Note, Civil Forfeiture and Innocent Owners

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Recommended Citation
64 Tenn. L. Rev. 195 (1996).
CONSTITUTIONAL LAW—FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS—CIVIL FORFEITURE AND INNOCENT OWNERS

_Bennis v. Michigan_,

In September, 1988, John and Tina Bennis jointly purchased a 1977 Pontiac sedan for $600.00. On October 3, 1988, John Bennis engaged in a sexual act with a prostitute in the Pontiac and was arrested for gross indecency. The State of Michigan then filed a civil forfeiture action against both John and Tina Bennis to have their car declared a nuisance and abated. At the nuisance abatement hearing on November 2, 1988, Tina Bennis provided most of the money used to purchase the car through babysitting and similar jobs.” Petitioner’s Brief at 2, Bennis (No. 94-8729).

The nuisance abatement statues under which John and Tina Bennis were sued provide, in pertinent part: “Any . . . vehicle . . . used for the purpose of . . . prostitution . . . is hereby declared a nuisance . . . and nuisances shall be enjoined and abated . . . Any person . . . who owns . . . any . . . vehicle . . . used for any of the purposes . . . set forth in this section is guilty of a nuisance.” MICH. COMP. LAWS ANN. § 600.3815(2) (West 1987). Further, § 600.3825 states in pertinent part:

Sec. 3825(1) Order of abatement. If the existence of the nuisance is established . . . an order of abatement shall be entered as a part of the judgment in the case . . .

(3) Sale of personality, costs, liens, balance to state treasurer. Upon the sale of any . . . vehicle . . . the officer executing the order of the court shall, after deducting the expenses of keeping such property and costs of such sale . . . pay the balance to the state treasurer to be credited to the general fund of the state.

The purpose of the nuisance abatement statute is “to remedy the inevitable decline of vice-laden neighborhoods.” Michigan ex rel., 527 N.W.2d at 491.

5. The abatement of a nuisance may be defined as “[t]he removal, stoppage, prostration, or destruction of that which causes a nuisance.” BLACK’S LAW DICTIONARY 1066 (6th ed. 1990).

6. Petitioner’s Brief at 3, Bennis (No. 94-8729). The Michigan Supreme Court,
Bennis argued that her interest in the car was not subject to forfeiture because she had no knowledge that her husband used the Pontiac to violate Michigan's indecency law. The Wayne County Circuit Court declared the car a nuisance and ordered its confiscation.

The Michigan Court of Appeals reversed on the ground that under Michigan case law, proof of knowledge is required for forfeiture and the record did not demonstrate that the defendant knew about her husband's illegal activity. In the Michigan Supreme Court, the defendant challenged the constitutionality of Michigan's abatement scheme and argued that it violated her Fourteenth Amendment right to due process. The Michigan Supreme Court reversed the court of appeals and held that, despite the defendant's innocence, her claim was "without constitutional consequence" because the Pontiac was neither stolen nor driven without her consent.

Michigan ex rel., 527 N.W.2d at 486, and the United States Supreme Court. Bennis, 116 S. Ct. at 996, incorrectly implied that John Bennis was convicted before Michigan filed its civil action against Mr. and Mrs. Bennis. Petitioner's Brief at 3 n.2, Bennis (No. 94-8729). John Bennis did not plead guilty to a misdemeanor indecency charge until January 27, 1989. Id. He was fined $250.00 and ordered to perform community service. Id.

7. Although Michigan initially sued both John and Tina Bennis, only Tina Bennis petitioned the Supreme Court for certiorari. See Bennis, 116 S. Ct. at 994. Tina Bennis, therefore, will hereinafter be referred to as "the defendant."

8. Id. at 997.

9. Id. In reaching his decision, the trial judge recognized his "remedial discretion." Id. He took into account the fact that John and Tina Bennis owned another vehicle and, therefore, the forfeiture did not leave them without transportation. Id. The judge also noted that he had the "authority to order the payment of one-half of the sale proceeds, after the deduction of costs," to the defendant. Id. He declined to do so, however, because given the "age and value of the car," there would be almost nothing left to award the defendant after costs. Id.


11. Id. The Michigan Court of Appeals also held, alternatively, that "a single incident is insufficient to establish a nuisance." Id. at 734. Mr. Bennis' conduct, therefore, did not constitute a nuisance that subjected the Pontiac to abatement because the State only established that he used the Pontiac for gross indecency on one occasion. Id. Furthermore, the court determined that an act of prostitution did not take place in the Pontiac because there was no proof that Mr. Bennis paid Kathy Polarchio. Id. at 734-35.


On certiorari to the United States Supreme Court, held, affirmed.\(^{14}\) An owner's interest in property is subject to forfeiture when the owner entrusts the property to a party who uses it to commit a crime, even if the owner has no knowledge of the illegal use. *Bennis v. Michigan*, 116 S. Ct. 994 (1996).

Forfeiture may be defined as "the divestiture without compensation of property used in a manner contrary to the laws of the sovereign."\(^{15}\) Although forfeiture is an ancient practice,\(^{16}\) its constitutional validity has only recently been seriously questioned.\(^{17}\) Historically, the Supreme Court has relied on a legal fiction—that the property itself is guilty—to confiscate property without regard to the Constitution.\(^{18}\) Cloaking itself in the "guilty property fiction," the Court has virtually ignored the property owner's culpability. In *Bennis*, the Court decided whether an owner's interest in property is subject to forfeiture when the owner entrusts the property to a party who uses it to commit a crime, even if the owner has no knowledge of the illegal use.\(^{19}\)

Under both state and federal law, property may be forfeited as part of either criminal or civil proceedings.\(^{20}\) Criminal forfeiture is "a proceeding *in personam*, an action against the person."\(^{21}\) Because the forfeiture proceeding is part of the criminal process, the defendant is afforded constitutional protections.\(^{22}\) In contrast, civil forfeiture "is a proceeding *in rem*, an action against the thing."\(^{23}\) Therefore, "the government need not prove

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16. See infra notes 31-33 and accompanying text.
17. See infra note 114 and accompanying text.
22. *Id.*
23. *Id.* at 390. The nuisance abatement statute at issue in *Bennis* "subjects all who might become nuisance abatement defendants to the possible equitable penalty of loss of the
that the owner committed the violation which supposedly justifies the forfeiture. The property is the defendant. Thus, only the property's guilt is at issue.

The government prosecutes property because it is deemed to be tainted by illegal activity. Consequently, forfeited property generally belongs in one of three categories: (1) contraband, (2) proceeds, or (3) instrumentalities.

Contraband is "anything prohibited by law from being imported, exported, or even possessed." Proceeds are the profits derived from illegal activity, including money and goods. Instrumentalities are property that is intended for use, even tangentially, in criminal activity.

The origins of in rem forfeiture can be traced back to the Bible, ancient Greece, and Anglo-Saxon law. Three different types of forfeiture existed under English common law: (1) forfeiture of estate, (2) forfeiture at issue, even though the action is brought in rem against their Pontiac.


25. Id.

26. Romantz, supra note 21, at 390.

27. Cheh, supra note 20, at 1341.

28. Id.

29. Id.

30. Id.

31. See, e.g., Michael F. Zeldin & Roger G. Weiner, Innocent Third Parties and Their Rights in Forfeiture Proceedings, 28 AM. CRIM. L. REV. 843, 843 & n.1 (1991) (“If an ox gore a man or woman and they die, then the ox shall be stoned and his flesh not eaten; but the owner of the ox shall be quit [freed of further obligation].”) (quoting Exodus 21:28). This is a “perfect forfeiture.” Id. at 843. The owner’s culpability is uncertain, but the ox is deemed guilty. Id. Therefore, the ox is forfeited and “the owner denied the right to eat ox steaks.” Id.


33. Romantz, supra note 21, at 393 (“Under Anglo-Saxon law, noxal surrender involved forfeiting the instrumentality of death or injury to the sovereign. The guilt of the res, independent from individual culpability, was premised on an ecclesiastical ‘possession’; the resulting death or injury demonstrated the ‘demonic culpability’ of the thing.”).

deodand and (3) forfeiture by statute. Forfeiture of estate, or criminal forfeiture, was based on the theory that the Crown “retained a superior interest in all property.” Thus, upon conviction, felons and traitors forfeited all real and personal property to the Crown. In contrast, the Crown brought deodand actions to recover the value of an object that struck and killed an innocent victim. The object was deemed guilty and the Crown proceeded against the thing itself.

The original justification for deodand actions is unknown, but several theories have been advanced, including: (1) forfeiture of the object’s value cleansed the property, (2) forfeiture was “a substitute for revenge by the decedent’s relatives against the owner of the offending object,” (3) forfeiture provided “money to say Mass for the victim’s soul,” (4) forfeiture provided money for charity, and (5) forfeiture punished the property’s owner because the owner’s negligence was, in part, responsible for the victim’s death. In 1846, with the dawn of the industrial age and a large increase in the number of accidental deaths, deodand actions were abolished in England.

The Crown also confiscated property for violations of customs and shipping statutes. A ship master’s failure to pay a customs duty “could subject the shipowner to forfeiture of his cargo and sometimes his ship.” As in deodand actions, the Crown proceeded in rem against the goods or the vessel. In the 1600s, Parliament enacted the Navigation Acts to

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35. Lieske, supra note 34, at 271.
36. Id.
37. Id. at 272.
38. Gordon, supra note 34, at 746.
39. “The word ‘deodand’ derives from the Latin Deo dandum meaning ‘given to God.’” Piety, supra note 24, at 928.
40. Id. at 929.
41. Gordon, supra note 34, at 746.
42. Piety, supra note 24, at 929.
43. Id.
44. Lieske, supra note 34, at 274.
45. Id.
46. Piety, supra note 24, at 930.
49. Id.
50. Gordon, supra note 34, at 747.
51. See L. HARPER, THE ENGLISH NAVIGATION LAWS: A SEVENTEENTH-CENTURY
promote national seapower."\(^{52}\) The Acts "required the shipping of most commodities in English built, owned, and manned vessels. Violations . . . resulted in forfeiture of both the illegally carried goods and the ship that transported them."\(^{53}\) Statutory forfeitures were "usually imposed . . . in the Exchequer, the court of the King's revenue"\(^{54}\) and "appealed to the English Crown . . . because [they] were the principal means of tax enforcement."\(^{55}\)

Of the three types of English forfeiture, only statutory forfeiture became part of American law.\(^{56}\) During the colonial era, American vice-admiralty courts enforced the Navigation Acts "which by their terms were applicable to the colonies."\(^{57}\) When customs officials seized ships or cargo, the court proceeded against the object *in rem* without a jury.\(^{58}\)

This mode of trial allowed customs officers to not only secure the payment of fines due the Crown, but also prevented an offending vessel from being further engaged in illegal trade. *In rem* process was necessary because of the frequent impossibility of determining either ownership of the vessel or the identities of those engaged in smuggling.\(^{59}\)

After the ratification of the United States Constitution, the first Congress "passed forfeiture statutes to aid in the collection of customs duties, which provided 80-90% of the finances for the federal government during that time."\(^{60}\) To enforce the new revenue and tariff acts, Congress gave the federal courts jurisdiction over "all seizures under laws of impost, navigation, or trade of the United States."\(^{61}\) Forfeiture proceedings in the new federal court system were *in rem* "since federal forfeiture statutes were largely patterned on the English navigation and customs statutes . . . ."\(^{62}\)
Thus, the original justification for American civil forfeiture statutes “rested on the power of the government to regulate and protect its revenue.”

The first American cases that upheld *in rem* forfeitures were brought under admiralty law. In *The Palmyra*, decided in 1827, a vessel, named the *Palmyra*, committed acts of “piratical aggression” in violation of a federal statute. The U.S. Supreme Court upheld the forfeiture of the ship even though neither the ship’s crew nor its owners had been convicted of piracy. The Court reasoned that *in rem* actions do not depend on whether any other defendant is joined *in personam*, because “[t]he thing is here primarily considered as the offender, or rather the offence is attached primarily to the thing.” Thus, the guilty property fiction was implanted in American jurisprudence.

Almost twenty years later, in *United States v. Cargo of the Brig Malek Adhel*, the Court faced a similar situation. The captain of the *Malek Adhel* performed acts of piracy on a voyage from New York to California in violation of federal law. In *Brig Malek Adhel*, however, the ship’s owners were admittedly innocent. Granting forfeiture, the Court held that “[t]he vessel which commits the aggression is treated as the offender . . . without any reference whatsoever to the character or conduct of the owner.” The Court explained that “this is done from the necessity of the case, as the only adequate means of suppressing the offence or wrong, or insuring an indemnity to the injured party.”

The most important aspect of these early forfeiture cases is the justification provided for the expansion of civil forfeiture to innocent property owners. [The] Court held that the forfeitures were closely tied to the functional necessities of enforcing admiralty, piracy, and customs laws. In *rem* forfeiture permitted courts to obtain jurisdiction over property when it was virtually impossible to obtain *in personam* jurisdiction over the property owners. Therefore, the government could ensure that customs

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63. *Id.* at 783.
64. Piety, *supra* note 24, at 935. “One of the first recorded cases was *United States v. La Vengeance*, 3 U.S. (3 Dall.) 297 (1796) (holding that a jury in civil forfeiture was not required because forfeiture was properly under admiralty jurisdiction, which did not traditionally provide for jury trials).” *Id.* at 935 n.109.
66. *Id.* at 8.
68. *Id.* at 14.
69. 43 U.S. (2 How.) 210 (1844).
70. *Id.* at 210.
71. *Id.* at 233.
72. *Id.*
73. *Id.* (emphasis added).
laws were enforced even if the owner of the ship or the cargo was outside the court’s jurisdiction.\textsuperscript{74}

Thus, the original justification for \textit{in rem} proceedings rested on the need to enforce forfeiture statutes and thereby protect the government’s revenue.

The Civil War, however, “brought about a radical change” in forfeiture law.\textsuperscript{75} During the war, southern rebels could not be prosecuted for treason because they were “safely behind Confederate lines.”\textsuperscript{76} Furthermore, the United States government could not confiscate Confederate-owned property located in the North because the rebels “were considered citizens, not aliens, and were entitled to full constitutional rights. Therefore, \textit{in absentia} prosecutions were forbidden.”\textsuperscript{77} To solve this problem, Congress narrowly passed a confiscation bill permitting \textit{in rem} forfeitures.\textsuperscript{78}

In 1863, the Kentucky Supreme Court found the Confiscation Act unconstitutional and predicted that “\textit{[t]hese \textit{in rem} proceedings may to-day be the engines of punishment to the rebels, but, in the future, they may be the instruments of oppression, injustice and tyranny . . . .}”\textsuperscript{79} In 1871, however, the United States Supreme Court upheld the Confiscation Act’s constitutionality “not on due process grounds, but as an exercise of the war power in taking enemy property.”\textsuperscript{80} Thus, forfeiture law was expanded in the 1860s to permit the \textit{in rem} forfeiture of property where the government could not obtain \textit{in personam} jurisdiction over the property owners. “The result was a revolution in forfeiture law that persists to this day—use of the \textit{in rem} action without constitutional limitation. It is unlikely that such a change would have occurred had it not been for the passions raised by the Civil War.”\textsuperscript{81}

\textsuperscript{74.} Brief of the Institute for Justice as Amicus Curiae in Support of Petitioner at 9, \textit{Bennis} (No. 94-8729) [hereinafter Brief of the Institute for Justice].

\textsuperscript{75.} Maxeiner, \textit{supra} note 48, at 785.

\textsuperscript{76.} \textit{Id.} at 785-86.

\textsuperscript{77.} \textit{Id} at 786.

\textsuperscript{78.} \textit{Id.} at 786-87; \textit{see} Act of July 7, 1862, 12 Stat. 589.

The advocates of confiscation contended that forfeitures under the customs statutes demonstrated that all \textit{in rem} forfeitures constituted due process of law. The opponents argued that proceedings under the proposed bill would constitute criminal prosecutions of the rebel property owners, since confiscation could occur only upon a finding that the owner was guilty of treason . . . . If the government could proceed in rem to punish treason, nothing would stop it from proceeding similarly to punish lesser crimes. The proponents of the bill urged the necessity of the hour . . . .

Maxeiner, \textit{supra} note 48, at 786 (footnotes omitted).

\textsuperscript{79.} \textit{Id.} at 787 & n.11 (quoting Norris v. Doniphan, 61 Ky. (4 Met.) 385, 426 (1863)).

\textsuperscript{80.} \textit{Id.} at 787 & n.112 (footnotes omitted); \textit{see} Tyler v. Defrees, 78 U.S. (11 Wall.) 331 (1871); Miller v. United States, 78 U.S. (11 Wall.) 268 (1871); McVeigh v. United States, 78 U.S. (11 Wall.) 259 (1871).

\textsuperscript{81.} Maxeiner, \textit{supra} note 48, at 787 (footnotes omitted).
In the late 1870s and early 1920s, the United States Supreme Court further extended the guilty property fiction to uphold forfeitures for violations of tax revenue laws and prohibition statutes. In *Dobbins's Distillery v. United States*, a distillery owner leased his facility and, unbeknownst to him, the lessor violated provisions of a revenue law. Citing both *The Palmyra and Brig Malek Adhel*, the Court upheld forfeiture of the distillery and all real and personal property used in connection with its operation. The Court again held that the property itself was guilty regardless of the "personal misconduct or responsibility of the owner."

In *J.W. Goldsmith, Jr.-Grant Co. v. United States*, the Grant Company sold an automobile to a taxi driver, but retained title to the car until it was paid in full. The Court upheld forfeiture of the car when the cab driver used it to violate a revenue statute. The company had no knowledge of the illegal acts committed by the cab driver. Once again, the Court relied on the guilty property fiction to explain its decision. The Court also introduced a new justification for civil forfeiture: The government's interest in preventing violation or evasion of its laws outweighed the innocent owner's property interest. Finally, the Court stated that whether the reasons for civil forfeiture were "artificial or real, it is too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced."

During the era of Prohibition, the Supreme Court decided *Van Oster v. Kansas*, in which it rejected an innocent owner's Fourteenth Amendment due process challenge to civil forfeiture. The plaintiff in *Van Oster* entrusted her automobile to another party and, without her knowledge, that party used the car to illegally transport alcohol. The government sought forfeiture and sale of the car as a nuisance under a Kansas statute. As
in previous cases, the Court relied on precedent to sanction the forfeiture.\textsuperscript{97} The Court further explained the confiscation by reasoning that civil forfeiture "builds a secondary defense against a forbidden use and precludes evasions by dispensing with the necessity of judicial inquiry as to collusion between the wrongdoer and the alleged innocent owner."\textsuperscript{98}

In 1970, forfeiture was reincarnated as a weapon against crime when Congress enacted a federal civil forfeiture statute\textsuperscript{99} and two criminal forfeiture laws.\textsuperscript{100} The new civil forfeiture statute provided for the forfeiture of "[i]llegal drugs and the materials used in their manufacture, processing, and distribution," as well as conveyances.\textsuperscript{101} It also supplied an innocent owner defense where (1) the conveyance was a common carrier and the owner did not consent to its illegal use\textsuperscript{102} or (2) the conveyance was stolen from its owner and used in an illegal activity.\textsuperscript{103}

Then, in 1974, the United States Supreme Court decided \textit{Calero-Toledo v. Pearson Yacht Leasing Co.}\textsuperscript{104} The Pearson Yacht Company leased a yacht, and the lessees used the conveyance to transport narcotics without Pearson's knowledge.\textsuperscript{105} The Court upheld the yacht's forfeiture and rejected Pearson's claim that the divestiture was an unconstitutional taking of property without compensation.\textsuperscript{106} Not surprisingly, the Court relied on \textit{The Palmyra} and its progeny to rationalize the forfeiture.\textsuperscript{107} The \textit{Calero-Toledo} Court also suggested additional justifications for civil forfeiture: It prevents further illegal use of the property, imposes an "economic penalty" that renders criminal activity unprofitable, and may induce property owners to "exercise greater care in transferring possession of their property."\textsuperscript{108} The Court also acknowledged, however, that:

97. \textit{Id.} at 468.
98. \textit{Id.} at 467-68.
103. 21 U.S.C. § 881(a)(4)(B) (1988). The statute was broadened in 1978 and 1984 to provide for the forfeiture of drug proceeds and real property. Van Eck, \textit{supra} note 32. The innocent owner defense was also amended in 1988 "to preclude forfeiture for prohibited use where that use occurred 'without the knowledge, consent, or willful blindness of the owner.'" \textit{Id.}
105. \textit{Id.} at 665, 668.
106. \textit{Id.} at 669.
107. \textit{Id.} at 683-86.
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; for, in that circumstance, it would be difficult to conclude that forfeiture served legitimate purposes and was not unduly oppressive.\textsuperscript{109}

 Throughout the 1970s, 1980s and early 1990s, the use of civil forfeiture exploded. In 1991 alone, “more than two billion dollars worth of property was forfeited to the federal government.”\textsuperscript{110} As a result, commentators alleged that the government was abusing its power.\textsuperscript{111} Scholars also criticized the lack of constitutional protections for those at risk of losing their property through civil forfeiture.\textsuperscript{112} Finally, both Congress and the Supreme Court responded. Congress proposed legislation to limit the scope of federal civil forfeiture,\textsuperscript{113} and the Supreme Court decided five forfeiture cases against the government during its 1992-93 Term.\textsuperscript{114}

\textsuperscript{109} Id. at 689-90.
\textsuperscript{110} Lieske, supra note 34, at 266-67.
\textsuperscript{112} See generally Piety, supra note 24 (arguing that the legal fictions used to justify civil forfeiture have the effect of “crushing every due process claim” raised in protest of the doctrine).
\textsuperscript{113} Michele M. Jochner, From Fiction to Fact: The Supreme Court’s Re-Evaluation of Civil Asset Forfeiture Laws, 82 ILL. B.J. 560, 567 (1994). In November, 1993, however, the Justice Department “requested a delay of any congressional action” until it could perform its own review of the federal forfeiture statutes. Id.
\textsuperscript{114} See United States v. James Daniel Good Real Property, 510 U.S. 43, 46 (1993) (holding that absent “exigent circumstances, the Due Process Clause of the Fifth Amendment prohibits the Government in a civil forfeiture case from seizing real property without first affording the owner notice and an opportunity to be heard”); Austin v. United States, 509 U.S. 602, 604 (1993) (holding that the “Excessive Fines Clause of the Eighth Amendment applies to forfeitures of property under 21 U.S.C. §§ 881(a)(4) and (a)(7)” and remanding the case for determination of whether the forfeiture at issue was excessive); United States v. 92 Buena Vista Avenue, 507 U.S. 111, 114-18 (1993) (holding that “an owner’s lack of knowledge . . . that her home had been purchased with the proceeds of illegal drug transactions constitutes a defense to a forfeiture proceeding under . . . 21 U.S.C. § 881(a)(6)”); Republic Nat’l Bank v. United States, 506 U.S. 80, 81-82, 93 (1992) (holding that an appellate court “may continue to exercise jurisdiction in an in rem civil forfeiture proceeding after the res, then in the form of cash, is removed . . . from the judicial district and deposited in the United States Treasury”). The fifth case, Alexander v. United States, 509 U.S. 544 (1993), like Austin, was remanded for consideration of whether the forfeiture “resulted in an ‘excessive’ penalty within the meaning of the Eighth Amendment’s Excessive Fines Clause.” Id. at 559.
Of these cases, *Austin v. United States* was deemed the most significant. In *Austin*, the Court analyzed the guilty property fiction and concluded that it rested "at bottom, on the notion that the owner has been negligent in allowing his property to be misused and he is properly punished for that negligence." Consequently, forfeiture is, at least in part, punitive. The Court then held that forfeiture proceedings under 21 U.S.C. §§ 881(a)(4) and (a)(7) are punishment and therefore, "subject to the limitations of the Eighth Amendment's Excessive Fines Clause."

In reaching its decision in *Austin*, the Court appeared to treat the property owner, rather than the property, as the real party in interest. Consequently, commentators heralded *Austin* as the death knell for the guilty property fiction and proclaimed a new trend toward greater constitutional protections in civil forfeiture proceedings. In this expectant atmosphere, the Court decided *Bennis v. Michigan*.

In *Bennis v. Michigan*, a five-four decision, the Supreme Court held that an owner's interest in property is subject to forfeiture when the owner entrusts the property to a party who uses it to commit a crime, even if the owner has no knowledge of the illegal use. Chief Justice Rehnquist, joined by Justices Scalia and O'Connor, authored the plurality opinion. Rehnquist's analysis centered primarily on *stare decisis* and determined that the Fourteenth Amendment right to due process is not implicated when an innocent owner's property is forfeited to the state.

First, the Court briefly discussed the facts that led to the forfeiture of the defendant's car and then reviewed *Bennis' procedural history.*

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116. Beaver, supra note 47, at 43.
117. *Austin*, 509 U.S. at 615.
118. *Id.* at 618.
119. *Id.* at 622.
121. Jochner, *supra* note 113, at 567 ("These recent developments in civil forfeiture law strip away, for the first time, the ancient fictions in favor of protection of individual liberties and rights."); Romantz, *supra* note 21, at 432 ("[T]he *Austin* Court implicitly rejected any reliance on the fiction of the guilty res as grounds for immunizing civil forfeitures from constitutional scrutiny."); Sondak, *supra* note 120, at 26 ("[Austin] has, in large measure, stripped the civil forfeiture laws of its [sic] legal fictions. Civil forfeiture cases are now far more likely to be adjudicated on the merits of the owner's . . . actions, rather than the fiction that the property committed a wrong.").
123. *Id.* at 1001.
124. *Id.* at 996.
125. *Id.* at 998.
126. *Id.* at 995-96.
127. *Id.* at 996.
The Court carefully noted the trial judge's "remedial discretion," the Bennis' second automobile, and the judge's "authority to order the payment of one-half of the sale proceeds, after the deduction of costs," to the innocent owner. Further, the Court pointed out that the Michigan Supreme Court emphasized that the nuisance abatement proceeding was an "equitable action." Next, the Court stated unequivocally that the defendant's innocence was irrelevant because "a long and unbroken line of cases holds that an owner's interest in property may be forfeited by reason of the use to which the property is put even though the owner did not know it was to be put to such use." Citing The Palmyra and its progeny, the Court explained that it had historically rejected the property owner's innocence as a defense to civil forfeiture. Because the defendant did not distinguish her case from the Court's precedent, she was "in the same position as the . . . owners . . . in the forfeiture cases beginning with The Palmyra in 1827." Further, the Court dismissed Calero-Toledo's innocent owner defense as "obiter dictum." Thus, the Court once again abandoned innocent owners and freshly cemented the guilty property fiction in civil forfeiture law.

The Court then dismantled both the dissent's and the defendant's remaining arguments. First, the Court rejected the dissent's contention that The Palmyra line of cases justified forfeiture only when the property's principal use was for illegal activity. The Court reasoned that its prior cases had "never made the due process inquiry depend on whether the use for which the instrumentality was forfeited was the principal use." Unwilling to extinguish the instrumentality argument entirely, however, the Court reserved opinion on whether an ocean liner could be confiscated due to the illegal activity of one passenger.

Second, the Court gave short shrift to the defendant's argument that the decision in Austin could not be reconciled with the guilty property fiction. The Court minimized Austin by stating, simply, that there was no real occasion in Austin to "deal with the validity of the 'innocent-owner
defense."\textsuperscript{142} Perhaps searching for a more substantial justification for its ruling than \textit{stare decisis}, the Court implied that \textit{Austin}'s holding would not apply in \textit{Bennis} because the forfeiture in \textit{Bennis} was remedial, not punitive.\textsuperscript{143}

Finally, in a last attempt to fortify its position, the Court cited \textit{Van Oster} and \textit{Calero-Toledo} for the proposition that forfeiture "serves a deterrent purpose distinct from any punitive purpose."\textsuperscript{144} Divestiture prevents illegal use of the property, renders criminal activity unprofitable and thwarts "collusion between the wrongdoer and the alleged innocent owner."\textsuperscript{145} The Court concluded by stating that the guilty property fiction is "too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced."\textsuperscript{146}

Writing separately, Justice Thomas concurred with the plurality opinion, but wrote to express his concern with the permissive scope of civil forfeiture and to explain his acquiescence in the judgment.\textsuperscript{147} He agreed with the plurality that precedent precludes a successful due process challenge to civil forfeiture.\textsuperscript{148} Nevertheless, Justice Thomas described the forfeiture in \textit{Bennis} as "intensely undesirable."\textsuperscript{149} Further, he lent credence to the dissent's instrumentality argument when he admitted that "[t]he limits on what property can be forfeited as a result of what wrongdoing" were not clear to him.\textsuperscript{150}

Like the plurality, however, Justice Thomas could not distinguish \textit{Bennis} from \textit{Van Oster}.\textsuperscript{151} Perhaps to ease his concerns about uncompensated divestiture, he also decided that if the abatement in \textit{Bennis} could be characterized as remedial, "then the more severe problems involved in punishing someone not found to have engaged in wrongdoing . . . do not arise."\textsuperscript{152} Ultimately, Thomas left civil forfeiture reform to the states and Congress.\textsuperscript{153}

Justice Ginsburg also concurred in the plurality opinion and judgment, but wrote to "highlight features of the case key to [her] judgment."\textsuperscript{154} For

\begin{itemize}
\item \textsuperscript{142} \textit{Id.}
\item \textsuperscript{143} \textit{Id.}
\item \textsuperscript{144} \textit{Id.; see supra} text accompanying notes 93-98, 104-08.
\item \textsuperscript{145} \textit{Bennis}, 116 S. Ct. at 1000-01.
\item \textsuperscript{146} \textit{Id.} at 1001 (citing J.W. Goldsmith, Jr.-Grant Co. v. United States, 254 U.S. 505, 511 (1921)). Near the end of the majority opinion, the Court briefly discussed the Takings issue, which is beyond the scope of this Note. \textit{Id.}
\item \textsuperscript{147} \textit{Id.} at 1001-03 (Thomas, J., concurring).
\item \textsuperscript{148} \textit{Id.} at 1001 (Thomas, J., concurring).
\item \textsuperscript{149} \textit{Id.} at 1001-02 (Thomas, J., concurring).
\item \textsuperscript{150} \textit{Id.} at 1002 (Thomas, J., concurring).
\item \textsuperscript{151} \textit{Id.} (Thomas, J., concurring); \textit{see supra} text accompanying notes 93-98.
\item \textsuperscript{152} \textit{Bennis}, 116 S. Ct. at 1002 (Thomas, J., concurring).
\item \textsuperscript{153} \textit{Id.} at 1003 (Thomas, J., concurring).
\item \textsuperscript{154} \textit{Id.} at 1003 (Ginsburg, J., concurring).
\end{itemize}
Ginsburg, the sole question in *Bennis* was whether the defendant was entitled to an offset from the sale of the Pontiac, not whether the defendant was entitled to the car itself. She was satisfied that the Michigan Supreme Court would "police exorbitant applications" of the forfeiture statute at issue in *Bennis* because proceedings under the statute are "equitable." Consequently, due to the age and value of the defendant's Pontiac, the forfeiture in *Bennis* was not unfair. Thus, Justice Ginsburg seemed to suggest that if the car had been more valuable, failure to provide the defendant with an offset from its sale might not have passed constitutional muster. Finally, Justice Ginsburg, like the plurality, signaled her support for Michigan’s attempt to deter illicit activity through *in rem* forfeiture.

Justice Stevens, joined by Justices Souter and Breyer, dissented from the majority opinion. Calling the Court’s holding novel, the dissent distinguished *Bennis* from the precedent relied on by the majority. To differentiate *Bennis*, the dissent first presented the instrumentality argument. The dissent contended, in contrast to the plurality, that early civil forfeiture cases demonstrate that property can only be forfeited when its principal use is illegal. In *Bennis*, however, the defendant’s husband used the car to engage in one isolated incident of illicit activity. Therefore, the vehicle should not be subject to forfeiture as "an instrumentality of crime."

Further, precedent also indicates that property must actually facilitate a crime before it can be confiscated in a civil forfeiture proceeding. While the illegal activity in *Bennis* occurred in the Pontiac, the car "bore no necessary connection to the offense committed by [defendant’s] husband." The act could have taken place "in a multitude of other locations." Thus, the nexus between the crime and the Pontiac was "insufficient to support forfeiture." In addition, the dissent could not characterize the proceeding in *Bennis* as remedial because the forfeiture would not

155. *Id.* (Ginsburg, J., concurring).
156. *Id.* (Ginsburg, J., concurring).
157. *Id.* (Ginsburg, J., concurring).
158. *Id.* (Ginsburg, J., concurring).
159. *Id.* at 1003-11 (Stevens, J., dissenting).
160. *Id.* at 1004 (Stevens, J., dissenting).
161. *Id.* at 1004-05 (Stevens, J., dissenting); *see supra* text accompanying notes 26-30.
162. *See supra* text accompanying notes 136-38.
164. *Id.* (Stevens, J., dissenting).
165. *Id.* (Stevens, J., dissenting).
166. *See id.* at 1005-06 (Stevens, J., dissenting).
167. *Id.* at 1006 (Stevens, J., dissenting).
168. *Id.* (Stevens, J., dissenting).
169. *Id.* (Stevens, J., dissenting).
prevent the defendant’s husband from “using other venues for . . . illegal rendezvous.”

The dissent then addressed the defendant’s innocence. Citing Austin, the dissent stated that the forfeiture in Bennis should not have been permitted because the defendant “was in no way negligent in her use or entrustment of the family car.” The dissent accused the plurality of ignoring Austin and objected to the plurality’s dismissal of Calero-Toledo’s innocent owner defense.

Next, the dissent disagreed with the plurality’s contention that the forfeiture in Bennis served as a deterrent. There was “reason to think that the threat of forfeiture [would] deter an individual from buying a car with her husband—or from marrying him in the first place—if she neither knows nor has reason to know that he plans to use it wrongfully.” Further, the plurality’s argument that forfeiture prevents collusion had no validity in Bennis because it was “patently clear that [the defendant] did not collude with her husband to carry out this offense.” If anything, the defendant was a victim of her husband’s conduct.

Finally, the dissent returned to Austin and stated that the Court’s holding in Bennis was “dramatically at odds” with Austin. The dissent determined that the forfeiture in Bennis constituted excessive punishment because: (1) the defendant was blameless and (2) her husband had committed only one isolated crime in their car. Therefore, the forfeiture was “subject to the limitations of the Eighth Amendment’s Excessive Fines Clause.”

The dissent concluded that the “blatant unfairness” of the confiscation in Bennis placed it on the unconstitutional side of the line that separates permissible and impermissible forfeitures.

Writing separately, Justice Kennedy also dissented from the plurality opinion. Like the plurality, Justice Kennedy focused on the history of civil forfeiture. Unlike the plurality, however, he determined that the

170. Id. at 1007 (Stevens, J., dissenting).
171. Id. (Stevens, J., dissenting).
172. See supra text accompanying notes 115-19.
174. Id. (Stevens, J., dissenting).
175. Id. at 1008 (Stevens, J., dissenting).
176. Id. at 1008-09 (Stevens, J., dissenting).
177. Id. at 1009 (Stevens, J., dissenting).
178. Id. (Stevens, J., dissenting).
179. Id. (Stevens, J., dissenting).
180. Id. at 1010 (Stevens, J., dissenting).
181. Id. (Stevens, J., dissenting).
182. Id. (Stevens, J., dissenting).
183. Id. (Stevens, J., dissenting).
184. Id. at 1010-11 (Kennedy, J., dissenting).
185. Id. (Kennedy, J., dissenting).
early admiralty cases should not be analogized to automobiles in every instance. Justice Kennedy reasoned that the Court did not have to overrule its precedent to protect the defendant’s interest in her property. Instead, he suggested a compromise: “[I]t has not been shown that a strong presumption of negligent entrustment or criminal complicity would be insufficient to protect the government’s interest where the automobile is involved in a criminal act in the tangential way that it was here.” Justice Kennedy concluded by stating that nothing supports the implication that the value of the defendant’s interest in the Pontiac is “so insignificant as to be beneath the law’s protection.”

Given the history of civil forfeiture law, the Court’s holding in Bennis is not surprising; the Court’s reasoning, however, is quite disturbing. Once again the Court relied primarily on the guilty property fiction to justify the forfeiture of an innocent owner’s property, but was unable to articulate a persuasive rationale, other than stare decisis, for its continued adherence to the fiction.

In the early 1800s, the Court plausibly justified in rem forfeitures based on the need to enforce customs statutes and protect the government’s revenue. During the Civil War, Congress sanctioned the in rem forfeiture of Confederate-owned property because the government could not obtain in personam jurisdiction over southern rebels and try them for treason. Thus, the traditional justification for civil forfeiture—protection of the treasury—did not apply to the Civil War forfeitures. Nevertheless, Congress in effect created a new revenue stream.

Then, in Dobbins’s Distillery and Goldsmith-Grant, the Court simply relied on the guilty property fiction as enunciated in The Palmyra and Brig Malek Adhel to uphold forfeitures for violation of tax revenue laws. The forfeitures that took place in Dobbins’s and Goldsmith-Grant protected the government’s tax base and therefore, are analogous to forfeitures under early American customs statutes. The in rem nature of the forfeitures, however, cannot be justified by the inability to obtain in personam jurisdiction over the property owners. Thus, the Court’s reliance on The Palmyra and The Brig Malek Adhel to explain Dobbins’s and Goldsmith-Grant is unconvincing. It is likely that both the need to collect taxes and the expansion of in rem forfeiture during the Civil War contributed significantly to the Court’s decisions in Dobbins’s and Goldsmith-Grant.

186. Id. at 1011 (Kennedy, J., dissenting).
187. See id. (Kennedy, J., dissenting).
188. Id. (Kennedy, J., dissenting).
189. See id. (Kennedy, J., dissenting).
190. See supra text accompanying notes 69-74.
191. See supra text accompanying notes 75-78.
192. See supra text accompanying notes 82-92.
193. See supra text accompanying notes 60-63.
Later, in *Van Oster* and *Calero-Toledo*, the Court introduced new rationales for in rem forfeiture but, at bottom, based its decisions on the guilty property fiction without explanation. The confiscations in *Van Oster* and *Calero-Toledo* under alcohol and drug forfeiture statutes cannot be justified by either the government’s need to protect a traditional revenue source or the property owners’ unavailability.

Similarly, none of the original justifications for in rem forfeiture apply to *Bennis*. First, the stated purpose of Michigan’s nuisance abatement statute was to deter illegal activity in crime-ridden neighborhoods. Second, the Wayne County Circuit Court actually obtained in personam jurisdiction over the defendant pursuant to the statute. Thus, the Court’s reliance on *The Palmyra* and *Brig Malek Adhel* to sanction the forfeiture of an innocent owner’s property is misplaced. As one commentator pointed out, although “[t]raditionally, the forfeiture power was narrowly limited in ways that prevented government from violating individual rights. . . . As the forfeiture power has strayed from its historical and common law moorings, governments now use this power without built-in safeguards and in violation of the Constitution.”

The forfeiture statutes in *Van Oster*, *Calero-Toledo* and *Bennis* indicate that “the forfeiture power has become one of the most powerful weapons in the government’s arsenal to eliminate vice.” At the same time, forfeiture statutes provide the government with a thinly disguised revenue stream. In its amicus brief in support of the defendant, the Institute for Justice suggested that “Michigan, like many other jurisdictions today, was using the civil forfeiture power to generate unappropriated revenues for the state [sic] through the expropriation of private property.”

Shortly after the Constitution was ratified, the government employed in rem civil forfeiture to enforce revenue statutes because customs duties provided the majority of the government’s general revenue. Today, however, “law enforcement agencies keep a percentage of forfeited assets and proceeds.” As a result, they have a strong motive to enforce laws that employ in rem forfeiture as a penalty. Consequently, the “current institutional arrangement and incentive structure behind civil forfeiture demand that the property rights of innocent owners be protected.”

194. *See supra* text accompanying notes 93-98, 104-08.
196. *See supra* note 23.
198. *Id.* at 11.
199. *Id.* at 12.
200. *See supra* text accompanying notes 60-63.
202. This aspect of civil forfeiture may explain its tremendous explosion in popularity. *See supra* text accompanying notes 110-11.
203. Brief of the Institute for Justice, *supra* note 74, at 12; *see also James Daniel Good*, 510 U.S. at 55 (constitutional considerations arise where “the Government has a direct
In the end, *Bennis* may be limited to its facts. Both the majority and the concurrences emphasized the equitable nature of Michigan's abatement scheme, the age and value of the Pontiac and the trial judge's authority to award an innocent co-owner her interest in property where appropriate.\textsuperscript{204} Furthermore, *Bennis* may ultimately deter future johns, decrease prostitution and protect other women from the defendant's fate. Nevertheless, Tina Bennis remains a victim of both her husband's crime and Michigan's forfeiture law. It is surely cold comfort for her to realize that if her interest in the car had only been more valuable, she might have received an offset after it was confiscated and sold to cover costs.

After the Court's 1993 civil forfeiture decisions, *Bennis* is a major disappointment. In *Austin*, the Court seemed to recognize that civil forfeiture, in general, punishes the property's owner, not the property itself.\textsuperscript{205} Commentators believed that the guilty property fiction was dead.\textsuperscript{206} The *Bennis* Court, however, virtually ignored *Austin* and appeared to limit *Austin*'s holding to forfeitures that occur under 21 U.S.C. § 881, a drug forfeiture statute.\textsuperscript{207} At the very least, the Court signaled its reluctance to further expand constitutional protections for innocent owners whose property is subject to civil forfeiture. Regardless of whether the Court ultimately restricts the scope of *Austin*, however, the guilty property fiction is alive and well.

Perhaps someday the Court will take a more reasonable approach to innocent property owners, such as the compromise suggested by Justice Kennedy.\textsuperscript{208} Until then, however, the guilty property fiction will remain a fixture in American jurisprudence. As Justice Holmes wrote in 1897:

> It is revolting to have no better reason for a rule of law than that... it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.\textsuperscript{209}

DEBORAH J. CHALLENER

\textsuperscript{204} *Bennis*, 116 S. Ct. at 997, 1000, 1002-03; *see supra* note 9 and accompanying text.

\textsuperscript{205} *See supra* text accompanying notes 115-20.

\textsuperscript{206} *See supra* note 121 and accompanying text.

\textsuperscript{207} *See Bennis*, 116 S. Ct. 994, 1000 (1996). In the Court's latest forfeiture case, United States v. Ursery, No. 95-345, 1996 WL 340815, *9* (U.S. June 24, 1996), the Court stated that it limited its review in *Austin* “to the question ‘whether the Excessive Fines Clause of the Eighth Amendment applies to forfeitures of property under 21 U.S.C. §§ 881(a)(4) and (a)(7).’”

\textsuperscript{208} *See supra* text accompanying note 188.

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