

FORFEITURE—COMPREHENSIVE DRUG ABUSE PREVENTION AND CONTROL ACT—RELATION BACK DOES NOT PRECLUDE INNOCENT DONEES FROM OBTAINING VALID INTERESTS IN DRUG PROCEEDS—*United States v. 92 Buena Vista Ave.*, 113 S. Ct. 1126 (1993).

Civil forfeiture laws¹ empower the government to seize property used or acquired illegally without providing remuneration to the property owner.² Despite the efficacy of this ancient doctrine,

¹ Two classes of forfeiture action exist: civil and criminal. Lalit K. Loomba, Note, *The Innocent Owner Defense to Real Property Forfeiture Under the Comprehensive Crime Control Act of 1984*, 58 FORDHAM L. REV. 471, 473 (1989) (citation omitted). Civil forfeiture actions proceed in rem, directly against the property subject to forfeiture rather than against the property's owner. *Id.* (citation omitted). In rem forfeitures descend from a legal fiction pursuant to which property's association with an illegal act results in its personification. *Id.* (citation omitted). As such, the government may name the "tainted" property as a defendant and may adjudge the property guilty; the government does not need to convict or indict the property owner. *Id.* On this point, see Beverly L. Jacklin, Annotation, *Who Is Exempt from Forfeiture of Drug Proceeds Under "Innocent Owner" Provision of 21 USCS § 881(a)(6)*, 109 A.L.R. FED. 322, 330 (1992) ("[D]efendants are the properties involved, not the owner, so that the government is not required to establish that the owner dealt in drugs but only that the properties were corrupt to the extent that they incorporated proceeds traceable to an exchange of controlled substances in violation of the law.").

Criminal forfeiture actions, on the other hand, proceed in personam, that is, directly against the person; such actions supplement the prosecution. Loomba, *supra*, at 473. As opposed to its civil counterpart, the criminal forfeiture of illegally acquired property occurs only upon the conviction of the criminal defendant. *Id.* (citations omitted). For additional discussion on civil versus criminal forfeiture actions, see Michael Goldsmith and Mark Jay Linderman, *Asset Forfeiture and Third Party Rights: The Need for Further Law Reform*, 1989 DUKE L.J. 1254, 1260-61 (1990). For a thorough commentary concerning the history of and distinction between in rem and in personam actions, consult William J. Hughes and Edward H. O'Connell, Jr., *In Personam (Criminal) Forfeiture and Federal Drug Felonies: An Expansion of a Harsh English Tradition into a Modern Dilemma*, 11 PEPP. L. REV. 613, 617-24 (1984).

² See BLACK'S LAW DICTIONARY 650 (6th ed. 1990) (citations omitted) (defining forfeiture as "[a] comprehensive term which means a divestiture of specific property without compensation; it imposes a loss by the taking away of some preexisting valid right without compensation."); see also *United States v. Eight Rhodesian Stone Statues*, 449 F. Supp. 193, 195 n.1 (C.D. Cal. 1978) ("'[F]orfeiture' is best defined as the divestiture without compensation of property used in a manner contrary to the laws of the sovereign.").

Modern forfeiture dates back to an English common law practice by which the King seized title to any inanimate objects that caused the death of a royal subject. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 680-81 (1974). Courts termed the offending objects "deodands," derived from the Latin "Deo dandum," meaning "to be given to God." *Id.* at 681 & n.16. The concept of the deodand in turn derived from the Bible, in which God commanded Moses "if an ox gore[s] a man or a woman, and they die, he shall be stoned and his flesh shall not be eaten." *Id.* at 681 & n.17 (quoting *Exodus* 21:28). For further discussion of the historical bases of modern day forfeiture law, see Jacob J. Fickelstein, *The Goring Ox: Some Historical Perspectives on*

the United States historically employed forfeiture sparingly.³ In 1970, however, Congress promulgated the Comprehensive Drug Abuse Prevention and Control Act, codified as 21 U.S.C. § 881,⁴

Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty, 46 TEMP. L.Q. 169, 181-83 (1973).

³ See 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, 524-25 (1991) (citation omitted) ("[D]espite its early roots, the role of forfeiture in this country's criminal justice system has been insignificant at best."); Richard C. Reuben, *Putting Brakes on Forfeiture*, A.B.A.J., Feb. 1994, at 14 ("Forfeiture has been around for years . . . but traditionally has been disfavored as a remedy because of constitutional concerns.").

⁴ See 21 U.S.C. § 881 (1988 & Supp. IV 1993). The relevant provisions of § 881, as amended, read as follows:

(a) Subject property

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

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

(2) All raw materials, products, and equipment of any kind which are used, or intended for use, in manufacturing, compounding, processing, delivering, importing, or exporting any controlled substance in violation of this subchapter.

(3) All property which is used, or intended for use, as a container for property described in paragraph (1), (2), or (9).

(4) All conveyances, including aircraft, vehicles, or vessels, which are used, or intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1), (2), or (9) except that—

....

(B) no conveyance shall be forfeited under the provisions of this section by reason of any act or omission established by the owner thereof to have been committed or omitted by any person other than such owner while such conveyance was unlawfully in the possession of a person other than the owner in violation of the criminal laws of the United States, or of any State; and

(C) no conveyance shall be forfeited under this paragraph to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge, consent, or willful blindness of the owner.

....

(6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

....

(h) Vesting of title in United States

All right, title, and interest in property described in subsection (a) of

through which it recruited civil forfeiture into its war on drugs.⁵

As enacted, § 881 targeted only controlled substances and their means of manufacture and transport.⁶ In an effort to heighten the Act's impact on the drug trade,⁷ Congress fortified the statute in 1978 by adding § 881(a)(6).⁸ As amended, this section also provided for the forfeiture of proceeds traceable to drug transactions, including property purchased with drug proceeds.⁹ Congress tempered the aggressive tone of § 881(a)(6) by exempting truly innocent parties from its terms.¹⁰ This "innocent owner"

this section shall vest in the United States upon commission of the act giving rise to forfeiture under this section.

Id.

⁵ See S. REP. NO. 98-225, 98th Cong., 2d Sess. 191 (1985), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3374-75 ("In recent years . . . Federal agencies have [launched] a concerted effort to increase the use of forfeiture in narcotics and racketeering cases. This bill is intended to eliminate the statutory limitations and ambiguities that have frustrated active pursuit of forfeiture.").

The Senate Report asserted:

Today, 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. Clearly, if law enforcement efforts to combat racketeering and drug trafficking are to be successful, they must include an attack on the economic aspects of these crimes. Forfeiture is the mechanism through which such an attack may be made.

Id. at 3374

⁶ See 21 U.S.C. § 881(a)(1)-(5) (1988). For the text of § 881 (a), see *supra* note 4.

⁷ See 124 CONG. REC. 23,055 (1978) (statement of Sen. Nunn). With regard to the efficacy of § 881, Senator Sam Nunn commented that "almost 8 years ago the Nixon administration declared an 'all out war' on illegal drugs. . . . Until recently, we were losing the battles as well as the war." *Id.*

⁸ See 21 U.S.C. § 881 (1988 & Supp. 1993); 124 CONG. REC. 23,055 (statement of Sen. Nunn) ("The amendment I propose here today is intended to enhance the efforts to reduce the flow of illicit drugs . . . by striking out against the profits from illicit drug trafficking."); see also *supra* note 4 (quoting the text of § 881(a)(6)).

⁹ See 21 U.S.C. § 881(a)(6) (1988); For the text of § 881(a)(6), see *supra* note 4.

In its section by section analysis, the Congressional Record explains that "[w]hile [881(a)(6)] broadens existing forfeiture law to enable federal authorities to reach the consideration used or intended to be used in illegal drug transactions or any proceeds directly traceable to such transactions, it specifically safeguards the rights of innocent persons." 124 CONG. REC. 23,056 (1978). Speaking on the proposed addition of subsection (a)(6), Senator Culver noted that "[t]he original language is modified in the proposed amendment in order to protect the individual who obtains ownership of proceeds with no knowledge of the illegal transaction." *Id.*

The term "proceeds" is defined as "[t]hat which results . . . or accrues from some possession or transaction." BLACK'S LAW DICTIONARY 1204 (6th ed. 1990) (citation omitted) (emphasis added).

¹⁰ See 21 U.S.C. § 881(a)(6) (1988) ("[N]o property shall be forfeited . . . to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that

caveat authorizes claimants to challenge a civil forfeiture and reclaim the seized property provided said claimants did not know of, or consent to, the illegal activities giving rise to the forfeiture.¹¹

Congress returned to the Act in 1984,¹² adding § 881(h).¹³ The 1984 amendment, a codification of the common law doctrine known as "relation back,"¹⁴ purported to vest title to "forfeitable" property in the United States upon the commission of an act giving rise to forfeiture.¹⁵ A civil proceeding, in which the forfeiture is formally decreed, later perfects the government's interest.¹⁶

owner."). Speaking on the addition of the "innocent owner" provision, Senator Nunn commented that the amendment was intended to clarify "that [if] a bona fide party . . . has no knowledge or consent to the property he owns having been derived from an illegal transaction, that party would be able to establish that fact under this amendment and forfeiture would not occur." 124 CONG. REC. 23,057 (1978).

In addition to the innocent owner provision found in 21 U.S.C. § 881(a)(6), Congress also provided for innocent owners in §§ 881(a)(4)(B) and 881(a)(7). 21 U.S.C. § 881(a)(4)(B) (1988); 21 U.S.C. § 881(a)(7) (1988). Section (a)(7) provides for the forfeiture of real property used in the violation of § 881, but adds "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).

¹¹ 21 U.S.C. § 881(a)(6) (1988). For the text of § 881(a)(6), see *supra* note 4.

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

A 1981 report by the General Accounting Office entitled *Asset Forfeiture—A Seldom Used Tool in Combatting Drug Trafficking* advised Congress that § 881 had produced disappointing results. See S. REP. NO. 98-225, 98th Cong., 2d Sess. 191 (1985), reprinted in 1984 U.S.C.C.A.N. 3182, 3374. The General Accounting Office posited two reasons for the failure: "(1) that Federal law enforcement agencies had not aggressively pursued forfeiture, and (2) that the current forfeiture statutes contain numerous limitations and ambiguities . . ." *Id.* Congress enacted 21 U.S.C. § 881(h) to help rectify these problems. See *id.* at 3375.

¹³ 21 U.S.C. § 881 (1988). For the text of § 881(h), see *supra* note 4.

¹⁴ See *United States v. 92 Buena Vista Ave.*, 113 S. Ct. 1126, 1136 (1993) ("[A]s we read that subsection . . . Congress merely codified the common-law rule.").

"Relation back" is defined as "[a] principle that an act done today is considered to have been done at an earlier time." BLACK'S LAW DICTIONARY 1289 (6th ed. 1990); see also 1 DAVID B. SMITH, PROSECUTION AND DEFENSE OF FORFEITURE CASES, ¶ 3.05[2] (1993) ("[U]nder a peculiar rule of statutory construction adopted early in the nineteenth century and followed consistently . . . thereafter, it is *presumed* that the legislature intends to 'vest' title in the government at the moment the property is illegally used unless the legislature indicates otherwise . . ."); 92 *Buena Vista Ave.*, 113 S. Ct. at 1137 ("The common-law rule had always allowed owners to invoke defenses made available to them *before* the Government's title vested, and after title *did* vest, the common-law rule had always related that title back to the date of the commission of the act . . .").

¹⁵ See 21 U.S.C. § 881(h); see also Michael J. Wietzychowski, Note, *Civil Forfeiture—Protecting Innocent Donees Under 21 U.S.C. § 881(a)(6)*, 65 TEMP. L. REV. 245, 250 (1992) ("Simply stated, section 881(h) placed the government first in the chain of ownership of any illicit drug proceeds, thus giving the government first claim rights to the booty.").

¹⁶ SMITH, *supra* note 14, at ¶ 3.05[2] (citations omitted) ("Thus, it is said that a

Since 1984, courts attempting to reconcile § 881(h) with § 881(a)(6) have asked one resounding question: How can a transferee of drug proceeds raise an innocent owner defense under § 881(a)(6) when § 881(h) has already operated to divest him?¹⁷ Recently, in *United States v. 92 Buena Vista Avenue*,¹⁸ the United States Supreme Court furnished an answer.¹⁹ Specifically, the Court opined that relation back does not preclude innocent owners from obtaining valid interests in illegal proceeds because the government does not acquire true owner status until the forfeiture has been decreed in a civil proceeding.²⁰ In addition, the Court asserted that the benefits of innocent ownership extend to donees as well as to bona fide purchasers for value.²¹

judgment of forfeiture 'relates back' to the date of the offense subjecting the property to forfeiture. Of course, this 'result follows only from an effective judgment of condemnation.' Where there is no such judgment the government acquires no title or interest in the property."); 36 AM. JUR. 2D *Forfeitures and Penalties* § 24 (citation omitted) ("[T]o state the principle in a concrete form, relation back to the date of the offense follows only from an effective judgment of condemnation.").

¹⁷ See Wietrzykowski, *supra* note 15, at 250 ("[F]or persons acquiring an ownership interest after the illegal act . . . the statute contained an anomaly The courts have struggled with this issue and are in disagreement as to which section to apply first—section 881(h) or section 881(a)(6)"); SMITH, *supra* note 14, at ¶ 3.05[1] ("The law in this area is arcane and confused . . . even when it is clear it does not always make much sense from a policy standpoint.").

The effect of the "relation back" doctrine on transfers occurring *subsequent* to the illegal act has engendered hot debate. See Jacklin, *supra* note 1, at 327. Essentially three schools of thought have developed on the subject. See *id.* Some courts assert that "relation back" vests title in the United States at the time of the illegal act, and that said vesting nullifies all subsequent sales and alienations. *Id.* at 327, 335-37. Others adhere to this view, but propose that an exception exists for "bona fide purchasers for value" who take after the prohibited event. *Id.* at 327, 337. Still other courts maintain that while vesting "relates back" to the prohibited act, all innocent owners taking *subsequent* to the illegal act but *prior* to perfection avoid the vesting entirely. *Id.* at 338-39.

¹⁸ 113 S. Ct. 1126 (1993). For a discussion of the Supreme Court's decision in *92 Buena Vista Ave.*, see generally Holly R. Skolnick and G. Richard Strafer, *Restrictions for Asset Forfeitures*, 134 N.J.L.J. 1476 (1993).

¹⁹ *92 Buena Vista Ave.*, 113 S. Ct. at 1137 ("Because the success of any defense available under § 881(a) will necessarily determine whether § 881(h) applies, § 881(a)(6) must allow an assertion of the defense *before* § 881(h) applies.").

²⁰ *Id.* at 1136.

²¹ *Id.* at 1134.

At least one commentator agrees with the Court's opinion on this issue, asserting that

[t]he plain language of the statute indicates that the protection of the innocent owner provision is not limited to those who give value for the tainted property. Likewise, the legislative history shows that Congress sought to protect all innocent owners including donees, heirs and others who have not given value for the property.

SMITH, *supra* note 14, at ¶ 4.03[4][c].

In 1982, Joseph Anthony Brenna gifted in excess of \$200,000 to Beth Anne Goodwin, enabling her purchase of 92 Buena Vista Avenue in Rumson, New Jersey.²² Brenna resided on the premises with Goodwin and her three children from 1982 to 1987, during which time the couple maintained intimate relations.²³ Following Brenna's indictment on drug charges, the United States instituted civil forfeiture proceedings against the property pursuant to 21 U.S.C. § 881.²⁴

In its verified complaint, the government asserted that the funds used to purchase the residence constituted proceeds traceable to Brenna's drug transactions.²⁵ Subsequently, in an *ex parte* proceeding,²⁶ the United States District Court for the District of New Jersey reviewed the complaint and authorized the seizure of 92 Buena Vista Avenue.²⁷

In response to the forfeiture proceedings, Goodwin moved for

²² 92 Buena Vista Ave., 113 S. Ct. at 1130; United States v. 92 Buena Vista Ave., 937 F.2d 98, 100 (3d Cir. 1991), *aff'd*, 113 S. Ct. 1126 (1993).

²³ 92 Buena Vista Ave., 113 S. Ct. at 1130; 92 Buena Vista Ave., 937 F.2d at 100.

²⁴ 92 Buena Vista Ave., 937 F.2d at 100. Brenna's indictment alleged that he had conspired to import and had knowingly imported into the United States over 1,000 kilograms of marijuana. *Id.*

See *supra* note 4 for the text of 21 U.S.C. § 881.

²⁵ 92 Buena Vista Ave., 113 S. Ct. at 1130 (citations omitted).

David Smith, an authority in the realm of forfeiture, notes that the most significant inquiry arising under the proceeds provision is whether the government must trace the proceeds "to a particular drug transaction or whether it is enough to trace 'proceeds' to drug trafficking activity in general." SMITH, *supra* note 14, at ¶ 4.03[4][a]. By way of response, Mr. Smith adds that "[t]he government, defense counsel and the courts have acted upon the latter assumption" *Id.*

²⁶ 92 Buena Vista Ave., 113 S. Ct. at 1130. An *ex parte* proceeding is "[a]ny judicial or quasi judicial hearing in which only one party is heard" BLACK'S LAW DICTIONARY 576 (6th ed. 1990).

²⁷ 92 Buena Vista Ave., 113 S. Ct. at 1130. The court premised this decision on a showing by the government that probable cause existed to believe that the property had been purchased with the proceeds of drug transactions. *Id.* Pursuant to an agreement with the United States Marshall, Goodwin remained in possession of the premises throughout the litigation process. *Id.* at 1130 n.3.

After deciding 92 Buena Vista Ave., the Supreme Court addressed the issue of whether it is permissible for the government to seize property subject to forfeiture without first providing the owner both notice and a reasonable opportunity to be heard. United States v. James Daniel Good Real Property, 114 S. Ct. 492, 497 (1993). In *James Daniel Good*, the Court held that the Due Process Clause prohibits such government action in all cases except those where exigent circumstances call for immediate seizure. *Id.* at 497. Moreover, the Supreme Court asserted that the confiscation of property under § 881(a)(7) does not give rise to the kind of extraordinary circumstances that verify the government's deferral of proper notice and hearing. *Id.* at 505. To establish the existence of exigent circumstances, the Court noted, the government must demonstrate that less restrictive measures would be insufficient to protect the government's interest in the property. *Id.*

dismissal on several grounds, among them, that she qualified as an innocent owner under 21 U.S.C. § 881(a)(6).²⁸ Goodwin buttressed this claim by swearing that she had no knowledge of the money's illicit origin.²⁹ The district court denied Goodwin's motion, holding that the innocent owner defense protected only bona fide purchasers for value, not donees.³⁰ The lower court also found that the relation back doctrine, as embodied in § 881(h), precluded Goodwin from acquiring an ownership interest in the property.³¹

On appeal, the United States Court of Appeals for the Third Circuit rejected the district court's interpretation of § 881(a)(6) and concluded that the innocent owner defense embraced not only bona fide purchasers for value, but also donees.³² The court

²⁸ United States v. 92 Buena Vista Ave., 738 F. Supp. 854, 856 (D.N.J. 1990), *aff'd*, 937 F.2d 98 (3d Cir. 1991), *aff'd*, 113 S. Ct. 1126 (1993). In addition to her claim of innocent ownership, Goodwin moved for dismissal based on the following claims: (1) that the seizure was unconstitutional because it was effected without a pre-seizure hearing; (2) that the verified complaint was partially premised on immunized testimony; (3) that the government's seizure was unduly delayed, violating both her due process rights and the applicable statute of limitations; and (4) that the government had refused to abide by the rules of discovery. *Id.*

²⁹ *Id.* at 859. Goodwin "assert[ed] that she had no knowledge that the funds . . . were traceable to drug sales; that the premises were used to facilitate drug sales . . . or that Mr. Brenna had a record of violating any laws." *Id.* One commentator has noted the extensive latitude that § 881(a)(7) allows for defenses based upon such lack of knowledge. SMITH, *supra* note 14, at ¶ 4.03[1] ("[U]nlike virtually every other federal civil forfeiture statute, this subsection and subsection (a)(7) exempt property owned by persons without knowledge of the facts that would otherwise subject the property to forfeiture, thus allowing for a broad defense based upon ignorance.")

³⁰ 92 Buena Vista Ave., 738 F. Supp. at 860 (citation omitted). The district court buttressed this conclusion by noting that the innocent owner provision of 21 U.S.C. § 835(c), the criminal forfeiture statute, explicitly protected only bona fide purchasers for value. *Id.* at 860-61 (citation omitted). The court further premised its holding on the settled principle that those lacking legal title to property may not validly transfer title except where the transferee qualifies as a bona fide purchaser for value. *Id.* at 861. Finally, the district court observed, "where fraudulent conveyances are made, bona fide purchasers for value may be protected, but recipients of gifts are not." *Id.* (citation omitted).

³¹ *Id.* at 860. The court noted that the language of § 881(a)(6) "implies that the acts or omissions giving rise to forfeiture must be committed *after* the third party acquires a legitimate ownership interest in the property." *Id.*

³² United States v. 92 Buena Vista Ave., 937 F.2d 98, 100, 102 (3d Cir. 1991), *aff'd*, 113 S. Ct. 1126 (1993). The court of appeals articulated three bases supporting its conclusion. *Id.* at 101-02. First, the court explicated, the plain language of the statute contained no limitations on the word "owner." *Id.* at 101. Second, the Third Circuit added, legislative history indicated that courts should construe the term "owner" broadly. *Id.* at 101-02 (citation omitted). Third, the court concluded, there existed a purposeful distinction between § 881(a)(6) and the criminal forfeiture statute, the latter's application being explicitly confined to bona fide purchasers for value. *Id.* at 102 (citation omitted).

of appeals also disagreed with the lower court's explication of § 881(h), holding instead that the relation back doctrine did not apply to property exempted from forfeiture by way of the innocent ownership defense.³³ Subsequently, the court remanded the matter to determine whether Goodwin qualified as an innocent owner.³⁴

The United States Supreme Court granted certiorari³⁵ to resolve whether a donee of drug proceeds, who uses those proceeds to purchase real property, may assert an innocent owner defense despite the relation back doctrine.³⁶ Adopting the Third Circuit's reasoning, the Court explained that vesting under § 881(h) occurs only after the United States has obtained a judgement of forfeiture and that, in the interim, valid title may pass to an innocent owner.³⁷ The Court added that § 881(h) applies only to property "forfeitable" under § 881(a).³⁸ Since proceeds transferred to innocent parties are exempt, the Court reasoned, such proceeds are not "forfeitable" and § 881(h) is inapplicable.³⁹ Endorsing the Third Circuit's construction of the word "owner," the Supreme Court added that limiting the defense to bona fide purchasers contradicted the statute's plain language.⁴⁰

Since 1984, courts have endeavored to reconcile the "relation back" doctrine of § 881(h) with the "innocent owner" proviso of

³³ *Id.* The court opined that "to interpret section 881(h) in the manner suggested by the government would essentially serve to emasculate the innocent owner defense provided for in section 881(a)(6)." *Id.* No person obtaining property after the alleged drug transaction, the court continued, would be able to assert the innocent owner defense. *Id.*

³⁴ *Id.* at 103, 105.

³⁵ *United States v. 92 Buena Vista Ave.*, 112 S. Ct. 1260, 1261 (1992).

³⁶ *United States v. 92 Buena Vista Ave.*, 113 S. Ct. 1127, 1129.

³⁷ See *id.* at 1136-37 (reasoning that § 881(h) applies only to property that is subject to forfeiture under § 881(a)); *92 Buena Vista Ave.*, 937 F.2d at 102 ("Section 881(h) vests title in the United States *in that property described in subsection (a)*. . . . [T]he property referred to in subsection (a) does *not* include property that has been exempted from forfeiture by means of an innocent owner defense.").

³⁸ *92 Buena Vista Ave.*, 113 S. Ct. at 1136 (footnote omitted). The court explained that "the Government cannot profit from the common-law doctrine of relation back until it has obtained a judgment of forfeiture. And it cannot profit from the statutory version of that doctrine in § 881(h) until respondent has had the chance to invoke and offer evidence to support the innocent owner defense under § 881(a)(6)." *Id.* at 1137.

³⁹ *Id.* at 1136-37.

⁴⁰ *Id.* at 1134; see 937 F.2d at 102 (holding that Congress intended "owner" to be defined broadly for the purposes of § 881, thereby including within its scope donees as well as bona fide purchasers for value).

§ 881(a)(6).⁴¹ The question, whether the relation back doctrine precludes the innocent ownership of proceeds, has evoked sundry responses.⁴² Some courts have responded in the affirmative, asserting that "relation back" vests title in the United States at the time of the illegal act and that this vesting nullifies all subsequent sales and transfers.⁴³ Other courts have adhered to this view, but proposed that a common-sense exception exists in "bona fide purchasers for value."⁴⁴ Still other courts have recognized that vesting "relates back" to the prohibited act, but have declared that this vesting does not affect innocent owners who take after the prohibited act but

⁴¹ See Jacklin, *supra* note 1, at 327 (describing the different positions that courts have taken on the effect of § 881(h)'s relation back provision).

⁴² See *id.*

⁴³ See, e.g., *Eggleston v. Colorado*, 873 F.2d 242, 248 (10th Cir. 1989) ("[F]orfeiture under section 881 occurs before value is received by the vendor. . . . Forfeiture therefore occurs while the value is still in the hands of the purchaser . . ."). Courts adhering to this view frequently cite *United States v. Stowell*, 133 U.S. 1, 16-17 (1890), a nineteenth century decision which contains perhaps the most famous explication on retroactive vesting in the context of forfeiture statutes. See, e.g., *Eggleston*, 873 F.2d at 247 (noting that the Supreme Court's decision in *Stowell* made it clear that an innocent owner exception does not prevent the relation back of forfeiture in cases where holders do not meet the exception's qualifications). In *Stowell*, the Court established the following:

[W]henever a statute enacts that upon the commission of a certain act specific property used in or connected with that act shall be forfeited, the forfeiture takes effect immediately upon the commission of the act; the right to the property *then vests* in the United States, although their title is not perfected until judicial condemnation; the forfeiture constitutes a statutory transfer of the right to the United States at the time the offense is committed, and the condemnation, when obtained, relates back to that time, and avoids all intermediate sales and alienations, even to purchasers in good faith.

Id. at 16-17 (emphasis added); accord *United States v. 1960 Bags of Coffee*, 12 U.S. (8 Cranch) 398, 405 (1814) ("[T]he commission of the offence marks the point of time on which the statutory transfer of right takes place."); *Gelston v. Hoyt*, 16 U.S. (3 Wheat.) 246, 311 (1818) ("[F]orfeiture . . . attach[es] at the moment of the commission of the offence, and . . . from that moment, the title of plaintiff would be completely divested . . ."). But see *United States v. Grundy and Thornburgh*, 7 U.S. (3 Cranch) 337, 350-51 (1806) ("at common law, *nothing vests* . . . until some legal step shall be taken . . . after which . . . the doctrine of relation carries back the title to the commission of the offense . . .") (emphasis added).

⁴⁴ See, e.g., *United States v. One 1983 Mercedes Benz 380SL*, No. 89-3123, 1991 WL 276262, at *5 (6th Cir. Dec. 20, 1991) ("[W]e hold that one who claims to be a subsequent bonafide purchaser for value and without notice has standing to assert the innocent owner defense under 21 U.S.C. [§] 881(a)(4)(C)."; see also *United States v. 92 Buena Vista Ave.*, 738 F. Supp. 854, 861 (D.N.J. 1990), *aff'd*, 937 F.2d 98 (3d Cir. 1991), *aff'd*, 113 S. Ct. 1126 (1993) (citation omitted) (noting that "it is a traditional rule of law that those who do not have legal title to property cannot validly transfer it to others, and certain exceptions to this rule apply only where the transferee is a bona fide purchaser for value").

before a judicial decree.⁴⁵

*Eggleston v. Colorado*⁴⁶ typifies those courts that have read § 881(h) to the exclusion of § 881(a)(6).⁴⁷ In *Eggleston*, officials seized drug proceeds, in the form of \$1.5 million in cash and twelve ounces of gold, from the home of Albert Levy.⁴⁸ Thereafter, the Colorado Department of Revenue (the Department) claimed entitlement to the sales tax owed by Levy as a result of his drug transactions.⁴⁹ Citing Colorado law,⁵⁰ the Department asserted that Levy never actually owned the sales tax proceeds but, rather, that he held the funds as the state's trustee.⁵¹ On this basis, the Department characterized itself as an innocent owner of the sales tax portion of the proceeds under § 881(a)(6).⁵²

⁴⁵ See *United States v. 92 Buena Vista Ave.*, 937 F.2d 98, 102 (3d Cir. 1991), *aff'd*, 113 S. Ct. 1126 (1993) (holding that § 881(h) does not pertain to property exempted from forfeiture by the innocent owner defense).

⁴⁶ 873 F.2d 242 (10th Cir. 1989).

⁴⁷ See *id.* at 248 (citations omitted) ("The innocent owner exception applies only to owners whose interest vests prior to the date of the illegal act that forms the basis of the forfeiture."); see also *United States v. \$41,305*, 802 F.2d 1339, 1346 (11th Cir. 1986) (citation omitted) ("Illegal use immediately vests title to the property in the sovereign, and cuts off the rights of third parties to obtain legally protectible interests in the property."); *In re Lot 8, Block 4 of Summit Hills*, 763 F. Supp. 150, 151 (W.D.N.C. 1991) ("Even the innocent owner of property cannot obtain an interest in property if the illegal acts which subject the property to forfeiture occurred prior to the innocent owner obtaining his interest."); *United States v. Sixth Dist. & Third Section of Gordon County*, 762 F. Supp. 1479, 1483 (N.D. Ga. 1991) ("[An innocent owner's interest] must predate the right of forfeiture asserted by the United States."); *United States v. 5854 N. Kenmore*, 762 F. Supp. 204, 208 (N.D. Ill. 1991) (quoting *In re One 1985 Nissan 300ZX*, 889 F.2d 1317, 1317 (4th Cir. 1989) ("[N]o third party can acquire a legally valid interest in the property forfeited from anyone other than the government after the illegal act takes place."); *United States v. 127 Shares of Stock in Paradigm Mfg., Inc.*, 758 F. Supp. 581, 584 (E.D. Cal. 1990) ("Under the 'relation back' doctrine codified at 21 U.S.C. § 881(h), the property is forfeit as of the time of the illegal act giving rise to the forfeiture.").

⁴⁸ *Eggleston*, 873 F.2d at 243 (citation omitted). Following the seizure, a number of parties asserted an interest in the seized property. *Id.* (citation omitted).

⁴⁹ *Id.* at 244 (citations omitted).

⁵⁰ *Id.* at 247. The relevant Colorado statute provides, in pertinent part, that "sums of money paid by the purchaser to the retailer as taxes . . . remain . . . the property of the state of Colorado, in the hands of such retailer, and he shall hold the same in trust . . ." COLO. REV. STAT. ANN. § 39-26-118(1) (West 1990).

⁵¹ *Eggleston*, 873 F.2d at 247. The Department relied on a Colorado statute that states:

[a]ll sums of money paid by the purchaser to the retailer as taxes imposed by this article shall be and remain public money, the property of the state of Colorado, in the hands of such retailer, and he shall hold the same in trust for the sole use and benefit of the state of Colorado until paid to the executive director of the department of revenue . . .

Id. at 247 (quoting COLO. REV. STAT. ANN. § 39-26-118 (West 1990)).

⁵² *Id.* at 247-48.

Writing for the Tenth Circuit, Judge Tachta rejected the Department's claim and explained that the Department's interest in the sales tax arose after the illegal acts transpired.⁵³ The United States's interest in the funds, the judge contrasted, vested at the moment the drug purchaser intended to relinquish those funds for drugs.⁵⁴ Judge Tachta concluded that the relation back of the United States's interest, pursuant to § 881(h), prevented the Department from asserting an innocent owner defense.⁵⁵

Temporally and substantively akin to the Tenth Circuit's opinion in *Eggleston* is the Fourth Circuit's decision in *In re One 1985 Nissan 300ZX*.⁵⁶ In that case, an investigation into the murder of alleged drug trafficker Dennis White led Maryland authorities to seize sundry property believed to be the spoils of his drug transactions.⁵⁷ White's heirs contested the forfeiture, claiming to qualify as innocent owners under § 881(a)(6).⁵⁸

Judge Widender, writing for the court, steadfastly rejected the heirs' claim.⁵⁹ Attempting to reconcile §§ 881(a)(6) and 881(h), the court firmly announced that "relation back" necessarily limits innocent owners to those whose interests in the seized property pre-date the illegal act.⁶⁰ According to the court, subsequent tak-

⁵³ *Id.* The court noted that the payments referred to in the Colorado tax code do not become the property of the Department until the purchaser actually gives value to the retailer. *Id.* (quoting COLO. REV. STAT. ANN. § 39-26-118(1) (West 1990)).

⁵⁴ *Id.* (quoting 21 U.S.C. § 881(a)(6) (1988)). The court selectively quoted from § 881(a)(6), stressing that the forfeiture "applies to '[a]ll moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance.'" *Id.* (quoting 21 U.S.C. § 881(a)(6) (1988)).

⁵⁵ *Id.* The court noted that the Department could not qualify as an innocent owner because title to the drug proceeds vested in the federal government before the state held an ownership interest. *Id.* In support of this proposition, the court stated that "[t]he innocent owner exception applies only to owners whose interest vests prior to the date of the illegal act that forms the basis for the forfeiture." *Id.* (citations omitted).

⁵⁶ 889 F.2d 1317 (4th Cir. 1989). Like the Tenth Circuit in *Eggleston*, the Fourth Circuit in *In re One 1985 Nissan* held that the innocent owner defense of § 881(a)(6) does not apply to property interests that arise after an illegal act occurs. *Id.* at 1320; *Eggleston*, 873 F.2d at 248.

⁵⁷ *One 1985 Nissan*, 889 F.2d at 1318.

⁵⁸ *Id.* at 1318-19. White's heirs also claimed that due to the penal nature of § 881(a)(6), civil forfeiture under that provision should abate upon the wrongdoer's death. *Id.* at 1319. The Fourth Circuit rejected this contention, stating that Congress intended § 881 to primarily serve remedial purposes. *Id.*

⁵⁹ *Id.* at 1320.

⁶⁰ *Id.* The court opined that, pursuant to the relation back doctrine, "no third party can acquire a legally valid interest in the property forfeited from anyone other than the government after the illegal act takes place. . . . [U]nless a claimant has a claim to the property forfeited which existed prior to the time the acts take place

ers could not become owners, regardless of their innocence.⁶¹

While conceding that an illegal act generally invalidates subsequent transfers, some courts have exempted from this rule those transfers made to individuals qualifying as bona fide purchasers for value.⁶² *United States v. One 1983 Mercedes Benz 380SL*⁶³ exemplifies this sentiment.⁶⁴ In *One 1983 Mercedes Benz*, the Sixth Circuit addressed the forfeiture, pursuant to 21 U.S.C. § 881(a)(4),⁶⁵ of an automobile used to transport cocaine.⁶⁶ The lessor of the vehicle asserted innocent ownership under § 881(a)(4)(C).⁶⁷

The court attempted to reconcile that innocent owner provision with the relation back provision in § 881(h).⁶⁸ Due to the sparse legislative history of § 881(a)(4)(C), the court analogized to the history of § 881(a)(6).⁶⁹ As a result of its analysis, the Sixth

which bring on the forfeiture, then the innocent owner provision of the statute has no application." *Id.*

In its analysis, the Fourth Circuit relied upon its holding in *In re Metmor Financial, Inc.*, 819 F.2d 446, 451 (4th Cir. 1987), in which the court held that the United States could not obtain through forfeiture a superior interest in property to that of a third party whose interest arose prior to the acts giving rise to forfeiture. *One 1985 Nissan*, 889 F.2d at 1326. Although the *Metmor* court did not specifically consider the third party's innocent owner status, the Fourth Circuit explained, the reasoning of *Metmor* extends to the application of the innocent owner provision of § 881(a)(6). *Id.* Thus, the court concluded, after the illegal act occurs, a third party cannot acquire a valid interest in forfeited property from any party other than the United States. *Id.*

⁶¹ *Id.* The Fourth Circuit noted that its reasoning in *One 1985 Nissan* was fortified by the Supreme Court's reasoning in *Caplin & Drysdale v. United States*, 491 U.S. 617 (1989). *One 1985 Nissan*, 889 F.2d at 1320. In *Caplin & Drysdale*, Judge Widener explained, the Supreme Court held that the forfeiture provisions of 21 U.S.C. § 853(a) were valid. *Id.* at 1321. The Court, the judge continued, based its argument on the doctrine of relation back and noted that subsequent dealings of the possessor cannot defeat the interests of the United States that vest through forfeiture. *Id.* (quoting *Caplin & Drysdale*, 491 U.S. at 627 (quoting *United States v. Stowell*, 113 U.S. 1, 19 (1890))).

⁶² See, e.g., *United States v. 2901 S.W. 118th Court*, 683 F. Supp. 783, 788 (S.D. Fla. 1988) ("[T]he innocent owner exception to forfeiture under section 881 also protects bona fide purchasers for value.").

⁶³ No. 89-3123, 1991 WL 276262 (6th Cir. Dec. 20, 1991).

⁶⁴ See *id.* at *5 ("[O]ne who claims to be a subsequent bona fide purchaser for value and without notice has standing to assert the innocent owner defense . . .").

⁶⁵ For the text of § 881 (a)(4), see *supra* note 4.

⁶⁶ *One 1983 Mercedes Benz*, 1991 WL 276262 at *1.

⁶⁷ *Id.* See *supra* note 4 for the text of § 881(a)(4)(C).

⁶⁸ See *One 1983 Mercedes*, 1991 WL 276262, at *3-5.

⁶⁹ *Id.* at *3 (citations omitted). With regard to the legislative history of § 881(a)(6) the court quoted Senator Nunn, who announced that prior to the addition of § 881(a)(6) the statute could have been construed to reach innocent parties. *Id.* at *4 (citation omitted). Senator Nunn further stated, the court noted, that "[Congress] did add a provision . . . to make it clear that [in the case of] a bona fide party who had no knowledge or consent to the property he owns having been derived from an illegal transaction . . . forfeiture would not occur." *Id.* (citation omitted).

Circuit concluded that the retroactive vesting of § 881(h) did not operate to the detriment of innocent purchasers *for value* under § 881(a)(6).⁷⁰

In *United States v. 298 Northwest Forty-Fifth Street*,⁷¹ the District Court for the Southern District of Florida duplicated the Sixth Circuit's reasoning and achieved a similar outcome.⁷² In *298 Northwest Forty-Fifth Street*, Peter Boschian sold narcotics from a home that he purchased in the name of his mother, Virginia Boschian.⁷³ Following the government's seizure of the residence, Virginia Boschian protested, claiming that she qualified as an innocent owner.⁷⁴

The district court rejected Mrs. Boschian's defense, noting that only a bona fide purchaser can deprive the government of forfeit title.⁷⁵ Because ownership of the home had passed without consideration, the court concluded that Mrs. Boschians had acquired the status of donee, rather than bona fide purchaser.⁷⁶ Thus, the district court opined, the forfeiture provision of § 881(h) operated undisturbed, thereby vesting title in the United States.⁷⁷

Rather than adhering to one of the aforementioned approaches, the Third Circuit, in *United States v. 92 Buena Vista Avenue*,⁷⁸ proposed a view of its own.⁷⁹ The Court observed that

⁷⁰ *Id.* at *5. The court explained that "[§ 881(h)] . . . was obviously not intended to operate in derogation of the rights of innocent purchasers under either paragraph 6 or 7." *Id.* at *4.

⁷¹ 804 F. Supp. 319 (S.D. Fla. 1992).

⁷² *See id.* at 325 ("This Court agrees with the Sixth Circuit's holding which clearly states 'that one who claims to be a subsequent bona fide purchaser for value and without notice has standing to assert the innocent owner defense . . .'" *Id.* (quoting *One 1983 Mercedes Benz*, 1991 WL 276262 at *5).

⁷³ *Id.* at 324. At trial, Boschian testified that he transferred the title of the property to his mother in order to manipulate both her and the system. *Id.*

⁷⁴ *Id.* at 326.

⁷⁵ *Id.* at 325-26. The court noted that "[a]ccording to the Uniform Commercial Code, to qualify as a bona fide purchaser, there needs to be an exchange for value. The U.C.C. defines value broadly, therefore, almost any purchaser will give value, with the notable exception of a donee." *Id.* (citations omitted). The court then concluded that Mrs. Boschian was merely a donee. *Id.* at 326. Mrs. Boschian admitted that she did not exchange value in return for the property, the court explained, and claimed that the funds she received from her son constituted a loan. *Id.* The court rejected Mrs. Boschian's claim, observing that other testimony in the case was inconsistent with her assertion that the contribution was a loan. *Id.*

⁷⁶ *Id.*

⁷⁷ *See id.* Because Mrs. Boschian was not a bona fide purchaser for value, the court concluded, she was not entitled to contest the forfeiture of the property. *Id.*

⁷⁸ 937 F.2d 98 (3d Cir. 1991), *aff'd*, 113 S. Ct. 1126 (1993). *See supra* notes 32-34 and accompanying text for additional discussion on the Third Circuit's decision in *92 Buena Vista Avenue*.

⁷⁹ *92 Buena Vista Ave.*, 937 F.2d at 101-02. First, the Third Circuit specifically refuted the bona fide purchaser approach posited by district court. *Id.* at 101, 102. The

§ 881(h) only vests in the government title to property *described in subsection (a)*.⁸⁰ Subsection (a), the court added, specifically excludes from forfeiture property owned by innocent parties.⁸¹ As such, the Court reasoned, property held by innocent persons is not among property *described in subsection (a)*. Therefore, the Court concluded, subsection (h) cannot vest title to such property in the government.⁸²

Confronted with this competing case law, the United States Supreme Court decided *United States v. 92 Buena Vista Avenue*.⁸³ Responding to whether a donee of drug proceeds who uses those proceeds to purchase real property may assert an innocent owner defense,⁸⁴ the Court embraced the inclusionary approach pioneered by the Third Circuit.⁸⁵

Writing for the plurality,⁸⁶ Justice Stevens expounded briefly on the historical foundations of modern forfeiture law⁸⁷ and distinguished between the modern civil forfeiture statute and its prede-

court stated that limiting the definition of "owner" to bona fide purchasers would "contravene the express legislative intent that we interpret 'owner' broadly." *Id.*

⁸⁰ *Id.* For the text of 21 U.S.C. § 881(a), see *supra* note 4.

⁸¹ *92 Buena Vista Ave.*, 937 F.2d at 102. See *supra* note 4 for the text of subsection (a) of § 881.

The court concluded that despite her status as a donee, Goodwin qualified as an innocent owner. *92 Buena Vista Ave.*, 937 F.2d at 102. The Third Circuit observed that "the innocent owner provision . . . in no way limits the term 'owner' to a bona fide purchaser for value. Furthermore, in *United States v. Parcel of Real Property Known as 6109 Grubb Road* . . . we determined . . . that . . . the term 'owner' should be broadly interpreted." *Id.* at 101-02 (citing *United States v. 6109 Grubb Rd.*, 886 F.2d 618, 625 n.4 (3d Cir. 1989)). In *6109 Grubb Road* the Third Circuit examined innocent ownership in the context of 21 U.S.C. § 881(a)(7), but had occasion to analyze and comment on § 881(a)(6) as well. *6109 Grubb Rd.*, 886 F.2d at 625. After reviewing the statute's legislative history, the court endorsed an interpretation of "owner" which embraced any person with a legitimate legal or equitable interest in the property in question. *Id.* at 625 n.4 (citation omitted). Claiming adherence to its prior interpretation of "owner," the Third Circuit in *92 Buena Vista Ave.* extended innocent owner protection to donees. *92 Buena Vista Ave.*, 937 F.2d at 102.

⁸² *92 Buena Vista Ave.*, 937 F.2d at 102. On this point, the court observed that "one must first ascertain whether the property at issue is not forfeitable because of an innocent owner defense before applying section 881(h)." *Id.* The Third Circuit further noted that interpreting § 881(h) to preclude all claims by subsequent owners would emasculate § 881(a)(6)'s innocent owner defense. *Id.*

⁸³ 113 S. Ct. 1126 (1993).

⁸⁴ *Id.* at 1129.

⁸⁵ See *id.* at 1134 ("The Court of Appeals correctly concluded that the protection afforded to innocent owners is not limited to bona fide purchasers.").

⁸⁶ *Id.* at 1129. The plurality consisted of Justices Stevens, Blackmun, O'Connor, and Souter. *Id.*

⁸⁷ *Id.* at 1131-33 (citations omitted). See *supra* note 2 for a discussion of the historical underpinnings of modern forfeiture law.

cessors.⁸⁸ Thereafter, Justice Stevens succinctly delivered the plurality's rendition of the term "owner," asserting that its scope was not limited to bona fide purchasers for value.⁸⁹ Adhering to the Third Circuit's broad construction of § 881(a)(6),⁹⁰ the Justice observed that Congress had used the word "owner" three times in § 881(a)(6) and each time had conspicuously refrained from modifying it.⁹¹ Thus, the plurality opined, no concrete basis existed for a finding that the legislature intended to distinguish between donees and bona fide purchasers.⁹²

Justice Stevens next dispensed with the government's contention that the common law and statutory principles of relation back precluded a donee from acquiring title to real property purchased with drug proceeds.⁹³ Although questioning its applicability,⁹⁴ the Justice addressed the government's use of the common law relation back doctrine.⁹⁵ Justice Stevens challenged the government's view that the vesting of title in the United States occurs immediately upon the occurrence of the event giving rise to forfeiture, asserting instead that vesting requires definitive steps on the part of the United States.⁹⁶ The Justice advanced that, as an exigency to

⁸⁸ 92 *Buena Vista Ave.*, 113 S. Ct. at 1133-34. Justice Stevens observed that, prior to the 1978 amendment, 21 U.S.C. § 881 so resembled the early forfeiture statutes that reference to case law interpreting those initial statutes had been profitable. *See id.* The Justice cautioned, however, that since the 1984 amendments to § 881, which added provisions allowing for the forfeiture of proceeds and the protection of innocent owners, the common law had become somewhat inadequate and so should be employed discretely. *Id.* at 1134.

⁸⁹ *Id.* After embarking on an explanation of why the term "owner" extends beyond bona fide purchasers for value, the court acknowledged that the government's argument rested not on an interpretation of the term "owner," but rather on an application of the relation back doctrine. *Id.*

⁹⁰ *See United States v. 92 Buena Vista Ave.*, 937 F.2d 98, 102 (3d Cir. 1991), *aff'd*, 113 S. Ct. 1126 (1993) (holding that one "need not be a bona fide purchaser for value to raise an innocent owner defense").

⁹¹ 92 *Buena Vista Ave.*, 113 S. Ct. at 1134. Directing attention to the word "owner" in 21 U.S.C. § 881(a)(6), the Court commented that "[s]uch language is sufficiently unambiguous to foreclose any contention that it applies only to bona fide purchasers." *Id.*

⁹² *Id.*

⁹³ *Id.* at 1137.

⁹⁴ *Id.* at 1135. The Court noted that the common law doctrine of relation back traditionally applied to forfeitures of property actually used to commit a crime. *Id.* (citing *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 680-84 (1974)). On this basis, the Court noted "[b]ecause we are not aware of any common-law precedent for treating proceeds traceable to an unlawful exchange as a fictional wrongdoer subject to forfeiture, it is not entirely clear that the common-law relation back doctrine is applicable." *Id.*

⁹⁵ *Id.* at 1135-37 (citations omitted).

⁹⁶ *Id.* at 1136. In support of its position, the Court quoted Chief Justice Marshall's

vesting, the government must first obtain a judgment in its favor.⁹⁷ A valid judgment, the Justice continued, carries the government's title back to the moment of the illegal event.⁹⁸ In the interim (the period after the illegal event and before a judgment in the government's favor), the Court concluded, persons acquiring innocent ownership in the property, even if by gift, may defeat the forfeiture.⁹⁹

After distinguishing between the common law doctrine and the amended § 881,¹⁰⁰ Justice Stevens scrutinized the language of §§ 881(a)(6) and 881(h).¹⁰¹ Rejecting the government's argument that § 881(h) prevents proceeds of illegal transactions from vesting in any party but the government, the Justice offered his impression of the interplay between the two sections.¹⁰² The Justice first observed that § 881(a)(6) exempts from forfeiture those proceeds belonging to innocent owners.¹⁰³ The Justice next read § 881(h) as operating to vest title in the United States only in property "forfeitable" under § 881(a).¹⁰⁴ Property owned by innocent parties, the Justice concluded, is not forfeitable under § 881(a)(6) and therefore cannot be affected by § 881(h).¹⁰⁵ With regard to property exempt from forfeiture under § 881(a)(6), Justice Stevens reasoned, § 881(h) is moot.¹⁰⁶

Before closing, the Court declined to address the issue of whether, to qualify as an innocent owner, a transferee must be unaware of the illegal act giving rise to the forfeiture at the time the act

opinion in *United States v. Grundy*, where the Chief Justice asserted that the government must take legal steps before title to property subject to forfeiture vests in the United States. *Id.* at 1135 (quoting *United States v. Grundy & Thornburgh*, 7 U.S. (3 Cranch) 337, 350-51 (1806)).

⁹⁷ *Id.* at 1136.

⁹⁸ *Id.*

⁹⁹ *Id.* On this point, the Court posited that "[u]ntil the government . . . win[s] such a judgement . . . someone else owns the property . . . [and] may therefore invoke any defense available to the owner of the property before the forfeiture is decreed." *Id.*

¹⁰⁰ *Id.* Justice Stevens noted that Congress had codified the common law rule of relation back, but cautioned that "[b]ecause . . . [the common law] rule was never applied to the forfeiture of proceeds, and because the statute now contains an innocent owner defense, it may not be immediately clear that they lead to the same result." *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* at 1136-37.

¹⁰³ *Id.* at 1136.

¹⁰⁴ *Id.* In defense of this proposition, the Justice refers to the Senate Report from the 1984 amendment which states that § 881(h) relates "only to 'property which is subject to civil forfeiture under section 881(a).'" *Id.* (citation omitted).

¹⁰⁵ *Id.* at 1136-37.

¹⁰⁶ *Id.* at 1137. On this point the Justice remarked that "§ 881(a)(6) must allow an assertion of the [innocent owner] defense *before* § 881(h) applies." *Id.*

occurs *or* at the time of receipt of the property.¹⁰⁷ Referring to the respondent's brief, the Justice merely noted that the respondent had assumed the burden of proving the latter proposition.¹⁰⁸

Concurring in the judgement, Justice Scalia, joined by Justice Thomas, began with an assault on the government's view of the common law relation back doctrine.¹⁰⁹ Restating the plurality's impression of the common law, Justice Scalia stressed that vesting transpires only upon the entry of a judgement in the government's favor.¹¹⁰ The Justice then added that Congress had codified this common law rule when it promulgated 21 U.S.C. 881(h).¹¹¹

The concurrence and the plurality then parted company as Justice Scalia criticized Justice Stevens's impression of the relationship between §§ 881(a)(6) and 881(h).¹¹² The plurality, observed Justice Scalia, held that a donee's interest that is acquired after the illegal event is not invalidated by retroactive vesting.¹¹³ The Justice noted that the plurality premised this conclusion on its belief that § 881(h) affects only "forfeitable" property.¹¹⁴ Scrutinizing the statute's plain language, Justice Scalia asserted that § 881(h) encompasses all property "described" in subsection (a), not merely all property "forfeitable" under that section.¹¹⁵ Subscribing to the government's theory, the concurring Justice opined that property

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 1137-38. On this issue, the respondent's brief provided:

The statute should be read to require that the owner assert his lack of knowledge of the criminal transaction at the time of the transfer. Since Goodwin did not have any knowledge of the alleged criminal transaction until long after the transfer, she should be protected by the innocent owner defense.

Id. at 1138 n.25 (citation omitted).

¹⁰⁹ *Id.* at 1138-42 (citations omitted) (Scalia, J., concurring). Regarding the government's view on the common law relation back doctrine, Justice Scalia chided, "[b]ecause the Government believes that the doctrine operates at the time of the illegal act, it finds the term 'relation back' to be 'something of a misnomer.' But the name of the doctrine is not wrong; the Government's understanding of it is." *Id.* at 1138 (citation omitted).

¹¹⁰ *Id.* The concurrence noted that this explication of § 881(h) makes sense within the scheme of statutory forfeiture procedures. *Id.* at 1140 (Scalia, J., concurring). It is clear from the procedures governing § 881, Justice Scalia asserted, that the United States cannot gain title to forfeited property until a decree of forfeiture is made. *Id.* The Justice further observed that "if . . . legal title to the property actually vested in the United States at the time of the illegal act, judicial forfeiture proceedings would never be 'necessary.'" *Id.*

¹¹¹ *Id.* at 1139 (Scalia, J., concurring).

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

held by innocent owners remains among the property "described" in § 881(a).¹¹⁶ Because vesting occurs at the time of judgment and not at the time of the illegal event, Justice Scalia distinguished, § 881(h) has no effect on pre-judgment transfers.¹¹⁷ Reuniting with the plurality, the concurrence concluded that, if in fact the donee had innocently acquired the property, section (h) could not operate to divest her.¹¹⁸

Finally, Justice Scalia rebuked the plurality for its failure to answer the question of whether an "innocent" owner is a person who has no knowledge of the illegal event when the event occurs or instead, is a person who had no knowledge of the illegal event when she receives the proceeds of that event.¹¹⁹ Unlike the plurality, the concurrence deemed the respondent's brief indeterminate on the issue.¹²⁰ Despite the respondent's adoption of the second alternative, the concurring Justice deemed premature the plurality's decision to estop the respondent from changing that position.¹²¹

Justice Kennedy, joined by Chief Justice Rehnquist and Justice White, launched the dissent, a methodical offensive on the logic of the reasoning of Justices Stevens and Scalia.¹²² Justice Kennedy opined that the plurality and concurrence had improvidently focused their arguments on the donee when, in fact, the donor had pre-determined the donee's ownership rights.¹²³ While in the donor's possession, the Justice observed, the proceeds unquestionably constituted "property subject to forfeiture" under § 881(a).¹²⁴ As

¹¹⁶ *Id.* Justice Scalia admitted that the concurrence's interpretation of § 881(h) did not coincide precisely with the statutory language. *Id.* at 1140 (Scalia, J., concurring). The Justice observed that the statute demands that "title shall vest in the United States upon commission of the act giving rise to the forfeiture," while the concurrence reads it to say that title "shall vest in the United States upon forfeiture, effective as of the commission of the act giving rise to forfeiture." *Id.* Justice Scalia claimed that the imprecision was forgivable. *Id.* (citations omitted).

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 1140.

¹¹⁹ *Id.* at 1142 (Scalia, J., concurring).

¹²⁰ *Id.*

¹²¹ *Id.* Justice Scalia noted that the question of whether the respondent should be estopped from changing those positions was not ripe for consideration because (1) petitioner had not yet attempted such a change, and (2) the issue was not properly before the court. *Id.*

¹²² *Id.* at 1143-46 (Kennedy, J., dissenting) (citations omitted).

¹²³ *Id.* at 1143 (Kennedy, J., dissenting). In this regard, Justice Kennedy advanced that "the threshold and dispositive inquiry is whether the donee had any ownership rights that required a separate forfeiture, given that her title was defective and subject to the Government's claim from the outset." *Id.*

¹²⁴ *Id.* The dissent remarked that "[t]he dealer did not just know of the illegal acts;

such, the Justice averred, the donor's title became defective or "voidable" prior to the transfer¹²⁵ under well-established principles of commercial and property law.¹²⁶

Identifying and then applying the rules of voidable title,¹²⁷ Jus-

he performed them." *Id.* As long as the wrongdoer possessed the illegal asset, Justice Kennedy asserted, the property was subject to forfeiture. *Id.*

¹²⁵ *Id.* at 1144 (Kennedy, J., dissenting). For a critique of Justice Kennedy's reasoning, see Moshe Heching, Recent Development, 16 HARV. J.L. & PUB. POL'Y 835, 844-48 (1993) (citations omitted). Heching opines that Justice Kennedy's interpretation of § 881(a)(6), while "comport[ing] with 'settled principles of property transfers, trusts and commercial transactions' . . . slights the design of the legislature in enacting the innocent owner defense—to protect the rights of parties who are at most peripherally related, and usually entirely unrelated, to the drug crimes in question." *Id.* at 845 (citation omitted).

¹²⁶ 92 Buena Vista Ave., 113 S. Ct. at 1144 (Kennedy, J., dissenting). The Justice utilized the Restatement of Trusts, the Restatement of Property, and the Uniform Commercial Code as support for the dissent's "voidable title" theory. *Id.*

With regard to bona fide purchasers, the Restatement of Trusts states:

If the trustee in breach of trust transfers trust property to, or creates a legal interest in the subject matter of the trust in, a person who takes for value and without notice of the breach of trust, and who is not knowingly taking part in an illegal transaction, the latter holds the interest so transferred or created free of the trust, and is under no liability to the beneficiary.

RESTATEMENT (SECOND) OF TRUSTS § 284 (1959). The restatement further explains that "[i]f the trustee in breach of trust transfers the property to a person who is not a bona fide purchaser and the transferee transfers the property to a bona fide purchaser, the latter takes the property free of the trust." *Id.* at § 287. Finally, with regard to donees, the Restatement indicates that "[i]f the trustee in breach of trust transfers trust property and no value is given for the transfer, the transferee does not hold the property free of the trust, although he had no notice of the trust." *Id.* at 289.

On the topic of bona fide purchasers, the Restatement of Property states:

If the conduct of a donee of a donative transfer causes another person reasonably to conclude that the donor owns the subject matter of the donative transfer and such person acting in good faith purchases for a fair and adequate consideration from the donor the subject matter of the donative transfer, such bona fide purchaser from the donor is entitled to the subject matter of the donative transfer as against the donee. The donee is entitled to receive from the donor the value of the subject matter of the donative transfer.

RESTATEMENT (SECOND) OF PROPERTY § 34.9 (1992).

¹²⁷ 92 Buena Vista Ave., 113 S. Ct. at 1144 (Kennedy, J., dissenting). The Justice explained:

The primary rules of voidable title are manageable and few in number. The first is that one who purchases property in good faith and for value from the holder of voidable title obtains good title. The second rule, reciprocal to the first, is that one who acquires property from a holder of voidable title other than by a good faith purchase for value obtains nothing beyond what the transferor held. The third rule is that a transferee who acquires property from a good faith purchaser for value or one of his lawful successors obtains good title, even if the transferee did not pay value or act in good faith.

Id. (citations omitted).

tice Kennedy explained that a donee can acquire no better title than that of her benefactor.¹²⁸ Therefore, the Justice noted, a donee obtains an inherently flawed interest in illegal proceeds, regardless of her innocence.¹²⁹ Only a bona fide purchaser for value, the dissent added, can purify tainted or voidable title and make it unassailable by the government.¹³⁰ In the case at bar, Justice Kennedy concluded, the recipient of the proceeds had passed no consideration and, therefore, had not earned the status or privilege accompanying a bona fide purchase.¹³¹

Justice Kennedy next demonstrated the plurality opinion's debilitating effect on forfeiture's objective of diminishing the economic might of drug traffickers.¹³² The Justice first defended that limiting the innocent owner exception to bona fide purchasers still accomplishes the aforementioned goal.¹³³ In the context of a bona fide purchase, the Justice reasoned, the criminal exchanges the proceeds for something he deems their equivalent in value.¹³⁴ The product of this latter transaction, the Justice proceeded, may in turn be confiscated by the government, thereby vicariously depriving the criminal of the proceeds of his illegal acts.¹³⁵

This strategy, the dissent continued, obviously fails in the context of a donative transfer.¹³⁶ Where a criminal has gifted the proceeds, Justice Kennedy cautioned, the criminal has acquired nothing tangible as a substitute for the proceeds.¹³⁷ Instead, the dissent deduced, the criminal has transferred the proceeds either to favor the donee or to shield the proceeds so that they may be re-acquired at a later date.¹³⁸ In either event, Justice Kennedy admonished, by stripping the donee of the proceeds, the government

¹²⁸ *Id.* (citations omitted).

¹²⁹ *Id.* The dissent noted that the donee of illicit proceeds "has no valid claim to the proceeds, not because she has done anything wrong but because she stands in the shoes of one who has." *Id.*

¹³⁰ *Id.*

¹³¹ *Id.* at 1143 (Kennedy, J., dissenting). Regarding consideration, the dissent added that the question of whether Goodwin's marital rights constituted value could be explored on remand. *Id.* at 1145 (Kennedy, J., dissenting).

¹³² *Id.* (citation omitted). Justice Kennedy noted that "the plurality's opinion leaves the forfeiture scheme that is the centerpiece of the Nation's drug enforcement laws in quite a mess." *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.* The Justice commented that "[i]n [donative transfer] cases, the criminal's economic power cannot be diminished by seizing what he received in the . . . exchange, for he received no tangible value." *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

deprives the criminal of the value of his illicit activities.¹³⁹ By not allowing the government to pierce the donative veil, the Justice concluded, the plurality effectively allows criminals to savor, directly or indirectly, their ill-gotten gains.¹⁴⁰

At first glance, the Court's attempt to rescue the "innocent owner" exception from the government's exclusionary ax appears valiant.¹⁴¹ Upon closer examination, however, it becomes evident that the Court's inclusionary position inflicts equal injury, taking as its victim the "relation back" amendment. The government's rendition of §§ 881(h) and 881(a)(6) admittedly works a disservice to the latter provision; so much so that even the government appears to doubt that its initial reading of the provisions is entirely tenable.¹⁴² Without doubt, the government's exclusionary interpretation of § 881(h) eviscerates the innocent owner provision in § 881(a)(6) as it applies to proceeds. The logic supporting this criticism is simple: any transfer involving the proceeds of an illegal transaction necessarily post-dates the illegal transaction giving rise to those proceeds. The government's uncharitable reading of the relation back provision, therefore, begets an implausible corollary—that Congress created a worthless defense in § 881(a)(6).¹⁴³

In its zeal to defend the "innocent owner" provision of § 881(a)(6), the Court commits some tactical errors of its own; these errors claim as a casualty the relation back provision of § 881(h). Analyzing the common law¹⁴⁴ as well as the statute, the

¹³⁹ *Id.*

¹⁴⁰ *Id.*; see Heching, *supra* note 125, at 844 ("In Justice Kennedy's eyes, by allowing a donee the benefit of the innocent owner defense, the plurality afforded drug offenders a new avenue to 'wash' their ill-gotten gains and elude the civil forfeiture laws.").

¹⁴¹ See Brief for the United States at 14, *United States v. 92 Buena Vista Ave.*, 113 S. Ct. 1126 (1993) (No. 91-781) (stating the United States's position that "[n]o party other than the United States can obtain an ownership interest in property after the events giving rise to civil forfeiture under federal statute.").

¹⁴² *92 Buena Vista Ave.*, 113 S. Ct. at 1135 & n.18 (citation omitted). The Court noted that the government's strict view of the effect of the relation back amendment would "effectively eliminate the innocent owner defense in almost every imaginable case in which proceeds could be forfeited." *Id.* at 1135. Faced with this anomaly, the government, at oral argument, "suggested that a narrow interpretation of the word 'proceeds' would 'probably' prevent this absurdity." *Id.* at 1135 n.18 (citation omitted).

¹⁴³ See *id.* at 1135 ("[T]he Government's submission would effectively eliminate the innocent owner defense in almost every imaginable case in which proceeds could be forfeited.").

¹⁴⁴ The plurality makes selective and damaging use of "relation back" common law; in its haste to establish that retroactive vesting is not "self executing," the Court reproduces a passage from *United States v. Stowell*, which bolsters the government's position more effectively than its own. See *id.* at 1136 (quoting *United States v. Stowell*, 133 U.S. 1, 16-17 (1890)). The language quoted by the *92 Buena Vista Ave.* Court states

plurality concedes that the government's title to forfeit property in fact "relates back" to the time of the prohibited act.¹⁴⁵ The court tempers this position, however, by mandating that the government must "win" a judgment before vesting occurs.¹⁴⁶ Using this requirement as a springboard, the plurality makes an incredible leap in logic: it concludes that all innocent transferees who take prior to the judgment maintain their ownership status despite relation back.¹⁴⁷ The concurring opinion arrives at this same destination, albeit by a different and less circuitous route.¹⁴⁸

Regardless of the means, the contorted end espoused by both the plurality and concurrence flies in the face of both the statute's plain language¹⁴⁹ and its legislative history.¹⁵⁰ At worst, this holding encourages drug dealers to "gift" their illicit wealth to straw persons¹⁵¹ with the intent of subsequent retrieval.¹⁵² At best, the decision amounts to judicial endorsement of charitable money laundering.

that "the forfeiture takes effect immediately upon the commission of the act . . . the condemnation *when obtained*, relates back to that time, and avoids all intermediate sales . . . even to purchasers in good faith." *Id.* (quoting *Stowell*, 133 U.S. at 16-17) (emphasis added).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *See id.*

¹⁴⁸ *See id.* at 1138-42 (Scalia, J., concurring).

¹⁴⁹ *See supra* note 4 (setting forth the relevant text of § 881).

¹⁵⁰ In a Senate Report accompanying the addition of §§ 881(h) and 881(7), Congress noted the following:

The problem of pre-conviction dispositions of property subject to criminal forfeiture is further complicated by the question of whether, simply by transferring an asset to a third party, a defendant may shield it from forfeiture. *In civil forfeitures, such transfers are voidable, for the property is considered "tainted" from the time of its prohibited use or acquisition.*

S. REP. NO. 98-225, 98th Cong., 2d Sess. (1985), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3379 (emphasis added); *see also* Brief for the United States at 4 n.1, *United States v. 92 Buena Vista Ave*, 113 S. Ct. 1126 (1993) (No. 91-781) (citation omitted) (noting that a Joint Explanatory Statement stated that drug proceeds are subject to forfeiture even when they are involved in legitimate transactions).

¹⁵¹ A "straw" is defined as "[a] 'front'; a third party who is put up in name only to take part in a transaction." BLACK'S LAW DICTIONARY 1421 (6th ed. 1990).

¹⁵² In this regard, the government warns:

It is not difficult for even close friends or relatives of a drug dealer to contend . . . that they were unknowing recipients of drug proceeds—and it is difficult to assemble evidence rebutting such a claim. By placing title to drug proceeds in another person, therefore, a drug trafficker can erect a serious obstacle in the way of the government's efforts to obtain forfeiture of assets that are demonstrably traceable to drug transactions.

Brief for the United States at 43, *United States v. 92 Buena Vista Ave*, 113 S. Ct. 1126 (1993) (No. 91-781).

In enacting 21 U.S.C. § 881, Congress clearly and unequivocally announced the statute's intended purpose and effect—to dissuade criminals by depriving them of the "value" of their crimes.¹⁵³ In formulating its holding, the Court dismissed entirely one of the many "values" of money—that it can be given away.¹⁵⁴ Assuming that the criminal legitimately donates the proceeds, and further assuming that the donee is truly "innocent," the modern day "Robin Hood" has nonetheless been enriched by his crime.¹⁵⁵ Sadly enough, this enrichment comes with the Court's inadvertent blessing.

The dissent, recognizing the tragedy of the Court's decree, poses a viable, well reasoned alternative; it proposes limiting the innocent owner defense, as it relates to proceeds, to bona fide purchasers for value.¹⁵⁶ This theory, espoused by several lower courts,¹⁵⁷ enables the relation back amendment to retroactively vest title to all proceeds in the government, excepting only those proceeds transferred to bona fide purchasers.¹⁵⁸ As to those excepted proceeds, however, the government is not entirely without recourse. Rather, the government may seize the secondary proceeds resulting from the bona fide purchase, thereby depriving the criminal of economic gain.

The bona fide purchaser exception represents a compromise between the extreme inclusionary and exclusionary approaches, es-

¹⁵³ See *supra* notes 5, 8, 9, and 12 for legislative history supporting this proposition.

¹⁵⁴ See Brief for the United States at 42, *United States v. 92 Buena Vista Ave.*, 113 S. Ct. 1126 (1993) (No. 91-781) ("Money has value to a drug dealer, like anyone else, in part because it can be given away.").

¹⁵⁵ See *id.* Arguing against the Third Circuit's interpretation of § 881, which re-emerged in the Supreme Court's holding, the government observed that "[the court's] interpretation would allow drug dealers to distribute their wealth to minor children, other unknowing family members, companions, and others with whom they seek to curry favor. . . . [T]hey could even enjoy the use of very valuable property that they have given to their most intimate companions." *Id.*

¹⁵⁶ See *United States v. 92 Buena Vista Ave.*, 113 S. Ct. 1126, 1144 (1993) (Kennedy, J., dissenting).

¹⁵⁷ See *supra* notes 62-77 and accompanying text (discussing the opinions of courts recognizing the bona fide purchaser exception).

¹⁵⁸ At least one commentator has endorsed this position, observing that, because a criminal holds "voidable title" by operation of the relation back doctrine, then by analogy to U.C.C. §2-403, he can pass good title to a good-faith purchaser. If the criminal retains title, or tries to clear title through a sham transaction to someone who is not a good-faith purchaser, then the property will be forfeited. But if a good faith subsequent purchaser acquires the property, then title will not be voided, and the innocent party will be protected.

Mark A. Janowski, Note, *Tempering the Relation Back Doctrine: A More Reasonable Approach to Civil Forfeiture in Drug Cases*, 76 VA. L. REV. 165, 188 (1990) (citation omitted).

poused by the plurality and the government respectively. Unfortunately, the plurality has failed to recognize the bona fide purchaser exception as perhaps the only means by which to give meaningful effect to both the "relation back" doctrine and the "innocent owner" proviso as they apply to illegal proceeds.¹⁵⁹

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¹⁵⁹ For an opposing view, see Heching, *supra* note 125, at 844 ("[T]he court correctly interprets the civil forfeiture statute and its innocent owner defense, providing a critical and indispensable safeguard against the government's overzealousness in enforcing civil forfeitures.").