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FORFEITURES IN NARCOTICS CASES: THE CONSTITUTION AND RECENT AMENDMENTS TO MARYLAND'S FORFEITURE STATUTE

Douglas Clark Hollmann†

Each year Americans spend almost eighty billion dollars on illegal drugs. The government's ability to confiscate property is perhaps its most powerful weapon in battling illegal drug trafficking. Amendments to Maryland's forfeiture provision have recently expanded the categories of forfeitable property. In this article, the author analyzes the amendments, with an emphasis on the fourth amendment limitations on forfeitures. The author concludes that the seizure of property for forfeiture requires a warrant or an exception to the warrant requirement, and that the exclusionary rule provides an ineffective remedy for fourth amendment violations in the forfeiture context. The author contends that the dismissal of a forfeiture should be the remedy for illegal seizures of forfeitable property.

I. INTRODUCTION

Forfeitures in narcotics cases are governed by article 27, section 297 of the Annotated Code of Maryland.¹ In 1982, the General Assembly significantly amended section 297 to expand the types of property involved in narcotics violations that can be forfeited to the state.² This expansion will accelerate the already increasing use of this tool by law enforcement agencies in combating narcotics traffickers.³ In addition, attempts to seize and forfeit the new categories of property included in section 297 will focus attention upon a facet of forfeiture law not often considered by courts: the relationship between the fourth amendment and seizures of forfeitable property. This article will discuss the legal principles that are unique to forfeiture law, the significance of the recent amendments to section 297, and the application of the fourth amendment to seizures of property subject to forfeiture.⁴

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1. MD. ANN. CODE art. 27, § 297 (1982 & Supp. 1983).

2. See *infra* notes 66-110 and accompanying text.

3. In the first year after the adoption by Congress of a similar forfeiture provision, the Drug Enforcement Administration (DEA) seized \$13,000 in assets; in the second year of operation, DEA seized \$94,000,000 in assets. *Hearings on S. 83 Before the Senate Judicial Proceedings Committee of the Maryland General Assembly*, 1982 Legislative Sess. (testimony of Charles Olender, Chief of Financial Investigation Division, DEA) [hereinafter cited as *Hearings on S. 83*].

4. The due process limitations upon the state's right to forfeit property will not be

II. FORFEITURE LAW—AN OVERVIEW

The concept of forfeiture⁵ was recognized in the Bible⁶ and has been a part of American law since the beginning of the Republic.⁷ While this article is limited to a discussion of forfeiture law as it relates to narcotics cases, certain principles apply to all forfeitures.⁸ First, a forfeiture is a civil action in rem.⁹ Second, the seized object is the subject of the suit rather than its owner, and the suit is unrelated to any criminal proceeding.¹⁰ Third, since a forfeiture is a civil proceeding,

given extensive treatment in this article. *See infra* note 208. One due process issue that may arise in the forfeiture context is whether the owner of seized property is entitled to preseizure notice and hearing. *See Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974) (preseizure hearing not required). For a discussion of due process and the forfeiture of automobiles under Maryland's statute, see Comment, *Due Process in Automobile Forfeiture Proceedings*, 3 U. BALT. L. REV. 270 (1974). A second issue that arises is whether delay between the time of seizure and the institution of forfeiture proceedings violates due process. *See United States v. Eight Thousand Eight Hundred and Fifty Dollars in United States Currency*, 103 S. Ct. 2005 (1983) (18 month delay did not violate due process); *see also Jones v. State*, 56 Md. App. 101, 117-18, 466 A.2d 895, 903-04 (1983) (three month delay between state's knowledge of narcotics violation and seizure of vehicle did not violate due process); *see generally Kandaras, Federal Property Forfeiture Statutes: The Need to Guarantee A Prompt Trial*, 33 U. FLA. L. REV. 195 (1981) (discussing due process implications of delay); *Kandaras, Federal Property Forfeiture Statutes: The Need for Immediate Post-Seizure Hearing*, 34 Sw. L.J. 925 (1980) (discussing due process and delay); *see also infra* note 197 (cases advocating dismissal of forfeiture as remedy for due process violations).

5. A forfeiture is a "deprivation or destruction of a right in consequence of the non-performance of some obligation or condition." BLACK'S LAW DICTIONARY 585 (5th ed. 1979); *see* 36 AM. JUR. 2D *Forfeitures and Penalties* § 1 (1968).
6. "If an ox gore a man or a woman and they die, he shall be stoned and his flesh not eaten." *Exodus* 21:28.
7. *See* Act of July 31, 1789, ch. 5, §§ 12, 36, 1 Stat. 29, 39, 47 (repealed 1790).
8. For a recent discussion of these principles that, although made in a gambling case, reflect the current view of the Court of Appeals of Maryland, *see Director of Fin. v. Cole*, 296 Md. 607, 465 A.2d 450 (1983).
9. *Prince George's County v. Blue Bird Cab Co.*, 263 Md. 655, 284 A.2d 203 (1971). This article will not discuss the concept of criminal forfeiture. Criminal forfeiture is an in personam suit against the felon; the forfeiture does not lie unless the felon is convicted of the underlying crime. *See Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 682 (1974). Although the First Congress specifically rejected this concept, Act of Apr. 30, 1790, ch. 9, § 24, 1 Stat. 117 (current version at 18 U.S.C. § 3563 (1982)), Congress in 1970 revived this form of forfeiture when it included criminal forfeiture provisions in two laws. Organized Crime Control Act of 1970, § 901(a), Pub. L. No. 91-452, 84 Stat. 943 (1970) (codified at 18 U.S.C. § 1963(c) (1982)) (governing racketeer influenced and corrupt organizations (RICO)); Controlled Substances Act, § 408(a)(2), Pub. L. No. 91-513, 84 Stat. 1265-66 (1970) (codified at 21 U.S.C. § 848(a)(2) (1982)) (applies to continuing criminal enterprise offenses). A bill pending in Congress would expand the availability of criminal forfeitures under the Controlled Substances Act. H.R. 4901, 98th Cong., 2d Sess., § 104(m) (1984). As this issue went to press, this bill was incorporated into H.R. 3291, 98th Cong., 2d Sess., and enacted as Pub. L. No. 98-573 (1984).
10. *Lilienthal's Tobacco v. United States*, 97 U.S. 237, 261, 267 (1878); *Prince George's County v. Blue Bird Cab Co.*, 263 Md. 655, 658, 284 A.2d 203, 205 (1971).

the state's burden is met if it proves by a preponderance of the evidence that the property was used or intended for use in violation of a criminal statute.¹¹ This burden is considerably less than that in criminal cases.¹² Fourth, since a forfeiture proceeding is a civil action in rem, it is of little significance whether there is a criminal conviction. Indeed, the innocence of the owner of the seized property is not a defense to a forfeiture action.¹³ Thus, even though a defendant/owner of forfeitable property is acquitted of the criminal charges, the property may nevertheless be forfeited to the state.¹⁴

Forfeiture laws are derived from the ancient concept of deodand.¹⁵ Because this concept was never accepted by American courts as part of the common law,¹⁶ forfeiture in the United States is a creature of statutory law.¹⁷ Federal forfeiture statutes are more extensive than those found in Maryland. For example, federal provisions allow the forfeiture of property used in connection with narcotics,¹⁸ aliens,¹⁹ firearms,²⁰ liquor violations,²¹ customs violations,²² gambling violations,²³ contraband,²⁴ and counterfeiting.²⁵ In Maryland, however, forfeitures are primarily restricted to property used in connection with narcotics,²⁶

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11. *State v. One 1967 Ford Mustang*, 266 Md. 275, 277, 292 A.2d 64, 66 (1972).
 12. *In re Winship*, 397 U.S. 358, 362 (1970) (prosecution must prove guilt of the defendant beyond a reasonable doubt).
 13. *Prince George's County v. Blue Bird Cab Co.*, 263 Md. 655, 659, 284 A.2d 203, 205 (1971). The court of appeals has held that a court does not have discretion or any basis to deny a forfeiture if the state proves the statutory elements. *State v. One 1967 Ford Mustang*, 266 Md. 275, 279, 292 A.2d 64, 66 (1972).
 14. *United States v. One Assortment of 89 Firearms*, 104 S. Ct. 1099 (1984); *see One Lot of Emerald Cut Stones v. United States*, 409 U.S. 232 (1972) (per curiam); *United States v. 1977 Lincoln Mark V*, 453 F. Supp. 1388 (S.D.N.Y. 1978); *Bozman v. Office of Fin.*, 52 Md. App. 1, 445 A.2d 1073 (1982), *aff'd*, 296 Md. 492, 463 A.2d 832 (1983).
 15. A deodand is "any personal chattel whatever, animate or inanimate, which, becoming the immediate instrument by which the death of a human creature was caused, was forfeited to the king . . ." *Parker-Harris Co. v. Tate*, 135 Tenn. 509, 510, 188 S.W. 54, 55 (1916). The concept was abused to provide property for favorites of the king. *Id.* In 1846, England abolished deodand by statute. 940 Vict. ch. 62 (1846).
 16. *See Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 682 (1974).
 17. *United States v. Lane Motor Co.*, 199 F.2d 495, 496-97 (10th Cir. 1952), *aff'd*, 344 U.S. 630 (1953). *But see State v. 158 Gaming Devices*, 59 Md. App. 44, 474 A.2d 545, *cert. granted*, 301 Md. 44 (1984).
 18. 21 U.S.C. § 881(a) (1982).
 19. 8 U.S.C. § 1324(b) (1982).
 20. 18 U.S.C. § 924(d) (1982); 26 U.S.C. § 5872(a) (1982).
 21. 18 U.S.C. § 3615 (1982).
 22. 46 U.S.C. § 325 (1976 & Supp. V 1981).
 23. 18 U.S.C. §§ 1082(c)(3), 1955(d) (1982); *see* 26 U.S.C. § 4412 (1982) (construed to permit forfeiture, *see United States v. 1978 Cadillac El Dorado 2-Door Coupe*, 489 F. Supp. 532 (D. Utah 1980)).
 24. 49 U.S.C. § 782 (1976).
 25. *Id.*
 26. MD. ANN. CODE art. 27, § 297 (1982 & Supp. 1983).

gambling or lottery violations,²⁷ alcoholic beverages,²⁸ and handguns.²⁹

III. RECENT AMENDMENTS TO SECTION 297

The recent amendments to section 297 have significantly expanded the availability of forfeiture in narcotics cases. A discussion of the history of Maryland's forfeiture statutes will illustrate the impact of these new amendments.

A. *The Law Prior to the 1982 Amendments*

In 1951, the General Assembly enacted the first Maryland forfeiture provision dealing with narcotics.³⁰ The scope of this original attempt to exercise the power to forfeit property was extremely limited, reaching only vehicles used in connection with violations of the narcotics law.³¹ A vehicle could not be forfeited unless the state established that the person using the vehicle had been convicted of the underlying crime and that the owner had authorized the illegal use.³²

This rather narrow forfeiture provision was superseded in 1970 by section 297. In 1971, Congress amended the federal provision relating to forfeitures in narcotics cases.³³ Both the federal and Maryland statutes were modeled on the Uniform Controlled Substances Act³⁴ and were not only parallel in format but contained identical language in many places.³⁵ Because of the similarities between the two statutes, the

27. *Id.* § 264(a) (1982).

28. *Id.* art. 2C, § 3 (1981).

29. *Id.* art. 27, § 36C (1982).

30. 1951 MD. LAWS 471 (current version at MD. ANN. CODE art. 27, § 297 (1982 & Supp. 1983)).

31. The 1951 forfeiture provision read as follows:

In addition to any other fines or penalties provided for a violation of the provisions of this subtitle, any motor vehicle or other vehicle, vessel or aircraft used or employed in the concealment, conveying or transporting of any such narcotic drugs, or used during the course of any violation of this subtitle by any person or persons convicted of the same, shall upon the conviction or convictions be declared by the court to be forfeited to the county or to Baltimore City, as the case may be; provided that no vehicle shall be forfeited hereunder unless the owner thereof authorized or permitted such use or employment. The county commissioners or the mayor and city council of Baltimore at their discretion may use the said vehicle for public purposes or may exchange, sell or convey it to another person or persons; and any cash or moneys received therefor shall be added to the general funds of the county or City of Baltimore.

1951 MD. LAWS 471 (first codified at MD. ANN. CODE art. 27, § 301 (1957)) (current version at *id.* § 297 (1982 & Supp. 1983)).

32. These requirements were added during consideration of Senate Bill 406, which became article 27, section 301 of the 1957 Code.

33. 21 U.S.C. § 881 (1970) (current version at *id.* (1982)).

34. UNIF. CONTROLLED SUBSTANCES ACT, 9 U.L.A. 187 (1970).

35. Compare 21 U.S.C. § 881(b) (1970) (former federal version) with MD. ANN. CODE art. 27, § 297(b) (1971) (former Maryland provision).

construction of the federal statute has been helpful in determining the meaning of the Maryland statute.³⁶

Section 297, as enacted in 1970, provided for the forfeiture of six categories of property: (1) controlled dangerous substances ("CDS"); (2) raw materials, products, and equipment; (3) containers; (4) "conveyances" such as vehicles, aircraft, and vessels; (5) books, records, and research; and (6) currency.³⁷ The first five categories, taken from the

36. See *Prince George's County v. One 1969 Opel*, 267 Md. 491, 298 A.2d 168 (1973) (relying on federal statute); *Prince George's County v. Blue Bird Cab Co.*, 263 Md. 655, 284 A.2d 203 (1971) (same).

37. The 1970 version of section 297, as amended through 1981, provided:

(a) Property subject to forfeiture.— The following shall be subject to forfeiture and no property right shall exist in them:

(1) All controlled dangerous substances which have been manufactured, distributed, dispensed, acquired, or possessed in violation of the provisions of this subheading;

(2) All raw materials, products and equipment of any kind which are used, or intended for use, in manufacturing, compounding, processing, delivering, importing, or exporting any controlled dangerous substance in violation of the provisions of this subheading;

(3) All property which is used, or intended for use, as a container for property described in paragraphs (1);

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

(i) No conveyance used by any person as a common carrier or vehicle for hire in the transaction of business as a common carrier or vehicle for hire shall be seized or forfeited under this subheading unless it appears that the owner or other person in charge of the conveyance was a consenting party or privy to a violation of this subheading; and

(ii) No conveyance shall be forfeited under the provisions of this section by reason of any act or omission established by the owner thereof to have been committed or omitted by any person other than such owner while such conveyance was unlawfully in the possession of a person other than the owner in violation of the criminal laws of the United States, or of any state;

(5) All books, records, and research, including formulas, microfilm, tapes, and data which are used or intended for use, in violation of this subheading;

(6) All money or currency which shall be found in close proximity to contraband controlled dangerous substances or controlled paraphernalia or which otherwise has been used or intended for use in connection with the illegal manufacture, distribution, dispensing or possession of controlled dangerous substances or controlled paraphernalia.

This money or currency shall be deemed to be contraband of law and all rights, title and interest in and to the money or currency shall immediately vest in and to Baltimore City or the county in which it was seized, the municipal corporation, if seized by municipal authorities, or, if it was seized by State authorities, the State; and no such money or currency shall be returned to any person claiming it, or to any other person, except in the manner hereinafter provided and;

(7) All drug paraphernalia as prohibited by § 287A of this article, and controlled paraphernalia as prohibited by § 287 of this article.

MD. ANN. CODE art. 27, § 297(a) (1982) (amended version at *id.* (Supp. 1983)).

Uniform Controlled Substances Act,³⁸ have been the subject of much litigation, particularly the category dealing with conveyances.³⁹ This litigation has resulted because conveyances are by far the largest class of objects seized and because it is easy to claim that an automobile, boat, or airplane, unlike contraband per se,⁴⁰ has been seized unjustly. As a result of this litigation, detailed provisions relating to the forfeiture of motor vehicles have been included in the Maryland statute.⁴¹

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38. UNIF. CONTROLLED SUBSTANCES ACT, 9 U.L.A. 187 (1970). The first five categories have also been adopted in substantial part by Congress in its forfeiture enactment, 21 U.S.C. § 881 (1982), and by at least 46 states and the District of Columbia. ALA. CODE § 20-2-93 (1975); ALASKA STAT. § 17.30.110 (1983); ARIZ. REV. STAT. ANN. § 13-106 (Supp. 1983); ARK. STAT. ANN. § 82-2629 (Supp. 1983); CAL. HEALTH & SAFETY CODE §§ 11470-11472 (West 1975 & Supp. 1983); CONN. GEN. STAT. § 21a-246(d) (Supp. 1983); DEL. CODE ANN. tit. 16, § 4784 (1975 & Supp. 1983); D.C. CODE ANN. § 33-552 (Supp. 1983); FLA. STAT. ANN. §§ 893.12, 932.701(e) (West 1976 & Supp. 1983); GA. CODE § 16-13-32 (1983); HAWAII REV. STAT. § 329-55 (Supp. 1983); IDAHO CODE § 37-2744 (1977 & Supp. 1983); ILL. ANN. STAT. ch. 56 1/2, § 1505 (Smith-Hurd 1976 & Supp. 1983); IND. CODE ANN. § 16-6-8.5 to -8.51 (Burns 1983); IOWA CODE ANN. § 204.505 (West Supp. 1983); KAN. STAT. ANN. § 65-4135 (1980); KY. REV. STAT. ANN. § 218A.270 (Baldwin 1982); LA. REV. STAT. ANN. § 32-1550 (West Supp. 1984); ME. REV. STAT. ANN. tit. 22, § 2387 (Supp. 1983); MD. ANN. CODE art. 27A, § 297 (1982 & Supp. 1983); MASS. GEN. LAWS ANN. ch. 94C, § 47 (West 1984); MICH. COMP. LAWS ANN. § 333.7521 (West 1980); MINN. STAT. ANN. § 152.19 (West Supp. 1984); MISS. CODE ANN. § 41-29-153 (Supp. 1983); MO. ANN. STAT. §§ 195.140, 195.145 (Vernon 1983); MONT. CODE ANN. § 44-12-102 (1983); NEB. REV. STAT. § 28-431 (Supp. 1982); NEV. REV. STAT. § 453.301 (1972); N.H. REV. STAT. ANN. § 318B:17b (1982); N.J. STAT. ANN. § 2C-64-1 (West 1982); N.M. STAT. ANN. § 30-31-34 (Supp. 1983); N.Y. PUB. HEALTH LAW § 3387 (McKinney 1977 & Supp. 1983); N.C. GEN. STAT. § 90-112 (1976 & Supp. 1983); N.D. CENT. CODE § 19-03.1-36 (1981 & Supp. 1983); OKLA. STAT. ANN. tit. 63, § 2-503 (West 1973 & Supp. 1983); PA. STAT. ANN. tit. 35, § 780-128 (Purdon 1977 & Supp. 1983); R.I. GEN. LAWS §§ 21-28-5.04 to -5.05 (Supp. 1983); S.C. CODE ANN. § 44-53-520 (Law. Co-op. 1962 & Supp. 1983); S.D. CODIFIED LAWS ANN. § 34-20B-70 (1977 & Supp. 1983); TENN. CODE ANN. § 53-11-409 (1983); TEX. REV. CIV. STAT. ANN. art. 4476-15, § 5.03 (Vernon 1976 & Supp. 1983); UTAH CODE ANN. § 58-37-13 (Supp. 1983); VA. CODE § 18.2-249 (1982); WASH. REV. CODE ANN. § 69.50.505 (1970 & Supp. 1983); W. VA. CODE § 60A-5-505 (1977); WIS. STAT. ANN. § 161.55 (West 1974 & Supp. 1983); WYO. STAT. § 35-7-1049 (1977 & Supp. 1983). Several other jurisdictions retain forfeiture provisions patterned after the older Uniform Narcotics Drug Act. COLO. REV. STAT. § 18-17-106 (Supp. 1983); OHIO REV. CODE ANN. § 2925.13 (Page 1982); OR. REV. STAT. § 167.247 (1981); VT. STAT. ANN. tit. 18, §§ 4219, 4227 (1982).
39. *E.g.*, *United States v. One 1945 Douglas C-54 (DC-4) Aircraft*, 604 F.2d 27 (8th Cir. 1979); *United States v. One 1974 Cadillac Eldorado Sedan*, 548 F.2d 421 (2d Cir. 1977); *United States v. One 1970 Pontiac GTO, 2-Door Hardtop*, 529 F.2d 65 (9th Cir. 1976); *United States v. One 1972 Datsun*, 378 F. Supp. 1200 (D.N.H. 1974).
40. Contraband per se is property that is inherently illegal to possess. *Director of Fin. v. Cole*, 296 Md. 607, 619, 465 A.2d 450, 457 (1983). In contrast, derivative contraband is property that is legal to possess, but which is subject to forfeiture if used illegally or if it is connected with illegal activity. *Id.* Conveyances are in the second category.
41. *See, e.g.*, MD. ANN. CODE art. 27, § 297(a)(4) (Supp. 1983) (exemptions for common carriers and stolen vehicles); *id.* § 297(f) (procedures for forfeiture). *See gen-*

Failure of the authorities to comply with these provisions may result in the defeat of the forfeiture action.⁴²

The sixth category, subsection 297(a)(6), dealt with the forfeiture of currency. This unique provision contained two separate bases for the forfeiture of currency. The first part of the subsection focused on the "proximity" of the currency to CDS, and permitted the forfeiture of "all money or currency which shall be found in *close proximity* to contraband controlled dangerous substances or controlled paraphernalia"⁴³ The second part of the subsection allowed for the forfeiture of currency that was "connected" with drug activity: "or which otherwise has been used or intended for use *in connection with* the illegal manufacture, distribution, dispensing or possession of controlled dangerous substances or controlled paraphernalia."⁴⁴

The question raised by this provision is whether the language requiring proximity is modified by the language requiring a connection with a CDS violation. If so, currency found in close proximity to CDS would need more than mere proximity to the contraband to be forfeitable. If not, mere proximity would appear to be enough. More traditional bases for forfeiture rely upon some association beyond mere proximity to support a forfeiture action.⁴⁵ Despite the statutory ambiguity, the Maryland cases that have considered the concept of "close proximity" have not attempted to resolve the issue.

In *Gatewood v. State*,⁴⁶ police seized a paper bag containing cash, heroin, and marijuana from the defendant. The Court of Appeals of Maryland dismissed the defendant's objection to the forfeiture with the following language:

The proximity point requires little discussion. The uncontroverted testimony was that the cash, the heroin and the mari-

erally Comment, *supra* note 4 (discussing procedures for forfeiting automobiles in Maryland).

42. *E.g.*, *State v. One 1980 Harley Davidson Motorcycle*, 57 Md. App. 178, 469 A.2d 487 (1984); *State v. One 1979 Pontiac Firebird*, 55 Md. App. 394, 462 A.2d 73 (1983); *see* *Prince George's County v. One 1969 Opel*, 267 Md. 491, 298 A.2d 168 (1973).

43. MD. ANN. CODE art. 27, § 297 (a)(6) (1982) (current version at *id.* (Supp. 1983)) (emphasis supplied). At least five other states and the District of Columbia have enacted provisions that appear to permit the forfeiture of currency found in close proximity to CDS. *See* ALA. CODE § 20-2-93 (1975); D.C. CODE ANN. § 33-552 (Supp. 1983); IDAHO CODE § 37-2744 (1977 & Supp. 1983); ILL. ANN. STAT. ch. 56 1/2, § 1505 (Smith-Hurd 1976 & Supp. 1983); KY. REV. STAT. ANN. § 218A.270 (Baldwin 1982); S.C. CODE ANN. § 44-53-520 (Law. Co-op. 1962 & Supp. 1983).

44. MD. ANN. CODE art. 27, § 297(a)(6) (1982) (current version at *id.* (Supp. 1983)) (emphasis supplied).

45. *See* MD. ANN. CODE art. 27, § 297(a)(1)-(5) (Supp. 1983) (categories of forfeitable property require some type of illegal use prior to forfeiture); *cf.* *Bozman v. Office of Fin.*, 296 Md. 492, 510, 463 A.2d 832, 842 (1983) (Eldridge, J., dissenting) (money is not contraband per se; whether it is contraband depends upon its connection with CDS).

46. 268 Md. 349, 301 A.2d 498 (1973).

juana were in the same brown paper bag. The fact that the cash happened to be in a bank money sack which was also in the paper bag can scarcely be said to negate the concept of proximity, and the lower court so found.⁴⁷

In the recent case of *Bozman v. Office of Finance*,⁴⁸ the Court of Special Appeals of Maryland upheld the forfeiture of currency discovered in the same room as the contraband. The *Bozman* court declined to define close proximity, remarking that: "[w]e liken 'close proximity' to Justice Stewart's comment on pornography. We do not define it, but we know it when we see it."⁴⁹ The court of appeals affirmed the decision, and only briefly discussed close proximity.⁵⁰ The court found that these two words "have relative rather than precise definitions. Thus, the interpretation of both depends upon the facts and circumstances existing in connection with their application."⁵¹ Since there was no explanation for the presence of the drugs and the money in the same room, the court of appeals upheld the trial judge's determination that the drugs and money were in close proximity.⁵²

The second part of the currency provision, which provided for the forfeiture of money used "in connection with" drug activity,⁵³ has rarely been used by Maryland law enforcement authorities. Each of the three Maryland decisions discussing the currency provisions of subsection (6) deals with currency found in close proximity to CDS.⁵⁴ The failure of narcotics agents to seize and forfeit currency used in connection with CDS violations may be attributable to their traditionally deficient skills in the handling of financial investigations.⁵⁵ Until recently

47. *Id.* at 353-54, 301 A.2d at 500-01; see also *Geppi v. State*, 270 Md. 239, 245, 310 A.2d 768, 771 (1973) (question of whether more than mere proximity was required to forfeit currency was raised but not discussed).

48. 52 Md. App. 1, 445 A.2d 1073 (1982), *aff'd*, 296 Md. 492, 463 A.2d 832 (1983).

49. *Bozman*, 52 Md. App. at 4-5, 445 A.2d at 1073-75 (citing *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring)).

50. *Bozman*, 296 Md. 492, 463 A.2d 832 (1983), *aff'g* 52 Md. App. 1, 445 A.2d 1073 (1982).

51. *Id.* at 501, 463 A.2d at 837.

52. *Id.*

53. MD. ANN. CODE art. 27, § 297(a)(6) (1971) (current version at *id.* (Supp. 1983)).

54. *Geppi v. State*, 270 Md. 239, 310 A.2d 768 (1973); *Gatewood v. State*, 268 Md. 349, 301 A.2d 498 (1973); *Bozman v. Office of Fin.*, 52 Md. App. 1, 445 A.2d 1073 (1982), *aff'd*, 296 Md. 492, 463 A.2d 832 (1983). It is doubtful, however, that the number of reported cases on forfeitures accurately reflects the actual number of forfeitures. Unlike criminal prosecutions, which are difficult for a defendant to avoid, forfeiture proceedings can be ignored with impunity since the only penalty for failing to contest the action is the forfeiture of the property itself. A challenge to the forfeiture requires an explanation of where the property came from and who was using it. This information is admissible in a subsequent criminal prosecution or tax proceeding. Many forfeitures are uncontested and it may be that the property owners choose to disavow any connection, legal or otherwise, rather than risk closer examination by law enforcement authorities.

55. The DEA began financial investigation training for its agents and supervisors in 1979. A course is now offered in the history of banking, the Federal Reserve

the investigator's drive to seize drugs obscured other ways of combating narcotics traffickers.⁵⁶

Under the 1970 Maryland act, money and currency were the only types of forfeitable financial property.⁵⁷ Other financial assets such as negotiable instruments or precious metals were not covered, even if there was a connection with a narcotics violation. It should be recognized, however, that the 1970 Maryland provision allowing the seizure of money and currency was broader than the forfeiture laws enacted in most other jurisdictions.⁵⁸ The Uniform Controlled Substances Act⁵⁹ and the federal forfeiture statute,⁶⁰ as well as the law in nearly every other state, provided only for the forfeiture of property that fit into one of the five specified categories.⁶¹ Money and currency were not included in those categories. Since the state's right to forfeit property depends upon statutory law,⁶² forfeitable property must be enumerated in a specific statutory provision. In those states lacking a "currency" category, money as well as the proceeds of CDS transactions, negotiable instruments, and stocks and bonds are not forfeitable. For example, a raid on a drug operation could result in the seizure and forfeiture of CDS, the laboratory equipment, the records used by the organization, containers for CDS, and any vehicles used in the operation. Except in Maryland and a few other states,⁶³ piles of cash on the same

System, the Financial Privacy and Bank Secrecy Act, net worth and concealment income analysis, as well as the review of forfeiture statutes. *See* COMPTROLLER GENERAL, U.S. GEN. ACCOUNTING OFFICE, ASSET FORFEITURE—A SELDOM USED TOOL IN COMBATTING DRUG TRAFFICKING 1 (1981). According to the Maryland Police and Correctional Training Commission, while no comparable training seminars are held for Maryland law enforcement officers at the present time, one is being prepared. Telephone interview with Carl Bart, Staff Member of Maryland Police and Correctional Training Commission (May 4, 1984).

56. Meyers, *Dealers, Dollars and Drugs*, 9 DRUG ENFORCEMENT 7 (Summer 1972); Comment, *Criminal Forfeiture: Attacking the Economic Dimension of Organized Narcotics Trafficking*, 32 AM. U.L. REV. 227 (1982).
57. MD. ANN. CODE art. 27, § 297(a)(6) (1982) (current version at *id.* (Supp. 1983)).
58. Forfeiture laws of other jurisdictions that allowed for the forfeiture of money and currency, *see supra* note 43 & *infra* note 63 (listing current versions), were preceded by the 1970 Maryland enactment. The comparable federal provision was not enacted until 1978. Psychotropic Substances Act of 1978, § 301, Pub. L. No. 95-633, 92 Stat. 3777 (1978) (codified at 21 U.S.C. § 881(a)(6) (1982)).
59. UNIF. CONTROLLED SUBSTANCES ACT, 9 U.L.A. 187 (1970).
60. 21 U.S.C. § 881 (1970) (current version at *id.* (1982)).
61. The five categories are: CDS; raw materials, products and equipment; containers; conveyances; and books, records, and research. *See supra* note 38 (listing current versions of state forfeiture provisions).
62. Absent a statute, there is no common law right of forfeiture. *Parker-Harris Co. v. Tate*, 135 Tenn. 509, 510, 188 S.W. 54, 55 (1916); *see supra* notes 16-17 and accompanying text.
63. Idaho and Illinois statutory law would seem to allow seizures of currency without requiring any showing other than proximity. IDAHO CODE § 37-2744 (1977 & Supp. 1983); ILL. ANN. STAT. ch. 56 1/2, § 1505 (Smith-Hurd 1976 & Supp. 1983). A number of other states permit seizures of currency if there is a connection with CDS activity beyond proximity. ALA. CODE § 20-2-93 (1975); ALASKA STAT. § 17.30.110 (1983); ARIZ. REV. STAT. ANN. § 13-106 (Supp. 1983); ARK.

table with the equipment and the CDS could not be seized and forfeited.

As drug trafficking increased during the 1970's, law enforcement authorities began to realize that they could not seize many assets connected with narcotics violations under existing statutes. The result has been a flurry of recent amendments to federal and state forfeiture laws.⁶⁴ In 1978 Congress amended the federal statute to permit the seizure and forfeiture of a wide range of financial assets connected with CDS activity.⁶⁵ Four years later, Maryland followed suit when the 1982 General Assembly enacted a substantially similar provision.

B. The 1982 Amendments

The 1982 amendments to section 297 revised the currency category in subsection (6). The amendments added a new subsection (8) that greatly expanded the types of property that can be forfeited.⁶⁶ To understand fully the range of assets now subject to forfeiture in narcotics cases, subsections (6) and (8) must be read together.⁶⁷

STAT. ANN. § 82-2629 (Supp. 1983); FLA. STAT. ANN. §§ 893.12, 932.701(e) (West 1976 & Supp. 1983); HAWAII REV. STAT. § 329-55 (Supp. 1982); KY. REV. STAT. ANN. § 218A.270 (Baldwin 1982); LA. REV. STAT. ANN. § 32-1550 (West Supp. 1984); ME. REV. STAT. ANN. tit. 22, § 2387 (Supp. 1983); MASS. GEN. LAWS ANN. ch. 94C, § 47 (West 1984); MINN. STAT. ANN. § 152.19 (West Supp. 1984); MISS. CODE ANN. § 41-29-153 (Supp. 1983); N.H. REV. STAT. ANN. § 318B:17b (1982); N.J. STAT. ANN. § 2C-64-1 (West 1982); N.M. STAT. ANN. § 30-31-34 (Supp. 1983); S.C. CODE ANN. § 44-53-520 (Law. Co-op. 1962 & Supp. 1983); TENN. CODE ANN. § 53-11-409 (1983); TEX. REV. CIV. STAT. ANN. art. 4476-15, § 5.03 (Vernon 1976 & Supp. 1983); VA. CODE § 18.2-249 (1982); WIS. STAT. ANN. § 161.55 (West 1974 & Supp. 1983).

64. *E.g.*, FLA. STAT. ANN. §§ 893.12, 932.701(e) (West 1976 & Supp. 1983); HAWAII REV. STAT. § 329-55 (Supp. 1982). See generally *supra* note 38 (listing statutes). Indeed, a bill is now pending in the House of Representatives that would further expand the categories of forfeitable property to include land and buildings used to store CDS. H.R. 4901, 98th Cong., 2d Sess., § 102(a) (1984) (proposed Comprehensive Drug Penalty Act of 1984). See *supra* note 9.

65. As amended in 1978, the federal statute provided:

All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

21 U.S.C. § 881(a)(6) (Supp. II 1978) (current version at *id.* (1982)).

66. See MD. ANN. CODE art. 27, § 297(a)(6), (8) (Supp. 1983). The General Assembly enacted subsection (7) in 1980 to provide for the forfeiture of drug paraphernalia. This category of property, which relates more to a possessory offense than to a trafficking violation, will not be discussed in this article.

67. Introduced as Senate Bill 83, this amendment became 1982 MD. LAWS 472 (codified at MD. ANN. CODE art. 27, § 297(a)(6), (8) (Supp. 1983)). The General Assembly amended subsection (6) to provide for the forfeiture of:

All money, coin, or currency which has been used or intended for use in

1. Subsection (6): Money, Coin, or Currency

Subsection (6) of section 297(a), dealing with the forfeiture of money and currency, has been amended more in style than in substance. "Money or currency" is now "money, *coin*, or currency."⁶⁸ The language providing for the forfeiture of money or currency "used or intended for use" in violation of the CDS laws has been moved so that the emphasis of the subsection is now clearly on the connection with CDS activity, rather than the proximity of the money to CDS.⁶⁹

Despite the statute's shift in emphasis, the physical proximity of money to CDS continues to be relevant under the amended statute. The amendments to subsection (6) create a rebuttable presumption that money, coin, or currency found in close proximity to CDS and other forfeitable property is forfeitable.⁷⁰ This presumption is necessary in light of the difficulty of proving a connection, absent other evidence, with CDS activity. Although there are constitutional constraints on the use of presumptions in criminal proceedings,⁷¹ the rebuttable presumption of section 297 is unaffected since a forfeiture is a civil action in rem.

An example posited in a dissent by Judge Eldridge serves to illustrate the impact of the amendments to subsection (6). Prior to the 1982 amendments, the close proximity rule of subsection (6) would have allowed the forfeiture of "the entire contents of a bank vault . . . if one safe deposit box were found to contain controlled dangerous substances

connection with the illegal manufacture, distribution, dispensing or possession of controlled dangerous substances or controlled paraphernalia. All money, coin, or currency which is found in close proximity to contraband controlled dangerous substances, controlled paraphernalia, or forfeitable records of the importation, manufacture, or distribution of controlled dangerous substances are presumed to be forfeitable under this paragraph. The burden of proof is upon a claimant of the property to rebut this presumption.

This money or currency shall be deemed to be contraband of law and all rights, title and interest in and to the money or currency shall immediately vest in and to Baltimore City or the county in which it was seized, the municipal corporation, if seized by municipal authorities, or, if it was seized by State authorities, the State; and no such money or currency shall be returned to any person claiming it, or to any other person, except in the manner hereinafter provided.

Id. § 297(a)(6). The new subsection (8) provides for the forfeiture of: Everything of value furnished, or intended to be furnished, in exchange for a controlled dangerous substance in violation of this subheading, all proceeds traceable to such an exchange, and all negotiable instruments and securities used, or intended to be used, to facilitate any violation of this subheading.

Id. § 297(a)(8).

68. MD. ANN. CODE art. 27, § 297(a)(6) (Supp. 1983) (emphasis supplied). For the text of this provision, see *supra* note 67.

69. See MD. ANN. CODE art. 27, § 297(a)(6) (Supp. 1983).

70. *Id.*

71. *Ulster County Court v. Allen*, 422 U.S. 140, 157-63 (1979).

. . . . [B]ecause the surrounding boxes would be in 'close proximity' to the drug containing box, all the money or currency contained within them would be subject to forfeiture."⁷² The 1982 amendments to subsection (6) permit owners of the safe deposit boxes to come forward and rebut the presumption that the contents of these boxes had a connection with the CDS violations.

The amended subsection (6) subjects money, coin, and currency to forfeiture if it has been used or intended for use "in connection with" a violation of the CDS laws.⁷³ In contrast, subsection (8) of section 297(a) provides for the forfeiture of negotiable instruments and securities that "facilitate" CDS violations.⁷⁴ This use of two similar but different terms in one statute implies that, arguably at least, a situation may exist where money, coin, or currency has some "connection" with a violation of CDS laws but does not "facilitate" the violation.⁷⁵ The federal forfeiture statute subjects vehicles to forfeiture if they "facilitate" a CDS transaction.⁷⁶ Not every situation involving a vehicle,

72. *Bozman v. Office of Fin.*, 296 Md. 492, 511 n.4, 463 A.2d 832, 842 n.4 (1983) (Eldridge & Davidson, JJ., dissenting).

73. MD. ANN. CODE art. 27, § 297(a)(6) (Supp. 1983).

74. *Id.* § 297(a)(8).

75. The dichotomy of the language is probably the result of an attempt to engraft provisions of the DEA's model forfeiture provision onto the existing Maryland statute. Because of the success with the 1978 amendment to the federal forfeiture provision, the DEA has been supporting similar amendments to state statutes. The 1982 amendment to section 297 was in part a result of these efforts. The DEA model forfeiture act provides:

Everything of value furnished, or intended to be furnished, in exchange for a controlled substance in violation of this Act (meaning the Controlled Substances Act of this State), all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used, or intended to be used, to *facilitate* any violation of this Act; except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by him to have been committed or omitted without his knowledge or consent. *Rebuttable Presumption*: All moneys, coin, and currency found in close proximity to forfeitable controlled substances, to forfeitable drug manufacturing or distributing paraphernalia, or to forfeitable records of the importation, manufacture or distribution of controlled substances, are presumed to be forfeitable under this paragraph. The burden of proof is upon claimants of property to rebut this presumption.

MODEL FORFEITURE OF DRUG PROFITS ACT (DEA, United States Dep't of Justice 1981) (emphasis supplied) (copy of act with drafters' comments available at the University of Baltimore Law Review).

76. 21 U.S.C. § 881(a)(4) (1982). Several courts have adopted a test requiring the facilitation to have a "substantial" or "significant" connection with the CDS violation. *E.g.*, *United States v. One (1) Liberian Refrigerator Vessel*, 447 F. Supp. 1053, 1060 (M.D. Fla. 1977), *aff'd sub nom.* *EA Shipping Co. v. Bazemore*, 617 F.2d 136 (5th Cir. 1980); *United States v. One 1972 Datsun*, 378 F. Supp. 1200, 1205 (D.N.H. 1974); *United States v. One 1971 Porsche Coupe*, 364 F. Supp. 745, 747-48 (E.D. Pa. 1973). In *United States v. One 1968 Ford LTD 4 Door*, 425 F.2d 1084, 1085 (5th Cir. 1970), the Fifth Circuit applied an "active aid" test and upheld the forfeiture of an automobile that was driven in the company of a second vehicle containing untaxed liquor.

however, results in a determination that the use "facilitated" the CDS violation. Thus, using a vehicle to commute to the scene of the transaction is usually not considered a significant enough connection to facilitate the transaction,⁷⁷ although some courts have reached an opposite conclusion.⁷⁸ In this regard, money, coin, and currency may be distinguishable from automobiles; it is difficult to conceive of a situation where money with any connection to a CDS violation would not facilitate the violation as well. As a result, concern over this difference in terminology in subsections 297(a)(6) and (a)(8) may thus be of only academic interest.

Subsection (6) provides that money, coin, and currency seized for forfeiture can only be returned to a claimant in accordance with the statutory procedures of section 297.⁷⁹ The statute requires that the seizing authority institute a forfeiture proceeding against the seized money, coin, or currency within ninety days from the date of final disposition of the underlying criminal proceeding.⁸⁰ If the forfeiture is not instituted within this time period, the defendant may petition for return of the money, coin, or currency,⁸¹ and is entitled to its return.⁸² The statutory provisions prevent a claimant from instituting an action in replevin to recover the seized property.⁸³

Subsection (6) also provides that title to seized money, coin, or currency vests "immediately" in the seizing authority.⁸⁴ The statute does not, however, specify whether immediately refers to the time of the violation, the seizure, or the institution of forfeiture proceedings. Analogous Maryland provisions allowing forfeiture of currency used in

77. *United States v. One 1974 Cadillac Eldorado*, 575 F.2d 344 (2d Cir. 1978); *Howard v. United States*, 423 F.2d 1102 (9th Cir. 1970) (decided under previous narcotics forfeiture statute); *United States v. Lane Motor Co.*, 199 F.2d 495 (10th Cir. 1952) (tax forfeiture), *aff'd*, 344 U.S. 630 (1953); *United States v. One Ford Coach, 1949 Model*, 184 F.2d 749 (4th Cir. 1950) (tax forfeiture); *Platt v. United States*, 163 F.2d 165 (10th Cir. 1947) (decided under previous narcotics forfeiture statute); *United States v. One 1972 Datsun*, 378 F. Supp. 1200 (D.N.H. 1974) (narcotics forfeiture); *United States v. One 1952 Ford Victoria*, 114 F. Supp. 458 (N.D. Cal. 1953) (decided under previous narcotics forfeiture statute).

78. *United States v. One 1977 Cadillac Coupe DeVille*, 644 F.2d 500 (5th Cir. 1981) (forfeiture under 21 U.S.C. § 881(a)(4) permitted when automobile used to transport drug dealer to site of transaction); *United States v. One 1974 Cadillac Eldorado Sedan*, 548 F.2d 421 (2d Cir. 1977) (forfeiture under § 881(a)(4) decreed when vehicle instrumental in transporting conspirators to location of conspiracy).

79. MD. ANN. CODE art. 27, § 297 (1982 & Supp. 1983).

80. *Id.* § 297(b)(2) (Supp. 1983); *see also* *Bozman v. Office of Fin.*, 296 Md. 492, 463 A.2d 832 (1983) (when no criminal proceeding is commenced, 90 day limit does not apply).

81. MD. ANN. CODE art. 27, § 297(b)(3) (Supp. 1983). The petition must be filed within one year of the disposition of the criminal proceeding. *Id.*

82. *Office of Fin. v. Jones*, 46 Md. App. 419, 417 A.2d 470, *cert. denied*, 288 Md. 740 (1980).

83. MD. ANN. CODE art. 27, § 297(c) (1982).

84. *Id.* § 297(a)(6) (Supp. 1983).

violation of gambling laws⁸⁵ suggest that the state's title to money, coin, or currency connected with narcotics activity vests immediately upon *seizure* of the property. The gambling provision contains language identical to that in subsection (6).⁸⁶ The Court of Appeals of Maryland has concluded that the language in the gambling forfeiture statute that title to seized money "shall vest immediately" in the seizing authority refers to the moment that the money is seized, and not to the time the money is used in violation of law or at the time of judgment in the forfeiture proceeding.⁸⁷ Because the forfeiture provisions of subsection (6) and the gambling provision govern the seizure of currency and money, and because the provisions contain identical language, subsection (6) should be construed to vest the title in the seizing authority upon seizure of the money, coin, or currency.⁸⁸

The time at which the government's title vests is significant in determining the rights of transferees of property. Most federal courts have concluded that the government's title to forfeitable property vests at the time the property is used in violation of law, and not at the time of seizure or the time of judgment in the civil forfeiture proceeding.⁸⁹

85. *Id.* § 264 (1982 & Supp. 1983).

86. *Id.* § 264(a). The gambling provision states in pertinent part:

Whenever any money, currency, or cash is seized or captured by any police officer in this State in connection with any arrest for the playing or operation of any bookmaking, betting and wagering on horses or athletic events, or any lottery, game, table, or gaming device unlawful under the provisions of this article, all such money, currency, or cash shall be deemed *prima facie* to be contraband of law as a gambling device or as a part of a gambling operation. *All rights, title, and interest in and to such money, currency, or cash seized by the police of the local government shall immediately vest in and to the local governments of the county, municipality, or Baltimore City, or if seized by State authorities, to the State, and no such money, currency, or cash shall be returned to any person claiming the same, or to any other person, except as provided in this section.* The Baltimore City police department is not a State authority for the purposes of this section.

Id. (emphasis supplied).

87. As the Court of Appeals of Maryland recently explained:

Because it is within the power of the legislature to determine when the transfer of rights to seized goods takes place, . . . the Maryland legislature has fixed the point at the moment the seizure occurs. At this time the money is *prima facie* contraband and belongs to the jurisdiction whose authorities consummate the seizure.

Director of Fin. v. Cole, 296 Md. 607, 623, 465 A.2d 450, 459 (1983).

88. *Cf.* Bozman v. Office of Fin., 296 Md. 492, 505-06, 463 A.2d 832, 839 (1983) (Elbridge, J. dissenting) (reviewing legislative history of subsection (6)); Jones v. State, 56 Md. App. 101, 116, 466 A.2d 895, 903 (1983) ("Maryland's forfeiture statute does not permit the federal concept of 'automatic forfeiture' upon illegal activity.").

89. United States v. Stowell, 133 U.S. 1, 16-17 (1890); Thacher's Distilled Spirits, 103 U.S. 679 (1880); Wood v. United States, 41 U.S. (16 Pet.) 342, 362 (1842); United States v. Kemp, 690 F.2d 397, 401 (4th Cir. 1982); Simons v. United States, 541 F.2d 1351, 1352 (9th Cir. 1976); United States v. O'Reilly, 486 F.2d 208, 210 (8th Cir.), *cert. denied*, 414 U.S. 1043 (1973); see Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 685 (1974) (recognizing rule).

For example, under this “automatic forfeiture” rule, a vehicle used to transport drugs is technically the property of the state from the moment of its illegal use. The forfeiture proceeding merely perfects the government’s interest in the property. The automatic forfeiture rule can defeat the title of subsequent purchasers of the property since the original owner, deprived of legal title by his unlawful conduct, cannot convey good title.⁹⁰ The automatic forfeiture rule, however, should not be applied to the forfeiture of money, coin, or currency, since there is a strong interest in the free transferability of legal tender.

In sum, both the nature of the property covered by subsection (6) and the similarity of the subsection with the gambling forfeiture provision suggest that the seizing authority’s title to seized money, coin, or currency vests at the time it is seized.

2. Subsection (8): Everything of Value, Proceeds, Negotiable Instruments, and Securities

The 1982 amendments to section 297(a) added a new subsection (8) that includes three additional categories of forfeitable property: (1) everything of value furnished, or intended to be furnished, in exchange for CDS; (2) all proceeds traceable to the exchange; and (3) negotiable instruments and securities used, or intended to be used, to facilitate any violation of section 297.⁹¹

a. Everything of Value

In the vast majority of drug transactions, controlled dangerous substances are exchanged for money. The “everything of value” provision covers not only money but anything else given in exchange.⁹² Thus, a boat given in exchange for CDS can now be seized and forfeited although it was never used to convey or facilitate the conveyance of CDS. In addition, anything “intended” to be furnished in exchange for CDS is subject to forfeiture. This provision is necessary because many transactions are interrupted by police action before the exchange actually takes place. Thus, while it may be more difficult to prove that property was intended to be furnished in exchange when no such exchange occurs, if the evidence establishes such an intention the property can be forfeited.

90. *United States v. Stowell*, 133 U.S. 1, 16-17 (1890).

91. MD. ANN. CODE art. 27, § 297(a)(8) (Supp. 1983). For the text of this provision, see *supra* note 67. Several jurisdictions have recently adopted provisions similar to subsection 297(a)(8). D.C. CODE § 33-552 (Supp. 1983); HAWAII REV. STAT. § 329-55 (Supp. 1983); LA. REV. STAT. ANN. § 32-1550 (West Supp. 1984); MONT. CODE ANN. § 44-12-102 (1983); UTAH CODE ANN. § 58-37-13 (Supp. 1983); WYO. STAT. § 35-7-1049 (Supp. 1983).

92. MD. ANN. CODE art. 27, § 297(a)(8) (Supp. 1983). Subsection (8) would cover, for example, precious metals such as gold, if it had been given in exchange for CDS. If the seller purchased the gold with the proceeds of a CDS transaction, the gold would be forfeitable proceeds.

b. Proceeds

The new subsection (8) provides that proceeds traceable to an exchange of CDS are forfeitable.⁹³ While not defined in section 297, proceeds is a commonly used legal term meaning the status that attaches to any property that is substituted for what was originally exchanged.⁹⁴ For example, if a seller transfers CDS to a buyer in exchange for \$100,000 in currency, the currency represents the proceeds of the CDS transaction. If the seller deposits the \$100,000 in a bank account, \$100,000 of his account becomes proceeds. If he withdraws \$40,000 and purchases an automobile, the automobile as well as the remaining \$60,000 in the account are proceeds. Of course, the further the proceeds are removed from the CDS transaction, the more difficult it becomes to show that they are proceeds from the transaction.

There is virtually no guidance in existing decisional law for determining what constitutes the proceeds traceable to an exchange of CDS.⁹⁵ Reference to analogous areas of law may provide guidance, however, in tracing the proceeds of a narcotics transaction. The object of both the federal and Maryland drug forfeiture statutes is to allow seizure and forfeiture of both profits and assets of CDS trafficking, and to assure that the owner does not profit from the narcotics offense.⁹⁶ The law of restitution serves a similar object: to attempt to make a wrongdoer forfeit everything gained from his wrongful activities.⁹⁷ Since the same principles that apply to the forfeiture of proceeds of a CDS transaction apply to restitution, the *Restatement of Restitution* may serve as a useful guide in this area.⁹⁸

The law of restitution clearly establishes that profits earned on

93. *Id.*

94. See U.C.C. § 9-306(1) (1978); BLACK'S LAW DICTIONARY 1084 (5th ed. 1979).

95. *United States v. \$364,960 in United States Currency*, 661 F.2d 319 (5th Cir. 1981), one of the few decisions construing the proceeds provisions of 21 U.S.C. § 881, is not technically a proceeds case. While there can be little doubt that the cash found in the apartment in that case was the proceeds of narcotics activity, this was not an instance where money given in exchange for CDS was traced through bank accounts and other property such as automobiles and real estate. Rather, the presence of small amounts of CDS, and the nationality and financial condition of the persons in possession was sufficient, in the Fifth Circuit's opinion, to show a substantial connection with CDS activity.

96. While there is no record, as there is in Congress, of the legislative intent of the Maryland General Assembly that passed Senate Bill 83, the legislative history file contains numerous references suggesting that the purpose of S. 83 is to attack the profits of drug trafficking. *Hearings on S. 83*, *supra* note 3 (testimony of Harry L. Meyers, Assistant Chief Counsel, DEA, Jan. 26, 1982). As to the federal provision, Senator John Culver (D-Iowa) stated in sponsoring the amendment to 21 U.S.C. § 881 that later became subsection 881(a)(6): "The amendment that I am offering today would provide the United States with strong new weapons to . . . strike at the profits of illegal drug trafficking." 124 CONG. REC. 17644 (1970) (statement of Sen. Culver).

97. RESTATEMENT OF RESTITUTION § 215 (1937).

98. *Id.* § 295; see Wade, *The Literature of the Law of Restitution*, 19 HASTINGS L.J. 1087 (1968).

proceeds are also proceeds.⁹⁹ Restitution law also supplies guidance in determining the rights of transferees of the proceeds. If the trafficker uses his proceeds to satisfy a lawful debt, the proceeds should not be seizable when possessed by the transferees.¹⁰⁰ If an asset that is proceeds is collateral for a debt, such as a residential mortgage, law enforcement authorities can proceed against the asset. In non-debt situations, if the transferee is a bona fide purchaser for value, law enforcement authorities should be estopped from forfeiting the proceeds in the possession of the bona fide purchaser.¹⁰¹ Indeed, subsection (8) gives an owner of property or proceeds an opportunity to prevent forfeiture by establishing that the basis for the forfeiture occurred without the owner's knowledge or consent.¹⁰² The justification for this rationale is clear: the purpose of tracing proceeds is to punish the trafficker, not an innocent third party.¹⁰³

In addition to profits, assets acquired by the trafficker in exchange for proceeds become proceeds themselves and are subject to forfeiture. The proceeds, however, must be traced to specific assets.¹⁰⁴ In a forfeiture case, unlike a tax proceeding,¹⁰⁵ it is not sufficient to show that the trafficker has assets, the source of which cannot be identified. For proceeds of CDS transactions to be forfeited, the government must identify the specific assets from which the proceeds are derived.¹⁰⁶ Thus, if the trail disappears, the right of forfeiture disappears with it.

c. Negotiable Instruments and Securities

The last part of subsection (8) provides for the forfeiture of "all negotiable instruments and securities used, or intended to be used, to

99. RESTATEMENT OF RESTITUTION § 205 (1937).

100. *See id.* § 207.

101. *See id.* § 172.

102. MD. ANN. CODE art. 27, § 297(a)(8) (Supp. 1983).

103. The federal rule providing for automatic forfeiture at the time of the violation would, in some circumstances, penalize a bona fide purchaser who obtained the property before the conclusion of the forfeiture. *See supra* notes 89-90 and accompanying text (discussing automatic forfeiture). A statute providing that title vests in the government at the time of seizure, however, would tend to protect the interests of the bona fide purchaser. *See supra* notes 84-88 and accompanying text (discussing Maryland provision).

104. RESTATEMENT OF RESTITUTION § 215 (1937).

105. *See* *United States v. Massei*, 355 U.S. 595 (1958); *United States v. Grasso*, 629 F.2d 805 (2d Cir. 1980) (per curiam).

106. The forfeiture statutes require that the government prove that the proceeds are traceable to a CDS exchange. *E.g.*, 21 U.S.C. § 881(a)(6) (1982); MD. ANN. CODE art. 27, § 297(a)(8) (Supp. 1983). In a criminal net worth tax prosecution, the government must show only an increase in net worth and either a "likely source" or the negation of all nontaxable sources of income. *United States v. Grasso*, 629 F.2d 805, 807-08 (2d Cir. 1980) (per curiam). The tracing required for the forfeiture of proceeds of CDS violations accords with the law governing identification of trust property or the proceeds thereof. *See Levin v. Security Fin. Ins. Corp.*, 246 Md. 712, 230 A.2d 93 (1967).

facilitate any violation of this subheading.”¹⁰⁷ This provision differs from the first two provisions in subsection (8) because it focuses on property used or intended to be used to facilitate *any* violation of the CDS laws. In contrast, the first two provisions (“everything of value” and “proceeds”) are limited to transactions or sales. Forfeiture of these categories requires proof that the property was furnished or was intended to be furnished *in exchange for* CDS.¹⁰⁸ The negotiable instruments provision is therefore broader since any negotiable instrument or security used to facilitate any violation of the CDS laws can be forfeited. The word “facilitate” has been extensively discussed in many federal cases dealing with the forfeiture of conveyances and has been interpreted as having the ordinary dictionary meaning of making easier or less difficult.¹⁰⁹

Nearly every use of negotiable instruments and securities by a drug trafficking organization facilitates the purpose of the organization, which is to sell drugs and realize profit. In contrast to the treatment of “money, coin, or currency” in subsection (6), the mere proximity of negotiable instruments and securities to CDS will not raise a presumption that the property is forfeitable. For example, if during a drug raid stocks and bonds are found lying on a table next to CDS and drug paraphernalia, probable cause to believe they have been used to facilitate a CDS violation must be shown before they can be seized and forfeited.¹¹⁰

IV. SEIZURE OF PROPERTY SUBJECT TO FORFEITURE UNDER ARTICLE 27, SECTION 297

The purpose of the discussion above was to review the recent changes to section 297. Although the 1982 amendments added several new categories of forfeitable property, the amendments did not affect many of the categories of property which could already be forfeited. Accordingly, the discussion below will first discuss the categories of property forfeitable under section 297, as well as the procedures for seizing each type of property. After reviewing the fourth amendment limitations upon forfeiture, this analysis concludes that compliance

107. MD. ANN. CODE art. 27, § 297(a)(8) (Supp. 1983).

108. *Id.*

109. *Compare, e.g.,* United States v. One 1979 Porsche Coupe, 709 F.2d 1424 (11th Cir. 1983) (vehicle facilitated CDS violation) *and* United States v. One 1974 Cadillac Eldorado Sedan, 548 F.2d 421 (2d Cir. 1977) (same) *with* United States v. One 1972 Chevrolet Corvette, 625 F.2d 1026 (1st Cir. 1980) (use of the conveyance did not facilitate CDS violation) *and* Howard v. United States, 423 F.2d 1102 (9th Cir. 1970) (use of property did not facilitate CDS violation). *See* 21 U.S.C. § 881(a)(4) (1982) (facilitation as a basis for forfeiture of conveyances); BLACK'S LAW DICTIONARY 531 (5th ed. 1979) (defining facilitate).

110. In addition, probable cause is necessary for a seizure alone. *See infra* text at notes 205-36 (discussing subsection (b) of section 297). It is doubtful, however, whether any law enforcement officer would fail to seize stocks found next to CDS and drug paraphernalia in the middle of a laboratory.

with the fourth amendment requires the issuance of a seizure warrant prior to the seizure of certain types of forfeitable property. Following this discussion is an analysis of the remedy for fourth amendment violations when illegal forfeiture seizures occur. An examination of the exclusionary rule will show that although it may provide an effective remedy when illegally seized property is sought to be introduced in the criminal trial of the property owner, the rule's application to a forfeiture proceeding does not protect the owner of illegally seized property. The analysis concludes that the only effective remedy for an illegal seizure of property for forfeiture is the dismissal of the forfeiture action.

A. *Types of Property Subject to Forfeiture*

Since a forfeiture action is a civil proceeding *in rem*, the property must be seized and brought within the jurisdiction of the court before the forfeiture process can begin.¹¹¹ Property seizable under the Maryland provision falls into three categories: (1) movable property, such as conveyances; (2) immovable property, such as real estate; and (3) intangible property, such as bank accounts. Movable property must be seized to create jurisdiction;¹¹² the owner of immovable property must be served with legal documents to create jurisdiction; intangible property must be attached.¹¹³

Although property forfeitable under section 297 can be placed in one of these three categories, the forfeiture provision does not use these categories. Rather, the eight categories of property that can be forfeited under subsection 297(a) are: (1) CDS; (2) raw materials, products, and equipment; (3) containers; (4) conveyances; (5) books, records, and research; (6) money, coin, or currency; (7) drug paraphernalia; and (8) everything of value, proceeds, negotiable instruments, and securities.¹¹⁴

Several categories of property rarely become the subject of litigation and thus warrant only brief mention. Seizures of CDS have not been the subject of litigation in forfeiture cases.¹¹⁵ Schedule I Con-

111. *The Brig Ann*, 13 U.S. (9 Cranch) 289, 291 (1815); *Prince George's County v. Blue Bird Cab Co.*, 263 Md. 655, 659, 284 A.2d 203, 205 (1971).

112. *See infra* text at notes 205-36 (discussing fourth amendment and the procedure under section 297 for seizing property).

113. Stocks and bonds can be considered movable property if they are documents that embody the obligation. *Cf.* MD. COMM. LAW CODE ANN. §§ 8-101 to -406 (1975) (governing investment securities). If these documents do not exist, however, the representation of the obligation, such as a bank account, must be frozen.

114. MD. ANN. CODE art. 27, § 297(a) (Supp. 1983).

115. A claimant will object if the property is also going to be used as evidence in a criminal proceeding, but he will make the objection during the criminal proceeding, not in the civil forfeiture proceeding. Cases that consider the basis for a seizure for forfeiture must be carefully segregated into two categories: (1) those in which the defendant challenges the evidence in a criminal case on the ground that it was discovered as a result of an illegal seizure for forfeiture; and (2) those in

trolled Dangerous Substances¹¹⁶ are summarily forfeited to the state under subsection 297(e).¹¹⁷ Although this provision does not explain what the seizing authority must show to forfeit Schedule I CDS,¹¹⁸ no formal procedure is required since Schedule I lists those drugs for which there is no legitimate use and therefore no legal basis for possession.¹¹⁹

Similarly, few challenges are made to seizure of three other types of property in subsection 297(a): raw materials, products, and equipment,¹²⁰ containers,¹²¹ and books, records, and research.¹²² Drug entrepreneurs are understandably hesitant to raise questions in civil forfeiture proceedings over the seizure of their laboratories and business records.¹²³ In addition, the seizure of immovables and intangibles such as real estate and bank accounts deserve little comment since the procedures for attaching these assets are well established.¹²⁴

Challenges to the seizure of forfeitable property will occur most frequently in cases involving the seizure of conveyances,¹²⁵ the seizure of money, coin, or currency,¹²⁶ and the seizure of property forfeitable under subsection (a)(8).¹²⁷ When this property is located in an area in which its owner has a reasonable expectation of privacy, law enforcement agents must obtain a search warrant to search for and seize the property.¹²⁸ When the property is not located in an area in which the

which the claimant contests the forfeiture action on the ground that the seizure was illegal. *See infra* notes 190-94 and accompanying text.

116. MD. ANN. CODE art. 27, § 279(a) (1982 & Supp. 1983). Among the drugs listed in Schedule I are heroin, lysergic acid diethylamide (LSD), and marijuana.

117. Subsection 297(e) provides:

(e) *Seizure and summary forfeiture of contraband.* All substances listed in Schedule I that are possessed, transferred, sold or offered for sale in violation of the provisions of this subheading shall be deemed contraband and seized and summarily forfeited to the State. Similarly, all substances listed in Schedule I, which are seized or come into possession of the State, the owners of which are unknown, shall be deemed contraband and summarily forfeited to the State.

MD. ANN. CODE art. 27, § 297(e) (1982).

118. *Id.* § 279(a) (1982 & Supp. 1983).

119. "Contraband *per se*, of course, requires no proceeding for forfeiture." Director of Fin. v. Cole, 296 Md. 607, 619, 465 A.2d 450, 457 (1983). Although subsection 297(e), by limiting itself to Schedule I drugs, implies that forfeitures of Schedule II, III, IV, and V CDS require more than summary forfeiture, formal proceedings are rarely followed to forfeit them. Once seized, CDS of any type is usually destroyed by the state.

120. MD. ANN. CODE art. 27, § 297(a)(2) (Supp. 1983).

121. *Id.* § 297(a)(3).

122. *Id.* § 297(a)(5).

123. They will, of course, object if the property will be used as evidence in a criminal proceeding.

124. MD. R.P. 622, 623, F1-F6, G40-G61 (1977 & Supp. 1983). For current versions, see MD. R.P. 2-115, 2-126(f), 2-621, 2-641, 2-642, 2-643, 2-645, 2-646.

125. MD. ANN. CODE art. 27, § 297(a)(4) (Supp. 1983).

126. *Id.* § 297(a)(6).

127. *Id.* § 297(a)(8).

128. *See Katz v. United States*, 389 U.S. 347 (1967). In discussing the federal narcotics

owner has an expectation of privacy, the question then becomes whether a seizure warrant of some type is required to seize property for forfeiture.

B. The Fourth Amendment and Seizures of Property Subject to Forfeiture

The fourth amendment provides:

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches *and seizures*, shall not be violated, and no Warrant shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.¹²⁹

Although the fourth amendment applies to seizures for forfeiture,¹³⁰ courts disagree as to the precise application of this constitutional provision. For example, courts are divided as to whether the fourth amendment warrant requirement is applicable to forfeiture seizures, whether an exception to that requirement excuses the failure to obtain a warrant, and if a constitutional violation occurs, what sanctions a court may impose.¹³¹

The following discussion will demonstrate that the fourth amendment warrant requirement should apply to certain seizures for forfeiture, that the application of the exclusionary rule, originally created to protect fourth amendment rights in criminal cases,¹³² provides inadequate protection in forfeiture cases, and that denial of the forfeiture may be an appropriate remedy when a fourth amendment violation occurs.

1. The Warrant Requirement of the Fourth Amendment

The Supreme Court has stated that "searches [made] without prior approval by a judge or magistrate are per se unreasonable under the fourth amendment subject only to a few specifically established and well-delineated exceptions."¹³³ Thus, probable cause and a warrant are

forfeiture provision, the Fourth Circuit recently stated: "[t]he statute does not purport to authorize an intrusion on a 'legitimate expectation of privacy,' which is now the focal point of Fourth Amendment protection." *United States v. Kemp*, 690 F.2d 397, 401 (4th Cir. 1982) (citing *Rawlings v. Kentucky*, 448 U.S. 98 (1980); *Rakas v. Illinois*, 439 U.S. 128 (1978)).

129. U.S. CONST. amend. IV (emphasis supplied).

130. *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 696-98 (1965).

131. See *infra* notes 167 & 185 and accompanying text.

132. *Mapp v. Ohio*, 367 U.S. 643 (1961).

133. *Katz v. United States*, 389 U.S. 347, 357 (1967) (footnote omitted). The Court has recognized that a warrant is not required in certain circumstances. *E.g.*, *United States v. Ross*, 456 U.S. 798 (1982) (mobile vehicle); *United States v. Mendenhall*, 446 U.S. 554 (1980) (consent); *Mincey v. Arizona*, 437 U.S. 385 (1978) (emergency); *South Dakota v. Opperman*, 428 U.S. 364 (1976) (inventory of vehicle);

required to search a place in which a person has a reasonable expectation of privacy.¹³⁴ A warrant will be excused, however, in situations involving hot pursuit,¹³⁵ mobile vehicles,¹³⁶ destruction of evidence,¹³⁷ or other exigent circumstances.¹³⁸

The application of the fourth amendment warrant requirement to seizures of property subject to forfeiture has not been analyzed by either the Supreme Court or Maryland's appellate courts.¹³⁹ Lower federal courts, however, have grappled with this question.¹⁴⁰ Several factors may explain why the question is seldom raised as to whether a warrant or some exception to the warrant requirement is required to seize forfeitable property. First, the statutes involved in forfeiture actions have not required a warrant and have in fact implied that none is needed.¹⁴¹ Second, most decisions have focused on the forfeiture claim, determining whether the property was used illegally,¹⁴² rather

United States v. Santana, 427 U.S. 38 (1976) (hot pursuit of arrestee); Almeida-Sanchez v. United States, 413 U.S. 266 (1973); Cupp v. Murphy, 412 U.S. 291 (1973) (highly evanescent evidence); Chimel v. California, 395 U.S. 752 (1969) (search incident to lawful arrest); Abel v. United States, 362 U.S. 217 (1960) (abandonment); Hester v. United States, 265 U.S. 57 (1924) (abandonment). As to the Court's preference for warrants, see Steagald v. United States, 451 U.S. 204 (1981) (search warrant in addition to an arrest warrant needed to arrest a suspect in the house of a third person).

134. "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." Katz v. United States, 389 U.S. 347, 351 (1967) (citations omitted).
135. United States v. Santana, 427 U.S. 38 (1976); Warden v. Hayden, 387 U.S. 294 (1967).
136. United States v. Ross, 456 U.S. 798 (1982); Carroll v. United States, 267 U.S. 132 (1925).
137. Cupp v. Murphy, 412 U.S. 291 (1973); United States v. Jeffers, 342 U.S. 48 (1951).
138. Mincey v. Arizona, 437 U.S. 385 (1978) (emergency); United States v. Gardner, 627 F.2d 906, 909-10 (9th Cir. 1980) (exigent circumstances justify protective search of residence when officers reasonably believe that dangerous persons are within); Wayne v. United States, 318 F.2d 205 (D.C. Cir.) (report of unconscious woman provided sufficient exigency for forcible entry without a search warrant), *cert. denied*, 375 U.S. 860 (1963). For a list of other search warrant exceptions, see *supra* note 133.
139. See Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 679-80 n.14 (1974) ("We have no occasion to address the question whether the Fourth Amendment warrant or probable cause requirements are applicable to seizures under the Puerto Rican statutes"). The Puerto Rican statutes referred to by the Court are identical for the purposes of this discussion to both the federal and Maryland provisions. See 21 U.S.C. § 881 (1982); MD. ANN. CODE art. 27, § 297 (1982 & Supp. 1983).
140. *E.g.*, United States v. McCormick, 502 F.2d 281 (9th Cir. 1974); United States v. Francolino, 367 F.2d 1013 (2d Cir. 1966), *cert. denied*, 386 U.S. 960 (1967); United States v. McMichael, 541 F. Supp. 956 (D. Md. 1982).
141. See *infra* notes 219-20 and accompanying text.
142. See, *e.g.*, United States v. One 1979 Porsche Coupe, 709 F.2d 1424 (11th Cir. 1983); United States v. Rich, 518 F.2d 980, 986 (8th Cir. 1975), *cert. denied*, 427 U.S. 907 (1976).

than analyzing whether the warrantless seizure was proper.¹⁴³ Third, most seizures have occurred contemporaneously with an arrest and a patent violation of the CDS laws, thereby obviating the need for a search warrant.

An explanation of the typical sequence of events giving rise to a forfeiture proceeding may be helpful in understanding the decisions discussing whether a warrant is required to seize property for forfeiture. Generally, the forfeitable property is in some manner used in violation of law. Depending upon the circumstances, the seizure of the property can occur during or subsequent to the violation. For example, the search of an automobile might reveal further evidence of a narcotics violation. Typically, a criminal prosecution of the owner of the seized property will follow the seizure, although the prosecution is not a prerequisite to forfeiture. During the pendency of the criminal trial, the government will usually retain possession of the seized property for use as evidence. Finally, the government will institute a forfeiture proceeding to establish its right to retain permanently the seized property.

Cases that have considered whether the fourth amendment requires a warrant for seizures of property for forfeiture can be divided into two categories. The first category consists of criminal cases in which the admission of evidence is challenged on the ground that it was found as a result of an illegal forfeiture seizure.¹⁴⁴ The second group consists of forfeiture cases in which the forfeiture itself is challenged on the ground that the seizure was illegal.¹⁴⁵ While the second category deals solely with a forfeiture question, the first category involves a classic search and seizure question, complicated somewhat by the involvement of a forfeiture seizure. The inconsistent results reached by the courts may be attributable to their failure to understand the difference between a search and seizure problem in a criminal case and a seizure in a civil forfeiture case.

2. The Warrant Requirement and Forfeiture Seizures: Challenges in Criminal Cases to the Admission of Evidence Found as a Result of a Warrantless Forfeiture Seizure

Most cases that discuss whether a forfeiture seizure must meet the fourth amendment warrant requirements have involved challenges in criminal cases to the admissibility of evidence found as a result of a warrantless seizure for forfeiture. Typically, the defendant argues that the failure to obtain a warrant prior to the forfeiture seizure violated the fourth amendment and that evidence found as a result of the seizure must be suppressed at the criminal trial. Most courts have held, for various reasons, that a warrant is not required to seize property for

143. See, e.g., *State v. One 1979 Pontiac Firebird*, 55 Md. App. 394, 462 A.2d 73 (1983); *Crowley v. State*, 25 Md. App. 417, 334 A.2d 557 (1975).

144. See *infra* notes 146-89 and accompanying text.

145. See *infra* notes 190-94 and accompanying text.

forfeiture.¹⁴⁶ A minority of courts, however, have held that a warrant or some exception to the warrant requirement is needed.¹⁴⁷

Courts have used several theories to support the conclusion that the fourth amendment does not require a warrant to seize property for forfeiture. The first theory relies on the concept that the government is entitled to the property subject to the forfeiture from the moment of its unlawful use.¹⁴⁸ This theory is derived from language in *Boyd v. United States*,¹⁴⁹ an 1886 Supreme Court decision. The *Boyd* Court stated:

The search for and seizure of stolen or forfeited goods, or goods liable to duties and concealed to avoid the payment thereof, are totally different things from a search for and seizure of a man's private books and papers for the purpose of obtaining information therein contained, or of using them as evidence against him. The two things differ *toto coelo*. In the one case, the government is entitled to the possession of the property; in the other, it is not.¹⁵⁰

The Court buttressed its position by indicating that the First Congress passed both the customs statutes and the Bill of Rights.¹⁵¹ Therefore, the Court reasoned that the First Congress did not regard searches and seizures of this kind as unreasonable, within the prohibition of the fourth amendment.¹⁵²

Subsequent lower court decisions have adopted this rationale, referred to as the automatic forfeiture rule.¹⁵³ Although this concept is useful in dealing with claims of bona fide purchasers, it ignores the

146. *E.g.*, *United States v. Bush*, 647 F.2d 357 (3d Cir. 1981); *United States v. One 1975 Pontiac LeMans*, 621 F.2d 357 (3d Cir. 1981); *Francolino v. United States*, 367 F.2d 1013 (2d Cir. 1966), *cert. denied*, 386 U.S. 960 (1967).

147. *E.g.*, *United States v. Spetz*, 721 F.2d 1457, 1468-76 (9th Cir. 1983); *United States v. Karp*, 508 F.2d 1122, 1124-25 (1974), *cert. denied*, 422 U.S. 1007 (1975); *United States v. McCormick*, 502 F.2d 281 (9th Cir. 1974); *United States v. Whitlock*, 418 F. Supp. 138, 141-42 (E.D. Mich. 1976), *aff'd mem.*, 556 F.2d 583 (6th Cir. 1977).

148. The inception of the government's property right "occurs when the car is illegally used. The physical repossession of the automobile may occur subsequently." *United States v. One 1952 Ford Victoria*, 114 F. Supp. 458, 459 (N.D. Cal. 1953).

149. 116 U.S. 616 (1886).

150. *Id.* at 623.

151. *Id.* In a recent decision the Court again used this reasoning to support its conclusion that another customs statute, 19 U.S.C. § 1581(a) (1976), authorized the suspicionless boarding of vessels by government officers. *United States v. Villamonte-Marquez*, 103 S. Ct. 2573, 2578 (1983) (citing *Boyd*, 116 U.S. at 623). For a discussion of the *Villamonte-Marquez* decision, see Note, *Constitutional Law-Search and Seizure-19 U.S.C. 1581(a). Random and Suspicionless Boarding of Vessel by Customs Officers does not Violate the Fourth Amendment's Prohibition Against Unreasonable Search and Seizure*, 14 U. BALT. L. REV. 159 (1984).

152. *Boyd*, 116 U.S. at 623.

153. *See, e.g.*, *United States v. One 1956 Ford Tudor Sedan*, 253 F.2d 725 (4th Cir. 1958); *United States v. One Pontiac LeMans*, 470 F. Supp. 1243 (D. Mass. 1979), *aff'd*, 621 F.2d 444 (1st Cir. 1980); *Fell v. Armour*, 355 F. Supp. 1319 (M.D. Tenn. 1972).

fourth amendment right of the property's owner or possessor to be free from unreasonable seizures. The fourth amendment "protects two types of expectations, one involving 'searches,' the other 'seizures'. . . . A 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property."¹⁵⁴ A determination, without more, that the government has a superior interest in the property is insufficient to uphold the constitutionality of the seizure. The fourth amendment, which governs the manner of seizure, must be satisfied.¹⁵⁵

Courts have adopted a second theory that recognizes a further exception to the fourth amendment warrant requirement when seizures of property for forfeiture are involved. In *United States v. Francolino*,¹⁵⁶ the United States Court of Appeals for the Second Circuit upheld the introduction in a criminal case of evidence found as a result of a search of a vehicle seized for forfeiture without a warrant under 49 U.S.C. §§ 781-84.¹⁵⁷ The *Francolino* court, relying on *Boyd* and *Carroll v. United States*,¹⁵⁸ reasoned that Congress could, consistently with the fourth amendment, create a further exception to the search warrant requirement for vehicles that have transported contraband.¹⁵⁹

The court's rationale in *Francolino* presents several problems. First, the Second Circuit created a new exception to the fourth amendment warrant requirement, something which the Supreme Court has not yet approved.¹⁶⁰ Second, reliance on *Boyd* is weak since the supportive language is dictum.¹⁶¹ Third, *Carroll* dealt with the warrantless search of a vehicle, not its warrantless seizure. The fourth amendment interests implicated in searches and seizures differ: while searches interfere with privacy interests,¹⁶² seizures interfere with possessory inter-

154. *United States v. Jacobsen*, 104 S. Ct. 1652, 1656 (1984).

155. *See United States v. Jeffers*, 342 U.S. 48 (1951). In *Jeffers*, government officials seized untaxed drugs after a warrantless search of a hotel room. The Court specifically rejected the argument that officials could search for and seize the drugs because of their contraband nature, holding that the right to forfeit drugs did not abrogate the fourth amendment. As to the idea that "forfeit is forfeit," no matter how far prior to the seizure the unlawful use occurred, see the majority and dissenting opinions in the recent Fourth Circuit case of *United States v. Kemp*, 690 F.2d 397 (4th Cir. 1982). The majority specifically declined to discuss the fourth amendment question: "We express no opinion on whether exigent circumstances are necessary, or were present in the case at bar, to sustain this seizure pursuant to [the federal statutes] under the Fourth Amendment." *Id.* at 402. The *Kemp* court remanded the case to the district court for consideration of this issue. *See also Jones v. State*, 56 Md. App. 101, 466 A.2d 895 (1983) (following *Kemp*).

156. 367 F.2d 1013 (2d Cir. 1966), *cert. denied*, 386 U.S. 960 (1967).

157. 49 U.S.C. § 782 (1976).

158. 267 U.S. 132 (1925).

159. *Francolino*, 367 F.2d at 1022.

160. *Calera-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 680 (1974).

161. *See Boyd v. United States*, 116 U.S. 616 (1886) (court did not determine whether warrantless seizure for forfeiture was unconstitutional).

162. *Katz v. United States*, 389 U.S. 347 (1967).

ests.¹⁶³ The *Carroll* rationale clearly does not justify the often permanent interference with a person's possessory interests, without prior judicial approval, that results from a warrantless forfeiture seizure. Fourth, the *Francolino* court's statement that "we cannot recall too often that the Fourth Amendment bans only unreasonable searches and seizures,"¹⁶⁴ cannot be considered accurate in light of the language in *Katz v. United States*.¹⁶⁵ The *Katz* Court remarked that "the most basic constitutional rule in this area is that 'searches' conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well delineated exceptions."¹⁶⁶ A blanket forfeiture exception to the warrant requirement is inconsistent with the mandate of *Katz* since many instances of seizures of property for forfeiture are planned well in advance and while there is time to secure a seizure warrant.

Despite these problems, *Francolino* remains the majority opinion on warrantless seizures of property for forfeiture and has been followed in a number of circuits.¹⁶⁷ As additional support for this position, other courts have cited warrantless arrests of persons in public places¹⁶⁸ and the inapplicability of fourth amendment warrant requirements to a civil in rem forfeiture action.¹⁶⁹ Some courts have also attempted to justify warrantless forfeiture seizures by reasoning that the fourth amendment standards applicable to seizures are less stringent than those applied to searches.¹⁷⁰ The Supreme Court has never directly

163. *United States v. Jacobsen*, 104 S. Ct. 1652, 1656 (1984).

164. *Francolino*, 367 F.2d at 1022.

165. 389 U.S. 347 (1967), *quoted with approval in* *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

166. *Katz*, 389 U.S. at 454-55; *see supra* notes 133-38.

167. *United States v. Bush*, 647 F.2d 357 (3d Cir. 1981); *United States v. One 1975 Pontiac LeMans*, 621 F.2d 444 (1st Cir. 1980); *United States v. Milham*, 590 F.2d 717 (8th Cir. 1979); *United States v. White*, 488 F.2d 563 (6th Cir. 1973); *United States v. Mills*, 440 F.2d 647 (7th Cir. 1971); *United States v. Stout*, 434 F.2d 1264 (10th Cir. 1970); *United States v. Troiano*, 365 F.2d 416 (3d Cir.), *cert. denied*, 385 U.S. 958 (1966); *Sirimarco v. United States*, 315 F.2d 699 (10th Cir.), *cert. denied*, 374 U.S. 807 (1963). In *United States v. Pappas*, 600 F.2d 300 (1st Cir.), *aff'd on rehearing*, 613 F.2d 324 (1st Cir. 1979), the First Circuit followed the *Francolino* approach. The latter *Pappas* opinion, however, can be interpreted as supporting the *McCormick* rationale. *Id.* (probable cause exception to seizure of automobile, 21 U.S.C. 881 (1982), not applicable unless the seizure immediately followed violations); *see infra* note 185 (discussing *Pappas*).

168. *See United States v. Bush*, 647 F.2d 357 (3d Cir. 1981).

169. *See United States v. One Thousand Fifty-Eight Dollars in United States Currency*, 323 F.2d 211, 213 (3d Cir. 1963).

170. *Compare United States v. McCormick*, 502 F.2d 281, 285 (9th Cir. 1974) ("[w]e start with the proposition that the Fourth Amendment applies equally to searches and to seizures") *with United States v. Bush*, 647 F.2d 357, 367, 369 (3d Cir. 1981) (finding a "distinction, for purposes of Fourth Amendment analysis, between searches and seizures"; court required less probable cause to support a forfeiture seizure than a search) *and United States v. Johnson*, 572 F.2d 227 (9th Cir.) (stan-

resolved the question, although a reading of *Cardwell v. Lewis*¹⁷¹ indicates that searches and seizures should be judged by the same criteria.

The first case to challenge the *Francolino* rule was *United States v. McCormick*.¹⁷² In *McCormick*, the Ninth Circuit held that the warrantless seizure for forfeiture of an automobile parked in the defendant's driveway violated the fourth amendment. Since the court assumed that the fourth amendment applied equally to searches and seizures, those seizures conducted without a warrant were per se unreasonable under the fourth amendment,¹⁷³ subject only to certain exceptions such as exigent circumstances.¹⁷⁴ The *McCormick* court reasoned that since Congress cannot authorize a search or seizure that violates the fourth amendment,¹⁷⁵ absent a recognized exception a law enforcement official must first obtain a valid warrant before seizing a vehicle under a forfeiture statute.¹⁷⁶

The United States District Court for the District of Maryland in *United States v. McMichael*¹⁷⁷ recently followed *McCormick*. In *McMichael*, the court analyzed prior decisions and held that CDS found during a search of a vehicle seized for forfeiture could not be introduced as evidence in McMichael's criminal trial since the warrantless seizure of the automobile violated the fourth amendment.¹⁷⁸ Although the vehicle had facilitated an earlier violation, it was not seized until fifteen hours after McMichael's arrest. Furthermore, the vehicle was not searched until two months after its seizure and the search was based on information supplied by a co-defendant that CDS might be found in the trunk. The search revealed tinfoil packets of cocaine.¹⁷⁹

The *McMichael* court first found that subsection 881(b)(1) of the federal statute,¹⁸⁰ which authorizes seizures for forfeiture made incident to a lawful arrest, did not support the seizure since it was not made until long after the defendant's arrest.¹⁸¹ Turning to subsection (b)(4), the court acknowledged that it did not require a warrant, but rather only probable cause.¹⁸² Nevertheless, applying the *McCormick* line of reasoning and rejecting *Francolino*, the court ruled that an "exigent circumstances" requirement must be read into the statute "to

dard of probable cause to support a seizure for forfeiture is less than that required to obtain a search warrant), *cert. denied*, 437 U.S. 907 (1978).

171. 417 U.S. 583 (1974).

172. 502 F.2d 281 (9th Cir. 1974).

173. *Id.* at 285; see *Katz v. United States*, 389 U.S. 347 (1967).

174. *McCormick*, 502 F.2d at 285; see *supra* note 133 and text accompanying notes 135-38.

175. See *United States v. Villamonte-Marquez*, 103 S. Ct. 2575, 2578 (1983); *Almeida-Sanchez v. United States*, 413 U.S. 266, 272 (1973).

176. *United States v. McCormick*, 502 F.2d 281, 285 (9th Cir. 1974).

177. 541 F. Supp. 956 (D. Md. 1982).

178. *Id.* at 965.

179. *Id.* at 957-60.

180. 21 U.S.C. 881(b)(1) (1982).

181. *McMichael*, 541 F. Supp. at 960.

182. *Id.*

avoid the serious constitutional question posed by a warrantless seizure pursuant to 21 U.S.C. Section 881(b)(4).¹⁸³ Finding no exigent circumstances, the *McMichael* court ruled the seizure invalid. As a result, the investigatory search that followed was also defective.¹⁸⁴

While a few courts have reached conclusions similar to *McMichael*,¹⁸⁵ a majority of courts have continued to uphold warrantless seizures of property for forfeiture.¹⁸⁶ Most of these cases involve automobiles. Because the mobile vehicle exception to the warrant requirement may excuse the necessity of obtaining a warrant,¹⁸⁷ many of these cases would be similarly decided regardless of the position adopted by the court. Problems arise, however, when the courts that follow *Francolino* are faced with warrantless seizures of property that do not involve an automobile or some clearly defined exception to the warrant requirement.

When evidence is offered in a criminal case that has been found as a result of a warrantless seizure of property for forfeiture, courts should follow the *McCormick* rationale. Under *McCormick*, seizures of property for forfeiture require a warrant or exigent circumstances that trigger a recognized exception to the warrant requirement.¹⁸⁸ Absent a warrant or an exception, the exclusionary rule requires that evidence obtained as a result of the seizure be excluded from the criminal trial.¹⁸⁹

183. *Id.* at 964.

184. *Id.* (citing *United States v. Johnson*, 572 F.2d 227 (9th Cir.), *cert. denied*, 437 U.S. 907 (1978)).

185. *United States v. Spetz*, 721 F.2d 1457, 1468-76 (9th Cir. 1983) (extending *McCormick* to narcotics forfeitures); *United States v. Pruett*, 551 F.2d 1365 (5th Cir. 1977) (suitcases found in automobile obtained by warrantless seizure inadmissible at owner's trial); *United States v. Thrower*, 442 F. Supp. 272 (E.D. Pa. 1977) (upholding warrantless seizure of automobile as exception to warrant requirement because it was seized under exigent circumstances); *State v. Manuel*, 426 So. 2d 140, 146 (La. 1983) ("The warrant safeguard is equally applicable to seizure of an automobile for the purposes of forfeiture, since the warrantless seizure of an automobile as contraband is subject to the same potential for abuse as the seizure of articles for evidentiary purposes without prior judicial approval."). In *United States v. Pappas*, 613 F.2d 324, 331 (1st Cir. 1979), the First Circuit held a warrantless seizure of an automobile a violation of the fourth amendment but nevertheless upheld the introduction into evidence in the criminal trial of a gun found in the vehicle. The *Pappas* court relied upon *Michigan v. DeFilipo*, 443 U.S. 31 (1979), and noted that the exclusionary rule was an improper remedy when the seizure was not in violation of any prior judicial construction.

186. *See supra* note 167 (listing cases).

187. *Carroll v. United States*, 267 U.S. 132 (1925). *But see* *United States v. Spetz*, 721 F.2d 1457, 1470-73 (9th Cir. 1983) (automobile exception did not excuse warrantless seizure of vehicle when there was no probable cause to believe vehicle contained contraband when seized, and when vehicle was parked two miles from owner's residence).

188. *United States v. McCormick*, 502 F.2d 281 (9th Cir. 1974).

189. *See* *United States v. Caceres*, 440 U.S. 741 (1979); *Mapp v. Ohio*, 367 U.S. 643 (1961); *Weeks v. United States*, 232 U.S. 383 (1914).

3. The Warrant Requirement and Forfeiture Seizures: Challenges to the Forfeiture of Property Seized Without a Warrant or an Exception to the Warrant Requirement

Although most courts have concluded otherwise,¹⁹⁰ the seizure of property for forfeiture without a warrant or an exception violates the warrant requirements of the fourth amendment. When the seizure is challenged in the criminal trial of the property's owner, the exclusionary rule provides adequate protection from fourth amendment violations by excluding any evidence found as a result of the illegal seizure. As explained below, however, the application of the exclusionary rule to a forfeiture proceeding itself does not protect against unconstitutional seizures; dismissal of the forfeiture proceeding is the appropriate remedy.

When a claimant in a forfeiture proceeding challenges the warrantless seizure of property for forfeiture, courts have almost unanimously rejected the argument that a seizure made in violation of the fourth amendment requires the dismissal of the forfeiture action.¹⁹¹ Courts reach this conclusion because of the manner in which they apply the exclusionary rule to forfeiture cases. The rule that excludes improperly seized evidence is effective in criminal cases since the defendant is objecting to the admissibility of the evidence against him, not the seizure or deprivation itself. Excluding the illegally seized evidence cures the constitutional violation by nullifying the reason for which the evidence was seized, that is, to be used against the defendant in a criminal proceeding. In forfeiture cases, however, the purpose of the seizure is not to generate evidence against the property owner, but rather to take the property away from him.¹⁹²

In forfeiture cases, the exclusionary rule, as in criminal cases, bars evidence that has been obtained in violation of the fourth amendment. The evidence that supports a forfeiture, however, rarely comes from the seizure itself.¹⁹³ Instead, the evidence of criminal use usually derives

190. *United States v. Bush*, 647 F.2d 357 (3d Cir. 1981); *United States v. One 1975 Pontiac LeMans*, 621 F.2d 444 (1st Cir. 1980); *United States v. Milham*, 590 F.2d 717 (8th Cir. 1979); *United States v. White*, 488 F.2d 563 (6th Cir. 1973); *United States v. Mills*, 440 F.2d 647 (7th Cir. 1971); *United States v. Stout*, 434 F.2d 1264 (10th Cir. 1970); *United States v. Francolino*, 367 F.2d 1013 (2d Cir. 1966), *cert. denied*, 386 U.S. 960 (1967); *United States v. Troiano*, 365 F.2d 416 (3d Cir.), *cert. denied*, 385 U.S. 958 (1966); *Sirimarco v. United States*, 315 F.2d 699 (10th Cir.), *cert. denied*, 374 U.S. 807 (1963).

191. *E.g.*, *United States v. One 1977 Mercedes-Benz*, 708 F.2d 444, 450 (9th Cir. 1983); *United States v. Eighty-Eight Thousand, Five Hundred Dollars*, 671 F.2d 293, 297 (8th Cir. 1982); *United States v. One 1971 Harley-Davidson Motorcycle*, 508 F.2d 351, 352 (9th Cir. 1974) (per curiam); *Director of Fin. v. Cole*, 296 Md. 607, 630 n.6, 465 A.2d 450, 463 n.6 (1983); *see generally* Annot., 8 A.L.R. 3d 473 (1966 & Supp. 1983) (collecting cases).

192. Of course, the seizure or a search of seized property could nevertheless generate evidence of the owner's criminal conduct.

193. An exception is *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1965).

from observations and admissions made prior to the seizure, such as when an automobile is seized because the defendant sold drugs from it on prior occasions. The evidence of illegal use, therefore, is independent of the seizure. The application of the exclusionary rule to forfeiture cases can result in the anomalous situation where the seizure itself may be constitutionally defective yet still be upheld because the evidence to support the forfeiture was constitutionally obtained.¹⁹⁴

The application of the exclusionary rule to forfeiture cases, therefore, does not protect citizens from unconstitutional seizures of their property. The fourth amendment forbids unreasonable searches *and seizures*. The disparity in treatment occasioned by the application of the exclusionary rule to forfeiture cases is nowhere justified in the Constitution. Indeed, in *Camara v. Municipal Court*,¹⁹⁵ the Supreme Court, in discussing administrative searches, specifically recognized that "[i]t is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior."¹⁹⁶

It is clear, therefore, that seizures of property intended for forfeiture should be treated the same as seizures of property intended as evidence in criminal cases. Since the exclusionary rule is an ineffective guardian of constitutional rights in forfeiture proceedings, courts dealing with forfeitures involving unconstitutional seizures of property should consider dismissal of the forfeiture proceedings as an appropriate remedy. A few courts have taken this position.¹⁹⁷

For example, in *Berkowitz v. United States*,¹⁹⁸ the court dismissed a forfeiture of currency as improper because the money had been

In that case, illegal liquor was found as a result of an illegal seizure. Since the evidence was excluded, the forfeiture failed.

194. *E.g.*, *United States v. One 1975 Pontiac LeMans*, 621 F.2d 444, 450 (1st Cir. 1980); *United States v. One 1971 Harley Davidson Motorcycle*, 508 F.2d 351, 352 (9th Cir. 1974) (per curiam); *John Bacall Imports, Ltd. v. United States*, 412 F.2d 586, 588 (9th Cir. 1969); *Interbartolo v. United States*, 303 F.2d 34, 39 (1st Cir. 1962).
195. 387 U.S. 523 (1967).
196. *Id.* at 530 (footnote omitted).
197. *Berkowitz v. United States*, 340 F.2d 168 (1st Cir. 1965); *United States v. Thirty-Eight Thousand Three Hundred Ninety-Four Dollars in United States Currency*, 498 F. Supp. 1325 (N.D. Ill. 1980) (dismissing forfeiture), *modified sub nom.* *United States v. White*, 660 F.2d 1178 (7th Cir. 1981) (seizure held legal; consequently no need to bar forfeiture), *on remand*, 541 F. Supp. 1114 (N.D. Ill. 1982) (underlying search illegal; forfeiture again dismissed), *rev'd*, 706 F.2d 806 (7th Cir. 1983) (forfeiture proceeded since search upheld); *Melendez v. Shultz*, 356 F. Supp. 1205, 1210 (D. Mass.), *appeal dismissed*, 486 F.2d 1032 (1st Cir. 1973); *In re 1972 Porsche*, 307 So. 2d 451, 452 (Fla. Dist. Ct. App. 1975). *See generally* Note, *Constitutional Law—Fourth Amendment—Illegal Seizure of Derivative Contraband Bars Forfeiture*, 60 WASH. U.L.Q. 724 (1982) (advocating dismissal of forfeiture). A trial judge should also consider dismissal of a forfeiture as an appropriate remedy for due process violations. *See supra* note 4.
198. 340 F.2d 168 (1st Cir. 1965).

seized in violation of the owner's constitutional rights.¹⁹⁹ In *Melendez v. Shultz*,²⁰⁰ a three judge federal district court panel held that the seizure by federal agents of an automobile in local police custody violated the fourth amendment. Specifically, the *Melendez* court reasoned that if a violation results in the suppression of evidence it should also result in the defeat of the forfeiture, stating that "[t]he initial seizure being unconstitutional, it would be 'attaching too great a premium' upon such conduct to permit the government now to retain the vehicle."²⁰¹

If the purpose of the exclusionary rule is to deter unlawful conduct and to preserve respect for government and judicial integrity,²⁰² these purposes are more effectively fulfilled by a rule that not only excludes illegally obtained evidence from use in a forfeiture proceeding but also bars the forfeiture itself.²⁰³ Absent this rule, there is little to deter police officers from improperly seizing property for forfeiture, something they cannot do in criminal cases without the scrutiny of a neutral and detached magistrate. Whether the property is seized as evidence in a criminal case or for forfeiture, the deprivation suffered by the property owner is the same. The *Melendez* court acknowledged this point in discussing the seizure of an automobile: "the right of the automobile owner not to have it searched is no more worthy of protection than his right not to have it seized without legal procedure."²⁰⁴ A rule barring the forfeiture of illegally seized property would have far less impact on the administration of justice than the exclusion of evidence in a criminal case.

C. Procedure for Seizing Property Subject to Forfeiture

Having analyzed the fourth amendment considerations in relation to seizures of property for forfeiture, the following discussion will examine the procedures that govern seizure of property involved in CDS violations, with an emphasis on whether the statutory procedures are adequate in light of the fourth amendment warrant requirement. The

199. *Id.* at 173. *But see* *United States v. One 1975 Pontiac LeMans*, 621 F.2d 444, 450 (1st Cir. 1980) (court questioned the *Berkowitz* rationale) (dictum).

200. 356 F. Supp. 1205 (D. Mass.), *appeal dismissed*, 486 F.2d 1032 (1st Cir. 1973).

201. *Melendez*, 356 F. Supp. at 1210 (quoting *Berkowitz v. United States*, 340 F.2d 168, 174 (1st Cir. 1965)).

202. *Stone v. Powell*, 428 U.S. 465, 486 (1976); *United States v. Janis*, 428 U.S. 433, 466 (1976); *United States v. Calandra*, 414 U.S. 338, 348 (1974); *Mapp v. Ohio*, 367 U.S. 643 (1961). *But cf.* *Illinois v. Gates*, 103 S. Ct. 2317, 2340-44 (1984) (White, J., concurring) (questioning deterrent effect of exclusionary rule when law enforcement officers act in the reasonable belief that a search and seizure was consistent with the fourth amendment).

203. *See* *United States v. Plymouth Coupe*, 182 F.2d 180, 182 (3d Cir. 1950) (barring forfeiture); *cf.* *State v. One 1980 Harley-Davidson Motorcycle*, 55 Md. App. 178, 185, 469 A.2d 487, 491 (1984) (dismissing forfeiture for failure to comply with statutory time constraints in MD. ANN. CODE art. 27, § 297 (1982)).

204. *Melendez v. Shultz*, 356 F. Supp. 1205, 1210 (D. Mass.), *appeal dismissed*, 486 F.2d 1032 (1st Cir. 1973).

controlling Maryland provision, article 27, subsection 297(b), provides in part:

Seizure of property subject to forfeiture.— Any property subject to forfeiture under this subheading may be seized upon process issued by any court having jurisdiction over the property except that seizure without such process may be made when—(i) The seizure is incident to an arrest or a search under a search warrant or an inspection under an administrative inspection warrant; (ii) The property subject to seizure has been the subject of a prior judgment in favor of the State in a criminal injunction or forfeiture proceeding under this subheading; (iii) There is probable cause to believe that the property is directly or indirectly dangerous to health or safety; or (iv) There is probable cause to believe that the property has been used or is intended to be used in violation of this subheading.²⁰⁵

Subsection 297(b), which closely parallels the language in the comparable federal provision,²⁰⁶ indicates that in the absence of the four enumerated exceptions, a court must issue some type of “process” before property may be seized for forfeiture.²⁰⁷ The statute, however, provides no guidelines as to what criteria a court should consider in issuing this process, although probable cause to believe the property has been or is intended to be used illegally should undoubtedly be the test.²⁰⁸

205. MD. ANN. CODE art. 27, § 297(b) (Supp. 1983).

206. 21 U.S.C. § 881(b) (1982).

207. Exactly what “process” is required by the statute, however, is unclear. Process in relation to seizures of property is a recognized concept in admiralty law. The rules governing admiralty seizures provide for the issuance of a seizure warrant on the basis of a verified complaint, affidavit, and description of the property to be seized. 28 U.S.C. App. SUPP. ADM. & MARITIME R. B(1), C(1), C(2). Maryland law, however, lacks a procedural analogue. Compare 21 U.S.C. § 881(b) (1982) (“upon process issued pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims”) with MD. ANN. CODE art. 27, § 297(b) (Supp. 1983) (“upon process issued by any court having jurisdiction over the property”). Maryland procedural rules define process as “any written order issued by a court to secure compliance with its commands, or to require action by any person, including but not limited to a summons at law or in equity, an order of publication, a commission, a writ and an order of any kind.” MD. R.P. 5, § y (1977) (current version at MD. R.P. 1-202(s)); see also *id.* § ff (defining writ) (current version at MD. R.P. 1-202(y)).

208. See MD. ANN. CODE art. 27, § 297(a) (Supp. 1983) (forfeiture of each category of property requires evidence of some type of illegal use). This should be the test even though subsection 297(b) states that the existence of probable cause constitutes an exception to the “process” requirement. Cf. *United States v. McMichael*, 541 F. Supp. 956, 964 (D. Md. 1982) (imposing an exigent circumstances requirement on analogous federal statute to remedy constitutional infirmity of statute). The statutory exception, of course, does not dispense with the warrant requirement of the fourth amendment. Cf. *United States v. Villamonte-Marquez*, 103 S. Ct. 2573, 2578 (1983) (“no Act of Congress can authorize a violation of the Con-

Subsection 297(b) sets forth four exceptions to the process requirement.²⁰⁹ The second exception merits little discussion since a prior judgment for forfeiture means that a judge has already ruled that the property was used in violation of law and should be forfeited. Thus, this exception satisfies the fourth amendment preference for review by a neutral and detached magistrate. The manner of seizure, however, may remain a problem. Although a court has already rendered a judgment for forfeiture, a seizure warrant may still be necessary to seize property for forfeiture. For example, the Supreme Court has indicated that an arrest warrant is insufficient by itself to seize a person in another person's home.²¹⁰ A search warrant for that home is also required. Applying this principle to forfeitures, it becomes apparent that a search warrant in addition to the judgment for forfeiture may be required to seize property located in another person's home or in an area where a third person has an expectation of privacy.²¹¹ The third exception, which applies when the property is dangerous to health or safety, poses few constitutional problems. If any CDS situation merits a seizure without a warrant, the emergency search exception to the warrant requirement will probably sustain such a seizure.²¹²

The first and the fourth exceptions enumerated in subsection 297(b) are most frequently used as the basis for seizing property subject to forfeiture in narcotics cases.²¹³ Specifically, seizures incident to an

stitution") (quoting *Almeida-Sanchez v. United States*, 413 U.S. 266, 272 (1973)). A recent Fourth Circuit decision contains a useful discussion of whether probable cause can become stale in forfeiture cases. *United States v. Kemp*, 690 F.2d 397 (4th Cir. 1982). The *Kemp* court held that the probable cause requirement of 21 U.S.C. § 881(b)(4) does not require that the seizure be contemporaneous with the events giving rise to probable cause "if the property seized allegedly 'has been used' in violation of the drug laws." The court implied that probable cause in this situation could never become stale. *Id.* at 400. The *Kemp* court expressed reservations about situations where probable cause existed to believe the property was "intended" to be used unlawfully since "if the property is *not* so used, that would belie the original belief." *Id.* at 401 n.4.

The Court of Special Appeals of Maryland recently followed the *Kemp* court's reasoning, and held that the passage of time between the criminal conduct and a seizure was irrelevant to a determination of probable cause under article 27, § 297, since the statute only required a showing that the property "has been used" in violation of CDS laws. *Jones v. State*, 56 Md. App. 101, 115, 466 A.2d 895, 903 (1983). The *Jones* court, however, acknowledged that delays in seizure could create due process problems. *Id.* at 117, 466 A.2d at 903. The court determined that the three month delay did not violate due process, and noted that a case-by-case analysis would be used in evaluating due process claims. *Id.* at 117-18, 466 A.2d at 903.

209. MD. ANN. CODE art. 27, § 297(b)(1) (Supp. 1983) (reproduced *supra* text at note 205).

210. *See Steagald v. United States*, 451 U.S. 204 (1981).

211. *See United States v. Kemp*, 690 F.2d 397, 401 (4th Cir. 1982).

212. *See United States v. Gardner*, 627 F.2d 906, 909-10 (9th Cir. 1980); *Wayne v. United States*, 318 F.2d 205 (D.C. Cir.), *cert. denied*, 375 U.S. 860 (1963).

213. *E.g.*, *Geppi v. State*, 270 Md. 239, 310 A.2d 768 (1973) (seizure based upon probable cause); *Office of Fin. v. Jones*, 46 Md. App. 419, 417 A.2d 470 (seizure of currency based upon probable cause), *cert. denied*, 288 Md. 740 (1980).

arrest and seizures made on probable cause to believe the property has been or is intended to be used unlawfully raise troublesome issues.

1. Seizures Made Incident to Arrest

This exception to the subsection 297(b) requirements provides that no process is necessary where the seizure for forfeiture is made "incident to an arrest." Thus, since no warrant is required, a police officer may arrest a person for possessing or selling CDS and seize any property that has become subject to forfeiture as a result of that offense.

Many arrests, however, are made long after the commission of the offense giving rise to the forfeiture.²¹⁴ For example, during a conspiracy investigation, arrests may be postponed while law enforcement officers gather additional evidence. When a conspirator is subsequently arrested in a vehicle that has been used previously to transport CDS, a question arises as to whether the arrest of the conspirator provides the basis for a simultaneous seizure of property that, by virtue of an earlier offense, had become subject to forfeiture. Subsection 297(b)(1)(i) implies that the arrest, in these circumstances, provides a basis for seizure. Examination of this common arrest situation, however, suggests that a warrant may be required.

Most courts uphold the seizure of property subject to forfeiture as long as the seizure is made contemporaneously with an arrest. Despite this tendency, danger exists in relying on the language of subsection 297(b). The phrase "incident to arrest" has a peculiar meaning in the law of search and seizure. In *Chimel v. California*,²¹⁵ the Supreme Court allowed an exception to the warrant requirement for searches incident to arrest because of the need to protect the officer's safety and to prevent the destruction of evidence.²¹⁶ It is difficult to perceive how this rationale justifies the warrantless seizure of forfeitable property merely because of the contemporaneous arrest of its owner or possessor. A court may therefore invalidate a seizure in this situation where the officer had time to obtain a warrant in advance. The court could easily distinguish a situation where an arrest and the grounds for seizure arise simultaneously from the situation where the arrest of a person and the seizure of his property was planned and was not the immediate result of a crime committed in the officer's presence. In sum, there is an exception to the warrant requirement of the fourth amendment in the first example because of the exigent circumstances, but no exception in the second situation because the officer had suffi-

214. For example, in *United States v. McCormick*, 502 F.2d 281 (9th Cir. 1974), the illegal use of the vehicle seized occurred prior to the owner's arrest. The vehicle was parked in the owner's driveway at the time the agents arrested the owner in his house.

215. 395 U.S. 752 (1969).

216. *Id.* at 764.

cient time to obtain a warrant.²¹⁷

2. Seizures Made Upon Probable Cause

Failing to find support in the incident to arrest exception to the process requirements of subsection 297(b),²¹⁸ an officer seizing property that is subject to forfeiture because of an earlier offense may still be able to rely on the fourth exception in subsection 297(b)(1). The fourth exception authorizes the warrantless seizure of property subject to forfeiture when there is probable cause to believe that the property has been used or was intended to be used unlawfully.²¹⁹ A literal reading of this exception would swallow the entire provision. Obviously the statutory drafters did not intend this result, and at least one federal court has been reluctant to give such an expansive interpretation to the federal counterpart of the Maryland statute.²²⁰

Maryland courts, though, have had few problems with this provision. Despite the statement by the Court of Appeals of Maryland in *Gatewood v. State*²²¹ that “[i]t would serve no purpose to repeat the careful explication of the constitutional problems inherent in forfeiture statutes made for the Court by Judge Digges in [*Prince George’s County v. Blue Bird [Cab Co.]*,”²²² the question of whether a warrant or some exception to the warrant requirement is constitutionally necessary to seize property for forfeiture has never been extensively discussed by the Maryland courts. For example, in *Geppi v. State*,²²³ the court of appeals decided whether the currency seized for forfeiture from the appellant was pursuant to the “incident to arrest” or the “probable cause” provisions of subsection 297(b).²²⁴ Although it concluded that the seizure was not made incident to the appellant’s arrest and thus sustainable under the first exception in subsection (b), the *Geppi* court found that the forfeiture proceeding was based on the fourth exception. The court indicated that there was probable cause to believe that the property had been used or was intended to be used in violation of Maryland law.²²⁵ The question of whether this was sufficient under the fourth and fourteenth amendments was never discussed.

217. *See United States v. McMichael*, 541 F. Supp. 956, 960 (D. Md. 1982) (warrantless seizure of automobile violated fourth amendment when there was “just no good reason why the DEA agents could not . . . have sought to obtain a warrant from a judicial officer”).

218. MD. ANN. CODE art. 27, § 297(b)(1)(i) (Supp. 1983).

219. *Id.* § 297(b)(1)(iv).

220. *United States v. One 1972 Chevrolet Nova*, 560 F.2d 464, 469-70 (1st Cir. 1977) (construing 28 U.S.C. § 881).

221. 268 Md. 349, 301 A.2d 498 (1973).

222. *Id.* at 353, 301 A.2d at 500.

223. 270 Md. 239, 244, 310 A.2d 768, 771 (1973).

224. Subsections 297(b)(1) and (b)(4) of the former Maryland statute at issue in *Geppi*, MD. ANN. CODE art. 27, § 297(b)(1), (4) (1971), correspond to the current provisions for arrest and probable cause, *id.* §§ 297(b)(1)(i) and (iv) (Supp. 1983).

225. *Geppi*, 270 Md. at 245, 310 A.2d at 771.

The sole Maryland appellate case to directly analyze this question is *Crowley v. State*,²²⁶ a 1975 decision by the Court of Special Appeals of Maryland. In *Crowley*, a county deputy sheriff acting under a search warrant stopped and searched a vehicle and found a brick of marijuana on the floor of the back seat. The driver and the vehicle's occupants were then arrested and the vehicle impounded. A week later, acting without a warrant, the police again searched the vehicle and found 240 LSD tablets.²²⁷ Referring to the second search of the vehicle, the *Crowley* court recognized the inapplicability of a number of legal theories that normally legitimize searches of property:

This search was not made under the authority of the search warrant which had been executed and returned. It was not made incident to an arrest, nor because of exigent circumstances. It was not made to take an inventory, nor to protect any personal property which may have been in the vehicle.²²⁸

Thus far, the court of special appeals had followed the same reasoning as the federal district court in *United States v. McMichael*,²²⁹ an almost identical case. The similarities, however, stopped at that point. The court of special appeals found the search legal, basing its decision on subsections 297(a)(1) and (4),²³⁰ the categories making CDS and conveyances forfeitable, and subsection 297(f),²³¹ which sets forth the standards for forfeiting motor vehicles. The court did not base its holding upon subsection 297(b),²³² which governs the manner of seizure. The *Crowley* court relied upon the Supreme Court's language in *Cooper v. California*²³³ that: "we cannot hold unreasonable under the Fourth Amendment the examination or search of a car validly held by officers for use as evidence in a forfeiture proceeding."²³⁴

The problem with the *Cooper* language is that the validity of the automobile's seizure in *Cooper* was never in question; rather, the issue before the Supreme Court was whether the vehicle could be searched.²³⁵ To cite *Cooper* for anything other than this is to extract more from the case than was decided.

Therefore, Maryland appellate courts have never directly analyzed the statutory bases for the seizure of property subject to forfeiture. The

226. 25 Md. App. 417, 334 A.2d 557 (1975).

227. *Id.* at 426, 334 A.2d at 562-63.

228. *Id.*

229. 541 F. Supp. 956 (D. Md. 1982).

230. MD. ANN. CODE art. 27, § 297(a)(1), (4) (1971) (current provisions at *id.* (Supp. 1983)).

231. *Id.* § 297(f) (current provision at *id.* (Supp. 1983)).

232. *Id.* § 297(b) (current provision at *id.* (Supp. 1983)).

233. 386 U.S. 58 (1976).

234. *Crowley v. State*, 25 Md. App. 417, 426-27, 334 A.2d 557, 563 (1975) (quoting *Cooper*, 386 U.S. at 62).

235. *Cooper*, 386 U.S. at 61.

discussion above as to the federal cases dealing with this question²³⁶ demonstrates the inadequacy of the procedures in subsection 297(b). The exceptions in subsections 297(b)(1)(i) and (iv) are so broad that in a practical sense they eliminate the requirement that process be obtained. In effect, subsection 297(b)(1), and in particular the first and fourth exceptions, gives Maryland law enforcement officers unlimited authority to seize property for forfeiture as long as they have probable cause to believe that the property has been used or is intended to be used in violation of the CDS laws, regardless of whether the seizure is a result of exigent circumstances or is a seizure planned well in advance.

V. CONCLUSION

The 1982 amendments to section 297 have greatly expanded the types of property that can be seized and forfeited to the state in narcotics cases. Since the number of seizures is likely to increase as a result of these amendments, courts will scrutinize the manner in which such seizures are made. Property now covered by subsections 297(a)(6) and (8) will generate more contested cases since claimants will argue that these assets, unlike contraband per se, were seized unjustly. The rule prevalent in most federal courts that no prior judicial approval is required before seizing property for forfeitures will likewise be tested. Cases in which automobiles are seized contemporaneously with an offender's arrest will be replaced by more troublesome cases in which assets such as currency, stocks and bonds, and other personal property will be seized independently of other law enforcement events. If seizures occur when the officer had time to obtain prior judicial approval, courts may find that fourth amendment requirements overcome the warrantless probable cause provision of subsection 297(b)(1)(iv) and require that a warrant be obtained to seize the property. Such a rule, requiring probable cause and a warrant or some exception to the warrant requirement, would bring constitutional rules to an area of the law that has stood to one side as the rules surrounding the search of a citizen's property have undergone extensive development. Application of the exclusionary rule to forfeiture cases has failed to provide the constitutional protection this rule has given defendants in criminal cases. The actual seizure, as opposed to the evidence supporting the forfeiture, should be subject to the warrant requirements of the fourth amendment and, to ensure the effectiveness of the enforcement of this rule, the penalty for the unconstitutional seizure of property should be the dismissal of the forfeiture action itself.

236. See *supra* notes 129-204 and accompanying text.