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Bound by the Sins of Another: Civil Forfeiture and the Lack of Constitutional Protection for Innocent Owners in Bennis v. Michigan

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Bound by the Sins of Another: Civil Forfeiture and the Lack of Constitutional Protection for Innocent Owners in *Bennis v. Michigan*

As criminal prosecutions continue to consume greater amounts of time and money, law enforcement officials are increasingly turning to civil remedies such as forfeiture statutes as an alternative method to punish offenders.[1] Forfeiture statutes permit officials to seize contraband as well as profits from criminal activities and to confiscate virtually any "instrumentality" used in connection with a crime.[2] Forfeiture actions are simple, allow quick recovery and are extremely profitable; all proceeds from the sale of forfeited property go directly to the state coffers.[3] Local agencies are often rewarded monetarily for aggressive forfeiture policies, causing the technique to quickly gain popularity among cash-strapped law enforcement agencies and state legislatures.[4] At least one jurisdiction has adopted a policy designed to reward individual officers by giving them a percentage of

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1. *See* Mary M. Cheh, *Can Something This Easy, Quick, and Profitable Also Be Fair? Runaway Civil Forfeiture Stumbles on the Constitution*, 39 N.Y.L. SCH. L. REV. 1, 1-7 (1994) [hereinafter Cheh, *Runaway Civil Forfeiture*]; Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325, 1325-26 (1991) [hereinafter Cheh, *Constitutional Limits*]; Tamara R. Piety, *Scorched Earth: How the Expansion of Civil Forfeiture Doctrine Has Laid Waste to Due Process*, 45 U. MIAMI L. REV. 911, 911-46 (1991). Civil remedies include forfeiture, padlock proceedings, nuisance abatement actions and evictions. *See generally* PRACTICING LAW INSTITUTE, UNDERSTANDING FORFEITURE AND RELATED CIVIL ACTIONS IN CRIMINAL LAW (1992) (describing various civil remedies).

2. *See* Cheh, *Constitutional Limits*, *supra* note 1, at 1340-42. In considering the proliferation of the use of forfeiture, Cheh notes that while forfeiture was "[o]riginally intended to reach property that actually was used to commit a crime, it now includes any property having the most tangential connection to criminal activity." *Id.* at 1341.

3. *See id.* at 1342. For example, Broward County, Florida officials seized property valued at almost $4,000,000 during 1988. *See id.* (citing Fred Strasser, *Forfeiture Isn't Only for Drug Kingpins*, NAT'L L.J., July 17, 1989, at 1, col. 1). From 1990 to 1994, officials in the small town of Sulphur, Louisiana seized about $5,000,000, primarily by confiscating cash suspected of being "drug money" from drivers along Interstate 10. *See* David Heilbroner, *The Law Goes on a Treasure Hunt*, N.Y. TIMES, Dec. 11, 1994, (Magazine), at 70, 70.

4. *See* Cheh, *Constitutional Limits*, *supra* note 1, at 1338-39 (discussing the popularity of forfeiture and the diversity of seizable assets). In Little Compton, Rhode Island, the seven-member police force was able to purchase "video cameras, police cruisers, an outdoor pistol range and officers' college tuition" with $3.8 million seized in a single "hashish bust." Heilbroner, *supra* note 3, at 73.

any assets seized under forfeiture laws, further increasing the incentives for aggressive seizures.[5]

Aggressive civil forfeiture often leads to situations described by House Judiciary Committee Chairman Henry Hyde as "Kafkaesque."[6] In an unfortunate example, Florida officials seized

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5. *See* Brian McGrory, *Only Cops Seem to Like Town's Plan to Offer Cut of Drug Forfeiture Funds*, PHOENIX GAZETTE, Mar. 3, 1995, at A29 (discussing the town of Helper, Utah, which adopted an ordinance rewarding local officers for aggressive forfeiture by giving the arresting officer 12% of the assets seized and splitting an additional 8% between the backup officers assisting in the seizure); *see also* Michelle Stevens, *Utah Drug-Seizure Law Goes Too Far*, CHI. SUN-TIMES, May 15, 1995, at 25 (arguing that rewarding individual officers creates a greater risk of corrupt law enforcement personnel).

6. *See* Linnet Myers, *Forfeiture Laws: Fair or Foul? Americans Not Guilty of Crimes Decry Loss of Property*, CHI. TRIB., Mar. 12, 1996, § 1, at 6. Representative Hyde supports legislation that would provide greater protection against civil forfeiture in federal actions. *See id.* The Federal Drug Forfeiture Statute is codified at 21 U.S.C. § 881 (1994 & Supp. 1996), and is an important part of the modern development of civil forfeiture proceedings. This Note does not focus on the Federal Drug Forfeiture Statutes because they are distinct from the type of state statute at issue here, in that the federal statutes, unlike many state laws, provide for a limited innocent owner defense. *See id.* § 881(a).

For general discussion and analysis of forfeiture under these federal statutes, see Michael F. Alessio, Comment, *From Exodus to Embarrassment: Civil Forfeiture Under the Drug Abuse Prevention and Control Act*, 48 SMU L. REV. 429 (1995) (analyzing judicial interpretation of the Federal Drug Forfeiture Statutes and the scope of governmental power under 21 U.S.C. § 881 (1988)); Rick Fueyo, Note, *Normative Considerations of Asset Forfeiture Under the Drug Abuse Control Act—Who Will Protect the People?—The Judiciary as Vox Populi*, 7 U. FLA. J.L. & PUB. POL'Y 143 (1995) (describing the history of forfeiture under the Drug Control Act and analyzing normative aspects of forfeiture); Stephen H. McClain, Note, *Running the Gauntlet: An Assessment of the Double Jeopardy Implications of Criminally Prosecuting Drug Offenders and Pursuing Civil Forfeiture of Related Assets Under 21 U.S.C. § 881(a)(4), (6) and (7)*, 70 NOTRE DAME L. REV. 941 (1995) (analyzing forfeiture cases within the framework of the Double Jeopardy Clause and focusing on forfeiture under the Federal Drug Forfeiture Statutes); Patricia A. O'Neill, Note, United States v. One 1973 Rolls Royce: *The Confusion Continues in Interpreting Drug Forfeiture Statutes*, 40 VILL. L. REV. 723 (1995) (analyzing the criminal nature of 21 U.S.C. § 881 and arguing that the forfeiture statute violates constitutional protections and fundamental notions of fairness); Michael Schecter, Note, *Fear and Loathing and the Forfeiture Laws*, 75 CORNELL L. REV. 1151 (1990). For discussion and analysis of the innocent owner protections offered by the Federal Drug Forfeiture Statutes, see generally Eric G. Zajac, *Tenancies by the Entirety and Federal Civil Forfeiture Under the Crime Abuse Prevention and Control Act: A Clash of Titans*, 54 U. PITT. L. REV. 553 (1993) (analyzing the knowledge and consent provisions of the innocent owner defense in 21 U.S.C. § 881 and considering forfeiture of property held in tenancy by the entireties where only one spouse is an innocent owner); Anne-Marie Feeley, Comment, *Forfeiture of Marital Property Under 21 U.S.C. § 881(a)(7): Irreconcilable Differences?*, 37 VILL. L. REV. 1487 (1992) (discussing the effects of forfeiture provisions contained in the Drug Control Act on property owned by husband and wife as tenants by the entirety); Anthony J. Franze, Note, *Casualties of War?: Drugs, Civil Forfeiture, and the Plight of the "Innocent Owner,"* 70 NOTRE DAME L. REV. 369 (1994) (considering the forfeiture of property owned by innocent parties due to the illegal conduct of third persons under 21

$19,000 from Selena Washington, a South Carolina citizen who was carrying cash on her trip to buy building materials to repair her Charleston home which was destroyed by Hurricane Hugo.[7] After stopping Ms. Washington as she traveled down a Florida Interstate late at night, police seized the cash as suspected drug money.[8] The officer did not take Ms. Washington's name or give her a receipt; he merely took the money and sped away.[9] After lengthy negotiations, Ms. Washington settled with the officials, an alternative cheaper than an extended legal battle; the sheriff kept $4,000, her attorney got $1,200 and Ms. Washington got back only $13,800.[10]

Civil forfeiture is an in rem proceeding brought against property based on the legal fiction that the property is guilty.[11] These civil proceedings do not provide many of the protections found in criminal

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U.S.C. § 881 and considering the rights of "donees and other post-illegal act transferees" to claim the protections of the innocent owner defense); J. William Snyder, Jr., Note, *Reining in Civil Forfeiture Law and Protecting Innocent Owners from Civil Asset Forfeiture:* United States v. 92 Buena Vista Avenue, 72 N.C. L. REV. 1333 (1994) (analyzing *United States v. 92 Buena Vista Avenue,* 507 U.S. 111 (1993), and the relationship between the innocent owner defense and the relation back doctrine, which dictates that under the Federal Drug Forfeiture Statute, title to the offending property vests in the government at the time the illegal act is committed, invalidating subsequent transfers to good faith purchasers); Derrick Wilson, Note, *Drug Asset Forfeiture: In the War on Drugs, Is the Innocent Spouse the Loser?*, 30 J. FAM. L. 135 (1991) (outlining the civil forfeiture framework and the innocent owner defense in 21 U.S.C. § 881, and analyzing forfeiture's effects on personal and real property held in tenancy by the entirety, joint tenancy and equity by an innocent spouse).

7. *See* John Dillin, *Tracking More Than Just Speed*, CHRISTIAN SCI. MONITOR, Oct. 4, 1993, at 8.

8. *See id.*

9. *See id.*

10. *See id.* For additional examples of aggressive civil forfeiture, see John Dillin, *When Federal Drug Laws Create Havoc for Citizens*, CHRISTIAN SCI. MONITOR, Sept. 28, 1993, at 10. For in-depth analysis and critique of civil forfeiture, see generally LEONARD W. LEVY, A LICENSE TO STEAL: THE FORFEITURE OF PROPERTY (1996) (considering the development of civil forfeiture and the problems caused by aggressive forfeiture policies). Civil forfeiture can also create problems for mortgage lien holders when collateral is forfeited. *See* Jeri Poller, *Government Forfeiture of Collateral: Mortgagees and the Innocent Lien Holder Defense*, 112 BANKING L.J. 534, 541-48 (1995).

11. *See* Cheh, *Constitutional Limits*, *supra* note 1, at 1340. Modern civil forfeiture evolved from the English common law of deodands which required forfeiture of any property that caused the death of a "reasonable creature." *See* Alison Roberts Solomon, Comment, *Drugs and Money: How Successful Is the Seizure and Forfeiture Program At Raising Revenue and Distributing Proceeds?*, 42 EMORY L.J. 1149, 1149-54 (1993) (discussing the historical development of civil forfeiture). Forfeiture was sanctioned as early as the Mosaic Law of the Old Testament. *See id.* For extensive analysis of the history and development of the law of civil forfeiture, see Jimmy Gurulé, *Introduction: The Ancient Roots of Modern Forfeiture Law*, 21 J. LEGIS. 155, 156-59 (1995); Helen M. Kemp, *Presumed Guilty: When the War on Drugs Becomes a War on the Constitution*, 14 QUINNIPIAC L. REV. 273, 277-83 (1994).

proceedings,[12] and allow forfeiture without actual conviction of any crime.[13] The relative ease of the seizures permitted by state forfeiture statutes implicates the Fourteenth Amendment's protection against deprivation of property without due process.[14] This is especially true when the owner of the property is not guilty of any wrongdoing and is unaware that someone else has used the property in the commission of a crime. These innocent owners are forced to forfeit their property when they have done no wrong, based solely on the misuse of their property by another and the resulting "guilt" of the property itself.[15] In *Bennis v. Michigan*,[16] the United States Supreme Court declined to provide constitutional protection for these innocent owners and continued to adhere to the legal fiction that allows states to seize the "guilty" property of an innocent owner under forfeiture statutes.[17]

This Note first discusses the facts of *Bennis*, the procedural history, and the majority and dissenting Supreme Court opinions.[18] After considering the historical line of cases addressing *in rem* forfeiture and innocent owners,[19] the Note then analyzes the influence of *Bennis* within this line of precedent and considers the decision in light of the judicial philosophy of stare decisis.[20] This Note further analyzes the connection between *Bennis* and constitutional Double Jeopardy arguments in civil forfeiture cases.[21] Finally, the Note considers the ramifications of the decision in *Bennis* and the implications for innocent owners in an era of increased and expansive forfeiture statutes with limited constitutional safeguards.[22]

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12. Criminal procedural protections include proof beyond a reasonable doubt and a requirement of conviction before property of the accused is forfeited. *See* Cheh, *Constitutional Limits*, *supra* note 1, at 1340. In contrast, the burden of proof for civil forfeiture is a preponderance of the evidence, and no criminal conviction is required. *See id.*; *see also* Solomon, *supra* note 11, at 1159 (analyzing distinctions in the burdens of proof).

13. *See* Cheh, *Constitutional Limits*, *supra* note 1, at 1340.

14. The Fourteenth Amendment provides in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

15. *See infra* notes 50-101 and accompanying text (discussing the guilty property fiction as it developed in Supreme Court cases).

16. 116 S. Ct. 994 (1996).

17. *See id.* at 998.

18. *See infra* notes 23-48 and accompanying text.

19. *See infra* notes 49-129 and accompanying text.

20. *See infra* notes 130-72 and accompanying text.

21. *See infra* notes 173-90 and accompanying text.

22. *See infra* notes 191-205 and accompanying text.

In *Bennis*, Michigan officials sought the forfeiture of an automobile after it was used in prostitution in violation of Michigan's indecency statutes.[23] John Bennis was arrested after police saw him engaging in sexual activity with a prostitute in a parked car.[24] The car was owned jointly by John Bennis and his wife, Tina Bennis.[25] Tina Bennis entrusted the car to her husband for transportation to and from work, but did not know that he would use it to violate the indecency laws.[26] After John Bennis' conviction for gross indecency, the State of Michigan sued to have the car abated as a public nuisance, calling for forfeiture of the car to the state.[27] The trial court ordered the car's abatement and forfeiture.[28] While the judge recognized his remedial discretion in protecting the innocent co-title holder, he declined to grant Ms. Bennis half the sale proceeds and ordered all of the proceeds to go to the state.[29]

Based on its interpretation of Michigan Supreme Court precedent, the Michigan Court of Appeals reversed, finding that the State could not abate Tina Bennis' interest unless it proved that she knew that the car would be used to violate the law.[30] The Michigan Su-

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23. *See Bennis*, 116 S. Ct. at 996; *infra* note 27 and accompanying text (discussing the relevant Michigan statutes).

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

25. *See id.* In oral argument before the Supreme Court, neither side was able to specify the exact nature of the joint ownership in the car. *See* Transcript of Oral Argument, Bennis v. Michigan, 1995 WL 712350, at *4, *31. Ms. Bennis' attorney responded to questioning by explaining that automobile ownership was a heavily regulated area, and that the interests of a co-title holder were most closely analogous to the common law interests of a tenant-in-common. *See id.* at *4. He noted that a co-title holder would not have the right to sell the entire vehicle, and that the Michigan court had assumed that Ms. Bennis had a "separately protectable interest in th[e] car." *Id.* at *5-*6. The attorney for the State of Michigan agreed that the exact nature of the ownership was unclear and agreed both spouses were required to sign the title to sell a commonly owned vehicle. *See id.* at *31. However, he also argued that the nature of the ownership interest was irrelevant to the outcome of the case. *See id.* at *32-*33.

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

27. *See id.* at 996. The State's suit for abatement was based on a set of Michigan statutes. The first declares any vehicle used for prostitution to be a nuisance. *See* MICH. COMP. LAWS § 600.3801 (1995). A vehicle found to be a nuisance is subject to an order of abatement directing the removal and sale of the property, and the balance after costs is credited to the general funds of the state. *See* MICH. COMP. LAWS § 600.3825 (1987). Finally, the abatement law provides that "[p]roof of knowledge of the existence of the nuisance on the part of the defendants or any of them, is not required." *Id.* § 600.3815(2).

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

29. *See id.*

30. *See* State *ex rel.* Wayne County Prosecuting Atty. v. Bennis, 504 N.W.2d 731, 733 (Mich. App. 1993), *rev'd*, 527 N.W.2d 483 (Mich. 1994), *aff'd sub nom.* Bennis v. Michigan, 116 S. Ct. 994 (1996). The Michigan Court of Appeals also found that the conduct would not qualify as a public nuisance because only one occurrence of conduct violating

preme Court reversed, finding that the owner did not need to know how her vehicle would be used as a condition of abatement under the statute.[31] The Michigan court cited United States Supreme Court precedent[32] and held that the failure of the statute to provide a defense for innocent owners was "without constitutional consequence."[33] Tina Bennis appealed to the United States Supreme Court arguing that Michigan's abatement scheme deprived her of property without due process of law in violation of the Fourteenth Amendment,[34] and that her property was taken without just compensation in violation of the Fifth Amendment as applied to the states through the Fourteenth Amendment.[35]

In *Bennis*, the Court affirmed the Michigan Supreme Court and held that statutes requiring forfeiture of property based on use of the property in a crime, without providing an innocent owner defense, do not violate the Due Process Clause of the Fourteenth Amendment or the Takings Clause of the Fifth Amendment.[36] Chief Justice Rehnquist, delivering the majority opinion, grounded the decision on the historical legal fiction that " 'the thing is here primarily considered as the offender' "[37] and relied on an "unbroken" line of cases

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the act was shown and there was no evidence of payment for the sexual act. *See id.* at 733-35.

31. *See* Michigan *ex rel.* Wayne County Prosecutor v. Bennis, 527 N.W.2d 483, 492 (Mich. 1994), *aff'd sub nom.* Bennis v. Michigan, 116 S. Ct. 994 (1996); *see also supra* note 27 (providing the applicable Michigan nuisance statutes).

32. *See* Michigan *ex rel.* Wayne County Prosecutor v. Bennis, 527 N.W.2d 483, 493-95 (Mich. 1994) (citing Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974); Van Oster v. Kansas, 272 U.S. 465 (1926); J.W. Goldsmith, Jr.-Grant Co. v. United States, 254 U.S. 505 (1921); Dobbins's Distillery v. United States, 96 U.S. 395 (1877); United States v. Brig Malek Adhel, 43 U.S. (2 How.) 210 (1844); The Palmyra, 25 U.S. (12 Wheat.) 1 (1827)), *aff'd sub nom.* Bennis v. Michigan, 116 S. Ct. 994 (1996); *see also infra* notes 50-101 and accompanying text (discussing each of the cases in the line of precedent).

33. Michigan *ex rel.* Wayne County Prosecutor v. Bennis, 527 N.W.2d 483, 493-95 (Mich. 1994), *aff'd sub nom.* Bennis v. Michigan, 116 S. Ct. 994 (1996). The Michigan Supreme Court recognized that the abatement proceeding was an equitable action and was correctly understood as such by the trial judge. *See id.* at 495.

34. *See Bennis*, 116 S. Ct. at 998. For the relevant text of the Fourteenth Amendment, see *supra* note 14.

35. The Fifth Amendment provides that "[n]o person shall be ... deprived of life, liberty or property, without due process of law; nor shall property be taken for public use, without just compensation." U.S. CONST. amend. V. The right to compensation for property taken by the government, as secured by the Fifth Amendment, was incorporated into the Due Process Clause of the Fourteenth Amendment. *See* Chicago, Burlington & Quincy R.R. v. Chicago, 166 U.S. 226, 235-41 (1897).

36. *See Bennis*, 116 S. Ct. at 998.

37. *Id.* (quoting *The Palmyra*, 25 U.S. (12 Wheat.) at 14).

rejecting the innocent owner defense.[38] Although the Court acknowledged a willingness to draw the line when necessary to constrain expanding forfeiture actions, citing as an example the forfeiture of an ocean liner because of the activities of a single passenger, the majority concluded that " 'the cases authorizing actions of the kind at issue here are too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced.' "[39]

The Court found that the forfeiture was neither punitive nor subject to the Eighth Amendment's limitations on excessive fines[40] because it was an equitable proceeding with a deterrent purpose distinct from its punitive purpose.[41] The majority reasoned that the failure to protect innocent owners was justified by the important governmental interest in deterring illegal activity and by the ease with which offenders could evade forfeiture actions if the government was required to prove collusion between the innocent owner and offender.[42] Finally, the Court held that this forfeiture was not a taking in violation of the Fifth Amendment as applied to the states through the Fourteenth Amendment because the property was lawfully transferred to the state by use of this forfeiture statute, without the exercise of eminent domain.[43]

Justice Stevens' dissenting opinion advanced three reasons supporting constitutional protection for innocent owners.[44] First, Justice

38. *See id.*; *see also infra* notes 50-101 and accompanying text (discussing the cases in the line of precedent holding the property itself guilty). Interestingly, the *Bennis* majority described the line of cases as "unbroken," *Bennis*, 116 S. Ct. at 998, while the dissenters argued that the question of an innocent owner's constitutional protection had been previously reserved by the Court. *See Bennis*, 116 S. Ct. at 1010 (Stevens, J., dissenting); *see also infra* notes 102-29 and accompanying text (discussing recent cases in which the Court extended constitutional protections to civil forfeitures, and questioned whether the property of truly innocent owners could be forfeited).

39. *Bennis*, 116 S. Ct. at 1001 (quoting J.W. Goldsmith, Jr.-Grant Co. v. United States, 254 U.S. 505, 511 (1921)).

40. The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

41. *See Bennis*, 116 S. Ct. at 1000; *id.* at 1002 (Thomas, J., concurring) (characterizing the forfeiture action as "remedial"). Interestingly, the majority seemed to differentiate the deterrent purpose and the punitive purpose, *see id.* at 1000, even though deterrence is one of the traditional aims of punishment, see Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168 (1962) (describing the dual aims of punishment as retribution and deterrence).

42. *See Bennis*, 116 S. Ct. at 1000-01; *id.* at 1003 (Ginsburg, J., concurring).

43. *See id.* at 1001. The majority relied on *United States v. Fuller*, 409 U.S. 488, 492 (1973) for the proposition that "[t]he government may not be required to compensate an owner for property which it has already lawfully acquired under the exercise of governmental authority other than the power of eminent domain." *Bennis*, 116 S. Ct. at 1001.

44. *See Bennis*, 116 S. Ct. at 1003-10 (Stevens, J., dissenting).

Stevens urged consideration of the property's use in the crime. While contraband is always forfeited, he argued that property which is considered an instrumentality of crime should not be forfeited by an innocent owner if the property did not actually facilitate the offense.[45] Specifically, he argued that the isolated use of a stationary vehicle is not an instrumentality of the crime, and that therefore the innocent owner should not be forced to forfeit the vehicle.[46] Second, Justice Stevens contended that this type of forfeiture is punishment, and that fairness and due process should prohibit the punishment of innocent people.[47] Finally, he argued that such forfeitures constitute punishment which violates the Eighth Amendment protection against excessive fines, and that the facts of this case presented the place to draw the line on broad-reaching forfeiture proceedings which deprive innocent owners of their property.[48]

The Due Process Clauses of both the Fifth and Fourteenth Amendments prohibit states and the federal government from depriving persons of "life, liberty, or property, without due process of law."[49] Historically, the Court has held that the Constitution allows in rem proceedings resulting in forfeiture of property, even if the owner of the property is innocent, based on the legal fiction that "the thing is . . . the offender."[50] This doctrine is grounded in admiralty law of the early 1800s, beginning with the 1827 case of *The Palmyra*,[51] in which the Palmyra, a vessel commissioned by the King of Spain, attacked several vessels in violation of the piracy laws of the United States.[52] A federal statute provided for condemnation and sale of

45. *See id.* at 1004-05 (Stevens, J., dissenting).

46. *See id.* at 1005 (Stevens, J., dissenting).

47. *See id.* at 1007 (Stevens, J., dissenting).

48. *See id.* at 1010 (Stevens, J., dissenting). In a separate dissent, Justice Kennedy argued that the precedent set in admiralty cases for forfeiture by innocent owners could continue without extending the principle to every automobile case. *See id.* at 1010-11 (Kennedy, J., dissenting) (citing *United States v. Brig Malek Adhel*, 43 U.S. (2 How.) 210 (1844), as an admiralty case which could survive as part of the long tradition of forfeiture of vessels). Justice Kennedy also argued that the state's interest in not having to prove collusion could be best served by a presumption that the innocent owner could overcome by showing a lack of involvement or knowledge of the crime. *See id.* (Kennedy, J., dissenting).

49. U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1; *see supra* notes 14, 35 and accompanying text (providing the relevant text of the Fourteenth and Fifth Amendments respectively).

50. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 684 (1974) (quoting The Palmyra, 25 U.S. (12 Wheat) 1, 14-15 (1827)); *see also infra* note 55 and accompanying text (discussing the use of the guilty property fiction in *The Palmyra*).

51. 25 U.S. (12 Wheat.) 1 (1827).

52. *See id.* at 8.

vessels captured for " 'piratical aggression.' "[53] On appeal to the Supreme Court, the owner of the Palmyra argued that the in rem proceeding against the Palmyra was improper because he had not been convicted of pirateering in an in personam proceeding.[54] The Court rejected this argument and found that "[t]he thing is here primarily considered as the offender, or rather the offence is attached primarily to the thing."[55] The Court held that "no personal conviction of the offender is necessary to enforce a forfeiture *in rem* in cases of this nature."[56]

In the second admiralty case addressing in rem forfeiture proceedings, *United States v. Brig Malek Adhel*,[57] the crew of a vessel engaged in acts of piracy which were not contemplated or authorized by the owners.[58] After the vessel and cargo were seized for adjudication, the owner argued that he was innocent of any crime and that therefore his property should not be forfeited.[59] Without any reference to the conduct of the owner, the Court concluded that the innocence of the owner was irrelevant because "[t]he vessel which commits the aggression is treated as the offender."[60] The Court found the rule necessary in these cases because it was almost impossible to enforce the piracy laws and insure indemnity for injured

53. *See id.* (quoting Piracy Act of March 3, 1819, ch. 77, 3 Stat. 510; Piracy Act of May 15, 1820, ch. 113, 3 Stat. 600 (codified as amended at 18 U.S.C. §§ 1651-61, 3238 (1994) and 33 U.S.C. §§ 381-84 (1994)). Chapter 77 of the Piracy Act of March 3, 1819 was cited as Chapter 75 in *The Palmyra*, and Chapter 113 of the Piracy Act of May 15, 1820 was cited as Chapter 112 in *The Palmyra*, possibly due to citation of the Acts prior to publication of the *Statutes at Large*. *See The Palmyra*, 25 U.S. (12 Wheat.) at 8.

54. *See The Palmyra*, 25 U.S. (12 Wheat.) at 12.

55. *Id.* at 14.

56. *Id.* at 15. Although the Court rejected the owner's argument and found that the offense attached to the vessel itself, there was disagreement among the Justices as to whether the Palmyra was actually guilty of the offense charged. Because the Justices were split, the Court summarily affirmed the decision of the lower court. *See id.* Since some Justices were opposed to the actual condemnation, the decision of the circuit court was affirmed and the Palmyra was acquitted and ordered returned to its owner. *See id.* at 15, 18.

57. 43 U.S. (2 How.) 210 (1844). This case is sometimes referred to by other names, including *Harmony v. United States* and *Malek Adhel*. *See, e.g.*, *Bennis*, 116 S. Ct. at 1004 (Stevens, J., dissenting).

58. *See Brig Malek Adhel*, 43 U.S. (2 How.) at 230. The acts of piracy were in violation of the U.S. Piracy Act of March 3, 1819, ch. 77, 3 Stat. 510 (codified as amended at 18 U.S.C. §§ 1651-61, 3238 (1994) and 33 U.S.C. §§ 381-84 (1994)). In this case, not only was the owner not convicted of any crime, he was completely innocent and unaware of the uses to which the crew was putting the ship. *See id.* at 230.

59. *See Brig Malek Adhel*, 43 U.S. (2 How.) at 229-30.

60. *Id.* at 233.

parties without the in rem proceeding.[61] However, the Court found that the cargo was not similarly bound and was "not generally deemed to be involved in the same confiscation as the ship, unless the owner thereof co-operates in or authorizes the unlawful act."[62] Because the cargo owner was innocent of any violation of the piracy laws, the Court restored the cargo to the owner; however, the vessel was condemned for the violation.[63]

These principles for in rem proceedings were extended beyond admiralty law in *Dobbins's Distillery v. United States*,[64] in which the owner of a piece of land containing a distillery leased the land to a distillery operator[65] who did not keep the distillery's books properly and made false entries in order to evade taxes.[66] Based on his alleged ignorance of the fraud committed by the lessee, the owner challenged the United States' seizure of his distillery equipment and land.[67] The Court held that real and personal property used in connection with the distillery was subject to forfeiture for the tax fraud of the lessee, despite the owner's lack of knowledge.[68] Applying the principle that the property is the offender, the Court extended the idea from the admiralty context into an in rem proceeding against real property.[69] The revenue statute did not make any exception for innocent owners, and the Court found that the owner was bound by the fraud or neglect of the person he entrusted with his property, just as the "acts of

61. *See id.* As noted by Justice Kennedy in his dissenting opinion in *Bennis*, forfeiture of vessels was necessary in order to provide compensation for victims where the "responsible owners were often half a world away and beyond the practical reach of the law and its processes." *Bennis*, 116 S. Ct. at 1010 (Kennedy, J., dissenting). In *Brig Malek Adhel*, the Court noted that smuggling statutes and revenue laws presented similar circumstances where in rem forfeiture proceedings were commonly used. *See Brig Malek Adhel*, 43 U.S.(2 How.) at 233.

62. *Id.* at 237.

63. *See id.*

64. 96 U.S. 395 (1877).

65. *See id.* at 396.

66. *See id.* at 396-97. The distillery was required to keep proper records and pay taxes under federal tax laws applicable specifically to distilling operations. *See id.*; Act of July 20, 1868, ch. 186, § 19, 15 Stat. 125, 132 (imposing a federal tax on distilled spirits and tobacco), *superseded by* Internal Revenue Code of 1939, ch. 26, 53 Stat. 298, *superseded by* Internal Revenue Code of 1954, ch. 736, 68A Stat. 595, *superseded by* Pub. L. No. 85-859, Title II, § 201, 72 Stat. 1313 (1958) (codified as amended at 26 U.S.C. §§ 5001-691 (1994)).

67. *See Dobbins's Distillery*, 96 U.S. at 397.

68. *See id.* at 399.

69. *See id.* at 400. The Court recognized that the same principles apply to in rem proceedings in admiralty and cited *The Palmyra*, 25 U.S. (12 Wheat.) 1 (1827) and *United States v. Brig Malek Adhel*, 43 U.S. (2 How.) 210 (1844). *See id.*

the master and crew bind the interest of the owner of the ship."[70]

This principle was first directly challenged on Fifth Amendment due process grounds in 1920 in the case of *J.W. Goldsmith, Jr.-Grant Co. v. United States*.[71] The Grant Company owned an automobile and sold it to J.G. Thompson, but retained the title as security for the unpaid balance of the purchase price.[72] Thompson used the automobile to transport and conceal distilled spirits which were subject to a tax that had not been paid.[73] The Grant Company did not know of this use by Thompson and was not involved in the revenue violation.[74] The federal revenue laws called for forfeiture of vessels used in the concealment of commodities on which tax was owed and not paid with the intent to defraud the United States.[75] The automobile was seized by the United States, and after a hearing, the court "charged the jury to render a verdict finding the car guilty."[76] The car was condemned and forfeiture entered, and the Grant Company appealed the decision.[77] The Supreme Court upheld the forfeiture and concluded that Congress had imposed a duty of care on owners of property by allowing the property itself to be judged guilty of wrongdoing and thereby forfeited.[78] Recognizing the constitutional protections implicated by the issue, the Court explained its reasoning:

> If the case were the first of its kind, it and its apparent paradoxes might compel a lengthy discussion to harmonize the section with the accepted tests of human conduct. Its words taken literally forfeit property illicitly used though the owner of it did not participate in or have knowledge of the illicit use. There is strength, therefore, in the contention that, if such be the inevitable meaning of the section, it seems to violate that justice which should be the foundation

70. *Dobbins's Distillery*, 96 U.S. at 401. Although fraud was not imputed to the owner, his property was bound by the acts of those he entrusted with its care; it was the property, not the owner, that was on trial. *See id.* at 403-04.

71. 254 U.S. 505 (1921).

72. *See id.* at 508-09.

73. *See id.* at 508.

74. *See id.* at 509.

75. *See id.* at 508; Act of July 13, 1866, ch. 184, § 14, 14 Stat. 98, 151, *superseded by* Internal Revenue Code of 1939, ch. 26, 53 Stat. 298, *superseded by* Internal Revenue Code of 1954, ch. 736, 68A Stat. 595, *superseded by* Pub. L. No. 85-859, Title II, § 201, 72 Stat. 1313 (1958) (codified as amended at 26 U.S.C. §§ 5001-691 (1994)).

76. *Goldsmith-Grant*, 254 U.S. at 509.

77. *See id.* The Grant Company had posted a bond with security when the car was initially seized, so the car had already been returned to the Grant Company. *See id.* at 508. The judgment was actually for $800 and costs against the Grant Company as principal and J.W. Goldsmith, Jr. as security. *See id.* at 509.

78. *See id.* at 510.

of the due process of law required by the Constitution.

. . .

But whether the reason for § 3450 be artificial or real, it is too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced.[79]

Six years later, the Court extended the principle to state forfeiture statutes in *Van Oster v. Kansas*.[80] In *Van Oster*, the owner of an automobile allowed the vendors who sold him the car to retain it for use in their business as part of the consideration for the sale.[81] An associate of the vendors used the automobile to illegally transport intoxicating liquor.[82] Kansas state officials arrested the associate and seized the automobile as provided by Kansas' forfeiture statute.[83] The car was judged forfeited under the Kansas statute, but the associate was subsequently acquitted of the offense.[84] The owner of the car challenged the forfeiture statute as violating the due process of law guaranteed by the Fourteenth Amendment.[85] The Court found that the statute did not violate the Fourteenth Amendment, since it had been long settled that statutory forfeiture of an innocent owner's property based on another's use in violation of federal revenue laws was not a violation of the due process guaranteed by the Fifth Amendment.[86] The Court noted that there is no distinction between the due process guaranteed by the Fifth Amendment and that guaranteed by the Fourteenth Amendment in these circumstances, and reasoned that the principle set forth in the earlier cases applied to the

79. *Id.* at 510-11.

80. 272 U.S. 465 (1926).

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

82. *See id.* at 466.

83. *See id.* The Kansas statute provided that an automobile used in the state for transportation of intoxicating liquor was a common nuisance which could be forfeited and sold. *See id.*

84. *See id.*

85. *See id.* The Kansas statute had been construed by the Kansas Supreme Court as allowing forfeiture of an innocent owner's interest based on misuse of the property entrusted to the wrongdoer. *See* Kansas v. Brown, 241 P. 112, 113 (Kan. 1925), *aff'd sub nom.* Van Oster v. Kansas, 272 U.S. 465 (1926). The owner of the car was challenging the constitutionality of the statute allowing this forfeiture. *See Van Oster*, 272 U.S. at 466. For the relevant text of the Fourteenth Amendment, see *supra* note 14.

86. *See Van Oster*, 272 U.S. at 468; *see also* J.W. Goldsmith, Jr.-Grant Co. v. United States, 254 U.S. 505, 510-11 (1921) (allowing forfeiture of an innocent owner's interest in property entrusted to someone who violated tax laws); Dobbins's Distillery v. United States, 96 U.S. 395, 399 (1877) (allowing forfeiture of real property for a lessee's tax fraud). The Court in *Van Oster* also considered the analogy to admiralty law where the owner is forced to forfeit property entrusted to another based on misuse of the property. *See Van Oster*, 272 U.S. at 467.

state forfeiture statute in this case.[87] The Court recognized that "certain uses of property may be regarded as so undesirable that the owner surrenders his control at his peril."[88] The Court also found that the subsequent acquittal of the associate was a question of state procedure and did not have constitutional implications for the owner deprived of his automobile.[89]

Five decades later, states were using forfeiture statutes to combat illegal drugs rather than the illegal liquor of the 1920s, and the Supreme Court affirmed their use for this important governmental purpose. In *Calero-Toledo v. Pearson Yacht Leasing Co.*,[90] an innocent owner forfeited his yacht when people who had leased the yacht from him used it to transport marijuana.[91] The owner challenged the seizure as violating due process and unconstitutionally depriving him of his property without just compensation in violation of both the Fourteenth and Fifth Amendments.[92] The Court considered the line

87. *See Van Oster*, 272 U.S. at 468. The Due Process Clause of the Fifth Amendment applies to the federal government and protects against deprivation of "life, liberty, or property, without due process of law." U.S. CONST. amend. V. Similarly, the Fourteenth Amendment prohibits any state from depriving any person of "life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. The *Van Oster* Court found that there was not "any valid distinction between the application of the Fourteenth Amendment to the exercise of the police power by the state in this particular field and the application of the Fifth Amendment to the similar exercise of the taxing power by the federal government." *Van Oster*, 272 U.S. at 468. The Court therefore used precedent upholding civil forfeiture by the federal government under tax statutes to uphold this civil forfeiture by a state under its police power. *See id.*

88. *Van Oster*, 272 U.S. at 467.

89. *See id.* at 469. The car was forfeited even though neither the owner nor the person using the car committed a crime. Thus, a conviction was unnecessary for the forfeiture to be upheld. *See id.*

90. 416 U.S. 663 (1974).

91. *See id.* at 668.

92. *See id.* The forfeiture was challenged under both the Fifth and Fourteenth Amendments. *See id.* The Court decided that it was unnecessary to determine which Amendment applied to Puerto Rico since constitutional protection extended to the Commonwealth regardless. *See id.* at 668 n.5 (noting that it was unnecessary to determine which Amendment applied to Puerto Rico because "there cannot exist under the American flag any governmental authority untrammeled by the requirements of due process of law as guaranteed by the Constitution of the United States); *see also supra* note 14 (providing the relevant text of the Fourteenth Amendment); *supra* note 35 (providing the relevant text of the Fifth Amendment).

The owner also challenged the lack of pre-forfeiture notice, but the Court held that the post-seizure notice was consistent with due process because of the "extraordinary circumstances" of forfeiture. *See Calero-Toledo*, 416 U.S. at 678. The yacht was seized without notice and without a prior hearing, and the owner challenged this lack of notice as a violation of his procedural due process rights. *See id.* at 668. The Court noted that immediate seizure of property without prior notice or hearing was appropriate where necessary to secure an important governmental interest. *See id.* at 678. Because the sei-

of cases from *The Palmyra*[93] and *Brig Malek Adhel*,[94] through *Dobbins's Distillery*[95] to *Goldsmith-Grant*[96] and *Van Oster*,[97] and held that forfeiture of property by an innocent owner did not violate the due process mandates of the Constitution.[98] The Court noted the strong weight of precedent and the long-standing historical fiction that " '[t]he thing is here primarily considered as the offender.' "[99] However, the Court also observed that in the case of an owner who was uninvolved, unaware, and had done all that could be expected to prevent the misuse of his property, "it would be difficult to conclude that forfeiture served legitimate purposes and was not unduly oppressive."[100] Justice Douglas criticized the majority's opinion in his dissent, arguing that the "ancient" fiction that an inanimate object could be "guilty" produced circumstances in which the forfeiture doctrine could not "be reconciled with the requirements of the Fifth Amendment."[101]

After decades of strict adherence to this historical principle, the Court seemed to ready to change course in *Austin v. United States*.[102]

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zure served important governmental purposes of preventing crime, and because the yacht could easily be removed or destroyed if notice was given, the Court found that extraordinary circumstances existed so that the owner's due process rights were not violated by the lack of pre-seizure notice or hearing. *See id.* at 678-79.

93. The Palmyra, 25 U.S. (12 Wheat.) 1 (1827); *see supra* notes 51-56 and accompanying text.

94. United States v. Brig Malek Adhel, 43 U.S. (2 How.) 210 (1844); *see supra* notes 57-63 and accompanying text.

95. Dobbins's Distillery v. United States, 96 U.S. 395 (1877); *see supra* notes 64-70 and accompanying text.

96. J.W. Goldsmith, Jr.-Grant Co. v. United States, 254 U.S. 505 (1921); *see supra* notes 71-79 and accompanying text.

97. Van Oster v. Kansas, 272 U.S. 465 (1926); *see supra* notes 80-89 and accompanying text.

98. *See* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 680, 683-86 (1974).

99. *Id.* at 684 (quoting The Palmyra, 25 U.S. (12 Wheat) 1, 14-15 (1827)).

100. *Id.* at 689-90.

101. *Id.* at 693 (Douglas, J., dissenting in part).

102. 509 U.S. 602 (1993). For additional analysis of the Court's decision in *Austin*, see generally James E. Beaver et al., *Civil Forfeiture and the Eighth Amendment After* Austin, 19 SEATTLE U. L. REV. 1 (1995) (considering *Austin* and restrictions on the proliferation of civil forfeiture); Catherine Cerna, Note, *Economic Theory Applied to Civil Forfeiture: Efficiency and Deterrence Through Reallocation of External Costs*, 46 HASTINGS L.J. 1939 (1995) (discussing *Austin*, suggesting a proportionality test for excessiveness under the Eighth Amendment, and applying economic theory to civil forfeiture "to achieve efficiency and deterrence through reallocation of the external costs associated with drug crimes"); Mary Ewing di Zerega, Note, Austin v. United States*: An Analysis of the Application of the Eighth Amendment to Civil Forfeitures*, 2 GEO. MASON U. L. REV. 127 (1994) (considering *Austin*, the Drug Control Act, and decisions of lower courts prior to *Austin*); W. David George, Note, *Finally, an Eye for an Eye: The Supreme Court Lets the*

Richard Austin was arrested after authorities discovered that he kept cocaine in his mobile home and sold it in his auto body shop.[103] After his arrest, Austin pled guilty to violation of South Dakota's drug laws, and his home and auto shop were seized in forfeiture proceedings based on their use in the crime.[104] Austin challenged the forfeiture as a violation of the Eighth Amendment prohibition against excessive fines.[105] The Eighth Circuit Court of Appeals "reluctantly" agreed that the forfeiture statute did not violate the Eighth Amendment, reasoning that " '[i]f the constitution allows *in rem* forfeiture to be visited upon innocent owners . . . the constitution hardly requires proportionality review of forfeitures .' "[106]

The Supreme Court reversed, stating that that the Eighth Amendment's application is not limited solely to criminal proceedings or proceedings so punitive "that [they] must be considered criminal."[107] Instead, the Court held that the Eighth Amendment limited the power of the government to punish in either civil or criminal proceedings.[108] The Court reasoned that forfeiture statutes

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Punishment Fit the Crime in Austin v. United States, 46 BAYLOR L. REV. 509 (1994) (analyzing civil forfeiture, the Excessive Fines Clause, and *Austin*, and proposing a proportionality test for excessiveness); Joseph B. Harrington, Note, Austin v. United States: *Forfeiture as Punishment and the Implications for Warrantless Seizures*, 4 B.U. PUB. INT. L.J. 415 (1995) (discussing the decision in *Austin* and contending that forfeitures under 21 U.S.C. § 881 based on allegations of criminal activity are unconstitutional); Scott A. Hauert, Comment, *An Examination of the Nature, Scope, and Extent of Statutory Civil Forfeiture*, 20 U. DAYTON L. REV. 159 (1994) (describing the history of civil forfeiture, the decision in *Austin*, and the use of civil forfeiture within constitutional bounds); Laura Larose, Comment, Austin v. United States: *Applicability of the Eighth Amendment to Civil In Rem Forfeitures*, 29 NEW ENG. L. REV. 729 (1995) (discussing civil forfeiture, 21 U.S.C. § 881, the Eighth Amendment and *Austin*, and criticizing the Court's analysis of in rem proceedings).

103. *See Austin*, 509 U.S. at 604-05.

104. *See id.*

105. *See id.* For the relevant text of the Eighth Amendment, see *supra* note 40.

106. United States v. 508 Depot St., 964 F.2d 814, 817 (8th Cir. 1992) (alteration in original) (quoting United States v. 300 Cove Rd., 861 F.2d 232, 234 (9th Cir. 1988)), *rev'd sub nom.* Austin v. United States, 509 U.S. 602 (1993).

107. *Austin*, 509 U.S. at 607; *see* Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963) (highlighting the factors for considering whether a proceeding is so punitive that it must be considered criminal); *see also* United States v. Halper, 490 U.S. 435, 442 (1989) (stating that a civil penalty may be so extreme that it constitutes punishment).

108. *See Austin*, 509 U.S. at 610; *see also Halper*, 490 U.S. at 447-48 ("The notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law...."). The Court in *Austin* found that civil forfeiture violated the Eighth Amendment if the punishment was excessive, but did not define "excessiveness." *See Austin*, 509 U.S. at 622. For various approaches used in developing and applying tests after *Austin*, see *United States v. Milbrand*, 58 F.3d 841, 847-48 (2d Cir. 1995) (creating a definition of excessiveness which included the owner's role as a perpetrator of the crime), *cert. denied*, 116 S. Ct. 1284 (1996); *United States v. Chandler*, 36 F.3d 358, 365 (4th Cir.

were punitive, at least in part, because they were considered punishment at the time the Eighth Amendment was ratified and are also understood as a form of punishment today.[109] The Court found that in the line of innocent owner forfeiture cases, the theory that the property itself is guilty rested 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."[110] Thus, the Court in *Austin* seemed to alter the guilty property fiction and justify forfeiture by imputing guilt to the owner based on the owner's negligence.

The Court supported its finding that forfeiture was punitive by reasoning that earlier cases did not impose liability on an innocent owner who had done everything possible to prevent the misuse of the property.[111] The Court also found that the more recent cases of *Goldsmith-Grant*[112] and *Calero-Toledo*[113] "expressly reserved the question whether the fiction could be employed to forfeit the property of a truly innocent owner."[114] Because the mobile home and auto shop were not "instruments" of the drug trade, the forfeiture

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1994) (adopting an instrumentality test for considering civil forfeiture under the Eighth Amendment), *cert. denied*, 115 S. Ct. 1792 (1995). *See generally* Sarah N. Welling & Medrith Lee Hager, *Defining Excessiveness: Applying the Eighth Amendment to Civil Forfeiture After* Austin v. United States, 83 KY. L.J. 835 (1995) (examining various tests for excessiveness used by lower courts); Christopher Zemp Campbell, Note, *Excessive Means: Applying the Eighth Amendment to Civil In Rem Forfeitures Under* United States v. Chandler, 73 N.C. L. REV. 2284 (1995) (discussing the Fourth Circuit's "instrumentality" test and analysis of a real property forfeiture as an excessive fine in violation of the Eighth Amendment); Clinton Hughes, Note, *Justice Through Synthesis: The Second Circuit Creates a Nonperpetrator Test for Civil Forfeiture Actions*, 4 J.L. & POL'Y 759 (1996) (discussing the Second and Ninth Circuits' response to *Austin* in the development of tests for excessiveness of civil forfeitures based on perpetrator status or culpability of the property owner); Meredith S. Katz, Note, Attorney-General of the State of New York v. One Green 1993 Four Door Chrysler: *Does the Punishment Fit the Crime?*, 12 TOURO L. REV. 715 (1996) (discussing New York's adoption of the Second Circuit's test for excessiveness of civil forfeitures).

109. *See Austin*, 509 U.S. at 611. One approach to constitutional interpretation involves considering the circumstances at the time of ratification to determine the intent of the framers, and considering current circumstances that affect the interpretation. *See* R. Randall Kelso, *Styles of Constitutional Interpretation and the Four Main Approaches to Constitutional Interpretation in American Legal History*, 29 VAL. U. L. REV. 121, 125-26 (1994). Other approaches to constitutional interpretation include consideration of subsequent events such as executive or legislative practice, consideration of politics or social policy, and individual bias. *See id.*

110. *Austin*, 509 U.S. at 615.

111. *See id.* at 616-17.

112. J.W. Goldsmith, Jr.-Grant Co. v. United States, 254 U.S. 505 (1921); *see supra* notes 71-79.

113. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974); *see supra* notes 90-101.

114. *Austin*, 509 U.S. at 617.

statutes were punitive, rather than remedial,[115] and thus implicated the Eighth Amendment's protection against excessive fines.[116] However, the Court declined to adopt a test for excessiveness under the Eighth Amendment and chose to remand the case to the court of appeals for consideration of the forfeiture in light of the protections of the Excessive Fines Clause.[117]

In his concurring opinion, Justice Scalia argued that the Court had never determined that negligence of the owner was required before property could be forfeited, and urged that the Court need not discuss the owner's culpability to reach the decision in this case.[118] Yet despite the urgings of Justice Scalia, Justice Kennedy, Justice Thomas, and Chief Justice Rehnquist,[119] the majority of the Court found that the basis of an owner's liability in forfeiture proceedings was negligence, and that the earlier cases did not hold property of truly innocent owners subject to forfeiture.[120]

After *Austin*, the Court reaffirmed the constitutional protections for civil in rem forfeitures in *United States v. James Daniel Good Real Property*,[121] and extended procedural due process protections to civil forfeitures of real property.[122] Although the decision in *James Daniel Good* did not involve civil forfeiture against an innocent owner, it followed the trend established in *Austin* providing constitutional pro-

115. Remedial recovery is generally designed to provide reasonable compensation to the government for "destruction of government property, losses from fraud or theft of government property" or interest and costs incurred by the government. Cheh, *Constitutional Limits*, *supra* note 1, at 1335. Remedial recovery also includes the "criminal's gains received as a result to her unlawful conduct" because the profits are broadly compensatory. *Id.* In contrast, punitive measures such as statutory penalties or fines are designed to punish the offender. *See id.*

116. *See Austin*, 509 U.S. at 621-22.

117. *See id.* at 622-23.

118. *See id.* at 625-26 (Scalia, J., concurring in part and concurring in the judgment).

119. *See id.* at 623-29 (Scalia, J., concurring in part and concurring in the judgment); *id.* at 628-29 (Kennedy, J., concurring in part and concurring in the judgment).

120. *See id.* at 616-17.

121. 510 U.S. 43 (1993). *See generally* Susanne H. Bales, Note, *Constitutional Law—Fifth Amendment Right to Due Process—Civil Forfeiture Defendants and Constitutional Protection*, 62 TENN. L. REV. 331 (1995) (considering the history of civil forfeiture law, 21 U.S.C. § 881, and the Court's decision in *James Daniel Good*); Tonie M. Franzese-Damron, Note, United States v. James Daniel Good Real Property: *Pre-Hearing Seizure of Real Property in Civil Forfeiture Cases and the 1993 Trilogy of Restraint*, 1994 DET. C.L. REV. 1293 (1994) (discussing how *James Daniel Good* limits broad-reaching civil forfeiture); Peter W. Salsich III, Note, *A Delicate Balance: Making Criminal Forfeiture a Viable Law Enforcement Tool and Satisfying Due Process After* United States v. James Daniel Good Real Property, 39 ST. LOUIS U. L.J. 585 (1995) (analyzing *James Daniel Good* and the due process analysis in civil and criminal forfeiture).

122. *See James Daniel Good*, 510 U.S. at 46.

tections to curb the government's forfeiture power.[123] *James Daniel Good* involved the seizure of a home and property four years after the owner had been convicted under federal drug statutes for the possession of drugs in his home.[124] Good had paid a fine and served one year in prison for his conviction.[125] While Good was away, officials seized his home without giving notice or opportunity for a hearing.[126] Good challenged the seizure as a violation of his Fifth Amendment due process rights.[127] The Court noted that "[t]he Government does not, and could not, dispute that the seizure of Good's home and four-acre parcel deprived him of property interests protected by the Due Process Clause."[128] The Court found that there was no "extraordinary situation" that would justify allowing seizure of real estate without notice and a pre-seizure hearing.[129]

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123. *See id.*

124. *See id.* Good was convicted under HAW. REV. STAT. § 712-1245(1)(b) (1985), and his house was forfeited under 21 U.S.C. § 881(a)(7) (1988). *See James Daniel Good*, 510 U.S. at 46-47. The federal drug statutes provide protection for innocent owners by requiring that an innocent owner be compensated for his interest in forfeited property. *See* § 881(a)(7). This protection, however, does not eliminate the potential for a wide variety of inconveniences suffered by innocent owners fighting forfeitures after the property has been seized. *See supra* notes 1-15 and accompanying text. The innocent owner provision in the federal statute would have protected Ms. Bennis from forfeiture of her interest in the automobile. Conversely, Michigan's forfeiture statutes did not provide the minimal innocent owner protections found in the federal statutes. *See* MICH. COMP. LAWS § 600.3815(2) (1987) (providing specifically that owner's knowledge of the nuisance is not a prerequisite to forfeiture).

125. *See James Daniel Good*, 510 U.S. at 46.

126. *See id.* at 46-47.

127. *See id.* For the relevant text of the Fifth Amendment, see *supra* note 35.

128. *James Daniel Good*, 510 U.S. at 49.

129. *See id.* at 53-56. The Court limited the holding to real estate, which is less likely to be removed or destroyed than personal property. *See id.* The Court thus distinguished the house in *James Daniel Good* from the yacht in *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974), where seizure without notice and without a pre-seizure hearing was upheld. *See James Daniel Good*, 510 U.S. at 52-53. The Court also distinguished earlier cases which found that seizure of property to enforce federal tax laws was important enough to justify seizure without more protections of procedural due process. *See id.* at 59-61. The Court noted that the collection of taxes before the passage of the Sixteenth Amendment allowing taxation of income was a matter of "executive urgency" vital to the government's existence. *See id.* The Court thus distinguished the lack of greater protection in cases like *Dobbins's Distillery v. United States*, 96 U.S. 395 (1878), as a product of the practical necessities of the times. *See James Daniel Good*, 510 U.S. at 59-61.

In an opinion joined by Justice Scalia, Chief Justice Rehnquist criticized the majority opinion for not giving greater weight to earlier cases allowing seizure of property without prior notice or hearing, and argued that seizure should be allowed without requiring additional constitutional protections. *See James Daniel Good*, 510 U.S. at 70-73 (Rehnquist, C.J., concurring in part and dissenting in part). He reasoned that the seizure served the important governmental purpose of combating drugs, and that seizure was appropriate

While the Court's earliest cases adhered to the "guilty property" fiction and allowed forfeiture of an innocent owner's property,[130] later cases seemed to shift toward extension of constitutional protection to civil forfeiture proceedings.[131] Against this backdrop, the Court considered the forfeiture of Tina Bennis' car after her husband violated Michigan's indecency laws without her knowledge or consent.[132] In *Bennis*, the majority deviated from the protectionist leanings of *Austin* and *James Daniel Good*, finding that the property interest of a truly innocent owner could be forfeited without violating the Constitution.[133]

The Court in *Bennis* recognized that the weight of earlier precedent supported the historical concept that the property was the offender in in rem proceedings. Based on these decisions, the Court found that the forfeiture statutes did not violate the Due Process Clause of the Fourteenth Amendment.[134] This is consistent with the doctrine of stare decisis, which provides legitimacy to the decisions of the Court by respecting and applying prior decisions.[135] Following this principle in *Bennis*, Chief Justice Rehnquist considered in detail

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since "[g]overnment officials made the seizure rather than self-interested private parties seeking to gain from the seizure." *Id.* at 72 (Rehnquist, C.J., concurring in part and dissenting in part). However, government officials may actually be acting with an incentive similar to the self-interest of private parties when their agencies will reap the benefits of lucrative seizures. *See supra* notes 1-10 and accompanying text (discussing the aggressive use of civil forfeiture by local officials who directly benefit from the proceeds of the seizure). The majority in *James Daniel Good* noted the government's direct financial stake in civil forfeiture. *See James Daniel Good*, 510 U.S. at 56 n.2.

130. *See* The Palmyra, 25 U.S. (12 Wheat) 1, 14-15 (1827).

131. *See James Daniel Good*, 510 U.S. 43; Austin v. United States, 509 U.S. 602 (1993). The leanings of *Austin* and *James Daniel Good* led many scholars to believe that the Court was shifting in its approach to civil forfeitures and was extending constitutional protection to these proceedings. *See* Cheh, *Runaway Civil Forfeiture*, *supra* note 1, at 7-8; J. Kelly Strader, *Taking the Wind Out of the Government's Sails?: Forfeitures and Just Compensation*, 23 PEPP. L. REV. 449, 452-53, 473-76 (1996); Bruce Voss, *Even a War Has Some Rules: The Supreme Court Puts the Brakes on Drug-Related Civil Forfeiture*, 16 U. HAW. L. REV. 493, 494-95 (1994).

132. *See Bennis*, 116 S. Ct. at 996-97.

133. *See id.* at 998. The Court in *Bennis* distinguished the case of *James Daniel Good*, in which the Court found that the Fifth Amendment Due Process Clause required only notice and opportunity to contest the abatement in in rem proceedings. *See Bennis*, 116 S. Ct. at 998; *James Daniel Good*, 510 U.S. at 46, 52-56. In *Bennis* the Court refused to allow an innocent owner to contest the abatement by showing she did not know of the misuse of the property. *See Bennis*, 116 S. Ct. at 998.

134. *See Bennis*, 116 S. Ct. at 998-99; *see also id.* at 1001 (Thomas, J., concurring) (noting the importance of "historical prevalence").

135. *See, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833, 854 (1992) (noting that respect for precedent in interpreting the Constitution is indispensable).

several prior civil forfeiture decisions.[136] The Court recognized the controlling principle from *The Palmyra* that the " 'offence is attached primarily to the thing.' "[137] The Court considered the holding in *Brig Malek Adhel*, noting that the interests of the owner were bound regardless of his culpability.[138] The Court also considered *Van Oster*, which held that "an owner surrenders his control [of his property] at his peril,"[139] as an additional case supporting the notion of forfeiture by innocent owners.[140] The Court briefly noted the decision in *Goldsmith-Grant* as support for the theory that innocent owner forfeiture was too firmly established to reverse.[141]

In addition, the Court acknowledged that statements in *Calero-Toledo* indicated that a truly innocent owner who had done everything possible to prevent the misuse of her property should be granted constitutional protection.[142] However, the *Bennis* Court dismissed these statements as dicta and concluded that the holding of *Calero-Toledo* supported the notion that property could be forfeited based on its use in a crime, despite the owner's lack of knowledge.[143] The Court thus limited its reliance on *Calero-Toledo* to its "central holding," dismissing the additional findings in the case.[144] Ironically, adherence to only a "central holding" in stare decisis analysis had been previously criticized by Justice Scalia and Chief Justice Rehnquist,[145] but they used this technique to justify their adherence to the guilty property fiction in *Bennis*.[146]

Chief Justice Rehnquist continued the majority's analysis of precedent by considering the Court's decision in *Austin*;[147] however, by limiting the holding of that case, he found that it did not affect the

136. *See Bennis*, 116 S. Ct. at 998-1000.

137. *Id.* at 998 (quoting The Palmyra, 25 U.S. (12 Wheat.) 1, 14 (1827)).

138. *See id.* at 998 (quoting United States v. Brig Malek Adhel, 43 U.S. (2 How.) 210, 234 (1844)).

139. *See id.* at 998 (quoting Van Oster v. Kansas, 272 U.S. 465, 467-68 (1926)).

140. *See id.* at 998.

141. *See id.* at 999 (quoting J.W. Goldsmith, Jr.-Grant Co. v. United States, 254 U.S. 505, 511 (1921)).

142. *See id.* at 999 (quoting Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 689 (1974) (noting that it would be difficult to reject the constitutional claim of a truly innocent owner)).

143. *See id.* at 999.

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

145. *See* Planned Parenthood v. Casey, 505 U.S. 833, 954 (1992) (Rehnquist, C.J., concurring in the judgment in part and dissenting in part); *id.* at 983 (Scalia, J., concurring in the judgment in part and dissenting in part).

146. *See Bennis*, 116 S. Ct. at 999.

147. *See id.* at 1000 (citing Austin v. United States, 509 U.S. 602 (1993)).

decision in *Bennis*.[148] The Court found that *Austin* provided only that forfeiture proceedings are subject to the limitations of the Eighth Amendment but do not apply to the situation at issue in *Bennis*.[149] It did not address the *Austin* Court's interpretation of earlier innocent owner cases.[150] The majority in *Austin* found that there was some basis of fault on the part of the owner whose property was forfeited, and determined that even in the earlier cases the basis of liability was negligence.[151] Chief Justice Rehnquist agreed with the decision in *Austin*, but joined Justice Kennedy's concurring opinion specifically urging the Court not to consider the issue of innocent owner forfeiture.[152] Chief Justice Rehnquist disagreed with the *Austin* majority's interpretation of those earlier cases and did not join those parts of the opinion.[153] Given the opportunity to write for the majority in *Bennis*, Chief Justice Rehnquist was able to depart from the position taken in *Austin*, which he disagreed with, and solidify the principle that the property of an innocent owner could be forfeited in an in rem proceeding.[154]

The decision in *Bennis* also departed from the holding in *Austin* that forfeiture proceedings are subject to the Eighth Amendment restriction against excessive fines.[155] Although the *Bennis* Court acknowledged this aspect of *Austin*, it found that the Michigan proceeding at issue in *Bennis* was "equitable" and abatement was in the discretion of the judge so that the outcome was not punitive.[156] The *Bennis* Court did not consider the application of the Eighth Amendment to this case or the excessiveness of any fine taken from an innocent person.[157]

In his dissent, Justice Stevens asserted that the majority decision in *Bennis* was dramatically at odds with the *Austin* decision, espe-

148. *See id.*

149. *See id.*

150. *See id.* (arguing that *Austin* did not directly address the validity of the innocent owner defense).

151. *See Austin*, 509 U.S. at 616-17.

152. *See id.* at 628-29 (Kennedy, J., concurring in part and concurring in the judgment). Justice Scalia also criticized the majority in *Austin* for engaging in the analysis of culpability requirements. *See id.* at 625-26 (Scalia, J., concurring in part and concurring in the judgment).

153. *See id.* at 628-29 (Kennedy, J., concurring in part and concurring in the judgment).

154. *See Bennis*, 116 S. Ct. at 998, 1001.

155. *See id.* at 1010 (Stevens, J., dissenting); *see also supra* note 40 (providing the text of the Eighth Amendment).

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

157. *See id.*

cially in failing to provide for Eighth Amendment protection for the innocent owner, since even a "modest penalty" was excessive in relation to Tina Bennis' blameworthiness.[158] Justice Stevens also argued that *Austin* provided for some distinction based on the use of the property as an "instrumentality" of the crime,[159] while the majority in *Bennis* refused to make any such distinction.

The majority in *Bennis* relied heavily on the doctrine of stare decisis in reaching their conclusion.[160] Yet while the principle of stare decisis emphasizes the importance of adherence to prior decisions of the Court,[161] Chief Justice Rehnquist chose to limit the ruling of *Austin* rather than to follow the principles it provided.[162] Although the more recent cases in the line of precedent, *Calero-Toledo*, *Austin* and

158. *See id.* at 1010 (Stevens, J., dissenting).

159. *See id.* at 1004-06 (Stevens, J., dissenting). Justice Stevens argued that the Court had distinguished property based on its use as an instrumentality in *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 699 (1965), *J.W. Goldsmith, Jr.-Grant Co. v. United States*, 254 U.S. 505, 512 (1921), and *Austin*. *See Bennis*, 116 S. Ct. 1004-06 (Stevens, J., dissenting). The *Austin* Court noted that the property where drugs were sold could not be characterized as an instrument of the drug trade any more than a car transporting illegal liquor could be characterized as contraband. *See* Austin v. United States, 509 U.S. 602, 621 (1993).

160. *See Bennis*, 116 S. Ct. at 998-99.

161. *See* Planned Parenthood v. Casey, 505 U.S. 833, 854 (1992); *id.* at 954 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part). The *Bennis* Court justified its decision primarily on the doctrine of stare decisis, which dictates adherence to prior decisions of the Court. *See Bennis*, 116 S. Ct. at 998-99. Especially in cases interpreting the Constitution, the Court seeks to provide continuity and consider the costs of overruling a prior decision. *See Casey*, 505 U.S. at 854 (noting considerations for review of a constitutional interpretation). The Court will consider the workability of the rule, whether the circumstances have changed to make the earlier holding unjustifiable, and whether reliance on the rule would create problems in reversal. *See id.* (listing factors to consider in review); *see also* Kelso, *supra* note 109, at 138 (noting the settled expectations which could be upset by overruling a decision).

However, Chief Justice Rehnquist challenged the use of stare decisis based on these principles alone. *See Casey*, 505 U.S. at 956-57 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part); *see also id.* at 983 (Scalia, J., concurring in the judgment in part and dissenting in part) (agreeing with the Chief Justice's analysis of the *Casey* decision). Chief Justice Rehnquist emphasized the importance of considering the error of a constitutional interpretation and its correctness in determining whether to reverse the prior ruling, rather than blind adherence to stare decisis based on some notion of reliance. *See id.* at 956-57 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part). In a separate dissent, Justice Scalia argued that stare decisis should apply to the whole decision and should not be used to uphold merely a "central holding," which he argued was a contrived use of the stare decisis principle. *See id.* at 993 (Scalia, J., concurring in the judgment in part and dissenting in part). In *Bennis*, Chief Justice Rehnquist did not articulate his theory of stare decisis or the weighing of the costs in that situation; instead he gave great weight to the prior Supreme Court decisions allowing forfeiture of an innocent owner's property. *See Bennis*, 116 S. Ct. at 998, 1001.

162. *See Bennis*, 116 S. Ct. at 1000; *see also id.* at 1010 (Stevens, J., dissenting).

James Daniel Good, leaned toward some constitutional protection for a truly innocent owner,[163] the *Bennis* majority rested its decision on earlier precedent allowing forfeiture.[164] The Court adopted the position taken in *Goldsmith-Grant* seventy-five years earlier, finding that the forfeiture authorized in cases like *Bennis* was " 'too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced.' "[165] Chief Justice Rehnquist justified his decision on stare decisis grounds, but in doing so, the Court limited it's reliance on *Calero-Toledo* and *Austin* to their respective "central holdings,"[166] much like the "contrived" use of stare decisis Justice Scalia previously criticized in *Planned Parenthood v. Casey*.[167]

In *Casey*, the Court analyzed the doctrine of stare decisis in a context unrelated to civil forfeiture. The Court articulated several factors it should consider when interpreting the Constitution including prior holdings, the workability of a rule, and changes in circumstances which may necessitate a change in the Court's interpretation.[168] In addition, Chief Justice Rehnquist emphasized the importance of considering the correctness of a constitutional decision rather than blindly following stare decisis.[169] However, Chief Justice Rehnquist did not undertake an analysis of the stare decisis factors in the majority's decision in *Bennis*.[170] He also chose not to consider the

163. *See* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 689 (1974) (noting that it would be difficult to deny constitutional protection to a truly innocent owner); *see also Austin*, 509 U.S. at 615-17 (recognizing that the basis of liability for owners in prior cases was actually negligence).

164. *See Bennis*, 116 S. Ct. at 998, 1001.

165. *Id.* at 1001 (quoting J.W. Goldsmith, Jr.-Grant Co. v. United States, 254 U.S. 505, 511 (1921)).

166. *See Bennis*, 116 S. Ct. at 999-1000 (noting actual holding of cases and limiting application in this case).

167. 505 U.S. 833, 993 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part) ("I confess never to have heard of this new, keep-what-you-want-and-throw-away-the-rest version [of stare decisis].").

168. *See id.* at 854-55. In a recent decision, the Court unanimously acknowledged that precedents have been overruled where intervening developments have " 'removed or weakened the conceptual underpinnings from the prior decision, or where the later law has rendered the decision irreconcilable with competing legal doctrines or policies.' " Neal v. United States, 116 S. Ct. 763, 769 (1996) (quoting Patterson v. McLean Credit Union, 491 U.S. 164, 173 (1989)).

169. *See Casey*, 505 U.S. at 956-57 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

170. *See Bennis*, 116 S. Ct. at 999-1001. The failure to consider a change in circumstances was important in this case because, as Justice Kennedy argued in his dissent, the rule may have been necessary in admiralty law of the 1800s but was not necessarily required to enforce Michigan's prostitution law in the 1990s. *See id.* at 1010-11 (Kennedy, J., dissenting). In addition, the Court recently acknowledged that victims of seizures in

correctness of the decision in *Bennis*, emphasizing instead that the principle was long established and could not be changed now.[171] In addition to the stare decisis argument, the Court supported this position by citing the policy rationale that forfeiture statutes are effective ways to deter illegal activity and promote law enforcement.[172]

The Court's concern for promotion of law enforcement using civil forfeiture may have been due in part to fear that constitutional protections for civil forfeiture would require that property of drug dealers be returned on double jeopardy grounds.[173] After the Court's decisions in *Austin*[174] and *United States v. Halper*,[175] civil forfeitures

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revenue cases like *Dobbins's Distillery v. United States*, 96 U.S. 395 (1877), needed greater protection because of the "executive urgency" of enforcement of these revenue laws in the era before passage of the Sixteenth Amendment allowed taxation of income. *See* United States v. James Daniel Good Real Property, 510 U.S. 43, 59-61 (1993). The *James Daniel Good* Court noted that these protections were no longer necessary because they evolved out of the practical needs of a different time period. *See id.*

171. *See Bennis*, 116 S. Ct. at 1001. In contrast to his strict adherence to stare decisis, Justice Scalia criticized the other justices in *Casey* for their failure to consider "how wrong was the decision on its face." *Casey*, 505 U.S. at 983 (Scalia, J., concurring in the judgment in part and dissenting in part). Chief Justice Rehnquist also noted that the Court "bows to lessons of experience and the force of better reasoning" and that "[w]hen it becomes clear that a prior constitutional interpretation is unsound we are obliged to reexamine the question." *Id.* at 955 (Rehnquist, J., concurring in the judgment in part and dissenting in part). Despite these exhortations, the Chief Justice did not consider whether the decision in *Bennis* was wrong on its face, and refused to reexamine earlier decisions made in the different circumstances of the 1800s and early 1900s. *See Bennis*, 116 S. Ct. at 999-1000.

172. *See Bennis*, 116 S. Ct. at 1001; *id.* at 1003 (Ginsburg, J., concurring).

173. For an analysis of civil forfeiture under the Double Jeopardy Clause, see generally Angela Anderson, *Asset Forfeiture as Double Jeopardy*, 32 IDAHO L. REV. 545 (1996) (arguing that because civil forfeiture is "punishment," Double Jeopardy protections should apply); Andrew L. Subin, *The Double Jeopardy Implications of In rem Forfeiture of Crime-Related Property: The Gradual Realization of a Constitutional Violation*, 19 SEATTLE U. L. REV. 253 (1996) (analyzing the punitive nature of civil forfeiture and the implications of the Double Jeopardy Clause).

174. Austin v. United States, 509 U.S. 602 (1993); *see also supra* notes 102-20 and accompanying text.

175. 490 U.S. 435 (1989). *Halper* involved the conviction of the manager of a health company for making false claims to the government for Medicare for his patients. *See id.* at 437 (citing 18 U.S.C. § 287 (1982)). Halper was convicted, fined $5,000 and sent to prison. *See id.* The federal statute provided for additional civil penalties which amounted to $130,000, a sum which the court declared bore "no rational relation" to the government's loss. *See id.* at 439, 451 (citing 31 U.S.C. §§ 3729-31 (1982)). The Court found that this civil penalty was so much greater than the actual loss that it constituted punishment, and imposition of the penalty would violate the Double Jeopardy Clause of the Fifth Amendment by punishing a second time for conduct for which he had already been convicted. *See id.* at 451-52. *See generally* Stanley E. Cox, Halper*'s Continuing Double Jeopardy Implications*: *A Thorn By Any Other Name Would Prick As Deep*, 39 ST. LOUIS U. L.J. 1235 (1995) (analyzing *Halper* and the protections of the Double Jeopardy Clause in civil proceedings with potential for punishment); Nelson T. Abbott, Note, United

were generally viewed as punishment entitled to general constitutional protection. Based on these decisions, lower courts began to overturn forfeitures of drug dealers' property, holding that the seizure and forfeiture of their assets constituted punishment that, when joined with a criminal conviction for the same crime, violated the Double Jeopardy Clause.[176] The Supreme Court considered this issue in *United States v. Ursery*[177] only a few months after the Court's decision in *Bennis*.[178]

In *Ursery*, officials instituted civil forfeiture proceedings against Ursery's house because of its use in illegal drug transactions.[179] Ursery was convicted for manufacturing marijuana based on the same charge.[180] He challenged the forfeiture as punishment in violation of

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States v. Halper: *Making Double Jeopardy Available in Civil Actions*, 6 BYU J. PUB. L. 551 (1992) (analyzing the Double Jeopardy Clause, *Halper*, and subsequent decisions by lower courts); Lauren Orchard Clapp, Note, United States v. Halper*: Remedial Justice and Double Jeopardy*, 68 N.C. L. REV. 979 (1990) (discussing *Halper* and the double jeopardy protections from punitive civil remedies); Andrew Z. Glickman, Note, *Civil Sanctions and the Double Jeopardy Clause: Applying the Multiple Punishment Doctrine to Parallel Proceedings After* United States v. Halper, 76 VA. L. REV. 1251 (1990) (considering *Halper* and double jeopardy analysis in parallel proceedings); Elizabeth S. Jahncke, Note, United States v. Halper, *Punitive Civil Fines, and the Double Jeopardy and Excessive Fines Clauses*, 66 N.Y.U. L. REV. 112 (1991) (same).

176. *See* United States v. Ursery, 59 F.3d 568 (6th Cir. 1995); United States v. $405,089.23 United States Currency, 33 F.3d 1210 (9th Cir. 1994). The cases were joined on appeal and were reversed by the Supreme Court in *United States v. Ursery*, 116 S. Ct. 2135 (1996). *See generally* Michael J. Munn, Note, *The Aftermath of* Austin v. United States: *When Is Civil Forfeiture an Excessive Fine?*, 1994 UTAH L. REV. 1255 (analyzing *Austin*, civil forfeiture, federal drug forfeiture, the Excessive Fines Clause, and tests for excessiveness that extend constitutional protections to civil forfeiture proceedings); Robin M. Sackett, Comment, *The Impact of* Austin v. United States: *Extending Constitutional Protections to Claimants in Civil Forfeiture Proceedings*, 24 GOLDEN GATE U. L. REV. 495 (1994) (same). The notion of civil forfeiture as Double Jeopardy has also been linked to arguments that statutes which allow states to revoke driver's or professional licenses also violate the Double Jeopardy Clause or the Excessive Fines Clause. *See* Max Kravitz, *Ohio's Administrative License Suspension: A Double Jeopardy and Due Process Analysis*, 29 AKRON L. REV. 123, 136-87 (1996) (analyzing the double jeopardy implications of a license forfeiture); Dee Potter, Comment, *A Critical Look at Texas's License Suspension Act: Does the Eighth Amendment's Excessive Fines Clause Prohibit the Revocation of Professional Licenses for Nonpayment of Child Support?*, 48 BAYLOR L. REV. 493, 503-05 (1996) (arguing that a license suspension violates the Excessive Fines Clause).

177. 116 S. Ct. 2135 (1996).

178. *Bennis* was argued on November 29, 1995 and was decided on March 4, 1996. *See Bennis*, 116 S. Ct. at 994. During the period between the oral arguments and the decision the Court granted certiorari to *Ursery*. *See* United States v. Ursery, 116 S. Ct. 762 (1996).

179. *See Ursery*, 116 S. Ct. at 2138-39. *Ursery* eventually settled the civil forfeiture claim by paying the government $13,250. *See id.*; *see also* 21 U.S.C. § 881(a)(7) (1994) (providing for forfeiture of real estate used to facilitate violation of the drug statutes, but excepting the property interest of an innocent owner).

180. *See Ursery*, 116 S. Ct. at 2138-39; *see also* 21 U.S.C. § 841(a)(1) (1994) (prohibiting the manufacture or distribution of a controlled substance).

the Double Jeopardy Clause of the Fifth Amendment.[181] Chief Justice Rehnquist delivered the opinion of the Court, holding that civil forfeitures "are neither 'punishment' nor criminal for purposes of the Double Jeopardy Clause."[182] Despite his professed philosophy of adherence to the principle of stare decisis, Chief Justice Rehnquist distinguished the holdings in *Austin*[183] and *Halper*,[184] finding that they did not involve a double jeopardy analysis.[185] In his dissent, Justice Stevens criticized the attempt to distinguish *Austin* and argued that "[r]emarkably, the Court today stands *Austin* on its head—a decision rendered only three years ago, with unanimity on the pertinent points—and concludes that § 881(a)(7) [the drug forfeiture statute] is remedial rather than punitive in character."[186]

Faced with the possibility that further extending constitutional protections in civil forfeiture cases could deprive officials of this drug enforcement tool on double jeopardy grounds, the Court may have been hesitant to invalidate the forfeiture in *Bennis*. The Court in *Bennis* denied that civil forfeiture was punishment, despite the contrary holding in *Austin*, possibly with an eye to the upcoming *Ursery* case and the anticipated rejection of constitutional protection for civil forfeiture as punishment.[187] This is especially true of Justice Ginsburg, who was the "swing" vote in the five-to-four decision in *Bennis*.[188] During oral arguments in *Ursery*, Justice Ginsburg repeatedly questioned the defense attorney about the application of the

181. *See Ursery*, 116 S. Ct. at 2139.

182. *See id.* at 2149.

183. United States v. Austin, 509 U.S. 602 (1993); *see also supra* notes 102-20 and accompanying text.

184. United States v. Halper, 490 U.S. 435 (1989); *see also supra* note 175 and accompanying text.

185. *See Ursery*, 116 S. Ct. at 2143-47.

186. *Id.* at 2158 (Stevens, J., concurring in the judgment in part and dissenting in part); *see also Too Far on Forfeitures*, N.Y. TIMES, June 26, 1996, at 18 (criticizing the Court in *Ursery* for "[s]kipping past recent precedents and ignoring common sense" in allowing abusive law enforcement seizures without allowing protection based on a "reasonable reading of the Constitution or basic fairness").

187. *See Bennis*, 116 S. Ct. at 1000; *see also Ursery*, 116 S. Ct. at 2149. The *Ursery* Court supported its conclusion by noting that "[w]e recently reaffirmed this conclusion in *Bennis v. Michigan*, ... where we held that 'forfeiture ... serves a deterrent purpose distinct from any punitive purpose.' " *Id.* (quoting *Bennis*, 116 S. Ct. at 1000). The Court also cited the proposition in *Bennis* that forfeiture served important criminal enforcement purposes by imposing an economic penalty and making illegal behavior unprofitable. *See id.* at 2148.

188. *See* David G. Savage, *Innocence Punished: Justice Ginsburg Keys Surprise Ruling in Double Jeopardy Case*, ABA JOURNAL, May 1996, at 47-48 (noting that Justice Ginsburg's vote upholding the forfeiture of Tina Bennis' interest was surprising because of Justice Ginsburg's reputation for "liberalism on the bench").

recent *Bennis* decision, and appeared unpersuaded by attempts to distinguish *Bennis*.[189] Justice Ginsburg may have been reluctant to extend constitutional protections to civil forfeitures in *Bennis* because she was looking ahead to *Ursery*. It was the *Bennis* decision which Justice Ginsburg seemed to use as a basis for denying the double jeopardy protection against civil forfeiture urged by the drug dealers.[190]

The *Bennis* majority argued that civil forfeiture was an important tool for law enforcement officials, and the decisions in *Bennis* and *Ursery* reveal the Court's reluctance to deprive officials of this tool.[191] Yet despite the majority's arguments, it appears that *Bennis* allows law enforcement agencies to effectively avoid constitutional safeguards.[192] Forfeiture statutes are expanding and becoming more common as an easier, more efficient method of punishment and crime prevention.[193] But the reason they are "easier" for law enforcement officials is that they deprive citizens of protections guaranteed by the Constitution for criminal proceedings.[194] As *Bennis* illustrates, states may expand forfeiture statutes to extremes by permitting the government to deprive innocent citizens of their property without adhering to constitutional protections and without compensating citizens for the loss.[195]

The majority in *Bennis* relied on stare decisis and the weight of the earlier cases to support its decision.[196] Yet the Court limited the holdings of the two most recent cases in the line of precedent, and followed principles enunciated in cases originating over one hundred years ago dealing with entirely different circumstances.[197] It may

189. *See* Transcript of Oral Argument, United States v. Ursery, 116 S. Ct. 2135 (1996) (No. 95-345, 95-346), 1996 WL 195163, at *62 (Jan. 12, 1996).

190. *See id.*; *see also Ursery*, 116 S. Ct. at 2149 (citing *Bennis* as a recent case supporting the principles articulated by the Court in *Ursery*).

191. *See* Ivan K. Fong, *Paying for White Collar Crime*, LEGAL TIMES, July 29, 1996, at S41 (recognizing that underlying the debate concerning the punitive or remedial nature of civil forfeiture is the practical concern that civil forfeiture is being more widely used to "redress and prevent crime").

192. *See supra* note 12 and accompanying text (describing constitutional protections in criminal cases which are not provided in civil forfeiture).

193. *See supra* notes 1-10 and accompanying text.

194. *See* Cheh, *Constitutional Limits*, *supra* note 1, at 1340; *see also supra* note 12 (discussing the protections guaranteed in criminal proceedings).

195. *See Bennis*, 116 S. Ct. at 997-98.

196. *See id.* at 1001.

197. *See id.* at 1000 (omitting any detailed discussion of Austin v. United States, 509 U.S. 602 (1993)); *see also id.* at 1010 (Stevens, J., dissenting) (charging that the majority's decision was at odds with *Austin*).

have been necessary to force forfeiture of pirating vessels in the 1820s when the owners of such vessels were often too far away to be found; however, that concern does not lead to the conclusion that admiralty decisions should control forfeiture decisions today.[198] While it is important to follow precedent to ensure the legitimacy of decisions, stare decisis should not be followed blindly.[199] The Court should consider human conduct and citizens' expectations, since decisions which violate basic societal expectations are often the greatest threats to the legitimacy of decisions.[200] Most people would expect that the government's seizure of Tina Bennis' property is exactly the sort of situation which the Constitution should protect, since the Fourteenth Amendment provides that states may not take property without due process of law.[201] The Court undermines its own legitimacy by adhering to century-old legal fictions to explain decisions that fly in the face of common expectations and fundamental fairness.

The government certainly has important interests in working to punish and prevent crime. Yet these interests can be advanced without extending the reach of forfeiture statutes with no protections for innocent owners. Forfeiture statutes are available as part of criminal proceedings and can be used to punish and deter those convicted of a crime without allowing short-cut civil proceedings.[202] To prevent collusion between criminal users of property and owners in criminal proceedings, the Court could adopt a presumption favoring forfeiture; if the owner proved that he had no knowledge or connection

198. *See* Donald J. Boudreaux & A.C. Pritchard, *Would You Like To Forfeit Your House?*, WASH. TIMES, Mar. 15, 1996, at A21; James Kilpatrick, *From Piracy to Prostitution: When Forfeiture Is Unfair*, ST. J. REG. (Springfield, Ill.), Mar. 19, 1996, at 4; Stuart Taylor, Jr., *A Car Is Not a Pirate Ship*, LEGAL TIMES, Mar. 11, 1996, at 21.

199. *See* Planned Parenthood v. Casey, 505 U.S. 833, 954 (1992) (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

200. *See Forfeiting Fairness*, N.Y. TIMES, Mar. 8, 1996, at 30 (criticizing the decision in *Bennis* and noting that "[w]hen the nation's highest court displays indifference to unfair actions by government against people who have done nothing wrong, it invites cynicism about the institution and the justice system generally").

201. *See* Donald A. Dripps, *Innocence Is No Defense*, TRIAL, June 1996, at 67, 67 (noting that the first paragraph of Chief Justice Rehnquist's opinion in *Bennis* "sounds like something straight out of Kafka"); Charles Levendosky, *Supreme Court Takes Low Road On Forfeitures; It Issued Michigan and Other States a License for Theft*, STAR TRIB. (Minneapolis-St. Paul), Mar. 18, 1996, at 11A (criticizing the *Bennis* decision for being "[b]loodless," "[c]allous" and "brutally wrongheaded" for allowing the government to steal from people and not considering the lives of the people which the decision affects).

202. *See* Cheh, *Constitutional Limits*, supra note 1, at 1333; *see also* Arthur W. Leach & John G. Malcolm, *Criminal Forfeiture: An Appropriate Solution to the Civil Forfeiture Debate*, 10 GA. ST. U. L. REV. 241, 285-95 (1994) (advocating expansion of criminal forfeiture to avoid continued use of civil forfeiture).

with the crime, his property interest should be constitutionally protected from forfeiture.[203] In the meantime, state legislatures should enact innocent owner defenses in their civil forfeiture statutes.[204] Although legislatures may be reluctant to take this tool away from law enforcement officials, constituent pressure against the basic unfairness of forfeiture by innocent owners should help to encourage adoption of special defense provisions.[205] The Constitution provides important restraints on the power of government and important guarantees of individual liberty; even in an age of cash-strapped agencies struggling to contain crime with more efficient tools, these constitutional protections must not be ignored.

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203. *See Bennis*, 116 S. Ct. at 1011 (Kennedy, J., dissenting) (arguing that a presumption would be sufficient to prevent collusion).

204. *See Forfeiting Fairness*, *supra* note 200, at 30 ("The majority's blindness to Mrs. Bennis's victimization does not stop Congress and state legislatures from redrafting those federal and state forfeiture statutes that do not protect innocent parties. Basic fairness requires no less."). For various suggestions and proposals for reform of civil forfeiture laws, see William Carpenter, *Reforming the Civil Drug Forfeiture Statutes: Analysis and Recommendations*, 67 TEMP. L. REV. 1087 (1994); Raymond P. Pepe, *Alternative Proposals For the Reform of State Legislation Dealing with Forfeitures for Drug Offenses*, 21 WM. MITCHELL L. REV. 197 (1995).

205. *See* Marcia Coyle, *Forfeiture Ruling Certain To Spur Reform*, NAT'L L.J., Mar. 18, 1996, at A12, col. 3 (noting that the *Bennis* decision may spur reform efforts at the state and federal level). Efforts to reform federal civil forfeiture have focused on the Civil Asset Forfeiture Reform Act, H.R. 1916, 104th Cong. (1995). This proposed act provides additional procedural safeguards, but innocent owners already have protections for their interests in property under the federal drug forfeiture statutes. *See, e.g.*, 21 U.S.C. § 881(a)(4), (a)(6), (a)(7) (1994). More troubling are the many state statutes without any protection for innocent owners. *Cf.* Dripps, *supra* note 201, at 67-68 ("One pernicious consequence of *Bennis* is that legislatures may be tempted to abolish statutory protections for innocent owners.").