Modern Forfeiture Law and Policy: A Proposal for Reform

Leslie C. Smith
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Clear evidence of the forfeiture of property to the state exists in Judeo-Christian history as early as the time of Moses: "[If an ox gore a man or woman, and they die, he shall be stoned and his flesh not eaten. . . . ]"1 From this beginning developed the English common law doctrine of the deodand, or "gift to God," whereby the owner of any chattel that caused the death of a human being was divested of that property. Whether the person to whom the "deadly thing" belonged was innocent of any wrongdoing was immaterial. The property was forfeited absolutely to the state; the owner could neither retain nor later recover it. The policy underlying this law was clear: the King then would use the revenues gained for charitable purposes or to support the dead man's dependents.2

By 1800 statutory forfeiture had appeared in England and was applied to persons who violated the customs and revenue laws. These early actions, brought as in rem proceedings in the Court of Exchequer,3 reflected the belief that property rights should be lost by an owner who engaged in illicit or fraudulent conduct. England has since statutorily eliminated the deodand institution, deciding that it was "unreasonable and inconvenient."4

Although never a part of our common law, forfeiture, however, has existed by statute in the United States since colonial days,5 and

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5. "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." C. J. Hendry Co. v. Moore, 318 U.S. 133, 139 (1943). Upon adoption of the Constitution, federal forfeiture statutes were enacted. Act of July 31, 1789, §§ 12, 36, 1 Stat. 39, 47; Act of Aug. 4, 1790, §§ 13, 22, 27, 28, 67, 1 Stat.
there are now a myriad of forfeiture acts expressing similar but not identical policies. The clear legislative intent behind forfeiture of contraband goods, such as untaxed whiskey, illegal gambling devices, or controlled substances, has been to rid communities of such illegal items. By legislative enactment certain property has become so repugnant as to commend its forfeiture to the state.

Though an extensive body of law concerning such property has developed, a discussion of this aspect of forfeiture is beyond the scope of this Article. Rather, this Article examines forfeitures of property that is not per se illegal to possess or use, such as automobiles, airplanes, and other conveyances, as well as real property, but whose use, when combined with a criminal purpose, becomes objectionable. Statutes compelling the forfeiture of such common items often express a legislative concern different from preventing simple possession, as clearly set forth in the following passage from a House of Representatives report:

Enforcement officers of the Government have found that one of the best ways to strike at commercialized crime is through the pocketbooks of the criminals who engage in it. Vessels, vehicles, and aircraft may be termed the operating tools of the dope peddlers, and often represent major capital investments to criminals whose liquid assets, if any, are frequently not accessible to the Government. Seizure and forfeiture of these means of transportation provide an effective brake on the traffic in narcotic drugs.8

The policy is one of “disabling [the accused] from continuing as a menace to the peaceful existence of the rest of us”7 by depriving him of the instruments of crime.8

Many federal courts consider certain forfeitures, particularly those directed against traffickers of narcotics and illegal whiskey, to be criminal actions,9 exhibiting both punitive and deterrent ele-

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8. One court has said that forfeiture “is a method of civil punishment imposed by the lawmaking power to restrain, and aid in the prevention of, an offense.” United States v. One 1964 Ford 4-Door Galaxie Sedan, 202 F. Supp. 841, 843 (E.D. Tenn. 1962).
9. See, e.g., One Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 700 (1965); United States
In fact, as one court recited, the only justification for forfeitures is "to punish...or deter people from committing wrongs and violating laws." Likewise, the California Supreme Court found in forfeiture actions "a close identity to the aims and objectives of criminal law enforcement." The United States Supreme Court, however, has held that forfeiture was not part of the punishment for criminal acts, even though under internal revenue and customs laws it could be imposed only upon those significantly involved in a criminal enterprise. The effect of this conflict over the nature of forfeiture has been explained cogently by the United States Court of Claims:

Forfeitures of the type before us are not exclusively "criminal" in the strict sense. They are hybrid in character. On one side they are related to the criminal process because intimately connected with the enforcement of the criminal law, and because the protections of the Fourth Amendment and the Fifth Amendment privilege against self-incrimination apply to forfeiture proceedings. But in spite of the punitive and deterrent aspects of the sanctions, they have been regarded by the Supreme Court in other respects as "civil", with criminal law concepts inapplicable. Forfeitures have been held not to violate the double jeopardy prohibitions, and the guilt of the property owner has not been considered a constitutionally necessary element.


15. Doherty v. United States, 500 F.2d 540, 544-45 (Cl. Ct. 1974); accord, Bramble v. Richardson, 498 F.2d 968, 970-73 (10th Cir. 1974) (civil action in which reasonable doubt standard does not apply); United States v. One 1969 Plymouth Fury, 476 F.2d 960, 961 (5th Cir. 1973) (implying that the only recourse is remission or mitigation at the Secretary's discretion).
As the court's remarks indicate, a determination that forfeiture is criminal and punitive in nature normally will assure claimants the important constitutional protections available to an accused in a criminal action; a contrary determination will result in a denial of those safeguards.

Punishment and deterrence, however, cannot justify the forfeiture of property that is owned or in which legal title is held by an innocent third party. The Supreme Court, in reviewing this argument in Van Oster v. Kansas, identified a third justification for forfeitures, one which allows the Court to smooth over the constitutional problems raised by the forfeiture of an innocent owner's property. There the Court upheld the constitutionality of a state forfeiture of an automobile carrying illegal whiskey, although the automobile was used without the owner's knowledge or consent. Kansas had not denied the innocent claimant substantive due process, said the Court, because:

[C]ertain uses of property may be regarded as so undesirable that the owner surrenders his control at his peril. The law thus builds a secondary defense against a forbidden use and precludes evasions by dispensing with the necessity of judicial inquiry as to collusion between the wrongdoer and the alleged innocent owner.

This necessity to discourage "undesirable" uses of property has led the Supreme Court since Van Oster to uphold other forfeiture statutes against charges by innocent claimants that their constitutional right to substantive due process has been violated. In so doing the Court has relied on the rationale that the action is in rem, that is, a suit by the government against the property sought to be forfeited. Thus the Court has adopted the fiction that "[i]t is the

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17. Id. at 467-88.
19. The earliest expression of this legal fiction occurred in The Palmyra, 25 U.S. (12
property which is proceeded against, and . . . held guilty and condemned as though it were conscious instead of inanimate and insen-
tient." Because due process is a personal right not enjoyed by an individual's property, an innocent claimant's legal rights are not violated by a forfeiture.

On other occasions the Supreme Court has refused to consider substantive due process issues because of its determination that forfeitures are fixed too firmly in the legislative scheme to be dislodged. Lower courts, in turn, have relied on this precedent in upholding the constitutionality of forfeiture statutes. Some courts, though, have avoided the issue altogether by holding that the owner's or lienholder's title to the property is voided immediately upon the commission of the illegal act. The forfeiture proceeding

Wheat.) 1 (1827). There Chief Justice Marshall reviewed the common law concept of forfeiture and distinguished it from the statutory in rem proceeding on the basis of the fiction that the in rem action was concerned only with the thing to be forfeited: the government was proceeding against the property, not against the owner or interest-holder. The dispositive question for the Court in The Palmyra, therefore, was whether the property had offended the laws of the land. If so, it would be forfeited to the government. The fiction continued in this form, see, e.g., Origet v. United States, 125 U.S. 240 (1889); Dobbins v. United States, 96 U.S. 395 (1877); United States v. The Brig Malek Adhel, 43 U.S. (2 How.) 210 (1841), until 1921, when the Court re-examined the fiction in Goldsmith-Grant Co. v. United States, 254 U.S. 505 (1921). This time the Court found legislative support for the fiction, concluding that Congress had assigned a personality, "a power of complicity and guilt in the wrong," to the chattel. Id. at 510. Because the property had had a part in the criminal activity, it could be found "guilty" by a jury and, by way of punishment, would be forfeited to the government. Again the Court dismissed the due process challenge, emphasizing the traditional nature of forfeiture: "[The forfeiture of personal property] is too firmly fixed in the punitive and remedial jurisprudence of this country to be now displaced." Id. at 511.


22. Goldsmith-Grant Co. v. United States, 254 U.S. 505, 513 (1921); see Dobbins v. United States, 96 U.S. 395, 399-400 (1877).


is merely the means by which the government perfects its title to the property.

Recently, the Supreme Court has entertained several direct attacks upon the constitutionality of the forfeiture laws, the more important of these being mounted by innocent parties deprived of their property. In 1974 in *Calero-Toledo v. Pearson Yacht Leasing Co.*, the Court reviewed the forfeiture of a yacht owned by an innocent claimant-lessee. Pursuant to a Puerto Rican statute modeled after federal law, the yacht was seized when the Coast Guard found marijuana on board. Despite the minor amount of marijuana discovered and the lack of proof that the vessel had been engaged in smuggling, the Court upheld the statute's constitutionality based upon what it determined to be a legitimate legislative goal, to further the statute's deterrent and punitive purposes by making illegal behavior unprofitable. The Court was not impressed with the lessor's due process argument, in effect, suggesting that the company was not truly innocent: "To the extent that such forfeiture provisions are applied to lessors, bailors, or secured creditors who are innocent of any wrongdoing, confiscation may have the desirable effect of inducing them to exercise greater care in transferring possession of their property."

The claimant-lessee of the yacht also contended that, as the Court had observed three years earlier in *United States v. United States Coin and Currency*, the forfeiture statutes were enacted only "to impose a penalty upon those who [were] significantly involved in a criminal enterprise." Because the government could not show that the owner of the yacht was criminally involved, the claimant argued that the forfeiture constituted a denial of due process. Although support for this argument also could be found in several earlier lower court decisions, the Court distinguished *Coin and

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29. Id. at 686-87.
30. Id. at 687-88 (citation omitted).
32. Id. at 721-22.
Currency on the ground that it concerned the self-incrimination provision of the fifth amendment, not the due process guarantees: “Thus, Coin & Currency did not overrule prior decisions that sustained application to innocents of forfeiture statutes, like the Puerto Rican statutes, not limited in application to persons 'significantly involved in a criminal enterprise.'” The Court, however, did confirm the existence of a strong due process argument to forfeiture statutes:

It . . . has been implied that it would be difficult to reject the constitutional claim of an owner whose property subjected to forfeiture had been taken from him without his privity or consent. . . . Similarly, the same might be said of an owner who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property; for, in that circumstance, it would be difficult to conclude that forfeiture served legitimate purposes and was not unduly oppressive.

Future due process challenges, then, may be based on the non-consent and reasonable investigation arguments, even though the particular statute does not specifically protect the innocent party when his property is taken without his “consent or privity” or when a reasonable investigation of the possessor’s record and reputation is made. At present, only in those jurisdictions with statutes that require reasonable investigations has the question ever arisen. Moreover, even when the statute requires that the property be returned to the owner if the possessor acquired the vehicle in violation of state law, the majority of courts have held that mere lack of consent is insufficient to avoid forfeiture.

Whether future challenges to forfeiture statutes based on the dic-

\footnotesize{\textsuperscript{34}} 416 U.S. at 688.
\footnotesize{\textsuperscript{35}} Id. at 689-90 (citations omitted).
\footnotesize{\textsuperscript{36}} But see United States v. One 1972 Toyota Mark II, 505 F.2d 1162, 1165 (8th Cir. 1974) (“The innocence, noninvolvement or lack of negligence of the owner in allowing the vehicle to be used for the forfeitable offense is no defense to the forfeiture action.”) (citations omitted).
\footnotesize{\textsuperscript{37}} See, e.g., United States v. One 1951 Oldsmobile Sedan, 135 F. Supp. 873 (E.D. Pa. 1955).}
tum in *Calero-Toledo* will be successful is a matter of speculation.\(^3\) It is abundantly clear, however, that a constitutional attack upon a federal statute must rest upon firmer ground than merely the innocence of the claimant.

In contrast, a number of state courts have held that the claimant's innocence is a sufficient defense but not without some judicial embellishment of the legislatures' handiwork.\(^3\) To escape wholesale rescission of all forfeiture acts, these state courts have simply read a scienter element into the statutes. For example, in *In re One 1965 Ford Mustang*,\(^4\) the Supreme Court of Arizona held that the statute implicitly required proof that the owner had "some connection with the unlawful act, or intended to permit the automobile to be used by a third person in the commission of the unlawful act, or had knowledge it was to be so used."\(^4\) Because the forfeiture statute was penal in nature, the court noted, a scienter requirement must be implied to prevent the law from being unconstitutionally arbitrary and unreasonable.\(^4\) Thus, even though the owner of the vehicle had given the accused permission to use the car, as she had no knowledge that it would be used to transport marijuana, the court ordered that her car be returned.

This comparison of *Ford Mustang* and *Calero-Toledo* demonstrates how different policy considerations may affect the determination whether a statute offends due process requirements. The United States Supreme Court has sided with those who believe that deterring potential offenders by denying them their means of transportation outweighs other policies that might support the due process arguments asserted successfully in *Ford Mustang*.\(^4\) Thus, the

\(\text{38. In United States v. One 1974 Mercury Cougar XR7, 397 F. Supp. 1325 (C.D. Cal. 1975), the court relied upon the reasonable investigation defense implied in *Calero-Toledo*. In *Mercury Cougar* an innocent claimant had filed a petition for remission or mitigation that was denied by the Attorney-General. The government argued that, therefore, the district court was without jurisdiction to decide the question. See notes 68-85 infra & accompanying text. The court, however, summarily disposed of the government's contention and, relying heavily on the *Calero-Toledo* dictum, held that the Attorney General's denial of the petition was an unconstitutional breach of the just compensation requirement of the fifth amendment. 397 F. Supp. at 1329.}\)


\(\text{40. 105 Ariz. 293, 463 P.2d 827 (1970).}\)

\(\text{41. Id. at 293, 463 P.2d at 834.}\)

\(\text{42. Id.}\)

Supreme Court construes these statutes as a constitutional exercise of the government's police power, but the *Calero-Toledo* dictum concerning consent and reasonable investigation may give innocent third parties solace in future cases.

**Procedure Under Modern Forfeiture Statutes**

Today forfeiture is a civil action brought *in rem* against the property. Most forfeitures occur for violations of the internal revenue laws, for the transportation of controlled substances, including narcotics, and for the transportation of contraband, including narcotic drugs, firearms, and counterfeit money. Vessels, vehicles, and aircraft used to violate customs laws frequently are forfeited, as are the items smuggled into the country. Property used in connection with violations of the gambling, wagering, and firearms laws also is subject to forfeitures. The following discussion of the statutory defenses and remedies available to one whose property has been seized and the applicable burden of proof focuses primarily on forfeitures under the Controlled Substances and Transportation of Contraband Acts.

**Remedies: Petition or Contest?**

Forfeiture actions are commenced upon the seizure of the property. The seizing officer submits his report to the United States Attorney for the district in which the alleged criminal act occurred

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and appraises the value of the property at its domestic value, the "retail price at which such property is freely offered for sale." This appraisal is critical as it dictates the character of the ensuing forfeiture proceedings. If the property's estimated value is greater than $2,500 a full condemnation hearing must be held in federal district court, unless the United States Attorney decides that the forfeiture cannot be sustained or that the "ends of the public justice" do not require prosecution. In that event the United States Attorney must advise the Secretary of the Treasury of his decision and await directions. If the appraised value is $2,500 or less, summary forfeiture proceedings will be initiated. The custodian of the property must publish in a newspaper within the judicial district notice of his intention to forfeit the items seized. If within twenty days of the first publication of the notice of seizure a party files a claim disclosing his interest in the property with the custodian and the claimant posts a $250 bond conditioned on the payment of all costs and expenses of the proceedings if condemnation is made, then the summary forfeiture proceeding is halted, and a hearing in federal court is permitted. The custodian then transmits the claim to the United States Attorney for the purpose of "proceeding to a condemnation of the property."

Before the sale of the property, as an alternative to contesting the forfeiture, a claimant may file a petition for remission or mitigation.

56. Id. § 1606.
59. Id. § 1604.
60. Id.
61. See id. § 1607; 21 C.F.R. § 1316.75 (1977). On their face, the regulations conflict with the statute's publication requirements. The customs statute requires publication for "three successive weeks," 19 U.S.C. § 1607 (1970), while the regulations set forth that the notice shall be published "once a week for at least three successive weeks." 21 C.F.R. § 1316.75 (1977).
Moreover, the custom statutes carry less protection for the absent claimant than do the internal revenue laws. Under the latter rules, a notice of forfeiture must be more specific, including information about the articles seized and the time, place and cause of seizure. Internal revenue laws also allow claimants thirty days after the first publication within which to appear and press their claim. 26 U.S.C. § 7325(2) (1970).
63. Id.
64. 21 C.F.R. § 1316.76(b) (1977). Cf. In re C.I.T. Corp., 28 F.2d 50, 52 (N.D.N.Y. 1928) (automobile forfeited because owner failed to file cost bond which would have brought automobile under the court's jurisdiction).
with the Secretary of the Treasury. The Secretary, however, has delegated this authority to the Justice Department, which must prosecute the action, if contested, but may return the property if not contested. Often the property will be returned to the party if there is an outstanding lien or mortgage or if the owner is truly innocent and without knowledge of its illegal use. Once a remedy is chosen, the election, with few exceptions, is final. Thus, an examination of the procedure and effects of both alternatives is imperative to determine which will be most advantageous to a particular claimant.

*The Petition for Remission or Mitigation*

The remedy sought most often by innocent parties and lienholders who have property interests subject to forfeiture is the petition for remission or mitigation. But in electing this remedy the claimant narrows significantly his bases of attack upon the forfeiture. In fact, filing a petition presumes a valid forfeiture, and, therefore, the government will not consider challenges to the constitutionality of the statute, the legality of the search, nor the claim that the substance found was not an illegal substance. Nor does it matter that the claimant was unaware of the unlawful substance.

The procedure under the Controlled Substances and Transportation Acts is very technical and confusing because of the gamut of laws and regulations controlling these petitions. Basically, a sworn

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67. In one case the claimant-lienholder filed a petition for remission and mitigation and also proceeded to contest. A libel was filed by the United States, and before the case was adjudicated the petition for remission was denied. The court indicated, in denying relief, that the petition in remission was the innocent lienholder's only hope. United States v. One 1955 Ford Sedan, 164 F. Supp. 729, 738 (D. Md. 1958); accord, United States v. One 1961 Cadillac, 337 F.2d 730, 732 (6th Cir. 1964). As stated elsewhere:

> The courts have held that "an election to proceed by petition for remission or mitigation of forfeiture rather than by claim with the requisite bond binds the plaintiff to the available administrative remedies; and the administrative method is exclusive."

After the plaintiff elects the administrative remedy, the law is clear that he is foreclosed from the District Courts.


68. 28 C.F.R. § 9.5(b) (1976).

petition, containing a documented description of the property and
the interest of the petitioner and setting forth the facts and circum-
stances that justify remission or mitigation, must be filed in tripli-
cate. This procedure is available only if the petitioner can establish
a valid interest in the property and further show that he was without
knowledge or reason to believe that the property was being or would
be used in violation of the law and that he at no time had knowledge
or reason to believe that the operator had a criminal record or a
reputation for violating the law. But even though statutory re-
quirements have been met, remission or mitigation is granted only
by the grace of the Secretary or his delegate and is not reviewable,
even for an alleged abuse of discretion. The Secretary may remit
the property, if he finds that the “forfeiture was incurred without
willful negligence or without any intention on the part of the peti-
tioner to defraud the revenue or to violate the law, or finds the
existence of such mitigating circumstances as to justify the remis-
sion. . . .” Agency regulations have illuminated these statutory
requirements, setting out explicitly what standards must be met
before remission will be granted. If the claimant does not satisfy
these conditions, though, he still may show that circumstances war-
rant at least a mitigation of the forfeiture. Thus, the Secretary may

70. Id. § 9.5(a).
71. Id.
72. See, e.g., United States v. One 1972 Mercedes-Benz 250, 545 F.2d 1233, 1236 (9th Cir.
1976); United States v. One 1970 Buick Riviera, 463 F.2d 1168, 1170 (5th Cir.), cert. denied
States v. One 1961 Cadillac, 337 F.2d 730, 733 (6th Cir. 1964); Bramble v. Kleindienst, 357
denied, 419 U.S. 1069 (1974); United States v. One 1957 Buick Roadmaster, 167 F. Supp. 597,
73. See, e.g., United States v. One 1961 Cadillac, 337 F.2d 730, 733 (6th Cir. 1964).
75. The determining official shall not remit or mitigate a forfeiture unless the
petitioner:
(1) Establishes a valid, good faith interest in the seized property as owner or
otherwise; and
(2) Establishes that he at no time had any knowledge or reason to believe that
the property in which he claims an interest was being or would be used in a
violation of the law.
(3) Establishes that he at no time had any knowledge or reason to believe that
the owner had any record or reputation for violating the laws of the United
States or of any State for related crime.
28 C.F.R. § 9.5(c) (1976). Other more specific provisions apply to lessors, voluntary bail-
ments, rival claimants, and straw purchase transactions. Id. § 9.6.
consider the presence of a prior lien or mortgage, whether the owner was involved in the scheme, and whether the possessor acquired the property legally.

A conflict exists between the statute and the regulations concerning the time within which the petition must be filed. Section 1618 of the Act provides that the petition may be filed at any time before the sale of the property. A regulation, however, provides that the petition should be filed within 30 days of the seizure. In addition, at least one federal court has indicated that the petition should be filed after the forfeiture. In any event, an attorney should file his client's petition within 30 days of seizure as required by the regulations to be certain of protecting his client's rights.

After the time for filing has expired, the government may sell or dispose of the property. This leaves the petitioner the remedy set out in title 19, section 1613 of the United States Code, which provides that any person claiming an interest in property forfeited and sold may petition the appropriate authority within three months after the sale for a restoration of his interest from the proceeds. The standards are basically the same as in pre-sale petitions for remission or mitigation, with the significant exception that the applicant must show that he did not know and was not in a position to know of the seizure prior to the forfeiture.

Assuming that the petition for remission or mitigation fails, the general rule is that a request for judicial review will fail for lack of subject matter jurisdiction. Shortly after the passage of the Ad-
ministrative Procedure Act (APA), which provides for judicial review of many agency decisions, review of a decision by the Secretary was sought in United States v. One 1961 Cadillac. The Court of Appeals for the Sixth Circuit determined that, because the APA did not provide for review when the applicable statute stated that the agency's decision was discretionary, the failure to grant remission or mitigation was not reviewable under any circumstances. A lower court in the same circuit had held to the same effect six years earlier and later decisions have been in accord.

An interesting exception to this rule arose in Pasha v. United States. Pasha, convicted of defrauding the government in connection with the payment of certain gambling taxes, was sentenced to prison and in a separate action forfeited his automobile. In a coram nobis proceeding, he applied to have his conviction reversed and the car or its value returned, relying on the Supreme Court holdings in Marchetti v. United States and Grosso v. United States. In those cases the Court held that statutes requiring the filing of certain gambling tax returns violated a defendant's fifth amendment right against self-incrimination. Pasha's criminal conviction subsequently was reversed and, because the evidence upon which the forfeiture was based was identical to that introduced in the criminal

81. 337 F.2d 730 (6th Cir. 1964).
82. Id. at 732.
83. Id. at 733.
85. See, e.g., Pullman Trust & Sav. Bank v. United States, 225 F. Supp. 860 (N.D. Ill. 1964). Contra, United States v. One 1974 Mercury Cougar XR7, 397 F. Supp. 1325 (C.D. Cal. 1975). In Mercury Cougar the court relied on Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971), in which the Supreme Court maintained that the "committed to agency action" exception of the APA was very narrow and applied only "in those rare instances where statutes are drawn in such broad terms that in a given case there is no law to apply." Id. at 410. The district court held that that statute, 19 U.S.C. § 1618 (Supp. 1977), delegating authority to remit certain forfeitures, did not fall within this narrow exception because the phrases "without willful negligence" and "without any intention on the part of the petitioner to defraud the revenue or to violate the law" provide identifiable standards and guidelines constituting "law to apply". 397 F. Supp. at 1331. The court distinguished United States v. One 1961 Cadillac, 337 F.2d 730 (6th Cir. 1964), as having been decided before Overton Park and therefore not binding. 397 F. Supp at 1332.
86. 484 F.2d 630 (7th Cir. 1973).
87. Coram nobis is a writ of error directed to another branch of the same court. BLACK'S LAW DICTIONARY 406 (Rev. 4th Ed. 1968).
case, the court ordered the value of Pasha’s car paid to him by the
government.\textsuperscript{90}

A variant of judicial review also may be obtained if the Secretary
or his authorized delegate fails or refuses to act. An order of manda-
minus may be sought in federal district court to compel the Secretary
to respond to a petition for remission or mitigation.\textsuperscript{91} Mandamus
also is available if the Secretary fails to act in the erroneous belief
that he is without authority to act;\textsuperscript{92} however, mandamus is not
available in any other circumstances.\textsuperscript{93}

In \textit{United States v. Decker},\textsuperscript{94} a criminal action, the claimant
moved for the return of his property pursuant to Rule 41(e) of the
Federal Rules of Criminal Procedure, which provides for the return
of property seized upon the initiation of criminal actions.\textsuperscript{95} The
government’s administrative forfeiture proceeding was in abeyance,
pending a final determination of the claimant’s guilt or innocence
on appeal from his conviction. The court held that the appeal di-

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  \item \textsuperscript{90}  484 F.2d 633. Although not a coram nobis proceeding, the United States Supreme Court
decision in \textit{United States v. United States Coin and Currency}, 401 U.S. 715 (1971), was the
basis for the holding. \textit{Accord, United States v. One Olivetti-Underwood Electric Adding
Machine}, 443 F.2d 372 (5th Cir. 1971) (money and property seized for violation of gambling
tax law required to be returned when fifth amendment privilege against self-incrimination
was invoked); \textit{United States v. One 1967 Ford Thunderbird}, 441 F.2d 1164 (4th Cir. 1971)
(forfeiture of automobile against lienholder barred when forfeiture of owner’s interest in
automobile would result in violation of owner’s privilege against self-incrimination). \textit{But see
United States v. 20 “Dealer’s Choice” Machines}, 483 F.2d 474, 477 (4th Cir. 1973), which held
that the fifth amendment was not a bar to forfeiture of mechanical poker machines for failure
to pay tax imposed on gaming devices. The court reasoned that the tax was not directed at a
small group of persons whose activities are inherently suspect, \textit{id. at 476, thus distinguishing
Marchetti v. United States}, 390 U.S. 39 (1968) (fifth amendment objection to tax on wagering
when wagering was prohibited by state criminal statutes). The court also based its decision
on the absence of any evidence that compliance with the federal tax statute would raise a
substantial danger of incrimination under state statutes, as it was the congressional purpose
that such information be confidential. 483 F.2d at 476.
  \item \textsuperscript{91}  \textit{United States v. Edwards}, 368 F.2d 722, 724 (4th Cir. 1966); \textit{Contonificio Bustese, S.A.
v. Morgenthau}, 121 F.2d 884, 886 (D.C. Cir. 1941).
  \item \textsuperscript{92}  \textit{United States v. One 1970 Buick Riviera}, 463 F.2d 1168, 1170 (5th Cir. 1972).
  \item \textsuperscript{93}  \textit{Id.}
  \item \textsuperscript{94}  322 F. Supp. 419 (W.D. Mo. 1970).
  \item \textsuperscript{95}  \textit{Fed. R. Crim. P. 41(e)} (1972).
  \item \textsuperscript{96}  322 F. Supp. at 423. \textit{See also United States v. Rapp}, 539 F.2d 1156, 1160 (8th Cir. 1976),
in which the court held that it lacked jurisdiction to entertain a motion for the return of
property under Rule 41(e) of the Federal Rules of Criminal Procedure. The court found Rule
41(e) insufficient to provide a jurisdictional basis for two reasons: first, the rule does not apply

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fact situation, however, Decker does not preclude future attempts by a claimant to have non-contraband property returned under Rule 41 in a criminal action, especially if he is acquitted or if the property was seized illegally.

An additional remedy for the aggrieved claimant is created by the Tucker Act, which grants federal district courts subject matter jurisdiction over actions against the United States, provided the amount in controversy is less than $10,000 and the claim is based on the Constitution or a law of the United States. Thus, the claimant whose challenge is constitutional in nature may bypass the petition for remission or mitigation and proceed directly into district court without having to post a cost bond.

An alternative to proceeding under the Tucker Act if the basis for the action is either constitutional or statutory is to bring suit against the United States in the Court of Claims. Although counsel usually will be required to appear in Washington, D.C., this remedy is attractive because direct appeal to the Supreme Court is possible. Moreover, actions brought in the Court of Claims are not limited to damages of $10,000 or less as are actions brought pursuant to the Tucker Act.

**Contested Forfeitures: The Government’s Burden of Proof**

Although forfeiture is a civil in rem action, many courts ac-

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99. 28 U.S.C. § 1491 (1970) provides in pertinent part:

> The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

This duplicates the language of the Tucker Act, with the exception that there is no $10,000 limit specified here. See Doherty v. United States, 500 F.2d 540, 542 (Ct. Cl. 1974) (monetary claim against the United States based on deprivation of property without compensation).
knowledge the resemblance between forfeiture and criminal proceedings.\textsuperscript{101} To avoid confusion over whether the civil "preponderance of the evidence" or the criminal "beyond a reasonable doubt" standard should apply, some forfeiture statutes have clarified the burden of proof issue.\textsuperscript{102} Most require the government to show "probable cause" that the property has been employed in a manner which contravenes the statute. Forfeitures pursuant to less common statutes only require that the government meet the preponderance of the evidence test.\textsuperscript{103} Normally, however, once probable cause has been demonstrated, the burden shifts to the claimant to show by a preponderance of the evidence that the property was not used illegally.\textsuperscript{104} Proof of intent is not necessary.\textsuperscript{105}

Apparently, "probable cause" requires the same showing in forfeiture cases as is necessary to establish the validity of an arrest or search warrant: the cause must be reasonable under the circumstances.\textsuperscript{106} According to at least one decision, the government must show circumstances that establish more than a mere suspicion but less than a prima facie case.\textsuperscript{107} In other decisions courts have requested only that the government demonstrate something less than a prima facie case.\textsuperscript{108} Even hearsay alone may be enough to demonstrate probable cause.\textsuperscript{109} No minimum quantum of proof, however, is es-

102. See, e.g., 19 U.S.C. § 1615 (1970); Associates Inv. Co. v. United States, 220 F.2d 885, 887 (5th Cir. 1955) (once probable cause has been established for forfeiture of vehicle carrying contraband, burden of proof shifts to claimant to show by a preponderance of evidence that the violation was committed while the automobile was in the possession of one who acquired it illegally); United States v. Andrade, 181 F.2d 42, 46 (9th Cir. 1950) (burden on claimant to show illegal possession).
108. See United States v. One 1949 Pontiac Sedan, 194 F.2d 755, 759 (7th Cir. 1952); United States v. Davidson, 50 F.2d 517, 520 (1st Cir. 1931); United States v. Blackwood, 47 F.2d 849, 851 (1st Cir. 1931).
109. People v. Macias, 39 Ill. 2d 208, 234 N.E.2d 783, 787 (1968) (armed robbery); see
tablished clearly in these decisions.\textsuperscript{110}

A property owner who pleads guilty to the associated criminal charge has little reason to challenge the forfeiture, having conceded probable cause in his plea. Likewise with the claimant who has been convicted. But when the claimant-owner of forfeited property has been found innocent, then the disparity in burdens of proof placed upon the government works to the innocent claimant-owner's disadvantage.

The defendant-owner's acquittal on the criminal charge may be of no avail to the beneficial owner in the ensuing forfeiture proceeding,\textsuperscript{111} in which the burden upon the government is merely to show probable cause. Criminal acquittal may show only that the government did not meet the "beyond a reasonable doubt" standard, and because indictment alone demonstrates a strong degree of probable cause, forfeiture is still conceivable following criminal acquittal of the accused or dismissal of the action on a motion of no case to answer. This rule is harsh on truly innocent parties, such as lienholders, lessors, and others who had no knowledge of the criminal activity in which the property was involved.\textsuperscript{112} To recover his property the claimant must assert and prove one of several specific sta-
tutory defenses: that the vehicle or other property was not within
the ambit of the statutory proscription, that the claimant was a
common carrier, or that the property had been stolen from or used
without the authority of the claimant. But because the claimant
usually has little knowledge of the facts and had no control over the
property, this may be very difficult, if not impossible. He thus finds
himself in the situation described by one court:

In any event sufficient [evidence] was shown to constitute prob-
able cause for the institution of the proceedings. The burden of
the explanation, therefore, fell upon the claimant. Since it offered
no proof it failed to carry that burden and a decree of forfeiture
must, therefore, be granted.

Clearly, access to the facts will be critical to the innocent party's
claim because a finding that the search was conducted illegally may
result in the suppression of evidence seized and the return of the
property.

One means by which an innocent claimant may defeat the govern-
ment's showing of probable cause is to move for the suppression of
evidence seized in violation of the fourth amendment's prohibition
against unreasonable searches and seizures. Whether the exclusion-
ary rule is applicable to forfeitures, however, is not entirely clear.
Two cases decided by the Supreme Court in 1926 have been cited
often as authority for the proposition that the exclusionary rule does
not apply to forfeiture proceedings. In Dodge v. United States, the
Court held that the forfeiture of a motorboat transporting li-
quor unlawfully but seized without statutory authority should not
fail because the owner suffered nothing that he would not have suf-
fered had the seizure comported with statutory process. In United
States v. One Ford Coupe Automobile, the Court, sustaining a
contested forfeiture, implied that the fourth amendment's protec-

prohibits use of evidence seized in warrantless search of automobile, without probable cause,
in forfeiture proceeding against automobile).
116. See generally, J. George, CONSTITUTIONAL LIMITATIONS ON EVIDENCE IN CRIMINAL CASES
117. 272 U.S. 530 (1926).
118. Id. at 532.
tion extended only to personal rights, not to property rights.\textsuperscript{120} Lower courts have since interpreted \textit{Dodge} and \textit{One Ford Coupe} to hold that an illegal search does not defeat an otherwise valid forfeiture.\textsuperscript{121}

In 1965 the Court of Appeals for the First Circuit, which three years earlier had decided that illegal search and seizure provisions did not apply in forfeiture proceedings,\textsuperscript{122} determined in a split decision that an illegal seizure was in fact not a seizure at all and that, therefore, the forfeiture could not be enforced.\textsuperscript{123} The court relied substantially on the early decision of \textit{Boyd v. United States}\textsuperscript{124} and distinguished the Supreme Court's holding in \textit{Dodge}.

Against this background, the issue again reached the Supreme Court in 1965 in \textit{One 1958 Plymouth Sedan v. Pennsylvania}.\textsuperscript{125} Again, \textit{Boyd} was the basis for the Court's decision. Holding that the forfeiture action, though civil in form, was in fact punitive and therefore criminal in nature, the Court determined that the provisions of the fourth amendment as applied to the states through the fourteenth amendment required suppression of the illegally seized evidence. Although the decision in \textit{Plymouth Sedan} technically applied only to the states, it also has been relied upon in cases instituted by the United States.\textsuperscript{126} The fourth amendment guarantee

\textsuperscript{120} It is settled that, where property declared by a federal statute to be forfeited, because used in violation of federal law is seized by one having no authority to do so, the United States may adopt the seizure with the same effect as if it had originally been made by one duly authorized." \textit{Id.} at 325 (citations omitted). \textit{See also} Cook v. United States, 288 U.S. 102 (1933).

\textsuperscript{121} \textit{See} Interbartolo v. United States, 303 F.2d 34 (1st Cir. 1962); United States v. Carey, 272 F.2d 492 (5th Cir. 1959); United States v. One 1956 Ford Tudor Sedan, 253 F.2d 725 (4th Cir. 1958); United States v. Pacific Fin. Corp., 110 F.2d 732 (2d Cir. 1940); Bourke v. United States, 44 F.2d 371 (6th Cir. 1930); United States v. One 1955 Cadillac Eldorado Convertible, 148 F. Supp. 752 (E.D. Ill. 1957); United States v. One 1951 Cadillac Sedan, 107 F. Supp. 491 (W.D. Okla. 1952), \textit{aff'd sub nom.} City Nat'l Bank v. United States, 207 F.2d 741 (10th Cir. 1953).

Some decisions have relied on the fact that the automobile (property) lacked standing to proceed under fourth amendment protections. \textit{See} Van Dam v. United States, 23 F.2d 235 (6th Cir. 1928); Cantrell v. United States, 15 F.2d 953 (5th Cir. 1926). Others have reasoned that upon seizure title instantly vested in the United States. \textit{See}, e.g., Grogan v. United States, 261 F.2d 86 (5th Cir. 1958).

\textsuperscript{122} Interbartolo v. United States, 303 F.2d 34 (1st Cir. 1962).

\textsuperscript{123} Berkowitz v. United States, 340 F.2d 168 (1st Cir. 1965).

\textsuperscript{124} 116 U.S. 616 (1886).

\textsuperscript{125} 380 U.S. 693 (1965).

\textsuperscript{126} Bramble v. Richardson, 498 F.2d 968 (10th Cir. 1974) (dictum); United States v. One 1971 Lincoln Continental Mark III, 460 F.2d 273 (8th Cir. 1972); Howard v. United States, 423 F.2d 1102 (9th Cir. 1970); United States v. One 1967 Dodge Pickup Truck, 310 F. Supp. 773 (S.D. Ala. 1970).
against unreasonable search and seizure, therefore, appears to render unenforceable the forfeiture of property seized in violation of the fourth amendment. This defense also may be raised by innocent claimants.\textsuperscript{127}

One question apparently still unresolved is whether collateral estoppel applies when during the criminal proceeding the reasonableness of the seizure is contested and adjudged and the issue is raised again in the forfeiture action. In a 1949 case, \textit{United States v. Physic},\textsuperscript{128} the accused was charged with purchasing unstamped heroin. At trial, he contended that the evidence was obtained illegally and should be suppressed; his motion was denied, but he was acquitted of all criminal charges. The government then filed a forfeiture libel against his vehicle, and again the accused moved to exclude the evidence. The government argued that the legality of the search had been decided conclusively in the criminal action and therefore the accused was estopped from raising the issue again in the forfeiture action. The Court of Appeals for the Second Circuit rejected this argument on the narrow ground that, because the ruling on the motion was interlocutory and could not be appealed after acquittal, the appellate court was not bound by the trial court's determination that the search was reasonable. Reexamining the circumstances of the seizure, the court concluded that the evidence should have been suppressed and that, therefore, the vehicle should be returned.

The Court of Claims, however, in a 1974 decision, \textit{Doherty v. United States},\textsuperscript{129} reached a contrary but distinguishable result. Again, in the criminal action the search was deemed to have been legal, and, when Doherty attempted to raise the issue in the forfeiture action, the court held that he was collaterally estopped. \textit{Doherty} thus represents something of an aberration in forfeiture law. Although recently the Supreme Court has refused to allow the defendant-claimant, acquitted of the criminal charges, to plead collateral estoppel in a subsequent forfeiture proceeding,\textsuperscript{130} it would appear from \textit{Doherty} that a determination of the reasonableness of


\textsuperscript{128} 175 F.2d 338 (2d Cir. 1949).

\textsuperscript{129} 500 F.2d 540 (Ct. Cl. 1974).

\textsuperscript{130} See, e.g., \textit{One Lot of Emerald Cut Stones and One Ring v. United States}, 409 U.S. 232 (1972). For a discussion of this case and its implications, see text accompanying notes 256-66 infra.
the search in the criminal action will carry over to the forfeiture proceeding. Of course, if the claimant and the accused are not the same, as in the case of the innocent lienholder, then the res judicata/collateral estoppel argument loses much of its force. It is submitted that One 1958 Plymouth v. Pennsylvania, in which the Supreme Court permitted the reasonableness of a search to be tested in a forfeiture case, makes the law dealing with searches and seizures applicable to forfeiture proceedings.

**Statutory Issues**

Before considering the constitutional issues raised by forfeiture statutes, several preliminary issues should be analyzed: namely, under what circumstances these statutes are violated and to what extent the enactment and enforcement of forfeiture laws implements congressional and judicial policy. This discussion will focus exclusively upon the provisions of the Controlled Substances and Transportation of Contraband Acts.

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131. Related questions also arise under the *Doherty* rationale: Is a determination in the criminal trial that the substance involved was, in fact, marijuana binding on the court hearing the forfeiture action? In all likelihood, such a finding would be enough for probable cause, thus shifting the burden of proving that the substance was not contraband to the claimant. *Compare* United States v. One 1963 Cadillac Hardtop, 231 F. Supp. 27 (E.D. Wis. 1974) and United States v. Lewallen, 385 F. Supp. 1140 (W.D. Wis. 1974) *with* United States v. Lawson, 507 F.2d 433, 438 (7th Cir. 1974), *cert. denied*, 420 U.S. 1004 (1975).

132. 380 U.S. at 702. Some courts have refused the innocent lienholder standing to challenge the reasonableness of the seizure. Returning to the *in rem* fiction, the District Court for the Western District of Missouri found that the petitioner-mortgagee could not challenge the search since it had no *locus standi*. *United States v. One 1963 Cadillac Coupe De Ville*, 250 F. Supp. 183 (W.D. Mo. 1966).

Entrapment also has been held to be a personal defense and unavailable in forfeiture actions. United States v. One 1972 Wood, 19 Foot Custom Boat, 501 F.2d 1327 (5th Cir. 1974).

Statutory Interpretation: "Facilitate"

Under these Acts, any vehicle, vessel, or aircraft that is used to transport, conceal or "facilitate" the transportation, possession, purchase, sale of contraband articles, including narcotics, firearms, and counterfeit currency, is subject to forfeiture to the United States.\(^\text{134}\) If the government can show that contraband was physically within the vehicle, vessel, or airplane, no problem of statutory construction arises. If the government attempts to prove that property was used to "facilitate" the transportation of or a transaction in contraband articles, however, courts must determine the meaning of that term in the absence of any statutory definition. Often, courts observe that, because of their penal character, forfeitures are not favored in the law,\(^\text{135}\) and, consequently, the term "facilitate" must be strictly construed.\(^\text{136}\) This is especially true when forfeitures deprive innocent persons of their property.\(^\text{137}\) But a property owner's lack of specific or general intent does not bar a forfeiture. Nor would it matter that the contraband was not actually within the possession or control of the owner.\(^\text{138}\) In *Thill v. United States*,\(^\text{139}\) for example, the owner did not know that his passenger was carrying narcotics on his person, but the vehicle clearly was facilitating the transportation of the contraband and thus was forfeited.

Two of the earliest and most cited decisions interpreting the statutory term "facilitate" are a 1942 case, *United States v. One Dodge


\(^{135}\) See *United States v. Tito Campanella Societa Di Navigazone*, 217 F.2d 751, 756 (4th Cir. 1955); *Manufacturers Acceptance Corp. v. United States*, 193 F.2d 622, 624 (6th Cir. 1951); *General Ice Cream Corp. v. Benson*, 113 F. Supp. 107, 109 (N.D.N.Y. 1953), aff'd, 217 F.2d 646 (2d Cir. 1954).


\(^{137}\) See *United States v. Five Gambling Devices*, 252 F.2d 210 (7th Cir. 1958); *United States v. Graham*, 199 F.2d 499 (5th Cir. 1952); *Platt v. United States*, 163 F.2d 165 (10th Cir. 1947); *United States v. One 1947 Oldsmobile Sedan*, 104 F. Supp. 159 (D.N.J. 1952).


\(^{139}\) 66 F.2d 432 (9th Cir. 1933).
Coupe,\textsuperscript{140} and Platt v. United States, decided five years later.\textsuperscript{141} In One Dodge Coupe the defendant drove his car to a rendezvous with a drug dealer, parked, and entered the dealer’s vehicle to purchase heroin. In a subsequent forfeiture action against the defendant’s car, the District Court for the Southern District of New York held that the vehicle had facilitated the sale by “lessening the labor” necessary to bring the heroin to the defendant.\textsuperscript{142} In any event, the court noted, these facts at least demonstrated probable cause, thus shifting the burden of proof to the claimant.\textsuperscript{143}

In 1947, in Platt, the Court of Appeals for the Tenth Circuit departed dramatically from the reasoning developed in One Dodge Coupe to arrive at a narrower interpretation of “facilitate.” A girl borrowed her mother’s car to drive to a pharmacy where with a bogus prescription she obtained morphine; she was arrested leaving the drugstore. Although the mother knew of her daughter’s addiction, the court disallowed the forfeiture:

The use of the automobile did not make the accomplishment of the purchase more easy [sic] or free it from obstructions or hindrance, or make the sale any less difficult. It was merely the means of locomotion by which . . . [the accused] went to the store to make the purchase. Its use enabled her to get to the store more quickly than if she had walked or had used a slower means of transportation. But the argument that this facilitated the purchase disregards the ordinary and accepted meaning of the word when applied to the sale.\textsuperscript{144}

Thus, the Tenth Circuit employed the “ordinary and accepted” meaning of “facilitate” to require more than merely transporting a criminal offender to the scene of the alleged crime.\textsuperscript{145} One Dodge Coupe, in contrast, implied that if the vehicle was used merely to assist the offender in consummating his crime, then seizure and forfeiture are justified.

\textsuperscript{140} 43 F. Supp. 60 (S.D.N.Y. 1942).
\textsuperscript{141} 163 F.2d 165 (10th Cir. 1947).
\textsuperscript{142} 43 F. Supp. at 62.
\textsuperscript{143} Id. A probable cause showing of “facilitate” can arise by “mere inference” in the context of the transportation of contraband. See generally United States v. One 1950 Buick Sedan, 231 F.2d 219 (3d Cir. 1955) (automobile used to facilitate transportation of heroin).
\textsuperscript{144} 163 F.2d at 167.
\textsuperscript{145} The Tenth Circuit reaffirmed its narrow construction in United States v. Lane Motor Co., 199 F.2d 495, 497 (10th Cir. 1952), aff’d per curiam, 344 U.S. 630 (1953) (mere use of the vehicle to commute to or from the scene of the crime not “facilitating”).
This conflict between the broad construction of "facilitate" in *One Dodge Coupe* and the narrower definition in *Platt* has led to contradictory results in subsequent cases. One court, for example, has upheld forfeiture when the vehicle was merely the locus of payment for illegal drugs.\(^\text{146}\) On similar facts, another court earlier had disallowed forfeiture.\(^\text{147}\) Likewise, despite a previous dismissal by a different court of a forfeiture action brought against an automobile used to drive to an airport a person who then flew to Mexico to purchase heroin,\(^\text{148}\) a federal court in Texas upheld the forfeiture of an automobile used solely to transport money for the rental of an airplane, which then was to be used in smuggling marijuana.\(^\text{149}\)

Nor have the Courts of Appeals favored one interpretation. The Seventh Circuit has adopted a broad interpretation of "facilitate" analogous to that enunciated in *One Dodge Coupe;*\(^\text{150}\) the Ninth Circuit has followed *Platt.*\(^\text{151}\) In the most recent case concerning the construction of "facilitate", *United States v. One 1971 Chevrolet Corvette,*\(^\text{152}\) the Fifth Circuit analyzed both interpretations and, in a well-reasoned decision, offered some guidance for future cases. The accused had switched cars several times while under the surveillance of narcotics officers. The United States filed a forfeiture action against the accused's Corvette, which she had been driving during the day but not when the narcotics were purchased. The arresting officer testified that the accused had told him that she had switched vehicles because she did not want to risk seizure of the

\[\text{146. United States v. One 1951 Oldsmobile Sedan Model 98, 126 F. Supp. 515, 516 (D. Conn. 1954).} \]
\[\text{148. United States v. One 1949 Ford Sedan, 96 F. Supp. 341, 344 (W.D.N.C. 1951). The forfeiture, however, was disallowed in part because the court determined that a bona fide purchaser without knowledge of the illegal transaction bought the car prior to seizure.} \]
\[\text{150. See, e.g., United States v. One 1957 Lincoln Premier, 265 F.2d 734, 736 (7th Cir. 1959) (defendant arrested for possession of narcotics after leaving certain place in automobile); United States v. One 1949 Pontiac Sedan, 194 F.2d 756, 761 (7th Cir. 1952) (narcotic purchaser's car, parked outside the house where the purchase was made, presumed driven there by purchaser).} \]
\[\text{151. See, e.g., Howard v. United States, 423 F.2d 1102, 1103-04 (9th Cir. 1970) (use of the car was merely a means of locomotion to reach site where marijuana stored); United States v. One 1952 Ford Victoria, 114 F. Supp. 458, 460 (N.D. Cal. 1953) (automobile driven to pick-up site). But see United States v. One 1970 Pontiac GTO, 2-Door Hardtop, 529 F.2d 65, 65-66 (9th Cir. 1976) (automobile used to facilitate sale of contraband when transaction took place inside car).} \]
\[\text{152. 496 F.2d 210 (5th Cir. 1974).} \]
Corvette. Although the court noted that had the vehicle been used to avoid surveillance the "facilitate" requirement would have been satisfied, it disallowed the forfeiture because the Corvette "did not become involved in the criminal act by virtue of the decision not to use it." Thus the Fifth Circuit joined the Ninth and Tenth Circuits in holding that property is used to "facilitate" an illegal act or transportation of contraband if it is directly involved in the illegal act. Meanwhile, the Seventh Circuit and, apparently, the Second Circuit require only that the property aid in the commission of the illegal act. These two courts and those district courts that construe "facilitate" broadly also rely on the government's easier standard of probable cause to uphold forfeitures.

**Statutory Defenses**

As previously noted, once the government establishes that probable cause existed for the seizure of property, the burden shifts to the claimant-owner to prove, by a preponderance of the evidence, any available defense. Generally, because forfeitures operate only against property used in violation of another law, the claimant-owner, of course, may prove that the law was not violated in the first instance. Also, assuming that the issue concerns the transporta-

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153. Id. at 212.
154. Id. (emphasis in original).
155. In United States v. One 1974 Cadillac Eldorado Sedan, 548 F.2d 421 (2d Cir. 1977), the Second Circuit considered the meaning of "facilitate" under 21 U.S.C. § 881(a)(4) (1970). The court held that commuting to the scene of a sale or a meeting where a sale was proposed was sufficient to uphold a forfeiture, distinguishing the Platt line of cases and relying on 49 U.S.C. § 781 (1970). 548 F.2d at 425. Section 881 added the language "used in any manner to facilitate," and the court maintained that this broader language encompassed commuting to the scene. 548 F.2d at 423-24.

That the quantity of contraband transported was relatively small has not been a successful defense to forfeiture. See, e.g., United States v. One 1957 Oldsmobile, 256 F.2d 931, 933 (5th Cir. 1958) (small quantity of marijuana in car); Associates Inv. Co. v. United States, 220 F.2d 885, 887-88 (5th Cir. 1955) (two marijuana cigarettes); United States v. One 1952 Model Ford Sedan, 213 F.2d 252-54 (5th Cir. 1954) (355 grams of marijuana); United States v. One 1971 Porsche, 364 F. Supp. 745, 749 (E.D. Pa. 1973) (two glassine packets of heroin); United States v. One 1963 Cadillac Hardtop, 231 F. Supp. 27, 29 (E.D. Wis. 1964) (one marijuana cigarette). In Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974), the Supreme Court affirmed the forfeiture of a $20,000 yacht on which one marijuana cigarette had been found.

In Subomlin v. United States, 345 F. Supp. 650 (D. Md. 1972), the court held that the forfeiture should be imposed only upon those who are significantly involved in criminal activity. Id. at 654-55. The court based its opinion on United States v. United States Coin &
tion of contraband, section 782 of title 49 provides two other defenses: the "common carrier" and "unlawful possession" defenses. A discussion of the "common carrier" defense is included later in the analysis of constitutional issues. In this section, the scope of the "unlawful possession" defense, which is crucial to the rights of innocent parties, is considered.

The "unlawful possession" defense derives from section 782 which states that:

No vessel, vehicle or aircraft shall be forfeited under the provisions of this chapter by reason of any act or omission . . . committed or omitted by any person other than [the] owner while such vessel, vehicle, or aircraft was unlawfully in the possession of a person who acquired possession thereof in violation of the criminal laws of the United States, or of any State.

To prevail on this defense the claimant-owner must prove that the accused's possession of the property was unlawful. Generally, this requires a determination that some state law regarding the posses-

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Currency, 401 U.S. 715 (1971). Coin & Currency held that "[w]hen the forfeiture statutes are viewed in their entirety, it is manifest that they are intended to impose a penalty only upon those who are significantly involved in a criminal enterprise." Id. at 721-22. In Suhomlin the court observed that the amount of money and property sought to be forfeited was many times the penalty imposed for related crimes. It should be noted, however, that the court distinguished the case from those involving contraband. See Doherty v. United States, 500 F.2d 540, 546 (Ct. Cl. 1974) (defense that forfeiture violated fifth amendment because disproportionate to the offense insufficient when forfeiture is based on marijuana smuggling).

Some state courts have read Coin & Currency as saying that the government must prove "significant involvement in a criminal enterprise" when the forfeiture law is applied only to vehicles used in connection with the sale of narcotics. See, e.g., In re the Forfeiture of One 1972 Dodge Challenger, Civil No. 7917 (Sierra County, N.M., April 5, 1974). See also State v. One Porsche 2-Door, 526 P.2d 917, 919 (Utah 1974) (small quantity of marijuana pleaded as successful defense) (decided after Calero-Toledo but refusing to follow it). But see State v. One 1987 Ford Mustang, 266 Md. 275, 276-78, 292 A.2d 64, 66 (1972) (mere possession of marijuana comes within statute requiring forfeiture and therefore the judiciary has no discretion to deny forfeiture).


[No] vessel, vehicle, or aircraft used by any person as a common carrier in the transaction of business as such common carrier shall be forfeited . . . unless it shall appear that . . . the owner . . . or other person in charge of such vehicle or aircraft was at the time of the alleged illegal act a consenting party or privy thereto . . . .

To the same effect is 18 U.S.C. § 1955 (1970) regarding illegal gambling activities.


160. See notes 224-27 infra accompanying text.
sion of property has been violated. Thus, no question arises if the person in possession of the vehicle is convicted in state court of theft or similar criminal acquisition. In many cases, however, federal courts, in the absence of a state prosecution, must interpret and apply state law to the circumstances of the accused's possession of the vessel, vehicle or aircraft.

Meeting the "unlawful possession" defense is always difficult, especially for claimant-owners who cannot demonstrate that the accused did not have general permission to use the forfeited property. In United States v. Bride, for example, a husband used his wife's car without her knowledge in illegal bookmaking activities. The Ninth Circuit Court of Appeals allowed forfeiture of the vehicle because the husband did not violate any law by taking his wife's car. Unfortunately for this and other innocent claimant-owners the statutory defense requires that the acquisition and possession of the seized property be unlawful. Thus, if the borrower disobeyed the owner's orders to return the vehicle immediately or to not lend it to anyone else, then the property still is subject to forfeiture because the owner could not prove that the original acquisition was accomplished unlawfully. The result would be different, however, if the user of the vehicle, even though closely related to the innocent claimant-owner, had no permission to use the vehicle.

The strict standard has been applied in other contexts. Conditional sales contracts that prohibit purchasers from using the vehicles for unlawful purposes have not helped innocent lienholders avoid forfeitures. The court, however, may construe state statutes

162. This is true primarily because there are few, if any, federal statutes making possession of a vehicle illegal. Most car theft statutes are state laws.
163. 308 F.2d 470 (9th Cir. 1962).
164. Id. at 473-74.
167. See, e.g., United States v. One 1967 Cadillac Coupe Eldorado, 415 F.2d 647, 648 (9th Cir. 1969). A similar clause also might be found in a security agreement or chattel mortgage. That a lienholder may intervene in a forfeiture action has rarely been seriously contested because 19 U.S.C. §§ 1615 and 1618 have been interpreted as providing the right to intervene in judicial forfeiture proceedings to any person having a "legally recognized interest." See United States v. One 1961 Cadillac Hardtop Automobile, 207 F. Supp. 693, 698 (E.D. Tenn. 1962).
broadly to find a violation so that seized property may be returned to a clearly innocent claimant-owner. In one case, the person in possession of a vehicle had purchased it and arranged for credit using a false name. The court found that the purchaser's use of a false name violated a state statute prohibiting the making of a false statement to obtain credit, even though no data on the form other than the name was false. A claimant-owner also may benefit from the liberal construction given "joy-riding" statutes, which generally impose criminal penalties for taking a vehicle without the consent or knowledge of the owner. Thus, when the claimant-owner has loaned his car on previous occasions to the party charged with possession, but not on the occasion of the unlawful activity, some courts have found a violation of the "joy-riding" statute and disallowed forfeiture.

To summarize, the claimant must prove the "unlawful possession" defense by a preponderance of the evidence. This can only be accomplished by convincing the court that both the acquisition and possession of the vehicle were in violation of state law. The constitutional issues raised by this requirement are considered below.

"Record or Reputation"

In addition to defending on any of the three grounds noted above, an innocent lessor or lienholder without knowledge of the possessor's illegal activity may seek remission or mitigation of the forfeiture by a third means. Section 3617(b) of title 18 allows remission or mitigation if before accepting a vehicle as security for a loan the claimant, as a prospective lender, made a "reasonable" investigation of the borrower's "reputation and record" as a liquor law violator. Surprisingly, the burden is on the government to prove by a preponderance of the evidence that the claimant failed to establish the "record or reputation" defense.

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169. Id. at 957.
170. See, e.g., CAL. PENAL CODE § 499b (West 1970 & Supp. 1978), which provides in pertinent part:
   
   Any person who shall, without the permission of the owner thereof, take any
   . . . vehicle . . . for the purpose of temporarily using or operating the same,
   shall be deemed guilty of a misdemeanor . . .

    accord, United States v. Commercial Credit Corp., 228 F.2d 215, 216 (5th Cir. 1955) (denying
    forfeiture when automobile was unlawfully taken and used without the owner's consent).
172. See notes 211-20 infra & accompanying text.
ance of the evidence that the borrower-mortgagor had such a record,\textsuperscript{174} a requirement that has been determinative in several cases.\textsuperscript{175} But even if the government is unable to establish such a record, the claimant’s failure to investigate, alone, will not defeat his right to remission.\textsuperscript{176}

In deciding what constitutes a “reasonable” investigation, a majority of courts require a lienholder to have made inquiry at least of the local and state law enforcement community.\textsuperscript{177} Records can be checked quite easily by any local law enforcement agency through the National Crime Information Center computer service. Information pertinent to an individual’s reputation also can be obtained by the prospective mortgagee at the local sheriff or police office. But the claimant must be sure to check all sources of information, including local residents who might know the individual’s reputation, for on several occasions the innocent claimant has suffered when the court’s hindsight has proven sharper than his foresight. In \textit{United States v. Carey},\textsuperscript{178} after an investigation made by the lienholder-claimant revealed no past infractions, the government offered proof that the accused did have a local reputation for transporting illegal


\textsuperscript{175} \textit{See, e.g.}, \textit{United States v. One 1972 Ford Pickup Truck}, 374 F. Supp. 413, 415 (E.D. Tenn. 1973). The stringency of the burden placed on the government has been the difference between the claimant regaining his vehicle and forfeiting it in several cases. In \textit{Ford Pickup Truck} the claimant-lienholder had not inquired about the reputation or record of the purchaser. The court noted, however, that no record or reputation would have been found had the inquiry been made. Therefore, because the government could not sustain its burden by demonstrating that the purchaser did in fact have such a record or reputation, the claimant prevailed. \textit{But see United States v. One 1969 International Harvester Farmall-Tractor}, 452 F.2d 110 (4th Cir. 1971) (forfeiture allowed because an inquiry would have revealed mortgagor’s reputation for dealing in liquor for which the appropriate taxes had not been paid).


\textsuperscript{177} 18 U.S.C. § 3617(b) (1970) provides that remission should be allowed if, on inquiry of the “sheriff, chief of police, principal Federal internal-revenue officer engaged in the enforcement of liquor laws, or other principal local or Federal law enforcement officer . . .,” the lender was informed that the borrower had no such record or reputation. \textit{See United States v. One 1969 Chevrolet Pickup Truck}, 321 F. Supp. 916, 920 (W.D. Tenn. 1971) (interpretation that inquiry of only one of the specified officers is required under the statute is a reasonable requirement).

\textsuperscript{178} 272 F.2d 492 (5th Cir. 1959).
whiskey. In allowing the forfeiture, the court opined that a more extensive inquiry would have uncovered these facts. In City National Bank v. United States, the lending institution had discovered that the borrower had a record, but the violations had occurred much earlier in his life and since that time he had not been charged with any other crimes. In fact, the local sheriff had indicated to the bank that the borrower was now a good risk. The court held, however, that any record was sufficient to put a claimant on notice, and the car was forfeited. The claimant argued that this decision would cause a bad record to haunt a borrower for the rest of his life. Not at all, replied the court: "The statute merely requires those taking liens from liquor law violators to assume the risk if they revert to their former unlawful activity."

Thus, as these decisions clearly indicate, a "reasonable" investigation would be better characterized as an "extensive" investigation. To secure his property interests, an innocent claimant must have conducted a thorough search of the individual's background and community standing; any evidence of the proscribed reputation or record, whatever its source, may prove fatal.

FORFEITURE AND THE CONSTITUTION

Procedural Due Process

The constitutional requirement of procedural due process imposes upon the government or other seizing authority the obligation to give proper notice and an adequate opportunity to be heard before the property is forfeited summarily. But beyond these minimal requirements there also may be other implications of procedural due process.

Notice

The timeliness of notice to the party whose property is seized has been the subject of several recent Supreme Court decisions. In

179. Id.
180. 207 F.2d 741 (10th Cir. 1953).
181. Id. at 744. See also People v. One 1941 Ford 8 Stake Truck, 26 Cal. 2d 503, 159 P.2d 641, 643 (1945): "The public interest to be protected against the drug and its victims outweighs the loss suffered by those whose confidence in others proves to be misplaced." 182. See generally Note, Due Process in Automobile Forfeiture Proceedings, 3 BALT. L. REV. 270 (1974).
Fuentes v. Shevin, the Court held that a replevin action, the seizure of private property by another private person claiming a better right to possession, could not be brought ex parte without reasonable notice and an opportunity for a hearing. Such ex parte seizures might be constitutionally permissible, the Court noted, only if there is some special need for very prompt action. The application of Fuentes to forfeiture cases was considered in Calero-Toledo v. Pearson Yacht Leasing Co. In Calero-Toledo the claimant-lessee argued that the seizure of a vessel without meeting the notice and opportunity for a hearing requirements of Fuentes deprived the lessor of property without the due process of law guaranteed by the fourteenth amendment. The Court rejected this argument, holding that there was "no constitutional necessity under Fuentes or any other case in this Court to accord the owner-lessee of the yacht a hearing in the circumstances of this case." In the Court's view, the forfeiture statute served important governmental purposes and thus presented an "'extraordinary' situation in which postponement of notice and hearing until after seizure did not deny due process." Seizure permits Puerto Rico to assert in rem jurisdiction over the property in order to conduct forfeiture proceedings, thereby fostering the public interest in preventing continued illicit use of the property and in enforcing criminal sanctions. Second, preseizure notice and hearing might frustrate the interests served by the statutes, since the property seized — as here, a yacht — will often be of a sort that could be removed to another jurisdiction, destroyed or concealed, if advance warning of confiscation were given. And finally, unlike the situation in Fuentes, seizure is not initiated by self-interested private parties; rather, Commonwealth officials determine whether seizure is appropriate under the provisions of the Puerto Rican statutes.

Because of the similarity between the Puerto Rican statute and the corresponding United States Code provision, it is likely that the

184. 416 U.S. 663 (1974). The same issue also arose prior to the Calero-Toledo decision in United States v. One 1967 Porsche, Model 911—Targa, 492 F.2d 893 (9th Cir. 1974), with the same results.
185. 416 U.S. at 691 (White, J., concurring) (citation omitted).
186. Id. at 680 (footnote omitted).
187. Id. at 679 (footnote omitted).
Calero-Toledo decision will be followed in federal forfeiture proceedings.

Even though Calero-Toledo held that a forfeiture may be valid without pre-seizure notice, if the statute itself calls for notice, then due process dictates that the notice be calculated reasonably to inform all interested parties of the impending legal action.\textsuperscript{189} Thus, in Jaekal v. United States,\textsuperscript{190} the plaintiff brought an action against the United States under the Tucker Act,\textsuperscript{191} which allows suits for the recovery of damages under $10,000 if the money sued for was "improperly paid, exacted, or taken from the claimant in contravention of the Constitution, a statute or regulation."\textsuperscript{192} In Jaekal the District Court for the Southern District of New York determined that, when the government knew the car owner's name and address, notice by publication, as required by statute,\textsuperscript{193} was not sufficient to meet the requirements of due process. Three years later, in Menkarell v. Bureau of Narcotics,\textsuperscript{194} the Court of Appeals for the Third Circuit approved Jaekal. Again notice was published, though not delivered to the owner, whose name and address were known to the seizing authority. The court, although not holding that the instant notice statute\textsuperscript{195} was unconstitutional, certainly cast doubt on its vitality. It observed that the provision requires only that notice be published in a newspaper, that the owner's name need not be included in the notice, that the notice include publication of the motor number, not the more familiar registration number, and, finally, that the notice could be published in any newspaper in the judicial district, conceivably even in a publication of minimal circulation. Under these circumstances the court found it "quite evident that the summary forfeiture procedure has not been designed to maximize the opportunities for notice and opportunity to be heard . . . . "\textsuperscript{196} The Bureau of Narcotics actually had communicated

\textsuperscript{190} 304 F. Supp. 993 (S.D.N.Y. 1969).
\textsuperscript{191} 28 U.S.C. § 1346(a)(2) (1970). See text accompanying notes 97-99 supra. This Act has provided the means of challenging a number of forfeitures on constitutional grounds. See, e.g., Simmons v. United States, 497 F.2d 1046 (9th Cir. 1974); United States v. One 1965 Chevrolet Impala Convertible, 475 F.2d 882 (6th Cir. 1973); United States v. One 1961 Red Chevrolet Impala Sedan, 457 F.2d 1353 (5th Cir. 1972).
\textsuperscript{192} Eastport S.S. Corp. v. United States, 372 F.2d 1002, 1007 (Ct. Cl. 1967).
\textsuperscript{194} 463 F.2d 88 (3d Cir. 1972).
\textsuperscript{196} 463 F.2d at 94.
with the owner but had not given notice of the forfeiture except through publication. Therefore, the court held that the due process requirement had not been met: "Due process may not demand actual notice in every case, but it forbids the use of a method of notice which is not reasonably calculated to reach those who could easily be informed by other means readily at hand." 197

Similarly, the Supreme Court has insisted steadfastly on proper notice procedures. 198 In Robinson v. Hanrahan, 199 the only forfeiture case to reach the Supreme Court on the notice issue, the accused had been arrested on charges of armed robbery and was in jail when forfeiture proceedings were instituted. Notice was mailed to his home, and when no answer was received the automobile was forfeited summarily. The Court ordered the car returned because the notice was not reasonably calculated to apprise the owner of the proceedings. 200

Delay

Undue delay by the government in commencing forfeiture proceedings also may violate procedural due process requirements. Early cases held that if the action was brought within the five year limitation period provided for in the statute, there was no due process violation. 201 In 1971, however, the Supreme Court, in United States v. Thirty-Seven Photographs, 202 held that long delays in initiating forfeiture proceedings were intolerable under the due process mandate of the fifth amendment. In that case, to save the pornography importation statute 203 from constitutional attack, the Court construed the statute to require the institution of judicial proceedings no later than fourteen days after the date of seizure and a decision no later than sixty days after the date of filing of the action. 204 Although Thirty-Seven Photographs might be distinguished

197. Id.
199. 409 U.S. 38 (1972) (per curiam).
200. Id. at 40.
204. 402 U.S. at 373-74. Thirty-Seven Photographs was followed in United States v. 77 Cartons of Magazines, 444 F.2d 81 (9th Cir. 1971).
from other forfeiture actions on the ground that the pornography importation statute imposed no specific time limits, its clear holding that unreasonable delays will not be tolerated should have considerable impact in all forfeiture actions.

To some extent this prediction has been born out in later cases. For example, in United States v. One 1971 Opel GT,\textsuperscript{205} the claimant's son allegedly had used marijuana in the subject vehicle. The automobile was seized on April 16, 1972, and the requisite bond was filed by the claimant on October 30, 1972. The government lodged its forfeiture complaint on May 31, 1973, more than a year after the seizure. In disallowing the forfeiture, the District Court for the Central District of California determined that such a delay, when dealing with a wasting asset, was a violation of the claimant's constitutionally protected rights:

If the claimant is so delayed in the exercise of the remedies afforded him that the property becomes substantially worthless before there can be a judicial determination, or is very greatly diminished in value even though it retains some worth, new dimensions are put on the summary forfeiture procedures making the matter one of constitutional significance.\textsuperscript{206}

The same court that decided 1971 Opel held a year later, in United States v. A Quantity of Gold Jewelry,\textsuperscript{207} that undue delay in a forfeiture action constitutes a denial of due process rights. Moreover, that the claimant sought administrative relief does not justify governmental delay in the institution of proceedings. Finally, the court disposed of the government's argument that the action need only be brought within the five-year limitation period, holding that a statute of limitations could not be used to abridge due process guarantees.\textsuperscript{208}

Thirty-Seven Photographs, 1971 Opel, and Gold Jewelry clearly indicate that dispatch is required in instituting forfeiture proceedings. Strict time limits have not been determined judicially, but under the most widely used forfeiture statute\textsuperscript{209} a delay of nine months following the completion of the government's investigation

\textsuperscript{206} Id. at 641.
\textsuperscript{207} 379 F. Supp. 283 (C.D. Cal. 1974).
\textsuperscript{208} Id. at 287-88.
is too long. In the future the government will be required to commence proceedings virtually immediately after seizure or at least without unreasonable delay. Any delay not occasioned by the claimant may become constitutionally suspect and invite detailed judicial examination.

**Reasonable Doubt — The Burden of Proof Challenge**

As discussed in detail above, under most forfeiture statutes the government is required only to show probable cause that the vehicle or other property was used in violation of the statute, shifting to the claimant the burden of proving by a preponderance of the evidence any defense. A few statutes require the government to show a statutory offense by a preponderance of the evidence, but because forfeiture proceedings possess at least some attributes of a criminal action, conceivably, the stricter reasonable doubt standard could be imposed.

Efforts by claimants to have this heavier burden placed on the government, however, have met with stiff resistance from the courts. In *Bramble v. Richardson*, the claimant argued that the Supreme Court in *United States v. United States Coin and Currency* had indicated that forfeiture actions were penal in nature, the forfeiture producing the same result upon the guilty party as a fine. Moreover, in *In re Winship*, the Supreme Court determined that at the very least the standard of proof reflected a profound common law tradition concerning the way the law should be administered, although it left undecided whether the reasonable doubt standard is a requirement of due process attaching to all proceedings of even remotely a criminal nature. Thus, the claimant argued, to allow forfeiture without use of the "reasonable doubt" standard may violate due process and surely would contravene the dictum in *Winship*. Rejecting these arguments, the court in *Bramble* held that, because a forfeiture proceeding is a hybrid ac-

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211. See text accompanying notes 100-33 supra.
214. The forfeiture acts manifest a clear intention "to impose a penalty only upon those who [were] significantly involved in a criminal enterprise." 401 U.S. at 721-22.
tion exhibiting characteristics common to both civil and criminal actions, no violation of due process results from the use of the civil burden of proof. 216

Bramble, however, may conflict in principle with Fell v. Armour,217 in which the Tennessee forfeiture act was challenged on the ground that the burden was placed not upon the state but upon the owner seeking recovery of his vehicle. The court first stated that the forfeiture act was punitive in nature and that "one who is to suffer a penalty for a crime is entitled to greater procedural safeguards than one who is merely a party to a civil suit."218 Therefore, before denying the claimant's petition for recovery, the court reasoned, the state must prove by a preponderance of the evidence that the vehicle was used in violation of the act: "The Act by placing no burden upon the State to prove that the seized conveyance was used in violation of the Act deprives owners of seized conveyances their rights to due process under the Fourteenth Amendment."219 But because in Fell the court presumed that forfeiture is penal in nature, this decision may be distinguished in federal cases upon the rationale of Calero-Toledo v. Pearson Yacht Leasing Co.,220 which restricted the penal orientation of the Coin and Currency definition of forfeitures.

Equal Protection

The fourteenth amendment forbids "any State [to] deprive any person of life, liberty, or property, without due process of law . . . " or to "deny to any person within its jurisdiction the equal protec-

216. 498 F.2d at 972-73. Lego v. Twomey, 404 U.S. 477 (1972), in which the Supreme Court held that the voluntariness of a confession must be proved by a preponderance of the evidence, provides some support for the decision in Bramble. The holding in Lego may be somewhat narrower, however, since the basis for the motion to exclude the confession was Jackson v. Denno, 378 U.S. 368 (1964), which held unconstitutional a New York procedure whereby the jury first considered the voluntariness of the confession, then considered its weight in determining guilt. This procedure, said the Court, deprived the accused of his "constitutional right . . . to object to the use of the confession and to have a fair hearing and a reliable determination on the issue of voluntariness . . . ." Id. at 376-77.


218. Id. at 1331.

219. Id. at 1335. The court rejected the notion that the state must prove its case beyond a reasonable doubt. Many state forfeiture statutes do not specify a burden of proof and thus may be unconstitutional according to Fell. See, e.g., N.M. STAT. ANN. § 54-11-33 (1953 Comp.).

220. 416 U.S. 663 (1974); see notes 26-38 supra & accompanying text.
tion of the laws."221 This protection is afforded citizens of the United States by virtue of the due process clause of the fifth amendment.222 As discussed earlier,223 the most commonly used federal forfeiture act, sections 781 and 782 of title 49, allows for two affirmative defenses: (1) that the vehicle was taken from the owner and was in the possession of the violator in contravention of some state law, or (2) that the vehicle was the property of a common carrier at the time of the violation.

The "common carrier" defense is predicated upon the premise that, although a lienholder or lessor may have the opportunity to investigate his client, to force a common carrier to investigate shippers or passengers would be extremely impractical and unreasonably burdensome.224 In at least one case225 the claimant-lienholder argued that to allow an exemption for common carriers but not for lienholders violates the right to equal protection guaranteed by the due process clause of the fifth amendment, thereby rendering the statute unconstitutional.226 Summarily disposing of this argument in upholding the statute, the court determined that the exempted class was reasonable in light of the limited opportunity of the common carrier to detect or prevent carriage of contraband by one of its passengers.227

Perhaps the most cogent equal protection argument was advanced in Doherty v. United States.228 The claimant-owner was not
an innocent lessor nor a lienholder but instead was one of the parties arrested and convicted for illegally smuggling marijuana. At the time of the arrest, Doherty had been in the vehicle with another man who also was convicted for the same offense. Doherty argued that the Supreme Court, in *United States v. United States Coin and Currency*, had determined that forfeiture actions were penal in nature, that the forfeiture amounted to a fine, and, therefore, that he had suffered a greater penalty than his accomplice who did not have any interest in the vehicle. Thus, he argued, the law denied equal protection to those who were arrested and punished not only by fine and prison sentence but also by the forfeiture of their property.

The court rejected this argument, stating:

> It is not irrational to penalize, through the loss of their investment, those who capitalize a criminal venture by throwing useful property into the illegal partnership, while not subjecting to this risk those who furnish only their personal services. Doherty aided the criminal arrangement by furnishing both himself and his truck, while Hansma supplied only himself. It is not arbitrary to take account of this significant difference in amount and quality of participation. There is no violation of equal protection or due process.

In *Fell v. Armour*, the plaintiff challenged a Tennessee statutory requirement that a $250 bond be posted before the forfeiture could be examined by a court, similar to a provision appearing in

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231. The argument was accepted in *Suhomlin v. United States*, 345 F. Supp. 650 (D. Md. 1972), in which the court relied on *Coin and Currency*. The decision was before *Calero-Toledo*, however, and therefore should be relied upon with caution.

232. 500 F.2d at 546. The court relied extensively on *Calero-Toledo* in characterizing forfeiture as a "hybrid" proceeding, related to the criminal process "because intimately connected with the enforcement of the criminal law, and because the protections of the Fourth amendment and the Fifth amendment privilege against self-incrimination apply to forfeiture proceedings." Id. at 544. However, the court realized, forfeitures also have a "civil" element, as characterized by the Supreme Court in *Calero-Toledo*. Id. at 544-45. The court admitted that, although some forfeitures are primarily criminal, calling for criminal proceedings, see *Connecticut Action Now, Inc. v. Roberts Plating Co.*, 457 F.2d 81 (2d Cir. 1972) (fine for discharging waste in violation of the Rivers and Harbors Act of 1899, 33 U.S.C. §§ 407, 411 (1970)), the statute involved in *Doherty*, 19 U.S.C. § 1595a (aiding unlawful importation) levies a civil penalty, "to be enforced, where necessary, by a civil proceeding, and subject (with important exceptions) to the constitutional oversight for civil matters." 500 F.2d at 545.

233. 355 F. Supp. 1319 (M.D. Tenn. 1972); see text accompanying notes 217-20 supra.
title 19 relating to forfeiture proceedings by the United States.\textsuperscript{234} The plaintiff contended that the bond requirement, by effectively precluding indigents from access to the hearing procedure, violated the due process and equal protection provisions of the fourteenth amendment. Relying on the Supreme Court’s decision in \textit{Boddie v. Connecticut},\textsuperscript{235} the three-judge court agreed:

The $250 cost bond of the Act allows one sufficiently affluent to obtain a hearing whereby he may seek recovery of his vehicle and avoid the harsh penalty of forfeiture. Those owners of seized vehicles who cannot afford the cost bond have their rights to seek recovery of the vehicle and thereby avoid the harsh penalty of forfeiture extinguished by their personal poverty. As to these indigent owners, the effect of the $250 cost bond requirement is to grant to the seizing police officer the effective right to extinguish all property interests. As to those too poor to afford a hearing, this exercise of raw power can only lead to arbitrary state action in that no neutral hearing officer or judicial official will have the opportunity to review the evidence and determine the propriety of the forfeiture or the claim for recovery. Thus, the indigent owner may be deprived of property without due process of law in that the deprivation may occur without any process whatsoever. As to the indigent owner the Act does not provide the requisite "protection of the individual against arbitrary action" which Mr. Justice Cardozo characterized as the very essence of due process.\textsuperscript{236}

Although the constitutionality of a state statute was at issue in \textit{Fell}, the same reasoning could be applied to the procedure outlined in title 19, section 1608 of the United States Code. The issue recently arose in \textit{Lee v. Thornton},\textsuperscript{237} in which the court squarely addressed whether the $250 cost bond set out in the United States Code denied indigents equal protection. The court held that it did not because the bond was reasonably calculated to help defray the costs associated with hearing claims under $2,500. Although not discussed, \textit{Fell} may be distinguished on the ground that the federal

\textsuperscript{236} 355 F. Supp. at 1333 (quoting Slochower v. Board of Educ., 350 U.S. 551, 559 (1956)).
statute, unlike Tennessee's, allows remission. However, because remission and mitigation are a matter of grace and do not involve a hearing before a neutral hearing officer or judicial official, this distinction is not compelling.\textsuperscript{238}

\textit{Double Jeopardy and Collateral Estoppel}

The fifth amendment provides, in addition to the due process and just compensation protections, that no citizen of the United States should "twice be put in jeopardy of life or limb" for the same criminal offense. The civil counterpart, known as \textit{res judicata}, has long been a part of the common law:

\begin{quote}
The judgment of a court of concurrent jurisdiction, directly upon the point, is as a plea or bar, or as evidence conclusive, between the same parties, upon the same matter directly in question in another court; and the judgment of a court of exclusive jurisdiction, directly upon the point, is, in like manner, conclusive upon the same matter, between the same parties; coming incidentally in the question in another court for a different purpose.\textsuperscript{239}
\end{quote}

A party may be collaterally estopped from raising in a criminal trial an issue already litigated in a civil proceeding, and, provided the same parties are involved, a determination in a civil court may be binding on the parties to a criminal action. In \textit{Ashe v. Swenson},\textsuperscript{240} the Supreme Court stated the rule as follows:

\begin{quote}
[Collateral estoppel] means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit. Although first developed in civil litigation, collateral estoppel has been an established rule of federal criminal law at least since this Court's decision more than 50 years ago in \textit{United States v. Oppenheimer} . . . . \textsuperscript{241}
\end{quote}

Underlying this rule is the policy to prevent the relitigation of issues

\textsuperscript{238} "[T]he district courts have jurisdiction to award relief from unlawful forfeitures. While the Secretary has been given sole power to mitigate proper forfeitures, he has not been given sole power to determine the propriety of forfeitures themselves." Simons v. United States, 497 F.2d 1046, 1049 (9th Cir. 1974). See also Jaekel v. United States, 304 F. Supp. 993 (S.D.N.Y. 1969).
\textsuperscript{239} R. v. Duchess of Kingston, 20 Howell, St. Tr. 355, 358 (1776).
\textsuperscript{240} 397 U.S. 436 (1970).
\textsuperscript{241} Id. at 443 (citation omitted).
already judicially determined. Thus, the question that arises in forfeiture actions is whether an acquittal on a related criminal charge in a criminal action, a dismissal of the charge, or a pardon serve as a bar to a subsequent forfeiture action either by reason of the constitutional prohibition against double jeopardy or because of the bars of res judicata or collateral estoppel.

The application of collateral estoppel to forfeiture actions was first considered in the early case of Gelston v. Hoyt; it was not until 1886 in Coffey v. United States, though, that the doctrine reached its zenith. In Coffey the accused was acquitted in a jury trial of the charge of failing to pay taxes on whiskey. The government pressed for forfeiture in a separate in rem proceeding. The Court reviewed the collateral estoppel rule and determined that the factual basis of the in rem action was identical to that of the criminal proceeding. Thus, the Court concluded, the forfeiture action could not be maintained by the government because the facts had been found in the defendant's favor in the criminal proceeding:

[W]here an issue raised as to the existence of the act or fact denounced has been tried in a criminal proceeding, instituted by the United States, and a judgment of acquittal has been rendered in favor of a particular person, that judgment is conclusive in favor of such person, on the subsequent trial of a suit in rem by the United States, where, as against him, the existence of the same act or fact is the matter in issue, as a cause for the forfeiture of the property prosecuted in such suit in rem.

Thus, there appeared to be three prerequisites to the defense of collateral estoppel by the property owner: (1) the associated criminal action against him must have been brought by the United States; (2) he must have been acquitted of these charges; (3) the issue in the forfeiture proceeding must be the same one previously litigated in the criminal action. This last requirement is used most often by courts to distinguish Coffey.

The erosion of the Coffey doctrine began soon after it appeared,

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242. If an issue has been raised in prior litigation, but not resolved, it may be the subject of a later controversy, and its determination is not barred by the doctrine of collateral estoppel. United States v. International Bldg. Co., 345 U.S. 502 (1953).
244. 116 U.S. 436 (1886).
245. Id. at 443.
first in the lower courts,\textsuperscript{247} and only slightly later in the Supreme Court. In \textit{Stone v. United States},\textsuperscript{248} the accused was acquitted of a charge of illegally cutting timber on government property. The United States thereafter sued Stone to recover the value of the wood allegedly cut, against which he pleaded the criminal action as a bar. The Court disagreed; the purpose of the suit was not punitive, but merely to reimburse the government for the lost timber. Because the basis for each action differed, the defense failed.\textsuperscript{249}

Similarly, the different policies underlying a civil suit and a related criminal action were relied upon by the Court in the landmark case of \textit{Helvering v. Mitchell}.\textsuperscript{250} After Mitchell had been acquitted of income tax evasion, the Bureau of Internal Revenue attempted to collect the fraud penalty on taxes owed. The Court determined that if the objective of the civil action was remedial, not punitive, then the civil action would not be barred even if both actions arose from the same facts. In \textit{Mitchell} the Court found that the action was remedial, used primarily to facilitate the recovery of taxes, and that, therefore, the defense of double jeopardy or collateral estoppel was inapposite.\textsuperscript{251} The distinction between punitive and remedial actions, relied upon by the Court in many subsequent actions, is often so fine as to defy definition;\textsuperscript{252} this artificial reasoning has resulted in confusion among the federal courts.\textsuperscript{253}

Besides the punitive/remedial distinction, other factors may support the denial of a claimant’s collateral estoppel or double jeopardy defense. Forfeiture has been regarded as an action against the proper-

\textsuperscript{247} \textit{See}, e.g., \textit{United States v. Three Copper Stills}, 47 F. 495 (D. Ky. 1890).

\textsuperscript{248} 167 U.S. 178 (1897).

\textsuperscript{249} To the same effect is \textit{Murphy v. United States}, 272 U.S. 630 (1926), in which the accused was acquitted of a nuisance charge. The subsequent action was to abate the nuisance, a matter of prevention, not a second punishment, said the Court.

\textsuperscript{250} 303 U.S. 391 (1938).

\textsuperscript{251} \textit{But cf.} \textit{United States v. LaFranca}, 282 U.S. 568 (1930) (tax may be a penalty used to punish for an infraction of the law); \textit{United States v. 86.9 Cases, More or Less, of Assorted Distilled Spirits, Wine and Beer}, 337 F. Supp. 1355 (S.D. Fla. 1971) (refusal to pay tax on spirits resulting in acquittal, forfeiture barred).

\textsuperscript{252} \textit{See}, e.g., \textit{United States ex rel. Marcus v. Hess}, 317 U.S. 537 (1943) (double damages are remedial, not punitive); \textit{Johnson v. Wall}, 329 F.2d 149 (4th Cir. 1964) (suit for taxes remedial).

\textsuperscript{253} \textit{Compare} \textit{United States v. Two Hundred Fifty Four United States Twenty Dollar Gold Coins}, 355 F. Supp. 298 (E.D. Mich. 1973) (forfeiture of coins is not a penalty but merely a reasonable means of reimbursing the government for investigation expenses) \textit{with} \textit{United States v. One 1956 Ford Fairlane Tudor Sedan}, 272 F.2d 704 (10th Cir. 1959) (car used to transport illegal liquor not forfeitable since action is punitive, not remedial in any sense).
erty for its part in the criminal activity, rendering the guilt or innocence of the owner immaterial.\textsuperscript{254} Also, many courts have reasoned that because a forfeiture action is civil in form, an acquittal in the criminal action simply means that the government failed to meet its burden of proving the accused guilty beyond a reasonable doubt,\textsuperscript{252} and, thus, there is no contradiction inhering in an acquittal of all criminal charges and a subsequent forfeiture of the accused's property. For example, in \textit{One Lot of Emerald Cut Stones and One Ring v. United States},\textsuperscript{256} although the accused had been acquitted of charges stemming from a smuggling operation into the United States, the government proceeded with a forfeiture action.\textsuperscript{257} The owner claimed that his acquittal in the criminal case precluded the forfeiture proceeding. The Court disagreed, reasoning that because the basis for the owner's acquittal in the criminal matter might have been the government's failure to prove the requisite specific intent, an essential element only of the criminal offense, the same issues had not been determined and collateral estoppel would not apply. Seeking to further justify its decision, the Court reiterated that the forfeiture action was remedial, not punitive, in that it was intended to assist in the enforcement of the tariff regulations by keeping certain merchandise out of the country. Thus, because the forfeiture was not the result of a criminal offense but rather was a separate action, the acquittal of the owner was no defense. The decision in \textit{Coffey} was mentioned only briefly and distinguished in a passing footnote.

\footnotesize
\begin{itemize}
\item \textsuperscript{254} Van Oster v. Kansas, 272 U.S. 465 (1926); United States v. Olsen, 57 F. 579 (1893). See also Various Items of Personal Property v. United States, 282 U.S. 577 (1931): "The provision of the Fifth Amendment to the Constitution in respect of double jeopardy does not apply." \textit{Id.} at 581.
\item \textsuperscript{256} 409 U.S. 232 (1972).
\item \textsuperscript{257} The forfeiture action was brought under 18 U.S.C. § 545 (1970) and 19 U.S.C. § 1497 (1970).
\end{itemize}
Similarly, in United States v. Alcatex, Inc., the court relied upon the remedial/punitive distinction to reject the defendant-claimant’s argument that his conviction in the prior criminal proceeding barred the civil forfeiture proceeding in that the forfeiture constituted a second punishment for the same actions resulting in his earlier conviction. The court distinguished decisions characterizing forfeiture acts as penal, stating that this label applied only to the protection of certain personal rights such as due process and search and seizure. Turning to the challenged statute, the court, relying on Helvering v. Mitchell, held that the forfeiture had a remedial purpose, to reimburse the government for the expenses of investigation and that, therefore, there was no double jeopardy.

The defense of double jeopardy has been notably unsuccessful since the Court’s decision in Emerald Cut Stones. Although the double jeopardy clause prohibits two criminal sanctions for the same offense, it does not prohibit one criminal sanction and one civil penalty. Moreover, proof of a criminal offense is unnecessary to sustain a forfeiture. The defense of collateral estoppel, however, still should be considered viable. The test for the application of collateral estoppel is not whether the two proceedings are both criminal or civil in nature, but whether substantially the same proof is necessary to substantiate each action. The claimant affirmatively alleging the defense of collateral estoppel must show that the issue has been decided by a court of competent jurisdiction in a previous action. If in fact there has been no adjudication of the issue, as when the charges have been dismissed or a nolle prosequi has been entered in the criminal action, the general rule is that collateral estoppel will not bar the forfeiture action. If the convicted party has been pardoned, however, at least one court has reasoned that

259. 303 U.S. 391 (1938).
260. See, e.g., United States v. Kismetoglu, 476 F.2d 269 (9th Cir. 1973) (per curiam) (acquittal in criminal proceeding no bar to forfeiture action).
the forfeiture of property belonging to one pardoned for the criminal offense would raise serious questions of constitutional due process.266

Self-Incrimination267

Confessions or admissions involuntarily made by a person upon whom a police investigation has focused must be excluded from evidence because they violate the self-incrimination clause of the fifth amendment.268 The due process clause of the fourteenth amendment makes the privilege against self-incrimination binding on the states.269

One approach to the application of this right in forfeiture proceedings is illustrated by *Ted's Motors, Inc. v. United States*,270 in which the court held that the privilege against self-incrimination does not apply to forfeitures. Basing its decision on the burden of proof issue and the rules of evidence, the court concluded that the owner's statements were admissible, even as hearsay, to show the requisite probable cause. Because the action was *in rem*, no personal right against self-incrimination could be claimed. Once probable cause was demonstrated from the owner's statements, the burden shifted to the claimant-lienholder to prove that the vehicle was not used in violation of the statute. As no such proof was offered, the forfeiture was granted. Other courts have used identical reasoning to uphold forfeitures.271

The Supreme Court addressed the issue of self-incrimination in forfeiture proceedings in *United States v. United States Coin and Currency*.272 Angelini had been convicted for violating federal gambling registration and tax statutes. The United States then proceeded with a forfeiture action against money seized at the time of

267. For a general discussion of the privilege and its development in criminal proceedings, see J. GEORGE, CONSTITUTIONAL LIMITATIONS ON EVIDENCE IN CRIMINAL CASES 87 (1973).
270. 217 F.2d 777 (8th Cir. 1954).
Angelini claimed that the registration acts, which required the filing of gambling registration forms with the government, violated his privilege against self-incrimination. Angelini relied on *Marchetti v. United States* and *Grosso v. United States*, Supreme Court decisions which had held the privilege applicable in related criminal proceedings. As in the past, the government argued that the proceeding was civil and *in rem* against the money allegedly used in illegal gambling activities. The Court, rejecting the *in rem* argument, determined that "[w]hen the forfeiture statutes are viewed in their entirety, it is manifest that they are intended to impose a penalty only upon those who are significantly involved in a criminal enterprise. It follows from *Boyd, Marchetti* and *Grosso* that the Fifth Amendment's privileges may properly be invoked in these proceedings." Many lower courts have followed *Coin and Currency* in cases based upon substantially the same facts.

*Coin and Currency* thus stands for the proposition that the personal privilege against self-incrimination applies to parties whose property is seized and proceeded against in an *in rem* action, even though technically the individual is not the named defendant. One court has gone even further, interpreting *Coin and Currency* to hold that a person may refuse to answer questions at a forfeiture hearing. Thus, at least to some extent, the Supreme Court has

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275. 401 U.S. at 721-22 (footnotes omitted).
277. In *Haynes v. United States*, 390 U.S. 85 (1968), decided in the same year as *Marchetti* and *Grosso*, the Court applied the self-incrimination privilege to the reporting requirements under the National Firearms Act. Thus, it would appear that any consequent forfeiture action based on that Act in which the claimant lost property due to the filing of then-required reports would come within the *Coin and Currency* rationale. The Act has been amended to prohibit lawful dealers from selling firearms to anyone who does not complete the required governmental forms. 26 U.S.C. § 5812(a) (1970). Thus, the statute no longer requires those directly affected to incriminate themselves; instead, it is the transferor who makes the incriminating statements. The amendment was constitutionally upheld in *United States v. Freed*, 401 U.S. 601 (1971). The Court relied heavily on the I.R.S. practice of not making the registration cards available to other agencies.
eliminated the *in rem* fiction used extensively in prior decisions. It has not resolved, however, all of the important issues affecting the protection against self-incrimination in forfeiture proceedings.

**Other Constitutional Matters**

"[C]offey, Boyd, One Plymouth Sedan and United States Coin and Currency say that the forfeiture proceeding will not provide an avenue through which the fundamental rights of protection against illegal search and seizure can be frustrated." Unfortunately, there is a paucity of case law to assist in determining whether there are other rights so entrenched in the Constitution that they may not be subverted by a forfeiture action. In *United States v. Zucker*, the Supreme Court rejected the defendant's contention that he was denied his sixth amendment right to be confronted with the witnesses appearing against him when a deposition, taken in the defendants' absence, was to be admitted into evidence. The Court relied, however, on the judicially created fiction that personal rights do not attach in an *in rem* action, which may no longer be tenable after *Coin and Currency*.

The seventh amendment right to trial by jury applies to forfeitures, so long as the seizure did not occur on navigable waters and thereby become subject to admiralty jurisdiction. The civil nature of forfeiture proceedings, however, probably requires less than a unanimous verdict.

The eighth amendment proscribes the use of "cruel and unusual punishment." This prohibition, though rarely asserted, may be an effective means of challenging the application of forfeiture in cases in which the involvement in criminal activity is less than

claimant argued that the provisions of the statute relating to remission and mitigation required a person to establish that he had no knowledge or reason to believe that the vehicle was used in connection with the statutory violation, and therefore were unconstitutional under the fifth amendment's self-incrimination protection. The court disagreed, pointing out that such petitions are for the benefit of innocent third parties, such as mortgagees and lessors.

279. Bramble v. Richardson, 498 F.2d 968 (10th Cir. 1974).
281. The sixth amendment also provides the right to assistance of counsel. The issue was raised unsuccessfully in Lee v. Thornton, 398 F. Supp. 970 (D. Vt. 1975).
284. U.S. Const. amend. VIII.
"significant." For example, if the amount of contraband possessed by the owner is small, punishment in many of the states is comparatively light.\textsuperscript{285} Arguably, forfeiture under these circumstances is cruel and unusual punishment, especially if the adverse effect on innocent parties is considered. Certainly, the forfeiture of a $20,000 yacht belonging to a leasing company because one marijuana cigarette was found aboard approaches cruel and unusual punishment.\textsuperscript{286} Whether the protection of the eighth amendment will be extended to cover such a situation is a matter for speculation.\textsuperscript{287} One court has admitted that the eighth amendment may apply even though the forfeiture action is \textit{in rem} and civil in form.\textsuperscript{288} Clearly, \textit{Coin and Currency} supports this argument by partially removing the \textit{in rem} fiction.

\textbf{A Proposed Model Forfeiture Act}

The increasing number of constitutional challenges to modern forfeiture laws and procedure, especially by innocent parties, combined with the extension of personal constitutional rights to these proceedings, indicate that the \textit{in rem} fiction is no longer tenable, representing only a persistent judicial adherence to the ancient, anthropomorphic deodand. Equally important as the protections offered to the claimant, however, is the effectiveness of forfeiture laws in fulfilling their underlying purposes. The forfeiture of contraband secures public welfare by removing undesirable property from the community. The object of the substantive law, then, is prophylactic, to insulate society from contact with the property itself. The same policy, however, does not underlie the forfeiture of "beneficial" property, property "tainted" only by its use and not because of its essential nature. Then the purpose of forfeiture is threefold: to prevent further criminal use of the property; to deter,

\textsuperscript{285} For example, in New Mexico, possession of less than one ounce of marijuana is punishable upon the first offense by a maximum fine of $100. N.M. \textsc{Stat. Ann.} \S 54-11-23(B)(1) (Supp. 1975).


\textsuperscript{287} See \textit{51 Tex. L. Rev.} 1411, 1417 (1973), wherein it was stated:

\textit{If the courts strike down even one forfeiture as excessive in relation to the offense committed, they will have difficulty in refusing to entertain any future request to measure the fitness of a sentence to the fact of the crime. Worse still, implicit in judicial reversal of a sentence is a judgment on the validity of the legislative purpose and the efficacy of the sanctioning statute promoting it.}

\textsuperscript{288} \textit{Toepelmann v. United States}, 263 F.2d 697 (4th Cir. 1959).
through threatened loss of property, the perpetration of crimes; and to reimburse the government for its expenses in the apprehension and prosecution of criminals.

Clearly, by removing the property from private possession, the forfeiture laws do prevent further illegal use of the property. But so long as property, such as vehicles, may be acquired with only a small financial investment, through lease or daily rental, the loss to the wrongdoer is only temporary.

Similarly, the deterrent effect of the financial sacrifice is minimal and may even be considered a cost of doing business. Besides, economic penalties, such as fines, are already available. Against this realization must be weighed the substantial impact forfeiture has upon innocent parties, such as lessors or lienholders, who often suffer the real loss from forfeiture and who are less able to insure themselves against such losses. Viewing forfeiture actions as in rem and civil in nature ignores this disproportionate impact in deference to procedural rubrics.

Secondly, forfeiture laws cannot achieve their intended deterrent effect unless the wrongdoer is aware of their existence and appreciates the risk he takes. The results of a survey conducted by the author indicates that seventy-five percent of those arrested for smuggling narcotics are unaware of the forfeiture laws affecting their vehicles. Clearly, whatever deterrent effect forfeiture laws may exert cannot outweigh their deleterious impact on innocent parties if the laws are not given adequate publicity.

Although the revenues derived from the sale of forfeited property may be used to offset the cost of investigating offenses and prosecuting offenders, it is not clear whether the cost of prosecuting forfeiture actions overshadows the revenues gained. A report prepared by the state of California emphasized that, through the repeal of that state's forfeiture laws, the state would save approximately $600,000 annually.289 This net figure included the additional revenues emanating from prosecution of the forfeiture laws. Shortly thereafter California repealed its forfeiture laws. A similar study should be made of the net financial effect of the active enforcement of federal forfeiture statutes on federal costs. Only then can it be determined whether the "benefits" of the reimbursement policy are real or illusory.

The solution to these objections, however, is not to repeal forfeiture statutes but to reform them. As an additional or alternative punitive device, forfeiture is a viable deterrent to crime, especially narcotic offenses. One commentator has suggested that forfeiture provisions be made a part of criminal law and be used, in the court's discretion, as an additional penalty much the way criminal fines currently are imposed.290 At least one such provision already exists among the criminal penalties for poaching game on United states reservations.291

A similar suggestion was made by the court in United States v. Cato Bros., Inc.,292 applying a provision of the Customs laws that commends the seizure of vessels and other conveyances as security for the payment of fines:293

There is a striking similarity to the function of the Court in determining the appropriate fine or penalty to be imposed upon one found guilty of violating a penal statute. In both situations the object to be attained is the fixing of a penalty commensurate with the ends of justice . . . . If a proper way is open to save the delinquent his pound of flesh that way should be followed unless the interests of the public demand the application of a harsher rule.294

A forfeiture law which requires a finding of guilty in the related criminal proceedings, which places the penalty within the discretion of the court as fines now are, and which allows seizure and forfeiture as security for a monetary fine appears desirable. The primary constitutional objection, the forfeiture of property without due process when innocent persons are involved, would thereby be removed, and only the offender's interest in the property would be subject to forfeiture. No problems would arise in choosing the appropriate burden of proof because a criminal conviction would be required before the forfeiture proceedings could commence. The forfeiture proceeding itself, however, would be conducted separately, after conviction and before sentencing. Such a proceeding would include adequate notice to all interested parties and a hearing in which the facts of owner-


294. 175 F. Supp. at 816.
ship could be made known to the court. In addition, the use of the vehicle in the offense will have been determined conclusively in the criminal proceedings. Nor will delays in the proceedings be problematic because the accused’s constitutional right to a speedy trial would control. Of course, after the entry of judgment any hearing on the forfeiture issue would necessarily have to be conducted without delay.

The proposed Model Act set out below draws heavily on the Uniform Controlled Substances Act now in effect in many states. Because the Model Act is concerned primarily with conviction, however, some of the provisions in the Uniform Act are superfluous. The Model Act is drafted around the narcotics laws but could easily be adapted to liquor, customs, gambling, and other areas where property is “involved” in criminal acts.

**PROPOSED MODEL FORFEITURE ACT: CONTROLLED SUBSTANCES**

§ 1. **TITLE AND EFFECTIVE DATE**

This Act shall be known as the Model Forfeiture Act: Controlled Substances and shall be effective immediately.

§ 2. **REPEAL OF PRIOR LAW**

Section ____ through and including Section ____ shall be and hereby stand repealed.

§ 3. **DEFINITIONS**

The definitions provided in this Section shall apply only to the Model Forfeiture Act. Any term in the Act not defined herein shall be defined as provided in the Controlled Substance Act.

(a) “Facilitate” means to make the accomplishment thereof easier, less difficult, or to free from obstructions or hindrance.

(b) “Container” means any box, carton, crate, drum, barrel, bag, suitcase, trunk, or any other container but shall not include any vehicle, vessel, airplane, or any other means of conveyance.

§ 4. **FORFEITURE OF CONTROLLED SUBSTANCES AND RELATED PROPERTY**

Upon conviction for any offense against the Controlled Substances Act the Court may order any of the property described in subsections (a) through and including (d) below, shown to the satisfaction of the Court at trial on the offense to relate to said offense, to be
forfeited to the United States; or, in the alternative, the Court may order such property to be held as security for the payment of any fine and/or costs imposed by the Court and, if so ordered, said property may be proceeded against in the same manner as foreclosure on judgment to recover the same.

The following are subject to forfeiture:

(a) All controlled substances which have been manufactured, distributed, dispensed or acquired in violation of the Controlled Substance Act;
(b) All raw materials, products and equipment of any kind which are used or intended for use in manufacturing, compounding, processing, delivering, importing or exporting any controlled substance in violation of the Controlled Substances Act;
(c) All property which is used, or intended for use, as a container for property described in subsection (a) or (b);
(d) All books, records and research products and materials, including formulas, microfilm, tapes and data which are used, or intended for use, in violation of the Controlled Substances Act.

The forfeiture of any of the above property may be in addition to or in lieu of any other penalty and/or fine provided for in this Act.

**Official Comment**

Section 3 provides for the forfeiture of any controlled substances and property used in connection with controlled substances. It should be noted that a criminal conviction, whether for a felony or a misdemeanor, is required. By requiring a conviction beforehand, the necessity for a second hearing to determine facts other than those concerning ownership is obviated. The phrase, "shown to the satisfaction of the Court," places the burden upon the government to show that the item was related to the offense. Thus, in order to enter an order of forfeiture, the court, as part of the sentencing process, must be satisfied that the item sought to be forfeited is the same item that was involved in the offense. Because forfeiture is part of the sentencing process, no issue concerning the appropriate standard of proof should arise.
The use of the word "other" in the last sentence of this section is intended to show that the forfeiture is a fine or penalty and thus is governed by the same policy considerations controlling fines.

§ 5. FORFEITURES OF CONVEYANCES

Upon conviction for any offense against the Controlled Substances Act involving trafficking or possession with intent to distribute controlled substances (§§ 3, 3, and 3 of the Controlled Substances Act), the Court may order the forfeiture to the United States of the property described below provided that it is shown to the satisfaction of the Court at the trial of the offense that the subject property is related to the offense; or, in the alternative, the Court may order that such property be held as security for the payment of any fine and/or costs imposed by the Court and, if so ordered, the property may be proceeded against in the same manner as foreclosure on judgment to recover the same.

The following property is subject to forfeiture.

(a) All property described in § 3, subsections (a), (b), (c) and (d) above;
(b) All conveyances, including aircraft, vehicles or vessels, which are used, or intended for use, to transport or to facilitate the transportation of any property described in § 3, subsection (a).

The forfeiture of any of the above property may be in addition to or in lieu of any other penalty and/or fine provided for in this Act.

OFFICIAL COMMENT

(See Comment to § 3 above). This section provides for the forfeiture of conveyances involved in trafficking crimes related to controlled substances. All crimes in this category are felonies. Here the objective is not only one of punishment but also to impose the economic loss upon the offender and to remove the conveyance from the drug traffic. The Controlled Substances Act defines "Trafficking" as follows:

(1) [The] manufacture of any controlled substance;
(2) [The] distribution, sale, barter or giving away of any controlled substance which is a narcotic drug; or
(3) [The] possession with intent to distribute any controlled substance which is a narcotic drug.
Note, too, that the court must be satisfied that the conveyance was used or was intended for use in the transportation of or to facilitate the transportation of contraband.

§ 6. Common Carriers

Notwithstanding the provisions of § 5:

(a) No conveyance used by any common carrier in the transaction of business as a common carrier is subject to forfeiture under this Act unless it appears that the owner or other person in charge of the conveyance is a consenting party or privy to a violation of the Controlled Substances Act.

(b) No conveyance is subject to forfeiture under this Section by reason of any act or omission established by the owner to have been committed or omitted without his knowledge or consent.

(c) A forfeiture of a conveyance encumbered by a bona fide security interest shall be subject to the interest of the secured party if the secured party neither had knowledge of nor consented to the act or omission, and the security interest was created prior to the commission of the offense for which the accused party has been convicted. The burden of proof shall be on the party claiming the exception or exemption set out above.

Official Comment

This provision of the Act ensures that the interest of "innocent" parties in the conveyance will be protected to the greatest extent possible. The prior requirement that the claimant show that the vehicle was stolen is no longer necessary. The burden, however, as with all exceptions, lies with the party claiming the exemption.

§ 7. Procedure

(a) Property subject to forfeiture under the Controlled Substances Act may be seized by any enforcement officer upon an order issued by any Court having jurisdiction.

(b) Seizure may be made without such an order if:

(1) the seizure is incident to an arrest or search under a search warrant or an inspection under an administrative inspection warrant;

(2) the property subject to seizure has been the subject of a prior order of forfeiture in a forfeiture proceeding based upon
the Controlled Substances Act;
(3) the enforcement officer has probable cause to believe that the property, which is a controlled substance, is directly or indirectly dangerous to health or safety; or
(4) the enforcement officer has probable cause to believe that the property was used or is intended to be used in violation of or to facilitate the violation of the Controlled Substances Act.

(c) In the event of a seizure pursuant to subsection (a), a proceeding under subsection (f) shall be instituted promptly, but in no case later than fifteen (15) days following the seizure. If forfeiture is ordered by a Court, it shall be ordered at the time of sentencing, but in no case later than thirty (30) days after the entry of judgment against the accused.

(d) Property taken or detained under this Section shall not be subject to replevin, but is deemed to be in the custody of the United States subject only to the orders and decrees of the Court. When property is seized under the Controlled Substances Act, the enforcement officer may:

(1) place the property under seal;
(2) remove the property to a place designated by the enforcement officer; or
(3) require the appropriate agency to take custody of the property and remove it to an appropriate location for disposition in accordance with law.

(e) When property is forfeited under the Controlled Substances Act, the agency responsible shall:

(1) sell that which is not required to be destroyed by law, and the proceeds thereof shall revert to the general fund;
(2) take custody of the property for use by law enforcement agencies in the enforcement of the Controlled Substances Act or remove it for disposition in accordance with the law;

(f) When property is seized under the Controlled Substances Act and is not subject to Summary Forfeiture as provided in § 8, the seizing agency shall:

(1) make all reasonable efforts to determine the name(s) and address(es) of the owner(s) of the property;
(2) make all reasonable efforts to determine whether the prop-
property is subject to a security lien for the payment of any indebtedness;

(3) notify the above parties that the property has been seized subject to the provisions of this Act and give them reasonable notice of all hearings and other judicial proceedings which may affect their interests in the property.

(i) Notice shall be mailed by prepaid certified or registered mail to the owner or other interested party, if his address be known, and if not known, by publishing such notice once per week for three consecutive weeks in a newspaper of general circulation within the county in which the property was seized.

(ii) The failure of an owner or secured party to appear shall not affect his property rights if proof of ownership or proof of a perfected security interest shown to be prior to the date of the commission of the offense is made to the Court within sixty (60) days from the date of the forfeiture order. Thereafter, the property may be disposed of as set forth herein.

(iii) No forfeiture of any property described in §§ 4 and 5 shall be ordered if the enforcement agency knows or has reason to believe that the owner of such property is a person, persons, corporation, or partnership other than the convicted party.

(iv) No forfeiture of any property described in §§ 4 and 5 shall be ordered if the enforcement agency knows or has reason to believe that the property is security for indebtedness owed to any person or persons, corporation or partnership, except that an order may be entered forfeiting the interest in the property belonging to the convicted party.

§ 8. Summary Forfeiture

(a) Controlled substances that are possessed, transferred, sold or offered for sale in violation of the Controlled Substances Act are contraband and shall be seized and summarily forfeited to the United States, regardless of whether the owner thereof is unknown.

(b) Species of plants from which controlled substances, possession of which is prohibited under any circumstances, may be derived, which have been planted or cultivated in violation of the Controlled Substance Act, or of which the owners or cultivators are unknown, or which are wild growths, may be seized and summarily forfeited to the United States.
OFFICIAL COMMENT

This section provides for the summary forfeiture of property which under no circumstances has beneficial use. Although subsection (c) may seem harsh to those who grow Indian hemp (marijuana) for use in ropes, twines, etc., the cultivation of these substances is already restricted and regulated. Since the market for these products is now quite small because of available synthetic substitutes, no real problem should exist.