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## Supreme Court Rejects Fifth and Fourteenth Amendment Protection Against the Forfeiture of an Innocent Owner's Property

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# THE SUPREME COURT REJECTS FIFTH AND FOURTEENTH AMENDMENT PROTECTION AGAINST THE FORFEITURE OF AN INNOCENT OWNER'S PROPERTY

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

## I. INTRODUCTION

In *Bennis v. Michigan*,<sup>1</sup> the Supreme Court upheld the forfeiture of an automobile in which one of the joint owners engaged in a sexual act with an alleged prostitute, notwithstanding the other owner's lack of knowledge of the misuse of the car.<sup>2</sup> In so holding, the Court rejected the innocent owner's contention that the forfeiture violated the Due Process Clause of the Fourteenth Amendment and the Takings Clause of the Fifth Amendment.<sup>3</sup>

In analyzing the petitioner's constitutional claim, Chief Justice Rehnquist, writing for a five-person majority, relied heavily on a "long and unbroken line" of precedent rejecting an innocent owner defense to civil forfeiture actions.<sup>4</sup> The Court concluded that the judicial acceptance of such forfeitures is "too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced."<sup>5</sup>

This Note argues, first, that the forfeiture of Mrs. Bennis's interest in the automobile is not supported by the justifications traditionally provided by the Supreme Court for abating an innocent owner's interest in property. Additionally, this Note asserts that, based on *Aus-*

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<sup>1</sup> 116 S. Ct. 994 (1996).

<sup>2</sup> *Id.* at 998. The forfeiture was authorized by a Michigan nuisance abatement statute, MICH. COMP. LAWS ANN. § 600.3801 (West 1991), which provides for the forfeiture of illegally used property without proof of the owner's knowledge of or consent to the illegal use.

<sup>3</sup> *Id.* at 1001. The Due Process Clause provides, in relevant part: "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. The Takings Clause of the Fifth Amendment provides: "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. The Fourteenth Amendment incorporates the Fifth Amendment against the States. *Bennis*, 116 S. Ct. at 998.

<sup>4</sup> *Id.* at 999.

<sup>5</sup> *Id.* at 1001 (quoting *J.W. Goldsmith Jr.-Grant Co. v. United States*, 254 U.S. 505, 511 (1921)).

*tin v. United States*,<sup>6</sup> the majority should have analyzed the forfeiture of Mrs. Bennis's interest in the car within the framework of the Excessive Fines Clause of the Eight Amendment. Finally, this Note contends that the Eight Amendment should have compelled the Court to remand the case to the trial court for determination of the punitive nature of the forfeiture and its proportionality to the offense.

## II. BACKGROUND

Civil forfeiture in the United States developed from English common law.<sup>7</sup> Under English law, there were three types of forfeiture: (1) deodand;<sup>8</sup> (2) escheat upon attainder;<sup>9</sup> and (3) statutory forfeitures of "offending objects used in violation of the customs and revenue laws."<sup>10</sup> Of the three types of forfeiture, only statutory forfeiture was incorporated into American law.<sup>11</sup> However, the courts initially used the rationales underlying deodands and escheat upon attainder, namely that the property itself is guilty and that a wrongdoer could legitimately be deprived of his property, respectively, as justification for statutory forfeitures in the United States.<sup>12</sup>

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<sup>6</sup> 509 U.S. 602 (1993). In *Austin*, the Court determined that a civil forfeiture pursuant to a federal statute authorizing the confiscation of property used in drug trafficking was, at least partially, punitive in nature. *Id.* at 622. Thus, the Court held that such forfeiture was constitutionally limited by the Excessive Fines Clause of the Eighth Amendment. *Id.* at 621. See *infra* Part II.B. for a discussion of *Austin*.

<sup>7</sup> See Robert Lieske, *Civil Forfeiture Law: Replacing the Common Law With A Common Sense Application of the Excessive Fines Clause of the Eighth Amendment*, 21 WM. MITCHELL L. REV. 265, 271-72 (1995).

<sup>8</sup> *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 681 (1974). According to the doctrine of deodand, an object that directly or indirectly caused the death of a King's subject was forfeited to the King. *Id.* This was done under the belief that the King would then provide money to pay for a religious ceremony for the slain or insure that the object was put to charitable use. *Id.* Eventually, the deodand became a source of revenue for the Crown and the forfeitures were justified as "a penalty for carelessness." *Id.* (citation omitted). According to another source, deodand was premised on the fiction that the property itself was guilty of the wrongdoing, not as a means of punishing the owner. Lieske, *supra* note 7, at 274 (noting that under deodand, a sword causing the death of a person would be forfeited to the Crown whether or not the sword-owner played a part in the death).

<sup>9</sup> Lieske, *supra* note 7, at 272. Escheat upon attainder was a criminal law doctrine which allowed the forfeiture of property upon the owner's conviction of a felony. *Id.* (citation omitted). It was premised on the common law theory that the King retained superior title to all property; therefore, property simply reverted back to the King upon the commission of a crime. *Id.* (citation omitted). The primary function of escheat upon attainder, however, was to punish the owner for his crime. *Id.* (citation omitted).

<sup>10</sup> *Calero-Toledo*, 416 U.S. at 680-82.

<sup>11</sup> *Id.* at 682-83.

<sup>12</sup> Lieske, *supra* note 7, at 271-72. See also *The Palmyra*, 25 U.S. (12 Wheat.) 1 (1827), discussed *infra* notes 20-27 and accompanying text.

A. JUSTIFICATION FOR THE FORFEITURE OF AN "INNOCENT OWNER'S" PROPERTY

Statutory forfeiture in the United States was established early in the country's history and its practice has continued and expanded over time.<sup>13</sup> As the Supreme Court noted in *Calero-Toledo v. Pearson Yacht Leasing Co.*:<sup>14</sup>

"[L]ong before the adoption of the Constitution the common law courts in the Colonies—and later in the States during the period of the Confederation—were exercising jurisdiction in rem in the enforcement of [English and local] forfeiture statutes," which provided for the forfeiture of commodities and vessels used in violations of customs and revenue laws. And, almost immediately after adoption of the Constitution, ships and cargoes involved in customs offenses were made subject to forfeiture under federal law, as were vessels used to deliver slaves to foreign countries, and somewhat later those used to deliver slaves to this country. The enactment of forfeiture statutes has not abated; contemporary federal and state forfeiture statutes reach virtually any type of property that might be used in the conduct of criminal enterprise.<sup>15</sup>

Despite the potential reach of forfeiture statutes, the Supreme Court has consistently upheld forfeiture statutes when confronted with constitutional challenges by innocent owners.<sup>16</sup> In so doing, the Court has usually justified the forfeiture on either of two grounds: (1) that the property itself is guilty of the offense; or (2) that the property owner may be held accountable for the wrongdoings of those to whom he entrusts his property.<sup>17</sup>

1. *The Guilty Property Fiction*

The earliest American civil forfeiture cases justifying the forfeiture of an innocent owner's property were condemnation actions against ships for acts of piracy or violations of United States customs laws.<sup>18</sup> In upholding such forfeitures, the Supreme Court invoked the "guilty property" fiction to justify in rem proceedings directly against the ship, rather than in personam proceedings against the ship-owners.<sup>19</sup> The in rem nature of the admiralty proceedings dispensed with

<sup>13</sup> See *Calero-Toledo*, 416 U.S. at 683.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 683 (brackets in original, internal citations omitted).

<sup>16</sup> See, e.g., *id.*

<sup>17</sup> *Austin v. United States*, 509 U.S. 602, 615 (1993).

<sup>18</sup> See, e.g., *Harmony v. United States*, 43 U.S. (2 How.) 210 (1844); *The Palmyra*, 25 U.S. (12 Wheat.) 1 (1827).

<sup>19</sup> Although the "guilty property" fiction is reminiscent of the justification for forfeiture under the law of deodand, the use of the fiction in admiralty proceedings may have developed out of necessity and practicality, rather than as a genuine belief that the property itself was guilty of wrongdoing. 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, 936-38 (1991).

the requirement of proving any underlying wrongdoing on the part of the property owner.

In *The Palmyra*,<sup>20</sup> the United States Supreme Court determined that a statutory, in rem forfeiture of property was "independent of, and wholly unaffected by any criminal proceeding in personam" against the property owner.<sup>21</sup> Pursuant to an act of Congress authorizing the capture and condemnation of any vessel from which piratical aggression was attempted or made, the United States sought the forfeiture of a ship, *The Palmyra*, suspected of privateering<sup>22</sup> under a commission from the King of Spain.<sup>23</sup> The ship owner asserted that the government could not maintain the condemnation action because he had not been criminally convicted of privateering.<sup>24</sup> Rejecting this contention, the Court reasoned that "[t]he thing is here primarily considered as the offender, or rather the offence is attached primarily to the thing."<sup>25</sup> Furthermore, the Court noted that acceptance of the ship owner's argument would prohibit the forfeiture of any vessel pursuant to the act of Congress because there was no authorization for the criminal punishment of one who commits piratical aggression.<sup>26</sup> Since such a requirement would make the statute inoperable, the Court held that a criminal conviction was not necessary to enforce an in rem forfeiture of this nature.<sup>27</sup>

Similarly, in *Harmony v. United States*<sup>28</sup> the Court upheld the forfeiture of a ship for acts of piracy notwithstanding the ship owners' lack of knowledge or authorization of the aggressions.<sup>29</sup> In *Harmony*, a ship, armed with the usual equipment for an innocent commercial voyage, committed acts of aggression that were admittedly outside the

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Piety discusses Holmes's theory that in rem proceedings against ships developed because the ship was the only security available when dealing with foreigners. *Id.* (citing O.W. HOLMES, *THE COMMON LAW* 36 (1881)). Seizing the vessel was a way to obtain jurisdiction over a foreigner or to ensure a remedy for a citizen, rather than forcing the citizen to search for a remedy abroad. *Id.*

<sup>20</sup> 25 U.S. (12 Wheat.) 1 (1827).

<sup>21</sup> *Id.* at 15.

<sup>22</sup> "Privateer" is defined as: "An armed private vessel which bears the commission of the sovereign power to cruise against the commerce or war vessels of the enemy." WEBSTER'S NEW INTERNATIONAL DICTIONARY 1969 (2d ed. 1945).

<sup>23</sup> *The Palmyra*, 25 U.S. at 8.

<sup>24</sup> *Id.* at 12.

<sup>25</sup> *Id.* at 14.

<sup>26</sup> *Id.* at 15.

<sup>27</sup> *Id.* at 15.

<sup>28</sup> 43 U.S. (2 How.) 210 (1844). This case is sometimes referred to as *United States v. The Brig Malek Adhel*. See *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 684 (1974).

<sup>29</sup> *Harmony*, 43 U.S. at 233-34.

contemplation of the ship owner.<sup>30</sup> The Court reasoned that treating the vessel as the offender was the "only adequate means of suppressing the offence or wrong, or insuring indemnity to the injured party."<sup>31</sup> As further support for attaching the offense to the vessel, the Court reasoned that, because a ship is guided by its crew and master, it was not unreasonable that the master's actions affect the ship.<sup>32</sup>

Outside the realm of admiralty law, the Court continued to premise the forfeiture of illegally-used property on the notion that the offense attaches directly to the property.<sup>33</sup> In addition, the Court began to examine the relationship between the property owner and the person using the property illegally.<sup>34</sup> In *Dobbins's Distillery v. United States*,<sup>35</sup> the Court upheld the forfeiture of the real and personal property of a distillery occupied and operated by a lessee who failed to maintain the distillery's business records in accordance with United States revenue laws.<sup>36</sup> The Court maintained that the forfeiture action attached to the distillery and did not require proof of the lessor-owner's knowledge that the lessee committed fraud upon the government.<sup>37</sup> The Court explained that the fact that the lessor-owner consented to his land being used as a distillery put him in the same place as if he was the distiller, and subjected the land to forfeiture just as if the distiller was the owner.<sup>38</sup> In conclusion, the Court determined that by virtue of the lease, the acts of the lessee bind the lessor-owner and the consequences to the property were the same as if the owner committed the illegal acts.<sup>39</sup>

## 2. *The Entrustment Theory*

Although the use of the "guilty property" fiction in American civil forfeiture actions operates under the premise that the guilt or innocence of the property owner is irrelevant, the Supreme Court's appli-

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<sup>30</sup> *Id.* at 230.

<sup>31</sup> *Id.* at 233.

<sup>32</sup> *Id.* at 234 (quoting *United States v. The Schooner Little Charles*, F. Cas. 979, 982 (C.C.D. Va. 1818) (No. 15,612)). The court also discussed the notion that "the acts of the master and crew . . . bind the interest of the owner of the ship, whether he be innocent or guilty; and he impliedly submits to whatever the law denounces as a forfeiture attached to the ship by reason of their unlawful or wanton wrongs." *Id.* at 234. However, the basis of the Court's judgment of forfeiture was the ship's accountability for the wrongdoing, not the owner's accountability for the illegal acts of the crew. *Id.*

<sup>33</sup> See, e.g., *Dobbins's Distillery v. United States*, 96 U.S. 395 (1877).

<sup>34</sup> See, e.g., *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974); *Van Oster v. Kansas*, 272 U.S. 465 (1926); *Dobbins's Distillery*, 96 U.S. at 395.

<sup>35</sup> 96 U.S. 395 (1877).

<sup>36</sup> *Id.* at 396 (citation omitted).

<sup>37</sup> *Id.* at 399.

<sup>38</sup> *Id.* at 399 (citation omitted).

<sup>39</sup> *Id.* at 404.

cation of the "guilty property" fiction rests on the "notion that the owner who allows his property to become involved in an offense has been negligent."<sup>40</sup> Thus, while not requiring a showing of guilt on the part of the property owner, in the later cases upholding the forfeiture of an innocent owner's property, the Court investigated whether the property owner actually entrusted the misused property to the wrongdoer.<sup>41</sup> Upon finding an entrustment by an innocent owner, the Court justified forfeiture as a means of deterring owners from transferring their property to those who may misuse it.<sup>42</sup>

In *Van Oster v. Kansas*,<sup>43</sup> the Court, in upholding the forfeiture of an automobile used to transport alcohol illegally, offered a rationale other than the "guilty property" fiction for allowing the forfeiture of property misused without the owner's knowledge or consent.<sup>44</sup> The Court determined that the government was justified in "visiting upon the owner of property, the unpleasant consequences of the unauthorized action of one to whom he has intrusted [sic] it."<sup>45</sup> The Court began by noting that a State's police power permits it to declare certain uses of property undesirable and to subject the property to forfeiture if the owner so uses it.<sup>46</sup> The Court then reasoned that an owner surrenders control of his property at his own peril and, by subjecting property to forfeiture for the illegal acts of those to whom the property is entrusted, the law "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."<sup>47</sup> As such, the Court determined that the State validly exercised its police power by forfeiting the car.<sup>48</sup> For that reason as well as the well-settled precedents allowing forfeiture of property entrusted by innocent owners to wrongdoers,<sup>49</sup> the Court held that the forfeiture did not violate the Due Process Clause of the Fourteenth Amendment.<sup>50</sup>

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<sup>40</sup> *Austin v. United States*, 509 U.S. 602, 616 (1993).

<sup>41</sup> *See, e.g., Calero-Toledo*, 416 U.S. at 663; *Van Oster v. Kansas*, 272 U.S. 465 (1926).

<sup>42</sup> *See Calero-Toledo*, 416 U.S. at 688.

<sup>43</sup> 272 U.S. 465 (1926).

<sup>44</sup> *Id.* at 467-68.

<sup>45</sup> *Id.* at 467.

<sup>46</sup> *Id.* at 466-67.

<sup>47</sup> *Id.* at 466.

<sup>48</sup> *Id.*, 272 U.S. at 468. The Court explicitly reserved judgment as to whether a State's police power would extend to the forfeiture of property which had been stolen from the owner and then misused. *Id.* at 467. Thus, the Court also implicitly reserved judgment as to the constitutionality of such a forfeiture.

<sup>49</sup> *Id.* (citing *J.W. Goldsmith, Jr.-Grant Co. v. United States*, 254 U.S. 505 (1921); *Dobbin's Distillery v. United States*, 96 U.S. 395 (1877)).

<sup>50</sup> *Id.*

Similarly, in *Calero-Toledo v. Pearson Yacht Leasing Co.*,<sup>51</sup> the Court upheld the constitutionality of a Puerto Rican statute providing grounds for the forfeiture of a boat upon which marijuana was found, notwithstanding the boat-leasing company's lack of knowledge of the lessee's criminal activity.<sup>52</sup> After surveying the forfeiture precedents, the Court concluded that the Puerto Rican forfeiture statute furthered punitive and deterrent purposes that had traditionally sufficed to withstand the constitutional challenges made by innocent owners.<sup>53</sup> Furthermore, the Court emphasized that application of forfeiture provisions to "lessors, bailors, or secured creditors who are innocent of any wrongdoing . . . may have the desirable effect of inducing them to exercise greater care in transferring possession of their property."<sup>54</sup> Concluding that the leasing company did not allege, nor offer proof, that it "did all that it reasonably could to avoid having its property put to unlawful use," the Court upheld the confiscation.<sup>55</sup>

Although the Supreme Court has consistently declined to limit the government's power to forfeit the property of innocent owners, the Court offered some protection against abuse of this power by applying the Eighth Amendment Excessive Fines Clause to civil forfeiture in *Austin v. United States*.<sup>56</sup>

#### B. APPLICATION OF THE EXCESSIVE FINES CLAUSE TO CIVIL FORFEITURE

In *Austin*, the Supreme Court again addressed the constitutionality of civil forfeiture; however, the attack was not a due process claim by an innocent owner.<sup>57</sup> Rather, the Court examined whether the Excessive Fines Clause of the Eighth Amendment applied to a civil forfei-

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<sup>51</sup> 416 U.S. 663 (1974).

<sup>52</sup> *Id.* at 669.

<sup>53</sup> *Id.* at 686.

<sup>54</sup> *Id.* at 688. (citing *United States v. One 1936 Model Ford V-8 DeLuxe Coach*, 307 U.S. 219, 238-41 (1939) (Douglas, J., dissenting)). The *Calero-Toledo* Court went on to opine that the "broad sweep" of forfeiture statutes could give rise to "serious constitutional questions" in other circumstances. *Id.* at 689. For example, the court noted that it "would be difficult to reject the constitutional claim of an owner whose property subjected to forfeiture had been taken from him without his privity or consent." *Id.* (citing *Van Oster v. United States*, 272 U.S. 465, 467 (1926); *J.W. Goldsmith Jr.-Grant Co. v. United States*, 254 U.S. 505, 512 (1921)). Furthermore, the Court stated that:

[T]he same might be said of an owner who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property; for, in that circumstance, it would be difficult to conclude that forfeiture served legitimate purposes and was not unduly oppressive.

*Calero-Toledo*, 416 U.S. at 689 (citing *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

<sup>55</sup> *Calero-Toledo*, 416 U.S. at 689.

<sup>56</sup> 509 U.S. 602 (1993).

<sup>57</sup> *Id.* at 604.



ture.<sup>58</sup> In holding that the Excessive Fines Clause limited the government's power to confiscate property, the Court examined both the historical purpose of civil forfeiture and the history of the Eighth Amendment.<sup>59</sup> The Court first noted that the text of the Excessive Fines Clause, unlike other constitutional provisions, did not limit its protection to the context of criminal proceedings.<sup>60</sup> Furthermore, the Court noted that the historical purpose of the provision was to "prevent the government from abusing its power to punish."<sup>61</sup> Thus, the Court concluded that the Excessive Fines Clause applied to any punitive governmental action, either civil or criminal in nature.<sup>62</sup>

Next, the Court addressed whether civil forfeiture generally serves a punitive purpose.<sup>63</sup> The *Austin* Court examined the history of civil forfeiture both in English and American law and concluded that forfeiture generally, and statutory in rem forfeiture in particular, serve as punishment.<sup>64</sup> Furthermore, the Court noted that even its decisions upholding the forfeiture of an innocent owner's property, under either the guilty property or entrustment theories, "rest, at bottom, on the notion that the owner has been negligent in allowing his property to be misused and that he is properly punished for that negligence."<sup>65</sup>

The Court also examined the history of the particular forfeiture statute applied in *Austin* and reached the conclusion that, like civil forfeiture generally, the specific statute served punitive purposes.<sup>66</sup> The Court rejected the government's claim that forfeitures of instruments of the drug trade were remedial and compensatory in nature.<sup>67</sup> Noting that the government possesses a remedial interest in confiscating contraband, the Court emphasized that the property at issue in

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<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 608-18.

<sup>60</sup> *Id.* at 607-10. The Court compared the Excessive Fines Clause to the Self-Incrimination Clause of the Fifth Amendment which states: "No person . . . shall be compelled in any criminal case to be a witness against himself." *Id.* at 607 (citing U.S. CONST. amend. V).

<sup>61</sup> *Id.* at 607 (citing *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. 257, 264-68, 286-97 (1989)).

<sup>62</sup> *Id.* at 610.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 618. The Court noted that forfeiture may also serve a remedial purpose, but concluded that, as long as it is at least partially punitive, it is subject to the limitation of the Excessive Fines Clause. *Id.* at 610.

<sup>65</sup> *Id.* at 615 (citing *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 683 (1974); *J.W. Goldsmith Jr.-Grant Co. v. United States*, 254 U.S. 505 (1921); *Dobbins's Distillery v. United States*, 96 U.S. 395 (1877); *Harmony v. United States*, 43 U.S. (2 How.) 210 (1844); *The Palmyra*, 25 U.S. (12 Wheat.) 1 (1827)).

<sup>66</sup> *Id.* at 619-22. In *Austin*, the government sought the forfeiture of a mobile home and an auto body shop pursuant to a federal statute authorizing the forfeiture of property used in drug trafficking. *Id.* at 604-05 (citing 21 U.S.C. §§ 881(a)(4) and (a)(7) (1988)).

<sup>67</sup> *Id.* at 620-21.

*Austin*, a mobile home and an auto-body shop, were not contraband.<sup>68</sup> Furthermore, the Court stated that the "dramatic variations in the value of conveyances and real property forfeitable under §§ 881(a)(4) and (a)(7) undercut any . . . argument" that the forfeitures serve to compensate the government for the cost of law enforcement.<sup>69</sup> Thus, the Court concluded that the forfeiture in *Austin* was subject to the limitation of the Excessive Fines Clause of the Eighth Amendment.<sup>70</sup>

The *Austin* Court declined to promulgate a test for determining when a civil forfeiture is constitutionally excessive.<sup>71</sup> Rather, the Court remanded the case to the trial court for such determination.<sup>72</sup>

### III. FACTS AND PROCEDURAL HISTORY

On the evening of October 3, 1988, two police officers observed a woman "flagging" passing vehicles on a street corner in a Detroit neighborhood reputed for prostitution.<sup>73</sup> The officers set up surveillance and witnessed a 1977 Pontiac, driven by John Bennis, pick the woman up, then drive a block away and park.<sup>74</sup> The officers approached the vehicle, shined a flashlight into the car and observed the woman and Mr. Bennis engaged in a sexual act.<sup>75</sup> Mr. Bennis was subsequently arrested for and convicted of gross indecency in violation of Michigan Compiled Laws § 750.338b.<sup>76</sup>

In addition to the criminal prosecution for gross indecency, the prosecutor for Wayne County filed a civil complaint against both John Bennis and his wife, Tina Bennis, as joint owners of the 1977 Pontiac.<sup>77</sup> The prosecutor sought to have the car declared a public nuisance subject to forfeiture under Michigan's public nuisance law.<sup>78</sup>

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<sup>68</sup> *Id.* at 621 (citing *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 699 (1965)).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 622.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Michigan v. Bennis*, 527 N.W.2d 483, 486, 488 (Mich. 1994). The court described "flagging" as "the manner in which prostitutes solicit business from potential customers in passing vehicles." *Id.* at 486 n.2.

<sup>74</sup> *Id.* at 486.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* (citing MICH. COMP. LAWS ANN. § 750.338b (West 1991)).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* MICH. COMP. LAWS ANN. § 600.3801 (West 1991) provides in relevant part:

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

In an unreported decision issued from the bench, the trial judge determined that Mr. Bennis had engaged in an act of lewdness and ordered the forfeiture of the Bennises' automobile.<sup>79</sup> Furthermore, he ordered the vehicle's sale with the proceeds to be used to cover the costs of prosecution and law enforcement, with any remainder to be turned over to the State.<sup>80</sup>

At trial, Mrs. Bennis testified that she had no knowledge that her husband would use their car to solicit prostitutes, nor did she know that, on the day of the incident, he would use the car for any purpose other than to come directly home from work.<sup>81</sup> In determining that both Mr. and Mrs. Bennis's interests in the car should be abated, the judge commented that, under other circumstances, he would have considered the independent interest of Mrs. Bennis in the automobile.<sup>82</sup> In this case, however, he would not do so because the Bennises owned another automobile and because there would be "practically nothing left" of the sale proceeds after deducting the relevant costs.<sup>83</sup>

The Michigan Court of Appeals reversed the trial court's decision on several grounds.<sup>84</sup> First, the court held that, as a matter of law, Michigan's nuisance statute required the prosecution to prove that Mrs. Bennis knew of her husband's use of the vehicle as a nuisance before the vehicle could be abated.<sup>85</sup> Second, the court found that, given the facts of this case, the prosecution failed to prove that Mrs. Bennis had such knowledge.<sup>86</sup> Additionally, the court determined that the single incident in the Bennis vehicle was insufficient to create a nuisance for the purpose of the statute because a reasonable inference could not be drawn that such conduct was habitual.<sup>87</sup> Moreover,

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Furthermore, MICH. COMP. LAWS ANN. § 600.3825 (West 1979) authorizes prosecuting attorneys to bring an action to abate the nuisance.

<sup>79</sup> Brief for Petitioner at 1, 5, *Bennis v. Michigan*, 116 S. Ct. 994 (1996) (No. 94-8729).

<sup>80</sup> *Id.* at 6.

<sup>81</sup> *Id.* at 5.

<sup>82</sup> *Id.* at 5 n.4.

<sup>83</sup> *Id.*

<sup>84</sup> *Michigan v. Bennis*, 504 N.W.2d 731, 732-33 (Mich. Ct. App. 1993).

<sup>85</sup> *Id.* at 733. The Michigan appellate court recognized that requiring the prosecution to prove such knowledge is contrary to the plain language of the statute which provides that "[p]roof of knowledge of the existence of the nuisance on the part of the defendant or any of them, is not required." MICH. COMP. LAWS ANN. § 600.3815 (West 1991). However, the court concluded that, regardless of the statutory language, proof of knowledge is required for abatement under the statute based on the Michigan Supreme Court decisions in *People v. Schoonmaker*, 216 N.W.2d 456 (Mich. 1927) (holding that the abatement statute does not deprive an owner of his property unless he consented to or acquiesced in the illegal use of the property) and *State v. Levenburg*, 280 N.W.2d 810 (Mich. 1979) (holding that a judgment for abatement could not be rendered without a finding that the property owner or operator knew of and acquiesced to the solicitation occurring on the property).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 733-34 (citing *State v. Motorama Motel Corp.*, 307 N.W.2d 349 (Mich. Ct. App.

the court found that since the prosecution offered no proof that Mr. Bennis paid money in exchange for sex, his conduct did not constitute lewdness to the extent required to subject the vehicle to forfeiture under the statute.<sup>88</sup>

The Supreme Court of Michigan reversed the appellate court and reinstated the trial court's order forfeiting the Bennis' automobile.<sup>89</sup> The court found that Mr. Bennis had engaged in an act of lewdness squarely within the purview of the nuisance statute.<sup>90</sup> Furthermore, the court determined that Mr. Bennis's single act of lewdness sufficiently constituted a nuisance given that the act occurred in an area known for prostitution, thereby contributing to an already existing public nuisance.<sup>91</sup> Finally, the court held that the statute did not require proof of Mrs. Bennis's knowledge of the nuisance in order to forfeit her interest in the vehicle.<sup>92</sup>

After determining that the Michigan statute subjected Mrs. Bennis's interest in the car to forfeiture, the court examined the constitutional significance of the abatement.<sup>93</sup> The court assumed that Mrs. Bennis did not have knowledge of or consent to her husband's illegal use of the vehicle.<sup>94</sup> Examining the decisions in *Van Oster*<sup>95</sup> and *Calero-Toledo*,<sup>96</sup> the court determined that the United States Supreme Court allows forfeiture of an innocent owner's property based on misuse of the property by others.<sup>97</sup> Specifically, the court relied on *Van Oster*, citing the Supreme Court's rejection of an innocent owner's Fourteenth Amendment due process claim when the offense was "committed by one entrusted by the owner with the possession and use of the offending vehicle."<sup>98</sup> The court noted that Mrs. Bennis, as a joint owner of the car, explicitly or implicitly entrusted Mr. Bennis

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1981) (holding that a single incident of solicitation for prostitution in a bar was insufficient to create a nuisance unless a reasonable inference could be drawn that the conduct was habitual)).

<sup>88</sup> *Id.* at 734-35 (citing *State v. Diversified Theatrical Corp.*, 240 N.W.2d 460 (Mich. 1976)).

<sup>89</sup> *Bennis v. Michigan*, 527 N.W.2d 483, 486 (Mich. 1994).

<sup>90</sup> *Id.* at 487.

<sup>91</sup> *Id.* at 490-92.

<sup>92</sup> *Id.* at 492.

<sup>93</sup> *Id.* at 493-94.

<sup>94</sup> *Id.* at 493.

<sup>95</sup> *Van Oster v. Kansas*, 272 U.S. 465, 467 (1926).

<sup>96</sup> *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 689 (1974).

<sup>97</sup> *Bennis*, 527 N.W.2d at 494 (citing *Van Oster*, 272 U.S. at 467; *Calero-Toledo*, 416 U.S. at 689). However, the court acknowledged that the Supreme Court's opinions indicated that there would be a constitutional limitation upon the forfeiture of property stolen from the owner and then misused or property that was used without the owner's consent or knowledge. *Id.* (citing *Calero-Toledo*, 416 U.S. at 689).

<sup>98</sup> *Id.* (quoting *Van Oster*, 272 U.S. at 467).

with use of the vehicle.<sup>99</sup> The court thus held that the abatement of Mrs. Bennis's interest in the car did not violate the Constitution.<sup>100</sup>

The United States Supreme Court granted certiorari<sup>101</sup> to determine if forfeiture of the Bennises' car pursuant to Michigan's abatement statute deprived Tina Bennis of her interest in the forfeited automobile without due process of law in violation of the Fourteenth Amendment, or constituted a taking of her property for public use without compensation in violation of the Fifth Amendment.<sup>102</sup>

#### IV. SUMMARY OF THE OPINIONS

##### A. THE MAJORITY OPINION

In an opinion by Chief Justice Rehnquist,<sup>103</sup> the Court affirmed the decision of the Michigan Supreme Court, holding that the forfeiture of Mrs. Bennis's interest in the automobile, despite her lack of knowledge of or consent to the illegal use of the car, offended neither the Due Process Clause nor the Takings Clause of the Constitution.<sup>104</sup>

Initially, the Court noted that the basis of Mrs. Bennis's due process claim was not that the State denied her notice or an opportunity to contest the forfeiture of her interest in the car.<sup>105</sup> Rather, Mrs. Bennis claimed an entitlement to contest the abatement by establishing her lack of knowledge that her husband would use the vehicle to violate the law.<sup>106</sup> In rejecting this claim, the Court examined a "long and unbroken line of cases" holding that an owner's interest in property could be forfeited because of others' illegal use of the property regardless of whether the owner knew the property would be put to such use.<sup>107</sup>

Chief Justice Rehnquist began by examining *The Palmyra*,<sup>108</sup> in which the United States sought the forfeiture of a ship that the King of Spain commissioned as a privateer and which attacked a United States vessel.<sup>109</sup> Considering the vessel, not the owner, as the offender, the Supreme Court rejected the owner's contention that the

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<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 494-95.

<sup>101</sup> *Bennis v. Michigan*, 115 S. Ct. 2275 (1995).

<sup>102</sup> *Bennis v. Michigan*, 116 S. Ct. 994, 998 (1996).

<sup>103</sup> Justices O'Connor, Scalia, Thomas, and Ginsburg joined Chief Justice Rehnquist's opinion.

<sup>104</sup> *Bennis*, 116 S. Ct. at 998.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> 25 U.S. (12 Wheat.) 1 (1827). See *supra* notes 20-27 and accompanying text for a discussion of *The Palmyra*.

<sup>109</sup> *Bennis*, 116 S. Ct. at 998.

ship could not be forfeited until he was convicted of privateering.<sup>110</sup> Chief Justice Rehnquist referred to another admiralty case, *Harmony v. United States*<sup>111</sup> for the proposition that a ship owner impliedly submits the vessel to forfeiture for the unlawful acts of ship's master and crew, regardless of the owner's guilt.<sup>112</sup>

Next, Chief Justice Rehnquist surveyed cases outside the realm of admiralty law to further support the Court's position that an innocent owner's interest may be subject to forfeiture for the wrongful acts of those to whom the owner entrusts the property.<sup>113</sup> The majority opinion highlighted *Van Oster*,<sup>114</sup> in which the Court upheld the forfeiture of a car used to illegally transport alcohol, despite the owner's claimed lack of knowledge or authorization of the illegal transport.<sup>115</sup> Furthermore, the Court emphasized the well-established principle that due process does not protect an owner against the consequences of the unlawful acts of those to whom the owner entrusts the property.<sup>116</sup> Chief Justice Rehnquist found Mrs. Bennis's position to be indistinguishable from the position of the various property owners in the precedential forfeiture cases.<sup>117</sup>

After surveying the forfeiture precedents, the majority rejected Mrs. Bennis's assertions that the Court's prior decisions left open the possibility that she should be afforded constitutional protection against the confiscation of her property.<sup>118</sup> First, Chief Justice Rehnquist disposed of Mrs. Bennis's reliance on a passage from the opinion in *Calero-Toledo v. Pearson Yacht Leasing Co.*,<sup>119</sup> as misplaced, characterizing the passage as "obiter dictum."<sup>120</sup> In *Calero-Toledo*, the Court acknowledged that "it would be difficult to reject the constitutional claim" of an owner who was unaware of the criminal use of his property and who had done everything reasonable to prevent such use.<sup>121</sup> However, the *Calero-Toledo* Court went on to uphold the forfeiture of the interest of a yacht leasing company in a yacht which the lessee used to transport drugs even though the company had no knowledge

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<sup>110</sup> *Id.* (quoting *The Palmyra*, 25 U.S. at 14).

<sup>111</sup> 43 U.S. (2 How.) 210 (1844). See also *supra* notes 28-32 and accompanying text discussing *Harmony*.

<sup>112</sup> *Bennis*, 116 S. Ct. at 998 (citing *Harmony*, 43 U.S. at 210).

<sup>113</sup> *Id.* (citing *Dobbins's Distillery v. United States*, 96 U.S. 395, 401 (1878); *Van Oster v. Kansas*, 272 U.S. 465, 465-68 (1926)).

<sup>114</sup> 272 U.S. 465 (1926).

<sup>115</sup> *Bennis*, 116 S. Ct. at 998 (citing *Van Oster*, 272 U.S. at 465-66).

<sup>116</sup> *Id.* (citing *Van Oster*, 272 U.S. at 465-66).

<sup>117</sup> *Id.* at 999.

<sup>118</sup> *Id.*

<sup>119</sup> 416 U.S. 663 (1974).

<sup>120</sup> *Bennis*, 116 S. Ct. at 999.

<sup>121</sup> *Id.* (quoting *Calero-Toledo*, 416 U.S. at 689).

of or involvement in the criminal activity.<sup>122</sup> Chief Justice Rehnquist stated that Mrs. Bennis's claim fell within the *Calero-Toledo* holding.<sup>123</sup>

Next, the Court acknowledged that previous forfeiture cases specifically reserved the question of whether an innocent owner's interest in illegally-used property could be forfeited when the property had been stolen from the owner or used without the owner's knowledge or consent.<sup>124</sup> However, Chief Justice Rehnquist pointed out that since Mr. Bennis was a co-owner of the vehicle, the Court was not required to make such a determination in this case.<sup>125</sup>

Furthermore, the Chief Justice rejected Mrs. Bennis's suggestion that the Court overrule the precedents "by importing a culpability requirement from cases having at best a tangential relation to the 'innocent owner' doctrine of the forfeiture cases."<sup>126</sup> Mrs. Bennis cited *Foucha v. Louisiana*,<sup>127</sup> for the proposition that a criminal defendant cannot be punished for a crime without proof that he is guilty.<sup>128</sup> The majority found unpersuasive Mrs. Bennis' argument that the *Foucha* holding mandated that Michigan demonstrate a punitive interest in forfeiting Mrs. Bennis's interest in the vehicle.<sup>129</sup> Reserving judgment on whether the forfeiture proceeding was punitive, the Court stated that the *Foucha* decision did not discuss, let alone overrule the forfeiture cases.<sup>130</sup>

Similarly, Chief Justice Rehnquist dismissed Mrs. Bennis's reliance on the *Austin* Court's holding that the Excessive Fines Clause limits the scope of civil forfeiture.<sup>131</sup> Mrs. Bennis argued that the *Austin* holding "would be difficult to reconcile with any rule allowing truly innocent persons to be punished by civil forfeiture."<sup>132</sup> Chief Justice

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<sup>122</sup> *Id.* (citing *Calero-Toledo*, 419 U.S. at 668).

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 999 n.5 (citing *J.W. Goldsmith Jr.-Grant Co. v. United States*, 254 U.S. 505, 512 (1921)).

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 1000.

<sup>127</sup> 504 U.S. 71 (1992). In *Foucha*, the Supreme Court held that a defendant found not guilty by reason of insanity could not be confined indefinitely unless the State showed that the defendant was either dangerous or mentally ill. The *Foucha* Court reasoned that without a showing of dangerousness or insanity, the State had no "punitive interest" to justify detention. *Bennis*, 116 S. Ct. at 1000 (citing *Foucha*, 504 U.S. at 80). Thus, Mrs. Bennis argued that Michigan had to demonstrate a valid punitive purpose for forfeiting her interest in the vehicle before the State could impose that "punishment" upon her. See *Bennis*, 115 S. Ct. at 1000.

<sup>128</sup> *Bennis*, 116 S. Ct. at 1000.

<sup>129</sup> See *id.*

<sup>130</sup> *Id.*

<sup>131</sup> See *id.*

<sup>132</sup> *Id.* (quoting Brief for Petitioner at 18-19 n.12, *Bennis v. Michigan*, 116 S. Ct. 994 (1996) (No. 94-8729)).

Rehnquist noted that the *Austin* Court did not address the validity of the “innocent-owner defense,” except to opine that the existence of such a defense in the forfeiture statute evidenced the punitive nature of the forfeiture.<sup>133</sup> Furthermore, he noted that Michigan’s abatement proceedings were not purely punitive, but, rather, were equitable actions in which the trial court had remedial discretion to consider alternatives other than abating the entire interest in the vehicle.<sup>134</sup> The Court also pointed out that forfeiture served a deterrent purpose distinct from punishment.<sup>135</sup>

Finally, Chief Justice Rehnquist addressed Mrs. Bennis’s Fifth Amendment claim.<sup>136</sup> The Court determined that Michigan lawfully acquired the Bennis’ vehicle because the forfeiture did not offend due process.<sup>137</sup> Noting that the government is not required to compensate an owner for property lawfully taken, other than through the exercise of eminent domain, the Court held that the State was not required to compensate Mrs. Bennis for her interest.<sup>138</sup>

#### B. JUSTICE THOMAS’S CONCURRENCE

Justice Thomas wrote a concurring opinion that acknowledged the apparent inequity of allowing the State to forfeit a property owner’s interest without proving any wrongdoing by the property owner.<sup>139</sup> He pointed out, however, that the Constitution does not prohibit all that is undesirable.<sup>140</sup> Justice Thomas also reiterated the majority’s position that the Constitution permits the forfeiture of an innocent owner’s property and that precedent supports such forfeitures.<sup>141</sup>

Justice Thomas noted the State has a valid, remedial interest in abating the vehicle to prevent future criminal activity and deducting the costs of law enforcement from the sale proceeds.<sup>142</sup> Furthermore, as the trial court determined that a division of the proceeds would yield almost nothing, Justice Thomas characterized the forfeiture of

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<sup>133</sup> *Bennis*, 116 S. Ct. at 1000.

<sup>134</sup> *Id.* (citing *Michigan v. Bennis*, 527 N.W.2d 483, 495 (Mich. 1994)).

<sup>135</sup> *Id.* (citing *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 687 (1974)).

<sup>136</sup> *Id.* at 1001.

<sup>137</sup> *See id.*

<sup>138</sup> *Id.* (citing *United States v. Fuller*, 409 U.S. 488, 492 (1973)).

<sup>139</sup> *Id.* at 1001 (Thomas, J., concurring).

<sup>140</sup> *Id.* at 1001-02 (Thomas, J., concurring).

<sup>141</sup> *See id.* at 1002 (Thomas, J., concurring). Justice Thomas suggested that a more appropriate limitation on the State’s right to forfeit property would be to strictly construe what may be considered an instrumentality of crime for purposes of abatement. *Id.* However, Mrs. Bennis did not assert that the vehicle was not an instrumentality of her husband’s crime. *Id.*

<sup>142</sup> *See id.* (Thomas, J., concurring).



Mrs. Bennis's interest in the vehicle without compensation as remedial, rather than punitive.<sup>143</sup> Therefore, Justice Thomas reasoned that the forfeiture avoided the problems associated with imposing punishment upon an innocent individual.<sup>144</sup>

#### C. JUSTICE GINSBURG'S CONCURRENCE

Justice Ginsburg wrote a separate opinion to "highlight features of the case key to [her] judgment."<sup>145</sup> She began by noting that the car belonged to John Bennis just as much as it belonged to Tina Bennis, and, at all times, he had her permission to use it.<sup>146</sup> Justice Ginsburg emphasized that no one contested Michigan's right to forfeit the automobile.<sup>147</sup> She pointed out that the sole question was whether Tina Bennis had a constitutional right to a portion of the proceeds from the sale of the car.<sup>148</sup>

Justice Ginsburg noted that Michigan's abatement proceedings are "equitable action[s]," which the Michigan Supreme Court "stands ready to police" against "exorbitant application" and "inequitable administration."<sup>149</sup> Furthermore, she emphasized that the trial court based its decision not to divide the proceeds of the sale on the practical consideration that the age and value of the forfeited car left almost nothing to be divided and that the Bennises had another car.<sup>150</sup> In short, the trial court had not acted "blatantly unfairly," nor had the State "embarked on an experiment to punish innocent third parties."<sup>151</sup> Thus, Justice Ginsburg reasoned, Michigan's endeavor to rid its neighborhoods of illicit activity did not warrant the Court's disapproval.<sup>152</sup>

#### D. JUSTICE STEVENS'S DISSENT

Justice Stevens dissented due to his belief that the majority's decision would allow the government "virtually unbridled power" to confiscate property used in illegal acts.<sup>153</sup> Furthermore, he disagreed with the majority's "apparent assumption" that the Constitution im-

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<sup>143</sup> See *id.* (Thomas, J., concurring).

<sup>144</sup> See *id.* (Thomas, J., concurring).

<sup>145</sup> *Bennis*, 116 S. Ct. at 1003 (Ginsburg, J., concurring).

<sup>146</sup> *Id.* (Ginsburg, J., concurring).

<sup>147</sup> *Id.* (Ginsburg, J., concurring).

<sup>148</sup> *Id.* (Ginsburg, J., concurring).

<sup>149</sup> *Id.* (Ginsburg, J., concurring).

<sup>150</sup> *Id.* (Ginsburg, J., concurring).

<sup>151</sup> *Id.* (Ginsburg, J., concurring).

<sup>152</sup> *Id.* (Ginsburg, J., concurring).

<sup>153</sup> *Bennis*, 116 S. Ct. at 1003 (Stevens, J., dissenting). Justices Souter and Breyer joined Justice Stevens' dissent.

posed no limitation on the government's authority to seize property from innocent owners.<sup>154</sup> Finally, Justice Stevens asserted that the forfeiture of Mrs. Bennis's interest in the car should have been reversed on due process grounds and as a violation of the Excessive Fines Clause.<sup>155</sup>

Justice Stevens began his analysis by dividing seizable property into three categories: pure contraband; proceeds of criminal activity; and the instrumentalities of crime.<sup>156</sup> Pure contraband, Justice Stevens explained, is property of which possession constitutes a crime.<sup>157</sup> While he acknowledged the government's remedial interest in confiscating such property irrespective of the owner's blameworthiness, he noted that a car was not contraband.<sup>158</sup>

Justice Stevens next explained that the second category of forfeitable goods, proceeds of criminal activity, had traditionally covered only stolen property, which was justifiably confiscated and returned to the original owner upon restitutionary grounds.<sup>159</sup> He noted that the enlargement of the category to cover earnings from various illegal activities was not problematic because most of the federal forfeiture statutes include protections for innocent owners.<sup>160</sup> Furthermore, he found the inclusion of the innocent owner provision in the federal statutes to be persuasive of the notion that fairness requires consideration of an innocent owner's property rights.<sup>161</sup>

Finally, Justice Stevens noted that forfeiture in the third category, property used in the commission of crime, is more problematic.<sup>162</sup> He reasoned that forfeiture of such property can have a very broad reach and the government's remedial interest in confiscation is less evident.<sup>163</sup> Reviewing the admiralty precedents in this category, Justice Stevens concluded that they were distinguishable from Mrs. Bennis' case for two reasons.<sup>164</sup> First, the principal use of Mrs. Bennis's

<sup>154</sup> *Id.* at 1004 (Stevens, J., dissenting).

<sup>155</sup> *See id.* at 1009-10 (Stevens, J. dissenting).

<sup>156</sup> *Id.* at 1004 (Stevens, J., dissenting).

<sup>157</sup> *Id.* (Stevens, J., dissenting) (citation omitted).

<sup>158</sup> *Id.* (Stevens, J., dissenting).

<sup>159</sup> *Id.* (Stevens, J., dissenting).

<sup>160</sup> *Id.* (Stevens, J., dissenting). For example, forfeitures of drugs, drug producing equipment, drug containers, and property used in drug trafficking under 21 U.S.C.A. § 881(a)(7) (1981 & Supp. 1996), provide an innocent owner with a defense as follows: "no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner."

<sup>161</sup> *Id.* (Stevens, J., dissenting).

<sup>162</sup> *Id.* (Stevens, J., dissenting).

<sup>163</sup> *Id.* (Stevens, J., dissenting).

<sup>164</sup> *See id.* at 1004-5 (Stevens, J., dissenting).

car was not to commit acts of lewdness.<sup>165</sup> Second, the car did not actually facilitate the crime.<sup>166</sup> Justice Stevens emphasized that, on one occasion, the car merely served as an enclosure for the sexual act, which could have occurred anywhere.<sup>167</sup> Thus, he felt that the nexus between the crime and the property was insufficient to justify forfeiture.<sup>168</sup>

Next, Justice Stevens criticized the State's attempt to categorize the forfeiture of the Bennis automobile as purely remedial.<sup>169</sup> He noted that confiscation of the car in no way prevented Mr. Bennis from engaging a prostitute in other venues; nor was the car itself a "nuisance" without the sexual activity.<sup>170</sup> Thus, he concluded that Michigan's remedial interest did not justify the confiscation.<sup>171</sup>

In the second part of his dissent, Justice Stevens voiced his belief that "[f]undamental fairness" prohibited the punishment of innocent individuals.<sup>172</sup> He asserted that the majority mischaracterized the rule of the Court's prior holdings as mandating an owner's strict liability for wrongful use of his property.<sup>173</sup> Furthermore, he noted that the *Austin* Court surveyed the same precedents and concluded that each decision rested, at a minimum, on the belief that the property owner was negligent in allowing his property to be misused.<sup>174</sup> As the State conceded that Mrs. Bennis was in no way negligent in allowing Mr. Bennis to use the car, Justice Stevens felt that forfeiture was improper.<sup>175</sup>

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<sup>165</sup> See *id.* at 1005 (Stevens, J., dissenting) (citing *Van Oster v. United States*, 272 U.S. 465 (1926); *J.W. Goldsmith Jr.-Grant Co. v. United States*, 254 U.S. 505 (1921); *Harmony v. United States*, 43 U.S. (2 How.) 210 (1844); *The Palmyra*, 25 U.S. (12 Wheat.) 1, 6 (1827)) (citations omitted).

<sup>166</sup> *Id.* Justice Stevens cited to several cases for similar propositions. For example, he noted that the offense giving rise to forfeiture of a car in *Van Oster* included transportation as an element. *Id.* (citing *Van Oster*, 272 U.S. at 466 (forfeiture of a car for the illegal transport of alcohol)). Justice Stevens also referred to the Court's decision in *J.W. Goldsmith Jr.-Grant Co.*, which discussed "the adaptability of a particular form of property to an illegal purpose." *Id.* at 1006 (quoting *J.W. Goldsmith Jr.-Grant Co.*, 254 U.S. at 513)).

<sup>167</sup> *Id.* at 1006 (Stevens, J. dissenting). Justice Stevens also highlighted the Michigan Supreme Court's theory that the car contributed the ongoing nuisance condition of the neighborhood. *Id.* at n.9 (citing *Bennis v. Michigan*, 527 N.W.2d 483, 491 (Mich. 1994)). He pointed out that a "bizarre consequence" of the Michigan Supreme Court's theory was that if Mr. Bennis had parked the car somewhere else during the sexual activity, the car may not have been subject to forfeiture. *Id.*

<sup>168</sup> *Id.* (Stevens, J., dissenting).

<sup>169</sup> *Id.* at 1006-07 (Stevens, J., dissenting).

<sup>170</sup> *Id.* at 1007 (Stevens, J., dissenting).

<sup>171</sup> *Id.* (Stevens, J., dissenting).

<sup>172</sup> *Id.* (Stevens, J., dissenting).

<sup>173</sup> *Id.* (Stevens, J., dissenting).

<sup>174</sup> *Id.* (Stevens, J., dissenting).

<sup>175</sup> *Id.* (Stevens, J., dissenting).

As further support for his proposition that the forfeiture offended due process, Justice Stevens noted the punitive nature of forfeiture and cited cases in which, albeit in other contexts, the Court determined that a person could not constitutionally be punished without a showing of wrongdoing.<sup>176</sup> He suggested that the Court should now hold, as it always had assumed, that due process requires proof of guilt for the imposition of punishment.<sup>177</sup> Furthermore, Justice Stevens opined that the facts of the case demonstrated that Mrs. Bennis was truly innocent; thus, he concluded that the "seizure constituted an arbitrary deprivation of property without due process of law."<sup>178</sup>

Justice Stevens concluded his dissent by stating that the forfeiture clearly violated the Eighth Amendment.<sup>179</sup> First, he criticized the majority's decision as "dramatically at odds with" the holding in *Austin*.<sup>180</sup> He noted that even a modest penalty is out of proportion to Mrs. Bennis' guilt.<sup>181</sup> Although Justice Stevens declined to draw a bright line between the permissible and impermissible forfeiture of an innocent owner's property, he felt that the "blatant unfairness" of the Bennis forfeiture made it unconstitutional.<sup>182</sup>

#### E. JUSTICE KENNEDY'S DISSENT

In a separate dissent, Justice Kennedy addressed the well-recognized tradition of forfeiture under maritime and admiralty law.<sup>183</sup> He also noted its justification of compensating the injuries caused by the vessels and the difficulty of locating the vessels' owners or ascertaining the owner's culpability.<sup>184</sup> However, he emphasized that even the tradition of admiralty forfeiture law could not justify a rule stating that, in all instances, a vessel may be seized for criminal activity conducted without the owner's consent or knowledge.<sup>185</sup> Thus, he reasoned that the Court could maintain the validity of its admiralty forfeiture deci-

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<sup>176</sup> *Id.* at 1008 (Stevens, J., dissenting) (citing *Southwestern Tel. & Tel. Co. v. Danaher*, 238 U.S. 482, 490-91 (1915) ("invalidating penalty under Due Process Clause for conduct that involved 'no intentional wrongdoing; no departure from any prescribed or known standard of action, and no reckless conduct'")).

<sup>177</sup> *Id.* (Stevens, J., dissenting).

<sup>178</sup> *Id.* at 1008-09 (Stevens, J., dissenting). Justice Stevens also asserted that the secondary rationales advanced for strict liability for property owners, namely deterrence and relieving the State of the difficulty of proving collusion between the wrongdoer and the property owner, were not supported in this case. *Id.* at 1009 (Stevens, J., dissenting).

<sup>179</sup> *Id.* at 1010 (Stevens, J., dissenting).

<sup>180</sup> *Id.* (Stevens, J., dissenting).

<sup>181</sup> *Id.* (Stevens, J., dissenting).

<sup>182</sup> *Id.* (Stevens, J., dissenting).

<sup>183</sup> *Bennis*, 116 S. Ct. at 1010 (Kennedy, J., dissenting).

<sup>184</sup> *Id.* (Kennedy, J., dissenting).

<sup>185</sup> *Id.* (Kennedy, J., dissenting).

sions without extending their application to Mrs. Bennis's case.<sup>186</sup> Moreover, he distinguished *Bennis* from the admiralty precedents because the Bennis vehicle was not used to transport contraband.<sup>187</sup>

Justice Kennedy expressed his view that the forfeiture did not meet the requirements of due process because the Michigan Supreme Court did not premise its decision to abate the vehicle on Mrs. Bennis's negligence or complicity with respect to her husband's illegal activity.<sup>188</sup> Justice Kennedy concluded that nothing in the record supported the notion "that the value of her co-ownership is so insignificant as to be beneath the law's protection."<sup>189</sup>

## V. ANALYSIS

This Note argues that although the majority's opinion claimed to be grounded in a "long and unbroken line" of precedent upholding the forfeiture of an innocent owner's property, the decision actually and unnecessarily extended the applicability of its prior decisions. Had the majority examined and applied the rationales underlying prior cases, it would have determined that the forfeiture of Mrs. Bennis's interest in the automobile was unjustified. Instead, the Court perpetuated the unfairness admittedly resulting from punishing one who is not guilty of wrongdoing.

This Note also argues that the majority failed to address the limitation that the Excessive Fines Clause of the Eighth Amendment imposed on the forfeiture in this case. The Court should have recognized that the forfeiture was at least partially punitive and, under *Austin*, remanded the case to the lower court to determine whether the punishment was unconstitutionally excessive.

### A. FORFEITURE OF MRS. BENNIS'S INTEREST IN THE CAR IS NOT JUSTIFIED

The majority's interpretation and application of the innocent owner forfeiture precedents reflects a superficial and overly-broad reading of those cases.<sup>190</sup> Furthermore, the *Bennis* case is distinguishable from the precedents on which the majority rely.<sup>191</sup> Thus, the majority could have determined the forfeiture of Mrs. Bennis's interest in the vehicle to be unconstitutional without overruling the admiralty

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<sup>186</sup> See *id.* (Kennedy, J., dissenting).

<sup>187</sup> *Id.* (Kennedy, J., dissenting).

<sup>188</sup> *Id.* (Kennedy, J., dissenting).

<sup>189</sup> *Id.* at 1011 (Kennedy, J., dissenting).

<sup>190</sup> See *id.*; *id.* at 1010-11 (Kennedy, J., dissenting).

<sup>191</sup> See *id.* at 1005-06 (Stevens, J., dissenting); *id.* at 1011 (Kennedy, J., dissenting).

and illegal transport cases.<sup>192</sup> Moreover, the rationales advanced by the Court for the forfeiture of an innocent owner's property in the precedents do not support the forfeiture of Mrs. Bennis's interest in the automobile. As such, the forfeiture of Mrs. Bennis's interest is not justified and should have been reversed.

### 1. *The Guilty Property Fiction and Its Underlying Rationales*

In reviewing the admiralty cases, specifically *The Palmyra* and *Harmony*, Chief Justice Rehnquist emphasized the Supreme Court's prior determination that in those in rem admiralty forfeiture proceedings, the offense attached to the vessel.<sup>193</sup> The vessel was considered "guilty property," thus, the guilt or innocence of the ship owner was irrelevant.<sup>194</sup> However, the majority failed to acknowledge the rationales advanced for attaching the offense to the ships. Consequently, the Court neglected to determine the rationales' applicability to civil forfeiture as used today, generally, and, specifically, to the abatement of a vehicle in which an alleged act of prostitution occurred.

A primary justification for treating the vessel as "guilty property" under admiralty law was the difficulty in locating or obtaining jurisdiction over the ship-owner.<sup>195</sup> Consequently, proceeding against the ship directly was the only way of ensuring a remedy for or indemnification to the injured party.<sup>196</sup>

Another rationale advanced for attaching the offense directly to the vessel was that under certain admiralty forfeiture provisions, there was no statutory means for proceeding against the property owner himself.<sup>197</sup> Thus, the forfeiture statutes would have been inoperable if application was dependent upon first convicting a ship owner of some wrongdoing.<sup>198</sup>

Applying these justifications to the forfeiture of Mrs. Bennis's interest in the Bennis's jointly-owned car reveals that they do not sustain the confiscation. First, because Mrs. Bennis is a Michigan resident, the State clearly had jurisdiction over her. Similarly, because Mr. Bennis is also a Michigan resident, compensation or indemnification for any injury resulting from Mr. Bennis's nuisance-use of the car

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<sup>192</sup> See *id.* at 1011 (Kennedy, J., dissenting).

<sup>193</sup> See *id.* at 998.

<sup>194</sup> *Id.* at 998.

<sup>195</sup> See Piety, *supra* note 19, at 936-38 (discussing Holmes's theory for the use of the "guilty property" in admiralty law).

<sup>196</sup> See *Harmony v. United States*, 43 U.S. (2 How.) 210, 233 (1844); Piety, *supra* note 19, at 936-38.

<sup>197</sup> See *The Palmyra*, 25 U.S. (12 Wheat.) 1, 15 (1827) (noting that there was no authorization for the punishment of a person who commits acts of piracy).

<sup>198</sup> See *id.*

could be addressed in a Michigan court.<sup>199</sup> As a result, the State did not need to proceed against the vehicle for lack of jurisdiction over the owners or to ensure a remedy for an injured party.

Additionally, as Mr. Bennis's guilt in the underlying offense, lewdness, was previously adjudicated, the State did not need to proceed against the car directly or Mr. and Mrs. Bennis jointly. Unlike the piracy forfeiture act in *Harmony*, Michigan maintains a statutory mechanism to proceed against the property owner for the illegal conduct in which the car was used.<sup>200</sup> Consequently, the State had adequate means of enforcing its nuisance abatement statute and did not need to proceed against the car without respect to or determination of the owners' guilt.<sup>201</sup> As such, the primary rationales used by the federal government in confiscating ships irrespective of the ship-owner's guilt in the admiralty cases do not apply to the State's forfeiture of Mrs. Bennis's interest in the car. Thus, in this case, the Court upheld the forfeiture of an innocent owner's property in a context that is beyond the scope of the initial application of such forfeitures under American law.

## 2. *The Entrustment Theory and Its Far-reaching Ramifications*

Similarly, the majority failed to address the underlying rationales behind the prior cases upholding the forfeiture of property when an innocent owner entrusts the property to one who then misuses it. The primary rationales advanced for allowing the forfeiture of such property are that it builds a secondary defense against a forbidden use by relieving the government of the obligation to prove complicity between the owner and the wrongdoer,<sup>202</sup> and that it may deter owners from transferring property to those who may misuse it.<sup>203</sup> Although Chief Justice Rehnquist quoted the language from *Van Oster and Calero-Toledo* which advances these rationales,<sup>204</sup> he did not examine their applicability to the forfeiture of Mrs. Bennis's interest.

For three reasons, the "entrustment" theory rationales are not applicable to Mrs. Bennis's case. First, the forfeiture of the automobile

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<sup>199</sup> Mr. Bennis was, in fact, criminally prosecuted in Michigan for gross indecency.

<sup>200</sup> Mr. Bennis was convicted of gross indecency pursuant to MICH. COMP. LAWS ANN. § 750.338b (West 1991 & Supp 1996). See *supra* note 76 and accompanying text.

<sup>201</sup> This argument applies to both Mr. and Mrs. Bennis's interest in the car. However, the argument has particular force with respect to Mrs. Bennis's interest because, while the State had an adequate means to suppress the offense of lewdness through its gross indecency statute, the State had to circumvent that statute and attach the offense directly to the car to forfeit Mrs. Bennis's interest.

<sup>202</sup> See *Van Oster v. Kansas*, 272 U.S. 465, 467-68 (1926).

<sup>203</sup> See *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 688 (1974).

<sup>204</sup> See *Bennis v. Michigan*, 116 S. Ct. 994, 998-99 (1996).

can serve no deterrent purpose with respect to Mrs. Bennis because she could not have known that Mr. Bennis would use the car to solicit prostitutes.<sup>205</sup> As such, the threat of forfeiture of the vehicle as a consequence of such use would not have altered her behavior. Mrs. Bennis would not have taken steps to prevent the illegal conduct or refrained from allowing her husband to drive the car despite the possibility of forfeiture.

Second, there was no "entrustment" or transfer of possession to deter in this case. As a joint-owner of the car, Mr. Bennis was entitled to use it at all times. Justice Ginsburg, however, asserted that as a joint-owner with Mrs. Bennis, Mr. Bennis had her consent to use the car at all times.<sup>206</sup> Justice Ginsburg's suggestion of treating joint-ownership as a form of consent or entrustment sufficient to justify forfeiture of an otherwise innocent owner's property not only exceeds the application of the entrustment theory in prior forfeiture cases,<sup>207</sup> but it would also have staggeringly far-reaching consequences. All items of business property or marital property would be subject to forfeiture for the wrongdoings of any of the co-owners and the threat of forfeiture could work as a deterrent against joint-ownership.

Finally, in some cases, the government may be justified in forfeiting property without a showing of guilt on the part of the property owner due to the difficulty of proving that the owner allowed the wrongdoer to use the property knowing or consenting to the fact that it would be used illegally. However, in this case, the State conceded that Mrs. Bennis did not know of or consent to her husband's illegal acts. Thus, the forfeiture of Mrs. Bennis' interest in the car cannot be premised on relieving the State from the obligation of proving her complicity in the crime.

### 3. *The Majority Opinion Represents an Unfair and Unnecessary Extension of Precedent*

Eight justices acknowledged that the imposition of punishment without a showing of guilt may be unfair.<sup>208</sup> Four members of the

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<sup>205</sup> See *id.* at 1009 (Stevens, J., dissenting). Justice Stevens noted that the car was not primarily used to provide a location for engaging a prostitute nor was a vehicle a necessary element for Mr. Bennis's offense. *Id.* at 1005. Thus, it is likely that Mrs. Bennis could not have foreseen and consequently prevented the conduct.

<sup>206</sup> *Id.* at 1003 (Ginsburg, J., concurring).

<sup>207</sup> The forfeiture precedents involve relationships in which the owner explicitly authorized the wrongdoer to use the property. For example, in *Calero-Toledo* and *Dobbins's Distillery*, there was a lessor-lessee relationship between the owner and the wrongful-user, and in the admiralty cases the ship-owner entrusted the operation of the ship to the ship-master.

<sup>208</sup> See *id.* at 1001; *id.* at 1001 (Thomas, J., concurring); *id.* at 1007 (Stevens, J., dissenting).



Court concluded that forfeiture of a truly innocent owner's property is a violation of due process.<sup>209</sup> Furthermore, the forfeiture cases upon which Chief Justice Rehnquist relied have consistently acknowledged that innocent owners may be afforded some constitutional protection. *J.W. Goldsmith Jr.-Grant Co. v. United States*<sup>210</sup> reserved the question of the constitutionality of forfeiting property that was stolen from the innocent owner.<sup>211</sup> *Calero-Toledo* went as far as intimating constitutional protection for an owner who did "all that reasonably could be expected to prevent the proscribed use of his property."<sup>212</sup> Additionally, the Court in *Austin* opined that all of the previous innocent owner forfeitures were premised on the owner's negligence in allowing his property to be misused.<sup>213</sup> The decisions in these cases indicate not only that the Constitution should protect a truly innocent owner from forfeiture due to the wrongdoings of others, but also that a viable standard for who is an innocent owner is one who was not negligent in allowing his property to be misused.

The *Bennis* Court could have adopted this standard and provided the constitutional protection to innocent owners that the prior decisions intimated existed. Instead, the Court in *Bennis* dismissed the *Calero-Toledo* Court's statement as obiter dictum and extended, beyond their underlying rationales, the applicability of its prior innocent owner forfeiture holdings. Had the Court adopted the *Calero-Toledo* Court's reasoning, it could have determined that the forfeiture of Mrs. Bennis' interest was unconstitutional, without overruling precedent, and continued on the course that it apparently had been undertaking to afford innocent owners constitutional protection.

#### B. THE COURT SHOULD HAVE APPLIED AN EXCESSIVE FINES CLAUSE ANALYSIS

In *Austin*, the Supreme Court determined that the Eighth

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<sup>209</sup> See *id.* at 1009 (Stevens, J., dissenting); *id.* at 1011 (Kennedy, J., dissenting).

<sup>210</sup> 254 U.S. 505 (1921).

<sup>211</sup> *Id.* at 512.

<sup>212</sup> *Calero-Toledo*, 416 U.S. at 689. Further support for the notion that the *Calero-Toledo* "negligence" standard should be used for determining the constitutionality of a forfeiture derives from the fact that several circuits have adopted the "*Calero-Toledo* Standard" or "all reasonable efforts" standard for determining merit of an "innocent owner" defense under the federal drug forfeiture statute. See, e.g., *United States v. 1012 Germantown Road*, 963 F.2d 1496, 1504-05 (11th Cir. 1992) (acknowledging that the intimation of constitutional constraint in the *Calero-Toledo* decision is not binding, but electing to adopt the standard to define "consent" in the innocent owner defense of the Controlled Substances Act, 21 U.S.C. § 881(a)(7) (1981 & Supp. 1996)); *United States v. 141st Street Corp.*, 911 F.2d 870, 879 (2d Cir. 1990). *But cf.* *United States v. Lots 12, 13, 14 and 15*, 869 F.2d 942, 946-47 (6th Cir. 1989).

<sup>213</sup> *Austin v. United States*, 509 U.S. 602, 615 (1993).

Amendment's Excessive Fines Clause, which was meant to limit the government's power to punish, applied to both civil and criminal actions, as long as they were punitive in nature.<sup>214</sup> The *Austin* Court surveyed the history of civil forfeiture in English common law and in the United States, including much of the same precedents that formed the basis for the *Bennis* majority's opinion, and concluded that civil forfeiture serves, at least in part, as punishment.<sup>215</sup> Furthermore, the *Austin* Court stated that a forfeiture statute may serve remedial or other purposes, in addition to punitive goals, and still be subject to the Excessive Fines Clause limitation.<sup>216</sup> Thus, after *Austin*, unless a civil forfeiture proceeding serves no punitive purpose, it is constitutionally restricted by the Eighth Amendment.

The *Bennis* majority, however, neglected to address the constitutional constraint imposed by the Eighth Amendment. Chief Justice Rehnquist noted that Michigan's nuisance abatement proceeding "is an equitable action" in which the trial judge may consider "alternatives [to] abating the entire interest in the vehicle,"<sup>217</sup> and asserted that the forfeiture serves a deterrent purpose distinct from any punitive aim.<sup>218</sup> However, a deterrent purpose and remedial discretion do not obviate the limitations imposed by the Excessive Fines Clause unless the forfeiture serves no punitive purpose.<sup>219</sup> Thus, Chief Justice Rehnquist should have extended his analysis of the purpose of Michigan's nuisance abatement statute to determine whether the statute punished Mrs. Bennis by forfeiting her interest in the car.

Although Justice Thomas' concurrence did not directly address the Excessive Fines Clause limitation, he attempted to characterize the forfeiture of the Bennis' automobile as strictly remedial in order to avoid the dilemma of punishing Mrs. Bennis absent a finding of wrongdoing.<sup>220</sup> This remedial characterization is problematic because, even assuming, as Justice Thomas does,<sup>221</sup> that all of the proceeds from the sale of the car were used to defray the costs of prosecution and law enforcement against the nuisance-use of the car, the forfeiture may still serve a punitive goal. Thus, a more complete

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<sup>214</sup> *Id.* at 613, 618.

<sup>215</sup> *See id.* 613-618.

<sup>216</sup> *See id.* at 610.

<sup>217</sup> *Bennis*, 116 S. Ct. at 1000 (quoting *Bennis v. Michigan*, 527 N.W. 2d 483, 495 (Mich. 1994)) (brackets in original).

<sup>218</sup> *Id.*

<sup>219</sup> *See Austin*, 509 U.S. at 610.

<sup>220</sup> *See Bennis*, 116 S. Ct. at 1002 (Thomas, J., concurring). Justice Thomas does not state that the Excessive Fines limitation would be one of the problems involved with imposing punishment on an innocent owner.

<sup>221</sup> *See id.* (Thomas, J., concurring).

analysis of the purpose of forfeiture would be necessary to dismiss the applicability of the Excessive Fines Clause.

Only Justice Stevens directly addressed the Eighth Amendment limitation on the forfeiture of the Bennis automobile.<sup>222</sup> Justice Stevens correctly analyzed the nature of the Michigan nuisance abatement statute and rejected the State's argument that forfeiture pursuant to the statute was purely remedial. The State had argued in an earlier stage of the litigation that seizing the Bennis's automobile was "swift and 'certain punishment'"<sup>223</sup> and the majority "conceded" that civil forfeiture serves in part to punish.<sup>224</sup> Furthermore, as the majority noted, forfeiture serves a deterrent purpose and imposes a penalty, rendering illegal-use of property unprofitable,<sup>225</sup> which is punishment for all intents and purposes.<sup>226</sup> For these reasons, forfeitures pursuant to Michigan's nuisance abatement statute, and the Bennis forfeiture in particular, are at least partially punitive. As such, the limitation of the Excessive Fines Clause should apply to the Bennis forfeiture.

The *Austin* Court declined in that case to establish a rule for determining when a forfeiture is excessive, nor has the Supreme Court established a standard since that decision.<sup>227</sup> Furthermore, the *Austin* Court stated that "[p]rudence dictates" allowing the lower courts to formulate the proper analysis.<sup>228</sup> As such, the *Bennis* Court should have remanded the case for determination of the excessiveness of the forfeiture of Mrs. Bennis interest in the jointly owned car.

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<sup>222</sup> See *id.* at 1010 (Stevens, J., dissenting). Justice Stevens determined that the forfeiture of Mrs. Bennis's interest was constitutionally excessive. *Id.* (Stevens, J., dissenting).

<sup>223</sup> *Id.* at 1007 (Stevens, J., dissenting) (citation omitted). Justice Stevens also pointed out that the State's argument that the confiscation of the automobile was remedial because it abated a public nuisance was unpersuasive for two reasons. *Id.* (Stevens, J., dissenting). First, unlike confiscation of a burglar's tools, taking Mr. Bennis's car would not prevent him from committing his illegal acts. See *id.* (Stevens, J., dissenting). Second, the car only constituted a nuisance because it was parked in an area reputed for prostitution at the time of the illegal act. *Id.* (Stevens, J., dissenting). Thus, Justice Stevens reasoned that the need to abate the vehicle disappeared when the car left the neighborhood. *Id.* (Stevens, J., dissenting). In concluding that the forfeiture was punishment in this case, Justice Stevens also relied on the Supreme Court's opinion in *United States v. Halper*, 490 U.S. 435 (1989), which stated a civil sanction which serves retributive or deterrent purposes "is punishment, as we have come to understand the term." *Id.* at 1007 n.10 (Stevens, J., dissenting) (quoting *Halper*, 490 U.S. at 448)).

<sup>224</sup> *Id.* at 1006-07 (Stevens, J., dissenting) (citing *id.* at 1000).

<sup>225</sup> *Id.* at 1000 (citation omitted).

<sup>226</sup> See *Halper*, 490 U.S. at 448.

<sup>227</sup> Justice O'Connor proposed a standard for the application of the Excessive Fines Clause in her dissent in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 300-01 (O'Connor, J., dissenting).

<sup>228</sup> *Austin v. United States*, 509 U.S. 602, 622 (1993).

## VI. CONCLUSION

Notwithstanding Mrs. Bennis's lack of knowledge of or consent to the illegal activity, the Supreme Court upheld the forfeiture of interest in a car in which the joint-owner, her husband, committed an act of lewdness with an alleged prostitute. The Court based its decision on the "well-established authority rejecting the innocent-owner defense" to civil forfeiture.<sup>229</sup> However, had the majority examined more closely the precedent upon which it relied, it would have discovered that rejecting Mrs. Bennis's innocent owner defense actually and unjustifiably expanded the scope of its prior holdings. Furthermore, as the forfeiture in this case arguably served punitive aims, the majority should have analyzed Mrs. Bennis's claim within the Eighth Amendment Excessive Fines Clause limitation and remanded the case to the lower court for determination of the excessiveness of the forfeiture.

JAMI BRODEY

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<sup>229</sup> *Bennis*, 116 S. Ct. at 1000.