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### Seizing Family Homes from the Innocent: Can the Eighth Amendment Protect Minorities and the Poor from Excessive Punishment in Civil Forfeiture?

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**SEIZING FAMILY HOMES FROM THE INNOCENT:  
CAN THE EIGHTH AMENDMENT PROTECT MINORITIES  
AND THE POOR FROM EXCESSIVE PUNISHMENT  
IN CIVIL FORFEITURE?**

*Louis S. Rulli\**

ABSTRACT

*Civil forfeiture laws permit the government to seize and forfeit private property that has allegedly facilitated a crime without ever charging the owner with any criminal offense. The government extracts payment in kind—property—and gives nothing to the owner in return, based upon a legal fiction that the property has done wrong. As such, the government’s taking of property through civil forfeiture is punitive in nature and constrained by the Eighth Amendment’s Excessive Fines Clause, which is intended to curb abusive punishments.*

*The Supreme Court’s failure to announce a definitive test for determining the constitutional excessiveness of civil forfeiture takings under the Eighth Amendment has led to disagreement among state and federal courts on the proper standard. At the same time, the War on Drugs has resulted in an explosion of civil forfeiture filings against the property of ordinary citizens—many are whom are innocent of any wrongdoing—and therefore there is a profound need for a robust constitutional test that satisfies the Eighth Amendment’s original purposes. This need has grown more urgent because civil forfeiture practices are increasingly plagued by police abuses motivated by self-gain, and recent studies show that civil forfeitures disproportionately affect low-income and minority individuals who are least able to defend their hard-earned property.*

*This Article documents the aggressive use of civil forfeiture in Pennsylvania and, by way of illustration, presents the plight of elderly, African-American homeowners in Philadelphia who were not charged with any crime and yet faced the loss of their homes because their adult children were arrested for minor drug offenses. In such cases, the Eighth Amendment should play a vital role in preventing excessive punishments. But some courts mistakenly apply a rigid proportionality test, upon prosecutorial urging, that simply compares the market value of the home to the maximum statutory fine for the underlying drug offense. When a home value is shown to be less than the maximum fine, these courts presume the taking to be constitutional. Under such a one-dimensional test, prosecutors routinely win because the cumulative maximum fines for even minor drug offenses almost always exceed the market values of modest, inner-city homes. This cannot be the proper test. Instead, this Article contends that the proper constitutional test for excessiveness must be a searching, fact-intensive inquiry, in which courts are required to balance five essential factors: (1) the relative instrumentality of the property at issue to the predicate offense; (2) the relative culpability of the property owner; (3) the proportionality between the value of the property at issue and the*

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\* Practice Professor of Law and Director of Clinical Programs, University of Pennsylvania Law School. I am deeply indebted to Zachary Manning (L’17), a talented research assistant and wonderful colleague, for his excellent research assistance and invaluable contributions to the preparation of this Article. I also want to express my deep appreciation to Barron Flood (L’16) who, as a third-year student, provided excellent assistance on an amicus brief in a civil forfeiture appeal in the Pennsylvania Supreme Court which is discussed in this Article. Some of the arguments and empirical findings in this Article owe their roots to the collaborative work completed for that brief by Barron and other student colleagues, and particularly attorneys Susanna Greenberg and Molly Tack-Hooper, who co-authored the amicus brief with me.

*gravity of the predicate offense; (4) the harm (if any) to the community caused by the offending conduct; and (5) the consequences of forfeiture to the property owner.*

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## I. THE EXCESSIVE FINES CLAUSE

A fundamental responsibility of government in a free society is to protect and defend the liberty of every citizen and, when necessary, to punish those who violate or infringe upon the safety and rights of others.<sup>1</sup> But the power to punish is not unlimited. The Bill of Rights wisely constrains this authority

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<sup>1</sup> See, e.g., CAESAR BONESANA & MARQUIS BECCARIA, AN ESSAY ON CRIMES AND PUNISHMENTS 17 (Edward D. Ingraham, trans., 2d Am. ed. 1819) (1764) [hereinafter BONESANA & BECCARIA, ON CRIMES AND PUNISHMENTS (“[T]he sovereign’s right to punish crimes is founded . . . upon the necessity of defending the public liberty, entrusted to [its] care, from the usurpation of individuals . . .”). Per Beccaria, the “public liberty” is the aggregate sum of the liberty relinquished by each individual in political society in exchange for the peace and security that society provides. *Id.* at 15–18.

to ensure that it is not abused,<sup>2</sup> and it confers upon an independent judiciary the solemn responsibility to guard its use.<sup>3</sup> Human experience has taught us that punishment powers are prone to abuse in government's zeal to protect public safety and, sometimes, to serve its own interests.

As early as 1215, Magna Carta placed important limits on the English government's authority to impose fines payable to the Crown for civil and criminal wrongs.<sup>4</sup> The first such limit was a proportionality requirement: a fine was required to relate to the gravity or degree of the predicate offense.<sup>5</sup> The second limit was a "livelihood-protection" requirement—the *salvo contentemento* principle.<sup>6</sup> The essence of the *salvo contentemento* principle is that a fine may not deprive one of his livelihood; the individual fined must still have sufficient means to sustain himself and his dependents.<sup>7</sup> Thus, in imposing a fine, the government had to tailor the fine to the gravity of the offense and it

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2 James Madison noted the limit on governmental power in an address on June 8, 1789 to the First Congress, "The great object [of a bill of rights] is to limit and qualify the powers of government, by excepting out of the grant of power cases in which the government ought not to act, or [ought] to act only in a particular mode. . . . [T]hese exceptions [are pointed] sometimes against the abuse of the executive power, sometimes against the legislative . . . ." 1 ANNALS OF CONG. 454 (Joseph Gales ed., 1789) [hereinafter ANNALS OF CONG.].

3 The vital role of the judiciary in constitutional enforcement was emphasized by James Madison, "If [a bill of rights is] incorporated into the constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon [those] rights . . ." *Id.* at 439.

4 *See, e.g.,* *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 270 (1989) ("In response to the frequent, and occasionally abusive, use of amercedments by the King, Magna Carta included several provisions placing limits on the circumstances under which a person could be amerced, and the amount of the amercedment."). *See also* Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 HASTINGS CONST. L.Q. 833, 854 (2013) ("Chapter 14 of . . . Magna Carta govern[ed] the assessment of amercedments, an early form of fines.") [hereinafter McLean, *Original Meaning*].

5 *See* Magna Charta, 9 Hen. III, ch. 14 (1225), 1 STAT. AT LARGE 5 (1762 ed.). Chapter 14 of Magna Carta (as translated) provides, "A free man shall not be amerced for a trivial offense, except in accordance with the measure of that same offense; and for a great offense, in accordance with the magnitude of [that] offense; [and] saving his contentement; and a merchant [shall be amerced] in the same manner, saving his merchandise; and a tenant farmer [shall be amerced] in the same manner, saving his wainage." *Id.* (translation mine). *See also* McLean, *Original Meaning*, *supra* note 4, at 865–66 (stating that Magna Carta's prohibitions on excessive amercedments included a "proportionality principle").

6 *See* Magna Charta, 9 Hen. III, ch. 14 (1225), 1 STAT. AT LARGE 5 (1762 ed.); McLean, *Original Meaning*, *supra* note 4, at 855 ("[T]o save a man's 'contentement' was to leave him sufficient for the sustenance of himself and those dependent on him.") (internal quotation marks omitted). *See also* 4 WILLIAM BLACKSTONE, COMMENTARIES \*372–73 (1769) [hereinafter BLACKSTONE, COMMENTARIES]. Per Blackstone, the essence of the *salvo contentemento* principle is that "no man shall have a larger amercedment imposed upon him, than his circumstances or personal estate will bear . . ." *Id.*

7 *See, e.g.,* McLean, *Original Meaning*, *supra* note 4, at 854–56 (noting that fines in English jurisprudence were generally allocated "according to ability to pay"); BLACKSTONE, COMMENTARIES, *supra* note 6, at \*372–73 (stating that amercedments are allocated based on ability to pay).

had to take into account the individual's financial situation, lest he be robbed of his livelihood.<sup>8</sup>

In the 1680s, English fines “became even more excessive and partisan.”<sup>9</sup> As a result, additional limitations on excessive fines were placed in the 1689 English Bill of Rights by those who had been personally subjected to such heavy fines.<sup>10</sup> The American colonists were aware of this history and acted to limit fines payable to the government in the emerging Republic.<sup>11</sup> Prior to the ratification of the United States Constitution, eight states had imported limitations on excessive fines from British law into their respective declarations of rights or state constitutions.<sup>12</sup> “Delaware, Georgia, Maryland, Massachusetts, New Hampshire, North Carolina, Pennsylvania, and Virginia all had enacted a Declaration of Rights or a Constitution expressly prohibiting excessive fines.”<sup>13</sup> Virginia’s 1776 Declaration of Rights (the “Virginia Declaration”), in particular, furnished the “immediate template” for the Eighth Amendment of the U.S. Constitution.<sup>14</sup>

Section 9 of the 1776 Virginia Declaration provided that “excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”<sup>15</sup> Similarly, the Eighth Amendment, adopted in 1791, provides that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.”<sup>16</sup> The Eighth Amendment’s only linguistic change was to substitute a mandatory “shall not” for the hortatory “ought not” in Section 9 of the Virginia Declaration. Section 9’s language was not novel; the same language also appeared in the

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8 See, e.g., McLean, *Original Meaning*, *supra* note 4, at 855–56 (noting that under Magna Carta’s *salvo contentamento* principle, “[A] minimum core level of economic viability was protected notwithstanding the imposition of monetary penalties.”); BLACKSTONE, *COMMENTARIES*, *supra* note 6, at \*372–73 (stating that gravity and ability to pay have to be taken into account to apply amercements).

9 *Browning-Ferris*, 492 U.S. at 267 (internal quotation marks omitted).

10 See *id.* See also Calvin R. Massey, *The Excessive Fines Clause and Punitive Damages: Some Lessons from History*, 40 VAND. L. REV. 1233, 1253–56 (1987) (detailing the history leading to fine-related provisions of the Declaration of Rights).

11 See, e.g., *Browning-Ferris*, 492 U.S. at 267 (“The Framers of our Bill of Rights were aware and took account of the abuses that led to the 1689 [English] Bill of Rights.”); 3 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES: WITH A PRELIMINARY REVIEW OF THE CONSTITUTIONAL HISTORY OF THE COLONIES AND STATES, BEFORE THE ADOPTION OF THE CONSTITUTION* 750 (1833) (stating that the Eighth Amendment was “adopted as an admonition to all departments of the national government to warn them against such violent proceedings as had taken place in England in the arbitrary reigns of some of the Stuarts.”).

12 E.g., *Browning-Ferris*, 492 U.S. at 264 n.5.

13 *Id.*

14 McLean, *Original Meaning*, *supra* note 4, at 869.

15 Va. Declaration of Rights § 9, NAT’L CTR. FOR PUB. POL’Y RES., <http://www.nationalcenter.org/VirginiaDeclaration.html> (last visited May 9, 2017).

16 U.S. CONST. amend. VIII.

1689 English Bill of Rights.<sup>17</sup> Indeed, the very “spirit” of Section 9 was inextricably bound up with English legal tradition, for embodied in Section 9 was the traditional legal understanding “that [a] fine should be according to the degree of the fault and the estate of the offender.”<sup>18</sup>

The importance of limiting the federal government’s power to punish was expressed in an influential essay written in 1787, prior to the adoption of the Bill of Rights. The essay, entitled *Brutus II*, tied this limitation to securing liberty:

For the security of liberty it has been declared, “that excessive bail should not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted . . . .” These provisions are as necessary under the general government as under that of the individual states; for the power of the former is as complete to the purpose of requiring bail, imposing fines, inflicting punishments, . . . and seizing . . . property . . . as the other.<sup>19</sup>

This essay reflected a common founding-era understanding of the justness of punishment; namely, that “punishments are just in proportion, as the liberty, preserved by the sovereign, is sacred and valuable.”<sup>20</sup> A prohibition against excessive fines secures and preserves liberty by limiting and qualifying the government’s power to “impos[e] fines, inflict[] punishments, and seiz[e] . . . property”<sup>21</sup> so as to “point . . . against the abuse”<sup>22</sup> of such power. Acutely aware of British abuses in the imposition of excessive fines, the framers of the Bill of Rights knew that they needed to limit “the ability of the sovereign to use its prosecutorial power, including the power to collect fines, for improper ends.”<sup>23</sup> And thus, the Eighth Amendment to the U.S. Constitution provides that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.”

The precise meaning of the term “excessive fines” in the Eighth Amendment was not spelled out at the time of its adoption. The records of the First

<sup>17</sup> *Browning-Ferris*, 492 U.S. at 291 (quoting 1 Wm. & Mary, 2d Sess., ch. 2, 3 STAT. AT LARGE 440, 441 (1689)) (“[E]xcessive Baile ought not to be required, nor excessive Fines imposed, nor cruell and unusuall Punishments inflicted.”).

<sup>18</sup> *Jones v. Commonwealth*, 5 Va. 555, 557 (1799) (opinion of Roane, J.). See also, ALLAN NEVINS, *THE AMERICAN STATES DURING AND AFTER THE REVOLUTION, 1775–1789* 146 (1924) (“In the main, [the Virginia Declaration] was a restatement of English principles—the principles of Magna Charta, the Petition of Rights . . . and the Revolution of 1688.”).

<sup>19</sup> *Brutus II* (Nov. 1, 1787), as reprinted in *THE COMPLETE BILL OF RIGHTS* 621 (Neil H. Cogan, ed., 1997) [hereinafter *Brutus II*].

<sup>20</sup> BONESANA & BECCARIA, ON CRIMES AND PUNISHMENTS, *supra* note 1, at 17. Beccaria’s writings on criminal theory and penology profoundly influenced founding-era legal thought. See, e.g., JOHN D. BESSLER, *THE BIRTH OF AMERICAN LAW: AN ITALIAN PHILOSOPHER AND THE AMERICAN REVOLUTION* 3–23 (2014) (stating the importance of Beccaria’s writings for the Founding Fathers). For example, Beccaria’s writings “materially informed the Founding Fathers’ attitudes and views of [the] provisions [of the federal Bill of Rights].” *Id.* at 17.

<sup>21</sup> *Brutus II*, *supra* note 19, at 621.

<sup>22</sup> *ANNALS OF CONG.*, *supra* note 2, at 454 (highlighting language from James Madison’s June 8, 1789 address to the First Congress).

<sup>23</sup> *Browning-Ferris*, 492 U.S. at 267.

Congress do not reveal that any member spoke to its meaning.<sup>24</sup> There appears to be no founding-era material that provides direct meaning of this term.<sup>25</sup> However, a general understanding of “excessive fines” from this time period may be gleaned from Blackstone’s *Commentaries*. Blackstone wrote that fines should be no larger than a person’s circumstances and holdings could bear, as an excessive fine “amount[ed] to imprisonment for life.”<sup>26</sup> In light of the Eighth Amendment’s history and its English law roots, it is clear that the purpose of the Eighth Amendment’s Excessive Fines Clause was to limit the government’s power to punish,<sup>27</sup> and specifically “to limit the government’s power to extract payments, whether in cash or in kind, ‘as punishment for some offense.’”<sup>28</sup>

Although the Eighth Amendment limits the federal government’s power in three distinct areas, Supreme Court jurisprudence has focused most heavily on the clauses governing cruel and unusual punishment and the imposition of bail.<sup>29</sup> Remarkably, the Supreme Court did not address the Excessive Fines Clause at all until 1989,<sup>30</sup> and since that time has provided only limited

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24 A draft of the Eighth Amendment was considered by the U.S. House of Representatives on August 17, 1789. Only one Member, Samuel Livermore of New Hampshire, is recorded as having spoken on the merits of the Excessive Fines Clause. Livermore stated as follows: “[T]he [Eighth Amendment] seems to express a great deal of humanity, on which account I have no objection to it; but as it seems to have no meaning in it, I do not think it necessary. . . . What is understood by excessive fines? It lies with the court to determine . . . .” ANNALS OF CONG., *supra* note 2, at 782–83.

25 See, e.g., McLean, *Original Meaning*, *supra* note 4, at 839. Laurence Claus, *The Antidiscrimination Eighth Amendment*, 28 HARV. J.L. & PUB. POL’Y 119, 133 (2004).

26 Blackstone wrote,  
 [T]he reasonableness of fines in criminal cases has also been usually regulated by the determination of *magna carta*, concerning amercements for misbehaviour in matters of civil right . . . [namely,] that no man shall have a larger amercement imposed upon him, than his circumstances or personal estate will bear . . . . [I]t is never usual to assess a larger fine than a man is able to pay, without touching the implements of his livelihood, but to inflict corporal punishment, or a stated imprisonment, which is better than an excessive fine, for that amounts to imprisonment for life.

BLACKSTONE, COMMENTARIES, *supra* note 6, at \*372–73.

27 See, e.g., *Austin v. United States*, 509 U.S. 602, 609–10 (1993) (citing *Browning-Ferris*, 492 U.S. at 266–67, 275) (stating that the purpose of the Eighth Amendment was to limit power of Government).

28 *Id.* (quoting *Browning-Ferris*, 492 U.S. at 265).

29 See, e.g., *Roper v. Simmons*, 543 U.S. 551, 578 (2005) (citing the execution of juvenile offenders violates the Eighth Amendment’s prohibition on cruel and unusual punishment); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (holding the execution of mentally retarded offenders violates the Eighth Amendment’s prohibition on cruel and unusual punishment); *United States v. Salerno*, 481 U.S. 739, 755 (1987) (noting “preventative” pretrial detention on public safety grounds does not *per se* violate the Eighth Amendment’s Excessive Bail Clause); *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (holding, pursuant to the Eighth Amendment, imposition of a death sentence requires individualized consideration of the offender’s character and record and the circumstances of the particular offense); *Stack v. Boyle*, 342 U.S. 1, 5 (1951) (noting that setting bail at “a figure higher than an amount reasonably calculated to” assure an arrestee’s presence at trial violates the Eighth Amendment’s Excessive Bail Clause).

30 See *Browning-Ferris*, 492 U.S. at 259 (examining whether the Excessive Fines Clause of the Eighth Amendment applies to a civil-jury award of punitive damages).

guidance on the interpretation of the Clause as it relates to civil forfeiture cases.<sup>31</sup> The first Supreme Court case to apply the Excessive Fines Clause to civil forfeiture was *Austin v. United States*,<sup>32</sup> decided in 1993. In *Austin*, the Supreme Court held that *in rem* civil forfeiture “constitutes ‘payment to a sovereign as *punishment* for some offense,’ and, as such, is subject to the limitations of the . . . Excessive Fines Clause.”<sup>33</sup> However, the *Austin* Court expressly declined to adopt a constitutional “excessiveness” standard, instead leaving it to the lower courts “to consider that question in the first instance.”<sup>34</sup>

The Supreme Court’s next major Excessive Fines Clause decision came five years later, in *United States v. Bajakajian*.<sup>35</sup> Unlike *Austin*, which had arisen in the civil forfeiture context, *Bajakajian* arose out of a *criminal* forfeiture case.<sup>36</sup> In *Bajakajian*, the Supreme Court announced a proportionality test as the touchstone for determining constitutional excessiveness, holding that “a punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant’s offense.”<sup>37</sup>

These two decisions—*Austin* and *Bajakajian*—comprise the Supreme Court’s limited guidance on the application of the Excessive Fines Clause to civil and criminal forfeitures of private property.<sup>38</sup> However, the explosion of civil forfeiture cases in the War on Drugs requires much more guidance in developing a robust test for the application of the Excessive Fines Clause to punitive forfeitures that is true to its constitutional purpose.

This Article argues that a fact-intensive, multi-factored standard is needed to curb abusive punishments, especially when the government uses strong civil forfeiture laws to seize family homes from vulnerable homeowners who are not accused of or convicted of a crime. I contend that the government’s aggressive use of civil forfeiture has been plagued by persistent abuses that are motivated by self-gain, and that government has largely targeted low-income and minority communities that are least able to defend their property. As a result, civil forfeiture frequently results in default judgments that deprive property owners of their day in court and evade constitutional review under the Excessive Fines

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31 See *Austin*, 509 U.S. at 621–22 (providing limited interpretation of the Excessive Fines Clause as it relates to civil forfeiture cases); cf. *United States v. Bajakajian*, 524 U.S. 321, 334 (1998) (holding a forfeiture of money that was not declared violates the Excessive Fines Clause of the Eighth Amendment).

32 509 U.S. at 602.

33 *Id.* at 621–22 (emphasis added) (citation omitted).

34 *Id.* at 622–23.

35 524 U.S. 321, 324 (1998).

36 *Id.* at 333 (“In this case . . . the Government has sought to punish respondent [Mr. Bajakajian] by proceeding against him criminally, *in personam*, rather than proceeding *in rem* against the [property seized].”).

37 *Id.* at 334.

38 It remains to be determined whether *Bajakajian*’s constitutional “excessiveness” standard applies strictly in the civil forfeiture context (as a matter of constitutional law). See, e.g., *United States v. Ahmad*, 213 F.3d 805, 815, 815–16 n.4 (4th Cir. 2000).



Clause. For too long, the Excessive Fines Clause has been the Constitution's least observed safeguard when it was needed most to curb government's abusive punishments. The time has come for the Excessive Fines Clause to take center stage in American jurisprudence.

## II. AN EXPLOSION IN CIVIL FORFEITURE SEIZURES

In recent decades, the War on Drugs has brought an explosion of federal and state civil forfeiture cases. Civil forfeiture is an *in rem* action against property that has allegedly facilitated a crime.<sup>39</sup> Under civil forfeiture laws, such property “can be seized and forfeited to the government . . . without compensation [to the owner].”<sup>40</sup> Civil forfeiture turns on the legal fiction of “guilty” property;<sup>41</sup> the predicate for civil forfeiture is the government’s proof of a “nexus” between the property and alleged criminal activity,<sup>42</sup> which is sometimes committed by a third party. The government’s proof of “nexus” need only be by a preponderance of the evidence.<sup>43</sup> Civil forfeiture does not focus on the conduct of the property owner, who often has not committed any offense; rather, the focus is on the *property’s* “guilt.” Thus, civil forfeiture does not require a criminal conviction of the property owner; indeed, the owner need not even be criminally charged.<sup>44</sup> On occasion, courts have examined whether civil forfeiture implicates procedural due process concerns.<sup>45</sup> However, the aggressive use of civil forfeiture has largely escaped intense scrutiny under the Eighth Amendment’s Excessive Fines Clause.

<sup>39</sup> See, e.g., 1 DAVID B. SMITH, PROSECUTION AND DEFENSE OF FORFEITURE CASES ¶ 2.01 (2015) [hereinafter SMITH, PROSECUTION AND DEFENSE].

<sup>40</sup> Yan Slavinskiy, *Protecting the Family Home by Reunderstanding* United States v. Bajakajian, 35 CARDOZO L. REV. 1619, 1623 (2014).

<sup>41</sup> E.g., SMITH, PROSECUTION AND DEFENSE, *supra* note 39, at ¶ 2.01.

<sup>42</sup> E.g., 18 U.S.C. § 983(c)(3) (2017); 42 PA. CONS. STAT. § 6802(j) (2006); Commonwealth v. Nineteen Hundred & Twenty Dollars United States Currency, 612 A.2d 614, 618 (Pa. Commw. Ct. 1992).

<sup>43</sup> E.g., 18 U.S.C. § 983(c)(1) (2017); 42 PA. CONS. STAT. § 6802(j) (2006); *Nineteen Hundred & Twenty Dollars United States Currency*, 612 A.2d at 618.

<sup>44</sup> See, e.g., Commonwealth v. Esquelin, 880 A.2d 523, 530 (Pa. 2005) (“[F]or property to be deemed forfeitable, neither a criminal prosecution nor a conviction is required.”); U.S. DEP’T OF JUSTICE, TYPES OF FEDERAL FORFEITURE, <http://www.justice.gov/afp/types-federal-forfeiture> (last updated Feb. 1, 2017) (“[N]o criminal charge against the owner is necessary [for civil forfeiture].”).

<sup>45</sup> See, e.g., United States v. James Daniel Good Real Prop., 510 U.S. 43, 62 (1993) (holding that, absent exigent circumstances, “the Due Process Clause requires the Government to afford notice and a meaningful opportunity to be heard before seizing real property subject to civil forfeiture.”); United States v. All Assets of Statewide Auto Parts, Inc., 971 F.2d 896, 905 (2d Cir. 1992) (“We continue to be enormously troubled by the government’s increasing and virtually unchecked use of the civil forfeiture statutes and the disregard for due process that is buried in those statutes.”).

Civil forfeiture laws date back to the nation's founding,<sup>46</sup> but at their inception they were primarily used in admiralty and customs cases.<sup>47</sup> The government needed a powerful tool to stop piracy and smuggling offenses facilitated by vessels owned by foreigners outside of American courts' personal jurisdiction.<sup>48</sup> *In rem* civil forfeiture met that need by obviating *in personam* proceedings against foreign ship owners.<sup>49</sup> At the same time, however, the nation's founders were wary of the punitive nature of forfeiture and its potential for governmental abuse. Thus, they imported only statutory forfeiture from British law and abolished forfeiture of estate in the new Constitution.<sup>50</sup>

It was not until the nation's War on Drugs that civil forfeiture really exploded and became heavily used against ordinary citizens, many of whom were not accused or convicted of a crime. In 1978, Congress amended the Comprehensive Drug Abuse Prevention and Control Act of 1970 ("CDAPCA") to permit civil forfeiture of currency and negotiable instruments.<sup>51</sup> And in 1984, Congress amended the CDAPCA to authorize the forfeiture of real property, including family homes.<sup>52</sup> Perhaps most significantly, the 1984 amendments authorized all proceeds from forfeited property to be directed to the exclusive accounts of law enforcement, rather than to the United States Treasury.<sup>53</sup> Thus, law enforcement was able to keep all proceeds from forfeited property, and the Department of Justice's Asset For-

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46 See, e.g., Donald J. Boudreaux & A.C. Pritchard, *Civil Forfeiture and the War on Drugs: Lessons from Economics and History*, 33 SAN DIEGO L. REV. 79, 96–99 (1996) [hereinafter Boudreaux & Pritchard, *Lessons*]. Forfeiture law in the United States has roots in English law, which at the time of the Eighth Amendment's ratification authorized three kinds of forfeiture: (1) Deodand, wherein property that caused the accidental death of an English subject was forfeited to the Crown; (2) Forfeiture of Estate, wherein a person convicted of a felony or treason thereby forfeited all his realty and personalty to the Crown; (3) Statutory Forfeiture, wherein property used in violation of customs and revenue laws was forfeited to the Crown. See *Austin*, 509 U.S. at 611–12. Only statutory forfeiture took hold in the United States. *Id.* at 613.

47 See, e.g., Boudreaux & Pritchard, *Lessons*, *supra* note 46, at 99 (stating that *in rem* forfeiture's "traditional domain" was "customs and admiralty").

48 See, e.g., Stefan B. Herpel, *Toward A Constitutional Kleptocracy: Civil Forfeiture In America*, 96 MICH. L. REV. 1910, 1917–19 (1998) (citing that when personal jurisdiction does not exist, *in personam* proceedings to satisfy a claim for restitution or to impose a fine or other penalty will be unavailing).

49 See, e.g., *The Palmyra*, 25 U.S. (12 Wheat.) 1, 15 (1827) (holding government's proof that a ship has engaged in piratical activity is sufficient to support *in rem* forfeiture of the ship; no personal conviction of the ship's owner is required).

50 *Austin*, 509 U.S. at 613. "The Constitution forbids forfeiture of estate as a punishment for treason 'except during the Life of the person attainted.'" *Id.* (quoting U.S. CONST. art. III, § 3, cl. 2.). "And the First Congress also abolished forfeiture of estate as a punishment for felons." *Id.* (citing Act of Apr. 30, 1790, ch. 9, § 24, 1 Stat. 117).

51 Psychotropic Substances Act of 1978, Pub. L. No. 95-633, § 301(a)(1), 92 Stat. 3768, 3777 (codified as amended at 21 U.S.C. § 881(a)(6)).

52 Comprehensive Forfeiture Act of 1984, Pub. L. No. 98-473, § 306, 98 Stat. 2040, 2050 (codified as amended at 21 U.S.C. § 881(a)(7)).

53 Comprehensive Forfeiture Act of 1984, Pub. L. No. 98-473, § 309, 98 Stat. 2040, 2051–52 (codified as amended at 21 U.S.C. § 881(e)).

feiture Fund became flush with enormous amounts of money. The very authorities entrusted with discretion over when to use civil forfeiture laws now had a direct financial stake in the outcome of the cases they filed. In a short amount of time, the Department of Justice's federal asset forfeiture fund grew from \$338 million in 1996 to \$1.3 billion in 2008 to more than \$2.0 billion today.<sup>54</sup> State law enforcement agencies similarly benefited from huge financial growth derived from civil forfeiture proceeds obtained under state law.

The explosion of civil forfeiture cases has brought with it persistent allegations of abuse. The CBS television show, *60 Minutes*, highlighted the plight of Willie Jones, a black landscaper who was stopped at the Nashville airport after being observed paying cash for his airline ticket.<sup>55</sup> Law enforcement authorities detained Mr. Jones and seized \$9,000 in cash from his person because, according to police, he matched the profile of a drug courier.<sup>56</sup> In fact, he was traveling to Texas to buy shrubs for his landscaping business and needed cash to do so. Nonetheless, police confiscated his \$9,000, and released him without ever charging him with a crime.<sup>57</sup> Mr. Jones sued the government to get his money back and ultimately prevailed, with the presiding judge noting that "the statutory [forfeiture] scheme as well as its administrative implementation provide[d] substantial opportunity for abuse and potentiality for corruption."<sup>58</sup>

In 1991, the Pittsburgh Press published a multi-part series reflecting ten months of national research on civil asset forfeiture.<sup>59</sup> After reviewing 25,000 drug seizures, interviewing 1,600 prosecutors, defense lawyers, cops, federal agents, and victims, and reviewing court documents in 510 cases, the Press series concluded that "seizure and forfeiture, the legal weapons meant to eradicate the enemy, have done enormous collateral damage to the innocent."<sup>60</sup> Many examples of forfeiture abuse surfaced. Police departments were found to have kept video games, fancy cars, and attack weaponry.<sup>61</sup>

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54 U.S. Dep't of Justice, Asset Forfeiture Program: Annual Financial Statement, Fiscal Year 1996 (Sept. 1997), <https://oig.justice.gov/reports/plus/a9732a/index.htm>; Dick M. Carpenter II et al., INSTT. FOR JUSTICE, POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE 10 (2d ed. Nov. 2015), <http://ij.org/wp-content/uploads/2015/11/policing-for-profit-2nd-edition.pdf> (citing U.S. Dep't of Justice, Asset Forfeiture Program: Annual Financial Statements, Fiscal Years 2001-2014) [hereinafter POLICING FOR PROFIT (2d ed.)].

55 *60 Minutes: You're Under Arrest* (CBS television broadcast Apr. 5, 1992).

56 H.R. REP. NO. 106-192, at 6 (1999).

57 *Id.* at 6-7.

58 *Jones v. U.S. Drug Enforcement Admin.*, 819 F. Supp. 698, 724 (M.D. Tenn. 1993).

59 Andrew Schneider & Mary Pat Flaherty, *Presumed Guilty: The Law's Victims in the War On Drugs*, PITTSBURGH PRESS (Aug. 11-Dec. 22, 1991), reprinted at <http://www.fear.org/guilty1.html#1> [hereinafter *Presumed Guilty*].

60 *Id.*

61 See C.J. Ciaramella, *Read How Chicago Police Use Asset Forfeiture as a Slush-Fund for Surveillance Equipment*, REASON.COM (Sept. 30, 2016, 3:30 PM), <http://reason.com/blog/2016/09/30/read-how-chicago-police-use-asset-forfeiture>; Robert O'Harrow Jr. et al., *Holder Limits Seized-Asset Sharing Process That*

According to a former chief of the DOJ's Asset Forfeiture Section, "the department's 'marching orders' were: 'Forfeit, forfeit, forfeit. Get money, get money, get money.'"<sup>62</sup> As civil forfeiture cases increasingly reached appellate court review, federal judges expressed serious concerns about aggressive civil forfeiture practices.<sup>63</sup>

In the 1990s, Congress held bipartisan hearings intended to reform civil forfeiture laws and curb abusive governmental practices. Congress expressed strong concern about high default rates in which at least eighty percent of all civil forfeiture cases went unchallenged. Congress also questioned low statutory evidentiary burdens that allowed government to take private property easily without adequate protection for property owners, and it expressed increasing concern about civil forfeiture's apparent disproportionate impact on low-income and minority communities. Representative Henry Hyde, then-Republican chairman of the House Judiciary Committee, forcefully articulated the need for reform: "Arcane laws originally intended to protect customs revenues from the depredations of smugglers are now used by government to strip innocent Americans of their hard-earned property."<sup>64</sup>

Seven years of legislative efforts led to the passage of the Civil Asset Forfeiture Reform Act of 2000 ("CAFRA"),<sup>65</sup> which brought about only limited changes to federal forfeiture law. Many commentators have regarded CAFRA's impact as disappointing and largely ineffective at leveling the playing field and curbing forfeiture abuses.<sup>66</sup> Perhaps most significantly, Congress' stated goal of encouraging greater use of criminal forfeiture over civil forfeiture never materialized.

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*Split Billions With Local, State Police*, WASH. POST (Jan. 16, 2015), [http://wapo.st/14JoV0R?tid=ss\\_mail](http://wapo.st/14JoV0R?tid=ss_mail).

62 Erik Grant Luna, *Fiction Trumps Innocence: The Bennis Court's Constitutional House of Cards*, 49 STAN. L. REV. 409, 433 (1997) (quoting Michael P. Zeldin, as quoted in Naftali Bendavid, *Asset Forfeiture, Once Sacrosanct, Now Appears Ripe for Reform*, LEGAL TIMES, July 5, 1993, at 1). See also 38 U.S. DEPT OF JUSTICE U.S. ATT'YS BULL. 180 (1990) ("We must significantly increase production to reach our budget target [for forfeiture revenue].").

63 See, e.g., *All Assets of Statewide Auto Parts, Inc.*, 971 F.2d at 905 ("We continue to be enormously troubled by the government's increasing and virtually unchecked use of the civil forfeiture statutes and the disregard for due process that is buried in those statutes.").

64 HENRY J. HYDE, FORFEITING OUR PROPERTY RIGHTS: IS YOUR PROPERTY SAFE FROM SEIZURE? 5 (1995).

65 Pub. L. 106-185, 114 Stat. 202 (2000) (codified in main part at 18 U.S.C. §§ 981, 983-85). CAFRA succeeded in elevating government's burden from probable cause to a preponderance of the evidence standard, 18 U.S.C. § 983(d)(1), instituting innocent owner defenses, § 983(d), providing for increased access to legal help, 18 U.S.C. § 983(b), and eliminating cost bonds required to contest civil forfeiture actions. 18 U.S.C. § 983(a)(2)(E).

66 See, e.g., John Yoder & Brad Cates, *Government Self-Interest Corrupted a Crime-Fighting Tool Into an Evil*, WASH. POST (Sept. 18, 2014), [http://wapo.st/1mjYkQg?tid=ss\\_mail](http://wapo.st/1mjYkQg?tid=ss_mail) ("The Asset Forfeiture Reform Act was enacted in 2000 to rein in abuses, but virtually nothing has changed. This is because civil forfeiture is fundamentally at odds with our judicial system and notions of fairness. It is unreformable.").

Since CAFRA's enactment, civil forfeiture abuses have continued at alarming rates in hot spots across the country. One highly publicized spot involved a highway interdiction program in Tenaha, Texas.<sup>67</sup> Tenaha police officers seized cash and other valuables from travelers without any legitimate suspicion of criminal activity. Police practices raised serious questions about whether police were targeting black and Hispanic drivers traveling on the highway. Law enforcement reportedly seized a total of \$3 million from 140 motorists between 2006 and 2008, during which time they routinely threatened to arrest drivers or seize their children and turn them over to child protective agencies if motorists did not *voluntarily* relinquish their property on the spot.<sup>68</sup>

The *Washington Post* published an extensive series in 2014 on police seizures and forfeitures that focused largely on the federal government's adoption of state forfeitures.<sup>69</sup> According to the *Post*, the federal government adopted \$2.5 billion in cash seizures from state and local law enforcement agencies between 2001 and 2014, with roughly \$1.7 billion returning to state and local law enforcement under the federal equitable sharing program. The *Post* series documented aggressive policing practices in highway interdictions resulting in the seizure of hundreds of millions of dollars in cash from motorists and passengers not charged with a crime. Property owners were required to fight lengthy court battles to prove that their possessions were lawfully acquired in order to get their property back. Only one out of six property seizures was legally challenged, but when a challenge did occur, the government voluntarily returned seized cash in 41% of the cases.<sup>70</sup>

Additionally, the *Post* series exposed highly troubling police practices that employed private training companies, such as Black Asphalt and Desert Snow, to train police officers on how to seize greater amounts of cash on the nation's highways.<sup>71</sup> It is for good reason that the Supreme Court has held that "forfeitures are not favored; they should be enforced only when within both [the] letter and spirit of the law."<sup>72</sup>

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67 Rebecca Vallas et al., CTR. FOR AM. PROGRESS, FORFEITING THE AMERICAN DREAM 5 (2016), [https://cdn.americanprogress.org/wp-content/uploads/2016/03/31133144/032916\\_CivilAssetForfeiture-report.pdf](https://cdn.americanprogress.org/wp-content/uploads/2016/03/31133144/032916_CivilAssetForfeiture-report.pdf) [hereinafter FORFEITING THE AMERICAN DREAM].

68 *Id.*

69 Michael Sallah et al., *Stop and Seize*, WASH. POST (Sept. 6, 2014), <http://www.washingtonpost.com/sf/investigative/collection/stop-and-seize-2/>.

70 Robert O'Harrow Jr. et al., *Asset Seizures Fuel Police Spending*, WASH. POST (Oct. 11, 2014), <http://www.washingtonpost.com/sf/investigative/2014/10/11/asset-seizures-fuel-police-spending/>.

71 Many law enforcement departments have come to rely heavily on proceeds from forfeitures, with several hundred leaning on forfeiture revenues to account for 20% or more of their annual budgets between 2008 and 2014. Michael Sallah et al., *Stop and Seize*, WASH. POST (Sept. 6, 2014), <http://www.washingtonpost.com/sf/investigative/collection/stop-and-seize-2/>.

72 *United States v. One 1936 Model Ford V-8 De Luxe Coach*, 307 U.S. 219, 226 (1939).

While much media attention is focused on federal civil forfeitures, the property of ordinary citizens is arguably more threatened by police practices under state civil forfeiture laws. Pennsylvania is typical of states that have enacted civil forfeiture laws directed at controlled substances and modeled largely upon federal civil forfeiture laws. The Pennsylvania Controlled Substances Forfeiture Act,<sup>73</sup> enacted in 1988, provides for the seizure and forfeiture of controlled substances, of vehicles used to transport controlled substances, and of money and real property used or intended to be used to facilitate a violation of Pennsylvania's Controlled Substance, Drug, Device, and Cosmetic Act.<sup>74</sup> Forfeited property is transferred to the custody of the district attorney if the seizing authority is local, or to the Attorney General if the seizing authority has statewide authority.<sup>75</sup> Forfeited property may be retained for official use or sold, with all proceeds going to law enforcement authorities.<sup>76</sup>

Civil forfeiture has become big business in Pennsylvania. According to reports of the Pennsylvania Attorney General, law enforcement authorities in Pennsylvania have derived income from forfeited property totaling \$17.9 million in Fiscal Year 2012-13 and \$13.3 million in Fiscal Year 2013-14.<sup>77</sup> Since 2000, Pennsylvania has taken in more than \$150 million in forfeited income from civil asset forfeiture.<sup>78</sup>

On a local level, Philadelphia County has aggressively pursued civil forfeiture against its own residents. The table below (Table 1) summarizes the results of Philadelphia County's civil forfeiture prosecutions from Fiscal Year 2005-06 to Fiscal Year 2013-14.

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73 42 PA. CONS. STAT. § 6801 *et seq.* (2006).

74 *Id.* at § 6801(a).

75 *Id.* at § 6801(e).

76 *Id.* at § 6801(e)-(h); POLICING FOR PROFIT (2d ed.), *supra* note 54 at 122 (“[Pennsylvania] law enforcement agencies . . . retain 100 percent of all forfeiture proceeds.”).

77 OFFICE OF PA. ATT’Y GEN., ASSET FORFEITURE REPORTS, FISCAL YEARS 2012-2014. Fiscal Year 2012-13 and Fiscal Year 2013-14 are the last two fiscal years for which official figures are available.

78 POLICING FOR PROFIT (2d ed.), *supra* note 54 at 122.

TABLE 179

FISCAL YEAR	CASH FORFEITED	CARS FORFEITED	HOUSES FORFEITED	TOTAL INCOME FROM FORFEITED PROPERTY
2005–06	\$ 4.3 MM	453	99	\$ 6.73 MM
2006–07	\$ 3.1 MM	352	85	\$ 6.39 MM
2007–08	\$ 3.8 MM	263	68	\$ 4.67 MM
2008–09	\$ 4.5 MM	176	118	\$ 6.22 MM
2009–10	\$ 4.3 MM	116	90	\$ 5.97 MM
2010–11	\$ 4.2 MM	154	114	\$ 5.54 MM
2011–12	\$ 3.8 MM	183	96	\$ 4.80 MM
2012–13	\$ 3.5 MM	169	38	\$ 4.98 MM
2013–14	\$ 2.7 MM	72	38	\$ 3.43 MM
<b>TOTALS</b>	<b>\$ 34.2 MM</b>	<b>1,938</b>	<b>746</b>	<b>\$ 47.73 MM</b>

The forfeiture of such large amounts of private property (especially homes) and the direct financial benefit to the budgets and salaries of police and prosecutors have caused substantial public concern. Aggressive civil forfeiture practices prompted the *Philadelphia Inquirer* to publish an editorial on July 6, 2015, “*Dirty Money*,” stating:

Using the state’s civil forfeiture law, which is designed to deprive drug dealers of ill-gotten gains, the Philadelphia [D.A.’s] Office has routinely thrown innocent people out of their homes on the grounds that investigators believed drug crimes took place in them. The law allows prosecutors to take a property even if the owner has not been accused of a crime and, worse, before a judge reviews the case.<sup>80</sup>

79 OFFICE OF PA. ATT’Y GEN., ASSET FORFEITURE REPORTS, FISCAL YEARS 2005-2014 (on file with the author).

80 Editorial, *Dirty Money*, PHILA. INQUIRER, July 6, 2015, at A14. The *Scranton Times-Tribune* has repeatedly urged reform of Pennsylvania’s “draconian” forfeiture law. Editorial, *Fix State’s Draconian Forfeiture Law*, SCRANTON TIMES-TRIB. (Dec. 10, 2012), <http://thetimes-tribune.com/opinion/fix-state-s-draconian-forfeiture-law-1.1414192>. See, e.g., Editorial, *Scale Back Forfeiture Rule*, SCRANTON TIMES-TRIB. (Apr. 30, 2016), <http://thetimes-tribune.com/opinion/scale-back-forfeiture-rule-1.2037010>; Editorial, *Rein In Law on Forfeiture*, SCRANTON TIMES-TRIB. (Sept. 28, 2015), <http://thetimes-tribune.com/opinion/rein-in-law-on-forfeiture-1.1949326>. And a Philadelphia journalist described local civil forfeiture practices as “*seize first, ask questions later*.” Isaiah Thompson, *The Cash Machine*, PHILA. CITY PAPER (Nov. 28, 2012), <http://mycitypaper.com/The-Cash-Machine/> [hereinafter Thompson, *The Cash Machine*]. Forfeiture practices in Philadelphia’s Courtroom 478 have been the subject of national satire on the *Daily Show* and *Last Week Tonight*. See Highway-Robbing Highway Patrolmen: *The Daily Show with John Stewart*, COMEDY CENTRAL, <http://www.cc.com/video-clips/pjxlm/the-daily-show-with-jon-stewart-highway-robbing-highway-patrolmen>; Civil Forfeiture: *Last Week Tonight with John Oliver*, YOUTUBE, <https://www.youtube.com/watch?v=3kEpZWGgJks&feature=youtu.be>. Even the Common-

The explosion in civil forfeiture cases is frequently attributed to the direct pecuniary interest of law enforcement—one of the most controversial parts of civil forfeiture laws. Pennsylvania directs all forfeiture funds to law enforcement agencies.<sup>81</sup> This creates a powerful profit incentive for law enforcement authorities that skews prosecutorial discretion and distorts agency priorities. In some cases, civil forfeiture proceeds have been handed back to prosecutors as bonuses.<sup>82</sup> And, for the most part, the flow of forfeited funds directly to law enforcement agencies escapes public scrutiny. Such practices are often criticized as “policing for profit.”<sup>83</sup> Prosecutors sometimes attempt to justify their receipt of such large sums of forfeiture proceeds on the basis that they direct some of these proceeds to anti-drug and crime-fighting programs in the community.<sup>84</sup> But a review of more than a decade of civil forfeiture reports submitted by the Pennsylvania Attorney General’s office reveals that Philadelphia County admits to not spending even one dollar of forfeiture proceeds on such programs.<sup>85</sup> Despite taking in almost 48 million dollars in forfeiture proceeds from Fiscal Year 2005-06 to Fiscal Year 2013-14, the Philadelphia DA’s office kept it all for its own use.<sup>86</sup>

As the War on Drugs has escalated, a powerful weapon given to prosecutors to combat drug kingpins has been turned against everyday motorists who have their hard-earned cash seized in dubious highway traffic stops<sup>87</sup> and

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wealth Court of Pennsylvania has cautioned that it is only strong procedural protections that prevent civil forfeiture from amounting “to little more than state-sanctioned theft.” *Commonwealth v. 605 Univ. Drive*, 61 A.3d 1048, 1054 (Pa. Commw. Ct. 2012) (quoting *Commonwealth v. Younge*, 667 A.2d 739, 747 (Pa. Super. Ct. 1995)), *rev’d on other grounds*, 71 A.3d 915 (Pa. 2013).

81 POLICING FOR PROFIT (2d ed.), *supra* note 54, at 122 (citing 42 PA. CONS. STAT. § 6801(e)–(h)). While a majority of states direct all forfeited funds to law enforcement authorities (“LEAs”), seven states do not distribute any portion of forfeiture proceeds to LEAs. *Id.* at 14 (noting those seven states, which are New Mexico, Missouri, Wisconsin, Indiana, North Carolina, Maryland, and Maine). Some other states direct only a percentage of forfeited funds to LEAs. *Id.* (including, for example, New York: 60%; Texas: 70% at most; California: 66.25%).

82 Kaitlyn Foti. *Berks D.A., Public Defender Staffs to Receive Bonuses from Drug Forfeitures*, POTTSTOWN MERCURY (Jan. 8, 2015), <http://www.pottsmmerc.com/article/MP/20150108/NEWS/150109671>.

83 POLICING FOR PROFIT (2d ed.), *supra* note 54, at 122 (“Pennsylvania earns a D- for its civil forfeiture laws” for three reasons: “[1] Low bar to forfeit and no conviction required[;] [2] Poor protections for innocent third-party property owners[;] [3] 100% of forfeiture proceeds go to law enforcement.”).

84 *See, e.g.*, OFFICE OF THE PA. ATT’Y GEN., ASSET FORFEITURE & MONEY LAUNDERING SECTION, [https://www.attorneygeneral.gov/Criminal/Asset\\_Forfeiture\\_and\\_Money\\_Laundering\\_Section/](https://www.attorneygeneral.gov/Criminal/Asset_Forfeiture_and_Money_Laundering_Section/) (last visited Oct. 27, 2016) (“The monies derived from the forfeitures are, in turn, used by law enforcement to help fund future drug and other criminal investigations as well as assist community-based drug and crime-fighting programs throughout the state.”).

85 *See* OFFICE OF THE PA. ATT’Y GEN., ASSET FORFEITURE REPORTS, FISCAL YEARS 2005-14.

86 *See id.* The same is true of Cumberland and Dauphin Counties in Pennsylvania, two other high income-generators of forfeited funds. *Id.*

87 Robert O’Harrow Jr. et al., *Asset Seizures Fuel Police Spending*, WASH. POST (Oct. 11, 2014), <http://www.washingtonpost.com/sf/investigative/2014/10/11/asset-seizures-fuel-police-spending/>.



against small entrepreneurs traveling with cash to purchase needed inventory.<sup>88</sup> But perhaps most troubling is that prosecutors have turned this powerful weapon against innocent homeowners, whose family homes are seized for minor drug transactions they did not commit. Prosecutors justify the taking of a family home on the legal fiction that the home has facilitated a crime. It is a legal fiction that only lawyers can understand. The public is left wondering how it is possible that the government can take a family's most important asset for a crime the homeowner did not commit.

### III. WEAK PROTECTIONS, HIGH DEFAULTS

One of the most disturbing aspects of civil forfeiture is its persistently high default forfeiture rates. In too many cases, the government is not required to prove the validity of its claims, and property owners never have their day in court. Recent studies demonstrate that property owners frequently lose their right to contest the government's claims and sometimes have little choice but to walk away from their hard-earned property. For example, a recent study of Pennsylvania forfeiture cases conducted by the American Civil Liberties Union ("ACLU") of Pennsylvania found that Philadelphia County has a default forfeiture rate approaching 87%. The same study also found that suburban Montgomery County, Pennsylvania, has a default forfeiture rate of 90%.<sup>89</sup>

Concerns over such high default rates are not new. Congress was deeply troubled by high default rates when it conducted legislative hearings leading up to CAFRA's enactment. In those hearings, Congress learned that approximately 80% of all federal forfeitures were uncontested.<sup>90</sup> In fact, the

<sup>88</sup> See *60 Minutes: You're Under Arrest* (CBS television broadcast Apr. 5, 1992). See also H.R. REP. NO. 106-192, at 6 (1999).

<sup>89</sup> "The fact that default rates in both counties are so high strongly suggests that no matter how 'fairly' civil forfeiture is administered, the current law is heavily tilted against the property rights of private citizens." ACLU OF PA., BROKEN JUSTICE: AN INVESTIGATION OF CIVIL ASSET FORFEITURE IN MONTGOMERY COUNTY 4 (2015), [https://www.aclupa.org/files/1814/4526/3118/Broken\\_Justice\\_-\\_Montgomery\\_County\\_final.pdf](https://www.aclupa.org/files/1814/4526/3118/Broken_Justice_-_Montgomery_County_final.pdf) [hereinafter ACLU OF PA., BROKEN JUSTICE]. The unfairness of these two counties' *in rem* civil forfeiture practices is reflected by the adoption of a very different policy in Allegheny County, Pennsylvania, which includes the City of Pittsburgh. See, e.g., Douglas J. Guth, *Forfeiture Law Reformers See Allegheny County Policy As Model*, PITTSBURGH POST-GAZETTE (Dec. 6, 2015, 12:00 AM), <http://www.post-gazette.com/local/region/2015/12/06/Forfeiture-law-reformers-see-Allegheny-County-policy-as-model/stories/201512060061> (discussing the differences between civil forfeiture procedures in Allegheny County and Philadelphia County). The Allegheny County District Attorney's Office has pursued *in personam* criminal forfeiture, rather than *in rem* civil forfeiture. See *id.* (noting that forfeiture proceedings occur only after a criminal conviction).

<sup>90</sup> See *Oversight of Federal Asset Forfeiture: Its Role in Fighting Crime: Hearing Before the Subcomm. on Criminal Justice Oversight of the S. Comm. on the Judiciary*, 106th Cong. 90 (1999) (statement of Roger Pilon, Vice President for Legal Affairs, Cato Institute) (noting the Justice Department's statement that 80% of forfeitures are uncontested). See also H.R. REP. NO. 105-358, pt. 1, at 28-29 (1997) (discussing the reasons why 80% of forfeitures are not contested).

Congressional Budget Office reported that only 5% of seizures resulted in contested civil cases.<sup>91</sup>

There are understandable reasons for such high default rates that have nothing to do with the merits of the underlying claims. Civil forfeiture laws provide strong grants of strong authority to government prosecutors while providing only weak protections for property owners.<sup>92</sup> Perhaps most significantly, property owners facing civil forfeiture do not have a constitutional right to counsel.<sup>93</sup> In a criminal case, an accused who cannot afford legal representation is entitled to have a lawyer provided for his or her defense. For more than fifty years since the Supreme Court's unanimous decision in *Gideon v. Wainwright*,<sup>94</sup> the effective assistance of counsel has been viewed as essential to achieving a fair trial. Although civil forfeitures are punitive and disfavored in the law, Pennsylvania law does not provide for a right to counsel for indigent property owners facing civil forfeiture proceedings.<sup>95</sup>

Civil forfeiture is a quasi-criminal proceeding that falls between our civil and criminal justice systems, and therefore the public defender's office does not usually provide legal assistance. And, while Pennsylvania has a comprehensive network of civil legal aid providers, these non-profit organizations are seriously underfunded and struggling with a justice gap that leaves many residents without access to free legal help in civil matters. According to most studies, only 20% of low-income Pennsylvanians are able to be served with current resources.<sup>96</sup> Legal aid providers have their hands full with assisting indigent cli-

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91 146 CONG. REC. H2048 (Apr. 11, 2000).

92 See generally POLICING FOR PROFIT (2d ed.), *supra* note 54, 11–24 (contrasting the risks to property and due process rights of civil forfeiture with the financial rewards gained by law enforcement officials). The *Policing for Profit* report by the Institute of Justice (“IJ”) states “[c]ivil forfeiture laws pose some of the greatest threats to property rights in the nation today, too often making it easy and lucrative for law enforcement to take and keep property—regardless of the owner’s guilt or innocence.” *Id.* at 7. Regarding Pennsylvania’s civil forfeiture laws, IJ’s report is particularly critical: “Pennsylvania has some of the worst civil forfeiture laws in the country. Earning a [grade of] D-, Pennsylvania law only requires law enforcement to tie property to a crime by a preponderance of the evidence in order to forfeit it. Innocent owners are required to prove that they did not participate in, give consent to or have knowledge of the criminal activity with which their property is associated. Worst of all, law enforcement agencies have every incentive to seize: They retain 100 percent of all forfeiture proceeds.” *Id.* at 122.

93 See, e.g., *United States v. Forfeiture Prop., All Appurtenances & Improvements*, 803 F. Supp. 1194, 1197 (N.D. Tex. 1992) (finding no federal constitutional due process right to appointment of counsel in civil forfeiture proceedings); *Commonwealth v. \$9,847.00 United States Currency*, 704 A.2d 612, 613 (Pa. 1997) (finding the Due Process Clause does not guarantee appointment of counsel in civil forfeiture proceedings).

94 372 U.S. 335 (1963).

95 *\$9,847.00 United States Currency*, 704 A.2d at 613.

96 See generally LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS (2d ed. 2007), <http://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/JusticeGaInAmerica2009.authcheckdam.pdf> (discussing the level of civil legal assistance

ents in mortgage foreclosures, child custody, domestic violence, tenant evictions, public benefits, elder abuse, and consumer fraud cases. As a result, low-income individuals are mostly on their own when confronting the government's seizure of their property in civil forfeiture cases, and they are ill-equipped to mount a defense without legal help against government lawyers.<sup>97</sup>

The economics of civil forfeiture also contributes to high default rates. Most civil forfeiture petitions in Pennsylvania are filed to forfeit cash. Cash forfeitures are the most lucrative part of the forfeiture program. In Fiscal Year 2012-13, 76.4% of all income generated from forfeited property in Pennsylvania came from cash forfeitures.<sup>98</sup> If the amount of a cash seizure is small, as is true in many cash forfeitures, it is just not economically feasible for the property owner to lose time from work for multiple court appearances or to incur the expense of hiring a lawyer to defend the cash—regardless of the property owner's innocence. In this common situation, the government wins by default because the transactional cost required to defend private property exceeds the value of the seized property. The dark truth is that police are able to seize modest sums of cash with near-impunity.

A 2015 study of cash seizures in Philadelphia County revealed that half of all such cases involve sums as small as \$192 or even less.<sup>99</sup> And an investigative journalist's 2012 study of cash forfeitures in Philadelphia County concluded that Philadelphia prosecutors regularly forfeit sums as small as \$100 and that it sometimes took as many as ten separate court dates to obtain

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available to low-income Americans); RESOURCE FOR GREAT PROGRAMS, INC., A REPORT ON PENNSYLVANIA'S ACCESS TO JUSTICE ACT, FY 2004-2011, at 6 (May 2012), <http://www.paiolta.org/wp-content/uploads/2014/05/Report-on-Pennsylvanias-Access-to-Justice-Act.pdf> (“Only 20 percent of low-income Pennsylvanians who experience a legal problem are able to get legal help from any source.”).

<sup>97</sup> In CAFRA, Congress attempted to reduce high default rates in federal civil forfeiture proceedings by boosting access to counsel. “[CAFRA] grants discretionary authority to federal courts to appoint counsel where the property owner is accused of criminal activity related to the civil forfeiture [18 U.S.C. § 983(b)(1)(A)]; it provides for the appointment of counsel as a matter of right at public expense for indigent property owners whose primary residences are the subject of the civil forfeiture proceeding [18 U.S.C. § 983(b)(2)(A)]; and it awards attorney's fees to claimants who have substantially prevailed in civil forfeiture proceedings [18 U.S.C. § 983(b)(2)(B)].” Louis S. Rulli, *The Long Term Impact of CAFRA: Expanding Access to Counsel and Encouraging Greater Use of Criminal Forfeiture*, 14 FED. SENTENCING REP. 87, 88 (2001). Congress funded the right to counsel for indigent property owners with monies from the Department of Justice's Asset Forfeiture Fund and not from tax dollars. *Id.* at 89. This development has not been adopted by most states, including Pennsylvania. See NAT'L COAL. FOR A CIVIL RIGHT TO COUNSEL, *Status Map: Civil Forfeiture*, <http://www.civil-righttocounsel.org/map> (last visited Mar. 14, 2017) (noting which states have adopted civil forfeiture, and specifically noting that Pennsylvania has not).

<sup>98</sup> See POLICING FOR PROFIT (2d ed.), *supra* note 54, at 122 (noting the values of forfeited property).

<sup>99</sup> ACLU OF PA., GUILTY PROPERTY: HOW LAW ENFORCEMENT TAKES \$1 MILLION IN CASH FROM INNOCENT PHILADELPHIANS EVERY YEAR—AND GETS AWAY WITH IT 7 (2015), [https://www.aclupa.org/files/3214/3326/0426/Guilty\\_Property\\_Report\\_-\\_FINAL.pdf](https://www.aclupa.org/files/3214/3326/0426/Guilty_Property_Report_-_FINAL.pdf) (end-note omitted) [hereinafter ACLU OF PA., GUILTY PROPERTY].

a hearing before a judge for the return of this small amount of cash.<sup>100</sup> According to this study, the Philadelphia D.A.'s Office filed more than 8,000 cash forfeiture cases in 2010, seeking to forfeit, on average, just \$550 per filing. And in a sample of more than 100 cases from 2011 and 2012, the median amount of cash forfeitures was only \$178.<sup>101</sup>

So long as government is permitted to seize small amounts of cash, default rates will remain very high.<sup>102</sup> This is extremely troubling as forfeitures-by-default rob citizens of their hard-earned property without any showing that the government is acting lawfully. There are ways to remedy this, such as requiring minimum thresholds for cash forfeitures, but the real solution begins with governmental disclosure of basic information that informs the public of the magnitude of this problem and the factors which contribute to its occurrence. The solution begins with transparency.<sup>103</sup>

#### IV. INNOCENCE DISRESPECTED

In an earnest effort to combat drug and nuisance crimes, we have compromised our respect for innocence. While innocence has traditionally commanded the highest regard in our justice system,<sup>104</sup> we have now compromised

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<sup>100</sup> Isaiah Thompson, *The Cash Machine*, PHILA. CITY PAPER (Nov. 28, 2012), <http://mycitypaper.com/The-Cash-Machine/>.

<sup>101</sup> *Id.*

<sup>102</sup> There is still an economic disincentive to contest the government's claims even where larger amounts are seized. *See, e.g.*, Louis S. Rulli, *On The Road To Civil Gideon: Five Lessons from the Enactment of a Right to Counsel for Indigent Homeowners in Federal Civil Forfeiture Proceedings*, 19 J.L. & POLICY 683, 729 n.200 (2011) [hereinafter Rulli, *Civil Gideon*] (citing an example where a citizen could not afford the attorney's fees to recover \$10,000 in seized cash).

<sup>103</sup> While Pennsylvania authorities do not specifically report default rates in civil forfeiture actions, there is ample evidence of high default rates. Some journalists and non-profit advocacy organizations have analyzed this information in the absence of government reporting. The most accurate information on actual default rates resides in the records of prosecutors and courts; yet neither prosecutors nor courts have undertaken to compile and report this information. And state legislators have not required annual reports detailing this essential data. Legislators require reporting on only the most basic information, and surprisingly appear reluctant to scrutinize how civil forfeiture actually affects their constituents. While civil forfeiture takes huge amounts of private property from citizens, there is little transparency about how civil forfeiture really functions in local communities. Prosecutors allege that civil forfeiture makes communities safer, but there is no empirical evidence to support such a claim. Without question, the government should be required to greatly improve forfeiture transparency. *See* J. Justin Wilson, *State and Federal Governments Must Improve Forfeiture Transparency*, INSTIT. FOR JUSTICE (Jan. 17, 2017), <http://ij.org/press-release/state-federal-governments-must-improve-forfeiture-transparency/> (rating government transparency in forfeiture laws based upon six basic elements of transparency and accountability).

<sup>104</sup> *See, e.g.*, Letter from Benjamin Franklin to Benjamin Vaughan (Mar. 14, 1785), in 11 THE WORKS OF BENJAMIN FRANKLIN 13 (John Bigelow ed., 1904) ("That it is better a hundred guilty persons should escape than one innocent person should suffer, is a maxim that has been long and generally approved . . .").

this respect for unproven promises of enhancing public safety. The Supreme Court's decision in *Bennis v. Michigan*<sup>105</sup> illustrates this troubling development.

Tina Bennis owned an automobile jointly with her husband, John Bennis.<sup>106</sup> Without Tina's knowledge and certainly without her consent, John drove their car to a part of town where he engaged the services of a prostitute.<sup>107</sup> When he did not come home that evening, Tina called Missing Persons, and John was arrested by the police.<sup>108</sup> The Bennis car was seized and forfeited as a public nuisance under Michigan law.<sup>109</sup> Since Michigan law did not provide for an innocent owner defense, Tina argued that the government's seizure of her car, at least to the extent of her interest, violated her right to due process of law.<sup>110</sup> On appeal from the grant of a forfeiture order, the *Bennis* Court upheld the forfeiture and ruled that that the Due Process Clause did not prevent a forfeiture of Tina's legal interest in her car despite her innocence.<sup>111</sup> The Court found it to be significant that Michigan law authorized the initial seizure of the Bennis car and that state courts retained remedial discretion in deciding whether to grant a forfeiture.<sup>112</sup> Apparently, the *Bennis* Court was not moved by the obvious fact that neither the prosecutor nor the trial court had exercised any discretion in favor of Tina Bennis. Rather, the *Bennis* Court retreated behind the notion that civil forfeiture is "too firmly fixed in the country's punitive and remedial jurisprudence to be now displaced."<sup>113</sup>

The *Bennis* decision was a shocking revelation, for it signaled that innocence alone would not be enough to protect against the forfeiture of vital property. Neither factual innocence nor the guarantees of due process of law saved Tina Bennis' property from being forfeited to the government, leaving us with the nagging question of why *Austin*<sup>114</sup> and the Excessive Fines Clause did not curb this abusive punishment.

In fact, Justice Stevens' dissent in *Bennis* questioned whether the Court's holding was at odds with *Austin*, and he expressed concern that the forfeiture of Mrs. Bennis' half interest in her car was an "excessive" punishment "out of all proportion to her blameworthiness."<sup>115</sup> Nonetheless, the Supreme Court did not decide the *Bennis* case on Eighth Amendment grounds, and so the forfeiture stood.

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105 516 U.S. 442 (1996).

106 *Id.* at 443.

107 *Id.*

108 *Id.* at 443, 468.

109 *Bennis*, 516 U.S. at 444.

110 *Id.* at 445-46.

111 *Id.* at 453.

112 *Id.*

113 *Id.* at 453.

114 509 U.S. 602 (1993).

115 *Bennis*, 516 U.S. at 471 (Stevens, J., dissenting).

The *Bennis* case highlights the importance of *Austin*'s application to civil forfeiture cases. In *Austin*, the Court held that *in rem* civil forfeiture "constitutes 'payment to a sovereign as *punishment* for some offense,' and, as such, is subject to . . . the [ ] Excessive Fines Clause."<sup>116</sup> The *Austin* case arose out of an *in rem* civil forfeiture action filed by the government against Richard Austin's mobile home and auto body shop after he pleaded guilty to possessing cocaine with intent to sell.<sup>117</sup> In the Supreme Court, Austin argued that the Eighth Amendment's Excessive Fines Clause applies to *in rem* civil forfeiture proceedings.<sup>118</sup> Ultimately, the Court agreed with Austin's argument. The Court rejected the government's contention that *in rem* civil forfeiture was *solely* remedial in nature, concluding instead that "forfeiture generally, and statutory *in rem* forfeiture in particular historically have been understood, at least in part, as punishment."<sup>119</sup> Having so concluded, the Court held that *in rem* civil forfeiture "constitutes 'payment to a sovereign as *punishment* for some offense,' and, as such, is subject to . . . the [ ] Excessive Fines Clause."<sup>120</sup>

At this juncture, the *Austin* Court expressly declined to adopt a constitutional "excessiveness" standard, instead leaving it to the lower courts "to consider that question in the first instance."<sup>121</sup> However, the Court did acknowledge that a property's relative instrumentality *vel non* to the underlying offense might be a relevant factor in the excessiveness calculus. Still, the *Austin* Court emphasized that its decision "in no way limit[ed] the Court of Appeals from considering other factors . . ."<sup>122</sup>

The Supreme Court's next Excessive Fines Clause decision came five years later, in *United States v. Bajakajian*.<sup>123</sup> Unlike *Austin*, which arose in a civil forfeiture context, *Bajakajian* arose out of a *criminal* forfeiture case.<sup>124</sup> Hosep Bajakajian and his family had been preparing to board an international flight

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116 509 U.S. at 621–22 (emphasis added) (internal citation omitted).

117 The Government alleged the following: (1) that Austin, while at his auto body shop, had agreed to sell cocaine to a certain buyer; (2) that Austin had gone to his mobile home to retrieve two grams of cocaine; and (3) that Austin had sold that cocaine to that buyer at the shop. And alas, the buyer had been accompanied by a government informant throughout this time. A search warrant executed on both Austin's shop and mobile home the recovered small amounts of marijuana and cocaine, along with cash, drug paraphernalia, and a revolver. Brief for Respondent-Appellate at 4–5, *Austin v. United States*, 509 U.S. 602 (1993).

118 *Austin*, 509 U.S. at 606.

119 *Id.* at 618.

120 *Id.* at 622 (quoting *Browning-Ferris*, 492 U.S. at 265) (internal citation omitted).

121 *Id.* at 622–23.

122 *Id.* at 623 n.15. On the same day that it decided *Austin*, the Supreme Court also decided *Alexander v. United States*, 509 U.S. 544 (1993), a criminal forfeiture case in which the Court analyzed a defendant's punishment under the Excessive Fines Clause. *Id.* at 558–59. In this case as well, the Court declined to announce a definitive test for determining constitutional excessiveness. *Id.* at 559.

123 524 U.S. 321 (1998).

124 *Id.* at 325–27, 333.

at Los Angeles International Airport.<sup>125</sup> In his luggage, Mr. Bajakajian carried \$357,144 in cash.<sup>126</sup> Under federal law, any person transporting “more than \$10,000” in money out of the United States “at one time” must report that fact to authorities.<sup>127</sup> Mr. Bajakajian did not report that he had \$357,144 in cash in his luggage, and so he was arrested and charged with willful failure to comply with this statutory reporting requirement.<sup>128</sup> The government seized the \$357,144 in cash in his luggage and sought forfeiture of the full amount.<sup>129</sup> Here, “the Government . . . sought to punish [Mr. Bajakajian] by proceeding against him criminally, *in personam*, rather than proceeding *in rem* against the currency.”<sup>130</sup> Therefore, forfeiture of the seized currency was predicated on Mr. Bajakajian’s criminal conviction for the reporting offense. Mr. Bajakajian pleaded guilty to that offense, thereby triggering a forfeiture of the entire \$357,144 sum.<sup>131</sup>

This then presented the case’s key question: “[W]hether forfeiture of the entire \$357,144 that [Mr. Bajakajian] failed to declare would violate the Excessive Fines Clause of the Eighth Amendment.”<sup>132</sup> The *Bajakajian* Court “h[e]ld that it would, because full forfeiture of [Mr. Bajakajian’s] currency would be grossly disproportional to the gravity of his offense.”<sup>133</sup> *Bajakajian* thus stands for the proposition that “a punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant’s offense.”<sup>134</sup>

In the almost twenty years that have elapsed since *Bajakajian*, the Supreme Court has not provided additional guidance to lower courts on how they should apply the Excessive Fines Clause to *in rem* civil forfeitures. Thus, it remains uncertain how courts should apply the Excessive Fines Clause to *in rem* forfeitures of family homes when the homeowner is not accused of or convicted of a crime. In this uncertainty, some busy trial courts have been quick to set aside questions of instrumentality, culpability, or actual harm, and instead have reduced their constitutional inquiry to a narrow and rigid interpretation of *Bajakajian*—simply comparing the property’s monetary value to the maximum statutory fine authorized for the underlying crime. If the amount of the property is less than the maximum authorized fine, these courts presume the forfeiture to be non-excessive and thus constitutional. It is not a thoughtful process, and, worse yet, it disadvantages citizens of modest means who are most vulnerable, while protecting affluent owners who possess expensive homes.

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<sup>125</sup> *Id.* at 324.

<sup>126</sup> *Id.* at 325.

<sup>127</sup> 31 U.S.C. § 5316(a) (2012).

<sup>128</sup> *Bajakajian*, 524 U.S. at 325.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 333.

<sup>131</sup> *Id.* at 325–26.

<sup>132</sup> *Id.* at 324.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 334.

This is clearly not what the Excessive Fines Clause was intended to do. The experience of civil forfeiture at the grassroots level in Pennsylvania illustrates the dangers of such an overly rigid and misguided approach.

#### V. THE IMPACT OF CIVIL FORFEITURE ON THE GROUND

For more than a decade, the Civil Practice Clinic at the University of Pennsylvania Law School (“Penn Law Clinic”) has provided free legal representation to indigent Philadelphia homeowners faced with civil forfeiture petitions filed against their homes even though they were not accused or convicted of any wrongdoing. We saw repeated patterns in these cases that revealed much about how civil forfeiture plays out in low-income, minority communities. In many of these cases, the homeowners were older residents who were law-abiding citizens who had never committed a crime in their lives. Many were retirees tending to personal challenges of poverty and ill-health who agreed to take extended family members into their homes during tough economic times that hit minority communities especially hard.

In many cases, we found that a homeowner’s adult son or grandson was arrested for low-level drug offenses, usually several sales of marijuana or crack cocaine for twenty dollars each to undercover agents and confidential informants. Almost always, police initiated controlled buys by placing a phone call to the cell phone of the adult child or grandchild. A confidential informant then arranged to meet the son or grandson at the front door of the home in which he resided (but did not own). Almost without exception, police reports documenting their observations of the home and drug transactions reported no involvement (or even physical presence) of the homeowner. It was clear that these transactions were hidden from the homeowner, providing additional evidence that the son or grandson knew that their parents or grandparents would not approve of their drug involvement. And, contrary to popular images sometimes conjured up by police or prosecutors, these homes certainly were not “crack houses.” They were stable residences in impoverished communities where homeowners tried their best to watch over their property; there were no claims that strangers were coming and going from the home at all hours of the day or night.

In several of these cases, prosecutors claimed that neighbors had demanded police action against drug activity at our clients’ homes. In two such cases, we decided to investigate those claims. Our students went to the residential blocks where the homeowners resided and surveyed neighbors. In both cases, we found overwhelming support for the homeowners among the neighbors. Our students talked with the neighbors on the block and obtained signatures from the great majority of them who willingly signed petitions addressed to the District Attorney’s office expressing their support for the homeowner. With everyone’s permission, we delivered those petitions to the District Attorney’s office.



There were so many requests for free legal help in the high volume of civil forfeiture petitions filed against homes, cars, and cash in low-income Philadelphia communities that the Clinic decided to adopt a case acceptance policy that prioritized real estate. With some exceptions, we used our limited resources primarily to help homeowners save their homes, since these cases appeared to have the greatest impact on the well-being of whole families and especially innocent young children. We found that entire families were the “collateral damage” of harsh civil forfeiture policies that enabled the government to seize homes for an adult child’s alleged transgression, and sometimes even for the actions of non-residents.<sup>135</sup>

The Clinic handled scores of such cases over the past decade. I want to describe two such cases that provide needed context for an examination of civil forfeiture. These two cases are representative of patterns we saw with great frequency on the ground in low-income and minority communities when the government actively pursued family homes in civil forfeiture.<sup>136</sup>

#### A. *Mary and Leon Adams’ Story*

Several years ago, a black husband and wife living in West Philadelphia came to the Penn Law Clinic after being served with a civil forfeiture petition filed by the Philadelphia D.A.’s office seeking to forfeit their home for three alleged \$20 marijuana sales by their adult son. Allegedly, one of those sales had occurred on the porch of their home. Mary and Leon Adams were sixty-eight and seventy years of age, respectively, and upright, law-abiding citizens; they had never been accused of, charged with, or convicted of any crime. Leon was a former steel plant worker; Mary was a retail saleswoman and former block captain in her neighborhood. Their home was all paid up, and they now were retired, living on very modest means and financially eligible for free legal services under federal poverty guidelines.

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135 See e.g., MARIAN R. WILLIAMS ET AL., INSTTT. FOR JUSTICE, POLICING FOR PROFIT 38 (1st ed. Mar. 2010), <http://ij.org/wp-content/uploads/2015/03/assetforfeituretoemail.pdf> [hereinafter POLICING FOR PROFIT (1st ed.)] (citing *Commonwealth v. Davis*, Case ID: 010902903). “Margaret Davis, a 77-year-old [black] homeowner with . . . end-stage renal disease, was in the habit of leaving her North Philadelphia home unlocked so her neighbors, who routinely checked up on her, could come and go. She used paratransit to travel to dialysis treatment three times a week.” *Id.* In August 2001, police chased an alleged neighborhood drug dealer through Ms. Davis’s front door, through her house, and out the back. *Id.* Ms. Davis gave the police permission to search her home, and the police reported that they found a small quantity of drugs, “left in plain view, presumably [dropped] by the fleeing suspect[.]” *Id.* Although Ms. Davis was not charged with any criminal offense, the D.A.’s Office filed a civil forfeiture petition against her home in September 2001. Ms. Davis was indigent and came to the Penn Law Clinic in early 2002. The Clinic undertook representation and filed affirmative defenses to the forfeiture petition. In November 2003, some twenty-three months after the government’s filing, the D.A.’s office finally withdrew its forfeiture petition.

136 See e.g., POLICING FOR PROFIT (1st ed.), *supra* note 135, at 38.

Mr. and Mrs. Adams were very frightened about the prospect of losing their home in their senior years with nowhere to go. They were also frightened for their adult son who was now facing criminal charges for a drug offense. They did not know how they were going to help their son through this situation. And they were especially frightened about the possibility of losing their home because Leon was battling pancreatic cancer, and they needed to spend a lot of their time and energy at the hospital and with his doctors. They did not know what to do and they did not understand how their home could be taken from them when they had not done anything wrong.<sup>137</sup>

Pitted against the power of the state and too poor to afford a lawyer, Mary and Leon could have easily lost their home at a most vulnerable time in their lives. However, they were more fortunate than many others. They learned of the Penn Law Clinic and received free legal help. Certified legal interns in the Clinic conducted interviews, filed pleadings, engaged in fact investigation and formal discovery, and entered into prolonged negotiations with the District Attorney's office. After more than a year of pre-trial litigation<sup>138</sup> and only after substantial public exposure in the popular media,<sup>139</sup> the Clinic obtained a court-approved agreement that saved their home from civil forfeiture.

But many other Philadelphians are not so fortunate.

### B. Elizabeth Young's Story

Like Mary and Leon Adams, Elizabeth Young is an elderly, black homeowner in Philadelphia. She purchased her West Philadelphia home in the 1970s and worked for Amtrak for more than twenty-five years.<sup>140</sup> She retired in 1995 and at age seventy, after her husband's death, she remained in her West Philadelphia home while being active in her church and assisting the needy as a missionary. Her health began to fail in later years and she purchased a used Chevrolet Venture in 2006 to transport her to her medical appointments.<sup>141</sup> Her health worsened in 2009 when she suffered blood clots in her lungs and was hospitalized for several weeks, requiring bed rest and several medications.<sup>142</sup>

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137 Mary and Leon's story was featured in the *New Yorker's* cover article, *Taken*, with their permission. Sarah Stillman, *Taken*, THE NEW YORKER (Aug. 12, 2013), <http://www.newyorker.com/magazine/2013/08/12/taken>. At first, Mary and Leon did not want to disclose their story to the public, but they ultimately decided they would do so if their plight could help others facing the same situation. *Id.*

138 Commonwealth v. 5937 Vine St., No. CP-51-MD-0008959-2012 (Ct. C.P. Phila. Cty. Sept. 5, 2012).

139 See, e.g., Sarah Stillman, *Taken*, THE NEW YORKER (Aug. 12, 2013), <http://www.newyorker.com/magazine/2013/08/12/taken>.

140 Forfeiture Hearing, Commonwealth v. 416 S. 62nd St., No. CP-51-MD-0002972-2010, at 56-57, 59 (Ct. C.P. Phila. Cty. May 1, 2012); Commonwealth v. 1997 Chevrolet, No. CP-51-MD-0013471-2010 (Ct. C.P. Phila. Cty. May 1, 2012).

141 *Id.* at 60, 72-73.

142 *Id.* at 68.

At this time, Ms. Young's adult son, Donald Graham, resided in her home along with two of Ms. Young's grandchildren. Donald was then nearly fifty years of age. When he was a teenager he had a drug problem and was incarcerated. Ms. Young had banned Donald from her home at that time, and they were estranged for many years. But in later years as Donald advanced through middle age, he appeared to have turned his life around. Donald had children and was a responsible father. When he needed a place to live, Ms. Young let Donald back in to her home and he proved quite helpful to her in her later years as her health problems worsened.

After Ms. Young returned home from a hospital stay in the fall of 2009, and while on bed rest pursuant to doctor's orders, police officers came to her home and informed her that they suspected that Donald was selling marijuana. She did not believe this to be true and asked the police for some proof of their suspicion. They did not provide any evidence to her and they did not arrest Donald at that time. Ms. Young did not see any drug involvement by her son and heard nothing further in 2009.

However, in 2010 and again in 2011, Donald was arrested for several sales of small packets of marijuana for \$20 each to confidential informants working with police narcotics agents.<sup>143</sup> Each marijuana sale was initiated by the police with a phone call to Donald on his cell phone (not on a house phone), offering to buy marijuana and arranging to meet him at or near his residence. The D.A.'s office prosecuted Donald for these drug offenses,<sup>144</sup> but then it did something more. It brought a civil forfeiture petition against Ms. Young's home and car, alleging that Ms. Young's property facilitated Donald's marijuana sales. Ms. Young was not charged with a crime, and it is clear from police reports that officers never suspected her of any criminal wrongdoing. Ms. Young was about to lose her home and her car at age seventy and while infirm for her adult son's low-level marijuana sales, even though she earnestly believed (as she testified at trial) that he was not again involved with drugs.

Unlike the Adams case, the D.A.'s office was unwilling to resolve Ms. Young's case amicably. Ms. Young was fortunate to obtain *pro bono* legal help from a large Philadelphia law firm that had previously worked with the Clinic on civil forfeiture cases. At trial, Ms. Young contended that she was an innocent owner because she neither knew nor consented to any drug activity by her fifty-year-old son. She also argued that the government's taking of her home and car for her son's marijuana sales violated the Eighth Amendment's Excessive Fines Clause.

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<sup>143</sup> *Id.* at 16–22.

<sup>144</sup> This prosecution resulted in Donald's incarceration, but no fine (other than standard court costs) was imposed on him. Commonwealth v. Graham, No. CP-51-CR-0000643-2010 (Ct. C.P. Phila. Cty. Sept. 15, 2010).

The trial judge rejected Ms. Young's innocent owner defense, instead adopting the prosecutor's claim that Ms. Young had turned a *blind eye* to her son's drug activity and that such negligence, however minor, justified the taking her home and car. The trial judge was not persuaded by affidavit testimony from a close neighbor verifying that Ms. Young had been a good neighbor and community resident, and that the neighbor had never observed any drug activity at Ms. Young's house.

The trial court also rejected Ms. Young's "excessive fines" defense, reasoning that forfeitures of both Ms. Young's home and car were not grossly disproportional to the gravity of Donald's marijuana offenses. To reach this conclusion, the trial court simply compared the *maximum* statutory fine for Donald's criminal conduct (at least \$80,000) to the market value of Ms. Young's home (approximately \$54,000).

At age seventy and innocent of any criminal wrongdoing, Ms. Young found that her own government had snatched away her home and car and threw her and her grandchildren on the street. Claims of a statutory innocent owner defense and a constitutional excessive fines defense, and even legal representation from a large law firm, were not enough to save Ms. Young and her grandchildren from being thrown out on the street by the government. The most vital belongings of Ms. Young and her family were handed over to the D.A.'s office, even though Donald was separately prosecuted and punished for his minor drug offenses. While the prosecutor's office retained discretion not to take Ms. Young's home and car, especially because Donald was already incarcerated for his marijuana sales, it refused to exercise that discretion in Ms. Young's favor. This is what civil forfeiture means in poor and minority neighborhoods, where abuse of this extraordinary power plays out with disturbing frequency.

Ms. Young's case resembles many other civil forfeiture actions in profound ways. The government sought to forfeit a family home based not upon any criminal conduct of the homeowner, but rather based upon low-level drug offenses by a third party (most often an adult child or grandchild). The case involved several "controlled buys" of small amounts of marijuana. Each drug exchange was initiated by the police, and in each case, a narcotics agent called the third party (here, Donald) on his cell phone (not on a house phone), offering to buy a controlled substance and arranging to meet that person at or near his residence. On the third controlled buy, the police arrested the third party, searched the property and sometimes found additional drugs, often hidden in that person's bedroom. The Penn Law Clinic has helped scores of low-income homeowners over the past decade and their stories are remarkably similar.<sup>145</sup>

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<sup>145</sup> One example is the case of Anna (fictitious name), a middle-aged, Hispanic single mother, and a hard working health care worker employed outside of her home. Police seized and sealed Anna's

On the other hand, Ms. Young's case also differs in some ways from many other cases. Most Philadelphia civil forfeiture cases end up in default judgments in favor of the government or in settlements that place conditions on the homeowners. Here, Ms. Young's case went to trial and she had *pro bono* counsel at her side to represent her and to present her defenses. When forfeiture was nonetheless granted by the trial court, Ms. Young appealed to the Commonwealth Court of Pennsylvania with the assistance of her *pro bono* lawyers. After briefing and oral argument before the appellate court sitting *en banc*, Ms. Young obtained a favorable decision overturning the trial court's ruling. However, years later, Ms. Young is still in legal limbo and not in possession of her home or car as the prosecutor's office sought and obtained further review from the Pennsylvania Supreme Court.<sup>146</sup>

In civil forfeiture cases, weak statutory protections are wholly inadequate to protect private property from government overreaching, especially where powerful financial incentives drive aggressive forfeiture practices. If family homes of the innocent are to be saved from civil forfeiture, a strongly enforced Excessive Fines Clause will need to do the heavy lifting.

## VI. WHOSE PROPERTY IS IT, ANYWAY?

At this point, we need to ask just whose property is caught up in the civil forfeiture web? Are harsh civil forfeiture laws applied evenly across racial

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home under Pennsylvania's civil forfeiture law, evicting her on the spot without any advance notice or opportunity to be heard. The seizure was based upon low-level drug sales allegedly committed by her adult son and her son's friend (who was temporarily living with them). Anna had agreed to allow her son's friend to live in her home because he had nowhere else to go. Upon seizure, Anna's clothes and household belongings were locked up in her home. She was excluded from her home for two months, forced to live temporarily with her sister in overcrowded conditions.

Anna had committed no crime, was never charged with a crime, and was not even suspected by police of any wrongdoing. Indeed, she had never been convicted of a drug offense in her life. With the Clinic's help, Anna filed a court motion to be restored to her home. Even after the filing, the D.A.'s Office refused to allow her to return to her home. The court held a full evidentiary hearing, after which it ordered that Anna be returned to her home. Though some measure of justice was ultimately obtained for her, it took two months and full legal proceedings just to get her back into her home. While the Clinic's cases largely involve home forfeitures, civil forfeiture focuses largely on cash and cars. In one Clinic case, the police confiscated the piggy bank belonging to our client's young daughter when they searched the client's home as a result of a third party's alleged drug offense. The piggy bank contained the young girl's birthday money totaling \$91. Neither mother nor daughter was ever charged with any criminal wrongdoing, but it still took over twelve months and many court appearances (with counsel) before our client was able to get her daughter's piggy bank money returned.

<sup>146</sup> On May 25, 2017, the Supreme Court of Pennsylvania issued a 73 page, unanimous decision affirming the order of the Commonwealth Court and remanding the case to the trial court for further proceedings consistent with the Court's opinion. The remand hearing has not yet been scheduled as of the writing of this article. *Commonwealth v. 1997 Chevrolet and Contents Seized from James Young [Elizabeth Young]*, 29 EAP 2015 (May 25, 2017) and *Commonwealth v. The Real Property and Improvements Known as 416 S. 62nd Street, Philadelphia, PA 19143 [Elizabeth Young]*, 30 EAP 2015 (May 25, 2017); *Commonwealth v. 1997 Chevrolet*, 106 A.3d 836 (Pa. Commw. Ct. 2014), appeal granted, 120 A.3d 993 (Pa. 2015).

groups and income levels? Do troubling concerns of disproportionality in our criminal justice system also apply to government's pursuit of civil forfeiture?<sup>147</sup>

We live in a time of *Big Data* when it is relatively easy to capture, record, and analyze large amounts of statistical information. To answer such questions, we should have easy access to a full range of demographic and default judgment statistics compiled by government authorities. Both law enforcement agencies and courts are well situated to know the demographics of those whose property is seized through civil forfeiture and the extent to which default judgments deprive property owners of their day in court. Despite the huge amounts of money that civil forfeiture amasses on both national and state levels, legislators have inexplicably failed to require that such essential information be reported to them and to the public.

Pennsylvania is typical of most states in requiring that the state attorney general and local district attorney's offices report annually the amount of homes, cars, and currency they forfeit and the total income generated from forfeiture proceeds. Yet, these are only summary reports; they do not provide the data necessary to answer whether civil forfeiture is being applied fairly to all citizens and communities.<sup>148</sup> Such information is not mandated by civil forfeiture laws, and it is revealing that law enforcement agencies do not voluntarily compile or disclose this information.

In Philadelphia County, official civil forfeiture reports provided by the local district attorney's office reveal that over a period of nine fiscal years (2005–2014), the Philadelphia D.A.'s office took in to its budget \$34.2 million in forfeited cash, 1,938 forfeited vehicles, and 746 forfeited homes, for a total of \$47.7 million in forfeited proceeds. Despite the magnitude of these numbers, the government's reports are silent about whose property was taken or whether property confiscation was applied fairly across racially and economically diverse communities. With such huge profits flowing to law enforcement agencies from confiscated property, it is hard to understand why legislators have not demanded to know whose constituents are most at risk in civil forfeiture.

There does not appear to be a single government study examining the race and income levels of homeowners who have lost their homes to civil forfeiture. Nor does there appear to be a government report analyzing whether the practice of seizing family homes from homeowners who are not

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<sup>147</sup> See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010) (arguing—*inter alia*—(1) that legislators have incentivized police drug arrests through asset forfeiture laws that allow prosecutors to keep the proceeds from seizures; and (2) that police fight the War on Drugs in predominantly black and Latino communities, independent of the prevalence of drug use among whites).

<sup>148</sup> 42 PA. CONS. STAT. § 6802(i)–(j) (2006).

charged with a crime makes communities safer or, conversely, whether it destabilizes fragile communities and undermines public safety.<sup>149</sup>

With such strong profit motives built into civil forfeiture laws, there is no satisfactory justification for not requiring answers to these fundamental questions from law enforcement authorities. The public should know whether aggressive civil forfeiture practices are applied fairly to all segments of the population or whether the most vulnerable members of our society disproportionately shoulder the burden of such harsh laws. A research study published ten years ago concluded that civil forfeiture petitions were brought more often in communities with a high proportion of African-American residents and in communities with a high degree of economic inequality.<sup>150</sup> More recent studies conducted by both non-profit organizations and investigative journalists have produced similarly disturbing results.

The ACLU of Pennsylvania has taken a close look at Pennsylvania civil forfeiture practices. After a months-long investigation in Philadelphia, in which the ACLU obtained public records and examined court files, the ACLU gathered summary data on every civil forfeiture case filed in Philadelphia in recent years and obtained in-depth information on a randomized sample of over 350 cash forfeiture cases from 2011 to 2013.<sup>151</sup> In addition, the organization interviewed property owners to learn more about their personal experiences with civil forfeiture.

The findings of the ACLU study present cause for concern. In particular, the ACLU study noted pronounced disparities resulting from civil forfeiture practices in Philadelphia:

[T]he racial composition of the group of Philadelphians affected by forfeiture laws is similar to the racial composition of the people arrested for forfeitable offenses in Philadelphia; African-Americans comprise approximately 60% of both groups. But experts have suggested that Philadelphia's high rate of arrest for black people results from racial bias in policing. This raises the question of whether law enforcement bias (either conscious or unconscious) is similarly responsible for the racial disparity in Philadelphia's enforcement of civil asset forfeiture laws. There are even more pronounced disparities among cash forfeitures

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<sup>149</sup> See *supra* note 86 and accompanying text.

<sup>150</sup> Research by two social scientists found that civil asset forfeiture claims were brought more often in communities with a high proportion of African-American residents. Robert Helms & S.E. Costanza, *Race, Politics, & Drug Law Enforcement: An Analysis of Civil Asset Forfeiture Patterns across US Counties*, 19 POLICING & SOCIETY 1, 13 (2007). Further, they found that civil asset forfeiture is more likely to occur in communities with a high degree of economic inequality. *Id.* at 13–14. Additionally, a prior report from the Drug Policy Foundation found that civil asset forfeiture has a disproportionate impact on racial minorities and the poor; the report also explained that Seattle's drug nuisance abatement program, which used civil forfeiture to seize buildings suspected of being involved in drug dealing, targeted property owned by racial minorities in 96% of cases. See SCOTT EHLERS, POLICY BRIEFING: ASSET FORFEITURE 9 (1999), [http://www.drugpolicy.org/docUploads/Asset\\_Forfeiture\\_Briefing.pdf](http://www.drugpolicy.org/docUploads/Asset_Forfeiture_Briefing.pdf) (noting that only one of the twenty-eight drug abatement cases in Seattle involved a white property owner).

<sup>151</sup> ACLU OF PA., GUILTY PROPERTY, *supra* note 99, at 10.

without supporting convictions. An estimated 7 out of 10 people whose cash is taken by Philadelphia law enforcement agencies even though they have not been convicted of a crime are African-American.<sup>152</sup>

The ACLU study also examined civil forfeiture enforcement in other Pennsylvania counties. In Montgomery County, a suburban county located outside of Philadelphia, only 9% of the population is black, yet black people made up 37% of those arrested for forfeitable offenses and 53% of property owners facing forfeiture.<sup>153</sup> In Cumberland County, located in south-central Pennsylvania, only 3% of the population is black, but black people make up 15% of those arrested for forfeitable offenses and 36% of property owners targeted for forfeiture.<sup>154</sup> According to the ACLU, it appears that in Cumberland County black people are eighteen times more likely to be the targets of civil forfeiture than are people of other races.<sup>155</sup>

The ACLU study also raised troubling concerns about one-sided outcomes in civil forfeiture cases. From 2012 to 2014, 92% of the 1,502 forfeiture actions filed against individual property owners in Montgomery County ended in the government's favor, 7.7% ended in a settlement or partial forfeiture, and only 0.3% resulted in favor of the property owner.<sup>156</sup> Montgomery County property owners were three times less likely to successfully defend their case than Philadelphia County property owners.<sup>157</sup>

The Center for American Progress (“Center”), a non-profit organization located in Washington, D.C., has also conducted research on civil forfeiture practices. In a recently published report, the Center noted that “[w]hile available data on the populations affected by civil asset forfeiture are limited, an array of analyses conducted by media outlets and advocacy organizations suggests that people of color are disproportionately impacted by civil asset forfeiture.”<sup>158</sup> The report referred to civil asset forfeiture as “the new stop and frisk.”<sup>159</sup> It cited a 2014 analysis by the *Washington Post* that examined 400 court cases across 17 states which found that, “where people . . . challenged seizures and received some money back, the majority were black, Hispanic, or another minority.”<sup>160</sup> While the *Post*'s analysis examined only cases where property owners successfully challenged forfeitures, people of color appear to bear the brunt of civil asset forfeiture—whether they challenge it

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152 *Id.*

153 ACLU OF PA., BROKEN JUSTICE, *supra* note 89, at 6, 8 n.22.

154 ACLU OF PA., FORFEITURE IN THE SHADOWS: AN INVESTIGATION OF CIVIL ASSET FORFEITURE IN CUMBERLAND COUNTY 5, 8 n.24 (2015), [https://www.aclupa.org/files/2114/5010/9994/CumberlandCounty\\_Forfeiture\\_Report-Final.pdf](https://www.aclupa.org/files/2114/5010/9994/CumberlandCounty_Forfeiture_Report-Final.pdf).

155 *Id.* at 5–6, 8 n.25.

156 ACLU OF PA., BROKEN JUSTICE, *supra* note 89, at 3–4.

157 *Id.*

158 FORFEITING THE AMERICAN DREAM, *supra* note 67, at 5.

159 *Id.*

160 *Id.*



or not—in states and cities across the United States, according to the Center’s findings. For example, the report cited an Oklahoma study examining 401 cash seizures made between 2010 and 2015 in ten Oklahoma counties that found that nearly two-thirds of seizures came from African Americans, Latinos, and other racial and ethnic minorities, even though 75% of the state’s population is white.<sup>161</sup>

The Center also expressed concern that cash forfeitures keep low-income families from getting ahead and can actually drive them deeper into poverty. The Center’s report suggested that low-income and minority communities may be particularly hard-hit by civil forfeiture because they are more likely to be disconnected from the financial mainstream, leaving their residents more likely to carry cash.<sup>162</sup> Low-income and minority residents are especially likely to operate outside the financial mainstream: As of 2013, nearly half of all black and Latino households were unbanked or underbanked compared with one in five white households.<sup>163</sup> Because unbanked and underbanked individuals are often forced to carry relatively large sums of cash—such as a full month’s rent payment or wages from an entire pay period—they can be especially vulnerable to civil forfeitures of cash.

The Center’s report also expressed concern that low-income individuals may face special barriers to challenging governmental seizures.<sup>164</sup> The cost of taking off from work to appear in court on multiple occasions can be too costly for individuals living paycheck to paycheck, and their absence from work may even threaten their continued employment. The Center reported that on average, a property owner facing civil forfeiture must spend four days in court to challenge the seizure of his or her property, and this can have a devastating impact upon low-wage workers.<sup>165</sup>

Finally, the Center reported that while cash seizures make up the vast majority of civil forfeiture cases, the seizure of cars and homes can be even more devastating to low-income individuals. The Center cited an analysis by the Institute for Justice that found that Texas and Virginia seized more

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161 *Id.* The Center’s report also cited the data and analysis from the ACLU’s “Guilty Property” report. ACLU OF PA., GUILTY PROPERTY, *supra* note 99.

162 *See* FORFEITING THE AMERICAN DREAM, *supra* note 67, at 6 (“In 2013, the most recent year for which data are available, 17 million Americans were unbanked—meaning they did not have a bank account—and 51 million Americans were underbanked—meaning they had a bank account but still utilized alternative financial providers, such as pawn shops or check cashers. Half of all households with income of less than \$15,000 were either unbanked or underbanked.”) (endnotes omitted).

163 *Id.*

164 *Id.*

165 *See id.* (“For a minimum-wage worker, the cost of taking off work for four days is \$232—and that is if the worker’s employer will permit time off, a luxury many low-wage workers do not have. There is also the cost of hiring an attorney to help navigate the complex laws—an expense that most low-income individuals cannot afford—leaving many without legal representation given the scarcity of civil legal aid and other free or low-cost legal services.”) (endnotes omitted).

than 17,000 vehicles between 2001 and 2007.<sup>166</sup> The average value of seized vehicles was less than \$6,000, which strongly suggests that low-income people are most affected in those states.<sup>167</sup>

The Penn Law Clinic has provided free representation to low-income property owners in Philadelphia civil forfeiture cases for almost fifteen years. In the Clinic's experience over this lengthy time, clients caught up in civil forfeiture are overwhelmingly black and, to a lesser degree, Latino. This conclusion is based upon a review of the clients who sought legal assistance from the Clinic as well as regular observations of property owners awaiting the call of their cases in Philadelphia's dedicated, full-time civil forfeiture courtroom. This same conclusion was also reported by an investigative journalist studying Philadelphia civil forfeiture practices.<sup>168</sup> Based upon these observations, the Penn Law Clinic decided to take a closer look at available data to determine if actual court filings confirmed these observations.<sup>169</sup>

The Penn Law Clinic obtained data on every real estate forfeiture petition filed by the Philadelphia D.A.'s office during calendar year 2010. This data showed that the D.A.'s office filed 479 real estate civil forfeitures in that calendar year.<sup>170</sup> Excluding commercial properties, we charted the official assessed value and geographical location of each of the 452 homes against which a civil forfeiture petition was filed in that year. The results were troubling.

We learned that the mean assessed value of all residential properties in 2010 was only \$23,174.34.<sup>171</sup> The median value was even lower at \$18,550.00, meaning that half of all homes against which civil forfeiture actions were filed had an official assessed value of under \$18,550.00.<sup>172</sup> Perhaps, most revealing, we learned that 75% of all homes in civil forfeiture had an official assessed value of \$29,900 or less.<sup>173</sup> These low-assessed values

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166 *Id.*

167 *Id.* at 7, 21 n.40 (citing POLICING FOR PROFIT (1st ed.), *supra* note 135, at 29).

168 See Thompson, *The Cash Machine*, *supra* note 80 ("The majority of those affected [by civil forfeiture] . . . [are] generally black or Hispanic, working-class and poor.").

169 Pennsylvania's civil forfeiture laws provide limited transparency to the public, mandating only that prosecutors provide annual reports with summary information about the types of forfeited property and forfeiture revenues. 42 PA. CONS. STAT. § 6802(i)-(j) (2006).

170 Brief of Amici Curiae, American Civil Liberties Union of Pennsylvania, Community Legal Services, Philadelphia NAACP, Philadelphia Legal Assistance, Philadelphia Volunteers for the Indigent Program, and SeniorLaw Center at Exhibit C, D, Commonwealth v. 1997 Chevrolet, 2017 WL 2291733 (Pa. Mar. 23, 2016) (No. 29 EAP 2015, No. 30 EAP 2015) [hereinafter ACLU-PA Young Amicus Brief].

171 ACLU-PA Young Amicus Brief, *supra* note 170, at Exhibit D.

172 *Id.*

173 See *infra* Appendix (ex. A.4). Because average property values are reported by ward, median values for the City are not available. Between 2010 and 2015 the City of Philadelphia engaged in an actual value initiative ("AVI"), which consisted of a reassessment of the value of properties in the city. In 2015 terms, the median value of homes against which forfeitures were brought in 2010 was \$61,250. See *infra* Appendix (exs. A.3, A.4). Still, over half of the homes against which forfeiture

confirm the Penn Law Clinic's experience and observations that civil forfeiture actions are overwhelmingly brought against Philadelphia homes owned by families of very modest means who lack the financial resources to pay for legal representation.

The Penn Law Clinic also mapped out the physical location of each of the 452 real estate civil forfeitures filed in calendar year 2010 (excluding commercial properties) to determine which communities were most affected by civil forfeiture. We used *PolicyMap*,<sup>174</sup> a geographical mapping software program that integrates official census data and related demographic information into the mapping program. Using this software, we generated a map of the City of Philadelphia containing a pinpoint for every civil forfeiture action filed against a Philadelphia home in 2010. This map, displayed in the Appendix to this Article (as Exhibit A.1), demonstrates that civil forfeiture petitions filed against homes are overwhelmingly concentrated in those areas of the City that have the highest concentrations of non-white residents.<sup>175</sup>

Race-based disparity came into even sharper focus in a close-up mapping and analysis of the expanded Center City area of Philadelphia.<sup>176</sup> The expanded central area of the City has a high white population, in contrast to neighborhoods directly to the north and west of Center City. In this expanded central part of the city, the D.A.'s office filed only one civil forfeiture petition out of a total of 452 petitions filed against homes in 2010.<sup>177</sup> Upon review of that one petition, we confirmed that this home belonged to a black family.<sup>178</sup> Significantly, not a single forfeiture petition was brought against a white family's home in the heavily populated Greater Center City area of Philadelphia. This race-skewed result is difficult to explain because we know that drug activity occurs in this heavily populated area of the City and, in fact, police records document an average of around 464 drug-related incidents annually in the Greater Center City Area.<sup>179</sup> In short, while drug activity definitely occurs in this largely white residential area of the City, there

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petitions were filed were valued at less than \$80,000—the amount of the maximum authorized fines in Ms. Young's case.

174 POLICYMAP, <https://www.policymap.com/> (last visited Oct. 28, 2016).

175 See *infra* Appendix (ex. A.1).

176 See *infra* Appendix (ex. A.2). For this purpose, the expanded central part of the City was defined as the area from the Delaware River to 44th Street and Powelton Avenue in the West and from Washington Avenue in the South to Fairmount Avenue in the North. *Id.*

177 ACLU-PA Young Amicus Brief, *supra* note 170, at 30.

178 2305 Montrose Street is located in one of the few remaining predominately non-white areas of the central part of the City and was owned by a black family. *Id.* The race of the family was determined from a review of publicly-available criminal records of underlying and related criminal offenses of family members which contained race information.

179 This data was discovered by obtaining a letter and CD from the Open Records Officer of the Philadelphia Police Department on April 8, 2016, which contained Part II crime data regarding non-violent offenses, including drug offenses from the years 2012-2014 to calculate an approximate annual average. Crime Incidents, PHILA.GOV, <http://www.opendataphilly.org/dataset/crime-incidents> (last visited May 10, 2017).

was not a single civil forfeiture petition filed against the home of a white family in all of 2010.<sup>180</sup>

Notably, our review utilizing *PolicyMap* software also revealed that the vast majority of real estate forfeitures filed by Philadelphia prosecutors in 2010 were brought against families in the City's lowest income bracket—those making less than \$41,114 per year.<sup>181</sup> In short, the graphic mapping of 2010 civil forfeiture petitions demonstrates that Philadelphia prosecutors disproportionately filed civil forfeiture petitions against low-income families of color. These families largely lack the financial resources needed to hire a lawyer and frequently must proceed on their own if they wish to defend against civil forfeiture petitions brought to take away their homes.

These studies do not answer the question of what, if anything, happens to the property of affluent whites when we know that serious drug activity has occurred at their homes. While we are unaware of any empirical study that addresses this question, three prominent Pennsylvania drug cases are highly instructive and suggest that the homes of affluent whites are likely to escape civil forfeiture.

The clearest example of disparate treatment involved the expensive home of Andy Reid, a former head coach of the Philadelphia Eagles.<sup>182</sup> Andy Reid struggled as many parents do with his sons' drug problems. His two adult sons were arrested and convicted of serious drug charges while residing in Andy Reid's suburban Philadelphia home.<sup>183</sup> Police searched his home where they found illegal drugs, prescription pills, weapons, and ammunition. One of Reid's sons admitted in a probation report that he sold drugs to his friends and their parents in the suburbs and in tough areas of Philadelphia, and that he liked being a drug dealer.<sup>184</sup> At a hearing for one of Reid's sons, the sentencing judge said that Andy Reid's family was "in crisis" and described his home as a "drug emporium . . . with drugs all over the house."<sup>185</sup>

Despite the pervasiveness of illegal drugs in the Reid home, and despite the fact that some of the charges—carrying a firearm without a license, hitting another driver while driving under the influence—carried overtones of

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180 According to reported studies, while marijuana is used at roughly comparable rates by white and black people, a black Pennsylvanian is 5.19 times more likely than a white Pennsylvanian to be arrested for marijuana possession. See, e.g., ACLU, THE WAR ON MARIJUANA IN BLACK AND WHITE 18 (2013), [https://www.aclu.org/sites/default/files/field\\_document/1114413-mj-report-rfs-re11.pdf](https://www.aclu.org/sites/default/files/field_document/1114413-mj-report-rfs-re11.pdf).

181 ACLU-PA Young Amicus Brief, *supra* note 170, at 37.

182 See Gary Myers, *Judge Calls Andy Reid Home a Drug Den*, N.Y. DAILY NEWS (Nov. 2, 2007, 4:00 AM), <http://www.nydailynews.com/sports/football/judge-calls-andy-reid-home-drug-den-article-1.256416>.

183 ACLU-PA Young Amicus Brief, *supra* note 170, at 33.

184 *Id.* at 33–34.

185 *Reid Brothers Receive Jail Terms; Judge Cites 'Family in Crisis'*, ESPN (Nov. 2, 2007), <http://espn.com/nfl/news/story?id=3089753>.

violence, the Reid home was never seized in a civil forfeiture proceeding for the serious and undisputed drug offenses committed by his sons.<sup>186</sup>

A second incident involved suburban high school students residing on Philadelphia's affluent mainline. According to published reports, Neil Scott and Timothy Brooks—both graduates of the prestigious Haverford School—started a drug trafficking operation based in the affluent Main Line suburbs.<sup>187</sup> Their operation had connections at Lower Merion High School, Radnor High School, Harrington High School, and, eventually, Haverford College. The operation was highly profitable, earning each partner several thousand dollars per week.<sup>188</sup> Both ringleaders regularly had packages of marijuana delivered to their homes. They were arrested in 2014, but despite a direct connection between drug activity and their homes, civil forfeiture petitions were not filed against the homes in which Neil Scott and Timothy Brooks resided.<sup>189</sup>

This is not to suggest that civil forfeiture petitions are never brought against white, affluent individuals. According to police reports, Philadelphia pediatrician Jan Widerman and his wife, Annette, were arrested in February 2016 after police discovered a marijuana growing operation at their home in suburban Bucks County, Pennsylvania.<sup>190</sup> They were charged with felony and misdemeanor drug offenses.<sup>191</sup> Apparently, police and firefighters had responded to Dr. Widerman's home for a car fire that had spread to his garage. "As crews extinguished the flames and searched inside the home for occupants, they found 40 marijuana plants in various stages of growth . . . along with grow lamps and ventilation systems . . ." <sup>192</sup>

In May 2016, the Bucks County District Attorney's Office filed a civil forfeiture petition in connection with its criminal prosecution of the

186 ACLU-PA Young Amicus Brief, *supra* note 170, at 34.

187 Simon Van Zuylen-Wood, *The Fall of the Main Line Drug Ring*, PHILA. MAGAZINE (July 27, 2014), <http://www.phillymag.com/articles/fall-main-line-drug-ring-high-hopes/>.

188 *Id.*

189 Our research through multiple databases did not reveal any civil forfeiture petition filed against either home of Neil Scott or Timothy Brooks. As of the writing of this article, it appears that the statute of limitations has expired for the filing of a civil forfeiture petition. See 42 PA. CONS. STAT. § 5524(5) (2004) (providing a two-year limitation period for "[a]n action upon a statute for a civil penalty or forfeiture").

190 Anastasia Weckerly & David Chang, *Philadelphia Pediatrician Arrested for Pot Growing Operation: Police*, NBC 10 PHILA. (Mar. 31, 2016), <http://www.nbcphiladelphia.com/news/local/Philadelphia-Pot-Growing-Pediatrician-in-Court--374160561.html> [hereinafter Weckerly & Chang, *Philadelphia Pediatrician Arrested*].

191 See *Commonwealth v. Widerman*, No. CP-09-CR-0005432-2016 (Ct. C.P. Bucks Cty. Aug. 18, 2016) (showing the docket for criminal proceedings against Jan Widerman); *Commonwealth v. Widerman*, No. CP-09-CR-0005433-2016 (Ct. C.P. Bucks Cty. Aug. 18, 2016) (noting the docket for criminal proceedings against Annette Widerman).

192 Weckerly & Chang, *Philadelphia Pediatrician Arrested*, *supra* note 190.

Widermans.<sup>193</sup> Significantly, however, this forfeiture petition did not target the Widerman home—the key instrument of the Widermans’ alleged marijuana growing operation. Rather, the D.A.’s Office sought forfeiture of \$16,410.82 in cash and three silver troy ounce coins, which the police alleged were in Dr. Widerman’s possession at the time of his illegal drug activity.<sup>194</sup> In sharp contrast to the government’s aggressive pursuit of the homes of minorities for their adult children’s minor marijuana exchanges which, at best, are tangentially connected to their homes, the government chose not to seek civil forfeiture of the Widerman home even when it was the situs of a large marijuana growing operation carried on by the homeowners. The difference in treatment is disturbing.

These three examples underscore the importance of knowing just whose homes are at risk in civil forfeiture. They suggest troubling questions of selective enforcement that adversely affects low-income homeowners and people of color. We need to know whether white homeowners escape civil forfeiture prosecution under similar (or more serious) circumstances. As heroin moves increasingly to white, affluent suburbs,<sup>195</sup> it will be telling whether the government’s use of civil forfeiture against family homes follows this migration of drug activity.

The lesson to be learned from these preliminary studies is clear: When governmental power is tilted so heavily in its favor and the law does not provide a right to counsel to those who are most vulnerable, vigorous judicial enforcement of constitutional protections is essential. If prosecutors are intent on seeking the forfeiture of homes owned by low-income and vulnerable homeowners who have not committed a crime, and legislators are unwilling to enact meaningful reforms that balance the scales of justice, courts must step up to curb abusive punishments. The Excessive Fines Clause cannot be an illusory promise in the dangerous world of civil forfeiture.

## VII. WEAK STATUTORY PROTECTIONS DEMAND STRONG CONSTITUTIONAL PROTECTIONS

Although a few states have recently adopted statutory reforms,<sup>196</sup> vulnerable property owners must be able to invoke state and federal constitutional

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<sup>193</sup> See *In re Jan Widerman*, No. CP-09-MD-1179-2016 (Ct. C.P. Bucks Cty. May 5, 2016). Both the criminal and civil forfeiture matters are still in litigation at the time of the writing of this Article. See *id.* (listing the case status as “active”); *Commonwealth v. Widerman*, No. CP-09-CR-0005432-2016 (Ct. C.P. Bucks Cty. Aug. 18, 2016) (noting the same “active” status).

<sup>194</sup> *Id.*

<sup>195</sup> *60 Minutes: Heroin in the Heartland* (CBS television broadcast Nov. 1, 2016).

<sup>196</sup> A few states have adopted civil forfeiture reforms. For example, Minnesota, New Mexico, and Montana each have enacted legislation providing that the government may not take private property in civil forfeiture unless the property owner has been criminally convicted of the offense on which the forfeiture is predicated. MINN. STAT. § 609.531, subdiv. 6a(b)(1) (2016); N.M. STAT.

protections as a final line of defense against abusive punishments. Weak statutory protections in most civil forfeiture laws, coupled with disturbing evidence of disproportionate enforcement, demand that courts diligently enforce constitutional protections against excessive fines.

When the Supreme Court held in *Austin* that the Excessive Fines Clause applies to statutory *in rem* civil forfeiture, it found that forfeited property must be instrumental to the commission of the underlying criminal offense.<sup>197</sup> Apart from this “instrumentality” requirement, the *Austin* Court left the initial development of a multi-factor “excessiveness” test to the lower courts.<sup>198</sup> However, before lower courts were able to develop such a test, the Supreme Court announced a proportionality test in *Bajakajian* when applying the Excessive Fines Clause to *in personam* criminal forfeitures.

The *Bajakajian* Court directed that courts should “compare the amount of the forfeiture to the gravity of the defendant’s offense” to determine if it was grossly disproportional and thus unconstitutional.<sup>199</sup> While acknowledging that this determination was “inherently imprecise,” the *Bajakajian* Court identified several relevant, non-exclusive factors for courts to consider; to wit—the maximum authorized penalty for the defendant’s offense, the penalty actually imposed; whether the offense was isolated; and the harm resulting from the offense.<sup>200</sup> These factors were tailored to the criminal forfeiture context where the forfeiture of private property is predicated upon the property owner’s conviction of the predicate offense(s).

Prosecutors have attempted to apply strictly *Bajakajian*’s proportionality test to both criminal *and* civil forfeitures. Of course, a civil forfeiture action is very different. Civil forfeiture is an *in rem* action that proceeds on the legal fiction of “guilty” property—that certain property has done wrong by facilitating criminal activity. Civil forfeiture *is not* predicated upon the property owner’s guilt; indeed, the property owner need not be charged with a criminal offense. And in many cases the property owner is not the person accused of criminal wrongdoing. Nonetheless, prosecutors still argue that the “excessiveness” *vel non* of a civil forfeiture should be determined simply by comparing the property’s value to the maximum statutory fine for the alleged underlying offense.

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ANN. § 31-27-4 (2015); MONT. CODE ANN. §§ 44-12-206–213 (West 2015). In addition, the New Mexico law directs all “forfeited currency and all . . . proceeds [from] the sale of forfeited . . . property” into a general fund—rather than to law enforcement—and prohibits equitable sharing. N.M. STAT. ANN. §§ 31-27-7–11 (2015).

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

198 *Id.* at 622–623, 623 n.15.

199 *Bajakajian*, 524 U.S. at 336–37.

200 *Id.* at 339.

Here, Ms. Young's case illustrates the danger of rigidly applying *Bajakajian's* proportionality test, meant for criminal forfeitures, to the civil forfeiture of a home and car. At trial, Ms. Young's lawyer argued that the forfeiture of her home and car for low-level marijuana sales by her adult son, Donald, would constitute an excessive fine. The trial court made a cursory assessment of "the gravity of the [underlying] offense" and agreed with the prosecutor that Donald "theoretically could have faced criminal penalties of \$80,000 for making four sales of marijuana in December 2009 and January 2010."<sup>201</sup> The Court then mechanically compared this maximum authorized fine to the fair market value of Ms. Young's home, approximately \$54,000 (based on evidence presented). The prosecutor argued at trial that the proposed forfeiture was not "excessive" because the value of Ms. Young's home fell below the maximum fine that could have been imposed against Donald. The prosecutor did not offer, and the trial court did not require, any evidence of the *actual* fine imposed against Donald for these several marijuana sales.<sup>202</sup> Nor did the prosecutor offer any evidence of specific harm from the controlled marijuana buys initiated by police and confidential informants. Instead, the prosecutor argued that the trial court should infer generalized harm because drug activity has undesirable social consequences and jeopardizes the safety of neighbors and police officers.<sup>203</sup> The trial court adopted the prosecutor's arguments and ruled that the forfeiture of Ms. Young's home and car was not an excessive fine for her son's marijuana sales.<sup>204</sup>

In many (if not most) Pennsylvania civil forfeiture cases, an excessive fines defense is not raised at all because the property owner lacks counsel and is unaware of this constitutional defense. Neither the prosecutor nor the trial court inform the property owner of this defense and a notice of this right is not required by statute. While trial courts may, on occasion, inform an unrepresented property owner of the existence of an innocent owner defense or of a right to a jury trial, I have never observed a Philadelphia trial court inform a property owner *sua sponte* that both the U.S. and Pennsylvania constitutions prohibit excessive fines. In the large number of civil forfeiture cases that result in default judgments, the constitution is rarely mentioned; homes and cars and cash are forfeited with judicial rubber-stamping of the prosecutor's paperwork. Local courts do not even require that the government present a *prima facie* showing before entering a default judgment and taking a home from its lawful owner. In sharp contrast, Philadelphia courts will not

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201 *1997 Chevrolet*, 106 A.3d at 846, 849.

202 The criminal court did not impose a fine on Donald Graham for the underlying marijuana offenses in this case, but it did require him to pay standard court costs of approximately \$700. *Commonwealth v. Graham*, No. CP-51-CR-0000643-2010 (Ct. C.P. Phila. Cty. Sept. 15, 2010).

203 Forfeiture Hearing, *Commonwealth v. 416 S. 62nd St.*, No. CP-51-MD-0002972-2010, at 97-98 (Ct. C.P. Phila. Cty. May 1, 2012).

204 *1997 Chevrolet*, 106 A.3d at 846-47 (citing Trial Court Op. at 14).



enter a judgment in a quiet title case that shifts legal title from a private owner to another unless the claimant puts forth evidence proving the essential elements of the claim, even when there is no opposition filed by the title owner. There are no *paperwork* defaults in quiet title actions as there are in civil forfeiture actions.

When a property owner contests a civil forfeiture petition, the Excessive Fines Clause must be more than a paper tiger. However, this will not happen if courts rigidly apply *Bajakajian*'s proportionality test in the civil forfeiture context. Ms. Young's case aptly illustrates the problem. There, the trial judge found that the combined value of Ms. Young's house and car amounted to less than the amount of the maximum fine that *could* have been imposed on her son, and on that basis concluded that "the real property and vehicle forfeited were not grossly disproportionate to the gravity of the offense." In a mere fifteen lines of text in her opinion, the trial judge swept aside Ms. Young's constitutional defense.

This highlights the danger of rigidly applying a gross proportionality test meant for criminal forfeiture in a civil forfeiture case. Even when the property owner was not the wrongdoer and a family home was at stake, the *Young* trial court applied the same mechanical test to determine whether a fine was excessive.<sup>205</sup> It is understandable why prosecutors want to reduce the Excessive Fines Clause to a mathematical comparison between these two numbers: Under such a test, the prosecutor almost always wins. Yet, such a rigid "excessiveness" test negates any meaningful constitutional protection<sup>206</sup> because the maximum statutory fines for most drug offenses—even minor ones—far exceed the market value of inner-city homes, thereby resulting in a presumption against "excessiveness" and in favor of forfeiture.<sup>207</sup>

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205 One scholar has expressly stated that "*Bajakajian* does not answer every question about the test for excessiveness." Yan Slavinskiy, *Protecting the Family Home by Reunderstanding United States v. Bajakajian*, 35 CARDOZO L. REV. 1619, 1634 n.121 (2014) (quoting SMITH, PROSECUTION AND DEFENSE, *supra* note 39, at ¶13.05).

206 On appeal, the Commonwealth Court of Pennsylvania reversed the trial court in *1997 Chevrolet* and issued a comprehensive *en banc* decision requiring a multi-prong, fact-intensive inquiry when determining whether a forfeiture is excessive. *1997 Chevrolet*, 106 A.3d at 863–66. The government sought review of the Commonwealth Court's decision in the Pennsylvania Supreme Court, *Commonwealth v. 1997 Chevrolet*, 120 A.3d 993 (Pa. 2015), which granted the request. (This Article's author co-authored an amicus brief in support of the property owner in that case). The parties are currently awaiting a ruling on the merits of that appeal.

207 For example, in CY2010, the Philadelphia D.A.'s office filed civil forfeiture petitions against 452 homes; the median home value was only \$18,550. *See infra* Appendix (ex. A.4). Of those 452 homes, only eight homes were assessed higher than \$80,000, the maximum statutory fine for the low-level drug offenses charged against Ms. Young's son. *Id.* Under the government's arguments, all but those eight owners would be presumed to lack constitutional protection under the same circumstances as the *Young* case. Moreover, the mean assessed home value in Philadelphia in 2010 was just \$44,143.52. *Id.* Thus, under the government's interpretation of the Excessive Fines Clause, civil forfeiture of the average Philadelphia home (in 2010) would be presumptively constitutional. Such an interpretation eviscerates the Excessive Fines Clause; so interpreted, the Clause

If an Excessive Fines analysis depends upon this simple comparison of property value to the maximum statutory fine for the underlying offense, regardless of whether a crime is even proven, the Eighth Amendment's protection will turn mostly on the market value of a home, rather than upon individualized considerations related to the property's instrumentality, the owner's culpability, or the owner's personal circumstances. In inner-city minority communities, homeowners are more vulnerable under this standard because their homes are generally lower in value than their suburban counterparts. Under this test, the very same underlying criminal conduct results in constitutional protection for wealthy families with expensive homes while denying similar protection to families of modest means.

Such a test turns the Constitution on its head. As some courts have observed, property owners with fewer resources should actually enjoy *greater* constitutional protection against excessive fines.<sup>208</sup> Otherwise, a strict proportionality analysis will generally permit the forfeiture of property from persons of lesser means, while prohibiting forfeiture from persons of greater means under identical factual circumstances.<sup>209</sup>

This cannot be the proper constitutional test. A robotic, mechanical evaluation of gross proportionality creates a tale of two cities in which the homes of low-income citizens are forfeited because their homes are worth less on the open market, leaving those who are most vulnerable to the crushing loss of shelter without any meaningful constitutional protection against excessive punishments.

#### VIII. A FACT-INTENSIVE INQUIRY MUST BALANCE FIVE ESSENTIAL FACTORS

To be true to the history and purpose of the Excessive Fines Clause, I contend that the Eighth Amendment requires courts to conduct a fact-intensive inquiry and balancing of five essential factors: (1) Instrumentality; (2) Culpability; (3) Proportionality; (4) Harm; and (5) Consequences. When properly applied, these factors will guide courts to navigate successfully the imprecision inherent in excessiveness inquiries and to reach a constitutionally sound determination. Ultimately, the bottom-line question is whether a forfeiture of private property is excessive relative to *something*, but exactly as to what is admittedly complicated. In the simple mathematical equation advanced by prosecutors, courts would sidestep this difficult question so evident

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would not protect the average Philadelphia homeowner against civil forfeiture of his or her home—despite the relatively minor nature of the predicate offense(s).

208 See, e.g., *Stuart v. State Dep't of Safety*, 963 S.W.2d 28, 36 (Tenn. 1998) (stating that a court's excessive fines analysis "should consider the monetary value of the property forfeited, particularly in light of the claimant's financial resources. A forfeiture is less likely to be excessive when the claimant has the financial ability to replace the property without undue hardship.").

209 *Id.* at 36 n.12.

in the *Adams* and *Young* cases, where the homeowner and the alleged perpetrator are not the same person. But the Constitution is not so easily short-circuited.

Until now, the proper development of a multi-factor test under the Excessive Fines Clause has been confused and even stunted by an overly-narrow reading and rigid application of the *Bajakajian* test. Of course, *Bajakajian* was a not a civil forfeiture case; it was a criminal forfeiture case. Thus, the *Bajakajian* Court did not need to confront the difficult issue of determining the level of “wrongdoing” required to forfeit property of an owner who did not commit a crime. Nor did it have to consider whether a grandparent is expected to be a guarantor that no criminal wrongdoing will ever touch her property. Yet civil forfeiture raises such difficult issues. In civil forfeiture, the homeowner is often not the wrongdoer, and the focus is on the “guilt” *vel non* of the realty itself. When the government contends that the home “facilitated” a crime, what should be made of the homeowner’s culpability? Will ordinary negligence by a non-consenting homeowner provide sufficient legal justification to take her home? Or must the homeowner have engaged in some measure of *intentional* conduct to warrant the forfeiture of her home? And if civil forfeiture relies on the legal fiction that the property has somehow done wrong, just how involved in that wrongdoing must the property be?

These questions cannot be answered by a mathematical comparison. Instead, I contend that the proper constitutional test requires a court to conduct a meaningful factual inquiry into five factors—instrumentality, culpability, proportionality, harm, and consequences—and then to carefully balance their outcomes in order to satisfy the meaning and purpose of the Excessive Fines Clause.

- *INSTRUMENTALITY OF THE PROPERTY.* Civil forfeiture is an *in rem* action against property premised on the legal fiction of “guilty” property. Accordingly, courts must examine the relationship between the “suspect” property and the alleged offense to determine whether the property truly “facilitated” that offense. Was the property essential to the offense or was it only tangential? As the property’s “instrumentality” to the alleged offense decreases, it becomes more likely that the forfeiture of that property constitutes an excessive fine, especially where the property in question is a family home. Indeed, instrumentality may be considered a *threshold* requirement; if the government is unable to demonstrate that the seized property is an instrumentality of the underlying crime, the constitutional analysis need not go further. Without a showing of instrumentality, a forfeiture is unconstitutional.<sup>210</sup>
- *CULPABILITY OF PROPERTY OWNER.* While an *in rem* forfeiture does not require a criminal conviction of the property owner, it does impute some culpability to the owner. Civil forfeiture is predicated upon the legal fiction of “guilty” property, but legal fictions can be taken too far. It would be pure folly not to

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210 See, e.g., *Commonwealth v. 1997 Chevrolet and Contents Seized from James Young* [Elizabeth Young], No. 29 EAP 2015, 30 EAP 2015, 2017 WL 2291733, at \*21–22, 27 (Pa. 2017).

recognize that a civil forfeiture results in the taking of a home from a person and usually a family. When the perpetrator of an offense is not the homeowner, as in both the Adams' case and Ms. Young's case, we must consider the homeowner's relative culpability. It may be argued that intentional conduct or even reckless indifference by a homeowner is sufficient to satisfy this requirement. But will mere negligence also suffice? Just how much knowledge or inaction by a homeowner is sufficient when police initiate and covertly set up controlled drug buys at the home via cell phone calls to someone other than the property owner, and police records confirm that the homeowner was not present when these controlled buys took place? Clearly, the owner's conduct (or lack of conduct) must be a part of a culpability determination as to whether the forfeiture of a home is excessive.

- *PROPORTIONALITY.* Courts must determine the relationship between the value of the property and the gravity of the underlying offense to determine proportionality. But, this is not as easy as it sounds, and it certainly cannot be reduced to a simple equation. How do we measure the value of a family home? One measure is its fair market value. But the value of a family home is more than the economic value assigned to its sale in the free market. The family home has special significance in both American life and jurisprudence, and for a low-income family it represents their most important asset that prevents them from slipping deeper into poverty. It is not easily replaced. In other words, home value holds a special, contextualized meaning. Similarly, an assessment of the gravity of an underlying offense may arguably begin with a look at the maximum statutory fine authorized by the legislature, but that assessment must be balanced by other factors as well. The actual fine imposed by a presiding judge who heard the facts of the criminal case is more likely to accurately reflect the gravity of the offense, especially when one compares the imposed fine to the maximum authorized fine.
- *HARM TO THE COMMUNITY.* Courts should review evidence of actual harm caused to the community by the offending conduct, including harm to neighbors and police officers, and especially to children. Is there a serious pattern of offending conduct that adversely affects the safety and welfare of others in close proximity? At the same time, courts should also consider whether a homeowner is a constructive member of her community and a good neighbor whose stability helps improve the lives those around her. It is appropriate to ask whether the forfeiture of a home will leave the building vacant for long periods of time, only contributing to urban blight and neighborhood instability?
- *CONSEQUENCES FROM FORFEITURE.* The final line of inquiry should examine the personal consequences that will result if a family home is forfeited to the government. Will the forfeiture leave the family homeless? Will it disrupt the education of innocent children? Will it deprive the homeowner of her livelihood and community support network? Or will there be no real consequences to the owner, as when the property is a sham for illegal activity by non-residents or straw parties who use the building for illegal gain at the community's expense?

These factors will require factual development and careful balancing to determine constitutional excessiveness, but courts are accustomed to conducting such fact-intensive determinations to satisfy constitutional demands.<sup>211</sup>

While the Supreme Court has yet to establish a comprehensive test to determine excessiveness in *in rem* forfeitures, and particularly where the property owner is not the perpetrator of the underlying crime, a growing number of federal and state courts have rejected the application of strict mathematical comparisons to determine constitutionality. The Second Circuit has held that “[t]he greater the property’s involvement in the offense—both in terms of its temporal and spatial reach and the other uses to which the property was being put—the stronger the argument that the forfeiture is not excessive.”<sup>212</sup> The Ninth Circuit has held that the property owner’s relative culpability is a necessary factor.<sup>213</sup> And a California federal court noted that examining other factors beyond simply maximum authorized fines and fair market values provides a needed check on the government’s “potential for abusive use of the civil forfeiture statutes.”<sup>214</sup>

Several state courts have also rejected a rigid mathematical test that does not consider other factors. The Utah Supreme Court expressly refused to simply compare the value of the forfeited property to the maximum possible penalty, observing that, “[w]hile reference to the maximum penalties is helpful in determining the gravity of the offenses, it has limited relevance in determining proportionality.”<sup>215</sup> Instead, the court compared the fair market value of the home to the fines actually imposed, and found the forfeiture in that case to be grossly disproportionate.<sup>216</sup> The court also considered other

211 See, e.g., *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (holding that “[i]dentification of the specific dictates of due process generally requires consideration of three distinct factors . . .”).

212 *von Hofe v. United States*, 492 F.3d 175, 184–85 (2d Cir. 2007). There, the court held that the forfeiture of a wife’s one half-interest in her home resulting from her husband’s criminal activity “bears no reasonable correlation either to her minimal culpability or any harm she caused.” *Id.* at 191. See also *United States v. Wagoner Cty. Real Estate*, 278 F.3d 1091, 1101 (10th Cir. 2002) (considering factors including “the severity of the offense with which the property was involved, the harshness of the sanction imposed, . . . the culpability of the claimant[,] . . . and the property’s connection with the offense” because “*Bajakajian* in no way undermines the relevance of these factors . . .”).

213 *United States v. Ferro*, 681 F.3d 1105, 1115 (9th Cir. 2012) (“[N]othing in *Bajakajian* directs a court to ignore the culpability of the owner and focus solely on whether the fine is excessive given the conduct that subjected the property to forfeiture.”).

214 *United States v. 6625 Zumirez Drive*, 845 F. Supp. 725, 735 (C.D. Cal. 1994).

215 *State v. 633 E. 640 N.*, 994 P.2d 1254, 1261 (Utah 2000) (emphasis added). Here, the Utah Supreme Court cited *Bajakajian* for its reasoning, and stated that, since the actual fine imposed was “but a fraction of the [maximum] penalties authorized,” the State cannot rely on a maximum possible penalty argument because “[the property owner]’s culpability relative to other potential violators of the . . . provision . . . is small indeed.” *Id.* at 1259. See also *Bajakajian*, 524 U.S. at 339 n.14.

216 *633 E. 640 N.*, 994 P.2d at 1261.

factors in determining the “harshness of the forfeiture,” which included “the intangible, subjective value of the property” and “the hardship to the defendant, including the effect of the forfeiture on the defendant’s family or financial condition.”<sup>217</sup>

In Ms. Young’s appeal, the Commonwealth Court of Pennsylvania understood the importance of applying a multi-prong test. Sitting *en banc*, the Commonwealth Court reversed the trial court’s grant of forfeiture and cautioned that “the Eighth Amendment requires more than ‘lip service.’”<sup>218</sup> The court articulated a comprehensive test requiring an intensive factual inquiry into several factors beginning with a threshold showing that the property was the instrumentality of the offense. The next step of the Court’s analysis focused on proportionality, asserting three prongs to help guide the determination of the gravity of the offense: the actual charges and penalty as well as the maximum statutory fine; pattern of behavior, including timing and spacing; and the actual harm caused. The Court’s test considered whether confiscation of the property was proportional to the gravity of the perpetrator’s offense.

In both Ms. Young’s case and the Adams’ case, a family home was at stake. Constitutional excessiveness should require an examination of the harm and consequences that such a forfeiture would exact upon an entire family, especially young children. The family home enjoys a special place in American jurisprudence and is entitled to heightened constitutional protection under the Eighth Amendment. An Alabama federal court put it this way:

Obviously, the harshness of taking the roof from over the head of a person, even a wrongdoer, is something that must be carefully examined if the Eighth Amendment is to be given meaning, as it was unanimously in *Austin*, even over the strong resistance of the United States.<sup>219</sup>

The family home holds immense subjective value and its loss can have a disastrous impact on innocent residents, especially children.<sup>220</sup> Congress understood this when it enacted CAFRA. While Congress rejected a general right

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<sup>217</sup> *Id.* at 1259–60. See also *Street Vendor Project v. City of New York*, 841 N.Y.S.2d 79, 80 (2007) (stating that New York state courts have used a “multitude of factors test,” with sensitivity for the impact of a potential fine); Sarah Marx, *Supreme Court of New York Appellate Division, First Department*, *Street Vendor Project v. City of New York*, 24 TOURO L. REV. 411, 411 (2008).

<sup>218</sup> *1997 Chevrolet*, 106 A.3d at 871 (citing *Commonwealth v. 5444 Spruce St.*, 832 A.2d 396, 402 (Pa. 2003)).

<sup>219</sup> *United States v. 461 Shelby Cty. Rd.*, 857 F. Supp. 935, 938 (N.D. Ala. 1994). See also *Stuart*, 963 S.W.2d at 36 (“[T]he intangible value of the forfeited property should be considered. For example, real property, especially a home, has higher intangible value than personal property.”).

<sup>220</sup> *United States v. 7046 Park Vista Rd.*, 537 F. Supp. 2d 929, 941 (S.D. Ohio 2008), *aff’d*, 331 Fed. App’x 406 (6th Cir. 2009). See *United States v. Dodge Caravan Grand SE*, 387 F.3d 758, 763 (8th Cir. 2004) (including in its analysis “the fact that the property was a residence and the effect of the forfeiture on innocent occupants of the residence.”). Legal scholars also have pointed to the

to counsel in federal civil forfeiture cases, it provided a right to counsel for indigent property owners whose primary residence was at stake.<sup>221</sup> The displacement of whole families and the potential fate of homelessness, loss of employment, disruption of education, and loss of neighborhood support networks, are critical concerns that should factor into a determination of excessiveness. As a Massachusetts federal court noted, “[t]he strongest factor in [a] claimant’s favor is the harshness of forfeiture on innocent family members.”<sup>222</sup>

These same concerns led the Ninth Circuit to consider “the intangible value, subjective value of the property, e.g., whether it is the family home.”<sup>223</sup> Similarly, an Ohio district court considered “whether the property was a residence [and] the effect of the forfeiture on innocent occupants, including children.”<sup>224</sup> These concerns are appropriately heightened when the homeowner is not the perpetrator of the underlying offense. As the Commonwealth Court of Pennsylvania stated in an unrelated civil forfeiture case,

[I]t is also our obligation to assure that these laudable goals [depriving criminals of the proceeds of their crimes and making communities safer] are achieved within constitutional boundaries. These boundaries become more apparent where there is no alleged criminal conduct of the homeowner, the taking of whose home may result in eviction and homelessness to the homeowner and perhaps even several generations of a family, by the use of civil forfeiture proceedings.<sup>225</sup>

For low-income homeowners who are least able to absorb the loss of their most valuable asset, these concerns weigh heavily.

It is not only the family home that is of vital concern under the Excessive Fines Clause, but also the livelihood of the property owner. As discussed earlier, the Excessive Fines Clause’s protection of livelihood dates back to

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subjective importance of a home in addition to any objective value of the property. *See e.g.*, Abraham Bell & Gideon Parchomovsky, *Taking Compensation Private*, 59 STAN. L. REV. 871, 887 (2007) (“The property owner’s enjoyment of part of the community premium is a potentially important component of subjective value not reflected in the market value of an individual property.”). *See also* D. Benjamin Barros, *Home as a Legal Concept*, 46 SANTA CLARA L. REV. 255, 255 (2006). Yan Slavinskiy, for example, suggests that courts should consider factors such as nexus between property subject to forfeiture and the underlying offense, the subjective value of the forfeited property, the effect of forfeiture on a defendant’s livelihood, and the effect of the forfeiture upon innocent third parties. *See* Yan Slavinskiy, *Protecting the Family Home by Reunderstanding United States v. Bajakajian*, 35 CARDOZO L. REV. 1619, 1640 (2014).

221 18 U.S.C. § 983(b)(2) (2017).

222 *United States v. 221 Dana Ave.*, 81 F. Supp. 2d 182, 191 (D. Mass. 2000).

223 *United States v. 6380 Little Canyon Rd.*, 59 F.3d 974, 985 (9th Cir. 1995).

224 *7046 Park Vista Rd.*, 537 F. Supp. 2d at 941. *See also Dodge Caravan Grand SE*, 387 F.3d at 763 (including in its analysis the fact that the property was a residence and the effect of the forfeiture on innocent occupants of the residence).

225 *Commonwealth v. 2338 N. Beechwood St.*, 65 A.3d 1055, 1066 (Pa. Commw. Ct. 2013), *vacated*, 114 A.3d 1036 (Pa. 2015).

Magna Carta's *salvo tenemento* principle.<sup>226</sup> A fine should not be so severe as to deprive a defendant of her ability to keep a roof over her head or support herself and her family.<sup>227</sup> The *Bajakajian* Court acknowledged this proposition when it described the history of forfeiture and noted that Magna Carta required that fines should be proportioned to the offense and not deprive a *wrongdoer* of his livelihood.<sup>228</sup>

In Ms. Young's case, the prosecutor had the discretion not to file a civil forfeiture petition against an elderly grandmother's home and car when she was not the wrongdoer. But when such discretion is routinely declined, courts must consider the life-long impact of the loss of a home and car on a grandmother's ability to put a roof over her head and meet life-threatening medical needs.<sup>229</sup> Indeed, if courts do not consider such factors, it is hard to understand what real meaning the word "excessive" holds in our constitutional framework. And, given the strong financial self-interest that prosecutors have in the proceeds of forfeited property, courts have a special obligation to assure that potential conflicts of interest do not override the sound exercise of prosecutorial discretion.

If these factors are not considered, the results will be perverse. A test that simply compares a home's fair market value to the maximum statutory fine for the underlying offense, even when the homeowner is not charged with a crime, will mean that for *identical conduct* poor families with lower home values will lose their homes to the government while affluent families with expensive homes will escape civil forfeiture's harsh punishment. This cannot be the test of the Eighth Amendment.

On the eve of publication of this article, the Supreme Court of Pennsylvania issued a lengthy, unanimous decision in the Young case.<sup>230</sup> In one of the most comprehensive excessive fines opinions of any court in the nation, the Court reversed the trial court's grant of forfeiture of Ms. Young's home and car and remanded the case to the trial court.<sup>231</sup> In its opinion, the Court outlined a blueprint to guide trial courts when adjudicating excessive fines claims. The Supreme Court instructed that a trial court must first determine

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226 See *United States v. Levesque*, 546 F.3d 78, 83–84 (1st Cir. 2008); *United States v. Jose*, 499 F.3d 105, 113 (1st Cir. 2007) (affirming that an excessive fines analysis should consider whether forfeiture deprives a defendant of his or her livelihood). See also McLean, *Original Meaning*, *supra* note 4, at 853–70 (outlining the history of the Magna Carta's *Salvo Tenemento* principle).

227 See, e.g., McLean, *Original Meaning*, *supra* note 4, at 854–56.

228 See *Bajakajian*, 524 U.S. at 335–36 (alluding to the Magna Carta's principle of not depriving a man of his livelihood).

229 See, e.g., *221 Dana Ave.*, 81 F. Supp. 2d at 191. See also *6380 Little Canyon Rd.*, 59 F.3d at 985 (considering "the hardship to the defendant, including the effect of the forfeiture on defendant's family or financial condition.").

230 *Commonwealth v. 1997 Chevrolet and Contents Seized from James Young [Elizabeth Young]*, No. 29 EAP 2015, 30 EAP 2015, 2017 WL 2291733 (Pa. 2017).

231 *Id.* at \*1.



whether the seized property is an instrumentality of the underlying offense.<sup>232</sup> This is a threshold requirement of the excessive fines analysis. If the government is unable to demonstrate that the property was significantly used in the commission of the offense, the constitutional inquiry ends and a forfeiture of the property is unconstitutional. If this threshold requirement is met, the trial court proceeds to an analysis of proportionality to determine whether the value of the property is grossly disproportional to the gravity of the underlying offense.<sup>233</sup>

However, proportionality is not simply a mathematical comparison that was utilized by the trial court. Instead, proportionality requires careful consideration of many factors that assess both objective and subjective value of the property, the harm that would result to the owner and innocent third parties, and the impact upon the livelihood of the property owner.<sup>234</sup> Similarly, the gravity of the offense is not measured simply by the maximum statutory fine authorized for the offense, but rather by a range of factors that include a close look at the nature of the offense and its relation to other illegal activity, a comparison of the maximum authorized penalty to the actual penalty imposed upon the wrongdoer, the regularity of the criminal conduct, the actual harm resulting from the crime beyond a generalized harm to society, and the culpability of the property owner.<sup>235</sup> The trial court will be required to apply these factors to the Young case in a remand hearing.<sup>236</sup>

#### IX. WHOSE BURDEN IS THE EXCESSIVE FINES CLAUSE?

The establishment of a comprehensive “excessive fines” test is a critical first step. However, no matter how robust the standard is, the constitution’s protection against excessive fines will be ineffective unless it is known and available when it matters most. Because constitutional rights are generally not self-enforcing, precautions must be taken to ensure that important constitutional rights are not unknowingly waived.

Few property owners facing civil forfeiture even know they have a constitutional right to be free from excessive fines. A property owner who is unaware of this right is also unaware that it must be timely pleaded in the civil forfeiture action or else forever lost. Yet, an unaware property owner cannot count on the prosecutor or trial judge for enlightenment. Property

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232 *Id.*

233 *Id.*

234 *Id.* at \*27.

235 Commonwealth v. 1997 Chevrolet and Contents Seized from James Young [Elizabeth Young], No. 29 EAP 2015, 30 EAP 2015, 2017 WL 2291733, at \*27 (Pa. 2017).

236 *Id.*

owners facing civil forfeiture do not receive a *Miranda*-like notice of their constitutional right to be free of excessive fines (or any instruction on what they must do to assert it).<sup>237</sup> This then raises two important questions.

First, should the government be required to notify property owners of their constitutional right to be free of excessive fines when it pursues civil forfeiture? Second, should a trial court be required to ensure that a property owner's waiver of this right is *knowing and intelligent*, as courts routinely do when they conduct on-record plea colloquies in criminal cases?<sup>238</sup>

As a matter of due process, waivers of constitutional rights in criminal proceedings must be voluntary, knowing, and intelligent.<sup>239</sup> To satisfy this waiver standard, an accused must be aware of the constitutional right and the consequences of forfeiting that right.<sup>240</sup> This strict waiver standard is essential to ensuring that an accused receives a fair trial,<sup>241</sup> the hallmark of which is a "verdict worthy of confidence."<sup>242</sup> Accordingly, a strict waiver standard goes to the integrity of convictions, and this is important because of the *consequences* of conviction; to wit—punishment of the convict.<sup>243</sup> In turn, the integrity of a conviction bears on the justness of such punishment.<sup>244</sup> If a conviction lacks integrity, punishment of the individual so convicted is unjust.<sup>245</sup> Ultimately,

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237 The public may possess a general understanding of their *Miranda* rights, gleaned from popular TV shows such as *Law and Order*. Yet the public almost certainly lacks a comparable understanding of their constitutional right to be free from excessive fines—particularly in the civil forfeiture context. Thus, it is arguably even more important that persons facing civil forfeiture be notified of their constitutional right to be free of excessive fines.

238 The Pennsylvania Supreme Court, for example, has "required of record, a full and complete colloquy . . . in the context of waiving the right to counsel, the right to a jury trial, and entering a guilty plea as opposed to proceeding to trial." *Commonwealth v. Vega*, 719 A.2d 227, 230 (Pa. 1998). The colloquy is a mechanism to ensure that such waivers are voluntary, knowing, and intelligent, as due process of law requires. *See, e.g.,* *McCarthy v. United States*, 394 U.S. 459, 466 (1969) ("A defendant who enters [a guilty] plea simultaneously waives several constitutional rights . . . . [I]f a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void.").

239 *See* *Brady v. United States*, 397 U.S. 742, 748 (1970) (emphasizing the importance of a waiver of constitutional right being done intelligently and knowingly).

240 *See, e.g., Vega*, 719 A.2d at 230. *See also* *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (mandating that a valid waiver requires "intentional relinquishment or abandonment of a known right or privilege.").

241 *See* *Schneekloth v. Bustamonte*, 412 U.S. 218, 237 (1973) (applying the standard of a knowing and intelligent waiver of constitutional rights in an assessment of a waiver of right to trial).

242 *Kyles v. Whitley*, 514 U.S. 419, 434 (1995).

243 *See, e.g.,* *Adams v. United States ex rel. McCann*, 317 U.S. 269, 276 (1942); *Commonwealth v. Wharton*, 435 A.2d 158, 161 (Pa. 1981) ("The procedures which constitute due process of law . . . are not ends in themselves but means of safeguarding [the] substantive rights" of life, liberty, and property).

244 *See, e.g., Adams*, 317 U.S. at 279; *Zerbst*, 304 U.S. at 462–65; *Wharton*, 435 A.2d at 161.

245 *See, e.g., Lafler v. Cooper*, 132 S. Ct. 1376, 1388 (2012) ("The goal of a just result is not divorced from the reliability of a conviction . . . .")

then, the requirement of a voluntary, knowing, and intelligent waiver of constitutional rights goes to the *justness* of punishment.<sup>246</sup>

Of course, “[t]he notion of punishment . . . cuts across the division between the civil and the criminal law.”<sup>247</sup> Indeed, “civil proceedings may advance punitive as well as remedial goals.”<sup>248</sup> *In rem* civil forfeiture is *punitive* in nature; civil forfeiture extinguishes an individual’s private property rights without compensating him or her for that loss. And civil forfeiture’s punitive nature is precisely why it is subject to the Excessive Fines Clause.<sup>249</sup> Because the “forfeiture of one’s home implicates the fundamental rights of ‘personal security,’ ‘personal liberty,’ and ‘private property,’”<sup>250</sup> we must question whether fundamental fairness demands that individuals faced with civil forfeiture of their home be notified of their constitutional right to be free from excessive fines.<sup>251</sup> Insofar as civil forfeiture proceedings implicate these fundamental rights, surely “[t]he goal of a just result is not divorced from . . . the fairness and regularity of the processes that precede[]”<sup>252</sup> a decree of forfeiture. A forfeiture may be unjust if “processes that preceded it” were unfair or irregular (or both).<sup>253</sup> “And, of course, even those protections associated with criminal cases may apply to a civil forfeiture proceeding if it is so punitive that [it] must reasonably be considered criminal.”<sup>254</sup>

Surely, “[i]t is difficult to imagine a more punitive result than the forfeiture of one’s home . . . when . . . there [are] no convictions of the homeowner for any of the underlying offenses that could result in forfeiture, [and] no charges have ever been alleged or filed against the [homeowner].”<sup>255</sup> Accordingly, all homeowners faced with civil forfeiture of their home should be notified of their constitutional right to be free of excessive fines, and a waiver of that right should be valid only if it is voluntary, knowing, and intelligent.

Yet, another fundamental question still remains. In a civil forfeiture action, which party should bear the burden of proof with respect to the Excessive Fines Clause? Should the government bear the burden of establishing

246 A conviction may be unjust if “the processes that preceded it” were unfair or irregular (or both). *Id.* Surely it follows that punishment predicated upon an unjust conviction is also unjust.

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

248 *Id.* (quoting *Halper*, 490 U.S. at 447).

249 *Id.* at 621–22.

250 *2338 N. Beechwood St.*, 65 A.3d at 1063–64 (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886)). See also *James Daniel Good Real Prop.*, 510 U.S. at 61 (“At stake in . . . forfeiture cases [against an individual’s home] are the security and privacy of the home and those who take shelter within it.”); *von Hofe*, 492 F.3d at 188 (quoting *James Daniel Good Real Prop.*, 510 U.S. at 53) (finding that forfeiture of one’s home implicates a constitutionally protected liberty interest—the right “to be free from governmental interference”).

251 *2338 N. Beechwood St.*, 65 A.3d at 1063 (questioning whether fundamental fairness has prevailed when a claimant in civil forfeiture action was never notified of her right to a jury trial).

252 *Lafley*, 132 S. Ct. at 1388.

253 *Id.*

254 *Austin*, 509 U.S. at 608 n.4.

255 *2338 N. Beechwood St.*, 65 A.3d at 1065.

that a proposed forfeiture is *not* “excessive”? Or should the property owner bear the burden of establishing that the proposed forfeiture *is* “excessive”? In a criminal forfeiture case, if the property owner is duly convicted of the crime(s) upon which the forfeiture is based, it may be justifiable to require the property owner to prove “excessiveness”. In such a case, the government has already proved beyond a reasonable doubt that the property owner is guilty of the crime(s) upon which the forfeiture is based. Yet in the civil forfeiture context, the government need not even *charge* the property owner with the crime(s) upon which the forfeiture is based. If the government pursues civil forfeiture against an individual’s home, but never charges the homeowner with a crime, there is a stronger argument that fundamental fairness requires the government to bear the burden of demonstrating compliance with the Excessive Fines Clause.

After all, it is the government’s choice whether to pursue criminal or civil forfeiture. If government chooses civil forfeiture, where legal protections for the homeowner are much weaker, shouldn’t it bear the burden of demonstrating compliance with the Eighth Amendment before a home is taken from a family and handed over to the prosecutor’s office?<sup>256</sup> And, in the final analysis, shouldn’t a trial court—as guardian of the Constitution—have the solemn duty of ensuring that an unjust, unconstitutional punishment does not occur?

#### CONCLUSION

Intended to take away the tools of the trade from drug kingpins in the War on Drugs, civil forfeiture is now aggressively directed against ordinary citizens for low-level drug offenses. Civil forfeiture’s modern history is marked by high default rates, persistent abuses, and disproportionate enforcement. Despite this history, the Eighth Amendment’s counter-balance to the government’s raw punishment power has yet to receive the careful judicial development that it deserves. The government’s seizure of family homes from parents and grandparents who have not committed a crime and

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<sup>256</sup> In civil forfeiture proceedings requiring the property owner to bear the burden of proving “excessiveness”, it can be argued that such a burden allocation fails to sufficiently protect the property owner’s “core constitutional right” to be free of excessive fines. *United States v. Beras*, 183 F.3d 22, 28 (1st Cir. 1999). Accordingly, any legislative prescription of such a burden allocation should be proscribed under the Due Process Clauses of the Fifth and Fourteenth Amendments. *See, e.g., Cooper v. Oklahoma*, 517 U.S. 348, 367 (1996) (finding the legislative “power to regulate procedural burdens [is] subject to proscription under the Due Process Clause[s]” of the Fifth and Fourteenth Amendments if a particular burden allocation fails to sufficiently protect a “fundamental constitutional right.”). It may seem unorthodox to place the burden on the government to prove a negative, *i.e.*—that a proposed forfeiture is not excessive. Yet, claimants seeking to defend their property in civil forfeiture proceedings already bear the burden of proving a negative; to wit—that their property has done no wrong, or if it has, that they did not know or consent to such wrongdoing.

the transfer of their hard-earned equity to the budgets of law enforcement agencies demand greater court scrutiny.

The several studies discussed in this Article reveal that civil forfeiture unfairly plagues low-income and minority communities, which only undermines public confidence in law enforcement authorities. As former Attorney General Eric Holder stated in testimony before Congress, “[N]o tool of law enforcement, however effective at fighting crime, can survive for long if the public thinks that it violates the basic principles of fairness and due process that lie at the core of the American system of justice.”<sup>257</sup> It may be that civil forfeiture is now beyond repair. Two former Department of Justice employees who were original architects of the modern civil forfeiture program voiced this belief in a letter to the *Washington Post*:

[CAFRA] was enacted in 2000 to rein in abuses, but virtually nothing has changed. This is because civil forfeiture is fundamentally at odds with our judicial system and notions of fairness. It is unreformable. . . . The program began with good intentions but now, having failed in both purpose and execution, it should be abolished.<sup>258</sup>

As long as prosecutors use civil forfeiture to seize family homes from the innocent, our courts will have a solemn duty to vigorously enforce the Excessive Fines Clause and protect vulnerable homeowners who are caught in the crosshairs of abusive punishment.

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257 *Oversight of Federal Asset Forfeiture: Its Role in Fighting Crime: Hearing Before the Subcomm. On Criminal Justice Oversight of the S. Comm. On the Judiciary*, 106th Cong. 19 (1999) (statement of Eric Holder, Deputy Att’y Gen., U.S. Dep’t of Justice).

258 John Yoder & Brad Cates, *Government Self-Interest Corrupted a Crime-Fighting Tool Into an Evil*, WASH. POST (Sept. 18, 2014), [http://wapo.st/1mjYkQg?tid=ss\\_mail](http://wapo.st/1mjYkQg?tid=ss_mail).

APPENDIX

EXHIBIT A.1.



Map of Block Group (421010010023, PA) with 2010 Civil Forfeitures with Estimated percent of all people who were of a race other than White between 2009-2013.

Estimated percent of all people who were of a race other than White between 2009-2013.

Estimated percent of the population that is not White between 2009-2013. Percentage calculations were suppressed in cases where the denominator of the calculation was less than 10 of the unit that is being described (e.g., households, people, householders, etc). Such areas are represented as having 'Insufficient Data' in the map. Denominators for percentage calculations were created by summing all of the component data items in a particular dataset.

**Legend**

Year  
2013

Variable  
%

- Insufficient Data
- 29.99% or less
- 30.00% - 59.99%
- 60.00% or more

Shaded by Census Tract, 2010  
Source: Census

Sites  
▼ 2010 Civil Forfeitures

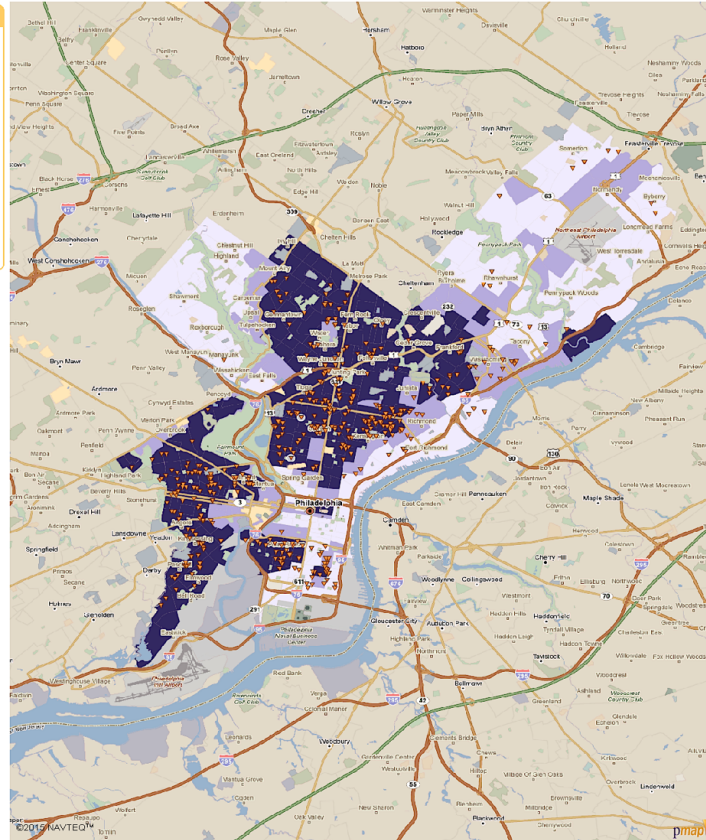
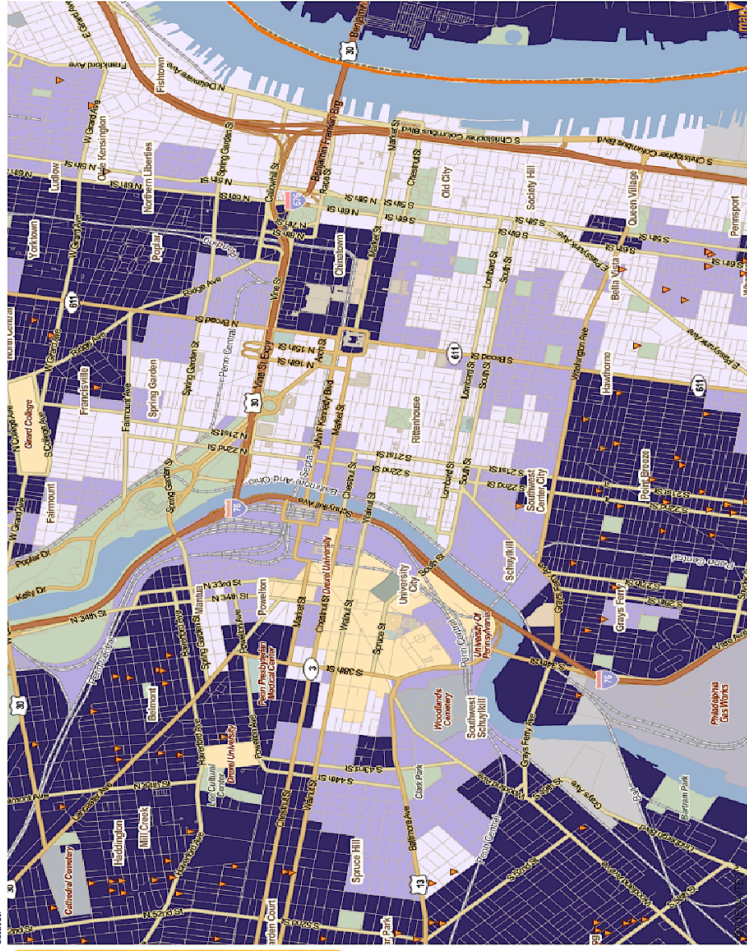


EXHIBIT A.2.

Map of Block Group (421010010023, PA) with 2010 Civil Forfeitures with Estimated percent of all people who were of a race other than White between 2009-2013.

Estimated percent of all people who were of a race other than White between 2009-2013. Estimated percent of the population that is not White between 2009-2013. Percentage calculations were suppressed in cases where the denominator of the calculation was less than 10 of the unit that is being described (e.g., people, households, etc). Such areas are represented as having 'insufficient data' in the map. Denominators for percentage calculations were created by summing all of the component case items in a particular block.



**Legend**

**Year**  
2013

**Variable**  
%

- Insufficient Data
- 29.99% or less
- 30.00% - 59.99%
- 60.00% or more

Shaded by Block Group, 2010  
Source: Census

**Sites**  
2010 Civil Forfeitures

THE policymap

## EXHIBIT A.3.

## PHILADELPHIA 2015 PROPERTY VALUES BY WARD

PHILADELPHIA PROPERTY VALUES BY WARD			
WARD	2015 ASSESSMENT VALUE (\$)	NUMBER OF ACCOUNTS	AVERAGE VALUE (\$)
1	1,333,495,400	7,296	182,770
2	2,215,521,700	7,768	285,211
3	421,218,900	6,811	61,843
4	413,645,500	7,627	54,234
5	2,190,630,300	5,184	422,575
6	271,255,900	4,782	56,724
7	346,686,600	8,627	40,186
8	1,479,945,500	2,466	600,140
9	1,738,781,600	4,439	391,705
10	977,519,100	8,658	112,903
11	201,236,000	5,609	35,877
12	616,311,500	7,072	87,148
13	439,810,200	7,586	57,976
14	219,299,900	1,430	153,356
15	1,724,970,900	4,881	353,405
16	135,014,000	5,763	23,427
17	717,038,500	7,629	93,988
18	894,200,200	7,222	123,816
19	258,839,200	7,833	33,044
20	149,504,400	2,415	61,906
21	3,259,849,100	15,175	214,817
22	1,443,489,100	7,240	199,376
23	659,064,500	7,651	86,140
24	471,659,900	4,407	107,025
25	661,378,500	8,694	76,072
26	1,355,377,101	7,045	192,388
27	436,590,300	2,708	161,222
28	123,719,200	6,665	18,562
29	284,384,200	5,079	55,992
30	1,861,391,700	5,489	339,113
31	746,783,700	7,444	100,320
32	446,917,000	8,224	54,343
33	564,223,400	8,353	67,547
34	1,498,055,200	12,568	119,195



PHILADELPHIA PROPERTY VALUES BY WARD			
WARD	2015 ASSESSMENT VALUE (\$)	NUMBER OF ACCOUNTS	AVERAGE VALUE (\$)
35	1,039,093,900	9,728	106,814
36	1,091,809,100	14,149	77,165
37	235,172,000	6,679	35,210
38	755,598,200	6,451	117,128
39	2,148,341,100	16,179	132,785
40	1,174,587,900	16,192	72,541
41	827,328,900	7,917	104,500
42	804,786,700	9,782	82,272
43	406,479,400	7,927	51,277
44	242,865,500	5,844	41,558
45	908,169,400	9,797	92,698
46	856,169,500	5,215	164,174
47	246,448,700	2,721	90,572
48	573,460,300	6,738	85,108
49	714,021,600	7,639	93,470
50	1,375,278,600	9,456	145,439
51	450,519,600	8,309	54,220
52	761,885,700	6,139	124,105
53	1,020,874,300	7,502	136,080
54	898,696,000	7,202	124,784
55	1,237,008,200	9,625	128,520
56	1,737,825,000	9,812	177,112
57	1,326,996,000	7,287	182,104
58	3,040,340,500	13,725	221,518
59	725,291,100	6,000	120,881
60	517,051,100	5,733	90,188
61	1,049,522,000	8,778	119,562
62	909,136,400	9,504	95,658
63	1,542,604,100	7,201	214,220
64	824,404,500	5,321	154,934
65	967,436,800	6,659	145,282
66	2,568,413,000	14,014	183,274
<b>TOTAL</b>	<b>63,535,423,301</b>	<b>503,065</b>	
		<b>AVERAGE</b>	<b>126,296</b>

## EXHIBIT A.4.

## PHILADELPHIA 2010 PROPERTY VALUES BY WARD

PHILADELPHIA PROPERTY VALUES BY WARD			
WARD	2010 ASSESSMENT VALUE (\$)	NUMBER OF ACCOUNTS	AVERAGE VALUE (\$)
1	269,705,100	7,548	35,731
2	710,717,300	8,191	86,768
3	191,420,500	7,115	26,903
4	152,532,100	7,876	19,366
5	801,793,200	5,353	149,783
6	85,266,700	5,204	16,384
7	108,043,500	8,938	12,088
8	579,012,850	2,591	223,470
9	777,019,100	4,483	173,325
10	405,251,400	8,706	46,548
11	94,537,900	5,931	15,939
12	212,049,800	7,310	29,008
13	181,760,000	7,936	22,903
14	63,823,600	1,567	40,729
15	501,448,200	5,141	97,539
16	49,206,600	5,930	8,297
17	258,048,700	7,775	33,189
18	188,621,600	7,484	25,203
19	40,531,739	8,083	5,014
20	41,770,100	2,510	16,641
21	1,212,862,200	15,061	80,529
22	561,918,500	7,321	76,754
23	238,054,900	7,906	30,110
24	107,802,700	4,635	23,258
25	199,435,200	9,097	21,923
26	480,522,200	7,288	65,933
27	128,763,400	2,865	44,943
28	57,893,500	6,849	8,452
29	82,164,445	5,340	15,386
30	353,425,900	5,666	62,376
31	173,302,300	7,532	23,008
32	71,544,800	8,547	8,370
33	252,895,500	8,608	29,379
34	525,678,200	13,001	40,433
35	461,464,800	9,938	46,434

PHILADELPHIA PROPERTY VALUES BY WARD			
WARD	2010 ASSESSMENT VALUE (\$)	NUMBER OF ACCOUNTS	AVERAGE VALUE (\$)
36	205,179,500	14,776	13,885
37	37,981,900	6,994	5,430
38	277,411,800	6,587	42,115
39	568,419,100	16,946	33,542
40	578,856,300	16,673	34,718
41	335,931,700	8,111	41,416
42	311,668,200	10,108	30,833
43	104,574,200	8,231	12,704
44	100,107,800	6,149	16,280
45	317,305,000	10,019	31,670
46	253,050,200	5,434	46,567
47	49,780,600	3,012	16,527
48	210,501,200	6,988	30,123
49	255,324,300	8,634	29,571
50	557,223,300	9,540	58,409
51	182,273,900	8,540	21,343
52	329,538,600	6,213	53,040
53	434,185,600	7,570	57,356
54	361,555,000	7,243	49,917
55	500,675,700	9,743	51,388
56	763,173,300	9,947	76,723
57	570,254,900	7,282	78,310
58	1,309,308,800	13,724	95,402
59	250,490,700	6,092	41,117
60	167,991,500	6,048	27,776
61	439,375,400	9,006	48,786
62	131,390,500	4,147	31,683
63	648,393,200	7,236	89,606
64	338,525,600	5,396	62,736
65	394,805,800	6,726	58,698
66	1,016,011,100	14,017	72,484
TOTAL	22,621,553,234	512,458	
		AVERAGE	44,143