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Forfeitures—Due Process—Supreme Court Upholds Forfeiture of Innocent Owner’s Property Without Prior Notice and Hearing


It is a fundamental notion of justice that the guilty, and only the guilty, should be punished.¹ The same law which disciplines the wrongdoer protects the innocent. Indeed, any system which would punish the blameless, even to protect society as a whole, would not only be considered unfair, but morally objectionable as well.² Yet present-day forfeiture statutes,³ which authorize governments to confiscate property used in the commission of a crime, permit society to inflict harsh punishment upon completely law-abiding individuals.

³ Those cases which do find criminal liability in the absence of fault, such as United States v. Dotterweich, 320 U.S. 277 (1943), and United States v. Ballint, 258 U.S. 250 (1922), have been severely attacked. As one writer declared, “[t]o inflict substantial punishment upon one who is morally entirely innocent . . . would so outrage the feelings of the community as to nullify its own enforcement.” Sayre, Public Welfare Offenses, 33 Colum. L. Rev. 55, 56 (1933). See also J. Hall, General Principles of Criminal Law 303-05 (1947); G. Williams, Criminal Law §§ 70-76 (1953); Hart, The Aims of the Criminal Law, 23 Law & Contemp. Prob. 401, 422-25 (1958); Wechsler, The Challenge of a Model Penal Code, 65 Harv. L. Rev. 1097, 1109 (1952).


The United States Supreme Court, however, has upheld the constitutionality of such laws in the recent decision of *Calero-Toledo v. Pearson Yacht Leasing Co.* In this case a split Court determined that the confiscation of an innocent owner's belongings did not constitute a taking of property without just compensation in violation of the fifth and fourteenth amendments. The case is important not only for its reinforcement of the ancient principle of "forfeiture," but also as an exposition of the continuing evolution of the Burger Court's notions of procedural due process.

I

HISTORY OF FORFEITURE

The history of forfeiture statutes can be traced to the Old Testament. The basis for modern forfeiture enactments—the principle that inanimate objects and animals could be guilty of a crime—found its way into the laws of ancient Greece, Rome, and England. Eventually this curious notion was implemented in American law as well. Despite the antiquity of their heritage,

5 *Exodus* 21:28 contains the oft-quoted passage of Mosaical law: "If an ox gore a man or a woman, that they die: then the ox shall be surely stoned, and his flesh shall not be eaten . . . ." This portion of the Bible has been cited by many judges who have attempted to justify modern forfeiture statutes. See, e.g., J. W. Goldsmith, Jr.—Grant Co. v. United States, 254 U.S. 505, 511 (1921); United States v. One 1963 Cadillac Coupe de Ville, 250 F. Supp. 183, 185 (W.D. Mo. 1966).
6 1 W. BLACKSTONE, COMMENTARIES 301 (T. Cooley 4th ed. 1899); Justice Holmes illustrated this point by reference to a speech of Æschines: "[W]e banish beyond our borders stocks and stones and steel, voiceless and mindless things, if they chance to kill a man; and if a man commits suicide, bury the hand that struck the blow afar from its body." O. HOLMES, THE COMMON LAW 8 (1881).
7 O. HOLMES, supra note 6, at 8-17.
8 The old English common law provided that any chattel that caused the death of a person was forfeited to the crown as a deodand (from the Latin *Deo dandum*, "given to God"). Originally the proceeds from the sale of the deodand were distributed to the poor in order to appease God's wrath. W. BLACKSTONE, supra note 6, at 300. Later, deodands became a source of revenue and were then justified as a penalty for negligence. I M. HALE, PLEAS OF THE CROWN 424 (1st American ed. 1847).

Deodand was different from the common law forfeiture of a felon's property. In the latter case the conviction of the owner was a prerequisite for forfeiture, whereas deodand was thought of as an in rem proceeding against the object itself. See *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 680-82 (1974); 21 KAN. L. REV. 235, 237-38 (1973).
9 Two Supreme Court cases have introduced this principle into American jurisprudence. In *The Palmyra*, 25 U.S. (12 Wheat.) 1 (1827), the Court held that a forfeiture of a vessel for piracy was an in rem proceeding against the ship itself. Fifty years later the Court extended this reasoning in the case of a seizure of real estate and a distillery for the liquor
forfeiture statutes repeatedly have been challenged on fifth and fourteenth amendment grounds as denying due process and allowing a taking of property without just compensation.

Not surprisingly, courts often have been reluctant to enforce forfeitures demanded by governments. In *J. W. Goldsmith, Jr. — Grant Co. v. United States*, the government brought an action against an automobile in which federal agents had found a large quantity of untaxed liquor. The innocent vendor of the automobile, who had retained title as security for the purchase price, objected to confiscation of the vehicle alleging a deprivation of property without due process of law. The Court noted that according to prior decisions, the guilt or innocence of the owner has no legal significance since the object itself is considered the offender.

Understandably, the Justices found such a conclusion paradoxical and the opinion observed that the statute in question seemed "to violate that justice which should be the foundation of the due process of law required by the Constitution." The Court, however, recognized that history and precedent dictated a different conclusion and upheld the forfeiture.

The law changed little in the half century after *Grant Co.* as courts continually, though often unwillingly, enforced forfeitures law violations of a lessee. In *Dobbins's Distillery v. United States*, 96 U.S. 395, 401 (1878), the Court declared:

Nothing can be plainer in legal decision than the proposition that the offence therein defined is attached primarily to the distillery, and the real and personal property used in connection with the same, without any regard whatsoever to the personal misconduct or responsibility of the owner.


10 254 U.S. 505 (1921).
11 254 U.S. at 508-09.
12 Id. at 511. In *Various Items of Personal Property v. United States*, 282 U.S. 577 (1931), the Supreme Court explained that "[i]t is the property which is proceeded against, and, by resort to a legal fiction, held guilty and condemned as though it were conscious instead of inanimate and insentient." Id. at 581.
13 254 U.S. at 510.
14 The opinion placed heavy reliance upon precedent to reach its result, citing both *The Palmyra*, 25 U.S. (12 Wheat.) 1 (1827), and *Dobbins's Distillery v. United States*, 96 U.S. 395 (1878). *See* note 9 *supra*. Such deference to old case law is common. Two good examples are *Van Oster v. Kansas*, 272 U.S. 465 (1926), and *United States v. One 1940 Packard Coupe*, 36 F. Supp. 788 (D. Mass. 1941). In the latter case the court said: "[I]n the light of the authorities, it is now too late to attempt a construction of the statutes here involved as exempting from forfeiture the interest of a person in a chattel for the reason that he was guileless." Id. at 790.
against blameless parties. Many times judges, expressing sympathy for innocent persons, questioned the wisdom of such enactments and invited both the Congress and the Supreme Court to change the law. One court, for example, went so far as to declare:

The laws relating to forfeitures do cause one who is raised in the traditions of the Anglo-American principles of justice and who is committed to the constitutional principles of due process and just compensation to search closely for a constitutional violation. On other occasions judges refused to sanction seizures even when this refusal forced them to bend the law or rewrite a statute. But

15 In United States v. One 1962 Ford Thunderbird, 232 F. Supp. 1019 (N.D. Ill. 1964), the court sustained the constitutionality of the forfeiture of an automobile seized pursuant to 49 U.S.C. § 782 (1970). In so doing it ruled that the statute did not violate the due process clause by authorizing confiscation of the security interest of a lienor. After noting that Congress hoped to prompt owners to be more careful about entrusting their property by making it subject to forfeiture, the court expressed "grave doubts" as to the efficacy of the law's policy as it applied to blameless creditors. 232 F. Supp. at 1022.

16 In United States v. One 1967 Ford Mustang, 457 F.2d 931 (9th Cir. 1972), a bank contested the confiscation of three automobiles to which it held legal title by virtue of its purchase of security agreements. The vehicles in question were seized after they were used, without the knowledge of the owner, to transport counterfeit Federal Reserve notes. The Ninth Circuit nevertheless refused to grant relief. Said the court: "While we are not unsympathetic to the position of innocent lenders such as is the Bank in these cases, only the Congress or the Supreme Court may, at this time, afford the sought protection." Id. at 932-33.

17 United States v. One 1961 Cadillac, 207 F. Supp. 693, 698 (E.D. Tenn. 1962). The opinion in this case also noted:

Until or unless some judicial or administrative remedy is provided to relieve innocent parties who have acted in good faith and with due diligence from the harsh consequences of a forfeiture, it would appear that some constitutional violation may exist.

Id. at 699.

18 A notable example of this occurred in Platt v. United States, 163 F.2d 165 (10th Cir. 1947). In this case the Tenth Circuit attempted to avoid the effect of the holding in United States v. One Dodge Coupe, 43 F. Supp. 60 (S.D.N.Y. 1942). In One Dodge Coupe the suspect drove the Dodge to a location and parked it in order to enter another car in which he bought four packages of heroin. The court held that the government could confiscate the Dodge since it had "facilitated" the sale of illegal drugs. Id. at 61-62. The Platt court evaded the impact of One Dodge Coupe by creating an exception to the forfeiture statute involved, 49 U.S.C. § 782 (1970).

In Platt a drug-addict daughter used the family car to drive to a neighborhood drugstore where she illegally obtained morphine with a forged prescription. The court of appeals held that the United States could not confiscate the car since the vehicle did not "facilitate" the sale. According to the opinion, the "use of the automobile did not . . . make the sale any less difficult. It was merely the means of locomotion by which Blanche Cooper went to the store to make the purchase." 163 F.2d at 167. There is no basis in the statute for this tenuous distinction between "locomotion" and "facilitation."

Despite this flaw, the Platt case has been followed because of its equitable result. See, e.g., United States v. One 1949 Ford Sedan, 96 F. Supp. 341 (W.D.N.C. 1951); 27 Notre Dame Law. 433, 441-42 (1952). Furthermore, Platt was reinforced by United States v. One 1941 Pontiac Sedan, 83 F. Supp. 999 (S.D.N.Y. 1948), in which a court drew a distinction between
for the most part, courts felt compelled to follow the well-settled law in this area and they did not return property to claimants.\textsuperscript{19}

Until recently this era of judicial acquiescence in the gross hardship caused to innocent people by forfeiture statutes appeared to be heading to a richly deserved end. By the end of the 1960's some courts were noticeably bolder in their determination to change the law. The Supreme Court itself, in \textit{United States v. United States Coin and Currency},\textsuperscript{20} extended an invitation to lower courts to re-examine forfeiture laws insofar as they caused hardship to innocent people. The majority announced that it was not entirely satisfied that these statutes "with such a broad sweep" could pass constitutional inspection.\textsuperscript{21}

Other judges also shared this change of attitude. The Sixth Circuit, for example, in \textit{McKeehan v. United States},\textsuperscript{22} held that the imposition of a forfeiture in that case caused an unconstitutional deprivation of property without just compensation even though the petitioner had actually violated a federal firearms statute.\textsuperscript{23} Three unregistered machine guns, kept as souvenirs by a private citizen, were seized by federal authorities. The court, however, ruled against the United States after determining that the seized property was not "per se contraband"\textsuperscript{24} and that there was no valid a vehicle used by an addict (which, like the car in \textit{Platt}, cannot be seized) and one used by a peddler (which can be confiscated as a tool of crime). There is no basis for this addict-peddler distinction in 49 U.S.C. § 782 (1970). Like the locomotion-facilitation rule, this is merely a way to temper the law's harshness.

For a particularly oppressive application of the facilitation rule, see Biasotti v. Clarke, 51 F. Supp. 608 (D.R.I. 1943), in which a court held that a house trailer, which was connected to municipal water, sewer, and electricity lines, and which was used as a family dwelling for over a year prior to seizure, was a "vehicle" and not a "home" and was therefore subject to forfeiture under 49 U.S.C. § 782 (1970), since it had been used to facilitate the transportation and possession of a narcotic drug.


\textsuperscript{20} 401 U.S. 715 (1971). \textit{Coin and Currency} involved a proceeding to forfeit $8,674 allegedly used in an illegal bookmaking operation.

\textsuperscript{21} 401 U.S. at 720. In this regard the Supreme Court observed that "[e]ven Blackstone, who is not known as a biting critic of the English legal tradition, condemned the seizure of the property of the innocent as based upon a 'superstition' inherited from the 'blind days' of feudalism." \textit{Id.} at 720-21. For Blackstone's views on the forfeiture of innocent people's possessions, see \textit{W. Blackstone, supra} note 6, at 300.

\textsuperscript{22} 438 F.2d 739 (6th Cir. 1971).

\textsuperscript{23} 26 U.S.C. § 5841 (1970). This statute requires that certain weapons he entered in the National Firearms Registration and Transfer Record.

\textsuperscript{24} There is a difference between "per se contraband" (possession of which is illegal under all circumstances) and "derivative contraband" (property which is made illegal by wrongful use). Examples of "per se contraband" include sawed-off shotguns, pornographic books, and certain gambling equipment. Automobiles, money, and ordinary household
legislative, revenue, or administrative reason to warrant the confiscation.\textsuperscript{25}

A similar result was reached in \textit{Suhomlin v. United States}.\textsuperscript{26} In this case nine claimants, bar owners, were found to have negligently violated a civil tax law provision; they were not involved in criminal activity. Nevertheless, federal authorities seized a large amount of their property. Under these facts a federal district court ordered the government to return the seized belongings.\textsuperscript{27} At the very least, \textit{McKeohan} and \textit{Suhomlin} indicated that some judges were willing to consider the fault of the owner a relevant factor in forfeiture cases.\textsuperscript{28}

Then in \textit{United States v. One 1971 Ford Truck},\textsuperscript{29} another district court considered the constitutionality of one of the most widely used federal forfeiture statutes.\textsuperscript{30} The court observed that the claimant, whose truck had been used in the illegal transfer of a gun, had “absolutely no connection with the crime whatsoever”\textsuperscript{31} and had neither knowledge nor suspicion that the offense would be committed. The opinion nevertheless concluded that precedent would still hold that the owner was not “innocent enough” to get his truck back.\textsuperscript{32} But the court did not end its inquiry there. “We have searched carefully” the court stated, “and although mindful

\begin{itemize}
\item \textsuperscript{25} 438 F.2d at 745.
\item \textsuperscript{26} 345 F. Supp. 650 (D. Md. 1972). In a series of raids, IRS agents seized liquor and amusement licenses, cash, checks, and alcoholic beverages for the owners’ failure to pay a federal retail liquor dealer’s tax of $54 as required by \textsection 7302 (1970). The seizures were made pursuant to \textsection 5121(a) (1970). The same statute that was before the Supreme Court in \textit{Coin and Currency}. \textit{See} note 20 \textsuperscript{supra}.
\item \textsuperscript{27} 345 F. Supp. at 655. The owners of the seized property conceded that they had failed to pay the special tax and the United States did not allege that the violations were willful. Nor did the government claim that the owners had committed any other infractions. The court observed that immediately after the seizures, the bar owners paid the special tax. \textit{Id.} at 652-53.
\item \textsuperscript{28} \textit{See} notes 9, 12, and 14 \textsuperscript{supra}.
\item \textsuperscript{29} 346 F. Supp. 613 (C.D. Cal. 1972). In this case a father left his son in charge of the family truck with explicit instructions as to the use of the vehicle. Disobeying his father’s instructions, the son hid an unregistered sawed-off shotgun behind the driver’s seat. He later tried to sell the contraband weapon to a special investigator of the Alcohol, Tobacco and Firearms Division of the Treasury Department. The son was arrested for the possession and illegal transfer of the shotgun and the truck was seized.
\item \textsuperscript{30} 49 U.S.C. § 782 (1970). This statute provides for the forfeiture of any vessel, vehicle, or aircraft which has been used to transport or conceal narcotics, firearms, or counterfeit currency or securities.
\item \textsuperscript{31} 346 F. Supp. at 616.
\item \textsuperscript{32} \textit{Id.} at 619.
\end{itemize}
of the many cases to the contrary, we feel compelled to do away with this enclave of injustice . . . .” Accordingly, the opinion held that the statute was unconstitutional insofar as it deprived innocent owners of their property without just compensation.34

Armed with the changes in the law and judicial attitudes evidenced by Coin and Currency, McKeehan, Suhomlin, and 1971 Ford Truck, attorneys for the Pearson Yacht Leasing Company contested the confiscation of the Parranda, a boat which had been chartered to a couple in Puerto Rico.35 Puerto Rican authorities had seized the yacht36 after finding one marijuana cigarette on board. There was no suggestion from the record, however, that the pleasure craft had been used in smuggling or that anything more than possession of an illegal drug was involved.37

A three-judge district court found that the Puerto Rican forfeiture statutes were unconstitutional under the fifth and fourteenth amendments38 and the Commonwealth appealed. The Supreme Court noted probable jurisdiction39 and undertook to review the well-settled, but uniformly criticized,40 law of forfeitures.

32 Id. at 618.
34 The constitutional question could have been avoided since it was possible to return the truck to the claimant-father under the provisions of 49 U.S.C. § 782 (1970). This statute provides that no forfeiture may take place when the vessel, vehicle, or aircraft is acquired in violation of either federal or state criminal law. The judge found that the son came into possession of the truck in violation of California law. 346 F. Supp. at 620.
36 The seizure was made pursuant to P.R. LAws ANN. tit. 24, § 2512 (Supp. 1974), and P.R. LAws ANN. tit. 34, § 1722 (1971). These two statutes provide that all conveyances (including vessels) which are used, or are intended to be used, to transport or facilitate the transportation, sale, receipt, possession, or concealment of any controlled substance (including marijuana) shall be subject to forfeiture. Such proceedings can be initiated by seizure of the conveyance without prior notice to any party having an interest in it. Notice must be given, however, within 10 days after the seizure and a challenge may be filed within 15 days following service of the original notice. Within 10 days after the filing of the challenge, the Commonwealth must return the seized property if a bond is posted for the conveyance's assessed value. If a challenge is not filed within 15 days after the receipt of the notice, or if no bond has been posted within 25 days after service of notice, the Commonwealth may destroy, use, or sell the conveyance.
37 416 U.S. at 693 (Douglas, J., dissenting).
40 For a strong attack on forfeiture laws, see Finkelstein, supra note 9. For other works critical of modern forfeiture statutes, see 21 KAN. L. REV. 235 (1973); 38 NOTRE DAME LAW. 727 (1963).
II

THE MAJORITY AND DISSENTING OPINIONS

Over fifty years ago Justice Holmes remarked that "[i]f a thing has been practised for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it . . . ."41 Apparently, the *Pearson* Court felt that the appellee had not presented facts sufficient to overcome the presumption of constitutionality that centuries had conferred on forfeiture enactments, for it reversed the district court and upheld the confiscation.

A majority of the Court,42 speaking through Justice Brennan,43 was obviously impressed by the long history of forfeitures. As the opinion explicitly noted, "The historical background of forfeiture statutes in this country and this Court's prior decisions sustaining their constitutionality lead to [the] conclusion . . . [that] statutory forfeiture schemes are not rendered unconstitutional because of their applicability to the property interests of innocents . . . ."44 Indeed, much of the *Pearson* opinion is a history of the law of deodand, common law forfeiture in England, and a summary of early cases which introduced this feature into American law.45

Perhaps reluctant to strike down a practice legitimized by time, the Court decided the case on a narrow ground. Justice Brennan placed much emphasis on the fact that the yacht company had "voluntarily entrusted" the boat to the lessee, thereby ignoring the obvious fact that Pearson was in the business of renting pleasure craft.46 The majority also found it significant that "no allegation

43 There are three parts to the *Pearson* decision. In the first part, in which the Court held that a direct appeal was proper from the three-judge district court under 18 U.S.C. § 1253 (1970), the vote was unanimous. Justice Douglas was the lone dissenter from the second part in which the majority determined that due process did not require the Commonwealth to provide notice and a hearing before the seizure of the boat. Justice Stewart joined the Douglas dissent in the third portion of the Court's opinion, which held that the seizure of the yacht was not an unconstitutional taking of property without just compensation. Justice White, who joined the majority opinion, wrote a short concurring opinion in which Justice Powell joined.
44 136 U.S. at 680.
45 Id. at 680-88. See note 9 infra.
46 Id. at 690.
has been made or proof offered that the company did all that it reasonably could to avoid having its property put to an unlawful use." In short, the Court evaded the constitutional question by suggesting that the yacht company had negligently rented the boat; therefore, under no circumstances was it entitled to relief. In this manner the majority did not reach the issue of whether the fifth and fourteenth amendments prohibited the forfeiture of property of innocent and non-negligent owners.

The Court's disposition of the case is significant in several respects even though it did not reach the constitutional issues. On the theoretical level, this opinion evidences a small, but important shift in the Supreme Court's position. In *Grant Co.* the Court had declared that forfeitures, no matter how unjust, are "too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced." However, following the lead of the *Coin and Currency* decision, the *Pearson* majority appeared to be ready to question the long line of cases holding that the innocence of the owner of seized property is without constitutional significance. The Court intimated that under some fact situations it might be ready to relieve blameless parties from "unduly oppressive" confiscations.

Justice Brennan also suggested a test to measure the conduct of property owners in future cases. To be eligible for the return of seized belongings, the individual could not, of course, be aware of or involved in the criminal activity that led to the confiscation. Furthermore, such a person would have to prove "that he had done all that reasonably could be expected to prevent the proscribed use of his property."

Despite the use of the word "reasonably," the Supreme Court's standard of care appears to be a very strict one. The three-judge district court noted that the rental agreement between the yacht company and the lessee had a clause which specifically prohibited any illegal use of the boat. And after hearing all the evidence, the

47 *Id. See note 54 infra.*
49 *See* notes 9, 12, and 14 *supra.*
50 416 U.S. at 689-90. The majority implied that it might be "unduly oppressive" for a state to confiscate property which had been taken from its owner "without his privity or consent." *Id.* at 689.
51 *Id.* at 689.
52 363 F. Supp. at 1340. In order to enforce this provision, the lease further provided that forfeiture of the boat would neither discharge nor diminish the obligation of the lessee to pay rent. A copy of the rental agreement may be found in Appendix C of the Appellants' Jurisdictional Statement submitted to the Supreme Court in this case.
lower court concluded that Pearson was totally unaware that its craft was being put to illegal use and therefore was "completely innocent of the lessee's criminal act." Given these findings, it is unclear what additional precautions the yacht company should have taken to meet the majority's standard. In light of Brennan's observation that the record was barren as to Pearson's conduct, it would have been logical for the Court to have remanded the case for further findings of fact, as Justice Douglas proposed in his dissent.

In this short but strong dissent, Douglas did not dispute the Court's contention that under some circumstances the state has the right to confiscate the property of innocent parties. He stated, however, that "traditional forfeiture doctrine cannot at times be reconciled with the requirements of the Fifth Amendment." In contrast, Justice Brennan would only hint that there was a possibility of constitutional violation in some cases.

Justice Douglas would subject owners to a more permissive standard of care in the transfer of their property. Under his test, a person would be entitled to relief as long as he or she was "in no way implicated in the illegal project." This formulation is differ-

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53 363 F. Supp. at 1340.
54 It would have been very difficult for the yacht company to have monitored the use of its leased craft since all of its rentals were long term—three to seven years. Letter from J. J. Serota, Vice President and General Counsel, Grumman Allied Industries, Inc., to author, Jan. 23, 1975 (on file at the Cornell Law Review). In this case, the lease was for a five-year period. Id. Although the agreement was couched in lease terms, the transaction was in substance a sale. The "lessee" would "rent" the boat over a period of time, at the end of which he would receive a bill of sale for $2.50. According to Pearson, there "never existed any real possibility of reverter to the lessor." Not surprisingly, this type of transaction gave the yacht company virtually no opportunity to supervise the use of its craft. Id.

Possibly, Justice Brennan thought that Pearson should have required the lessee to post a bond to assure that there would be no illegal use of the boat. But such a practice could have an adverse effect on the company's business. In any event, the strict standard of care suggested by the Court could make it very hard for anyone with a criminal history to borrow money or property. Lending to an individual with a record of convictions might be regarded as an indication that the lender did not exercise the required caution. In other words, a court could find that lending money to a felon is a careless act which makes the creditor ineligible for the return of seized property which constituted security. Cf. United States v. One 1967 Ford Mustang, 457 F.2d 931, 932 (9th Cir. 1972); 21 KAN. L. REV. 235, 247 (1973).

55 416 U.S. at 694 (Douglas, J., dissenting). On this point Justice Douglas wrote that he would remand the case to the three-judge district court for findings as to the innocence of the lessor of the yacht—with whether the illegal use was of such magnitude or notoriety that the owner cannot be found faultless in remaining ignorant of its occurrence.

Id.
56 Id. at 693.
57 Id. at 688-90. See note 50 and accompanying text supra.
58 Id. at 694.
ent from the majority's since it does not require the owner actively to take steps to prevent illegal use of property.

In any case, Justice Douglas would search more closely than the majority to find a constitutional violation, especially in cases of "extreme hardship" where "harsh judge-made law should be tempered with justice." To Douglas, Pearson was such a case, and it is clear that on the facts presented to the Court he would have returned the boat to the company.

III

THE REVENUE ASPECT OF FORFEITURES

Perhaps the Court's decision to uphold the constitutionality of the forfeiture in the Pearson case can best be explained by the majority's unwillingness to hamper effective law enforcement. Justice Brennan characterized forfeiture statutes as serving "legitimate governmental interests" because they prevent further unlawful use of property and render illegal behavior unprofitable "by imposing an economic penalty." And according to the Court, the confiscation of the belongings of lessors, bailors, and secured creditors "may have the desirable effect of inducing them to exercise greater care in transferring possession of their property."

Some observers have blamed the Warren Court for the explosive growth in the nation's crime. Senator McClellan of Arkansas, for example, voiced this sentiment in a speech before the Senate. Since that time, changes in the composition of the Court, and possibly the criticism of political leaders, appear to have caused the Court to subordinate the rights of criminal defendants to the power of the state to fight lawlessness.

It is important to note that none of these reasons would support the forfeiture in the instant case, since neither the lessee nor the lessor was engaged in smuggling.

It has been the experience of our enforcement officers that the best way to strike at commercialized crime is through the pocketbooks of the criminals who engage in it. By decreasing the profits which make illicit activity of this type possible, crime itself can also be decreased. Vessels, vehicles, and aircraft may be termed "the operating tools" of dope peddlers, counterfeiters, and gangsters. They represent tangible major capital investments to criminals whose liquid assets, if any, are frequently not accessible to the Government.

It is important that none of these reasons would support the forfeiture in the instant case, since neither the lessee nor the lessor was engaged in smuggling.

The report also noted that "if such means of transportation are not forfeited, they will be readily available for future violations." Id. at 3.

Yet the majority opinion did not explain why this legitimate state interest is so powerful that it can insulate forfeiture enactments from constitutional attack. As the Court noted, seizures are often used by governments to raise revenue.\(^{64}\) In its amicus brief in *Pearson*, the United States defended such laws because they "help to compensate the government for the cost of apprehending law violators."\(^{65}\) This justification of forfeiture laws has even been adopted by the Supreme Court. In *One Lot Emerald Cut Stones v. United States*,\(^{66}\) the opinion noted that seizures serve to reimburse governments for investigation and enforcement expenses.\(^{67}\)

The *Pearson* case itself illustrates the revenue-producing aspect of confiscations. Originally, the Commonwealth intended to sell the *Parranda* at an auction to raise money for the public treasury. However, the authorities later decided to retain the pleasure craft for "official use."\(^{68}\) In light of the actual facts of the case, therefore,

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\(^{64}\) 416 U.S. at 687-88 n.26.


\(^{67}\) Id. at 237. See *Helvering v. Mitchell*, 303 U.S. 391, 401 (1938).

\(^{68}\) 363 F. Supp. at 1340 n.9.

The Puerto Rican authorities were going to sell the *Parranda*. Letter from J. J. Serota, Vice President and General Counsel, Grumman Allied Industries, Inc., to author, Jan. 23, 1975 (on file at the *Cornell Law Review*). However, a vacationing Pearson Yacht dealer saw the legal notice of the auction and called Grumman's office in New York. *Id.* Pearson's attorneys in San Juan immediately sought and received a restraining order enjoining the sale. *Id.* The three-judge district court, on the other hand, found that Grumman learned of the seizure after the lessee defaulted on the rental payments. 363 F. Supp. at 1340.
Puerto Rico's assertion that "no property is being taken 'for public use'" does not withstand scrutiny.

It is precisely this type of governmental abuse, so clearly demonstrated in the instant case, that the fifth amendment was designed to guard against. As the Supreme Court said in *Armstrong v. United States*,

> [t]he Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.

Of course, a violation of the just-compensation clause is all the more offensive and unjust when the state seizes the belongings of innocent people.

In light of such a questionable practice, it is surprising that this aspect of the fifth amendment issue was neither briefed nor argued by the yacht company. Indeed, it is hard to imagine a clearer case of taking property without just compensation than the public use of seizures to collect revenue.

IV

THE NATURE OF FORFEITURE PROCEEDINGS

The law of forfeitures before the *Pearson* case was characterized by conflicting decisions. The Supreme Court, however, did little to correct this situation, although it had the opportunity to do so. The Brennan opinion unfortunately did not attempt to harmonize apparently conflicting precedents or overrule those which were inconsistent with *Pearson*.

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71 Id. at 49.
The most noticeable shortcoming in the majority opinion is the failure to decide, or even to clarify, the character of forfeiture proceedings. It was once well-settled that such actions were civil in nature so that the guilt of the owner need not be considered, as it must in criminal proceedings. The state, resorting to the legal fiction that inanimate objects were capable of wrongdoing, proceeded against the property itself and not the owner. Many cases, therefore, hold that the owner's innocence is immaterial.

However, a respectable minority of courts have done much to undermine this traditional theory. Three Supreme Court cases, for example, have declared that even though forfeiture actions are technically civil in form, they are criminal in substance and effect. One lower federal court even went so far as to explicitly discard the fiction that cars and boats can be just as guilty of crimes as men and women. In *McKeehan v. United States*, the Sixth Circuit concluded that the outcome of forfeiture contests may be determined with reference to the owner's guilt or innocence.

The Supreme Court, however, declined the opportunity to decide whether such proceedings are civil or criminal. Justice Brennan's opinion did not even criticize, much less overrule, *McKeehan*, which would appear to be in conflict with *Pearson*, and which was relied upon by the district court below.

The *Pearson* majority also did not comment upon those cases creating safeguards for property owners in forfeiture contests which were once thought to be limited to criminal proceedings. In

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75 See note 12 supra.
76 J. W. Goldsmith, Jr.—Grant Co. v. United States, 254 U.S. 505 (1921), is the leading case on this point. See notes 10-14 and accompanying text supra.

If only the "guilt" of the property is before the court, the state need not convict a person of a crime before it confiscates the property. In *Van Oster v. Kansas*, 272 U.S. 465 (1926), the purchaser of an automobile agreed to let the vendor use the vehicle as partial consideration for the sale. The state then charged that the vendor's employee, Brown, had used the car to transport illegal liquor. After trial, Kansas confiscated the automobile, but soon thereafter Brown was acquitted on all counts. The Supreme Court held that the forfeiture of the car was constitutional even though the state failed to prove that anyone was guilty or even that a crime had occurred at all. For cases which hold that a criminal conviction is not a prerequisite to a forfeiture, see *United States v. One 1965 Buick*, 397 F.2d 782 (6th Cir. 1968); *United States v. One 1937 Model Ford Coach*, 57 F. Supp. 977, 978 (W.D.S.C. 1944). See Finkelstein, supra note 9. But see *United States v. United States Coin & Currency*, 401 U.S. 715 (1971).


79 See notes 82-84 and accompanying text infra.
80 Id. at 745. See notes 22-25 and accompanying text supra.
81 363 F. Supp. at 1341.
Boyd v. United States, 82 for example, the Supreme Court held that defendants in such actions could properly assert a fifth amendment privilege against self-incrimination. In another case, One 1958 Plymouth Sedan v. Pennsylvania, 83 the Court decided that the fourth and fourteenth amendments prohibited the introduction of illegally seized evidence in a forfeiture contest. Both cases have been followed in later decisions. 84 Since Pearson did not express its disapproval of these precedents, it is probable that lower courts will extend this protection as one way to avoid unjust confiscations.

Although Justice Brennan's opinion did not prevent judges from relieving innocent owners from harsh forfeitures, it also did not limit the authority of the state to forfeit property. In most instances governments may still proceed with impunity against the belongings of law-abiding people. Not surprisingly, law enforcement officials have sought to give forfeiture statutes the broadest possible scope. In Suhomlin v. United States, 85 the district court, in ordering the return of seized property, observed that under the Justice Department's interpretation of a revenue forfeiture law, 86 the government could seize all the business property of a sole proprietor who unintentionally underpaid his income taxes. 87 Given such a power, the Internal Revenue Service, or any other government agency, could circumvent legislative acts by confiscating property worth more than the appropriate statutory fines and penalties. 88

Unfortunately, governments have sought to exercise this power, as the Suhomlin court feared they would. In Commonwealth v. One 1970 Lincoln Automobile, 89 for example, the Supreme Court of Virginia upheld the confiscation of a vehicle valued at $8,700

82 116 U.S. 616 (1886). In this case the federal government charged that the defendants had imported 35 cases of plate glass without paying the required duties. In a forfeiture proceeding the United States ordered the defendants to produce their business records, which they did under protest. The Supreme Court, however, ruled that the defendants had a fourth and fifth amendment privilege to withhold their papers. Id. at 634-35.
84 The most notable are United States v. United States Coin & Currency, 401 U.S. 715 (1971), and McKeehan v. United States, 438 F.2d 739 (6th Cir. 1971).
87 345 F. Supp. at 655.
88 This possibility was also discussed in One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965), where the Court noted that the offender was liable for a maximum fine of $500 in a criminal proceeding, but subject to the loss of his car, valued at $1,000, in a civil action. Id. at 701. See note 83 supra.
89 212 Va. 597, 186 S.E.2d 279 (1972).
because the owner was found guilty of driving with a revoked license. Justice Brennan's proposed standard of care, however, would not have provided relief for the defendant in this case since he had committed an intentional, though seemingly minor, infraction. Nor would this test limit the power of governments to exact excessive forfeitures where there have been negligent violations of the law, such as those which occurred in *McKeehan* and *Suhomlin*. The harshness of some seizures, including the one in *1970 Lincoln Automobile*, has led to suggestions that such confiscations would constitute an "excessive fine" specifically prohibited by the eighth amendment. The *Pearson* majority, however, chose not to address this problem.

The ultimate impact of the *Pearson* decision, of course, remains to be seen. In the short run this case leaves the law of forfeitures in an unsatisfactory state. Later decisions will have to tackle the questions that Justice Brennan's opinion did not attempt to answer. Whatever its shortcomings, though, *Pearson* will have an important effect on the law in one respect. Even though it did not break new ground, this case is significant because it affirmed old and much criticized precedents and thereby reinforced the authority of the state as sovereign to confiscate property. Insofar as *Pearson* supports the power of government to seize the possessions of its citizens, the decision limits the scope of the fifth amendment's just-compensation clause.

V

THE DUE PROCESS ASPECT OF FORFEITURES

Aside from the constitutionality of forfeitures, the *Pearson* Court considered whether the fifth and fourteenth amendments

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90 The owner was also fined $100 and sentenced to ten days in jail (seven of which were suspended) for his offense. *Id.* at 598, 186 S.E.2d at 280.
91 See notes 23, 26, 27 and accompanying text supra.
92 In *Topeelman v. United States*, 263 F.2d 697 (4th Cir. 1959), the court remarked that while the Eighth Amendment has generally been thought to apply only to criminal cases . . . there would seem to be no basis in reason why a court could not invoke the Eighth Amendment, either specifically or by analogy, to prevent an abuse of the power of punishment though it be only manifested in a civil form. *Id.* at 700. See also 38 NOTRE DAME LAW. 727, 736 (1963); 51 TEXAS L. REV. 1411, 1417 (1973).
93 U.S. CONST. amend. VIII provides: "Excessive bail shall not be required, nor excessive fines imposed . . . ."
94 See notes 9, 10, and 14 supra.
95 The effect of forfeiture precedents on other areas of the law is discussed in *Finkelstein*, supra note 9.
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require notice and hearing before the seizure of property. On this issue attorneys for the yacht company relied principally upon *Fuentes v. Shevin*, which held unconstitutional as a denial of due process Florida and Pennsylvania statutes which allowed prejudgment summary seizure of chattels on a writ of replevin. Pearson argued that the Puerto Rican statutes, which provided for only post-seizure hearings, were likewise constitutionally inadequate. The three-judge district court agreed and declared the law unconstitutional on its face.

The Supreme Court, however, viewed the problem differently. The majority correctly pointed out that however broadly it may be interpreted, *Fuentes* did not require a preseizure hearing in every instance. According to that case there are “extraordinary situations” in which notice and a hearing may be postponed. But before the state may dispense with these procedural safeguards, certain criteria must be met: the seizure must be “directly necessary to secure an important governmental or general public interest” where there is a “special need for very prompt action.” In addition, the state must keep “strict control over its monopoly of legitimate force.” In other words, a governmental official who initiates the seizure must be responsible for determining, under a narrowly drawn statute, that such action is necessary and justifiable.

The *Pearson* majority then hastily explained that Puerto Rico's seizure of the *Parranda* satisfied this test. The Court's rationale, however, invites scrutiny. There is no doubt that the seizure of the craft was initiated by a proper official and it is at least arguable that confiscation serves an important governmental interest. But if the

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98 The *Pearson* Court also emphasized that *Fuentes* required that statutory procedures depriving debtors of their property must provide for hearings “at a meaningful time.” 416 U.S. at 678.
100 407 U.S. at 90. The Court in *Fuentes* observed that the Supreme Court has allowed immediate seizure in cases where it has been necessary to protect the public from bank failures, contaminated food and misbranded drugs, and to aid the government in the collection of taxes and in the prosecution of war. Id. at 91-92.
101 Id. at 91.
102 Id.
103 416 U.S. at 679-80.
actions of the Commonwealth authorities provide any indication, it is clear that there was no need for swift action in this case. As Justice Douglas pointed out in his dissent, there was an interval of over two months between the date the police discovered the marijuana and the date they seized the yacht.\footnote{104} If there was a need for "very prompt action" in this case, only the Supreme Court recognized it.

\textit{Pearson}, therefore, shows that the broad holding of \textit{Fuentes} can be undermined by the use of the "extraordinary situations" exception. If the majority was willing to fit the instant case under this loophole, then it appears likely that the Court will circumvent \textit{Fuentes} by enlarging this exception on a case-by-case basis. After \textit{Pearson}, \textit{Fuentes} offers less protection to the individual from the power of the state to seize property since it appears that the Court will not interpret this loophole narrowly, as some scholars had predicted.\footnote{105}

\textit{Pearson} is also significant because it sheds light upon the continued vitality of \textit{Fuentes} after \textit{Mitchell v. W. T. Grant Co.}\footnote{106} In \textit{Mitchell} a 5-4 majority sustained the constitutionality of a Louisiana sequestration law which resembled the replevin statute invalidated in \textit{Fuentes}. The statutes considered in these two cases were so similar that five Justices believed that the prior case had been overturned by the latter, although this conclusion was not incorporated in the majority opinion.\footnote{107}

Despite \textit{Mitchell}, Justice Brennan did not question the yacht company's contention that \textit{Fuentes} was controlling in \textit{Pearson}. Indeed, the majority opinion assumed that it was. The Court, however, merely determined that a preseizure hearing was unnecessary because the case came under a recognized exception.\footnote{108} In decid-

\footnote{104} Id. at 691 (Douglas, J., dissenting).


\footnote{106} 416 U.S. 600 (1974).

\footnote{107} In a dissenting opinion in which Justices Douglas and Marshall concurred, Justice Stewart wrote that \textit{Mitchell} "is constitutionally indistinguishable from \textit{Fuentes v. Shevin}, and the Court today has simply rejected the reasoning of that case and adopted instead the analysis of the \textit{Fuentes} dissent." 416 U.S. at 634. Justice Brennan noted that he was in agreement with the three other dissenters that \textit{Fuentes} was controlling in \textit{Mitchell}. Id. at 636.

Justice Powell, in a concurring opinion, stated that he thought that the "sweeping language" of \textit{Fuentes} was "overruled" by \textit{Mitchell} and implied that the prior case should have no applicability beyond its particular facts. \textit{Id.} at 623.


\footnote{108} 416 U.S. at 679-80.
ING Pearson in this manner, the Supreme Court in effect declared that all seizure cases would still have to be argued within the Fuentes framework.

The majority, of course, did not have to accept Fuentes as dispositive of Pearson. The Court, after all, could have determined that Mitchell had overruled Fuentes. On the other hand, the Pearson majority could have decided that Mitchell confined Fuentes to its facts so that the prior case had no relevance to forfeiture proceedings.

It would have come as no surprise if the Supreme Court had completely abandoned Fuentes, thereby continuing the due process retreat highlighted in Mitchell. If the majority had chosen to fashion a new rule applicable to all seizures made for the public benefit, there was certainly ample precedent for the Court to build upon. In Cafeteria Workers v. McElroy, for example, the Supreme Court declared that where there is a substantial countervailing purpose, "[t]he Fifth Amendment does not require a trial-type hearing in every conceivable case of government impairment of private interest." Another case, Phillips v. Commissioner,


This retreat seems to have been halted, at least momentarily, by the Court's decision in North Georgia Finishing, Inc. v. Di-Chem, Inc., 95 S. Ct. 719 (1975). In this case, the Court, by a 6-3 majority, struck down a Georgia garnishment statute which had "none of the saving characteristics" of the Louisiana sequestration law considered in Mitchell. Id. at 722. Justice Stewart was moved to quip, in the language of Mark Twain, "It is gratifying to note that my report of the demise of Fuentes v. Shevin . . . seems to have been greatly exaggerated." Id. at 723.

Although this decision will probably give Fuentes a new lease on life, it is significant that the Court did not rule that due process requires preseizure notice to the debtor when the state lends its judicial machinery to aid a creditor.

Such a rule could be applied to all seizures instituted by the state to secure "the public interest." In other words, in addition to forfeitures, it might include those seizures covered by the Fuentes "extraordinary situations" exception. See note 100 supra.

367 U.S. 886 (1961). Cafeteria Workers involved a short-order cook employed by a private concessionaire on a secret defense installation who lost her security clearance and her job. The Court held that the summary dismissal of the cook, without a hearing, did not offend the fifth amendment's due process clause.

Id. at 894. The Court also stated that consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.

Id. at 895.

283 U.S. 589 (1931). In this case the Commissioner of Internal Revenue assessed a
stated that “[w]here only property rights are involved, mere postponement of the judicial inquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of the liability is adequate.”

Both Cafeteria Workers and Phillips, however, could be distinguished from Pearson. Cafeteria Workers did not involve private property and rested upon national security considerations. Phillips, on the other hand, dealt with the special case of the collection of revenue and the use of administrative procedures. Despite these differences, the Pearson Court could have extended the rationale of these two cases and established new constitutional due process standards applicable specifically to public benefit confiscations. Had it done so, it would have obviated the need for governments to argue that their seizures fell within the Fuentes “extraordinary situations” exception.

The Pearson majority declined to adopt such a specific rule, however, and chose to retain the Fuentes framework. Yet Pearson emasculated that case by making the “extraordinary situations” exception very broad and flexible. The instant case, therefore, read in conjunction with Mitchell and other recent decisions, suggests that the Supreme Court will henceforth take a much more tolerant view of summary proceedings. Such a trend, of course, will substantially reduce the scope of procedural due process. How far the Court will go remains to be seen; but after Pearson, the direction seems clear.

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114 Id. at 596-97.

115 The United States suggested a similar argument. See Brief for United States as Amicus Curiae at 15-17, Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974).

116 See, e.g., Arnett v. Kennedy, 416 U.S. 134 (1974). In Arnett a federal employee in the Office of Economic Opportunity (OEO) was dismissed for allegedly making “recklessly false and defamatory statements” about his fellow workers. Id. at 137. The Supreme Court held that the OEO and Civil Service Commission post-termination hearing procedures satisfied fifth amendment due process requirements. See Freund, supra note 109, at 83-90.

117 In Fusari v. Steinberg, 95 S. Ct. 533 (1975), the Supreme Court had an opportunity to consider the impact of Pearson on procedures for the termination of state unemployment compensation benefits. Connecticut’s “seated interview” system allowed the state to cease payments to a recipient without a prior hearing other than an interview at the time of the denial of payments. The district court found that these procedures did not provide “minimal due process under the Fourteenth Amendment to the constitution” and, therefore, enjoined the state from denying benefits without “a constitutionally sufficient prior hearing.” Steinberg v. Fusari, 364 F. Supp. 922, 938 (D. Conn. 1973).

On appeal, the Supreme Court vacated the judgment of the district court and remanded the case. The opinion stated that “the possible length of wrongful deprivation” of
Conclusion

Pearson affirmed once again the state's traditional right to confiscate the property of its citizens. In this respect, it is just the most recent case in a line of decisions which goes back more than a hundred years. But as history has shown, the antiquity of the principle of forfeiture has not insulated it from constitutional attack. On the contrary, law-abiding individuals have continually complained of the injustices frequently wrought by forfeiture statutes.

The confiscation of innocent people's property is in fact a punishment, despite whatever legal fictions judges may rely upon to suggest that it is not. As the Supreme Court observed in Coin and Currency, "there is no difference between a man who 'forfeits' $8,674 . . . and a man who pays a 'criminal fine' of $8,674 as a result of the same course of conduct . . . ."118 As long as society believes that punishment should not be inflicted upon the blameless, forfeiture enactments will be challenged. Pearson, therefore, cannot be the last word on this subject.

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benefits is "a significant factor in assessing the sufficiency of the entire process." 95 S. Ct. at 540. The Court remanded the case to the district court for a consideration of the effect of new state procedures designed to shorten the appeals process, and thereby reduce the period during which benefits are withheld. The assessment of the effect of Pearson, therefore, must await a future decision of the Court. See also Crow v. California Dep't of Human Resources Dev., 490 F.2d 580 (9th Cir. 1973), cert. granted, 95 S. Ct. 1110 (1975).

118 402 U.S. at 718.