Innocents Beware: Has *Bennis v. Michigan* Made Asset Forfeiture Too Easy?

"The better the society, the less law there will be. In Heaven there will be no law, and the lion will lie down with the lamb. The values of an unjust society will reflect themselves in an unjust law. The worse the society, the more law there will be. In Hell there will be nothing but law, and due process will be meticulously observed."

I. INTRODUCTION

The War on Crime is claiming more victims. This time, the victims are the owners of property who are unlucky enough to have had their property used in the commission of the crime. This victimization occurs because asset forfeiture, a weapon that has long been in the government's crime-fighting arsenal, has become increasingly popular with both law enforcement agencies and legislatures. Historically, the use of asset forfeiture has been limited to areas vital enough to justify its harshness. More recently, however, asset forfeiture has been used to deter and punish crimes much different from its historical analogs. This use is an attack on the rights of property owners that freedom-loving Americans should not ignore.

Asset forfeiture is a legal concept that finds its roots in the Bible. The idea can be traced through English common law. The United States has accepted it as an appropriate method of dealing with smugglers, pirates, and evaders of revenue laws. Recently, it has been used in an attempt to stem the traffic in illicit drugs and reduce the occurrence of other intractable crimes. The advantages of appeal, its relative ease, and the revenue that forfeiture makes available have made it quite popular with law enforcement agencies.

3. *Id. at 44-45.
5. *In civil forfeiture cases, the government has the right to appeal an “acquittal,” an advantage that simply does not exist in criminal cases. Id. at 12-63.*
6. *Levy, supra note 2, at 1.*
This casenote will discuss the roots of asset forfeiture. Section II of this note discusses the historical justifications of asset forfeiture as well as its more recent uses. Section III is divided into two parts. Section IIIA will provide the factual background of Bennis v. Michigan,7 and Section IIIB will discuss the procedural history of the case. Section IV is divided into a three-part analysis. Section IVA will trace the reasoning of the majority opinion to its conclusion. Section IVB is this author’s analysis of the strength and weaknesses of the opinion. It will demonstrate how the Supreme Court’s decision in Bennis has severed asset forfeiture from its historical underpinnings and will allow for it to be used in ways that violate the Constitutional safeguards of due process. Section IVC argues that the practical impact of the Supreme Court’s Bennis decision will be a further erosion of civil liberties as overzealous law enforcement officers attempt to seize property.

II. HISTORY

Asset forfeiture has a venerable history and has taken many forms. It has been used in criminal and civil proceedings for deterrent, remedial and punitive reasons. Since the various permutations of asset forfeiture have different purposes and justifications, any discussion of asset forfeiture should be narrowly focused. The scope of this historical background will be limited to the concept of civil asset forfeiture.8

Civil forfeiture is a proceeding in rem.9 Since in an in rem proceeding, the property is the defendant, courts have officially considered the guilt or innocence of the property’s owner to be irrelevant.10 Unofficially,
however, the courts viewed the owner as being culpable\textsuperscript{11} or the forfeiture as otherwise necessary.\textsuperscript{12} Admiralty treated property as the offender because the admiralty courts viewed an \textit{in rem} proceeding as the only effective method of stopping smuggling or piracy.\textsuperscript{13} The courts were also willing to indulge the legislative tendency to employ forfeiture to enforce the revenue laws.\textsuperscript{14}

One of the first Supreme Court cases to recognize the injustice of punishing an innocent owner was \textit{United States v. 1960 Bags of Coffee}.\textsuperscript{15} The case involved the illegal importation of coffee.\textsuperscript{16} After the commission of the offense, but prior to its seizure, the coffee was sold to a bona fide purchaser.\textsuperscript{17} The Court faced the dilemma of determining when title of forfeited property vested in the Sovereign. If title vested at the moment of the illegal act, injustice to innocent parties might result. But if title vested only upon actual seizure, the intent of the law might be circumvented by an interim transfer of title to another party. In a one-page majority opinion, the Court upheld the forfeiture based on statutory interpretation.\textsuperscript{18} The dissent, however, vigorously protested.\textsuperscript{19} The dissent stated that basic notions of fairness required that "fictions of law shall not be permitted to be eaten." See \textit{United States v. Sandini}, 816 F.2d 869, 872 (3d Cir. 1987) (quoting Exodus 21:28) (excellent discussion of the foundations of \textit{in rem} forfeiture proceedings).

\textsuperscript{11} "As Blackstone put it, 'such misfortunes are in part owing to the negligence of the owner, and therefore he is properly punished by such forfeiture.'" Austin v. United States, 509 U.S. 602, 611 (1993) (quoting I \textit{BLACKSTONE'S COMMENTARIES} 291 (Dawsons of Pall Mall 1966) (Oxford, Clarendon Press 1765)).

\textsuperscript{12} Harmony v. United States, 43 U.S. (2 How.) 210, 233 (1844) ("And this is done from the necessity of the case.").

\textsuperscript{13} "It is not an uncommon course in the admiralty, . . . to treat the vessel . . . as the offender, without any regard whatsoever to the personal misconduct or responsibility of the owner thereof. And this is done from the necessity of the case, as the only adequate means of suppressing the offence or wrong . . . ." \textit{Id}.

\textsuperscript{14} "Forfeitures in rem which the legislature has provided to guard the revenue laws from abuse." \textit{United States v. 1960 Bags of Coffee}, 12 U.S. (8 Cranch) 398, 406 (1814) (Story, J. dissenting).

\textsuperscript{15} 12 U.S. (8 Cranch) 398 (1814).

\textsuperscript{16} \textit{Id}.

\textsuperscript{17} \textit{Id.} at 401.

\textsuperscript{18} \textit{Id.} at 404. Perhaps, this case is more important for its discussion of the "relation back" doctrine. This concept vests the title of the illegally used property in the sovereign at the moment of its illegal use. The Court recognized the harshness of the doctrine, but found it necessary lest "if by a sale it is put in the power of an offender to purge a forfeiture, a state of things not less absurd will certainly result from it." \textit{Id.} at 405.

\textsuperscript{19} \textit{Id.} (Story, J., dissenting) (joined by two other Justices) ("[T]he discussion in this Court has not increased my confidence").
work any wrong"\textsuperscript{20} and that very little reliance should be "placed upon analogies borrowed from the feudal tenures . . . ."\textsuperscript{21} Although recognizing the dilemmas posed by its position, the dissent stated that it would have refused to reinstate the forfeiture.\textsuperscript{22}

In \textit{The Palmyra},\textsuperscript{23} the Court more directly confronted the issue of an innocent owner. \textit{The Palmyra}, a Spanish flagged vessel, attacked two American ships and was eventually captured by a United States war ship.\textsuperscript{24} The vessel was then seized under the authority of The Piracy Act of 1891.\textsuperscript{25} The owner objected on the grounds that at common law "no rights to the goods and chattels of the felon could be acquired by the crown by the mere commission of the offence, but rather that the right attached only by the conviction of the offender."\textsuperscript{26} The Court rejected the owner's argument that the vessel could not be forfeited until he was convicted of privateering.\textsuperscript{27} The Court rested its decision on the distinction between criminal and civil forfeiture.\textsuperscript{28} It held that in admiralty, as well as on the revenue side of the Exchequer, a conviction of the property owner was not necessary because "[t]he thing here is primarily considered as the offender . . . ."\textsuperscript{29}

\begin{itemize}
\item[20.] \textit{Id.} at 415 (Story, J., dissenting).
\item[21.] \textit{Id.} at 413 (Story, J., dissenting).
\item[22.] The dissent recognized the right of the United States to engage in forfeiture and that forfeiture attached to a thing. However, it viewed the government as only possessing inchoate title. "That against the offender or his representatives, upon seizure or suit, the title, by operation of law, relates back to the time of the offence, so as to avoid all mesne acts; but as to a bona fide purchaser, for valuable consideration, and without notice of the offence, the doctrine of relation does not apply so as to divest his legitimate title." \textit{1960 Bags of Coffee}, 12 U.S. (8 Cranch) at 416 (Story, J., dissenting).
\item[23.] 25 U.S. (12 Wheat.) 1 (1827).
\item[24.] \textit{Id.} at 2.
\item[25.] \textit{Id.}
\item[26.] \textit{Id.} at 14.
\item[28.] \textit{Id.} at 14.
\item[29.] The Court was extremely careful to note the difference between forfeitures used as punishment and those forfeitures allowed under the revenue and admiralty laws. "In the contemplation of the common law, the offender's right was not divested, until the conviction. But this doctrine never was applied to seizures and forfeitures created by statute, in rem, cognisable on the revenue side of the exchequer . . . . The same principle applies to proceedings in rem, on seizures in the Admiralty." \textit{Id.} Later in the opinion, the Court more directly indicates that civil forfeitures should be limited to cases involving admiralty and revenue laws. "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." \textit{Id.} at 15 (emphasis added).
\end{itemize}
Nearly twenty years later the Court reiterated *The Palmyra* holding in *Harmony v. United States.* This case also involved piracy on the high seas, but the prosecution stipulated as to the innocence of the vessel's owners. The owners of the Brig Malek Adhel had authorized "an innocent commercial voyage." During the voyage, however, the commander and crew engaged in acts of aggression and piracy against other vessels. Based on the allegations of piracy, the ship was seized. Despite the innocence of the owners the Court upheld the forfeiture, but stressed that it viewed it as a necessity in admiralty cases. The Court also repeated that this doctrine was applicable "to cases of smuggling and other misconduct under our revenue laws." In an interesting piece of dictum, the Court stated that the harsh penalty of forfeiture should only be applied to gross violations of the admiralty laws and that "the infliction of any forfeiture beyond this does not seem to be pressed by any considerations derived from public law."

This notion of allowing forfeiture of property involved in the violation of admiralty or revenue laws, regardless of the innocence or guilt of the owner, was repeated through the turn of the century. Forfeiture for violation of prohibition era liquor laws was also allowed when it involved smuggling and violation of revenue laws. The principles justifying these holdings were expressly stated in *J.W. Goldsmith, Jr.-Grant Co. v. United States.* The *Goldsmith* Court was faced with the task of deciding whether a seller's interest in a car could be forfeited based on the purchaser's use of the car to smuggle bootleg liquor in violation of the applicable revenue statutes.

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30. 43 U.S. (2 How.) 210 (1844). Some sources also refer to this case as *Brig Malek Adhel v. United States.*
31. Id. at 211.
32. Id. at 230.
33. Id. at 232.
34. *Harmony,* 43 U.S. at 211.
35. "And this is done from the necessity of the case, as the only adequate means of suppressing the offence or wrong, or insuring an indemnity to the injured party." Id. at 233.
36. Id.
37. Id. at 236.
38. E.g., United States v. Stowell, 133 U.S. 1 (1890).
39. "It has long been settled that statutory forfeitures of property entrusted by the innocent owner or lienor to another who uses it in violation of the revenue laws of the United States is not a violation of the Due Process Clause of the Fifth Amendment." Van Oster v. Kansas, 272 U.S. 465, 468 (1926) (emphasis added).
40. 254 U.S. 505 (1921).
41. Id. at 508 (seller's interest in this case is the lien used as security for the car loan).
The Grant Company, an automobile dealer, had sold the car, but was retaining title until the purchase price was paid in full. Subsequently, the buyer of the car used it in violation of the revenue laws. The case went to the jury on the stipulated fact that the vehicle was illegally used without the knowledge of the Grant Company. The car was found guilty and a judgment of forfeiture was entered against it. On appeal, the Supreme Court upheld the forfeiture of the innocent seller’s interest, but expressly reserved the question of whether forfeiture could extend to “property stolen from the owner or otherwise taken from him without his privity or consent.” The Court reasoned that those property owners who voluntarily surrendered their property to a wrongdoer were guilty of some amount of negligence and deservedly punished. Interestingly, despite the fact that the case involved a violation of the revenue laws and the weight of precedent supporting its position, the Court felt it necessary to justify its holding.

In the modern era, Congress has utilized forfeiture as a weapon in the War on Drugs. In 1970, Congress enacted the Comprehensive Drug Abuse Prevention and Control Act, which is codified as part of the Controlled Substances Act for the seizure of drug-related assets. State enactment of comparable statutes soon followed.

The validity of one such statute was questioned in Calero-Toledo v. Pearson Yacht Leasing Co. The statute in question, “P.R. Laws Ann., Tit. 24, section 2512(a) (Supp. 1973), [was] modeled after 21 U.S.C. section 881(a).” This statute, however, did not also include an innocent owner

42. Id. at 509.
43. Id.
44. Id.
45. Id.
46. Goldsmith, 254 U.S. at 509.
47. Id. at 512.
48. Id. at 511.
49. “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.” Id. at 510 (emphasis added).
53. Id. at 686-87 n.25.
defense. The *Calero-Toledo* case involved the seizure of a yacht from a leasing company. The lessees of the yacht were caught with marijuana on board and charged with violation of the Controlled Substances Act of Puerto Rico and the yacht was seized. The owners first learned of the seizure when they attempted to repossess the yacht.

The Court upheld the forfeiture and the applicable Puerto Rican statutes by likening the situation to smuggling. The majority reasoned that "[t]o 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." The Court, however, acknowledged that in other circumstances a forfeiture of this type could "give rise to serious constitutional questions." The Court in *Austin v. United States* found one of these serious constitutional questions to be whether the Excessive Fines Clause of the Eighth Amendment could serve as a limit to *in rem* civil forfeiture proceedings. The Court answered the question in the affirmative.

* Austin involved the forfeiture of the criminal defendant's home and auto body shop. The defendant had pled guilty to one count of possessing

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54. Id. at 694.
55. Id. at 663.
57. Id. at 668.
58. "Plainly, the Puerto Rican forfeiture statutes further the punitive and deterrent purposes that have been found sufficient to uphold, against constitutional challenge, the application of other forfeiture statutes to the property of innocents." Id. at 686.
59. Id. at 687-688.
60. "[T]he broad sweep of forfeiture statutes . . . [could], in other circumstances, give rise to serious constitutional questions." *Calero-Toledo*, 416 U.S. at 689.
63. Id. at 604. The government seized both pieces of property because both pieces were "involved" in the drug transaction. The purchaser of the drugs met Austin at his body shop, where they finalized the details of the transaction. Austin then retrieved the illegal drugs from his mobile home and returned to his body shop, where the transaction was consumated. Id. at 605.
cocaine with the intent to distribute. The United States then filed an *in rem* action against the defendant’s home and auto body shop. The government justified this action because Austin, the defendant, had brought the cocaine from his home to the body shop in order to sell it. According to the government, this constituted “use” of those properties to facilitate a drug-related crime. The Court accepted Austin’s contention that civil forfeitures are subject to the Excessive Fines Clause. The Court reasoned that some provisions of the Bill of Rights were expressly limited to criminal cases. The Eighth Amendment, however, does not expressly contain such a limitation. Also, the Court found that the history of the Eighth Amendment does not support the conclusion that such a limitation should be read into the Amendment. Therefore, the Court refused to hold that the Eighth Amendment’s application was limited to only criminal cases.

Since the defendant argued only that the forfeiture would violate the Eighth Amendment and the statute involved had an “innocent owner” defense, the Court did not need to decide the issue of forfeiture regarding “innocent owners.” The Court, however, recognized that its precedent in the area of forfeiture was justified in each case on the notion that the individual owner was somehow culpable.

Austin seemed to indicate a willingness on the part of the Court to question the vitality of civil forfeiture proceedings. The Court strengthened this implication just months later in *United States v. James Daniel Good*

64. *Id.* at 602.
65. *Id.* The United States made a motion for summary judgment. Austin’s answer included his Eighth Amendment claim, but the District Court rejected this argument and granted summary judgment for the United States. *Id.* at 605.
66. *Austin,* 509 U.S. at 602.
67. *Id.*
68. *Id.* at 622.
69. *Id.* at 607-08. The Court reasoned that when the framers of the Constitution wished to limit the application of a certain right, they did so by express language. The Court specifically mentioned the Fifth Amendment’s Self-Incrimination Clause: “No person . . . shall be compelled in any *criminal case* to be a witness against himself,” and noted that the protections of the Sixth Amendment are expressly limited to “criminal prosecutions.” *Id.* (emphasis added).
70. *Austin,* 509 U.S. at 608.
71. *Id.*
72. *Id.* at 617. “Because the forfeiture provisions at issue here exempt ‘innocent owners,’ we again have no occasion to decide in this case whether it would comport with due process to forfeit the property of a truly innocent owner.” *Id.* at 617 n.10.
73. “Both theories rest, at bottom, on the notion that the owner has been negligent in allowing his property to be misused and that he is properly punished for that negligence.” *Id.* at 615. Accord Peisch v. Ware, 2 L. Ed. 347 (1808).
In James Daniel Good, the defendant pled guilty to drug charges. Four and one half years later, the United States seized the defendant’s house “on the ground that the property had been used to commit or facilitate the commission of a federal drug offense.” The government seized the home without any prior notice to its owner. The defendant objected on the ground that he was not afforded the due process guaranteed by the Fifth Amendment. The Court agreed and held that due process required a meaningful opportunity to be heard prior to seizure.

While the holding in James Daniel Good makes the forfeiture process only slightly more difficult for the government, the Court’s opinion is important in other respects. First, the Court noted that it had rationalized its precedent in the forfeiture arena on a finding of urgency. Second, admitting that the rules regulating forfeiture proceedings had their origins in admiralty cases, the Court re-evaluated their necessity and application in modern times. Even the dissent admitted that in a proper case re-evaluation of civil forfeiture might be proper.

75. Id. at 495.
76. Id. at 497. The government’s argument that this property was “involved” in a drug offense seems a bit stronger than this same argument in Austin. At the time of their search, Hawaiian police officers discovered about 89 pounds of marijuana hidden in Good’s home. Id.
77. Id. at 498. To many observers, this case signaled a sea change in the Court’s attitude towards forfeiture because, ironically, it seems to be relatively free of any abusive government action. Austin, at the time of the seizure, was renting his home to tenants. The government did not evict the tenants, but rather allowed them to continue occupying the premises provided they paid their rent directly to the United States Marshal. Id.
79. The Court noted that pre-notice seizures were justifiable only to preserve the Court’s jurisdiction. The Court reasoned that prior notice was especially appropriate in the case of real property “[b]ecause real property cannot abscond, the court’s jurisdiction can be preserved without prior seizure.” Id. at 503.
80. “Without revisiting these cases, it suffices to say that their apparent rationale — like that for allowing summary seizures during wartime, and seizures of contaminated food — was one of executive urgency.” Id. at 504 (citations omitted). The Court explained that since by 1902, nearly 75 percent of federal revenues were based on liquor, customs, and tobacco taxes “the very existence of government depends upon prompt collection of revenues.” Id. (quoting G.M. Leasing Corp. v. United States, 429 U.S. 338, 352 n.18 (1977)).
82. Id. (finding that while there were valid reasons for denying pre-seizure hearings in admiralty, the Court could not find any justifiable reasons in the instant case).
83. Id. at 515 (Thomas, J., concurring in part and dissenting in part) (“Given that current practice under [federal forfeiture statutes] appears to be far removed from the legal fiction upon which the civil forfeiture doctrine is based, it may be necessary — in an
Just three years later, the Supreme Court took the opportunity to decide *Bennis v. Michigan*, a case that required the Court to directly confront the issue of an innocent owner’s property being forfeited. In addition, in the *Bennis* case, the urgencies of the admiralty setting arguably did not exist.

III. HISTORY OF *BENNIS V. MICHIGAN*84

A. CASE FACTS

The arrest of John Bennis, the husband of the petitioner, is the starting point for this case. Prior to Bennis’s arrest, Detroit police officers had set up a surveillance of a woman they believed to be a prostitute.85 Eventually, the officers witnessed a 1977 Pontiac stop and pick up this woman.86 The officers monitored this vehicle until they noticed that the woman’s head had disappeared.87 As the officers approached the vehicle they observed the woman performing fellatio on the car’s driver.88

The driver of the car, John Bennis, was charged and convicted of gross indecency.89 Following this conviction, the prosecutor initiated abatement proceedings against the Bennis vehicle alleging it was a public nuisance.90 The trial judge agreed and abated the vehicle.91

The vehicle, a 1977 Pontiac, was jointly owned by John Bennis and his wife Tina.92 Tina Bennis claimed that she had no knowledge that her husband would use the vehicle to violate the applicable statute.93 Ironically, Mrs. Bennis was so concerned about her husband’s tardiness on the night of the incident that she called the police to report him missing.94

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85. Michigan *ex rel.* Wayne County Prosecutor v. Bennis, 527 N.W.2d 483, 486 (Mich. 1994). The officers had noticed the woman “flagging,” i.e., attempting to solicit business from passing cars. Id.
86. Id.
87. Id.
88. Id.
90. Id.
91. Id.
93. Bennis, 527 N.W.2d at 486. (The Michigan Court of Appeals held that the record did not support a finding that Mrs. Bennis knew the vehicle was being used in an illegal manner.) 504 N.W.2d at 732.
94. Bennis, 116 S. Ct. at 1008.
B. PROCEDURAL HISTORY

After John Bennis's conviction for gross indecency, the Circuit Court of Wayne County, Michigan instituted proceedings to abate the Bennis's vehicle as a nuisance pursuant to the applicable Michigan statute.\textsuperscript{95} The Michigan Court of Appeals reversed the abatement on several grounds: first, the prosecution was obligated to demonstrate that Mrs. Bennis knew of the use of the vehicle as a nuisance;\textsuperscript{96} second, the very nature of a nuisance is that it is a repetitive act and the prosecution had failed to prove that the vehicle was involved in more than one incident of lewdness;\textsuperscript{97} and third, the applicable statute is confined to acts of prostitution and absent proof of an exchange of money, his conduct was not lewd in the statutory sense.\textsuperscript{98}

The Supreme Court of Michigan reversed on all three grounds. On the proof of knowledge issue, the court held that its earlier common law requirement of knowledge had been abrogated by statute.\textsuperscript{99} Regarding the failure to allege more than a single instance of lewdness, the court reasoned that the statute referred to the vehicle and the neighborhood combined. The neighborhood was notorious for prostitution and the Bennis's vehicle was "thereby contribut[ing] to an existing condition that is a public nuisance."\textsuperscript{100} The court also held that in the totality of the circumstances, an act of prostitution did occur and the conduct alleged was squarely within the purview of the statute.\textsuperscript{101} The court assumed the innocence of the petitioner,\textsuperscript{102} but concluded that United States Supreme Court precedent did not require an innocent owner defense\textsuperscript{103} and that the issue was "without constitutional consequence."\textsuperscript{104}

\begin{itemize}
  \item \textsuperscript{95} Bennis, 504 N.W.2d at 732. The applicable statute states: "Any building, vehicle, boat, aircraft or place used for the purpose of lewdness, assignation, or prostitution . . . is hereby declared a nuisance and . . . shall be enjoined and abated." \textsc{Mich. Comp. Laws} § 600.3801 (West 1987 & Supp. 1996).
  \item \textsuperscript{96} Bennis, 504 N.W.2d at 732.
  \item \textsuperscript{97} Id. at 733.
  \item \textsuperscript{98} Id. at 735.
  \item \textsuperscript{99} Michigan ex rel. Wayne County Prosecutor v. Bennis, 527 N.W.2d 483, 493 (Mich. 1994). The court referred to M.C.L. § 600.3815(2) which states: "Proof of knowledge of the existence of the nuisance on the part of the defendants or any of them, shall not be required." \textsc{Mich. Comp. Laws} § 600.3815(2) (West 1987).
  \item \textsuperscript{100} Bennis, 527 N.W.2d at 491.
  \item \textsuperscript{101} Id.
  \item \textsuperscript{102} Id. at 493.
  \item \textsuperscript{103} Id. at 495.
  \item \textsuperscript{104} Bennis, 527 N.W.2d at 494 (citing Van Oster v. Kansas, 272 U.S. 465 (1926); Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974)).
\end{itemize}
From a constitutional viewpoint, the failure to require knowledge was troubling and the United States Supreme Court granted certiorari. 105

IV. ANALYSIS

A. THE SUPREME COURT DECISION

Chief Justice Rehnquist began the 5-4 majority opinion by stating that a "long and unbroken line of cases holds that an owner's interest in property may be forfeited by reason of the use to which the property is put even though the owner did not know that it was to be put to such use." 106 The Court noted that in its earliest opinion on this issue it held that, in admiralty, conviction of the owner was not necessary to subject the property to forfeiture because the "offence is attached primarily to the thing." 107 The Court emphasized this point by citing another admiralty case which held that where a ship is in violation of statute, the owner's interest in the ship is subject to forfeiture regardless of whether the owner is innocent. 108

The Court also cited two cases where property was forfeited for violation of the revenue laws. The Court repeated the holding of Dobbin's Distillery v. United States. 109 The Dobbin's Court stated that where an owner entrusts possession of his property to another, the acts of the possessor will bind the property (and its owner) and subject the property to forfeiture regardless of whether the property's owner was a party to any wrongdoing. 110 The Court then attempted to justify this apparent harshness. The Court emphasized it is not "uncommon for the law to visit upon the owner of property the unpleasant consequences of the unauthorized action [because] certain uses of property may be regarded as so undesirable that the owner surrenders his control at his peril." 111 The Court remarked that even as early as 1921, the Court concluded that forfeiture schemes that disregarded the innocence of the owner were "too firmly fixed in the

107. Id. (quoting The Palmyra, 25 U.S. (12 Wheat.) 1, 14 (1827)).
108. "[T]he interest of the owner of the ship, whether he be innocent or guilty is [subject to forfeiture]." Id. (quoting Harmony v. United States, 43 U.S. (2 How.) 210, 233 (1844)).
110. "Cases often arise where the property of the owner is forfeited on account of the . . . misconduct of those intrusted with its possession, . . . and it has always been held . . . that the acts of [the possessors] bind the interest of the owner . . . whether he be innocent or guilty." Bennis, 116 S. Ct. at 998 (quoting Dobbin's Distillery, 96 U.S. at 401).
111. Id. (quoting Van Oster v. Kansas, 272 U.S. 465, 467 (1926)).
punitive and remedial jurisprudence of the country to be now dis-
placed.”\footnote{112}

The Court also noted that in its most recent decision on point, \textit{Calero-
Toledo v. Pearson Yacht Leasing Co.},\footnote{113} it had rejected the innocent
owner defense.\footnote{114} The Court stated that the petitioner’s reliance on
\textit{Calero-Toledo} was misplaced because the language favorable to the
petitioner’s cause was dictum.\footnote{115} The Court stated that the holding of
\textit{Calero-Toledo} was that the owner’s interest in property could be forfeited
despite the owner’s ignorance of and lack of involvement in the criminal
activity.\footnote{116}

The Court went on to reject the dissent’s interpretation of prece-
dent.\footnote{117} The dissent had argued that forfeitures that disregarded the
owner’s innocence were based on cases where the illegal activity had been
the principal use of the property.\footnote{118} The majority rejected this interpreta-
tion stating that “this Court’s precedent has never made the due process
inquiry depend on whether the use for which the instrumentality was
forfeited was the principal use.”\footnote{119} The majority also stated that the
dissent’s \textit{ad absurdem} arguments would be dealt with as they arose.\footnote{120}

The Court then dealt directly with the innocent owner argument raised
by the petitioner. The Court stated that accepting the petitioner’s argument
would amount to overruling its case law in this area by “importing a
culpability requirement from cases having at best a tangential relation to the
‘innocent-owner’ doctrine in forfeiture cases.”\footnote{121} The two cases that the
Court dismissed as only tangentially related were \textit{Foucha v. Louisiana}\footnote{122}
and \textit{Austin v. United States}.\footnote{123}

\footnote{112. \textit{Id.} at 999 (quoting J.W. Goldsmith, Jr.-Grant Co. v. United States, 254 U.S. 505,
511 (1921)).}
\footnote{113. \textit{416 U.S.} 663 (1974).}
\footnote{114. \textit{Bennis,} 116 S. Ct. at 999.}
\footnote{115. \textit{Id.} (The petitioner had relied on the language stating “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.”) \textit{Calero-Toledo}, 416 U.S. at 689.}
\footnote{117. \textit{Bennis,} 116 S. Ct. at 999.}
\footnote{118. \textit{Id.} at 1005.}
\footnote{119. \textit{Id.} at 999-1000.}
\footnote{120. \textit{Id.} at 1000. (The majority refers to the dissent’s suggestion that the majority
holding “would justify the confiscation of an ocean liner because one of its passengers sinned
while on board.” \textit{Bennis}, 116 S. Ct. at 1005 (Stevens, J., dissenting)).}
\footnote{121. \textit{Id.}}
\footnote{122. \textit{504 U.S.} 71 (1992).}
\footnote{123. \textit{509 U.S.} 602 (1993).}
Foucha dealt with detention of criminal defendants found not guilty by reason of insanity. The Court there concluded that the State must possess a punitive interest to justify continued detention.124 The Bennis Court denied Foucha's applicability because "Foucha did not purport to discuss, let alone overrule, The Palmyra line of cases."125

The central holding of Austin was that "forfeiture ... constitutes payment to a sovereign as punishment for some offense and, as such, is subject to the limitations of the Eighth Amendment's Excessive Fine Clause."126 The Court found that Austin was not on point because it did not deal with an innocent owner defense.127

The Court then justified forfeiture on its deterrent aspects.128 The Court stated that forfeiture prevents the "further illicit use of the [property] and . . . render[s] illegal behavior unprofitable."129 Forfeiture also serves to preclude "evasions by dispensing with the necessity of judicial inquiry as to collusion between the wrongdoer and the alleged innocent owner."130

The Court then concluded that Mrs. Bennis had not made a showing greater than any of the Court's earlier cases upholding forfeiture and denied the relief requested.131 Justice Thomas wrote a concurring opinion,132

124. Foucha, 504 U.S. at 80.
125. Bennis, 116 S. Ct. at 1000.
126. Austin, 509 U.S. at 622.
127. Bennis, at 1000.
128. The Court compared the deterrent affect of Michigan's abatement scheme to another Michigan law making an automobile owner liable for any negligent driving committed by anyone who had the owner's permission to drive it. Id.

The Court failed to explain how someone will be deterred by consequences of which they are unaware. The law may be able to presume that an automobile owner can determine whether or not the person to whom they are loaning their car is inebriated. The presumption, however, appears to be much weaker regarding the automobile owner's potential knowledge of prostitution use. It is hard to imagine that many people would loan their car to someone knowing that it was going to be the locus of an illicit rendezvous.

129. Id. (quoting Calero-Toledo, 416 U.S. at 687).
130. Id. at 1000-01 (quoting Van Oster, 272 U.S. at 467-68).
132. Justice Thomas's concurrence suggested that since the "use" of property in a crime was the limit to forfeiture application, "use" should be defined carefully. Justice Thomas also stated that "[i]n this case is ultimately a reminder that the Federal Constitution does not prohibit everything that is intensely undesirable." Id. at 1001-02 (Thomas, J., concurring) (emphasis added).
as did Justice Ginsburg. Both of these opinions firmly supported the reasoning of the majority opinion.

B. DUE PROCESS ANALYSIS OF BENNIS v. MICHIGAN

The Supreme Court, while holding that no violation of the Fourteenth Amendment Due Process Clause occurred, did not engage in any independent due process analysis. The Court analogized the Bennis situation to earlier admiralty and revenue cases. Uncritical acceptance of those analogies leads inexorably to the same conclusion the Court reached. Dispensing with that analogy, however, and conducting a serious analysis of the Bennis facts in light of the Court's earlier Fourteenth Amendment jurisprudence will find that Michigan's abatement scheme seriously violates constitutional safeguards.

The analogy the Court made to its precedents should not be accepted as a substitute for a substantive due process analysis for two reasons. First, analogies to admiralty and revenue precedent are inappropriate because their justifying rationale — that the absence of other means of punishment and deterrence makes the use of asset forfeiture a necessity — is inapplicable where the offender is known and available. Second, the Court laid the foundation for its analogy with precedents that were decided well before the passage of the Fourteenth Amendment and any recognition that it or the Fifth Amendment contained a substantive component.

133. Justice Ginsburg seemed to take a practical view of the matter. Noting that the car in question was only valued at $600 and that the forfeiture proceeding was an equitable action, Justice Ginsburg implied that trial judges could be trusted to police the more egregious forfeitures. Id. at 1003 (Ginsburg, J., concurring).

134. For example, the Court cited The Palmyra, 25 U.S. (12 Wheat.) 1 (1827), an admiralty case, and Van Oster v. Kansas, 272 U.S. 465 (1926), a revenue case.

135. This analysis will be conducted under the premise that a government in a free society will not be permitted to operate in an irrational or unjust manner. The Supreme Court accepts this premise:

It does not at all follow that every statute enacted ostensibly for the promotion of these ends [public health, safety or morals], is to be accepted as a legitimate exertion of the police powers of the State. There are, of necessity, limits beyond which legislation cannot rightfully go . . . . [T]he courts must obey the Constitution rather than the law-making department of government, and must, upon their own responsibility, determine whether, in any particular case, these limits have been passed.


136. The Fourteenth Amendment was ratified in 1868, but it took almost another twenty years for the Court to recognize that it contained substantive protections. The Court made this recognition in 1887:
The ability, indeed the obligation, of the Supreme Court to review the substance of laws was recognized by some of the Court’s earliest justices. Proponents of the natural law philosophy upon which our government was founded contended that arbitrary and irrational acts of government should not be sustained. Substantive due process analysis is one of the doctrinal tools the Court has previously used to invalidate irrational and arbitrary laws.

Substantive due process analysis requires a determination whether the law being challenged is infringing on a fundamental right. If the Court determines that a fundamental right is being abrogated, it strictly scrutinizes the law to ascertain its validity. The Court reviews non-fundamental rights under an extremely deferential “mere rationality” test. In most cases,

The courts are not bound by mere forms, nor are they to be misled by mere pretences. They are at liberty — indeed, are under a solemn duty — to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute . . . is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.

Id. The Court’s recognition of substantive due process safeguards in 1887 explains why a similarly worded Fifth Amendment Due Process Clause did not afford those protections in The Palmyra (decided in 1827), the Harmony (decided in 1844), or 1960 Bags of Coffee (decided in 1814).

Justice Chase argued that natural law and reason prevented a grant of absolute power to the legislature. He stated that people entered into society to protect their rights in their persons and property. Invasions of those rights could not be allowed because they were destructive of society. From this belief Justice Chase reasoned that “[t]here are acts which the Federal, or State Legislature cannot do, without exceeding their authority.” Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798).

Interestingly, most of the irrational acts that aggravated our founders dealt with deprivations of property or the punishment of innocents:

A law that punished a citizen for an innocent action, or, in other words, for an act, which, when done, was in violation of no existing law; a law that destroys or impairs, the lawful private contracts of citizens; a law that makes a man a judge in his own cause; a law that takes property from A. and gives it to B: it is against all reason and justice, for a people to entrust a Legislature with such powers; and therefore, it cannot be presumed that they have done it . . . [The legislature] may command what is right, and prohibit what is wrong; but they cannot change innocence into guilt; or punish innocence as a crime; or violate . . . the right of private property.

Id.

“The nature of the right invaded is pertinent, to be sure, for statutes regulating sensitive areas of liberty do, under the cases of this Court, require ‘strict scrutiny’ and must be viewed in light of less drastic means for achieving the same basic purpose.” Griswold v. Connecticut, 381 U.S. 479, 503-04 (1965) (White, J., concurring).
this determination is vital to the disposition of the case. As one commentator has noted, a decision by the Court to use the “mere rationality” test amounts to “minimal scrutiny in theory and virtually none in fact,” while strict scrutiny amounts to scrutiny that is “strict in theory and fatal in fact.” It is this author’s contention, however, that Michigan’s abatement scheme fails either test.

Strict scrutiny requires that the interest the State is pursuing be a compelling one. The Court also examines the means used to accomplish the State’s objective. If the Court finds that the State could have achieved its objective in a manner less destructive of personal liberties, the law will be found unconstitutional.

The objective of Michigan’s abatement scheme is clearly to deter and reduce prostitution in areas that have been plagued by its commission. It is not denied that the State can legitimately regulate the behavior of its citizens within the constraints of its police powers. This interest can even be elevated to the level of compelling when some of its citizens are so threatened by criminal activities that it impacts the conduct of their daily lives. It can even be conceded that the State of Michigan has a duty to conduct more intensive law enforcement efforts where criminal conduct is more flagrant.

Granting that Michigan has a compelling interest in reducing prostitution in crime ravaged neighborhoods, however, does not necessarily lead to the conclusion that Michigan’s abatement scheme is constitutional. Michigan has other law enforcement tools at its disposal that are potentially just as effective as its current scheme. In cases similar to the Bennis situation, Michigan can choose to punish the guilty party more severely. This could include, if Michigan insists, seizure of any property owned by the


141. Id.

142. “Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling.” Bates v. City of Little Rock, 361 U.S. 516, 524 (1960).

143. This “means” part of the strict scrutiny review is often more difficult for the government to meet. The Court requires that the law “will be upheld only if it is necessary, and not merely rationally related, to the accomplishment of a permissible state policy.” McLaughlin v. Florida, 379 U.S. 184, 196 (1964) (emphasis added) (sometimes courts refer to this requirement as the most narrowly tailored means).

144. Mr. Bennis was apprehended in a residential neighborhood that had a reputation for prostitution and other criminal activity. Michigan ex rel. Wayne County Prosecutor v. Bennis, 527 N.W.2d 483, 488 (Mich. 1994).
offender that was used in the commission of the crime. Michigan could also choose to punish the offender with prison. The existence of these alternatives indicates that the seizure of an innocent person’s property is not vital to the success of Michigan’s anti-prostitution efforts. If reviewed under a strict scrutiny standard, therefore, Michigan’s attempt to reduce prostitution should be held unconstitutional because the means Michigan employs are not necessary to the achievement of its objective.

Assuming, arguendo, that the right to own property is not a fundamental right, Michigan’s abatement scheme still violates the deferential scrutiny given by the “mere rationality” test. This test would only require Michigan to pursue a legitimate governmental objective with means that are rationally related to the achievement of that objective.145

Michigan’s objectives, reduction and deterrence of prostitution, are unarguably within the police powers that it possesses to protect the health, safety, welfare and morality of its citizens. Michigan’s abatement scheme does not fail because its objective is illegitimate, rather it fails because it does not meet the second requirement: rationality. Any policy which tends to encourage or fails to discourage the very acts that the policy condemns is, by definition, irrational. Michigan’s abatement scheme meets this definition.

Currently, Michigan’s penal code makes the solicitation of a prostitute a misdemeanor,146 punishable by a fine of one hundred dollars or ninety days imprisonment or both.147 Michigan does not treat solicitation as a felony until it obtains a third conviction.148 Apparently, it must be difficult to prove that a male has engaged the services of a prostitute or the deterrent effect of a gross indecency charge149 is more effective since Mr. Bennis was charged with gross indecency.150

Since Michigan does not consider the act of sexual intercourse grossly indecent151 the combined effect of these laws allows for results bordering on the absurd. For example, a man borrows his girlfriend’s car, uses the car to engage a prostitute in normal sexual intercourse in the car’s rear seat, and is caught in flagrante delicto by the police. Under Michigan law, if the

146. MICH. COMP. LAWS ANN. § 750.449a (West 1987).
147. § 750.451 (West 1987).
148. § 750.451 (West 1987).
149. Michigan treats gross indecency as a felony and allows for punishments of up to five years of prison or fines up to $2,500. § 750.338b (West 1987).
prostitution charge is proven, the boyfriend can only be fined one hundred dollars and sentenced to ninety days in the county jail since by the nature of the act (normal sexual intercourse), the boyfriend has not committed gross indecency. The girlfriend, however, whose only offense is possession of judgment poor enough to be dating such a scoundrel, can be punished severely by the forfeiture of her car.\textsuperscript{152} In these situations, Michigan’s choice of punishment does not discourage the offense, but makes its commission relatively free of punishment to the offender. This can hardly be considered a rational result if one is sincerely wishing to punish the participants of the illegal act.

Michigan’s use of asset forfeiture to deter and punish prostitution fails strict scrutiny because there are alternatives less destructive of personal property rights. It also fails deferential scrutiny because, as applied, it can lead to the manifest injustice of punishing the innocent, while allowing the guilty to escape with the equivalent of a slap on the wrist.

C. PRACTICAL IMPACT

Many states have had asset forfeiture laws for several years. Since many of these states modeled their forfeiture laws after the federal government’s asset forfeiture law, most include innocent owner defenses and most only apply to drug related offenses. This circumstance should mute the immediate impact of the \textit{Bennis} decision in those states. In states such as Michigan, however, the \textit{Bennis} decision gives the green light to law enforcement officials at all levels to seize first, and ask questions later.

Increased use of forfeiture should worry anyone concerned about civil liberties. One of the most cherished presumptions in the American legal system is the presumption that a person is innocent until proven guilty. Upon a showing of probable cause this presumption is reversed in an \textit{in rem} proceeding, requiring the property owner to prove the property’s [their?] innocence.\textsuperscript{153} This is even more alarming when one realizes that hearsay

\begin{footnotesize}
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\item \textsuperscript{152} The injustice of this becomes even more shocking if the car seized is not the Bennis’s 1977 Pontiac (valued at $600), but, for example, a late model Ford Explorer that could be worth as much as $30,000.
\item \textsuperscript{153} The Second Circuit addressed this issue in 1986:
\begin{quote}
In almost all cases, once the Government has shown probable cause to believe that someone has sold drugs and deposited the proceeds of a drug sale into a bank account, there will be probable cause to believe that the bank account contains “traceable proceeds” of the sale . . . . The burden will then be on the claimant to demonstrate that no portions of the account . . . . are “traceable proceeds” of the drug sale.
\end{quote}
United States v. Banco Cafetero Pan., 797 F.2d 1154, 1160-61 (2nd Cir. 1986).
\end{itemize}
\end{footnotesize}
(e.g., a phone call from an angry neighbor) will support a finding of probable cause.¹⁵⁴

In the long term, we can expect states and local communities to expand the number of illegal activities to which asset forfeiture applies. As these laws are passed there will be no Supreme Court precedent mandating the inclusion of an innocent owner defense. The financial incentive not to include such a defense is unlikely to be overruled by any sense of justice, if Michigan’s attitude is any guide. In fact, barring any state constitutional limits, the *Bennis* decision is likely to entice cash hungry local communities to pass forfeiture laws to fund their law enforcement efforts.¹⁵⁵ One wonders if the Supreme Court will reconsider its decision when forfeiture becomes the punishment of choice for illegally parked cars.

V. CONCLUSION

Asset forfeiture is a law enforcement tool best suited for use in the area from which it emerged. The use of forfeiture in areas outside of its historical boundaries is both unnecessary and dangerous. Law enforcement agencies tend to favor forfeiture because its use is convenient and expedient. Expedience, however, has never been known as the great protector of civil liberties.

The Supreme Court’s decision in *Bennis v. Michigan* failed to acknowledge the reasons why forfeiture emerged in the areas of admiralty and revenue collection. This failure led the Court to improperly analogize those situations to the *Bennis* facts. Had the Court ignored this false analogy and engaged in a substantive due process analysis it would have concluded that forfeiting the property of an innocent owner is unconstitutional.

In an era of tight budgets, many state and local governments will find the revenue enhancing aspects of forfeiture to be quite appealing. The removal of a culpability requirement can only add to its appeal and will likely lead to egregious abuses. The failure of the *Bennis* Court to recognize these dangers and sanction the removal of a culpability requirement will lead to an increased use of forfeiture by law enforcement agencies and an attendant loss of civil liberties.

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¹⁵⁵. One town has personalized the forfeiture incentive. In Helper, Utah, police officers are awarded 10 to 25 percent of the drug properties they seize. The Mayor of Helper explains, “Why not give our guys a reason to be more aggressive?” LEVY, *supra* note 2, at ix.