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THE NEW YORK CITY CIVIL FORFEITURE LAW: IS IT GOING TOO FAR?

While civil forfeiture¹ has existed for centuries,² only in recent years has it become an increasingly popular and powerful tool of law enforcement.³ Civil forfeiture has a history dating back to biblical times.⁴ The Bible speaks of the forfeiture of an ox when it gores a person to death,⁵ and of punishment to its owner if he knew of the animal's dangerous nature.⁶ In more recent times, the English common law included two different kinds of forfeiture.⁷ The first was referred to as "criminal," "common law," or "attainer," and it involved the forfeiture of a person's entire estate, or all of his property, if he committed a very serious crime such as treason.⁸ This occurred in an in personam proceeding, which was an action against an individual, similar to a modern criminal action.⁹ This type of forfeiture

1. Forfeiture is the process by which the government seizes private property without compensation as a result of the use of such property in connection with the commission of a crime. See Anthony J. Girese, *Forfeiture: A General Introduction*, in UNDERSTANDING FORFEITURE AND RELATED CIVIL ACTIONS IN CRIMINAL LAW, at 7, 9 (PLI Litig. & Admin. Practice Course Handbook Series No. 164, 1992) (citing 37 C.J.S. *Forfeitures* § 1, p. 4.3 (1990)).

2. See *infra* notes 4-14 and accompanying text.

3. Girese, *supra* note 1, at 9; see George C. Pratt & William B. Petersen, *Civil Forfeiture in the Second Circuit*, 65 ST. JOHN'S L. REV. 653, 655 (1991) (stating that civil forfeiture is used openly and extensively as a weapon in the "war on drugs").

4. See Joseph A. Brintle & Glenn M. Katon, Note, *Guilty Until Proven Innocent? Protections for Innocent Owners in Civil Forfeiture Cases Under 21 U.S.C. § 881(a) and New York's CPLR Article 13-A*, 6 ST. JOHN'S J. LEGAL COMMENT. 143, 147-48 (1990) (providing a history of civil forfeiture dating back to biblical times); see also *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 680-86 (1974).

5. *Exodus* 21:28 (King James) ("If an ox gore a man or a woman, that they die: then the ox shall be surely stoned, and his flesh shall not be eaten; but the owner of the ox shall be quit.").

6. *Id.* at 21:29. "But if the ox were wont to push with his horn in time past, and it hath been testified to his owner, and he hath not kept him in, but that he hath killed a man or a woman; the ox shall be stoned, and his owner also shall be put to death." *Id.* In some circumstances, however, the owner was allowed to make a payment in exchange for his life. See *id.* at 21:30.

7. Girese, *supra* note 1, at 9-10.

8. *Id.* at 10.

9. *Id.*; see *infra* notes 27-30 and accompanying text; see also *Racketeer Influence and Corrupt Organizations Act (RICO)*, 18 U.S.C. § 1963 (1988). Criminal forfeiture under

proceeding exists today, and allows a person's assets to be reached as a result of his wrongdoing.¹⁰

The second kind of forfeiture was the deodand,¹¹ literally meaning to be "given to God."¹² A sword that was used to commit "murder was forfeited to the crown, regardless of the owner's guilt or innocence."¹³ This was the result of a legal fiction, as Justice Harlan once stated, that "inanimate objects themselves can be guilty of wrongdoing."¹⁴ This legal fiction has survived in what is today called an *in rem* proceeding, and "the idea that property could itself be tainted by illegal use [has become] a mainstay of modern forfeiture in most jurisdictions."¹⁵

In recent years, civil forfeiture has been extensively utilized in this nation's ongoing war against crime, and more specifically against the sale and use of drugs.¹⁶ Because many people have concluded that traditional crime-fighting tools such as imprisonment have been unsuccessful in stemming the tide of criminal activity,

RICO is an *in personam* action against a person, group, or legal entity. *Id.*; see Suzanne J. Morris & Steven L. Kessler, *Real Property Forfeiture: Seizure of Property Emerges as Law Enforcement Device*, 205 N.Y. L.J. 35, 37 (1991). Forfeiture depends on whether the defendant is found guilty in the criminal action against him. See *United States v. \$39,000.00 in Canadian Currency*, 801 F.2d 1210, 1218 (10th Cir. 1986) (stating that a criminal forfeiture proceeding can take place only where a defendant is found guilty beyond a reasonable doubt).

10. See N.Y. CIV. PRAC. L. & R. § 1311(1) (McKinney 1991); *Morgenthau v. Citisource, Inc.*, 500 N.E.2d 850, 854 (1986) (stating that under the Civil Practice Law and Rules (CPLR) article 13-A any assets of the claimant can be attached to satisfy the judgment).

11. See *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 681 (1974); NEW YORK CITY POLICE DEPARTMENT. LEGAL BUREAU. FORFEITURE GUIDE 1 (1988) [hereinafter FORFEITURE GUIDE].

12. *Calero-Toledo*, 416 U.S. at 681 n.16; FORFEITURE GUIDE, *supra* note 11, at 1.

13. FORFEITURE GUIDE, *supra* note 11, at 1. Custom held that once given to the king, property would be used for religious purposes such as providing masses for the dead man's soul, or for charitable uses. *Calero-Toledo*, 416 U.S. at 681. Yet even when used solely for religious purposes, the deodand remained an important source of revenue for the crown. *Id.* at 681. See generally *Brintle & Katon*, *supra* note 4, at 148 n.24 (citation omitted) (discussing the history of civil forfeiture).

14. *Pratt & Petersen*, *supra* note 3, at 653 (citing *United States v. United States Coin & Currency*, 401 U.S. 715, 719 (1971)); see also *Brintle & Katon*, *supra* note 4, at 149 (illustrating how legal fictions enable civil forfeiture statutes to combat various criminal activities).

15. *Girese*, *supra* note 1, at 10 (citation omitted).

16. See *id.* at 9 (discussing the upsurge of crime, and the need for forfeiture as a prosecutorial weapon); Abraham Abramovsky, *Asset Forfeiture*, 206 N.Y. L.J. 3 (1991) [hereinafter *Asset Forfeiture*] (discussing the use of civil forfeiture statutes to combat drug trade); *Pratt & Peterson*, *supra* note 3, at 665 (outlining the use of civil forfeiture as a weapon relatively unconstrained by constitutional limitations); *Brintle & Katon*, *supra* note 4, at 153 (stating that a number of forfeiture statutes have been enacted due to the war on drugs).

lawmakers at the federal, state, and municipal levels have all resorted to the use of civil forfeiture as almost a last resort.¹⁷ A leading reason for forfeiture's recent popularity is its powerful economic component, which rests on the theory that eradicating the profit incentive dramatically lowers the number of criminal incidents.¹⁸

There are many federal, state, and local civil forfeiture laws.¹⁹ At the federal level, the main civil forfeiture provision is in the Controlled Substances Act of 1970,²⁰ which uses an in rem approach²¹ to handle the forfeiture of property used in the transport of controlled substances.²² In New York, the primary civil forfeiture statutes are section 3388 of the Public Health Law, an in rem provision,²³ and Article 13-A of the Civil Practice Law and Rules (CPLR), an in personam provision.²⁴ The Public Health Law section 3388 provides

17. Morris & Kessler, *supra* note 9, at 35; see also Girese, *supra* note 1, at 9 (using forfeiture as a powerful crime-fighting tool).

18. Morris & Kessler, *supra* note 9, at 35-37; see also Pratt & Petersen, *supra* note 3, at 655 (stating that a fundamental assumption in American law is that crime should not pay).

19. Morris & Kessler, *supra* note 9, at 37. Considering both civil and criminal laws, there are over one hundred forfeiture provisions in federal law, and over fifteen in New York State. *Id.*

20. 21 U.S.C. § 881 (1988). The statute provides, in pertinent part, that "[a]ll conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1), (2), or (9)" are subject to forfeiture. 21 U.S.C. § 881(a)(4) (1988 & Supp. 1992).

The government has broad power under this Act; it only has to prove that there are reasonable grounds to establish probable cause to forfeit property. See *United States v. Banco Cafetero Panama*, 797 F.2d 1154, 1160 (2d Cir. 1986); see also James M. Strauss, Comment, *Shouldn't the Punishment Fit the Crime?*, 55 BROOK. L. REV. 417, 418-20 (1989) (discussing the power of 21 U.S.C. § 881). Once the government has established probable cause, the person claiming the property must come forward and prove by a preponderance of the evidence that he is entitled to the return of the property. See *United States v. One Brown 1978 Mercedes Benz*, 657 F. Supp. 316, 318 (E.D. Mo. 1987) (citing *One Blue 1977 AMC Jeep CJ-5 v. United States*, 783 F.2d 759, 761 (8th Cir. 1986) (per curiam)), *aff'd*, 837 F.2d 479 (8th Cir. 1987).

21. Morris & Kessler, *supra* note 9, at 37. A forfeiture proceeding under the Controlled Substances Act is a civil in rem action in which the property itself is the defendant. As discussed earlier, there is a legal fiction that property connected in some manner with criminal or illegal activity is culpable or guilty in its own right. *Id.*; see *supra* notes 12-15 and accompanying text.

22. 21 U.S.C. § 881(a)(4).

23. See N.Y. PUB. HEALTH LAW § 3388 (McKinney 1985).

24. See N.Y. CIV. PRAC. L. & R. art. 13-A. In New York there are fifteen civil and criminal statutes. Morris & Kessler, *supra* note 9, at 37; see, e.g., N.Y. PENAL LAW § 415.00 (McKinney 1989) (entitled "Seizure and forfeiture of vehicles, vessels and aircraft used to transport or conceal gambling records."); N.Y. PENAL LAW § 420.05 (McKinney 1989 & Supp. 1991) (authorizing forfeiture of unauthorized recording equipment); N.Y. PENAL LAW § 480.00-35 (McKinney Supp. 1991) (allowing criminal forfeiture in felony drug cases). *But*

for the forfeiture of vehicles, boats, or aircraft when a drug-related felony has been committed under Article 220 of the New York Penal Code.²⁵ CPLR Article 13-A authorizes the District Attorney or the State Attorney General to commence a forfeiture action to recover property obtained through the commission of a felony.²⁶ It is signifi-

cf. N.Y. PENAL LAW § 470.20 (McKinney Supp. 1991) (imposing a fine for money laundering rather than civil forfeiture).

25. See N.Y. PUB. HEALTH LAW § 3388(1), (2); see also N.Y. PENAL LAW §§ 220.00-.65 (McKinney 1989) (concerning controlled substance offenses); *Henry v. Castagnaro*, 434 N.Y.S.2d 592, 596 (Sup. Ct. Suffolk County 1980) (holding that defendant's plea of guilty to criminal sale of controlled substance and evidence that vehicle was used as site of sale were sufficient to justify forfeiture). Although the statute gives a right to forfeit property, it is limited to vehicles, vessels, or aircraft. N.Y. PUB. HEALTH LAW § 3388(2). Marijuana offenses and non-felony narcotic crimes do not establish a right to forfeiture under the Public Health Law. *Id.*; FORFEITURE GUIDE, *supra* note 11, at 2. The Public Health Law provides for forfeiture only when a drug related crime has occurred which has risen to the level of a felony offense. N.Y. PUB. HEALTH LAW § 3388(2); see FORFEITURE GUIDE, *supra* note 11, at 2; Abraham Abramovsky, *Asset Forfeiture: Burden of Proof*, 206 N.Y. L.J. 3 (1991) [hereinafter *Burden of Proof*] (discussing N.Y. PUB. HEALTH LAW § 3388).

26. See N.Y. CIV. PRAC. L. & R. § 1311(1)(a). See generally Girese, *supra* note 1, at 12-20 (discussing Article 13-A); Steven L. Kessler, *Quo Vadis? Assessing New York's Civil Forfeiture Law*, 4 TOURO L. REV. 253, 254-57 (1988) [hereinafter *Quo Vadis?*] (discussing attributes of Article 13-A).

Article 13-A distinguishes between post-conviction and pre-conviction felonies. See *Burden of Proof*, *supra* note 25, at 3. A post-conviction forfeiture crime encompasses all felonies, while a pre-conviction forfeiture action is limited exclusively in its coverage to felony drug offenses. *Id.*; see N.Y. CIV. PRAC. L. & R. § 1311(1)(a), (b). Article 13-A makes further distinctions by classifying defendants as either criminal or non-criminal. See N.Y. CIV. PRAC. L. & R. §§ 1310(9), 1310(10), 1311(1), 1311(3)(b); *Burden of Proof*, *supra* note 25, at 3. A criminal defendant is one who has been convicted of a post-conviction forfeiture crime or one who the claiming authority can establish by clear and convincing evidence is guilty of a controlled substance offense. See N.Y. CIV. PRAC. L. & R. § 1310(9); *Burden of Proof*, *supra* note 25, at 3 (citing N.Y. PENAL LAW §§ 220.00-.65 (McKinney 1990)). A non-criminal defendant is one other than the original defendant who was either charged or convicted of a drug offense but still has an interest in the proceeds of a crime or the instrumentality of a crime. See N.Y. CIV. PRAC. L. & R. § 1310(10); *Burden of Proof*, *supra* note 25, at 3. The burdens of proof necessary to win a forfeiture action in court differ for the criminal and non-criminal defendant. See *Burden of Proof*, *supra* note 25, at 3. For the criminal defendant in a post-conviction forfeiture action the case must be proven by a preponderance of the evidence, while in a pre-conviction forfeiture proceeding the burden of proof is one of clear and convincing evidence. See N.Y. CIV. PRAC. L. & R. § 1311(3)(a); *Burden of Proof*, *supra* note 25, at 3. For the non-criminal defendant in a case where the primary defendant was convicted, the claiming authority must prove by a preponderance of the evidence that the non-criminal defendant knew or should have known of the forfeitable goods' relationship to the crime. See N.Y. CIV. PRAC. L. & R. § 1311(3)(b)(ii)(A), (B); *Burden of Proof*, *supra* note 25, at 3, 7 (citation omitted). In a pre-conviction forfeiture proceeding for a non-criminal defendant, the government is only required to prove by clear and convincing evidence the occurrence of the crime; here it is not necessary for the state to prove that the defendant knew that the property would be used illegally. See N.Y. CIV. PRAC. L. & R. § 1311(3)(b)(i); *Burden of Proof*, *supra* note 25, at 7.

cant that actions under Article 13-A are in personam rather than in rem; it is the only civil forfeiture statute with this classification.²⁷ Among other advantages, in personam status gives the prosecutor the ability to attach property outside the jurisdiction²⁸ and to attach any assets owned by the criminal defendant,²⁹ and/or offers the benefit of not having to locate the proceeds of the crime.³⁰

In addition to the above laws, New York City employs New York City Administrative Code section 14-140,³¹ which empowers the Property Clerk³² to bring a forfeiture action to recover the proceeds of a crime or property used as an instrumentality of a crime.³³ The New York City Police Department is only able to bring forfeiture actions for property that is in the possession of the Police Department Property Clerk,³⁴ but contrary to New York Public Health

27. See *Morris & Kessler, supra* note 9, at 37; see also *Brintle & Katon, supra* note 4, at 168-69 (discussing the in personam status of Article 13-A).

28. See *District Attorney v. McAuliffe*, 493 N.Y.S.2d 406, 409 (Sup. Ct. Queens County 1985) (deciding that real property in Pennsylvania purchased with extorted money is subject to forfeiture).

29. See *Morgenthau v. Citisource, Inc.*, 500 N.E.2d 850, 854 (N.Y. 1986) (deciding that attachment can reach any assets that could satisfy possible judgment).

30. See *Brintle & Katon, supra* note 4, at 168 n.151 (citing ANTHONY J. GIRESE, FORFEITURE HANDBOOK: LITIGATION UNDER CPLR ARTICLE 13-A 33 (New York District Attorneys' Association 1985)).

31. N.Y. CITY ADMIN. CODE § 14-140 (Williams 1986 & Supp. 1990).

32. Forfeiture actions are brought by the Legal Bureau of the New York City Police Department and the New York City Corporation Counsel. The Police Department uses the Property Clerk as the named party in such proceedings. Therefore, the terms "City," "Police Department," and "Property Clerk" will be used interchangeably throughout this Note.

33. N.Y. CITY ADMIN. CODE § 14-140(b); see FORFEITURE GUIDE, *supra* note 11, at 1; see also *Property Clerk v. Seroda*, 521 N.Y.S.2d 233, 234-38 (App. Div. 1st Dep't 1987) (empowering Property Clerk to undertake forfeitures); *Property Clerk v. Scricca*, 531 N.Y.S.2d 156, 157-58 (Sup. Ct. N.Y. County 1988) (allowing Property Clerk to bring forfeiture action against owner of a car seized while containing controlled substance).

34. N.Y. CITY ADMIN. CODE § 14-140(b); see FORFEITURE GUIDE, *supra* note 11, at 2-3. The Police Department derives the authority to bring forfeiture actions from subdivision (b) of § 14-140 of the Administrative Code which provides:

All property or money taken from the person or possession of a prisoner . . . being the proceeds of a crime or derived through crime . . . all property or money suspected of having been used as a means of committing crime or employed in aid or furtherance of crime . . . shall be given, as soon as practicable, into the custody of and kept by the [P]roperty [C]lerk.

N.Y. CITY ADMIN. CODE § 14-140(b).

Subdivision (e) of § 14-140 of the Administrative Code discusses the disposition of the property or money and provides:

Where moneys or property have been unlawfully obtained or stolen or embezzled or are the proceeds of crime or are derived through crime . . . or have been used as a means of committing crime or employed in aid or in furtherance of crime or held, used or sold in violation of law . . . a person who so obtained, received or derived

Law section 3388 or CPLR Article 13-A, it can be any property, based on misdemeanor as well as felony offenses.³⁵

This Note critically examines New York City's forfeiture law under New York City Administrative Code section 14-140, and explores the need for change. Part I of this Note analyzes the statute, related constitutional concerns, and the defenses available to the claimant. Part II reviews some of the issues concerning the Administrative Code that are often the subject of litigation. Part III compares section 14-140 to state and federal forfeiture laws, and discusses the effectiveness and implications of the law. Finally, Part IV urges legislative action to modify New York City Administrative Code section 14-140.

I. STATUTORY AND LEGAL ASPECTS OF SECTION 14-140

A. *The Statute*

Section 14-140 of the New York City Administrative Code provides for the forfeiture of any property that is the proceeds of a crime or has "been used as a means of committing crime or [has been] employed in aid or in furtherance of crime"³⁶ Nowhere in the Code are the terms "in aid or in furtherance of" defined. This omission provides the Police Property Clerk with enormous latitude when deciding what the City may seize through forfeiture.³⁷ The

any such moneys or property, or who so used, employed, sold or held any such moneys or property . . . shall not be deemed to be the lawful claimant entitled to any such moneys or property

Id. § 14-140(e).

35. Unlike § 14-140, the Public Health Law § 3388 provides for the forfeiture of vehicles, boats or aircraft when a drug-related felony has occurred, and CPLR Article 13-A permits the forfeiture of property only after a felony has been committed. *See supra* notes 23-30 and accompanying text.

36. N.Y. CITY ADMIN. CODE § 14-140(b). The Property Clerk seeks a declaratory judgment from the court which would allow the forfeited property to legally remain in the Property Clerk's custody. FORFEITURE GUIDE, *supra* note 11, at 5.

37. *See* Property Clerk v. Pagano, 573 N.Y.S.2d 658, 660-61 (App. Div. 1st Dep't 1991) (discussing the ambiguity of statutory language within § 14-140); *Asset Forfeiture*, *supra* note 16, at 7 (stating that "given the broad language of the statute, there is nothing to prevent the city from using it to forfeit any kind of property with the remotest drug taint."); Steven L. Kessler, *Sex, Cars and the Administrative Code*, 208 N.Y. L.J. 1, 4 (1992) [hereinafter *Sex, Cars and the Administrative Code*] (stating that the statute "is an extraordinarily inclusive provision.").

The courts have employed § 14-140 in a wide variety of cases. Cases range from one in which a drug transaction took place in a defendant's car, *see* Property Clerk v. Fanning, 556 N.Y.S.2d 874 (App. Div. 1st Dep't 1990), to one in which money and a car were subject to forfeiture because the defendant conspired to sell drugs, *see* Borzuko v. Property Clerk, 519

New York City forfeiture law is enforced in civil proceedings,³⁸ thus the outcome of the criminal case does not affect the outcome of the forfeiture.³⁹ Criminal charges do not have to be instituted against a person in order for the Property Clerk to initiate a forfeiture proceeding against that person.⁴⁰

Furthermore, it has never been clearly determined whether section 14-140 provides for an *in rem* proceeding, as opposed to one which is *in personam* in nature.⁴¹ A Managing Attorney of the Legal Bureau of the New York City Police Department recently referred to section 14-140 actions as “quasi-*in-rem*,”⁴² for the likely reason that, although a section 14-140 proceeding is directed against the property whether or not a claimant has been convicted of a crime, a claimant’s actions are still clearly considered when determining whether a forfeiture should occur.⁴³

N.Y.S.2d 491 (Sup. Ct. N.Y. County 1987), to one in which using a vehicle to purchase drugs was sufficient to make a case for its forfeiture, *Property Clerk v. Negron*, 550 N.Y.S.2d 351 (App. Div. 1st Dep’t 1990). See generally Cerisse Anderson, *Forfeiture Standard Tightened for Drugs*, 203 N.Y. L.J. 1 (1990) [hereinafter *Forfeiture Standard*] (stating that strict enforcement of § 14-140 results in more drug related forfeitures).

38. See *Burden of Proof*, *supra* note 25, at 3 (discussing New York’s civil forfeiture statutes, including § 14-140).

39. See *Property Clerk v. Batista*, 489 N.Y.S.2d 739, 740 (App. Div. 1st Dep’t 1985) (stating that “disposition of criminal charges is not determinative in a civil forfeiture proceeding.”); *Property Clerk v. Hurlston*, 478 N.Y.S.2d 906, 907 (App. Div. 1st Dep’t 1984) (holding that although criminal charges were dismissed forfeiture proceeding may be instituted); *Property Clerk v. Corbett*, 457 N.Y.S.2d 175, 177 (Sup. Ct. N.Y. County 1982) (providing that “neither a decision to abandon criminal charges, nor even a judgment of acquittal, necessarily represents a finding (much less a finding conclusive in a later civil proceeding) that no crime was committed . . .”).

Although a defendant’s acquittal is not very damaging to a later forfeiture proceeding, a defendant’s criminal conviction clearly enhances the Property Clerk’s case. *FORFEITURE GUIDE*, *supra* note 11, at 26.

40. See N.Y. CITY ADMIN. CODE § 14-140(b) (Williams 1986 & Supp. 1990). Nowhere in § 14-140 does it specify that criminal charges have to be brought against the defendant. *Id.* The Property Clerk must only show that the property was used in the “aid or furtherance of crime” in a civil proceeding, whether the claimant was found guilty during a criminal trial or whether any criminal charges were brought at all. *Id.*; see *supra* note 39.

41. *Sex, Cars and the Administrative Code*, *supra* note 37, at 4.

42. Robert F. Messner, *Forfeiture Actions Commenced Pursuant to New York City Administrative Code Section 14-140: the “McClendon Forfeiture,”* in *UNDERSTANDING FORFEITURE AND RELATED CIVIL ACTIONS IN CRIMINAL LAW*, at 67, 69 (PLI Litig. & Admin. Practice Course Handbook Series No. 164, 1992); cf. *Property Clerk v. Hyne*, 557 N.Y.S.2d 244, 248 (Sup. Ct. N.Y. County 1990) (“The present action [under Administrative Code § 14-140] is brought for the forfeiture of property only in the Property Clerk’s possession as a result of a seizure and is clearly *in rem*.”), *aff’d*, 567 N.Y.S.2d 603 (App. Div. 1st Dep’t 1991).

43. See generally Pratt & Petersen, *supra* note 3, at 654-55 (discussing the problems involved in using *in rem* proceedings); see *supra* note 39.

B. Constitutional Considerations

In 1972, the constitutionality of section 14-140 was challenged in *McClendon v. Rosetti*, a case brought by the New York Legal Aid Society on behalf of six plaintiffs.⁴⁴ In *McClendon*, the court found section 14-140, previously "section 435-4.0," unconstitutional because of a due process violation.⁴⁵ The person seeking the return of his property was required to commence a civil action in replevin and also had the burden of proving entitlement to the property, rather than requiring the Police Department to justify its retention of the property.⁴⁶ The Second Circuit remanded the case back to the trial court to formulate new procedures, which resulted in the *McClendon* Order.⁴⁷ The *McClendon* Order sought to remedy the problems in-

44. See *McClendon v. Rosetti*, 460 F.2d 111 (2d Cir. 1972); Messner, *supra* note 42, at 71-72 (discussing the *McClendon* lawsuit and its outcome); Sex, Cars and the Administrative Code, *supra* note 37, at 4 (discussing *McClendon* and its consequences).

45. *McClendon*, 460 F.2d at 116.

46. *Id.*

47. See *McClendon v. Rosetti*, 70 Civ. 3851 (S.D.N.Y. July 15, 1974) (unpublished order) [hereinafter *McClendon* Order]. In the *McClendon* Order, Judge Morris F. Lasker of the United States District Court for the Southern District of New York set forth some procedures for the Police Property Clerk to follow. The main components of the Order are summarized as follows:

1. The claimant who is seeking the return of his property from the Property Clerk must be given a voucher, which contains an itemized list of all of his property. *McClendon* Order at 3.;
2. The voucher must contain a notice to the claimant stating that in order to reclaim his property, he has to submit the voucher to the office of the Police Property Clerk, along with a District Attorney's release stating that the property is not needed as evidence. *Id.* at 4.;
3. The notice must also explain that if the claimant fails to demand the property within 90 days after the criminal proceedings have concluded, or where the claimant obtains the District Attorney's release prior to the termination of the criminal proceedings and the claimant fails to demand the property within 90 days of receiving the release, whichever is sooner, the property can be disposed of by the Property Clerk. If the claimant is in jail, he has an extra 90 days to obtain the District Attorney's release. *Id.*;
4. The Property Clerk will return all non-contraband property upon timely demand of the claimant, unless there is reason to believe that the property was illegally obtained, or that it is the proceeds of or instrumentality of crime. *Id.* at 5.;
5. In such cases, the Property Clerk may commence a forfeiture action or another similar judicial proceeding within 10 days of the receipt of the claimant's demand and the District Attorney's release. *Id.* at 6-7.;
6. If the forfeiture action is not commenced within 10 days, the property must be returned to the claimant. *Id.* at 7.;
7. Notice of the commencement of the forfeiture action must include a statement of the State's justification for keeping the claimant's property. *Id.*;
8. The proceeding must provide the claimant with an adequate opportunity to be heard within a reasonable amount of time. *Id.*; and
9. The State has the burden of proving by a preponderance of the evidence why it is legally justified in retaining the property. *Id.*

The *McClendon* Order only concerns those who have had money or property directly

herent in section 435.40; it included requiring a claimant to make a formal legal demand for his non-contraband⁴⁸ property, but not requiring the claimant to bring a lawsuit.⁴⁹ If the demand is made within ninety days after the issuance of a District Attorney's release or termination of criminal proceedings, the Property Clerk must commence a forfeiture action within ten days after such demand is made.⁵⁰ Also, the *McClendon* Order puts the burden on the Property Clerk to prove by a preponderance of the evidence why the Police Department is justified in keeping the property.⁵¹ If for any reason the Property Clerk does not fully comply with the *McClendon* Order, the claimant's due process rights are violated, and, therefore, a forfeiture action is precluded.⁵²

While the *McClendon* Order has been recognized as legitimizing the applicability of section 14-140,⁵³ the legislature never amended section 14-140 to incorporate the *McClendon* procedures, causing much unwanted confusion.⁵⁴ Many times a claimant is not

taken by the police, and does not address the rights of owners who had their property taken by the police when it was in the possession of a third party bailee. Messner, *supra* note 42, at 72-73. However, in practice, the Property Clerk has allowed demands from third party owners of cars because their ownership can be proven by title. *Id.*

48. Any items that are illegal per se, such as narcotics, are not covered by the *McClendon* Order. Messner, *supra* note 42, at 72.

49. *McClendon* Order, *McClendon v. Rosetti*, 70 Civ. 3851 (S.D.N.Y. 1974) (unpublished order).

50. *Id.* at 4, 6-7. If the Property Clerk fails to institute a forfeiture proceeding within 10 days from the date that the demand is made, the property must be returned to the claimant. *Id.* at 7.

51. *Id.* at 7.

52. *See Butler v. Castro*, 896 F.2d 698 (2d Cir. 1989). Claimant Butler had been arrested but had never been given a voucher for his property, one of the required *McClendon* procedures. *Id.* at 699. When Butler finally received a copy of the voucher, he was only given the front side, while only the back side of the voucher had information concerning recovery procedures. *Id.* He therefore had no effective notice of how to reclaim his property. *Id.* The Second Circuit decided that the failure of the Property Clerk to issue a voucher violated Butler's constitutional rights. *Id.* at 700; *see also Sex, Cars and the Administrative Code*, *supra* note 37, at 4 ("It appears after *Butler*, [that] New York City must either amend the Code or devise a system to prove that each arrestee has received a voucher form with the notice on the reverse side.").

53. *See Property Clerk v. Hyne*, 557 N.Y.S.2d 244, 246 (Sup. Ct. N.Y. County 1990) (discussing the role of the *McClendon* Order), *aff'd*, 567 N.Y.S.2d 603 (App. Div. 1st Dep't 1991); *Property Clerk v. Seroda*, 521 N.Y.S.2d 233, 235 (App. Div. 1st Dep't 1987) (stating that the *McClendon* Order establishes the applicable time period in which the Property Clerk can commence a § 14-140 forfeiture proceeding).

54. *See Butler*, 896 F.2d at 703 (stating that, because § 14-140 is silent as to what steps claimant must take to reclaim his property, and because it has not been amended to reflect the *McClendon* Order, claimant is led to believe that no such procedures exist); *Hyne*, 557 N.Y.S.2d at 246 (explaining that § 14-140 is confusing because it still contains a provision

aware of the what is required of him because § 14-140 does not include the relevant procedures, and, therefore, a claimant does not know how to adequately fulfill the requirements to reclaim his property.⁵⁵ Logically, a claimant might still believe that he has an affirmative duty to bring a civil action because, although this burden on the claimant was declared unconstitutional by *McClendon v. Rosetti*,⁵⁶ the requirement still remains a part of the unamended section 14-140.⁵⁷ Indeed, many have questioned the overall effectiveness of the *McClendon* Order, and there has been much concern about failures in enforcement of some of the *McClendon* Order's most important safeguard procedures.⁵⁸ The Legal Aid Society and the law firm of White & Case (of counsel) challenged the effectiveness of the *McClendon* Order and the failure of the Property Clerk, and parties concerned, to fully comply with the Order.⁵⁹ Concerns in-

which speaks of a claimant's duty to prove his right to possession by commencing a civil action, which was found to be unconstitutional in *McClendon*).

55. *Hyne*, 557 N.Y.S.2d at 246.

56. 460 F.2d 111 (2d Cir. 1972).

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

58. See *supra* notes 48-52 and accompanying text.

59. Affidavit in Support of Motion to Enforce and Modify Order, *McClendon v. Rosetti*, 369 F. Supp. 1391 (S.D.N.Y. 1974) (No. 70-3851) (Affidavit of Allan L. Gropper, member of White & Case, filed Apr. 15, 1987); see also Notice of Motion to Enforce and Modify Judgment, *McClendon* (No. 70-3851) (filed Apr. 15, 1987). Among the concerns expressed in their challenge were:

1. The Property Clerk's failure to return property after a timely demand. (Gropper Aff. at 2);
2. Police officers, Assistant District Attorneys, and others acting in concert to frustrate claimants' attempts to recover their property. *Id.* at 3;
3. Failure to give required vouchers and acknowledgements of demands for the return of the property. *Id.*;
4. Failure to give claimants required notice of their rights. *Id.*; and
5. Bargaining to try and unlawfully retain at least one-half of a claimant's property. *Id.*

The specific relief sought included:

1. An elimination of the requirements that a claimant has to obtain a District Attorney's release, and that a claimant forfeits his property if he does not make a demand. *Id.* at 4-5;
2. Replace the above requirements with the mandate that the Property Clerk must return a claimant's property unless before the end of the criminal case the Assistant District Attorney has certified that the property is needed as evidence and the claimant is notified of such need. *Id.* at 5;
3. When there is no forfeiture proceeding, and when the property is needed as evidence, the Property Clerk must notify the claimant at the end of the criminal case, or obtain notice from the Assistant District Attorney that the property is no longer needed as evidence and that the claimant is entitled to the return of his property (whichever occurs first). *Id.*;
4. Likewise, when there is no forfeiture proceeding the Property Clerk must notify claimants who have not made a demand, at the end of the criminal case or obtain notice from the Assistant District Attorney that the property is no longer needed as evidence and that the property will be disposed of after ninety days if they do not respond and submit a claim. The Property Clerk must treat any claims made within the ninety day period as timely. *Id.*;

cluded shifting the burden of proof to claimants to prove their rights to ownership,⁶⁰ and the imposition of arbitrary, unreasonable, and unauthorized conditions in order to obtain the release of property.⁶¹ Although negotiations are ongoing among the Legal Aid Society, the Police Department, and other interested parties to modify the *McClendon* Order, no agreement has been reached to date.⁶² Thus, people still face a confusing and difficult task when trying to claim their property.

Other constitutional issues have been raised regarding section 14-140. Detrimental ramifications of the statute under the Fourth Amendment's search and seizure provision⁶³ have been addressed by applying the exclusionary rule to section 14-140 forfeiture actions.⁶⁴ In addition, claimants have also raised Fifth Amendment⁶⁵ self-incrimination questions, but courts rarely consider these challenges in civil cases⁶⁶ because, under section 14-140, a forfeiture proceeding cannot advance until all criminal proceedings involving the property are terminated.⁶⁷ Therefore, "Fifth Amendment considerations of self-incrimination are not likely to arise where no further criminal

5. The Property Clerk must make all notifications in writing, by return receipt mail, to the last known address of the property owner, or if the claimant is incarcerated, to the correctional facility. *Id.* at 5-6;

6. Prohibit the Property Clerk and other interested parties from imposing procedural requirements not in the *McClendon* order. *Id.*; and

7. Require that any willful or grossly negligent failure to comply with the *McClendon* order result in a penalty amounting to three times the fair market value of the property withheld by the Property Clerk. *Id.* at 4-6.

60. *Id.* at 3.

61. *Id.* at 2.

62. As of February 1993, no agreement has been reached. Telephone interview with Robert F. Messner, Managing Attorney, New York City Police Department, Legal Bureau (Feb. 1993); see Messner, *supra* note 42, at 86 (discussing ongoing litigation to amend the *McClendon* Order).

63. See U.S. CONST. amend. IV. The Fourth Amendment states that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated . . ." *Id.*

64. See *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1965) (deciding that evidence seized during illegal search of car could not be used in forfeiture proceeding); *People v. One 1965 Fiat Convertible Vehicle*, 326 N.Y.S.2d 833 (Sup. Ct. Herkimer County 1971) (concluding marijuana illegally obtained was not admissible in forfeiture action); see also FORFEITURE GUIDE, *supra* note 11, at 12 ("While the general rule is that the outcome of the criminal charges has no bearing on the civil forfeiture, one exception is that suppressed evidence cannot be introduced in a forfeiture proceeding.")

65. See U.S. CONST. amend. V. The Fifth Amendment states that "[n]o person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . ." *Id.*

66. See *infra* note 69 and accompanying text.

67. See N.Y. CITY ADMIN. CODE § 14-140(g) (Williams 1986 & Supp. 1990).

prosecution can result from charges which have been fully resolved."⁶⁸ However, "the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them."⁶⁹ This means that a claimant is at risk of losing property merely because he invokes his Fifth Amendment rights.⁷⁰

Finally, claimants occasionally advance an Eighth Amendment⁷¹ challenge to section 14-140, questioning whether the punishment fits the crime.⁷² It is often misperceived that the Eighth Amendment only applies to criminal cases. However, it can potentially apply to civil cases because, according to the United States Supreme Court, civil forfeiture proceedings are "quasi-criminal" in nature.⁷³ The Court considered forfeiture an extreme punishment that basically serves the same purposes, and has most of the same facets, as a criminal penalty.⁷⁴ The Supreme Court also stated that its decision in *United States v. Halper*⁷⁵ "implied that punitive damages⁷⁶ awarded to the [g]overnment in a civil action may raise

68. *Property Clerk v. Hyne*, 557 N.Y.S.2d 244, 248 (Sup. Ct. N.Y. County 1990), *aff'd*, 567 N.Y.S.2d 603 (App. Div. 1st Dep't 1991).

69. *Pratt & Petersen*, *supra* note 3, at 669 (quoting *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976)).

70. *Id.*

71. See U.S. CONST. amend. VIII. Amendment Eight to the Constitution states that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." *Id.*

72. See *Property Clerk v. Small*, 582 N.Y.S.2d 932 (Sup. Ct. Bronx County 1992) (deciding that defendant's car should be forfeited as a result of his soliciting a prostitute for oral sex in his car).

73. See *United States v. United States Coin and Currency*, 401 U.S. 715, 718 (1971); *Boyd v. United States*, 116 U.S. 616, 633-34 (1886) (discussing civil forfeiture's quasi-criminal nature).

While it is considered quasi-criminal in nature, it is clear that civil forfeiture does not have the same protections as criminal proceedings, which raises the question of whether there are adequate safeguards for the claimant in civil forfeiture actions. See *Pratt & Peterson*, *supra* note 3, at 654-56 (discussing the problems with procedural safeguards in civil forfeiture proceedings); see *infra* notes 74-86 and accompanying text.

74. *Strauss*, *supra* note 20, at 436 (citing *United States Coin and Currency*, and *Boyd*).

75. 490 U.S. 435 (1989).

76. In *Halper*, punitive damages are defined as civil fines that are so extreme and divorced from the government's actual damages and expenses, that they could be considered a prohibited punishment. *Id.* at 442. The *Halper* test derived from *United States v. Ward*, 448 U.S. 242, *reh'g denied*, 448 U.S. 916 (1980), in which the Court laid out a test to determine whether a civil statute's penalty was so punitive in either purpose or effect as to negate its civil classification. *Ward*, 448 U.S. at 248. The test requires that the court first determine whether the legislature expressly or impliedly indicated a preference for a civil or criminal penalty. *Id.* Then, if the legislature indicated an intention to establish a civil penalty, the court must decide whether the statutory scheme is actually "so punitive either in purpose or effect as to negate

Eighth Amendment concerns”⁷⁷

Recently the issue was raised in *Property Clerk v. Small*,⁷⁸ a case in which the defendant's car was forfeited as a result of having solicited an undercover officer posing as a prostitute to perform oral sex in his car.⁷⁹ The court concluded that if the proposed penalty was incredibly disproportionate to the crime, it could be classified as punishment, unless it served an articulated, legitimate purpose.⁸⁰ In determining the reasonableness of the penalty, the court compared the potential criminal penalty of patronizing a prostitute to the civil penalty exacted against the defendant.⁸¹ The court ultimately decided that, even if this forfeiture was considered punitive,⁸² it was an appropriate penalty for the crime that the defendant committed.⁸³

that intention.” *Id.* at 248-49 (citation omitted). Only the clearest proof will be enough to establish unconstitutionality of a statute on such grounds. *Id.* at 249 (citation omitted). The *Ward* test was applied in a § 14-140 case, and the court concluded that civil forfeiture actions under the Administrative Code § 14-140 are civil in nature. See *Property Clerk v. Hyne*, 557 N.Y.S.2d 244, 246-48 (Sup. Ct. N.Y. County 1990), *aff'd*, 567 N.Y.S.2d 603 (App. Div. 1st Dep't 1991). The Supreme Court has not considered whether a § 14-140 forfeiture is constitutional under the Eighth Amendment, but the Second Circuit recently concluded that the Supreme Court case *Halper* applies to excessive civil forfeitures. *Small*, 582 N.Y.S. 2d at 936.

77. *Small*, 582 N.Y.S.2d at 935 (citing *Browning Ferris Indus. v. Kelco Disposal*, 492 U.S. 257, 275-76 n.21 (1989); *United States v. Halper*, 490 U.S. 435, 442 (1989); *Ingraham v. Wright*, 430 U.S. 651, 669 n.37 (1977)).

78. 582 N.Y.S.2d 932. See generally Edward A. Adams, *Auto Forfeiture Upheld in Case of Solicitation: Judge Declares Seizure Legal Under Constitution*, 207 N.Y. L.J. 1 (1992) (discussing *Small*).

79. *Small*, 582 N.Y.S.2d at 932.

80. *Id.* at 936 (citing *United States v. 38 Whalers Cove Drive*, 954 F.2d 29, 35 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 55 (1992)). Some examples of legitimate purposes provided in *Small* were thwarting the success of a criminal undertaking by eradicating its resources and instrumentalities, *United States v. \$2500 in United States Currency*, 689 F.2d 10, 13 (2d Cir. 1982), *cert. denied*, 465 U.S. 1099 (1984), and compensating the government for investigation and enforcement costs, *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232, 237 (1972).

81. *Small*, 582 N.Y.S.2d at 936-37.

82. The issue of whether this type of forfeiture is considered punitive was never decided by the court. *Id.* at 937.

83. *Id.* at 936-37. The court explained that while patronizing a prostitute is considered a minor crime, with a B misdemeanor status, and the Penal Law even defines it as one of New York's least serious crimes, the criminal punishment authorized by the Penal Law was practically equivalent to the value of the forfeiture that took place. *Id.* As with all B misdemeanors, the most severe sentence possible is a three month jail sentence and a \$500 fine, and the forfeited car's worth was appraised at a value of somewhere between \$550 to \$750. *Id.* at 937.

It should be noted that federal cases have upheld the seizure of a condominium worth \$68,000 as a result of the sale of 2.5 grams of cocaine, and the forfeiture of a \$19,800 yacht on which one marijuana cigarette was found, which did not belong to the owner of the yacht. Adams, *supra* note 78, at 2. Also a Mercedes Benz was forfeited because less than twenty-five grams of marijuana were found in the car. *United States v. One Mercedes Benz*, 846 F.2d 2, 4

It should be noted that although defendant Small rolled down his car window and propositioned a prostitute, who happened to be an undercover officer, the officer never entered Small's car.⁸⁴ Despite this extremely tenuous connection between the property and the criminal act, the court found the link between the car and the criminal act to be sufficient to justify the forfeiture of Small's car without activating Eighth Amendment protections.⁸⁵ It is unclear how far the courts will take this kind of reasoning, and how much protection the Eighth Amendment can provide to claimants. Under the analysis used in *Small*, it is possible that a person who propositioned a prostitute in his penthouse apartment could then lose his home.⁸⁶

C. Procedural Unfairness

In addition to constitutional concerns about section 14-140, it is clear that the procedures involved under this section clearly favor the government.⁸⁷ First, only a low level of probable cause is needed.⁸⁸ Second, because a section 14-140 proceeding is a civil action, the burden of proof for the government is not as stringent as the "beyond a reasonable doubt" standard required to secure a criminal conviction.⁸⁹ In order to succeed in a civil forfeiture proceeding, the Property Clerk must only demonstrate by a preponderance of the evidence that the property was used to commit a crime, or was used in aid or furtherance of a crime.⁹⁰ Therefore, a claimant can be acquitted in a related criminal proceeding or can never have faced

(2d. Cir. 1988).

84. *Sex, Cars and the Administrative Code*, *supra* note 37, at 1 (discussing *Small*).

85. *Id.* at 4.

86. *Id.*

87. *See infra* notes 88-94 and accompanying text.

88. *See McClendon Order*, *supra* note 47, at 6-7. The *McClendon Order* only requires that "[w]here there is *reasonable cause* to believe that the property or money was unlawfully obtained or was stolen or was the proceeds of crime or instrumentality of crime . . ." a forfeiture action may take place. *Id.* (emphasis added); *cf.* *United States v. 4492 South Livonia Road*, 889 F.2d 1258, 1267 (2d Cir. 1989) (deciding that once cause is considered to have reached reasonable grounds above mere suspicion, the property is subject to forfeiture).

89. *See Property Clerk v. Hurlston*, 478 N.Y.S.2d 906, 907 (App. Div. 1st Dep't 1984) (stating that burden of proof is only a preponderance of the evidence standard); *see also Burden of Proof*, *supra* note 25, at 3.

90. *Id.* Some of the criteria used by the Property Clerk to attempt to establish a preponderance of the evidence include the claimant's conviction or guilty plea to the crime related to the forfeitable property; the claimant's criminal record involving the same kinds of activities of which he is accused in the forfeiture action; the claimant's knowledge of the unlawful use of the property; the claimant's failure to establish a lawful property right; and the commingling of the property with contraband or its use in the illegal activity. FORFEITURE GUIDE, *supra* note 11, at 23.

criminal charges, yet his property may still be subject to forfeiture.⁹¹ Third, summary judgment is another measure that the government can take “[u]nder a civil forfeiture procedure that does not include constitutional protections, [and which allows] owners . . . [to] be stripped of their property in a precipitous, summary fashion.”⁹² If the court determines that there are no triable issues of fact raised in a case, a summary determination can be made.⁹³ There is concern that with the lower standard of probable cause, a lesser burden of proof, and the possibility of summary judgment, the property owner in a forfeiture proceeding does not have adequate protections.⁹⁴

D. *Defenses Available to the Claimant*

Claimants in forfeiture proceedings have very few defenses, and the available defenses are especially difficult to prove.⁹⁵ Administrative Code section 14-140 does not provide any particular ameliorative provisions,⁹⁶ unlike both the federal and New York State forfeitures laws which specify clear defense options.⁹⁷ For example, the Controlled Substances Act includes an innocent owner defense,⁹⁸

91. See *supra* notes 38-40 and accompanying text. The civil burden of proof has a lower standard which thereby enables the government to have a greater likelihood of success in forfeiture proceedings. Yet forfeiture can sometimes have severe consequences. If an item of property is “used as a means of committing crime or employed in aid or furtherance of crime,” and if it is in the possession of the Property Clerk, no matter how expensive, or vital, it can be subject to forfeiture. See N.Y. CITY ADMIN. CODE § 14-140(b). The only limit to what can be forfeited is that the Property Clerk has to be in possession of the property. *Id.* § 14-140(a)(1).

92. Pratt & Petersen, *supra* note 3, at 668 (discussing federal civil forfeiture, which is similar to § 14-140). If a claimant does not provide enough of a differing version of the facts, summary judgment will be granted and the forfeiture will take effect. *Id.* at 667; see *New York v. Cosme*, 413 N.Y.S.2d 20, 21 (App. Div. 1st Dep’t 1979) (deciding summary judgment is authorized under CPLR 409(b)); *cf.* *Property Clerk v. DiPaolo*, 433 N.Y.S.2d 151, 152 (App. Div. 1st Dep’t 1980) (holding that material issue of fact existed which precluded summary judgment decision); *Sex, Cars and the Administrative Code*, *supra* note 37, at 4 (stating that “summary judgment is not available to the prosecuting authority in an action under § 14-140”).

93. *Cosme*, 413 N.Y.S.2d at 21.

94. See Pratt & Petersen, *supra* note 3, at 668 (commenting that civil forfeiture has become a “draconian punishment that is virtually bereft of constitutional protections”).

95. See N.Y. CITY ADMIN. CODE § 14-140; see also *Property Clerk v. Scricca*, 531 N.Y.S.2d 156, 158 (Sup. Ct. N.Y. County 1988) (discussing lack of defenses in § 14-140). See generally Pratt & Petersen, *supra* note 3, at 665-67 (discussing defenses available in federal forfeiture cases).

96. See *supra* note 95.

97. See *infra* notes 98-107 and accompanying text.

98. 21 U.S.C. § 881(a)(6) (1988); see Pratt & Petersen, *supra* note 3, at 665-67. To establish this defense, the owner must prove that the illegal activity concerning the property occurred without the knowledge or consent of the owner. *Id.* at 666-67. It should be noted that it is not easy for an owner to be successful with this defense; a person could be totally

which gives an opportunity to the claimant to prove that he did not know about, and/or did not consent to the illegal use of his property.⁹⁹ Also, section 3388 of the Public Health Law provides two affirmative defenses: a claimant can defeat a forfeiture action if he proves by a preponderance of the evidence that the illegal use of the property was unintentional,¹⁰⁰ or that another person used the property without his permission.¹⁰¹ The Public Health Law also gives the District Attorney an option to release the seized property in the interests of justice.¹⁰² In addition, CPLR Article 13-A provides a variety of protections and defenses for claimants,¹⁰³ including raising the burden of proof of the prosecution in some situations,¹⁰⁴ exempting funds needed for living expenses and for the maintenance of property

uninvolved in the illegal activity and still not be considered an innocent owner. *Id.* at 667. *See generally*, Brintle & Katon, *supra* note 4, at 157-67 (commenting on innocent owner provisions of 21 U.S.C. § 881). *Cf.* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974) (recognizing validity of innocent owner defense, but allowing forfeiture of innocent owner's yacht as a result of one marijuana cigarette, because owner didn't offer any proof that he did all that he could to prevent the unlawful use).

99. *See* 19 U.S.C. § 1615 (1988) (providing that in forfeiture actions involving items including vessels and vehicles, once probable cause has been shown, the burden of proof is on claimant); Pratt & Petersen, *supra* note 3, at 666. The owner might have problems establishing this defense because the government does not have to link the property to a particular transaction, or have the criminal activity satisfy all the elements of a crime. *Id.*

100. N.Y. PUB. HEALTH LAW § 3388(6)(a) (McKinney 1985) (stating that "[f]orfeiture shall not be adjudged where the owners establish by preponderance of the evidence that . . . the use of such seized property, in violation of subdivision one of this section, was not intentional on the part of any owner . . ."); *see, e.g.*, Chesworth v. Block, 535 N.Y.S.2d 392 (App. Div. 2d Dep't 1988) (deciding father could use affirmative defense and try to prove he never intended his car to be used in drug transaction, and that he, not his son, was principal user of car); Henry v. Castagnaro, 434 N.Y.S.2d 592 (Sup. Ct. Suffolk County 1980) (noting claim of defendant that because wife was equitable owner of car, and she did not intend car to be used illegally, unintentional use defense should succeed).

101. N.Y. PUB. HEALTH LAW § 3388(6)(b) (stating that "[f]orfeiture shall not be adjudged where the owners establish by preponderance of the evidence that: . . . said seized property was used in violation of subdivision one of this section by any person other than an owner thereof, while such seized property was unlawfully in the possession of a person who acquired possession thereof in violation of the criminal laws of the United States . . .").

102. N.Y. PUB. HEALTH LAW § 3388(4); *see* Henry v. Alquist, 513 N.Y.S.2d 730 (App. Div. 2d Dep't 1987) (determining that District Attorney, not trial court, had authorization to preclude forfeiture in interests of justice).

103. N.Y. CIV. PRAC. L. & R. art. 13-A; *see* Brintle & Katon, *supra* note 4, at 167-79; Girese, *supra* note 1, at 12-20 (discussing CPLR 13-A and available protections and defenses); Morris & Kessler, *supra* note 9, at 37-39.

104. N.Y. CIV. PRAC. L. & R. § 1311(3)(b)(v); *see* Morris & Kessler, *supra* note 9, at 37. To help protect innocent owners and non-criminal defendants in cases involving real property, the prosecutor has the burden of proof by clear and convincing evidence that the non-criminal defendant knew his property would be used for the felony, and voluntarily consented to it or benefitted from it. *Id.*; N.Y. CIV. PRAC. L. & R. § 1311(3)(b)(v).

from forfeiture,¹⁰⁵ and a broad "interests of justice" relief mechanism which precludes forfeiture in certain limited circumstances.¹⁰⁶

While section 14-140 fails to set forth specific defenses, courts have recognized that there should be an opportunity for the claimant to vindicate himself in section 14-140 cases.¹⁰⁷ For example, in *Property Clerk v. Scricca*¹⁰⁸ the court established an affirmative defense for the owner.¹⁰⁹ The court held that the claimant had to prove that he did not know that his property was being used for an unlawful purpose.¹¹⁰ However, similar to the problems inherent in the federal innocent owner provision,¹¹¹ it is difficult for a claimant to prove that he did not know of the unlawful purpose.¹¹² For example, if parents knew their son had a drug problem, and knew that he had been buying drugs for years, it would be very hard to establish that they did not know that he was using their car to transport narcotics.¹¹³ Therefore, the only question remaining would be whether the parents should be the ones to suffer for the transgressions of their son.¹¹⁴

105. Girese, *supra* note 1, at 20.

106. *Id.*; see Brintle & Katon, *supra* note 4, at 177-78. Some factors courts consider include the seriousness of the crime in relation to the impact of the forfeiture, the impact of the forfeiture on innocent people, and the appropriateness of the forfeiture when there has been an acquittal in the related criminal proceeding. *Id.*

107. See *infra* notes 108-19 and accompanying text.

108. 531 N.Y.S.2d 156 (Sup. Ct. N.Y. County 1988).

109. *Id.* at 158.

110. *Id.* In *Scricca*, the case was prosecuted under both the Public Health Law and the Administrative Code, but as the court explained, the Public Health Law already has a provision for a defense of unintentional use, so the affirmative defense discussed by the court applied directly to § 14-140. *Id.*; see *Chmielewski v. Rosetti*, 298 N.Y.S.2d 875, 876 (App. Term 1969) (holding that unintentional use defense applies to § 14-140 as well as Public Health Law).

111. See *supra* notes 98-99.

112. See Pratt & Petersen, *supra* note 3, at 665-67. Even if a person had suspicions, but did not verify them, his suspicions could invalidate his innocent owner defense. *Id.* at 667.

113. See FORFEITURE GUIDE, *supra* note 11, at 28 (stating that if parents knew child was in drug treatment program it would be hard to deny that they knew their child used drugs).

114. Although it may not seem fair for innocent third parties to pay for the illegal activities of others, it is considered to be an effective way of curtailing criminal activity. See *Forfeiture Standard*, *supra* note 37. Some people have attempted to circumvent the law by disguising the ownership of the property. See FORFEITURE GUIDE, *supra* note 11, at 27-28. For example, a child might be using his father's car to buy and sell drugs but does not think it will be subject to forfeiture since the car is not registered to him. *Id.* at 27. In this situation the authorities merely have to prove that the child is the beneficial owner of the car, and that the registration is in the father's name for other purposes, like insurance. *Id.* Circumstantial evidence can be used, for example, vanity license plates, youth-oriented bumper stickers, or certain items found in the car that may indicate the son, not the father, is the real user of the vehicle. *Id.* at 27-28.

Recently, the Appellate Division addressed the above concern in *Property Clerk v. Pagano*.¹¹⁵ While the court did not directly overrule *Scricca*, its decision directly conflicted with it; the court required that the government—not the property owner, as in *Scricca*—prove that the claimant knew that his property was being used by another, and that he “permitted or suffered”¹¹⁶ the illegal use of such property.¹¹⁷ In *Pagano*, the Property Clerk was able to prove that the parents allowed the son to use their car, but not that they allowed him to illegally use the car, which was the proof needed for forfeiture.¹¹⁸ At least, in this instance, claimants are in a more advantageous position than the Property Clerk because of the Property Clerk’s burden. However, since *Pagano* is a very recent case, it is not possible to predict whether future courts will broaden or narrow *Pagano’s* scope.¹¹⁹

Besides the uncertain benefits of the above defenses, courts have not been lenient on defendants, even when they present a particu-

In other types of third party forfeiture cases, it will be necessary for the Property Clerk to prove that the owner had knowledge of the criminal propensity of the user. *Id.* at 28. For example, if an employee had a criminal record including narcotics possession, the employer would be hard pressed to establish he did not know that the company car would be used to buy drugs. *Id.* However, a criminal record would only be relevant if it involved the same type of behavior involved in the forfeiture case, and if the owner knew or should have known about the record. *Id.*

115. 573 N.Y.S.2d 658 (App. Div. 1st Dep’t 1991).

116. *Id.* at 660.

117. *Id.* The City was able to prove by a preponderance of the evidence that the parents allowed their son to use their 1989 BMW, and that he used it during the commission of the misdemeanor of reckless driving, but were not able to establish that the parents permitted the illegal use of the car, which was the proof needed in order to forfeit the car. *Id.* at 658-62. The court concluded that even though the parents knew that their son had a terrible driving record, and may have used poor judgment in allowing him to use the car, poor judgment is not equivalent to “implied knowledge that a particular course of conduct will thereafter ensue.” *Id.* at 661. “There was lacking . . . [a] ‘measure of continuity and permanence’ of prior conduct” which would have established that the parents permitted their son to use the car illegally. *Id.*; see also *Property Clerk v. Covell*, 528 N.Y.S.2d 299, 300-01 (Sup. Ct. N.Y. County 1988) (stating that under § 14-140 the City has the burden of proving that the owner permitted the illegal use of his property); cf. N.Y. CIV. PRAC. L. & R. § 1311(3)(b)(ii)(A) (stating that government is required to prove claimant allowed unlawful use of his property).

118. *Pagano*, 573 N.Y.S.2d at 158-62. The court determined that “[t]he purpose of the Administrative Code provision here is to deprive those who have a real nexus with the criminal use of property—whether by their own actions or by knowledgeable acquiescence in such use by another—it is not designed to punish for a lack of clairvoyance.” *Id.* at 661.

119. *Burden of Proof*, *supra* note 25, at 3 (stating that the future scope of the *Pagano* ruling is unclear); see also *Messner*, *supra* note 42, at 77 (commenting that to date “*Pagano* [sic] has not been relied upon by an Appellate Court to deny forfeiture. However, at the trial level there is clearly a trend among respondents to vociferously assert their lack of knowledge of the criminal use of the property.”).

larly valid defense like an agreement with the District Attorney's Office to enter a plea of guilty in exchange for a promise to return their property.¹²⁰ The courts have generally ignored deals made between the District Attorney's Office and often uninformed defendants¹²¹ who make the deals because they believe them to be valid.¹²² In the recent case *Property Clerk v. Ferris*,¹²³ even though the defendant had relied on a promise from an Assistant District Attorney, and a major consideration in making his decision to plea guilty was to obtain the release of his car, the court strictly interpreted section 14-140 and decided that there was no statutory language which authorized a dismissal in the interests of justice.¹²⁴

II. MOST OFTEN LITIGATED ISSUES

A. *Nexus Between the Property and the Underlying Illegal Act*

In addition to failing to define "employed in aid or in furtherance of crime,"¹²⁵ section 14-140 also fails to specify the connection that must exist between the property in question and the illegal act for the Property Clerk to succeed in a forfeiture action.¹²⁶ The New

120. See *Property Clerk v. Ferris*, 570 N.E.2d 225 (N.Y. 1991) (concluding that regardless of promise from District Attorney's Office, property was subject to forfeiture). But see N.Y. CIV. PRAC. L. & R. § 1311(4) (stating that the court may dismiss or limit a forfeiture action in the interests of justice, taking into account the seriousness of crime, the effect on innocent parties, and the appropriateness when criminal proceeding has resulted in acquittal); N.Y. PUB. HEALTH LAW § 3388(4) (McKinney 1985) (stating that District Attorney can determine whether to return vehicle in interests of justice).

121. See *supra* notes 55-58 and accompanying text. Section 14-140 does not clearly specify the procedures that defendants need to follow to reclaim their property, and often the vouchers they receive do not include the proper information they need to know, such as the fact that their property is being held by the Property Clerk for forfeiture. *Id.*

122. See *Ferris*, 570 N.E.2d at 226; *Property Clerk v. Bauman*, 552 N.Y.S.2d 1015 (Sup. Ct. N.Y. County 1990).

123. 570 N.E.2d at 225.

124. *Id.* at 227. The court did provide that if the defendant was misled by the prosecutor's promise, he could vacate his guilty plea and be restored to his pre-plea status. *Id.* at 228.

In other cases, there has been confusion among defendants as to the effect of the District Attorney's release. *Property Clerk v. Lanzetta*, 550 N.Y.S.2d 349 (App. Div. 1st Dep't 1990); *Bauman*, 552 N.Y.S.2d at 1015-16. Courts have consistently ruled that the District Attorney's release is only a procedural step, signifying that the District Attorney's Office no longer needs the property for any criminal proceedings, but it does not have any effect on the Property Clerk's ability to commence forfeiture proceedings. *Lanzetta*, 550 N.Y.S.2d at 351; *Bauman*, 552 N.Y.S.2d at 1015-16.

125. N.Y. CITY ADMIN. CODE § 14-140; see *Property Clerk v. Pagano*, 573 N.Y.S.2d 658, 660-61 (App. Div. 1st Dep't 1991) (discussing ambiguity in wording of § 14-140).

126. *Pagano*, 573 N.Y.S.2d at 660-61; cf. FORFEITURE GUIDE, *supra* note 11, at 26-27 (discussing factors that can strengthen the Police Department's case against claimant).

York Supreme Court in *Borzuko v. Property Clerk*¹²⁷ used the CPLR criterion for "instrumentality" to help determine the meaning of "in aid or in furtherance" under section 14-140.¹²⁸ To be subject to forfeiture, the court determined that the property does not have to be an essential element of the crime, but does need to contribute directly and materially to the crime.¹²⁹ Although the seized property in *Borzuko*, a car and cash, were clearly connected to an attempted drug transaction,¹³⁰ the link between the property and the crime has not been as clear in other cases.¹³¹

In *Property Clerk v. Negron*,¹³² the Appellate Division established that a drug transaction does not have to take place in a car in order for the car to be subject to forfeiture.¹³³ In *Negron*, the defendant was seen purchasing narcotics while outside of his car, and subsequently driving away from the scene of the purchase.¹³⁴ The defendant argued that section 14-140 should be limited to drive-up transactions in which someone in the car buys the drugs.¹³⁵ However, the court held that "use of the vehicle to transport a controlled substance away from the point of sale is sufficient to substantiate a finding that the vehicle was employed to aid a crime"¹³⁶

In comparison, the trial court in *Property Clerk v. Aponte*¹³⁷ denied a forfeiture in a similar situation where the defendant also used his car to drive away from a drug transaction.¹³⁸ The trial court determined that the defendant's use of his car was completely incidental because he could have walked the four blocks from his home to the place he purchased the drugs; the car was "merely the method of locomotion"¹³⁹ After examining the language of section 14-

127. 519 N.Y.S.2d 491 (Sup. Ct. N.Y. County 1987).

128. *Id.* at 496.

129. *Id.*

130. *Id.* at 495-97.

131. See *supra* notes 127-30 and accompanying text; see *infra* notes 137-47 and accompanying text.

132. 550 N.Y.S.2d 351 (App. Div. 1st Dep't 1990).

133. *Id.*

134. *Id.* at 352.

135. *Id.*

136. *Id.*; see *Property Clerk v. Amato*, 567 N.Y.S.2d 263 (App. Div. 1st Dep't 1991) (permitting forfeiture of motorcycle used to drive away from the scene of a drug purchase). See generally *Forfeiture Standard*, *supra* note 37, at 1 (discussing recent cases involving narcotics and the subsequent forfeiture of cars).

137. 532 N.Y.S.2d 1000 (Sup. Ct. N.Y. County 1988), *rev'd*, 552 N.Y.S.2d 118 (App. Div. 1st Dep't 1990).

138. *Id.* at 1001.

139. *Id.* at 1002.

140, and comparing it to section 3388 of the Public Health Law and the Controlled Substances Act of 1970, the court concluded that the link between the car and the underlying crime was too attenuated to permit a forfeiture of the property.¹⁴⁰ However, the Appellate Division reversed the trial court's decision, ruling that the drug transaction did not take place in the car, and that it was irrelevant that the defendant's house was near the place of purchase; the car was still subject to forfeiture.¹⁴¹

Furthermore, in *Property Clerk v. Vogel*,¹⁴² the Appellate Division ruled that a defendant sniffing cocaine in his car was enough to justify the forfeiture of the car.¹⁴³ The defendant was not found to have bought, sold, or transported the drugs in his car, yet the court allowed forfeiture because the car was used as "a place to facilitate the possession and use of illegal drugs"¹⁴⁴ In *Property Clerk v. Small*, the defendant solicited an undercover officer posing as a prostitute to perform oral sex.¹⁴⁵ The court determined that, by simply requesting that oral sex be performed in his car,¹⁴⁶ a nexus was created between the crime and the car sufficient to warrant the forfeiture of the car.¹⁴⁷ If this kind of trend in the courts continues, the amount of forfeitures could become much more prevalent where the property is remotely related, if at all, to an accused's crime.

B. Timeliness Issues

Two time periods related to section 14-140 have been popular issues of litigation—the ninety-day period in which the claimant has to make a demand for his property, and the subsequent ten-day period within which the Police Department must commence forfeiture proceedings.¹⁴⁸ There has been some flexibility regarding the ninety-day time frame.¹⁴⁹ Even if the claimant fails to make a demand for the return of his property within ninety days, he may still have a viable action in replevin to legally ensure the return of his prop-

140. *Id.* at 1004.

141. *Property Clerk v. Aponte*, 552 N.Y.S.2d 118 (App. Div. 1st Dep't 1990).

142. 573 N.Y.S.2d 511 (App. Div. 1st Dep't 1991).

143. *Id.*

144. *Id.* at 512.

145. 582 N.Y.S.2d 932 (Sup. Ct. 1992).

146. *Id.*

147. *Id.*; see *supra* notes 79-86 and accompanying text.

148. See *McClendon Order*, *supra* note 47.

149. See *DeBellis v. Property Clerk*, 588 N.E.2d 55 (N.Y. 1992); see *infra* notes 153-

erty.¹⁵⁰ The time period does not extinguish the claimant's right to his property; it simply "fixes the point at which the [P]roperty [C]lerk may be relieved of the responsibility of retaining the moneys in custody, and provides for the transfer of the money from one fund to another at the termination of the statutory period."¹⁵¹ However, it was also held that, adhering to General Municipal Law section 50-i, there is a time limit during which one can bring a replevin action of one year and ninety days from the time of the event (in section 14-140 cases, the event is the termination of the criminal proceeding).¹⁵²

In the recent decision of *DeBellis v. Property Clerk*,¹⁵³ the Court of Appeals interpreted the *McClendon* Order's ninety-day time limit liberally, reasoning that the *McClendon* Order was only a judicial order, not a statute.¹⁵⁴ Claimant DeBellis made his demand early, but the demand was hampered by a tax levy and administrative problems in retaining the District Attorney's release.¹⁵⁵ The court found that the delay was not due to any lack of diligence on the claimant's behalf and therefore ruled that the claimant's demand should have been honored.¹⁵⁶ The court also held that the ninety-day time limit should only be strictly applied when there is a countervailing state interest.¹⁵⁷

Regarding the ten-day time limit within which the Property Clerk may initiate forfeiture proceedings, it has been clarified through litigation that the period is meant to be ten working days, excluding Saturdays, Sundays, and holidays.¹⁵⁸ A Property Clerk's

150. See *Moreno v. City of New York*, 508 N.E.2d 645, 647 (N.Y. 1987) (determining that replevin action to recover funds was timely even though it was made after 90-day period, because 90-day period did not extinguish a claimant's right to his property); cf. *Beck v. City of New York*, 507 N.Y.S.2d 129, 130-31 (Sup. Ct. Richmond County 1986) (concluding that a replevin action against city was time barred because it must be commenced within 1 year and 90 days from termination of criminal proceedings).

151. *Moreno*, 508 N.E.2d at 647.

152. *Beck*, 507 N.Y.S.2d at 130. Defense counsel argued that the termination of criminal proceedings referred to the day on which permission to appeal his client's sentence was denied, but the court ruled that it referred to the day on which the sentence was imposed. *Id.*

153. 588 N.E.2d 55 (N.Y. 1992).

154. *Id.* at 59-60.

155. *Id.* at 56-61.

156. *Id.* See generally Messner, *supra* note 42, at 82-84 (discussing *DeBellis*); Sex, *Cars and the Administrative Code*, *supra* note 37, at 4-5.

157. *DeBellis*, 588 N.E.2d at 59-60.

158. *Property Clerk v. Seroda*, 521 N.Y.S.2d 233 (App. Div. 1st Dep't 1987). In *Seroda* the Appellate Division referred to the May 27, 1983 letter written by Judge Lasker, which clarified the *McClendon* Order, and specified this period to be 10 working days. *Id.* at 235; see

delay in returning a claimant's property because of the need to validate a District Attorney's release does not toll the ten day time period.¹⁵⁹ Regardless of any investigation, the Property Clerk is required to commence a forfeiture proceeding within the allotted time in order to limit the delays that would be likely to occur if the Property Clerk were given discretion.¹⁶⁰

In addition, some dissention exists as to whether or not the ten-day time period applies to holders of security interests in seized property.¹⁶¹ In *Chrysler Credit Corp. v. Shaw*,¹⁶² the court noted that the ten day time period is not limited to owners, and should be applied to those with a security interest; "[t]o hold otherwise would improperly vest in the Property Clerk unfettered discretion to determine when to institute a forfeiture proceeding, which would unnecessarily delay adjudication of the parties' rights in the property. . . . [and] would be inconsistent with due process requirements."¹⁶³

However, the court in *Property Clerk v. Bauman*¹⁶⁴ disagreed with the contention set forth in *Shaw*.¹⁶⁵ In *Bauman*, the lienholder was not "in possession" of the seized property and thus the court ultimately held that "[t]here is no requirement that the forfeiture proceeding be started within ten days against the holders of security interests in seized property."¹⁶⁶

C. Claims to Seized Property by Lienholders

Lienholders' property interests are often the focus of litigation in section 14-140 cases; usually at issue is the point in time when a lienholder's right to the seized property attaches.¹⁶⁷ In *Property Clerk v. Molomo*,¹⁶⁸ the defendant Molomo had used his car during a drug transaction, thereby subjecting the car to forfeiture.¹⁶⁹

also *Property Clerk v. Hurd*, 496 N.Y.S.2d 197, 200 (Sup. Ct. N.Y. County 1985) (discussing the meaning of Judge Lasker's letter).

159. *Property Clerk v. Madden*, 526 N.Y.S.2d 710, 710-12 (Sup. Ct. N.Y. County 1988).

160. *Id.* at 712.

161. See *infra* notes 162-66 and accompanying text.

162. 527 N.Y.S.2d 172 (N.Y. Civ. Ct. 1988).

163. *Id.* at 173 (dictum).

164. 552 N.Y.S.2d 1015 (Sup. Ct. N.Y. County 1990).

165. *Id.* at 1017.

166. *Id.*

167. See *infra* notes 168-79 and accompanying text.

168. 583 N.Y.S.2d 251 (App. Div. 1st Dep't 1992); see Cerisse Anderson, *Finance Co. Denied Possession of Automobile Seized in Crime*, 207 N.Y. L.J. 1 (1992); Messner, *supra* note 42, at 75-76 (discussing *Molomo*).

169. *Molomo*, 583 N.Y.S.2d at 252.

Molomo did not own the car; an amount totaling \$17,719.95 was due to the lienholder, the Ford Motor Credit Corporation (FMCC).¹⁷⁰ The trial court characterized the FMCC as an innocent holder of a security interest entitled to the return of the car, because it had done all that it could have done to prevent the illegal use of the car.¹⁷¹ The court noted that the FMCC had even stipulated in its purchase contract with Molomo that unlawful use of the car would result in a breach of the contract.¹⁷²

In reversing the trial court's decision, the Appellate Division noted the similarity of *City of New York v. Salamon*,¹⁷³ where the FMCC had also done all that could be expected to prevent the unlawful use of the car, and was uninvolved in any wrongdoing.¹⁷⁴ Regardless of the FMCC's innocence, the *Salamon* court still decided that the FMCC was "merely entitled . . . to satisfy its lien from the proceeds of the property after the forfeiture had been adjudicated against the guilty party."¹⁷⁵ Moreover, the Appellate Division in *Molomo*¹⁷⁶ rejected the trial court's reliance on *Calero-Toledo v. Pearson Yacht Leasing Co.*,¹⁷⁷ in which Justice Brennan expressed concerns regarding innocent owners.¹⁷⁸ In holding that a lienholder can only satisfy its lien after execution of the forfeiture, the Appellate Division recognized that in *Calero-Toledo* the Supreme Court upheld the forfeiture of a yacht on which one marijuana cigarette was found, even though there had been a prohibition in the lease, similar to the ones in *Molomo* and *Salamon*, against use of the

170. *Id.*

171. *Id.*

172. *Id.* Also, the lower court, adhering to § 14-140(e), enjoined FMCC from returning the car to Molomo or allowing Molomo to redeem it. *Id.*

173. 555 N.Y.S.2d 380 (App. Div. 1st Dep't 1990). In *Molomo*, the Appellate Division rejected the trial court's reasoning that *Salamon* was distinguishable because in *Molomo* the FMCC had not received satisfaction on its lien. *Molomo*, 583 N.Y.S.2d at 252. The court decided that this factor had no bearing on the holding that the FMCC was only entitled to satisfy its lien from the proceeds of the property after forfeiture. *Id.* at 252-53.

174. *Salamon*, 555 N.Y.S.2d at 380-81.

175. *Molomo*, 583 N.Y.S.2d at 252 (quoting *Salamon*, 555 N.Y.S.2d at 381 (citing *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974); *Santora Equip. Corp. v. City of New York*, 524 N.Y.S.2d 663 (Sup. Ct. N.Y. County 1988); *Dillon v. Reese*, 402 N.Y.S.2d 713 (Sup. Ct. Nassau County 1977)). If the proceeds from the sale are insufficient to satisfy the lien, the owner from whom the car was seized is liable for any deficiency. *Molomo*, 583 N.Y.S.2d at 252.

176. 583 N.Y.S.2d at 252.

177. 416 U.S. 663 (1974).

178. *Id.* at 683.

yacht for illegal purposes.¹⁷⁹

III. AN OVERVIEW OF OTHER CIVIL FORFEITURE STATUTES AND THE RELATIVE EFFECTIVENESS OF SECTION 14-140

Section 14-140 on its face has a broader reach than statutes such as 21 U.S.C. § 881 (the Controlled Substances Act), section 3388 of the Public Health Law, and CPLR Article 13-A.¹⁸⁰ While the forfeitable property in the latter three statutes is limited--in the Controlled Substances Act to property allowing or facilitating transportation;¹⁸¹ in the Public Health Law to vehicles, vessels, and aircraft when there has been a drug related felony;¹⁸² and in the CPLR to felonies¹⁸³—section 14-140 covers any property in possession of the Property Clerk used in any crime or “employed in aid or in furtherance of crime.”¹⁸⁴ However, regarding the enforcement of a judgment, section 14-140 may be more restricted than at least CPLR Article 13-A, and other criminal forfeiture statutes, largely because of their in personam status.¹⁸⁵ In an in personam proceeding, authorities may obtain a judgment against personal assets of a defendant, which cannot be done in an in rem proceeding.¹⁸⁶ In addition, the Controlled Substances Act of 1970 and CPLR Article 13-A specifically provide for the forfeiture of real property, while section 14-140 does not.¹⁸⁷ But, as a practical matter, this does not inhibit the effectiveness of section 14-140, since it has been used largely to forfeit cars in drug cases.¹⁸⁸ Moreover, the federal statute and the two New York statutes provide much more comprehensive protec-

179. *Id.*

180. *See supra* notes 31-35 and accompanying text.

181. 21 U.S.C. § 881(a)(4) (1988); *see supra* notes 20-22 and accompanying text.

182. N.Y. PUB. HEALTH LAW § 3388; *see supra* notes 23, 25 and accompanying text.

183. N.Y. CIV. PRAC. L. & R. § 1311(1)(a); *see supra* notes 24, 26-30 and accompanying text.

184. N.Y. CITY ADMIN. CODE § 14-140.

185. *See supra* notes 24, 26-30 and accompanying text.

186. *See, e.g.,* N.Y. CIV. PRAC. L. & R. § 1311(1) (providing a description of all items forfeitable in this in personam proceeding); *Morgenthau v. Citisource, Inc.*, 500 N.E.2d 850, 854 (1986) (determining that under CPLR 13-A authorities can attach any assets of claimant necessary to obtain judgment). In an in rem proceeding, the action is not against the person but rather against the property, so the government cannot attempt to seize any of the claimant's personal assets. *See supra* notes 14-15 and accompanying text. *See generally* *United States v. \$152,160.00 United States Currency*, 680 F. Supp. 354, 356-57 (D. Colo. 1988) (discussing the difference between in rem and in personam forfeiture proceedings).

187. *See* N.Y. CITY ADMIN. CODE § 14-140.

188. *See Asset Forfeiture, supra* note 16, at 7.

tions for innocent owners.¹⁸⁹

The abundance of case law and instances of forfeiture indicate that all of these statutes have made an impact on individuals' lives,¹⁹⁰ but it is not clear whether the impact has been more beneficial or detrimental to society as a whole. It is debatable whether the forfeiture of a man's car as the result of his solicitation of a prostitute constitutes a punishment that fits the crime.¹⁹¹ The forfeiture of his car may cause the man to suffer unjustly for his actions, and it may unfairly affect others as well. Consider, for example, the family of the man in this situation; they are innocent of all wrongdoing, but would be likely to suffer greatly from the powerful effects of forfeiture. Section 14-140 does not adequately address the problems of innocent people who suffer from the painful effects of forfeiture. As the law exists presently, its success is clear in terms of the sheer number of forfeitures. Equally apparent however, are its profound costs to innocent people who lose their property and who have few avenues of redress available.

While there seems to be a potential for exploitation on the part of public officials concerning many of the forfeiture statutes, section 14-140 is particularly vulnerable to abuse because of its extremely broad language and because of the expansive power it grants to law enforcement authorities to forfeit any or all property and/or money used in a crime or "employed in aid or furtherance of crime."¹⁹² Therefore, an effective and just law enforcement tool should not be so broad and open to abuse.

IV. A NEED FOR LEGISLATIVE CHANGE

The *McClendon* Order is not the best way to address the problems concerning the New York City Administrative Code section 14-140. Mere modification of the Order¹⁹³ is not the solution. Legislative action is necessary to avoid what will most likely become a never-ending process of redrafting and litigation.

189. See *supra* notes 98-107 and accompanying text.

190. See *Forfeiture Standard, supra* note 37 ("Police Department officials said the number of forfeitures has increased dramatically over the past few years because of the crack epidemic and the department's Tactical Narcotic Team program . . .").

191. See *supra* notes 78-83 and accompanying text.

192. N.Y. CITY ADMIN. CODE § 14-140; see also *Pagano*, 573 N.Y.S.2d at 660-61 (explaining how § 14-140 is ambiguous); cf. *Butler v. Castro*, 896 F.2d 698, 703 (discussing confusion about provisions in § 14-140 due to the lack of legislative amendments after the *McClendon* Order); see *supra* notes 53-62 and accompanying text.

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

Section 14-140 should be amended to eliminate its ambiguity, lack of direction, and its great potential for misuse. Necessary adjustments to the statute should include the provisions of the *McClendon Order*. The *McClendon Order* took effect years ago, but was never incorporated into section 14-140. Incorporation of the *McClendon Order* into section 14-140 would eliminate confusion among claimants who today must rely on an unpublished order.¹⁹⁴ Certain changes, such as those proposed by the Legal Aid Society, should also be incorporated into section 14-140 to make it more effective.¹⁹⁵ In addition, the language of section 14-140 should be limited to certain crimes or types of crimes. This change would better address the legislative intent, and avoid governmental abuse in section 14-140's application. Finally, the New York City government could use innocent owner provisions similar to those found in other civil forfeiture laws.¹⁹⁶ The City government could consider using the CPLR and the Public Health Law as guides to give the courts the opportunity to take extenuating circumstances into account when considering the forfeiture of a claimant's property.¹⁹⁷ Incorporating these changes into the existing law would create an effective law enforcement tool that would more justly serve both the system and society.

CONCLUSION

Forfeiture statutes can be powerful tools in law enforcement, but they should also protect the rights of property owners. The New York City Administrative Code section 14-140 presently has an effect on crime, but its language is broad and subject to governmental misapplication. Section 14-140 should be redrawn to incorporate procedural safeguards and to limit its potential scope. By doing so, section 14-140 would become a more potent weapon to protect society against crime, and would be a more fair and just method of protecting society and the rights and benefits of property owners in the New York City legal system.

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194. See *supra* notes 53-57 and accompanying text.

195. See *supra* notes 58-61 and accompanying text.

196. See *supra* notes 97-106 and accompanying text.

197. See *supra* notes 103, 107 and accompanying text.

