Nexus Rethought: Toward a Rational Factual Standard for Federal Criminal Forfeitures

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ABSTRACT: Numerous federal statutes authorize the government to seek forfeiture of a criminal defendant's property after conviction. Under each of those statutes, the government must establish, by a preponderance of the evidence, that there is a factual nexus between the defendant's criminal conduct and the property to be forfeited. Courts have struggled to articulate a standard for judging whether the government has established a factual nexus sufficient to warrant forfeiture. As a result, the existing criminal forfeiture jurisprudence is idiosyncratic and chaotic, and invites suspicion that the forfeiture statutes may be unconstitutionally vague. This Note traces the development of asset forfeiture law in the United States and outlines the current, inconsistent application of the forfeiture statutes. It then argues that courts should: (1) read the statutory language authorizing forfeiture to determine the types of property that may be forfeited; and (2) grant forfeiture if the government establishes that the contact between the property at issue and the criminal conduct is more than merely incidental or fortuitous. Such a standard will comport with the purpose of the forfeiture statutes and allow courts to meaningfully distinguish between property that is sufficiently connected with crime to permit forfeiture and property that is not.

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I. INTRODUCTION

Crime should not pay. This basic idea reflects both the moral intuition and the legislative purpose of numerous federal statutes that authorize the federal government to take away property involved in crime.[1] Since the Founding, property involved in illegal conduct has been subject to forfeiture to the government.[2] Early in American history, property forfeitures were restricted to just a few specific types of crime, and were accomplished through a civil in rem proceeding against the "guilty property."[3] The subsequent 200 years witnessed repeated expansions of the forfeiture power, culminating in 1970 when Congress created a new type of forfeiture: criminal forfeiture, which is part of sentencing following criminal conviction.[4] Now, instead of a civil proceeding against a particular piece of property, the government can forfeit property following a defendant's conviction without instituting a separate action.[5] As a result of the government's enhanced forfeiture powers

1. *See* DEE R. EDGEWORTH, ASSET FORFEITURE: PRACTICE AND PROCEDURE IN STATE AND FEDERAL COURTS 25–26 (2014) (listing the various federal statutes that authorize criminal forfeiture). For a description of asset forfeiture law in the United States, see *infra* Part III.

2. C.J. Hendry Co. v. Moore, 318 U.S. 133, 139 (1943) ("Long before the adoption of the Constitution the common law courts in the Colonies—and later in the states during the period of Confederation—were exercising jurisdiction *in rem* in the enforcement of forfeiture statutes.").

3. United States v. Bajakajian, 524 U.S. 321, 325–26 (1998) (recounting the history of asset forfeiture in the United States).

4. *Id.*

5. *Id.* at 332 n.7.

and the convenience of avoiding a separate proceeding, criminal forfeiture has become a ubiquitous part of federal criminal prosecution.[6]

But if the underlying policy rationale for criminal forfeiture is that crime should not pay, courts imposing forfeitures must differentiate between property that is connected with criminal conduct and property that is not. This determination involves the so-called "factual nexus" element of criminal forfeiture: the government must prove by a preponderance of the evidence that there is a factual nexus between the property to be forfeited and the criminal conduct of which the defendant was convicted.[7]

Courts have struggled to apply the factual nexus requirement with any consistency.[8] Instead, they have adopted a patchwork of approaches that lack any articulable standard for how strong of a connection must exist between the property and the criminal conduct before forfeiture is proper.[9] Of course, analysis of the factual nexus element is, by its very definition, a highly fact-specific inquiry.[10] But without some standard for determining when a connection is strong enough, the courts' myriad approaches to the factual nexus element invite the conclusion that the forfeiture statutes are being enforced arbitrarily, and are therefore unconstitutionally vague.[11] To avoid the specter of unconstitutional vagueness and rationalize the current, disparate jurisprudence, this Note argues that courts should adopt a standard that requires the government to show that the contact between the property and the criminal conduct is more than incidental or fortuitous.[12]

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6. Stefan D. Cassella, *Criminal Forfeiture Procedure: An Analysis of Development in the Law Regarding the Inclusion of a Forfeiture Judgment in the Sentence Imposed in a Criminal Case*, 32 AM. J. CRIM. L. 55, 56 (2004) ("[F]ederal prosecutors have begun to make criminal forfeiture a routine part of criminal law enforcement in federal cases. Indeed, criminal forfeitures now account for approximately 50 percent of all contested forfeiture actions in federal courts. In some districts, the fraction is actually much higher."); *see also* United States v. Delco Wire & Cable Co., 772 F. Supp. 1511, 1515 (E.D. Pa. 1991) ("In 1984, the Comprehensive Crime Control Act . . . amended the criminal forfeiture provisions of RICO 'to enhance the use of forfeiture, and in particular, the sanction of criminal forfeiture, as a law enforcement tool.'" (quoting S. REP. NO. 225, at 191 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3374)).

7. *See infra* Part II.B.

8. *See infra* Part III.

9. *See infra* Part III.

10. *See* FED. R. CRIM. P. 32.2 (Advisory Committee's note to subdivision (b)) ("To the extent that the government is seeking forfeiture of a particular asset, such as the money on deposit in a particular bank account that is alleged to be the proceeds of a criminal offense, or a parcel of land that is traceable to that offense, the court must find that the government has established the requisite nexus between the property and the offense. To the extent that the government is seeking a money judgment, such as a judgment for the amount of money derived from a drug trafficking offense or the amount involved in a money laundering offense where the actual property subject to forfeiture has not been found or is unavailable, the court must determine the amount of money that the defendant should be ordered to forfeit.").

11. *See infra* note 83 and accompanying text.

12. *See infra* Part IV.

This Note has five parts. After this introduction, Part II discusses the development of property forfeiture law in the United States. Part III examines the disorderly approaches that courts have taken when determining whether a particular piece of property meets the factual nexus requirement. Part IV argues that courts should adopt a uniform factual nexus standard for all criminal forfeitures: something more than incidental or fortuitous contact between the property and the criminal conduct. Part V concludes by arguing that the proposed standard affords courts an opportunity to develop the criminal nexus jurisprudence in an orderly way.

II. THE DEVELOPMENT OF ASSET FORFEITURE LAW IN THE UNITED STATES

The development of asset forfeiture law is, in large part, the story of the nation's evolving law enforcement needs and priorities.[13] It tracks policymakers' evolving attitudes towards taking a person's property as punishment for crime—from hesitance to enthusiasm.[14] This Part first traces the historical development of asset forfeiture in the United States. It then highlights two cases in which the Supreme Court defined modern criminal forfeiture and its constitutional limits. It concludes by providing a framework for the analysis of modern criminal forfeiture proceedings.

A. HISTORICAL DEVELOPMENT OF ASSET FORFEITURE LAW

The historical development of asset forfeiture—from the sparse use of forfeitures at the time of the Founding to the ubiquity of modern criminal forfeitures—revolves around two general themes: (1) the transition from civil

13. This Note focuses exclusively on forfeitures imposed by the federal courts pursuant to federal law. Accordingly, in recounting the history and development of asset forfeiture law, exclusive attention is paid to federal courts applying federal law. However, it is worth noting that many states have also developed their own criminal forfeiture laws and related jurisprudence. Some states list the crimes that trigger forfeiture in a single statute. *See, e.g.*, KAN. STAT. ANN. § 60-4104 (West 2015) (authorizing forfeiture following conviction for money laundering, narcotics offenses, and gambling violations); MICH. COMP. LAWS § 600.4701 (West 2015) (authorizing forfeiture following conviction for insurance fraud, securities fraud, and embezzlement); MO. ANN. STAT. § 513.605 (West 2015) (authorizing forfeiture following conviction for child obscenity, pornography, and prostitution). Some states authorize forfeiture in a decidedly less organized fashion. For instance, California authorizes forfeiture for more than 40 criminal offenses, but the authorizing statues are scattered throughout the state code. *See* EDGEWORTH, *supra* note 1, at 39. Making matters worse, not all of California's authorizing statutes conform to the same theory of forfeiture. For instance, profits may be forfeitable under one statute, but not another. *Compare* CAL. PENAL CODE § 186 (West 2015) (profiteering forfeiture), *with* CAL. HEALTH & SAFETY CODE § 11470 (West 2015) (narcotics forfeiture).

14. *See* STEFAN D. CASSELLA, *The Development of Asset Forfeiture Law in the United States*, *in* ASSET FORFEITURE LAW IN THE UNITED STATES 28–37 (2d ed. 2013) (describing the historical development of asset forfeiture in the United States).

in rem[15] forfeitures to criminal in personam[16] forfeitures; and (2) policymakers' evolving attitudes about the utility of asset forfeiture as a crime-fighting tool.

Asset forfeiture is an old concept that dates back to early common law.[17] Under English common law, property that directly or indirectly caused the death of one of the King's subjects was forfeited to the crown under the ancient doctrine of deodands.[18] Forfeiture of property also resulted from conviction for a felony or treason.[19] These common law forfeitures incident to criminal offenses, which were early predecessors of today's criminal forfeitures, were "justified on the ground that property was a right derived from society which one lost by violating society's laws."[20] The British Parliament also authorized the forfeiture of property used in violation of customs and revenues laws, but these statutory forfeitures required a separate civil action against the "guilty property" in a court of equity.[21] Accordingly, English law authorized both forfeitures incident to criminal proceedings and forfeitures accomplished through civil proceedings against the property itself.[22] Thus, a subject that breached the King's peace by committing a crime was liable to lose his property as a punishment for that crime, while a subject that breached Parliamentary law was subject to lose his property in a civil in rem proceeding.

The colonies imported only the in rem forfeiture tradition from English law.[23] That is, only statutory violations resulted in asset forfeiture, and the only mechanism for accomplishing these forfeitures was an in rem proceeding against the "guilty property."[24] The Founding generation's rejection of in

15. An in rem action is "[a]n action determining the title to property and the rights of the parties, not merely among themselves, but also against all persons at any time claiming an interest in that property; a real action . . . in which the named defendant is real or personal property." *Action*, BLACK'S LAW DICTIONARY (10th ed. 2014).

16. An in personam action is "[a]n action brought against a person rather than property." *Action*, BLACK'S LAW DICTIONARY (10th ed. 2014).

17. *See* United States v. Bajakajian, 524 U.S. 321, 330–32 (1998) (recounting the history of asset forfeiture in the United States).

18. Calero–Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 680–84 (1974) (explaining the history of asset forfeiture). Black's Law Dictionary defines a deodand as "[s]omething . . . that has done wrong and must therefore be forfeited to the Crown." *Deodand*, BLACK'S LAW DICTIONARY (10th ed. 2014).

19. *Calero–Toledo*, 416 U.S. at 682.

20. Austin v. United States, 509 U.S. 602, 612 (1993) (describing the history of asset forfeiture doctrine); *see also Calero–Toledo*, 416 U.S. at 682.

21. *See Calero–Toledo*, 416 U.S. at 682.

22. *Id.*

23. *Id.* at 682–83; *see also* C. J. Hendry Co. v. Moore, 318 U.S. 133, 139 (1943).

24. Contemporary forfeiture jurisprudence refers to the "guilty property" concept as a legal "fiction that . . . has a venerable tradition in our case law." *Austin*, 509 U.S. at 615; *see also* J. W. Goldsmith, Jr.-Grant Co. v. United States, 254 U.S. 505, 511 (1921) ("[T]he *thing* is primarily considered the offender." (emphasis added)).

personam criminal forfeitures was unambiguous: the Constitution expressly proscribed forfeitures resulting from conviction for treason,[25] and the first Congress "explicitly rejected in personam forfeitures as punishments for federal crimes."[26] When read in conjunction with other constitutional provisions, namely the Eighth Amendment's Excessive Fines Clause, this refusal to allow the government to take criminal defendants' property as a punishment for conviction reflected the founders' deep concern over "the potential for governmental abuse of its prosecutorial power."[27]

Consistent with English law, the first Congress authorized forfeiture of property involved in crime through civil in rem proceedings.[28] One of the most frequent subjects of Founding-era civil forfeitures was shipping: "almost immediately after adoption of the Constitution, ships and cargoes involved in customs offenses were made subject to forfeiture under federal law, as were vessels used to deliver slaves to foreign countries, and somewhat later those used to deliver slaves to this country."[29] Apart from being consistent with English law, these in rem civil forfeitures reflected the law enforcement exigencies of the time. Frequently in piracy, slave trafficking, and smuggling cases, the offending ship and its cargo were found within the jurisdiction of the United States, but the owner of the contraband was not.[30] Accordingly, the government needed a means of asserting jurisdiction when no wrongdoer was available for prosecution.[31] In rem forfeiture provided that jurisdiction and, thus, proved itself as a useful tool for confiscating contraband in American territorial waters.

The doctrine of in rem forfeiture continued to evolve during the 19th and 20th centuries. Instead of shipping and contraband, the principal law enforcement concern of this era was the regulation and taxation of alcohol.[32] By the early 20th century, taxes and levies on alcohol and tobacco accounted

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25. U.S. CONST. art. III, § 3.

26. United States v. Bajakajian, 524 U.S. 321, 332 n.7 (1998); *see also Calero–Toledo*, 416 U.S. at 682–83 (describing the Founders' approach to asset forfeiture).

27. Browning–Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 266, 267 n.9 (1984) ("The Eighth Amendment was adopted as an admonition to all departments of the national government, to warn them against such violent proceedings as had taken place in England in the arbitrary reigns of some of the Stuarts.").

28. *Calero–Toledo*, 416 U.S. at 683.

29. *Id.*

30. *See* Austin v. United States, 509 U.S. 602, 615 n.9 (1993) ("'The fictions of in rem forfeiture were developed primarily to expand the reach of the courts,' . . . which, particularly in admiralty proceedings, might have lacked *in personam* jurisdiction over the owner of the property." (quoting Republic Nat'l Bank of Miami v. United States, 506 U.S. 80, 87 (1992))).

31. *See* Bennis v. Michigan, 516 U.S. 442, 472 (1996) (Kennedy, J., dissenting) (noting that early in rem forfeiture evolved "from the necessity of finding some source of compensation for injuries done by a vessel whose responsible owners were often half a world away and beyond the practical reach of the law and its processes").

32. *See* United States v. James Daniel Good Real Prop., 510 U.S. 43, 60 (1993) (describing the law enforcement needs of the time).

for some 75% of the federal government's total revenue, and therefore suppressing tax avoidance on these items was a singularly important law enforcement priority.[33] To prevent tax avoidance, the doctrine of in rem forfeiture evolved. Instead of constraining forfeitures to contraband, such as smuggled goods, property that was the means of committing a crime, like distilleries and automobiles, were subjected to forfeiture.[34] Such forfeitures were justified under the so-called instrumentalities theory of forfeiture.[35] In short, to combat illegal alcohol and tobacco production, it was necessary to confiscate not only the illegal goods, but also the instrumentalities used to create those goods.[36]

The doctrine of forfeiture expanded yet again in the second half of the 20th century. Congress enacted statutes authorizing in rem forfeiture of property involved in a wide variety of crimes, including counterfeiting, gambling, people smuggling, and drug trafficking.[37] Congress also amended forfeiture statutes to permit forfeiture not just of drugs (contraband) or property used to manufacture or transport drugs (instrumentalities), but also the proceeds of drug crimes and any property used to facilitate drug crimes.[38] These new forfeiture theories granted the government considerably more latitude in subjecting property to forfeiture.

At the same time, "Congress resurrected the English common law of punitive forfeiture to combat organized crime and major drug trafficking."[39]

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33. *Id.*

34. *See generally* Van Oster v. Kansas, 272 U.S. 465 (1926) (finding an automobile used in the transport of liquor subject to forfeiture); J.W. Goldsmith, Jr.-Grant Co. v. United States, 254 U.S. 505 (1921) (finding an automobile subject to forfeiture); Dobbins' Distillery v. United States, 96 U.S. 395 (1878) (finding a distillery subject to forfeiture).

35. *See* United States v. Bajakajian, 524 U.S. 321, 333 n.8 (1998) (observing that "[a]lthough the term instrumentality is of recent vintage . . . it fairly characterizes property that historically was subject to forfeiture because it was the actual means by which an offense was committed").

36. Austin v. United States, 509 U.S. 602, 615 (1993); Calero–Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 686–87 (1974).

37. *See* CASELLA, *supra* note 14, at 33–37.

38. 21 U.S.C. § 881(a)(6) (2012) ("All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance or listed chemical in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter."); 21 U.S.C. § 881(a)(7) ("All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment."); United States v. 92 Buena Vista Ave., 507 U.S. 111, 121–23 (1993) (describing the expansion of Congressional forfeiture authorization from contraband and instrumentalities to proceeds as "an important expansion of governmental power"); *see also* United States v. Schifferli, 895 F.2d 987, 990 (4th Cir. 1990) (defining facilitating property as anything that makes the criminal offense easier to commit or harder to detect).

39. *Bajakajian*, 524 U.S. at 332 n.7.

The Organized Crime Control Act of 1970[40] and the Comprehensive Drug Abuse Prevention and Control Act of 1970[41] relieved the government of having to institute a separate proceeding against "guilty property." Instead, forfeiture was added to the penalty phase of a criminal prosecutions ("criminal forfeiture").[42] In authorizing criminal forfeiture, "which had long been unused in this country, the Senate Judiciary Committee acknowledged that 'criminal forfeiture . . . represents an innovative attempt to call on our common law heritage to meet an essentially modern problem.'"[43] Congress's resurrection of criminal forfeiture was a reaction to a particular problem—organized crime—and had a specific purpose in mind: "to remove the leaders of organized crime from their sources of economic power."[44] Instead of allowing convicted mob bosses' positions to be "filled by successors no different in kind, the channels of commerce can be freed of racketeering influence."[45]

Since authorizing in personam criminal forfeiture in 1970, Congress has appended criminal forfeiture provisions to numerous federal criminal statutes.[46] That expansion culminated in 2000 when Congress adopted a policy encouraging the use of criminal forfeiture.[47] As the Supreme Court noted, the resurrection of criminal forfeiture and its broad application to federal criminal statutes "marked an important expansion of government power."[48] But it also had side effects, namely a battle over how much of a defendant's property the government can forfeit before running afoul of the Eighth Amendment's Excessive Fines Clause.[49]

B. THE EXCESSIVE FINES CASES

In the 1990s, the Supreme Court sought to determine whether criminal forfeitures were subject to the constitutional prohibition against excessive fines. The answer to that inquiry depended on whether a criminal forfeiture is inherently punitive or remedial in nature. The Eighth Amendment's Excessive Fines Clause only restrains the government from imposing fines that

40. 18 U.S.C. § 1963 (2012).

41. 21 U.S.C. § 848(a).

42. *See* Libretti v. United States, 516 U.S. 29, 38–39 (1995) (Criminal "[f]orfeiture is an element of the sentence imposed *following* conviction . . . .").

43. *Bajakajian*, 524 U.S. at 332 n.7 (quoting S. REP. NO. 91–617, at 79 (1969)).

44. S. REP. NO. 91–617, at 80 (1969).

45. *Id.*

46. 18 U.S.C. § 982(a) (appending a forfeiture provision to numerous federal crime statutes, including statutes criminalizing counterfeiting (18 U.S.C. §§ 471–473), identity theft (18 U.S.C. § 1028), mail fraud (18 U.S.C. § 1341), and wire fraud (18 U.S.C. § 1343)).

47. 28 U.S.C. § 2461(c) (2012).

48. United States v. 92 Buena Vista Ave., 507 U.S. 111, 121 (1993).

49. *See infra* Section II.B.

are punitive.[50] The Court's jurisprudence is bookended by two seminal cases: *Austin v. United States* and *United States v. Bajakajian*.

In *Austin*, the Court held that both civil and criminal forfeiture proceedings are subject to the limitations imposed by the Excessive Fines Clause if they are punitive in nature.[51] *Austin* involved a civil forfeiture that the government won against the home and auto body shop of a defendant who pled guilty to possession of cocaine with intent to distribute.[52] The government argued that the Excessive Fines Clause applied only to in personam criminal forfeiture and not to civil in rem proceedings.[53] The Court, after reviewing the history of asset forfeiture in the United States, concluded that the key issue was not the distinction between in rem and in personam proceedings.[54] Instead, the deciding issue was whether the forfeiture was remedial or punitive in nature because, consistent with existing jurisprudence, punishments alone were subject to the limitations imposed by the Excessive Fines Clause.[55] In setting punishment as the prerequisite to constitutional scrutiny, the Court downplayed the differences between the forms of forfeiture—in personam versus in rem—and emphasized the function that a forfeiture plays in a particular case. However, the *Austin* court, having determined that the Excessive Fines Clause applied, declined to define the standard for determining when a forfeiture is too high and, thus, constitutes an excessive fine.[56]

The Court returned to the issue of setting a standard for excessive fines in *Bajakajian*, but also went much further.[57] In *Bajakajian*, the defendant had been arrested at Los Angeles International Airport for failing to declare that he and his family were transporting currency in excess of $10,000.[58] They were in fact transporting $357,144.[59] The applicable statute required that the

50. The Eighth Amendment commands that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. The four words pertaining to fines constitute the Excessive Fines Clause.

51. Austin v. United States, 509 U.S. 602, 609–10 (1993).

52. *Id.* at 604–06.

53. *Id.* at 607. The government also argued that the forfeiture of the defendant's property was not punitive because it forwarded two remedial purposes: (1) it removed "instruments" of crime from the stream of commerce; and (2) it "serve[d] to compensate the Government for" expenditures on law enforcement programs. *Id.* at 620. The Court rejected both arguments, finding that: (1) the items the government forfeited were not contraband per se; and (2) "the dramatic variations in the value of conveyances and real property forfeitable [in this case] undercut" the argument that this is mere recompense for the government's enforcement expenses. *Id.* at 621–22.

54. *Id.* at 609–10.

55. *Id.*

56. *Id.* at 622–23.

57. United States v. Bajakajian, 524 U.S. 321 (1998).

58. *Id.* at 324.

59. *Id.*

entire sum be forfeited to the government.[60] En route to finding that forfeiture of the entire sum was an unconstitutionally excessive fine, the Court reinterpreted *Austin* to stand for the proposition that all criminal forfeitures are per se punitive.[61] Instead of inquiring whether the function of a particular forfeiture was to punish, the Court instead relied solely on the forfeiture's form to find that an Excessive Fines analysis was required.[62] The Court went on to find that "[t]he touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish."[63] In particular, "a punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense."[64]

The Court's holdings in *Austin* and *Bajakajian* settled the question of what a criminal forfeiture is: criminal forfeitures are criminal fines, which are always punitive for the purposes of Eighth Amendment analysis. But the Court's opinions left many experts dissatisfied[65] and sowed confusion in the lower courts, which have not consistently applied *Bajakajian*'s formalistic distinction between civil and criminal forfeitures.[66] The result is a body of law without a central organizing framework, and a recipe for uneven and arbitrary application.

C. FRAMEWORK FOR CONTEMPORARY CRIMINAL FORFEITURES

Today, criminal forfeitures are a ubiquitous part of federal law enforcement.[67] Criminal forfeitures account for half of all contested forfeiture actions in federal courts,[68] and are routinely sought in drug and

60. *See* 18 U.S.C. § 982(a)(1) (2012) ("The court . . . shall order that the person forfeit to the United States any property . . . involved in such offense.").

61. *Bajakajian*, 524 U.S. at 332 (noting that in personam criminal "forfeitures have historically been treated as punitive, being part of the punishment imposed for felonies and treason in the Middle Ages and at common law").

62. *Id.*

63. *Id.* at 334.

64. *Id.* The Court went on to conclude that subjecting the full $357,144 hidden in the defendant's bags to forfeiture was grossly disproportionate because the defendant's underlying offense was nothing more than a reporting violation. The money was obtained legally, and the defendant was transporting it to Italy in order to pay a lawful debt. *Id.* at 337–38, 338 n.13.

65. *See* Stefan D. Cassella, *Bulk Cash Smuggling and the Globalization of Crime: Overcoming Constitutional Challenges to Forfeiture Under 31 U.S.C. § 5332*, 22 BERKELEY J. INT'L L. 98, 102–06 (2004) (criticizing the Court's decision in *Bajakajian*).

66. *See* United States v. Ahmad, 213 F.3d 805, 813 (4th Cir. 2000) (applying *Bajakajian* equally to criminal forfeitures and to civil forfeitures of non-instrumentalities); United States v. $273,969.04 U.S. Currency, 164 F.3d 462, 466 (9th Cir. 1999) (noting that civil forfeiture for failure to report exportation of currency is subject to the *Bajakajian* proportionality test).

67. *See* Cassella, *supra* note 6, at 56 (describing the ubiquity of federal criminal forfeitures).

68. *Id.* (describing the statistics).

money laundering cases.[69] Modern criminal forfeitures are governed by Federal Rule of Criminal Procedure 32.2. The forfeiture procedure has three steps, which coincide with the various phases of a federal criminal proceeding. In the first step, a grand jury appends a forfeiture allegation to one of the counts charged in the indictment.[70]

In the second step, the court must determine whether the defendant's property is subject to forfeiture.[71] This second step occurs "[a]s soon as practical after a verdict or finding of guilty, or after a plea of guilty . . . is accepted . . . ."[72] To establish that a defendant's property is subject to forfeiture, the government must satisfy three elements. First, criminal forfeiture must be authorized by statute.[73] Second, the defendant must be convicted of the qualifying offense.[74] Third, the government must establish a factual nexus between the property to be forfeited and the criminal offense for which the defendant was convicted.[75]

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69. EDGEWORTH, *supra* note 1, at 33–34 (noting the ubiquity of federal criminal forfeiture).

70. *See* FED. R. CRIM. P. 7(c)(1) (setting out the rules for a federal indictment); *see also* FED. R. CRIM. P. 32.2(a) ("A court must not enter a judgment of forfeiture in a criminal proceeding unless the indictment or information contains notice to the defendant that the government will seek the forfeiture of property as part of any sentence in accordance with the applicable statute."); United States v. Grammatikos, 633 F.2d 1013, 1024 (2d Cir. 1980) (describing the necessity of alleging the property to be forfeited). Note that "[t]he indictment or information need not identify the property subject to forfeiture or specify the amount of any forfeiture money judgment that the government seeks." FED. R. CRIM. P. 32.2(a). The purpose of the inclusion of the forfeiture allegation is merely to put the defendant on notice.

71. *See supra* note 70. Even when the government and the defendant stipulate to facts sufficient to establish the factual nexus as part of a plea agreement, the "court [has] an independent duty to ensure that the required nexus exists." United States v. Beltramea, 785 F.3d 287, 291 (8th Cir. 2015). In the *Beltramea* court's words: "we do not believe a defendant's consent to forfeiture abrogates the requirement that a nexus exist between the property sought for forfeiture and the conviction of offense." *Id.*

72. FED. R. CRIM. P. 32.2(b)(1)(A).

73. 28 U.S.C. § 2461(c) (2012); EDGEWORTH, *supra* note 1, at 25–26.

74. *See* United States v. Aramony, 88 F.3d 1369 (4th Cir. 1996) (holding that because an earlier conviction was reversed on appeal, the forfeiture order pursuant to 18 U.S.C. § 982 had to be vacated). This element is the key differentiator between modern civil and criminal forfeiture proceedings. In civil forfeitures, criminal conviction is not required, which is one of the most controversial aspects of the practice. *See generally* Kyla Dunn, *Reining in Forfeiture: Common Sense Reform in the War on Drugs*, FRONTLINE, http://www.pbs.org/wgbh/pages/frontline/shows/drugs/special/forfeiture.html (last visited Aug. 25, 2016). There is concern that the government can take property connected to crime, even when the alleged criminal has been acquitted or when the property is later acquired by an innocent third party. *Id.* Such concerns were the basis for Congress's passage of the Civil Asset Reform Act of 2000, which increased the government's burden in civil forfeiture cases from "probable cause" to "preponderance of the evidence." 18 U.S.C. § 983(c)(1) (2012) ("[T]he burden of proof is on the Government to establish, by a preponderance of the evidence, that the property is subject to forfeiture.").

75. FED. R. CRIM. P. 32.2(b)(1)(A) ("[I]f the government seeks forfeiture of specific property, the court must determine whether the government has established *the requisite nexus between the property and the offense*." (emphasis added)).

In the third step, "[a]t sentencing—or at any time before sentencing if the defendant consents—the preliminary forfeiture order becomes final as to the defendant."[76] As the next Part explains, the factual nexus element of criminal forfeiture lacks a coherent standard that allows courts to determine whether property is subject to forfeiture.

III. THE VARIOUS APPROACHES TO THE FACTUAL NEXUS ELEMENT

Courts have struggled to define what exactly is meant by the factual nexus requirement. The reason for this struggle is the confused analytic method that the courts use to define the factual nexus element. Two authorities govern criminal forfeiture proceedings: the statute authorizing forfeiture and Federal Rule of Criminal Procedure 32.2.[77] These authorities are in tension. On the one hand, the language of the forfeiture statutes is extremely broad.[78] The statutes appear to subject any and all property even remotely connected with the proscribed criminal conduct to forfeiture.[79] On the other hand, Federal Rule of Criminal Procedure 32.2 demands that courts restrict forfeiture to the property for which the government has established the "requisite" factual nexus.[80] Unlike the other elements of criminal forfeiture, which are binary yes-or-no questions, the factual nexus element is a matter of

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76. FED. R. CRIM. P. 32.2(b)(4)(A). Note also that "[i]f the order directs the defendant to forfeit specific property, it remains preliminary as to third parties until the ancillary proceeding is concluded under Rule 32.2(c)." *Id.*; *see also* 21 U.S.C. § 853(n)(1) (2012) ("Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified."). After the hearing, at which the third party petitioner is entitled to present evidence, the court must determine whether

> the petitioner has established by a preponderance of the evidence that . . . the petition has a legal right, title, or interest in the property . . . [that] renders the order of forfeiture invalid in whole or in part because the [petitioner's right] was vested in the petitioner rather than the defendant or was superior . . . [to the interests] of the defendant at the time of the commission of the acts which gave rise to the forfeiture . . . [or if] the petitioner is a bona fide purchaser for value . . . .

21 U.S.C. § 853(n)(6)(A)–(B). If the petitioner meets her burden "the court shall amend the order of forfeiture . . . ." 21 U.S.C. § 853(n).

77. *See supra* Part II.C.

78. United States v. Monsanto, 491 U.S. 600, 607 (1989) ("Congress could not have chosen . . . broader words to define the scope of what was to be forfeited.").

79. *See, e.g.*, 18 U.S.C. § 982(a)(2) (stating that a court "shall order that the [defendant] forfeit to the United States any property constituting, or derived from, proceeds the person obtained directly or indirectly, as the result of such violation"); 21 U.S.C. § 853(a)(1) (authorizing forfeiture of "any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of [the criminal] violation"); 28 U.S.C. § 2461(c) (authorizing criminal forfeiture of *any* property for which a statute authorizes civil forfeiture).

80. FED. R. CRIM. P. 32.2(b)(1)(A).

degree.[81] The nexus between the property and the criminal conduct can be strong or weak, direct or indirect.[82] Thus, while the forfeiture statutes provide broad authority to take a defendant's property following conviction, Rule 32.2 limits that authority based on the strength of the government's evidence that the property was connected with criminal conduct.

Instead of recognizing this tension, most federal courts search the broad statutory language in vain to find the limits it imposes on forfeiture. The resulting forfeiture jurisprudence is fundamentally disorderly. Moreover, the courts' confusion has real-world consequences, not only for criminal defendants liable to lose their property, but also for forfeiture doctrine more generally. In particular, the current disorderly approach to the factual nexus element raises the specter of unconstitutional vagueness.[83] Under that doctrine, "the Government violates [the Fifth Amendment Due Process Clause] by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement."[84] To avoid arbitrary enforcement and give defendants an idea of the punishment that awaits their criminal conduct, the courts must develop a uniform standard for assessing whether the government has established the requisite factual nexus.

Before developing a uniform standard for the factual nexus element, it is necessary to understand how the current jurisprudence is disordered. The current jurisprudence suffers from three principal infirmities. First, courts take differing approaches to the factual nexus element based on the language of the authorizing statute despite there being no evidence that Congress intended these differential approaches.[85] Second, courts do not uniformly adopt any of the approaches to the factual nexus element. Therefore, even under the same statute authorizing forfeiture, defendants in some jurisdictions are liable to lose their property while defendants in other jurisdictions are not. Third, none of the existing approaches is able to

81. The other elements—statutory authorization and criminal conviction—are merely binary elements. *See supra* Part II.C. A particular forfeiture allegation either has statutory authorization or it does not. And a particular defendant is either convicted or acquitted. There is no middle ground.

82. *See* United States v. Beltramea, 785 F.3d 287 (8th Cir. 2015). In *Beltramea*, even though the defendant had stipulated to the factual nexus between the criminal conduct and the property, the Eighth Circuit reversed, holding that "[t]he district court had an independent duty to ensure that the required nexus exists." *Id.* at 291. Without such an independent inquiry, even where the defendant consents, "[t]he forfeiture of . . . property without a proper basis in law and fact violates [the defendant's] substantial rights . . . and affects the integrity of judicial proceedings." *Id.*

83. *See* Johnson v. United States, 135 S. Ct. 2551, 2556–57 (2015) (setting out the doctrine of unconstitutional vagueness as applied to criminal statutes).

84. *Id.* at 2556.

85. Congress has not expressed much interest in the nuanced differences between the various forfeiture statutes. *See* 134 CONG. REC. S.17360 (daily ed. Nov. 10, 1988) (statement of Sen. Biden) ("There does not appear to be any reason for treating [the fees for laundering and the money actually laundered] differently for forfeiture purposes.").

meaningfully differentiate property that is sufficiently connected with crime to warrant forfeiture from property that is not.

With these infirmities in mind, this Part reviews the existing criminal forfeiture jurisprudence.[86] It examines the three general approaches that courts have taken to the factual nexus: (1) the "reasonable under the circumstances" approach; (2) the "received benefit" approach; and (3) the "commingling" approach. After this Part describes and critiques each approach, Part IV proposes a unifying standard for the factual nexus element.

A. THE "REASONABLE UNDER THE CIRCUMSTANCES" APPROACH

The courts that apply this approach focus on a single inquiry: whether the calculation of the forfeiture amount "is reasonable under the circumstances."[87] Courts have adopted this approach when called upon to determine the amount of monetary forfeitures against defendants convicted of federal program fraud.[88] The rationale for this approach seems in large part to be that "[t]he calculation of forfeiture amounts is not an exact science."[89] As a result, this approach amounts to little more than a "smell-test" used in only a subset of cases that gives judges wide latitude to determine whether property is sufficiently connected to the criminal conduct.[90]

Not all courts accept the reasonableness approach. To date, only the Second Circuit has recognized reasonableness as a method for measuring the factual nexus,[91] and only two courts from other circuits have cited it favorably.[92] The reasonableness approach also fails to meaningfully differentiate between forfeitable and non-forfeitable property because it

86. It is worth noting that the law of criminal forfeiture procedure is "extremely volatile." Stefan D. Cassella, *Criminal Forfeiture Procedure in 2006: A Survey of Developments in the Case Law*, 42 CRIM. L. BULL. 515, 563 (2006).

87. United States v. Jafari, 85 F. Supp. 3d 679, 693 (W.D.N.Y. 2015).

88. *See* 18 U.S.C. § 1347 (2012) (setting out the crime of federal healthcare fraud). Forfeitures pursuant to conviction under this section are governed by 18 U.S.C. § 982(a)(7), which, in turn, provides that "[t]he court, in imposing sentence on a person convicted of a Federal health care offense, shall order the person to forfeit property, real or personal, that constitutes or is derived, directly or indirectly, from the gross proceeds traceable to the commission of the offense." 18 U.S.C. § 982(a)(7).

89. United States v. Treacy, 639 F.3d 32, 48 (2d Cir. 2011).

90. *See* United States v. Uddin, 551 F.3d 176, 181 (2d Cir. 2009) ("Although there will undoubtedly be situations in which a district court's estimate of loss amount falls outside the boundaries of reasonableness, we need not define precisely what those boundaries are."); *see also* United States v. Bryant, 128 F.3d 74, 76 (2d Cir. 1997) ("Although extrapolation might not be reasonable if, for example, there were few instances of fraud, or if the returns audited constituted a miniscule percentage of the total that the defendant prepared or in whose preparation he assisted, we see no unreasonableness here.").

91. *See, e.g.*, United States v. Annabi 746 F.3d 83, 85 (2d Cir. 2014) (applying *Treacy*); *Treacy*, 639 F.3d at 48 (explaining the reasonableness standard); *Jafari*, 85 F. Supp. 3d at 693 (applying a reasonableness standard).

92. *See* United States v. Crews, 885 F. Supp. 2d 791, 802 (E.D. Pa. 2012); United States v. Stewart, No. 8:14CR288, 2015 WL 6039742, at *4 (D. Neb. Oct. 15, 2015).

allows judges to avoid making any explicit finding of fact about the nexus between the property and the criminal conduct. A judge using this approach need only conclude that the government's calculation of how much money the defendant owes is reasonable.[93] Though such a standard is convenient, it is not really saying anything about the factual nexus.

As a result, the reasonableness approach effectively reduces the government's burden of proof.[94] Instead of proving a factual nexus between the property and the criminal conduct by a preponderance of the evidence, the government need only establish that it is "reasonable" to believe that such a nexus exists. Under this approach, Rule 32.2's limitation on the property that can be forfeited does no real work. And while some courts have tried to moderate the unbridled discretion of the reasonableness approach by interpreting reasonableness in light of "the purpose of forfeiture,"[95] those courts do not define the purposes of criminal forfeiture beyond its most basic contours—namely that it is punitive and not remedial.[96] Therefore, the reasonableness approach at most repackages the constitutional standard for excessive fines, which leaves the courts with no guidance on how to determine whether the government has established the factual nexus.[97]

B. THE "RECEIVED BENEFIT" APPROACH

The "received benefit" approach holds that the factual nexus requirement is met if the defendant received some tangible benefit from the property in question. Courts employ it in cases dealing with the proceeds of crime[98] where the government attempts to take property that is "obtained

93. *See Jafari*, 85 F. Supp. 3d at 693 (holding that, so long as the government's calculation of the size of the fraud is reasonable, forfeiture is permissible).

94. *See* FED. R. CRIM. P. 32.2(b)(1)(A) ("[T]he court must determine whether the government has established the requisite nexus between the property and the offense. If the government seeks a personal money judgment, the court must determine the amount of money that the defendant will be ordered to pay.").

95. *See* United States v. St. Pierre, 809 F. Supp. 2d 538, 545 (E.D. La. 2011).

96. *Id.* at 541. Other courts have been more explicit in describing the purpose of criminal forfeiture. *See, e.g.*, Libretti v. United States, 516 U.S. 29, 39 (1995) ("Congress conceived of forfeiture as punishment for the commission of various . . . crimes."); United States v. Martin, 662 F.3d 301, 309 (4th Cir. 2011) ("[T]he substantive purpose of criminal forfeiture is . . . to deprive criminals of the fruits of their illegal acts and deter future crimes."); United States v. Venturella, 585 F.3d 1013, 1019 (7th Cir. 2009) ("[F]orfeiture seeks to punish a defendant for his ill-gotten gains by transferring those gains to the United States Department of Justice." (quoting United States v. Emerson, 128 F.3d 567–68 (7th Cir. 1997))).

97. *See* United States v. Bajakajian, 524 U.S. 321, 334 (1998).

98. It is worth noting that courts have not even formed a consensus about what the "proceeds" of crime are. Most courts hold that "proceeds" means "gross receipts" not "profits" of crime. *See* United States v. Peters, 732 F.3d 93, 101 (2d Cir. 2012) (finding that "reading 'proceeds' to mean 'receipts' rather than 'profits' . . . better vindicates the primary purpose of the [forfeiture] statute"); United States v. Newman, 659 F.3d 1235, 1243 (9th Cir. 2011) (same). This is based on two rationales. First, "Congress could not have chosen . . . broader words to define the scope of what is to be forfeited." United States v. Monsanto, 491 U.S. 600, 607 (1989).

directly or indirectly" from the criminal conduct.[99] *United States v. Bailey* provides a good example of a court applying the received benefit approach. In *Bailey*, the government sought to forfeit real properties and other assets that were allegedly bought on the defendant's behalf as proceeds of fraud offenses.[100] After an extensive recitation of the purposes of criminal forfeiture, the district court denied the government's request in part because "in a criminal forfeiture proceeding, the Government acquires on the 'defendant's interest in the property'"[101] and "the Government . . . failed to demonstrate that the Defendant received any benefit by acquiring these assets, beyond briefly possessing the funds used to purchase them."[102] The court's reasoning is tied to its understanding of the purpose of criminal forfeiture, namely to punish the wrongdoer.[103] Accordingly, only the property that the defendant benefited from is tainted by his crimes and subject to forfeiture.

But the received-benefit approach would likely fail to meaningfully distinguish between forfeitable and non-forfeitable property because it is unclear from existing case law whether any benefit is sufficient to subject property to forfeiture, or if only a benefit connected with the criminal conduct will suffice. In proceeds cases, where the government has already demonstrated that the funds at issue are the proceeds of crime, it makes sense to merely inquire whether the defendant received a benefit from those funds. But in many other cases, the taint of crime is less direct. For instance, if a defendant operated a business that structured financial transactions in a manner that violated federal law, it is unclear whether the physical premises of that business would be subject to forfeiture under the received-benefit approach. On the one hand, the defendant's fraudulent business was housed within the building's four walls. But on the other hand, the benefit that the defendant received from using the building is disconnected from his criminal conduct—it is the same benefit that any lawful business owner receives from the building that houses his business. Without a principled way to distinguish between benefits that permit forfeiture and benefits that preclude forfeiture, the received-benefit approach is unlikely to offer courts much guidance as to the substance of the factual nexus element.

Second, the primary purpose of the forfeiture statutes is to punish "all convicted criminals who receive income from illegal activity, and not merely those whose criminal activity turns a profit." United States v. Simmons, 154 F.3d 765, 771 (8th Cir. 1998). Accordingly, "proceeds" means all financial gain, not merely gain in excess of investment, in most jurisdictions.

99. 18 U.S.C. § 982(a)(2) (2012).

100. United States v. Bailey, 926 F. Supp. 2d 739, 764 (W.D.N.C. 2013).

101. *Id.* at 765 (quoting United States v. Pease, 331 F.3d 809, 810 (11th Cir. 2003)).

102. *Id.* (emphasis added).

103. *See* United States v. Hoover–Hankerson, 511 F.3d 164, 171 n.4 (D.C. Cir. 2007) ("[I]f a defendant purchases a house with his share of the loot from a bank robbery, the house would be considered proceeds subject to forfeiture."); United States v. Genova, 333 F.3d 750, 761 (7th Cir. 2003) ("A change in form from the proceeds immediately obtained from crime—for example, use of criminal lucre to buy a house—does not prevent forfeiture of the resulting property.").

The received-benefit approach also suffers from another principal limitation: although other courts have used the received-benefit approach exemplified by *Bailey*,[104] many courts have rejected it. These courts impose no real boundaries on forfeiture based on the benefits that the defendant enjoyed. For instance, in *United States v. Watts*, the Second Circuit found that under 18 U.S.C. § 982(a)(1), "criminal forfeiture is not a measure restricted to property owned by a criminal defendant; it reaches any property that is 'involved' in the offense."[105] Accordingly, the defendant need not even possess the property in order for it to be forfeited to the government, much less benefit from it.[106] Courts have reached similar results with regards to "indirectly" obtained proceeds of crime.[107] Under either name—"involved in" or "indirectly obtained"—the analysis is equally ambivalent toward any benefit that the defendant received from property.

These contradictory approaches to the role of the defendant's property rights present an obvious problem: in one jurisdiction the factual nexus between the property and the criminal conduct is metered by the extent to which the defendant enjoyed the benefit of that property, and in another jurisdiction it is irrelevant. Moreover, if the Second Circuit is any indication, courts that decline to apply the received-benefit analysis do not articulate any viable alternative standard.[108]

C. THE "COMMINGLING" APPROACH

The "commingling" approach comes closest to setting a per se rule: if proceeds of criminal conduct are commingled with untainted property, the proceeds and the untainted property are both subject to forfeiture. This approach is most often adopted in cases where the defendant has been convicted of a money laundering offense.[109] Forfeiture following conviction

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104. *See, e.g.*, United States v. Bader, 678 F.3d 858, 896 (10th Cir. 2012).

105. United States v. Watts, 786 F.3d 152, 174 (2d Cir. 2015) (quoting De Almeida v. United States, 459 F.3d 377, 381 (2d Cir. 2006)).

106. *Id.* at 175 (noting that the government's authorization to forfeit property "extend[s] beyond the defendant's own property interests").

107. *See* 18 § U.S.C. 982(a)(2) (2012) (authorizing forfeiture of "proceeds the person obtained directly or indirectly" from the criminal conduct); United States v. Peters, 732 F.3d 93, 103 (2d Cir. 2013) (finding that "the defendant 'indirectly' obtained the loan proceeds, rendering him liable for forfeiture in connection with them").

108. *See Watts*, 786 F.3d at 174; *Peters*, 732 F.3d at 103.

109. *See* United States v. Bornfield, 145 F.3d 1123, 1135 (10th Cir. 1998) (noting that "property 'traceable to' means property where the acquisition is attributable to the money laundering scheme rather than from money obtained from untainted sources"); United States v. Schlesinger, 396 F. Supp. 2d 267, 271 (E.D.N.Y. 2005) (noting that "[t]he term 'involved in' has consistently been interpreted broadly by courts to include any property involved in, used to commit, or used to facilitate the money laundering offense"). 18 U.S.C. § 1956, which prohibits money laundering, provides, in part, that:

> Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such

for money laundering is authorized by 18 U.S.C. § 982(a), which allows forfeiture of property "involved in" the criminal conduct, and property that is "traceable" to that property. The close proximity of innocent and tainted property in money laundering cases makes them especially important in terms of defining the factual nexus.[110]

For instance, in *United States v. Parenteau*, the defendant commingled his own funds with laundered funds to purchase several life insurance policies.[111] The government sought forfeiture of the defendant's interest in the policies.[112] The court found that the life insurance policies were forfeitable because the defendant "could not have afforded to continue to pay the premiums on the policy, since [the defendant's] available legitimate income . . . was insufficient to meet all of his expenses and pay the premiums" without the commingled funds.[113] Similarly, in *United States v. Wyly*, the defendant constructed a private prison using both the profits of a money laundering conspiracy and untainted funds.[114] The Fifth Circuit found that the prison was forfeitable because it "was indispensable to the money laundering conspiracy. Without the prison, there could have been no bribery, mail fraud, or money laundering."[115]

But courts do not apply the comingling standard consistently. In both *Parenteau* and *Wyly*, the courts examined the extent of the connection between the commingled funds and the criminal conduct. Such an approach is consistent with the holdings of several courts that "[t]he mere pooling or comingling of tainted and untainted funds in an account does not, without more, render the entire contents of the account subject to forfeiture."[116] Indeed, "forfeiture of legitimate and illegitimate funds commingled in an account is [only] proper . . . [if] the government demonstrates that the

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> a financial transaction which in fact involves the proceeds of specified unlawful activity . . . knowing that the transaction is designed in whole or in part . . . to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity . . . shall be sentenced . . . .

18 U.S.C. § 1956.

110. These cases present a new kind of complexity in that they often involve two relevant sets of property: (1) property that is obviously criminal; and (2) property that appears innocent. For instance, a convicted money launderer may have deposited the proceeds of his crime into a bank account that contains untainted funds derived from his lawful job. These questions arise most frequently in cases of white collar crime, and have the potential to involve very complex transactions. *See* United States v. Beltramea, 785 F.3d 287, 291 (8th Cir. 2015) (describing acquisition of three pieces of real property as central to the inquiry).

111. United States v. Parenteau, 805 F. Supp. 2d 438, 440–42 (S.D. Ohio 2011).

112. *Id.*

113. *Id.* at 450.

114. United States v. Wyly, 193 F.3d 289, 302 (5th Cir. 1999).

115. *Id.*

116. United States v. Puche, 350 F.3d 1137, 1153 (11th Cir. 2003) (citation omitted); *see also* United States v. Tencer, 107 F.3d 1120, 1134 (5th Cir. 1997) (noting that mere comingling is not enough).

defendant pooled the funds to facilitate, i.e., disguise the nature and source of, his scheme."[117] However, other courts take the opposite approach. These courts find that "[l]imiting the forfeiture of funds . . . to the proceeds of the initial [illegal] activity would effectively undermine the purpose of the forfeiture statute."[118] If the court rejects the commingling approach, "it is not necessary for the government to prove that the funds in question 'could not possibly have come from any source other than . . . [the] unlawful activity.'"[119]

The conflicting applications of the "commingling" approach render it non-uniform, and thus unhelpful as a guide for courts that must determine whether the government has established the requisite factual nexus. Defendants in some jurisdictions are liable to lose any and all monies commingled with tainted funds, while defendants in other jurisdictions will only lose the tainted funds unless the government can produce evidence that the commingling itself was part of the defendant's criminal conduct.

Moreover, the commingling approach fails to meaningfully distinguish between forfeitable and non-forfeitable property for two reasons. First, the standard fails to account for innocent commingling, for instance by bank error or by the actions of an innocent spouse with joint access to the relevant account. If even innocent commingling is enough to authorize forfeiture, then the commingling approach does not restrict the government's forfeiture power in any meaningful way. Second, commingling has no real application outside of money in bank accounts. Indeed, the commingling approach does not even offer guidance on the forfeitability of physical currency that is, for instance, secreted in a hidden compartment in a car seat by a defendant convicted of drug possession. Accordingly, the commingling approach is unlikely to provide an effective definition of the factual nexus element.

The next Part suggests that the courts should adopt a standard for the factual nexus element imported from civil forfeiture law.

IV. TOWARD A RATIONAL STANDARD FOR THE FACTUAL NEXUS

As the foregoing review of the forfeiture jurisprudence makes clear, courts lack a meaningful standard for judging whether the government has established the requisite factual nexus between property and criminal conduct. Such a standard is required to prevent arbitrary enforcement, foreclose the possibility of unconstitutional vagueness, and more generally to promote the "integrity of judicial proceedings."[120] Without an overriding standard, courts are apt to interpret the factual nexus requirement in highly

117. United States v. Bornfield, 145 F.3d 1123, 1135 (10th Cir. 1998) (citing *Tencer*, 107 F.3d at 1134–35).

118. United States v. Baker, 227 F.3d, 955, 970 (7th Cir. 2000) (citation omitted).

119. United States v. Nicolo, 597 F. Supp. 2d 342, 354 (W.D.N.Y. 2009) (quoting United States v. Sokolow, 91 F.3d 396, 409 (3d Cir. 1996)).

120. United States v. Beltramea, 785 F.3d 287, 291 (8th Cir. 2015).

idiosyncratic ways that bear no relationship to the underlying doctrine of asset forfeiture.[121]

This Part argues that courts should divide their forfeiture analysis into two parts, rather than searching the broad text of the authorizing statute in vain for the limitations it might impose on the property to be forfeited. In the first part of the analysis, courts should read the statutory language authorizing forfeiture to determine only what types of property are at issue.[122] For instance, if the government seeks to forfeit property under 18 U.S.C. § 982(a)(2), the relevant property would be proceeds "constituting, or derived from" the enumerated crimes, regardless of whether those proceeds are "obtained directly or indirectly" from the criminal conduct.[123] Under this first step of the analysis, property merely "traceable to" the crimes at issue would not be subject to forfeiture because, under § 982(a)(2), only "proceeds" are relevant.[124] Courts already apply this step of the analysis, though in idiosyncratic ways.[125]

In the second part of the analysis, courts should determine whether the relevant property identified in the first step is sufficiently connected to the criminal conduct as required by Federal Rule of Criminal Procedure 32.2.[126] This second analytic step requires courts to measure the degree of connection between the relevant property and the criminal conduct. This Part argues that the metric for the degree of connection should be imported from the law governing civil forfeitures. In civil forfeiture, "[i]t is the property which is proceeded against, and, by resort to a legal fiction, held guilty and condemned as though it were conscious instead of inanimate and insentient."[127] The legal fiction that the property itself is "guilty" is a useful device because it attaches culpability to the property at issue.[128] If culpability is not present, then the property is not subject to forfeiture.[129] Moreover, attaching culpability to property is precisely what courts are attempting to do when determining whether the government has established the criminal nexus element. Property is forfeitable only if the government can establish, by a preponderance of the evidence, that the property is sufficiently connected

121. *See supra* Part III.

122. *See* EDGEWORTH, *supra* note 1. The language of each of the statutes addresses an identification problem: what property is subject to forfeiture? But the factual nexus requirement is also concerned with the degree of connection. The courts must read in a standard governing this second step of the inquiry.

123. 18 U.S.C. § 982(a)(2) (2012).

124. *Id.*

125. *See supra* Part III.

126. FED. R. CRIM. P. 32.2.

127. Waterloo Distilling Corp. v. United States, 282 U.S. 577, 581 (1931).

128. *See* The Palmyra, 25 U.S. 1, 9 (1827) (explaining that, under the legal fiction of guilty property, "the offence is attached primarily to the thing").

129. *Id.*

with the criminal conduct that Congress has deemed morally blameworthy.[130] In other words, the government must show that the property is somehow tainted by the defendant's culpable conduct. In particular, courts should find that property is only subject to forfeiture if the connection between the property and the criminal conduct is more than "incidental or fortuitous."[131]

This Part argues that the "incidental or fortuitous contact" standard is desirable for several reasons. First, it would harmonize the criminal forfeiture analysis with the purpose Congress had in mind when it established criminal forfeiture. Second, it would meaningfully differentiate between property that is subject to forfeiture and property whose relation to criminal conduct is too tenuous to support forfeiture. Finally, it would give a name to a standard that some courts already apply.

A. *THE "MORE THAN INCIDENTAL OR FORTUITOUS CONTACT" STANDARD IS CONSISTENT WITH THE PURPOSE OF CRIMINAL FORFEITURE*

Criminal forfeiture is, first and foremost, a law enforcement tool.[132] At its inception, Congress intended for criminal forfeiture to deter future criminal conduct by a particular class of criminal: the kingpins of large criminal enterprises. It found that "[f]ine and imprisonment as criminal sanctions are not new. The use of criminal forfeiture, however, represents an innovative attempt to call on our common law heritage to meet an essentially modern problem."[133] In particular, Congress sought to "remove the leaders of organized crime from their sources of economic power. Instead of their positions being filled by successors no different in kind, the channels of commerce can be freed of racketeering influence."[134]

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130. *See* FED. R. CRIM. P. 32.2(b)(1)(A); *see also* United States v. Hasson, 333 F.3d 1264, 1277 (11th Cir. 2003) (holding that the evidentiary standard in criminal forfeiture proceedings is a preponderance of the evidence). With the limited exception of strict liability crimes, the courts have held that criminal punishment should only be imposed when a defendant's conduct is morally blameworthy. *See* Morissette v. United States, 342 U.S. 246, 249 (1952). All of the crimes for which Congress has authorized criminal forfeiture contain some sort of mens rea requirement. For instance, 21 U.S.C. § 841(a)(1) (2012) makes it a crime "for any person *knowingly or intentionally* . . . to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance . . . ." (emphasis added). Thus the mens rea required is that the defendant acted knowingly or intentionally. Defendants convicted under 21 U.S.C. § 841 are subjected to criminal forfeiture under 21 U.S.C. § 853.

131. United States v. Lewis, 987 F.2d 1349, 1356 (8th Cir. 1993).

132. *See* S. REP. NO. 91-617, at 79 (1969) (describing criminal forfeiture as a "new" remedy).

133. *Id.*

134. *Id.* at 80; *see also* 145 CONG. REC. H4854 (daily ed. June 24, 1999) (statement of Rep. Hyde) ("There are two kinds of forfeiture, criminal assert forfeiture and civil asset forfeiture. What is the difference? The difference is in criminal assert forfeiture you must be indicted and convicted. . . . I think that [criminal forfeiture] is useful in deterring drug deals and extortionists and terrorists.").

But as Congress expanded the availability of criminal forfeiture,[135] it also reshaped the purpose of forfeiture. The legislative history of more contemporary forfeiture statutes reveals that Congress is not so much concerned with deterring future crime as it is with punishing the convicted. For instance, then-Senator Joseph Biden's statement on the Anti-Drug Abuse Act of 1988, which expanded criminal forfeiture to include federal obscenity cases, does not once mention deterrence.[136] Instead, Biden's statement focuses on the punitive nature of criminal forfeiture, and the defendant's culpability as the basis for subjecting him to forfeiture.[137] Similar statements have been made by members of Congress when differentiating between criminal and civil forfeiture.[138] For instance, Representative Hyde stated during a debate that "in criminal assert forfeiture you must be indicted and convicted. Once that happens, the government then may seize your property if your property was used, however indirectly, in facilitating the crime for which you have been convicted."[139] Representative Hyde's statement is, like then-Senator Biden's, focused on punishing defendants convicted of crimes for which forfeiture is authorized. Moreover, Congress has not expressed much interest in the nuanced differences between the various forfeiture statutes so long as the property at issue is "guilty."[140] Instead it has stated its intent broadly; for instance: "[i]t 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 regardless of which statutory provisions he happens to violate."[141]

If punishing the convicted was Congress's primary goal in enacting the criminal forfeiture statutes, then the courts should adopt standards for applying those statutes that give effect to that purpose. Doing so involves a standard that accomplishes two things. First, it must meter the "guilt" of the property at issue. And second, it must not impose too onerous a burden on the government. This second requirement reflects the fact that Congress was cognizant of the robust protections afforded to criminal defendants in the

135. *See generally supra* Part II.

136. 134 CONG. REC. S. 17360 (daily ed. Nov. 10, 1988) (statement of Sen. Biden). Senator Biden "took the lead in drafting the criminal law provisions that are contained in the . . . bill." *Id.*

137. *Id.* ("Criminal forfeiture . . . is intended to be a punishment imposed on the defendant in addition to other penalties (such as fines and imprisonment) provided by law.").

138. 145 CONG. REC. H4854 (daily ed. June 24, 1999) (statement of Rep. Hyde). Representative Hyde was the floor manager of the bill that became the Civil Asset Forfeiture Reform Act of 2000 ("CAFRA"), Pub. L. No. 106-185.

139. 145 CONG. REC. H4854.

140. 134 CONG. REC. S. 17360 (daily ed. Nov. 10, 1988) (statement of Sen. Biden) ("There does not appear to be any reason for treating [the fees for laundering and the money actually laundered] differently for forfeiture purposes.").

141. *Id.*

guilt phase of criminal trials.[142] But once a defendant is convicted of a crime, there is no longer a presumption of innocence and Congress clearly wanted the government to be able forfeit the property used in that crime without significant additional procedural obstacles.[143]

The "more than incidental or fortuitous contact" standard is well-suited to both Congressional purposes. First, because it is borrowed from the civil forfeiture jurisprudence, it is designed to determine whether property is "guilty" enough to warrant forfeiture. Second, it is does not place a terribly onerous burden on the government. Once the defendant has been convicted, all the government must show is that the defendant's criminal conduct was connected to the property in a way that is more than incidental or fortuitous. Having enjoyed the protections of the robust pre-conviction protections provided to federal defendants, the defendant is now liable to lose his property at sentencing under a statutory framework that Congress intended as a punishment. Thus, adoption of the "more than incidental or fortuitous contact" standard would comport with the legislative purposes of criminal forfeiture.

B. THE "MORE THAN INCIDENTAL OR FORTUITOUS CONTACT" STANDARD ALLOWS COURTS TO MEANINGFULLY DISTINGUISH BETWEEN FORFEITABLE PROPERTY AND PROPERTY NOT SUBJECT TO FORFEITURE.

The "more than incidental or fortuitous contact" standard will allow courts to meaningfully differentiate between property that should be subject to forfeiture and property that should not. In fact, the standard is already doing that work in cases where the federal government seeks civil forfeiture of money suspected of being proceeds of, or facilitating, drug trafficking. In many such cases, the defendant is initially questioned by police for conduct unrelated to a drug crime, but subsequent searches lead to the discovery of a

142. 145 CONG. REC. H4854 (daily ed. June 24, 1999) (statement of Rep. Hyde) (opining that, because the moral guilt of criminal defendants has been determined through the guilt phase of a criminal trial, "I have no problem with criminal asset forfeiture.").

143. *Id.* The factual nexus must be proven by a preponderance of the evidence. *See* United States v. Hasson, 333 F.3d 1264, 1277 (11th Cir. 2003). By contrast, the standard of proof for criminal conviction is proof beyond a reasonable doubt. *See In re* Winship, 397 U.S. 358, 386 (1970).

large quantity of cash.[144] The question for the court then becomes whether the cash is sufficiently connected to criminal conduct to make it forfeitable.[145]

Instead of merely relying on the statutory language defining the types of relevant property,[146] courts have applied the "more than incidental or fortuitous contact" standard to determine whether the connection is close enough.[147] Applying this standard, courts have ordered forfeiture of cash wrapped in fabric softener sheets and hidden above the ceiling panel of a car,[148] cash in vacuum-sealed bags that a drug dog alerted to,[149] a large quantity of cash bundled with rubber bands and hidden beneath clothing in a duffle bag,[150] and a house where members of a drug conspiracy counted and divided up their profits.[151] Applying the same standard, courts have denied forfeiture in cases involving a large quantity of cash being carried through an airport,[152] a truck that only transported a person involved in illicit activity,[153] and a vehicle whose use in transportation of contraband could not be established by admissible evidence.[154] Courts have also applied this standard to apportion the amount of property that is forfeitable to the government.[155]

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144. *See, e.g.*, United States v. $117,920.00 in U.S. Currency, 413 F.3d 826, 827 (8th Cir. 2005) (traffic stop for making an improper pass; officer asked for voluntary search of vehicle following defendant's suspicious behavior); United States v. $84,615 in U.S. Currency, 379 F.3d 496, 498 (8th Cir. 2004) (routine traffic stop; police officer noticed "strong odor of marijuana"); United States v. $141,770.00 in U.S. Currency, 157 F.3d 600, 602 (8th Cir. 1998) (stopped for driving onto the shoulder and officer detected heavy odor of fabric softener). But the "guilty property" standard is also applied in cases where the underlying conduct is not so innocent. *See* United States v. $191,910.00 in U.S. Currency, 16 F.3d 1051, 1054 (9th Cir. 1994) (stacks of cash being secreted through airport screening); United States v. Plat 20, Lot 17, Great Harbor Neck, New Shoreham, 960 F.2d 200, 203 (1st Cir. 1992) (marijuana plants being grown on homestead).

145. *See* United States v. 3639–2nd St., N.E., 869 F.2d 1093, 1097 (8th Cir. 1989) (determining that the government had introduced evidence "sufficient to conclude that [a] house was used in contravention" of the applicable statute).

146. *See* 21 U.S.C. § 853(a)(1) (2012) (stating that "any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of" an enumerated violation is subject to forfeiture).

147. United States v. Lewis, 987 F.2d 1349, 1356 (8th Cir. 1993) ("[T]here must be 'something more than an incidental or fortuitous contact between the property and the underlying illegal activity, although the property need not be indispensable to the commission of' the offense.") (quoting *3639–2nd St., N.E.*, 869 F.2d at 1096).

148. *$141,770.00*, 157 F.3d at 604.

149. *$84,615*, 379 F.3d at 501.

150. *$117,920.00*, 413 F.3d at 829.

151. United States v. Phieu Van Nguyen, 602 F.3d 886, 904 (8th Cir. 2010).

152. United States v. $191,910.00 in U.S. Currency, 16 F.3d 1051, 1071 (9th Cir. 1994).

153. United States v. One 1976 Ford F-150 Pick-Up, 769 F.2d 525, 527 (8th Cir. 1985).

154. One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 699–700 (1965).

155. *See* United States v. Plat 20, Lot 17, Great Harbor Neck, New Shoreham, 960 F.2d 200, 203 (1st Cir. 1992). Defendant and three others held a property worth $1,800,000 as tenants in common. *Id.* Defendant grew marijuana (some 385 plants) on the property. *Id.* As a result, the court forfeited a one-third interest in the property to the government, noting that "the

It is not difficult to see that applying the "more than incidental or fortuitous contact" standard would easily separate assets that are sufficiently connected to the criminal activity from assets that are not. For instance, in a money laundering case where the tainted and untainted funds are commingled, the court would first use the statutory language to zero in on the relevant funds: those involved in or traceable to the criminal conduct.[156] Assuming the defendant kept a single bank account in which tainted and untainted funds were commingled, the court would then inquire whether the contact between the tainted and untainted funds was more than incidental or fortuitous. If the government could introduce facts that showed the defendant intentionally comingled the funds, the court would have to find that the contact was more than incidental or fortuitous, and thus the factual nexus required by Rule 32.2 was established. If, by contrast, the government could only show that some bank error or the innocent actions of the defendant's unknowing spouse had caused the tainted money to mix with untainted funds, the factual nexus element would not be established because the untainted funds' contact with the proceeds of the criminal conduct would be merely incidental or fortuitous.

By reorganizing courts' forfeiture inquiries into two steps, the "more than incidental and fortuitous contact" standard will stabilize forfeiture jurisprudence in two important ways.[157] First, it will promote consistency and, accordingly, remove the specter of unconstitutional vagueness.[158] Second, the new two-step inquiry will serve as an aid to appellate courts reviewing forfeiture decisions made in the district court. Instead of having to divine what facts the district court used to determine that the factual nexus requirement had been satisfied,[159] appellate tribunals will be able to examine both the district court's interpretation of the forfeiture statute to determine if it selected the correct property, and the facts the court used to determine whether the factual nexus was established. In short, the "more than incidental and fortuitous contact" standard will make the Courts of Appeals' jobs easier, which will, in turn, allow the Court of Appeals to develop clearer forfeiture jurisprudence.

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government is justified in describing a seized tract in the usual and customary manner reflected in local land records." *Id.* at 206.

156. *See* 18 U.S.C. § 982(a) (2012).

157. *See* Cassella, *supra* note 86, at 563 (explaining that forfeiture jurisprudence is highly volatile).

158. For more on the standard for unconstitutional vagueness, see *supra* note 83 and accompanying text.

159. *See* United States v. Molina–Sanchez, 298 F.R.D. 311, 313 (W.D.N.C. 2014) (finding that because "most people do not pay for houses with cash," the government had established that home was actually purchased using the proceeds of crime). An appellate court reviewing *Molina–Sanchez* would have no idea what facts supported the district court's conclusion. It would be forced to guess.

C. Some Courts Already Apply the "More Than Incidental or Fortuitous Contact" Standard.

Some courts already use the "more than incidental or fortuitous contact" standard; naming the standard will make clear that it can be applied to all criminal forfeitures. For instance, in *United States v. Hassan*, the court found that a convenience store was not subject to forfeiture after the defendants were convicted of "structuring financial transactions to evade reporting requirements."[160] The government argued that, because the defendants' "use of the convenience store to generate the revenue" gave rise to the illicit financial transactions, the store was subject to forfeiture.[161] The court disagreed. It found that, unlike the facts in cases cited by the government,[162] the defendants had not used the convenience store as part of an illegal conspiracy.[163] The test that the court applied: "there must be something more than an incidental or fortuitous contact between the property and the underlying illegal activity."[164] Finding that the contact between the criminal conduct and the convenience store was merely incidental, the court denied the government's request for forfeiture.[165]

Other courts have also adopted the "more than incidental or fortuitous contact" standard, though in less explicit terms. In *United States v. Watts*, the court held that criminal forfeiture was authorized even when the property at issue was never owned or possessed by the defendant so long as it was actually involved in the crime—that is, so long as the contact between the property and the crime was not incidental.[166] Similarly, in *United States v. Peters*, the court found that forfeiture was appropriate when the defendant's illegal acts could be imputed to a corporation that "was effectively under [his] control."[167] Accordingly, the contact between the corporate assets and the

160. United States v. Hassan, 439 F. Supp. 2d 903, 904 (E.D. Ark. 2006). The defendants were charged with violating 31 U.S.C. §§ 5324 and 5325, and 18 U.S.C. § 371. *Id.* at 905. The government sought pretrial protective order against the property that it alleged was subject to forfeiture. *Id.*

161. *Id.* at 907.

162. The government cited to *United States v. Wyly*, 193 F.3d 289 (5th Cir. 1999), where a prison that was built as part of an illegal kick-back conspiracy was forfeited, and *United States v. Huber*, 404 F.3d 1047 (8th Cir. 2005), where a farmer leased portions of his land for the purpose of illegally obtaining federal farm subsidies.

163. *Hassan*, 439 F. Supp. 2d at 908 ("[T]he fact that the store was used to generate money, some of which was sent overseas in transactions allegedly structured to avoid reporting, is insufficient to establish that the store facilitated the structure because the store did not make the structuring of the financial transactions any less difficult or more or less free from hindrance or obstruction.").

164. *Id.* at 907 (quoting United States v. Lewis, 987 F.2d 1349, 1356 (8th Cir. 1993)).

165. *Id.* at 909.

166. United States v. Watts, 786 F.3d 152, 174 (2d Cir. 2015) ("[C]riminal forfeiture is not a measure restricted to property owned by the criminal defendant; it reaches *any* property that is 'involved' in the offense.").

167. United States v. Peters, 732 F.3d 93, 104 (2d Cir. 2013).

defendant's criminal conduct was more than incidental or fortuitous.[168] Conducting a similar analysis, the court in *United States v. Bailey* found that merely comingling proceeds of criminal conduct with legitimately obtained funds was insufficient to authorize forfeiture because the government had not shown that the contact between tainted and untainted funds was more than merely incidental or fortuitous.[169]

In each case, the court attempted to determine whether the culpability of the defendant's criminal conduct touches the property at issue. Such a determination hinges on whether the property's conduct with the criminal activity is more than incidental or fortuitous. If it is not, the government has not met its burden of showing the requisite factual nexus.

V. CONCLUSION

Criminal forfeiture proceedings are designed to deprive convicted criminals of the profits of their criminal conduct. But courts must impose this punishment in a consistent, non-arbitrary manner or risk rendering the numerous statutes that authorize criminal forfeiture unconstitutionally vague. The current forfeiture jurisprudence, though it universally acknowledges that the government must establish a factual nexus between the defendant's criminal conduct and the property to be forfeited, provides no consistent standard for determining whether the government has met that burden. To remedy this ambiguity, courts should adopt an approach to the factual nexus element that follows a two-step analysis. In the first step, courts should use the words of the statute authorizing forfeiture to narrow the types of property that are subject to forfeiture.[170] In the second step, the courts should determine whether the connection between the property and the defendant's criminal conduct is sufficiently strong to warrant forfeiture. The standard to be applied in this second step is not an onerous one: so long as the government can show by a preponderance of the evidence that the contact between the property and the underlying criminal activity was more than incidental or fortuitous, forfeiture is authorized. Adopting such a standard is consistent with the purpose of the forfeiture statutes and will allow courts to meaningfully

168. United States v. Bader, 678 F.3d 858, 896 (10th Cir. 2012) ("[G]iven the current posture of this case—involving our reversal of the § 545-related . . . counts—we are reluctant to speak definitively regarding the precise amount (if any) of proceeds that properly may be attributed to the other (i.e., non-§ 545) counts of the Second Superseding Indictment for purposes of adjudging the forfeiture amount.").

169. United States v. Bailey, 926 F. Supp. 2d 739, 767 (W.D.N.C. 2013) ("Taking the Government's argument to its logical conclusion, any expenditure by the Defendant—for salaries of employees who were oblivious to his fraud, for mortgage or rental payment for office space, even for payment of the electric bill—would constitute funds which would now be subject to forfeiture from innocent third parties who received them. Such a result is nonsensical and is completely contrary to the underlying remedial purposes of the criminal forfeiture laws.").

170. For instance, proceeds of, property traceable to, property derived from, or property involved in crime.

distinguish between property that is subject to forfeiture and property that is not. The standard will also allow courts to begin to develop a body of factual nexus case law that will provide guidance to both the government and to criminal defendants. Without setting a standard for the factual nexus element and giving it a name, the jurisprudence on criminal forfeiture is likely to remain volatile, chaotic, and vague.