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Husband and Wife are One - Him: *Bennis v. Michigan* as the Resurrection of Coverture

Amy D. Ronner
St. Thomas University School of Law

HUSBAND AND WIFE ARE ONE—HIM: *BENNIS V. MICHIGAN* AS THE RESURRECTION OF COVERTURE

*Amy D. Ronner**

INTRODUCTION

After Milton's Adam has partaken of the forbidden fruit and has blamed his sin on Eve, he receives a deific lecture on coverture:

> To whom the sovran Presence thus repli'd.
> Was shee thy God, that her thou didst obey
> Before his voice, or was shee made thy guide,
> Superior, or but equal, that to her

* Associate Professor of Law, St. Thomas University School of Law. J.D., 1985, University of Miami; Ph.D., 1980, University of Michigan; M.A., 1976, University of Michigan; B.A., 1975, Beloit College. I would like to dedicate this Article to Beth Weitzner, a superb friend and top-notch lawyer. I am most grateful to my research assistants Deby Raccina and Renee Duff.

> Thou didst resign thy Manhood, and the Place
> Wherein God set thee above her made of thee,
> And for thee, whose perfection far excell'd
> Hers in all real dignity: Adorn'd
> She was indeed, and lovely to attract
> Thy Love, not thy Subjection, and her Gifts
> Were such as under Government well seem'd,
> Unseemly to bear rule, which was thy part
> And person, hadst thou known thyself aright.[1]

According to Milton's God, Adam did not merely violate the laws of Eden, but actually abandoned his governing status as the husband in the marital merger. As Justice Black once encapsulated it, the coverture doctrine is based "on the old common-law fiction that the husband and wife are one . . . [which] has worked out in reality to mean . . . the one is the husband."[2] Coverture achieved this fiction by restricting married women's legal rights, such as the ability to control property, and granting those rights to their husbands.[3] Many of married women's legal rights were restored by the Married Women's Property Acts of the mid-nineteenth century.[4]

Another legal fiction that redefined identities in order to reallocate rights is the myth of guilty property.[5] This idea appears in *Exodus* when Moses admonishes that "[w]hen an ox gores a man or a woman to death, the ox shall be stoned, and its flesh may not be eaten."[6] In some forfeiture cases, the United States Supreme Court has used the guilty property fiction to justify governmental confiscation of property for crimes committed by its owners.[7] Essentially, property is treated as punishable for the acts committed with it. Yet, in a recent decision, *Austin v. United States*,[8] the United States Supreme Court devitalized the hoary notion "that 'the thing is primarily considered the offender'" by acknowledging that forfeiture is punishment imposed on human beings.[9]

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1. JOHN MILTON, PARADISE LOST 239 (Merritt Y. Hughes ed., Odyssey Press 1962) (1674).
2. United States v. Yazell, 382 U.S. 341, 361 (1966) (Black, J., dissenting).
3. *See generally infra* Part I.A.
4. *See infra* notes 30–31 and accompanying text.
5. *See generally infra* Part I.B.
6. *Exodus* 21:28.
7. *See infra* notes 58–64 and accompanying text.
8. Austin v. United States, 509 U.S. 602 (1993).
9. *Id.* at 615 (quoting J.W. Goldsmith, Jr.-Grant Co. v. United States, 254 U.S. 505, 511 (1921)). Even more recently in United States v. Ursery, 116 S. Ct. 2135 (1996),

Although the legal fictions of coverture and guilty property have been repudiated by statutes and the Court respectively, the Supreme Court implicitly resurrected and fused the coverture and guilty property myths in *Bennis v. Michigan*.[10] In that decision, the Court approved the forfeiture of Ms. Bennis' interest in a car in which her husband engaged in sexual activity with a prostitute. This Article explores that resurrected conglomerate in three parts.

Part I is a concise review of the feudal doctrine of coverture and the disabilities it imposed on married women. In that context, I preliminarily suggest that although the Married Women's Acts technically abolished the doctrine, the image of the *feme covert*[11] nevertheless endures and, in fact, surfaces menacingly in the *Bennis* decision. In Part I, I also explore the separate myth of guilty property and how the Supreme Court has sporadically used it to justify the forfeiture of property used in the commission of crimes.

Part II focuses almost entirely on the decision in *Austin*, in which the Supreme Court held that the Eighth Amendment's Excessive Fines Clause applies to *in rem* forfeiture proceedings.[12] It is here that I advance the view that at the very core of the *Austin* reasoning lies the explicit recognition not just that forfeiture is punishment, but that it is punishment imposed on a human being—not an object. As such, *Austin* effectively disabled the guilty property myth.

Part III begins with a summary of the *Bennis* decision and ends with an exposé of *Bennis* as the resurrection and fusion of both the guilty property and coverture fictions. In this context, I posit that the Supreme Court, at least unconsciously, connects the old marital and forfeiture fictions. Consequently, the composite image that ultimately emerges in *Bennis* is that of the *feme-covert* as guilty property.

The conclusion, alluding again to the Miltonic diatribe on coverture, explores the ramifications of the resurrected guilty *feme-covert*.

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the Supreme Court appears to resurrect the guilty property fiction in deciding that in rem forfeitures are not "punishment" for purposes of the double jeopardy clause. *Ursery*, 116 S. Ct. at 2160 ("Although the Court prefers not to rely on this notorious fiction too blatantly, its repeated citations . . . make clear that the Court believes respondent's home was 'guilty' of the drug offenses with which he was charged.") (Stevens, J., concurring and dissenting).

10. Bennis v. Michigan, 116 S. Ct. 994 (1996).

11. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *442. *See also infra* note 16 and accompanying text.

12. *See Austin*, 509 U.S. at 604.

I. THE MYTHS OF COVERTURE AND GUILTY PROPERTY

A. The Coverture Myth

At common law, an adult single woman could own, manage and transfer property.[13] She could sue and be sued. She could likewise earn money and enjoy it as her own.[14] Once that same woman married, however, her status changed radically; coverture subsumed her legal identity into her husband's.[15]

Blackstone described coverture status as follows:

> By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of husband: under whose wing, protection, and *cover*, she performs everything; and is therefore called in our law-French a *feme covert*, *foemina viro co-operta*; is said to be *covert-baron*, or under the protection and influence of her husband, her *baron*, or *lord*; and her condition during her marriage is called her *coverture*. Upon this principle, of an [sic] union of person in husband and wife, depend almost all the legal rights, duties and disabilities, that either of them acquire by the marriage.[16]

The coverture doctrine prevented a man from granting anything to his wife or from entering into a contract with her. Such actions would be futile because they would "suppose her separate existence . . . and to covenant with her, would be only to covenant with himself."[17]

The coverture merger was not mere metaphysics, but imposed real disabilities on the married woman. For example, a wife relinquished the

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13. *See* LEO KANOWITZ, WOMEN AND THE LAW: THE UNFINISHED REVOLUTION (1969). Kanowitz states, however, that "[a]t common law, unmarried females were subject to oppressive sexually discriminatory rules of law principally in the public sphere—as in the denial of the right to vote or serve on juries on the same basis as men." KANOWITZ, *supra*, at 35. *See also* John D. Johnston, Jr., *Sex and Property: The Common Law Tradition, The Law School Curriculum, and Developments Toward Equality*, 47 N.Y.U. L. REV. 1033, 1045 (1972) ("The common law did not treat unmarried men and women equally; still, it imposed no special disabilities upon single women.").

14. *See* KANOWITZ, *supra* note 13, at 35; Johnston, *supra* note 13, at 1045.

15. *See* KANOWITZ, *supra* note 13, at 35; Johnston, *supra* note 13, at 1045.

16. BLACKSTONE, *supra* note 11, at *442 (citations omitted).

17. BLACKSTONE, *supra* note 11, at *442.

control of her real property to her "baron" and although he could not alienate the rents and profits, he was not obligated to account for them to her.[18] Moreover, her husband enjoyed complete control of his wife's interests, which meant that he could alienate them and unilaterally pocket the proceeds.[19] All chattels that a woman owned at the time of marriage and those she acquired thereafter belonged to her husband.[20] The suspension of a wife's legal identity also meant that she could not sue or be sued at law unless her husband had joined in the action or "ha[d] abjured the realm, or is banished."[21]

Coverture prohibited husband and wife from testifying for or against each other in trials "principally because of the union of person."[22] That is, such testimony would be irrebuttably presumptively self-serving or self-incriminating.[23] In criminal law, a husband and wife could not comprise a conspiracy because one person could not conspire with *him*self.[24] They also could not steal from one another because the property belonged essentially to only one—him.[25] In other situations the wife was utterly divested of free will and viewed as "inferior to him, and acting by his compulsion."[26] For example, because certain criminal acts

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18. *See* KANOWITZ, *supra* note 13, at 36.
19. *See* KANOWITZ, *supra* note 13, at 36.
20. *See* KANOWITZ, *supra* note 13, at 36.
21. BLACKSTONE, *supra* note 11, at *443. The quote reads in full:

> There is, indeed, one case where the wife shall sue and be sued as a *feme sole*, viz., where the husband has abjured the realm, or is banished: for then he is dead in law; and, the husband being thus disabled to sue for or defend the wife, it would be most unreasonable if she had no remedy, or could make no defense at all.

BLACKSTONE, *supra* note 11, at *443 (citation omitted). *But see* KANOWITZ, *supra* note 13, at 36–37 (explaining how "marriage did not represent a matter of all economic gain and no loss for the husband").

22. BLACKSTONE, *supra* note 11, at *443. Blackstone elaborates:

> [T]herefore, if they were admitted to be witnesses *for* each other, they would contradict one maxim of law, "*nemo in propria causa testis esse debet* (no one may be a witness in his own cause)"; and if *against* each other, they would contradict another maxim, "*nemo tenetur seipsum accusare* (no one is bound to accuse himself)."

Blackstone, *supra* note 11, at *443–*444 (emphasis in original) (citation omitted).
23. *See* BLACKSTONE, *supra* note 11, at *443.
24. *See* KANOWITZ, *supra* note 13, at 36.
25. *See* KANOWITZ, *supra* note 13, at 36.
26. BLACKSTONE, *supra* note 11, at *444. The quote reads in full:

> But, though our law in general considers man and wife as one person, yet there are some instances in which she is separately considered; as inferior

on her part, short of treason or murder, were viewed as if done under his "command," coverture bestowed upon the married woman a specie of immunity.[27]

Many legal scholars trace coverture to the Biblical portrayal of husband and wife as "one flesh."[28] The legal fiction that two separate entities become a single unit is quite plainly analogous. Likewise, the common law's hierarchical construction of marriage follows the biblical model of female obedience.[29]

Today coverture is usually treated as a legal relic. Beginning in the mid-nineteenth century, each state adopted a version of the Married Women's Act in an effort to eliminate the detriments of coverture.[30] These laws recognized the rights of a married woman to contract, to sue and be sued on her own, to manage and control her own property, to join the work force without her husband's approval and to keep the money she earned.[31]

> to him, and acting by his compulsion. And therefore all deeds executed, and acts done, by her, during her coverture, are void; except it be a fine, or the like matter of record, in which case she must be solely and secretly examined, to learn if her act be voluntary.

BLACKSTONE, *supra* note 11, at *444 (citation omitted).

27. *See* BLACKSTONE, *supra* note 11, at *444.

28. *Genesis* 2:24; *see* 2 F. POLLOCK & F. MAITLAWD, THE HISTORY OF ENGLISH LAW 405–06 (2d ed. 1923); KANOWITZ, *supra* note 13, at 38; Johnston, *supra* note 13, at 1046.

29. *See Genesis* 3:16; *see also Ephesians* 5:22 ("Wives, be subject to your husbands as to the Lord."); MILTON, *supra* note 1 and accompanying text.

30. *See* KANOWITZ, *supra* note 13, at 40.

31. In Michigan, the state that confiscated Ms. Bennis' Pontiac, the Married Women's Property Act provides in pertinent part:

> If a woman acquires real or personal property before marriage or becomes entitled to or acquires, after marriage, real or personal property through gift, grant, inheritance, devise, or other manner, that property is and shall remain the property of the woman and be a part of the woman's estate. She may contract with respect to the property, sell, transfer, mortgage, convey, devise, or bequeath the property in the same manner and with the same effect as if she were unmarried. The property shall not be liable for the debts, obligations, or engagements of any other person, including the woman's husband, except as provided in this act.

MICH. COMP. LAWS ANN. § 557.21(1) (West 1988).

Other state statutes are similar. *See, e.g.*, ALA. CODE §§ 30-4-1, 30-4-8, 30-4-11 (1975); ALASKA STAT. §§ 25.15.010, 25.15.020, 25.15.060, 25.15.100 (Michie 1995); ARIZ. REV. STAT. ANN. §§ 25-213 to -215 (West 1991); ARK. CODE ANN. §§ 9-11-502, 9-11-505, 9-11-507 (Michie 1987); CAL. FAM. CODE §§ 803, 913–914 (West 1994); COLO. REV. STAT. ANN. §§ 14-2-201, 14-2-202, 14-2-208 (West

Even though coverture is technically defunct, it perplexingly endures[32] in certain contemporary judicial decisions that allow a woman's legal identity to be entirely subsumed within her husband's.

B. The Guilty Property Myth

Legal historians have dated asset forfeiture back to the ancient Greeks, who believed that objects were guilty of the acts committed with them.[33] Animals and inanimate objects were convicted of wrongdoing in the Prytaneum in the second century B.C.[34] As Oliver Wendell Holmes has explained, if an inanimate object caused a human death, "it was to be cast beyond the borders."[35] He attributed this punishment of objects to "[t]he hatred for anything giving us pain, which wreaks itself on the manifest cause, and which leads even civilized man to kick a door when

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1987); CONN. GEN. STAT. ANN. § 46b-36 (West 1995); HAW. REV. STAT. §§ 572-22, 572-23, 572-25, 572-28 (1993); 750 ILL. COMP. STAT. ANN. 65/1, 65/5, 65/6, 65/9 (West 1993); KAN. STAT. ANN. §§ 23-201, 23-202, 23-203 (1995). *But see* FLA. STAT. ANN. ch. 708.08 (Harrison 1989) ("[e]very married woman is empowered to take charge of and manage and control her separate property, to contract and to be contracted with, to sue and be sued . . ." but the statute does not also state that her property cannot be liable for the debts of her husband); MONT. CODE ANN. § 40-2-209 (1995) (separate property is exempt from the debts and liabilities of the spouse except for necessary articles or when the property is in "the sole and exclusive possession of the spouse and the creditors have dealt with the spouse in good faith on the credit of the individual property without knowledge that the property does not belong to the spouse."); WYO. STAT. ANN. § 20-1-201 (Michie 1996) (separate property is exempt from debts and liabilities of the spouse, but permitting necessary expenses to be charged "upon the property of both husband and wife, or either of them, for which they may be sued jointly or separately.").

32. *Cf.* Joan Williams, *Is Coverture Dead? Beyond a New Theory of Alimony*, 82 GEO. L.J. 2227, 2229 (1994) (analyzing "the problem of women's and children's impoverishment upon divorce," states that "[t]he crucial issue concerns the distribution of *entitlements* . . . [and an] analysis of those entitlements uncovers a system of property rules, unchanged since coverture, that allocates ownership of family wealth to husbands.").

33. *See, e.g.*, OLIVER WENDELL HOLMES, JR., THE COMMON LAW 7–15 (Little Brown & Co. 1949) (1881); 1 THE CIVIL LAW 69 (Samuel P. Scott trans., 1932) (discussing forfeiture in Roman law: "If a quadruped causes injury to anyone, let the owner tender him the estimated amount of the damage; and if he is unwilling to accept it, the owner shall . . . surrender the animal that caused the injury."). Cynthia Sherrill Wood, *Asset Forfeiture and the Excessive Fines Clause: An Epilogue of* Austin v. United States, 29 WAKE FOREST L. REV. 1357, 1359 (1994).

34. *See* HOLMES, *supra* note 33, at 8.

35. HOLMES, *supra* note 33, at 8.

it pinches his finger . . . ."[36] This is "embodied in the *noxae deditio* and other kindred doctrines of early Roman Law."[37]

The English common law embodied the guilty property fiction in the form of deodand.[38] Deodand derives from the Latin *deo dandum*, which means "a thing to be given to God."[39] Under deodand law, the value of the object that caused the death of the king's subject was forfeited to the crown, and the king in turn would dedicate the funds to a mass for the dead person's soul or ensure that the deodand went to charity. Eventually the religious or eleemosynary purposes disappeared and the deodand became simply a source of crown revenue.[40]

In England, deodand coexisted with two other forms of forfeiture: "forfeiture upon conviction for a felony or treason, and statutory forfeiture."[41] The forfeiture of the property of felons and traitors ensued from the notion of property ownership as being a "right derived from society" and from the belief that one who breaks society's laws should lose the ownership right.[42] As such, the convicted felons' land escheated to their lord, while their personalty went to the crown.[43] Similarly, convicted traitors lost all real and personal property, but it went solely to the crown.[44]

Statutory forfeiture was described by Blackstone as "penal."[45] While forfeitures that targeted "offending objects used in violation of the

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36. HOLMES, *supra* note 33, at 11–12.

37. HOLMES, *supra* note 33, at 11–12. The guilty object fiction also surfaces in Judeo-Christian history. Moses admonishes in that "[w]hen an ox gores a man or a woman to death, the ox shall be stoned, and its flesh may not be eaten." *Exodus* 21:28.

38. *See generally* HOLMES, *supra* note 33, at 24–25; 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, 170 (1973); Scott A. Hauert, *An Examination of the Nature, Scope and Extent of Statutory Civil Forfeiture*, 20 U. DAYTON L. REV. 159, 162 (1994); Michael J. Munn, *The Aftermath of* Austin v. United States: *When is Civil Forfeiture An Excessive Fine?*, 1994 UTAH L. REV. 1255, 1260–61 (1994); Tamara R. Piety, *Scorched Earth: How the Expansion of Civil Forfeiture Doctrine Has Laid Waste to Due Process*, 45 U. MIAMI L. REV. 911, 928 (1991).

39. BLACK'S LAW DICTIONARY 436 (6th ed. 1990).

40. *See* Austin v. United States, 509 U.S. 602, 611 (1993) (*quoting* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 680–81 (1974)).

41. *Austin*, 509 U.S. at 611.

42. *Austin*, 509 U.S. at 612.

43. *See Austin*, 509 U.S. at 611–12. *See also Calero-Toledo*, 416 U.S. at 682 ("The basis for these forfeitures was that a breach of the criminal law was an offense to the King's peace, which was felt to justify denial of the right to own property.").

44. *See Austin*, 509 U.S. at 611–12. *See also Calero-Toledo*, 416 U.S. at 682.

45. *Austin*, 509 U.S. at 612.

customs and revenue laws"[46] rested on the guilty property fiction, they nevertheless presumed a culpable owner who should be punished for direct or vicarious wrongdoing.[47]

Neither deodand nor forfeiture of estate was adopted in the New World.[48] Before the adoption of the Constitution, the Colonies used *in rem* forfeiture proceedings to seize objects under the English and local forfeiture statutes.[49] After the adoption of the Constitution, new enactments authorized *in rem* jurisdiction over ships and cargos involved in customs offenses.[50] Fairly recently, in *Austin*, the Supreme Court recognized that our First Congress viewed such early forfeiture laws as punishment.[51]

In the mid-1980s Congress extended forfeiture beyond its typical use in customs violations and admiralty law by employing it to combat the spread of drug use and distribution.[52] While there are presently at

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46. *Calero-Toledo*, 416 U.S. at 682.

47. *Austin*, 509 U.S. at 612. By way of example, a violation of the Navigation Acts of 1660, which mandated the shipping of most goods in English vessels, resulted in forfeiture of the ship and the goods. *Austin*, 509 U.S. at 612. Even where the violation was due to some mariner's act of which the ship owner was unaware, the result was the same. The theory was that the owner should be blamed for entrusting the property to the wrongdoer or that the unlawful act should simply be imputed to the owner. *Austin*, 509 U.S. at 612.

48. *See Calero-Toledo*, 416 U.S. at 682–83.

49. *See Calero-Toledo*, 416 U.S. at 683.

50. *See Austin*, 509 U.S. at 613. *See also Calero-Toledo*, 416 U.S. at 683 (noting that "almost immediately after adoption of the Constitution, ships and cargoes involved in customs offenses were made subject to forfeiture under federal law"); Anthony J. Franze, *Casualties of War?: Drugs, Civil Forfeiture, and the Plight of "The Innocent Owner"*, 70 NOTRE DAME L. REV. 369, 375 (1994).

> These initial . . . forfeiture statutes served vital national interests during the early days of our Republic. In times of war, vessel forfeitures were used to destroy the maritime strength of our enemies. Such provisions were also utilized during the Revolutionary War to seize Tory property and later to seize Confederate property during the Civil War.

Franze, *supra*, at 375.

51. *See Austin*, 509 U.S. at 612. However, until the Civil War, the guilty property fiction was the basis behind statutory civil forfeiture. An Act that Congress passed in 1862, which provided for confiscation of property of persons involved in the rebellion, was directed not at the property—but the property owner. Munn, *supra* note 38, at 1261–62. According to Munn, after the Civil War, "statutory civil forfeiture again became intertwined with the guilty property fiction." Munn, *supra* note 38, at 1262.

52. *See* 1 STEVEN L. KESSLER, CIVIL AND CRIMINAL FORFEITURE § 1.01 (1994) (discussing Congress' efforts to combat crime by using forfeiture as an attractive alternative to prison). The sponsor of the Comprehensive Drug Abuse Prevention and Control

least one hundred different federal statutes,[53] and even more state statutes, authorizing civil forfeiture in a variety of contexts, 21 U.S.C. section 881 has been denominated the forfeiture "centerpiece."[54] Under section 881, the government can combine conveyance, asset and real property forfeiture provisions and thus confiscate a vast panoply of property.[55]

Act, Pub. L. No. 91-513, 84 Stat. 1242 (1970), 21 U.S.C. § 801 (1994), Senator Dodd of Connecticut, described it as "strictly and entirely a law enforcement measure . . . designed to crack down hard on the narcotics pusher and the illegal diverters of pep pills and goof balls." 116 CONG. REC. 977–78 (1970).

53. William Carpenter, *Reforming the Civil Drug Forfeiture Statutes: Analysis and Recommendations*, 67 TEMP. L. REV. 1087, 1109 (1994). Carpenter has summarized the federal provisions as follows:

> Many of these are directed at per se contraband, like unregistered dynamite, sawed-off shotguns, pornographic films, dying swine, the bacon, and magazines devoted to bestiality. Others are directed at derivative contraband, such as bald eagle eggs, whales, video-games that violate copyrights, smuggled potatoes, prison-made whips, Mayan temples, and untaxed whiskey. Other forfeitable items include vehicles used to import aliens; firearms used to kill animals in national parks; vessels and gear used to poach halibut, seals, and salmon; equipment used to counterfeit currency or coinage; vessels unloaded without a permit; vessels outfitted for smuggling; and containers, records, conveyances, manufacturing equipment, and real property used in drug violations. The proceeds of racketeering activity are forfeitable under RICO. A bank account consisting only partly of proceeds of illegal activity has been judged to be forfeitable in its entirety.

Carpenter, *supra* at 1109–10 (citations omitted). *See also* Carpenter, *supra* at 1096–97 (discussing state forfeiture laws which "are fundamentally similar to section 881").

54. *See* David J. Taube, *Eighth Survey of White Collar Crime: Civil Forfeiture*, 30 AM. CRIM. L. REV. 1025, 1026–27 (1993).

55. *See* Franze, *supra* note 50, at 385 ("Forfeiture under section 881 clearly encompasses a broad array of property . . . ."). Another commentator has noted that this section can lead to excessive forfeiture:

> Because § 881 allows the forfeiture of any asset used in a drug transaction, forfeitures have the potential of being excessive, in the sense that the punishment is not proportional to the crime. For example, an expensive yacht was seized by the government when one marijuana cigarette was found on board.

W. David George, *Finally, An Eye for an Eye: The Supreme Court Lets the Punishment Fit the Crime in* Austin v. United States, 46 BAYLOR L. REV. 509, 509 (1994) (citations omitted); *see also* James B. Speta, *Narrowing the Scope of Civil Drug Forfeiture: Section 881, Substantial Connection and the Eighth Amendment*, 89 MICH. L. REV. 165, 166–67 (1990) ("By combining the conveyance, asset, and real property forfeiture provisions, the government, under section 881, can threaten to seize all of a person's property.") (citation omitted). This expansive breadth, along with the absence of the procedural protections that are afforded criminal protections, has

Significantly, the section 881 forfeiture scheme provides for an innocent owner defense.[56] This defense, at least in theory, gives such owners a way to defeat forfeiture by establishing that the "act or omission" was "committed or omitted" without the owner's "knowledge or consent."[57] Not all forfeiture statutes, however, have such an express innocent owner loophole.

Historically, the Supreme Court has used the guilty property personification as a basis for condoning forfeiture in situations in which property owners claimed that they themselves were innocent of any wrongdoing.[58] In one of the relics of forfeiture case law, *The Palmyra*,[59] the King of Spain had commissioned the Palmyra as a privateer and then used it to attack a United States vessel. A United States warship brought the commissioned ship to South Carolina for trial.[60] On an appeal from the circuit court's acquittal of the vessel, the owner argued that the vessel could not be confiscated unless he himself was actually convicted of being a privateer. In rejecting the owner's position, the *The Palmyra* Court said that "[t]he thing is here primarily considered as the offender, or rather the offence is attached primarily to the thing."[61]

In *Dobbins's Distillery v. United States*,[62] an innocent owner had to forfeit his property when a lessor defrauded revenue officers by concealing and altering sales records.[63] The Court maintained that, "the offence . . . is attached primarily to the distillery, and the real and personal

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prompted one section 881 critic to describe the forfeiture scheme as "[t]he H-Bomb in the war on drugs," Rebecca Frank Dallet, *Taking the Ammunition Away from the "War on Drugs": A Double Jeopardy Bar to 21 U.S.C. § 881 After* Austin v. United States, 44 CASE W. RES. L. REV. 235, 235–36 (1993), which is "making civil liberties a casualty." Dallet, *supra*, at 237.

56. *See* 21 U.S.C. § 881 (a)(4)(c), (a)(6), (a)(7) (1996); *see also Austin*, 509 U.S. at 619.

57. 21 U.S.C. § 881 (a)(4)(c), (a)(6), (a)(7).

58. *See generally* T. Michelle Ator, *Constitutional Law—21 U.S.C. § 881 and the Eighth Amendment: Application of the Proportionality Requirement to Civil Forfeitures:* Austin v. United States, *113 S. Ct. 2801 (1993)*, 17 U. ARK. LITTLE ROCK L.J. 95, 95 (1994); Hauert, *supra* note 38; Steven L. Kessler, *For Want of a Nail: Forfeiture and the Bill of Rights*, 39 N.Y.L. SCH. L. REV. 205, 207 (1994); Piety, *supra* note 38, at 917–20, 967–73; Stacy J. Pollock, *Proportionality In Civil Forfeiture: Toward a Remedial Solution*, 62 GEO. WASH. L. REV. 456, 462–63 (1994).

59. The Palmyra, 25 U.S. (12 Wheat.) 1 (1827).

60. *See The Palmyra*, 25 U.S. (12 Wheat.) at 8.

61. *The Palmyra*, 25 U.S. (12 Wheat.) at 14.

62. Dobbins's Distillery v. United States, 96 U.S. 395 (1878).

63. *Id.* at 403–04.

property used in connection with the same, without any regard whatsoever to the personal misconduct or responsibility of the owner."[64]

The Supreme Court has adhered to the guilty property concept in the twentieth century. In *J.W. Goldsmith, Jr.-Grant Co. v. United States*,[65] the purchaser of an automobile had used the car to transport distilled bootleg spirits. The Supreme Court, however, upheld the forfeiture of the car even though it meant that the innocent seller lost the title he had retained as security for the unpaid purchase amount.[66] In so doing, the Supreme Court said that "whether the reason for [the forfeiture] be artificial or real, it is too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced."[67]

Shortly thereafter, the Court in *Van Oster v. Kansas*[68] relied on *Goldsmith-Grant* to approve the forfeiture of a purchaser's interest in a car that the seller had misused.[69] Although Van Oster had purchased the automobile from the dealer, she agreed that the dealer might keep it for use in his business. When the dealer permitted an associate to use the automobile and the associate used it to transport intoxicating liquor, the state of Kansas sought forfeiture.[70] In ultimately rejecting Van Oster's claim that she should not suffer because the transportation of liquor in her car occurred without her knowledge or consent, the Supreme Court stated that "[i]t is not unknown or indeed uncommon for the law to visit upon the owner of property the unpleasant consequences of the unauthorized action of one to whom he has entrusted it."[71]

By 1974, however, the Supreme Court began to question the harsh consequences of the guilty property myth. In *Calero-Toledo v. Pearson Yacht Leasing Co.*, a pleasure yacht which a leasing company had leased to Puerto Rican residents was seized under the aegis of Puerto Rican statutes after the authorities found marijuana on board in violation of the

64. *Dobbins's Distillery*, 96 U.S. at 401.

65. J.W. Goldsmith, Jr.-Grant Co. v. United States, 254 U.S. 505 (1921).

66. *See Goldsmith-Grant*, 254 U.S. at 508–09.

67. *Goldsmith-Grant*, 254 U.S. at 511. *But cf. Austin*, 509 U.S. at 617 (interpreting *Goldsmith-Grant* as expressly reserving "the question whether the fiction could be employed to forfeit the property of a truly innocent owner"); *see also infra* notes 94–95 and accompanying text.

68. Van Oster v. Kansas, 272 U.S. 465 (1926).

69. *Id.* at 468.

70. *See Van Oster*, 272 U.S. at 465.

71. *Van Oster*, 272 U.S. at 467.

Controlled Substances Act of Puerto Rico.[72] The lessor asserted that forfeiture schemes that apply to the property interests of innocent individuals are unconstitutional.[73] Although the Court disagreed, it said:

> It . . . 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.[74]

Thus, the *Calero-Toledo* Court acknowledged, albeit in dicta, that in certain circumstances the artifice of the guilty property would yield to the reality of an innocent owner. Read most optimistically, *Calero-Toledo* indicated that the personification of inanimate objects, the very myth that had traditionally precluded the innocent owner defense, was not without its limits.

II. The Disabling of the Guilty Property Myth in *Austin v. United States*

A. The Austin *Decision*

Austin v. United States[75] disabled the guilty property myth by acknowledging that forfeiture is a punishment imposed on property owners. In *Austin*, the United States commenced a forfeiture proceeding to confiscate Austin's mobile home and auto body shop[76] after Austin pleaded guilty to one count of possessing cocaine with intent to distribute and was sentenced to seven years in prison.[77] Austin opposed the government's summary judgment motion by arguing that the forfeiture

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

73. *See Calero-Toledo*, 416 U.S. at 680.

74. *Calero-Toledo*, 416 U.S. at 689–90.

75. Austin v. United States, 509 U.S. 602 (1993).

76. *See Austin*, 509 U.S. at 602. The forfeiture provisions were 21 U.S.C. § 881(a)(4), (a)(7). *See also supra* notes 54–56 and accompanying text.

77. *See Austin*, 509 U.S. at 604.

of his home and business would violate the Eighth Amendment.[78] The district court, however, found in favor of the government, and the Eighth Circuit affirmed.[79] The United States Supreme Court granted certiorari because of an apparent conflict between the Eighth and Second Circuits over the application of the Eighth Amendment to *in rem* civil forfeitures.[80]

The Court in *Austin* interpreted the Eighth Amendment's Excessive Fines Clause as preventing "the government from abusing its power to punish."[81] While the Court had previously explained that "the Excessive Fines Clause was intended to limit only those fines directly imposed by, and payable to, the government,"[82] the *Austin* Court believed that it had not yet reached the pivotal question of whether the Excessive Fines Clause applies only to criminal cases.[83]

The *Austin* Court concluded that the Eighth Amendment was neither expressly nor historically limited to criminal cases.[84] Repeating language from *United States v. Halper*,[85] the Court said that the "notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law."[86] Thus, the salient consideration became whether a given forfeiture is punishment rather than whether it was labeled as civil or criminal.

The *Austin* Court examined the ratification of the Eighth Amendment to ascertain whether "forfeiture was understood at least in part as punishment."[87] The Court concluded that all three forms of English forfeiture—deodand, forfeiture upon conviction for a felony or treason

78. *See* U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

79. *See* United States v. One Parcel of Property, 964 F.2d 814, 817 (8th Cir. 1992).

80. *See Austin*, 509 U.S. at 604.

81. *Austin*, 509 U.S. at 607.

82. Browning-Ferris Indus. v. Kelco Inc., 492 U.S. 257, 268 (1968).

83. *See Austin*, 509 U.S. at 606–07.

84. *See Austin*, 509 U.S. at 608. The Court noted that while the original version of Section 10 of the English Bill of Rights that was introduced in the House of Commons contained language restricting its application to criminal cases, that restriction only applied to the excessive bail clause. *Austin*, 509 U.S. at 609. As such, the "absence of any similar restriction in the other two clauses suggests that they were not limited to criminal cases." *Austin*, 509 U.S. at 609. In fact, in the final draft, even that single reference to criminal cases in the bail clause was omitted. *Austin*, 509 U.S. at 609.

85. United States v. Halper, 490 U.S. 435 (1989).

86. *Austin*, 509 U.S. at 609 (quoting *Halper*, 490 U.S. at 447–48).

87. *Austin*, 509 U.S. at 610.

and statutory forfeiture[88]—were indeed punitive. Also, the *Austin* Court opined that the First Congress that enacted forfeiture laws for ships and cargo involved in customs offenses defined such forfeiture as punishment.[89] In fact, in one such Act, Congress had actually included the forfeiture of goods and the vessel in the punishment section.[90]

In reviewing decisions in which it had characterized statutory *in rem* forfeiture as punitive, the *Austin* Court dwelled on cases in which it had rejected the innocent owner as a common law defense to forfeiture.[91] The Court read such decisions, including *Goldsmith-Grant* and *Calero-Toledo*, as premised on the understanding that owners were being punished because they were negligent in allowing others to misuse their property.[92] Most significantly, the Court recognized that the notion of forfeiture as punitive had endured in spite of the age-old forfeiture fiction "that the thing is primarily considered the offender."[93]

The Court referred to the "more recent cases [that] have expressly reserved the question whether the fiction could be employed to forfeit the property of a truly innocent owner."[94] The Court found, given the underlying "assumption that forfeiture serves in part to punish," that such cases suggest that true innocence on the part of the owner could raise serious constitutional concerns.[95]

The Court then addressed the forfeiture provisions at issue and found "nothing . . . to contradict the historical understanding of forfeiture as punishment."[96] In addition, the Court noted that these forfeiture provisions housed express innocent owner defenses, which made them

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88. *See supra* notes 41–51 and accompanying text.

89. *See Austin*, 509 U.S. at 613.

90. *See Austin*, 509 U.S. at 613. The *Austin* Court is referring to the Act of July 31, 1789, ch. 5, § 12, 1 Stat. 39, which, according to the Court, provided that "goods could not be unloaded except during the day and with a permit." *Austin*, 509 U.S. at 613.

91. *See Austin*, 509 U.S. at 615. (referring to Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974); J.W. Goldsmith, Jr.-Grant Co. v. United States, 254 U.S. 505 (1921); Dobbins's Distillery v. United States, 96 U.S. 395 (1878); United States v. Brig Malek Adhel, 43 U.S. (2 How.) 210 (1844); and The Palmyra, 25 U.S. (12 Wheat.) 1 (1827)).

92. *See Austin*, 509 U.S. at 615.

93. *Austin*, 509 U.S. at 615–16 (citing *Goldsmith-Grant*, 254 U.S. at 511; *The Palmyra*, 506 U.S. at 14).

94. *Austin*, 509 U.S. at 617 (referring to *Goldsmith-Grant*, 254 U.S. at 512; *Calero-Toledo*, 416 U.S. at 689–90).

95. *Austin*, 509 U.S. at 617.

96. *Austin*, 509 U.S. at 619.

"look more like punishment" directed at those individuals actually involved in drug offenses.[97] Finally, the Court rejected the government's invitation to categorize drug trafficking forfeiture as remedial.[98] As the Court noted, while forfeiture of contraband can have the remedial effect of removing dangerous or illegal items from society, there was nothing inherently criminal or illegal about the actual Austin property—the mobile home and body shop.[99]

Also, the Court dismissed the government's contention that forfeiture is remedial in the sense that the assets serve as "a reasonable form of liquidated damages."[100] This argument fails because of the "dramatic variations" in the value of the forfeitable property.[101] Ultimately, what the *Austin* Court pointed out was that even if forfeiture statutes have some remedial goals, the fact that they *also* aim to punish makes them punitive.[102]

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97. *Austin*, 509 U.S. at 619 (citing 21 U.S.C. § 881(a)(4)(C), (a)(7) (1994)). *See also supra* notes 56–57 and accompanying text.

98. *See Austin*, 509 U.S. at 621–22.

99. *See Austin*, 509 U.S. at 621. The *Austin* Court focused on One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965), in which the Court noted that "[t]here is nothing even remotely criminal in possessing an automobile." *Plymouth Sedan*, 380 U.S. at 699. The *Austin* Court stated that "the Government's attempt to characterize these properties as 'instruments' of the drug trade must meet the same fate as Pennsylvania's effort to characterize the 1958 Plymouth Sedan as 'contraband.'" *Austin*, 509 U.S. at 621.

100. *Austin*, 509 U.S. at 621 (quoting One Lot Emerald Cut Stones v. United, 409 U.S. 232, 237 (1972)).

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

102. *See Austin*, 509 U.S. at 621–22. Justice Scalia, concurring in part and concurring in the judgment, said that he "would have reserved the question without engaging in the misleading discussion of culpability." *Austin*, 509 U.S. at 626. He, however, would conclude that "the *in rem* forfeiture in *this* case is a fine" because the statute, "in contrast to the traditional *in rem* forfeiture, *requires* that the owner not be innocent—that he have some degree of culpability for the 'guilty' property" and because there is no "consideration of compensating for loss, since the value of the property is irrelevant to whether it is forfeited." *Austin*, 509 U.S. at 626. Justice Kennedy, with whom the Chief Justice and Justice Thomas joined, also concurred and explained that he was "not convinced that all *in rem* forfeitures were on account of the owner's blameworthy conduct" and that "[s]ome impositions of *in rem* forfeiture may have been designed either to remove property that was itself causing injury, or to give the court jurisdiction over an asset that it could control in order to make injured parties whole." *Austin*, 509 U.S. at 629 (citations omitted). He also indicated that he would reserve the question of whether *in rem* forfeitures are always punitive. *Austin*, 509 U.S. at 629. In a more recent decision, United States v. Ursery, the Supreme Court held that civil *in rem* forfeitures were not "punishment" for purposes of the Double Jeopardy Clause of the Fifth Amendment. United States v. Ursery,

B. The Disabling of the Guilty Property Myth

Forfeiture is not only punishment, as the *Austin* decision indicates, but it is also punishment imposed on a human being. The Court's recognition of forfeiture as a punitive measure against a person appears in its historical rendition of forfeiture, its approach to the common law innocent owner defense and its virtual extirpation of the guilty property myth.

First, the Court identified a common denominator among the three types of forfeiture existing in England at that time the Eighth Amendment was ratified: each imposed punishment.[103] Congress' initial laws subjecting ships and cargos involved in customs offenses to forfeiture treated forfeiture as punishment.[104] For example, Congress included the forfeiture of goods and the vessel in the punishment category in the Act of July 31, 1789.[105]

Second, the *Austin* court's examination of the common law innocent owner defense deflated the guilty property myth. It interpreted the guilty property language as a formulaic encapsulation of the fact that "the owner has been negligent in allowing his property to be misused and that he is properly punished for that negligence."[106] In *Austin*, the Court noted that it had never used the guilty property fiction to sanction forfeiture where the owner was truly innocent or "had done all that reasonably could be expected to prevent the unlawful use of his property."[107]

The Court's approval of the innocent owner defense suggested that in some future decision, the Court would find that the Constitution shields a truly innocent owner's property from governmental confiscation. This foreshadowing comes across in the *Austin* Court's interpreta-

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116 S. Ct. 2135 (1996). In reaching this conclusion, the Court ignored the *Austin* Court's disabling of the guilty property fiction and distinguished *Austin* as a case dealing narrowly with the Excessive Fines Clause. *Ursery*, 116 S. Ct. at 2143–44.

103. *See Austin*, 509 U.S. at 611 (1993). Deodand punished a property owner for carelessness, as the forfeited object became a source of Crown revenue. Forfeiture of estate punished felons and traitors. Objects used to violate customs or revenue laws were also subject to forfeiture, and English forfeiture statutes (such as the Navigation Acts of 1660) aimed to penalize those participating in this illegal activity. *Austin*, 509 U.S. at 611–12.

104. *See Austin*, 509 U.S. at 613.

105. *See Austin*, 509 U.S. at 613–14.

106. *Austin*, 509 U.S. at 615.

107. *Austin*, 509 U.S. at 616.

tion of its more recent decisions as ones expressly reserving the question of the truly innocent owner.[108] The *Austin* Court suggested that it had reserved that question because of the underlying assumption that forfeiture functions as punishment not imposed on the inanimate object, but rather on the object's flesh and blood owner.[109] In fact, the Court acknowledged that forfeiture of one person's property for another person's offense is justified by the notion that the owner and not the property is blameworthy.[110]

The elastic reasoning in *Austin* cannot be legitimately confined to an analysis of the Eighth Amendment or the section 881 forfeitures.[111] The core of the *Austin* decision is its repeated depiction of forfeiture as punishment of a property owner. In fact, when the *Austin* Court actually focused on the section 881 provisions, it used them primarily to corroborate the conclusions it had already reached through a predominantly historical analysis. Even though section 881 differs from traditional forfeiture statutes by containing an innocent owner defense, it is not that attribute that makes the provisions punitive. Rather, in the Court's view, the express defense is an explicit recognition of the requirement that in forfeiture the property owner must have some culpability before she can

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108. *See Austin*, 509 U.S. at 617 (referring to Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 689–90 (1974); J.W. Goldsmith, Jr.-Grant Co. v. United States, 254 U.S. 505, 512 (1921).

109. *See Austin*, 509 U.S. at 617.

110. *See Austin*, 509 U.S. at 615.

111. *See Ursery*, 116 S. Ct. at 2157–58 (Stevens, J., concurring and dissenting, criticizing the Court for its treatment of *Austin*). *See generally* Stephen H. McClain, *Running the Gauntlet: An Assessment of the Double Jeopardy Implications of Criminally Prosecuting Drug Offenders and Pursuing Civil Forfeiture of Related Assets Under 21 U.S.C. § 881(a)(4), (6) and (7)*, 70 NOTRE DAME L. REV. 941, 976–77 (1995) ("[Because the *Austin* Court] based its decision on the 'historical understanding of forfeiture as punishment, the clear focus of §§ 881(a)(4) and (a)(7) on the culpability of the owner, and the evidence that Congress understood those provisions as serving to deter and to punish' . . . [and because] [t]hese three factors equally apply to section 881(a)(6), . . . it should therefore follow that the section does indeed inflict punishment."). *But see* United States v. Ursery, 116 S. Ct. 2135, 2147 (1996) ("The holding of *Austin* was limited to the Excessive Fines Clause of the Eighth Amendment, and we decline to import the analysis of *Austin* into our double jeopardy jurisprudence"); Ator, *supra* note 58, at 129 (arguing that *Austin* may be limited to situations where the property subject to forfeiture was used to facilitate a crime and may not apply to proceeds forfeiture); Daniel P. Buckley, *A Proposed Measure for Excessiveness After* Austin v. United States *Put a Twist on the Forfeiture Laws*, 29 GONZ. L. REV. 621, 630 (1993/94) (arguing that forfeiture of proceeds is not punishment). *Accord* United States v. Tilley, 18 F.3d 295, 299–300 (5th Cir. 1994).

be so penalized.[112] Finally, the Court stressed that Congress restricted the application of forfeiture as a remedy for criminal offenses, thereby solidifying forfeiture's *innately* punitive character.[113]

In reiterating its statements in *Halper* that "'[t]he notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law[,]'"[114] the *Austin* Court overthrew the labels of "civil" and "remedial" that had limited Constitutional protection in the forfeiture domain.[115] The Court also rejected the Government's argument that civil forfeiture provisions are "remedial" and thus non-punitive because they remove the "instruments" of crime from the community and provide a form of societal and governmental compensation.[116]

While there is some language in *Austin* indicating that forfeiture of contraband itself might be "remedial because it removes dangerous or

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112. *See Austin*, 509 U.S. at 619–20.

113. *See Austin*, 509 U.S. at 622.

114. *Austin*, 509 U.S. at 610 (quoting United States v. Halper, 490 U.S. 435, 447–48 (1989).

115. Before the United States Supreme Court decision in *Halper*, when proceedings were denominated "civil," the Court rejected double jeopardy defenses to actions in which the government sought civil sanctions for offenses that had been the subject of prior criminal proceedings. *See, e.g.*, United States v. One Assortment of 89 Firearms, 465 U.S. 354 (1984) (holding that double jeopardy does not prevent the forfeiture of property after the defendant was acquitted of the related charges); Helvering v. Mitchell, 303 U.S. 391, 397 (1938) ("[t]he acquittal on a criminal charge is not a bar to a civil action by the Government, remedial in its nature, arising out of the same facts on which the criminal proceeding was based . . ."). The *Halper* Court, however, disposed of the autocratic reign of the proverbial labels, "criminal" and "civil." *Halper*, 490 U.S. at 448. It instead defined a civil *or* criminal sanction as punitive "when the sanction applied in the individual case serves the goals of punishment," or "the twin aims of retribution and deterrence." *Halper*, 490 U.S. at 448.

116. *See Austin*, 509 U.S. at 620–21. Before *Halper*, the "remedial label" was a significant factor. *See* One Lot Emerald Cut Stones v. United States, 409 U.S. 232, 237 (1972) ("[forfeiture] prevents forbidden merchandise from circulating in the United States. . . . In other contexts we have recognized that such purposes characterize remedial rather than punitive sanctions."). The Court has also likened forfeiture penalties to a form of "liquidated damages" which are governmentally compulsory. *One Lot Emerald Cut Stones*, 409 U.S. at 237. The *Halper* Court, however, acknowledged that where a civil penalty, imposed in a proceeding against a defendant who has already sustained a criminal punishment, "bears no rational relation to the goal of compensating the Government for its loss," then that civil penalty cannot be deemed remedial. *Halper*, 490 U.S. at 449. *See generally* Hauert, *supra* note 38 (discussing remedial forfeiture); Piety, *supra* note 38, at 946–63 (noting that civil forfeiture is justified as remedial).

illegal items from society,"[117] the Court did not suggest that other forfeitures might be non-punitive. According to the Court, the section 881 forfeitures are punitive on their face in part because of the "dramatic variations in the value of [the forfeitable] property,"[118] which potentially holds true for all forfeiture.

In saying that "forfeiture statutes historically have been understood as serving not simply remedial goals but also those of punishment and deterrence,"[119] the Court deemed all forfeiture to be at the very least a remedial and punitive amalgam. Under the *Halper* analysis, upon which the *Austin* Court extensively relied, even the mere injection of *a* punitive goal into a predominantly "remedial" or denominatedly "civil" mechanism means that the whole mechanism is punitive in character.[120]

In sum, *Austin* constitutes the Court's most outspoken enervation of the guilty property myth. While the Court acknowledged that the fiction itself endures, it expressly declined to employ it as a way to circumvent the obvious reality—that objects themselves do not commit crimes and that confiscation of such objects does not punish the objects. The message of *Austin* is plainly that forfeiture is punishment imposed on people.

III. *Bennis* as the Resurrection and Fusion of Both the Guilty Property Myth and Coverture

A. The Bennis *Decision*

1. The Background

While driving home from work in the family car, John Bennis picked up a woman standing by the side of the road. Shortly thereafter, police observed him receiving fellatio in the car. Police believed that Mr. Bennis paid the woman to perform this act.[121] Bennis was convicted of gross indecency and the prosecutor commenced an action, alleging that

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

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

119. *Austin*, 509 U.S. at 622 n.14.

120. *See Halper*, 490 U.S. at 448 ("[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.") (emphasis added).

121. *See* Michigan v. Bennis, 527 N.W.2d 438, 483 (Mich. 1994).

Mr. Bennis' car was a public nuisance and thus subject to abatement.[122] Tina Bennis, wife of John and co-owner of the vehicle, claimed that she had no knowledge that her husband had ever used their vehicle to break the law.[123] The trial judge nevertheless found that the vehicle was a nuisance and abated the interest of both Mr. Bennis and his wife.[124]

The trial judge apparently recognized the remedial discretion that he had under Michigan's case law.[125] He also took into account the couple's ownership of "another automobile," under the logic that they would not be bereft of transportation.[126] While the trial judge noted that he had the authority to order the payment of one-half of the sale proceeds after the deduction of costs to "the innocent co-title holder," he declined to do so.[127] He based this decision on the fact that the car was eleven years old and that the couple had purchased it for $600, commenting, "[t]here's practically nothing left minus costs in a situation such as this."[128]

The Michigan Court of Appeals reversed, finding that Michigan Supreme Court precedent interpreting the statute precluded the State from abating Ms. Bennis' interest without proof that she knew to what end the car would be put.[129] Further, the appellate court found that the conduct in question did not qualify as a public nuisance because the State showed only one occurrence of criminality and had failed to present evidence of payment for the sexual act.[130]

In reversing the decision of the court of appeals, the Michigan Supreme Court concluded that the occurrence in the Bennis automobile was indeed an abatable nuisance.[131] It also determined that the State need not prove that the owner knew or agreed that her vehicle would be used

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122. *See Bennis*, 527 N.W.2d at 486.

123. *See Bennis*, 527 N.W.2d at 486.

124. *See Bennis*, 527 N.W.2d at 486.

125. *See* Bennis v. Michigan, 116 S. Ct. 994 (1996).

126. *Bennis*, 116 S. Ct. at 997.

127. *Bennis*, 116 S. Ct. at 997.

128. *Bennis*, 116 S. Ct. at 997.

129. *See* Michigan v. Bennis, 504 N.W.2d 731 (Mich. Ct. App. 1993). The appellate court relied on People v. Schoonmaker, 216 N.W. 456 (Mich. 1927), which it interpreted as holding that "proof of knowledge is required for abatement." *Bennis*, 504 N.W.2d at 733. Although there were other supreme court decisions to the contrary, *Schoonmaker* "had never been expressly overruled." *Bennis*, 504 N.W.2d at 733.

130. *See Bennis*, 504 N.W.2d at 733–35.

131. *See Bennis*, 527 N.W.2d at 483.

in the illegal manner when she entrusted it to the user in order to abate the owner's interest.[132] The Michigan Supreme Court further rejected Ms. Bennis' federal constitutional challenges to the State's abatement scheme.

2. The United States Supreme Court Decision

In affirming the *Bennis* decision, the Supreme Court first addressed Ms. Bennis' due process claim that she was entitled to challenge the abatement by showing that she had no knowledge that her husband would use the car to violate Michigan's indecency law. In rejecting this position, Chief Justice Rehnquist adhered to several of the landmark guilty-property-personification cases, which according to the court "hold[] that an owner's interest in property may be forfeited by reason of the use to which the property is put even though the owner did not know that it was to be put to such use."[133]

While the *Austin* Court had observed that *Goldsmith-Grant* had "expressly reserved the question whether the [guilty property] fiction could be employed to forfeit the property of a truly innocent owner,"[134] the *Bennis* court retreated from this position, holding that its previous "observation [was] quite mistaken."[135] The *Bennis* Court emphasized that the reserved question in *Goldsmith-Grant* was "whether the section can be extended to property *stolen* from the owner or otherwise taken from him *without his privity or consent.*"[136] As the *Bennis* Court saw it, the Supreme Court in *Goldsmith-Grant* and the Michigan Supreme Court in *Bennis* had drawn the same distinction between the situation where a vehicle is used without the owner's consent and one in which although the owner consents to another's use of the vehicle, he or she does not

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132. *See Bennis*, 527 N.W.2d at 492. The supreme court relied on language in the statute, MICH. COMP. LAWS ANN. § 600.3815(2) (West 1987), stating, "Proof of knowledge of the existence of the nuisance on the part of the defendants, or any of them is not required." *Bennis*, 527 N.W.2d at 492 n.26.

133. *Bennis*, 116 S. Ct. at 997. The Court referred specifically to *The Palmyra*, 25 U.S. (12 Wheat.) 1 (1827), Dobbins Distillery v. United States, 96 U.S. 395 (1878), Van Oster v. Kansas, 272 U.S. 465 (1926), J.W. Goldsmith, Jr.-Grant Co. v. United States, 254 U.S. 505 (1921) and Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974). *See supra* notes 59–74 and accompanying text.

134. *Austin*, 509 U.S. at 617.

135. *Bennis*, 116 S. Ct. at 999 n.5.

136. *Bennis*, 116 S. Ct. at 999 n.5 (quoting *Goldsmith-Grant*, 254 U.S. at 512) (emphasis in second original).

consent to the manner of the vehicle's use.[137] The Court thus reasoned that because John Bennis and Tina Bennis co-owned the car at issue, Ms. Bennis could not claim that she fell into the former non-consent configuration.

Emphasizing that *Calero-Toledo* was the "most recent decision on point," the Court reiterated that "'the innocence of the owner of property subject to forfeiture has almost uniformly been rejected as a defense.'"[138] *Bennis* thus relegated Ms. Bennis to the same category as the owners involved in early forfeiture cases including the 1827 case, *The Palmyra*.[139]

The Court also specifically dismissed the dissent's distinction between contraband and instrumentalities used to convey contraband. The dissent argued that while contraband was forfeitable, "however blameless or unknowing their owners may be,"[140] an instrumentality could be protected by the innocent owner defense unless the "principal use being made of that property" was criminal.[141] In rejecting that theory, the Court said that the due process analysis did not hinge on whether the use for which the property is forfeited was the principal use.[142]

Ms. Bennis, relying on *Foucha v. Louisiana*[143] and *Austin*, argued in the alternative that the Court should import a culpability requirement into forfeiture.[144] In *Foucha*, a criminal defendant was found not guilty by reason of insanity.[145] The Supreme Court concluded that the State could not confine that defendant indefinitely without a "punitive interest," i.e. without showing that he was either dangerous or mentally ill.[146] Ms. Bennis argued by analogy that Michigan was required to prove a "punitive interest" in depriving her of her interest in the forfeited car.[147] The *Bennis* Court, however, rejected the analogy and said that *Foucha* did not overrule the guilty-property cases.

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137. *See Bennis*, 116 S. Ct. at 999 n.5.
138. *Bennis*, 116 S. Ct. at 999 (quoting *Calero-Toledo*, 416 U.S. at 683).
139. *See supra* notes 59–74 and accompanying text.
140. *Bennis*, 116 S. Ct. at 1004 (Stevens, J., dissenting).
141. *Bennis*, 116 S. Ct. at 1005.
142. *See Bennis*, 116 S. Ct. at 999–1000.
143. Foucha v. Louisiana, 504 U.S. 71 (1992).
144. *See Bennis*, 116 S. Ct. at 1000.
145. *See Foucha*, 504 U.S. at 71.
146. *Foucha*, 504 U.S. at 77–80.
147. *See Bennis*, 116 S. Ct. at 1000.

The Court also declined to apply the reasoning in *Austin*, which it said did not deal with the validity of the "innocent-owner defense."[148] In fact, the Court suggested that the innocent owner defense was relevant to the *Austin* analysis only because it was part of the statute and thus amounted to additional evidence that the provisions at issue in *Austin* had a punitive motive. The Court contrasted the *Austin* scheme with Michigan's " 'equitable action,' in which the trial judge has discretion to consider 'alternatives [to] abating the entire interest in the vehicle.' "[149]

In addition, the Court opined that "forfeiture also serves a deterrent purpose distinct from any punitive purpose."[150] The Court found support for this position in Michigan law, which deters dangerous driving by making the owner of a motor vehicle liable for the negligent operation of the vehicle by a driver who had the owner's consent to use the car.[151] The Court reasoned that Michigan's negligence law would expose Ms. Bennis to liability for her husband's use of the car.

Finally, Ms. Bennis argued that the forfeiture of her interest in the car constituted a taking of private property for public use in violation of the Fifth Amendment Takings Clause.[152] Without much discussion, the Court disposed of that argument by stating that the Constitution did not require the government to "compensate an owner for property which it has already lawfully acquired under the exercise of governmental authority other than the power of eminent domain."[153]

3. The Concurring Opinions

Justices Thomas and Ginsburg authored separate concurring opinions. Perceiving factual similarities between *Bennis v. Michigan*[154] and *Van Oster v. Kansas*,[155] where a car used in a crime was forfeited even though there was no proof that the criminal use occurred with the " 'knowledge or authority' " of the owner,[156] Justice Thomas argued that

148. *See Bennis*, 116 S. Ct. at 1000.

149. *Bennis*, 116 S. Ct. at 1000 (alteration in original).

150. *Bennis*, 116 S. Ct. at 1000.

151. *See Bennis*, 116 S. Ct. at 1000 (citing MICH. COMP. LAWS ANN. § 257.401 (West 1990)).

152. *See Bennis*, 116 S. Ct. at 1001.

153. *Bennis*, 116 S. Ct. at 1001.

154. Bennis v. Michigan, 116 S. Ct. 994 (1996).

155. Van Oster v. Kansas, 272 U.S. 465 (1926).

156. *Bennis*, 116 S. Ct. at 1002 (Thomas, J., concurring) (quoting *Van Oster*, 272 U.S. at 466).

the lack of an innocent owner exception "builds a secondary defense against a forbidden use and precludes evasions by dispensing with the necessity of judicial inquiry as to collusion between the wrongdoer and the alleged innocent owner."[157]

In addition, Justice Thomas felt that the *Van Oster* forfeiture was actually "harder to justify" than the *Bennis* forfeiture:

> [U]nder a different statutory regime, the State might have authorized the destruction of the car instead, and the State would have had a plausible argument that the order for destruction was 'remedial' and thus noncompensable. That it chose to order the car sold, with virtually nothing left over for the State after 'costs' may not change the 'remedial' character of the State's action substantially.[158]

In essence, Justice Thomas equates "remedial" noncompensable destruction of property with an unprofitable post-seizure sale. According to Thomas, because the State action could be labeled "remedial," the case did not really present the problem of punishing the innocent.[159]

Thomas acknowledged that if "[i]mproperly used, forfeiture could become more like a roulette wheel employed to raise revenue from innocent but hapless owners whose property is unforeseeably misused, or a tool wielded to punish those who associate with criminals, than a component of a system of justice."[160] For Thomas, *Bennis* was "ultimately a reminder that the Federal Constitution does not prohibit everything that is intensely undesirable."[161]

Justice Ginsburg believed that the "sole question" was not whether Ms. Bennis was entitled to the vehicle itself but whether she was entitled to a portion of the proceeds.[162] Ginsburg added that it was "critical" to the decision below that the proceeding was equitable in nature, signifying that the Michigan Supreme Court "stands ready to police exorbitant applications of the statute."[163]

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157. *Bennis*, 116 S. Ct. at 1002 (Thomas, J., concurring) (quoting *Van Oster*, 272 U.S. at 467–68).

158. *Bennis*, 116 S. Ct. at 1002 (Thomas, J., concurring).

159. *Bennis*, 116 S. Ct. at 1002 (Thomas, J., concurring). *See also supra* note 116.

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

161. *Bennis*, 116 S. Ct. at 1001–02 (Thomas, J., concurring).

162. *Bennis*, 116 S. Ct. at 1003 (Ginsburg, J., concurring).

163. *Bennis*, 116 S. Ct. at 1003 (Ginsburg, J., concurring).

The dissenters, according to Ginsburg, could not legitimately charge the trial court with "blatant unfairness."[164] The trial court elected not to order a division of the sale proceeds for practical reasons—namely, the fact that the couple had another car and that the 11-year-old Pontiac left "'practically nothing'" to divide after the subtraction of costs.[165]

4. The Dissenting Opinions

Justice Stevens, with whom Justices Souter and Breyer joined, dissented, arguing that it was quite anomalous for a State "to experiment with the punishment of innocent third parties by confiscating property in which, or on which, a single transaction with a prostitute has been consummated."[166] The Court's approach, Stevens believed, would permit States to "confiscate vast amounts of property where professional criminals have engaged in illegal acts."[167]

The dissent distinguished *Bennis* from the precedent on which the Court relied by noting the "tenuous" nexus between the forfeited property and the illegality.[168] The early admiralty cases presumed that the owner of property was aware of the "principal use" of that property.[169] In fact, that same presumption applied to the confiscation of real estate. Thus, the seizure of the premises on which the lessee operated the unlawful distillery in *Dobbins's Distillery v. United States*[170] was justified when the owner "'knowingly suffer[ed] and permitt[ed] his land to be used as [the] site.'"[171]

In contrast, the "principal use" of the Bennis' car "was not to provide a site for [the] husband to carry out forbidden trysts."[172] The dissent finds that there was no evidence in the record that the car had been used previously for the purpose of prostitution.[173] Consequently,

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164. *Bennis*, 116 S. Ct. at 1003 (Ginsburg, J., concurring).
165. *Bennis*, 116 S. Ct. at 1003 (Ginsburg, J., concurring).
166. *Bennis*, 116 S. Ct. at 1003 (Stevens, J., dissenting).
167. *Bennis*, 116 S. Ct. at 1003 (Stevens, J., dissenting).
168. *Bennis*, 116 S. Ct. at 1004 (Stevens, J., dissenting).
169. *Bennis*, 116 S. Ct. at 1005 (Stevens, J., dissenting).
170. Dobbins's Distillery v. United States, 96 U.S. 395 (1877). *See supra* notes 62–64 and accompanying text.
171. *Bennis*, 116 S. Ct. at 1005 (Stevens, J., dissenting) (quoting *Dobbins's Distillery*, 96 U.S. at 399).
172. *Bennis*, 116 S. Ct. at 1005 (Stevens, J., dissenting).
173. *See Bennis*, 116 S. Ct. at 1005 (Stevens, J., dissenting).

Bennis presented an "isolated misuse" of the vehicle, which should not warrant the forfeiture of an innocent owner's interest in the property.[174]

The dissenters further distinguished *Bennis* from cases like *J.W. Goldsmith, Jr.-Grant Co. v. United States*,[175] where the forfeited property actually facilitated the violations of the law.[176] Unlike the situation where a confiscated car had concealed compartments for transporting liquor, or where the seized yacht was used to carry a controlled substance, the "forfeited [Pontiac] bore no necessary connection to the offense committed by [Bennis'] husband."[177] That is, as the dissent saw it, the offense could have occurred in many other places, and the car's mobility only affected the preliminaries—not the offense's "consummation."[178]

The dissenters also believed that the Court's decision contradicts the direction of recent decisions toward the curtailment of forfeiture. The dissent noted the *Austin* Court's rejection of the argument that a mobile home and auto body shop where the illegal transaction occurred could be forfeited as " 'instruments' of the drug trade."[179] The Bennis' car was not significantly different from other property which in the Court's eyes had lacked a sufficient connection to the crime.[180]

The State had characterized the forfeiture as being solely remedial—not punitive—and described it as a pure abatement of a nuisance. The dissenters, however, recalled the contradictory argument by the State in the lower courts that the forfeiture constituted "swift and certain 'punishment' of the voluntary vice consumer."[181] They also noted that the confiscation of the Bennis' car did not prevent Mr. Bennis from securing prostitutes. In fact, trial court testimony revealed that Mr. Bennis had previously solicited prostitutes without the car.

Finally, the dissent noted the restraint of "fundamental fairness"[182] on punishing the innocent which surfaces in *Austin*: "such misfortunes

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

175. J.W. Goldsmith, Jr.-Grant Co. v. United States, 254 U.S. 505 (1921) (Stevens, J., dissenting).

176. *Id.* at 513.

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

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

179. *Bennis*, 116 S. Ct. at 1006 (Stevens, J., dissenting) (citing Austin v. United States, 509 U.S. 602, 620 (1993) (quoting Brief for United States at 32)).

180. *See Bennis*, 116 S. Ct. at 1006 (Stevens, J., dissenting).

181. *Bennis*, 116 S. Ct. at 1007 (quoting Brief for Plaintiff-Appellant at 22, Michigan ex rel. Wayne Cty. Prosecutor v. Bennis, 527 N.W.2d 483 (Mich. 1994)).

182. *Bennis*, 116 S. Ct. at 1007 (Stevens, J., dissenting).

are in part owing to the negligence of the owner, and therefore he is properly punished by the forfeiture."[183] Because Ms. Bennis was not negligent, the majority simply disregarded the reasoning in *Austin.*[184]

The dissent also found conflict with precedent recognizing an exception for "truly blameless individuals."[185] The *Calero-Toledo* Court had indicated that it would be unconstitutional to allow the forfeiture of property when the owner "took all reasonable steps to prevent its illegal use."[186] This principle could not be relegated to mere "*obiter dictum,*"[187] but followed a principle extant in an entire line of cases.[188] Stevens specifically referred to Chief Justice Marshall's statement in *Peisch v. Ware*[189] that "'a forfeiture can only be applied to those cases in which the means that are prescribed for the prevention of a forfeiture may be employed.'"[190]

The dissenters analyzed the forfeiture of an innocent owner's property according to respondeat superior principles. The law has established certain limits on a principal's liability in situations where the "agent strays from his intended mission and embarks on a 'frolic of his own.'"[191] If Mr. Bennis had been her agent, Ms. Bennis could not be found liable for activity so clearly beyond her intentions. As a joint owner, however, Mr. Bennis was independently entitled to use the car and was thus not even acting as an agent.[192]

As to the majority reasoning that strict liability was necessary to ease the burden of proving collusion, the dissent stressed that such a consideration was irrelevant to the *Bennis* case.[193] It was clear that Ms. Bennis did not collude with Mr. Bennis to solicit a prostitute.[194] As the dissent described, Ms. Bennis, "[i]f anything, . . . was a *victim* of [her husband's] conduct."[195]

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183. *Bennis,* 116 S. Ct. at 1007 (Stevens, J., dissenting) (citations omitted).

184. *See Bennis,* 116 S. Ct. at 1007 (Stevens, J., dissenting).

185. *Bennis,* 116 S. Ct. at 1008 (Stevens, J., dissenting).

186. *Bennis,* 116 S. Ct. at 1008 (Stevens, J., dissenting) (discussing Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 688–90 (1974)).

187. *Bennis,* 116 S. Ct. at 1008 (Stevens, J., dissenting) (quoting majority at 999).

188. *See Bennis,* 116 S. Ct. at 1008 (Stevens, J., dissenting).

189. Peisch v. Ware, 8 U.S. (4 Cranch) 347 (1808).

190. *Bennis,* 116 S. Ct. at 1008 (Stevens, J., dissenting) (quoting Peisch, 8 U.S. (4 Cranch) at 363).

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

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

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

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

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

Finally, the dissent pointed out that the majority decision conflicted with *Austin*, in which the Court had deemed the Eighth Amendment Excessive Fines Clause applicable to forfeiture.[196] Under the *Austin* analysis, the confiscation of Ms. Bennis' interest in the property was indeed an "'excessive punishment.'"[197] The majority reasoning that the value of the car is somehow irrelevant contravened *Austin*'s holding that "'dramatic variations'" in the value of forfeited property indicate forfeiture's punitive nature.[198]

In a separate dissenting opinion, Justice Kennedy asserted that even admiralty forfeiture did not provide an "unequivocal confirmation"[199] that ships are always seizable when "used for criminal activity without the knowledge or consent of the owner."[200] Forfeiture of vessels existed to compensate injuries when the "responsible owners were often half a world away and beyond the practical reach of the law and its processes."[201] The owner's lack of culpability did not become a defense because of the interest in prompt compensation and the impracticality of adjudicating such innocence.[202] As a "trade-off," the owner's absolute liability was capped at the amount of the vessel and its cargo; an owner's personal culpability was not actually part of the forfeiture rationale.[203]

Justice Kennedy further objected to the extension of admiralty forfeiture to an automobile, "which is a practical necessity in modern life for so many people."[204] Like Justice Stevens, Kennedy believed that since the Bennis' automobile was not used to transport contraband, its seizure did not really fit within the contours of the cases that uphold the government's use of such forfeiture.[205]

B. The Resurrection and Fusion of Both the Guilty Property and Coverture Myths

The *Bennis* Court resurrected the coverture concept in three specious steps. Their reasoning culminates in an image of the *feme-covert* combined with the concept of guilty property.

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196. *See Bennis*, 116 S. Ct. at 1010 (Stevens, J., dissenting).
197. *Bennis*, 116 S. Ct. at 1010 (Stevens, J., dissenting).
198. *Bennis*, 116 S. Ct. at 1010 (Stevens, J., dissenting) (quoting *Austin*, 509 U.S. at 621).
199. *Bennis*, 116 S. Ct. at 1011 (Kennedy, J., dissenting).
200. *Bennis*, 116 S. Ct. at 1011 (Kennedy, J., dissenting).
201. *Bennis*, 116 S. Ct. at 1010 (Kennedy, J., dissenting).
202. *See Bennis*, 116 S. Ct. at 1010 (Kennedy, J., dissenting).
203. *See Bennis*, 116 S. Ct. at 1010 (Kennedy, J., dissenting).
204. *Bennis*, 116 S. Ct. at 1011 (Kennedy, J., dissenting).
205. *See Bennis*, 116 S. Ct. at 1011 (Kennedy, J., dissenting).

First, the Court cast what is in fact a variegated body of cases as a supposedly "long and unbroken line of cases hold[ing] that an owner's interest in property may be forfeited by reason of the use to which the property is put even though the owner did not know that it was to be put to such use."[206]

The inclusion of admiralty cases like *The Palmyra*[207] and *Calero-Toledo v. Pearson Yacht Leasing Co.*[208] ignores Justice Kennedy's point that practical necessity—not the myth of guilty property—explains the early forfeiture of vessels.[209] The Court needed to ensure compensation for wrongdoing when the actual ship owners were inaccessible and adjudicating such owners' innocence or good faith was nearly impossible. In this context, forfeiture was in fact a trade-off that capped the owner's liability at the amount of the vessel and its cargo, and in return treated the owner's culpability as irrelevant rather than presumed. The guilty property fiction served as shorthand for the trade-off in which the shipowner became tantamount to an insurer.

The application of the admiralty forfeiture scheme to Ms. Bennis' interest in her Pontiac is, as Justice Kennedy suggests, an implausible stretch.[210] Unlike the relatively deep pocket of the maritime vessel owner, Ms. Bennis is a private individual with a car essential to everyday life.[211] She is not "beyond the practical reach of the law and its processes,"[212] and a judicial determination of her innocence or good faith is no more difficult or impractical than resolving intent or scienter in any case. Also, the *Austin* Court focused on *One 1958 Plymouth Sedan v. Pennsylvania*,[213] noting that " '[t]here is nothing even remotely criminal in possessing an automobile,' "[214] disapproving of "the Government's attempt to characterize [the *Austin*] properties as 'instruments' of the drug trade,"[215] and

206. Bennis v. Michigan, 116 S. Ct. 994, 998 (1996).

207. The Palmyra, 25 U.S. (12 Wheat.) 1 (1827). *See supra* notes 59–61 and accompanying text.

208. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974). *See supra* notes 72–74 and accompanying text.

209. *See Bennis*, 116 S. Ct. at 1010 (Kennedy, J., dissenting).

210. *See Bennis*, 116 S. Ct. at 1011 (Kennedy, J., dissenting).

211. *See Bennis*, 116 S. Ct. at 1011 (Kennedy, J., dissenting).

212. *Bennis*, 116 S. Ct. at 1010 (Kennedy, J., dissenting).

213. One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 699 (1965).

214. *Austin*, 509 U.S. at 621 (quoting *One 1958 Plymouth Sedan*, 380 U.S. at 699).

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

equating such an attempt with Pennsylvania's effort to characterize the 1958 Plymouth sedan as "contraband."[216]

The Court's comparison of Ms. Bennis' Pontiac to the vessel in admiralty implicitly denies her very presence. She becomes, like the vessel owner in early forfeiture cases, "half a world away and beyond the practical reach of the law and its processes."[217] The *Bennis* Court treated her as a distant nullity, a thing without innocence or guilt.

The *Bennis* Court's approach to Ms. Bennis is reminiscent of common-law marital coverture; her "very being or legal existence . . . is suspended."[218] For the *Bennis* Court, what Mr. Bennis—the "baron"—did with the property determined the fate of his wife's interest in the property.[219] In the vernacular of Blackstone, the Court "incorporate[d] and consolidate[d]" Ms. Bennis' "very being or legal existence . . . into that of the husband."[220]

The Court's reliance on a purportedly "long and unbroken line of cases" disregards inconsistent authority and the more recent cases inaugurating change. For example, the Court simply ignored *Peisch v. Ware*,[221] which predates *The Palmyra*.[222]

In *Peisch*, when salvors carried off the cargo of a shipwreck in Delaware Bay, the United States sought forfeiture of that cargo on numerous grounds. The Government charged that the shipowners failed to pay duties on cargo at the time of importation, and that they avoided the tax assessment.[223] The Supreme Court, however, disallowed forfeiture

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

217. *Bennis*, 116 S. Ct. at 1010 (Kennedy, J., dissenting).

218. BLACKSTONE, *supra* note 11, at *442; *see supra* note 16 and accompanying text.

219. *See* BLACKSTONE, *supra* note 11, at *442; *see supra* note 16 and accompanying text.

220. BLACKSTONE, *supra* note 11, at *442; *see supra* note 16 and accompanying text.

221. Peisch v. Ware, 8 U.S. (4 Cranch) 347, 363 (1808). *See also*, Miller v. United States, 78 U.S. (11 Wall.) 268, 313–14 (1870) (upholding forfeiture as constitutionally predicated on government's military power—not on the basis of guilty property); Munn, *supra* note 38, at 1261–62 (describing the Supreme Court's detour from the guilty property fiction). Munn states:

> Then, in 1862 Congress passed a law providing for confiscation of the property of persons engaged in rebellion. Although ostensibly an *in rem* proceeding, forfeiture under this law was based not on whether the property was used for insurrectionary purposes, but on whether the property owner was a Confederate soldier or supporter.

Munn, *supra* note 38, at 1261–62 (citations omitted).

222. The Palmyra, 25 U.S. (12 Wheat.) 1 (1827). *See supra* notes 59–61 and accompanying text.

223. *See Peisch*, 8 U.S. at 358–59.

because the ship owners were unable to comply with the customs law.[224] The crew had abandoned the ship before landing, and the vessel simply could not reach the port.[225]

The *Peisch* Court said that "a forfeiture can only be applied to those cases in which the means that are prescribed for the prevention of a forfeiture may be employed."[226] The Court equated the situation in *Peisch* with a "private theft, or open robbery" for which the owner surely should not suffer.[227] The broad meaning of the *Peisch* decision is that property owners should not be punished for the conduct of third persons over whom such owners have no control.

Ms. Bennis was not unlike the shipowners in *Peisch* who could not be punished for actions taken by the third parties. The purpose of the Bennis car was for Mr. Bennis' commute to work. The record contained no evidence that Ms. Bennis gave him permission to use the car to pick up prostitutes. Moreover, Ms. Bennis gave uncontroverted testimony that she did not know that her husband would do anything other than come directly home from work. In fact, it was shown that when he failed to return on the night of his illicit tryst, she actually took action and called "Missing Persons."[228]

The Court's failure to address the exonerating premise in *Peisch* or to even distinguish it demonstrates the underlying influence of coverture on the Court's reasoning. While both cases implicate a third party or involve the conduct of someone other than the owner whose property interest is at stake, Mr. Bennis is not and cannot be a third party for the Court. He is instead the "covert-baron" who has absorbed his wife's identity.[229]

The Court also ignores language in *J.W. Goldsmith, Jr.-Grant Co. v. United States*[230] and *Calero-Toledo v. Pearson Yacht Leasing Co.*[231] that foreshadowed a future case in which a truly innocent owner has a viable defense. In *Goldsmith-Grant*, the Court expressly reserved judgment "as to whether [the forfeiture could] be extended to property stolen from the

224. *See Peisch*, 8 U.S. at 364–65.
225. *See Peisch*, 8 U.S. at 363.
226. *Peisch*, 8 U.S. at 363.
227. *Peisch*, 8 U.S. at 364.
228. *Bennis*, 116 S. Ct. at 1008.
229. BLACKSTONE, *supra* note 11, at *442; *see supra* note 16 and accompanying text.
230. J.W. Goldsmith, Jr.-Grant Co. v. United States, 254 U.S. 505, 512 (1921).
231. *Calero-Toledo*, 416 U.S. at 689.

owner or otherwise taken from him without his privity or consent."[232] Similarly, in *Calero-Toledo*, the Court questioned the constitutionality of forfeiture where the "owner . . . 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 . . . ."[233] The *Bennis* Court diminished the *Calero-Toledo* definition of an innocent owner into mere "*obiter dictum.*"[234] The Court acknowledged the change in the case law only by saying that the *Austin* Court was "mistaken" when it had said that the reserved question in *Goldsmith-Grant* dealt with that "truly innocent owner."[235]

Calero-Toledo and *Goldsmith-Grant* plainly diverge from earlier forfeiture cases. These two cases create a definition of a truly innocent owner that Ms. Bennis easily fulfills. Uncontradicted testimony established that Ms. Bennis was not involved in and was not aware of her husband's use of the car for purchasing sex. Moreover, she had no reason to know of the illegal use of the car because Mr. Bennis had always come directly home from work before. While it would be unreasonable for her to relentlessly stalk him or have him accompanied by a chaperon on all of his steel mill commutes, she did do what *was* reasonable. She, in fact, took action and called "Missing Persons" on the one night that he did not come promptly home.[236]

The Court's make-believe backward time travel erased the Married Women's Acts[237] and replaced them with oppressive coverture disabilities. That is, Ms. Bennis effectively became Mr. Bennis and their awareness and acts became one.[238]

The real essence of the coverture doctrine was reanimated by Justice Ginsburg's concurring opinion.[239] While the Court passively ignored her separate property interest and *sub silentio* viewed the car as if it belonged solely to the Bennis "lord", Justice Ginsburg actively bestowed upon Ms. Bennis a virtual "propertyless" status. Justice Ginsburg accomplished this

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232. *Goldsmith-Grant*, 254 U.S. at 512. *See also* Austin v. United States, 509 U.S. 602, 617 (1993).

233. *Calero-Toledo*, 416 U.S. at 689. *See also supra* notes 72–74 and accompanying text.

234. *Bennis*, 116 S. Ct. at 999.

235. *Bennis*, 116 S. Ct. at 999 n.5.

236. *See Bennis*, 116 S. Ct. at 1008 (Stevens, J., dissenting).

237. *See supra* notes 30–31 and accompanying text.

238. *See* BLACKSTONE, *supra* note 11, at *442–*443 (citations omitted).

239. *See Bennis*, 116 S. Ct. at 1003. *See also* BLACKSTONE, *supra* note 11, at *442–*443 (citations omitted).

reanimation by defending the trial judge's decision to award Ms. Bennis nothing.[240] Although there was "practically nothing" left after subtraction of costs to compensate Ms. Bennis for her interest,[241] there was indeed *something* to which she was entitled. Justice Ginsburg's approval of denying a separate interest to Ms. Bennis translates, however, into a perception of Ms. Bennis as really having *no* interest, despite the undisputed fact that she had acquired an ownership interest by expending money she had earned herself. The effect is to treat both Ms. Bennis and the whole car as *his*.

Second, coverture is resurrected through the Court's derogation of its own significant *Austin* decision.[242] As discussed above, in *Austin* the Court recognized that *all* forfeiture is punishment.[243] The Court arrived at this conclusion primarily through a historical analysis of forfeiture and through examination of its own "innocent owner" cases.[244] In this context, the Court debunked the guilty property fiction, acknowledging not only that forfeiture imposes punishment, but that its punitive target is the property owner. In so doing, the *Austin* Court clearly stated that it had never used the guilty property personification as a justification of forfeiture where the owner was truly innocent or "had done all that reasonably could be expected to prevent the unlawful use of his property."[245]

The *Bennis* Court, however, eviscerated *Austin*. The Court denied that the *Austin* case dealt with the "validity of the 'innocent-owner defense.' "[246] In fact, the *Austin* Court's recognition of a potential forfeiture immunity for the "truly innocent" owner is a significant part of the analysis: it is one of the main bases for the Court's ultimate conclusion that forfeiture is punitive.

Further, the *Bennis* Court tried to escape the *Austin* bind by interpreting *Austin* as merely "point[ing] out that if a forfeiture statute allows such a defense, the defense is additional evidence that the statute itself is 'punitive' in motive."[247] Such an interpretation, however, amounts to an outright concession that the *Austin* decision did not hinge upon the

240. *See Bennis*, 116 S. Ct. at 1003.
241. *Bennis*, 116 S. Ct. at 1003.
242. *See Austin*, 509 U.S. at 602.
243. *See supra* Part II.B.
244. *See supra* Part II.B.
245. *Austin*, 509 U.S. at 616.
246. *Bennis*, 116 S. Ct. at 1000.
247. *Bennis*, 116 S. Ct. at 1000.

existence of a *statutory* innocent owner defense. Rather, as the *Bennis* Court apparently saw it, in *Austin* the Court had only used those provisions to bolster what already was its assessment—namely, that forfeiture by its very nature punishes a culpable owner.

The *Bennis* Court's transparent attempt to narrow *Austin* is untenable. The *Bennis* Court suggests that *Austin* stands only for the proposition that "forfeiture proceedings are subject to the limitations of the Eighth Amendment's prohibition against excessive fines."[248] It should be undeniable, however, that the very foundation upon which the Eighth Amendment analysis rests is the understanding of forfeiture as punishment and that without that understanding, the whole Eighth Amendment construct would simply topple.[249]

The once definitive labels, "civil" and "criminal," were rejected in *Austin*: " '[t]he notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law.' "[250] The *Bennis* Court strained to vindicate the Michigan forfeiture proceeding at issue by affixing to it an "equitable" title and by deeming it significant that Michigan law gives trial judges "discretion to consider 'alternatives . . . .' "[251] Since the "civil" label does not make forfeiture non-punitive, packaging forfeiture with an "equitable" label should not make a difference. Also, because it is apodictic that judges have discretion in the context of criminal sentencing, and that a criminal sentence is nevertheless punishment, discretion cannot be *the* differentiating factor making a forfeiture scheme instantly non-punitive.

All efforts to distinguish and narrow *Austin* fail embarrassingly in *Bennis*. If *Austin* is not overruled, then its loud and clear message that forfeiture punishes culpable people—not culpable objects—endures. Beneath its veneer, the *Bennis* decision intimated not only that it is irrelevant whether Ms. Bennis did "all that reasonably could be expected to prevent the proscribed use of [the] property,"[252] but also that Ms.

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248. *Bennis*, 116 S. Ct. at 1000.

249. *See Austin*, 509 U.S. at 610 ("Thus, the question is not, as the United States would have it, whether forfeiture under §§ 881(a)(4) and (a)(7) is civil or criminal, but rather whether it is punishment."). *See also* United States v. Ursery, 116 S. Ct. 2135, 2158 (1996) (Stevens, J., concurring and dissenting) ("The punitive nature [of the forfeiture provisions] was accepted by every Member of the *Austin* Court.").

250. *Austin*, 509 U.S. at 610 (quoting United States v. Halper, 490 U.S. 435, 447–48 (1989)).

251. *Bennis*, 116 S. Ct. at 1000. *See also Bennis*, 116 S. Ct. at 1003 (Ginsburg, J., concurring).

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

Bennis herself does nothing and can do nothing. To the Court, there is only one actor in the married couple—Mr. Bennis. This idea is reminiscent of the coverture precept that in certain instances, the wife acts "by [her husband's] compulsion" and thus, is not really acting at all.[253]

Third, the *Bennis* Court resurrected coverture not only by refusing to see Ms. Bennis as doing and acting, but also by denying that she is a person being subjected to punishment. In so doing, the Court resurrected not just coverture, but the guilty property myth and blended it with the statutorily disestablished doctrine of coverture.

The congealment of coverture and guilty property manifests itself not only in the Court's insistence that *Austin* did not validate the "innocent owner defense"[254] but also in its illogical dismissal of the *Foucha v. Louisiana* case.[255] Ms. Bennis had offered *Foucha* for the proposition that criminal defendants cannot be punished for crimes if they are found to be not guilty. The Court's only response to Ms. Bennis' *Foucha* argument was that "*Foucha* did not purport to discuss, let alone overrule, *The Palmyra* line of cases."[256]

Foucha can harmoniously coexist with *The Palmyra* only if blind faith in guilty property is once again flourishing. That is, although *Foucha* may say that innocent people cannot be punished, *The Palmyra* validates the punishment because *people* are not being punished at all.[257]

While it could be mere coincidence that the *Bennis* decision resurrected the myths of guilty property and of the *feme-covert* in one fell swoop, it is more likely that a subliminal ligature connects the two myths. That is, somewhere in the Court's deliberative process there is a link between the wife in coverture and guilty property. Specifically, the *feme-covert* has no "being," no "legal existence."[258] All of that "life" is suspended and she becomes a thing or a piece of property, which is wholly "under the influence of her husband."[259]

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253. *See* BLACKSTONE, *supra* note 11, at *444; *see supra* notes 26–27 and accompanying text.

254. *Bennis*, 116 S. Ct. at 1000.

255. *Bennis*, 116 S. Ct. at 1000 (citing Foucha v. Louisiana, 504 U.S. 71 (1992)). *See supra* notes 143–147 and accompanying text.

256. *Bennis*, 116 S. Ct. at 1000.

257. *The Palmyra*, 25 U.S. at 14. ("The thing is here primarily considered as the offender, or rather the offense is attached primarily to the thing."). *See also supra* notes 59–61 and accompanying text.

258. *See* BLACKSTONE, *supra* note 11, at *441; *see supra* note 16 and accompanying text.

259. BLACKSTONE, *supra* note 11, at *442; *see supra* note 16 and accompanying text.

The *Bennis* Court equated Ms. Bennis not with property having a neutral valence, but with "guilty" property, denying that she was an "innocent." For the Court, Ms. Bennis is not what the dissent said she was—not "as blameless as if a thief, rather than her husband, had used the car in a criminal episode."[260] The Court never even considered the emotional toll on Ms. Bennis or the reality that Ms. Bennis herself feels no or *should* feel *no* responsibility for her husband's lascivious escapade.

Rather, the Court's opinion sketched Ms. Bennis as if she is somehow at fault regarding her husband's infidelity. She becomes, in essence, not just the *feme-covert*, but his guilty *feme-covert*—somewhat like the ship, a distillery or a vehicle that has brought about its own demise.[261] She is what Holmes once described as the offending door that "even civilized man . . . kick[s] . . . when it pinches his finger."[262]

Ironically, the nexus between Ms. Bennis and guilty property destroys one of the few coverture presumptions that slightly favored the wife at common law. As discussed above, a common-law *feme-covert* could not be guilty of certain unlawful acts because such acts were simply deemed to be done under the aegis of her husband.[263] Here, however, the *Bennis* Court's *feme-covert*, likened to guilty property, is not immune from criminal liability but actually vicariously liable for her husband's acts. The Court makes this sentiment almost explicit when it compares the "deterrent mechanism" of forfeiture to Michigan's vicarious liability statute, which exposes a motor vehicle owner to liability for the driver's negligence.[264]

When coverture and guilty property converge, the effect is doubly unfair: the mythic amalgam becomes the worst of both worlds. Specifically, as resurrected by the *Bennis* Court, the present day *feme-covert* is nothing and has nothing when she is blameless; but when *he* is culpable, she comes to life for the sole purpose of being blamed. As rendered by the *Bennis* Court, the wife, like the deodand's progenitor, becomes an inanimate object "cast beyond the borders" for an actor's offense.[265]

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260. *Bennis*, 116 S. Ct. at 1008 (Stevens, J., dissenting).

261. *See supra* notes 59–71 and accompanying text (discussing classic guilty property cases).

262. *See* HOLMES, *supra* note 33, at 11–12; *see supra* note 36 and accompanying text.

263. *See supra* notes 26–27 and accompanying text.

264. *Bennis*, 116 S. Ct. at 1000 (citing MICH. COMP. LAWS ANN. § 257.401 (West 1990)).

265. *See supra* note 35 and accompanying text.

CONCLUSION

This Article began with the exploration of two seemingly separate myths: coverture in common law marriage and that of guilty property in forfeiture proceedings. As Blackstone describes it, marital coverture fused the husband and wife and "incorporated and consolidated [her] into . . . the husband."[266] In coverture, the wife relinquished the control and management of her property to her husband.[267] With respect to chattels that the woman owned at the time of marriage and those she acquired later, coverture transformed the husband into *the* owner.[268]

Forfeiture proceedings are rooted in the myth that objects are guilty of the wrongs committed with them.[269] The United States Supreme Court has used the guilty property personification to approve forfeiture in situations in which property owners claimed innocence. In these forfeiture decisions the Court has vilified culpable ships, an offending distillery and guilty cars.[270]

Until *Bennis v. Michigan*, both the coverture and guilty property myths had been vanquished. All states, including Michigan, have statutorily abolished coverture disabilities.[271] Today's married women can contract, sue and be sued on their own, manage and control their own property, join the work force without their husbands' consent and keep the money they earn.[272]

While the state legislatures have defeated coverture, the United States Supreme Court has enervated the guilty property fiction. In *Austin*, the Supreme Court clearly proclaimed not only that forfeiture punishes but that it punishes human beings—not objects.[273] In fact, implicit in *Austin* is a prefiguration of a case in which the Court would disallow the confiscation of property belonging to a truly innocent owner even where the forfeiture provisions at issue lack an innocent owner exemption.[274]

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266. BLACKSTONE, *supra* note 11, at *442; *see supra* note 16 and accompanying text.

267. *See supra* notes 18–19 and accompanying text.

268. *See supra* text accompanying note 20.

269. *See supra* note 33 and accompanying text.

270. *See supra* notes 58–71 and accompanying text.

271. *See supra* notes 30–31 and accompanying text.

272. *See supra* note 31 and accompanying text.

273. *See supra* Part II.B.

274. *See* Austin v. United States, 509 U.S. 602, 617 (1993) ("If forfeiture had been understood not to punish the owner, there would have been no reason to reserve the case

The *Bennis* Court resurrected both the coverture and guilty property myths. By implicitly comparing Ms. Bennis' car to the vessels in the old admiralty forfeiture cases, the Court effectively "suspended" the wife's very existence.[275] Like the shipowner, who was "half a world away and beyond the practical reach of the law and its processes,"[276] Ms. Bennis was peripheral to this analysis. For the *Bennis* Court, the wife is a nullity; Mr. Bennis' use of the property determined the fate of his wife's interest in the property.[277] In short, the property is wholly *his*.

The *Bennis* Court also declined to confront the analogous situation in *Peisch v. Ware*,[278] which involved the conduct of individuals other than the person whose property interest was at stake.[279] The Court's disregard of *Peisch* inherently suggests that the *Bennis* situation does not involve the conduct of an individual who is actually separate from the owner.[280] That is, the *Bennis* Court effectively merged husband and wife into the ubiquitous him.

The Court also rejected crucial language in *J.W. Goldsmith, Jr.-Grant Co. v. United States*[281] and *Calero-Toledo v. Pearson Yacht Leasing Co.*[282] that carves out an exemption from loss of property for truly innocent owners who are not involved in or aware of the wrongful activity and have done all that they reasonably could do to prevent the illegal use of the property. In essence, the Court reneged on its pledge

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of a truly innocent owner. Indeed, it is only on the assumption that forfeiture serves in part to punish that the Court's past reservation of that question makes sense."). *See also supra* Part II.B.

275. *See* BLACKSTONE, *supra* note 16 and accompanying text.

276. Bennis v. Michigan, 116 S. Ct. 994, 1010 (1996) (Kennedy, J., dissenting).

277. *See* BLACKSTONE, *supra* note 16 and accompanying text.

278. Peisch v. Ware, 8 U.S. (4 Cranch) 347, (1808).

279. *See supra* notes 221–227.

280. In *Bennis*, the Court also uses Mr. Bennis' co-ownership of the vehicle to imply Ms. Bennis' consent to his use as a basis for depriving her of her use of the car, and thus distinguishes her from a "truly innocent" owner. *Bennis*, 116 S. Ct. at 999 n.5. In truth, however, the Court treats them as one being—him, and this fusion divests her of her ability to withhold consent.

281. J.W. Goldsmith, Jr.-Grant v. United States, 254 U.S. 505, 512 (1921) (reserving question of "whether the section can be extended to property stolen from the owner or otherwise taken from him without his privity or consent").

282. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 689 (1974) ("[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."). *See supra* notes 72–74 and accompanying text.

in *Austin* to insulate the truly innocent from forfeiture even where the forfeiture provisions do not contain an express innocent owner defense. Because Ms. Bennis epitomizes the innocent owner, the *Bennis* decision surely should have been the one to take the step that the *Austin* court had presaged.

By ignoring *J.W. Goldsmith, Jr.-Grant, Calero-Toledo* and *Austin*, the *Bennis* Court effectively turned back the clocks, deleting the Married Women's Acts[283] and inserting coverture disabilities.[284] Ms. Bennis was reborn as the *nouveau feme covert*.[285] Although Ms. Bennis had paid for her interest in the vehicle with money that she herself had earned, the *Bennis* Court treated the car as if it were solely her husband's property.[286] In fact, Justice Ginsburg's defense of the trial judge's decision to award Ms. Bennis nothing reveals the perception shared by the Court and the concurrence that Ms. Bennis herself really owns nothing.[287]

Through its disingenuous narrowing of *Austin* and dogged adherence to the hoary guilty property cases, the *Bennis* Court resurrected both forfeiture and the guilty property fiction. Stated otherwise, the *Bennis* Court once again empowered the guilty property myth and used it to do what the *Austin* Court said it could not do: it made guilty property justify forfeiture where the owner was truly innocent.

The *Bennis* Court, however, did not merely conterminously resurrect two *separate* anachronisms. It actually fused the two myths by first implicitly equating Ms. Bennis with property and then by imbuing her with her husband's guilt. Ultimately, his *mens rea* or guilt became hers so that the wife—like the ship, distillery, or car—could be punished as the object that brought about its own demise.[288]

The *Bennis* Court's melding together of the mythic *feme covert* and the notion of guilty property is a most disturbing conglomerate. While the coverture fiction "suspended" the wife's existence, the Court's fledgling myth of the guilty *feme covert* denies the wife's existence

283. *See supra* notes 30–31 and accompanying text.

284. *See supra* notes 15–27 and accompanying text.

285. *See supra* note 16 and accompanying text.

286. In fact, in the Court's view, Ms. Bennis cannot even claim that she withheld her consent to her husband's use of the vehicle as a basis of why she should have her car back. *See Bennis*, 116 S. Ct. at 999 n.5.

287. *See Bennis*, 116 S. Ct. at 1003 (Ginsburg, J., concurring) (Ms. Bennis' ownership of the vehicle amounted to "practically nothing").

288. For a discussion of classic guilty property cases, see generally *supra* notes 58–71 and accompanying text.

altogether by demoting her to a purely inanimate status. While common law coverture sometimes bestowed upon the wife a benefit in the form of immunity from punishment for certain crimes,[289] the myth of the guilty *feme covert* exposes the wife to vicarious liability and punishment for crimes that are solely her husband's. By combining two independently noxious myths, the *Bennis* Court created a more pernicious composite—a guilty property wife saddled with more disabilities than the original Blackstonian *feme covert.*

In Milton's Biblical epic, postlapsarian Adam, submitting himself to a deific lecture on coverture, learned that his fatal flaw was uxoriousness and met his supposedly "rightful" identity as the ruler in the marital union.[290] In the *Bennis* epic, Ms. Bennis also confronted her putative crime—possibly that of failing to keep her husband faithful—and likewise met her new rightful identity as not merely her husband's subject but as his guilty property. She, like the second century B.C. inanimate objects that Oliver Wendell Holmes described, was convicted and punished in the Twentieth Century "Prytaneum." ⚓

289. *See supra* notes 26–27 and accompanying text.

290. *See supra* note 1 and accompanying text.