

Front-Seat Adventures: Forfeiting Fundamental Fairness and a 1977 Pontiac

Forfeiture¹ is a concept common in American jurisprudence² that is grounded in world history.³ Indeed, the law of forfeiture dates back to the beginning of recorded time.⁴ For example, both early Greek⁵ and Roman

¹ See BLACK'S LAW DICTIONARY 650 (6th ed. 1990) (defining forfeiture as the "[l]oss of some right or property as a penalty for some illegal act."); Alice Marie O'Brien, "Caught in the Crossfire": *Protecting the Innocent Owner of Real Property from Civil Forfeiture Under 21 U.S.C. ' 881 (a)(7)*, 65 ST. JOHN'S L. REV. 521, 521 (1991) (stating that forfeiture involves governmental confiscation without compensation of property that was illegally used or acquired).

² See Anne-Marie Feeley, *Forfeiture of Marital Property Under 21 U.S.C. ' 881 (a)(7): Irreconcilable Differences?*, 37 VILL. L. REV. 1487, 1492 (1992) (noting that since the ratification of the Constitution, forfeiture has been recognized as a legal concept in American jurisprudence); see also *United States v. 92 Buena Vista Ave.*, 507 U.S. 111, 118-23 (1993) (discussing the history of forfeiture law in the United States).

³ See O'Brien, *supra* note 1, at 523-24.

⁴ See OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 7 (1923). In fact, the roots of forfeiture law can be traced back to the Old Testament. See *id.* For example, *Exodus* 21:28 of the Bible provides that, when an ox gores a person and that person dies from the inflicted injuries, the ox must be stoned and its flesh may not be consumed; the owner of the ox, however, will not be held culpable for the acts of the animal. See *id.* (citing *Exodus* 21:28). This passage from *Exodus* is considered a precursor to modern day forfeiture law. See O'Brien, *supra* note 1, at 524 n.18. The in rem forfeiture of an ox as an offer to God is mandated by the Old Testament regardless of the guilt or innocence of the ox's owner. See *id.*; see also Dennis R. Hewitt, Comment, *Civil Forfeiture and Innocent Third Parties*, 3 N. LL. U. L. REV. 323, 326 (1983) (commenting that *Exodus* 21:28 endorses the view that the property is guilty of any wrongdoing while the fault of the owner is irrelevant); see also *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 681 (1974) (noting that the guilt or innocence of the owner under the Old Testament rule was of no consequence). But see Jacob J. Finkelstein, *The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty*, 46 TEMP. L.Q. 169, 180 (1973) (commenting that the forfeiture of the animal was not an offer to God).

⁵ See O'Brien, *supra* note 1, at 524. The laws governing the ancient Greeks contained countless provisions regarding the forfeiture of property associated with specific wrongs. See HOLMES, *supra* note 4, at 7-8. For example, under laws espoused by Plato, if a slave caused the death of a person, the slave's owner was required to forfeit the offending slave to the relatives of the deceased. See *id.* Additionally, if an animal or other piece of personal property caused a man's or woman's death, the animal or property would be exiled beyond the borders. See *id.* at 8. Early forfeiture law is further illustrated by an ancient Greek law commanding that "if a man commits suicide, bury the hand that struck the blow afar from its body." *Id.* This directive demonstrates the early Greek belief that the offending object was the cause of the wrong and, therefore, had to be placed outside of society.

manuscripts attest to the practice of civil forfeiture.⁶ It was the English, however, who translated the archaic principle into contemporary rules of law⁷ by classifying forfeiture into three categories:⁸ (1) deodand,⁹ (2) common-law forfeiture,¹⁰ and (3) statutory forfeiture.¹¹ Current American jurisprudence recognizes two basic types of forfeiture proceedings:¹² (1) in rem proceedings, which are conducted against the property,¹³ and (2) in

⁶ See HOLMES, *supra* note 4, at 8-9. As early as 451 B.C., evidence of forfeiture provisions appear in Roman law. See *id.* at 8. Roman law provided that "if an animal had done damage, either the animal was to be surrendered or the damage paid for." *Id.* Similar to the Biblical and Greek provisions, these actions did not depend on fault of the owner. See *id.* at 9.

⁷ See HOLMES, *supra* note 4, at 24-25; see also *Calero-Toledo*, 416 U.S. at 680-83 (tracing the development of forfeiture law to early English jurisprudence).

⁸ See Feeley, *supra* note 2, at 1493.

⁹ See *id.* In fact, the term deodand derives from the Latin *Deo Dandum*, "to be given to God." *Calero-Toledo*, 416 U.S. at 681 n.16. *Black's Law Dictionary* defines deodand as "any personal chattel which was the immediate occasion of the death of any reasonable creature, and which was forfeited to the crown to be applied to pious uses, and distributed in alms by the high almoner." BLACK'S LAW DICTIONARY 436 (6th ed. 1990). At common law, the value of any animal or inanimate object that directly or indirectly caused the death of a human being would be forfeited to the King or Queen as deodand. See *Calero-Toledo*, 416 U.S. at 681. The Crown would then distribute the value to its subjects in the name of God. See *id.*

The concept of deodand laid the foundation for the modern day in rem forfeiture proceeding. See Feeley, *supra* note 2, at 1493. Both the old and new rationales are based on the legal fiction that the owner's fault was not a factor in the property's forfeiture. See *id.*

Over time, the deodand concept evolved to encompass all objects involved in criminal activity. See *id.* Deodands became a large generator of the Crown's revenue. See *Calero-Toledo*, 416 U.S. at 681. As English jurisprudence progressed, deodands soon disappeared. See *id.* Despite the absence of the deodand institution, the English retained the concept of forfeiting property involved in criminal activity. See *id.* at n.19. Thus, a concept born as a purely religious idea evolved to serve a modern method of deterrence. See *id.* at 681 & n.19.

¹⁰ See Feeley, *supra* note 2, at 1493. Common-law forfeiture later developed into in personam forfeiture proceedings. See *id.* At common law, forfeiture resulted from a conviction of a felony or treason. See *Calero-Toledo*, 416 U.S. at 682. Subsequent to the conviction, an in personam proceeding was held against the convict. See Feeley, *supra* note 2, at 1493. A convicted felon forfeited his personal property to the Crown and his lands to his lord. See *Calero-Toledo*, 416 U.S. at 682. In contrast, the convicted traitor forfeited both his chattels and real property to the Crown. See *id.* Common-law forfeiture was justified because "a breach of the criminal law was an offense to the King's peace." *Id.*

¹¹ See Feeley, *supra* note 2, at 1494. Statutory forfeiture involved a civil action against an object used in violation of customs or revenue laws. See *id.* Given an in rem proceeding, the innocence or guilt of the owner was not a factor because the property itself was the offending party. See *id.* at 1487. Statutory forfeiture laid the foundation for in rem forfeiture proceedings. See *Calero-Toledo*, 416 U.S. at 682 (attributing statutory forfeiture as the product of the merger between deodand tradition and the legal premise that ownership of property can be denied to the wrongdoer).

¹² See Feeley, *supra* note 2, at 1487-88.

¹³ See *id.* at 1487 (explaining that in rem proceedings are brought by a govern-

personam proceedings, which are conducted against the person.¹⁴ A shared history suggests that English classifications influenced American forfeiture law.¹⁵ In both systems, an owner's innocence does not constitute a defense to a civil forfeiture proceeding.¹⁶ In fact, there have been countless cases in which innocent owners have forfeited their property due to the illegal acts of others.¹⁷

mental entity against property involved with a statutorily defined illegal activity). In rem proceedings are synonymous with civil forfeiture proceedings. *See id.*; *see also* BLACK'S LAW DICTIONARY 793 (6th ed. 1990) (defining in rem as "[a] technical term used to designate proceedings or actions instituted *against the thing* . . .").

Civil forfeiture of property may occur regardless of the guilt or innocence of the owner of the property. *See* Hewitt, *supra* note 4, at 325. Therefore, an innocent owner's property may be subject to in rem forfeiture despite that the owner neither knew of nor consented to the property's involvement in the illegal activity. *See id.*

¹⁴ *See* Feeley, *supra* note 2, at 1492; *see also* BLACK'S LAW DICTIONARY 791 (6th ed. 1990) (defining an in personam proceeding as an "[a]ction seeking judgment against a person involving his personal rights and based on jurisdiction of his person . . ."). In contrast to in rem proceedings, which are brought against the property, in personam proceedings, also known as criminal forfeitures, are brought against an owner of property in response to the owner's involvement in criminal activity. *See* Feeley, *supra* note 2, at 1487-88. Criminal forfeiture proceedings are brought against the property owner and operate to forfeit any property acquired by illegal means. *See id.* at 1487 n.5 (citing Michael Goldsmith & Mark Jay Linderman, *Asset Forfeiture & Third Party Rights: The Need for Further Law Reform*, 1989 DUKE L.J. 1254, 1260).

¹⁵ *See* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 682-83 (1974). Colonies, before the adoption of the Constitution, and states, under the Articles of Confederation, enforced English as well as local in rem forfeiture provisions. *See id.* at 683 (citing C.J. Henry Co. v. Moore, 318 U.S. 133, 139 (1943)). This English influence was most strongly reflected in American customs and admiralty law. *See id.*

The English influence, however, did have its limitations. *See id.* at 682-83. For example, deodands never found a place in the American common-law tradition of civil forfeiture. *See id.* Furthermore, the forfeiture of estates belonging to traitors was proscribed by the Supreme Court if such forfeiture was not limited to the lifetime of the traitor. *See id.* at 683 (citing Wallach v. Van Riswick, 92 U.S. 202 (1876)).

¹⁶ *See* The Palmyra, 25 U.S. (12 Wheat.) 1, 15 (1827); *see also infra* notes 52-55 and accompanying text (discussing the facts and holding of *The Palmyra*). "The thing is . . . primarily considered as the offender, or rather the offence [sic] is attached primarily to the thing. . . ." *The Palmyra*, 25 U.S. at 14; *see also* Sandra Guerra, *Family Values?: The Family as an Innocent Victim of Civil Drug Asset Forfeiture*, 81 CORNELL L. REV. 343, 362 & n.87 (1996) (discussing the rejection of the innocent owner defense by early American courts).

¹⁷ *See, e.g.,* Bennis v. Michigan, 116 S. Ct. 994, 998 (1996) (upholding state forfeiture of a jointly-owned vehicle despite the fact that one joint-owner was completely unaware of the other owner's illegal use of the car); Dobbin's Distillery v. United States, 96 U.S. 395, 401 (1877) (finding that owner and lessor of distillery illegally used by tenant/lessee could not assert his lack of knowledge of lessee's illegal conduct to rebut forfeiture of the property); United States v. Brig Malek Adhel, 43 U.S. (2 How.) 210, 233, 234 (1844) (holding that a property owner's innocence is irrelevant when conducting an in rem analysis); *The Palmyra*, 25 U.S. at 15 (holding that a ship owner cannot use his innocence as a defense against the government-imposed forfeiture of his ship); United States v. One 1973 Buick Riviera Automobile, 560 F.2d 897, 901 (8th Cir. 1977) (upholding the forfeiture of an innocent

In a 1996 decision, *Bennis v. Michigan*,¹⁸ the United States Supreme Court addressed the concept of an innocent owner defense within the context of determining the constitutionality of a state's abatement scheme.¹⁹ Specifically, the Court held that an owner's property interest may be civilly forfeited if the property is used to commit an illegal act even if the illegal use is unbeknownst to the owner.²⁰ The Court also commented that an owner is not entitled to compensation from the government when a property interest is civilly forfeited.²¹

On the night of October 3, 1988, John Bennis drove home from work in a 1977 Pontiac automobile.²² The automobile was jointly owned by he and his wife, Tina Bennis.²³ Mr. Bennis parked his car next to a young woman who was "flagging"²⁴ passing vehicles.²⁵ At that time, two Detroit police officers working undercover for the vice squad turned their attention to Mr. Bennis and the young woman.²⁶

The young woman entered the 1977 Pontiac on the passenger's side.²⁷ Mr. Bennis then proceeded down the street, parked the automobile, and turned off the headlights.²⁸ The two officers followed Mr. Bennis and

owner's automobile that was used by the owner's son to transport marijuana); *United States v. One 26 1/2 Oz. Full Bottle of Lawson's Scotch Whiskey*, 17 F. Supp. 975, 975 (E.D.N.Y. 1936) (declaring that innocent owner defense was not available to purchaser of untaxed bottle of whiskey).

¹⁸ 116 S. Ct. 994 (1996).

¹⁹ *See id.* at 997-98.

²⁰ *See id.* at 998.

²¹ *See id.* at 1001.

²² *See Michigan ex rel. Wayne County Prosecuting Att'y v. Bennis*, 527 N.W.2d 483, 488-89 (Mich. 1994), *aff'd*, 116 S. Ct. 994 (1996). Mr. Bennis admitted during trial that he usually proceeded home on Eight Mile and turned north onto Woodward. *See id.* On the evening in question, however, Bennis turned south onto Sheffield, which is in the opposite direction of his home. *See id.* Testimony at trial clearly indicated that this area of the city was infamous for its numerous solicitation incidents and high records of arrests for prostitution. *See id.* at 491. The Michigan Supreme Court went as far as stating that the neighborhood had "a reputation for illicit activity." *Id.* at 486.

²³ *See id.*

²⁴ *See id.* "Flagging" is a term used by law enforcement authorities to describe the method by which prostitutes attract potential customers. *See id.* at n.2.

²⁵ *See id.* at 486. The police knew the prostitute servicing Mr. Bennis because they had arrested her on several prior occasions for solicitation and obscene conduct. *See id.* at n.3. The testimony of one witness, a local security guard, indicated that Bennis had spoken with prostitutes on two prior occasions during the summer of 1987 but had not invited them into his automobile. *See id.* at 488.

²⁶ *See id.* at 486. One of the officers testified that it was common knowledge among law enforcement officials that the young woman was a prostitute. *See Michigan ex rel. Wayne County Prosecuting Att'y v. Bennis*, 504 N.W.2d 731, 737-38 (Mich. Ct. App. 1993) (Jansen, J., dissenting).

²⁷ *See Bennis*, 527 N.W.2d at 486.

²⁸ *See Bennis*, 504 N.W.2d at 737 (Jansen, J., dissenting).

parked behind his automobile.²⁹ After the officers observed the young woman's head disappear toward the driver's side of the 1977 Pontiac, they approached the vehicle and witnessed the young woman performing fellatio³⁰ on Mr. Bennis.³¹ Mr. Bennis was then charged with, and subsequently convicted of, gross indecency.³²

Following Mr. Bennis's conviction, the State filed a complaint against both he and his wife alleging that their 1977 Pontiac was a "public nuisance"³³ and was therefore subject to abatement.³⁴ Mrs. Bennis defended

²⁹ See *id.*

³⁰ See BLACK'S LAW DICTIONARY 616 (6th ed. 1990) (defining fellatio as "[a] sexual act in which the mouth or lips come into contact with the penis.").

³¹ See *Bennis*, 527 N.W.2d at 486.

³² See *id.* There was no evidence presented at trial that indicated that Mr. Bennis paid for the prostitute's services. See *id.* at 488. Mr. Bennis was charged with and convicted of lewdness. See *id.* at 486, 488. This statute 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."

³³ See MICH. COMP. LAWS ANN. § 600.3801 (West 1991). The Michigan State Legislature defined a public nuisance as follows:

Any building, vehicle, boat, aircraft, or place used for the purpose of lewdness, assignation or prostitution or gambling, or used by, or kept for the use of prostitutes or other disorderly persons . . . is hereby declared a nuisance . . . and all . . . nuisances shall be enjoined and abated as herein provided, and as provided in the court rules. Any person, or his servant, agent, or employee who shall own, lease, conduct, or maintain any building, vehicle, or place used for any of the purposes or any of the persons above set forth or where any of the acts above enumerated are conducted, permitted or carried on, is guilty of a nuisance.

Id.

³⁴ See *Bennis*, 504 N.W.2d at 732; see also BLACK'S LAW DICTIONARY 4 (6th ed. 1990) (defining abatement as "[a] reduction, a decrease, or a diminution. The suspension or cessation, in whole or in part, of a continuing charge, such as rent."). The Michigan Legislature promulgated § 600.3825, which states in pertinent part:

(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 in 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.

(3) Sale of personalty, costs, liens, balance to state treasurer. Upon the sale of any furniture, fixtures, contents, vehicle, boat or aircraft as provided in this section, the officer executing the order or the court shall, after deducting the expenses of keeping such property and costs of such sale, pay all liens according to their priorities . . . and shall pay the balance to the state treasurer to be credited to the general fund of the state.

her property interest in the automobile by arguing that she had no knowledge that her husband would use the car in violation of Michigan's indecency laws.³⁵ The Wayne County Circuit Court rejected this argument, held that the 1977 Pontiac was a public nuisance, and ordered its abatement.³⁶

On appeal, the Michigan Court of Appeals, with one dissent, reversed the decision on three grounds.³⁷ First, the court held that, notwithstanding the express language of the statute, Michigan common law required the government to prove that Mrs. Bennis possessed knowledge of the illicit act performed in the vehicle.³⁸ Second, the court declared that the automobile could not be considered a nuisance because only one alleged incident of lewdness, assignation, or prostitution was charged.³⁹ According to the court's interpretation of the Michigan statute, one incident did not amount to a nuisance.⁴⁰ Third, the court of appeals held that the State failed to prove that an act of lewdness, assignation, or prostitution had actually occurred in the 1977 Pontiac.⁴¹

The Supreme Court of Michigan granted leave to appeal and reversed the decision on all grounds.⁴² The court first declared that an act of lewdness, assignation, or prostitution clearly took place in the vehicle on the eve-

MICH. COMP. LAWS ANN. ' 600.3825 (West 1996).

³⁵ See *Bennis*, 504 N.W.2d at 732.

³⁶ See *Bennis v. Michigan*, 116 S. Ct. 994, 997 (1996). The Supreme Court reviewed the trial judge's decision that the court had the authority to reimburse "the innocent co-title owner" with one-half of the sale proceeds minus expenses. See *id.* The Supreme Court noted, however, that the judge refused to award reimbursement in this case because the costs associated with selling the vehicle virtually amounted to the \$600 value of the 1977 Pontiac. See *id.*

³⁷ See *Bennis*, 504 N.W.2d at 732-35.

³⁸ See *id.* at 733. The court first noted that the express language of the statute stated that "[p]roof of knowledge of the existence of the nuisance on the part of the defendants or any of them, is not required." *Id.* (quoting MICH. COMP. LAWS ANN. ' 600.3815 (West 1996)). The court, however, observed that the Michigan Supreme Court in *People v. Schoonmaker*, 216 N.W. 456, 457 (Mich. 1927) would not uphold an abatement scheme absent proof of the owner's knowledge of the illicit act. See *id.* The court also referred to *State ex rel. Patterson v. Motorama Motel Corp.*, 307 N.W.2d 349, 351 (Mich. Ct. App. 1981). See *Bennis*, 504 N.W.2d at 733. The *Motorama* court held that "knowledge, consent or acquiescence by the owner or operator of an alleged public nuisance are necessary elements for abatement." *Motorama Motel Corp.*, 307 N.W.2d at 351-52. The court distinguished and dismissed earlier decisions that held that the forfeiture statute required actual knowledge of the illegal acts by declaring that *Schoonmaker* had not been overruled. See *Bennis*, 504 N.W.2d at 733 (discussing *State ex rel. Brucker v. Robinson*, 229 N.W. 403, 405 (Mich. 1930) and *People ex rel. Dowling v. Bitonti*, 10 N.W.2d 329, 330 (Mich. 1943)).

³⁹ See *Bennis*, 504 N.W.2d at 733

⁴⁰ See *id.*

⁴¹ See *id.* at 735. Due to the absence of evidence that Mr. Bennis paid for the prostitute's services, the majority reasoned that no proof existed that Mr. Bennis engaged in an activity prohibited by the statute. See *id.*

⁴² See *Michigan v. Bennis*, 527 N.W.2d 483, 487 (Mich. 1994).

ning of October 3, 1988.⁴³ Furthermore, the majority concluded that one instance of lewdness could create an abatable public nuisance.⁴⁴ Then, despite the existence of a Michigan Supreme Court case to the contrary,⁴⁵ the *Bennis* court found that the Michigan statutory scheme unambiguously stated that an owner's knowledge of the property's use is not required to make the property abatable.⁴⁶ Finally, the court held that the Michigan abatement scheme was constitutional.⁴⁷

Following the Michigan Supreme Court's resolution of the case, the United States Supreme Court granted certiorari.⁴⁸ Writing for the majority, Chief Justice Rehnquist declared that Michigan's abatement scheme did not dispossess Mrs. Bennis's property interest in the automobile without due process of law.⁴⁹ In reaching that conclusion, the Court stated that a lack of knowledge concerning the illegal use of property provided no defense to

⁴³ See *Bennis*, 527 N.W.2d at 486. The court stated that proof of a monetary exchange was not necessary to find that an act of lewdness had occurred given the circumstances listed in the record. See *id.* at 488. These circumstances included (1) the neighborhood's reputation as an area where illicit activities took place, (2) the prostitute's record or prior arrests for solicitation, and (3) the officer's testimony that the prostitute was engaged in the act of fellatio. See *id.* The court concluded that these circumstances substantiated the prostitution charge. See *id.* at 489; see also *State ex rel. Macomb County Prosecuting Att'y v. H.C. Mesk*, 333 N.W.2d 184, 188 (Mich. Ct. App. 1983) (stating that the term "prostitution" for purposes of Michigan's abatement scheme includes the "manual stimulation of another person for the payment of money . . .").

⁴⁴ See *Bennis*, 527 N.W.2d at 492. But see *H.C. Mesk*, 333 N.W.2d at 190-91 (stating that the court need not determine the number of occurrences when finding that an illicit act is a continuing nuisance, but commenting that the rate of such occurrences may be dispositive).

⁴⁵ See *Bennis*, 527 N.W.2d at 493 (citing *People v. Schoonmaker*, 216 N.W. 456, 457 (Mich. 1927)); see also *supra* note 38 and accompanying text (discussing the Michigan Court of Appeals's holding that state common law prohibited the forfeiture of the *Bennis* automobile).

⁴⁶ See *Bennis*, 527 N.W.2d at 493. Other jurisdictions have expressly upheld civil forfeiture schemes, like the Michigan scheme at issue, under very similar circumstances. See, e.g., *In re 1976 Blue Ford Pickup*, 586 P.2d 993, 994-96 (Ariz. Ct. App. 1978) (holding that when a joint tenant acts like a sole owner while engaging in illegal conduct forfeiture of the jointly held property does not violate the innocent owner's due process rights); *People v. Garner*, 732 P.2d 1194, 1196, 1198-99 (Colo. 1987) (upholding the application of civil forfeiture to an automobile co-owned by an innocent wife when her husband used the automobile illegally to transport controlled substances).

⁴⁷ See *Bennis*, 527 N.W.2d at 495. To reach its conclusion, the court reasoned that "the property subject to forfeiture was the evil sought to be remedied." *Id.* at 493-94.

⁴⁸ See *Bennis v. Michigan*, 115 S. Ct. 2275 (1995).

⁴⁹ See *Bennis v. Michigan*, 116 S. Ct. 994, 997-98 (1996). Due process of law is defined as "an exercise of the powers of the government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs." BLACK'S LAW DICTIONARY 500 (6th ed. 1990).

abatement.⁵⁰ Based on this reasoning, the majority held that the State need not compensate the owner of such abated property.⁵¹

In the seminal case of *The Palmyra*,⁵² the United States Supreme Court recognized the difference between a proceeding in personam and a proceeding in rem.⁵³ In *The Palmyra*, the owner of the ship contended that he must be convicted in an in personam proceeding before his ship could be forfeited in an in rem proceeding.⁵⁴ Justice Story, writing for an unanimous Court, disagreed and declared that in personam and in rem proceedings are not dependent upon each other.⁵⁵

⁵⁰ See *Bennis*, 116 S. Ct. at 998. The Chief Justice elaborated this proposition by stating that “a long and unbroken line of cases holds that an owner’s interest in property may be forfeited by reason of use to which the property is put even though the owner did not know that it was to be put to such use.” *Id.*

⁵¹ See *id.* at 1001. In reaching this conclusion, the Supreme Court relied on *United States v. Fuller*, 409 U.S. 488, 493 (1973), and *United States v. Rands*, 389 U.S. 121, 125 (1967), for the proposition that the Fifth Amendment’s Takings Clause does not require that the government compensate an owner for property that is gained through powers other than the eminent domain power. See *Bennis*, 116 S. Ct. at 1001.

⁵² 25 U.S. (12 Wheat.) 1 (1827).

⁵³ See *id.* at 14-15; see also *supra* notes 12-14 and accompanying text (explaining the difference between in rem and in personam forfeiture proceedings). The *Palmyra* was a privateer ship commissioned by the King of Spain. See *The Palmyra*, 25 U.S. at 8. The ship was captured by a United States war vessel and brought to Charleston, South Carolina, to face adjudication on charges of piracy. See *id.* The District Court of South Carolina acquitted the ship without rewarding damages to the owner. See *id.* Both sides appealed and the Circuit Court of South Carolina upheld the acquittal but rewarded damages to the owner in the amount of \$10,288.58. See *id.* at 8-9. Both sides then appealed to the United States Supreme Court. See *id.* at 9.

⁵⁴ *The Palmyra*, 25 U.S. at 12; see also *supra* note 13 and accompanying text (defining in rem forfeiture). The respondent ship owner further argued that the charge against the ship was defective because it failed to list specially particular acts of piracy. See *The Palmyra*, 25 U.S. at 7. Lastly, the ship owner contended that the United States lacked sufficient probable cause to subdue and adjudicate the ship. See *id.*

⁵⁵ See *The Palmyra*, 25 U.S. at 14-15. The rhetoric of this classic opinion captures the essence of the *Palmyra* Court’s argument:

The thing is here primarily considered as the offender, or rather the offense is attached primarily to the thing But the practice has been, and so this Court understand [sic] the law to be, that the proceeding *in rem* stands independent of, and wholly unaffected by any criminal proceeding *in personam* In the judgment of this Court, no personal conviction of the offender is necessary to enforce a forfeiture *in rem* in cases of this nature.

Id.

The Court held that probable cause existed to subdue the ship and reversed the award of damages. See *id.* at 18. The majority did affirm, however, the circuit court’s order of the ship’s restitution to her owner. See *id.*

In *United States v. Brig Malek Adhel*,⁵⁶ a similar admiralty forfeiture case decided seventeen years later, Justice Story reaffirmed the rule established in *The Palmyra*.⁵⁷ The owner of the Brig Malek Adhel alleged that his innocence and lack of knowledge regarding the illegal acts⁵⁸ of the ship's captain and its crew should prevent the forfeiture of his ship.⁵⁹ The Supreme Court proclaimed that the vessel itself was the offender and, therefore, the innocence or lack of knowledge of the owner provided no defense to the forfeiture action.⁶⁰ The Court concluded by holding that the ship, but not its cargo, could be subjected to forfeiture.⁶¹

The rule articulated in these admiralty cases—that the vessel itself is brought up on charges in an in rem proceeding and the guilt or innocence of its owner is legally insignificant—extended beyond admiralty proceedings with the Supreme Court's decision in *Dobbin's Distillery v. United States*.⁶² In *Dobbin's*, the owner of a spirits distillery forfeited both real

⁵⁶ 43 U.S. (2 How.) 210 (1844).

⁵⁷ *See id.* at 234. The United States captured and brought the Malek Adhel to Baltimore, Maryland, where it faced adjudication of "piratical aggression and restraint on the high seas." *Id.* at 229. The United States District Court for the District of Maryland found the ship guilty but acquitted the ship's cargo. *See id.* The ship owner and the United States appealed, and the Circuit Court of the United States for the District of Maryland reaffirmed the district court decision. *See id.* at 229-30. Both parties then appealed to the United States Supreme Court. *See id.* at 230.

⁵⁸ *See id.* at 230 (noting that the ship carried a cannon, pistols, and daggers in violation of the commercial law of the time).

⁵⁹ *See id.* at 221-22. The owner's innocence and lack of knowledge was clearly noted in the record. *See id.* at 221. The owner of the ship used these facts to argue that the ship was neither liable in personam nor in rem, and thus, the ship and its cargo should not be forfeited. *See id.* at 222.

⁶⁰ *See id.* at 233. To illustrate the point, the Court quoted from *United States v. Little Charles*, 26 F. Cas. 979 (C.C.D. Va. 1818)(No. 15,612) where then-judge Marshall asserted:

This is not a proceeding against the owner; it is a proceeding against the vessel for an offence committed by the vessel; which is not the less an offence, and does not the less subject her to forfeiture because it was committed without the authority and against the will of the owner. It is true that inanimate matter can commit no offence. But this body is animated and put in action by the crew, who are guided by the master. The vessel acts and speaks by the master. She reports herself by the master. It is therefore not unreasonable that the vessel should be affected by this report.

Id. at 234 (quoting *The Little Charles*, 26 F. Cas. at 982).

Justice Story applied this rule and held that the owner's guilt or innocence is not a factor when determining whether the property should be forfeited on account of illegal activities committed by agents of the property owner. *See id.*

⁶¹ *See id.* at 238. Affirming the decision of the circuit court, Justice Story noted that forfeiture of the cargo, as well as the ship, would violate a well-established admiralty principle that exempts cargo from similar forfeiture actions. *See id.* at 237.

⁶² 96 U.S. 395 (1877). *But see* Donald J. Boudreaux & A. C. Pritchard, *Innocence Lost: Bennis v. Michigan and the Forfeiture Tradition*, 61 Mo. L. Rev. 593, 622 (1996)

and personal property to the federal government after the lessee of the property violated a United States revenue statute.⁶³ Like the ship owners' defenses in the admiralty cases, the lessor and owner of the distillery claimed that he had no knowledge of the lessee's illegal conduct.⁶⁴ The Supreme Court reasoned, however, that the civil forfeiture resulted from an *in rem* proceeding brought against the real and personal property of the distillery, and not against the property's owner.⁶⁵ Therefore, the innocence or guilt of the lessor and owner was irrelevant to the *in rem* proceeding.⁶⁶

(stating that *Dobbin's Distillery* fails to cite precedent supporting the legal theory that *in rem* forfeiture is applicable outside the realms of customs and admiralty proceedings).

⁶³ See *Dobbin's*, 96 U.S. at 396. The acts perpetrated by the lessee that led to the forfeiture at issue primarily dealt with infractions of federal revenue provisions pursuant to 15 Stat. 125, 132-33 § 19 (1868). See *id.* The statute prohibited acts of negligence in bookkeeping and required proper maintenance of revenue books. See *id.*; see also 15 Stat. at 132-33 § 19. The lessee committed negligence and failed to maintain proper revenue books by creating false entries with the intent to defraud the government. See *Dobbin's*, 96 U.S. at 396. The lessee also refused to produce these books when a request was filed by revenue officers. See *id.*

A jury verdict entered in favor of the federal government resulted from the *in rem* proceeding against the lessor's property conducted by the Circuit Court of the United States for the District of Iowa. See *id.* at 395, 397. The lessor and owner of the distillery sued pursuant to a writ of error, and the cause was removed to the United States Supreme Court. See *id.* at 397.

⁶⁴ See *Dobbin's*, 96 U.S. at 397. The innocent owner's writ of error argued that the trial court erred when charging the jury that the claimant's lack of knowledge was unnecessary in finding for the government. See *id.*

⁶⁵ See *id.* at 399; see also *The Little Charles*, 26 F. Cas. at 982 (stating that an *in rem* proceeding is "a proceeding against the vessel, for an offence committed by the vessel, which is not less an offence, and does not the less subject her to forfeiture, because it was committed without the authority, and against the will of the owner."); *supra* notes 13-17 and accompanying text (discussing the historical roots of civil forfeiture as an *in rem* proceeding).

In effect, the Supreme Court's holding in *Dobbin's* denoted that the illegal acts of a lessee will bind the lessor no matter how innocent or unknowing he may be. See *Dobbin's*, 96 U.S. at 404. The Justice's reasoning may seem a bit harsh, but a strict reading of the revenue statute mandates this interpretation. See Hewitt, *supra* note 4, at 331 n.55 (stating that the Court in *Dobbin's* strictly adhered to the text of the federal revenue statute in affirming the trial court's holding of civil forfeiture); see also *United States v. 1960 Bags of Coffee*, 12 U.S. (8 Cranch) 398, 405 (1814) (declaring that "[i]n the eternal struggle that exists between avarice . . . [and] enterprize . . . on the one hand, and the power charged with the administration of the laws on the other, severe laws are rendered necessary to enable the executive to carry into effect the measures of policy adopted by the legislature."); cf. David F. B. Smith, *Mortgage Lenders Beware: The Threat to Real Estate Financing Caused by Flawed Protection for Mortgage Lenders in Federal Forfeiture Actions Involving Real Property*, 25 REAL. PROP., PROB. & TR. J. 481, 485 (1990) (discussing the problems resulting from the application of traditional civil forfeiture law to innocent and unknowing mortgage lenders when real property is illegally used).

The Court in *Dobbin's* failed to cite any precedent justifying the extension of civil forfeiture proceedings to circumstances outside the admiralty and customs areas of law. See *Boudreaux & Pritchard*, *supra* note 62, at 622. Several cases decided during the *Dobbin's* era of forfeiture jurisprudence held that an *in rem* forfeiture pro-

The evolution of civil forfeiture law jurisprudence continued in *J.W. Goldsmith, Jr.-Grant Co. v. United States*.⁶⁷ In *J.W. Goldsmith*, a car dealership maintained that in rem forfeiture under the Internal Revenue Act violated the Constitution.⁶⁸ The car dealership forfeited its security interest

ceeding under similar circumstances was an improper penalty imposed on an owner of property. *See id.* at 623. Moreover, mid-nineteenth century state courts vigilantly policed the boundaries of forfeiture as a criminal penalty and refused to impose forfeiture as a civil penalty pursuant to in rem proceedings. *See id.*

⁶⁶ *See Dobbin's*, 96 U.S. at 399.

⁶⁷ 254 U.S. 505 (1921).

⁶⁸ *See id.* at 508-09. The federal revenue statute at issue provided:

Whenever any goods or commodities for or in respect whereof any tax is or shall be imposed, . . . are removed, or are deposited or concealed in any place, with intent to defraud the United States of such tax, or any part thereof, all such goods and commodities, . . . shall be forfeited; and in every such case all the casks, vessels, cases, or other packages whatsoever, containing, or which shall have contained, such goods or commodities, respectively, and every vessel, boat, cart, carriage, or other conveyance whatsoever, and all horses or other animals, and all things used in the removal or for the deposit or concealment thereof, respectively, shall be forfeited.

Id. at 508 (quoting Act of July 13, 1866, ch. 184, 14 Stat. 98, 151 *codified as* ' 3450 Revised Statutes).

Pursuant to this statute, the petitioner's interest in a Hudson automobile, valued at \$800, was seized after three perpetrators used the automobile to remove, deposit, and conceal 58 gallons of untaxed spirits. *See id.*; *see also* *United States v. One Chevrolet 1935 Sedan*, 12 F. Supp. 793, 796-97 (W.D.N.Y. 1935) (noting that the National Prohibition Act protected innocent automobile owners but that § 3450 of the Internal Revenue Act did not); Boudreaux & Pritchard, *supra* note 62, at 627 (stating that federal prosecutors were deferential in bringing forfeiture cases involving the illegal transportation of untaxed liquor under ' 3450 of the Internal Revenue Act because, unlike the National Prohibition Act, ' 3450 did not offer an innocent owner defense). Despite this apparent conflict, courts have overwhelmingly held that the National Prohibition Act did not provide inapposite results with § 3450 in forfeiture cases involving the illegal transportation of alcohol. *See* *United States v. One Ford Coupe Auto.*, 272 U.S. 321, 334-35 (1926) (holding that the National Prohibition Act, as applied to the forfeiture of an innocent owner's property, did not impliedly repeal § 3450); *see also* *General Motors Acceptance Corp. v. United States*, 286 U.S. 49, 61 (1932) (differentiating between the National Prohibition Act and the forfeiture provisions of federal customs law).

The case of *United States v. One Chevrolet Automobile*, 21 F.2d 477 (M.D. Ala. 1927), suggests an interesting caveat. Like the factual circumstances of *J.W. Goldsmith*, an innocent third-party car dealership had one of its automobiles forfeited after an authorized party used the automobile illegally to transport alcohol. *See id.* at 478. The court held that, notwithstanding that the federal government brought the action against the defendant's automobile pursuant to § 3450 of the Internal Revenue Act, the defendant was nonetheless afforded the innocent owner defense under the National Prohibition Act. *See id.* at 479. The court reasoned that failure to pay the tax specified under the statute was incidental to the illegal transportation and possession of alcoholic beverages. *See id.* The court deferred to the prohibition agents' testimony that they confiscated the automobile while acting pursuant to the prohibition law rather than the tax law. *See id.* at 478. Thus, the holdings of prohibition-era cases like *One Chevrolet* and *J.W. Goldsmith* turned on a fact-sensitive analysis. *See, e.g., One Ford Coupe*, 272 U.S. at 325 (stating that a prohibition director

in an automobile after the vehicle was used to transport untaxed distilled spirits.⁶⁹ Determining that Congress intended to sacrifice innocent owner defenses in favor of protecting revenue sources,⁷⁰ the Court upheld the in rem forfeiture.⁷¹ The Court declined to address, however, whether the legal rationale of the holding might be extended.⁷²

may nonetheless invoke a § 3450 forfeiture action against the property of an innocent owner); *United States v. One Graham Paige Sedan*, 38 F.2d 848, 849 (E.D.N.Y. 1930) (stating that the federal government may not bar the invocation of the innocent owner defense by proceeding under § 3450 in cases where perpetrators have been arrested under the National Prohibition Act).

⁶⁹ *See J. W. Goldsmith*, 254 U.S. at 508.

⁷⁰ *See id.* at 510. Writing for the majority, Justice McKenna concluded: Congress must have taken into account the necessities of the Government, its revenues and policies, and was faced with the necessity of making provision against their violation or evasion and the ways and means of violation or evasion. In breaches of revenue provisions some forms of property are facilities, and therefore it may be said, that Congress interposes the care and responsibility of their owners in aid of the prohibitions of the law and its punitive provisions, by ascribing to the property a certain personality, a power of complicity and guilt in the wrong.

Id.

The Supreme Court previously made a similar interpretation of a federal liquor tax statute when it found that “statutes to prevent frauds upon the revenue are considered as enacted for the public good and to suppress a public wrong, and therefore . . . they are to be fairly and reasonably construed, so as to carry out the intention of the legislature.” *United States v. Stowell*, 133 U.S. 1, 12 (1889).

With the passage in 1933 of the Twenty-First Amendment, which repealed the Prohibition Amendment to the United States Constitution, Congress sought to alleviate the harshness imposed on innocent owners by the Internal Revenue Act. *See United States v. One 1936 Model Ford V-8 De Luxe Coach*, 307 U.S. 219, 221 (1939). Accordingly, Congress drafted the Liquor Law Repeal and Enforcement Act Title 27 U.S.C. ' 151 *et seq.* *See id.*; *see also One Chevrolet 1935 Sedan*, 12 F. Supp. at 797 (declaring that the Liquor Law Repeal and Enforcement Act provided for the protection of innocent property owners after forfeiture had been declared, by detailing the proceedings that may be taken in lieu of forfeiture); Boudreaux & Pritchard, *supra* note 62, at 627 n.198 (arguing that passage of the Twenty-First Amendment caused the Supreme Court to withdraw some of “the rather daunting monitoring duties it had imposed on creditors” under the Eighteenth Amendment).

⁷¹ *See J.W. Goldsmith*, 254 U.S. at 511, 513; *see also United States v. Elliott Hall Farm*, 42 F. Supp. 235, 238 (D.N.J. 1941) (holding that in rem civil forfeiture made pursuant to statute did not depend on the property owner’s guilt or innocence as established in a separate criminal proceeding); *United States v. One 26 1/2 Oz. Full Bottle of Lawson’s Scotch Whiskey*, 17 F. Supp. 975, 975 (E.D.N.Y. 1936) (stating that innocence is immaterial in civil forfeiture cases).

⁷² *See J.W. Goldsmith*, 254 U.S. at 512. The Court made two express reservations. *See id.* First, the majority refused to determine whether the present law may be extended. *See id.* For example, the Court declined to discuss the likelihood of forfeiture of a Pullman railway sleeper car when a passenger carries an illegal bottle of liquor on board the car. *See id.* The Court also declined to address the possible forfeiture consequences of an ocean steamer when the ship unknowingly receives and transports contraband. *See id.* Next, the Court reserved its opinion as to whether § 3450 of the Internal Revenue Act should “be extended to property stolen from the owner or otherwise taken from him without his privity or consent.” *Id.* Instead, the

Five years later, in *Van Oster v. Kansas*,⁷³ the United States Supreme Court reaffirmed the rule established in *J.W. Goldsmith*.⁷⁴ *Van Oster* involved the forfeiture and sale of an automobile pursuant to state nuisance law after an authorized user operated it illegally by transporting liquor without the automobile owner's knowledge or consent.⁷⁵ The Court began its

Court stated that its holding would be limited to the facts before it, and that any extension of the holding would be considered on a case by case analysis. *See id.*; *see also* *Austin v. United States*, 509 U.S. 602, 617 (1993) (noting that "more recent cases have expressly reserved the question whether the legal fiction [that the property, itself, is guilty of the illegal conduct] could be employed to forfeit the property of a truly innocent owner."). *But see* *Bennis v. Michigan*, 116 S. Ct. 994, 999 n.5 (1996) (rejecting the broad reading of *J.W. Goldsmith's* second reservation).

⁷³ 272 U.S. 465 (1926).

⁷⁴ *See id.* at 468; *see also* *Bennis*, 116 S. Ct. at 998 (stating that the Supreme Court relied on its holding in *J.W. Goldsmith* to formulate its ruling in *Van Oster*); *Boudreaux & Pritchard*, *supra* note 62, at 629 (commenting that the Supreme Court in *Van Oster* applied the holding of *J.W. Goldsmith*).

⁷⁵ *See Van Oster*, 272 U.S. at 466. *Van Oster* purchased an automobile from a dealership with the agreement that the vendors could retain use of it for business purposes. *See id.* An associate of the car dealership used the automobile illegally to transport intoxicating liquor. *See id.* On one of these occasions, the associate was arrested for the illegal transportation of contraband pursuant to 1919 KAN. SESS. LAWS §§ 1-5, 21-2162 to 21-2167. *See id.* The petitioner's automobile was subsequently forfeited and sold as a common nuisance under this same statute. *See id.* The state court of Kansas upheld the forfeiture notwithstanding *Van Oster's* claim that he was an innocent owner and therefore the automobile should not be subject to forfeiture. *See id.* The associate of the car dealership was later acquitted, but the automobile remained forfeited. *See id.*

Van Oster presented three arguments to the United States Supreme Court in support of his contention that the car's forfeiture was unconstitutional. *See id.* at 466-67. First, *Van Oster* claimed that the Kansas statute violated the Fourteenth Amendment's Due Process Clause. *See id.* at 466. Second, *Van Oster* argued that the use of the state statute was precluded by the National Prohibition Act, which adequately covered forfeiture cases pursuant to the illegal transportation of alcohol. *See id.* at 466-67; *see also supra* notes 68-70 and accompanying text (explaining why the National Prohibition Act would have offered *Van Oster* an innocent owner defense). Third, *Van Oster* contended that the arrest and subsequent acquittal of the arrested associate did not trigger the Kansas forfeiture scheme. *See Van Oster*, 272 U.S. at 467.

As to *Van Oster's* third claim, the United States Supreme Court dismissed it as a matter of state procedure and declared that the state court decision controlled. *See id.* at 469. The Court reasoned that there was no "tenable ground" for supporting a constitutional argument based on the associate's acquittal. *See id.*

Prior to *Van Oster*, the Supreme Court had held that the Fourteenth Amendment did not guarantee a citizen any particular form of state procedure as long as the state satisfied general notice requirements and provided an opportunity to be heard. *See, e.g., Missouri ex rel. Hurwitz v. North*, 271 U.S. 40, 41-42 (1926) (holding that the Fourteenth Amendment did not entitle doctors brought before the state board of health the absolute right to subpoena witnesses); *Hurtado v. California*, 110 U.S. 516, 538 (1884) (positing that the Due Process Clause of the Fourteenth Amendment does not require a grand jury indictment before the state prosecutes a defendant for murder); *Kennard v. Louisiana ex rel. Morgan*, 92 U.S. 480, 481 (1875) (stating that "[i]rregularities and mere errors in [state court] proceedings can only be corrected in the State courts. Our authority does not extend beyond an examina-

opinion by expressly recognizing traditional state police power⁷⁶ to forfeit property used in furtherance of illegal liquor traffic.⁷⁷ The Supreme Court ultimately found no valid distinction between applying the Fourteenth Amendment Due Process Clause to a state's regulatory power of domestic affairs and the application of the Fifth Amendment to federal exercises of the taxing authority.⁷⁸

tion of the power of the courts below to proceed at all.”).

⁷⁶ See *Lawton v. Steele*, 152 U.S. 133, 136 (1894). A state's traditional police power includes:

[E]verything essential to the public safety, health, and morals, and to justify the destruction or abatement, by summary proceedings, of whatever may be regarded as a public nuisance Beyond this, however, the State may interfere wherever the public interests demand it, and in this particular a large discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests.

Id.

⁷⁷ See *Van Oster*, 272 U.S. at 467. In *Van Oster* the Supreme Court extended the use of civil forfeiture proceedings for punitive purposes to state governments. See *Boudreaux & Pritchard*, *supra* note 62, at 629. The *Van Oster* Court noted that the State of Kansas operated under the auspices of traditional state police powers to suppress the unlawful transportation of intoxicating liquor by declaring the instrumentality a common nuisance and subjecting it to forfeiture. See *Van Oster*, 272 U.S. at 466.

The Supreme Court has extended the use of state police power to encompass a wide range of scenarios. See, e.g., *Lawton*, 152 U.S. at 136 (stating that state police power extends to “the confinement of the insane or those afflicted with contagious diseases; the restraint of vagrants, beggars, and habitual drunkards; the suppression of obscene publications and houses of ill fame; and the prohibition of gambling houses and places where intoxicating liquors are sold.”); *Kidd v. Pearson*, 128 U.S. 1, 16 (1888) (holding that a statute that inflicts penalties for the manufacture and sale of liquor and provides for the abatement of the property used for such prohibited purposes is a valid exercise of state police power under the Fourteenth Amendment); *Mugler v. Kansas*, 123 U.S. 623, 671 (1887) (holding same). *But see* *Railroad Co. v. Husen*, 95 U.S. 465, 468, 469, 471 (1877) (holding that a Missouri statute prohibiting the driving of out-of-state cattle into its borders violates the Commerce Clause and is an illegitimate exercise of state police power); *Chy Lung v. Freeman*, 92 U.S. 275, 276, 281 (1875) (holding that a California statute that forbade the immigration of “lewd and debauched women” was an unconstitutional use of state police power that infringed on individuals' rights under the Fourteenth Amendment).

⁷⁸ See *Van Oster*, 272 U.S. at 468; see also *Hibben v. Smith*, 191 U.S. 310, 325 (1903) (noting that “[t]he Fourteenth Amendment . . . legitimately operates to extend to the citizens and residents of the States the same protection against arbitrary state legislation, affecting life, liberty and property, as is offered by the Fifth Amendment against similar legislation by Congress . . .”). Writing for a unanimous Court, Justice Stone noted that “certain uses of property may be regarded as so undesirable that,” when an owner relinquishes control of the property and the property is subsequently used for an undesirable purpose, the owner surrenders control of the property at his own peril. See *Van Oster*, 272 U.S. at 467. The Court emphasized this rationale by stating that *Van Oster* had voluntarily entrusted the offender with the use of his automobile. See *id.*; cf. *Logan v. United States*, 260 F. 746, 747, 749 (5th

In *Calero-Toledo v. Pearson Yacht Leasing Co.*,⁷⁹ the United States Supreme Court returned to its traditional admiralty analysis of forfeiture proceedings and reconsidered the question of an innocent owner's defense.⁸⁰ Although respondent, a lessor of pleasure yachts, knew nothing of the illegal activity that took place aboard one of its ships,⁸¹ the yacht nonetheless was forfeited under Puerto Rican law after lessees used it to transport controlled substances.⁸² The United States District Court for the Dis-

Cir. 1919) (upholding the forfeiture of an automobile and a mule entrusted by their owners for use by revenue law offenders notwithstanding the owners' lack of knowledge concerning the tax violations); *United States v. Mincey*, 254 F. 287, 288 (5th Cir. 1918) (holding that property entrusted by an owner to an employee for the item's lawful use is nonetheless subject to civil forfeiture if the employee deceptively uses the property for unlawful purposes).

⁷⁹ 416 U.S. 663 (1974).

⁸⁰ See *id.* at 664; Boudreaux & Pritchard, *supra* note 62, at 619 (discussing how the *Calero-Toledo* opinion marked a return to the traditional domain of civil forfeiture in admiralty cases).

⁸¹ See Boudreaux & Pritchard, *supra* note 62, at 619 (noting that the ship illegally transported marijuana).

⁸² See *Calero-Toledo*, 416 U.S. at 665. In March 1971, the Pearson Yacht Leasing Company rented a yacht to two Puerto Rican residents. See *id.* The lessees were subsequently arrested by Puerto Rican authorities for transporting marijuana aboard the leased yacht. See *id.* As far as the Supreme Court could discover, there was only one marijuana cigarette found on board. See *id.* at 693 (Douglas, J., dissenting).

The seizure and forfeiture of the yacht was made pursuant to the Controlled Substances Act of Puerto Rico, which does not offer an innocent owner defense. See *id.* at 665. The statute states in relevant part:

(a) The following shall be subject to forfeiture to the Commonwealth of Puerto Rico:

(1) All controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of this chapter

....

....

(4) All conveyances, including aircraft, vehicles, mount or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property described in clauses (1) [which includes marijuana] and (2) of this subsection . . .

P.R. LAWS ANN. tit. 24, ' 2512(a)(1)&(4) (1980). On the other hand, the Puerto Rican statute's federal counterpart, the Comprehensive Drug Abuse Prevention and Control Act of 1970, expressly provides an innocent owner defense by noting that "no conveyance shall be forfeited under this paragraph to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge, consent, or willful blindness of the owner." 21 U.S.C. ' 881(a)(4)(C) (1988).

After the arrest of the lessees, the Puerto Rican government seized the yacht without notifying the lessor. See *Calero-Toledo*, 416 U.S. at 667. Shortly after taking custody of the boat, the government gave the lessee notice of the ship's seizure but it failed to notify Pearson. See *id.* at 667-68. Thus, by the time the respondent discovered that one of its yachts had been seized, the forfeiture action had already commenced. See *id.*

trict of Puerto Rico found the Puerto Rican law unconstitutional as applied to the facts of the case.⁸³

The United States Supreme Court overruled the district court and upheld the Puerto Rican forfeiture scheme.⁸⁴ The Supreme Court based its holding on the well-established common-law principle that an innocent owner is not necessarily protected from the civil forfeiture of her property.⁸⁵ In dictum, the Court suggested two possible scenarios where an innocent owner defense could present an exception to the well-established rule of forfeiture.⁸⁶ The first scenario, according to the Court, occurs when

⁸³ See *Pearson Yacht Leasing Co. v. Massa*, 363 F. Supp. 1337, 1343 (D.P.R. 1973), *rev'd sub nom. Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974). In *Pearson*, the United States District Court for the District of Puerto Rico held that forfeiture of the plaintiff's yacht was an unconstitutional exercise of the Fifth Amendment's Takings Clause. See *id.* at 1342. Noting the Pearson Company's status as an innocent owner, the court reasoned that the forfeiture blatantly deprived Pearson of its property without just compensation. See *id.* The court based its opinion on its interpretation of *United States v. United States Coin & Currency*, 401 U.S. 715 (1971). See *Pearson*, 363 F. Supp. at 1341. In *United States Coin & Currency*, the Supreme Court stated in dictum that a broadly sweeping forfeiture statute might be difficult to reconcile with the due process and just compensation requirements of the Fifth Amendment. See *id.* (citing *United States Coin & Currency*, 401 U.S. at 720-21).

⁸⁴ See *Calero-Toledo*, 416 U.S. at 680, 690. In reversing the district court's holding, the Supreme Court opined that the lower court had seriously misconstrued *United States Coin & Currency*. See *id.* at 688. Writing for the majority, Justice Brennan first noted that the Court in *United States Coin & Currency* did not overrule prior case law insofar as the applicability of forfeiture to innocent owners. See *id.* at 664, 680. Justice Brennan further noted that the majority in *United States Coin & Currency* limited its holding to the notion that the Fifth Amendment privilege against self-incrimination could be asserted by a claimant in a federal revenue forfeiture proceeding as a complete defense when the property at issue was derived from illegal gambling activities. See *id.* at 688 (citing *United States Coin & Currency*, 401 U.S. at 719-21). The Supreme Court coupled the fact that the prior case law had not been overturned with the assertion that Puerto Rico enacted its forfeiture scheme pursuant to the state's police power to protect a legitimate public interest and upheld the forfeiture of Pearson's yacht. See *id.*; see also *supra* note 76 and accompanying text (discussing the relevance of the state police power and legitimate governmental interests notions to the forfeiture analysis under the Constitution).

⁸⁵ See *Calero-Toledo*, 416 U.S. at 683-86. Justice Brennan rooted the Puerto Rican forfeiture scheme's constitutional legitimacy in criminal law's traditional goals of punishment and deterrence. See *id.* at 686; see also *supra* note 76 and accompanying text (discussing the state police power and its function of ensuring the health and safety of state citizens). The Court stated that the forfeiture of such property prevents future illegal uses of the property because the economic penalties render the illegal behavior unprofitable. See *Calero-Toledo*, 416 U.S. at 687; see also *One Lot Emerald Cut Stones & One Ring v. United States*, 409 U.S. 232, 237 (1972) (reasoning that the forfeiture of property serves a remedial function of reimbursing governments for their investigatory and enforcement exercises). Lastly, the majority explained that forfeiture provisions place great incentives on innocent lessors, secured creditors, and other owners to practice optimal care in entrusting the use of their property to third parties. See *Calero-Toledo*, 416 U.S. at 688.

⁸⁶ See *Calero-Toledo*, 416 U.S. at 689-90; Hewitt, *supra* note 4, at 341 (stating that

an owner's property is forfeited despite an absence of privity or consent.⁸⁷ The second situation, the Court mentioned, occurs when an owner proves that he did all that could be reasonably expected to prevent the illicit use of the property.⁸⁸

the enunciation of these limiting circumstances were not part of the *Calero-Toledo* holding and operated solely as dicta); O'Brien, *supra* note 1, at 546 (collectively deeming both of these exceptions the *Calero-Toledo* defense).

As to the first circumstance of the *Calero-Toledo* defense, Justice Brennan stated: "It . . . would be difficult to reject the constitutional claim of an owner whose property subjected to forfeiture had been taken from him without his privity or consent." *Calero-Toledo*, 416 U.S. at 689; *see also* *United States v. One Ford Coupe Auto.*, 272 U.S. 321, 333 (1926) (holding by implication that civil forfeiture of an innocent owner's automobile pursuant to § 3450 would be unfounded if a thief used the automobile illegally to transport intoxicating liquor). In regard to the second circumstance, the Justice declared that "the same might be said of an owner who proved . . . that he had done all that reasonably could be expected to prevent the proscribed use of his property." *Calero-Toledo*, 416 U.S. at 689.

The majority concluded that neither of these exceptions applied because the Pearson Company voluntarily entrusted the yacht to the lessees and no evidence suggested that the Company acted to prevent the unlawful use of the yacht. *See id.* at 690. The Court made this determination notwithstanding the Puerto Rican Government's concession that the Pearson Company lacked any knowledge of the lessee's illegal acts. *See id.* at 668. That concession, along with the Pearson Company's standard illegality clause in its leasing contracts, seemed to question the majority's nonapplication of either defense. *See id.* at 693 (Douglas, J., dissenting).

Regardless of the apparent unfairness of the ultimate holding, the recognition of the *Calero-Toledo* defense designated a jurisprudential floor below which the forfeiture of an innocent owner's property would be unconstitutional. *See* O'Brien, *supra* note 1, at 546. In fact, after *Calero-Toledo* was decided, lower courts spilt on the applicability of the *Calero-Toledo* defense to federal forfeiture statutes. *See id.* at 544-45 (noting that lower courts disagreed as to whether the *Calero-Toledo* defense applied in a 21 U.S.C. § 881(a)(7) forfeiture action of real property). Even if a court adopted the defense, the innocent owner still carried the heavy burden of proving she had done all she could reasonably do to prevent the proscribed use of the property at issue. *See* Hewitt, *supra* note 4, at 342. *See, e.g.,* *United States v. 755 Forest Road*, 985 F.2d 70, 72 (2d Cir. 1993) (holding that willful blindness to her husband's narcotics sales did not exempt a wife's property from forfeiture); *United States v. M/V Mologa*, 876 F.2d 884, 888-89 (11th Cir. 1989) (concluding that the *Calero-Toledo* defense did not apply because claimant failed to take reasonable actions that would ensure that the third party taking possession of the claimant's ship would not use the ship illegally to smuggle drugs); *United States v. One 1973 Buick Riviera Auto.*, 560 F.2d 897, 901 (8th Cir. 1977) (stating that the *Calero-Toledo* defense did not apply to the forfeiture of claimant's automobile because he knew of his son's narcotics history and he allowed his son unrestricted use of the automobile); *United States v. One 1980 Cadillac Eldorado*, 603 F. Supp. 853, 857 (E.D.N.Y. 1985) (stating that claimant did not do all she could reasonably do to prevent the forfeiture of her automobile because she had notice of her husband's prior narcotics convictions).

⁸⁷ *See Calero-Toledo*, 416 U.S. at 689 (commenting that an owner must be uninvolved with and unaware of the wrongful activity).

⁸⁸ *See id.* at 689-90.

The Supreme Court recently revisited the issue of forfeiture in *Bennis v. Michigan*.⁸⁹ In *Bennis*, the United States Supreme Court addressed whether the forfeiture of an innocent owner's property under a state statutory scheme violated the Constitution.⁹⁰ Chief Justice Rehnquist, writing for the majority, thoroughly outlined the historical evolution of civil in rem forfeiture.⁹¹ The Chief Justice traced in rem forfeiture jurisprudence from early nineteenth-century Supreme Court cases to late twentieth-century holdings.⁹² Relying on extensive precedent allowing forfeiture of property used in illegal activities despite the owner's ignorance of the activity, the Supreme Court, in a five to four decision, upheld the Michigan forfeiture scheme.⁹³ Additionally, the majority noted that Michigan's statute did not violate the Fifth Amendment Takings Clause.⁹⁴

The Supreme Court began by discussing the due process argument⁹⁵ with an examination of the holdings and rationales of *The Palmyra, Brig*

⁸⁹ 116 S. Ct. 994, 997-98 (1996).

⁹⁰ *See id.* at 996. The United States Supreme Court granted certiorari to determine whether the Michigan State abatement scheme violated the Due Process Clause of the Fourteenth Amendment or the Takings Clause of the Fifth Amendment as incorporated by the Fourteenth Amendment. *See id.* at 997-98.

⁹¹ *See id.* at 998-1000.

⁹² *See id.* at 998-99. Chief Justice Rehnquist first addressed the petitioner's due process argument under the Fourteenth Amendment. *See id.* at 998. The crux of the petitioner's claim regarded substantive due process issues. *See id.* Tina Bennis contended that she should have been allowed to invoke the "innocent owner" defense in order to prevent the forfeiture of her property interest in the automobile at issue. *See id.* She claimed that she lacked knowledge that her husband would use the automobile to violate the state indecency law. *See id.*

⁹³ *See id.* at 998-99 (citing *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974); *Van Oster v. Kansas*, 272 U.S. 465 (1926); *J.W. Goldsmith, Jr.-Grant Co. v. United States*, 254 U.S. 505 (1921); *Dobbin's Distillery v. United States*, 96 U.S. 395 (1877); *United States v. Brig Malek Adhel*, 43 U.S. (2 How.) 210 (1844); *The Palmyra*, 25 U.S. (12 Wheat.) 1 (1827)).

State courts have expressly upheld civil forfeiture schemes, like the Michigan scheme at issue, under very similar circumstances. *See, e.g., In re 1976 Blue Ford Pickup*, 586 P.2d 993, 994-96 (Ariz. Ct. App. 1978) (holding that, after an innocent joint tenant of an automobile allows the other joint tenant to act as sole owner, the forfeiture of the automobile subsequent to the illegal acts of the acting sole owner does not violate the innocent owner's due process rights); *People v. Garner*, 732 P.2d 1194, 1196, 1199 (Colo. 1987) (upholding the application of civil forfeiture to an automobile co-owned by an innocent wife and her husband, who used the automobile illegally to transport a controlled substance).

⁹⁴ *See Bennis*, 116 S. Ct. at 1001. The Takings Clause states: "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

⁹⁵ *See Bennis*, 116 S. Ct. at 998. The *Bennis* Court primarily addressed whether the forfeiture of Tina Bennis's co-owned automobile constituted a violation of the Fourteenth Amendment's Due Process Clause. *See id.* at 998-1001. After disposing of the petitioner's due process complaint, the Court similarly dismissed her claim that the Michigan statute violated the Fifth Amendment Takings Clause. *See id.* at 1001.

Malek Adhel, Dobbin's Distillery, Van Oster, and the J.W. Goldsmith cases.⁹⁶ Chief Justice Rehnquist noted that the *J.W. Goldsmith* Court expressly reserved its opinion "as to whether [forfeiture] can be extended to property stolen from the owner or otherwise taken from him without his privity or consent."⁹⁷ Interpreting this language, the Chief Justice distinguished between the case of property used without the owner's consent, where the *J.W. Goldsmith* reservation applies, and the case of property employed by an authorized user but used in an unauthorized capacity.⁹⁸ The Supreme Court, applying this rationale, held that Tina Bennis could not claim the innocent owner defense because her husband was a co-owner of the vehicle.⁹⁹ Consequently, because Tina Bennis's husband was an

⁹⁶ See *id.* at 998-99. The Supreme Court began its analysis of American civil forfeiture tradition with a discussion of nineteenth-century admiralty cases and noted that these cases stood for the jurisprudential maxim that "[t]he thing is here primarily considered as the offender, or rather the offense is attached primarily to the thing." *Id.* at 998 (quoting *The Palmyra*, 25 U.S. at 14). The *Bennis* Court further noted that the *Brig Malek Adhel* majority declared that "the acts of the master and crew . . . bind the interest of the owner of the ship, *whether he be innocent or guilty*; and he impliedly submits to whatever the law denounces as a forfeiture attached to the ship by reason of their unlawful or wanton wrongs." *Id.* (quoting *Brig Malek Adhel*, 43 U.S. at 234).

After discussing the admiralty cases, the majority opined that neither lessors nor secured interest holders are afforded protection from civil forfeiture of their property interests by the "innocent owner" defense based on *Dobbin's Distillery* and *Van Oster*. See *id.* The Chief Justice pointed out that *Dobbin's Distillery* embraced the ancient legal principle "that the acts of [the possessors] bind the interest of the owner . . . whether he be innocent or guilty." *Id.* (quoting *Dobbin's Distillery*, 96 U.S. at 401). The Court then rejected Mrs. Bennis's arguments that forfeiture of her automobile would be unconstitutional because it was illegally used without her knowledge and consent. See *id.* at 999. To support its decision, the *Bennis* majority commented that *Van Oster* mandated "that statutory forfeitures of property entrusted by the innocent owner or lienor to another who uses it in violation of the revenue laws of the United States is not a violation of the due process clause" *Id.* (quoting *Van Oster*, 272 U.S. at 468).

⁹⁷ *Id.* at 999 n.5 (citing *J.W. Goldsmith*, 254 U.S. at 512).

⁹⁸ See *id.* (citing *Michigan ex rel. Wayne County Prosecutor v. Bennis*, 527 N.W.2d 483, 495 n.36 (Mich. 1994)). Interpreting the *J.W. Goldsmith* language, the United States Supreme Court in *Austin v. United States* opined: "The more recent cases have expressly reserved the question whether the fiction could be employed to forfeit the property of a truly innocent owner." 509 U.S. 602, 616 (1993). Relying on a legal distinction drawn by the Michigan Supreme Court, the United States Supreme Court in *Bennis* rejected the *Austin* interpretation. See *Bennis*, 116 S. Ct. at 999 n.5. The Michigan Supreme Court noted that when property is used without any consent by the owner, the innocent owner's property could not be forfeited. See *Bennis*, 527 N.W.2d at 495 n.36. When an owner gives her consent for use of the property and the property is subsequently used in an unauthorized manner, however, the innocent owner's property is not protected from abatement. See *id.*

⁹⁹ See *Bennis*, 116 S. Ct. at 999 n.5. In the majority opinion, Chief Justice Rehnquist dismissed Justice Stevens's dissent, commenting that the dissent's reading attempted to broaden the *J.W. Goldsmith* reservation into the legal rationale that forfeiture is only applicable when "the means that are prescribed for the pre-

authorized user of the 1977 Pontiac, her case fell outside the rubric of the *J.W. Goldsmith* reservation.¹⁰⁰

During its discussion of the *Calero-Toledo* case, the United States Supreme Court reiterated the well-established common-law rule that the innocence of an owner does not present a defense to civil forfeiture.¹⁰¹ In rejecting Mrs. Bennis's argument that her conduct fell within the second *Calero-Toledo* exception, the majority refused to adopt a prophylactic rule for innocent owners who prove that they took all reasonable precautions against the illicit use of their property.¹⁰² Furthermore, Chief Justice Rehnquist commented that *Calero-Toledo* was directly on point because

vention of a forfeiture may be employed.” *Id.* (quoting *Peisch v. Ware*, 8 U.S. (4 Cranch) 347, 363 (1808)). The Chief Justice wrote that *Peisch* dealt with the same issue as the *J.W. Goldsmith* reservation: “If, by private theft, or open robbery, without any fault on his part, [an owner's] property should be invaded, . . . the law cannot be understood to punish him with the forfeiture of that property.” *Id.* (quoting *Peisch*, 8 U.S. at 364); *see also infra* notes 128-137 and accompanying text (discussing Justice Stevens's dissent in *Bennis*).

¹⁰⁰ *See Bennis*, 116 S. Ct. at 999 n.5.

¹⁰¹ *See id.* at 999 (stating that “the innocence of the owner of property subject to forfeiture has almost uniformly been rejected as a defense.”) (quoting *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 683 (1974)). The Chief Justice strictly followed the historical progression of the development of civil forfeiture law and rejected Tina Bennis's innocent owner claim. *See id.* at 998-99. In other words, the Court invoked the doctrine of stare decisis to ground its holding in a strong legal foundation. *See id.* *But see The Supreme Court, 1995 Term-Leading Cases*, 110 HARV. L. REV. 135, 139 (1996) (arguing that the goals of the stare decisis doctrine of certainty and consistency were not served by the Supreme Court's opinion in *Bennis*). *Cf.* *United States v. Ursery*, 116 S. Ct. 2135, 2140-41 (1996) (where Chief Justice Rehnquist, who also authored the *Bennis* majority opinion, implemented a similar use of precedent and cited to the Court's conclusion in *Bennis* to ultimately hold that in rem forfeiture does not violate the Double Jeopardy Clause of the United States Constitution).

¹⁰² *See Bennis*, 116 S. Ct. at 999 (citing *Calero-Toledo*, 416 U.S. at 689). Tina Bennis based her argument on the portion of the *Calero-Toledo* defense that argues that “it would be difficult to reject the constitutional claim of . . . an owner who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property . . .” *Id.*

In rejecting Mrs. Bennis's claim, Chief Justice Rehnquist noted that Tina Bennis conceded that the *Calero-Toledo* defense was mere dictum to which the Supreme Court would give no weight. *See id.*; *see also Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 379 (1994) (stating, “It is to the holdings of our cases, rather than their dicta, that we must attend . . .”).

The Supreme Court did not dismiss the protective effect of the *Calero-Toledo* exceptions in their entirety. *See Bennis*, 116 S. Ct. at 999 n.5. In fact, the defense pertaining to the use of property without the owner's consent was expressly preserved by the Chief Justice. *See id.*; *see also supra* notes 86-88 and accompanying text (discussing the *Calero-Toldeo* protection afforded to innocent owners whose property is taken without their consent).

Tina Bennis, like the Pearson Yacht Company, had no knowledge of the unlawful activity that took place in her property.¹⁰³

Tina Bennis also contended that *Foucha v. Louisiana*¹⁰⁴ and *Austin v. United States*¹⁰⁵ applied to the due process analysis of her case¹⁰⁶ and that the cases required the recognition of the innocent owner defense.¹⁰⁷ The United States Supreme Court, however, distinguished these cases from the *The Palmyra* line of forfeiture cases and upheld the common-law rule.¹⁰⁸ The Supreme Court distinguished *Foucha* on the grounds that that opinion never even mentioned, let alone rejected, the long-standing practice first announced in *The Palmyra*.¹⁰⁹ Similarly, Chief Justice Rehnquist refused to apply *Austin* because the case never discussed the validity of the innocent owner defense.¹¹⁰

¹⁰³ See *Bennis*, 116 S. Ct. at 999; see also *supra* notes 81-82 (discussing that the yacht company had no knowledge of or connection to the controlled substances that were transported by the lessees).

¹⁰⁴ 504 U.S. 71 (1992).

¹⁰⁵ 509 U.S. 602 (1993).

¹⁰⁶ See *Bennis*, 116 S. Ct. at 1000.

¹⁰⁷ See *id.*

¹⁰⁸ See *id.* Notwithstanding the well-established legal principles in this area, the petitioner argued that *The Palmyra* line of cases should be overruled because *Foucha* mandates a culpability requirement. See *id.* In addition, Mrs. Bennis claimed that the Eighth Amendment's Excessive Fines Clause, as stated in *Austin*, could not be reconciled with the rejection of an innocent owner's defense to a civil forfeiture of that owner's property. See *id.* Chief Justice Rehnquist, however, refuted the application of *Foucha* and *Austin* because those cases had "at best a tangential relation to the 'innocent owner' doctrine in forfeiture cases." *Id.*

¹⁰⁹ See *id.* In *Foucha*, the United States Supreme Court struck down as unconstitutional a Louisiana law that permitted the confinement of a person acquitted from criminal proceedings by reason of insanity until that person proves that she is not potentially dangerous to herself or others, even if the person is not mentally ill. See 504 U.S. at 73, 83, 84-85. Writing for the majority, Justice White instructed that the state statute could serve no punitive purpose because the petitioner had not been convicted of any crime. See *id.* at 80. The Court argued that Louisiana could not punish the petitioner because a jury of his peers acquitted him of the state's criminal charges based on an insanity defense. See *id.*

Tina Bennis argued that the reasoning in *Foucha* applied to her case and that, under a similar analysis, Michigan does not have a punitive interest in forfeiting her property interest in the automobile at issue. See *Bennis*, 116 S. Ct. at 1000. Chief Justice Rehnquist found it unnecessary to determine whether the abatement and forfeiture scheme under Michigan law constituted "punishment" for purposes of *Foucha*. See *id.* Rather, the Chief Justice stated that the *Foucha* analysis did not apply because that case did not deal with the civil forfeiture of an innocent owner's property interest. See *id.*

¹¹⁰ See *Bennis*, 116 S. Ct. at 1000. In *Austin*, the United States Supreme Court held that the Eighth Amendment's prohibition against excessive fines applies to the context of a civil forfeiture. See *Austin*, 509 U.S. at 617. The *Bennis* Court found that *Austin* did not apply because the *Austin* Court failed to analyze the necessity of an innocent owner defense in civil forfeiture proceedings. See *Bennis*, 116 S. Ct. at 1000.

The Supreme Court concluded its due process analysis by addressing the deterrence theory and its role in forfeiture cases.¹¹¹ The Court declared that forfeiture serves a deterrent purpose separate from any punitive purpose.¹¹² Chief Justice Rehnquist reasoned that forfeiture may prevent any further illegal use as well as levy an economic penalty.¹¹³ The Chief Justice further recognized that the law of civil forfeiture provides law enforcement officials with an extra layer of crime deterrence because innocent owners are compelled to prevent illicit use of their property by others.¹¹⁴

In considering the Takings Clause issue, the United States Supreme Court addressed whether the forfeiture of the Bennis automobile resulted in a Fifth Amendment taking of private property for a public use.¹¹⁵ The Su-

¹¹¹ See *Bennis*, 116 S. Ct. at 1000-01. The verb deter is defined as: "To discourage or stop by fear. To stop or prevent from acting or proceeding by danger, difficulty, or other consideration which disheartens or countervails the motive for the act." BLACK'S LAW DICTIONARY 450 (6th ed. 1990). Under the economist view, offenders are deterred by expected punishment, and therefore, they act as risk assessors. See Catherine Cerna, *Economic Theory Applied to Civil Forfeiture: Efficiency and Deterrence Through Reallocation of External Costs*, 46 HASTINGS L.J. 1939, 1956 (1995) (analogizing offenders to investors because both groups act in their respected capacities until the risk reaches expected return).

Congress has used forfeiture as a vehicle of deterrence in comprehensive criminal statutes such as the Racketeer Influenced and Corrupt Organizations (RICO) Act. 18 U.S.C. §§ 1961-1968 (1989); see also 115 CONG. REC. H9951 (daily ed. Apr. 22, 1969) (statement of Rep. Poff) ("After conviction, the ill-gotten gains must be forfeited to the Government. This sanction is not only poetic justice but a strong deterrent as well."); 116 CONG. REC. S607 (daily ed. Jan. 21, 1970) (statement of Sen. Byrd) ("By removing its leaders from positions of ownership, by preventing them and their associates from regaining control, and by visiting heavy economic sanctions on their predatory business practices this legislation should prove to be a mighty deterrent to any further expansion of organized crime's economic power."). Congress used a similar rationale when drafting the forfeiture provision of the Comprehensive Drug Abuse Prevention and Control Act. 21 U.S.C. § 881 (1988). This act seeks to deter the trafficking of illegal drugs through forfeiture. See H.R. REP. NO. 91-1444, at 4567 (1970) ("This legislation is designed to deal in a comprehensive fashion with the growing menace of drug abuse in the United States . . . by providing for an overall balance scheme of criminal penalties for offenses involving drugs."); see also *United States v. Borromeo*, 995 F.2d 23, 27 (4th Cir. 1993) (reasoning that civil forfeiture under the Comprehensive Drug Act reduces offenders' incentive to participate in drug trafficking).

¹¹² See *Bennis*, 116 S. Ct. at 1000.

¹¹³ See *id.*

¹¹⁴ See *id.* at 1000-01; cf. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 687-88 (1974) (reasoning that the bar against the invocation of an innocent owner defense will induce property owners to take greater care in allowing the use of their property to others). The *Calero-Toledo* Court stated: "To the extent that such forfeiture provisions are applied to lessors, bailors, or secured creditors who are innocent of any wrongdoing, confiscation may have the desirable effect of inducing them to exercise greater care in transferring possession of their property." *Id.*

¹¹⁵ See *Bennis*, 116 S. Ct. at 1001. The Supreme Court noted that the Fifth Amendment's Takings Clause applied to the Michigan abatement scheme by way

preme Court reiterated that Tina Bennis's property interest in the jointly owned 1977 Pontiac legally transferred to the State of Michigan as a result of John Bennis's illegal activities.¹¹⁶ The Court concluded its opinion by stating that, because Michigan acquired the automobile pursuant to a power other than the eminent domain authority, the state need not compensate Tina Bennis for her loss.¹¹⁷

In a concurring opinion, Justice Thomas agreed with the majority's use of precedent and legal tradition in affirming the Michigan Supreme Court decision.¹¹⁸ The Justice conceded that forfeiture of an innocent owner's property might seem unfair but in light of the well-established case law no violation of due process occurred.¹¹⁹ Furthermore, Justice Thomas voiced concern regarding the lack of any well-defined limits on what constitutes a "use" for the purposes of civil forfeiture law.¹²⁰ In conclusion, the concur-

of the Fourteenth Amendment. *See id.*

¹¹⁶ *See id.* Thus, the Court noted that the state lawfully operated within the jurisprudential bounds of the Fourteenth Amendment's Due Process Clause when it exercised its police powers to abate and forfeit the automobile at issue. *See The Supreme Court, 1995 Term, supra* note 101, at 137.

¹¹⁷ *See Bennis*, 116 S. Ct. at 1001. The government must make just compensation when it exercises its eminent domain power under the Fifth Amendment. *See United States v. Fuller*, 409 U.S. 488, 490 (1973). Just compensation provides the owner of the property with its fair market value. *See United States v. Miller*, 317 U.S. 369, 374 (1943). No compensation is required, however, if the property was transferred by a state power other than the power of eminent domain. *See Bennis*, 116 S. Ct. at 1001; *Fuller*, 409 U.S. at 492 ("[T]he Government as condemnor may not be required to compensate a condemnee for elements of value that the Government has created, or that it might have destroyed under the exercise of governmental authority other than the power of eminent domain."); *United States v. Rands*, 389 U.S. 121, 125 (1967) (holding that Congress is not required to compensate owners when it exercises its commerce power to condemn private land along navigable waters).

¹¹⁸ *See Bennis*, 116 S. Ct. at 1001-02 (Thomas, J., concurring); Boudreaux & Pritchard, *supra* note 62, at 599 n.46 (explaining that "[r]eliance on history is a familiar theme in Justice Thomas's jurisprudence."). Justice Thomas observed that forfeiture of property, regardless of the owner's guilt or innocence, has been an accepted hallmark in English and American jurisprudence since before the ratification of the Fifth and Fourteenth Amendments. *See Bennis*, 116 S. Ct. at 1002 (Thomas, J., concurring); *see also Burnham v. Superior Court of Cal.*, 495 U.S. 604, 619 (1990) (defining "due process of law" for purposes of the Fifth and Fourteenth Amendments as procedures that are firmly rooted in the jurisprudence of England and America).

¹¹⁹ *See Bennis*, 116 S. Ct. at 1001 (Thomas, J., concurring). Further, in *J.W. Goldsmith*, the United States Supreme Court made an identical observation 75 years before Justice Thomas authored his concurring opinion:

If the case were the first of its kind, it and its apparent paradoxes might compel a lengthy discussion to harmonize the section with the accepted tests of human conduct. . . . There is strength . . . in the contention that, if such be the inevitable meaning of the section, it seems to violate that justice which should be the foundation of the due process of law required by the Constitution.

254 U.S. 505, 510 (1921).

¹²⁰ *See Bennis*, 116 S. Ct. at 1002 (Thomas, J., concurring). Justice Thomas pointed out that "[i]mproperly used, forfeiture could become more like a roulette

rence requested that Congress and state legislatures promulgate guidelines on the government's ability to forfeit property that belongs to an innocent owner.¹²¹

Justice Ginsburg also authored a concurring opinion in which the Justice proffered three reasons to support the holding of the Michigan Supreme Court.¹²² First, the Justice emphasized that the Bennis automobile was not only jointly owned by Tina and John, but that both husband and wife consented to the other's use of the vehicle.¹²³ Stressing that the abatement proceeding of the car at issue was an equitable action,¹²⁴ Justice Ginsburg next explained that the state supreme court must be given broad discretion when applying the forfeiture statute.¹²⁵ Further, Justice Ginsburg posited that the trial court's decision to abate and forfeit the entire property interest in the automobile was not "blatantly unfair" as Justice Stevens's dissent contended.¹²⁶ Finally, Justice Ginsburg's concurrence articulated that it is well within the bounds of state police power to deter, by means of civil forfeiture, the use of property that contributes to "neighborhood blight."¹²⁷

In dissent, Justice Stevens opined that the majority's reasoning would bestow upon the states carte blanche authority to forfeit property that has any connection with an unlawful act.¹²⁸ The Justice commenced his dissent

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." *Id.* at 1003 (Thomas, J., concurring); *see also* *United States v. James Daniel Good Real Property*, 510 U.S. 43, 81 (1993) (Thomas, J., concurring in part and dissenting in part) (discussing the lack of any clear bounds on government authority to forfeit real property pursuant to 21 U.S.C. § 881(a)(7)).

¹²¹ *See Bennis*, 116 S. Ct. at 1003 (Thomas, J., concurring).

¹²² *See id.* (Ginsburg, J., concurring).

¹²³ *See id.*; *see also supra* notes 96-98 and accompanying text (discussing the distinction between an unauthorized user and an authorized user who uses the object for an unauthorized purpose).

¹²⁴ An equitable action is defined as "[o]ne seeking an equitable remedy or relief. . ." BLACK'S LAW DICTIONARY 538 (6th ed. 1990).

¹²⁵ *See id.* In *Michigan ex rel. Wayne County Prosecutor v. Bennis*, 527 N.W.2d 483, 495 (Mich. 1994), the Michigan Supreme Court emphasized the equitable characteristic of the abatement and forfeiture proceeding. Given an equitable proceeding, the court noted that the trial judge had the discretion to utilize any of a number of possible remedies, including forfeiture. *See id.* The Michigan Supreme Court then sanctioned the trial judge's determination to abate and forfeit the entire interest in the automobile. *See id.*

¹²⁶ *See Bennis*, 116 S. Ct. at 1003 (Ginsburg, J., concurring). Justice Ginsburg based her determination upon two principles: (1) the Bennises owned another car and (2) the petitioner would not receive any monetary compensation because the difference between the automobile's worth, approximately \$600, and the costs associated with impoundment and abatement of the automobile, was nominal. *See id.*

¹²⁷ *See id.*

¹²⁸ *See id.* (Stevens, J., dissenting). Justice Stevens declared: "The State surely may impose strict obligations on the owners . . . but neither logic nor history supports the Court's apparent assumption that their complete innocence imposes no

by identifying the three categories of property subject to forfeiture: (1) pure contraband,¹²⁹ (2) proceeds of criminal activity,¹³⁰ and (3) tools or instrumentalities of a criminal trade.¹³¹ With the three aforementioned categories of forfeitable property in mind, Justice Stevens next distinguished the facts of *Bennis* from the precedent relied on by the majority.¹³² The dissent explained that the principal use of the forfeited property in this case, unlike the use of the challenged property in *The Palmyra* line of cases, was not the commission of illegal acts.¹³³

constitutional impediment to the seizure of their property simply because it provided the locus for a criminal transaction.”

¹²⁹ See *id.* at 1004 (Stevens, J., dissenting). Justice Stevens noted that states have a strong interest in confiscating contraband notwithstanding the guilt or innocence of their owners. See *id.* Examples of contraband include smuggled goods, adulterated food, narcotics, and sawed-off shotguns. See *id.*; see also *One 1958 Plymouth Sedan v. Pennsylvania*, 308 U.S. 693, 699 (1965) (defining contraband as “objects the possession of which, without more, constitutes a crime.”). Relying on these definitions of contraband, Justice Stevens concluded that this category of forfeitable property was not implicated because automobiles are not contraband items. See *Bennis*, 116 S. Ct. at 1004 (citing *Plymouth Sedan*, 380 U.S. at 699).

¹³⁰ See *Bennis*, 116 S. Ct. at 1004 (Stevens, J., dissenting). The dissent noted that in recent years Congress has enacted legislation that extends the coverage of the second category of property to include a wide array of items. See *id.* Stressing that this federal legislation is replete with references to the innocent owner defense, Justice Stevens posited that the existence of such protections within congressional acts lends support to the need for “elementary notions of fairness” when a governmental entity operates outside the jurisdiction of these acts. See *id.*; see also Guerra, *supra* note 16, at 368 (discussing the existence of an innocent owner defense in federal legislation regarding the forfeiture of property used in connection with the sale of illegal drugs).

¹³¹ See *Bennis*, 116 S. Ct. at 1004-05 (Stevens, J., dissenting). The dissent explained that the tools or instrumentalities of the criminal trade category are also known as “derivative contraband.” See *id.* at 1004 (Stevens, J., dissenting) (citing *Plymouth Sedan*, 380 U.S. at 699). Referring to cases such as *The Palmyra* and *Brig Malek Adhel*, Justice Stevens explained that the notion of the forfeiture of derivative contraband, regardless of the innocence of the property’s owner, is rooted in early admiralty law. See *id.* at 1004 & n.2, 1005 (Stevens, J., dissenting). The Justice stated that the underlying reasoning of these cases was based on the presumption that owners of valuable property are “aware of the principal use being made of that property.” *Id.* at 1005 (Stevens, J., dissenting). Next, the dissent articulated that the aforementioned reasoning should not be extended to factual scenarios other than admiralty cases. See *id.* But see *General Motors Acceptance Corp. v. United States*, 286 U.S. 49, 53 (1932) (seizure of automobile used to unlawfully import liquor into the United States); *United States v. Commercial Credit Co.*, 286 U.S. 63, 66 (1932) (same); *Dobbin’s Distillery v. United States*, 96 U.S. 395, 399 (1877) (forfeiting premises that contained an illegal distillery).

¹³² See *Bennis*, 116 S. Ct. at 1005 (Stevens, J., dissenting).

¹³³ See *id.* Justice Stevens noted the lack of evidence suggesting that the *Bennis* automobile previously acted as a site for “forbidden trysts.” See *id.* The Justice continued, “An isolated misuse of a stationary vehicle should not justify the forfeiture of an innocent owner’s property on the theory that it constituted an instrumentality of the crime.” *Id.*; cf. *J.W. Goldsmith, Jr.-Grant Co. v. United States*, 254 U.S. 505, 512 (1921) (expressing doubt as to the appropriateness of the forfeiture of an entire ocean liner because one passenger engaged in an illegal activity on board).

Even if a legal nexus existed between the Bennis automobile and the criminal act, Justice Stevens would have reversed the strict liability standard imposed by the majority on the grounds of fundamental fairness.¹³⁴ The Justice qualified this proposition by instructing that the *Calero-Toledo* exceptions to forfeiture should apply when owners have taken all reasonable steps to guard against illegal use.¹³⁵ Justice Stevens's dissent contended that because Mrs. Bennis possessed neither knowledge of her husband's intent to commit a criminal act nor any knowledge of any similar past acts, it could not be alleged that she failed to take reasonable steps to prevent her husband's deviant and unlawful behavior.¹³⁶ Justice Stevens concluded

Justice Stevens commenced the analysis by pointing out that leading forfeiture case law involved some mode of transportation. *See Bennis*, 116 S. Ct. at 1006 (Stevens, J., dissenting). *See, e.g., Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 665-66 (1974) (discussing the forfeiture of a yacht used to transport controlled substances); *Van Oster v. Kansas*, 272 U.S. 465, 465-66 (1926) (forfeiting automobile under a state statute that made the transportation of liquor illegal); *Carroll v. United States*, 267 U.S. 132, 134 (1925) (addressing the forfeiture of an automobile illegally used to transport whiskey and gin). The Justice then pointed out that the Bennis automobile was not a necessary element in the commission of a crime. *See Bennis*, 116 S. Ct. at 1006 (Stevens, J., dissenting). The dissent opined that Mr. Bennis's "forbidden trysts" could have occurred in a multitude of locations other than in the 1977 Pontiac. *See id.* at 1005, 1006 (Stevens, J., dissenting).

¹³⁴ *See Bennis*, 116 S. Ct. at 1007 (Stevens, J., dissenting). The Justice stressed Mrs. Bennis's innocence of any crime committed by her husband and therefore found that she should not be held responsible for his illicit conduct. *See id.* The dissent posited that the precedent relied on by the majority was interpreted by the Court three terms earlier in *Austin*. *See id.* (citing *Austin v. United States*, 509 U.S. 602, 615 (1993)). Unlike the *Bennis* majority, Justice Stevens commented that the *Austin* Court held that the idea of punishing property for its own guilt stems from the existence of some negligence on the part of the property's owner. *See id.* (citing *Austin*, 509 U.S. at 615). Applying this rationale, Justice Stevens declared the forfeiture in *Bennis* unconstitutional because Mrs. Bennis did not act negligently when she entrusted the car to her husband. *See id.*

¹³⁵ *See id.* at 1007-08 (Stevens, J., dissenting) (citing *Calero-Toledo*, 416 U.S. at 688-90). Justice Stevens applied the second *Calero-Toledo* exception, which provides that an owner cannot be punished if she proves that she took all reasonable steps to prevent the illegal use of her property. *See id.* at 1008 (Stevens, J., dissenting).

Additionally, the Justice implied that the first instance of the *Calero-Toledo* defense may also apply to the circumstances surrounding the illegal use of the Bennis automobile. *See id.* This exception protects innocent owners "whose property . . . had been taken from [them] without [their] privity or consent." *Calero-Toledo*, 416 U.S. at 689. Justice Stevens posited that Mrs. Bennis "is just as blameless as if a thief, rather than her husband, had used the car in a criminal episode." *Bennis*, 116 S. Ct. at 1008 (Stevens, J., dissenting); *see also Peisch v. Ware*, 8 U.S. (4 Cranch) 347, 364 (1808) (commenting that stolen property is not subject to forfeiture if it is subsequently used in the commission of an illegal act).

¹³⁶ *See Bennis*, 116 S. Ct. at 1008 (Stevens, J., dissenting). The dissent further contended: "There is no reason to think that the threat of forfeiture will deter an individual from buying a car with her husband—or from marrying him in the first place—if she neither knows nor has reason to know that he plans to use it wrongfully." *Id.* at 1009 (Stevens, J., dissenting).

that, even though this case did not present an opportunity to differentiate between permissible and impermissible forfeitures, the "blatant unfairness" of the 1977 Pontiac forfeiture demonstrated the unconstitutionality of the Michigan statutory scheme.¹³⁷

Justice Kennedy filed a separate dissenting opinion in which the Justice acknowledged the well-recognized legal tradition of admiralty forfeiture.¹³⁸ The Justice also noted, however, that the admiralty tradition does not provide an absolute justification for the modern forfeiture of an innocent owner's vessel.¹³⁹ Furthermore, forfeiture of the property interest in this case, the dissent concluded, would be a violation of due process because Mrs. Bennis acted neither negligently nor compliantly as to her husband's illegal action.¹⁴⁰

In accord with Justice Stevens's dissent, many commentators have posited that the Supreme Court should have reversed the Michigan Supreme Court on the grounds of fundamental fairness.¹⁴¹ The critics point out that Tina Bennis should not be forced to endure forfeiture of her property interest on account of her husband's need to fulfill his deviant sexual desires in the front seat of their jointly owned car. Further, supporters of Tina Bennis ask: should she lose both her husband's fidelity and her 1977 Pontiac? Chief Justice Rehnquist seemed to think so, and for some very good reasons. Nonetheless, did the *Bennis* majority ignore fairness considerations when upholding Michigan's forfeiture of Tina's property?

At first blush, *Bennis* seems to epitomize inequity and legal irrationality. Upon further analysis, however, it becomes evident that the holding rests on long-established precedential and public policy grounds. Despite the Chief Justice's sugar-coating of the case, the bitter taste of unfairness remains.

¹³⁷ See *id.* at 1010 (Stevens, J., dissenting).

¹³⁸ See *id.* (Kennedy, J., dissenting); see also Boudreaux & Pritchard, *supra* note 62, at 622 (discussing the application of in rem forfeiture in admiralty cases). Justice Kennedy reiterated that the guilt or innocence of an owner was not a factor in the forfeiture of a vessel used for illicit purposes. See *Bennis*, 116 S. Ct. at 1010 (Kennedy, J., dissenting) (citing *United States v. Brig Malek Adhel*, 43 U.S. (2 How.) 210 (1844)).

¹³⁹ See *Bennis*, 116 S. Ct. at 1010-11 (Kennedy, J., dissenting). Justice Kennedy agreed with Justice Stevens that the two *Calero-Toledo* exceptions work to negate the unequivocal forfeiture tradition founded in admiralty and maritime law. See *id.* at 1011 (Kennedy, J., dissenting) (citing *Calero-Toledo*, 416 U.S. at 688-90). The Kennedy dissent expanded on this line of legal reasoning and argued that admiralty precedent can remain intact without extending its application to the *Bennis* automobile. See *id.*

¹⁴⁰ See *id.*

¹⁴¹ See Deborah Jones Merritt, *Supreme Court 1995-96 Year in Review: Forfeiture and Real Feminism*, N.J. L.J., Aug. 26, 1996, at 850 (stating that the press has criticized the Court for not compensating Tina Bennis for her half interest in the 1977 Pontiac).

The omission of the innocent owner defense from civil forfeiture tradition has been documented throughout United States jurisprudence.¹⁴² As the Chief Justice correctly noted, well-grounded precedent mandated that Tina Bennis be precluded from using her innocence to defeat the forfeiture of her automobile.¹⁴³

Notions of public policy also buttress the legal reasoning of the *Bennis* holding. First and foremost, goals of crime prevention are supported by forcing an innocent owner to keep a careful eye on who is using her property.¹⁴⁴ Second, precluding the innocent owner defense relieves the government of the burden of proving collusion in scenarios where the alleged innocent owner may have had knowledge of or consented to the illegal use.¹⁴⁵ Third, public policy would be better served if the judicial branch refrained from defining the parameters of the innocent owner defense.

In the realm of promoting the goals of public policy, forfeiture can also act as a powerful deterrent to criminal activity. With economic and other punitive repercussions, criminals soon realize that probable forfeiture of their property makes prosecution a high price to pay for illegal activity.¹⁴⁶ Commentators point to the argument that offering an innocent owner defense would not seemingly disturb the goal of deterrence.¹⁴⁷ This argument fails to recognize that criminals will avoid forfeiting their property merely by using the property of others in the commission of illegal activities.¹⁴⁸

An “eternal struggle [] exists between the avarice, enterprize and combinations of individuals on the one hand, and the power charged with the administration of the laws on the other, severe laws are rendered necessary to enable the executive to carry into effect the measures of policy adopted by the legislature.”¹⁴⁹ In the face of the public policy and precedential justifications provided by the *Bennis* majority, the “severe laws” of forfeiture remain inherently inequitable to innocent owners such as Tina Bennis.

Indeed, perhaps it is best to heed the advice of Justice Thomas and spur legislators to overrule expressly the preclusion of the innocent owner

¹⁴² See *supra* notes 52-88 and accompanying text.

¹⁴³ See *Bennis*, 116 S. Ct. at 1001.

¹⁴⁴ See *id.* at 1000-01.

¹⁴⁵ See Merritt, *supra* note 141, at 850 (discussing public policy arguments supporting the *Bennis* majority).

¹⁴⁶ See *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 687 (1974) (noting that forfeiture of property used in illegal activities imposed upon the criminal an economic penalty that renders the illegal behavior unprofitable); Cerna, *supra* note 111, at 1956 (describing criminals as economic risk-takers).

¹⁴⁷ See Merritt, *supra* note 141, at 850.

¹⁴⁸ See *id.* (“If the state cannot enforce forfeiture against innocent owners, then criminals who rent, finance, or borrow their vehicles will suffer less than wrongdoers who pay cash for their cars.”).

¹⁴⁹ *United States v. 1960 Bags of Coffee*, 12 U.S. (8 Cranch) 398, 405 (1814).

defense and promulgate statutes that will better preserve the property interests of innocent parties.¹⁵⁰ It would be a futile attempt at judicial legislation if the judicial branch was given the responsibility of defining the parameters of such a defense. To Tina Bennis's dismay, the law as it currently stands forces innocent owners to guard against the unexpected and, in some unfortunate cases, to remain the victim of outdated common law rules.

Joseph G. Calella

¹⁵⁰ See *Bennis v. Michigan*, 116 S. Ct. 994, 1003 (1996) (Thomas, J., concurring) (noting that the Constitution assigns the role of protector of hapless innocent owners to the political branches of the federal government and the state governments).