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THE ABSURDITY OF CIVIL FORFEITURE LAW EXPOSED: SUPREME COURT UPHOLDS PUNISHMENT OF INNOCENT IN *BENNIS V. MICHIGAN* AND HIGHLIGHTS THE NEED FOR REFORM

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INTRODUCTION

Imagine that your teenage son borrows the family car to go to the mall. The next thing you know, a police officer calls to inform you that your son has been picked up for shoplifting. Now imagine that the officer then informs you that your car is going to be forfeited to the state because it was an instrument in the crime. If you do not think it can happen, think again.[1] Even if the charges against your son are dropped, you can still lose your car. This is because civil forfeiture is a proceeding against your car, not your son, so his guilt or innocence is irrelevant.[2]

It is conceivable that some may justify such a situation by arguing that a parent should be responsible for his or her child's actions because it was the parent's decision to entrust the car to the child. But can the same rationalization be used between spouses? Should you be held responsible for the actions of another adult, over whom you have no control, who has equal ownership rights to the car in question? A majority of the United States Supreme Court apparently thinks so.

In *Bennis v. Michigan*,[3] a state nuisance statute was used to abate a husband and wife's co-owned car after the husband committed a mis-

1. Jacqueline Saravion, a New Jersey resident, lost her 1987 Oldsmobile after police said her son drove it to a local Sears, where he allegedly shoplifted a pair of pants. Daniel Hay, *Highway Robbery*, WORLD PRESS REV., June 1996, at 28.

2. *See, e.g.*, Van Oster v. Kansas, 272 U.S. 465 (1926) (upholding the forfeiture of a car when the alleged wrongdoer is acquitted of the charges). For a more detailed discussion of *Van Oster*, see *infra* notes 67-73 and accompanying text. In fact, in more than 80% of asset forfeiture cases, the property owner is not charged with a crime, yet the government often keeps the seized property. *Civil Asset Forfeiture: Hearings on H.R. 1916 Before the House Comm. on the Judiciary*, 104th Cong. (1996) (statement of Terrance G. Reed, on behalf of the American Bar Association, citing George Fishman, *Civil Asset Forfeiture Reform: The Agenda Before Congress*, 39 N.Y.L. SCH. L. REV. 121, 129 (1994)).

3. 116 S. Ct. 994 (1996).

demeanor while using it.[4] Mrs. Bennis thought that if her car was going to be taken from her, she at least deserved reimbursement for her share of the automobile's value.[5] However, the state statute did not provide for an "innocent owner defense" and her request was denied.[6] She therefore challenged the constitutionality of the statute.

In March of 1996, the Supreme Court, by reviewing the *Bennis v. Michigan* case, decided for the first time whether a state statute's failure to provide an innocent owner defense in a civil forfeiture proceeding[7] was unconstitutional.[8] The Court, in a five-to-four opinion written by Chief Justice Rehnquist, held that such an omission did not violate any of the innocent owner's constitutional rights.[9] For Tina Bennis, the majority's opinion meant that although she was not guilty of any wrongdoing, and in fact was never accused of wrongdoing, she had lost her car, lost any chance of getting reimbursed for her share of the car's value, and lost her faith in a Constitution which supposedly protects its citizens from losing "life, liberty, or property, without due process of law."[10]

This Note addresses the current status of civil forfeiture law by examining the *Bennis v. Michigan* decision and its implications for innocent owners under current law. Part I explores the history of civil forfeiture, beginning with English common law.[11] Both early and recent American case law follows, highlighting some of the precedent used by the Court in the *Bennis* case, and some of the precedent the Court chose to ignore.[12] Part II reviews the *Bennis* decision in detail, explaining the basis of the majority, concurring, and dissenting opinions. Part III analyzes the Court's choice of precedent, the Court's

4. *Id.*

5. *See infra* Part II.

6. *See infra* note 130 and accompanying text.

7. Forfeiture is defined as the "loss of some right or property as a penalty for some illegal act." BLACK'S LAW DICTIONARY 650 (6th ed. 1990). In a civil forfeiture proceeding, the government can confiscate property without proving the owner's guilt or even charging the owner with a wrongdoing; the only requirement is that the government show probable cause for the forfeiture. *See* REPRESENTATIVE HENRY HYDE, FORFEITING OUR PROPERTY RIGHTS 26 (1995); BUREAU OF JUSTICE ASSISTANCE, CIVIL FORFEITURE: TRACING THE PROCEEDS OF NARCOTICS TRAFFICKING 1-2 (1988). The owner then has the burden of showing why his property should be returned. HYDE, *supra*, at 26; BUREAU OF JUSTICE ASSISTANCE, *supra*, at 2.

8. *Bennis*, 116 S. Ct. at 997-98.

9. *See infra* Part II.A.

10. U.S. CONST. amend XIV, § 1.

11. Although civil forfeiture can be traced further back in history, doing so would go beyond the scope of this Note. For more historical background, see LEONARD W. LEVY, A LICENSE TO STEAL 7-20 (1996); James R. Maxeiner, Note, *Bane of American Forfeiture Law—Banished at Last?*, 62 CORNELL L. REV. 768, 770-92 (1977).

12. *See infra* Part I.B.-C.

failure to apply any of the standards that have been set forth in prior case law, the Court's continued use of the personification fiction,[13] and whether the forfeiture in the *Bennis* case can be categorized as remedial or punitive. Part IV discusses the impact the *Bennis* decision may have on the state of innocent owner defenses in civil forfeiture law, including the impact this decision may have on third-party creditors as well as consumers of credit. Finally, Part V concludes by criticizing the Court's misplaced use of outdated precedent and suggests that Congress must now take the initiative to create legislation that will revamp civil forfeiture law as it currently stands.

I. BACKGROUND

In order to understand the current forfeiture laws and their purposes, it is important to start in England, at the root of American forfeiture law.[14] This Part begins with a brief historical look at English Common Law regarding civil forfeiture.[15] An exploration of America's adoption of England's forfeiture law in the nineteenth century follows.[16] Due to the diversity of twentieth-century forfeiture laws, the law will be explored by separating the cases that have relied on statutes with innocent owner defenses from those cases that have not.[17] Finally, this Part explores the recent Supreme Court decision of *Austin v. United States*,[18] which the *Bennis* dissent relied on, and which the majority concluded was irrelevant to the issue.[19]

A. Civil forfeiture in England

The issue of innocent owners' rights in property dates back to at least the fourteenth century.[20] The British Crown sought to impose vicarious liability upon property owners in forfeiture proceedings "because [it was] the principle means of tax enforcement."[21] These *in*

13. Personification is the rationale courts have traditionally used to justify civil forfeiture as an act against the property, for the property's wrong. *See* Tamara R. Piety, *Scorched Earth: How the Expansion of Civil Forfeiture Doctrine Has Laid Waste to Due Process*, 45 U. MIAMI L. REV. 911, 918-19 (1991). This concept is discussed throughout the case law reviewed in the background section.

14. *See* LEVY, *supra* note 11, at 39-40.

15. *See infra* Part I.A.

16. *See infra* Part I.B.

17. *See infra* Part I.C.1.-2.

18. 509 U.S. 602 (1993).

19. *See infra* Part I.C.3.

20. *See* Maxeiner, *supra* note 11, at 773.

21. *Id.*

rem[22] proceedings were hindered, however, by legislation concerned with innocent property owners. In 1353, the Statute of Staples provided an innocent owner defense,[23] and ten years later, an innocent owner provision protecting ship owners in customs proceedings was created.[24]

The complete disregard of innocent owners appeared again in British law three centuries later with the enactment of the British Navigation Acts.[25] The Acts, passed during England's expansion as a maritime power, required imports and exports to be carried on British ships, and if violated, authorized the ships' forfeiture to the Crown, regardless of the owners' innocence.[26] However, although the Acts were worded in absolute terms, juries acquitted shipowners if it could not be shown that the owner would have discovered the illegality after a reasonable search.[27] Furthermore, after the Navigation Acts, in

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22. In rem is defined as "[a] technical term used to designate proceedings or actions instituted *against the thing* . . . ." BLACK'S LAW DICTIONARY 793 (6th ed. 1990).

23. Mitchell v. Torup, 145 Eng. Rep. 764 (Ex. 1766) (quoting Statute of Staples, 1353, 27 Edw. 3, ch. 19, *reprinted in* 1 Stat. at Large 281). The Statute of Staples, provided:

> No merchant or other, of what condition that he may be, shall lose or forfeit his goods or merchandizes, for trespass & forfeiture of his servant; unless he do [sic] it by the commandment or procurement of his master, or that he shall have offended in the office in which his master hath set him, or in other manner that the master be holden to answer for the deed of his servant by the law merchant, as elsewhere is used.

Id.

24. *See* Amicus Curiae Brief of the National Association of Criminal Defense Lawyers, Bennis v. Michigan, 116 S. Ct. 994 (1996) (No. 94-8729). This statute provided:

> Whereas the Ships and diverse People of the Realm by arrested and holden forfeit, because of a little Thing put in their Ship not customed, whereof the Owners of the same Ships be ignorant; it is accorded and assented, That no Owner shall lose his ship from the fifteenth day of February next coming forth, for such a small Thing put within the Ship not customed, without this Knowledge.

37 Edw. 3, ch. 8, *reprinted in* 1 Stat. at Large 319 (1363).

25. The Navigation Act, 1660, 12 Car. 2. ch. 18, *reprinted in* 1 Stat. at Large 182. The Navigation Act at issue, entitled "An Act for the Encouraging and Increasing of Shipping and Navigation" stated:

> [N]o goods or Commodities whatsoever shall be imported into or exported out of any Lands, Islands, Plantations or Territories of his Majesty . . . in any [foreign] ship . . . whatsoever, but in such Ships or Vessels as do truly and without Fraud belong only to the People of England . . . [and] under the Penalty of the Forfeiture and Loss of all the Goods and Commodities which shall be imported into or exported out of any the aforesaid Places in any other Ship . . . his Majesty . . . [is] hereby authorized and strictly required to seize and bring in as Prize all such Ships or Vessels as shall have offended contrary hereunto, and deliver them to the Court of Admiralty, there to be proceeded against.

Id.

26. Maxiener, *supra* note 11, at 774.

27. *Id.* at 775. For example, although the Court in *Mitchell*, upheld the forfeiture of a ship under the British Navigation Acts when the jury found no "knowledge, privity or consent of the master, mate or owners," the Court suggested that the jury "neither would nor ought . . . find a

1692 the Fourth of William and Mary Parliament enacted a statute entitled, An Act for Encouraging the Apprehending of Highwaymen.[28] This statute, by allowing a person who apprehended a robber to keep the robber's property unless it had wrongfully been taken from its rightful owner,[29] demonstrated that when protection of customs revenues was not at issue, respect for property rights was still intact.

B. Nineteenth-Century Civil Forfeiture in America

Early American forfeiture statutes can be traced back to the British Navigation Acts.[30] However, the United States adoption of British forfeiture laws was a highly unpopular concept because of the belief that the British Crown had widely abused forfeiture laws "in its attempt to tax, control, and punish American colonists."[31] The tendency of early American decisions to follow the English route was merely an expression of economic necessity during the nation's first century—the first United States Congress passed forfeiture statutes to aid in the collection of customs duties, a major source of revenue during the nineteenth century.[32]

In 1827, America's forfeiture power was challenged and upheld by the Supreme Court in *The Palmyra*.[33] In that case, the forfeited ves-

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forfeiture" in cases where the quantity of contraband was very small. *Mitchell*, 145 Eng. Rep. at 765, 767.

28. An Act Encouraging the Apprehending of Highwaymen, 4 W. & M., 1692, ch. 8, *reprinted in* 1 Stat. at Large 517. Section 6 of the statute provided:

> [Such a person] shall have and enjoy to his . . . proper Use and Behoof the Horse, Furniture, and Arms, Money, or other Goods of the said Robber . . . Provided always, That this Clause . . . shall not be construed to extend to take away the Right of any Person or Persons to such Horses, Furniture, and Arms, Money, or other Goods, from whom the same were before feloniously taken.

Id.

29. *Id.*

30. *See* Arthur W. Leach & John G. Malcolm, *Criminal Forfeiture: An Appropriate Solution to the Civil Forfeiture Debate*, 10 GA. ST. U. L. REV. 241, 247-48 n.25 (1994) (discussing several sources of modern forfeiture laws); Maxiener, *supra* note 11, at 777 (explaining that while the colonies had to adhere to the Navigation Acts, there were significant variances among the colonies).

31. HYDE, *supra* note 7, at 20. In fact, one of the earliest cases of colonial rebellion came when the Crown seized John Hancock's schooner Liberty after he refused to pay the unpopular tax on its cargo of Madiera wine. *Id.* His attorney, John Adams's, defense—that "property is surely a right of mankind as real as liberty"—was used by pamphleteers of the American Revolution. *Id.*

32. Leach & Malcolm, *supra* note 30, at 249.

33. 25 U.S. (12 Wheat.) 1 (1827). Note that before the Supreme Court discarded the interests of innocent owners in cases of admiralty, the Court did look at an owner's innocence. *See* Peisch v. Ware, 8 U.S. (1 Cranch) 347 (1808). In *Peisch*, Justice Marshall delivered the opinion of a unanimous court, and held that goods removed from the custody of revenue officers without

sel was armed, cruising as a privateer, and under commission from the King of Spain when it was captured on the high seas for piracy.[34] The appellees contended that the suit could not be maintained because the offenders were not alleged to have been convicted *in personam*.[35] Justice Story, writing for the majority, stated that to require a conviction in personam has never "applied to seizures and forfeitures, created by statute, in rem, cognizable on the revenue side of the Exchequer. The thing is here primarily considered as the offender, or rather the offence [sic] is attached primarily to the thing."[36] Justice Story explained that if such a conviction were required, "there could never be a judgment of condemnation pronounced against any vessel [involved in piracy]; for there is no act of Congress which provides for the personal punishment of [the] offenders."[37]

The Court again looked at the issue of an owner's innocence in an 1844 case, *Harmony v. United States*,[38] when a vessel was seized for piracy.[39] Using *The Palmyra* as precedent, the Court held that "[t]he vessel which commits the aggression is treated as the offender . . . without any reference whatsoever to the character or conduct of the owner."[40] The Court explained that disregarding the owner's innocence "is done from the necessity of the case, as the only adequate means of suppressing the offence [sic] or wrong, or insuring an indemnity to the injured party."[41]

Although the early admiralty decisions supported forfeitures with equitable or remedial principles, the United States government radi-

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payment of duties should not be forfeitable for that reason unless they were removed with the consent of the owner or his agent—giving weight to the innocence of the owner in the forfeiture decision. *Id.* at 364. The Court went on to state that "if . . . without any fault on his part, his property should be invaded, the law cannot be understood to punish him with the forfeiture of that property." *Id.*

34. *The Palmyra*, 25 U.S. at 1.

35. *Id.* at 12. In personam literally means "against the person." BLACK'S LAW DICTIONARY 791 (6th ed. 1990). In personam jurisdiction is the "[p]ower which a court has over the defendant himself . . . [a] court which lacks personal jurisdiction is without power to issue an in personam judgment." *Id.*

36. *The Palmyra*, 25 U.S. at 14. This concept of treating the object as the offender is known as the personification fiction. *See supra* note 13.

37. *The Palmyra*, 25 U.S. at 15. Justice Story did not elaborate, however, on the personification fiction or discuss the appropriateness of conducting a forfeiture proceeding in rem other than in Admiralty and English Common Law Courts. *See* Maxeiner, *supra* note 11, at 781-82.

38. 43 U.S. (1 How.) 210 (1844).

39. *Id.* at 210-11.

40. *Id.* at 233.

41. *Id.* Oliver Wendell Holmes, Jr. agreed that "[t]he ship is the only security available in dealing with foreigners, and rather than send one's own citizens to search for a remedy abroad in strange courts, it is easy to seize the vessel and satisfy the claim at home." *See* HYDE, *supra* note 7, at 22 (citing OLIVER WENDELL HOLMES, JR., THE COMMON LAW 26 (1881)).

cally changed the law of forfeiture during the Civil War, proceeding in rem for purely punitive reasons.[42] Forfeiture was put into practice in an effort to "seize and confiscate all property of an enemy and to dispose of it at the will of the captor" through the Confiscation Act of 1862.[43] Opponents argued that it would be unconstitutional to take property without compensation and to punish a citizen without a trial.[44] The Act narrowly passed and was challenged thereafter in the courts as the states began to implement the law.[45] Three cases challenging the law reached the Supreme Court.[46] However, the Supreme Court upheld the law, not on due process grounds, but as one commentator noted, "because it was a war powers exercise aimed at enemies of the Union."[47]

Disregard for the status of the owner in forfeiture proceedings was broadly extended in 1877 when the Court ruled on *Dobbins's Distillery v. United States.*[48] In that case, a distillery was seized when the lessee of the property, the operator of the distillery, was charged with tax fraud.[49] The owner of the distillery proclaimed innocence, but the Court, using the same justification for forfeiture as in *The Palmyra*,[50] held that the wrongdoer was the distillery and, therefore, the owner's innocence was irrelevant.[51] The Court explained that "property of the owner is [often] forfeited on account of the fraud, neglect, or misconduct of those *entrusted with its possession.*"[52] Returning to the logic of admiralty decisions, the Court stated that, "acts of the master and crew bind the interest of the owner of the ship, whether he be inno-

42. *See* LEVY, *supra* note 11, at 51-52.

43. HYDE, *supra* note 7, at 22 (citing Miller v. United States, 78 U.S. (11 Wall.) 268, 305 (1870)).

44. *See* LEVY, *supra* note 11, at 53-54.

45. Maxeiner, *supra* note 11, at 787 (discussing the events leading up to the Supreme Court cases that challenged the constitutionality of the Confiscation Act of 1862).

46. Tyler v. Defrees, 78 U.S. (11 Wall.) 331 (1870); Miller v. United States, 78 U.S. (11 Wall.) 268 (1870); McVeigh v. United States, 78 U.S. (11 Wall.) 259 (1870).

47. *See* Maxiener, *supra* note 11, at 787. Henry Hyde has noted that this rationale may explain the government's willingness to let forfeiture play such a large role today in the war on drugs. HYDE, *supra* note 7, at 23.

48. 96 U.S. 395 (1877); *see* Maxiener, *supra* note 11, at 791 n.133 (discussing *Dobbins's Distillery* in the context of a lessor's vicarious liability).

49. *Dobbins's Distillery*, 96 U.S. at 395.

50. The Palmyra, 25 U.S. (12 Wheat.) 1, 14 (1827); *see supra* notes 33-37 and accompanying text.

51. *Dobbins's Distillery,* 96 U.S. at 401.

52. *Id.* (emphasis added). Note that the language "entrusted with its possession" is the basis of the negligent entrustment standard articulated in *Van Oster v. Kansas*, 272 U.S. 465 (1926), *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974), and *Austin v. United States*, 509 U.S. 602 (1993), which justified forfeiture of innocent owners' property based on their own negligence. *See infra* notes 67-83, and 112-22 and accompanying text.

cent or guilty, and that in sending the ship to sea under their charge he impliedly submits to whatever the law denounces as a forfeiture."[53]

C. *Twentieth-Century Civil Forfeiture*

Unlike their common law predecessors, twentieth-century civil forfeitures have been part of larger governmental efforts to eliminate undesirable social behavior, such as alcohol and drug use.[54] Forfeiture cases in this century have produced a wide variety of inconsistent results: some states have used statutes that do not provide for an innocent owner defense,[55] and federal courts have relied on many statutes that do provide for innocent owner defenses,[56] leaving factually similar situations treated quite differently.

1. *The Irrelevance of Innocence*

In early twentieth-century cases,[57] as well as more recent decisions,[58] the Court has continued to personify property of alleged wrongdoers to justify forfeiture. In fact, *Goldsmith-Grant Co. v. United States*,[59] decided in 1921, is often cited by courts that justify the forfeiture of innocent owners' property.[60] In that case, a car dealership challenged the constitutionality of a statute that imposed forfeiture regardless of an owner's innocence.[61] The dealer had sold the car to the persons responsible for using the car illegally (transporting liquor to evade taxes), but had retained the title for unpaid purchase money.[62] At trial, the "jury found the car guilty."[63] The Court upheld the verdict, stating that "the thing is primarily considered the offender."[64] Although the Court acknowledged that the section of the statute which provided for forfeiture regardless of an owner's guilt

53. *Dobbins's Distillery*, 96 U.S. at 401.

54. *See* Amicus Curiae Brief of the Institute for Justice n.4, Bennis v. Michigan, 116 S. Ct. 994 (1996) (No. 94-8729). New Jersey has one of the most severe forfeiture laws, which is triggered by any alleged criminal conduct, even shoplifting. HYDE, *supra* note 7, at 24.

55. *See infra* Part I.C.1.

56. *See infra* Part I.C.2.

57. *See infra* notes 59-73 and accompanying text.

58. *See infra* notes 74-83 and accompanying text.

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

60. As noted by one commentator: "From 1921 to the present, the law of forfeiture has followed the interpretation of *Goldsmith-Grant*." Maxiener, *supra* note 11, at 792.

61. *Goldsmith-Grant*, 254 U.S. at 509-10.

62. *Id.* at 509. The dealership's interest, as a third-party creditor, is representative of the concerns voiced by the American Bankers Association in their Amicus Curiae Brief submitted on behalf of Tina Bennis. *See infra* notes 264-67 and accompanying text.

63. *Goldsmith-Grant*, 254 U.S at 509. The quote exemplifies the personification of objects used to justify forfeiture when the owner's guilt is questionable.

64. *Id.* at 511.

"seem[ed] to violate that justice which should be the foundation of the due process of law required by the Constitution,"[65] it went on to state that "[i]n breaches of revenue provisions some forms of property are facilities, and therefore . . . Congress . . . ascrib[es] to the property a certain personality, a power of complicity and guilt in the wrong."[66]

Similarly, in *Van Oster v. Kansas,*[67] decided five years later, an innocent owner's car was forfeited.[68] The car's owner lent the car to the car dealership owner for his use, and the dealership owner's agent, while in the car, was arrested for illegal transport of liquor.[69] Although the agent was acquitted of the charges, the Kansas Supreme Court upheld the forfeiture of the car.[70] The United States Supreme Court affirmed the Kansas Supreme Court decision and, using the revenue line of cases as a basis for upholding the forfeiture,[71] explained that an owner who entrusts another with his vehicle subjects himself to responsibility for the entrusted's acts.[72] The Court was not disturbed by the agent's acquittal, stating only that the decision of the state court was controlling.[73]

As recently as 1974, the Supreme Court endorsed the personification fiction for forfeiture.[74] In *Calero-Toledo v. Pearson Yacht Leasing Co.*,[75] a leased yacht became the subject of forfeiture when one marijuana cigarette was found on board.[76] The Supreme Court stated that,

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65. *Id.* at 510.

66. *Id.* The Court added that such reasoning "is too firmly fixed in the punitive and remedial jurisprudence of the country to now be displaced." *Id.* at 511. Interestingly, although this decision is widely cited as justification for civil forfeiture of innocent owners' property, had this decision been reached 11 months later, it may have produced a different outcome. The forfeiture proceeding in *Goldsmith-Grant*, under § 3450 of the Revised Statutes, reached a decision on Jan. 17, 1921. *Id.* at 505. On November 23, 1921, the Willis-Campbell Act was passed, which stated that, "all laws relating to taxation and traffic in liquors . . . in force when the [National Prohibition Act] was adopted, were continued in force except . . . [where] directly in conflict with the NPA." Willis-Campbell Act, ch. 134, 42 Stat. 222, 223 (1921). The National Prohibition Act ("NPA"), which was in effect when *Goldsmith-Grant* was decided, provided an innocent owner defense. 27 U.S.C. § 40 (1919) (repealed 1935); *see infra* notes 84-89 and accompanying text.

67. 272 U.S. 465 (1926).

68. *Id.* at 466.

69. *Id.*

70. *Id.*

71. *Id.* at 468. The Court cited *Goldsmith-Grant* and *Dobbins's Distillery* as support. *Id.*

72. *Id.* at 467. The Court reasoned that this logic extends beyond forfeiture proceedings, pointing out that an automobile owner is liable for the negligent operation of those entrusted with its use. *Id.*

73. *Id.* at 469. The court stated that the acquittal "at most involved questions of state procedure." *Id.*

74. *See* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 686-88 (1974) (upholding a Puerto Rican statute providing for forfeiture of vessels used for unlawful purposes).

75. 416 U.S. 663 (1974).

76. HYDE, *supra* note 7, at 71.

"the innocence of the owner of property subject to forfeiture has almost uniformly been rejected as a defense,"[77] and held that regardless of the owner's innocence, the yacht was the offender and, therefore, was properly forfeited.[78] The Court stated that, "[t]o the extent that such forfeiture provisions are applied to lessors, bailors, or secured creditors who are innocent of any wrongdoing, confiscation may have the desirable effect of inducing them to exercise greater care in transferring possession of their property."[79]

Although the Puerto Rican statute at issue in *Calero-Toledo* did not explicitly provide an innocent owner defense, it was modeled after The Controlled Substances Act, which provides an innocent owner defense in the enforcement of forfeiture proceedings.[80] Puerto Rican courts had previously recognized the same exceptions as the federal statute—namely, that when the owner's property was taken from an individual without privity or consent, the unbending rule might not apply.[81] In what later became known as the "reasonable steps test," the Court explained, "it would be difficult to reject the constitutional claim of an owner . . . who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done *all that reasonably could be expected* to prevent the proscribed use of his property."[82] In such a circumstance, the Court added, "it would be

77. *Calero-Toledo*, 416 U.S. at 683 (discussing *The Palmyra*, 25 U.S. (12 Wheat.) 1 (1827), a piracy case, as an example).

78. *Id.* at 687-88.

79. *Id.* Such logic was recently revisited. Although the owners of a three unit apartment building knew of drug activity on the property, they were fearful of getting involved and left law enforcement up to the police. Ron Galperin, *Landlords vs. Drug Dealers*, L.A. TIMES, Jan. 12, 1992, at K1. The building was seized and the Ninth Circuit affirmed, reasoning that the owners were guilty of "willful dereliction of social responsibility." *Id.*

80. The Controlled Substances Act provides:

> (B) No conveyance shall be forfeited under the provisions of this section by reason of any act or omission established by the owner thereof to have been committed or omitted by any person other than such owner while such conveyance was unlawfully in the possession of a person other than the owner in violation of the criminal laws of the United States, or of any State.
>
> (C) No conveyance shall be forfeited under this paragraph to the extent of an interest of an owner, by reason of any act of omission established by that owner to have been committed or omitted without the knowledge, consent, or willful blindness of the owner.

21 U.S.C. §881(a)(4) (1994).

81. *Calero-Toledo*, 416 U.S. at 689.

82. *Id.* (emphasis added). This "reasonable steps" test has been adhered to in a number of cases where innocent owners protested the forfeitures at issue. United States v. One 1982 28' International Vessel, 741 F.2d 1319, 1322 (11th Cir. 1984); United States v. One Tintoretto, 691 F.2d 603, 607 (2nd Cir. 1982); United States v. One 1972 Chevrolet Blazer, 563 F.2d 1386, 1388 (9th Cir. 1977); United States v. One 1983 Homemade Vessel Named Barracuda, 625 F. Supp. 893, 899 (S.D. Fla. 1986). Although each of these cases was prosecuted under 21 U.S.C. §881(a),

difficult to conclude that the forfeiture served legitimate purposes and was not unduly oppressive."[83]

2. *The Creation of Innocent Owner Defenses*

Various federal laws which were passed in the twentieth century implemented innocent owner defenses when subjecting property to forfeiture. The National Prohibition Act ("NPA"), for example, created to punish the illegal transport and consumption of liquor, implemented an innocent owner defense.[84] In the 1930 case of *Richbourg Motor Co. v. United States*,[85] a person discovered in the act of unlawfully transporting liquor was arrested and the automobile he was driving was seized under section 26 of the NPA.[86] Since the car's owner was not the driver, the government sought to proceed with the forfeiture under a different statute in order to avoid the innocent owner defense of the NPA.[87] The owner of the vehicle, who was a lienor under a conditional sales contract with a person other than the arrested driver, protested prosecution under that statute since the original seizure was authorized under the NPA.[88] The Supreme Court held that the forfeiture must proceed under the NPA because under the Willis-Campbell Act of 1921, any law, or section of law, relating to the illegal transportation of liquor that was in direct conflict with the NPA must be superseded by that Act.[89] The Court determined that Con-

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which provides for an innocent owner defense, the courts in each case cited *Calero-Toledo* as support for "the reasonable steps" test. *One 1982 28' International Vessel*, 741 F.2d at 1322; *One Tintoretto*, 691 F.2d at 607; *One 1972 Chevrolet Blazer*, 563 F.2d at 1388; *One 1983 Homemade Vessel Named Barracuda*, 625 F. Supp. at 899.

83. *Calero-Toledo*, 416 U.S. at 689-90.

84. The National Prohibition Act provided:

> Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, . . . and upon conviction of the person so arrested shall order the liquor destroyed, and unless good cause to the contrary is shown by the owner, shall order a sale by public auction of the property seized, and the officer . . . shall pay all liens, . . . which are established, . . . as being bonafide and as having been created without the liener having any notice that the carrying vehicle was being used or was to be used for illegal transportation of liquor.

27 U.S.C. § 40 (1919) (repealed 1935).

85. 281 U.S. 528 (1930).

86. *Id.* at 531, 536. The petitioners intervened in the district court to assert their interests in the vehicle as innocent lienors. *Id.* at 530-31. This was actually a consolidated case of two similar factual situations. *Id.* Note that this is another example of the government continuing to pursue the automobile's forfeiture after the charges against the driver were dropped. *Id.* at 531.

87. *Id.* The government sought enforcement of forfeiture under section 3450 of the Revised Statutes, which stated only that "every vessel, boat, cart, carriage, or other conveyance whatsoever . . . shall be forfeited." *Id.* n.2. The district court forfeited the vehicles and the court of appeals affirmed. *Id.* at 530.

88. *Id.*

89. *Id.* at 532. Section 5 of the Willis-Campbell Act of Nov. 23, 1921 provided:

gress intended to protect innocent owners because the Act potentially would increase the seizure of vehicles and, therefore, prosecution would have to be attempted under the NPA.[90]

Nine years later, in *United States v. One 1936 Model Ford V-8 Deluxe Coach*,[91] an individual was similarly arrested and the car he was driving was forfeited for violation of the internal revenue laws relating to liquor.[92] Under the Act in question, an owner's innocence was also a defense.[93] The owner, a credit company, established this defense by showing that: 1) it was the owner, 2) it made a good faith purchase, and 3) it had no knowledge or reason to know that the car would be used to violate the law.[94] The Court affirmed the lower courts' rulings for the remission of forfeiture,[95] explaining that "forfeiture acts are exceedingly drastic . . . [and] were intended for [the] protection of the revenues, not to punish without fault,"[96] and "should be enforced only when within both [the] letter and spirit of the law."[97]

Innocent owner defenses have also been employed in the fight against drugs through the Controlled Substances Act.[98] In several

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> [A]ll laws in regard to the manufacture and taxation of and traffic in intoxicating liquor and all penalties for violations of such laws that were in force when the National Prohibition Act was enacted, shall be and continue in force . . . except such provisions . . . as are directly in conflict with any provision of the National Prohibition Act.

Willis-Campbell Act, ch. 134, 42 Stat. 222, 223 (1921).

90. *Richbourg Motor Co.*, 281 U.S. at 535-37.

91. 307 U.S. 219 (1939).

92. *Id.* at 221. In this case an automobile finance company that purchased in good faith a conditional sales contract covering the sale of an automobile from a dealer believed that the vendor named therein was the real purchaser and owner of the vehicle. *Id.* at 222. In reality, the vendor named was the brother of the actual car owner. *Id.*

93. *Id.* at 221. The defendant was prosecuted under the Liquor Law Repeal & Enforcement Act of Aug. 27, 1935, 27 U.S.C. § 40a (repealed 1948). *One 1936 Model Ford V-8 Deluxe Coach*, 307 U.S. at 220-21.

> Sec. 204 (b) In any such proceeding the court shall not allow the claim of any claimant for remission or mitigation unless and until he proves (1) that he has an interest in such vehicle or aircraft . . . which he acquired in good faith, (2) that he had at no time any knowledge or reason to believe that it was being or would be used in the violation of laws of the United States or any State relating to liquor . . . .

Id.

94. *One 1936 Model Ford V-8 Deluxe Coach*, 307 U.S. at 223. Because the claimant's innocent owner defense was based on his status as a lienor, a fourth element was required by the Act; namely a showing that an inquiry was made of law enforcement officers in the locality about the record or reputation of the 'owner' of the vehicle. 27 U.S.C. § 40a; *One 1936 Model Ford V-8 Deluxe Coach*, 307 U.S. at 223. The claimant fulfilled this requirement, and was told upon inquiry, that the owner had no record. *One 1936 Model Ford V-8 Deluxe Coach*, 307 U.S. at 223.

95. *One 1936 Model Ford V-8 Deluxe Coach*, 307 U.S. at 238.

96. *Id.* at 236. The Court noted that if any claimant has been negligent or in good conscience ought not be relieved, courts should deny the claim. *Id.* at 226.

97. *Id.* (citing Farmers' & Mechanics' Nat'l Bank v. Dearing, 91 U.S. 29, 33-35 (1875)).

98. The Controlled Substances Act provides:

cases seeking forfeiture under this Act, half-owners of property have succeeded in using their innocence as a defense. For example, in *United States v. One 1981 Datsun 280ZX*,[99] a father and daughter co-owned a car in which the daughter was arrested for buying drugs.[100] Although the car was forfeited, the father succeeded in establishing an innocent owner defense and regained the car.[101] The court reasoned that the predominance of the evidence supported his contention that he had nothing to do with the purchase of the drugs and that he neither knew or had reason to know of any illegal drug transaction.[102] The court also added that a family situation where a father reasonably thought he knew his daughter was totally different from a commercial situation where a lessor is obligated to investigate its lessee.[103] Therefore, the court held that the father *did all that he reasonably could have done* to prevent illegal use of the automobile.[104]

A similar co-owner situation occurred in both *United States v. One Parcel of Real Property*[105] and *Devito v. United States*.[106] In *One Parcel of Real Property*, a husband and wife co-owned a house that was forfeited in a drug raid.[107] The wife claimed to be an innocent owner.[108] The court found that she sufficiently proved co-ownership and ignorance of her husband's drug activity, and granted her a fifty-

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

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

21 U.S.C. §881(a)(4) (1994). Many commentators find fault with this innocent owner defense for placing the burden on the owners to prove their innocence. *See, e.g., Civil Asset Forfeiture: Hearings on H.R. 1916 Before the House Comm. on the Judiciary*, 105th Cong. (1997) (statement of David B. Smith, on behalf of the Nat'l Ass'n of Criminal Defense Lawyers).

99. 644 F. Supp. 1280 (E.D. Pa. 1986).

100. *Id.* at 1281-83. The F.B.I. stopped the daughter while driving the car and found approximately 103 grams of methamphetamine. *Id.* at 1283.

101. *Id.* at 1288.

102. *Id.* at 1287.

103. *Id.*

104. *Id.* at 1288 (emphasis added). The court specifically pointed to the father's numerous attempts after his daughter's arrest to contact her and find the car. *Id.*

105. 942 F.2d 74 (1st Cir. 1991).

106. 520 F. Supp. 127 (E.D. Pa. 1981).

107. *One Parcel of Real Property*, 942 F.2d at 76. During the raid, heroine and $19,325 in cash were found in a microwave oven. *Id.*

108. *Id.* at 79. Although only the husband's name was on the title to the house, the wife convinced the court that an oral agreement between her and her husband providing that she would pay the mortgage created a resulting trust. *Id.*

percent interest in the property.[109] In *Devito*, a husband and wife's car was forfeited after the husband allegedly made an illegal drug transaction in the car.[110] The wife claimed to be an innocent owner, and the court, citing *Calero-Toledo* as authority, held that the wife should be given the opportunity to prove "that she *did all that she reasonably could have been expected to do* to prevent the illegal use of her automobile" and, therefore, denied the government's motion for summary judgment.[111] As these cases demonstrate, concern for an owner's innocence has not been completely disregarded in all civil forfeiture precedent.

3. *Forfeiture and Innocent Owners Under the Contemporary Supreme Court*

In 1993, in *Austin v. United States*,[112] the Supreme Court did not consider whether an innocent owner was entitled to protection, but instead whether the forfeiture at issue was a violation of the Excessive Fines Clause of the United States Constitution.[113] Therefore, in *Austin*, the Court needed to first determine whether civil forfeiture could be considered punishment.[114] In *Austin*, the State sought forfeiture of a mobile home and auto body shop where the defendant had partaken in a drug deal.[115] By exploring the history of forfeiture and its purpose, the Court held that the forfeiture could be violative of the Excessive Fines Clause.[116] Concluding that forfeiture is and has had a

109. *Id.* at 80.

110. *Devito*, 520 F. Supp. at 128.

111. *Id.* at 130 (emphasis added) (citing Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974)). No subsequent history is available; presumably, the government did not pursue the forfeiture further. Note too that not all co-owners challenging forfeiture under this statute are as successful as the co-owners just discussed. In *One Blue 1977 AMC Jeep CJ-5 v. United States*, 783 F.2d 759 (8th Cir. 1986), a mother challenged the forfeiture of her car due to her son's alleged drug activity, claiming that she was an "innocent owner." *Id.* at 761. Although the son was acquitted of all charges, the court said that the proceedings were unrelated and nothing in the record demonstrated a lack of consent to the son's use of the car or an attempt to prevent him from using the car for drug related purposes. *Id.* at 762. As one can see, even under the statutes with innocent owner defenses, courts do not uniformly apply the law and some innocent owners still lose their property.

112. 509 U.S. 602 (1993).

113. *Id.* at 604.

114. The Court reasoned that because the Excessive Fines Clause of the Constitution is primarily concerned with excess punishment, it could only be applied to a civil forfeiture case if civil forfeiture serves at least in part to punish. *Id.* at 610.

115. *Id.* at 604. Richard Austin pleaded guilty to possessing two grams of cocaine (worth about $2,000) with intent to distribute. *Id.* He received seven years in prison. *Id.* After deciding that forfeiture of his home and auto body shop could be found violative of the Excessive Fines Clause, the Court remanded the case back to the lower courts. *Id.* at 623.

116. *Id.* at 611-23.

history of being, at least in part, punitive in nature,[117] the Court then looked to the history of the innocent owner defense as proof of a legislative intent not to punish the innocent.[118] The Court further found that although the United States has a long history of disregarding the innocent in forfeiture cases, the decisions were based either on the idea that the property itself was considered guilty, or that the owner was accountable for the wrongs of the entrusted, for being negligent in choice or practice of entrusting.[119] As a result, the Court reasoned that the innocent owners in past cases were not protected when some basis of negligence by act or omission was found.[120] As one of the last civil forfeiture cases the Supreme Court heard before *Bennis v. Michigan*, the *Austin* Court seemed to have firmly established that forfeiture can serve punitive purposes.[121] As a preface to *Bennis*, *Austin,* by reviewing and analyzing the history of civil forfeiture extensively, seemed to signal a change in the law—perhaps more concern for excessiveness and innocence would be given—then again, maybe not.[122]

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117. *Id.* at 609-10. The government argued that this forfeiture should be considered remedial, but the Court rejected the argument, stating that although "forfeiture of contraband . . . [is] . . . remedial, . . . [this] Court . . . previously has rejected . . . [the extension of] . . . that reasoning to conveyances used to transport illegal liquor . . . [and] the same, without question, is true of the properties involved here." *Id.* at 621. Note also that further support for the notion that forfeiture is punitive can be found in the language used in *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1965), where the Supreme Court reversed the forfeiture of an automobile because of an illegal search, reasoning that forfeiture is quasi-criminal in character, directed toward penalizing the commission of illegal offenses. *Id.* at 700. The Court added, "[t]here is nothing even remotely criminal in possessing an automobile." *Id.* at 699.

118. *Austin,* 509 U.S. at 619. By looking at the Federal Controlled Substances Act (under which Austin's seizure was instituted), the Court found that because the statute's innocent owner provision focused on the culpability of the owner, Congress clearly understood that those provisions serve to deter and punish. *Id.* at 621-22.

119. *Id.* at 615. The Court further reasoned that even the personification fiction rests on the notion that an owner who allows personal property to become involved in an offense has been negligent. *Id.* at 616.

120. *Id.*

121. In late 1993, the Supreme Court heard another civil forfeiture case. In *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993), the Supreme Court again restrained the government's use of civil forfeiture in real property actions by holding that the Due Process Clause requires the government to afford notice and meaningful opportunity to be heard before seizing real property subject to civil forfeiture. *Id.* at 62.

122. In fact, although *James Daniel Good*'s holding, *see supra* note 121, was sympathetic to property owners in theory, in that case the government seized the property *four and one half years* after the property owner was convicted on drug charges. *Id.* at 46. Although the Court acknowledged that the government was financially motivated, it failed to halt the proceeding. *Id.* at 56. This decision failed to curb the abuses of using forfeiture laws to make money for law enforcement. *See* HYDE, *supra* note 7, at 34. In fact, the attorney for the property owner in the *James Daniel Good* case said he had eight other small crime cases in which police had gone back several years to resurrect cases for forfeiture actions. *Id.* at 35.

II. SUBJECT OPINION: *Bennis v. Michigan*[123]

Tina Bennis cleaned offices at night, worked as a part-time cook in a school cafeteria, and worked a newspaper route with one of her five children to help make ends meet.[124] She and her husband, a Detroit area steelworker,[125] co-owned an eleven year old Pontiac.[126] A few weeks after purchasing the Pontiac for $600,[127] Tina Bennis's husband, while en route from work to home, drove to a neighborhood reputed for prostitution and engaged in sexual activity with a prostitute in the car.[128] Mr. Bennis was arrested and charged with the misdemeanor of gross indecency.[129] Since the illicit act occurred in the car, the Wayne County prosecutor filed a complaint alleging that the vehicle was a public nuisance subject to abatement in accordance with a Michigan statute that provided for the abatement of any "building, vehicle, boat, aircraft, or place used for the purpose of lewdness, assignation or prostitution or gambling."[130]

The circuit court declared the car to be a nuisance and abated it, terminating the couple's interest in the automobile.[131] Tina Bennis protested the forfeiture contending that: a one-time act was not sufficient to be a nuisance;[132] lewdness was never proved;[133] and the State failed to demonstrate knowledge on her part of her husband's lewdness.[134] The Michigan Court of Appeals reversed the circuit court's decision, holding that: Mr. Bennis's act, although lewd, was not a violation of the Michigan statute because a one-time event does not constitute a nuisance;[135] the prosecution failed to prove that an act of

123. 116 S. Ct. 994 (1996).

124. David G. Savage, *Innocence Punished: Justice Ginsburg Keys Surprise Ruling in Double Jeopardy Case*, A.B.A. J., May 1996, at 47.

125. *Id.*

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

127. *Id.*

128. Michigan v. Bennis, 527 N.W.2d 483, 486 (Mich. 1994).

129. Michigan v. Bennis, 504 N.W.2d 731, 732 (Mich. Ct. App. 1993).

130. The Michigan statute in question, The Revised Judicature Act of 1961, provides:

> Any building, vehicle, boat, aircraft, or place used for the purpose of lewdness, assignation or prostitution or gambling, or used by, or kept for the use of prostitutes or other disorderly persons . . . is declared a nuisance, . . . and all . . . nuisances shall be enjoined and abated as provided in this act and as provided in the court rules. Any person or his or her servant, agent, or employee who owns, leases, conducts, or maintains any building, vehicle, or place used for any of the purposes or acts set forth in this section is guilty of a nuisance.

MICH. COMP. LAWS ANN. § 600.3801 (West Supp. 1995); *Bennis*, 116 S. Ct. at 996 n.2.

131. *Bennis*, 504 N.W.2d at 732.

132. *Id.* at 733.

133. *Id.* at 734.

134. *Id.* at 732.

135. *Id.* at 734.

prostitution occurred in the car (there was no proof of payment);[136] and regardless of the statute's language, Michigan Supreme Court precedent interpreting this section prevented the State from abating Tina Bennis's interest absent proof that she knew how the car would be used.[137]

On appeal by the State, the Michigan Supreme Court reversed the appellate court's decision and reinstated the forfeiture.[138] The State Supreme Court found that, because the action was against the car and not Mr. Bennis, proof of payment to establish solicitation of a prostitute was unnecessary.[139] The court also found that Mr. Bennis contributed to an existing nuisance by "enter[ing] a neighborhood that [was] a known place for prostitution and used his vehicle to engage in illicit activity."[140] The court addressed Tina Bennis's innocence, but concluded that in light of precedent, specifically *Van Oster*[141] and *Calero-Toledo*,[142] Michigan's failure to provide an innocent owner defense was "without constitutional consequence."[143]

On appeal to the United States Supreme Court, Tina Bennis argued that she was an innocent owner, and that the Michigan statute, by not providing for an innocent owner defense, was unconstitutional for violating the Due Process Clause of the Fourteenth Amendment and the Takings Clause of the Fifth Amendment.[144] In a five-to-four opinion

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136. *Id.* at 734-35.

137. *Id.* at 732. The Michigan Appellate Court's decision is not surprising since in *In re Forfeiture of $53.00*, 444 N.W.2d 182 (Mich. Ct. App. 1989), the court held that in a forfeiture proceeding of co-owned property, "the state may only forfeit the ownership interest of the non-innocent owner. If, for example, the innocent owner has a 50% interest in the vehicle, the property may be sold and the proceeds divided equally between the state and the innocent co-owner." *Id.* at 189.

138. Michigan v. Bennis, 527 N.W.2d 483, 495 (Mich. 1994).

139. *Id.* at 486.

140. *Id.* Although in many prior abatement cases, the state provided or implied the property's nuisane status with *several* acts, the Court justified the car's forfeiture for a *single* act, under a nuisance statute. It reasoned that the car, by entering a neighborhood that was a nuisance, was "used for" the continuance of a nuisance. *Id.* at 491. In fact, the Michigan Supreme Court emphasized the fact that Mr. Bennis engaged in this act with a known prostitute in an area reputed for illicit activity, and noted that its position was limited to situations in which a nuisance condition exists, admitting that "a vehicle could not be abated if the same situation arose in another area of Detroit, such as Palmer Woods [a wealthy neighborhood], where certainly no such nuisance condition exists." *Bennis*, 527 N.W.2d at 491 n.22.

141. *See supra* notes 67-73 and accompanying text.

142. *See supra* notes 74-83 and accompanying text.

143. *Bennis*, 527 N.W.2d at 494. In Justice Levin's dissenting opinion, which analyzed the construction of the statute at issue, he determined that the majority had "enlarge[d] the application of the nuisance abatement statute beyond its letter and beyond any prior application in its seventy-year history." *Id.* at 505 (Levin, J., dissenting).

144. Bennis v. Michigan, 116 S. Ct. 994, 997-98 (1996). The Due Process Clause provides: "[No] State [shall] deprive any person of life, liberty, or property, without due process of law."

written by Justice Rehnquist, the Supreme Court affirmed the Michigan Supreme Court's ruling, and held that Michigan's failure to provide an innocent owner defense did not offend the Due Process Clause of the Fourteenth Amendment.[145]

A. *The Majority Opinion*

Chief Justice Rehnquist, writing for the majority,[146] first focused on the petitioner's due process claim and held that there was no law supporting Bennis's argument that an innocent owner should be protected against forfeiture proceedings.[147] The majority reasoned that "a long and unbroken line of cases holds that an owner's interest in property may be forfeited by reason of the use to which the property is put even though the owner did not know that it was to be put to such use."[148] The Court cited *The Palmyra*,[149] *Dobbins's Distillery*,[150] and *Van Oster*[151] to provide an historical basis for the principle that culpability in owners is not necessary to constitutionally forfeit property.[152] The Court acknowledged that such cases have left room for an owner to be granted relief when an owner asserts that the car was taken without consent, but not when consent was given to use the car but not to perform the illegal act.[153]

The Court then analogized *Bennis* to *Calero-Toledo,* which it considered to be the most recent case on point.[154] The Court ruled that the passage in *Calero-Toledo,* which Bennis relied on, was obiter dictum and therefore irrelevant.[155] Rehnquist reasoned that Tina Bennis was similarly situated to the various owners involved in the forfeiture cases beginning with *The Palmyra* in 1827.[156] Like the owners in those

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U.S. CONST. amend. XIV, § 1. The Takings Clause provides: "[P]rivate property [shall not] be taken for public use, without just compensation." U.S. CONST. amend. V.

145. *Bennis,* 116 S. Ct. at 996.

146. Rehnquist's opinion was joined by Justices O'Connor, Scalia, Thomas, and Ginsburg.

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

148. *Id.* at 998.

149. *See supra* notes 33-37 and accompanying text.

150. *See supra* notes 48-53 and accompanying text.

151. *See supra* notes 67-73 and accompanying text.

152. *Bennis,* 116 S. Ct. at 998.

153. *Id.* at 999 n.5.

154. *Id.* at 999; *see supra* notes 74-83 and accompanying text.

155. *Bennis,* 116 S. Ct. at 999. The *Calero-Toledo* opinion stated that "it would be difficult to reject the constitutional claim of . . . an owner who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property." Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 689 (1974).

156. *See supra* Part I.B.

cases, she did not know that her car would be used in an illegal activity that would subject it to forfeiture.[157] Therefore, Rehnquist held that her result should be the same as the others.[158] The majority emphasized that the circuit court called the forfeiture an equitable action, as opposed to a punitive one,[159] and found that the deterrent effect of forfeiture was sufficient justification.[160]

Chief Justice Rehnquist briefly addressed Tina Bennis's claim that the forfeiture was also violative of the Fifth Amendment, but determined that, because the forfeiture did not violate the Fourteenth Amendment, the government was not required to compensate an owner for property it had lawfully acquired through governmental authority.[161] Just as the Court had done throughout the twentieth century in forfeiture cases where the facts inferred harm to innocent owners, Rehnquist concluded that, "the cases authorizing actions of the kind at issue are 'too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced.'"[162]

B. The Concurring Opinions

In a concurring opinion, Justice Thomas emphasized that an "unfairness" argument like the one lodged by both Tina Bennis and the dissent was not persuasive in a forfeiture case, given the lengthy history of forfeiture against innocent owners.[163] Thomas reiterated that:

> [The State's motivation is] to punish for deterrence and perhaps also for retributive purposes, persons who *may* have colluded or acquiesced in criminal use of their property, or who *may* at least have negligently entrusted their property to someone likely to use it for misfeasance. But, . . . it does not want to have to *prove* (or to refute proof regarding) collusion, acquiescence, or negligence.[164]

Thomas further reasoned that the abatement was justifiable on remedial grounds and, therefore, could not be properly described as *punishing* an innocent owner.[165] He opined that the *Bennis* decision was a

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

158. *Id.*

159. *Id.* at 1000. By declaring the forfeiture to be equitable, and not punitive, the majority freed itself from having to discuss and justify *punishment* of Mrs. Bennis.

160. *Id.* Although Rehnquist differentiated punitive acts from deterrents, Justice Blackmun, in *Austin,* had pointed out that earlier Supreme Court precedent established that "a civil sanction that . . . [can] be explained as . . . serving either retributive or deterrent purposes, is punishment, as we have come to understand the term." Austin v. United States, 509 U.S. 602, 621 (1993) (citing United States v. Halper, 490 U.S. 435, 448 (1989)).

161. *Bennis*, 116 S. Ct. at 1001.

162. *Id.* (citing Goldsmith-Grant Co. v. United States, 254 U.S. 505, 511 (1921)).

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

164. *Id.* (emphasis in original).

165. *Id.* at 1002.

reminder that the Constitution does not prohibit everything that is intensely undesirable.[166]

Justice Ginsburg also wrote a brief concurring opinion.[167] Her concurrence was based on three factors. First, Ginsburg believed that John Bennis, as an equal owner, at all times "had [Tina Bennis's] consent to use the car."[168] Second, she believed that it was critical to the Michigan Court that the nuisance abatement proceeding was an equitable action.[169] And third, Ginsburg thought that because of the car's age and value,[170] there was "practically nothing" to give Tina Bennis after subtracting costs.[171] In Justice Ginsburg's view, the State "ha[d] not embarked on an experiment to punish innocent third parties . . . [but] to deter Johns from using cars they own (or co-own) to contribute to neighborhood blight."[172]

C. *The Dissenting Opinions*

Justice Stevens and Justice Kennedy wrote the dissenting opinions. Justice Stevens's dissenting opinion, joined by Justices Breyer and Souter, proposed that the majority opinion's logic "would permit states to exercise unbridled power to confiscate vast amounts of property where professional criminals had engaged in illegal acts."[173] Looking to historical precedents cited by the majority, Stevens pointed out that in the admiralty and earlier twentieth-century cases, "the vehicles or property actually facilitated the offenses themselves."[174] In the *Bennis* case, however, Stevens argued that the for-

166. *Id.* at 1001-02. Surprisingly, in his concurring opinion in *James Daniel Good*, Justice Thomas voiced concern over the breadth of new civil forfeiture statutes, and noted that because current practices "seem to be far removed from the legal fiction upon which the doctrine [was] based, it may be necessary—in an appropriate case—to reevaluate our generally deferential approach to legislative judgments in this area of civil forfeiture." United States v. James Daniel Good Real Property, 510 U.S. 43, 81-82 (1993) (Thomas, J., concurring); *see supra* notes 121-22. Unfortunately for Tina Bennis, Justice Thomas did not think hers was the "appropriate case."

167. *Bennis*, 116 S. Ct. at 1003 (Ginsburg, J., concurring).

168. *Id.*

169. *Id.*

170. The Pontiac was eleven years old and purchased by John and Tina Bennis for $600. *Id.*

171. *Id.* Maybe Ginsburg would have ruled for Tina Bennis "if the car had been a nice new Mercedes worth $40,000, instead of an old Pontiac worth $600.00." Stuart Taylor, Jr., *Law of Forfeiture Takes a Big Step Back; Wrong Rationale Used to Uphold Confiscation, Sale of Innocent Victim's Property*, FULTON COUNTY DAILY REP., Mar. 11, 1996, *available in* LEXIS, Regnws Library, Fulton File.

172. *Bennis*, 116 S. Ct. at 1003. Ginsburg's opinion ran counter to expectations from her comments at oral arguments and her larger reputation for liberalism on the bench. Savage, *supra* note 124, at 48.

173. *Bennis*, 116 S. Ct. at 1003 (Stevens, J., dissenting).

174. *Id.* at 1005. Justice Stevens made reference to *Dobbins's Distillery*, *Van Oster*, *Goldsmith-Grant*, and *The Palmyra* on this point. *Id.* at 1004-06.

feited property was not sufficiently connected to the offense committed by the petitioner's husband.[175] In addressing the issue of whether forfeiture is intended as remedial or punitive, Stevens asserted that the majority's contention that the forfeiture served only remedial purposes was unpersuasive because "confiscating [the car did] not disable [Mr. Bennis] from using other venues for similar illegal rendezvous."[176]

Stevens further reasoned that *Austin v. United States* compelled reversal.[177] Looking to *Austin*, Stevens pointed out that Justice Scalia, in his concurring opinion, had agreed that if an isolated drug sale happened to take place in a building, the building could hardly be regarded as an instrumentality of the offense.[178] Consequently, Stevens felt that the majority's use of historical justification for the forfeiture ignored *Austin.*[179] In *Austin*, the Court had reasoned that prior decisions upholding the forfeiture of an innocent owner's property had rested on "the notion that the owner ha[d] been negligent in allowing his property to be misused and that he [wa]s properly punished for that negligence."[180] That justification could not be accurately applied to the *Bennis* case.[181]

Addressing the majority's use of *Calero-Toledo*, Stevens noted that the Court in that case had found the innocent owner negligent because it had determined that if all reasonable steps had been taken to prevent the yacht's illegal use, the owner would not have been punished.[182] In contrast, Stevens reasoned that Tina Bennis could not be blamed for failing to take all "reasonable steps" to prevent the illegal use of her car because she had no knowledge that her husband would do anything other than come straight home from work as he had always done.[183] Finally, Stevens asserted that the fundamental unfairness of punishing Tina Bennis had been addressed in precedent, which

175. *Id.* at 1006.

176. *Id.* at 1006-07. If the State was concerned about Mr. Bennis driving to pick up prostitutes, the forfeiture of his driver's license would have been a more logical seizure. (Although such a punishment would undoubtedly be challenged as an excessive fine.) Stevens's dissent also points out that according to trial testimony, the petitioner's husband was seen twice during the previous summer, without the car, soliciting prostitutes in the same neighborhood. *Id.* Therefore, again it seems clear that the *car* was not the nuisance in this case.

177. *Id.* at 1006.

178. *Id.* (citing Austin v. United States, 509 U.S. 602, 627-28 (1993) (Scalia, J., concurring)).

179. *Id.* at 1006-07.

180. *Id.* at 1007 (citing *Austin,* 509 U.S. at 615).

181. *Id.*

182. *Id.* at 1008 (citing Calero-Toledo v. Pearson Yacht Leasing Co, 416 U.S. 663, 688-90 (1974)).

183. *Id.* Stevens compared Mrs. Bennis's blamelessness in the act to a victim of theft, wherein the car is later used for criminal purposes. *Id.*

held that punishing people who have done nothing wrong is unconstitutional.[184]

Justice Kennedy's brief dissenting opinion emphasized that the admiralty case law that allowed forfeiture of innocent owners' property "evolv[ed] . . . from the necessity of finding some source of compensation for injuries done by a vessel whose responsible owners were often half a world away and beyond the practical reach of the law and its processes."[185] Kennedy reasoned that because the automobile in *Bennis* was not used to transport contraband, the seizure went beyond the line of cases that sustained forfeiture to suppress that type of traffic.[186] Finally, Kennedy determined that "[n]othing in the rationale of the Michigan Supreme Court . . . supports the suggestion that the value of [Tina Bennis's] co-ownership is so insignificant as to be beneath the law's protection."[187]

III. ANALYSIS

The *Bennis v. Michigan* decision is an example of the harm that can be done by blindly following outdated precedent without looking to the policies behind those decisions. This Note's analysis of the *Bennis v. Michigan* decision consists of four Subparts. Subpart A critiques the majority's choice of precedent. Subpart B criticizes the majority's failure to follow standards set forth in prior case law. Subpart C discusses the continued and unbridled use of the personification fiction. Finally, Subpart D analyzes whether the forfeiture action in this case can be called remedial or whether it is punitive.

A. The Majority's Choice of Precedent

The majority's justification for denying Mrs. Bennis relief rested on "the long history" of civil forfeiture that has ignored the rights of innocent owners. The cases presented, however, are distinguishable from the facts of the *Bennis* case and, therefore, the cited legal principles were improperly applied.[188] In addition, the *Calero-Toledo* decision, though recent, was selectively construed to favor the majority opinion.[189] Finally, the Court turned a blind eye to the innocent

184. *Id.* at 1007. Stevens listed several cases to establish this point, including: *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 454 (1993), *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978), and *Southwestern Telephone & Telegraph Co. v. Danaher*, 238 U.S. 482, 490-91 (1915). *Bennis*, 116 S. Ct. at 1008.

185. *Id.* at 1010 (Kennedy, J., dissenting).

186. *Id.* at 1011.

187. *Id.*

188. *See infra* Part III.A.1.

189. *See infra* Part III.A.2.

owner statutes in the last fifty years which have exemplified, through case law, Congress's intent to protect owners like Tina Bennis.[190]

1. *The Majority's Improper Use of Admiralty, Customs, and Revenue Case Law*

Justice Rehnquist began the majority opinion by citing *The Palmyra*,[191] *Dobbins's Distillery*,[192] and *Van Oster*,[193] for the general proposition that "'it has always been held . . . that the acts of [the possessors] bind the interest of the owner . . . whether he be innocent or guilty.'"[194] However, the cases cited by the majority are distinguishable from *Bennis* in four ways: a) negligence was never alleged or inferred in *Bennis*; b) the property in *Bennis* was not an instrument of the crime; c) *Bennis* involved co-owners; and d) Mr. Bennis, the wrongdoer, was punished for his crime.

a. Negligence Was Never Alleged or Inferred in *Bennis*

As the dissent in *Bennis* pointed out, the Supreme Court surveyed the same historical precedents in *Austin* and held that all of its prior forfeiture decisions rested "at bottom, on the notion that the owner ha[d] been negligent in allowing his property to be misused and that he [was] properly punished for that negligence."[195] In *The Palmyra* and other admiralty cases, the owner entrusted his ship to a captain and crew that, presumably, he hired.[196] In *Dobbins's Distillery,* where the owner had leased the property to a lessee, the Court determined that the owner had a duty to know what the lessee was doing on his property.[197] Therefore, because the owner's innocence was due to ignorance, the Court held that his innocence was no excuse.[198] Finally, in *Van Oster,* the Court asserted that negligent entrustment of one's car justifiably subjects the owner to whatever consequences arise from that entrustment.[199] All three cases attacked the "innocent" owners'

190. *See infra* Part III.A.3.

191. *See supra* notes 33-37 and accompanying text.

192. *See supra* notes 48-53 and accompanying text.

193. *See supra* notes 67-73 and accompanying text.

194. Bennis v. Michigan, 116 S. Ct. 994, 998 (1996) (quoting Dobbins's Distillery v. United States, 96 U.S. 395, 401 (1877)).

195. *Id.* at 1007 (Stevens, J., dissenting) (citing Austin v. United States, 509 U.S. 602, 615 (1993)).

196. The Palmyra, 25 U.S. (12 Wheat.) 1 (1827).

197. *See Dobbins's Distillery*, 96 U.S. at 399 ("[I]f [an owner] knowingly . . . permits his land to be used as a site for a distillery, the law places him on the same footing as if he were the distiller.").

198. *Id.*

199. Van Oster v. Kansas, 272 U.S. 465 (1926).

act or omission to justify the forfeiture. The line of reasoning permeating all of these decisions suggests a duty on the part of an owner and a breach of that duty.

Tina Bennis, on the other hand, cannot persuasively be called negligent in allowing her husband to drive a car he co-owned. Nor can it be said that she breached a duty to inquire about what activity would go on in the car. In contrast to precedent, Tina Bennis did not hire her husband to drive the car, she did not entrust her car to him, nor did she have a duty to inquire about the activities of an adult who had equal ownership rights to the car. Using *The Palmyra*, *Dobbins's Distillery*, and *Van Oster* against Tina Bennis, implies negligence, which in turn infers that the Court did not thoroughly analyze the precedent on which it relied.

b. The Property in *Bennis* Was Not an Instrument

In *The Palmyra*, *Dobbins's Distillery*, and *Van Oster*, the offending property that was seized was more than incidental to the crime, it was an instrument of the crime.[200] To commit piracy, one must have a ship. To illegally run a distillery, one must have a distillery. Furthermore, to illegally transport liquor, one must have transportation. The car in the *Bennis* situation, however, cannot easily be called an "instrument" of the crime. More likely, Mr. Bennis's use of the car was incidental. Solicitation of a prostitute can occur in the street, in an alley, in a hotel room, or by telephone. As Justice Stevens pointed out, one does not need an automobile to solicit a prostitute. In fact, Mr. Bennis had been spotted in that neighborhood before without the car at issue.[201]

c. *Bennis* Involved Co-Owners

In *The Palmyra*, *Dobbins's Distillery*, and *Van Oster*, there was only one owner.[202] The owner in each case, though innocent, had voluntarily relinquished possession of the property to the wrongdoer.[203] In *Bennis*, there were two owners of the forfeited vehicle.[204] To say that Tina Bennis was in the same position as the "innocent owners" in *The Palmyra*, *Dobbins's Distillery*, or *Van Oster* and, therefore, should be

200. *See Bennis*, 116 S. Ct. at 1004 (Stevens, J., dissenting) (stating that unlike the precedent used by the majority, Tina Bennis's car was not an instrument of the wrong).

201. *Id.* at 1007.

202. The Palmyra, 25 U.S. (12 Wheat.) 1, 2 (1827); *Dobbins's Distillery*, 96 U.S. at 399; *Van Oster*, 272 U.S. at 465-66.

203. *Palmyra*, 25 U.S. at 2; *Dobbins's Distillery*, 96 U.S. at 399; *Van Oster*, 272 U.S. at 466.

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

treated the same,[205] is an inaccurate comparison. As the dissent pointed out, "[she] did not 'entrust' the car to her husband . . . ."[206] As a co-owner, she could not have stopped him from taking what was rightfully his.[207]

d. Mr. Bennis, the Wrongdoer, Was Punished for His Crime

Finally, at the time that *The Palmyra* and *Dobbins's Distillery* were decided, actual wrongdoers were often unreachable by the courts. For example, in cases like *The Palmyra*, the owner's involvement in the alleged wrong was disregarded out of necessity.[208] In times of piracy, when the owner of the ship was half-way across the world, the owner's involvement could not be a foremost concern.[209] This country did not yet have laws in place to prosecute the men on board, so the best defense was to seize their ships.[210] Unlike admiralty cases where the owners were often unreachable by the courts, the Michigan courts could theoretically reach the wrongdoers, and in the *Bennis* case, did convict the husband of a misdemeanor.

Additionally, in cases like *Dobbins's Distillery*, practical considerations were at play behind the reasoning used for forfeiture against the tax evaders.[211] Tax evaders often owed the government massive amounts of money, therefore, seizing all property attached to the wrongdoing justified equitable considerations.[212] In contrast to tax evaders whose property was the only real means of collecting debts, the car in *Bennis* did not substitute for any money owed to the government by the owner. The district court did not impose forfeiture because Mr. Bennis could not pay his fine. In fact, Mr. Bennis did pay a fine.[213] Therefore, the majority's use of such outdated and obviously

205. *See supra* note 157-58 and accompanying text.

206. *Bennis*, 116 S. Ct. at 1009 (Stevens, J., dissenting).

207. *Id.* The Florida legislature has acknowledged the difficulty of holding a spouse responsible for the other's actions. *See In re* Forfeiture of 1978 BMW Automobile, 524 So. 2d 1077 (Fla. Dist. Ct. App. 1988). In *In re Forfeiture of 1978 BMW Automobile*, the court distinguished co-owning spouses from other co-owners. The court held that although the "reasonably innocent owner" defense is available to husband-wife co-ownership situations (which would prohibit forfeiture where one spouse is reasonably innocent), in a father-son co-owner situation (as was the case) knowledge of wrongful use by one owner is sufficient to justify forfeiture. *Id.* at 1080.

208. *See supra* notes 33-41 and accompanying text.

209. *See supra* note 185 and accompanying text.

210. *See supra* note 37 and accompanying text.

211. *See supra* notes 48-53 and accompanying text.

212. *See* United States v. James Daniel Good Real Property, 510 U.S. 43, 59-61 (1993).

213. Even the Amicus Brief written supporting the government's action stated that "[t]he State [did] not suggest that the forfeiture of vehicles under the circumstances of this case is justified by an overriding government need." Amicus Curiae Brief of United States, Bennis v. Michigan, 116 U.S. 994 (1996) (No. 94-8729).

distinguishable case law only adds fuel to critics' arguments that this area of the law needs to be revamped.[214]

2. *The Majority's Over-Simplified Comparison to Calero-Toledo*

The majority in *Bennis* focused on *Calero-Toledo* as "the most recent decision on point" because the innocent owner's property was forfeited under a state statute that did not have an innocent owner defense.[215] But again, there is a distinction. In *Calero-Toledo*, the "innocent owner" was a lessor.[216] The lessee was given permission to use the boat.[217] The Court even stated in its opinion that "confiscation may have the desirable effect of inducing [lessors] to exercise greater care in transferring possession of their property."[218] Tina Bennis, however, did not "transfer possession" of her property because she was a co-owner. Mr. Bennis's use of the car cannot be called transfer of *her* property since at all times it was also *his* property.

The majority looked at the holding of *Calero-Toledo*, but ignored the reasoning behind the decision. The lengthy discussion in the *Calero-Toledo* decision, if applied, would have exonerated Mrs. Bennis.[219] The *Calero-Toledo* opinion applied the "reasonable steps" test in holding the owner accountable.[220] That reasoning, in support of upholding the forfeiture, was that the "appellee voluntarily entrusted the lessees with possession of the yacht, and no allegation has been made or proof offered that the company *did all that it reasonably could* to avoid having its property put to an unlawful use."[221] Had the majority applied the "reasonable steps" test to Mrs. Bennis, it is difficult to imagine that it could have found her to have failed in taking "all reasonable steps" to prevent her husband from using a car that

214. *See, e.g.*, Raymond Banoun et al., *Making a Strong Argument for Civil Forfeiture Reform*, MONEY LAUNDERING L. REP., Aug. 1996, at 1, *available in* LEXIS, Legnew Library, Leader File.

215. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 680 (1974).

216. *Id.* at 665.

217. *Id.*

218. *Id.* at 688.

219. *See id.* at 689-91.

220. *Id.* at 690.

221. *Id.* (emphasis added); *see supra* notes 81-82 and accompanying text.

was equally his to use.[222] How could Tina Bennis prove a negative? How could any innocent owner for that matter?[223]

3. *The Court Disregarded the History of Protecting Innocent Owners*

By handing down this opinion, the majority of the Court completely disregarded the extended history of innocent owner defenses both in England and America in civil forfeiture proceedings.[224] The Court painted a picture of a historical disregard for innocence. However, concern for the innocent has existed along with, and prior to all the precedent the Court cited.[225] Federal statutes aimed at many twentieth-century societal ills have implemented innocent owner defenses to prevent the type of injustice that occurred in this case.[226]

A review of cases that have been tried in the last fifty years under federal statutes with innocent owner defenses provides an awareness that congressional intent is firmly rooted in preventing the punishment of the truly innocent.[227] Had the Court looked to some of these cases, it would have seen that denying the necessity of an innocent owner defense in *Bennis* would perpetuate and give strength to the inconsistency of forfeiture decisions. As illustrated in *One 1981 Datsun 280ZX*, *One Parcel of Real Property*, and *Devito,* co-owners of property similarly situated to Tina Bennis were afforded relief solely because the innocent owners were *fortunate* enough to be subject to forfeiture under a federal statute.[228]

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222. The burden would have been on Mrs. Bennis to show that she had taken all reasonable steps to prevent the illegal use, however, as her argument to the Supreme Court asserted, "if one has no knowledge or reason to know of a wrongful use, then one cannot be expected to take affirmative steps to prevent that use." Petitioner's Brief, Bennis v. Michigan, 116 S. Ct. 994 (1996) (No. 94-8729).

223. This is a common criticism of the current civil forfeiture enforcement law because even with "innocent owner" provisions in place, the owner has to prove his or her own innocence. *Civil Asset Forfeiture: Hearings on H.R. 1916 Before the House Comm. on the Judiciary*, 105th Cong. (1997) (statements of Gerald B. Lefcourt, President-Elect, Nat'l Ass'n of Criminal Defense Lawyers and David B. Smith, Nat'l Ass'n of Criminal Defense Lawyers); *Civil Asset Forfeiture: Hearings on H.R. 1916 Before the House Comm. on the Judiciary*, 104th Cong. (1996) (written statement of E.E. Edwards et al., Co-Chairs, on behalf of the Nat'l Ass'n of Criminal Defense Lawyers). However, one aspect of the current reform proposal is the shifting of the burden to the government. *See* Banoun et al., *supra* note 214.

224. *See supra* Part I.A. & I.C.2.

225. *See supra* Part I.A. (discussing the early English statutes that supported innocent owners' rights); *supra* notes 98-111 and accompanying text (discussing cases of forfeiture under the Federal Controlled Substances Act); *supra* notes 84-97 and accompanying text (discussing the National Prohibition Act).

226. *See supra* Part I.C.2.

227. *See supra* Part I.C.2.

228. *See supra* notes 99-111 and accompanying text.

B. *The Majority Failed to Follow the Standards Set Forth in Precedent*

In the precedent used by the majority, holdings against innocent owners were determined by looking either at the owner's *negligent entrustment* of the property or failure to take *reasonable steps*. In fact, in *Bennis*, both the government and the petitioner argued in their respective briefs about which test should be applied to the situation.[229] But the majority of the Court adopted neither standard and simply rested on the fact that in past cases, forfeiture of innocent owners' property had been upheld and it "[was] too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced."[230] If the Court had attempted to apply either standard, as the dissent pointed out, Tina Bennis's interest would have been protected since there was no negligence on her part or a failure to "take reasonable steps."[231] The dissent accurately noted that "she had no knowledge of her husband's plans to do anything with the car except 'come directly home from work,' as he had always done before; and that she even called 'Missing Persons' when he failed to return on the night in question."[232] Not only does this holding fail to provide guidance for future decisions as to which rationale should be applied in a similar situation, but it indicates a failure to thoroughly study the precedent, the policies behind earlier decisions, and the implications of the Court's own holding.

C. *The Continued and Unhampered Use of the Personification Fiction*

The Court chose to follow previous cases that disregarded concern for innocent owners by emphasizing the personification fiction. Such a fiction may have had its place in admiralty decisions of the early nineteenth century due to the inability to find or hold owners accountable for their crimes, and still may have a place in removing contraband from society since the property's very existence is illegal. But

229. In the Brief for Petitioner, Bennis argued that regardless of which test the Court applied, she would meet the standard, but that the negligent entrustment standard should be applied because the reasonable steps test was vague and would perpetuate widely divergent determinations. Reply Brief for Petitioner, Bennis v. Michigan, 116 S. Ct. 994 (1996) (No. 94-8729). In the Brief for the Respondent, the government argued that the reasonable steps test should be applied and that the property should be forfeited because the petitioner did not prove at trial that she took "all reasonable steps" to prevent her husband from having illicit sex in the car. Amicus Curiae Brief of United States, Bennis v. Michigan, 116 S. Ct. 994 (1996) (No. 94-8729).

230. Bennis v. Michigan, 116 S. Ct. 994, 1001 (1996).

231. 116 S. Ct. at 1008 (Stevens, J., dissenting).

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

the personification of property unencumbered by innocent owner defenses serves to rationalize judicial doctrines based not on consideration of fundamental rights, but on policy considerations, usually driven by economic[233] or political factors.[234]

To justify taking away the property of someone who has not committed a crime should not be so easily sidestepped by saying, in effect, that is the way it has been, so that is the way it is.[235] By using the personification of the car as justification of the forfeiture, the Court failed to be concerned with the due process rights of Tina Bennis. Such a doctrine has no place in a society that is supposedly grounded in the "unalienable rights" of its citizens.[236]

The use of this fiction displaces the long established jurisprudence of this country regarding citizens' rights.[237] The property, obviously inanimate, has no counsel, and is convicted (forfeited) by a mere showing of probable cause of some illegal use. The property owner must then institute a challenge to the forfeiture and bear the burden of proving *his property's* innocence. Not only does this defy the "innocent until proven guilty" concept that lies at the base of our judicial proceedings, but also, as the *Bennis* case illustrated, it is difficult for an owner to prove a negative. Many constitutional rights are left aside by proceeding against the property as the guilty party,[238] and since there is no arguing that *property* can actually be *guilty* of committing a crime, there can be no sufficient justification for divorcing civil forfei-

233. A July 1990 U.S. Department of Justice bulletin sent to all United States Attorneys stated: "We must significantly increase forfeiture production to reach our budget target." United States v. James Daniel Good Real Property, 510 U.S. 43, 56 n.2 (1993) (citing Executive Office for United States Attorneys, 38 U.S. ATTNY'S BULL. 180 (1990)).

234. One commentator has noted that to the extent that Tina Bennis shares a similar innocence with previous owners that have been afforded no relief, reconsideration of those cases may be justified because, "forfeiture has become a standard tactic in the war on drugs . . . [transforming itself] into a billion-dollar government industry." Donald A. Dripps, *Innocence Is No Defense*, TRIAL, June 1996, at 68.

235. In Justice McKenna's opinion in *Goldsmith-Grant*, upholding the forfeiture of an innocent owner's property, he stated that, "[i]f the case were the first of its kind, it and its apparent paradoxes might compel a lengthy discussion . . . [because] it seems to violate that justice which should be the foundation of the due process of law required by the Constitution." Goldsmith-Grant v. United States, 254 U.S. 505, 510 (1921).

236. However, one commentator opined: "[T]he Court will not seriously scrutinize the injury to property rights, because it does not regard such rights as worthy of the same respect as the rights of an accused felon, a member of a minority race, or a First Amendment dissident." LEVY, *supra* note 11, at 88.

237. For further analysis and criticism of the personification fiction, see generally, Piety, *supra* note 13.

238. Indigents, for example, have no right to free counsel to help them demonstrate that their 'home' is not guilty of wrongdoing when the government has seized it under a mistaken belief of probable cause of illegal activity. HYDE, *supra* note 7, at 81.

ture proceedings from a property owner's innocence. The fiction, although perhaps founded in logic, has led to such illogical use that it should no longer form the basis of a contemporary court's opinion.[239]

D. Did Bennis *Punish an Innocent Person or Serve A Remedial Goal?*

Confiscation of contraband is characterized as remedial because it removes dangerous or illegal items from society. Similarly, the early admiralty cases justified the forfeiture of ships as the only way to remove the threat from society—since without the ships, the offenders could not continue piracy. But as *Austin* points out, forfeiture can serve both remedial and punitive purposes.[240] For example, a precedent like *Calero-Toledo* that upholds the forfeiture of an innocent lessor's property can be said to serve both remedial and punitive purposes since the Court was attempting to establish a higher level of care.[241] The Supreme Court in *Bennis* justified the forfeiture as remedial, but the evidence points to a more punitive purpose.

No remedial justification can be established to support the forfeiture in *Bennis*. Abating the car does nothing to further the goal of removing prostitution from the streets and does nothing to further the goal of ridding Mr. Bennis of the means to accomplish his desire to be with a prostitute in that area.[242] Therefore, if the Court cannot justify the forfeiture under remedial grounds, its effect is purely punitive.[243] In fact, the Solicitor General, in support of the government in *Bennis,* stated that "[t]his case involves the punitive forfeiture of non-contraband," and supported this belief by quoting the State's explanation that "[c]onfiscation of an automobile in the context that defendant's car was seized . . . is swift and certain punishment of the voluntary vice consumer."[244] The Court, by condoning such motivation for forfeiture, impliedly admits that it is sustaining punishment to an innocent

239. In fact, several commentators favor the ban of civil forfeiture all together, recommending instead that criminal forfeiture (applied only toward convicted criminals) be used. *See generally* Donald J. Boudreaux & A.C. Pritchard, *Civil Forfeiture and the War on Drugs: Lessons from Economics and History*, 33 SAN DIEGO L. REV. 79, 127 (1996); Leach & Malcolm, *supra* note 30.

240. Austin v. United States, 509 U.S. 602, 613-22 (1993) (providing a lengthy discussion of the remedial versus the punitive debate).

241. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 687-88 (1974); *see supra* notes 77-79 and accompanying text.

242. *See supra* notes 175-76 and accompanying text.

243. *See* Amicus Curiae Brief of United States, Bennis v. Michigan, 116 U.S. 994 (1996) (No. 94-8729).

244. *Id.*

person—contradicting the foundation of this country's beliefs.[245] The *Bennis* decision, by failing to recognize the unique position of co-owners of property, has highlighted the need for change.

IV. IMPACT

The impact of the *Bennis* decision is debatable.[246] As one author wrote: "It doesn't take much political sophistication to realize that it is far more likely for legislatures to exploit than to remedy the Court's holding in *Bennis*."[247] In contrast, another commentator wrote that this decision may have a positive impact by energizing reform on Capitol Hill.[248] Currently, there is a bill in Congress, introduced by Representative Henry Hyde of Illinois, called the Civil Asset Forfeiture Reform Act that seeks to further reform of civil forfeitures.[249] The reform, in part, is seeking to: 1) shift the burden to the government to show that the property is subject to forfeiture,[250] 2) provide for a "substantial hardship" exception that, if proven, would give the property back to the claimant pending the final disposition of the proceeding, 3) provide legal counsel to indigents,[251] 4) clarify, in a hope of

245. It has been asserted that the goal of forfeiture is not based on remedial or punitive grounds, but rather economic goals. Former New York City police commissioner Patrick Murphy testified before Congress that "[t]he large monetary value of forfeitures . . . has created a great temptation for state and local police departments to target assets rather than criminal activity." HYDE, *supra* note 7, at 9 (citing Carl Horowitz, *What Can Government Take from You?*, INVESTOR'S BUS. DAILY, Dec. 9, 1993, at 1, 2). Most police departments have "quietly adopted a policy of 'structured arrests,' making certain that undercover agents purchase drugs or make deals when they are physically located in a valuable building or on a high-priced tract of land" that can then be seized by the police. HYDE, *supra* note 7, at 31.

246. Ultimately, the significance of *Bennis* "may well be the doctrinal confusion [it adds] to an already confusing area of law." Ivan K. Fong, *Paying for White Collar Crime*, N.J. L.J., Aug. 26, 1996, at S-18.

247. *See* Dripps, *supra* note 234, at 68.

248. Marcia Coylf, *Critics: Forfeiture Ruling Certain to Spur Reform*, NAT'L L.J., Mar. 18, 1996, at A12. One forfeiture expert stated: "The Bennis decision is so out of touch with the times and political currents that most prosecutors are simply not going to take advantage of it." *Id.*

249. H.R. 1835 was introduced on June 10, 1997. H.R. 1835, 105th Cong. (1997). On June 19, 1997, after pressure from the Clinton administration, H.R. 1965 was introduced, a milder version of the same. H.R. 1965, 105th Cong. (1997); Editorial, *A Botched Reform*, ORANGE CO. REGISTER, Oct. 27, 1996, at B06, *available in* LEXIS, Regnws Library, Ocreg File. In addition, Representative Owen Pickett (Va.) sponsored H.R. 428, known as the "Innocent Owners' Forfeiture Protection Act of 1997." Michele M. Jochner, *The Supreme Court Turns Back the Clock on Civil Forfeiture in* Bennis, 85 ILL. B.J. 314, 321 (1997). This bill was introduced on January 9, 1997. Search of LEXIS, Legis Library, Blcast File (Feb. 19, 1998).

250. Surprisingly, the Justice Department now agrees that the burden of proof should be on the government and not the property owner. Banoun et al., *supra* note 214, at 1.

251. "Currently, there is no constitutional right to appointed counsel in civil forfeiture cases. This is one of the reasons why so few forfeitures are challenged." HYDE, *supra* note 7, at 81.

protecting more owners, the innocent owner defense,[252] and 5) force the government to pay for its negligence.[253] But there are two problems with this legislation. First, it may not pass.[254] Second, it is unclear what effect such an Act would have on statutes like the one that determined Tina Bennis's fate.[255] As the bill is now written, states remain free to use local nuisance statutes with no further goal than to raise money for the state.[256] If culpability is not a factor, any local government running over budget may use these statutes to raise money.[257] On the state level, some minor reforms have passed, but overall, asset forfeiture has only expanded.[258] In California, for example, thirty percent of asset seizures are in non-drug related cases.[259] And automobile forfeiture by police has become an especially lucrative national trend because cars are easy to seize, and valuable for

252. The Justice Department apparently favors a uniform innocent owner defense, but one that is much narrower than the one currently provided under the Controlled Substances Act. *Civil Asset Forfeiture: Hearings on H.R. 1916 Before the House Comm. on the Judiciary*, 105th Cong. (1997) (statement of David B. Smith, on behalf of the Nat'l Ass'n of Criminal Defense Lawyers).

253. This provision would allow property owners to sue the government for negligence. HYDE, *supra* note 7, at 82. Currently, the government is exempted from liability for damage caused by handling and storage during seizure. *Id.* Stephen Cassella, the Deputy Chief of Asset Forfeiture at the Justice Department, said he supports giving property owners the right to sue over damaged property. Matt Pottinger, *Las Vegas Man Recounts How He Lost Everything to Government*, STATES NEWS SERVICE, June 11, 1997, *available in* LEXIS, Legis Library, Sns File.

254. Hyde has been trying to pass a bill since 1993, *see* LEVY, *supra* note 11, at 210, but nobody wants to change laws still largely perceived as weapons against drug dealers. Susan Adams, *Forfeiting Rights*, FORBES, May 20, 1996, at 96. Hyde's original bill, H.R. 1835, was given a 30% chance of passing in the House, and a 9% chance of passing in the Senate. Search of LEXIS, Legis Library, Blcast File (Feb. 19, 1998). H.R. 1965, a slightly watered-down version of Hyde's bill, has been given a 64% chance of passing in the House, and 44% chance of passing in the Senate. Search of LEXIS, Legis Library, Blcast File (Feb. 19, 1998).

255. Hyde points out that the Civil Asset Forfeiture Reform Act would not directly affect these statutes as it only pertains to federal law. HYDE, *supra* note 7, at 83; *see also* H.R. 1965, 105th Cong. § 2 (f)(6)(A) (1997) ("The term 'civil forfeiture statute' means any provision of *federal law* providing for the forfeiture of property.") (emphasis added).

256. Between 1985 and 1990 the total value of forfeited cash and property represented a growth in asset forfeitures of over 1,500%. United States v. Twelve Thousand, Three Hundred Ninety Dollars ($12,390), 956 F.2d 801, 807 n.6 (8th Cir. 1991) (Beam, C.J., dissenting) (citing UNITED STATES DEPARTMENT OF JUSTICE, FEDERAL FORFEITURE OF THE INSTRUMENTS & PROCEEDS OF CRIME: THE PROGRAM IN A NUTSHELL 1 (1990)). For more in-depth discussion on the monetary benefits gained through forfeiture for law enforcement, 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, 41-47 (1994).

257. Because the current law allows 90% of proceeds from drug-related forfeitures to be returned to local law enforcement, they have a stake in them to the extent that forfeitures fund their budget. Piety, *supra* note 13, at 975.

258. *Id.*

259. Hay, *supra* note 1, at 28.

quick sale—in Houston, Texas, over 4,000 cars are confiscated a year, and in New York City, over 10,000.[260]

The *Bennis* decision leaves co-owners of property like Tina Bennis without much confidence in justice. By failing to reign in the states' unbridled use of forfeiture, the door is left wide open for continued abuse. Since most innocent owners are in the same economic boat as Tina Bennis, fighting for the return of property is too costly to bother with since, as the law stands, their chance of success is slim.[261] Additionally, because potential forfeiture is typically a one time, low-probability occurrence for each owner, they have little incentive to form or join lobbying groups to fight for reform.[262] Evidence suggests that Michigan has already capitalized on this open door. In 1992, Michigan seized fifty-four homes, with an average value of $15,000, and 807 automobiles, with an average value of $1,400, along with some 8,000 other forfeitures.[263]

The *Bennis* ruling has stirred great fear in third-party creditors.[264] The American Bankers Association addressed the possible repercussions society may face when dealing with lenders if banks are to be held responsible as "innocent owners."[265] The Association predicts that financial institutions will restrict the flow of credit or other banking transactions to individuals when there is even the slightest suspicion of illegal activity, leading to a huge increase in credit costs for all potential borrowers.[266] Additionally, the lenders' efforts to investigate prospective borrowers could conflict with their efforts to comply with antidiscrimination laws or subject them to defamation claims.[267]

Such creditor fears may also inspire consumer fears of privacy violations. Privacy rights are implicated by the notion that any attempt to borrow capital will lead to much more than a standard review of each applicant's background, business dealings, and lifestyle. When one actually considers all of the potential owners of any given property, the implications of *Bennis* continue to spiral.

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260. HYDE, supra note 7, at 42.

261. As pointed out by officials of the Michigan Association for the Preservation of Property, the majority of people who suffer from civil asset forfeiture in that state are average Americans, not rich criminals or even druglords. HYDE, *supra* note 7, at 32.

262. Boudreaux & Pritchard, *supra* note 239, at 85.

263. HYDE, *supra* note 7, at 32.

264. Steve France, *Lenders Ask Supreme Court to Shield Innocent Third Parties*, LENDER LIABILITY NEWS, Sept. 8, 1995, *available in* LEXIS, Legnew Library, Lrplln File.

265. *See* Amicus Curiae Brief of American Bankers Association, Bennis v. Michigan, 116 S. Ct. 994 (1996) (No. 94-8729).

266. *Id.*

267. *Id.*

V. CONCLUSION

In an age where co-ownership is widespread, any statute that seeks forfeiture should require an innocent owner defense. But to hope that every state legislature will amend its statutes is unrealistic. There are more than one hundred statutes in place on the federal and state level.[268] The Supreme Court has failed in its duty to meaningfully look at this case and the implications of its decision. As one commentator noted: "[T]he Court is sending mixed signals to the lower courts and muddying the constitutional waters."[269] The *Bennis* decision can only be called a good decision if its effect is to highlight for legislators the urgent need for reform in this area.

The *Bennis* holding is the result of too much deference to the past and unconvincing analogies that add confusion to this area of law. Regardless of whether civil forfeiture as a practice is justifiable or not, "[the Supreme] Court has never felt constrained to follow precedent. . . . [and] throughout its history has freely exercised its power to reexamine the basis of its constitutional decisions."[270] It is unfortunate that in this case the Court felt constrained by outdated precedent to do just that. While the Court was reviewing cases from the 1800s to find justification for its decision, perhaps it should have taken notice of a leading Justice of that time, Oliver Wendell Holmes, who stated:

> It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.[271]

268. *Civil Asset Forfeiture: Hearings on H.R. 1916 Before the Comm. on the Judiciary*, 105th Cong. (1997) (statement of Gerald B. Lefcourt, President-Elect, Nat'l Ass'n of Criminal Defense Lawyers).

269. Jochner, *supra* note 249, at 315.

270. Smith v. Allwright, 321 U.S. 649, 665 (1944).

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