CONSTITUTIONAL LAW—FOURTH AMENDMENT—ILLEGAL SEIZURE OF DERIVATIVE CONTRABAND BARS FORFEITURE. *United States v. $38,394 U.S. Currency*, 498 F. Supp. 1325 (N.D. Ill. 1980). Government agents arrested respondent and three other persons in a first floor Chicago apartment on drug charges in *United States v. $38,394 U.S. Currency*.[1] Immediately following the arrests, the agents unlawfully searched an apartment on the third floor of the same building, where they discovered and seized $38,394 in United States currency.[2] Prior to the trial on the criminal charges, respondent filed a motion for the return of the money pursuant to Federal Rule of Criminal Procedure 41(e).[3] Following pretrial hearings on the motion, the district court held that the agents had seized the currency illegally and ordered it returned to respondent.[4] The government responded by filing an action for forfeiture of the currency.[5] The federal district court for the Northern District of Illinois *held*: When the government obtains possession of currency by means of an illegal seizure, the government is barred from maintaining forfeiture proceedings against the currency.[6]

The fourth amendment protects persons and their property from un-

1. 498 F. Supp. 1325 (N.D. Ill. 1980). The four defendants were also charged with unlawful gun possession. *Id.* at 1325.

2. *Id.* The money had been stuffed in Crown Royal bags and placed in a closet. In the subsequent criminal proceedings the court ruled that the government's seizure of the currency was unlawful. The agents had no probable cause to make the seizure as an incident to the arrests. *Id.* at 1326. *See, e.g.,* Chimel v. California, 395 U.S. 752 (1969).

3. FED. R. CRIM. P. 41(e) provides:

> A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property on the ground that he is entitled to lawful possession of the property which was illegally seized. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored and it shall not be admissible in evidence at any hearing or trial. If a motion for return of property is made or comes on for hearing in the district of trial after an indictment or information is filed, it shall be treated also as a motion to suppress under Rule 12.

4. 498 F. Supp. at 1326. Because the court ruled that the seizure was illegal, it was unnecessary to determine, as the government contended, whether the search was lawful. *Id.* at 1326 n.1.

5. *Id.* at 1326. 21 U.S.C. § 881(a)(6) (Supp. III 1979) provides in part:

> The following shall be subject to forfeiture to the United States and no property right shall exist in them:
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> . . . .
>
> (6) All moneys . . . 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 . . . used or intended to be used to facilitate any violation of this subchapter . . . .

See notes 12-30 *infra* and accompanying text.

6. 498 F. Supp. at 1327.

reasonable searches and seizures.[7] The Supreme Court has repeatedly stated that warrantless searches are "*per se* unreasonable under the Fourth Amendment—subject to only a few specifically established and well delineated exceptions."[8] The Court has attempted to ensure protection of fourth amendment rights by creating the exclusionary rule.[9] Recently, the Supreme Court has cut back on the use of the exclusionary rule in favor of other interests.[10] Nevertheless, the Court has held that the fourth amendment and the exclusionary rule apply to forfeiture proceedings.[11]

Scholars have traced forfeiture actions historically at least as far back as Roman times, when legal systems justified forfeiture as a form of vengeance against instrumentalities of death or injury.[12] In the United States, forfeiture is an in rem proceeding against property that Congress has statutorily[13] classified as "contraband."[14] Forfeiture statutes

7. The fourth amendment assures that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated . . . ." U.S. CONST. amend. IV. The fourth amendment was enacted primarily in reaction to "the evils associated with the use of the general warrant in England and the writs of assistance in the Colonies . . . and was intended to protect the 'sanctity of a man's home and the privacies of life, . . . from searches under unchecked general authority." Stone v. Powell, 428 U.S. 465, 482 (1967).

8. *E.g.*, Katz v. United States, 389 U.S. 347, 357 (1967). "The purpose of the warrant requirement in a forfeiture seizure case is to obtain a neutral magistrate's determination of probable cause to believe the government in fact has a superior possessory right to the property" *before* the property is seized. United States v. One 1965 Pontiac Lemans, 621 F.2d 444, 453 (1st Cir. 1980) (Coffin, C.J., dissenting).

9. In Weeks v. United States, 232 U.S. 383 (1914), the Court upheld the defendant's right to petition before trial for the return of property procured through an unlawful search or seizure by federal authorities. *Id.* at 398. Later, in Gouled v. United States, 255 U.S. 298 (1921), the Court held that such illegally obtained evidence is inadmissible in a federal prosecution. The Supreme Court held that the exclusionary rule principle is applicable to the states in Mapp v. Ohio, 367 U.S. 643 (1961).

10. Critics of the rule emphasize the "high cost to society" and the limited need to deter wrongful police misconduct. *See, e.g.*, Stone v. Powell, 428 U.S. 465 (1976) (exclusionary rule inapplicable in state habeas corpus proceedings); United States v. Janis, 428 U.S. 433 (1976) (exclusionary rule inapplicable in civil tax refund proceedings); United States v. Peltier, 422 U.S. 531 (1975) (exclusionary rule not applied retroactively—deterrence would be marginal); United States v. Calandra, 414 U.S. 338 (1974) (exclusionary rule inapplicable to grand jury proceedings).

11. One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965).

12. 40 OHIO ST. L.J. 1007, 1008 (1979) (citing O. HOLMES, THE COMMON LAW (Howe ed. 1963)).

13. All forfeiture proceedings in the United States are statutory. Note, *Bane of American Forfeiture Law—Banished at Last?*, 62 CORNELL L. REV. 768, 769 (1977).

14. There are two types of contraband: contraband per se and derivative contraband. *See* 1 W. LAFAVE, SEARCH AND SEIZURE 85-86 (1978).

are technically civil.[15] The government has the initial burden of establishing that there was probable cause to believe the object was subject to forfeiture when the government instituted the forfeiture action.[16] Courts generally have held that the probable cause standard required in forfeiture proceedings is that of reasonable grounds for belief of guilt; more than mere suspicion, but less than prima facie proof.[17]

Despite the civil nature of forfeiture,[18] the Supreme Court has held that fourth amendment protections apply to forfeiture proceedings. In *Boyd v. United States*[19] the Supreme Court, observing that forfeiture is

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Contraband per se is property that is always unlawful to possess. One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 699 (1980). Examples of per se contraband include heroin, 21 U.S.C. §§ 812, 881(f) (1976); "moonshine whiskey," 26 U.S.C. §§ 5686, 7302 (1976); and sawed-off shotguns, *id.* §§ 5861(d), 5872. The Supreme Court has indicated that an illegal seizure will never require the government to return per se contraband. *See* United States v. Jeffers, 342 U.S. 48 (1951) (illegally imported narcotics); Trupiano v. United States, 334 U.S. 699 (1949) (unregistered still, alcohol, and mash), *overruled on other grounds,* United States v. Rabinowitz, 339 U.S. 56 (1980). The Court later noted that repossession of such per se contraband by Jeffers and Trupiano would have subjected them to criminal penalties and the "return of the contraband would clearly have frustrated the express public policy against the possession of such objects." *One 1958 Plymouth Sedan,* 380 U.S. at 699.

On the other hand, derivative contraband is property that is normally lawful to possess but has become "contraband," and hence subject to forfeiture, only because of the illegal manner in which it was used or intended to be used. Examples of derivative contraband include cars, airplanes, and boats, 21 U.S.C. § 881(a)(4) (1976), and money, *id.* § 881(a)(6) (Supp. III 1979). *See* 40 OHIO ST. L.J. 1007, 1009-10 (1979).

15. The Federal Rules of Civil Procedure govern appeals in forfeiture cases. *See* One 1961 Lincoln Continental Sedan v. United States, 360 F.2d 467, 469 (8th Cir. 1966).

16. *E.g.,* United States v. One 1972 Toyota Mark II, 505 F.2d 1162 (8th Cir. 1974); United States v. United States Currency Amounting to the Sum of $20,294.00 More or Less, 495 F. Supp. 147 (E.D.N.Y. 1980).

17. Proof of a criminal conviction is not a prerequisite to forfeiture of a person's property. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 683-84 (1974); The Palmyra, 25 U.S. (12 Wheat.) 1 (1827). Courts have held that the level of probable cause required in a forfeiture proceeding is the same as the standard applied to search and seizure generally. United States v. One 1974 Mercedes 280S, 590 F.2d 196, 199 (6th Cir. 1978) (citing United States v. One Twin Engine Beech Airplane, 533 F.2d 1106, 1108-09 (9th Cir. 1976)). The test is "whether at that moment the facts and circumstances within [the police's] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that" the property in question was subject to forfeiture. *See* Beck v. Ohio, 379 U.S. 89, 91 (1964). The claimant may come forward and show that the facts constituting "probable cause" do not actually exist. *One 1974 Mercedes 280S*, 590 F.2d at 199 (citing United States v. One 1975 Ford F100 Pickup Truck, 558 F.2d 755, 756-77 (5th Cir. 1977)). *See* 40 OHIO ST. L.J. 1007, 1010 (1979).

18. *See* note 15 *supra* and accompanying text. Generally, the exclusionary rule does not apply in civil proceedings. *See* 1 W. LAFAVE, *supra* note 14, § 1.5.

19. 116 U.S. 616 (1886).

a penalty for the property's connection with criminal conduct, recognized the inherently criminal nature of the action.[20] The Court, referring to such actions as "quasi-criminal in nature," declared that the protections of the fourth amendment against unreasonable searches and seizures must apply to forfeiture cases.[21]

In *One 1958 Plymouth Sedan v. Pennsylvania*[22] the Court, relying on

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20. The Court stated that "proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offences committed by him, though they may be civil in form, are in their nature criminal." *Id.* at 634.

21. *Id.* at 633-34. The *Boyd* Court stated: "As . . . suits for penalties and forfeitures incurred by the commission of offenses against the law, are of [a] quasi-criminal nature, we think that they are within the reason of criminal proceedings for all the purposes of the Fourth Amendment . . . ." *Id.*

22. 380 U.S. 693 (1965). The Court reaffirmed the principles established in *Boyd* and *Plymouth Sedan*, *see* note 23 *infra* and accompanying text, and applied other constitutional principles as well in United States v. United States Coin & Currency, 401 U.S. 715 (1971). The defendant appealed from a forfeiture proceeding instigated by the government following defendant's conviction for failure to comply with federal gambling registration and tax statutes. The court of appeals had held that the defendant could properly assert the fifth amendment privilege against self-incrimination in forfeiture proceedings and ordered the government to return the seized money. United States v. United States Coin & Currency, 393 F.2d 499, 499-500 (7th Cir. 1968) (per curiam), *aff'd*, 401 U.S. 715 (1971).

The Court applied the *Boyd* principle, stating:

> [T]here is no difference between a man who "forfeits" $8,674 because he has used the money in illegal gambling activities and a man who pays a "criminal fine" of $8,674 as a result of the same course of conduct . . . [I]n both cases, the Fifth Amendment applies with equal force.

United States Coin & Currency, 401 U.S. at 718 (citations omitted).

Observing that "centuries of history" show that forfeiture statutes have an "extraordinarily broad scope," *id.* at 719, the Court reasoned that the broad scope of the forfeiture statute in question may raise serious fifth amendment due process questions, *id.* at 721. Thus, it is "manifest that [forfeiture statutes] are intended to impose a penalty only upon those who are significantly involved in a criminal enterprise." *Id.* at 721-22.

Coin & Currency reflects the Supreme Court's concern for protecting citizens' property against the harshness of forfeiture proceedings. *See* United States v. One 1976 Buick Skylark, 453 F. Supp. 639 (D. Colo. 1978) ("[f]orfeitures are not favored and should be enforced only when within both the letter and the spirit of the law"). Thus, federal courts generally have followed *Boyd* and ruled that forfeiture proceedings are quasi-criminal in nature and that fourth amendment protections apply. *See, e.g.*, United States v. Smith, 497 F. Supp. 459 (N.D. Iowa 1980); Doherty v. United States, 500 F.2d 540 (Ct. Cl. 1974). *See also* United States v. Alcatex, Inc., 328 F. Supp. 129, 132 n.6 (S.D.N.Y. 1971), in which Judge Frankel wrote that "Boyd . . . is designed to expand [the Fourth] Amendment's protection of privacy and security. . . . What the Government has unlawfully seized, it may well have no business keeping simply because a proceeding is captioned 'civil.'" *Id.*

Basic constitutional considerations also mandate that the protections of the fourth amendment apply to forfeiture proceedings.

> Though the consequences of noncriminal punitive proceedings are not infamous, nonetheless the government is seeking retribution for legal transgressions. Conse-

Boyd, held that the exclusionary rule also applies to forfeiture proceedings[23] and ordered the return of an illegally seized automobile. The Court also indicated that an automobile is "derivative contraband"[24] so that Pennsylvania could not establish an improper use of the automobile without relying on evidence obtained through the illegal search and seizure.[25] Thus, the Court reasoned, petitioner's possession of the "contraband" did not frustrate any public policy.[26]

The *Plymouth Sedan* decision did not, however, consider the effect of a fourth amendment violation upon a forfeiture action when the government is able to prove its forfeiture case independently; that is, with legally obtained evidence.[27] There is some dissension among the lower federal courts[28] that have addressed this issue.[29] Most courts resolve

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quently, such proceedings raise some of the same concerns that underlie the Fifth Amendment self-incrimination clause . . . the concern, for example, that oppressive tactics will be used to secure testimony and that testimony will often prove unreliable.

Clark, *Civil & Criminal Penalties & Forfeitures: A Framework for Constitutional Analysis,* 60 MINN. L. REV. 379, 417 (1976). It is unnecessary because the government has alternative means available to attain its evidence—mainly, the constitutionally required search warrant requirement. Moreover, the fourth and fifth amendment protections are of a broader scope than the guarantees in article III and the sixth amendment, which govern only criminal prosecutions. *See, e.g.,* United States v. Regan, 232 U.S. 37, 47 (1914).

23. 380 U.S. at 696. In *Plymouth Sedan*, the Supreme Court reviewed a Pennsylvania forfeiture statute that stated: "No property rights shall exist in any . . . vehicle . . . used in the illegal manufacture or illegal transportation of liquor . . . , and the same shall be deemed contraband and proceedings for its forfeiture to the Commonwealth may . . . be instituted . . . ." *Id.* at 694 n.2. Officers of the Pennsylvania Liquor Control Board had stopped an automobile they believed was abnormally low in the rear as if heavily loaded in the trunk. *Id.* at 694. After conducting a warrantless search of the car and discovering cases of liquor without tax seals, the officers seized the car and the liquor pursuant to the statute. The Supreme Court of Pennsylvania reasoned that forfeiture proceedings are civil in nature and upheld an action for forfeiture of the automobile against petitioner's contention that forfeiture of the car "depended upon the admission of evidence illegally obtained in violation of the Fourth Amendment . . . ." *Id.* at 694-95. The Supreme Court reversed. 380 U.S. 693 (1965). *Plymouth Sedan* is still good law, because the Court reapproved the case in United States v. Janis, 428 U.S. 433, 447 n.17 (1976). *See* 1 W. LAFAVE, *supra* note 14, at 84-86.

24. 380 U.S. at 699. *See* note 14 *supra*.

25. "There is nothing even remotely criminal in possessing an automobile. It is only the alleged use to which this particular automobile was put that subjects [petitioner] to its possible loss." 380 U.S. at 699. *See* note 14 *supra*.

26. 380 U.S. at 699. Public policy would be frustrated, however, by the return of per se contraband, such as heroin, or the bootleg liquor in *Plymouth Sedan*. *Id.*

27. Although the Court in *Plymouth Sedan* remanded the case to the Pennsylvania Supreme Court, it did so only to allow the state court to consider whether the search was actually illegal, "a question which [the state's supreme court] previously did not consider necessary to decide." *Id.* at 702.

28. *Compare* United States v. One 1971 Harley-Davidson Motorcycle, 508 F.2d 351 (9th Cir.

the issue by allowing forfeiture when the government can prove its case with untainted evidence.[30]

1974) (illegally seized property is subject to forfeiture when the government can prove its case by evidence derived independently of the illegal seizure) *with* United States v. $38,394 U.S. Currency, 498 F. Supp. 1325 (N.D. Ill. 1980) (government not entitled to forfeiture when possession results from illegal seizure). Until recently, the First Circuit has held that an illegal seizure immunizes property from forfeiture. In Berkowitz v. United States, 340 F.2d 168 (1st Cir. 1965), the First Circuit held that the government cannot enforce forfeiture of money allegedly used to violate internal revenue laws when it discovers and seizes that money only by a direct invasion of the owner's constitutional rights that results from an unlawful arrest and search of the owner as an incident to that arrest.

Relying on the *Boyd* decision, which the court characterized as the *locus classicus* to which later judges have always returned for quotation, the court stated:

> [W]hen the Government violated Constitutional commands it should not be allowed to use its misconduct for its own advantage. Disregard of constitutional rights is not to be ignored even if it would achieve some goal asserted by the Government of the day to be superior to the permanent interest that the Constitution proclaims in leaving men to enjoy their privacy.

Id. at 170. *See* Melendez v. Shultz, 356 F. Supp. 1205, 1210 (D. Mass. 1973).

The continued vitality of *Berkowitz* is doubtful. In a recent First Circuit case, United States v. One 1975 Pontiac Lemans, 621 F.2d 444 (1st Cir. 1980), the court stated:

> Even if a seizure for forfeiture purposes were not an exception to the fourth amendment warrant requirement, it is not clear why an inadequacy in the procedure used to secure initial possession would or should defeat the government's ultimate entitlement to the property as established by untainted evidence at a properly conducted forfeiture proceeding.

Id. at 450.

The court's decision in *One Pontiac* cannot be regarded as truly overruling *Berkowitz*. The language quoted above is only dictum, because *One Pontiac* expressly held that the government's seizure of the automobile did not violate the fourth amendment: "[T]he warrantless seizure, undergirded as it was by probable cause, was constitutional." *Id.*

29. *See generally* Annot., 8 A.L.R.3d 473 (1966).

30. *See, e.g.,* United States v. One 1971 Harley-Davidson Motorcycle, 508 F.2d 351 (9th Cir. 1974); United States v. $1,058.00 in United States Currency, 323 F.2d 211 (3d Cir. 1963); United States v. One 1956 Ford Tudor Sedan, 253 F.2d 725 (4th Cir. 1958); Sanders v. United States, 201 F.2d 158 (5th Cir. 1953); United States v. Eight Boxes Containing Various Articles of Miscellaneous Merchandise, 105 F.2d 896 (2d Cir. 1939). *But see* Berkowitz v. United States, 340 F.2d 168 (1st Cir. 1965); Melendez v. Shultz, 356 F. Supp. 1205 (D. Mass. 1973); Doherty v. United States, 500 F.2d 540 (Ct. Cl. 1974).

The Eighth Circuit recently decided a case squarely on point, United States v. $297,235.00, 516 F. Supp. 720 (E.D. Mo. 1981), *aff'd sub nom.* United States v. $88,500, No. 81-1750 (8th Cir. Feb. 22, 1981). Appellant claimed that the district court judge erred by ruling that an illegal seizure of money by drug enforcement agents did not bar forfeiture when the government could prove its case by untainted means. Brief for Appellant at 30. Appellant also disputed the lower court's finding that the government met its burden of proving that there was probable cause to believe the money was intended to be used to purchase illegal drugs. Brief for Appellant at 15. The United States, on the other hand, argued that "the mere illegal seizure does not immunize property from forfeiture." Brief for Appellee at 22. The Eighth Circuit failed to address appellant's argument that the cases relied on by the government, United States v. One Harley-Davidson Motorcycle, 508 F.2d 351 (9th Cir. 1974), and John Bacall Imports, Ltd. v. United States, 412 F.2d 586 (9th

The court in *United States v. $38,394 U.S. Currency*[31] found two issues. The court first considered whether the "agents seized the currency 'acting under authority of law,' " as alleged in the government's complaint.[32] If the currency was not seized by the agents acting with lawful authority, the court then found it necessary to determine whether the "under authority of law" portion of the complaint was "necessary to the government's action."[33] Because the court in an earlier proceeding had held that the government's seizure was unlawful,[34] collateral estoppel precluded the government from "reasserting" in the forfeiture action that the currency was seized "under authority of law."[35] The court apparently assumed an affirmative answer to the second issue. Implicit in the court's dismissal of the government's action, with prejudice, and its order directing a return of the currency to respondent, is a ruling that the premise "under authority of law" is essential to the government's complaint.[36]

The remaining question for the court was "whether the government is then free simply to reinstate new forfeiture proceedings" after return of the money to respondent.[37] The court stated that possession of property is a "condition precedent" to an in rem forfeiture proceeding.[38] Because the government would not have possession of the currency but for its violation of respondent's fourth amendment rights,[39] the court reasoned that allowing the government to return respondent's property

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Cir. 1969), (see note 53 *infra*), were incorrectly decided. United States v. $88,500, slip. op. at 6-7. The court of appeals upheld the forfeiture.

31. 498 F. Supp. 1325 (N.D. Ill. 1980).

32. *Id.* at 1326.

33. *Id.*

34. *Id.* Respondent relied on the transcript from the pre-trial proceeding on the criminal charges to invoke his collateral estoppel claim. *Id.* The parties framed the collateral estoppel issue as whether "probable cause" had been previously litigated. If the focus had been correct, then "[respondents] motion for summary judgment would have to be denied." *Id.* The earlier proceeding had resulted in a holding that the agents lacked probable cause to effect the seizure as an incident to respondent's arrest. The question in the forfeiture proceeding, however, was "whether . . . at the time the Complaint was filed 'probable cause [existed] to believe that the [currency] has been used or is intended to be used in violation of' the chapter dealing with drug offenses." *Id.* The latter issue had not been previously litigated. *Id. See* note 27 *supra*.

35. *Id.* The court stated: "Property of private citizens simply cannot be seized and held in an effort to compel the possessor to 'prove lawful possession.' " *Id.* (quoting United States v. One Residence & Attached Garage, 603 F.2d 1231, 1234 (7th Cir. 1979)).

36. 498 F. Supp. at 1326-27.

37. *Id.* at 1326.

38. *Id.* at 1326-27.

39. *Id.* at 1327.

only to reseize it promptly would permit the government to profit from its unlawful conduct.[40]

The rule adopted in *$38,394 U.S. Currency*[41] is consistent with fourth amendment policies and the Supreme Court's decision in *Plymouth Sedan*.[42] A rule that immunizes from forfeiture illegally seized derivative contraband comports with the underlying purposes of the exclusionary rule.[43]

The Supreme Court has advanced two rationales to justify the exclusionary rule: deterrence of unlawful police conduct and preservation of respect for governmental and judicial integrity.[44] Allowing the government to reseize property and reinstitute new forfeiture proceedings would not deter unconstitutional police conduct.[45] Furthermore, this questionable procedure would create serious doubts about governmental and judicial integrity.

Police officers are likely to view the forfeiture of an auto, or, as in *$38,394 U.S. Currency*, a large sum of money, as the imposition of a criminal fine rather than a civil penalty.[46] Thus, a rule immunizing illegally seized property from forfeiture arguably will have a deterrent effect on unlawful police conduct equivalent to the deterrent effect of the exclusionary rule in criminal trials.[47] A contrary holding, granting

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40. *Id.* The court summarized its position:

> This Court will not permit the government to take advantage of its own illegal conduct to forfeit a citizen's property, nor to bootstrap itself by the return and prompt reseizure of the property (whose present location it would have no knowledge of but for its own unlawful conduct in the initial seizure).

Id. (citing United States v. One 1976 Cadillac Seville, 477 F. Supp. 879, 882, 884-85 (E.D. Mich. 1979)). The court also noted that *Plymouth Sedan*, relied on "heavily" by respondent, was inapplicable to the present case as "direct precedent," but "the approach it takes to tainted forfeiture proceedings is similar to what this Court employs here." 498 F. Supp. at 1327 n.3.

41. 498 F. Supp. 1325 (N.D. Ill. 1980).

42. 380 U.S. 693 (1965). The Court reapproved *Plymouth Sedan* in United States v. Janis, 428 U.S. 433, 447 n.17 (1976).

43. *See* notes 9-10 *supra* and accompanying text.

44. Mapp v. Ohio, 367 U.S. 643, 658 (1961). The primary rationale is deterrence of unconstitutional police conduct. Stone v. Powell, 428 U.S. 465, 468 (1976).

45. *See* United States v. One 1975 Pontiac Lemans, 621 F.2d 444, 458-59 (1st Cir. 1980) (Coffin, C.J., dissenting). *See* note 28 *supra*. Because property subject to forfeiture proceedings is not protected against double jeopardy, the government agents, when the property is returned, can show probable cause and immediately obtain a warrant to reseize the property and initiate a new forfeiture proceeding. The result will "be little more than a minor irritant to the government and will . . . waste judicial time and resources." 621 F.2d at 458-59 (citing One Lot Emerald Cut Stones v. United States, 409 U.S. 232, 235 (1972)).

46. *See* notes 15-17 & 20-21 *supra* and accompanying text.

47. The effectiveness of the exclusionary rule in this regard has been questioned. *See, e.g.,*

the government a second opportunity to obtain forfeiture after an illegal seizure, would certainly undermine the police misconduct deterrence rationale in the forfeiture context.

An "immunization rule" would also preserve respect for governmental and judicial integrity as much as does the exclusionary rule in criminal trials.[48] Moreover, the societal cost of this rule is nominal because "the only loss to the government is its possessory right to property that has become contraband as a result of its use as an instrument of a crime."[49]

By treating forfeiture cases as sui generis,[50] courts can vindicate constitutional rights in a manner consistent with both the underlying purposes of the fourth amendment and the Supreme Court's application of procedural protections to secure personal rights.[51] Surely persons can-

Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics. 403 U.S. 388, 417 (1971) (Burger, C.J., dissenting) (police officers do not have the time or inclination to grasp the "nuances" of appellate opinions).

48. Applying the exclusionary rule so as to allow forfeiture if proved by untainted evidence or permitting the return, reseizure, and initiation of new forfeiture proceedings would do little to enhance respect for judicial integrity.

49. United States v. One 1975 Pontiac Lemans, 621 F.2d 444, 459 (1st Cir. 1980) (Coffin, C.J., dissenting). This is in sharp contrast to the effect of applying exclusionary sanctions in a criminal trial. There, the result may be the dissolution of the government's case and the liberation of a guilty criminal. *Id.* Judge Coffin points out that this is "a social cost we are willing to pay to preserve the rights guaranteed to all by the Fourth Amendment." *Id. But see* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 413-14 (1971) (Burger, C.J., dissenting). In view of the recent limitations imposed on the scope of the exclusionary rule, *see* note 10 *supra* and accompanying text, the current Supreme Court may be unwilling to adopt the "immunization rule" set forth in *$38,394 U.S. Currency*. *See also* Note, *Forfeiture of Property Used in Connection With Criminal Acts,* 25 WAYNE L. REV. 83, 93 (1978).

Professor LaFave notes that "[o]n the merits, it may be said that the conclusion that forfeiture proceedings need not be quashed merely because the government came by the property to be forfeited illegally, is no more harsh than the longstanding rule that jurisdiction over a criminal defendant is not affected by his illegal seizure." 1 W. LAFAVE, *supra* note 14, at 85. *See* United States v. Crews, 445 U.S. 463, 474 (1980). But this analysis seems strained. No criminal is returned unpunished to haunt society with his possible future misdeeds as a result of a rule immunizing illegally seized property from forfeiture proceedings. United States v. One 1975 Pontiac Lemans, 621 F.2d 444, 459 (1st Cir. 1980) (Coffin, C.J., dissenting). *See* 40 OHIO ST. L.J. 1007, 1008 (1979). One author observes that it requires "some intellectual strain" to justify forfeiture as satisfying a need for societal vengeance on the basis that "an inanimate object is guilty of an offense." *Id.* Therefore, the case for not allowing property (at least property deemed derivative contraband) to "go free" because of an illegal seizure is a weaker one than refusing to allow a criminal to go free because of an infirmity in his arrest.

50. *See* United States v. One 1975 Pontiac Lemans, 621 F.2d 444, 459 (1st Cir. 1980) (Coffin, C.J., dissenting).

51. *See* notes 7-11 *supra* and accompanying text.

not be "secure in their persons, houses, papers, and effects against unreasonable searches and seizures"[52] if an illegal seizure of a large sum of money, for example, is considered irrelevant simply because "probable cause" is independently obtained.[53]

52. U.S. CONST. amend IV.

53. Admittedly, a number of courts remain unpersuaded by this logic. A prime example is the Ninth Circuit's approach in United States v. One Harley-Davidson Motorcycle, 508 F.2d 351 (9th Cir. 1974), and John Bacall Imports, Ltd. v. United States, 412 F.2d 586 (9th Cir. 1969). These cases hold that illegally seized property is subject to forfeiture when the Government can prove its case by evidence independently derived from the illegal seizure. *Bacall Imports* and *Harley-Davidson* are based on questionable reasoning, however.

The sole cases cited by the *Bacall Imports* court in support of its holding were Dodge v. United States, 272 U.S. 530 (1926), and United States v. One Ford Coupe Automobile, 272 U.S. 321 (1926). Neither *Dodge* nor *One Ford*, however, stands for the proposition for which the *Bacall Imports* court cited them. The court read these cases as supporting a conclusion that "[t]he mere fact of the illegal seizure, standing alone, does not immunize the goods from forfeiture." 412 F.2d at 588. Both cases, however, must be read in the light of the language in *Plymouth Sedan*, in which the Court expressly recognized that the issues in *Dodge* and *One Ford* were "whether evidence seized by one without statutory authority could be used when its seizure was later ratified by an official with statutory authority." One 1958 Plymouth Sedan v. United States, 380 U.S. 693, 700 n.7 (1965). *See* Berkowitz v. United States, 340 F.2d 168, 171 (1st Cir. 1965) (court pointed out that no fourth amendment violation was present in *Dodge*). Thus, the cases relied upon by the *Bacall Imports* court did not involve the same issues as the case that the court was deciding. The *Bacall Imports* court, in attempting to state what *Dodge* and *One Ford* did not stand for, neglected to state what the cases did stand for. Neither case represents the proposition relied on by the court.

In *Harley-Davidson*, the Ninth Circuit quoted *Bacall Imports* and refused to use its supervisory powers to immunize an illegally seized motorcycle from forfeiture proceedings. The court stated that there is "no constitutional distinction for Fourth Amendment purposes between per se and derivative contraband." 508 F.2d at 352. Both the fabrics in *Bacall Imports* and the motorcycle in *Harley-Davidson* were not inherently illegal. Rather, the vice was the manner in which the objects were imported or used. *Id. See* note 14 *supra*. The *Harley-Davidson* court reasoned that returning illegally seized contraband when possession of such items is ordinarily legal would be "unmanageable and in many cases arbitrary." 508 F.2d at 352. This logic seems less than compelling, and it is unsupported by case law.

The *Harley-Davidson* court's reasoning stands in contradistinction to the fact that almost all courts have recognized that per se contraband is *always* subject to forfeiture, regardless of the legality of the seizure. In *Plymouth Sedan*, the Supreme Court pointed out that the car in question, although labeled "contraband," was "quite different." 380 U.S. at 699. *See, e.g.,* Berkowitz v. United States, 340 F.2d 168, 174 (1st Cir. 1965); Melendez v. Shultz, 356 F. Supp. 1205, 1209 (D. Mass. 1973). *See also* notes 14 & 24-26 *supra* and accompanying text. The Ninth Circuit's reasoning with regard to derivative, as opposed to per se, contraband is flawed. There is no plausible reason why a court would have difficulty distinguishing between derivative objects, such as a motorcycle, and unlawfully possessed property, such as heroin. An illegally seized motorcycle should be returned to its rightful owner. Illegally seized heroin should not.

The distinction between derivative and per se contraband,which the Ninth Circuit fails to see as significant for fourth amendment purposes, is important and indicates that *Bacall Imports* and *Harley-Davidson* are incorrect decisions. *See* notes 14 & 24-26 *supra* and accompanying text. To the extent that both cases are representative of the reasoning employed by other circuits that have

Courts should read *Plymouth Sedan* broadly in light of the Supreme Court's sweeping language that "the Government [can]not seize evidence in violation of the Fourth Amendment for use in a forfeiture proceeding."[54] In *$38,394 U.S. Currency*,[55] the fourth amendment violation is "not the procurement of evidence, but the act of obtaining possession of the object itself."[56] Although it is arguably inconsistent with decisions in other circuits,[57] the court's holding correctly applies the relevant policy considerations and current constitutional principles.

The harshness and quasi-criminal nature of forfeiture in combination with the underlying policies of the fourth amendment mandate a rule that immunizes illegally seized property from forfeiture.[58] An immunization rule deters unconstitutional police conduct[59] and enhances public respect for governmental and judicial integrity.[60] Most importantly, the result in *$38,394 U.S. Currency* ensures vindication of the fourth amendment's protections of persons and property.[61]

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rejected an "immunization" rule, they indicate that the court in *$38,394 U.S. Currency* reached the correct result.

54. *Plymouth Sedan*, 380 U.S. at 698. *See* United States v. One 1976 Cadillac, 477 F. Supp. 879, 884 (E.D. Mich. 1979).

55. 498 F. Supp. 1325 (N.D. Ill. 1980).

56. United States v. One 1975 Pontiac Lemans, 621 F.2d 444, 458 (1st Cir. 1980) (Coffin, C.J., dissenting). In *Melendez v. Shultz*, 356 F. Supp. 1205 (D. Mass. 1973), the court stated that allowing an illegally seized automobile to be forfeited is tantamount to "holding that an automobile could itself be seized in the unbridled discretion of an officer . . . . The right of the automobile owner not to have it searched is surely no more worthy of protection than his right not to have it seized without legal procedure." *Id.* at 1210. This reasoning is equally applicable to respondent's money in *$38,394 U.S. Currency*. The First Circuit's analysis in Berkowitz v. United States, 340 F.2d 165 (1st Cir. 1965), is also compelling. *See* note 28 *supra*.

57. *See* note 53 *supra* and accompanying text.

58. *See* notes 20-21 *supra* and accompanying text.

59. *See* notes 44-47 *supra* and accompanying text.

60. *See* note 48 *supra* and accompanying text.

61. U.S. CONST. amend IV.