1995 WL 782840 (U.S.) (Appellate Brief)
United States Supreme Court Amicus Brief.

Tina B. **BENNIS**, Petitioner,
v.
STATE OF **MICHIGAN** ex rel. WAYNE COUNTY PROSECUTOR, Respondent.

No. 94-8729.
October Term, 1995.
August 4, 1995.

On Writ Of Certiorari To The **Michigan** Supreme Court

BRIEF OF THE INSTITUTE FOR JUSTICE AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INSTITUTE FOR JUSTICE
* WILLIAM H. MELLOR III
CLINT BOLICK
SCOTT G. BULLOCK
1001 Pennsylvania Avenue, NW
Suite 200 South
Washington, DC 20004
(202) 457-4240
Attorneys for Amicus Curiae

***i** TABLE OF CONTENTS

***ii** TABLE OF AUTHORITIES

CASES

STATUTES

MISCELLANEOUS

*1 INTEREST OF AMICUS CURIAE

The Institute for Justice is a nonprofit, public interest law center committed to defending essential foundations of a free society and securing greater protection for individual liberty. Central to the mission of the Institute is strengthening the ability of individuals to control their property and advancing the belief that property rights are intricately connected to other civil rights. The Institute's brief therefore critiques civil forfeiture from a property rights perspective. It recognizes that the government's current, aggressive use of civil forfeiture laws represents one of the gravest threats to private property rights today.

The Institute for Justice has obtained the consent of the parties to the filing of this brief and letters of consent have been filed with the Clerk.

STATEMENT OF FACTS

On October 3, 1988, Detroit police officers witnessed Kathy Polarchio, a suspected prostitute, perform a sex act on John **Bennis** in a 1977 Pontiac. The car, co-owned by Mr. **Bennis** and his wife, petitioner Tina **Bennis**, was parked on the street in a residential neighborhood. Mr. **Bennis** was arrested for gross indecency. In addition, the Wayne County prosecutor filed a complaint alleging that the Pontiac was a public nuisance subject to abatement under a **Michigan** statute providing for the abatement of property used for the purpose of lewdness, assignation, or prostitution. **Michigan** Comp. Laws § 600.3801. This case was the first time in the seventy-year history of the *2 statute that the law had been invoked to forfeit an automobile used for the purpose of prostitution.

In the trial court, Mr. **Bennis** was convicted of gross indecency. Furthermore, the trial judge held that the Pontiac was a nuisance and abated the interest of Mr. **Bennis** and his wife. Although the Wayne County prosecutor conceded that Ms. **Bennis** had no knowledge of her husband's activities, her interest in the car was also forfeited.

In a 2-1 decision, the **Michigan** Court of Appeals reversed the decision of the trial court. In a 4-3 decision, however, the **Michigan** Supreme Court reversed the judgment of the **Michigan** Court of Appeals and upheld the forfeiture. The **Michigan** Supreme Court found that the statute in question did not require Tina **Bennis** to have prior knowledge of her husband's activities. It said that the statute "expressly obviates the requirement that an owner consent to or acquiesce in the illegal use of property." State ex rel. Wayne Cty. Prosecutor v. **Bennis**, 447 **Mich**. 719, 739 (1994).

Furthermore, the Court rejected Tina **Bennis**' constitutional claims. **Bennis** had argued that because she was an innocent owner of the automobile, the Due Process Clause of the Fourteenth Amendment, as well as the Takings Clause of the Fifth Amendment (as applied to the states through the Fourteenth Amendment) precluded the forfeiture of her interest in the Pontiac. The **Michigan**

Supreme Court, however, held that under the Constitution, an innocent owner's interest may be abated so long as the vehicle was not stolen or used without the consent of the owner. One dissenting justice agreed with the Court's rejection of **Bennis**' constitutional claims even ***3** though he disagreed with its interpretation of the statute. The opinion signed by the two other dissenting justices did not address **Bennis**' constitutional claims.

This Court has granted Tina **Bennis**' petition for certiorari to hear the issues of whether the **Michigan** statute and its application to Ms. **Bennis** violates the Due Process Clause of the Fourteenth Amendment and the Takings Clause of the Fifth Amendment by permitting the forfeiture of an innocent owner's property.

SUMMARY OF ARGUMENT

Private property rights form the foundation of a free society. The ability of government to forfeit the property of wholly innocent owners strikes at the core of the constitutional right to own and control property. Although civil forfeiture has roots in common law and was incorporated into early American law, it was originally viewed as an extraordinary power that arose from the necessities of enforcing admiralty and customs laws. At the federal and state levels, today's forfeiture practices far exceed the limited forfeiture power at common law.

The State of **Michigan** deprived Ms. **Bennis** of her property even though she committed no wrong and had no knowledge of the illegal use of her property. Current **Michigan** law provides no recourse for innocent owners. This Court should adopt as law the language in Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974) and Austin v. United States, 113 S.Ct. 2801 (1993) that the forfeiture of property held by truly innocent owners is unduly oppressive and violates the Due Process Clause of ***4** the Fourteenth Amendment. Furthermore, the law should not place affirmative obligations on individuals to police the actions of third parties. Rather, the burden should be on the government to demonstrate that an owner negligently entrusted property to another in order to expose that individual to civil forfeiture.

The forfeiture of Ms. **Bennis**' rights in the automobile of which her husband was a co-owner also constitutes a taking of private property without just compensation. The cost of solving urban problems cannot, consistent with the Takings Clause, be thrust upon innocent property owners such as Ms. **Bennis**. Nor can the state escape takings liability by distorting common law nuisance principles and characterizing the single illegal use of an automobile as a “public” “nuisance.”

ARGUMENT

I. THE GOVERNMENT'S ZEALOUS USE OF CIVIL FORFEITURE LAWS, AND THEIR APPLICATION TO INNOCENT PROPERTY OWNERS, SERIOUSLY UNDERMINES PRIVATE PROPERTY RIGHTS.

In reviewing the state of contemporary civil forfeiture law, Judge John Pratt of the United States Court of Appeals for the Second Circuit astutely commented that the forfeiture power generates a conflict between two fundamental principles of American law: “(1) that crime does not, or at least should not, pay, and (2) that property rights are a fundamental aspect of individual freedom.” Pratt & Petersen, Civil Forfeiture in the Second Circuit, 65 St. John's L. Rev. 653, 655-56 (1991). Pratt concluded that ***5** “[a]s civil forfeiture has been used with increasing aggressiveness, the discord between these two assumptions has increased to a point at which they seem unable to coexist.” Id. at 656.

In its last decision addressing civil forfeiture, this Court recognized the current imbalance between governmental power and private property rights in the context of civil forfeiture. Starting from first principles and reinserting a property rights perspective to the civil forfeiture debate, this Court declared that “individual freedom finds tangible expression in property rights.” U.S. v. James Daniel Good Real Property, 114 S.Ct. 492, 505 (1993). Noting the trampling of private property rights in the government's recent exercise of the forfeiture power, Justice Thomas stated in Good that property rights are “central to our heritage” and

that he was "sympathetic to [the majority's] focus on the protection of [those] rights...." Id. at 515. (Thomas, J., concurring and dissenting).

The abuse of civil forfeiture laws, and the concomitant destruction of private property rights, has been well documented in both scholarly and popular publications. Franze, Casualties of War?: Drugs, Civil Forfeiture and the Plight of the Innocent Owner, 70 Notre Dame L. Rev. 369 (1994); Gordon, Prosecutors Who Seize Too Much and the Theories They Love: Money Laundering, Facilitation, and Forfeiture, 44 Duke L. J. 744 (1995); Pilon, Can American Asset Forfeiture Law Be Justified?, 39 N.Y. L. Rev. 311 (1994); Hyde, Forfeiting Our Property Rights: Is Your Property Safe From Seizure? (1995); Reed, American Forfeiture Law: Property Owners Meet the Prosecutor, Cato Policy Analysis No. 179 (Sept. 29, 1992); Bullock, Filling the Coffers with Civil Forfeitures, Legal Times, Nov. 1, 1993; Brazil & Berry, ***6** Tainted Cash or Easy Money?, Orlando Sentinel Trib., June 14-15, 1992; Schneider & Flaherty, Presumed Guilty: The Law's Victims in the War on Drugs, Pittsburgh Press, Aug. 11-Sep. 16, 1991. Moreover, the numerous horror stories of property owners caught in the web of government's enormous forfeiture power has spawned "distrust of the Government's aggressive use of broad civil forfeiture statutes." Good, 114 S.Ct. at 515 (Thomas, J., concurring and dissenting). Consequently, efforts are underway to reform civil forfeiture laws and afford greater procedural protection to property owners. See Civil Asset Forfeiture Reform Act of 1995, H.R. 1916, 104th Cong., 1st Sess. (1995) (introduced on June 22, 1995).

The issue in the instant case, however, does not concern providing greater procedural protections in order to separate the guilty from the innocent in civil forfeiture proceedings. The instant case addresses whether the property of an unquestionably innocent owner can be forfeited to the government because that property was connected to illegal activity through no fault of the owner.

Petitioner Tina **Bennis** claims that the forfeiture of her interest in the automobile she co-owned with her husband violates the Due Process Clause of the Fourteenth Amendment and the Takings Clause of the Fifth Amendment. This Court has recognized that property rights claims, like those of Ms. **Bennis**, should not be relegated "to the status of a poor relation" in comparison to other constitutional rights. See Dolan v. City of Tigard, 114 S.Ct. 2309, 2320 (1994). The **Michigan** Supreme Court ignored this Court's mandate in Dolan and undermined vital property rights protections.

***7 II. ALTHOUGH CIVIL FORFEITURE IS A CENTURIES-OLD DOCTRINE, IT HAS BEEN RELEASED FROM ITS HISTORICAL MOORINGS AND IS NOW USED IN A VARIETY OF INAPPROPRIATE CONTEXTS.**

The forfeiture power has roots in common law and even predates the founding of this country. Early forfeitures, however, were of limited use and application. Property owners in the twentieth century have witnessed the virtually unbounded expansion of civil forfeiture laws far beyond their common law origins. Therefore, it is important to explore the history of civil forfeiture in order to distinguish between constitutional applications of a long-established, limited governmental power and unwarranted and unconstitutional applications of its vastly expanded incarnation.

In his seminal work, The Common Law, Oliver Wendell Holmes traced the origin of American civil forfeiture law to the ancient law of deodands. [1] For several decades, Holmes' historical view of civil forfeiture prevailed. [2] However, recent scholarship disputes Holmes' perspective. Schecter, Fear and Loathing and the Forfeiture Laws, 75 Corn. L. Rev. 1151, 1154 (1990) (hereinafter "Schecter"); Maxeiner, Bane of American Forfeiture Law - Banished at ***8** Last?, 62 Corn. L. Rev. 768, 772 (1977) (hereinafter "Maxeiner"). According to this scholarship, American forfeiture law arose not from ancient deodand law, but from English admiralty procedures. Piety, Scorched Earth: How the Expansion of Civil Forfeiture Doctrine Has Laid Waste to Due Process, 45 U. Miami L.Rev. 911, 935-42 (1991).

Early American forfeiture statutes trace their origins to the British Navigation Acts of the mid-1600s. The Acts were passed during England's vast expansion as a maritime power. The Acts required imports and exports from England to be carried on British ships. If the Acts were violated, the ships or the cargo on board could be seized and forfeited to the crown regardless of the guilt or innocence of the owner. [3]

Using the British statutes as a model, the first United States Congress passed forfeiture statutes to aid in the collection of customs duties, which provided 80-90% of the finances for the federal government during that time. Act of August 4, 1790, 1 Stat. 145; Act of July 31, 1789, 1 Stat. 29; Maxeiner, 62 Corn. L. Rev. at 782 n.86. Civil or "in rem" forfeitures were introduced in American law through these early customs statutes. The forfeiture power was challenged and upheld in The Palmyra, 25 U.S. (12 Wheat.) 1 (1827). The owner of a shipping vessel asserted that an in rem forfeiture could not occur unless ***9** he was convicted of criminal wrongdoing. However, Justice Story held that the "proceeding in rem stands independent of, and wholly unaffected by any criminal proceeding in personam." Id. at 15. Consequently, "[t]he thing is here primarily considered as the offender, or rather the offence is primarily attached to the thing...." Id. at 14. Despite the sweep of the Palmyra language, it is clear from a careful reading of the case that the holding was plainly limited to in rem forfeitures under the admiralty jurisdiction.

This Court clarified the government's forfeiture power in the landmark case, United States v. Brig Malek Adhel, 43 U.S. (2 How.) 210 (1844). The case presented the question of whether an innocent owner of a ship could have his property forfeited due to the illegal and unauthorized acts of the master. Justice Story, once again writing for the majority, upheld the forfeiture under the same rationale developed in The Palmyra.

The most important aspect of these early forfeiture cases is the justification provided for the expansion of civil forfeiture to innocent property owners. This Court held that the forfeitures were closely tied to the functional necessities of enforcing admiralty, piracy, and customs laws. In rem forfeiture permitted courts to obtain jurisdiction over property when it was virtually impossible to obtain in personam jurisdiction over the property owners. Therefore, the government could ensure that customs laws were enforced even if the owner of the ship or the cargo was outside the court's jurisdiction. Justice Story wrote that the "vessel which commits the aggression is treated as the offender, as the guilty instrument or ***10** thing to which the forfeiture attaches, without any reference whatsoever to the character or conduct of the owner." Brig Malek Adhel, 43 U.S. at 233. However, Story justified such forfeitures "from the necessity of the case, as the only adequate means of suppressing the offence or wrong, or insuring an indemnity to the injured party." Id. (emphasis added).

Civil forfeitures were released from their historical moorings during the Civil War. The Confiscation Acts allowed the Union to seize and forfeit the rebels' Northern property and the property of those who aided the Confederacy. Act of July 17, 1862, 12 Stat. 589; Act of August 6, 1861, 12 Stat. 319. In 1863, the Supreme Court of Kentucky declared the Acts unconstitutional and presciently observed that "[t]hese in rem proceedings may today be the engines of punishment to the rebels, but, in the future, they may be the instruments of oppression, injustice, and tyranny...." Norris v. Doniphan, 61 Ky. (4 Met.) 385, 426 (1863).

Numerous challenges to these Acts were mounted and eventually this Court agreed to address the constitutional issues. In 1871, the Acts were upheld against Fifth and Sixth Amendment challenges. Miller v. United States, 78 U.S. (11 Wall.) 268, 305 (1871). Upholding the Confiscation Acts in the face of constitutional attack worked "a revolution in forfeiture law that persists to this day - use of the in rem action without constitutional limitation. It is unlikely that such a change would have occurred had it not been for the passions raised by the Civil War." Maxeiner, 62 Corn. L. Rev. at 787 (1977).

***11** After the Confiscation Act cases, expansion of civil forfeiture law continued. Unlike their common law predecessors, twentieth century civil forfeitures are part of larger governmental efforts to eliminate undesirable social behavior, such as alcohol [4] and drug use. [5] Released from its functional application as a means of enforcing admiralty and customs laws, the forfeiture power has become one of the most powerful weapons in the government's arsenal to eliminate vice.

The instant case is a good example of the differences between the extraordinary common law remedy of civil forfeiture and modern forfeiture applications. As discussed previously, early civil or in rem forfeitures arose from necessity. The government needed a means of enforcing revenue and customs laws even if they could not obtain in personam jurisdiction over an owner. See Good, 114 S.Ct. at 504 (noting broader deference afforded government in collecting debts or revenues). Otherwise, the state and private litigants would often be left without a remedy. Significantly, the forfeiture of a yacht - the ***12** property at issue in this Court's decision upholding civil forfeiture, Calero-Toledo - is within the traditional admiralty domain of in rem forfeiture.

None of the traditional justifications for civil forfeiture apply in the instant case. If Ms. **Bennis** were guilty of any wrongdoing or negligently entrusted her property to the care of another, the government could easily obtain in personam jurisdiction over her for the issuance of an injunction or a criminal penalty. Furthermore, the state was not enforcing revenue laws when it forfeited the **Bennis** automobile. It is more likely that the State of **Michigan**, like many other jurisdictions today, was using the civil forfeiture power to generate unappropriated revenues for the state through the expropriation of private property. [6]

***13** Traditionally, the forfeiture power was narrowly limited in ways that prevented government from violating individual rights. As the forfeiture power has strayed from its historical and common law moorings, governments now use this power without built-in safeguards and in violation of the Constitution.

***14 III. THE APPLICATION OF CIVIL FORFEITURE TO INNOCENT PROPERTY OWNERS VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT AND THE TAKINGS CLAUSE OF THE FIFTH AMENDMENT.**

This Court in Pearson recognized, albeit in dicta, two instances where the application of civil forfeiture to innocent owners may raise serious constitutional concerns: forfeitures where the wrongdoer obtained the property without the consent of the owner and those situations where an innocent owner demonstrated not only that he was unaware of the property's illegal use, but that he had done all that could reasonably be expected to prevent its illegal use. Id at 689. In those situations, it would be difficult to conclude that the forfeiture was not "unduly oppressive." [7] Id. at 690. The instant case squarely presents one of the situations alluded to in Pearson - the case of the entirely innocent owner. This Court should adopt as law, with the modifications outlined below, the Pearson dicta. As the following sections set forth, the nuisance abatement statute's lack of any "innocent owner" exception to forfeiture violates both the Due Process Clause of the Fourteenth Amendment and the Takings Clause of the Fifth Amendment to the United States Constitution.

***15 A. Unless An Owner Negligently Entrusts His Property To Another, The Forfeiture of An Innocent Owner's Property Is Unduly Oppressive And Violates The Due Process Clause Of The Fourteenth Amendment.**

The Due Process Clause protects individuals from malicious, arbitrary, and irrational deprivations of property. Moore v. City of East Cleveland, 431 U.S. 494 (1977); Eide v. Sarasota, 908 F.2d 716 (11th Cir. 1990); Sinaloa Lake Owners Ass'n v. City of Simi Valley, 882 F.2d 1398 (9th Cir. 1989), cert. denied sub nom. Doody v. Sinaloa Lake Owners Ass'n, 110 S.Ct. 1317 (1990). Not providing innocent owners any relief whatsoever from the application of civil forfeiture laws results in arbitrary and "unduly oppressive" forfeitures in violation of due process guarantees. See Pearson, 416 U.S. at 689. If there were ever an example of an "unduly oppressive" forfeiture, it is the forfeiture of Ms. **Bennis**' interest in the automobile of which her husband was a co-owner. Ms. **Bennis** is, unquestionably, an innocent owner; she had absolutely no knowledge of, nor did she consent to, her husband's illegal use of their property. Current **Michigan** law, however, provides no recourse for innocent owners such as Ms. **Bennis**.

Because the Pearson language setting forth what would constitute an "unduly oppressive" forfeiture was dicta, several courts, including the **Michigan** Supreme Court, have refused to provide any relief to innocent owners. At a minimum, this Court should adopt as law the Pearson dicta in order to prevent "unduly" oppressive forfeitures such as the forfeiture of Ms. **Bennis**' automobile.

***16** Even when courts have applied the Pearson dicta, however, the lack of clarity concerning what constitutes reasonable steps a property owner must take to prevent the illegal use of his property has led to particularly harsh applications of the forfeiture power. See, e.g., U.S. v. One 1957 Rockwell Aero Commander, 671 F.2d 414 (10th Cir. 1982) (upholding forfeiture of an aircraft for non-compliance with Customs Service regulations even though aircraft was stolen and owner was unaware of its activities); U.S. v. $6,700, 615 F.2d 1 (1st Cir. 1980) (affirming forfeiture of cash brought into United States illegally even

though the cash was embezzled from the owner's estate); U.S. v. One Mercedes Benz 380 SEL, 604 F. Supp. 1307 (S.D.N.Y. 1984) (upholding forfeiture of an automobile used in drug transaction even though car had been loaned to third person in whose care owner had left the car and owner had no knowledge of drug activity). As these cases and many others demonstrate, a strict interpretation of the Pearson suggestion that a private party must take "all" reasonable precautions against illegal use places both onerous and vague duties on private parties to pro-actively police the actions of others.

Such a burden is especially troubling in the context of family relationships, where the government has traditionally not intervened to impose obligations on family members to probe into the activities of one another. Indeed, it would be difficult to imagine any steps Ms. **Bennis** could have reasonably taken to prevent the illegal use of her property when she had no previous knowledge or reason to believe that her property was going to be used illicitly. What precautions should a woman take before letting her heretofore law-abiding husband use the ***17** family car? Even outside the special context of a marriage, if a property owner has no knowledge or reason to believe that someone will engage in illegal activity with particular property, then why would one take steps to prevent its illegal use?

Other innocent owners, such as mortgagees, purchasers, lessors, and landlords also have to walk a very fine line. They subject themselves, on the one hand, to possible physical harm or legal action (by prying too closely into the affairs of others) or, on the other hand, the possible forfeiture of valuable property (by not prying closely enough). Moreover, the imposition of affirmative law enforcement obligations on private parties runs counter to traditional Anglo-American criminal law doctrine that has refused to place such duties on individuals. Hart, Variety of Responsibility, 83 Law Q. Rev. 346, 354-55 (1967). Innocent property owners "should not forfeit their property for failing to act as a private police force which searches every person who borrows, leases, or is invited into a vehicle." Schecter, 75 Corn. L. Rev. at 1180.

In order to prevent the application of civil forfeiture to unquestionably innocent owners, this Court should adopt the Pearson dicta as a constitutional rule. However, the Pearson rule should be clarified and strengthened by adopting a rule of negligent entrustment when forfeiture is used against innocent owners.[8] Drawn from traditional ***18** common law tort principles, the negligent entrustment doctrine holds:

It is negligence to permit a third party to use a thing ... which is under the control of the actor, if the actor knows or should know that such person intends or is likely to use the thing ... in such a manner as to create an unreasonable risk of harm to others.

Restatement of Torts (2d) § 308 (1965). As petitioner's brief more substantially sets forth, the substitution of the words "in such a manner as to create an unreasonable risk of harm to others" with the words "in a manner proscribed by law" establishes a reasonable rule of care when property owners allow their property to be used by others.

The negligent entrustment doctrine would provide clear guidance to lower courts where, as in the instant case, forfeiture statutes provide no relief for innocent owners. Under this doctrine, Ms. **Bennis** clearly did not negligently entrust her property to her husband. There is no evidence that Ms. **Bennis** "should have known" that her car would be used by her husband for illegal purposes. She never knew her husband to engage in such conduct in the past nor did she have any reason to suspect he was going to engage in such conduct that night. Furthermore, since Mr. **Bennis** had equal access and "control" over the vehicle and did not have to seek ***19** his wife's consent to use the car, Ms. **Bennis** could not have taken reasonable steps to prevent its misuse. Accordingly, the state has not met its burden of justifying the forfeiture of Ms. **Bennis**' property either under the Pearson dicta language or the negligent entrustment doctrine.[9]

Without an innocent owner exception, the **Michigan** nuisance abatement statute deprives individuals of property without due process of law in violation of the Fourteenth Amendment. Recognizing the inherent unfairness of a rule which deprived individuals of property without regard to wrongdoing or negligence, the Supreme Court of North Carolina declared that

> a law which requires such a person at all times to know what is being done with his property, in other words, by the act of sale or lease to make a public guaranty that it shall at all times be used for a legitimate

> purpose, is opposed to common experience and the necessity of commercial and social intercourse, and is so obviously unjust as to be arbitrary.

Sinclair v. Croom, 8 S.E.2d 834, 836 (N.C. 1940). Furthermore, the Pearson suggestion that an owner must take "all" reasonable precautions imposes a far too onerous ***20** burden on property owners and provides extremely narrow relief. The negligent entrustment doctrine provides a workable rule when innocent owners are swept up in civil forfeiture proceedings.

B. Forcing Ms. Bennis To Bear The Costs of Addressing Urban Problems When She Is Entirely Innocent Of Wrongdoing Violates The Takings Clause Of The Fifth Amendment.

In addition to violating due process guarantees, the application of **Michigan's** nuisance abatement statute to innocent property owners such as Ms. **Bennis** constitutes a taking of private property without just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution. While this Court held that the forfeiture in Pearson did not constitute a taking, it left open the question, later reiterated in Austin, of whether "forfeiture of a truly innocent owner's property" would comport with the Constitution. Austin, 113 S.Ct. at 2809. In the instant case, it is undisputed that Ms. **Bennis** acted neither criminally nor negligently with her property. In other words, she is a "truly innocent owner[]." Id. However, the **Michigan** nuisance abatement statute offers no relief or exception for innocent property owners.

The Fifth Amendment to the United States Constitution states that "private property shall not be taken for public use without just compensation." Central to the requirements of the Takings Clause is this Court's holding that private parties cannot be forced to bear costs that should in fairness and justice be borne by the public. Armstrong v. United States, 364 U.S. 40, 49 (1960); see also ***21** Nollan v. California Coastal Commission, 483 U.S. 825, 837 (1987); Epstein, Takings: Private Property and the Law of Eminent Domain 42-44, 182-94 (1985). Significantly, the plaintiff in Armstrong, like Ms. **Bennis**, was an innocent owner. Armstrong was a subcontractor who furnished material to a shipbuilding company. He attached valid liens to the products he provided. The shipbuilding company had a contract with the government. When the company went bankrupt, the government demanded and secured the ships under its contract. The government prevented Armstrong, however, from foreclosing on his valid liens.

This Court held in Armstrong that while the government was certainly entitled to foreclose and destroy liens, it had to compensate the lienholders. Similarly, if the government chooses to forfeit the **Bennis** automobile to further the public purpose of law enforcement and "cleaning up" Detroit, then it must compensate innocent parties, like Ms. **Bennis**, who hold an interest in the property. As discussed in Part A of this section, the forfeiture of Ms. **Bennis**' interest serves no remedial or punitive purpose to take it outside the protection of the Fifth Amendment's Takings Clause. Furthermore, Ms. **Bennis** was not the "intended beneficiary" of the government action in this case. See National Board of Y.M.C.A. v. United States, 395 U.S. 85 (1969) (no taking if government destroys property when it acts primarily in defense of plaintiffs' property rather than primarily for public good). Rather, the forfeiture of Ms. **Bennis**' property rights is a taking of property for a public purpose without the payment of just compensation. As an unquestionably innocent third party, Ms. **Bennis** should not bear the ***22** financial burden of law enforcement activities designed to address urban problems.

The destruction of an innocent owner's interest has been considered a violation of the Takings Clause in other contexts. For instance, in In re Metmor Financial, 819 F.2d 446, 450 (4th Cir. 1987), the United States Court of Appeals for the Fourth Circuit held that the forfeiture of property could not change the nature of an innocent mortgagee's rights. The court held that "if viewed from the perspective of a Fifth Amendment taking, for which [an innocent owner] is entitled to 'just compensation' - typically defined as 'fair market value of the property on the date it is appropriated' - the government must pay [the innocent owner] the fair market value of the mortgage.... " Id. at 450; see also Shelden v. United States, 7 F.3d 1022 (Fed. Cir. 1993); Monroe Savings Bank v. Castalano, 733 F. Supp. 595 (W.D.N.Y. 1990). The court further held that "the government can succeed to no greater interest in the property than that which belonged to the wrongdoer whose actions have justified the seizure." Id.

at 448-49. Likewise, the government in the instant case should not be allowed to deprive innocent third parties, such as Ms. **Bennis**, of any legitimate interests in the property.

Nor can the government escape the requirements of the Takings Clause merely by characterizing the forfeiture as an abatement of a nuisance. Only a single act of prostitution occurred in the **Bennis** car. A majority of the **Michigan** Supreme Court, however, ruled that the car was transformed into a nuisance because it occurred in a neighborhood allegedly known as an area frequented by those soliciting prostitutes.

***23** Chief Justice Cavanaugh's dissent clearly demonstrates how the majority twisted the traditional rights and responsibilities of property owners in an effort to address an urban problem. **Bennis**, 44 **Mich**. at 744-51. At common law, property could, under specific and limited circumstances, be declared a nuisance. 58 Am.Jur.2d, Nuisances, § 77. However, nuisance has always involved "continuity or recurrence" of an offending practice. People ex rel. Arcara v. Cloud Books, Inc., 480 N.E.2d 1089, 1095 (N.Y. 1985), rev'd on other grounds, 478 U.S. 697 (1986) (nuisance is "a consistent pattern of conduct sufficient to prove that the premises are being employed for a proscribed use"). Under the common law, a "place" becomes a nuisance when it has "absorbed and taken the character of the acts committed." State ex rel. Carrol v. Gatter, 260 P.2d 360, 364 (Wash. 1953).

The **Michigan** Supreme Court deviated widely from the common law definition of a nuisance when it attempted to demonstrate the continuity of supposed nuisance-like acts in a particular neighborhood or "place" where prostitution occurs. However, it was the automobile and not the neighborhood that was forfeited. Under the **Michigan** Supreme Court's logic, property rights are determined by the area in which property happens to be located. If a property owner is unfortunate enough to have property located in an area where "lewdness" occurs on a regular basis, then his rights are significantly diminished under the **Michigan** court's novel and unprecedented approach to property rights. Indeed, under this view of property rights, a respectable hotel that happens to be located in a neighborhood that has "declined" could be forfeited if a single act of prostitution ***24** occurred in one of the rooms without the knowledge of the owner. That same act of prostitution could occur in a more upscale neighborhood, however, and the hotel (or automobile) could not be forfeited under the **Michigan** Supreme Court's rule.

These common law understandings of nuisance - and the **Michigan** Supreme Court's departure from them - are significant in light of this Court's decision in Lucas v. South Carolina Coastal Council, 112 S.Ct. 2886 (1992). Lucas recognized that a taking cannot be excused merely by a legislature or a court attaching the nuisance label to the government action:

> Any limitation [on property] so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon ... ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts - by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complimentary power to abate nuisances that affect the public generally, or otherwise.

Lucas, 112 S.Ct. at 2900.

Under Lucas, a nuisance must be justified on common law doctrines and principles rather than self-serving legislation or novel judicial determinations of what constitutes a nuisance. Use of the nuisance abatement statute to forfeit Ms. **Bennis**' interest in the automobile would be extremely difficult to justify under common law nuisance ***25** principles. A private party could not successfully file a nuisance action against the automobile based upon a single act of prostitution (although a private party could probably successfully file such an action against a house of prostitution that was causing significant and long-standing problems in the neighborhood and interfering with the owner's use of his property). Moreover, the automobile does not rise to the level of a public nuisance at common law, which was generally a criminal action to abate property uses that were injurious to the public at large. See Lee & Lindahl, Modern Tort Law § 35.02 (1990) ("[A] public nuisance ... is an invasion of a right common to members of the public generally.... It is an offense against the state.... It is a crime.").

The **Michigan** Supreme Court has undermined property rights and traditional property law principles in its attempt to address vexing urban problems. Such problems cannot be ameliorated, however, at the expense of private property rights. Ms. **Bennis** had absolutely no knowledge of, nor did she consent to, the illicit use of the automobile she co-owned with her husband. She should not be punished for the behavior of her husband and, even more importantly, the behavior of other men in a particular neighborhood. The cost of cleaning up Detroit cannot be thrust upon an individual who merely wishes to retain property she rightfully owns.

*26 CONCLUSION

For all the foregoing reasons, amicus curiae Institute for Justice respectfully requests that this honorable Court reverse the opinion below.

Footnotes

FN

*Counsel of Record

1 Deodand, derived from the Latin “deo dandum,” means “to be given to God.” Pearson, 416 U.S. at 681. It represents the oldest form of civil forfeiture and embodied the notion that the “thing” was guilty of illegal activity.

2 This Court in Pearson relied in part on Holmes' history of the rise of American forfeiture law. Id. at 681.

3 Although the Acts were worded in absolute terms, juries nevertheless acquitted shipowners if it could be shown that they had taken all reasonable steps to ensure that the ship not be used for illegal purposes. Maxeiner, 62 Corn. L. Rev. at 774.

4 Included in most efforts to eliminate alcohol were attempts to curb what were considered the secondary effects of alcohol consumption: gambling, prostitution, and other forms of vice.

5 It is interesting to note that between the end of Prohibition and the start of the modern Drug War, this Court reined in the application of forfeiture to innocent owners at least to a certain extent. See United States v. One 1936 Model Ford V-8 Deluxe Coach, 307 U.S. 219, 236 (1939) (“The forfeiture acts ... were intended for the protection of the revenues, not to punish without fault.”).

6 In its last decision addressing the general constitutionality of civil forfeiture, this Court held that forfeiture did not violate the Due Process Clause of the Fourteenth Amendment due in part to the assumption that forfeitures were “not initiated by self-interested private parties.” Calero-Toledo, 416 U.S. at 679. Instead, it was assumed that forfeitures are carried out by government officials acting in the public, as opposed to self, interest.

This Court's assumption concerning government officials ignores crucial incentives that influence all government decisionmakers. This assumption is especially misplaced in civil forfeiture where law enforcement agencies keep a percentage of forfeited assets and proceeds. Individuals, whether they act in the public or private spheres, tend to promote their own self-interest. Buchanan, Constitutional Economics 37-38 (1991); Boudreaux & Pritchard, Civil Forfeiture and the War on Drugs: Lessons from Economics and History (forthcoming); see also The Federalist No. 51 (Madison). Given this natural orientation, government officials need to be bound by what Madison described as “auxiliary precautions,” or the constitutional restraints designed by the Framers to protect individuals from unwarranted or abusive government actions. Id.

When public officials and agencies have a direct financial stake in the outcome of their actions, this Court has subjected such actions to particularly close scrutiny. Tumey v. Ohio, 273 U.S. 510 (1927) (overturning fine where mayor, who also sat as judge, personally received share of the fines); Ward v. Village of Monroeville, 409 U.S. 57 (1972) (due process violated where substantial portion of town's income came from fines imposed by town mayor sitting as judge); Marshall v. Jerrico, Inc., 446 U.S. 238, 250 (1980) (constitutional concerns raised when government official's “judgment will be distorted by the prospect of institutional gain as a result of zealous enforcement efforts”); Good, 114 S.Ct. at 502 (constitutional considerations arise where “the Government has a direct pecuniary interest in the outcome of the proceeding”). The current institutional arrangement and incentive structure behind civil forfeiture demand that the property rights of innocent owners be protected. Accordingly, this Court should discard the Calero-Toledo holding that civil forfeiture is not initiated by self-interested parties and instead consider the constitutional claims of innocent property owners, such as petitioner in the instant case.

7 Likewise, this Court in Austin, 113 S.Ct. at 2809, reiterated the Pearson dicta by declaring that forfeitures have never been applied “when the owner had done all that reasonably could be expected to prevent the unlawful use of his property.”

8 Indeed, this Court already has suggested such a rule. Similar to the negligent entrustment rule for civil forfeiture suggested in the instant case, the Austin decision stated that holding the owner “accountable for the wrongs of others to whom he entrusts his property”

rests “on the notion that the owner has been negligent in allowing his property to be misused and that he is properly punished for the negligence.” 113 S.Ct. at 2809.

9 The Pearson dicta implies that property owners have the burden of proving that they took all reasonable steps to prevent the illegal use of their property. As petitioner's brief more substantially sets forth, the negligent entrustment rule would place the burden on the government to demonstrate that an owner negligently allowed another to use his property for illegal purposes.

End of Document