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# "Not Now" Does Not Necessarily Mean "Not Ever": The Supreme Court's Refusal in Bennis v. Michigan To Abandon the "Guilty Property" Fiction of Forfeiture Law

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# "NOT NOW" DOES NOT NECESSARILY MEAN "NOT EVER": THE SUPREME COURT'S REFUSAL IN *BENNIS V. MICHIGAN* TO ABANDON THE "GUILTY PROPERTY" FICTION OF FORFEITURE LAW

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## I. INTRODUCTION

The result in *Bennis v. Michigan*[1] may be indefensible, as many commentators believe,[2] but it is not inexplicable.[3] To the contrary, Chief

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1. 116 S. Ct. 994 (1996).

2. *See* Sandra Guerra, *Family Values?: The Family As an Innocent Victim of Civil Drug Asset Forfeiture*, 81 CORNELL L. REV. 343, 366-368 (1996) (criticizing the decision of the *Bennis* Court). Although the decision in *Bennis* has not yet generated much legal commentary, it was quickly and almost unanimously condemned in newspaper editorials. *See, e.g.*, Robyn E. Blumner, Perspective, *Moving One Step Closer To a Police State*, ST. PETERSBURG TIMES, Mar. 17, 1996, at 4D; Bruce Fein, Commentary, *Benchmarks of Absurdity: A Criminal Step Too Far?*, WASH. TIMES, Mar. 12, 1996, at A16; Richard Grossman, Editorial, *As a Matter of Law Seizure*

Justice Rehnquist, writing for the Court, explained the result with his customary candor and brevity.[4] He said that the result flowed from the "guilty property" fiction of civil forfeiture law and that this fiction was "too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced."[5]

Critics of forfeiture law, understandably, ridicule the "guilty property" fiction; it is an easy target.[6] Most critics do not, however, consider why that

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*Ruling Belongs in 19th Century*, POST STANDARD (Syracuse, N.Y.), Mar. 11, 1996, at A8; Charles Levendosky, Op Ed, *High Court Takes Low Road on Forfeiture*, DAYTON DAILY NEWS, Mar. 14, 1996, at 15A; Debra J. Saunders, Editorial, *A Convoluted Court Ruling: Is Fairness Totally Disconnected from the Law?*, ATLANTA J. & CONST., Mar. 13, 1996, at A18; George Will, *Confiscation Ruling Serves As a Warning*, FRESNO BEE, Mar. 11, 1996, at B5; *cf. It's a Legislative Job*, PROVIDENCE J.-BULL., Mar. 15, 1996, at B6 (arguing that the Court in *Bennis* properly applied its precedent and that protection for "innocent owners" should be supplied by legislation, rather than court decisions).

3. *See* George M. Dery III, *Adding Injury to Insult: The Supreme Court's Extension of Civil Forfeiture to Its Illogical Extreme in* Bennis v. Michigan, 48 S.C. L. REV. 359 (1997). In *Bennis*, Detroit police officers caught John Bennis engaged in a sexual act with a prostitute in the front seat of a car that he co-owned with his wife, Tina Bennis. *See* Michigan *ex rel.* Wayne County Prosecutor v. Bennis, 527 N.W.2d 483, 486 (Mich. 1994), *aff'd*, *Bennis*, 116 S. Ct. 994. In addition to charging Mr. Bennis with a crime, the Prosecutor for Wayne County Michigan (in which Detroit is located) brought a civil proceeding seeking forfeiture of the car, as a "nuisance," based on its use in the crime. *See id.* Ms. Bennis argued that, because she had not known that her husband would use the car illegally, the forfeiture of her interest in the car violated the Due Process Clause of the Fourteenth Amendment and the Takings Clause of the Fifth Amendment (which applies to States under the Fourteenth Amendment, *see, e.g.*, Dolan v. City of Tigard, 512 U.S. 374 (1994)). *See Bennis*, 116 S. Ct. at 997. The United States Supreme Court, by a five-to-four vote, affirmed the Michigan Supreme Court's decision to uphold the forfeiture. *See id.* at 996.

4. Justices O'Connor, Scalia, Thomas, and Ginsburg joined the Chief Justice's majority opinion. *See Bennis*, 116 S. Ct. at 996. Justices Thomas and Ginsburg also filed separate, concurring opinions. *See id.* Justice Stevens filed a dissenting opinion, in which Justices Souter and Breyer joined. *See id.* Justice Kennedy filed a separate, dissenting opinion. *See id.*

5. *Id.* at 1001 (quoting J.W. Goldsmith, Jr.-Grant Co. v. United States, 254 U.S. 505, 511 (1921)). The "guilty property" fiction holds that the property to be forfeited is itself to blame for the wrongdoing on the basis of which forfeiture is sought. *See, e.g.*, Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 684-686 (1974). Thus, in an early decision upholding the forfeiture of a pirate ship, the Court stated that "[t]he 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." Harmony v. United States, 43 U.S. (2 How.) 210, 233 (1844) (Story, J.). For a concise history of forfeiture law, see 9 THOMPSON ON REAL PROPERTY § 77.01 (David A. Thomas ed., 1996 Cum. Supp.).

6. *See, e.g.*, Jacob J. Finkelstein, *The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty*, 46 TEMP. L.Q. 169, 257 (1973) (stating that the guilty property fiction "is about as irrational and unjust a proposition as a sober mind can concoct"); Robert Lieske, *Civil Forfeiture Law: Replacing the Common Law with a Common Sense Application of the Excessive Fines Clause of the Eighth Amendment*, 21 WM. MITCHELL L. REV. 265, 292, 298-99 (1995) (tracing current abuse of civil

fiction is "so firmly fixed" in the Court's "punitive and remedial jurisprudence."[7] Nonetheless, I believe that the important role of the guilty property fiction in the broader scheme of the Court's "punitive and remedial jurisprudence" is the key to the *Bennis* decision.

If the Court in *Bennis* had abandoned the guilty property fiction, its decision would have cast doubt on the application of other well-settled "punitive and remedial" doctrines. These include the doctrines of strict and vicarious liability and double jeopardy. My purpose is not to praise *Bennis*, but to explain it, briefly, in terms of its implications for these other legal theories. I hope to show that critics of the guilty-property fiction should focus their efforts, not on its absurdity, but, instead, on the way in which the Court might lay it to rest without unduly disturbing other firmly entrenched (and perhaps more defensible) doctrines.

## II. THE SUPREME COURT HAS CONSISTENTLY ADHERED TO THE "GUILTY PROPERTY" FICTION OF FORFEITURE LAW

Say what you will about *Bennis*; you cannot say that it broke with the past. Over the years, the Court has consistently upheld the civil forfeiture of property that has been used illegally without the owner's knowledge.[8] Granted, the Court has sometimes held its nose while doing so. In *J.W. Goldsmith, Jr.-Grant Co. v. United States*, for example, the Court wondered aloud about the fairness of forfeiting a car used to transport liquor without the owner's knowledge.[9] In later decisions, the Court has hinted that the Constitution may forbid the forfeiture of property belonging to a "truly" innocent owner.[10] But as Justice Scalia remarked during the oral argument

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forfeiture laws to continuing judicial acceptance of guilty property fiction); Roger Pilon, *Can American Asset Forfeiture Law Be Justified?*, 39 N.Y.L. SCH. L. REV. 311, 332 (1994) (finding the "personification" and "taint" doctrines underlying the guilty property fiction "simply too fantastic to require much rebuttal").

7. *Bennis*, 116 S. Ct. at 1001 (quoting *Goldsmith-Grant Co.*, 254 U.S. at 511).

8. *See Bennis*, 116 S. Ct. at 998-99; *see also* United States v. 92 Buena Vista Ave., 507 U.S. 111, 119 (1993) (plurality opinion) (noting the historic availability of forfeiture "notwithstanding the innocence of the owner"); *Calero-Toledo*, 416 U.S. at 683 ("the innocence of the owner of property subject to forfeiture has almost uniformly been rejected as a defense") (citing Van Oster v. Kansas, 272 U.S. 465, 466-69 (1926); *Goldsmith-Grant Co.*, 254 U.S. at 509; Dobbins's Distillery v. United States, 96 U.S. 395, 399-401 (1878); *Harmony*, 43 U.S. (2 How.) at 233-35; The Palmyra, 25 U.S. (12 Wheat.) 1 (1827)).

9. 254 U.S. at 510 ("There is strength . . . in the contention that . . . [the statute at issue] seems to violate that justice which should be the foundation of the due process of law required by the Constitution", *quoted in Bennis*, 116 S. Ct. at 1001 (Thomas, J., concurring) (ellipses and bracketed material added by Justice Thomas)).

10. Austin v. United States, 509 U.S. 602, 617 (1993). In *Calero-Toledo*, the Court said:

and as the Court observed in its opinion, these suggestions of fairness-based limits on forfeiture were dicta.[11] While Ms. Bennis was armed with dicta, her opponent, the Prosecutor for Wayne County, Michigan, was armed with holdings, including several from this century, which sustained the forfeiture of an innocent owner's property.[12]

This point is not made to defend the dignity of the current Court or to defend the result in *Bennis*. It is made to suggest that there is an important explanation for the *Bennis* decision. If the decision were less consistent with the reasoning and result of precedent than it is, it might be dismissed as the reactionary sport of a "head in the sand" majority.[13] But the consistency and tenacity with which the Court has clung to the guilty-property fiction suggests that something more is going on. Here is my thesis of what it is: Far from demonstrating that the *Bennis* majority had its head in the sand, the decision reflects the majority's awareness of the broader remedial and punitive jurisprudence of which civil forfeiture is a part. I will discuss the remedial jurisprudence and then the punitive.

## III. AN ABANDONMENT OF THE "GUILTY PROPERTY" FICTION WOULD CAST DOUBT ON CERTAIN APPLICATIONS OF STRICT AND VICARIOUS LIABILITY

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> It therefore has been implied that it would be difficult to reject the constitutional claim of an owner whose property subjected to forfeiture had been taken from him without his privity or consent. Similarly, the same might be said 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.

416 U.S. at 689-90 (citations and footnote omitted).

11. *See* Transcript of Oral Argument in *Bennis*, No. 94-8729, 1995 WL 712350, at *54; *Bennis*, 116 S. Ct. at 999.

12. Justice Stevens asserts in his dissent in *Bennis* that the majority's decision is "novel[]." 116 S. Ct. at 1004 (Stevens, J., dissenting). He does not, however, persuasively distinguish *Bennis* from prior civil forfeiture decisions by the Court. That precedent includes three decisions upholding the civil forfeiture of cars that were used illegally without the owner's knowledge. *See* Van Oster v. Kansas, 272 U.S. 465, 466-69 (1926) (upholding forfeiture of car used to transport liquor in violation of state law, despite owner's claim that she lacked knowledge of illegal use); United States v. One Ford Coupe, 272 U.S. 321, 332 (1926) (upholding "forfeiture of the interest in a vehicle of one who had no guilty knowledge that it was to be used for an illegal purpose"); *Goldsmith-Grant Co.*, 254 U.S. at 509 (upholding forfeiture of a taxicab used to transport alcohol in violation of federal law, even though owner had no knowledge of, or even "any notice or reason to suspect," the illegal use). Justice Stevens argues that, in such cases, the cars facilitated the crime (transportation of contraband) in a manner that cars cannot facilitate prostitution. *See Bennis*, 116 S. Ct. at 1006. Common experience, as well as the record in *Bennis*, however, indicates that cars do indeed facilitate prostitution. *See* Michigan *ex rel.* Wayne County Prosecutor v. Bennis, 527 N.W.2d 483, 491 (Mich. 1994).

13. Dery, *supra* note 3, at 379.

Consider the most straightforward way that the Court could have decided the case in favor of Ms. Bennis. One might begin with the issue before the Court as framed by the media: Does the Constitution permit the government to confiscate an innocent owner's property?[14] Most people would agree that the answer should be "no." The principle underlying that answer, at this level of analysis, would be that the Constitution prohibits the government from confiscating innocent owners' property. The problem with deciding *Bennis* on that principle is that the government takes innocent owners' property in other contexts. Such takings may occur under the doctrines of strict or vicarious liability.[15]

For example, many states make the owner of a car financially responsible for any accident caused by someone to whom the owner has loaned the car.[16] A car owner's liability for such an accident may exceed the value of the car by many orders of magnitude. In some states, the owner cannot escape liability by showing that he or she had every reason to believe that the person who borrowed the car would be careful.[17] These financial-responsibility laws, some of which impose vicarious liability on car owners, have never been thought to pose a constitutional concern. To the contrary, the Court has taken it for granted that they are constitutional.[18]

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14. *See, e.g.*, Joan Biskupic, *Woman Asks Court to Shield Family Car From Straying Husband's Forfeiture*, WASH. POST, Nov. 30, 1995, at A25 ("'Why should a person who is totally innocent have to give up property' used for activities unbeknown to the owner?") (quoting Justice Breyer's question at oral argument); Paul Leavitt, *Supreme Court Weighs Law Allowing Confiscation*, USA TODAY, Nov. 30, 1995, at 3A (stating that the issue in *Bennis* was "[a] Michigan law that lets authorities confiscate crime-related property even if owned by innocent people"); *Justices Hear Car Seizure Argument*, BOSTON GLOBE, Nov. 30, 1995, at 28 ("At issue: The scope of government's power to confiscate property linked to crime but owned, at least partially, by innocent people.").

15. "'Vicarious liability' may be defined as the imposition of liability upon one party for a wrong committed by another party." Alan O. Sykes, *The Boundaries of Vicarious Liability; An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines*, 101 HARV. L. REV. 563, 563 (1988); *see also* 5 FOWLER V. HARPER, FLEMING JAMES & OSCAR S. GRAY, THE LAW OF TORTS § 26.1, at 2 (2d ed. 1986) [hereinafter HARPER & JAMES]; W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER AND KEETON ON TORTS § 69, at 499 (5th ed. 1984) [hereinafter PROSSER & KEETON]. "Strict liability" is imposed upon one whose conduct causes injury without fault. *See* 3 HARPER & JAMES, *supra*, § 14.1, at 183; PROSSER & KEETON, *supra*, § 75, at 534.

16. *See* PROSSER & KEETON, *supra* note 15, § 73, at 522-28; 7A AM. JUR. 2D, *Automobiles & Highway Traffic* § 668 (1980).

17. *See* Sykes, *supra* note 15, at 594-97.

18. *See* Young v. Masci, 289 U.S. 253, 257 (1933); Van Oster v. Kansas, 272 U.S. 465, 467 (1926); *cf.* Pacific Mutual Life Ins. v. Haslip, 499 U.S. 1, 14-15 (1991) (rejecting substantive due process challenge to a state, common-law rule authorizing punitive damages against corporations for the fraud of employees acting within scope of employment).

Strict liability, or "liability without fault," is similarly common in federal statutory schemes. A famous illustration is *United States v. Park*, in which the Supreme Court upheld the conviction of a food company president for federal health violations at company plants.[19] The Court made it clear that the validity of the president's conviction did not depend on whether he knew about the violations.[20] It was enough that he stood "'in responsible relation'" to the violations.[21] In other words, his ability to prevent the violations from occurring or continuing if he had known of them (which he did not) was determinative.[22]

Other examples of federal liability without fault arise under the Superfund law.[23] According to Superfund statutes, a person who has owned land on which a prior owner has dumped hazardous wastes may be liable for the government's costs of responding to the release, or a threatened release, of the wastes. This is true even if (1) the dumping of the wastes was not illegal when it occurred; (2) the person had no reason to know about the dumping of the wastes; and (3) the person has sold the land to a third party by the time the wastes are discovered.[24] Although the Supreme Court has not reviewed a constitutional challenge to the retroactive imposition of strict liability under CERCLA, the lower federal courts have consistently rejected such challenges.[25]

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19. United States v. Park, 421 U.S. 658, 667-78 (1975).

20. *See id.* at 670-75 (reviewing the standard of liability accorded by the statute under which Park was charged as well as jury instructions on that standard).

21. *Id.* at 668 (quoting United States v. Dotterweich, 320 U.S. 277, 280-281 (1943)).

22. *See id.* at 671.

23. The formal name for the Superfund law is the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. §§ 9601-75 (1994).

24. Under CERCLA, the government may respond to the release or threatened release of hazardous wastes and then recover its response costs from those parties connected with the wastes. These parties specifically include "any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of." 42 U.S.C. § 9607(a)(2) (1994). CERCLA defines the term "facility" broadly to include not just industrial facilities, but any place where a hazardous substance has "come to be located." 42 U.S.C. § 9601(9)(B) (1994). The concept of "disposal" has also been defined and interpreted broadly to include almost any dispersal or movement of a hazardous substance. *See* 4 WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW: HAZARDOUS WASTES AND SUBSTANCES § 8.12.B.1, at 674 & n.47 (1992). As a result, "the past owners who are drawn into the liability net include not only the fellow whose historical bad judgment polluted the site but all those other owners who dug, and pushed the soil about, and otherwise manipulated the surface." *Id.* It does not matter that the disposal occurred prior to the enactment of CERCLA, nor that the former owner of the land was not to blame for the disposal. *See id.* § 8.13.A, at 683-685. CERCLA was amended in 1986 "to exclude innocent landowners from the liability scheme." *Id.* § 8.13.C.3, at 695. That defense is "constrained in a variety of ways," however, that may often make the burden of establishing it "insuperable." *Id.* § 8.13.C.3(*e*), at 698.

25. *See* RODGERS, *supra* note 24, at 685; *cf.* United States v. Olin Corp., 927 F. Supp. 1502

The imposition of liability without guilty knowledge under the doctrines of strict and vicarious liability is not new.[26] The doctrines have deep roots in, for instance, the law of private nuisance. A landowner sued under a private nuisance theory can be held liable for damages caused to other properties by the non-negligent use of the land.[27] Liability without negligence could likewise attach under the separate, but similarly named doctrine of public nuisance.[28] Under this latter doctrine, the government may enjoin activities that are noxious to the public or even confiscate the offending property.[29] In such cases, it does not matter that the owner of the property is not blameworthy.[30] The constitutionality of government power to abate public nuisances is well-established in a "long line of [Supreme] Court[] cases sustaining against Due Process and Takings Clause challenges the State's use of its 'police powers' to enjoin a property owner from activities akin to public nuisances."[31] The Court also has upheld against constitutional attack the government's destruction of property that created a public nuisance.[32]

## IV. AN ABANDONMENT OF THE "GUILTY PROPERTY" FICTION WOULD ALSO CAST DOUBT ON DOUBLE JEOPARDY CASES INVOLVING CIVIL FORFEITURE.

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(S.D. Ala. 1996), *appeal docketed,* No. 96-6645 (11th Cir.) (argued Oct. 4, 1996).

26. 5 HARPER & JAMES, *supra* note 15, § 26.2 (discussing history of vicarious liability); 3 HARPER & JAMES, *supra* note 15, § 14.1 (discussing history of strict liability).

27. *See* 3 HARPER & JAMES, *supra* note 15, § 14.2 (discussing Rylands v. Fletcher, 159 Eng. Rep. 737 (1865)).

28. *See* William L. Prosser, *Nuisance Without Fault*, 20 TEX. L. REV. 399, 410-16 (1942) (explaining the difference between private nuisance and public nuisance); *id.* at 416-18 (explaining that courts have imposed strict liability in both public and private nuisance proceedings).

29. *See id.* at 411.

30. *See id.* at 417-18.

31. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1022 (1992); *see also* Grosfield v. United States, 276 U.S. 494 (1928) (affirming decree entered under the National Prohibition Act "padlocking" premises used by tenant, without lessor's knowledge, for distilling alcohol); United States v. Boynton, 297 F. 261, 266-68 (E.D. Mich. 1924) (using public nuisance doctrine to enforce prohibition); Catherine R. Connors, *Back to the Future: The "Nuisance Exception" to the Just Compensation Clause*, 19 CAP. U. L. REV. 139 (1990) (discussing the Supreme Court's conception of nuisance exception to takings); Andrew R. Mylott, Comment, *Is There a Doctrine in the House?: The Nuisance Exception to the Takings Clause Has Been Mortally Wounded by* Lucas, 1992 WIS. L. REV. 1299, 1301 n.11, 1306-08 (discussing the use of nuisance doctrine in takings cases prior to *Lucas*).

32. *See* Miller v. Schoene, 276 U.S. 272, 279-80 (1928); Sweet v. Rechel, 159 U.S. 380, 399 (1895); *see also* Mugler v. Kansas, 123 U.S. 623, 669 (1887) (allowing state to declare and abate alcohol manufacturing site as a nuisance).

One can distinguish *Bennis* from the other settings described above in which liability without guilty knowledge is imposed. Indeed, Ms. Bennis attempted to distinguish them on the ground that liability in those other settings dominantly served some non-punitive purpose—such as to provide compensation or to reallocate a loss to the party best able to bear it—whereas the forfeiture of her car dominantly served a punitive purpose.[33] Non-punitive purposes certainly underlie the provisions making car owners financially responsible for accidents caused by others driving their cars. Those provisions reflect the determination that, if the negligent driver evades or cannot pay the judgment, the loss should be borne by the owner rather than by the injured victim.[34] Similar reasoning may justify imposing liability upon the company president in *Park* and upon the landowner in a CERCLA case, instead of upon the public.[35] It is difficult, however, to conceive of a comparable justification for the result in *Bennis*; indeed, it seems perverse to impose a financial burden on Ms. Bennis when it was she, more than the public, who was victimized by Mr. Bennis's illegal use of the family car.[36] In defending the forfeiture of Ms. Bennis's car in the state courts, the Wayne County Prosecutor seemed unwittingly to lend credence to Ms. Bennis's contention that the forfeiture served no legitimate, non-punitive purpose. The prosecutor's lower-court briefs highlighted the punitive purpose and effect of the forfeiture scheme.[37]

A punitive rationale ostensibly provided a more promising basis for a decision in Ms. Bennis's favor than a rationale resting on the broad principle (discussed in Section III *supra*) that the government may *never* take the property of an innocent person. For one thing, the punitive rationale appeared not to cast doubt on the validity of doctrines like strict and vicarious liability, since those doctrines may, in general, be justified as serving non-punitive purposes. For another thing, the punitive rationale had some foundation in the case law. Specifically, decisions based on the doctrine of substantive due process suggest that the Constitution forbids the government from *punishing*

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33. *See Bennis*, 116 S. Ct. at 1000; Transcript of Oral Argument in *Bennis*, No. 94-8729, 1995 WL 712350, at *13-14.

34. *See generally* Sykes, *supra* note 15, at 594-97 (discussing the vicarious liability of motor vehicle owners).

35. *See Park*, 421 U.S. at 670-73 (discussing justification for strict liability under food and drug laws); *Developments in the Law: Toxic Waste Litigation*, 99 HARV. L. REV. 1458, 1519 (1986) (discussing justification for strict liability under CERCLA); *cf.* David G. Owen, *Rethinking the Policies of Strict Products Liability*, 33 VAND. L. REV. 681, 703-14 (1980) (evaluating conventional justifications for strict products liability, many of which are applicable outside the defective-products context).

36. *See Bennis*, 116 S. Ct. at 1009 (Stevens, J., dissenting).

37. *See id.* at 1007 (Stevens, J., dissenting) (quoting State of Michigan's brief in the Michigan Supreme Court).

a person who has no knowledge of or involvement in the conduct for which she is being punished.[38]

The problem with this principle is that it begs the question of what constitutes "punishment." This is not an easy question. The short answer is: "It depends."[39] At the time of *Bennis*, the Court had defined punishment in different ways, depending on the constitutional provision involved.[40] The most recent such case, *Austin v. United States*, held that civil forfeiture may be "punishment" and, as such, subject to challenge under the Excessive Fines Clause of the Eighth Amendment.[41] *Austin* contained dicta, moreover, suggesting that civil forfeiture could also be punishment for purposes of other constitutional provisions,[42] including the Double Jeopardy Clause of the Fifth

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38. *See* Southwestern Tel. & Tel. Co. v. Danaher, 238 U.S. 482, 490-91 (1915) (invalidating penalty against telephone company on due process grounds because company's conduct involved "no intentional wrongdoing; no departure from any prescribed or known standard of action, and no reckless conduct"); *see also* TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443, 454 & n.17 (1993) (plurality opinion) (following *Danaher*); *id.* at 479 (O'Connor, J., dissenting) (quoting *Danaher* with approval). The Court has understood the Due Process Clauses of the Fifth and Fourteenth Amendments to have both a "procedural" and a "substantive" component. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 10.6(a), at 346-48 (5th ed. 1995). The procedural component requires the government to use fair procedures when it seeks to deprive a person of life, liberty, or property. *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319, 344-45 (1976). The substantive component "bars certain arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them.'" Zinermon v. Burch, 494 U.S. 113, 125 (1990) (quoting Daniels v. Williams, 474 U.S. 327, 331 (1986)).

39. *See* Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168 (1963) (stating that question whether a sanction is punitive "has been extremely difficult and elusive of solution").

40. *See, e.g.*, Department of Revenue v. Kurth Ranch, 511 U.S. 767, 781-83 (1994) (finding a state tax on marijuana to be punishment for purposes of Double Jeopardy Clause of Fifth Amendment); *Austin*, 509 U.S. at 610 (holding civil forfeiture under 21 U.S.C. § 881(a)(4), (7) constitutes "punishment" for purposes of Excessive Fines Clause of Eighth Amendment); United States v. Halper, 490 U.S. 435, 436 (1989) (considering "whether and under what circumstances a civil penalty may constitute 'punishment' for the purposes of double jeopardy analysis"); United States v. Salerno, 481 U.S. 739 (1987) (pretrial detention was not "punishment" for purposes of substantive due process); Specht v. Patterson, 386 U.S. 605, 608-10 (1967) (civil commitment of sexual psychopath under state law was "punishment" for procedural due process purposes); *Mendoza-Martinez*, 372 U.S. at 165-66 (loss of citizenship was punishment that could, consistently with due process, be imposed only with constitutional protections afforded criminal defendants).

41. 509 U.S. at 619-22; *see also* U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

42. The Court in *Austin* explored the historical justification for civilly forfeiting property owned by someone other than the person whose illegal conduct causes the forfeiture. *See* 509 U.S. at 611-18. The Court concluded that the justification rests "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; *see id.* at 618. In so concluding, the Court in *Austin* relied on, among other cases, *Halper*, a double jeopardy case. *See Austin*, 509 U.S. at 610-11,

Amendment.[43] The *Austin* dicta cast doubt on an earlier line of Supreme Court cases holding that civil forfeiture is not punishment for purposes of the Double Jeopardy Clause.[44]

The apparent conflict between *Austin* and the line of old double jeopardy cases on the issue of whether civil forfeiture is punitive was before the Court when *Bennis* was briefed and argued. Specifically, it was posed by two other cases then on the Court's docket, which involved the civil forfeiture of property owned by a criminal defendant.[45] Those cases had not been fully briefed and argued when *Bennis* was decided.[46] It would have been difficult for the Court to find that civil forfeiture was punitive in *Bennis* without also finding it punitive in the two pending double-jeopardy cases. A decision in favor of Ms. Bennis based on the substantive due process case law cited above therefore might have required the Court to overrule its prior decisions holding that civil forfeiture is *not* punitive for double jeopardy purposes. The Court would have done so, moreover, without full briefing and oral argument on whether the prior, double-jeopardy decisions warranted being overruled.

The Court in *Bennis* might have avoided the need to characterize the forfeiture there as punitive by merely holding the Wayne County Prosecutor to his acknowledgement in lower-court briefs that the forfeiture of Ms. Bennis's car was primarily punitive.[47] Taking that route, the Court would have *assumed* that the forfeiture was punitive, as the Wayne County Prosecu-

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621.

43. U.S. CONST. amend. V ("nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb").

44. *See* United States v. Ursery, 116 S. Ct. 2135, 2140-42 (1996) (describing prior case law); *see also* Matthew P. Harrington, *Rethinking In Rem: The Supreme Court's New (and Misguided) Approach to Civil Forfeiture*, 12 YALE L. & POL'Y REV. 281, 335-36 (1994) (criticizing *Austin*).

45. In *United States v. Ursery*, 59 F.3d 568 (6th Cir. 1995), *rev'd*, 116 S. Ct. 2135 (1996), the United States brought a civil proceeding to forfeit Ursery's house on the ground that he had processed marijuana there. *See id.* at 570. After Ursery paid the government more than $13,000 to settle the forfeiture proceeding, he was convicted of manufacturing marijuana. *Id.* The Sixth Circuit held that his conviction violated the Double Jeopardy Clause because it was a second punishment for the same offense. *See id.* at 572-76. In *United States v. $405,089.23 U.S. Currency*, 33 F.3d 1210 (9th Cir. 1994), *rev'd*, 116 S. Ct. 2135 (1996), the defendants were first convicted of a crime, and then the government sought civil forfeiture of their property based on its connection with the crime. *See id.* at 1214-15. The Ninth Circuit held that the forfeiture constituted a second punishment and therefore violated the Double Jeopardy Clause. *See id.* at 1215-22. The Supreme Court granted the government's petitions for certiorari, consolidated the two cases, United States v. Ursery, 116 S. Ct. 762 (1996), and reversed in both. *See* United States v. Ursery, 116 S. Ct. 2135 (1996).

46. *Bennis* was decided on March 4, 1996. At that time, the Court had granted certiorari in *United States v. Ursery*, No. 95-345, and *United States v. $405,089.23 in United States Currency*, No. 95-346, but the cases had not been fully briefed and were not argued until April 17, 1996. *See Ursery*, 116 S. Ct. at 2135.

47. *See supra* note 37 and accompanying text.

tor had conceded, without deciding the issue as an independent matter. That escape route was made difficult, however, by the prosecutor's retreat from this concession in its briefs and argument before the Court.[48] Moreover, if the Court in *Bennis* had struck down the forfeiture in *Bennis* based on the prosecutor's concession that the forfeiture was punitive, it would have cast doubt on the validity of the many civil forfeiture laws that do not expressly protect "innocent owners."[49] The lower courts would be left without guidance on how to determine whether these laws are punitive.

If this were not enough to give pause, the Court would have had to answer another difficult question that lay beyond the issue of whether the forfeiture was punitive. This further question was: Upon what provision of the Constitution could it base a decision in Ms. Bennis's favor? Ms. Bennis staked her claim on the Takings Clause and the substantive component of the Due Process Clause.[50] The Court has divided deeply in recent years over the existence and nature of the doctrine of substantive due process.[51] In any event, its decisions appeared to require any outcome in Ms. Bennis's favor to be based on the Takings Clause, rather than on substantive due process.[52] If the Takings Clause was chosen, however, the Court would have had to explain why the *Bennis* case did not fall within the "nuisance exception" to the Takings Clause (to which reference was made above).[53]

The Court could not base a decision in Ms. Bennis's favor upon the Excessive Fines Clause, even though that Clause might have provided the most attractive ground for a ruling in her favor.[54] The Court was prevented from

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48. *See Bennis*, 116 S. Ct. at 1006-07 (Stevens, J., dissenting); Transcript of Oral Argument in *Bennis*, No. 94-8729, 1995 WL 712350, at *42 (attorney for Michigan states that "if there was punishment, it was incidental to the regulatory aim of this police power.").

49. "Innocent owner" provisions are included in the major federal statutes authorizing civil forfeiture of property that has been used illegally. *See, e.g.*, 21 U.S.C. § 881(a)(6) (1994). Some federal forfeiture statutes, however, do not contain such provisions. *See, e.g.*, 18 U.S.C. § 545 (1994) (customs); 18 U.S.C. § 1955 (1994) (racketeering); 19 U.S.C. § 1595a (1994) (unlawful importation); 31 U.S.C. § 5317 (1994) (forfeiture of monetary instruments). As for state statutory schemes, the innocent owner defense is certainly not unfamiliar. *See, e.g.*, S.C. CODE ANN. § 44-53-586 (Law. Co-op. Supp. 1995) (innocent owner defense to forfeiture of property connected with drug crimes); *id.* § 50-11-740 (allowing owners of property connected with fish and game violations to "show cause" why forfeiture should not occur).

50. *See Bennis*, 116 S. Ct. at 997-98, 1001.

51. *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110 (1989).

52. "Where a particular Amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that Amendment, not the more generalized notion of "substantive due process," must be the guide for analyzing these claims.'" Albright v. Oliver, 510 U.S. 266, 273 (1994) (quoting Graham v. Connor, 490 U.S. 386, 395 (1989)).

53. *See supra* notes 27-32 and accompanying text.

54. Under the Excessive Fines Clause, Ms. Bennis would have argued that the forfeiture of the car imposed a punishment on her that was grossly disproportionate to her culpability.

relying on that Clause by Ms. Bennis's failure to initiate such a challenge below. Ms. Bennis's failure to do so was probably the result of bad timing: *Austin*, the Court's first decision holding that a civil forfeiture can be an unconstitutionally "excessive fine," did not come down until Ms. Bennis's case was on appeal to the Michigan Supreme Court.[55] Although *Austin* would not have been a sure ticket to success, on a properly developed record, the Excessive Fines Clause may have provided the strongest basis for invalidating the forfeiture in *Bennis*.[56] Moreover, the Court could have relied on the Excessive Fines Clause in *Bennis* without casting any doubt on its old line of double jeopardy cases (which had held that civil forfeiture is not punitive) beyond the doubt created by the *Austin* decision itself. In any event, *Bennis*'s rejection of due-process and Takings Clause claims does not foreclose excessive-fines claims by innocent owners.[57] Indeed, the various opinions in *Bennis* suggest that a majority of the Court might well be receptive to an excessive-fines claim in an appropriate future case.[58]

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55. *See supra* note 46 and accompanying text; *see also* State v. Bennis, 504 N.W.2d 731 (Mich. App. 1993). Ms. Bennis's appeal was submitted on Dec. 17, 1992; *Austin* was decided in 1993. Even if Ms. Bennis had been permitted to raise an excessive-fines argument in the Michigan Supreme Court, she might have decided not to do so because the trial court record had not been developed to support such reasoning. To support an excessive-fines argument, Ms. Bennis would have wanted to put on evidence of her husband's prior criminal activities (if any), her knowledge of those activities, and the impact upon her—the loss of a car.

56. *Austin* does not make clear whether an innocent owner can prove that a forfeiture violates the Excessive Fines Clause. The Court in *Austin* declined to describe the standard for determining whether a civil forfeiture is "excessive." 509 U.S. at 621-22. Some of the approaches developed by lower federal courts do not appear to take into account the innocence of the owner. For example, courts have held that the value of the subject property should be compared to the harm caused by its illegal use. *See generally* United States v. One Parcel Property Located at 427 & 429 Hall Street, 74 F.3d 1165, 1170-73 (11th Cir. 1996) (discussing various approaches and adopting an approach for property owned by the person who committed the crime that led to forfeiture); Guerra, *supra* note 2, at 361 n.83 (discussing various approaches of lower federal courts).

57. Other constitutional provisions may also invalidate certain civil forfeiture statutes. For example, some forfeiture statutes limit "innocent owner" protection in a way that may violate the Equal Protection Clause. Indeed, the Michigan statute under which the Bennis car was forfeited protects holders of liens on property to be forfeited, but not holders of other types of property interests. Under that statute, the proceeds of the sale of forfeited property are used first to pay the expenses of the sale and then to pay any liens "created without the lienor having any notice that such property was being used or was to be used for the maintenance of a nuisance." MICH. COMP. LAWS ANN. § 600.3825(3) (West 1987). Subsequently, any balance goes into the state treasury. *See id.* It is unfair, and perhaps a violation of the Equal Protection Clause, for the State to protect innocent lienholders but not innocent, co-owner spouses.

58. As indicated, *Bennis* was a five-to-four decision. *See supra* note 4. Justice Ginsburg makes it clear that she based her vote on narrow grounds. *See id.* at 1003 (Ginsburg, J., concurring). She observed that Michigan's right to forfeit the car was uncontested; the issue was whether Ms. Bennis had a right to be compensated for her interest in the car. *See id.* Justice Ginsburg regarded the impact of denying Ms. Bennis compensation as minimal. She noted that

In sum, the Court could not have characterized the forfeiture in *Bennis* as punitive without raising serious questions in other areas of the law. This Section has focused on the serious questions that would arise in double-jeopardy challenges to civil forfeitures. But the issue of what constitutes punishment arises in cases involving other constitutional provisions, besides the Double Jeopardy Clause, and other civil sanctions besides civil forfeiture.[59] The Court in fact will face the issue this term in a setting quite different from those discussed here.[60]

## V. CONCLUSION

It is no wonder that the Court in *Bennis* clung so tightly to the "guilty property" fiction of civil forfeiture law. The Court could quite reasonably have been concerned about how abandoning that fiction might affect its "punitive and remedial jurisprudence."[61] That concern may have been

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the value of Ms. Bennis's interest in the car was negligible, especially after the costs of the forfeiture proceeding were deducted from the proceeds of selling the car. She further noted that the Bennises had another car. *See id.* Justice Ginsburg also attached importance to the Michigan Supreme Court's indication that it would not permit "exorbitant" forfeitures. *See id.* In these circumstances, Justice Ginsburg concluded that "Michigan . . . has not embarked on an experiment to punish innocent third parties." *Id.* Similarly, Justice Thomas expressed the view that the forfeiture was not punitive. *See id.* at 1002 (Thomas, J., concurring). Justice Thomas determined that, because almost no money was left after the Bennis car was sold, the forfeiture merely "prevent[ed] the risk of continued criminal use of it by Mr. Bennis." *Id.* He observed that the State could have accomplished the same thing by destroying the car, instead of selling it, in which case the State "would have had a plausible argument that the order for destruction was 'remedial.'" *Id.* Justice Thomas reasoned that, "if the forfeiture of the car here . . . can appropriately be characterized as 'remedial' action, then the more severe problems involved in punishing someone not found to have engaged in wrongdoing of any kind do not arise." *Id.* Thus, Justices Ginsburg and Thomas left open the possibility that a punitive civil forfeiture could violate the Constitution.

59. *See* cases cited *supra* note 40 (addressing whether various civil sanctions are punitive for purposes of various constitutional doctrines).

60. A few days before *Bennis* was decided, the Supreme Court of Kansas struck down that state's Sexually Violent Predator Act (Act), holding that the indefinite civil confinement of people covered by the Act violates substantive due process. *In re* Care & Treatment of Hendricks, 912 P.2d 129, 138 (Kan.), *cert. granted sub nom.*, Kansas v. Hendricks, 116 S. Ct. 2522 (1996). The U.S. Supreme Court stayed the Kansas Supreme Court's decision (which, unless stayed, could have caused the release of any then-confined "sexually violent predators"). *See* Kansas v. Hendricks, 116 S. Ct. 1540 (1996). The Court later granted petitions for a writ of certiorari filed by each side in the case. *See* Kansas v. Hendricks, 116 S. Ct. 2522 (1996). Among the questions before the Court are: whether the Act, "though labeled a civil proceeding, [is] so punitive either in purpose or effect as to require that it be considered criminal"; whether the Act "violate[s] the constitutional prohibition against double jeopardy"; and whether the Act violates "the constitutional prohibition against *ex post facto* laws." Brief for Leroy Hendricks Cross-Petitioner, Kansas v. Hendricks, Nos. 95-1649 & 95-9075, 1996 WL 450661, at *i (U.S., Aug. 1, 1996).

61. *Bennis*, 116 S. Ct. at 1001 (quoting J.W. Goldsmith, Jr.-Grant Co. v. United States, 254

particularly acute because of the parties' failure to address the possible impact of abandoning the fiction; the absence of an excessive-fines challenge; and the pendency on the Court's docket of double-jeopardy cases raising related issues. Given those circumstances, as well as the brevity of the majority's opinion and the narrow margin by which the case was decided, one should not read the Court's refusal to abandon the guilty-property fiction "now"[62] to mean that it will *never* do so.[63]

*Bennis* makes clear, however, that the Court will not abandon the guilty property fiction of forfeiture law merely because it is old and perhaps indefensible. Other doctrines have grown up around the fiction that are themselves firmly fixed in the Court's "punitive and remedial jurisprudence."[64] These doctrines include, but are not limited to, doctrines of strict and vicarious liability and double jeopardy. To be sure, these doctrines, in some applications, themselves impose arguably punitive liability on people who are as innocent as Ms. Bennis (or who have already been punished). Perhaps such applications are themselves unconstitutional. If so, perhaps the Court should broadly re-evaluate what constitutes innocence and punishment for purposes of the Constitution. The Court must, however, be convinced of the need for such a broad reevaluation, and of the achievability of a unified theory for defining innocence and punishment before it will abandon the guilty property fiction on grounds that unsettle other well-settled doctrines of liability. Alternatively, the Court must be convinced that there is a way to lay the fiction to rest that does not have unduly broad doctrinal consequences.

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U.S. 505, 511 (1921)).

62. *Id.*

63. The Court will have fewer occasions to address the continuing vitality of the guilty property fiction as more and more legislatures adopt statutes protecting innocent owners. As noted above, *supra* note 49, the major federal forfeiture statutes already include such provisions. Moreover, a bill introduced in the last Congress would provide an innocent owner defense under all federal forfeiture statutes. *See* H.R. 3194, 104th Cong. 2d Sess. § 2 (1996). Indeed, the growing prevalence of statutory, innocent owner provisions may have contributed to the Court's unwillingness to abandon the fiction in *Bennis*. The Court might regard legislative protection for innocent owners as preferable to judicial protection based on the Constitution, among other reasons, because the former do not have uncertain constitutional sources and implications. Justice Scalia suggested as much in responding to the United States' contention, based on *Calero-Toledo*, *see supra* note 10, that the Constitution protects owners who show that they have taken "all reasonable steps" to prevent illegal use of the property to be forfeited. He said:

> [A]s an original matter, if I were writing a statute I might well buy your . . . all reasonable steps standard. It seems like a good idea.
>
> But we're not writing a statute. Where do you get it from? I mean, where do you find it in our historical tradition, or is it just that . . . we should say, well, it seems like a good idea, it must be constitutional law.

Transcript of Oral Argument in *Bennis*, No. 94-8729, 1995 WL 712350, at *54.

64. *Bennis*, 116 S. Ct. at 1001 (quoting J.W. Goldsmith, Jr.-Grant Co. v. United States, 254 U.S. 505, 511 (1921)).

Because of *Bennis*, critics of the fiction now bear the burden of persuasion.[65]

65. In its *amicus* brief in *Bennis*, the United States argued that, with certain exceptions, the Constitution prohibits the civil forfeiture of property owned by someone who showed that she took "all reasonable steps" to prevent the illegal use that led to the forfeiture. Brief for the United States as *Amicus Curiae* Supporting Respondent, at 7-21. The stated exceptions to the proposed "all reasonable steps" standard related to forfeitures of contraband and forfeitures based on the traditional doctrines of strict and vicarious liability. Perhaps because of my involvement in that brief, I believe that the Court should adopt an "all reasonable steps" standard, qualified by appropriate, historically based exceptions. The Court's decision in *Bennis* does not foreclose the adoption of such a standard since Ms. Bennis did not allege or attempt to prove that she took all reasonable steps to prevent the illegal use of the car. This is not to suggest that there were *any* reasonable steps Ms. Bennis could have taken. Instead, I mean to suggest that the Court might have ruled differently if Ms. Bennis had alleged and attempted to prove that there were *no* steps that she reasonably could be expected to have taken to avoid the illegal use. While endorsing the "all reasonable steps" standard, I recognize that it would be difficult to apply in many cases. *See* Guerra, *supra* note 2, at 376-90 (discussing the application of an "all reasonable steps" standard in a family setting).