The Innocent Owner Defense to Real Property Forfeiture Under the Comprehensive Crime Control Act of 1984

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INTRODUCTION

The last five years have seen a dramatic increase in the use of both civil and criminal forfeitures as weapons in the war against drugs.\(^1\) Recently, attention has focused on the drug-related civil forfeiture of real property.\(^2\) The civil forfeiture of real property used in connection with a felony narcotics violation is provided for under section 881(a)(7) of United States Code title 21.\(^3\) Section 881(a)(7) includes an affirmative defense, known as the “innocent owner” defense, which allows a property owner to avoid the forfeiture of his real property by showing that the proscribed use of that property occurred “without [his] knowledge or consent.”\(^4\)

Courts have interpreted section 881(a)(7) and its “innocent owner” defense inconsistently in at least three areas: the threshold determination of whether real property is subject to forfeiture; the construction of the phrase “without knowledge or consent” in the defense; and the applicability of the constitutional defense to property forfeiture established in *Calero-Toledo v. Pearson Yacht Leasing Co.*\(^5\) The purpose of this Note is

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\(^2\) See, e.g., Johnson, Vermont Ponders Spirit of the Law on Drugs, N.Y. Times, Oct. 24, 1989, at A18, col. 5 (community questions forfeiture of family farm in Vermont upon which marijuana plants were grown).


Real property is also subject to civil forfeiture under section 881(a)(6) when the government can show that the property was bought or sold in connection with a narcotics exchange. See, e.g., United States v. Four Parcels of Real Property, 870 F.2d 586, 589 n.5 (11th Cir. 1989) (civil forfeiture action brought against real property under section 881(a)(6)); United States v. Premises Known as 8584 Old Brownsville Road, 736 F.2d 1129, 1130 (6th Cir. 1984) (“the term ‘all proceeds’ in § 881(a)(6) is unambiguous and includes all types of property, both real and personal”). Section 881(a)(6) was introduced by the Psychotropic Substances Act of 1978, Pub. L. No. 95-633, 92 Stat. 3768, and also amends the civil forfeiture scheme in the Comprehensive Drug Abuse Prevention and Control Act. Section 881(a)(6) provides for the civil forfeiture of real and personal property that consists of, or is traceable to, “all proceeds” of a narcotics exchange. See 21 U.S.C. § 881(a)(6) (1988).

\(^4\) The innocent owner defense to section 881(a)(7) provides 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.” 21 U.S.C. § 881(a)(7) (1988); see also id. § 881(a)(6) (subsection (a)(6) contains identical language).

to suggest an analysis for the innocent owner defense under section 881(a)(7) that would replace this inconsistent treatment.

Part I of this Note offers a background discussion on forfeiture law. Part II argues that only real property shown to be substantially connected to a drug-related offense should be subject to forfeiture under section 881(a)(7). Part III argues that the phrase "without knowledge or consent" in the innocent owner defense be read disjunctively, thus allowing the owner an independent lack of consent defense even if that owner fails to establish lack of knowledge of the illegal drug-related activity. Finally, in Part IV, this Note argues that courts should apply the Calero-Toledo standard of "reasonable precaution" in determining whether a claimant has proven lack of consent.

I. FORFEITURE LAW

Forfeiture occurs when the government takes illegally used or acquired property without compensating the owner. Although many of the present-day characteristics of civil forfeiture law and procedure may be traced to origins in the early stages of English common law, the forfeiture of both real and personal property is based exclusively on statutory authority. Several federal statutes authorize the forfeiture of property that represents the proceeds of certain criminal activity, or that is used in furtherance of such activity.

6. There are generally two types of property subject to forfeiture in connection with a narcotics violation. See United States v. Farrell, 606 F.2d 1341, 1344 (D.C. Cir. 1979); see also Winn, supra note 1, at 1118-20 (four-part classification). "Contraband per se" includes controlled substances themselves, and the raw materials and equipment used to grow or manufacture controlled substances. The mere possession of contraband per se constitutes a crime, and such materials may be seized and forfeited automatically. See One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 699 (1965); Farrell, 606 F.2d at 1344; Darmstadter & Mackoff, Some Constitutional and Practical Considerations of Civil Forfeitures Under 21 U.S.C. § 881, 9 Whittier L. Rev. 27, 30 (1989); Comment, Civil Forfeiture and Innocent Third Parties, 3 N. Ill. L. Rev. 323, 336 (1983). "Derivative contraband" includes materials that are not inherently illegal, but that are subject to forfeiture because of their connection to unlawful drug-related activity. See Darmstadter & Mackoff, supra, at 30; Comment, supra, at 336-37. Unless otherwise indicated all references to property in this Note will be to derivative contraband.


8. See Calero-Toledo, 416 U.S. at 680-83; D. Smith, supra note 1, ¶ 2.02, at 2-2; Note, supra note 1, at 390-91; see also Comment, supra note 6, at 326-29 (historical discussion of various types of forfeitures developed in England).


Forfeitures can be either criminal or civil proceedings. A criminal forfeiture is an in personam proceeding, ancillary to the prosecution of a criminal defendant, and may proceed only in the event of a conviction of that defendant. In contrast, a civil forfeiture proceeds in rem, that is, against the property to be forfeited. In rem forfeiture proceedings are brought based on the legal fiction that the property itself is guilty. The government need not convict or even indict the property owner.

Actual or constructive seizure of the property to be forfeited is a jurisdictional prerequisite in a civil forfeiture action. Once seized, property may be forfeited in one of three types of proceedings: summary forfeiture, administrative forfeiture, or judicial forfeiture. In a summary forfeiture, property is seized and forfeited to the government without any notice or hearing. Only contraband per se—materials the mere possession of which is unlawful—is subject to summary forfeiture. In an administrative forfeiture, property seized by a governmental agency, such as the Customs Service, may be forfeited to the United States without the acquired in connection with a violation of narcotics laws; see also Note, supra note 1, at 392 & n.17.

11. See D. Smith, supra note 1, ¶ 1.02, at 1-4.


13. See Comment, supra note 6, at 325. The in rem nature of civil forfeiture proceedings produces oddly captioned cases, such as United States v. Real Property Known as 19026 Oakmont South Drive, Located in South Bend, Indiana, Saint Joseph County. The property owner contesting the forfeiture in such a case is referred to by convention as the claimant.

14. See United States v. $152,160.00 United States Currency, 680 F. Supp. 354, 356 (D. Colo. 1988); Asset Forfeiture, supra note 9, at 3. See generally D. Smith, supra note 1, 2.03, at 2-8 to 2-9 (background material on civil forfeitures).

15. Historically, the innocence or guilt of the owner was not an issue in a civil forfeiture proceeding. See, e.g., Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 683 (1974) (“Despite [the] proliferation of forfeiture enactments, the innocence of the owner of property subject to forfeiture has almost uniformly been rejected as a defense.”); Dobbins's Distillery v. United States, 96 U.S. 395, 401 (1877) (the forfeiture “is attached primarily to the distillery, and the real and personal property used in connection with the same, without any regard whatsoever to the personal misconduct or responsibility of the owner”). In Calero-Toledo, however, the Supreme Court recognized a constitutional defense to property forfeiture. See infra note 101 and accompanying text. Since 1978, statutory “innocent owner” defenses have also been available. See 21 U.S.C. §§ 881(a)(6)-881(a)(7) (1988).

16. See Dobbins's Distillery, 96 U.S. at 396; Pelham v. Rose, 76 U.S. 103, 106 (1869); Asset Forfeiture, supra note 9, at 63.

There are three primary methods by which the government may seize property and thus obtain jurisdiction in a forfeiture action. Property may be seized (1) by a fourth amendment warrant, (2) by a warrant of arrest in rem, or (3) without any warrant at all pursuant to 21 U.S.C. § 881(b). See Asset Forfeiture, supra note 9, at 32-36.

17. See Asset Forfeiture, supra note 9, at 40-42.

intervention of the judiciary.\textsuperscript{19}

Real property may be forfeited only pursuant to a judicial forfeiture.\textsuperscript{20} Judicial forfeitures are civil actions brought and tried in the federal district courts. The government begins the process by filing a complaint against the property pursuant to Rule C(2) of the Supplemental Rules for Certain Admiralty and Maritime Claims.\textsuperscript{21} Once initiated, the judicial forfeiture proceeds according to the Federal Rules of Civil Procedure, "except to the extent that they are inconsistent with [the] Supplemental Rules."\textsuperscript{22}

Some of the procedural rules that govern civil forfeiture actions clearly favor the government; the allocation of the burden of proof is an example. In a criminal forfeiture, the burden of proof rests on the government to prove each element of the underlying crime beyond a reasonable doubt.\textsuperscript{23} In a civil forfeiture action, however, the government has to establish only "probable cause" to believe that the property is subject to forfeiture.\textsuperscript{24} Probable cause in the forfeiture context is defined as a "reasonable ground for belief of guilt, supported by less than prima facie proof, but more than mere suspicion."\textsuperscript{25} In establishing this reasonable ground for belief, the government's task is much easier than in the criminal context. For example, the government's showing of probable cause may be based entirely on hearsay\textsuperscript{26} or on circumstantial evidence.\textsuperscript{27} As a

\textsuperscript{19} Customs laws "authorize the administrative forfeiture of property that does not exceed $100,000 in value, conveyances that are used to transport controlled substances, and illegally imported goods." \textit{Asset Forfeiture, supra} note 9, at 43; see \textit{19 U.S.C. § 1607} (1988). According to Justice Department policy, the forfeiture of real property must be undertaken judicially, regardless the value of the property. \textit{See Asset Forfeiture, supra} note 9, at 44; Valukas & Walsh, \textit{Forfeitures: When Uncle Sam Says You Can't Take it with You}, 14 Litigation 31, 31 (Wint. 1988).

\textsuperscript{20} \textit{See Asset Forfeiture, supra} note 9, at 44; Valukas & Walsh, \textit{supra} note 19, at 35.


\textsuperscript{22} \textit{See Asset Forfeiture, supra} note 9, at 8.

\textsuperscript{23} \textit{See Valukas & Walsh, supra} note 19, at 33-34.


\textsuperscript{26} \textit{See}, e.g., \textit{4492 South Livonia Road}, 889 F.2d at 1267 (hearsay evidence is traditional basis of probable cause showing, and thus, allowable in forfeiture context) (citing
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practical matter, the government usually meets its initial burden of showing probable cause simply by filing its verified complaint.\textsuperscript{28} Perhaps the government's most significant advantage in civil forfeiture actions is that once probable cause is shown, the burden of proof shifts to the claimant.\textsuperscript{29} To avoid forfeiture, the property owner must show either that probable cause does not exist, or that he falls within an affirmative defense to forfeiture, such as the innocent owner defense.\textsuperscript{30} An unrebutted showing of probable cause to believe that the property is subject to forfeiture results in summary judgment in favor of the government.\textsuperscript{31}

II. THE FACILITATION ISSUE

Contraband per se is inherently illegal and subject to forfeiture without regard to the rights of its owner.\textsuperscript{32} In contrast, the forfeiture of material as derivative contraband,\textsuperscript{33} including real property forfeited under section 881(a)(7), requires that the government show a connection between the property and a narcotics violation.\textsuperscript{34} In the absence of an obvious relation between the property and the offense, this connection generally turns on a showing that the property was used, or intended to be used, to

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  \item United States v. One 56-Foot Motor Yacht Named Tahuna, 702 F.2d 1276, 1283 (9th Cir. 1983)); United States v. $250,000.00 in United States Currency, 808 F.2d 895, 899 (1st Cir. 1987) (government's showing of probable cause may be made "wholly with otherwise inadmissible evidence").
  \item United States v. $93,685.61 in United States Currency, 730 F.2d 571, 572 (9th Cir.), cert. denied, 469 U.S. 831 (1984); $364,960.00 in United States Currency, 661 F.2d at 324-25; United States v. Certain Real Property Situated at Route 3, 568 F. Supp. 434, 436 (W.D. Ark. 1983); Asset Forfeiture, supra note 9, at 92.
  \item See Valukas & Walsh, supra note 19, at 34.
  \item See One Blue 1977 AMC Jeep CJ-5 v. United States, 783 F.2d 759, 761 (8th Cir. 1986); United States v. $83,320.00 in United States Currency and Forty Dollars in Canadian Currency, 682 F.2d 573, 577 (6th Cir. 1982); United States v. One Parcel of Real Estate at 11885 S.W. 46 Street, 715 F. Supp. 355, 357 (S.D. Fla. 1989).
  \item See United States v. Premises and Real Property at 4492 South Livonia Road, 889 F.2d 1258, 1267 (2d Cir. 1989); One Blue Jeep, 783 F.2d at 761; Real Estate at 11885 S.W. 46 Street, 715 F. Supp. at 357.
  \item See 4492 South Livonia Road, 889 F.2d at 1267; One Blue Jeep, 783 F.2d at 761.
  \item If a judgment of forfeiture is delivered, the claimant may still avoid forfeiture and regain his property by applying to the Attorney General for remission. See Darmstadter & Mackoff, supra note 6, at 37-38. See generally D. Smith, supra note 1, ¶ 15.01-15.04 (discussing remission). Generally, a petition for remission must establish a good faith interest in the property, lack of knowledge or reason to believe that the property was being used illegally, and that the petitioner neither knew nor had reason to know that any previous owner had a record or reputation for violating laws. See 28 C.F.R. §§ 9.5(b)-9.5(c); Valukas & Walsh, supra note 19, at 35. A petition for remission is essentially an appeal for executive grace. Courts have only the narrowest power to review the decision of the Attorney General. See United States v. Parcel of Real Property Known as 6109 Grubb Road, 886 F.2d 618, 625 (3d Cir. 1989).
  \item See supra note 6.
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facilitate the violation.\textsuperscript{35}

Most courts that have addressed the issue of facilitation have done so under Section 881(a)(4) of Title 21, which authorizes the forfeiture of conveyances—trucks, cars, boats and planes—used in connection with a narcotics violation. Circuit courts have applied different standards to determine whether property has facilitated a narcotics violation and is thus subject to forfeiture under this provision.\textsuperscript{36} Relying on the statutory language, one group of courts has broadly held that property "in any manner" connected to the underlying offense is subject to forfeiture.\textsuperscript{37} On the other hand, some circuits have adopted a more narrow interpretation of facilitation, holding that there must be a "substantial connection" between the property and the underlying offense before that property is subject to forfeiture.\textsuperscript{38}

Under section 881(a)(7) most courts conclude that a substantial connection between the real property and the drug offense is required to support a finding of facilitation and subject the property to forfeiture.\textsuperscript{39}

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\item See D. Smith, supra note 1, ¶ 3.03, at 3-14.
\item See, e.g., 1964 Beechcraft Baron Aircraft, 691 F.2d at 727 ("[section] 881 forfeiture is proper if the vehicle in question was used 'in any manner' to facilitate the sale or transportation of a controlled substance"); United States v. One 1977 Lincoln Mark V Coupe, 643 F.2d 154, 157 (3d Cir.) (facilitation element met when there exists "'reasonable ground for belief that the use of the automobile made the sale less difficult and allowed it to remain more or less free from obstruction or hindrance'") (quoting United States v. One 1950 Buick Sedan, 231 F.2d 219, 222 (3d Cir. 1956)), cert. denied, 454 U.S. 818 (1981); United States v. One 1974 Cadillac Eldorado Sedan, 548 F.2d 421, 425 (2d Cir. 1977) (vehicle used to transport drug trafficker to sale, or to pre-arranged meeting with prospective customer, is subject to forfeiture).
\item See, e.g., United States v. 1966 Beechcraft Aircraft Model King Air, 777 F.2d 947, 953 (4th Cir. 1985) (stating that the "substantial connection" standard follows from legislative history of section 881(a)(6)); United States v. One 1976 Ford F-150 Pick-Up, 769 F.2d 525, 527 (8th Cir. 1985) (use of truck on one occasion to inspect marijuana crop insufficient to subject truck to forfeiture); United States v. One 1972 Chevrolet Corvette, 625 F.2d 1026, 1029-30 (1st Cir. 1980) (denying forfeiture of an automobile used to transport claimant to meeting where "front" money was to be reimbursed).
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In adopting the substantial connection standard for real property, many opinions have relied on the legislative history of section 881(a)(7) in Senate Report No. 98-225 on the Comprehensive Crime Control Act of 1984 ("Senate Report"). The Senate Report contains a passage which refers to a structure housing tons of marijuana and a manufacturing laboratory for amphetamines. From this passage, these courts have gleaned the congressional intent that forfeiture should not apply when there is only an incidental or fortuitous connection between the drug offense and the real property.

Recently, however, it was argued that this interpretation is invalid. The examples used in the Senate Report, one commentator asserted, are not germane to the facilitation issue, but rather are used simply to highlight a serious problem by way of vivid example. One federal district court has also held that property "in any manner" related to a drug offense should be subject to forfeiture under section 881(a)(7).

Courts should continue to require more than a fortuitous or coincidental nexus between real property and the underlying criminal offense before that property is subject to forfeiture under section 881(a)(7). Although the legislative history of section 881(a)(7) is very sparse, the

41. See, e.g., United States v. Santoro, 866 F.2d 1538, 1542 (4th Cir. 1989) (citing Senate Report); $12,585 in United States Currency, 669 F. Supp. 939, 943 (D. Minn. 1987) ("The example and language used in the Senate report illustrate Congress' intent to subject real property to forfeiture only if the property is substantially connected to illegal drug activity."); All Those Certain Lots, 657 F. Supp. at 1064-65 (citing Senate Report).
42. See Note, supra note 36, at 328.
43. See id.
45. See infra notes 82-84 and accompanying text.
often cited Senate Report, which refers to property that was “indispensable to the commission of a major drug offense,” provides sufficient guidance in determining the intent of Congress in passing the real property amendment. The argument that the Senate Report examples are merely egregious examples of the problem and an expression of Congress’ frustration is not convincing. In the absence of specific language in the legislative history of section 881(a)(7) on the facilitation issue, it is valid to use the Senate Report examples as indicative of Congressional intent on this issue. Indeed, the vast majority of courts have done just that. Based on the nature of these examples, it is reasonable to conclude that Congress did not intend for real property only circumstantially or fortuitously connected to a drug violation to be subject to forfeiture.

Moreover, policy considerations suggest that real property, especially homes, should not be subject to forfeiture on the basis of a circumstantial relationship to a prohibited act. The home has traditionally been provided extra protection by courts. If Congress had intended section 881(a)(7) to reach homes less than substantially related to a drug offense, it is reasonable to expect that a specific reference to such a shift in policy would have been made. These policy considerations become more important when the procedural disadvantages to claimants in civil forfeiture actions are considered.

III. CONSTRUCTION OF THE INNOCENT OWNER DEFENSE

A. United States v. Liberty Avenue

United States v. Certain Real Property and Premises Known as 171-02

46. Senate Report, supra note 40, at 3378.

47. In declaring that the scope of civil forfeiture was “too limited,” Congress was concerned that real property not subject to forfeiture under section 881(a)(6), but otherwise involved in a drug-related activity, could slip through what was intended to be a comprehensive forfeiture scheme. See id. It seems highly unlikely, however, that Congress intended “that [section 881(a)(7)] be employed to impose drastic penalties on those who cultivate or traffic in small quantities of controlled substances.” D. Smith, supra note 1, 4.02(6), at 4-16.

Additionally, the legislative history to section 881(a)(6) states that “[d]ue to the penal nature of forfeiture statutes, it is the intent of these provisions that property would be forfeited only if there is a substantial connection between the property and the underlying criminal activity which the statute seeks to prevent.” Joint Explanatory Statement of Titles II and III, 124 Cong. Rec. S17647 (1978), reprinted in 1978 U.S. Code Cong. & Admin. News 9518, 9522 (emphasis added).

48. See notes 40-41 and accompanying text.

49. See D. Smith, supra note 1, ¶ 4.02(6), at 4-16.

50. See, e.g., South Dakota v. Opperman, 428 U.S. 364, 367-68 (1976) (fourth amendment standard on reasonable searches is stricter with respect to homes and offices than with respect to automobiles); United States v. Santoro, 866 F.2d 1538, 1542 (4th Cir. 1989) (“the home has a protected place in our jurisprudence”); United States v. All Those Certain Lots, 657 F. Supp. 1062, 1065 (E.D. Va. 1987) (“[C]ourts have traditionally drawn a distinction between one’s personal property and one’s home, according the latter far greater protection under the law.”).

51. See supra notes 23-31 and accompanying text.
Liberty Avenue first raised a question concerning the interpretation of the innocent owner defense which is now confronting an increasing number of federal courts. The innocent owner defense states that property shall not be forfeited under section 881(a) "by reason of any act or omission established by [the] owner to have been committed or omitted without the knowledge or consent of that owner." The question raised in Liberty Avenue was whether a property owner can assert the innocent owner defense on the basis of lack of consent, even though he admits to having knowledge of the drug-related use of his property.

The claimant in Liberty Avenue lived on Long Island, New York, and owned a two-story building in Jamaica, Queens. The property was notorious as a haven for drug-related activity, and the police had contacted the owner requesting that he press criminal charges against trespassers. At first the owner cooperated with the police. Efforts to curb drug trafficking at the site were unsuccessful, however, and the United States Attorney for the Eastern District of New York eventually had the property seized and brought the forfeiture action.

The government argued that to assert the innocent owner defense successfully, the claimant must show both lack of knowledge and lack of consent. Claimant, on the other hand, asserted that lack of consent represents an independent way of satisfying the requirements of the innocent owner defense, and that therefore he could prevail by showing that he did not consent to the criminal use of his property. The Liberty Avenue court held that a textual analysis of section 881(a)(7) was suffi-
cient to resolve the issue.\textsuperscript{61} Noting that, in accord with "canons" of statutory interpretation, terms separated by the word "or" must be read disjunctively, the court concluded that a claimant could achieve innocent owner status by showing either that he lacked knowledge of, or had not consented to, the drug-related use of his property.\textsuperscript{62}

To date, three other courts have followed \textit{Liberty Avenue}'s disjunctive interpretation of "knowledge or consent."\textsuperscript{63} Another group of district courts, however, seems to require that the claimant show he lacked both knowledge and consent in order mount a successful innocent owner defense.\textsuperscript{64} While the \textit{Liberty Avenue} court was correct in holding that "knowledge or consent" should be read in the disjunctive,\textsuperscript{65} arguments which support the opposite conclusion suggest that \textit{Liberty Avenue} and subsequent cases reached the right result for the wrong reasons.

\textbf{B. Flaws in the \textit{Liberty Avenue} Analysis}

A strict logical interpretation of the innocent owner language in section 881(a)(7) requires a different result from that obtained in \textit{Liberty Avenue}.\textsuperscript{66} A principle of logic, known as De Morgan's theorem, states

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  \item[61.] See \textit{id.} at 50.
  \item[62.] The court concluded that section 881(a)(7) creates "an affirmative defense where the illegal acts giving rise to the forfeiture occurred without the knowledge or without the consent of the owner. If Congress had meant to require a showing of lack of knowledge in all cases . . . it could have done so by replacing 'or' with 'and.'" \textit{Id.}
  \item[64.] The \textit{Liberty Avenue} opinion has created its own "common law" in the federal courts. As stated in \textit{Sixty Acres}, "[t]his court sees no reason why the Eleventh Circuit should not follow the Third Circuit, which, in turn, followed the Eastern District of New York in \textit{171-02 Liberty Avenue} and gave the disjunctive word, 'or,' its ordinary meaning." \textit{Sixty Acres}, 727 F. Supp. at 1419.
  \item[65.] See \textit{infra} notes 89-95 and accompanying text.
  \item[66.] This argument is drawn from the government's brief in support of a petition to take an immediate appeal of the summary judgment in \textit{Liberty Avenue} pursuant to 28 U.S.C. § 1292(b) (Supp. V 1988) (brief on file at Fordham Law Review).
\end{itemize}
that "the denial of a conjunction [not $A$ and $B$] is equivalent to the alternation of the denials [not $A$ or not $B$] and the denial of an alternation [not $A$ or $B$] is equivalent to the conjunction of the denials [not $A$ and not $B$]."\textsuperscript{67} Section 881(a)(7) provides that an owner must establish that the proscribed act was committed "without the knowledge or consent of [the] owner." Because "without the knowledge or consent of [the] owner" is a denial of an alternation, De Morgan's theorem would indicate that the owner must be without both knowledge and consent (the conjunction of the denials) in order to meet the innocent owner defense.\textsuperscript{68} Accordingly, the \textit{Liberty Avenue} court may erroneously have focused on the word "or" without recognizing the logical context in which that word was used.

The \textit{Liberty Avenue} analysis may further be flawed in its reliance on certain standards of statutory construction. The court stated that normal canons of statutory construction require words separated by "or" to be read in the disjunctive.\textsuperscript{69} This reasoning has influenced other courts addressing the same question of statutory construction; these courts all have referred to the "canons" of statutory construction in their analyses, while citing to \textit{Liberty Avenue}.\textsuperscript{70} A closer examination of the cases cited by \textit{Liberty Avenue} in support of this proposition,\textsuperscript{71} however, reveals that the court's reliance on them may have been misplaced.

For example the \textit{Liberty Avenue} court cited \textit{Reiter v. Sonotone Corp.}\textsuperscript{72}

\textsuperscript{67} Webster's Third New International Dictionary 600 (1986 Unabridged) (emphasis added); see also I. Copi, Symbolic Logic 27 (4th ed. 1973) ("since a disjunction asserts merely that at least one disjunct is true, to negate it is to assert that both are false. Negating the disjunction $p \vee q$ amounts to asserting the conjunction of the negations of $p$ and $q".)

\textsuperscript{68} A simple example illustrates the application of De Morgan's theorem. Consider the statement, "In order to go to school, you must not have a fever or a sore throat." The clear meaning of this statement is that one cannot go to school unless he is completely well. Having either a sore throat or a fever would keep him home in bed. The analysis would be the same for section 881(a)(7). In order to be an innocent owner, the claimant must be without "knowledge or consent." De Morgan's theorem suggests that the claimant must lack both of these elements in order to achieve innocent owner status. As he must be without both, having either would deny him innocent ownership. In terms of the facts of \textit{Liberty Avenue}, because the owner had knowledge (that is, he failed to lack knowledge), it would appear that a necessary condition of innocent ownership was not obtained. Thus, according to this logical analysis, the court should have granted summary judgment in favor of the government.

It should be noted that research thus far has not revealed any cases that have employed De Morgan's theorem to resolve a question of statutory construction.

\textsuperscript{69} See United States v. Certain Real Property and Premises Known as 171-02 Liberty Avenue, 710 F. Supp. 46, 50 (E.D.N.Y. 1989).

\textsuperscript{70} See United States v. Real Property Known as 6109 Grubb Road, 886 F.2d 618, 626 (3d Cir. 1989); United States v. Sixty Acres, 727 F. Supp. 1414, 1419; United States v. Real Property Known as 19026 Oakmont South Drive, 715 F. Supp. 233, 237 n.3 (N.D. Ind. 1989).


\textsuperscript{72} 442 U.S. 330 (1979).
Reiter involved a suit brought under Section 4 of the Clayton Act. The question presented to the Court was whether consumers sustain an injury in their "business or property" within the meaning of Section 4 when they are forced to pay higher prices for personal goods as a result of an antitrust violation. Respondents (defendants) argued that the phrase "business or property" meant a business activity or a business-related property. The Court rejected this argument, stating that respondent's "strained construction would have us ignore the disjunctive 'or' and rob the term 'property' of its independent and ordinary significance."  

Reiter v. Sonotone may be distinguished from Liberty Avenue on two grounds. First, the alternative in Section 4, "business or property," is not cast in the negative. Therefore, a disjunctive reading of the term "business or property" does not conflict with the premise of De Morgan's theorem. The phrase "without the knowledge or consent" in section 881(a)(7), on the other hand, is cast in the negative; the innocent owner must show that the proscribed act was committed without his knowledge or consent. Second, the question in Reiter concerned a definitionally-based distinction between the terms business and property. The issue was whether "business" in any way modified or affected the meaning of the term "property."  

In contrast, the issue in Liberty Avenue constitutes an operationally-based dispute as to the effect of the terms knowledge and consent. The question is not simply over what these terms mean, nor whether one term's meaning affects that of the other. Rather, the issue is whether the claimant must lack either, or both knowledge and consent in order to achieve innocent owner status. The Court in Reiter stated that terms connected by a disjunctive are given separate meanings, "unless the context dictates otherwise." The context of section 881(a)(7)—the negatively cast alternation and the focus on the operational effect of the terms—suggests that a disjunctive reading of "knowledge or consent" would be inappropriate.  

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73. See id. at 335. The Clayton Act, Section 4 provides: "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . ." 15(a) U.S.C. § 15 (1988).

74. See Reiter, 442 U.S. at 334.
75. Id. at 338.
76. Id. at 338-39. The Court continued, "[c]anons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings, unless the context dictates otherwise." Id. at 339.
77. See id.
78. See id.
79. The second case cited by Liberty Avenue in support of its statutory interpretation of the phrase "knowledge or consent" is FCC v. Pacifica Foundation, 438 U.S. 726 (1978). Pacifica Foundation involved a violation of 18 U.S.C. § 1464 that regulates the use of "obscene, indecent, or profane" speech in a public broadcast. See id. at 731; 18 U.S.C. § 1464 (1988). Respondents (defendants) argued that because their broadcast lacked "prurient appeal," they did not fall within the statute, because while prurient appeal is an element of "obscene," it is not necessarily part of the terms indecent or
C. Legislative History

In determining the proper construction of the innocent owner defense to section 881(a)(7), the Liberty Avenue court relied entirely on the language of the statute. Because congressional intent is not clear from the language of the statute itself, however, it is appropriate to examine the statute's legislative history to determine congressional intent. The legislative history surrounding section 881(a)(7) is very sparse; the Senate Report discussing the newly-adopted real property provision contains only two substantive passages. The first discusses the need for a real property provision to the civil forfeiture laws in order to close a loophole in the existing civil forfeiture scheme. The second describes the proposed real property section itself. This second passage contains the only reference to the innocent owner defense in the legislative history of

profane. See Pacifica Foundation, 438 U.S. at 739. The premise of respondent's argument apparently was that the communication must be obscene, indecent and profane in order to fall within the proscription of the statute. The Court rejected this argument, noting that the descriptive terms were written in the disjunctive, which implies that each has a separate meaning. See id. at 739-40.

Pacifica Foundation may be distinguished from Liberty Avenue on the ground that the phrase "obscene, indecent, or profane" is not cast in the negative. A disjunctive interpretation of section 1464, therefore, does not conflict with De Morgan's theorem. Reliance by Liberty Avenue on this case in support of a disjunctive construction of "knowledge or consent" may also have been misplaced.

82. See United States v. Parcel of Real Property Known as 6109 Grubb Road, 886 F.2d 618, 624 (3d Cir. 1989). The real property amendment to the civil forfeiture provision of the Crime Control Act of 1984 was only a small part of a very large body of penal legislation. Additionally, the forfeiture title of the 1984 Act focused primarily on criminal forfeitures. See id. at 624; see also Senate Report, supra note 40, at 3374 ("Title III of the bill . . . is designed to enhance the use of forfeiture, and in particular, the sanction of criminal forfeiture, as a law enforcement tool in combatting . . . racketeering and drug trafficking.").
83. The passage states:
The extent of drug-related property subject to civil forfeiture under 21 U.S.C. [section] 881 is also too limited in one respect. Under current law, if a person uses a boat or car to transport narcotics or uses equipment to manufacture dangerous drugs, his use of the property renders it subject to civil forfeiture. But if he uses a secluded barn to store tons of marijuana or uses his house as a manufacturing laboratory for amphetamines, there is no provision to subject his real property to civil forfeiture, even though its use was indispensable to the commission of a major drug offense and the prospect of the forfeiture of the property would have been a powerful deterrent.
Senate Report, supra note 40, at 3378 (footnote omitted).
84. This passage states:
The first amendment would add to the list of property subject to civil forfeiture set out in section 881(a) real property which is used or intended to be used in a felony violation of the Drug Abuse Prevention and Control Act. This provision would also include an "innocent owner" exception like that now included in
section 881(a)(7). The Senate Report did not make any specific comments as to whether the phrase “knowledge or consent” should be read disjunctively or conjunctively. Thus, the legislative history of section 881(a)(7) provides no direct basis for answering this question.

Nor does the legislative history surrounding the innocent owner defense in section 881(a)(6) provide a clear basis for determining whether “or” really means “and” in section 881(a)(7). In its most direct statement concerning the defense, Congress stated that “property would not be subject to forfeiture unless the owner of such property knew or consented to the fact” that the property was associated with a drug-related activity.

On its face this language indicates that either knowledge of or consent to the proscribed act would result in forfeiture. This implies that the owner would have to prove the lack of both these elements to avoid forfeiture, which is equivalent to a conjunctive interpretation of the defense.

On the other hand, the statement also places the burden of proof on the government. The language, in effect, creates a presumption against forfeiture unless the government can show that the owner either knew or consented to the illegal activity. This effect is clearly inconsistent with the well-established legal analysis in forfeiture cases, which places the burden of proof with the claimant once the government has shown probable cause to support the forfeiture. The legislative history in section 881(a)(6), therefore, does not provide an unambiguous basis for determining whether Congress meant “without the knowledge or consent of [the] owner” to mean that a claimant must always establish lack of knowledge to achieve innocent owner status.

85. Reference to the legislative history in section 881(a)(6) is relevant because Congress referred to section 881(a)(6) in describing the section 881(a)(7) innocent owner defense, and because section 881(a)(6) contains identical innocent owner language. See 6109 Grubb Road, 886 F.2d at 625.

86. In full the passage states:

Finally it should be pointed out that no property would be forfeited under the Senate amendment to the extent of the interest of any innocent owner of such property. . . . Specifically the property would not be subject to forfeiture unless the owner of such property knew or consented to the fact that:

1. the property was furnished or intended to be furnished in exchange for a controlled substance in violation of law,
2. the property was proceeds traceable to such an illegal exchange, or
3. the property was used or intended to be used to facilitate any violation of Federal illicit drug laws.


87. See United States v. Parcel of Real Property Known as 6109 Grubb Road, 890 F.2d 659, 662 (3d Cir. 1989) (petition for rehearing) (Greenberg, J., dissenting).

88. See supra notes 29-31 and accompanying text.
D. Disjunctive Construction

Despite the apparent flaws in the *Liberty Avenue* analysis, and the ambiguity in the legislative history of section 881(a)(6), courts should construe the innocent owner defense disjunctively and allow the property owner a separate lack of consent defense. As stated in *United States v. Menasche*, a court must “give effect, if possible, to every clause and word of a statute.” The *Liberty Avenue* opinion cited to this case in finding that the word “or” must not be ignored. In light of the arguments above, however, it appears more appropriate that *Menasche* be directed at the word “consent.”

Consent is defined as “compliance or approval especially of what is done or proposed by another.” It follows that in order to demonstrate lack of consent to a given act or practice, knowledge of that act or practice would normally be required. Therefore, an interpretation of “knowledge or consent” by which knowledge alone would deny a claimant innocent owner status would render the word “consent” mere surplusage. In trying to show lack of consent, the claimant is burdened with a knowledge predicate. In a conjunctive interpretation of the statute, however, that very knowledge would deny the claimant the status of innocent ownership. In establishing one side of the defense, the claimant would necessarily preclude himself from the other.

Despite the lack of clarity in the legislative history, it does not seem reasonable to assume that Congress would use the word “consent” simply to reinforce a required condition of lack of knowledge. *Menasche* indicates that each word in a statute must be given significance. A conjunctive interpretation of “without knowledge or consent,” however, would essentially convert that phrase to “without knowledge.” A dis-

89. 348 U.S. 528 (1955).
92. Webster’s Third New International Dictionary 482 (1986 Unabridged).
93. See United States v. Parcel of Real Property Known as 6109 Grubb Road, 886 F.2d 618, 626-27 (3d Cir. 1989).

The following example illustrates a possible exception to this idea. Five men conspire to traffic in narcotics. One of them, the claimant, is troubled by the obvious illegality of the enterprise and tells the others that he refuses to have his home used or connected to the dealing in any way. While away for the weekend, the other four make a large transaction from the claimant’s house. The transaction leads to a forfeiture proceeding in which the claimant tries to prove he was an innocent owner. In this case, it seems possible that the claimant has demonstrated lack of consent, even though he had no knowledge of the act. To so conclude would, of course, require a very narrow interpretation of knowledge.

In the broader sense, claimant did have knowledge of the act because he was aware of the conspiracy and knew that the goal of the conspiracy was to engage in narcotics transactions. One could also argue that the claimant must have had knowledge of the act, or at least of the strong possibility that it would occur, because otherwise he would not have bothered to request that his partners not use his home.
junctive interpretation allows each term independent significance, and is thus more viable.\(^9\)

In addition, policy considerations strongly suggest that a disjunctive interpretation of "knowledge or consent" is appropriate. Consider the example of a landlord who owns property in a city. He knows that drug trafficking is taking place in his building. He does his best to stop the activity: he bolts the doors and calls the police. It would be unfair to disallow such a landlord innocent owner status merely because he knew about the drug dealing. Likewise, consider a person whose spouse is selling drugs from their jointly-owned home.\(^6\) The person knows about the drug dealing and tries to convince his or her spouse to discontinue the practice, and perhaps threatens to call the authorities. It would be unfair to deny such a person the chance to attain innocent owner status simply based on their knowledge of the illegal activity.

In adopting the innocent owner defense, Congress intended to exempt innocent owners from the otherwise harsh results of forfeiture.\(^7\) If courts adopt a disjunctive interpretation of the statute, the owner would have a chance to demonstrate issues of material fact with regard to his "lack of consent" and therefore avoid summary judgment of forfeiture. This outcome is clearly more in keeping with Congress' purpose in creating the defense.

IV. WHAT CONSTITUTES LACK OF CONSENT

Having decided that the claimant should have an opportunity to prove lack of consent in the event of failing to show lack of knowledge,\(^8\) two

\(^9\)5. See, e.g., Pettis ex rel. United States v. Morrison-Knudsen Co., 577 F.2d 668, 673 (9th Cir. 1978) ("Statutes should not be construed so as to make mere surplusage of any of the provisions included therein.").


\(^9\)8. If the claimant is successful in showing by a preponderance of the evidence that he lacked knowledge of the proscribed activity, then, of course, there is no need to address the lack of consent issue. Under the disjunctive construction of the innocent owner defense, the claimant need only show that he lacked either knowledge or consent in order to prevail.

An interesting question is whether a claimant must show the lack of objective or subjective knowledge of the proscribed activity for innocent owner purposes. That is, can an owner rely on the fact that he did not know—even though he should have known—about the proscribed use of his property for purposes of proving "lack of knowledge" under the defense? Most authorities hold a claimant to a subjective, or actual knowledge, standard. See United States v. Four Million, Two Hundred and Fifty-Five Thousand, 762 F.2d 895, 906 (11th Cir. 1985), cert. denied, 474 U.S. 1056 (1986); United States v. Parcel of Real Property Known as 3201 Caughey Road, 715 F. Supp. 131, 133 (W.D. Pa. 1989). To require that a landlord show both lack of objective and subjective knowledge—that is, to require that a landlord not know nor have reason to know—about the proscribed use of the property would pose too heavy a burden on that landlord. See Strafer, Civil Forfeitures: Protecting the Innocent Owner, 37 U. Fla. L. Rev. 841, 847 (1985). Therefore, a
additional questions must be addressed: What must an owner do to establish lack of consent, and what standard should courts use to judge a particular owner's claims? Courts have given inconsistent answers to these questions. The difference in approach turns upon the incorporation of the constitutional defense of innocent ownership established from dictum in Calero-Toledo v. Pearson Yacht Leasing Co.99

Calero-Toledo involved the forfeiture of a yacht under a Puerto Rican statute modeled after section 881(a)(4).100 The owner, who lived in New York City, leased a boat to two residents of Puerto Rico under a five-year lease. The boat was seized by Puerto Rican authorities after one marijuana cigarette was found in the hold.101 The owner (lessor), who had no knowledge of the forfeiture until he tried to repossess the yacht for non-payment of rent, sued for the return of his boat and a declaration that the statute under which it was seized was unconstitutional. A three-judge district court, relying primarily on Fuentes v. Shevin,102 held the statute unconstitutional because it failed to provide for pre-seizure notice and hearing.103 The United States Supreme Court reversed the district court.104

...subjective standard is more reasonable than an objective standard in this context. See also Note, Tempering the Relation-Back Doctrine: A More Reasonable Approach to Civil Forfeiture in Drug Cases, 76 Va. L. Rev. 165, 188-89 (1990) (discussing the standard of knowledge question).

In certain circumstances, however, knowledge should be imputed to the owner, despite the fact that he lacks actual knowledge. Thus, where a landlord's agent, such as a superintendent or building manager, has knowledge of the illegal activity, such knowledge should be attributed to the landlord for innocent owner purposes. See United States v. Real Property Located at 2011 Calumet, 699 F. Supp. 108, 110 (S.D. Tex. 1988).

Likewise, where the owner's lack of knowledge is due to conscious indifference or willful ignorance, knowledge should clearly be imputed. See, e.g., United States v. Jewell, 532 F.2d 697, 700 (9th Cir.) (deliberate ignorance held equivalent to positive knowledge), cert. denied, 426 U.S. 951 (1976); R. Perkins, Criminal Law 776 (2d ed. 1969) (same); G. Williams, Criminal Law: The General Part § 57, at 157 (2d ed. 1961) ("if a party has his suspicion aroused but then deliberately omits to make further enquiries, because he wishes to remain in ignorance, he is deemed to have knowledge"); Edwards, The Criminal Degrees of Knowledge, 17 Mod. L. Rev. 294, 298 (1954) ("a person who deliberately shuts his eyes to an obvious means of knowledge" will satisfy the "knowingly" aspect of mens rea). Where knowledge is imputed on the basis of deliberate ignorance, the claimant would still have an opportunity to show lack of consent. As a practical matter, however, lack of consent would be extremely difficult to establish under these circumstances, because it would be difficult to distinguish deliberate ignorance from approval.

100. See Controlled Substances Act of Puerto Rico, P.R. Laws Ann., tit. 24, §§ 2512 (a)(4), 2512(b) (1980). Note that unlike § 881(a)(4), the Puerto Rican statute did not have any statutory defenses.
103. See Calero-Toledo, 416 U.S. at 669.
104. Despite the holding in Fuentes, the Court noted that "in limited circumstances, immediate seizure of a property interest, without an opportunity for prior hearing, is constitutionally permissible." Id. at 678. Citing the strong state interest in enforcement of drug laws, the fact that the government, as opposed to a self-interested private con-
The Court reinforced the proposition that the innocence of the owner in a forfeiture proceeding is almost uniformly rejected as a defense. In now-famous dicta, however, the Court discussed two circumstances in which the innocent owner may have a defense to a civil forfeiture action. The first occurs when the property subject to forfeiture has been stolen from the owner. The second—and more important in terms of section 881(a)(7)—is when the owner was uninvolved and unaware of the illegal activity, and had taken all reasonable steps to prevent the proscribed use of his property. The second exception from the dicta in Calero-Toledo (the “Calero-Toledo defense”) has since been incorporated into a large number of civil forfeiture cases brought under sections 881(a)(4) and 881(a)(6).

The circumstances in Calero-Toledo were such that a pre-hearing seizure was justified. See id. at 679-80.

106. The Court stated:

[It] would be difficult to reject the constitutional claim of an owner whose property subjected to forfeiture had been taken from him without his privity or consent. Similarly, the same might be said 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; for, in that circumstance, it would be difficult to conclude that forfeiture served legitimate purposes and was not unduly oppressive.

Id. at 689-90 (emphasis added) (citations omitted).

107. Id.


Recently, section 881(a)(4) was amended to include an innocent owner provision similar to those in sections 881(a)(6) and (a)(7). Subsection (a)(4)(C) states:

No conveyance 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, consent, or willful blindness of that owner.


Courts have taken different positions on the issue of incorporating the Calero-Toledo dicta into the affirmative defense in section 881(a)(6). Compare United States v. One Urban Lot, 865 F.2d 427, 430 (1st Cir. 1989) (not incorporating Calero-Toledo, court concludes that section 881(a)(6) “does not in any way limit innocent owners to those who have done ‘all that reasonably could be expected to prevent the proscribed use of the property’” (quoting Calero-Toledo, 416 U.S. at 689) with United States v. One Single Family Residence, 683 F. Supp. 783, 788 (S.D. Fla. 1988) (incorporating Calero-Toledo,
Federal courts have inconsistently applied the Calero-Toledo defense to section 881(a)(7) innocent owner cases. Some courts incorporate the entire defense and require a claimant to show not only that he was uninvolved and lacked knowledge, but also that he did everything he reasonably could have done to prevent the illegal use of the real property. Other courts have expressly rejected the incorporation of the Calero-Toledo defense into the analysis under section 881(a)(7). In rejecting Calero-Toledo, however, some of these courts rest on the very statutory language at issue and simply state that the owner need only show that he lacked "knowledge or consent" to the proscribed acts. This does little to resolve, and in fact merely poses anew, the question of what constitutes lack of consent under the innocent owner defense.

The "reasonableness" standard in Calero-Toledo should apply to the court concludes that "claimant must demonstrate both that it lacked actual knowledge and that it did everything reasonably possible [to avoid the proscribed use of his property]"). A few courts have recognized the issue, but found it unnecessary to rule on the incorporation question because the cases could be disposed of on other grounds. See United States v. Four Million, Two Hundred Fifty-Five Thousand, 762 F.2d 895, 906 n.24 (11th Cir. 1985), cert. denied, 474 U.S. 1056 (1986); United States v. $47,875.00 in United States Currency, 746 F.2d 291, 292 n.1 (5th Cir. 1984).

109. See, e.g., United States v. One Parcel of Real Estate at 11885 S.W. 46 Street, 715 F. Supp. 355, 358 (S.D. Fla. 1989) (claimant must show that "she did not know of the property's connection to drug trafficking, and that she took every reasonable precaution to prevent the property's use in drug trafficking"); United States v. One Single Family Residence, 699 F. Supp. 1531, 1534 (S.D. Fla. 1988) (to claim innocent ownership claimant must prove that she "did not know of the property's connection to drug trafficking, and that she took every reasonable precaution to prevent the property's use in drug trafficking"), aff'd 894 F.2d 1511 (11th Cir. 1990); United States v. Real Property Located at 2011 Calumet, 699 F. Supp. 108, 110 (S.D. Tex. 1988) ("The innocent owner defense applies only to owners who can show that they did not know and had no reason to know of the illegal use; were uninvolved in the illegal use; and did all that could reasonably be expected to preclude or discover the illegal use."); United States v. Two Tracts of Real Property Containing 30.80 Acres, Etc., 665 F. Supp. 422, 425 (M.D.N.C. 1987) (section 881(a)(7) innocent owner defense "fully comports" with the Court's reasoning in Calero-Toledo), aff'd sub nom. United States v. Reynolds, 856 F.2d 675 (4th Cir. 1988). 110. See, e.g., United States v. Lots 12, 13, 14, and 15, 869 F.2d 942, 947 (6th Cir. 1989) (dicta stating that section 881(a) imposes no duty on the claimant to comply with the Calero-Toledo standard: "It is enough, under the statute, that the owner establish that the proscribed act was committed "without the knowledge or consent of that owner.""

111. See Lots 12, 13, 14, and 15, 869 F.2d at 947; Certain Real Property, 724 F. Supp. 908 at 916. 112. The "reasonable precaution" standard, or third element of the Calero-Toledo defense, states that an owner must have "done all that reasonably could be expected to prevent the proscribed use of his property." Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 689 (1974) (emphasis added).

The Calero-Toledo defense has three parts: the claimant must show that he was (1) unaware and (2) uninvolved in the illegal activity, and that (3) he took all reasonable precautions to prevent it. See supra note 106. Application of the entire Calero-Toledo defense creates the logically troublesome effect of having to prevent an event of which
section 881(a)(7) innocent owner defense. The intent of Congress in passing section 881(a)(7) was to expand the use of a tough forfeiture scheme to encompass real property as such. The case law demonstrates, however, that difficult questions arise when the government's interest in fighting drugs through forfeiture is pitted against interests particular to real property ownership. The *Calero-Toledo* standard would allow courts to balance the competing interests of the government and property owners inherent in a forfeiture scheme directed at real property.

The innocent owner defense is raised in two common factual settings. In the first, a landlord attempts to avoid forfeiture by claiming innocent owner status. Landlords should be under an obligation to do "all that reasonably could be expected" to prevent the criminal use of their property. Placing an affirmative burden on landlords would encourage them to manage their land and buildings responsibly and conscientiously. On the other hand, it would be unrealistic to expect a landlord to enlist as an "active soldier" in the war against drugs to prevent the forfeiture of his building. The *Calero-Toledo* standard, although demanding meaningful action on the part of the landlord, does not require such a patently unreasonable step.

The second factual setting in which an innocent owner claim often arises occurs when an "innocent spouse" attempts to avoid the forfeiture of their home brought about by the narcotics related activities of their husband or wife. In such a case the issue of spousal loyalty, or perhaps intimidation, complicates the question of what should be considered sufficient lack of consent and clearly demonstrates the need for a flexible test. As courts traditionally have protected the privacy of marital rela-
tions, and given the realities of marital life, courts should allow an innocent spouse to prove lack of consent more easily than a landlord or other non-domestic claimant. An innocent spouse should not, however, be able to hide behind marital status to avoid an otherwise justified forfeiture. "At some point the obligations of citizenship in a drug ridden society must overcome spousal loyalty and even spousal intimidation." Again, the Calero-Toledo test would allow courts to hold the spouse to such "obligations," while factoring in what can reasonably be expected of a spouse under the circumstances.

The drug crisis in this country demands a strict drug enforcement policy. The innocent owner defense should not be available to those who simply turn their heads and look the other way, nor to those who make merely perfunctory attempts to prevent the illegal use of their property. On the other hand, the variety of factual contexts present in innocent owner claims suggests that the standard for lack of consent should be flexible. The Calero-Toledo standard demands positive steps to prevent the illegal use of property from those who seek innocent owner status. Yet its basic operative context is one of reasonableness.

Sixty Acres fell short of adopting the Calero-Toledo standard and attempted to "make a nice distinction between doing everything reasonably necessary to stop the proscribed activity and doing at least something to stop it." Id. at 1420. Yet the court's holding did not set forth any clear standard that other courts could follow. Rather, limiting itself strictly to the facts of the case before it, the court held that "[w]ithout speculating on what exactly [claimant] should have done, this court is satisfied that she could have done something which she did not do to keep from exposing her property to forfeiture." Id. at 1421. The court noted the difficult nature of the legal and factual issues in the case and suggested that "[i]t may be the case in which the Eleventh Circuit will establish the law of the Eleventh Circuit as to what constitutes 'consent' as that word is employed in § 881(a)(7)." Id.

119. See, e.g., Moore v. City of East Cleveland, 431 U.S. 494, 499 (1977) ("freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment") (quoting Cleveland Board of Education v. LaFleur, 414 U.S. 632, 639-40 (1974)); Trammel v. United States, 445 U.S. 40, 53 (1980) (fostering and protecting the sanctity of marriage relationship is goal behind rule that witness may not be compelled to testify against his or her spouse).

120. Sixty Acres, 727 F. Supp. at 1420.

121. See id. at 1421.

122. See United States v. One Boeing 707 Aircraft, 750 F.2d 1280, 1289 (5th Cir.), cert. denied, 471 U.S. 1055, 471 U.S. 1126 (1985). The court stated that the burden under Calero-Toledo "cannot be defined in precise, universal terms. Its operative texture—reasonableness—depends on the facts of the particular situation to which it is applied. We can only observe that 'reasonably' is woven into the stout fabric of 'all that could be expected.' The standard was intended to be high." Id.

123. Although Congress has never expressly incorporated the Calero-Toledo standard into its civil forfeiture scheme, language from a recently passed forfeiture provision provides what might be congressional recognition, if not approval, of the test. In section 6079 of the Anti-Drug Abuse Act of 1988, Congress sets forth administrative require-
CONCLUSION

Application of section 881(a)(7) poses several difficult problems. Federal courts, seeking to harness forfeiture's potential as a weapon against drugs, have applied section 881(a)(7) employing inconsistent standards and different constructions of the statutory language. The analysis proposed by this Note suggests that (1) only property substantially connected with a narcotics violation be subject to forfeiture; (2) failure to establish "lack of knowledge" not preclude a claimant from innocent owner status; and (3) "lack of consent" be evaluated under the Calero-Toledo standard of reasonable precaution.

The policy reinforced by this approach is the conscientious management and use of property. The drug trade flourishes in part because real property provides sites for the storage and distribution of drugs. While property rights must be respected, so must society's right to combat the drug trade. The proposed approach balances the interests of property owners with society's interests, which ensures that real property forfeiture will continue to be an effective weapon in the war against drugs.

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