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Statutory Forfeitures: The Taking of Pearson's Yacht: *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974)

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Note

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Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974).

> It is the peculiar genius and strength of the common law that no decision is *stare decisis* when it has lost its usefulness in our social evolution; it is distinguished, and if times have sufficiently changed, overruled. Judicial opinions do not always preserve the social statics of another generation.[1]

I. INTRODUCTION

In *Calero-Toledo v. Pearson Yacht Leasing Co.*,[2] the United States Supreme Court recently reaffirmed its longstanding position that forfeiture statutes may be constitutionally applied to innocent property owners such as lessors, bailors, and secured creditors. The Court also held that seizure for purposes of forfeiture constitutes an "extraordinary situation"[3] which justifies postponing notice and an adversary hearing. The decision overturned a lower court ruling which held the seizure and forfeiture to be unconstitutional on two distinct grounds: as a taking of property for government use without just compensation and as a taking of property without adequate notice and hearing.[4]

Pearson Yacht Leasing Company had leased a pleasure yacht to two Puerto Rican residents in March 1971. Marijuana was discovered on the yacht in May 1972, and one of the lessees was charged with violation of the Controlled Substances Act of Puerto Rico.[5] In July 1972, two months after the discovery of marijuana, the authorities seized the yacht pursuant to Puerto Rican law.[6] The

1. Jayne, V.C., in Carroll v. Local 269, I.B.E.W., 31 A.2d 223, 225 (N.J. Ch. 1943).
2. 416 U.S. 663 (1974), *rev'g* 363 F. Supp. 1337 (D.P.R. 1973).
3. *See* Fuentes v. Shevin, 407 U.S. 67, 90 (1972).
4. Pearson Yacht Leasing Co. v. Massa, 363 F. Supp. 1337 (D.P.R. 1973).
5. P.R. LAWS ANN. tit. 24, § 2101 *et seq.* (Supp. 1973).
6. *Id.*, § 2512(a)(4)(b) (Supp. 1973) states:
   > (a) The following shall be subject to forfeiture to the Commonwealth of Puerto Rico:
   > . . .

yacht was forfeited to the government when a challenge to the seizure was not made within 15 days after service of notice.[7] The lessor Pearson was given neither notice of the seizure and forfeiture nor an opportunity to be heard.[8] Only when the lessee fell in arrears on his rent payments did the Company become aware of the forfeiture.[9] "It [was] conceded that appellee [Pearson] was 'in no way . . . involved in the criminal enterprise carried on by [the] lessee' and 'had no knowledge that its property was being used in connection with or in violation of [Puerto Rican law].' "[10] The lessor Company had, in fact, inserted a provision in the lease agreement forbidding any illegal use of the yacht.[11] Despite the Company's lack of culpability, seizure and forfeiture of their property was held to be constitutional.

This note argues that such seizure and forfeiture of beneficial property[12] of innocent owners[13] serves no legislative purpose and

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(4) All conveyances, including aircraft, vehicles, mount or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment or property described in clauses (1) and (2) of this subsection . . . .

Marijuana is classified as a controlled substance to which section 2512 applies. P.R. LAWS ANN. tit. 24, § 2202(c) (Supp. 1973).

7. P.R. LAWS ANN. tit. 34, § 1722(c) (Supp. 1973) provides:
(c) After fifteen (15) days have elapsed since service of notice of the seizure without the person or persons with interest in the property seized have filed the corresponding challenge, . . . the officer under whose authority the seizure took place, . . . may provide for the sale at auction of the seized property, or may set the same aside for official use of the Government of Puerto Rico.
8. The lessee was given proper notice as required by § 1722(a) but failed to challenge the seizure.
9. 416 U.S. at 668.
10. *Id.*
11. *Id.* at 693 (Douglas, J., dissenting).
12. There is an important distinction between the two classes of property generally subject to forfeiture. Contraband per se describes property which is inherently dangerous and the possession or distribution of which is itself usually a crime. Certain types of guns, narcotics, liquor, and gambling devices are contraband per se. Derivative contraband is property which has some beneficial use such as automobiles, boats, airplanes, and currency. This article is concerned only with the forfeiture of derivative contraband. For further discussion of this distinction, see Comment, *Forfeitures—Civil or Criminal?*, 43 TEMP. L.Q. 191, 195 (1970); 21 KAN. L. REV. 235, 236 (1973). The Supreme Court has recognized the distinction in One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 699 (1965).
13. The term "innocent owners" includes lessors, bailors, and secured creditors who are unaware of any criminal enterprise which involves property in which they have an interest.

should be held unconstitutional. The notice and hearing problems that accompany this procedure are beyond the scope of this article.[14]

II. BACKGROUND HISTORY OF FORFEITURES

Modern forfeiture[15] statutes originate from two sources, deodand and common law forfeiture.[16] The law of deodand, which means "given to God," required forfeiture to the King, as a religious sacrifice, of an instrument that had caused death so there would be money to pay for Masses to be said for the deceased's soul. The action was characterized as against the "thing" itself.[17] Blackstone criticized deodand as a "superstition" inherited from "the blind days of popery" and thus condemned the seizure of the property of an innocent owner.[18] The second source from which the modern statutes originated was common law forfeiture. It was invoked when an offense was committed by the owner against the crown. Blackstone could justify this as the sacrifice society evokes for the violation, by one of its members, of the fundamental contract of association.[19]

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14. There is no intention to minimize the importance of the notice and hearing issue. Indeed, the district court in *Pearson* felt compelled to hold the seizure and forfeiture invalid purely for failure of notice and hearing. Before *Pearson* there was some disagreement among state courts as to whether due process requires pre-seizure notice and hearing in forfeiture cases. *Compare* City of Everett v. Slade, 83 Wash. 2d 80, 515 P.2d 1295 (1973) *and* State v. One 1970 2-Door Sedan Rambler, 191 Neb. 462, 215 N.W.2d 849 (1974). Moreover, in *Pearson* the Company was given no *post-seizure* notice of the impending forfeiture. Due process requires that such notice be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Robinson v. Hanrahan, 409 U.S. 38, 40 (1970), *quoting* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).
15. The primary meaning of "forfeit" is "to lose." BLACK'S LAW DICTIONARY 778 (4th ed. 1968). Forfeiture, in the context of the *Pearson* case, has been defined as "the divestiture of property without compensation, in consequence of . . . an offense, and is a method deemed necessary by the Legislature to restrain the commission of the offense and to aid in its prevention." 36 AM. JUR. 2D *Forfeitures and Penalties* § 1 (1968).
16. *See* Finkelstein, *The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty*, 46 TEMP. L.Q. 169 (1973) [hereinafter cited as Finkelstein].
17. O. HOLMES, THE COMMON LAW ch. 1 (1881). The law of deodand was based on the proposition that " 'if an ox gore a man that he die, the ox shall be stoned, and his flesh shall not be eaten'." Goldsmith Grant Co. v. United States, 254 U.S. 505, 511 (1921) (citing BLACKSTONE).
18. 1 W. BLACKSTONE, COMMENTARIES *300.
19. *Id.*

Federal and state governments in America adopted the practice of forfeitures. Early cases sustaining the validity of such actions characterized them as in rem seizures.[20] The property itself was held to be the object punished; thus, the owner's guilt was deemed to be irrelevant.[21] Since the action was in rem rather than in personam, and therefore civil rather than criminal, the standard of proof was "a preponderance of the evidence" instead of "beyond a reasonable doubt."[22] Although this characterization of the action has continued to be applied[23] and was preserved by *Pearson,* it is a judicial fiction and has not gone uncriticized. As early as 1818, Chief Justice Marshall remarked that "[t]he mere wood, iron, and sails of the ship cannot, of themselves, violate the law."[24]

Van Oster v. Kansas[25] offered another judicial fiction to justify the forfeiture of an innocent owner's property. The Court upheld the forfeiture of an automobile used to transport intoxicating liquor in violation of Kansas law, even though the owner had no knowledge of the illegal act.

> [The cases] suggest that certain uses of property may be regarded as so undesirable that the owner surrenders his control at his peril. The law thus builds a secondary defense against a forbidden use and precludes evasions by dispensing with the necessity of judicial inquiry as to collusion between the wrongdoer and the alleged innocent owner.[26]

"By dispensing with the necessity of judicial inquiry," the Court established a conclusive presumption[27] that collusion would exist between the wrongdoer and any alleged innocent owner.

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20. *See* The Palmyra, 25 U.S. (12 Wheat.) 1 (1827); Dobbins Distillery v. United States, 96 U.S. 395 (1877); United States v. One Ford Coupe Automobile, 272 U.S. 321 (1926); Goldsmith-Grant Co. v. United States, 254 U.S. 505 (1921).
21. *See* note 20 *supra.* In United States v. Brig Malek Adhel, 43 U.S. (2 How.) 210, 233 (1844), the Court held the innocence of the owner to be irrelevant in a forfeiture action and stated: "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."
22. *See* note 20 *supra.*
23. *See, e.g.,* United States v. One 1970 Buick Riviera, 463 F.2d 1168 (5th Cir. 1972).
24. United States v. The Little Charles, 26 F. Cas. 979, 982 (No. 15,612) (C.C.D. Va. 1818) (dictum). In Peisch v. Ware, 8 U.S. (4 Cranch) 347, 365 (1808), Chief Justice Marshall also stated that "the law is not understood to forfeit the property of owners or consignees, on account of the misconduct of mere strangers, over whom such owners . . . could have no control."
25. 272 U.S. 465 (1926).
26. *Id.* at 467-68.
27. An irrebuttable, or conclusive presumption, provides that the existence

The principle of stare decisis has performed yeoman service in perpetuating these two fictions. In *Goldsmith-Grant Co. v. United States*,[28] the Court, though admitting the potential inequity of forfeiture as applied to an innocent owner, stated that "[w]hether the reason for [the forfeiture statute at issue] be artificial or real, it is too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced."[29] Thus the rule has been established, and preserved, that there is no constitutional violation in the statutory forfeiture of property of an innocent owner, who has entrusted such property to a person who has used it illegally.

The concept of forfeiture as an in rem, civil action was clouded by *Boyd v. United States*.[30] There the Court held statutory forfeitures to be "quasi-criminal" for purposes of invoking the protection of the fourth amendment and the self-incrimination clause of the fifth amendment. In *Boyd*, private papers that had been illegally seized were used as evidence in an action to forfeit goods, which were alleged to have been fraudulently imported. The Court reasoned that it would be anomalous to admit illegally seized evidence in a forfeiture action, while refusing to admit such evidence in criminal actions, since the purpose of both actions is to deter commission of criminal acts. The Supreme Court reaffirmed *Boyd* in *One 1958 Plymouth Sedan v. Pennsylvania*,[31] observing that forfeiture is clearly a penalty for a criminal offense and can result in even greater punishment than the criminal prosecution.[32]

In recent years courts have continued to express their disfavor

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of one fact is conclusive evidence of the existence of another fact. *See* note 46 *infra*.

28. 254 U.S. 505 (1921).

29. *Id.* at 511. *See also* United States v. One 1970 Buick Riviera, 463 F.2d 1168 (5th Cir. 1972). There, a secured creditor intervened in a forfeiture action and filed for remission of its security interest. Although the creditor was completely innocent of any wrongdoing, the courts denied its claim. The extent of the court's reasoning was that "[t]he Bank's due process arguments are without merit," citing Van Oster v. Kansas, 272 U.S. 465 (1927).

30. 116 U.S. 616 (1886).

31. 380 U.S. 693 (1965). McGonigle, the driver and owner of the automobile subject to forfeiture, was arrested and charged for violation of Pennsylvania's liquor laws. The record did not disclose which offense(s) McGonigle was charged with having committed.

32. If convicted of any one of the possible offenses involved, however, he would be subject, if a first offender, to a minimum penalty of a $100.00 fine and a maximum penalty of a $500.00 fine. In this forfeiture proceeding he was subject to the loss of his automobile, which at the time involved had an estimated value of approximately $1,000.00, a higher amount than the maximum fine in the criminal proceeding.
Id. at 700-01.

with the characterization of forfeitures as actions in rem. In *McKeehan v. United States*,[33] the Sixth Circuit held the forfeiture of firearms of an innocent owner to be unconstitutional as a deprivation of property without just compensation. Because there was no valid legislative, administrative or revenue purpose to justify the in rem characterization of the forfeiture, the court considered the action to be in personam to afford the owner certain constitutional safeguards. "In so doing, [the court was] not creating a 'legal fiction,' but destroying one. [The court was] characterizing the facts underlying this action as to their substance."[34] Thus it was widely presumed in the lower federal courts, until *Pearson*, that forfeiture of property would violate due process if the owner lacked knowledge of the commission of the crime.[35]

The Supreme Court, in *United States v. United States Coin and Currency*,[36] seemed to support this proposition, holding that the fifth amendment privilege against self-incrimination was applicable to actions brought under section 7302 of Title 26 of the United States Code, involving forfeiture of money used in violation of federal gambling laws. The Court reasoned that "when forfeiture statutes are viewed in their entirety" it is obvious they are to be applied only to those who are "significantly involved in a criminal enterprise."[37] After expressing strong disenchantment with the govern-

33. 438 F.2d 739 (6th Cir. 1971).
34. *Id.* at 745.
35. *Id.* *See also* Suhomlin v. United States, 345 F. Supp. 650 (D. Md. 1972); United States v. One Ford Two-Door-Sedan, 69 F. Supp. 417 (D. Idaho 1947). In United States v. One 1971 Ford Truck, 346 F. Supp. 613 (C.D. Cal. 1972), the court did away with forfeitures against the property of innocent owners, describing such an action as an "enclave of injustice." *Id.* at 618. Other federal courts, though feeling bound by prior rulings, have, nevertheless, criticized the rule. *See, e.g.*, United States v. One 1967 Ford Mustang, 457 F.2d 931, 932-33 (9th Cir. 1972). In United States v. One 1962 Ford Thunderbird, 232 F. Supp. 1019 (N.D. Ill. 1964), the court stated that as a legislator, it would express grave doubts as to the validity of forfeitures that affect innocent lienholders. In United States v. One 1961 Cadillac, 207 F. Supp. 693 (E.D. Tenn. 1962), the court recognized the constitutionality of such forfeitures but also expressed the view that

> [t]he laws relating to forfeitures do cause one who is raised in the traditions of the Anglo-American principles of justice and who is committed to the principles of due process and just compensation to search closely for a constitutional violation.

Id. at 698. *But see* United States v. One 1970 Buick Riviera, 463 F.2d 1168 (5th Cir. 1972), *cert. denied*, 409 U.S. 980 (1972); United States v. One 1967 Ford Mustang, 457 F.2d 931 (9th Cir. 1972), *cert. denied*, 409 U.S. 850 (1972).
36. 401 U.S. 715 (1971).
37. *Id.* at 721-22.

ment's characterization of the proceeding as an in rem suit, the Court stated in strong dictum:

> Before the Government's attempt to distinguish the *Boyd* case could even begin to convince, we would first have to be satisfied that a forfeiture statute, with such a broad sweep, did not raise serious constitutional questions under that portion of the Fifth Amendment which commands that no person shall be "deprived of property without due process of law; nor shall private property be taken for public use without just compensation." Even Blackstone, who is not known as a biting critic of the English legal tradition, condemned the seizure of the property of the innocent as based upon a "superstition" inherited from the "blind days" of feudalism. And this Court has recognized the difficulty of reconciling the broad scope of traditional forfeiture doctrine with the requirements of the Fifth Amendment.[38]

Underlying this analysis was undoubtedly a deep concern that the doctrine of the "offending res," a judicial fiction, was being used as a subterfuge by which the government could punish a blameless individual.[39]

III. THE TAKING OF PEARSON'S YACHT

Against this backdrop, the Supreme Court upheld the forfeiture of Pearson's yacht despite the Company's complete innocence of the crime committed by the lessee. Retreating from the dictum in *Coin and Currency*, the Court deferred to the "punitive and deterrent purposes" of the Puerto Rican narcotics laws, stating that their application to innocent owners would encourage greater care in the transfer of property.[40] To justify this position the *Pearson* case preserved the critical distinction between consent to use, which is an essential prerequisite to invoking a forfeiture statute, and consent to use for an unlawful purpose. The Court held that a mere showing of consent to use is constitutionally sufficient for forfeiture and knowing consent for illegal use is not required.[41]

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38. *Id.* at 720-21.
39. One commentator, writing from an historical perspective, has suggested that the old law of deodand was more justified than present day forfeiture since the execution of the proverbial ox expressed a genuine concern about human life. Forfeiture actions today commonly result in the punishment of a blameless individual and, more remarkably, a blameless inanimate object. *Pearson* is such a case. "If anything, the legal historians who have heaped such contempt upon the old deodand, would have been upon firmer moral ground if they cast their critical scrutiny instead upon its modern counterpart." Finkelstein, *supra* note 16 at 252.
40. 416 U.S. at 686-88.
41. *Id.* at 689. The Court stated that it would be difficult to justify constitutionally forfeiture of property that had been taken from the owner without his consent.

This distinction presents several problems. It is difficult to understand how the objective of curbing illicit narcotics traffic can be achieved by forfeiting the property of innocent owners. The purpose of any forfeiture statute should be rationally related to the conduct of the owner since he alone is the party to whom the forfeiture applies, and a showing of consent to use should not be the only prerequisite to invoking forfeiture. As Justice Harlan stated in *Coin and Currency*:

> From the relevant constitutional standpoint there is no difference between a man who "forfeits" $8,674 because he has used the money in illegal gambling activities and a man who pays a "criminal fine" of $8,674 as a result of the same course of conduct. In *both instances, money liability is predicated upon a finding of the owner's wrongful conduct*; . . .[42]

Yet in *Pearson*, Puerto Rico conceded that the Company was "completely innocent" of any wrongful conduct,[43] but the Company was "punished,"[44] despite its innocence.

There is another difficulty in basing forfeiture on a showing of consent to use. The lease agreement drawn by the lessor Pearson expressly precluded the use of the yacht for illegal purposes,[45] so that when the lessee was arrested, he was using the yacht *beyond the original consent* of Pearson.

A further constitutional objection to the forfeiture in *Pearson*, not addressed by the Court, concerned the existence of an irrebuttable presumption.[46] By "dispensing with judicial enquiry"[47] into the

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42. 401 U.S. at 718 (emphasis added).
43. 363 F. Supp. at 1340.
44. Applying the rationale of *Coin and Currency*, the Pearson Company was punished to the extent of $19,800.00, the fair market value of the yacht. 416 U.S. at 688 n.4.
45. *Id.* at 693 (Douglas, J., dissenting).
46. Irrebuttable presumptions have long been disfavored. The reason is that "when [an irrebuttable presumption is] not necessarily or universally true in fact," it is irrational and cannot be squared with the due process clauses of the fifth and fourteenth amendments. *See* Vlandis v. Kline, 412 U.S. 441, 452 (1973). It is apparent that irrebuttable presumptions are becoming increasingly disfavored. The *Vlandis* case recognized that Connecticut students had a constitutional right to rebut a conclusive presumption that a student would be a nonresident throughout his university career if his legal address at the time of admission was outside Connecticut. Cleveland Bd. of Educ. v. LeFleur, 414 U.S. 632 (1974), invalidated school board rules requiring maternity leaves for teachers entering their fifth or sixth month of pregnancy. The rules conclusively presumed "that every pregnant school teacher who reaches the fifth or sixth month of pregnancy is physically incapable of continuing." *Id.* at 644. Stanley v. Illinois, 405 U.S. 645 (1972), held unconstitutional an Illinois statute which irrebuttably

innocence of the property owner, the Puerto Rican statute irrebuttably presumed the owner's collusion in the crime, committed by another, simply because his property was used in the commission of the crime.[48] No recourse was provided by which the owner could rebut the presumption.[49]

The Court held another statutory scheme based on fault to be an unconstitutional violation of procedural due process in *Bell v. Burson*.[50] That case involved a Georgia law which required an uninsured motorist, who was involved in an accident, to post security for the amount of damages claimed by the injured party. In the event the motorist could not comply, his driver's license and motor vehicle registration were suspended. Since the entire statutory plan was concerned with fault, "[the State] could not conclusively presume the fault from the fact that the uninsured motorist was involved in an accident, and could not, therefore, suspend his driver's license without a hearing on that crucial factor."[51]

In *Bell*, lack of judicial recourse on the issue of the driver's fault was fatal to Georgia's law. The driver there was integrally involved in the activity, the automobile accident, which the state sought to regulate. In *Pearson*, however, it was conceded that the Company was not even involved in the criminal enterprise. Since judicial inquiry was required in *Bell* on the fault issue, the Company in *Pearson* should have been given a hearing on the issue of

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presumed that unmarried fathers were incompetent to raise their children. *See also* United States Dep't of Agriculture v. Murry, 413 U.S. 508 (1973). For an extensive discussion of the recent presumption cases and a suggested new analysis see Comment, *Irrebuttable Presumptions: An Illusory Analysis*, 27 STAN. L. REV. 449 (1975).

47. 272 U.S. at 467. By dispensing with judicial inquiry into each individual case, evasions of forfeiture statutes can be avoided. The Supreme Court of Puerto Rico has cited *Van Oster* with approval in General Motors Acceptance Corp. v. District Court, 70 P.R.R. 898, 900 (1950), and applied its reasoning to justify the statute under which Pearson was prosecuted.

> If we seek to assimilate criteria of criminal intention in the case of third parties, we would be granting immunity to offenders of the law who by means of a clever strategy would be in condition to violate it by employing vehicles belonging to others without the risk of confiscation.

Commonwealth v. Superior Court, 94 P.R.R. 687, 691 (1967).

48. Use of any conveyance to transport or in any manner facilitate the transportation, sale, receipt, possession, or concealment of an unlawful controlled substance is the only element required for forfeiture. *See* P.R. LAWS ANN. tit. 24, § 2512 (Supp. 1974). The owner's state of mind is irrelevant.
49. *See* Commonwealth v. Superior Court, 94 P.R.R. 687, 697 (1967).
50. 402 U.S. 535 (1971).
51. Vlandis v. Kline, 412 U.S. 441, 447 (1973), describing the holding in *Bell*.

intent, or, at least, on whether ordinary care was used in the transfer of the yacht.

No element of knowledge, intent or criminal involvement was required for forfeiture under the Puerto Rican law, yet that was the critical factor underlying the entire statutory scheme of Puerto Rico's narcotics laws. The conveyance subject to forfeiture must have been used in commission of a criminal offense,[52] and that offense could be established only by a showing that the defendant *knowingly* or *intentionally* manufactured, distributed, dispensed, conveyed or concealed a controlled substance.[53] Since the whole statutory scheme involved in *Pearson* was created to punish and deter intentional conduct, forfeiture of the Company's yacht should have been held to violate the due process clause of the fourteenth amendment because of the Company's innocence.

Although Puerto Rico does have an interest in deterring the unlawful transportation of illicit drugs,[54] this does not justify the presumption of collusion since other reasonable means exist to establish the pertinent fact, criminal involvement or knowledge,[55] on which the deterrent objective is premised. Federal and state courts are using remission and mitigation procedures which allow an owner to prove his innocence or lack of knowledge and thereby reclaim his interest.[56] Such procedures eliminate the gross overinclusiveness of forfeiture statutes as applied to innocent owners, but do not threaten the efficiency of federal and state narcotics laws since the burden of proof is placed on the owner.[57]

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52. P.R. LAWS ANN. tit. 24, § 2512(a)(4) (Supp. 1973).
53. *Id.* § 2401.
54. *See* note 39 and accompanying text *supra.*
55. The fact of the owner's guilt or innocence could be ascertained at a pre-forfeiture hearing as easily as it could in any other criminal case. Assuming *arguendo* that such fact could be established, it appears that the only purpose for disallowing such a hearing would be administrative convenience. Vlandis v. Kline, 412 U.S. 441, 451 (1973), establishes that:

> The State's interest in administrative ease and certainty cannot, in and of itself, save the conclusive presumption from invalidity under the Due Process Clause where there are other reasonable and practical means of establishing the pertinent facts on which the State's objective is premised.

56. *See, e.g.*, NEB. REV. STAT. § 28-4,135(4) (Cum. Supp. 1974); ILL. ANN. STAT. ch. 38 § 36-2 (Smith Hurd Supp. 1974). Forfeitures under 21 U.S.C. § 881(a) (1970), which is the model of the Puerto Rican statute at issue in *Pearson*, are subject to remission and mitigation in forfeitures resulting from violations of certain internal revenue laws. *See generally* United States v. Morris, 23 U.S. (10 Wheat.) 246, 293-95 (1825); United States v. United States Coin & Currency, 401 U.S. 715, 721 (1971).
57. *See* note 56 *supra.*

The *Pearson* court preserved the antiquated in rem label as applied to forfeitures that were admittedly "punitive" in effect,[58] thereby perpetuating the civil-criminal distinction in forfeiture actions. Increasingly, legislative bodies are resorting to the device of "civil" penalties to avoid the administrative inconvenience of criminal prosecution.[59] It is questionable whether Congress or a state legislature should be allowed to deny a defendant certain rights, such as double jeopardy, guilt beyond a reasonable doubt, and establishment of mens rea, merely by changing the label of an action from "criminal" to "civil." It can be argued that, "criminal prosecutions masquerading in the guise of civil penalties [should] not be tolerated; the alleged offender in a civil penalty case should receive the same protections afforded a defendant in a criminal case."[60]

By deferring to this legislative labelling process, the Court in *Pearson* has abdicated its responsibility to protect the constitutional rights of innocent property owners. Failure to require a showing of mens rea or scienter as a minimum constitutional requirement in the prosecution of forfeitures results in the forfeiture action serving *no* valid state purpose. Instead, it should be considered a taking of property without due process of law or a taking of property for government use without just compensation.[61] There is an anomaly in requiring a showing of mens rea in the prosecution of the lessee, as was done in *Pearson*,[62] and not requiring the same showing in the forfeiture action against the owner-lessor, who was not involved in any criminal enterprise. Assuming *arguendo* that the purpose of the criminal and forfeiture actions is the same,[63] it would be a denial of equal protection of the law if a showing of mens rea were required for the party charged in connection with the criminal offense[64] and not for the owner of the property subject to forfeiture.

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58. [S]eizure permits Puerto Rico to assert *in rem* jurisdiction over the property in order to conduct forfeiture proceedings, thereby fostering the public interest in preventing continued illicit use of the property and in enforcing criminal sanctions. 416 U.S. at 679.

59. *See* Charney, *The Need for Constitutional Protections for Defendants in Civil Penalty Cases*, 59 CORNELL L. REV. 478 (1974).

60. *Id.* at 482.

61. *See* McKeehan v. United States, 438 F.2d 739 (6th Cir. 1971); *see also* cases cited in note 35 *supra* and accompanying text.

62. The statute under which the lessee was charged, requires that the act be committed "knowingly or intentionally." P.R. LAWS ANN. tit. 24, § 2401 (Supp. 1973).

63. The United States Supreme Court has stated that the purpose of both forfeiture and criminal actions is punishment. *See* United States v. United States Coin & Currency, 401 U.S. 715, 718 (1971); One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 700-01 (1965).

64. Inextricably related to mens rea is the eighth amendment safeguard

The Court in *Pearson* had the opportunity to create some semblance of uniformity in the area of statutory forfeitures, but instead, created *more* confusion. The Court expressly refused to overrule those prior decisions which had characterized forfeitures as in rem suits and which had conclusively presumed the fault of the owner,[65] yet stated in dictum that the forfeiture of an innocent owner's property would be unconstitutional if he proved he had done everything reasonably possible to avoid unlawful use.[66] In view of this, it is arguable that the Court initiated a new standard which would disallow forfeitures where the innocent owner could prove he was neither involved in the criminal enterprise, nor negligent in entrusting the property to a third person. However, the Court's preservation of prior decisions, holding the conduct of the owner to be irrelevant, cannot be reconciled with this interpretation.[67]

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against cruel and unusual punishment. The eighth amendment states that "[e]xcessive bail shall not be required nor excessive fines imposed, nor cruel and unusual punishments inflicted." This provision reflects a basic feeling within our society that the sentence imposed in any action should be roughly proportionate to the "crime" committed. Robinson v. California, 370 U.S. 660, 676 (1962) (Douglas, J., concurring); O'Neil v. Vermont, 144 U.S. 323, 331 (1892). Thus it has been suggested by some commentators that forfeiture might qualify as an excessive fine in violation of the eighth amendment. *See, e.g.*, 51 TEXAS L. REV. 1411, 1419 (1973). For example, in Pearson, it could be argued that the loss of a $19,800.00 yacht is disproportionate to the "offense" committed, that of innocently leasing the yacht to one who used it in commission of a criminal offense. Yet the eighth amendment has never been considered a bar to forfeitures, largely because of their "civil" characterization and their failure to "shock" the judicial sense of equity. *Id.*

65. 416 U.S. at 680.

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

416 U.S. at 689-90.

67. The ultimate disposition of the case also seems at odds with this interpretation. Puerto Rico's lack of any basis to challenge the forfeiture was precisely what Pearson was complaining about. Puerto Rico provided *no* judicial recourse by which an innocent party could prove either his lack of knowledge *or* his use of reasonable care. If this dictum had been applied, the case should have been remanded for a hearing on the issue of Pearson's reasonable care in leasing the yacht to the lessee.

Another source of confusion is the phrase "completely innocent" as used to describe the owner's conduct. That phrase is inherently ambiguous, yet the Court does not adequately define what conduct by the "innocent" owner is constitutionally protected from forfeiture statutes.

Additional problems are presented by the *Pearson* decision since many courts had literally rewritten state as well as federal forfeiture statutes to require a showing of knowledge of the property owner in commission of a crime.[68] Further, the uncertainty of the law regarding forfeitures will continue to have ramifications outside the judicial system.[69]

IV. CONCLUSION

This Note has attempted to show that forfeiture statutes as applied to innocent property owners are unconstitutional. Actions brought under such statutes result in a taking of property without due process and just compensation. Further, they are premised upon a conclusive presumption of the owner's collusive conduct and therefore violate procedural due process. By characterizing forfeitures as in rem actions, property owners are denied the procedural safeguards afforded to defendants in criminal prosecutions. Moreover, forfeitures are incompatible with the mobile society in which we live. For these reasons, forfeiture of property of innocent owners should be abandoned.

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68. For state cases see, e.g., *In re* One 1965 Ford Mustang, 105 Ariz. 293, 463 P.2d 827 (1970); 1957 Chevrolet v. Division of Narcotic Control, 27 Ill. 2d 429, 189 N.E.2d 347 (1963). For a collection of such cases, see Annot., 50 A.L.R.3d 172 (1973). *Coin and Currency* held that federal forfeiture actions with respect to money used in violation of gambling laws required a showing that the owner was "significantly involved in [the] criminal enterprise." 401 U.S. at 722.

69. For example, car rental agencies, whose business crosses state lines, will be forced to conduct their operations with extraordinary care to protect their property from statutory forfeitures. There will also be difficult conflicts of law problems, such as to what extent a nonresident owner should be bound by the investigation requirements of the state in which the criminal act is committed and the forfeiture action prosecuted. *See, e.g.*, People v. One 1953 Ford Victoria, 48 Cal. 2d 595, 311 P.2d 480 (1957), where a nonresident creditor was held not bound by California's "reasonable investigation" requirement.

A fear of forfeiture based on innocent conduct of the owner may also cause potential lenders and lessors to avoid doing business with anyone who has a criminal record. This analysis assumes that property owners even contemplate forfeiture of their property, or that they could accurately predict whether a bailee, secured debtor, or lessee would use the property in the commission of a criminal offense. These assumptions themselves are uncertain and should not be allowed to justify the harsh penalty of forfeiture.