Bennis v. Michigan: Forfeiting the Family Car Under Public Nuisance Laws

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For centuries, governments have seized and sold private property associated with criminal activities as a method to punish, deter, and remedy criminal acts. Many property owners have argued that these forfeitures unfairly harm their property rights and are unconstitutional under the Fifth or Fourteenth Amendment Due Process Clause. Historically,
property owners who were innocent of criminal wrongdoing had the greatest cause to challenge civil forfeitures when the government seized their property despite the owners’ lack of culpability for the criminal act that triggered the forfeiture proceeding. Commentators often have some basic limits on the federal government’s forfeiture authority. See id. amend. V; see also Degen v. United States, 116 S. Ct. 1777, 1780 (1996) (acknowledging that the Due Process Clause typically guarantees owners the right to a hearing to contest property forfeiture); United States v. James Daniel Good Real Property, 510 U.S. 43, 62 (1993) (holding that the Due Process Clause mandates that, absent exigent circumstances, the government furnish the property owner with notice and a meaningful opportunity to be heard, prior to the seizure of real property).

Other due process challenges to civil forfeiture statutes have met with mixed results in the courts. See, e.g., Calero-Toledo, 416 U.S. at 677-79 (holding that seizure of a yacht for purposes of forfeiture constituted an “extraordinary situation” that justified postponing notice and opportunity for a hearing because the property is “of a sort that could be removed to another jurisdiction, destroyed, or concealed, if advance warning of confiscation were given”); Van Oster v. Kansas, 272 U.S. 465, 466 (1926) (alleging that the state nuisance law wrongfully deprived an innocent owner of her car in violation of the Fourteenth Amendment Due Process Clause); United States v. One Ford Coupe Auto., 272 U.S. 321, 328 (1926) (challenging the constitutionality of government seizure of illegally distilled spirits as a penalty for failure to pay tax on those spirits); United States v. 194 Quaker Farms Rd., 85 F.3d 985, 988-90 (2d Cir. 1996) (alleging that the civil forfeiture provisions under the Controlled Substances Act, 21 U.S.C. § 881(a)(7) violated an innocent owner’s Fourteenth Amendment due process rights), cert. denied, 117 S. Ct. 304 (1996); United States v. 300 Cove Road, 861 F.2d 232, 235-36 (9th Cir. 1988) (challenging, on due process grounds, the federal Comprehensive Drug Abuse Prevention and Control Act of 1970 because the Act authorized confiscation without preseizure judicial review), cert. denied, 493 U.S. 954 (1989); National Bond & Inv. Co. v. Gibson, 6 F.2d 288, 291-93 (D. Kan. 1925) (addressing a Fourteenth Amendment challenge to the forfeiture of a car illegally used to transport alcohol); State v. Hochhausler, 668 N.E.2d 457, 467 (Ohio 1996) (challenging the constitutionality of state seizure provisions that afforded vehicle owners no hearing prior to seizure); see also LEONARD W. LEVY, A LICENSE TO STEAL: THE FORFEITURE OF PROPERTY 177, 190-94 (1996) (discussing how the Supreme Court has imposed Fifth Amendment constraints on government action depriving owners of their property); JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW §§ 13.1, 13.5(a) (5th ed. 1995) (describing the role of substantive and procedural due process in protecting individual property rights). Additionally, other constitutional provisions constrain the government’s power to confiscate, seize, and forfeit property. See, e.g., JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 1141-62 (3d. ed. 1993) (discussing Fifth Amendment Takings Clause limitations on government regulatory takings of private property); WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 2.1 to 2.1(a) (3d. ed. 1996) (describing Fourth Amendment limitations on government powers to search and seize property associated with criminal activity); CHARLES E. TORCIA, WHARTON’S CRIMINAL LAW § 71 (15th ed. 1993) (reviewing Fifth Amendment double jeopardy limitations on the government’s power to seize property in conjunction with criminal offenses).

3. See LEVY, supra note 2, at 161-76 (describing civil forfeiture law as “inherently hostile” to innocent owners giving rise to constitutional challenges). Many states have ignored the severe impact that forfeitures can have on innocent owners and have passed laws denying culpable owners the right to defend against government forfeitures on the basis that they were unaware that another party had used their property in an unlawful manner. See, e.g., ALASKA STAT. § 16.05.195 (Michie 1995); MD. ANN. CODE OF 1957 art.
agreed with the innocent owners' constitutional criticisms, arguing that seizing a blameless individual's property does not serve the intended goals of civil forfeiture. American courts steadfastly have refused to accept the innocence defense, upholding government civil forfeitures against innocent owners for almost two centuries.

27, § 297(m) (Michie Supp. 1996); MICH. COMP. LAWS ANN. § 600.3825 (West 1987). In contrast, the federal government and some states have expressly incorporated an innocent owner defense into their forfeiture laws. See, e.g., 21 U.S.C. § 881(a)(6) (1994) (exempting innocent parties from forfeiture provisions under the federal Comprehensive Drug Prevention and Crime Control Act); ARIZ. REV. STAT. ANN. § 13-4304 (West 1989); CONN. GEN. STAT. ANN. § 54-33g(d) (West 1994); see also Calero-Toledo, 416 U.S. at 685 (explaining that courts have upheld forfeitures of innocent owners' property for more than one hundred years). The codification of innocent owner defenses in some states may reflect the impact of past constitutional challenges on modern forfeiture law. See HYDE, supra note 1, at 61-64 (discussing the importance of an innocent owner defense to protect individuals from unwarranted and improvident government seizures).

4. See Raymond Banoun et al., Making a Strong Argument for Civil Forfeiture Reform, 7 MONEY LAUNDERING L. REP. 1 (1996), available in 1996 WESTLAW 1 MONEY LLR 1 (arguing for civil forfeiture reform because the federal government and state and local governments no longer understand the crime-fighting goals of government seizures, and instead, often confiscate innocent owners' property to boost department revenues); Julie Barnes, Survey, 6 SETON HALL CONST. L.J. 1267, 1273 (1996) (explaining that seizing a wholly innocent owner's property does not serve the punitive goals of civil forfeitures); The Supreme Court, 1995 Term—Leading Cases, supra note 1, at 142-45 (arguing that the broad provisions of modern forfeiture statutes no longer serve narrow punitive, remedial, and deterrent goals, and urge legislators to enact provisions that protect innocent parties); Robert Reno, Victim Sideswiped By Rolling Wreck of Justice System, NEWSDAY, Mar. 7, 1996, at A49 (describing innocent owners as victims of the government's refusal to acknowledge constitutional limits on civil forfeitures); Noah Eliezer Yanich, Court Abdicates Its Role Against Tyranny, DETROIT NEWS, Apr. 11, 1996, at 13A (warning that the dangerous effect of modern civil forfeiture statutes and court decisions is to require "wives [to] betray their husbands to the police or risk losing their property"). But see George E. Ward, Bennis and the War Against Drugs, 46 CATH. U. L. REV. 109, 115-16 (1996) (agreeing with the Michigan Supreme Court's decision, arguing that upon purchase, car owners assume an obligation for certain tortious or criminal acts involving their property "even as to... harms that the owner has no part in causing").

5. See Bennis v. Michigan, 116 S. Ct. 994, 998 (1996) (reeaffirming the rationale enunciated in The Palmyra and observing that an "unbroken line of cases holds that an owner's interest in property may be forfeited... even though the owner did not know that it was to be put to [a proscribed use]"); The Palmyra, 25 U.S. (12 Wheat.) 1, 14-15 (1827) (maintaining that an offender's culpability is irrelevant in an in rem civil forfeiture proceeding). Many of the Court's decisions simply explained that civil forfeiture is deeply rooted in American jurisprudence as the basis for denying a property owner's complaint. See, e.g., Calero-Toledo, 416 U.S. at 680 (endorsing the proposition that the historical background of forfeiture statutes "establishes the principle that statutory forfeiture schemes are not rendered unconstitutional because of their applicability to the property interests of innocents"); Van Oster, 272 U.S. at 468 (stating that it "has long been settled" that an innocent owner's property can be seized); Harmony v. United States, 43 U.S. (2 How.) 210, 233 (1844) (noting that by 1844 it was already commonplace for the government to seize pirate ships without regard to the owner's knowledge of or participation in pirating activities). Even today, courts regularly refuse to divest the government of prop-
The guilty property fiction is primarily responsible for the absence of a constitutionally mandated innocent owner defense. Under the guilty property fiction, the government charges the property used in connection with criminal activity, rather than the property owner. Courts have relied on this fiction to form the premise that civil forfeiture proceedings do not threaten the property owner's constitutional rights because the owner is not charged in the forfeiture proceeding. Moreover, courts have fashioned other rationales to justify forfeiture of a blameless owner's property, including the master-servant agency theory and the doctrine of negligent entrustment. Such tenuous justifications for up-

6. See LEVY, supra note 2, at 19-20 (blaming the guilty property fiction for the Court's rejection of the innocent owner defense); Noya, supra note 1, at 495 & n.9 (explaining that, under the guilty property fiction, property owners' constitutional rights are not implicated).


8. See The Palmyra, 25 U.S. (12 Wheat.) at 14. Again, in a civil forfeiture proceeding, the property is the actual defendant under the guilty property fiction. See id.; see also 36 AM. JUR., supra note 1, § 17 (noting that a conviction of a personal offender is not a condition precedent to in rem civil forfeitures); J. William Snyder, Jr., Note, Reining in Civil Forfeiture Law and Protecting Innocent Owners from Civil Asset Forfeiture: United States v. 92 Buena Vista Avenue, 72 N.C. L. REV. 1333, 1345 (1994) (describing how civil forfeiture proceedings are actually brought against the property, not the property owner). Thus, it can be argued that the property owner's constitutional rights are not harmed by the government's property seizure. See Harmony, 43 U.S. (2 How.) at 233. But see Austin v. United States, 509 U.S. 602, 622 (1993) (holding that the Eighth Amendment Excessive Fines Clause does afford property owners some constitutional protection from unreasonable forfeitures serving punitive ends).

9. See Harmony, 43 U.S. (2 How.) at 233. Under the master-servant agency theory, "the acts of the master and crew . . . bind the interest of the owner of the ship, whether he be innocent or guilty." Id. at 234. After reciting the guilty property fiction from The Palmyra, the Harmony Court offered the agency theory as an alternative basis for liability and upheld the forfeiture of a pirate ship despite the innocent owner's pleas. See id. at 233-36.

10. See Dobbins's Distillery v. United States, 96 U.S. 395, 404 (1878). In Dobbins's Distillery, the Court upheld the forfeiture of a lessor's property after his lessee violated the federal tax laws while operating a distillery on the premises. See id. The Court based its
holding civil forfeitures have weakened the United States Supreme Court’s historical consensus on the innocent owner defense. Still, recent efforts to establish an innocent owner defense illustrate the Court’s continued reliance upon the guilty property fiction.

Capitalizing on the Court’s continued endorsement of civil forfeitures, local and state governments and the federal government have expanded the reach of asset forfeiture laws in an effort to curb crime by depriving criminals of the contraband, proceeds, and instrumentalities of their criminal acts. Furthermore, because forfeited assets furnish local gov-

decision on the guilty property fiction, reasoning that because the owner leased the property knowing it would be used for a distillery, “the law place[d] him on the same footing as if he were the distiller.” Id. at 399. Accordingly, the Court found the lessor’s knowing entrustment sufficient to impose penal consequences for his lessee’s actions. See id. at 404; see also Austin, 509 U.S. at 612-13 (justifying earlier seizures of innocent owners’ ships as punishment for their negligence in entrusting the vessel to lawbreaking captains); United States v. One Brown 1978 Mercedes Benz 450 SEL Vehicle, 657 F. Supp. 316, 319 (E.D. Mo. 1987) (holding that the vehicle was properly forfeited where the owner entrusted it to the wrongdoer and failed to take reasonable steps to ensure that the property would not be used in criminal activity).

11. See Calero-Toledo, 416 U.S. at 692-95 (Douglas, J., dissenting in part). Justice Douglas cited Peisch v. Ware, 8 U.S. (4 Cranch) 347, 365 (1808), for the proposition that the Court should invalidate a forfeiture if the owner could not have prevented the illegal use of the property. See Calero-Toldeo, 416 U.S. at 692; see also One 1936 Model Ford V-8 Deluxe Coach, 307 U.S. at 237 (explaining that a buyer should not suffer forfeiture when a third party wrongfully used its car because “[i]t would be excessively harsh . . . to say that one dealing in entire good faith must, at his peril, first discover and then make inquiry concerning somebody of whose existence he has no knowledge or suspicion”).

12. See Bennis v. Michigan, 116 S. Ct. 994, 998 (1996) (tracing the guilty property fiction as the cornerstone of the Supreme Court’s continued denial of the innocent owner defense); Austin, 509 U.S. at 615 (characterizing the Supreme Court’s guilty property fiction jurisprudence as “venerable”). Levy asserts that civil forfeiture’s most repugnant consequence is that, for years, courts have refused to grant innocent property owners relief from civil forfeiture statutes on the basis that the property, and not the property owner, stands accused of the crime. See Levy, supra note 2, at 161-76. But see Boudreaux & Pritchard, supra note 1, at 617-21 (interpreting American civil forfeiture case law to exclude innocent owners of jointly held property from government seizures and arguing that the Court has improperly broadened the guilty property fiction, contradicting its past decisions).

13. See Alan Nicgorski, Comment, The Continuing Saga of Civil Forfeiture, the “War on Drugs,” and the Constitution: Determining the Constitutional Excessiveness of Civil Forfeitures, 91 NW. U. L. REV. 374, 376 (1996) (stating that the judicial and fiscal success of federal asset forfeiture persuaded states to pass new forfeiture laws or strengthen existing laws); David G. Savage, Wide Seizure Laws OKd by High Court, L.A. TIMES, Mar. 5, 1996, at A1 (asserting that the Supreme Court’s decision in Bennis sends the wrong message to aggressive lawmakers and prosecutors that the Constitution places few limits on their power to adopt and enforce civil forfeiture statutes). One congressman argued that the government has used its seize powers to wage a “war on drugs”: a cause that has served as a convenient, yet improvident, justification for the encroachment upon “the right to own and enjoy private property.” See HYDE, supra note 1, at 1. Others however, attribute the emergence of progressive federal asset forfeiture laws to congressional efforts
ernments with an additional source of revenue, local law enforcement has a further incentive to construe forfeiture laws broadly, often ensnaring innocent owners’ property in the process. Today, these efforts to increase crime control and enhance law enforcement budgets often overshadow an innocent owner’s property interests.

In Bennis v. Michigan, the United States Supreme Court determined that due process of law does not prohibit states from excluding an innocent owner defense from modern civil forfeiture statutes. In Bennis, the

to curb the growing drug trade. See Joy Chatman, Note, Losing the Battle, But Not the War: The Future Use of Civil Forfeiture by Law Enforcement Agencies After Austin v. United States, 38 ST. LOUIS U. L.J. 739, 747-49 (1994); see also Sandra Guerra, Family Values?: The Family as an Innocent Victim of Civil Drug Asset Forfeiture, 81 CORNELL L. REV. 343, 359-64 (1996) (attributing the emergence of many broad civil forfeiture statutes to the government’s “war on drugs”). Others argue, however, that broad civil forfeiture laws remain “on the books” because prosecutors prefer to pursue criminal defendants in civil proceedings which require a lower burden of proof. See Marcus Lopez et al., Recent Developments, 23 AM. J. CRIM. L. 215, 216 (1995).

14. See HYDE, supra note 1, at 8-9. Congressman Hyde argued that civil forfeiture laws pose an inherent conflict of interest for law enforcement officials: “The more they seize, the more they get for their own ‘official use.’” Id. at 9. He explained that the current civil forfeiture system encourages police to make “‘structured arrests’”—undercover drug purchases deliberately conducted in or on high-priced buildings or tracts of land that are thereafter subject to forfeiture. See id. at 31. Congressman Hyde noted that in 1993 alone, the Department of Justice inventoried over 27,000 forfeited properties valued at $1.9 billion. See id. at 9; see also WILLIAM FALCON, U.S. DEP’T OF JUSTICE, ASSET FORFEITURE: GUIDE TO PRESEIZURE PLANNING 1-16 (1993) (outlining procedures for law enforcement to maximize forfeiture results); MICHAEL GOLDSMITH, U.S. DEP’T OF JUSTICE, ASSET FORFEITURE: CIVIL FORFEITURE: TRACING THE PROCEEDS OF NARCOTICS TRAFFICKING 1-10 (1988) (discussing methods by which law enforcement can acquire necessary evidence to build strong forfeiture cases). But see George E. Ward, Seizure Law Constitutionally Solid, DETROIT NEWS, Mar. 20, 1996, at A8. Ward, a prosecutor in Wayne County, noted that Detroit enforced the nuisance abatement statute against vice crime violators only after Detroit citizens demanded relief from neighborhood crime. See id. Ward also emphasized that the State of Michigan strictly adheres to the statute’s procedural requirements, forfeiting cars only for probable cause and after a trial. See id.

15. See LEVY, supra note 2, at 161-76 (discussing current constitutional infirmities inherent in civil forfeitures of innocent owners’ property due to legislative and law enforcement efforts).


17. See id. at 997-98. The Court distinguished an innocent owner whose vehicle was stolen or used without consent, from an owner whose vehicle was used with the owner’s consent, but in an unconsented manner. See id. at 999. The Court did not declare, however, whether an individual whose property was stolen or used without consent actually would be entitled to the innocent owner defense. See id.; cf. J.W. Goldsmith, Jr.-Grant Co. v. United States, 254 U.S. 505, 512 (1921) (“It is the illegal use that is the material consideration, it is that which works the forfeiture, the guilt or innocence of its owner being accidental.”). Instead, the Court explained that it had reserved the issue as to whether a state could seize the property of an owner who did not consent to the property’s use, and implied that since it was reluctant to decide the above issue, then certainly, an owner who consented to the use of her property, but not the property’s unlawful use, was not entitled
Court determined that the State of Michigan did not violate Mrs. Bennis's constitutional rights when it seized her interest in the family car after her husband used the car while soliciting a prostitute. The State brought an abatement action in the Wayne County Circuit Court, arguing that the Bennises' car was a public nuisance. The Michigan Supreme Court agreed with the State and ordered the abatement.

18. See Bennis, 116 S. Ct. at 996. John Bennis was convicted of gross indecency under Michigan law. See id. at 996 & n.1. After the criminal conviction, Michigan brought an action under MICH. COMP. LAWS ANN. §§ 600.3801, 600.3825 (West 1987), alleging that the car was a nuisance and asking the court to order an abatement. See id. at 996 nn.2-3.

Section 600.3801 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 hereby declared a nuisance and the furniture, fixtures and contents of any such building, vehicle, boat, aircraft, or place . . . are also declared a nuisance, and all . . . nuisances shall be enjoined and abated as hereinafter provided, and as provided in the court rules.

MICH. COMP. LAWS ANN. § 600.3801 (West 1987). Section 600.3825 provides that:

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 . . . . 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 . . . . Upon the sale of any furniture, fixtures, 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).

Generally, governments implement and enforce nuisance laws to eliminate harms to the public safety, health, and comfort. See C. DALLAS SANDS ET AL., 3 LOCAL GOVERNMENT LAW § 14.03, at 14-8 (1996); see also 8 THOMPSON ON REAL PROPERTY, THOMAS EDITION § 67.02(a), at 90 (David A. Thomas ed., 1994) (explaining the public and private nuisance doctrine). This Note will not engage in a detailed analysis as to whether the Court should have approached Michigan's nuisance abatement statute under traditional nuisance doctrines rather than under a civil forfeiture analysis. For such alternative analysis, see generally C. DALLAS SANDS, supra, §§ 14.03, 14.41, for a discussion of local government regulatory powers in nuisance law and property owners' constitutional defenses. One author suggests that Bennis was wrongfully decided under existing nuisance law because, traditionally, the proper remedy for a nuisance is an injunction, not seizure. See Erik Grant Luna, Note, Fiction Trumps Innocence: The Bennis Court's Constitutional House of Cards, 49 STAN. L. REV. 409, 414-16 (1997).


Bennis appealed to the United States Supreme Court, alleging that the Michigan law violated innocent owners' rights under the Fourteenth Amendment Due Process Clause. Alternatively, Mrs. Bennis argued that the State violated the Fifth Amendment Takings Clause when it confiscated the car for public use without compensating her. The Supreme Court found the guilty property fiction dispositive and denied Mrs. Bennis relief under the Fourteenth Amendment. Moreover, the Court ruled that because Michigan lawfully acquired the Bennises' car in the forfeiture proceeding, the State was not required to reimburse Mrs. Bennis for her ownership interest under the Fifth Amendment Takings Clause.

Concurring in the opinion, Justice Thomas emphasized that tradition strongly supported the government's authority to forfeit an innocent owner's property. Justice Thomas acknowledged that, although some forfeiture laws cause harsh results and appear to violate due process limitations, the Michigan law was constitutional because government forfeitures existed at the time of the adoption of the Fourteenth Amendment. Accordingly, Justice Thomas concluded that Michigan's civil forfeiture statute did not violate due process.

21. See Bennis, 116 S. Ct. at 997-98. Specifically, Mrs. Bennis argued that the statute's failure to provide a defense for innocent owners violated the Fourteenth Amendment Due Process Clause. See id.

22. See id. Mrs. Bennis argued that the Fifth Amendment Takings Clause, as incorporated by the Fourteenth Amendment, prohibits a state government from seizing property unless it compensates the property owner. See id. A detailed discussion of Mrs. Bennis's Fifth Amendment takings claim is beyond the scope of this Note.

23. See id. at 997-98. The majority opinion explained that because the Bennises' car was the actual defendant in the civil case, Michigan could seize the vehicle after Mr. Bennis violated the indecency law, without regard to Mrs. Bennis's personal culpability. See id.

24. See id. at 1001. The Court explained that the government does not have to reimburse owners for property it lawfully acquires except when exercising its eminent domain power. See id. (citing United States v. Fuller, 409 U.S. 488, 492 (1973)).

25. See id. (Thomas, J., concurring). Justice Thomas first discussed the balance of interests at stake in Bennis. See id. He explained that Mrs. Bennis was concerned with her right to retain her property unless she had committed some wrong. See id. Justice Thomas then noted that Michigan's primary interest was to achieve punitive, remedial, and deterrent law enforcement goals while assuming the lowest permissible burden of proof. See id.

26. See id. at 1001-02 ("This case is ultimately a reminder that the Federal Constitution does not prohibit everything that is intensely undesirable.").

27. See id. Justice Thomas also argued that the seizure could be rationalized under traditional nuisance abatement concepts because, under nuisance theory, Michigan had the power to destroy the car in the interests of public health and safety. See id. at 1002.
In a separate concurrence, Justice Ginsburg explained that Michigan's civil forfeiture law was a reasonable and constitutional means of deterring criminal activity. Justice Ginsburg concluded that the trial court acted within its remedial discretion in upholding the state forfeiture action because Mrs. Bennis had consented to her husband's use of the vehicle by way of co-ownership.

Justices Stevens, joined by Justices Souter and Breyer, dissented, arguing that the Court's holding gave states unbridled authority to seize any property associated with criminal acts. Justice Stevens argued that Court precedent required Michigan to demonstrate a sufficient nexus between the Bennises' car and the underlying act of prostitution. Furthermore, Justice Stevens interpreted past forfeiture decisions as requiring proof that the owner negligently entrusted the seized property to the wrongdoer. Finally, Justice Stevens asserted that the Court's decision in Austin v. United States limiting unreasonable civil forfeitures under the
Eighth Amendment's Excessive Fines Clause compelled the Court to rule in Mrs. Bennis's favor.\textsuperscript{34}

In a separate dissent, Justice Kennedy warned that the Court's holding established dangerous precedent damaging to vehicle owners' property rights in instances where the government seized a vehicle tenuously related to criminal activity.\textsuperscript{35} Justice Kennedy argued that because cars are essential to the daily lives of most Americans, the Court should invoke a rebuttable presumption that the owner negligently entrusted the car to the wrongdoer or that the owner participated in the criminal acts triggering the forfeiture.\textsuperscript{36} Because the parties in \textit{Bennis} had conceded that Mrs. Bennis was innocent of any criminal wrongdoing and could not have known about her husband's wrongful acts, Justice Kennedy asserted that Michigan could not mandate forfeiture of her vehicle.\textsuperscript{37}

This Note first examines the historical justifications for civil forfeiture laws and traces the United States Supreme Court's reluctance to acknowledge an innocent owner defense during the last one hundred and seventy years. This Note then discusses the historical undercurrent on the Court that has called for a limited innocent owner defense in statutory civil forfeiture cases. This Note next analyzes the Court's reasoning in \textit{Bennis v. Michigan}, its effect on prior law that unconditionally upheld civil forfeitures, and the decision's potential impact on the recent demand for an innocent owner defense. This Note argues that \textit{Bennis} marks a departure from the growing trend of Supreme Court decisions acknowledging that civil forfeitures may be limited by due process. This Note asserts that \textit{Bennis} will confuse lower courts and give state legislatures and law enforcement the authority to invoke powerful forfeiture laws without fear of limitation under the Fourteenth Amendment Due Process Clause or the Eighth Amendment Excessive Fines Clause. Finally, this Note explores \textit{Bennis}'s immediate effect on lower courts and state governments and considers the potential impact on certain classes of property owners.

\textsuperscript{34} \textit{See Bennis}, 116 S. Ct. at 1010 (reasoning that because the seizure of the Bennises' car constituted a form of punishment, it should be subjected to the restraints of the Excessive Fines Clause).

\textsuperscript{35} \textit{See id.} at 1011 (Kennedy, J., dissenting). Justice Kennedy urged the Court to retain the absolute liability standard established in early admiralty decisions, but asserted that government seizure of automobiles warranted a standard that would require some culpability on the part of the car's owner to justify the forfeiture. \textit{See id.}

\textsuperscript{36} \textit{See id.} (reasoning that "[the automobile] is a practical necessity in modern life for so many people").

\textsuperscript{37} \textit{See id.}
I. LOSING THE FAMILY CAR TO PIRATES AND DRUG RUNNERS

Many states and the federal government have adopted and implemented civil forfeiture laws with little judicial interference.38 While the advent of civil forfeitures began in the context of admiralty law,39 the Supreme Court's reliance upon the guilty property fiction has withstood constitutional challenge in non-admiralty contexts for more than one hundred and seventy years.40 Recognizing the judiciary's reluctance to restrain civil forfeiture authority, the states and the federal government have continued to enact broad forfeiture laws, often authorizing the seizure of property that has only a tenuous connection with the criminal activity triggering the seizure.41

Despite the nationwide adoption of broad forfeiture statutes, the Supreme Court has continued to adhere to the guilty property fiction, deferring to state court discretionary remedial powers to cure inequities.42

38. See Meyer, supra note 1, at 866 (stating that courts have refused to interfere with the ostensible remedial goals of civil forfeiture statutes, even though the laws are often applied inequitably to punish property owners).
40. See Bennis, 116 S. Ct. at 998 (acknowledging the Court's continued adherence to The Palmyra, and by implication, the guilty property fiction); see also Austin v. United States, 509 U.S. 602, 615-16 (1993) (concluding that the American civil forfeiture tradition is rooted in the guilty property fiction); Meyer, supra note 1, at 866-69 (discussing the guilty property fiction's role in modern federal civil forfeiture law); George F. Will, Mrs. Bennis's Car, WASH. POST, Mar. 10, 1996, at C7 (attributing the result in Bennis to The Palmyra's concept of the guilty property fiction).
41. See Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 692-93 (1974) (Douglas, J., dissenting in part). The Calero-Toledo Court held that a leased yacht could be forfeited under Puerto Rico's Controlled Substances Act when the lessee was found on board with marijuana. See id. at 690. Justice Douglas objected to the forfeiture on due process grounds because the evidence indicated that the police may have found only a single marijuana cigarette on board. See id. at 693 (Douglas, J., dissenting). Some state courts, however, have refused to expand forfeiture powers, exercising their discretionary powers to strike forfeitures unless the state proves that the property owner was culpable or that the property seized was directly connected to the criminal activity triggering the forfeiture. See People v. Beck, 31 Cal. Rptr. 2d 44, 52 (Ct. App. 1994) (finding that the defendant's firearms could not be seized without proof that the guns were associated with the crime of which the defendant was convicted).
42. See Calero-Toledo, 416 U.S. at 689 n.27. Common law forfeiture tradition often relied on the bench's or the jury's sympathies to mitigate harsh forfeitures. See id. However, if a particular statute does not leave the forfeiture decision to the jury, or contain an ameliorative provision, an appellate court still may rely on the trial judge's inherent equitable remedial powers to cure unfair seizures. See Bennis, 116 S. Ct. at 1003 (Ginsburg, J., concurring). Some federal laws have attempted to codify judicial power to mitigate harsh forfeitures by including ameliorative provisions in statutes that permit the trial court to restore property to innocent owners when forfeiture would be unfair. See Calero-Toledo, 416 U.S. at 689 n.27. State courts also have attempted to mitigate harsh forfeitures by relying upon state constitutional due process protections. See State v. Rice, 626 P.2d 104,
By the end of the nineteenth century, the Court's consistent sanction of absolute liability forfeiture statutes offered property owners little constitutional protection, even if the owner was completely unaware that her property was involved in a criminal act.43

A. Creating the American System of Statutory Forfeiture

1. The Guilty Property Fiction: The Palmyra

The legal concept upon which courts subsequently would base denials of constitutional protection to innocent owners was first articulated by an American court in 1827.44 The United States Supreme Court, in The Palmyra,45 held that the federal government could seize a private vessel notwithstanding the fact that the captain had not been convicted of any criminal wrongdoing.46 In The Palmyra, the federal government seized a vessel in the wake of piracy allegations, and subjected the vessel to a condemnation hearing.47 The lower courts ruled that the government could condemn the property without a criminal conviction.48 The courts determined, however, that the piracy allegations lacked evidentiary support and restored the vessel to its surety.49

The Supreme Court addressed whether the government must obtain a criminal conviction before confiscating property used in the commission

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43. See Dobbins’s Distillery v. United States, 96 U.S. 395, 404 (1878) (upholding government seizure of a lessor’s property when the lessee violated federal revenue laws, even though the Court acknowledged the lessor’s lack of knowledge of or consent to the lessee’s criminal acts); LEVY, supra note 2, at 57-59 (describing the prevalence of civil forfeiture statutes after the Civil War and in the wake of Dobbins’s Distillery).
46. See id. at 14, 18. The ship’s captain was charged under the Piracy Act of March 3, 1819, ch. 75, and the Piracy Act of May 15, 1820, ch. 112. See id. at 7-8. The Piracy Act authorized the federal government to seize vessels involved in piratical acts and criminally prosecute the ship’s captain. See id.
47. See id. at 2. The circuit court found that the government vessel, the Grampus, had probable cause to seize The Palmyra after The Palmyra rebuked the Grampus crew’s efforts to board. See id.
48. See id. at 14-15.
49. See id. at 8, 9, 15. The facts in The Palmyra do not indicate whether the ship’s owner pled an innocent owner defense; the only issue before the Court was whether the government could confiscate the vessel before the captain was convicted of the criminal offense triggering the confiscation. See id. at 9.
The Court explained that because civil forfeitures and criminal proceedings are separate causes of action, a criminal conviction was not a condition precedent to civil recovery. The Court reasoned that "[t]he thing is here primarily considered as the offender, or rather the offence is attached primarily to the thing." With respect to the sufficiency of the evidence supporting the piracy charges, the Supreme Court agreed with the trial court's factual findings and affirmed the trial court's order restoring the vessel to its surety.

Thus, even though the Court denied the government's right to forfeit The Palmyra, it articulated the constitutional standard that would serve as the cornerstone of government civil forfeiture power for the next one hundred and seventy years.

2. Rejecting the Innocent Owner Defense

While The Palmyra Court established the legal justification underlying American civil forfeiture law, the vessel's owners did not challenge the forfeiture on the basis that they were innocent owners, but instead, argued that the vessel could not be forfeited unless the captain was convicted of using it in a crime. Thus, The Palmyra Court did not consider whether the government's forfeiture power would yield to an innocent owner's property interests. Twenty years later in Harmony v. United States, the Court held that an innocent owner could not regain possession of his ship when the captain used the vessel to violate federal piracy laws.

Harmony, a shipowner claimed that the government wrongfully seized his vessel because he, the owner, was unaware that the captain would use

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50. See id. at 14-15.
51. See id. at 15 ("[A]nd so this Court understand[s] the law to be, that the proceeding in rem stands independent of, and wholly unaffected by any criminal proceeding in personam.").
52. Id. at 14. This principle from The Palmyra was later termed the "guilty property fiction." See Austin v. United States, 509 U.S. 602, 615-16 (1993).
54. See The Palmyra, 25 U.S. (12 Wheat) at 15 (citing The Palmyra with approval); see also The Supreme Court, 1995 Term—Leading Cases, supra note 1, at 140 & n.63 (tracing the origin of American civil forfeiture law to The Palmyra).
56. See id. at 2, 4.
57. 43 U.S. (2 How.) 210 (1844).
58. See id. at 237. As in The Palmyra, the federal government in Harmony seized the Malek Adhel alleging that the captain violated the Federal Piracy Act of 1819. See id. at 229. Following the seizure, the ship's owner filed a complaint demanding the ship's return. See id.
the ship to commit piratical acts.9 The lower courts ruled that in in rem civil forfeitures, the government need not prove that the owner knew the wrongdoer would use the property in an illegal manner.60 Relying on The Palmyra, the Supreme Court agreed with the lower courts and held that because civil forfeiture punished the ship, rather than the shipowner, there was no violation of the owner's constitutional rights.61 The Court also explained that the crew's illegal acts could be imputed to the shipowner because of the nature of the owner's master-servant relationship with his employees.62

If the Court's position on the innocent owner defense was unclear after The Palmyra, Harmony offered little guidance because it, too, failed to address squarely the rights of innocent owners.63 Instead, the Harmony Court relied on the ship owner's unique master-servant relationship64 to justify imputing the employee's conduct to the owners and to mitigate the seemingly harsh result produced by the guilty property fiction.65

In Dobbins's Distillery v. United States,66 the Supreme Court again addressed the call for an innocent owner defense.67 The debate in Dobbins's Distillery centered around a lessee who violated federal tax laws

59. See id. at 211.
60. See id. at 230. Specifically, both lower courts condemned the brig but acquitted the cargo, thus releasing the cargo to its rightful owners, the claimant's customers. See id. at 229-30. By releasing the cargo to the owners, and forfeiting the ship, the lower courts implicitly may have acknowledged a judicially created innocent owner defense, but it is more likely that the courts found the ship guilty and the cargo innocent of the offense triggering the forfeiture. See id. at 229-30.
61. See id. at 233-34, 237. The Supreme Court also agreed that the ship's cargo should be released because the vessel was considered the "offending" property under the Piracy Act, and therefore, the cargo was acquitted in the forfeiture action. See id. at 236-37.
62. See id. at 234. This principle rests squarely upon the master-servant agency theory. Cf. Austin v. United States, 509 U.S. 602, 617 (1993) ("[T]he owner may be held accountable for the wrongs of others to whom he entrusts his property."); see also supra note 9 and accompanying text (describing the master-servant agency theory).
64. See id. at 234 ("In short, the acts of the master and crew, in cases of this sort, 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.").
65. See id. at 233.
66. 96 U.S. 395 (1878).
67. See id. at 397. In Dobbins's Distillery, the lessor argued that he was entitled to a judicially created innocent owner defense because he was unaware his lessee would violate the federal revenue laws. See id.; cf. Harmony, 43 U.S. (2 How.) at 234 (avoiding determination on the shipowner's innocence defense by holding that a shipowner's agency relationship with his employees imputed responsibility from the crew's illegal acts to the owner).
while operating a distillery on the lessor’s property. Upon discovering the lessee’s criminal conduct, the government seized the distillery, including the lessor’s land. In response, the lessor filed an appearance and challenged the forfeiture. The circuit court determined that the government had sufficient evidence to bring a condemnation proceeding and upheld the government’s sale of the leased property.

Relying on The Palmyra and Harmony decisions, the Supreme Court upheld the forfeiture in Dobbins’s Distillery despite the lessor’s lack of knowledge of, or consent to, the lessee’s unlawful conduct. Unpersuaded by the innocent owner defense, the Court found that under The Palmyra the government need establish only that the forfeited property was involved in some criminal activity. Moreover, the Dobbins’s Distillery Court analogized a property lessor to the shipowner in Harmony and concluded that just as the shipowner was liable for the acts of the crew under an agency theory, the lessor was liable for the lessee’s criminal acts because the lessor entrusted the property to the lessee’s care. Thus, after Dobbins’s Distillery, the Court could use the master-servant relationship or negligent entrustment theory to support its use of the guilty property fiction to forfeit an innocent owner’s property.

68. See Dobbins’s Distillery, 96 U.S. at 396. The federal government prosecuted the lessee under federal tax laws for failure to keep accurate accounting records. See id.
69. See id. at 397.
70. See id.
71. See id. On appeal, the lessor argued that the jury should have been instructed that it must find that the lessor knew of the lessee’s criminal acts in order to uphold the forfeiture. See id.
72. See id. at 404. The Court also noted that the lessor’s right to pursue a contract suit against the lessee on the lease mitigated the effect of the Court’s decision on the lessor. See id. This idea of alternative remedies has continued through Bennis which illustrates that the Court may uphold a forfeiture against an innocent owner when other relief is available or when the trial court can deny unjust forfeitures under its equitable powers. See Bennis v. Michigan, 116 S. Ct. 994, 1003 (1996) (Ginsburg, J., concurring).
73. See Dobbins’s Distillery, 96 U.S. at 400-01.
74. See id. at 401, 404. Though the Court’s holding rested upon the guilty property fiction, the majority noted that the lessor could be held responsible for the acts of those to whom he entrusted the property because the lessor retained control and management over the property while it was in the lessee’s possession. See id. at 399, 404 (“If he knowingly suffers and permits his land to be used as a site for a distillery, the law places him on the same footing as if he were the distiller and the owner of the lot where the distillery is located. . . .”); accord Austin v. United States, 509 U.S. 602, 615-16 (1993).
75. See supra notes 71-73 and accompanying text.
3. Owners' and Lessors' Rights After The Palmyra Line of Cases

In the wake of Dobbins's Distillery, owners and lessors were deprived of many remedial avenues vis-a-vis government seizure powers. Beginning with The Palmyra, the Supreme Court advocated use of the guilty property fiction and held that civil forfeiture actions were not dependent upon a wrongdoer's criminal conviction. Initially, The Palmyra appeared limited to the narrow issue concerning the relationship between criminal convictions and civil forfeitures. Shortly thereafter, however, the Court continued to clarify the guilty property fiction by denying an innocent owner's property claim in Harmony. In Harmony, however, the Court clouded its application of the guilty property fiction to innocent owners by relying upon the master-servant agency theory to uphold the forfeiture. Moreover, while the Dobbins's Distillery Court upheld the government's authority to seize a lessor's property which had been entrusted to a lessee, it did so by relying on the negligent entrustment theory to support its use of the guilty property fiction. Thus, after Dobbins's Distillery, it seemed unlikely that the Court would find that the innocent owner defense was required constitutionally.

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76. See Dobbins's Distillery, 96 U.S. at 400. The Court referenced Harmony v. United States, 43 U.S. (2 How.) 210 (1844), for the proposition that an owner's knowledge or participation in the criminal activity is irrelevant in civil forfeitures; the government is empowered to seize the property to prevent further offenses. See Dobbins's Distillery, 96 U.S. at 400.


78. See id. at 14.


80. See id. (ordering forfeiture of the owner's ship under the guilty property fiction and master-servant agency theory despite the owner's lack of participation in or consent to the ship captain's criminal acts).

81. See Dobbins's Distillery, 96 U.S. at 404 ("the unlawful acts of the distiller bind the owner of the property, in respect to the management of the same, as much as if they were committed by the owner himself.").

82. See id. at 401. In Dobbins's Distillery, the Court listed a number of circumstances in which the government could forfeit an innocent owner's property, including smuggling, violations of revenue laws, and embargo and non-intercourse acts. See id. Consequently, after Dobbins's Distillery, the Court may have viewed an owner's legal responsibility for his property in terms of absolute, strict, or vicarious liability. See Austin v. United States, 509 U.S. 602, 618 (1993). Alternatively, Dobbins's Distillery indicates that the Court suspected the lessor negligently entrusted the property to the lessee because he knew the lessee was operating a distillery on his land and failed to take reasonable steps to insure that the lessee followed the law, even though the lessor had powers of management and control over the property. See Dobbins's Distillery, 96 U.S. at 404.
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B. A Glimmer of Hope for the Innocent Owner Defense

1. A Sympathetic Tone But a Strong Precedential Voice

In *The Palmyra* and its progeny, the Court unconditionally upheld the forfeiture of property associated with criminal activities, and remained unsympathetic to the rights of innocent owners. At times, the Court justified its absolute liability forfeiture decisions and use of the guilty property fiction, by declaring that the owner also was liable for the wrongdoer's acts under the master-servant agency theory or the doctrine of negligent entrustment. Almost fifty years after *Dobbins's Distillery*, however, the Supreme Court, in *J.W. Goldsmith, Jr.-Grant Co. v. United States*, finally offered innocent owners cause for optimism by acknowledging that government seizure of a "truly innocent" owner's property serves few of the traditional goals of civil forfeiture.

In *J.W. Goldsmith*, the Court upheld the federal government's condemnation of a car used in the illegal transport of alcohol. A car dealership initially sold the vehicle contingent upon the understanding that the dealer would retain title to the car until the buyer completed the payments. Soon thereafter, the buyer violated tax laws by using the car illegally to transport liquor. In response to the buyer's actions, the government commenced forfeiture proceedings against the dealership's in-

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83. See, e.g., *The Palmyra*, 25 U.S. (12 Wheat.) at 15 (finding that "no personal conviction of the offender is necessary to enforce a forfeiture"); *Harmony*, 43 U.S. (2 How.) at 233-34 (holding that an owner's lack of knowledge of criminal activity is irrelevant in upholding forfeiture under the guilty property fiction and master-servant agency theory); *Dobbins's Distillery*, 96 U.S. at 401 (concluding that knowledge of wrongdoing was irrelevant under the guilty property fiction or when the owner entrusted property to another).

84. See *Harmony*, 43 U.S. (2 How.) at 234.

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

86. 254 U.S. 505 (1921).

87. See id. at 511-12. Although the Court expressed its distaste for forfeitures of innocent owners' property, the Court reserved opinion as to whether the government constitutionally could seize property used in criminal activity which was stolen from an innocent owner or used without the owner's consent. See id. at 512. The Court's failure to define a "truly innocent" owner early on has inspired debate on the Court until this day. See *Bennis v. Michigan*, 116 S. Ct. 994, 999 n.5 (1996). Some of the Justices argue that only a person whose property is stolen or used without consent is deemed an innocent owner. See id. Other justices contend that an individual who consents to the use of her property, but not to the illegal manner in which it was used, constitutes an innocent owner. See id.

88. See *J.W. Goldsmith*, 254 U.S. at 508, 513.

89. See id. at 508-09.

90. See id. The government separately charged the buyer under federal tax law for failure to pay taxes on the alcohol in his possession. See id.
The dealership challenged the forfeiture, but the court found for the government and ordered the dealership to pay the Internal Revenue Service the amount of the car’s value.92

The Supreme Court quickly disposed of the dealer’s assertion that the forfeiture violated his Fifth Amendment due process rights.93 The Court explained that a property owner’s guilt or innocence was immaterial in an in rem forfeiture proceeding because the guilty property fiction “is too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced.”94 Despite strict adherence to this precedent, the Court recognized that civil forfeiture laws often lead to unjust results.95 Nonetheless, the Court elected to postpone further consideration of the innocent owner defense,96 expressly reserving its opinion on whether the government could seize property stolen from the owner or used without the owner’s consent or whether a grossly disproportionate forfeiture was constitutional.97 Rather, the Court stood poised to address the viability of the innocent owner defense under more favorable circumstances.98

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91. See id. at 508. The dealer challenged the seizure under the Fifth Amendment Due Process Clause arguing that he should have been afforded an innocent owner defense. See id.

92. See id. at 509. Prior to final judgment, the dealership was permitted to post bond and replevy the vehicle. See id. at 508. Thus, once the Court ordered a judgment, the dealer was forced to pay for the value of the vehicle. See id. at 509.

93. See id. at 510.

94. Id. at 511.

95. See id. at 510 (expressing concern that the statute “seems to violate that justice which should be the foundation of the due process of law required by the Constitution”).

96. See id. at 512.

97. See id.

98. See id. (stating that when the forfeiture statute reaches such “amplitude of application . . . it will be time enough to pronounce upon it”).
Despite the *J.W. Goldsmith* Court's indications that the Court might, at some point, be prepared to acknowledge a judicially created innocent owner defense, the government's forfeiture powers again prevailed over an innocent owner's property interests in *Van Oster v. Kansas*.99 The Court, in *Van Oster*, held that a state nuisance law authorizing the seizure of vehicles used in the illegal transportation of alcohol did not violate an owner's Fourteenth Amendment due process rights.100 In *Van Oster*, an owner allowed the car dealer to use her vehicle in lieu of part of the purchase price.101 Subsequently, an associate of the dealer was arrested for illegally transporting alcohol in the car.102 When the government brought an action to forfeit the vehicle, the owner intervened, alleging that the state forfeiture law violated her right to due process.103 The Kansas Supreme Court rejected the owner's due process claim and ordered seizure of the car.104

In considering the constitutionality of the Kansas law, the United States Supreme Court declined to address the innocent owner defense.105 Relying upon *J.W. Goldsmith*, the Court again refused to rule on whether the government could confiscate property stolen or used without the owner's consent, explaining that the plaintiff in the case had consented to the defendant's use of the car.106 The *Van Oster* Court ultimately rejected the dealer's due process claim and held that nothing in the Constitution prohibited a state from initiating an *in rem* forfeiture proceeding against the car.107

When read together, *J.W. Goldsmith* and *Van Oster* suggest that the Court may have been willing to consider the innocent owner defense un-

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100. See id. Even though the defendant was acquitted in a criminal trial, Kansas seized the car under the state nuisance law. See id. at 467. The Court simply stated that if an innocent owner entrusts her property to a wrongdoer, she is not entitled to assert innocence in a subsequent forfeiture proceeding. See id.
101. See id. at 465-66.
102. See id. at 466. The Kansas law declared any vehicle involved in the transportation of intoxicating liquor to be a common nuisance. See id.
103. See id. The owner asserted that the Kansas statute was unconstitutional because the law permitted the State to seize her property without proof that she knew of, or consented to, the criminal acts. See id. at 466-67.
104. See id. at 466. After the Kansas Supreme Court decision, the associate of the dealer was acquitted of the alcohol trafficking charge. See id.
105. See id. at 467. Specifically, the Court stated that a person who gives another permission to use her vehicle cannot be an innocent owner. See id. The Court also explained that certain uses of property are so abhorrent or damaging to society that the innocent owner surrenders control to the wrongdoer at her own risk. See id.
106. See id.
107. See id. at 467-68.
der specific factual circumstances in which property was stolen,\textsuperscript{108} used without an owner's consent,\textsuperscript{109} or if the seriousness of the seizures was grossly disproportionate to the underlying offense.\textsuperscript{110} Nonetheless, in both cases the Court strictly adhered to the guilty property fiction articulated in \textit{The Palmyra} and refused to consider each owner's lack of culpability or the unfairness of the seizure in determining the constitutionality of civil forfeitures.\textsuperscript{111}

\section{2. Harsh Conclusion Offers Hope for Innocent Owner Defense}

Despite these decisions, the call for recognition of an innocent owner defense persisted.\textsuperscript{112} In \textit{Calero-Toledo v. Pearson Yacht Leasing Co.},\textsuperscript{113} the Supreme Court held that the Puerto Rico government did not violate a yacht lessor's due process rights when police confiscated the lessor's yacht.\textsuperscript{114} The government charged the lessee criminally under Puerto Rico's Controlled Substances Act after the officers discovered marijuana on board.\textsuperscript{115} The government then seized the boat, but failed to provide the lessors with actual notice of the forfeiture.\textsuperscript{116} Upon learning of the forfeiture, the lessors brought an action for restoration of their vessel.\textsuperscript{117} The lower court held that the Puerto Rico statutory sections at issue were unconstitutional because the Fifth Amendment Due Process Clause required preseizure notice to innocent owners.\textsuperscript{118}

The Supreme Court reversed the lower court's decision, holding that the Fifth Amendment did not require preseizure notice.\textsuperscript{119} Citing \textit{The
The Court explained that, historically, the judiciary had devoted little attention to innocent owner property rights. Consequently, the Court ruled that Puerto Rico was not required to notify the ship's lessors before it seized the offending property.

Although Calero-Toledo upheld the constitutionality of the Puerto Rico statute, the Court once again alluded to the inherent unfairness of forfeiting the property of a truly innocent owner. Moreover, the Court cited its prior discussions in J.W. Goldsmith and Van Oster and expressed concern over the constitutionality of seizure cases in which the wrongdoer obtained the property without the owner's consent, or where an owner consented to the use of the property but, despite having exercised every reasonable precaution, was unaware that it would be used in criminal activity. The Court ultimately concluded, however, that the Puerto Rico forfeiture statute's failure to provide an innocent owner defense was without constitutional consequence because the yacht owner had entrusted his property to the lessee. Moreover, the Court ruled that the lessee failed to take reasonable steps to assure that the boat would not be used to facilitate criminal activity. Still, Calero-Toledo had suggested that property may be exempt from civil forfeiture when an owner either

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120. See id. at 683-84. The Court illustrated this point by explaining that Harmony v. United States, 43 U.S. (2 How.) 210, 238 (1844), upheld the forfeiture of a wholly innocent owner's ship under piracy laws. See Calero-Toledo, 416 U.S. at 684. Moreover, to demonstrate how minimal an innocent owner's due process rights were, the Court noted that United States v. 1960 Bags of Coffee, 12 U.S. (8 Cranch) 398, 405 (1814), upheld the forfeiture of a bona fide purchaser's interest in coffee when the seller failed to pay customs tax. See Calero-Toledo, 416 U.S. at 684 n.24.

121. See id. at 679-80. After the Court addressed the statute's notice provisions, it considered the propriety of the seizure itself. See id. at 680.

122. See id. The Court remarked that under different circumstances, the broad sweep of a civil forfeiture statute could "give rise to serious constitutional questions." Id. Not surprisingly, however, the Court failed to articulate what circumstances would actually trigger the necessity for a judicially created innocent owner defense. See id.

123. See id. (citing Van Oster v. Kansas, 272 U.S. 465, 467 (1926); J.W. Goldsmith, Jr.-Grant Co. v. United States, 254 U.S. 505, 512 (1921)).

124. See id. at 689-90. Supporting a "best efforts" defense, the Court argued that "a forfeiture can only be applied to those cases in which the means that are prescribed for the prevention of a forfeiture may be employed." Id. at 689 (quoting Peisch v. Ware, 8 U.S. (4 Cranch) 347, 363 (1808)).

125. See id. at 690.

126. See id.
C. Placing a Limit on Civil Forfeiture Penalties

In *The Palmyra* decision in 1827, the Supreme Court relied upon the guilty property fiction and steadfastly refused to acknowledge that individual property rights imposed limitations on the government's forfeiture powers. In the years following *The Palmyra*, however, the Court appeared willing to consider the adoption of a narrow, judicially created innocent owner defense in instances where the wrongdoer lacked consent or where an egregious forfeiture violated an owner's due process rights. Then, in *Calero-Toledo*, the Supreme Court indicated that two potential classes of innocent owners may be entitled to a defense in forfeiture proceedings. Because the Court applied these defenses so narrowly, though, only a small fraction of innocent owners would be permitted to enjoy due process protection against civil forfeiture.

Prior to 1993, Fifth and Fourteenth Amendment due process challenges to in rem forfeiture proceedings were common. Then, unexpectedly, in *Austin v. United States*, the Supreme Court changed its analytical approach and considered an Eighth Amendment excessive fines challenge to an alleged disproportionate civil forfeiture. In a

127. *See id.* at 689-90.
129. *See J.W. Goldsmith, Jr.-Grant Co. v. United States*, 254 U.S. 505, 512 (1921) (sympathizing with innocent owners whose property is used without their consent or who are subject to an egregious forfeiture, but refusing to articulate a judicially created innocent owner defense).
130. *See Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 689-90 (1974). The Court suggested that an owner who diligently protects her property, or whose property is used without her consent, may be entitled to due process protection from forfeiture. *See id.*
131. *See id.* at 690.
132. *See, e.g.*, *Van Oster v. Kansas*, 272 U.S. 465, 466 (1926) (Fourteenth Amendment); *United States v. One Ford Coupe Auto.*, 272 U.S. 321, 328-29 (1926) (Fifth Amendment); *J.W. Goldsmith*, 254 U.S. at 508 (Fifth Amendment).
134. *See id.* at 606. The Eighth Amendment Excessive Fines Clause provides that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. CONST. amend. VIII (emphasis added). Unlike *The Palmyra*, *Harmony*, *Dobbins's Distillery*, *J.W. Goldsmith*, *Van Oster*, and *Calero-Toledo*, which were all in rem proceedings, the petitioner in *Austin*, who sought constitutional review of the forfeiture statute, was also the defendant in the criminal proceeding that trig-
landmark decision, the *Austin* Court ruled that the Excessive Fines Clause applied to civil forfeitures that were punitive in character. In *Austin*, South Dakota brought a forfeiture action against the petitioner's house and business following his drug conviction. In his defense, the petitioner argued that the forfeiture was an unconstitutional excessive fine under the Eighth Amendment. Nonetheless, both the district and circuit courts rejected the petitioner's argument and upheld the State's authority to forfeit his property.

Unlike prior challenges to civil forfeiture laws, the petitioner in *Austin* conceded that he had used his property to facilitate the drug activities triggering the drug conviction. He argued, however, that forfeiting his home and business after he used the property to facilitate a minor infraction would violate his constitutional rights. After extensively reviewing the punitive, remedial, and deterrent goals underlying civil forfeitures,
the Supreme Court held that, if a civil forfeiture can be characterized as punitive, the forfeiture must not be disproportionate in relation to the crime. Accordingly, the Court remanded the case and instructed the lower courts to develop a test to determine the excessiveness of a seizure.

By the time *Austin* was decided, the Court had relied upon the guilty property fiction to uphold a state's power to forfeit innocent owners' property for more than one hundred and fifty years.

Due process challenges to this judicially created legal fiction were generally unsuccessful. Although the Court expressed displeasure with the guilty property fiction, and forfeiture of innocent owners' property interests in *Calero-Toledo*, it ultimately upheld the forfeiture. Similarly, the *Austin* Court sympathized with the innocent owner's plight, but did not consider a due process challenge to civil forfeiture, and limited its holding to the criminal defendant's Eighth Amendment challenge. Thus, because the *Austin* Court neither rejected nor approved of the *Calero-Toledo* dictum proposing an innocent owner defense, but adopted a new analytical approach to assess the constitutionality of civil forfeitures, it was unclear whether, after *Austin*, innocent owners should seek constitutional protec-

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141. See *Austin*, 509 U.S. at 613-18, 622. In deciding whether a statute was subject to Eighth Amendment review, the Court stated that the excessive fines test applied to a statute if even part of the statute's goal was to punish the owner for the wrongdoer's acts. See id. at 610-11.

142. See id. at 623. The Court did not address whether forfeiting an innocent owner's property was per se excessive under the Eighth Amendment because the statute at issue contained an innocent owner provision. See id. at 619. Similarly, the Court expressly refused to address "whether it would comport with due process to forfeit the property of a truly innocent owner." Id. at 617 n.10.

143. See Bennis v. Michigan, 116 S. Ct. 994, 998 (1996); see also Guerra, supra note 13, at 359-67 (arguing that since *The Palmyra*, the Court has used the guilty property fiction to remove civil forfeitures from the reach of property owners' constitutional claims); Niegorski, supra note 13, at 384-88 (tracing the development of civil forfeiture law predating *Bennis*); Noya, supra note 1, at 500-01 (attributing many of the Court's civil forfeiture decisions to the guilty property fiction).

144. See *Austin*, 509 U.S. at 615-17 (tracing the Court's use of the guilty property fiction to uphold civil forfeitures against constitutional attack since *The Palmyra*).

145. See *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 668-89 (1974) (noting that "serious constitutional questions" might arise given "the broad sweep of forfeiture statutes").

146. See id. at 617 n.10, 622; see also Chatman, supra note 13, at 759-61 (discussing the dearth of Eighth Amendment civil forfeiture jurisprudence).
tion under the Fifth and Fourteenth Amendments or under the Eighth Amendment.

II. **Bennis v. Michigan: Abrogating the Innocent Owner Defense**

A. **Due Process Challenge: Upholding State Forfeiture Power**

In *Bennis v. Michigan*, the Supreme Court reaffirmed its absolute liability approach to civil forfeitures first announced in its early admiralty decisions. In *Bennis*, the petitioner's spouse had been arrested for engaging in sexual acts with a prostitute inside the family car. Alleging that the Bennises' vehicle was a public nuisance, the State of Michigan brought a forfeiture action against the car. Mrs. Bennis contested the

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147. See Robert M. Sondak, *The Tide Is Turning: Civil Forfeiture Law Is Becoming More Accommodating to Innocent Owners and Innocent Mortgagees*, 48 CONSUMER FIN. L.Q. REP. 178, 179 (1994) ("[T]he [Austin] Court all but held that under the U.S. Constitution such a truly innocent owner could not have his property forfeited.").

148. See id. at 179-80 (arguing that *Austin* helped to diminish the judicial sanction of formidable civil forfeiture laws and may result in greater constitutional protection for innocent owners). Some state courts applied *Austin* to innocent owners, and developed “excessive penalty” tests to guide future decisions. See *State v. 392 South 600 East*, 886 P.2d 534, 541 (Utah 1994). The Utah Supreme Court held that, under the Eighth Amendment Excessive Fines Clause, the State could not forfeit a family home simply because the police discovered the husband kept drugs on the premises. See id. at 542. The court's excessive fines analysis focused on the nexus between the home and the criminal activity. See id. at 541-42. Consequently, when the court determined that seizing the entire house was excessive, the wife's interest as an innocent owner was preserved. See id. at 542. Other courts refused to place Eighth Amendment limits on government forfeitures. See *Milwaukee v. Arrighi*, 565 N.W.2d 291, 294 (Wis. Ct. App. 1997) (refusing to apply Eighth Amendment excessive fines analysis to a nuisance abatement proceeding because nuisance abatements have “never been considered to be 'punishment' and [have] never triggered an 'excessive fines' analysis”).


150. See id. at 998. Specifically, the majority referred to American civil forfeiture jurisprudence as an “unbroken line” of cases, thereby rebuking any claim that the Court had created a common law innocent owner defense. See id.; see also Boudreaux & Pritchard, *supra* note 1, at 615 (explaining that *Bennis* relied upon the same rationale that evolved in early admiralty cases); Joi Elizabeth Peake, Note, *Bound by the Sins of Another: Civil Forfeiture and the Lack of Constitutional Protection for Innocent Owners in Bennis v. Michigan*, 75 N.C. L. REV. 662, 688-89 (1997) (describing the Court's apparent blind adherence to stare decisis in light of the changing nature of modern civil forfeiture laws and dicta in its own recent decisions); Will, *supra* note 40, at C7 (attributing the seemingly unfair result in *Bennis* to the Court's early strict liability admiralty decisions).

151. *See Bennis*, 116 S. Ct. at 996. The majority opinion noted that Mr. and Mrs. Ben- nis were co-title holders of the vehicle. See id. at 997.

152. See id. at 996. The local nuisance abatement statute authorized the State to sell cars declared to be public nuisances. See *Mich. Comp. Laws Ann.* § 600.3801 (West 1987
abatement proceeding, arguing that the Michigan statute did not apply to property owners who were unaware that their property was used for criminal purposes. The Wayne County Circuit Court rejected her argument and ordered the sale of the car, concluding that the trial judge's remedial discretion was sufficient to protect an innocent owner's interests.

The Michigan Court of Appeals reversed the lower court, reasoning that prior Michigan Supreme Court decisions prohibited the State from forfeiting a blameless individual's property unless the owner knew the wrongdoer would use the property for criminal purposes. Because the parties had conceded that Mrs. Bennis was unaware of her husband's illegal activities, the court of appeals vacated the judgment.

The Michigan Supreme Court reversed the Michigan Court of Appeals and rejected Mrs. Bennis's state and federal constitutional challenges. Maintaining that the court of appeals had misinterpreted Michigan's forfeiture law, the Michigan Supreme Court held that an owner's culpability is irrelevant in a civil forfeiture proceeding. Moreover, the Michigan Supreme Court also rejected Mrs. Bennis's newly asserted due process challenge, concluding that the statute's failure to supply an innocent owner defense was inconsequential. In rejecting the due process
claims, the Michigan Supreme Court relied on United States Supreme Court decisions, suggesting that only an owner whose car was stolen or used without consent could assert an innocent owner defense. The United States Supreme Court granted certiorari to determine whether Michigan's forfeiture proceedings violated Mrs. Bennis's rights under the Fourteenth Amendment Due Process Clause or the Fifth Amendment Takings Clause.

**B. The Majority Opinion: Pirate Ships and Booze Runners Doom Modern Innocent Owners' Claims**

In *Bennis*, the United States Supreme Court affirmed the Michigan Supreme Court's decision and refused to extend the innocent owner defense beyond the boundaries established in *The Palmyra* and its progeny. Writing for the five member majority, Chief Justice Rehnquist rejected Mrs. Bennis's contention that the Court's holdings in *Calero-Toledo* and *Austin* prohibited Michigan from forfeiting her property interest in the family car. In rejecting Mrs. Bennis's innocent owner defense, the Court dismissed, as dictum, language from earlier decisions suggesting that inculpable property owners should be entitled to exemp-

160. See id. 493-94 (citing *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 683 (1974)); *Van Oster v. Kansas*, 272 U.S. 465, 467 (1926)). The Michigan Supreme Court also noted that the trial court retained discretionary power to mitigate unfair forfeitures and to protect an innocent owner's interests. See id. at 495.

161. See *Bennis v. Michigan*, 116 S. Ct. 994, 997-98 (1996). The United States Supreme Court dismissed Mrs. Bennis's Takings Clause claim because Michigan had "lawfully acquired [the property] under the exercise of governmental authority other than the power of eminent domain." Id. at 1001.

162. See id. at 1001. The majority explained that the Court's past decisions, beginning with *The Palmyra*, 25 U.S. (12 Wheat.) 1 (1827), formed an unbroken chain of precedent denying an owner relief from forfeiture without regard to knowledge of the criminal activity triggering the forfeiture. See *Bennis*, 116 S. Ct. at 998; see also George M. Dery III, *Adding Injury to Insult: The Supreme Court's Extension of Civil Forfeiture to Its Illogical Extreme in* Bennis v. Michigan, 48 S.C. L. REV. 359, 379 (1997) ("Chief Justice Rehnquist relied on *The Goldsmith-Grant Co.* Court's dodge of an issue as precedent for his placing the *Bennis* Court's head in the sand.").

163. See *Bennis*, 116 S. Ct. at 999-1001. The Court rejected Mrs. Bennis's innocence defense because: (1) she constructively consented to her husband's use of the car as a co-title holder; and (2) she misunderstood the holding in *Calero-Toledo* when she argued that a cautious property owner was entitled to an innocent owner defense. See id. at 999 & n.5. The Court explained that *Calero-Toledo* implicitly reiterated the Court's position that only property stolen or used without the owner's consent may be excluded from government forfeiture. See id. at 999. The Court also rejected her argument that *Austin* limited Michigan's power to seize her car because *Austin* did not address the interests of innocent owners. See id. at 1000. Even if the Court applied the *Austin* analysis to Mrs. Bennis's case, the Excessive Fines Clause would not limit the Michigan statute which also sought non-punitive goals. See id.
tion from forfeiture.\textsuperscript{164} Instead, the Court applied absolute liability principles to property owners who consent to the use of their property by third party wrongdoers.\textsuperscript{165}

1. A Return to The Palmyra

The \textit{Bennis} majority upheld the forfeiture despite Mrs. Bennis's due process assertions, reasoning that case law overwhelmingly supported the constitutionality of civil forfeitures as valid law enforcement mechanisms.\textsuperscript{166} Chief Justice Rehnquist noted that \textit{The Palmyra} Court's adoption of the guilty property fiction marked the advent of a well-recognized civil forfeiture tradition in American law.\textsuperscript{167} Although \textit{The Palmyra} Court had not addressed the innocent owner defense, the \textit{Bennis} majority explained that \textit{The Palmyra} line of cases stood for the proposition that an owner's culpability is irrelevant in civil forfeiture proceedings.\textsuperscript{168}

Furthermore, the \textit{Bennis} majority reaffirmed the continued validity of the agency theory and the doctrine of negligent entrustment as justification for holding property owners responsible for a wrongdoer's acts.\textsuperscript{169} Specifically, the \textit{Bennis} majority cited \textit{Harmony} and \textit{Dobbins's Distillery}, for the proposition that an owner relinquishes control of her property at her own risk and, therefore, is responsible for ensuring that the property is not used for illegal purposes.\textsuperscript{170} Consequently, the majority opinion asserted that civil forfeiture rests on three historical principles: (1) the property itself, rather than the property owner, is accused of the crime; (2) the owner is responsible for an agent's acts; and (3) the owner is responsible if she knowingly entrusts property to another.\textsuperscript{171}

\begin{itemize}
  \item \textsuperscript{164} See \textit{id.} at 999 (referring to the suggested "best efforts" innocent owner defense in \textit{Calero-Toledo} as "obiter dictum").
  \item \textsuperscript{165} See \textit{id.} at 998 (explaining that the guilty property fiction justifies the harsh results in civil forfeiture cases because the property is considered the defendant in the forfeiture proceeding, not the property owner (citing \textit{The Palmyra}, 25 U.S. (12 Wheat.) 1, 14 (1827))).
  \item \textsuperscript{166} See \textit{id.} at 1001 ("We conclude today, as we concluded 75 years ago, that the cases authorizing [forfeiture of innocent owners' property]... are 'too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced.'" (citation omitted)).
  \item \textsuperscript{167} See \textit{id.} at 998. Chief Justice Rehnquist highlighted the significance of \textit{The Palmyra} decision, emphasizing that it firmly established that a property owner's constitutional rights are not at issue in \textit{in rem} civil forfeitures. \textit{See id.}
  \item \textsuperscript{168} See \textit{id.}
  \item \textsuperscript{169} See \textit{id.}
  \item \textsuperscript{170} See \textit{id.} The majority opinion reaffirmed \textit{Harmony}, stating that the shipowner's master-servant relationship with the crew justified the forfeiture. \textit{See id.} Similarly, the majority expressed confidence in its decision in \textit{Dobbins's Distillery}, explaining that the forfeiture was justified because the lessor erred when he entrusted his property to the criminal lessee. \textit{See id.}
  \item \textsuperscript{171} See \textit{id.}
\end{itemize}
2. The Next Generation of Forfeitures—Striking the Early Innocent Owner Defense

The Bennis Court dismissed language contained in previous decisions suggesting that the Court may create an innocent owner defense under the proper circumstances.\(^ {172} \) First, the Bennis majority noted that the J.W. Goldsmith Court refused to decide if the government could forfeit an owner’s interest in property stolen by a wrongdoer or used without the owner’s consent.\(^ {173} \) Thus, the majority maintained that the J.W. Goldsmith Court merely affirmed traditional forfeiture law.\(^ {174} \) Second, the Bennis Court noted that Van Oster, relying on J.W. Goldsmith, had declined to consider the owner’s lack of culpability when it upheld the forfeiture of the owner’s car.\(^ {175} \) Consequently, the Bennis majority found that the status of traditional civil forfeiture law was not altered by the Court’s holdings in J.W. Goldsmith or Van Oster.\(^ {176} \)

3. Obiter Dictum: Dismissing the Call for an Innocent Owner Defense

In urging the Court to adopt an innocent owner defense, Mrs. Bennis relied on the dictum in Calero-Toledo in which the Court suggested that, under the proper circumstances, due process may require an innocent owner defense.\(^ {177} \) Specifically, Mrs. Bennis asked the Court to consider the statement in Calero-Toledo that it would be difficult to punish those

\(^{172}\) See id. at 999 n.5. The majority opined that earlier cases did not alter the Court’s position on the innocent owner defense because Calero-Toledo, J.W. Goldsmith, and Austin reserved the question of whether an owner whose property was stolen or used without consent was entitled to an innocent owner defense. See id. at 999 n.5, 1000.

\(^{173}\) See id. at 999 n.5; see also supra notes 86-98 and accompanying text (discussing the Court’s reasoning in J.W. Goldsmith). The majority disagreed with Justice Stevens’s dissenting view that Chief Justice Marshall articulated an innocent owner defense in Peisch v. Ware, 8 U.S. (4 Cranch) 347, 364 (1808), which Justice Stevens believed that it held it was unfair to seize an individual’s property if the owner could not employ the means to prevent the criminal act. See Bennis, 116 S. Ct. at 999 n.5.

\(^{174}\) See Bennis, 116 S. Ct. at 999 n.5. The majority emphasized that in Van Oster the Court expressly declined to comment on the stolen property issue and affirmed J.W. Goldsmith, thereby demonstrating that the J.W. Goldsmith Court did not create an innocent owner defense for victims of egregious forfeitures. See id. at 998-99.

\(^{175}\) See id.

\(^{176}\) See id. Some commentators agree with this interpretation of past civil forfeiture decisions, arguing that the Court steadfastly has refused to deviate from the absolute liability principles established in The Palmyra. See Richard H. Scamon, “Not Now” Does Not Necessarily Mean “Not Ever”: The Supreme Court’s Refusal in Bennis v. Michigan to Abandon the “Guilty Property” Fiction of Forfeiture Law, 48 S.C. L. REV. 389, 391-95 (1997) (agreeing with the Bennis majority and complementing the Court on its bold adherence to past decisions, even when presented with a sympathetic plaintiff).

\(^{177}\) See Bennis, 116 S. Ct. at 999.
who took all reasonable steps to assure that their property would not be used in an unlawful manner. Essentially, Mrs. Bennis alleged that she was entitled to an innocent owner defense under Calero-Toledo because, although she implicitly consented to Mr. Bennis's use of the car, she could not have taken greater precautions to prevent him from using the vehicle for his criminal enterprise.

The Bennis majority disagreed, however, dismissing the Calero-Toledo passage as obiter dictum. Again, the Court explained that Calero-Toledo had no more than reserved the question of whether theft or lack of consent might, if at all, create a constitutionally required innocent owner defense. Here, the Court stated that Mrs. Bennis's circumstances were no more compelling than those of any of the defendants in the Court’s prior civil forfeiture cases, and therefore, no departure from precedent was warranted.

4. Dodging the Eighth Amendment

Not only was the Court unwilling to address Mrs. Bennis's due process challenge on the merits, it also found her Eighth Amendment excessive fines argument uncompelling. In particular, the Bennis majority rejected the assertion that Austin accorded Mrs. Bennis relief from Michigan's forfeiture law. Because the Austin Court recognized the applicability of the Excessive Fines Clause in punitive civil forfeiture proceedings, Mrs. Bennis argued that the forfeiture of her property constituted an excessive penalty prohibited under the Eighth Amendment.

178. See id. The Calero-Toledo Court articulated what might be termed a “best efforts” defense, admitting that “it would be difficult to reject the constitutional claim of... an owner who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property.” Id. (quoting Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 689 (1974)).

179. See id. In this case, Mrs. Bennis argued that she could not have prevented her husband's criminal activities because Mr. and Mrs. Bennis owned the car jointly and Mrs. Bennis was unaware that her husband would use the vehicle to solicit a prostitute. See id. at 997.

180. See id. at 999. Furthermore, assuming that Mrs. Bennis's circumstances as an inculpable co-owner were admitted as a “best efforts” defense, the Court explained that she could not substantiate the defense because she did not take any greater steps than did the lessor in Calero-Toledo to insure that her property would not be used illegally. See id.

181. See id.

182. See id.

183. See id. at 1000.

184. See id.

185. See id. Mrs. Bennis failed to raise an Eighth Amendment argument in the lower courts. See Michigan ex rel. Wayne County Prosecutor v. Bennis, 527 N.W.2d 483 (Mich.
The majority disagreed, explaining that *Austin* involved government seizures of criminal defendants’ property, under a statute providing an innocent owner defense, rather than forfeitures of innocent owners’ property. Additionally, the *Bennis* majority noted that, unlike the forfeiture in *Austin* that was solely punitive in nature, the forfeiture in *Bennis* advanced both deterrent and punitive goals. Thus, absent any constitutional protection from seizure, the *Bennis* majority maintained that Mrs. Bennis’s only salvation from inequitable forfeiture rested in the trial court’s remedial discretion.

C. The Concurring Opinions


In a concurring opinion, Justice Thomas emphasized that Michigan’s nuisance abatement scheme was constitutional because civil forfeiture was an accepted practice in the United States before and after the adoption of the Fourteenth Amendment. Justice Thomas expressed concern, however, that forfeiture proceedings may appear unfair to a public that is unaware of the long-standing history and tradition of forfeiture law in American jurisprudence.
tion that is "intensely undesirable." He admonished that traditional due process jurisprudence, rather than subjective notions of unfairness, sanctioned government forfeitures of innocent owners' property. Finally, Justice Thomas concluded that although improper and excessive enforcement of civil forfeiture laws could deprive innocent owners of their property, the Constitution conferred upon the states the primary duty to avoid such a result.

2. Justice Ginsburg: A Simple Decision

Justice Ginsburg also joined in the majority opinion, asserting that because the vehicle was jointly owned and used with Mrs. Bennis's implied consent, the only matter before the Court was whether Mrs. Bennis was entitled to one-half of the car's proceeds. In Justice Ginsburg's view, only owners who did not consent to the wrongdoer's use of the property might be entitled to assert an innocent owner defense. Therefore, because Mrs. Bennis consented to her husband's use of the car, she fell outside of any constitutionally mandated innocent owner defense. Furthermore, Justice Ginsburg characterized as "critical" to the Court's due process analysis the equitable nature of Michigan's nuisance abatement law which accorded the state courts the power to monitor its enforcement. Because both parties agreed that Michigan had the power to ac-

191. See Bennis, 116 S. Ct. at 1001-02 (Thomas, J., concurring).
192. See id. 1003 (explaining that "the Constitution apparently assigns to the States and to the political branches of the Federal Government the primary responsibility for avoiding [unjust forfeitures]"). Although Justice Thomas believed that the executive and legislative branches were responsible for policing excessive forfeiture laws, he suggested that, at some point, an egregious forfeiture may violate a property owner's constitutional rights. See id. at 1002-03. Justice Thomas suggested a test by which courts should compare each new seizure case with prior forfeiture decisions to determine if the government violated the property owner's due process rights. See id. at 1002. Applying his own test, Justice Thomas noted that the Bennises' rather ordinary forfeiture must be constitutional because the forfeiture was no more unfair than any of the forfeitures set forth in The Palmyra line of cases. See id. at 1003.
193. See id. 1003.
194. See id. (Ginsburg, J., concurring) (arguing that the dissent's excessive fines analysis was inapplicable to Mrs. Bennis's cause of action because the dissent overlooked the Michigan nuisance abatement statute's remedial and deterrent goals, inappropriately characterizing the law as punitive and therefore subject to the Austin analysis).
195. See id.
196. See id.
197. See id. Specifically, Justice Ginsburg's argument closely resembles the last part of Chief Justice Rehnquist's opinion where he explained that the Michigan trial court's discretionary power would mitigate harsh forfeiture laws. Compare id. at 1001 (explaining that judicial discretion would ameliorate unfair forfeitures), with id. (Ginsburg, J., concurring) (same). Justice Stevens, however, asserted that Justice Ginsburg's reliance on the
tually seize the car, Justice Ginsburg explained that the lower courts bore
the responsibility of distributing the proceeds equitably. In her view, therefore, the trial court did not abuse its discretion when it refused to
reimburse Mrs. Bennis for her interest in the car because the State’s costs
offset any outstanding proceeds from the car’s sale.

D. The Dissenting Opinions

Justice Stevens, joined by Justices Breyer and Souter, dissented, arguing that Michigan’s forfeiture law violated the Due Process Clause and the Excessive Fines Clause. Justice Stevens argued that the forfeiture of Mrs. Bennis’s property was unconstitutional for three distinct reasons: (1) the connection between Mrs. Bennis’s car and her husband’s violation was insufficient; (2) Mrs. Bennis was an innocent owner; and (3) the forfeiture of the Bennises’ car was an excessive penalty under the Eighth Amendment. Justice Kennedy also dissented, arguing that by failing to import a culpability requirement or a rebuttable presumption of negligent entrustment in automobile forfeiture cases, the Bennis majority unconstitutionally favored Michigan’s crime-fighting objectives over Mrs. Bennis’s property interests.

1. Justice Stevens: Nexus Theory, Culpability Requirement, and Excessive Penalty Analysis

In dissent, Justice Stevens argued that the Court’s holding marked a
critical departure from its prior holdings in which the government was
permitted only to seize property that actually facilitated the underlying
criminal act. Justice Stevens identified three categories of property
subject to civil forfeiture: contraband, proceeds derived from criminal ac-

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\item \textit{Bennis v. Michigan} 315
\item trial court’s discretionary power was misplaced because he believed that the lower court abused its discretionary power in this case. See \textit{id.} at 1009 n.14 (Stevens, J., dissenting).
\item 198. See \textit{id.} at 1003 (Ginsburg, J., concurring) (arguing that the trial judge’s decision could be overturned only if manifestly unreasonable).
\item 199. See \textit{id.} Justice Ginsburg also was concerned that the dissent’s position would deter states from implementing nonpunitive schemes to curb prostitution. See \textit{id.}
\item 200. See \textit{id.} at 1004 (Stevens, J., dissenting).
\item 201. See \textit{id.} Justice Stevens maintained that the Court’s past decisions protected blameless owners by allowing the Court to consider the owner’s culpability or the connection between the property and the crime as threshold requirements in the forfeiture proceeding. See \textit{id.} at 1007-08. In addition, he believed that Michigan’s forfeiture action was unconstitutionally excessive. See \textit{id.} at 1010.
\item 202. See \textit{id.} at 1011 (Kennedy, J., dissenting). Justice Kennedy distinguished automobile owners’ due process rights from the rights of shipowners in the Court’s early absolute liability admiralty forfeiture cases. See \textit{id.}
\item 203. See \textit{id.} at 1003-04 (Stevens, J., dissenting).
\end{itemize}
tivity, and instruments that facilitate proscribable acts.\textsuperscript{204} In his view, the government always can seize contraband and tainted proceeds because the government has a strong remedial and restitutionary interest in depriving criminals of the tools and proceeds of their criminal activities.\textsuperscript{205} With respect to the third category, Justice Stevens maintained that forfeiting instrumentalities used in criminal activity was difficult to reconcile with traditional forfeiture jurisprudence because the government obtains few benefits from such forfeitures and the potential harm to inculpable property owners is great.\textsuperscript{206} To best balance the government's needs against the property owner's due process rights, Justice Stevens asserted that criminal instruments can be confiscated by the government only if the instrument bears a sufficient connection to the underlying offense.\textsuperscript{207} Therefore, Justice Stevens concluded that the majority improperly applied precedent because the Bennises' car did not truly facilitate Mr. Bennis's wrongful act.\textsuperscript{208}

Even if the Court found that the Bennises' car facilitated Mr. Bennis's acts, however, Justice Stevens argued that Michigan could not forfeit the property of a wholly blameless owner.\textsuperscript{209} Specifically, he interpreted The Palmyra line of cases as having barred government forfeiture unless the owner was, at a minimum, negligent for entrusting the property to the wrongdoer.\textsuperscript{210} Under this standard, Justice Stevens concluded that Michigan's seizure of Mrs. Bennis's property was improper because, as both parties conceded, she was wholly without fault for her husband's conduct.\textsuperscript{211}

\textsuperscript{204} See \textit{id.} at 1004-05.
\textsuperscript{205} See \textit{id.} at 1004.
\textsuperscript{206} See \textit{id.}
\textsuperscript{207} See \textit{id.} at 1006. Justice Stevens noted that in the cases the majority relied upon, the property seized actually facilitated the crime. \textit{See id.} at 1005-06.
\textsuperscript{208} See \textit{id.} Justice Stevens argued that the car in this case did not facilitate Mr. Bennis's offense because the sexual acts could have occurred anywhere. \textit{See id.} at 1006.
\textsuperscript{209} See \textit{id.} at 1007.
\textsuperscript{210} See \textit{id.} Justice Stevens relied on \textit{Austin} where the Court stated that forfeiture decisions "rested 'at bottom, on the notion that the owner has been negligent in allowing his property to be misused and that he is properly punished for that negligence.'" \textit{Id.} (quoting \textit{Austin v. United States}, 509 U.S. 602, 615 (1993)). Justice Stevens argued that this text from \textit{Austin} indicated that the government must prove that the property owner negligently entrusted the offending property to the wrongdoer in order to succeed in a civil forfeiture action. \textit{See id.}
\textsuperscript{211} See \textit{id.} In addition, Justice Stevens urged that even if an innocent owner was strictly liable for a third party's actions, \textit{Calero-Toledo} provided the owner with a "best efforts" defense, exempting the individual from forfeiture if she took reasonable steps to ensure that her property was not used for criminal purposes. \textit{See id.} at 1007-08; see also \textit{supra} notes 122-27 and accompanying text (discussing the \textit{Calero-Toledo} Court's sug-
Finally, Justice Stevens asserted that the majority erred when it refused to recognize that seizure of the Bennises' car violated the Eighth Amendment Excessive Fines Clause.\textsuperscript{212} According to Justice Stevens, Michigan's appropriation of Mrs. Bennis's car was an excessive penalty because the State used a punitive statute to seize property belonging to an owner who was without fault for the criminal acts triggering the deprivation.\textsuperscript{213} Furthermore, he argued that the seizure surely was disproportionate because Mrs. Bennis's harm was far greater than the benefit Michigan gained by punishing Mr. Bennis for the one isolated incident.\textsuperscript{214}

2. Justice Kennedy: Forfeiture Only for Criminal or Negligent Owners

Justice Kennedy disagreed with the majority opinion and with Justice Stevens's dissenting opinion.\textsuperscript{215} Unlike Justice Stevens, Justice Kennedy agreed with the majority's interpretation that The Palmyra line imposed absolute liability on property owners when they loaned their property to

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  \item \textsuperscript{212} See Bennis, 116 S.Ct. at 1010 (Stevens, J., dissenting). Justice Stevens declared that, under Austin, the property owner's status as a criminal defendant or an innocent owner did not alter the Eighth Amendment analysis so long as the forfeiture was punitive. See id. Many commentators have agreed with Justice Stevens's interpretation of Austin, urging the Court to strike civil forfeitures that disproportionately affect innocent owners. See Sondak, supra note 147, at 179-80 (predicting that the Austin analysis will give rise to court decisions that are more receptive to innocent owner defenses); R. Todd Ingram, Comment, The Crime of Property: Bennis v. Michigan and the Excessive Fines Clause, 74 DENV. U. L. REV. 293, 303 (1996) (arguing that Michigan's nuisance abatement scheme was punitive, not solely remedial, and therefore subject to the Austin excessive fines analysis).
  \item \textsuperscript{213} See Bennis, 116 S. Ct. at 1010 (Stevens, J., dissenting).
  \item \textsuperscript{214} See id. (asserting that even a partial forfeiture would be excessive because Mrs. Bennis was completely without blame for her husband's acts).
  \item \textsuperscript{215} See id. at 1010-11 (Kennedy, J., dissenting). Justice Kennedy disagreed with the majority opinion because he believed the facts warranted a showing that Mrs. Bennis was negligent or criminally culpable before Michigan seized the car. See id. at 1011. He also disagreed with Justice Stevens's dissent because he believed that the forfeitures in The Palmyra line of cases did not rely on proof that the property owner was negligent in entrusting his property to a wrongdoer, but instead, imposed absolute liability on shipowners to avoid the difficult jurisdictional problems of bringing suits against European defendants. See id. at 1010.
\end{itemize}
criminal wrongdoers. Justice Kennedy explained, however, that the majority opinion failed to recognize that automobiles were a unique form of property that was essential to the daily lives of many Americans and should not be seized by the government without just cause. To permit society to function smoothly, he believed that a strong presumption of negligent entrustment or criminal complicity would protect the government’s crime-fighting objectives and still give the owner the opportunity to rebut the presumption and recover her property. Applying the culpability standard to the facts in the Bennis case, Justice Kennedy argued that Michigan could not forfeit Mrs. Bennis’s interest in the car because the State failed to demonstrate that she negligently entrusted the car to her husband or that she had knowledge of his criminal activity.

III. REJECTING THE INNOCENT OWNER DEFENSE IN CIVIL FORFEITURE CLAIMS

A. Mired in the Historical Fiction

1. Rewriting Civil Forfeiture History Through Stare Decisis

Ultimately, the Bennis majority declined to adopt an innocent owner defense. As a result, the Court destroyed what little momentum prop-
erty rights advocates gained in the *Calero-Toledo* and *Austin* decisions.\textsuperscript{221} Furthermore, although *Bennis* may be consistent with the Court's historical precedent on government civil forfeiture powers, the result is neither equitable nor logical.\textsuperscript{222} Since *J.W. Goldsmith*, many of the Supreme Court's civil forfeiture rulings upheld broad forfeiture laws, simultaneously expressing concern for innocent owners' due process rights.\textsuperscript{223} The

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\textsuperscript{221} See *Bennis*, 116 S. Ct. at 1007-08 (Stevens, J., dissenting) (arguing that *Calero-Toledo* established an innocent owner exception even for laws that impose strict liability on the property owner); id. at 1010 (arguing that *Austin* established an Eighth Amendment limitation on all civil forfeiture actions). Before the Court decided *Bennis*, some commentators predicted that *Austin* would give rise to an excessive fines limitation on forfeitures of innocent owners' property. See Robert M. Sondak, *Justice to Rule on Forfeiture of Innocent Owner's Property*, 5 MONEY LAUNDERING L. REP. 1, 5-6 (June 1995) (predicting, before *Bennis* was decided, that the Court would use *Austin* to strike down Michigan's forfeiture scheme in *Bennis*). After *Bennis*, many property rights advocates were shocked in light of the Court's position in *Calero-Toledo* and *Austin*. See Joan Biskupic, *Court Upholds Criminal Forfeiture Law: States Can Seize Belongings Used in Offenses—Even if Owner Is Innocent*, WASH. POST, Mar. 5, 1996, at A1 (describing the *Bennis* decision as surprising to attorneys on both sides of the issue); Kevin Johnson, *Seizure Ruling Thrills Police; Others Fearful*, USA TODAY, Mar. 5, 1996, at 5A (stating that advocates of private property rights were stunned by the *Bennis* decision). Similarly, the *Bennis* decision surprised lower courts that had adopted the *Calero-Toledo* Court's "best efforts" innocent owner defense. See United States v. 4560 Kingsbury Rd., No. 93-3054, 1994 WL 28772, at **2 (6th Cir. Feb. 2, 1994), 16 F.3d 1222, 1223 (6th Cir. 1994). Finally, the *Bennis* Court's rejection of Mrs. Bennis's Eighth Amendment claim also shocked lower courts applying an Excessive Fines Clause analysis to innocent owners under *Austin*. See State v. 392 South 600 East, 886 P.2d 534, 540-41 (Utah 1994).

\textsuperscript{222} See Ingram, supra note 212, at 306-07. Ingram argues that the *Bennis* Court erred by declaring Michigan's forfeiture law to be non-punitive, and thus not subject to the limitations prescribed under the Excessive Fines Clause. See id. at 303. Ingram maintains that "[c]ommon sense dictates that the deprivation of Ms. Bennis's interest in the vehicle punished [her] for an ultimately unwise 'investment.'" Id. at 306-07. Accordingly, an accurate analysis under established jurisprudence would require the Court to consider "whether Ms. Bennis's punishment was constitutionally 'excessive.'" Id. at 307; cf. State v. Rice, 626 P.2d 104, 114 (Alaska 1981) (questioning that, because forfeitures advance punitive goals, "what purpose is served by punishing the owner who has done all that reasonably could be expected to prevent illegal use... considering the minimal control that [an owner] has over an item whose ownership is in the hands and direct control of another?"). Moreover, *Bennis* is not analogous to early admiralty forfeiture cases that resorted to the guilty property fiction to avoid difficulties associated with obtaining in personam jurisdiction over a foreign shipowner. See *Bennis*, 116 S. Ct. at 1010 (Kennedy, J., dissenting) ("The prospect of deriving prompt compensation from in rem forfeiture, and the impracticality of adjudicating the innocence of the owners or their good-faith efforts in finding a diligent and trustworthy master, combined to eliminate the owner's lack of culpability as a defense.").

\textsuperscript{223} See *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 692 (1974) (Douglas, J., dissenting in part) (expressing that the government should not seize the property of a wholly innocent owner). Recent Supreme Court jurisprudence extending
Bennis majority, however, ignored the realities of modern civil forfeiture laws and, instead, provided a history lesson to the American people—a lesson that offers innocent property owners little protection from aggressive law enforcement policies, revenue-hungry legislators, and unyielding trial court judges.\textsuperscript{224}

2. Creating an All-Encompassing Strict Liability Standard in Forfeiture Proceedings

The Court’s holding in Bennis was improper because the Court blindly rejected language in its earlier decisions calling for an innocent owner defense. First, the majority improperly dismissed the good faith innocent owner defense articulated in Calero-Toledo.\textsuperscript{225} In Calero-Toledo, the additional procedural due process safeguards to property owners in forfeiture proceedings seems to recognize that owners are not completely without constitutional protection from arbitrary forfeitures. See Degen v. United States, 116 S. Ct. 1777, 1780 (1996) (explaining that property owners are constitutionally guaranteed the right to a hearing in order to contest a forfeiture); United States v. James Daniel Good Real Property, 510 U.S. 43, 53 (1993) (explaining that prior notice and opportunity for a meaningful hearing are “central to the Constitution’s command of due process”). Furthermore, the Bennis majority ignored the fact that lower federal and state courts have long expressed concerns that forfeiture laws infringe upon the due process rights of property owners. See, e.g., Rice, 626 P.2d at 113-14 (holding that while the United States Supreme Court has declined to recognize a due process innocent owner defense, the Alaska constitution did afford innocent owners due process protection); In re One 1965 Ford Mustang v. State, 463 P.2d 827, 834 (Ariz. 1970) (holding that “an automobile may not be forfeited . . . unless the owner had some connection with the unlawful act, or intended to permit the automobile to be used by a third person in the commission of the unlawful act, or had knowledge it was to be so used”); State v. Hochhausler, 668 N.E.2d 457, 468-69 (Ohio 1996) (indicating that the government’s failure to establish probable cause for the confiscation of an owner’s vehicle until several days after the seizure was executed was not supported by any governmental interest and constituted a manifest violation of due process).

\textsuperscript{224} See Steven L. Kessler, Civil Forfeiture’s Supreme Challenge After Bennis and Ursery, 10 WHITE-COLLAR CRIME REP. 1, 14 (1996) (suggesting that to avoid the potentially harsh results of Bennis, enforcement officials should learn to view forfeiture situations “as if they or their relatives were the claiming third party”); Melissa N. Cupp, Note, Bennis v. Michigan: The Great Forfeiture Debate, 32 TULSA L.J. 583, 601 (1997) (cataloging predictions that Bennis will encourage legislators to abolish statutory innocent owner defenses).

\textsuperscript{225} See Bennis, 116 S. Ct. at 999. Specifically, the Court wrongfully criticized the dissent’s argument that a truly innocent owner should be exempt from forfeiture in reliance on Peisch v. Ware, where Chief Justice John Marshall stated that “a forfeiture can only be applied to those cases in which the means that are prescribed for the prevention of a forfeiture may be employed.” Id. at 999 n.5 (quoting Peisch v. Ware, 8 U.S. (4 Cranch) 347, 363 (1808)). The majority insisted that Chief Justice Marshall was referring to situations in which the seized property had been stolen from the owner. See id. But in Peisch, the Court refused to uphold the forfeiture because the ship’s owner did not have the means to remove the cargo from the ship-wrecked vessel when his crew deserted. See Peisch, 8 U.S. (4 Cranch) at 363. Consequently, the Court refused to forfeit the cargo when local residents unloaded the ship and refused to pay the import duties because the shipowner could
Court held that the Due Process Clause did not require the government to provide preseizure notice to property owners under Puerto Rico's drug forfeiture laws. In the process, however the Court articulated a "best efforts" defense for innocent owners which is consistent with traditional due process principles and comports with property owners' expectations.

Alternatively, assuming the "best efforts" defense is rejected as mere dictum, the majority's reasoning creates a logical inconsistency. Persons who do not consent to a wrongdoer's use of their property may be entitled to a defense, while persons who implicitly consent to the wrongdoer's use of the property, but take every reasonable effort to prevent the illegal use of the property, are subject to forfeiture. For example, under Bennis, the government may not be able to confiscate a car if a thief was convicted of driving the car while under the influence of alcohol even after the owner recklessly left the car on a busy street, with the keys in the ignition, the motor running, and an open bottle of scotch on the seat, because the owner did not expressly or implicitly consent to the

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227. See LEVY, supra note 2, at 162-65 (explaining the impact of the Calero-Toledo decision's suggested "best efforts" innocent owner defense on lower courts and on federal legislation exempting innocent owners who take reasonable efforts to ensure that their property is not used for criminal purposes); see also supra notes 190-91 and accompanying text (discussing Justice Thomas's observation in Bennis that forfeitures may appear "lawless" to persons unfamiliar with Court precedent). The fact that the federal government and many states have recently included innocent owner defenses in their civil forfeiture statutes demonstrates expressed abhorrence for forfeiture of blameless owners' property. See 21 U.S.C. § 881(a)(4)(A) (1994); N.J. STAT. ANN. § 2C:64-5 (West 1995); H.R. 1916, 104th Cong. (1995) (proposed federal asset forfeiture reform act providing for an innocent owner defense under a number of federal asset forfeiture provisions).

228. See Bennis, 116 S. Ct. at 999 n.5. The majority reserved its opinion as to whether the government can seize an individual's property when the wrongdoer stole it or used it without the owner's consent. See id.
car's use. In contrast, the government could seize a mother's car after her child, a co-owner of the car, was convicted of driving under the influence of alcohol, even after she forbade him from drinking, took away his keys, traveled to a bar to pick him up, attempted to prevent him from getting behind the wheel, and called the police to stop him, because, as his mother, the court may determine that she implicitly consented to his use of her car and because Bennis denies her the right to a "best efforts" defense.

Undoubtedly, the Bennis decision placed Mrs. Bennis, and other joint owners in an inescapable dilemma. After Bennis, co-owners and secured parties are subject to absolute liability for the unpredictable acts of co-owners or debtors, even though the innocent parties do not possess the legal means to prevent the co-owner or debtor from using the property.

3. Criminals Get Constitutional Protection From Forfeitures While Wholly Innocent Parties Enjoy Strict Liability

The Bennis majority further erred when it rejected Mrs. Bennis's argument that Austin barred disproportionate forfeitures of innocent owners' property. The Austin Court held that the Eighth Amendment Ex-

229. See id. (reporting the long reserved question whether "'[i]f, by private theft, or open robbery, without any fault on his part, [an owner's] property should be invaded, . . . the law cannot be understood to punish him with the forfeiture of that property" (quoting Peisch v. Ware, 8 U.S. (4 Cranch) 347, 364 (1808)).

230. See id. at 999 (denying that an individual that took reasonable steps to prevent the illegal use of her property was entitled to an exemption from civil forfeiture). As co-title holder, Mrs. Bennis was powerless to prevent Mr. Bennis from using the family car because, as Justice Ginsburg noted, Mrs. Bennis implicitly consented to his use of the vehicle by virtue of her co-ownership. See id. at 999; see also id. at 1003 (Ginsburg, J., concurring); id. at 999 n.5 ("Because John Bennis co-owned the car at issue, [Tina Bennis] cannot claim [that John used the car without her consent].").

231. Compare id. at 999 (characterizing as dictum the Calero-Toledo Court's reference to a "reasonable efforts" defense and arguing that even if the defense was recognized, Mrs. Bennis failed to demonstrate that she took the necessary precautions to assert it), with id. at 1008 (Stevens, J., dissenting) ("Without knowledge that [her husband] would commit [a criminal] act in the family car, . . . surely [Mrs. Bennis] cannot be accused of failing to take 'reasonable steps' to prevent the illicit behavior."). See William Lee Borden, Jr., Real Estate Forfeiture Under Federal Law, 48 CONSUMER FIN. L.Q. REP. 164, 167-68 (1994) (analyzing the impact of civil forfeiture laws on innocent joint tenants); Barnes, supra note 4, at 1273 (noting that, as a co-title holder, there was very little that "[Mrs. Bennis] could do to prevent her husband's illegal acts"); Yanich, supra note 4, at 13A (noting that, in oral arguments before the Supreme Court, Justice Kennedy asked the Solicitor General whether, to protect their property interests, wives had to call the police if they suspected that their husband solicited prostitutes).

232. See Bennis, 116 S. Ct. at 1010 (Stevens, J., dissenting) (arguing that the Austin Court "established that when a forfeiture constitutes 'payment to a sovereign as punishment for some offense' . . . it is subject to the limitations of the Eighth Amendment's Ex-
cessive Fines Clause limited the enforcement of punitive civil forfeitures. 233 However, the Bennis Court opined that the Austin rationale still accorded Mrs. Bennis no relief. 234 First, because Austin involved a statute that provided an innocent owner defense, the Bennis majority held that Austin did not control in Mrs. Bennis’s case. 235 Second, even if Austin applied, the Bennis majority maintained that, unlike the punitive statute in Austin, Michigan’s forfeiture statute served both deterrent and punitive goals. 236

In Austin, however, not only did the Court express displeasure with the plight of innocent owners, but the Court also held that a statute seeking to deter future criminal acts can be characterized as punitive and is subject to the Excessive Fines Clause. 237 The Bennis Court, therefore, should have extended Eighth Amendment protection to Mrs. Bennis because it conceded that the statute served both punitive and deterrent goals. 238 By failing to do so, the Court effectively granted criminals greater constitutional protection from civil forfeitures than innocent owners. 239

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234. See Bennis, 116 S. Ct. at 1000.
235. See id.
236. See id. at 1000-01. The Bennis majority misread the Austin Court’s reasoning, because, in Austin, the Court held that if a law served any punitive purpose, the statute was subject to Eighth Amendment limitations. See Austin, 509 U.S. at 621; Kessler, supra note 224, at 13 (surmising that the above distinction “appears to stand the Court’s prior ruling on its head and take precedent at least two steps backwards, since it was that forfeiture which was at least partially punitive, causing the Court to emphasize in Austin the application of the Excessive Fines Clause to civil forfeiture actions, not the other way around”).
237. See Austin, 509 U.S. at 618.
238. See Bennis, 116 S. Ct. at 1000 (“[F]or the reasons pointed out in Calero-Toledo and Van Oster, forfeiture also serves a deterrent purpose distinct from any punitive purpose.”).
4. Concurring and Dissenting Opinions Fail to Provide Answers

In denying innocent owners Fourteenth or Eighth Amendment protection against civil forfeiture, the majority and Justice Ginsburg reasoned that the trial court's remedial discretionary powers would preclude abusive government seizures. Justice Thomas, however, relied on the political branches to police inequitable forfeitures. As Justice Stevens noted in his dissent, the majority unjustifiably relied upon the trial court's discretionary authority to avoid harsh forfeitures because, as Bennis itself clearly illustrated, unless trial judges are bound constitutionally to consider the rights of innocent owners, these owners will inevitably suffer injustice at the trial court level. Similarly, Justice Tho-

240. See Bennis, 116 S. Ct. at 1001 (commenting that the trial courts are empowered to mitigate unfair government seizures); see id. at 1003 (Ginsburg, J., concurring) (observing that an abatement proceeding is an "equitable action" in which the state court "stands ready to police exorbitant applications of the statute").

241. See id. at 1003 (Thomas, J., concurring). Justice Thomas acknowledged the potential danger of arbitrary government seizures, but because he believed innocent owners' property rights were not constitutionally protected, he interpreted the Constitution as delegating to the political branch the task of monitoring unfair government forfeitures. See id.

242. See id. at 1009 n.14 (Stevens, J., dissenting) (arguing that the majority's reliance on the trial court's remedial powers to protect innocent owners from exorbitant or oppressive seizures is misplaced because the lower court did not protect Mrs. Bennis); HYDE, supra note 1, at 61-64. Congressman Hyde proposed a stronger innocent owner defense because not all courts exercise their discretionary powers in an equitable fashion; some courts have established narrow innocent owner defenses, while others have created broad categories of exemptions from government forfeitures. See id. at 61-62 (citing United States v. Lot 111-B, 902 F.2d 1443, 1445 (9th Cir. 1990)). The proposed text would amend a number of federal asset forfeiture laws. See H.R. 1916, 104th Cong. (1995). Specifically, the proposed amendments to the popularly invoked Federal Controlled Substances Act generally represent the Act's reach, stating:

(a) In General—Section 511 of the Controlled Substances Act (21 U.S.C. § 881(a)) is amended

(1) in paragraph (4)(C), by striking "without the knowledge, consent, or willful blindness of the owner." and inserting "either without the knowledge of that owner or without the consent of that owner."

Id. at § 8(a)(1). The amendment would effectively change the federal anti-drug provisions to include a "best efforts" defense similar to the one referenced by the Court in Calero-Toledo. Compare id. § 8(b)(1) (proposing to amend 21 U.S.C. § 881 by adding the following—"property shall not be considered to have been used for a proscribed use without the knowledge or... consent of the owner ... if that owner ... failed to take reasonable steps to prevent the proscribed use"), with Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 689 (1974) ("[i]t 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 ... [or when] he had done all that reasonably could be expected to prevent the proscribed use of his property."). By codifying the "best efforts" defense, Congress could reduce trial courts' discretionary power and ensure uniformity in the application of federal asset forfeiture laws, presumably offering innocent owners greater protection from gov-
mas's reliance on the political branches to curb abusive forfeiture statutes is also implausible: history reveals that legislatures and the executive branches have continued to expand, rather than restrict, government forfeiture powers. Consequently, the majority and concurring Justices' confidence in the political and lower judicial branches of the government remains unsupported by historical practice and the current movement towards broad civil forfeiture laws.

While Justice Stevens accurately characterized the Bennis decision as inherently unfair to the interests of innocent owners, his abstract interpretations of earlier forfeiture cases drew attention away from the principal issue in Bennis: the adoption of a judicially created innocent owner defense under the Due Process Clause. For example, Justice Stevens insisted that the Court's prior forfeiture decisions rested upon a "nexus theory"—the presumption that the government could seize only property that is sufficiently connected to or employed in the commission of proscribable conduct. However, until the Court abandons the policy of

243. See HYDE, supra note 1, at 9-10 (explaining that because an increasing number of jurisdictions apply civil forfeiture to any criminal activity, "owners must police their property against all possible criminal activity—or lose it"); Richard C. Reuben, One Crime, Two Punishments: Asset Forfeiture Cases Offer Chance to Sort Out Double Jeopardy Issues, 81 A.B.A. J. 38, 38 (Dec. 1995) (noting that, as of December 1995, there were more than 100 federal civil forfeiture laws); Piety, supra note 1, at 911-27 (tracking the legislative expansion of civil forfeiture laws). Unfortunately, history reveals that the federal government and the states are unwilling to police civil forfeitures because seizures are both an effective crime-fighting tool and a readily available source of government funding. See HYDE, supra note 1, at 35 (alleging "[a]s if on the narcotics they are supposed to control and suppress, law enforcement agencies at all levels have become addicted to forfeiture as a source of ready cash to supplement their budgets"). Governments prefer civil forfeiture laws because law enforcement can inflict immediate economic injury on the criminal wrongdoer and the government must overcome minimum procedural rules in court, including a lower burden of proof than is required in criminal forfeiture proceedings. Cf. Bennis, 116 S. Ct. at 1001 (Thomas, J., concurring) (explaining that Michigan "wants to punish, for deterrence and perhaps also for retributive purposes, persons who may have colluded or acquiesced in criminal use of their property . . . [b]ut . . . it does not want to have to prove . . . collusion, acquiescence, or negligence"); see also Meyer, supra note 1, at 866 ("With civil forfeiture we see the worst of both worlds; proceedings and penalties which appear criminal, but which do not enjoy constitutional protection.").

244. See Piety, supra note 1, at 911-27.

245. See Bennis, 116 S. Ct. at 1004-07 (Stevens, J., dissenting).

246. See id.
absolute liability in forfeiture cases and adopts an innocent owner defense, the relationship between the forfeited property and the commission of the offense is wholly irrelevant.\textsuperscript{247} Thus, Justice Stevens failed to dissect the majority's weak due process analysis, by urging the Court simply to reconsider its civil forfeiture precedent, rather than to adopt an innocent owner defense that is consistent with the undeniable realities facing contemporary property owners.

**B. The Majority Opinion's Impact on Future Forfeiture Powers**

Prior to *Bennis*, adoption of a judicially created innocent owner defense seemed a plausible and likely extension of the rationales enunciated in *Calero-Toledo* and *Austin*.\textsuperscript{248} Surprisingly, the *Bennis* majority re-

\textsuperscript{247} See id. at 998. Not only did the majority reject Justice Stevens's nexus theory, but Chief Justice Rehnquist repeated the 75-year-old adage from *J.W. Goldsmith*, that when the Court is presented with an egregious forfeiture it will then decide whether there must be a minimal connection between the property and the underlying criminal acts before the government can institute forfeiture proceedings. See id. at 1000. The majority clearly sent property owners an ambiguous message by first stating that civil forfeitures do not implicate the innocent owner's constitutional rights under the guilty property fiction, but then stating that the Court may reconsider its position if presented with an egregious forfeiture where the government seized property only tangentially related to criminal activity. See id. at 999-1000. If, under the guilty property fiction, the property stands accused of the crime, then under the Court's reasoning, if the government seizes property tenuously connected to a crime, the owner's constitutional rights should not be implicated by the seizure because any injustice resulting from the forfeiture is visited upon the property, not the property owner. See id. In addition, the Court has acknowledged in other contexts that innocent owners are entitled to limited constitutional rights in forfeiture proceedings including, for example, preseizure notice and a meaningful hearing. See *Degen v. United States*, 116 S. Ct. 1777, 1781-82 (1996) (hearing); *United States v. James Daniel Good Real Property*, 510 U.S. 43, 62 (1993) (notice and a hearing). The *Bennis* majority failed to explain, and Justice Stevens failed to note, however, that if civil forfeitures do not implicate innocent owners' constitutional rights, then why has the Court extended other constitutional protections to innocent owners? Compare *Bennis*, 116 S. Ct. at 998 (explaining that a rich history of Supreme Court case law holds that an owner's interest in property may be constitutionally forfeited when it is used to facilitate criminal ends, even though the owner did not know that it was to be put to such use), with *Degen*, 116 S. Ct. at 1781-82 (requiring the opportunity for a hearing to contest a civil forfeiture), and *James Daniel Good Real Property*, 510 U.S. at 62 (accordig limited due process rights to preseizure notice and a hearing). These decisions lead to the inevitable conclusion that Justice Stevens should have focused his dissent on a full due process challenge to existing civil forfeiture precedent by relying on the guilty property fiction.

\textsuperscript{248} See *Bennis*, 116 S. Ct. at 1007-08 (Stevens, J., dissenting). The *Calero-Toledo* decision suggested two innocent owner defenses in the context of the Fourteenth Amendment Due Process Clause. See *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 689 (1974). The majority in *Calero-Toledo* asserted that it would be difficult to ignore the constitutional claim of an owner whose forfeited property was stolen or used without the owner's consent. See id. Furthermore, the Court in *Calero-Toledo* explained that an owner who proved that she took reasonable steps to prevent the illicit use of her property
fused to extend Calero-Toledo or Austin to immunize blameless owners from government seizures. Consequently, the majority opinion likely will further the expansion of broad state and federal forfeiture laws and generate needless confusion among attorneys defending their client’s property interests against seemingly omnipotent government powers. In addition, the continued expansion of forfeiture laws may cause greater harm to lienholders, mortgagees, financial institutions, retailers, and insurance companies because these parties, notwithstanding their innocence, may forfeit their security interests in the property. Perhaps the

may be exempt from civil forfeiture. See id. at 689-90. In Austin, the Court held that the Eighth Amendment protects criminal defendants from excessive fines in civil forfeiture proceedings. See Austin v. United States, 509 U.S. 602, 622 (1993). Many commentators expressed surprise that the Court refused to apply Austin to innocent owners in the Bennis decision because, to many, forfeiting an innocent owner’s property seemed to be the ultimate excessive fine. See Ingram, supra note 212, at 307 (maintaining that, by holding that civil forfeitures of innocent owners’ property was a form of punishment, the Bennis Court would have honored the Austin Court’s extensive inquiry into forfeiture jurisprudence’); Savage, supra note 13, at A1 (characterizing the Bennis decision as “a surprising victory for the broad use of a state’s forfeiture power”). However, many lower courts considered applying Austin and Calero-Toledo to innocent owners, but declined to do so until given further guidance by the Supreme Court. See State v. Gaudio, 562 A.2d 1156, 1158 (Conn. App. Ct. 1989) (noting the absence of any cases subsequent to Calero-Toledo in which the innocent owner defense was applied).

249. See Bennis, 116 S. Ct. at 998 (explaining the Court’s intention to continue to adhere to the guilty property fiction from The Palmyra line of cases); see also Will, supra note 40, at C7 (criticizing the Court’s strict adherence to The Palmyra decision and its inability to assess the need for change in Due Process rights for innocent owners).

250. See Richard Carelli, Court Backs Car Seizure in Michigan: Wife Co-Owned Vehicle Used With Prostitute, BOSTON GLOBE, Mar. 5, 1996, at 3; Spiros A. Tsimbinos, U.S. Supreme Court Expands Government Forfeiture Rights, N.Y. CRIM. L. NEWS, Mar. 1996, at 3, 3 (describing Bennis as a “boost for local, state and federal prosecutors who see the forfeiture laws as an aggressive crime-fighting tool”); The Supreme Court, 1995 Term— Leading Cases, supra note 1, at 143 (cautioning that the Bennis decision may result in forfeiture laws harming property owners when parties such as common carriers and commercial lessees commit wrongs triggering a forfeiture of the bailor’s or lessor’s property). Surprisingly, some commentators have argued that the Bennis decision actually may inspire legislators to enact innocent owner defenses in response to the public outcry over Mrs. Bennis’s loss. See Cupp, supra note 224, at 602 (“Bennis may have the effect of prompting legislatures to enact innocent owner defenses along with civil forfeiture statutes.”); Significant Ruling For Asset Forfeiture, PROSECUTOR, May-June 1996 at 31, 31 (quoting one federal official with the Justice Department who commented that Bennis may have made it “more difficult to get legislation favorable to asset forfeiture passed”).

251. Cf. Tsimbinos, supra note 250, at 3 (“The majority opinion also appears to have halted the trend in the High Court to restrict what many have seen as over-zealous forfeiture procedures.”). Tsimbinos comments that civil forfeiture proceedings have become so common over the last several years that practitioners must diligently keep abreast of developing trends to best represent their clients. See id. at 4.

252. See Jeri Poller, Government Forfeiture of Collateral: Mortgagees and the Innocent Lien Holder Defense, 112 BANKING L.J. 534, 540-41 (1995) (discussing the difficulties that co-titleholding spouses and mortgagees may have in maintaining an innocent owner de-
most disturbing aspect of the majority's holding, however, is that Bennis apparently stands for the proposition that seizure of even prized possessions may be unavoidable, in certain circumstances, despite an owner's "best efforts" to contain her conduct, or the conduct of others, within the limits of the law. 253

Furthermore, the Bennis decision may encourage law enforcement to interpret forfeiture laws broadly in order to encompass even more property within the reach of the law and, consequently, fill department coffers with the proceeds of seized property. 254 The Bennis decision provides innocent owners little relief from arbitrary government seizures, cloaked in

fense under state and federal forfeiture laws); The Supreme Court, 1995 Term—Leading Cases, supra note 1, at 143 (explaining that while civil forfeiture theoretically places the costs of criminal conduct on the shoulders of those best-equipped to prevent it, in reality, certain classes of owners are unable to detect or prevent such abuse); see also Joseph F. Savage, Jr. & Stephanie A. Martz, How Corporations Spell Relief: Substituting Civil Sanctions for Criminal Prosecution, 11 CRIM. JUST. 10, 10 (1996) (warning that corporations are vulnerable to civil forfeiture proceedings under the federal mail and wire fraud statute, 18 U.S.C. § 1345). The domestic and international banking industry is particularly susceptible to civil forfeiture enforcement proceedings because criminal defendants often launder money through the bank's otherwise untainted accounts, thus exposing all monies in the accounts to forfeiture. See Kirk W. Munroe, Surviving the Solution: The Extraterritorial Reach of the United States, 14 DICK. J. INT'L L. 505, 515-16 (1996) (describing the difficulties that both domestic and foreign banks experience in attempting to prevent illegal use of their accounts and potential forfeiture proceedings); William J. Snider, International Cooperation in the Forfeiture of Illegal Drug Proceeds, 6 CRIM. L.F. 377, 381-82 (1995) (reporting on international agreements under which foreign countries and the United States will honor the forfeiture decisions of foreign courts for property physically present in another country).

253. Cf. Bennis, 116 S. Ct. at 1009 (Stevens, J., dissenting) (arguing that "[i]f anything, [Mrs. Bennis] was a victim"). Furthermore, if Mrs. Bennis had discovered her husband's exploits and had attempted to stop him, Chief Justice Rehnquist's strict reading of Calero-Toledo would not afford her a defense even if she took reasonable steps to prevent his criminal use of the car. See id. at 999 (rejecting the "best efforts" defense). But see Seamon, supra note 176, at 393-94 (arguing that civil forfeiture laws impose strict liability and express a legislative judgment that public health and safety is more important than protecting the rights of an individual property owner); Ward, supra note 4, at 118 (explaining that any harm caused to inculpable owners is secondary to the achievement of Michigan's policy goals served by the statute because "swift and certain punishment deters crime").

254. See HYDE, supra note 1, at 8-9 (explaining the conflict of interest created when law enforcement officers view forfeiture proceedings as a revenue source); LEVY, supra note 2, at 118-60 (describing law enforcement's seemingly unrestrained pursuit of forfeiture property and the liberal fiscal limitations on how the seized assets are spent); Ward, supra note 4, at 111 (noting that since Wayne County, Michigan commenced the enforcement initiative that yielded Mr. Bennis's arrest, the county has seized over 13,450 vehicles totaling "almost $5.3 million for enhanced law enforcement"). Some authors have published instructional manuals or books to educate law enforcement personnel to maximize department forfeiture revenues. See FALCON, supra note 14, at 1-14; GOLDSMITH, supra note 14, at 1-10.
crime-fighting objectives, which the government may employ to obtain financial windfalls for local police departments.\footnote{255} Moreover, any federal legislation calling for forfeiture reforms will have little impact on the innocent owner defense because civil forfeiture statutes often are grounded in state police powers, an area traditionally beyond Congress's reach.\footnote{256} Thus, the \textit{Bennis} decision effectively limits federal control over the enforcement of state forfeiture laws because the Supreme Court has refused to extend constitutional due process protection to innocent owners who lose their property under state forfeiture statutes.\footnote{257} Ultimately, state law enforcement, police, and revenue-hungry state legislatures are left to interpret the \textit{Bennis} decision to their advantage.\footnote{258}

\footnote{255. See Jacob M. Hilton, Note, \textit{Keep Him on a Short Leash: Innocence of Owner Not a Constitutional Defense to Forfeiture of Property Allegedly Connected to Illegal Conduct: Bennis v. Michigan, 116 S. Ct. 994 (1996), 28 TEX. TECH L. REV. 133, 153-56 (1997) (surmising that \textit{Bennis} gives law enforcement personnel the "green light" to fight for greater department revenue through increased numbers of forfeitures); Aaron Epstein, \textit{High Court Affirms Seizure Laws: Critics Say Ruling Will Penalize Many Property Owners Unfairly}, \textit{DAILY NEWS (LOS ANGELES)}, Mar. 5, 1996, at N9 (arguing that \textit{Bennis} provides individuals with little protection from the "flagrant abuses" of law enforcement seizure powers that also compelled Congress to draft forfeiture reform proposals); see also HYDE, \textit{supra} note 1, at 11-15 (reviewing cases in which law enforcement personnel in pursuit of department revenues improperly seized innocent owners' property, often with scant evidence of criminal activity); Carelli, \textit{supra} note 250, at 3 (arguing that the "ruling could make some prosecutors more aggressive in seeking to enforce forfeiture laws as a crime-fighting tool").}

\footnote{256. See HYDE, \textit{supra} note 1, at 75, 79-80 (advocating federal forfeiture reforms); Linnet Myers, \textit{Forfeiture Laws: Fair or Foul? Americans Not Guilty of Crimes Decry Loss of Property}, CHI. TRIB., Mar. 12, 1996, at 6 (summarizing federal asset forfeiture reform legislation, but explaining that federal reforms would not have helped Mrs. Bennis because Michigan seized her property under a state nuisance law). Congressman Hyde recently introduced a proposed amendment to the federal asset forfeiture laws. \textit{See H.R. 1916, 104th Cong. (1995). This bill would shift the burden of proof in federal forfeiture proceedings from the property owner to the government and provide owners with a "best efforts" defense. See id. While this bill would not have helped Mrs. Bennis's challenge to Michigan's nuisance abatement law, the proposed legislation would provide greater protection for owners whose property is seized under the notorious Comprehensive Drug Prevention and Crime Control Act, 21 U.S.C. § 881 (1994); see also supra note 242 (reciting the text of H.R. 1916).}

\footnote{257. See \textit{Bennis}, 116 S. Ct. 1003 (Thomas J., concurring) (stating that it is not the role of the United States Supreme Court to impose constitutional limits on state civil forfeiture statutes). However, some state courts have extended due process protection to innocent owners under their state constitution. \textit{See State v. Rice, 626 P.2d 104, 112 (Alaska 1981).}

\footnote{258. See Savage, \textit{supra} note 13, at A12 ("Nonetheless, the ruling leaves the matter in the hands of local prosecutors and state lawmakers, many of whom have supported aggressive efforts to seize property that is linked to criminal activity."). Justice Thomas's concurring opinion states that broad forfeiture laws, though undesirable, are not unconstitutional, further inviting legislatures to tailor forfeiture laws to satisfy growing fiscal requirements. \textit{See Bennis}, 116 S. Ct at 1001-02 (Thomas, J., concurring).}
Finally, the *Bennis* decision may increase confusion among lower courts attempting to decipher the majority's enigmatic posture with respect to whether a truly innocent owner defense exists. While the majority and concurring Justices deferred to the trial courts' remedial discretionary powers to monitor unfair forfeitures, they failed to furnish lower courts with any guidance as to how the courts should exercise their discretion. Moreover, in light of *Bennis*, if a trial court wants to afford an individual an innocent owner defense, the court must first determine whether the owner expressly or implicitly "consented" to the wrongdoer's use of her property. For example, the *Bennis* Court ruled that Mrs. Bennis's status as a co-title holder constituted consent for her hus-

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259. See *Bennis*, 116 S. Ct. at 999 n.5. Chief Justice Rehnquist asserted that *J.W. Goldsmith* and *Calero-Toledo* expressly reserved the question as to whether stolen property or property used without an owner's consent could be subject to civil forfeiture. See id. Again, however, the Court failed to explain whether, at a minimum, unconsenting owners could be considered "truly innocent owners," and thereby excluded from the reach of forfeiture provisions under the Due Process Clause. See id. One lower court, for example, has argued that the majority opinion may have created a limited innocent owner defense for certain classes of claimants, but held that the plaintiff "ha[d] not alleged facts sufficient to establish his eligibility for the innocent owner defense as defined in *Bennis.*" United States v. Eighty-Three Thousand, One Hundred and Thirty-Two Dollars, No. 95-CV-2844, 1996 WL 599725, at *3 (E.D.N.Y. Oct. 11, 1996). However, when considering what facts the claimant must allege in order to sustain an innocence defense, the Court may have concluded erroneously that because the wrongdoer did not steal the seized property, the claimant was not entitled to an innocent owner defense. Compare id. ("[T]he [Bennis] majority [argued] that any constitutional innocent owner defense ... exists, if at all, only where property was stolen from its owner before the right to forfeiture attached." (emphasis added)), with *Bennis*, 116 S. Ct. at 999 n.5 ("The *Goldsmith-Grant* Court expressly reserved 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.'" (emphases added)).

260. See *Bennis*, 116 S. Ct. at 1003 (Ginsburg, J., concurring). Justice Ginsburg opined that Michigan courts stood ready to police inequitable government seizures, but failed to articulate guidelines for trial courts to use in exercising those equitable powers. See id. The majority opinion also failed to set forth a standard that appellate courts could apply to determine when a trial court abused its discretion in ordering a forfeiture. See id. at 1009 n.14 (Stevens, J., dissenting) (noting that the Michigan Supreme Court "did not even mention the relevance of innocence to the trial court's exercise of its 'equitable discretion').

261. Cf. *Bennis*, 116 S. Ct. at 999 n.5 (asserting that because John Bennis co-owned the forfeited automobile, Mrs. Bennis could not claim that the car was used without her consent, and thus she was not entitled to an innocent owner defense); *Levy*, *supra* note 2, at 161-66 (discussing the difficulty of applying the various "knowledge" or "consent" provisions in judicially and legislatively created innocent owner defenses). State courts have cited *Bennis* when interpreting the language of innocence defenses in state statutes and have struggled with the same issues concerning what level of knowledge or consent is required under the statute. See *In re One 1986 Pontiac Firebird*, 687 A.2d 190, 191 (Del. 1997) (citing *Bennis* in determining whether statutory innocence defense should be extended to co-owners under state law).
band’s use of the family car.\textsuperscript{262} Therefore, assuming the majority would extend an innocent owner defense only to unconsenting defendants, under the majority’s rationale, certain classes of property owners, including parents, siblings, and employers, would be subject to government seizure laws due to the wrongful conduct of their children, siblings, or employees.\textsuperscript{263} Regrettably, given the Court’s past civil forfeiture decisions, the lower courts are unlikely to resolve this dilemma in favor of innocent owners’ property rights.\textsuperscript{264}

IV. CONCLUSION

\textit{Bennis v. Michigan} marks a return to the absolute liability decisions of the early nineteenth century. By failing to recognize the need for a judicially created innocent owner defense, the \textit{Bennis} majority ignored the reality of increasingly broad civil forfeiture laws and overzealous law enforcement practices. In addition, by refusing to apply the Excessive Fines Clause to innocent owners, the Court effectively conferred greater protection from civil forfeiture upon criminal defendants than blameless property owners. The \textit{Bennis} decision will likely spawn further expansion of broad state and federal forfeiture laws as legislatures increase their efforts to curb crime and help fund law enforcement with the valued proceeds derived from the sale of seized property. Because \textit{Bennis} failed to articulate a judicially created innocent owner defense for indi-

\textsuperscript{262} See \textit{Bennis}, 116 S. Ct. at 999 n.5.

\textsuperscript{263} See \textit{id}. This conclusion is disturbing for those property owners who are deemed by law to have given implicit consent for another to use their property. \textit{Cf.} \textit{HYDE}, supra note 1, at 7 (“Think what this could mean to you: your teenager is allowed to use the family car and a ‘roach’ discarded in an ashtray by one of his passengers could cost you your car.”). Even under a broad reading of the majority opinion, these special classes of property owners could assert an innocence defense only if they were able to prove that the wrongdoer did not occupy a special relationship with them, and, therefore, that the wrongdoer used the property without the owner’s consent. \textit{See Bennis}, 116 S. Ct. at 999 n.5.

\textsuperscript{264} Recently, one federal court followed \textit{Bennis}, when it rejected an owner’s innocence defense to the confiscation of a substantial sum of his money when he entrusted the money to a third party with directions to deliver it to the owner’s mother in the Dominican Republic. \textit{See Eighty-Three Thousand, One Hundred and Thirty-Two Dollars}, 1996 WL 599725, at *3. Thus far, however, most other lower court decisions have cited \textit{Bennis} for principles other than that civil forfeitures do not implicate innocent owners’ constitutional rights. \textit{See St. Peter v. United States}, No. CIV. A. 96-11043-ADM, 1996 WL 461625, at *3 (D. Mass. July 24, 1996) (citing \textit{Bennis} for the proposition that civil forfeiture statutes advance certain nonpunitive goals that “include encouraging property owners to take care in managing their property so that it will not be used for illegal purposes”); \textit{State v. Mathies}, C.A. No. 17591, 1996 WL 527196, at *2 (Ohio Ct. App, Sept. 18, 1996) (citing \textit{Bennis} for the proposition that “in property forfeiture context, the goal of deterrence is not necessarily punitive”).
individuals whose property is used without their consent, lower courts have little guidance for future decision making. Inculpable property owners: Beware.