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Civil Forfeiture of Real Property: The Government's Weapon Against Drug Traffickers Injures Innocent Owners

I. Introduction

The doctrine of forfeiture permits the United States Government to take property illegally used or acquired, without compensating the owner.¹ The doctrine is an ancient one that has survived for thousands of years,² yet it has traditionally played an insignificant role in the government's struggle with crime.³ Over the last two decades, however, Congress has revitalized forfeiture by enacting several provisions which have dramatically increased the scope of civil forfeiture.⁴ Most signifi-

1. U.S. DEP'T OF JUSTICE, DRUG AGENTS' GUIDE TO FORFEITURE OF ASSETS 2 (1987)[hereinafter DRUG GUIDE].

2. *Id.* at 1.

3. *Id.*

4. In 1970, Congress initiated its expansion of forfeiture by enacting the Comprehensive Drug Abuse Prevention and Control Act, Pub. L. No. 91-513, 84 Stat. 1236 (codified as amended at 21 U.S.C. §§ 801-970 (1988)). Section 881 of this Act reads in part:

The following shall be subject to forfeiture to the United States and no property right shall exist in them:

(1) All controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of this subchapter.

(2) 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 this subchapter.

(3) All property which is used, or intended for use, as a container for property described in paragraph (1) or (2).

(4) All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1) or (2), except that-

(A) no conveyance used by any person as a common carrier in the transaction of business as a common carrier shall be forfeited under the provisions of this section unless it shall appear that the owner or other person in charge of such conveyance was a consenting party or privy to a violation of this subchapter or subchapter II of this chapter; and (B) no conveyance shall be forfeited under the provisions of this section by reason of any act or omission established by the owner thereof to have been committed or omitted by any person other than such owner while such conveyance was unlawfully in the posses-

cantly, and central to the thesis of this Comment, the statutory reach of the government now extends to real property.⁵

The very nature of real property interests complicates the application of the civil forfeiture doctrine. Several parties can simultaneously hold an interest in a single parcel of real property. When the illegal action of one interest holder subjects a parcel of real property to forfeiture, the rights of the remaining interest holders are jeopardized. The federal courts, in civil forfeiture actions, are requiring interest holders who allege innocence to show, among other things, that they did everything reasonably possible to avoid the illegal use of the seized property. As applied, this standard is impractical as it allows the government to seize property on a showing of probable cause and ultimately take title to the property, unless the interest holder challenging the forfeiture shoulders the heavy burden of innocence that is mandated by the federal courts. As the government deploys this new weapon in its war against drug traffickers, the rights of innocent persons are getting caught in the cross fire.

The historical development of forfeiture, from the early English common law until the adoption of the modern American forfeiture statutes, is presented in Part II of this Comment. Part

sion of a person other than the owner in violation of the criminal laws of the United States, or any State.

(5) All books, records, and research, including formulas, microfilm, tapes, and data which are used, or intended for use, in violation of this subchapter.

21 U.S.C. § 881 (1988).

In 1978, Congress amended this statute to permit the forfeiture of all monies used in and all proceeds acquired from the illegal drug trade. Pub. L. No. 95-633, tit. III, § 301, 92 Stat. 3777 (codified at 21 U.S.C. § 881(a)(6) (1988)). This is the first United States statute to permit the civil forfeiture of the accumulated profits of a criminal activity. DRUG GUIDE, *supra* note 1, at 1. In 1984, Congress again amended the civil forfeiture provisions to allow forfeiture of real property used in connection with drug transactions. Pub. L. No. 98-473, tit. II, § 306, 98 Stat. 2050 (codified at 21 U.S.C. § 881(a)(7)(1988)).

5. 21 U.S.C. § 881(a)(7)(1988). This section subjects to forfeiture:

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, except that no property shall be forfeited under this paragraph, to the extent of an 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.

Id.

II also discusses the origin of the innocent owner defense to civil forfeiture — initially as enunciated by the Supreme Court,⁶ then as legislated by Congress⁷ — and the standard of proof necessary to establish that defense.⁸ Finally, this section explores the complications and concerns caused by the relation-back doctrine⁹ and the issue of post-seizure interest.¹⁰ Part III analyzes the similarities between civil and criminal forfeiture proceedings, and concludes that a claimant in a civil forfeiture proceeding against real property should only be required to meet the same standard of proof required for claimants in criminal forfeiture proceedings.

II. Background

A. *Historical Development of the Concept of Forfeiture*

1. *English Law*

The history of civil forfeiture stems from the concept of the deodand in English law.¹¹ The deodand was any personal chattel

6. *Calero-Toledo v. Pearson Yacht Leasing, Co.*, 416 U.S. 663, 689 (1974) (The Court, in dicta, stated that it would be difficult to reject the claim of an owner who “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 . . .”). The defense alluded to in *Calero-Toledo* is generally termed the innocent owner exception. See *infra* notes 55-62 and accompanying text.

7. 21 U.S.C. § 881(a)(6),(7) (1988).

8. The Supreme Court, in *Calero-Toledo*, created two requirements for the innocent owner defense. See *infra* text accompanying note 62. This standard has been applied by the lower courts when interpreting the innocent owner exception to section 881. See *infra* notes 81-105 and accompanying text.

9. 21 U.S.C. § 881(h) (1988). This provision states that: “All right, title, and interest in property described in subsection (a) of this section shall vest in the United States upon commission of the act giving rise to forfeiture under this section.” *Id.* This simply means that at the moment of the illegal use of the property all rights and legal title to the property pass to the government. DRUG GUIDE, *supra* note 1, at 159. Seizure and formal proceedings simply confirm the forfeiture that has already taken place. *Id.*

10. The post-seizure interest issue generally arises when a claimant is the holder of a security interest in the seized property and is entitled to interest until the maturity date of the security instrument, but is denied any interest beyond the date of seizure. See *infra* notes 171-87 and accompanying text.

11. *United States v. Schmalfeldt*, 657 F. Supp. 385, 388 (W.D. Mich. 1987). “Deodand derives from the Latin *Deo dandum*, ‘to be given to God.’” *Calero-Toledo v. Pearson Yacht Leasing, Co.*, 416 U.S. 663, 681 n.16 (1974). “The origins of the deodand are traceable to Biblical and pre-Judeo-Christian practices, which reflected the view that the instrument of death was accused and that religious expiation was required.” 416 U.S. at

which was used as the immediate instrument of death.¹² When a chattel was employed to cause a death, it was forfeited to the Crown to be applied to charitable uses.¹³ Our ancestors created the concept of forfeiture out of a desire for revenge.¹⁴ Over the centuries, the theory that the doctrine serves a legitimate need for revenge has gradually diminished, but the doctrine of forfeiture remains.¹⁵ A more contemporary justification for forfeiture is to punish and to deter crime.¹⁶

Forfeiture of chattels also resulted from conviction for felonies and treason according to English common law.¹⁷ The particular items subject to forfeiture were extended beyond the chattel which occasioned the felony, to the entire estate of the

681. For a discussion of the history between these ancient laws and modern forfeiture statutes, see Finkelstein, *The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty*, 46 TEMP. L.Q. 169 (1973).

12. *Schmalfeldt*, 657 F. Supp. at 388 (quoting BLACK'S LAW DICTIONARY 392 (5th ed. 1979)) ("In English Law, [a deodand was] any personal chattel which was the immediate occasion of the death of any reasonable creature, and which was forfeited to the crown to be applied to pious uses, and distributed in alms by the higher almoner."). For further explanation of the deodand concept, see *infra* note 21.

13. *Schmalfeldt*, 657 F. Supp. at 388.

14. DRUG GUIDE, *supra* note 1, at 3. The original focus of the revenge was directed at the offending chattel, rather than at the owner.

15. *Id.*

16. *Id.* Congress recognized that the traditional criminal sanctions of fine and punishment are inadequate to deter or punish the enormously profitable drug trade. H.R. REP. NO. 1030, 98th Cong., 2d Sess. 4, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3374 ("Clearly, if law enforcement efforts to combat . . . 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."). The Court in *Calero-Toledo* discussed how the modern justification of forfeiture can develop.

The adaptation of the deodand institution to serve the more contemporary function of deterrence is an example of a phenomenon discussed by Mr. Justice Holmes: "The customs, beliefs, or needs of a primitive time establish a rule or a formula. In the course of the centuries the custom, belief, or necessity disappears, but the rule remains. The reason which gave rise to the rule has been forgotten, and ingenious minds set themselves to inquire how it is to be accounted for. Some ground of policy is thought of, which seems to explain it and reconcile it with the present state of things; and then the rule adapts itself to the new reasons which have been found for it and it enters on a new career. The old form receives a new content, and in time even the form modifies itself to fit the meaning which it has received."

Calero-Toledo v. Pearson Yacht Leasing, Co., 416 U.S. 663, 681-82 n.19 (1974) (citation omitted).

17. *Calero-Toledo*, 416 U.S. at 682.

convicted felon.¹⁸ The rationale for these forfeitures was that violation of the criminal law was a breach of the King's peace, and this breach justified a denial of the right to own property.¹⁹ In addition, English law also provided for statutory forfeitures of offending objects used in violation of the customs and revenue laws.²⁰

2. *Early American Law*

Deodands did not become a part of the common law tradition of the United States.²¹ Nor has forfeiture of estates resulting from felony convictions been permitted.²² The concept of the deodand, however, has been incorporated in modern notions of liability.²³ The government has been substituted for the church

18. *Id.* ("The convicted felon forfeited his chattels to the Crown and his land escheated to his lord; the convicted traitor forfeited all of his property, real and personal, to the Crown.").

19. *Id.*

20. *Id.* (These "statutory forfeitures [are] likely a product . . . of the deodand tradition and the belief that the right to own property could be denied the wrongdoer. Statutory forfeitures were most often enforced under the *in rem* procedure utilized in the Court of Exchequer to forfeit the property of felons.").

21. *Calero-Toledo*, 416 U.S. at 682. At the base of the deodand doctrine was superstition. For example, if an ox-drawn cart were to break loose and kill its owner, the implication was that the cart was evil because it caused the death. This cart then would be a deodand for pious uses.

Needless to say, historians record that the "pious uses" under the control of the king and his almoner became a scandal which moderns would describe as being graft To the credit of American jurisprudence, from the outset the doctrine was deemed to be so repugnant to our ideas of justice as not to be included as a part of the common law of this country.

Parker-Harris Co. v. Tate, 135 Tenn. 509, 514-15, 188 S.W. 54, 55 (1916).

22. *Calero-Toledo*, 416 U.S. at 682-83. Forfeiture of estates was particularly abhorred by our founding fathers. The framers of the Constitution demonstrated their repudiation of criminal forfeiture by including article III, section 3 in the Constitution. U.S. CONST. art. III, § 3, cl. 2. This section forbade forfeiture of an estate because of a criminal conviction. The only exception permitted forfeiture of a life estate for treason, commonly considered the most heinous of crimes. Sinoway, *Seizures of Houses and Real Property Under Marijuana Forfeiture Laws*, 14 SEARCH AND SEIZURE L. REP. 113 (May 1987). For further discussion of abhorrence to forfeiture of estates, see *United States v. Reckmeyer*, 628 F. Supp. 616, 619 (E.D. Va. 1986).

23. *United States v. Schmalfeldt*, 657 F. Supp. 385, 388 (W.D. Mich. 1987). The court here stated that the concept of the deodand had been transformed by historical processes. Thus, a modern secular society has replaced the dynastic society, while the underlying concept of forfeiture remains. *Id.*

and the crown,²⁴ and the forfeited property may be retained for official use, sold, or destroyed,²⁵ rather than applied to pious uses.²⁶ "Long 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 forfeiture statutes."²⁷ Almost immediately after the adoption of the Constitution, ships and cargo involved in violations of the customs laws were subject to forfeiture under federal law.²⁸

3. *Twentieth Century Forfeiture Statutes*

The enactment of forfeiture statutes has not abated. Modern forfeiture statutes, both federal²⁹ and state,³⁰ extend to virtually any type of property that may be connected with a criminal enterprise.³¹ Specifically, in the drug-related arena, Congress enacted the Comprehensive Drug Abuse Prevention and Control Act of 1970.³² In its ongoing crusade against the "growing men-

24. *Id.*

25. 21 U.S.C. § 881(e) (1988). This section reads in part:

(1) Whenever property is civilly or criminally forfeited under this subchapter the Attorney General may—

(A) retain the property for official use or transfer the custody or ownership of any forfeited property to any Federal, State, or local agency

(B) sell any forfeited property which is not required to be destroyed by law

Id.

26. *Schmalfeldt*, 657 F. Supp. at 388.

27. *C.J. Hendry Co. v. Moore*, 318 U.S. 133, 139 (1942), quoted in *Calero-Toledo*, 416 U.S. at 683. An in rem action is a legal proceeding directed solely against property and brought to determine the ownership of the defendant-property. *DRUG GUIDE*, *supra* note 1, at 5. An in personam proceeding is brought against an individual and determines his personal obligations, rights, duties or liabilities. *Id.*

28. *Calero-Toledo*, 416 U.S. at 683 (citing Act of July 31, 1789, §§ 12, 36, 1 Stat. 39, 47). Also subject to forfeiture were "vessels used to deliver slaves to foreign countries, and somewhat later those used to deliver slaves to this country." *Id.* (citing Act of Mar. 2, 1807, 2 Stat. 426).

29. For more than 200 years, Congress has continued to pass civil in rem forfeiture statutes for a wide range of property, including: conveyances, hazardous substances, counterfeiting paraphernalia, obscene materials, firearms, and moonshine paraphernalia. For a list of the relevant statutes subjecting these properties to forfeiture, see *DRUG GUIDE*, *supra* note 1, at 8-9.

30. For a thorough discussion of state forfeiture provisions, see *DRUG GUIDE*, *supra* note 1, at A8-45.

31. *Calero-Toledo*, 416 U.S. at 683.

32. Pub. L. No. 91-513, 84 Stat. 1236 (codified as amended at 21 U.S.C. §§ 801-970

ace of drug abuse in the United States,"³³ Congress, through section 881 of this Act, has authorized civil forfeiture of drug related property, including raw materials, containers, aircraft, vessels, and vehicles.³⁴ Also, under section 881(a)(6), "moneys, negotiable instruments, securities, or other things of value" are subject to forfeiture.³⁵ This provision extends to "all proceeds traceable" to an illicit exchange of controlled substances.³⁶

Congress subsequently extended the scope of forfeiture when it amended the Comprehensive Drug Abuse Prevention and Control Act. The amendment was a component of the Crime Control Act of 1984.³⁷ Title III of the Crime Control Act was "designed to enhance the use of forfeiture . . . as a law enforcement tool in combatting . . . drug trafficking."³⁸ Congress' aim was to attack the economic power bases of criminals, and forfeiture was believed to be the "mechanism through which such an attack [could] be made."³⁹

The Crime Control Act established two significant amendments to section 881.⁴⁰ The first change added real property that is used or intended to be used in a felony to the list of property subject to civil forfeiture.⁴¹ The second revision codified a well-

(1988)). Also enacted in the same year and for essentially the same purpose were the Racketeer Influenced and Corrupt Organizations Act, Pub. L. No. 91-452, 84 Stat. 941-44 (codified as amended at 18 U.S.C. §§ 1961-68 (1988)), and Continuing Criminal Enterprise, Pub. L. No. 91-513, tit. II, § 408, 84 Stat. 1265 (codified as amended at 21 U.S.C. § 848 (1988)), which provide for in personam forfeiture. For a discussion of in personam proceedings as compared to in rem actions, see *supra* note 27.

33. H.R. REP. NO. 1444, 91st Cong., 2d Sess. 3, reprinted in 1970 U.S. CODE CONG. & ADMIN. NEWS 4566, 4567.

34. 21 U.S.C. § 881(a) (1988).

35. 21 U.S.C. § 881(a)(6) (1988).

36. *Id.*

37. Pub. L. No. 98-473, 98 Stat. 2050 (codified as amended at 21 U.S.C. § 881 (1988)).

38. H.R. REP. NO. 1030, 98th Cong., 2d Sess. 4, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3374.

39. *Id.* The legislative history of the Crime Control Act explains that both Congress and the law enforcement community recognize that the traditional criminal sanctions of fine and imprisonment are inadequate to deter or punish the enormously profitable trade in dangerous drugs. *Id.* The history then provides comment on a report released in April 1981 by the General Accounting Office which concludes, in part, that since the enactment of the federal forfeiture statutes in 1970, the federal government's record in taking the profit out of drug trafficking was far below Congress' expectations. *Id.*

40. *Id.* at 3398.

41. *Id.* This provision was codified at § 881(a)(7) (1988). For the text of this provi-

established principle of law called the relation-back doctrine.⁴² This doctrine provides that "[a]ll right, title, and interest in property [which is subject to civil forfeiture] vests in the United States upon the commission of the act giving rise to forfeiture"⁴³ Therefore, when property is used during the course of illegal drug transactions, or derived as a result of such transactions, all rights to that property transfer immediately to the government regardless of when the property is actually seized.⁴⁴ The relation-back doctrine, as applied to the forfeiture of real property, has created substantial conflicts and concerns for persons who obtained an interest in property subsequent to its illegal use.⁴⁵

B. *Forfeiture Procedures*

A civil forfeiture action is an in rem suit against the seized property.⁴⁶ The property in an in rem action is proceeded against and held guilty as though it were a person by resorting to a legal fiction.⁴⁷ The government does not have to convict or even charge the owner of the seized property with a crime because civil forfeiture is independent of any criminal proceedings.⁴⁸

The procedures of forfeiture are governed by customs law.⁴⁹ The government has the initial burden of establishing that prob-

sion, see *supra* note 5. It is interesting to note that even before the enactment of section 881(a)(7) in 1984, at least two courts had found that section 881(a)(6) covered real property as proceeds of an illegal drug transaction. See *United States v. Premises Known as 8584 Old Brownsville Rd.*, 736 F.2d 1129, 1131 (6th Cir. 1984); *United States v. Certain Real Property Situated at Route 3*, 568 F. Supp. 434, 436 (W.D. Ark. 1983).

42. 21 U.S.C. § 881(h) (1988).

43. *Id.*

44. See *supra* note 9.

45. See *infra* notes 125-57 and accompanying text.

46. For a definition of an in rem action, see *supra* note 27.

47. *Various Items of Personal Property v. United States*, 282 U.S. 577 (1931). "It 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" *Id.* at 579.

48. *DRUG GUIDE*, *supra* note 1, at 30.

49. The federal forfeiture statute incorporates by reference the well-established procedures of the customs statutes. Section 881(d) provides in pertinent part:

"(d) The provisions of law related to the seizure, summary and judicial forfeitures . . . for violation of the customs laws . . . shall apply to seizures and forfeitures incurred . . . under the provisions of this subchapter" These procedures are set forth in 19 U.S.C. §§ 1602-1618 (1988).

able cause exists to connect the property with the commission of a federal drug felony.⁵⁰ The government's burden has been judicially interpreted to require a showing of probable cause to believe there is a substantial connection between the property to be forfeited and the criminal activity defined by statute.⁵¹ Such belief must be grounded on more than mere suspicion but need not rise to a level of *prima facie* proof.⁵²

C. *Establishment of the Innocent Owner Defense*

Historically, after probable cause was established, the only remedy for a person with an interest in property forfeited under any federal statute was to petition the Attorney General of the

50. 19 U.S.C. § 1615 (1988). "In all suits or actions . . . brought for the forfeiture of any [property] seized . . . where the property is claimed by any person, the burden of proof shall lie upon such claimant . . . [p]rovided, That [sic] probable cause shall be shown first for the institution of such suit or action . . ." *Id.*

51. The substantial connection standard has been consistently applied to the probable cause requirement for the forfeiture of real property. See *United States v. Real Property Containing 30.80 Acres*, 665 F. Supp. 422 (M.D.N.C. 1987), *aff'd sub nom. United States v. Reynolds*, 856 F.2d 675 (4th Cir. 1988); *United States v. Certain Lots in Virginia Beach*, 657 F. Supp. 1062 (E.D. Va. 1987); *United States v. A Fee Simple Parcel of Real Property*, 650 F. Supp. 1534 (E.D. La. 1987); *United States v. Various Parcels of Real Property*, 650 F. Supp. 62 (N.D. Ind. 1986). In personal property cases, however, a variety of standards have been applied. For cases applying the substantial connection standard to personal property, see *United States v. \$38,000*, 816 F.2d 1538 (11th Cir. 1987); *United States v. \$64,000*, 722 F.2d 239 (5th Cir. 1984); *United States v. One 1979 Porsche Coupe*, 709 F.2d 1424 (11th Cir. 1983); *United States v. One 1974 Cadillac Eldorado Sedan*, 548 F.2d 421 (2d Cir. 1977); *United States v. One 1980 Ford Mustang*, 648 F. Supp. 1305 (N.D. Ind. 1986). For a case requiring a lesser standard defined as a connection which exists between the property to be forfeited and the criminal activity, see *United States v. \$128,035*, 628 F. Supp. 668 (S.D. Ohio), *appeal dismissed*, 806 F.2d 262 (6th Cir. 1986). For cases requiring a standard where the property subject to forfeiture must be used in any manner related to the illegal activity, see *United States v. Little Al*, 712 F.2d 133 (5th Cir. 1983); *United States v. 1964 Beechcraft Baron Aircraft*, 691 F.2d 725 (5th Cir. 1982), *cert. denied*, 461 U.S. 914 (1983) (rejecting the substantial connection standard in matters concerning the forfeiture of vehicles); *United States v. One 1979 Mercury Cougar XR-7*, 666 F.2d 228 (5th Cir. 1982); *United States v. One 1977 Cadillac Coupe DeVille*, 644 F.2d 500 (5th Cir. 1981).

52. *30.80 Acres*, 665 F. Supp. at 424. See *Certain Lots in Virginia Beach*, 657 F. Supp. at 1065 (suggestion by undercover agent to meet at the house to complete a drug transaction was insufficient to establish a substantial connection between the property and the illegal activity). *Prima facie* evidence is: "[S]uch evidence as, in the judgment of the law, is sufficient to establish a given fact, or the group or chain of facts constituting the party's claim or defense, and which if not rebutted or contradicted, will remain sufficient." BLACK'S LAW DICTIONARY 1071 (5th ed. 1979).

United States for remission or mitigation.⁵³ Although innocent interest holders could not prevent forfeiture of their interest, they could by this procedure request that the Attorney General exercise his discretion and return part or all of the property because of mitigating circumstances.⁵⁴

1. *The Supreme Court Approach to the Innocent Owner Defense*

In 1974, the Supreme Court in *Calero-Toledo v. Pearson Yacht Leasing Co.*,⁵⁵ recognized a need for statutory relief for innocent interest holders.⁵⁶ In *Calero-Toledo*, the lessor of a yacht challenged the constitutionality of Puerto Rico's civil forfeiture statutes which were modeled after section 881.⁵⁷ These statutes permitted seizure and forfeiture of a yacht leased to individuals who used it to transport marijuana.⁵⁸ The Court held that the application of the statute to forfeit the lessor's interest in the yacht was constitutional even though no innocent owner defense was provided by the statute.⁵⁹ Because Pearson Yacht Leasing Co., the lessor, voluntarily entrusted the lessees with possession of the yacht and offered no proof that it did all it reasonably could to avoid having its property put to an illegal use, the property became subject to forfeiture.⁶⁰ The Court, in dicta, recognized a need to protect innocent interest holders and

53. DRUG GUIDE, *supra* note 1, at 228. Remission is considered to be a form of pardon. Because there is no legal right to a pardon there is no legal right to a remission of forfeiture. Thus, the granting of a remission is "purely a matter of grace." *Id.* at 214. Mitigation is the granting of a pardon on the condition that the petitioner pay a penalty for the return of his property. *Id.* at 228.

54. For a thorough discussion of the remission and mitigation procedures, see DRUG GUIDE, *supra* note 1, at 214-34.

55. 416 U.S. 661 (1974).

56. *Id.* at 688-90.

57. The applicable forfeiture provisions of the Code of Puerto Rico provide that: "All conveyances, including aircraft, vehicles, mount or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property [shall be subject to forfeiture to the Commonwealth of Puerto Rico]." P.R. LAWS ANN. tit. 24, § 2512 (1979 & Supp. 1988). Forfeited property may be sold at auction, set aside for official use, or destroyed. *Id.*

58. *Calero-Toledo*, 416 U.S. at 686.

59. *Id.*

60. *Id.* at 690. Thus, application of the statute was constitutional as applied to Pearson Yacht Leasing Co. because it was not found to be an innocent owner.

consequently announced an exception to the general rule that property could be forfeited simply because it was related to a criminal activity.⁶¹ The Court stated that a valid defense to forfeiture would be raised if a claimant could prove: first, that he was uninvolved in and unaware of the illegal activity; and second, that he had done all that reasonably could be expected to prevent the wrongful use of his property.⁶²

2. *The Statutory Approach to the Innocent Owner Defense*

In 1978, Congress followed the Supreme Court's lead and established a statutory exception to forfeiture by amending section 881 to provide for an innocent owner defense.⁶³ This amendment provides that no property shall be forfeited by reason of any act or omission committed without the knowledge or consent of the owner.⁶⁴ Thus, after probable cause is established by the government, the burden of proof shifts to the claimant to prove by a preponderance of the evidence that the property is not subject to forfeiture.⁶⁵ Because of the similarities between

61. *Id.* at 689.

62. *Id.* at 688-90; *see supra* note 6. The second requirement that claimant had done everything reasonably possible to prevent the proscribed use of his property has created conflicting duties that have been imposed upon claimants by the lower federal courts. *See infra* notes 81-105 and accompanying text.

63. Pub. L. No. 95-633, tit. III, § 301, 92 Stat. 3777 (codified as amended at 21 U.S.C. § 881(a)(6),(7) (1988)).

64. 21 U.S.C. § 881(a)(6),(7) (1988). The term "owner" should be broadly interpreted to include any person with a recognizable legal or equitable interest in the property seized. Joint House-Senate Explanation, 1978 U.S. CODE CONG. & ADMIN. NEWS 9496, 9522. The terms "owner," "claimant" and "interest holder" are used interchangeably in this Comment.

65. 21 U.S.C. § 881(a)(6),(7) (1988). An owner must establish innocence by showing that the illegal act was "committed or omitted without [his] knowledge or consent." *Id.* The plain wording of the innocent owner section of the statute makes it clear that the burden is on the claimant to prove his/her innocence: "[E]xcept that no property shall be forfeited . . . 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." *Id.*

The practice of shifting the burden of proof onto property owners in an *in rem* forfeiture first appeared in seventeenth-century England when Parliament passed the Navigation Acts. . . .

Forfeiture laws in the new American republic followed their English counterparts. Congress immediately adopted the practice of shifting the burdens in customs law forfeitures. The practice of shifting the burden gradually caught on in other proceedings as well, and eventually became an integral part of the jurispru-

the statute involved in *Calero-Toledo* and the federal forfeiture statute,⁶⁶ the two requirements that were alluded to in *Calero-Toledo*⁶⁷ have been applied by the lower courts when interpreting the innocent owner defense clause of the federal forfeiture statute.⁶⁸ For example, although *Calero-Toledo* involved forfeiture of personal property, the court in *United States v. One Single Family Residence*⁶⁹ applied the *Calero-Toledo* standard to the forfeiture of real property under the federal statute.⁷⁰ In *One Single Family Residence*, the claimant asserted that the mortgage interest in the house which had been taken as security for a bail bond was not subject to forfeiture.⁷¹ The court studied an Eleventh Circuit opinion⁷² that had discussed both of the *Calero-Toledo* requirements.⁷³ Ultimately, the court followed the lead of the Eleventh Circuit and analyzed both elements of the *Calero-Toledo* standard.⁷⁴

dence of *in rem* forfeiture law.

Comment, *Due Process Implications of Shifting the Burden of Proof in Forfeiture Proceedings Arising out of Illegal Drug Transactions*, 1984 DUKE L.J. 822, 825-26 (footnotes omitted).

66. The relevant similarities between the Controlled Substances Act of Puerto Rico, P.R. LAWS ANN. tit. 24, § 2512 (1979 & Supp. 1988), see *supra* note 57, and the Comprehensive Drug Abuse Prevention and Control Act, 21 U.S.C. § 881 (1988), see *supra* note 4, are that both statutes subject the same types of property to forfeiture "if used or intended for use" in illegal activity, and both statutes provide for similar disposition of the property forfeited. P.R. LAWS ANN. tit. 24, § 2512 (1979 & Supp. 1988); 21 U.S.C. § 881 (1988).

67. For the two requirements that established the standard for the burden of proof, see *supra* text accompanying note 62.

68. See, e.g., *United States v. One Single Family Residence*, 683 F. Supp. 783 (S.D. Fla. 1988). After referring to other cases that have applied the *Calero-Toledo* dicta, this court concluded that both *Calero-Toledo* requirements must be established to reach innocent owner status. *Id.* at 788.

69. 683 F. Supp. 783 (S.D. Fla. 1988).

70. *Id.* at 788.

71. *Id.* at 785.

72. *United States v. \$4,255,000*, 762 F.2d 895, 906 (11th Cir. 1985), *cert. denied*, 474 U.S. 1056 (1986).

73. The Eleventh Circuit ultimately held against the claimant because he failed to satisfy the first requirement that he had no knowledge of the illegal activity. *Id.*

74. *One Single Family Residence*, 683 F. Supp. at 788.

D. The Standard of Proof for Real Property Claimants

1. The Calero-Toledo Dicta

The application of the *Calero-Toledo* dicta to the forfeiture of real property has created numerous inconsistencies in the duties imposed upon interest holders.⁷⁵ The Supreme Court, in *Calero-Toledo*, stated that forfeiture provisions as applied to "lessors, bailors, or secured creditors who are innocent of any wrongdoing, . . . may have the desirable effect of inducing them to exercise greater care in transferring possession of their property."⁷⁶ This statement is an unreasonably harsh and impractical comment, particularly since the lower courts have traditionally disfavored forfeiture.⁷⁷ Furthermore, the Supreme Court in *Calero-Toledo* did not explain what an interest holder must do to exercise greater care in the numerous types of real property transactions that create interests which can be subjected to forfeiture proceedings.⁷⁸ For instance, a mortgage lender located in

75. For example, in *One Single Family Residence*, the court rejected the claimant's allegation that since it had no actual knowledge of the illegal activity, the property could not be forfeited. 683 F. Supp. at 788-89. The court required the claimant to meet a higher standard and prove that it was reasonably without cause to believe that the property was subject to forfeiture. *Id.* The court additionally required the claimant to prove that it did everything reasonably possible to prevent the proscribed use of the property. *Id.* In contrast, in *United States v. A Fee Simple Parcel of Real Property*, 650 F. Supp. 1534 (E.D. La. 1987), the court found the mortgagee to be an innocent owner merely on a showing that the mortgagee was unaware of the illegal source of the funds used to purchase the property. *Id.* at 1541.

76. *Calero-Toledo*, 416 U.S. 661, 688 (1974). Although the Court expressly referred only to lessors, bailors and secured creditors, it did so due to the nature of the facts of this case. Subsequently, the lower federal courts have extended this duty of greater care to all interest holders. See *infra* notes 81-105 and accompanying text.

77. *United States v. One Rockwell Aero Commander*, 671 F.2d 414, 417 (10th Cir. 1982) (forfeiture has long been disfavored by the common law and should only be enforced when within both the spirit and the letter of the law); *United States v. Edwards*, 368 F.2d 722, 724 (4th Cir. 1966) (forfeiture statutes were not designed to punish without fault); *United States v. One 1981 Cadillac Eldorado*, 535 F. Supp. 65, 67 (N.D. Ill. 1982) (forfeitures are not favored and a statute should be strictly construed to mitigate the harshness).

78. *Calero-Toledo*, 416 U.S. at 688. When the Supreme Court, in *Calero-Toledo*, referred to the "desirable effect of inducing [interest holders] to exercise greater care," it cited *United States v. One Ford Coach*, 307 U.S. 219, 238-41 (1939) (Douglas, J., dissenting), as authority which supports this proposition. In *One Ford Coach*, Justice Douglas, joined by Justices Black and Frankfurter, stated that an automobile finance company had a duty to reasonably investigate purchasers to determine if the purchasers were in reality strawmen for bootleggers. *One Ford Coach*, 307 U.S. at 238. The dissent believed

California which holds a mortgage on Florida property may have different duties from a Florida bank with a mortgage on property in Florida. Similarly, a third party with notice of past or current illegal activity may have an affirmative duty to act with greater care, but a party with no notice may not have such a duty.⁷⁹ The Supreme Court's mention of greater care leaves interest holders with a potential legal duty and little clarification of how this duty will be defined.⁸⁰

2. *The Lower Federal Courts*

The lower federal courts, working within the confines of the *Calero-Toledo* dicta, have attempted to clarify the legal duties of the innocent owner.⁸¹ In *United States v. A Fee Simple Parcel of Real Property*,⁸² Pan America Bank, N.A. granted a mortgage on real property which was subsequently found to have been purchased with proceeds from illegal drug transactions.⁸³ The Bank did not request a personal financial statement from the titleholder because the title search and abstract review indicated that the titleholder owned the property in fee simple.⁸⁴ Additional reasons for not requesting a financial statement were that the Bank had no previous legal problems with the owner and the loan was fully secured by collateral.⁸⁵ The court found Pan America to be an innocent owner with a valid claim to the property in forfeiture proceedings under the Comprehensive Drug Abuse Prevention and Control Act.⁸⁶ The court held that

that a requirement for reasonable investigation was not an excessive burden and "would add but imperceptibly if at all to the cost of doing business." *Id.* at 241.

79. *United States v. One 1985 Chevrolet Camaro Z-28*, No. 85-6348 (C.D. Cal. Sept. 11, 1986) (LEXIS, Genfed library, Dist file). ("[P]reventive action is only required when there is actual or constructive notice of potential wrongdoing fairly imputable to the vehicle owner."). See *infra* notes 109-17 and accompanying text for a discussion of this case.

80. The only clarification of this duty was the Court's reference, without elaboration, to the dissent in *One Ford Coach. Calero-Toledo*, 416 U.S. at 688.

81. See, e.g., *United States v. One 1985 Chevrolet Camaro Z-28*, No. 85-6348 (C.D. Cal. Sept. 11, 1986) (LEXIS, Genfed library, Dist file) (discussing the difficulty of applying the *Calero-Toledo* dicta).

82. 650 F. Supp. 1534 (E.D. La. 1987).

83. *Id.* at 1540.

84. *Id.* at 1539.

85. *Id.*

86. *Id.* at 1541. The Bank, however, asked for interest from the date of seizure. The

Pan America had no actual or constructive knowledge of any involvement of the property with illegal activities.⁸⁷ "The Bank's failure to obtain a personal financial statement from [the titleholder] is insufficient to establish any knowledge of the illegal activity giving rise to the tainted money used to purchase the [property]."⁸⁸

The significant factors in the court's analysis were an absence of any legal problems or suspicious transactions in the mortgagor's banking history, and that the procedures which the Bank utilized in extending the loan were "consistent with past practices."⁸⁹ Pan America's past relationship and dealings with this borrower were used as the standard to show that it was not aware of the illegal source of the funds used to purchase the mortgaged property.⁹⁰ Thus, although the court did not require proof of greater care in order for the Bank to establish itself as an innocent owner, this determination was fact-sensitive and will not automatically apply to all mortgage loan cases.⁹¹ It does give some insight, however, to the factors that a court may find to be relevant to an innocent owner analysis.⁹²

Other real property forfeiture cases which have examined the actions of interest holders have ranged from one in which the court could easily conclude that the claimant had knowledge of the illegal activities occurring on the property, such as in *United States v. Real Property Containing 30.80 Acres*,⁹³ to situations in which the claimant's assertions of innocence were not

court held that a lienholder is not entitled to post-seizure interest, attorneys' fees, or other charges that may be permitted under a mortgage note. *Id.* For a discussion of the issue of post-seizure interest, see *infra* notes 171-87 and accompanying text.

87. 650 F. Supp. at 1539.

88. *Id.*

89. *Id.* at 1541.

90. *Id.*

91. For instance, a claimant who dealt with a party for the first time may have a greater duty than Pan America did in *A Fee Simple Parcel of Real Property*, 650 F. Supp. at 1534. This increased duty is what the Supreme Court alluded to in *Calero-Toledo* when it referred to "greater care." *Calero-Toledo*, 416 U.S. at 688.

92. *A Fee Simple Parcel of Real Property*, 650 F. Supp. at 1539 (based on the facts that the Bank followed the same procedure that it had with an earlier loan (with the wrongdoer) and that it was paid back in the ordinary course of business, the court found the bank to be an innocent owner).

93. 665 F. Supp. 422 (M.D.N.C. 1987), *aff'd sub nom.* *United States v. Reynolds*, 856 F.2d 675 (4th Cir. 1988).

even challenged, such as in *United States v. Real Property Titled in the Name of Shashin, Ltd.*⁹⁴ In *30.80 Acres*, the claimant's husband was involved in a conspiracy to distribute cocaine.⁹⁵ The claimant lived in the house on the subject property while various incidents of cocaine trafficking occurred in her kitchen and bedroom.⁹⁶

The claimant testified that she was "overwrought with suspicions that her husband was having an affair and that this concern, in effect, blinded her to realities"⁹⁷ The court held that it simply could not accept this assertion, "particularly in the light of the testimony of [the government's witness] that the claimant delivered to him, upon instructions from her husband, a quantity of cocaine and money secreted in a briefcase to secure the premises in case of a search by law enforcement officers."⁹⁸ Factors relevant to the defeat of the claimant's innocent owner defense included her proximity to the illegal actions as well as her questionable role in the conspiracy.⁹⁹ This case presents a clear example of when an innocent owner claim will be unsuccessful.

At the other end of the spectrum is *United States v. Real Property Titled in the Name of Shashin, Ltd.*¹⁰⁰ Here the claimant was the holder of a mortgage on property which was subject to forfeiture.¹⁰¹ The claimant submitted uncontradicted allegations that he had no knowledge of, nor did he assent to, any illegal drug transactions on the property.¹⁰² The court held that in the absence of any contradictory allegations, the claimant's affidavit must be taken as true.¹⁰³ Thus, the claimant was an innocent owner and had a valid defense to the forfeiture of

94. 680 F. Supp. 332 (D. Haw. 1987). See *infra* notes 100-05 and accompanying text.

95. *30.80 Acres*, 665 F. Supp. at 426.

96. *Id.* at 426-27.

97. *Id.* at 427.

98. *Id.* at 428.

99. *Id.* The court concluded that the claimant had knowledge of the illegal activity. A review of the findings of fact indicates that the court based its conclusion on: 1) the ongoing transactions in the house where the claimant lived; and 2) the delivery of a suitcase filled with cocaine by the claimant to the government's witness. *Id.* at 426-27.

100. 680 F. Supp. 332 (D. Haw. 1987).

101. *Id.* at 333.

102. *Id.* at 334.

103. *Id.*

the mortgage principal.¹⁰⁴ Although this case is a positive precedent for uncontested innocent owner claims, the problem of showing that one did everything reasonably possible to avoid the illegal use still exists for the numerous claims that are contested.¹⁰⁵

E. *Analogous Application of the Standards of Proof for Personal Property Forfeitures*

Since forfeiture of real property is a recent development, and since the *Calero-Toledo* standard has been applied to both personal property and real property cases, the courts have looked to personal property cases for guidance when applying section 881 to real property.¹⁰⁶ Generally, in personal property cases, the courts have interpreted the *Calero-Toledo* standard for innocent owners to require affirmative steps only when the claimant has a reason to suspect that the property will be used in violation of the law.¹⁰⁷ In most cases in which an affirmative duty to do everything reasonably possible to avoid the illegal use has been required, the factual setting has established either actual or constructive notice of a potential for illegal use.¹⁰⁸ In

104. *Id.* In addition, the court here allowed post-seizure interest, disagreeing with *United States v. A Fee Simple Parcel of Real Property*, 650 F. Supp. 1534 (E.D. La. 1987).

105. Additional problems of contested innocent owner claims are discussed *infra* notes 125-57.

106. *See, e.g., United States v. One Single Family Residence*, 683 F. Supp. 783, 788 (S.D. Fla. 1988)(holding that the burden of proof for real property claimants was governed by the two requirements established by *Calero-Toledo*).

107. *United States v. One 1985 Chevrolet Camaro Z-28*, No. 85-6348 (C.D. Cal. Sept. 11, 1986) (LEXIS, Genfed library, Dist file) (claimant who loaned his car to a family friend did not have to act affirmatively because there was no reason to suspect wrongdoing); *United States v. One Datsun 280ZX*, 644 F. Supp. 1280, 1283 (E.D. Pa. 1986)(father who allowed daughter to use his automobile had no duty to act because his daughter had no criminal record); *United States v. One 1983 Homemade Vessel Named Barracuda*, 625 F. Supp. 893, 898 (S.D. Fla. 1986), *aff'd*, 853 F.2d 643 (11th Cir. 1988)(forfeiture denied because there was no showing that lessee of boat had a questionable background that would cause the lessor to suspect wrongdoing); *United States v. One 1979 Mercury Cougar XR-7*, 397 F. Supp. 1325, 1327 (C.D. Cal. 1975)(forfeiture denied where claimant had no reason to suspect her boyfriend would use her car to sell heroin).

108. *United States v. 1966 Beechcraft Aircraft*, 777 F.2d 947 (4th Cir. 1985)(claimant had constructive notice because he loaned plane in area where drug trafficking through the use of private aircraft flourished); *United States v. One Mercedes Benz*, 604 F. Supp. 1307, 1317 (S.D.N.Y. 1984), *aff'd*, 762 F.2d 991 (2d Cir. 1985)(claimant had

United States v. One 1985 Chevrolet Camaro Z-28,¹⁰⁹ the claimant, who entrusted his automobile to a friend, took no affirmative steps to prevent the subsequent illegal use of his automobile.¹¹⁰ There was no evidence that the claimant was involved in the wrongful activity or aware of it.¹¹¹ The government, however, contended that the second part of the *Calero-Toledo* test, that the claimant do all that reasonably could be expected, had not been met.¹¹²

The court, in *One 1985 Chevrolet*, rejected the government's contention and held that the claimant does not have to act affirmatively to prohibit an illegal use of his property unless there is an apparent reason to suspect illegality.¹¹³ There was no reason for suspicion here because the user of the automobile was a family friend who had borrowed the car on several previous occasions.¹¹⁴ The court discussed the difficulty of applying the requirements for an innocent owner defense as set forth in *Calero-Toledo* because these requirements suggest an affirmative duty to act, whereas ignorance of wrongdoing is a passive condition.¹¹⁵ Accordingly, the court found that the *Calero-Toledo* requirement could be satisfied here even though the claimant did not act affirmatively to prevent a wrongful use of his property.¹¹⁶ The court held that preventive action is only required when there is actual or constructive notice of potential illegality, and that this notice was not present here because the wrongdoer was

constructive notice because party to whom claimant entrusted automobile had prior criminal record); *United States v. One Liberian Refrigerator Vessel*, 447 F. Supp. 1053, 1065 (M.D. Fla. 1977), *aff'd sub nom. Ea Shipping Co. v. Bazemore*, 617 F.2d 136 (5th Cir. 1980)(claimant had knowledge because vessel had been taken to remote area of Columbia well-known for drug-related activities and had been assessed penalties for drug-related activities on two previous occasions).

109. No. 85-6348 (C.D. Cal. Sept. 11, 1986)(LEXIS, Genfed library, Dist file).

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* The court noted here that the government had not apprised the court of what the claimant should have done, even when the court directly addressed this question to the government. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* "The question becomes whether doing nothing is reasonable behavior under the circumstances. The answer is yes. The average person loaning a vehicle to a trusted Family Friend would do no more than what was done here." *Id.*

a trusted family friend.¹¹⁷

The holdings that a claimant does not have an affirmative duty to act to prevent criminal use of personal property unless there is a suspicion of wrongdoing may, at first glance, seem to elucidate the innocent owner defense requirements for both personal and real property cases. On further analysis, however, these holdings seem to apply only to the particular case and thus do not establish firm guidelines.¹¹⁸ For example, the courts have held that the level of inquiry for the lending of an airplane is "fundamentally different than that of a car" because a car is a "common mode of transportation freely borrowed and lent in our society."¹¹⁹ Moreover, a strict application of these holdings could give constructive knowledge to a lender taking a mortgage in southern Florida simply because the land is located in "an area known for drug trafficking."¹²⁰

The practical consequences of these interpretations will most likely result in a decrease in the number of mortgages granted in an area known for drug trafficking. This result directly conflicts with the idealization espoused in *Calero-Toledo* that interest holders will exercise greater care over the supervision of their collateral.¹²¹ "This is a burden that is probably too time consuming and expensive to meet. What will probably happen is that lenders will . . . rely on their instincts, which will be to the detriment of poor and minority borrowers and also economically depressed areas."¹²² In *United States v. One 1983 Homemade Vessel Named Barracuda*,¹²³ the court denied forfeiture, noting that "provisions which serve to encourage owners to take the necessary precautionary measures . . . are not designed to immobilize all transferences of property"¹²⁴

117. *Id.*

118. *Id.* "[W]hat one 'reasonably could be expected to do to prevent criminal use of property is a standard that must be tailored to individual circumstances.'" *Id.* (citations omitted).

119. *Id.*

120. *United States v. 1966 Beechcraft Aircraft*, 777 F.2d 947, 951 (4th Cir. 1985). The fact that an aircraft was leased in southern Florida was a major factor in a finding of constructive notice of the potential for illegal use. *Id.*

121. Boyd, *New Real Estate Forfeiture Laws*, N.Y.L.J., July 28, 1988, at 2, col. 5.

122. *Id.*

123. 625 F. Supp. 893 (S.D. Fla. 1986), *aff'd*, 858 F.2d 643 (11th Cir. 1988).

124. *Id.* at 899.

F. *Complication of the Issue by the Relation-Back Doctrine*

The issue of the standard of proof necessary to formulate an innocent owner defense is complicated further by the relation-back doctrine of the civil forfeiture statute.¹²⁵ This doctrine conveys title to the United States from the date of the illegal act rather than from the date of seizure.¹²⁶ Thus, because forfeiture actually occurs at the moment of illegal use, numerous courts have held that no third party can acquire a legally recognizable interest in the property after the occurrence of the activity that subjects it to forfeiture.¹²⁷ "Indeed, under a literal application of [the relation-back doctrine], the interest of innocent third parties would be cut off at the date of the violation . . . rather than at the date of the seizure."¹²⁸ Thus, Congress' codification of this common law doctrine comes into direct conflict with the innocent owner provision in situations where the innocent claimant acquired an interest subsequent to the illegal act.¹²⁹

1. *Recent Judicial Applications of the Relation-Back Provision to Defeat Innocent Owner Standing*

The relation-back doctrine has been applied to defeat the standing of a claimant asserting a property interest that did not predate the right to forfeiture declared by the United States. For example, in *United States v. One Parcel of Real Estate*

125. 21 U.S.C. § 881(h)(1988). See *supra* note 9 for the text of this provision.

126. *United States v. Stowell*, 133 U.S. 1 (1890).

127. *Florida Dealers and Growers Bank v. United States*, 279 F.2d 673, 677 (5th Cir. 1960)(illegal use of automobile vested title in the government at the time of the illegal act and cut off all subsequent property rights); *United States v. One Parcel of Real Estate Property*, 660 F. Supp. 483, 487 (S.D. Miss.), *aff'd*, 831 F.2d 566 (5th Cir. 1987)(lessees of camp did not have legal interest because it arose after the date of the wrongful act); *United States v. Miscellaneous Jewelry*, 667 F. Supp. 232, 249 (D. Md. 1987), *aff'd sub nom. In re One 1985 Nissan 300ZX*, 889 F.2d 1317 (4th Cir. 1989)(all rights and title vested in the government upon the commission of the illegal acts and thus the government owned the property before the four children of the owner ever became heirs); *United States v. One Piece of Real Estate*, 571 F. Supp. 723, 725 (W.D. Tex. 1983)(title to property used in violation of the law transferred to the government from the date of the illegal act and a subsequent decree of forfeiture merely confirms the forfeiture that has already taken place).

128. *One Piece of Real Estate*, 571 F. Supp. at 725.

129. See *One Parcel of Real Estate Property*, 660 F. Supp. at 487; *Miscellaneous Jewelry*, 667 F. Supp. at 249.

Property,¹³⁰ the claimants were lessees of property known as the Rod and Reel Fish Camp.¹³¹ The lessor had received title to the property for the sole purpose of preventing seizure by the government because the property was being used as a loading site for marijuana.¹³² The wrongful act subjecting the property to forfeiture was "its intended use in a drug smuggling operation in July 1979 and/or the use of the proceeds of drug smuggling to purchase the property. Accordingly, the forfeiture occurred, and title to the property vested in the United States in 1979."¹³³ The lease upon which the claimants relied to establish their property interest was not executed until 1984.¹³⁴ The United States seized the Camp in 1985 and thus caused title to vest retroactively in 1979.¹³⁵ The court held that the claimants, although alleging innocence as to the lessor's activities, lacked any cognizable interest in the subject property necessary to confer standing to contest the forfeiture action.¹³⁶ "Seizure and a subsequent decree of forfeiture merely confirms the forfeiture that has already taken place."¹³⁷ Thus, the court granted summary judgment against the claimants and allowed the relation-back doctrine to defeat any possible innocent owner defense.¹³⁸

The relation-back provision was also used to defeat standing to contest forfeiture in *United States v. Miscellaneous Jewelry*.¹³⁹ The claimants in this case were the heirs to property that was subject to forfeiture under 21 U.S.C. § 881(a).¹⁴⁰ The property consisted of over one million dollars in cash, two large checks, two pieces of real estate, miscellaneous jewelry, and electronic equipment.¹⁴¹ The heirs' father, who was a drug smuggler and the purchaser of the property, died just prior to the filing of

130. 660 F. Supp. 483 (S.D. Miss. 1987), *aff'd*, 831 F.2d 566 (5th Cir. 1987).

131. *Id.* at 485.

132. *Id.*

133. *Id.* at 487.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. 667 F. Supp. 232 (D. Md. 1987), *aff'd sub nom. In re One 1985 Nissan 300ZX*, 889 F.2d 1317 (4th Cir. 1989).

140. *Id.* at 233.

141. *Id.*

the forfeiture complaint.¹⁴² Although the court considered the heirs to be innocent parties, it held that under the relation-back doctrine the property was actually forfeited to the government at the time the heirs' father purchased it with drug proceeds.¹⁴³ Accordingly, the property could not be considered part of the decedent father's estate and the heirs had no recognizable legal interest in the forfeited property.¹⁴⁴ The court rejected the claimants' contention that application of the relation-back provision in this manner is inconsistent with the innocent owner defense provision.¹⁴⁵ The court stated that the innocent owner provision of section 881, in light of the relation-back doctrine, protects only the interest of an innocent party acquired before the date of the illegal act.¹⁴⁶

Within the factual setting of *Miscellaneous Jewelry*, in which the claimants were the children of a drug smuggler seeking to inherit the fruits of his illegal activity, it is understandable why the court refused to recognize their interest. The court's reasoning, however, becomes troublesome when applied to other types of innocent claimants who have no relationship to the wrongdoers, such as the lessees of the fishing camp in *One Parcel of Real Estate Property*.¹⁴⁷

2. Rejection of the Relation-Back Doctrine

A positive development involving the relation-back doctrine issue is the decision of the federal district court in *United States v. One Single Family Residence*.¹⁴⁸ This court rejected the government's argument that the relation-back doctrine cuts off the rights of an innocent mortgagee who acquired its interest after the illegal act.¹⁴⁹ *One Single Family Residence* is the first decision in which a court considered the application of the relation-back provision to a lienholder and concluded that the inno-

142. *Id.* at 234.

143. *Id.* at 247.

144. *Id.* at 249.

145. *Id.*

146. *Id.* at 247.

147. 660 F. Supp. 483, 486 (S.D. Miss.), *aff'd*, 831 F.2d 566 (5th Cir. 1987).

148. 683 F. Supp. 783 (S.D. Fla. 1988).

149. *Id.* at 787.

cent owner provision must prevail.¹⁵⁰ The mortgagee in this case, although subsequently not found to be an innocent owner, was permitted to present its claim of innocent ownership.¹⁵¹

The court in *One Single Family Residence* addressed a variety of factors in its consideration of the issue of whether a claimant "may seek shelter under the innocent owner exception to section 881 even though his purported property interest did not arise until after that property was used in or derived from an illegal drug transaction."¹⁵² The court first referred to the criminal forfeiture statute¹⁵³ to demonstrate that "Congress certainly has not per se precluded bona fide purchasers from avoiding the relation-back doctrine."¹⁵⁴ The relation-back doctrine is codified in the criminal forfeiture section, but the section goes on to exempt any otherwise forfeitable property which is transferred to a person other than the defendant, if the transferee is a "bona fide purchaser for value . . . who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section."¹⁵⁵

The court also concluded that the legislative history of the innocent owner provision of section 881 was evidence that this provision protects individuals whose interests arose subsequent to the illegal act giving rise to forfeiture.¹⁵⁶ Additionally, the court pointed out that the term "proceeds" under section 881(a)(6) "necessarily bear[s] the imprimatur of a *prior* illegal

150. *Id.* at 788. Other courts have upheld the mortgagee's interest, but without considering the relation-back doctrine. See *United States v. A Fee Simple Parcel of Real Property*, 650 F. Supp. 1534, 1541 (E.D. La. 1987).

151. *One Single Family Residence*, 683 F. Supp. at 783.

152. *Id.* at 786.

153. 21 U.S.C. § 853 (1988). For the relevant text of this statute, see *infra* note 192.

154. *One Single Family Residence*, 683 F. Supp. at 787. In section 853(c) of the criminal forfeiture statute, Congress codified *both* the relation-back doctrine and an innocent owner exception. Thus, the court concluded that innocent owners must be exempt from relation-back. *Id.*

155. *Id.*

156. *Id.* For example, the court noted that Senator Culver commented that the original language of the innocent owner provision "is modified in order to protect the individual who obtains ownership of proceeds with no knowledge of the [original] transaction." Similarly, the court pointed out Senator Nunn's explanation of the exception, which was "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" would be able to establish his innocence under this exception. *Id.*

drug transaction . . . and thus a subsequent transferee must be entitled to assert the innocent owner defense."¹⁵⁷

3. *The Title Insurance Industry Concerns*

The application of the relation-back doctrine to defeat the standing of an innocent owner, such as the decisions in *One Parcel of Real Estate Property* and *Miscellaneous Jewelry*, is the cause of much concern.¹⁵⁸ The American Land Title Association, a Washington, D.C., based group, is the national trade association of the land title industry.¹⁵⁹ The principal function of this industry is to facilitate the sure and efficient transfer of title to real estate by ascertaining and insuring the rights of purchasers, mortgage lenders, and others involved in these transactions.¹⁶⁰ Accordingly, the members of the national trade association have an interest in the certainty and predictability of the laws affecting title to and interest in real estate, as well as the proper interpretation and administration of such laws.¹⁶¹

In a report issued by the General Accounting Office, a concern of the title insurance industry is expressed over the degree to which innocent parties, such as mortgage lenders, are protected in the government's application of the relation-back provisions.¹⁶² Essentially, the industry is concerned that if an innocent lender issues a mortgage on a property after the date of the

157. *Id.* at 788.

158. Boyd, *New Real Estate Forfeiture Laws*, N.Y.L.J., July 28, 1988, at 2, col. 3. For a general discussion of land title issues relating to forfeiture, see Sherris, *Drug Related Forfeitures Land Title Issues*, Jan./Feb. 1990 PROB. & PROP. 33.

159. *Asset Forfeiture Programs: Corrective Actions Underway But Additional Improvements Needed: Hearings Before the Subcommittee on Crime*, 100th Cong., 2d Sess. (1988)(statement of Gene L. Dodaro, Associate Director, General Government Division) [hereinafter *Hearings*].

160. See D. BURKE, *LAW OF TITLE INSURANCE* (1986), for a general discussion of the title insurance industry.

161. *Hearings*, *supra* note 159, at Summary. See Sherris, *supra* note 158.

162. *Hearings*, *supra* note 159, at 1. The second principal concern of the title industry centers on whether the Justice Department has complied with all legal forfeiture requirements for the transfer of clear title. The industry is not willing to insure against the risk of constitutional challenges to the forfeiture procedures generally, or to the propriety of the procedure that was followed in a particular case. According to the title industry, the Justice Department has not been willing to guarantee that it would reimburse injured innocent parties for any title defects that arose because of its processing of the forfeiture. These risks are considered to be extraordinary and the title industry is not willing to accept them. *Id.* at 2.

illegal act, the lender's interest will not be recognized.¹⁶³ According to the American Land Title Association's General Counsel, the Department of Justice has not been willing to issue a definitive policy statement making it clear that the government will not apply the relation-back provision to injure innocent parties with interests in the property being forfeited.¹⁶⁴ The general position of the Department of Justice has had a significant impact on the attitude of the title industry toward undertaking the risk of insuring title out of the government after property has been forfeited.¹⁶⁵ Consequently, the industry has been very reluctant to insure title for purchasers of the forfeited property.¹⁶⁶

The ramifications of this reluctance, according to the General Accounting Office report, are that properties offered for sale by the government often were withdrawn, or the sales were cancelled or significantly delayed before going to settlement.¹⁶⁷ One reason for the delays was the purchasers' inability to obtain the title insurance coverage required by the mortgagee.¹⁶⁸ For example, because of title defects, only two of twenty-three properties for which sales offers were accepted went to settlement within the sixty days specified in the sales contract.¹⁶⁹ The report of the General Accounting Office recognizes the title industry's concerns as valid, and recommends that the Attorney General "consider alternative measures for resolving title insurance companies' reluctance to insure forfeited real properties."¹⁷⁰

G. *Post-Seizure Interest*

Another consideration relevant to the forfeiture of real property is that the government, on a number of occasions, has chosen not to contest forfeiture of the principal amount claimed

163. *Id.* at 7.

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.* at 5.

168. *Id.* at 6. Title insurance could not be obtained because the Department of Justice could not demonstrate to the satisfaction of title insurers that it had clear title to the property. The other reason for the delays was that the Department of Justice had not complied with all of the forfeiture requirements. *Id.* at 2.

169. *Id.* at 6.

170. *Id.* at 9.

by a lienholder,¹⁷¹ but has consistently challenged the claims to post-seizure interest and other charges permitted under the loan document.¹⁷² Thus, although a mortgage lender asserting an innocent owner defense to forfeiture may sometimes not be challenged for the principal due on the mortgage, the lender still faces the problem of being denied any claim to its property after the date of seizure.¹⁷³

The issue of post-seizure interest has been a subject of much controversy among district courts.¹⁷⁴ The leading case holding that an innocent lienholder is not entitled to post-seizure interest is *United States v. One Piece of Real Estate*.¹⁷⁵ This case involved consolidated forfeiture actions in which the government sought to have various parcels of real property forfeited from their legal owners because the parcels were purchased with proceeds from illegal drug transactions.¹⁷⁶ Several institutional lienholders sought to recover unpaid principal, post-seizure interest, and other charges permitted under their

171. See *United States v. 8.4 Acres of Land*, 648 F. Supp. 79, 81 (D.S.C. 1986), *aff'd*, 823 F.2d 549 (4th Cir. 1987) (mortgage lenders had no knowledge or reason to believe any illegal activity traceable to the secured property had occurred and were considered innocent owners); *United States v. One Piece of Real Estate*, 571 F. Supp. 723, 725 (W.D. Tex. 1983) (government conceded that lienholders were entitled to unpaid principal and interest up until date of seizure).

172. For cases in which the government has challenged post-seizure interest, see *United States v. A Fee Simple Parcel of Real Estate*, 650 F. Supp. 1534, 1541 (E.D. La. 1987); *8.4 Acres of Land*, 648 F. Supp. at 83; *United States v. Escobar*, 600 F. Supp. 88, 89 (S.D. Fla. 1984).

173. The denial of post-seizure interest can cause significant injury to a mortgage lender when one considers the enormous delays involved between the time of seizure and the time of the sale of these properties by the government. Such delays can be divided into two categories: (1) The delay between seizure and initiation of forfeiture proceedings; and (2) the delay between the offering of forfeited property for sale by the government and the actual settlement. For examples of the delay between seizure and forfeiture proceedings, see *United States v. United States Treasury Bills*, 750 F.2d 900 (11th Cir. 1985) (fourteen-month delay); *United States v. \$18,505.10*, 739 F.2d 354 (8th Cir. 1984) (twenty-six-month delay); *United States v. Oil Screw Gulf Princess II*, 543 F. Supp. 1037 (D.S.C. 1982) (four-month delay). For an example of the delay between the offering of sale and the settlement, see *Hearings*, *supra* note 159, at 6 (two-year delay). For a general discussion of delays in instituting proceedings, see Darmstadter, *Some Constitutional and Practical Considerations of Forfeitures Under 21 U.S.C. § 881*, 9 WHITTIER L. REV. 27 (1987).

174. *United States v. Real Property Titled in the Name of Shashin, Ltd.*, 680 F. Supp. 332, 335 (D. Haw. 1987).

175. 571 F. Supp. 723 (W.D. Tex. 1983).

176. *Id.* at 724.

promissory notes.¹⁷⁷ The court held that an innocent lienholder, though entitled to receive principal and interest accruing up until the time of seizure, was not entitled to receive interest or other charges accruing after the seizure.¹⁷⁸

The *One Piece of Real Estate* court looked at the administrative practices prior to the enactment of the innocent owner provision which consisted of the granting of remissions under the discretion of the Attorney General.¹⁷⁹ The Attorney General has consistently adopted the position that a lienholder's interest is cut off as of the date of seizure.¹⁸⁰ The court noted that although these interests are now statutorily protected, whereas in the past relief was granted as a matter of "executive grace," this administrative practice has been in effect for many years.¹⁸¹ Thus, Congress' failure to provide some guidelines for the granting of interest beyond the date of seizure was persuasive evidence that it was the intent of Congress that innocent owners were to receive the same relief and protection under the statute as they had received for years in the administrative process.¹⁸² The court noted that since Congress has the power to provide for the payment of post-seizure interest, it would not grant relief beyond what is expressly provided for by the statute.¹⁸³

The most recent district court decision rejecting the reasoning of the *One Piece of Real Estate* court is *United States v. Parcel of Real Property Known as 708-710 West 9th Street*.¹⁸⁴ This court held that "where a forfeited property is encumbered by a lien which encompasses a right to receive continuing interest payments, an innocent lienholder is entitled to collect from the government such interest as accrues until the principal is

177. *Id.*

178. *Id.* at 725. The holding in this case has been followed in *United States v. A Fee Simple Parcel of Real Property*, 650 F. Supp. 1534, 1541 (E.D. La. 1987); *United States v. 8.4 Acres of Land*, 648 F. Supp. 79, 83 (D.S.C. 1986), *aff'd*, 823 F.2d 549 (4th Cir. 1987); *United States v. Escobar*, 600 F. Supp. 88, 89 (S.D. Fla. 1984). *See United States v. One Condominium Apartment*, 636 F. Supp. 457, 458 (S.D. Fla. 1986).

179. *One Piece of Real Estate*, 571 F. Supp. at 725.

180. *Id.*

181. *Id.* at 726.

182. *Id.*

183. *Id.*

184. 715 F. Supp. 1323 (W.D. Pa. 1989), *vacated in part sub nom. United States v. Parcel of Real Property Known as 6109 Grubb Rd.*, 886 F.2d 618 (3d Cir. 1989) (hearsay evidence was erroneously admitted).

repaid.”¹⁸⁵ The court reasoned that to conclude otherwise would give the United States the benefit of an interest-free loan at the expense of the mortgage lender.¹⁸⁶ Since the United States had been accumulating rental income on the property for its management and maintenance, “it is particularly disingenuous for [the United States] to argue that it should not be required to pay the interest on the mortgage.”¹⁸⁷

III. Analysis

The forfeiture of drug-related property is penal in nature, especially as applied to real property,¹⁸⁸ and yet the government is free to proceed under a civil or criminal forfeiture theory.¹⁸⁹ Since these proceedings demand different burdens of proof, an incongruous result occurs. For instance, within the same factual setting, an innocent interest holder can be required to meet a significantly greater standard of proof to successfully contest forfeiture simply because the government elected to follow civil forfeiture procedures rather than criminal procedures.¹⁹⁰ In a civil proceeding, the claimant must overcome two obstacles. First, the claimant must show that he was unaware of the illegal activity. Second, the claimant must bear the more difficult burden of showing that he had taken affirmative steps to do everything reasonably possible to avoid the illegal use of his property. In a criminal proceeding, on the other hand, the claimant merely must establish that he was a bona fide purchaser without any suspicion of the illegal activity.¹⁹¹ To ensure protection of real property rights, claimants in civil forfeiture proceedings must be required to satisfy the same burden of proof in both civil and

185. *Id.* at 1326. *Accord* United States v. Real Property Titled in the Name of Shashin, Ltd., 680 F. Supp. 332, 336 (D. Haw. 1987); United States v. All that Tract and Parcel of Land, 602 F. Supp. 307, 313 (N.D. Ga. 1985).

186. *Parcel of Real Property Known as 708-710 West 9th St.*, 715 F. Supp. at 1326.

187. *Id.* See *Real Property Titled in the Name of Shashin, Ltd.*, 680 F. Supp. at 336. Under a typical loan agreement, the lender is entitled to receive interest until the loan is paid in full. To compel the claimant to accept anything less than what the agreement calls for would “fly in the face of the statute.” *Id.*

188. Sinoway, *supra* note 22, at 115.

189. United States v. Schmalfeldt, 657 F. Supp. 385, 395 (W.D. Mich. 1987).

190. Sinoway, *supra* note 22, at 115.

191. For a definition of a bona fide purchaser, see *infra* note 196. For a discussion of the criminal standard, see *infra* notes 195-201 and accompanying text.

criminal forfeiture proceedings.¹⁹² Requiring the same burden of proof in both civil and criminal real property forfeiture actions would protect innocent owners from the unfettered discretion of the government as to the requisite burden of proof.¹⁹³ In addition, the criminal standard effectuates the purpose of forfeiture more fairly than does the civil standard. There is a "public interest in the need for certainty in title and in the protection of the rights of innocent owners,"¹⁹⁴ and this interest will be served by requiring civil claimants to show only that they were bona fide purchasers with no suspicion of illegal activity.

A. *The Criminal Standard*

A criminal forfeiture is an in personam action against the owner of the seized property.¹⁹⁵ A third party claimant who had acquired an interest in the property subsequent to the illegal use may challenge the forfeiture under section 853(c) by showing that he was a bona fide purchaser for value with no reasonable suspicion of wrongdoing.¹⁹⁶ In *United States v. Reckmeyer*,¹⁹⁷ a

192. 21 U.S.C. § 853(a),(c) (1988). This statute provides in part:

(a) Property subject to criminal forfeiture

Any person convicted of a violation of this subchapter . . . shall forfeit to the United States . . . ;

(1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation;

(2) any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation;

. . . .

(c) Third party transfers

All right, title, and interest in property described in subsection (a) . . . vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes . . . that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

Id.

193. Sinoway, *supra* note 22, at 15.

194. *United States v. One Parcel of Real Estate on Fellows Tract*, 715 F. Supp. 360, 363 (S.D. Fla. 1989).

195. 21 U.S.C. § 853(a) (1988). See *supra* note 192 for the text of this provision.

196. 21 U.S.C. § 853(c) (1988). "A Bona Fide Purchaser (BFP) is an innocent party who: (1) gives something of legal value in exchange for proceeds, and (2) has no knowledge that what he is acquiring is connected to drug trafficking." DRUG GUIDE, *supra* note

father petitioned to recover certain property forfeited to the United States as a result of his son's conviction.¹⁹⁸ The court stated that it was Congress' intent to provide standing for all creditors to make claims, and that Congress did not intend to apply the criminal forfeiture statute "in such a manner as would cause such great hardship to innocent persons in violation of their constitutional rights, while also leading to erroneous results in a large number of cases."¹⁹⁹ The court held that a creditor need only establish that a bona fide obligation did exist between the creditor and the defendant, and that the creditor had no reasonable suspicion of wrongdoing.²⁰⁰ "Any narrower interpretation of legal right[s], title, or interests in Section 853 . . . would likely render the statute unconstitutional. This procedure will help insure that the primary statutory purpose to punish the defendant will be effectuated without unfairly punishing innocent third persons."²⁰¹

B. *Similarities Between Civil and Criminal Forfeiture*

The criminal burden of proof should be used in civil forfeiture proceedings against real property because all forfeiture proceedings are "quasi-criminal in character."²⁰² Forfeiture under any statute is a highly punitive sanction, long disfavored by the common law.²⁰³ Moreover, the forfeiture statutes are not designed to "punish without fault."²⁰⁴ In reality, the goal of forfeiture, whether in a civil or in a criminal proceeding, is to penalize for the commission of an unlawful offense.²⁰⁵

1, at 116.

197. 628 F. Supp. 616 (E.D. Va. 1986).

198. *Id.*

199. *Id.* at 621.

200. *Id.* at 622.

201. *Id.*

202. *One Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1965). For an in-depth comparison of the similarities between civil and criminal forfeiture, see DRUG GUIDE, *supra* note 1, at 270.

203. *See, e.g., United States v. One Rockwell Aero Commander*, 671 F.2d 414, 417 (10th Cir. 1982).

204. *United States v. Edwards*, 368 F.2d 722, 724 (4th Cir. 1960)(quoting *United States v. One 1936 Model Ford*, 307 U.S. 219, 236 (1939)).

205. Sinoway, *supra* note 22, at 115. *See Comment, Due Process Implications of Shifting the Burden of Proof in Forfeiture Proceedings Arising out of Illegal Drug Transactions*, 1984 DUKE L. J. 822, 830 (forfeiture device punishes individuals who use

In determining whether civil actions are so penal in nature as to require criminal trial safeguards, the Supreme Court in *United States v. Ward*²⁰⁶ established a two-part analysis. First, did Congress denominate the sanction in question as civil in nature? Second, even if Congress affixed a civil label, is the statute nonetheless so punitive in nature as to require constitutional protections ordinarily applicable in criminal proceedings?²⁰⁷

In *United States v. One Assortment of 89 Firearms*,²⁰⁸ the United States instituted an in rem action for forfeiture of firearms.²⁰⁹ The Court used the two-part test established in *Ward* to decide whether the forfeiture sanction was intended to be, or was by its nature, criminal and punitive, or civil and remedial.²¹⁰ Since the firearms forfeiture provision required an in rem proceeding, the first inquiry from *Ward* was necessarily answered in the affirmative.²¹¹ "In contrast to the in personam nature of criminal actions, actions in rem have traditionally been viewed as civil proceedings"²¹²

In turning to the second prong of the *Ward* inquiry, the Court addressed a list of "helpful" considerations as established in *Kennedy v. Mendoza-Martinez*.²¹³ This list includes such factors as whether the sanction was penal in nature, whether it was

their property to perpetrate criminal activity).

206. 448 U.S. 242 (1980).

207. *Id.* at 248-49.

208. 465 U.S. 354 (1984).

209. *Id.* at 355. The firearms were seized pursuant to 18 U.S.C. § 922(a)(1) (1989). This statute prohibits knowingly engaging in the business of dealing in firearms without a license. *Id.*

210. *Id.* at 362-63.

211. *Id.* at 363. The forfeiture provision in this case incorporated the Internal Revenue Code which provides that actions to enforce forfeiture shall be in rem proceedings. *Id.*

212. *Id.*

213. 372 U.S. 144 (1963). The *Kennedy* Court enumerated the test traditionally applied to determine whether an Act of Congress is penal or regulatory in character:

Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment - retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions.

Id. at 168-69.

excessive, and whether it served the traditional criminal law goals of deterrence and retribution.²¹⁴ The Court, in *One Assortment of Firearms*, held that the firearm forfeiture statute²¹⁵ was intended to be civil and remedial, finding that an analysis of these factors "in no way undermines Congress' classification of the § 922(d) forfeiture action as a civil sanction."²¹⁶

In *United States v. \$2,500 in United States Currency*,²¹⁷ the Second Circuit applied the *Ward* and *Mendoza-Martinez* tests directly to section 881.²¹⁸ The court rejected the claimant's contention that since forfeiture under this statute constitutes criminal punishment, an allocation of the burden of proof on the claimant violates due process.²¹⁹ The court justified this conclusion by finding that Congress "expressly and impliedly" indicated a preference for the civil label.²²⁰ In performing the second level of the analysis, the court inquired whether the forfeiture involved was so punitive in purpose as to override Congress' intention to enact a civil penalty.²²¹ The court concluded that since section 881 has many remedial purposes other than the punishment of drug offenders, it is not criminal punishment and can be administered civilly.²²²

On closer analysis of the *Mendoza-Martinez* factors, however, it appears that many of the considerations established in that test are present in section 881.²²³ First, this sanction is penal and involves an affirmative disability since a claimant's

214. *Id.* at 168-69.

215. 18 U.S.C. § 922 (1988).

216. *One Assortment of Firearms*, 465 U.S. at 366.

217. 689 F.2d 10 (2d Cir. 1982), *cert. denied*, 465 U.S. 1099 (1984).

218. *Id.* at 12-13.

219. *Id.* at 13.

220. *Id.*

221. *Id.*

222. *Id.*

Forfeiture of drugs, vehicles and money used in drug trafficking has many apparent remedial, non-punitive [sic] purposes. These include impeding the success of the criminal enterprise by eliminating its resources and instrumentalities, diminishing the efficiency and profitability of the business by increasing the costs and risks associated with it, and helping to finance the government's efforts to combat drug trafficking.

Id.

223. Darmstadter, *Some Constitutional and Practical Considerations of Civil Forfeiture Under 21 U.S.C. § 881*, 9 WHITTIER L. REV. 27, 49 (1987).

property is to be taken from him without compensation.²²⁴ Second, the criminal law aims of deterrence and retribution are being promoted.²²⁵ Third, section 881 applies to behavior that is already a crime — drug trafficking.²²⁶ Fourth, the sanction, as applied to innocent third parties, appears excessive.²²⁷ This last factor has been interpreted to require an analysis of whether a less burdensome alternative exists to accomplish the stated goals of the legislation.²²⁸ The less burdensome alternative to requiring a claimant to show that he did everything reasonably possible to avoid the illegal use of his property would be to regard section 881 proceedings as “quasi-criminal” and thus require a claimant to merely show that he was a bona fide purchaser who was reasonably without suspicion.²²⁹ If the government could refute this showing, then forfeiture would not appear excessive.²³⁰ The numerous similarities between civil and criminal forfeiture, the inherent penal nature of forfeiture actions, and the importance of protecting real property rights support the contention that the claimant should only be required to bear the criminal burden of proof to produce a fair result in real property civil forfeiture proceedings.

Moreover, requiring the claimant to carry a lesser burden in civil proceedings would not defeat Congress’ goal of attacking the economic power bases of drug traffickers since Congress could provide for substitute property to be forfeited as is pro-

224. *Id.* at 50.

225. *Id.* “The fact that seizure serves to impede drug traffic, and therefore bestows a benefit upon society, is incidental to [the promotion of deterrence and retribution] and may be viewed as nothing more than a form of general deterrence.” *Id.*

226. *Id.*

227. *Id.*

228. *Id.* “This determination concentrates on other potential goals and benefits that forfeiture would promote, while considering whether the punitive element of the statute is so strong that these other goals should be achieved through another legislative mechanism.” *Id.*

229. *Id.* See *supra* note 192.

230. Norman Siegel, Executive Director of the New York Civil Liberties Union, summed up his view of civil forfeiture by recalling a line from an old Western: “First we’ll hang him. Then we’ll give him a fair trial.” Siegel feels that forfeiture laws are used as a form of summary punishment by prosecutors without having satisfied their burden of proof. Pinsley, *Putting Sharper Teeth in Forfeiture Law*, MANHATTAN LAWYER, Feb. 21, 1989, at 8.

vided in the criminal forfeiture statute.²³¹ Section 853(p)(2) of the criminal statute allows the government to seize substitute property and subject it to forfeiture when the criminal transfers an interest in property to an innocent third party²³² solely to avoid forfeiture.²³³

In addition, the relation-back doctrine must not be used to defeat the claims of innocent owners who acquired property after the illegal act. The legislative history surrounding the innocent owner provision is evidence that a bona fide purchaser has standing to contest forfeiture regardless of when the interest arose.²³⁴ By not allowing the relation-back doctrine to defeat innocent owner standing, many of the concerns expressed by the title insurance industry will be alleviated.²³⁵ Moreover, the line of reasoning which upholds an innocent owner's right to receive post-seizure interest must also be followed.²³⁶ Since the civil forfeiture statute provides that "no property shall be forfeited . . . to the extent of the interest of any owner,"²³⁷ to compel a claimant to accept anything less than the principal plus interest and costs until the loan is paid in full would "fly in the face of the statute."²³⁸

Thus, the government can still fight its war against drug abuse by attacking the economic power bases of drug traffickers

231. 21 U.S.C. § 853(p) (1988). This section provides:

If any of the property described in subsection (a) of this section, as a result of any act or omission of the defendant-

- (1) cannot be located upon the exercise of due diligence;
- (2) has been transferred or sold to, or deposited with a third party;
- (3) has been placed beyond the jurisdiction of the court;
- (4) has been substantially diminished in value; or
- (5) has been commingled with other property which cannot be divided without difficulty;

the court shall order the forfeiture of any other property of the defendant up to the value of any property described in paragraphs (1) through (5).

Id.

232. An innocent third party is one who is a bona fide purchaser for value without reasonable suspicion. 21 U.S.C. § 853(c) (1988).

233. 21 U.S.C. § 853(p)(2)(1988).

234. *See supra* notes 148-57 and accompanying text.

235. *See supra* notes 162-70 and accompanying text.

236. *See supra* notes 184-87 and accompanying text.

237. 21 U.S.C. § 881.

238. *United States v. Real Property Titled in the Name of Shashin, Ltd.*, 680 F. Supp. 332, 336 (D. Haw. 1987).

without injuring innocent interest holders. Through these procedural changes the government's objective to combat drug trafficking, as well as its interest in preventing unfairness to property owners, will be equally served.

IV. Conclusion

Requiring the claimant to show only that he was a bona fide purchaser reasonably without suspicion would enable the courts to take into account whether forfeiture would effect a disproportionate penalty. Mandating that a criminal procedure be followed within section 881 forfeitures would draw attention to the question of whether the punishment fits the crime. An owner who does not suspect that his property is being misused does not have a duty to prevent alleged wrongdoing. Such an owner has inherently done all that could reasonably be expected to ensure that property was not misused. Accordingly, the innocent owner is entitled to the return of his property unless the government can refute the owner's claim of innocence.

In addition to the change in the standard necessary to show innocence, the relation-back doctrine and the post-seizure interest issue must be addressed. The government must be willing to recognize all claims by bona fide purchasers and ensure that regardless of the time that the interest arose, the full interest in the property will be upheld. If these changes are put into effect, civil forfeiture of real property will be a more effective weapon to combat crime, and this weapon will not injure innocent owners.

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