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Recommended Citation

James R. Maxeiner, *Bane of American Forfeiture Law Banished at Last*, 62 Cornell L. Rev. 768 (1977)
Available at: <http://scholarship.law.cornell.edu/clr/vol62/iss4/5>

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BANE OF AMERICAN FORFEITURE LAW— BANISHED AT LAST?

Forfeiture statutes impose upon law-abiding citizens a degree of vicarious liability otherwise unknown in American law. Under the conventional view, forfeiture is a civil sanction imposed in an in rem proceeding against “guilty” property rather than against the owner. Theoretically, the owner is not punished because the forfeiture is directed against the property. The rationale is that the property has “offended” and can be condemned regardless of the owner’s actions;¹ no suit need ever be brought against the owner, who may, in fact, be innocent of any wrongdoing.²

Courts have repeatedly upheld the constitutionality of forfeiture statutes.³ In *United States v. United States Coin & Currency*,⁴ the Supreme Court justified the broad sweep of vicarious liability under these statutes:

[C]enturies of history support the Government’s claim that forfeiture statutes similar to this one have an extraordinarily broad scope. . . . Simply put, the theory has been that if the object is “guilty,” it should be held forfeit. In the words of a medieval English writer, “Where a man killeth another with the sword of John at Stile, the sword shall be forfeit as deodand, and yet no default is in the owner.”⁵

In 1970 Congress took a new approach to forfeiture by enacting two criminal control statutes⁶ that sanction the imposition of forfeiture in criminal prosecutions, rather than in traditional in rem suits. The Federal Rules of Criminal Procedure were subsequently amended in 1972 to make possible such “criminal

¹ In this Note, the concept of “offending” property is referred to as the “personification fiction.”

² Thus, one mother lost her car under a narcotics forfeiture statute when her son unwittingly transported a passenger who was carrying one-thirtieth of an ounce of contraband marijuana. *United States v. One 1957 Oldsmobile Auto.*, 256 F.2d 931 (5th Cir. 1958).

³ See, e.g., *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974) (noted in 60 CORNELL L. REV. 467 (1975)).

⁴ 401 U.S. 715 (1971).

⁵ *Id.* at 719-20 (footnote omitted).

⁶ Organized Crime Control Act, 18 U.S.C. § 1963 (1970); Comprehensive Drug Prevention and Control Act, 21 U.S.C. § 848(a)(2) (1970). The two statutes mandate forfeiture of certain illegal interests held by organized crime in commercial enterprises.

forfeitures."⁷ Prior to that time, the Rules had excluded all forfeitures from their scope in accord with the conventional view that forfeiture was necessarily civil and in rem.⁸

The effect of the Federal Rules amendments on pre-1970 forfeiture statutes is, as yet, unresolved. But in *United States v. Hall*,⁹ the Ninth Circuit Court of Appeals held that the amendments applied to a pre-1970 forfeiture statute and dismissed an indictment on the ground that the failure to provide mandatory notice¹⁰ deprived the defendant of the opportunity to defend against the forfeiture.¹¹ The United States Department of Justice contends that *Hall* was wrongly decided.¹² It argues that the new amendments do not affect preamendment forfeiture statutes, which the Department characterizes as "civil."¹³ A possible revolution in the law of forfeiture and the applicability of constitutional guarantees to forfeiture proceedings turns upon the outcome of this conflict.

This Note analyzes the history of forfeiture, both in England and in the United States, and attempts to reconcile the divergent views on the effect of the 1972 Federal Rules amendments. A framework for future resolution of the conflict is suggested.¹⁴

⁷ FED. R. CRIM. P. 7(c)(2), 31(e), 32(b)(2), 54(b)(5).

⁸ See notes 148, 160-64 and accompanying text *infra*.

⁹ 521 F.2d 406 (9th Cir. 1975). The facts in *Hall* are set forth in notes 149-54 and accompanying text *infra*.

¹⁰ FED. R. CRIM. P. 7(c)(2).

¹¹ 521 F.2d at 408. See notes 155-59 and accompanying text *infra*. Cf. *Neal v. Morse*, 134 Mich. 186, 96 N.W. 14 (1903) (notice to defendant required when question of forfeiture to be tried in suit for violation of fish and game statute).

¹² Department of Justice Memo No. 828 to all United States Attorneys in the Ninth Circuit (Mar. 23, 1976) (on file at the *Cornell Law Review*), citing S. REP. NO. 617, 91st Cong., 1st Sess. 79 (1969).

¹³ *Id.*

¹⁴ See text accompanying notes 160-67 *infra*.

Before starting analysis, it is necessary to explain the terminology to be used throughout this Note. The terms in personam and in rem are used in their usual sense. In personam refers to an action directed against a person that may result in personal liability, either civil or criminal. In rem refers to an action directed solely against property, in which the rights of all the world to that property are determined. However, the terms civil, criminal, penal, and remedial will be used in a specialized sense. Anglo-American law is traditionally divided into criminal and civil categories, but this division has never been perfect. Civil suits often impose punishment, such as civil penalties and punitive damages in tort suits. In this Note, the terms criminal and civil identify solely the mode of process. The terms penal, remedial, punitive, and regulatory are used to describe the character of the sanction imposed. Traditionally, remedial sanctions corresponded to compensation. Any legal (*i.e.*, non-equitable) sanction that was not compensatory was therefore penal. Although penal still denotes punishment, remedial no longer refers solely to compensation. When the government is the plaintiff, a sanction may be considered remedial if it protects or promotes a governmental function, even though the government has suffered no actual injury. Thus, today a suit may have both penal and remedial aspects.

I

FORFEITURE IN ENGLAND AND THE AMERICAN
COLONIES BEFORE 1776

Forfeiture of property is one of the oldest sanctions of Anglo-American law, originating with the beginnings of public wrongs during the Anglo-Saxon period.¹⁵ Early English law distinguished between three types of forfeiture—forfeiture consequent to attainder,¹⁶ statutory forfeiture,¹⁷ and deodand.¹⁸ The oldest and best known was forfeiture consequent to attainder, which inflicted on felons and traitors the complete forfeiture of all real and personal property. The forfeiture was not part of the sentence, but followed as a consequence of conviction for felony or treason and judgment of legal death.¹⁹ Statutes also imposed lesser forfeitures for lesser violations, ranging from forfeiture of a specific piece of property, to forfeiture of all personal property.²⁰ The exact property forfeit was specified in the sentence of judgment. Finally, the common law imposed forfeiture of the instrument of a man's death, known as deodand.²¹ Today deodands are spoken of as the spiritual predecessors of forfeiture statutes,²² but evidence suggests

In this Note, penal refers to punishment, whether imposed in a civil or criminal action. Remedial, on the other hand, is used in the modern sense discussed above, except where the context indicates otherwise. Punitive refers to a primarily penal suit that requires a showing of criminal or moral guilt. Regulatory, on the other hand, refers to a primarily remedial suit. See generally Clark, *Civil and Criminal Penalties and Forfeitures: A Framework for Constitutional Analysis*, 60 MINN. L. REV. 379 (1976).

¹⁵ E.g., Laws of Ine, c. 6 (circa 688-695), collected in I F. LIEBERMANN, *DIE GESETZE DER ANGELSACHSEN* 91 (1903). See generally T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 442-62 (5th ed. 1956); 2 F. POLLACK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 462-511 (2d ed. 1911).

¹⁶ See text accompanying notes 32-38 *infra*.

¹⁷ See text accompanying notes 40-44 *infra*.

¹⁸ See text accompanying notes 24-31 *infra*.

¹⁹ See *Commonwealth v. Pennock*, 3 Serg. & Rawl. 199 (Pa. 1817); 4 W. BLACKSTONE, *COMMENTARIES* *386. See generally *id.* at *380-89; 1 M. HALE, *THE HISTORY OF THE PLEAS OF THE CROWN* 239-57, 341-70 (1st Am. ed. Philadelphia 1847) (1st ed. London 1736); 2 W. HAWKINS, *A TREATISE OF THE PLEAS OF THE CROWN* 637-49 (8th ed. London 1824) (1st ed. London 1716-21). Forfeiture of personalty followed conviction, while realty was forfeited only after attainder, that is, judgment. In this Note, the several forms are treated together as forfeiture consequent to attainder.

²⁰ See notes 40-44 and accompanying text *infra*.

²¹ See notes 24-31 and accompanying text *infra*.

²² See *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 680-83 (1974). Holmes once tried to show that the maritime lien originated in the principle of deodand. O. HOLMES, *THE COMMON LAW* 23-34 (1881). His reconstruction has been correctly termed "flimsy[ly]," resting upon scholarship that is "ingenuous rather than solid." G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY* 484 (1957). Gilmore and Black suggest that Holmes did not adhere to the personification fiction while on the Supreme Court. *Id.* at 503-04.

that when actually imposed they were considered atypical.²³

A. *Deodand*

In the early middle ages deodands may have served as an alternative to the blood feud of early justice—the instrument of death replacing the slayer's kin as the object of vengeance.²⁴ Throughout the later middle ages, deodands were one of many prerogatives of the English kings, providing a small but steady source of income. The principle underlying deodand was *sui generis* and did not extend to other areas of forfeiture law. English forfeiture statutes did not rest upon analogy to deodand;²⁵ indeed, attempts to raise the analogy were specifically rejected. In 1766, in a case before the Court of the Exchequer, the Crown argued that deodand represented a general principle of forfeiture law.²⁶ Chief Baron Parker rejected the argument, citing Chief Justice Vaughn for the proposition that “goods as goods, cannot offend, forfeit, unlade, pay duties, or the like, but [only] men whose goods they

Nevertheless, the Supreme Court has cited Holmes for the contention that deodands are the forerunners of modern forfeiture statutes. *United States v. United States Coin & Currency*, 401 U.S. 715, 720 (1971).

²³ See text accompanying notes 25-31 *infra*.

²⁴ The deodand was referred to as the dead man's malefactor or bane. 2 H. BRACTON, *ON THE LAWS AND CUSTOMS OF ENGLAND*, 328, 350 (Thorne trans. 1968). Maitland observed that the concept of deodand is not much different from the instinct to curse the chair over which one stumbles. 2 F. POLLOCK & F. MAITLAND, *supra* note 15, at 474. *Cf. United States v. One 6.5mm. Mannlicher-Carcano Military Rifle*, 250 F. Supp. 410 (N.D. Tex.), *rev'd sub nom. King v. United States*, 364 F.2d 235 (5th Cir. 1966) (forfeiture sought of rifle used to kill President Kennedy). See generally Finkelstein, *The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty*, 46 TEMP. L.Q. 169 (1973); *Law of Deodands*, 34 LAW MAGAZINE 188 (1845).

²⁵ Two Anglo-Saxon laws provided that if a lord compelled his slave to work on a festival day, the lord should be fined and the slave (the “guilty property”) should be set free. *Laws of Canute*, c. 45 (circa 1016-1035), and *Laws of Ine*, c.3 (circa 688-695), collected in 1 F. LIEBERMANN, *supra* note 15, at 342-45, 90-91. A fourteenth century law of the town of Cork explicitly provided that the penalty should be imposed “in such a way that the [violation] shall suffer the forfeiture.” 2 *Borough Customs* 174 (Selden Soc'y Vol. 21, 1906). See also 14 Hen. 6, c. 5 (1435).

The American fiction of “guilty property” originates not by analogy to deodand, but in decisions of the early nineteenth century. See notes 81-91 and accompanying text *infra*. The earliest American forfeiture cases do not show reliance on the fiction of guilty property. The cases are digested in L. DAY, *THE CONSTITUTIONALITY AND LEGALITY OF CONFISCATIONS IN FEE, UNDER ACT OF JULY 17, 1862*, at 60-68 (New Orleans 1870). The first case to introduce the fiction was a circuit decision by Justice Marshall, involving the admissibility of a master's statement in a forfeiture proceeding. *United States v. The Little Charles*, 26 F. Cas. 979, 982 (C.C.D. Va. 1818) (No. 15,612). See also G. GILMORE & C. BLACK, *supra* note 22, at 485, 503-04. The fiction has fallen into disrepute in admiralty. *Id.* at 510; see note 85 and accompanying text *infra*. See also *Continental Grain Co. v. Barge FBL-585*, 364 U.S. 19 (1960).

²⁶ *Mitchell qui tam v. Torup*, Parker 227, 145 Eng. Rep. 764 (Ex. 1766).

are.”²⁷ Thus, reliance upon deodand as a general forfeiture principle of early English law is probably misplaced. The only English authority cited as proof that deodand represents a general forfeiture principle is one sentence from St. German’s *Doctor & Student*²⁸ dialogues, published in 1530—the very John at Stile remark quoted by the Supreme Court.²⁹ But a careful reading of the sentence in context does not support that conclusion. The Student’s reference to deodand was not to illustrate a general principle of law that “guilty” property may be held forfeit.³⁰ Rather, the Student offered deodand as but one example of property being taken by law from an owner who was without fault. In any case, the Doctor, representing the viewpoint of the chancellor in equity, rejected the Student’s suggestion and insisted upon a better reason for taking property from its owner.³¹ The Student did not press the argument and quickly offered an alternate explanation.

B. *Vicarious Liability for Forfeiture Consequent to Attainder and Statutory Forfeiture*

Insofar as they imposed broad vicarious liability, deodands were out of character in the later middle ages. Anglo-American law has not lightly held one man responsible for the acts of another.³²

²⁷ *Id.* at 236, 145 Eng. Rep. at 767, citing *Sheppard v. Gosnold*, Vaughn 159, 172, 124 Eng. Rep. 1018, 1024 (C.P. 1673). Vaughn’s comment is quoted with approval in *Boyd v. United States*, 116 U.S. 616, 637 (1886).

²⁸ ST. GERMAN, *DOCTOR & STUDENT* 291 (Selden Soc’y Vol. 91, 1974).

²⁹ See note 5 and accompanying text *supra*.

³⁰ ST. GERMAN, *supra* note 28, at 291-92.

³¹ See text accompanying note 198 *infra* for an excerpt from the Doctor’s answer.

In the dialogues the Doctor generally represents the position of the canon law and the chancellor in equity, while the Student generally takes the position of the common law. W. HOLDSWORTH, *SOME MAKERS OF ENGLISH LAW* 95-97 (1938). See also Barton, *Introduction to ST. GERMAN*, *supra* note 28, at xlix. In this particular dialogue the Doctor sought to have the Student rationalize the medieval law of wreck and explain why the chancellor should not continue to interfere with the common law in order to protect blameless owners whose goods were seized.

³² As late as the seventeenth century, a master was civilly liable only for acts of his servant that were at his direct command or were afterwards ratified by him. T. PLUCKNETT, *supra* note 15, at 472-75. See also 3 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 371-88 (5th ed. 1942); 8 W. HOLDSWORTH, *supra*, at 472-82 (2d ed. 1937); 1 W. BLACKSTONE, *COMMENTARIES* *429-32. Vicarious criminal liability did not accompany the development of vicarious civil liability: “It is a point not to be disputed, but that in criminal cases the principal is not answerable for the act of the deputy, as he is in civil cases” *Rex v. Huggins*, 2 Strange 882, 885, 93 Eng. Rep. 915, 917 (C.P. 1730). See Sayre, *Criminal Responsibility for the Acts of Another*, 43 HARV. L. REV. 689, 700-01 (1930).

To this day, the master’s liability has almost always been limited to repairing the injury done by the servant; only rarely has the master been held criminally liable for his servant’s deeds without his own complicity or failure in a public duty. See *id.* at 723. The distinction

Forfeiture law, on the other hand, has often been the focus of attempts to expand vicarious liability. Forfeiture appealed to the English Crown both because forfeited estates of attainted traitors and felons added substantially to the Crown domain³³ and because statutory forfeitures were the principal means of tax enforcement.³⁴ As early as the fourteenth century, the Crown was able to expand the definition of an attainted's property to include goods held as bailee.³⁵ This early imposition of vicarious liability was halted by a provision in the Statute of Staples of 1353.³⁶ Thereafter, common-law forfeiture normally took only the interest the attainted traitor or felon had in the property.³⁷ But the vicarious aspect of attainder was not the harshest consequence to befall innocent third parties. Attainder of felony meant that children could not inherit the forfeited property of their attainted parents, but it also brought about corruption of the blood—*i.e.*, no descendant could ever trace a line of inheritance through the attainted

between compensation and punishment is an old one. *Compare* Leges Henrici Primi, c. 5, § 28b (circa 1100) (Downer trans. 1972), *with id.*, c. 88, § 6a.

In the past half century, however, American courts have allowed a degree of vicarious criminal liability largely in the area of food and drug regulation, by imposing on entirely innocent corporate officials "a duty to implement measures that will insure that violations will not occur." *United States v. Park*, 421 U.S. 658, 672 (1975). Awareness of wrongdoing is not necessary for conviction. *Id.* at 672-73. *See also* *United States v. Dotterweich*, 320 U.S. 277 (1942).

³³ *See* 1 T. MADOX, THE HISTORY AND ANTIQUITIES OF THE EXCHEQUER OF THE KINGS OF ENGLAND 295-302, 343-48 (2d ed. London 1769) (1st ed. London 1711); A. STEEL, THE RECEIPT OF THE EXCHEQUER 1377-1485, *passim* (1954).

³⁴ *See* Hale, *Concerning the Custom of Goods Imported and Exported*, in HARGRAVE'S LAW TRACTS 226-28 (Dublin 1787).

³⁵ T. PLUCKNETT, *supra* note 15, at 474.

³⁶ "No merchant or other person . . . shall lose or forfeit his goods or merchandise for any trespass or forfeiture incurred by his servant, unless his act is by the command and consent of his master . . ." 27 Edw. 3, C. 19 (1353) (translation in T. PLUCKNETT, *supra* note 15, at 474).

³⁷ Property held by an attainted as trustee, executor, administrator, or corporate officer was not forfeit. *See, e.g.*, *Hix v. Harrison*, 3 Bulstrode 210, 81 Eng. Rep. 177 (K.B. 1616) (opinion of Coke, C.J.). Generally the dower rights of an attainted's widow were lost. But her jointure—that is, property jointly enfeoffed to her and the attainted—was usually saved. 1 M. HALE, *supra* note 19, at 247-53.

Nevertheless, vicarious liability was still possible through the doctrine of relation back; forfeiture of real estate, but not chattels, related back to reach all property held by the attainted at the date of the offense, overcoming subsequent transfers to even bona fide purchasers. Blackstone explained that forfeiture of goods did not relate back because "chattels are of so vague and fluctuating a nature, that to affect them by any relation back would be attended with more inconvenience than in the case of landed estates . . ." 2 W. BLACKSTONE, COMMENTARIES *421. Justice Story thought that the relation back of real estate could only be explained by the "barbaric character" of an earlier time. *United States v. 1960 Bags of Coffee*, 12 U.S. (8 Cranch) 188, 198 (1814) (dissenting opinion). *See also* *Attorney General v. Weeks*, Bunbury 223, 145 Eng. Rep. 654 (Ex. 1726); note 74 *infra*.

ancestor. Largely because of attainder's harsh consequences for innocent descendants, common-law forfeiture quickly fell into disrepute in America.³⁸

Despite its failure to extend liability consequent to common-law attainder, the Crown was able to impose broader vicarious liability under certain forfeiture statutes relating to customs and shipping.³⁹ Under these acts, the misdeeds of the ship's master could subject the shipowner to forfeiture of his cargo and sometimes his ship. Although this liability was imposed by common-law courts, it was in keeping with contemporary trends in courts of maritime and merchant law. In most cases before the seventeenth century, only the goods on which duty had not been paid were forfeited.⁴⁰

In the mid-seventeenth century, Parliament enacted the Navigation Acts, the broadest of English forfeiture statutes.⁴¹ The Navigation Acts were the major component of English policy to promote national seapower. They required the shipping of most commodities in English built, owned, and manned vessels. Violation of the Acts resulted in forfeiture of both the illegally carried goods and the ship that transported them.⁴² The English courts construed these statutes so that the act of an individual seaman, undertaken without the knowledge of master or owner, could cause a forfeiture of the entire ship. Chief Baron Parker, speaking for the Court of Exchequer, explained:

These words [of the statute] are . . . negative, absolute, and prohibitory; . . . there is not a syllable that hints at the privity or consent of the master, mate or owners.

The reason of penning this clause in these strong terms is to prevent as much as possible its being evaded, for if the privity or consent of the master, mate or owners, had been made necessary to the forfeiture, it would have opened a door for perpetual evasion, and the provisions of this excellent act for the increase of the navigation would have been defeated.⁴³

³⁸ 2 J. KENT, COMMENTARIES ON AMERICAN LAW 317 (New York 1827). See notes 67-68 and accompanying text *infra*.

³⁹ See Hale, *supra* note 34, at 149-50.

⁴⁰ *Id.* at 150.

⁴¹ See L. HARPER, THE ENGLISH NAVIGATION LAWS: A SEVENTEENTH-CENTURY EXPERIMENT IN SOCIAL ENGINEERING 387-414 (1964) (digest of Acts).

⁴² *Id.* at 109.

⁴³ Mitchell *qui tam* v. Torup, Parker 227, 232-33, 145 Eng. Rep. 764, 766 (Ex. 1766). *Accord*, Idle *qui tam* v. Vanheck, Bunbury 230, 145 Eng. Rep. 657 (Ex. 1727). The customs statutes, on the other hand, were read restrictively to avoid imposing forfeitures in the absence of culpability. *E.g.*, Attorney General v. Flower, Bunbury 227, 145 Eng. Rep. 656

The court narrowed the effect of its holding by stating that a jury would be justified in finding no forfeiture, if the quantity of contraband was so small that the master could not have discovered it after a reasonable search.⁴⁴ Thus, under the Navigation Acts, forfeiture of a ship carrying contraband was required only if the owner or his carefully chosen master was implicated or negligent.

C. *Exchequer Forfeiture Procedure*

Forfeitures under the customs and navigation statutes were usually imposed in proceedings in the Exchequer, the court of the King's revenue. Suits in the Exchequer for forfeitures were commenced by civil information, either by a Crown attorney or by an individual suing *qui tam*;⁴⁵ they were either in personam or in rem depending upon the statute or seizure involved.⁴⁶ As the forfeiture was often the lesser punishment, it was common for the owner not to contest it for fear of further proceedings in personam. If the owner was available, the forfeiture evidently was imposed only upon confession or adjudication of his guilt, at least until the time of the Navigation Acts.⁴⁷

(Ex. 1726); Sheppard v. Gosnold, Vaughn 159, 124 Eng. Rep. 1018 (C.P. 1683); Reniger v. Fogassa, Plowden 1, 75 Eng. Rep. 1 (Exch. Ch. 1551).

⁴⁴ Mitchell *qui tam* v. Torup, Parker 227, 237-38, 145 Eng. Rep. 764, 767 (Ex. 1766). In so ruling, the court held that an old English principle, that an owner should not lose his ship for the carriage of a small amount of contraband without his knowledge, was applicable to the Navigation Acts. The doctrine dates at least from the statute, 38 Edw. 3, c. 8 (1363). The court modified the principle by holding that the privity of the master would suffice. See also Idle *qui tam* v. Vanheck, Bunbury 230, 145 Eng. Rep. 657 (Ex. 1727). See generally Hale, *supra* note 34, at 149-50. At one time the doctrine was approved in the United States. See Phile *qui tam* v. The Anna, 1 Dall. (1 U.S.) 187, 206 (C.P. Phila. County 1787). But today, "the smallness of the quantity of marihuana transported or concealed is not a basis for granting remission." United States v. One 1957 Oldsmobile Auto., 256 F.2d 931, 933 (5th Cir. 1958). See also United States v. One 1973 Dodge Van, 416 F. Supp. 43, 46 (E.D. Mich. 1976).

⁴⁵ An action *qui tam* is brought by an individual suing for himself and the state; it is also known as an informer's suit. 1 M. BACON, A NEW ABRIDGEMENT OF THE LAW, *Actions Qui Tam* 61 (6th ed. London 1807) (1st ed. London 1736).

⁴⁶ For the practice of the Court of Exchequer in forfeiture cases, see L. HARPER, *supra* note 42, at 111-12; E. HOON, THE ORGANIZATION OF THE ENGLISH CUSTOMS SYSTEM 1696-1786, at 277-80 (1968). For contemporary treatments, see "B.Y.," THE MODERN PRACTICE OF THE COURT OF EXCHEQUER (London 1731); G. GILBERT, A TREATISE ON THE COURT OF EXCHEQUER (London 1758); J. MANNING, THE PRACTICE OF THE COURT OF EXCHEQUER (London 1827). The Exchequer was one of the three common-law courts at Westminster.

The origin of the Exchequer's unusual in rem jurisdiction was probably in its exercise of the Crown's ancient prerogative over derelict property, wreck of the sea, waifs, and strays. It is not clear exactly when the Exchequer began to assert in rem jurisdiction over forfeitures. However, it must have been natural to extend jurisdiction to goods seized when the owner was unknown or had run off, since such goods could be considered derelict. 3 W. BLACKSTONE, COMMENTARIES *262; G. GILBERT, *supra*, at 180-82.

⁴⁷ See, e.g., the Case of Shipping Wools to Calais (1458), SELECT CASES IN THE

Circumstances of the seventeenth and eighteenth centuries favored greater use of the *in rem* action in the Exchequer at the expense of *in personam* proceedings. When suing *in rem*, an "informer"⁴⁸ could proceed alone without Crown interference. If no liability beyond the forfeiture was involved, the informer could negotiate a money settlement with the claimant-owner to avoid the expense of trial. The *in rem* action had the further advantage of placing the burden of proof on the claimant-owner to refute the forfeiture.⁴⁹ In contrast, when proceeding *in personam*, the informer had to prove the forfeiture by establishing that the carrying ship or its crew was not British. Shifting the burden of proof onto the claimant was particularly helpful as commerce grew more complicated and it became increasingly difficult to identify the owners and obtain jurisdiction over them.⁵⁰ Since the sanction for violation of the Navigation Acts was usually limited to forfeiture, the Acts further encouraged the trend toward the *in rem* action.⁵¹

D. *Adoption of Forfeiture in the American Colonies*

In the American colonies the criminal law did not automatically follow that of England; it depended on local adoption, except as Parliament specifically directed.⁵² As a result, the law of forfeiture varied substantially from colony to colony. For example, forfeiture consequent to attainder was largely abolished in Massachusetts,⁵³ in disuse in New York,⁵⁴ but fairly widely used in Pennsylvania⁵⁵

EXCHEQUER CHAMBER BEFORE ALL THE JUSTICES OF ENGLAND 144 (Selden Soc'y Vol. 51, 1933). There the court stated that, under the customs statute involved, the party suing *qui tam* "shall have a third [of the forfeiture], after [the offender] is duly attainted or confesses this in a court of record etc." *Id.*

⁴⁸ See note 45 *supra*.

⁴⁹ 12 Geo. 1, c. 28, § 8 (1725).

⁵⁰ See note 46 *supra*.

⁵¹ See *Mitchell qui tam v. Torup*, Parker 227, 236, 145 Eng. Rep. 764, 767 (Ex. 1766). In the colonies, forfeiture was usually the only penalty. REPORTS OF CASES IN THE VICE ADMIRALTY OF THE PROVINCE OF NEW YORK (1715-1788) 270 (Hough ed. 1925) [hereinafter cited as N.Y. V. Adm. Rep.].

⁵² Smith, *The English Criminal Law in Early America*, in J. SMITH & T. BARNES, THE ENGLISH LEGAL SYSTEM: CARRYOVER TO THE COLONIES 16-21, 41 (1975).

⁵³ In 1641 Massachusetts abolished all forfeitures, save those specifically imposed by statute. THE COLONIAL LAWS OF MASSACHUSETTS WITH SUPPLEMENTS 1660-72, at 35 (Whitmore ed. 1889); 5 N. DANE, A GENERAL ABRIDGEMENT AND DIGEST OF AMERICAN LAW 4 (1824).

⁵⁴ In New York juries simply found nothing to forfeit. J. GOEBEL & T. NAUGHTON, LAW ENFORCEMENT IN COLONIAL NEW YORK 712-13, 716 (1944). See also 2 J. KENT, *supra* note 38, at 318.

⁵⁵ Pennsylvania apparently used forfeiture consequent to attainder more widely than other colonies. See, e.g., Acts of Jan. 12, 1705-06, chs. 116, 120, 125, 2 Pa. Stats. 172, 178,

and Virginia.⁵⁶ However, no colony applied forfeiture consequent to attainder as severely as England. The acceptance of deodand is more difficult to assess.⁵⁷ In any case, the Crown did not insist on most forfeitures, perhaps because the proceeds would have gone to the colonial governments; it did, however, demand adherence to the Navigation Acts, which by their terms were applicable to the colonies.⁵⁸

Forfeiture proceedings brought in America under the Navigation Acts differed substantially from those in England.⁵⁹ Since the colonies had no exchequer courts (save one short-lived exception),⁶⁰ forfeiture suits were initially brought in other common-law courts.⁶¹ However, after the turn of the eighteenth century, most contested suits were brought in the newly-established vice admiralty courts.⁶² Owing to the distance from London and the closed nature of the British admiralty practice, American forfeiture suits followed neither the various Exchequer proceedings nor the admiralty in rem action, but were more of a personal action founded on foreign attachment.⁶³ The Crown preferred to sue in the vice admiralty courts, since it could thereby avoid the colonial jury of the common-law courts.⁶⁴ This practice was bitterly criticized by John Adams and other Americans, who objected to the denial of trial by

184 (H. Flanders & J. Mitchell eds. 1896). *See also* *Respublica v. Doan*, 1 Dall. (1 U.S.) 86 (Pa. 1784).

⁵⁶ For a discussion of Virginia's forfeiture law, see A. SCOTT, *CRIMINAL LAW IN COLONIAL VIRGINIA* 109 (1930). Some Virginia statutes forfeited the estate of an attainted, subject to a use in the survivors. Act of March 10, 1655, 1 Va. Stats. 397-98 (Hening ed. 1809); Act of October 18, 1784, 11 Va. Stats. 508 (Hening ed. 1809).

⁵⁷ Property was sometimes forfeited as deodand in New York. J. GOÉBEL & T. NAUGHTON, *supra* note 54, at 717. Pennsylvania evidently did not use deodand. S. PENNYPACKER, *PENNSYLVANIA COLONIAL CASES* 70 (1892).

⁵⁸ *See, e.g.*, 12 Car. 2, c. 18, cl. II (1660).

⁵⁹ *See generally* Wroth, *The Massachusetts Vice Admiralty Court and the Federal Admiralty Jurisdiction*, 6 AM. J. LEGAL HIST. 250 (1962).

⁶⁰ In 1685 New York established an Exchequer court that lasted a few years. 1 P. HAMLIN & C. BAKER, *SUPREME COURT OF JUDICATURE OF THE PROVINCE OF NEW YORK 1691-1704*, at 33-36 (1959). *See also* Surrency, *The Courts in the American Colonies*, 11 AM. J. LEGAL HIST. 253, 261 (1967).

⁶¹ Wroth, *supra* note 59, at 257-63. *See generally* H. CRUMP, *COLONIAL ADMIRALTY JURISDICTION IN THE SEVENTEENTH CENTURY* (1931); C. UBBELOHDE, *THE VICE-ADMIRALTY COURTS AND THE AMERICAN REVOLUTION* (1960). For examples of forfeitures brought under the Navigation Acts in common-law courts, see 1 *RECORDS OF THE COURT OF ASSISTANTS OF THE COLONY OF THE MASSACHUSETTS BAY 1630-1692*, at 149-50, 160, 170-71, 176-77, 209-10, 220, 342-44, 355-56, 366 (J. Noble ed. 1901); *SELECT CASES OF THE MAYOR'S COURT OF NEW YORK CITY 1674-1784*, at 566-648 (R. Morris ed. 1935).

⁶² H. CRUMP, *supra* note 61, at 35.

⁶³ Wroth, *supra* note 59, at 265-67. Such an in personam action is inconsistent with the personification fiction, which views the property as the "guilty" object. *See* notes 89-92 and accompanying text *infra*.

⁶⁴ Wroth, *supra* note 59, at 257-58.

jury ordinarily given in Exchequer forfeiture suits.⁶⁵ Although the colonists may have been denied the benefit of a jury, the much maligned American vice admiralty courts were themselves reluctant to impose forfeitures absent culpability. When the Crown failed to show fraud, the colonial vice admiralty courts often denied the forfeiture, despite proof of technical violations.⁶⁶ In 1773 the Massachusetts Vice Admiralty Court refused to order the forfeiture of cargo of an innocent shipper for the unlawful acts of the owner of the ship in which the goods were sent, explaining:

The wisdom or justice of parliament ought never to be so impeached, as to suppose that, for the omission of an Owner, the innocent [shipper] who could not, in the nature of things, be privy to it, should suffer perhaps to his total ruin. Such a doctrine if once established, I imagine, would be very destructive to trade and Commerce, and therefore instead of promoting the Public interest, would have a quite contrary effect.⁶⁷

⁶⁵ See e.g., *Advocate General v. Hancock*, Quincy 457, 460 (Mass. V. Adm. 1769); 2 LEGAL PAPERS OF JOHN ADAMS 194, 200 (L. Wroth & H. Zobel eds. 1965). Despite this criticism of nonjury trials, the United States Supreme Court in 1769 decided that an action cognizable in the English Exchequer could be properly tried without a jury in an American admiralty court, when founded upon a seizure made within the admiralty jurisdiction. *United States v. La Vengeance*, 3 U.S. (3 Dall.) 297 (1796). Chancellor Kent criticized the decision and expressed doubt that it had been "sufficiently considered." 1 J. KENT, *supra* note 38, at 351.

Juries deciding forfeiture cases have tended to mitigate the sanction, often by requiring culpability. See, e.g., 1 W. BLACKSTONE, COMMENTARIES *302; S. DOC. NO. 683, 60th Cong., 2d Sess. 81-82, 84 (1908). Today there is no constitutional right to trial by jury, even in forfeitures incurred outside the admiralty jurisdiction. *Van Oster v. Kansas*, 272 U.S. 465, 469 (1926).

⁶⁶ For example, in 1740 the New York Vice Admiralty Court denied forfeiture of a ship because it found that the failure to have a proper registration paper was "wholly owing to the forgetfulness of the master who was part Owner thereof and without any Design or Intention of fraud." *Kennedy qui tam v. The Silvia*, N.Y. V. Adm. Rep. 18 (1740). In another case, the same court was so lenient toward the American owners that the customs officials appealed to the High Court of Admiralty in London, the only such appeal ever taken. *Brown qui tam v. The New York*, N.Y. V. Adm. Rep. 215 (1764), *rev'd in part sub nom. Brown v. Kenyon*, Burrell (Marsden ed.) 30, 167 Eng. Rep. 457 (Adm. 1767). In 1750 this New York court held that the landing of goods occasioned by a shipwreck should not be considered an "importation" in violation of a customs statute. *Kennedy qui tam v. 96 Pc^s of Sail Cloth*, N.Y. V. Adm. Rep. 64, 65-66 (1750). More recently, the First Circuit Court of Appeals refused to read into a customs statute a "highly technical" meaning and upheld a forfeiture incurred when a foreign diamond dealer's commercial airline flight was temporarily diverted to the United States in bad weather. *Leiser v. United States*, 234 F.2d 648, 649 (1st Cir.), *cert. denied*, 352 U.S. 893 (1956).

⁶⁷ *Dawson v. The Dolphin* (Mass. V. Adm. 1773), in 2 LEGAL PAPERS OF JOHN ADAMS, *supra* note 65, at 232. See also *In re One 1965 Ford Mustang*, 105 Ariz. 293, 299-300, 463 P.2d 827, 833-34 (1970).

II

FORFEITURE LAW IN THE UNITED STATES

Forfeiture consequent to attainder fell into disrepute in colonial America and did not survive long in the new republic. It deprived innocent heirs of their rightful inheritance, and it too easily dispensed with judicial findings of guilt.⁶⁸ Accordingly, the Constitution forbade bills of attainder of any kind,⁶⁹ as well as corruption of the blood and forfeiture of estate for treason, except during the life of the person attainted.⁷⁰ Moreover, in the Act of April 30, 1790, the first Congress abolished forfeiture of estate and corruption of the blood for felony.⁷¹ A number of states took similar actions.⁷²

While forfeiture as a consequence of conviction rapidly fell into disuse, forfeitures of specific property continued to be imposed by statute in the same manner as fines and penalties. These forfeitures were imposed in both criminal and civil proceedings and could be either in rem or in personam. Classifying the forfeiture was often difficult.⁷³ Statutory interpretation determined

⁶⁸ See 1 J. BISHOP, CRIMINAL LAW § 643 (2d ed. Boston 1858) (1st ed. Boston 1856-58); 2 J. KENT, *supra* note 38, at 317-18. Another important reason for the disappearance of forfeiture consequent to attainder was the desire to end all vestiges of the feudal era. See 5 N. DANE, *supra* note 53, at 35. Pragmatic considerations also played a part. See J. GOEBEL & T. NAUGHTON, *supra* note 54, at 716-17. See also note 38 and accompanying text *supra*.

⁶⁹ U.S. CONST. art. 1, § 9, cl. 3.

⁷⁰ U.S. CONST. art. III, § 3, cl. 2.

⁷¹ 1 Stat. 117, c. 9, § 24 (now 18 U.S.C. § 3563 (1970)).

⁷² See 2 J. KENT, *supra* note 38, at 318.

⁷³ A. CONKLING, TREATISE ON THE ORGANIZATION, JURISDICTION, AND PRACTICE OF THE COURTS OF THE UNITED STATES 159 (Albany 1831). The Justice Department contends that no forfeiture has been imposed in a criminal prosecution since 1790 (Justice Dep't Memo No. 828, *supra* note 12), overlooking a leading federal case holding that forfeiture under an embargo statute had to be imposed in a criminal action. *United States v. Mann*, 26 F. Cas. 1153, 1155 (C.C.D.N.H. 1812) (No. 15,718) (Story, J.). Some of the more important federal cases discussing imposition of forfeiture in a criminal prosecution include *Origet v. United States*, 125 U.S. 240 (1888); *United States v. Three Tons of Coal*, 28 F. Cas. 149, 153-54 (E.D. Wis. 1875) (No. 16,515); *The Amy Warwick*, 1 F. Cas. 808, 811 (D. Mass. 1862) (No. 342), *aff'd sub nom. The Prize Cases*, 67 U.S. (2 Black) 635 (1863); *Greene v. Briggs*, 10 F. Cas. 1135 (C.C.D.R.I. 1852) (No. 5,764). Other relevant federal cases include *Mugler v. Kansas*, 123 U.S. 623, 675 (1887) (dissenting opinion, Field, J.); *United States v. Claffin*, 97 U.S. 546 (1878); *The Harbour Trader*, 42 F.2d 858 (2d Cir. 1930); *United States v. Mynderse*, 27 F. Cas. 50 (C.C.N.D.N.Y. 1870) (No. 15,850); 17 Op. Atty Gen. 282 (1882).

Although many states have statutory or constitutional provisions similar to the 1790 Act (see, e.g., 2 J. KENT, *supra* note 38, at 318), the following cases allow the imposition of a forfeiture in a criminal prosecution: *Rubino v. State*, 391 P.2d 946 (Alaska 1964); *People v. Treadway*, 55 Cal. App. 3d 15, 127 Cal. Rptr. 306 (1975); *Boles v. Lynde*, 1 Root 195

which proceeding was appropriate, and also whether the government's interest attached at the time of condemnation, seizure, or commission of the offense. The established rule was "[t]hat in the absence of any express terms in the statute declaring an instantaneous forfeiture, the forfeiture relates to the time of seizure only."⁷⁴ It was considered impermissible for the government's title to vest, absent a judicial proceeding.⁷⁵

The usual forfeiture proceeding in the federal courts was in rem,⁷⁶ since federal forfeiture statutes were largely patterned on the English navigation and customs statutes, violations of which were cognizable in the Exchequer.⁷⁷ American judges were even more reluctant than their English counterparts to impose liability

(Conn. 1790); *Armbruster v. Behan*, 3 Orl. App. 184 (La. App. 1906) (prior cases reviewed); *State v. Adams*, 78 Me. 486, 7 A. 267 (1886); *Commonwealth v. Certain Intoxicating Liquors*, 80 Mass. (14 Gray) 375 (1860); *Fisher v. McGirr*, 67 Mass. (1 Gray) 1 (1854); *Neal v. Morse*, 134 Mich. 186, 96 N.W. 14 (1903); *City of Duluth v. Cervený*, 218 Minn. 511, 16 N.W.2d 779 (1944); *McConnell v. McKillip*, 71 Neb. 712, 99 N.W. 505 (1904); *State v. McConnell*, 70 N.H. 158, 46 A. 458 (1900); *Woods v. Cottrell*, 55 W. Va. 476, 482, 47 S.E. 275, 278 (1904) (differences between common law and statutory criminal forfeitures discussed); *State v. Roggensack*, 15 Wis. 2d 625, 113 N.W.2d 389 (1962); *State v. Peterson*, 201 Wis. 20, 229 N.W. 48 (1930). The following state statutes direct or allow forfeitures in criminal proceedings: ME. REV. STAT. tit. 12, § 4508 (1974); MICH. STAT. ANN. §§ 27A.4801-4805 (1975); MINN. STAT. § 574.35 (1976); MO. REV. STAT. § 545.020 (1969); N.D. CENT. CODE § 32-14-01 (1975); TENN. CODE ANN. § 40.3206 (1976); VT. STAT. ANN. tit. 13, § 7171 (1974); WIS. STAT. § 288.01 (1976). See note 162 *infra*.

For treatise discussions of the subject, see 1 J. BISHOP, *supra* note 68, at §§ 629, 693a; 25 C.J. *Fines, Forfeitures and Penalties* § 57 (1921); 5 N. DANE, *supra* note 53, at 3-4, 11, 251-52. See also CONG. GLOBE, 37th Cong., 2d Sess. 2921 (1862) (remarks of Senator Browning); *id.* at 2960, 2962 (remarks of Senator Cowan).

⁷⁴ *United States v. 396 Barrels Distilled Spirits*, 28 F. Cas. 121, 125 (E.D. Mo. 1866) (No. 16,503). Today the rule is always relation back to the time of the offense. See *Florida Dealers & Growers Bank v. United States*, 279 F.2d 673, 676 (5th Cir. 1960).

In *United States v. 1960 Bags of Coffee*, 13 U.S. (8 Cranch) 398 (1814), Justice Story, in dissent, argued for a presumption against relation back to the time of the offense.

Looking to the vast extent of commercial transfers, the favor with which navigation and trade are fostered in modern times, and the extreme difficulty of ascertaining latent defects of title, it seems difficult to resist the impression that the present is a case which requires the application of the milder rule of the law.

If the principle contended for by the government be admitted in its full extent, it will be found very difficult to bound it.

Id. at 416. Present cases incorrectly rely on *1960 Bags of Coffee* as establishing a general rule of relation back to the time of the offense. The general rule, however, was no relation back without clear statutory direction. See, e.g., *United States v. 396 Barrels Distilled Spirits*, *supra*. See also note 37 and accompanying text *supra*.

⁷⁵ *Gelston v. Hoyt*, 16 U.S. (3 Wheat.) 246, 312 (1818); 2 J. BOUVIER, *INSTITUTES OF AMERICAN LAW* 147 (Philadelphia 1854). According to a Kentucky case, such action would constitute a legislative bill of attainder. *Gaines v. Buford*, 31 Ky. (1 Dana) 481, 509 (1833).

⁷⁶ 2 J. BOUVIER, *supra* note 75, at 147; 5 N. DANE, *supra* note 53, at 11.

⁷⁷ See, e.g., Act of Aug. 4, 1790, ch. 35, §§ 13, 22, 27, 28, 67, 1 Stat. 145, 157, 161, 163, 176; Act of July 31, 1789, ch. 5, §§ 12, 36, 1 Stat. 29, 39, 47.

in the absence of fault. For example, necessity was a good plea to violations of the embargo acts.⁷⁸ Other forfeiture statutes were strictly construed so as to avoid imposing liability for blameless acts,⁷⁹ or were held not to relate back so as to avoid depriving an innocent bona fide purchaser of his property.⁸⁰

A. *Early Constitutional Challenges*

In 1827 the use of the *in rem* action to impose a forfeiture was challenged in the Supreme Court case of *The Palmyra*.⁸¹ The owner contended that a forfeiture could not be imposed *in rem* until he had been first convicted in a criminal prosecution. Justice Story, speaking for the Court, rejected the argument and held that when a federal court was properly sitting either as a court of admiralty or as a court of exchequer, no prior conviction was necessary.⁸² Indeed, Justice Story noted, since neither an exchequer nor an admiralty court had criminal jurisdiction, no conviction of the owner was even possible. Basing his conclusions on "a fair interpretation of the legislative intention apparent in . . . the enactments"⁸³ of admiralty and exchequer *in rem* forfeiture statutes, Justice Story held that the "proceeding *in rem* stands independent of, and wholly unaffected by any criminal proceeding *in personam* [since] . . . [b]oth in England and America, the jurisdiction over proceedings *in rem*, is usually vested in different courts from those exercising criminal jurisdiction."⁸⁴ Justice Story justified the imposition of an *in rem* forfeiture in admiralty and exchequer cases on the long history surrounding the English exchequer proceeding and on the fiction that "[t]he thing is here primarily considered as the offender, or rather the offense is attached primarily to the thing . . ."⁸⁵ But he neither elaborated on the personification fiction nor discussed the appropriateness of an *in rem* forfeiture, other than in

⁷⁸ See *Brig Struggle v. United States*, 13 U.S. (9 Cranch) 71 (1815); *Brig James Wells v. United States*, 11 U.S. (7 Cranch) 22 (1812). An exception of necessity would often be implied even if none were stated in the relevant statute. *The William Gray*, 29 F. Cas. 1300 (C.C.S.D.N.Y. 1810) (No. 17,694).

⁷⁹ *United States v. The Penelope*, 27 F. Cas. 486 (D. Pa. 1806) (No. 16,024).

⁸⁰ *United States v. The Anthony Mangin*, 24 F. Cas. 833 (D. Md. 1802) (No. 14,461). The *Federal Cases* compilation names the judge and court incorrectly; see the original report in 2 Pet. Adm. 452 (1802).

⁸¹ 25 U.S. (12 Wheat.) 1 (1827).

⁸² *Id.* at 14-15. For a discussion of the federal court sitting as a court of exchequer, see *C.J. Hendry Co. v. Moore*, 318 U.S. 133, 137-53 (1943); *United States v. 422 Casks of Wine*, 26 U.S. (1 Pet.) 547 (1828) (Story, J.).

⁸³ 25 U.S. (12 Wheat.) at 15.

⁸⁴ *Id.*

⁸⁵ *Id.* at 14.

admiralty and exchequer proceedings. Further, Justice Story expressly limited his holding to "cases of this nature."⁸⁶

In 1844 in *United States v. Brig Malek Adhel*,⁸⁷ a determined argument was made against the imposition of vicarious liability for the unauthorized acts of the master. The owner of the forfeited armed merchantman presented an appealing case—he was admittedly innocent of any wrongdoing.⁸⁸ The shipowner's attorney argued that forfeiture liability should be imposed only for acts within the scope of the master's authority, as was generally the case in other areas of employer liability. At that time, even the unauthorized acts of one part owner of a ship would not subject the interests of the other part owners to condemnation.⁸⁹ The shipowner's counsel also argued that to impose a forfeiture would punish an innocent party for the crime of another. The Supreme Court rejected both arguments, explaining that the shipowner must accept complete liability for all acts of the master. Justice Story, speaking for the Court, justified this result on public policy grounds, and used the personification fiction to rationalize his decision:

The vessel which commits the aggression is treated as the offender, as the guilty instrument or thing to which the forfeiture attaches, without any reference whatsoever to the character or conduct of the owner. . . . It is not an uncommon course in the admiralty . . . to treat the vessel . . . as the offender And this is done from the necessity of the case, as the only adequate

⁸⁶ *Id.* at 15. Justice Story may have been partially motivated to uphold the in rem proceeding because of his belief that forfeitures under revenue and duty acts should be construed more broadly than those under embargo acts, to which he would have applied the strict construction given penal statutes. See *Taylor v. United States*, 44 U.S. (3 How.) 197, 205 (1845); *United States v. Breed*, 24 F. Cas. 1222, 1224 (C.C.D. Mass. 1832) (No. 14,638). During Justice Story's lifetime customs duties usually provided from 80% to 90% of federal revenues. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, HISTORICAL STATISTICS OF THE UNITED STATES, H.R. Doc. No. 33, 86th Cong., 1st Sess. 712 (1960).

Contrary to present interpretations of *The Palmyra*, as broadly authorizing in rem proceedings for any forfeiture (see, e.g., *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 684 (1974)), contemporary observers saw no expansion of prior law. See, e.g., *United States v. Brig Malek Adhel*, 43 U.S. (2 How.) 210, 228 (1844) (government attorney cited *The Palmyra* for proposition that no prior conviction of owner was necessary where punishment was limited to forfeiture).

⁸⁷ 43 U.S. (2 How.) 210 (1844).

⁸⁸ The owner had the misfortune to hire a master who became mentally unbalanced shortly after the voyage began and fired on several ships that crossed the *Malek Adhel's* course. *Id.* at 212-19.

⁸⁹ J. STORY, COMMENTARIES ON THE LAW OF PARTNERSHIP AS A BRANCH OF COMMERCIAL AND MARITIME JURISPRUDENCE § 453, at 636 (Boston 1841).

means of suppressing the offence or wrong, or insuring an indemnity to the injured party.⁹⁰

Although Justice Story rested his decision on policy grounds, subsequent cases to this day have relied on the fiction to explain all forfeiture law.⁹¹ In contrast to later, more expansive interpretations, the fiction was initially thought to limit the reach of civil forfeitures.⁹²

Civil forfeitures are difficult to classify. They do not fit into the traditional division between crime and civil tort.⁹³ Bishop observed that the civil forfeiture "is neither a punishment for crime, even though a crime is committed when it is incurred; nor a damage awarded for a civil injury, even though a civil liability follows the act which produces it."⁹⁴ The justification for civil forfeiture has traditionally rested on the power of the government to regulate and protect its revenue. Accordingly, the first American civil forfeitures were patterned on those cognizable in the English Exchequer, the Crown's revenue court. In America, however, these actions had to be fitted into a unified federal judicial system that lacked a revenue court. In England, whether a given forfeiture suit required civil or criminal proceedings was not an issue—the issue was simply whether the action could properly be heard by the Exchequer. In the unified American court system, it was necessary to determine the appropriate procedure for exchequer-type forfeitures. However, a 1796 Supreme Court decision,⁹⁵ holding that certain exchequer forfeitures could be imposed in civil in rem proceedings, created a problem. For if an exchequer forfeiture could be imposed in a civil in rem action, limits on the use of the in rem procedure had to be established. In England, the jurisdictional restrictions on the Exchequer and Admiralty courts imposed the necessary limitation,⁹⁶ but the American system contained no com-

⁹⁰ 43 U.S. (2 How.) at 233. Story elaborated at length "upon the general policy of [the maritime] law, which looks to the instrument itself, used as the means of the mischief, as the best and surest pledge for the compensation and indemnity to the injured party." *Id.* at 234.

⁹¹ *E.g.*, *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 683-88 (1974).

⁹² *See* notes 97-100 and accompanying text *infra*.

⁹³ *See* note 14 *supra*.

⁹⁴ 1 J. BISHOP, *supra* note 68, at § 698.

⁹⁵ *United States v. La Vengeance*, 3 U.S. (3 Dall.) 297 (1796) (forfeiture of vessel for exporting arms and ammunition in violation of federal law). *See* notes 65, 81-86 and accompanying text *supra*.

⁹⁶ For example, of the common-law courts, only the Exchequer exercised in rem jurisdiction over property other than realty. L. HARPER, *supra* note 41, at 113. For a discussion

parable limitation. Thus, it was necessary to distinguish the primarily regulatory exchequer-type civil forfeiture from the primarily punitive forfeiture imposed in criminal prosecutions. When would a forfeiture proceeding require a personal prosecution of the owner? The personification fiction was thought to provide an answer.

The personification fiction required that the property itself furnish all the material evidence of its own condemnation. An *in rem* forfeiture was, therefore, permissible either in the case of property so dangerous that its possession was completely prohibited, such as contraband, or in the case of normally harmless property found endangering the public, such as a ship committing piracy.⁹⁷ Thus the personification fiction enabled the courts to conceptualize civil forfeitures as *in rem* proceedings not involving any punishment of the owner. Justice Field gave perhaps the best statement of this limitation on *in rem* forfeiture:

The thing is the instrument of wrong, and is forfeited by reason of the unlawful use made of it, or the unlawful condition in which it is placed. And generally the thing, thus subject to seizure, itself furnishes the evidence for its own condemnation. Thus, goods found smuggled . . . prove of themselves nearly all that is desired to establish the right of the government to demand their confiscation. . . . And it is true that . . . criminal proceedings will also lie against the smuggler, . . . and that the proceedings *in rem* are wholly independent of, and unaffected by, the criminal proceedings against the person. But in the two cases the proof is entirely different. In the one case, there must be proof that the thing proceeded against was subjected to some unlawful use, or was found in some unlawful condition. In the other case the personal guilt of the party must be established,

of the revenue jurisdiction of the Exchequer, see 1 W. HOLDSWORTH, *supra* note 32, at 238-39. See generally authorities cited in note 46 *supra*.

⁹⁷ The latter was sometimes analogized to nuisance. Chief Justice Shaw of the Massachusetts Supreme Judicial Court explained:

[The property] has fallen into the hands of those who have made, and intend to make, the injurious or dangerous use of it, of which the public have a right to complain, and from which they have a right to be relieved. Therefore, as well to abate the nuisance, as to punish the offending or careless owner, the property may be justly declared forfeited

Fisher v. McGirr, 67 Mass. (1 Gray) 1, 28 (1854). See *Our House No. 2 v. State*, 4 Greene 172 (Iowa 1853); *Gray v. Kimball*, 42 Me. 299 (1856); *Woods v. Cottrell*, 55 W. Va. 476 482, 47 S.E. 275, 278 (1904); *CONG. GLOBE*, 37th Cong., 2d Sess. 2962 (1862) (remarks of Senator Cowan); *cf.*, *Mugler v. Kansas*, 123 U.S. 623 (1887); *Sinclair v. Croom*, 217 N.C. 526, 8 S.E.2d 834 (1940) (nuisance abatement discussed as a property "taking" within the Constitution).

and when condemnation is founded upon such guilt, it must be preceded by due conviction of the offender, according to the forms prescribed by the Constitution.⁹⁸

Therefore, a primarily remedial forfeiture could still be so penal as to require a personal action against the owner, if the forfeiture depended upon proof of the owner's guilt. As Judge Sprague observed: "Confiscations of property, not for any use that has been made of it, which go not against an offending thing, but are inflicted for the personal delinquency of the owner, are punitive; and punishment should be inflicted only upon due conviction of personal guilt."⁹⁹ Accordingly, statutes that imposed forfeitures in rem as punishment were found unconstitutional.¹⁰⁰

B. *The Civil War Confiscation Acts*

The Civil War brought about a radical change in the law of forfeiture. Congress abandoned pre-War constitutional limitations on forfeiture and approved the use of in rem proceedings to impose purely punitive sanctions. Shortly after the War began, it became clear that traditional treason statutes were inadequate to punish the Southern rebels; most rebels were safely behind Con-

⁹⁸ *Miller v. United States*, 78 U.S. (11 Wall.) 268, 321-22 (1871) (dissenting opinion). Justice Field's example illustrating in rem forfeiture is similar to the situation in *United States v. Hall*, 521 F.2d 406 (9th Cir. 1975). See notes 149-58 and accompanying text *infra*. But in *Hall*, the forfeiture by statute required proof of personal guilt. See notes 168-87 and accompanying text *infra*. Thus, by Field's reasoning, forfeiture requires a criminal prosecution.

⁹⁹ *The Amy Warwick*, 1 F. Cas. 808, 811 (D. Mass. 1862) (No. 342), *aff'd sub nom.* *The Prize Cases*, 67 U.S. (2 Black) 635 (1863). Bishop said of the problem:

And, disguise the matter as we may, under whatever form of words, if the intent which the owner of property carries in his bosom is the gist of the thing on which the forfeiture turns, then the question is one of the criminal law, and the forfeiture is a penalty imposed for crime, instead of being [a regulatory] forfeiture

1 J. VISNOF, *supra* note 68, at § 703.

¹⁰⁰ *Greene v. Briggs*, 10 F. Cas. 1135 (C.C.D.R.I. 1852) (No. 5,764); *Fisher v. McGirr*, 67 Mass. (1 Gray) 1, 36-41 (1854); *Hibbard v. People*, 4 Mich. 125 (1856). There is some innumeration in these and other cases that in rem actions might have been permissible if accompanied by the safeguards of a criminal prosecution. In Iowa, such in rem suits were routinely held subject to the rules of criminal suits. *State v. Arlen*, 71 Iowa 216, 32 N.W. 267 (1887); *Part of Lot No. 294 v. State*, 1 Iowa 506 (1855). However, the court in *State v. Brennan's Liquors*, 25 Conn. 278 (1858), upheld a similar in rem suit, and dismissed due process concerns by noting:

It is to be presumed that the magistrate will discharge the duty conferred upon him properly; that he will not decree a forfeiture, if the party in interest is not before the court, without giving him due notice to appear; or if it should appear that the person having it, with intent to sell, was a mere trespasser, and the true owner was chargeable with no fault or neglect.

Id. at 286.

federate lines, protected from treason prosecutions. Nevertheless, many Confederates owned property in the North that was subject to confiscation. If the Confederacy had been a foreign power, there would have been few constitutional obstacles to confiscating enemy property. The rebels, however, were considered citizens, not aliens, and were entitled to full constitutional rights.¹⁰¹ Therefore, in absentia prosecutions were forbidden.¹⁰² The congressional solution for this problem was a proposed confiscation bill permitting in rem forfeitures.

The advocates of confiscation contended that forfeitures under the customs statutes demonstrated that all in rem forfeitures constituted due process of law.¹⁰³ The opponents argued that proceedings under the proposed bill would constitute criminal prosecutions of the rebel property owners, since confiscation could occur only upon a finding that the owner was guilty of treason.¹⁰⁴ One Senator noted that the choice of the in rem proceeding was no more than "hocus pocus" designed to avoid the constitutional requirements of a criminal trial.¹⁰⁵ If the government could proceed in rem to punish treason, nothing would stop it from proceeding similarly to punish lesser crimes.¹⁰⁶ The proponents of the bill urged the necessity of the hour, and countered that without in rem forfeiture the rebels would go "forever unwhipped."¹⁰⁷ Congress

¹⁰¹ See J. RANDALL, *THE CONFISCATION OF PROPERTY DURING THE CIVIL WAR 19-23* (1913).

¹⁰² Ordinary civil condemnation of rebel property was blocked by the requirement of adequate compensation. U.S. CONST. amend. V. Criminal prosecutions were prevented by such constitutional guarantees as confrontation by one's accusers and trial in the district of the offense. U.S. CONST. amend. VI; U.S. CONST. art. III, § 2, cl. 3. See also U.S. CONST. art. III, § 3.

¹⁰³ CONG. GLOBE, 37th Cong., 2d Sess. 1762 (1862) (remarks of Senator Davis); *id.* at 2294 (remarks of Rep. Wallace); L. DAY, *supra* note 25, at 51-55 (New Orleans 1870). Day concluded that "[p]roceedings in rem, then, for a forfeiture, although the forfeiture is intended as a punishment by the law-maker for the violation of law, are not to be regarded as criminal, but as *civil* proceedings." *Id.* at 55 (emphasis in original). The opponents raised the personification fiction to distinguish the proposed bill from the customs forfeitures, since few confiscation supporters could reasonably assert that the proposed bill was directed against guilty property. See, e.g., CONG. GLOBE, 37th Cong., 2d Sess. 1574 (1862) (remarks of Senator Henderson). The proponents answered that forfeiture of rebel property without conviction of the owner rested "[n]ot upon a mere fiction of law, but upon a great public necessity." *Id.* at 2239 (remarks of Rep. Noell). The personification fiction was attacked as a recent invention. L. DAY, *supra*, at 65.

¹⁰⁴ CONG. GLOBE, 37th Cong., 2d Sess. 1574 (1862) (remarks of Senator Henderson); *id.* at 1809 (remarks of Senator Collamer); *id.* at 2921 (remarks of Senator Browning); *id.* at 2960 (remarks of Senator Cowan); *id.* at App. 202 (remarks of Rep. Thomas); *id.* at App. 267 (remarks of Rep. Walton); *id.* at App. 304 (remarks of Senator Howard).

¹⁰⁵ *Id.* at 1809 (remarks of Senator Collamer).

¹⁰⁶ *Id.* at 1859 (remarks of Senator Browning).

¹⁰⁷ *Id.* at App. 167 (remarks of Rep. Babbitt). Other advocates of confiscation argued

debated the bill throughout the spring of 1862 and narrowly passed the measure in the early summer.¹⁰⁸ Even then the struggle was not over, since President Lincoln threatened a veto.¹⁰⁹ Congress responded by passing an "explanatory" Joint Resolution which met one of the President's objections, and Lincoln finally signed the bill.¹¹⁰

The Confiscation Acts were soon challenged. In 1863 the Supreme Court of Kentucky held the 1862 Act unconstitutional, predicting that "[t]hese [in rem] proceedings may to-day be the engines of punishment to the rebels, but, in the future, they may be the instruments of oppression, injustice and tyranny"¹¹¹ Nevertheless, the prosecutions continued, and in 1870 three constitutional challenges finally reached the United States Supreme Court. The Court considered the cases for over a year, and heard arguments twice in all three. In 1871, the Court upheld the constitutionality of the in rem proceedings, not on due process grounds, but as an exercise of the war power in taking enemy property.¹¹² Justice Field, joined by Justice Clifford, dissented. They argued that the forfeitures punished offenders for treason and, therefore, could only be imposed in criminal prosecutions.¹¹³ Despite Justice Field's dissent, and regardless of the majority's rationale, the broad scope of in rem forfeiture had been established. The result was a revolution in forfeiture law that persists to this day—use of the in rem action without constitutional limitation.¹¹⁴ It is unlikely that such a change would have occurred had it not been for the passions raised by the Civil War.

that the bill did not fall within constitutional limitations because it was a measure to suppress rebellion and not to punish traitors. *Id.* at 2294 (remarks of Rep. Wallace); *The Right to Confiscate and Emancipate*, 24 MONTHLY LAW REP. 645, 650-51 (1862).

¹⁰⁸ CONG. GLOBE, 37th Cong., 2d Sess. 2361, 3006 (1862). The principal measure was the Act of July 17, 1862, 12 Stat. 589. See the related Act of Aug. 6, 1861, 21 Stat. 319, 50 U.S.C. § 212 (1970).

¹⁰⁹ President Lincoln had two primary objections: the confiscation was not limited to the lifetime of the traitor and the "act, *in rem*, forfeits property for the ingredients of treason without a conviction of the supposed criminal, or a personal hearing given him in any proceeding." CONG. GLOBE, 37th Cong., 2d Sess. 3406 (1862) (text of President's prepared veto message).

¹¹⁰ The Joint Resolution limited the forfeiture to a life estate, but did not address President Lincoln's second objection. *Id.* at App. 423 (text of resolution). For a general discussion of the legislative history of the confiscation bill, see J. RANDALL, *supra* note 101, at 9-12.

¹¹¹ *Norris v. Doniphan*, 61 Ky. (4 Met.) 385, 426 (1863).

¹¹² *Tyler v. Defrees*, 78 U.S. (11 Wall.) 331 (1871); *Miller v. United States*, 78 U.S. (11 Wall.) 268 (1871); *McVeigh v. United States*, 78 U.S. (11 Wall.) 259 (1871). See also 3 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 138-39 (1922).

¹¹³ 78 U.S. (11 Wall.) at 355-56. See note 98 and accompanying text *supra*.

¹¹⁴ During the congressional debates, Senator Browning had predicted that if the

C. *Forfeiture Law after the Civil War*

In personam forfeiture prosecutions disappeared in the federal system shortly after the advent of punitive in rem suits.¹¹⁵ The conventional view that forfeiture is a sanction necessarily imposed in rem developed during this period. Within three decades after the Civil War, the Supreme Court presumed that a "proceeding to enforce the forfeiture against the *res* named must be a proceeding *in rem* and a civil action."¹¹⁶ The disappearance of in personam forfeiture proceedings is not surprising for a number of reasons. In upholding the Confiscation Acts, the Supreme Court had accepted that punishment might be imposed in rem.¹¹⁷ Thus little reason remained for the more complicated in personam suit. Furthermore, since most of the pre-Civil War forfeitures had been in rem regulatory proceedings, a strong tradition of in personam forfeiture had not developed in the federal system. Finally, after the Civil War Congress usually provided an in rem proceeding for any new punitive forfeiture legislation.¹¹⁸ Thus, by the turn of the century it was established doctrine that all forfeitures should be imposed in civil in rem proceedings.

Imposing punitive forfeitures in civil in rem suits did not, at first, obscure their character as punishment. For some years the federal courts continued to distinguish between punitive and remedial forfeitures. The punitive in rem forfeiture required proof of the owner's criminal intent and entitled the owner to many of

confiscation bill were passed, "a total revolution [will be] wrought in our criminal jurisprudence, and, in despite of all the safeguards of the Constitution, proceedings *in personam* for the punishment of crime may be totally ignored, and punishment inflicted by proceeding against property alone." CONG. GLOBE, 37th Cong., 2d Sess. 2921 (1862) (remarks of Senator Browning).

¹¹⁵ The author has been unable to find any reported federal in personam forfeiture proceedings after the Civil War and prior to the 1970 Organized Crime and Drug Control Acts.

¹¹⁶ *United States v. Zucker*, 161 U.S. 475, 478 (1896). The language of the statute in *Zucker* was virtually identical to that in *United States v. Mann*, 26 F. Cas. 1153 (C.C.D.N.H. 1812) (No. 15,718). In *Mann*, Justice Story had held that the statute required a criminal prosecution. See note 73 and accompanying text *supra*.

As late as 1888, the Supreme Court was willing to hear argument that a particular forfeiture required a criminal prosecution. *Origet v. United States*, 125 U.S. 240, 245-46 (1888). However, by the 1890's some lower court judges were openly hostile to forfeiture in a criminal prosecution; one judge remarked that it "would be, if not wholly impracticable, at least productive of great confusion." *United States v. A Lot of Jewelry*, 59 F. 684, 686 (E.D.N.Y. 1894). By 1906 a Louisiana judge felt compelled to write a lengthy opinion in order to justify any forfeiture in a criminal prosecution. See *Armbruster v. Behan*, 3 Orl. App. 184 (La. App. 1906).

¹¹⁷ See notes 112-14 and accompanying text *supra*.

¹¹⁸ *E.g.*, Sherman Antitrust Act of 1890, § 6, 15 U.S.C. § 6 (1970).

the constitutional protections afforded criminal defendants. In 1886 in *Boyd v. United States*,¹¹⁹ the Supreme Court held that a property owner could claim the fifth amendment privilege against self-incrimination in an in rem proceeding against his property. The Court explained that "proceedings instituted for the purpose of declaring the forfeiture of a man's property *by reason of offences committed by him*, though they may be civil in form, are in their nature criminal."¹²⁰ The Court, therefore, held that since

suits for penalties and forfeitures incurred by the commission of offences against the law, are of this quasi-criminal nature, . . . they are within the reason of criminal proceedings for all the purposes of the Fourth Amendment of the Constitution, and of that portion of the Fifth Amendment which declares that no person shall be compelled in any criminal case to be a witness against himself¹²¹

Similarly, in *Coffey v. United States*¹²² the Supreme Court decided that an acquittal in a criminal prosecution barred a subsequent punitive in rem suit when "all that is imposed by the statute, as a consequence of guilt, is a punishment therefor."¹²³ In *Osborn v.*

¹¹⁹ 116 U.S. 616 (1886).

¹²⁰ *Id.* at 634 (emphasis added). The Court continued:

If an indictment had been presented against the claimants, upon conviction the forfeiture of the goods could have been included in the judgment. If the government prosecutor elects to waive an indictment, and to file a civil information against the claimants—that is, civil in form—can he by this device take from the proceeding its criminal aspect . . . ? This cannot be.

Id. See *United States v. A Lot of Jewelry*, 59 F. 684, 691 (E.D.N.Y. 1894); cases cited in note 123 *infra*; Annot., 29 L.R.A. 811, 820-22 (1895). See generally 12 R.C.L. *Forfeitures* §§ 9-14 (1916). See also note 100 and accompanying text *supra*.

¹²¹ 116 U.S. at 634. *Boyd* does not make a clear distinction between punitive and remedial in rem forfeitures. *But see* *One Lot Emerald Cut Stones & One Ring v. United States*, 409 U.S. 232, 236 n.6 (1972) (*Boyd* discussed; distinction supported). Other cases, both in the Supreme Court and the lower courts, clearly make this distinction. See authorities cited in note 120 *supra* and notes 122-25 *infra*.

The *Boyd* problem would not have arisen had the pre-Civil War limitations on in rem forfeiture been maintained. Under those limitations, if it had been necessary to compel testimony from the owner, then an in rem action would have been impermissible. See notes 97-100 and accompanying text *supra*.

Although Justice Brandeis once said that the *Boyd* case "will be remembered as long as civil liberty lives in the United States" (*Olmstead v. United States*, 277 U.S. 438, 474 (1928) (dissenting opinion)), *Boyd* is now in trouble. The Supreme Court has said that the *Boyd* holding would be overruled today for its interpretation of the right against self-incrimination. *Fisher v. United States*, 425 U.S. 391, 405-08 (1976). *Boyd's* treatment of forfeiture, however, is still good law. *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 700 (1965).

¹²² 116 U.S. 436 (1886).

¹²³ *Id.* at 443. For cases and an annotation discussing former jeopardy in a subsequent

United States,¹²⁴ the Court held that a pardon remitted any punitive forfeiture incurred, since "the penalty of forfeiture annexed to the commission of the offence must fall with the pardon of the offence itself."¹²⁵ In *Stone v. United States*¹²⁶ the Court emphasized that the safeguards surrounding a punitive in rem suit "can have no application in a civil [remedial] case not involving any question of criminal intent or forfeiture for prohibited acts."¹²⁷ Finally, in *United States v. Zucker*,¹²⁸ the Court curtailed the protections available to the owner in a punitive in rem suit by ruling that the sixth amendment guarantees did not apply to in rem forfeiture suits. Reversing a lower court decision, the Court held that in rem suits were not "criminal prosecutions" within the meaning of the sixth amendment even though the same suit could be a "criminal case" within the meaning of the fifth amendment.¹²⁹

Limitations on punitive in rem forfeitures collapsed early in the twentieth century when the Supreme Court adopted the personification fiction of guilty property.¹³⁰ The personification fic-

punitive in rem suit, see *Stone v. United States*, 167 U.S. 178 (1897); *United States v. Seattle Brewing & Malting Co.*, 135 F. 597 (D. Wash. 1905); *United States v. Jaedicke*, 73 F. 100, 103 (D. Kan. 1896); *United States v. Three Copper Stills*, 47 F. 495, 499 (D. Ky. 1890); *State ex rel. Remley v. Meek*, 112 Iowa 338, 84 N.W. 3 (1900); Annot., 11 L.R.A. (n.s.) 653, 667-69 (1906).

The *Coffey* case has also been criticized. See *McKeehan v. United States*, 438 F.2d 739, 747 (6th Cir. 1971); *United States v. One 1953 Oldsmobile*, 222 F.2d 668, 670 (4th Cir. 1955); Annot., 27 A.L.R.2d 1137 (1953).

¹²⁴ 91 U.S. 474 (1876).

¹²⁵ *Id.* at 477. If "[t]he questions of [the owner's] guilt and ownership were . . . fundamental in the case," the ordinary finality rules did not apply, since "[t]he case is wholly unlike a proceeding purely *in rem*." *McVeigh v. United States*, 78 U.S. (11 Wall.) 259, 266-67 (1871). Further, such a punitive in rem forfeiture might be limited to "that which belonged to the offending person." *Day v. Micou*, 85 U.S. (18 Wall.) 160, 161 (1873). This line of cases was attacked by admirers of the in rem action even before *Boyd* and *Coffey* were decided. See R. WAPLES, A TREATISE ON PROCEEDINGS IN REM § 252 (1882).

Yet the lower courts refused to find the punitive in rem forfeiture of such a criminal character as to require proof beyond a reasonable doubt, "notwithstanding [that the action] is essentially criminal and intended to punish a crime." *3880 Boxes of Opium v. United States*, 23 F. 367, 395 (C.C.D. Cal. 1883). See also *Clark*, *supra* note 14, at 393-94 n.45.

¹²⁶ 167 U.S. 178 (1897) (action to recover value of timber unlawfully cut on government land).

¹²⁷ *Id.* at 188. The distinction between punitive and remedial forfeitures continues to have some vitality in applying the *Coffey* doctrine. See *One Lot Emerald Cut Stones & One Ring v. United States*, 409 U.S. 232, 236 n.6 (1972); *McKeehan v. United States*, 438 F.2d 739, 747 (6th Cir. 1971).

¹²⁸ 161 U.S. 475 (1896).

¹²⁹ *Id.* at 480-82. The Court noted that "[t]he Sixth Amendment relates to a prosecution of an accused person which is technically criminal in its nature." *Id.* at 481.

¹³⁰ See notes 138-42 and accompanying text *infra*. It is not surprising that punitive in rem forfeiture disappeared as a general principle, given the difficulty of reconciling an in rem action with punitive ends. One commentator observed that one line of Supreme Court

tion, as a guiding principle, had little place immediately after the Civil War, since both punitive and remedial forfeitures were imposed in rem. Indeed, in *Boyd* the Supreme Court explicitly rejected the notion that property could be considered guilty.¹³¹ Nevertheless, the personification fiction was gaining acceptance in admiralty law.¹³² Toward the turn of the century, therefore, government prosecutors urged reliance on the fiction to support a broader imposition of vicarious liability.¹³³

In the lower courts, the government contended that the forfeiture was solely a punishment of "guilty" property and not of its owner. Therefore, the use to which the property was put would determine the forfeiture question, regardless of the owner's guilt or innocence. Absent Supreme Court authority, however, a number of lower courts rejected the personification fiction and insisted on explicit statutory authority to justify a forfeiture of one person's property because of the use made of it by another.¹³⁴ The courts appeared to be on the verge of adopting a more conservative theory of vicarious liability.¹³⁵ Although broader than the pre-Civil War approach,¹³⁶ this conservative theory required either that the actor be an agent of the owner or, alternatively, that the

cases "emphasizes that forfeitures are in rem and therefore . . . necessarily remedial and not punitive. The second line emphasizes that forfeitures do serve a punitive and deterrent function, despite their in rem procedural nature." Clark, *supra* note 14, at 476.

¹³¹ 116 U.S. at 637. See note 27 and accompanying text *supra*.

¹³² G. GILMORE & C. BLACK, *supra* note 22, at 510.

¹³³ See Annot., 1916E L.R.A. 343. In *Dobbins's Distillery v. United States*, 96 U.S. 395 (1878), the Court held a lessor vicariously liable for the acts of his lessee. Although *Dobbins's Distillery* is often regarded as supporting virtually unlimited vicarious liability, the Court was careful to note that the particular statute involved was not punitive in nature and that the forfeiture was incurred "without any regard whatsoever to the personal misconduct or responsibility of the owner." *Id.* at 401. Nevertheless, *Dobbins's Distillery* did mark a broad extension of vicarious liability under remedial forfeiture statutes. The Court suggested that holding the lessor liable for the acts of his lessee was analogous to past instances of vicarious liability of a shipowner for the acts of his master. *Id.* at 400, 404. The analogy, however, is not well taken, since the master of a ship occupied a very special position of trust with respect to the shipowner, which does not exist between lessor and lessee. See notes 43-44, 89-91 and accompanying text *supra*.

¹³⁴ In 1899 the Fourth Circuit explicitly rejected the fiction and held that "it is the duty of the court to inquire into the facts; and, if it appears clearly that the owner [is not] . . . in some way justly chargeable with blame or negligence, he ought not to suffer [forfeiture] . . ." *United States v. Two Barrels of Whiskey*, 96 F. 479, 481 (4th Cir. 1899). See *The Cargo ex Lady Essex*, 39 F. 765 (E.D. Mich. 1889). In 1920 the Oklahoma Supreme Court observed that "both the state and federal courts have refused to order a forfeiture of property of an innocent person because used by others to unlawfully transport liquors, except where the Legislature had expressly and unequivocally declared [it] . . ." *One Hudson Super-Six Auto. v. State*, 77 Okla. 130, 136, 187 P. 806, 813 (1920).

¹³⁵ See Annot., 1916E L.R.A. 343; *Hoover v. People*, 68 Colo. 249, 187 P. 531 (1920).

¹³⁶ See notes 93-100 and accompanying text *supra*.

owner know and consent to the use of his property in an activity that might expose it to forfeiture. The conflict between the government's theory and the conservative theory came to a head with the passage of numerous liquor prohibition statutes during President Wilson's administration. In 1920 the Colorado Supreme Court, construing one of these statutes, adopted the conservative theory. The court noted that under the government's position:

I forfeit title to my automobile if I overtake, on the road, a man with a bottle of whiskey in his pocket, invite him to ride and he accepts the invitation. He is using my automobile to transport whisky unlawfully. I have not consented to it and do not know it—but . . . that will not avail me. . . . Is this result absurd? It surely is; but it is a conclusion inevitable from the argument that is put before us in this case.¹³⁷

Scarcely a year later, the government's theory triumphed. The United States Supreme Court, in *J.W. Goldsmith, Jr.-Grant Co. v. United States*,¹³⁸ relied on analogy to deodand¹³⁹ and the personification fiction to adopt the broad theory of vicarious liability under forfeiture statutes. The Court specifically rejected the conservative view.¹⁴⁰ The "absurd" result that the Colorado Supreme Court predicted as inevitable has followed.¹⁴¹ From 1921 to the present, the law of forfeiture has followed the interpretation of *Goldsmith-Grant*.¹⁴²

III

"CRIMINAL FORFEITURE" AND THE FEDERAL RULES

In 1970 Congress took a new approach to forfeiture in enacting the Organized Crime Control Act.¹⁴³ The Act makes illegal certain racketeering involvement in commercial enterprises and punishes violators with up to twenty years imprisonment, a \$25,000 fine, and the forfeiture of all interests held in contravention of the

¹³⁷ *Hoover v. People*, 68 Colo. 249, 254-55, 187 P. 531, 533 (1920).

¹³⁸ 254 U.S. 505 (1921).

¹³⁹ See notes 24-27 and accompanying text *supra*.

¹⁴⁰ 254 U.S. at 510-12.

¹⁴¹ *United States v. Addison*, 260 F.2d 908 (5th Cir. 1958); *United States v. One 1957 Oldsmobile Auto.*, 256 F.2d 931 (5th Cir. 1958). See note 44 *supra*.

¹⁴² One student author has correctly observed that "[t]he law changed little in the half century after *Grant Co.* as courts continually, though often unwillingly, enforced forfeitures against blameless parties." 60 CORNELL L. REV. 467, 469-70 (1974).

¹⁴³ 18 U.S.C. § 1963 (1970).

statute.¹⁴⁴ In the same session, Congress also passed the Comprehensive Drug Prevention and Control Act,¹⁴⁵ which similarly employs forfeiture. Congress envisioned these forfeitures as sanctions imposed as part of the criminal prosecution.¹⁴⁶ To make possible the imposition of forfeiture in a criminal prosecution, Congress approved amendments to the Federal Rules of Criminal Procedure. The Rules now apply to all "criminal forfeitures" and exclude from their scope only "civil forfeiture[s]."¹⁴⁷ Previously, the Rules had excluded all forfeitures in accord with the conventional view that forfeiture is necessarily civil and in rem.¹⁴⁸ As yet unresolved is the question of whether a forfeiture under a statute enacted before 1970 can be considered a "criminal forfeiture" within the meaning of the amendments.

A. *United States v. Hall*

On March 15, 1974, Arthur Hall brought two diamond rings into the United States without declaring their \$14,000 value to customs officials.¹⁴⁹ Arrested by government agents, Hall was indicted under 18 U.S.C. § 545.¹⁵⁰ First enacted in 1866,¹⁵¹ section 545 makes smuggling a felony punishable by fine and imprisonment, and authorizes the forfeiture of merchandise introduced into the United States in violation of the section.¹⁵² Before trial

¹⁴⁴ *Id.* The forfeiture provision of § 1963 was held constitutional in *United States v. Amato*, 367 F. Supp. 547 (S.D.N.Y. 1973).

¹⁴⁵ 21 U.S.C. § 848(a)(2) (1970).

¹⁴⁶ S. REP. NO. 617, 91st Cong., 1st Sess. 79-80 (1969). *Cf.* H.R. REP. NO. 1549, 91st Cong., 1st Sess. 188 (dissenting views of Reps. Conyers, Mikva, and Ryan), *reprinted in* [1970] U.S. CODE CONG. & AD. NEWS 4083-84.

¹⁴⁷ FED. R. CRIM. P. 54(b)(5).

¹⁴⁸ Advisory Committee's Comments to the 1972 Amendments to the Federal Rules of Criminal Procedure, 56 F.R.D. 143, 180 (1972).

¹⁴⁹ *United States v. Hall*, 521 F.2d 406, 407 (9th Cir. 1975).

¹⁵⁰ *Id.*

¹⁵¹ Act of July 18, 1866, 14 Stat. 179.

¹⁵² 18 U.S.C. § 545 (1970) provides in pertinent part:

Whoever knowingly and willfully, with intent to defraud the United States, smuggles, or clandestinely introduces into the United States any merchandise which should have been invoiced . . . ; or

Whoever fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law . . .

Shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

Proof of defendant's possession of such goods, unless explained to the satisfaction of the jury, shall be deemed evidence sufficient to authorize conviction for violation of this section.

Merchandise introduced into the United States in violation of this section, or

Hall moved to quash the indictment for failure to "allege the extent of the interest or property subject to forfeiture" in accordance with Rule 7(c)(2) of the Federal Rules of Criminal Procedure. The district court held the indictment defective, but ruled that the proper remedy was to prohibit the government from claiming the forfeiture, rather than to dismiss the prosecution.¹⁵³ In the subsequent trial, Hall was convicted and sentenced to imprisonment for one year. The district judge suspended the sentence on the condition that Hall consent to civil forfeiture of the rings.¹⁵⁴

In a per curiam opinion, the Ninth Circuit Court of Appeals reversed.¹⁵⁵ The court held that to allow Hall to "consent" to a civil forfeiture, after the government had failed to allege the property subject to forfeiture in the indictment, denied Hall the opportunity to defend against the forfeiture.¹⁵⁶ Although observing that the amendment to Rule 7 had originated in the 1970 Organized Crime Control Act,¹⁵⁷ the court nevertheless held that "Rule 7(c)(2) is written in specific terms for general application. We cannot conscientiously disregard the Rule's plain mandatory language . . ."¹⁵⁸

The Justice Department contends that *Hall* was wrongly decided and that the amendments to the Federal Criminal Rules should apply only to the two new forfeiture statutes, since "[f]rom [1790] to [1970] . . . no Federal statute has provided for a penalty of forfeiture as a punishment for violation of a criminal statute of the United States."¹⁵⁹ To evaluate the conflict it is necessary to consider what Congress meant by a "criminal forfeiture" in the 1970 Acts and in the amendments to the Criminal Rules. The appropriate place to begin is the legislative history of the 1970 Acts.

B. *What Is a "Criminal Forfeiture"?*

In passing the 1970 Acts, Congress thought it was providing for the first use of forfeiture as criminal punishment since the first

the value thereof, to be recovered from any person described in the first or second paragraph of this section, shall be forfeited to the United States.

¹⁵³ 521 F.2d at 407.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 408.

¹⁵⁷ *Id.* at 407-08.

¹⁵⁸ *Id.* at 408.

¹⁵⁹ Department of Justice Memo No. 828, *supra* note 12, at 3. In light of *Hall*, the Federal Rules Advisory Committee has under consideration a further revision of the forfeiture provisions. Interview with the Honorable William Webster, United States Circuit Judge and member of the Advisory Committee on the Federal Rules of Criminal Procedure, in St. Louis, Missouri (Aug. 24, 1976).

Congress abolished the common-law forfeitures consequent to conviction and attainder of felony and treason.¹⁶⁰ Thus, Congress believed that it was repealing, in part, an Act of April 30, 1790,¹⁶¹ which provides that "[n]o conviction or judgment shall work corruption of blood or any forfeiture of estate."¹⁶² But the 1790 Act only abolished the common-law forfeitures that followed as consequences of conviction and judgment of felony or treason;¹⁶³ purely punitive forfeitures imposed either as a fine in a criminal prosecution or separately in a civil in rem proceeding have continued in American law since the 1790 Act.¹⁶⁴ Nevertheless, Congress evidently adopted the conception of "criminal forfeiture" offered in the Justice Department's testimony explaining the 1970 Acts:

The concept of forfeiture as a criminal penalty which is embodied in this provision differs from other presently existing forfeiture provisions under Federal statutes where the proceeding is in rem against the property and the thing which is declared unlawful under the statute, or which is used for an unlawful purpose, or in connection with the prohibited property or transaction, is considered the offender, and *the forfeiture is no part of the punishment for the criminal offense. . . . Such statutes having [sic] been*

¹⁶⁰ S. REP. NO. 617, *supra* note 146, at 79-80; Advisory Committee's Comments to the 1972 Amendments to the Federal Rules of Criminal Procedure, 56 F.R.D. 143, 157 (1972). See notes 19, 69-73 and accompanying text *supra*.

¹⁶¹ 18 U.S.C. § 3563 (1970).

¹⁶² *Id.* Twenty-two states have constitutional provisions essentially identical to § 3563. ALA. CONST. art. 1, § 19; ALASKA CONST. art. 1, § 15; ARIZ. CONST. art. 2, § 16; ARK. CONST. art. 2, § 17; COLO. CONST. art. 2, § 9; GA. CONST. art. 1, § 2-203; ILL. CONST. art. 1, § 11; IND. CONST. art. 2, § 30; KAN. CONST. Bill of Rights § 12; MD. CONST. Decl. of Rights art. 27; MINN. CONST. art. 1, § 11; MO. CONST. art. 1, § 30; MONT. CONST. art. 3, § 9; NEB. CONST. art. 1, § 15; OHIO CONST. art. 1, § 12; ORE. CONST. art. 1, § 25; S.C. CONST. art. 1, § 8; TENN. CONST. art. 1, § 12; TEX. CONST. art. 1, § 21; WASH. CONST. art. 1, § 15; W. VA. CONST. art. 3, § 18; WIS. CONST. art. 1, § 12. Another seven states have provisions similar to § 3563. CONN. CONST. art. 9, § 4; DEL. CONST. art. 9, § 19; KY. CONST. Bill of Rights § 20; ME. CONST. art. 1, § 11; N.C. CONST. art. 1, 29; OKLA. CONST. art. 2, § 15; PA. CONST. art. 1, § 19. Florida has its own somewhat peculiar provision. FLA. CONST. art. 1, § 17. None of these constitutional provisions, with the possible exceptions of Florida and Oklahoma, prohibits forfeiture imposed as a fine in a criminal prosecution; all are directed toward eliminating common-law forfeiture consequent to conviction and attainder. Recent modernization of constitutional language raises possible doubt in Florida and Oklahoma, although there too, the correct interpretation is probably that only common-law forfeiture is forbidden. See also notes 73 *supra* & 163 *infra*.

¹⁶³ See note 73 and accompanying text *supra*. The difference between the two is explained in 2 Z. SWIFT, A SYSTEM OF THE LAWS OF CONNECTICUT 405 (Windham 1796), and illustrated by *Commonwealth v. Pennock*, 3 Serg. & Rawl. 199 (Pa. 1817); *Woods v. Cottrell*, 55 W. Va. 476, 482, 47 S.E. 275, 278 (1904); 21 R.C.L. *Prisons and Prisoners* § 20 (1918).

¹⁶⁴ See notes 68-142 and accompanying text *supra*.

uniformly upheld against the objection that they violate due process on the grounds that they are wholly preventive and remedial

Under the criminal forfeiture provision of section 1963, however, *the proceeding is in personam against the defendant who is the party to be punished upon conviction of violation of any provision of the section, not only by fine and/or imprisonment, but also by forfeiture*¹⁶⁵

Congress believed that criminal forfeiture was distinguishable from civil forfeiture because the former was directed primarily toward punishing the wrongdoer upon proof of his personal guilt, while the latter was primarily remedial.¹⁶⁶

If Congress indeed believed that all forfeitures since 1790 have been primarily remedial and not punitive, then adoption of a criminal mode of prosecution for what was thought to be the first punitive forfeiture in nearly two hundred years stands as a legislative determination that a criminal prosecution rather than an in rem proceeding should be used to impose forfeiture as punishment. By approving the 1972 amendments to the Federal Rules of Criminal Procedure, Congress effectively overruled its determination in passing the Confiscation Acts in 1862 that an in rem proceeding is an appropriate means to impose punishment.¹⁶⁷ Congress clearly directed that punitive forfeitures be imposed in criminal prosecutions. On the other hand, Congress plainly intended that remedial forfeitures continue to be imposed in rem. The correctness of *United States v. Hall*, therefore, depends on whether the forfeiture in that case was punitive or remedial.

C. *Is 18 U.S.C. § 545 a Criminal Forfeiture?*

In *Kennedy v. Mendoza-Martinez*¹⁶⁸ the Supreme Court stated that the question whether a given sanction is punitive or remedial is "extremely difficult and elusive of solution."¹⁶⁹ No one test is decisive; indeed, in *Mendoza-Martinez* the Court referred to seven different tests.¹⁷⁰ Nevertheless, the Court has made it clear that the

¹⁶⁵ S. REP. NO. 617, *supra* note 146, at 124 (emphasis added). See 116 CONG. REC. 35193 (remarks of Rep. Poff); 116 CONG. REC. 18939 (remarks of Senator McClellan).

¹⁶⁶ The former Chief Counsel of the Senate Subcommittee that considered the Organized Crime Control Bill asserted that, according to Congress, the principal distinguishing feature of the criminal forfeiture was the imposition of punishment upon a finding of personal guilt. Interview with G. Robert Blakey, Professor of Law, Cornell Law School, in Ithaca, New York (Sept. 14, 1976).

¹⁶⁷ See notes 101-14 and accompanying text *supra*.

¹⁶⁸ 372 U.S. 144 (1963).

¹⁶⁹ *Id.* at 168.

¹⁷⁰ *Id.* at 168-69 (footnotes omitted):

appropriate starting point is the intent of Congress in initially passing the legislation in question.¹⁷¹

The forfeiture involved in *United States v. Hall*¹⁷² originated in section four of the Act of July 18, 1866.¹⁷³ The legislative history of the section is confusing. Apparently Congress did not intend a forfeiture under the section at all. Senator Morrill, the floor leader of the bill, answered one query as follows:

[The] prosecution of the goods . . . is not contemplated by this section, and therefore it is irrelevant, to say the least of it.

. . . I am speaking of the intent of this section. It was to provide a remedy against the person, and not against the property. We have a remedy against the property in the laws already provided for.¹⁷⁴

Although it is unclear whether Congress intended to authorize a forfeiture, it did agree that the section was punitive. Senator Morrill concurred in an opponent's statement that "[t]he whole purpose of the section is to punish men for importing goods contrary to law"¹⁷⁵ Thus, Congress intended to impose only punitive sanctions under the predecessor of section 545. The courts, after some disagreement, finally decided that the section authorized a forfeiture.¹⁷⁶

Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions.

See *Rex Trailer Co. v. United States*, 350 U.S. 148 (1956); *Morrisette v. United States*, 342 U.S. 246 (1951); *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943); *Helvering v. Mitchell*, 303 U.S. 391 (1938); Charney, *The Need for Constitutional Protections For Defendants in Civil Penalty Cases*, 59 CORNELL L. REV. 478 (1974).

¹⁷¹ For criticism of this approach, see Clark, *supra* note 14, a 436-44.

¹⁷² 521 F.2d 406 (9th Cir. 1975).

¹⁷³ 14 Stat. 179 (1866). Subsequently, this section became R.S. § 3082 (1878); Tariff Act of September 21, 1922, c. 356, § 593, 42 Stat. 982; Tariff Act of June 17, 1930, c. 497, tit. IV, § 593, 46 Stat. 751. No significant change in the wording of the forfeiture provision was made until it was enacted into positive law as part of the 1948 codification of the criminal code. Act of June 24, 1948, ch. 645, § 545, 62 Stat. 716.

¹⁷⁴ CONG. GLOBE, 39th Cong., 1st Sess., 2591-92 (1866).

¹⁷⁵ *Id.* at 2591 (remarks of Senator Howe). Another Senator, who thought the section did authorize a forfeiture, observed: "[T]he section is merely penal. As applied to goods the necessary penalty must be forfeiture, because that is the only way you can punish the thing." *Id.* at 2593 (remarks of Senator Edmunds).

¹⁷⁶ In 1875 the New York Circuit Court said that there could be no forfeiture under the section. *United States v. A Lot of Jewelry*, 26 F. Cas. 994, 996 (C.C.S.D.N.Y. 1875) (No.

Subsequent decisions support the conclusion that a forfeiture under the Act of 1866 and its successors is punitive. In 1871 the Supreme Court held the Act to be "strictly penal [and] not at all remedial."¹⁷⁷ Seven years later, in *United States v. Claflin*,¹⁷⁸ the Court reconsidered and found a limited remedial aspect. The Court said:

[A] renewed and more careful examination . . . has convinced us that Congress, in the act of 1866, had in view not only punishment of the offence described, but indemnity to the government for loss sustained in consequence of the criminal conduct of those guilty of the offence. The [1866] act denounces a forfeiture of the goods concealed, &c., *no matter in whose hands they may be found*.¹⁷⁹

Claflin did not prevent the lower federal courts from continually construing forfeitures under the 1866 Act as punitive. In 1883, the California Circuit Court, commenting that the forfeiture was "essentially criminal and intended to punish a crime," noted that "[a] criminal offense committed is the basis of the proceeding and ground of punishment, alike, in the indictment, and of forfeiture and condemnation on the information, and the same offense must be shown in order to maintain either proceeding."¹⁸⁰ Since the promulgation of the *Coffey* doctrine in 1886—that an acquittal in a criminal prosecution barred a subsequent punitive in rem suit when "all that is imposed by the statute, as a consequence of guilt, is a punishment therefor"¹⁸¹—courts have consistently held the 1866 Act punitive.¹⁸² Any support *Claflin* may have given to viewing section 545 as predominantly remedial was eliminated by the language of the 1948 codification, which brought the section into

15,626). Nevertheless, in the 1880's the courts occasionally applied forfeitures under the section without challenge. *E.g.*, 3880 Boxes of Opium v. United States, 23 F. 367 (C.C.D. Cal. 1883). In 1894 a court read the statute on its face, without regard to its legislative history, and decided that the section did authorize a forfeiture. *United States v. A Lot of Jewelry*, 59 F. 684, 686 (E.D.N.Y. 1894). The argument that the statute did not authorize a forfeiture was raised again 25 years later, and was rejected. *In re 200 7/12 Dozen Wool Hose*, 263 F. 376 (2d Cir. 1920).

¹⁷⁷ *Stockwell v. United States*, 80 U.S. (13 Wall.) 531, 551 (1871).

¹⁷⁸ 97 U.S. 546 (1878).

¹⁷⁹ *Id.* at 553 (emphasis added). The Court found a remedial element in order to avoid finding that the 1866 Act repealed a prior statute.

¹⁸⁰ 3880 Boxes of Opium v. United States, 23 F. 367, 394 (C.C.D. Cal. 1883).

¹⁸¹ *Coffey v. United States*, 116 U.S. 436, 443 (1886). See notes 122-23 and accompanying text *supra*.

¹⁸² See, *e.g.*, *United States v. 201 Fifty Pound Bags of Furazolidone*, 52 F.R.D. 222 (D.N.D. 1971), *cert. denied*, 405 U.S. 964 (1972). See notes 122, 126-27 and accompanying text *supra*.

the Criminal Code. Under the present version of section 545, property is not subject to forfeiture unless it is recovered from the smuggler.¹⁸³ The rationale of *Clafin* has vanished.

The three other principal tests that distinguish the punitive from the remedial—scienter, relationship of sanction to injury, and placement in the statutory scheme—further support the conclusion that section 545 is punitive.¹⁸⁴ First, section 545 requires the prosecution to prove scienter.¹⁸⁵ Second, the statute requires no showing of a relationship between sanction and injury; the forfeiture imposed may be totally disproportionate to the government's injury. For example, an owner forfeits his goods for failure to invoice them, even though they are not subject to duty or other regulation.¹⁸⁶ Finally, section 545's placement in the statutory scheme of customs and smuggling statutes is evidence that it is punitive. As the Supreme Court recently observed:

The forfeiture provision [of a related customs statute] fell within . . . the "Administrative Provisions" [and was therefore a civil sanction]. Section 545, on the other hand, was part of the "Enforcement Provisions" and became part of the Criminal Code of the United States. The fact that the sanctions were separate and distinct and were contained in different parts of the statutory scheme is relevant in determining the character of the forfeiture. Congress could and did order both civil and criminal sanctions, clearly distinguishing them.¹⁸⁷

Thus forfeiture under section 545 is punitive. Ordinarily, a punitive forfeiture should be regarded as a criminal forfeiture under the Federal Rules of Criminal Procedure. A criminal forfei-

¹⁸³ See note 152 *supra*. The present version of § 545 eliminates the doctrine of relation back because the forfeiture applies to either the goods or their value. See *Caldwell v. United States*, 49 U.S. (8 How.) 366 (1850); *National Atlas Elevator Co. v. United States*, 97 F.2d 940, 943 (8th Cir. 1938).

The draftsmen of the 1948 codification almost certainly did not intend to change the wording of § 545 to create a criminal forfeiture. Just two years earlier, the Federal Rules of Criminal Procedure, which embodied the conventional view, had gone into effect and made a criminal forfeiture a procedural impossibility. See note 148 and accompanying text *supra*.

¹⁸⁴ See Charney, *supra* note 170, at 491-95.

¹⁸⁵ See 18 U.S.C. § 545 (1970), set out in note 152 *supra*. Under § 545 the government must prove the state of mind of the person who introduced the goods into the country. Usually, if not always, this person is the owner. Thus, in order to contest the forfeiture, an owner risks being found to be a smuggler.

¹⁸⁶ See Annot., 20 A.L.R. Fed. 410, 424 (1974).

¹⁸⁷ *One Lot Emerald Cut Stones & One Ring v. United States*, 409 U.S. 232, 236 (1972). This case dealt with the more usual customs statute in which forfeiture is imposed regardless of state of mind. Section 545, on the other hand, requires a finding of personal guilt before forfeiture will lie. See note 98 and accompanying text *supra*.

ture is a forfeiture imposed as punishment for personal guilt.¹⁸⁸ Since "punishment" as used in Anglo-American law implies personal guilt of the person punished,¹⁸⁹ in the usual case no separate showing of a statutory requirement of proof of personal guilt should be necessary to establish a forfeiture as criminal. In any event, section 545 *does* explicitly require proof of personal guilt.¹⁹⁰ Property can be forfeit only upon a finding that the person from whom it is recovered is guilty of smuggling. Although the smuggler from whom the property is recovered will not always be the owner, the property will still be subject to forfeiture under section 545. But that occasional case does not alter the character of the forfeiture as punishment in the usual situation where, as in *Hall*, the alleged smuggler and the owner are one and the same. Therefore, the Ninth Circuit could reasonably find that a punitive forfeiture requiring proof of the owner's guilt is a criminal forfeiture within the meaning of the Federal Rules of Criminal Procedure. Yet the court reached this result without analysis of the issues and thereby continued the current misconception that all forfeitures, whether civil or criminal, are necessarily the same.

IV ·

RECOMMENDATIONS

Not all forfeitures are alike; some are remedial and some are punitive.¹⁹¹ Although in enacting the 1970 Acts Congress assumed

¹⁸⁸ See notes 160-67 and accompanying text *supra*.

¹⁸⁹ A. Quinton argues there is "a logically necessary relation holding between guilt and punishment. Only the guilty can be punished . . ." Quinton, *On Punishment* in *THE PHILOSOPHY OF PUNISHMENT* 55, 63 (H.B. Acton ed. 1969). See also Flew, *The Justification of Punishment*, *id.* at 83; Baier, *Is Punishment Retributive?*, *id.* at 130.

¹⁹⁰ See note 185 *supra*.

¹⁹¹ In discussing their law, German commentators reached the same fundamental distinction some years ago. They now agree that a German forfeiture must be considered either as "Strafe" (punishment) or as a "Sicherungsmaßnahme" (preventive measure). See A. ESER, *DIE STRAFRECHTLICHEN SANKTIONEN GEGEN DAS EIGENTUM* 67-70, 72-73, 76-77 (1969); A. SCHÖNKE & H. SCHRÖDER, *STRAFGESETZBUCH KOMMENTAR* § 40, at 184-85 (12th ed. 1965). Any restructuring of American law would benefit from study of the extensive German literature, which systematically considers many of the same problems encountered here. For a good bibliography, see A. ESER, *supra*, at 382-88. Particularly relevant are the forfeiture provisions of the new German criminal code of 1975 which replaced the century-old prior law. The old law was changed partly to bring forfeiture provisions into accord with the West German constitution by protecting innocent parties. Cf. StGB §§ 73-76a (1975) (new code provisions extensively rewritten, expanded, and detailed); StGB §§ 40-42 (1953); RStGB §§ 40-42 (1871) (original code sections). See generally A. SCHÖNKE & H. SCHRÖDER, *STRAFGESETZBUCH KOMMENTAR* §§ 73-76a, at 726-71 (18th ed. 1976) (A. Eser, contributor). For a discussion in English of recent changes in German for-

that all prior forfeiture statutes were remedial, this certainly was not the case. In spite of this misconception, Congress has determined that an in rem proceeding is an inappropriate means to impose punishment. Therefore, although a remedial forfeiture may be imposed in a civil in rem proceeding, a court should impose a punitive forfeiture only upon criminal conviction of the owner.¹⁹²

The procedural classification of forfeiture statutes will continue to cause confusion as long as there are punitive forfeiture statutes that specifically provide for civil in rem proceedings. Congress should repeal those statutory provisions that require the in rem proceeding. Where statutes do not specifically provide for a particular proceeding, Congress should furnish a rule for distinguishing criminal from civil forfeitures. Several midwestern states have such rules.¹⁹³ Until Congress acts, however, the courts must determine whether the forfeiture is civil or criminal where the statute is silent on the issue.

In deciding this question, the courts should use the criteria established by Congress—namely, a forfeiture is criminal if it imposes punishment and rests on a finding of personal guilt. When a court finds that a given forfeiture is punitive, and therefore criminal, the owner will be entitled to all constitutional protections granted a criminal defendant.¹⁹⁴ In the exercise of this duty, the courts should not conclude that a remedial forfeiture is criminal in order to avoid an unjust result. If Congress has established a remedial forfeiture, the courts should treat the forfeiture as civil.

In light of this reexamination of forfeiture law, it is appropriate for the judiciary to reconsider its own doctrines in order to ameliorate most of the evil results of present day forfeiture law. The judiciary should consider the readoption of older views abandoned scarcely a half century ago. Specifically, three changes

feiture law, see Maxeiner, *Constitutionalizing Forfeiture Law—The German Example* (on file at the *Cornell Law Review*).

¹⁹² The objections to an in rem action to impose a punitive forfeiture are not necessarily present in a civil in personam action to impose a similar forfeiture. Although Congress could provide for such a procedure, it has not done so. There is precedent for such civil in personam forfeitures in the practice of the English Exchequer. See notes 45-51 and accompanying text *supra*.

¹⁹³ The rule in Wisconsin states: "Where a forfeiture imposed by statute shall be incurred it may be recovered in a civil action unless the act or omission is punishable by fine and imprisonment or by fine or imprisonment." WIS. STAT. ANN. § 288.01 (West 1958). There are similar rules in Michigan and North Dakota. MICH. STAT. ANN. §§ 27A.4801, 4805 (1962); N.D. CENT. CODE § 32-14-01 (1975).

¹⁹⁴ See note 148 and accompanying text *supra*.

would effectively minimize the severity of the law without reducing its overall effectiveness:

(1) Vicarious liability should not be considered typical of all forfeitures, but should be found only if there is a clear congressional mandate. The appropriate extent of vicarious liability should depend upon the character of the forfeiture and the need for such liability to effect the statute's purpose.¹⁹⁵

(2) Relation back of the forfeiture to the time of the offense should not be assumed, but should be applied only if the statute directs it. Justice Story's presumption against relation back should be adopted.¹⁹⁶

(3) The rule that no little thing will work a forfeiture without the owner's complicity should be applied where appropriate.¹⁹⁷

All three of these doctrines were created but later abandoned by the judiciary. They were general rules of interpretation and were not limited to any specific statutes. The present day conceptions of unlimited vicarious liability and relation back to the time of the offense owe their existence solely to judicial adoption of a perverse version of the fiction of guilty property. That fiction should at long last be abandoned and a rule of reason reinstated. In the words of the late medieval English writer St. German:

¶ DOCTOUR) In the cases that thou haste put before of the stray & deodand there be consyderacyons why they be forfeit/ but it is not so here/ & me thynketh that in this case [the finder should hold the property on behalf of the owner] sauynge his reasonable expences/ & this me thinketh were more resonable law than to pull the property out of the owner without cause.¹⁹⁸

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¹⁹⁵ See notes 32-44, 66-67, 78-80, 134-41 and accompanying text *supra*. See also *United States v. One 1969 Plymouth Fury*, 509 F.2d 1324 (5th Cir. 1975) (dissenting opinion, Wisdom, Brown, Ainsworth, Dyer, Clark & Gee, JJ.).

¹⁹⁶ See notes 37, 74 and accompanying text *supra*.

¹⁹⁷ See note 44 and accompanying text *supra*.

¹⁹⁸ ST. GERMAN, *supra* note 28, at 291-92 (emphasis added).