Nova Law Review

Volume 21, *Issue* 2 1997 *Article* 5

Bennis v. Michigan: Does the Innocent Owner Have a Defense to Civil Forfeiture?

Brooke D. Davis*

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I. INTRODUCTION

On March 4, 1996, the United States Supreme Court handed down its surprising[1] opinion in *Bennis v. Michigan* ("*Bennis III*").[2] The 5-4 opinion,

1. *See, e.g.*, Marcia Coyle, *Critics: Forfeiture Ruling Certain to Spur Reform*, NAT'L L.J., March 18, 1996, at A12 (stating that the decision surprised forfeiture proponents and opponents); Carol McHugh Sanders, *Looking for Drama Among the Shadows*, CHI. DAILY L. BULL., March 18, 1996, at 3 (stating that Justice Ginsburg's majority-making vote was surprising); Robert Reno, *Reno at Large: Victim Sideswiped By Rolling Wreck of Justice System*, NEWSDAY, March 7, 1996, at A49 ("The 5-4 ruling was not the [C]ourt's finest hour."); J. Kelly Strader, *Taking the Winds Out of the Government's Sails?: Forfeitures and Just Compensation*, 23 PEPP. L. REV. 449 (1996) (commenting on the severe restrictions that had been recently imposed upon governmental seizures and forfeitures); Joan Biskupic, *Supreme Court Agrees to Hear Disputes on Seized Automobile; Protection Against Property Forfeitures May Be Widened*, WASH. POST, June 6, 1995, at A6 (pre-decision prediction that the case would "lead to new protection for potentially innocent owners who lose their property

authored by Chief Justice Rehnquist, upheld the forfeiture of property that had been used during the commission of a statutory violation.[3] Additionally, the opinion established that the Constitution affords no protection to an innocent owner of that property.[4]

In *Bennis III*, the Court was presented with the opportunity to clearly establish the guidelines by which the government may seize property that has been used to facilitate a crime.[5] While the Court has rarely disallowed the forfeiture of such property, it has often reserved the question of whether a forfeiture would be upheld in the case of an innocent owner, while indicating an anticipated reluctance to do so.[6] However, when faced in *Bennis III* with

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through forfeiture"); Robert M. Sondak, *Justice to Rule on Forfeiture of Innocent Owner's Property*, 5 NO. 10 MONEY LAUNDERING L. REP. 1, 5 (June 1995) (predicting that the Court was "ready to rule that . . . the Constitution requires some protection for the truly innocent owner of property").

2. 116 S. Ct. 994 (1996) [hereinafter *Bennis III*].

3. Michigan v. Bennis, 504 N.W.2d 731, 732–33 (Mich. Ct. App. 1993), *rev'd*, 527 N.W.2d 483 (Mich. 1994) [hereinafter Bennis I]. Section 600.3801 of the Michigan nuisance statute states in pertinent part: "Any . . . vehicle . . . used for the purpose of lewdness, assignation or prostitution . . . is declared a nuisance, . . . and all . . . nuisances shall be enjoined and abated . . . ." *Bennis III*, 116 S. Ct. at 996 n.2 (citing Mich. Comp. Laws Ann. § 600.3801 (Supp. 1995)).

Section 600.3825 of the Michigan abatement statute states in pertinent part:

> (1) Order of abatement. If the existence of the nuisance is established . . . an order of abatement shall be entered . . . which order shall direct the removal from the building or place of all . . . contents therein and shall direct the sale thereof in the manner provided for the sale of chattels under execution. . . .
> (2) Vehicles, sale. Any vehicle . . . found by the court to be a nuisance within the meaning of this chapter, is subject to the same order and judgment as any . . . contents as herein provided."

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

4. *Bennis III*, 116 S. Ct. at 995–96.

5. Brief for Petitioner at 11, Bennis v. Michigan, 116 S. Ct. 994 (1996) (No. 94-8729) (LEXIS, Genfed, Briefs, "name (Bennis and Michigan)"); Brief of Amicus Curiae United States in Support of Position of Respondent at 7, *Bennis III* (No. 94-8729) (LEXIS, Genfed, Briefs, "name (Bennis and Michigan)") [hereinafter Brief of United States]. Two standards were presented to the Court for adoption for application in future forfeiture cases. Although the Court addressed the standards during oral arguments, it failed to discuss or adopt a standard for application in *Bennis III* or any future cases. Transcript of Oral Argument at 10, 53, *Bennis III* (No. 94-8729), 1995 WL 712350 (Nov, 29, 1995).

6. *See, e.g.*, Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 689–90 (1974) [hereinafter Calero-Toledo] (stating 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"); J. W. Goldsmith, Jr.-Grant Co. v. United States, 254 U.S. 505, 512 (1921) [hereinafter Goldsmith-Grant].

the question of whether the Constitution protects the rights of an innocent owner whose property has, without his or her knowledge or consent, been used in violation of the law, the Court abandoned its reluctance, found that no constitutional protections exist, and declined to establish any guidelines by which to adjudge future forfeiture cases.[7]

Although the Court's decision was sharply divided, producing two concurring opinions[8] and two dissenting opinions,[9] the potential ramifications are great. In *Bennis II*, a vehicle co-owned by a married couple was forfeited due to the husband's unlawful actions, despite the wife's lack of knowledge or consent.[10] Thus, while the husband's interest in the car was, arguably, appropriately forfeited, the wife's interest in the car was also forfeited, without compensation. The Court, in essence, has imposed a punitive sanction on a woman for trusting her husband enough to purchase a car with him.

By failing to establish any guidelines by which to adjudge future forfeitures, and by further failing to establish the rationale it was relying upon in deciding *Bennis III*, the Court has left itself, and courts nationwide, with no apparent way to preclude most forfeitures. In fact, the Court has seemingly denied itself the option of proscribing even the forfeiture of property against the innocent owner whose property was stolen and subsequently used in the commission of a statutory violation. The Constitution apparently provides no safeguard for any innocent owner, and to hold otherwise would be irreconcilable with the holding in *Bennis III*.

In examining the Court's decision, Part II of this case comment addresses civil forfeiture, examining the history and various purposes ascribed to the practice of forfeiture. Part III explains the factual and procedural background of the case. The facts of this case, although brief, are important to understanding how *Bennis III* is distinguishable from the cases which the Court cited in its opinion. Part IV of the case comment scrutinizes the rationale of the Court's decision. Specifically, this section demonstrates that the cases relied upon by the Court are distinguishable from *Bennis III*. This section argues that by relying upon distinguishable cases dating back to the early 1800s, the Court reached an imprudent conclusion. Part V explores the standards which the parties advocated for adoption by the Court for use in

7. *Bennis III*, 116 S. Ct. at 996.

8. *Id.* at 1001 (Thomas, J., concurring); *Id.* at 1003 (Ginsburg, J., concurring).

9. *Id.* (Stevens, J., dissenting); *Id.* at 1010 (Kennedy, J., dissenting).

10. Michigan v. Bennis, 527 N.W.2d 483, 486 (Mich. 1994), *aff'd*, 116 S. Ct. 994 (1996) [hereinafter Bennis II].

future forfeiture cases. These standards were not addressed in the Court's opinion; however, in light of the sharply divided Court in *Bennis III*, the adoption of a standard by which to adjudge future forfeitures would help establish a guideline to fairly, uniformly, and constitutionally apply to forfeiture statutes and would impose limitations on the government's ability to seize the property of individuals.

II. CIVIL FORFEITURE: THE HISTORY AND PURPOSES

In our legal system, civil forfeiture has a history beginning in England.[11] The practice began to take hold in the United States by the late 1700s.[12] In England, there were three justifications upon which forfeitures were based, each viewed as imposing punishment: 1) deodand; 2) forfeiture upon conviction of felonious or treasonous crimes; and 3) statutory forfeiture.[13]

At common law, the law of deodand was the forfeiture of property considered to have "directly or indirectly caus[ed] the accidental death of a King's subject."[14] This type of forfeiture had its historical origins in "[b]iblical and pre-Judeo-Christian practices, which reflected the view that the instrument of death was accused and that religious expiation was required."[15] When forfeiture eventually became a source of revenue, forfeiture became known to serve as punishment for carelessness.[16] However, the institution of deodand was abolished in England by an act authored by Lord Campbell in 1846.[17]

The second justification of English forfeiture was based upon conviction for felonies or treason.[18] Under this type of forfeiture, "[t]he convicted felon forfeited his chattels to the Crown and his lands escheated to his lord; the convicted traitor forfeited all of his property, real and personal, to the Crown."[19] The justification for this forfeiture was that it served "to punish felons and traitors, and [was] justified on the ground that property was a right derived from society which one lost by violating society's laws."[20]

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11. Austin v. United States, 509 U.S. 602, 611 (1993).
12. *Id.* at 613.
13. *Id.* at 611.
14. *Calero-Toledo*, 416 U.S. at 680–81.
15. *Id.* at 681 (citing O. Holmes, The Common Law, c. 1 (1881)).
16. *Id.*
17. *Id.* at 681 n.19.
18. *Austin*, 509 U.S. at 611.
19. *Calero-Toledo*, 416 U.S. at 682.
20. *Austin*, 509 U.S. at 612 (citations omitted).

The third basis of English forfeiture, and the only type to take hold in the United States, was premised upon a statutory violation.[21] It provided for the forfeiture of "offending objects used in violation of the customs and revenue laws—likely a product of the confluence and merger of the deodand tradition and the belief that the right to own property could be denied the wrongdoer."[22] Since the adoption of the Constitution, it is upon this premise that the practice of forfeiture has been based in the United States.[23]

Civil forfeiture in the United States dates back to early admiralty cases in which the United States government seized ships that were involved in activities such as piracy, slave trade, or smuggling contraband goods.[24] There are two significant admiralty cases involving the forfeiture of ships found to have engaged in piracy that helped to set the precedent by which civil forfeiture is applied today: *The Palmyra*[25] and *Harmony v. United States*.[26]

In *Palmyra*, the ship had been commissioned by the King of Spain to cruise as a privateer and was subsequently engaged in acts of piracy against a United States vessel.[27] The ship was captured by the United States and was sent to Charleston, South Carolina for adjudication.[28] In 1827, the Court determined that the ship was properly forfeited to the government and that the owner of the ship, however innocent or guilty, need not be convicted of the offense for the forfeiture to be permissible.[29] The opinion of the Court, delivered by Justice Story, stated that the reason for holding the owner accountable for the actions of his crew was that "[a] commission to cruise [as a privateer] [was] a delegated authority, and c[ould] only proceed from the sovereign."[30] Thus, once the King commissioned a ship, he became vicariously responsible for the activities in which the ship was engaged during the ship's commission. The premise of the rule permitting the forfeiture of the ship is that "[t]he thing is here primarily considered as the

21. *Id.*
22. *Calero-Toledo*, 416 U.S. at 682.
23. *Id.* at 683. It is worth noting that the "First Congress viewed forfeiture as punishment," and "'forfeit' is the word Congress used for fine." *Austin*, 509 U.S. at 613–14.
24. *Calero-Toledo*, 416 U.S. at 683.
25. 25 U.S. (12 Wheat.) 1 (1827).
26. 43 U.S. (2 How.) 210 (1844).
27. *Palmyra*, 25 U.S. at 2.
28. *Id.*
29. *Id.* at 14–15.
30. *Id.* at 4.

offender, or rather the offence is attached primarily to the thing."[31] The rationale for this is quite apparent: one cannot commit piracy without a ship.

Almost twenty years later in *Harmony*, Justice Story again delivered the opinion of the Court which upheld the rule of *Palmyra*: "The vessel which commits the aggression is treated as the offender, as the guilty instrument or thing to which the forfeiture attaches, without any reference whatsoever to the character or conduct of the owner."[32] However, the Court in *Harmony* proceeded to explain the rationale behind the rule as being "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."[33]

The forfeited ship in *Harmony*, the Malek Adhel, belonged to the firm Peter Harmony and Co., of New York.[34] However, the Malek Adhel was used, without the knowledge or consent of its owners,[35] to commit acts of piracy upon ships whose owners were British, American, and Portuguese.[36] Because some of the owners were foreign, their governments would have no jurisdiction over the crew of the Malek Adhel and would, therefore, have little success in procuring compensation for the owners' losses.[37] Thus, in addition to the fact that forfeiture of the ship would undoubtedly suppress the crew's ability to commit further acts of piracy, forfeiture served the purpose of insuring compensation for injured parties who may not otherwise have been compensated.

In both of these cases the ships, despite the guilt or innocence of the owner, were forfeited "[b]ecause the entire mission of the ship was unlawful[;] admiralty law treated the vessel itself as . . . the offender."[38] Furthermore, in many instances, especially those of piracy, such forfeiture was considered inherently necessary. Thus, admiralty cases present two policy aims behind civil forfeiture: 1) to eradicate the vessel which was itself the offense by virtue of being too closely attached to the offense to be severed from it and 2) to insure compensation to those injured by the vessel's actions.

The application of forfeiture was eventually expanded to other forms of property, and its purposes became "to punish, for deterrence and perhaps

31. *Id.* at 14.
32. *Harmony*, 43 U.S. at 233.
33. *Id.*
34. *Id.* at 229.
35. *Id.* at 221.
36. *Id.* at 229.
37. *See Harmony*, 43 U.S. at 233–34.
38. *Id.* at 1005 (Stevens, J., dissenting) (citation omitted).

also for retributive purposes, persons who *may* have colluded or acquiesced in criminal use of their property, or who *may* at least have negligently entrusted their property to someone likely to use it for misfeasance."[39] In the more modern cases,

> forfeiture has been justified on two theories—that the property itself is "guilty" of the offense, and that the owner may be held accountable for the wrongs of others to whom he entrusts his property. 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.[40]

In 1877, Justice Clifford delivered an opinion in which the Court expanded the applications of forfeiture set forth in admiralty to other properties. In *Dobbins's Distillery v. United States*,[41] an owner lost his property when it was discovered that his lessee was "defraud[ing] the revenue"[42] by avoiding federal alcohol taxes regarding the distillery upon the property.[43] In this case, the Court upheld the forfeiture despite the innocence of the owner because "he knowingly suffer[ed] and permit[ted] his land to be used as a site for a distillery . . . ."[44] Thus, "the law places him on the same footing as if he were the distiller and the owner of the lot where the distillery is located."[45] The Court then asserted that "[c]ases often arise where the property of the owner is forfeited on account of the fraud, neglect, or misconduct of those [e]ntrusted with its possession, care, and custody, even when the owner is otherwise without fault."[46] The Court proceeded to establish, however, that "if [the lessee] abuses his trust, it is a matter to be settled between him and his lessor."[47] Furthermore, the Court elicited the reasoning in *Harmony* that "the necessity of the case requir[es] it as the only adequate means of suppressing the offence or wrong, or of insuring an indemnity to the injured party."[48] Thus, the Court remained reliant on the justifications of forfeiture set forth in the admiralty cases and began to

39. *Bennis III*, 116 S. Ct. at 1001 (Thomas, J., concurring) (emphasis added).
40. *Austin*, 509 U.S. at 615.
41. Dobbins's Distillery v. United States, 96 U.S. 395 (1877).
42. *Id.* at 396.
43. *Id.* at 397.
44. *Id.* at 399.
45. *Id.*
46. *Dobbins's Distillery*, 96 U.S. at 401.
47. *Id.*
48. *Id.* at 400 (citing United States v. Brig Malek Adhel, 43 U.S. (2 How.) 210 (1844)).

develop a focus on the "negligent entrustment"[49] of property by innocent owners to persons who may, unbeknownst to the owner, involve the property in the commission of a statutory violation.

In 1921, the Court heard *J.W. Goldsmith, Jr.-Grant Co. v. United States* ("*Goldsmith-Grant*").[50] In this case, the seller of an automobile retained an interest in the vehicle for the unpaid balance of the purchase price; however, the purchaser engaged the vehicle in the illegal act of transporting liquor to evade taxes.[51] In its opinion, authored by Justice McKenna, the Court upheld the forfeiture of the seller's interest in the vehicle despite his lack of knowledge of the illegal activities.[52] Again, the Court cited the rule that "the thing is primarily considered the offender"[53] as justification for the forfeiture. The Court went on to state that the vehicle was appropriately forfeited as "[i]t is a 'thing' that can be used in the removal of 'goods and commodities' and the law is explicit in its condemnation of such things."[54]

The *Goldsmith-Grant* Court then acknowledged that forfeiture statutes, taken literally, could often result in the forfeiture of property belonging to completely innocent owners and that

> [t]here is strength . . . in the contention that, if such be the inevitable meaning of the [statute], it seems to violate that justice which should be the foundation of the due process of law required by the Constitution. It is, hence, plausibly urged that such could not have been the intention of Congress . . . . And it follows, is the contention, that Congress only intended to condemn the interest the possessor of the property might have to punish his guilt, and not to forfeit the title of the owner who was without guilt.[55]

However, the Court noted that "there are other and militating considerations."[56] As such, the Court examined the purposes of forfeiture which were premised on the idea that the "'misfortunes are in part owing to the

49. "Negligent entrustment" is a term which indicates that an owner, although innocent of any wrongdoing, has been in some way negligent in entrusting their property to another who has misused the property. Brief for Petitioner at 9 (citing RESTATEMENT (SECOND) OF TORTS § 308 (1965)).

50. 254 U.S. 505 (1921).

51. *Id.* at 509.

52. *Id.*

53. *Id.* at 511.

54. *Id.* at 513.

55. *Goldsmith-Grant*, 254 U.S. at 510.

56. *Id.*

negligence of the owner, and therefore he is properly punished by such forfeiture.'"[57] Thus, while the Court also noted the "guilty-property" theory,[58] the Court began to firmly recognize the punitive aspect of forfeiture that began with the law of deodand.[59] The Court upheld the forfeiture on the several theories it examined and determined that the idea of forfeiture as punishment for even the innocent owner's negligence is "too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced."[60] However, in response to the concerns that forfeiture statutes might someday be applied in violation of constitutional provisions, the Court stated that "[w]hen such application shall be made it will be time enough to pronounce upon it."[61] Thus, the Court began to recognize the potential for improper forfeitures and reserved the question, as it repeatedly did, for the appropriate case.

In 1926, the Court turned its attention to *Van Oster v. Kansas*,[62] a case very similar to *Goldsmith-Grant*. However, in *Van Oster*, it was the seller who engaged the vehicle in the illegal activity and the buyer who lost her interest in the vehicle.[63] In the opinion authored by Justice Stone, the Court upheld the forfeiture of a vehicle purchased by Van Oster but left it in the possession of the sellers as partial consideration for use in their business.[64] The car was, with the knowledge and permission of Van Oster, frequently operated by an associate of the seller;[65] however, unbeknownst to Van Oster, the associate used the vehicle to unlawfully transport liquor in violation of a Kansas statute.[66] The Court upheld the forfeiture on the premise that even innocent owners may become liable for the negligent operation of vehicles by those to whom they entrust their property.[67] Thus, in *Van Oster*, the Court furthers the theory that innocent owners who negligently entrust their property to those who misuse it may be held accountable for the misuse.

57. *Id.* at 511 (citations omitted).
58. *Id.*
59. *Id.* at 510–11.
60. *Goldsmith-Grant*, 254 U.S. at 511.
61. *Id.* at 512.
62. 272 U.S. 465 (1926).
63. *Id.* at 466.
64. *Id.* at 465–66.
65. *Id.* at 466.
66. *Id.* (citations omitted).
67. *Van Oster*, 272 U.S. at 467.

In the much more modern 1974 case, *Calero-Toledo v. Pearson Yacht Leasing Co.*,[68] a leased yacht was forfeited when authorities discovered marijuana aboard the yacht in violation of a statute that provided for the forfeiture of "vessels used to transport, or to facilitate the transportation of, controlled substances, including marihuana."[69] The Court, in its opinion authored by Justice Brennan, upheld the forfeiture, rejecting the contention that to forfeit the property of innocent owners without just compensation is unconstitutional.[70] The Court here, as in previous cases, examined the history and purposes of forfeiture, accepting the theories that the "thing" is the offender;[71] that forfeiture is "'the only adequate means of suppressing the offence or wrong, or insuring an indemnity to the injured party;'"[72] and that forfeiture serves punitive and deterrent purposes that "may have the desirable effect of inducing [property owners] to exercise greater care in transferring possession of their property."[73] However, the Court then qualified its decision by stating:

> [I]t would be difficult to reject the constitutional claim of an owner . . . who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property; for, in that circumstance, it would be difficult to conclude that forfeiture served legitimate purposes and was not unduly oppressive.[74]

The Court refrained from rendering an opinion on whether it would accept this argument until presented with a more appropriate case.[75] The Court further qualified its decision by emphasizing that in *Calero-Toledo* the property owner had "voluntarily entrusted the lessees with possession of the yacht, and no allegation has been made or proof offered that the company did all that it reasonably could to avoid having its property put to an unlawful use."[76]

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68. 416 U.S. 663 (1974).
69. *Id.* at 665–66 (citing Controlled Substances Act of Puerto Rico, P.R. LAWS ANN. tit. 24, § 2101 (Supp. 1973)).
70. *Id.* at 680.
71. *Id.* at 684.
72. *Id.* (quoting United States v. Brig Malek Adhel, 43 U.S. (2 How.) 210, 238 (1844)).
73. *Calero-Toledo*, 416 U.S. at 688.
74. *Id.* at 689–90 (citations omitted).
75. *Id.* at 689.
76. *Id.* at 690.

Thus, the Court reaffirmed the justifications of forfeiture that have evolved from admiralty, while providing an indication that it would consider the establishment of a standard, the "all reasonable steps" standard mentioned in this case, by which to adjudge future forfeitures. The Court also recognized that forfeiture is most often typified by the negligent entrustment of property.

In 1993, the Court decided the most recent case on point, *Austin v. United States*.[77] In *Austin*, the Court refused to uphold the forfeiture of a body shop and mobile home that was seized by the government after Austin was found to have engaged in a single drug transaction within them.[78] In this case, the government presented the argument that civil forfeiture was not, as the Court had held for well over a century, punitive, but rather it is remedial in nature.[79] The remedial purposes served by forfeiture, the government contended, were the removal of the "'instruments' of the drug trade 'thereby protecting the community from the threat of continued drug dealing,'"[80] and compensation for the government's expenses of "law enforcement activity and for its expenditure on societal problems such as urban blight, drug addiction, and other health concerns resulting from the drug trade."[81] However, the Court flatly rejected the government's contentions.

The reasons upon which the Court based its decision were two-fold: 1) because, just as "'[t]here is nothing even remotely criminal in possessing an automobile,'"[82] the possession of a body shop and mobile home are similarly not criminal and, therefore, the contention that they are "'instruments' of the drug trade" must be rejected[83] and 2) because "'forfeiture of property . . . [is] a penalty that ha[s] absolutely no correlation to any damages sustained by society or to the cost of enforcing the law,'"[84] any contention that the forfeiture provides compensation for such law enforcement is undercut by "dramatic variations in the value of conveyances and real property"[85] that may be forfeitable.[86] Therefore, the forfeiture of the properties was punitive,

77. 509 U.S. 602 (1993).
78. *Id.* at 605.
79. *Id.* at 620.
80. *Id.* (quoting Brief of United States at 32).
81. *Id.* (citing Brief of United States at 25, 32).
82. *Austin*, 509 U.S. at 621 (quoting One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 699 (1965)).
83. *Id.*
84. *Id.* (quoting United States v. Ward, 448 U.S. 242, 254 (1980)).
85. *Id.*
86. *Id.*

serving neither the remedial goal of removing an instrumentality of crime nor the goal of compensating the government for expenses relating to law enforcement, and was subject to the Excessive Fines Clause.[87] The Court emphasized its holding by stating that "'[a] civil sanction that cannot fairly be said *solely* to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term,'"[88] and that "it consistently has recognized that forfeiture serves, at least in part, to punish the owner."[89]

Thus, the justifications of civil forfeiture, beginning with *Palmyra* in 1827, have evolved into two: 1) the "guilty-property" theory, and 2) the theory that the owner, although innocent, may be held accountable for the misuse of his property by those to whom he entrusts it. Further, the Court has derived a "negligent owner" premise that seemingly underlies both of these theories. The "negligent owner" premise underlying the first theory, that "[t]he thing is here primarily considered as the offender,"[90] is that "the owner who allows his property to become involved in an offense has been negligent,"[91] which is in turn premised upon Blackstone's explanation of the law of deodand, which states that "'such misfortunes are in part owing to the negligence of the owner, and therefore he is properly punished by the forfeiture.'"[92]

The "negligent owner" premise underlying the second theory, that an innocent owner may still be held accountable for the misuse of his property by those to whom he entrusts it, is similar. "Like the guilty-property fiction, this theory of vicarious liability is premised on the idea that the owner has been negligent."[93] However, this theory has specifically reserved to the innocent owner the power to recover, from the wrongdoer, his losses.[94] Thus, because both theories have been relied upon by the Supreme Court,[95] and because the concept of negligent entrustment is fundamental to both, the Court has determined that forfeiture is, at least in part, punitive.[96]

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87. *Austin*, 509 U.S. at 622.
88. *Id.* at 621 (quoting United States v. Halper, 490 U.S. 435, 448 (1989)).
89. *Id.* at 618. *See, e.g.*, *Goldsmith-Grant*, 254 U.S. at 510–11; *Calero-Toledo*, 416 U.S. at 686.
90. *Palmyra*, 25 U.S. at 14.
91. *Austin*, 509 U.S. at 616.
92. *Id.* at 616 (quoting *Goldsmith-Grant*, 254 U.S. at 510–11).
93. *Id.* at 618.
94. *Id.* at 617 (citing *Dobbins's Distillery*, 96 U.S. at 401).
95. *See, e.g.*, *Calero-Toledo*, 416 U.S. at 684; *Goldsmith-Grant*, 254 U.S. at 510–11.
96. *Bennis III*, 116 S. Ct. at 1000.

III. FACTS AND PROCEDURAL POSTURE

A. *The Facts of* Bennis v. Michigan

In October of 1988, Detroit police officers observed a known prostitute, Kathy Polarchio, standing on a street corner "flagging"[97] passing vehicles.[98] Shortly thereafter, the police officers observed a 1977 Pontiac, driven by John Bennis, approach Ms. Polarchio, at which time she entered the vehicle.[99] The officers then witnessed the vehicle proceed one block, make a U-turn, and stop.[100] From the rear, the officers could see the heads of Ms. Polarchio and Mr. Bennis. When they saw her head disappear toward Mr. Bennis's lap, they approached the car and observed Ms. Polarchio performing fellatio on Mr. Bennis.[101] Although the officers observed Ms. Polarchio "flagging" and subsequently performing a sexual act in a vehicle, acts which would be indicative of prostitution, the officers never witnessed an exchange of money.[102] Therefore, Mr. Bennis was arrested for gross indecency,[103] and Ms. Polarchio was arrested the following day for accosting and soliciting.[104]

Prior to Mr. Bennis's conviction for gross indecency, John and Mrs. Bennis lost their jointly-owned 1977 Pontiac when a judge declared the vehicle a public nuisance and ordered its abatement and subsequent sale.[105] The judge then stated that Mrs. Bennis, despite the fact that she was an innocent owner, was not entitled to any compensation for her interest in the vehicle because, after assessing various costs, "'[t]here's practically nothing left.'"[106]

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97. "Flagging" is a term used to describe the act of a prostitute signaling passing vehicles to stop in an effort to solicit customers. *Bennis II*, 527 N.W.2d at 486 n.2.

98. *Id.* at 486.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Bennis I*, 504 N.W.2d at 735.

103. *Id.* Mr. Bennis was initially charged with "indecent and immoral conduct," and the complaint alleged that he engaged in the services of a prostitute and gross indecency between a male and a female. However, Mr. Bennis was eventually only charged with gross indecency, presumably due to the lack of evidence that Mr. Bennis did or intended to pay Ms. Polarchio for her services. *Id.* at 735 n.1 (citing MICH. COMP. LAWS ANN. §§ 750.338b, .449a (West 1992)).

104. *Bennis II*, 527 N.W.2d at 486 n.3.

105. *Bennis I*, 504 N.W.2d at 732.

106. *Bennis III*, 116 S. Ct. at 997 (citation omitted). *But see id.* at 1010 (Kennedy, J., dissenting) ("[N]othing supports the suggestion that the value of her co-ownership is so insignificant as to be beneath the law's protection.").

Approximately three weeks prior to the October incident,[107] Mr. Bennis and his wife purchased the car for $600 with money that Mrs. Bennis had earned through baby-sitting and other odd jobs.[108] The car was jointly-owned by the couple and was driven that evening by Mr. Bennis to and from work.[109] Mrs. Bennis, believing her husband would return directly home from work that evening, as he did every other evening, had no reason to suspect or know that Mr. Bennis would instead be arrested for gross indecency.[110]

B. *Procedural Posture*

After the trial court abated the interests in the car of both Mr. Bennis and Mrs. Bennis,[111] despite her lack of knowledge that her husband had ever used the car in violation of any statutes,[112] and following Mr. Bennis's conviction for gross indecency,[113] the Bennises appealed the abatement of their vehicle to the Court of Appeals of Michigan.[114]

The court of appeals reversed the trial court's judgment on three bases: 1) the prosecutor was required, but failed, to prove knowledge on the part of Mrs. Bennis that the vehicle was being used in violation of the abatement statute; 2) a single incident of lewdness, assignation, or prostitution in violation of the abatement statute was insufficient to constitute a public nuisance subject to abatement; and 3) the prosecution failed to prove an act of lewdness, assignation, or prostitution by Mr. Bennis in violation of the abatement statute.[115]

However, upon appeal by the Wayne County Prosecuting Attorney, the Michigan Supreme Court reversed the court of appeals,[116] and in doing so, stretched the realm of civil forfeiture beyond any previous application. The court summarily held that: 1) while "lewdness" as used in the statute is limited to acts that are committed in furtherance of prostitution, and further

107. *Bennis I*, 504 N.W.2d at 734.

108. BISKUPIC, *supra* note 1, at A6.

109. *Bennis I*, 504 N.W.2d at 737.

110. *Bennis III*, 116 S. Ct. at 1008 ("She had no knowledge of her husband's plans to do anything with the car except 'come directly home from work,' as he had always done before; and that she even called 'Missing Persons' when he failed to return on the night in question.").

111. *Bennis I*, 504 N.W.2d at 732.

112. *Id.* at 733.

113. *Id.* at 732.

114. *Id.*

115. *Id.* at 733–34.

116. *Bennis II*, 527 N.W.2d at 487–88.

that although there was no exchange of money, Mr. Bennis's gross indecency constituted "lewdness" for purposes of the statute; 2) a single act of "prostitution" occurring in a vehicle in a neighborhood known for prostitution is an abatable nuisance, despite the court's notation that if the vehicle had been driven to another neighborhood the vehicle would not have been abatable;[117] and 3) Mrs. Bennis's knowledge or consent of Mr. Bennis's actions was unnecessary to abate the entire interest of the co-owned vehicle.[118]

At this point, Mrs. Bennis appealed her case to the United States Supreme Court, challenging the constitutionality of the government's ability to forfeit the property of completely innocent owners.[119] Mrs. Bennis's appeal was based upon both a facial challenge and an as-applied challenge:

> WHETHER A MICHIGAN NUISANCE ABATEMENT STATUTE THAT PERMITS THE FORFEITURE OF A PERSON'S PROPERTY IF IT IS USED IN A PROSCRIBED MANNER BY ANOTHER PERSON EVEN IF THE OWNER HAD NO KNOWLEDGE OF, OR CULPABILITY IN CONNECTION WITH, THE MISUSE OF THE PROPERTY VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT AND/OR THE TAKINGS CLAUSE OF THE FIFTH AMENDMENT (AS APPLIED TO THE STATES BY THE FOURTEENTH AMENDMENT); AND
>
> WHETHER THE APPLICATION OF THAT STATUTE TO DEPRIVE A WIFE OF HER INTEREST IN AN AUTOMOBILE SHE JOINTLY OWNED WITH HER HUSBAND VIOLATED THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT AND THE TAKINGS CLAUSE OF THE FIFTH AMENDMENT (AS APPLIED TO THE STATES BY THE FOURTEENTH AMENDMENT), WHERE THE FORFEITURE RESULTED FROM A FINDING THAT THE HUSBAND ENGAGED IN A SEX ACT WITH A REPUTED PROSTITUTE INSIDE THE AUTOMOBILE, AND WHERE THE RECORD ESTABLISHED THAT THE WIFE HAD NO KNOWLEDGE OF

117. *Id.* at 491 n.22 ("We note that our position is limited to situations in which a nuisance condition exists, regardless of the city. Therefore, a vehicle could not be abated if the same situation arose in another area of Detroit, such as Palmer Woods, where certainly no such nuisance condition exists.").

118. *Id.* at 492.

119. *Bennis III*, 116 S. Ct. at 995.

OR CULPABILITY REGARDING HER HUSBAND'S PROSCRIBED USE OF THE VEHICLE.[120]

The United States Supreme Court affirmed the Michigan Supreme Court in a 5-4 decision.[121] The Court held that, based on a line of cases in which various forfeitures were upheld, neither the Due Process Clause of the Fourteenth Amendment[122] nor the Takings Clause of the Fifth Amendment were violated:[123] Because "the forfeiture proceeding here in question did not violate the Fourteenth Amendment, the property in the automobile was transferred by virtue of that proceeding from petitioner to the State,"[124] and did not violate the Takings Clause of the Fifth Amendment.[125] However, in its decision, the Court relied upon distinguishable cases based upon medieval rationale which affords no consideration to modern societal conditions and failed to establish a standard by which to decide future forfeiture cases.

IV. THE CASES ARE DISTINGUISHABLE

A. *Admiralty Cases: Forfeiture on the High Seas*

Each of the several principal cases relied upon in the lead opinion is arguably distinguishable from *Bennis III*. Furthermore, the aims of the forfeitures in these cases are not advanced by the forfeiture in *Bennis III*. The Court's opinion, authored by Chief Justice Rehnquist, establishes support for the forfeiture of Mrs. Bennis's interest in her and her husband's jointly-owned vehicle by comparing the forfeiture to the forfeiture of ships involved in piracy.[126] The Court begins its inquest with *Palmyra* and *Harmony*.

In both *Palmyra* and *Harmony*, the Court upheld forfeitures of ships that were found to have engaged in piracy based upon the principle that "[t]he thing is here primarily considered as the offender, or rather the offence is attached primarily to the thing."[127] The rationale supporting the forfeitures is plausible. When the "thing" is so necessary and attached to the

120. Brief for Petitioner at 4.
121. *Bennis III*, 116 S. Ct. at 996.
122. *Id.* at 997.
123. *Id.* at 998.
124. *Id.* at 1001.
125. *Id.*
126. *Bennis III*, 116 S. Ct. at 998.
127. *Palmyra*, 25 U.S. at 14.

offense that the offense could not be committed without it, it is reasonable that forfeiture is an appropriate course of action with which to proceed. However, unlike in *Palmyra* and in *Harmony*, in *Bennis* the vehicle in which the act of gross indecency occurred was not necessary to commit the offense, nor was the vehicle so attached to the offense as to be inseparable from it. As stated by Justice Stevens in his dissenting opinion, "the forfeited property bore no necessary connection to the offense committed by petitioner's husband."[128] While the vehicle proved convenient, it certainly was not necessary or attached to the offense, as were the ships in the admiralty cases. Without the ships, the crews would have been hard pressed to have reached, let alone engaged in "piratical aggression, search, depredation, restraint, and seizure . . . upon[,] the high seas."[129]

In support of the State of Michigan, it was posited that, like the ships in *Palmyra* and *Harmony*,

> [t]he forfeited car underlying the instant litigation was intimately related to the offense punished. Mr. Bennis could not have found other means of transportation adequate for acquiring Ms. Polarchio's services. The car was uniquely necessary both for getting to the prostitution market and in 'hosting' the illicit sexual act. The state should be allowed to focus on both the individual engaged in the illicit conduct and the vehicle which facilitated that conduct.[130]

However, contrary to this argument, Mr. Bennis could have committed the act of gross indecency without the aid of the Bennis's 1977 Pontiac or any other car. While the vehicle did provide transportation to the street corner upon which he found Ms. Polarchio, he could have walked or taken a bus. Once he had engaged the company of Ms. Polarchio, they could have commenced their activities in an alley, on a bus bench, or in any secluded (or public) place. It is implausible that every person who solicits the services of prostitutes both has a car and uses it as the locale for their subsequent activities. Furthermore, the Court accepted that had Mr. Bennis simply driven the vehicle to a different neighborhood where a "nuisance condi-

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

129. *Palmyra*, 25 U.S. at 2.

130. Brief of the American Alliance for Rights and Responsibilities, The Alliance for a Safer, Greater Detroit, The Eleventh Precinct Police-Community Relations Council, and The Community Anti-Drug Coalitions of America as Amici Curiae in Support of Respondent at 7, *Bennis III* (No. 94-8729) (LEXIS, Genfed, Briefs, "name (Bennis and Michigan)") [hereinafter Brief of American Alliance].

tion"[131] did not exist the car no longer would have been abatable. However, if the car were "primarily considered as the offender,"[132] as were the ships in *Palmyra*[133] and in *Harmony*,[134] it would be abatable regardless of the neighborhood in which it was parked. Obviously, the car is not so necessary and so attached to the offense.

In *Harmony*, while the Court upheld the rule in *Palmyra*, that the vessel is considered the offender and is subject to forfeiture without regard for the guilt or innocence of the owner, it also offered a rationale for such forfeiture which provides further support for the proposition that these cases are distinguishable from *Bennis*. The two reasons for permitting forfeiture, as espoused in *Harmony*, are: 1) forfeiture is the only way to suppress the wrongful activity and 2) forfeiture is the only way to insure that injured parties will be compensated for their losses.[135]

First, because the vehicle in *Bennis* is not necessary for engaging in the act of fellatio, forfeiture of the vehicle will not necessarily prevent or incapacitate Mr. Bennis from engaging in such acts in the future. Thus, forfeiture of the Bennis vehicle is not even an, let alone the only, "adequate means of suppressing the offence or wrong."[136] Undoubtedly, incarceration, or perhaps a stiffer fine, would produce a more deterrent effect.

Second, because there was no "injured party"[137] in *Bennis III*, the idea of "insuring an indemnity"[138] to one is incongruous. Furthermore, the reason for forfeiting the ships for compensatory purposes was premised on the fact that many of the ships' owners were located in other countries. Therefore, the United States quite often lacked jurisdiction over the owners for the purpose of awarding indemnity to the injured parties.[139] Thus, because the illegal acts will not necessarily be suppressed by the forfeiture, and because there are no victims to compensate, the necessity of the forfeiture in the admiralty cases relied upon by the Court is not present in *Bennis III*, and the rationale supporting the forfeitures in *Palmyra* and *Harmony* is inconsistent with any rationale supporting the forfeiture of the Bennis vehicle.

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131. *Bennis II*, 527 N.W.2d at 491 n.22.
132. *Palmyra*, 25 U.S. at 14.
133. *Id.*
134. *Harmony*, 43 U.S. at 233.
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.*
139. *See Harmony*, 43 U.S. at 233.

B. *Forfeiture Comes Ashore*

The next set of cases relied upon by the Court begins with *Dobbins's Distillery*, in which an innocent owner lost his property due to the illegal business practices of his lessee.[140] In that case, the owner was aware of the use to which his land was being put—a distillery.[141] Thus, the possibility that the lessee might undertake illegal activities in the process of running the business is a risk the lessor consequently accepted. In *Bennis III*, however, Mrs. Bennis was completely ignorant of the use to which the couple's vehicle was being put.[142] And while, as the *Dobbins's Distillery* Court noted, forfeiture cases often arise as the result of the "[e]ntrustment"[143] of property, as one Justice asserted at the *Bennis III* oral argument, "[Mrs. Bennis] didn't have to entrust it. It's half [Mr. Bennis's] car."[144] Additionally, it is unlikely that Michigan would permit Mrs. Bennis to sue her husband to recover her losses,[145] an option provided the lessor in *Dobbins's Distillery*,[146] and if Michigan so permits, it would be futile for a wife to attempt to recover from her husband money to which she is already entitled. And, once again, the reasons proffered for upholding forfeitures[147] do not apply in *Bennis III*: Forfeiture of the vehicle will not necessarily suppress the wrong, and there is no victim to compensate. Thus, as were the admiralty cases, *Dobbins's Distillery* is distinguishable from *Bennis III*.

The Court next relied on *Van Oster*, in which it upheld the forfeiture of an automobile that was involved in the illegal transportation of liquor, regardless of the innocence of the owner.[148] The decision was based upon the premise that innocent owners may be held accountable for the misuse of their property by those to whom they negligently entrust their property.[149] However, as established, Mrs. Bennis did not entrust the vehicle to her

140. 96 U.S. 395, 396 (1877).
141. *Id.* at 399.
142. *Bennis III*, 116 S. Ct. at 997.
143. 96 U.S. at 401.
144. Transcript of Oral Argument at 11.
145. It was implied during oral argument that Michigan would permit such an action between spouses only in conjunction with a divorce action. *Id.* at 30. Despite their difficulties, Mr. and Mrs. Bennis remain married; thus, recovery by Mrs. Bennis from her husband is precluded. Aaron Epstein, *Should Property Be Seized When Owner is Blameless? High Court to Hear Forfeiture Case*, SEATTLE TIMES, November 25, 1995, at A3.
146. 96 U.S. at 404.
147. *Id.* at 400.
148. *Bennis III*, 116 S. Ct. at 998.
149. *Van Oster*, 272 U.S. at 467.

husband;[150] he had every right to use the car as he was the co-owner; and, even if she had become aware of his illegal activities, "she would have had no right to stop him from using the car."[151]

Additionally, and perhaps more importantly, the circumstances in *Van Oster* bear a distinct resemblance to the circumstances in the aforementioned admiralty cases: As in the admiralty cases where the ship was so necessary and attached to the offense as to be considered the offender itself,[152] the vehicle in *Van Oster* also was as necessary and attached to the offense. The Kansas statute that was violated in *Van Oster* prohibited the "*transportation* of intoxicating liquor."[153] While other modes of transportation could have been used in the commission of this activity, a vehicle is a "thing" that is used for the purpose of transportation which is necessary for the violation of the statute. Had the liquor been discovered in a "thing" that could not facilitate its "transportation," then the offense of "transportation of intoxicating liquor" could not have been committed.[154] Discovered in a non-mobile entity, the pertinent "transportation" element of the statute would have been missing. Thus, for these reasons, *Van Oster* is distinguishable from *Bennis III*.

Next, the Court attempted to analogize *Goldsmith-Grant* and *Bennis III*.[155] In *Goldsmith-Grant*, a vehicle that had been misused by the purchaser was forfeited. The seller, who had retained an interest in the car to secure the unpaid balance, lost his interest, as well, despite his lack of consent to or knowledge of the illegal activity. The Court upheld the forfeiture on the several theories it had espoused in previous cases, concluding that forfeiture of an innocent owner's property as punishment for the negligent entrustment of it to others is "too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced."[156] At this point, the *Goldsmith-Grant* Court addressed concerns that the application of forfeiture would extend to unconstitutional lengths: "When such application shall be made it will be time enough to pronounce upon it."[157] The situation in *Bennis III* can be analogized to a scenario the *Goldsmith-Grant* Court suggested might trigger such a review: "It is said that a Pullman sleeper can be forfeited if a bottle

150. Transcript of Oral Argument at 11.
151. *Id.* at 12.
152. *Palmyra*, 25 U.S. at 14.
153. 272 U.S. at 466 (emphasis added).
154. *Id.*
155. *Bennis III*, 116 S. Ct. at 999 n.5.
156. *Goldsmith-Grant*, 254 U.S. at 511.
157. *Id.* at 512.

of illicit liquor be taken upon it by a passenger."[158] The forfeiture of an entire automobile because a grossly indecent act was performed upon its front seat is much more similar to the preceding scenario than to the forfeiture of a ship that was engaged in piracy or to a vehicle forfeited for transporting illegal goods. As such, the *Goldsmith-Grant* Court might very well have recognized *Bennis III* as the application upon which it should pronounce. When there has been no violation so connected to the vehicle as to declare the vehicle itself the offender,[159] and when there has been no negligence on the part of the owner to be punished, perhaps it is time to review the forfeiture that is so rooted in America's jurisprudence.

The next significant case relied upon by the *Bennis III* Court is *Calero-Toledo* in which a leased yacht was forfeited upon discovery that drugs were being transported in violation of a statute.[160] The Court premised its opinion upon the theories of forfeiture established in the several previous cases. However, once again, the reasoning of the case relied upon by the Court is inapplicable to *Bennis III*: As previously established, the Bennis vehicle can hardly be considered the offender, forfeiture of the vehicle will unlikely prevent a recurrence of the unlawful activity, there is no injured party in need of compensation, and because there was no negligent entrustment, there can be no deterrent or acceptable punitive affect. However, while the Court upheld the forfeiture of the yacht upon the basic principle that the owner negligently entrusted his property to the lessees, it reserved the question of whether such a forfeiture would be upheld in the case of a truly innocent owner.[161] In its *Bennis III* opinion, the Court acknowledges the passage from *Calero-Toledo* upon which the petitioner, Mrs. Bennis, relies: "'[I]t would be difficult to reject the constitutional claim of . . . an owner who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property.'"[162] However, the Court opted to dismiss the issue on the basis that the statement is "'*obiter dictum*,' and '[i]t is to the holdings of [the] cases, rather than their dicta, that [the Court] must at-

158. *Id.*

159. *Bennis II*, 527 N.W.2d at 491 n.22 ("We note that our position is limited to situations in which a nuisance condition exists, regardless of the city. Therefore, a vehicle could not be abated if the same situation arose in another area of Detroit, such as Palmer Woods, where certainly no such nuisance condition exists.").

160. *Calero-Toledo*, 416 U.S. at 665–66.

161. *Id.* at 689–90.

162. *Bennis III*, 116 S. Ct. at 999 (quoting *Calero-Toledo*, 416 U.S. at 689).

tend.'"[163] It is seemingly pointless, then, for the Court to expend its energy on an apparently inert abstraction.

The final significant case upon which the *Bennis III* Court relied is *Austin*.[164] Despite being the most recent case on point, the Court affords this case no analysis.[165] The Court merely acknowledged that in *Austin*, it had "no occasion . . . to deal with the validity of the 'innocent-owner defense,' other than to point out that if a forfeiture statute allows such a defense, the defense is additional evidence that the statute itself is 'punitive' in motive,"[166] and held that because "forfeiture serves, at least in part, to punish the owner,"[167] it is subject to the Eighth Amendment's Excessive Fines Clause.[168] However, the Court failed to mention that it therefore reversed the forfeiture of property that, due to its punitive nature, was excessive.[169] It is confusing how the Court could then determine, in *Bennis III*, that "forfeiture . . . serves a deterrent purpose distinct from any punitive purpose,"[170] after having concluded in *Austin* that forfeiture serving any retributive or deterrent purposes is punitive.[171] And it is further confusing that in *Bennis III* the Court acknowledged its determination that forfeiture is at least partially punitive,[172] yet failed to explain how imposing a punitive action upon a completely innocent person is constitutional, or even why it is not unconstitutional.

Initially, the most apparent distinction between the two cases is that, unlike Mrs. Bennis, Austin himself was convicted of the offense by which his property was forfeited. Thus, he made (and had) no claim of innocence. Moreover, based upon the blatant rejection of the government's two-part argument for upholding the *Austin* forfeiture, it is difficult to decipher the rationale of the Court's decision in *Bennis III*.

The first contention the government asserted in *Austin* was that forfeiture of the mobile home and body shop would serve to remove "'instruments' of the drug trade 'thereby protecting the community from the

163. *Id.* (quoting Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375, 379 (1994)).
164. *Id.* at 1000.
165. *Id.*
166. *Id.*
167. *Bennis III*, 116 S. Ct. at 1000 (quoting *Austin*, 509 U.S. at 618).
168. *Id.*
169. *Austin*, 509 U.S. at 622.
170. *Bennis III*, 116 S. Ct. at 1000.
171. *Austin*, 509 U.S. at 621 (citing *Halper*, 490 U.S. at 448).
172. *Bennis III*, 116 S. Ct. at 1000 (citing *Austin*, 509 U.S. at 618).

threat of continued drug dealing.'"[173] However, the Court flatly rejected this contention and determined that the punitive measure of forfeiture was excessive because the possession of the property was "'nothing even remotely criminal.'"[174] This result should surely support the refusal to impose such a punitive measure of forfeiture upon a completely innocent person, since there is likewise "'nothing even remotely criminal'" in owning a car. These decisions further appear readily conflicting: If the forfeiture of the premises upon which a drug deal occurred would fail to "[protect] the community from the threat of continued drug dealing,"[175] then the forfeiture of a car in which an indecent act occurred surely will not serve to combat the threat of continuing prostitution.

The second contention the government asserted was also rejected by the Court. In *Austin*, the Court refused to permit the forfeiture of Austin's properties for the purpose of compensating the government for costs incurred in performing its law enforcement duties[176]—the same costs that were assessed against Mrs. Bennis.[177] The basis of the Court's rejection of this contention was that the "dramatic variations in the value of [property] forfeitable"[178] in these situations fails to provide "'a reasonable form of liquidated damages,'"[179] thereby having "'absolutely no correlation to any damages sustained by society or to the cost of enforcing the law.'"[180] Thus, the decision in *Austin* seems to provide support for rejecting the Court's acquiescence in assessing "costs"[181] against Mrs. Bennis's interest in the forfeited vehicle. It seems incongruent for the Court to refuse the assess-

173. *Austin*, 509 U.S. at 620 (quoting Brief of the United States at 32).

174. *Id.* at 621 (quoting *One 1958 Plymouth Sedan*, 380 U.S. at 699).

175. *Id.* at 620.

176. *Id.* at 621.

177. *See Bennis III*, 116 S. Ct. at 1002 n.* (Thomas, J., concurring).

178. *Austin*, 509 U.S. at 621.

179. *Id.* (quoting One Lot Emerald Cut Stones v. United States, 407 U.S. 232, 237 (1972)).

180. *Id.* (quoting *Ward*, 448 U.S. at 254).

181. *Bennis III*, 116 S. Ct. at 998. In his concurring opinion, Justice Thomas struggles with the definition attributed to the term "costs" as used by the trial court judge. There is evidence that the judge was referring to costs such as law enforcement and costs of keeping the car. Justice Thomas stated that if these were in fact the costs referred to by the judge, "the State would still have a plausible argument that using the sales proceeds to pay such costs was 'remedial' action, rather than punishment." *Id.* at 1002 n.* (Thomas, J., concurring). This attribution is completely at odds with the Court's holding in *Austin* which reiterated its previous holding that "'the forfeiture of property . . . [is] a penalty that ha[s] absolutely no correlation to any damages sustained by society or to the cost of enforcing the law.'" 509 U.S. at 621 (quoting United States v. Ward, 448 U.S. 242, 254 (1980)).

ment of costs in *Austin*, and subsequently conclude that it is appropriate to assess against an innocent person these same costs, costs to which the forfeiture of property was deemed to have "'absolutely no correlation.'"[182] This assessment seems especially inappropriate when allegedly the proceeds of the forfeitures often serve to compensate the law enforcement officers directly, not the government for its expenditure on law enforcement.[183]

Had the *Bennis III* Court determined the outcome of the case prior to its analysis, it is not difficult to understand its reason for "ignor[ing] *Austin's* detailed analysis of . . . case law without explanation or comment."[184] *Austin*, even without the previously discussed case law, offers no reason for deciding as the Court did and every reason for deciding as the Court did not. Had the previous analyses not been evidence enough that the cases upon which the decision was based were distinguishable, *Austin's* completely irreconcilable decision should sway those not yet convinced. Thus, in *Bennis III*, the Court's decision was rooted solely in cases that are distinguishable. The facts are distinguishable, the reasons for upholding the forfeiture are distinguishable, the purposes of the forfeitures are inapplicable to the case, and the characterization of the forfeiture in *Bennis III* is completely inconsistent with even the Court's most recent decision on point.

V. IMPLICATIONS AND RAMIFICATIONS

A. *Implications of the Standards*

Although presented with two standards,[185] the Court failed to adopt, or even address, an appropriate standard by which to adjudge future forfeiture cases. Either standard would have limited the government's ability to seize the property of completely innocent owners, safeguarding the property rights of individuals while concurrently ensuring the police powers necessary to deter crime, punish criminals, and nullify the profitability of crime.

182. *Austin*, 509 U.S. at 621 (quoting *Ward*, 448 U.S. at 254).
183. *Readers' Views*, CINN. ENQ., March 14, 1996, at A19.
184. *Bennis III*, 116 S. Ct. at 1007 (Stevens, J., dissenting).
185. Brief for Petitioner at 11; Brief of United States at 7.

1. The "Negligent Entrustment" Standard

The petitioner, Mrs. Bennis, advocated a "negligent entrustment" standard that was suggested by the Court in the *Calero-Toledo* dicta.[186] She urged that

> [b]ecause of the historic importance of property rights, the need for a clear, uniform standard to guide the lower courts, and the need to avoid "unduly oppressive" confiscations of property from innocent owners like [herself], the Court should adopt the negligent entrustment standard as the measure of culpability required to satisfy due process in these circumstances.[187]

The "negligent entrustment" standard is adopted from section 308 of the Restatement (Second) of Torts, which states:

> It is negligence to permit a third person to use a thing or to engage in an activity which is under the control of the actor, if the actor knows or should know that such person intends or is likely to use the thing or to conduct himself in the activity in (a manner proscribed by law).[188]

This standard would permit the forfeiture of property belonging to an innocent owner only if the owner had been negligent in entrusting his property to a third person. Furthermore, this standard would "place the burden on the government to demonstrate that an owner negligently allowed another to use his property for illegal purposes."[189]

It is argued that Mrs. Bennis would have met the "negligent entrustment" standard and defeated the forfeiture.[190] The record reflects uncontradicted testimony that Mrs. Bennis had no knowledge that her husband would use the vehicle in a proscribed manner,[191] nor any reason to believe that he would do so.[192] Furthermore, Mr. Bennis, as established at oral argument, had no need to be "entrusted" with the vehicle due to his right, by virtue of

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186. Brief for Petitioner at 9.

187. *Id.*

188. *Id.* at 15. "[A] manner proscribed by law" reflects the change suggested by petitioner. These words replaced the actual language "such a manner as to create an unreasonable risk of harm to others."

189. Brief of The Institute for Justice as Amicus Curiae In Support of Petitioner at 12.

190. Brief for Petitioner at 16.

191. *Id.*

192. *Id.*

being a co-owner, to use the car as he chose.[193] Thus, there is no "negligent entrustment" for which Mrs. Bennis should be punished. Accordingly, Mrs. Bennis met the "negligent entrustment" standard she advocated, and, therefore, the punitive forfeiture of her interest in the vehicle without compensation was inappropriate.[194]

While the respondent advocated the adoption of no particular standard by which to adjudge forfeiture, both The American Alliance for Rights and Responsibilities ("American Alliance") and the United States, in their *amici curiae* briefs, encouraged the Court to reject the negligent entrustment standard advocated by Mrs. Bennis,[195] and the United States advocated the adoption of an "all reasonable steps" standard.[196] The parties encouraged the rejection of the "negligent entrustment" standard for two principal reasons. First, it was suggested that such a standard would exempt many co-ownership arrangements, placing a vast amount of property beyond the hands of forfeiture,[197] including Mrs. Bennis's interest in her forfeited automobile. This seemed unacceptable to the parties supporting the respondent, for apparently their goal was to subject as much property as possible to the threat of forfeiture. Second, it was suggested that the "negligent entrustment" standard is unacceptable because it limits the innocent owner's liability to the time of entrustment. It was contended that this standard should be rejected because "[i]n many cases, an owner can reasonably be expected to take precautions against illegal use of his property after, as well as before, entrusting it to someone else."[198] Thus, it was upon these grounds that the parties believed the Court should reject the "negligent entrustment" standard advocated by Mrs. Bennis.

2. The "All Reasonable Steps" Standard

While American Alliance was content to encourage the rejection of the "negligent entrustment" standard, the United States advocated the adoption of an "all reasonable steps" standard by which to adjudge future forfeitures.[199] However, the goal of the United States was not to promote efficiency in future forfeiture cases, rather the United States believed that "[t]he

193. Transcript of Oral Argument at 11.
194. Brief for Petitioner at 17.
195. Brief of United States at 8; Brief of American Alliance at 6.
196. Brief of United States at 7.
197. Brief of American Alliance at 14.
198. Brief of United States at 8.
199. *Id.* at 11.

Constitution [b]ars [t]he [p]unitive [f]orfeiture [o]f [p]roperty [w]hen [t]he [o]wner [a]lleges [a]nd [p]roves [t]hat [h]e [t]ook [a]ll [r]easonable [s]teps [t]o [p]revent [i]llegal [u]se [o]f [t]he [p]roperty."[200] Thus, the United States, unlike the Supreme Court, believed that the Constitution affords a degree of protection to the innocent owners of forfeited property. The United States asserted:

> [W]hen an owner pleads and proves that he took all reasonable steps to prevent the involvement of his property in the illegal conduct underlying the forfeiture, . . . [he] has, by definition, minimized the foreseeable risk of illegal use and, in turn the risk of forfeiture. . . . Moreover, an owner who can prove that he took all reasonable, affirmative measures to prevent unlawful use is far less likely to be in collusion with the person who uses the property illegally than is an owner who merely asserts lack of knowledge or participation in the illegal use.[201]

Thus, because the United States contended that the Constitution does not bar forfeiture of property when an innocent owner merely asserts lack of knowledge or reason to know of the illegal use, adopting the "all reasonable steps" standard would provide property owners an incentive to "take affirmative steps to detect and prevent the illegal use of their property, [thereby] eliminat[ing] the need for judicial inquiry into the possibility that the alleged innocent owner is in collusion with the person making illegal use of the property."[202]

Although she contended that she would prevail under either standard, Mrs. Bennis urged the Court to reject the "all reasonable steps" standard in favor of the "negligent entrustment" standard.[203] She so urged because the vagueness of the former standard "has led to widely divergent innocent owner determinations in federal and state cases, and to arbitrary forfeitures of property."[204] Furthermore, "because [the standard] does not require courts to take account of the relationship between actual or constructive knowledge of misuse and a duty to take preventive measures—courts have too often applied that standard so as to permit a forfeiture in the absence of fault."[205]

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200. Brief of United States at 8.
201. *Id.* at 11.
202. Brief of United States at 11.
203. Reply Brief for Petitioner at 3.
204. *Id.*
205. *Id.* at 6.

In other words, on its face, the "all reasonable steps" standard could aid in the forfeiture of an innocent owner's property merely because the owner was unaware that any steps could or should have been taken.

Mrs. Bennis contended that, were the "all reasonable steps" standard applied, she would prevail on three principal grounds.[206] First, Mrs. Bennis asserted that her undisputed innocence[207] precluded her ability to take *any* steps to have prevented the act which led to the forfeiture of the Bennis vehicle.[208]

> Whether one did all that could reasonably be expected to prevent a misuse is necessarily a function of whether one knew or should have known of another's criminal wrongdoing. . . . Indeed, if one has no knowledge or reason to know of a wrongful use, then one cannot be expected to take affirmative steps to prevent that use. As to Mrs. Bennis, it hardly requires argument that a wife would, as a matter of course, take all reasonable steps to assure her husband's fidelity.[209]

While the state conceded that Mrs. Bennis had no knowledge of her husband's illegal actions,[210] the United States contended that she failed to prove that she took "all reasonable steps" to prevent it.[211] Furthermore,

> [t]he United States concedes that "it may be true in many cases that a spouse who lacks reason to know that the other spouse will use jointly owned property illegally cannot reasonably be expected to take any precautions." And the amicus brief of the American Alliance acknowledges that "an uninvolved co-owner would have to know of the specific illegal use in order to take reasonable steps to prevent it."[212]

Thus, the fact that Mrs. Bennis was ignorant of her husband's activity would seem to exculpate her from proving that she had taken "all reasonable steps" to deter the misuse. Hence, the contentions of the respondent, United States, and *amici curiae* are completely inconsistent with Mrs. Bennis's innocence.

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206. Brief for Petitioner at 17.
207. *Bennis II*, 527 N.W.2d at 486.
208. Brief for Petitioner at 17.
209. *Id.*
210. *Bennis I*, 504 N.W.2d at 733.
211. Brief of United States at 15.
212. Reply Brief for Petitioner at 8 n.7 (citations omitted).

Second, Mrs. Bennis asserted the fact that "she did not stand to benefit financially or otherwise from the particular use he was found to have made of the car,"[213] as further supporting her contention that, had there been steps she could have or should have taken, nothing would have discouraged her from doing so. This contention addresses any supposition that she may have been "in collusion with [her husband in] making illegal use of the property."[214]

Third, "the fact that [Mrs. Bennis] lacked meaningful control over her husband's use of the property is another factor supporting the conclusion that [she] took all steps that 'reasonably could be expected' to prevent the proscribed use."[215] As previously established, Mrs. Bennis did not entrust[216] the car to her husband on October 3, 1988.[217] John Bennis, as co-owner of the car, had every right to use the car when and how he chose, and Mrs. Bennis had no right to impede him from doing so.[218] Thus, without the power and ability to prevent her husband from employing the car as he pleased, Mrs. Bennis was without the power and ability to take "all reasonable steps" to prevent the misuse of the property. As such, she took "all [the] reasonable steps" that she could.

B. *The Flaws*

Based upon the preceding analysis, it is apparent that each standard possesses inherent flaws which would aid in, rather than prevent, the misapplication of forfeiture. Thus, while the Court may have properly failed to adopt one of the proffered standards, the failure to address the issue or adopt an alternative standard left the Court's opinion incomplete. Without a standard, and without any indication of the Court's position on a standard, courts will be hard-pressed to apply the *Bennis III* decision in any way other than to uphold the array of forfeitures encountered. Without a standard, and without any indication of the Court's position on a standard, courts will be hard-pressed to derive from *Bennis III* the characteristics of forfeiture that determine its constitutionality or unconstitutionality, or its permissibility or impermissibility.

213. Brief for Petitioner at 17.
214. Brief of United States at 11.
215. Brief for Petitioner at 17.
216. Transcript of Oral Argument at 28.
217. *Bennis II*, 527 N.W.2d at 486.
218. Transcript of Oral Argument at 31.

The "negligent entrustment" standard, which strives to achieve a principle purpose of forfeiture,[219] may place a greater limitation on forfeiture than the "all reasonable steps" standard, but may inadvertently provide persons whose property should rightfully be seized a loophole by which to escape the deterrence of forfeiture. The "negligent entrustment" standard, as advocated by Mrs. Bennis, restricts the time of entrustment, in a co-ownership situation, to the time at which a co-ownership is created.[220] In Mrs. Bennis's situation, for example, the time of entrustment occurred at the time she and her husband purchased the car together.[221] Thus, Mrs. Bennis could be held accountable for negligent entrustment only if she knew or had reason to know of her husband's tendency to solicit prostitutes *at the time the car was purchased.* Had Mrs. Bennis become aware of her husband's activities at any time subsequent to the purchase, she could not be held accountable solely on the premise that there was no entrustment.

While the fact that there was no entrustment in the Bennis situation does distinguish it from previous cases, the lack of entrustment should not be the sole determinative factor in proscribing forfeiture. The "negligent entrustment" standard fails to consider whether the property owner had any knowledge of misuse by a third party to whom they entrusted their property subsequent to the entrustment but prior to the time the misuse occurred. If the owner becomes apprised of the misuse post-entrustment, the "negligent entrustment" standard imposes upon the owner no duty or incentive to take steps to prevent or diminish the misuse. Thus, the application and deterrent nature of the "negligent entrustment" standard is quite limited and does not best serve the intentions of forfeiture.

Likewise, the "all reasonable steps" standard has inherent flaws that would theoretically permit the forfeiture of stolen property more readily than the forfeiture of property that had been negligently entrusted. The "all reasonable steps" standard forces the petitioner to plead and prove the steps he took to prevent the misuse of his property. However, the respondent may then produce "reasonable steps" that had not, but arguably should have, been taken.

Furthermore, as the "negligent entrustment" standard imposes upon the owner no duty to take precautions, the "all reasonable steps" standard fails to

219. The primary purpose being referred to here is the idea of punishing persons who negligently entrust their property to others who misuse it. This is seen as underlying each of the several theories of forfeiture. *Austin*, 509 U.S. at 618.

220. Transcript of Oral Argument at 12.

221. *Id.*

consider whether the owner was aware of any wrongdoing. In the Bennis situation, Mrs. Bennis was completely unaware of the use to which her husband was putting the car. The United States acknowledged that without knowledge of any potential misuse of the property, an innocent owner is limited in his ability to prevent that of which he is unaware. The United States, advocate of the "all reasonable steps" standard, then failed to suggest any steps that Mrs. Bennis could or should have taken to prevent her husband's illegal activity. But the United States insists that she failed the test. Thus, if not guilty of negligent entrustment, how could any truly innocent owner meet the standard advocated by the United States?

Although a victim of car theft is arguably the epitome of the innocent owner, it can reasonably be foreseen that a person's vehicle may at some point be stolen. Thus, in order to prevent the forfeiture of a stolen vehicle that was misused by the thief, the owner must take "all reasonable steps" to prevent the vehicle from being stolen, the key to preventing its subsequent misuse. Perhaps the owner left his car unlocked, placed a spare key in a "hiding" spot on the car which the thief found, or failed to arm the car with an alarm. Certainly locking the doors, refraining from placing a spare key on the car, and installing a car alarm are "reasonable steps" that could or should have been taken. Because there were "reasonable steps" that the owner failed to take, under the "all reasonable steps" standard, the victim of car theft fails, losing his property because it was misused by a thief. Perhaps the government contends that it would use its "prosecutorial discretion" and not proceed with such actions; however, the "all reasonable steps" standard does not prohibit the government from imposing punitive forfeiture upon the victims of car theft if it so chooses.

Furthermore, while the "all reasonable steps" standard completely ignores a basic premise underlying the theories of forfeiture, the punishment of negligent entrustment, both the "negligent entrustment" and "all reasonable steps" standards disregard each of the major theories and purposes of forfeiture: The "guilty property" theory is irrelevant to the standards, as are the purposes of suppressing the wrong and ensuring indemnity to an injured party. Thus, each standard would permit improper applications of forfeiture and would fail to recognize the theories and purposes that have propelled forfeiture into modern jurisprudence.

C. *An Alternative: A Standard Comprising Both Concepts*

However, were the Court to institute a standard which would encompass both a "negligent entrustment" and an "all reasonable steps" faction, both the theories and purposes of forfeiture could be recognized, and the

property rights of truly blameless individuals could be protected against inequitable forfeitures. Because a basic premise of forfeiture has been to punish the negligent entrustment of property, such a standard is appropriate—even necessary. This would punish those who truly were negligent, while serving to protect those who did not entrust their property, negligently or otherwise. Thus, those whose property had been stolen would be free from the threat of forfeiture, and those who co-own property are not made a "guarantor for the behavior of the person who misuses the property."[222] However, it is important to then impose upon the owner, whether or not the property was found to have been negligently entrusted, a "reasonable steps" standard.[223] Imposing this subsequent standard would impose upon the owner a duty to take "reasonable steps" to prevent or diminish any misuse or potential misuse of his property, if the owner had, at any time, become apprised of such. Thus, a truly innocent owner would be protected from the threat of forfeiture, while an owner who either negligently entrusted his property and failed to take reasonable steps to prevent the misuse of it, or did not negligently entrust his property but learned of a possible or actual misuse of it and failed to take reasonable steps to prevent or diminish the misuse, would be properly punished for his failure to control his property in a responsible manner. Such a standard would protect the property rights of individuals against unnecessary and improper forfeiture and impose upon property owners a duty to take precautions to ensure that their property will not be misused.

D. *Ramifications of* Bennis v. Michigan

Although the institution of a standard by which to adjudge future forfeitures would be preferable than lacking any obvious guidelines, the Court did not comply. Thus, bearing in mind the reality, there undoubtedly are post-*Bennis III* ramifications that will be experienced. As previously addressed, there presumably will be cases in which a court finds itself bound to order or uphold the forfeiture of property that belongs to a truly innocent owner. There may very well be cases in which a court finds itself bound to

222. Reply Brief for Petitioner at 7.

223. The "all reasonable steps" standard has been altered slightly here, dropping the "all." It seems that courts would be constricted with such a qualification, as it would be difficult for any petitioner to plead and prove *all* reasonable steps. Thus, by omitting the qualification, courts have greater discretion to judge whether the "reasonable steps" that were taken by a petitioner are sufficient to prevent a forfeiture.

order or uphold the forfeiture of property that has been stolen from a truly innocent owner. These scenarios, however, have been intimated.

What has not been intimated is an example of a more practical ramification that could be more expansively suffered. While the preceding commentary considered situations most similar to the situation in *Bennis*, those who most often have an interest in property belonging to another that is apparently at great risk are financial institutions. The *Bennis* decision will place money lenders in an extremely perilous predicament—for every loan they approve, they incur the risk of losing their interest in the property upon which they loaned money.[224] Faced with this possibility, "financial institutions will be forced to restrict credit and banking availability to many individuals."[225] Thus, it will be essential for financial institutions to conduct in-depth background checks on potential customers to detect those that are at risk for being the subject of a forfeiture proceeding.[226] However, the most extensive background check will undoubtedly be unable to detect a person's potential to be the victim of a forfeiture due to misuse of their property by a third person. Moreover, "no prudent lender could justify a loan against the risk that an honest and good credit risk customer could have their property seized because the government asserts that the property was used to facilitate a crime by another individual."[227]

In denying a customer financing collateralized by property based upon a determination that he is at greater risk for being the subject of a forfeiture, the lender "might violate [a] duty to the customer or anti-discrimination laws. Indeed, the lender could even be subjected to defamation claims and lawsuits, all of which would raise the cost of borrowing money."[228] Thus, while the decision will probably permit the forfeiture of property from innocent owners, adversely affecting those faced with the inequitable forfeiture, the most daunting effects of the decision could infiltrate aspects of our society not yet considered, inflicting ramifications not yet fathomed.

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224. *See* Steven L. Kessler, *Forfeiture and the Innocent Owner*, N.Y. L.J., November 27, 1995, at 1.

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

VI. CONCLUSION

While it is difficult to deny that forfeiture, if properly applied, can be a useful and successful tool in combating and deterring crime, it is important that the individual rights of innocent people are not compromised in the process. The respondent in this case asserts that the crux of the forfeiture debate lies within the question, "[d]o an individual's property rights outweigh a government's ability to exist?"[229] To this question the respondent replies, "'No.'"[230] While the respondent's answer to the question is seemingly appropriate, the question misses the mark. The "government's ability to exist" hardly hinges on its ability to forfeit the property of innocent owners. More importantly and more accurately, there is absolutely no reason that the government's ability to combat and deter crime should not exist without infringing upon the rights of innocent individuals. While the Court's decision in *Bennis III* has apparently impeded the path to such a coexistence, perhaps legislators will take heed and initiate a few impediments of their own—impediments to the government's seemingly unbridled power to forfeit, that is. Conceivably the Court will detect its own error and rectify the situation in due time. As pointed out by George Will, "[i]n 1896, in *Plessy v. Ferguson* the [C]ourt held that 'separate but equal' public facilities segregated by race were compatible with the 14th Amendment's guarantee of equal protection of laws. Later, the [C]ourt staged a protracted retreat from that position."[231] Does *Bennis III* await the same fate? As aptly stated by Thomas Jefferson in his first inaugural speech exactly 195 years prior to the *Bennis III* decision, "[l]et history answer this question."[232]

Brooke D. Davis

229. Brief for Respondent at 10.

230. *Id.*

231. George Will, *It's Time to Fix Forfeiture Law*, NEWSDAY, March 10, 1996, at A42.

232. President Thomas Jefferson, First Inaugural Address, March 4, 1801, *reprinted in* GREAT ISSUES IN AMERICAN HISTORY (Richard Hofstadler ed., Vintage Books 1958).