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The Innocent Owner Defense to Civil Forfeiture Proceedings

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CASENOTES

THE INNOCENT OWNER DEFENSE TO CIVIL FORFEITURE PROCEEDINGS

I. INTRODUCTION

The Constitution of the United States prohibits the deprivation of "life, liberty, or property, without due process of law."[1] The Constitution also expressly states that private property may not be "taken" by the government without "just compensation."[2] Seizures and forfeitures of personal and real property without notification or hearing and without compensation have, however, become a powerful tool used by the government to deter crime.[3]

Both historic common law and modern law distinguish between criminal and civil forfeiture; the former is a proceeding against the person, and the latter is a proceeding brought against property.[4] Upon the occurrence of an act specified by statute, property used in or connected with that act is forfeited.[5] The forfeiture is immediate, "and a conditional right to the

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1. U.S. CONST. amend. XIV, § 1.

2. U.S. CONST. amend. V.

3. *See, e.g.*, Van Oster v. Kansas, 272 U.S. 465, 467-68 (1926); Dobbins's Distillery v. United States, 96 U.S. 395 (1877).

4. In rem jurisdiction is the power to adjudicate claims against property or res. *See generally* 1 ROBERT C. CASAD, JURISDICTION IN CIVIL ACTIONS § 1.01[3] (2d ed. 1991 & Supp. 1996). Personal jurisdiction over the owner of the property is not required for the application of in rem jurisdiction. *See id.* In personam jurisdiction is the power to bind a person or adjudicate an action involving the person. *See generally id.* § 1.01[2].

5. *See* United States v. Eight Rhodesian Stone Statues, 449 F. Supp. 193, 195 n.1 (C.D. Cal. 1978).

property then vests in the government."[6] The property owner does not have to be convicted and is not named as a party to the action.[7] This tool would surely be unconstitutional as applied to the innocent owner if it were not for the courts' continued reliance on the common-law fiction of "guilty property."[8] Under this rationale, the relevant question in a forfeiture proceeding is whether the property, and not the property owner, is guilty or innocent.[9] The guilty property rationale has enabled the courts to look past the constitutional protections traditionally afforded to individuals.[10] Forfeiture of property used in connection with criminal activity serves as a deterrent, and prevents illegal uses of property by preventing further illicit use and imposing economic penalties on the owner.[11] Forfeiture of an innocent owner's property is justified on the basis that the owner may be held accountable for the wrongs of others to whom he entrusts his property.[12] This, in turn, induces innocent owners to exercise greater care in transferring possession of property.[13] When, however, the owner of property has no knowledge and has taken reasonable precautions against the illicit use of his property, the government's objective of deterrence is arguably inapplicable.[14] The innocent owner defense to forfeitures has become an important issue to courts that have struggled with the impact of taking a person's property despite

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6. *Id.*

7. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 683-84 (quoting The Palmyra, 25 U.S. (12 Wheat.) 1, 14-15 (1827)).

8. At common law, there were three kinds of forfeiture recognized: escheat upon attainder, deodand, and statutory forfeiture. Only statutory forfeiture is recognized today. Escheat upon attainder was based upon the premise that the sovereign retained a superior interest in the property. Deodand was premised upon the idea that the property itself, regardless of the conduct of its owner, could be guilty of committing a crime. This is where the concept of guilty property has its roots. *See, e.g.*, Van Oster v. Kansas, 272 U.S. 465 (1926); Goldsmith v. United States, 254 U.S. 505 (1921); The Palmyra, 25 U.S. (12 Wheat.) 1 (1827).

9. At common law, it was recognized that the guilty object was the defendant, and that the property owner's guilt or innocence was not a defense. *See* The Palmyra, 25 U.S. (12 Wheat.) at 14. "The thing is here primarily considered as the offender, or rather the offence is attached primarily to the thing." *Id.*

10. *See Calero-Toledo*, 416 U.S. 663, 687 (1974); Van Oster v. Kansas, 272 U.S. 465 (1926); Dobbins's Distillery v. United States, 96 U.S. 395 (1877).

11. *See Calero-Toledo*, 416 U.S. at 687.

12. *See Dobbins's Distillery*, 96 U.S. at 404.

13. *See Calero-Toledo*, 416 U.S. at 688.

14. *See id.* at 689-90.

guilt or innocence. In 1996 the Supreme Court had the opportunity to re-examine the innocent owner defense to forfeiture proceedings in *Bennis v. Michigan*.[15]

In 1995, Tina Bennis' husband, John, used their jointly owned car to pick up a prostitute in a Detroit suburb.[16] A police officer saw him engaged in a sex act in the car.[17] Mr. Bennis was subsequently arrested and convicted of gross indecency.[18] Michigan sought forfeiture of the car under an abatement statute.[19] Mrs. Bennis unsuccessfully fought the forfeiture of her interest in the car by arguing that she had no knowledge of Mr. Bennis' use of the car to violate Michigan law.[20]

The question before the Supreme Court was "whether Michigan's abatement scheme . . . deprived [Tina Bennis] of her interest in the forfeited car without due process, in violation of the Fourteenth Amendment, or [took] her interest for public use without compensation, in violation of the Fifth Amendment as incorporated by the Fourteenth Amendment."[21]

This casenote examines the Court's rejection of the innocent owner defense in *Bennis v. Michigan,* and the effect its decision will have on the future use of the defense to seizure and forfeiture cases. Part II discusses the historical evolution of the innocent owner defense. Part III discusses the Supreme Court's modern analysis of the innocent owner defense. Part IV introduces the facts and the procedural history of *Bennis* and explains the reasoning of the Court and the dissent. Part V ana-

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15. 116 S. Ct. 994 (1996).

16. *See id.* at 996.

17. *See id.*

18. *See* MICH. COMP. LAWS ANN. § 750.338(b) (West 1991); *Bennis,* 116 S. Ct. at 996.

19. *See* MICH. COMP. LAWS ANN. § 600.3825 (West 1987). The statute provides, in relevant part,

> (1) Order of abatement. If the existence of the nuisance is established in an action as provided in this chapter, an order of abatement shall be entered as a part of the judgment in the case . . . (2) Vehicles, sale. Any vehicle, boat, or aircraft found by the court to be a nuisance within the meaning of this chapter, is subject to the same order and judgment as any furniture, fixtures and contents as herein provided.

Id.

20. *See Bennis,* 116 S. Ct. at 997.

21. *Id.* at 997-98.

lyzes the Court's conclusion that forfeiture of a vehicle, used for illicit purposes without the knowledge of one of the owners, was valid under both the Fourteenth and Fifth Amendments. Part VI concludes by examining the impact this decision will have on the future of the innocent owner defense.

II. THE HISTORICAL DEVELOPMENT OF THE INNOCENT OWNER DEFENSE

A. *Introduction*

Civil forfeiture statutes and the notion of "guilty property" can be historically traced to three types of forfeiture recognized at English common law: escheat upon attainder, deodand and statutory forfeiture.[22] Escheat upon attainder was applied as a criminal penalty in personam; its primary rationale was punishment of property owners who have committed crimes.[23] Under this doctrine, the sovereign had a superior interest in all property; if a person committed a capital offense like treason or a felony, the interest in his property reverted back to the sovereign.[24] The doctrine of deodand was an in rem proceeding, providing that any object which caused the death of a King's subject was forfeited to the Crown.[25] The money gained from the forfeited property was used for prayer services for the decedent.[26] The doctrine of deodand dates to pre-biblical times[27] and was premised on the idea that property could be guilty of a crime despite the owner's guilt or innocence.[28] Unlike escheat upon attainder, the doctrine of deodand was intended to punish the property, not the property owner.[29] Forfeiture by statute

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22. *See* Craig W. Palm, *RICO Forfeiture and the Eighth Amendment: When Is Everything Too Much?*, 53 U. PITT. L. REV. 1, 7-8 (1991).

23. *See id.*

24. *See id.*

25. *See* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 681 (1974).

26. *See id.*

27. *See id; Exodus* 21:28 ("If an ox gores a man or a woman and they die, then the ox shall be stoned and his flesh not eaten; but the owner of the ox shall be quit.").

28. *See* Lawrence A. Kasten, Note, *Extending Constitutional Protection to Civil Forfeitures That Exceed Rough Remedial Compensation*, 60 GEO. WASH. L. REV. 194, 198-99 (1991) (citing 1 WILLIAM BLACKSTONE COMMENTARIES *300-02).

29. *See* Austin v. United States, 509 U.S. 602, 611 (1993) (recognizing that deo-

was essentially a statutory version of deodand.[30] Under this doctrine, a statute provided for the forfeiture of property used in violation of customs and revenue laws.[31] The only requirement was in rem jurisdiction, and like the doctrine of deodand, there was no requirement that the property owner be found guilty of any crime.[32]

Each of these doctrines has contributed to modern forfeiture statutes; however, only statutory forfeiture is still recognized in the United States.[33] The modern notion of guilty property has its roots in these common-law doctrines, specifically forfeiture by statute and its predecessor, the doctrine of deodand.[34] The rationales proposed by each is important when analyzing the innocent owner defense to forfeitures, since the Supreme Court has consistently used these doctrines as a basis for upholding the constitutionality of civil forfeiture statutes.[35]

B. *The Innocent Owner Defense in the United States:* The Palmyra *and* Malek Adhel

The innocent owner defense to forfeiture proceedings in the United States can be traced back to *The Palmyra*[36] and *Harmony v. United States*.[37] In both of these early cases the Supreme Court upheld forfeitures of property despite the property owner's guilt or innocence.[38]

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dand served, at least in part, to punish the negligence of the owner).

30. *See* Robert Lieske, *Civil Forfeiture Law: Replacing The Common Law With A Common Sense Application of the Excessive Fines Clause of the Eighth Amendment*, 21 WM. MITCHELL L. REV. 265, 276 (1993).

31. *See* Marc B. Stahl, *Asset Forfeiture, Burdens of Proof and the War on Drugs*, 83 CRIM. L. & CRIMINOLOGY 274, 295 (1992).

32. *See* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 682 (1974).

33. *See id.* at 682-83.

34. *See, e.g.*, Van Oster v. Kansas, 272 U.S. 465, 468 (1926).

35. *See* Bennis v. Michigan, 116 S.Ct. 994 (1996); Van Oster v. Kansas, 272 U.S. 465 (1926); Dobbins's Distillery v. United States, 96 U.S. 395 (1877).

36. 25 U.S. (12 Wheat.) 1 (1827).

37. 43 U.S. (2 How.) 210 (1844). *Harmony* is frequently cited as United States v. Brig Malek Adhel.

38. In *The Palmyra* the Supreme Court held that guilt to the property is not contingent upon the owner's innocence or guilt. 25 U.S. (12 Wheat.) 1 (1827). In *Harmony*, the Court sustained the condemnation of a ship pursuant to a federal forfeiture statute despite conceding that the owner was not guilty of any crime. 43 U.S. (2 How.) 210 (1844).

In *The Palmyra*, decided in 1827, the Supreme Court upheld the forfeiture of a ship under a federal forfeiture law.[39] The *Palmyra*, ostensibly cruising under a commission as a privateer by the King of Spain, was used to commit acts of piracy against other ships.[40] The vessel was captured by a United States war ship and was taken into Charleston, South Carolina for adjudication.[41] The circuit court acquitted the *Palmyra* and restored the ship to its claimants without damages.[42] An appeal was interposed to the Supreme Court on behalf of the United States.[43] The owner of the *Palmyra* argued that the vessel could not be forfeited unless he was convicted of privateering.[44] After discussing its common-law roots, the Supreme Court stated that under forfeitures created by statute, the offender's guilt was not a prerequisite to forfeiture.[45] In reversing the circuit court, Justice Story stated that "[t]he thing is here primarily considered as the offender, or rather the offence is attached primarily to the thing."[46] The Court conceded that the owner

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39. *The Palmyra*, 25 U.S. (12 Wheat.) at 6-8 (1827) (discussing the Piracy Act of 1819, ch. 75, 3 Stat. 510, 513, codified as amended at 33 U.S.C. § 384 (1988)). The second section of the Piracy Act authorized the president to,

> instruct the commanders of public armed vessels of the United States, to seize, subdue, and send into any port of the United States, any armed vessel or boat, or any vessel or boat, the crew whereof shall be armed, and which shall have attempted or committed any piratical aggression, search, restraint, depredation or seizure, upon any vessel of the United States, or of the citizens thereof, or upon any other vessel.

Id at 8 (quoting the Piracy Act, ch. 75, § 2).

The fourth section of the Piracy Act stated that

> whenever any vessel or boat *from which* any piratical aggression, search, restraint, depredation, or seizure, shall have been first attempted or made, shall be captured and brought into any port of the United States, the same shall and may be adjudged and condemned to their use, and that of the captors, *after due process and trial*, in any Court having admiralty jurisdiction, and which shall be holden for the district into which such captured vessel shall be brought, and the same Court shall thereupon order a sale be brought, and the same Court shall thereupon order a sale and distribution thereof accordingly, and at their discretion.

Id. (quoting the Piracy Act, ch. 75, § 4).

40. *See id.* at 8.

41. *See id.*

42. *See id.*

43. *See id.* at 9.

44. *See id.* at 12.

45. *See id.* at 14-15.

46. *Id.* at 14. "[T]he practice has been, and so this Court understand [sic] the law to be, that the proceeding *in rem* stands independent of, and wholly unaffected by

of the *Palmyra* was blameless; however, it found that culpability was not relevant when applying the guilty property fiction.[47]

In *Harmony*, decided in 1844, a ship commanded by an insane captain had fired at other ships, and was seized by a United States war vessel.[48] The ship and its cargo were condemned pursuant to a statutory forfeiture act.[49] The owners contested the proceedings, relying on the argument that they had never contemplated or authorized the actions of the captain or the crew.[50] Although the Court conceded that the shipowner's innocence was "fully established,"[51] the statutory forfeiture of the vessel was sustained.[52] Justice Story explained that the vessel which committed the acts of aggression is treated as the offender to which forfeiture attaches, apart from the guilt or innocence of the owner.[53] The guilty property fiction, the Court reasoned, "is not an uncommon course . . . to treat the vessel in which . . . a wrong or offence has been done as the offender, without regard whatsoever to the personal misconduct or responsibility of the owner thereof."[54]

The Palmyra and *Harmony* illustrate the Court's early reliance on the English common law and the guilty property fiction.[55] In *The Palmyra,* the Court laid the foundation for the modern notion of the guilty property fiction.[56] That reasoning

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any criminal proceeding *in personam.*" *Id.* at 15.

47. *See id.*

48. *See* 43 U.S. (2 How.) at 230.

49. *See id.* at 231.

50. *See id.* at 230.

51. *Id.* at 238.

52. *See id.*

53. *See id.* at 233.

> The vessel which commits the aggression is treated as the offender, as the guilty instrument or the thing to which the forfeiture attaches, without any reference whatsoever to the character or conduct of the owner. The vessel or boat (says the act of Congress) from which such piratical aggression . . . shall have been first attempted or made shall be condemned. Nor is there any thing [sic] new in a provision of this sort.

Id.

54. *Id.*

55. *See id.*

56. At common law, it was recognized that the guilty object was the defendant and that the property owner's guilt or innocence was not a defense. *The Palmyra*, 25 U.S. (12 Wheat.) at 14. "The thing is here primarily considered as the offender, or rather the offence is attached primarily to the thing." *Id.*

resurfaced in *Harmony*, where the Court justified its continued reliance on the guilty property fiction by pointing to its historical acceptance.[57] The Court has relied heavily on this rationale to reject the innocent owner defense to forfeitures for over a century.[58]

III. THE SUPREME COURT'S MODERN ANALYSIS OF THE INNOCENT OWNER DEFENSE

A. *Introduction*

A discussion of cases beginning in 1921 with *Goldsmith v. United States*[59] provides a comprehensive framework to sufficiently understand the Court's rationale for its decision in *Bennis*. The guilty property fiction and its predecessors, the doctrines of escheat upon attainder and deodand, play an integral part in the Court's modern analysis. When analyzing the following cases, two important questions may prove useful to the reader: (1) What is the connection or nexus between the property forfeited and the illegal act?[60] and (2) Did the owner consent to the use of the property?

1. *Goldsmith v. United States*[61]

In *Goldsmith,* the Court upheld a federal statute permitting forfeiture of a seller's interest in a car misused by a buyer.[62] The Grant Company was the owner in fee simple of a car which it sold, retaining title until full payment was made, to a purchaser who used it to transport bootleg spirits.[63] Under a federal statute, the car was forfeited, and the Grant Company lost title to the vehicle.[64] The Grant Company argued that the

57. *See* 43 U.S. (2 How.) at 233-34.

58. *See* Bennis v. Michigan, 116 S. Ct. 994 (1996); Calero-Toledo, 416 U.S. 663 (1974); Van Oster v. Kansas, 272 U.S. 465 (1926); Dobbins's Distillery v. United States, 96 U.S. 395 (1877).

59. 254 U.S. 505 (1921).

60. *See* Austin v. United States, 509 U.S. 602, 628 (1993) (Scalia, J., concurring).

61. 254 U.S. 505 (1921).

62. *See id.* at 511.

63. *See id.* at 508.

64. *See id.* at 508-09 (citing the Act of July 13, 1866, ch. 184, 14 Stat. 93, 157,

forfeiture violated the Fifth Amendment prohibition against deprivation of life, liberty or property without due process of law because the statute was not to be construed to forfeit the title of an innocent owner, but only the interest of the wrongdoer.[65] Justice McKenna announced that although the statute seemed "to violate that justice which should be the foundation of the due process of law required by the Constitution . . . there are other and militating considerations."[66] He noted that such seemingly unjust occurrences are in part owing to the negligence of the owner upon whom Congress interposes responsibility in aid of the prohibitions of the law.[67] Justice McKenna declared that forfeiture actions such as the one at issue are "too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced."[68] The Court in this early decision was content to rely on the common-law fiction of guilty property[69] to rationalize its decision.[70] When faced with the argument that a scheme of this nature had no limits, the Court reserved the question of whether the guilty property fiction could be used to forfeit the property of a truly innocent owner.[71] Justice McKenna stated that the Court had not had the opportunity to deal with that issue, but "[w]hen such application shall be made it will be time enough to pronounce upon it."[72]

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repealed by U.S. Rev. Stat. 2d § 3450 (1878) *repealed by* I.R.C. § 7301(a) (West 1996)). The Federal statute stated that "[w]henever any goods or commodities for or in respect whereof any tax is or shall be imposed, . . . are removed, or are deposited or concealed in any place, with intent to defraud the United States of such tax, or any part thereof, all such goods or commodities, . . . shall be forfeited . . . ." *Id.*

65. *See Goldsmith*, 254 U.S. at 509.

66. *Id.* at 510.

67. *See id.* "In breaches of revenue provisions some forms of property are facilities, and therefore it may be said, that Congress interposes the care and responsibility of their owners in aid of the prohibitions of the law . . . ." *Id.*

68. *Id.* at 511.

69. At common law, it was recognized that the guilty object was the defendant and that the property owner's guilt or innocence was not a defense. *The Palmyra*, 25 U.S. (12 Wheat) 1, 14 (1827). "The thing is here primarily considered as the offender, or rather the offence is attached primarily to the thing . . . ." *Id.*

70. *See Goldsmith*, 254 U.S. at 510-12.

71. *See id.* at 512.

72. *Id.*

2. *Van Oster v. Kansas*[73]

In *Van Oster*, the Court was confronted with a Fourteenth Amendment challenge to a Kansas law which authorized forfeiture of a vehicle used in the illegal transportation of liquor.[74] Van Oster purchased a car from a dealer, but allowed the dealer to retain possession.[75] The dealer subsequently allowed the car to be used to transport liquor.[76] Van Oster argued that the dealer transported the liquor without her knowledge or authority.[77] The Supreme Court of Kansas construed the law as authorizing forfeiture of the interest of an innocent owner or lienor in property entrusted to the wrongdoer.[78] In his opinion upholding the decision of the Supreme Court of Kansas, Justice Stone explained that the law does not attempt to inquire about collusion between a wrongdoer and an innocent owner.[79] Relying on *Goldsmith*, the Court stated that because Van Oster had entrusted and consented to the dealer's use of the car, there was no innocent owner defense. The Court held that the state, in the exercise of its police power, could determine that certain uses of property were undesirable; judicial inquiry into the guilt of the owner was not necessary.[80]

The rules put forth in *Goldsmith* and *Van Oster* indicate the Court's unwillingness to allow a defense based upon lack of knowledge or culpability. The Court relies on the guilty property fiction, and in both cases justifies this reliance on its historical acceptance. The "nexus" between the instrumentality and the crime was the vehicles' use to transport the illicit items. Although the cars were not considered contraband, they served as means to facilitate illicit activity. After *Goldsmith* and *Van*

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73. 272 U.S. 465 (1926).

74. KAN. REV. STAT. ANN. §§ 21-2162 to -2167 (1919) (authorizing forfeiture of vehicles used in illegal transportation of liquor).

75. *See Van Oster*, 272 U.S. at 465.

76. *See id.* at 465-66.

77. *See id.* at 466.

78. *See* State v. Brown, 241 P. 112, 113 (Kan. 1925), *aff'd sub nom.* Van Oster v. Kansas, 272 U.S. 465 (1926).

79. *See Van Oster*, 272 U.S. at 467. "It is not unknown or indeed uncommon for the law to visit upon the owner of property the unpleasant consequences of the unauthorized action of one to whom he has intrusted it." *Id.*

80. *See id.*

Oster, the question still remained whether the guilty property fiction could be used to forfeit the property of an owner who was in no way negligent.

B. *Stare Decisis and* Calero-Toledo v. Pearson Yacht Leasing Co.[81]

In *Calero-Toledo,* the Court upheld the constitutionality of the Puerto Rican government's seizure, without compensation, of a yacht that was owned by a party who had neither knowledge nor reason to know of any statutory violation.[82] The pleasure yacht, owned by Pearson Yacht Leasing Company and leased to Puerto Rican residents, was seized pursuant to the Controlled Substances Act of Puerto Rico after marijuana was found aboard the vessel.[83] The district court, relying upon *Fuentes v. Shevin*,[84] held that the act was unconstitutional because it failed to provide for pre-seizure notice or hearing, and deprived persons of property without just compensation.[85]

In dispensing with the due process claim, Justice Brennan noted that *Fuentes* "reaffirmed, however, that, in limited circumstances, immediate seizure of a property interest, without an opportunity for prior hearing, is constitutionally permissible."[86] Seizure under the Act did not deny due process because seizure permitted the government to assert in rem jurisdiction

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81. 416 U.S. 663 (1974).

82. *See id.* at 663.

83. *See id.* at 665.

84. 407 U.S. 67 (1972) (holding that Florida and Pennsylvania prejudgment replevin provisions work a deprivation of property without due process of law insofar as they deny the right to a prior opportunity to be heard before chattels are taken from their possessor).

85. *See* Pearson Yacht Leasing Co. v. Massa, 363 F. Supp. 1337, 1342 (1973), *rev'd sub nom.* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974).

86. *Calero-Toledo*, 416 U.S. at 678.

> Such circumstances are those in which "the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance."

Id. (quoting Fuentes v. Shevin, 407 U.S. 67, 91 (1972)).

over the property in order to conduct forfeiture proceedings.[87] Justice Brennan concluded that the yacht was mobile and could easily be destroyed or hidden, thus immediate seizure was necessary and proper.[88]

Justice Brennan then found that the Act did not unconstitutionally authorize the taking for government use of innocent parties' property without just compensation.[89] Noting that the innocence of the owner of property subject to forfeiture has almost uniformly been rejected as a defense, Justice Brennan reaffirmed the notion set forth in *Goldsmith* and *Van Oster* that the property was considered the wrongdoer.[90] The Court stated that, although severe, the fiction of "guilty property" helps to prevent further illicit use of the conveyance and may cause innocent owners to exercise greater care in transferring possession of their property.[91]

Quoting Chief Justice Marshall in *Peisch v. Ware*,[92] the Court implied that an owner whose property was taken without his consent, or who was unaware and had taken reasonable care to prevent illicit use of the property, may have a constitutional defense to a forfeiture proceeding.[93] Justice Brennan

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87. *See id.* at 679.

88. *See id.*

89. *See id.* at 690.

90. *See id.* at 685.

91. *See id.* at 686.

92. 8 U.S. (4 Cranch) 347 (1808). "[A] forfeiture can only be applied to those cases in which the means that are prescribed for the prevention of a forfeiture may be employed." *Id.* at 363. In *Peisch*, a ship was wrecked and salvors carried off its cargo. *See id.* at 359. The United States sought forfeiture of the cargo by charging failure to pay duties on distilled spirits and removal of spirits from the tax collector before assessment. *See id.* at 360-62. The Supreme Court held that forfeiture was impermissible because the ship's owners were unable to comply with the customs law regarding importation, since the crew had deserted the ship before landing, and the vessel could not be brought into port. *See id.* at 362-63. The Court held that forfeiture is inappropriate when the means to prevent the violation cannot be carried out. *See id.* at 363.

93. *See Calero-Toledo*, 416 U.S. at 688.

> It therefore has been implied that it would be difficult to reject the constitutional claim of an owner whose property subjected to forfeiture had been taken from him without his privity or consent. Similarly, the same might be said of an owner who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property; for, in that circumstance, it would be difficult to conclude

distinguished *Calero-Toledo*, however, by explaining that in *Calero-Toledo* the property was voluntarily entrusted to the wrongdoer, then used in a manner inconsistent with that consent.[94]

After the *Calero-Toledo* decision, there remained a strong argument for the innocent owner defense only if the property was taken without the owner's consent or the owner had no knowledge of the offense and had taken affirmative precautions to prevent misuse. This test left an owner who merely had no knowledge of the offense or gave no consent to the illicit use with no defense.[95] *Calero-Toledo's* reliance on the guilty property fiction, in combination with its extremely narrow innocent ownership test, was used by courts to reject the innocent ownership defense to forfeiture cases for nearly two decades.[96]

C. *Forfeiture as Punishment; Eighth Amendment Limits:* Austin v. United States[97]

In *Austin*, the United States sought forfeiture of a mobile home and a body shop after the owner pleaded guilty to violating South Dakota's drug laws.[98] The government alleged that Austin brought cocaine from his mobile home to his body shop in order to consummate a pre-arranged sale of drugs.[99] Under the United States Code, real property used to facilitate the sale of drugs is subject to forfeiture.[100] Austin challenged the stat-

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that forfeiture served legitimate purposes and was not unduly oppressive. *Id.* (citations omitted).

94. *See id.* at 690.

95. *See* J. Kelly Stader, *Taking the Wind Out of the Government's Sails: Forfeitures and Just Compensation*, 23 PEPP. L. REV. 449, 492 (1996).

96. *See, e.g.*, Bennis v. Michigan, 116 S. Ct. 994 (1996).

97. 509 U.S. 602 (1993).

98. *See id.* at 605.

99. *See id.*

100. *See* 21 U.S.C. §§ 881(a) (4), (7) (1970). The statutes provide, in relevant part,

> (4) All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale receipt, possession, or concealment of [controlled substances, their raw materials, and equipment used in their manufacture and distribution] . . . . (7) All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to

ute under the Eighth Amendment's Excessive Fines Clause.[101] The Eighth Circuit, relying on *Calero-Toledo,* rejected Austin's claim, holding that the Constitution does not require proportionality in civil forfeiture proceedings.[102]

The Supreme Court's unanimous decision reversing the Eighth Circuit held that the Eighth Amendment extends to civil proceedings where fines are intended to punish.[103] Justice Blackmun explained that the common-law fiction of guilty property rests on the notion that the owner has been negligent and that he is properly punished for the negligence.[104] The Court recognized that forfeiture serves, at least in part, to punish, thus the Eighth Amendment's Excessive Fines Clause applies.[105] Finding that forfeiture is a form of monetary punishment, Justice Blackmun rejected the underlying assumption in *Calero-Toledo* that civil forfeiture operates only against property.[106] He explained that had forfeiture not been understood to punish the owner, there would have been no reason in *Calero-Toledo* to reserve the case of a truly innocent owner.[107] However, the Court declined to establish a test for determining whether a forfeiture is unconstitutionally excessive, leaving this question for the lower courts to consider.[108]

The Court rejected the Government's argument that the real property in *Austin* was an "instrument" of the drug trade.[109]

> facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment . . . .

Id.

101. *See Austin*, 509 U.S. at 606. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

102. United States v. One Parcel of Property, 964 F.2d 814, 817 (1992), *rev'd sub nom.* Austin v. United States, 509 U.S. 602 (1993).

103. *See Austin*, 509 U.S. at 618.

104. *See id.* at 612.

105. *See id.* at 618; *see also* United States v. Halper, 490 U.S. 435, 448 (1989) (noting that "[a] civil sanction that cannot be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term").

106. *See Austin*, 509 U.S. at 618.

107. *See id.* at 617. Recent cases have expressly reserved the question of whether the guilty property fiction could be used to forfeit the property of a truly innocent owner. *See, e.g.,* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974).

108. *See Austin*, 509 U.S. at 622.

109. *See id.* at 620. Under 21 U.S.C. § 881 (a) (7), real property is forfeitable if it

Justice Blackmun found that the attempt to characterize the property as an instrument of the drug trade was too tenuous.[110] In his concurrence, Justice Scalia suggested that the relevant "instrumentality" inquiry is the "relationship of the property to the offense: Was it close enough to render the property, under traditional standards, 'guilty' and hence forfeitable?"[111] It is important to note that in *Austin*, the Court again relied on precedent which employed the common-law fiction of guilty property.[112]

IV. *BENNIS V. MICHIGAN*[113]

A. *Introduction*

When the Supreme Court granted certiorari in *Bennis v. Michigan*, the state of the law was defined by a long line of cases culminating with *Calero-Toledo* and *Austin*.[114] The restrictions on the scope of forfeitures as applied to innocent owners had evolved from a very deferential standard of review based upon the holding of *Calero-Toledo*, to a seemingly new vulnerability that arose under the Eighth Amendment in *Austin*.[115] In the same year as the *Austin* decision, the Court in *United States v. James Daniel Good Real Property*[116] held that the Government's ex parte action to seize Good's property was a violation of his Fifth Amendment due process rights. However,

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is used or intended for use to facilitate the commission of a drug-related crime.

110. *See Austin*, 509 U.S. at 620.

111. *See id.* at 628 (Scalia, J., concurring).

112. *See id.* at 616-17 (citing The Palmyra, 25 U.S. (12 Wheat.) 1 (1827); Dobbins's Distillery v. United States, 96 U.S. 395 (1921)).

113. 116 S. Ct. 994 (1996).

114. *See Austin*, 509 U.S. at 624.

115. *See id.* at 2803, 2806 (holding that criminal and civil forfeitures are subject to the Eighth Amendment's Excessive Fines Clause).

116. 114 S. Ct. 492 (1993). In *James Daniel Good*, the Government filed an in rem action against Good's home based upon a 1985 drug conviction. *See id.* at 497. It is important to note that the Government had nearly five years in which to move for forfeiture under the statute. *See id.* Good claimed that the seizure violated his Fifth Amendment right to due process. *See id.* at 498. The Court found that there were no exigent circumstances to support the government's ex parte action to seize the property. *See id.* at 505. Under the Fifth Amendment the Court found a requirement to notify Good of the forfeiture action and to permit him a hearing on the matter. *See id.*

unlike *Calero-Toledo*, in *James Daniel Good* there were no exigent circumstances to support a forfeiture without notice or hearing. Additionally, in 1994, the Court ruled that civil forfeitures are subject to the Double Jeopardy Clause of the Fifth Amendment.[117] *Bennis v. Michigan* was viewed by proponents of the innocent owner defense as the next big step by the Court toward protecting the property of the innocent owner.

B. *Facts and Procedural History*

Tina Bennis and John Bennis were joint owners of a car in which John Bennis engaged in sexual activity with a prostitute.[118] Michigan law states that any vehicle used for prostitution is declared a nuisance and shall be abated.[119] After John Bennis was convicted of gross indecency, the county prosecutor filed a complaint alleging that the car was a nuisance subject to abatement.[120] Tina Bennis argued that Michigan's abatement scheme had taken her property for public use without compensation; relying on the innocent owner test in *Calero-Toledo,* she argued that she was entitled to contest the abatement by showing that she did not know that her husband

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117. Department of Revenue v. Kurth Ranch, 114 S. Ct. 1937, 1944-45 (1994). In *Kurth Ranch*, a family growing marijuana on their ranch was arrested and charged with drug offenses. *See id.* at 1942. The Kurths were forced to give up equipment and cash under a forfeiture action permitted by Montana law. *See id.* The Montana Department of Revenue then moved to assess the Kurths with a tax on the dangerous drugs. *See id.* at 1942-43. The Supreme Court found the tax to be more than 400% of the market value of the drugs. *See id.* at 1947 n.17. The Court found that tax unreasonably high and further found the tax to be criminal. *See id.* at 1948. Two of the Kurths were incarcerated and subject to forfeiture. *See id.* at 1942. The state action of the additional tax resulted in punishing the defendants twice for the same crime. *See id.* at 1948. The Court held the tax to be a violation of the Double Jeopardy Clause of the Fifth Amendment. *See id.*

118. *See Bennis*, 116 S. Ct. at 996.

119. See MICH. COMP. LAWS ANN. § 600.3801 (West Supp. 1995). The statute provides in relevant part:

> Any building, vehicle, boat, aircraft, or place used for the purpose of lewdness, assignation or prostitution or gambling, or used by, or kept for the use of prostitutes or other disorderly persons . . . is declared a nuisance . . . and all . . . nuisances shall be enjoined and abated as provided in this act and as provided in court rules.

Id.

120. *See Bennis*, 116 S. Ct. at 996.

would use the car to violate Michigan law.[121] Using its remedial discretion, the trial court declared the car forfeited as a public nuisance, permitting no offset for Tina Bennis' interest, and entered an order of abatement.[122] The court of appeals held that, irrespective of the statute's language, Michigan case law interpreting the section compelled reversal.[123] The Michigan Supreme Court reversed and reinstated the abatement in its entirety.[124] Relying on the United States Supreme Court's decisions in *Van Oster* and *Calero-Toledo*, the Michigan Supreme Court found that the statute's failure to provide an innocent owner defense was "without constitutional consequence."[125]

C. *The Majority Opinion*

In a five-four decision affirming the Michigan Supreme Court, Justice Rehnquist relied on the proposition put forth in *Goldsmith*, seventy-five years before, that there is a distinction between the situation in which a vehicle is used without consent of the owner, and one in which "although the owner consented to [another person's] use, [the vehicle] is used in a manner to which the owner did not consent."[126] Justice Rehnquist found that a long history of cases holding that an owner's interest in property may be forfeited by reason of the use to which the property is put, despite the owner's lack of knowledge, compelled rejection of the due process claim.[127] He reviewed the Court's decision in *Calero-Toledo* and noted that Tina Bennis was in the "same position as the various owners involved in the

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121. *See id.* at 997.

122. *See id.*

123. See Michigan *ex rel.* Wayne County Prosecuting Attorney v. Bennis, 504 N.W.2d 731, 733 (Mich. Ct. App. 1993).

124. See Michigan *ex rel.* Wayne County Prosecutors v. Bennis, 527 N.W.2d 483, 487 (Mich. 1994).

125. *See id.* at 494.

126. *Bennis*, 116 S. Ct. at 999.

127. *See id.* at 997. Justice Rehnquist explained that the Court's earliest opinion to this effect was Justice Story's opinion in *The Palmyra*, 25 U.S. (12 Wheat.) 1 (1827), where the Court explained that the thing is primarily considered as the offender. Justice Rehnquist then reviewed *Van Oster v. Kansas*, 272 U.S. 465 (1926), and *Goldsmith v. United States*, 254 U.S. 505 (1921), drawing the same conclusion. *See id.*

forfeiture cases beginning with *The Palymra* in 1827."[128] *Calero-Toledo's* proposition that a defense may be available to an owner who had taken reasonable steps to prevent illicit use was not applicable to Mrs. Bennis.[129] Justice Rehnquist stated that Tina Bennis made no showing beyond the *Calero-Toledo* holding that the interest of an owner could be forfeited even though the owner had no knowledge that his property was being used in connection with the violation.[130]

Tina Bennis relied on *Foucha v. Louisiana*[131] for the proposition that a criminal defendant may not be punished for a crime if he is found not guilty; thus, the State must demonstrate a punitive interest in depriving her of her interest in the forfeited car.[132] In *Foucha*, the Court held that a defendant found not guilty by reason of insanity in a criminal trial could not be confined without a showing that he was either dangerous or mentally ill.[133] Putting aside the question whether forfeiture is punishment, Justice Rehnquist explained that *Foucha* "did not purport to discuss, let alone overrule, the *Palmyra* line of cases."[134]

Next, the Court addressed Tina Bennis' claim that the forfeiture of her interest in the automobile was punitive.[135] She argued that the Supreme Court's decision in *Austin* "would be

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128. *Bennis*, 116 S. Ct. at 997.

129. *See id.* at 999.

> And the holding of *Calero-Toledo* . . . was that the interest of a yacht rental company in one of its leased yachts could be forfeited because of its use for transportation of controlled substances, even though the company was 'in no way . . . involved in . . . its property . . . being used in connection with or in violation of [the law].' Petitioner has made no showing beyond that here." *Id.* (quoting Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 668 (1974)).

130. *See id.*

131. 504 U.S. 71 (1992). In *Foucha*, Justice White concluded that the Louisiana statute violated the Due Process Clause because it allowed the defendant to be committed to a mental hospital until he demonstrated that he was not a danger to himself or others. *See id.* at 78-79. The Court rationalized that the State's basis for holding Foucha disappeared once the State conceded that he was not mentally ill at the time of the trial court's hearing. *See id.* at 79. The Court stated that "[a]lthough a State may imprison convicted criminals for the purposes of deterrence and retribution, Louisiana has no such interest here, since Foucha was not convicted and may not be punished." *Id.* at 72.

132. *See Bennis*, 116 S. Ct. at 1000; *Foucha*, 504 U.S. at 80.

133. *See Foucha*, 504 U.S. at 71.

134. *Bennis*, 116 S. Ct. at 1000.

135. *See id.*

difficult to reconcile with any rule allowing truly innocent persons to be punished by civil forfeiture."[136] The Court distinguished *Austin* by noting that "[t]here was no occasion in that case to deal with the validity of the 'innocent-owner defense' other than to point out that if a forfeiture statute allows such a defense, the defense is additional evidence that the statute itself is 'punitive' in motive."[137] Justice Rehnquist stated that the forfeiture in this case serves both a deterrent and punitive purpose, but he noted that the trial judge has discretion under *Austin* to consider alternatives to abatement.[138]

Justice Rehnquist then addressed Tina Bennis' claim under the Fifth Amendment Takings Clause.[139] The Court easily found that if the forfeiture proceeding was not a violation of due process, the property in the automobile was transferred by virtue of that proceeding from Tina Bennis to the State of Michigan.[140] Justice Rehnquist concluded that the government is not required to compensate an owner for property which it has already lawfully acquired under the exercise of governmental authority, other than under the power of eminent domain.[141]

D. *The Concurring Opinions*

Justices Thomas and Ginsburg each wrote concurring opinions.[142] Justice Thomas explained that the "Federal Constitution does not prohibit everything that is intensely undesirable."[143] He stated that the facts of this case do not seem obviously distinguishable from *Van Oster*, and "[i]f anything, the

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136. *Id.*

137. *Id.* In *Austin* the court held that forfeiture proceedings are subject to the limits of the Eighth Amendment's prohibition against excessive fines. *Austin*, 509 U.S. 602, 618 (1993).

138. *See Bennis*, 116 S. Ct. at 1000.

139. *See id.* at 1001.

140. *See id.*

141. *See id.* The government may not be required to compensate an owner for property which it has already lawfully acquired. *See* United States v. Fuller, 409 U.S. 488 (1973); United States v. Rands, 389 U.S. 121 (1967).

142. *See Bennis*, 116 S. Ct. at 1001, 1003 (Thomas & Ginsburg, JJ., concurring).

143. *Id.* at 1001-02 (Thomas, J., concurring) (citing Herrera v. Collins, 506 U.S. 390, 438 (1993)).

forfeiture in *Van Oster* was harder to justify than is the forfeiture here, albeit in a different respect."[144]

Justice Thomas then discussed his concerns with what it means to "use" property for purposes of forfeiture law.[145] He stated that the limits defining what can be forfeited as a result of wrongdoing should be strictly applied, adhering to historical standards.[146] Those limits are the "sole restrictions on the state's ability to take property from those it merely suspects, or does not even suspect, of colluding in crime."[147] In any event, Justice Thomas wrote, Mrs. Bennis had not asserted that the car was not an instrumentality of her husband's illicit act.[148] He then explained that the state's action in selling the car was remedial, as indicated by the trial judge's statement that there would be little left over after costs.[149] Because this was a remedial action, there was no need to confront the difficult problem involved in punishing someone not found to have engaged in any wrongdoing.[150]

Justice Ginsburg, in her concurring opinion, noted that the car belonged to both Mr. Bennis and his wife, and "at all times he had her consent to use the car, just as she had his."[151] As a result, the only question that remained was whether Mrs. Bennis was "entitled not to the car, but to a portion of the proceeds."[152] Because the abatement proceeding was an "equitable action", Justice Ginsburg stated that the Court should defer to

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144. *Id.* at 1002. (Thomas, J., concurring).
145. *See id.* (Thomas, J., concurring).
146. *See id.* (Thomas, J., concurring).
147. *Id.* (Thomas, J., concurring).
148. *See id.* (Thomas, J., concurring).
149. *See id.* (Thomas, J., concurring).

> This is most obviously true if, in stating that there would be little left over after "costs," the trial judge was referring to the costs of sale. The court's order indicates that he may have had other "costs" in mind as well when he made that statement, e.g., law enforcement costs. . . . Even if the "costs" that the trial judge believed would consume most of the sales proceeds included not simply the expected costs . . . related to this particular proceeding, the State would still have a plausible argument that using the sales proceeds to pay such costs was "remedial" action, rather than punishment.

Id. at 1002 n.* (Thomas, J., concurring) (citations omitted).
150. *See id.* at 1002 (Thomas, J., concurring).
151. *Id.* at 1003 (Ginsburg, J., concurring) (citation omitted).
152. *Id.* (Ginsburg, J., concurring).

the judgment of the Supreme Court of Michigan.[153] She noted that the trial judge declined to divide the sale of the proceeds for two practical reasons: 1) the Bennis's had another car; and 2) the value of the forfeited car left almost nothing after subtracting costs.[154]

E. *The Dissenting Opinions*

Justice Stevens, with whom Justice Souter and Justice Breyer joined, argued that neither logic nor history supported the majority's opinion.[155] Justice Stevens argued that under the Court's logic, states would have limitless power to confiscate vast amounts of property where criminals have engaged in illegal acts.[156] He stated that the time to confront the limits of a forfeiture scheme with such expansive potential for application had arrived.[157]

Justice Stevens focused primarily on the connection between the forfeited property and the offense committed.[158] Justice Stevens argued that the Court in recent years has agreed that the idea of illicit instrumentalities must have a limit, and that there must be some connection between the crime and the property other than mere location.[159] He explained that there are three different categories of property subject to seizure: pure contraband, proceeds of criminal activity, and tools of the criminal trade.[160] The third category, known as "derivative

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153. *See id.* (Ginsburg, J., concurring). "Michigan, in short, has not embarked on an experiment to punish innocent third parties. Nor do we condone any such experiment. Michigan has decided to deter Johns from using cars they own (or co-own) to contribute to neighborhood blight, and that abatement endeavor hardly warrants this Court's disapprobation." *Id.* (Ginsburg, J., concurring) (citation omitted).

154. *See id.* (Ginsburg, J., concurring).

155. *See id.* at 1004 (Stevens, J., dissenting).

156. *See id.* (Stevens, J., dissenting).

157. *See id.* at 1010 (Stevens, J., dissenting). "Some 75 years ago, when presented with the argument that the forfeiture scheme we approved had no limit, we insisted that expansive application of the law had not yet come to pass. 'When such application shall be made,' we said, 'it will be time enough to pronounce upon it.'" *Id.* at 1004 (Stevens, J., dissenting) (quoting Goldsmith v. United States, 254 U.S. 505, 512 (1921)).

158. *See id.* at 1004 (Stevens, J., dissenting).

159. *See id.* at 1006 (Stevens, J., dissenting) (citing Austin v. United states, 509 U.S. 602, 619-20 (1994)).

160. *See id.* at 1004 (Stevens, J., dissenting).

contraband" and which applied in *Bennis*, was the most problematic because "of its potentially far broader sweep" and minimal remedial effect.[161] Justice Stevens asserted that although many of the early cases demonstrate that the law may reasonably presume that the owner of property is aware of the principle use being made of that property, the property in this case differs from historical precedent.[162] The distinguishing factor, he stated, was that the car used by Mr. Bennis did not constitute the principle use of an instrumentality of the crime and the "mobile character of the car played a part only in the negotiation, but not in the consummation of the offense."[163] In earlier cases, he argued, the property actually played a part in facilitating the offenses.[164] Specifically relying on *Austin*, Justice Stevens argued that the nexus between the car and the

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> The first category—pure contraband—encompasses items such as adulterated food, sawed-off shotguns, narcotics, and smuggled goods. With respect to such 'objects the possession of which, without more, constitutes a crime,' the government has an obvious remedial interest in removing the items from public circulation, however blameless or unknowing their owners may be. The States' broad and well-established power to seize pure contraband is not implicated by this case, for automobiles are not contraband.

Id. (Stevens, J., dissenting) (quoting One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 699 (1965)).

> The second category—proceeds—traditionally covered only stolen property, whose return to its original owner has a powerful restitutionary justification. Recent federal statutory enactments have dramatically enlarged this category to include the earnings from various illegal transactions. Because those federal statutes include protections for innocent owners, cases arising out of the seizure of proceeds do not address the question whether the Constitution would provide a defense to an innocent owner in certain circumstances if the statute had not done so.

Id. (Stevens, J., dissenting) (citations omitted).

> The third category includes tools or instrumentalities that a wrongdoer has used in the commission of a crime, also known as "derivative contraband." Forfeiture is more problematic for this category of property than for the first two, both because of its potentially far broader sweep, and because the government's remedial interest in confiscation is less apparent.

Id. (Stevens, J., dissenting) (quoting *One 1958 Plymouth Sedan*, 380 U.S. at 699).

161. *Id.* at 1004 (Stevens, J., dissenting).

162. *See id.* at 1008 (Stevens, J., dissenting).

163. *Id.* at 1006 (Stevens, J., dissenting).

164. *See id.* at 1005-06 (Stevens, J., dissenting) (citing Goldsmith v. United States, 254 U.S. at 505, 513) (referring to "the adaptability of property to an illegal purpose"); Van Oster v. Kansas, 272 U.S. 465, 465 (noting that transporting liquor is an element in the statute prohibiting transportation of intoxicating liquor)).

crime in *Bennis* is fatally insufficient to support forfeiture.[165] He asserted that the car used by John Bennis was simply a location for a one-time event, effectively no different from the real property in *Austin*.[166]

Justice Stevens attacked the majority's dismissal of the *Calero-Toledo* proposition that reasonable precautions may serve as a defense, arguing that the Court has consistently recognized an exception for truly innocent owners.[167] He reasoned that because Mrs. Bennis had no knowledge that her husband would commit the illicit act in the car, she cannot be accused of not taking reasonable precautions to prevent the incident.[168] Citing *Austin*, Justice Stevens noted that the Court has held that all of its forfeiture decisions rested "at bottom, on the notion that the owner has been negligent in allowing his property to be misused and that he is properly punished for that negligence."[169] He stated that "[s]he is just as blameless as if a thief, rather than her husband, had used the car in a criminal episode."[170]

Justice Stevens then addressed his concerns with the excessiveness of the forfeiture.[171] He argued that the forfeiture of Mrs. Bennis' interest in her car violated the limitations of the Eighth Amendment's Excessive Fines Clause and was "dramatically at odds" with the Courts holding in *Austin*.[172] He stated that the forfeiture of Mrs. Bennis' interest in the car was excessive because the confiscation of the entire car, simply because one illicit act took place in the driver's seat, is "out of all proportion with her blameworthiness."[173] Additionally, he reasoned, the forfeiture violated the Eighth Amendment because of the disparity between the value of conveyances subject to forfeiture; the government could not reasonably tie this forfeiture

165. *See id.* at 1006 (Stevens, J., dissenting).
166. *See id.* (Stevens, J., dissenting).
167. *See id.* at 1007-08 (Stevens, J., dissenting).
168. *See id.* at 1008 (Stevens, J., dissenting).
169. *Id.* at 1007 (Stevens, J., dissenting) (quoting Austin v. United states, 509 U.S. 602, 615 (1993)).
170. *Id.* at 1008 (Stevens, J., dissenting).
171. *See id.* at 1010 (Stevens, J., dissenting).
172. *Id.* (Stevens, J., dissenting).
173. *Id.* (Stevens, J., dissenting).

to a remedial end.[174] He stated that "[u]nder the Court's reasoning, the value of the car is irrelevant. A brand-new luxury sedan or a ten-year-old used car would be equally forfeitable."[175]

Justice Kennedy, in his dissent, explained that the history of forfeiture proceedings developed in response to concerns uniquely related to admiralty law that are not present today.[176] Lack of culpability was eliminated as a defense for forfeitures only as a necessity, to derive prompt compensation for injuries done by a vessel whose owners were often too far away to be reached by the law.[177] Justice Kennedy explained that admiralty law can remain valid without extending it to the automobile in every analogous instance.[178] He argued that a strong presumption of negligent entrustment or criminal complicity may be sufficient "to protect the government's interest where the automobile is involved in a criminal act in the tangential way that it was [in *Bennis*]."[179] Justice Kennedy concluded that the forfeiture in *Bennis* cannot meet the requirements for due process, because nothing "indicates that the forfeiture turned on the negligence or complicity" of Mrs. Bennis.[180]

V. ANALYZING *BENNIS V. MICHIGAN*

The decision in *Bennis* was in one sense shocking and in another sense very pragmatic. The Court was sharply divided, but the majority correctly concluded that, despite the perceived hardship imposed on innocent owners, precedent supported their conclusion.[181] Critics will be quick to point out that this decision seems out of touch with the times and offends the reasonable person's sense of fairness. On its face, the result in *Bennis* does not seem equitable. In light of these criticisms, it again becomes important to note that a truly innocent owner

174. *See id.* (Stevens, J., dissenting).
175. *Id.* (Stevens, J., dissenting).
176. *See id.* (Kennedy, J., dissenting).
177. *See id.* at 1010 (Kennedy, J., dissenting) (citing Harmony v. United States, 43 U.S. (2 How.) 210, 233 (1844)).
178. *See id.* at 1011 (Kennedy, J., dissenting).
179. *Id.* (Kennedy, J., dissenting).
180. *Id.* (Kennedy, J., dissenting).
181. *See id.* at 999.

still has a defense under *Calero-Toledo.*[182] Concerned owners have the option of refusing to share, lend or lease their property to irresponsible persons. Additionally, despite the *Austin* Court's refusal to formulate a test for excessiveness, forfeitures remain limited by the Eighth Amendment.[183]

A. *Liability of the "Innocent Owner"*

In *Bennis*, the Court again relied on the guilty property fiction to impose strict liability.[184] The dissent was content to ignore this fiction because it seemed "fundamentally unfair."[185] Justice Thomas pointed out that "one unaware of the history of forfeiture laws and years of this Court's precedent . . . might well assume that such a scheme is lawless."[186] The Court in *Van Oster* stated, "[i]t is not unknown or indeed uncommon for the law to visit upon the owner of property the unpleasant consequences of the unauthorized action of one whom he has entrusted it."[187] The majority opinion explains that this proposition creates the undesirable, yet necessary effect of placing liability upon the owner of property.[188]

The dissent, relying on the reservation in *Goldsmith,* sought to import the principle that "forfeiture is inappropriate when the means to prevent the illicit use cannot be carried out."[189] Justice Rehnquist explained that this proposition merely applies to situations involving theft or robbery.[190] The dissent, failing to recognize that *Calero-Toledo* is still good law, instead asked

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182. A truly innocent owner is one who has taken reasonable actions to prevent illicit use, and has lack of knowledge. *See* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 689-90 (1974).

183. *See* Austin v. United States, 509 U.S. 602, 622 (1993).

184. *See* 116 S. Ct. 994, 997 (1996).

185. *Id.* at 1007 (Stevens, J., dissenting).

186. *Id.* at 1001 (Thomas, J., concurring).

187. *Id.* at 998 (quoting Van Oster v. Kansas, 272 U.S. 465, 467 (1926)).

188. *See id.*

189. *Id.* at 1008 n.12 (Stevens, J., dissenting) (explaining Peisch v. Ware, 8 U.S. (4 Cranch) 347 (1808)).

190. *See id.* at 999. "But *Peisch* was dealing with the same question reserved in *Goldsmith-Grant*, not any broader proposition: 'If, by private theft, or open robbery, without any fault on his part, [an owner's] property should be invaded . . . the law cannot be understood to punish him with the forfeiture of that property.'" *Id.* (quoting Peisch v. Ware, 8 U.S. (4 Cranch) 347, 364 (1808)).

the Court to limit liability and import an element of culpability.[191] The Court correctly declined to overrule the "well-established" precedent from cases "having at best a tangential relation to the 'innocent owner' doctrine in forfeiture cases."[192] The majority found that this would effectively eliminate the Government's objective of deterrence, thus rendering forfeitures powerless.

Recognizing that *Calero-Toledo's* innocent owner test still provides a truly innocent owner with a defense, the Court explained that Mrs. Bennis did not qualify for the protection set forth by that dicta.[193] Justice Rehnquist stated that there is a distinction between a situation where an owner does not consent and one in which the owner merely does not consent to a particular use.[194] Tina Bennis could not claim she was in the former situation because John Bennis co-owned the car.[195] The majority opinion in *Bennis* makes it clear that simply demonstrating an owner's lack of knowledge is not enough to show innocence under *Calero-Toledo*. The test is narrow, and protects only an owner who can show that the property was stolen or otherwise taken without his privity or consent. Tina Bennis was in the same position as the yacht owner in *Calero-Toledo*; she merely proved that she did not take part in or have knowledge of John Bennis' crime.

B. *The "Nexus" Consideration*

The Court explained that it is unwilling to base the due process inquiry on whether the use for which the instrumentality was forfeited was the principle use.[196] The dissent argued that the property in *Bennis* bore no necessary connection to the offense.[197] This contention is misguided, because, as the majority explains, it is unsupported by a long line of cases imposing liability on owners in similar circumstances.[198] The Court

191. *See id.* at 1007-08 (Stevens, J., dissenting).
192. *Id.* at 1000.
193. *See id.* at 999.
194. *See id.* at 999 n.5.
195. *See id.* at 998.
196. *See id.* at 999-1000.
197. *See id.* at 1003 (Stevens, J., dissenting).
198. *See id.* at 998.

explained that had the due process inquiry depended on the principal use question, then *Calero-Toledo,* where only one marijuana cigarette was found on the entire yacht, may have been decided differently.[199] The dissent's suggestion that the *Palmyra* line of cases "would justify the confiscation of an ocean liner just because one of its passengers sinned while on board"[200] overstates the majority opinion. In response to this argument, the majority repeated the longstanding *Goldsmith* reservation, that "[w]hen such application shall be made it will be time enough to pronounce upon it."[201] The dissent also argued that there is no difference between the car in *Bennis* and the real property in *Austin.*[202] This view ignores the majority's contention that the car served not only as the locus for the crime but was also used to facilitate the crime. Again, this reasoning is supported by numerous cases.[203] In *Bennis*, the majority clearly viewed the car as an instrumentality of the crime, and the precedent supports that conclusion. However, the Court remains unwilling to draw a bright line in this area.[204] Justice Thomas, in his concurring opinion, acknowledged that the limits on what property is an instrumentality of crime are unclear.[205] Because of the lack of definition in this area, he explained, it is appropriate for the Court to strictly apply the limits that exist and adhere to historical precedent.[206]

Finally, the Court explained that *Austin* merely answered the question of whether the Excessive Fines Clause applies to civil forfeitures.[207] Justice Stevens, in his dissent, stated that there should be limits placed on the forfeiture of property.[208] The Court stated that the Eighth Amendment does indeed limit forfeitures, but the question of excessiveness was best left to

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199. *See id.* at 999-1000.
200. *Id.* at 1005 (Stevens, J., dissenting).
201. *Id.* at 1000 (quoting Goldsmith v. United States, 254 U.S. 505, 512 (1921)).
202. *See id.* at 1005 (Stevens, J., dissenting).
203. *See* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974); Van Oster v. Kansas, 272 U.S. 465 (1926); Goldsmith v. United States, 254 U.S. 505 (1921).
204. *See Bennis*, 116 S. Ct. at 999.
205. *See id.* at 1002 (Thomas, J., concurring).
206. *See id.*
207. *See id.* at 1000.
208. *See id.* at 1010 (Stevens, J., dissenting).

the discretion of the lower court.[209] The *Bennis* majority did not consider the monetary value of the forfeited automobile substantial enough to warrant limitations. This leaves open the question of whether the forfeiture of an innocent owner's interest that is substantial may warrant the establishment of such limits. In *Bennis*, however, the Court was content to confine *Austin* to its specific holding.

VI. CONCLUSION

The limits on forfeiture proceedings are narrow, and as Justice Thomas stated, "it thus seems appropriate . . . to apply those limits rather strictly."[210] Although the fiction of guilty property has lost much of its relevance, the Court in *Bennis* continued to recognize the proposition.[211] If it were not for this arcane legal theory, forfeitures would inevitably be rendered unconstitutional.[212] Despite criticism, this fiction does indeed have a long and venerable history. Critics may have expected a victory in this area, where the Court has been sensitive to innocent owners since *Austin* and *James Good.* When one factors in the current conservative mode of the Court and a seemingly unending "war on drugs," however, this decision is not so surprising.[213] By adhering to this strict legal standard, the government is relieved of the burdens that would be im-

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209. *See id.* at 1000.

210. *Id.* at 1002 (Thomas, J., concurring).

211. *See id.* at 998. "Cases often arise where the property of the owner is forfeited on account of the fraud, neglect, or misconduct of those intrusted with its possession . . . and it has always been held . . . that the acts of [the possessors] bind the interest of the owner . . . whether he be innocent or guilty." *Id.* (quoting Dobbins's Distillery v. United States, 96 U.S. 395, 401 (1878)).

212. *See* Austin v. United States, 509 U.S. 602, 615-16 (1993); *see also* Lawrence A. Kasten, *Extending Constitutional Protection to Civil Forfeitures That Exceed Rough Remedial Compensation*, 60 GEO. WASH. L. REV. 194, 198-99 (1991) (describing common-law fiction of guilty property).

213. Civil forfeiture statutes are used to fund the "war on drugs." President Bush stated in 1991 that "[a]sset forfeiture laws allow us to take the ill-gotten gains of drug kingpins and use them to put more cops on the streets and more prosecutors in court." Marc B. Stahl, *Asset Forfeiture, Burdens of Proof and the War on Drugs*, 83 J. CRIM. L. & CRIMINOLOGY 274, 275 (1992) (citing President George Bush, Remarks By President Bush at the Attorney General's Summit on Law Enforcement: Responses to Violent Crime, FED. NEWS SERV., Mar. 5, 1991 *available in* LEXIS, Nexis Library, FEDNEW File).

posed on it if a criminal trial was a prerequisite to forfeiture. The paradoxical result is that civil forfeiture laws permit the forfeiture of property from owners whom the government concedes are not criminals by definition.

Perhaps one result of *Bennis v. Michigan* will be to reinforce the common-law theory used to support forfeitures, leaving the innocent owner defense subject to the rules put forth in *Calero-Toledo* and *Austin*.[214] On the other hand, the decision may also serve to reinvigorate forfeiture reform in the legislature. It would seem logical that Congress' objective should be to ensure that civil forfeiture proceedings serve to prevent, rather than facilitate, such undesirable outcomes. After *Bennis*, however, the primary rationale for imposing civil forfeitures remains the guilty property fiction and all of its unpleasant baggage.

There will always be feelings of injustice when an owner is deprived of his property without regard to guilt or innocence.[215] The law in its most fundamental sense is designed to protect the innocent. But in order to provide the government with any force with which to use this tool, a strict liability theory has been and apparently continues to be necessary.[216] "[T]he rule simply persists from blind imitation of the past."[217]

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214. The relevant rule of *Calero-Toledo* is that the owner may have a defense to a forfeiture action if he can show that he has taken reasonable precautions to prevent the illicit use of property and that he was not aware of the illicit use. *See* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 680 (1974). The holding of *Austin* is that the Eighth Amendment extends to civil proceedings where fines are intended to punish. *See* Austin v. United States, 509 U.S. 602, 604 (1993).

215. "Fundamental fairness prohibits the punishment of innocent people." Bennis v. Michigan, 116 S. Ct. 994, 1007 (1996) (Stevens, J., dissenting).

216. *See* Bennis v. Michigan, 116 S. Ct. 994 (1996); Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974); Van Oster v. Kansas, 272 U.S. 465 (1926); Goldsmith v. United States, 254 U.S. 505 (1921).

217. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).