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Statutory In Rem Civil Forfeiture, the Punishment of Innocent Owners, and the Excessive Fines Clause: An Analysis of *Bennis v. Michigan*, 116 S. Ct. 994 (1996)

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Note

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I. INTRODUCTION

"This case is ultimately a reminder that the Federal Constitution does not prohibit everything that is intensely undesirable."[1]

In *Bennis v. Michigan*,[2] the United States Supreme Court upheld the forfeiture of a wife's interest in a sedan, jointly owned by her and her husband, because the husband engaged in a sexual act with a prostitute in that sedan. The facial injustice of the ruling engenders an emotional protest, particularly because the subject matter concerns domestic relations and personal property, issues familiar to most Americans.

Statutory in rem civil forfeiture, which procedurally rests upon the fiction that property used unlawfully is itself guilty of the unlawful offense and should be punished by forfeiture, traditionally proceeds with no investigation as to the culpability of the owner. In the past forty years, the United States Supreme Court, in both dicta and holdings, has indicated a retreat from the strict application of the guilty property fiction and suggested the possibility of a constitutional innocent owner's defense to in rem forfeitures. Unfortunately, in *Bennis*, the United States Supreme Court once again refused to recognize a constitutional innocent owner's defense to statutory in rem civil forfeiture. The Court achieved this dubious result by calling into question the categorical definition of punishment in civil actions established in *United States v. Halper*[3] and *Austin v. United States*.[4]

This Note presents a brief review of the historical underpinnings of statutory in rem civil forfeiture in American jurisprudence and then examines the relatively recent contributions of United States Supreme Court cases, most notably *Austin*, which introduced constitutional protections available to owners in in rem forfeiture actions. *Bennis v. Michigan* is then introduced and analyzed, highlighting the Court's inconsistent reasoning in upholding the forfeiture in *Bennis* despite its holding in *Austin*, which was decided only three years earlier. Finally, this Note proposes a threshold test for application of the Excessive Fines Clause of the Eighth Amendment.

II. BACKGROUND OF IN REM CIVIL FORFEITURE IN THE UNITED STATES

Statutory in rem civil forfeiture has a history in the United States that is nearly as long as American jurisprudence itself. While it existed in various guises in England, it initially appeared in the United States in the context of admiralty and as a tool to enforce revenue and

1. Bennis v. Michigan, 116 S. Ct. 994, 1001-02 (1996)(Thomas, J., concurring).
2. 116 S. Ct. 994 (1996).
3. 490 U.S. 435 (1989)
4. 509 U.S. 602 (1993).

customs laws.[5] Forfeiture of property was commonly used against bootleggers during and after prohibition. Civil in rem forfeiture has lately become a favorite and oft-used tool in the fight against organized crime and the illegal drug trade.[6] Federal and state statutes provide for the forfeiture of property that is an "instrumentality" of criminal activity, as well as contraband and property that can be shown to be the proceeds of criminal activity.

A. The Guilty Property Fiction

A typical in rem action proceeds against the property to determine rights (usually title) in the property when a dispute arises between two or more parties. In rem forfeiture actions, like traditional in rem actions, proceed against the property, but in rem forfeiture actions differ in that they rest on the "guilty property" fiction. The guilty property fiction holds that if otherwise lawful property is used for an unlawful purpose, the property itself is considered to be guilty of the offense and therefore should suffer forfeiture. The owner is simply an interested nonparty.

It is the nonparty status of the owner that traditionally and procedurally prevents any opportunity to raise innocence as a defense to the forfeiture. Most civil in rem forfeiture statutes, such as those in the federal antidrug statutes, include a provision for an innocent owner's defense.[7] Occasional situations arise, however, when the property is used in an unlawful manner without the knowledge or consent of the owner to the unlawful use. The applicable statutes provide no "safe harbor" for innocent owners in these instances. To date, innocents have not fared well in forfeiture cases brought before the United States Supreme Court.

B. The Owner-Property Relationship

In 1827, in *The Palmyra*,[8] the Supreme Court made clear that the guilty property fiction, strictly applied, insulates the government from

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5. For a short summary of the history and development of in rem civil forfeiture in the United States, see *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974).
6. Medrith Lee Hager & Sarah N. Welling, *Defining Excessiveness: Applying the Eighth Amendment to Civil Forfeiture After* Austin v. United States, 83 Ky. L.J. 835, 837-38 (1995).
7. "[N]o property shall be forfeited under this paragraph to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed without the knowledge or consent of that owner. . . ." 21 U.S.C. § 881(a)(7) (1994). Under the Federal antidrug statutes, once the government shows probable cause that the property is subject to forfeiture, the burden shifts to the owner to show he had no knowledge or reason to know the property would be used in an unlawful manner.
8. 25 U.S. (12 Wheat.) 1 (1827).

any need to consider the guilt or innocence of the property owner relative to the offense giving rise to the forfeiture. In *The Palmyra*, a case involving the forfeiture of a pirate vessel, Justice Story stated that "[t]he thing is here primarily considered as the offender, or rather the offence is attached primarily to the thing. . . . [T]he proceeding in rem stands independent of, and wholly unaffected by any criminal proceeding in personam."[9] According to the *Palmyra* Court, forfeiture may arise without any reference to the culpability of the owner. At English common law, a conviction of the owner was unnecessary in cases of "seizures and forfeitures, created by statute, in rem, cognizable on the revenue side of the Exchequer."[10]

Despite this common law tradition, the United States Supreme Court has stated in dicta that before a forfeiture will be sustained, there must exist some minimal nexus beyond ownership between the owner and the property being forfeited. In *Peisch v. Ware*,[11] the Court articulated the relationship required between owner and property. In *Peisch*, the government sought to forfeit cargo salvaged from a wrecked ship after the salvors who discovered the wreck, acting without consent or knowledge of the owner, removed the cargo from the custody of the customs agent before any duty had been paid.

> [T]he removal for which the [forfeiture statute] punishes the owner with a forfeiture of the goods must be made with his consent or connivance, or with that of some person employed or trusted by him. If, by private theft, or open robbery, 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. . . .
>
> . . . [T]he law is not understood to forfeit the property of owners or consignees, on account of the misconduct of mere strangers, over whom such owners or consignees could have no controul.[12]

By this statement, the Court clearly delineates the two extremes of the spectrum of possible relationships between the owner and the unlawful property use: the "guilty" owner who uses his property unlawfully or knowingly consents to its unlawful use, and the "innocent" owner whose property is unlawfully used without his control, knowledge, or consent. Since *Peisch*, the Court has had no opportunity to consider a forfeiture concerning property used without any owner's consent whatsoever. It has consistently reserved the question of whether property may be forfeited if it is stolen from the owner and later used unlawfully.[13] But relationships falling in the gray area be-

9. *Id.* at 14-15.
10. *Id.* at 14 (explaining why the old English rules pertaining to forfeiture of goods to the crown upon commission of a felony are inapplicable).
11. 8 U.S. (4 Cranch) 347 (1808).
12. *Id.* at 364-65.
13. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 689 (1974)(citing Peisch v. Ware, 8 U.S. (4 Cranch) 347 (1808)). "It is unnecessary for us to inquire whether the police power of the state extends to the confiscation of the property of

tween the two extremes have regularly been found by courts to support forfeiture despite evidence of an owner's innocence. Ship owners, lessors, and secured creditors have all lost property through in rem forfeiture due to unlawful use of the property by others.

In *United States v. The Cargo of the Brig Malek Adhel*,[14] a case of a merchant ship crew that committed acts of piracy, the Court allowed forfeiture of the ship even though it acknowledged the proven innocence of the owners regarding the unlawful acts. "The vessel which commits the aggression is treated as the offender, as the guilty instrument or thing to which the forfeiture attaches, without any reference whatsoever to the character or conduct of the owner."[15]

In *United States v. Dobbins's Distillery*,[16] personal and real property was forfeited because, unknown to the owner, the lessee of the distillery cooked the books to defraud the government of revenue. Again, the offense attached to the property "without any regard whatsoever to the personal misconduct or responsibility of the owner, beyond what necessarily arises from the fact that he leased the property to the distiller, and suffered it to be occupied and used by the lessee as a distillery."[17]

A similar fate befell a secured creditor in *Goldsmith-Grant v. United States*.[18] The Grant Company sold a car and retained title against payments owed. The vehicle eventually was used to transport liquor in violation of the revenue laws, which contained no provision exempting the interests of innocent owners. The company argued that the relationship between buyer and secured creditor differed from the relationships found in previous cases. The company pointed out that in this situation no agency relationship existed and that the company, as owner, had no opportunity to determine the use to which the property would be put. Therefore, the owner urged the Court to deny forfeiture in this situation.[19] Unpersuaded, the Court allowed the forfeiture.[20]

The common theme arising in forfeiture cases when the owner raises innocence as a defense is as follows: as long as control of the

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innocent persons appropriated and used by the law breaker without the owner's consent. . . ." Van Oster v. Kansas, 272 U.S. 465, 467 (1926). "[W]e also reserve opinion as to whether the section can be extended to property stolen from the owner or otherwise taken from him without his privity or consent." United States v. One Ford Coupe Automobile, 272 U.S. 321, 333 (1926)(quoting Goldsmith-Grant v. United States, 254 U.S. 505, 512 (1921)).

14. 43 U.S. (2 How.) 210 (1844).
15. *Id.* at 233.
16. 96 U.S. 395 (1877).
17. *Id.* at 401.
18. 254 U.S. 505 (1921).
19. *Id.* at 512.
20. *Id.*

property voluntarily passes from the owner, forfeiture will be allowed despite a complete and proven lack of culpability on the part of the owner for the offense committed with the property. The owner need only consent to the use of the property and need not consent to, or even have reason to know of, the misuse. The Court has, however, continued to reserve the question of whether a forfeiture would be allowed in a case where the property was stolen from the owner and later used unlawfully.[21]

III. THE UNDERPINNINGS

The United States Supreme Court uses several lines of reasoning, both historical and contemporary, to justify the forfeiture of property belonging to nonculpable persons. The most consistently cited reason is that the owner is properly punished for an implied negligence or carelessness for allowing his property to be used improperly. Blackstone is often cited in support of this reasoning.[22] The negligent owner theory is logically consistent with *Peisch* and the continued reservation of the question as to the forfeitability of stolen property. In admiralty cases, when ships are taken on the high seas, the owners might never be reached by the personal jurisdiction of an American court. The seizure and forfeiture of the vessel is thus often the only practicable source of redress for injured parties.

Other justifications for the forfeiture of property belonging to innocent owners reflect more contemporary concerns. The *Goldsmith* Court, in countering an assertion that Congress intended only the property of guilty owners to be forfeited, theorized:

> In breaches of revenue provisions, some forms of property are facilities, and therefore it may be said, that Congress interposes the care and responsibility of their owners in aid of the prohibitions of the law and its punitive provisions, by ascribing to the property a certain personality, a power of complicity and guilt in the wrong.[23]

The Supreme Court pointed out just five years later that "[t]he law thus builds a secondary defense against a forbidden use and precludes evasions by dispensing with the necessity of judicial inquiry as to collusion between the wrongdoer and the alleged innocent owner."[24] Through this rationalization, the guilty property fiction (which has its roots in English common law) becomes an expedient vehicle for addressing modern legitimate governmental interests. Most often, the legitimate governmental interest is deterrence.[25]

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21. *See supra* note 13 and accompanying text.
22. Austin v. United States, 509 U.S. 602, 611 (1993); Goldsmith-Grant v. United States, 254 U.S. 505, 510 (1921).
23. Goldsmith-Grant v. United States, 254 U.S. 505, 510 (1921).
24. Van Oster v. Kansas, 272 U.S. 465, 467-68 (1926).
25. For example, in advancing the government interest, the Supreme Court has stated that "[t]o the extent that such forfeiture provisions are applied to lessors,

Despite this modern rationalization, it appears that the justification for the guilty property fiction, and its attendant lack of consideration of the culpability of the owner, is based primarily on its antiquity and reliance on tradition. The Supreme Court has never definitively stated the theory upon which statutory in rem forfeitures rests.[26] In fact, the justification or theoretical basis now seems unimportant in the eyes of the Court. "[W]hether the reason for [the forfeiture] be artificial or real, it is too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced."[27]

IV. RECENT DEVELOPMENTS: RECOGNITION OF OWNER'S RIGHTS

Notwithstanding the Court's language in *Bennis*, in the past thirty years, the Supreme Court has indicated a possible retreat from the strict application of the guilty property fiction and the forfeiture of property belonging to innocent owners. In *One 1958 Plymouth Sedan v. Pennsylvania*,[28] evidence obtained from an unlawful search of a car was used in an in rem action to forfeit the car. The United States Supreme Court held that the Fourth Amendment protections applied to forfeiture proceedings against the car when the forfeiture results from some offense by the owner.[29] The Court had no occasion to decide if the evidence could have been used against an innocent owner who had loaned or rented the car to another.[30] The ruling is significant, however, in that even though the action was in rem, and thus against "guilty" property (which has no rights), the Court acknowledged that the action was, for practical purposes, against the owner.

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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." Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 687-88 (1974).

26. The majority in *Austin* did conclude that civil in rem forfeiture rested upon the notion of negligence on the part of the owner. This conclusion, however, was in dicta, rather than a definitive statement in the holding of the case. *See* Austin v. United States, 509 U.S. 602 (1993). *See also* discussion *infra* Part V.
27. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 686 (1974)(quoting Goldsmith-Grant v. United States, 254 U.S. 505, 511 (1921)). *See also* Bennis v. Michigan, 116 S. Ct. 994, 1001 (1996).
28. 380 U.S. 693 (1965).
29. *Id.* at 700-01.
30. The Court stated that in rem forfeiture proceedings against an owner because of offenses committed by the owner are criminal in nature despite their civil form, thus necessarily implicating constitutional protections available to the defendant in a criminal action, particularly those embodied in the Fourth Amendment. *Id.* at 697. Literally applied to the unique facts of *Bennis*, when one owner has committed an offense and the other is innocent, this results in the absurd conclusion that an action that is criminal in nature against one owner affords Fourth Amendment protections to the wrongdoer. Yet, a civil action against the innocent owner will not provide that owner similar protections.

The owner, in turn, could raise his own constitutional rights even though he was technically not a party to the action.

In *United States v. United States Coin and Currency*,[31] dicta illustrated the Court's skepticism regarding the strict application of in rem forfeiture to innocent owners and suggested another constitutional protection may be available to property owners in in rem forfeitures. While acknowledging the strong historical support for forfeiture of property belonging to innocent owners, the Court stated that

> we would first have to be satisfied that a forfeiture statute, with such a broad sweep [as to include the property of innocent owners], did not raise serious constitutional questions under that portion of the Fifth Amendment which commands that no person shall be "deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation." Even Blackstone . . . condemned the seizure of the property of the innocent as based on a "superstition" inherited from the "blind days" of feudalism.[32]

Three years later, in *Calero-Toledo v. Pearson Yacht Leasing Co.*,[33] the Court used dicta once again to open the door a bit further for the possibility of an innocent owner's defense. In *Calero-Toledo*, a yacht belonging to a leasing company was forfeited when drugs were discovered in the possession of the lessee on board the yacht. After citing *Peisch* and the proposition that forfeiture might not lie against an owner whose property has been stolen from him, the *Calero-Toledo* Court added that "the same might be said of an owner who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property."[34] The Court did not elaborate on what steps the owner could have taken, and the owner did not attempt to make such a showing. Thus, the forfeiture was affirmed. The clear implication is that an owner who could establish his innocence by showing active steps taken to avoid the unlawful use could prevail in a forfeiture action. The dicta from both *Coin and Currency* and *Calero-Toledo* lend substantial weight to the underlying justification of implied negligence on the part of the owner. And, by implication, the dicta weakens strict application of the guilty property fiction by suggesting that factors other than the unlawful use of the property should be considered in an in rem forfeiture.

31. 401 U.S. 715 (1971).
32. *Id.* at 720.
33. 416 U.S. 663 (1974).
34. *Id.* at 689. Even though the leasing company included a provision in the lease prohibiting unlawful use of the vessel, it did not fall into this "actively innocent" category.

V. *AUSTIN V. UNITED STATES*

A. Forfeitures as Punishment and the Excessive Fines Clause

In 1993, two more factors entered into the civil forfeiture formula. In *Austin v. United States*,[35] the government sought the forfeiture of a mobile home and a body shop because the owner engaged in a single drug transaction on the property. The defendant, Austin, claimed the forfeiture constituted an excessive fine under the Eighth Amendment.[36] The United States Supreme Court held that the Excessive Fines Clause could be applied to civil in rem forfeitures. After a review of history and past Supreme Court cases, the Court concluded that civil in rem forfeitures are fines for purposes of the Eighth Amendment and that the Excessive Fines Clause should be applied where such fines are found to impose punishment.[37] The Court recognized that "[t]he notion of punishment, as we commonly understand it, cuts across the division between the civil and criminal law."[38] Because civil as well as criminal actions can serve both remedial and punitive goals,[39] the Court determined that the purpose of the sanction, rather than the label placed upon the action, determines whether punishment has been imposed.

The Court set forth the following test for punishment:

> We need not exclude the possibility that a forfeiture serves remedial purposes to conclude that it is subject to the limitations of the Excessive Fines Clause. We, however, must determine that it can only be explained as serving in part to punish. . . . [A] civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term.[40]

So long as the sanction serves solely remedial aims, there is no punishment and the Excessive Fines Clause is not implicated. But, once

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35. 509 U.S. 602 (1993).
36. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.
37. "The Excessive Fines Clause limits the Government's power to extract payments, whether in cash or in kind, 'as punishment for some offense.'" Austin v. United States, 509 U.S. 602, 609-10 (1993).
38. *Id.* at 610.
39. *Id.*
40. *Id.* (internal quotations omitted). The test could be described more accurately as a threshold test for excessiveness rather than a test to determine if the Excessive Fines Clause applies to any given sanction.

> [I]t appears to make little practical difference whether the Excessive Fines Clause applies to all forfeitures . . . or only to those that cannot be characterized as purely remedial. The Clause prohibits only the imposition of "excessive" fines, and a fine that serves purely remedial purposes cannot be considered "excessive" in any event.

Id. at 622 n.14.

the sanction goes on to serve other purposes, such as deterrence or retribution, the sanction is subject to the limitations of the Excessive Fines Clause. The Court also concluded that, at least when instrumentalities are concerned, "forfeiture generally and statutory in rem forfeiture in particular historically have been understood, at least in part, as punishment."[41] And, statutory in rem forfeitures of vehicles and real property are presumed not to be totally remedial because, due to the widely disparate values of property subject to forfeiture, it is "a penalty that has absolutely no correlation to any damages sustained by society or to the cost of enforcing the law."[42]

B. Forfeiture Based on Owner's Negligence

In *Austin*, Justice Blackmun, writing for the majority, attempted to reconcile the recognition of punishment in statutory in rem forfeitures with past cases allowing forfeiture of property belonging to innocent owners. Justice Blackmun concluded that the justifying notion underlying in rem statutory forfeitures is the presumption that the owner has been negligent in allowing his property to be misused. For Justice Blackmun, this is true regardless of whether the court uses the theory that the property is guilty or the theory that the owners are responsible for the misuse of their property by others under some notion of vicarious liability.[43] To a degree, this comports with previous cases, but only if innocence is viewed as more than a lack of culpability pertaining to the offense giving rise to the forfeiture. If consistency with precedence is to be maintained, innocence of implied negligence must be included as a component of Blackmun's theory. Essentially, because the innocent owners in the previous cases consented to the use of their property by the wrongdoers, they were not so innocent as to overcome a presumption of negligence.[44] Thus, Blackmun makes the distinction between the "innocent" and the "truly innocent" owner.[45] Succinctly stated, the "innocent owners" in previous cases

41. *Id.* at 618. The two other classes of forfeitable property—contraband and proceeds—do not give rise to punishment because the owner can have no legitimate property right in them.
42. *Id.* at 621 (citations omitted).
43. *Id.* at 618.
44. Until the dicta in *Calero-Toledo*, the owner had no opportunity in statutory in rem forfeitures to overcome the presumption of negligence because the actions of the owner (beyond voluntary transfer of the property) were not considered.
45. Austin v. United States, 509 U.S. 602, 615-18 (1993). Implicit in Blackmun's analysis is the notion that if property is misused after the owner voluntarily relinquishes control, the owner is presumed to be negligent by a process similar to res ipsa loquitur. That presumption can be rebutted only by a showing that the owner has actively done "all that reasonably could be expected to prevent the unlawful use of his property." *Id.* at 616. But the availability of such a rebuttal remains only a possibility because the Court has continued to reserve the question of whether a "truly innocent" owner may have his property forfeited.

have not been innocent enough. (Since *Peisch*, the Court has not recognized a "truly innocent" owner.)

This reasoning implicates a constitutional requirement of some degree of culpability on the part of the property owner, even if it is only the presumption of negligence. But that is not at all clear from the holdings of previous cases, none of which expressly relied on any one theory for their holdings, but relied instead on the traditional strict application of the guilty property fiction. Although the Court did not expressly address the issue, it did acknowledge that recent cases reserved the question of whether the property of a truly innocent owner can be forfeited,[46] thus questioning the Court's own conclusion that in rem forfeitures of "innocent" owners rest upon the notion of negligence. If the forfeiture is based on a presumption of negligence on the part of the owner in allowing the property to be used unlawfully, how can an owner whose property has been stolen, assuming the theft was not the result of negligence by the owner, suffer a forfeiture when the owner allowed no use of the property at all?

C. Justice Scalia's Concurrence

Justice Scalia, in his concurrence in *Austin*, highlights the narrowness of the Court's reading of previous cases involving innocent owners. Moreover, Scalia dismisses the entire exercise as unnecessary to establish the existence of punishment in in rem forfeitures. While agreeing that the forfeiture under the Drug Abuse Prevention and Control Act in *Austin* does constitute punishment for purposes of the Eighth Amendment, he strongly questions the Court's proposition that any degree of culpability on the part of the owner is a prerequisite for in rem forfeitures or for finding that punishment exists in those forfeitures.[47] Scalia believes the guilty property fiction should be given greater weight than does the majority. If culpability is required, Scalia argues the distinction between in rem and in personam forfeitures is effectively erased and "[w]ell established common-law distinc-

46. *Id.* at 617. "The more recent cases have expressly reserved the question whether the fiction could be employed to forfeit the property of a truly innocent owner." *Id.*

47. The Court apparently believes, however, that only actual culpability of the affected property owner can establish that a forfeiture provision is punitive, and sets out to establish . . . that such culpability exists in the case of in rem forfeitures. . . . [T]he case law is far more ambiguous than the Court acknowledges. We have never held that the Constitution requires negligence, or any other degree of culpability, to support such forfeitures.

Id. at 625 (Scalia, J., concurring).

tions should not be swept away by reliance on bits of dicta."[48] Three other Justices agreed with this criticism.[49]

Justice Scalia also addressed the next logical question, which the majority left to the lower court on remand: if the Excessive Fines Clause applies to in rem forfeitures, what is the measure of excessiveness in such cases? In Scalia's view, both the culpability of the owner and the value of the property are irrelevant. "The question is not how much the confiscated property is worth, but whether the confiscated property has a close enough relationship to the offense. . . . Was it close enough to render the property, under traditional standards, 'guilty' and hence forfeitable?"[50] In response, the majority stated: "We do not rule out the possibility that the connection between the property and the offense may be relevant, but our decision today in no way limits the Court of Appeals from considering other factors . . . ."[51]

Austin's addition to forfeiture jurisprudence is four-fold. First, any fine or forfeiture (including in rem forfeitures) that has retribution or deterrence among its purposes is punishment. Second, in rem forfeitures of real property and conveyances are presumed to result in punishment, which is subject to the limitations of the Excessive Fines Clause. Third, though arguably in dicta, the majority for the first time stated that the underlying justification for forfeitures applied to owners uninvolved in the underlying offense is the notion of negligence on the part of the owner. And fourth, the Court recognized that despite the nature of an in rem forfeiture action aimed solely at the guilty property, yet another constitutional protection is available to the owner—the protection of the Excessive Fines Clause.[52] These factors result in an implicit denial that the innocence of the property owner is irrelevant in an in rem forfeiture proceeding.

VI. *BENNIS V. MICHIGAN*

A. Statement of the Case

The recognition of punishment in statutory in rem civil forfeitures raises the conflict between the oft-held lack of a constitutional inno-

48. *Id.* at 626 (Scalia, J., concurring).
49. Chief Justice Rehnquist, Justice Kennedy, and Justice Thomas joined Justice Scalia in questioning whether the owner's culpability is required to uphold a forfeiture or to find punishment in that forfeiture. *Id.* at 629 (Kennedy, J., concurring).
50. *Id.* at 628 (Scalia, J., concurring).
51. *Id.* at 623 n.15.
52. The Court stated that as a general matter the constitutional protections applied to civil in rem forfeitures distinguish between protections available in civil as opposed to criminal cases, except where the civil sanction is so punitive as to be considered criminal in nature or where the statute in question makes the culpability of the owner relevant. *Id.* at 608 n.4.

cent owner's defense and the axiom, basic to American jurisprudence, that innocent parties should not be punished. By a narrow majority, the Supreme Court recently declined the opportunity to recognize a constitutional innocent owner's defense in *Bennis v. Michigan*[53] and backed away from the possibility.

In 1988, John and Tina Bennis were joint owners of a recently purchased 1977 Pontiac sedan that John Bennis regularly used to commute to work. John Bennis was arrested while engaged in a sexual act with a prostitute in the front seat of the car. Because the officers did not witness any payment, he was charged with, and eventually convicted of, gross indecency. Prior to John Bennis' conviction, the county prosecutor moved to abate the vehicle as a nuisance under Michigan's statutory abatement scheme.[54] Tina Bennis, the wife, testified that she had no knowledge of her husband's involvement with prostitutes and no knowledge of his illicit use of the vehicle either on the evening in question or at the time the vehicle was purchased and titled in both of their names.[55] The State did not dispute this assertion. Tina Benis argued that her innocence in the matter precluded the forfeiture of her interest in the vehicle. The county court, however, approved the forfeiture of the vehicle and declined to grant Tina Bennis any share of the proceeds of the sale, even though it

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53. 116 S. Ct. 994 (1996).

54.
> 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. 1996). Section 600.3825 states in pertinent part:

> (1) Order of abatement. If the existence of the nuisance is established in an action as provided in this chapter, an order of abatement shall be entered as a part of the judgment in the case, which order shall direct the removal from the building or place of all furniture, fixtures and contents therein and shall direct the sale thereof in the manner provided for the sale of chattels under execution. . . .
>
> (2) Vehicles, sale. Any vehicle, boat, or aircraft found by the court to be a nuisance within the meaning of this chapter, is subject to the same order and judgment as any furniture, fixtures and contents as herein provided.
>
> (3) Sale of personalty, costs, liens, balance to state treasurer. Upon the sale of any furniture, fixture, contents, vehicle, boat or aircraft as provided in this section, the officer executing the order of the court shall, after deducting the expenses of keeping such property and costs of such sale, pay all liens according to their priorities . . . and shall pay the balance to the state treasurer to be credited to the general fund of the state. . . .

MICH. COMP. LAWS ANN. § 600.3825 (West 1987).

55. Bennis v. Michigan, 116 S. Ct. 994, 997 (1996).

noted that it had the authority to do so.[56] The court justified this decision by noting that John and Tina Bennis owned another vehicle and "[t]here's practically nothing left minus costs in a situation such as this."[57]

Tina Bennis appealed, and the Michigan Court of Appeals reversed. Relying on previous Michigan Supreme Court rulings, the court of appeals held that an owner's interest could not be abated without proof that she knew how the car was to be used. The court also ruled that the car could not qualify as a nuisance simply because of a single occurrence of a sexual act without evidence of a continuing or ongoing unlawful use.[58] The Michigan Supreme Court in turn reversed the court of appeals and reinstated the abatement.[59]

The Michigan Supreme Court held the episode in the Bennis car was a nuisance as a matter of state law. John Bennis was arrested in a neighborhood with a reputation for prostitution activity. Finding that a general condition of nuisance existed in the neighborhood, the court reasoned that any cars entering the area for purposes of prostitution "are being 'used for' the continuance of this nuisance."[60] Thus, even a vehicle used only once for a sexual act contributes to the continuing nuisance condition that can be abated provided the act takes place in an area known for prostitution.[61] Further, the court resolved a conflict in Michigan case law, holding that the Michigan statute allowed the abatement of Tina Bennis' interest even though she had no knowledge of the illicit use of the vehicle at the time she entrusted her interest to her husband.[62] The Michigan Supreme Court then reviewed a long line of United States Supreme Court cases relying on the "guilty property" fiction in in rem civil forfeiture. Quoting substantial sections of *Calero-Toledo v. Pearson Yacht Leasing Co.* and *Van Oster v. Kansas*,[63] the Michigan Supreme Court concluded that Tina Bennis' innocence was "without constitutional consequence."[64] In responding to a dissent, the court also pointed out that the abatement action sounded in equity, that the trial court had discretion to

56. *Id.*
57. *Id.*
58. Michigan *ex rel.* Wayne County Prosecuting Atty. v. Bennis, 504 N.W.2d 731, 733 (Mich Ct. App. 1993).
59. Michigan *ex rel.* Wayne County Prosecutor v. Bennis, 527 N.W.2d 483 (Mich. 1994).
60. *Id.* at 491.
61. *Id.* at 491 n.22.
62. "Proof of knowledge of the existence of the nuisance on the part of the defendants or any of them, is not required." MICH. COMP. LAWS ANN. § 600.3815(2) (West 1987).
63. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974); Van Oster v. Kansas, 272 U.S. 465 (1926).
64. Michigan *ex rel.* Wayne County Prosecutor v. Bennis, 527 N.W.2d 483, 494 (Mich. 1994).

shape an appropriate remedy, and that the trial court had not abused its discretion.[65]

Tina Bennis applied for certiorari to the United States Supreme Court, arguing that the forfeiture of her interest in the vehicle violated due process or, in the alternative, that the forfeiture of her interest was a compensable taking under the Fifth Amendment.[66]

Tina Benis' due process argument used a two-prong approach. First, relying on dicta from *Austin* and *Calero-Toledo*, Tina Benis suggested the forfeiture of property belonging to "innocent" owners rests upon the notion that the owner had been somehow negligent. Thus, a forfeiture action might not lie against an "innocent" owner who demonstrated she had done all that was reasonable to prevent the misuse. Bennis essentially claimed that she had a right to have her innocence or culpability considered by the court in the forfeiture action. Second, relying on *Austin*, which equated in rem forfeitures with punishment for the purposes of the Excessive Fines Clause of the Eighth Amendment, Bennis argued that the state has no legitimate interest in punishing an innocent person, and that it is a violation of due process to punish a person in an action where the state has no burden of proof regarding the culpability of the person. Bennis then urged that the Court adopt a test for "innocent" owners based on section 308 of the Restatement (Second) of Torts, which defines negligent entrustment.[67]

In her alternative attack, Bennis invoked the Fifth Amendment's Takings Clause to challenge the trial court's refusal to pay her the balance of the proceeds of the sale (after costs), which instead went to the state's general coffers. Bennis claimed that, despite a clear lack of culpability for the actions leading to the forfeiture, the state took her interest in the vehicle to finance law enforcement and other general activities of the state, burdens that the public as a whole should bear.

In contrast, the State of Michigan chose not to cast the issue as a traditional forfeiture argument. Rather, the State framed the issue as the exercise of police power. By analogy, the State argued that the lack of culpability was simply another example of strict liability that attaches with the ownership of property.[68]

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65. *Id.* at 495.
66. *See* Brief for Petitioner, Bennis v. Michigan, 116 S. Ct. 994 (1996)(No. 94-8729). One can only speculate as to why Bennis did not claim the forfeiture was an excessive fine under the Eighth Amendment. Perhaps she felt the low dollar value of the vehicle precluded the argument.
67. "It is negligence to permit a third party to use a thing . . . which is under the control of the actor, if the actor knows or should know that such person intends or is likely to use the thing . . . in such a manner as to create an unreasonable risk of harm to others." *Id.* at 25 (quoting RESTATEMENT (SECOND) OF TORTS § 308 (1965)).
68. *See* Brief for Respondent, Bennis v. Michigan, 116 S. Ct. 994 (1996)(No. 94-8729).

By a five vote majority, the United States Supreme Court upheld the forfeiture of Tina Bennis' interest in the vehicle. Writing for the majority, Chief Justice Rehnquist cast the issue as a traditional forfeiture question. After reviewing past cases beginning with *The Palmyra* and continuing through *Calero-Toledo*, the majority concluded Bennis' due process arguments were without merit. The Court rejected the dicta from previous cases, primarily *Calero-Toledo*, upon which Bennis' first due process argument relied. "[I]t is to the holdings of our cases, rather than their dicta, that we must attend."[69] Having stripped away the main thrust of the first due process argument, the Court concluded that the Due Process Clause did not afford protection to Tina Bennis' interest.

> Petitioner is in the same position as the various owners involved in the forfeiture cases beginning with *The Palmyra* in 1827. She did not know that her car would be used in an illegal activity that would subject it to forfeiture. But under these cases the Due Process Clause of the Fourteenth Amendment does not protect her.[70]

The Court did not reach Bennis' second due process argument because the Court denied that Tina Bennis had been punished by the forfeiture action.

Bennis' takings challenge was also summarily rejected.[71] The Court reasoned that since the state obtained the vehicle without violation of due process, the state need not compensate Bennis because the state already owned the property by virtue of an authority other than that of eminent domain.[72]

69. Bennis v. Michigan, 116 S. Ct. 994, 999 (1996)(citation omitted).

70. *Id.*

71. An analysis of the takings challenge is beyond the scope of this Note. For an investigation of possible takings challenges to civil in rem forfeitures, see J. Kelly Strader, *Taking the Wind Out of the Government's Sails?: Forfeitures and Just Compensation*, 23 PEPP. L. REV. 449 (1996).

72. Bennis v. Michigan, 116 S. Ct. 994, 1001 (1996). The Court relied on two cases with little or no relation to the issues in *Bennis*: *United States v. Fuller*, 409 U.S. 488 (1973), and *United States v. Rands*, 389 U.S. 121 (1967). In *Fuller*, the Court held that the government need not compensate a landowner for the increased market value of his property due to *revocable* grazing permits, *issued by the government*, associated with the land that was taken by eminent domain. In *Rands*, the Court held that the power to regulate navigation confers upon the federal government a dominant servitude in navigable waters and all beds and lands under the high water mark. Thus the property rights of riparian owners have always been subject to the government's right to regulate and manipulate the waters and beds of navigable waters. Both of these cases resolve the takings issue in favor of the government by invoking either value added to land by the government or the government's superior property rights. Neither of these elements is present in *Bennis*. The State of Michigan did not hold any property rights in the Bennis automobile, and no portion of the value of the automobile was a result of revocable benefit conferred by the state.

B. Analysis

Bennis' first due process argument was weak and was defeated by the traditional application of the guilty property fiction found in the holdings of past cases. The dicta in *Calero-Toledo* did raise the possibility that an innocent owner could prevail in an in rem forfeiture action if she could show both that she was unaware of the unlawful use and that she took all reasonable steps to prevent the unlawful use of the property. However, dicta in other decisions, beginning with *Peisch*, is much narrower than the dicta in *Calero-Toledo*, suggesting only that an owner may not have her property forfeited if it is stolen or otherwise used without her consent.[73] Even if the Court had chosen to entertain the *Calero-Toledo* dicta, Bennis' argument may have fallen flat because she attempted to broaden that dicta even further by claiming that her unique status as a wife and co-owner presumes no additional reasonable steps could be taken, therefore exempting her from making such a showing. It can be expected, Bennis argued, that a man who uses prostitutes will take pains to conceal that fact from his wife; absent any knowledge of her husband's use of prostitutes, much less his intention to employ a prostitute in the jointly-owned car in an area known for its vice trade, what reasonable steps could Tina Bennis be expected to take?[74]

Bennis also argued that her status as a joint owner distinguished her situation from that of owners in previous forfeiture cases. At all times, her husband, as a joint owner, possessed as much right to use the vehicle as she did. Tina Bennis could do nothing, short of notifying the police, that would not unlawfully infringe upon her husband's property rights in the car.[75] Therefore, she argued that she was effectively prevented from proactively averting the unlawful use of the car by her husband.

The distinction does not hold up when compared to previous cases, however. In *Goldsmith-Grant*, the innocent owner was a chattel mortgage holder. As such, the company had no right to interfere with the possessory rights of the buyer who used the vehicle unlawfully. Similarly, in *Dobbins's Distillery*, the lessor was legally powerless to affect the behavior of the lessee as long as the lessee did not act counter to the contractual obligations in the lease. *Malek Adhel* differed only in

73. *See supra* note 13 and accompanying text.

74. Brief for Petitioner at 27-29, Bennis v. Michigan, 116 S. Ct. 994 (1996)(No. 94-8729).

75. In oral argument in support of an amicus curiae brief, the United States indicated that a wife who suspects her husband is using a jointly owned car to meet with a prostitute should call the police to preserve her innocence for the purpose of any constutional arguments. (Laughter interrupted the complete explanation.) United States Supreme Court Official Transcript at 61, Bennis v. Michigan, 116 S. Ct. 994 (1996)(No. 94-8729).

that it was a physical impossibility rather than a legal impossibility that theoretically prevented the owners of the ship from taking any preventative steps because the unlawful acts took place after the ship was on the high seas. In all three cases, the "innocent" owner was either legally or practicably precluded from preventing the unlawful use of the property. Thus Bennis' situation is in fact no different than that of previous innocent owners in previous cases.

The above arguments illustrate the difficulty of determining a practical application of the *Calero-Toledo* dicta. The "reasonable steps" envisioned by the *Calero-Toledo* Court would evidently require a very strong showing, which would necessarily vary with the type of property involved and the nature of the owner-user relationship in each case.[76] Further, it must be remembered that these are steps to be taken by an owner who is wholly unaware of the unlawful use. In *Calero-Toledo*, the lessor had included in the lease a clause prohibiting the use of the yacht for an unlawful purpose.[77] It is difficult to imagine any further measures the lessor could have taken to prevent an unlawful use and yet remain in the realm of the reasonable or economically feasible. It is doubtful that a lessee would enter into an agreement that allowed for or required random searches by the owner. Nonetheless, the vessel was forfeited. Because the *Calero-Toledo* dicta is a singular expansion of the innocent owners exception, and because it is inherently unworkable in real life applications, it is doubtful the Court will adopt the dicta as the basis for a test in the future.

Although Bennis' reliance on the *Calero-Toledo* dicta is unworkable, the Court's resolution is equally unsatisfying. Holding that the action in *Bennis* satisfied the requirements of due process simply because similar actions had done so in the past[78] leaves unanswered the question of exactly how due process was satisfied.[79] Some underlying theory must justify or explain the imposition of forfeiture on an inno-

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76. For example, a transfer of property in a commercial setting, such as a lease for land, may include clauses in the lease to prevent certain uses or to allow for regular inspections. Loaning a car to a friend for a short time, on the other hand, may involve nothing more than a seat-of-the-pants evaluation of the borrower's trustworthiness and driving ability. Similarly, while the owner may be aware that a car might be used to transport narcotics, the same could not reasonably be expected of a farm tractor.
77. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 693 (1974)(Douglas, J., dissenting).
78. "[T]he 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." Bennis v. Michigan, 116 S. Ct. 994, 1001 (1996).
79. The Court acknowledged the difficulty in reconciling the holding with traditional notions of due process. *Id.* Justice Thomas addressed the conflict more fully, but agreed with the majority that traditional application of the guilty property fiction should prevail.

cent owner. The *Austin* Court concluded that the justification was a presumption of negligence on the part of the owner for allowing the unlawful use of the property. But without some test for culpability or an opportunity to make a contrary showing, such as that suggested by the *Calero-Toledo* dicta, the presumption becomes irrebuttable. An irrebuttable presumption of negligence or guilt on the part of the owner is, in effect, a judicial fiat holding that the owner deserves to be "punished" whether or not any negligent culpability actually exists.

This is inconsistent with the Court's continued reservation of the question of whether property stolen from an owner and later used unlawfully may be forfeited. If no culpability is required, why should owners whose property has been stolen be treated differently? The only difference between the two cases is the element of consent. Arguably, consent alone cannot be deemed conclusary evidence of negligence strong enough to support an irrebuttable presumption as it certainly is not a unique element of negligence. Unless the Court expands the fiction of "tainted" property to hold that the stain spreads to the owner through the act of consent, the act of consent alone will not comport with traditional standards of proof required to inflict punishment on an individual in criminal or civil actions, assuming that such a forfeiture is indeed "punishment."

C. Punishment: Now You See It, Now You Don't

The second prong of Bennis' due process argument was stronger than the first. Had Bennis relied solely on the *Calero-Toledo* dicta and the inherent injustice of the sanction, the case would have been unremarkable in that it simply maintained the status quo of forfeiture jurisprudence. But since *Calero-Toledo*, the Court in *Halper* and *Austin* determined that the concept of punishment transcends the civil-criminal distinction.[80] Under these two cases, if a sanction serves

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> As the Court notes, evasion of the normal requirement of proof before punishment might well seem "unfair." One unaware of the history of forfeiture laws and 200 years of this Court's precedent regarding such laws might well assume that such a scheme is lawless—a violation of due process. . . . "If the case were the first of its kind, it and its apparent paradoxes might compel a lengthy discussion to harmonize the [statute at issue] with the accepted tests of human conduct. . . . There is strength . . . in the contention that . . . [the statute at issue] seems to violate that justice which should be the foundation of the due process of law required by the Constitution."

Id. (Thomas, J., concurring)(citations omitted)(quoting Goldsmith-Grant v. United States, 254 U.S. 505, 510 (1921)(alteration in original)).

80. "The notion of punishment, as we commonly understand it, cuts across the division between the civil and criminal law . . . ." United States v. Halper, 490 U.S. 435, 448 (1989)(explaining that the nature of the sanctions imposed in a civil proceeding must be assessed to determine if they fall within the double jeopardy protections of the Fifth Amendment).

either deterrent or retributive purposes, it is punishment. And, for purposes of the Excessive Fines Clause of the Eighth Amendment, punishment historically is presumed to exist in in rem statutory forfeitures.[81] Thus, two issues must be addressed. First, how does an in rem action, which punishes owners without any burden of proof by the State as to owners' culpability or any opportunity to establish their innocence, comport with due process? Second, if the Excessive Fines Clause applies to a particular in rem forfeiture, what test is to be used to determine excessiveness?

The Court in *Bennis* evaded both issues by finding that Tina Bennis had not been punished, thus implicitly denying the reasoning in its previous decisions regarding the punitive nature of in rem forfeitures. The Court used two lines of reasoning. First, the Court pointed to the trial judge's equitable discretion to craft an appropriate remedy.[82] Second, the Court redefined the punishment threshold so clearly set forth in *Halper* and *Austin*.

1. *Equitable Label of the Action*

The equitable label placed on the forfeiture action is not dispositive as to the question of punishment. The Michigan statute specifically calls for the forfeiture of the vehicle without regard to the owner's knowledge of the nuisance activity or the value of the vehicle. As written, the statute does not call for equity, nor does it purport to be a remedial action. Thus, *Austin*'s presumption of punishment applies to sanctions imposed under the statute as written.[83] Michigan case law, however, gives the trial judge equitable discretion to modify the sanction.[84] Arguably, this is enough to overcome the presumption of punishment. Yet it hardly follows that simply applying the equitable label to a concededly nonremedial action automatically renders the sanction solely remedial. The presumption of punishment in statutory in rem forfeitures of vehicles and real property is merely a starting point for the investigation of whether or not punishment actually occurrs.[85] Both *Austin* and *Halper* held that the purpose of the sanc-

81. In determining whether or not the particular forfeiture in *Austin* was punishment, the Court began with the presumption of punishment, then examined the statute itself and legislative history to determine if factors indicated that it was not punishment. Austin v. United States, 509 U.S. 602, 618-19 (1993).
82. Bennis v. Michigan, 116 S. Ct. 994, 1000 (1996).
83. *See* Austin v. United States, 509 U.S. 602 (1993); *supra* text accompanying note 81.
84. *See* Brief for Respondent at 6, Bennis v. Michigan, 116 S. Ct. 994 (1996)(No. 94-8729).
85. *See* Austin v. United States, 509 U.S. 602 (1993); *supra* text accompanying note 81.

tion, rather than the label of the action, is the measure of whether or not punishment exists.[86]

In *Bennis*, the trial judge not only declined to split the sale price with Tina Bennis, which would have preserved all of her interest, but also declined to give her any portion of the proceeds of the sale after costs.[87] The trial judge justified his decision by stating that "there's practically nothing left minus costs in a situation such as this."[88] Even assuming, arguendo, that Tina Bennis' interest could be reached at all without offending due process, if the action was truly remedial and nonpunitive, half of what little money was left after costs were deducted should have been turned over to Tina Bennis. Once the amount of forfeiture exceeded the state's costs, the sanction ceased to be solely remedial. Added to this is retribution and deterrence, thereby punishment[89] despite the equitable label. The statute authorized the judge to forfeit all interest in the vehicle, but equity did not. Under *Austin*, unless a sanction fairly can be described as solely remedial, it is at least in part punishment, and the protections of the Excessive Fines Clause apply.[90] The existence of punishment not only implicates the Excessive Fines Clause, but also places the second prong of Bennis' due process argument squarely before the Court.

2. Deterrence By Any Other Name . . .

Possibly realizing that the equitable label alone failed to negate the possibility of punishment, the Court cast a cloud over the test for punishment set forth in *Halper* and *Austin*. In *Austin*, the Court stated that "[t]he Excessive Fines Clause limits the Government's power to extract payments, whether in cash or in kind, as punishment for some offense."[91] Thus, the remaining question to determine if the Eighth Amendment applies is not "whether [an action] is civil or crim-

86. Austin v. United States, 509 U.S. 602, 610 (1993); United States v. Halper, 490 U.S. 435, 448 (1989).
87. Bennis v. Michigan, 116 S. Ct. 994, 997 (1996).
88. *Id.*
89. Dicta in *Halper* indicates that the dividing line between remedial and punitive sanctions may not be subject to such precise delineations. "[T]he Government is entitled to rough remedial justice, that is, it may demand compensation according to somewhat imprecise formulas . . . ." United States v. Halper, 490 U.S. 435, 446 (1989). However, this should not be controlling for two reasons. First, *Halper* dealt with a monetary fine as opposed to an in rem forfeiture. Second, *Halper* dealt with punishment for purposes of the Double Jeopardy Clause, which requires a much stronger showing than that for the protections of the Excessive Fines Clause. Punishment for purposes of the Double Jeopardy Clause is found in a civil sanction when the sanction "bears no rational relation to the goal of compensating the Government for it's loss." *Id.* at 449.
90. Austin v. United States, 509 U.S. 602, 610 (1993).
91. *Id.* at 609-10 (citations and quotations omitted).

inal, but rather whether it is punishment."[92] *Austin* and *Halper* held that a forfeiture need not have a wholly punitive purpose for the Excessive Fines Clause to apply.

> We, however, must determine that it can only be explained as serving *in part* to punish. . . . "[A] civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as *also* serving *either* retributive *or deterrent* purposes, is punishment, as we have come to understand the term."[93]

In response to Bennis' assertion that the forfeiture of her interest in the vehicle was punishment, the Court pointed to justifications used in pre-*Austin* forfeiture cases involving innocent owners. The Court concluded that "forfeiture also serves a deterrent purpose *distinct from any punitive purpose*."[94] This statement directly opposes the categorical holdings of both *Austin* and *Halper*. The deterrence in *Bennis* operates "'both by preventing further illicit use of the [property] and by imposing an economic penalty, thereby rendering illegal behavior unprofitable.'"[95]

The Court's reliance on this quote from *Calero-Toledo* is inconclusive at best. While the *Calero-Toledo* Court did state that "forfeiture statutes further the punitive and deterrent purposes,"[96] no effort was made to distinguish the two purposes or to explain how the deterrent characteristics were divorced from the punishment.[97] The *Austin* Court used the same citation from *Calero-Toledo* to determine that "forfeiture generally and statutory in rem forfeiture in particular historically have been understood, at least in part, as punishment."[98] Yet, the *Bennis* Court made no effort to distinguish the deterrence in *Bennis* from that in *Austin* or *Halper*. The deterrent purposes cited suggest both specific and general forms of deterrence, both of which are traditional goals of punishment.[99] No indication was asserted in *Austin* or *Halper* that some deterrence was punitive while some was

92. *Id.* at 610.
93. *Id.* (quoting United States v. Halper, 490 U.S. 435, 448 (1989)(emphasis added)).
94. Bennis v. Michigan, 116 S. Ct. 994, 1000 (1996)(emphasis added).
95. *Id.* (quoting Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 683, 687 (1974)(alteration in original)). The Court went on to compare this deterrence to the deterrent action of negligence laws, which would make Tina Bennis liable for damages caused by her husband's negligent operation of the vehicle. But as Justice Stevens points out in his dissent, tort liability is based on compensation. *Id.* at 1009 (Stevens, J., dissenting). Tort liability does not result in punishment imposed by the state.
96. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 686 (1974).
97. Because the *Calero-Toledo* Court was exploring the governmental interests embodied in the forfeiture statute and not determining whether or not punishment existed for the purposes of the Excessive Fines Clause, a careful reading could conclude that the Court used the terms "punitive" and "retributive" synonymously.
98. Austin v. United States, 509 U.S. 602, 618 (1993).
99. United States v. Halper, 490 U.S. 435, 448 (1989).

not. As Justice Stevens points out in his lengthy dissent, "deterrence is itself one of the aims of punishment."[100] Logically, retribution and deterrence have separate and distinct purposes. Deterrence, however, cannot occur unless it is the result of punishment or the threat of punishment. As stated previously in *Halper*, "'[r]etribution and deterrence are not legitimate nonpunitive governmental objectives.'"[101]

VII. A PROPOSED SOLUTION

The Court in *Bennis* backed away from the categorical definition of punishment laid down in *Austin*, but offered nothing to take its place. To defeat Bennis' second due process argument that the state has no legitimate interest in punishing an innocent person, the Court went out of its way to find that Tina Bennis was not punished.[102] Several other avenues, however, were open to the Court. The Court could have found that Tina Bennis had been punished, but that since owners have been similarly punished for time out of mind, due process was not violated.[103]

Alternatively, the Court could have agreed that Benis committed no offense, thus avoiding the label of punishment and the due process implications. This argument would comport with *Austin* because *Austin* defines punishment under the Excessive Fines Clause as payment to the government for some offense. On the other hand, this same argument would be inconsistent with the Michigan statute, which specifically declares that any owner of a vehicle used in violation of the statue is "guilty of a nuisance."[104] Because Austin's reliance on negligence as the underlying theory is inconsistant with the Michigan statute's reliance on strict liability, the Court cannot use both theroies. As another alternative, the Court also could have held that Bennis

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100. Bennis v. Michigan, 116 S. Ct. 994, 1009 (1996)(Stevens, J., dissenting).

101. United States v. Halper, 490 U.S. 435, 448 (1989)(quoting Bell v. Wolfish, 441 U.S. 520, 529 n.20 (1979)).

102. Justice Thomas perhaps illustrates the Court's motivations.

> And if the forfeiture of the car here (and the State's refusal to remit any share of the proceeds of its sale to Mrs. Bennis) can appropriately be characterized as "remedial" action, then the more severe problems involved in punishing someone not found to have engaged in wrongdoing of any kind do not arise.

Bennis v. Michigan, 116 S. Ct. 994, 1002 (1996)(Thomas, J., concurring).

103. The Court used this argument to defeat the first prong of Bennis' due process argument, saying that in rem forfeitures are "too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced." *Id.* at 1001 (quoting Goldsmith-Grant v. United States, 254 U.S. 505, 511 (1921)). But reliance on previous cases would not be totally persuasive since no previous petitioner had raised the specific claim of punishment imposed by the state in an action where the state has no burden of proof as to culpability.

104. MICH COMP. LAWS ANN. § 600.3801 (West Supp. 1995).

was punished, but that it was a de minimus level of punishment with which the Constitution is not concerned.[105]

Another logical solution would have been to agree that Tina Bennis was punished and afford her protection under the Excessive Fines Clause of the Eighth Amendment. This would have eliminated the messy effort to find that there was no punishment and, at the same time, would render moot the due process problem. Because lower courts since *Austin* have developed differing tests for excessiveness in in rem forfeitures,[106] the Supreme Court had the opportunity to define the proper test, rather than remand as the Court did in *Austin*. In the vast majority of possible applications of the Excessive Fines Clause, the question presented is the following: How much can this person be punished without offending justice? The inquiry necessarily involves a weighing of the fine imposed against the nature and severity of the offense committed, the culpability of the owner being previously determined at trial.[107]

Because in rem forfeiture is nominally against the property that has committed an offense, Justice Scalia condenses this inquiry into the single question of whether or not the property was used in a manner or activity that traditionally would support a forfeiture.[108] But

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105. This would have been possible only if the Court found Tina Bennis was punished by the forfeiture of her half of the proceeds after costs were deducted. Since the record did not indicate what that amount was, other than mentioning the trial judge's estimate of "practically nothing," the Court had nothing upon which to base a formulation. However, the concept of a de minimus amount of punishment has been articulated before. *See* Ingraham v. Wright, 430 U.S. 651, 674 (1977)(analyzing corporal punishment in a public school setting).

106. For a survey of some lower court applications of the Excessive Fines Clause to in rem forfeitures after *Austin*, see Meredith S. Katz, Attorney General of the State of New York v. One Green 1993 Four Door Chrysler: *Does the Punishment Fit the Crime?*, 12 TOURO L. REV. 715 (1996); Hager & Welling, *supra* note 6.

107. Very little Excessive Fines Clause jurisprudence exists. In evaluating monetary fines, Courts have applied a proportionality review based on *Solem v. Helm*, 463 U.S. 277 (1983). The factors in this investigation include: gravity of the offense, harshness of the penalty, comparison of the sentences imposed on other criminals in the same jurisdiction, and comparison of the sentences imposed for similar crimes in other jurisdictions. *Id.*

108. Even using this narrow test, the forfeiture in *Bennis* would not be allowed.

> But an in rem forfeiture goes beyond the traditional limits that the Eighth Amendment permits if it applies to property that cannot be properly regarded as an instrumentality of the offense—the building, for example, in which an isolated drug sale happens to occur. Such a confiscation would be an excessive fine.

Austin v. United States, 509 U.S. 602, 627-28 (1993)(Scalia, J., concurring). Similarly, the vehicle in *Bennis* was used for one isolated tryst, and the State offered no evidence it had been used in such a manner before. Traditionally, one isolated occurrence of a sexual act in a car does not support the determination that it is an abatable nuisance. It could also be argued that the strict application of the guilty property fiction was traditionally limited to cases in admiralty, breaches of the revenue laws, and similar serious felonies. Expanding the heavy-handed strict

this question is no different from the primary question of guilt of the property, which is properly addressed at trial. The major problem with this limited approach is that it leads to the conclusion that old Pontiacs are afforded Eighth Amendment protection, but the owners are not. The Excessive Fines Clause is a constitutional protection personal to the owner and a check on the government's power.[109] Despite the guilty property fiction, the Court has recognized that it is the owner who is punished. It hardly makes sense to judge the excessiveness of a fine without considering the culpability or actions of the owner suffering punishment.[110] The guilty property fiction controls the procedure of the in rem action, precluding any consideration of the owner's guilt or innocence. But the Excessive Fines analysis is a separate review for the benefit of the owner, not a part of the in rem action, and therefore should not participate in the fiction at all.

Several factors are applied to evaluate the excessiveness of an in rem forfeiture. These factors include: the severity of the underlying offense, the extent of the property's involvement in the offense, and the property's fair value. Most of these are beyond the scope of this Note. However, because in rem forfeiture punishes the owner, and the owner may or may not be the person immediately responsible for the misuse resulting in the forfeiture, an investigation into the relationship between the owner, the property, and the misuse is necessary to avoid a punishment that would bear no rational relation to the conduct of the owner.[111] If the conduct of the owner is one factor to con-

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application of the guilty property fiction to minor misdemeanors weakens the argument that the state's interest is so strong as to override the traditional aspects of due process afforded an individual being punished by the state.

109. "The Excessive Fines Clause limits the Government's power to extract payments . . . ." Austin v. United States, 509 U.S. 602, 609-10 (1993). In *Austin*, the Court suggested the Government relied too heavily on the technical distinctions between in rem and in personam forfeitures. The Court implied the constitutional protections implicated by the punitive nature of the sanction would trump any conflicting procedural technicalities that arose from the strict application of the guilty property fiction. *Id.* at 616 n.9.

110. "The question is not *how much* the confiscated property is worth, but *whether* the confiscated property has a close enough relationship to the offense." *Id.* at 628 (Scalia, J., concurring)(emphasis added). The question is appropriate, but when evoking the Eighth Amendment protections of the owner, it should be asked if the *owner* has a close enough relationship to the offense.

111. At the same time the Court was deciding *Austin*, the Court also considered the excessiveness of an in personam forfeiture of a business arising from a RICO conviction. Alexander v. United States, 509 U.S. 544 (1993). In remanding the case, the Court instructed the court of appeals to evaluate the excessiveness of the forfeiture in light of the defendant's criminal conduct. *Id.* at 559. Since a forfeiture, whether in rem or in personam, results in the same punitive effect on the owner, and the purpose of the Excessive Fines Clause is to protect the individual from excessive punishment, the criteria used to determine excessiveness should be the same. Indeed, the only distinction that the Court drew between the forfeiture in *Alexander* and that in *Austin* is that an in personam forfeiture arising

sider in applying the Excessive Fines Clause to an in rem forfeiture, there must be a minimum threshold of culpability.

The common element of all previous innocent owner forfeiture cases is the voluntary transfer of the property from the owner to another who then uses the property unlawfully. In addition, because of the nature of the relationships between the owners and the wrongdoers, the previous cases also included a discrete transaction or moment of decision when the owner is chargeable with evaluating the ability and trustworthiness of the user before voluntarily relinquishing control. Indeed, in most instances addressed by the Court, the use of the property was the focus, or *raison d'etre*, of the relationship between the owner and the wrongdoer. Ship owners hire masters specifically for the purpose of taking control of the vessel. Thus, ship owners rightly should take pains to hire a master with the proper reputation and credentials. Sales and leases are entered into for the very purpose of transferring possession and control of property. Even in a situation where a friend asks to borrow a vehicle, it is an identifiable transaction within the existing relationship between the owner and the friend where the owner has an opportunity, and a duty, to exercise his judgement as to the fitness of the friend to use the vehicle properly.

This analysis fits well with the notion of the owner's negligence as the underlying theory supporting in rem statutory forfeiture applied to owners innocent of the underlying offense. To impute negligence to an owner, the owner must have had an opportunity to be negligent. As long as a point of decision can be identified, the owner can be charged with making the wrong decision. Similarly, this analysis comports with the alternative justification of deterrence as a legitimate government interest, which argues forfeiture of property belonging to innocent owners causes owners to exercise greater care in transferring their property.[112] If, however, there is no identifiable

from a criminal conviction does not require the investigation laid down in *Austin* to determine if the forfeiture operates as punishment. *Id.* For discussion in support of considering an owner's culpability as a factor in determining excessiveness see Welling & Hager, *supra* note 6, at 872-73; Christopher Zemp Campbell, Note, *Excessive Means: Applying the Eighth Amendment to Civil In Rem Forfeitures Under* United States v. Chandler, 73 N.C. L. Rev. 2284, 2298-3000 (1995). The 1994 amendments to the Uniform Controlled Substances Act of 1970, in light of *Austin* and *Alexander*, "limit [for Excessive Fines purposes] the scope of a forfeiture judgement to the extent the court finds the effect of the forfeiture is grossly disproportionate to the nature and severity of the owner's conduct." Raymond P. Pepe, *Alternative Proposals for the Reform of State Legislation Dealing With Forfeitures For Drug Offenses*, 21 Wm. Mitchell L. Rev. 197, 210 (1995). One factor essential to this inquiry is the "nature and extent of the owner's culpability." *Id.*

112. "To the extent that such forfeiture provisions are applied to lessors, bailors, or secured creditors who are innocent of any wrongdoing, confiscation may have the

point of decision, there can be no opportunity for that deterrence to have its desired effect.[113]

The identifiable point of decision should be used as a threshold test for the measure of the owner's culpability in the application of the Excessive Fines Clause. If no transaction or moment identifies when the owner is chargeable with exercising discretion or judgement regarding the transferring of control of her property, then any forfeiture would work an excessive fine because the owner is not culpable. In the case of Tina Bennis, the Court made no finding concerning the control of her interest in the vehicle. The decision to jointly title the vehicle effectively granted to Tina Benis a measure of control over her interest to her husband. Arguably, that was not the purpose of the decision. The decision of how to hold marital property often includes many factors besides control, such as insurance, taxes, and general asset management with respect to family finances. This type of decision varies dramatically from those involved in the transfer of property in the Court's earlier innocent owner forfeiture cases, upon which the Court relies.

Once the threshold requirement of an identifiable point of decision is met, which essentially establishes that negligence or culpability on the part of the owner is possible, then the existence or degree of that culpability can be evaluated. In the vast majority of in rem forfeitures, this question need not be addressed because either the owner misuses the property or the statute provides for an innocent owner defense. This threshold for the Excessive Fines analysis is especially crucial because there is no other opportunity in a proceeding in rem to raise the issue of the relationship between the offense and the person being punished.

Austin dictates that once a civil sanction is found to be at least in part punitive, that sanction is subject to the limitations of the Excessive Fines Clause. Had the United States Supreme Court in *Bennis* found the forfeiture of Tina Bennis' interest to work an excessive fine, further questions would arise on remand. If Tina Bennis had incurred a monetary fine, the trial court simply would eliminate the excessive portion of the fine. *Bennis* did not involve a monetary fine, however. By the time the Court decided *Bennis*, the State of Michigan had long since sold the car. Yet, because of the unique facts of the case involving joint ownership and one culpable owner, the simple remedy of dis-

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desirable effect of inducing them to exercise greater care in transferring possession of their property." Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 688 (1974).

113. As applied to Tina Bennis, Justice Stevens believed deterrence would be inappropriate. "There is no reason to think that the threat of forfeiture will deter an individual from buying a car with her husband—or from marrying him in the first place—if she neither knows or has reason to know he plans to use it wrongfully." Bennis v. Michigan, 116 S. Ct. 994, 1009 (1996)(Stevens, J., dissenting).

allowing the forfeiture of the car was unavailable. Neither party questioned the state's power to seize and sell the car. Should the lower court order the state to pay Tina Bennis one half of the sale price the car fetched at auction? Or should the court order the state to pay her one-half of the sale price less costs? Only Tina Bennis' half of the value was in question. Since reimbursing the state for costs is remedial in nature, the state could return to Tina Bennis half of the proceeds less costs. This would eliminate the punitive aspect of the sanction and thus any applicability of the Excessive Fines Clause. The record is void of any indication of the amount that remained after costs other than the trial judge's estimate of "practically nothing." Nevertheless, any fine imposed on an innocent person, no matter how small, is arguably excessive.

VIII. CONCLUSION

The guilty property fiction is indeed too firmly ingrained in American jurisprudence to be abandoned. It is a necessary and convenient device used to gain jurisdiction and reach the instrumentalities and proceeds of illegal activities. But it must be remembered that the guilty property fiction is just that—a fiction—and not a fantasy that includes the willing suspension of the Constitution and the Bill of Rights. While the guilty property fiction is a useful procedural tool, it cannot be expected that a mere fiction can be used to negate an innocent owner's constitutional protections. Conflicts between the guilty property fiction and constitutional protections arise when that fiction is applied to punish innocent owners through the forfeiture of their property. The Court understandably is reluctant to make any major changes to the application of the guilty property fiction. Any change may not be limited solely to cases involving innocent owners and could impact statutory in rem forfeitures currently used in the government's war on drugs. But articulating a minimum culpability requirement on the part of the owner would have no such effect on those statutes because they already include innocent owner provisions far more inclusive than the minimal culpability threshold described above.[114] The Court's recognition of constitutional protections available to owners need not hamper the procedural application of the guilty property fiction. Just as the Excessive Fines inquiry takes place after the in rem action, the unlawful search and seizure inquiry in *One 1958 Plymouth* simply determined admissibility of evidence and arguably left unchanged the procedural aspect of the in rem action.

The impact of *Bennis* is two-fold. On its face, with the current political climate favoring harsher penalties and smaller budgets, it may encourage states to enact more forfeiture laws without innocent

114. *See supra* note 7.

owner provisions. Such statutes provide both a source of revenue for law enforcement agencies and the appearance of prosecutorial efficiency.

Perhaps the more important impact will arise from the doubt *Bennis* casts on the holding in *Austin*, which was not constrained to the narrow issue of an innocent owner. *Austin* dealt with an in rem forfeiture under § 881 of the federal Drug Control and Enforcement Act, which engenders a high volume of forfeiture actions. Because the Court in *Bennis* treated deterrence differently than in *Austin*, but then failed to explain its reasoning or even distinguish the two cases, a lower court might conclude that deterrence alone now does not constitute punishment for purposes of the Eighth Amendment. As a result, lower courts may avoid any excessiveness inquiry unless the sanction clearly has a retributive purpose. So not only will the lower courts be uncertain of the proper test for excessiveness, they now may be uncertain when to apply the Excessive Fines Clause to an in rem forfeiture action. Thus, the result of *Bennis* may be far-reaching indeed.

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