



6-1-1999

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Recommended Citation

Anthony J. Franze, *Casualties of War: Drugs, Civil Forfeiture and the Plight of the Innocent Owner*, 70 Notre Dame L. Rev. 369 (1994).
Available at: <http://scholarship.law.nd.edu/ndlr/vol70/iss2/4>

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NOTE

Casualties of War?: Drugs, Civil Forfeiture, and the Plight of the "Innocent Owner"

I. INTRODUCTION

In the midst of the nation's war on drugs, Congress enacted legislation directed at broadening the powers of the federal government to combat illegal narcotics activities. A central feature of this legislation was 21 U.S.C. § 881,¹ a statute which has evolved into the government's primary civil forfeiture weapon utilized in the trenches of the drug war.

A concept of biblical origins,² civil forfeiture³ has proven an effective and extremely controversial⁴ method of depriving drug

1 21 U.S.C. § 881 (1988 & Supp. V 1993).

2 See *infra* Part II.

3 This Note focuses on civil, as opposed to criminal forfeiture. Civil forfeitures are in rem actions adhering to the notion that "[i]t is the property which is proceeded against, and, by resort to a legal fiction, held guilty and condemned as though it were conscious instead of inanimate and insentient." *Various Items of Personal Property v. United States*, 282 U.S. 577, 581 (1931). Thus, in a civil forfeiture action, the defendant is the property itself rather than the property owner. The property owner in a civil forfeiture action is often referred to as the "claimant."

In contrast, criminal forfeitures are in personam actions requiring defendants to be found guilty of a crime prior to the forfeiture of their property. For examples of criminal forfeiture statutes, see *infra* note 40.

4 One commentator chronicles the controversy surrounding civil forfeiture as follows:

[T]he government's overzealous forfeiture efforts are being criticized by the courts, the media, legal commentators, bar associations, civil liberties organizations, some members of Congress, and even by the prosecutors responsible for leading and directing the federal forfeiture program. We are witnessing a major swing of the law enforcement pendulum. After years of relentless expansion, our forfeiture laws are in for a long overdue review by the courts, legislatures and the Clinton Department of Justice. There is a widely perceived need to reform these laws and the way they are being implemented to make them fairer and to prevent the kinds of abuses that have occurred.

1 DAVID B. SMITH, PROSECUTION AND DEFENSE OF FORFEITURE CASES ¶ 1.02, at 1-19 (1985 & Supp. 1994).

This statement is buttressed by the fact that the Supreme Court ruled against the government in all of its recent civil forfeiture cases. See *United States v. James Daniel Good Real Property*, 114 S. Ct. 492, 505 (1994) (holding that the Due Process Clause requires the government to afford notice and an opportunity to be heard before seizing real property subject to civil forfeiture); *Austin v. United States*, 113 S. Ct. 2801, 2803

offenders the economic benefits of their crimes.⁵ Under section 881, for example, the government may seize a broad array of property based merely on a showing of probable cause that the property was derived from, or facilitated illegal narcotics activities.⁶ Once the government has established probable cause, the burden shifts to the property owner to establish by a preponderance of the evidence that this illegal activity did not occur or that the owner fulfills the requirements of an affirmative defense to forfeiture.⁷

While civil forfeiture provides an uncharitable mechanism to deprive drug traffickers of their assets, it also yields unintended consequences for persons unconnected with the drug trade but

(1993) (looking past guilty-property fiction and holding that civil forfeitures may constitute Excessive Fines under Eighth Amendment); *United States v. 92 Buena Vista Ave.*, 113 S. Ct. 1126 (1993) (plurality opinion); *Republic Nat'l Bank v. United States*, 113 S. Ct. 554, 562 (1992) (holding that government cannot deprive the appellate court of jurisdiction by transferring forfeited property out of judicial district). *Cf.* *Dep't of Revenue of Montana v. Kurth Ranch*, 114 S. Ct. 1937, 1945 (1994) ("A defendant convicted and punished for an offense may not have a nonremedial civil penalty imposed against him for the same offense in a separate proceeding.").

Furthermore, statements by the members of the Supreme Court and the Appellate Courts indicate an increasing distrust of the government's use of civil forfeiture. *James Daniel Good Real Property*, 114 S. Ct. at 515 (Thomas, J., concurring in part, dissenting in part) (stating a "distrust of the Government's aggressive use of broad civil forfeiture statutes."); *United States v. \$191,910.00*, 16 F.3d 1051, 1068-69 (9th cir. 1994) ("The relative ease of obtaining forfeitures may tempt the government to seek criminal law enforcement objectives through these nominally 'civil' proceedings.").

Indeed, it appears that the call for forfeiture reform has created some strange political bedfellows. For example, when Representative Henry Hyde, a conservative Republican from Illinois, held a press conference to announce his proposed asset forfeiture reform bill, he was joined by the president of the American Civil Liberties Union. Lynne Marek, *Hyde Seeks to Curb Property Seizures by U.S.*, CHI. TRIB., June 16, 1993, at 2. The Hyde Bill will be discussed *infra* notes 85, 102 and accompanying text.

5 Congress stated the purpose of forfeiture as follows:

[T]he conviction of individual racketeers and drug dealers [is] of only limited effectiveness if the economic power bases of criminal organizations or enterprises [are] left in intact Today, few in Congress or the law enforcement community fail to recognize that the traditional criminal sanctions of fine and imprisonment are inadequate to deter or punish the enormously profitable trade in dangerous drugs which, with its inevitable attendant violence, is plaguing the country. Clearly, if law enforcement efforts to combat racketeering and drug trafficking are to be successful, they must include an attack on the economic aspects of these crimes. Forfeiture is the mechanism through which such an attack may be made.

S. REP. NO. 225, 98th Cong., 2d Sess. 191 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3374.

6 *See infra* Part III.A.

7 *See infra* Parts III.B., IV.

who have had their property forfeited due to the illegal activities of third parties. Unable to prove that their property did not derive from or facilitate illegal activity, these owners are forced to prove an affirmative defense or concede to the forfeiture.

The primary affirmative defense available to these owners under section 881 is known as the "innocent owner" defense. This defense permits a property owner to defeat a forfeiture action by establishing that the illegal activity subjecting the property to forfeiture was committed "without the knowledge or consent of that owner."⁸ The protection afforded to owners by the innocent owner defense is questionable, however, because two problems surround the defense: (1) chronic inconsistent judicial interpretation; and (2) the unforeseen repercussions of the Supreme Court decision *United States v. 92 Buena Vista Avenue*.⁹

Many property owners choosing to assert the innocent owner defense are burdened by inconsistent judicial interpretation of the statutory phrase "without the knowledge or consent of that owner." Some jurisdictions give this phrase a conjunctive meaning, requiring an owner to prove *both* lack of knowledge *and* lack of consent to defeat a forfeiture. Other jurisdictions interpret the phrase disjunctively, allowing the owner to prove *either* lack of knowledge *or* lack of consent to defeat a forfeiture action. Finally, there are many jurisdictions that refuse to take any position, leaving the determination of the conjunctive or disjunctive question to the lower courts. Moreover, courts have also inconsistently defined the statutory terms "knowledge" and "consent". This inconsistent judicial interpretation renders the standard for "innocence" under the innocent owner defense unclear.

Further complicating the innocent owner defense is the recent decision *United States v. 92 Buena Vista Avenue*. Prior to *92 Buena Vista Avenue*, courts were split as to whether the innocent owner defense was available to an owner who obtained an interest in the property after the illegal activity giving rise to the forfeiture had occurred.¹⁰ In *92 Buena Vista Avenue*, a plurality of the Supreme Court specifically addressed the issue by permitting donees

8 21 U.S.C. §§ 881(a)(6),(7) (1988). Cf. 21 U.S.C. § 881(a)(4) (1988). Although each of the primary forfeiture provisions under § 881 provides for separate innocent owner defenses, this Note will consider the defense as a single entity. The rationale for this approach is that each provision's version of the defense is similarly worded and applied thereby rendering distinction unnecessary.

9 113 S. Ct. 1126 (1993) (plurality opinion).

10 See *infra* Part IV.D.

and other post-illegal act transferees¹¹ of forfeitable property to claim protection under the defense. Unfortunately, however, the Court declined the opportunity to clarify how the innocent owner defense should be applied to these owners. Therefore, courts have been left to apply their pre-92 *Buena Vista Avenue* interpretation of the innocent owner defense to these claimants. As this Note will illustrate, post-illegal act transferees can always defeat a forfeiture action under the disjunctive interpretation of the innocent owner defense. This has left a major loophole in forfeiture law.

These and other problems¹² have fueled an atmosphere of uncertainty surrounding the application and stability of the innocent owner defense. Accordingly, this Note considers the plight of the unintended casualties of this nation's war on drugs—the innocent owners of property forfeited to the government due to the illegal conduct of third parties. Part II traces the origins of civil forfeiture from biblical times to the modern-day war on drugs. Part III provides a substantive and procedural overview of 21 U.S.C. § 881, the primary civil forfeiture statutory weapon utilized in the drug war. Part IV provides a detailed discussion of the innocent owner defense under section 881, emphasizing the current inconsistent judicial interpretation of the defense.

Within the context of *United States v. 92 Buena Vista Avenue*,¹³ Part V discusses the right of donees and other post-illegal act transferees to seek the protection of the innocent owner defense under section 881. Based on this foundation, Part VI addresses the central problems underlying the current application of the innocent owner defense: inconsistent judicial interpretation and the need to reconcile the defense with the post-illegal act transferees of forfeitable property. Part VII proposes amendments to section 881 that would balance the interest of innocent owners and the government. The proposed amendment would not only benefit claimants by providing a consistent standard for "innocence" under the defense, but it also would benefit the government by clarifying the rights of post-illegal act transferees, thereby avoiding a major loophole in forfeiture law. Part VIII concludes that until the courts and legislature are willing to provide a consistent interpretation of the innocent owner defense that protects the rights of all

11 As used in this Note, a "post-illegal act transferee" means a person who acquired an interest in forfeitable property after the illegal acts subjecting the property to forfeiture had occurred.

12 See discussion *infra* Part IV.

13 *92 Buena Vista Ave.*, 113 S. Ct. 1126.

parties involved, the innocent owners of property forfeitable under section 881 will continue to be casualties of our nation's war on drugs.

II. THE ORIGINS OF CIVIL FORFEITURE

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*.¹⁴

Thus was born the concept of civil forfeiture.¹⁵ But why this fiction of "punishing" an inanimate object? And more importantly, how did this practice eventually manifest itself in modern law?

In his book, *The Common Law*, Justice Oliver Wendell Holmes, Jr. traced the origin of in rem forfeitures to humankind's predilection for personifying inanimate objects.¹⁶ Holmes observed that "[a]n untrained intelligence only imperfectly performs the analysis by which jurists carry responsibility back to the beginning of a chain of causation. The hatred for anything giving us pain, which wrecks itself on the manifest cause . . . leads even civilized man to kick a door when it pinches his finger" ¹⁷ It was this "untrained intelligence" that was the basis for early English laws from which the principles of modern forfeiture law in this country were derived. The primary sources of English forfeiture law were the medieval "institution of the deodand"¹⁸ and early English admiralty law.¹⁹ The "institution of the deodand"²⁰ made any object

14 *Exodus* 21:28.

15 Cf. Alison R. Solomon, Comment, *Drugs and Money: How Successful is the Seizure and Forfeiture Program At Raising Revenue and Distributing Proceeds?*, 42 EMORY L.J. 1149, 1149 (1993). For a complete review of the historical development of forfeiture law, see generally 1 SMITH, *supra* note 4.

16 OLIVER W. HOLMES, JR., *THE COMMON LAW* 11 (Little, Brown & Co. ed. 1923); Arthur W. Leach & John G. Malcolm, *Criminal Forfeiture: An Appropriate Solution to the Civil Forfeiture Debate*, 10 GA. ST. U. L. REV. 241, 246 (1994).

17 See sources cited *supra* note 16.

18 See generally Jacob J. Finkelstein, *The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Western Notation of Sovereignty*, 46 TEMP. L.Q. 169 (1973). But see James R. Maxeiner, Note, *Bane of American Forfeiture Law—Banished at Last?*, 62 CORNELL L. REV. 768, 772 (1977) ("[R]eliance upon deodand as a general forfeiture principle of early English law is probably misplaced.").

19 See generally Maxeiner, *supra* note 18, at 771-77. Another source of English forfeiture law was forfeiture upon conviction for a felony or treason, known as forfeitures of the estate. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 682 (1974). In *Calero-Toledo*, the Supreme Court stated:

The convicted felon forfeited his chattels to the Crown and his lands escheated

causing the death of a person subject to forfeiture to the crown.²¹ The offending instrument was forfeited to the King "in the belief that the King would provide money for Masses to be said for the good of the dead man's soul, or insure that the deodand was put to charitable uses."²² Although deodands did not become part of the common law tradition in this country,²³

[l]ong before the adoption of the Constitution the common law courts in the Colonies—and later in the states during the period of Confederation—were exercising jurisdiction *in rem* in the enforcement of [English and local] forfeiture statutes, which provided for the forfeiture of commodities and vessels used in violation of customs and revenue laws.²⁴

Thus, English admiralty laws served as a solid foundation for modern civil forfeiture laws.²⁵ In fact, almost immediately after

to his lord; the convicted traitor forfeited all of his property, real and personal, to the Crown. The basis for these forfeitures was that a breach of the criminal law was an offense to the King's peace, which was felt to justify denial of the right to own property.

Id. at 682 (citations omitted).

Thus, unlike civil forfeiture, the principle behind forfeiture of the estate was punishing the wrongdoer (as opposed to the property), which is the same purpose that underlies modern criminal forfeiture statutes.

20 The word "deodand" derives from the latin term *Deo dandum*, which translates as "given to God" or "to be given to God." Finkelstein, *supra* note 18, at 180 n.35.; accord *Calero-Toledo*, 416 U.S. at 681 n.16.

21 Thus, "[i]f a man fell from a tree, the tree was deodand. If he drowned in a well, the well was to be filled up. It did not matter that the forfeited instrument belonged to an innocent person." HOLMES, *supra* note 16, at 24-25 (footnotes omitted). However, by 1280 the forfeiture of the actual offending object of death was replaced by a system whereby the mere value of the object was forfeited to the King. Finkelstein, *supra* note 18, at 182 n.45; see also 1 SMITH, *supra* note 4, ¶ 2.02, at 2-3 n.3.

22 *Calero-Toledo*, 416 U.S. at 681. The application of the deodand for religious purposes eventually ceased, however, and the purpose of the deodand became a means for providing a source of revenue for the Crown justified as a penalty for carelessness. *Id.* This new justification for forfeiture eventually manifested itself in the abolition of the deodand institution, and the contemporaneous passage of Lord Campbell's Act creating a cause of action for wrongful death. *Id.* at 681 n.19.

23 *Id.* at 682.

24 *Id.* at 683 (quotation marks omitted) (citation omitted) (quoting C.J. Hendry Co. v. Moore, 318 U.S. 133, 139 (1943)).

25 Unlike the initial purpose of the deodand, forfeiture under the English admiralty statutes did not have the religious underpinnings.

The Navigation Acts of 1660, which required the shipping of commodities in English vessels, were a major component of English policy to promote dominance at sea. These Acts were made applicable to the colonies, and enforced in its courts. Thus, any vessel found to be in violation of the Acts was forfeited to the crown.

the Constitution was adopted, a federal statute was enacted making ships and cargo involved in customs offenses subject to forfeiture.²⁶ These initial federal civil forfeiture statutes served vital national interests during the early days of our Republic.²⁷ In times of war, vessel forfeitures were used to destroy the maritime strength of our enemies.²⁸ Such provisions were also utilized during the Revolutionary War to seize Tory property and later to seize Confederate property during the Civil War.²⁹ Despite its early roots, however, forfeiture played an insignificant role in American law³⁰ until our nation was confronted with a new war—the war on drugs.

III. MODERN FORFEITURE LAW AND THE WAR ON DRUGS: 21 U.S.C. § 881

Although the nation's infamous "war on drugs" is often attributed to the Reagan-Bush era, this war has actually been waged by every administration since that of John F. Kennedy.³¹ Ironically, despite strong federal efforts our nation has consistently been the greatest casualty of this war.³² Recognizing that traditional methods of law enforcement were ineffective in curtailing the lucrative drug trade,³³ Congress actively created new weapons to help America kick its drug habit. In 1970, Congress took the first step in this initiative by enacting the Racketeer Influenced and Corrupt Organizations Act (RICO),³⁴ the Continuing Criminal Enterprise statute (CCE),³⁵ and importantly, the initial version of section 881

Leach & Malcolm, *supra* note 16, at 248 n.25.

26 *Calero-Toledo*, 416 U.S. at 683; *see also* Leach & Malcolm, *supra* note 16, at 248 n.25.

27 1 SMITH, *supra* note 4, ¶ 2.01, at 2-2; Leach & Malcolm, *supra* note 16, at 248.

28 *See* sources cited *supra* note 27.

29 *See* sources cited *supra* note 27.

30 *See* *United States v. 92 Buena Vista Ave.*, 113 S. Ct. 1126, 1133 (plurality opinion) (describing the modern evolution of forfeiture laws as "an important expansion of governmental power.")

31 Kelly McClure, Note, *Federal Civil Forfeiture of Assets: How It Works and Why It Must*, 11 U. BRIDGEPORT L. REV. 419, 442 (1991). For a critical evaluation of the American drug policy, *see* generally WAR ON DRUGS STUDIES IN THE FAILURE OF U.S. NARCOTICS POLICY (Alfred W. McCoy & Alan A. Block eds., 1992).

32 *See* discussion *supra* note 5.

33 *See* discussion *supra* note 5.

34 RICO was enacted as part of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 901, 84 Stat. 992, 941 (codified as amended at 18 U.S.C. §§ 1961-1968 (1988 & Supp. V 1993)).

35 CCE was enacted as part of the Comprehensive Drug Abuse Prevention and Con-

of the Controlled Substances Act.³⁶ This legislation was based on the premise that crime *does* pay. In short, Congress realized that "if law enforcement efforts to combat racketeering and drug trafficking are to be successful, they must include an attack on the economic aspects of these crimes. Forfeiture is the mechanism through which such an attack may be made."³⁷

Eventually it became apparent, however, that forfeiture was not fulfilling its anticipated goals.³⁸ Consequently, by 1984 Congress had enacted legislation to increase the efficiency of civil and criminal forfeiture laws by vastly expanding the categories of property subject to forfeiture.³⁹ Since that time, the most effective, most utilized, and most criticized statute to combat the war on drugs has been 21 U.S.C. § 881.

A. § 881 Substantive Overview

Forfeiture is currently authorized by more than 100 federal statutes,⁴⁰ providing for confiscation of everything from diseased

trol Act of 1970, Pub. L. No. 91-513, § 511, 84 Stat. 1236, 1276 (codified as amended at 21 U.S.C. § 848 (1988 & Supp. V 1993)).

36 The Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, § 511, 84 Stat. 1236, 1276 (codified as amended at 21 U.S.C. § 881 (1988 & Supp. V 1993)).

37 S. REP. No. 225, *supra* note 5, at 191, *reprinted in* 1984 U.S.C.C.A.N. at 3374.

38 In 1984, Congress reviewed a report released by the General Accounting Office which found that asset forfeiture was not being pursued aggressively under the statutes. In fact, the report found that from 1970 to 1980 the RICO and CCE statutes had been used in only 98 drug cases wherein the assets subject to forfeiture in those cases only amounted to \$2,000,000. *See source cited supra* notes 5, 37; *see also* 1 SMITH, *supra* note 4, ¶ 1.01, at 1-5 n.11.

39 For example, 21 U.S.C. § 881(a)(6) was enacted as part of the Psychotropic Substances Act of 1978, Pub. L. No. 95-633, § 301(a), § 511(a) (6), 92 Stat. 3768, 3777 (codified at 21 U.S.C. § 881(a)(6) (1988)). 21 U.S.C. § 881(a)(7) was enacted as part of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 306(a), § 511(a)(7), 98 Stat. 1837, 2050 (codified at 21 U.S.C. § 881(a)(7) (1988)). The fact that § 881 is the most central forfeiture statute utilized to fight the drug war can be attributed to the enactment of these two sections. *See discussion infra* Part III.A-B.

40 Some examples of non-drug related civil forfeiture statutes include: 18 U.S.C. § 981 (1988 & Supp. V 1993) (forfeiture of any property involved in illegal money laundering transactions); 18 U.S.C. § 512 (1988) (forfeiture of vehicles which have removed, obliterated or altered identification number); 18 U.S.C. § 1955(d) (1988) (forfeiture of any property used in conducting an illegal gambling business); 18 U.S.C. § 2254 (1988 & Supp. V 1993) (forfeiture of objects depicting minors engaged in sexually explicit conduct). Additionally, there are a number of criminal forfeiture statutes which provide the property owners with many more procedural rights than civil forfeiture statutes. For two common examples of criminal forfeiture statutes, see 18 U.S.C. § 1963 (1988 & Supp. V 1993) (forfeiture of any interest in property acquired or maintained in violation of RICO substantive provisions); 21 U.S.C. § 853 (1988) (forfeiture of property obtained from or

poultry⁴¹ to pornographic magazines.⁴² Notwithstanding the wide array of both criminal and civil forfeiture statutes, the nation's drug crisis has encouraged the disproportionate use of section 881. Three subsections under 21 U.S.C. § 881 generally govern the majority of circumstances in which property related to narcotics trafficking is forfeited to the government: (1) section 881(a)(4) provides for the forfeiture of conveyances (including aircraft, vehicles, or vessels) that are used to facilitate illegal narcotics transactions; (2) section 881(a)(6) authorizes the forfeiture of anything of value furnished in exchange for illegal drugs, proceeds traceable to such exchanges, and moneys used to facilitate illegal narcotics transactions; and (3) section 881(a)(7) authorizes the forfeiture of real property, when it is used to facilitate illegal narcotics transactions.⁴³

facilitating narcotics violation after owner is convicted of such offense).

41 See 21 U.S.C. § 467b(a) (1988 & Supp. V 1993).

42 See 18 U.S.C. § 1466 (1988 & Supp. V 1993).

43 Other forfeitable items under § 881 include:

(1) Controlled Substances. See generally 21 U.S.C. §§ 881(a)(1),(8) (1988).

(2) Raw Materials, Products, and Equipment. "All raw materials, products, and equipment of any kind which are used, or intended for use, in manufacturing, compounding, processing, delivering, importing, or exporting any controlled substance in violation of [federal drug laws]." 21 U.S.C. § 881(a)(2) (1988). Thus, this provision can be utilized for the forfeiture of anything from electronic equipment to crack vials. See *United States v. Kim*, 803 F. Supp. 352, 361 (D. Haw. 1992) (government seized cellular telephone where there was probable cause to believe that claimant had used it to facilitate delivery, importation or exportation of controlled substances), *aff'd*, 25 F.3d 1426 (9th Cir. 1994); *United States v. Bank of New York*, 14 F.3d 756 (2d Cir. 1994) (forfeiture of crack vials and proceeds from the sale of crack vials).

(3) Containers. "All property which is used, or intended for use, as a container for property described in paragraph (1), (2), or (9)." 21 U.S.C. § 881(a)(3) (1988). Examples of property subject to forfeiture under this provision include luggage, furniture or any other property that is used to smuggle or contain illegal drugs. Compare *United States v. Ladesma*, 499 F.2d 36 (9th Cir. 1974) (government seized a trunk which had cocaine in false bottom), *cert. denied*, 419 U.S. 1024 (1974). One district court has specifically held that a mobile home which contained marijuana was not a "container" for the purposes of this provision. *United States v. 1989 Stratford Fairmount 14' x 70' Mobile Home*, 783 F. Supp. 1154 (N.D. Ill. 1992), *aff'd*, 986 F.2d 177 (7th Cir. 1993).

(4) Books, Records, and Research. "All books, records, and research, including formulas, microfilm, tapes, and data which are used, or intended for use, in violation of [federal drug laws]." 21 U.S.C. § 881(a)(5) (1988). While this provision could conceivably reach books and magazines detailing how to cultivate drugs, one district court construed an analogous state forfeiture statute so as to not permit the forfeiture of books of general literature and distribution. See *Kane v. McDaniel*, 407 F. Supp. 1239, 1243 (W.D. Ky. 1975) (not permitting the forfeiture of books entitled "Child's Garden of Grass," "Sexual Power of Marijuana," and "The Pot Report").

(5) Chemicals, Equipment, Machines, and Capsules. See generally 21 U.S.C. § 881(a)(9) (1988).

1. Forfeiture of Conveyances - § 881(a)(4)

Section 881(a)(4) provides for the forfeiture of "[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" controlled substances or the equipment or raw materials used to make controlled substances.⁴⁴ Forfeiture under this provision commonly occurs where an automobile or aircraft is used to transport or facilitate the delivery of illegal drugs.⁴⁵ However, a recent Seventh Circuit case permitted the forfeiture of a vehicle which was used merely to transport its owner to and from the scene of a drug meeting. The vehicle neither carried nor concealed any drugs.⁴⁶

There are three statutory exemptions to forfeiture of otherwise guilty conveyances. The first exemption states that common carriers are not subject to forfeiture unless it appears "that the owner or other person in charge of such conveyance was a consenting party or privy to" a violation of federal drug laws.⁴⁷ The second exempts conveyances if the owner can prove that the illegal use of the conveyance occurred while the property was illegally in possession of someone other than the owner.⁴⁸ Finally, the third exemption outlines an innocent owner defense directing that a conveyance cannot be forfeited for illegal acts "committed or omitted without the knowledge, consent, or wilful blindness of the

(6) Drug Paraphernalia. "Any drug paraphernalia (as defined in [21 U.S.C. § 863])." 21 U.S.C. § 881(a)(10) (Supp. V 1993). Thus, property subject to forfeiture under this provision include "any equipment, product, or material of any kind which is primarily intended or designed for use in manufacturing, compounding, converting . . . or . . . introducing into the human body a controlled substance . . ." 21 U.S.C. § 863(d) (Supp. V 1993) (providing examples such as water pipes, roach clips, bongs, and cocaine freebase kits).

(7) Firearms. *See generally* 21 U.S.C. § 881(a)(11) (Supp. V 1993).

For a thorough discussion of items forfeitable under § 881, see generally ASSET FORFEITURE OFFICE, 1 ASSET FORFEITURE MANUAL (1993).

44 21 U.S.C. § 881(a)(4) (1988). Thus, § 881(a)(4) authorizes forfeiture of conveyances used in one of two ways: (1) to transport illegal drugs and the like; or (2) to facilitate in any manner the transport, sale, receipt, possession, or concealment of illegal drugs or the like. *See* United States v. 1990 Toyota 4Runner, 9 F.3d 651 (7th Cir. 1993).

45 *See, e.g.,* United States v. 1978 Piper Cherokee Aircraft, No. 92-15350, 1994 WL 528447, at *4 (9th Cir. Sept. 30, 1994) (forfeiture of airplane used to transport or facilitate delivery of illegal controlled substances).

46 *See generally* 1990 Toyota 4Runner, 9 F.3d 651.

47 21 U.S.C. § 881(a)(4)(A) (1988).

48 21 U.S.C. § 881(a)(4)(B) (1988).

owner."⁴⁹ The person attempting to utilize one of these exemptions has the burden of presenting at trial the evidence establishing the defense.⁵⁰

2. Forfeiture of Exchange Money, Traceable Proceeds, and Facilitating Money - § 881(a)(6)

Section 881(a)(6) provides three provisions that allow for the forfeiture of three types of property.⁵¹ First, an exchange provision allows forfeiture of anything of value exchanged or intended to be exchanged for a controlled substance.⁵² Many forfeiture cases under the exchange provision involve situations where the only evidence of an exchange was either the mere proximity of large sums of money found near drugs or drug paraphernalia,⁵³ or where a person carrying a large sum of money acts in a suspicious manner.⁵⁴ Second, a proceeds provision allows forfeiture of all proceeds traceable to such an exchange.⁵⁵ Thus, where there

49 21 U.S.C. § 881(a)(4)(C) (1988). The innocent owner defense will be discussed *infra* Part IV. One commentator states that the innocent owner defense was added to § 881(a)(4) due to congressional pressure stemming from abuses of the statute in an attempt to uphold the Reagan Administration's "zero tolerance" policy toward drug users. See I SMITH, *supra* note 4, ¶ 4.02, at 4-9 to 4-10.

50 See *infra* Part IV.

51 Section 881(a)(6) provides for forfeiture of:

[a]ll moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter

21 U.S.C. § 881(a)(6) (1988).

52 Although the exchange provision specifically refers to "moneys, negotiable instruments, and securities," it is not limited to these items. It also applies to "[any] other things of value" exchanged or intended to be exchanged for drugs. Compare 21 U.S.C. § 881(a)(6) (the facilitation provision of § 881(a)(6) is limited to moneys, negotiable instruments and securities).

53 See, e.g., *United States v. \$91,960.00, 897 F.2d 1457, 1462* (8th Cir. 1990) ("[T]he discovery of a large sum of money, unexplained and in conjunction with the presence of drug paraphernalia, may constitute evidence of probable cause.").

54 For example, a recent Eleventh Circuit case held that probable cause existed under § 881(a)(6) for the forfeiture of \$121,100, where an individual was at the airport, held a large quantity of cash, bought his airline ticket in cash under a false name, acted nervously and had a history of drug violations. *United States v. \$121,100.00, 999 F.2d 1503, 1508* (11th Cir. 1993).

55 As used in § 881(a)(6), the word "proceeds" means property derived from money or other things of value directly exchanged for drugs. For example, property acquired with the profits of drug trafficking. Thus, if cash acquired in exchange for drugs is used to purchase a house and the house is later sold for cash, that cash is forfeitable under

is probable cause to believe that a home or other property was purchased with money exchanged for illegal drugs, the property may be forfeitable as proceeds of illegal drug activity.⁵⁶ Finally, a facilitation provision allows forfeiture of all moneys, negotiable instruments, and securities used or intended to be used to facilitate any federal drug law violation.⁵⁷ For example, a recent Fourth Circuit case held that probable cause existed for the forfeiture of \$15,716 which the claimant had intended to use to finance a clothing store.⁵⁸ The money was subject to forfeiture under the facilitation provision because the clothing store was used merely as "a front for [the claimant's] drug sales," thereby rendering the money a facilitator of illegal narcotics activity.⁵⁹ Section 881(a)(6) contains an innocent owner defense for all legal and equitable owners of an interest in the exchange monies, traceable proceeds, or facilitating monies sought to be forfeited if they can prove by a preponderance of the evidence that they did not know or consent to the underlying illegal conduct.⁶⁰

3. Forfeiture of Real Property - § 881(a)(7)

As part of the Comprehensive Crime Control Act of 1984,⁶¹

the proceeds provision of § 881(a)(6), but the original cash obtained from the sale of drugs is not (the original cash would be forfeitable under the exchange provision of § 881(a)(6)). See 1 SMITH, *supra* note 4, ¶ 4.03, at 4-82.

Additionally, in order for proceeds to be forfeited they must be traceable to drug trafficking activity. It appears that such tracing need not be to a particular drug transaction. Rather, it is enough that the government trace the proceeds to drug activity in general. *United States v. \$87,060*, 23 F.3d 1352, 1354 (8th Cir. 1994) ("Circumstantial evidence may be considered and the government need not trace the property to a specific drug transaction."); *\$121,100.00*, 999 F.2d at 1508 ("The government need not connect the defendant currency to any particular drug transaction."). Obviously, to require the government to trace proceeds to particular transactions would be a nearly insurmountable obstacle.

56 See *United States v. 92 Buena Vista Ave.*, 113 S. Ct. 1126 (1993) (plurality opinion); *United States v. Chandler*, No. 93-2064, 1994 WL 523993 (4th Cir. Sept. 27, 1994).

57 The facilitation provision is both broader and narrower than the exchange and proceeds provisions of § 881(a)(6). It is broader because it permits the forfeiture of property that is merely used or intended to be used to facilitate felony drug violations. The other two provisions are limited to violations involving the "exchange" of drugs. The provision is narrower in that it merely provides for the forfeiture of "moneys, negotiable instruments, and securities," whereas the other provisions permit forfeiture of "other things of value." See 21 U.S.C. § 881(a)(6) (1988).

58 *United States v. Perez*, No. 92-2152, 1994 WL 318760, at *3 (4th Cir. July 1, 1994).

59 *Id.* at *2.

60 See discussion *infra* Part IV.

61 Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 306(a), §

Congress added section (a)(7) to 21 U.S.C. § 881(a). This section authorizes the forfeiture of "[a]ll real property . . . which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of" felony narcotics transactions.⁶² Forfeiture under this provision often occurs when a drug sale or meeting occurs on the real property.⁶³ However, courts have permitted the government to forfeit property under this provision where the property was used to grow marijuana,⁶⁴ and have even permitted the forfeiture of a home where the owner merely used the home telephone to negotiate and arrange a drug transaction.⁶⁵

Like sections 881(a)(4) and (a)(6), section 881(a)(7) contains a statutory innocent owner defense.⁶⁶

Finally, it should be noted that because the three primary forfeiture provisions under section 881 authorize forfeiture of property that merely "facilitates" illegal narcotics activity, questions arise as to how "connected" this property must be to the illegal activity. According to Congress, "it is the intent of these provisions that the property would be forfeited only if there is a *substantial connection* between the property and the underlying criminal activi-

511(a)(7), 98 Stat. 1837, 2050 (codified at 21 U.S.C. § 881(a)(7) (1988)).

62 Section 881(a)(7) provides for the forfeiture of:

All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment

21 U.S.C. § 881(a)(7) (1988).

63 See, e.g., *United States v. 19 & 25 Castle St.*, 31 F.3d 35, 37 (2d Cir. 1994).

64 See *United States v. Plat 20, Lot 17, Great Harbor Neck*, 960 F.2d 200 (1st Cir. 1992).

65 *United States v. 916 Douglas Ave.*, 903 F.2d 490 (7th Cir. 1990), cert. denied, 498 U.S. 1126 (1991). The broad language of § 881(a)(7), creates an issue of the potential for disproportionality between the offense and the forfeited property. By its language, § 881(a)(7) would permit a huge estate to be forfeited if any part of it was used, or was intended to be used, to facilitate a small felony drug offense. While most courts have alleviated some of the disproportionality concerns by requiring that there be a "substantial connection" between the property and the underlying illegal activity, many courts have declined to follow the "substantial connection" test. See *United States v. 916 Douglas Ave.*, 903 F.2d 490 (7th Cir. 1990), cert. denied, 498 U.S. 1126 (1991). Such problems will likely be reduced, however, by the recent decision of *Austin v. United States*, 113 S. Ct. 2801, 2803 (1993), wherein the Supreme Court looked past the "guilty-property" fiction and permitted Excessive Fines Clause challenges to civil forfeitures under the Eighth Amendment.

66 See discussion *infra* Part IV.

ty which the statute seeks to prevent."⁶⁷ While many courts have required this "substantial connection" between the property and the unlawful conduct triggering the forfeiture,⁶⁸ other courts have held that "the government must demonstrate only a 'nexus' between the seized property and illegal drug activity."⁶⁹

B. § 881 Procedural Overview

Because forfeiture under section 881 is an *in rem* action, "[i]t is the property which is proceeded against, and, by resort to a legal fiction, held guilty and condemned as though it were conscious instead of inanimate and insentient."⁷⁰ This "guilty-property" fiction has enabled civil forfeiture to avoid many of the procedural safeguards afforded in criminal proceedings.⁷¹ In fact, the property owned by a person acquitted of a criminal narcotics offense may still be subject to civil forfeiture.⁷² Furthermore, be-

67 124 CONG. REC. 34670, 34671 (1978) (emphasis added), *reprinted in* 1978 U.S.C.C.A.N. at 9496, 9522.

68 *See, e.g.,* *United States v. Two Tracts of Real Property*, 998 F.2d 204, 212 (4th Cir. 1993) ("[T]he mere fact that land provides a 'means of access' by which contraband reaches a public highway can hardly be said to establish the 'substantial connection' [test].").

69 *United States v. Daccarett*, 6 F.3d 37, 56 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 1538 (1994). One court has noted, however, that the differences between the "substantial connection" test and other approaches is largely "semantical rather than practical." *916 Douglas Ave.*, 903 F.2d at 494.

70 *Various Items of Personal Property v. United States*, 282 U.S. 577, 581 (1931). *See also* *Austin v. United States*, 113 S. Ct. 2801, 2808-09 (1993) (citations omitted) ("The fiction 'that the thing is primarily considered the offender,' has a venerable history in our case law.").

71 For example, civil forfeiture under § 881 does not require a criminal conviction for forfeiture to occur. As stated in one of the earliest forfeiture cases: "[T]he practice has been, and so this Court understand [sic] the law to be, that the proceeding *in rem* stands independent of, and wholly unaffected by any criminal proceeding *in personam*." *The Palmyra*, 25 U.S. (12 Wheat.) 1, 15 (1827).

72 For example, one district court held that the government was not precluded from bringing a forfeiture action against a vehicle which had been used to transport contraband despite the fact that the owner of the vehicle was acquitted of narcotics charges arising out of the same events on which the forfeiture was based. *United States v. 1977 Chevrolet Pickup*, 503 F. Supp. 1027 (D. Colo. 1980). *See also* *United States v. 89 Firearms*, 465 U.S. 354 (1984); *United States v. Dunn*, 802 F.2d 646, 647 (2d Cir. 1986), *cert. denied*, 480 U.S. 931 (1987). In light of *Austin v. United States*, 113 S. Ct. 2801 (1993), however, wherein the Court recognized the punitive aspects of civil forfeiture, it is likely that forfeiture after a criminal acquittal may constitute a violation of the Double Jeopardy Clause of the Fifth Amendment.

For recent cases considering the Double Jeopardy Clause implications of bringing forfeiture actions and criminal actions in separate proceedings, see *United States v. \$405,089.23*, No. 93-55947, 1994 WL 476736, at *1 (9th Cir. Sept. 6, 1994) (Double Jeopardy Clause violated where criminal proceedings and civil forfeiture proceedings are held

cause one of the earliest sources of forfeiture law was admiralty law,⁷³ many civil forfeiture statutes, including section 881, specifically incorporate procedures from admiralty and customs laws.⁷⁴ Accordingly, under section 881 the government has the initial burden of proving merely that there is probable cause to believe that the seized property is subject to forfeiture.⁷⁵

Probable cause in the forfeiture context has generally been

separately). *See also* United States v. Torres, 28 F.3d 1463, 1464-65 (7th Cir. 1994) (stating that "parallel [forfeiture] and criminal actions do not necessarily violate the Double Jeopardy clause," but noting that the government "would do well to seek imprisonment, fines, and forfeiture in one proceeding."). *Cf.* Dep't of Revenue of Montana v. Kurth Ranch, 114 S. Ct. 1937 (1994), wherein the Court held that a "civil" tax assessed on possession of illegal drugs after the state has imposed a criminal penalty for the same conduct violates Double Jeopardy under Fifth Amendment. The court stated that "[a] defendant convicted and punished for an offense may not have a nonremedial civil penalty imposed against him for the same offense in a separate proceeding." *Id.* at 1945 (emphasis added). In light of the *Austin* case which recognized that civil forfeiture may violate the Eighth Amendment's proscription against excessive fines, (and thus may be a nonremedial civil penalty), the *Kurth Ranch* case has obvious Double Jeopardy implications in the context of civil forfeiture.

⁷³ *See supra* Part II.

⁷⁴ Hence, 21 U.S.C. § 881(d) states:

The provisions of law relating to the seizure, summary and judicial forfeiture, and condemnation of property for violation of the *customs laws*; the disposition of such property or the proceeds from the sale thereof; the remission or mitigation of such forfeitures; and the compromise of claims shall apply to seizures and forfeitures incurred, . . . under any of the provisions of this subchapter

21 U.S.C. § 881(d) (1988) (emphasis added).

The burden of proof in forfeiture proceedings under customs laws is set forth in 19 U.S.C. § 1615 which provides:

In all suits or actions . . . brought for the forfeiture of any vessel, vehicle, aircraft, merchandise, or baggage seized . . . where the property is claimed by any person, the burden of proof shall lie upon such claimant; and in all suits or actions brought for the recovery of the value of any vessel, vehicle, aircraft, merchandise, or baggage, because of violation of any such law, the burden of proof shall be upon the defendant: *Provided*, That probable cause shall be first shown for the institution of such suit or action, to be judged by the court

19 U.S.C. § 1615 (1988).

Consequently, under § 881 (as it incorporates 19 U.S.C. § 1615), the government need only show probable cause to seize property and commence a forfeiture action. Thereafter, the burden shifts to the claimant to establish by a preponderance of the evidence that the property is not subject to forfeiture.

⁷⁵ *See, e.g.*, United States v. \$191,910.00, 16 F.3d 1051, 1071 (9th Cir. 1994) (finding probable cause for forfeiture of property under § 881(a)(6)); United States v. Bizzell, 19 F.3d 1524, 1527 n.6 (4th Cir. 1994) (finding probable cause for forfeiture of property under § 881(a)(4)); United States v. Rural Route 1, Box 137-B, 24 F.3d 845, 848 (6th Cir. 1994) (finding probable cause for forfeiture of property under § 881(a)(7)).

defined by courts to mean a reasonable ground for belief of guilt, supported by less than prima facie proof, but more than mere suspicion.⁷⁶ The government may rely on circumstantial and hearsay evidence to establish probable cause,⁷⁷ while the claimant cannot rely on such evidence in rebuttal.⁷⁸ Once the government shows probable cause to believe that the property is subject to forfeiture, the burden of proof shifts to the claimant.⁷⁹

Thus, unlike a criminal trial where the government must prove every element of a crime beyond a reasonable doubt,⁸⁰ a forfeiture action under section 881 requires the property owner to establish by a preponderance of the evidence that the property is not subject to forfeiture or that the owner has an affirmative defense.⁸¹ Therefore, to the surprise of many, the axiom *probandi necessitas incumbit illi qui agit* (he who sues must carry the burden of proof),⁸² has few implications in the context of civil forfeiture. Although criticized,⁸³ this burden-shifting procedure has been

⁷⁶ See cases cited *supra* note 75.

⁷⁷ See, e.g., *United States v. \$87,060.00*, 23 F.3d 1352, 1354 (8th Cir. 1994) ("Circumstantial evidence may be considered . . ."); *United States v. Daccarett*, 6 F.3d 37, 56 (2d Cir. 1993) (citations omitted) ("A finding of probable cause may be based on hearsay . . . or circumstantial evidence . . ."), *cert. denied*, 114 S. Ct. 1538 (1994).

⁷⁸ See, e.g., *United States v. 15 Black Ledge Drive*, 897 F.2d 97 (2d Cir. 1990); *United States v. 1986 Nissan Maxima GL*, 895 F.2d 1063, 1065 (5th Cir. 1990); *United States v. 6109 Grubb Rd.*, 886 F.2d 618 (3d Cir. 1989); *United States v. \$250,000*, 808 F.2d 895, 899 (1st Cir. 1987).

⁷⁹ See, e.g., *\$87,060.00*, 23 F.3d at 1354 ("Once the government establishes probable cause, the burden shifts to the claimant to show that the property was not connected to a crime."); *United States v. RR #1, Box 224*, 14 F.3d 864, 869 (3d Cir. 1994) ("Once the Government has provided sufficient evidence to show probable cause, the burden shifts to the defendant-owner to rebut the property's connection to his criminal activity . . ."); *United States v. 19 & 25 Castle St.*, 31 F.3d 35, 39 (2d Cir. 1994) ("Once the Government has established probable cause, the burden of proof shifts to the claimant opposing forfeiture.");

⁸⁰ See, e.g., *In re Winship*, 397 U.S. 358, 364 (1975) (government required to prove beyond a reasonable doubt every fact necessary to constitute crime).

⁸¹ For example, if the owner cannot show that the illegal activity giving rise to the forfeiture did not occur, she may raise the affirmative innocent owner defense. See *infra* Part IV.

⁸² 1 SMITH, *supra* note 4, ¶ 11.02, at 11-9.

⁸³ For example, Judge George C. Pratt, of the Second Circuit Court of Appeals, recently stated:

While we also might question the wisdom of forcing the owner of the seized property to prove the property is "innocent", rather than making the government prove the property is "guilty", the constitutionality of congress's [sic] allocation of the burdens of proof in forfeiture cases has been upheld.

United States v. Daccarett, 6 F.3d 37, 57 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 1538 (1994).

upheld repeatedly against constitutional challenges.⁸⁴

A proposed amendment to section 881 would place the burden of proof on the government. The amendment, known as the Civil Asset Forfeiture Reform Act of 1993, would revise 19 U.S.C. § 1615 (admiralty and customs procedures as incorporated by section 881(d)) requiring the government to 'prove by clear and convincing evidence that the property is subject to forfeiture.'⁸⁵

In addition to these procedural constraints, until recently forfeiture claimants had limited due process rights. However, in *United States v. James Daniel Good Real Property*,⁸⁶ the Supreme Court held that due process requires pre-seizure notice and an adversary hearing prior to the forfeiture of any real property forfeited pursuant to section 881(a)(7).⁸⁷

Forfeiture under section 881 clearly encompasses a broad array of property and includes a disadvantageous procedural process for claimants. Standing alone, these factors expose many owners to forfeiture as a result of illegal activity that they did not participate in or even know of. In an attempt to protect these property owners, Congress included an innocent owner defense in each of the primary forfeiture provisions under section 881.

IV. § 881 AND THE INNOCENT OWNER DEFENSE

Traditionally, "the innocence of the owner of property subject

84 See, e.g., *United States v. White Hill Rd.*, 916 F.2d 808, 814 (2d Cir. 1990), cert. denied, 498 U.S. 1091 (1991); *United States v. Santoro*, 866 F.2d 1538, 1543 (4th Cir. 1989); *United States v. \$250,000*, 808 F.2d 895 (1st Cir. 1987). Many of the courts that have upheld burden-shifting, however, have relied on the civil/remedial character of civil forfeiture statutes. See *id.* The reasoning of these courts is now questionable in light of *Austin v. United States*, 113 S. Ct. 2801 (1993), wherein the Supreme Court held that forfeitures are punishment subject to limitations under the Excessive Fines clause of the Eighth Amendment. For a discussion of the implications of the *Austin* decision on burden-shifting and other areas of civil forfeiture law, see generally Robin M. Sackett, *The Impact of Austin v. United States: Extending Constitutional Protections to Claimants in Civil Forfeiture Proceedings*, 24 GOLDEN GATE U. L. REV. 495 (1994) (stating that burden-shifting in civil forfeiture "shocks the conscience" and that "[t]he burden of proof requirements in civil forfeiture proceedings must be changed."). For a pre-*Austin* discussion of the inequities of burden-shifting in civil forfeiture, see Christine M. Durkin, Note, *Civil Forfeiture Under Federal Narcotics Law: The Impact of the Shifting Burden of Proof Upon the Fifth Amendment Privilege Against Self-Incrimination*, 24 SUFFOLK U. L. REV. 679, 683 (1990) (arguing that burden-shifting under § 881 violates owner's privilege against self-incrimination under Fifth Amendment).

85 See generally The Civil Asset Forfeiture Reform Act of 1993, H.R. 2417, 103d Cong., 1st Sess. (1993).

86 114 S. Ct. 492 (1994).

87 *Id.* at 505.

to forfeiture has almost uniformly been rejected as a defense."⁸⁸ Despite this traditional rule, each of the three primary statutory forfeiture provisions under section 881 provide for an innocent owner defense, whereby an owner may defeat a forfeiture by establishing by a preponderance of the evidence that the alleged wrongful act was "committed or omitted without the knowledge or consent of that owner."⁸⁹ Unfortunately, courts have struggled in defining a consistent standard for "innocence" under the defense. Courts have had difficulty determining: (1) whether the innocent owner defense should have a conjunctive or disjunctive meaning; (2) what constitutes "knowledge"; (3) what constitutes "consent"; and (4) who qualifies as an "owner".

A. *The "Conjunctive" or "Disjunctive" Debate*

One of the foremost difficulties that has confronted the courts interpreting the innocent owner defense under section 881 has been determining whether the phrase "without the knowledge or consent of that owner"⁹⁰ should follow a conjunctive or disjunctive meaning.

Courts adhering to the conjunctive interpretation of the innocent owner defense hold that owners claiming innocence may do so only by proving by a preponderance of the evidence that they were *both* without knowledge of the illegal activity giving rise to the forfeiture *and* did not consent to the illegal activity giving rise to the forfeiture.⁹¹ By contrast, courts adhering to the disjunctive

88 *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 683 (1974).

89 *But cf.* 21 U.S.C. § 881(a)(4) (1988). The innocent owner under § 881(a)(4)(C) (the conveyance provision) requires the owner to establish that the alleged wrongful acts were "committed or omitted without the *knowledge, consent, or willful blindness of the owner.*" 21 U.S.C. § 881(a)(4)(C) (1988) (emphasis added).

Whereas the innocent owner provisions under both § 881(a)(6) (the exchange/proceeds provision) and § 881(a)(7) (the real property provision) provide:

[N]o property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted *without the knowledge or consent of that owner.*

21 U.S.C. §§ 881(a)(6),(7) (1988) (emphasis added).

Despite the different language in these sections, the conjunctive or disjunctive debate still applies. *See United States v. One 1989 Jeep Wagoneer*, 976 F.2d 1172 (8th Cir. 1992) (court discusses conjunctive/disjunctive debate in context of § 881(a)(4)(C)).

90 *See* discussion *supra* note 89.

91 The seminal case illustrating the conjunctive approach to the innocent owner defense is *United States v. Lot 111-B, Tax Map Key*, 902 F.2d 1443 (9th Cir. 1990) (*per curiam*). In *Tax Map Key*, the district court had found that there was probable cause that the claimant's property was used to facilitate the commission of a narcotics violation and

interpretation hold that owners claiming innocence may do so by showing that they were *either* without knowledge of the acts giving rise to the forfeiture *or* they did not consent to the acts giving rise to forfeiture.⁹² Hence, under a disjunctive interpretation of the defense, owners who had knowledge of illegal narcotics activities could still prevent the forfeiture of their property if they could prove that they did not "consent" to the activity. Although it is clear that the majority of courts have favored the disjunctive ap-

was therefore forfeitable under § 881(a)(7). *Id.* at 1444. The claimant did not dispute that the premises had been so used, but argued that he was an innocent owner. *Id.* The district court rejected the claimant's defense because the claimant had knowledge of the illegal activities occurring on the property. *Id.* at 1445. On appeal the claimant argued that notwithstanding his knowledge of the illegal activities, he should have been entitled to establish that he was without consent of the activities. *Id.* The Court of Appeals rejected the claimant's argument, holding that an innocent owner must establish both lack of knowledge and lack of consent to avoid the forfeiture of property. *Id.* The *Tax Map Key* court reached its conclusion by pointing to the policy and legislative history behind § 881. *Id.* *Accord* United States v. 10936 Oak Run Circle, 9 F.3d 74 (9th Cir. 1993).

92 The decision of the Court of Appeals for the Third Circuit in United States v. 6109 Grubb Rd., 886 F.2d 618 (3d Cir. 1989), exemplifies the disjunctive approach. In *6109 Grubb Rd.*, the claimant's spouse was convicted of three drug felonies. *Id.* at 620. Thereafter, the government sought forfeiture of property owned by the claimant and her spouse. Although the claimant conceded that there was probable cause to believe that her home, 6109 Grubb Road, had been used to commit or facilitate narcotics violations (in violation of § 881(a)(7)), the claimant argued that her interest in the property should not be forfeited because she *either* did not know of the illegal use of the property *or* did not consent to the use of the property for narcotics violations. *Id.* The district court entered an order of forfeiture concluding that the claimant had failed to prove that she was without knowledge of the illegal use of the premises (the court did not consider whether she consented to such use). *Id.* at 620 n.1 to 623. On appeal, the claimant argued that despite her knowledge of the illegal activity, she should have been provided the opportunity to establish her lack of consent to such use. *Id.* at 624. The *Grubb* court relied on the canons of statutory construction to resolve the issue. The court determined that these canons hold that terms connected by a disjunctive, such as the word "or," are to be given separate meanings. The court reasoned that since the words "knowledge" and "consent" are separated in the statute by the disjunctive "or," the court gave the terms separate meanings. *Id.* at 626. Thus, the court held that the claimant could establish innocent ownership by showing "that the illegal use of the property occurred either without her knowledge or without her consent." *Id.* at 626.

Recognizing that the reasoning of the *6109 Grubb Rd.* court may be flawed, other courts and commentators have arrived at a disjunctive interpretation of the innocent owner defense by different means. In United States v. 141st St. Corp. By Hersh, 911 F.2d 870 (2d Cir. 1990), *cert. denied*, 498 U.S. 1109 (1991), the court held that "in order to consent to drug activity, one must know of it. If we were to construe section 881(a)(7) to mean that a claimant's knowledge alone precludes the innocent owner defense (*i.e.*, that a claimant must disprove both knowledge and consent), then 'consent' as used in the statute would be totally unnecessary." *Id.* at 878. Concluding that every word in a statute should be given effect, and that the conjunctive interpretation of the innocent owner defense would render the word "consent" superfluous, the court adhered to the disjunctive interpretation of the defense. *Id.* at 878.

proach, the debate is far from settled.⁹³

The few proponents of the conjunctive interpretation present two rationales for their position. First, in the legislative history of the innocent owner defense, Congress stated that "property would not be subject to forfeiture unless the owner of such property knew or consented to the fact" that the property was associated with drug related activity.⁹⁴ Courts and commentators state that, on its face, this language indicates that *either* knowledge of *or* consent to the proscribed act would result in forfeiture. Thus, the owner must prove lack of both elements to avoid forfeiture.⁹⁵

93 It appears that the First, Second, Third, Fourth, Sixth and Eleventh Circuits adhere to the disjunctive interpretation of the defense. *United States v. 77 Walnut St.*, No. 90-1729, 1990 U.S. App. LEXIS 22457, at *12 (1st Cir. Dec. 10, 1990) (claimant utilizing innocent owner defense under § 881(a)(7) may do so by proving "that the illegal use of the property occurred either without her knowledge or without her consent."); *United States v. 141st St. Corp. by Hersh*, 911 F.2d 870, 878 (2d Cir. 1990) ("We conclude that a claimant may avoid forfeiture by establishing either that he had no knowledge of the narcotics activity or, if he had knowledge, that he did not consent to it."), *cert. denied*, 498 U.S. 1109 (1991); *United States v. 6109 Grubb Rd.*, 886 F.2d 618, 624 (3d Cir. 1989) ("[K]nowledge of the illegal usage does not deprive the owner of an interest when the owner can demonstrate the property was used without her consent."); *United States v. 31 Endless St.*, No. 92-1609, 1993 WL 441804 (4th Cir. Nov. 2, 1993) (discussing whether claimant had knowledge, and if so, whether claimant did not consent), *cert. denied*, 114 S. Ct. 1545 (1994); *United States v. 14307 Four Lakes Dr.*, No. 92-1585, 1993 U.S. App. LEXIS 18537, at *10 n.2 (6th Cir. July 13, 1993) ("Several of this Court's (unpublished) opinions make clear that either ignorance or non-consent will suffice to make out an innocent owner defense."); *United States v. 1012 Germantown Rd.*, 963 F.2d 1496, 1503 n.3 (11th Cir. 1992) ("[E]ither ignorance or non-consent is sufficient to make out an innocent owner defense."). *But see United States v. Miraflores Ave.*, 995 F.2d 1558 (11th Cir. 1993) (appearing to follow conjunctive interpretation); *infra* note 100.

The Ninth Circuit is the only Circuit to maintain the conjunctive interpretation. *United States v. Lot 111-B, Tax Map Key*, 902 F.2d 1443, 1445 (9th Cir. 1990) (*per curiam*). *See supra* note 91.

Finally, there are those courts, namely the Fifth, Seventh, Eighth, Tenth, and District of Columbia Circuits which have refused to take a position regarding whether the defense should have a conjunctive or disjunctive interpretation. *United States v. Lot 9, Block 2 of Donnybrook Place*, 919 F.2d 994, 1000 (5th Cir. 1990) ("The Fifth Circuit has not taken a position, and it would be unwise for us to make Circuit law without a complete record and thorough briefing of this issue."). *But cf. United States v. Stop Six Center*, 781 F. Supp. 1200 (N.D. Tex. 1991) (recognizing the Fifth Circuit's neutral stance then proceeding to follow the disjunctive interpretation); *United States v. 7326 Highway 45 North*, 965 F.2d 311, 315 (7th Cir. 1992) ("The Seventh Circuit has not taken a position on this issue, and we need not do so here."); *United States v. 1989 Jeep Wagoneer*, 976 F.2d 1172, 1174 n.1 ("We need not decide whether the claimant must prove both lack of knowledge and consent . . .").

94 124 CONG. REC. 34670, 34671 (1978), *reprinted in* 1978 U.S.C.C.A.N. at 9496, 9522. The court in *Tax Map Key* relied on this statement to conclude that congressional "policy would be substantially undercut if persons who were fully aware of the illegal connection or source of their property were permitted to reclaim property as 'innocent' owners." *Tax Map Key*, 902 F.2d at 1445.

95 *See Tax Map Key*, 902 F.2d at 1445; *6109 Grubb Rd.*, 890 F.2d at 663 (Greenberg,

Second, proponents argue that

[m]ost of the decisions holding that lack of consent [alone] is a defense ignore the fact that the phrase "without the knowledge or consent" is cast in the negative. The innocent owner must show that the activity subjecting the property to forfeiture was committed without his "knowledge or consent."⁹⁶

Again, this indicates that the owner must prove lack of both elements to avoid forfeiture.

Similarly, there are two rationales for adhering to the disjunctive interpretation of the innocent owner defense. First, courts adhering to this interpretation note that the canons of statutory construction hold that terms connected by a disjunctive, such as the word "or," are to be given separate meanings. Since the terms "knowledge" and "consent" are separated in the innocent owner provision by the disjunctive "or," these courts give the terms separate meanings.⁹⁷

Second, some courts follow a disjunctive approach by focusing on the word "consent" as used in the statute. These courts hold that "in order to consent to drug activity, one must know of it. If [courts] were to construe section 881(a)(7) to mean that a claimant's knowledge alone precludes the innocent owner defense (*i.e.*, that a claimant must disprove both knowledge and consent), then 'consent' as used in the statute would be totally unnecessary."⁹⁸ Assuming that every word in a statute should be given effect, these courts conclude that the conjunctive interpretation of the innocent owner defense would render the word "consent"

J., dissenting); *141st St. Corp. By Hersh*, 911 F.2d at 878 (holding for disjunctive interpretation on other grounds); Lalit K. Loomba, Note, *The Innocent Owner Defense to Real Property Forfeiture Under the Comprehensive Crime Control Act of 1984*, 58 *FORDHAM L. REV.* 471, 483-84 (1989); 1 SMITH, *supra* note 4, ¶ 4.02, at 4-36.4 (stating that the conjunctive interpretation "is the only one consistent with the legislative history.").

96 1 SMITH, *supra* note 4, ¶ 4.02, at 4-36.4. One commentator notes that a principle of logic, known as De Morgan's theorem, states that "the denial of a conjunction [not A and B] is equivalent to the alteration of the denials [not A or not B] and the denial of an alteration [not A or B] is equivalent to the conjunction of denials [not A and not B]." Because the innocent owner defense provides that an owner must establish that the proscribed act was committed "without the knowledge or consent of [the] owner," it is a denial of the an alteration. Thus, De Morgan's theorem would indicate that the owner must be without both knowledge and consent (the conjunction of the denials) in order to meet the innocent owner defense. Loomba, *supra* note 95, at 480-82.

97 See *6109 Grubb Rd.*, 886 F.2d at 626; *United States v. 171-02 Liberty Ave.*, 710 F. Supp. 46 (E.D.N.Y. 1989); see also discussion *supra* note 92. But see Loomba, *supra* note 95, at 480-87 (noting flaws in this reasoning).

98 *141st St. Corp. By Hersh*, 911 F.2d at 878.

superfluous. Thus, the disjunctive interpretation of the defense should be followed.⁹⁹

The Circuit Courts have adhered to one of three positions on this issue. The First, Second, Third, Fourth, Sixth, and Eleventh¹⁰⁰ Circuits have adhered to the disjunctive interpretation. The Fifth, Seventh, Eighth, Tenth, and District of Columbia Circuits implicitly or explicitly decline to take a position on the debate, while the Ninth Circuit stands alone by expressly adhering to the conjunctive interpretation.¹⁰¹

A proposed amendment to section 881 attempts to alleviate this confusion by explicitly adding a disjunctive interpretation to section 881(a)(7).¹⁰² Although the amendment would resolve this conflict, it is unlikely that the confusion surrounding the innocent owner defense would dissipate. This is so because the innocent owner defense raises questions beyond the conjunctive or disjunctive debate. For instance, what is meant by the terms "knowledge" and "consent"? How can claimants fulfil their burden of establishing one or the other¹⁰³ or both?¹⁰⁴ In addition, how should the defense apply to post-illegal act transferees?

B. What is "Knowledge"?

What is "knowledge"? The majority view appears to be that a

99 *Id.* at 878; *Loomba*, *supra* note 95, at 485-87. *Contra* *United States v. Property Titled in the Names of Ponce*, 751 F. Supp. 1436, 1440 n.3 (D. Haw. 1990) (stating that it is possible to consent to illegal activity even where person can show lack of knowledge of illegal activity).

100 There appears to be some confusion in the district courts as to which interpretation the Eleventh Circuit follows. The confusion was explained by one district court as follows:

In 1991, an Eleventh Circuit panel determined that the "or" provision should be interpreted in a conjunctive manner. *United States v. 15603 85th Avenue*, 933 F.2d 976, 981 (11th Cir. 1991) ("Innocent owners are those who have no knowledge of the illegal activities and who have not consented to the illegal activities."). A year later, however, a different Eleventh Circuit panel concluded that the innocent owner test should be interpreted in a disjunctive manner. *United States v. 1012 Germantown Road*, 963 F.2d 1496, 1503 (11th Cir. 1992) In 1993, a third Eleventh Circuit panel returned to the 1991 standard, stating that "Innocent owners are those who have no knowledge of the illegal activities and who have not consented to the illegal activities." *United States v. 6960 Miraflores Avenue*, 995 F.2d 1558 (11th Cir. 1993).

United States v. 6640 S.W. 48th St., 831 F. Supp. 1578, 1583 n.3 (S.D. Fla. 1993).

101 *See supra* notes 91, 93.

102 *See* H.R. 2417 *supra* note 85.

103 Under a disjunctive interpretation.

104 Under a conjunctive interpretation.

claimant seeking to prevent forfeiture based upon the innocent owner defense has the burden of proving, by a preponderance of the evidence, that she had no *actual* (subjective) knowledge of the facts subjecting the property to forfeiture at the time she became the owner.¹⁰⁵ Additionally, it appears that such actual knowledge incorporates the concept of "willful blindness."¹⁰⁶ Thus, the claimant who deliberately avoids knowledge of the act giving rise to forfeiture by "sticking his head in the sand"¹⁰⁷ will be deemed to have actual knowledge.¹⁰⁸ Courts have even held that knowledge may be imputed to another.¹⁰⁹

Contrary to the majority position, a few courts hold that the failure to exercise due care precludes reliance on the innocent owner defense.¹¹⁰ In these jurisdictions, an innocent owner who

105 See, e.g., *United States v. 141st St. Corp. by Hersh*, 911 F.2d 870, 877 (2d Cir. 1990) (upholding district court's instruction requiring claimant to prove lack of actual knowledge), *cert. denied*, 498 U.S. 1109 (1991); *United States v. \$10,694.00*, 828 F.2d 233, 234 (4th Cir. 1987) ("There is nothing in the plain language of section 881(a)(6) requiring courts to look to the objective rather than subjective knowledge of the owner when determining whether forfeiture is proper."), *overruled in part by In re 1985 Nissan*, 300ZX, 889 F.2d 1317, 1320 (1989) (not effecting holding as to knowledge issue); *United States v. 14307 Four Lakes Dr.*, No. 92-1585, 1993 U.S. App. LEXIS 18537, at *10 (6th Cir. July 13, 1993) (utilizing actual knowledge standard); *United States v. 7326 Highway 45 N.*, 965 F.2d 311, 315 (7th Cir. 1992) ("The language of section 881(a)(7) constrains courts to employ a subjective rather than an objective standard for assessing the claimant's knowledge."); *United States v. 6960 Miraflores Ave.*, 995 F.2d 1558 (11th Cir. 1993) (innocent owner defense does not encompass "should have known" standard).

106 In the criminal context, a person who willfully blinds herself to the facts has the same state of mind as a person with actual knowledge of those facts. See *United States v. Jewell*, 532 F.2d 697, 700-03 (9th Cir. 1976), *cert. denied*, 426 U.S. 951 (1976).

107 *United States v. 1980 Red Ferrari*, 827 F.2d 477, 480 (9th Cir. 1987).

108 See *United States v. 755 Forrest Rd.*, 985 F.2d 70, 72 (2d Cir. 1993) (holding that willful blindness applies to lack of knowledge element under § 881(a)(7)); *1980 Red Ferrari*, 827 F.2d at 480 (court held that a claimant who could have avoided connection between the illegal acts and his automobile only by "sticking his head in the sand" could not prove lack of actual knowledge).

Thus, the "willful blindness" concept applies to all three of the primary forfeiture sections under § 881 despite the fact that § 881(a)(4) (forfeiture of conveyances) is the only provision which expressly provides for the "willful blindness" exception in its innocent owner defense.

109 For example, knowledge may be imputed to a corporate owner, where an agent of the corporation uses corporate property to facilitate narcotics violations. *141st St. Corp. by Hersh*, 911 F.2d at 876.

110 See *United States v. 10936 Oak Run Circle*, 9 F.3d 74, 76 (9th Cir. 1993) ("[I]nnocence is incompatible with knowledge that puts the owner on notice that he should inquire further."). In *10936 Oak Run Circle*, the government sought forfeiture of a drug dealer's home pursuant to § 881(a)(6) (as proceeds of illegal activity). *Id.* at 75. Prior to the government's claim, however, the drug dealer had transferred title to the home, valued at \$88,000, to his girlfriend's parents (claimants). In turn, the claimants

should have known (objective standard) of the illegal use of the property may be deemed to have "knowledge" for the purpose of the statute.¹¹¹

C. What is "Consent"?

In *Calero-Toledo v. Pearson Yacht Leasing Co.*,¹¹² the United States Supreme Court, in now-famous dicta, stated that although the innocence of an owner is generally not a defense in to an in rem civil forfeiture, a constitutional defense may be available if the owner is able to prove "not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property."¹¹³ So began the "*Calero-Toledo* defense," a constitutional defense to civil forfeiture.¹¹⁴

agreed to discharge an \$11,000 debt owed to them by the drug dealer. *Id.* Thereafter, the claimants attempted to prevent the forfeiture of the property by stating that they were innocent owners who were without knowledge of the illegal activities of the drug dealer and without knowledge that the property was purchased with drug proceeds. *Id.* In addressing the claimants' defense the court stated:

[T]he [claimants] were offered what appears to have been a remarkable bargain. Should they have asked why? Did they ask why? What answers were they given? These and other factual questions must be resolved in the district court, whose task it will be to determine the credibility of the evidence and explanations tendered by the [claimants]. Under the statute the burden is on them to "establish" their innocence.

Id. at 76. See also *United States v. \$215,000*, 882 F.2d 417, 420 (9th Cir. 1989), cert. denied, 997 U.S. 1005 (1990); *Contra Red Ferrari*, 827 F.2d at 478 (holding that actual knowledge is standard).

¹¹¹ See *supra* note 110.

¹¹² 416 U.S. 663 (1974).

¹¹³ *Id.* at 689. In *Calero-Toledo*, a yacht company leased a pleasure yacht to two Puerto Rican residents. *Id.* at 665. One year later, the lessees were arrested for using the yacht to transport marijuana. Thereafter, the Puerto Rican government sought the forfeiture of the yacht under its statute providing for the forfeiture of any conveyances (including vessels) used "in any manner to facilitate the transportation" of illegal drugs. *Id.* at 665 n.1. The lessees conceded that the yacht company neither knew of nor participated in the drug offense. *Id.* at 668. After reviewing the history of forfeiture and explaining that the innocence of the owner in a forfeiture proceeding is almost uniformly rejected as a defense, the Court stated that if an owner "proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property, . . . it would be difficult to conclude that forfeiture served legitimate purposes and was not unduly oppressive." *Id.* at 689-90. See Alice M. O'Brien, Note, "*Caught in the Crossfire*": *Protecting the Innocent Owner of Real Property From Civil Forfeiture Under 21 U.S.C. § 881(a)(7)*, 65 ST. JOHN'S L. REV. 521 (1991).

¹¹⁴ Unlike the primary provisions of § 881(a), many civil forfeiture statutes do not provide for statutory innocent owner defenses. Thus, under these statutes the constitution-

Calero-Toledo is significant to this discussion because federal courts are divided over whether this defense should be incorporated into the statutory innocent owner provisions under section 881. In other words, it is unclear whether proving lack of "consent" under the innocent owner defense requires claimants to prove that they had done all that reasonably could be expected to prevent the proscribed use of their property.¹¹⁵

The Second Circuit, for example, held that since "Congress has left to the courts the task of interpreting and refining the

ally based "*Calero-Toledo* defense" is the primary means to alleviate some of the harshness of civil forfeiture laws.

115 See *Calero-Toledo*, 416 U.S. at 689. Many courts expressly incorporate the *Calero-Toledo* standard into the statutory definition of "consent". *United States v. 141 St. Corp.* by Hersh, 911 F.2d 870, 879 (2d Cir. 1990) ("We find the *Calero-Toledo* standard appropriate for section 881(a)(7) forfeiture cases"), cert. denied, 498 U.S. 1109 (1991); *United States v. 31 Endless St.*, No. 92-1609, 1993 WL 441804, at *3 (4th Cir. Nov. 2, 1993) ("Consent, for the purposes of section 881(a)(7), is 'the failure to take all reasonable steps to prevent illicit use of premises once one acquires knowledge of that use'"); *United States v. 1012 Germantown Rd.*, 963 F.2d 1496, 1504-05 (11th Cir. 1992) (holding the *Calero-Toledo* standard applicable to both §§ 881(a)(6),(7)).

Other courts, however, have expressly rejected the incorporation of *Calero-Toledo* into the statutory innocent owner defense. *United States v. 1 St. A-1*, 865 F.2d 427, 430 (1st Cir. 1989) (application of *Calero-Toledo* to statutory innocent owner defense "seems inapposite."); *United States v. Lots 12, 13, 14, & 15*, 869 F.2d 942, 947 (6th Cir. 1989) ("[T]he statute with which we are concerned imposes no requirement that a person who claims the status of an 'innocent owner' establish [the *Calero-Toledo* standard]."); *United States v. 1989 Jeep Wagoneer*, 976 F.2d 1172, 1175 (8th Cir. 1992) (*Calero-Toledo* is constitutional doctrine that has no place in statutory innocent owner analysis under § 881(a)(4)).

Other courts leave the application of the doctrine to the district courts. *United States v. 6109 Grubb Rd.*, 886 F.2d 618, 627 (3d Cir. 1989) ("What, if any, applicability the following dictum in [*Calero-Toledo*] has to the innocent owner defense will be for the district court to decide"); *United States v. \$47,875.00*, 746 F.2d 291, 292 (5th Cir. 1984) ("[W]e leave the question of the applicability of the *Calero-Toledo* dicta . . . for another day."); *United States v. 7326 Highway 45 N.*, 965 F.2d 311, 315 (7th Cir. 1992) ("[W]e need not decide whether consent is determined by subjective or objective criteria."); *United States v. Property Titled in the Names of Ponce*, 751 F. Supp. 1436, 1440-41 (D. Haw. 1990) (recognizing *Calero-Toledo* as the appropriate standard despite Ninth Circuit's failure to address issue).

Even the commentators disagree as to the application of *Calero-Toledo* and the statutory innocent owner defense. For a discussion favoring the incorporation of the *Calero-Toledo* standard into the statutory innocent owner defense, see generally Loomba, *supra* note 95, at 489-90; Eric G. Zajac, *Tenancies By The Entirety and Federal Civil Forfeiture Under the Crime Abuse Prevention and Control Act: A Clash of Titans*, 54 U. PITT. L. REV. 553, 577 (1993). For a contrary view arguing that *Calero-Toledo* should not be incorporated into the innocent owner defense, see generally O'Brien, *supra* note 113; Arthur G. Crabtree, Comment, *Seizure of Third Party's Property Associated With Drug Money: Requiring Third Parties To Become Private Police?*, 23 SW. U. L. REV. 79, 95 (1993).

term 'consent,'"¹¹⁶ a landlord attempting to establish his lack of consent to the use of his property for illegal drug-related activities would have to prove that he did all that reasonably could be expected to stop the illegal use once he learned it was occurring.¹¹⁷ The court reasoned that consent "must be something more than a state of mind," due to the "ever increasing toll" that the sale and use of drugs has had on our nation.¹¹⁸

Other courts, such as the Sixth Circuit have expressly rejected the incorporation of *Calero-Toledo* into the statutory innocent owner defense.¹¹⁹ These courts have generally held that *Calero-Toledo* is irrelevant to interpreting section 881 because *Calero-Toledo* is a constitutionally based defense, whereas section 881 is a statutory defense. Additionally, these courts have recognized that when enacting section 881, Congress was aware of *Calero-Toledo* and would have either specifically placed such language in the statute or made an explicit reference to the standard had it wished to incorporate the standard.¹²⁰ Unfortunately, most courts which reject the *Calero-Toledo* "consent" standard fail to offer any guidance as to what lack of consent means.

Currently, the Second, Fourth, and Eleventh Circuits expressly incorporate the *Calero-Toledo* standard into the statutory definition of consent. The First, Sixth, and Eighth Circuits expressly reject the incorporation of the *Calero-Toledo* standard, while the Third, Fifth, Seventh, Ninth, Tenth and District of Columbia Circuits either fail to address the issue or leave the application of *Calero-Toledo* to the district courts.¹²¹

D. Who Qualifies as an "Owner"?

In order to raise the innocent owner defense, one must have standing to do so. The general rule is that "only 'owners' have standing to contest a forfeiture proceeding under section 881."¹²² Not surprisingly, who qualifies as an "owner" has great significance

116 *141st St. Corp. by Hersh*, 911 F.2d at 879.

117 *Id.* at 878-79.

118 *Id.* at 879.

119 *See Lots 12, 13, 14 & 15*, 869 F.2d 942.

120 *See id.* at 946-47; *see also* Zajac, *supra* note 115, at 95.

121 *See supra* note 115. For an annotated discussion of the innocent owner defense, *see generally* Beverly L. Jacklin, Annotation, *Who is Exempt From Forfeiture of Drug Proceeds Under "Innocent Owner" Provision of 21 U.S.C. § 881(a)(6)*, 109 A.L.R. FED. 322 (1992); Beverly L. Jacklin, Annotation, *Who is Exempt From Forfeiture of Drug Proceeds Under "Innocent Owner" Provision of 21 U.S.C. § 881(a)(7)*, 110 A.L.R. FED. 569 (1992).

122 *United States v. \$38,570*, 950 F.2d 1108, 1111-12 (5th Cir. 1992).

to many claimants. Courts have generally held that an "owner" is someone who possesses more than mere legal title to the forfeited property. In sum, the claimant must have the right to exercise dominion and control over the property.¹²³ Thus, "straw" owners holding nominal title to forfeitable property lack standing to defend the property from forfeiture.¹²⁴ Prior to 1993, however, many claimants were being denied standing to raise the innocent owner defense notwithstanding that they exercised sufficient control over the forfeitable property. These claimants were victims of the pre-1993 interpretation of the "relation-back doctrine" under 21 U.S.C. § 881(h).

Section 881(h) provides that "[a]ll right, title, and interest in property described in subsection (a) of this section shall vest in the United States upon the commission of the act giving rise to forfeiture under this section."¹²⁵ Prior to 1993, lower courts were split on whether the innocent owner defense was available to an owner who acquired a post-illegal act interest in the property.¹²⁶ Under a strict interpretation of the provision, some courts reasoned that since title to the forfeited property vested in the United States "upon the commission of the act giving rise to forfeiture," the drug dealer never owned the property and thus could not pass title to an innocent third party. Under this reasoning, no one who acquired rights in the property subsequent to the illegal activity giving rise to the forfeiture could ever constitute an "owner" of the property. Consequently, any subsequent donees, lienholders or purchasers of the property could not utilize the

123 See, e.g., *§38,570*, 950 F.2d at 1112 ("[A] bare assertion of ownership of the *res*, without more, is inadequate to prove an ownership interest sufficient to establish standing."); *United States v. Lot 111-B, Tax Map Key*, 902 F.2d 1443, 1444 (9th Cir. 1990) (*per curiam*) (quoting *United States v. 900 Rio Vista Blvd.*, 803 F.2d 625, 630 (11th Cir. 1986)) ("The claimant in a forfeiture action has the burden of showing that he owns or has an interest in the forfeited property '[P]ossession of mere legal title by one who does not exercise dominion and control over the property is insufficient even to establish standing to challenge a forfeiture.'").

124 See *United States v. Contents of Accounts Nos. 3034504504 and 144-07143 at Merrill Lynch*, 971 F.2d 974, 984-87 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 1580 (1993).

125 21 U.S.C. § 881(h) (1988).

126 See *In re 1985 Nissan, 300ZX*, 889 F.2d 1317, 1320 (4th Cir. 1989) (*en banc*) ("[N]o third party can acquire a legally valid interest in the property forfeited from anyone other than the government after the illegal act takes place."). *But cf. Eggleston v. Colorado*, 873 F.2d 242, 247 (10th Cir. 1989) ("[A] judgment of forfeiture relates back to the time of the unlawful act Forfeiture therefore cuts off the rights of subsequent lienholders or purchasers, subject to the so-called innocent owners exception").

innocent owner defense, thereby rendering the property held by post-illegal act transferees who had no knowledge or consent of the illegal activity *automatically* forfeitable to the government.¹²⁷ Hence, prior to 1993, few courts had to reconcile the innocent owner defense with the rights of those persons who acquired an interest in forfeitable property after the underlying illegal activity. In 1993, however, the Supreme Court, in *United States v. 92 Buena Vista Avenue*,¹²⁸ drastically altered the interrelation between the innocent owner defense and the relation-back doctrine thereby creating a new context for the application of the innocent owner defense.¹²⁹

V. PROTECTING POST-ILLEGAL ACT TRANSFEREES & THE DONEES OF FORFEITABLE PROPERTY: *UNITED STATES V. 92 BUENA VISTA AVENUE*

In its last two terms, the Supreme Court has rendered no less than four decisions which have major implications for civil forfeiture law.¹³⁰ In *United States v. 92 Buena Vista Avenue*,¹³¹ the Court granted the protection of the innocent owner defense to the donees of forfeitable property. Additionally, the Court stated that the government may no longer utilize the relation-back doctrine to deprive donees and post-illegal act transferees the opportunity to raise the innocent owner defense. Unfortunately, however, the Court declined the opportunity to clarify the confines of the innocent owner defense in relation to these claimants.

A. *Statement of Facts and Procedural History*

Joseph Anthony Brenna made a gift of \$240,000 to his girlfriend, Beth Ann Goodwin.¹³² Ms. Goodwin used this money to purchase a home, 92 Buena Vista Avenue, Rumson, New Jersey, where she resided with her children.¹³³ The District Court of New Jersey determined that there was probable cause to believe

127 See *1985 Nissan, 300ZX*, 889 F.2d at 320. Many courts did permit the innocent owner defense to override the relation-back doctrine where the claimant had given value for the property. See, e.g. *United States v. Lake Forrest Circle*, 870 F.2d 586, 590 n.11 (11th Cir. 1989). *92 Buena Vista Ave.*, however, rendered the interpretation of the relation-back provision to apply similarly to all claimants, including donees.

128 113 S. Ct. 1126 (1993) (plurality opinion).

129 See discussion *infra* Part V.

130 See cases cited *supra* note 4.

131 *92 Buena Vista Ave.*, 113 S. Ct. 1126 (plurality opinion).

132 *Id.* at 1130.

133 *Id.*

that the funds used to buy the house were the proceeds of illegal drug trafficking of Mr. Brenna.¹³⁴ Accordingly, the government seized the premises pursuant to section 881(a)(6), but allowed Ms. Goodwin to remain in possession of the premises pending the outcome of the forfeiture action.¹³⁵ Ms. Goodwin subsequently filed a claim in the District Court of New Jersey and moved for summary judgment, claiming that she was unaware of Mr. Brenna's drug activities and therefore exempt from the forfeiture pursuant to the innocent owner defense under section 881(a)(6).¹³⁶

The district court denied Ms. Goodwin's motion, holding that Ms. Goodwin could not invoke the innocent owner defense for two reasons: First, it ruled that "the innocent owner defense may only be invoked by those who can demonstrate that they are bona fide purchasers for value."¹³⁷ Thus, because the property subject to forfeiture was a gift, Ms. Goodwin did not have standing to invoke the innocent owner defense. Second, the court held that the innocent owner defense applied only to persons who acquire an interest in the property *before* the acts giving rise to the forfeiture occurred.¹³⁸ Ms. Goodwin was permitted to take an interlocutory appeal pursuant to 28 U.S.C. § 1292(b).

The Court of Appeals for the Third Circuit reversed the district court, holding that Ms. Goodwin could assert the innocent owner defense under section 881(a)(6).¹³⁹ The Third Circuit refused to limit the innocent owner defense to bona fide purchasers for value because (1) the plain language of the statute contains no such limitation; (2) the legislative history indicates that the term "owner" should be broadly construed; and (3) the difference between the text of section 881(a)(6) and the text of the criminal forfeiture statute, which limits the defense to bona fide purchas-

134 *Id.* The forfeiture proceeding was brought by the government as a consequence of an indictment alleging that Joseph Anthony Brenna engaged in a continuing criminal enterprise in violation of 21 U.S.C. § 848, engaged in a conspiracy to import more than 1,000 kilograms of marijuana into the United States in violation of 21 U.S.C. § 963, and knowingly imported in excess of 1,000 kilograms of marijuana into the United States in violation of 21 U.S.C. § 952(a) and 18 U.S.C. § 2. *United States v. 92 Buena Vista Ave.*, 937 F.2d 98, 100 (3d Cir. 1991), *aff'd*, 113 S. Ct. 1126 (1993) (plurality opinion).

135 *United States v. 92 Buena Vista Ave.*, 113 S. Ct. 1126, 1130 (1993) (plurality opinion).

136 *Id.* at 1130.

137 *Id.*

138 *Id.*

139 *Id.* at 1131.

ers, evidenced congressional intent not to restrict the civil section in the same manner.¹⁴⁰

Further, the Third Circuit rejected the government's relation-back argument. The government had argued, pursuant to section 881(h), that Ms. Goodwin could never have been an "owner" of the premises because at the time of the drug transactions, all right, title, and interest in the proceeds from the drug transactions vested in the United States.¹⁴¹ The Third Circuit concluded that the relation-back doctrine applied only to "property described in subsection (a) [section 881(a)]" and that the property at issue would not fit into that description if the respondent (Ms. Goodwin) could first establish her innocent owner defense.¹⁴²

Thus, under the Third Circuit's interpretation of the relation-back doctrine, a court would have to ascertain whether the innocent owner defense in section 881(a)(6) was applicable before applying the relation-back provision. In addition, even if the government's interest vested upon the commission of the illegal act, it could not attach under section 881(h) to property exempted from forfeiture under section 881(a) because section 881(a) preempted section 881(h). The court stated that any other interpretation of section 881(h) "would essentially serve to emasculate the innocent owner defense provided for in section 881(a). No one obtaining property after the occurrence of a drug transaction, including a bona fide purchaser for value, would be eligible to offer an innocent owner defense on his behalf."¹⁴³ The Third Circuit remanded the case to the district court to determine "whether [Ms. Goodwin] was, in fact, an innocent owner."¹⁴⁴

B. *The Supreme Court's Analysis*

The United States Supreme Court affirmed the judgment of the Court of Appeals for the Third Circuit in a 6-3 decision.¹⁴⁵

1. The Plurality

Writing for the plurality, Justice Stevens¹⁴⁶ first summarily

140 *Id.*

141 *See* discussion *supra* Part IV.D.

142 *92 Buena Vista Ave.*, 113 S. Ct. at 1131.

143 *Id.*

144 *Id.*

145 *92 Buena Vista Ave.*, 113 S. Ct. 1126 (plurality opinion).

146 Justices Blackmun, O'Connor and Souter joined in the plurality opinion.

held that "[t]he Court of Appeals correctly concluded that the protection afforded to innocent owners is not limited to bona fide purchasers."¹⁴⁷ As a result, donees of forfeitable property may challenge a forfeiture under the statutory innocent owner defense. Justice Stevens reasoned that the text of section 881(a)(6) used the term "owner" three times without qualification.¹⁴⁸ Hence, such language was "sufficiently unambiguous to foreclose any contention that it applies only to bona fide purchasers."¹⁴⁹ Thus, the fact that the funds used by Ms. Goodwin to purchase her home were a gift did not disqualify her from raising the innocent owner defense under section 881(a)(6).

The plurality next addressed the relation-back provision in section 881(h). Justice Stevens refuted the government's relation-back argument that Ms. Goodwin had never been the owner of the home because section 881(h) had vested ownership in the United States at the moment when the proceeds of the illegal drug transaction were used to pay the purchase price. First, Justice Stevens cited Chief Justice John Marshall for the proposition that "under the common-law rule the fictional and retroactive vesting was not self-executing."¹⁵⁰ Justice Stevens reasoned that should the government win a judgment of forfeiture, the vesting of its title in the property relates back to the moment when the property became forfeitable. Until the government does win such a judgment, however, someone else owns the property and may invoke any defense available to the owner before the forfeiture is decreed.¹⁵¹

Second, Justice Stevens reasoned that even if the common law rules of retroactive vesting were inapplicable,¹⁵² the text of section 881(a)(6) still supported extending the innocent owner defense to property interests obtained after the act giving rise to

147 92 Buena Vista Ave., 113 S. Ct. at 1134.

148 *Id.*

149 *Id.*

150 *Id.* at 1135.

It has been proved, that in all forfeitures accruing at common law, nothing vests in the government until some legal step shall be taken for the assertion of its right, after which, for many purposes, the doctrine of relation carries back the title to the commission of the offense.

Id. (quoting *United States v. Grundy*, 7 U.S. (3 Cranch) 337, 350-51 (1806)).

151 *Id.* at 1136.

152 Justice Stevens implied that since the common law rule "was never applied to the forfeiture of proceeds, and because the statute now contains an innocent owner defense, it may not be immediately clear that they lead to the same result." *Id.*

forfeiture. Justice Stevens explained that the relation-back provision of section 881(h) only applies to "property described under subsection (a) [section 881(a)]."¹⁵³ Since subsection (a) itself, contains the innocent owner defense, courts must first determine whether the property is exempt from subsection (a) before the relation-back provision applies.¹⁵⁴ Therefore, the Court concluded that Ms. Goodwin was entitled to a hearing on her innocent owner defense before the government moved to procure a forfeiture order, even though she was a donee who obtained her interest in the home after the alleged illegal activity had occurred.¹⁵⁵

As a "postscript," Justice Stevens identified, but failed to decide an issue regarding the statutory construction of the innocent owner defense: Whether a post-illegal act claimant (a claimant who acquired an interest in forfeitable property after the illegal activity had occurred) must show that she was without knowledge of the illegal act at the time it occurred, or at the time of the transfer. Although the Court declined to resolve the issue, Justice Stevens observed that "equitable doctrines may foreclose the assertion of an innocent owner defense by a party with guilty knowledge of the tainted character of the property."¹⁵⁶

2. The Concurrence

Justice Scalia, concurring in the judgment,¹⁵⁷ disagreed with the plurality's reasoning. Justice Scalia explained that the relation-back provision under section 881(h) merely codified the common law relation-back doctrine.¹⁵⁸ Justice Scalia stated that the plurality's position regarding the relationship between section 881(a)(6) and section 881(h) was based on faulty premises. Rather, Justice Scalia obtained a similar result by reading section 881(h) as an expression of the traditional common law relation-back doctrine which holds that retroactive vesting of title operates only on the judicial order of forfeiture. According to Justice Scalia, while section 881(h) says that title "shall vest in the United States upon commission of the act giving rise to forfeiture," section 881(h) really means that title "shall vest in the United States upon

153 *Id.*

154 *Id.* at 1136-37

155 *Id.*

156 *Id.* at 1137.

157 Justice Thomas joined in the concurring opinion.

158 92 *Buena Vista Ave.*, 113 S. Ct. at 1138 (Scalia, J., concurring).

[judicial order of] forfeiture, effective as of commission of the act giving rise to forfeiture."¹⁵⁹ Thus, as owner of the property subject to, but not yet ordered for forfeiture, Ms. Goodwin should have been afforded the opportunity to raise the innocent owner defense.

3. The Dissent

Justice Kennedy,¹⁶⁰ severely criticized the plurality. He stated that "[o]nce this case left the District Court, the appellate courts and all counsel began to grapple with the wrong issue."¹⁶¹ Justice Kennedy insisted that the determinative issue in the case was not the proper application of the relation-back doctrine to a donee holding a post-crime interest in property, but rather whether such a donee could ever obtain a superior interest in the property sufficient to defeat a forfeiture order.¹⁶² Justice Kennedy stated that under the principles established by the laws of voidable title, "one who acquires property from a holder of voidable title other than by a good faith purchase for value obtains nothing beyond what the transferor held."¹⁶³ Justice Kennedy reasoned that since the transferor of drug proceeds could not assert the innocent owner defense, neither could a donee who has given no value. Simply stated, the donee, having provided no value to eliminate the defect in title, merely stands in the shoes of the donor. Hence, Ms. Goodwin, a mere donee, could not allege rights that Mr. Brenna, an alleged drug dealer, could not assert.¹⁶⁴ By denying this principle, Justice Kennedy argued that "the plurality rip[ped] out the most effective enforcement provisions in all of the drug forfeiture laws."¹⁶⁵

159 *Id.* at 1140.

160 Chief Justice Renquist and Justice White joined in the dissenting opinion.

161 *92 Buena Vista Ave.*, 113 S. Ct. at 1143 (Kennedy, J., dissenting).

162 *Id.*

163 *Id.* at 1144.

164 *Id.*

165 *Id.* at 1146. For a thorough review of the facts and holdings of *92 Buena Vista Ave.*, see generally Moshe Heching, *Civil Forfeiture and the Innocent Owner Defense*: United States v. *92 Buena Vista Ave.*, 113 S. Ct. 1126 (1993), 16 HARV. J.L. & PUB. POL'Y 835, 848 (1993) (praising the Court for "temper[ing] our pursuit of drug offenders with an equally zealous protection of personal rights."); see also J. William Snyder, Jr., *Reining in Civil Forfeiture Law and Protecting Innocent Owners from Civil Asset Forfeiture*: United States v. *92 Buena Vista Avenue*, 72 N.C. L. REV. 1332, 1365 (1994) ("*92 Buena Vista Avenue* imposes a long overdue restraint on federal civil forfeiture law . . ."). For a discussion on the ambiguities created by *92 Buena Vista Ave.*, see generally Michael D. Dautrich, Note,

In sum, *92 Buena Vista Avenue* essentially held that (1) the innocent owner defense is not limited to bona fide purchasers, but may apply to donees; and (2) the statutory relation-back doctrine vests ownership of forfeitable property in the government only after the entry of a final order of forfeiture rather than vesting title in the government at the moment of the illegal acts.

The ramifications of this holding are best understood when it is recalled¹⁶⁶ that prior to *92 Buena Vista Avenue*, a strict interpretation of the relation-back doctrine rendered it likely that ownership never vested in property given or transferred to post-illegal act transferees because ownership of the property had already vested in the United States at the moment of the illegal act. Therefore, *92 Buena Vista Avenue* creates a dilemma in that the innocent owner defense must now be interpreted in the context of certain claimants (namely, post-illegal act transferees) whose interests may not have been considered when the various courts formulated their Circuit's interpretation of the innocent owner defense. Applying the majority interpretation of the defense will not only cause more judicial confusion, but it will also create a potentially damaging loophole in forfeiture law.

VI. RECONCILING THE INNOCENT OWNER DEFENSE IN LIGHT OF INCONSISTENT JUDICIAL INTERPRETATION AND *UNITED STATES V. 92 BUENA VISTA AVENUE*

It is apparent that the innocent owner defense under section 881 has been plagued by inconsistent judicial interpretation.¹⁶⁷ But equally disturbing is the confusion that will arise when the current interpretations of the defense are applied in the context of *92 Buena Vista Avenue*—in particular, the application of the defense to post-illegal act transferees. Current application of the defense not only renders it likely that identically situated property owners will receive severely different treatment, but also provides drug dealers with an ideal method to shelter their ill-gotten assets.

A. *Inconsistent Judicial Interpretation*

Judicial interpretation of the phrase "without the knowledge

The "Innocent Owner" Defense in Civil Drug Forfeitures After United States v. 92 Buena Vista Avenue: Still an Uphill Battle for Third-Party Claimants, 3 J. PUB. L. 995 (1994).

¹⁶⁶ See discussion *supra* Part IV.D.

¹⁶⁷ See discussion *supra* Part IV.A-D.

or consent of that owner"¹⁶⁸ has been anything but consistent.¹⁶⁹ As a result of this inconsistent judicial interpretation, two identically situated claimants can receive severely different treatment under the defense.¹⁷⁰ The problem is best illustrated by example.

Consider a land owner who owns a building which is located in one of the most drug-infested neighborhoods in a city. The land owner has actual knowledge that his building is used for illegal drug activities, yet he takes only a few minor steps to prevent such use. As a result of the illegal activity on the premises, the government brings a forfeiture action against the property pursuant to section 881(a)(7).¹⁷¹

Unfortunately for the land owner, his rights as an innocent owner depend upon the jurisdiction in which the forfeiture action is brought. If the property is located within the Sixth Circuit (which follows the disjunctive interpretation requiring claimant to prove either lack of actual knowledge or lack of non-*Calero-Toledo* consent),¹⁷² the claimant could possibly prevail on the innocent owner defense. The claimant could admit to his knowledge of the illegal activity, yet argue that he did not consent to such activity, as illustrated by the few overt actions that he had taken to prevent the illegal activity. However, if this same land owner was defending property located in the Eleventh Circuit, (which follows the disjunctive interpretation requiring claimants to prove either lack of actual knowledge or that they did all that reasonably could be expected to stop the use),¹⁷³ it is unlikely that the owner would prevail on the defense. Although the owner could admit to his knowledge of the activity, he would be unable to fulfill the *Calero-Toledo* consent standard by proving that he did all that could reasonably be expected to prevent the illegal use. Further, had this claimant been defending property located in the Ninth Circuit (which follows the conjunctive interpretation of the defense),¹⁷⁴ the claimant's mere knowledge of the activity would preclude

168 21 U.S.C. §§ 881(a)(6),(7) (1988). See also *supra* Part IV.

169 See discussion *supra* Part IV.

170 See discussion *supra* Part IV.

171 This example is similar to the facts of two district court cases out of New York. See generally *United States v. Liberty Ave.*, 710 F. Supp. 46 (E.D.N.Y. 1989); *United States v. 710 Main St.*, 744 F. Supp. 510 (S.D.N.Y. 1990).

172 See *supra* notes 93, 105, 115 and accompanying text.

173 See *supra* notes 93, 105, 115.

174 See *supra* notes 93, 105, 115.

victory under the innocent owner defense. Thus, in three different jurisdictions the same land owner would receive disparate treatment by the courts applying the same innocent owner defense.

Modifying the example further portrays the potential absurdities. Assume now that our land owner acquired knowledge of illegal activity on his property and thereafter took extensive steps at great personal expense and risk to prevent the illegal activity. If the forfeiture action was brought in the Sixth or Eleventh Circuits, the land owner would likely prevail on the innocent owner defense. The land owner could prove that despite his knowledge of the illegal use of the property, he did not "consent" (under either the *Calero-Toledo* or the non-*Calero-Toledo* standard for consent) to such use. However, if this same property owner was in the Ninth Circuit (conjunctive interpretation), he would still fail to meet his burden of proving both lack of knowledge or consent to the illegal use of the property, and the property would be forfeited to the government. The inequities are obvious.

Finally, consider the defense in the context of two identically situated land owners who live in two different jurisdictions. A land owner in the Sixth Circuit who knew of illegal activities on her property but took only a *few* steps to prevent such use can receive the benefit of the innocent owner defense. In contrast, a land owner in the Ninth Circuit who has the mere "objective" knowledge of the illegal activities, yet has done everything in her power to prevent the activities, would be denied the benefit of the defense. In addition, these examples fail to illustrate that if these land owners were defending property in the Fifth, Seventh, Eighth, Tenth or D.C. Circuits, they would have very little guidance as to the application of the defense. Thus, claimants in these jurisdictions are left to guess on what their rights may be.

The inconsistency in the interpretation of the innocent owner defense creates a climate which defies a principle of justice—that similarly situated litigants (or claimants) should receive similar treatment under the law. Moreover, this inconsistent interpretation "creates a general air of uncertainty"¹⁷⁵ surrounding civil forfeiture law which further exacerbates the problem.¹⁷⁶

175 Kirsten M. Dunne, Legislative Reform, *The Innocent Owner Defense to Real Property Forfeiture Under the Comprehensive Crime Control Act: Does Knowledge Equal Consent?*, 20 J. LEGIS. 81, 83 (1994).

176 As one commentator noted:

In the absence of more definitive authority, residents of the "majority" circuits cannot rest assured that they will have the continuing benefit of the current

This is not the only flaw of current interpretations of the innocent owner defense. Courts have also failed to consider the application of the innocent owner defense to the unique position of the post-illegal act transferee.

*B. Failure to Reconcile the Innocent Owner Defense
and the Post-Illegal Act Transferee*

The majority of courts and commentators¹⁷⁷ maintain that the disjunctive interpretation of the innocent owner defense is the most equitable for claimants.¹⁷⁸ This Note agrees that owners who acquire knowledge that their property is being used to facilitate illegal drug activity should be given the opportunity to act upon that knowledge.¹⁷⁹ Thus, landlords who learn of illegal drug activity on their property, or claimants who learn that their spouse or child is selling drugs out of the family home should be given the opportunity to do all that is reasonably possible to prevent such activity.¹⁸⁰ Accordingly, for the majority of situations,

standard The uncertainty also encourages those circuits which have not committed to one side to remain neutral.

Id. at 83.

Furthermore, another potential consequence of inconsistent judicial interpretation is that the government is likely to "venue-shop," by attempting to bring a forfeiture action in the most favorable jurisdiction. Thus, if the government has the option of bringing a forfeiture action in either the Ninth Circuit or the Sixth Circuit, there is no question that the government would bring the action in the Ninth Circuit (to obtain the benefit of the conjunctive interpretation of the defense). For a recent discussion of jurisdiction of civil forfeiture actions, see *United States v. 1978 Piper Cherokee Aircraft*, No. 92-15350, 1994 WL 528447 (9th Cir. Sept. 30, 1994).

177 See *supra* Part IV.A.

178 See *supra* note 93.

179 One commentator noted the potential unfairness of the conjunctive interpretation as follows:

The correct interpretation as a matter of policy favors establishing innocence either by lack of knowledge or by lack of consent. Forfeiture upon knowledge alone can lead to an unconscionable result if the owner acquires knowledge of illegal use but has no reasonable opportunity to act on it prior to governmental seizure. If, for example, a landlord is informed by a tenant in a multi-unit apartment building that another tenant is selling crack cocaine out of his apartment, and the landlord quickly begins to investigate the allegation, he could see his interest in the building immediately forfeitable upon seizure whether he has had any chance to contact the authorities. A similar result would occur with a wife who finds out for the first time that her husband is selling drugs from the marital home but who has no real opportunity to act on that knowledge before seizure.

Zajac, *supra* note 115, at 571.

180 See *supra* note 179.

the disjunctive approach to the innocent owner defense combined with the *Calero-Toledo* consent standard is the most equitable.¹⁸¹ While the disjunctive interpretation of the innocent owner defense is appropriate for the majority of claimants, it is inappropriate for one type of claimant—the post-illegal act transferee.

A post-illegal act transferee is a person who obtains an interest in property *after* the commission of the illegal activities which subjected the property to forfeiture. For example, in *92 Buena Vista Avenue*, Ms. Goodwin was a post-illegal act transferee because she did not hold an interest in the forfeitable proceeds given to her until long after the illegal activity had occurred. Therefore, Ms. Goodwin could potentially have had no knowledge of the illegal activity at the time it occurred but may have acquired such knowledge at or before the time she obtained an interest in the property.

This Note contends that the current disjunctive interpretation of the innocent owner defense is inappropriate for post-illegal act transferees because it creates a major loophole in forfeiture law. If the disjunctive interpretation of the innocent owner defense is applied to a claimant who acquires a post-illegal act interest in property, the claimant would be permitted to raise the lack of consent defense to the forfeiture despite clear evidence that the claimant had knowledge that the property derived from or facilitated illegal drug activities. As a result, claimants who did not have knowledge of the illegal activity at the moment the illegal activity occurred, but who obtained knowledge at or before the time the

181 This Note favors the disjunctive interpretation combined with the *Calero-Toledo* consent standard based solely on the grounds of fairness. Although a few courts similarly justify their positions on these matters on the basis of fairness, many courts and commentators look solely to the technicalities of language to determine their position. See discussion *supra* Part IV.

Recall that in *United States v. 141st St. Corp. by Hersh*, 911 F.2d 870 (2d Cir. 1990), *cert. denied*, 498 U.S. 1109 (1991), the court adhered to a disjunctive interpretation of the innocent owner defense and the *Calero-Toledo* standard for consent. See *supra* notes 92-93. The court held that this combination provides:

[A] balance between the two congressional purposes of making drug trafficking prohibitively expensive for the property owner and preserving the property of an innocent owner. A claimant with knowledge of the illegal use to which his property is put may defend on the basis of lack of consent, but consent in this situation must be something more than a state of mind.

Id. at 879.

This Note agrees with this balanced approach to the innocent owner defense where the claimant is a pre-illegal act owner of the property subject to forfeiture. However, this approach is inappropriate for the post-illegal act transferee.

property was transferred to them, *could always* meet their burden under the innocent owner defense. This is so because claimants could always admit that they had knowledge of the illegal activity, but that they did not "consent" to the activity. Claimants could merely argue that "consent" was impossible under the majority or minority interpretation of the term. It is impossible to do all that is reasonably possible to prevent the illegal use¹⁸² of property, because claimants have no control or knowledge of the activity at the time it occurred.

Hence, if the disjunctive interpretation of the innocent owner defense were to apply to such post-illegal act transferees, drug dealers would have every incentive to keep the specific details of illegal drug activities from certain persons close to them. The dealers could then transfer property to those persons who may know (at the time of transfer) that the property is derived from or facilitated illegal activity, but who were in no position to prevent such activity. These transferees would provide an ideal shelter for illicit drug proceeds and facilitative property. The incentive for drug dealers to take such action is particularly present in light of 92 *Buena Vista Avenue*, which permits donees of forfeitable property to raise the innocent owner defense. One of the few cases to consider the issue of the applicability of the innocent owner defense to post-illegal act transferees occurred in the district court for the Southern District of Florida.¹⁸³

In *United States v. 6640 S.W. 48th Street*,¹⁸⁴ Reinaldo Luis used his home to facilitate a narcotics conspiracy.¹⁸⁵ Thereafter, Luis was arrested and formally charged with conspiracy to import cocaine.¹⁸⁶ The United States Magistrate held a pre-trial hearing

182 See *supra* Part IV.C. (discussing *Calero-Toledo* standard of "consent").

183 *United States v. 6640 S.W. 48th St.*, 831 F. Supp. 1578 (S.D. Fla. 1993). The *6640 S.W. 48th St.* court noted that the innocent owner defense had rarely been applied to post-illegal act transferees, as opposed to pre-illegal act owners. The court stated that one of the primary reasons for the deficiency in case law was that prior to *United States v. 92 Buena Vista Ave.*, 113 S. Ct. 1126 (1993) (plurality opinion), courts had adopted a strict interpretation of the relation-back doctrine, and therefore "routinely denied the innocent owner claims advanced by post-illegal act transferees." *Id.* at 1582. See also *supra* Part IV.D, V. (discussing relation-back doctrine pre and post-92 *Buena Vista Ave.*).

184 831 F. Supp. 1578 (S.D. Fla. 1993).

185 The government met its burden of showing probable cause that the property was used to facilitate illegal narcotics activity under § 881(7) by establishing that "in Luis' presence at the defendant property, one of Luis' associates offered a \$15,000 cash deposit to the confidential informants to entice them to travel to Aruba to obtain over 1500 kilograms of cocaine." *Id.* at 1580.

186 *Id.*

wherein the court, in the presence of Luis' attorney, was informed of the conspiratorial meetings that took place at Luis' home.¹⁸⁷ Later that day, Luis executed a promissory note and a mortgage deed to his home to his lawyer, Jose Larraz, Sr.¹⁸⁸ A short time later, Luis was convicted of conspiracy to import cocaine and the government filed a civil forfeiture action against Luis' home pursuant to section 881(a)(7).¹⁸⁹ Luis' lawyer filed a claim against his interest in the home as an innocent owner under section 881(a)(7).¹⁹⁰ The lawyer stipulated that he had "knowledge" of the government's allegations concerning the illegal use of the property at the time the property was transferred to him.¹⁹¹ However, the lawyer stated that he qualified as an innocent owner because "[h]e did not have any knowledge of Luis' illegal use of the defendant property *at the time that Luis engaged in the illegal activity*; and . . . [i]f he did have knowledge of any unlawful use of the property, he did not consent to [such use]."¹⁹² In addressing the lawyer-claimant's arguments, the court was confronted with two issues:

- (1) Whether the innocent owner test should be applied to the claimant's state of mind at the time of the underlying criminal activity, or at the time that the claimant acquires the property;
- and (2) Whether the issue of consent applies to an analysis of the innocent owner status of a *post-illegal* act transferee.¹⁹³

First, the *6640 S.W. 48th Street* court agreed with the plurality in the *92 Buena Vista Avenue* case which had suggested (in dicta) that the appropriate time to consider a claimant's lack of knowledge is at the time of the transfer of the property rather than the

187 *Id.*

188 The transfer process occurred as follows: "Luis executed a warranty deed . . . transferring his interest in the defendant property to Mendicuti, the co-owner of the defendant property. Mendicuti then executed a promissory note payable to Larraz, Sr., and a mortgage deed, both in the amount of \$50,000.00 in favor of Larraz, Sr." *Id.* at 1580.

189 *Id.*

190 A default judgment was entered against Mendicuti (the owner of record of the property), because she failed to file a claim against the property. *Id.*

191 Although Luis' lawyer, Larraz, Sr., was not present at the pre-trial hearing wherein the court provided "knowledge" of the illegal use of the forfeited property, Larraz, Sr.'s son/law partner was at the hearing. Thereafter, Larraz, Sr. stipulated that he was aware of the allegations of the illegal use of the property prior to obtaining an interest in the property. *Id.*

192 *Id.* at 1582 (emphasis added).

193 *Id.* (emphasis added).

time of the illegal act.¹⁹⁴ The *6640 S.W. 48th Street* court stated that considering a claimant's knowledge at the time of the illegal act would encourage "[c]riminals [to] simply keep friends and family 'out of the loop' when committing crimes, so that these persons could later serve as post-illegal act transferees without knowledge of the underlying crimes,"¹⁹⁵ thereby avoiding the forfeiture of the property.

Second, the court addressed the issue of consent as applied to post-illegal act transferees.¹⁹⁶ The court stated that "[c]onsent is simply irrelevant when examining the innocent owner claims of post-illegal act transferees,"¹⁹⁷ because a post-illegal act claimant's innocence under a consent standard is "a foregone conclusion."¹⁹⁸ In particular, the court emphasized that persons who did not have knowledge of the illegal acts at the moment they occurred could not possibly "consent" to such illegal acts.¹⁹⁹ The court stated that even if claimants subsequently learn of the illegal acts, they could not possibly consent to acts that had already occurred.²⁰⁰ The *6640 S.W. 48th Street* court was able to avoid the possible application of the disjunctive interpretation of the innocent owner defense by holding that the conjunctive/disjunctive debate concerns only the pre-illegal act owners.

In sum, the court implicitly held that when courts interpret the innocent owner defense, they should first distinguish between pre-illegal act owners and post-illegal act transferees. If the claimant is a pre-illegal act owner, the court should simply follow the circuit's interpretation of the innocent owner defense.²⁰¹ Thus, if the circuit adheres to the disjunctive interpretation, the claimant should be permitted to prove either lack of knowledge or lack of consent to the illegal activities. If the claimant is a post-illegal act transferee, however, the court should limit a claimant's use of the innocent owner defense to proving lack of knowledge. In other words, claimants who are post-illegal act transferees are precluded from proving that (despite their knowledge), they did not consent to the illegal activity. The *6640 S.W. 48th Street* court appropriately

194 *Id.* at 1583. See also *supra* note 156 and accompanying text.

195 *6640 S.W. 48th St.*, 831 F. Supp. at 1584.

196 *Id.* at 1585.

197 *Id.*

198 *Id.*

199 *Id.*

200 *Id.*

201 See *id.*

concluded by stating that “[t]his Court simply cannot allow post-illegal act transferees with post-illegal act knowledge of prior illegal activities to take advantage of a linguistic loophole in the innocent owner provision.”²⁰²

This Note agrees with the analysis of the *6640 S.W. 48th Street* court. Until the legislature amends section 881, the innocent owner defense should be judicially interpreted in accordance with *6640 S.W. 48th Street*.

Finally, in addition to the common sense inapplicability of the “consent” standard of the innocent owner defense to post-illegal act transferees, the legislative history of the defense supports the position that knowledge alone precludes the post-illegal act transferee from prevailing on the defense.²⁰³ Further, the *92 Buena Vista Avenue* case itself recognized that “equitable doctrines may foreclose the assertion of an innocent owner defense by a party with guilty knowledge of the tainted character of the property.”²⁰⁴

Accordingly, based on common sense, the reasoning of *6640 S.W. 48th Street*, and the legislative history of section 881, courts should uphold the “equitable doctrine” of precluding the application of the disjunctive interpretation of the innocent owner defense to post-illegal act transferees. Courts can achieve this goal by distinguishing between post-illegal act transferees and pre-illegal

202 *Id.* at 1586.

203 Specifically, Congress noted that:

[T]he original language [of § 881(a)(6)] could have been construed to reach properties traceable to the illegal proceeds but obtained by an innocent party *without knowledge* of the manner in which the proceeds were obtained. The original language is modified in the proposed [innocent owner] amendments in order to protect the individual who obtains ownership of proceeds with *no knowledge* of the illegal transaction.

124 CONG. REC. 23,056 (1978) (emphasis added).

When speaking of the innocent owner rights of pre-illegal act owners, however, Congress stated that the innocent owner provision was added

to make it clear that a bona fide party who has *no knowledge or consent* to the property *he owns* having been derived from an illegal transaction, that party would be able to establish that fact under this amendment and forfeiture would not occur.

Id. at 23,057 (emphasis added).

Thus, when speaking of persons who acquire proceeds after the crime has occurred, Congress appeared to recognize that the “consent” of claimants is irrelevant. By contrast, when speaking of the rights of pre-illegal act owners, Congress recognized that “consent” is pertinent.

204 *United States v. 92 Buena Vista Ave.*, 113 S. Ct. 1126, 1137 (1993) (plurality opinion).

act owners prior to the application of the innocent owner defense. To hold otherwise would create a severe loophole in civil forfeiture laws under section 881 and would merely add to the confusion that has afflicted the courts in applying the defense. Of course, courts could avoid most of the confusion that has plagued the interpretation and application of the innocent owner defense were Congress to add a simple amendment to the statute.

VII. PROPOSED STATUTORY AMENDMENT TO § 881

The innocent owner defense under section 881 can be rectified by merely amending the statute to include the following definitional section:

Definitions

(m) As used in subsections (a)(4)(C); (a)(6); and (a)(7) of this section:

(1) The term "knowledge" means having actual subjective knowledge or being wilfully blind to the illegal acts which subjected the property to forfeiture.

(2) The phrase "without the . . . consent of" shall require that the claimant did all that was reasonably possible to prevent the illegal acts which subjected the property to forfeiture.

(3) The term "owner" means a claimant having more than a mere nominal interest in the property at the moment that the illegal acts subjecting the property to forfeiture occurred. Those who are not "owners" are "post-illegal act transferees."

(4) The term "post-illegal act transferee" means a claimant who acquires an interest in property at a time subsequent to the moment of the illegal acts subjecting the property to forfeiture occurred.

(5) The phrases "without the knowledge or consent of that owner" and "without the knowledge, consent, or willful blindness of the owner" shall require:

(A) "owners" to prove that they were either without knowledge of the illegal acts giving rise to forfeiture or without consent of the illegal acts giving rise to forfeiture;

(B) "post-illegal act transferees" to prove that they were without knowledge of the illegal acts giving rise to forfeiture at the time they acquired an interest in the property. The consent of these claimants to the illegal activity is irrelevant.

This amendment resolves the following issues:

First, the amendment provides a consistent definition of "knowledge" which utilizes the subjective actual knowledge standard and incorporates the willful blindness concept. This elimi-

nates the ambiguities of the objective "should have known" standard and is appropriate in light of the amendment's more stringent definition of consent.

Second, the amendment incorporates the *Calero-Toledo* standard for consent. This definition not only recognizes that persons who know of the illegal use of their property should attempt to take at least reasonable steps to prevent such use, but also provides the district court with the flexibility to determine what is reasonable in the context of the multiple array of situations that may arise. This more stringent definition for consent is particularly appropriate in light of the amendment's incorporation of the disjunctive interpretation of the defense.

Third, the amendment provides a consistent interpretation which would finally end the conjunctive or disjunctive debate and the disparate application of the innocent owner defense. The amendment does so by distinguishing between pre-illegal act owners and post-illegal act transferees. The amendment provides that pre-illegal act owners may meet their burden under the defense by proving that they were either without knowledge of the illegal activity subjecting the property to forfeiture or that they did not consent to such activity. This interpretation appropriately avoids the harshness of the conjunctive interpretation by protecting those who may have knowledge of the activity but truly make reasonable attempts to prevent the activity.²⁰⁵

Lastly, the amendment eliminates the possibility that post-illegal act transferees can utilize the disjunctive interpretation of the innocent owner defense. By depriving post-illegal act transferees the opportunity to prove "lack of consent," the amendment not only eliminates a potential loophole in forfeiture law, but also recognizes that equity mandates that people who acquire an interest in property knowing that it derives from illegal activity should not be permitted to retain their interest in the property.

Therefore, this amendment provides consistency and fairness to an area characterized by confusion and inequity. The amendment would not only benefit claimants by providing a consistent standard for "innocence" under the innocent owner defense, but also would benefit the government by closing a major loophole in drug forfeiture law.

205 See *supra* Parts IV, VI.A.

VIII. CONCLUSION

Civil forfeiture under 21 U.S.C. § 881 provides for an innocent owner defense whereby owners may defeat a forfeiture by establishing that the illegal activity was committed "without the knowledge or consent of that owner." In many instances, this defense provides the only means that property owners may defeat a forfeiture which occurred because of the illegal conduct of third parties. The innocent owner defense has proven burdensome to many owners, however, due to the inconsistent judicial interpretation of the defense and to the unforeseen consequences of *United States v. 92 Buena Vista Avenue*. These and other factors, have produced an atmosphere of uncertainty surrounding the application and stability of the innocent owner defense.

The amendment to section 881 proposed in this Note resolves the difficulties underlying the innocent owner defense. Specifically, the amendment provides a consistent standard of "innocence" under the defense by providing explicit definitions for the statutory terms "knowledge" and "consent". Moreover, the amendment provides for an explicit disjunctive interpretation of the phrase "without the knowledge or consent of the owner." Under this interpretation, property owners who owned the property at the time of the illegal conduct may defeat a forfeiture action by proving that they were either without knowledge or without consent of a third party's illegal use of their property. The amendment also reconciles the defense in light of the unique interests of post-illegal act transferees by eliminating the possibility that these claimants can utilize the disjunctive interpretation of the innocent owner defense. By depriving post-illegal act transferees the opportunity to prove "lack of consent," the amendment eliminates a current loophole in forfeiture law.

In conclusion, until the courts and legislature are willing to provide a consistent interpretation of the innocent owner defense, that protects the rights of all parties involved, the innocent owners of property forfeited by the government pursuant to 21 U.S.C. § 881 will continue to be casualties of this nation's war on drugs.

*Anthony J. Franze**

* I would like to thank Professor J. Gurulé for his assistance in the preparation of this Note. Special thanks to my wife, Tracy, for her support and patience throughout.

