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From Piracy to Prostitution - State Forfeiture of an Innocent Owner's Property: *Bennis v. Michigan*

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From Piracy to Prostitution — State Forfeiture of an Innocent Owner’s Property: Bennis v. Michigan

Why should a person who’s totally innocent, who has done whatever they could do to stop the crime, who has no knowledge of it . . . be punished by having to give up their property?1

I. INTRODUCTION

How confident are you that your property is safe from seizure?2 The United States Constitution clearly states that an individual shall not be deprived of property without due process of law.3 However, in order to gain a complete understanding of the potential limitations on your property rights, “[i]magine owning an expensive piece of property . . . [n]ow imagine having your property forcefully taken away from you because someone suspects, or pretends to suspect, that you are using the property in the commission of criminal acts.”4 Most people might not believe that this could happen in America.5 They would, however, be wrong.6

Because traditional modes of punishment, such as fines and imprisonment, have proven ineffective in halting the highly profitable drug trade, civil forfeiture of real property has become a powerful deterrent of such criminal activity.7 Between 1985 and 1991, the number of federal forfeitures increased over eighteen times to a total of 35,295, and the amount deposited into the Asset Forfeiture Fund has grown from $93.7 million in 1986 to $555.7 million in 1993.8 The profitability of this law enforcement

* Copyright © 1997 by Charlena Toro.
3. U.S. CONST. amend. XIV § 1; U.S. CONST. amend. V.
5. Id. at 2.
6. Id.
8. Mary M. Cheh, Can Something This Easy, Quick, And Profitable Also Be Fair?, 39 N.Y.L. SCH. L. REV. 1, 3 (1994).
mechanism may explain why the number of civil forfeitures is escalating at a rapid rate.9

Under current forfeiture procedures, law enforcement agencies may seize property used in connection with criminal conduct, sell it on the open market, and retain the sale proceeds.10 A significant portion of law enforcement agency revenue is now largely dependent on the aggressive pursuit of seizable property.11 Put simply, the more property that agencies confiscate, the more money such agencies will receive.12 According to a previous official in the Justice Department’s Asset Forfeiture Section, “the departments ‘marching orders’ were: ‘[f]orfeit, forfeit, forfeit. Get money, get money, get money.’”13 The government has pursued such a policy even to the extent of encroaching on the personal freedom of individuals who all too frequently are completely unaware of any wrongdoing.14

Innocent and unknowing property owners commonly fall victim to civil forfeiture provisions.15 Examples are prolific.16 Paul and Ruth Derbacher, an elderly couple, had invited their twenty-three year old grandson Julian to live with them.17 When a police search uncovered marijuana and cocaine belonging to their grandson, the Derbacher’s Connecticut home was confiscated.18 Similarly, Willie Jones, an innocent black nurseryman from Tennessee allegedly fitting the profile for a drug cou-

9. Id. at 3.
10. Id. There are billions of civil forfeiture dollars spent without legislative controls. Hyde, supra note 2, at 6. Thus, law enforcement agencies have been “[s]kirting safeguards provided by the normal governmental appropriations process, billions of dollars worth of property and hundreds of millions of dollars in cash fall into the hands of police and prosecutors, then are spent (and often misspent) with no control or oversight by elected legislative bodies — and little or no accounting to anyone, much less to the public.” Id.
11. Cheh, supra note 8, at 4.
12. Id.
13. Id. (citations omitted).
15. See infra notes 16-29 and accompanying text.
16. See infra notes 17-29 and accompanying text.

[The police] found fifteen pounds of marijuana, several ounces of cocaine, and several firearms, which included sawed-off shotguns fitted with bayonets. Paul and Ruth were arrested on charges of possession of cocaine and possession with intent to distribute. Their twenty-three year old grandson Julian was convicted of multiple crimes, having tried to burn down his girlfriend’s house and having robbed a convenience store while dressed up as Rambo and armed with an assault rifle. At their trial, the defense contended that the Derbachers lived in terror of Julian and never ventured into his part of the house. The couple finally settled with the government, agreeing to sell the house and split the proceeds.

Id. at 1093-1094.
18. Id. at 1090.
rier, had $9,600 improperly seized by Nashville police as he boarded a plane to buy shrubbery in Houston. Likewise, Donald Scott, a millionaire rancher, was shot and killed by Los Angeles police officers when they attempted to serve him with an illegal search warrant. Later the

19. Id. The following passage details the civil forfeiture abuse experienced by Willie Jones:

[Willie Jones was] a Nashville landscaper who in 1991 bought an airline ticket to Houston with cash. That prompted an airline employee to tip off the Drug Enforcement Agency (DEA) in the hope of collecting a 10 percent commission on any drug money that might be seized. The Department of Justice pays out about $24 million annually to such tipsters. A search of Mr. Jones revealed no drugs, but he had $9,600 in his wallet. A drug-sniffing dog supposedly detected traces of drugs on the money, a fact of slight merit because about 96 percent of all currency in circulation, whether carried by clergymen or crack dealers, has such traces. Mr. Jones was not arrested but his cash, which was intended for the purchase of shrubbery, was confiscated. He was unable to post a bond for 10 percent of the money in order to mount a legal challenge to the forfeiture. He nearly drove him out of business. He lamented, "I didn’t know it was against the law for a 42-year-old black man to have money in his pocket." Jones had no police record and could produce documents showing that he regularly made such trips to buy from nurseries that demanded cash. Luckily, a distinguished lawyer who heard about Jones’s case volunteered to represent him. As a result a federal district court judge in Nashville tongue-lashed the conduct of the DEA officers who took Jones’s money and ordered them to return it. Most such cases do not have happy endings.


In addition, Congressman Hyde articulated the following:

Government abuse of asset forfeiture discriminates against minority Americans, especially African-Americans and Hispanics. Their often meager property and cash are seized at a far greater rate than that of whites because those minorities are said to fit stereotypical drug courier profiles prepared by insensitive police. In Memphis, 75 percent of the air travelers stopped by drug police were black, yet only 4 percent of the flying public is black.

Hyde, supra note 2, at 6.

20. Carpenter, supra note 17, at 1090. The following passage provides the story of Donald Scott:

[Donald Scott was] a multimillionaire, who owned a two-hundred-acre ranch in Ventura County, California. In the wee hours of the night in 1992, thirty-one lawmen from eight agencies, including DEA agents and Los Angeles police, occupied the ranch and smashed in the door of Scott’s home with a battering ram. Five officers, guns drawn, rushed in. Scott, groggy from sleep and a drunken stupor, grabbed his revolver and ran into the outer room. Officers ordered him to drop the weapon. As he lowered it, he was shot dead before his wife. A search of the property yielded no drugs. Nor did the officers find marijuana growing on it, despite a tip from an informant. Indeed, before the fatal raid, the California National Guard had photographed the property from the air, and so had the DEA. The inconclusive results had led to a furtive ground scan of the Scott property by the United States Border Patrol, but no marijuana was found. Nevertheless a local judge issued a search warrant, which led to the raid on Scott’s home and to his subsequent death. The search warrant later turned out to be illegal, because it lacked probable cause. A Ventura County investigation also concluded that the border patrol illegally trespassed on the property and that the Los Angeles County Sheriff’s Department had been motivated by a desire to seize and forfeit the ranch for the benefit of the various law enforcement agencies that had been involved. The property ‘was worth millions of dollars,’ said the district attorney of Ventura County, and the Ventura County sheriff ‘was not called because Los Angeles County did not want to split the forfeiture proceeds with that agency.’ The L.A. County sheriff
Ventura County District Attorney determined that one motivation for the search warrant was to enable the officers to find contraband to support the seizure of Donald Scott's million dollar property. Finally, Billy Munnerlyn's Lear jet was seized in an erroneous civil forfeiture by officers of the Drug Enforcement Agency ("DEA"), who caused $185,000 in damages and recovery costs. As a result of these expenses, Billy Munnerlyn was forced into bankruptcy and is now a truck driver. These are only four examples of civil forfeiture abuses, and "[a]s the individual horror stories multiply, people are realizing they could easily be the next victims of government run amok."

Levy, supra note 19, at 1, 6-7.

21. Carpenter, supra note 17, at 1090.

22. Id. The story regarding Billy Munnerlyn and his experiences with the governmental abuse of civil forfeiture is as follows:

Billy Munnerlyn, who had an air charter service, flew a passenger from Little Rock to Ontario, California, in 1989. DEA officers seized the passenger's luggage, finding $2.7 million in it. Although the government dropped the arrest charges against Munnerlyn, who knew nothing about the drug money, it refused to return his Lear jet. He sold three smaller planes and his office equipment to pay $80,000 in legal fees, but his attempt to force the return of his jet failed when a federal district court ruled against him. The government offered to return the plane for $66,000, which he could not afford. He finally got it back for $7,000 only to discover that government agents, having ripped the plane apart in a futile search for drugs, caused damage of at least $50,000, for which the DEA is not liable. Munnerlyn declared bankruptcy, lost his business, and became a truck driver.

Levy, supra note 19 at 1, 4-5.

23. Carpenter, supra note 17, at 1090.

24. Hyde, supra note 1, at 3. The following passages are other examples of civil forfeiture abuses:

In 1988 customs agents seized the Atlantis II, an $80 million research vessel owned by the Woods Hole Oceanographic Institution in Massachusetts. The pretext for confiscating the vessel was the fact that a drug-sniffing dog found about one one-hundredth of an ounce of marijuana in a crewman's shaving kit. The public outcry in this instance was exceptional, because of the trivial pretext for the seizure and because the oceanographic institution had no knowledge that a crewman used marijuana; as a result of the public response, the United States had to return the vessel.

Levy, supra note 19, at 1, 2.

Following is a similar situation:

Professor Craig Klein [who] was equally innocent but not as lucky. He bought a new sailboat for $24,000, which was being delivered to him in Jacksonville, Florida. Customs agents in Florida waters commonly suspect boats of carrying drugs. They conducted a seven-hour search of Klein's sailboat by ripping out its woodwork, smashing its engine, rupturing its fuel tank, and drilling thirty holes into its hull, many below the water line. The officers, who found no drugs, damaged the boat beyond repair. Klein sold it for scrap.

Id.
Recently, the United States Supreme Court addressed the civil forfeiture of an automobile in *Bennis v. Michigan*. The automobile, a 1977 Pontiac, was purchased jointly by John and Tina Bennis for $600. When John Bennis was arrested for committing an illicit act in the Pontiac, the car was seized and ultimately became the subject of a civil forfeiture action. Tina Bennis challenged the forfeiture because she had no knowledge of, or involvement in, her husband's criminal activity. The Supreme Court was not persuaded by the fact that Tina Bennis, as co-owner of the car, was innocent, and ultimately approved the forfeiture.

This Note will demonstrate the inequity of the *Bennis* decision, noting that Tina Bennis' property interest in the Bennis family car should not have been forfeited. This Note will further examine the government's recent abuse of civil forfeiture, demonstrating in itself a "long and unbroken line" of examples of governmental abuse. Finally, this Note will predict the wide spread ramifications of the *Bennis* decision, concluding that civil forfeiture reform should be embraced.

II. FACTS AND HOLDING

In September 1988, Tina and John Bennis purchased a 1977 Pontiac sedan for John Bennis to commute to work. On October 3, 1988, Detroit...
law enforcement officers, Jacob Anthony and John Howe, initiated surveillance of a woman after observing her "flagging" down passing vehicles. The woman, later identified as Kathy Polarchio, flagged down and entered the 1977 Pontiac driven by John Bennis. Police officers Anthony and Howe arrested John Bennis after observing that he and Ms. Polarchio were engaged in sexual activity inside the Bennis family car. John Bennis was subsequently charged and convicted of violating MICH. COMP. LAW § 750.338(b), which prohibits gross indecency. As a result, a civil forfeiture action was initiated to seize the Pontiac under MICH. COMP. LAWS §§ 600.3801 and 600.3825.


The Michigan statute prohibiting gross indecency provides in pertinent part:

Any male person who, in public or in private, commits or is a party to the commission of any act of gross indecency with a female person shall be guilty of a felony, punishable as provided in this section. Any female person who, in public or private, commits or is a party to the commission of any act of gross indecency with a male person shall be guilty of a felony punishable as provided in this section. Any person who procures or attempts to procure the commission of any act of gross indecency by and between any male person and any female person shall be guilty of a felony as provided in this section. Any person convicted of a felony as provided in this section shall be punished by imprisonment in the state prison for not more than 5 years, or by a fine of not more than $2,500.00, or if such person was at the time of the said offense a sexually delinquent person, may be punishable by imprisonment in the state prison for an indeterminate term, the minimum of which shall be 1 day and the maximum of which shall be life.

MICH. COMP. LAWS ANN. § 750.338(b) (West 1995).

38. Bennis, 116 S. Ct. at 996. The Bennis family car was forfeited because according to Michigan law: "[a]ny 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 . . . is declared a nuisance . . . and all . . . nuisances shall be enjoined and abated . . . ." ld.; MICH. COMP. LAWS ANN. § 600.3801 (West 1987).

In addition, the abatement statute provides:

(1) Order of abatement. If the existence of the nuisance is established in an action as provided in this chapter, an order of abatement shall be entered as a part of the judgment in the case, which order shall direct the removal from the building or place of all furniture, fixtures and contents therein and shall direct the sale thereof in the manner provided for the sale of chattels under execution . . . . (2) Vehicles, sale. Any vehicle, boat, or aircraft found by the court to be a nuisance within the meaning of this chapter, is subject to the same order and judgment as any furniture, fixtures and contents as herein provided . . . .
The Wayne County prosecutor filed a civil action in the Wayne County Circuit Court, alleging that John Bennis had used the Bennis family car for an act of "lewdness, assignation, or prostitution." According to the prosecutor, when the Pontiac was used for such a purpose, it became an abatable nuisance. Tina Bennis challenged the abatement of the Pontiac because she was unaware of her husband's criminal conduct. Despite Tina Bennis' lack of knowledge, the circuit court declared the automobile a nuisance, ordered the forfeiture, and terminated her interest in the automobile.

Although the trial judge had the discretion to order one-half of the sale proceeds after costs to be paid to the innocent co-owner, the trial judge refused, noting that the Bennises owned another vehicle and were not left without transportation when the Pontiac was confiscated. As a key factor in his decision to remit all of the sale proceeds to the State, the trial judge noted that "[t]here's practically nothing left minus costs in a situation such as this." As a result, Tina and John Bennis appealed the circuit court's decision to the Michigan Court of Appeals.

On appeal, the Bennises argued that the prosecutor failed to prove that Tina Bennis had knowledge of John Bennis' criminal use of the car and that, because only one incident occurred in the automobile, insufficient evidence existed to target the automobile for abatement as a nuisance. The fact that the record provided no indication that Tina Bennis was aware of her husband's criminal use of the automobile proved persuasive to the court. Moreover, the court of appeals held that the

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

Kathy Polarchio, the prostitute with John Bennis when he was arrested, was arrested the following day for "accosting and soliciting." Bennis v. Michigan, 527 N.W. 2d at 486. Ms. Polarchio had previously been arrested for this offense as well as the offenses of disorderly conduct and indecent and offensive conduct. Id.

39. Bennis, 527 N.W.2d at 486.
40. Id. An abatement is "[a] reduction, a decrease, or a diminution. The suspension or cessation, in whole or in part, of a continuing charge, such as rent." BLACK'S LAW DICTIONARY 4 (6th ed. 1990). A nuisance is "that activity which arises from unreasonable, unwarranted or unlawful use by a person of his own property, working obstruction or injury to right of another, or to the public, and producing such material annoyance, inconvenience and discomfort that law will presume resulting damage." Id. at 1065. (citations omitted).
42. Id. at 996. The Michigan Statute provides that "[p]roof of knowledge of the existence of the nuisance on the part of the defendants or any of them, is not required." MICH. COMP. ANN. LAWS § 600.3815(2) (West 1987).
43. Bennis 116 S. Ct. at 997.
44. Id.
45. Bennis, 504 N.W.2d at 732.
46. Id. at 733.
47. Id. at 732-33.
prosecutor had the burden of proving that Tina Bennis was aware of the vehicle's criminal use in order for her interest to be abated. 48

In addition, the court of appeals stated that one criminal incident was insufficient to qualify the automobile as an abatable nuisance. 49 The court of appeals reasoned that "just as one incident of prostitution does not create a brothel out of a family hotel, neither does one isolated incident of prohibited conduct in a vehicle necessarily make the vehicle a nuisance." 50

The Bennises also contended that the prosecutor did not bring the car within the scope of the abatement statute because he failed to demonstrate that an act of "lewdness, assignation, or prostitution" occurred in the automobile. 51 The court of appeals accepted this line of reasoning because John Bennis was convicted of gross indecency, not an act of "lewdness, assignation, or prostitution." 52 Furthermore, the court of appeals noted that insufficient evidence existed to prove that the incident involving John Bennis and Ms. Polarchio included the payment of money. 53 After noting the absence of a proven exchange of money, the court of appeals concluded that John Bennis' behavior amounted to gross indecency, not an act of "lewdness, assignation, or prostitution." 54 For these reasons, the court of appeals reversed the district court's decision, holding the forfeiture improper. 55 The State appealed the court of appeals' decision to the Michigan Supreme Court. 56

On appeal, the Michigan Supreme Court reversed the holding of the court of appeals, concluding that the Bennis family car was an abatable nuisance as a matter of law. 57 Upon review of the statute, the supreme court concluded that evidence of a money exchange was unnecessary when the circumstances clearly indicated that the sexual act was in exchange for money. 58 The supreme court noted as "particularly persuasive the fact that Mr. Bennis engaged in this act with a known prostitute in an

48. Id. at 732.
49. Id. at 733.
50. Bennis, 504 N.W.2d at 734.
51. Id. The prosecution conceded in its brief that the "defendant John Bennis was charged only with gross indecency, and further admits that there is no evidence that Mr. Bennis paid or intended to pay Ms. Polarchio." Id. at 735.
52. Id. at 734.
53. Id. at 735.
54. Id. at 735.
56. Bennis, 527 N.W. 2d at 433.
57. Bennis, 116 S. Ct. at 996.
58. Bennis, 527 N.W. 2d at 486. One consequence of the nuisance theory articulated by the Michigan Supreme Court "is that the very same offense, committed in the very same car, would not render the car forfeitable if it were parked in a different part of Detroit such as the affluent Palmer Woods area." Bennis, 116 S. Ct. at 1006.
area reputed for illicit activity,” and thus concluded that the Bennis car was properly abatable.59

In light of precedent, the Michigan Supreme Court also stated that the unavailability of an innocent-owner defense in Michigan was constitutionally inconsequential.60 The supreme court reinstated the forfeiture of the Pontiac, noting that the law permits the confiscation of an innocent owner’s property unless that property was stolen or used without the owner’s authorization.61 Tina Bennis subsequently appealed the Michigan Supreme Court’s ruling to the United States Supreme Court.62

The United States Supreme Court granted certiorari to determine whether the forfeiture violated Tina Bennis’ constitutional rights under the Fifth and Fourteenth Amendments of the United States Constitution.63 Tina Bennis maintained that the forfeiture was unconstitutional because she did not know that her husband would use the family car in an illegal manner.64 Chief Justice William Rehnquist, writing for the majority, held that a “long and unbroken line” of cases provided that an innocent owner’s property may be forfeited if the property was used illegally.65 Justice Rehnquist stated that even though Tina Bennis was unaware of her husband’s illicit conduct, the Due Process Clause of the Fourteenth Amendment did not insulate her against civil forfeiture.66

As support for her constitutional challenge, Tina Bennis relied on an excerpt from a case cited by the Bennis majority, which provided that “it would be difficult to reject the constitutional claim of . . . an owner who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property.”67 Upon the concession by Tina Bennis that the passage was mere dicta, Justice Rehnquist noted that “[i]t is to the holdings of our cases, rather than their dicta, that we must attend.”68 Justice Rehnquist further negated Tina Bennis’ argument by

59. Bennis, 529 N.W. 2d at 488.
60. Id. at 494.
63. Bennis, 116 S. Ct. at 997. The United States Supreme Court affirmed the Michigan Supreme Court determination with a 5-4 decision. Id. at 996. Justice Rehnquist wrote the opinion of the court, in which Justices O’Connor and Scalia joined. Id. Justices Thomas and Ginsburg wrote concurring opinions. Id. Justice Stevens wrote a dissenting opinion which was joined by Justices Souter and Breyer. Justice Kennedy filed an additional dissenting opinion. Id.
64. Id. at 998.
65. Id.
66. Id. at 999.
67. Id. (quoting Calero-Toledo v. Pearson Yacht Leasing Co., 945 S. Ct. 2080, 2094-95 (1974)).
68. Id. at 999. (citations omitted).
explaining the value of civil forfeiture as a deterrent. Justice Rehnquist maintained that when property is seized, criminal conduct is deterred because it prevents the further illicit use of the property and imposes an economic penalty on the owner, "thereby rendering illegal conduct unprofitable."\(^{69}\)

In addition to asserting the innocent owner's defense, Tina Bennis argued that the Michigan Supreme Court's decision was a violation of the rights conferred to her under the Takings Clause of the Fifth and Fourteenth Amendments.\(^{70}\) The majority also rejected this challenge, noting that the State cannot be required to compensate an owner for property that the State has lawfully acquired under authority other than that of eminent domain.\(^{71}\) The majority concluded, just as it had seventy-five years earlier, that the cases which bind the Supreme Court are "too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced."\(^{72}\)

In his concurring opinion, Justice Clarence Thomas stated that no bright line provides "what property can be forfeited as a result of what wrongdoing."\(^{73}\) Thus, there is confusion concerning both the scope of the property which may be seized and the type of wrongdoing for which forfeiture may be imposed.\(^{74}\) Justice Thomas further noted the significance of these parameters as the sole criteria on which the State's authority to confiscate property rests.\(^{75}\) In circumstances in which an innocent co-owner is involved, Justice Thomas stated that limitations should be applied strictly and should adhere to historical standards for determining whether property is the instrumentality of a crime.\(^{76}\) Justice Thomas criticized, however, the fact that Tina Bennis failed to argue that the Pontiac was not an instrumentality of John Bennis' crime, and as a result concluded that she was not entitled to such strict limitations.\(^{77}\)

Justice Thomas also recognized that the State's characterization of the Pontiac as an abatable nuisance was in part to prevent John Bennis

\(^{69}\) Id. at 1000.
\(^{70}\) Id.
\(^{71}\) Id.
\(^{72}\) Id. The United States Supreme Court held that the forfeiture of Tina Bennis' property interest in the car "was not a taking of private property for public use in violation of the takings clause." Id. at 994.
\(^{73}\) Id. at 1000. (quoting J.W. Goldsmith, Jr.-Grant Co. v. United States, 25 U.S. 505 (1921)).
\(^{74}\) Id. at 1002. (Thomas, J., concurring).
\(^{75}\) Id.
\(^{76}\) Id. Justice Thomas stated that it was unclear to him "what it means to 'use' property for crime under civil forfeiture laws." Id.
\(^{77}\) Id. at 1002. (Thomas, J., concurring).
\(^{78}\) Id.
from using the car for further illicit activity. Justice Thomas noted that under a different statutory procedure the Bennis car might have been destroyed, thus giving the State a plausible argument that the order was remedial and therefore not compensable. Justice Thomas stated that even though the State ordered the car sold instead of destroyed, that decision did not substantially change the remedial nature of the State’s action. Justice Thomas further noted that if the forfeiture of the car could be properly labeled remedial, problems stemming from the punishment of an innocent owner would not arise.

Justice Thomas concluded that even though the seizure of an innocent owner’s property is inequitable, the statute was nevertheless constitutional due to historical precedent and the wide acceptance of related laws. Justice Thomas warned, however, that if improperly utilized, seizure could be wielded like a roulette wheel, used to raise revenue from innocent and unsuspecting owners who are unaware that their property is being misused, or to punish individuals who associate with criminals, rather than as an element of a fair and impartial system of justice. In addition, Justice Thomas articulated that “[t]his case is ultimately a reminder that the Federal Constitution does not prohibit everything that is intensely undesirable.”

Justice Ruth Bader Ginsburg wrote a concurring opinion in which she noted that John and Tina Bennis owned the forfeited Pontiac jointly and that John Bennis had Tina Bennis’ consent to use the car. Justice Ginsburg agreed with the majority that half of the sale proceeds should not be remitted to Tina Bennis. Moreover, because the car was so inexpensive, virtually no money would remain after court costs were deducted from the sale proceeds to pay Tina Bennis for her interest in the vehicle. Justice Ginsburg noted that because the Bennises also owned a 1984 Ford van, the forfeiture of the Pontiac did not leave them without transportation. In addition, Justice Ginsburg commented that “Michigan, in short, has not embarked on an experiment to punish ‘innocent’ third parties.

79. Id. Civil forfeiture of property “without proof of the owner's wrongdoing, merely because it was ‘used’ in or was an ‘instrumentality’ of crime has been permitted in England, and this country, both before and after the adoption of the Fifth and Fourteenth Amendments.” Id.
80. Id. (Thomas, J., concurring).
81. Id.
82. Id.
83. Id. at 1004.
84. Id. at 1003.
85. Id. at 1001-1002.
86. Id. at 1003. (Ginsburg, J., concurring).
87. Id.
88. Id. Justice Ginsburg recognized that the trial judge could have remitted half of the sale proceeds to Tina Bennis, based on her lack of criminal culpability. Id.
89. Id. (Ginsburg, J., concurring).
Nor do we condone any such experiment. Michigan has decided to deter Johns from using cars they own (or co-own) to contribute to neighborhood blight, and that abatement endeavor hardly warrants this court's disapprobation. 90

In his dissenting opinion, Justice John Paul Stevens, joined by Justices David Souter and Steven Breyer, criticized the State's ability to seize a vehicle, or for that matter an airplane or hotel, simply because one customer possessed contraband on the premises without the owner's knowledge. 91 In addition, Justice Stevens stated that no real connection existed between the forfeited property in this case and the illegal act performed. 92 Specifically, since the Bennis family car was not needed to effectuate the crime of solicitation, Justice Stevens argued that this lack of nexus distinguished the present case from historical precedent. 93 Justice Stevens emphasized Tina Bennis' complete lack of culpability and articulated the following:

For centuries prostitutes have been plying their trade on other people's property. Assignations have occurred in palaces, luxury hotels, cruise ships, college dormitories, truck stops, back alleys, and back seats. A profession of this vintage has provided governments with countless opportunities to use novel weapons to curtail abuses. As far as I am aware, however, it was not until 1988 that any State decided to experiment with the punishment of innocent third parties by confiscating property in which, a single transaction with a prostitute has been consummated. 94

Justice Stevens also criticized the State's attempt to characterize the seizure of the Pontiac as exclusively remedial and not punitive. 95 Justice Stevens noted, however, that even if this argument was valid, the forfeiture would still be excessive. 96 Moreover, Justice Stevens stated that the majority itself conceded that the forfeiture was, at least in part, punitive. 97

90. Id. at 1003-1004. (Stevens, J., dissenting). Justice Stevens contended the following. The state surely may impose strict obligations on the owners of airlines, hotels, stadiums and vehicles to exercise a high degree of care to prevent others from making illegal use of their property, but neither logic nor 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.

91. Id. at 1004. (Stevens, J., dissenting).

92. Id. at 1004. (Stevens, J., dissenting).

93. Id. at 1005-06, 1007.

94. Id. at 1003.

95. Id. at 1006.

96. Id.

97. Id. at 1006-1007.
In fact, at an earlier stage in this case, the State "unequivocally argued that confiscation of automobiles in the circumstances of this case 'is swift and certain punishment of the voluntary vice consumer.'"\(^98\) Therefore, Justice Stevens concluded that any argument that this forfeiture was not punishment was simply not plausible.\(^99\)

Although the majority insisted that an owner of property is strictly liable for illegal activity for which that property has been used, Justice Stevens emphasized that the Supreme Court has previously recognized an exception for individuals who are truly blameless.\(^100\) Justice Stevens criticized the majority for ignoring the possible application of an exception in the present case without explanation or comment.\(^101\) Because Tina Bennis was ignorant of her husband's criminal intentions, and certainly not aware that her husband would use the family car to solicit prostitution, Justice Stevens reasoned that the profound unfairness of this particular seizure made it unconstitutional.\(^102\)

Justice Stevens also criticized the majority's attempt to characterize the instant case as one of vicarious liability.\(^103\) As support for this criticism, Justice Stevens noted the majority's failure to acknowledge that an employer is exonerated from vicarious liability when its employee ventures off on a "frolic."\(^104\) In addition, Justice Stevens favored the application of an analysis which would place property that is subject to forfeiture into one of three categories: pure contraband, proceeds of criminal activity, and instrumentalities utilized in the commission of a crime.\(^105\) Under this analysis, Justice Stevens concluded that forfeiture of the Bennis car was improper.\(^106\)

Justice Anthony Kennedy, in a separate dissenting opinion, argued against the majority's analogous application of admiralty law to situations involving automobiles.\(^107\) As support for his contention that the analogy was improper, Justice Kennedy stated that forfeiture based in admiralty law sought to punish owners located on the other side of the world who would have otherwise been outside the limited reach of the law.\(^108\) Justice Kennedy noted that automobiles are a "practical necessity," and unlike sea-faring vessels, criminal acts involving automo-

\(^{98}\) Id. at 1007.
\(^{99}\) Id.
\(^{100}\) Id.
\(^{101}\) Id.
\(^{102}\) Id. at 1008, 1010.
\(^{103}\) Id. at 1009.
\(^{104}\) Id.
\(^{105}\) Id. at 1008.
\(^{106}\) Id. at 1004-1005.
\(^{107}\) Id. at 1011. (Kennedy, J., dissenting).
\(^{108}\) Id. at 1010.
biles usually have only a tangential connection to the vehicle itself. In addition, Justice Kennedy criticized the State’s position that a co-owner’s interest in property can be so insignificant as to be outside the law’s protection. Thus, according to Justice Kennedy, the seizure involved in this case failed to achieve the minimum standard of constitutional protection required by the Due Process Clause.

III. BACKGROUND

Civil forfeiture is premised on a legal fiction which personifies property. Under this “personification theory,” objects can be guilty of criminal conduct. Guilty objects may be subject to various forms of punishment, including civil forfeiture. The theory that the object is the guilty thing is as old as the Old Testament, is rooted in medieval doctrine, and has historically been applied in admiralty law. In the Old Testament, inanimate objects and animals could be considered guilty of wrongdoing. In medieval times, deodands were forfeited to the crown. In admiralty law, ships and cargo were seized for the failure to pay customs duties. Thus, civil forfeiture is an ancient concept which has been rekindled in American courts by what is commonly referred to today as “the war on drugs.”

A. Deodands

A medieval English writer once stated that, “[w]here a man killeth another with the sword of John at Stile, the sword shall be forfeit as deodand, and yet no default is in the owner.” Civil forfeiture began in this spirit, and in this spirit civil forfeiture has thrived. Deodand, derived from the Latin phrase “deo dandum” (meaning “given to God”) was described in the Book of Exodus: “[i]f an ox gore a man or a woman that they die, the ox shall be surely stoned and its flesh shall not be eaten.”

109. Id. at 1011.
110. Id.
111. Id.
112. Hyde, supra note 2, at 17.
113. Id.
114. Id.
115. Id. at viii.
116. Id.
117. Hyde, supra note 2, at 17.
118. Id.
119. Id. at vii.
120. Levy, supra note 19, at 8.
121. Id. at 7.
122. Id. (citations omitted).
The Greeks of Periclean Athens believed that inanimate objects could have personalities and be possessed by the Furies of mythology. Under their belief system, if an object killed a person then the accused object could be formally tried, convicted, and banished to protect Athens from pollution. Along this line, Plato wrote the following:

And if any lifeless thing deprive a man of life, except in the case of a thunderbolt or other fatal dart sent from the gods—whether a man is killed by lifeless objects falling upon him or his falling on them, the nearest of kin shall appoint the nearest neighbor to be a judge and thereby acquit himself and the whole family of guilt. And he shall cast forth the guilty thing beyond the border.

In theory, a deodand was an object seized and given to God for the benefit of the community. However, in reality, the seized property went to the English Crown. The value of the deodand was forfeited to the King under the assumption that the money would provide a mass to be held in honor of the dead person’s soul or to ensure that the deodand was put to a charitable purpose. In England, the procedure used against an accused object was an in rem proceeding, which literally means “against the thing.” After a guilty object was personified and considered tainted, the property could not lose this stigma, regardless of subsequent ownership.

Moreover, the nineteenth century laws of England provided that if a bull injured a person, then the bull would be targeted for retribution. Likewise, if a tree fell on a man and he died as a result, his relatives could avenge his death by cutting down the tree and scattering the bark chips. If a man drowned in a well, then the well could be filled. Or, if a person was stung to death by bees, the whole bee colony could be suffocated in their hive.

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123. Id. at 9.
124. Id.
125. Id.
126. Levy, supra note 19, at 7.
127. Id.
129. Hyde, supra note 2, at 18.
130. Id.
131. Levy, supra note 19, at 10.
132. Id.
133. Id.
134. Id. There was a notion that “[the bees] were demonically possessed or would not have otherwise have committed the crime . . . .” Id.
Little or no consideration was given to the guilt or innocence of the owner of the tree, the well or the bee hive.\textsuperscript{135} The guilt, therefore, attached to the guilty thing which had allegedly done the wrongful act.\textsuperscript{136} This guilt provided the basis for the theory that an object which caused an accident, whether an animal or a tree, was thereby tainted.\textsuperscript{137} These principles formed the legal foundation that disregards a property owner's innocence as an irrelevant consideration.\textsuperscript{138} And as societies continued to develop, so did the idea that those in authority should receive compensation from the owners of guilty objects.\textsuperscript{139}

By the eighteenth century, however, situations involving deodands were still uncommon in America.\textsuperscript{140} Even so, the doctrine of deodands established that owners of "guilty" property were properly punishable because forfeiture inspired better care by the property owner.\textsuperscript{141} In fact, William Blackstone, a well-known legal analyst, believed that events leading to accidental death, were in part, a result of the property owner's negligence.\textsuperscript{142} However, "[t]he notion that deodands could be justified as an inducement to better care or as a deterrent to negligence continued until the frequency of deaths from accident revealed its emptiness."\textsuperscript{143}

The increase of accidental deaths and the law's failure to provide redress for victims' families forced Parliament to create an alternative to the deodand.\textsuperscript{144} The Parliament thus decided to eliminate deodands and vest a cause of action in victims' survivors.\textsuperscript{145} By 1846, deodands were abolished in England without ever entering the mainstream of American law.\textsuperscript{146} The basic theories supporting deodands, however, established the foundation of current civil forfeiture law in the United States.\textsuperscript{147}

In examining the personification of guilty objects, the United States Supreme Court has held that the law attributes "to the property a certain personality, a power of complicity and guilt in the wrong. In such cases

\begin{enumerate}
\item\textsuperscript{135} Levy, supra note 19, at 10.
\item\textsuperscript{136} Id.; Hyde, supra note 2, at 18.
\item\textsuperscript{137} Id. During the middle ages, animals could be subjected to capital punishment if "convicted" of a crime. Levy, supra note 19, at 11. Ecclesiastical courts of the medieval church tried accused animals as if they were rational creatures. In some instances, animals would be dressed up in human clothing before a death sentence was imposed. The persecution of these animals was a symbolic gesture to appease the victim and God. Id.
\item\textsuperscript{138} Levy, supra note 19, at 10.
\item\textsuperscript{139} Id. at 11.
\item\textsuperscript{140} Id. at 14. The rarity of deodands may have been attributed to the colonists' reluctance to make the crown the beneficiary of the deodands. Id.
\item\textsuperscript{141} Levy, supra note 19, at 15.
\item\textsuperscript{142} Id.
\item\textsuperscript{143} Id. at 17.
\item\textsuperscript{144} Id. at 18.
\item\textsuperscript{145} Id. at 19.
\item\textsuperscript{146} Id.
\item\textsuperscript{147} Id. at 19.
\end{enumerate}
there is some analogy to the law of deodand by which a personal chattel that was the immediate cause of the death of any reasonable creature was forfeited. Inanimate objects have been forfeited under the theory that the object is guilty of the wrongdoing. For example, in United States v. One 1963 Cadillac Coup de Ville Two Door, the government sued a Cadillac Coup de Ville as though the vehicle itself were guilty of a crime. Similarly, in United States v. One 6.5 mm. Mannlicher-Carcano Military Rifle, the government sued the firearm used in the assassination of President John F. Kennedy under the theory that the rifle was a species of a deodand.

B. Admiralty Cases: Pirating

Admiralty law covers maritime matters that relate to commercial sea traffic and navigation, and is rooted in the English fiction which personifies inanimate objects with life and personal responsibility. Admiralty law is also considered “the immediate wellspring of American civil asset forfeiture law and procedure.” Because American civil forfeiture law was influenced by the maritime law of England, civil forfeitures in America require the use of admiralty law in forfeiture cases. Admiralty cases that influenced civil forfeitures in America have been well documented, most notably by Justice Oliver Wendell Holmes, who long ago stated that a ship may be the most living of inanimate things because everyone assigns a gender to vessels. In addition, Justice Holmes rationalized his position:

[the ship is the only security available in dealing with foreigners, and rather than send one’s own citizens to search for a remedy abroad in strange courts, it is easy to seize the vessel and satisfy the claim at home, leaving the foreign owners to get their indemnity as they may be able. 158

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148. Id. at 8.
149. Id.
151. Levy, supra note 19, at 7.
154. Hyde, supra note 2, at 20.
155. Id.
156. Id.
157. Id. at 21.
158. Id. at 22.
The United States Supreme Court addressed civil forfeiture under admiralty law in *The Palmyra*. The Palmyra, which was a private armed vessel, had allegedly attacked a United States ship and the citizens on board, resulting in the death of one man and the injury of six others. Subsequent to this confrontation, the Palmyra was captured by the United States vessel, the Grampus. After the Palmyra was captured, she was sent to a Charleston, South Carolina port where a libel action was filed, alleging that the Palmyra committed acts of piratical aggression.

The United States Attorney General alleged that the Palmyra was not commissioned lawfully or regularly, and was therefore a piratical vessel. The attorney general further contended that the seizure was fully justified for three reasons: 1) the Palmyra had committed acts of piratical aggression; 2) the Palmyra searched American ships in violation of a treaty between the United States and Spain; and 3) the captain of the Palmyra gave unsatisfactory explanations for these suspicious circumstances.

Counsel for the Palmyra asserted that the charges of piratical aggression were not made with sufficient precision. The Palmyra characterized the situation as a hostile attack by a United States vessel of war against a foreign vessel which was known to be regularly commissioned. Counsel further contended that the Palmyra was captured even after the vessel’s character had been satisfactorily explained.

The District Court of South Carolina restored the Palmyra to its owners, but denied damages. Both parties appealed this decision to the Cir-

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161. *Id.* at 2.

162. *Id.* The acts of “piratical aggression, search, depredation, restraint, and seizure had been attempted and made upon the high seas in and upon [sic] . . . the United States vessels, the Coquette and the Jeune Eugenie, and upon vessels of various other nations.” *Id.* When the Palmyra was captured, the Palmyra was armed with cannons, cannonades, and a one hundred man crew. *Id.* at 3.

163. *The Palmyra*, 25 U.S. at 4. The Palmyra, an armed vessel, was originally commissioned by the King of Spain; when its commission expired, the vessel’s commission was renewed for three additional months by the Port Captain of Porto Rico, not by the King of Spain. *Id.* The Attorney General for the United States argued that “a commission to cruise is a delegated authority, and can only proceed from the sovereign. Subordinate agents may be employed to execute the will of the sovereign in that respect, but the actual delegation of the power must clearly appear.” *Id.* The Attorney General thus contended that the extension granted by the lieutenant was without the proper authority from the king, making it a piratical vessel. *Id.*

164. *Id.* at 6.

165. *Id.* at 7.

166. *Id.*

167. *Id.*

168. *Id.* at 8.
circuit Court of South Carolina which reversed in part and affirmed in part the district court’s decision. After the circuit court returned the Palmyra to its owners and awarded $10,288 in damages, both parties filed an appeal to the United States Supreme Court. The Supreme Court affirmed the circuit court’s restoration of the Palmyra to its owners, but denied damages. Justice Joseph Story, writing for the majority, explained that “[t]he thing is here primarily considered as the offender, or rather the offence [sic] is attached primarily to the thing.”

Seventeen years later, the United States Supreme Court again referred to the guilt or innocence of the vessel, rather than that of the owner. A United States vessel of war seized the Malek Adhel based on reports that the Malek Adhel was stopping ships and engaging in piratical aggression and sea robbery. The Malek Adhel was subsequently sent to a Baltimore, Maryland port for adjudication and forfeiture proceedings. The case of Harmony v. United States resulted when the ship’s owner, Peter Harmony protested the seizure of his ship, the Malek Adhel. Harmony maintained, and the United States conceded, that Harmony neither contemplated nor authorized the acts of the Malek Adhel’s captain.

The United States District Court for the District of Maryland condemned the vessel, but restored the cargo to the owners. Both parties then appealed the district court’s decision directly to the United States Supreme Court. The United States Attorney General argued that the

169. Id. at 8-9.
170. Id. at 9.
171. Id. at 18. The United States Supreme Court noted that no damages are to be awarded to a vessel brought into port on charges of piratical aggression. Id. at 6. While a final claim of damages had been submitted; the clerk of the circuit court failed to transmit an accurate record. Id. at 9. The United States Supreme Court originally dismissed the claim because no final claim of damages had been submitted, but reinstated the claim after it was discovered. Id. at 3. The Justices of the Supreme Court were divided in opinion, and thus, “according to the known practice of the Court . . . .” the Supreme Court affirmed the circuit court’s decree of acquittal. Id. at 15.
172. Id. at 14.
174. Id. at 211.
175. Id. On June 30, 1840, the Malek Adhel sailed from New York to California, and was commanded by Joseph Nunez. Id. at 210. The vessel, armed with a cannon, ammunition, pistols, and daggers, stopped vessels on the high seas. Id. at 210-211. On August 21, 1840, the Malek Adhel was seized by the Enterprise, a United States vessel of war under an act of Congress designed to protect commerce and punish piracy. Id. at 211.
176. 43 U.S. 210 (1844).
177. Id. at 211.
178. Id. The United States admitted that the equipment on board the Malek qualified as the usual equipment necessary for the voyage on which the Malek embarked. Id.
179. Harmony, 43 U.S. at 211.
180. Id. at 229. Additional evidence was given in the form of a deposition, which was corroborated by two different persons. Id. at 212. The witness, John Meyer, gave an account of the voyage, highlighting Captain Nunez’s bizarre and belligerent behavior. Id. at 212-13. Several circumstances included the captain instructing his crew not to speak English to any crew member
Malek Adhel's actions were piratical under an Act of Congress of March 3, 1819.\(^{181}\) Harmony maintained that the acts complained of were not piratical in nature and, even if the ship was brought within the scope of the act, the vessel should not have been condemned because he never participated in or authorized such piratical acts.\(^{182}\)

The Supreme Court condemned the vessel, but restored the cargo to the owner, holding that the act does not address the property owner, but rather the guilt of the vessel or thing.\(^{183}\) In fact, according to the act, the only facts required to be proven were that the Malek Adhel was an armed vessel, and that she committed a piratical aggression.\(^{184}\) In fact, the Supreme Court noted that if Congress intended to create an exception for innocent owners, it would have left the courts with some discretion.\(^{185}\) The Supreme Court stated that because Congress did not leave the courts with this discretion, it did not intend to provide an exception for innocent owners.\(^{186}\)

The Supreme Court further noted that, although it is inequitable to punish an innocent owner, the court must adhere to Congress' goal of destroying the means used to facilitate crime.\(^{187}\) The Supreme Court concluded that "the acts of the master and crew . . . bind the interest of the owner of the ship, whether he be innocent or guilty; and he impliedly submits to whatever the law denounces as a forfeiture . . . ."\(^{188}\)

C. Contraband Cases: Manufacturing

In an illegal manufacturing case, the United States Supreme Court again articulated that a civil forfeiture was aimed at the object instead of the property owner.\(^{189}\) In *Dobbins's Distillery v. United States*,\(^{190}\) a property owner leased his premises to a lessee in order to operate a distillery.\(^{191}\) The lessee was subsequently charged with failing to keep the required accounting records, making false entries with intent to defraud the

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181. Harmony, 43 U.S. at 211-12.
182. Id. at 230.
183. Id. at 227.
184. Id.
185. Id.
186. Id. at 227. Although it might seem unjust to "punish the innocent for the guilty . . . the object of Congress was to stop the crime by breaking up the means of committing it." Id.
187. Id. at 227.
188. Id. at 234.
190. 96 U.S. 395 (1877).
government of taxes, and refusing to produce records when requested. Although the property owner maintained his ignorance of the lessee’s tax evading activities, an order of condemnation was nevertheless entered by the Circuit Court for the District of Iowa against the property owner and the lessee. The circuit court held that it was unnecessary to prove that the owner was aware of the crime in order for the seizure to be proper. The circuit court further stated that if one knowingly rents one’s property to a wrongdoer, then one must suffer the consequences of the law. As support for this statement, the circuit court reasoned that an owner impliedly submits to the consequences of the law if his property is used illegally because “the law places him on the same footing as if he were the distiller. . .” The property owner subsequently filed a writ of error and removed the action to the United States Supreme Court.

On appeal, the property owner argued that the circuit court erred by instructing the jury that they were not required to find that the owner was implicated in the lessee’s activities in order to return a verdict for the government. The United States Supreme Court noted, however, that the property owner “appear[ed] to have assumed, as the theory of the defence [sic] to the information, that he was the accused party and that he was on trial.” The Supreme Court further stated that the information was not aimed at the property owner, but rather at the distillery, stating that “the offence [sic] . . . is attached primarily to the distillery, and the real and personal property in connection with the same, without any regard whatsoever to the personal misconduct or responsibility of the owner.” Thus, the Supreme Court concluded that condemnation of the distillery was proper.

D. Contraband Cases: Transporting

Two courts have addressed civil forfeiture law as it applies to the transportation of contraband in automobiles. In *J.W. Goldsmith, Jr.-Grant Co. v. United States*, for example, the Grant Company sold a
Hudson automobile to a taxicab driver, J.G. Thompson, but retained title to the vehicle as security for the unpaid balance.\textsuperscript{204} When J.G. Thompson was caught transporting moonshine, the taxicab was seized, even though the Grant Company was unaware of the purchaser's criminal activity.\textsuperscript{205} The Grant Company challenged the forfeiture as a violation of the Due Process Clause of the Fifth Amendment.\textsuperscript{206} In the District Court of the United States for the Northern District of Georgia, the jury concluded that the automobile, in essence, was itself the guilty thing.\textsuperscript{207} As a result of the jury's verdict, the district court ordered the automobile's seizure.\textsuperscript{208} The district court denied the Grant Company's motion for a new trial, and the Grant Company subsequently appealed.\textsuperscript{209} On appeal, the United States Supreme Court concluded that "whether the reason for . . . the challenged forfeiture scheme be artificial or real, it is too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced."\textsuperscript{210} The Supreme Court reasoned that because the owner had entrusted the property to the wrongdoer, the owner was partly responsible and thus properly punishable.\textsuperscript{211} Consequently, the Supreme Court held that "[i]t is the illegal use that is the material consideration . . . the guilt or innocence of its owner being accidental."\textsuperscript{212} Thus, the Supreme Court held that because the automobile was used to facilitate the crime, it was the proper object of condemnation.\textsuperscript{213}

The United States Supreme Court also addressed civil forfeiture in another case applying to automobiles.\textsuperscript{214} In \textit{Van Oster v. United States},\textsuperscript{215} Stella Van Oster purchased an automobile from a local car dealer in Finney County, Kansas.\textsuperscript{216} As partial consideration for the purchase, Ms. Van Oster permitted the car dealer to retain the automobile for use in the dealership.\textsuperscript{217} Clyde Brown, an associate of the car dealer, was frequently permitted to use the automobile.\textsuperscript{218} Ms. Van Oster was aware of Brown's

\textsuperscript{204} J.W. Goldsmith, Jr.-Grant Co., v. United States, 254 U.S. 505, 508-509 (1921).
\textsuperscript{205} Goldsmith-Grant, 254 U.S. at 509.
\textsuperscript{206} Id.
\textsuperscript{207} Id.
\textsuperscript{208} Id.
\textsuperscript{209} Id.
\textsuperscript{210} Goldsmith-Grant, 254 U.S. at 511. (citations omitted).
\textsuperscript{211} Id. (citations omitted).
\textsuperscript{212} Id. at 513.
\textsuperscript{213} Goldsmith-Grant, 254 U.S. at 513. The Supreme Court did, however, reserve opinion on whether the "guilty" object theory may be extended to stolen property or property taken without the owner's consent. Id. at 512.
\textsuperscript{214} Van Oster v. United States, 272 U.S. 465 (1926).
\textsuperscript{215} Id.
\textsuperscript{216} Id. at 465-466.
\textsuperscript{217} Id.
\textsuperscript{218} Id. at 466.
use of the automobile, but unaware of any illegal activity accompanying that use.\textsuperscript{219} When Brown was arrested and charged with illegally transporting intoxicating liquor in the car, the State sought the forfeiture and sale of the automobile.\textsuperscript{220} Ms. Van Oster intervened in the forfeiture action, arguing that her interest in the vehicle should not have been forfeited because she was unaware of the automobile's criminal use.\textsuperscript{221} The District Court of Kansas nevertheless entered an order of forfeiture.\textsuperscript{222} Ms. Van Oster appealed this holding to the Kansas Supreme Court.\textsuperscript{223}

On appeal, the Kansas Supreme Court affirmed the district court's decision.\textsuperscript{224} The supreme court stated that the Kansas civil forfeiture statute authorized the seizure of an innocent owner's property if it was entrusted to a lawbreaker.\textsuperscript{225} Ms. Van Oster maintained that this interpretation of the statute violated rights conferred to her under the Due Process Clause of the Fourteenth Amendment.\textsuperscript{226} The supreme court rejected Ms. Van Oster's argument, reasoning that the state may exercise its police powers to seize property used in violation of Kansas' laws.\textsuperscript{227} According to the supreme court, the forfeiture was constitutional in this case, despite Ms. Van Oster's lack of knowledge.\textsuperscript{228} Ms. Van Oster filed a writ of error to the United States Supreme Court.\textsuperscript{229}

On appeal, the United States Supreme Court noted that because the car was misused by the seller, the forfeiture was proper.\textsuperscript{230} Ms. Van Oster maintained that the car's criminal use was without her knowledge or consent.\textsuperscript{231} The Supreme Court rejected her argument, holding that no significant basis supported Ms. Van Oster's constitutional challenge to the forfeiture.\textsuperscript{232}

\textsuperscript{219} Id.
\textsuperscript{220} Id. The State sought the forfeiture of the automobile as a common nuisance. Id.
\textsuperscript{221} Id. at 465-466.
\textsuperscript{222} Id.
\textsuperscript{223} Id.
\textsuperscript{224} Id. at 466. The Kansas Supreme Court stated, however, that because the legislature sought to effectuate a purpose within its power, this civil forfeiture was within the limits of due process. Id. at 468.
\textsuperscript{225} Id. at 466.
\textsuperscript{226} Id.
\textsuperscript{227} Id. at 467.
\textsuperscript{228} Id. at 467.
\textsuperscript{229} Id. at 468.
\textsuperscript{230} Id.
\textsuperscript{231} Id.
\textsuperscript{232} Id. at 469.
E. Rejection of the Innocent Owner’s Defense

The innocent owner defense has been uniformly rejected by modern American courts adjudicating civil forfeiture cases. In *Calero-Toledo v. Pearson Yacht Leasing Co.*, for example, a pleasure yacht was seized after the lessees were arrested for transporting controlled substances. The yacht company challenged the seizure, asserting that it was unaware of the lessee’s criminal use of the yacht. The yacht company further contended that it was unaware of the yacht’s seizure, until it attempted to repossess the yacht because of past due rent.

The United States District Court held that the Puerto Rican statute permitting forfeiture under the circumstances was unconstitutional because the yacht company was unaware of the criminal conduct which had triggered the seizure. The district court also held that the forfeiture statute unconstitutionally authorized the governmental taking of an innocent person’s property without just compensation. When the district court struck down the statute as unconstitutional, the government appealed directly to the United States Supreme Court.

On appeal, the Supreme Court reversed the district court’s decision, stating that forfeiture furthered punitive and deterrent purposes in this case, and could withstand the constitutional challenge of an innocent owner. As support for its decision, the Supreme Court noted that forfeitures were "likely a product of the confluence and merger of the deodand tradition and the belief that the right to own property could be denied the wrongdoer."

In dicta, the Supreme Court acknowledged that, “it would be difficult to reject the constitutional claim of . . . an owner who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property.” The Supreme Court noted that nothing in the record indicated that the yacht company had done everything that could reasonably have been expected of it to prevent the illegal use of the

233. See infra notes 234-245 and accompanying text.
236. *Id.* at 668.
237. *Id.* The government can typically effectuate seizures without affording the owner notice and an opportunity to object. Cheh, *supra* note 8, at 1, 2.
238. Calero-Toledo, 416 U.S. at 669.
239. *Id.*
240. *Id.*
241. *Id.*
242. *Id.* at 682.
243. *Id.* at 689-690.
Based on this analysis, the Supreme Court reversed the district court’s decision and ordered the condemnation of the pleasure yacht.245

F. Application of the Excessive Fines Clause to Civil Forfeiture

The United States Supreme Court has held that the Excessive Fines Clause of the Eighth Amendment to the United States Constitution applies to civil forfeiture actions.246 In Austin v. United States,247 Richard Austin was convicted for the possession of narcotics with the intent to distribute, contrary to South Dakota laws.248 After Mr. Austin pled guilty to this charge, the government filed a civil forfeiture action pursuant to 21 U.S.C. § 881(a)(4) and (a)(7) to seize Mr. Austin’s mobile home and auto body shop.249 Mr. Austin challenged the forfeiture, alleging that the seizure was a violation of the Eighth Amendment’s Excessive Fines Clause.250

Sioux Falls Police Officer Donald Satterlee signed an affidavit which connected Mr. Austin’s possession of cocaine to his movements between his mobile home and body shop.251 Based on the support of this affidavit, the United States District Court for the District of South Dakota granted summary judgment in favor of the government.252 Mr. Austin appealed the district court’s decision to the United States Court of Appeals for the Eighth Circuit.253

On appeal, the Eighth Circuit affirmed, noting that “the principle of proportionality should be applied in civil actions that result in harsh penalties . . . and that the government was exacting too high a penalty in rela-
tion to the offense committed."  

Subsequent to the Eighth Circuit's affirmation of the district court's decision, Mr. Austin appealed to the United States Supreme Court.  

On appeal, the United States Supreme Court sought to resolve the issue of whether forfeiture was within the purview of the Eighth Amendment's Excessive Fines Clause. The Supreme Court noted that historically the Eighth Amendment was "intended to prevent the government from abusing its power to punish." Specifically, the Excessive Fines Clause of the Eighth Amendment was designed to limit "the Government's power to extract payments, whether in cash or in kind, 'as punishment for some offense.'"  

The Supreme Court held that because forfeiture serves as monetary punishment, "[forfeiture proceedings are] subject to the limitations of the Eighth Amendment's Excessive Fines Clause." Even if the forfeiture served some remedial purpose, the Court explained, the Eighth Amendment is still implicated if the forfeiture is designed in part to punish the owner. Moreover, the Supreme Court noted that sanctions may frequently serve multiple purposes. The Supreme Court stated, however, that even if a sanction was partly punitive in nature, the sanction could still withstand an Eighth Amendment challenge if it was primarily remedial.  

The Supreme Court then concluded that forfeiture in general has historically been understood to constitute punishment, and as such is at least partly subject to the restrictions of the Eighth Amendment's Excessive Fines Clause. The Supreme Court reversed the Eighth Circuit, holding that the forfeiture of Mr. Austin's mobile home and auto body shop was subject to the limitations of the Eighth Amendment's Excessive Fines Clause.

254. Id. The Eighth Circuit noted "that the penalty imposed was too severe in comparison to the magnitude of the crime committed, the court could only reach a split decision." Id.
255. Id. at 604-605.
256. Id. at 605.
257. Id.
258. Id. at 606.
259. Id. at 603.
260. Id.
261. Id.
263. Austin, 113 S. Ct. at 602.
264. Id. at 622.
Civil forfeiture is a desirable tool for law enforcement agencies because it is quick, easy, and highly profitable.\textsuperscript{265} On a mere showing of probable cause, property may be seized if it constitutes the proceeds of a crime or is intended for use in a criminal project.\textsuperscript{266}

1. The current burden of proof in civil forfeiture proceedings

In order to seize property in a civil forfeiture action, the government is required to demonstrate that “probable cause” exists.\textsuperscript{267} Oftentimes, in order to effectuate a civil forfeiture, law enforcement officials rely upon probable cause that is “mere rumor, gossip, a police hunch, or self-serving statements from anonymous paid police informants, from criminals cooperating in order to obtain a lighter sentence on pending charges, or from incarcerated convicts trying to shorten an existing jail term.”\textsuperscript{268} After demonstrating that probable cause exists to seize the property, the burden of proof shifts to the owner of the seized property.\textsuperscript{269} The property owner must then prove, by a “preponderance of the evidence,” that the accused property was not used in a criminal act.\textsuperscript{270}

2. Counsel for indigent property owners

Although the Sixth Amendment provides a right to counsel in a criminal proceeding for indigent parties who cannot afford an attorney, no such right extends to indigent parties in civil forfeiture actions.\textsuperscript{271}

\begin{itemize}
\item \textsuperscript{265} Cheh, supra note 8, at 1, 3.
\item \textsuperscript{266} Id. Civil forfeiture may be predicated on probable cause when one person says to another, “that guy Smith looks like he does drugs. An informant overhears this idle gossip and reports it to the police, who in turn seize Smith’s residence and start forfeiture proceedings. No drugs are found and Smith is never arrested or charged with a crime yet. Smith is forced to hire a lawyer and fight in court to get his house back — and he and his family, may well be evicted.” Hyde, supra note 2, at 57.
\item \textsuperscript{267} Probable cause is defined as “having more evidence for than against. A reasonable ground for belief in certain alleged facts. A set of probabilities grounded in the factual and practical considerations which govern the decisions of reasonable and prudent persons and is more than mere suspicion but less than the quantum of evidence required for conviction.” BLACK’S LAW DICTIONARY 1201 (6th ed. 1990) (citations omitted).
\item \textsuperscript{268} Preponderance of the evidence is defined as “evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not.” BLACK’S LAW DICTIONARY 1182 (6th ed. 1990) (citations omitted).
\item \textsuperscript{269} Id.
\item \textsuperscript{270} Id.
\item \textsuperscript{271} Id. at 8.
\end{itemize}
current civil forfeiture procedures, a property owner who cannot afford an attorney to contest an improper seizure by the government is simply "out of luck." Representative Elvin Martinez, a member of the Florida House of Representatives, has commented that police administrators in Florida have "corrupted [civil forfeiture's] legislative purpose and were instead using it to harass innocent owners with little or no financial or other ability to defend themselves."  

Statistics support Representative Martinez's view, demonstrating that "the vast majority of forfeitures involve the property of average citizens caught in the clutches of this draconian law and its too-eager enforcers." For example, the U.S. Drug Enforcement Agency ("DEA") released figures for the eighteen months preceding December 1990 showing that only seventeen percent of the 25,297 property items seized by the DEA had a value of over $50,000. Such statistics "speak volumes about the targets—and victims—of this law."  

3. Civil forfeiture as a crime-fighting mechanism

Until the 1980's, the government rarely resorted to the civil forfeiture of private property. Since then, however, civil forfeiture has been frequently used as "a weapon in the arsenal of the drug war." Currently, more than one hundred federal forfeiture statutes exist which address both criminal and civil matters.  

Civil forfeiture, however, can be distinguished from criminal forfeiture. Civil forfeiture is utilized to seize the property of a person not involved in a crime whereas criminal forfeiture seizes the property of the lawbreaker.  

[Criminal forfeiture] arises under criminal statutes that allow in personam actions against a named criminal defendant. In such cases, forfeiture comes about subsequent to and as a punitive consequence of the defendant's conviction for specific criminal acts, usually as a supplement to other statutory punishment including possible incarceration or fines . . . . The important differ-

272. Id.  
273. Id. at 10-11.  
274. Id. at 11.  
275. Id.  
276. Id.  
277. Id. at 23.  
278. Id.  
279. Id.  
280. Id. at 21.  
281. Id.
ence in this procedure compared to civil forfeiture, is that criminal forfeiture occurs, at least in theory, only after a trial of the defendant at which full constitutional and procedural safeguards of due process apply. No convictions; no forfeiture. No wrongdoing; no property confiscation. The issue at trial is the individual's misconduct, not the fictional guilt of an inanimate object, as in civil forfeiture cases.282

Thus, an arrest and conviction of the property owner is not required to effectuate a civil forfeiture of personal property.283

H. A Proposal for Civil Forfeiture Reform

On June 15, 1993, United States Congressman and Chairman of the House Judiciary Committee Henry Hyde (R-IL) introduced a bill entitled the Civil Asset Forfeiture Reform Act of 1993 ("CAFRA") to the House of Representatives.284 Chairman Hyde also introduced the bill to the House Judiciary Committee and to the House Ways and Means Committee on June 22, 1995.285 Chairman Hyde's proposed legislation seeks to reform certain statutes governing civil forfeiture.286 United States Senator James Jefford (R-VT) introduced an identical version of this bill in the Senate.287 In support of the Civil Asset Forfeiture Reform Act, Senator Jefford stated, "[t]he terms of the bill are relatively simple, and its objectives are modest at best."288

1. Procedural reform

Procedurally, Chairman Hyde's proposed legislation notably differs from existing civil forfeiture statutes.289 For example, under current law, a property owner has ten days to file a claim in a civil forfeiture proceeding.290 Under CAFRA, however, the current time limit would be extended to sixty days.291 Additionally, under the current system, owners of seized

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282. Id. In personam is defined as "[a]gainst the person." BLACK'S LAW DICTIONARY 791 (6th ed. 1990). In personam is an "[a]ction seeking judgment against a person involving his personal rights and based on jurisdiction of his personal rights and based on jurisdiction of his person, as distinguished from a judgment against property (i.e. in rem)." Id.


284. Levy, supra note 19, at 210.


286. Id. CAFRA would apply to all claims brought on or subsequent to the enactment of the Civil Asset Forfeiture Reform Act. H.R. 1916, 104th Cong. § 9 (1995).

287. Levy, supra note 19, at 210.

288. Carpenter, supra note 17, at 1139.

289. See infra notes 290-309 and accompanying text.

290. Levy, supra note 19, at 212.

property must provide a bond worth ten percent of the value of the confiscated property in order to obtain the right to contest the forfeiture. 292 CAFRA would completely eliminate this bond requirement. 293

Under current law, the government is permitted to commence civil forfeiture proceedings, but remains exempt from any liability resulting from damage inflicted on the property during the seizure. 294 This exemption would be eliminated under CAFRA, allowing innocent victims of civil forfeiture to hold the government liable for damage done to their property while in the government’s possession. 295 Currently, seized property will not be returned to the property owner unless a court adjudicates that the seizure was improper, regardless of whether the seizure creates a financial hardship for the property owner. 296 CAFRA would permit courts, on a demonstration of “substantial hardship,” to temporarily return seized property to the owner while a final judicial resolution is pending. 297

2. Altering the burden of proof in civil forfeiture proceedings

Under current law, the burden of proof rests with property owners to demonstrate that their property has not been utilized in the commission of a crime, and as such is not seizable under civil forfeiture statutes. 298 Under this burden, “[t]he law reverses the normal presumption of innocence, presuming the property ‘guilty’ unless the owner can prove otherwise.” 299 CAFRA, however, would alter the current burden of proof, placing the burden on the government to prove that the property was properly seized. 300

Additional differences exist between current forfeiture law and Chairman Hyde’s proposed legislation. 301 For example, under CAFRA, the government would be required to demonstrate that the seizure of the property was lawful by “clear and convincing evidence,” rather than by the “preponderance of the evidence” standard currently required of a property owner. 302 Under the clear and convincing standard proposed by

292. Levy, supra note 19, at 212. This bond, however, must not be less than $250 or more than $5000, and is used to cover court and storage costs in case the government wins. Id.
293. Id.
294. Id.
296. Levy, supra note 19, at 212.
297. Id. at 212-13.
298. Hyde, supra note 2, at 55.
299. Id.
301. See infra notes 302-309 and accompanying text.
302. H.R. 1916 104th Cong. § 615 (1995). Clear and convincing proof can be defined as
Chairman Hyde, "[t]he government would be required to prove (1) that the unlawful act on which the forfeiture is based actually did occur and (2) that a sufficient nexus exists between the property to be seized and the alleged unlawful act." A clear and convincing standard would provide that these two requirements be satisfied before a seizure could be considered proper.

3. Court-appointed representation

Currently, a property owner has no constitutional right to court-appointed counsel in a civil forfeiture proceeding. Thus, a property owner who is financially unable to obtain legal representation may be unable to contest a forfeiture. Consequently, indigent property owners may be forced to forfeit their property, regardless of whether their property was improperly seized. In contrast, CAFRA would provide court-appointed counsel to represent indigent property owners who claim that the forfeiture of their property was improper. In addition to providing court-appointed counsel, CAFRA would require that such counsel be compensated from the Justice Assets Forfeiture Fund.

IV. ANALYSIS

When John Bennis was arrested for his acts of gross indecency inside the Bennis family car, the state initiated a civil forfeiture action and seized the automobile. Tina Bennis claimed that her property interest in the automobile should not have been forfeited because she was unaware of her husband's criminal activities. However, the Michigan District Court determined that the automobile could be seized because it constituted an abatable nuisance. Tina Bennis appealed the district court's decision.

"[t]hat proof which results in reasonable certainty of the truth of the ultimate fact in controversy."
303. Hyde, supra note 2, at 59.
304. Id.
305. Id. at 81.
306. Id.
307. Id. at 59.
309. Id.
311. Id. at 997. A commentator has suggested that there has never been a more sympathetic Petitioner to come before the United States Supreme Court. Savage, supra note 33, at 47.
313. Bennis, 504 N.W.2d at 732.
On appeal, the Michigan Court of Appeals reversed the district court's decision, holding that the civil forfeiture of the automobile was improper. The Michigan Supreme Court reversed the court of appeals, affirmed the district court's decision, and noted that the Bennis family car was an abatable nuisance as a matter of law. Tina Bennis subsequently appealed the Michigan Supreme Court's decision to the United States Supreme Court. The United States Supreme Court rejected Tina Bennis' constitutional challenges, and approved the forfeiture of the automobile.

A. The Development of Civil Forfeiture Law As Applicable to Bennis

1. Focusing on the property, not the property owner

The law of civil forfeiture, like the law of deodands, focuses on the property of the owner, not the owner's guilt or innocence. For example, in The Palmyra, the United States Supreme Court rejected the property owners' assertion that they were innocent, holding that "the thing" is the primary offender and that the offense is attached to "the thing." In addition, the United States Supreme Court addressed the innocent owner defense in Harmony v. United States. Although the government conceded that Mr. Harmony never contemplated or authorized the criminal acts of the vessel's captain, the Supreme Court nevertheless held that the law does not focus on the property owner, but rather on the guilt of the vessel or thing.

2. Labeling the object as the "guilty" thing

Historical precedent controlling civil forfeiture is grounded in the need to punish and deter piracy as demonstrated in the cases of The Palmyra and Harmony v. United States. In both cases, vessels were seized because of piratical aggression. Under the theory that the vessel,

314. , 116 S. Ct. at 997.
315. Id. The Michigan Supreme Court rejected the Court of Appeals assertion that in order to abate an automobile, the state must prove that the owner consented to the criminal use of the vehicle. Id.
316. Id. at 997.
317. Id. at 1000-01.
318. Levy, supra note 19, at 17, 19.
319. 25 U.S. 1 (1827).
320. The Palmyra, 25 U.S. 1, 14.
321. 43 U.S. 210, 233 (1844).
322. Id.
323. 25 U.S. 1 (1827).
324. 43 U.S. at 229.
325. The Palmyra, 25 U.S. at 1; Harmony, 43 U.S. at 229.
as well as the individual directing the vessel, helped facilitate the crime of piracy, the court in *Harmony* found that once the vessel was seized, its captain could no longer engage in piratical aggression. As the United States Supreme Court noted in *The Palmyra*, "[t]he thing is here primarily considered as the offender, or rather the offense is attached primarily to the thing." In *The Palmyra* and *Harmony*, the vessels were seized irrespective of the owner's innocence. However, rational reasons supported this forfeiture, because in those times a ship could travel halfway around the world to escape the then limited reach of justice. The owners, falsely claiming they were ignorant of any criminal activity, could then continue to pirate with impunity. In *Bennis*, however, an automobile does not facilitate the crime of soliciting prostitution in the same manner as a vessel facilitates piratical aggression. Nor was the car a "necessary element" of the crime in *Bennis*; in fact, the solicitation could have occurred anywhere. Unlike the captains in *Harmony* or *The Palmyra*, John Bennis did not need a car to perpetrate his criminal act.

Similar to the admiralty cases, the United States Supreme Court addressed the need for civil forfeiture when the use of real property constituted an element of the crime. For example, in *Dobbins's Distillery v. United States*, the Supreme Court upheld the forfeiture of an illegally operated distillery because it constituted an element of the crime. In *Bennis*, however, the operation of the car did not constitute an element of the crime, as the operation of the distillery did in *Dobbins's Distillery*. Because no direct correlation existed between the crime of solicitation of prostitution and the operation of a motor vehicle, the forfeiture of the Bennis car would not prevent John Bennis' crime from recurring.

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326. *Harmony*, 43 U.S. at 233-34.
327. *The Palmyra*, 25 U.S. at 14. The United States Supreme Court in *The Palmyra* acknowledged that it is unfair to punish the innocent, but relied on Congress' significant goal of destroying the means to facilitate crime. *Harmony*, 43 U.S. at 227 (citations omitted).
329. See supra notes 154-188 and accompanying text.
330. Id.
331. See supra notes 91-94, 323-327 and accompanying text.
332. Id.
333. Id.
334. See infra notes 323-333; 335-338 and accompanying text.
335. 96 U.S. 395 (1877).
337. See supra notes 91-94, 189-201 and accompanying text.
3. Rejecting the innocent owner's defense and justifying civil forfeiture

In the past seventy-five years, courts have continually rejected property owner's assertions that they should be insulated against forfeiture through an innocent owner's defense. In both J.W. Goldsmith, Jr.-Grant Co. v. United States and Van Oster v. Kansas, vehicles were forfeited for illegally transporting moonshine. Similarly, in Calero-Toledo v. Pearson Yacht Leasing Co., a leased yacht was forfeited when the lessee was caught transporting controlled substances. In all three cases, the property owners challenged the forfeiture on constitutional grounds because they lacked knowledge of the criminal acts.

In Goldsmith-Grant, the United States Supreme Court concluded that because the car was used to facilitate the crime, it was a proper object of forfeiture, regardless of the property owner's innocence. Moreover, the Supreme Court held that the car was properly confiscated because the forfeiture prevented the recurrence of the crime. Similarly, the automobile in Bennis was forfeited, however, transportation was not an element of the crime and forfeiture would not have prevented the crime from recurring. In fact, John Bennis was sighted in the area reputed for prostitution on two prior occasions; neither incident involved the use of the family car. As Justice John Paul Stevens noted in his dissenting opinion, "[a]n 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."

In Calero-Toledo, the United States Supreme Court stated in dicta that a constitutional challenge by an innocent owner would be difficult to disregard when his or her property had been seized under the civil forfeiture statutes if that owner was entirely without culpability and had taken reasonable precautions to prevent the criminal activity. Such dicta implicitly:

339. See infra notes 340-355 and accompanying text.
340. 254 U.S. 505 (1921).
344. Id.
345. See supra notes 203-245 and accompanying text.
347. See supra notes 69-70 and accompanying text.
348. See supra notes 334-338 and accompanying text. Additionally, the United States Supreme Court noted that Congress' intentions were to condemn the interests of guilty individuals, not to forfeit the property of a guiltless owner. J.W. Goldsmith Jr.-Grant Co., 254 U.S. at 510.
350. Id. at 1005.
351. Calero-Toledo, 416 U.S. at 689-90.
recognizes that where the forfeiture statute at issue serves punitive purposes, the State may not forfeit property on the basis of its misuse by another person, unless the owner had some culpability at least amounting to negligence in connection with the unlawful use. The principle implicit in the dicta—that the State has no legitimate interest in punishing one who is entirely innocent...352

The Court in Bennis nevertheless followed its "long and unbroken line" of precedent, failing to consider what is regarded as "logic, equity, or the practical needs of a modern society."353 Although a "long and unbroken line" of cases involving civil forfeiture remains, Bennis is neither a lineal descendant nor first cousin to the historical precedent relied upon by the majority.354 Moreover, the doctrine of deodands, similar to the doctrine of civil forfeiture, "was a tissue of legal fictions and contradictions. It was also unjust to its core."355

B. Adopting the Bennis Dissent's Analysis

Throughout American history, automobiles have been seized when transportation was a factor facilitating the criminal offense, such as the transportation of moonshine or controlled substances.356 In Bennis, however, the automobile bears no rational relationship to the crime committed; indeed, although the crime occurred in the automobile, the Bennis family car was not necessary to effectuate the crime.357

In his dissenting opinion, Justice Stevens criticized the Michigan Supreme Court's opinion that the character of the neighborhood in which the criminal offense occurred justified seizing the car as a contribution to an ongoing "nuisance condition."358 Based on this theory, Justice Stevens concluded that the very same car, parked in a more affluent neighborhood in suburban Detroit, would not be subject to forfeiture.359 Thus, Justice Stevens criticized the notion that these same criminal acts would not create an "ongoing nuisance condition" in a distinguished neighborhood.360

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353. Hyde, supra note 2, at 71.
354. Id; See supra notes 310-353 and accompanying text.
355. Levy, supra note 19, at 19.
357. Id.
358. Id. at 1006 n.9. It is difficult to confiscate real property when there is no real connection between the crime and the property. Id. (citations omitted).
359. Id. at 1006 n.9. (Stevens, J., dissenting).
360. Id.
Justice Stevens also questioned the State's argument that the forfeiture was not punitive because the goal of this forfeiture was to abate a nuisance.\(^{361}\) Although the majority conceded that the forfeiture, at least in part, punished the innocent owner, Justice Stevens maintained that the principal aim of the forfeiture was punishment.\(^{362}\) Even assuming that forfeiture may occasionally serve a remedial end by deterring future criminal conduct, forfeiture of the Bennis car would not have prevented a recurrence of this criminal act.\(^{363}\) As John Bennis' behavior demonstrates, this crime could have been committed anywhere.\(^{364}\) In fact, witnesses testified at trial that John Bennis was seen at least twice during the previous summer soliciting prostitutes on foot without the use of car.\(^{365}\)

Thus, Justice Stevens concluded that because the principal aim of the forfeiture was punitive, the majority erred in affirming the Michigan Supreme Court.\(^{366}\) Justice Stevens asserted that Tina Bennis had done nothing to warrant such punishment.\(^{367}\) In his dissenting opinion, Justice Stevens argued that the forfeiture of the Bennises automobile was an arbitrary deprivation of an innocent woman's property without due process of law.\(^{368}\) Thus, the state utilized its forfeiture powers to arbitrarily and inequitably confiscate Tina Bennis' property interest in the Bennis family car.\(^{369}\)

C. Justice Stevens' Three Category Approach

In his dissenting opinion in \textit{Bennis}, Justice Stevens stated that property subject to forfeiture can be divided into three separate categories: "pure contraband, proceeds of criminal activity, and tools of the criminal trade."\(^{370}\) The first category, pure contraband, covers objects where mere possession would amount to a \textit{per se} criminal violation.\(^{371}\) Examples include smuggled goods, narcotics, and adulterated food.\(^{372}\) The Bennis car,
however, does not fit into the first category because the mere possession of an automobile is not a crime. 373

The second category, proceeds of criminal activity, historically has denoted stolen property. 374 However, federal statutes have dramatically broadened this category to enable the government to seize money earned through criminal means. 375 Examples include a piece of property purchased with drug money or an asset acquired through the means of embezzlement. 376 However, the Bennis family car was not purchased by such ill-gotten gains. 377

The third category, instrumentalities utilized in the commission of a crime, includes items such as yachts, airplanes, and automobiles. 378 Typically, the government has difficulty justifying forfeitures for items not utilized in the commission of a crime because the remedial interest in confiscation is less obvious. 379 For example, the early cases involving civil forfeiture primarily targeted pirate ships engaged in trading slaves and smuggling goods. 380 As a result, the forfeiture of these vessels was approved by the courts, regardless of whether the owner knew of the criminal activity. 381 Thus, under admiralty law, the ship itself was considered the offender. 382 In his dissenting opinion, Justice Stevens criticized the majority’s application of admiralty cases to the Bennis case because the law demonstrated in the case precedent presumes that an owner is aware of the principal use of his property. 383

Tina Bennis, however, testified that she was completely unaware of any criminal use of the Pontiac by her husband. 384 In fact, she expected him to “come directly home from work,” as was his normal routine. 385 When John Bennis failed to come home on the night of his arrest, Tina Bennis even called “Missing Persons.” 386 As Tina Bennis’ testimony was uncontradicted and inherently credible, she demonstrated that she was “[w]ithout knowledge that [John Bennis] would commit such an act in the family car, or that he had ever done so previously, [and] surely [Tina

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373. See supra notes 91-94 and accompanying text.
375. Id.
376. Id. The return of such property has an important “restitutionary justification.” Id.
377. Id. at 1008.
378. Id. at 1010.
379. Id. at 1004.
380. Id. at 1004-1005.
381. Id. at 1005.
382. Id.
383. Id.
384. Id. at 1008.
385. Id.
386. Id.
Bennis] cannot be accused of failing to take 'reasonable steps' to prevent the illicit behavior." 387 Tina Bennis is as innocent as if a thief had stolen the Pontiac and used it criminally. 388

D. Austin: The Punishment Should Be Proportionate to the Crime

The United States Supreme Court recently held, in Austin v. United States, 389 that the Eighth Amendment Excessive Fines Clause applies to civil forfeitures. 390 In Austin, the Supreme Court demonstrated support for a constitutional limitation on civil forfeiture by acknowledging that forfeiture has historically served to punish the criminally culpable. 391 Further, the Supreme Court recognized that civil forfeiture, in certain circumstances, may be so disproportionate to the crime committed that it violates the Eighth Amendment's Excessive Fines Clause. 392

In addition, United States Congressman and Chairman of the House Judiciary Committee Henry Hyde (R-IL) has explained that the confiscation of a family home would be disproportionate to the crime committed when only one family member had stolen items worth less than $500. 393 Using Chairman Hyde's reasoning, the Bennis family car should not have been confiscated simply because one act of prostitution occurred in the car. 394

Applying the due process principles articulated in Austin and the rationale asserted by Chairman Hyde, logic would dictate that forfeiture of the $600 Pontiac was disproportionate and inequitable because it was, in effect, punishment for Tina Bennis' husband's conduct, of which she was completely unaware. 395 The forfeiture of Tina Bennis' property interest is punishment for her husband's conduct; conduct of which she was completely unaware. 396 Although Tina Bennis consented to her husband's use of the family car to commute to work, that consent is such that "even a modest penalty is out of all proportion to her blameworthiness; and when the assessment is the confiscation of the entire car, simply because [one]
illicit act took place once in the driver's seat, the punishment is plainly excessive." 397

E. Lack of Fundamental Fairness

In his dissenting opinion, Justice Stevens stated that "[f]undamental fairness prohibits the punishment of innocent people." 398 Fundamental fairness also militates against the forfeiture of an innocent owner's property. 399 When the majority revisited historical precedent, it held that its early forfeiture decisions were based on the theory of negligent entrustment. 400 This theory is based on the inference that the owner negligently allowed the property to be misused. 401 Under this analysis, the majority stated that the owner is properly punishable through forfeiture for this negligence. 402 Here, however, the State conceded that Tina Bennis was in no way negligent in entrusting the family car to John Bennis. 403

In his concurring opinion, Justice Clarence Thomas criticized the majority, noting that if "[i]mproperly used, forfeitures could become more like a roulette wheel employed to raise revenue from innocent, but hapless owners whose property is unforeseeably misused, or a tool wielded to punish those who associate with criminals, than a component of a system of justice." 404 Tina Bennis, as an innocent co-owner whose car was seized as a result of her husband's criminal acts, experienced the inequities of the roulette wheel phenomenon which concerned Justice Thomas. 405 In fact, "[c]ivil forfeiture] law today is being used across the nation to make a mockery of our rights to property and due process and is now reaching well beyond the war on drugs." 406

F. The Goal Of Civil Forfeiture Reform

1. Eliminating profitability as the sole motivation for civil forfeiture

Many civil forfeiture actions are now "unrelenting governmental assaults on property rights, fueled by a dangerous and emotional vigilante mentality that sanctions shredding the U.S. Constitution into meaningless
confetti. Thus, one of the primary objectives of civil forfeiture reform should be to stop the "'pillage and plunder' mentality of greed..." This attitude is a direct result of the "easy money temptation offered by the current civil asset forfeiture laws." Under current civil forfeiture law, the government has the power to confiscate the property of private citizens, sell it, and retain the proceeds. Through the use of civil forfeiture, the government has devised an unlimited source of revenue which lacks legislative oversight. Thus, civil forfeiture reform should create legislative oversight for the seizure of property and the expenditure of monies retained from the sale proceeds.

2. Rebalancing the scales of justice

The presumption of innocence is one of "the most vital and treasured tenets of United States criminal law." This presumption is the popular embodiment of the due process rights guaranteed by the United States Constitution. The presumption of innocence has been increasingly undermined by the government's abusive use of civil forfeiture. Under current civil forfeiture laws, property owners have the burden of proving, by a preponderance of the evidence, that the forfeiture of their property was improper. Sustaining that burden has proven to be an unreasonable hardship on property owners. Property owners find it nearly impossible to produce documentation or other evidence which can demonstrate that the "property was never used... to 'facilitate' the commission of a crime." Thus, a property owner is essentially required to prove a negative. This burden, as most property owners have discovered, is nearly insurmountable.

407. Id. at 1.
408. Id. at 33.
409. Id.
410. Id. at 51-52. The vessel or object which "commits the aggression is treated as the offender as the guilty instrument or thing to which the forfeiture attaches, without reference whatsoever to the character or conduct of the owner." Bennis, 116 S. Ct. at 1005 n5. (citations omitted).
411. Hyde, supra note 2, at 51.
412. See infra notes 444-447 and accompanying text.
413. Levy, supra note 19, at 210-11.
414. Id. at 211.
415. Id.
416. Id.
417. Hyde, supra note 2, at 56.
418. Id.
419. Id.
420. Id. An innocent property owner is faced with "extreme difficulty, if not impossibility proving such a negative, which the government, as accuser, has easy access to proof of the property's use in criminal activity—if indeed such proof really does exist." Id.
As a general rule of American jurisprudence, the burden of proof is allocated to the party who has the “more easily available means of proof.” Arguably, however, property owners do not have a “more easily available means of proof,” because they often do not have the resources necessary to meet this burden. Thus, the burden of proof unfairly rests on the property owner. This burden should be shifted to the party who can best shoulder such a burden, the government.

Judge C. Arlen Beam of the United States Court of Appeals for the Eighth Circuit has commented on the inequitable burden of proof which rests on property owners. Judge Beam said the following:

The current allocations of burdens and standards of proof require that the [owner] prove a negative, that the property was not used in order to facilitate illegal activity, while the government must prove almost nothing. This creates a great risk of erroneous, irreversible deprivation [of property] . . . . The allocation of burdens and standards of proof . . . is of great importance because it decides who must go forward with evidence and who bears the risk of loss should proof not rise to the standard set. In civil forfeiture cases, where owners are required to go forward with evidence and exculpate their property by a preponderance of the evidence, all risks are squarely on the owner. The government, under the current approach, need not produce any admissible evidence and may deprive citizens of property based on the rankest of hearsay and the flimsiest evidence. This result clearly does not reflect the value of private property in our society, and makes the risk of an erroneous deprivation intolerable.

Thus, civil forfeiture reform is necessary to “rebalance the scales of Justice” and to protect property owners from governmental abuse. Past civil forfeiture abuses necessitate the implementation of civil forfeiture reform which is fair to property owners, yet at the same time preserves the forfeiture procedures which are necessary to combat criminal activity.

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421. Id.
422. See supra notes 413-421 and accompanying footnotes.
423. Id.
424. Hyde, supra note 2, at 56.
425. Id. at 57.
426. Hyde, supra note 2, at 56.
427. Id. at 59.
428. Id. at 80.
G. Implementing Civil Forfeiture Reform

1. Chairman Hyde's civil asset forfeiture reform act ("CAFRA")

As Chairman Henry Hyde has noted, the first step in reforming civil forfeiture "is easily identifiable, a giant step for property rights, a reform every commentator and relevant interest group has recommended without exception: shift the burden of evidentiary proof in any judicial proceeding involving forfeiture."\(^{429}\) Under CAFRA, the government would be required to establish, by clear and convincing evidence, that the illegal conduct on which the forfeiture is premised actually occurred and that a sufficient nexus exists between the property and the unlawful act.\(^{430}\) In addition, CAFRA would standardize the innocent owner's defense, making it easier for property owners to "demonstrate 'either' that [they] did not know of 'or' consent to the illegal activity."\(^{431}\)

Under current forfeiture procedures, indigent property owners do not have a constitutional right to court-appointed counsel.\(^{432}\) This omission in current civil forfeiture law may explain why so few forfeitures are challenged.\(^{433}\) Many property owners do not have the financial resources necessary to hire a lawyer to fight the forfeiture.\(^{434}\) In fact, property owners may decide that their property is not worth the money they would be forced to pay to attain legal representation.\(^{435}\)

Under Chairman Hyde's proposed legislation, legal representation would be provided for individuals who lack the financial resources necessary to obtain independent legal representation.\(^{436}\) CAFRA would also eliminate the current bond requirement because it is inequitable as applied to indigent property owners and serves no real purpose in other cases.\(^{437}\) Willie Jones, a black Tennessee nurseryman, had $9600 seized because he allegedly fit the description of a drug courier.\(^{438}\) Even though his money was improperly seized, Willie Jones was nearly forced to forfeit his money because he did not have the financial resources necessary to post the required ten percent bond.\(^{439}\) Luckily, a reputable attorney

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\(^{429}\) Id. at 55.

\(^{430}\) Id. at 81.

\(^{431}\) Levy, supra note 19, at 212.

\(^{432}\) Hyde, supra note 2, at 81.

\(^{433}\) Id.

\(^{434}\) Id.

\(^{435}\) Id.

\(^{436}\) See supra notes 308-309 and accompanying text.

\(^{437}\) Hyde, supra note 2, at 81.

\(^{438}\) Levy, supra note 19, at 3-4.

\(^{439}\) Id.
learned of the civil forfeiture abuse and volunteered his assistance to Willie Jones.\textsuperscript{440}

CAFRA would further extend the time period for filing a claim to recover property from ten to sixty days.\textsuperscript{441} Finally, CAFRA would protect innocent property owners.\textsuperscript{442} By providing that property used to facilitate a crime may be confiscated unless the violation was "committed . . . without the knowledge or consent of the owner," CAFRA unequivocally states that a lack of consent, coupled with reasonable efforts to avoid the illegal activity, may constitute a valid defense to a civil forfeiture.\textsuperscript{443}

2. \textit{Legislative oversight}

Under current forfeiture procedures, law enforcement agencies are not required to report expenditures from asset forfeiture revenue.\textsuperscript{444} These agencies should, however, be subjected to "annual authorization and appropriation bills passed by the Congress."\textsuperscript{445} Such legislative oversight would charge legislators with public accountability for the use of civil forfeiture and would operate to deter egregious civil forfeiture abuses.\textsuperscript{446} In fact, Justice Thomas noted in \textit{Bennis} that "[l]egislators, not the courts . . . have 'the primary responsibility for avoiding [inequitable civil forfeiture] result[s].'"\textsuperscript{447}

\textbf{H. Civil Forfeiture Reform As Applied To Bennis}

Innocent property owners, such as Tina Bennis, would clearly benefit from the implementation of civil forfeiture reform.\textsuperscript{448} Specifically, CAFRA would have protected Tina Bennis from civil forfeiture on several different fronts.\textsuperscript{449} For example, CAFRA would have provided Tina Bennis with court-appointed counsel.\textsuperscript{450} Moreover, CAFRA would codify an innocent owner's defense which would have shielded Tina Bennis from the forfeiture of her interest in the Bennis family car.\textsuperscript{451} Finally, under CAFRA, Tina Bennis could have petitioned the court to temporarily return the Pontiac due to "substantial hardship" pending a final judicial

\textsuperscript{440} Id.
\textsuperscript{441} Hyde, supra note 2, at 82.
\textsuperscript{442} Id. at 81.
\textsuperscript{443} Id.
\textsuperscript{444} Id. at 66.
\textsuperscript{445} Id.
\textsuperscript{446} Id.
\textsuperscript{447} Savage, supra note 311, at 48.
\textsuperscript{448} See supra notes 289-309 and accompanying text.
\textsuperscript{449} Id.
\textsuperscript{450} See supra notes 305-309 and accompanying text.
\textsuperscript{451} See supra notes 430-431 and accompanying text.
disposition.452 Thus, Tina Bennis would have benefited if CAFRA had been adopted prior to the commencement of the Bennis litigation.453

V. CONCLUSION

As Justice Stevens wrote in his dissenting opinion in Bennis, "[f]undamental fairness prohibits the punishment of innocent people."454 The United States Supreme Court’s decision in Bennis v. Michigan,455 is inequitable and a derogation of principles of fundamental fairness. In Bennis, John and Tina Bennis co-owned a 1977 Pontiac. The Pontiac was seized when John Bennis used the car as the location for engaging in sexual relations with a known prostitute. Tina Bennis challenged the forfeiture because she was unaware of her husband’s illicit conduct. The Supreme Court, however, upheld the forfeiture of the automobile, despite Tina Bennis’ complete lack of criminal culpability. The Bennis decision is inequitable because Tina Bennis was entirely innocent, and therefore, not properly punishable.

The Bennis decision gives the government the power to take an innocent owner’s property under the pretext of abating a nuisance. Under Bennis, the government is further empowered to arbitrarily declare anything a nuisance and to punish innocent individuals. The government may now set its sights on an ideal piece of property and effectively seize such property under the guise of civil forfeiture power. In fact, "[a] land grab described as part of the war against drugs would be [an ideal] official cover for a city that wanted to build a freeway off-ramp . . . without paying land acquisition costs."456 Donald Scott knows this only too well — his only crime was owning million dollar property in which the government was interested. Civil forfeiture law also empowers the government to seize an innocent owner’s property for merely associating with a criminal. Adequate parameters no longer limit the application of civil forfeiture.

Congressman Henry Hyde has proposed the Civil Asset Forfeiture Reform Act in an effort to eliminate civil forfeiture abuses. This act, if passed, would provide limitations on civil forfeiture, thereby making it a useful and effective doctrine, instead of a profit-seeking law enforcement tool. CAFRA would place the burden of proof on the State, rather than on

452. See supra notes 296-297 and accompanying text.
453. See supra notes 289-309 and accompanying text.
454. Bennis, 116 S. Ct. at 1007; Savage, supra note at 47.
456. Hyde, supra note 2, at 63.
property owners, thereby safeguarding property owners against the arbitrary seizure of their property. CAPRA would also provide court-appointed counsel for property owners with limited financial resources. Thus, CAPRA would enable indigent property owners to contest a suspicious seizure. CAPRA would also completely eliminate the current bond requirement. In addition, CAPRA would allow the courts to temporarily return seized property to property owners on a showing of substantial hardship pending a final judicial resolution. Thus, Chairman Hyde’s bill would provide a useful curb on the government’s insatiable appetite for confiscating private property, while maintaining civil forfeiture as a crime-fighting mechanism.

Passionate individuals must speak up in order to protect their constitutional rights and to persuade Congress to act. Civil forfeiture abuses jeopardize the fundamental rights that most Americans cherish, but often take for granted. As Justice Thomas stated in his concurring opinion in Bennis, although punishing an innocent owner appears to be unfair, “this case is a reminder that the Constitution does not prohibit everything that is intensely undesirable.”457 Tina Bennis learned this first-hand. Unless civil forfeiture reform occurs, you could be the next victim of the government’s greed.

Charlena Toro

457. Savage, supra note 33, at 47.