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I. INTRODUCTION

Congress enacted the Comprehensive Drug Abuse Prevention and Control Act of 1970, codified at 21 U.S.C. § 881, "to deal in a comprehensive fashion with the growing menace of drug abuse in the United States." Under § 881(a)(7), "[a]ll real property, including any right, title, and interest . . . in the whole of any lot or tract of land . . . which is used, or intended to be used, in any manner or part . . . [in] violation of this [country's drug laws]" is subject to forfeiture. The only relief afforded to an owner of real property forfeited under § 881(a)(7) is the "innocent owner" defense contained in that section. The innocent owner defense provides that an owner's property will not be forfeited if the owner establishes that the act or omission leading to the forfeiture was committed without the owner's knowledge or consent.

The innocent owner defense of § 881(a)(7) is frequently raised by an innocent spouse in order to prevent the forfeiture of marital property to the government as a result of the other spouse's drug-related activities. One federal court recently described this unfortunate, but common, situation as follows:

A husband's greed has destroyed a family. To turn a quick dollar, the husband—unbeknownst to his wife—used the family home to facilitate a cocaine transaction. The fruits of his endeavors were swift but devastating. He is now serving a mandatory ten-year prison sentence, and his family's home has become the subject of [a] forfeiture action.

The purpose of this Comment is to provide a comprehensive survey of how federal courts have dealt with the problems encountered under varying state property laws when one spouse raises the innocent owner defense of § 881(a)(7) and the other spouse has violated the statute. This Com-

7. 11885 S.W. 46 St., 715 F. Supp. at 356.
ment first provides a brief background of forfeiture law and 21 U.S.C. § 881. This Comment then reviews the innocent owner defense and the conflicting decisions among federal courts construing the defense. The remainder of this Comment surveys the forfeiture cases in which one spouse has raised the innocent owner defense to prevent the forfeiture of marital property due to the drug-related offenses of the other spouse. This Comment examines and evaluates forfeiture cases arising in states which recognize tenancy by the entirety, states which recognize community property principles, and states which do not recognize either tenancy by the entirety or community property principles.

II. BACKGROUND

A. History of In Rem Forfeiture

The in rem forfeiture of property can be traced back to the Biblical rule that "[i]f an ox gore a man or woman, that they die: then the ox shall be surely stoned, and his flesh shall not be eaten; but the owner of the ox shall be quit." 8 The principle of this rule was carried over into both the Greek and Roman systems of law. 9 The original objective of in rem forfeiture was to exact vengeance against property associated with wrongful acts, as the property itself was considered the offender. 10


9. See Holmes, supra note 8, at 7-8. The Greeks developed the principle of forfeiture into an entire system. Id. at 7. For example, animals and inanimate objects that caused injury or death were "cast beyond the borders." Id. at 8. In addition, slaves who killed or injured a person were given up to the relatives of the deceased or to the injured party. Id. at 7. Roman law contained a system of forfeiture similar to Greek law. Id. at 8; see also Alice Marie O'Brien, Note, "Caught in the Crossfire": Protecting the Innocent Owner of Real Property from Civil Forfeiture Under 21 U.S.C. § 881(a)(7), 65 St. John's L. Rev. 521, 524 n.20 (1991) (citing examples of forfeiture in Roman law dating back to 451 B.C.).

10. See Holmes, supra note 8, at 34. The property would be forfeited regardless of whether its owner was at fault, because the desire for retaliation was aimed against the property itself. Id. But cf. Finkielstein, supra note 8, at 228 (stating that Holmes' assertion that forfeiture of property was motivated by desire for retaliation against property is not entirely accurate).

Despite Finkielstein's criticism of Holmes, modern courts continue to state that the in rem forfeiture of property is based upon the fiction "'that the thing is primarily considered the offender.'" Austin v. United States, 113 S. Ct. 2801, 2808 (1993) (quoting Goldsmith-Grant Co. v. United States, 254 U.S. 505, 511 (1921)); see also United States v. $83,900.00 in U.S. Currency, 774 F. Supp. 1305, 1319 (D. Kan. 1991) (noting that 21 U.S.C. § 881 continues to be based upon "the legal fiction that the property itself is guilty of wrongdoing").
In rem forfeiture was also firmly-rooted in early English common law. 11 Three types of forfeiture were established in England: deodand, forfeiture upon conviction for a felony or treason, and statutory forfeiture. 12 Under the law of deodands, the value of an inanimate object causing the death of a man was forfeited to the King as a deodand. 13 A convicted felon or traitor forfeited all of his property, whether real or personal, to the Crown. 14 These forfeitures were called forfeitures of estate. 15 English law also provided for statutory forfeiture of property used in violation of customs and revenue laws. 16

Statutory forfeiture was the only kind of forfeiture to become part of the laws of the United States. 17 Colonial courts enforced English and local forfeiture statutes through the exercise of in rem jurisdiction. 18 Later, Congress passed its own forfeiture statutes. 19 In rem forfeiture is now well-established in American law. 20

13. Calero-Toledo, 416 U.S. at 680-81; Holmes, supra note 8, at 24-25. The word “deodand” is derived from the Latin phrase Deo dandum, meaning “to be given to God.” Calero-Toledo, 416 U.S. at 681 n.16. It was believed that the instrument of death was accused and required religious expiation. Id. at 681. The deodand was forfeited to the King, and the King would provide money for masses for the deceased’s soul or put the deodand to charitable uses. Id. (citing 1 William Blackstone, Commentaries *300).
14. Calero-Toledo, 416 U.S. at 682; Austin, 113 S. Ct. at 2806. Those convicted of a felony forfeited their chattels to the Crown and their land escheated to their lord. Austin, 113 S. Ct. at 2806. Those convicted of treason forfeited everything to the Crown. Id.
15. Austin, 113 S. Ct. at 2807 (citing 4 William Blackstone, Commentaries *981). Forfeitures of estate were justified upon the principle that property rights were derived from society and were lost by violating society’s laws. Id. (citing 1 William Blackstone, Commentaries *299; 4 William Blackstone, Commentaries *382).
16. Calero-Toledo, 416 U.S. at 682. The Court in Calero-Toledo suggested that statutory forfeitures were “likely a product of the confluence and merger of the deodand tradition and the belief that the right to own property could be denied the wrongdoer.” Id.; Austin, 113 S. Ct. at 2807.
17. Austin, 113 S. Ct. at 2807; Calero-Toledo, 416 U.S. at 682-83. Deodands did not carry over into the common law of the United States, and forfeitures of estate were eliminated. Id. Article III, Section 3 of the United States Constitution prohibits forfeiture for a conviction of treason, and the First Congress abolished forfeiture for conviction of a felony. Id.
18. Calero-Toledo, 416 U.S. at 683 (citing C. J. Hendry Co. v. Moore, 318 U.S. 133, 139 (1943)).
19. Id. Congress’ early forfeiture statutes required ships and cargo used in violation of customs laws, ships used to deliver slaves to foreign countries and ships used to deliver slaves to this country to be forfeited. Id.
B. 21 U.S.C. § 881

Congress enacted the Comprehensive Drug Abuse Prevention and Control Act of 1970, codified at 21 U.S.C. § 881, “to deal in a comprehensive fashion with the growing menace of drug abuse in the United States.” Section 881(a) originally subjected to forfeiture all controlled substances manufactured or distributed in violation of the Act; all raw materials, products and equipment used in violation of the Act; all containers for such property; all conveyances, including aircraft, vehicles and vessels, used in violation of the Act; and all books, records and formulas used in violation of the Act.

Since its enactment in 1970, § 881 has been amended several times, most notably in 1978 and 1984. In 1978, section 301(a) of the Psychotropic Substances Act codified at 21 U.S.C. § 881(a)(6), amended the statute to provide for the forfeiture of all moneys, negotiable instruments and securities furnished by any person in exchange for a controlled substance, and all proceeds traceable to such an exchange. Because § 881(a)(6) enabled the government to reach the immediate cash proceeds of drug transactions, it was considered to be “a very powerful tool.”

24. For a discussion of these amendments and their significance, see infra notes 25-35 and accompanying text.

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Despite the apparent success of § 881 (a) (6), however, § 881 as a whole was not meeting the government's expectations. Thus, in 1984, Congress enacted section 306(a) of the Comprehensive Crime Control Act, codified at 21 U.S.C. § 881 (a) (7), which further expanded § 881 to allow for the forfeiture of all real property used in violation of the statute. Section 881 (a) (7) was "designed to enhance the use of forfeiture . . . in combatting two of the most serious crime problems facing the country: racketeering and drug trafficking." Because these illegal activities are motivated by profit, Congress recognized that law enforcement efforts to eliminate them would not be successful unless the economic aspects of these crimes were attacked. Congress believed that forfeiture was "the mechanism through which such an attack . . . [could] be made."

29. See Hearings, supra note 28, at 127 (statement of Ted W. Hunter, Chief, Special Action Division, Office of Enforcement, Drug Enforcement Administration) ("The civil forfeiture provision of 21 U.S.C. [§ ] 881 (a) (6) is working well."); id. at 18 (statement of William J. Anderson, Director, General Government Division, General Accounting Office) ("Since 1978, section 881 has been used successfully to reach the immediate cash proceeds of drug transactions.").


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

   (7) All real property, including any right, title, and interest (including any lease hold 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 . . .


34. See id. The Report notes that, "[t]oday, few in the Congress or the law enforcement community fail to recognize that the traditional criminal sanctions of fine and imprisonment are inadequate to deter or punish the enormously profitable trade in dangerous drugs which, with its inevitable attendant violence, is plaguing the country." Id.; see also Hearings, supra note 28, at 125 (statement of Ted W. Hunter, Chief, Special Action Division, Office of Enforcement, Drug Enforcement Administration) (stating that money is "lifeblood" of drug trafficking organizations and must be removed).


Section 881 does not have a specific set of procedural rules designed for use in civil forfeiture actions. Rather, the statute provides three general procedures for the seizure of property. First, § 881(b) allows the government to seize property "upon process issued pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims." These Rules do not require the government to obtain a warrant based on probable cause, nor do they require "a certification of exigent circumstances." Second, § 881(b) also provides that the government may obtain a seizure warrant under the Federal Rules of Criminal Procedure. Third, when the government has probable cause to believe that property is subject to civil forfeiture, it may proceed under § 881(d), which incorporates the forfeiture provisions of the customs laws.

Once the government has seized property, any claimants who come forward must establish standing by proving that they own or have an interest in the seized property. "Ownership" of property for purposes of the statute has been liberally construed to include "any recognizable legal or equitable interest" in the seized property. After a claimant has established the existence of such an interest, they may challenge the government's seizure of the property under the procedures provided by the statute.


37. Livonia Rd., 889 F.2d at 1262.


39. Richmond Tenants, 956 F.2d at 1302.

40. Livonia Rd., 889 F.2d at 1262 (quoting Rule C(3) of Supplemental Rules for Certain Admiralty and Maritime Claims, which allows court clerk to issue summons and arrest vessel or other property without certification of exigent circumstances).

41. See 21 U.S.C. § 881(b) (1988). Rule 41 of the Federal Rules of Criminal Procedure requires a judicial officer to make an ex parte determination of probable cause before a seizure warrant will issue. Richmond Tenants, 956 F.2d at 1302 (discussing various means by which government may obtain seizure warrant); Livonia Rd., 889 F.2d at 1263 (same).


43. United States v. 1012 Germantown Rd., 963 F.2d 1496, 1500 (11th Cir. 1992); United States v. Lot 111-B, 902 F.2d 1443, 1444 (9th Cir. 1990).


Despite the liberal construction of the term "ownership," however, some courts have held that mere possession of title to property without the exercise of dominion and control over the property is not sufficient to establish standing to challenge a forfeiture under the statute. See, e.g., Lot 111-B, 902 F.2d at 1444; United States v. 900 Rio Vista Blvd., 803 F.2d 625, 630 (11th Cir. 1986). Courts
lished standing, the burden shifts to the government to show probable cause to believe that the property is subject to forfeiture.45 Exactly what constitutes probable cause in a forfeiture action has been the subject of disagreement among courts.46

Once the government has met its burden of establishing probable cause, the burden shifts back to the claimant to prove a defense to the forfeiture.47 The only defenses available to claimants are “that the property was not used in violation of the statute or that it was so used without [their] knowledge or consent.”48 The defense that the claimant’s property was used without his or her knowledge or consent is known as the “innocent owner” defense.49

D. The Innocent Owner Defense

At common law, the “innocence of the owner of property subject to forfeiture . . . [was] almost uniformly . . . rejected as a defense.”50 The rationale behind the common-law rejection of the innocent owner defense was that owners who allowed their property to become involved in an of

have also held that “[t]he future expectation of ownership by a child is insufficient to give a claimant standing” under the statute. See, e.g., United States v. One Parcel of Property Located at RR 2, 959 F.2d 101, 103-04 (8th Cir. 1992).

45. Germantown Rd., 963 F.2d at 1500. See United States v. Plat 20, Lot 17, 960 F.2d 200, 204 (1st Cir. 1992) (stating government has burden of showing probable cause); United States v. 890 Noyac Rd., 945 F.2d 1252, 1255 (2d Cir. 1991) (same); United States v. Lot 9, Block 2 of Donnybrook Place, 919 F.2d 994, 997-98 (5th Cir. 1990) (same); United States v. 6109 Grubb Rd., 886 F.2d 618, 621 (3d Cir. 1989) (same).

46. See, e.g., Germantown Rd., 963 F.2d at 1501 (stating “[t]he government must convince the judge that it had ‘a reasonable ground for belief of guilt, supported by less than prima facie proof, but more than reasonable suspicion.’”) (quoting 900 Rio Vista Blvd., 803 F.2d at 628); Plat 20, Lot 17, 960 F.2d at 204 (using same standard); Donnybrook Place, 919 F.2d at 998 (stating that probable cause is tested by same criteria used to determine probable cause for searches and seizures); 6109 Grubb Rd., 886 F.2d at 621 (stating “[p]robable cause is defined as a reasonable ground for belief in guilt.”). See generally Darmstadter & Mackoff, supra note 20, at 35-37 (providing general discussion of different standards courts have adopted regarding amount of proof necessary to establish probable cause).

Despite the disagreement over the definition of probable cause, however, courts do agree that probable cause may be established by hearsay. See, e.g., Germantown Rd., 965 F.2d at 1501; 6109 Grubb Rd., 886 F.2d at 621; All That Tract, 762 F. Supp. at 1482.

47. Germantown Rd., 963 F.2d at 1501; Plat 20, Lot 17, 960 F.2d at 204. A claimant must prove a defense by a preponderance of the evidence. Id.

48. Id. If the claimant fails to prove a defense to the forfeiture, the government’s showing of probable cause alone is sufficient to support a forfeiture. Donnybrook Place, 919 F.2d at 998.

49. See United States v. 116 Emerson St., 942 F.2d 74, 80 (1st Cir. 1991) (citing United States v. 418 57th St., 922 F.2d 129, 130 (2d Cir. 1990), for proposition that this is commonly known as “innocent owner” defense).

defense were negligent and properly punished for their negligence by the forfeiture.\textsuperscript{51} The absence of an innocent owner defense at common law could often lead to harsh and unfair results.\textsuperscript{52} 

In contrast to the common law and to prior forfeiture statutes, 21 U.S.C. § 881(a) expressly contains an innocent owner defense in three of its subsections, (a)(4), (a)(6) and (a)(7).\textsuperscript{53} The first subsection of § 881 to provide an innocent owner defense was § 881(a)(6).\textsuperscript{54} The defense was added to the statute by an amendment introduced by Senators Nunn, Mathias and Wallop.\textsuperscript{55} In adopting the innocent owner defense, Congress intended that 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.\textsuperscript{56} 

Six years later, Congress amended § 881 to allow for the forfeiture of real property used in violation of the statute.\textsuperscript{57} Section 881(a)(7) in-

\textsuperscript{51} Austin, 113 S. Ct. at 2808-09. In Austin, the Court noted that this rationale formed the foundation for two theories: the fiction that "the property itself is 'guilty' of the offense," and the idea "that the owner may be held accountable for the wrongs of others to whom he [or she] entrusts his [or her] property." Id. at 2808. Both of these theories were used to justify forfeiture of the property of innocent owners in cases rejecting innocence as a common-law defense to forfeiture. Id.

\textsuperscript{52} See United States v. 6109 Grubb Rd., 886 F.2d 618, 624 (3d Cir. 1989) (citing Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974), as example of case in which civil forfeiture led to harsh and unjust results because owner had no knowledge that his property was being used for illegal purposes).

\textsuperscript{53} See 21 U.S.C. § 881 (1988 & Supp. IV 1992); Austin, 113 S. Ct. at 2810 (stating that unlike traditional forfeiture statutes, § 881(a)(4) and (a)(7) expressly provide innocent owner defenses); United States v. 92 Buena Vista Ave., 113 S. Ct. 1126, 1134 (1993) (stating that § 881(a)(6) "contains an express and novel protection for innocent owners"). This Comment will focus on the innocent owner defense contained in § 881(a)(7).


\textsuperscript{55} 6109 Grubb Rd., 886 F.2d at 625. The purpose of this amendment was "to make it clear that a bona fide party who has no knowledge or [has not] consent[ed] to the [fact that the] property he [or she] owns [was] derived from an illegal transaction... would be able to establish that fact under this amendment and forfeiture would not occur." 124 CONG. REC. 23,057 (1978) (statement of Senator Nunn). See also 124 CONG. REC. 23,056 (1978) (statement of Senator Culver) (noting that purpose of amendment is "to protect the individual who obtains ownership of proceeds with no knowledge of the illegal transaction").


cluded an innocent owner defense identical to the one contained in § 881(a)(6).\textsuperscript{58}

E. Construction of the Innocent Owner Defense

The innocent owner defense provides that “no property shall be forfeited ... 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.”\textsuperscript{59} The construction of the phrase “without the knowledge or consent of that owner” has led to conflicting decisions among courts applying the innocent owner defense.\textsuperscript{60} Specifically, courts are divided as to whether an owner asserting the defense must show \textit{either} a lack of knowledge or a lack of consent or \textit{both} a lack of knowledge and a lack of consent.\textsuperscript{61} In addition, some courts have added the requirement that owners show that “all reasonable steps” were taken to prevent the unlawful use of their property in order to prove a lack of consent.\textsuperscript{62}

In \textit{United States v. 171-02 Liberty Avenue},\textsuperscript{63} the United States District Court for the Eastern District of New York first addressed the issue of whether the phrase “knowledge or consent” should be read disjunctively


\textsuperscript{60} See generally O’Brien, supra note 9, at 529-51 (examining conflicting judicial decisions in this area and suggesting three-step analysis for application of innocent owner defense); Brad A. Chapman & Kenneth W. Pearson, Comment, The Drug War and Real Estate Forfeiture Under 21 U.S.C. § 881: The “Innocent” Lienholder’s Rights, 21 Tex. Tech. L. Rev. 2127, 2176-83 (1990) (discussing different standards adopted by courts construing innocent owner defense); Loomba, supra note 6, at 479-80 (noting inconsistencies in construction of phrase).

\textsuperscript{61} See United States v. Lot 9, Block 2 of Donnybrook Place, 919 F.2d 994, 1000 (5th Cir. 1990) (noting disagreement among courts and comparing cases taking opposing positions on this issue); United States v. 8848 S. Commercial St., 757 F. Supp. 871, 886 (N.D. Ill. 1990) (same).

Courts allowing an owner to show either a lack of knowledge or a lack of consent follow a “disjunctive” interpretation of the defense. See Chapman & Pearson, supra note 60, at 2177 (labeling this approach as disjunctive); O’Brien, supra note 9, at 529-30 (same). Courts requiring an owner to show both a lack of knowledge and a lack of consent follow a “conjunctive” interpretation of the defense. See O’Brien, supra note 9, at 529-30 (labeling this approach as conjunctive).

\textsuperscript{62} See, e.g., United States v. 1012 Germantown Rd., 963 F.2d 1496, 1505 (11th Cir. 1992) (holding that jury instruction regarding consent should make clear that claimant is required to make all reasonable efforts to prevent illegal use of property to establish lack of consent); United States v. 15603 85th Ave. N., 933 F.2d 976, 982 (11th Cir. 1991) (stating defense requires doing everything reasonably possible to withdraw from activity); United States v. 141st St. Corp., 911 F.2d 870, 879 (2d Cir. 1990) (stating failure to take reasonable steps to prevent activity is “consent”); cert. denied, 498 U.S. 1109 (1991). See also O’Brien, supra note 9, at 543 (noting that courts are divided as to whether this requirement should be incorporated into statutory innocent owner defense).

\textsuperscript{63} 710 F. Supp. 46 (E.D.N.Y. 1989).
or conjunctively. In *Liberty Avenue*, the court adopted a disjunctive approach, allowing an owner to assert the innocent owner defense "where the illegal acts giving rise to the forfeiture occurred without the knowledge or without the consent of the owner." In adopting this approach, the court relied on basic canons of statutory construction, which require that the terms "knowledge" and "consent" be read disjunctively because of Congress' use of the word "or." The *Liberty Avenue* court stated that had Congress intended the terms to be read conjunctively, it would have used the word "and" instead of "or."

The court in *United States v. 141st Street Corp.* also adopted a disjunctive approach. The 141st Street court found that both the ordinary meaning of the word "consent" and basic canons of statutory construction mandated this approach. The court reasoned that "in order to consent to drug activity, one must know of it." Thus, if a claimant was required to disprove both knowledge and consent, the term "consent" would be unnecessary, as courts would never reach the issue of consent once they concluded that a claimant had knowledge. The term "consent" would then be rendered superfluous, a result that should be avoided under canons of statutory construction. Several other courts have also adopted a disjunctive approach, although not all based on the same reasoning.

Other courts have adopted a conjunctive approach, requiring an owner to prove both a lack of knowledge and a lack of consent to drug-

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64. *Id.* at 50. See *United States v. 6109 Grubb Rd.*, 886 F.2d 618, 626 (3d Cir. 1989) (noting that *Liberty Avenue* was first published opinion to address this issue); Loomba, *supra* note 6, at 478-79 (same).

65. *Liberty Ave.*, 710 F. Supp. at 50. Applying the disjunctive standard to the facts of the case, the court in *Liberty Avenue* concluded that although the owner of an apartment building knew of the drug trafficking on his property, he had raised a genuine issue of material fact concerning his lack of consent. *Id.* at 49, 52. Thus, the *Liberty Avenue* court denied the government's motion for summary judgment and allowed the owner an opportunity to prove his lack of consent at trial. *Id.* at 52.

66. *Id.* at 50.

67. *Id.*

68. 911 F.2d 870 (2d Cir. 1990), cert. denied, 498 U.S. 1109 (1991).

69. *Id.* at 878.

70. *Id.* The court defined "consent" as "'compliance or approval esp[ecially] of what is done or proposed by another.'" *Id.* (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 482 (1971)).

71. *Id.*

72. *Id.* Conversely, the court noted that it would only be necessary for a court to determine if an owner consented if the court first concluded that the owner did not have knowledge. *Id.*

73. See *id.*

74. See, e.g., *United States v. 1012 Germantown Rd.*, 963 F.2d 1496, 1503 (11th Cir. 1992) (following plain language of statute); *United States v. 890 Noyac Rd.*, 945 F.2d 1252, 1260 (2d Cir. 1991) (following reasoning of 141st St.); *United States v. 6109 Grubb Rd.*, 886 F.2d 618, 626 (3d Cir. 1989) (following reasoning of *Liberty Avenue*). See also Loomba, *supra* note 6, at 485-86 (advocating disjunctive approach).
related activity in order to assert the innocent owner defense. In United States v. Lot 111-B, the United States Court of Appeals for the Ninth Circuit adopted this approach. The court in Lot 111-B found that the conjunctive approach is supported by the policy and intent behind the statute, which is "to seize all property that has a 'substantial connection' to the illegal drug activity." The court reasoned that this policy would be "substantially undercut" if owners who were aware of the illegal activity on their property were allowed to assert the innocent owner defense based on lack of consent.

In addition to the disagreement over whether the phrase "knowledge or consent" should be read disjunctively or conjunctively, federal courts construing the innocent owner defense have also disagreed as to whether the "Calero-Toledo defense" should be incorporated into the consent requirement of the statutory innocent owner defense. The "Calero-Toledo defense" is derived from dicta in the United States Supreme Court opinion Calero-Toledo v. Pearson Yacht Leasing Company. In Calero-Toledo, the Supreme Court noted that it might be unconstitutional to forfeit the property of "an owner who proved not only that he [or she] was uninvolved in and unaware of the wrongful activity [or his or her property], but also that he [or she] had done all that reasonably could be expected to prevent the proscribed use of his [or her] property . . . ." Some federal courts have incorporated this standard into the innocent owner defense, requiring claimants who assert the defense to show that they took all reasonable steps to prevent the illegal use of their property in order to prove a lack of

75. See, e.g., United States v. 15603 85th Ave. N., 933 F.2d 976, 981 (11th Cir. 1991) (relying upon legislative history in reading statute conjunctively); United States v. Lot 111-B, 902 F.2d 1443, 1445 (9th Cir. 1990) (holding property is subject to forfeiture if owner "either knew or consented to illegal activities"); see also Chapman & Pearson, supra note 60, at 2181-82 (endorsing conjunctive approach).

76. 902 F.2d 1443 (9th Cir. 1990).

77. Id. at 1445.


79. Id.

80. See United States v. 141st St. Corp., 911 F.2d 870, 879 (2d Cir. 1990) (discussing disagreement among courts as to whether Calero-Toledo standard should be incorporated into innocent owner defense), cert. denied, 498 U.S. 1109 (1991); United States v. 8848 S. Commercial St., 757 F. Supp. 871, 886 (N.D. Ill. 1990) (stating that courts applying innocent owner defense disagree as to whether Calero-Toledo standard "should be imported into the consent component of the statutory innocent ownership defense").

81. 416 U.S. 683 (1974). See also Loomba, supra note 6, at 488 (labeling dicta in Calero-Toledo as "Calero-Toledo defense"); O'Brien, supra note 9, at 543 (same).

82. 416 U.S. at 689 (footnote omitted). The Court went on to note that, in such a circumstance, "it would be difficult to conclude that forfeiture served legitimate purposes and was not unduly oppressive." Id. at 689-90.
consent.\textsuperscript{83} Other courts, however, have rejected the incorporation of this standard into the innocent owner defense.\textsuperscript{84}

In \textit{United States v. 141st Street Corp.},\textsuperscript{85} the United States Court of Appeals for the Second Circuit concluded that the \textit{Calero-Toledo} standard should be incorporated into the innocent owner defense of § 881(a)(7).\textsuperscript{86} The Second Circuit reasoned that, although the legislative history of § 881(a)(7) does not refer to the \textit{Calero-Toledo} standard, the \textit{Calero-Toledo} standard is "appropriate" for forfeiture cases because "it provides a balance between the two congressional purposes of making drug trafficking prohibitively expensive for the property owner and preserving the property of an innocent owner."\textsuperscript{87}

The United States Court of Appeals for the Sixth Circuit took the opposite position in \textit{United States v. Lots 12, 13, 14 and 15}.\textsuperscript{88} In that case, the court rejected the application of the \textit{Calero-Toledo} defense to the innocent owner defense. The Sixth Circuit interpreted the statute as not requiring claimants to prove that they had done all that they could reasonably do to prevent illicit use of their property.\textsuperscript{89} Similarly, in \textit{United States v. 171-02 Liberty Avenue},\textsuperscript{90} the United States District Court for the Eastern District of New York rejected the \textit{Calero-Toledo} defense, stating that "Congress could have written the relevant language from \textit{Calero-Toledo} into the statute," but did not.\textsuperscript{91}

### III. Narrative Analysis

The innocent owner defense is frequently raised by an innocent spouse to prevent the forfeiture of marital property to the government as a result of a guilty spouse’s drug-related activities.\textsuperscript{92} Spouses who assert the innocent owner defense bear a “particularly severe” burden of proof “be-

\textsuperscript{83} See, e.g., 8848 S. Commercial St., 757 F. Supp. at 880 n.10 (noting that several courts have held that consent requirement of innocent owner defense includes duty to take reasonable steps to prevent illicit activity on property); Loomba, supra note 6, at 489 (same).

\textsuperscript{84} See, e.g., United States v. 141st St. Corp., 911 F.2d 870, 879 (2d Cir. 1990) (stating that many courts have rejected \textit{Calero-Toledo} standard), cert. denied, 498 U.S. 1109 (1991); Loomba, supra note 6, at 489 (same).

\textsuperscript{85} 911 F.2d 870 (2d Cir. 1990), cert. denied, 498 U.S. 1109 (1991).

\textsuperscript{86} Id. at 879.

\textsuperscript{87} Id. The court also noted that incorporation of the \textit{Calero-Toledo} standard into the innocent owner defense was appropriate in light of its disjunctive construction of the phrase "knowledge or consent." Id. The court reasoned that, once a claimant has knowledge and asserts a defense based on lack of consent, consent "must be something more than a state of mind." Id.

\textsuperscript{88} 869 F.2d 942, 947 (6th Cir. 1989).

\textsuperscript{89} Id.

\textsuperscript{90} 710 F. Supp. 46 (E.D.N.Y. 1989).

\textsuperscript{91} Id. at 50.

\textsuperscript{92} See Loomba, supra note 6, at 490 (noting that innocent owner claims often arise when innocent spouses attempt to avoid forfeiture of their property due to narcotics-related activities of their spouses).
cause of the inherent difficulty in proving lack of knowledge" within the marital relationship.93 In addition, 21 U.S.C. § 881(a)(7) "contains no suggestion that the burden of proving innocent ownership is any less stringent when it is carried by a spouse seeking to retain marital property than when advanced by a third party."94

The following three sections of this Comment discuss forfeiture cases in which one spouse asserts the innocent owner defense to prevent the forfeiture of marital property due to the drug-related offenses of the other spouse. The cases discussed fall into two basic groups. The first group includes states that recognize the marital estates of tenancy by the entirety and community property. In these states, when one spouse raises the innocent owner defense in a forfeiture proceeding, the courts have focused on the issue of what interest, if any, of the innocent spouse is forfeitable to the government.95 The results of these cases have varied, depending upon both the way in which courts balance the interests of the government and the innocent spouse and the nuances of the particular state property law involved. The second group comprises states that recognize neither tenancy by the entirety nor community property principles. In these states, when one spouse asserts the innocent owner defense in a forfeiture proceeding, the courts have focused on the issue of standing; specifically, whether the innocent spouse has a sufficient ownership interest in the defendant property to assert the innocent owner defense.96

A. Tenancy by the Entirety

"A tenancy by the entirety is a unique form of [property] ownership [between a husband and wife] in which both spouses are jointly seized of the property such that neither spouse [acting alone can convey an interest in the property to a third party]."97 A tenancy by the entirety is based

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93. United States v. 9818 S.W. 94 Terrace, 788 F. Supp. 561, 565 (S.D. Fla. 1992), aff'd, 983 F.2d 1083 (11th Cir. 1993); see also United States v. 15621 S.W. 209th Ave., 699 F. Supp. 1531, 1538 (S.D. Fla. 1988) (stating that "[i]n many instances, the nature and circumstances of the marital relationship . . . may well give rise to an inference of knowledge of the spouse claiming innocent ownership"), aff'd, 894 F.2d 1511 (11th Cir. 1990).

94. United States v. 6109 Grubb Rd., 890 F.2d 659, 665 (3d Cir. 1989) (Greenberg, J., dissenting); see also United States v. 116 Emerson St., 942 F.2d 74, 81 n.1 (1st Cir. 1991) (Campbell, J., dissenting) (stating that forfeiture statute does not contain equitable defense on ground that it would be unfair to forfeit property of innocent spouse).

95. For a further discussion of how courts have handled the innocent owner defense as applied to spouses in states applying the principles of tenancy by the entirety and community property, see infra notes 97-174 and accompanying text.

96. For a further discussion of how courts have handled the innocent owner defense, asserted by an innocent spouse, in states not recognizing tenancy by the entirety or community property principles, see infra notes 175-223 and accompanying text.

upon the common-law doctrine that a husband and wife constitute one person under the law. Generally, five “unities” are required to create a tenancy by the entirety: marriage, title, time, interest and control or possession.

A tenancy by the entirety creates one indivisible estate in both a husband and wife that neither can destroy by separate act. Thus, neither spouse has an individual, separate interest in the property that may be conveyed, encumbered or alienated. Each spouse is considered the owner of the whole property and entitled to its enjoyment. In addition, the creditors of an individual spouse cannot levy against property held as a tenancy by the entirety to satisfy a debt of that particular individual spouse. However, a tenancy by the entirety is terminated if one of the five unities is destroyed, the spouses divorce, or one spouse dies.

Today, there are at least fifteen states which recognize tenancies by the entirety. Federal courts construing the laws of five of these states


99. Leroy Lane, 972 F.2d at 138; United States v. 15621 S.W. 209th Ave., 894 F.2d 1511, 1514 (11th Cir. 1990); Toki, 779 F. Supp. at 1280 n.2. The five unities require that the joint owners be married to each other; the owners both have title to the property; the owners receive title from the same conveyance; the owners share an equal interest in the property; and the owners both have the right to use the entire property. 209th Ave., 894 F.2d at 1514; United States v. 11885 S.W. 46 St., 751 F. Supp. 1538, 1539 (S.D. Fla. 1990).

100. Mount Howard Court, 755 F. Supp. at 171-72 (quoting Hoffmann v. Newell, 60 S.W.2d 607 (Ky. 1932)).

101. Leroy Lane, 910 F.2d at 346 (quoting Rogers v. Rogers, 356 N.W.2d 288, 292-93 (Mich. Ct. App. 1984)). The consent of both spouses is required before property held as a tenancy by the entirety can be sold, encumbered, leased, forfeited or disposed. 209th Ave., 894 F.2d at 1514.

102. Leroy Lane, 910 F.2d at 346 (quoting Rogers v. Rogers, 356 N.W.2d 288, 292-93 (Mich. Ct. App. 1984)); see also 209th Ave., 894 F.2d at 1514 (noting that “each spouse’s interest comprises the whole or entirety of the property and not a divisible part”).

103. E.g., Leroy Lane, 972 F.2d at 138; 209th Ave., 894 F.2d at 1515; Toki, 779 F. Supp. at 1281.

104. 209th Ave., 894 F.2d at 1514.

105. Toki, 779 F. Supp. at 1281. When the spouses divorce, the estate becomes a tenancy in common. Leroy Lane, 972 F.2d at 138; 209th Ave., 894 F.2d at 1514 n.2. Upon the death of one spouse, the survivor becomes the sole owner of the property by virtue of the deed. United States v. 5205 Mount Howard Court, 755 F. Supp. 169, 172 (W.D. Ky. 1990).

106. See 209th Ave., 894 F.2d at 1519 n.9 (noting that District of Columbia and 14 states recognize tenancy by the entireties—Delaware, Florida, Hawaii, Indiana, Maryland, Michigan, Mississippi, Missouri, North Carolina, Pennsylvania, Rhode Island, West Virginia, and Wisconsin).
have addressed the issue of whether the government can forfeit property held by spouses as tenants by the entirety when one spouse is an innocent owner under 21 U.S.C. § 881(a)(7) and the other spouse has violated the statute. The decisions addressing this issue fall into three categories. First, the United States Courts of Appeals for the Eleventh, Fourth and Sixth Circuits have held that no present interest in the property could be forfeited to the government, although the government may acquire an interest in the property at a future time. Second, the United States District Court for the District of Hawaii has determined that the government cannot obtain any interest in entireties property when one spouse is an innocent owner. Finally, the United States Court of Appeals for the Third Circuit has decided that the guilty spouse's interest can be forfeited, with the innocent spouse receiving a life estate in the property.

The courts that have held that no present interest in entireties property is forfeitable to the government when one spouse is an innocent owner under 21 U.S.C. § 881(a)(7) have based their decision on the unique nature of property held in a tenancy by the entirety and the importance of protecting innocent owners. In United States v. 15621 S.W. 209th Avenue, the United States Court of Appeals for the Eleventh Circuit held that as long as the entireties estate remained intact, the government could not forfeit any of the property when one spouse was an innocent owner. The Eleventh Circuit began its analysis by noting the

Island, Virginia, Vermont and Wyoming); Mount Howard Court, 755 F. Supp. at 171, 172 (stating that Kentucky recognizes tenancies by the entirety).


108. See 35 Acres, No. 90-7376, 1991 WL 154348, at *2; Leroy Lane, 910 F.2d at 351-52; United States v. 15621 S.W. 209th Ave., 894 F.2d 1511, 1516 n.6 (11th Cir. 1990). For a discussion of these cases, see infra notes 112-41 and accompanying text.


110. See 1500 Lincoln Ave., 949 F.2d at 77-78. For a discussion of this case, see infra notes 148-55 and accompanying text.

111. See 35 Acres, No. 90-7376, 1991 WL 154348, at *1 (affirming district court's determination that special nature of entireties property prevented any interest in property from being forfeitable to government); Leroy Lane, 910 F.2d at 350 (stating that government may not alter nature of entireties estate by forfeiture); 209th Ave., 894 F.2d at 1515-16 (noting that innocent spouse has right to own and occupy entire property subject to forfeiture and, therefore, no interest is forfeitable to government).

112. 894 F.2d 1511 (11th Cir. 1990).

113. Id. at 1512. In 209th Ave, Carломilton and Ibel Aguilera owned the defendant property as tenants by the entirety. Id. Mr. Aguilera sold cocaine to an undercover agent of the Drug Enforcement Agency on the property and was later
convicted for trafficking in cocaine. Id. The government then filed a complaint for forfeiture of the property pursuant to 21 U.S.C. § 881(a)(7). Id. Mrs. Aguilera entered the forfeiture proceeding claiming to be an innocent owner. Id. at 1512-13. The district court found Mrs. Aguilera to be an innocent owner and held that the property was not subject to forfeiture because an entireties estate cannot be forfeited due to the independent criminal conduct of one spouse under Florida law. Id. at 1513.

114. Id.

115. Id. at 1514-15. The Eleventh Circuit concluded that Mrs. Aguilera, as an innocent owner, held an interest in the land as a tenant by the entireties. Id. at 1515.

116. Id. The court noted that the district court had correctly decided the case, although it used different reasoning. Id.

117. See 21 U.S.C. § 881(h) (1988). This section provides that "[a]ll right, title, and interest in property . . . shall vest in the United States upon commission of the act giving rise to forfeiture . . . ." Id.

118. United States v. 15621 S.W. 209th Ave., 894 F.2d 1511, 1515 (11th Cir. 1990). In 209th Avenue, the government argued that under the relation back section, when the guilty spouse sold the cocaine, the government replaced the guilty spouse as co-owner of the property with the innocent spouse. Id. This would have the effect of terminating the entireties estate and converting it into a tenancy in common. Id.

Today, it is unlikely that the government could make this argument due to the United States Supreme Court’s recent decision in United States v. 92 Buena Vista Avenue, 113 S. Ct. 1126 (1993). In Buena Vista, the Court held that the relation back doctrine of 21 U.S.C. § 881(h) does not take effect until after there has been a judgment of forfeiture against the property. Id. at 1137. Thus, the Buena Vista holding seems to render the government’s "relation back" claim invalid.

119. 209th Ave., 894 F.2d at 1516. If the government was a tenant in common with the innocent spouse, it would have "the right to freely alienate its half-interest of the property and the right to force partition on its co-tenant—a far greater interest than that possessed by [the guilty spouse]." Id. The court also noted that converting the entireties estate into a tenancy in common would be a taking without due process in violation of the Fifth Amendment. Id.
The Eleventh Circuit also rejected the government's argument that, in this case, federal law should preempt state law. The government argued that Florida's law of tenancy by the entireties directly conflicts with federal forfeiture law and frustrates its goals. Further, the court emphasized that the clear language of § 881(a)(7) protected the property interests of innocent owners and noted that a uniform federal rule of decision would blatantly disregard the express terms of the statute.

The Eleventh Circuit in 209th Avenue ultimately concluded: "using Florida law to define what property interest each of the . . . [spouses] has, we find that no interest exists in the subject property which can be forfeited to the government at the present time." The court noted, however, that "[n]othing would prevent the government from attempting to execute or levy on its interest should the entireties estate be altered by changes in circumstances or by court order." Thus, the government could file a *lis pendens* against the property and acquire the guilty spouse's interest in a later forfeiture proceeding without affecting the innocent spouse's rights.

In an unpublished opinion, the United States Court of Appeals for the Fourth Circuit also held that property owned as a tenancy by the en-

120. *Id.* at 1517.
121. *Id.* The government also argued that the district court should have adopted a uniform federal rule allowing the United States to forfeit one half of all property owned jointly by spouses where only one spouse is involved in drug trafficking activities. *Id.*
122. *Id.* at 1518. The Eleventh Circuit reviewed a series of United States Supreme Court cases which have held that federal law will preempt state law only if Congress expressly provides for preemption, if the area of law is one of comprehensive federal regulation that leaves no room for state laws to supplement, if the state law affects a field of dominant federal interest precluding state laws on the same subject, or if the state law and the federal law are in actual conflict so that compliance with both is physically impossible or the state law obstructs the accomplishment of the full objectives of Congress. *Id.* at 1517. The Eleventh Circuit determined that 21 U.S.C. § 881 contains no express preemption, nor is it an example of a field in which federal regulation excludes state law. *Id.* at 1518. The court also noted that there was no conflict between Florida law and federal law and that "Florida law merely defines the interests of owners of property." *Id.*
123. *Id.* at 1518-19. The Eleventh Circuit also concluded that a federal rule was unnecessary because, in most cases, "the application of state property law to define what is and is not forfeitable will not adversely affect the federal interest in effecting forfeiture." *Id.* at 1519.
124. *Id.* at 1516; see also United States v. 11885 S.W. 46 St., 751 F. Supp. 1538, 1539-40 (S.D. Fla. 1990) (entering final judgment consistent with Eleventh Circuit's opinion in 209th Avenue).
125. United States v. 15621 S.W. 209th Ave., 894 F.2d 1511, 1516 n.6 (11th Cir. 1990). For a discussion of the changes in circumstances that alter a tenancy by the entirety, see *supra* notes 104-05 and accompanying text.
126. *Id.*
tirety is not immediately forfeitable to the government when one spouse is an innocent owner. In United States v. 35 Acres, the Fourth Circuit adopted the reasoning of the Eleventh Circuit in 209th Avenue. The Fourth Circuit held that, although a tenancy by the entirety prevents an immediate forfeiture of the property to the government, the guilty spouse’s interest may be forfeitable in the future if the entireties estate is altered.

In United States v. 2525 Leroy Lane, the United States Court of Appeals for the Sixth Circuit reached a result similar to that of the Eleventh Circuit’s decision in 209th Avenue. The court in Leroy Lane held that when the government seeks forfeiture of property held as a tenancy by the entirety and one spouse is an innocent owner, the government acquires an interest analogous to that of a judgment creditor of one spouse. Next, the Sixth Circuit examined Michigan law to determine the property interest of the innocent spouse under § 881(a)(7). The court determined that the government could only acquire the interest the guilty spouse has

127. United States v. 35 Acres, No. 90-7376, 1991 WL 154348, at *3 (4th Cir. Aug. 15, 1991). In 35 Acres, Charles McHan pled guilty to conspiracy to possess with intent to distribute marijuana. Id. at *1. The government then filed a forfeiture action under 21 U.S.C. § 881(a)(7) against the property that Mr. McHan and his wife owned as tenants by the entirety. Id.


129. Id. at *2.

130. Id.


132. Id. at 351. In Leroy Lane, Mitchell and Leah Marks owned the defendant property as tenants by the entirety. Id. at 345. Mr. Marks was convicted for distribution of cocaine. Id. The judgment order imposing sentence ordered forfeiture of his interest in the property pursuant to 21 U.S.C. § 853(a)(2), the forfeiture provision of the criminal statute under which he was convicted. Id. While Mr. Marks’ criminal prosecution was pending, the government filed a civil complaint for forfeiture under 21 U.S.C. § 881(a)(7). Id. Mrs. Marks then filed a claim of interest in the property. Id. The civil and criminal forfeiture actions were later consolidated. Id. The district court found that Mrs. Marks was an innocent owner under § 881(a)(7) and held that her innocent owner status operated to avoid forfeiture of the property. Id.

133. Id. at 346-47. Like the Eleventh Circuit in 209th Avenue, the Sixth Circuit in Leroy Lane rejected the government’s argument that the federal courts should develop a federal common law of forfeiture to govern the treatment of property interests. Id. at 347-49. The court noted that forfeiture actions involve property rights traditionally defined by state law. Id. at 349. The court also pointed out that the forfeiture provisions of 21 U.S.C. § 881 do not contain rules of law defining the scope of an innocent owner’s property rights, indicating that Congress had not expressly preempted the area. Id. Thus, the court reasoned that it was appropriate to refer to state law to define an innocent owner’s property interest under 21 U.S.C. § 881. Id.

In a dissenting opinion, Judge Krupansky argued that, in this case, a federal common law of forfeiture should preempt state law. Id. at 353 (Krupansky, J., dissenting). Judge Krupansky stated that a federal common law addressing the forfeiture of marital property should be developed so as to preempt the “contrary provisions of the myriad spousal estates recognized in the various states.” Id. at 354 (Krupansky, J., dissenting).
in the entireties estate. However, the government could not actually obtain this property interest until the entireties estate was terminated. Thus, the court concluded that the government would acquire an interest analogous to a judgment creditor in the entireties property.

The Sixth Circuit claimed that its opinion in Leroy Lane was consistent with the decision of the Eleventh Circuit in 209th Avenue. The court noted that the only difference was that the property in 209th Avenue had not been sold. Thus, in 209th Avenue, the government's interest in the entireties property was protected by the filing of a lis pendens against the property. In Leroy Lane, however, the proceeds from the sale of the entireties property were held in escrow to protect the government's interest in the property. The court in Leroy Lane stated that "in effect" the escrow account established a lis pendens against the entireties property.

In United States v. Property Entitled in the Names of Alexander Morio Toki and Elizabeth Mila Toki, the United States District Court for the District

134. Id. at 351. The court rejected the government's argument that the relation back provision of 21 U.S.C. § 881 converted the entireties estate into a tenancy in common, allowing the government to assume ownership of the entire property. Id. at 350. The court in Leroy Lane held that the relation back provision would vest the government with a greater interest in the estate than that held by the guilty spouse and would not adequately compensate the innocent spouse's interest. Id. This same argument was also considered and rejected by the Eleventh Circuit in 209th Avenue. See United States v. 15621 S.W. 209th Ave., 894 F.2d 1511, 1515-16 (11th Cir. 1990). For a discussion of the relation back argument made in 209th Avenue, see supra notes 117-19 and accompanying text.

In his dissenting opinion, Judge Krupansky advocated a severance of the entireties estate and the creation of a tenancy in common between the innocent spouse and the government. Leroy Lane, 910 F.2d at 356 (Krupansky, J., dissenting). Judge Krupansky stated that this solution would serve both the governmental interest in forfeiture and the property interest of the innocent spouse. Id. (Krupansky, J., dissenting).

135. 910 F.2d at 351. The court held that the government could not presently obtain the guilty spouse's interest in the entireties property because entireties estates are founded on a marital union, and the government could not assume the role of spouse to the innocent owner. Id. Thus, the government would have to wait until the entireties estate was terminated to obtain its interest in the property. Id.

136. Id. Because the property had been sold while the forfeiture action was pending, the court defined the government's interest in the entireties property as analogous to that of a judgment creditor. Id. The parties agreed to treat the proceeds of the sale as a substitute res which retained the same qualities as entireties property. Id. at 345, 351. Had the property not been sold, the innocent spouse would have been entitled to live in the house for the duration of the tenancy, and the government would have had a lien on the property equivalent to the value of the guilty spouse's interest in the property. Id. at 351.

137. Id. at 352. For a discussion of the decision of the Eleventh Circuit in 209th Avenue, see supra notes 112-26 and accompanying text.

138. Id.

139. Id.

140. Id.

141. Id.

of Hawaii reached a different result than the results of the Eleventh Circuit in 209th Avenue and the Sixth Circuit in Leroy Lane. The Toki court held that, under Hawaii law, the government cannot obtain any interest in entireties property when one spouse is an innocent owner.¹⁴³

The court in Toki began its analysis by citing 209th Avenue and Leroy Lane.¹⁴⁴ The court stated that these cases establish that the government cannot forfeit a guilty spouse’s interest in entireties property, but that it acquires the right to file a lis pendens or a lien against the property.¹⁴⁵ The court in Toki, however, stated that differences in Hawaii’s law of tenancy by the entirety precluded the government from filing a lis pendens or acquiring a lien against entireties property.¹⁴⁶ Thus, the court concluded that, under Hawaii law, the government could not obtain any interest in entireties property when one spouse was an innocent owner.¹⁴⁷

Through a balancing of interests test, one court has held that a guilty spouse’s interest in entireties property can be forfeited, with the innocent spouse receiving a life estate in the property.¹⁴⁸ In United States v. 1500 Lincoln Avenue,¹⁴⁹ the United States Court of Appeals for the Third Circuit stated that it wished to “adopt the interpretation that best serves the two intended goals of 21 U.S.C. § 881(a)(7): forfeiture of the property used in committing drug offenses and preservation of the property rights of innocent owners.”¹⁵⁰ In 1500 Lincoln Avenue, the court held that the immedi-

¹⁴³. Id. at 1284. In Toki, the defendant property was owned by Alexander Toki and Elizabeth Toki as tenants by the entirety. Id. at 1274. Mr. Toki pled guilty to possession with intent to distribute marijuana. Id. at 1275. Thereafter, the government filed an action to forfeit the property. Id. Mrs. Toki then asserted her interest in the property and claimed to be an innocent owner. Id.

¹⁴⁴. Id. at 1281-82. For a discussion of 209th Avenue, see supra notes 112-26 and accompanying text. For a discussion of Leroy Lane, see supra notes 131-41 and accompanying text.

¹⁴⁵. Id. at 1282.

¹⁴⁶. Id. at 1284. In support of this proposition, the court cited a Hawaii Supreme Court decision finding that “property held as tenants by the entirety may be conveyed free and clear of any levy, lien, or lis pendens due to a judgment against one spouse.” Id. (emphasis added) (citing Sawada v. Endo, 561 P.2d 1291 (Haw. 1977)).

¹⁴⁷. Id. The court in Toki stated that the government was “relegated to a position analogous to that of an unsecured judgment creditor of the non-innocent spouse.” Id.

¹⁴⁸. United States v. 1500 Lincoln Ave., 949 F.2d 73, 77-78 (3d Cir. 1991). In 1500 Lincoln Avenue, A. Leonard Bernstein and Linda Bernstein owned a pharmacy as tenants by the entireties. Id. at 74. Mr. Bernstein was convicted of several drug-related offenses for selling controlled substances without a prescription. Id. at 75. Mrs. Bernstein asserted, and the government conceded, that she was an innocent owner. Id. The district court, following the Eleventh Circuit decision in 209th Avenue, held that no interest in the entireties property was forfeitable to the government. Id. However, the district court held that the government could file a lis pendens against the property. Id.

¹⁴⁹. 949 F.2d 73 (3d Cir. 1991).

¹⁵⁰. Id. at 77. The court in 1500 Lincoln Avenue noted that the legislative history of 21 U.S.C. § 881(a)(7) provides no guidance as to how the government's
ate forfeiture of the guilty spouse's interest would serve the goal of forfeiting property used in drug offenses, while allowing the innocent spouse to have a life estate in the entireties property would serve the competing goal of protecting the property of innocent owners.151

The Third Circuit in 1500 Lincoln Avenue rejected the approach taken by the Eleventh Circuit in 209th Avenue as not serving the dual goals of 21 U.S.C. § 881(a)(7).152 The court stated that the Eleventh Circuit approach of denying forfeiture but allowing the government to file a lis pendens against the property "frustrates the strong governmental interest in forfeiture [because] it permits a guilty spouse during his or her lifetime to retain title as a tenant by the entireties in property that he or she has used in illegal drug activities."153 Furthermore, the court noted that the Eleventh Circuit approach creates "substantial procedural difficulties" by requiring the government to postpone forfeiture actions until the guilty spouse acquires a separate interest in the entireties property.154 Thus, the court in 1500 Lincoln Avenue concluded that its approach best served the dual purposes of 21 U.S.C. § 881(a)(7).155

B. Community Property

Community property is defined as "property owned in common by husband and wife with each having an undivided one-half interest."156 The basic principle of the community property system is that "all property acquired during marriage by the industry and labor of either spouse or both spouses together . . . belongs beneficially to both during the continuance of the marriage relation."157 Community property systems exist only in states that have enacted them by statute.158

interest in forfeiture and the innocent owner's interest in the defendant property should be balanced. Id.

151. Id. at 77-78. The court stated that the innocent spouse would retain exclusive use and possession of the home during her lifetime. Id. at 78. The court also protected the innocent spouse against conveyances without her consent or attempts to levy upon any interests formerly held by the guilty spouse. Id. Moreover, if the guilty spouse predeceased the innocent spouse, the court held that she would have the right to obtain title to the property in fee simple absolute. Id.

152. Id.

153. Id. The court also rejected the defendants' argument that 21 U.S.C. § 881(a)(7) requires an outright denial of forfeiture. Id. The court stated that this approach "completely frustrates" the government's interest in forfeiture. Id.

154. Id. The court noted that it may be several years before the guilty spouse acquires a separate interest in the property. Id. Such a delay would make proof of the facts supporting a forfeiture difficult or impossible to prove. Id.

155. Id. at 77.


Community property systems recognize two categories of marital property: community property and separate property.\footnote{159} All property acquired by either spouse during the marriage is community property.\footnote{160} Separate property is defined as “property owned by a married person in his or her own right during marriage.”\footnote{161} Generally, all property acquired by either spouse prior to marriage, and all property acquired by either spouse during the marriage by gift, devise, bequest or descent is separate property.\footnote{162}

Each spouse owns an undivided one-half interest in the community property acquired during the marriage.\footnote{163} Additionally, each spouse possesses an equal right to manage and control community property.\footnote{164} Consequently, one spouse cannot alienate or dispose of community property without obtaining the other spouse’s consent.\footnote{165} This “community” between spouses may only be terminated as provided for by statute.\footnote{166}

Currently, there are eight community property states.\footnote{167} Only one federal court sitting in one of these states has addressed the issue of whether the government can forfeit community property when one spouse qualifies as an innocent owner under 21 U.S.C. § 881 (a) (7) and the other spouse violates the statute.\footnote{168}

In United States v. South 23.19 Acres of Land,\footnote{169} the United States District Court for the Eastern District of Louisiana held that the community property may be sold, with the government and the innocent spouse each

\footnote{159} 41 C.J.S. Husband and Wife § 128 (1991). The distinction between community property and separate property is important because it determines the remedies and processes available for the maintenance of the rights incident to the property. \textit{Id.}

\footnote{160} \textit{Id.} § 130. Property specifically designated as separate by statute is excepted from this general rule. \textit{Id.}

\footnote{161} \textit{Id.} § 128. Separate property may be acquired by a spouse only as set forth by statute. \textit{Id.}

\footnote{162} \textit{Id.} §§ 129, 136. Arizona incorporates these general rules into its community property statute. See ARIZ. REV. STAT. ANN. § 25-211 (1991) (stating that “[a]ll property acquired by either husband or wife during the marriage, except that which is acquired by gift, devise or descent, is the community property of the husband and wife”).

\footnote{163} 41 C.J.S. Husband and Wife § 157 (1991); \textit{see also} United States v. South 23.19 Acres of Land, 694 F. Supp. 1252, 1254 (E.D. La. 1988) (stating that, under Louisiana law, each spouse owns undivided one-half interest in community property) (citing LA. CIV. CODE ANN. art. 2336 (West 1985)).

\footnote{164} 41 C.J.S. Husband and Wife § 158 (1991). However, some state statutes allow each spouse acting alone to manage or control community property. \textit{Id.}

\footnote{165} \textit{Id.} § 168.

\footnote{166} \textit{Id.} § 178. Thus, if not explicitly allowed by statute, spouses may not terminate the community by mutual consent. \textit{Id.}

\footnote{167} IRA M. ELLMAN ET AL., FAMILY LAW 214 (2d ed. 1991). These eight states are Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas and Washington. \textit{Id.}


\footnote{169} \textit{Id.}
taking one half of the sale proceeds.\textsuperscript{170} The court based its holding on article 2345 of the Louisiana Civil Code, which "specifically provides that a separate obligation [of either the husband or wife] may be satisfied during the existence of a community property regime from community property," and it does not distinguish separate debts of the wife from separate debts of the husband.\textsuperscript{171} The court in 23.19 Acres reasoned that if a spouse's separate obligation may be satisfied from community property, then a forfeiture of one spouse's interest in community property may also be satisfied from community property.\textsuperscript{172} The court also cited article 2336 of the Louisiana Civil Code, which provides that each spouse owns an undivided one-half interest in the community property of the marriage.\textsuperscript{173} Based on these two Civil Code articles, the court in 23.19 Acres held that the government was entitled to an order that the community property be sold and that the proceeds of the sale be divided between the government and the innocent spouse.\textsuperscript{174}

C. States Not Recognizing Tenancy by the Entirety or Community Property Principles

In states that do not recognize tenancy by the entirety or community property principles, forfeiture cases brought under 21 U.S.C. § 881(a)(7), where one spouse claims innocent ownership and the other spouse violates the statute, often address whether the spouse claiming to be an innocent owner has standing to assert the innocent owner defense.\textsuperscript{175} In order

\textsuperscript{170} Id. at 1254. The defendant property in 23.19 Acres was the community property of Wayne and Ann Young. Id. at 1253. Wayne Young was convicted under two federal criminal statutes for possessing with intent to distribute marijuana. Id. The government then instituted a forfeiture proceeding against the property. Id. Ann Young claimed to be an innocent owner, and the government did not dispute her claim. Id. at 1254.

\textsuperscript{171} Id. (quoting Pan American Import Co. v. Buck, 440 So. 2d 182, 188 (La. Ct. App. 1983), cert. denied in part and granted in part, 445 So. 2d 445, rev'd on other grounds, 452 So. 2d 1167 (La. 1984)).

\textsuperscript{172} Id.


\textsuperscript{174} Id. The court in 23.19 Acres noted that, if community property could not be divided to satisfy a forfeiture, then the property of married drug traffickers in community property states would be insulated from forfeiture. Id. The court stated that "[s]tate family and property laws cannot supercede and interfere with the uniform application of federal forfeiture law to produce such a result." Id. (citing United States v. Rodgers, 461 U.S. 677, 683 (1983))

to have standing to assert the innocent owner defense, a claimant must be an "owner" of the subject property.\textsuperscript{176} The term "owner" is broadly construed to encompass "any person with a recognizable legal or equitable interest in the property seized."\textsuperscript{177} Courts look to state laws to determine whether a claimant has an interest in the subject property.\textsuperscript{178}

The common situation presented in these forfeiture cases is that the spouse claiming innocent ownership attempts to establish an ownership interest in property titled in the name of the spouse violating the statute.\textsuperscript{179} Spouses claiming innocent ownership advance several theories to establish an ownership interest in property titled in the name of the guilty spouse, including: equitable distribution statutes,\textsuperscript{180} gift,\textsuperscript{181} oral contract,\textsuperscript{182} constructive trust,\textsuperscript{183} resulting trust\textsuperscript{184} and survival statutes.\textsuperscript{185}

1. \textit{Equitable Distribution Statutes}

A number of federal courts have decided cases involving the issue of whether a spouse asserting the innocent owner defense may establish an ownership interest under a state's equitable distribution statute. In \textit{United States v. 717 South Woodward Street},\textsuperscript{186} the United States Court of Appeals for the Third Circuit rejected the argument that Pennsylvania's equitable distribution statute conferred an ownership interest sufficient to satisfy the standing requirement in a forfeiture case.\textsuperscript{187} The court in \textit{717 Woodward St.} stated:

176. \textit{717 S. Woodward St.}, 2 F.3d at 535 (citing 21 U.S.C. § 881(a)(7)).


178. See, e.g., \textit{1419 Mount Alto Rd.}, 890 F. Supp. at 1480 (noting that state law determines interest of claimant); \textit{5854 N. Kenmore}, 762 F. Supp. at 209 (stating that "property issues concerning ownership are governed by the laws of the state in which the property is located").

179. See, e.g., \textit{717 S. Woodward St.}, 2 F.3d at 535 (noting that wife claimed ownership interest in property where husband was sole record owner).

180. See, e.g., \textit{id.} at 555-36 (discussing wife's claim under Pennsylvania's equitable distribution statute that she had ownership interest in property subject to forfeiture).


182. \textit{See id.} at 1482-83 (assessing wife's argument that oral contract gave her one-half interest in property subject to forfeiture).

183. \textit{See id.} at 1481-82 (discussing wife's claim that constructive trust in subject property existed).


186. \textit{2 F.3d} 529 (3d Cir. 1993).

Street stated that "[t]he primary objective of . . . [the equitable distribution statute] is clearly to designate the property that is subject to disposition by the court in a divorce proceeding." 188 The court also noted that the Pennsylvania Superior Court declined to find that the statute confers an ownership interest outside the context of equitable distribution. 189 The Third Circuit refused to hold that Pennsylvania's equitable distribution statute conferred an ownership interest upon a spouse claiming to be an innocent owner in a forfeiture action. 190 Other federal courts considering this issue have reached the same conclusion. 191

2. Gift

In United States v. 1419 Mount Alto Road, 192 the United States District Court for the Northern District of Georgia held that a spouse claiming innocent ownership could establish an interest sufficient for standing purposes by virtue of a valid oral gift. 193 The spouse claiming innocent ownership in 1419 Mount Alto Road asserted that she had an agreement with her husband that she would receive a one-half undivided interest in the defendant property in exchange for her help in completing the home located on the property. 194 Relying on this agreement, the claimant moved into the home and invested her time, labor and money in completing the home. 195 The court in 1419 Mount Alto Road held that, based on these facts, the spouse claiming innocent ownership received a valid gift of a one-half undivided interest in the property under Georgia law. 196

188. Id.
189. Id. The court noted that the Pennsylvania Supreme Court did not consider this issue. Id.
190. Id. at 536. The court based its holding, in part, upon the decisions of other federal courts, which rejected the application of other states' equitable distribution statutes to forfeiture actions. Id. For a discussion of these other cases, see infra note 191.
191. See United States v. 116 Emerson St., 942 F.2d 74, 79 n.3 (1st Cir. 1991) (noting that Rhode Island's equitable distribution statute was improper basis for wife's claim because it applies "only to the assignment of property interests between husband and wife during divorce proceedings"); United States v. Kenmore, 762 F. Supp. 264, 208-09 (N.D. Ill. 1991) (holding that wife had no property interest in subject property under Illinois Marriage and Dissolution Act because "the Act is concerned with what constitutes marital property at the time of the dissolution of a marriage").
193. Id. at 1482.
194. Id. at 1479. The claimant's husband purchased the subject property before the marriage, and legal title was in his name. Id. at 1480. The individuals made the agreement at the time of the marriage, when the home located on the property was "an unfinished shell." Id. at 1479.
195. Id. at 1479, 1482. Claimant's husband intended to execute a deed granting claimant a one-half interest in the property, but he never did. Id. at 1479.
196. Id. at 1482. The court stated that all the elements necessary for an oral gift of land under Georgia law had been shown. Id. These elements are (1) the
3. **Oral Contract**

The court in *1419 Mount Alto Road* held that the same agreement that formed the basis of the gift of a one-half interest in the defendant property also constituted an oral contract for a one-half interest in the property.\(^{197}\) The court in *1419 Mount Alto Road* stated that, under Georgia law, [t]he specific performance of a parol contract as to land shall be decreed if the defendant admits the contract or if the contract has been so far executed by the party seeking relief and at the instance or by the inducements of the other party that if the contract were abandoned he could not be restored to his former position.\(^{198}\)

The claimant's husband admitted that an agreement concerning the land had been made, and the claimant made valuable improvements to the property in reliance on this agreement.\(^{199}\) Thus, the court in *1419 Mount Alto Road* held that, for purposes of standing, the claimant had a sufficient interest in the defendant property pursuant to an oral contract.\(^{200}\)

4. **Constructive Trust**

The court in *1419 Mount Alto Road* further held that the spouse claiming innocent ownership proved an ownership interest in the defendant property sufficient for standing under a constructive trust theory.\(^{201}\) The court stated that, under Georgia law, a constructive trust arises " 'whenever the circumstances are such that the person holding legal title to property . . . cannot enjoy the beneficial interest in the property without violating some established principle of equity.' "\(^{202}\) In this case, the spouse claiming innocent ownership expended time, labor and money in completing the home located on the defendant property.\(^{203}\) Because the claimant made these expenditures in reliance on an agreement with her husband

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\(^{198}\) Id. at 1482-83 (quoting Ga. CODE ANN. § 23-2-131(a) (1982)). The court stated that although the quoted language's code section did not set forth the rule of decision in the case, it did set forth the standard to be utilized for adjudicating the claimant's position. *Id.* at 1483.

\(^{199}\) *Id.* The court noted that the oral agreement determined all of the claimant's actions. *Id.*

\(^{200}\) *Id.*


\(^{202}\) *Id.* at 1481 (quoting Ga. CODE ANN. § 53-12-93 (1982)).

\(^{203}\) *Id.* at 1479. The claimant's husband held legal title to the defendant property. *Id.* at 1480.
that she would receive a one-half interest in the property,\textsuperscript{204} the court in 1419 Mount Alto Road concluded that "it would be unjust enrichment to the value of the property if [c]laimant . . . failed to receive the promised return."\textsuperscript{205}

5. Resulting Trust

Two federal court holdings indicate that a spouse asserting the innocent owner defense may establish an ownership interest in the defendant property by proving the existence of a resulting trust in the property.\textsuperscript{206} In United States v. 5854 North Kenmore,\textsuperscript{207} the United States District Court for the Northern District of Illinois found that a spouse claiming innocent ownership presented sufficient evidence to suggest that she had a resulting trust in the defendant property.\textsuperscript{208} The court stated that, under Illinois law, a resulting trust arises when one person's money is invested in property, but title is taken by another.\textsuperscript{209} A resulting trust may also arise when one person pays only part of the purchase price of property, in which case the resulting trust will be proportionate to the amount of the purchase price paid.\textsuperscript{210} In 5854 North Kenmore, the spouse asserting the innocent owner defense presented evidence that she shared the mortgage payments, taxes and building expenses with her husband even though title to the property was in his name.\textsuperscript{211} The court in 5854 North Kenmore held that her long-term contributions to the property were evidence of a resulting trust under Illinois law.\textsuperscript{212}

Similarly, the United States Court of Appeals for the First Circuit in United States v. 116 Emerson Street\textsuperscript{213} affirmed a district court finding of a resulting trust when the spouse, claiming to be an innocent owner, made long-term contributions to the defendant property.\textsuperscript{214} In 116 Emerson Street, the defendant property was registered under the name of the hus-

\textsuperscript{204} Id. at 1481. For a further discussion of the agreement between the spouse claiming innocent ownership and her husband, see supra note 194 and accompanying text.

\textsuperscript{205} Id.

\textsuperscript{206} See United States v. 116 Emerson St., 942 F.2d 74, 79-80 (1st Cir. 1991); United States v. 5854 N. Kenmore, 762 F. Supp. 204, 209 (N.D. Ill. 1991). For a further discussion of these cases, see infra notes 207-18.

\textsuperscript{207} 762 F. Supp. 204 (N.D. Ill. 1991).

\textsuperscript{208} Id. at 209. The wife claimed innocent ownership and the husband's estate held title to the defendant property. Id. at 208.

\textsuperscript{209} Id. at 209 (citing In re Estate of Jarodsky, 258 N.E.2d 365 (Ill. App. Ct. 1970)).

\textsuperscript{210} Id. (citing In re Estate of Jarodsky, 258 N.E.2d 365 (Ill. App. Ct. 1970)).

\textsuperscript{211} Id.

\textsuperscript{212} United States v. 5854 North Kenmore, 762 F. Supp. 204, 209 (N.D. Ill. 1991). The court noted, however, that its findings were not conclusive and requested that the parties brief the issue so that the question of standing could be finally resolved. Id.

\textsuperscript{213} 942 F.2d 74 (1st Cir. 1991).

\textsuperscript{214} Id. at 79-80.
band. In the district court, the wife claimed innocent ownership and testified that she had an agreement with her husband that he would pay the down payment on the property, she would pay the mortgage, and they would share ownership of the property. The wife also offered cancelled money orders to prove that she paid the mortgage. Based on this evidence, the district court found that the wife had a resulting trust in the defendant property, and the First Circuit affirmed.

6. Survival Statutes

A final basis for spouses to assert the innocent owner defense is pursuant to a survival statute. In United States v. East Half Section 12, the United States District Court for the District of Nebraska held that Nebraska's survival statute gave a wife an interest in her husband's property sufficient to give her standing to assert the innocent owner defense in a forfeiture action. The court held that the Nebraska statute "gives a surviving spouse the right to take a share of a deceased spouse's real estate, in lieu of what he or she may receive under a will." In addition, the court in East Half cited the Nebraska Supreme Court's holding that the surviving spouse's right gave a wife "'an interest in the real estate of her husband which he cannot alienate without her consent.'" The East Half court concluded that the wife claiming innocent ownership had an interest in the defendant property sufficient to give her standing.

IV. Critical Analysis

The forfeiture cases discussed in the preceding section of this Comment fall into two basic categories. First, in states that recognize tenancy by the entirety or community property principles, the forfeiture cases in which one spouse raised the innocent owner defense focused on what interest, if any, of the innocent spouse is forfeitable to the government. Second, in states not recognizing tenancy by the entirety or community property principles, the forfeiture cases in which one spouse raised the

215. Id. at 79.
216. Id. The down payment on the property was $8000, and the mortgage was $8000. Id.
217. Id.
218. United States v. 116 Emerson St., 942 F.2d 74, 79-80 (1st Cir. 1991). The Court of Appeals in 116 Emerson Street stated that "[t]here was ample evidence supporting the district court's decision." Id. at 80.
220. Id. at 174.
221. Id. (citing Neb. Rev. Stat. § 30-2313 (1989)).
222. Id. (quoting Sadler v. Sadler, 167 N.W.2d 187, 190 (Neb. 1969)). The court also cited a federal decision from South Carolina that indicated that a statute providing for property distribution between spouses could create an interest sufficient to give a spouse standing in a forfeiture action. Id. (citing United States v. Trafalgar St., 700 F. Supp. 857, 862 n.5 (D.S.C. 1988)).
223. Id.
innocent owner defense focused on whether the innocent spouse had a sufficient ownership interest in the defendant property to confer standing to assert the innocent owner defense.

Federal courts adjudicating forfeiture cases in states recognizing tenancy by the entirety or community property principles employ a balancing test.\(^{224}\) In resolving the issue of what interest of the innocent spouse is forfeitable to the government, these courts seek the result that best serves both the governmental interest in forfeiting property used in violation of drug laws and the interest of innocent spouses in preserving their property rights.\(^{225}\)

Federal courts adjudicating forfeiture cases in states not recognizing tenancy by the entirety or community property principles, on the other hand, are confronted with the task of determining whether innocent spouses have standing to assert the innocent owner defense in the first place.\(^{226}\) In making this determination, these courts evaluate the merits of the various theories innocent spouses advance in order to establish an ownership interest in property titled in the name of the guilty spouse.\(^{227}\)

The following three sections of this Comment evaluate the federal courts' holdings in forfeiture cases in states that recognize tenancy by the entirety, community property principles and, finally, states that do not recognize either tenancy by the entirety or community property principles.

\(^{224}\) See, e.g., United States v. 1500 Lincoln Ave., 949 F.2d 73, 77 (3d Cir. 1991) (stating that "nothing in the legislative history discloses precisely how Congress wanted to balance the interest in forfeiture and the interest of an innocent owner in the circumstances presented by the case now before us"); United States v. 2525 Leroy Lane, 910 F.2d 343, 348-49 (6th Cir. 1990) (noting that, while "[f]orfeiture statutes serve the ends of law enforcement by ... rendering illegal behavior unprofitable," they are also "intended to impose a penalty only upon those who are significantly involved in a criminal enterprise"), cert. denied, 499 U.S. 947 (1991); United States v. 15621 S.W. 209th Ave., 894 F.2d 1511, 1518 (11th Cir. 1990) (stating that "even though the goal of enacting [§ 881(a)(7)] was to reach [drug traffickers'] property and forfeit it to the government ... Congress equally intended full protection of the interest of innocent owners").

\(^{225}\) See, e.g., 1500 Lincoln Ave., 949 F.2d at 77 (stating that "we believe that we should adopt the interpretation that best serves the two goals that 21 U.S.C. § 881(a)(7) was intended to promote"); 209th Ave., 894 F.2d at 1513 (beginning analysis of case by noting "two interrelated aims of Congress" reflected in language of § 881(a)(7)).

\(^{226}\) See, e.g., United States v. 1419 Mount Alto Rd., 830 F. Supp. 1476, 1479 (N.D. Ga. 1993) (stating that issue before court is claimant's standing to assert innocent owner defense). For a brief discussion of other cases addressing this issue, see supra note 175.

\(^{227}\) See, e.g., United States v. 717 S. Woodward St., 2 F.3d 529, 535-86 (3d Cir. 1993) (evaluating wife's claim that she had ownership interest in defendant property under equitable distribution statute); 1419 Mount Alto Rd., 830 F. Supp. at 1480-83 (assessing wife's argument that she had ownership interest in defendant property under theories of gift, oral contract and constructive trust); United States v. 5854 N. Kenmore, 762 F. Supp. 204, 209 (N.D. Ill. 1991) (evaluating wife's assertion that she had resulting trust in subject property); United States v. East Half Section 12, 151 F.R.D. 171, 174 (D. Neb. 1990) (analyzing wife's theory that she acquired ownership interest in defendant property through survival statute).
A. Tenancy by the Entirety

Balancing the government's interest in forfeiting property used in violation of drug laws with the interest of innocent spouses in preserving their property rights is particularly difficult in cases arising in states that recognize tenancy by the entirety. This difficulty arises because the language of the innocent owner defense protects an innocent owner's interest in the defendant property, while the law of tenancy by the entirety provides that each spouse is considered the owner of the whole property. Thus, it would appear that when property subject to forfeiture is owned as a tenancy by the entirety and one spouse asserts the innocent owner defense, no interest in the property remains to be forfeited to the government. This argument, however, ignores the strong governmental interest in using forfeiture to combat drug trafficking in the United States.

As previously noted, the decisions of the five federal courts that address whether the government can forfeit property held by spouses as tenants by the entirety when one spouse is an innocent owner under 21 U.S.C. § 881(a)(7) and the other spouse violates the statute fall into three categories. Of the three different approaches federal courts take on this issue, the Third Circuit's approach in United States v. 1500 Lincoln Avenue best balances the government's interest in forfeiture with the innocent spouse's interest in preserving his or her property rights.

In 1500 Lincoln Avenue, the Third Circuit served the government's interest in forfeiture by immediately forfeiting the guilty spouse's interest in the defendant property. At the same time, the court also protected the...

228. The innocent owner defense of 21 U.S.C. § 881(a)(7) provides that "no property shall be forfeited . . . 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) (emphasis added).

229. See, e.g., United States v. 2525 Leroy Lane, 910 F.2d 343, 346 (6th Cir. 1990) (stating that "[i]n a true tenancy by the entireties, each spouse is considered to own the whole" (quoting Rogers v. Rogers, 356 N.W.2d 288, 292-93 (Mich. Ct. App. 1984)), cert. denied, 499 U.S. 947 (1991). The law of tenancy by the entirety also provides that neither spouse has an individual, separate interest which may be conveyed, encumbered or alienated. Id.


231. See S. Rep. No. 225, 98th Cong., 2d Sess. 191 (1984), reprinted in 1984 U.S.C.C.A.N. 3182, 3374 (stating that purpose of § 881(a)(7) was "to enhance the use of forfeiture . . . in combating two of the most serious crime problems facing the country: racketeering and drug trafficking"). The report further noted that forfeiture was the mechanism through which these crimes could be attacked. Id.

232. For a discussion of these three categories of decisions, see supra notes 107-10 and accompanying text.


234. Id. at 77.
property interest of the innocent spouse by giving her a life estate in the property, which retained all of the property rights she previously had under the tenancy by the entirety.235

In a well-reasoned opinion, the court in 1500 Lincoln Avenue rejected the Eleventh Circuit's approach in United States v. 15621 S.W. 209th Avenue,236 pointing out two weaknesses in the Eleventh Circuit's opinion.237 First, the court stated that the Eleventh Circuit's holding frustrates the strong governmental interest in forfeiture, allowing guilty spouses to retain their title to entireties property used in drug offenses.238 Second, the court pointed out that the Eleventh Circuit's approach creates "substantial procedural difficulties" because it requires the government to postpone forfeiture proceedings until the guilty spouse acquires a separate interest in the entireties property.239 The court noted that it may be several years before the guilty spouse acquires a separate interest in the property, thus "postponing adjudication of the government's right to forfeiture ... until [that] time, rather than adjudicating [the] issue when the evidence [is] still fresh."240

The "substantial procedural difficulties" of the Eleventh Circuit's test are illustrated in the Sixth Circuit case United States v. 2525 Leroy Lane.241 The first time the Leroy Lane case came before the Sixth Circuit, the court adopted an approach similar to the Eleventh Circuit's in 209th Avenue.242

235. Id. at 77-78. For a complete discussion of these rights, see supra note 151.

236. 894 F.2d 1511 (11th Cir. 1990).

237. 1500 Lincoln Ave., 949 F.2d at 78. The Eleventh Circuit approach, also adopted by the Sixth and Fourth Circuits, held that no present interest in entireties property could be forfeited to the government, although the government might acquire an interest in the property at a future time. See United States v. 2525 Leroy Lane, 910 F.2d 343, 351-52 (6th Cir. 1990) (noting that its opinion was consistent with Eleventh Circuit's approach in 209th Avenue), cert. denied, 499 U.S. 947 (1991); 209th Ave., 894 F.2d at 1516 n.6 (recognizing possibility that government might acquire interest in later forfeiture action); United States v. 35 Acres, No. 90-7376, 1991 WL 154348, at *2 (4th Cir. Aug. 15, 1991) (same). For a discussion of these cases, see supra notes 112-41 and accompanying text.

238. United States v. 1500 Lincoln Ave., 949 F.2d 73, 78 (3d Cir. 1991). The United States District Court for the District of Hawaii's approach also frustrates the government's interest in the forfeiture of property used in drug offenses. United States v. Property Entitled in the Names of Alexander Morio Toki and Elizabeth Mila Toki, 779 F. Supp. 1272, 1284-85 (D. Haw. 1991). In Toki, the court held that the government cannot obtain any interest (either present or future) in entireties property when one spouse is an innocent owner. Id. at 1284. For a full discussion of Toki, see supra notes 142-47 and accompanying text.

239. 1500 Lincoln Ave., 949 F.2d at 78. The Eleventh Circuit held that the government could file a lis pendens against the property and acquire the guilty spouse's interest in a later forfeiture proceeding should the entireties estate be altered in the future. 209th Ave., 894 F.2d at 1516 n.6.

240. 1500 Lincoln Ave., 949 F.2d at 78.


242. See United States v. 2525 Leroy Lane, 910 F.2d 343, 351 (6th Cir. 1990) (holding that government acquired interest is analogous to judgment creditor of guilty spouse when it seeks forfeiture of property held as tenancy by the entirety,
While this first forfeiture proceeding was still pending, the spouses obtained a divorce in a state court. The Sixth Circuit then remanded the case to the district court, which awarded all of the proceeds of the entireties property to the innocent spouse based upon the divorce decree. The government appealed this district court decision, bringing the case before the Sixth Circuit for a second time. The Sixth Circuit again remanded the case to the district court, "to insure total disclosure . . . of all facts surrounding the entry of the divorce decree." The Third Circuit’s approach in 1500 Lincoln Avenue avoids this type of protracted litigation.

B. Community Property

Balancing the government’s interest in forfeiture with the interest of innocent spouses in preserving their property rights is far less difficult in cases arising in states that recognize community property principles because, in community property states, each spouse owns an undivided one-half interest in the community property of the marriage. Thus, in United States v. South 23.19 Acres of Land, the United States District Court for the Eastern District of Louisiana ordered that the community property be sold, with the government and the innocent spouse each taking one half of the proceeds of the sale.

The court in 23.19 Acres, however, also based its holding on article 2345 of the Louisiana Civil Code, which allows the separate obligations of one spouse to be satisfied from community property. The court stated that, even if community property could not be divided to satisfy a forfeiture, such a law would not prevent the forfeiture of the property. This statement suggests that even if Louisiana’s community property law was and other spouse was innocent owner), cert. denied, 499 U.S. 947 (1991). For a more complete discussion of the first Leroy Lane case, see supra notes 131-41 and accompanying text.

243. Leroy Lane, 972 F.2d at 137.
244. Id. The divorce decree awarded the entireties property solely to the innocent spouse. Id.
245. Id. at 138.
246. Id. at 138-39.
247. See 41 C.J.S. Husband and Wife § 157 (1991) (stating that “[b]oth spouses have a right to one-half of the community property derived from their marriage, and each spouse owns an undivided one-half interest in the whole community real estate”) (footnotes omitted).
249. Id. at 1254.
250. Id. (citing La. CIV. CODE ANN. art. 2345 (West 1985)).
251. Id. The court stated, [i]f it were the law that community property cannot be divided to satisfy a forfeiture, married drug traffickers in community property states would automatically have all their unlawfully gained property immediately insulated. State family and property laws cannot supercede and interfere with the uniform application of federal forfeiture law to produce such a result.

Id. (citing United States v. Rodgers, 461 U.S. 677, 683 (1983)); see also United States v. 15621 S.W. 209th Ave., 894 F.2d 1511, 1516 n.5 (11th Cir. 1990) (noting
different, the court in *23.19 Acres* would have reached the same result, balancing the government’s interest in forfeiture with the innocent spouse’s property interest.\(^{252}\) This approach is similar to the approach taken by the Third Circuit in *1500 Lincoln Avenue*.

**C. States Not Recognizing Tenancy by the Entirety or Community Property Principles**

The common situation presented in cases arising in states that do not recognize either tenancy by the entirety or community property principles is that of the innocent spouse trying to establish an ownership interest in property titled in the name of the guilty spouse. In these situations, the innocent spouse must prove an ownership interest in the property to have standing to assert the innocent owner defense because title to the property is in the name of the guilty spouse.\(^{253}\) As previously noted, innocent spouses successfully assert an ownership interest in property titled in the name of the guilty spouse under the theories of gift, oral contract, constructive trust, resulting trust and survival statutes.\(^{254}\) Spouses asserting an ownership interest under state equitable distribution statutes, however, are not successful.\(^{255}\)

The situation presented in the cases where the innocent spouse must establish an ownership interest illustrates the harshness of the common

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\(^{253}\) *See, e.g.*, United States v. 717 S. Woodward St., 2 F.3d 529, 535 (3d Cir. 1993) (stating that claimant must be owner of property in order to have standing to assert innocent owner defense). For a further discussion of the standing requirement, see *supra* note 175 and accompanying text.

\(^{254}\) *See* United States v. 116 Emerson St., 942 F.2d 74, 79-80 (1st Cir. 1991) (holding that innocent spouse had resulting trust in defendant property); United States v. 1419 Mount Alto Rd., 880 F. Supp. 1476, 1480-83 (N.D. Ga. 1993) (holding that innocent spouse had ownership interest in property titled in name of guilty spouse under theories of gift, oral contract and constructive trust); United States v. 5854 N. Kenmore, 762 F. Supp. 204, 209 (N.D. Ill. 1991) (same); United States v. East Half Section 12, 131 F.R.D. 171, 174 (D. Neb. 1990) (holding that state survival statute gave innocent spouse interest in guilty spouse’s property). For a further discussion of these cases, see *supra* notes 192-223 and accompanying text.

\(^{255}\) *See, e.g.*, 717 S. Woodward St., 2 F.3d at 536 (rejecting argument that Pennsylvania’s equitable distribution statute conferred ownership interest upon spouse claiming to be innocent owner in forfeiture action). For a further discussion of this case and other cases rejecting the use of equitable distribution statutes to establish an ownership interest, see *supra* notes 186-91 and accompanying text.
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law title system of property ownership. Under the title system, the person whose name appears on the title to property is presumed to be the owner of that property. Thus, unless an innocent spouse (whose name is not on the title) can prove an ownership interest in the property under a theory accepted by the court, all of the property will be forfeited to the government. This result does not provide adequate protection for innocent spouses.

Alternatively, an approach allowing courts to consider the contribution of the innocent spouse to the acquisition, maintenance and increase in value of the property would provide greater protection to innocent spouses. Such an approach would ameliorate the harsh results of forfeiture in cases where an innocent spouse is unable to prove an ownership interest in the property under a theory such as gift or trust.

V. Conclusion

 Innocent spouses often raise the innocent owner defense of 21 U.S.C. § 881(a)(7) in an attempt to prevent the forfeiture of marital property due to the narcotics-related offenses of their spouses. Federal courts adjudicating these forfeiture cases in states that recognize tenancy by the en-

256. The common-law title system of property ownership assumes that each spouse owns the property he or she earns. ELLMAN, supra note 166, at 223. The community property system, on the other hand, “assumes an equal partnership between spouses, regardless of whose labors accounted directly for the acquisition of any particular asset.” Id.

257. See id. at 233 (noting that “underlying premise” of common-law title system is that “property is owned by the spouse who earned it”). In addition, “each spouse has sole management authority over the property each acquires with his or her earnings, except to the extent they explicitly place it in some form of joint ownership.” Id.

258. See, e.g., United States v. 717 South Woodward St., 2 F.3d 529, 536 (3d Cir. 1993) (holding that innocent spouse could not assert forfeiture statute’s innocent owner defense because she lacked ownership interest in property under Pennsylvania’s equitable distribution statute).

259. Courts in states following the common-law title system of property ownership frequently consider spousal contributions to marital property when allocating marital property under equitable distribution laws. ELLMAN, supra note 166, at 237. Many states have statutes providing for consideration of spousal contribution in the equitable distribution of property. See, e.g., 23 PA. CONS. STAT. ANN. § 3502 (1991) (providing for consideration of “[t]he contribution . . . of each party in the acquisition, preservation . . . or appreciation of the marital property, including the contribution of a party as homemaker”); W. VA. CODE § 48-2-32 (1992) (providing for consideration of spousal contributions to acquisition of property, including services as homemaker).

260. Because many innocent spouses may have difficulty in proving all of the elements required under a theory such as gift or trust, allowing courts to consider the contributions of innocent spouses to marital property will increase the likelihood that innocent spouses will be found to have an ownership interest in the property sufficient to confer standing to assert the innocent owner defense. This approach would provide greater protection to innocent spouses and decrease the number of cases in which all of the marital property is forfeited to the government, leaving the innocent spouse with nothing.
tirety or community property principles reach varying conclusions when deciding what interest, if any, of an innocent spouse is forfeitable to the government. Meanwhile, federal courts in states that do not recognize tenancy by the entirety or community property principles focus on the different theories innocent spouses may use to establish standing to raise the innocent owner defense. This Comment has provided a comprehensive survey of how federal courts have dealt with the range of issues and decisions in this area.

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