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Innocence Lost: *Bennis v. Michigan* and the Forfeiture Tradition

Donald J. Boudreaux* & A.C. Pritchard**

There have been times—there still are countries and times, when and where the rule, founded in justice and nature, that the property of the parent is the inheritance of his children, has been intercepted in its benign operation by the cruel interference of another rule, founded in tyranny and avarice—the crimes of the subject are the inheritance of the prince. At those times, and in those countries, an insult to society becomes a pecuniary favor to the crown; the appointed guardian of the publick security becomes interested in the violation of the law; and the hallowed ministers of justice become the rapacious agents of the treasury.

James Wilson¹

In *Bennis v. Michigan*, the Supreme Court upheld the State of Michigan's forfeiture of Tina Bennis's joint ownership interest in a car used by her husband for a tryst with a prostitute.² Surveying its prior cases, the Court found that Tina Bennis's innocence of the offending conduct was irrelevant to the constitutionality of Michigan's forfeiture of her ownership interest. In so finding, the Court relied on the tradition of forfeiture to affirm the constitutionality of the "tyranny and avarice" condemned by James Wilson—a leading framer of the Constitution.

The Anglo-American tradition of civil forfeiture, however, is considerably narrower than the Court's account. The forfeiture known to the common law

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1. 2 JAMES WILSON, THE WORKS OF JAMES WILSON 630-31 (reprinted 1967) (1804).

2. 116 S. Ct. 994 (1996).

never would have reached the conduct giving rise to the forfeiture in *Bennis*. The modern Court's careless reading of forfeiture tradition has allowed state and federal governments to expand forfeiture well beyond its historical boundaries. Consequently, forfeiture has come to be an instrument of oppression that would have appalled Wilson and the rest of America's founding generation. Even conceding civil forfeiture's current scope, the relevant forfeiture tradition would have protected Tina Bennis's ownership interest. Justice Oliver Wendell Holmes, Jr.'s familiar epigram holds that "hard cases make bad law."³ In Tina Bennis's case, bad history makes hard law.

I. NO WAY TO TREAT AN INNOCENT LADY

A. *Michigan Adds Insult to Injury*

The Wayne County, Michigan police discovered John Bennis with a prostitute who was performing *fellatio* on him.⁴ When the police discovered Bennis, he was in the 1977 Pontiac that he jointly owned with his wife, Tina Bennis.⁵ The car was parked in a residential Detroit neighborhood that had been plagued by prostitution for several years.⁶ John Bennis was charged with "gross indecency," for which he subsequently was convicted and fined.⁷ The State of Michigan was not satisfied, however, with exposing John Bennis's infidelity. He and Tina Bennis were named as co-defendants in an *in personam* action to have the car declared a public nuisance⁸ and abated.⁹

3. Northern Sec. Co. v. United States, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting).

4. State v. Bennis, Transcript of Nov. 2, 1988 Bench Ruling of Trial Court in Nuisance Abatement Proceeding ("Trial Transcript") at 180-81, reprinted in Petitioner's Appendix to Petition for Writ of Certiorari, *Bennis v. Michigan* (U.S. 94-8729, March 29, 1995).

5. Order/Judgment (Nov. 16, 1988), reprinted in Petitioner's Appendix to Petition for Writ of Certiorari, *Bennis v. Michigan* (U.S. 94-8729, March 29, 1995).

6. Trial Transcript at 182-87.

7. Petition for a Writ of Certiorari at 9 n.7.

8. MICH. COMP. LAW ANN. § 600.3801 (West Supp. 1996) ("Any building, vehicle, boat, aircraft, or place used for the purpose of lewdness, assignation or prostitution or gambling, or used by, or kept for the use of prostitutes or other disorderly persons, . . . is declared a nuisance, . . . and all . . . nuisances shall be enjoined and abated as provided in this act and as provided in the court rules. Any person or his or her servant, agent, or employee who owns, leases, conducts, or maintains any building, vehicle, or place used for any of the purposes or acts set forth in this section is guilty of a nuisance.").

9. *Michigan v. Bennis*, 527 N.W.2d 483, 486 (Mich. 1994). The Michigan

At the trial, Tina Bennis testified—without contradiction—that she had no knowledge of her husband's use of the car.¹⁰ The trial court nonetheless concluded that her interest was subject to abatement as a public nuisance.¹¹ The court ordered the car sold and the proceeds deposited in the Michigan Treasury without any allowance for Mrs. Bennis's interest in the car.¹²

The Michigan Court of Appeals reversed on statutory grounds.¹³ The appellate court held "that the prosecutor was required to prove that defendants knew that their vehicle was being used for [prostitution]," but found that "the record in this case does not support a finding that Mrs. Bennis knew that the vehicle was being used for such purpose."¹⁴

The Michigan Supreme Court reversed, rejecting the appellate court's view of the statute.¹⁵ The court went on to address Tina Bennis's argument

abatement statute provides:

(1) Order of abatement. If the existence of the nuisance is established in an action as provided in this chapter, an order of abatement shall be entered as a part of the judgment in the case, which order shall direct the removal from the building or place of all furniture, fixtures and contents therein and shall direct the sale thereof in the manner provided for the sale of chattels under execution . . .

(2) Vehicles, sale. Any vehicle, boat, or aircraft found by the court to be a nuisance within the meaning of this chapter, is subject to the same order and judgment as any furniture, fixtures and contents as herein provided.

(3) Sale of personalty, costs, liens, balance to state treasurer. Upon the sale of any furniture, fixture, contents, vehicle, boat or aircraft as provided in this section, the officer executing the order of the court shall, after deducting the expenses of keeping such property and costs of such sale, pay all liens according to their priorities . . . , and shall pay the balance to the state treasurer to be credited to the general fund of the state . . .

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

10. Trial Transcript at 154.

11. Michigan has not always defined "nuisance" so broadly. See *People v. Bitonti*, 10 N.W.2d 329, 330 (Mich. 1943) ("A nuisance involves the idea of repetition or continuity, and is not to be predicated upon proof of a single isolated prohibited act.").

12. Order/Judgment.

13. *State v. Bennis*, 504 N.W.2d 731 (Mich. Ct. App. 1993).

14. *Id.* at 733.

15. The statute at issue provides that "[p]roof of knowledge of the existence of the nuisance on the part of the defendants or any of them, is not required." *Michigan v. Bennis*, 527 N.W.2d 483, 492 n.26 (Mich. 1994) (quoting MICH. COMP. LAW ANN. § 600.3815(2) (1987)).

that the statute violated the Takings¹⁶ and Due Process¹⁷ clauses of the United States Constitution. The court determined Tina Bennis's innocence to be "without constitutional consequence."¹⁸ Surveying the United States Supreme Court's forfeiture cases, the court found that "[h]istorically, consideration was not given to the innocence of an owner because the property subject to forfeiture was the evil sought to be remedied."¹⁹ The Michigan court concluded:

Review of the controlling cases persuades us that no constitutional violation results from the abatement of Mrs. Bennis' interest in the vehicle. The United States Supreme Court indisputably allows forfeiture of an innocent owner's property, unless evidence was submitted that the property was stolen or used without the consent of the owner.²⁰

In Michigan, Tina Bennis discovered, innocence is no defense.

B. No Justice For A Woman Scorned

Dissatisfied with her treatment at the hands of the Michigan Supreme Court, Tina Bennis petitioned for certiorari to the United States Supreme Court.²¹ The Court granted her petition, but affirmed the judgment of the Michigan Supreme Court, with Chief Justice William H. Rehnquist writing for a 5-4 majority.²²

The Chief Justice explained that "a long and unbroken line of cases holds that an owner's interest in property may be forfeited by reason of the use to which the property is put even though the owner did not know that it was to be put to such use."²³ The Chief Justice cited six cases as falling within that "long and unbroken line:" *The Palmyra*,²⁴ *Harmony v. United States*,²⁵

16. U.S. CONST. amend. V.

17. U.S. CONST. amend. XIV.

18. *Bennis*, 527 N.W.2d at 494.

19. *Id.* at 493-94.

20. *Id.* at 495.

21. *Bennis v. Michigan*, 116 S. Ct. 35 (1995).

22. *Bennis v. Michigan*, 116 S. Ct. 994, 998 (1996). The Chief Justice was joined by Justices O'Connor, Scalia, Thomas, and Ginsburg. *Id.* at 996. Justice Stevens dissented, joined by Justices Souter and Breyer. *Id.* at 1103. Justice Kennedy dissented separately. *Id.* at 1010.

23. *Bennis*, 116 S. Ct. at 998.

24. 25 U.S. (12 Wheat.) 1 (1827).

25. 43 U.S. (2 How.) 210 (1844). *Harmony* is more frequently cited by the Court as *United States v. Brig Malek Adhel*.

Dobbins's Distillery v. United States,²⁶ *Van Oster v. Kansas*,²⁷ *J.W. Goldsmith, Jr.-Grant Co. v. United States*,²⁸ and *Calero-Toledo v. Pearson Yacht Leasing Co.*²⁹

In *The Palmyra*, the Court rejected the shipowner's contention that the vessel could not be forfeited for privateering unless he was convicted of that charge.³⁰ The Chief Justice focused on the *Palmyra* Court's language that "[t]he thing is here primarily considered as the offender, or rather the offence is attached primarily to the thing."³¹ The Chief Justice gleaned similar language from *Harmony*:

Justice Story wrote for the Court that in *in rem* admiralty proceedings "the acts of the master and crew . . . bind the interest of the owner of the ship, whether he be innocent or guilty; and he impliedly submits to whatever the law denounces as a forfeiture attached to the ship by reason of their unlawful or wanton wrongs."³²

Dobbins's Distillery involved the forfeiture of a distillery and the appurtenant real estate; the lessee of that property had fraudulently avoided federal taxes on liquor distilled there.³³ *Dobbins's Distillery* also yielded language helpful to the Chief Justice's position:

Cases often arise where the property of the owner is forfeited on account of the fraud, neglect, or misconduct of those intrusted with its possession, care, and custody, even when the owner is otherwise without fault . . . and it has always been held . . . that the acts of [the possessors] bind the interest of the owner . . . whether he be innocent or guilty.³⁴

Like *Bennis*, *Van Oster* and *J. W. Goldsmith* involved automobile forfeiture. The Chief Justice related the facts of *Van Oster*: "Van Oster purchased an automobile from a dealer but agreed that the dealer might retain possession for use in its business. The dealer allowed an associate to use the automobile, and the associate used it for the illegal transportation of intoxicating liquor."³⁵ The State of Kansas forfeited the vehicle, despite Van

26. 96 U.S. 395 (1877).

27. 272 U.S. 465 (1926).

28. 254 U.S. 505 (1921).

29. 416 U.S. 663 (1974).

30. *Bennis*, 116 S. Ct. at 998.

31. *Id.* (quoting *The Palmyra*, 25 U.S. (12 Wheat.) 1, 14 (1827)).

32. *Id.* (quoting *Harmony v. United States*, 43 U.S. (2 How.) 210, 234 (1844)).

33. *Id.*

34. *Id.* (quoting *Dobbins's Distillery v. United States*, 96 U.S. 395, 401 (1877)).

35. *Id.*

Oster's plea of ignorance of the illegal use. The Supreme Court upheld the forfeiture: "It is not unknown or indeed uncommon for the law to visit upon the owner of property the unpleasant consequences of the unauthorized action of one to whom he has entrusted it. . . . certain uses of property may be regarded as so undesirable that the owner surrenders his control at his peril"³⁶

Van Oster relied on *J.W. Goldsmith*, in which a dealership lost the title to a car retained as security when the purchaser illegally transported alcohol.³⁷ According to the Chief Justice, the *J.W. Goldsmith* "[c]ourt discussed the arguments for and against allowing the forfeiture of the interest of an owner who was 'without guilt,' and concluded that 'whether the reason for [the challenged forfeiture scheme] be artificial or real, it is too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced.'³⁸

Finally, the Chief Justice relied on *Calero-Toledo*, the Court's most recent pronouncement on innocence as a defense to forfeiture. The *Calero-Toledo* Court read the above cases to stand for the proposition that "the innocence of the owner of property subject to forfeiture has almost uniformly been rejected as a defense."³⁹

This unbroken string of precedent was fatal to Tina Bennis's claim:

Petitioner is in the same position as the various owners involved in the forfeiture cases beginning with *The Palmyra* in 1827. She did not know that her car would be used in an illegal activity that would subject it to forfeiture. But under these cases the Due Process Clause of the Fourteenth Amendment does not protect her interest against forfeiture by the government.⁴⁰

As the Chief Justice saw it, Michigan's abatement of Tina Bennis's ownership interest in the car simply followed the historical practice—established from the nation's earliest years—of forfeiting property used in criminal activity. Even the innocent must bear the cost of the war against crime.

Justice Ruth Bader Ginsburg, while joining in the Chief Justice's opinion, wrote separately to explain her vote.⁴¹ She took comfort in two facts:

36. *Id.* (quoting *Van Oster v. Kansas*, 272 U.S. 465, 467-68 (1926)).

37. *Id.* at 999.

38. *Id.* (quoting *J.W. Goldsmith, Jr.-Grant Co. v. United States*, 254 U.S. 505, 510-11 (1921)).

39. *Id.* (quoting *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 683 (1974)).

40. *Id.*

41. *Id.* at 1003.

(1) Michigan styled the proceeding an "equitable action;" and (2) the forfeited car was not worth very much.⁴²

Justice Clarence Thomas also wrote separately to explain his vote to affirm the judgment of abatement.⁴³ He conceded that "[o]ne unaware of the history of forfeiture laws and 200 years of this Court's precedent regarding such laws might well assume that such a scheme is lawless—a violation of due process."⁴⁴ Instead of relief, however, he offered Tina Bennis a lesson in the virtues of judicial restraint: "This case is ultimately a reminder that the Federal Constitution does not prohibit everything that is intensely undesirable."⁴⁵ While recognizing Michigan's overreaching in Mrs. Bennis's case, Justice Thomas relied on the Chief Justice's assurance that the practice of depriving innocent owners of their property was sanctified by tradition.⁴⁶ "As detailed in the Court's opinion and the cases cited therein, forfeiture of property without proof of the owner's wrongdoing, merely because it was 'used' in or was an 'instrumentality' of crime has been permitted in England and this country, both before and after the adoption of the Fifth and Fourteenth Amendments."⁴⁷

With all due respect, we believe that Justice Thomas too quickly accepted the Chief Justice's partial account of forfeiture tradition. A fuller account of that tradition might well have changed Justice Thomas's vote. We fill in the gaps of the Chief Justice's account in the next Section.

II. FORFEITURE'S HISTORY OF ABUSE

The Chief Justice, in his usual style, included only the essentials in his account of the tradition of civil forfeiture. To fully understand that tradition, however, we must begin with the English origins of the practice. We also address forfeiture's introduction into American law. We then turn to the treatment of innocent owners in forfeiture proceedings under both English and American law.

42. *Id.*

43. *Id.* at 1001.

44. *Id.*

45. *Id.* at 1001-02 (citations omitted).

46. Reliance on history is a familiar theme in Justice Thomas's jurisprudence. *See, e.g.,* McIntyre v. Ohio Elections Comm'n, 115 S. Ct. 1511, 1525 (1995) (Thomas J., concurring in the judgment) (examining historic treatment of anonymous speech).

47. *Bennis*, 116 S. Ct. at 1002.

A. Forfeiture at Common Law

English law recognized three types of forfeiture: (1) deodand; (2) attainder forfeiture; and (3) admiralty forfeitures. Deodand and attainder forfeitures have the longest history; admiralty forfeitures did not become prevalent until the seventeenth century.⁴⁸

1. Deodand

A deodand is an instrument causing a person's death, e.g., a pistol or a runaway carriage.⁴⁹ Forfeiture to the Crown under the common law of a deodand is the oldest method of forfeiture.⁵⁰ The deodand "may have served as an alternative to the blood feud of early justice—the instrument of death replacing the slayer's kin as the object of vengeance."⁵¹ In theory, the funds from the liquidated deodand were used to pay for masses for the deceased.⁵² In time, though, the Crown came to profit from deodand.⁵³

48. See Michael Schecter, Note, *Fear and Loathing and the Forfeiture Laws*, 75 CORNELL L. REV. 1151, 1154 (1990) ("The in rem proceeding . . . developed in the seventeenth century.").

49. 1 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 419 (reprinted 1980)(1736) ("Regularly that moveable good, that brings a man to an untimely death is forfeit to the king, and it is usually granted by the king to his almoner to distribute in charitable uses."). The word "deodand" derives from the Latin "Deo dandum," which means "to be given to God." *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 681 n.16 (1974).

50. See generally Walter Woodburn Hyde, *The Prosecution and Punishment of Animals and Lifeless Things in the Middle Ages and Modern Times*, 64 U. PA. L. REV. 696 (1916) (tracing the origins of deodand to ancient civilizations).

51. James R. Maxeiner, Note, *Bane of American Forfeiture Law—Banished at Last?*, 62 CORNELL L. REV. 768, 771 (1977). On the blood feud, see generally RICHARD A. POSNER, THE ECONOMICS OF JUSTICE 192-99 (1981).

52. See 2 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW 473 (1968).

53. *Id.* ("In process of time . . . the law appears to have been perverted from its original intention, and while ulterior object for which the forfeiture was inflicted, appears to have been gradually lost sight of, the forfeiture itself was retained, but in favour of the crown; and the fruits of it became and have continued, even down to this day, a mere source of revenue to the crown."). See also ADAM SMITH, LECTURES ON JURISPRUDENCE 116-17 (R. L. Meek, D.D. Raphael & P.G. Stein eds., 1978) (1762-63) ("By the English law of deoda[nd], what ever was the occasion[s] of a mans [sic] death was thus devoted; formerly the clergy claimed it, and now the king, as being the head of the church.").

Some courts have explained modern *in rem* forfeiture as the descendant of deodand.⁵⁴ Oliver Wendell Holmes, Jr. also subscribed to this view.⁵⁵ After all, like modern American forfeiture statutes under which the government proceeds directly against offending objects (e.g., a yacht used to transport marijuana) as if these objects were culpable for the offense, the Crown proceeded directly against the deodand as if it were guilty of a crime. But, in fact, there is little evidence that modern forfeiture law descended from deodand.⁵⁶ First and most obviously, property became deodand only if it caused a human's death.⁵⁷ Second, attempts to raise the analogy of forfeiture to deodand were specifically rejected by English courts.⁵⁸ Third, Grant Gilmore and Charles Black, in their *Treatise on Admiralty*, found little evidence for Holmes's contention that deodand is the evolutionary ancestor of modern forfeiture law.⁵⁹ Sea-going ships that caused a man's death were never forfeited as deodands.⁶⁰ Fourth, deodand was strictly limited to the instrument of harm, unlike modern forfeiture.⁶¹ Fifth, deodands were always

54. See, e.g., *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 681 (1974).

55. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 23-26 (1881).

56. See Schecter, *supra* note 48, at 1154 ("Modern forfeiture law originated, independent of deodands, during England's seventeenth century maritime expansion."). See also Maxeiner, *supra* note 51, at 772 ("The only English authority cited as proof that deodand represents a general forfeiture principle is one sentence from St. Germain's *Doctor & Student* dialogues, published in 1530 But a careful reading . . . does not support that conclusion.").

57. 1 HALE, *supra* note 49, at 419 ("they are not forfeit till death be found. . .").

58. "In 1766, in a case before the Court of the Exchequer, the Crown argued that deodand represented a general principle of forfeiture law. Chief Baron Parker rejected the argument, citing Chief Justice Vaughn for the proposition that 'goods as goods, cannot offend, forfeit, unlade, pay duties, or the like, but [only] men whose goods they are.'" Mitchell *qui tam* v. Torup, Parker 227, 145 Eng. Rep. 764 (Ex. 1766) (citing with approval Sheppard v. Gosnold, Vaughn 159, 172, 124 Eng. Rep. 1018, 1024 (C.P. 1677)). Sheppard is also quoted in *Boyd v. United States*, 116 U.S. 616, 637 (1886).

59. GRANT GILMORE & CHARLES L. BLACK, JR., *THE LAW OF ADMIRALTY* 590 (2d ed. 1975).

60. 1 WILLIAM HAWKINS, *A TREATISE OF THE PLEAS OF THE CROWN* 66 (Garland ed. 1978) (1716); 1 HALE *supra* note 49, at 422.

61. Compare 1 HALE, *supra* note 49, at 420 ("If a man fall into the water, and the water carry him under the wheel of a mill, whereby he is killed, the wheel is forfeited, but not the mill.

If a weight of earth fall upon a worker in a mine and kill him, the weight of the earth is forfeit, not the whole mine.") with *United States v. Sixty Acres, More or Less, with Improvements, Located in Etowa County, Alabama*, 727 F. Supp 1414, 1422 (N.D. Ala. 1990), *vacated*, 736 F. Supp. 1579 (N.D. Ala. 1990), *subsequent decision rev'd*, 930 F.2d 857 (11th Cir. 1991) ("The United States argues that all of Texas

tried in criminal courts.⁶² Finally, the superstition that inanimate objects can be culpable for harming humans has been discarded with the advance of science.

Deodand was questioned even before the adoption of the Constitution: "Even Blackstone, who is not known as a biting critic of the English legal tradition, condemned the seizure of the property of the innocent as based upon a 'superstition' inherited from the 'blind days' of feudalism."⁶³ Justice Joseph Story similarly condemned it: "*deodand* . . . seems a peculiar case, growing out of the avarice of the church, and the superstition of the laity, in ancient times."⁶⁴ Despite its archaic nature, deodand survived in England until 1846.⁶⁵ But, whatever its status in England, "[d]eodands did not become part of the common-law tradition of this country."⁶⁶ In sum, modern forfeiture practice did not descend from the "guilty property" fiction of deodand.

2. Attainder Forfeitures

Attainder forfeitures were the largest class of forfeitures at English law.⁶⁷ The government proceeded against the property owner *in personam*. The convicted felon's personal property was forfeited to the Crown, while his real property was forfeited to his lord.⁶⁸ A conviction for treason, however,

would be forfeited under a literal reading of § 881(a)(7) if Texas were owned by one person, and if one acre of it was used in a drug deal with the owner's knowledge or consent. The larger the tract and the smaller the portions misused, the more questionable may become the constitutionality of a literal application of the § 881(a)(7) language. This court is happy not to have had to deal with this question."

62. Hyde, *supra* note 50, at 729 ("The trials of deodand never took place before ecclesiastical courts, but always before criminal courts.").

63. United States v. United States Coin & Currency, 401 U.S. 715, 720-21 (1971) (Harlan, J.) (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, c. 8, *300 (1765)).

64. United States v. 1960 Bags of Coffee, 12 U.S. (8 Cranch) 398, 413 (1814) (Story, J., dissenting).

65. Jacob J. Finkelstein, *The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty*, 46 TEMP. L.Q. 169, 170-71 (1973). Repeal of deodand faced little opposition at that point. Harry Smith, *From Deodand to Dependency*, 11 AM. J. LEGAL HIST. 389, 402 (1967) ("Deodand . . . had few supporters, and came to an end mourned by few.").

66. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 682 (1974).

67. Stuart David Kaplan, Note, *The Forfeiture of Profits Under the Racketeer Influenced and Corrupt Organizations Act: Enabling Courts to Realize RICO's Potential*, 33 AM. U. L. REV. 747, 751 (1984).

68. J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 413 (2d. ed.

rendered all of the felon's property, personal and real, forfeitable to the Crown.⁶⁹ No property was forfeited unless the owner of the property was first duly convicted of a criminal offense, and no forfeiture resulted from conviction for a misdemeanor.⁷⁰

William Blackstone justified attainder forfeitures as an appropriate sanction for the property owner's violation of the social compact. "The true reason and only substantial ground of any forfeiture for crimes consists in this; that all property is derived from society, being one of those civil rights which are conferred upon individuals, in exchange for that degree of natural freedom, which every man must sacrifice when he enters into social communities."⁷¹ Sir James Fitzjames Stephen provided a slightly different explanation: forfeitures "have their source in the feudal theory that property, especially landed property, was held of a superior lord upon the condition of discharging duties attaching to it, and was forfeited by the breach of those conditions."⁷²

1979) ("conviction brought forfeiture of all the felon's property: his chattels to the king, his lands to the feudal lord."). Conviction also resulted in corruption of blood. "The effect of corruption of blood was that descent could not be traced through a person whose blood was corrupted." 1 JAMES FITZJAMES STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 487 (1870); 1 HALE, *supra* note 49, at 356. *See also* S.F.C. MILSOM, *HISTORICAL FOUNDATIONS OF THE COMMON LAW* 109 (2d ed. 1981) (forfeiture for felony "was rationalised by the proposition that the felony so corrupted his blood, that he could have no heirs.").

69. 1 EDWARD HYDE EAST, *PLEAS OF THE CROWN* 138 (reprinted 1987)(1803). *See also* BAKER, *supra* note 68, at 206 ("Forfeiture, in the original sense occurred when a tenant committed treason; in which case his land went to the crown, and the rights of the mesne lord were extinguished."). The Crown renounced its claim to forfeiture of land for felony in the Magna Carta. 3 W. S. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 69 (3d ed. 1927).

70. *See* THEODORE F.T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 455 (5th ed. 1956) ("Norman kings sometimes enacted that a particular offense would be visited with the king's 'full forfeiture', [sic] and so the heavy penalty of loss of chattels might be inflicted for crimes which fall short of felony. Henry I had to abandon this, and in his coronation charter promised what seems to be a return to the Anglo-Saxon system of pre-appointed fines or *wite*."); 4 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND*, 97 (1765) ("In short, the true criterion of felony is forfeiture.").

71. 1 BLACKSTONE, *supra* note 63, at 289.

72. 1 STEPHEN, *supra* note 68, at 488. *See also* PLUCKNETT, *supra* note 70, at 442 ("Felony is a feudal conception particularly applying to the breach of fidelity which should accompany the feudal relationship which has been consecrated by homage. Its characteristic punishment is therefore loss of tenement—escheat."); 2 POLLOCK & MAITLAND, *supra* note 52 at 82 ("[F]orfeiture . . . can hardly be described as [a] mode by which proprietary rights are acquired. The lord's rights have been there all along; the tenant's rights disappear; the lord has all along been entitled to the

Both theories presume that property is merely a social construct, and that society—which confers property rights—can revoke those rights for transgressions against society. Less philosophical, but more realistic, is Theodore Plucknett's view: "The principle of forfeiture was designed to weaken the power of opposition to the Crown at the expense of possibly innocent members of the rebel's family."⁷³ At bottom, attainder was about consolidating the power of the Crown: "children are pledges to the prince of the father's obedience."⁷⁴ Despite its harshness, England did not abolish "the barbarous system of . . . forfeiture which reduced to beggary the families of men of substance who had strayed from the paths of virtue" until 1870.⁷⁵ Only then, apparently, could the Crown feel secure in its authority.

The Founders of the American Republic, however, had a different view of the nature of property and the limits of government power. They regarded property as both a natural right and the cornerstone of individual liberty.⁷⁶ Consequently, the Founders rejected the use of forfeiture to consolidate government authority in this country. The Constitution's framers reined in forfeiture's worst abuses by forbidding bills of attainder,⁷⁷ and limiting the penalty for treason by providing that "no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted."⁷⁸ Thus, forfeiture could no longer be used as a weapon to beggar the families of traitors. Against this constitutional backdrop, the first Congress also abolished attainder forfeiture.⁷⁹ The state governments

land; he is entitled to it now, and, since he has no tenant, he can enjoy it in *de mesne*."). *But see* 4 BLACKSTONE, *supra* note 70, at 383-84 ("With us in England forfeiture of lands and tenements to the crown for treason is by no means derived from the feudal policy . . . but was antecedent to the establishment of that system in this island; being transmitted from our Saxon ancestors, and forming a part of the ancient Scandinavian constitution.").

73. PLUCKNETT, *supra* note 70, at 713.

74. *See* 4 HENRY JOHN STEPHEN, *NEW COMMENTARIES ON THE LAWS OF ENGLAND* 404 (14th ed. 1903) ("forfeitures, whereby one's posterity must suffer, are eminently calculated to restrain a man, not only by the dread of personal punishment, but also by his passions and natural affections, from committing this offence . . . For children are pledges to the prince of the father's obedience.").

75. EDWARD JENKS, *A SHORT HISTORY OF ENGLISH LAW* 351 (2d ed. 1920).

76. David Schultz, *Political Theory and Legal History: Conflicting Depictions of Property in the American Political Founding*, 37 *AM. J. LEGAL HIST.* 464, 475-81 (1993) (collecting views of Founders on the importance of property rights).

77. U.S. CONST. art I, § 9, cl. 3.

78. U.S. CONST. art. III, § 3, cl. 2. England repealed corruption of blood in 1814 for all crimes save murder and treason. 4 STEPHEN, *supra* note 74, at 406.

79. Act of April 30, 1790, 1 Stat. 117, c. 9, § 24.

followed the federal government's lead in curtailing the use of forfeiture. According to Chancellor Kent:

The forfeiture of the estate is very much reduced in practice in this country, and the corruption of blood is, I apprehend, universally abolished. In New York, forfeiture of property for crimes, is confined to the case of a conviction for treason; and, by a law of the colony of Massachusetts, as early as 1641, escheats and forfeitures, upon the death of the ancestor, "natural, unnatural, casual, or *judicial*" were abolished for ever.⁸⁰

Thus, in the early days of the Republic, forfeiture was largely eliminated as a tool of government oppression at both the federal and state level.

3. Admiralty Forfeitures

Although not the first English forfeiture statutes, the Navigation Acts of the mid-seventeenth century were the first to allow for *in rem* forfeiture.⁸¹ Prior to these Acts, "[i]f the owner was available, the forfeiture evidently was imposed only upon confession or adjudication of his guilt."⁸² *In rem* procedures under the Navigation Acts allowed the Crown to prosecute the offending property directly, naming the property itself as the defendant.⁸³ The legal fiction was that the property itself violated the law. Thus, no conviction of the property owner was required because the property owner was, legally, not being punished; only the property was found 'guilty.'

The Navigation Acts were intended to strengthen England's naval prowess. By requiring that most imports and exports from England be carried in English ships, the Navigation Acts protected the English maritime industry from foreign competition.⁸⁴ Given the importance of the maritime industry

80. 4 JAMES KENT, COMMENTARIES ON AMERICAN LAW 422-23 (reprinted 1971) (1st ed. 1826-1830). See also 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 318 (reprinted 1971)(1st ed. 1826-1830) ("some [states] have taken away the power of forfeiture absolutely without any exception.") (citing Ohio, Tennessee, Indiana, Illinois, and Missouri).

81. For a discussion of the earlier acts, see Matthew Hale, *A Treatise in Three Parts, Pars Tertia, Concerning the Custom of Goods imported and "exported,"* reprinted in A COLLECTION OF TRACTS RELATIVE TO THE LAW OF ENGLAND (Francis Hargrave ed., 1787).

82. Maxeiner, *supra* note 51, at 775.

83. LAWRENCE A. HARPER, THE ENGLISH NAVIGATION LAWS 111 (1973).

84. See ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 464-65 (reprinted 1976; R.H. Campbell & A.S. Skinner, eds.)(1776) ("As defence, however, is of much more importance than opulence, the act of navigation is, perhaps, the wisest of all the commercial regulations in England.").

to British commerce, courts enforced the Acts strictly. "Violation of the Acts resulted in forfeiture of both the illegally carried goods and the ship that transported them. The English courts construed these statutes so that the act of an individual seaman, undertaken without the knowledge of master or owner, could cause a forfeiture of the entire ship."⁸⁵ According to Chief Baron Parker of Exchequer, the Acts were:

negative, absolute, and prohibitory; they not only operate upon the goods, but equally the ship, there is not a syllable that hints at the privity or consent of the master, mate or owners. The reason of penning this clause in these strong terms is to prevent as much as possible its being evaded, for if the privity or consent of the master, mate or owners, had been made necessary to the forfeiture, it would have opened a door for perpetual evasion, and the provisions of this excellent act for the increase of the navigation would have been defeated.⁸⁶

England repealed the Navigation Acts in favor of free trade in 1849.⁸⁷

The Navigation Acts were also enforced in the American colonies before the Revolution.⁸⁸ Enforcement differed in the colonies, however, in that suits were brought in the vice-admiralty courts, rather than in the Exchequer as in England.⁸⁹ The vice-admiralty courts were not limited to hearing maritime

Smith, of course, opposed the protectionist functions of the Acts. *Id.* See also 3 HENRY JOHN STEPHEN, NEW COMMENTARIES ON THE LAWS OF ENGLAND 160-61 (14th ed. 1903) ("Until the year 1825, this subject was regulated by the Navigation Act of 12 Charles II. (1660), c.18 . . . These provisions (it is said) were framed with the object of dealing a blow at our own sugar islands, which were disaffected to the Parliament, and still held out for Charles II, by stopping or crippling their trade with the Dutch (b); and with the object also of clipping in the wings of those of our opulent and enterprising neighbors. With these objects in view, this law prohibited all ships of foreign nations from trading with any English plantation without a license from the council of state. In 1651, the prohibition was extended also to ships trading with the mother country; consequently, no goods were suffered to be imported from England, or into any English dependence, in any other than English bottoms, or in the ships of that European nation, of which the merchandize imported was the genuine growth or manufacture.").

85. Maxeiner, *supra* note 51, at 774.

86. Mitchell *qui tam* v. Torup, Parker 227, 232-33, 145 Eng. Rep. 764, 766 (Ex. 1766) (quoted in United States v. Hutchinson, 26 F. Cas. 446, 448 (D. Me. 1868) (No. 15,431)).

87. 3 STEPHEN, *supra* note 84, at 161-62.

88. See, e.g., *The "Freemason,"* 167 Eng. Rep. 469 (Burrell 55) (1767) (upholding the forfeiture of a vessel and its goods for illegal importation into Boston harbor).

89. Waring v. Clarke, 46 U.S. (5 How.) 441, 483 (1847) (Woodbury, J., dissenting); Erwin C. Surrency, *The Courts in the American Colonies*, 11 AM. J. LEG.

cases; they also heard cases arising from the Sugar and Stamp Acts.⁹⁰ The colonists bitterly condemned this expansion of the jurisdiction of the vice-admiralty courts beyond the realm of maritime law to enforcing revenue provisions "completely divorced from the sea and its commerce."⁹¹ Not surprisingly, Parliament established the vice-admiralty courts in America without the consent of the colonies.⁹² The expansion of the admiralty jurisdiction had a significant advantage for the Crown; by resorting to the vice-admiralty courts the Crown avoided trying its cases before a jury.⁹³ This procedural innovation was fought by the colonists as a deprivation of the constitutional rights of Englishmen.⁹⁴ A rising young lawyer, John Adams, made his name in the colonies by defending a merchant, John Hancock, against charges of evading custom duties that were brought in the vice-admiralty court.⁹⁵ Adams' defense centered on the deprivation of Hancock's constitutional right to a trial by jury.⁹⁶ Adams' legal assault on the expansion of the vice-admiralty courts' jurisdiction had ramifications beyond the world of commerce; one count of the Declaration of Independence's indictment against the Crown charges that:

HIST. 253, 357 (1967). The colonies did not have the multiple courts with limited jurisdiction as existed then in England. *Id.* at 261. Exchequer courts were never established in America. *Id.* at 361.

90. Surrency, *supra* note 89, at 357.

91. CARL UBBELOHDE, *THE VICE-ADMIRALTY COURTS AND THE AMERICAN REVOLUTION* 207 (1960).

92. Surrency, *supra* note 89, at 266 ("The British Government sought to exercise the function of creating courts directly through an act of Parliament only once, when it established admiralty courts in the colonies. Since there could be little doubt that these were created under an act of Parliament and were not controlled by the colonies may in part explain the colonial hostility to them.").

93. L. Kinvin Wroth, *The Massachusetts Vice Admiralty Court and the Federal Admiralty Jurisdiction*, 6 AM. J. LEGAL HIST. 250, 257-58 (1962). Before the creation of the vice-admiralty courts violations of the Navigation Acts were tried to a jury in the common law courts. *C.J. Hendry Co. v. Moore*, 318 U.S. 133, 140 (1943).

94. *Waring*, 46 U.S. at 483, 484 (Woodbury, J., dissenting). Several colonies passed statutes providing for admiralty juries, but these statutes were overturned by the government in Britain. Surrency, *supra* note 89, at 359.

95. UBBELOHDE, *supra* note 91, at 125.

96. *Id.* The Crown eventually dropped the case. *Id.* at 127.

He has combined with others to subject us to a Jurisdiction foreign to our Constitution, and unacknowledged by our Laws; giving his Assent to their Acts of pretended Legislation:

* * *

For depriving us, in many cases, of the Benefits of Trial by Jury . . .⁹⁷

The colonists, however, were not defenseless before this usurpation of their constitutional rights. Merchants who had their goods forfeited by the admiralty courts retaliated against customs collectors with actions in common law courts for wrongful seizure of their goods.⁹⁸ In the common law courts, "[c]ivil juries countered the enforcement powers of the admiralty courts and the discretion of the collectors of customs."⁹⁹

Another difference between England and the colonies was that the colonial vice-admiralty courts used both *in personam* and *in rem* procedures. In England, "the admiralty could proceed only *in rem*, that is, against a vessel liable for the obligation sued upon."¹⁰⁰ In the colonies, by contrast, "[i]n the majority of cases the process seems to be *in personam* in the first instance. . . . The action *in rem* seems to have been relied upon primarily in cases in which no respondent to an *in personam* suit could be found within the jurisdiction . . ."¹⁰¹ Thus, the American vice-admiralty courts ordinarily resorted to *in rem* procedures only when the owner of the vessel could not be subjected to an *in personam* suit. *In rem* procedures were a secondary means of enforcement.

97. DECLARATION OF INDEPENDENCE para. 20 (U.S. 1776).

98. UBBELOHDE, *supra* note 91, at 165-71; Douglas Lamar Jones, "The Caprice of Juries": *The Enforcement of the Jeffersonian Embargo in Massachusetts*, 24 AM. J. LEG. HIST. 307, 310 (1980).

99. Jones, *supra* note 98, at 310.

100. Wroth, *supra* note 93, at 264. *But see* Thomas Lambert Mears, *The History of the Admiralty Jurisdiction*, in 2 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 312, 349 (reprinted 1968)(1908) ("the process was a proceeding *in rem* in the sense that if the defendant did not appear the suit could go on without in any way touching the person, and that by the operation of the judgment the defendant was deprived of his property in the chattel, unless he appeared, in which case the proceedings went on in the ordinary course as an action *in personam*.").

101. Wroth, *supra* note 93, at 266.

B. Treatment of Innocent Owners

1. English Law

While the innocence of owners is formally irrelevant to *in rem* forfeiture,¹⁰² Anglo-American law has for centuries struggled to protect the property interests of innocent owners from *in personam* forfeiture. The *in personam* tradition is found in the history of attainder forfeitures. Particularly relevant to *Bennis* is the law's traditional protection of wives, blameless of their husbands' criminal wrongdoing, from forfeiture of their property. This protection arose from the earliest times. At the time of Edward III, "in case of a feoffment to a baron and *feme* in fee, if the baron committed felony, the land was not forfeited, but survived entirely to the *feme*. . . ." ¹⁰³ Later, an innocent wife's dower rights were forfeited¹⁰⁴ to the crown upon conviction of her husband for treason, but a felony conviction of her husband did not result in forfeiture of her dower interests.¹⁰⁵ Even forfeiture for treason

102. Because *in rem* proceedings are formally against the property, the only question is the "culpability" of the property. Legislatures, however, are often unwilling to accept fully the logic of *in rem* proceedings; statutes providing for an *in rem* forfeiture often contain an innocent-owner defense. See, e.g., Comprehensive Forfeiture Act of 1984, 21 U.S.C. § 881(a)(7) (1992) ("(a) The following shall be subject to forfeiture to the United States and no property shall exist in them: (7) All real property . . . which is used, or intended to be used, in any manner or party, to commit, or to facilitate the commission of, a violation of this title punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of any owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner."). "The prevalence of protection for innocent owners in such legislation does . . . lend support to the conclusion that elementary notions of fairness require some attention to the impact of a seizure on the rights of innocent parties." *Bennis*, 116 S. Ct. at 1004 (Stevens, J., dissenting).

103. 3 W.F. FINLASON, REEVES' HISTORY OF THE ENGLISH LAW 335 (reprinted 1981)(1880).

104. MILSOM, *supra* note 68, at 167 ("Dower was the right of the widow to hold a proportion of her dead husband's land, generally a third, as long as she lived. She would hold it of her husband's heir not of his lord; and unless the heir was an infant, the lord was not concerned.").

105. 1 HALE, *supra* note 49, at 359 ("tho [sic] her husband be attainted of felony or murder, she shall not lose her dower. But by attainder of her husband of high treason or petit treason the wife shall lose her dower at this same day."); 3 HOLDSWORTH, *supra* note 69, at 195 ("In Edward VI's reign [an innocent wife's] rights were secured also against the claims of the lord or Crown to escheat or forfeiture if her husband committed felony; but the old law remained if her husband committed treason, whether grand or petit.").

could be evaded by putting the wife's property interests in the form of jointure¹⁰⁶ rather than dower.¹⁰⁷

This protection of the joint property interests of innocent wives is consistent with protections for other innocent owners. Theodore Plucknett reports that, even in cases of treason, the law was "specifically modified in particular cases . . . to prevent the forfeiture of legal estates held by [the traitor] to the use of other persons."¹⁰⁸ Not only interests in real property were protected; protection also extended in many cases to personal property. According to Matthew Hale, "[a]t common law the king by attainder of treason was not entitled to any chattels, that the party had *en autre droit*, as executor, or administrator, or in right of a corporation aggregate."¹⁰⁹ Similarly, the 14th-century Statute of Staples protected the personal property of innocent bailors from being forfeited along with the property of convicted baillees.¹¹⁰

And there is evidence that English lawmakers were uneasy about forfeiting an innocent wife's dower interest even when her husband was convicted of treason; there was a time during the 16th century when even the dower interests of an innocent wife were immune to forfeiture upon her husband's conviction of treason. See PLUCKNETT, *supra* note 70, at 713 ("[f]orfeiture defeated dower in spite of parliamentary protests . . . until 1 Edw. VI, c. 11 (1547), preserved dower in all cases; but this was soon repealed as to treason by 5 & 6 Edw. VI, c. 11 (1552).").

106. Jointure was "a competent livelihood of freehold for the wife, of lands or tenements to take effect presently in possession or profit after the decease of the husband, for the life of the wife at least." 1 STEPHEN, *supra* note 68, at 157 (citing Co. Litt. 366).

107. 4 BLACKSTONE, *supra* note 70, at 381-82 ("a wife's jointure is not forfeitable for the treason of her husband, because settled upon her previous to the treason committed. But her dower is forfeited by the express provision of statutes 5 & 6 Edward VI, c. 11 [Treason 1551]."). See also 4 STEPHEN, *supra* note 74, at 403 ("a wife's jointure was not forfeitable for the treason of her husband, because settled on her previous to the treason committed."); 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 456 (Garland ed. 1978)(1716) ("But it seems that the wife never forfeited lands given jointly to her husband and her, but only for the Year and Day and Waste.").

108. PLUCKNETT, *supra* note 70, at 581.

109. 1 HALE, *supra* note 49, at 251-52.

110. 27 Edw. III, st. 2, c. 19 (1353) ("No merchant or other person, of what condition soever he be, shall lose or forfeit his goods or merchandise for any trespass or forfeiture incurred by his servant, unless his act is by the command and consent of this master, or he has offended in the office in which his master put him, or unless the master is in some other way bound to answer for the servant's act by law merchant as has been used heretofore."). See also PLUCKNETT, *supra* note 70, at 474-75 ("The Crown was constantly straining the law of forfeiture, and had obtained decisions that if a bailee incurs a forfeiture, the goods bailed to him are liable to it and the

Parliament had to stay vigilant to protect innocent owners from royal avarice. English kings were "constantly straining the law of forfeiture,"¹¹¹ to the point where the Crown had come to take title to even stolen goods in the thief's possession.¹¹² Parliament ended this royal abuse in 1529, giving innocent victims the right to retrieve their property.¹¹³

Also relevant is the law's historical treatment of trusts for the benefit of a husband and his family. If such trusts were created in good faith, the interests of innocent family members in these trusts were not forfeited even though the convicted husband's interests were forfeited to the crown. According to William Hawkins,

it seems to be in great measure settled, that the trust of a term granted by a man for the use of himself, his wife and children, etc. is liable . . . to be forfeited, if fraudulently made with an intent to avoid a subsequent forfeiture; but that it shall be forfeited so far only as it is reserved to the benefit of the party himself, if made *bona fide*, whether before or after marriage, or good consideration without fraud. . . .¹¹⁴

Any fair reading of English legal history makes plain the law's long-standing reluctance to allow innocent owners to suffer the ill-consequences of attainder forfeitures. Indeed, even the law of deodand—which proceeded

merchandise in his hands goes to the Crown. . . . Some boroughs had succeeded in maintaining a custom that the rule should not apply to them, and others got charters exempting them from its operation. It was this indefensible rule which the statute finally abrogated for the whole country. . . ." (citations omitted).

111. PLUCKNETT, *supra* note 70, at 474.

112. 3 HOLDSWORTH, *supra* note 69, at 280 ("But in the case of goods we must always remember that, if the goods had been taken under such circumstances as amounted to a felony, and the thief had been convicted, the right of recapture was subject to the Crown's rights to have these goods as a forfeiture. It was only under special circumstances that the rights of the true owner overrode the rights of the Crown."). The true owner was forced to compete with the Crown in enforcing the criminal law in order to recover his property. *Id.* at 330 ("it was only if the owner made fresh pursuit, captured the thief with the goods in his possession, and convicted him as the result of the appeal, that the owner saved his goods from forfeiture."). *Id.* at 362-63.

113. 4 BLACKSTONE, *supra* note 70, at 362 ("The statute 21 Henry VIII, c. 11 [Restitution of Goods Stolen, 1529] . . . enacts that if any person be convicted of larceny by the evidence of the party robbed, he shall have full restitution of his money, goods and chattels, or the value of them out of the offender's goods, if he has any, by a writ to be granted by the justices.").

114. 1 HAWKINS, *supra* note 60, at 640. *See also* 1 HALE, *supra* note 49, at 247 ("At common law the king by attainder of treason was not entitled to uses or trusts belonging to the party attain. . . .").

against the property and, hence, was formally unconcerned with the culpability of property owners¹¹⁵—was limited in practice by juries to avoid inflicting disproportionate penalties on innocent owners.¹¹⁶

The lone authority we have found rejecting protection of innocent joint owners of personal property is Blackstone. Blackstone insists that "because the king cannot have a *joint* property with any person in one entire chattel . . . the king shall have the whole" if he is entitled to any part through forfeiture.¹¹⁷ According to Blackstone, even innocent owners lose their interests when the crown acquires property interests through forfeiture that cannot be separated from interests held by others because it is beneath "the dignity of the crown to be partner with a subject."¹¹⁸

Blackstone's opinion, of course, is weighty. But the basis for his conclusion is suspect. In one of the cases he cites, *Willion v. Berkley*,¹¹⁹ the question is whether or not the crown is bound by the Statute De Donis Conditionalibus,¹²⁰ a statute designed to give better effect to the conditions imposed by donors of interests in real property. The part of the opinion cited by Blackstone to support his contention that the crown is entitled to innocent owners' shares of forfeited chattel is clearly dicta.¹²¹ Another case relied

115. 2 HENRY JOHN STEPHEN, *NEW COMMENTARIES ON THE LAWS OF ENGLAND* 542-43 (14th ed. 1903) ("it mattered not whether the owner were concerned in the killing or not; for if A. killed B. with the sword of C., the sword was forfeited as an accursed thing.").

116. *Id.* at 543 ("But no thing being a deodand, unless it were presented as such by the jury, juries very frequently took upon themselves to mitigate these forfeitures, by finding only some trifling thing, or party of an entire thing, to have been the occasion of death; and although such finding of the jury may have been hardly warrantable by law, the Court, in general, refused to interfere.").

117. 2 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 409 (1765) (original emphasis). He continues: "Thus, if a horse be given to the king and a private person, the king shall have the sole property; if a bond be made to the king and a subject, the king shall have the whole penalty; the debt or duty being one single chattel; and so, if two persons have the property of a horse between them, or have a joint debt owing them on a bond, and one of them assigns his part to the king, or is attainted, whereby his moiety is forfeited to the crown; the king shall have the entire horse, and entire debt." *Id.* (citations omitted).

118. *Id.*

119. 75 Eng. Rep. 339 (C.B. 1562).

120. 13 Edw. I, c. 1 (1285).

121. 75 Eng. Rep. 339, 370-71 (C.B. 1562) ("[I]t seems to me that the estate shall be adjudged a fee simple conditional in the King, and that the remainder shall be void, and that the King shall not be bound by the Statute de Donis Conditionalibus. . . . So if a part of a thing entire comes to the King, the common law gives him the whole, as if an obligation is made to two, and one of them is outlawed, the King shall have the whole duty; so he shall have an entire ox or horse which the person outlawed held

upon by Blackstone, *Miles v. Williams*,¹²² involves the question of whether or not a wife's debt is discharged by her husband's bankruptcy. The only passage in the case relevant to Blackstone's point hardly speaks to the issue of forfeiture: "If a bond be entered into two, and one grants the bond to the King, the King may sue alone."¹²³ Finally, a third case cited by Blackstone, *The Case of Mines*, concerned the crown's prerogative right to gold and silver throughout the realm.¹²⁴ Because it would be too costly for the crown to melt the copper and separate out gold and silver from the copper belonging to other landowners, the law gave the crown title to extracted copper as well.¹²⁵ Again, forfeiture was not at issue.

These are, at best, weak precedents for Blackstone's claim that innocent joint owners of personal properties lost their interests to the crown upon forfeiture. The weight of authority is to the contrary. Even if Blackstone were correct, the forfeiture he hypothesizes could easily be evaded. Forfeiture of personal property related only to the time of conviction. *Bona fide* transfers before conviction gave good title to the purchaser.¹²⁶ Thus, the accused only needed to sell his jointly-held property before conviction to avoid forfeiting the innocent joint-owner's interest.¹²⁷

3. American Law

Even if we take Blackstone at his word—and thereby reject the authority of Hale, Hawkins, and others—American law always treated innocent owners more favorably than did English law. Americans early on adopted a hostile attitude toward criminal forfeitures.¹²⁸ James Wilson of Pennsylvania, a

in common.") (citation omitted).

122. 88 Eng. Rep. 711 (Q.B. 1714).

123. *Id.* at 712.

124. 75 Eng. Rep. 472 (Ex. 1562).

125. *Id.* at 491-92.

126. 1 HALE, *supra* note 49, at 362; United States v. 1960 Bags of Coffee, 12 U.S. (8 Cranch.) 398, 410 (1814) (Story, J., dissenting).

127. 4 BLACKSTONE, *supra* note 70, at 388 ("a traitor or felon may *bona fide* sell any of his chattels, real or personal, for the sustenance of himself and family between the fact and conviction.").

128. 2 KENT, *supra* note 80, at 317 ("the tendency of public opinion has been to condemn forfeiture of property, at least in cases of felony, as being an unnecessary and hard punishment of the felon's posterity."). See also LEONARD W. LEVY, A LICENSE TO STEAL: THE FORFEITURE OF PROPERTY 34 (1996) ("In America the English law on criminal forfeitures was known and either disliked or modified in the corporate colonies and followed in the proprietary and royal colonies without much enthusiasm or frequency.").

prominent member of the Constitutional Convention, well understood the dangerous nature of government's forfeiture powers.

Need I mention it as a rule, that punishments ought to be inflicted upon those persons only, who have committed crimes—that the innocent ought not to be blended in cruel and ruinous confusion with the guilty? Yes; it is necessary to mention this as a rule: for, however plain and straight it is, when viewed through the pure and clear ether of reason and humanity, it has not been seen by those whom pride and avarice have blinded; nay, it has been represented as a rule, crooked and distorted, by those who have beheld it through the gross and refracting atmosphere of false policy and false philosophy. The doctrines of forfeiture and corruption of blood have found their ingenious advocates, as well as their powerful patrons.¹²⁹

As discussed above, Wilson and the other members of the Constitutional Convention limited this abuse by abolishing corruption of blood and bills of attainder.¹³⁰

State governments went further. Chancellor Kent is clear that innocence is protection against *in personam* forfeitures. According to Kent,

It is a rule of law, that the state, on taking lands by escheat, and even by forfeiture, takes the title which the party had, and none other. It is taken in the plight and extent by which he held it, and the estate of the remainderman is not destroyed or divested by the forfeiture of the particular estate.¹³¹

Similarly, "[e]very person convicted of any manner of treason, under the laws of this state, forfeits his goods and chattels, as well as his land and tenements; but the rights of third persons, existing at the time of the commission of the treason, are saved."¹³² Even a wife's dower interests were protected from forfeiture for her husband's treason, contrary to English practice.¹³³ Thus, American law provided broad protection to innocent owners in *in personam* forfeiture proceedings.

129. 2 WILSON, *supra* note 1, at 630-31.

130. *See supra* text accompanying note 77-78.

131. 4 KENT, *supra* note 80, at 423.

132. 2 KENT, *supra* note 80, at 317.

133. *Id.* at 317-18. *See also* LEVY, *supra* note 128, at 37 ("states tended to restrict forfeitures to the attainted individual and prevent the punishment of relatives.").

III. THE SUPREME COURT'S UNFAITHFUL HISTORY

Understanding forfeiture's origins sheds light on the forfeiture cases relied on by the Court in *Bennis*. The English law of forfeiture influenced, while not strictly determining, American law. While the first Congress rejected attainder forfeiture, it did adopt *in rem* civil forfeiture to aid in the collection of customs revenues.¹³⁴

A. *Forfeiting the Jury*

In construing these forfeiture statutes, the Supreme Court laid the legal foundation for current forfeiture practice by adopting most features of English *in rem* forfeiture procedure under the Navigation Acts.¹³⁵ The Court adopted English *in rem* practice for forfeitures under the admiralty jurisdiction over a substantial historical objection. Arguing that the Seventh Amendment required a trial by jury, former Attorney General Lee pointed out that "[a]ll seizures [in England] for violation of the laws of revenue, trade, or navigation are tried by a jury in the court of exchequer according to the course of the common law."¹³⁶ Lee also urged that "[i]t was one of our serious grievances, and of which we complained against Great Britain in our remonstrances to the King, and in our addresses to the people of Great Britain, while we were colonies, that the jurisdiction of the courts of vice-admiralty was extended to cases of revenue."¹³⁷ Chief Justice John Marshall rejected Lee's argument on the basis of *La Vengeance*, in which Lee had argued unsuccessfully (on behalf of the United States!) that a jury was required because forfeiture was a criminal action.¹³⁸ Justice Chase explained Congress's motive in taking forfeiture from the jury: "The reason of the legislature for putting seizures of this kind on the admiralty side of the court was the great danger to the revenue if such cases should be left to the caprices of juries."¹³⁹

134. Act of Aug. 4, 1790, 1 Stat. 145; Act of July 31, 1789, 1 Stat. 29.

135. See generally Donald J. Boudreaux & A.C. Pritchard, *Civil Forfeiture and the War on Drugs: Lessons From Economics and History*, 33 SAN DIEGO L. REV. (forthcoming 1996).

136. *United States v. The Schooner Betsey and Charlotte*, 8 U.S. (4 Cranch.) 443, 447 (1808).

137. *Id.* at 448.

138. *Id.* at 452 (citing *United States v. La Vengeance*, 3 U.S. (3 Dall.) 297, 299 (1796)).

139. *Id.* at 446 n.**. See also *Waring v. Clarke*, 46 U.S. (5 How.) 441, 460 ("But there is no provision, as the constitution originally was, from which it can be

Congress's fear was well founded; early American juries acquitted alleged violators of the maritime laws at a much higher rate than did judges.¹⁴⁰ *In rem* forfeiture allowed federal judges to circumvent jury nullification of unpopular laws, thereby extending the power of the federal government.¹⁴¹ Michigan, too, no doubt feared that juries would fail to deliver the revenues that it sought; this presumably was the state's motive for styling its abatement proceedings as "equitable" actions. No doubt a jury would have been reluctant to find a defendant like Tina Bennis "guilty" of a nuisance.

Tina Bennis was deprived of the right to a jury that she would have enjoyed at common law in the Exchequer.¹⁴² History supports her claim to a jury: the colonists bitterly condemned the Crown's usurpation of their right

inferred that civil causes in admiralty were to be tried by a jury, contrary to what the framers of the constitution knew the mode of trial of issues of fact in the admiralty."). The newly-independent states experimented with trial by jury in admiralty cases, but the experiment was a failure. UBBELOHDE, *supra* note 91, at 195-99. ("But the experiment soon proved unworkable. . . . Men with no knowledge of sea law or sea customs could not be expected to prove able umpires in the causes that were put before them."). *Id.* at 199.

140. Jones, *supra* note 98, at 326, n.8.

141. *Id.* at 324-30. In so doing, the federal government was simply following the precedent set by the Crown. See UBBELOHDE, *supra* note 91, at 209 ("The British position can be stated simply. Juries could not be relied upon to bring verdicts against fellow colonists for violating the acts of trade and revenue. In seeking to place the prosecution of such offenders out of the hands of juries, the British government had traditionally granted the vice-admiralty courts concurrent jurisdiction . . . which allowed customs officials to circumvent the hazards of jury trial."). Indeed, the federal government followed the colonial precedent condemned by John Adams and other revolutionaries. See Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 74 (1923) ("In view of the extreme fears expressed by opponents of the federal system lest the right of jury trial should be impaired, the jurisdiction thus granted to the District Courts, in the clause beginning with the words 'including all seizures,' was extraordinary. For in England, the admiralty jurisdiction did not extend to such 'seizures under laws of import, navigation, or trade,' which, consequently, were triable, in that country, in a common law Court by a jury. Although in some of the Colonies, trials of such cases had been in the Colonial Admiralty Courts without jury, it seems curious that the framers of this Bill should have deliberately included such cases of seizure within the admiralty jurisdiction of the new Federal Courts and should thus have deliberately enlarged the scope of such Courts and consequently the scope of trials without jury, beyond the scope then existent in England.").

142. The trial court denied her motion for a jury trial. Trial Transcript at 39 (The trial court: "By its very nature, it could not be, could not be a jury case. Go back to the Magna Carta.").

to a jury trial.¹⁴³ More to the point, Chief Justice Marshall distinguished forfeiture of goods seized on land, which were to be tried to a jury under the common law jurisdiction of the court, from goods seized at sea.¹⁴⁴ The federal courts continued to follow the rule laid down by Chief Justice Marshall.¹⁴⁵ But the *Van Oster* Court rejected as "unsubstantial" the claim of a constitutional right to a jury trial in state court.¹⁴⁶ Having allowed state governments to extend civil forfeiture well beyond its historical domain, the Court should at least afford property owners the protection of a jury guaranteed by the Seventh Amendment. In light of the state governments' abuse of forfeiture, the Court should reconsider *Van Oster's* refusal to incorporate the Seventh Amendment against the states, at least in cases of civil forfeiture.

*B. Forfeiture at Sea: The Palmyra,
 Harmony, and Calero-Toledo Trilogy*

Two of the cases cited in *Bennis*—*The Palmyra* and *Harmony*—are among the Court's early cases adopting English *in rem* forfeiture procedure. Those cases fall squarely within the traditional domain of civil forfeiture.

In *The Palmyra*, Justice Story, writing for the Court, upheld a vessel's *in rem* forfeiture for piracy, rejecting the argument that the forfeiture was defective because "the offenders are not alleged to have been convicted upon any prosecution *in personam*, of the offence charged in the libel."¹⁴⁷ Story recognized that "no personal conviction of the offender is necessary to enforce

143. In light of the colonists' bitter denunciation of the deprivation of their right to a jury in forfeiture actions, *see supra* text accompanying note 97, the comfort that Justice Ginsburg took from Michigan styling its proceedings as "equitable," *see supra* text accompanying note 42, is simply mystifying.

144. *See The Sarah*, 21 U.S. (8 Wheat.) 391, 394 (1823). On remand in *The Sarah*, the jury found for the claimants in an exchequer proceeding. *See United States v. 422 Casks of Wine*, 26 U.S. (1 Pet.) 547, 548 (1828).

145. *See Garnharts v. United States*, 83 U.S. (16 Wall.) 162, 165 (1872) (where a seizure giving rise to a forfeiture was made on land, the claimant was entitled to a jury trial); *Henderson's Distilled Spirits*, 81 U.S. (14 Wall.) 44, 53 (1871) ("Being a seizure on land, the claimant was entitled to a trial by jury.").

146. *Van Oster v. Kansas*, 272 U.S. 465, 467-68 (1926). The Court had earlier rejected attempts to incorporate the Seventh Amendment against the states in other contexts. *See, e.g., Walker v. Sauvinet*, 92 U.S. 90, 92 (1875) ("A trial by jury in suits at common law pending in the State courts is not . . . a privilege or immunity of national citizenship, which the States are forbidden by the Fourteenth Amendment of the Constitution of the United States to abridge.").

147. *The Palmyra*, 25 U.S. at 12.

a forfeiture *in rem* in cases of this nature"¹⁴⁸ because "[t]he thing is here primarily considered as the offender."¹⁴⁹ The forfeiture proceeding was independent of any criminal proceeding, and the challenged statute did not provide for criminal punishment.¹⁵⁰ Story was careful to distinguish, however, *in rem* forfeitures in admiralty from common-law *in personam* forfeitures. He summarized common law forfeiture:

It is well known, that at the common law, in many cases of felonies, the party forfeited his goods and chattels to the crown. The forfeiture did not, strictly speaking, attach *in rem*; but it was a part, or at least a consequence of the judgment of conviction. It is plain from this statement, that no right to the goods and chattels of the felon could be acquired by the crown by the mere commission of the offence; but the right attached only by the conviction of the offender. The necessary result was, that in every case where the crown sought to recover such goods and chattels, it was indispensable to establish its right by producing the record of the judgment of conviction.¹⁵¹

But the requirement of a conviction "never was applied to seizures and forfeitures, created by statute, *in rem*."¹⁵² Only *in personam* forfeitures required the owner's complicity in the wrongdoing.

The Palmyra accords with historical practice. Historically, *in rem* forfeiture allowed courts to hear actions against property owned by individuals beyond the court's *in personam* jurisdiction. Forfeiture of vessels employed in wrong-doing carries a sound functional justification with its long historical pedigree. *In rem* procedures were essential to enforce revenue and piracy laws, given that the vessel's owner was likely beyond the court's jurisdiction. The government often would be left remediless if required to obtain personal jurisdiction over the owner.¹⁵³

148. *Id.* at 14.

149. *Id.*

150. *The Palmyra*, 25 U.S. at 15. In this the statute also followed tradition. Piracy was not a crime at early common law. Mears, *supra* note 100, at 320 n. 3 ("Piracy was not a felony at common law . . ."). Forfeiture for piracy was simply a form of restitution. *Id.* at 320 ("In the case of piracy, of which suits now became frequent in the Court of Admiralty, the criminal aspect was disregarded the proceedings for restitution, and no preliminary conviction was required . . ."). Piracy did not become a criminal offense, subject to the loss of lands and chattels, until the reign of Henry VIII. 4 W.E. FINLASON, REEVES HISTORY OF ENGLISH LAW 452-53 (reprinted 1981)(1880).

151. *The Palmyra*, 25 U.S. at 14.

152. *Id.* at 14.

153. *Bennis*, 116 S. Ct. at 1010 (Kennedy, J., dissenting) ("The forfeiture of

The *in rem* fiction personifying the vessel solves this jurisdictional dilemma. As Justice Story explained in *Harmony*, another admiralty *in rem* case cited in *Bennis*: "The vessel which commits the aggression is treated as the offender, as the guilty instrument or thing to which the forfeiture attaches, without any reference whatsoever to the character or conduct of the owner."¹⁵⁴ Justice Story justified the fiction as arising "from the necessity of the case, as the only adequate means of suppressing the offence or wrong, or insuring an indemnity to the injured party."¹⁵⁵ Justice Story made it clear that the challenged act was no innovation: "The act of Congress has therefore done nothing more on this point than to affirm and enforce the general principles of the maritime law and of the law of nations."¹⁵⁶ And the rule did not extend beyond the necessity: "Looking to the authorities upon this subject, we shall find that the cargo is not generally deemed to be involved in the same confiscation as the ship, unless the owner thereof co-operates in or authorizes the unlawful act."¹⁵⁷ Innocence was a defense where feasible. Chief Justice Rehnquist omitted from his *Bennis* opinion Justice Story's explanation of the rule—and limits—of *in rem* forfeiture.

The most recent case cited by the Chief Justice, *Calero-Toledo v. Pearson Yacht Leasing Co.*, marked a return to forfeiture's traditional domain.¹⁵⁸ In *Calero-Toledo*, the Court upheld a yacht's forfeiture resulting from the discovery of marijuana on board. The lessor's innocence of the yacht's illegal use was no defense against forfeiture.¹⁵⁹ The lessor claimed that the

vessels pursuant to the admiralty and maritime law has a long, well-recognized tradition, evolving as it did from the necessity of finding some source of compensation for injuries done by a vessel whose responsible owners were often half a world away and beyond the reach of the law and its processes.").

154. 43 U.S. (2 How.) 210, 233 (1844).

155. *Id.* Cf. HOLMES, *supra* note 55, at 28 ("The ship is the only security available in dealing with foreigners, and rather than send one's own citizens to search for a remedy abroad in strange courts, it is easy to seize the vessel and satisfy the claim at home, leaving the foreign owners to get their indemnity as they may be able.").

156. *Harmony v. United States*, 43 U.S. (2 How.) 210, 234 (1844). See also *Jecker v. Montgomery*, 59 U.S. (18 How.) 110, 119 (1856) ("intercourse with the enemy is sufficient cause for personal punishment, and for the confiscation of property; that is a cause originating in, and inflexibly enforced by necessity for guarding the public safety.").

157. *Id.* at 237. See also *The William Bagaley*, 72 U.S. (5 Wall.) 377, 410 (1866) (reporting English cases in which "violation of blockade by the master affects the ship, but not the cargo, unless it is the property of the same owner, or unless the owner of the cargo was cognizant of the intended violation.").

158. 416 U.S. 663 (1974).

159. See *Pearson Yacht Leasing Co. v. Massa*, 363 F. Supp. 1337, 1340 (D.P.R.

forfeiture violated due process and was a taking without just compensation. The Court offered three reasons for rejecting the lessor's claim to pre-seizure notice and hearing: (1) seizure permitted *in rem* jurisdiction, "thereby fostering the public interest in preventing continued illicit use of the property and in enforcing criminal sanctions"; (2) pre-seizure notice might lead to the removal, concealment, or destruction of the property; and (3) the seizure was initiated by government officials rather than "self-interested private parties."¹⁶⁰ The Court also rejected the takings claim, invoking the long history of civil and criminal forfeiture provisions, as well as the need to help enforce the criminal law. Forfeiture ensured that the conveyance would not be used again for illegal activity "and . . . impos[ed] an economic penalty thereby rendering illegal behavior unprofitable."¹⁶¹ The owner's innocence was irrelevant, because the forfeiture would "induc[e] them to exercise greater care in transferring possession of their property."¹⁶² The Court did not explain how the owners might have done so. But in light of civil forfeiture's roots in admiralty, no explanation was necessary; the forfeiture of the yacht fell squarely within *in rem* forfeiture's nautical tradition.

To be sure, *in rem* procedures were not limited strictly to admiralty; the customs statutes also authorized the seizure on land of goods that had been illegally imported.¹⁶³ The admiralty jurisdiction did not extend to such seizures,¹⁶⁴ but permitting *in rem* procedures on land for customs violations comports with the logic of their use in admiralty for the seizure of vessels. The owner of the goods was often beyond the Court's *in personam* jurisdiction, and forfeiture was the government's only means for collecting the tax.¹⁶⁵ Moreover, the sanction imposed usually fell within the broad range

1973) ("Plaintiff did not know that its property was being used for an illegal purpose and was completely innocent of the lessee's criminal act."), *rev'd*, 416 U.S. 663 (1974).

160. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 679 (1974). On the economic incentives of government officials who enforce forfeiture laws, see Boudreaux & Pritchard, *supra* note 135.

161. *Calero-Toledo*, 416 U.S. at 687.

162. *Id.* at 688.

163. *See, e.g.*, *Clifton v. United States*, 45 U.S. (4 How.) 242, 243 (1846).

164. *United States v. Coombs*, 37 U.S. (12 Pet.) 72, 76 (1838) ("[I]n cases purely dependent upon the locality of the act done, it is limited to the sea, and to tide waters, as far as the tide flows; and that it does not reach beyond high water mark."). Forfeiture proceedings for goods seized on land were authorized by Congress's "power to regulate commerce and navigation, and to levy and collect duties." *Id.* at 78.

165. *See HARPER*, *supra* note 83, at 111 (the *in rem* "technique proved valuable in customs seizures because the authorities could more often lay their hands upon smuggled merchandise than upon the smugglers.").

of the government's expenses incurred due to the smuggling.¹⁶⁶ Requiring personal jurisdiction over the owner before smuggled goods could be forfeited might leave the government without any sanction against the owner.¹⁶⁷ The government's entitlement to collect taxes by seizing the property could also be defeated if the goods were removed before judgment: "revenue seizures . . . are always of personal and movable property."¹⁶⁸ Thus, summary search and seizure of goods imported without payment of duties, accompanied by streamlined forfeiture procedures, protected the public revenues from massive fraud.¹⁶⁹ Again, the Chief Justice overlooked this rationale in his *Bennis* opinion. He invoked the *in rem* forfeiture tradition without reference to its purposes or its limits.

Tina Bennis, however, like most owners of automobiles, was within the Michigan court's *in personam* jurisdiction. In light of the historical justification for civil forfeiture, the Court could have properly adopted a rule requiring the government to show that the conveyance had crossed a jurisdictional boundary or that the owner was beyond the court's *in personam* jurisdiction before permitting the civil forfeiture of Tina Bennis's car. Recall that the colonial vice-admiralty courts usually proceeded *in personam* if the owner was available.¹⁷⁰ The Court rejected that alternative, instead choosing to read its tradition as broadly as possible at the expense of an innocent woman.

166. See *One Lot Emerald Cut Stones and One Ring v. United States*, 409 U.S. 232, 237 (1972) ("[The] forfeiture is intended to aid in the enforcement of tariff regulations. It prevents forbidden merchandise from circulating in the United States, and, by its monetary penalty, it provides a reasonable form of liquidated damages for violation of the inspection provisions and serves to reimburse the Government for investigation and enforcement expenses.").

167. See *Origet v. United States*, 125 U.S. 240, 246 (1888) ("The person punished for the offence may be an entirely different person from the owner of the merchandise, or any person interested in it. The forfeiture of the goods of the principal can form no part of the personal punishment of his agent.").

168. *Tyler v. Defrees*, 78 U.S. (11 Wall.) 331, 348 (1870). *In rem* proceedings also prevented jurisdictional conflicts. See *Miller v. United States*, 78 U.S. (11 Wall.) 268, 294 (1870) ("In revenue and admiralty cases a seizure is undoubtedly necessary to confer upon the court jurisdiction over the thing when proceeding is *in rem*. In most such cases the *res* is movable personal property, capable of actual manupcaption. Unless taken into actual possession by an officer of the court, it might be eloiigned before a decree of condemnation could be made, and thus the decree would be ineffectual.").

169. See generally *In re Platt*, 19 F. Cas. 815, 816-17 (S.D.N.Y. 1874) (No. 11,212) (Blatchford, J.) (discussing history and policy of customs searches).

170. See *supra* text accompanying note 101.

C. *Forfeiture Comes Ashore:*
Dobbins's Distillery

The next case cited by the Chief Justice, *Dobbins's Distillery v. United States*, is a sharp departure from forfeiture tradition. The survival of the Civil War-era Confiscation Acts¹⁷¹ encouraged Congress to expand *in rem* forfeiture beyond its traditional domain of customs and admiralty to enforce revenue provisions unrelated to the maritime trade.¹⁷² In so doing, Congress returned to a royal practice—the Crown's enforcement of the Sugar and Stamp Acts through *in rem* procedures—that was so fiercely condemned by the colonial revolutionaries.¹⁷³ In *Dobbins's Distillery*, the Court upheld the forfeiture for liquor-tax violations of a distillery and the real property upon which it stood.¹⁷⁴ The owner had leased the property to a tenant who defrauded the government of excise taxes due on the liquor distilled there.¹⁷⁵ The Court held it not "necessary that the owner of the property should have knowledge that the lessee and distiller was committing fraud on the public revenue, in order that the information of forfeiture should be maintained."¹⁷⁶ The Court justified its holding by citing *The Palmyra*.¹⁷⁷ No precedent is cited in *Dobbins's Distillery*, however, for the proposition that *in rem* forfeiture can be applied outside of admiralty and customs proceedings.

In fact, contemporary cases had held to the contrary. Chief Justice Shaw, in an *in rem* case for the forfeiture of alcohol, had found the law unconstitutional under the Massachusetts Declaration of Rights:

Supposing the process *in rem*, when rightly conducted, to be a suitable and proper mode of enforcing obedience to a useful and salutary law, it does it by punishing the offender, who must be the owner, or some person intrusted with the possession by him, or some person for whose unlawful possession of it the owner is responsible; it does this by depriving such owner of his property, at the same time preventing the further noxious and unlawful use of it. Such being the character of the prosecution, in a high degree penal in its operation and consequences; it should be surrounded with all the safeguards necessary to the security of the innocent, having the full benefit

171. See *Miller*, 78 U.S. at 305 (upholding Confiscation Acts as an exercise of Congress's war powers). On the validity of the Confiscation Acts, see Boudreaux & Pritchard, *supra* note 135.

172. See An Act imposing Taxes on distilled Spirits and Tobacco, and for other Purposes, 15 Stat. 125, 133 (July 20, 1868).

173. See *supra* text accompanying notes 90-101.

174. 96 U.S. 395 (1877).

175. *Id.* at 396-97.

176. *Id.* at 399.

177. *Id.* at 399-400.

of the maxim, that every person shall be presumed innocent until his guilt be established by proof. He should have notice of the charge of guilty purpose, upon which his property is declared to be unlawfully held, and in danger of being forfeited, a time and opportunity to prepare his defence, an opportunity to meet the witnesses against him face to face, and the benefit of the legal presumption of innocence.¹⁷⁸

Shaw recognized that the proceeding, although styled *in rem*, was really an attempt to punish the owner; therefore, criminal procedures were required. The Michigan Supreme Court, addressing a similar statute making liquor a public nuisance, reached the same conclusion in 1856:

That this is clearly a criminal proceeding, within the meaning of the Constitution, we can entertain no doubt. It is instituted for the purpose of forfeiting the property, on the ground that is kept for an illegal and criminal purpose. The party must be tried and convicted of an offence which the statute declares to be a misdemeanor, before judgment of forfeiture can be declared, and such forfeiture is imposed as a part of the punishment for such offence. It makes no difference in its character, that the form of proceeding for the recovery of the pecuniary penalty or forfeiture, is assimilated to that of a civil action. The issue is, guilty or not guilty, and the penalty is imposed as a punishment for an offence.¹⁷⁹

Thus, the state courts of the mid-nineteenth century were vigilant in policing the boundaries of *in rem* forfeiture. When those boundaries were breached they recognized forfeiture as a criminal penalty and struck down efforts to impose such a penalty through a civil proceeding.¹⁸⁰ The *Dobbin's*

178. *Fisher v. McGirr*, 67 Mass. (1 Gray) 1, 35-36 (1854).

179. *Hibbard v. People*, 4 Mich. 125, 129 (1856). See also *Welch v. Stowall*, 2 Doug. 332, 341-342 (Mich. 1846) ("So, in the case before us, the nuisance was not caused by the erection itself, but by the persons who resorted there for the purpose of prostitution. Our laws have provided a mode by which the cause may be removed; the person who owned or occupied the house, might have been indicted, as well as the persons who resorted there for the purpose of prostitution; and, upon conviction, they would have become tenants of our jails or penitentiary. This would have been striking at the root of the evil; but surely the destruction of the house did not abate the nuisance. The cause still remained; its inmates would resort to other receptacles of vice; and in no respect would the public morals be promoted.").

180. See also *Greene v. Briggs*, 10 F. Cas. 1135, 1146 (C.C.D. R.I. 1852) (No. 5,764) (Curtis, Cir. J.) (forfeiture of liquor required criminal process); *Part of Lot No. 294 v. State*, 1 Iowa (Clarke Vol. III) 507, 509 (1855) (action against real property for trafficking in liquor: "We have no doubt but that this is a criminal proceeding."). But see *State v. Brennan's Liquors*, 25 Conn. 278, 287 (1856) (upholding *in rem* forfeiture of liquor); cf. *United States v. Hall*, 26 F. Cas. 75, 79 (C.C.E.D. Pa. 1844) (No.

Distillery court failed to recognize the criminal nature of the forfeiture at issue; it instead affirmed the forfeiture despite the owner's lack of wrongdoing because "the offence . . . attached primarily to the distillery."¹⁸¹

The Court extended the *in rem* doctrine beyond its historical function in *Dobbins's Distillery*. No longer could it be said that "revenue seizures . . . are always of personal and moveable property . . ."¹⁸² In *Dobbins's*, the jurisdictional rationale that forfeiture was necessary to collect taxes was unavailable because the taxpayer was subject to the court's *in personam* jurisdiction.¹⁸³ Moreover, the owner was also subject to *in personam* jurisdiction, and therefore would have been subject to injunctive relief to assure compliance with the law. Nonetheless, the Court extended *in rem* forfeiture to real property. The Court did not acknowledge the novelty of the proceeding, nor did it consider whether the functional justifications for *in rem* procedures extended to real property. In fact, the *in rem* procedure "was unknown to the common law."¹⁸⁴ Similarly, the Chief Justice in *Bennis* did not acknowledge the sharp break with tradition that *Dobbins's* represented.

Even conceding the correctness of *Dobbins's Distillery*, its holding offers scant support for the result in *Bennis*. When Dobbins leased the property to his lessee, the distillery was already standing.¹⁸⁵ Dobbins therefore knew that there was some risk in entrusting the property to his lessee. His choice to trust the distillery to the lessee could therefore be analogized to a ship-owner's choice to entrust his ship to its master. The primary purpose of a ship is to transport goods; transported goods require the payment of customs duties. The owner, therefore, must take care in choosing a master who will

15,281) (upholding fine against owner of railroad car in which party carried mail in violation of federal law protecting postal monopoly; knowledge of owner irrelevant).

181. *Dobbin's Distillery v. United States*, 96 U.S. 395, 401 (1877).

182. *Tyler v. Defrees*, 78 U.S. (11 Wall.) 331, 348 (1870).

183. Moreover, the government could levy, by summary procedure, on any property owned by the taxpayer to the extent of the tax. See *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 273, 276-80 (1855) (holding that summary seizure of real property for payment of taxes owing did not violate due process, because such procedures were followed in both England and the colonies before the Revolution). See also *G. M. Leasing Corp. v. United States*, 429 U.S. 338, 352 (1977) (no Fourth Amendment violation in summary seizure of automobiles to satisfy tax claims); *Phillips v. Commissioner*, 283 U.S. 589, 595 (1931) ("The right of the United States to collect its internal revenue by summary administrative proceedings has long been settled."); *Springer v. United States*, 102 U.S. 586 (1880) (no due process violation in distraint and sale of real and personal property for satisfaction of unpaid taxes).

184. *UBBELOHDE*, *supra* note 91, at 20.

185. Compare *United States v. Stowell*, 133 U.S. 1, 20 (1890) (no forfeiture of mortgagor's interest where he had no knowledge of still's presence on real property).

ensure the payment of the requisite duty.¹⁸⁶ By simple measures, the carefully chosen master could avoid all risk of forfeiture.¹⁸⁷ Where the master could not avoid the risk, the Court rejected the forfeiture.¹⁸⁸

So, too, with the distillery. The distillery's *sole* purpose is the production of alcohol. Congress adopted a comprehensive system of regulation and

186. *See* *Jecker v. Montgomery*, 59 U.S. (18 How.) 110, 119 (1856) ("it is a settled principle, that if the owners had not anticipated a violation of the public law, the fate of their vessel, with respect to an infraction of that law, must depend upon the conduct of the agent with whom they have entrusted its management."); *United States v. Hutchinson*, 26 F. Cas. 446, 449 (D.C. Me. 1868) (No. 15,431) ("It thus appears that in such a case an innocent owner is made to lose his property, his vessel, by reason of its misuse and illegal employment by his agents in charge. It is after all, holding the owner responsible through a forfeiture of his property for the misconduct of his servants and agents.").

187. *Hutchinson*, 26 F. Cas. at 449 ("there can be no doubt that it was not an impossibility for the master to obtain accurate knowledge of all goods on board his vessel and enter the same on his manifest, and by so doing, of course, escape the penalty for those which were not thus entered."); *Id.* at 450 ("Certainly is not exacting much of a master to have such care and oversight of this ship and cargo, as to prevent goods from leaving her before the duties are paid thereon. A very little extra time, a few more fastenings, could easily prevent anything of this sort.").

A similar understanding is reflected in Chief Justice Marshall's opinion on circuit in *United States v. The Little Charles*:

This is not a proceeding against the owner; it is a proceeding against the vessel, for an offence committed by the vessel, which is not less an offence, and does not the less subject her to forfeiture, because it was committed without the authority, and against the will of the owner. It is true, that inanimate matter can commit no offence. The mere wood, iron, and sails of the ship, cannot, of themselves, violate the law. But this body is animated and put in action by the crew, who are guided by the master. The vessel acts and speaks by the master. She reports herself by the master. It is, therefore, not unreasonable, that the vessel should be affected by this report.

26 F. Cas. 979, 982 (C.C.D. Va. 1818) (No. 15,612). The owner's liability without fault resulted from the negligent omissions of his master. *Id.* ("The master is selected by the owner, as his agent, for the purpose, among others, of reporting the vessel on her coming into port."). Note that Chief Justice Marshall was careful to distinguish *in personam* actions from the *in rem* action before him. *Id.* ("If this was a prosecution against the owner personally . . . the argument [that the owner could not be charged with the actions of the master] would be entitled to great consideration.").

188. *See* *Peisch v. Ware*, 8 U.S. (4 Cranch) 347, 363 (1808) (Marshall, C.J.) (rejecting forfeiture of goods illegally imported after shipwreck: "it is unquestionably a correct legal principle, that a forfeiture can only be applied to those cases in which the means that are prescribed for the prevention of a forfeiture may be employed.").

monitoring for distilleries in response to widespread evasion of the liquor tax.¹⁸⁹ In light of this comprehensive system of regulation, the owner entrusting his distillery to another must take care to choose a lessee who will ensure that the liquor taxes are paid. This argument, while not made by the *Dobbin's Distillery* Court, at least brings the forfeiture in that case into the proximity of the forfeiture tradition.

No such analogy, however, fits Tina Bennis's case. The primary purpose of an automobile is, of course, transportation. Tina Bennis had no reason to suspect that her husband would use that parked car as a shelter for criminal activity.¹⁹⁰ As Justice Stevens noted in his dissent,

the forfeited property bore no necessary connection to the offense committed by petitioner's husband. It is true that the act occurred in the car, but it might just as well have occurred in a multitude of other locations. The mobile character of the car played a part only in the negotiation, but not in the consummation of the offense.¹⁹¹

Tina Bennis reasonably believed that her husband used the car only for the purpose for which she had entrusted him with the vehicle: driving to and from work.¹⁹² The car's primary purpose does nothing to put its owner on notice that she must take care in selecting an agent to whom she entrusts her property. And, of course, the idea of taking care in selecting an agent translates poorly from the businesses of shipping and distilling to the context of marriage. The analogy to the owner's selection of his master is strained to the breaking point by imposing such duties on individuals who are selecting spouses. All of the cases cited by the Chief Justice involved commercial relationships; none of those cases dealt with a personal relationship such as marriage.

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

190. *See One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 699 (1965) ("There is nothing even remotely criminal in possessing an automobile.").

191. *Bennis v. Michigan*, 116 S. Ct. 994, 1006 (1996).

192. *Id.* at 1008 (Stevens, J., dissenting).

*D. Forfeiture on "Dry" Land:
J.W. Goldsmith and Van Oster*

Prohibition brought forfeiture into common use in the United States.¹⁹³ The National Prohibition Act provided for forfeiture of automobiles used to transport alcohol, but it also provided a defense for innocent owners.¹⁹⁴ In passing the National Prohibition Act, however, Congress did not repeal the Internal Revenue Act's provisions authorizing the forfeiture of conveyances used to transport untaxed liquor.¹⁹⁵ The Internal Revenue Act provided no defense for innocent owners.¹⁹⁶ Not surprisingly, federal prosecutors preferred to bring forfeitures under the Revenue Act.

In *J.W. Goldsmith*, an innocent third-party claimant, who lost his security interest in a car forfeited for transporting alcohol, broadly challenged *in rem* forfeiture under the Internal Revenue Act.¹⁹⁷ The Court rejected his due process claim, relying on Congress's determination that *in rem* forfeiture was necessary to protect the revenue:

Congress must have taken into account the necessities of the Government, its revenues and policies, and was faced with the necessity of making provision against their violation or evasion and the ways and means of violation or evasion. In breaches of revenue provisions some forms of property are facilities, and therefore it may be said, that Congress interposes the care and responsibility of their owners in aid of the prohibitions of the law and its punitive provisions, by ascribing to the property a certain personality, a power of complicity and guilt in the wrong.¹⁹⁸

The Court did not scrutinize the purported "necessity" of *in rem* forfeiture to enforce the revenue laws on dry land, as opposed to revenue laws that applied to goods shipped in and out of the country. The "necessity" of *in rem*

193. Roy W. McDonald, *Automobile Forfeitures and the Eighteenth Amendment*, 10 TEX. L. REV. 140, 142 (1932) ("while forfeitures are thus older than written law and have featured our revenue legislation from its earliest days, only recently did they attain importance for the general practitioner.").

194. *Id.* at 143.

195. *United States v. One Ford Coupe*, 272 U.S. 321, 326-27, 332 (1926).

196. *Id.* at 332.

197. *J.W. Goldsmith, Jr.-Grant Co. v. United States*, 254 U.S. 505, 506, 509 (1921). The proceeding was brought pursuant to "a libel . . . filed against a Hudson automobile of the appraised value of \$800." *Id.* at 508.

198. *Id.* at 510. After Prohibition's repeal, the Court stepped back from the rather daunting monitoring duties it had imposed on creditors. *See United States v. One 1936 Model Ford V-8 De Luxe Coach*, 307 U.S. 219, 236 (1939) ("The forfeiture acts . . . were intended for protection of the revenues, not to punish without fault.").

forfeiture for enforcing the revenue laws was hardly obvious: there was "no way in which the tax could be . . . paid . . ."¹⁹⁹ Ignoring this difficulty, the Court simply drew an "analogy to the law of *deodand*,"²⁰⁰ and cited to *Dobbin's Distillery* as authority for the Act's constitutionality.²⁰¹ Having sanctioned the unrestricted use of *in rem* forfeiture as a device for collecting taxes in *Dobbin's Distillery*, the Court again upheld *in rem* forfeiture as necessary for the collection of taxes. Once again the Court did not analyze whether the *in rem* rationale properly applied beyond the admiralty jurisdiction and the customs laws to taxes that incurred on dry land. But Congress had no intention of collecting the taxes in *J.W. Goldsmith*. Whatever Congress's original intent had been in passing the Revenue Act's forfeiture provisions, the federal government's continuing use of forfeiture against innocents during Prohibition was plainly punitive. The *J.W. Goldsmith* Court simply ignored this punitive intent in relying on *Dobbin's Distillery*.

The Court also rejected the argument that its prior cases had turned on the connection between the nature of the property and the forfeitable offense.

There is an intimation that in the prior cases there was something in the relation of the parties to the property or its uses from which it was possible to infer its destination to an illegal purpose; at any rate, the risk of such purpose and that such relation had influence in the decision of the cases. We are unable to accept the intimation. There may, indeed, be greater risk to the owner of property in one form or purpose of its bailment than in another, but wrong cannot be imputed to him by reason of the form of purpose. *It is the illegal use that is the material consideration, it is that which works the forfeiture, the guilt or innocence of its owner being accidental.* If we should regard simply the adaptability of a particular form of property to an illegal purpose, we should have to ascribe facility to an automobile as an aid to the violation of the law. It is a "thing" that can be used in the removal of "goods and commodities" and the law is explicit in its condemnation of such things.²⁰²

In rem procedures were no longer rooted in the jurisdictional necessities of the admiralty jurisdiction and customs enforcement. In the Court's view, strict liability attached to any property used in criminal activity. The automobile, because of its flexibility, was useful for a variety of illegal purposes. The

199. *One Ford Coupe*, 272 U.S. at 327.

200. *J. W. Goldsmith*, 254 U.S. at 510 (emphasis supplied). Deodand, of course, was never accepted as part of American law. See *supra* note 66. Moreover, deodand was forfeited in criminal proceedings. See *supra* note 62.

201. *J. W. Goldsmith*, 254 U.S. at 511.

202. *Id.* at 512-13 (emphasis supplied).

Court made it plain that it would read *in rem* forfeiture as broadly as possible to serve Congress's purposes.

The final step came five years later in *Van Oster v. Kansas*.²⁰³ Having allowed the federal government to impose a punitive *in rem* forfeiture on an innocent party in *J.W. Goldsmith*, the Court saw no reason to restrain the State of Kansas from doing the same. Kansas made no pretense that it was enforcing revenue laws through *in rem* forfeiture; it was simply trying to suppress the illegal trade in liquor. The Court had no objection:

We do not perceive any valid distinction between the application of the Fourteenth Amendment to the exercise of the police power of a state in this particular field and the application of the Fifth Amendment to the similar exercise of the taxing power by the federal government, or any reason for holding that the one is not as plenary as the other.²⁰⁴

Thus, the Court allowed *in rem* forfeiture to evolve from its origins in admiralty and customs enforcement to become a general tool for government to suppress criminal activity through civil procedures. More to the point, government was permitted to wield that weapon against people who had committed no crime.

J.W. Goldsmith and *Van Oster*, having taken *in rem* forfeiture far beyond its traditional domain, arguably support the Chief Justice's conclusion in *Bennis*. But those cases hardly represent the "long and unbroken line of cases" claimed by the Chief Justice. They are plainly distinguishable from *The Palmyra*, *Harmony*, and *Calero-Toledo*, all of which fell within the traditional domain of *in rem* forfeiture: offenses related to the sea. Even *Dobbins's Distillery*, which represented a break from that nautical tradition, at least had a connection with tax collection, *in rem* forfeiture's original purpose. *J.W. Goldsmith* and *Van Oster* had no connection whatsoever to *in rem* forfeiture's tradition. Thus, the "tradition" that the Chief Justice relied on

203. 272 U.S. 465 (1926).

204. *Id.* at 468. The Court had previously approved a state's use of *in rem* forfeiture in connection with a maritime offense. *See Smith v. Maryland*, 59 U.S. (18 How.) 71, 75-76 (1855) (Curtis, J.) ("it is the judgment of the court, that it is within the legislative power of the State to interrupt the voyage and inflict the forfeiture of a vessel . . . for a disobedience, by those on board, of the commands of [a law proscribing oystering]. To inflict a forfeiture of a vessel on account of the misconduct of those on board—treating the thing as liable to forfeiture, because the instrument of the offense is within established principles of legislation, which have been applied by most civilized governments. Our opinion is, that so much of this law as appears by the record to have been applied to this case by the court below, is not repugnant to the clause in the constitution of the United States which confers on Congress the power to regulate commerce.").

in *Bennis* amounts to Prohibition-era cases in which the Court allowed civil liberties to be trampled in the fight against demon rum. That so-called tradition arose long after the adoption of the Fifth and Fourteenth Amendments. The common law tradition of *in rem* forfeiture was firmly rooted in admiralty until after the Civil War. Only historical revisionism—blind to *in rem* forfeiture's purpose in solving the jurisdictional dilemma faced by the admiralty courts—can tie the forfeitures in *J.W. Goldsmith* and *Van Oster* to the common law tradition of forfeiture. The *stare decisis* effect of *Van Oster* may justify the result in *Bennis*, but tradition surely does not. *Stare decisis*, according to the Chief Justice, is "a principle of policy," not an "inexorable command."²⁰⁵ "[W]hen governing decisions are unworkable or are badly reasoned, th[e] Court has never felt constrained to follow precedent."²⁰⁶ For the reasons discussed, *Van Oster* surely qualifies as "badly reasoned."

But, even conceding the validity of *Van Oster*, the forfeiture of Tina Bennis's interest in the car cannot be justified. *Van Oster*, like the other five cases cited by the Chief Justice, was an *in rem* proceeding.²⁰⁷ *In rem* proceedings never protected the rights of innocent owners.²⁰⁸ *In personam* proceedings, by contrast, protected most ownership interests held by third parties at English common law;²⁰⁹ American *in personam* forfeiture protected *all* interests held by innocent third parties.²¹⁰ Tina Bennis was deprived of her interest in an *in personam* proceeding.²¹¹ In *Michael H. v. Gerald D.*, Justice Scalia, joined by the Chief Justice, wrote that the proper focus for due process inquiry is "the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified."²¹² Applying this standard to Tina Bennis's case, the relevant

205. *Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114, 1127 (1996) (Rehnquist, C.J.) (citations omitted).

206. *Id.* (citations and internal quotations omitted). This doctrine is "particularly true in constitutional cases, because in such cases correction through legislative action is practically impossible." *Id.* (citations and internal quotations omitted).

207. *State v. Brown*, 119 Kan. 874, 874 (1925) ("Stella Van Oster intervened and asked to be made a party to the proceeding against the automobile . . ."), *aff'd*, 272 U.S. 465 (1926).

208. *See supra* text accompanying notes 62.

209. *See supra* text accompanying note 108.

210. *See supra* text accompanying notes 133.

211. *See* MICH. COMP. LAW. ANN. § 600.3801 (West Supp. 1996) ("Any person or his or her servant, agent, or employee who owns, leases, conducts, or maintains any building vehicle, or place used for any of the purposes or acts set forth in this section is guilty of a nuisance.").

212. 491 U.S. 110, 127 n.6 (1989).

historical tradition was the treatment of innocent ownership interests in *in personam* proceedings. As we discussed above, that tradition would have protected Tina Bennis's ownership interest.²¹³ The Chief Justice ignored that tradition in *Bennis*.

Moreover, *in personam* forfeiture never resulted from convictions for misdemeanors.²¹⁴ At common law, even John Bennis's interest in the car would not have been forfeitable, much less Tina Bennis's interest.²¹⁵ Michigan's extension of forfeiture to non-felonies has no basis in the common law. Given the punitive nature of the forfeiture, Michigan should have been required to seek the forfeiture in a criminal, rather than civil, proceeding. Tina Bennis's interest would have been protected in a criminal proceeding.

IV. FORFEITING INNOCENCE: BENNIS V. MICHIGAN

Justice Thomas correctly notes in his *Bennis* concurrence that legal precedent and history can save otherwise objectionable practices from constitutional condemnation. Tradition is a powerful tool of constitutional interpretation. But those who would rely on tradition must read tradition carefully. For the many reasons detailed above, the Anglo-American history of forfeiture bears scant resemblance to the history recounted by Chief Justice Rehnquist in his *Bennis* opinion.

Bad history is especially disappointing coming from the Rehnquist Court, which is ostensibly committed to judicial restraint and legal tradition. Opinions relying on tradition as a method of constitutional interpretation should be models of painstaking and meticulous historical understanding. Slipshod history makes reliance on legal tradition suspect. While a strong case can be made that long-standing legal rules and practices generally embody a quantum of wisdom that even the most intelligent courts are unlikely to possess,²¹⁶ a Court that fabricates its history, or refuses to learn the traditions it purports to apply, does not really rely upon legal tradition. History, done poorly, is merely a cloak for the Court's own policy preferences. Only faithful reliance on history gives a basis for decision making external to the judges' policy views. A Court that relies on sham history is as guilty of judicial activism as the Warren Court, a court that explicitly sought to further "justice" without regard to constitutional text or

213. See *supra* text accompanying notes 133.

214. See *supra* note 70.

215. See 4 BLACKSTONE, *supra* note 70, at 64 ("open and notorious *lewdness* . . . by . . . some grossly scandalous and public *indecency*, for which the punishment is by fine and imprisonment.").

216. See, e.g., F.A. Hayek, *Individualism: True and False*, in *INDIVIDUALISM AND ECONOMIC ORDER* (F.A. Hayek, ed.) (1948).

precedent. The only difference, apart from their particular policy preferences, is the candor of the respective courts.

Forfeiture is a well-established feature of Anglo-American legal history. That history, however, is marked by nuances and limitations on government's forfeiture powers ignored by the *Bennis* majority. To ignore these nuances and limitations not only led to the wrong result in *Bennis*, but more generally undermines the rule of law. After all, a Court that mischaracterizes legal tradition to achieve a desired outcome is no less activist than the Warren Court. Warren Court decisions, of course, have been a prime target of Chief Justice Rehnquist and like-minded proponents of judicial restraint. The Chief Justice and the *Bennis* majority have set back the cause of legal tradition and judicial restraint by their sloppy use of history. True respect for tradition requires a fidelity to that tradition, wherever it may lead. The *Bennis* opinion falls disappointingly short of that standard. Unfortunately, Tina Bennis must pay the hard price of the Rehnquist Court's bad history.