THE PROPER DISPOSITION OF SEIZED PAPERS AND EFFECTS

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When the Supreme Court of the United States abandoned the "mere evidence" rule in 1967,[1] it greatly expanded the categories of property subject to seizure by government under color of law for use in judicial proceedings.[2] Although Rule 41(e) of the Federal Rules of Criminal Procedure,[3] its analogues in most state codes of criminal procedure,[4] and a fairly well-developed body of case law[5] tell us what should happen to papers and effects seized in violation of the fourth amendment to the Constitution,[6] the Supreme Court has not extensively considered the proper disposition of lawfully seized property. The Federal Rules of Criminal Procedure do not address the issue, and only rarely and confusingly do state codes of criminal procedure[7] provide for the disposition of lawfully seized papers and effects. In recent years the United

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1. *See* Warden v. Hayden, 387 U.S. 294 (1967).

2. This expansion has continued in more recent decisions of the Court. In Andreson v. Maryland, 427 U.S. 463 (1976), and Fisher v. United States, 425 U.S. 391 (1976), the Court rejected the view that the fifth amendment component of the decision in Boyd v. United States, 116 U.S. 616 (1886), limits seizures of evidence. In Zurcher v. Stanford Daily, 436 U.S. 547 (1978), the Court also rejected limitations on the seizure power when evidence is the property of a nonlitigant.

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. *See, e.g.*, ILL. ANN. STAT. ch. 38, § 114-12 (Smith-Hurd 1979); N.Y. CRIM. PROC. § 710.70 (McKinney 1971).

5. *See* notes 10-33 *infra* and accompanying text.

6. 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 warrants 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.

U.S. CONST. amend. IV.

7. *See, e.g.*, ILL. ANN. STAT. ch. 38, § 108-11 (Smith-Hurd 1979); OHIO REV. CODE ANN. §§ 2933.27- .28 (Page 1975).

States Courts of Appeals have more frequently, but unsatisfactorily, ruled on the proper disposition of seized property either used[8] or subject to use[9] as evidence in a criminal trial.

This article examines what the United States Constitution and other laws mandate with respect to seized property both before and after its use as evidence in litigation. This article also analyzes what should be done with seized property that may be classified as both evidence (*e.g.*, a fruit or instrumentality of a crime) and contraband. The latter inquiry requires exploration of the legal rationale of forfeiture and the concept of contraband. This article concludes that governmental retention of seized property is no more than "a taking without compensation." Although some discrete and supportable reasons justify governmental retention of property in certain instances, this characterization is generally the only honest description in the absence of a plausible rationale for governmental retention of property seized under color of law.

I. UNLAWFUL SEIZURE[10]

Suppose *A* has a cache of money in *A*'s home and police enter with a search warrant and seize the money for use in a criminal proceeding against *A*. *A* concludes that the search warrant is invalid because the underlying affidavit did not set out probable cause for the search. Suppose further that *A* not only wants to prevent the prosecutor's use of the money as evidence against *A*, but also wants the money back. In this situation, the law spells out a fairly straightforward remedy. Rule 41(d) of the Federal Rules of Criminal Procedure requires that an inventory be prepared upon seizure, that the inventory be verified, and that a copy be provided by the magistrate to *A* on request. Rule 41(e) then allows *A*, a "person aggrieved," to move for return of the money "on the ground that he is entitled to lawful possession[11] of the property

8. *See, e.g.,* United States v. Palmer, 565 F.2d 1063 (9th Cir. 1977); United States v. LaFatch, 565 F.2d 81 (6th Cir. 1977); United States v. Wilson, 540 F.2d 1100 (D.C. Cir. 1976).

9. *See, e.g.,* United States v. Premises Known As 608 Taylor Ave., Apt. 302, Pittsburgh, Pa., 584 F.2d 1297 (3rd Cir. 1978); Shea v. Gabriel, 520 F.2d 879 (1st Cir. 1975).

10. Although the following discussion primarily focuses on search and seizure law in the federal courts, the results of this discussion should be equally applicable, except for matters of practice, to state courts, because the requirements of the fourth amendment have been made applicable to the states by Wolf v. Colorado, 338 U.S. 25 (1949).

11. The term "lawful possession," however, will operate to deny return of property in some cases of unlawful seizure. One clear example is contraband; *i.e.*, something that is unlawful to

which was illegally seized."[12] The rule also provides that if the court orders return of the money, the money "shall not be admissible in evidence at any hearing or trial."[13]

The complexity of a motion for return of unlawfully taken property necessitates examination of the rule's antecedents to understand its operation. Actions in trespass or replevin comprised the common-law remedies for unlawful search and seizure.[14] Fourth amendment remedies developed little in the nineteenth century. In *Boyd v. United States*,[15] for example, a leading fourth amendment case in this era, the Supreme Court did not give serious consideration to any remedy for an invalid judicial order to produce evidence other than to declare it unconstitutional.

The Court first seriously confronted the exclusionary rule in *Adams v. New York*,[16] in which it held that a criminal defendant could not resist admission of competent evidence because it had been obtained in the

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possess. *See* 21 U.S.C. § 841(a) (1976) (narcotic drugs). It also seems certain that property seized as evidence alone must be returned on a finding that it was illegally seized. A more difficult problem is presented by property seized as a fruit or instrumentality of crime. Often this property will be evidence of crime as well. It is not self-evident that this property cannot be lawfully possessed; if it can, then the rule seems to require return. Later discussion of what should be done with lawfully seized fruits or instrumentalities should guide the way here. *See* text following note 106 *infra* and text accompanying notes 130-60 *infra*.

12. *See* note 3 *supra*.

13. *Id.* This provision is probably an overstatement. As will be seen shortly, the fourth amendment requires the remedy stated in rule 41(e), and the drafters drafted the rule to afford the required remedy. *See* notes 20-22 *infra* and accompanying text. It can be expected, however, that the Supreme Court, particularly the present Court, will not interpret the rule to deny admissibility to *A*'s money if return is ordered, because the Constitution, as interpreted, does not require exclusion. If *A* successfully moves under rule 41(e) for return of his money on the ground that it was illegally seized, its admission in a subsequent civil trial seems to follow from the limitation of the exclusionary rule in United States v. Janis, 428 U.S. 433 (1976). Admission in grand jury proceedings probably follows as well. *See* United States v. Calandra, 414 U.S. 338 (1974).

It is unlikely that admissibility will be denied if the victim of the illegal seizure is the proponent of the evidence. Further, it is likely that admission can be compelled by a subpoena duces tecum over the victim's objection if knowledge of the evidence was not obtained by illegal search or seizure. *See, e.g.*, United States v. Ceccolini, 435 U.S. 268 (1978); Brown v. Illinois, 422 U.S. 590 (1975); Wong Sun v. United States, 371 U.S. 471 (1963).

It is fair to predict, therefore, that the inadmissibility principle of rule 41(e) will apply only when a motion to suppress would succeed; otherwise, the label on the motion would control admissibility.

14. *See* Warden v. Hayden, 387 U.S. 294, 303-04 (1967). *See, e.g.*, Entick v. Carrington, 2 Wils. K.B. 275, 95 Eng. Rep. 807 (1765) (trespass); Huckle v. Money, 2 Wils. K.B. 205, 95 Eng. Rep. 768 (1763) (trespass).

15. 116 U.S. 616 (1886).

16. 192 U.S. 585 (1904).

course of an unconstitutional search or seizure.[17] Ten years later the Supreme Court decided *Weeks v. United States*.[18] In *Weeks*, unlike *Adams*, defendant moved pretrial for the return of property that he claimed United States marshals had unlawfully seized in the course of a warrantless search of his home. On this tenuous distinction, the Court held that the trial court erred in denying defendant's motion for return of property, because a court should not affirm by its decision a constitutional violation.[19]

Silverthorne Lumber Co. v. United States[20] established that the right to physical repossession of property seized in violation of the fourth amendment is legally equivalent to the right to insist on its suppression as evidence at trial. The prosecutor in *Silverthorne* complied with the trial court's order to return unlawfully seized evidence, but not before he made copies of it and persuaded the trial judge to subpoena the originals. The Supreme Court held invalid the contempt order for defendant's violation of the subpoena duces tecum on the ground that the contrary result would reduce the fourth amendment "to a form of words."[21] By the time of the *Go-Bart* decision,[22] the remedies of return and suppression for violations of the fourth amendment were settled law. Some years later, however, the *Wolf* decision,[23] though it held the fourth amendment applicable to state officers' conduct,[24] denied consti-

17. Defendant Adams was convicted of unlawful possession of policy slips. Policy slips and private papers had been seized in the execution of a search warrant authorizing only the seizure of policy slips. Defendant raised no motion for return of the property and raised no objection to the introduction into evidence of the policy slips. Defendant claimed error in the trial court's overruling of an objection to admission of the private papers based on unlawful seizure. The Supreme Court unanimously held that a court need not exclude otherwise competent evidence because of the manner in which it was obtained. *Id.* at 594-96. The Court, in light of its disposition of the case, did not decide whether the fourth and fifth amendments applied to the states.

18. 232 U.S. 383 (1914).

19. *Id.* at 394-96. The Court also stated that the seizure of the private papers in *Adams* had not violated the fourth amendment because it was incidental to the lawful seizure of the policy slips. The fourth amendment legality of the seizure, however, had not been the ground of decision in *Adams*. In suggesting that it could have been, *id.* at 395, Justice Day's opinion apparently ignored *Boyd*'s "mere evidence" rule.

20. 251 U.S. 390 (1920).

21. *Id.* at 392. The Court paid little more than lipservice attention to *Adams v. New York*.

22. Go-Bart Import Co. v. United States, 282 U.S. 344 (1931) (suppression and return of illegally seized papers).

23. Wolf v. Colorado, 338 U.S. 25 (1949).

24. *Wolf* overruled Weeks v. United States, 232 U.S. 383 (1914), on this issue. The *Weeks* Court, in discussing several items of evidence that police officers had seized and given to the federal prosecutor, held the fourth amendment inapplicable to state police conduct. *Id.* at 398.

tutional force to the federal law of remedies for violations of the fourth amendment by state officers.

The reversal of *Wolf*'s remedy rule in *Mapp v. Ohio*[25] in 1962 seems to establish the foregoing law of remedies as constitutionally required on both federal and state levels. The most recent pertinent case is the *Bivens*[26] decision, which held that violation of the fourth amendment gives rise to a cause of action for damages even in the absence of implementing legislation.[27] Although the Supreme Court never has flatly stated so, it can hardly be doubted after this line of cases that the source of the right to return of property seized in violation of the fourth amendment is the Constitution itself, rather than rule or statute.

Several important consequences follow the conclusion that the return-of-property remedy is constitutionally based. First, the remedy is enforceable against unlawful seizure by either federal or state officers. Second, the remedy is enforceable in state courts, whose judges are required to enforce constitutional mandates.[28] Third, the remedy is enforceable in federal court against federal officers, provided that general federal question jurisdiction exists, and against state officers under the Civil Rights Act of 1871.[29]

A special problem arises when there is an effort to assert in federal court the right to return of property unlawfully seized by state officials for use in a state criminal trial, because the Supreme Court has made clear that its anti-injunction decisions prevent interference with ongoing state prosecutions.[30] The availability of a federal return order thus may turn on whether a state prosecution, in which a party seeks to introduce the seized property, is in progress.[31]

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25. 367 U.S. 643 (1961). Defendant filed no motion for return in *Mapp*; the Supreme Court held only that suppression was required.

26. Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971).

27. *Id.* at 397.

28. U.S. CONST. art. VI, § 2 (supremacy clause).

29. Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13 (1871) (codified at 42 U.S.C. § 1983 (1976); 28 U.S.C. § 1343 (1976)). Although the substantive and jurisdictional portions of the Act have been separately codified in titles 42 and 28, respectively, they were enacted together.

30. *See* Dyson v. Stein, 401 U.S. 200 (1971); Younger v. Harris, 401 U.S. 37 (1971); Stefanelli v. Minard, 342 U.S. 117 (1951).

31. The real reason behind the federal anti-injunction rule in this context is the desire to let the court that has the litigation in front of it decide all the issues relevant to its resolution before other courts interfere. Federalism and comity concepts are secondary to this notion, and the reasons underlying the "hands-off" approach are much like those underlying the rule against appeals of interlocutory orders, particularly in criminal cases. The appealability of orders granting and

Although the Supreme Court in recent years has tampered considerably with the law of fourth amendment remedies,[32] the tampering can be explained by the tension between the goals of enforcing the fourth amendment and convicting the guilty.[33] Inasmuch as these values are not counterweighted in a straightforward motion directed solely at the return of unlawfully seized property, there is little reason to expect the Court to change the present remedial structure for return of property.

II. LAWFUL SEIZURE OF EVIDENCE

Although the fourth amendment is the ultimate source of remedies for unlawful seizure, it plays no role in the law of remedies for lawful seizure. As a result, the lawful-unlawful determination ordinarily must look to the legitimacy of the search, since the Supreme Court has virtually removed all limits on seizure of papers and effects, other than those of probable cause and, where required, the prior decision of a magistrate. The history of this removal is an important backdrop to the discussion that follows.

In England, general warrant abuses led to strong feeling against searches for evidence. This antipathy resulted in Lord Camden's opinion in *Entick v. Carrington*,[34] which not only banned the general warrant, but also condemned searches for mere evidence.[35] Several scholars have demonstrated that Americans were well aware of this his-

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denying motions for return of property, or for suppression on the ground of unlawful search or seizure, has been often litigated. The Supreme Court has settled on a rule for federal cases by which an appellate court may review return-of-property decisions only if the order was solely for return of property; an appellate court cannot review these orders if the property seized relates to a prosecution *in esse*. DiBella v. United States, 369 U.S. 121 (1962). Although the *DiBella* rule is not always easy to apply to a criminal prosecution, *see* Shea v. Gabriel, 520 F.2d 879 (1st Cir. 1975), the reason behind the line-drawing effort is clear and would likely govern efforts to obtain federal injunctive review of state seizures of property in state criminal proceedings.

32. *See, e.g.*, Michigan v. DeFillippo, 99 S. Ct. 2627 (1979) (evidence from search incident to an arrest pursuant to statute later held constitutionally invalid is admissable unless statute was flagrantly unconstitutional); Stone v. Powell, 428 U.S. 465, 494 (1976) ("where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial"); United States v. Calandra, 414 U.S. 338 (1974) (witness before a grand jury may not refuse to testify on the ground that evidence was obtained in unlawful search and seizure).

33. *See* Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 412-15 (1971) (Burger, C.J., dissenting).

34. 2 Wils. K.B. 275, 95 Eng. Rep. 807 (1765).

35. This history is thoroughly summarized in Warden v. Hayden, 387 U.S. 294, 312-15 (1967) (Douglas, J., dissenting).

tory during the drafting of the fourth amendment and sought to incorporate into our Constitution the rules announced by Lord Camden.[36] The Supreme Court recognized the constitutional basis for the rule against searches for "mere evidence" in 1886, grounding its decision on both the fourth amendment and the fifth amendment proscription of compulsory self-incrimination.[37] By the turn of this century, it was a well-settled tenet of the Constitution that "mere evidence" was inadequate justification for search or seizure.[38] The "mere evidence" rule served privacy interests in two respects: it limited governmental invasion of private places in that "limitations on the fruit to be gathered tend to limit the quest itself";[39] and it strengthened protection against compulsory self-incrimination by permitting people to commit to writing, without fear of incrimination, information that they could not be forced to divulge from their own mouths.

In 1967 the Supreme Court abandoned the "mere evidence" rule in *Warden v. Hayden*[40] as "wholly irrational" and unsupported by the fourth amendment's language.[41] Justice Brennan's opinion in this case is a study in irony, because his later opinion in *Andreson v. Maryland*[42] demonstrates that he saw the mere evidence rule as protecting a valued fifth amendment right, which was not, due to the nature of the evidence seized, involved in *Warden v. Hayden*. The relevant part of the case concerned a seizure of clothing worn by a robber. Justice Fortas pointed out that the whole case could have been decided under the "hot

36. *See* N. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 103 (1937). Again, Justice Douglas' dissenting opinion in *Warden v. Hayden* provides the most readily available and scholarly summary. *See* 387 U.S. at 315-18.

37. Boyd v. United States, 116 U.S. 616 (1886).

38. T. COOLEY, CONSTITUTIONAL LIMITATIONS 431-32 (7th ed. 1903). *See* Gouled v. United States, 255 U.S. 298, 309 (1921). Although well-settled, the rule often seems to have been ignored. For example, in the Court's discussion of Adams v. New York, 192 U.S. 585 (1904), in Weeks v. United States, 232 U.S. 383, 395-96 (1914), Justice Day contended that the papers in *Adams* had been lawfully seized and protected from inquiry by the rule against inquiry into collateral issues at trial. Had the Court analyzed *Adams* correctly under the *Boyd* rule, it would have concluded that the seizure of the private papers—as opposed to the contraband policy slips—violated the "mere evidence" ban; thus, no mid-trial collateral inquiry into the circumstances of the search would have been required because the "mere evidence" rule made possible automatic application of the exclusionary rule.

39. United States v. Poller, 43 F.2d 911, 914 (2d Cir. 1930).

40. 387 U.S. 294 (1967).

41. *Id.* at 301-02.

42. 427 U.S. 463, 484 (1976) (Brennan, J., dissenting).

pursuit" doctrine without overruling *Boyd*,[43] but Justice Brennan, influenced strongly by scholarly criticism of the "mere evidence" rule,[44] wrote a broad opinion that abolished the rule. By the time the "mere evidence" issue actually came before the Court in *Andresen v. Maryland*, the Court already had undercut any fifth amendment protection against self-incrimination in an earlier holding that a seizure does not constitute compulsion under the fifth amendment.[45] Justice Brennan's opinion of the "mere evidence" rule was thus reduced to a dissent in *Andresen* and an excellent brief in favor of the rule on fifth amendment grounds.[46] In 1978 the Supreme Court went one step further in *Zurcher v. Stanford Daily*[47] to hold that the fourth amendment does not require the government to secure evidence through a subpoena duces tecum rather than through the more intrusive search warrant, even though the premises to be searched are owned or occupied by a newspaper not suspected of complicity in the crime under investigation.[48] The *Zurcher* majority's heavy reliance on the absence of precedents recognizing third-party search and seizure limits is disingenuous because during the regime of the "mere evidence" rule, it would not have been necessary to inquire into the status of the possessor of the evidence, for the evidence itself was immune to seizure.[49]

Because any seizable property that comes into plain view during the course of a search based on probable cause is lawfully subject to warrantless seizure, particularly if the discovery is inadvertent,[50] the only limit on the government's right to take into custody papers and effects that are thought to have some relevance to a criminal proceeding is probable cause to believe that they have evidentiary value—an extremely loose standard. Searching agents, therefore, can be expected to have custody of enormous quantities of property for evidentiary purposes without claim to an interest in the property superior to either the government or a complainant.[51]

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43. 387 U.S. at 310-12 (Fortas, J., Warren, C.J., concurring).
44. *Id.* at 300 nn.6 & 7.
45. Fisher v. United States, 425 U.S. 391 (1976).
46. 427 U.S. at 484-93 (Brennan, J., dissenting).
47. 436 U.S. 547 (1978).
48. *Id.* at 565.
49. *See id.* at 579 (Stevens, J., dissenting).
50. *See* Coolidge v. New Hampshire, 403 U.S. 443 (1971).
51. The notion of "superior interest" derives from Gouled v. United States, 255 U.S. 298, 309-10 (1921).

A. *After Trial*

Suppose governmental agents in the course of a lawful search seized *A*'s cache of money in the belief, supported by probable cause, that it constitutes relevant evidence that *B* has committed a crime. *B* is charged with the crime, brought to trial, and acquitted.[52] This appears to be the simplest case. The justification for authorizing seizure of *A*'s money is the need for it as evidence against *B*.[53] Once *A*'s money is no longer needed as evidence against *B*, the state's justification for retention of the money fails and it should return the money to *A*.[54] Put another way, once the limited purposes sought to be achieved by the abolition of the "mere evidence" rule have been accomplished, the state's permanent retention of *A*'s money simply amounts to a taking without compensation in violation of the fifth and fourteenth amendments to the Constitution.[55] Furthermore, any delay in returning the money to *A* is a taking of the investment value of *A*'s money for whatever period the state unnecessarily keeps it. As a result, the refusal to return *A*'s money and the failure to adopt procedures to assure its prompt return both violate the Constitution.

The foregoing conclusions also hold true when *B* is convicted. The underlying reason for taking *A*'s money is identical with that in the first example, and it similarly ceases to exist when a decision on the merits resolves the case against *B*.[56]

Suppose that *A*'s money is taken for use as evidence against *A*.[57] The same reasoning applies: the reason for taking *A*'s money as mere

52. *B* is charged with defrauding others of money. The prosecution's attempt to prove *B*'s guilt includes evidence that *B*, without legitimate sources of money, spent cash that *B* allegedly obtained from the fraudulent scheme on goods that *B* bought from *A*.

53. *See* Zurcher v. Stanford Daily, 436 U.S. 547, 560 (1978); Warden v. Hayden, 387 U.S. 294, 306-07 (1967).

54. *See* Bova v. United States, 460 F.2d 404, 406 n.5 (2d Cir. 1972); ALI MODEL CODE OF PREARRAIGNMENT PROC. § 280.3 (1975).

55. *See* Lowther v. United States, 480 F.2d 1031 (10th Cir. 1973).

56. There is, of course, one major difference between the first and second example. *B*'s acquittal prevents further trial of *B* on the charge. *B*'s conviction may lead to an appeal, which may lead to reversal and retrial (unless reversal is based on insufficient evidence, *see* Burks v. United States, 437 U.S. 1 (1978)). The prosecutor's retention of *A*'s money for possible retrial should be analyzed in the same way as any effort to hold evidence for trial. *See* notes 79-101 *infra* and accompanying text.

57. Varying the earlier example, *B* has reached an agreement with the prosecutor to testify that *A* was really the brains behind the scheme to defraud and that *B* had paid *A* the money as part of the arrangement. *A* is prosecuted for aiding and abetting the fraud or for conspiracy, and the money is to be introduced as evidence.

evidence against *A* ends with either *A*'s acquittal or conviction, and *A*'s right to return of the money proceeds on the same basis as before.[58]

The District of Columbia Circuit's decision in *United States v. Wilson*[59] raises many of these points. Police, executing a search warrant, raided Wilson's home and seized $2,725. After being indicted for drug offenses, Wilson moved for return of the money, claiming it could not be used as evidence against him "as it cannot be traced to criminal conduct."[60] Before the trial court could rule on the motion, Wilson pleaded guilty to possession of drugs for distribution. He then renewed the motion for return of property, which the trial court denied.[61] Although the government tried at trial to prove that defendant had earned the money in narcotics traffic, it abandoned that position on appeal.[62] The court of appeals held that the trial court not only had the jurisdiction, but also had a duty to return property "not alleged to be stolen, contraband, or otherwise forfeitable, and which is not needed, or is no longer needed, as evidence."[63] The appeals court reasoned that it was "fundamental to the integrity of the criminal justice process that property involved in the proceeding, against which no government claim lies, be returned promptly to its rightful owner."[64]

Although the result in *Wilson* obviously was correct, its reasoning exposes several of the problems that abound in this area. The court, for example, correctly pointed out that the proceedings for return of property were completely independent of those for unlawfully seized property under rule 41(e);[65] nevertheless, the court held that the trial court had a duty to return the property, oddly enough, for exactly those reasons[66] advanced for adoption of the fourth amendment exclusionary

58. The same difference between acquittal and conviction exists in this variation as that discussed in note 56 *supra*. In addition, success may spur the prosecutor to claim that *A*'s money has more than evidentiary value. The prosecutor's attempt to retain *A*'s money on this ground will be discussed at length later. *See* notes 102-06 *infra* and accompanying text. *A*'s conviction also may lead the court to seek to retain *A*'s money as security for a fine or as restitution for victims of the crime. *Cf.* notes 107-23 *infra* and accompanying text (discussing the wrongdoer's rights to the seized evidence).

59. 540 F.2d 1100 (D.C. Cir. 1976).

60. *Id.* at 1101.

61. *Id.* at 1102.

62. *Id.*

63. *Id.* at 1101.

64. *Id.* at 1103.

65. *Id.* at 1104.

66. *See* note 64 *supra* and accompanying text.

rule.[67] If the court had correctly perceived the basis for return, it would have justified its holding on Wilson's fifth amendment right to return of property for which he had never been compensated.[68] Similarly confusing is the crucial significance that the court attached to the government's abandonment on appeal of its claim that Wilson had obtained the money in the course of earlier illegal drug sales.[69] That fact is relevant not to Wilson's right to return of his money, but to the basis for return. If, as conceded on appeal, Wilson's possession of the money was not a result of prior crimes and, therefore, not evidence that he possessed the drugs in question with intent to distribute, then the seizure was unlawful and the right to return would be based on rule 41(e) and the fourth amendment, because even a broad reading of *Warden v. Hayden*[70] justifies only the seizure of papers and effects that are evidence of crime.[71] Conversely, if Wilson's money represented the proceeds of prior crime and, therefore, tended to prove that Wilson's possession of drugs on this occasion was for the purpose of sale, then the government's right to seize it was based on its evidentiary value.[72]

67. *See* Mapp v. Ohio, 367 U.S. 643, 656 (1961); Weeks v. United States, 232 U.S. 383, 394 (1914). The Supreme Court's shift from "judicial integrity" to "police deterrence" as the rationale for the exclusionary rule is a more recent development. *See, e.g.,* Michigan v. DeFillippo, 99 S. Ct. 2627 (1979); United States v. Janis, 428 U.S. 433 (1976); United States v. Calandra, 414 U.S. 338 (1974).

68. The weakness of the court's rationale crops up again in its recognition of ancillary jurisdiction as one reason for its rejection of the government's argument that Wilson should be left to pursue his local administrative and civil remedies for the return of his property because rule 41(e) did not govern. If Wilson's right to return was based on the fifth amendment, the court would have had an independent basis of federal jurisdiction, provided that Wilson pleaded the minimal amount in controversy. *See* Davis v. Passman, 99 S. Ct. 2264 (1979). That result also would follow if the claim rested on the fourth amendment. Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971).

69. 540 F.2d at 1102.

70. 387 U.S. 294 (1967). *See* notes 40-41 *supra* and accompanying text.

71. The opinion does not reveal whether the warrant authorized seizure of the money or whether the agents executing the warrant found the money, concluded it was evidence, and seized it without other authorization. Within limits, police have the right to seize objects of evidentiary value, although not described in the warrant, if in plain view. *See generally* Lo-Ji Sales, Inc. v. New York, 99 S. Ct. 2319 (1979). In light of the plain view doctrine, *Warden v. Hayden* may be validly criticized on the ground that often the police, not the magistrate, decide which papers and effects are evidence of crime; moreover, police can be expected to err on the side of overinclusion.

72. Although the court did not clearly articulate the point, the government's argument may have been that the money, as proceeds of prior narcotics sales, was subject to retention as "fruits of crime." If so, as we will see later, the argument ignores the rationale for retaining fruits of crime. *See* notes 107-23 *infra* and accompanying text.

When the need for the evidence ended with Wilson's conviction, his right to return rested in the fifth amendment.

B. *Before Trial*

The rationale underlying seizure of mere evidence might appear to bar any claims for return of property until its evidentiary use is exhausted. In fact, the issue is much more complicated.

Suppose police lawfully seize *A*'s money for use as evidence against *B*, and trial of *B* is pending. *A* has several arguments to obtain the return of his money before *B*'s trial. *A* could argue that the police mistakenly believe that *A*'s money is relevant and admissible evidence against *B*. Although probable cause may be an adequate standard for the lawfulness of a seizure, pretrial retention of the seized property demands a higher standard of review—perhaps an adversary hearing. If *A*'s property is retained until after trial, *A* will suffer loss of use of the property for the period from seizure to return. If, as in this example, the seized evidence is money, *A* loses, at the very least, the interest that could have been earned on the money had it been available to invest. No authority has been found that requires the return of lawfully seized property—even money—to be accompanied by payment of interest.[73] As a result, it is easy to argue that the fifth and fourteenth amendments to the Constitution require more than ultimate return of the seized evidence. The "taking" of the investment value of the evidence should be preceded by at least an adversary hearing that complies with due process of law and applies a preponderance standard to the question of whether *A*'s property is relevant and admissible evidence in the pending case against *B*.[74]

A could also argue that even if *A*'s property is evidence against *B*, the case against *B* can proceed as well without as with *A*'s property as

73. In fact, payment of interest should not be required. If the property has no unique characteristics, it is not really needed as evidence in its present form and should be returned, perhaps after making copies or stipulations to its seizure, rendering unnecessary the payment of interest. If the property has unique evidentiary characteristics, its use would destroy its evidentiary value. As a result, to require the government to pay interest or its equivalent on property that truly has unique value as real evidence would be to impose a penalty on its retention. Although a penalty is certainly appropriate for an unlawful seizure, it is not suitable for lawfully seized and retained property.

74. *See generally* North Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975); Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974); Fuentes v. Shevin, 407 U.S. 67 (1972); Lynch v. Household Fin. Corp., 405 U.S. 538 (1972); Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969).

real evidence. Following the example, *A* might argue that the prosecution of *B* could go forward successfully with authenticated photocopies of the money taken from *A*, together with testimony regarding the circumstances of the seizure. *A* might join this argument with a stipulation from *B* that authenticates the seized property.

A rebuttal to this latter line of argument centers around the Supreme Court's decision in *Zurcher*,[75] which rejected the contention that police must follow the least disruptive method of obtaining evidence possessed by a nonparty for use in court. *Zurcher*, however, does not precisely address the issue of pretrial retention of seized property. The case holds simply that police need not demonstrate the inefficacy of a subpoena duces tecum, which leaves the evidence in the owner's hands until it must be brought to court on the day of use, before seizing the evidence under warrant; the Court did not address the considerations involved in retaining, rather than taking, seized property. In fact, the Court had no reason to reach the point; although the warrant in *Zurcher* authorized seizure of "[n]egatives and photographs and films,"[76] the police found only a photograph that already had been published.[77] Thus, the reasons that caused the Supreme Court not to require the less disruptive alternative for police to obtain evidence do not affect the issue of retention, at least not directly. It is easy to concede, as the *Zurcher* Court concluded, that it is burdensome to require police to demonstrate the need for seizure over subpoena when evidence is in perhaps hostile hands with no guarantee of its safety.[78] Once the evidence is securely in police custody, however, *Zurcher*'s preoccupation with safeguarding evidence is inapposite, and a court could then take the time to make a cautious decision whether the police need to retain the evidence.

Zurcher does have one bearing on the pretrial retention issue. The Court concluded that the difference between potential defendants (targets) and nonparties (nontargets) does not affect the determination whether search or seizure is proper. This conclusion seems to obtain with equal ease on the question of police retention of property. No known policy supports a distinction between the target and nontarget

75. Zurcher v. Stanford Daily, 436 U.S. 547 (1978). *See* notes 47-49 *supra* and accompanying text.

76. 436 U.S. at 551.

77. *Id.*

78. *Id.* at 561. *See also id.* at 568 n.1 (Powell, J., concurring).

on the evidence-retention issue. As a result, whatever conclusions we apply to pretrial disposition of *A*'s money taken as evidence against *B* must also apply when the money is seized for use as evidence against *A*.

A few courts have considered these issues, but have only confused matters. *Shea v. Gabriel*[79] is typical. Federal agents executed three search warrants on Shea's premises in search for items associated with unlawful gambling and seized cash ($4,368) and several documents[80] that suggested that Shea (or someone) had taken bets on football games. The government did not initiate criminal proceedings against Shea, but a grand jury had begun to investigate unlawful gambling activities. When Shea filed a complaint seeking suppression and return of the seized property,[81] the government resisted disclosure of the affidavit underlying the search warrants, arguing that disclosure would endanger the ongoing grand jury investigation.[82] The district judge examined the affidavit *in camera*, found it "colorable," and denied its disclosure.[83] The court also refused suppression or return because " 'the legitimate and appropriate governmental interest [in] using the property as evidence before the grand jury' " outweighed the prejudice to Shea in delayed return.[84] The court of appeals noted in passing that no forfeiture proceeding had started,[85] but affirmed because the district court had (1) balanced the government's secrecy interest against Shea's temporary property loss, (2) examined the affidavit *in camera*, (3) dismissed the motion without prejudice, and (4) found that Shea had failed to show under rule 41(e) that he was entitled to lawful possession of the property.[86]

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79. 520 F.2d 879 (1st Cir. 1975).

80. *Id.* at 879 n.1.

81. The purported jurisdictional bases were rule 41(e) and the court's "inherent power to discipline its officers." *Id.* at 880.

82. *Id.*

83. *Id.*

84. *Id.* The decision was without prejudice to renewal of the motion should the government fail to proceed with reasonable dispatch. *Id.* at 880 n.4.

85. *Id.* at 881. *See generally* 18 U.S.C. § 1955(d) (1976). As we will see later, forfeiture proceedings must be commenced promptly. If the government has not done so, it cannot defend a motion for return on the ground that the property is forfeitable. *See* notes 152-56 *infra* and accompanying text. As a result, any case that arguably concerns forfeitable property that is not the subject of a forfeiture proceeding must be examined as if the sole issue is whether the property is mere evidence.

86. 520 F.2d at 882.

The First Circuit's analysis of the merits,[87] like that of the district court, gave little if any thought to the basis for the motion. The court failed to consider whether Shea had a right to return of the property in the absence of a fourth amendment violation. Yet, the opinion's reliance on the district judge's approach of balancing the government needs against Shea's property claims suggests that the court of appeals considered values other than those underlying the fourth amendment.

A more analytically sustainable approach would have been for the court to distinguish between the fourth and fifth amendment bases of Shea's claims.[88] The first question should have been whether Shea suffered a violation of his fourth amendment rights. Probable cause to believe that there was evidence at the places searched would be the only legitimate basis to sustain the seizures.[89] Shea's motion for return

87. The court of appeals devoted a substantial portion of its analysis to the appealability issue, concluding that insofar as the action sought suppression at trial, *cf.* United States v. Calandra, 414 U.S. 338 (1974) (denial of grand jury suppression), it was not appealable, and insofar as the action sought return of property, *see* United States v. Ryan, 402 U.S. 530 (1971), the appealability question was close enough to justify consideration of the merits. Appealability and interpretation of the *DiBella in esse* doctrine, *see* note 31 *supra*, is beyond the scope of this article, but the court's decision on this point seems foolish. If the appeals court had concluded that rule 41(e) required return of property because of an unlawful search or seizure, it is hard to find a policy supported by the district court's adherance to its order denying trial suppression. Assuming the court of appeals would adhere to its unlawful search and seizure conclusion, it would then have to reverse any conviction obtained at a trial in which the district court admitted the evidence. The opposite and more sensible result would be for the district court to reverse itself on the basis of the court of appeal's finding of a fourth amendment violation, which certainly constitutes appellate review of the original "interlocutory" order.

88. In fairness to the court, it should be pointed out that these distinctions do not appear to have been made by Shea's counsel.

89. *See* Spinelli v. United States, 393 U.S. 410 (1969); Aguilar v. Texas, 378 U.S. 108 (1964). The district judge is also subject to severe criticism for his failure to make a probable cause determination. To refuse disclosure to a property owner who seeks return or suppression denies him both the opportunity to argue effectively the lack of probable cause and to challenge the validity of the affidavit by going behind its face. *See* Franks v. Delaware, 438 U.S. 154 (1978). It thus renders the proceedings ex parte and relegates the judge's task to nothing more than what the magistrate already has done. *See generally* United States v. Ruiz-Estrella, 481 F.2d 723 (2d Cir. 1973). The Supreme Court never has recognized an executive privilege or law enforcement privilege in this circumstance and should not. The privilege regarding an informant's identity is explainable because the informant's identity is irrelevant to the issue of whether the affiant, whose identity and sworn statement are disclosed, had adequate reason to believe the informant. *See* McCray v. Illinois, 386 U.S. 300 (1967); Rugendorf v. United States, 376 U.S. 528 (1964). There may be a limited national security privilege applicable to fourth amendment cases. *Compare* Alderman v. United States, 394 U.S. 165 (1969), *with* Taglianetti v. United States, 394 U.S. 316 (1969), *and* Butenko v. United States, *decided sub nom.* Alderman v. United States, 394 U.S. at 197-200 (Harlan, J., concurring and dissenting). The Supreme Court, however, never has applied

of property entitled him to a resolution of this issue, but he received none. Rather, the district court, sustained by the court of appeals, applied a balancing test and found the affidavit "colorable" with "equitable and practical considerations" tilting the balance in favor of the government.[90]

Assuming no fourth amendment violation, the second issue should have been whether the government, under the fifth amendment due process clause, had a right to keep Shea's property without compensation. This is a particularly important issue when there is no pending prosecution or there is reason to believe that a long delay will occur before any post-trial return or before the government makes a decision not to charge a crime and returns the property. Because Shea suffered a taking, the court's determination should have been based on a higher standard than the existence of probable cause to believe that the seized property would become admissible evidence in a criminal prosecution; moreover, the court should have made the determination by the procedurally correct preponderance-of-the-evidence standard.

Even if the court had decided these issues against Shea, it should have considered whether photocopying of the paper evidence[91] (perhaps with waiver of any objections grounded in the best evidence rule, to its authenticity) could have adequately served the government's need to use it during the investigation, before the grand jury, or at trial.

Much of this analysis was followed in the Third Circuit's recent decision in the *Margolis*[92] case. As in *Shea*, government agents, while executing a warrant for evidence and gambling contraband, seized $11,975 in cash. Three months later Margolis moved for return of property on the ground that its retention violated his fifth amendment rights to due

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a national security privilege to deny the subject of a search the information necessary to challenge a probable cause determination.

90. 520 F.2d 879, 880 (1st Cir. 1975).

91. As mentioned before, there is little need for "real evidence" when its existence can be demonstrated or is admitted. *See* text following note 74 *supra*. Some seized evidence, of course, cannot be replaced by copies. A claim of forgery in a document, for example, would suggest that the jury should be able to examine the original for itself. Other items are legitimate subjects of tests or experiments at or before trial, for which there can be no substitute. Some "real evidence" may be needed for its "graphic" value, although its shock value sometimes may be as good a reason to not present it to the jury. It is hard, however, to see how the government's need for the evidence seized in *Shea*, 520 F.2d at 879 n.1, would not have been served by photocopies had Shea stipulated to their authenticity and waived any "best evidence" objections.

92. United States v. Premises Known As 608 Taylor Ave., Apt. 302, Pittsburgh, Pa., 584 F.2d 1297 (3rd Cir. 1978).

process. The district court read *Shea* to hold that government retention of the property violated due process only if the government's delay in commencing a proceeding took on "unreasonable proportions."[93] Finding three months reasonable, the court denied the motion.[94] The district court subsequently denied Margolis' renewed motion, without prejudice to further renewal, over four months later, noting that delays of up to two years in gambling investigations often occur.[95]

On appeal, Margolis renewed his argument that the government's retention of his property violated due process. He also argued that the government should be required to return the property if its evidentiary value could be preserved by other means, and suggested that even if the investigation required the actual bills seized, he should be paid for them.

The court of appeals pointed out that because the government had not instituted proceedings against Margolis, retention of his property amounted to de facto forfeiture.[96] The court nevertheless relied on its supervisory power over law enforcement officials and the United States Attorney's office to hold that retention was proper so long as it was reasonable.[97] Also on the basis of its supervisory power, however, the court accepted Margolis' suggestion that the district court should have considered alternative methods of preserving the evidence;[98] thus, it remanded the case to the court for consideration of the purposes for which the government needed to retain the property.[99]

Although Judge Hunter's opinion for the court makes good sense, the concurrence of Judge Rosenn commands even more respect. Judge Rosenn argued that the purpose of the court's supervisory power is to provide remedies for violation of existing rules; thus, the only basis for the return of Margolis' property was the due process clause.[100] Curiously, Judge Rosenn's due process analysis led him to the same conclu-

93. *Id.* at 1300.

94. *Id.*

95. *Id.*

96. *Id.* at 1301-02.

97. *Id.* at 1302.

98. The court used the example of a bystander to a robbery whose car bore the robber's fingerprints. *Id.* at 1303. It concluded that the government could seize the car to conduct a fingerprint test, but once it completed the test and took photographs of the fingerprints, the government should return the car because the owner's interest in its possession and use outweigh the government's need for its retention. *Id.*

99. *Id.* at 1304.

100. *Id.* at 1305-06.

sion as the majority's—due process violations turn on whether retention is reasonable. "Reasonableness" analysis, however, ignores the underlying basis for the property owner's right to return of property. If keeping *A*'s goods for two years is a "taking," it is also a taking to keep *A*'s goods for one year even if one year is a reasonable time during which to conduct an investigation. Retention is also a "taking" even if *A*'s property is so unique that there is no feasible way to substitute for its evidentiary value.

The point that the cases fail to recognize is that *A* should be compensated for loss of the property during the period that it is withheld as well as for the property itself if it is not returned. Neither do the cases seem to recognize that there should be a different substantive standard for seizure, which the *Zurcher* court explains is proper under the threat of loss or destruction of evidence, than for retention, when there is time for an adversary hearing.[101] Even when a taking of property is permissible, it can be accomplished only in compliance with due process of law.

III. NONEVIDENTIARY SEIZURES AND RETENTIONS

The classic objects of search and seizure prior to *Warden v. Hayden*[102] were fruits of crime, instrumentalities of crime, and contraband.[103] Examined together, the reasons for permitting their search and seizure become apparent. Those reasons, in turn, shed light on the proper disposition of seized property. In all three categories the government's fundamental justification for seizure is that either the government itself or a claimant on whose behalf the government acts holds a superior claim to ultimate possession (as opposed to temporary possession in the case of evidence) of the seized property.[104] Fruits of crime are subject to seizure because the victim of the crime has a

101. Supreme Court due process decisions have long recognized the propriety of immediate administrative action, when necessary, if subsequently followed by a due process hearing at which the earlier action's continued validity can be challenged. *See, e.g.,* Arnett v. Kennedy, 416 U.S. 134 (1974); Morrissey v. Brewer, 408 U.S. 471 (1972).

102. 387 U.S. 294 (1967).

103. Common law also recognized a fourth category of seizable items—goods liable to customs duties and concealed to avoid payment. *See* Boyd v. United States, 116 U.S. 616, 623 (1886). Discussion of the justification for this category of objects subject to seizure is beyond the scope of this article, except to point out that the government's status as a lien holder justifies seizure to create a possessory lien. *See* G.M. Leasing Corp. v. United States, 429 U.S. 338 (1977).

104. *See* Gouled v. United States, 255 U.S. 298 (1921).

greater claim to ultimate possession of the property than the person in whose custody it is found. Contraband is subject to seizure because the state, having declared private possession unlawful, has a greater claim to possession than the person in whose custody the contraband material is found; indeed, it has the only claim to possession. Similarly, an instrumentality of crime, when subject to forfeiture, is subject to seizure because the government has a greater claim to ultimate possession than the person in whose custody it is found.[105]

Any one of these categories can be—and often is—evidence of crime as well. Police for example, may seize money from *A* because it is a fruit of a bank robbery. *A*'s possession of the money, however, also may be strong evidence that *A* committed the robbery. Similarly, police may seize heroin from *A* because it is contraband, but *A*'s possession of the heroin also will be strong evidence of the possessory offense of unlawful possession of heroin. Indeed, it is difficult to envision any case in which *A*'s possession of the heroin will not be evidence, unless a prosecutorial decision has been made not to charge *A* for the possessory offense.

In addition to the need for evidence, many seizures can be justified on more than one of the classic rationales for seizure. If *A* is claimed to have robbed a bank with a sawed-off shotgun, seizure of the weapon can be justified either on its status as an instrumentality of crime or on its status as contraband.[106] The weapon may also be evidence that *A* committed the crime of bank robbery as well as the possessory offense.

As discussed in the previous section, strong arguments exist for the return of property seized on the evidence justification both before and after trial. When the property is seized as evidence of a crime as well as on one or more of the last three grounds, the property's retention may be justified under circumstances in which its character merely as evidence might call for its return. As a result, it is important to define carefully the three categories and to consider when their rationales permit police retention of seized property.

A. *Fruits of Crime*

Because a thief can neither obtain nor pass along to another person

105. *See generally* Warden v. Hayden, 387 U.S. 294, 306 n.11 (1967).
106. 26 U.S.C. §§ 5861, 5848 (1976).

the right to possession of stolen property,[107] the victim of the theft holds a superior claim to possession. By seizing the property, the government acts on the victim's behalf.[108] Permitting the police to do so makes sense because the victim's exercise of his right to self-help[109] often may be dangerous, and the victim's reliance on a civil action for return of stolen property or for the tort of conversion frequently will offer nothing more than theoretical value.

Once it is seen that the fruit-of-crime justification for seizure is the victim's claim to the property, the limits of the category become apparent: if the victim has no claim to return of the property, its seizure cannot be justified by the duty of police to secure it for its rightful owner. As a result, the proceeds of most consensual crimes should not be subject to seizure on the fruit-of-crime rationale because the "victim" or person from whom the proceeds were gained, being *in pari delicto*,[110] has no greater claim to possession of the property than the person in whose custody the property is found.

Suppose *A* is a prostitute, and police have probable cause to believe that *A* has $100 received from *B* for services rendered. If the police seek to search for and seize the $100 for the sole reason that they wish to secure *B*'s right to repossess the money, the magistrate should deny the warrant. If, however, the police request the warrant on the grounds that the $100 is both evidence and fruit of a crime, the warrant should be issued on the former ground. Following the scenario, suppose *A* is then charged and convicted of the offense of prostitution and moves after trial for return of the $100. Because its seizure and retention were justified only as evidence of crime, the money must be returned when it is no longer needed as evidence. It cannot be kept on a fruit-of-crime theory; nor can it be given to *B*, who has no valid claim to it. As a result, *A*'s post-trial motion for return should be granted. Had *A* moved for return pretrial, the analysis would not differ from that for property seized solely on an evidence rationale.

The disposition of property seized as fruit of a crime turns on whether it can be properly characterized in this manner and on whether

107. *See generally* 73 C.J.S. *Public Administrative Bodies & Procedures* § 15(b)(4) (1951 & 1978 Supp.). One exception to this rule recognizes superior title to money in one who has obtained it in good faith from a thief. *See* Holly v. Missionary Soc'y, 180 U.S. 284 (1901).

108. *See* Warden v. Hayden, 387 U.S. 294, 306 n.11 (1967).

109. *See, e.g.*, MODEL PENAL CODE § 3.06 (1962).

110. *See, e.g.*, Wager v. Pro, 575 F.2d 882 (D.C. Cir. 1978); Hunter v. Wheate, 289 F. 604, 606 (D.C. Cir. 1923).

the property seized is actually the fruit of a crime. Resolution of the latter question is often difficult because of its procedural interrelationship with the defendant's guilt. The cases on this question are somewhat confusing.

A recent case from the Sixth Circuit is a good example.[111] LaFatch was charged in federal court with extortion. In the course of their investigation, F.B.I. agents seized $50,000 from LaFatch, which the trial court held in custody pending trial. After his acquittal, LaFatch moved that the trial court order return of the $50,000 to him. The alleged extortion victim appeared and opposed LaFatch's motion and also filed a separate lawsuit in state court for the $50,000. The trial judge withheld action on the motion for return pending the outcome of the civil lawsuit. After the state court jury awarded the victim $15,000, the criminal trial judge concluded that the state judgment was res judicata on the issue of entitlement to the money and ordered its return to LaFatch.

On appeal, the Sixth Circuit concluded that the interests of judicial efficiency dictate that the criminal trial court should resolve the question of proper disposition of seized property,[112] but held that, although the trial court was correct in its ruling that LaFatch's acquittal established his right to the money,[113] it had erred in following the state court's judgment. Judge Weick dissented on the latter ground, arguing that the state judgment was entitled to full faith and credit.[114]

In large part, the majority and dissent were both correct. A jury's failure to reach a guilty verdict in a criminal prosecution is not res judicata against the victim on any issue of law in a civil action. That the jury did not find the evidence sufficient to establish guilt beyond a reasonable doubt does not mean that the evidence would be insufficient in a civil action under the preponderance-of-the-evidence standard.[115] Furthermore, the victim, who was not a participant in the criminal action, cannot be bound by the jury's verdict.[116] Thus, the majority rule

111. United States v. LaFatch, 565 F.2d 81 (6th Cir. 1977).

112. *Id.* at 83. The court of appeals recognized that "seized property, other than contraband, should be returned to its rightful owner once the criminal proceedings have terminated." *Id.* (citing McSurly v. Ratliff, 398 F.2d 817 (6th Cir. 1968)).

113. *Id.* at 84-85.

114. *Id.* at 85.

115. *See id.* at 84-85. *See also* Helvering v. Mitchell, 303 U.S. 391, 397 (1938); United States v. Burch, 294 F.2d 1, 3 (5th Cir. 1961). *But see* Coffey v. United States, 116 U.S. 436 (1886).

116. *See* Blonder-Tongue Labs. v. University Foundation, 402 U.S. 313 (1971).

does not view a criminal acquittal as having res judicata or collateral estoppel effect on the civil claim. On the other hand, the court holding the property has no real interest in it other than to see to its proper disposition. As a result, the issue in *LaFatch* may be recast in terms of whether the trial court correctly deferred to the state court. If it did, then the trial court properly granted res judicata effect to the state judgment; in this case ancillary jurisdiction in the trial court makes sense much as it did in the previously discussed situations.[117] Ancillary jurisdiction should not be invoked, however, to deny whatever procedural rights the alleged crime victim might have in an independent civil action; thus, the district judge's preference in *LaFatch* for the victim's state right to jury trial over his prior decision to defer judgment on the motion for return of property also makes sense.

United States v. Palmer[118] presents almost the opposite side of *LaFatch*. At the time of Palmer's arrest for bank robbery, police seized cash and other property from him. Unlike LaFatch, Palmer was convicted. The government opposed his post-trial motion for return of property, but the bank made no effort to intervene and the trial court denied the motion, leaving the money with the government. The court of appeals reversed.[119] The appeals court noted that the guilty verdict did not carry with it any civil adjudication of liability to the victim bank, and held that because no claim of forfeiture had been made, neither the government nor the court could hold the money in the absence of any adverse claim of ownership or right to possession.[120]

It may first rankle, as it did the prosecutor in *Palmer*, to see a guilty person get the money, and in that sense it is a harder case than that of LaFatch, who was acquitted.[121] On closer examination, however, the court of appeals obviously was correct because its decision turned on the absence of a claimant to the seized property when its evidentiary role had been completed. Even so, the court's suggestions on the limits of res judicata, assuming there had been a claimant to the property, may be overstated. Suppose *A* is charged with robbing bank *B*, which

117. *See* United States v. Wilson, 540 F.2d 1100, 1103-04 (D.C. Cir. 1976); notes 52-72 and accompanying text.

118. 565 F.2d 1063 (9th Cir. 1977).

119. *Id.* at 1065.

120. *Id.* at 1064-65.

121. The result in *LaFatch* may be explained in that the court, although eschewing any views on guilt or innocence, recited the evidence in a manner that makes its belief of LaFatch's guilt obvious. *See* 565 F.2d at 84.

claims that the money seized from *A* is the proceeds of the bank robbery. Suppose *A* contests guilt and testifies that the money is *A*'s, derived from an innocent source, and *A*'s testimony is countered by testimony that all the money seized from *A* was "bait money."[122] If on this evidence the jury convicts *A* of bank robbery, it will have decided the crucial questions relevant to the disposition of the property. As a result, if bank *B* intervenes and opposes *A*'s post-trial motion for return of property, the court should return the money to bank *B*, because there is no reason why res judicata should not run against somebody found guilty.[123]

The *Palmer* court, however, did not have to determine the limits of res judicata because of the absence of an adverse claimant. Moreover, even a conclusion of res judicata on Palmer's guilt would not lead to collateral estoppel on the issue of ownership of the money, assuming that no evidence in the record tied it to the bank. The ownership issue would have to be decided in a separate evidentiary hearing.

B. *Contraband*

The rationale for seizure of contraband is that the state's claim to immediate, as well as ultimate, possession of an object whose possession the legislature has declared illegal is greater than that of the possessor. The justification for the state's power to declare contraband lies in its police power and the view that the mere possession of certain objects should be criminalized because of their tendency to cause harm.[124] The most obvious example is the possession of dangerous drugs. A possessory offense actually is an inchoate offense that has taken on a life of its own; the state's disapproval often stems not from the unequivocal dangerousness of the object, but from the possessor's intention to use it, as with burglar's tools.

If the justification for seizure is the ban on possession, then there is no basis for the return of contraband because the ban on possession is continuing. As a result, even the victim of an unlawful search or

122. An example of "bait money" is money whose serial numbers have been recorded in the bank before the robbery.

123. *See* Emich Motors Corp. v. General Motors, 340 U.S. 558, 569 (1951); Kaufman v. Moss, 420 F.2d 1270, 1274 (3rd Cir. 1970).

124. If this is the rationale, there may be certain limits on the state's power to declare contraband. *See, e.g.*, Warden v. Hayden, 387 U.S. 294, 306 n.11 (1967).

seizure of contraband has no valid claim to return of property[125] either before or after trial. That conclusion is likewise true after lawful seizures.

Ordinarily, the only ground on which allegedly contraband property can be returned is that the property is not, in fact, contraband.[126] In the Second Circuit's oft-cited decision in *In re Brenner*,[127] government agents seized liquor from Brenner and filed two indictments for unlawful possession and use. He was tried and convicted in district court, but his conviction was reversed on appeal because the statute then in force did not proscribe Brenner's possession of the liquor in the absence of a charge that he possessed it for sale.[128] The court of appeals directed the district court to dismiss all charges against Brenner, and Brenner subsequently petitioned the district court for return of the liquor, alleging that it had been unlawfully seized without a warrant. The district court denied the motion, but the court of appeals ordered return of the liquor on the ground that its earlier decision was res judicata on the issue of Brenner's lawful possession of the liquor.[129]

C. *Instrumentalities of Crime*

The state's claim to seize instrumentalities of crime is based on its right to seek their forfeiture. The forfeiture concept itself derives from the medieval idea that inanimate objects which cause harm are guilty of wrongdoing and must be forfeited as deodand.[130] There is a strong temptation to dismiss deodand forfeiture as medieval mumbo jumbo until one reads Justice Holmes searching consideration of the common-law development of forfeiture.[131] Holmes traced the history of forfeiture into the *Old Testament* and explored the process that led to the

125. *See* note 3 *supra*.

126. The only other situation in which contraband property can be recovered arises when the party claiming title has a privilege to possess the substance or object. A medical researcher, for example, may be privileged under statute or administrative decision to possess a drug, possession of which is generally prohibited. In this situation the drug is not contraband in the researcher's hands and the contraband label should not be sufficient to justify seizure or retention.

127. 6 F.2d 425 (2d Cir. 1925).

128. Brenner v. United States, 287 F. 636 (2d Cir. 1922).

129. 6 F.2d at 426. The court of appeals also found that the search and seizure was unlawful. *Id.* This finding was unnecessary because the government had no basis other than unlawful possession to retain Brenner's liquor.

130. *See* United States v. United States Coin & Currency, 401 U.S. 715, 719 (1971); Goldsmith-Grant Co. v. United States, 254 U.S. 505, 510 (1921).

131. O. HOLMES, JR., THE COMMON LAW 6-36 (1881).

treatment of animals and inanimate objects as guilty of crime when they caused harm. He observed that it would seem to be a fallacy to say of an inanimate object that " 'she did it and she ought to pay for it,' "[132] but Holmes demonstrated that terminology of this sort appears again and again in decisions of great judges.[133] The reason, he pointed out, is that the law proceeds through apparent syllogisms, but its essential content is legislative; the policy behind the form may change, dictating a change in content, but the form itself remains despite its original content's being outmoded.[134]

Whatever the history of forfeiture of instrumentalities of crime, its present justification is crime prevention. When government seizes the instrumentality of crime from an offender's hands, the forfeiture acts as a punishment. When an instrumentality is seized from a noncriminal, the forfeiture serves to deter association with criminals and denies criminals the instrumentality with which to commit crime.

The penalty justification is carefully exposed in Justice Harlan's opinion in *United States v. United States Coin & Currency*.[135] After defendant-Angelini had been convicted of failing to register and pay the federal gambling tax, the government started forfeiture proceedings against the $8,674 seized at his arrest. Angelini appealed the district court's forfeiture order on the ground that he could properly invoke his fifth amendment privilege against self-incrimination in the forfeiture proceeding in light of the Court's decisions[136] between his conviction and the forfeiture proceeding that the fifth amendment privilege against self-incrimination is a valid defense to a prosecution for failure to comply with the statute under which he was convicted.

The government argued that Angelini could not assert this privilege because the forfeiture proceeding was a civil action against the object rather than a penal proceeding against Angelini. The Court held that there was no constitutional difference between a fine of $8,674 and a forfeiture of $8,674;[137] each resulted from a proceeding criminal in na-

132. *Id.* at 28.
133. *Id.* at 29.
134. *Id.* at 35.
135. 401 U.S. 715 (1971).
136. Grosso v. United States, 390 U.S. 62 (1968); Marchetti v. United States, 390 U.S. 39 (1968).
137. 401 U.S. at 718.

ture.[138]

The government also argued that even if the "criminal penalty" label might be generally accurate, it was not applicable to the particular forfeiture statute,[139] which mandated forfeiture of property even if the owner of the property had nothing to do with the illegal activity.[140] The Court responded that for the government to sustain this argument, it would have to demonstrate that the broad sweep of this forfeiture statute was consistent with the due process and just compensation clauses of the fifth amendment.[141] The Court, however, did not reach the due process and just compensation issues;[142] rather, it construed the statute to allow a defendant in a forfeiture proceeding to invoke the fifth amendment privilege against self-incrimination.[143]

The *Coin & Currency* decision probably cannot be read as holding that the only justification for forfeiture of instrumentalities of crime is to penalize the criminal.[144] The Court also cited with approval two earlier decisions that sustained in principle the forfeiture of automobiles used in crime over the security interests of nonparticipants in the crime.[145] Nevertheless, important consequences flow from the Court's recognition of forfeiture as a penalty. Perhaps the most impor-

138. *Id.* Justice Harlan, writing for the Court, relied heavily on Boyd v. United States, 116 U.S. 616, 634 (1886), to reach this conclusion.

139. 401 U.S. at 718 (referring to proceedings under 26 U.S.C. § 7302 (1976)).

140. *Id.* at 719.

141. *Id.* at 720.

142. *Id.* at 721.

143. *Id.* at 721-22.

144. *Id.* The Court's holding that forfeiture is a punishment for crime precludes the argument, occasionally heard, that forfeiture, as an archaic remnant of the Middle Ages, violates the Constitution. Forfeiture of crime instruments used to further criminal conduct is unconstitutional to the extent that other punishment is unconstitutional. This area of the law, despite some starts, has developed little. *Compare* Robinson v. California, 370 U.S. 660 (1962), *with* Powell v. Texas, 392 U.S. 514 (1968).

145. 401 U.S. at 715 (citing United States v. One Ford Coupe, 272 U.S. 321 (1926); Goldsmith-Grant Co. v. United States, 254 U.S. 505 (1921)). The latter case sustained the forfeiture of a taxi used for unlawful liquor distribution, taking the interest of the seller who had retained title for unpaid purchase money. The former case involved the seizure of an automobile used to conceal liquor with intent to defraud the United States of tax. The Court held that there was no protection of the innocent interest. 272 U.S. at 332-33. *But see* United States v. One Ford Coach, 307 U.S. 219 (1939), in which the majority invalidated a similar forfeiture under a different statute, but on the ground that the statute absolved the credit company because it had made adequate inquiry into the background of the buyer to assure that the automobile would not be used in bootlegging. Justices Douglas, Frankfurter, and Black dissented, but solely over the Court's interpretation of the statute's remission provisions. No member of the Court suggested that the forfeiture would be unconstitutional, although Justice McReynolds, writing for the majority, did comment that

tant is that forfeiture, at least under federal law, must be based on statute rather than on the common law.[146] Although the Supreme Court has not specifically adopted or rejected this position, it is logically correct. Furthermore, it provided the basis for resolution of the litigation concerning the notorious weapons with which Lee Harvey Oswald is claimed to have killed President John F. Kennedy and Officer Tippit. Shortly after the shootings, the government took into custody the weapons alleged to have been used in the crimes. After Oswald's death, his widow, acting as his administratrix, sold to King the estate's claim to the weapons. A federal district court granted the government's request for forfeiture,[147] but the Fifth Circuit reversed.[148] Chief Judge Tuttle, writing for the court of appeals, characterized the issue as whether the government could obtain the weapons by forfeiture without compensation, or whether it must resort to condemnation and compensate the owner. He conceded that it would be quick and easy to accept the government's deodand theory, but because the case could not be fitted under a forfeiture statute, the court could not accept this theory.[149] Judge Doyle later reiterated this conclusion in the district court's decision on King's action for compensation from the United States: "judicial forfeiture has had little acceptance in the United States, and it is generally held that the remedy must be through statutory proceedings."[150]

When an instrument of crime is seized, a motion for its return is possible either before or after trial. Based on the foregoing analysis, the motion for return of property seized solely as an instrument of crime can only be resisted on the ground that it is statutorily subject to forfeiture.[151] Even then the state may be unable to resist forfeiture if it

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"[f]orfeitures are not favored; they should be enforced only when within both letter and spirit of the law." *Id.* at 226.

146. King v. United States, 292 F. Supp. 767, 771 (D. Colo. 1968). The view that penal laws must be statutory derives from the concept of fairness, but the proscription of federal common-law crimes is also based on historical opposition to the growth of federal criminal law. Most states also require penal laws to be statutory. *See generally* H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION (1968).

147. King v. United States, 292 F. Supp. 767 (D. Colo. 1968), *rev'd*, 364 F.2d 235 (5th Cir. 1966).

148. King v. United States, 364 F.2d 235 (5th Cir. 1966).

149. *Id.* at 241.

150. 292 F. Supp. at 772.

151. A recent decision of the District of Columbia Circuit in United States v. Farrell, No. 78-1279 (D.C. Cir. Aug. 27, 1979), in which the author was supervising counsel, reaffirms this view. Farrell went to a bogus fencing operation run by police and turned over $5000 in what his trial

did not commence forfeiture proceedings in a timely manner. Courts fairly consistently insist that the state must promptly begin forfeiture proceedings, even with respect to property forfeitable as an instrument of crime; otherwise, the claim that the property is subject to forfeiture cannot be asserted as a defense to a motion for return.[152]

Although the most commonly used federal forfeiture statute compels prompt implementation of forfeiture proceedings,[153] many cases sug-

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jury concluded was an attempt to buy heroin for redistribution. Farrell was ultimately convicted of attempting to possess heroin for purposes of distribution and attempted distribution. United States v. Farrell, No. 76-236 (D.D.C. Sept. 17, 1976), *aff'd*, No. 76-1890 (D.C. Cir. May 23, 1977). After trial and affirmance of his conviction, Farrell moved for return of the money, which had been admitted in evidence against him at the criminal trial and kept in police custody thereafter. District Judge Gesell denied the motion because the money had been used as an instrumentality of crime. United States v. Farrell, No. 76-236 (D.D.C. Feb. 15, 1978). The court of appeals extensively discussed the government's argument that because the money had been used as an instrumentality of crime, it was a species of "derivative contraband," which should be forfeited despite the absence of a forfeiture statute governing the situation. The court of appeals concluded that there was "no precedent for confiscation without statutory authority" of "derivative contraband" (or crime instruments) and declined to fashion any such rule.

The court did, however, refuse to order return of the money, holding, by analogy to contract cases in which courts refuse to enforce unlawful contracts, that it would "deny the aid of the courts to a single violator of the law who seeks the return of money paid to a government agent in an attempt to contract for the purchase of contraband drugs." United States v. Farrell, No. 78-1279 (D.C. Cir. Aug. 27, 1979) (footnote omitted). The opinion does not define the limits of its principle that the law will not aid a wrongdoer to recover his property, although its analysis suggests that the court had in mind only the case in which the property sought by the motion to return was delivered voluntarily as part of an illegal, but aborted, agreement.

152. *See, e.g.,* United States v. Premises Known As 608 Taylor Ave., Apt. 302, Pittsburgh, Pa., 584 F.2d 1297, 1304 (3rd Cir. 1978); United States v. One 1970 Ford Pickup, 564 F.2d 864, 865 (9th Cir. 1977); United States v. Wilson, 540 F.2d 1100, 1104 (D.C. Cir. 1976); *In re* Brenner, 6 F.2d 425, 427 (2d Cir. 1925). In *United States v. Wilson*, the court stated that a motion for return of property cannot be resisted by the assertion that the property is subject to forfeiture, but only by proof that actual forfeiture proceedings have been commenced. There is, however, no general barrier to assertion of the state's right to forfeiture by setoff or counterclaim other than the proscription on delay, which should modify the court's rule. 540 F.2d at 1104.

153. 19 U.S.C. §§ 1592, 1602-1604 (1976) govern forfeitures for violation of the customs laws. Its procedure has been incorporated in several federal forfeiture laws, including those related to gambling, 18 U.S.C. § 1955(d) (1976); *see* United States v. Premises Known As 608 Taylor Ave., Apt. 302, Pittsburgh, Pa., 584 F.2d 1297, 1304 (3rd Cir. 1978), counterfeiting, 49 U.S.C. § 784 (1976); *see* United States v. One Ford Pickup, 564 F.2d 864, 865 (9th Cir. 1977), and narcotics laws, 21 U.S.C. § 881(d) (1976); *see* United States v. One Motor Yacht Named Mercury, 527 F.2d 1112, 1114 (1st Cir. 1975).

Custom law, 19 U.S.C. § 1602 (1976), requires the seizing officer to report immediately the seizure of property to the relevant administrative agency. The agency, in turn, must report to the United States Attorney who, in turn, is required by § 1604 to conduct an immediate investigation and start forfeiture proceedings. These provisions require prompt commencement of forfeiture proceedings and permit delay only for that period of time reasonably necessary to investigate and to resolve applications for remission; *i.e.,* a decision not to invoke the forfeiture remedy. *See*

gest that the requirement has a constitutional basis.[154] The most thoroughly reasoned of these cases is Judge Turk's opinion for the Fourth Circuit in *States Marine Lines, Inc. v. Shultz*.[155] Plaintiff brought suit against customs officials on a constitutional and statutory theory for consequential damages resulting from the seizure of general cargo for customs violation and the administrative delay in resolving the forfeiture issue. The court concluded that the government violated plaintiff's right to due process when it seized property for forfeiture and unreasonably delayed in seeking a judicial determination of its forfeitability claim over property it had confiscated.[156]

Although courts have recognized the application of this approach to instruments-of-crime forfeitures,[157] the justification may be slightly different. Because instruments-of-crime forfeitures usually arise as a penalty for committing the crime,[158] it would seem to follow on first consideration that the outside limit on commencement of forfeiture proceedings should be identical with the statute of limitations and the speedy-trial requirement applicable to prosecutions for the crime related to the forfeiture.[159] Unlike a fine, however, a forfeiture penalty is imposed long before any determination of guilt and often with no judicial supervision or only ex parte supervision. Moreover, there is no statutory provision for the owner of seized property to obtain compensation in the event that the forfeiture effort is unsuccessful or abandoned. This uncompensated loss,[160] therefore, argues for the

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United States v. One Motor Yacht Named Mercury, 527 F.2d 1112, 1114 (1st Cir. 1975); States Marine Lines, Inc. v. Shultz, 498 F.2d 1146, 1155 (4th Cir. 1974); Sarkisian v. United States, 472 F.2d 468, 471 (10th Cir.), *cert. denied*, 414 U.S. 976 (1973).

154. *See* United States v. One Ford Pickup, 564 F.2d 864, 866 n.1 (9th Cir. 1977); *cf.* United States v. Thirty-Seven Photographs, 402 U.S. 363, 367-75 (1971) (first amendment considerations compel prompt proceedings regarding seized and allegedly obscene material).

155. 498 F.2d 1146, 1152-55 (4th Cir. 1974).

156. *Id.* at 1154.

157. *See, e.g.*, United States v. One Ford Pickup, 564 F.2d 864, 866 (9th Cir. 1977).

158. *See* notes 139-43 *supra* and accompanying text.

159. Nominally, forfeiture is an in rem action against the offending instrument, *see* United States v. United States Coin & Currency, 401 U.S. 715, 719 (1971), and can proceed contemporaneously with, or independently of, the criminal action. The res judicata and collateral estoppel considerations are much like those discussed in connection with fruits of crime. *See* text accompanying notes 111-17 *supra*. It seems plausible to argue that despite the formalism of the in rem action, it follows from the conclusion that the forfeiture of crime instruments is a penalty for the crime; thus, a separate penalty proceeding violates the fifth amendment's double jeopardy proscription. No credible authority, however, has been found for this position.

160. *Cf.* United States v. One Ford Pickup, 564 F.2d 864, 866 (9th Cir. 1977) (recognizing rapid depreciation of automobile held by Secret Service).

conclusion that due process requires a more prompt determination of the government's claim of forfeitability than the period defined by the statute of limitations or speedy-trial requirement of the sixth amendment.

IV. CONCLUSION

Once the wide variety of seized property is categorized in accordance with the reasons for its seizure, it is possible to develop a fairly straightforward body of rules for the disposition of seized property. Even the deodand theory fits into a modern analysis of the proper disposition of property seized under color of law. At the same time, the policies underlying the imposition of penalties for crime could be imposed in a more direct and sensible manner if civil courts simply treated the forfeiture of crime instruments as they do a fine, permitting criminal courts to impose the fine at the sentencing proceeding and to hold defendant's property only insofar as it is necessary to secure payment of the fine.[161]

161. Due process considerations, of course, should govern the determination whether and for how long retention of the seized property is necessary to ensure payment of the fine.

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