Tulsa Law Review

Volume 32
Number 3 *Practitioner's Guide to the October 1995 Supreme Court Term*

Volume 32 | Number 3

Spring 1997

Bennis v. Michigan: The Great Forfeiture Debate

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NOTES

BENNIS v. MICHIGAN: THE GREAT FORFEITURE DEBATE

I. INTRODUCTION

One of the most fundamental concepts to American society is the right to own property. Another important concept is that a defendant is deemed innocent until proven guilty, and similarly, innocent people are not punished. Could it then be possible for a state to seize a citizen's property without first proving their guilt or compensating them? The United States Supreme Court said "yes" in a case giving states more crime fighting power.[1] The Supreme Court held that the Constitution does not require a state to include an innocent owner defense in its civil forfeiture statutes.[2] Civil forfeiture has been defined as "a process by which the government institutes a civil proceeding parallel to a criminal prosecution and attempts to seize property of the accused that is related to the crime."[3] An innocent owner defense would ensure that owners who were unaware their property was being used in the commission of a crime would be protected from asset forfeiture. The idea that a state could abate an innocent owner's property without payment offends the United States' notions of fairness and ideals of freedom.

This case note begins with a review of the Michigan state courts' decisions of *State v. Bennis*.[4] Next, this note analyzes the issues presented in the case and the holding of the United States Supreme Court.[5] Part III discusses the majority, concurring and dissenting opinions. Part IV defines and reviews the origins and history of both civil and criminal forfeiture. Next, this note discusses the role of forfeiture and its importance in today's American criminal justice system. Lastly, this note predicts the effects that *Bennis* will have on forfeiture law and proposes some solutions to the problems discussed.

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1. Bennis v. Michigan, 116 S. Ct. 994 (1996).
2. *See id.* at 998.
3. Ira Mickenberg, *Prosecutors Granted Leeway in Forfeitures*, NAT'L L.J., July 29, 1996, at C6.
4. State v. Bennis, 527 N.W.2d 483 (Mich. 1994); State v. Bennis, 504 N.W.2d 731 (Mich. Ct. App. 1993).
5. *See Bennis*, 116 S. Ct. at 994.

II. STATEMENT OF THE CASE

A. The Facts and Lower Court Decisions

On March 3, 1988, John Bennis (Mr. Bennis) engaged in sexual activity with a prostitute on a Detroit city street in a 1977 Pontiac automobile co-owned by himself and his wife, Tina Bennis (Bennis).[6] Two undercover police officers observed Mr. Bennis' conduct and arrested him for gross indecency between male and female persons,[7] and indecent and immoral conduct.[8] Mr. Bennis was subsequently convicted of gross indecency.[9] The state of Michigan sued both Mr. and Mrs. Bennis under the state's nuisance abatement laws.[10] The Wayne County Circuit Court ordered the car forfeited, including Bennis' interest, because it was a public nuisance.[11]

Bennis appealed the Circuit Court's decision claiming: (1) she had no knowledge of her husband's misuse of their car,[12] and (2) a single incident of lewdness, assignation or prostitution was insufficient to support a finding of public nuisance.[13] The Court of Appeals of Michigan reversed the Circuit Court by holding: (1) that "the prosecution was obligated to demonstrate that defendant knew of the use of the vehicle as a nuisance before the nuisance could be ordered abated,"[14] (2) that one incident of gross indecency does not make a car a nuisance,[15] and (3) Mr. Bennis' conduct was not proven to fall within the statute's requirement for lewdness, assignation, or prostitution.[16]

The Supreme Court of Michigan reversed the court of appeals decision holding: (1) Mr. Bennis' conduct does fall within the statute after analyzing the circumstances as a whole and examining the intent and definition of lewd behavior,[17] (2) Michigan's abatement law does not require multiple or continuous

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6. *See Bennis*, 504 N.W.2d at 737-38.

7. *See* MICH. COMP. LAWS ANN. § 750.338b (West 1991).

8. *See* MICH. COMP. LAWS ANN. § 750.449a (West 1991).

9. *See Bennis*, 504 N.W.2d at 732. Mr. Bennis was convicted in violation of MICH. COMP. LAWS ANN. § 750.338b (West 1991). *See id.*

10. *See* Bennis v. Michigan, 116 S. Ct. 994, 996 (1996). Michigan's nuisance statutes provide:

> 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 all . . . nuisances shall be enjoined and abated as hereinafter provided, and as provided in the court rules. Any person or his or her servant, agent or employee who shall own, lease, conduct or maintain any building, vehicle or place used for any of the purposes or . . . acts . . . is guilty of a nuisance.

MICH. COMP. LAWS ANN. § 600.3801 (West Supp. 1995). "If the existence of the nuisance is established in an action as provided in this chapter, an order of abatement shall be entered as part of the judgement in the case. . . ." MICH. COMP. LAWS ANN. § 600.3825(1) (West 1987). "Proof of knowledge of the existence of the nuisance on the part of the defendants or any of them, is not required." MICH. COMP. LAWS ANN. § 600.3815(2) (West 1987).

11. *See Bennis*, 116 S. Ct at 996.

12. *See* State v. Bennis, 504 N.W.2d 731, 732 (Mich. Ct. App. 1993).

13. *See id.* at 733.

14. *Id.* at 732.

15. *See id.* at 734.

16. *See id.* at 735.

17. *See* State v. Bennis, 527 N.W.2d 483, 489 (Mich. 1994). The Court held that the definition of lewdness under Michigan's statute is limited to those acts committed for the purpose of prostitution. They went on

incidents,[18] and (3) knowledge of the use of property as a nuisance is not required.[19]

B. *Issues Presented*

The United States Supreme Court granted certiorari to determine whether Michigan's nuisance abatement statute violated Bennis' Fourteenth Amendment right to due process[20] or the Fifth Amendment's Takings clause,[21] by not allowing her to use an innocent owner defense.

C. *The Holding*

The United States Supreme Court affirmed the Supreme Court of Michigan's holding in a 5-4 decision.[22] The Court held that Michigan's forfeiture statute did not violate Bennis' constitutional rights and Michigan was not constitutionally required to include an innocent owner defense.[23]

III. THE DECISION

A. *The Majority Opinion*

The Supreme Court began its opinion by responding to Bennis' argument that "she was entitled to contest the abatement by showing she did not know her husband would use [their car] to violate Michigan's indecency law."[24] The Court stated that unbroken precedent allows property to be forfeited without the owner having knowledge of its illegal use.[25] The Supreme Court traces this precedent through the history of forfeitures beginning with two cases arising out of Admiralty Law. In *The Palmyra*,[26] cited as the earliest case expressing this view of the Court, the Court held a vessel captured for privateering could be

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to say that Mr. Bennis committed an act that "traditionally forms the basis of a prostitution charge, i.e. fellatio." *Id.* at 488.

18. *See id.* at 489. Court looked at dictionary meaning, statutory structure, and case law interpretation to hold that a nuisance involves a continual or repeated problem. The Court then found that because cars consistently come into this same neighborhood for the purpose of prostitution, the nuisance was continuous and Mr. Bennis contributed to it. *See id.* at 490.

19. *See id.* at 493-95.

20. *See* Bennis v. Michigan, 116 S. Ct. 994, 997 (1996).

21. *See id.* at 998.

22. *See id.* at 995.

23. *See id.* at 1001. The Court stated,

> We conclude today, as we concluded 75 years ago . . . . The State here sought to deter illegal activity that contributes to neighborhood deterioration and unsafe streets. Both the trial court and the Michigan Supreme Court followed our longstanding practice, and the judgment of the Supreme Court of Michigan is therefore *affirmed.*

Id.

24. *Id.* at 998.

25. *See id.* The Court stated, "But a long and unbroken line of cases holds that an owner's interest in property may be forfeited by reason of the use to which the property is put even though the owner did not know that it was to be put to such use." *Id.*

26. 25 U.S. (12 Wheat.) 1 (1827).

forfeited without conviction of the owner.[27] The forfeiture was based on the theory that "[t]he thing is here primarily considered as the offender, or rather the offence is attached primarily to the thing."[28] *Harmony v. United States*,[29] which followed in 1844, expanded the forfeiture analysis by holding the owner of a ship bound by the actions of the master and crew "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."[30] These early decisions laid the foundation for forfeiture of property used in the commission of a crime regardless of the guilt or innocence of the owner. The reasoning behind these forfeitures was that in most cases arising under admiralty law, the owner of the ship was not aboard when the criminal behavior took place. Often, the owner was a citizen of another country.[31] The government would have an impossible burden of proving the owner was involved in a crime in order to stop the criminal behavior. Attaching the guilt to the ship itself solved this problem. All that was necessary was to prove that the ship itself was used to commit a crime.

The next set of cases cited by the Supreme Court, decided nearly one hundred years later, arise from the illegal transportation of alcohol.[32] In *J.W. Goldsmith, Jr.-Grant Co. v. United States*,[33] the Court held an automobile dealership, who retained interest in a car as security of payment, forfeited that interest after the purchaser of the car used it for illegal transportation of alcohol.[34] The Court in *Goldsmith* conceded that the dealership was unaware of the buyer's intent to use the automobile for illegal purposes.[35] Nonetheless, the Court abated the dealership's interest in the car, based on the purchaser's criminal activity.[36] The Court in *Bennis* quoted this earlier Court's reasoning for allowing the forfeiture stating, "it is too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced."[37]

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27. *See id.* at 14.

28. *Id., quoted in Bennis*, 116 S. Ct. at 998.

29. 43 U.S. (2 How.) 210 (1844).

30. *Id.* at 234, *quoted in Bennis*, 116 S. Ct at 998.

31. *See Bennis*, 116 S. Ct. at 1010 (Kennedy, J., dissenting).

> The forfeiture of vessels pursuant to the admiralty and maritime law has a long, well-recognized tradition, evolving as it did from the necessity of finding some source of compensation for injuries done by a vessel whose responsible owners were often a half a world away and beyond the practical reach of the law and its processes.

Id.

32. *See* Van Oster v. Kansas, 272 U.S. 465 (1926) (forfeiting automobile after driver was caught illegally transporting controlled substances); J.W. Goldsmith, Jr.-Grant Co. v. United States, 254 U.S. 505 (1921) (forfeiting automobile here also because driver was convicted of illegally transporting alcohol). *See also* Dobbins's Distillery v. United States, 96 U.S. 395 (1877) (forfeiting property in possession of lessee accused of avoiding federal alcohol taxes). The Court in *Dobbins's Distillery* stated:

> Cases often arise where the property of the owner is forfeited on account of the fraud, neglect, or misconduct of those intrusted with its possession, care and custody, even when the owner is otherwise without fault . . . and it has always been held . . . that the acts of [the possessors] bind the interest of the owner . . . whether he be innocent or guilty.

Id. at 401, *quoted in Bennis*, 116 S. Ct. at 998.

33. 254 U.S. 505 (1921).

34. *See id.* at 508-09.

35. *See id.* at 509.

36. *See id.* at 513.

37. *Bennis*, 116 S. Ct. at 999 (quoting *Goldsmith*, 254 U.S. at 511). The Court also cites this passage in

Van Oster v. Kansas[38] arose from similar circumstances. The Court held that a car buyer's interest was forfeited after the dealership, which retained possession of the car, allowed it to be used for the illegal transportation of alcohol.[39] Like Bennis, the *Van Oster* defendant argued that she had no knowledge that the car was being used for illegal purposes.[40] The Court stated that it was not necessary for the state to prove the owner's guilt before subjecting her property to forfeiture.[41] The Court cited other situations where an owner of property can be punished or his property abated by the actions of a non-owner possessor. For example, in a bailor/bailee relationship, the bailee, having only possessory rights, can subject the bailor's property to a lien.[42] Another example cited by the Court is the "power of a vendor of chattels to sell and convey good title to a stranger," regardless of whether that vendor had ownership rights himself.[43] The Court held that Van Oster's due process rights were not violated by the forfeiture despite her lack of knowledge that her car would be used in connection with criminal activity.[44]

The last case cited by the Supreme Court in its historical discussion of forfeiture was *Calero-Toledo v. Pearson Yacht Leasing Co.*[45] In this case, marijuana was found on board a pleasure yacht in the possession of a lessee.[46] The Court held the owner's interest in the yacht forfeited[47] in violation of Puerto Rico's statutes against transportation of controlled substances.[48] The Court conducted a historical analysis reviewing the *Palmyra* line of cases, a format closely mirrored by the Court in *Bennis*.[49] The Court in *Bennis* cited the *Calero-Toledo* conclusion that "the innocence of the owner of property subject to forfeiture has almost uniformly been rejected as a defense."[50] In her arguments, Bennis cited a passage from *Calero-Toledo*, which she argued showed the Court's desire to have an innocent owner defense: "[I]t 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

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its conclusion. *See Bennis*, 116 S. Ct. at 1001.

38. 272 U.S. 465 (1926).

39. *See id.* at 465-66.

40. *See id.* at 466.

41. *See id.* at 467-68.

42. *See id.* The relevant portion states, "It is not unknown or indeed uncommon for the law to visit upon the owner of property the unpleasant consequences of the unauthorized action of one to whom he has entrusted it." *Id.* at 467.

43. *Id.*

44. *See id.* at 467-68, *quoted in* Bennis v. Michigan, 116 S. Ct. 994, 998 (1996). "It has long been settled that statutory forfeitures of property entrusted by the innocent owner or lienor to another who uses it in violation of the revenue laws of the United States is not a violation of the due process clause of the Fifth Amendment." *Van Oster*, 272 U.S. at 467-68.

45. 416 U.S. 663 (1974).

46. *See id.* at 665.

47. *See id.* at 690.

48. *See id.* at 665.

49. *See id.* at 682-87. The Court cited The Palmyra, 25 U.S. (12 Wheat.) 1 (1827); Dobbins's Distillery v. United States, 96 U.S. 395 (1878); J.W. Goldsmith, Jr.-Grant Co. v. United States, 254 U.S. 505 (1921); Van Oster v. Kansas, 272 U.S. 465 (1926).

50. *Bennis*, 116 S. Ct. at 999 (citing *Calero-Toledo*, 416 U.S. at 683).

all that reasonably could be expected to prevent the proscribed use of his property."[51] The Court rejected Bennis' argument, holding this passage as merely dicta.[52]

Following its historical analysis, the Supreme Court began its application of the *Palmyra* line of cases to Bennis' arguments. The Court summarized Bennis' arguments as: (1) *Calero-Toledo* creates a defense for owners who had done all that reasonably could be expected to prevent the misuse of their property,[53] (2) that *Foucha v. Louisiana*[54] requires that the state show punitive interest in the forfeited property,[55] (3) that *Austin v. United States*[56] limits forfeitures in accordance with the Eighth Amendment's prohibition against excessive fines,[57] and (4) that the Michigan forfeiture statute violates the Fifth Amendment's Takings Clause.[58] The Court rejected each of these arguments.

Bennis' first, second, and fourth arguments were swiftly rejected by the Court. The Court dismissed Bennis' first argument as dicta from *Calero-Toledo* with no precedential value,[59] and the second argument, by holding that *Foucha*[60] did not discuss or overrule the *Palmyra* line of cases.[61] The fourth argument was rejected by the Court's holding that the Fifth Amendment's Taking Clause does not apply to property already lawfully acquired by the state.[62] The Court's short and swift rejection of these arguments reflects its view of the strong precedential value of the *Palmyra* line of cases.

The Court rejected the third argument by stating that *Austin v. United States*[63] did not deal with the validity of an innocent owner defense,[64] and by claiming that the civil forfeiture statute has other purposes which balance its punitive interests under the Eighth Amendment. *Austin* held that forfeiture actions must comply with the Eighth Amendment's excessive fines clause[65] because of their punitive nature. Although the Court did not expressly overrule *Austin*, it emphasized that forfeiture serves a purpose other than its punitive purpose, namely, deterrence.[66] The Court also recalled the lower court's deci-

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51. *Calero-Toledo*, 416 U.S. at 689.
52. *See Bennis*, 116 S. Ct. at 999.
53. *See id.* at 999.
54. 504 U.S. 71 (1992).
55. *See Bennis*, 116 S. Ct. at 1000.
56. 509 U.S. 602 (1993).
57. *See Bennis*, 116 S. Ct. at 1000.
58. *See id.* at 1001.
59. *See id.* at 999.
60. Foucha v. Louisiana, 504 U.S. 71 (1992). The Court stated that this case didn't affect the *Palmyra* line of cases because *Foucha* dealt with the issue of whether a criminal defendant who is declared not guilty by reason of insanity could still be detained by the state. The Court in *Foucha* held that a state had no punitive interest that would justify continued detention. *See id.* at 80.
61. *See Bennis*, 116 S. Ct. at 1000.
62. *See id.* at 1001. "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.
63. 509 U.S. 602 (1993).
64. *See id.*
65. *See* U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").
66. *See Bennis*, 116 S. Ct. at 1000.

sion that stated that forfeiture is an equitable action.[67] The lower court held that it had discretion to offset Bennis' interest in the car, but decided against it because of the low value of the car and the fact that Bennis had another car available to drive.[68] This discretion to apply the punishment to the particular abatement action enabled the Court to hold that the Michigan statute was not in violation of the excessive fines clause.[69]

The Court's final application is perhaps the most troublesome. The Court stated that "[a]t bottom, petitioner's claims depend on an argument that the Michigan forfeiture statute is unfair because it relieves prosecutors from the burden of separating innocent co-owners who are complicit in the wrongful use of property from co-owners . . . . This argument, in the abstract, has considerable appeal . . . ."[70] The Court then went on to disregard this argument stating that the trial court's remedial discretion and Bennis' focus on her right to interest in the property, instead of on the invalidity of the forfeiture statute, weakened this argument.[71] This statement seems contradictory to the Court's statement (during oral arguments) that it is impossible to forfeit half of a car.[72] Bennis did not own the entire car; therefore, she could not claim that the statute was invalid as to the half which she did not own. As earlier noted, forfeiture of half a car is not possible, but reimbursement of the one half interest in that car is possible. The Court seems to forget the logic of its own concerns.

The Court's only consideration of Bennis' Due Process arguments was to state, "[U]nder [the *Palmyra*] cases the Due Process Clause of the Fourteenth Amendment does not protect her interest against forfeiture by the government."[73] The Court did not attempt to analyze Michigan's statute on its own Due Process merits. The Supreme Court did not offer an explanation of its rejection of Bennis' Due Process claim other than to analyze its precedent.[74] The Court assumes that due process has been met because previous cases have

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67. *See id.*

68. *See Bennis*, 527 N.W.2d at 495 ("It is not contested that this is an equitable action. That being the case, it is critical to recognize that the trial judge considered alternatives on the record and, in the exercise of his discretion, fashioned an appropriate remedy, abating the entire interest in the vehicle.").

69. *See Bennis*, 116 S. Ct. at 1000.

70. *Id.* at 1001.

71. *See id.* Specifically, the Court stated, "Its force is reduced in the instant case, however, by the Michigan Supreme Court's confirmation of the trial court's remedial discretion . . . and petitioner's recognition that Michigan may forfeit her and her husband's car whether or not she is entitled to an offset for her interest in it." *Id.* (citation omitted).

72. Justice Ginsburg asked:

> Does one usually hold cars by tenancy in common? Isn't—but in any event, he is at least half-owner, and you can't impound half a car, you can't sell at an auction half a car, so in effect your position seems to be that she, because she is half-owner, can immunize him against having his property taken, is that essentially your position?

Transcript of Oral Argument, *Bennis* (No. 94-8729), *available in* 1995 WL 712350, at *7 (Nov. 29, 1995). Petitioner replied, "No, Justice Ginsburg, we're not contending that the state has no power to forfeit the vehicle. What we are saying is they cannot do so without compensating Tina Bennis, the innocent owner, for her interest." *Id.*

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

74. *See id.*

so held.[75] The Court did not reanalyze the constitutionality of civil forfeiture when used in connection with criminal activity.

B. *Key Points from Justice Thomas' and Justice Ginsburg's Concurring Opinions*

Justice Thomas recognized that forfeiture of innocent owners' property seems unfair.[76] However, Thomas reaffirmed the Majority's historical analysis by stating, "[F]orfeiture of property without proof of the owner's wrongdoing, merely because it was 'used' in or was an 'instrumentality' of crime has been permitted . . . both before and after the adoption of the Fifth and Fourteenth Amendments."[77] Justice Thomas expressed his dissatisfaction with forfeiture by stating, "This case is ultimately a reminder that the Federal Constitution does not prohibit everything that is intensely undesirable."[78] Justice Thomas emphasized the precedent as the reason for upholding this forfeiture. He stated that the statute should be upheld, "based on the historical prevalence and acceptance of similar laws."[79]

Justice Thomas next briefly discussed his concerns with the unclear standard of determining when property has been "used" for a crime, but distinguished *Bennis* from this analysis by stating that *Bennis* has not raised this issue.[80] He stated that historical limits should be adhered to; specifically, only abating the instrumentalities of crime.[81] He went on to state that Bennis did not claim that her car was not an instrumentality of the crime.[82] Justice Thomas concluded by stating that although he has some concerns about misuse of forfeiture,[83] the Constitution "apparently assigns to the States and to the political branches of the Federal Government the primary responsibility for avoiding that result."[84]

Justice Ginsburg also wrote a concurring opinion to point out "features of the case key to my judgement."[85] Justice Ginsburg emphasized the fact that the car belonged to John Bennis as much as it belonged to Tina Bennis; therefore, each had each other's consent to operate the car.[86] These facts are important

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75. *See id.* "[T]he cases authorizing actions of the kind at issue are 'too firmly fixed in the punitive and remedial jurisprudence of the country to now be displaced.'" *Id.* (citing J.W. Goldsmith, Jr.-Grant Co. v. United States, 254 U.S. 505, 511 (1921)).

76. *See Bennis*, 116 S. Ct. at 1001 (Thomas, J., concurring). Thomas stated, "One unaware of the history of forfeiture laws and 200 years of this Court's precedent regarding such laws might well assume that such a scheme is lawless—a violation of due process." *Id.*

77. *Id.* at 1002.

78. *Id.* at 1001-02.

79. *Id.* at 1001.

80. *Id.* at 1002.

81. *See id.*

82. *See id.*

83. *See id.* at 1003 ("Improperly used, forfeiture could become more like a roulette wheel employed to raise revenue from innocent but hapless owners whose property is unforseeably misused, or a tool wielded to punish those who associate with criminals, than component of a system of justice.").

84. *Id.*

85. *Id.* at 1003 (Ginsburg, J., concurring).

86. *See id.*

because of the distinction set out between cases where the owner did not consent to any use of the property and cases where the owner just did not consent to the particular illegal use of the property.[87] However, the other side of this argument was not discussed by Ginsburg or the rest of the Court. Would Bennis have been able to prevent Mr. Bennis from using the car even if she had known about his intention to break Michigan law? Since each owned the car jointly, Ginsburg holds the issue solved since joint ownership implies that the other owner will have consent to use the vehicle.[88]

Justice Ginsburg also calls attention to the fact that Michigan designates this action as one in equity, which "means that the State's Supreme Court stands ready to police exorbitant applications of the statute."[89] Justice Ginsburg focussed on the trial court's attention to the facts when rendering its decision, suggesting that the trial court's discretion and consideration of alternative methods to abatement on a case by case basis were important in her affirmation.[90]

C. *The Dissent*

Justice Stevens wrote a dissenting opinion joined by Justices Souter and Breyer.[91] Justice Stevens divided his dissent into three parts: (1) analysis of the connection between the property forfeited and the crime committed,[92] (2) analysis of fundamental fairness[93] and (3) application of the Eighth Amendment's Excessive Fines Clause.[94]

In part one of the dissent, Justice Stevens divided property subject to seizure into three categories.[95] The first category is pure contraband, things which are illegal in and of themselves.[96] The second category is proceeds, including earnings from crimes committed.[97] The third category, in which Justice Stevens placed Bennis' car, includes "tools or instrumentalities . . . used in the commission of a crime . . . ."[98]

Justice Stevens also looked back to the early admiralty cases for the foundation of the forfeiture of instrumentalities.[99] He held these cases are distinguishable from *Bennis* because forfeiture was the "limit of liability."[100] *The Palmyra*[101] stated that forfeiture was the only punishment available for crimes committed at sea; there was no law under which to convict owners of ships for

87. *See id.*
88. *See id.*
89. *Id.*
90. *See id.*
91. *See id.* at 1003 (Stevens, J., dissenting).
92. *See id.* at 1003-10.
93. *See id.* at 1007.
94. *See id.* at 1010.
95. *See id.* at 1004.
96. *See id.*
97. *See id.*
98. *Id.*
99. *See id.* at 1005.
100. *Id.*
101. 25 U.S. (12 Wheat.) 1 (1827).

privateering.[102] These cases presume that the owner of a ship sent out to sea was aware of its principle use. In *Bennis*, Stevens argued that in contrast to early Admiralty law, Michigan has laws that allow for the punishment of the actor who committed the crime; forfeiture of an innocent owner's interest is not the only available remedy.[103]

The early Admiralty cases also provide the basis for Justice Stevens' argument that the crime committed must be the principle use of the property before it can be forfeited. Justice Stevens stated, "An isolated misuse of a stationary vehicle should not justify the forfeiture of an innocent owner's property on the theory that it constituted an instrumentality of the crime."[104] The principle use of the car was to transport Mr. Bennis to work, not to commit sexual acts.[105]

Justice Stevens also distinguished the facts of *Bennis* from the historical cases because the car did not facilitate the crime.[106] Earlier cases centered on property that was involved in illegal transportation, when such illegal transportation was an element of a crime.[107] In *Bennis*, the car "played a part only in the negotiation, but not in the consummation of the offense."[108] The crime of gross indecency does not require a vehicle or other form of transportation or movement.[109] Justice Stevens also rejected the Majority's argument of the remedial interest in forfeiting the car by arguing that, "confiscating petitioner's car does not disable her husband from using other venues for similar illegal rendezvous, since all that is needed to commit this offense is a place."[110] Justice Stevens attempted to display the tenuous connection between the car and the crime committed.

In part two of the dissent, Justice Stevens argued that "[f]undamental fairness prohibits the punishment of innocent people."[111] The dissent argued that forfeiture is based on the theory that the owner has in some way been negligent, and in this case the owner is truly innocent.[112] Justice Stevens argued that even if forfeiture is not based on a theory of negligence and it is a true strict liability crime, "we have consistently recognized an exception for truly blameless individuals."[113] In light of the punitive and deterrent purposes of

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102. *See id.* The Court stated, "[T]here is no act of Congress which provides for the personal punishment of offenders, who commit 'any piratical aggression, search, restraint, depredation or seizure,' within the meaning of those acts." *Id.* at 15.

103. *See, e.g.*, MICH. COMP. LAWS ANN. § 750.338b (West 1991), under which Mr. Bennis was convicted.

104. *Bennis*, 116 S. Ct. at 1005 (Stevens, J., dissenting).

105. *See id.* at 1010.

106. *See id.* at 1005.

107. *See* Van Oster v. Kansas, 272 U.S. 465, 466 (1926); Carroll v. United States, 267 U.S. 132, 134 (1925); Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 665 (1974). In each of these cases, transportation of controlled substances was an element of the offense that was committed.

108. *Bennis*, 116 S. Ct. at 1006 (Stevens, J., dissenting).

109. *See* MICH. COMP. LAWS ANN. § 750.338b (West 1991).

110. *Bennis*, 116 S. Ct. at 1007 (Stevens, J., dissenting). Justice Stevens also stated, "[N]either logic or history supports the Court's apparent assumption that their complete innocence imposes no constitutional impediment to the seizure of their property simply because it provided the locus for a criminal transaction." *Id.* at 1004.

111. *Id.* at 1007.

112. *See id.* at 1008.

113. *Id.* at 1007. The dissent cites Peisch v. Ware, 8 U.S. (4 Cranch.) 347 (1808) (stating that property

forfeiture, there was no good reason for forfeiting Bennis' car. Justice Stevens argued that neither the punitive nor the deterrent purpose is applicable in this case because Bennis had no reason to know her husband would use their car for illegal purposes.[114] The last purpose for forfeiting the interest of an innocent owner, to relieve prosecutors of the burden of proving collusion, was also held by the dissent to be inapplicable in *Bennis*.[115] It is fairly obvious that Bennis did not collude with her husband to carry out an act of gross indecency.[116]

Another issue touched on only tangentially by the dissent is the predicament that consent creates in light of the Bennis' marital status. The dissent stated:

> In this case, petitioner did not "entrust" the car to her husband on the night in question; he was entitled to use it by virtue of their joint ownership. There is no reason to think that the threat of forfeiture will deter an individual from buying a car with her husband— or from marrying him in the first place—if she neither knows nor has reason to know that he plans to use it wrongfully.[117]

Both opinions treat Bennis as if she had merely lent her car to her husband, instead of owning the car jointly with him. Although the issue arose during oral arguments,[118] the Court skirted the issue of whether Bennis would have had the right to prevent her husband from driving the car even if she had known he was planning to use the car to engage in sexual activity with a prostitute.

In the third part of the Stevens dissent, the Justice examined the limitations of the Eighth Amendment's Excessive Fines Clause.[119] Justice Stevens first held the forfeiture of Bennis' car a violation of the Eighth Amendment because forfeiture of the entire car is excessive given that the car was only used once in the crime of gross indecency.[120] The second reason that the forfeiture violated the Eighth Amendment is because "[u]nder the Court's reasoning, the value of the car is irrelevant.[121] A brand new luxury sedan or a ten-year-old car would be equally forfeitable."[122] Unless the value of the property forfeited is taken into consideration, the action cannot be considered remedial.[123]

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should only be forfeited in cases where the owner has means available which would help him avoid forfeiture). *Id.* at 1008.

114. *See Bennis*, 116 S. Ct. at 1008 (Stevens, J., dissenting).

115. *See id.* at 1009.

116. *See id.*

117. *Id.*

118. *See* Transcript of Oral Argument, *Bennis* (No. 94-8729), *available in* 1995 WL 712350, at *9 (Nov. 29, 1995).

119. *See* U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

120. *See Bennis*, 116 S. Ct. at 1010 (Stevens, J., dissenting).

121. *Id.*

122. *Id.* (citing Austin v. United States, 509 U.S. 602 (1993); United States v. Ward, 448 U.S. 242 (1980)).

123. *See Bennis*, 116 S. Ct. at 1010 (Stevens, J., dissenting) ("We have held that 'dramatic variations' in the value of conveyances subject to forfeiture actions undercut any argument that the latter are reasonably tied to remedial ends.").

In conclusion, the Stevens dissent held that the time had arrived to limit the scope of forfeitures.[124] Stevens would not hold Bennis at all liable for her husband's indecency.[125] Stevens summed up the dissent's position by stating, "I am convinced that the blatant unfairness of this seizure places it on the unconstitutional side of [the] line."[126]

D. Key Point from Justice Kennedy's Dissent

Justice Kennedy dissented in a separate opinion.[127] The key point from his dissent is that although forfeiture in admiralty cases is justifiably recognizable, it does not automatically extend to the seizure of automobiles.[128] He stated, "We can assume the continued validity of our admiralty forfeiture cases without in every analogous instance extending them to the automobile."[129] Justice Kennedy concluded by finding that a showing of negligent entrustment or criminal complicity should be required before an automobile is forfeited, to comply with due process.[130]

IV. ANALYSIS

In order to understand the Court's justification of the forfeiture of Bennis' car, it is necessary to understand the concept of forfeiture and the differences between civil and criminal forfeiture. This section explores the basic concepts of forfeiture, analyzes the effect *Bennis* will have on forfeiture law and proposes some changes to solve the problem of the innocent owner defense and due process considerations.

A. Civil Forfeiture and Criminal Forfeiture Defined

Civil forfeiture is the process by which governments seize property without compensating its owner, based on its connection with the commission of crime.[131] However, there is no prerequisite that a crime be proved before

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124. *See id.*

125. *See id.* Stevens stated:

> I would hold now what we have always assumed: that the principle is required by due process. The unique facts of this case demonstrate that petitioner is entitled to the protection of that rule. . . . [The car's] principal use was entirely legitimate. It was an ordinary car that petitioner's husband used to commute to the steel mill where he worked . . . . Without knowledge that [her husband] would commit such an act in the family car, or that he had ever done so previously, surely petitioner cannot be accused of failing to take "reasonable steps" to prevent the illicit behavior. She is just as blameless as if a thief, rather than her husband, had used the car in a criminal episode.

Id. at 1008.

126. *Id.* at 1010. The "line" refers to Stevens statement that he is "not prepared to draw a bright line that will separate the permissible and impermissible forfeitures of the property of innocent owners . . . ." *Id.*

127. *Bennis*, 116 S. Ct. at 1011 (Kennedy, J., dissenting).

128. *See id.* at 1011 ("[E]ven the well-recognized tradition of forfeiture in admiralty has not been sufficient for an unequivocal confirmation from this Court that a vessel in all instances is seizable when it is used for criminal activity without the knowledge or consent of the owner." (citations omitted)).

129. *Id.*

130. *See id.*

131. *See* LEONARD LEVY, A LICENSE TO STEAL; THE FORFEITURE OF PROPERTY ix (1996).

property is subject to confiscation.[132] In fact, the government not only has no duty to prove that a crime was committed beyond a reasonable doubt, they also have no duty to prove a crime by clear and convincing evidence or even by a preponderance of the evidence. The government must only prove that there was probable cause to believe that the property was used in connection with a crime.[133]

This burden is made possible by the legal fiction that the property itself is guilty.[134] Civil forfeiture is considered an *in rem* proceeding, meaning that the judicial proceeding is aimed at the property to be forfeited, instead of the owner of that property.[135] This rationale is perhaps the only substantive distinguishing factor between civil and criminal forfeiture, which is an in personam action where the proceeding is aimed at an owner's guilt with the forfeiture of property as punishment of criminal activity.

Leonard Levy claims the distinction between civil and criminal forfeiture essentially consists only of the same distinction that separates civil and criminal proceedings in general.[136] Civil proceedings deal with private rights and remedies, while criminal proceedings deal with punishment for violation of public rights.[137] Levy states that when civil proceedings punish, as in the case of civil forfeiture, the line between criminal and civil law becomes blurred.[138] In *Kennedy v. Mendoza-Martinez*,[139] the Supreme Court set out a list of factors to be used in determining whether a procedure is criminal despite its civil label. Some of the factors listed were whether the statute contains a scienter requirement, whether historically the sanction was treated as criminal, and whether a non-punitive purpose also exists.[140] There is no bright line rule for distinguishing civil from criminal forfeitures, and usually the legislature simply designates a forfeiture statute as either a criminal or a civil action.[141]

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132. *See* Kirk W. Munroe, *Surviving the Solution: The Extraterritorial Reach of the United States*, 14 DICK. J. INT'L L. 505, 515 (1996) ("As this is a civil forfeiture action, the U.S. government need not bring criminal charges, either before or after the forfeiture. [They can seize] assets without ever bringing a criminal charge against anyone involved with the asset.").

133. *See id.* at 514-15.

134. *See* William F. Rohrbaugh, *My Brother's Keeper*, W. VA. LAW., June 9, 1996, at 8.

135. *See* LEVY, *supra* note 131, at 22.

136. *See id.*

137. *See id.*

138. *See id.* Levy stated, "Criminal law punishes criminal offenders. The trouble is that civil law also may punish, making the distinction between the civil law and criminal law somewhat bewildering." *Id.*

139. 372 U.S. 144 (1963).

140. *See id.* at 168-69. These factors have been summarized as follows:

> Whether the sanction had historically been regarded as a punishment, whether the sanction involved an affirmative disability or restraint, whether the sanction is dependent upon a finding of scienter, whether the sanction promotes traditional aims of punishment, whether the behavior to which it applies is a crime, whether there is a non-punitive purpose to which the sanction may be rationally connected, and whether the sanction appears excessive in relation to that non-punitive purpose.

Arthur W. Leach & John G. Malcolm, *Criminal Forfeiture: An Appropriate Solution to the Civil Forfeiture Debate*, 10 GA. ST. U. L. REV. 241, 261 n.82 (1994).

141. For example, when RICO was first passed, the forfeitures included therein were considered criminal forfeitures. When the forfeitures were proven to be ineffective, they were changed to civil forfeiture proceedings without changing the statutes, but by simply redesignating them as civil statutes. *See* LEVY, *supra* note 131, at 80-81.

While civil forfeiture is not easily distinguishable from criminal forfeiture, by classifying some types of forfeiture as civil, the government side-steps many constitutional as well as procedural stumbling blocks.[142] As discussed above, the burden of proof the government must meet is much lower in civil forfeiture proceedings. The Fifth Amendment right against double jeopardy is not offended by a civil forfeiture following a criminal conviction in contrast to a subsequent criminal forfeiture proceeding.[143] Also, whereas the Fifth Amendment's privilege against self-incrimination prevents a defendant's silence from being used against him in a criminal trial, if a defendant remains silent in a civil trial, the jury is permitted to draw adverse inferences from that silence. Levy calls civil forfeiture a "prosecutor's legal Eden."[144]

The United States Supreme Court claims there are remedial purposes of civil forfeiture that distinguish it from criminal punishment.[145] These purposes include: (1) to seize property involved in the commission of a crime; (2) to seize the profits of crime; (3) to prevent criminals from benefitting from criminal activities; and finally, (4) to discourage owners from allowing their property to be used illegally.[146] This justification for civil forfeiture prompts the question, why is a civil proceeding being used to prevent or punish criminal behavior? To find the answer to that question it is necessary to look at the history of both civil and criminal forfeiture.

B. The Origins of Civil Forfeiture

Criminal and civil forfeiture can be traced to distinctly separate origins.[147] The concept of civil forfeiture can first be found in thirteenth century England's law of the deodand.[148] A deodand was an object, such as an animal or an inanimate object, that caused the death of a human. An object involved in the death of a person was deemed guilty and forfeited to the Crown.[149] This concept that an object can be personified and then held culpable for crimes existed long before this time, but this was the first instance where such objects were forfeited to the government.[150] The law of the deodand never became popular

142. *See* Rohrbaugh, *supra* note 134, at 8 ("The United States Supreme Court has nonetheless, upheld the constitutionality of civil forfeiture as an application of the '*in rem*' jurisdiction of the courts. . . . Thus, the Court has neatly side-stepped the due process and takings issues.").

143. *See* United States v. Ursery, 116 S. Ct. 2135 (1996).

144. LEVY, *supra* note 131, at 48.

145. *See Ursery*, 116 S. Ct. at 2142.

146. *See* Robert M. Sondak, *Government Forfeiture Powers Are On The Rise*, MONEY LAUNDERING L. REP., July 1996, at 1, 4.

147. *See* LEVY, *supra* note 131, at 23 ("Criminal forfeitures have a different origin from civil ones.").

148. *See id.* at 11.

149. *See* Donald J. Boudreaux & A.C. Pritchard, *Innocence Lost:* Bennis v. Michigan *and the Forfeiture Tradition*, 61 MO. L. REV. 593, 600 (1996).

150. *See id.* ("Forfeiture to the Crown under the common law of a deodand is the oldest method of forfeiture."). *See also* LEVY, *supra* note 131, at 10. "Retribution against inanimate objects . . . became common in the Middle Ages. . . . In 864 the Council of Worms decreed that a colony of bees should be suffocated in their hive, because they had stung a person to death," based on the belief that the bees must have been demonically possessed. *Id.*

in America and was eventually abolished in England in 1846.[151] However, the concept of attaching guilt to inanimate objects outlived the deodand and is represented in civil forfeiture law.[152]

This legal fiction may have made the transition from English law of the deodand to twentieth century US law through admiralty law. In early admiralty law, as discussed by the Court in *Bennis*, a vessel itself was deemed the defendant and could be found guilty and seized.[153] Seizure based on the culpability of the vessel was necessary, because of the inability to secure in personam jurisdiction over the owner of the ship,[154] who was often living in Europe. The Court in *Bennis* relies on these early cases to establish the validity of civil forfeiture.[155] Civil forfeiture also emerged during the Revolutionary and Civil wars to quash opposition.[156] Later, forfeiture was again put to use to control interstate transportation of alcohol in automobiles.[157] Thus, the concept that culpability could attach to property, as seen in English deodand, made its way across the Atlantic ocean on vessels and into today's automobiles.[158]

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151. *See* LEVY, *supra* note 131, at 19.

152. *See* United States v. United States Coin and Currency, 401 U.S. 715, 719-20 (1971). "Traditionally, forfeiture actions have proceeded upon the fiction that inanimate objects themselves can be guilty of wrongdoing. Simply put, the theory has been that if the object is 'guilty,' it should be held forfeit. . . . [T]he modern forfeiture statutes are the direct descendants of this heritage." *Id.* (citations omitted). *But see* Boudreaux & Pritchard, *supra* note 149, at 601-02:

> But, in fact, there is little evidence that modern forfeiture law descended from deodand. First and most obviously, property became deodand only if it caused a human's death. Second, attempts to raise the analogy of forfeiture to deodand were specifically rejected by English courts. Third, Grant Gilmore and Charles Black, in their Treatise on Admiralty, found little evidence . . . that deodand is the evolutionary ancestor of modern forfeiture law. . . . Fifth, deodands were always tried in criminal courts. Finally, the superstition that inanimate objects can be culpable for harming humans has been discarded with the advance of science.

Id.

153. *See* Bennis v. Michigan, 116 S. Ct. 994, 1005 (1996) (Stevens, J., dissenting).

154. *See generally* The Palmyra, 25 U.S. (12 Wheat.) 1 (1827).

155. *See Bennis*, 116 S. Ct. at 994, 998-1001. Also, during oral argument, the Court refers to the deodand in its questioning on the law of civil forfeiture:

> A: Well, that's the guilty property fiction.
> Q: the deodand?
> A: Yes, the idea that an inanimate object can—you can ascribe guilt to an inanimate object . . .
> Q: And you say that notion is no longer valid at all?
> A: Well . . . it's a rather obsolete notion . . .
> Q: Well, didn't we say in *Austin* that never took hold in the United States? That was an English fiction.
> A: the deodand?
> Q: yes
> A: Yes, we did say that about the deodand.

Transcript of Oral Argument, *Bennis* (No. 94-8729), *available in* 1995 WL 712350, at *19-*20 (Nov. 29, 1995).

156. *See* Leach & Malcolm, *supra* note 140 at 249. The authors stated:

> Forfeiture statutes were used to enforce the payments of customs duties, a major source of revenue during the nineteenth century. Such provision[s] were also utilized during the Revolutionary War to seize Tory property and later to stem the tide of slave-running and to seize Confederate property during the Civil War.

Id.

157. *See, e.g.*, J.W. Goldsmith, Jr.-Grant Co. v. United States, 254 U.S. 505 (1921); Van Oster v. Kansas, 272 U.S. 465 (1926).

158. "In the United States, though deodands never entered the mainstream of the law, their basic element did: a thing can be guilty and if so is forfeit to the government." LEVY, *supra* note 131, at 19. "Congress began dramatically expanding the forfeiture power in 1984. There are now more than 100 such federal laws, and civil forfeiture proceedings have become a key weapon in the war on crime and drugs." Richard C.

C. *The Origins of Criminal Forfeiture*

Criminal forfeiture developed in England as a punishment for committing a felony. When a subject was convicted of a felony, all his lands would escheat to the King.[159] In 1870 and 1884, the right of the King to seize all lands belonging to a felon was abolished.[160] Criminal forfeiture did not flourish in the early history of America.[161] Although in 1790, Congress abolished forfeiture of estate, "a limited criminal forfeiture still existed in theory."[162] Leonard Levy stated that, "In practice, however, criminal forfeiture[] nearly disappeared from the United States until 1970," when it was revived to fight organized crime.[163] The Organized Crime Act of 1970, including RICO, and Continuing Criminal Enterprise Act, enacted eight days later,[164] sought to use criminal forfeiture to prevent the infiltration of organized crime into legitimate businesses.[165] However, because of procedural complications, criminal forfeiture failed and the statutes were modified to replace criminal forfeiture with civil forfeiture.[166] For an example of procedural complications in using criminal forfeiture statutes, the prosecution often not only had to prove that a felony was committed, but also had to prove that it was part of a continuing series of felonies committed by a number of people. The criminal forfeiture statutes were too "limited in scope and cumbersome in a substantive sense" to work,[167] thus beginning the government's attempt to solve the problems created by criminal forfeiture by substituting civil forfeiture proceedings.

Reuben, *One Crime, Two Punishments*, A.B.A. J., Dec. 1995, at 38.

159. *See* LEVY, *supra* note 131, at 24.

> The failure of a tenant to fulfil his obligations, which was the original meaning of the word "felony", resulted in escheat. Felony came to signify the breach of the feudal bond by a significant criminal offense such as murder, rape, arson, or robbery. . . . Commission of a felony was punishable by death, and the felon's lands escheated to his lord.

Id.

160. *See id.* at 34.

161. *See id* at 34. "Disfavored by the Framers of the Constitution, *in personam* forfeiture saw little action in American Courts until it was resurrected by the 91st Congress." Peter W. Salsich, *A Delicate Balance*, 39 ST. LOUIS U. L.J. 585, 589 (1995).

162. LEVY, *supra* note 131, at 38.

163. *Id.*

164. *See id.* at 78; *See* Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968 (1994); The Continuing Criminal Enterprise Act, 21 U.S.C. § 848 (1994).

165. *See* LEVY, *supra* note 131, at 70. "The Senate Report regarded [RICO] as a means of assaulting the economic power of the Mafia. . . . [I]t was a means of removing 'the leaders of organized crime from their sources of economic power.'" *Id.*

166. *See id.* at 79-80. The author stated:

> Procedural obstacles would eventually cripple the forfeiture provisions. If, for example, enforcement procedures allowed felons to dispose of their property before the government could seize it, the forfeiture provisions would be abortive. . . . [A]ll forfeitures, especially RICO and CCE forfeitures lagged miserably. A decade after the resort to criminal forfeiture, [a DEA manual] declared that forfeiture normally meant civil forfeiture . . . . Criminal forfeitures, as a matter of fact, proved to be a failure, a ludicrous failure for at least a decade, as a government study revealed.

Id. at 79-80.

167. *Id.* at 79.

D. The Need for Forfeiture

The importance of forfeiture in today's criminal justice system should not be overlooked in an effort to protect innocent owners from the loss of their property. Rapidly rising crime rates and increasingly high numbers of recidivism show the need for a supplement to prison. Many people have lost faith that the American prison system is a sufficient punishment and deterrent to crime. Incarceration does not appear to be working to decrease the level of crime in America. Forfeiture not only punishes criminals by seizing the profits of their crimes, but also deters further crimes by taking away criminals' ways and means of crime.[168] Forfeiture takes the incentive away from crime by making it unprofitable. Forfeiture is an extremely powerful tool of crime fighting, which if combined with the appropriate safeguards, is a valuable asset to our justice system.[169]

The proceeds from forfeiture are invested back into the criminal justice system to even further help with the prevention of crime. For example, forfeiture proceeds are being used to build new prisons:

> Attorney General Richard Thornburgh announced that $229 million from the Justice Department's Asset Forfeiture Fund would be used to build more than 3000 federal prison cells. At that time, he stated that, "[i]t's satisfying to think that it is now possible for a drug dealer to serve time in a forfeiture-financed prison after being arrested by agents driving a forfeiture-provided automobile while working in a forfeiture-funded sting operation."[170]

The idea that criminals are paying to fight crime is very appealing.[171] There aren't many tax payers who would object to forfeiture characterized in these terms.[172] Meaningful resistance to forfeiture only occurs when forfeiture is abused; when innocent third parties' rights are violated and property is wrongfully taken.

E. The Status of Forfeiture Law Today

The Government can only seek forfeiture of property involved in crime if there is a statute specifically authorizing that forfeiture.[173] Although criminal

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168. *See* Leach & Malcolm, *supra* note 140, at 250. "Depriving criminals of their ill-gotten bounty, in addition to depriving them of their liberty, reinforces the message that crime does not pay." *Id.*

169. *See id.* Leach and Malcolm stated:

> [I]ncarceration is expensive, and society appears to be increasingly unwilling to expend the funds necessary to build more prisons to house increasing numbers of offenders for longer and longer periods of incarceration. For a society searching for a creative alternative (or supplement) to incarceration, asset forfeiture may prove to be an attractive solution.

Id. at 250-51.

170. *Id* at 251. *See also* Raymond Banoun et al., *Making a Strong Argument for Civil Forfeiture Reform*, MONEY LAUNDERING L. REP., Aug. 1996, at 1, 2. "Civil forfeiture is big business for Uncle Sam. Since 1991, deposits to the Assets Forfeiture Fund of the Department of Justice, the largest of the forfeiture proceed funds, have averaged $500 million per year." *Id.*

171. *See generally id.*

172. *See generally id.*

173. *See* Leach & Malcolm, *supra* note 140, at 241.

forfeiture statutes still exist, most times civil forfeiture statutes are used.[174] As discussed earlier, civil forfeiture statutes are easier for prosecutors to use because of the lower burden of proof and easier procedural standards. Prosecutors also want to keep criminal trials as simple as possible. Integrating forfeiture into an already complex criminal trial has the potential of confusing the jury and taking the focus away from the more important issues in the case.[175] For example, under federal law, if the criminal charge isn't one involving drugs,[176] prosecutors must rely on complicated money laundering statutes to secure criminal forfeiture.[177] Money laundering statutes are often the only type of criminal forfeiture statutes available for prosecutors to use.[178] Therefore, prosecutors have the burden of proving that the property was in some way connected to money laundering before it will be forfeited.[179] Reliance on money laundering statutes in an already confusing criminal trial further complicates the jury's job.

The federal civil forfeiture statute, on the other hand, is clear, broad and easy to use.[180] The civil statute is extensive in its coverage, allowing property involved in a variety of crimes to be forfeited, in contrast to the federal criminal forfeiture statutes which only applies to property involved in specific, limited crimes.[181] It is easy to see why prosecutors opt for civil forfeiture statutes. The status of forfeiture law today is such that while criminal forfeiture statutes exist, most forfeitures are sought through civil forfeiture statutes.

Many civil forfeiture statutes include a defense for innocent and third party owners. For example, the federal civil forfeiture statute[182] includes a statutory defense, providing that property cannot be forfeited unless the owner either knew of or consented to the criminal activity.[183] An innocent owner defense ensures that innocent people are not deprived of their property because of criminal activity of which they had no knowledge. The defense provides a safeguard against property legitimately used by the owner being forfeited because of the criminal activity of others.

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174. *See id.* at 242. "Even when both civil and criminal forfeiture statutes are available, prosecuting attorneys frequently defer to the civil forfeiture process." *Id.*

175. *See id.* ("[F]rom a prosecutor's perspective, inclusion of a criminal forfeiture charge . . . will oftentimes significantly increase the complexity of a criminal prosecution.").

176. The federal criminal forfeiture statute, 21 U.S.C. § 853 (1994), is applicable to property used in connection with drug related offenses. It has become widely used because of its clear, broad sweeping application, but it *narrowly* applies to drug offenses. *See* Leach & Malcolm, *supra* note 140, at 252-53.

177. *See* 18 U.S.C. § 982 (1994) (requiring that property can be forfeited when defendant has been convicted of various fraud related statutes. *See also* 18 U.S.C. § 1956 (1994) (money laundering statute).

178. *See* Leach & Malcolm, *supra* note 140, at 242.

179. *See id.*

180. *See* 21 U.S.C. § 881 (1994). "[M]ost civil forfeiture provisions are extraordinarily broad. Some civil forfeiture laws, such as 21 U.S.C. § 881, permit the government to seek forfeiture of all the property that was used or intended to be used 'in any manner to facilitate' a violation." Leach & Malcolm, *supra* note 140, at 259.

181. *See* 18 U.S.C. § 982 (1994).

182. *See* 21 U.S.C. § 881(a)(6) (1994).

183. *See id.* ("[N]o property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.").

The Michigan statute under which *Bennis* was sued did not contain an innocent owner defense.[184] The Supreme Court held that such a defense is not required by the Constitution.[185]

F. The Implications of Bennis *on Forfeiture Law*

The experts take a wide variety of views on the predicted effect of *Bennis*. One claims, "Experts in forfeiture law say *Bennis* is not likely to have a broad, direct effect because most statutes now include an innocent owner exception."[186] The antithesis of that opinion is expressed by another author, stating, "One pernicious consequence of Bennis is that legislatures may be tempted to abolish statutory protections for innocent owners. If prosecutors seek the repeal of innocent-owner defenses, legislators could turn them away only at the risk of appearing soft on crime."[187] Steven Kessler, who has authored a three volume treatise on forfeiture, states, "This [decision] will have more shock value than practical impact."[188] Author Ira Mickenberg argues that *Bennis* will have the effect of giving states the all-clear to enact broad abatement statutes with no protection for innocent owners.[189]

Despite the critics' variety of opinions on how *Bennis* will effect forfeiture law, one thing is certain: *Bennis* shows that civil forfeitures will not be held unconstitutional. Prosecutors will not be forced to rely on criminal forfeiture and criminal convictions to fight crime. Despite the many arguments against civil forfeiture, it will continue to be used in conjunction with criminal offenses.

Some common responses to the Supreme Court's decision in *Bennis* include questioning the extent of *Bennis'* application. Donald Dripps writes, "What, for instance, can parents do to prevent their teenage children from secreting illegal drugs in the family home or the family car? Rent a drug-sniffing dog once a week?"[190] Justice O'Connor herself expressed this attitude during oral arguments, when she asked whether a rental car comapny's interest in the car would have been forfeited if the car had been rented.[191] Dripps also wonders if the Court will not go so far as to say owners should protect their property from misuse by thieves.[192] Dripps characterizes the majority opinion as "sound[ing] like something straight out of Kafka."[193]

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184. *See* MICH. COMP. LAWS ANN. §§ 600.3801 (West Supp. 1995), 600.3825 (1987).
185. *See* Bennis v. Michigan, 116 S. Ct. 994 (1996).
186. David Savage, *Innocence Punished*, A.B.A. J., May 1996, at 47, 48.
187. Donald A. Dripps, *Innocence is No Defense*, TRIAL, June 1996, at 67-68.
188. Savage, *supra* note 186, at 48.
189. *See* Mickenberg, *supra* note 3, at C6. Mickenberg stated, "It also signals state legislatures and courts that there is no constitutional impediment to passing laws which contain broad laws directed against the forfeitable property of all owners, innocent or guilty." *Id.*
190. Dripps, *supra* note 187, at 67.
191. *See* Savage, *supra* note 186, at 48.
192. *See* Dripps, *supra* note 187, at 69. Dripps states, "If people are expected to prevent their spouses from using joint property for crimes, why not expect them to take precautions against the theft of their property?" *Id.*
193. *Id.* at 67.

United States v. Ursery[194] was another important asset forfeiture case decided within the same term as *Bennis*. In *Ursery*, the Court held that civil forfeitures, in conjunction with criminal convictions, do not violate the Double Jeopardy Clause.[195] *Ursery*, in conjunction with *Bennis*, further demonstrates the Supreme Court's desire to give prosecutors more leeway.[196] Ursery reaffirmed an earlier case's two-part test in determining whether a civil forfeiture is so criminal in nature that it violates the due process clause.[197] First, the Court will review the proceedings to determine if the legislature intended the proceedings to be civil in nature.[198] Second, the Court will consider whether the proceedings are so punitive in nature that they will be considered criminal despite the legislature's intent.[199] Based on the Court's leniency towards legislatures in enacting civil forfeiture laws, the burden on the defendant will be extremely high.[200]

In summary, it does not seem fair that an innocent wife should lose her car because her husband hired a prostitute in it. Without the protection of an innocent owner defense, these inequitable results will continue to occur. Although civil forfeiture statutes greatly aid law enforcement, the potential for abuse is great.

G. Proposed Solution

Bennis may have the effect of prompting legislatures to enact innocent owner defenses along with civil forfeiture statutes. However, the *Bennis* decision allows states to keep taking the property of innocent or third party owners through civil forfeiture. A proposed solution to correct the problem of innocent people losing their property is to abolish civil forfeiture completely and require states to prosecute under criminal forfeiture statutes.[201] By using criminal forfeiture statutes instead of civil forfeiture statutes, the government will have to convict the owner of a crime before his property can be abated. This method would solve the problems of the lack of an innocent owner defense because

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194. 116 S. Ct. 2135 (1996).

195. *See id.* at 2138. The Supreme Court specifically held, "These civil forfeitures (and civil forfeitures generally) . . . do not constitute 'punishment' for purposes of the Double Jeopardy Clause." *Id.* In this case, marijuana was found growing in Ursery's house. The Federal government sued Ursery to forfeit the house under 21 U.S.C. § 881(a)(7) (1994). The claim was settled for $13,250. Subsequently, Ursery was convicted of manufacturing marijuana under 21 U.S.C. § 841(a)(1) (1994) (a forfeiture statute). The United States Supreme Court heard this case to determine whether these two proceedings constituted double jeopardy under the United States Constitution. *Id.* "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb." U.S. CONST. amend. V.

196. *See* Mickenberg, *supra* note 3, at C6. The Court cites Bennis v. Michigan by stating, "We recently affirmed this conclusion in *Bennis v. Michigan*, where we held that 'forfeiture . . . serves a deterrent purpose distinct from any punitive purpose.'" *Ursery*, 116 S. Ct. at 2149 (citation omitted).

197. *See Ursery*, 116 S. Ct. at 2147.

198. *See id.*

199. *See id.*

200. *See* Mickenberg, *supra* note 3, at C6. "Given the Court's reluctance to characterize even drastic forfeitures as 'punitive,' this will be an extremely difficult burden to meet." *Id.*

201. *See* Marcia Coyle, *Critics: Forfeiture Ruling Certain to Spur Reform*, NAT'L L.J., Mar. 18, 1996, at A12. "Mrs. Bennis' high court counsel, Stefan B. Herpel . . . predicted that the decision would generate more abuse 'unless the public demands that civil forfeiture be repealed, or at least criminalized.'" *Id.*

prosecutors would be required to prove an owner's guilt beyond a reasonable doubt.[202] In addition to other benefits, there would be much less potential for abuse under criminal forfeiture. However, changes would have to be made to the present criminal forfeiture system.

Criminal forfeitures will have to be modified to make them easier for prosecutors to use.[203] For example, the federal criminal forfeiture statute was recently amended to apply to more crimes.[204] Instead of proving the crime of money laundering, prosecutors can directly forfeit property involved in a list of crimes.[205] Legislatures could enact clear, specific statutes allowing criminal forfeiture of property involved in a list of crimes. Arthur Leach and John Malcolm suggested that we enact one forfeiture statute allowing property involved in the commission of any felony to be criminally forfeited.[206] Easy to use statutes could prompt prosecutors to use criminal forfeiture instead of relying on civil forfeiture, and provide a remedy for crimes that have neither type of forfeiture statute.[207]

In order to keep criminal trials less complicated, criminal forfeiture should only be an issue at the sentencing phase of the proceedings. Forfeiture should be a punishment option along with fines and incarceration. Any property considered contraband, proceeds of a crime, or tools and instrumentalities of a crime, could be forfeited as part of the convict's sentence. This would solve the problem of more complicated criminal trials, since forfeiture would not become an issue until after the defendant was convicted. Double Jeopardy problems would also be resolved since the defendant would only be prosecuted once.

Using criminal forfeiture will inevitably make it harder for states to abate property involved in crimes. However, federal criminal forfeiture statutes involving drug crimes are being successfully used to seize property of drug dealers.[208] Criminal forfeiture was too quickly abandoned after it didn't appear to

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202. *See* Leach & Malcolm, *supra* note 140, at 258. "'Innocent owner' issues exist in the civil forfeiture context, but not in the criminal forfeiture context because the action in criminal forfeiture cases is against the culpable individual's interest in the property rather than against the property itself." *Id.*

203. *See* Salsich, *supra* note 161, at 611 ("If the government is going to successfully implement criminal forfeiture as a law enforcement tool, it must be easy to use and effective as a means of controlling the drug problem. This is not the case with section 853 as it is presently written and construed.").

204. *See* 18 U.S.C. § 982 (1994).

205. *See* Leach & Malcolm, *supra* note 140, at 253.

> In 1992, Congress took a little-noticed but dramatic step in the right direction in the criminal forfeiture area. In that year, Congress amended § 982 to provide for direct criminal forfeiture of the proceeds for a series of crimes, regardless of whether those crimes affected a financial institution and regardless of whether the criminal activity also involved money laundering.

Id. "Specifically, Congress amended 18 U.S.C. § 982(a) to provide for direct criminal forfeiture of proceeds in cases involving violations of 18 U.S.C. §§ 471, 472, 473, 474, 476, 477, 478, 479, 480, 481, 485, 486, 487, 501, 502, 510, 511, 542, 545, 553, 842, 1028, 1029, 1030, 2119, 2312, 2313." *Id.* at n.49.

206. *See id.* at 285-91. The authors state, "Our proposed solution is a simple, across-the-board criminal forfeiture provision for the proceeds of all illegal activity." *Id.* at 285.

207. *See id.* at 284.

> Furthermore, there are cases in which a prosecutor cannot utilize either criminal or civil forfeiture. There is no forfeiture provision, for instance, for the murder-for-hire statute, 18 U.S.C. § 1958. Therefore, if the government were to prosecute a contract killer who had been paid $25,000 to complete his job, it would have no statutory vehicle, with the possible exception of RICO, with which to forfeit the money that the killer had been paid.

Id.

208. *See id.* at 252.

work in the 1970's to fight organized crime.[209] However, organized crime is very specific type of crime for which criminal forfeiture did not work. Today's crimes, especially drug crimes, are more easily punished with criminal forfeiture. Criminal forfeiture statutes, when drafted correctly, are valuable tools of crime fighting.

Criminal forfeiture does have its advantages. For example, currently, if a criminal is prosecuted under criminal statutes and sued under civil forfeiture statutes, separate proceedings are orchestrated by separate branches of the government; this results in increased effort, time, and cost.[210] If criminal forfeiture could be used in the sentencing phase, there would be no need for a separate civil proceeding. Also, criminal forfeiture would give the government more bargaining power at the plea stage.[211] Prosecutors could promise leniency of the amount of property to be seized in exchange for a guilty plea.[212] Obtaining more guilty pleas will help reduce the volume of trials the government will have to prosecute.

V. CONCLUSION

The Court in *Bennis v. Michigan* bases its conclusion on precedent rooted in 200 years of history.[213] However, the Court does not analyze the Due Process argument independent from its precedent to determine whether today's forfeiture laws have transformed into violations of innocent owner's constitutional rights. The Court never explains why, in early admiralty law or today's law, why due process is not violated by these forfeiture statutes.

Many problems are created by the use of civil forfeiture statutes as opposed to criminal forfeiture statutes. *Bennis* exemplifies the way forfeiture laws, in their present state, violate innocent owner's Constitutional rights. States should not be allowed to abate an innocent owner's property based on its connection with a crime of which they had no knowledge. A proposed solution to the problem is to redraft criminal forfeiture statutes to make them more accessible to prosecutors and easier to use. Then, prosecutors will have to meet the burden of proving an owner guilty before property would be forfeited.

Melissa N. Cupp

> In general, the criminal forfeiture statute that has evolved in the area of drug-related crimes, 21 U.S.C. § 853, is straightforward, clearly written, and relatively simple to use. The drug forfeiture statute was an appropriate response to the need to attack forcefully an illicit industry worth literally billions of dollars. As a result of Congress' focused effort against illegal and dangerous narcotics, the drug forfeiture statute has been used quite effectively by criminal prosecutors.

Id.

209. *See* Levy, *supra* note 131, at 80-81.

210. *See* Leach, *supra* note 140, at 264-66. "With a criminal prosecution followed by a civil forfeiture action, taxpayers fund dual proceedings which further encumber an already overburdened federal judicial system. . . . [A] subsequent and separate forfeiture proceeding by a civil assistant United States Attorney does not make sense." *Id.* at 265.

211. *See id.* at 266.

212. *See id.*

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