional to the offense, the forfeiture of property of similar value that was exchanged for the proceeds in the money laundering transaction will not be grossly disproportional either.\(^{129}\)

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3. Facilitating property

So far, we’ve talked about two theories of forfeiture in money laundering cases: 1) the forfeiture of the SUA proceeds; and 2) the forfeiture of “subject matter property,” or property other than the SUA proceeds that was part of the financial transaction constituting the money laundering offense. The third theory is much broader, permitting the forfeiture of any property used to “facilitate” the money laundering offense.

“Facilitating property” includes property that is external to the money laundering offense—i.e., property that is not part of the financial transaction itself—but is nevertheless “involved” in the transaction in the sense that it makes the offense easier to commit or harder to detect.\(^{130}\) Clean money that is used to conceal or disguise dirty money, and businesses used as fronts for money laundering operations are examples of external property that facilitate the commission of the money laundering offense without necessarily being part of the illegal financial transaction. “Subject matter” property is, by definition, property that is part and parcel of the financial transaction constituting the money laundering offense. The proceeds being laundered, the money that is commingled with these proceeds when they are shifted from one account to another or used to make an investment, the property obtained in a purchase, sale, or exchange—all of those assets are part of the financial transaction itself, and thus are “involved” in the

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\(^{129}\) See United States v. Loe, 248 F.3d 449 (5th Cir. 2001) (forfeiture of portion of property traceable to laundered SUA proceeds is not disproportional at all, never mind “grossly disproportional”).

\(^{130}\) Facilitating property is generally defined in forfeiture cases as any property that makes the underlying crime easier to commit or harder to detect. That same definition applies when the facilitation theory is applied to forfeitures in a money laundering case. See United States v. Wyb, 193 F.3d 289, 302 (5th Cir. 1999) (forfeiture under the facilitation theory is not limited to commingled money; facilitating property is anything that makes the money laundering offense less difficult or more or less free from obstruction or hindrance); United States v. Hawkey, 148 F.3d 920 (8th Cir. 1998) (same); United States v. Tencer, 107 F.3d 1120, 1134 (5th Cir. 1997) (“facilitation occurs when the property makes the prohibited conduct ‘less difficult or more or less free from obstruction or hindrance.’”).
the money laundering offense in the sense of being inextricably intertwined with the illegal transaction in a tangible, physical way. One cannot, for example, purchase jewelry without the jewelry being involved in the transaction. Thus, “subject matter” property is forfeitable as “property involved” in the offense whether it makes the offense easier to commit or harder to detect or not.

“Subject matter” property can, of course, facilitate a money laundering offense. Property that is not only part of the financial transaction but also makes the offense easier to commit or harder to detect can be forfeited either as the “corpus” of the transaction or as facilitating property. But facilitating property is not limited to things that are physically part of the illegal transaction. It can include anything external to the transaction that the offender uses to commit the crime.

a. The Substantial Connection Requirement

Of course, there are limits on what can be forfeited as facilitating property. Although the theory permits the forfeiture of property that is external to the money laundering transaction, there nevertheless must be a “substantial connection” between the property and the money laundering offense. In United States v. One 1989 Jaguar XJ6, a would-be money launderer drove his Jaguar to the Chicago airport where he planned to perpetrate a money laundering offense through misuse of an automatic teller machine. When he attempted to leave the airport parking lot, the government seized the car and brought a forfeiture action against it on the ground that it had been used to facilitate the money laundering offense. But the district court rejected that theory, holding that the

use of the car was too incidental to the money laundering transaction to satisfy the “substantial connection” requirement.

To satisfy the substantial connection requirement, the connection between the property and the offense must be more than merely incidental or fortuitous. The government has to show that the property aided in the commission of the money laundering offense in some substantial way. A car that simply serves as the means of transportation to the situs of the money laundering transaction generally will not qualify, nor will the residence where the laundered cash happens to have been dropped off on a single occasion. But a car that is used to transport laundered cash in large quantities from one place to another, or a residence that is used routinely as a stash house, would qualify as facilitating property.

The notion of forfeiting facilitating property in a money laundering case comes, of course, from drug cases like United States v. Rivera, where livestock on a ranch used as a cover for a drug operation was forfeited because it facilitated the drug offense by making the ranch appear to be something that it was not. In that case, the defendant argued that his livestock was not part of the drug operation, but the court held that by providing the defendant’s operation with an aura of legitimacy—making the operation appear to be a working ranch when it was really the base for a heroin trafficking business—the livestock had made the drug offense easier to commit and harder to detect.

131. See 18 U.S.C. § 983(c)(3) (2003): “if the Government’s theory of forfeiture is that the property was used to commit or facilitate the commission of a criminal offense, or was involved in the commission of a criminal offense, the Government shall establish that there was a substantial connection between the property and the offense.”


134. 884 F.2d 544 (11th Cir. 1989).
The same is true in money laundering cases. A defendant may argue that property that is external to the illegal financial transaction was not part of the money laundering offense, but if the property made the offense easier to commit or harder to detect—by providing a cover for the illegal activity, or hiding the illegal funds by commingling them with other legitimate property—it may be forfeited as property “involved” in the money laundering offense.

b. Property Used to Conceal or Disguise

The best examples of this theory come from cases where the government established that the defendant committed concealment money laundering, i.e., a violation of § 1956(a)(1)(B)(i), and used legitimate property of some kind to help him conceal or disguise his dirty money. Most often, the facilitating property has been clean money commingled with dirty money in a bank account.

In United States v. Tencer, a health care provider in Louisiana distributed fraudulently obtained proceeds to numerous bank accounts in other parts of the country where they were commingled with other money from other sources. All together, the defendant mixed approximately half a million dollars in dirty money with another half a million dollars in clean money in these accounts, before consolidating all of the money in a single bank account in Las Vegas. When he attempted to liquidate the Las Vegas account by converting the entire million dollars to cash, the government seized the money and sought to forfeit all of it as part of the criminal money laundering case.

[...]

135. 107 F.3d 1120 (5th Cir. 1997).
136. See fig. 13.
137. 107 F.3d at 1129.

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Figure 13

The defendant argued that the clean money was not part of the money laundering transaction, but the Fifth Circuit applied the facilitation theory and held that the clean money was subject to forfeiture because it had aided the defendant in concealing and disguising the nature, source, location, ownership, and control of the proceeds of his health care fraud offense. Quoting from a district court opinion from the Southern District of New York, the panel said the following:

[...]limiting the forfeiture of funds under these circumstances to the proceeds of the initial fraudulent activity would effectively undermine the purpose of the forfeiture statute. Criminal activity such as money laundering largely depends upon the use of legitimate monies to advance or facilitate the scheme. It is precisely the commingling of tainted funds

138. Id. at 1135 (entire bank account balance is forfeitable even though less than half the balance was criminal proceeds if the purpose of the deposit was to conceal or disguise proceeds among legitimate funds; distinguishing cases where commingling of SUA proceeds with untainted funds was merely fortuitous).
with legitimate money that facilitates the laundering and enables it to continue.\textsuperscript{139}

Similarly, in \textit{United States v. All Monies},\textsuperscript{140} a district court held that the untainted money in a Peruvian money exchanger's bank account was forfeitable under the facilitation theory because it provided "cover" for the use of that account to launder the proceeds of cocaine trafficking. A number of other cases say the same thing.\textsuperscript{141}

The facilitation theory has also been applied to "sting" cases. In \textit{United States v. Puche},\textsuperscript{142} DEA ran a sting operation in which undercover agents posed as drug dealers in need of money laundering services in South Florida. Over the course of several weeks, the agents brought approximately $700,000 in cash to the defendants who ran a money transmitting business, and asked them to wire the money to foreign bank accounts. The defendants accepted the currency, deposited it into bank accounts that contained other funds from their business, and wired the agents' money to the accounts that they designated.


\textsuperscript{140} 754 F. Supp. 1467, 1475-76 (D. Haw. 1991).

\textsuperscript{141} See United States v. Bornfield, 145 F.3d 1123 (10th Cir. 1998) (forfeiture of legitimate and illegitimate funds commingled in an account is proper as long as the government demonstrates that the defendant pooled the funds to facilitate—i.e., disguise—the nature and source of his scheme); id. (if money laundering offense consists of writing check on bank account, money remaining in the account is not the "corpus," but may be forfeitable as facilitating property); United States v. Hawkey, 148 F.3d 920, 928 n.13 (8th Cir. 1998) (dicta) (citing Bornfield with approval, and noting that in some instances it may be proper to order the forfeiture of an account containing commingled tainted and untainted funds); United States v. Trast, 152 F.3d 715 (7th Cir. 1998) (dicta) (legitimate funds may be forfeited if used to disguise legitimate funds); United States v. Iacaboni, 221 F. Supp. 2d 104 (D. Mass. 2002) (commingling clean money with gambling proceeds to conceal nature of transaction rendered entire sum forfeitable); United States v. Certain Funds on Deposit in Account No. 01-0-71417, 769 F. Supp. 80, 84-85 (E.D.N.Y. 1991) (same); United States v. Certain Accounts, 796 F. Supp. 391, 397 (S.D. Fla. 1992); United States v. Contents of Account Numbers 208-06070, 847 F. Supp. 329, 334-35 (S.D.N.Y. 1994) (legitimate funds used to conceal or disguise laundering forfeited; cases involving structuring offenses distinguished).

\textsuperscript{142} 350 F.3d 1137 (11th Cir. 2003).

\textsuperscript{143} Other cases in which business assets were forfeited under the facilitation theory include the following: United States v. All of the Inventories of the Bus. Known as Khalife Bros. Jewelry, 806 F. Supp. 648, 650 (E.D. Mich. 1992) (following All Monies, inventory of jewelry business forfeitable as facilitating property); United States v. Tencer, 1993 WL 310527, No. 92-570 (E.D. La. 1993) (car used to facilitate laundering offense may be forfeited under § 981 if the connection to the offense was substantial and not "merely fortuitous"); aff'd on other grounds, 107 F.3d 1120 (5th Cir. 1997); Hawkey, 148 F.3d at 928 (dicta) (if defendant had used a personal computer to facilitate the illegal monetary transaction in violation of § 1957, the computer would have been subject to forfeiture as facilitating property); United States v. Sonny Cook Motors, 819 F. Supp. 1015, 1018 (N.D. Ala. 1993) (entire parcel of real property on which car dealership is located is "involved in" effort to launder money through the business in "sting" case); United States v. 1501 West Boulevard, 814 F. Supp. 468, 479-89 (W.D.N.C. 1993) (where drug money is hidden by using it to pay for construction of a valuable building on land, the land is involved in and facilitates the laundering offense; therefore the entire parcel is forfeitable, not just the portion traceable to the drug money).
Indeed, the facilitation theory has been used to forfeit entire businesses that provided the cover of legitimacy for a money laundering operation by allowing the defendant to run criminal proceeds through the business’s operating account, or by using the criminal proceeds to add to the business’s inventory. For example, in United States v. Baker, the Seventh Circuit upheld the forfeiture of a sex-oriented business called Fantasyland on the ground that the entire business, including its legitimate operations, was used to launder the proceeds of the prostitution and other illegal activities taking place on the premises. Other business forfeitures in money laundering cases have involved car dealerships, a trucking business, and other legitimate retail and wholesale operations that were used as a cover for the money laundering offenses.

Another recent example of the application of the facilitation theory is the First Circuit’s decision in United States v. McGauley. McGauley was a kleptomaniac who stole tens of thousands of dollars worth of women’s clothes and returned them to department stores for refunds. Over a period of time, she deposited more than $55,000 in such refunds into several bank accounts held in her own name. Then, on the day that police officers searched her home (and found stockpiles of additional stolen clothing), McGauley closed all of her bank accounts and transferred the balances, which totaled more than $243,000, to new accounts she held jointly with her parents. She was convicted of mail fraud and money laundering and ordered to forfeit $243,000, but appealed, arguing inter alia that the forfeiture order should have been limited to the amount of actual proceeds.

The First Circuit affirmed the forfeiture. First, it held that each of the transfers from an individual account to a joint account was a money laundering offense, even though the transfers included commingled money and the portion of the transferred funds traceable to the fraud was sometimes minuscule. For example, one transfer involved the movement of nearly $99,000 in commingled funds, of which only $150 was traceable to a fraudulently-obtained refund check. Nevertheless, because there is no de minimus rule that requires the government to prove that a certain portion of commingled funds was derived from a

144. 227 F.3d 955 (7th Cir. 2000).
145. See United States v. South Side Finance, Inc., 755 F. Supp. 791, 797-98 (N.D. Ill. 1991) (bank accounts into which laundered money is deposited, and a business through which such money moved, forfeitable under § 981 as property "involved" in the money laundering offense); United States v. All Assets of G.P.S. Automotive Corp., 66 F.3d 483, 487 (2d Cir. 1995) (business used to sell stolen auto parts and launder proceeds forfeited under § 881); Swank Corp., 797 F. Supp. at 502 (proceeds of mail fraud scheme "cleared" through corporate bank accounts; if there is substantial connection between business and laundering activity, entire business and all of its assets are forfeited regardless of amount of money laundered); United States v. Any and All Assets of Shancol Co., 816 F. Supp. 389, 397 (M.D.N.C. 1991) (drug proceeds laundered through trucking business); United States v. 155 Bennis Rd., 760 F. Supp. 245, 251 (D.N.H. 1991) (business forfeitable under § 981 because corporate checks were used to make drug trafficker’s purchase and improvement of real property with drug money appear to be legitimate business activity).
146. 279 F.3d 62 (1st Cir. 2002).

147. See fig. 14.
148. 279 F.3d at 70.
forfeitures have in common is that, in each case, the underlying offense was "concealment money laundering." Thus, the clean property could be forfeited based on the notion that it was used by the defendant to conceal or disguise the dirty property. Would the facilitation theory permit the forfeiture of untainted property if the money laundering offense consisted of "promotion money laundering," or a § 1957 violation, or a structuring violation? Possibly, but it's much more difficult in such cases for the government to demonstrate the requisite nexus between the property and the offense.

Structuring cases present the most difficult hurdle. Several courts have held that clean money that is already in, or is later added to, the account into which structured deposits are made is "present at the scene of the crime," but does not make the structuring offense any easier to commit or any harder to detect. Thus, clean money in a structuring case generally is not "involved in" the offense and cannot be forfeited.151

The point to remember is that it's not a bank account that the government is trying to forfeit, but the money in the account.152 That a given account was used to commit a structuring offense does not, by itself, mean that the funds in the account were used to facilitate the money laundering violation. The focus must be on the connection between the money in the account and the offense being committed.

The same problem exists in promotion money laundering cases charged under § 1956(a)(1)(A) and in cases charged under § 1957. To be sure, money that is commingled with the dirty money when the financial

c. Facilitating Property Outside of "Conceal and Disguise" Cases

What McGauley, Tencer and most of the other cases applying the facilitation theory to money laundering

149. Id. at 71.
150. Id. at 76.
151. See United States v. All Funds on Deposit in Great Eastern Bank Account No. 11008117, 804 F. Supp. 444, 447 (E.D.N.Y. 1992) (legitimate funds in bank account do not facilitate structuring; account itself is not subject to forfeiture; cases involving facilitation of § 1956 or 1957 offenses distinguished); Marine Midland Bank, N.A. v. United States, 1993 WL 158542, Nos. 93 Civ. 0307 (RPP), 93 Civ. 0357 (RPP), at *7-8 (S.D.N.Y. 1993) (untainted funds in interbank account used to "clear" structured money orders not forfeitable under facilitation theory), aff'd on other grounds, 11 F.3d 1119 (2d Cir. 1993).
152. See United States v. $448,342.85, 969 F.2d 474, 477 (7th Cir. 1992) (an account is just an address or routing device, not a res subject to forfeiture).
transaction takes place can be forfeited under the subject matter theory that we discussed earlier (Category Two). But it is not obvious how clean money that just happens to be present in an account can be said to be involved in an offense that has no conceal or disguise element, but instead involves only the deposit, withdrawal, or expenditure of dirty money. As one court has said, the facilitation theory may not be limited to "conceal or disguise" cases under § 1956, but the clean money does have to be involved in the money laundering offense in some way. 153

d. Application of the Eighth Amendment

Obviously, when we talk about forfeiting facilitating property, there are going to be Eighth Amendment considerations; property that makes an offense easier to commit may conceivably be so valuable that its forfeiture in its entirety would be grossly disproportional the gravity of the money laundering offense. But so far, the courts have had little difficulty in upholding the forfeiture of facilitating property in money laundering cases against challenges based on the Excessive Fines Clause.

For example, in United States v. Wyly, 154 which we discuss in detail in a moment, the Fifth Circuit held that the forfeiture of a $4 million business used to facilitate a money laundering offense was not grossly disproportional even though the offense involved only $175,000. Eighth Amendment analysis, the court said, looks not just to the value of the forfeited property in comparison to the amount laundered, but to the scope and duration of the scheme, the harm caused, and the relationship of the property to the offense. Because the property being forfeited in that case was central to the entire scheme, and because the scheme took place over a period of time and involved the corruption of a public official, the forfeiture was not disproportionate. 155

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154. 193 F.3d 289 (5th Cir. 1999).
155. 193 F.3d at 303; see also United States v. Puche, 350 F.3d 1137 (11th Cir. 2003) ($1.6 million money judgment representing value of untainted money that facilitated a money laundering offense, did not violate the Excess Fines Clause; distinguishing Bajakajian as limited to reporting violations); United States v. Hill, 167 F.3d 1055, 1072 (6th Cir. 1999) (maximum fine for money laundering is twice the amount laundered; therefore, forfeiture of less than twice the amount laundered cannot be excessive); United States v. Matai, 173 F.3d 426, 1999 WL 61913, Nos. 97-4129, 97-4130 (4th Cir. 1999) (unpublished) (Table) (forfeiture of inventory of clothing store as property used to facilitate a money laundering offense not excessive even though defendants laundered only $11,000 because the maximum fine is $500,000 under § 1956); United States v. Tencer, 107 F.3d 1120 (5th Cir. 1997) (forfeiture of both laundered proceeds and commingled clean money under facilitation theory not excessive in light of the amount laundered and duration of the offense).
The Theories of Forfeiture Lie Along a Continuum

**LEAST**

Aggressive

Untainted

§ 1956(c)(3)(A) property

**MOST**

Aggressive

Subject matter property tainted or untainted but integral to the transaction

Facilitating property untainted and external to the transaction

Proceeds of the SUA

Figure 15

Then come the cases involving real property or chattels obtained by the money launderer in exchange for dirty money as part of a purchase, sale, or exchange. As we have seen, such forfeitures are more aggressive because the property involved in the transaction is forfeitable in its entirety regardless of the amount of dirty money that was used to commit the underlying offense. Likewise, clean money commingled with dirty money that is transferred from one place to another is forfeitable as part of the subject matter of the offense.

Finally, at the other end of the continuum fall the facilitation cases where property that is external to the financial transaction and is otherwise untainted is nevertheless subject to forfeiture because it was used to make the money laundering offense easier to commit or harder to detect. Such property, however, is subject to forfeiture only if it was substantially connected to the money laundering offense.

4. Property That Is Central to the Entire Scheme, Including the Underlying SUA Offense

There is a fourth category of property forfeitable in a money laundering case that falls outside of this continuum. The theory is that the court may order the forfeiture of property that was not involved in the money laundering offense itself, but was nevertheless central to the underlying scheme of which the money laundering offense was a part. Some courts permit the forfeiture of such property under the money laundering statutes and some do not.

a. The Proceeds Left Behind

One example of this theory concerns SUA proceeds that are left behind in a bank account when the defendant commits the money laundering offense giving rise to the forfeiture. Look again at Figure 7 illustrating what happened in the Trost case. Recall that the defendant in that case put $57,000 in SUA proceeds in a bank account and transferred $23,000 somewhere else. The $23,000 was the subject of the money laundering conviction and by anyone’s definition represented “property involved” in the money laundering offense. That money was clearly subject to forfeiture. But what about the remainder of the $57,000 that the defendant put into the first bank account and left there? Was that involved in the offense? Is that subject to forfeiture?

It is easy to understand Trost’s objection to the forfeiture of the remaining money. He was convicted of laundering $23,000. The money left behind in the account was never laundered; in fact, it was never moved out of the first bank account. How is it possible, Trost asked, for money that was never laundered to have been “involved” in a money laundering offense? But the Seventh Circuit held that when a defendant puts his criminal proceeds in a bank account and is convicted of laundering some of it by moving it out of that account, the money left behind is also involved
in the offense, and is also subject to forfeiture, because it is the proceeds of the same SUA.\textsuperscript{156}

In essence, the Seventh Circuit was using common sense to fill what was then a gap in the money laundering forfeiture regime: While it is true that the money left behind was not the subject matter of any money laundering offense, the court reasoned that if clean money can be forfeited if it facilitates the money laundering offense, it would make no sense to hold that the dirty money derived from the same SUA could not be forfeited.\textsuperscript{157}

The gap existed in the statute, of course, because at the time Trost was convicted, federal law did not authorize the forfeiture of the proceeds of the underlying SUA offense. Thus, if the court had not extended the forfeiture theory to the un laundered SUA proceeds, Trost would have been able to retain the proceeds of his crime. Would a court reach the same conclusion today now that SUA proceeds are forfeitable under a separate statute? We will have to wait to see. But it is likely that the government will avoid this problem either by alleging that the un laundered money is forfeitable directly under § 981(a)(1)(C), or by alleging that the defendants conspired to launder all of the proceeds of their offense. In a conspiracy case, of course, all of the money that the defendants intended to launder is subject to forfeiture whether they consummated the money laundering transaction or not.\textsuperscript{158}

\textbf{b. Other Property Involved in the Underlying SUA}

In other cases, the government has tried to forfeit property that was part of the SUA offense, or was used to facilitate the SUA offense, but again was not part of the money laundering transaction itself. The best example is \textit{United States v. Wyly}.\textsuperscript{159}

\begin{figure}[h]
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\caption{Figure 16}
\end{figure}

In \textit{Wyly}, the defendant was a public official who accepted a kickback in return for steering a public construction contract to a particular contractor. The contract was for the construction and operation of a new privately-owned county jail. The money sent by the public body to the contractor was the SUA proceeds, and the payment of the kickback by the contractor to the defendant was the money laundering offense.

When the defendant was convicted of money laundering, the government sought to forfeit the new jail itself as property involved in the money laundering offense. It was clear that, in the traditional sense at least, the jail was not part of the money laundering transaction. But it was also clear that without the jail—which was the subject matter of the SUA offense—there would have been no scheme and hence no money laundering. Adopting the latter rationale, the Fifth Circuit extended its earlier decision in \textit{Tencer}, and held that the jail was subject to forfeiture.\textsuperscript{160}

\begin{flushright}
\textsuperscript{156} United States v. Trost, 152 F.3d 715 (7th Cir. 1998).
\textsuperscript{157} Id.
\textsuperscript{158} See supra note 85.
\textsuperscript{159} 193 F.3d 289 (5th Cir. 1999). See fig. 16.
\textsuperscript{160} 193 F.3d at 302.
\end{flushright}
Other courts have reached similar conclusions. For example, in United States v. Puello,161 a district court held that property used to facilitate food stamp fraud was forfeitable as property involved in the laundering of the fraud proceeds, even though it was not part of the money laundering transaction itself.162 But other courts hold that property involved only in the SUA offense, and not part of the money laundering transaction, is not forfeitable under the money laundering statutes.

In United States v. Iacoboni,163 the defendant pled guilty to money laundering and to the underlying gambling offense that served as the SUA. The court granted the government’s motion for an order forfeiting the gambling proceeds that were used to promote the continuation of the gambling proceeds because the disbursement of those funds constituted the money laundering offenses for which the defendant was convicted.164 In other words, the gambling proceeds represented the subject matter of the money laundering offense. But the court declined to order the forfeiture of the real property that the defendant had used to facilitate the gambling offense, on the ground that it was not involved in, or at least was not substantially connected to, the money laundering.165

162. See also United States v. Eleven Vehicles, 838 F. Supp. 1147, 1155 (E.D. Pa. 1993) (business is used to facilitate violation of the Arms Export Act was forfeitable because money laundering was essential to the arms export scheme); United States v. All Assets of Blue Chip Coffee, Inc., 836 F. Supp. 104, 108 (E.D.N.Y. 1993) (property used to facilitate underlying § 659 offense forfeitable under § 981(a)(1)(A)); United States v. Matai, 173 F.3d 426, 1999 WL 61913, Nos. 97-4129, 97-4130 (4th Cir. 1999) (unpublished) (Table) (inventory in defendants’ clothing business is forfeitable as facilitating property in a money laundering case, where defendants used the business to perpetrate a credit card fraud and money laundering scheme); United States v. $448,342.85, 969 F.2d 474, 477 (7th Cir. 1992) (dicta) (property “involved” in money laundering offense not limited to money derived from the SUA, but may include funds that facilitated the SUA).
164. Id. at 117-18.
165. Id. at 115-17 (because the forfeiture allegation in the indictment based the forfeiture only on the money laundering offense, and not on the underlying gambling SUA as well, property involved only in the SUA offense could not be forfeited; declining to follow cases that confuse property involved in the SUA with

Similarly, in United States v. Loe,166 the court held that leasing rights that the defendant had used to facilitate the underlying insurance fraud scheme were not involved in the subsequent laundering of the fraud proceeds, and so could not be forfeited under § 982(a)(1).167

I tend to think that the courts that have taken the more conservative approach on this issue are correct. To me, the essence of the money laundering crime is the financial transaction, so only property involved in some way in the financial transaction can be forfeited. The jail in Wyly might have been involved in the kickback in the sense that it was the subject matter of the entire kickback scheme. But property that merely facilitates the underlying SUA and is not involved at all in the subsequent laundering of the SUA proceeds does not fit, in my view, within the meaning of the term “property involved” in the money laundering offense. If it were so, then any automobile used to facilitate a drug offense could be forfeited in a subsequent money laundering case involving the laundering of the drug proceeds. It would be better if the forfeiture of the automobile in that case were based on the forfeiture statute for drug offenses, and not on the statute that authorizes the forfeiture of property involved in money laundering.

CONCLUSION

The development of the law regarding asset forfeitures in money laundering cases is not yet complete, but it is clear that the statutes authorizing forfeiture in money

property involved in the money laundering). Note: the court in Iacoboni apparently was under the mistaken impression that the government could have based the criminal forfeiture of the real property on the gambling violation. It may have been unaware that at the time of the offense in question, which pre-dated the effective date of CAFRA, there was no criminal forfeiture authority for gambling offenses in violation of 18 U.S.C. § 1955.
167. See also United States v. Hawkey, 148 F.3d 920 (8th Cir. 1998) (emphasizing that the property must have been used to facilitate the laundering offense).