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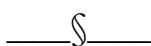
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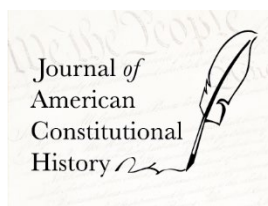
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Of Guilty Property and Civil/Remedial Punishment: The Implications and Perils of “History” for the Excessive Fines Clause and Beyond

Beth A. Colgan^{*}

Abstract

In 1998, the Supreme Court issued its opinion in *United States v. Bajakajian*, in which it held that a criminal forfeiture violated the Eighth Amendment’s Excessive Fines Clause. The opinion contained a discussion of early *in rem* customs forfeitures, imposed when mariners engaged in fraudulent behavior to avoid paying taxes on cargo brought to shore. Those customs forfeitures were based on a legal fiction that property tainted by crime—the cargo or even the ship—was the offender. The *Bajakajian* Court declared that, unlike the modern criminal forfeiture at issue, those early *in rem* forfeitures would have historically been understood to be nonpunitive because they were based on the guilty property fiction, were processed civilly, and could serve to remediate the government’s tax losses—and thus would not have been “fines” within the Clause’s ambit.

Bajakajian, and the principles on which it stands, have important implications for the Excessive Fines Clause and beyond. It has led to a lack of uniform treatment in the lower courts, leaving the question of whether the Excessive Fines Clause provides protection against forfeitures, as well as civil fines, tax penalties, restitution, and a panoply of

^{*} Professor of Law, UCLA School of Law. My thanks to the faculty at the UCLA School of Law, Texas A&M University School of Law, and the University of Florida Levin College of Law for engaging with this work; to Blake Emerson, Andrew Gilden, Thea Johnson, David Marcus, and Kaiponanea Matsumura for their excellent feedback; Jessica Nerz for research assistance locating materials regarding Rufus Waples; and UCLA Law librarians Shangching Huitzacua, Eli Edwards, and Rachel Green for critical support in accessing additional historical documents.

administrative fees, dependent upon jurisdictional chance. Further, *Bajakajian's* purported limitations on civil punishment with remedial qualities has implications for a variety of contested constitutional issues of continuing political importance, including limits on the government's ability to target people seen as politically subversive, strip people of citizenship, and investigate presidential misconduct, as well as the role of the administrative state.

This Article tests the integrity of the Court's determination that early *in rem* forfeitures were nonpunitive. It does so by mining eighteenth- and nineteenth-century legal texts, focusing primarily on federal and state caselaw. Caution must be taken with any historical analysis, particularly one spanning a significant period of time—in this case, the century and a half covered by the few sources upon which the *Bajakajian* Court relied. But with that caution in mind, this Article reveals the startling degree to which the *Bajakajian* Court misapprehended the records it did review and ignored substantial evidence—including evidence found in the Court's own early opinions—that supports the conclusion that *in rem* forfeitures were historically understood to constitute punishment. This Article, therefore, provides grounds for courts to take up anew decisions that have unduly restricted the scope of the Excessive Fines Clause, with implications for other constitutional issues in which the scope of what constitutes punishment is in play.

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INTRODUCTION

“The court is also of the opinion, that the removal for which the act *punishes* the owner with a forfeiture of the goods must be made with his consent or connivance, or with that of some person employed or entrusted by him.”

Peisch v. Ware, 8 U.S. (4 Cranch) 347, 364 (1808) (emphasis added)

“[T]raditional civil *in rem* forfeitures ... were historically considered nonpunitive.”

United States v. Bajakajian, 524 U.S. 321, 330 (1998)

* * *

In 1998, in a case called *United States v. Bajakajian*, the Supreme Court distinguished the criminal forfeiture at issue in the case—which it held constituted punishment, and thus a fine subject to the protections of the Eighth Amendment’s Excessive Fines Clause—from early American *in rem* customs forfeitures.¹ In doing so, it declared that, as a matter of historical fact, *in rem* forfeitures would not have been understood to constitute punishment.² Those early *in rem* forfeitures of cargo and vessels were based on the legal fiction that the property to be forfeited was itself the offender, and therefore the forfeiture could be imposed with or without criminal charges being brought against the master or crew engaged in customs and maritime violations at the nation’s seaports.³ The *Bajakajian* Court reasoned that the guilty property fiction rendered early *in rem* forfeitures nonpunitive because Congress could not have been understood as intending to punish an “innocent” owner of the cargo or vessel who was not directly involved in the underlying offense.⁴ The Court further reasoned that the nonpunitive nature of early *in rem* forfeitures was confirmed by the civil nature of the proceedings through which they were imposed⁵ and

¹ *United States v. Bajakajian*, 524 U.S. 321, 324, 329–34, 340–44 (1998).

² *Id.*

³ See *infra* Part II.A.

⁴ *Bajakajian*, 524 U.S. at 329–34.

⁵ *Id.* at 333–34, 343, n.18.

because forfeiture revenues “serv[ed] the remedial purpose of reimbursing the Government for the losses accruing from the evasion of customs” laws, thereby “vindicat[ing] the Government’s underlying property right in customs duties.”⁶

This Article tests the integrity of the *Bajakajian* Court’s determination that early *in rem* forfeitures were historically understood as nonpunitive by mining eighteenth- and nineteenth-century legal texts, focusing primarily on federal and state caselaw.⁷ What it reveals is the startling degree to which the *Bajakajian* Court misapprehended the records it did review and ignored substantial evidence—including evidence found in the Court’s own early opinions—that supports the conclusion that *in rem* forfeitures were historically understood to constitute punishment.

The Article proceeds in three parts, beginning in Part I with a brief note on methodology—both the methodology that I employed to recover evidence of early American *in rem* forfeiture practices and the way in which the excavation of this evidence plays into broader debates regarding the use of originalism as a method of constitutional interpretation and construction.⁸

The excavation of early American *in rem* forfeiture practices begins in Part II with respect to the *Bajakajian* Court’s misapprehension of the guilty property fiction. In actuality, early American courts treated the fiction *as a fiction*, understanding that the deprivation of cargo, ships, and other property was, in fact, punishment of the property’s owner for their own wrongdoing or for their negligence in employing an offending crew. This misapprehension of the

⁶ *Id.* at 340–43 & n.19.

⁷ Along with other sources cited herein, this Article builds on the examination of historical practices related to customs forfeitures by Kevin Arlyck, Caleb Nelson, and Nicholas Parrillo. See generally Kevin Arlyck, *The Founders’ Forfeiture*, 119 COLUM. L. REV. 1449 (2019) (examining federal forfeiture cases decided between 1789 and 1807 in which the Treasury Department limited forfeitures by remitting forfeited property to owners who did not intentionally defraud the government); Caleb Nelson, *The Constitutionality of Civil Forfeiture*, 125 YALE L.J. 2446 (2016) (arguing that an originalist interpretation would not mandate criminal procedures in forfeiture actions); NICHOLAS R. PARRILLO, *AGAINST THE PROFIT MOTIVE* (2013) (documenting the ways in which the government and *qui tam* prosecutors engaged in profit-seeking with respect to early customs practices).

⁸ This Part does not address the full scope of debates between those opposing and those supporting (or resigned to) the use of originalism as a method of constitutional interpretation and construction. For an overview of those debates see JONATHAN GIENAPP, *AGAINST CONSTITUTIONAL ORIGINALISM: A HISTORICAL CRITIQUE* 1–35, 226–50 (2024). For a positive response, see Jud Campbell, *Originalism’s Two Tracks*, 104 B.U. L. REV. 1435 (2024). For an opposing response, see William Baude & Stephen E. Sachs, *Yes, The Founders Were Originalists*, 36 YALE J. OF L. & HUM. (forthcoming 2025), <https://ssrn.com/id=5352553>.

historical use of the fiction has had very real modern consequences, as it has led some lower courts to hold that modern civil forfeitures imposed via *in rem* proceedings that necessarily employ the fiction are outside of the protections afforded by the Excessive Fines Clause.⁹ The use of *in rem* proceedings has metastasized to all nature of alleged criminal activity in modern times. At the federal level, property (real and personal) and cash may be the subject of *in rem* civil forfeiture actions for a wide range of offenses¹⁰ including drug offenses,¹¹ gambling,¹² various forms of fraud,¹³ and money laundering.¹⁴ With few exceptions,¹⁵ the states have followed suit, in some cases adopting civil forfeiture statutes so broad that they could result in the forfeiture of cash or property in response to even minor public order and traffic offenses.¹⁶ *Bajakajian* helps ensure that such forfeitures go without constitutional check, no matter how excessive.

Part III considers the *Bajakajian* Court's suggestion that the civil nature of early *in rem* forfeiture proceedings along with the remedial qualities of such forfeitures—specifically the potential for forfeiture revenues to reimburse the

⁹ *E.g.*, *United States v. 1948 South Martin Luther King Drive*, 270 F.3d 1102, 1115 (7th Cir. 2001) (holding that the forfeiture of real estate and vehicles allegedly related to drug offenses were not fines because they were processed in “truly *in rem* proceedings”); *United States v. An Antique Platter of Gold*, 184 F.3d 131, 139–40 (2d Cir. 1999) (holding that the forfeiture of an illegally imported platter was not a fine because it was processed in a civil *in rem* proceeding under the customs laws); *In re 1,650 Cases of Seized Liquor*, 721 A.2d 100, 108 (Vt. 1998) (holding that a forfeiture was not a fine in part because it was processed under the guilty property fiction); *but see* \$100 and A Black Cadillac v. State, 822 N.E.2d 1001, 1010–11 (Ind. Ct. App. 2005) (finding that the forfeiture of a vehicle in which a pound of marijuana was found was at least partially punitive and thus a fine, though not an excessive one).

¹⁰ *See generally* 18 U.S.C. § 981.

¹¹ 21 U.S.C. § 881; *see also* 18 U.S.C. §§ 981, 1956(c)(7)(B)(i).

¹² 18 U.S.C. § 1955(d).

¹³ *E.g.*, 18 U.S.C. §§ 981(a)(1)(C)–(D).

¹⁴ 18 U.S.C. §§ 1956–1957.

¹⁵ Four states—Maine, Nebraska, New Mexico, and North Carolina—do not allow forfeitures without first obtaining a criminal conviction. J. Justin Wilson, *Maine Becomes Fourth State to End Civil Forfeiture*, INST. FOR JUST. (July 13, 2021), <https://ij.org/press-release/maine-becomes-fourth-state-to-end-civil-forfeiture/>.

¹⁶ For example, the State of Indiana has argued that under its statutory scheme, forfeiture of a vehicle would be appropriate for the offence of speeding. Transcript of Oral Argument at 43–44, *Timbs v. Indiana*, 139 S. Ct. 682 (2019) (No. 17–1091). For a recent compilation of state forfeiture laws see Lisa Knepper, Jennifer McDonald, Kathy Sanchez, and Elyse Smith Pohl, *Policing for Profit: The Abuse of Civil Asset Forfeiture*, 3d Edition (Inst. For Just. Dec. 2020).

government for tax arrears and expenses related to enforcement—were antithetical to punishment. Instead, early American legal texts indicate that rather than defining punishment by the criminal or civil nature of the proceedings, the relevant question would have been whether the penalty was imposed in response to an offense against the public (thus constituting punishment) or, instead, as a remedy in a purely private dispute. Public offenses included “criminal” offenses necessitating formal criminal proceedings, as well as “penal” offenses for which civil processes were routinely employed to impose pecuniary punishments. Further, early legal texts support the conclusion that the punitive and remedial qualities of fines and forfeitures were not historically understood to be mutually exclusive. As explained below, the Court reached the opposite conclusion because it failed to understand the bounds of the rule of lenity as a tool of statutory interpretation. The Court further erred in its substantial reliance on a pair of cases—one of which was decided in the late nineteenth century and the other in the late twentieth century—both of which largely ignored historical practice.

As with the guilty property fiction, the *Bajakajian* Court’s declarations regarding the civil nature and remedial qualities of early *in rem* customs forfeitures have had serious repercussions. Five years prior, in *Austin v. United States*, the Court held that a civil forfeiture was subject to the Excessive Fines Clause in part because early *in rem* customs forfeitures *would* historically have been understood to be punishment.¹⁷ *Bajakajian* did not overrule *Austin*’s determination that the modern civil forfeiture at issue there constituted punishment and therefore a fine.¹⁸ In fact, it employed *Austin*’s rule that a pecuniary penalty need only be punitive in part to constitute a fine, in determining that the criminal forfeiture at issue in *Bajakajian* also constituted a fine.¹⁹ But in holding that the forfeiture was both a fine and constitutionally excessive, the *Bajakajian* Court distinguished those modern forfeitures from early *in rem* customs forfeitures, claiming that historically the early forfeitures would have been understood as nonpunitive.²⁰ The divergent treatment of the history of early forfeitures

¹⁷ *Austin v. United States*, 509 U.S. 602, 611–18 (1993).

¹⁸ See generally *Bajakajian*, 524 U.S. 321.

¹⁹ *Id.* at 328–31, & nn.4, 6.

²⁰ *Id.* at 329–34, 340–44. In its briefing, the government had conceded that the criminal forfeiture at issue in *Bajakajian* constituted a fine, focusing instead on whether it was constitutionally excessive. See generally Brief for the United States, *United States v. Bajakajian*, 524 U.S. 321 (1998) No. 96-1487 (July 14, 1997). Regardless, in the opinion the Court considered the threshold question of what constituted a fine as noted above. This Article does not contest either the application of *Austin*’s partially punitive test or the *Bajakajian* Court’s

between *Austin* and *Bajakajian* created confusion,²¹ and has ultimately led the lower courts to split on whether civil forfeitures filed *in personam* against a person rather than *in rem* against the underlying property constitute fines.²² And *Bajakajian*'s wake extends well beyond the civil forfeiture context. The lower courts have also split on whether civil fines constitute fines,²³ whether pecuniary

conclusion that the criminal forfeiture at issue there met that test. With respect to excessiveness, the government argued that the forfeiture was *per se* constitutional because it resembled early *in rem* customs forfeitures. Brief for the United States, *supra*, at 10–11, 15–20. After determining that the excessiveness inquiry is grounded on the idea of proportionality between offense seriousness and punishment severity, the Court rejected the government's argument by, again, differentiating between modern (punitive) and early American (non-punitive) forfeitures. *Bajakajian*, 524 U.S. at 334–44. Again, this Article does not contest that proportionality is a central consideration in the excessiveness inquiry. Rather, it challenges the Court's determination that early *in rem* customs forfeitures were historically understood to be nonpunitive in light of the repercussions that determination has had with respect to other pecuniary punishments and constitutional inquiries. For a separate discussion of historical conceptions of excessiveness, see Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 CAL. L. REV. 277, 319–36 (2014).

²¹ *E.g.*, *United States v. 1866.75 Board Feet and 11 Doors and Casings, More or Less, of Dip-teryx Panamensis Imported from Nicaragua*, 587 F.Supp.2d 740, 754–55 (E.D. Va. 2008) (describing *Bajakajian* as having “creat[ed] an unclear distinction between [early *in rem*] forfeitures and modern civil *in rem* forfeitures”); *United States v. One 1997 Ford Expedition Utility Vehicle*, 135 F.Supp.2d 1142, 1145, n.2 (D. N.M. 2001) (noting that “there is some language in *Bajakajian* [regarding the civil *in rem* nature of forfeitures] that leads to confusion” and that “contradicts the clear holding of *Austin*”); *United States v. Kruse*, 101 F.Supp.2d 410, 412 (E.D. Va. 2000) (explaining that a lower court had avoided resolving the question of whether a civil penalty violated the Excessive Fines Clause “because of the murkiness surrounding Supreme Court decisions in this area”).

²² *Compare, e.g.*, *United States v. Davis*, 648 F.3d 84, 96–97 (2d Cir. 2011) (holding that the forfeiture of a piece of art purchased at fair market value without knowledge it had been stolen was remedial in nature and thus not a fine), *with United States v. Ford Motor Co.*, 442 F.Supp.2d 429, 436–37 (E.D. Mich. 2006) (holding that the forfeiture of money for the failure to report the diversion of currency was a fine even though some portion of it may reimburse the government's costs).

²³ *Compare, e.g.*, *OTR Media Group, Inc. v. City of New York*, 920 N.Y.S.2d 337, 338, 340 (2011) (holding that civil fines imposed for violating “advertising regulations that restrict outdoor advertising situated within view of arterial highways and public parks and impose substantial penalties for violations” were not subject to the Excessive Fines Clause because “the penalties serve only a remedial purpose and are intended to secure compliance”), *with Pimentel v. City of Los Angeles*, 974 F.3d 917, 921–22 (9th Cir. 2020) (holding that municipal parking fees constitute fines), *United States v. Mackby*, 261 F.3d 821, 829–30 (9th Cir. 2001) (finding that civil penalties for Medicare fraud in violation of the False Claims Act were at least partially punitive given their deterrent qualities and therefore are fines), *and Kruse*, 101 F.Supp.2d at

penalties imposed for tax violations constitute fines,²⁴ and whether pecuniary penalties that may only be imposed following a criminal conviction or ticketing—restitution²⁵ as well as various fees and costs²⁶—constitute fines. As a result,

413-14 (holding that civil penalties imposed in violation of the Anti-Kickback Act of 1986 constituted fines given their “dual nature” as remedial and punitive).

²⁴ Compare, e.g., *United States v. Toth*, 33 F.4th 1, 16-17 (1st Cir. 2022) (holding that a \$2.1 million fine for the failure to fill out a one-page form declaring a foreign bank account—known as an “FBAR”—does not constitute a fine), *cert. denied* 143 S. Ct. 552 (2023), and *Louis v. C.I.R.*, 170 F.3d 1232, 1236 (9th Cir. 1999) (holding that the addition of fifty percent of tax arrears as a civil penalty was not a fine because the purpose was “primarily remedial: to protect the revenue and to reimburse the government for the expense of investigating fraud”), with *United States v. Schwarzbaum*, 127 F.4th 259, 268-74 (11th Cir. 2025) (holding that a fine imposed for the failure to file an FBAR was subject to the Excessive Fines Clause), and *Wilson v. C.I.R.*, 656 N.W.2d 547, 553-54 (Minn. 2003) (holding that an assessment against an employer or corporate officer for the failure to remit a small portion of an employee’s tax arrears subject to a wage levy “cannot be said to serve a solely remedial purpose” given its retributive and deterrent qualities and thus constituted a fine).

²⁵ Compare, e.g., *State v. Johnson*, 430 P.3d 494, 500-01 (Mont. 2018) (holding that restitution is purely remedial because it is intended “to make victims whole, not to further punish offenders”), and *Benton v. State*, 711 A.2d 792, 799 (Del. 1998) (holding that restitution is “remedial and compensatory” and thus not a fine), with *State v. Izzolena*, 609 N.W.2d 541, 548-49 (Iowa 2000) (holding that while partially remedial, restitution also serves retributive and deterrent purposes and therefore constitutes a fine). I have previously argued that the treatment of restitution as a fine is consistent with both historical practice and the modern Court’s treatment of the Excessive Fines doctrine. See Colgan, *Reviving*, *supra* note 20, at 305-11; Beth A. Colgan, *The Excessive Fines Clause: Challenging the Modern Debtors’ Prison*, 65 UCLA L. REV. 2, 41-46 (2018).

²⁶ Compare, e.g., *Vanderhorst v. City of Georgetown*, No. 2:23-cv-3594-RMG, 2024 WL 5322714, *5 (D. S.C. Dec. 5, 2024) (slip opinion) (holding that “charges for a state assessment, victim service assessment, victim conviction surcharge, and law enforcement surcharge” do not constitute fines because they are “remedial”), and *State v. Clement*, 21 Wash. App. 2d 1030, 2022 WL 831998, *2-4 (2022) (unreported) (holding that a mandatory DNA collection fee imposed upon conviction for certain offenses and a mandatory surcharge funding the Crime Victim Compensation program were not punitive), with *Wright v. Riveland*, 219 F.3d 905, 915-16 (9th Cir. 2000) (holding that a five percent deduction from funds received by incarcerated people to support Washington’s Crime Victim Compensation Fund constituted a fine because it “serves the traditional goals of deterrence” and was imposed for all offenses “without regard to the existence and extent of an injury to a victim”), and *City of Seattle v. Long*, 198 Wash.2d 136, 163-66 (2021) (holding that vehicle towing and storage fees for impounded vehicles were at least partially punitive and thus fines). As with restitution, I have previously argued that treating administrative fees as fines is consistent with both historical practice and modern jurisprudence. See Colgan, *Reviving*, *supra* note 20, at 311-19; Colgan, *The Excessive Fines Clause*, *supra* note 25, at 32-40.

the question of whether the Clause provides protection or not is dependent upon jurisdictional luck.²⁷

Further, the *Bajakajian* Court's focus on criminal/civil and punitive/remedial dichotomies, rather than the public nature of an offense, has created disruptions that have implications well-beyond the Excessive Fines Clause. The necessity of resolving what constitutes punishment has been central to a wide variety of constitutional questions in the twentieth and twenty-first centuries, with no signs of abating.²⁸ These questions have involved protections afforded to those alleged to have committed offenses, such as the applicability of the Fifth Amendment's Double Jeopardy Clause²⁹ and privilege against self-incrimination to civil fines and forfeitures³⁰ and of the Eighth Amendment's Cruel and Unusual Punishment's Clause to corporal punishment in schools.³¹ These questions have also included the constitutionality of statutes mandating sex offender

²⁷ In certain contexts, there may be value to regional experimentation in sentencing. See Richard A. Bierschbach & Stephanos Bibas, *What's Wrong with Sentencing Equality?*, 102 VA. L. REV. 1447, 1454 (2016) (arguing that allowing geographic variation in sentencing "can operate as a useful feedback mechanism without privileging any one approach to punishment over another," thereby empowering "communities and even neighborhoods to experiment with what works and what does not"). But the idea that whether a constitutional right applies only if one happens to live in a particular jurisdiction is unacceptable. Cf. Wayne A. Logan, *Constitutional Cacophony: Federal Circuit Splits and the Fourth Amendment*, 65 VAND. L. REV. 1137, 1156-67 (2012) (examining circuit splits arising in the Fourth Amendment doctrine and distinguishing between those that turn on "idiosyncratic, often nonrecurrent particular factual scenarios," and those that touch on "basic doctrinal differences").

²⁸ E.g., *Ellinburg v. United States*, 145 S.Ct. 1899 (2025) (accepting certiorari on the question of whether the Ex Post Facto Clause applies to the Mandatory Victim Restitution Act).

²⁹ E.g., *United States v. Ursery*, 518 U.S. 267, 292 (1996) (holding that an *in rem* forfeiture was not sufficiently punitive to warrant double jeopardy protections); *United States v. Halper*, 490 U.S. 435, 442, 446 (1989) (holding that a civil penalty is punishment for double jeopardy purposes if it is "so extreme and so divorced from the Government's damages and expenses as to constitute punishment," but not if it provides "rough remedial justice"); *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 361 (1972) (holding that double jeopardy did not preclude the forfeiture of firearms following a conviction for the unlicensed sale of firearms); see also *infra* Part III.B.2 (discussing the *Bajakajian* Court's reliance on a double jeopardy case).

³⁰ *United States v. Ward*, 448 U.S. 242, 248-51 (1980) (holding that the Federal Water Pollution Control Act, which imposed a "civil penalty" for discharging oil into navigable waters, was civil in nature and therefore the defendant could not claim the privilege against self-incrimination).

³¹ *Ingraham v. Wright*, 430 U.S. 651, 666-71 (1977) (holding that the Cruel and Unusual Punishments Clause did not apply to corporal punishment in public schools on the grounds that the Clause was historically limited to punishment for crimes).

registration or long-term civil commitment³² and of the imposition of taxes on illegally possessed narcotics.³³ The nature of punishment has also long been central to a variety of constitutional issues implicating matters of exceptional and continuing political importance, including the targeting of people seen as politically subversive,³⁴ the investigation of and preservation of materials related to presidential misconduct in relation to the Watergate scandal,³⁵ the constitutionality of the Affordable Care Act's individual insurance mandate,³⁶ the role of the administrative state,³⁷ and limitations on the ability of the federal government to strip a person of citizenship.³⁸ Correcting the cramped

³² *E.g.*, *Smith v. Doe*, 538 U.S. 84, 92-106 (2003) (holding that Alaska's Sex Offender Registration Act was nonpunitive and thus not subject to the Ex Post Facto Clause); *Kansas v. Hendrix*, 521 U.S. 346, 361-71 (1997) (same); *Allen v. Illinois*, 478 U.S. 364, 366-74 (1986) (holding that confinement in a maximum security institution along with people who are serving criminal sentences does not constitute "punishment" of a person civilly committed as a sexually dangerous person).

³³ *Dep't of Revenue v. Kurth Ranch*, 511 U.S. 767, 776-84 (1994) (holding that a tax imposed on illicit drugs constituted a punishment triggering the Double Jeopardy Clause).

³⁴ *E.g.*, *American Communications Ass'n v. Douds*, 339 U.S. 382, 413-14 (1950) (upholding a requirement that labor organizations file affidavits of its officers attesting that they were not members of the Communist Party and did not believe in the overthrow of the U.S. government because it was "intended to prevent future action rather than to punish past action"); *United States v. Lovett*, 328 U.S. 303, 315-17 (1946) (holding that the Urgent Deficiency Appropriation Act of 1943, which prohibited the payment of government salaries to individuals deemed "subversive," amounted to an unconstitutional bill of attainder); *see also* *Flemming v. Nestor*, 363 U.S. 603, 613-21 (1960) (upholding the termination of Social Security benefits that were otherwise owed to a person deported for having been a member of the Communist Party).

³⁵ *Nixon v. Administrator of General Svcs.*, 433 U.S. 425, 468-83 (1977) (holding that the Presidential Recordings and Materials Preservation Act did not constitute a bill of attainder because requiring presidential papers to be housed in a library and subjected to a screening process to separate out private papers for the purpose of preserving documents for prosecution efforts and for the public interest did not constitute punishment).

³⁶ *National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 563-74 (2012) (holding that the Affordable Care Act's individual insurance mandate constituted a tax, not a punishment).

³⁷ *E.g.*, *Securities & Exchange Comm'n v. Jarkesy*, 603 U.S. 109, 122-26 (2024) (holding that the Seventh Amendment jury-trial right applied to civil fines for securities violations because they "are designed to punish and deter, not to compensate").

³⁸ *E.g.*, *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 164-84 (1963) (holding that stripping an American of citizenship for leaving the country to avoid being drafted into military service during the Vietnam War constituted punishment and was therefore unconstitutional because the government did not provide procedural safeguards under the Fifth and Sixth Amendments); *Trop v. Dulles*, 356 U.S. 86, 95-104 (1958) (holding that stripping citizenship from a person

understanding of punishment espoused in *Bajakajian*, therefore, could play a key role as the Court addresses issues that shape the contours of American democracy.

I. ON METHODOLOGY

This Article is designed to analyze the very few, but wide-ranging, sources employed by the *Bajakajian* Court to support its claim that early American *in rem* customs forfeitures would have been understood to be nonpunitive. In total, the *Bajakajian* Court relied on language selected out of context from a handful of cases dating between 1813 and 1996 and from a treatise published in 1882, along with four early federal statutes that merely stood for the proposition that Congress employed *in rem* forfeitures in response to customs violations.³⁹ Inexplicably, the opinion did not address a small number of additional sources, such as a Supreme Court case from 1810 explicitly describing an *in rem* customs forfeiture as punishment, that the Court had cited five years prior in *Austin* for the proposition that early *in rem* customs forfeitures *were* employed as punishment.⁴⁰

The *Bajakajian* Court's claim that such a limited historical record provides a dispositive account of early American understandings naturally raises questions about whether and how history should be used in constitutional interpretation and construction. I have previously posited that history can serve an important role in these enterprises, with two important caveats.

History can serve an important role in constitutional interpretation and construction, but only so long as its users are candid about the strengths and limitations of the historical record.⁴¹ That is to say, the assessment that must be

convicted of desertion in a military tribunal constituted punishment that was cruel and unusual in violation of the Eighth Amendment).

³⁹ *Bajakajian v. United States*, 524 U.S. 321, 329–34, 340–43 (1998).

⁴⁰ Compare *id.*, with *Austin*, 509 U.S. at 614–15 (quoting *Peisch v. Ware*, 8 U.S. (4 Cranch.) 347, 364 (1808) (stating that an *in rem* forfeiture “punishes the owner”)).

⁴¹ Colgan, *Reviving*, *supra* note 20, at 337–40; see also Jack Rakove, *Tone Deaf to the Past: More Qualms About Public Meaning Originalism*, 84 *FORDHAM L. REV.* 969, 972 (2015) (explaining that those engaging in historical work need “to identify and then to weigh the evidentiary value of the primary sources that one can bring to bear to solve some problem about historical action”).

undertaken is one of weight rather than admissibility.⁴² In assessing the strength of the historical evidence presented, attention should be paid, for example, to the breadth and depth of the records used, including evidence that relevant records were ignored, lost, or are otherwise unavailable; to deficiencies in record keeping at the time the records were created; to inconsistencies in practice across jurisdiction, time, or both; and to other evidence of contradictory meanings.⁴³ Had such an assessment occurred in *Bajakajian*—in which very few sources were used and easily identifiable sources were ignored—it would have been made clear that the record presented should be given little to no weight in assessing the applicability of the Excessive Fines Clause to modern pecuniary punishments.

Relatedly, because there is always more history to discover, for all but the most mundane questions, historical inquiry does not provide dispositive answers to issues of contestation. This limitation on its use is perhaps less a concern here given the relatively straightforward nature of the question. While it is not as uncontestable as determining that “[t]wo means two” when interpreting the constitutional limitation of two senators per state,⁴⁴ it does involve the uncontroversial premise that a fine is a pecuniary penalty used as punishment and asks only if a particular form of pecuniary penalty—early *in rem* forfeitures—constituted punishments, thus rendering them fines. But still, the claim I make here is not that early *in rem* forfeitures were understood to constitute punishment full stop, but rather that there is substantial historical evidence supporting that conclusion, which can and should be assessed along with other considerations.⁴⁵

I am sympathetic to the argument that any concession to the interpretive value of historical inquiry, even when it may result in constitutional interpretation supportive of progressive goals, legitimizes the use of originalism, increasing the risk “history” will be used as a thin guise for validating the

⁴² For an important exploration of how historical evidence might be adjudicated, see generally Joseph Blocher & Brandon L. Garrett, *Originalism and Historical Fact-Finding*, 112 GEO. L.J. 699 (2024).

⁴³ Colgan, *Reviving*, *supra* note 20, at 338–39.

⁴⁴ Richard H. Fallon, Jr., *The Chimerical Concept of Original Public Meaning*, 107 VA. L. REV. 1421, 1430 (2021) (“Reaching these conclusions requires no fine-grained knowledge about the relevant provisions’ authors or about possibly divergent linguistic, historical, biographical, or political assumptions among their audiences.”).

⁴⁵ Such considerations might include, for example, the compatibility of treating *in rem* forfeitures as punishment with modern Eighth Amendment jurisprudence broadly, see Colgan, *The Excessive Fines Clause*, *supra* note 25, at 17–46; or the moral and legal philosophies of punishment, see generally Carol S. Steiker, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO. L.J. 775 (1997).

political preferences of conservative Justices.⁴⁶ These concerns are justified. As Reva Siegel has documented, originalism as a political project has been democracy depleting, resulting in the entrenchment of early American social hierarchies that necessarily disfavor women and people of color.⁴⁷

But, in terms of *Bajakjian* and the legitimacy of originalism, the proverbial ship, as it were, has sailed. In recent years, for example, conservative jurist William H. Pryor has employed *Bajakjian* as an exemplar of originalism's legitimacy because it pit two originalist stalwarts—Justice Clarence Thomas writing the majority, and Justice Antonin Scalia joining the dissent—against each other, thus showing that originalism was not merely a cover story for an agreed-upon conservative agenda.⁴⁸ The argument presumes, however, that the historical evidence employed in the competing opinions provided solid scaffolding for their dispute.⁴⁹ Offering a much more robust historical account of *in rem* forfeiture practices to reveal how rickety that scaffolding is delegitimizes the remarkably feeble historical accounts that Justices frequently employ. As Lawrence Solum has argued, opinions through which the conservative members of the Court have engaged in originalism as a political project do not exemplify meaningful engagement with historical sources and are better understood as conservative Justices “flying under a false flag, claiming the mantle of originalism when in fact they are covert living constitutionalists.”⁵⁰ Similarly, as Karen Tani has noted, these tactics “depart from the more ordinary uses of

⁴⁶ E.g., ERWIN CHERMERINSKY, *WORSE THAN NOTHING: THE DANGEROUS FALLACY OF ORIGINALISM* (2022); Lisa Heinzerling, *Resisting Originalism, Even When “Done Well,”* YALE J. ON REGULATION, NOTICE & COMMENT (Oct. 31, 2022), <https://www.yalejreg.com/nc/symposium-shane-democracy-chief-executive-05/>.

⁴⁷ Reva B. Siegel, *Memory Games: Dobbs’s Originalism as Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance*, 101 TEXAS L. REV. 1127, 1148–69, 1193–97 (2023).

⁴⁸ William H. Pryor, Jr., *Justice Thomas, Criminal Justice, and Originalism’s Legitimacy*, 127 YALE L.J. FORUM 173, 377–78 (2017).

⁴⁹ The dissenting opinion’s use of history was limited to countering the majority’s claim that early *in rem* forfeitures were not punishment due to their remedial character, by using a small set of cases and statutes to show that *in personam* customs fines (like forfeitures) often greatly exceeded the amount of unpaid duties, or were imposed for offenses that did not involve tax arrears. *Bajakjian*, 524 U.S. at 344–47 (Kennedy, J., dissenting).

⁵⁰ Lawrence B. Solum, *Progressives Need to Support Justice Ketanji Brown Jackson*, BALKINIZATION (Dec. 9, 2022), <https://balkin.blogspot.com/2020/06/mcclaim-symposium-10.html>; see also generally Siegel, *supra* note 47 (arguing that conservative Justices claiming to use originalism have actually employed living constitutionalism).

history that have always been visible in the Court's work."⁵¹ By insisting on robust engagement with historical evidence, the ability for any jurist to employ originalism as politics is reduced.

Therefore, rather than cede history as a field of relevant constitutional inquiry, this Article tests the validity of the *Bajakajian* Court's claim by marshaling a substantial volume of eighteenth- and nineteenth-century federal and state caselaw, supplemented by other legal texts including statutes, legal treatises and dictionaries, and attorney general opinions. As noted below, the temporal scope of these materials is driven by the sources employed in *Bajakajian*. This Article is, therefore, agnostic as to the ideal focus of constitutional interpretation: the intent or purpose of the framers, original understandings or public meaning,⁵² or the seemingly all-encompassing scope of the Court's more recent forays into "history and tradition."⁵³ Relatedly, it does not address disputes among adherents to originalism as to the proper temporal scope of the inquiry, as including or not the English common law, the colonial era, the moment of drafting the relevant text, the period of ratification, or beyond.⁵⁴

The strength of the evidence presented below—documenting that early *in rem* forfeitures were understood to be punishment—is substantial. It does, however have limitations. First, this analysis is limited to formal legal texts. On the one hand, this provides critical information; judges were, after all, directly involved in the enterprise of imposing or upholding the imposition of punishment and interpreting the will of lawmakers to punish.⁵⁵ But on the

⁵¹ Karen M. Tani, *Foreward: Curation, Narration, Erasure: Power and Possibility at the U.S. Supreme Court*, 138 HARV. L. REV. 1, 43 (2024) (regarding "the current Court's formalistic approach to decisionmaking, combined with the Justices' sympathy for conservative ends," in constitutional interpretation).

⁵² Richard H. Fallon, Jr., *The Many and Varied Roles of History in Constitutional Adjudication*, 90 NOTRE DAME L. REV. 1753, 1762–72 (2015).

⁵³ See generally Randy E. Barnett & Lawrence B. Solum, *Originalism After Dobbs, Bruen, and Kennedy: The Role of History and Tradition*, 118 NORTHWESTERN U. L. REV. 433 (2023).

⁵⁴ E.g., *Samia v. United States*, 599 U.S. 635, 655–56 (2023) (Barrett, J., concurring in part and concurring in the judgment) (stating that historical evidence "from the late 19th and early 20th centuries" was "far too late"); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 856 (1995) (Thomas, J., dissenting) (positing that reliance on a treatise by Justice Story published in 1833 was too late to "represent[] the original understanding of the Constitution").

⁵⁵ This is not to say that caselaw and related legal texts should be given the same weight for all interpretive questions. For example, while caselaw would still be relevant, the central role judicial actors played in imposing punishment (as well as prosecutors in seeking to punish) may make reliance on some formal legal texts more susceptible to challenge when assessing the meaning of "excessive" within the Excessive Fines Clause because claims of excessiveness carry with them a critique of judicial and prosecutorial power. In turn, this may make attention to

other, these materials reveal the law on the books, which may or may not equate with the law as applied. Additional research would be needed to more fully establish how *in rem* forfeitures were understood outside of formal legal settings.⁵⁶ Second, while this analysis is grounded on a large volume of materials, I cannot claim to have captured all relevant cases. At least some case records were destroyed during the evacuation of Richmond, Virginia, during the Civil War.⁵⁷ Other cases may remain undiscovered or may have never been published. And third, the temporal scope of the legal texts needed to properly analyze the sources employed by the *Bajakajian* Court—which span over a century and a half—is noteworthy. While “[i]n a common law country like the United States, legal texts gain meaning from interpretation over many years,”⁵⁸ such a broad temporal scope inflates the risk that practices and understandings will have shifted over time or will lack uniformity across or within jurisdictions at various junctures.⁵⁹ As detailed in the discussion that follows, however, the early American caselaw and other legal texts gathered herein exhibit remarkable

historical accounts of efforts at resisting such power particularly important. See Jack M. Balkin, *Constitutional Memories*, 31 WM. & MARY BILL OF RTS. J. 307, 349–55 (2022) (arguing that by incorporating the history of protest against injustice, including the ways in which protestors “understood, diagnosed, and criticized injustices in their world, we are better able to critique our existing arrangements, and perceive how elements or the effects of these past wrongs are still with us in contemporary life”); Reval B. Siegel, *The Politics of Constitutional Memory*, 20 GEO. J. L. & PUB. POL’Y 19, 23–24 (2022) (noting the importance of expanding the scope of historical sources to avoid “legitimat[ing] authority by generating the appearance of consent to contested status relations and by destroying the vernacular of resistance”). I leave the spadework needed for the interpretation of “excessive” for another day.

⁵⁶ For an argument that “‘internal’ accounts” employing legal texts such as “treatises, court cases, and so on” to discern the “substance of past law” provides a sufficient grounds for constitutional interpretation, making “external accounts of the law’s wider reception and operation” unnecessary, see William Baude & Stephen E. Sachs, *Originalism and the Law of the Past*, 37 LAW & HISTORY REV. 809, 813–14 (2019).

⁵⁷ See *C.J. Hendry Co. v. Moore*, 318 U.S. 133, 140, n.4 (1943).

⁵⁸ Jenny S. Martinez, *International Courts and the U.S. Constitution: Reexamining the History*, 159 U. PA. L. REV. 1069, 1132–33 (2011).

⁵⁹ *United States v. Mundell*, 27 F. Cas. 23, 27 (C.C.D. Va. 1795) (No. 15,834) (Iredell, Circuit Justice) (noting that a lack of uniformity could be expected in the “United States, wherein each state had a separate government of its own for internal purposes, with a system of laws originally in substance the same, but varying in a number of particulars, as the different habits and views of thinking of so many unconnected communities would naturally occasion”); see also Bernadette Meyler, *Towards a Common Law Originalism*, 59 STAN. L. REV. 551, 567–80 (2006) (describing the potential for historical evidence to reveal a “disunified field”).

consistency in support of the conclusion that early *in rem* forfeitures constituted punishment.⁶⁰

What follows takes the *Bajakajian* opinion's declaration head on, beginning with the Court's misapprehension of the guilty property fiction, followed by its claims that the civil and remedial nature of *in rem* forfeitures rendered them nonpunitive.

II. The Guilty Property Fiction as Fiction

Early American jurists and lawmakers understood the guilty property fiction to be a legal *fiction*. The detailed examination of the role the guilty property fiction played in punishing violations of customs laws, maritime regulations, and other offenses set out below shows how the *Bajakajian* Court's failure to more fully examine relevant historical materials led it to misapprehend the fiction, putting its declaration that early *in rem* forfeitures were nonpunitive at odds with actual historical practice.

A. Use of the Fiction for Early Customs Laws and Maritime Regulations

To understand where *Bajakajian* went wrong, it is helpful to examine the theory behind the legal fiction whereby the *rem*—the vessel or the cargo it carried—would be treated as guilty of evading the law. Take, for example, a case involving a ship. Of course, “[t]he mere wood, iron, and sails of the ship, cannot, of themselves, violate the law.”⁶¹ But pursuant to the guilty property fiction, the ship “is animated and put in action by the crew, who are guided by the master.”⁶² Therefore, their wrongdoing became the ship's wrongdoing,

⁶⁰ This would not necessitate overturning *Bajakajian* in the technical sense. See *supra* note 20 and accompanying text.

⁶¹ *The Little Charles*, 26 F. Cas. 979, 982 (C.C.D. Va. 1818) (No. 15,612) (Marshall, Circuit Justice); see also OLIVER WENDEL HOLMES, *THE COMMON LAW* 18 (1881) (explaining that “[a] ship is the most living of inanimate things . . . [a]nd we need not be surprised, therefore, to find a mode of dealing which has shown such extraordinary vitality in the criminal law applied with even more striking thoroughness in the Admiralty,” and further stating: “It is only by supposing the ship to have been treated as if endowed with personality, that the arbitrary seeming peculiarities of the maritime law can be made intelligible, and on that supposition they at once become consistent and logical.”).

⁶² *The Little Charles*, 26 F. Cas. at 982. The agency relationship was not limited to that between the owner and the vessel's master and crew. An owner may also be punished for the actions of a co-owner. *E.g.*, *United States v. Grundy & Thornburgh*, 7 U.S. (3 Cranch) 337, 352 (1806) (explaining that a ship's forfeiture “is claimed from all the owners”). Similar agency principles were employed in maritime law to hold the master of the ship liable for the actions of the crew.

which was in turn adjudicated through *in rem* proceedings in which the property was treated as the defendant.⁶³ In other words, *Bajakajian* is correct that the *in rem* fiction did not—and could not—punish the mariners with no ownership interest in the property at stake,⁶⁴ and instead operated to deprive the owner of their property in response to the mariners' wrongful acts.⁶⁵

Bajakajian's gaffe comes from conceiving of the owners losing ships and cargo to forfeiture as innocent. The Court seems to have assumed that all of the skullduggery that could be found at America's seaports in the nation's early years involved wrongdoing by a ship's crew: mariners sneaking a ship to shore in the dark of night or unlading goods outside of official ports to avoid customs duties,⁶⁶ handling goods without proper licenses or permits,⁶⁷ trading precious

E.g., *The Eleanor*, 15 U.S. (2 Wheat) 345, 357–58 (1817) (explaining that so long as seamen are “acting within the scope of his commands,” the seamen are treated as agents of the ship's master, though suggesting the rules may be relaxed where the master commands a squadron rather than a single ship). That, in turn, could result in punishment of the owner through *in rem* forfeiture. *E.g.*, *United States v. The Cuba*, 25 F. Cas. 716, 716–17 (D. Md. 1869) (No. 14,898) (explaining that fines imposed on the master for the actions of seamen were designed “to secure extreme caution and vigilance upon his part” and upholding a forfeiture based on the illegal importation of goods by the crew without the owner or captain's knowledge).

⁶³ *The Little Charles*, 26 F. Cas. at 981–82.

⁶⁴ *United States v. Bajakajian*, 524 U.S. 321, 330–31 (1998); *see also* *Origet v. United States*, 125 U.S. 240, 245–47 (1888) (interpreting a statute as allowing *in personam* punishment through imprisonment or fine and *in rem* forfeiture of goods, explaining: “The forfeiture of the goods of the principal can form no part of the personal punishment of his agent.”); *United States v. La Vengeance*, 3 U.S. (3 Dall.) 297, 301 (1796) (“a libel *in rem* ... does not, in any degree, touch the person of the offender”).

⁶⁵ *See* *United States v. Fifty-Six Barrels of Whiskey*, 25 F. Cas. 1075, 1079 (No. 15,095) (D. Ky. 1866) (“Whether the forfeiture is in consequence of [the owner's] own unlawful act, or of the unlawful act of some other person, respecting the thing forfeited, the loss is still his, and his only.”); *Fisher v. McGirr*, 67 Mass. (1 Gray) 1, 36 (1854) (describing an *in rem* forfeiture as “punish[ing] the owner, upon whom ultimately the loss must fall, by a deprivation of property, in the nature of a penalty”); *see also* John Nelson, *Concerning the Slave Trade*, 4 Op. Att'y Gen. 241, 245 (Aug. 29, 1843) (stating that when a vessel is seized for a violation of the law, “her fate and that of her owners must in any case depend upon the ascertainment of” whether the law was violated).

⁶⁶ *E.g.*, *The Schooner Industry*, 13 F. Cas. 35, 35 (C.C.D. Mass. 1812) (No. 7028) (Story, Circuit Justice) (regarding the unlading of foreign cigars and sugar in Martha's Vineyard at night, violating the requirement that foreign goods be unladen in “open day”).

⁶⁷ *E.g.*, *Bottomley v. United States*, 3 F. Cas. 968, 972–74 (C.C.D. Mass. 1840) (No. 1688) (Story, Circuit Justice) (holding that a fraudulently obtained permit to unlade goods was the equivalent of having no permit).

cargo in violation of international trade embargos,⁶⁸ and more. The Court concluded that early *in rem* forfeitures could not have been understood to be punishment, because they deprived owners of property for the mariners' misconduct, and Congress could not have intended to punish the innocent.⁶⁹ As detailed below, however, that conception of ownership was out of step with early American practices in which Congress both employed *in rem* forfeitures as punishment for the owner's own misconduct or perceived negligence and took pains to protect actually innocent owners.

At the dawn of the new republic, the federal government's ability to generate revenue through taxation and to regulate commerce—along with the authority to punish violations of those laws—was understood to be among the “great powers” afforded by the Constitution, essential to the young nation's survival.⁷⁰ Unsurprisingly, then, among its earliest acts, Congress adopted an array of laws, which were designed to and did generate revenue through taxation of goods entering the nation's seaports and to regulate maritime industries.⁷¹

⁶⁸ *E.g.*, *The Little Charles*, 26 F. Cas. at 980–81 (regarding the unlicensed sailing of a ship loaded with cargo from North Carolina to Antigua in violation of the 1807 Embargo Act).

⁶⁹ *See Bajakajian*, 524 U.S. at 328, 331, 334.

⁷⁰ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407, 417 (1819) (explaining that “we find the great powers, to lay and collect taxes [and] to regulate commerce,” and that “the government may, legitimately, punish any violation of its laws” if necessary to support their execution even if the right to punish isn't expressly stated in the Constitution); *see also* *Tyler v. Defrees*, 78 U.S. (11 Wall.) 331, 345 (1870) (listing the “great powers essential to a perpetual union” as including “the power . . . to levy taxes”); *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 445–46 (1827) (describing the importance of Congressional regulation of commerce for the country's prosperity), *abrogation on other grounds recognized by* *Oklahoma Tax Com'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 180 (1995).

⁷¹ *Generally, e.g.*, Act of Sept. 1, 1789, ch. 11, 1 Stat. 55 (regulating maritime industries through registration and licensing); Act of July 31, 1789, ch. 5, 1 Stat. 29 (regulating customs duties) [hereinafter 1789 Collections Act]; *see also* Arlyck, *supra* note 7, at 1466, n.96 (“In every year from 1791 to 1809, customs collections accounted for more than seventy-five percent of non-loan revenue, and for the entire period it constituted ninety percent of total nonloan revenue.”). In addition to the regulation of customs and maritime industries, Congress also imposed forfeitures for trading with Indian tribes without a license, Act of July 22, 1790, ch. 33, § 3, 2 Stat. 137, 137–38, and for a variety of offenses related to liquor manufacturing, *e.g.*, Act of Mar. 3, 1791, ch. 15, § 25, 3 Stat. 205 (imposing the forfeiture of distilled spirits, along with \$100 fine, for failure to post a sign outside of a building marking it as a distillery) [hereinafter 1791 Whiskey Tax Act]. For a description of forfeiture practices in the colonial era, which also relied upon the guilty property fiction, *see* James R. Maxeiner, *Bane of American Forfeiture Law Banished at Last*, 62 CORNELL L. REV. 768, 770–76, 780–81 (1977).

But as essential as they were, the enforcement of such laws in the nation's busy ports and waterways was also notoriously difficult. Those engaging in fraud were seen as "exceedingly ingenious in resorting to various subterfuges to avoid detection."⁷² Smuggled items could be secreted away in places difficult to spot—*e.g.*, opium hidden behind an onboard bureau,⁷³ or illegally imported kid gloves tucked away in personal luggage.⁷⁴ False explanations of misfortunes may be given to explain an otherwise illegal unlading of cargo—*e.g.*, mariners intentionally running a ship to shore in a scheme to split the profits awarded for rescuing the cargo with a salvor,⁷⁵ or pretending a ship had been wrecked when it never had.⁷⁶ Illegal acts could occur under cover of darkness, or away from official ports to avoid detection by customs officers.⁷⁷ And at times, the mariners

⁷² *The Brig Burdett*, 34 U.S. (9 Pet.) 682, 690 (1835); *see also* *United States v. Curtis*, 16 F. 184, 186–87 (S.D.N.Y. 1883) (explaining that "[t]he opportunities which vessels approaching the coast, or coming into port, have for the unlawful discharge of goods, and the difficulty on the part of the government in detecting the particular persons guilty of it on board ship, are so great" that if "punishment[s] or penalt[ies]" were limited to "those proved to have knowingly taken part in the unlawful acts," then "convictions would be very few, and the prevention of smuggling well nigh impossible"); *see also* R. KENT NEWMYER, *SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC* 82 (1985) (describing the challenging nature of enforcing laws "involving falsified ships' papers, simulated shipwreck, and collusive capture, all of which devices were regularly employed by New Englanders to circumvent the law," due to "[a]mbiguous evidence [and] complicated factual environments").

⁷³ *In re The Mary Belle Roberts*, 3 Haw. 823, 824 (1877) ("the captain had surreptitiously landed nineteen tins of opium, and had eighteen other tins ingeniously concealed in the bulkhead behind his bureau").

⁷⁴ *Lewey v. United States*, 15 F. Cas. 449, 450–51 (C.C.S.D.N.Y. 1878) (No. 8309) (Waite, Circuit Justice) (describing an importer transporting kid gloves in his personal trunks rather than treating them as merchandise subject to import duties).

⁷⁵ *The North Carolina*, 40 U.S. (15 Pet.) 40, 41–45 (1841). The financial incentive for salvage was that when a salvager brought property into court, the court could order compensation for "restoring [the property] to the owners." *The Boston*, 3 F. Cas. 932, 937 (C.C.D. Mass. 1833) (No. 1673) (Story, Circuit Justice).

⁷⁶ *The Brig Monte Christo*, 17 F. Cas. 607, 607–08 (N.D.N.Y. 1872) (No. 9719); *see also* *The Brig Struggle*, 13 U.S. (9 Cranch.) 71, 74 (1815) (regarding the high quantity of "cases of fictitious distress [that] have been offered to the Courts of the United States, as excuses for violations of the restrictive system" of customs laws, and noting "that these cases, whether real or imaginary, have generally been supported by" testimony of the crew, and so "it cannot be wondered at if this Court shall receive, with considerable jealousy and caution, evidence ... calculated to impress a belief that some overwhelming calamity, of which, in ordinary voyages, so little is heard.").

⁷⁷ *E.g.*, *supra* note 66 and accompanying text.

engaged in efforts to defraud the government were in cahoots with the very customs officers whose duty it was to enforce the law.⁷⁸

A crucial part of enforcement, therefore, was an effort to deter wrongdoing through harsh punishment. Congress imposed upon a ship's master (the person in command of the vessel, including its cargo and its crew) fines for offenses related to the employment of the vessel.⁷⁹ In early statutes those fines ranged between \$100 and \$2,000 for offenses including the failure to provide a proper manifest or other documentation at customs;⁸⁰ illegal unlading, concealment,

⁷⁸ *E.g.*, *Bottomley*, 3 F. Cas. at 972 (admitting testimony as to prior bad acts of customs officers who previously had "the baseness to accept a bribe, or knowingly to connive at a false entry of goods to defraud the public" because "[t]o exclude evidence of the use of such machinery in other cases, shown to be fraudulent, would be to shake all just confidence in the rules of evidence in the administration of public and civil justice"); 651 Chests of Tea v. United States, 22 F. Cas. 253, 256, 259 (C.C.S.D.N.Y. 1826) (No. 12,916) (Thompson, Circuit Justice) (declining to award a moiety of the forfeiture's value because the offense "must have been effected by the misconduct or negligence of some of the custom-house officers at Philadelphia," "and it would be dangerous, and a violation of all sound principles, to admit a construction of the law, which, in its consequences, might reward such misconduct with a portion of the forfeiture").

⁷⁹ The typical language employed for the imposition of a penalty requiring a person to pay a monetary amount in the early customs and maritime regulation statutes was "forfeit and pay" or "forfeit." *E.g.*, Act of Aug. 4, 1790, ch. 35, § 4, 2 Stat. 153 ("shall forfeit and pay five hundred dollars"); *id.* § 10, 2 Stat. 156 ("shall forfeit a sum of money equal to the value of such goods") [hereinafter 1790 Collections Act]. Congress also used the word "fine" interchangeably with "forfeit." *E.g.*, *id.* § 66, 2 Stat. 175-76 (describing a post-conviction pecuniary penalty as both a "forfeit" and a "fine"). These terms were also frequently used interchangeably in colonial and early state statutes. Colgan, *Reviving*, *supra* note 20, at 302-03. Therefore, to avoid confusion in describing these laws, I use the term "fine" to describe penalties that require a person to pay money and "forfeiture" to describe penalties that result in the deprivation of property. It should be noted, however, that modern forfeitures often involve the seizure of cash. *E.g.*, 31 U.S.C. § 5332.

⁸⁰ *E.g.*, 1790 Collections Act, *supra* note 79, §§ 4, 10, 12, 16, 20, 34, 2 Stat. 153, 156-60, 166 (imposing fines between \$50 and \$1,000 or the value of a ship's cargo for various offenses related to the ship's manifest or other records); 1789 Collections Act, *supra* note 71, at §§ 11, 12, 16, 1 Stat. 38-39, 41 (imposing fines between \$200 and \$500 for violations related to manifests or other records). Congress imposed \$100 fines severally on both owners and masters for the failure to deliver a certificate of registry. Act of Dec. 31, 1792, ch. 1, § 11, 2 Stat. 292-93 [hereinafter 1792 Vessel Registration Act].

or sale of cargo;⁸¹ and other forms of fraudulent or illicit behavior.⁸² In addition, Congress continued an English practice employed during the colonial period, imposing upon the owners of the ships and cargo the *in rem* forfeiture of the property itself based on the misconduct of the master in their employ.⁸³

The guilty property fiction had the advantage of holding responsible absent owners⁸⁴ who conspired with offending mariners to violate the law but who may otherwise go unpunished.⁸⁵ Were it not for the guilty property fiction,

⁸¹ *E.g.*, 1790 Collections Act, *supra* note 79, § 13, 2 Stat. 157–58 (imposing a \$1,000 fine on a “master or other person having the charge or command of such ship or vessel” for the illegal unloading of cargo); *id.* at 14, 2 Stat. 158 (imposing a fine of treble the value of cargo taken on board from another ship); *id.* § 15, 2 Stat. 158 (imposing a fine of \$400 for the illegal departure from a port); *id.* § 22, 2 Stat. 161 (imposing treble the value of sea stores landed for the purpose of sale); *id.* § 27, 2 Stat. 163 (imposing fines of \$400 for unloading cargo at night); *id.* § 31, 2 Stat. 164–65 (imposing a fine of \$200 per item missing or with broken seals and \$200 for locks and fastenings removed during the night); 1789 Collections Act, *supra* note 71, at § 12, 1 Stat. 39 (imposing a fine of \$400 for illegal unloading). For some offenses, fines were also imposed on anyone aiding the master in the offense. *E.g.*, 1790 Collections Act, *supra* note 79, §§ 14, 27, 2 Stat. 158, 163.

⁸² *E.g.*, 1790 Collections Act, *supra* note 79, § 73, 2 Stat. 177–78 (imposing a fine of \$200 on a master for an unauthorized departure from the port); 1789 Collections Act, *supra* note 71, at §§ 11–12, 1 Stat. 38–39 (imposing fines of between \$400 and \$500 for various offenses).

⁸³ For forfeitures for wrongdoing related to customs documentation, such as the use of a fraudulent manifest or invoice, see, *e.g.*, 1790 Collections Act, *supra* note 79, §§ 46–47, 2 Stat. 169–70; 1789 Collections Act, *supra* note 71, at §§ 22–23, 1 Stat. 42–43. For forfeitures related to illegal unloading, receipt, concealment, or sale of goods, see, *e.g.*, 1790 Collections Act, *supra* note 79, §§ 13–14, 22, 27–28, 48, 2 Stat. 157–58, 161, 163–64, 170; 1789 Collections Act, *supra* note 71, at §§ 12, 15, 24, 1 Stat. 39–41, 43. For forfeitures for offenses related to other forms of fraud, see, *e.g.*, 1790 Collections Act, *supra* note 79, § 60, 2 Stat. 174; 1789 Collections Act, *supra* note 71, at §§ 35, 40, 1 Stat. 46–49.

⁸⁴ Some courts have mentioned that the absence of the owner, and thus the inability to charge them *in personam*, served as a primary justification for *in rem* forfeiture practices without which the owner would go unpunished. *E.g.*, *Continental Grain Co. v. The FBL-585*, 364 U.S. 19, 23 (1960) (explaining that the *in rem* forfeiture system allowed courts to hold accountable owners absent from the jurisdiction); see also *Fisher*, 67 Mass. (1 Gray) at 28 (“the actual seizure of the property, intended to be offensively used, may be effected, when it would not be practicable to detect and punish the offender personally”). Kevin Arlyck and Caleb Nelson have noted, however, that the universality of the lack of jurisdiction over the owner as central to *in rem* forfeitures is undermined by the fact that the federal and state governments also employed such forfeitures in cases in which owners would have been identifiable and chargeable *in personam*. Arlyck, *supra* note 7, at 1477–80; Nelson, *supra* note 7, at 2468–75.

⁸⁵ *E.g.*, *The Betsy*, 3 F. Cas. 303, 304–05 (C.C.D. Mass. 1818) (No. 1365) (Story, Circuit Justice) (condemning a ship where the owner and master worked together to smuggle cargo); see also *United States v. 58,850 Cigars*, 25 F. Cas. 1072, 1074 (C.C.D. Mass. 1857) (No. 15,092).

“the owner [would need] only to keep behind the curtain, while the master is fitting his vessel for the criminal enterprise, and make, at the proper time, such declarations and manifestations as may repel the presumption of complicity.”⁸⁶

In addition to punishing conspiratorial acts, Congress employed *in rem* forfeitures to punish owners for their own individual misconduct. Congress passed laws regulating the vessels that would bring goods to and from the nation’s ports, and imposing punishment for an owner’s failure to adhere to regulatory requirements related to the ship’s status—its registration, licensing, and ownership.⁸⁷ A ship’s owner, therefore, could be fined \$50 for failing to paint a ship’s name and port of registration on its hull,⁸⁸ \$100 for failure to deliver a ship’s certificate of registry to the collector of the district,⁸⁹ or \$500 for the failure to turn over documents related to a registration that was no longer valid.⁹⁰ And in addition to heavy fines, a ship’s owner could be subject to the *in rem* forfeiture of the ship itself. For example, Congress imposed on owners either the forfeiture of their “ship or vessel, together with her tackle, furniture and apparel” or, in the alternative, “the value thereof” for the offenses the owners themselves committed related to the registration process.⁹¹ Similarly, in acts generally known

(Curtis, Circuit Justice) (explaining that where concealed goods “were imported without any invoice, bill of lading, or consular certificate, the absence of which directly implicates the owner of the goods, and affords a strong *prima facie* case of an intent to smuggle them”).

⁸⁶ *The Wanderer*, 29 F. Cas. 150, 152 (D. Mass. 1860) (No. 17,139); *see also* *United States v. Cargo of Sugar*, 25 F. Cas. 288, 289 (D. Cal. 1874) (No. 14,722) (“the knowledge of his principal is his knowledge for such purposes . . . otherwise, any fraud could be perpetrated with impunity by procuring an innocent broker or agent, through whom parties not innocent could effect the entry of their goods”); *Commonwealth v. King*, 1 Whart. 448, 457 (Pa. 1836) (explaining that the forfeiture of a ship, “though belonging to persons who intended no wrong and had been guilty of nothing, except negligence, and that not personal, but the negligence of the officers of the vessel” was appropriate because if the owner’s lack of participation “were admitted as an excuse . . . we may as well repeal the whole act at once”).

⁸⁷ *See generally* 1792 Vessel Registration Act, *supra* note 80.

⁸⁸ *Id.* § 3, 2 Stat. 288–89.

⁸⁹ *Id.* § 11, 2 Stat. 292–93. This fine could also be imposed upon the master. *Id.*

⁹⁰ *Id.* § 14, 2 Stat. 294–95. Like the owner, a master could be fined for swearing a false oath or affirmation related to registration. *Id.* § 28, 2 Stat. 298. Masters were also fined for failing to alert customs officers of a change in the ship’s command. *Id.* § 15, 2 Stat. 295.

⁹¹ *Id.* § 4, 2 Stat. 289 (requiring that “an oath or affirmation shall be taken and subscribed by the owner, or by one of the owners thereof” regarding the ship’s name, place built, and that the owner or owners are citizens of the United States); *see also id.* § 11, 2 Stat. 292–93 (imposing the same forfeiture when a person purchases a ship or vessel and lies under oath); *id.* § 12, 2 Stat. 293–94 (allowing “an agent or attorney for” the owner to take the oath subject to the same forfeiture if the agent or attorney lies during the oath).

as “Neutrality Acts,” but given titles explicitly referencing the “punishment” of the behaviors prohibited therein, Congress made it an offense to fit out a ship for use in combat against a government with which the United States was at peace.⁹² Those convicted of that offense were subject to fines and imprisonment, and the ship and “materials, arms, ammunition and stores” employed for the forbidden purposes were subject to *in rem* forfeiture.⁹³

But the guilty property fiction not only served to deter owners from their own conspiratorial behavior and direct misconduct, it also punished them for negligence, thus incentivizing them to act with “the utmost vigilance” when selecting a ship’s master who would serve as their agent.⁹⁴ That agency relationship—which had long been recognized with respect to a wide variety of public and private legal matters arising in admiralty and maritime law⁹⁵—was

⁹² See Act of Apr. 20, 1818, ch. 88, 1 Stat. 447 (entitled “An act in addition to the ‘Act for the punishment of certain crimes against the United States,’ and to repeal the acts therein mentioned”) [hereinafter 1818 Neutrality Act]; Act of June 5, 1794, ch. 50, 1 Stat. 381 (entitled “An Act in addition to the act for the punishment of certain crimes against the United States”) [hereinafter 1794 Neutrality Act].

⁹³ See 1818 Neutrality Act, *supra* note 92, § 3, 1 Stat. 448; see also 1794 Neutrality Act, *supra* note 92, § 3, 1 Stat. 383; see also Ebenezer R. Hoar, *Neutrality Act*, 13 Op. Atty’ Gen. 177, 178 (Dec. 16, 1861) (describing the 1818 Neutrality Act as “an act to punish certain offenses against the United States by fines, imprisonment, and forfeitures”).

⁹⁴ *Peisch v. Ware*, 8 U.S. (4 Cranch) 347, 364–65 (1808) (explaining that *in rem* forfeitures punished an owner for wrongdoing undertaken “with his consent or connivance” and for the actions “of some person employed or trusted by him”); see also *651 Chests of Tea*, 22 F. Cas. at 259 (explaining that the *in rem* forfeiture, which “punishes the owner,” was improper due to evidence “satisfactorily showing that no fault or negligence was imputable to the owners”); *cf.* *The Eleanor*, 15 U.S. (2 Wheat.) at 357 (stating that the liability of owners for “the acts of their commanders has never been disputed” because the owners “are left at large in the selection of the commander, and are not permitted to disavow his actions as being authorized by them”).

⁹⁵ *E.g.*, *Del Col v. Arnold*, 3 U.S. (3 Dall.) 333, 334–35 (1796) (considering the responsibility of a ship’s owner for damage caused when a privateer ran a vessel into a shoal and explaining that “the owners of the privateer are responsible for the conduct of their agents, the officers and crew, to all the world”); *Stinson v. Wyman*, 23 F. Cas. 108, 109–10 (D. Me. 1841) (No. 13,460) (explaining, in private litigation brought by a shipper against the master and owner for the loss of cargo that rotted during the voyage, that the United States adopted the common law rule “hold[ing] the owners responsible for the full amount of any damage occasioned by the faults or negligence of the master or any of the crew,” though noting the rule may be altered by a statute limiting liability); see also *E.J. Dupont de Nemours & Co. v. Vance*, 60 U.S. (19 How.) 162, 167–70 (1856) (“By ancient admiralty law, the master could bind both the ship and cargo by an express hypothecation, to obtain a ransom on capture. So he could, and still may, when the whole enterprise has fallen into distress”); *The Amiable Nancy*, 16 U.S. (3 Wheat.) 546, 559 (1818) (assessing a case in which the owners of *The Amiable Nancy* sought damages against

central to the guilty property fiction. By imposing the risk of forfeiture should an offense occur, Congress “sa[id] to [owners] emphatically, you must, on peril of losing your vessel, see to it that she shall not be made use of as an instrument for violating the law.”⁹⁶ The owner’s negligence in selecting a master in which the property was entrusted was sufficient to make the master’s illegal conduct the owner’s, thereby justifying the owner’s punishment.⁹⁷

Though an undoubtedly aggressive tactic that may have captured truly innocent owners in its wake, both courts and lawmakers took steps to shield such owners from forfeiture. One way they did so was to employ an agency principle through which an owner could only suffer the deprivation of forfeiture if wrongdoing was actually committed by a person serving as the owner’s agent. For example, in 1808, in *Peisch v. Ware*, the Court considered the forfeiture of cargo salvaged from a boat found “adrift in the bay of Delaware, with her masts gone by the board, and without anchors, cables or rudder, and in danger of being carried out to sea.”⁹⁸ Customs officers sought forfeiture of the cargo because when salvaged it was “without the marks and certificates required by law.”⁹⁹ The Court held that because the forfeiture “punishes the owner,” such a deprivation would be improper unless illegality was undertaken “with his consent or connivance, or with that of some person employed or trusted by him.”¹⁰⁰ The calamity of a shipwreck through no fault of the master, therefore, could

the crew of a brig called “The Scourge,” which had raided it, and finding that The Scourge’s owners were liable under an agency theory for actual but not punitive damages).

⁹⁶ *The Wanderer*, 29 F. Cas. at 152.

⁹⁷ *The Meteor*, 17 F. Cas. 178, 183–84 (S.D.N.Y. 1866) (No. 9498) (“the law imposes upon the owner the necessity of withholding his property from being made by any person the instrument of violating the law”), *reversed on other grounds* 26 F. Cas. 1241, 1241–42 (S.D.N.Y. 1868); see also *Fisher*, 67 Mass. (1 Gray) at 27–28 (describing the agency theory allowing for the punishment of the owner because of his own illegal acts or those of “some person with whom he has placed and entrusted it,” including when the owner “has so carelessly and negligently used his power and control over it, that by his default, it has fallen into the hands of those who have made, and intended to make, the injurious or dangerous use of it”). The *Bajakajian* Court cited an early twentieth-century case for the idea that *in rem* forfeitures were nonpunitive because they could be imposed on innocent owners. *Bajakajian*, 524 U.S. at 331 (citing *Van Oster v. Kansas*, 272 U.S. 465 (1926)). But that case is consistent with the nineteenth-century understanding that the owner’s punishment is derived from the decision to entrust property to a wrongdoer. *Van Oster*, 272 U.S. at 467–69 (holding that an owner’s car could be forfeited because she had “intrusted it” to a man who used it to illegally transport liquor).

⁹⁸ *Peisch*, 8 U.S. (4 Cranch) at 359.

⁹⁹ *Id.* at 360.

¹⁰⁰ *Id.* at 364. For a further discussion of this case in relation to the rule of lenity, see *infra* notes 316–319 and accompanying text.

not serve as grounds for a forfeiture of the owner's property.¹⁰¹ Similarly, in 1815, the Supreme Court reversed the *in rem* forfeiture of an American vessel and cargo that had been seized for a violation of a non-intercourse statute making it illegal to enter American waters with British goods, because the master had sailed from Scotland before it was known there that war had broken out, attempted to obtain instructions from the owner upon reaching the waters close to Connecticut, only entered into American waters when a "storm forc[ed] him into a bay for shelter," and only stayed because "his crew mutin[ied], and prevent[ed] him leaving the bay."¹⁰² The lack of wrongdoing by the owner's agent protected the owner from being punished. Owners also could not be punished with a loss of property if the wrongdoing occurred when the property was in the hands of a thief¹⁰³ or party with whom the owner had no agency

¹⁰¹ Of course, the calamity had to have actually occurred. *E.g.*, *The North Carolina*, 40 U.S. (15 Pet.) at 41-45 (regarding evidence that the master intentionally ran a ship into a reef in order to later split the profits of the cargo's sale with salvagers); *The Josefa Segunda*, 18 U.S. (5 Wheat.) 338, 355-57 (1820) (noting that the relevant question was whether the attempt to enter port was really "frustrated by adverse winds, or by any one of those disasters which so frequently occur on the ocean"); *The Aeolus*, 16 U.S. (3 Wheat.) 392, 405-07 (1818) (noting that necessity of landing due to distress would be a defense but not in a case where the evidence of distress was missing); *The James Wells*, 26 F. Cas. 585, 586 (C.C.D. Conn. 1808) (No. 15,467) (Livingston, Circuit Justice) (finding that a boat's "leaky condition" did not constitute a necessity).

¹⁰² *The Fanny*, 13 U.S. (9 Cranch) 181, 182-83 (1815).

¹⁰³ *E.g.*, *651 Chests of Tea*, 22 F. Cas. at 257 (explaining that an owner is to be held responsible "where it is in the power of the party to comply with the requirements of the law," unlike situations in which the property has been stolen).

relationship.¹⁰⁴ While courts understood these agency concepts protecting owners as inherent in the law,¹⁰⁵ Congress also set them down in code.¹⁰⁶

In addition to owners who were innocent at the time of the offense, courts recognized some protections for bona fide purchasers of vessels or cargo after the offense who had no knowledge of the misconduct or role in selecting the crew. Courts confronting the bona fide purchaser issue sought to balance the need to prevent wrongdoers from escaping punishment by selling property that would otherwise be subject to forfeiture¹⁰⁷ against the risk that forfeiting

¹⁰⁴ *E.g.*, *Peisch*, 8 U.S. (4 Cranch) at 364–65 (explaining that a forfeiture could not be based on “the misconduct of mere strangers, over whom such owners ... have no control”); *see also* *The Hoppet*, 11 U.S. (7 Cranch) 389, 393 (1813) (“The *innocent* articles are liable to forfeiture only where they belong to the owner of the *prohibited* articles. It is this association, and this alone, which constitutes their crime.”); *The Sloop Active v. United States*, 11 U.S. (7 Cranch) 100, 106–07 (1812) (exempting from forfeiture cargo onboard a vessel owned by someone other than the vessel’s owners or crew); *250 Barrels of Molasses*, 24 F. Cas. 437, 441 (C.C.D.S.C. 1869) (No. 14,293) (exempting from forfeiture coffee transported on a ship from other forfeited items because the mariners engaging in the offence lacked an agency relationship with the owner of the coffee and “acted without [his] authority... and against his wishes and feelings”).

¹⁰⁵ *E.g.*, *Brown*, 25 U.S. (12 Wheat.) at 442 (explaining that “goods forced in by stress of weather ... are exempted from the payment of duties”); *The William King*, 15 U.S. (2 Wheat.) 148, 153 (1817) (“There can be no doubt that if the *William King* was carried off to Jamaica by actual force, it was an act which wanted the concurrence of the will, and, therefore, innocent.”); *The Gertrude*, 10 F. Cas. 265, 267–68 (C.C.D. Me. 1841) (No. 5370) (describing *in rem* forfeiture as “highly penal” and therefore declining its application where a customs violation was due to a shipwreck); *United States v. Nine Packages of Linen*, 27 F. Cas. 154, 157–60 (C.C.D.N.Y. 1818) (15,844) (Livingston, Circuit Justice) (forgiving the failure to enter the proper quantity of goods imported because the packing was done “in great haste and confusion” while Prussian troops were descending on a village); *The Waterloo*, 29 F. Cas. 399, 401 (S.D.N.Y. 1830) (No. 17,257) (explaining that in construing penal statutes it should be assumed that Congress would exempt involuntary acts because “[a]ny other construction would lead to the revolting conclusion, that a vessel and cargo cast as wrecks upon our shores, might nevertheless be forfeited for sheltering themselves in a port closed against them by the policy of trade” thereby transforming “a man’s calamities [to] his offence, and to convert the acts of God into causes of punishment and confiscation”); *Stratton v. Hague*, 8 Va. (4 Call.) 564, 568–69 (1790) (allowing a necessity defense where a landing was due to a heavy storm).

¹⁰⁶ *E.g.*, 1790 Collections Act, *supra* note 79, §§ 10, 13–15, 34, 38, 47, 2 Stat. 156–58, 166–67, 169–70.

¹⁰⁷ *United States v. 1,960 Bags of Coffee*, 12 U.S. (8 Cranch) 398, 405 (1814) (“It is true that cases of hardship and even absurdity may be supposed to grow out of this decision, but on the other hand if by a sale it is put in the power of an offender to purge a forfeiture, a state of things not less absurd will certainly result from it.”); *see also* *United States v. The Catherine*, 25 F. Cas. 332, 340–41 (C.C.D.N.Y. 1840) (No. 14,755) (Thompson, Circuit Justice) (interpreting a statute to allow the forfeiture of a ship engaged in the slave trade even if sold to a foreign entity

property honestly obtained by bona fide purchasers would “shackle trade and commerce, ... check the industry and enterprise of the merchant, and render hazardous to the whole community the purchase of articles which may have been subject to the payment of duties.”¹⁰⁸ Ultimately, the Court determined that if the statute provided an enforcement option—*i.e.*, the option to seek either a forfeiture of the offending cargo or the imposition of a fine set at the value of that cargo—then the government could only claim that the forfeiture related back to the moment of the selection of remedy, rather than the moment of the offense, thereby protecting purchases made by innocent parties in the interim.¹⁰⁹ But if the statute spoke of forfeiture in absolute terms, presenting it as the only option, then it was seen to relate back to the time of the offense, and the government could condemn the property even if subsequently purchased by someone who was entirely innocent.¹¹⁰

For those owners not otherwise protected, there were additional opportunities for relief through pardon or remission that provided protection for innocent owners.¹¹¹ A presidential pardon could serve to restore forfeited property in whole or in part to the innocent or guilty alike.¹¹² Another protection

because if not the act “may be evaded with the utmost facility” and because “[t]he vessel becomes tainted with the offence wherever she may go, or into whatever hands she may fall”).

¹⁰⁸ *651 Chests of Tea*, 22 F. Cas. at 256; *see also* *United Staters v. 396 Barrels Distilled Spirits*, 28 F. Cas. 121, 124 (E.D. Mo. 1866) (No. 16,503) (explaining that if liquor could be seized at any time, “no purchaser could know, at any time, when the spirits owned by him would become forfeited by the conduct of the manufacturer subsequent to the sale,” which “would be destructive of all commerce and fair dealing in the manufactured article”).

¹⁰⁹ *Grundy & Thornburgh*, 7 U.S. (3 Cranch) at 351–55 (holding that where the statute gives an election between an *in personam* penalty or an *in rem* forfeiture, it does not relate back to the time of the offense, but only the time of the election). Caleb Nelson has noted that “most forfeiture provisions did not give the government this option” and therefore would have allowed forfeiture. Nelson, *supra* note 7, at 2479, n.169.

¹¹⁰ *1,960 Bags of Coffee*, 12 U.S. (8 Cranch) at 404–05 (holding that “the commission of the offence marks the point of time on which the statutory transfer of right takes place”); *see also* *Henderson’s Distilled Spirits*, 81 U.S. (14 Wall.) 44, 56–57, 61 (1871) (explaining that the rule that “[w]here the forfeiture is made absolute by statute the decree of condemnation when entered relates back to the time of the commission of the wrongful acts,” has its “origin in the early history of the common law”).

¹¹¹ Innocent owners also had the option of suing the wrongdoers personally for the loss. *E.g.*, *250 Barrels of Molasses*, 24 F. Cas. at 441 (explaining that if an agent’s actions result in forfeiture, the owner’s options for relief are to sue the agent “or a resort to the equity of the government administered by the Secretary of the Treasury”).

¹¹² *E.g.*, Pardon of Jan. 17, 1834, Nat’l Archives Record 5989411 (restoring a libeled ship, though not the illegally imported jewelry at issue, and ordering further prosecution on the

was afforded by the First Congress, which created a failsafe to remit forfeited property in cases in which a truly innocent party (the original owner lacking intent to defraud¹¹³ or a bona fide purchaser uninvolved in the offense¹¹⁴) was deprived of property via *in rem* forfeiture.¹¹⁵ By 1790, just one year after the passage of the first customs act, Treasury Secretary Alexander Hamilton and members of Congress recognized the harsh consequences resulting from the guilty property fiction for some owners of vessels and cargo. He reported to Congress that “considerable forfeitures have been incurred, manifestly through inadvertence and want of information.”¹¹⁶ At his urging, and out of concern that “no person ought to be liable who is not guilty of a violation of the laws intentionally or willfully,”¹¹⁷ Congress passed the 1790 Remission Act, which allowed the owners of forfeited property to petition the Treasury Secretary for

payment of costs be discontinued because “it does not appear by the evidence exhibited before me that there was intention on the part of the said Capt. Dillingham to evade or violate the Revenue Laws, but that the landing of the jewelry as aforesaid was an act of indiscretion and without any fraudulent intent”); Pardon of Aug. 25, 1832, Nat’l Archives Record 3318887 (restoring the Steamer Henrietta to James Whitney for a maritime regulation violation on the grounds that “the said violation of the Laws aforesaid was altogether unintentional and committed through ignorance”). The Office of the Attorney General at times provided input to the president on requests for the return of forfeited property, including in cases recommending relief. *E.g.*, William Wirt, *Forfeiture for Smuggling*, 1 Op. Att’y Gen. 338, 338 (Mar. 18, 1820) (noting that a bona fide owner purchased a brig “in entire ignorance of the fact that a forfeiture had attached to her by a previous act of smuggling,” and noting that it was “a very hard case on” the owner and “a fit one for the act of grace which the petition solicits”).

¹¹³ For examples of cases acknowledging the hardship for innocent owners, see *The Venus*, 12 U.S. (8 Cranch) 253, 276–77 (1814) (acknowledging that a registration error may have been innocent but that regardless “the consequence is a forfeiture of the ship to the United States”); *The Cuba*, 25 F. Cas. at 716–17 (noting that the owners were “perfectly innocent” and that forfeiture of the ship was “a very hard case upon them, for it is perfectly clear that no human prudence or skill can guard against the landing of merchandise as small in bulk as the value of \$400 in Havana cigars”); *The Harriet*, 11 F. Cas. 594, 596 (D. Me. 1836) (No. 6100) (“the fair presumption from the evidence, is, that [the owner] was ignorant of” the master’s filing of a fraudulent certificate to obtain a fishing bounty, “[b]ut it was well known to his agent, and, in a legal point of view, the act of the agent is the act of the principal”).

¹¹⁴ Arlyck, *supra* note 7, at 1492 & n.254.

¹¹⁵ For a detailed description of the concerns underlying, adoption of, and procedural requirements set out in, the 1790 Remission Act, see *id.* at 1482–91, 1506–09.

¹¹⁶ Alexander Hamilton, Report on the Petition of Christopher Saddler, in 6 THE PAPERS OF ALEXANDER HAMILTON 191–92 (Syrett ed., 1962).

¹¹⁷ Arlyck, *supra* note 7, at 1483 (quoting 1 Annals of Cong. 1128 (1790) (Joseph Gales ed., 1834) (statement of Sen. Sturgis)); *United States v. Morris*, 23 U.S. (10 Wheat.) 246, 291–92 (1825) (“[t]he law was made for the benefit of those who had innocently incurred the penalty”) (internal quotation marks omitted).

a return of items if the forfeiture was “intended without willful negligence or any intention of fraud.”¹¹⁸

That Congress intended the Treasury Department’s remission program to protect innocent owners is evident in the resolution of disputes raised when the Secretary remitted property to which people involved in identifying and prosecuting alleged wrongdoing would otherwise have had a claim. Early federal customs statutes primarily tasked various customs officers and staff known as “informers”¹¹⁹ with identifying evidence of and prosecuting customs violations.¹²⁰ The government compensated informers with a portion, or “moiety,” of the value of the fines and forfeitures awarded for their efforts.¹²¹

Despite the importance of prosecutions instituted by these “moiety men”¹²² for the efficacy of customs and maritime regulation, informers’ claims to the value of forfeited goods and vessels were not understood as more important than those of innocent owners who engaged in the remission program. For example, in 1818, when the Treasury Secretary remitted “all the right, claim, and demand of the United States” on a set of seized goods, the informers claimed

¹¹⁸ Act of May 26, 1790, ch. 12, § 1, 1 Stat. 122, 122–23.

¹¹⁹ See 1 JOHN BOUVIER, A LAW DICTIONARY, ADAPTED TO THE CONSTITUTION AND LAWS OF THE UNITED STATES OF AMERICA 503 (Philadelphia, T. & J.W. Johnson 1839) (defining “informer” as “[a] person who informs or prefers an accusation against another, whom he suspects of the violation of some penal statute”).

¹²⁰ The exact role of informers changed over time, and while their role in identifying fraud remained consistent, eventually U.S. attorneys prosecuted *in rem* forfeitures. See Ebenezer R. Hoar, *Informers’ Shares Under the Internal-Revenue Laws*, 13 Op. Att’y Gen. 228, 230–35, 239 (May 13, 1870) (providing an overview of statutes regarding the use of informers beginning in 1791).

¹²¹ See PARRILLO, *supra* note 7, at 223–24, 241; Randy Beck, *Qui Tam Litigation Against Government Officials: Constitutional Implications of a Neglected History*, 93 NOTRE DAME L. REV. 1235, 1291–96 (2018) (describing the use of informers and, to a lesser extent, *qui tam* prosecutors—private actors who instituted prosecutions in exchange for a moiety of pecuniary penalties—to enforce early customs regulations); *Marvin v. Trout*, 199 U.S. 212, 225 (1905) (regarding the use of informers and *qui tam* prosecutors as “hav[ing] been in existence for hundreds of years in England, and in this country ever since the foundation of our government”); *In re 1,209 Quarter Casks, Etc. of Wine*, 24 F. Cas. 398, 412 (S.D.N.Y. 1868) (No. 14,279) (explaining that informers had been used to find revenue violations “since the act of 1799”); see also Nelson, *supra* note 7, at 2460–61 (regarding the use of informers under the English system during the colonial period). For a detailed history of the use of informers, with a particular focus on their use in the customs context, see generally PARRILLO, *supra* note 7. For more detail on the use of *qui tam* prosecutors, see *infra* notes 237–245 and accompanying text.

¹²² See PARRILLO, *supra* note 7, at 221.

that they still should have been awarded a moiety of the forfeited items' value.¹²³ This may have seemed a sensible position to take. At least some early English treatises suggested that the pardon power extended only to monies to be distributed to government coffers, meaning the crown had no capacity to forgive debts incurred to people awarded monies related to the processing of cases.¹²⁴ But though the circuit court acknowledged that by statute informers had a right to a moiety, it saw that statute as part of a larger body of regulations that included the Remission Act. Therefore, unless the monies had already been distributed, the Secretary was allowed to compromise their moiety via remission.¹²⁵ In doing so, it reasoned that the Remission Act was adopted because without it "the system here would justly have exposed the American government to the charge of injustice in making no discrimination between the innocent and guilty," and that the statutes collectively must be understood as protecting the innocent through the return of all that was wrongly taken, rather than all minus a moiety.¹²⁶ On appeal, the Supreme Court agreed, reasoning that to hold otherwise "would be subjecting the innocent to great and inequitable losses, contrary to the manifest spirit and intention of the law."¹²⁷

As Kevin Arlyck's analysis of 578 federal forfeiture cases from the districts of New York and Pennsylvania decided between 1789 and 1807 shows, owners frequently found meaningful relief through the remission program.¹²⁸ Relief

¹²³ *United States v. Morris*, 26 F. Cas. 1336, 1342-43 (C.C.D. N.Y. 1822) (No. 15,816) (Livingston, Circuit Justice), *aff'd* 23 U.S. (10 Wheat.) 246 (1825).

¹²⁴ *E.g.*, 3 RICHARD BURN, *THE JUSTICE OF THE PEACE AND PARISH OFFICER* 268 (15th ed. 1785) ("the king can but discharge his own part, and cannot discharge the informer's part").

¹²⁵ *Morris*, 26 F. Cas. at 1344-47; *see also Morris*, 23 U.S. (10 Wheat.) at 289, 296 (describing the customs officer acting as informer as "the agent of the government" whose personal interests "must necessarily be held subordinate" to the government's, and thus "the condemnation is not to them, but to the United States"); *cf. United States v. Three Parcels of Embroidery*, 28 F. Cas. 141, 142-43 (D. Mass. 1856) (No. 16,512) ("The sole purpose of the penalties and forfeitures with which they are so profusely studded, is the protection of the revenue. It is no part of their object, in a just and legal sense, to enrich the officers of the customs.").

¹²⁶ *Morris*, 26 F. Cas. at 1345.

¹²⁷ *Morris*, 23 U.S. (10 Wheat.) at 292; *see also id.* at 302-03 (Johnson, J.) (explaining that under the Remission Act "relief was to be provided for a case of misfortune and of innocence, and nothing could have been more absurd, than to suffer the vested rights of informers and seizing officers to embarrass the government in its benevolent and just view towards the objects of this law").

¹²⁸ Arlyck, *supra* note 7, 1491-98; *see also, Curtis*, 16 F. at 188 (noting that remission applications were "very frequent[ly]" based on claims that "the importer had no knowledge or intent of wrong").

was based on claims that went beyond “innocence.”¹²⁹ In particular, Arlyck found that “[p]etitioners who could credibly pin the blame on others,” including their crew, were successful in obtaining remission, and that “the rare cases in which the Secretaries denied remission usually involved facts suggesting complicity or at least a failure to properly supervise on the owner’s part.”¹³⁰ This, of course, is in keeping with the understanding that the guilty property fiction is justified on the grounds that owners may be properly punished either because they were directly involved in the underlying criminality or because they were negligent with respect to their crews’ behavior.¹³¹ All told, the Treasury Secretaries granted relief in ninety-one percent of remission petitions in Arlyck’s dataset, nearly three quarters of which were full remissions of the property at issue.¹³² It is unsurprising, then, that the existence of the remission program gave wary courts comfort in imposing *in rem* forfeitures on potentially innocent owners, knowing that such owners had a meaningful opportunity for relief.¹³³

¹²⁹ For example, while a violation due to necessity—such as landing or unloading in violation of the laws due to inclement weather—was necessary to render property outside the bounds of forfeiture in the first instance, *supra* note 105 and accompanying text, the Secretaries provided relief in cases where adhering to the customs laws was merely difficult rather than impossible. Arlyck, *supra* note 7, at 1489.

¹³⁰ Arlyck, *supra* note 7, at 1492–93; *see also id.* at 1496–97 (noting that in cases of negligence it was likely that partial admission would be awarded).

¹³¹ *Supra* notes 84–97 and accompanying text; *see also* Charles Devens, *Remission of Forfeiture*, 16 Op. Att’y Gen. 473, 473–74 (Mar. 15, 1880) (stating that the “owner and a mortgagee” of a ship forfeit for smuggling in liquor after sunset “can be considered as persons *who incurred* such forfeiture,” and thus able to seek remission from the Treasury Secretary at which point it is “*their* concurrence in the acts or neglects in question that is to be considered and passed upon”).

¹³² Arlyck, *supra* note 7, at 1488.

¹³³ *E.g., Morris*, 23 U.S. (10 Wheat.) at 283–85 (stating that it is in the province of the Treasury Secretary to decide “whether there was wilful negligence, or intentional fraud”); *58,850 Cigars*, 25 F. Cas. at 1074 (“No doubt cases of hardship may possibly occur; but they are provided for by the power to remit the forfeiture, lodged with the secretary of the treasury.”); *United States v. The Margaret Yates*, 26 F. Cas. 1159, 1161–62 (D. Vt. 1849) (No. 15,720) (explaining that when forfeitures result from an “accident or mistake,” claimants can apply to Treasury for a remission); *United States v. Package of Wool*, 27 F. Cas. 405, 406 (E.D. Pa. 1833) (No. 15,986) (noting that “[t]he power to remit the forfeiture, in cases of accident or innocent mistake, without a fraudulent intention, is given to the secretary of the treasury”); *United States v. Package of Lace*, 27 F. Cas. 401, 404–05 (E.D. Pa. 1833) (No. 15,985) (explaining that it is left to the Treasury Secretary “to discriminate between fraudulent and innocent cases of excess”); *The Boat Swallow*, 23 F. Cas. 494, 495 (D. Me. 1822) (No. 13,666) (describing “the revenue and navigation laws” as “of a very unbending character” and explaining that relief is available to address inequities “in another quarter”).

In addition to efforts to protect innocent owners, an opportunity to test the constitutionality of employing the guilty property fiction against potentially guilty owners in customs forfeiture cases arose in the midst of the Civil War,¹³⁴ “a period of great national excitement, when the powers of the government were subjected to a severe strain to protect national existence.” Congress passed a unique piece of legislation that allowed federal prosecutors seeking the forfeiture of property to request that a court issue a notice to the property owner ordering the owner to produce books and papers tending to prove the underlying wrongdoing, so long as the forfeiture action was civil rather than

¹³⁴ During the Civil War era, Congress passed the Confiscation Act of July 17, 1862, 12 Stat. 589, which authorized the forfeiture of estates and property owned by rebels or those who gave comfort to them regardless of location, and the Captured and Abandoned Property Act of March 12, 1863, 12 Stat. 820, which allowed for the seizure of property within the insurrectionist states of those disloyal to the union. *United States v. Winchester*, 99 U.S. 372, 374–75 (1878). Initially the federal courts spoke of these forfeitures in the vein of punishment for treason. *E.g.*, *McVeigh v. United States*, 78 U.S. (11 Wall.) 259, 266–67 (1870) (describing information in a libel stating that “the respondent was ‘a resident of the city of Richmond, within the Confederate lines, and a rebel’ and ‘was guilty of the offences charged, which rendered [the property] liable to forfeiture’”); *Bigelow v. Forrest*, 76 U.S. (9 Wall.) 339, 350–52 (1869) (describing a forfeiture as “punishment”); *United States v. Athens Armory*, 24 F. Cas. 878, 882 (N.D. Ga. 1868) (No. 14,473) (stating that the forfeiture at issue was “a penalty inflicted for his crime”); *Norris v. Doniphan*, 61 Ky. (4 Met.) 385, 390 (1863) (distinguishing forfeitures based on the guilty property fiction from those that “are to be effected, not on account of any use of the property by its owner, but on account of offenses which the owner may commit without reference to his property”). In 1870, however, the Supreme Court declared that these forfeitures arose under the government’s war powers, and therefore those against whom forfeitures were employed were treated as hostile enemies, rather than violators of municipal law. *Miller v. United States*, 78 U.S. (11 Wall.) 268, 304–13 (1870); *see also Winchester*, 99 U.S. at 374–75 (describing the act as “directed against persons committing certain overt acts of treason, and against their property,” as “inseparable from a war measure”); *The Chapman*, 5 F. Cas. 471, 472 (N.D. Cal. 1864) (No. 2602) (describing such forfeitures as incurred because “the crime committed by the persons concerned was treason,” but falling within the government’s “exercise of belligerent rights”). These forfeitures were processed similarly to those in early customs and maritime cases. *See infra* notes 182–185 and accompanying text; *The Confiscation Cases*, 87 U.S. (20 Wall.) 92, 104–07 (1873) (holding that an information need not be as precise as in a criminal case); *but see Athens Armory*, 24 F. Cas. at 880–81 (holding that, unlike in admiralty cases, juries were required). But because they were ultimately deemed to be an exercise of war powers rather than the imposition of punishment, they are outside the scope of this Article. *In rem* forfeitures falling within the Article’s scope were, however, available for other public offenses related to the Civil War. *E.g.*, *United States v. 129 Packages*, 27 F. Cas. 284, 284–85 (E.D. Mo. 1862) (No. 15,941) (regarding smuggling whisky in barrels of cement to sneak into insurrectionist states in violation of an embargo).

criminal.¹³⁵ It had long been understood that customs officers with reason to suspect fraudulent activity could enter onto ships to examine the cargo and, upon probable cause of fraudulent activity, seize potentially offending goods.¹³⁶ It was also understood that customs officers could demand manifests and invoices related to the importation of cargo.¹³⁷ But the statute in question reached even farther, allowing prosecutors to demand access to a suspect's private papers.¹³⁸ This raised the question of whether the Fifth Amendment's privilege against self-incrimination would apply in an *in rem* action where the fictionalized guilty party was the ship or cargo to be forfeit, meaning that no person's privilege against self-incrimination was at issue, an argument that had found some purchase in the lower courts.¹³⁹ The *Boyd* Court rejected that argument, noting: "Goods, as goods, cannot offend, forfeit, unlade, pay duties, or the like, but men whose goods they are."¹⁴⁰ Therefore, the *in rem* forfeiture was "in effect, a proceeding against the owner of the property" and therefore "to require

¹³⁵ *Boyd v. United States*, 116 U.S. 616, 619–21 (1886) (describing the Act of Mar. 3, 1863, 12 Stat. 737 as "the first legislation of the kind that ever appeared on the statute books of the United States"); see also PARRILLO, *supra* note 7, at 244–45 (describing the origins of the Act).

¹³⁶ *E.g.*, 1790 Collections Act, *supra* note 79, § 31, 46–48, 2 Stat. 164–65, 169–70; see also *In re 1,209 Quarter Casks, Etc. of Wine*, 24 F. Cas. at 412 ("From the year 1793 to the present time—a period of seventy-five years—the law has stood, that the collector, and the other officers of the revenue, on mere suspicion, may enter into a vessel and search it, and seize the goods[.]"); see also *United States v. Sears*, 27 F. Cas. 1006, 1010 (C.C.D. Mass. 1812) (No. 16,247) (Story, Circuit Justice) (regarding the "implied authority" of customs officers to search vessels, without which it would not "have been possible, either to execute the known provisions of the law, or to have avoided infringements of the rights of the citizen"); *United States v. Cook*, 25 F. Cas. 607, 608 (D. Mass. 1853) (No. 14,852) ("probable cause must be shown for seizure").

¹³⁷ *E.g.*, 1790 Collections Act, *supra* note 79, §§ 4, 10, 12, 20, 34, 16, 2 Stat. 153, 156–57, 160, 166. As with manifests and invoices, the production of documents under this act was distinguishable from the tax books distillers were mandated to keep as part of the standard regulation of liquor production. *E.g.*, *Dandolet v. Smith*, 85 U.S. (18 Wall.) 642, 647–48 (1873) (explaining that a manufacturer's "books show, or ought to show, everything that he has produced, and in an investigation of this kind, if he shows that his returns or stamps fully equal the amount of his production and sale, the burden will then be on the government to show a deficiency").

¹³⁸ *Boyd*, 116 U.S. at 621–22.

¹³⁹ *E.g.*, *United States v. Mason*, 26 F. Cas. 1189, 1191 (N.D. Ill. 1875) (No. 15,735) (determining that "there is no violation of the principle that no man shall be compelled to bear witness against himself" in relation to a "proceeding against certain property in rem"); *United States v. Distillery No. Twenty-Eight*, 25 F. Cas. 868, 869 (D. Ind. 1875) (No. 14,966) (holding that the privilege against self-incrimination did not apply because the books and papers at issue may only "inculpate the property").

¹⁴⁰ *Boyd*, 116 U.S. at 637 (quoting *Sheppard v. Grosnold* 159, 172 (Vaughn, C.J.)).

such an owner to produce his private books and papers, in order to prove his breach of the laws, and thus to establish the forfeiture of his property, is surely compelling him to furnish evidence against himself.”¹⁴¹

Taken together, there is significant evidence that early American lawmakers and courts believed that the guilty property fiction, as employed in *in rem* forfeiture proceedings related to violations of customs law and maritime regulations, was in fact a fiction. Put simply, it was the owner of the cargo or ship forfeited, not the cargo or ship itself, which was punished by the forfeiture.

B. *Expansion of the Fiction to Other Offenses*

In the latter half of the nineteenth century, the guilty property fiction continued to play an essential role in the punishment of wide-ranging customs and maritime violations at the nation’s ports, waterways, and borders,¹⁴² but also

¹⁴¹ *Id.* at 637. The defendant also claimed that the civil nature of the *in rem* process at issue in *Boyd* was problematic under both the Fourth Amendment’s prohibition on unreasonable searches and seizures and, again, the privilege against self-incrimination. *Id.* at 622–30, 633–34. The Court found the document disgorgement statute unconstitutional on both grounds because protecting owners from being forced to turn over documents in support of forfeiture was consistent with “the very essence of constitutional liberty and security,” and, despite the Fifth Amendment’s textual limitation to “a criminal case,” because the *in rem* forfeiture proceeding, “though technically a civil proceeding, is in substance and effect a criminal one.” *Id.* A decade later the Court did hold that the Sixth Amendment’s textual limitation to “criminal prosecutions” meant that it applied to only those matters which are “*technically* criminal in its nature,” and therefore did not apply to a penal *in rem* proceeding. *United States v. Zucker*, 161 U.S. 475, 481 (1896). For an in-depth discussion of the consistency between the civil nature of *in rem* forfeiture proceedings and the understanding that such forfeitures constitute punishment, see *infra* Part III.A.

¹⁴² *In re Cliquot’s Champagne*, 70 U.S. 114, 140 (1865) (“Whatever is done by an agent, in reference to the business in which he is at the time employed, and within the scope of his authority, is said or done by the principal, and may be proved as well in a criminal as in a civil case, in all respects, as if the principal were the actor or the speaker.”); see also *United States v. 1,150 One-Half Pounds of Celluloid*, 82 F. 627, 629–32, 634–35 (6th Cir. 1897) (holding that a forfeiture may be declared upon a showing of intent by “the owner of such goods or his agent,” but not “by the acts and conduct of a mere stranger and trespasser”); *The Cargo ex Lady Essex*, 39 F. 765, 767–68 (E.D. Mich. 1889) (“It is clear that if goods be stolen from the owner, or if a person has obtained possession of them fraudulently, or without authority, no act of his can forfeit them against the true owner.”); *Boggs v. Commonwealth*, 76 Va. 989, 993–94, 996 (1882) (explaining that “the acts of the master and the crew... bind the owner of the ship, whether he be innocent or guilty; and he impliedly submits to whatever the law demands,” and that the “theory of the law” is based on illegal acts “by the owner himself, or by some other person with whom he has intrusted” the forfeited property); see also *United States v. Seventy-*

expanded to a much wider array of offenses. By the mid-nineteenth century, Congress and the states increasingly turned to a different, and expansive, revenue source, creating a complex web of laws related to the taxation and regulation of liquor and tobacco manufacturing.¹⁴³ The result—described by one court as “a system, rigorous in its features and in many instances arbitrary in its operation”¹⁴⁴—regulated and taxed practically every aspect of liquor and tobacco production and sales.¹⁴⁵

The use of *in rem* forfeitures in those arenas remained consistent with its earliest American counterparts. The overarching rationales for the practice were the same: taxes were essential to the nation’s survival;¹⁴⁶ there was a strong incentive to defraud the revenue to avoid taxation;¹⁴⁷ and frauds related to the

Eight Cases of Books, 27 F. Cas. 1030, 1033 (S.D. Ohio 1869) (No. 16,258) (describing “laws for the collection of revenue, whose provisions are often very complicated and numerous”).

¹⁴³ Laws taxing and regulating liquor manufacturing were long in use in the United States. *Generally, e.g.*, 1791 Whiskey Tax Act, *supra* note 71 (taxing distilled spirits). But by the mid-nineteenth century the reach of those laws had expanded significantly as federal and state lawmakers sought additional sources of revenue. *See* United States v. 1,412 Gallons of Distilled Spirits, 27 F. Cas. 332, 332 (C.C.S.D.N.Y. 1873) (No. 15,960) (“From the passage of the Revenue law of 1862 down, the legislation of congress manifestly looked to distilled spirits and distilleries, and to tobacco and its manufacturers, for a considerable revenue”); United States v. Distillery No. Twenty-Eight, 25 F. Cas. 868, 869 (D. Ind. 1875) (No. 14,966) (“The tax on the production and sale of spirits is a material source of revenue.”).

¹⁴⁴ United States v. Three Tons of Coal, 28 F. Cas. 149, 157 (E.D. Wis. 1875) (No. 16,515).

¹⁴⁵ *Distillery No. Twenty-Eight*, 25 F. Cas. at 869-70 (“The government has ... practically assumed control of the manufacture and sale of spirits.”); *see also* United States v. Mason, 26 F. Cas. 1189, 1190 (N.D. Ill. 1875) (No. 15,735) (remarking that “under the various laws now in force, the government practically runs the distilleries”); United States v. 100 Barrels of Spirits, 27 F. Cas. 303, 308 (E.D. Mo. 1870) (No. 15,948) (describing revenue statutes, “which, to prevent fraud, are complicated, and enacted frequently at different times to meet special exigencies or defects in previous enactments”), *overturned on other grounds* Henderson’s Distilled Spirits, 81 U.S. 44 (1871).

¹⁴⁶ *E.g.*, United States v. Distillery in West Front Street, 25 F. Cas. 866, 867 (D. Del. 1870) (No. 14,965) (describing *in rem* forfeitures imposed for liquor tax violations as “framed to secure to the United States fair payment of taxes imposed for the support of the government, a regulation of civil policy to accomplish a purpose vital to government; for without revenue the government cannot exist”). This rationale continued with respect to customs laws as well. *E.g.*, Lane v. Russell, 14 F. Cas. 1085, 1086 (C.C.D. Mass. 1870) (No. 8053) (Clifford, Circuit Justice) (noting, in an action for assumpsit to recover excess taxes, that “[p]ublic policy, national purposes, and the regulation of operations of government require that the revenue system should be faithfully observed and strictly executed”).

¹⁴⁷ *E.g.*, United States v. Two Barrels of Whisky, 96 F. 479, 480 (4th Cir. 1899) (“The high tax on distilled spirits offers extraordinary temptation to fraud, and the habits of the people of

manufacturing of liquor and tobacco were difficult to detect given the extraordinary array of potential violations,¹⁴⁸ the often-private nature of the manufacturing and distribution processes,¹⁴⁹ and, in some cases, the involvement of unscrupulous officers on the take.¹⁵⁰ Further, like laws employing *in rem* forfeitures as a deterrent to the slave trade,¹⁵¹ many jurists saw the regulation of distilleries as central to protecting public morality.¹⁵² Therefore, while the

certain sections and the geographical configuration of the country afford unusual facilities for its perpetuation.”), *overturned on other grounds* United States v. One Saxon Auto, 257 F. 251, 253–55 (4th Cir. 1919); United States v. Black, 24 F. Cas. 1151, 1153 (C.C.S.D.N.Y. 1874) (No. 14,600) (stating that “congress had apparently looked with no leniency upon the distiller” in light of “[e]xperience [which] had apparently proved that the temptations to fraud were great, and that all conceivable precautions must be taken to prevent it”).

¹⁴⁸ *E.g.*, *Two Barrels of Whisky*, 96 F. at 480 (relating the “successive enactments” of laws attempting to tax and regulate the liquor industry to the likelihood of fraudulent activity).

¹⁴⁹ *E.g.*, United States v. Thirty-Six Barrels of Highwines, 28 F. Cas. 67, 68 (C.C.N.D.N.Y. 1870) (No. 16,468) (regarding a statute treating liquor as remaining in the custody and possession of the manufacturer even if moved to a bonded warehouse because it was “enacted in view of the great difficulty, if not impracticability, of following distilled liquors, after sale or removal, or of identifying them, if found”); United States v. 800 Caddies of Tobacco, 25 F. Cas. 989, 990–91 (S.D. Ohio 1869) (No. 15,036) (acknowledging in a jury charge that the forfeiture of property in cases where an owner may be innocent “may seem to partake of harshness and severity,” but explaining that people often “resor[t] to all kinds of crafty devices to evade the payment of taxes”); *In re Quantity of Distilled Spirits*, 20 F. Cas. 116, 118 (S.D.N.Y. 1869) (No. 11,495) (remarking that a regulation requiring tax stamps placed on liquor barrels to be stripped off immediately after a barrel is emptied, something that would likely occur within the walls of the distillery, meant that “the chances are ninety-nine in a hundred that the government will be defrauded, on every such barrel of spirits”); *see also* United States v. Singer, 82 U.S. (15 Wall.) 111, 118–20 (1872) (describing regulations mandating bookkeeping and inspection as needed “[i]n view of the enormous frauds previously practiced upon the government in rendering accounts,” and that therefore “this system cannot be justly charged with unnecessary harshness”).

¹⁵⁰ *E.g.*, *800 Caddies of Tobacco*, 25 F. Cas. at 991 (“it would seem probable that these [fraudulent] brands were put on by McDonald, a revenue official, acting in collusion with Gaines”); *The Fideliter*, 8 F. Cas. 1177, 1185 (D. Or. 1869) (No. 4756) (noting “that the collector before whom this proceeding took place has attempted, since this suit was commenced, to excuse and palliate his very singular and suspicious conduct in granting this certificate of registry”), *overturned on other grounds* 8 F. Cas. 1176 (C.C.D. Or. 1870) (No. 4755); *Summers v. Clark*, 29 La. Ann. 93, 103 (1877) (“The story told in this record is one of systematized fraud upon the revenue, which could not have been practiced on so large a scale and with such success without the guilty connivance and complicity of some of the officers of the government charged with the collection of the customs at New Orleans.”).

¹⁵¹ *See infra* notes 324, 326–329 and accompanying text.

¹⁵² *E.g.*, *Mugler v. Kansas*, 123 U.S. 623, 662 (1887) (“we cannot shut out of view ... that the public health, the public morals, and the public safety, may be endangered by the general use of intoxicating drinks; nor ... that the idleness, disorder, pauperism, and crime existing in the

infeasibility of prosecuting absent foreign owners may not have been the problem it had been in some cases arising at the nation's seaports,¹⁵³ judicial opinions and statutes began to speak more frequently in the tenor of nuisance, whereby *in rem* forfeitures were used to remove instrumentalities of the liquor trade "if their use [was] deemed pernicious to the best interests of the community."¹⁵⁴ Further, as in the earlier period, protections for truly innocent owners continued to serve as an important backstop. Presidential pardons remained available for those and other offenses,¹⁵⁵ and the Treasury Department's remission

country, are, in some degree at least, traceable to this evil"); *Beer Co. v. Massachusetts*, 97 U.S. 25, 33 (1877) (discussing "the extent and boundaries of the police power" as including "the protection of the lives, health, and property of the citizens, and to the preservation of good order and the public morals"); *Bartemeyer v. Iowa*, 85 U.S. (18 Wall.) 129, 136 (1873) (regarding privileges and immunities: "No one has ever doubted that a legislature may prohibit the vending of articles deemed injurious to the safety of society, provided it does not interfere with vested rights of property."); *State v. Brennan's Liquors*, 25 Conn. 278, 288 (1856) (describing a statute as intended "to aid in the suppression of intemperance, pauperism and crime; evils which impose very heavy and onerous burdens upon the public"); *Fisher v. McGirr*, 67 Mass. (1 Gray) 1, 26 (1854) (describing a liquor statute as intended to "prevent or diminish the evils of intemperance, by the punishment of an indiscriminate sale of spiritous liquors"); see also *Our House No. Two v. State*, 4 Greene 172, 173-74 (Iowa 1853) (describing a statute that allowed forced sale of property to pay fines and costs for maintaining a dram shop as "seek[ing] to abolish a general and growing evil" by "keep[ing] men from the common use of those intoxicating and poisonous beverages which so frequently lead to the ruin of property, character and health, and are proved to be the leading incentives to crime").

¹⁵³ See *supra* notes 84-86 and accompanying text.

¹⁵⁴ *Gray v. Kimball*, 42 Me. 299, 307 (1856) (noting that such property "may be subjects of forfeiture and destruction"); see also *Mugler*, 123 U.S. at 671-72 (describing a statute allowing for a forfeiture for the offense of illegal liquor manufacturing as relating to a "common nuisance"); *State v. Barrels of Liquor*, 47 N.H. 369, 373 (1867) (describing seized liquor by noting that "by the illegal way in which they have been kept, [they] have become a public nuisance"). The imposition of punishment and the abatement of a nuisance are not mutually exclusive. *E.g.*, *Brennan's Liquors*, 25 Conn. at 285, 287 (describing "liquor unlawfully kept for sale" as a "nuisance" and stating "the law imposes the forfeiture of the liquors ... as a punishment for keeping them for an unlawful purpose"); *Fisher*, 67 Mass. (1 Gray) at 27 ("[I]t is competent for the legislature to declare the possession of certain articles of property ... to be unlawful, because they would be injurious, dangerous or noxious; and by due process of law, by proceedings in rem, to provide both for the abatement of the nuisance, and the punishment of the offender").

¹⁵⁵ *E.g.*, Nathan Clifford, *Power of the Executive to Remit Forfeitures*, 4 Op. Att'y Gen. 573, 573-76 (May 13, 1847) (opining that the Treasury Secretary could not remit "a vessel condemned for an infraction of the slave-trade acts," but that remission could be granted through a pardon).

program remained active for cases involving tax fraud.¹⁵⁶ In this setting, yet again, lawmakers turned to the guilty property fiction as an enforcement tool.

In the field of liquor and tobacco production, the guilty property fiction operated as it had in the late eighteenth and early nineteenth centuries. The facilities, manufacturing equipment, or distilled spirits and tobacco were treated as guilty property, the deprivation of which punished the owner.¹⁵⁷ As with customs and maritime forfeitures, property owners were themselves at times directly involved in the illegality.¹⁵⁸ When based on the agency relationship, the owner could neither be held liable for accidents outside the control of their agents—such as a fire in the distillery necessitating the otherwise illegal removal of alcohol¹⁵⁹—nor be subject to forfeiture if the illegal acts were committed by

¹⁵⁶ *E.g.*, *United States v. Two Bay Mules*, 36 F. 84, 85 (W.D. N.C. 1888) (explaining that “owners who have in no way participated in the frauds which caused the forfeiture . . . can apply to the officers of the government invested with the authority to remit forfeitures” stemming from liquor tax violations); *United States v. Curtis*, 16 F. 184, 188 (S.D.N.Y. 1883) (discussing how remission applications were frequently based on claims that the owners had no knowledge of fraudulent activity); *Sinn v. United States*, 22 F. Cas. 226, 227 (S.D.N.Y. 1878) (No. 12,906) (explaining that the lack of fraudulent intent could be argued “upon a timely application to the secretary of the treasury”); *see also* *United States v. Malone*, 26 F. Cas. 1147, 1148–49 (S.D.N.Y. 1876) (No. 15,713) (noting, with respect to a \$100 fine imposed for a liquor law violation, that “if there was no willful negligence nor any intent to defraud the government in the transaction, the secretary has power to remit the forfeiture, and undoubtedly will do so, on being satisfied that there was no wilful negligence or intent to defraud the revenue”). The remission process, however, was not immediate and required advocacy on behalf of the claimant. *See Summers*, 29 La. Ann. at 97–98 (describing a case where a person traveled to Washington, D.C., to “urge [his case] in person” because “[t]he Secretary of the Treasury did not act promptly on this application”).

¹⁵⁷ *E.g.*, *Gray*, 42 Me. at 304–05 (explaining that the forfeiture of liquor could be processed *in rem*); *see also* *Our House No. Two*, 4 Greene at 175–76 (holding that if a violation was committed by a tenant, the property, rather than the landlord, was treated as the defendant because “the landlord has an opportunity to see that the requirements of the law are observed in reference to his property, which he has permitted to be used for unlawful purposes”).

¹⁵⁸ *E.g.*, *Gray*, 42 Me. at 304–05 (regarding the forfeiture of liquor in a case in which the building’s owner was “the keeper of those liquors, for sale in violation of the law”).

¹⁵⁹ *E.g.*, *Clickenbeard v. United States*, 88 U.S. (21 Wall.) 65, 69 (1874) (holding a tax was not applicable for days the “distillery was inactive from an accident”); *cf.* *Felton v. United States*, 96 U.S. 699, 701–02 (1877) (listing potential accidents in a distillery “such as the breaking of the bands of the cisterns, and leakage from unknown defects, the danger of an approaching fire, [a] fire [at the distillery], and many other causes” which “may not only render it necessary, but a duty, on the part of the distiller, to draw off the liquor in the speediest way”).

someone outside of the agency relationship.¹⁶⁰ But they could be punished for the actions of those with whom they entrusted their property.¹⁶¹

Take, for example, the case of *Dobbins's Distillery v. United States*, decided by the Supreme Court in 1877.¹⁶² Federal law required liquor manufacturers to keep books related to their production for use in establishing taxes due.¹⁶³ The government alleged a manufacturer included false entries designed to defraud the revenue, seized the spirits, equipment, and the distillery itself, and initiated forfeiture proceedings.¹⁶⁴ The owner of the distillery intervened, claiming that he had no knowledge of his lessee's fraudulent activity.¹⁶⁵ In assessing whether such a claim could protect the owner from forfeiture, the *Dobbins's Distillery* Court reached back to the use of the guilty property fiction in early customs and maritime cases, noting the "judicial history" within which "it has always been held that the acts of the master and crew bind the interest of the owner of the ship."¹⁶⁶ In the same way, "[n]othing [could] be plainer in legal decision

¹⁶⁰ *E.g.*, *Two Barrels of Whisky*, 96 F. at 483–84 (affirming the rejection of an *in rem* forfeiture where the wrongdoer obtained the property without the "consent and knowledge" of the owner, and thus the forfeiture "would be pressing the implication of negligence further than justice demands"), *overturned on other grounds One Saxon Auto*, 257 F. at 252–55 (noting that the guilty property fiction creates liability for an owner for the actions of those "to whom he has relinquished his possession," but disagreeing as to the *Two Barrels of Whisky* court's application of that rule to a specific statute); *United States v. Thirty-Three Barrels of Spirits*, 28 F. Cas. 73, 73 (D. Mass. 1868) (No. 16,470) (interpreting a statute so as not to allow the forfeiture of the property of building occupants unrelated to the distillery because "[i]t is impossible to believe that any such sweeping condemnation is intended to be passed, founded upon mere proximity in place"); *cf.* *Jones v. Mason*, 12 Ark. 687, 690–91 (1852) (explaining that a gun held by an enslaved person without permission was forfeitable "as a punishment annexed by law to some illegal or culpably negligent act of the owner," and therefore the owner must be given an opportunity to show the gun was taken "by private theft or open robbery, without any fault or negligence on the part of the owner").

¹⁶¹ *E.g.*, *Gregory v. United States*, 10 F. Cas. 1195, 1197 (C.C.S.D.N.Y. 1879) (No. 5803) (holding that an owner's interest in a distillery premises was subject to forfeiture because "knowing that the place was used for a distillery and permitting it to [be] so used, he is made responsible for its use in a fraudulent manner"); *Distillery in West Front St.*, 25 F. Cas. at 867 (holding that a claimant could be subject to the forfeiture of his property because "he knowingly permitted the distiller who carried on this business to use this distillery" because "[a]s the use was by his permission, he must abide the consequences").

¹⁶² *Dobbins's Distillery v. United States*, 96 U.S. 395 (1877).

¹⁶³ *Id.* at 396.

¹⁶⁴ *Id.* at 396–97.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 401.

than the proposition that the offence [at issue] is attached primarily to the distillery, and the real and personal property used in connection with the same.”¹⁶⁷ And just as in the early cases where the owner was treated as complicit in the mariners’ wrongdoing because “in sending the ship to sea under their charge, he impliedly submits to” their illegal behavior,¹⁶⁸ so too here the distillery owner “leased the property to the distiller, and suffered it to be occupied and used by the lessee as a distillery.”¹⁶⁹ Therefore, while the *Bajakajian* Court cited *Dobbins’s Distillery* in support of the claim that the use of the guilty property fiction was indicative of Congressional belief in an owner’s innocence,¹⁷⁰ according to the *Dobbins’s Distillery* Court, the distiller’s negligence in allowing his property to be used illegally justified the *in rem* forfeiture.¹⁷¹

In sum, as was the case in the country’s earliest years, from the late eighteenth century through the close of the nineteenth century, lawmakers consistently employed, and courts consistently interpreted, the guilty property fiction as a mechanism for imposing punishment against the owners of property for their own offenses and those committed by their agents.

* * *

As the foregoing documents, the guilty property fiction employed in prosecuting violations of early American customs and maritime laws, as well as other offenses, was understood to be just that, a fiction. That courts relied on that fiction repeatedly and explicitly by describing *in rem* forfeitures as “punishment” solidifies that conclusion. In addition to *Peisch v. Ware*, the Supreme Court did so throughout the nineteenth century.¹⁷² The lower courts joined suit as cases

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*; see *supra* notes 94–97 and accompanying text.

¹⁶⁹ *Dobbins’s Distillery*, 96 U.S. at 401.

¹⁷⁰ *Bajakajian*, 524 U.S. at 329–31. The *Bajakajian* Court also cited a case decided in 1930, in which the Court relied on the guilty property fiction to hold that the prior prosecution of a person for violating liquor tax laws did not bar a later *in rem* forfeiture based on an allegation that the property had served as an instrumentality of that fraud. *Id.* at 330 (citing *In re Various Items of Personal Property*, 282 U.S. 577, 578–79, 581 (1931)). In its cursory analysis, beyond a brief discussion of *Dobbins’s Distillery*, the *In re Various Items* Court failed to consider the historical understanding that *in rem* forfeitures punished owners directly involved in public offenses as well as the property’s owners for the acts of their agents. See 282 U.S. at 581.

¹⁷¹ *Dobbins’s Distillery*, 96 U.S. at 403–04.

¹⁷² *E.g.*, *Stone v. United States*, 167 U.S. 178, 187–88 (1897) (describing *in rem* forfeitures as “punishment”); *Coffey v. United States*, 116 U.S. 436, 442–43 (1886) (describing an *in rem* forfeiture as a “statutory punishment”); *Caldwell v. United States*, 49 U.S. (8 How.) 366, 379–80

related to *in rem* forfeitures were litigated in courts after the founding,¹⁷³ in the early half of the nineteenth century,¹⁷⁴ as the country emerged from the Civil

(1850) (describing *in rem* forfeitures as “punishment of the fraud”); *United States v. Carr*, 49 U.S. (8 How.) 1, 8–9 (1850) (describing the *in rem* forfeiture of goods as an “aggravated punishment”); *The Brig Burdett*, 34 U.S. (9 Pet.) 682, 690–91 (1835) (describing a prosecution for the *in rem* forfeiture of a vessel as “highly penal” and describing the loss of property through such a forfeiture as being “punished for a violation of the law”); *Schooner Paulina’s Cargo v. United States*, 11 U.S. (7 Cranch) 52, 60–61 (1812) (regarding the *in rem* forfeiture of a vessel and cargo and describing violations of an embargo act as “criminal and [which] subject the person to such punishment as the law inflicts”); *United States v. Riddle*, 9 U.S. (5 Cranch) 311, 312 (1809) (interpreting a statute imposing a forfeiture for evading duties through fraudulent invoices as “not intend[ing] to punish the *intention*, but the *attempt* to defraud the revenue”); *see also* *Henderson’s Distilled Spirits*, 81 U.S. (14 Wall.) 44, 56–57, 65–69 (1871) (Field, J., dissenting) (describing an *in rem* forfeiture as “punishment”); *United States v. Sixty-Seven Packages of Dry Goods*, 58 U.S. (17 How.) 85, 94 (1854) (Campbell, J., dissenting) (“[f]alse swearing was punished with the forfeiture of the import”).

¹⁷³ *E.g.*, *Parker v. United States*, 18 F. Cas. 1179, 1179–80 (C.C.D. Pa. 1809) (No. 10,751) (Washington, Circuit Justice) (describing both the *in rem* forfeiture of a ship and the alternative fine of double its value as “punishment”); *United States v. The Anthony Mangin*, 24 F. Cas. 833, 837 (D. Pa. 1802) (No. 14,461) (describing *in rem* forfeiture as an alternative “penalty or punishment”).

¹⁷⁴ *E.g.*, *United States v. 58,850 Cigars*, 25 F. Cas. 1072, 1074 (C.C.D. Mass. 1857) (No. 15,092) (interpreting a statute allowing for the *in rem* forfeiture of concealed goods as including concealment by the owner, consignee, or the master, because if limited to the owner or consignee it would make it too likely that the wrongdoer would “escape all punishment”); *The Reindeer*, 27 F. Cas. 758, 760 (C.C.D.R.I. 1848) (No. 16,145) (Woodbury, Circuit Justice) (rejecting an interpretation of a licensing statute as imposing an *in rem* forfeiture against a fisher licensed to catch cod who inadvertently caught mackerel because “[it] can hardly be supposed, that so severe a penalty could be designed to punish a departure from a mere custom-house regulation”); *United States v. Twenty-Four Coils of Cordage*, 28 F. Cas. 276, 279 (C.C.E.D. Pa. 1832) (No. 16,566) (Baldwin, Circuit Justice) (describing a statute as “creat[ing] the forfeiture, as a punishment for the omission of the duties previously prescribed”); 651 Chests of Tea *v. United States*, 22 F. Cas. 253, 257, 259 (C.C.S.D.N.Y. 1826) (No. 12,916) (Thompson, Circuit Justice) (describing a statute imposing an *in rem* forfeiture for unlading without permit as “highly penal” and relying on language from *Peisch v. Ware*, 8 U.S. (4 Cranch) 347, 364 (1808), under the name *United States v. Cargo of The Favourite*, in which the Supreme Court described *in rem* forfeitures as “punish[ing] the owner with a forfeiture of his goods”); *The Caroline*, 5 F. Cas. 90, 91–92 & n.2 (C.C.D. Va. 1819) (No. 2418) (Marshall, Circuit Justice) (describing a statute forfeiting a vessel for engaging in the slave trade as “of a highly penal character” and stating that in interpreting a statute a court would err if it held that *in rem* forfeiture was available because “[t]o the legislature it belongs, to define punishment as well as crime”); *The Waterloo*, 29 F. Cas. 399, 401 (S.D.N.Y. 1830) (No. 17,257) (describing an *in rem* forfeiture as “punishment”); *State v. Brennan’s Liquors*, 25 Conn. 278, 287 (1856) (rejecting an argument that an *in rem* forfeiture of liquors was an unlawful taking because it was “not for the benefit of the town,

War,¹⁷⁵ in the years immediately following the ratification of the Fourteenth Amendment in 1868,¹⁷⁶ and throughout the nineteenth century.¹⁷⁷ The widespread understanding of *in rem* forfeiture as punishment was also evident in the arguments made by attorneys representing the government in early *in rem*

but as a punishment for keeping them for an unlawful purpose"); *Fisher v. McGirr*, 67 Mass. (1 Gray) 1, 28, 35-37 (1854) (repeatedly describing *in rem* forfeiture as "punishing" the owner); *Jones v. Mason*, 12 Ark. 687, 690-91 (1852) (describing the *in rem* forfeiture of a gun possessed by an enslaved person without permission as "punishment"); *Commonwealth v. King*, 1 Whart. 448, 457 (Pa. 1836) (explaining the guilty property fiction's relationship to "punishment"); *Gaines v. Buford*, 31 Ky. (1 Dana) 481, 509 (1833) (explaining that regardless of whether the proceeding is *in personam* or *in rem*, "[w]hen the state rightfully acquires the property of a citizen by forfeiture, it is, as the punishment annexed, by law, to some illegal act, or negligence of its owner"); see also *infra* notes 283, 285 and accompanying text.

¹⁷⁵ E.g., *Dorsheimer v. United States*, 2 Ct. Cl. 103, 117-18 (1866) (differentiating between taxes due and the "punishment" of the *in rem* forfeiture of a distillery and distilled spirits), *aff'd* 74 U.S. 166 (1868); *Commonwealth v. Certain Intoxicating Liquors*, 95 Mass. (13 Allen) 561, 562 (1866) ("Although the process is primarily a process *in rem*, to procure the condemnation and forfeiture of intoxicating liquors illegally kept for sale, it involves in it a criminal charge which must be specifically set forth, and of which the forfeiture is the punishment.").

¹⁷⁶ E.g., *250 Barrels of Molasses*, 24 F. Cas. 437, 440 (C.C.D.S.C. 1869) (No. 14,293) ("in case the owner, agent, or consignee should act dishonestly or unfairly, he was properly punished by losing the whole of the goods he thus entered by his false invoice or any false device"); *United States v. Three Tons of Coal*, 28 F. Cas. 149, 153 (E.D. Wis. 1875) (No. 16,515) (describing an *in rem* forfeiture as "a punishment which 'falls on the thing as respects ownership'"); *In re 1,209 Quarter Casks, Etc. of Wine*, 24 F. Cas. 398, 411-12 (S.D.N.Y. 1868) (No. 14,279) (quoting with approval a lower court's rejection of a limitation on evidence of fraud for cases that had passed through the custom house because it "would be to offer a premium for successful fraud, and punishment only to the unskilful"); *Commonwealth v. Certain Intoxicating Liquors*, 107 Mass. 216, 218 (1871) (describing an *in rem* forfeiture as "punishment").

¹⁷⁷ *United States v. Two Barrels of Whisky*, 96 F. 479, 481 (4th Cir. 1899) ("the forfeiture of a man's property is one of the severest punishments that the law can inflict"), *overturned on other grounds* *United States v. One Saxon Auto*, 257 F. 251, 252-55 (4th Cir. 1919); *United States v. 1,150 One-Half Pounds of Celluloid*, 82 F. 627, 629-32, 634-35 (6th Cir. 1897) (stating that an owner "may be punished by a forfeiture of his goods in addition to punishment by fine"); *Thatcher v. United States*, 23 F. Cas. 875, 877 (C.C.S.D.N.Y. 1878) (No. 13,851) (Waite, Circuit Justice) (rejecting the contention that the forfeiture of distilled spirits was improper when based only on regulations promulgated by the Commissioner of the Internal revenue because "[t]he punishment is of the offence created by the statute").

forfeiture actions¹⁷⁸ and opinions of attorneys general,¹⁷⁹ as well as in the charges given by federal judges to juries.¹⁸⁰

In sum, *Bajakajian's* interpretation of the guilty property fiction is inconsistent with the early American practices in which *in rem* forfeitures were treated and described as punishment. The way in which the civil nature of *in rem* proceedings and the potential remedial use of forfeiture revenues also drove the *Bajakajian* Court's misunderstanding of early *in rem* forfeiture practices, is addressed next.

¹⁷⁸ *E.g.*, *United States v. 1,960 Bags of Coffee*, 12 U.S. (8 Cranch) 398, 400 (1814) (argument of Attorney General) (arguing that an *in rem* forfeiture relates back to the time of the offense "in all cases where the punishment for the offence is the forfeiture of the thing by which the offence was committed, or where the punishment cannot be inflicted on the person"); *Priestman v. United States*, 4 U.S. (4 Dall.) 28, 33 (1800) (argument for the United States) (arguing that a forfeiture is "punishment [that] is inflicted for offences committed by the master, or owner, of the vessel"); *United States v. Twenty-Five Cases of Cloth*, 28 F. Cas. 257, 258 (E.D. Pa. 1840) (No. 16,563) (argument of the *qui tam* prosecutor) (arguing against an interpretation of a statute to limit forfeiture for cases of attempted fraud because then "[a]n attempt to defraud would be punishable, but if the attempt should be successful, the perpetrator and his goods would go free"); *United States v. Twenty-Eight Packages of Pins*, 28 F. Cas. 244, 247 (E.D. Pa. 1833) (No. 16,561) (argument of United States District Attorney) (arguing that "the revenue laws have been founded, from the beginning of the government," on the principle that "forfeiture accrues" in response to fraud, and that such laws "punished [an invoice's] falsification").

¹⁷⁹ *E.g.*, Hoar, *supra* note 120, at 239–41 (stating that revenue officers had a duty "to see that the internal-revenue laws are faithfully administered, and offenders against them punished" in discussing the imposition of a "fine, penalty, or forfeiture"); Nelson, *supra* note 65, at 242–46 (including *in rem* forfeitures of vessels employed in the slave trade with capital punishment and fines when discussing how "all such citizens or persons, and the vessels employed by them, within the purview of the acts, are obnoxious to the penalties and forfeitures thereby denounced"); John MacPherson Berrien, *Pardons and Remissions of Forfeitures*, 2 Op. Att'y Gen. 329, 330 (Mar. 17, 1830) (stating that "the pardoning power is considered to be coextensive with the power to punish," and that it therefore applies to "[t]he remission of fines, penalties, and forfeitures, under the revenue laws"); *see also* Henry Stanberry, *President's Pardon*, 12 Op. Att'y Gen. 81, 81 (Nov. 2, 1866) (stating that the pardon power "is co-extensive with the punishing power, and is applicable to the remission of fines, penalties, and forfeitures which are imposed by law as punishment for offences").

¹⁸⁰ *E.g.*, *United States v. 800 Caddies of Tobacco*, 25 F. Cas. 989, 990 (S.D. Ohio 1869) (No. 15,036) (charging the jury: "I can not entertain a doubt that the article of tobacco, by a fair construction of section 9, is included in its terms, as forfeitable for any fraud contemplated and punished by it."); *United States v. Twenty-Five Cases of Cloth*, 28 F. Cas. 257, 274 (E.D. Pa. 1840) (No. 16,563) (charging the jury, concluding: "If, as you have heard, there has been a combination anywhere to defraud your revenue, and depress the honest business and industry of your fellow-citizens, you will be happy to be instrumental in punishing the offenders and breaking it up.").

III. CIVIL AND REMEDIAL PUNISHMENT

In addition to its misapprehension of the guilty property fiction, the *Bajakajian* Court appears to have believed that early *in rem* customs forfeitures would have historically been understood as nonpunitive because the proceedings were civil matters resulting in remediation of government losses, rather than criminal matters resulting in punishment of an offender.¹⁸¹ It is true that early *in rem* forfeitures were adjudicated without the full panoply of criminal procedural protections.¹⁸² The illegal acts rendering property forfeitable were, in many cases, determined at a standard less than beyond a reasonable doubt,¹⁸³

¹⁸¹ *United States v. Bajakajian*, 524 U.S. 321, 333–34, 343, n.18 (1998). The Court did, however, note that some modern civil forfeitures were more akin to criminal forfeitures. *Id.* at 331, n.6.

¹⁸² See Arlyck, *supra* note 7, at 1468–73; Nelson, *supra* note 7, at 2465–67, 2482–86, 2496–501; see also Martinez, *supra* note 58, at 1101–1111 (arguing that slave-trade courts were civil in nature because violations were punishable via *in rem* forfeiture). For example, modern administrative forfeitures—in which a forfeiture is processed by prosecutors internally without judicial review—may be out of step with historical practices. See *Miller v. United States*, 78 U.S. (11 Wall.) 268, 299–304 (1870) (requiring the holding of an evidentiary hearing even when a property owner defaulted to “at least examine the allegations of the libel to see if they are sufficient in law”) (quoting *United States v. The Schooner Lion*, 26 F. Cas. 976, 976 (D. Mass. 1858) (No. 15,067)). A full examination of the constitutionality of modern administrative forfeitures is beyond the scope of this Article.

¹⁸³ The federal government initially placed the burden of proof on the owner. 1790 Collections Act, *supra* note 79, § 51, 1 Stat. 170 (“the onus probandi shall be upon such claimant”). Congress amended the process to place the initial burden on the government in 1795. Act of Feb. 26, 1795, ch. 31, § 2, 2 Stat. 420, 420–21. As to the standard of proof, the government was typically required to prove probable cause supported the seizure, at which point the burden shifted to the property owner to show an offense had not occurred. *E.g.*, *Clifton, Claimant of Cases of Cloth v. United States*, 45 U.S. (4 How.) 242, 244 (1846) (holding that the government must establish a violation by probable cause, at which point the burden shifted to the claimant); *Locke v. United States*, 11 U.S. (7 Cranch) 339, 348 (1813) (interpreting a statute to shift the burden to the claimant upon a showing of probable cause). In some cases, however, courts held the government to proof beyond a reasonable doubt. *E.g.*, *The Brig Burdett*, 34 U.S. (9 Pet.) 682, 690–91 (1835) (describing a prosecution for forfeiture as “a highly penal one” and that “the penalty should not be inflicted, unless the infractions of the law shall be established beyond reasonable doubt”); *Commonwealth v. Certain Intoxicating Liquors*, 115 Mass. 142, 145 (1874) (holding that a beyond a reasonable doubt standard must be applied to the question of intent prior to forfeiture); see also *Fisher v. McGirr*, 67 Mass. (1 Gray) 1, 35–36 (1854) (stating that in an *in rem* forfeiture case, the property owner is entitled to “the benefit of the legal presumption of innocence”).

juries were available only in some cases,¹⁸⁴ charging documents were required to provide sufficient notice but could contain less detail than a criminal indictment,¹⁸⁵ and so on. Likewise, there is no doubt that the revenues generated from early *in rem* customs forfeitures held remedial qualities as they were used, at least in part, to recover tax arrears and compensate those who investigated, reported, and prosecuted customs and maritime offenses.¹⁸⁶ But, as detailed below, the

¹⁸⁴ Jury trials typically were unavailable in cases of admiralty. *United States v. La Vengeance*, 3 U.S. (3 Dall.) 297, 301 (1796). Where a seizure occurred on land, however, the right to a jury trial was generally recognized. *E.g. generally*, *United States v. Fourteen Packages of Pins*, 25 F. Cas. 1182 (E.D. Pa. 1832) (No. 15,151). Congress afforded a statutory right to a jury in some cases as well. *E.g.*, 1792 Vessel Registration Act, *supra* note 80, § 16, 2 Stat. 295. For examples of cases involving jury trials see *Lilienthal's Tobacco*, 97 U.S. 237, 261–62 (1877) (regarding a jury trial in a case involving the forfeiture of property as an instrumentality of tax fraud); *United States v. Sixteen Packages*, 27 F. Cas. 1111, 1113–14 (C.C.D. Mass. 1819) (No. 16,303) (Story, Circuit Justice) (regarding the jury deciding whether there was sufficient evidence of fraud to sustain a forfeiture). Andrea Roth has marshalled a variety of historical sources for the purpose of interpreting the phrase “all crimes other than impeachment shall be by jury” under Article III and the phrase “all criminal prosecutions” with respect to the Sixth Amendment’s jury trial right, concluding that those phrases would encompass misdemeanor offenses adjudicated through both criminal and summary processes. Andrea Roth, *The Lost Right to Jury Trial in “All” Criminal Prosecutions*, 72 DUKE L.J. 599 (2022). Her determination that the terms “crimes” and “criminal” were used to refer to minor offenses, including misdemeanors, is consistent with the findings discussed herein that those terms referred to offenses against the public. There is some tension, however, given the lack of jury trials in admiralty court proceedings. Further research is necessary to determine the extent to which admiralty courts were an outlier in comparison to non-felony adjudications in other contexts given their origins in civil law. *Cf.* 4 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *268–69 (12th ed. 1793–1795).

¹⁸⁵ *E.g.*, *The Brig Neuria*, 60 U.S. (19 How.) 92, 94 (1856) (explaining that “[a]n information for forfeiture of a vessel need not be more technical in its language, or specific in its description of the offence, than an indictment,” needing only to “describe the offence in the very words of the statute”); *The Samuel*, 14 U.S. (1 Wheat.) 9, 14–15 (1816) (“It is deemed sufficient that the offence be described in the words of the law, and be so described that if the allegation be true the case must be within the statute.”); *United States v. 396 Barrels of Distilled Spirits*, 28 F. Cas. 121, 122 (E.D. Mo. 1866) (No. 16,503) (explaining that in a libel for forfeiture “the allegations must be sufficiently specific to enable the claimant to traverse them, and the court to see that, if true, a violation of the statute exists”). Despite the relaxation of pleading standards, courts were willing to strike down charging documents that provided insufficient notice or failed to allege the necessary elements of an offense. *E.g.*, *The Brig Caroline v. United States*, 11 U.S. (7 Cranch) 496, 500 (1813) (holding that a libel was “too imperfectly drawn”); *The Hoppet*, 11 U.S. (7 Cranch) 389, 392–94 (1813) (holding that a general reference to the statute in an information was insufficient).

¹⁸⁶ See *supra* notes 119–121 and accompanying text.

strict lines employed in *Bajakajian* separating the criminal from the civil and the punitive from the remedial constitute an anachronistic misstep.

A. *The Use of Civil Processes to Impose Punishment*

Three years before *Bajakajian*, Justice Thomas criticized reliance on the writings of Justice Joseph Story in interpreting a constitutional question because “he was not a member of the Founding generation.”¹⁸⁷ But in authoring the majority opinion in *Bajakajian*, Justice Thomas drew the determination that the civil nature of *in rem* forfeiture proceedings rendered such forfeitures nonpunitive in large part from *The Palmyra*, an 1827 case authored by Justice Story.¹⁸⁸ The crew of that Spanish brig was alleged to have engaged in a piratical attempt to capture American vessels, and was itself ultimately captured in a deadly fire-fight and brought to South Carolina to be condemned.¹⁸⁹ As with other cases regarding the scope of admiralty jurisdiction wending their way through the courts in the early 1800s,¹⁹⁰ *The Palmyra* Court was presented with a set of

¹⁸⁷ U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 856 (1995) (Thomas, J., dissenting) (regarding the majority opinion’s reliance on the third edition of Justice Story’s *Commentaries on the Constitution* in holding that states could not expand the list of qualifications for congressional office beyond those listed in Article I).

¹⁸⁸ United States v. Bajakajian, 524 U.S. 321, 330-31 (1998) (quoting *The Palmyra*, 25 U.S. (12 Wheat.) 1, 14-15 (1827)).

¹⁸⁹ *The Palmyra*, 25 U.S. (12 Wheat.) at 8, 13-14.

¹⁹⁰ E.g., *The Margaret*, 22 U.S. (9 Wheat.) 421, 427-29 (1824) (examining the 1789 Judiciary Act to ascertain the proper tribunal to litigate cases involving penalties and forfeitures); *Slocum v. Mayberry*, 15 U.S. (2 Wheat.) 1, 9-10 (1817) (holding that the Judiciary Act gave “federal courts exclusive cognizance of all seizures made on land or water” for the violation of federal laws); *The Brig Ann*, 13 U.S. (9 Cranch) 289, 290-91 (1815) (explaining that “the jurisdiction as to revenue forfeitures, was intended to be given to the Court of the district, not where the offence was committed, but where the seizure was made”); *Keene v. United States*, 9 U.S. (5 Cranch) 304, 309-11 (1809) (regarding which district court had jurisdiction); *United States v. The Schooner Betsey & Charlotte*, 8 U.S. (4 Cranch) 443, 452 (1808) (“It is the place of seizure, and not the place of committing the offence, which decides the jurisdiction.”); *United States v. The Schooner Sally of Norfolk*, 6 U.S. (2 Cranch) 406, 406 (1805) (holding that the *in rem* forfeitures of vessels for engaging in the slave trade were in the admiralty courts’ jurisdiction); *Ketland v. The Cassius*, 2 U.S. (2 Dall.) 365, 367-68 (1796) (holding that the district court had jurisdiction over *in rem* forfeiture proceedings); *The Little Ann*, 15 F. Cas. 622, 624 (C.C.D.N.Y. 1810) (No. 8397) (Livingston, Circuit Justice) (holding that the court of the district in which seizure occurred had jurisdiction “unless they take place on the high seas, which being within no particular district, may generally without much inconvenience be acted on in one court as well as in another”). These jurisdictional questions also arose in cases involving *in personam* criminal punishments. E.g., *United States v. Holmes*, 18 U.S. (5 Wheat.) 412, 416-17

questions regarding whether an admiralty court had jurisdiction to condemn the brig, even though no person involved in the piracy had been criminally convicted.¹⁹¹

In *The Palmyra*, Justice Story set the stage for his analysis by describing the guilty property fiction, explaining: “The thing is here primarily considered as the offender, or rather the offence is attached primarily to the thing.”¹⁹² He also described *in rem* forfeitures as distinct from common law forfeitures that served as a component of a criminal sentence following a felony conviction, thereby necessitating a conviction prior to imposition of the punishment.¹⁹³ Such ordering—conviction before forfeiture—was unnecessary in the *in rem* forfeiture context, because “the proceeding *in rem* stands independent of, and wholly unaffected by any criminal proceeding *in personam*.”¹⁹⁴

Put simply, Justice Story merely stated that *in rem* forfeitures were unrelated to criminal proceedings. The *Bajakajian* Court’s treatment of that statement as proof that such forfeitures, as civil actions, were nonpunitive is on shaky ground. As detailed below, that interpretation is belied by documents suggesting that punishment was imposed following the prosecution of criminal offenses through formal criminal procedures and through “penal” offenses for which civil processes could be employed; by Justice Story’s own writing; and by placing a treatise relied upon by the *Bajakajian* Court in historical context.

1. Public Offenses Versus Private Disputes

In contrast to the criminal/civil framing employed by *Bajakajian*, early American legal texts focused on the distinction between public offenses for which punishment is imposed and private disputes in which purely private injuries are remedied. That distinction, and in turn the ability to adjudicate certain

(1820) (holding that the federal courts could hear cases involving “murder or robbery committed on the high seas”).

¹⁹¹ *The Palmyra*, 25 U.S. (12 Wheat.) at 12–14. The Court also held that jurisdiction was proper under the statute so long as the initial proceeding was brought by the United States, even if the captors had a claim for damages. *Id.* at 11–12.

¹⁹² *Id.* at 14.

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 15.

public offenses civilly, was borrowed from the English common law.¹⁹⁵ As Blackstone explained, public wrongs, including customs law violations,¹⁹⁶ “are a breach and violation of public rights and duties, which affect the whole community, considered as a community; and are distinguished by the harsher appellation of *crimes* and *misdemeanors*.”¹⁹⁷ Punishment for some non-capital public offenses, in turn, could be imposed following a prosecution undertaken without full criminal process.¹⁹⁸ In contrast, private disputes involved “an infringement or privation of the civil rights belonging to the individuals, considered as individuals; and are thereupon frequently termed *civil injuries*.”¹⁹⁹

Dating back to the English common law, the substance of the underlying harm as against the public, rather than the criminal or civil nature of the proceeding, dictated whether a pecuniary sanction constituted punishment. While a conceptual distinction between public offenses that harm the community as a whole and private disputes over purely private injuries is relatively straightforward, there is terminological complexity that must be accounted for when analyzing early American legal texts.²⁰⁰ It is evident from influential legal treatises and legal and general dictionaries,²⁰¹ as well as caselaw, that the terms “crime” or “criminal” and “offence” were generally understood to refer to laws

¹⁹⁵ See *Huntington v. Attrill*, 146 U.S. 657, 668 (1892) (citing Blackstone for the proposition that “[t]he test whether a law is penal, in the strict and primary sense, is whether the wrong sought to be addressed is a wrong to the public or a wrong to the individual”).

¹⁹⁶ 4 BLACKSTONE, *supra* note 184, at *154–55 (listing “smuggling, or the offence of importing goods without paying the duties imposed thereon by the laws of customs and excise” as a public wrong).

¹⁹⁷ 3 BLACKSTONE, *supra* note 184, at *2; see also 4 BLACKSTONE, *supra* note 184, at *5 (“public wrongs, or crimes and misdemeanors, are a breach and violation of the public rights and duties, due to the whole community, considered as a community, in its social aggregate capacity”); WILLIAM EDEN AUCKLAND, *PRINCIPALS OF PENAL LAW* 2 (3d ed. 1744–1814) (“and the promulgation of punishments is extended to All, by the common content of All, for the benefit of All”).

¹⁹⁸ 4 BLACKSTONE, *supra* note 184, at *272, *280–83 (explaining that public offenses could be adjudicated in summary proceedings, including for revenue fraud); 3 BLACKSTONE, *supra* note 184, at 2 (regarding the processing of lesser public offenses by justices of the peace, rather than through full criminal process).

¹⁹⁹ 3 BLACKSTONE, *supra* note 184, at *2.

²⁰⁰ See *United States v. Mann*, 26 F. Cas. 1153, 1154–55 (C.C.D.N.H. 1812) (No. 15,718) (Story, Circuit Justice) (remarking on the difficult of parsing terminology relating to public offenses).

²⁰¹ For a discussion of the benefits and limitations of using dictionaries to discern historical meaning, see Gregory E. Maggs, *A Concise Guide to Using Dictionaries from the Founding Era to Determine the Original Meaning of the Constitution*, 82 GEO. WASH. L. REV. 358 (2014).

imposing punishment—including fines and forfeitures²⁰²—for wrongdoing that injured the public as a community.²⁰³ In addition, the term “penal” was closely associated with the concept of criminality and the imposition of punishment for public offenses.²⁰⁴ It was at times used as a synonym for “criminal” and in

²⁰² *E.g.*, 1 ALEXANDER BURRILL, A NEW LAW DICTIONARY AND GLOSSARY: TERMS OF THE COMMON AND CIVIL LAW 491, 506–07 (New York, John S. Voorhies 1850) (defining “fine” as “a sum of money paid by an offender in satisfaction for his offence, and as a punishment” and “to forfeit” as “[t]o lose what belongs to one by some fault, misconduct or crime,” and further noting that “[p]enal statutes frequently provide that a party found guilty of violating their provisions shall *forfeit* a sum of money, or an article of property”); 2 BOUVIER, *supra* note 119, at 311 (1839) (defining “punishment” as including “fines; forfeitures”). For a discussion of the way the terms “fine” and “forfeiture” were used interchangeably in colonial and early American statutes, see Colgan, *Reviving*, *supra* note 20, at 302–03. Some sources distinguish statutes that use only the term “fine” as relating to offenses processed criminally and phrases employing the word “fine” along with another term such as “penalty” or “forfeiture” as relating to offenses processed in civil or summary proceedings. *E.g.*, 1 BENJ. VAUGHAN ABBOTT, DICTIONARY OF TERMS AND PHRASES USED IN AMERICAN OR ENGLISH JURISPRUDENCE 501 (Boston, Little, Brown, & Co. 1879) (defining “fine”: “It is not confined to a pecuniary punishment of an offence, inflicted by a court in the exercise of criminal jurisdiction. It has other meanings; and may include a forfeiture, or a penalty recoverable by civil action.”); *id.* (explaining that “fine” “is commonly employed to designate, not a penalty or forfeiture for violation of a penal statute, but a pecuniary punishment for a breach of the criminal law,” and positing that “[w]hen the proceeds arising from civil suits for penalties are intended to be embraced, the phrases ‘fines and penalties,’ or ‘fines and forfeitures,’ instead of the word ‘fines’ alone, should be used”); *see also supra* note 79.

²⁰³ *E.g.*, 2 ABBOTT, *supra* note 202, at 199–200 (defining “offence” as “[a] breach of the laws established for the protection of the public, as distinguished from an infringement of mere private rights” and noting that the terms crime and offence are “equivalent and interchangeable”); 1 ABBOTT, *supra* note 202, at 322–23 (defining “crime”: “An act or omission forbidden by law, under threat of punishment; an offence; a wrong considered in its aspect of a violation of the rights of the community”); 2 BURRILL, *supra* note 202, at 766 (defining “offence” as “an act committed against a law, or omitted where the law requires it, and punishable by it . . . generally used as synonymous with *crime*”); 1 BURRILL, *supra* note 202, at 302 (defining “crime” as “[a]n act committed or omitted, in violation of a public law”); SILAS JONAS, AN INTRODUCTION TO LEGAL SCIENCE . . . TO WHICH IS APPENDED A CONCISE DICTIONARY OF LAW TERMS AND PHRASES, Appendix at 6 (New York, John S. Voorhies 1842) (defining “crime” as “an act committed or omitted in violation of a public law, either forbidding or commanding it”); 1 BOUVIER, *supra* note 119, at 272 (defining “crime” as “an act committed or omitted in violation of a public law”); 1 NOAH WEBSTER, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 52 (New Haven, 1828) (defining “crime”: “in a more common and restricted sense, a crime denotes an offense, or violation of public law”).

²⁰⁴ *E.g.*, 2 BURRILL, *supra* note 202, at 789 (defining “penal statute” as “[a] statute which punishes; a statute which forbids an act and punishes the doing or commission of it. A statute enacting or imposing a penalty or punishment on the commission of a certain offence”); 2

reference to offenses processed criminally.²⁰⁵ At other times, however, the terms were treated as distinct, differentiating between crimes prosecuted through criminal procedures on the one hand, and penal offenses—including revenue violations²⁰⁶—punished civilly on the other.²⁰⁷ Complicating matters, the terms

WEBSTER, *supra* note 203, at 36 (defining “penal” as “[e]nacting punishment”); *Huntington*, 146 U.S. at 667 (1892) (“[p]enal laws, strictly and properly, are those imposing punishment for an offense committed against the state”); *McCulloch v. Maryland*, 1 U.S. (4 Wheat.) 316, 416 (1819) (discussing the whole penal code of the United States” as related to the power to “punish any violation of its laws”); *Hitchcock v. Munger*, 15 N.H. 97, 103–05 (1844) (describing penal laws as those related to public offenses).

²⁰⁵ *E.g.*, 2 ABBOTT, *supra* note 202, at 261 (defining “penal” as “that which pertains to punishment,” and while not always “interchangeable,” “is used as a synonym of criminal”); *id.* at 323–24 (defining “criminal” as “that which pertains to or is connected with the law of crimes, or the administration of penal justice,” and “criminal action or prosecution” as “[a] suit instituted for the enforcement of a penal law to secure the conviction and punishment of the offender”); 2 BOUVIER, *supra* note 119, at 203 (1839) (defining “offence” as “the doing what a penal law forbids to be done, or omitting to do what it commands; in this sense it is nearly synonymous with crime”); *see also* 2 ABBOTT, *supra* note 202, at 230 (distinguishing civil actions from “criminal proceedings, which are instituted to vindicate public justice, by infliction of punishment in the name of the sovereign power, and for the protection of the whole people”); *supra* notes 92–93 and accompanying text (regarding the Neutrality Acts, in which Congress imposed *in rem* forfeitures in statutes adding to an “Act for the punishment of certain crimes against the United States”).

²⁰⁶ *E.g.*, 1 WEBSTER, *supra* note 203, 51 (defining “conviction” as including “the summary convictions before commissioners of the revenue”).

²⁰⁷ *E.g.*, 2 BOUVIER, *supra* note 119, at 203 (defining “offence” and stating that a “penal law” is “nearly synonymous with crime” but that “[i]n a more confined sense, it may be considered as having the same meaning with misdemeanor” except that it is “punishable summarily by the forfeiture of a penalty”); *id.* at 311 (defining “punishment” as “some pain or penalty warranted by law, inflicted on a person, for the commission of a crime or misdemeanor” including through “fines; forfeitures”). An 1848 case decided by the Indiana Supreme Court provides a particularly good example of how convoluted the distinction between “criminal” and “penal” statutes could be. In it, the court considered whether a municipal ordinance directing that the revenues generated from a \$100 fine for selling liquor without a license be payable to the town violated a state constitutional provision requiring that fines imposed for a “breach of the penal laws” be distributed to seminaries. *Town of Indianapolis v. Fairchild*, 1 Ind. 315, 318–19 (1848). The court determined that the constitutional provision applied only to criminal prosecutions, not penal matters prosecuted through civil processes, because “the word *fines* there used is the term commonly employed to designate, not penalties or forfeitures for violations of penal statutes, but pecuniary punishments for breaches of the criminal law,” and the drafters would have used the phrase “fines and penalties, or fines and forfeitures” had they meant “penal laws” to include penal laws prosecuted civilly. *Id.* at 318. The court also looked to the constitutional provision that immediately followed, which required the creation of a “penal code.” *Id.* It reasoned that the word “penal” must have the same meaning in both provisions, and therefore “a penal code

“penal” and “penalty” were at times used to describe private disputes, such as the penalty agreed upon when a surety defaulted on a bond, or when a party to a contract failed to abide by its terms.²⁰⁸ Those private injuries for penalties would, of course, be litigated through civil proceedings.²⁰⁹ For ease of reference, in the discussion that follows, the term “criminal” refers to public offenses prosecuted through criminal proceedings, the term “penal” refers to public offenses

being a criminal code,” the word “penal” in the distribution provision must mean “criminal.” *Id.* at 318–19.

²⁰⁸ *E.g.*, 2 BURRILL, *supra* note 202, at 789 (defining “penalty” as both “a punishment imposed by a statute as a consequence of the commission of a certain specified offense,” and as “[a] sum of money agreed upon, and fixed by the parties to a contract, to be paid in case of its non performance by either,” and as “[a] sum of money mentioned in the obligatory part of a bond [to be taken] in case of non performance of the condition”); *see also* United States v. Jones, 33 U.S. (8 Pet.) 399, 412 (1834) (describing terms of a bond requiring the party to pay \$35,000 should he not “well and truly perform, &c. certain articles of agreement” as a “penal sum”). *But see* United States v. Poyllon, 27 F. Cas. 608, 611 (D. N.Y. 1812) (No. 16,081) (describing an action to obtain the penal sum on a bond required under an embargo statute as “in its nature and essence, though not in its form, a penal or criminal action”).

²⁰⁹ This may include matters related to mariners, such as “cases of possessory suits, mariners’ wages, and marine torts” for which the owner of the ship became liable; such suits were understood to be purely private actions in which ships were treated “as personal property ... like other personal property.” Taylor v. Carryl, 61 U.S. (20 How.) 583, 591, 599–99 (1857). For other sources related to the nature of private actions see, for example, 1 ABBOTT, *supra* note 202, act 230 (defining “civil action case, cause, remedy, suit, or proceeding”: “These phrases embrace judicial proceedings designed to enforce the rights and redress the wrongs of individuals as between themselves”); 1 BURRILL, *supra* note 202, at 217–18 (defining “civil injury” as “An infringement or privation of some civil right, and which is a subject for civil redress or compensation; as distinguished from a *crime*, which is a subject for punishment”); 1 BOUVIER, *supra* note 119, at 51–52, 179 (defining “civil” as related to “the private rights and remedies of men” adjudicated through “civil process” and civil “action” as “a legal demand of one’s right, or it is the form of a suit given by law for the recovery of that which is due”); 1 WEBSTER, *supra* note 203, 38 (defining “civil” as “as a *civil* suit, a suit between citizens alone; whereas a *criminal* process is between the state and a citizen”); 3 BLACKSTONE, *supra* note 184, at 2–3 (defining “private wrongs” as “an infringement or privation of the private or civil rights belonging to individuals, considered as individuals” and noting they are to be adjudicated “by civil suit or action”); *see also* 1 BOUVIER, *supra* note 119, at 179 (defining “civil” as “sometimes used in contradistinction to *criminal* ... thus we speak of civil process and criminal process”); *see also id.* (defining “action”: “Actions are also civil or penal; civil when instituted solely in behalf of private persons, to recover debts or damages; penal, when instituted to recover a penalty, imposed by way of punishment”). The government could be a litigant in a suit involving private wrongs, if the claims were effectively the same as could be made by a private party. 3 BLACKSTONE, *supra* note 184, at *254–69.

prosecuted through civil proceedings, and “private disputes” refers to purely private matters processed civilly.

Following the English common law tradition, in the country’s earliest days, offenses against the public were enforced in and punished through both criminal and civil proceedings. Criminal proceedings for public offenses were initiated by indictment or criminal information,²¹⁰ and those processes were mandated for offenses that carried a sentence of death or imprisonment,²¹¹ often along with pecuniary punishments such as fines and criminal forfeitures.²¹² But lawmakers often authorized the use of civil proceedings (at times referred to as “summary” proceedings²¹³) to prosecute public offenses for which pecuniary

²¹⁰ As is the case today, a criminal information was “[a] species of prosecution which may in a proper case be instituted for the enforcement of the criminal law, without the interposition of a grand jury, and by the attorney-general or other law officer of the government.” 1 ABBOTT, *supra* note 202, at 324.

²¹¹ There is some question as to whether corporal punishment mandated full criminal procedure or not. *See* 4 BLACKSTONE, *supra* note 184, at *283 (suggesting that corporal punishment could be imposed following summary proceedings).

²¹² *See, e.g.*, Act of Apr. 30, 1790, ch. 9, § 2 1 Stat. 112 (\$1,000 fine for misprison of treason); *see also* *Slaughter v. People*, 2 Doug. 334, 335 (Mich. 1842) (holding that a statute making “keeping a bawdy-house, or house of ill-fame ... punishable by fine or imprisonment” was unconstitutional because it was a criminal offense punished without protections afforded by a grand jury). Further research is needed regarding the treatment of statutes that allowed a person to be imprisoned for the non-payment of a fine as criminal or penal, as there are conflicting authorities on that point. *Compare, e.g., Mann*, 26 F. Cas. at 1156 (distinguishing between a fine imposed through criminal proceedings and a pecuniary penalty imposed through civil proceedings by noting that for the former, “imprisonment in case of non-payment, is a part of the judgment”) and *Hitchcock*, 15 N.H. at 103-04 (holding that civil processes could be employed in relation to the fine at issue and distinguishing it from fines “where imprisonment is the consequence of nonpayment”), *with, e.g., Williamson v. Commonwealth*, 43 Ky. (4 B. Mon.) 146, 147 (1843) (treating a fine “enforced by confinement and labor in the work house” as penal rather than criminal). Regardless, that question is irrelevant in the case of an *in rem* forfeiture of property already seized.

²¹³ *E.g.*, 2 ABBOTT, *supra* note 202, at 520 (defining “summary conviction”: “A trial of offenders, before a magistrate or bench of magistrates, without the intervention of a jury, is authorized by the statutes of many of the states, and by the acts of parliament in England. These trials are authorized chiefly for the lesser offences.”); *see also* 1 ABBOTT, *supra* note 202, at 285-86 (defining “conviction” as “the act or proceeding of pronouncing a person guilty of an offense and punishable therefor” and as including “summary proceedings”); 2 BURRILL, *supra* note 202, at 820 (explaining that summary proceedings must be “authorized by legislative authority, except perhaps in the case of contempts”); 1 BOUVIER, *supra* note 119, at 235 (defining “conviction” as including “the summary proceedings upon any penal statute”); *Hall v. State*, 4 Del. (4 Harr.) 132, 141 (1844) (“The act of 1795 is a penal statute and authorizes a summary conviction.”); *Spaulding v. People ex rel. Backus*, 7 Hill 301, 302-04 (N.Y. Ct. Corr. Errors 1843) (declining

penalties, including fines and forfeitures, primarily served as punishment.²¹⁴ In these proceedings one or more procedural protections were relaxed,²¹⁵ including case initiation by information,²¹⁶ libel, or action of debt (rather than by grand jury indictment or criminal information), and, in some but not all cases, access to a jury trial.²¹⁷

Mechanisms to enforce public offenses criminally and civilly could be incorporated into a single statute.²¹⁸ For example, in the 1790 Collections Act,

to allow the discharge of contempt fines in bankruptcy despite the “summary mode of punishment”); *Cook v. Drake*, 1 Ohio Dec. Reprint 12, 14 (1841) (describing a statute imposing pecuniary penalties for sheriffs who violate their duties as “both penal and summary in its character”).

²¹⁴ *E.g.*, *People v. Stevens*, 13 Wend. 341, 342 (N.Y. Sup. Ct. 1835) (describing both a fine imposed civilly and fines and imprisonment imposed criminally as the “punishment which the law inflicts upon the offence”); Nelson, *supra* note 7, at 2492–507 (discussing the “[p]erils” of treating punishment as limited to “criminal” statutes and arguing that historically civil statutes could also impose punishment). If the statute was silent as to alternative forms of civil enforcement, courts in some jurisdictions assumed civil processes were required, and in other jurisdictions assumed criminal processes were required. *Compare, e.g.*, *Ex parte Marquand*, 16 F. Cas. 776, 777 (C.C.D. Mass. 1815) (No. 9100) (per curiam) (“at common law, whenever a penalty is given, and no appropriation or method of recovery is prescribed by the act, an action or information of debt lies, and not an indictment”), *with State v. Williams*, 7 Rob. 279, 311–12 (La. 1844) (“If a statute imposing a fine does not authorize its recovery by action of debt, bill, plaint, or information of debt, but merely denounces such fine or penalty to be paid by the offender on conviction, the law is properly a criminal one, and the offender must be prosecuted by [criminal] information.”).

²¹⁵ *E.g.*, *Logan v. Siggerson*, 2 Blackf. 266, 266–67 (Ind. 1829) (regarding summary processes through which fines were imposed as punishment as conducted by justices of the peace rather than a court but requiring the defendant’s presence for the proceedings).

²¹⁶ An “information in debt” or “information *in rem*” were civil proceedings distinct from the modern criminal information. Nelson, *supra* note 7, at 2460–61, 2497–98.

²¹⁷ *E.g.*, *Pearce v. Atwood*, 13 Mass. 324, 342–43 (1816) (quoting a statute setting out the process for adjudicating offenses as requiring presentment to a grand jury for offences carrying a penalty of greater than forty shillings but allowing prosecution via complaint for those offenses punished by forty shillings or less). In the *in rem* forfeiture context, juries were not used for seizures of goods or vessels obtained on navigable waters, but were employed for seizures obtained on land. *The Sarah*, 21 U.S. (8 Wheat.) 391, 394, 396, n.c (1823) (distinguishing between *in rem* proceedings brought in admiralty in which juries were not required and civil actions to enforce penal laws outside of admiralty); *see also supra* note 184 and accompanying text.

²¹⁸ *See United States v. Gates*, 25 F. Cas. 1263, 1266 (S.D.N.Y. 1845) (No. 15,191) (explaining that the government had the statutory authority to seek an indictment “unless the special mode of remedy,” which may include proceeding by information or action of debt, “is pointed out by the statute”); *see also United States v. Mundell*, 27 F. Cas. 23, 26, 31 (C.C.D. Va. 1795) (No.

Congress prohibited bribing a customs officer to allow fraudulent entry of goods.²¹⁹ Upon criminal conviction, the defendant was subject to between \$200 and \$2,000 in fines and in some cases a prison term of up to a year.²²⁰ Within the same statute, Congress authorized the imposition of fines and forfeitures for offenses related to the entry and unloading of foreign goods without the necessity of a criminal conviction.²²¹ In short, civil proceedings were routinely employed to impose punishment for public offenses.

Actions of debt—the specific form of civil action referenced in *Bajakajian* as proof that *in rem* forfeitures were nonpunitive—illustrate the use of civil processes to impose punishment for public offenses.²²² Actions of debt could be used to institute proceedings of a purely private nature²²³ and to recover unpaid taxes (as opposed to penalties for nonpayment of taxes).²²⁴ But they also were routinely employed to prosecute penal offenses arising out of the common law

15,834) (Iredell, Circuit Justice) (holding that no bail can be required “in actions of debt upon penal statutes” given that Congress had only established bail for criminal cases and noting that “[i]t is scarcely necessary to stop here to observe that the proceeding in question was not a proceeding in a criminal case, within the meaning of the provisions of congress, but was, in truth, a civil suit” and further that the penal statute addressed “an act of disobedience for which a criminal prosecution might possibly have been commenced, if the act of congress does not expressly, or impliedly, exclude it”).

²¹⁹ 1790 Collections Act, *supra* note 79, § 66, 2 Stat. 175–76.

²²⁰ *Id.*

²²¹ *Id.*, § 70, 2 Stat. 177.

²²² *United States v. Bajakajian*, 524 U.S. 321, 343, n.18 (1998). While the discussion here focuses on actions of debt as a penal mechanism to impose punishment, some courts went further, describing actions of debt to recover pecuniary penalties as being criminal in nature. *E.g.*, *Buckwalter v. United States*, 11 Serg. & Rawle 193, 197 (Pa. 1824) (citing *Davy v. Baker*, 4 Burr. 2471 (1769) (“an action of debt for a penalty inflicted for an offence, is not a civil action”); *see also Davy*, 4 Burr. at 2472 (holding, in opinions by Lord Mansfield and Mr. Justice Yates, that a charging declaration was not sufficiently certain, given that an action under statute calling for forfeiture of £500 and the loss of the right to vote constituted a “criminal charge”).

²²³ *United States v. Lyman*, 26 F. Cas. 1024, 1030–31 (D. Mass. 1818) (No. 15,647) (Story, Circuit Justice) (explaining that actions of debt could “arise from contract, or be created by statute”); *Osborn v. First Nat. Bank of Athens*, 154 Pa. 134, 137–38 (1893) (explaining that actions of debt were available to recover penalties in contract disputes).

²²⁴ *E.g.*, *Meredith v. United States*, 38 U.S. (13 Pet.) 486, 493–94 (1839) (explaining that “an action of debt lies in favour of the government against the importer, for duties, whenever by accident, mistake, or fraud, no duties, or short duties have been paid”); *Dunlap v. Gallatin Co.*, 15 Ill. 7, 9 (1853) (“The assignees were legally liable for the taxes, and that liability could be enforced by an action of debt.”).

and later set out in statute.²²⁵ In interpreting a 1790 law imposing a statute of limitations on federal penal statutes, the Supreme Court noted the statutory text, “nor shall any person be prosecuted,” and determined that it “appl[ied] not to any particular mode of proceeding, but generally to any prosecution, trial, or punishment for the offence,” including the action of debt at issue.²²⁶ In doing so, the Court remarked on the frequency of reliance on actions of debt to enforce penal statutes, noting that “[a]lmost every fine or forfeiture under a penal statute, may be recovered by an action of debt as well as by information.”²²⁷

²²⁵ For examples of statutes explicitly allowing prosecutions via action of debt see, for example, 1791 Whiskey Tax Act, *supra* note 71, § 44, 1 Stat 209 (“And such penalty and forfeiture shall be recoverable with costs of suit, by action of debt, in the name of the person or persons intitled thereto, or by information, in the name of the United States of America.”); Act of Mar. 1, 1790, ch. 2, § 3, 1 Stat. 101, 102 (allowing a *qui tam* prosecution to be brought “by action of debt, information, or indictment” for the failure of census officials to do their duties). For examples of the use of actions of debt in relation to *in personam* fines in the customs and maritime context, see for example, *United States v. Smith*, 27 F. Cas. 1136, 1136 (C.C.N.D.N.Y. 1850) (No. 16,319) (Nelson, Circuit Justice) (\$400 fine for not presenting a manifest); *United States v. Fairclough*, 25 F. Cas. 1037, 1038 (C.C.E.D. Pa. 1823) (No. 15,068) (Washington, Circuit Justice) (\$500 fine for concealing twenty kegs of white lead); *United States v. Hutchinson*, 26 F. Cas. 446, 446 (D. Me. 1868) (No. 15,431) (the value of “2,300 cigars, three demijohns of rum, and two bottles of gin” not included on the manifest); *United States v. Shackford*, 27 F. Cas. 1040, 1040 (D. Me. 1830) (No. 16,263) (\$100 fine for failing to deliver a ship’s temporary registry to the collector). For examples of cases in which the action of debt was employed to impose pecuniary punishments in other contexts see, for example, *Mayor v. Davis*, 6 Watts. & Serg. 269, 276–77 (Pa. 1843) (\$6 fine for the sale of beef in a prohibited area); *Garman v. Gamble*, 10 Watts 382, 382–84 (Pa. 1840) (\$5 fine for killing fish in a creek with poison); *Inhabitants of Wiscasset v. Trundy*, 12 Me. 204, 204 (1835) (\$50 fine for violating a statute restricting liquor sales). In some cases courts interpreted statutes as calling for an initial procedure to ascertain guilt followed by an action of debt to recover the pecuniary penalties imposed. *E.g.*, *Weeks v. Forman*, 16 N.J.L. 237, 243–44 (1837). Other courts rejected such an interpretation. *E.g.*, *Garman*, 10 Watts at 384 (“I cannot bring myself to believe, that the legislature intended to harass the offender by a summary conviction in the first place, and a civil suit to recover the small penalty of \$5 imposed by the act. We have no instance of similar legislation in our statute book[.]”); *see also* *Reagh v. Spann*, 3 Stew. 100, 107 (Ala. 1830) (holding that a statute that included both the elements of the offense and its mode of prosecution—an action of debt—did not necessitate a conviction under some related statute to seek the penal forfeiture listed as the punishment).

²²⁶ *Adams v. Woods*, 6 U.S. (2 Cranch) 336, 340–41 (1805).

²²⁷ *Id.* at 341; *see also* *Mundell*, 27 F. Cas. at 30 (regarding “actions of debt by the public upon penal statutes”); *Markle v. Town Council of Akron*, 14 Ohio 586, 589–91 (1846) (explaining that actions of debt, while civil, can be brought for “many offenses, made so by statute, which are but *quasi* criminal” and “for the recovery of fines, penalties, and forfeitures”); *Johnson v. Hughes*, 1 Stew. 263, 265 (Ala. 1827) (“In the construction of a statute limiting the time for

Actions of debt were employed to enforce public offenses where the amount of the fine at issue was certain because it was explicitly set out in statute, rather than left to the discretion of judges²²⁸—as would be the case of forfeitures of property where the amount at issue was determined by the value of the forfeited property²²⁹—or because it was codified in a penal statute as an option for proceeding.²³⁰ Sometimes, actions of debt were the sole vehicle for charging public offenses,²³¹ including when no statute allowed for *in personam* punishment²³² or when it was impossible to identify the person who actually committed the offense.²³³ In still other cases, actions of debt were one of multiple civil or criminal processes available to enforce penal laws.²³⁴ Underscoring that actions of debt actually served a punitive function, some penal statutes allowed for prosecution via an action of debt *or* a criminal indictment. For example, a Georgia statute made minor gambling offenses punishable via action of debt, while more serious gambling offenses—punishable by fines and corporal punishment—were

instituting a prosecution for a fine or forfeiture, the words *prosecution* or *prosecuted*, will apply to any proceeding for the recovery of the fine or forfeiture, to an action of debt as well as to a prosecution by indictment.”).

²²⁸ *Lyman*, 26 F. Cas. at 1030 (“an action of debt is the general remedy for the recovery of all sums certain”). For explanations of the sum certain rule see *Chicago, B. & Q. Ry. Co. v. United States*, 220 U.S. 559, 577–78 (1911); *Hepner v. United States*, 213 U.S. 103, 106 (1909).

²²⁹ *United States v. York St. Flax Spinning Co.*, 28 F. Cas. 800, 801 (C.C.S.D.N.Y. 1879) (No. 16,781) (Waite, Circuit Justice) (explaining that though an action of debt applies where the dollar value at issue must be certain, that includes forfeitable property because the forfeiture equates to “the recovery of a certain sum, to wit, the value of the property”).

²³⁰ *E.g.*, *United States v. Platt*, 27 F. Cas. 546, 550 (S.D.N.Y. 1840) (No. 16054A) (agreeing with the statement that “almost every fine or forfeiture under penal statutes may be recovered indifferently in either” an action of debt or an information).

²³¹ *E.g.*, An Act for the Suppressing of Lotteries, 1791 N.H. Laws ch. 72, in 5 LAWS OF NEW HAMPSHIRE (Henry Harrison Metcalf, ed. 1916); An Act to Prevent Stealing of Cattle and Hogs, 1741 N.C. Sess. Laws 48, ch. 8, §§ 2–3.

²³² *E.g.*, *The Ambrose Light*, 25 F. 408, 415 (S.D.N.Y. 1885) (explaining that though a ship might be forfeited *in rem* for piracy under the common right of nations, no municipal statute existed to allow for *in personam* charges against the crew).

²³³ *E.g.*, *The Three Friends*, 166 U.S. 1, 49–50 (1897) (“forfeiture might be decreed if the proof showed the prohibited acts were committed, though lacking as to the identity of the particular person by whom they were committed”).

²³⁴ *E.g.*, An Act Confirming and Establishing the Ancient and Approved Method of Drawing Juries, 1731 S.C. Acts 129, No. 522, § 41 (“All the fines and forfeitures which shall arise and accrue by virtue of this act ... [are] to be recovered by action of debt, bill, plaint or information.”); see also Colgan, *Reviving*, *supra* note 20, at 319 & n.211.

prosecuted via indictment.²³⁵ In short, actions of debt served as one mechanism for punishing offenses against the public.²³⁶

Another indicator that penal laws imposed punishment, whether prosecuted through criminal or civil procedures, is evident in the widespread use of informers and *qui tam* prosecutors for their enforcement.²³⁷ From the colonial period through the mid- to late-nineteenth century, American jurisdictions relied heavily on informers and *qui tam* prosecutors—private citizens who investigated, reported, and prosecuted public offenses.²³⁸ Through a modern lens, such prosecutions had several features that may make them appear at first glance to constitute private litigation. In many cases, informers and *qui tam* prosecutors proceeded through civil procedures.²³⁹ A key feature of such prosecutions was that the person serving as an informer or *qui tam* received a moiety

²³⁵ An Act to Suppress Lotteries, and Prevent Other Excessive and Deceitful Gaming, 1764 Ga. Laws 15–20, §§ 1, 5; *see also* An Act Limiting Suits on Penal Statutes, 1789 (1790) N.H. Acts 262–63 (describing civil processes and indictments as both arising under “penal statutes”). Some courts articulated that the action of debt was appropriate in response to more minor offenses. *E.g.*, *Hawloetz v. Kass*, 25 F. 765, 767–68 (C.C.S.D.N.Y. 1885) (noting that civil actions are allowed to enforce public welfare statutes through pecuniary punishments where “the issue does not involve an act of any appreciable degree of moral turpitude on the part of the defendant”); *Hitchcock*, 15 N.H. at 103–04 (“This is an action to recovery a penalty imposed by a statute when a person commits some act considered detrimental to the community, but whose criminality is not of an aggravated nature.”).

²³⁶ *See* Colgan, *Reviving*, *supra* note 20, at 319 & n.211; Nelson, *supra* note 7, at 2497–500.

²³⁷ *See* Harold J. Krent, *Executive Control Over Law Enforcement: Some Lessons from History*, 38 AM. U. L. REV. 275, 296–303 (1989) (providing an overview of early *qui tam* practices, concluding that they were “long considered ... the functional equivalent of criminal prosecution” despite their civil form).

²³⁸ Beck, *supra* note 121, at 1269–1305 (collecting colonial, state, and federal statutes allowing for *qui tam* prosecutions against government and quasi-governmental officials). The use of *qui tam* prosecutors did vary from jurisdiction to jurisdiction, and reliance on the practice decreased over time. *E.g.*, *State Treasurer v. Rice*, 11 Vt. 339, 342–436 (1839) (describing how the use of *qui tam* prosecutions were common under the English common law and in early Vermont practices, but that by 1839 *qui tam* prosecutions were infrequent because lawmakers amended the state’s code so that county court prosecutions were “conducted by a public officer appointed for that purpose”).

²³⁹ Actions of debt were a common form of civil procedure employed in *qui tam* prosecutions. *E.g.*, *Harris v. Bullock*, Brayt. 141, 142 (Vt. 1819) (holding a county court had jurisdiction over *qui tam* actions of debt for the “offense” of usury where the amount at issue exceeded \$7); *Caswell v. Allen*, 7 Johns 63, 68 (N.Y. Sup. Ct. 1810) (regarding a *qui tam* action of debt against county supervisors for the failure to raise money to build a fire proof clerk’s office as required pursuant to a “penal statute”).

of fines and forfeitures obtained upon an adjudication of guilt,²⁴⁰ meaning that they stood to personally benefit from the litigation.²⁴¹ Those serving as informers or *qui tam* also took on personal financial risk should the suit be unsuccessful.²⁴² Further, as public prosecutors employed by the government became more prevalent, in some circumstances the state could not intervene to take control of a *qui tam* prosecution.²⁴³ But it was widely understood that, despite the frequent use of civil processes as a means of adjudication and the personal stakes involved, *qui tam* prosecutions were “popular actions,”²⁴⁴

²⁴⁰ *E.g.*, 2 ABBOTT, *supra* note 202, at 369 (describing the “distinctive feature” of *qui tam* actions as “being that the penalty is recoverable, part for the informer and part for the king, the people, or commonwealth, or some corporation or society”); 2 BURRILL, *supra* note 202, at 855 (defining “*qui tam*” as “[t]he name given to an action brought by an informer, where part of the penalty or forfeiture sued for, is given to the king, the state, the poor, or to some public use, and the other part to the informer or prosecutor”); *see also* 4 BLACKSTONE, *supra* note 184, at *308 (explaining that *qui tam* prosecutions were “usually brought upon penal statutes, which inflict a penalty upon conviction of the offender, one part to the use of the king, and another to the use of the informer”).

²⁴¹ For a further discussion of how this compensation to informers and *qui tam* prosecutors relates to the *Bajakajian* Court’s misapprehension of punishment and remediation as mutually exclusive, *see infra* Part III.B.2.

²⁴² *E.g.*, *Rice*, 11 Vt. at 344 (explaining that under statutes passed in 1779 *qui tam* prosecutors were liable for costs if their suits were unsuccessful); The risk to *qui tam* prosecutors generally was consistent with the risks taken on by informers in undertaking early customs investigations and prosecutions. *E.g.*, *McLane v. United States*, 31 U.S. (6 Pet.) 404, 426 (1832) (describing the officers’ role in seizing property as “onerous, and full of perplexity” because “[i]f he seizes any goods, it is at his own peril; and he is condemnable in damages and costs, if it should turn out upon the final adjudication, that there was no probable cause for the seizure”); *Burke v. Trevitt*, 4 F. Cas. 746, 748 (C.C.D. Mass. 1816) (No. 2163) (Story, Circuit Justice) (explaining that officers seize vessels and cargo “at their own peril”); *United States v. 396 Barrels Distilled Spirits*, 28 F. Cas. 121, 125 (E.D. Mo. 1866) (No. 16,503) (“He is justified by acts of congress for performance of his duty when reasonable cause exists; and if he acts without ‘reasonable cause,’ he proceeds at his peril.”).

²⁴³ *E.g.*, *State v. Tufts*, 56 N.H. 137, 138–40 (1875) (finding that because a *qui tam* prosecutor is subject to costs if he loses, public prosecutors cannot intervene).

²⁴⁴ 1 THOMAS EDLYNE TOMLINS, *THE LAW-DICTIONARY, EXPLAINING THE RISE, PROGRESS, AND PRESENT STATE OF THE BRITISH LAW* 28 (Philadelphia 1836) (defining “actions popular” as “given on the breach of some penal statute, which *every man* hath a right to sue for himself and by the king, by information, action, &c.”); *Huntington*, 146 U.S. at 673 (citing Blackstone for the proposition that *qui tam* actions were known as “popular actions”); *United States v. Griswold*, 24 F. 361, 364 (D. Or. 1885) (explaining that a *qui tam* prosecution was, at common law, referred to as “a ‘popular’ action,” that was “brought for the benefit of the king or other public use, as well as [the prosecutor] himself”); *Hubbell v. Gale*, 3 Vt. 266, 271 (1830) (“when-ever a penalty or forfeiture is given to anyone who will sue, the action is a popular action, and the plaintiff a common informer”).

brought under penal statutes to protect against offenses that implicated the public interest.²⁴⁵

That penal laws, even those adjudicated without full criminal process, involved the imposition of punishment for public offenses is also evident in the resolution of early constitutional issues for which the imposition of punishment was a central concern, such as the Court's early analyses of the Bill of Attainder and Ex Post Facto Clauses.²⁴⁶ Both Clauses center around punishment. A bill of attainder is a statute that "inflicts punishment without a judicial trial" on a particularly named or identified individual,²⁴⁷ whereas an *ex post facto* statute is one that retroactively imposes punishment for an act that was not an offense at the time it was committed or increases the punishment for an offense after its commission.²⁴⁸ Bills of attainder obviously applied to confiscations of property, as the Clause was in direct response to legislatures that employed such statutes to confiscate the property of Loyalists during, and in the period directly following, the Revolutionary War.²⁴⁹ But outside of that context, the Court grappled with the application of both clauses to civil matters.

²⁴⁵ *E.g.*, *Nichols v. Squire*, 22 Mass. (5 Pick.) 168, 173 (1827) (explaining in a case brought *qui tam* that "as all penal actions partake of the nature of a criminal prosecution for an offence, it may be good policy to require strictness in the proceedings"); *Drake v. Watson*, 4 Day. 37, 41-42 (Conn. 1809) (applying the statute of limitations for penal offenses to a *qui tam* prosecution); *Hannaball v. Spalding*, 1 Root 86, 86-87 (Conn. Super. Ct. 1783) (overturning a grant of a new trial in a *qui tam* matter because it was "a criminal cause"); Hoar, *supra* note 120, at 236-237 (opining that the distribution of moieties to informers was not dependent upon whether a prosecution was by indictment, information, or action of debt).

²⁴⁶ U.S. Const. art. 1 §§ 9-10.

²⁴⁷ *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 323-25 (1866).

²⁴⁸ *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798).

²⁴⁹ For a detailed description of these practices and the political effort to stop them through the passage of the Bill of Attainder Clause, see generally Brett Palfreyman, *The Loyalists and the Federal Constitution: The Origins of the Bill of Attainder Clause*, 35 J. OF THE EARLY REPUBLIC 451 (2015); James Westfall Thompson, *Anti-Loyalist Legislation During the American Revolution*, 3 ILL. L. REV. 147 (1908-1909); see also TIMOTHY FARRAR, *MANUAL OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA*, § 473, at 419-20 (Boston, Little, Brown, & Co. 1867) (noting that bills of attainder "may affect the life of an individual, or may confiscate his property, or may do both") (quoting an unidentified edition of James Kent's "Commentaries on American Law"); Matthew Steilen, *Bills of Attainder*, 53 HOUS. L. REV. 767, 826-91 (2016) (describing the use of attainder against loyalists, with a particular focus on the Confiscation Act); Anthony Dick, *The Substance of Punishment Under the Bill of Attainder Clause*, 63 STAN. L. REV. 1177, 1198-1202 (2011) (regarding the use of attainder during the Revolutionary War); Michal P. Lehmann, *The Bill of Attainder Doctrine: A Survey of the Decisional Law*, 5 HASTINGS CONST. L. Q. 767, 768-90 (1978) (providing an overview of attainder under the English common law

The Court's explication of the Clauses began with *Calder v. Bull*, which addressed the question of whether a statute regarding the time limit for challenging the probate of wills passed by the Connecticut legislature in 1795, and which affected the property interests of a private party, fell within the *ex post facto* prohibition.²⁵⁰ The Court unanimously held it did not, given that the prohibition was intended to protect against "punishment by legislative acts" beyond that allowable under the law existing at the time of the conduct, and not statutes affecting "private rights, of either property, or contracts" that would be litigated in civil proceedings.²⁵¹ While this appears at first to place civil matters exclusively within the private realm, as the Court's jurisprudence continued to develop, it became evident that with respect to both Clauses the relevant distinction was between (1) laws "by which a man shall be punished criminally or penally"²⁵² by "inflict[ing] penalties on the person, or [by] inflict[ing] pecuniary penalties that swell the public treasury,"²⁵³ or (2) those laws that only "affect private rights."²⁵⁴ The embrace of the applicability of the Clauses to criminal and penal measures continued throughout the nineteenth century,²⁵⁵ with the Court further clarifying in 1878 that penal matters included those cases in which a person is "punished ... civilly," because "the *ex post facto* effect of a law cannot be evaded by giving a civil form to that which is essentially

through the close of the nineteenth century). For a historical account of the Ex Post Facto Clause, see WAYNE A. LOGAN, *THE EX POST FACTO CLAUSE: ITS HISTORY AND ROLE IN A PUNITIVE SOCIETY*, 1-49 (2023).

²⁵⁰ *Calder*, 3 U.S. (3 Dall.) at 386-87.

²⁵¹ *Id.* at 390; *see also id.* at 399-400 (Iredell, J.) (explaining that the "true construction of the prohibition [against *ex post facto* laws] extends to criminal, not civil cases").

²⁵² *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 266 (1827) (describing both Clauses) (emphasis added).

²⁵³ *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 138 (1810) (interpreting both Clauses); *see also Cummings*, 71 U.S. (4 Wall.) at 323-32 (interpreting both Clauses and quoting favorably from *Fletcher*).

²⁵⁴ *Watson v. Mercer*, 33 U.S. (8 Pet.) 88, 110 (1834) (explaining that "ex post facto laws relate to penal and criminal proceedings which impose punishments or forfeitures; and not to civil proceedings which affect private rights retrospectively"); *see also Carpenter v. Com. of Pennsylvania*, 58 U.S. (17 How.) 456, 463-64 (1854) (declining to apply the Ex Post Facto Clause to an estate tax law).

²⁵⁵ *Green v. Biddle*, 21 U.S. (8 Wheat.) 1, 66-67 (1823) (explaining that the Ex Post Facto Clause "is only applied to penal matters"); *cf. Cummings*, 71 U.S. (4 Wall.) at 323-25 (interpreting "attainder" to include both statutes inflicting capital punishment, as the term was used in Britain, and "pains and penalties," which are non-capital forms of punishment); *Ex Parte Garland*, 71 U.S. (4 Wall.) 333, 377 (1866) (same).

criminal.”²⁵⁶ In simple terms, for the eighteenth- and nineteenth-century Court, what distinguished penal laws processed through civil procedures from civil laws addressing private disputes was the punitive nature of the deprivation.

Another area in which courts had to grapple with the relationship between criminal and penal laws involved a jurisdictional rule precluding a state court from enforcing the criminal, but not civil, laws of the federal government or those of another state, and vice versa,²⁵⁷ raising the question of which side of that line civilly processed penal laws fell. In the leading case on the issue, *State of Wisconsin v. Pelican Insurance Company*, the Court emphasized substance over form, explaining:

The real nature of the case is not affected by the forms provided by the law of the state for the punishment of the offense. It is immaterial whether, by the law of Wisconsin, the prosecution must be by indictment or by action In whatever form the state pursues her right to punish the offense against her sovereignty, every step of the proceeding

²⁵⁶ *Burgess v. Salmon*, 97 U.S. 381, 382, 385 (1878) (interpreting the Ex Post Facto Clause: “Can a manufacturer be punished, criminally and civilly,—civilly here,—for the violation of a statute, when the statute was not in force at the time the act was done?”); see also 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 450–51 (8th ed. 1854) (summarizing the jurisprudence and stating: “*Ex post facto* laws relate to penal and criminal proceedings, which impose punishments or forfeitures, and not to civil proceedings, which affect private rights retrospectively.”); Clifford, *supra* note 155, at 575–76 (opining that the presidential pardon power applied to an *in rem* forfeiture because, while “[i]t is true that the process in this case was an information *in rem* against the vessel, which in many cases is regarded as a civil proceeding; but in essence it was in this case a prosecution for a criminal offense” in which “the form of the allegations contains all the characteristics of a criminal charge” given that “participation in the slave-trade is made highly penal by numerous provisions of the law”).

²⁵⁷ *State of Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 289–90 (1888), *limited by* *Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 278 (1935) (explaining that *Pelican Insurance* cannot properly be read “to suggest that full faith and credit is not required with respect to a judgment unless the original cause of action would have been entitled to like credit”); see also *The Antelope*, 23 U.S. (10 Wheat.) 66, 123 (1825) (noting that “[t]he Courts of no country execute the penal laws of another,” in holding that a Spanish vessel captured on the high seas could not be the subject of prize because the slave trade did not constitute piracy and was not made illegal by the law of nations). The jurisdictional restriction on penal actions did not prevent states from regulating matters that were also subject to federal regulation so long as it did not conflict with an exclusive federal power. *E.g.*, *Corfield v. Coryell*, 6 F. Cas. 546, 550, 552–53 (C.C.E.D. Pa. 1823) (No. 3230) (Washington, Circuit Justice) (holding that the state has the authority to regulate fishing in areas within its boundaries including through enforcement by imposition of fines and condemnation of vessels).

tends to one end, the compelling the offender to pay a pecuniary fine by way of punishment for the offense.²⁵⁸

Therefore, while a private lawsuit of a “strictly civil nature”—such as an action to seek damages resulting from a collision between two ships—did not fall within the scope of the jurisdictional prohibition,²⁵⁹ “all suits in favor of the state for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue, or other municipal laws, and to all judgments for such penalties” did.²⁶⁰

In sum, the *Bajakajian* Court mistakenly believed that the relevant line for ascertaining whether punishment was imposed would have historically been drawn on procedural grounds, rendering *in rem* forfeitures processed civilly as nonpunitive:

Criminal Procedure = Punishment	Civil Procedure = Nonpunitive
<i>Crimes</i>	<i>Penal Offenses</i> <i>Private Disputes</i>

²⁵⁸ *Pelican Ins.*, 127 U.S. at 299; see also FARRAR, *supra* note 249, § 477, at 421–22 (regarding the application of the Ex Post Facto Clause to criminal and penal matters, explaining: “Civil and criminal relate rather to the form in which the act is dealt with, than to the nature and character of the act itself.”).

²⁵⁹ *Pelican Ins.*, 127 U.S. at 290; see also *Stearns v. United States*, 22 F. Cas. 1188, 1190–92 (C.C.D. Vt. 1835) (No. 13, 341) (Thompson, Circuit Justice) (holding that a private action seeking to recover the penal sum for the violation of the terms of a bond did not violate the rule preventing one jurisdiction from enforcing the penal laws of another due to their contractual nature); see *supra* note 208 and accompanying text (regarding the private nature of such bonds).

²⁶⁰ *Pelican Ins.*, 127 U.S. at 290–91; see also *Haney v. Sharp*, 31 Ky. (1 Dana) 442, 442 (1833) (holding that a state court had no jurisdiction for the penalty of a fine and costs for the federal offense of refusal to participate in the census); *United States v. Lathrop*, 17 Johns. 4, 9–10 (N.Y. Sup. Ct. 1819) (holding that a prosecution via action of debt to recover a \$150 penalty for the unlicensed sale of liquor in violation of federal law could not be maintained in state court because “a pecuniary penalty for a violation of, or nonconformity to, an act of Congress, is as much a punishment for an offence against the laws, as if a corporal penalty had been inflicted”); *Graham v. Lowrie*, 4 N.C. (Taylor) 622, 624–25 (1817) (regarding the penal nature of a usury law, and noting the jurisdictional restriction); cf. *Jackson v. Rose*, 4 Va. (2 Va. Cas.) 34, 35–38, 41 (1815) (treating an action of debt to enforce a federal tax penalty as obviously penal and relying in part on the jurisdictional restriction to determine that Congress cannot vest state courts with jurisdiction over penal laws).

In reality, from the English common law through the nineteenth century, legal texts reflect the understanding of punishment as imposed in response to public offenses—whether for crimes prosecuted criminally or penal offenses prosecuted civilly:

Public Offenses = Punishment	Private Disputes = Nonpunitive
<i>Crimes Prosecuted Criminally</i> <i>Penal Offenses Prosecuted Civilly</i>	<i>Private Disputes Processed Civilly</i>

Therefore, when Justice Story differentiated between criminal and civil proceedings in *The Palmyra*, writing that a “proceeding *in rem* stands independent of, and wholly unaffected by any criminal proceeding *in personam*,”²⁶¹ it did not equate to a statement that the *in rem* proceedings were nonpunitive. Further evidence of the *Bajakajian* Court’s misreading of *The Palmyra*, taken from Justice Story’s own writing, follows.

2. *The Palmyra* in Context

Interpreting Justice Story’s opinion in *The Palmyra* as consistent with the notion that civilly processed *in rem* forfeitures constituted punishment is supported by his treatment of the guilty property fiction that undergirded *in rem* forfeiture practices and his broader recognition of civilly-imposed punishments.

As detailed in Part II, given the importance of revenue generation and the ease by which customs and maritime laws could be evaded, Congress aggressively sought to deter such misconduct by imposing not only *in personam* punishments, but also *in rem* forfeitures. The processing of the latter relied on the guilty property fiction, which allowed the imposition of such forfeitures on owners for their own misconduct and for that of their agents.

Justice Story had a lifelong interest both in admiralty and maritime law that would have informed his views regarding the guilty property fiction. Not only had his grandfather overseen prize proceedings in the Vice Admiralty Court at

²⁶¹ *The Palmyra*, 25 U.S. (12 Wheat.) 1, 15 (1827); see also *supra* notes 189–194 and accompanying text.

the Boston Navy Yard and later as clerk of the American Navy Board,²⁶² Justice Story's own early years as a practicing attorney focused in large part on maritime law, so that by the time he became a judge, "he could write an opinion which sounded like an excerpt from a quarter-master's log."²⁶³ This depth of understanding served him well both as he rode circuit in New England, where some of the nation's busiest ports—and the cases arising out of them—were found,²⁶⁴ but also on the Supreme Court where he quickly became the "scholar in residence" on the subject.²⁶⁵

He was, therefore, highly cognizant of both the importance of the generation of revenue through the customs laws and how difficult it could be to prove revenue fraud.²⁶⁶ Justice Story had little patience for those who engaged in wrongdoing.²⁶⁷ He held a general disdain for lawbreakers, frustrated by the ease

²⁶² THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969: THEIR LIVES AND MAJOR OPINIONS 435 (Leon Friedman & Fred L. Israel, eds. 1969) [hereinafter THE JUSTICES]; see also GERALD T. DUNNE, JOSEPH STORY AND THE RISE OF THE SUPREME COURT 99 (1970).

²⁶³ DUNNE, *supra* note 262, at 101-02; see also, e.g., The Three Brothers, 23 F. Cas. 1162, 1163 (C.C.D. Mass. 1812) (No. 14,009) (Story, Circuit Justice) (describing fishing practices along Newfoundland's Labrador coast and interpreting a statute to allow for fishing in foreign waters because lawmakers must have known that was common in the fishing industry when devising the licensing system).

²⁶⁴ DUNNE, *supra* note 262, at 96-97, 253 (describing the circuit as including Portsmouth, Boston, Newport, and Providence); NEWMYER, *supra*, note 72, at 87 (describing the backlog of cases in New England's federal courts).

²⁶⁵ NEWMYER, *supra* note 72, at 82, 93; see also JAMES MCCLELLAN, JOSEPH STORY AND THE AMERICAN CONSTITUTION: A STUDY IN POLITICAL AND LEGAL THOUGHT 255-56, n.68 (reprt. 1990) ("Story was generally regarded as the leading American authority in the field of maritime law."). The depth of Justice Story's knowledge at times led to long and involved opinions that could be difficult to parse. THE JUSTICES, *supra* note 262, at 443 ("the typical Story opinion, as someone has observed, groans with learning like an overloaded Christmas tree and thereby carries a decidedly tedious character").

²⁶⁶ E.g., *Barlow v. United States*, 32 U.S. (7 Pet.) 404, 411-12 (1833) (explaining that "[t]he safety of the revenue, so vital to the government, is essentially dependent upon" rejecting mistake of law as an excuse); *The Margaret*, 22 U.S. (9 Wheat.) 421, 425 (1824) (noting that "[t]he Legislature foresaw that it would be impossible for the officers of government to ascertain the secret intentions of the parties, or the object of ostensible transfers of ownership"); *Bottomley v. United States*, 3 F. Cas. 968, 971 (C.C.D. Mass. 1840) (No. 1688) (Story, Circuit Justice) (describing difficulties in establishing fraud because "the question of intent, or purpose, or design in the act done, whether innocent or illegal, whether honest or fraudulent, rarely admits of direct and positive proof").

²⁶⁷ Justice Story was an ardent proponent of federal court jurisdiction over federal common law crimes. DUNNE, *supra* note 262, 239-40, 404; see also 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, Book I, Ch. 16, § 158, at 141, n.2 (1833) ("It would be a most extraordinary state of things, that the common law should be the basis of

with which “offenders, conspirators and traitors are enabled to carry on their purposes almost without check.”²⁶⁸ And when taking up cases of purported customs and maritime violations, Justice Story displayed a significant degree of skepticism regarding mariners’ claims of innocence.²⁶⁹

It is therefore unsurprising, in a situation in which there was no existing statute that provided for *in personam* punishment (criminal or civil) for piratical acts of the type committed by The Palmyra’s crew, that Justice Story declined to limit jurisdiction in such a way as to allow offenders to escape all punishment, and thereby “wholly to defeat [the] operation [of the revenue laws], and

the jurisprudence of the States originally composing the Union; and yet a government engrafted upon the existing system should have no jurisprudence at all.”). He saw the longstanding practice of enforcing crimes on the high seas and in the nation’s seaports in admiralty court as a hook for that expansion. DUNNE, *supra* note 262, at 109; *see also* The Ship Virgin, 33 U.S. (8 Pet.) 538, 550 (1834) (stating that admiralty courts “are not governed by the strict rules of the common law, but act upon enlarged principles of equity”). When that project proved unsuccessful, Justice Story drafted a statute that ultimately was passed as the 1825 Federal Crimes Act. DUNNE, *supra* note 262, at 240.

²⁶⁸ DUNNE, *supra* note 262, at 106 (quoting a letter from Justice Story to Nathaniel William, May 27, 1813 in which he stated “[t]he courts are crippled”).

²⁶⁹ *Barlow*, 32 U.S. (7 Pet.) at 411 (stating that claimant’s “conduct in the course of making the shipment, if it be entirely compatible with good faith, is not wholly free from the suspicion of an intention to overreach, and evade the vigilance of the custom-house department”); *United States v. Hayward*, 26 F. Cas. 240, 246–48 (C.C.D. Mass. 1815) (No. 15,336) (Story, Circuit Justice) (suggesting that claims of necessity due to distress caused by weather or other calamities may be a “mere fiction ingeniously contrived to cover an illegal traffic”); *The Lark*, 14 F. Cas. 1149, 1150 (C.C.D. Mass. 1812) (No. 8090) (Story, Circuit Justice) (dismissing a charge of taking an illegal foreign voyage given the ship sailed only along the coast in domestic waters, but stating: “As however I have no doubt of a fraudulent intent, I shall certify that there was reasonable cause of seizure.”); *The Argo*, 1 F. Cas. 1100, 1103 (C.C.D. Mass. 1812) (No. 516) (Story, Circuit Justice) (describing witness testimony regarding inclement weather as “loose, inaccurate and awkward” and noting: “The wind does not appear to have been very violent; the deck load was not thrown overboard; no spars sprung, no rigging injured.”); *The America*, 1 F. Cas. 606, 607 (C.C.D. Mass. 1812) (No. 287) (Story, Circuit Justice) (dismissing a case because the actions alleged did not fit within the statute charged, but suggesting it may support a prosecution under another statute and noting: “I must say, that there have been great irregularities in the conduct of this vessel, which have not left her without heavy suspicions.”). Justice Story did not mince words about customs officers involved in fraudulent activity either. *See United States v. Sears*, 27 F. Cas. 1006, 1010 (C.C.D. Mass. 1812) (No. 16,247) (Story, Circuit Justice) (“They act at their peril. If they invade the rights of the citizens under color of office, this court will, I trust, be the last to afford them a shelter or a refuge.”).

violat[e] their plain import.”²⁷⁰ In such a setting, requiring a criminal conviction before an *in rem* forfeiture could be imposed would do just that.

Justice Story saw the guilty property fiction underlying *in rem* forfeiture practices as necessary for the enforcement of customs and maritime regulations.²⁷¹ That included owners who were responsible for offenses for which they were directly involved or had approved.²⁷² And in addition, though an owner may have “never contemplated or authorized the acts complained of,” Justice Story understood the owner as “impliedly submit[ting] to whatever the law denounces as a forfeiture” for the wrongful acts of the crew.²⁷³

²⁷⁰ The *Palmyra*, 25 U.S. (12 Wheat.) 1, 15 (1827) (noting that “there is no act of Congress which provides for the personal punishment of offenders, who commit ‘any piratical aggression, search, restraint, depredation or seizure’ within the meaning of those acts”).

²⁷¹ *E.g.*, *The Malek Adhel v. United States*, 43 U.S. (2 How.) 210, 233 (1844) (“this is done from the necessity of the case, as the only adequate means of suppressing the offence or wrong”). Justice Story had a strong belief in the authority of the federal government to impose punishments as necessary for the effective administration of government, including as it related to the imposition of taxes. *See* 1 STORY, *supra* note 267, Book II, ch. 4, §§ 252–53, at 231–33 (positing that a major reason why the Articles of Confederation proved unsuccessful was the “total want of power to lay and levy taxes,” and that “Congress had no power to exact obedience, or punish disobedience to its ordinances” through “fines” and “forfeitures”); *id.*, Book III, Ch. 5, § 530, at 415, n.2 (“the power of punishment appertains to sovereignty, and may be exercised, whenever the sovereign has a right to act, as incidental to his constitutional powers”). Note that *The Malek Adhel*, which is cited to further below, was referred to by that title in the early American caselaw, though the modern Court has taken to referring to it by the name of the claimant of that vessel, thus calling it “*Harmony v. United States*.” *E.g.*, *Austin v. United States*, 509 U.S. 602, 615–16 (1993).

²⁷² *See* JOSEPH STORY, COMMENTARIES ON THE LAW OF AGENCY, AS A BRANCH OF COMMERCIAL AND MARITIME JURISPRUDENCE, WITH OCCASIONAL ILLUSTRATIONS FROM THE CIVIL AND FOREIGN LAW, Ch. 2, § 11, at 12–13 (1839) (explaining that a person cannot authorize an agent to commit an illegal act or later enforce such an obligation, but while doing so “imports neither duty, nor obligation, nor responsibility on either side ... it may involve both in punishment”).

²⁷³ *The Malek Adhel*, 43 U.S. (2 How.) at 230, 233–34; *see also* *The Schooner Industry*, 13 F. Cas. 35, 36 (C.C.D. Mass. 1812) (No. 7028) (Story, Circuit Justice) (rejecting an argument that a vessel could not be subject to *in rem* forfeiture due to the owner’s lack of direct involvement, and noting that under the revenue laws “the act of the master, who is the confidential agent of the owner, is imputed to the owner; or at least the latter is held responsible for the acts of the former, so far as the laws inflict forfeitures of property on account of illegal traffic”); *The Schooner Harmony*, 11 F. Cas. 556, 558 (C.C.D. Mass. 1812) (No. 6081) (Story, Circuit Justice) (“The master has the confidence of the owner, and is responsible to him for his own acts.”); *see also* STORY, *supra* note 272, Ch. 17, § 452, at 465, 466 n.2 (stating that a principal “sometimes is” liable “in a criminal suit, for the acts or misdeeds of his agent” and that “the master is liable for the wrong and negligence of his servant, just as much, when it had been done contrary to

Justice Story's understanding that *in rem* forfeitures were punitive is also evident in his recognition of the limitations on the guilty property fiction and the protections afforded to innocent owners. He did not stretch the fiction farther than longstanding practice would allow. Not only did he decline to impose *in rem* forfeitures when doing so was not set out in statute,²⁷⁴ where a calamity made a violation necessary,²⁷⁵ or where no agency relationship existed,²⁷⁶ he also held the government to their procedural burdens in pursuing *in rem* forfeitures.²⁷⁷ Further, he would have been more protective than his colleagues on the Court of bona fide purchasers of tainted property to ensure truly innocent owners were not subject to punishment.²⁷⁸ And he recognized the applicability

his orders and against his intent, as he is, when he has coöperated in, or known the wrong"); *id.* Ch. 12, § 343, at 350–51 (noting that if an agent “evad[ed] the payment of foreign customs and duties ... he thereby subjected the goods of the latter to the peril of confiscation and forfeiture”).

²⁷⁴ *The Malek Adhel*, 43 U.S. (2 How.) at 235 (explaining that “in the silence of any expression of the legislature, in the case or provisions confessedly penal, it ought not to be presumed that their intention exceeded their language”).

²⁷⁵ *E.g.*, *The Mary*, 16 F. Cas. 932, 933–34 (C.C.D. Mass. 1812) (No. 9183) (Story, Circuit Justice) (overturning the forfeiture of a vessel and its cargo and explaining that “[i]f a vessel come in by distress, or to avoid capture, it has never been considered as an importation” and stating “cases of distress and wreck are exempted from the operation of these, and I believe most other revenue laws”); *see also* *Hayward*, 26 F. Cas. at 248–50 (“if a literal compliance be impracticable from the presence of superior force, or unavoidable accident, necessity or distress, it stands excused upon the principles of law, as well as the immutable dictates of justice”). Justice Story at times seemed to relish in describing the perils of sea voyages. *See, e.g.*, *The Boston*, 3 F. Cas. 932, 936 (C.C.D. Mass. 1833) (No. 1673) (Story, Circuit Justice) (describing a vessel in distress: “She was water-logged and drifting to sea ... If the weather had continued boisterous, with any thing like the severity of any of the customary equinoctial gales in September, her fate, as a lost vessel, was inevitably sealed.”).

²⁷⁶ *E.g.*, *The Marianna Flora*, 24 U.S. (11 Wheat.) 1, 57–58 (1825) (emphasizing that the master's acts bound the owner while also potentially exempting the “innocent owner of the cargo” unless the master also served as his agent).

²⁷⁷ Justice Story felt that libels were often “quite too loose and general” and implored litigators to write with greater “precision ... articulating some material allegation, capable of a distinct answer and proof,” with answers to also contain “clear and exact” statements. *The Boston*, 3 F. Cas. at 933 (regarding a suit for salvage); *see also* *United States v. Burnham*, Claimant, 24 F. Cas. 1309, 1311 (C.C.D. Mass. 1816) (No. 14,690) (Story, Circuit Justice, concurring) (expressing discontent with the state of the pleadings); *The Nancy*, 17 F. Cas. 1148, 1148 (C.C.D. Mass. 1812) (No. 10,008) (Story, Circuit Justice) (holding that the libel was too “dry” on details to be sufficient to sustain an *in rem* forfeiture).

²⁷⁸ *United States v. 1,960 Bags of Coffee*, 12 U.S. (8 Cranch) 398, 406–07 (1814) (Story, J., dissenting) (dissenting from a case holding that the government's claim to forfeited property

of both the presidential pardon power and the return of “fines and forfeitures” through the Secretary of the Treasury’s remission program as mechanisms for forgiving punishment imposed on innocent owners.²⁷⁹

In addition to his embrace of the compatibility of the guilty property fiction and the punitive nature of *in rem* forfeitures, Justice Story’s writings also exhibit a recognition of the use of civil processes to punish, broadly speaking. Consistent with colonial and early American practice, Justice Story understood that “without question all infractions of public laws are offences,” and that punishment for such infractions could be pursued criminally or civilly.²⁸⁰ He recognized that some fines were imposed following a criminal conviction,²⁸¹ but that “civil prosecutions for penalties and forfeitures” were also “common enough.”²⁸² He also understood that penal matters included those involving punishment via *in rem* forfeiture.²⁸³ That is to say, while the processes used to impose these punishments were distinct—and therefore may be seen, as he did in *The Palmyra*, as “independent” of one another²⁸⁴—that did not alter the fact or his perception that the resulting penalties were punishments.²⁸⁵

dates back to the time of the offense and noting that balancing the need to protect the revenue and also innocent purchasers of property “have pressed heavily upon my mind”).

²⁷⁹ 3 STORY, *supra* note 267, Book III, Ch. 37, § 1498, at 353–54 (describing pardon powers generally as applying to the “remission of fines, penalties, and forfeitures,” and specifically noting that the power of remission “is in many cases by our laws confided to the treasury department”).

²⁸⁰ *United States v. Mann*, 26 F. Cas. 1153, 1154–55 (C.C.D.N.H. 1812) (No. 15,718) (Story, Circuit Justice) (explaining that “it is the mode of prosecution, and not the nature of the prohibitions, which ordinarily distinguishes penal statutes from criminal statutes”); *see also The Argo*, 1 F. Cas. at 1103 (describing a forfeiture statute as a “public law”).

²⁸¹ *Mann*, 26 F. Cas. at 1155–56.

²⁸² 3 STORY, *supra* note 267, Book III, ch. 38, § 1780, at 659 (1833).

²⁸³ *The Malek Adhel*, 43 U.S. (2 How.) at 235 (describing an *in rem* forfeiture statute as “confessedly penal”); *Barlow*, 32 U.S. (7 Pet.) at 410 (describing an *in rem* forfeiture for the false entry of goods as “the penal consequences of an infraction of the law”); *The Friendship*, 9 F. Cas. 822, 825 (C.C.D. Mass. 1812) (No. 5124) (Story, Circuit Justice) (describing a statute imposing an *in rem* forfeiture for a permitting violation as “highly penal” and the illegal conduct as being “punished”); *see infra* notes 347–352 and accompanying text.

²⁸⁴ *The Palmyra*, 25 U.S. (12 Wheat.) at 14–15; *see also* Anonymous, 1 F. Cas. 996, 997 (C.C.D. Mass. 1845) (No. 444) (Story, Circuit Justice) (“But it is not true, that informations *in rem* are criminal proceedings. On the contrary, it has been solemnly adjudged that they are civil proceedings.”).

²⁸⁵ *E.g.*, *The Harriet*, 11 F. Cas. 588, 590 (C.C.D. Me. 1840) (No. 6099) (Story, Circuit Justice) (describing an *in rem* forfeiture for fraudulent activity as “necessary ... to punish the dishonest owner”); *The Two Friends*, 24 F. Cas. 433, 434 (C.C.D. Mass. 1812) (No. 14,289) (Story,

In short, Justice Story understood the guilty property fiction as necessary to ensure that revenue fraud would be deterred through the punishment of owners for their own acts and those of their agents, and that that punishment could be imposed civilly in penal matters including *in rem* forfeiture proceedings. Therefore, the *Bajakajian* Court's interpretation of *The Palmyra* (namely, that its authorization of separate criminal and civil proceedings to enforce the law indicated the latter was nonpunitive) is inconsistent with not only early American practices, but also Justice Story's own explications of those practices. In actuality, both *The Palmyra* and Justice Story's other writings are consistent with the notion that *in rem* forfeitures were historically understood to be punishment.

3. On Proceedings *In Rem*

The *Bajakajian* Court attempted to bolster its reading of *The Palmyra* by turning to another source for its understanding that the civil nature of *in rem* forfeitures rendered them nonpunitive: a treatise authored by Rufus Waples in 1882.²⁸⁶ The reliance on this treatise by Justice Thomas in particular is somewhat odd, given that he had only three years prior criticized the Court for relying on the third edition of Justice Story's treatise, *Commentaries on the Constitution of the United States*, because it was published in 1858, "a half century after the framing," and thus not "representing the original understanding of the Constitution," but instead "represent[ing] only [Justice Story's] own understanding."²⁸⁷ Waples began his career as an attorney in 1852, practicing at various times in Delaware, Louisiana, Michigan, and Washington, D.C.—including service as the district attorney for the District of Columbia and the United States Attorney for the Eastern District of Louisiana for two years—and was counsel in at least one case involving an *in rem* forfeiture, albeit regarding

Circuit Justice) (interpreting a statute involving the *in rem* forfeiture of cargo and noting that "[t]he object of the legislature was, to punish" illegal trade); *The Ann*, 1 F. Cas. 926, 927 (C.C.D. Mass. 1812) (No. 397) (Story, Circuit Justice) (discussing a statute imposing the *in rem* forfeiture of a ship for a violation of an embargo act as "punishment"). Justice Story also understood the forfeiture of a claim to salvage for embezzlement as "punishment." *The Boston*, 3 F. Cas. at 936.

²⁸⁶ *United States v. Bajakajian*, 524 U.S. 321, 330 (1998) (citing RUFUS WAPLES, A TREATISE ON PROCEEDINGS IN REM (1882)).

²⁸⁷ *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 856 (1995) (Thomas, J., dissenting); see also *supra* notes 187–188 and accompanying text (regarding Justice Thomas's opposition to relying on Justice Story's treatise).

a vessel captured as prize.²⁸⁸ A man of many interests, he engaged in public speaking on issues as diverse as Republican party politics²⁸⁹ and the earth's natural wonders.²⁹⁰ Waples wrote three treatises and a handbook: one on attachment and garnishment, one on homestead laws, one on parliamentary practice, and the one cited in *Bajakajian* entitled *A Treatise on Proceedings in Rem*, which was published a quarter of a century after the cited edition of Justice Story's *Commentaries*.²⁹¹

One third of Waples's volume, *Proceedings in Rem*, was dedicated to "Actions Against Things Guilty."²⁹² The *Bajakajian* Court cited four pages from that section, in which Waples set out the guilty property fiction in terms largely consistent with the explanation in Part II.²⁹³ While Waples did use phrases consistent with the idea that *in rem* forfeitures were nonpunitive—e.g., "[the property] is never punishable: the only effect is the immediate change of *status*"²⁹⁴—a closer evaluation of the treatise belies the *Bajakajian* Court's reliance on it.²⁹⁵ The majority of the section on guilty property is merely citing cases for the proposition that a particular activity was an offense against the public for

²⁸⁸ *Hon Rufus Waples Died Suddenly*, ANN ARBOR ARGUS-DEMOCRAT (Jan. 24, 1902); H. Rep. Ex. Doc. No. 40-32, at 3, 10, 14 (1869), Claim for Salvage Against United States Steamer Leviathan.

²⁸⁹ *The Filmore Rangers Second Meeting*, NEW ORLEANS DAILY CREOLE (Sept. 8, 1856) ("Mr. Rufus Waples made an address before the Rangers which elicited repeated cheers. He mercilessly flayed the old Squatter Sovereign and exposed the unsoundness of the position of the Democratic party.").

²⁹⁰ *Lecture of Rufus Waples, Esq.*, NEW ORLEANS TIMES (Feb. 24, 1865) (regarding the Sahara Desert, the Norwegian Sea, the Gulf Stream, and Mammoth Cave in Kentucky).

²⁹¹ See generally RUFUS WAPLES, A TREATISE ON ATTACHMENT AND GARNISHMENT (1895); RUFUS WAPLES, A TREATISE ON HOMESTEAD AND EXEMPTION (1893); RUFUS WAPLES, HANDBOOK ON PARLIAMENTARY PRACTICE (1883); WAPLES, *supra* note 286. Waples also wrote a law review article that discusses jurisdiction over a variety of matters, some of which were processed *in rem*. See generally Rufus Waples, *Constitutional Statutory Jurisdiction*, 35 AM. L. REG. 481, 501-02 (1887). It briefly references *in rem* matters in admiralty court and tax cases, but only with respect to notice to interested parties. *Id.* at 486-87, 501-02.

²⁹² WAPLES, *supra* note 286, Book II.

²⁹³ *Bajakajian*, 524 U.S. at 330 (citing WAPLES, *supra* note 286, at 205-09).

²⁹⁴ WAPLES, *supra* note 286, at 206.

²⁹⁵ In addition to reviewing the section's above the line text, I reviewed 436 cases cited in the relevant portion of the treatise. I was unable to review a small number of cases for which the citation was sufficiently obscure as to render identification of the case impossible.

which *in rem* forfeitures were available.²⁹⁶ Several of the cases cited for this purpose explicitly described such statutes as penal and the *in rem* forfeitures imposed as punishment.²⁹⁷ With that in mind, the treatise may be best understood as Waples merely saying, at times inartfully, that *in rem* forfeitures need not receive full criminal procedural protections because they were not *in personam* criminal punishments, rather than declaring them nonpunitive altogether. His own summary of the “settled doctrines” set out in the treatise support that reading:

[P]roceedings against things are always civil in character; that there must be a pre-existing right in or to property before it can be proceeded against; that such right to a guilty thing can spring only from an offense committed in, with, or by it; that the defendant in such action is always a thing and never a person; that a decree against property, after general notice, rendered by a court of competent jurisdiction, when final, is conclusive against all the world; that the object of such judgment against a guilty or offending thing is to pronounce upon its *status*, (whether forfeited or not,) and that absolute forfeiture vests in the libellant a title new and complete.²⁹⁸

In other words, by not engaging with the cases underlying the discussion and by not considering the section as a whole, the *Bajakajian* Court relied on a treatise that is best read as standing for the uncontroversial position that *in rem* forfeitures need not be processed criminally. Given the longstanding use of civil processes to impose pecuniary penalties for violations of penal laws, that conclusion is entirely consistent with the understanding that *in rem* forfeitures were historically understood to constitute punishment.

²⁹⁶ Of the 117 subsections in the section on Actions Against Things Guilty, 63 simply set out offense types. See WAPLES, *supra* note 286, at 206–360.

²⁹⁷ *E.g.*, *id.* at 246, 260, 282–302, 315; *Barlow v. United States*, 32 U.S. (7 Pet.) 404, 410 (1833) (describing *in rem* forfeitures as “penal consequences”); *The Two Friends*, 24 F. Cas. 433, 434 (C.C.D. Mass. 1812) (No. 14,289) (Story, Circuit Justice) (stating that “[t]he object of the legislature was, to punish” via *in rem* forfeiture); *United States v. One Still*, 27 F. Cas. 317, 318 (C.C.E.D.N.Y. 1867) (No. 15,954) (Nelson, Circuit Justice) (describing a statute allowing for the *in rem* forfeiture of a distillery and distilling equipment as “penal”); *The Caroline*, 5 F. Cas. 90, 91–92, n.2 (C.C.D. Va. 1819) (No. 2418) (Marshall, Circuit Justice) (describing a statute as “of a highly penal character” and *in rem* forfeitures as “punishment”).

²⁹⁸ WAPLES, *supra* note 286, at 352. For a further indication that Waples understood *in rem* forfeitures to constitute punishment, see *infra* note 319 and accompanying text (regarding the rule of lenity).

B. *Early American Remedial Punishments*

In addition to its error regarding the use of civil processes to punish, the *Bajakajian* Court made a somewhat muddled claim regarding the remedial nature of *in rem* forfeitures. Though it stated that questioning whether revenues from a modern forfeiture may compensate the government for investigation and enforcement expenses “is essentially meaningless, because even a clearly punitive criminal fine or forfeiture” could serve that purpose, it also claimed that early American *in rem* forfeitures were exclusively remedial, and thus outside of the scope of the Excessive Fines Clause, because they “provide[d] a reasonable form of liquidated damages’ to the Government” for taxes owed and the costs of investigating and prosecuting customs violations.²⁹⁹

As detailed below, the Court’s conception of early American law as treating punishment and remediation as mutually exclusive in the *in rem* forfeiture context is grounded on a failure to understand the use of the word “remedial” as a term of art in the context of the rule of lenity, and to account for the ways in which funds generated through pecuniary punishments—including both fines and forfeitures—were distributed to ensure the government was made whole and to compensate government actors.

1. *In Rem* Forfeitures and the Rule of Lenity

As proof that early *in rem* forfeitures were “not considered punishment against the individual for an offense,” the *Bajakajian* Court plucked a few words from the 1845 case *Taylor v. United States*, which involved the role of the rule of lenity in interpreting a statute imposing the *in rem* forfeiture of goods for revenue fraud.³⁰⁰ The text selected from *Taylor* noted that customs statutes “imposing a penalty or forfeiture . . . truly deserve to be called remedial.”³⁰¹ Devoid of context, the quote chosen by the *Bajakajian* Court appears to support the conclusion that *in rem* forfeitures would have been understood to be

²⁹⁹ *Bajakajian*, 524 U.S. at 343 n.19 (quoting *One Lot Emerald Cut Stones & One Ring v. United States*, 409 U.S. 232, 237 (1972)). This conclusion is hard to fathom as a mathematical proposition. As Kevin Arlyck has documented, ad valorem duties between 1790 and 1807 were approximately twenty percent of the value of imported goods, meaning that the forfeiture of the goods themselves—let alone the vessels that carried them—were multiple times higher than the customs revenue that would have been lost through fraudulent activity, even with the addition of enforcement costs in any given case. Arlyck, *supra* note 7, at 1474–76.

³⁰⁰ *United States v. Bajakjian*, 524 U.S. 321, 331 (1998) (citing *Taylor v. United States*, 44 U.S. (3 How.) 197 (1845)).

³⁰¹ *Id.* (quoting *Taylor*, 44 U.S. (3 How.) at 210).

nonpunitive (read: remedial) in nature. Critically, however, the *Taylor* Court was not speaking to the question of whether *in rem* forfeitures were or were not punishment, but instead was considering the application of the rule of lenity to customs statutes as a tool of statutory construction.³⁰²

Dating back to the English common law and continuing forward in the United States, the rule of lenity held that, in a case of ambiguity as to legislative intent,³⁰³ penal statutes were to be interpreted in favor of the person who might be punished, whereas other statutes—described as “remedial” for the purposes of the rule—were to be liberally construed.³⁰⁴ The rule, therefore, called for the strict interpretation of criminal and penal statutes imposing punishment through either criminal or civil processes.³⁰⁵ But the rule of lenity had its limits,

³⁰² *Taylor*, 44 U.S. (3 How.) at 210–11.

³⁰³ 5 JOHN COMYNS, A DIGEST OF THE LAWS OF ENGLAND, 323, R. 20 (5th ed., corr. 1822) (“It is not a rule, that courts, in the exposition of penal statutes, are to narrow the construction. Where the sense is doubtful, they are to be construed in favor of the supposed offender; but where it is plain, they must be literally followed.”); *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 628–29 (1818) (explaining that the statutory text could be “understood to indicate clearly the intention” of the legislature and therefore “rejecting a construction, narrowing the plain meaning of the words, that such construction would leave the crime entirely unpunished”); *Campbell v. Shattuck*, 2 Aik. 109, 111–12 (Vt. 1827) (explaining that “where a statute, whether penal or remedial, is clearly and unequivocally expressed, and the signification manifest, courts are not at liberty, by construction, in view of its being hard or unreasonable, to restrain its effect and operation”).

³⁰⁴ 7 MATTHEW BACON, A NEW ABRIDGMENT OF THE LAW § 9, at 462–63 (7th ed. 1832) (“[t]he rules of the common law will not suffer the general words of a statute to be restrained, to the prejudice of a person upon whom a penalty is inflicted”); COMYNS, *supra* note 303, at 322, R.19 (“A penal statute cannot be extended to other cases than those intended by the legislature, even though within the mischief aimed at.”); 1 BLACKSTONE, *supra* note 184, at *88, n.19 (explaining that “whenever any ambiguity arises in a statute introducing a new penalty or punishment, the decision shall be on the side of lenity and mercy”); *Respublica v. Weidle*, 2 U.S. (2 Dall.) 88, 90–91 (1781) (stating that “a law constituting a crime, must be strictly and literally interpreted and pursued”); *Bray v. The Atalanta*, 4 F. Cas. 37, 38 (D. S.C. 1794) (No. 1819) (explaining that “it is a penal law and must be construed strictly”); *Perdue v. Burnett*, Minor 138, 139 (Ala. 1823) (interpreting a revised statute imposing a reduced punishment as evidence of legislative intent to reduce the amount of punishment without changing the elements of the offense because “[i]t is a safe rule to give to penal laws a strict construction”); *Respublica v. Cleaver*, 4 Yeates 69, 73 (Pa. 1804) (stating “[w]e ... are disposed to construe penal laws strictly, and not extend them beyond their letter”); *Smith v. Minor*, 1 N.J.L. 16, 22 (1790) (“It is a penal act, and by the rules of construction cannot be extended to cases which do not come within its express words.”).

³⁰⁵ *E.g.*, JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF STATUTORY CRIMES; INCLUDING THE WRITTEN LAWS AND THEIR INTERPRETATION IN GENERAL, WHAT IS SPECIAL

an understanding of which is critical for comprehending the language the *Bajakajian* Court pulled from *Taylor*. As a general matter, due to difficulties detecting and thus prosecuting offenses involving fraud, such statutes were at times categorized as “remedial” for the sole purpose of applying a liberal statutory construction³⁰⁶ even though they were “penal” in the broader sense of imposing punishment.³⁰⁷ This was done because, “though penal laws [were] to

TO THE CRIMINAL LAW § 193, at 185–86 (2d ed. 1883) (“statutes which subject one to a punishment or penalty, or to forfeiture, or a summary process calculated to take away his opportunity of making a full defence, or in any way deprive him of his liberty, are to be construed strictly”); *Campbell v. Rankins*, 11 Me. 103, 107–08 (1833) (applying the rule of lenity in an action of debt to limit the scope of an offence related to transporting a minor without a parent’s consent); *Budd v. Sip*, 13 N.J.L. 348, 349 (1833) (applying the rule of lenity in an action of debt to limit the scope of fishing regulations).

³⁰⁶ *E.g.*, 1 BLACKSTONE, *supra* note 184, at *88 (explaining that strict construction should not be required when interpreting statutes involving frauds, which “act[ed] upon the offence, by setting aside the fraudulent transaction”); *see also* *Commonwealth v. Boynton*, 2 Mass. 77, 79–80 (1806) (noting the rule of lenity but in order “more effectually to prevent” a fraud, interpreting a statute to apply to a fraud completed by counterfeiting signatures of a bank president and the cashier of the bank because “common prudence might not be able to guard against this fraud”); sources cited *infra* note 314. *But see* *The Henry*, 11 F. Cas. 1160, 1161–62 (D. Me. 1867) (No. 6373) (describing an *in rem* forfeiture as an “extreme penalty” and stating that “[t]he true rule of construction” was that statutes imposing *in rem* forfeitures for offenses related to the registration of ships is that such statutes “are to be construed strictly as penal, not liberally as remedial laws”).

³⁰⁷ *E.g.*, *The Merino*, 22 U.S. (9 Wheat.) 391, 403 (1824) (describing a statute allowing for an *in rem* forfeiture as “highly penal”); *The Gertrude*, 10 F. Cas. 265, 267 (C.C.D. Me. 1841) (No. 5370) (describing a statute imposing an *in rem* forfeiture for the unlading of goods without a permit as “highly penal”); *The Wilson*, 30 F. Cas. 239, 245 (C.C.D. Va. 1820) (No. 17,846) (Marshall, Circuit Justice) (describing a customs law that allowed for *in rem* forfeitures as part of the “penal law”); *United States v. Nine Packages of Linen*, 27 F. Cas. 154, 157 (C.C.D.N.Y. 1818) (No. 15,884) (Livingston, Circuit Justice) (describing *in rem* forfeitures as “penal and calamitous”); *The Cotton Planter*, 6 F. Cas. 620, 621 (C.C.D.N.Y. 1810) (No. 3270) (Livingston, Circuit Justice) (describing a statute imposing an *in rem* forfeiture of a ship for a violation of the embargo laws as “of the most penal nature”); *The James Wells*, 26 F. Cas. 585, 586 (C.C.D. Conn. 1808) (No. 15,467) (Livingston, Circuit Justice) (describing a libel to obtain the *in rem* forfeiture of a brig as “a penal suit between the government and a fellow citizen”); *United States v. Seventy-Eight Cases of Books*, 27 F. Cas. 1030, 1031 (S.D. Ohio 1869) (No. 16,258) (describing the portion of a statute setting out the forfeiture as “the penal clause”). Some jurists even went so far as to describe *in rem* forfeitures in criminal terms. *E.g.*, *The Hoppet*, 11 U.S. (7 Cranch) 389, 392 (1813) (describing an embargo act violation as a “crime”); *United States v. Three Parcels of Embroidery*, 28 F. Cas. 141, 143–44 (D. Mass. 1856) (No. 16,512) (discussing “[t]he criminality of the fraudulent design” justifying the *in rem* forfeiture); *Commonwealth v. Certain Intoxicating Liquors*, 107 Mass. 216, 218 (1871) (describing an *in rem* forfeiture as “a criminal cause within the meaning of the statute”); *State v. Certain Casks of Rum*, 35 N.H. 222, 224 (1857) (describing *in rem* forfeitures as “in their form and substance of a criminal character”);

be construed strictly, they [were] not to be construed so strictly as to defeat the obvious intention of the legislature.”³⁰⁸ Put plainly, the rule of lenity did not mandate an interpretation of any statute—including a customs statute or maritime regulation—that would effectively neuter the law.

From America’s earliest days, courts respected the balance between employing the rule of lenity to protect those alleged to have committed public offenses and ensuring that it did not go so far as to undermine the nation’s efforts to collect tax revenue. In 1787, the Court of Common Pleas in Philadelphia County took up the case *Phile v. The Ship Anna*, which involved the interpretation of the following statutory language: “Every vessel or boat, from which any goods, wares, or merchandize shall be unladed, before due entry thereof at the office of the collector of the port of Philadelphia, &c. shall be forfeited.”³⁰⁹

see also *The Sloop Active v. United States*, 11 U.S. (7 Cranch) 100, 106 (1812) (holding that a vessel that had never left port was not forfeitable under the embargo statute no matter how “criminal the intentions” of those on board).

³⁰⁸ *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820); see also 7 BACON, *supra* note 304, § 9, at 463 (“However true it may in the general be, that penal laws are to be construed strictly, yet, even in the construction of these, the intention of the legislators ought to be regarded.”); *Farmers’ & Mechanics’ Nat. Bank v. Dearing*, 91 U.S. 29, 35 (1875) (describing a statute setting out penalties for the offense of usury as “remedial as well as penal” and therefore that it “is to be liberally construed to effect the object which Congress had in view in enacting it”); *American Fur Co. v. United States*, 27 U.S. (2 Pet.) 358, 367 (1829) (quoting *Wiltberger’s* articulation of the rule in a matter involving the *in rem* forfeiture of goods for the violation of laws restricting trade with Indian tribes); *United States v. Hall*, 26 F. Cas. 75, 78 (C.C.E.D. Pa. 1884) (No. 15,281) (explaining, in relation to a statute imposing \$50 fines against postal carriers, that “notwithstanding this rule [of lenity], the intention of the law-makers must govern in the construction of penal as well as other statutes; they are not to be construed so strictly as to defeat the obvious intention of the legislature”); *United States v. Smith*, 27 F. Cas. 1149, 1151 (C.C.D.C. 1835) (No. 16,328) (stating, in relation to an indictment for keeping a common gaming table, that “although penal statutes are to be construed strictly, yet even in these the intention of the legislature is to be regarded”); *United States v. Cave*, 25 F. Cas. 351, 352 (D. Pa. 1809) (No. 14,760) (stating, in an action of debt to recover a \$500 fine for the violation of an impost law: “And it is also a rule, in the interpretation of statutes, penal as well as others, that they shall be so construed as to effectuate the intention of the legislature.”); *Buck v. Danzenbacker*, 37 N.J.L. 359, 361 (1875) (noting, in an action of debt to recover a \$5 fine and costs, the general rule that for penal statutes “a case which does not come within its words, shall not be brought within it by construction,” but also that they must be interpreted to address the bad acts the legislature sought to deter); *Harrison v. Hunter*, 2 Del. Cas. 76, 77 (Del. Ct. of Common Pleas 1797) (stating, in a *qui tam* prosecution for a £100 fine: “The observation that a penal statute is to be construed strictly is true. But those laws enacted for the public good are to be construed so as to prevent the mischief which they were intended to remedy.”).

³⁰⁹ *Phile v. The Ship Anna*, 1 U.S. (1 Dall.) 197, 205 (1787).

The claimants—whose crew allegedly unlade forty-two hampers of porter though the master only declared twenty in the official manifest³¹⁰—argued that the statute should be interpreted to mandate the forfeiture of only the twenty-two hampers not declared, rather than the full forty-two unladed.³¹¹ The court spoke in terms of the rule of lenity, remarking that “it is a requisite that such laws should be strictly worded,” and that “undoubtedly, there are cases where the construction of the words must be such, as to prevent more injury being done than was intended.”³¹² And yet, the court ultimately interpreted the statute to allow forfeiture of all of the unladen goods, given the evidence of legislative intent inherent in statutes designed to protect against revenue fraud, explaining: “This has been repeatedly called a hard law: but the truth is, that revenue laws are of a harsher nature than any others, and necessarily so; for, the devices of ingenious men, render it indispensable for the legislature to meet their illicit practices with severer penalties.”³¹³

Simply put, the statute at hand *was* penal in the sense that it imposed punishment (harsh punishment at that), but as a matter of statutory construction, the rule of lenity allowed for an interpretation favoring the government so as to avoid rendering the protection of the revenue against fraudulent behavior effectively meaningless.³¹⁴

Courts did, in fact, employ the rule of lenity to protect the owners of cargo and vessels at risk of forfeiture,³¹⁵ as was the case with *Peisch v. Ware*, decided in

³¹⁰ *Id.*

³¹¹ *Id.*

³¹² *Id.* at 206.

³¹³ *Id.* at 205–06.

³¹⁴ See JOEL PRENTISS BISHOP, 1 COMMENTARIES ON THE CRIMINAL LAW, Book II, ch. 6, §§ 116, 123, 127 at 110, 115, 118 n.6 (Boston, Little, Brown & Co. 1856) (stating that “[r]evenue laws” are within the scope of the rule of lenity “though their primary object is not the punishment of crimes, but the collection of duties,” because “they impose fines, work forfeitures, and deprive men of their property,” and citing *The Ship Anna* as an example of a case in which the rule applied but was not violated); *United States v. Twenty-Six Bales of Rubber Boots*, 28 F. Cas. 281, 283 (D. Mass. 1858) (No. 16,570) (explaining that because they “are for the prevention of fraud,” “[t]he fiscal laws of the country, though bristling with forfeitures and penalties, are not held to be penal laws in the technical sense of the word, and like them to receive a strict and narrow construction” instead “allow[ing] a fair and reasonable operation in furtherance of the intention of the legislature”).

³¹⁵ *E.g.*, *United States v. Eighty-Four Boxes of Sugar*, 32 U.S. (7 Pet.) 453, 462–63 (1833) (employing the rule of lenity to interpret a “highly penal” statute as excluding cases where, due to “accident or mistake,” sugars were miscategorized for the purpose of establishing duties); *Wright v. United States*, 30 F. Cas. 714, 715–16 (C.C.S.D.N.Y. 1840) (No. 18,099) (Thompson, Circuit Justice) (explaining that a statute does not make a lack of correspondence between an

1808.³¹⁶ As discussed in Part II, in *Peisch*, customs officers sought the forfeiture of cargo salvaged from a stranded vessel, arguing that the owners failed to comply with a statute requiring that imported cargo carry certain marks and certification.³¹⁷ In light of the accidental nature of the failure to comply, and “the extreme severity of [the government’s interpretation of the] regulation,” the *Peisch* Court determined that such a “construction of the law could only be made where the words would admit of no other.”³¹⁸ The Court declined to read the statute as allowing an owner to be “punish[ed]” through *in rem* forfeiture under circumstances in which the crew would have been unable to comply with the statute given the catastrophe at hand.³¹⁹

entry and the contents of a package a ground for forfeiture, and that to read such an offense into the statute “would violate the rules of construction applicable to penal statutes”); *The William Gray*, 29 F. Cas. 1300, 1302 (C.C.D.N.Y. 1810) (No. 17,694) (Livingston, Circuit Justice) (interpreting an embargo statute as including a necessity defense because it is a “penal” statute, and necessity was a core principle of “criminal justice”); *The Enterprise*, 8 F. Cas. 732, 734–36 (C.C.D.N.Y. 1810) (No. 4499) (Livingston, Circuit Justice) (applying the rule of lenity to a “highly penal” embargo statute punishing violators through fines and other punishments imposed against the mariners involved along with the *in rem* forfeiture of the goods and, in certain circumstances, the vessel, and determining that the language of the statute did not include language prohibiting the loading of vessels); *The Harriet*, 11 F. Cas. 594, 594–95 (D. Me. 1836) (No. 6100) (rejecting the government’s argument that a mistake in a certificate setting out the days spent fishing under a license was conclusive proof of intentional fraud, allowing for evidence of accidental error in order to avoid an *in rem* forfeiture, because “[t]o hold such an error conclusive proof of fraud, would be giving to the law a construction of extraordinary strictness, and in a statute so highly penal, not warranted, unless the words of the act clearly require it”); *The Isabella*, 13 F. Cas. 161, 163 (S.D.N.Y. 1810) (No. 7101) (Livingston, Circuit Justice) (interpreting an embargo statute that gave authority to customs officers to allow vessels already en route at the time the act was passed to continue carrying weapons and stores necessary for the voyage and explaining that courts, “in a case of forfeiture, particularly, will look very unwillingly elsewhere for a different meaning” of what constituted necessary items when there appeared to be a common understanding amongst merchants, seamen, and officers); *see also* *United States v. The Penelope*, 27 F. Cas. 486, 489–90 (D. Pa. 1806) (No. 16,024) (charging a jury that it had “latitude both as to law and fact” regarding whether the term “resident” in an embargo statute included the claimant because the act was “highly penal ... and must have a strict construction”); *Commonwealth v. Giltinan*, 64 Pa. 100, 104–05 (1870) (employing the rule of lenity to preclude the *in rem* forfeiture of liquors because it was “not within [the statute’s] words”).

³¹⁶ *Peisch v. Ware*, 8 U.S. (4 Cranch) 347 (1808).

³¹⁷ *See supra* notes 94–101 and accompanying text.

³¹⁸ *Peisch*, 8 U.S. (4 Cranch) at 362–64.

³¹⁹ *Id.* at 363–64. The response of Waples to *Peisch* also supports the conclusion that he believed *in rem* forfeitures to constitute punishment and that his concerns related primarily to procedure.

This understanding of the rule of lenity as consistent with the punitive nature of *in rem* forfeitures was not limited to the customs context, just as *in rem* forfeitures had never been limited to customs violations.³²⁰ Lawmakers frequently refined and broadened the scope of customs laws and other maritime regulations due to the “continual struggle between the law makers and the law breakers; between the officers of the government, whose duty it is to enforce the revenue laws, and the importers of foreign goods whose interest urges them to invent expedients to evade them.”³²¹ To that “patch work”³²² of laws were added statutes Congress introduced to address emerging issues understood to be highly penal and difficult to detect, including war time embargos,³²³ the intercontinental slave trade,³²⁴ and the regulation of liquor and tobacco

See supra Part III.A.3. His response began by acknowledging that “[t]he facts upon which [the *Peisch* Court’s] views were written, seem fully to warrant the liberal construction of the section under such circumstances.” *WAPLES, supra* note 286, at 277–78. He then warned that if the concept was taken to mean that an owner “could have all the presumptions in his favor which are accorded in criminal prosecutions, it would be found very difficult to enforce the laws of the revenue.” *Id.* at 278. The concern that the rule of lenity not be applied too vigorously to *in rem* customs forfeitures is consistent with the limitations on the rule to protect the revenue discussed herein.

³²⁰ *See* Arlyck, *supra* note 7, at 1465, 1481; Colgan, *Reviving, supra* note 20, at 303 & n.141.

³²¹ *United States v. Twenty-Eight Packages of Pins*, 28 F. Cas. 244, 249 (E.D. Pa. 1833) (No. 16,561).

³²² *Cardinel v. Smith*, 5 F. Cas. 45, 47 (C.C.D. Cal. 1867) (No. 2395) (describing a revenue act as “a piece of patch work, and it is sometimes difficult to reconcile its various provisions with each other” given “[i]ts great length, and the multiplicity of subjects which it embraces, [which] enhances the labor of understanding it”); *see also* *United States v. Sixty-Seven Packages of Dry Goods*, 58 U.S. (17 How.) 85, 93 (1854) (describing the “interpretation of our system of revenue laws” as “very complicated”).

³²³ *E.g., The Adventure*, 1 F. Cas. 202, 204 (C.C.D. Va. 1812) (No. 93) (Marshall, Circuit Justice) (remarking, with respect to an embargo statute imposing an *in rem* forfeiture, that the rule of lenity “has never been understood ... to imply, that the intention of the legislature, as manifested by their words, is to be overruled,” and that instead “where the intention is not distinctly perceived, ... where the mind balances and hesitates between the two constructions, the more restricted construction ought to prevail”), *overturned on other grounds* 12 U.S. (8 Cranch) 221 (1814).

³²⁴ *The Slaver Kate*, 69 U.S. (2 Wall.) 350, 363–64 (1864) (describing the slave trade as a “crime” and stating: “Fears of forfeiture of property, and even of life, have been easily overcome by hopes of enormous gains ... the most conspicuous results of penal legislation will be, more cunning in the contrivance and more adroitness in the use of means for evading or defeating its intent and operation.”); *Strohm v. United States*, 23 F. Cas. 240, 241–42 (C.C.D. Md. 1840) (No. 13,539) (Taney, Circuit Justice) (interpreting a statute as allowing the guilty intent of the ship’s owner to carry over to the factor or master or vice versa because “[u]pon any other

production.³²⁵ As that increasingly wide-ranging and complex set of laws developed, challenges to their scope were regularly on the dockets of American courts.

For example, as Congress developed laws prohibiting participation in the international slave trade, claimants protesting the forfeiture of vessels challenged the breadth of the statutes by raising the rule of lenity. One such case, *The Emily and the Caroline*, involved the violation of a federal law that prohibited the “build[ing], fit[ting], equip[ing], load[ing] or otherwise prepar[ing]” a ship for use in the slave trade upon pain of forfeiting the ship.³²⁶ The owners argued that to fall within the statute’s purview, the ship must be “ready for sea” rather than in a state of preparation.³²⁷ In its analysis, the Court explained the rule of lenity as follows: “In construing a statute, penal as well as others, we must look to the object in view, and never adopt an interpretation that will defeat its own purpose.”³²⁸ It therefore rejected the more limited interpretation of the statute that would have only allowed intervention at the very moment the ship was ready to set sail, because it would “render[] the law in a great measure nugatory, and enable offenders to elude its provisions in the most easy manner.”³²⁹

Further, as the use of *in rem* proceedings expanded beyond the customs and maritime settings, courts continued to understand the rule of lenity as requiring the strict construction of penal laws³³⁰ but that, just as in admiralty and maritime

construction the law would be nugatory” given the ease by which “the foreign owner who, through a factor or a master, procured a vessel to be built or equipped for the slave-trade ... [could] conceal from them any positive knowledge of the uses for which the vessel was intended”); *The Wanderer*, 29 F. Cas. 150, 152 (D. Mass. 1860) (No. 17,139) (describing the necessity of harsh forfeiture laws as “for a much stronger reason” than even enforcement of the revenue laws because the slave trade, “so denounced and so criminal, will assume every disguise, false pretence and deception, which fraud and ingenuity can devise,” making it necessary “to enlist the owner of the vessel to prevent her being so employed in violation of law, by holding him responsible for such use”).

³²⁵ See *supra* Part II.B.

³²⁶ *The Emily and the Caroline*, 22 U.S. (9 Wheat.) 381, 385–86 (1824).

³²⁷ *Id.* at 388–89.

³²⁸ *Id.* at 388.

³²⁹ *Id.* at 388–89; see also Nelson, *supra* note 65, at 242–46 (stating, in an attorney general opinion, that those committing the offense of preparing a ship for engagement in the slave trade were “subject to punishment,” and describing the capital punishment, fines, and *in rem* forfeitures that could be imposed).

³³⁰ E.g., *Giltinan*, 64 Pa. at 102, 105 (applying the rule of lenity to a statute allowing for the *in rem* forfeiture of distilled liquors because it is “penal and must be construed strictly”); see also *United States v. Whittier*, 28 F. Cas. 591, 592 (E.D. Mo. 1878) (No. 16,688) (stating, in a case

law,³³¹ laws related to liquor and tobacco regulation and taxation were to be interpreted in a manner that ensured those laws were enforceable.³³²

With all of this in mind, *Taylor* is cast in a different light. *Taylor* involved efforts by the government to obtain an *in rem* forfeiture of “certain cases of cloths and cassimeres seized upon land”³³³ by introducing evidence that, as a result of fraudulent behavior, the goods had been initially undervalued, leading to an underpayment of duties actually owed.³³⁴ The owner of the goods had argued that the United States was estopped from introducing evidence that the goods had been undervalued because the original valuation was based on an

involving an indictment under an obscenity statute, that “[s]tatutes creating crimes will not be extended by judicial interpretation to cases not plainly and unmistakably within their terms”).

³³¹ See *supra* notes 309–319 and accompanying text. This application of the rule of lenity remained constant with respect to imported goods in the mid- to late-1800s. *E.g.*, *Smythe v. Fiske*, 90 U.S. (23 Wall.) 374, 380 (1874) (“Revenue laws are to be construed liberally to carry out the purposes of their enactment. Their penal provisions are not penal in the sense that requires a rigidly strict construction.”); *In re Cliquot’s Champagne*, 70 U.S. 114, 145 (1865) (“Revenue laws are not penal laws in the sense that requires them to be construed with great strictness in favor of the defendant. . . . They should be so construed as to carry out the intention of the legislature in passing them and most effectually accomplish these objects.”); *United States v. 1,150 One-Half Pounds of Celluloid*, 82 F. 627, 629–32, 633–34 (6th Cir. 1897) (“We must so construe [the act] as to carry out the obvious intention of congress; but, being penal, every case must come, not only within its letter, but within its spirit and purpose.”); *250 Barrels of Molasses*, 24 F. Cas. 437, 440 (C.C.D.S.C. 1869) (No. 14,293) (“Revenue laws are not penal in the sense that requires them to be construed with great strictness in favor of defendants” and quoting *Taylor’s* language describing revenue statutes as remedial); *United States v. 58,850 Cigars*, 25 F. Cas. 1072, 1074 (C.C.D. Mass. 1857) (No. 15,092) (Curtis, Circuit Justice) (“Revenue laws should be so construed as effectually to prevent the mischief which they were designed to prohibit.”).

³³² *E.g.*, *United States v. Stowell*, 133 U.S. 1, 12 (1890) (noting that revenue fraud statutes are “enacted for the public good, and to suppress a public wrong, and therefore, although they impose penalties or forfeitures,” they must be construed “so as to carry out the intention of the legislature”); *United States v. Thirty-Six Barrels of Highwines*, 28 F. Cas. 67, 68 (C.C.N.D.N.Y. 1870) (No. 16,468) (interpreting a statute regarding liquors held in bonded warehouses and rejecting a strict construction if it “may furnish a chance of escape, and a means of evasion, to the guilty party, who is engaged in endeavors to defraud”); *United States v. Mynderse*, 27 F. Cas. 50, 52 (C.C.N.D.N.Y. 1870) (No. 15,805) (explaining that a revenue statute was “to be interpreted with just and fair liberality, so as to promote the object of the statute and secure obedience to its requirements”); *United States v. Two Bay Mules*, 36 F. 84, 85 (W.D. N.C. 1888) (describing the difficulty of detecting revenue fraud related to liquor and tobacco production, making a “liberal construction” necessary); *Glenn v. Winstead*, 21 S.E. 393, 394 (N.C. 1895) (following *Stowell*).

³³³ *Taylor*, 44 U.S. (3 How.) at 204.

³³⁴ *United States v. Twenty-Five Cases of Cloth*, 28 F. Cas. 257, 259 (E.D. Pa. 1840).

appraisement conducted by its own customs officers.³³⁵ In doing so, the owner posited that the underlying statutes referencing appraisement were “highly penal, and therefore [were] to receive a strict construction in favor of those who may be prosecuted under them.”³³⁶

The lower court’s response to the call for the application of the rule of lenity in *Taylor* was consistent with the understanding of the rule detailed above. It responded by noting that, for purposes of statutory interpretation, the revenue laws were “not in the strict sense penal,” and therefore that it “would construe them so as most effectually to accomplish the intention of the legislature in passing them.”³³⁷ It therefore declined to adopt the restricted version of the statute proposed by the goods’ owner, because that interpretation would protect owners who succeeded in defrauding the customs officers who conducted the original appraisement by locking the government to that undervaluation. As the lower court explained: “I can by no means assent to this doctrine, which in my judgment would be to offer a premium for successful fraud, and *punishment* only to the unskilful.”³³⁸ Therefore, even though the statute employed *in rem* forfeitures to “punish[] the offenders,”³³⁹ making it quintessentially penal, the rule of lenity did not result in an interpretation of the statute favoring the defendant.

The opinion by Justice Story, writing for the *Taylor* Court on appeal, is also consistent with the idea that customs laws, while imposing punishment, were subject to the rule of lenity’s limitation. In *Taylor*, Justice Story adopted the lower court’s analysis, quoting its discussion of the rule of lenity at length and ultimately upholding its determination that the statute did not prevent the introduction of evidence of fraudulent behavior.³⁴⁰ In doing so, it did not, as the *Bajakajian* Court suggests, declare customs statutes to be remedial in the sense of being nonpunitive. Rather, Justice Story treated the term “remedial” as a term of art as it was understood in the rule of lenity context:

Upon the point that the revenue laws, on which the information was founded, were not, as the judge in the court below suggested, to be deemed penal laws in the sense in which that phrase is sometimes used,

³³⁵ *Id.*

³³⁶ *Id.* at 264.

³³⁷ *Id.*

³³⁸ *Id.* (emphasis added).

³³⁹ *Id.* at 274 (describing an *in rem* forfeiture as “punishing the offenders” in the jury charge).

³⁴⁰ *Taylor*, 44 U.S. (3 How.) at 210-11.

it may be proper to say a very few words. He treated the point as not of great importance in the case, as we think it was not, since it had no tendency to change the interpretation of the provisions of the revenue laws then under his consideration. In one sense, every law imposing a penalty or forfeiture may be deemed a penal law; in another sense, such laws are often deemed, and truly deserve to be called, remedial. The judge was therefore strictly accurate, when he stated that "It must not be understood that every law which imposes a penalty is, therefore, legally speaking, a penal law, that is, a law which is to be construed with great strictness in favor of the defendant. Laws enacted for the prevention of fraud, for the suppression of a public wrong, or to effect a public good, are not, in the strict sense, penal acts, although they may inflict a penalty for violating them."³⁴¹

That *Taylor* is best read as consistent with an understanding that *in rem* forfeitures are punishment, but that the rule of lenity should not be over-extended so as to undermine Congress's efforts to prevent revenue fraud, is compatible with Justice Story's treatment of the rule of lenity in other cases.³⁴² Justice Story operated from the foundation that the goal of statutory construction was to ascertain legislative intent—in the admiralty context, the intent to generate revenue and regulate commerce on the nation's seaboard.³⁴³ He also repeatedly noted that while penal statutes must be strictly construed, they must primarily "be so construed, as to meet the mischief, which the legislature show[s] a clear determination to suppress."³⁴⁴ When congressional intent was unclear, Justice

³⁴¹ *Id.* at 210.

³⁴² See *The Abigail*, 1 F. Cas. 36, 36–37 (C.C.D. Mass. 1824) (No. 18) (Story, Circuit Justice) (declining to interpret a statute as requiring a claimant to establish the legal origin of coal to prove its importation's legality because doing so "may, nay it often must, have the effect of superinducing a forfeiture" and so should not be so interpreted "without a clear expression of legislative intention"); see also *Wood v. United States*, 41 U.S. (16 Pet.) 342, 365–66 (1842) (interpreting a statute "intended to suppress frauds upon the revenue" and noting that "no court of justice is at liberty to adopt such a mode of interpretation of the revenue laws" that would interfere with the detection of fraud, "unless driven to it by a stern and irresistible necessity"); *infra* notes 347–352 and accompanying text.

³⁴³ *The Schooner Harmony*, 11 F. Cas. 556, 558 (C.C.D. Mass. 1812) (No. 6081) (Story, Circuit Justice) (describing the legislative intent behind a statute as "to regulate all trade in merchandize brought from foreign ports, and to guard the revenue of the United States from frauds").

³⁴⁴ *Id.*; see also *The Nymph*, 18 F. Cas. 506, 507 (C.C.D. Me. 1834) (No. 10,388) (Story, Circuit Justice) (explaining that courts "are not to enlarge penal statutes by implication" but are "on the other hand, ... to ascertain the true legislative sense of the words used; and that sense being once ascertained, courts of justice are bound to give effect to that intent, and are not at liberty to fritter it upon metaphysical niceties"); *The Schooner Industry*, 13 F. Cas. 35, 36 (C.C.D.

Story readily applied the rule of lenity—“a principle grown hoary in age and wisdom”³⁴⁵—to strictly interpret revenue statutes.³⁴⁶ For example, in *United States v. One Open Boat*, Justice Story considered the question of whether a statute requiring the *in rem* forfeiture of “cargo on board such vessel” referred to the cargo present at the time of the offense or, instead, at the time of the seizure.³⁴⁷ Justice Story pointed to the guilty property fiction, noting that “[t]he cargo affected with forfeiture is deemed in some sense a participator in the offence, and involved in the guilt of the vehicle.”³⁴⁸ Reasoning that the only

Mass. 1812) (No. 7028) (Story, Circuit Justice) (noting that the object of a statute was “to prevent frauds upon the revenue” and then explaining that courts “are undoubtedly bound to construe penal statutes strictly” but that “on the other hand, we are bound to interpret them according to the manifest import of the words, and to hold all cases, which are within the words and the mischiefs, to be within the remedial influence of the statute”); *The Friendship*, 9 F. Cas. 822, 824 (C.C.D. Mass. 1812) (No. 5124) (Story, Circuit Justice) (noting the rule of lenity is “a maxim long since settled,” but explaining that “[w]hen the legislature speak directly, we must expound their acts according to their natural meaning, and obey their injunctions”); see also 1 STORY, *supra* note 267, Book III, Ch. 5, § 400, at 383 (regarding the interpretation of constitutions, and stating: “The first and fundamental rule in the interpretation of all instruments is, to construe them according to the sense of the terms, and the intention of the parties.”). Justice Story had little patience when Congress failed to provide clear statutory language. *E.g.*, *The Argo*, 1 F. Cas. 1100, 1101 (C.C.D. Mass. 1812) (No. 516) (Story, Circuit Justice) (complaining that: “[i]t is exceedingly to be regretted, that the legislature have chosen to express themselves in so loose and inartificial a manner, and to leave so important a subject to mere inference and judicial construction” and further that “the court cannot avoid the difficulty, and must content itself with the obscure and wavering lights, which are thinly scattered through the act”).

³⁴⁵ *United States v. Mann*, 26 F. Cas. 1153, 1157 (C.C.D.N.H. 1812) (No. 15,718) (Story, Circuit Justice).

³⁴⁶ *E.g., id.*; see also *Jackson v. United States*, 13 F. Cas. 254, 257 (C.C.D. Mass. 1826) (No. 7149) (Story, Circuit Justice) (interpreting a statute as excluding coasting vessels from a revenue law and noting: “I am aware, that this view of the act leaves the revenue system exposed to great frauds ... [t]he remedy, however, lies with Congress”); *The Falmouth*, 8 F. Cas. 981, 981-82 (C.C.D. Mass. 1812) (No. 4631) (Story, Circuit Justice) (upholding the restoration of a sloop and its cargo upon determining that a revenue statute had been repealed, stating: “I know no duty imposed on a court, to hunt through dark and doubtful passages, to catch a glimmering meaning, whereby to load the citizen with penalties and forfeitures.”); *cf.* *The Julia*, 14 F. Cas. 25, 25-26 (C.C.D. Mass. 1812) (No. 7573) (Story, Circuit Justice) (regarding the lack of evidence that a vessel docked in the harbor of Salem had begun a foreign voyage, and so application of a registration requirement would “be extending the construction of a penal statute, far beyond the liberality allowed by courts in the most favored of contracts”).

³⁴⁷ *United States v. One Open Boat*, 27 F. Cas. 354, 355-56 (C.C.D. Me. 1829) (No. 15,968) (Story, Circuit Justice).

³⁴⁸ *Id.* at 356.

property that could be guilty would be that on the vessel at the time of the illegality, he therefore construed the statute narrowly, to apply only to the cargo on a vessel at the time of the offence.³⁴⁹ He then turned to the question of whether an open boat—one “without decks or masts”—was a “vessel” within the meaning of the statute.³⁵⁰ He explained that “[it] is a well-known rule ... that forfeitures are not to be inflicted by straining the words” of the act “so as to reach some conjectural policy, not avowed on the face of the statute.”³⁵¹ Again, he interpreted the statute narrowly to exclude open boats, thereby upholding a restoration of not only the cargo, but the boat as well.³⁵²

Put simply, the *Taylor* Court’s description of a statute as remedial did not equate to a statement that *in rem* forfeitures were nonpunitive. Rather, it merely reflected the common understanding—shared by Justice Story—that the rule of lenity was cabined by the overarching goal of upholding congressional intent.

2. The Relationship Between Punishment and Compensation

In addition to its mistaken reliance on *Taylor*, the *Bajakajian* Court relied on a case involving a tax penalty decided in 1871³⁵³ and another regarding the scope of the Fifth Amendment’s Double Jeopardy Clause decided in 1972³⁵⁴ to reach the conclusion that early *in rem* customs forfeitures would have been understood as nonpunitive because they compensated the federal government for lost tax duties and reimbursed the expense of investigating and prosecuting customs offenses. Reliance on these cases to establish a historical understanding of the nature of *in rem* forfeitures is problematic. They failed to engage with cases

³⁴⁹ *Id.*

³⁵⁰ *Id.* at 356–57.

³⁵¹ *Id.* at 357.

³⁵² *Id.*

³⁵³ *United States v. Bajakajian*, 524 U.S. 321, 341–43 & n.18 (1998) (citing *Stockwell v. United States*, 80 U.S. (13 Wall.) 531 (1871)).

³⁵⁴ *Id.* at 329, 342–43 & n.19 (citing *One Lot Emerald Cut Stones & One Ring v. United States*, 409 U.S. 232 (1972) (per curiam)). The Court has described the Double Jeopardy Clause and the Excessive Fines Clause as “wholly distinct” because the former requires a penalty to be “so punitive either in purpose or effect as to negate” Congress’s intention to establish a civil remedial mechanism,” *United States v. Ursery*, 518 U.S. 267, 278 (1996) (quoting *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 365 (1984)), whereas to qualify as a fine for Eighth Amendment purposes the penalty need be punitive only “in part,” *Austin v. United States*, 509 U.S. 602, 610 (1993). This Article does not contest that distinction. For a brief discussion of three nineteenth-century double jeopardy cases, see *infra* note 372 and accompanying text.

exhibiting a broader historical understanding that tax penalties exceeding the value of taxes due constituted punishment. They also ignored the centrality of using revenue from fines and forfeitures—including *in rem* forfeitures in the customs and maritime context—to fund systems for enforcing penal laws.

We'll begin first with the idea that tax penalties are nonpunitive because they merely return to the government tax dollars to which they are rightly due. This idea was central to the decision in *Stockwell v. United States*, decided in 1871, which involved an action of debt to recover a tax penalty set at double the value of illegally imported shingles.³⁵⁵ In it the Court addressed two questions—the propriety of a jury instruction related to attribution of one firm partner's knowledge to another partner, and whether a later statute had impliedly overturned the statute on which the case rested—both of which required an assessment of whether the illegal importation statute was penal in nature.³⁵⁶ The Court framed its analysis of the statute as follows: “Is it strictly punitive, or is it remedial?”³⁵⁷ One aspect of its analysis focused on the government's pre-existing property interest in taxes, positing that upon illegal importation, goods immediately became the property of the government (something true only in some cases³⁵⁸), and so “[e]very act ... which interferes with the right of the government to seize and appropriate the property ... is a wrong to property

³⁵⁵ *Stockwell*, 80 U.S. (13 Wall.) at 544–55.

³⁵⁶ *Id.* at 543–53. The statute at issue provided the government the option of proceeding via criminal indictment or action of debt. The Court rejected an additional argument that an indictment was necessary on the grounds that the amount due under the statute was a sum certain and, due to its reference to another statute, contemplating civil actions; it therefore allowed the case to proceed as an action of debt. *Id.* at 541–43. That determination was in keeping with the traditional use of that procedure to impose fines and forfeitures. See *supra* notes 222–236 and accompanying text. Further, the Court rejected a fourth claim that the statute applied only to accessories after the fact. *Stockwell*, 80 U.S. (13 Wall.) at 550–51.

³⁵⁷ *Stockwell*, 80 U.S. (13 Wall.) at 545–46.

³⁵⁸ *Stockwell* treated the statute at issue as purely remedial because it set out the penalty as double duties, in contrast to a set of British statutes the Court described as “both penal and remedial” because they provided the government the ability to select between alternative penalties. *Id.* at 550. As detailed above, however, whether a statute provided an alternative or absolute punishment did not change its punitive nature, but instead merely afforded different degrees of and mechanisms for protection against the imposition of that punishment. See *supra* notes 107–110 and accompanying text (regarding the rule that property only related back to the offense when the underlying statute did not allow the government to opt between multiple modes of enforcement). As a general matter, *Stockwell* cited very few authorities, and those it did cite primarily related to the proposition that an agent may testify against a principal in both criminal and civil settings. See *Stockwell*, 80 U.S. (13 Wall.) at 543–53.

rights, and a fit subject for indemnity.”³⁵⁹ Further, because the scope of the deprivation depended on the value of the illegally imported goods rather than “the degree of criminality of the act of receipt or concealment,” the Court posited that the statute “must therefore be considered as remedial, as providing indemnity for loss.”³⁶⁰ Therefore, reasoned the Court, a statute imposing a penalty of double the value of the illegally imported goods merely indemnified the government and was remedial.³⁶¹

As with *Stockwell*, the double jeopardy case upon which *Bajakajian* relied—*One Lot Emerald Cut Stones and One Ring v. United States*—stands for the proposition that forfeiture proceeds are remedial because they allow the government to recoup tax monies owed as a form of “liquidated damages.”³⁶² Like *Stockwell*, the case, decided 181 years after the ratification of the Fifth Amendment, engaged in little to no historical analysis.³⁶³ Instead, it largely drew the idea that forfeiture proceeds merely replaced outstanding tax dollars on a set of mid-twentieth-century cases.³⁶⁴ Two of those cases merely allowed civil suits to proceed under statutes that afforded the government opportunities to recoup

³⁵⁹ *Stockwell*, 80 U.S. (13 Wall.) at 546.

³⁶⁰ *Id.* at 546–47.

³⁶¹ *Id.*; see also *United States v. Claflin*, 97 U.S. 546, 552–53 (1878) (holding that the later statute at issue in *Stockwell* had implicitly repealed the former, reasoning that the forfeitures in both were remedial because they were set in relation to the value of the goods).

³⁶² *One Lot Emerald Cut Stones & One Ring*, 409 U.S. at 236 (describing a forfeiture as “provid[ing] a reasonable form of liquidated damages”). The *Bajakajian* Court also cited another double jeopardy case decided in 1996 for the general idea that early *in rem* forfeitures were non-punitive. *Bajakajian*, 524 U.S. at 331 (citing *Ursery*, 518 U.S. at 293). The *Ursery* Court generally based that conclusion on *One Lot Emerald Cut Stones & One Ring*, the cases cited by it, and other cases decided in the 1980s and 1990s citing to it. See generally *Ursery*, 518 U.S. 267.

³⁶³ *One Lot Emerald Cut Stones & One Ring* only cited three late-nineteenth-century cases. 409 U.S. at 235–37, n.5–6. All three cases affirm the understanding that *in rem* forfeitures are punitive. Two do so in the context of analyzing fact preclusion between criminal and civil matters. See *Stone v. United States*, 167 U.S. 178, 187–88 (1897) (holding that a civil action could proceed because the relevant factual question was one of ownership rather than “criminal intent,” and distinguishing the civil judgment from an *in rem* forfeiture, which is “penal in its nature” and “punishment” imposed “for acts prohibited”); *Coffey v. United States*, 116 U.S. 436, 442–45 (1886) (barring an action for the *in rem* forfeiture of liquor and distillery equipment following an acquittal given the factual overlap and describing the forfeiture as a “statutory punishment”). The third case is discussed, *supra* notes 134–141 and accompanying text (regarding the Court’s treatment of *in rem* forfeitures as punitive in *Boyd v. United States*, 116 U.S. 616 (1886)).

³⁶⁴ *One Lot Emerald Cut Stones & One Ring*, 409 U.S. at 235–37 (citing *Rex Trailer Co. v. United States*, 350 U.S. 148 (1956), *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943), and *Helvering v. Mitchell*, 303 U.S. 391 (1938)).

damages from contractual or quasi-contractual breaches.³⁶⁵ The third, a 1938 case, *Helvering v. Mitchell*, involved the imposition of a statute that added fifty percent of a tax deficiency for tax fraud.³⁶⁶ The *Helvering* Court declined to apply the Double Jeopardy Clause to a criminal indictment for tax fraud filed after the imposition of that added tax for the same fraudulent conduct.³⁶⁷ It did so on the grounds that the already-imposed tax fraud penalty was remedial because such sanctions are “a safeguard for the protection of the revenue.”³⁶⁸ To reach that conclusion the *Helvering* Court cited *Stockwell*, along with numerous cases involving pecuniary penalties imposed in civil proceedings, to establish that the tax penalty wasn’t a “criminal penalty”—failing to recognize that the use of civil processes to punish was in keeping with early American practices.³⁶⁹ A handful of the cases cited involved nineteenth-century *in rem* forfeitures. Two affirmed that *in rem* forfeitures resulted in punishment of the owner.³⁷⁰ The remainder stood for the unremarkable propositions that civil procedures were allowed³⁷¹ and that the Double Jeopardy Clause did not preclude the

³⁶⁵ *Marcus*, 317 U.S. at 551–52 (holding that double jeopardy did not preclude a civil suit for statutory and actual damages against electricians who had engaged in collusive bidding for government contracts and who had previously been criminally punished); *Rex Trailer*, 350 U.S. at 151 (holding that double jeopardy did not preclude the government from seeking statutory damages for the loss of federal property illegally obtained in violation of the Surplus Property Act of 1944 when the defendant had already paid a fine because “[t]he Government has the right to make contracts and hold and dispose of property, and, for the protection of its property rights, it may resort to the same remedies as a private person”).

³⁶⁶ *Helvering*, 303 U.S. at 392.

³⁶⁷ *Id.* at 398–405.

³⁶⁸ *Id.* at 401.

³⁶⁹ Compare *id.* at 399–404 & nn.2–13, with *supra* Part III.A.

³⁷⁰ See *supra* notes 134–141 and accompanying text (regarding *Boyd*, 116 U.S. 616); *Dorsheimer v. United States*, 74 U.S. (7 Wall.) 166, 173–75 (1868) (holding that the Secretary of the Treasury had the authority to remit the value of a distillery and distilled spirits minus the taxes owed, thereby negating the informers’ claim to a moiety of that value). *Dorsheimer* upheld a determination by the U.S. Court of Claims in which that *in rem* forfeiture was referred to as “punishment.” *Dorsheimer v. United States*, 2 Ct. Cl. 103, 117–18 (1866).

³⁷¹ See *United States v. Zucker*, 161 U.S. 475, 481 (1896) (holding that the Sixth Amendment, which is textually limited to “criminal prosecutions,” did not apply to an action to recover the value of forfeitable merchandise because it only applies to matters that are “technically criminal”); *Four Packages v. United States*, 97 U.S. 404, 409, 412 (1878) (approving a directed verdict where the claimants provided “no opposing testimony” to dispute the unlading of “[f]our imported packages containing human hair and other dutiable articles” without a permit); *Lilienthal’s Tobacco*, 97 U.S. 237, 267–68 (1877) (regarding burdens of proof); *Locke v.*

adjudication of distinct parties or offenses.³⁷² *Helvering* also cited *Taylor* and one additional case involving the rule of lenity for the proposition that *in rem* forfeitures were remedial—failing to recognize that they were part of a long series of cases in which courts affirmed that such statutes were “penal” but applied the rule of lenity so as to leave the statutes enforceable.³⁷³

The problem with the conclusion that tax penalties were remedial rather than punitive is that, while the imposition of taxes in the first instance is unquestionably nonpunitive,³⁷⁴ courts had long-recognized that the overage gathered from the imposition of tax penalties constituted punishment. In addition to the litany of cases describing *in rem* forfeitures for customs violations as

United States, 11 U.S. (7 Cranch) 339, 348 (1813) (interpreting a statute to shift the burden to the claimant upon a showing of probable cause).

³⁷² In one case, the district court relied on the guilty property fiction to determine that the statutory basis for a previously imposed *in personam* punishment constituted a “different offense,” and thus the subsequent *in rem* forfeiture proceedings did not trigger double jeopardy. *United States v. Three Copper Stills*, 47 F. 495, 498–99 (D. Ky. 1890). In the other, the government filed an indictment alleging that the owner of a schooner had aided and abetted in the offense of bringing Chinese laborers into the United States by hiring mariners and furnishing transportation. *United States v. Olsen*, 57 F. 579, 580–81 (N.D. Cal. 1893). The government had previously obtained the *in rem* forfeiture of the schooner. *Id.* Though the district court recognized that the two matters involved the same action (by which the master of the vessel transported the laborers), it held that double jeopardy did not bar the owner’s prosecution. *Id.* at 586. The critical fact for establishing the forfeitability of the schooner in the *in rem* forfeiture action was that the master “knowingly [brought the laborers] within the United States on such vessel.” *Id.* at 584 (quoting the statute). In contrast, for the subsequent prosecution the government would have to show that the owner himself had knowledge and acted “independently of the master of the vessel, [to] in fact aid and abet the landing,” and thus did not involve the same issues. *Id.* at 586. To be fair to the *Helvering* Court, the *Olsen* opinion is particularly difficult to parse, given its inartful discussion of the guilty property fiction. *Id.* at 584–85. For an additional case involving the application of double jeopardy to an *in rem* forfeiture, which the *Olsen* court distinguished, see *United States v. One Distillery*, 43 F. 846, 853 (S.D. Cal. 1890) (barring an *in rem* forfeiture of a company’s property following the conviction of a stockholder because “for the same acts and omissions, to punish him criminally and also take his property, is, for the same offenses, to punish him twice”).

³⁷³ Compare *Helvering*, 303 U.S. at 401 & n.4 (citing *Taylor v. United States*, 44 U.S. 197 (1845) and *In re Cliquot’s Champagne*, 70 U.S. 114 (1865)), with *supra* Part III.B.1.

³⁷⁴ E.g., *Carpenter v. Com. of Pennsylvania*, 58 U.S. (17 How.) 456, 463 (1854) (declining to apply the Ex Post Facto Clause to an estate tax law because the tax did not constitute a punishment); *Whelan v. Corporation of Washington*, 29 F. Cas. 918, 918 (C.C.D.C. 1828) (No. 17,503) (per curiam) (holding that a tax mandated upon using the labor of an enslaved person did not accrue “until the hiring was complete, and that if paid and received before the prosecution, the defendant was not liable to the penalty”).

punishment throughout the nineteenth century noted above,³⁷⁵ state and federal courts also described and treated other forms of tax penalties—including penalties set as a multiplier of taxes due, similar to the doubling of the value of taxable goods at issue in *Stockwell*³⁷⁶—as punishment for tax violations.³⁷⁷ That

³⁷⁵ See *supra* notes 172–180 and accompanying text.

³⁷⁶ *E.g.*, *United States v. McKee*, 26 F. Cas. 1116, 1117 (C.C.E.D. Mo. 1877) (No. 15,688) (Miller, Circuit Justice) (treating double taxes as punishment in a double jeopardy analysis); *United States v. Thirty-Three Barrels of Spirits*, 28 F. Cas. 72, 73–74 (D. Mass. 1868) (No. 16,470) (stating an offense could be “punished by the same section with a fine of five thousand dollars, or double the amount of tax”); *Lott v. Hubbard*, 44 Ala. 593, 600 (1870) (explaining that “[t]he plain letter of the law makes it the duty of the assessor to ascertain the amount, and, as punishment, assess the delinquent a double tax”); *Chiles v. Commonwealth*, 27 Ky. (4 J.J. Marsh.) 577, 578 (1830) (stating that the “Act of 1819, imposing a fine and triple tax for failure to furnish the commissioner with a list of taxable property, is penal”); *Buckwalter v. United States*, 11 Serg. & Rawle 193, 196–97 (Pa. 1824) (describing double duties “given for the ... offense” of failing to pay a tax to secure a license to operate a distillery as “penal” rather than “mere surplusage”); *M’Call v. Justices of Clark Co. Ct.*, 4 Ky. (1 Bibb.) 516, 516–17 (1809) (holding that where the punishment for the failure to provide a property list to a tax commissioner is a fine and treble taxes, a summons to show cause listing only the fine was erroneous).

³⁷⁷ *E.g.*, *Dorsheimer*, 74 U.S. at 173–74 (differentiating between tax penalties, which the Secretary of the Treasury had the authority to remit, and taxes); *Bartlett v. Kane*, 57 U.S. (16 How.) 263, 274 (1853) (regarding additional duties imposed for the fraudulent undervaluing of goods to be taxed, which were “distributed among the officers of the customs upon the same conditions as penalties and forfeitures,” and explaining that “[a]s between the United States and the importer ... it must still be regarded in the light of a penal duty” that does “not fall within the regular administration of the revenue system”); *Jones v. Town of Bridgeport*, 36 Conn. 283, 286–87 (1869) (“This addition of ten per cent is distinguished by the law from the tax on the valuation of the property, and is in the nature of an additional tax made to punish a resident tax-payer for neglecting to give in his list according to law.”); *Judson v. State*, Minor 150, 153 (Ala. 1823) (agreeing that a statute “as relates to laying and fixing the amount of the tax” was not subject to strict construction, “[b]ut, as to penalties for failing to pay the taxes, it must be subject to the rules of construction which apply to all other penal Statutes”); *Crawford v. State*, Minor 143, 149–50 (Ala. 1823) (applying the rule of lenity to strictly construe a statute imposing penalties for violating tax laws); *Washington v. Commonwealth*, 4 Va. (2 Va. Cas.) 258, 258 (1821) (“[I]f a person neglects to enter land with the Commissioner of the land tax, he is not only liable to the tax, but to a penalty of 25 per centum per annum in the amount of each year’s tax”); see also *Henderson’s Distilled Spirits*, 81 U.S. (14 Wall.) 44, 59, 61 (1871) (remarking that “Congress possesses the power to levy taxes, duties, imposts, and excises, and it is clear that Congress may enact penalties and forfeitures for the violation of such laws”); *Jackson v. Rose*, 4 Va. (2 Va. Cas.) 34, 38 (1815) (declining to analyze whether a tax penalty was penal because “[t]hese are self-evident propositions, which would only be obscured by any attempt to elucidate them”). But cf. *State v. Harrison*, 16 S.C.L. 88, 89 (S.C. Ct. App. 1823) (holding that a higher than general rate of interest imposed on a tax collector who is late in turning over

distinction is also drawn, repeatedly, in nineteenth-century opinions of attorneys general.³⁷⁸ One such opinion surmised that Congress used the word “duty” rather than “penalty” in drafting a statute in an attempt to avoid the rule of lenity.³⁷⁹ Rejecting that attempt, the opinion explained that a tax penalty “is in its essence a fine inflicted to promote honesty; nor is it less a penalty because it is called something else. The law looks at facts, not names.”³⁸⁰

The Court’s understanding that tax penalties constituted punishment continued in nineteenth-century cases decided after *Stockwell*. For example, when the question arose as to whether the Ex Post Facto Clause—which applied only to criminal and penal statutes—was applicable to civil fines imposed for tax violations, the Court answered in the affirmative, describing the tax penalties as having “punished” the taxpayer.³⁸¹

collected revenue is not a penalty, but rather “only an increased rate of interest which he is required to pay for the use of money belonging to the public”).

³⁷⁸ *E.g.*, Benjamin Harris Brewster, *Customs Laws—Additional Duty Under*, 17 Op. Att’y Gen. 268, 274 (Jan. 27, 1882) (“Obviously the additional duty of the act of 1865 was a penal duty, designed to enforce the entry of imports by the importer according to the actual market value or wholesale price thereof[.]”); James Speed, *Penal Duty Under the Revenue Law*, 11 Op. Att’y Gen. 280, 284–85 (July 10, 1865) (opining that “penal taxes” for the submission of fraudulent invoices must be imposed by the assessor, but that the United States has the alternative of seeking “punishment by fine or imprisonment ... on the conviction”); Hugh S. Legare, *Penalties Under Tariff Act of 1842, and Their Remission*, 4 Op. Att’y Gen. 182, 182–83 (June 7, 1843) (“I am very clear that the 50 per cent., in addition to the duty imposed by law on the description of goods mentioned in the law proviso of the 17th section of the act of 1842, is a penalty.”); John MacPherson Berrien, *Customs—Forfeitures*, 2 Op. Att’y Gen. 358, 359 (July 10, 1830) (distinguishing duties from “the penalty or forfeiture” imposed for “an attempted fraud upon the revenue, by means of false or fraudulent invoice”); William Wirt, *Right of a Collector to a Moiety of Double Duties*, 1 Op. Att’y Gen. 259, 259–60 (Mar. 6, 1819) (opining that when the government reaches a settlement ending a forfeiture action in exchange for the payment of double duties, “the collector from whose prosecution those fruits arose is as much entitled to his moiety of them as he would have been to his moiety of the forfeiture which they represent”).

³⁷⁹ Richard Olney, *Additional Duties—Penalties—Remission of Forfeiture*, 20 Op. Att’y Gen. 660, 664 (Sept. 9, 1893) (“The change of wording was probably made, in accordance with the extreme high-tariff policy of the framers of this famous act, to prevent a strict construction in favor of the importer.”).

³⁸⁰ *Id.* at 661 (stating further that “it is clear that the so-called ‘additional duty’ is a penalty,” and that “[i]t is not provided for the purposes of revenue”).

³⁸¹ *Burgess v. Salmon*, 97 U.S. 381, 382, 384 (1878). The Court reinforced the distinction between tax penalties and taxes on numerous occasions in the twentieth and twenty-first centuries. *E.g.*, *National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 563–74 (2012) (holding that the Affordable Care Act’s individual insurance mandate constituted a tax, not a punishment); *Dep’t of Revenue v. Kurth Ranch*, 511 U.S. 767, 776–84 (1994) (noting the distinction but holding that an imposition nominally called a “tax” was so punitive that it was

We turn now to the *Bajakajian* Court's use of *Stockwell* and *One Lot Emerald Cut Stones and One Ring* to argue that early *in rem* customs forfeitures would have been understood as nonpunitive because they compensated the government for the costs incurred to investigate and prosecute customs offenses. The *Stockwell* Court attempted to explain away the overage inherent to a penalty exceeding the value of taxes owed by noting that, in addition to lost tax revenue, the government may also suffer losses related to "difficulties" in enforcing the law.³⁸² In turn, *One Lot Emerald Cut Stones and One Ring* drew again from the set of mid-twentieth-century opinions for the idea that forfeitures "reimburse the Government for investigation and enforcement expenses."³⁸³

This proposition is undermined by the very structures central to the operation and enforcement of the penal laws generally and early American customs-forfeiture systems specifically. Recall that *qui tam* prosecutors enforcing the penal laws were compensated through a moiety of fines imposed³⁸⁴ "to induce

properly characterized as a punishment); *United States v. Constantine*, 296 U.S. 287, 293–96 (1935) (holding that a special excise tax of \$1,000 imposed on liquor retailers was a penalty and thus unenforceable upon repeal of the Eighteenth Amendment, reasoning that "[i]f it was laid to raise revenue its validity is beyond question notwithstanding the fact that the conduct of the business taxed was in violation of the law," but that it was instead imposed only upon "the commission of a crime" at an amount multiple times higher than the annual tax); *In re Various Items of Personal Property*, 282 U.S. 577, 579–80 (1931) (reviewing a statute that set a tax at \$6.40 per gallon of alcohol for illegal production from which \$2.20 was "not a penalty but a true tax," with the remainder "regarded as a penalty"); *Lipke v. Lederer*, 259 U.S. 557, 561–62 (1922) (holding that due process requires sufficient notice and an opportunity to be heard before the imposition of tax penalties or distraint of property and remarking: "The mere use of the word 'tax' in an act primarily designed to define and suppress crime is not enough to show that within the true intendment of the term a tax was laid. ... When by its very nature the imposition is a penalty, it must be so regarded."); *see also* *Regal Drug Corp. v. Wardell*, 260 U.S. 386, 391–92 (1922) (following *Lipke*); *cf.* *Kelly v. Lewellyn*, 274 F. 108, 111–12 (W.D. Pa. 1921) (upholding the Volstead Act's imposition of taxes on unlawful liquor manufacturing in addition to civil and criminal liability for violations of the Act).

³⁸² *Stockwell*, 80 U.S. (13 Wall.) at 547.

³⁸³ *One Lot Emerald Cut Stones & One Ring*, 409 U.S. at 236–37 (citing *Rex Traylor, Marcus, and Helvering*); *see also Helvering*, 303 U.S. at 401 (stating that in addition to satisfying tax arrears, the penalty also served "to reimburse the Government for the heavy expenses of investigation"); *cf. Rex Traylor*, 350 U.S. at 151 (explaining that "[l]iquidated damages are a well-known remedy" in contract disputes); *Marcus*, 317 U.S. at 549–50 (citing *Helvering* for the proposition that "[w]e cannot say that the [quasi-contractual] remedy now before us requiring payment of a lump sum and double damages will do more than afford the government complete indemnity for the injuries done it").

³⁸⁴ *See supra* notes 238–245 and accompanying text.

persons from motives of gain,”³⁸⁵ thus “giv[ing] force and vigor to the laws, by showing the community, that they cannot be violated with impunity.”³⁸⁶ The fact that the monies generated by those fines were used in part to compensate those who served to enforce the penal laws did not render those fines non-punitive. That system mirrored the structure for enforcing customs laws. Informers who investigated and prosecuted customs violations undertook that work in exchange for a moiety of the value of the goods and vessels seized.³⁸⁷ As with penal laws generally, those payments were designed “to stimulate and reward their zeal and industry,”³⁸⁸ increasing the likelihood offenses would be “detected and punished.”³⁸⁹ Like fines, the fact that a portion of the monies generated from *in rem* forfeitures was employed to compensate its enforcers, did not render such forfeitures non-punitive. Instead, *in rem* forfeitures were both treated as³⁹⁰ and called³⁹¹ punishment—showing that punishment and remediation were not historically understood to be mutually exclusive.

³⁸⁵ *Hylliard v. Nickols*, 2 Root 176, 177 (Ct. 1795) (“A part of the [£100 fine for violating an act prohibiting the slave trade] is given to the prosecutor; this is done to induce persons from motives of gain, who would not be otherwise wrought upon, to prosecute to effect, the violations of this law.”); *see also, e.g., Inhabitants of Wiscasset v. Trundy*, 12 Me. 204, 208 (1835) (explaining that “the reason for sharing a [\$50 fine for a liquor law violation] with an informer, is to make self-interest subservient to public convenience, by interesting a third party in bringing offenders to justice, whose ill deeds might otherwise remain undiscovered or neglected”); *see also State of Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 299 (1888) (treating a statute as penal where “the prosecution was in the name of the state, and the whole penalty, when recovered, would accrue to the state, and be paid, one-half into her treasury, and the other half to her insurance commissioner, who pays all expenses of prosecuting for and collecting such forfeitures”), *limited on other grounds by Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 278 (1935).

³⁸⁶ *State v. Blennerhassett*, 1 Miss. 7, 15 (1818) (holding that a *qui tam* action for assault with intent to murder that resulted in the award of a moiety of the \$800 fine imposed to the prosecutor did not preclude a separate civil suit for damages for the same acts because “[t]he whole community is interested in the execution of the penal laws”).

³⁸⁷ *See supra* notes 119–121 and accompanying text.

³⁸⁸ *Dorsheimer*, 74 U.S. at 173; *see also PARRILO, supra* note 7, at 223–41 (regarding the use of moieties to prompt customs officers to serve as informers); *United States v. Griswold*, 24 F. 361, 366 (D. Or. 1885) (explaining that “one of the least expensive and most effective means of preventing frauds on the treasury is to make the perpetrators of them liable to actions by private persons acting, if you please, under the strong stimulus of personal ill will or the hope of gain”).

³⁸⁹ *See Hoar, supra* note 120, at 238 (explaining that moieties were employed “to stimulate the vigilance and activity of revenue officers to discover evidence ... whereby violations of the law could be detected and punished”).

³⁹⁰ *See generally supra* Parts II, III.A–B.1.

³⁹¹ *See supra* notes 172–180 and accompanying text.

CONCLUSION

In declaring that early *in rem* customs forfeitures would have historically been understood to be nonpunitive, the *Bajakian* Court was out of step with significant evidence found in early American legal texts in which such forfeitures are treated and described as punishment. In assembling that evidence, this Article does three things. First, it provides grounding for a more robust Excessive Fines Clause, in which a pecuniary punishment constitutes a fine if it is imposed in response to a public offense, regardless of whether it is based on the guilty property fiction, is imposed through civil processes, or has remedial qualities. This does not mean that the fine is unconstitutional—for that, it must also be excessive—but it does mean that for modern forfeitures, as well as civil fines, tax penalties, restitution awards, and fees, there is a constitutional check that protects against government overreach. Second, it provides a framework for thinking about pecuniary penalties beyond the Excessive Fines Clause, for the myriad constitutional questions in which the nature of punishment is at issue. And third, it contributes to the debate about whether and how history should be used for constitutional interpretation. It does so by delegitimizing the type of overclaiming done in *Bajakian* and by providing an example of how serious engagement with the historical record can provide fodder for robust constitutional protections today.

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