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California Forfeiture Statute: A Means For Curbing Drug-Trafficking?

In recent years, law enforcement efforts have been directed toward the problem posed by widespread drug-trafficking.¹ Research studies indicate that forfeiture of property attendant to a drug-related crime can be a highly effective means of attacking the problem.² Forfeiture is best defined as the "divestiture [to the sovereign] without compensation of property used in a manner contrary to the laws of the sovereign."³ The policy behind forfeiture is to remove the tools of crime from criminals.⁴ Forfeiture also prevents criminals from keeping the fruits of their crimes because property that may be forfeited includes proceeds traceable to illegal conduct.⁵ The concept of forfeiture is that when a statute provides for forfeiture of property connected with the commission of an unlawful act, the forfeiture occurs at the moment of the illegal use of the property.⁶ A conditional right to the property immediately vests in the Government.⁷ Title is perfected when a judicial decree of condemnation is obtained by the Government.⁸

Forfeiture statutes may be either civil or criminal. A civil forfeiture statute is an *in rem* proceeding,⁹ and the property is the defendant.¹⁰ The focus of the action is on the use of the property, not the motive of the individual.¹¹ No conviction of the person who used the property illegally is required¹² because the personal guilt of the individual

1. See MYERS & BRZOSTOWSKI, DRUG AGENTS' GUIDE TO FORFEITURE OF ASSETS 1 (1981) (analysis of federal drug forfeiture statutes) (available at United States Attorney's Office, Federal Building, 650 Capitol Mall, Sacramento, California 95814).

2. See *id.*

3. United States v. Eight (8) Rhodesian Stone Statues, 449 F. Supp. 193, 193 n.1 (C.D. Cal. 1978).

4. United States v. One 1976 Lincoln Mark IV, 462 F. Supp. 1381, 1391 (W.D. Penn. 1979); United States v. Jenison, 484 F. Supp. 747, 753 (D. Rhode Island 1980). Forfeiture is not a punishment for criminal activity, but rather an exercise of police power to confiscate property that was instrumental in crime so as to prevent a continuance of criminal activity. *Id.*

5. See 21 U.S.C. §881(a)(6); CAL. HEALTH & SAFETY CODE §11470(f).

6. Ivers v. United States, 581 F.2d 1362, 1367 (9th Cir. 1978); *Eight Rhodesian Stone Statues*, 449 F. Supp. at 193 n.1.

7. Ivers, 581 F.2d at 1367; *Eight Rhodesian Stone Statues*, 449 F. Supp. at 193 n.1.

8. Ivers, 581 F.2d at 1367; *Eight Rhodesian Stone Statues*, 449 F. Supp. at 193 n.1.

9. Various Items of Personal Property v. United States, 282 U.S. 577, 581 (1931).

10. *Id.*

11. See MYERS & BRZOSTOWSKI, *supra* note 1, at 48-49.

12. U.S. v. Veon, 538 F. Supp. 237, 242 (E.D. Cal. 1982). "The distinguishing characteristic of a criminal forfeiture provision is that, unlike the *in rem* character of civil forfeiture

is not at issue.¹³ The standard of proof is the civil standard of probable cause.¹⁴ The Government must show that reasonable grounds were present to believe the property was connected to illegal activity.¹⁵ The civil approach is effective because the low standard of proof allows the Government to prevail more easily in a forfeiture action. Civil forfeiture, then, is a highly effective tool for curbing the flow of drugs because property connected with illicit drug-trafficking is forfeited without imposing a severe burden on the Government. The criminal also will lose the profit gained from illegal activity. The federal forfeiture statute provisions for violation of controlled substances law are an example of the civil *in rem* procedure.¹⁶

In addition to the civil procedure, forfeiture may be accomplished by a criminal forfeiture statute.¹⁷ A criminal forfeiture statute provides for forfeiture of property used illegally when the user is convicted of the underlying crime.¹⁸ The criminal forfeiture statute differs from the civil statute in several ways. First, the criminal forfeiture is an *in personam* procedure, requiring a conviction of the person who used the property illegally before title is perfected in the Government.¹⁹ Unlike the civil procedure, the criminal action focuses on the motive of the individual, not on the use of the property.²⁰ Second, the standard of proof is higher under a criminal forfeiture statute. The Government must prove beyond a reasonable doubt that

. . . the personal guilt of the defendant is at issue." *Id.* See also *Various Items of Personal Property*, 282 U.S. at 580-81; MYERS & BRZOSTOWSKI, *supra* note 1, at 6-10 (discussion of differences in nature between civil and criminal forfeiture actions).

13. See *Veon*, 538 F. Supp. at 242; *Various Items of Personal Property*, 282 U.S. at 580-81; MYERS & BRZOSTOWSKI, *supra* note 1, at 6-10.

14. *E.g.*, U.S. v. One 56-Foot Yacht Named Tahuna, 702 F.2d 1276, 1282 (9th Cir. 1983). In rejecting the contention that the government must prove probable cause by at least a preponderance of the evidence, the court stated:

[T]he various levels of burden of proof have no application to the question of probable cause. That question concerns "only the probability, and not a prima facie showing, of criminal activity" [citations omitted]. It therefore seems inappropriate to speak in terms of probable cause being "proven" by one or another of the standards of proof applicable to proving the facts essential to establish a prima facie case.

Id. See also MYERS & BRZOSTOWSKI, *supra* note 1, at 6-10.

15. See *infra* notes 83-87 and accompanying text.

16. 21 U.S.C. §881. This statute provides in pertinent part for the forfeiture of controlled substances; raw materials used to manufacture controlled substances; containers for controlled substances; conveyances used to transport controlled substances, unless the conveyance is a common carrier or unlawfully in the possession of a person other than the owner; books, records, and research used to facilitate the manufacture of controlled substances; and proceeds traceable to an exchange of controlled substances unless owner does not have knowledge of the illegal source of the proceeds. *Id.*

17. See, *e.g.*, 18 U.S.C. §§1961-1968.

18. See MYERS & BRZOSTOWSKI, *supra* note 1, at 9-10.

19. See *Veon*, 538 F. Supp. at 242; MYERS & BRZOSTOWSKI, *supra* note 1, at 9-10.

20. See *Veon*, 528 F. Supp. at 242; MYERS & BRZOSTOWSKI, *supra* note 1, at 9-10.

the property was connected to criminal activity before obtaining a successful forfeiture.²¹ The criminal approach is less effective than civil forfeiture in curbing drug-trafficking because the Government will not prevail as easily under the criminal statute. The California drug related forfeiture statute is an example of the criminal *in personam* procedure.²²

The purpose of this comment is to recommend that the California statute be changed from a criminal to a civil forfeiture statute. This end can be accomplished by withdrawing the California statutory requirement of a conviction. As a consequence of the change, the burden on the Government will be reduced, and forfeitures will be sustained more easily. The statute then can become a highly effective tool for curbing drug-trafficking.

This comment will begin with a discussion of the history of forfeitures generally, which will be followed by a review of the history of federal and California drug related forfeiture statutes. The history section will provide the background necessary to understand the present law of forfeitures. The applicable federal and California statutes will be identified. Two reasons for changing the California statute then will be advanced. First, the present statute does not serve the purpose for which it was enacted. The statute was designed to curb the flow of controlled substances. The high standard of proof required, however, makes the statute ineffective for accomplishing this goal. Second, the criminal *in personam* nature of the statute is inconsistent with the history of forfeitures generally as civil *in rem* proceedings, and with the history of California forfeitures, which indicates that the state traditionally has patterned state forfeiture laws on federal forfeiture provisions.

The equities of forfeiture concerning the innocent owner also will be examined. This comment will suggest that the California approach is preferable to the federal approach. Under the federal statute, an owner who is innocent of any crime still may forfeit the illegally used property. California, however, protects innocent owners. By amending the drug related forfeiture statute to lower the standard of proof, yet retaining the protection afforded the innocent property owner,

21. See *infra* notes 138-42 and accompanying text.

22. CAL. HEALTH & SAFETY CODE §11470. This statute provides in pertinent part for the forfeiture of controlled substances; raw materials used to manufacture controlled substances; containers for controlled substances; books, records, and research used to facilitate the manufacture of controlled substances; boats, airplanes, and vehicles used to transport controlled substances; and proceeds traceable to an exchange of controlled substances. *Id.* Before the forfeiture may be sustained, however, the state must obtain a conviction of the user of the property. *Id.*

California will create a powerful, yet equitable, weapon with which to attack the problem of drug-trafficking. The recommendation for this change begins with a discussion of the history of forfeitures.

HISTORY

Forfeiture is an ancient doctrine having roots in the Old Testament, which states, "When an ox gores a man or woman to death, the ox must be stoned. Its flesh shall not be eaten, and the owner of the ox shall not be liable."²³ The passage mandated that the ox be forfeited to God regardless of the guilt or innocence of the owner. This ancient principle was the basis for the English common-law concept of the deodand, or "gift to God."²⁴ The concept was redefined as a "gift to the state" because the crown was viewed as the earthly representative of the "divine authority to which the corporate community believed itself to be ultimately responsible."²⁵ Property that caused the death of a human being was forfeited to the state.²⁶ The owner's culpability was immaterial. The forfeiture concept, therefore, developed as revenge against the offending property.²⁷

By 1800 statutory forfeiture existed in England.²⁸ The statutes set forth certain situations in which property would be subject to forfeiture.²⁹ The proceeding to determine whether the property should be surrendered was *in rem* because the action was brought directly against the property. Prior to 1800, actions were brought as revenge against the property regardless of the owner's culpability. The statutory forfeiture laws, however, did consider the owner's culpability.³⁰ The statutory *in rem* action was brought against the owner for illegal or

23. *Exodus* 21:28 (Jerusalem Bible).

24. Smith, *Modern Forfeiture Law and Policy: A Proposal for Reform*, 19 WM. & MARY L. REV. 661, 661 (1978).

25. See Finkelstein, *The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty*, 46 TEMP. L. Q. 169, 183 (1973) (in-depth discussion of the history of forfeitures).

26. Smith, *supra* note 24, at 661.

27. See O. W. HOLMES, *THE COMMON LAW* 34-35 (1881).

28. Smith, *supra* note 24, at 661.

29. See 3 BLACKSTONE, *COMMENTARIES* 262, 267 (1803).

Lands, tenements, and hereditaments may be forfeited in various degrees and by various means: 1. By crimes and misdemeanors. 2. By alienation contrary to law. 3. By nonpresentation to a benefice, when forfeiture is denominated a *lapse*. 4. By simony. 5. By nonperformance of conditions. 6. By waste. 7. By breach of copyhold customs. 8. By bankruptcy.

Id. (emphasis in original).

30. See Smith, *supra* note 24, at 661.

negligent conduct and as recompense for the wrongs sustained by another, or by the public generally.³¹

In addition to the civil forfeiture, which existed at common law, a second kind of English common-law forfeiture known as criminal forfeiture also was recognized.³² Contrary to the civil *in rem* action, criminal forfeiture was an *in personam* proceeding in which all the property of a convicted felon was forfeited to the king.³³ In the criminal forfeiture action, the litigation focused on the individual rather than the property. Under English law, then, civil *in rem* and criminal *in personam* forfeitures coexisted.

A slightly different history of federal forfeitures evolved in the United States. Forfeiture was never a part of American common law; nevertheless, forfeiture has existed by statute since colonial days.³⁴ In addition, criminal forfeitures were prohibited in 1790 by the first Congress of the United States.³⁵ The prohibition was reexamined and eliminated in 1970,³⁶ but until then, forfeiture in the United States was only by civil action.

Forfeiture under federal law currently is considered to be an *in rem* proceeding against property that has been used in connection with some wrong. Statutes that provide for forfeiture of contraband goods, such as drugs, are designed to rid the community of these items.³⁷ The belief developed that the illegal property was so repugnant that the property should be condemned to the state.³⁸ Modern statutes also provide for the forfeiture of property that is not illegal per se, such as boats,³⁹ vehicles,⁴⁰ and airplanes,⁴¹ but that has become objectionable because the property has been used in connection with illegal activity.⁴² A report of the United States House of Representatives⁴³ suggests that the rationale for forfeiture of these items is to deter crime:

Enforcement officers of the Government have found that one of

31. See 3 BLACKSTONE, COMMENTARIES 262, 267 (1803).

32. See MYERS & BRZOSTOWSKI, *supra* note 1, at 301.

33. See *id.* at 9, 301.

34. See Smith, *supra* note 24, at 661-62.

35. See 18 U.S.C. §3563; see also MYERS & BRZOSTOWSKI, *supra* note 1, at 301.

36. See *infra* notes 50-51 and accompanying text.

37. See Smith, *supra* note 24, at 662.

38. See *id.*

39. 21 U.S.C. §881(a)(4); CAL. HEALTH & SAFETY CODE §11490.

40. 21 U.S.C. §881(a)(4); CAL. HEALTH & SAFETY CODE §11490.

41. 21 U.S.C. §881(a)(4); CAL. HEALTH & SAFETY CODE §11490.

42. Smith, *supra* note 24, at 662; see also MYERS & BRZOSTOWSKI, *supra* note 1, at 75-77.

43. H.R. Rep. No. 2751, 81st Cong., 2d Sess., reprinted in 1950 U.S. CODE CONG. SERV. 2952, 2952-53.

the best ways to strike at commercialized crime is through the pocket-books of the criminals who engage in it. Vessels, vehicles and aircraft may be termed the operating tools of dope peddlers, and often represent major capital investments to criminals whose liquid assets, if any, are frequently not accessible to the Government. Seizure and forfeiture of these means of transportation provide an effective brake on the traffic in narcotic drugs.⁴⁴

Although statutory civil forfeiture in England was considered punishment for the owner's culpable conduct,⁴⁵ the goal of civil forfeiture in the United States is different. In the United States, the purpose of civil forfeiture is to confiscate the tools of crime to prevent a continuance of criminal activity⁴⁶ and to prevent criminals from keeping the fruits of their crimes.⁴⁷ The civil proceeding in the United States is independent of, and wholly unaffected by, any criminal proceeding.⁴⁸ The forfeiture action, however, is based on criminal conduct, which has led to the classification of civil forfeitures as quasi-criminal.⁴⁹ Despite the quasi-criminal nature, the standard of proof is the lower probable cause test used in civil actions. A successful forfeiture, then, is easier for the Government. The purpose of curbing crime, therefore, is advanced.

The civil action existed as the sole type of forfeiture proceeding for almost 200 years. In 1970, however, Congress established criminal forfeiture provisions as part of two federal statutes.⁵⁰ The two statutes provide for *in personam* actions. Forfeiture in those actions is dependent upon an initial conviction of the defendant of a pattern of criminal activity.⁵¹ Under present federal law, then, civil and criminal forfeitures coexist to make forfeiture applicable to a greater variety of situations.

The law of federal forfeitures has evolved to encompass civil and criminal actions that allow the Government to confiscate property used in illegal activities. Although the forfeiture statutes apply to a wide variety of crimes, modernly crimes related to controlled substances

44. *Id.* at 253.

45. *See supra* notes 22-23 and accompanying text.

46. *See One 1976 Lincoln Mark IV*, 462 F. Supp. at 1391; *Jenison*, 484 F. Supp. at 753.

47. *See supra* notes 43-44 and accompanying text.

48. *See The Palmyra*, 25 U.S. (12 Wheat.) 1, 14-15 (1827).

49. *Boyd v. United States*, 116 U.S. 616, 634 (1885).

50. The Racketeer Influenced and Corrupt Organizations Act [hereinafter referred to as RICO], 18 U.S.C. §§1962, 1963; The Controlled Substances Act, Continuing Criminal Enterprise Offense, 21 U.S.C. §848.

51. RICO, 18 U.S.C. §§1962, 1963; 21 U.S.C. §848.

occupy the forefront⁵² because forfeiture can be an effective means to curb the flow of drugs.⁵³ California⁵⁴ and federal⁵⁵ drug forfeiture statutes have been enacted to combat the problem of drug-trafficking. Although similar in language, the statutes are quite different in effect.

DRUG FORFEITURE STATUTES: FEDERAL V. CALIFORNIA

Forfeiture actions are created by statute to curb a wide variety of crimes. The focus of this section is on the provisions of the federal⁵⁶ and California⁵⁷ drug forfeiture statutes, which provide for forfeiture of property associated with drug-trafficking. A comparison of the statutes will indicate that the federal approach is more effective in accomplishing the statutory purpose. An understanding of the provisions of the federal statute, therefore, is necessary.

A. Federal Forfeiture Provisions

A major source for federal forfeiture in drug cases is 21 U.S.C. section 881, which was enacted in 1970 as part of the Comprehensive Drug Abuse Prevention and Control Act.⁵⁸ The Act was passed because Congress recognized a need to deal with the growing menace of drug abuse in the United States.⁵⁹ The statute does not require a conviction prior to forfeiture;⁶⁰ therefore, the action is a civil *in rem* proceeding.⁶¹ Section 881 sets forth a description of property forfeitable to the United States when used in violation of the Act. Specifically, forfeitable property includes: 1) controlled substances;⁶² 2) all materials used to manufacture controlled substances;⁶³ 3) containers;⁶⁴ 4) all conveyances used to transport controlled substances;⁶⁵ 5) books,

52. Comment, *An Analysis of Federal Drug-Related Civil Forfeiture*, 34 ME. L. REV. 435, 436-37 (1982).

53. See *supra* note 44 and accompanying text.

54. CAL. HEALTH & SAFETY CODE §11470.

55. 21 U.S.C. §881.

56. *Id.*

57. CAL. HEALTH & SAFETY CODE §11470.

58. 21 U.S.C. §§801-960.

59. H.R. Rep. No. 91-1444, 91st Cong., 2d Sess., reprinted in 1970 U.S. CODE CONG. & ADMIN. NEWS 4566, 4567; see also Comment, *supra* note 52, at 438.

60. See 21 U.S.C. §881.

61. See *supra* notes 11-13 and accompanying text.

62. 21 U.S.C. §881(a)(1).

63. *Id.* §881(a)(2).

64. *Id.* §881(a)(3).

65. *Id.* §881(a)(4).

records, and research;⁶⁶ and 6) proceeds traceable to an exchange of a controlled substance.⁶⁷

The federal forfeiture action begins with a seizure of the property by the investigating government agents.⁶⁸ This seizure may be made prior to, concurrent with, or subsequent to the arrest of the individual.⁶⁹ Although seizure may be made without a warrant,⁷⁰ the seizing official must have probable cause to believe that the property is connected to a violation of the Act.⁷¹ This pre-hearing seizure has been held constitutional.⁷²

Normally, the due process clauses of the fifth and fourteenth amendments require that an individual be given notice and an opportunity to be heard before being deprived of property.⁷³ When the following three criteria are satisfied, however, notice and a hearing may be delayed until after the seizure:⁷⁴ 1) the seizure serves an important governmental interest;⁷⁵ 2) a need for prompt actions exists;⁷⁶ and 3) a responsible government official initiates the seizure under a carefully worded statute.⁷⁷ Forfeiture under section 881 has been determined to satisfy the criteria. The important governmental interest is to reduce widespread drug abuse.⁷⁸ Prompt action is needed in seizing the property to prevent transfer to an innocent third party.⁷⁹ Finally, specially trained government officers have a duty to ensure that probable cause exists before the seizure is initiated.⁸⁰ Despite this exception to the general requirement of a pre-seizure hearing, however, the owner of the property is not deprived of an opportunity to be heard.⁸¹ A prompt post-seizure hearing is required.⁸² This post-seizure hearing is the forfeiture hearing.

At the forfeiture hearing, the Government must demonstrate that

66. *Id.* §881(a)(5).

67. *Id.* §881(a)(6).

68. *See* Comment, *supra* note 52, at 439.

69. *See* MYERS & BRZOSTOWSKI, *supra* note 1, at 13; Comment, *supra* note 52, at 439.

70. *See* Comment, *supra* note 52, at 439.

71. *Id.*; *see also* MYERS & BRZOSTOWSKI, *supra* note 1, at 13.

72. *See* U.S. v. One 1967 Porsche, 492 F.2d 893, 895 (9th Cir. 1974); *Ivers*, 581 F.2d at 1368.

73. *See* Fuentes v. Shevin, 407 U.S. 67, 80-81 (1972).

74. *See* MYERS & BRZOSTOWSKI *supra* note 1, at 200.

75. *Fuentes*, 407 U.S. at 90-91; *see also* MYERS & BRZOSTOWSKI, *supra* note 1, at 200.

76. *Fuentes*, 407 U.S. at 91; *see also* MYERS & BRZOSTOWSKI, *supra* note 1, at 200.

77. *Fuentes*, 407 U.S. at 91; *see also* MYERS & BRZOSTOWSKI, *supra* note 1, at 200.

78. *See* MYERS & BRZOSTOWSKI, *supra* note 1, at 200-01.

79. *Id.*

80. *Id.*

81. *See id.* at 212.

82. *Id.*

the required probable cause for the seizure was present. To meet the standard of probable cause, the Government must show that reasonable grounds were present to believe the property was connected to illegal drugs.⁸³ The grounds for belief may be supported by less than prima facie evidence but more than mere suspicion.⁸⁴ Probable cause is a low standard. The Government should easily meet the requirements. The quasi-criminal nature of forfeitures,⁸⁵ however, makes the exclusionary rule applicable to the proceeding.⁸⁶ As a result, evidence obtained in violation of the fourth amendment is inadmissible to establish the probable cause.⁸⁷

At the forfeiture hearing, once the Government has shown probable cause for the seizure, the burden of production and persuasion shifts to the party claiming the property (the claimant)⁸⁸ to establish that the property is not subject to forfeiture.⁸⁹ The claimant may defend against forfeiture either by vitiating the probable cause shown by the Government or by affirmatively demonstrating by a preponderance of the evidence that the property was not used illegally.⁹⁰ Unlike most civil and criminal proceedings, the burden is placed on the claimant, provided the Government first demonstrates probable cause for the seizure.⁹¹ This placing of the burden on the claimant, however, has been found constitutional.⁹²

The claimant also has very few defenses to the federal forfeiture. Acquittal or dismissal of charges in any criminal action, for exam-

83. See *supra* note 14 and accompanying text.

84. *Id.*

85. *Boyd*, 116 U.S. at 634.

86. *E.g.*, *U.S. v. One 1977 Mercedes Benz*, 450 SEL, 708 F.2d 444, 448 (9th Cir. 1983).

87. *Id.*

88. See *MYERS & BRZOSTOWSKI*, *supra* note 1, at 246. Claimants are persons with a possessory interest in the property seized. *Id.*

89. See 19 U.S.C. §1615, incorporated by 21 U.S.C. §881(d); *Mercedes Benz*, 708 F.2d at 447.

90. *Tahuna*, 702 F.2d at 1281.

91. See *United States v. One Twin Engine Beech Airplane*, 533 F.2d 1106, 1107 (9th Cir. 1976).

92. See *United States v. One 1970 Pontiac GTO, 2-Door Hardtop*, 529 F.2d 65, 66 (9th Cir. 1976). The court stated:

Forfeiture statutes are deemed criminal for the purpose of protecting rights secured by the 4th and 5th amendments [citations omitted] but they are predominantly civil. . . . The Supreme Court has firmly refused to broaden the criminal aspect of forfeitures so as to encompass a wider range of constitutional protections [citations omitted]. Accordingly, we conclude the challenged forfeiture statutes are not criminal enough to prevent Congress from imposing the burden of proof on claimant and we uphold the constitutionality of 21 U.S.C. §881. . . .

Id.

ple, is not a defense.⁹³ Innocence⁹⁴ is not a defense unless the claimant can show everything reasonable was done to prevent the illegal use of the property.⁹⁵ If, however, the property to be forfeited is proceeds, the owner's lack of knowledge or consent to the illegal activity is a defense.⁹⁶ Further defenses exist if the conveyance is a common carrier⁹⁷ or is in the unlawful possession of another.⁹⁸ With the exception of these few defenses, a federal forfeiture is very difficult to defeat. An illustration of the proceeding will be helpful to understand federal forfeiture more fully.

An agent of the Drug Enforcement Administration (hereinafter DEA agent) may suspect that D is dealing in cocaine and arrange for a meeting with D to "buy" some cocaine. D arrives at the designated location to discuss the sale, and the DEA agent observes what appears to be a bag of cocaine under the front passenger seat of D's car. The observation of the cocaine is enough to create the probable cause that the car was used to facilitate an illicit drug transaction and is thus forfeitable.⁹⁹ A subsequent chemical analysis establishing the bagged substance is cocaine will confirm the probable cause;¹⁰⁰ however, the DEA agent may seize the vehicle upon the initial observation, and at that point, begin the forfeiture proceeding, regardless of whether D is arrested.¹⁰¹

At the forfeiture hearing, the Government will establish the probable cause that the car is forfeitable. The evidence of the cocaine in D's car will be enough to show the probable cause.¹⁰² The burden

93. See MYERS & BRZOSTOWSKI, *supra* note 1, at 46-49. Acquittal or dismissal of charges is not a defense to a federal forfeiture procedure because of the independence of the criminal and forfeiture actions. Three reasons have been advanced for the independence of the trials. First, the issues in the two proceedings are different. Civil forfeiture proceedings focus on the use of the property and not the criminal state of mind of the claimant; criminal proceedings focus on both, and acquittal or dismissal of the charges may simply be because the government was unable to prove the requisite intent, without even deciding the question of use. Second, the burdens of proof in the two proceedings are different, and acquittal or dismissal may be the result of an inability to meet the "beyond a reasonable doubt" test; this does not necessarily mean the evidence would fail to meet the civil standard. Third, the parties to the two proceedings are different. In the criminal action the wrongdoer is the defendant, and in the forfeiture action, the defendant is the property. *Id.* See also *One Lot Emerald Cut Stones and One Ring v. United States*, 409 U.S. 232, 234 (1972).

94. For purposes of this comment, innocence refers to a person who is innocent of any wrongdoing and unassociated with any criminal activity.

95. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 689 (1974).

96. 21 U.S.C. §881(a)(6).

97. *Id.* §881(a)(4)(A).

98. *Id.* §881(a)(4)(B).

99. See *supra* note 76 and accompanying text.

100. *Id.*

101. See *supra* note 62 and accompanying text.

102. See *supra* note 76 and accompanying text.

then will shift to D to show either that the car was not used or intended to be used illegally,¹⁰³ or that everything reasonable was done to prevent the illegal use of the car.¹⁰⁴ If D is unable to meet that burden, the car will be forfeited. If the chemical analysis discloses that the bagged substance is not cocaine, forfeiture will be defeated. The evidence will have demonstrated that the car was not used illegally, and thus, the probable cause for forfeiture will have been vitiated.¹⁰⁵

Federal drug related forfeitures, therefore, are civil in form and completely independent of any related criminal proceeding. The low standard of proof allows the Government to prevail more easily in a forfeiture action. The civil statute, consequently, is an effective means to curb drug-trafficking. California formerly employed civil forfeiture procedures in fashion similar to the federal government. As the California drug forfeiture statute now stands, however, the result is quite different.

B. California Forfeiture Provisions

The first California forfeiture statute, enacted in 1939,¹⁰⁶ was embodied in the original Health and Safety Code.¹⁰⁷ The original statute¹⁰⁸ applied only to vehicles and provided that any vehicle unlawfully used in connection with narcotics would be forfeited to the state.¹⁰⁹ The clear purpose behind the statute was to curb the flow of narcotics.¹¹⁰ A forfeiture proceeding under the statute was considered an *in rem* action against the property.¹¹¹ Like the federal *in rem* proceeding, then, the state action was civil and was subject to the same requirements as those provided in a federal forfeiture.¹¹² Also similar

103. 19 U.S.C. §1615.

104. *Pearson Yacht*, 416 U.S. at 689.

105. *Tahuna*, 702 F.2d at 1281.

106. 1939 Cal. Stat. c. 60, §§11610-11629, at 767-69.

107. 1939 Cal. Stat. c. 60, at 482. The purpose of creating the California Health & Safety Code was to consolidate and revise the law relating to the preservation of the public health and safety. *Id.*

108. 1939 Cal. Stat. c. 60, §11610, at 767 (repealed by 1967 Cal. Stat. c. 280, §1, at 1437).

109. *Id.* Compare CAL. HEALTH & SAFETY CODE §11610 (which specifically relates to violations of "narcotics" law) with 21 U.S.C. §881 (which relates more generally to violations of "controlled substances" law). Although "narcotics" is more specific than "controlled substances," the cases interpreting California Health & Safety Code Section 11610 tended to use the terms interchangeably. See, e.g., *People v. One 1964 Chevrolet Corvette Convertible*, 274 Cal. App. 2d 721, 723, 79 Cal. Rptr. 447, 448 (1969) (forfeiture of car used for possession of marijuana, a non-narcotic drug).

110. See *One 1964 Chevrolet Corvette Convertible*, 274 Cal. App. 2d at 728, 79 Cal. Rptr. at 451-52.

111. See *People v. One 1941 Chevrolet Coupe*, 37 Cal. 2d 283, 286, 231 P.2d 832, 834 (1951).

112. See *supra* notes 68-92 and accompanying text.

to the federal forfeiture statute, the first California statute could have been classified as "quasi-criminal" because, despite the civil nature of the statute, the purpose was to deter crime.¹¹³ The civil aspects of the original statute established that the standard of proof was a showing of probable cause. The penal aspects, however, invoked certain rules of evidence normally applicable to criminal actions.¹¹⁴ These rules of evidence included the exclusionary rule.¹¹⁵

Defenses to forfeiture under the former California statute also were similar to those in the federal forfeiture action because only limited protection was extended to innocent owners. Although the California statute did not require an owner to do everything reasonable to prevent the illegal use of the property,¹¹⁶ the innocence of the owner, with few exceptions,¹¹⁷ was not a defense.¹¹⁸ The rationale was that narcotics traffic was so great a problem that the drastic penalty of seizure of vehicles used to transport contraband was justified.¹¹⁹ The public interest of defeating drug related crimes outweighed the loss suffered by a person whose confidence in others was misplaced.¹²⁰

The denial of innocence, in most instances, as a defense in a forfeiture proceeding was held constitutional by a California Court of Appeal in *People v. One 1961 Ford Falcon*.¹²¹ The case involved the forfeiture of a car because the owner's daughter was found in the car with a bag of marijuana. The Government and claimant both conceded that the daughter had permission to use the car, but that the father did not know of the illegal use. The court, nevertheless, upheld the forfeiture because of the seriousness of the drug-trafficking problem.¹²² The court reasoned that if the registered owner relinquishes control of the vehicle, the relinquishment is generally only to someone known to the owner and for a relatively short period of time.¹²³ The

113. See *People v. One 1960 Cadillac Coupe*, 62 Cal. 2d 92, 96, 396 P.2d 706, 709, 41 Cal. Rptr. 290, 293 (1964).

114. See *People v. One 1959 Porsche Coupe*, 252 Cal. App. 2d 1044, 1046, 60 Cal. Rptr. 816, 818 (1967).

115. See *supra* notes 86-87 and accompanying text.

116. See *People v. One 1957 Ford 2-Door*, 180 Cal. App. 2d 545, 552, 4 Cal. Rptr. 793, 798 (1960).

117. See 1939 Cal. Stat. c. 60, §11619, at 768 (repealed by 1967 Cal. Stat. c. 280, §1, at 1437).

118. *One 1957 Ford 2-Door*, 180 Cal. App. 2d at 551, 4 Cal. Rptr. at 797.

119. See *id.*; *One 1964 Chevrolet Corvette Convertible*, 272 Cal. App. 2d at 728, 79 Cal. Rptr. at 451-52.

120. See *One 1957 Ford 2-Door*, 180 Cal. App. 2d at 552, 4 Cal. Rptr. at 798; *One 1964 Chevrolet Corvette Convertible*, 274 Cal. App. 2d at 728, 79 Cal. Rptr. at 451-52.

121. 215 Cal. App. 2d 149, 153-54, 30 Cal. Rptr. 110, 112-13 (1963).

122. *Id.* at 154, 30 Cal. Rptr. at 113.

123. *Id.*

owner also has a choice whether to lend the car.¹²⁴ Theoretically, the registered owner is still in control of the vehicle. The court pointed out that the owner is punished because the legislature intended to curb narcotics traffic by penalizing those persons who have control over the vehicle.¹²⁵

Although the owner's innocence of the drug related crime was not a defense to the civil forfeiture action, lack of consent by the owner to allow the use of the vehicle was a defense.¹²⁶ That defense was similar to the present federal provision which prohibits forfeiture if the vehicle was unlawfully in the possession of someone other than the owner at the time of the illegal use.¹²⁷ Thus, the original California forfeiture statute paralleled the federal forfeiture provisions in many important aspects.

The California forfeiture statute was repealed in 1967¹²⁸ when the Legislature concluded that the expense of maintaining the forfeiture program under the statute was excessive and that the statute had no deterrent effect.¹²⁹ For reasons unknown,¹³⁰ the statute was reenacted in 1972.¹³¹ The new statute provides for the forfeiture of property used in connection with the manufacture or distribution of controlled substances and incorporates many types of property, including vehicles.¹³²

Evidence tends to demonstrate that the new statute is patterned after the federal provisions. The federal statute was passed only two years before the California statute.¹³³ The present California statute uses language identical to the federal statute in most of the provisions.¹³⁴ Forfeitable property under the California statute, for example, is the same as that enumerated in the federal statute.¹³⁵ The federal statute was amended in 1978 to provide for forfeiture of "moneys, negotiable instruments, securities, and other things of value," including

124. *Id.*

125. *Id.*

126. *See One 1957 Ford 2-Door*, 180 Cal. App. 2d at 550, 4 Cal. Rptr. at 797-98.

127. 21 U.S.C. §881(a)(4)(B).

128. *See* 1967 Cal. Stat. c. 280, §3, at 1438.

129. *Id.*

130. Research has been unable to uncover any reason for reenacting the statute. *See Review of Selected 1976 California Legislation*, 8 PAC. L.J. 312, 314 [hereinafter cited as *Review of 1976 Legislation*].

131. 1972 Cal. Stat. c. 1407, §1, at 3025.

132. CAL. HEALTH & SAFETY CODE §11470. Unlike the prior California forfeiture statute, the present statute relates to violations of "controlled substances" law, not to violations of "narcotics" law. *Id.*; *see supra* note 109.

133. 21 U.S.C. §881 (1970).

134. *Compare* 21 U.S.C. §881 with CAL. HEALTH & SAFETY CODE §11470.

135. *Compare* 21 U.S.C. §881 with CAL. HEALTH & SAFETY CODE §11470.

proceeds.¹³⁶ The California statute was amended similarly in 1982.¹³⁷ Based on the evolution of the two statutes, the reasonable inference arises that the California forfeiture law has been patterned on the federal counterpart.

Despite the similarities of the present California and federal statutes, they are different in several significant ways. First, California requires the owner or user of the property to be convicted of the drug offense before the state can prevail in the forfeiture action.¹³⁸ As a consequence, a California forfeiture is more difficult to sustain than a federal forfeiture. The California forfeiture procedure begins with a seizure of the property.¹³⁹ Although probable cause is enough for the seizure,¹⁴⁰ at the forfeiture hearing the state must prove beyond a reasonable doubt that the property was connected to criminal activity.¹⁴¹ This burden is met only after obtaining the conviction of the owner or user.¹⁴²

The second way in which the California statute differs from the federal statute is in extending greater protection to the innocent property owner.¹⁴³ California requires that the owner have actual knowledge of the illegal use before the property will be forfeited. At the forfeiture hearing the state bears the burden of proving beyond a reasonable doubt that the owner consented to the use of the property with knowledge that the property would be used illegally.¹⁴⁴ This burden of proving knowledge is independent of the conviction requirement.¹⁴⁵ The conviction of the user first must be obtained in a criminal trial. In the subsequent forfeiture action, the state must introduce evidence of the conviction and prove that the owner had actual knowledge of the illegal use.¹⁴⁶ This protection extended to innocent owners differs from the federal procedure. Under the federal law, the Government does not have to prove actual knowledge unless the property to be forfeited is proceeds.¹⁴⁷ Additionally, under the federal statute, the burden is on the innocent owner to prove that everything reasonable

136. See H.R. Rep. No. 95-1193, 95th Cong. 2d Sess., reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 9496, 9522.

137. See 1982 Cal. Stat. c. 1289, §1, at ____.

138. CAL. HEALTH & SAFETY CODE §11470.

139. *Id.* §11471.

140. *Id.*

141. See *supra* notes 19-22 and accompanying text; CAL. HEALTH & SAFETY CODE §11491.7.

142. See *supra* notes 19-22 and accompanying text; CAL. HEALTH & SAFETY CODE §11473.

143. CAL. HEALTH & SAFETY CODE §11488.5(e).

144. *Id.* §11488.5(d)(1).

145. *Id.* §11488.5(d)(2).

146. *Id.* §§11488.5(d)(2), 11488.5(e).

147. See *supra* note 96 and accompanying text.

was done to prevent the illegal use of the property.¹⁴⁸ As will be discussed more fully below,¹⁴⁹ the California approach is more equitable because the innocent owner will not suffer the consequences of another person's criminal conduct.

The third difference between the California and federal statutes concerns the forfeiture of vehicles. Under the federal statute, a vehicle may be forfeited if used to facilitate the possession of even a minute amount of any controlled substance.¹⁵⁰ The California statute was amended in 1982 to make vehicles forfeitable if used to facilitate the possession for sale of specific amounts of specific controlled substances.¹⁵¹ The California statute also prohibits forfeiture of a vehicle if a person other than the defendant has a community property interest in the vehicle and the vehicle is the only one available to the defendant's immediate family.¹⁵² Under the California statute, then, forfeiture of a vehicle is more difficult than under the federal statute.

Based on the previous illustration,¹⁵³ under the California provisions the DEA agent would be able to seize the car upon the initial observation of the cocaine. If the bag contains the requisite statutory amount of cocaine,¹⁵⁴ the observation is enough probable cause for the seizure. D will have to be convicted in a criminal trial, however, before the state can sustain the standard of proof in the forfeiture action. The California forfeiture action, then, necessarily is dependent upon the outcome of the criminal trial.

This dependency of the forfeiture action upon the criminal trial creates a practical problem. The various steps involved in California criminal procedure may cause the criminal trial to last for a year or longer. In the meantime, the property is being held in storage, deteriorating and costing the state a considerable amount of money. Under federal law, the criminal and forfeiture actions are completely independent.¹⁵⁵ In the federal action, the car may be forfeited even if no criminal charges are brought against D; therefore, the federal government incurs no undue costs.

A successful forfeiture judgment in California is more difficult to

148. See *supra* note 95 and accompanying text.

149. See *infra* notes 168-72 and accompanying text.

150. *Pearson Yacht*, 416 U.S. at 693.

151. 1982 Cal. Stat. c. 1280, §1, at ____ (amending CAL HEALTH & SAFETY CODE §11470); CAL. HEALTH & SAFETY CODE §11470(g).

152. 1982 Cal. Stat. c. 1280, §1, at ____ (amending CAL. HEALTH & SAFETY CODE §11470); CAL HEALTH & SAFETY CODE §11470(g).

153. See *supra* notes 99-105 and accompanying text.

154. See CAL. HEALTH & SAFETY CODE §11470(g).

155. See *supra* notes 48, 93 and accompanying text.

obtain because the criminal standard is more difficult to meet than is the civil standard. The federal government is required to show only probable cause at the forfeiture hearing. The claimant then has the burden of proving by a preponderance of the evidence the lack of probable cause or that everything reasonable was done to prevent the illegal use. Under California law, the state must prove beyond a reasonable doubt that the property was used illegally and that the owner knew of the illegal use. The burden on the state clearly is more difficult than the burden on the federal government.

The requirement of a conviction is in direct contravention of the historical purpose of forfeitures,¹⁵⁶ including the purpose of the prior California statute.¹⁵⁷ The state must meet a difficult standard to prevail. The forfeiture action, thus, is not as effective in curbing crime. This conviction requirement must be reexamined in light of the history and purpose of forfeiture statutes. The California Legislature should amend the forfeiture statute by eliminating the requirement of a conviction, to create a civil forfeiture statute. With a lower standard of proof, forfeitures will be obtained more easily, thereby promoting the purpose of a forfeiture action.

REDUCING THE STANDARD OF PROOF

As previously discussed, a successful forfeiture in California is more difficult to obtain than a federal forfeiture because California requires the state to meet a higher standard of proof. Although state and federal law are independent, the California drug forfeiture law is patterned on the federal counterpart.¹⁵⁸ Unlike federal forfeitures, though, the California law is an ineffective means for curbing the flow of controlled substances.¹⁵⁹ The California Legislature can remedy this problem by reducing the standard of proof. Two reasons for lowering the standard will be discussed. First, the California statute does not satisfy the purpose for which the statute was enacted. Second, the statute is inconsistent with the history of forfeitures generally and with the tendency of the California Legislature to pattern state forfeiture provisions on federal precedent. If the standard of proof is lowered to that prevailing in a civil action, the statute will be a

156. *See supra* notes 23-44 and accompanying text.

157. *See supra* notes 113-26 and accompanying text.

158. *See supra* notes 136-38 and accompanying text.

159. Under the California statute, the state bears a more difficult burden. Forfeitures are not easily sustained. The statute thus is not effective in curbing drug-trafficking. *See supra* notes 137-49 and accompanying text.

powerful weapon to attack drug-trafficking. As the statute presently stands, this purpose is not being fulfilled.

A. *The Purpose of the California Statute*

The purpose of the original California drug related forfeiture statute was to curb narcotics flow.¹⁶⁰ The purpose of the present statute is to deter trafficking of controlled substances.¹⁶¹ Under the present statute, however, that purpose is not being achieved because forfeitures are difficult for the state to sustain.¹⁶² A proceeding that will accomplish the statutory purpose, ease the burden on the state, yet comport with notions of equity and fairness, is both desirable and necessary. The statutory purpose can be achieved without compromising the critical notions of equity and fairness if the standard of proof is lowered.

Although the present California statute evidences no express purpose,¹⁶³ the language of the statute is substantially similar to that of the former state statute and to the present federal statute. By parity of reasoning, although the present state statute has a higher standard of proof, the purpose of the statute is the same as the purpose of the former and federal statutes.¹⁶⁴ In further support of this reasoning, when the prior state statute was repealed, the Legislature did not express an intent to alter the underlying purpose of curbing drug traffic.¹⁶⁵ The Legislature stated that the statute was repealed because the law was ineffective as a deterrent.¹⁶⁶ The logical inference arises that the lawmakers wanted a statute that would be more effective in curbing the flow of drugs. The statute was reenacted with a higher standard of proof, however, which creates an even less effective deterrent because the state cannot sustain the forfeiture of illegally used property or illegal profits as easily as in a civil action. A lower standard of proof would fulfill the purpose of forfeitures by depriving criminals of property used and profits gained illegally.¹⁶⁷

By reducing the standard of proof, California can still maintain

160. See *One 1964 Chevrolet Corvette Convertible*, 274 Cal. App. 2d at 728, 79 Cal. Rptr. at 451-52.

161. See *infra* notes 163-65 and accompanying text; see also *supra* note 109.

162. See *supra* notes 138-42 and accompanying text.

163. See *supra* note 131 and accompanying text.

164. See *Los Angeles Met-Transit v. Brotherhood of Railroad Trainment*, 54 Cal. 2d 684, 688-89, 355 P.2d 905, 907, 8 Cal. Rptr. 1, 3 (1960).

165. 1967 Cal. Stat. c. 280, §3, at 1438 (repealing 1939 Cal. Stat. c. 60, §11610, at 767).

166. *Id.*; see also *Review of 1976 Legislation*, *supra* note 130, at 314.

167. The forfeiture will provide revenue to the people because the seized items go to law enforcement agencies and money will go into the state treasury.

the interest in protecting innocent claimants. Under the federal statute, a forfeiture is very difficult to defeat, even if the claimant is innocent of any wrongdoing. The landmark case of *Calero-Toledo v. Pearson Yacht Leasing Co.*¹⁶⁸ held that the innocence of the claimant was no defense unless the claimant did everything reasonable to prevent the illegal use of the property.¹⁶⁹ The ruling imposes an affirmative duty upon the claimant to ensure against an illegal use of the property.¹⁷⁰

Although the duty to prevent illegal use of property is consistent with the history of forfeitures, a departure that protects innocent owners is justifiable. Forfeitures are designed to remove the instrumentalities of illegal activities from criminals to prevent the continuation of the crime.¹⁷¹ Deprivation of an innocent claimant's property does not comport with the purpose of deterrence because the innocent owner does not need to be deterred from criminal activity. By depriving the innocent claimant of property for fear of a continuation of the crime, the federal government creates a grave inequity. If, however, the innocent claimant is protected, the purpose of deterrence will not be hampered because the innocent owner has done nothing criminal from which to be deterred.

The California Legislature avoided the problem by enacting a statute providing that if the claimant did not have actual knowledge that the property would be used, or was used, for an illegal purpose, forfeiture is prohibited.¹⁷² Under this provision, an innocent claimant will not suffer a forfeiture because of another person's wrongdoing. A reduction in the standard of proof need not affect this provision. The state can still be required to prove by a showing of probable cause, consistent with the lower standard of proof, that the claimant had actual knowledge of the illegal activity.

Another way California protects claimants is through the provisions allowing forfeiture of vehicles. The statute requires that the vehicle must have been used to facilitate the possession for sale of specific amounts of controlled substances.¹⁷³ The requisite amounts are quite large;¹⁷⁴ therefore, unless the claimant is dealing in drugs extensively, forfeiture of a vehicle is unlikely to occur. Furthermore, even if the

168. 416 U.S. 663 (1974).

169. *Id.* at 689.

170. *See id.*

171. *See supra* notes 45-48 and accompanying text.

172. CAL. HEALTH & SAFETY CODE §11488.5(e).

173. *Id.* §11470(g).

174. *Id.*

vehicle were used to facilitate the possession of the requisite amount of a controlled substance, forfeiture still may not occur. If a person other than the defendant has a community property interest in the vehicle or the vehicle is the only one available to the defendant's immediate family,¹⁷⁵ the forfeiture will not be sustained. These provisions do not have to be altered by a reduction in the standard of proof.

Finally, California can protect the rights of claimants, innocent or guilty, without requiring a conviction prior to forfeiture through the exclusionary rule. The penal aspects of a civil forfeiture statute allow application of the exclusionary rule to the action.¹⁷⁶ All evidence obtained in violation of the individual's fourth amendment rights is inadmissible to establish the lower probable cause requirement.¹⁷⁷ The exclusionary rule, then, serves to protect the individual at the forfeiture hearing. A reduction in the standard of proof will not affect this protection. The federal civil forfeiture scheme provides for the use of the exclusionary rule, and no reason exists to eliminate that protection simply because California reduces the standard of proof.

The California forfeiture statute was designed to curb drug-trafficking. The high standard of proof makes successful forfeiture actions very difficult, and as a result, the statute does not serve the legislative purpose. By reducing the standard of proof to a probable cause standard, the state goal of protecting the individual will not be hampered. The probable cause standard also will realign the California statute with the history of forfeitures.

B. The California Approach is Inconsistent with the History of Forfeitures

Forfeiture has a deeply rooted history as a civil *in rem* proceeding.¹⁷⁸ The focus historically has been on the use of the property, rather than on the motive of the individual.¹⁷⁹ Although presently *in personam* forfeitures exist, the first criminal forfeiture statutes in the United States were not enacted until 1970.¹⁸⁰ The historical strength, therefore, lies in favor of civil forfeiture.

Consistent with this historical development, as noted above, California initially enacted a civil forfeiture statute.¹⁸¹ For reasons unknown,

175. *Id.*

176. *One 1977 Mercedes Benz*, 708 F.2d at 448.

177. *Id.*

178. *See supra* notes 23-50 and accompanying text.

179. *Id.*

180. *See supra* notes 50-51 and accompanying text.

181. 1939 Cal. Stat. c. 60, §11610, at 767 (repealed 1967 Cal. Stat. c. 280, §1, at 1437).

the statute was replaced with a criminal statute.¹⁸² The focus of the new statute is on the individual. This change of focus affects the underlying purpose by making forfeiture a form of punishment.¹⁸³ The result is that the statute is divorced from the history and precedent of forfeitures. By reenacting a civil *in rem* statute, California again will have a forfeiture law consistent with the history of forfeitures. The civil statute also will be consistent with the history of patterning the state forfeiture provisions on the federal law.

California clearly has evidenced a tendency to pattern the state forfeiture laws on federal forfeiture provisions.¹⁸⁴ The language and history of the present California statute is substantially similar to that of the federal statute. The California requirement that a conviction be obtained against the user prior to the forfeiture hearing, however, is inconsistent with this patterning. If the standard of proof is lowered, the traditional patterning after the federal model will continue.

At first glance, the theory that California is following the federal government could support the present California *in personam* statute. Congress enacted two federal criminal forfeiture statutes for the first time in 1970,¹⁸⁵ the same year the civil statute, 21 U.S.C. section 881, was passed, and only two years prior to the reenactment of the California statute.¹⁸⁶ The congressional enactment could be viewed as an endorsement of criminal forfeiture statutes after almost 200 years of prohibition. The California Legislature perhaps enacted the present statute with the intent to support federal recognition and creation of criminal forfeitures. This hypothesis is not viable, however, to support the replacement of the former civil forfeiture procedure with a criminal forfeiture proceeding.

First, the federal criminal statutes that require a conviction involve a pattern of crime,¹⁸⁷ and are not directed toward single criminal acts. The federal government has maintained the statute providing for *in rem* forfeiture of property connected to individual criminal acts.¹⁸⁸ If the federal criminal forfeiture statutes were models for the present California drug related forfeiture statute, a logical conclusion would be that the California statute would require a pattern of crime. That

182. See *supra* notes 128-31 and accompanying text.

183. See MYERS & BRZOSTOWSKI, *supra* note 1, at 9, 301.

184. See *supra* notes 133-37 and accompanying text.

185. RICO, 18 U.S.C. §§1962-1968; 21 U.S.C. §848.

186. CAL. HEALTH & SAFETY CODE §11470.

187. See RICO, 18 U.S.C. §§1961-1968; 21 U.S.C. §848; see also MYERS & BRZOSTOWSKI, *supra* note 1, at 302-41, for a full discussion of the federal criminal forfeiture statutes.

188. 21 U.S.C. §881.

requirement does not exist under this California statute. The federal criminal statutes, then, cannot be seen as precedent for a criminal forfeiture statute unrelated to a pattern of criminal activity.

In 1982 the California Legislature addressed the problem of a pattern of crime with the enactment of Penal Code section 186.1. This statute is patterned directly on the federal criminal statutes.¹⁸⁹ The purpose of Penal Code section 186.1 is to punish and deter organized criminal activities through forfeiture of profits acquired as a result of the activities.¹⁹⁰ California, therefore, has a very specific criminal forfeiture statute modeled after the federal criminal forfeiture statutes. The California drug related forfeiture¹⁹¹ need not remain a criminal procedure.

Federal law contains both civil and criminal forfeitures. By reducing the standard of proof, California will make the present drug related forfeiture statute the equivalent of the federal statute, and hence create a civil forfeiture action. California also will have a criminal statute patterned on the federal criminal forfeiture statutes.¹⁹² California civil and criminal forfeiture statutes then will coexist. The result will be that California will have a civil forfeiture statute that is an effective tool for deterrence, and that is consistent with history and precedent.

CONCLUSION

Forfeiture actions are used frequently to attack the particular vice of the era. Modernly, forfeitures are used to curb the flow of controlled substances. This purpose and use have firm roots in the history of forfeitures. Both the federal government and California adopted civil *in rem* proceedings to deter drug-trafficking. With the advent of the 1970s, criminal forfeitures became a part of American law. California repealed the civil forfeiture statute and subsequently adopted a criminal forfeiture statute. This present statute has changed the focus of forfeitures from the use of the property to the conduct and intent of the claimant.

Arguments have been advanced to support the contention that the present California forfeiture statute is ineffective as a deterrent to drug-trafficking because the criminal standard of proof is very difficult to meet. Thus, the state is unlikely to prevail in a forfeiture action. California could deter drug-trafficking effectively if the criminal

189. Compare RICO, 18 U.S.C. §§1961-1968 with CAL. PENAL CODE §186.1.

190. See CAL. PENAL CODE §186.1.

191. CAL. HEALTH & SAFETY CODE §11470.

192. CAL. PENAL CODE §186.1.

is not only incarcerated, but also deprived of illegal assets. A criminal will not be in the financial position to start trafficking drugs again after serving a jail sentence if the illegal assets are forfeited. Even if the user of the property is not convicted, forfeiture of illegal assets and property used illegally will prevent the continuance of the criminal activity.

Deterrence can be accomplished if the forfeiture statute is amended to reduce the standard of proof to the federal civil standard, which has been held constitutional. The history of forfeiture statutes indicates that the California forfeiture provisions have been patterned after the federal laws, evidencing a desire to conform to the federal approach. The result of amending the California statute to conform with the federal law would be an effective, civil drug forfeiture statute. This comment also has shown that California should retain the more equitable approach in affording greater protection to the innocent property owner. By amending the forfeiture statute to create a civil action, then, California will produce an effective, yet equitable means to deter drug-trafficking, consistent with the history and purpose of forfeitures.

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