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Notes

PENNIES FROM HEAVEN OR EXCESSIVE FINES FROM HELL?
COMMONWEALTH v. 1997 CHEVROLET KEEPS CIVIL ASSET
FORFEITURE'S THREAT TO HOMEOWNERSHIP
IN PURGATORY

LYDIA E. ELLSWORTH*

“Housing is absolutely essential to human flourishing.
Without stable shelter, it all falls apart.”¹

I. THE LORD GIVETH AND THE GOVERNMENT TAKETH AWAY: AN
INTRODUCTION TO CIVIL IN REM FORFEITURE

Eight boxes, a partially assembled drag racer, fifteen impounded cats, and a moon rock—a motley assortment of items if ever one existed.² Yet, these seemingly dissimilar objects have a unifying characteristic: each of them has been named as a defendant in a civil lawsuit.³ Although it is often remarked that America is becoming increasingly litigious, most Americans might be surprised to learn that even inanimate objects can be

* J.D. Candidate, 2019, Villanova University Charles Widger School of Law; B.A. 2016, Messiah College. This Note is dedicated to my loving parents, William and Amy Ellsworth, as well as my late grandmothers, Lydia Postupak Hirner and Marie Ellsworth, and my biggest supporter, Mitchell Rock. I would also like to thank all members of the *Villanova Law Review* who assisted me in the writing and publication of this Note and professors past and present who have inspired me along the way.

1. Kevin Nance, *Matthew Desmond's "Evicted" Details Cost of Evictions on Milwaukee's Poor*, CHI. TRIB. (Mar. 10, 2016, 10:22 AM) <http://www.chicagotribune.com/lifestyles/books/ct-prj-evicted-matthew-desmond-20160310-story.html> [https://perma.cc/XJ5F-L3AA] (quoting from interview with sociologist and author Matthew Desmond).

2. *See, e.g.*, *United States v. One Partially Assembled Drag Racer*, 107 F.3d 864, 864 (3d Cir. 1997) (Table) (granting drag racer owner's motion for return of property and dismissal of complaint after federal government seized drag racer without filing sufficient complaint); *United States v. Eight Boxes Containing Various Articles of Misc. Merch.*, 105 F.2d 896, 900 (2d Cir. 1939) (denying bankruptcy trustee's petition to intervene in civil forfeiture suit where trustee's debtor illegally smuggled eight boxes of miscellaneous items into United States); *United States v. One Lucite Ball Containing Lunar Material*, 252 F. Supp. 2d 1367, 1369, 1381 (S.D. Fla. 2003) (finding that stolen moon rock and plaque gifted to Honduras by United States were subject to forfeiture); *South Dakota v. Fifteen Impounded Cats*, 785 N.W.2d 272, 280 (S.D. 2010) (affirming warrantless impoundment of cats belonging to woman living in car).

3. *See supra* note 2; *see also In rem*, BLACK'S LAW DICTIONARY (10th ed., 2014) (“against a thing”); Stefan D. Cassella, *Overview of Asset Forfeiture Law in the United States*, 17 S. AFR. J. CRIM. JUST. 347, 357 (2007) (explaining that civil forfeitures are proceedings in rem, meaning action is filed “against property itself”).

sued.⁴ Of course, this is only possible for certain types of in rem proceedings, one of which is known as civil asset forfeiture.⁵ Pursuant to federal and state law, respective governments can initiate civil proceedings against a piece of real or personal property as itself, rather than its owner or occupant, after determining the property's involvement in criminal activity.⁶

Across the United States, federal and local law enforcement agencies collectively amass billions of dollars by seizing property deemed to be an instrumentality of illegal activity.⁷ In Pennsylvania alone, citizens have forfeited over \$100 million worth of private property to state law enforcement.⁸ Described by one officer as “pennies from heaven,” the funds derived from seizures of real and personal property contribute to the budgets of state government agencies.⁹ This is especially true for the City

4. See, e.g., Tonja Jacobi, *Explaining American Litigiousness: A Product of Politics, Not Just Law*, AM. L. & ECON. ASS'N ANN. MEETINGS, 2005, at 1, 5 (acknowledging and tracing roots of America's overly-litigious reputation); Christopher Danzig, *Infographic of the Day: American Litigiousness Statistics That Will Make You Angry*, ABOVE THE L. (July 17, 2012, 03:51 PM) <https://abovethelaw.com/2012/07/infographic-of-the-day-american-litigiousness-statistics-that-will-make-you-angry/> [https://perma.cc/6Z2G-8GY6] (comparing frequency of litigation in United States to other developed nations); Randy Hoder, *It's Not Your Old Camp: Too Many Lawsuits, Too Few Hugs*, L.A. TIMES (Aug. 26, 2014, 05:04 PM) <http://www.latimes.com/opinion/op-ed/la-oe-hoder-hugs-20140827-story.html> [https://perma.cc/LY2Y-Q5S2] (arguing that America's “litigious, hypersensitive, media-driven world” places unnecessary restrictions on social interactions).

5. See, e.g., 42 PA. STAT. AND CONS. STAT. ANN. § 5805(a) (West 2018) (“The proceedings for the forfeiture or condemnation of property . . . shall be in rem, in which the Commonwealth shall be the plaintiff and the property the defendant.”). See generally U.S. DEP'T OF JUST., FY2016 ASSET FORFEITURE FUND REPORTS TO CONGRESS, <https://www.justice.gov/afp/fy2016-asset-forfeiture-fund-reports-congress> [https://perma.cc/5NW5-8PGM] (last visited Jan. 8, 2018) (summarizing property seized through federal civil asset forfeiture program).

6. See 21 U.S.C. § 881(a) (2012) (listing property subject to forfeiture under federal law); see also 42 PA. STAT. AND CONS. STAT. ANN. §§ 5802–03 (describing applicability of Pennsylvania's forfeiture law).

7. See, e.g., Matt Ford, *The Bipartisan Opposition to Sessions's New Civil Forfeiture Rules*, ATLANTIC (July 19, 2017) <https://www.theatlantic.com/politics/archive/2017/07/sessions-forfeiture-justice-department-civil/534168/> [https://perma.cc/T2PE-FKCF] (providing overview of modern civil forfeiture practice); INST. FOR JUSTICE, POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE, <http://ij.org/report/policing-for-profit/introduction/> [https://perma.cc/4WM3-BDAG] (last visited Sept. 4, 2017) (presenting findings showing nearly \$29 billion in forfeiture deposits from 2001 to 2014).

8. See *Civil Asset Forfeiture*, ACLU OF PA. <https://www.aclupa.org/issues/forfeiture/> [https://perma.cc/TJ8D-RND4] (last visited Aug. 24, 2017) (providing brief explanation of civil forfeiture procedure and practice in Pennsylvania).

9. See *Last Week Tonight with John Oliver: Civil Forfeiture* (HBO television broadcast Oct. 5, 2014) (providing exposé of civil forfeiture practice in United States, including clip of Missouri police chief explaining that civil forfeiture funds are “kinda like pennies from heaven”). Philadelphia's reputation of aggressive civil forfeiture implementation is widely known. See, e.g., ACLU OF PA., GUILTY PROPERTY: HOW LAW ENFORCEMENT TAKES \$1 MILLION IN CASH FROM INNOCENT PHILADELPHIANS EVERY YEAR—AND GETS AWAY WITH IT 3 (June 2015), https://www.aclupa.org/files/3214/3326/0426/Guilty_Property_Report_-_FINAL.pdf

of Philadelphia, which has earned itself a nationwide reputation of aggressively employing civil forfeiture as a means to expand its own law enforcement budget.¹⁰

In Philadelphia and other metropolitan areas, civil forfeiture is increasingly used as a weapon in the war on drugs.¹¹ That is, the practice is purported to benefit communities plagued with crime by depriving drug dealers of resources and profits, while also deterring further instances of crime.¹² Lurking in the background of these policies, however, is a steady increase in homelessness and housing instability among the very commu-

[<https://perma.cc/5VFG-67VF>] (detailing allocation of funds amassed through civil forfeiture of property in Philadelphia); *Philadelphia Forfeiture*, INST. FOR JUSTICE, <http://ij.org/case/philadelphia-forfeiture/> [<https://perma.cc/3K43-JQHR>] (last visited Sept. 16, 2017) (describing Philadelphia's "Civil Forfeiture Machine"); see also Rich Zeoli, *Attorney: Philadelphia Is "Ground Zero" for Civil Asset Forfeiture*, CBS PHILLY (Feb. 28, 2017, 06:40 PM), <http://philadelphia.cbslocal.com/2017/02/28/attorney-philadelphia-ground-zero-forfeiture/> [<https://perma.cc/448S-YJTD>] (reporting that attorney for Institute of Justice characterized Philadelphia as worst abuser of civil asset forfeiture in United States).

10. See, e.g., Radley Balko, *Philadelphia Family Loses Home over a Single Drug Charge*, HUFFINGTON POST (Sept. 10, 2013, 11:03 AM), http://www.huffingtonpost.com/2013/09/10/philadelphia-family-loses_n_3899905.html [<https://perma.cc/FV6Q-Z6JQ>] (describing plight of Philadelphia family evicted during civil forfeiture proceedings, then lost home to mortgage foreclosure after district attorney withdrew claim); Pamela Brown, *Parents' House Seized After Son's Drug Bust*, CNN (Sept. 8, 2014, 10:45 AM), <http://www.cnn.com/2014/09/03/us/philadelphia-drug-bust-house-seizure/index.html> [<https://perma.cc/3PNK-2ZS4>] (reporting suburban Philadelphia parents' feelings of violation and devastation after being removed from home as a result of son's drug-related activities); see also KATHLEEN G. KANE, COMMNW. OF PA. OFFICE ATT'Y GEN., ASSET FORFEITURE REPORT, 12, 57–58 (2015), <https://www.documentcloud.org/documents/3897504-Asset-Forfeiture-Report-2014-2015-Controlled.html> [<https://perma.cc/A8BS-RUFG>] (reporting uses of funds amassed through civil forfeiture proceedings and listing total income from Philadelphia county forfeitures at \$2,203,272.00 for 2014 fiscal year, while next largest county, Allegheny, amassed \$1,080,535.33, and rural Perry County only amassed \$432.80); COMMNW. OF PA. OFFICE ATT'Y GEN., PHILADELPHIA ASSET FORFEITURE REPORT: FY 2007–10, <https://www.documentcloud.org/documents/746105-asset-forfeiture-phila-07-08-1-merged> [<https://perma.cc/BB4J-CTKF>] (last visited Jan. 8, 2018) (listing total income from forfeitures at \$4,671,276.00, \$6,220,560.00, and \$5,971,380.00 for years 2007 through 2010, respectively).

11. See John L. Worrall, *Addicted to the Drug War: The Role of Civil Asset Forfeiture As a Budgetary Necessity in Contemporary Law Enforcement*, 29 J. CRIM. JUST. 171, 171 (2001) (“[Civil forfeiture] is largely designed to weaken the economic foundations of the illicit drug trade and assist law enforcement in reducing drug-related crime” (internal citations omitted)). For examples of civil forfeiture proceedings absent drug-related activity, see Stefan D. Cassella & David B. Smith, *The Role of Civil Forfeiture*, 100 JUDICATURE, no. 4, 2016, at 68–69 (arguing civil forfeiture's utility in crimes related to terrorism, intellectual property violation, money laundering, and other international crimes).

12. See, e.g., Joel Mathis, *What Seth Williams Didn't Say About Civil Forfeiture*, PHILA. MAG. (Mar. 4, 2015, 05:30 AM) <http://www.phillymag.com/news/2015/03/04/seth-williams-civil-forfeiture-inquirer-oped/> [<https://perma.cc/K6T3-33WX>] (critiquing former district attorney Seth Williams's public stance on civil forfeiture).

nities that have been targets in this war.¹³ Although Philadelphia has attempted to mitigate its climbing rates of homelessness and housing instability, it continues to use civil asset forfeiture as a tool to seize low-income family residences indiscriminately.¹⁴ As its use continues, courts are increasingly faced with arguments that the practice of civil in rem forfeiture is unconstitutional on a variety of grounds, one of these being that it violates the Eighth Amendment prohibition against excessive fines.¹⁵

In *Commonwealth v. 1997 Chevrolet & Contents Seized from James Young*,¹⁶ the Supreme Court of Pennsylvania contemplated the extent to which civil in rem forfeitures implicate the Eighth Amendment's prohibition against excessive fines.¹⁷ The court, failing to carve out a specific exception for residential properties, confirmed a two-prong test for determining the constitutionality of a forfeiture: first, whether the property was an instrumentality of a crime, and second, whether the value of the property is "grossly disproportional to the gravity of the offense."¹⁸ Importantly, the court also delineated specific factors to be considered when conducting its

13. See, e.g., John Kopp, *Philly Mayor: Don't Give Cash to Panhandlers*, PHILLYVOICE (June 12, 2017) <http://www.phillyvoice.com/philly-officials-launch-fund-raiser-combat-increased-panhandling/> [<https://perma.cc/44CS-8DQJ>] (noting that "[t]he number of panhandlers on Philadelphia's streets is increasing, a trend that city officials believe is a byproduct of the opioid crisis"); see also City of Phila., Mayor's Task Force on Eviction Preparation and Response, Draft Report and Recommendations 4 (Apr. 16, 2018), <http://www.phila.gov/hhs/PDF/Draft%20eviction%20Task%20Report%2004%2016%2018.pdf> [<https://perma.cc/23TU-JTKN>] (reporting that "Philadelphia is currently suffering from an eviction crisis"); State Data and Contacts Map, U.S. INTERAGENCY COUNCIL ON HOMELESSNESS, [https://www.usich.gov/tools-for-action/map/#fn\[\]=1400&fn\[\]=3100&fn\[\]=6300&fn\[\]=10400&fn\[\]=13200&all_types=true&year=2016&state=PA](https://www.usich.gov/tools-for-action/map/#fn[]=1400&fn[]=3100&fn[]=6300&fn[]=10400&fn[]=13200&all_types=true&year=2016&state=PA) [<https://perma.cc/6LBH-PENL>] (last visited Sept. 4, 2017) (listing Pennsylvania's total homeless population at 15,339 as of 2016).

14. See, e.g., Press Release, City of Phila., City Announces Texting as a Way for People to Support the Homeless (June 12, 2017), <https://beta.phila.gov/press-releases/mayor/city-announces-texting-as-a-way-for-people-to-support-the-homeless/> [<https://perma.cc/N8VQ-6QLP>] (describing Philadelphia mayor's texting donation program, which allows individuals to text "Share" to designated number to make five dollar contribution, which is then matched by Philadelphia and donated to local programs that provide housing and other services to city's homeless population).

15. See U.S. Const. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed . . ."). See generally Susan R. Klein, *Civil In Rem Forfeiture and Double Jeopardy*, 82 IOWA L. REV. 183 (1996) (providing overview of the convergence of the Double Jeopardy Clause and civil forfeiture laws); Matthew A. Martel, *Bennis v. Michigan: Forfeiting the Family Car Under Public Nuisance Laws*, 47 CATH. U.L. REV. 283 (1997) (examining due process implications of civil forfeiture adjudication).

16. 160 A.3d 153 (Pa. 2017).

17. For a further analysis of the Pennsylvania supreme court's decision in *1997 Chevrolet*, see *infra* notes 89–110 and accompanying text.

18. See *1997 Chevrolet*, 160 A.3d at 159 (promulgating a two-part excessive fine test). The case was on appeal from the Commonwealth Court of Pennsylvania, which had reversed and remanded the Philadelphia County Court of Common Pleas' decision granting forfeiture. See *id.* at 162. See generally *Commonwealth v.*

prescribed analysis, something the United States Supreme Court has yet to do.¹⁹

This Note analyzes the factors laid out in *1997 Chevrolet* in the context of drug-related forfeitures of single-family homes and advocates for a categorical presumption of excessiveness in such cases.²⁰ Part II provides information regarding the historical roots and current implementation of asset forfeiture.²¹ Part III provides the facts and procedure of *1997 Chevrolet*.²² Part IV analyzes the court's reasoning in deciding *1997 Chevrolet*.²³ Part V provides a critical analysis of the court's reasoning and highlights the shortcomings of the two-step, multifactor approach to the excessive fine analysis.²⁴ Finally, Part VI discusses the potential impact of this decision.²⁵

II. BACKGROUND: THE NATIVITY OF CIVIL ASSET FORFEITURE

Undoubtedly, civil asset forfeiture is conceptually foreign to most.²⁶ This practice, however, is neither novel nor infrequent in the United States or abroad.²⁷ An historical analysis of *in rem* forfeiture reveals that its roots are both deep and far-reaching, spanning from biblical times to the war on drugs.²⁸

1997 Chevrolet, 106 A.3d 836 (Pa. Commw. Ct. 2014), *aff'd*, 160 A.3d 153 (Pa. 2017).

19. See *1997 Chevrolet*, 160 A.3d at 191–92 (summarizing list of factors to be considered when performing excessive fines analysis); *infra* note 100 and accompanying text for list of factors considered by the *1997 Chevrolet* court; see also *infra* note 64 and accompanying text explaining that the Supreme Court's most recent civil forfeiture case did not identify factors for lower courts to consider.

20. For a complete argument in favor of a presumption of excessiveness in cases of drug-related residential forfeitures, see *infra* notes 111–53 and accompanying text.

21. For a further discussion of the history and development of civil asset forfeiture practice, see *infra* notes 26–42 and accompanying text.

22. For a further discussion of the facts of *1997 Chevrolet*, see *infra* notes 70–88 and accompanying text.

23. For a complete narrative analysis of the *1997 Chevrolet* court's decision, see *infra* notes 89–110 and accompanying text.

24. For a complete critical analysis of the *1997 Chevrolet* court's decision, see *infra* notes 111–66 and accompanying text.

25. For a further discussion of the impact of *1997 Chevrolet*, see *infra* notes 166–75 and accompanying text.

26. See, e.g., Cassella & Smith, *supra* note 11, at 73 (remarking that “civil forfeiture is too complicated for a nonlawyer to understand. Indeed, it is difficult to find a lawyer who really understands it.”).

27. See *United States v. Ursery*, 518 U.S. 267, 274 (1996) (“Since the earliest years of this Nation, Congress has authorized the Government to seek . . . *in rem* civil forfeiture actions”); see also CIVIL FORFEITURE OF CRIMINAL PROPERTY: LEGAL MEASURES FOR TARGETING THE PROCEEDS OF CRIME 52–249 (Simon N.M. Young ed., 2009) (providing overviews of civil forfeiture laws in Ireland, South Africa, Australia, Canada, and United Kingdom).

28. For a further explanation of civil forfeiture's history, see *infra* notes 29–42 and accompanying text.

A. *Biblical Origins and Colonial Resurrection*

Scholars remark that the general concept of civil forfeiture can be traced back to the Old Testament.²⁹ Specifically, those who study civil forfeiture's history point to the Book of Exodus, which instructs that when an ox gores a person to death, the ox is to be killed, but its owner escapes liability.³⁰ The guilt of the ox itself seems to be the first recorded instance of "guilty property"—the legal fiction upon which civil forfeiture is based.³¹ The concept of guilty property lived on and infused itself into English common law in the form of the "deodand," or the term used for a forfeiture to the king absent a criminal conviction.³² When an inanimate object caused the death of one of the king's subjects, that object became a deodand and was forfeited to the crown, and its value was to be used for charitable purposes.³³

Given its common law roots, civil forfeiture was poised to be brought to America upon colonization.³⁴ However, this type of forfeiture was so

29. See, e.g., David R. Fine & Raymond P. Pepe, *Bennis v. Michigan and Innocent Owners in Civil Forfeiture: Balancing Legitimate Goals with Due Process and Reasonable Expectations*, 5 GEO. MASON L. REV. 595, 598 (1996) (including provisions from Old Testament and Roman law related to concept of guilty property); Tom Gordon, *Civil Asset Forfeiture: Procedural and Economic Inequities*, 55 GUILD PRAC. 188, 188 (1998) (noting that concept of civil in rem forfeiture "dates back to the Old Testament"); David Benjamin Ross, "Comment & Note" *Civil Forfeiture: A Fiction That Offends Due Process*, 13 REGENT U. L. REV. 259, 260 (citing biblical law as source contributing to concept of guilty property).

30. See Exodus 21:28; see also Anthony J. Franze, Note, *Casualties of War?: Drugs, Civil Forfeiture, and the Plight of the "Innocent Owner"*, 70 NOTRE DAME L. REV. 369, 373 (1994) (recognizing biblical roots of civil forfeiture); Alice Marie O'Brien, Note, *Caught in the Crossfire: Protecting the Innocent Owner of Real Property from Civil Forfeiture Under 21 U.S.C. 881(a)(7)*, 65 ST. JOHN'S L. REV. 521, 524 (1991) (noting that practice of forfeiture dates back to biblical era and is recorded in ancient Grecian and Roman manuscripts).

31. See *United States v. 427 & 429 Hall St.*, 74 F.3d 1165, 1168 (11th Cir. 1996) (noting that "[s]ome trace the roots of civil forfeiture to the Old Testament"); see also Michael van den Berg, Comment, *Proposing a Transaction Approach to Civil Forfeiture Reform*, 163 U. PA. L. REV. 867, 873 (2015) (stating that concept of "guilty" property, derived from Old Testament, is core of civil forfeiture).

32. See *Calero v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 680–82 (1974) (explaining that deodand served dual purpose of religious expiation and penalization for carelessness); see also Tamara R. Piety, Comment, *Scorched Earth: How the Expansion of Civil Forfeiture Doctrine Has Laid Waste to Due Process*, 45 U. MIAMI L. REV. 911, 929–30 (1991) (explaining that among the theories justifying deodand are religious cleansing, prevention of vigilante justice, and punishment for negligence).

33. See *Calero*, 416 U.S. at 681 ("The value of the instrument was forfeited to the King, in the belief that the King would provide the money for Masses to be said for the good of the dead man's soul, or insure[sic] that the deodand was put to charitable uses."). But see Donald J. Boudreaux & A.C. Pritchard, *Civil Forfeiture and the War on Drugs: Lessons from Economics and History*, 33 SAN DIEGO L. REV. 79, 94 (1996) ("In theory, the Crown used the funds from the liquidated deodand to pay for the funeral Mass of the deceased. In time, however, the Crown actually profited from deodand.").

34. See *427 & 429 Hall St.*, 74 F.3d at 1168 (stating that "only statutory forfeiture," rather than deodand, "became part of the American legal tradition"); see also

unpopular among the colonists that it was generally used as a tool to seize property only in situations where a criminal conviction was impractical.³⁵ It was not until Prohibition that state and federal governments began utilizing civil forfeiture as a means to combat domestic criminal enterprises.³⁶

B. *The War on Drugs: Civil Forfeiture's Second Coming*

After a period of dormancy following the end of Prohibition, Congress revived civil forfeiture in 1970 as one of its weapons in the war on drugs.³⁷ The intent behind authorizing civil forfeiture for drug-related crimes was to economically cripple, deter, and punish those involved in the “enormously profitable” drug trade.³⁸ States soon followed suit by en-

Caleb Nelson, *The Constitutionality of Civil Forfeiture*, 125 YALE L.J. 2446, 2457–58 (2016) (explaining that during colonial era, English Parliament used forfeiture laws as means to encourage statutory compliance); van den Berg, *supra* note 31, at 873–75 (noting that although deodand was excised from English common law during early eighteenth century, statutory forfeiture law remained in practice throughout Revolutionary Era).

35. See Brent Skorup, Comment, *Ensuring Eighth Amendment Protection from Excessive Fines in Civil Asset Forfeiture Cases*, 22 GEO. MASON U. CIV. RTS. L.J. 427, 433 (1994) (stating that despite founding fathers' disdain toward civil forfeiture, practice remained on books due to its utility in rare cases of piracy and other maritime situations); see also Brant C. Hadaway, Comment, *Executive Privateers: A Discussion on Why the Civil Asset Forfeiture Reform Act Will Not Significantly Reform the Practice of Forfeiture*, 55 U. MIAMI L. REV. 81, 84 (2000) (explaining that “forfeiture was a hated measure among the colonists” but “remained a tool, however, in certain matters involving the collection of revenue and at admiralty”).

36. See National Prohibition Act, ch. 85, 41 Stat. 305, 316 (1919) (repealed 1933) (prohibiting the sale of intoxicating liquors); Skorup, *supra* note 35, at 433 (“When Prohibition began in the first half of the twentieth century, use of civil forfeiture reemerged and was expanded to combat criminal bootlegging networks.”); see also *Rickman v. Kentucky*, 265 S.W. 452, 454 (Ky. 1924) (reversing and remanding forfeiture of 155-acre farm which contained still used to produce liquor). In *Rickman*, state law provided that:

Any person, firm or corporation, knowingly or intentionally renting, hiring, letting or lending or leasing or permitting the use of, or using any building, house, structure, or premises, farm or part thereof, real estate or part thereof, or any boat or other water craft or air craft, or any car, truck, wagon or team, automobile or propelling the same for the purpose of the unlawful manufacture, sale or transportation of intoxicating liquors, to another or others, shall be considered guilty of a nuisance and of a violation of this act, and any property so used in violation of this act shall become forfeited to the Commonwealth of Kentucky.

Id. at 452 (quoting 1922 Ky. ACTS 114). Despite the applicable forfeiture statute, the court found the forfeiture of the entire farm improper and instructed the forfeiture of only the discrete property used to produce alcohol. See *id.* at 454.

37. See Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, § 511, 84 Stat. 1236, 1276 (codified at 21 U.S.C. § 881(f)) (allowing forfeiture of controlled substances and all property which is used to facilitate a violation of the Drug Abuse Prevention and Control Act).

38. See Klein, *supra* note 15, at 208–09; see also Robin Sackett, Comment, *The Impact of Austin v. United States: Extending Constitutional Protections to Claimants in Civil Forfeiture Proceedings*, 24 GOLDEN GATE U.L. REV. 495, 502 (1994) (explaining

acting analogous statutes, such as Pennsylvania's Controlled Substances, Drug, Device, and Cosmetic Act (Controlled Substances Act).³⁹ When the federal legislation was first enacted, the assets and proceeds collected from forfeitures were deposited into the U.S. Treasury's general fund, meaning they would go towards financing "the daily and long-term operations of the U.S. government as a whole."⁴⁰ However, Congress amended the Act in 1984, allowing such funds to go directly to local law enforcement agencies.⁴¹ This amendment once again prompted states to enact similar provisions; Pennsylvania now allows the Commonwealth's attorney general to retain the property forfeited for official use or sell such property and use the cash proceeds for the enforcement of the Controlled Substances Act.⁴²

C. *Evolving Standards: Current Implementation of Civil Forfeiture*

Civil forfeiture in Pennsylvania is currently governed by a recently amended statute.⁴³ Under the current legal framework, police first make

legislative history of Drug Abuse Prevention and Control Act and its renewed use of civil forfeiture).

39. See Controlled Substance, Drug, Device and Cosmetic Act, 1972 Pa. Laws. 233 (codified at 35 Pa. Cons. Stat. §§ 780-101-44).

40. Gen. Fund of the U.S. Gov't, Bureau of the Fiscal Service, U.S. Dep't of the Treasury, https://www.fiscal.treasury.gov/fsservices/gov/acctg/genFund/genFund_home.htm [<https://perma.cc/7QKV-DTWK>] (last updated June 9, 2016). See also Barclay Thomas Johnson, Note, *Restoring Civility—the Civil Asset Forfeiture Reform Act of 2000: Baby Steps Towards a More Civilized Civil Forfeiture System*, 35 IND. L. REV. 1045, 1050 (2001) (discussing the evolution of civil asset forfeiture procedure and explaining that prior to 1984 assets seized through forfeiture were "deposited into the U.S. Treasury's general funds").

41. See *id.* (positing that allowing proceeds to be deposited into special forfeiture funds represented important shift in civil forfeiture procedure); see also Hada-way, *supra* note 35 at 84 (describing 1984 amendments to Drug Abuse Prevention and Control Act which gave Attorney General full control over funds from forfeited assets).

42. See 42 PA. STAT. AND CONS. STAT. ANN. § 5803(f)–(g) (West 2018) (allocating proceeds of forfeiture actions); see also KANE, *supra* note 10 (reporting that \$2,222,172.00 of state's expenditures during fiscal year 2014 were acquired through asset forfeiture); CRIM. L. DIV., ASSET FORFEITURE & MONEY LAUNDERING, COMMW. OF PA. OFFICE OF THE ATT'Y GEN., <https://www.attorneygeneral.gov/criminal-law-division/> [<https://perma.cc/5TZ4-CFEK>] (providing attorney general's asset forfeiture practice). In relevant part, the attorney general's website states:

an aggressive approach to the investigation and presentation/prosecution of asset forfeiture and money laundering cases has led to significant forfeitures of monies, automobiles, personal property and real estates . . . [t]he monies derived from the forfeitures are, in turn, used by law enforcement to help future drug and other criminal investigations as well as assist community-based drug crime-fighting program throughout the state

Id.

43. See 42 PA. STAT. AND CONS. STAT. ANN. § 5805; see also Press Release, Governor Tom Wolf, Governor Wolf Signs Civil Asset Forfeiture Reform Bill into Law (June 29, 2017), <https://www.governor.pa.gov/governor-wolf-signs-civil-asset-forfeiture-reform-bill-into-law/> [<https://perma.cc/P8FJ-TL5P>] (publicizing passing

a determination that the property is being used or is intended to be used to facilitate a violation of the Controlled Substances Act.⁴⁴ Then, the Commonwealth can initiate legal proceedings by filing a forfeiture petition in the appropriate court of common pleas where the property is located, naming the property as defendant.⁴⁵ Upon being served with notice of the petition, the property owner or occupant, who now becomes the claimant, has thirty days to file an answer.⁴⁶ Regardless of whether a claimant has filed an answer, the property may be seized once the claimant has been served with process.⁴⁷ However, the claimant may file a motion seeking release of the property pending the conclusion of the proceedings if he or she can prove that seizure would cause a substantial hardship.⁴⁸

If the claimant files an answer within the allotted thirty-day period, a trial commences.⁴⁹ Importantly, because this is a civil proceeding, the property owner does not have the right to counsel at any point during the trial.⁵⁰ As the plaintiff, the Commonwealth must show by clear and con-

of new civil forfeiture statute which raises burden of proof for Commonwealth and prohibits “pre-forfeiture seizure of real property without a hearing”).

44. See 42 PA. STAT. AND CONS. STAT. ANN. § 5803(b)(4) (“Property subject to forfeiture may be seized by a law enforcement authority if . . . [t]here is probable cause to believe that the property has been used or is intended to be used in violation of the act of . . . The Controlled Substance, Drug, Device and Cosmetic Act, or another offense for which forfeiture is expressly authorized as a sanction.”); see *United States v. Salmon*, 944 F.2d 1106, 1119 (3d Cir. 1991) (finding that vehicle was subject to forfeiture because police had probable cause to believe that defendant’s use of vehicle made drug transaction less difficult).

45. See 42 PA. STAT. AND CONS. STAT. ANN. § 5805(a) (“The proceedings for the forfeiture or condemnation of property, the sale of which is provided for in this chapter, shall be in rem, in which the Commonwealth shall be the plaintiff and the property the defendant.”).

46. See *id.* § 5805(a)(2)(i) (describing process of filing answer to petition of forfeiture).

47. See *id.* § 5805(b)(1) (“A copy of the forfeiture petition required under subsection (a) shall be served personally or by certified mail on the owner, if known, and on each person in possession at the time of the seizure, if known.”).

48. See *id.* § 5805(f)(1)(iii) (“A claimant to property subject to forfeiture is permitted to seek the immediate release of seized property if . . . the continued possession by the Commonwealth pending the final disposition of forfeiture proceedings will cause substantial hardship to the claimant, such as preventing the functioning of a legitimate business, preventing the claimant from working or *leaving the claimant homeless*.” (emphasis added)).

49. See *id.* § 5805(i) (prohibiting judicial district from requiring parties “to proceed through local rules of arbitration”); see also *id.* § 5805(a)(2)(i) (“A claimant shall file an answer setting forth a right of possession of the property within 30 days.”).

50. See *Commonwealth v. \$9,847.00 United States Currency*, 704 A.2d 612, 617 (Pa. 1997) (“Because a claimant in a civil forfeiture proceeding is not in danger of a loss of personal liberty should he be unsuccessful at trial, we now hold that there is no constitutional right to the appointment of counsel for indigent claimants in civil forfeiture matters under either[sic] the United States Constitution.”); cf. 18 U.S.C. § 983(b)(1)(A) (2012) (granting right to appointed counsel to indigent property owners in instances where owner is already represented in con-

vincing evidence that the property was used in contradiction of the Controlled Substances Act.⁵¹ The claimant, litigating pro se or with the aid of counsel, may raise the “innocent owner defense” by claiming that he or she did not have knowledge or give consent to the illegal activity.⁵²

Once raised, the burden remains with the Commonwealth to prove by clear and convincing evidence that the claimant in fact knew about and consented to the property’s illicit use.⁵³ If the Commonwealth is successful in proving both the owner’s knowledge and consent, the court may grant permanent forfeiture of the property.⁵⁴ After the court determines that forfeiture is appropriate, but prior to entry of the order, the owner can “petition the court to determine whether the forfeiture is constitutionally excessive.”⁵⁵ If the court finds that the forfeiture is grossly dispro-

nected criminal case or forfeiture is of real property being used by owner as primary residence).

51. See 2017 Pa. Laws 247 (codified as amended at 42 PA. CONS. STAT. § 5805(j)(3)) (holding Commonwealth to clear and convincing standard of proof). The statute now requires the Commonwealth to prove by clear and convincing evidence that property is subject to forfeiture, rather than the former and less-burdensome preponderance of the evidence standard. See, e.g., Commonwealth v. One 1988 Ford Coupe, 574 A.2d 631, 327 (Pa. Super. Ct. 1990) (“At that hearing, the Commonwealth must prove by a preponderance of the evidence that the property in question was used to facilitate the drug transaction.” (citations omitted)). Given the recently heightened burden of proof, Pennsylvania case law applying the clear and convincing standard is sparse. But see *In re King Props.*, 635 A.2d 128, 133 (Pa. 1993). In this case, the court affirmed the forfeiture of a criminal defendant’s home where clear and convincing evidence showed that the owner used the property to further his ongoing drug trade. See *id.* Large amounts of cash, drugs, and drug paraphernalia found in the home were sufficient to establish a “significant connection” between the criminal conduct and the property forfeited. See *id.* (internal quotation omitted); see also *Cohen v. a 1999 Pontiac*, 976 N.Y.S.2d 782, 782 (Sup. Ct. 2013) (finding that county failed to produce clear and convincing evidence that noncriminal defendant was involved in affirmative acts which aided, abetted, or facilitated conduct of criminal defendant, as required by New York law, where vehicle owner allowed another to operate her vehicle while under influence alcohol or drugs).

52. See 42 PA. STAT. AND CONS. STAT. ANN § 5805(j)(4) (providing that if Commonwealth succeeds in establishing by clear and convincing evidence that property is subject to forfeiture and claimant alleges that he or she did not have knowledge of or consent to illegal use of property, then Commonwealth must establish by clear and convincing evidence that property was either used unlawfully by claimant or was used by someone other than claimant with his or her “knowledge and consent” (emphasis added)); Commonwealth v. 5900 Market St., 732 A.2d 659, 662 (Pa. Commw. Ct. 1999) (providing that the “innocent owner defense” can be proven if the claimant shows “the property was not unlawfully used or possessed by him”).

53. See 42 PA. STAT. AND CONS. STAT. ANN. § 5805(j)(4) (explaining that if claimant puts forth innocent owner defense, the Commonwealth must rebut it with clear and convincing evidence).

54. See *id.* § 5805(a) (describing general civil forfeiture procedure).

55. See *id.* § 5805(k)(1). For a further discussion of how courts are to determine whether forfeiture is excessive under Eighth Amendment, see *infra* notes 89–110 and accompanying text.

tional to the value of the property, the forfeiture must be eliminated or reduced.⁵⁶

Even before Pennsylvania's civil forfeiture statute was amended to reflect a proportionality requirement, however, the United States and Pennsylvania supreme courts held that the Eighth Amendment's prohibition against excessive fines required a proportionality analysis in cases of civil forfeiture.⁵⁷ First, in *United States v. Austin*,⁵⁸ the U.S. Supreme Court decided that in rem forfeitures, although civil in nature, are nonetheless punitive and therefore subject to Eighth Amendment restrictions.⁵⁹ Next, the Supreme Court revisited the issue of excessive fines in *United States v. Bajakajian*,⁶⁰ where it considered the constitutionality of a forfeiture of \$357,144 in United States currency because the claimant violated a federal statute that required him to report that he was traveling with more than \$10,000 in cash.⁶¹

Building off of *Austin*, the *Bajakajian* Court adopted a gross proportionality standard for considering whether a forfeiture is constitutionally excessive.⁶² That is, a forfeiture is excessive under the Eighth Amendment where the "amount" of the forfeiture is grossly disproportional to the gravity of the underlying offense.⁶³ Although the Court did not instruct the lower courts to consider any particular factors when making this

56. See 42 PA. STAT. AND CONS. STAT. ANN § 5805(k)(2) ("If the court finds that the forfeiture is grossly disproportional to the offense, the court shall reduce or eliminate the forfeiture as necessary to avoid a constitutional violation."). For a further discussion of what constitutes gross disproportionality, see *infra* notes 101–11 and accompanying text.

57. See *United States v. Bajakajian*, 524 U.S. 321, 334 (1998) ("The touchstone of the constitutionality inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of a forfeiture must bear some relationship to the gravity of the offense that it is designed to punish."); see also *Commonwealth v. 5444 Spruce Street*, 832 A.2d 396, 401–03 (Pa. 2003) (adopting the *Bajakajian* Court's definition of proportionality and requiring a gross disproportionality test in all cases of punitive forfeiture). For a further discussion of the courts' application of the proportionality test, see *infra* notes 111–40.

58. 509 U.S. 602 (1993).

59. See *id.* at 622 (concluding that in light of relevant legislative history and current statutory scheme, civil forfeitures serve to punish wrongdoers). Although the *Austin* Court remanded the case to the Eighth Circuit to determine whether the forfeiture of the claimant's auto body shop was excessive, it declined to establish a multifactor test for determining whether a civil forfeiture is constitutionally excessive. See *id.* ("Austin asks that we establish a multifactor test for determining whether a forfeiture is constitutionally 'excessive.' We decline that invitation." (citation omitted)).

60. 524 U.S. 321 (1998).

61. See *id.* at 324–25 (describing the underlying criminal offense at issue).

62. See *id.* at 336 (reasoning that because "any judicial determination regarding the gravity of a particular criminal offense will be inherently imprecise," a standard of gross proportionality is preferable to one of strict proportionality).

63. See *id.* at 336–37 (instructing courts to apply gross proportionality standard in cases of forfeiture). In *Bajakajian*, the Court applied this standard and found that the forfeiture of the claimant's entire \$357,144 was grossly disproportional to his crime of failing to report the currency. See *id.* at 337.

determination, it considered the offense's lack of relation to other illegal activities, that the claimant did not fit into the class of persons for which the statute was designed, and the minimal harm caused by the offense, which all supported a finding of excessiveness.⁶⁴

After the Court decided both *Austin* and *Bajakajian*, the Supreme Court of Pennsylvania faced an analogous Eighth Amendment issue in *Commonwealth v. 5444 Spruce Street*,⁶⁵ where the claimant contested the constitutionality of the forfeiture of her longtime Philadelphia home.⁶⁶ The underlying offense in *5444 Spruce Street* was the owner's single charge of possession with intent to deliver, to which she pleaded guilty and received a sentence of two years' probation.⁶⁷ In assessing the owner's excessive fine claim, the court confirmed that the Eighth Amendment's Excessive Fines Clause applied to civil in rem forfeitures and adopted the gross disproportionality test espoused in *Bajakajian*.⁶⁸ Although the lower court had claimed to have been applying *Bajakajian* in its decision upholding the forfeiture, the *5444 Spruce Street* court remanded because the record contained no information regarding the value of the home, thus precluding an adequate comparison of the value of the property to the gravity of the underlying offense.⁶⁹

III. GOD BLESS SAVE THIS HOME: THE FACTS OF 1997 CHEVROLET

Come May 2017, the issue of excessive fines in the context of residential in rem forfeitures reached the Supreme Court of Pennsylvania again in *1997 Chevrolet*.⁷⁰ Seventy-one-year-old homeowner Elizabeth Young had resided in her West Philadelphia home since the 1970s.⁷¹ After being placed on bed rest after a lengthy hospital stay in October 2009, Ms. Young's son, Donald Graham, and his two children moved in with her.⁷² The following month, the Philadelphia Police Department, which had suspected Mr. Graham of selling drugs, set up controlled buys by using a

64. *See id.* at 337–40 (examining facts which pertain to gravity of underlying offense).

65. 832 A.2d 396 (Pa. 2003).

66. *See id.* at 397–98 (explaining background information of case).

67. *See id.* at 397 (describing underlying offense and procedure of forfeiture).

68. *See id.* at 403 (“We hold today that *Bajakajian*'s gross disproportionality test applies to all punitive forfeitures regardless of the form of the underlying proceedings.” (footnote omitted)); *see also* U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).

69. *See id.* at 402–03 (noting that the commonwealth court paid “lip service” to *Bajakajian* but actually used framework found in *Bajakajian* dissent, rather than majority opinion, by focusing on harm caused and ignoring value of property).

70. *See Commonwealth v. 1997 Chevrolet & Contents Seized from James Young*, 160 A.3d 153, 159 (Pa. 2017) (addressing Eighth Amendment challenge to forfeiture of residential property).

71. *See id.*

72. *See id.* (describing Ms. Young's medical condition, which included diagnosis of and treatment for two blood clots in lungs).

confidential informant who would call Mr. Graham and meet him outside of Ms. Young's home while the officers observed.⁷³

After each of these buys, the informant would return with a small packet of marijuana.⁷⁴ This prompted the police to search Ms. Young's residence on November 19, 2009 while she was present; the search yielded six small packets of marijuana and other materials typically used to weigh and package marijuana.⁷⁵ Although the officers told Ms. Young that her son had been dealing drugs and they were there to arrest him, Mr. Graham was, in fact, not arrested.⁷⁶ Rather, the police decided to conduct an investigation into the home itself.⁷⁷ As such, they set up four more controlled buys, the last of which resulted in Mr. Graham's arrest on the steps of Ms. Young's home.⁷⁸ Subsequently, he pleaded guilty to possession of marijuana with intent to deliver and was sentenced to eleven-to-twenty-three months of house arrest.⁷⁹

One month after sentencing Mr. Graham to house arrest, the Commonwealth filed a petition for forfeiture of the home.⁸⁰ Represented by pro bono attorneys, Ms. Young was able to navigate the procedural channels necessary to receive a hearing and to produce evidence.⁸¹ Attempt-

73. *See id.* (providing succinct timeline of controlled buys); *see also* Commonwealth v. 1997 Chevrolet, 106 A.3d 836, 841–42 (Pa. Commw. Ct. 2014) (providing more detailed overview of drug investigation and use of confidential informant). The first three controlled buys were substantially similar in that each time the informant met Mr. Graham on the corner of 62nd and Pine streets, handed him twenty to forty dollars in prerecorded cash, and brought the police back a small plastic packet of marijuana. *See* 1997 Chevrolet, 106 A.3d at 841.

74. *See id.* (describing second controlled buy, conducted on November 14, 2009).

75. *See id.* at 842 (explaining that police obtained and executed search warrant). Neither the legitimacy of the search warrant nor the presence of probable cause is at dispute in this case. *See id.*

76. *See id.* at 842 (noting that according to an officer, Ms. Young “was in disbelief when police informed her that [Mr. Graham] was selling drugs”).

77. *See id.* (“Instead, they decided to do an investigation into the property situated on 416 S. 62nd St.” (internal quotation omitted)).

78. *See id.* at 843 (describing events leading up to and following Mr. Graham's arrest). After the police arrested Mr. Graham, they searched his person as well as Ms. Young's home and vehicle. *See id.* In the living room, they found 1.3 grams of unpackaged marijuana, which “had a street value of \$20 to \$25.” *See id.*

79. *See* Commonwealth v. 1997 Chevrolet & Contents Seized from James Young, 160 A.3d 153, 160 (Pa. 2017) (noting that trial court did not impose fine on Mr. Graham).

80. *See id.* (“While the Commonwealth never charged Appellee with any crime, on October 20, 2010, the Commonwealth filed a petition for the forfeiture of Appellee's house and her vehicle under the Controlled Substances Forfeiture Act” (citation omitted)).

81. *See* 1997 Chevrolet, 106 A.3d at 841–47 (describing forfeiture proceeding in further detail, including evidence presented by Commonwealth and Ms. Young); *see also* Chris Mondics, *Law Review: Loss of Assets Shines Light on Civil Forfeiture*, PHILA. INQUIRER (June 30, 2014, 01:07 AM), http://www.philly.com/philly/columnists/chris-mondics/20140630_Law_Review_Loss_of_assets_shines_light_on_civil_forfeiture.html [https://perma.cc/G9NE-R5YY] (telling story behind 1997 Chevrolet

ing to raise the innocent owner defense, Ms. Young averred that she was unaware her son was dealing drugs.⁸²

Despite the evidence Ms. Young produced, the Philadelphia County Court of Common Pleas rejected her contention that she was unaware of the drug transactions and ordered the forfeiture of her home.⁸³ This decision was grounded in the theory that she facilitated the drug sales by allowing her son to store drug paraphernalia on her property and participate in drug transactions in and around the house.⁸⁴ From the court's perspective, Ms. Young was not entitled to the innocent homeowner defense because she was present in the home when the police conducted the search and did not take any affirmative steps to remove her son from the home or otherwise inhibit his illegal conduct.⁸⁵

On appeal, the Commonwealth Court of Pennsylvania reversed the trial court's grant of forfeiture and remanded for further proceedings because the record did not include any evidence of any actual harm caused by the offense.⁸⁶ Furthermore, the commonwealth court explained that the lower court erred in rejecting Ms. Young's innocent owner defense because it failed to consider all of the circumstances surrounding the illicit use of the property; it was simply not enough that the police told Ms. Young her son had been dealing drugs, as she was not required to believe

and remarking that Ms. Young had pro bono representation from lawyers at prominent firm); *Ballard Spahr Wins Landmark Civil Forfeiture Case: PA Supreme Court Decision Strengthens Eighth Amendment Protections*, BALLARD SPAHR (May 25, 2017), <http://www.ballardspahr.com/eventsnews/pressreleases/2017-05-25-ballard-spahr-wins-landmark-civil-forfeiture-case.aspx> [<https://perma.cc/T662-P5QN>] (reporting that Ballard Spahr attorneys Jessica Anthony, Jason Leckerman, and Joanna Hess Kunz represented Ms. Young throughout the case).

82. *See* 1997 *Chevrolet*, 106 A.3d at 844 (explaining that Ms. Young testified that she never saw her son use or keep drugs in her home and never allowed him to use her minivan to transport or sell drugs). Ms. Young also presented the testimony of her neighbor, who had never noticed any behavior suggesting illicit use of the property. *See id.* at 845–46.

83. *See id.* at 846 (explaining that the trial court ordered forfeiture after finding a sufficient nexus “between the seized property” and Mr. Graham’s possession of marijuana).

84. *See id.* (“[T]he trial court based its findings of fact on the credited testimony of the Commonwealth’s witnesses that a confidential informant or informants had purchased drugs ‘inside or around the property’ and the vehicle; that police recovered paraphernalia from inside the house; that Graham retrieved drugs from the vehicle; and that there was marijuana on Graham’s person when he was arrested.”).

85. *See id.* (noting trial court’s determination that Ms. Young, at best, “turned a blind eye to son’s illegal conduct on the property, which constituted consent” (internal quotations omitted)).

86. *See id.* at 854–55 (finding that it was not appropriate for trial court to merely compare the \$80,000 maximum monetary penalty to the collective monetary value of home and vehicle because there was no evidence of Mr. Graham’s actual penalty or actual harm caused by criminal activity).

their allegations.⁸⁷ The Commonwealth appealed the decision to the Supreme Court of Pennsylvania, which granted appeal to decide whether the commonwealth court contravened United States and Pennsylvania supreme court precedent.⁸⁸

IV. VICES AND VIRTUES: THE COURT'S ATTEMPT TO STRIKE A BALANCE

In *1997 Chevrolet*, the Supreme Court of Pennsylvania set out to determine the circumstances under which a forfeiture constitutes an excessive fine under the Eighth Amendment.⁸⁹ For the first time since 2003, the court conducted an Eighth Amendment analysis on a civil forfeiture, and broke new ground by highlighting specific factors to be considered when making such a determination.⁹⁰

The *1997 Chevrolet* court began its analysis by acknowledging both the significance of property rights in the abstract and the practical necessity that homes and vehicles have become to “one’s life and livelihood.”⁹¹ The court even went as far as quoting from a Prohibition-era forfeiture case, boldly stating that “forfeitures are not favored”⁹² In the same breath, however, the *1997 Chevrolet* court conceded the utility of civil forfeiture.⁹³ Recognizing this tension, the court developed a two-prong test with

87. *See id.* at 870 (citing *Commonwealth v. \$2,523.48 U.S. Currency*, 649 A.2d 658, 660 (Pa. 1994) (“We also reject the Commonwealth’s argument that Young had to invite the police to her house to prove lack of consent.”)).

88. *See Commonwealth v. 1997 Chevrolet & Contents Seized* from James Young, 120 A.3d 993 (Pa. 2015) (per curiam) (granting Commonwealth’s petition for allowance of appeal).

89. *See 1997 Chevrolet*, 160 A.3d at 159 (“[W]e attempt to reconcile the uncertain constitutional jurisprudence underlying civil *in rem* forfeiture and provide clarity and uniformity regarding the appropriate constitutional standard to be applied to excessive fines challenges to civil *in rem* forfeitures in our Commonwealth.”).

90. *See Commonwealth v. 5444 Spruce St.*, 832 A.2d 396, 434–35 (Pa. 2003) (reversing and remanding grant of forfeiture where sparse trial record inhibited proportionality analysis); *see also 1997 Chevrolet*, 160 A.3d at 191–92 (summarizing holding and re-stating factors to be considered in Eighth Amendment proportionality analyses). Also noteworthy is that the court ruled unanimously on the issue. *See id.* at 157 (indicating that all justices joined in majority opinion).

91. *See id.* at 177 (“Indeed, in our society, a home and a vehicle are often essential to one’s life and livelihood.”).

92. *See id.* at 177–78 (quoting *United States v. One 1936 Model Ford V-8 De Luxe Coach*, 307 U.S. 219, 226 (1939)). In *One 1936 Model Ford*, the claimant had purchased a vehicle previously used to illegally transport liquor for which the federal taxes had not been paid. *See One 1936 Model Ford*, 307 U.S. at 222–23. On appeal, the Supreme Court found that he complied with the requirements of the Liquor Law Repeal and Enforcement Act by purchasing the vehicle in good faith. *See id.* at 224. Accordingly, the forfeiture claim was dismissed. *See id.*

93. *See 1997 Chevrolet*, 160 A.3d at 178 (remarking that forfeiture “serves laudable goals”). Among the legal doctrine’s virtues are that it removes illegal items from the community, strips criminals and criminal enterprises of resources, “encourages property owners to prevent their property from being used for criminal” purposes, and funds law enforcement. *See id.*

delineated factors to provide courts undertaking this important issue with “clarity and uniformity.”⁹⁴

A. *The Instrumentality Prong*

Turning to the historical practice of civil in rem forfeiture, the court then addressed the first requirement of a valid civil forfeiture: that the property must be an instrumentality of the crime—conceptually based on property “guilty of” or directly responsible for causing an offense.⁹⁵ In addition to the longstanding concept of “guilty property,” the court found late-Justice Antonin Scalia’s concurrence in *Austin* persuasive as to the importance of the relationship between the property and the underlying crime.⁹⁶ Therefore, the Eighth Amendment necessitates a threshold finding that the property to be seized is an instrumentality of the offense.⁹⁷

The 1997 *Chevrolet* court explained that the instrumentality question turns on whether the property was “‘significantly used in the commission of the offense.’”⁹⁸ Specifically, the court delineated six factors to be considered when making a determination as to this relationship.⁹⁹ These factors are whether: (1) “the property was uniquely important to the success of the illegal activity”; (2) “the use of the property was deliberate and planned”; (3) the illegal use of the property was isolated or repeated; (4)

94. *See id.* (noting significant degree of uncertainty in excessive fine jurisprudence).

95. *See id.* at 178–79 (providing distinction between in rem and in personam forfeitures). In personam forfeitures proceed directly against a property-owner who has been accused of a crime. *See id.* In rem forfeitures, on the other hand, are civil proceedings against a piece of property itself, which does not need to be connected to a criminal conviction. *See id.*

96. *See id.* at 181 (“While, in *Austin*, Justice Scalia’s strict focus on the relationship of the property to the crime did not carry the day as discussed above, it certainly informs our analysis of the instrumentality question.”). Because civil forfeiture is in rem as opposed to in personam, Justice Scalia posited that it is not the culpability, or guilt, of the owner, but the relationship between the property and the crime that determines whether a forfeiture is excessive under the Eighth Amendment. *See id.* (citing *Austin v. United States*, 509 U.S. 602, 625–26 (1993) (Scalia, J., concurring)).

97. *See id.* at 185 (“Therefore, we hold that an instrumentality analysis, which considers the relationship between the property to be forfeited and the underlying criminal activity, must be a threshold inquiry in addressing an excessiveness challenge to a civil *in rem* forfeiture.”).

98. *See 1997 Chevrolet*, 160 A.3d at 183 (quoting *In re King Props.*, 635 A.2d 128, 133 (Pa. 1993)). In *King Properties*, the court affirmed the forfeiture of a criminal defendant’s home where clear and convincing evidence showed that the owner used the property to further his ongoing drug trade. 635 A.2d at 133. Large amounts of cash, drugs, and drug paraphernalia found in the home were sufficient to establish a “significant relationship between” the criminal conduct and the property forfeited. *See id.* (discussing *Austin*, 509 U.S. at 625–26 (Scalia, J., concurring)).

99. *See 1997 Chevrolet*, 160 A.3d at 191 (cautioning that prescribed “factors are not meant to be exhaustive, and that additional factors, when relevant, may be considered by a court, depending upon the particular circumstances at issue”).

“the purpose of acquiring, maintaining, or using the property was to carry out the offense”; (5) the illegal use of the property was extensive spatially, temporally, or both and (6) “the property is divisible with respect to the subject of forfeiture.”¹⁰⁰

B. *The Proportionality Prong*

Next, the *1997 Chevrolet* court relied on *Bajakajian* in adopting a proportionality prong to the Eighth Amendment excessive fine analysis.¹⁰¹ The court agreed with the majority’s conclusion in *Bajakajian* that a proportionality review is an indispensable element of an excessive fine inquiry.¹⁰² That is, a forfeiture constitutes an excessive fine under the Eighth Amendment where the amount of the forfeiture is grossly disproportional to the gravity of the underlying offense.¹⁰³

1. *Amount of Forfeiture: Hybrid Value of Property*

Because the amount of the currency seized in *Bajakajian* was self-evident, the *1997 Chevrolet* court did not have any precedent to draw upon in determining the amount of a forfeiture of a residential property.¹⁰⁴ Ultimately, the court rejected the Commonwealth’s argument that *Bajakajian* requires only a consideration of the property’s monetary value and instead opted to consider not only the fair market value of the property, but also its subjective value.¹⁰⁵ Assessing the subjective value of a piece of property involves taking into account whether the property is a family residence,

100. *See id.* (summarizing factors to be considered in instrumentality determination, but noting that list is not exhaustive). Because the Commonwealth in *1997 Chevrolet* argued that no such instrumentality requirement existed, the Pennsylvania supreme court did not apply these factors to the facts at hand but instead remanded to the commonwealth court for reconsideration in light of this new standard. *See id.* at 192.

101. *See id.* at 186 (emphasizing that proportionality is “the touchstone of the constitutional inquiry under the Excessive Fines Clause” (emphasis omitted) (quoting *United States v. Bajakajian*, 524 U.S. 321, 334 (1998))).

102. *See id.* at 166 (explaining that *Bajakajian* stands for principle that punitive forfeitures require proportionality determination as part of excessiveness analysis (citing *Bajakajian*, 524 U.S. at 333–34)).

103. *See 1997 Chevrolet*, 160 A.3d at 186 (“Broadly speaking . . . [i]f the amount of the forfeiture is grossly disproportional to the gravity of the offense, it is unconstitutional.” (citing *Bajakajian*, 524 U.S. at 336–37)). The *Bajakajian* Court, however, did not mandate that any particular factors be considered when performing such a proportionality analysis. *See id.*; *supra* note 64 and accompanying text for analysis that the *Bajakajian* Court refrained from defining categorical approach to proportionality. Because the forfeiture in *Bajakajian* dealt with currency, the Court gave no indication of how to value different types of property that are not as objectively quantifiable. *See 1997 Chevrolet*, 160 A.3d at 187–88.

104. *See id.* at 187 (noting that Supreme Court in *Bajakajian* used term “amount” referring to property because it was currency, while in *5444 Spruce Street*, the Pennsylvania supreme court referred to “value” of property because it was real property).

105. *See id.* at 188 (explaining that certain pieces of property, such as residences and vehicles, carry additional value aside from monetary worth and might

the harm forfeiture would bring to the owner or innocent third parties, and whether the forfeiture would deprive the property owner's livelihood.¹⁰⁶

2. Gravity of the Offense

To assess the gravity of the underlying offense at issue, the *1997 Chevrolet* court applied the *Bajakajian* factors as delineated in *5444 Spruce Street*.¹⁰⁷ Gravity is measured by considering (1) the nature of the crime; (2) the relation of the violation to any other illegal activity; (3) the maximum sentence that could have been imposed; (4) the actual harm caused; (5) regularity of the conduct; (6) and the culpability of the property owner.¹⁰⁸ Importantly, the court emphasized that the government must articulate the specific harm caused, beyond a generalized harm to society.¹⁰⁹ As a result, the *1997 Chevrolet* court rejected the Commonwealth's

require subjective evaluation, but qualifying that in some circumstances, simple market value may be appropriate).

106. *See id.* ("certain property—such as a residence, a vehicle, or other similar necessities in our daily life—carry additional value to the owner and possibly others"); *see also* *United States v. Viloski*, 814 F.3d 104, 111 (2d Cir. 2016). In *Viloski*, a real estate broker was ordered to forfeit \$1,273,285.50, which he had acquired through kickbacks and then laundered. *See Viloski*, 814 F.3d at 107. In determining whether the forfeiture constituted an excessive fine, the Second Circuit placed an emphasis on considering whether the forfeiture would deprive him of his livelihood, which the court defined as his future ability to earn a living. *See id.* at 111. The legal basis for such a consideration derives from the Magna Carta, which required that payments to the Crown "not be so large as to deprive an offender of his or livelihood." *See id.* (quoting *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 269 (1989)). Ultimately, the court found that the forfeiture at issue would not have deprived the claimant of his ability to earn a living upon his release from prison. *See id.* at 114.

107. *See 1997 Chevrolet*, 160 A.3d at 189 (noting that both *Bajakajian* and *5444 Spruce Street* focused on culpability-based factors). The court then concluded: [I]n our view, in analyzing the gravity of the offense, a court must consider these *Bajakajian* factors. In doing so, a court must consider the essence of the crime—that is, the nature of the underlying offense. Related thereto, the relation of the offense to any other illegal activity and whether the offender fit into the class of persons for whom the offense was designed should be considered. Further, the court should take into account the maximum penalty as compared to the penalty imposed upon the criminal offender. In making this assessment, the actual penalty imposed (sentence, fine) upon the offender giving rise to the forfeiture is compared to the maximum authorized sentence for the underlying offenses for which the offender was convicted. Moreover, the regularity of the criminal conduct must be considered, including whether the illegal acts were isolated or frequent, constituting a pattern of misbehavior. Finally, a court must take into account the harm resulting from the crime charged.

Id. at 189–90.

108. *See id.* (listing factors taken from *Bajakajian* and *5444 Spruce Street*).

109. *See id.* at 190 (affirming commonwealth court's rejection of Commonwealth's claim that crime committed was harmful to society, on grounds that "all crimes have a negative impact in some general way to society").

bare assertion that harm can be inferred in cases of drug trafficking within residential neighborhoods.¹¹⁰

V. CRITICAL ANALYSIS: LACK OF A CATEGORICAL RULE LEAVES
HOMEOWNERS WITHOUT SANCTUARY

At first blush, the Pennsylvania supreme court's two-step instrumentality and proportionality test with specific factors seems to offer greater constitutional protection to homeowners facing forfeiture.¹¹¹ *1997 Chevrolet*, however, is not cause for definitive celebration.¹¹² Even in light of the decision's nuanced interpretation of the Eighth Amendment's prohibition against excessive fines, the gross disproportionality standard falls short of a categorical protection necessary to a society experiencing burgeoning rates of homelessness and housing instability.¹¹³ Rather than establishing a clear rule that removing a family from its home as punishment for a drug-related offense is per se excessive under the Constitution, *1997 Chevrolet* invites courts to consider not only the factors it prescribes, but also any other factor the trial court deems relevant to the overall resolution of the excessive fine challenge.¹¹⁴ Although providing courts with the opportunity to consider all relevant factors may work to the favor of homeowners in some cases, allowing such discretion can just as easily result in affirmative forfeiture rulings.¹¹⁵

By failing to promulgate a presumption of excessiveness in cases of residential forfeiture, *1997 Chevrolet* does not give ample weight to the sanctity of homeownership, which has long been recognized by the

110. See *id.* at 175, 190 (stating Commonwealth's argument and delineating the factors to be considered in excessive fine analysis).

111. See, e.g., BALLARD SPAHR, *supra* note 81 (reporting that *1997 Chevrolet* provides Pennsylvania residents facing forfeiture with the "most robust constitutional protections in the country").

112. See Cassella & Smith, *supra* note 11, at 68 (arguing that right to counsel is essential to civil forfeiture reform); see also Rachel L. Stuteville, Comment, *Reverse Robinhood: The Tale of How Texas Law Enforcement Has Used Civil Asset Forfeiture to Take from Property Owners and Pad the Pockets of Local Government—the Righteous Hunt for Reform Is On*, 46 TEX. TECH. L. REV. 1169, 1192–97 (2014) (providing overview of most progressive civil forfeiture reform throughout country, including increasing public accountability, disallowing proceeds from being distributed to law enforcement agencies, requiring criminal conviction, and requiring state to prove property subject to forfeiture beyond reasonable doubt).

113. See, e.g., *State Data and Contacts Map*, *supra* note 13. For a more detailed analysis of the proportionality test, see *supra* notes 101–10 and accompanying text for explanation that subjective value of property—such as the value of having a roof over one's head—should be taken into account.

114. See *1997 Chevrolet*, 160 A.3d at 191 (“[A]dditional factors, when relevant, may be considered by a court, depending upon the particular circumstances at issue.”).

115. See, e.g., *von Hofe v. United States*, 492 F.3d 175, 188 (2d Cir. 2007) (finding that forfeiture of husband's interest in family home was not grossly disproportionate to offense of cultivating marijuana, in part because “his own actions eviscerated any sanctity he might claim in his home”).

courts.¹¹⁶ Although courts are now obligated to consider the subjective value of a home subject to forfeiture, the 1997 *Chevrolet* court did not excise the objective market value consideration from the excessive fine analysis, thus leaving low-income homeowners—who are already at a significantly higher risk of homelessness than their more affluent counterparts—more vulnerable to forfeiture.¹¹⁷ A presumption that civil forfeiture of a primary residence violates the Excessive Fines Clause of the Eighth Amendment would adequately protect low-income homeowners and uphold the sanctity of homeownership, without abridging the objectives of forfeiture.¹¹⁸

116. See, e.g., *Boyd v. United States*, 116 U.S. 616, 630 (1886) (recognizing “the sanctity of a man’s home”); see also *Leonard v. Texas*, 137 S. Ct. 847, 848 (2017) (Thomas, J., concurring) (denying certiorari). Although Justice Thomas ultimately joined in the Court’s denial of certiorari in *Leonard*, his concurring opinion suggested that the current implementation of civil forfeiture swallows the doctrine’s original purpose of allowing the government to seize property that would otherwise be out of the government’s reach due to an out-of-jurisdiction owner. See *id.* at 849.

117. See, e.g., *United States v. 25445 Via Dona Christa*, No. 95-56352, 1998 U.S. App. LEXIS 36917, at *14 (9th Cir. Mar. 3, 1998) (finding that “continuous drug-related activity at the property outweighed any intangible value it had as a family home”); *Sheriff’s Sale WebAPP*, PHILA. SHERIFF’S OFFICE, <https://www.officeofphila.delphisheriff.com/en/real-estate/sheriffs-sale-webapp> [<https://perma.cc/4PKU-X4E2>] (last visited Sept. 16, 2017) (listing 474 properties up for sheriff’s sale due to mortgage foreclosure and 313 properties up for sale due to real estate tax delinquency in September 2017).

118. Although law enforcement has a legitimate objective in keeping illicit drug enterprises out of residential areas, civil forfeiture has proven ineffective in ridding communities of drug trade and has instead been selectively applied to poor, African-American homeowners. See *Leonard*, 137 S. Ct. at 848 (recounting the “egregious and well-chronicled” abuses of civil forfeiture and lamenting that modern civil forfeiture operations target low-income individuals, who are most burdened by such forfeitures); see also Louis S. Rulli, *Seizing Family Homes from the Innocent: Can the Eighth Amendment Protect Minorities and the Poor from Excessive Punishment in Civil Forfeiture?*, 19 U. PA. J. CONST. L. 1111, 1143–46 (2017) (contrasting the average assessed value of forfeited properties in Philadelphia (\$23,174.34) with that of un-seized property involved in extensive drug activity belonging to affluent, white families); Yan Slavinsky, *Protecting the Family Home by Reunderstanding United States v. Bajakajian*, 35 CARDOZO L. REV. 1619, 1647 (2014) (“A stronger emphasis by courts to carefully value family homes would not harm [civil forfeiture] strategy and would help focus prosecutors on identifying forfeitures that can make a dent in criminal enterprise and take the profits out of crime.”). Furthermore, the presumption advocated in this Note would only apply to properties used as primary residences rather than those colloquially referred to as “trap houses,” which are not suitable for inhabitation and are solely used for drug manufacture and sale. See, e.g., *Gabriel v. State*, 842 S.W.2d 328, 329–33 (Tex. 1992) (describing a “crack” or “trap” house as “a facility used exclusively for the sale of drugs” that is “usually barren of furniture”). Therefore, this presumption would not unreasonably contravene the policing objective of keeping residential areas used for residential rather than illicit purposes. For a further discussion of the legitimate objectives of civil forfeiture, see *infra* notes 155–67 and accompanying text.

A. *Presumption of Excessiveness: The Savior We Need*

To safeguard homeownership interests, *1997 Chevrolet* instructs courts to consider a variety of factors underlying a forfeiture action, some of which weigh in favor of homeowners, while others strongly disfavor homes involved in drug-related activity.¹¹⁹ However, under the *1997 Chevrolet* test, the sanctity of homeownership is obscured in that a court is free to assign relative weight to theoretically unlimited factors.¹²⁰ Rather than merely considering the subjective value of a home as one of many factors involved in a forfeiture, courts should recognize a presumption of excessiveness where a primary residence is subject to forfeiture.¹²¹

1. *More Than a Mere Instrumentality of Crime*

In *1997 Chevrolet*, the court decided that the instrumentality prong turned on whether the property was “‘significantly utilized in the commission’ of the offense.”¹²² To flesh out the meaning of such a standard, the court listed six factors to be considered when making an instrumentality determination.¹²³ However, applying these factors in the context of typical cases of drug-related forfeitures such as *1997 Chevrolet* will likely produce varying results, thus providing little security to low-income homeowners.¹²⁴

119. For a more detailed analysis of the factors laid out in *1997 Chevrolet*, see *supra* notes 95–110 and accompanying text.

120. See *Commonwealth v. 1997 Chevrolet & Contents Seized from James Young*, 160 A.3d 153, 191 (Pa. 2017) (allowing for consideration of additional factors depending on circumstances of forfeiture). In *1997 Chevrolet*, the court prescribed fifteen factors to be considered when conducting an excessive fine analysis, only three of which contemplate the importance of the home. See *id.* at 192 (finding that subjective value of the property, harm forfeiture would cause to owner or third parties, and whether forfeiture would deprive owner of his or her livelihood must be considered by courts conducting proportionality analyses).

121. See *van den Berg*, *supra* note 31 at 902 (noting that lower courts tend to selectively apply multi-factor proportionality test).

122. See *1997 Chevrolet*, 160 A.3d at 185 (quoting *Commonwealth v. Wingait Farms*, 690 A.2d 222, 227 (Pa. 1997)).

123. See *id.* at 185. The court stated:
 Considerations regarding this “significant utilization” assessment include: whether the property was integral to the commission of the offense—i.e., uniquely important to the success of the illegal activity; whether the use of the property was deliberate and planned or was merely incidental and fortuitous to the illegal enterprise; whether the illegal use of the property was an isolated event, or repeated; whether the purpose of acquiring, maintaining or using the property was to carry out the offense; and whether the illegal use of the property was extensive spatially and/or temporally.

Id. (citing *United States v. Milbrand*, 58 F.2d 841, 846, 848 (2d Cir. 1995)).

124. The fact pattern of *1997 Chevrolet* is not unusual among cases of drug-related forfeitures. See, e.g., *United States v. Collado*, 348 F.3d 323, 325 (2d Cir. 2003) (per curiam) (granting forfeiture of building containing residential apartments where owner’s son had been selling and buying drugs in its vicinity); *United States v. 6625 Zumirez Drive*, 845 F. Supp. 725, 742 (C.D. Cal. 1994) (holding that

First, the question of whether the home was uniquely important to the success of the drug-related offense is a malleable factor; one can argue that the home is merely a location of the drug activity, and thus not essential to the crime because drug deals can occur in a variety of environments.¹²⁵ Nevertheless, data showing that drug sales increasingly occur inside homes as open-air markets become less prevalent undermines this argument.¹²⁶ Likewise, in cases where the home functions as a site for drug manufacture, the argument that a home is not integral to drug-related offenses loses legitimacy.¹²⁷

Next, considering whether the use of the home was deliberately planned or fortuitous is likely to favor forfeiture, as individuals tend to store things in and arrange meetings at their homes out of convenience rather than happenstance.¹²⁸ The following factor, whether the illegal use of the property was an isolated or repeated event, is also largely useless to homeowners, given that law enforcement agencies often do not end their investigations upon the first observation of drug-related criminal

forfeiture of father's home due to his son's drug-related offense would violate Excessive Fines Clause); *Commonwealth v. 12534 Chilton Rd.*, No. 1254 C.D. 2014, 2015 WL 6755111, at *3–4 (Pa. Commw. Ct. 2015) (ruling whether wife and homeowner's interest in property was properly subjected to forfeiture based on husband's possession with intent to deliver offense), *vacated in light of 1997 Chevrolet*, 169 A.3d 579 (Pa. 2017) (table); *Commonwealth v. 5444 Spruce St.*, 787 A.2d 1117, 1123 (Pa. Commw. Ct. 2001) (affirming forfeiture of Philadelphia woman's long-time home after she pleaded guilty to one count of possession with intent to deliver), *rev'd*, 832 A.2d 396 (Pa. 2003).

125. *See, e.g.*, *6625 Zumirez Drive*, 845 F. Supp. at 737–38 (finding that home was not integral to its occupant's drug possession or transactions because property was “nothing more than a place at which drugs were sold,” and there was no additional link between commission of crime and home). The *6625 Zumirez Drive* court also reasoned that the forfeiture at hand was unlike forfeitures of property integral to an offense because the seizure of the home “[did] not rid society of the instrumentality of the crime or eliminate the resources of any criminal enterprise.” *See id.* at 738. Rather, it only functioned to evict a father and son from their home. *See id.*

126. *See, e.g.*, Graham C. Ousey & Matthew R. Lee, *Homicide Trends and Illicit Drug Markets: Exploring Differences Across Time*, 24 JUST. Q. 48, 55 (2007) (“[D]rug dealing operations increasingly have moved indoors to private, protected, residential settings rather than the vulnerable settings of crack houses or open-air street markets that were commonplace in the 1980s.”).

127. *See, e.g.*, *United States v. Chandler*, 36 F.3d 358, 366 (4th Cir. 1994) (noting that property subject to forfeiture aided drug-related activity by providing a “secluded location”).

128. *See, e.g.*, *United States v. One Parcel of Real Estate*, 903 F.2d 490, 494 (7th Cir. 1990) (finding that use of property was not fortuitous where owner had instructed potential buyer, who happened to be undercover investigator, to call owner's home phone number and had two conversations with investigator on home telephone while arranging drug transaction). *But see von Hofe v. United States*, 492 F.3d 175, 188 (2d Cir. 2007) (contemplating that in context of excessive fine analysis, “[t]he location of a drug sale, for instance, may be more a function of happenstance than reason,” as opposed to homeowner's cultivation of marijuana in basement, which was a “conscious and deliberate decision”).

conduct.¹²⁹ Even where a forfeiture does occur after one isolated drug offense, it is common that a search of the home will reveal some type of drug paraphernalia or the Commonwealth will introduce testimonial evidence to establish a pattern of drug-related activity.¹³⁰

In contrast, the consideration of whether the property was purchased, acquired, or maintained for the purpose of carrying out the underlying offense will likely disfavor forfeiture in cases like *1997 Chevrolet* and *5444 Spruce Street*.¹³¹ That is, the very fact that the property provides shelter to an individual or family belies the notion that it was acquired for the sole purpose of furthering a criminal enterprise.¹³² However, courts have nonetheless found forfeiture appropriate in cases where the property used to facilitate drug-related crimes also served other legitimate, even residential, purposes.¹³³

Like the previous two factors, considering whether the illicit use of the property was extensive spatially or temporally may favor elderly or long-term homeowners such as Ms. Young, as the sheer time period of homeownership places a heavy burden on the government to prove that the home facilitated the drug-related activity since its purchase.¹³⁴ The spatial consideration also has the potential of protecting homes of which

129. See, e.g., *Commonwealth v. 1997 Chevrolet & Contents Seized from James Young*, 160 A.3d 153, 159–60 (Pa. 2017) (explaining that Philadelphia Police Department conducted two controlled buys, executed search warrant, and then conducted three additional controlled buys before arresting Ms. Young’s son and filing petition to forfeit her home); *Commonwealth v. 605 Univ. Drive*, 104 A.3d 411, 413 (Pa. 2014) (explaining that owner of property was arrested after “a joint investigation by Pennsylvania Office of Attorney General and Centre County Drug Task Force” and pleaded guilty to multiple sales of cocaine).

130. See *Commonwealth v. 5444 Spruce St.*, 787 A.2d 1117, 1119 (Pa. Commw. Ct. 2001) (citing testimony of juvenile who claimed to have purchased drugs from homeowner as evidence of pattern of criminal use of property), *rev’d*, 832 A.2d 396 (Pa. 2003).

131. See *1997 Chevrolet*, 160 A.3d at 159 (noting that Ms. Young had resided in her home for four decades prior to forfeiture); see also *5444 Spruce St.*, 787 A.2d at 1121 n.7 (stating that homeowner Elizabeth Lewis had been living in her home since 1962, thirty-four years before forfeiture at issue).

132. Cf. *United States v. Milbrand*, 58 F.3d 841 842–43, 848 (2d Cir. 1995) (upholding civil forfeiture of eighty-five-acre wooded piece of land used to cultivate marijuana and noting that home on the property was not claimant’s primary residence).

133. See, e.g., *United States v. 11869 Westshore Drive*, 70 F.3d 923, 930 (6th Cir. 1995) (affirming civil forfeiture of family’s residence where home operated as “sales office” in which marijuana transactions were arranged, along with barn that was used as warehouse for marijuana storage); *United States v. Chandler*, 36 F.3d 358, 366 (4th Cir. 1994) (“While it would appear that the farm had substantial purposes other than serving as an instrument of drug activity, the property nevertheless was an important, if not necessary, instrument for the drug activity, in providing a secluded location.”).

134. *But see von Hofe v. United States*, 492 F.3d 175, 188 (2d Cir. 2007) (finding that the temporal and spatial extent of the criminal activity favored forfeiture of interest in property where homeowner grew marijuana in basement for one year, even though he and his wife had lived in property for over twenty years).

only portions are involved in drug crimes, such as the curtilage or a particular room.¹³⁵ However, homes that are relatively new or used more extensively for drug transactions—but nonetheless provide shelter to individuals and families—are left more vulnerable under this factor.¹³⁶

The final consideration under the instrumentality prong, whether the property is divisible with respect to the subject of the forfeiture, purportedly serves the function of allowing forfeiture of only the discrete property that is integral to the underlying offense.¹³⁷ In the context of drug-related forfeitures of primary residences, however, this consideration is not applicable, as dwellings are typically indivisible structures.¹³⁸ Therefore, the foregoing factors, considered together, favor a finding that the home of an owner or occupant involved in drug-related activity is an instrumentality of the offense.¹³⁹

2. *Value of the Home*

Despite recognizing the universal sanctity and necessity of homeownership, the *1997 Chevrolet* court did not do away with the objective, fair-market-value consideration.¹⁴⁰ While it may seem logical to account for the monetary value of property when comparing it to the maximum fine imposed, this consideration is inappropriate because it disfavors low-income property owners whose modest homes represent a significant por-

135. See, e.g., *1997 Chevrolet*, 160 A.3d at 160–62 (explaining that search of Ms. Young’s home only yielded a scale, plastic packets, “and six baggies of marijuana,” and transactions occurred around rather than inside of home). For a detailed explanation of the meaning of the term “curtilage,” see *Oliver v. United States*, 466 U.S. 170, 171 (1984) (describing curtilage as “the land immediately surrounding and associated with the home”).

136. See *11869 Westshore Drive*, 70 F.3d at 930 (noting that district court concluded “the house was used as a ‘sales office’ in which sales of marijuana were arranged”); see also *Commonwealth v. 5043 Anderson Rd.*, 728 A.2d 907, 907–09 (Pa. 1999) (affirming forfeiture of residence which housed property owner, his wife, and two-month-old child on the basis that owner had been operating lucrative business selling marijuana from home for several years).

137. See *1997 Chevrolet*, 160 A.3d at 191 (summarizing six factors to be considered when conducting excessive fine analysis under Eighth Amendment); *supra* note 100 and accompanying text for list of factors.

138. See *1997 Chevrolet*, 160 A.3d at 185 (“[I]f the property is not divisible, the entire property is forfeited.” (citing *5043 Anderson Rd.*, 728 A.2d at 909)). In *5043 Anderson Rd.*, the Pennsylvania supreme court held that because only the property owner’s home and adjoining land had been used in his marijuana sales, the Commonwealth was not permitted to seize his remaining real property. 728 A.2d at 909; cf. *Idaho Dep’t of Law Enf’t v. Real Prop. Located in Minidoka Cty.*, 885 P.2d 381, 383 (Idaho 1994) (conceding that house itself is not divisible property).

139. See, e.g., *United States v. Plescia*, 48 F.3d 1452, 1462 (7th Cir. 1995) (finding a close relationship between drug ring participant’s home and drug distribution where the owner made single phone call furthering conspiracy from residence).

140. See *1997 Chevrolet*, 160 A.3d at 188 (“[I]n the realm of civil *in rem* forfeiture, both an objective pecuniary and subjective non-pecuniary valuation of the property is necessary.”).

tion of their assets.¹⁴¹ When a low-income family loses its place of shelter, in addition to its main source of equity, that family is inevitably at greater risk of homelessness than a family with greater financial security.¹⁴²

On the other hand, the remaining factors to be considered when determining the value of a home—the harm forfeiture would bring to the owner or third parties and whether forfeiture would deprive the owner of his or her livelihood—decidedly favor low-income homeowners.¹⁴³ It is beyond dispute that subjecting individuals or families to homelessness or otherwise unstable housing causes emotional and physical trauma.¹⁴⁴ Furthermore, shelter is among the most basic needs on which the ability to

141. See, e.g., THOMAS P. BOEHM & ALAN SCHLOTTMANN, OFFICE OF POL'Y DEV. & RES., U.S. DEP'T OF HOUSING & URB. DEV., WEALTH ACCUMULATION AND HOMEOWNERSHIP: EVIDENCE FOR LOW-INCOME HOUSEHOLDS 33 (2004), <https://www.huduser.gov/publications/pdf/wealthaccumulationandhomeownership.pdf> [<https://perma.cc/N295-RFJL>] (reporting benefits of homeownership among lower class families). This report finds that:

In terms of lower income households, non-housing wealth accumulation is at best minor and, for minority families, often negative. Thus, over the nine year period of [the] study, owned housing is an important means of wealth accumulation. Indeed, [the] results may be broadly interpreted for lower income households as implying that housing wealth is total wealth.

Id.; cf. MICHAL GRINSTEIN-WEISS ET AL., HOUS. POL'Y DEBATE, HOMEOWNERSHIP AND WEALTH AMONG LOW- AND MODERATE-INCOME HOUSEHOLDS 3–4 (2013) (“Home equity represents 60 percent of the total wealth among the American middle class.” (citing EDWARD N. WOLFF, TOP HEAVY: THE INCREASING INEQUALITY OF WEALTH IN AMERICA AND WHAT CAN BE DONE ABOUT IT (2002))).

142. See Barrett A. Lee et al., *The New Homelessness Revisited*, 36 ANN. REV. SOC. 501, 502 (2010) (contrasting individuals living in poverty from affluent individuals in that latter group is able to avoid homelessness in event that its homes are unexpectedly lost).

143. See *1997 Chevrolet*, 160 A.3d at 188 (listing factors involved in making non-pecuniary valuation of property); cf. *United States v. 817 N.E. 29th Drive*, 175 F.3d 1304, 1311 (11th Cir. 1999). The court in *817 N.E. 29th Drive* held: whether a forfeiture is excessive is determined by comparing the amount of the forfeiture to the gravity of the offense . . . and not by comparing the amount of the forfeiture to the amount of the owner’s assets. In other words, excessiveness is determined in relation to the characteristics of the offense, not in relation to the characteristics of the offender.

Id. (footnote omitted) (internal quotation marks omitted).

144. See Lee et al., *supra* note 142, at 506 (noting that likelihood of becoming victim to crime is increased for those experiencing long periods of homelessness, which is evidenced by fact that over one half of homeless persons contacted during study claimed to have been victimized); see also Colleen E. Wynn & Lauren McClain, *Not Quite out on the Streets: Housing Tenure Among Low-Income Urban Fathers* 9 (Princeton, NJ: Ctr. for Res. on Child Wellbeing, Working Paper No. WP 13-17-FF, 2015), <https://fragilefamilies.princeton.edu/sites/fragilefamilies/files/wp13-17-ff.pdf> [<https://perma.cc/QSA7-4KUZ>] (“It has also been demonstrated that doubling up is negatively associated with mental health while homeownership is positively associated with mental health.” (citations omitted)). “Doubling up” refers to an unstable form of housing in which otherwise homeless individuals or families live with other families and share the cost of rent. See *id.* at 3, 5; see also Steven R. Paisner, Comment, *Compassion, Politics, and the Problems Lying on Our Sidewalks: A Legislative Approach for Cities to Address Homelessness*, 67 TEMP. L. REV. 1259, 1265–68

make a living depends.¹⁴⁵ Hence, the subjective value of a home is more meaningful than its market value and should be given greater weight in an excessive fine analysis.¹⁴⁶

3. Gravity of the Offense

First, defining the gravity of an underlying offense in drug-related forfeitures will involve considering the particular charge and whether that is a variation of possession or a more serious charge such as distribution or manufacture.¹⁴⁷ Taking into account the nature of the specific drug-related offense will, theoretically, protect most homeowners facing forfeiture in connection with lower-level offenses, while leaving vulnerable those whose property is involved with manufacture or distribution of harsher drugs.¹⁴⁸ The next factor, whether the offender fits into the class of per-

(1994) (providing overview of health and welfare problems among homeless population).

145. See Wynn & McClain, *supra* note 144, at 4 (“Housing security has been cited as the single most important factor for obtaining access to employment and social services because a valid address is often required” (citing Amanda Geller & Allyson Walker, *Partner Incarceration and Women’s Housing Insecurity* (Princeton, NJ: Ctr. for Res. on Child Wellbeing, Working Paper No. WP 12-02FF, 2012)).

146. See, e.g., Prentiss Cox, *Foreclosure Reform Amid Mortgage Lending Turmoil: A Public Purpose Approach*, 45 Hous. L. Rev. 683, 723–24 (2008) (noting that “[i]ncreasing homeownership rates is fundamental objective of public policy at every level of government”); see also D. Benjamin Barros, *Home As a Legal Concept*, 46 SANTA CLARA L. REV. 255, 265 n.38 (2006) (highlighting importance of homeownership by explaining homes’ historic legal protection compared to other property such as ships and characterizing modern civil forfeiture practice as “an unwarranted erosion of the protection given to homes”).

147. See, e.g., *United States v. 817 N.E. 29th Drive*, 175 F.3d 1304, 1309–10 (stating that courts must “[t]ranslat[e] the gravity of a crime into monetary terms” by looking to “the maximum permissible fine for a given offense” and the sentencing guidelines). Courts have been far less generous in cases where the property has been involved in mass cultivation of controlled substance or has served as the site of a consistent distribution chain or large-scale transaction. See, e.g., *United States v. 60795 Rimrock Canyon Rd.*, No. 07cv2322, 2009 U.S. Dist. LEXIS 132737, at *6 (S.D. Cal. July 27, 2009) (upholding forfeiture where police found over 1,000 marijuana plants in home, along with packaging materials which suggested that plants were intended for distribution rather than personal use); cf. *United States v. Shelly’s Riverside Heights Lot x*, 851 F. Supp. 633, 634 (M.D. Pa. 1994) (“In the instant case, there is no question that the offense was a serious one. In the realm of drug offenses, however, it was not a crime of tremendous gravity . . .”). The specific drug-related activity in *Shelly’s Riverside Heights Lot x* involved the indoor cultivation of approximately twenty marijuana plants, which resulted in charges of manufacturing marijuana with the intent to distribute and with conspiracy thereof. See *id.* at 634. For a comprehensive listing of drug offenses in Pennsylvania, see generally 35 PA. STAT. AND CONS. STAT. ANN. § 780-113 (West 2018).

148. See, e.g., *United States v. 24124 Lemay St.*, 857 F. Supp. 1373, 1382 (C.D. Cal. 1994) (finding that “the inherent gravity of [homeowner’s] . . . offenses” of possession of cocaine for sale and cultivation of over 100 marijuana plants was “severe”). For a complete schedule of controlled substances in Pennsylvania, see generally 35 PA. CONS. STAT. AND CONS. STAT. ANN. § 780-104.

sons for whom the offense was designed, will likely present the same problem.¹⁴⁹

The following gravity of the offense factor, the maximum authorized penalty as compared to the actual penalty imposed, is a bit clumsier, as it is not clear whether courts are to use an objective, subjective, or hybrid valuation of the property forfeited in this comparison.¹⁵⁰ If Pennsylvania courts opt for the straight fair-market-value approach, as have other jurisdictions, this will again breed inequality between communities of low-income homeowners and wealthier communities.¹⁵¹ Importantly, the final gravity factor, the specific harm resulting from the criminal offense, will no longer allow courts to summarily state that drug-related crimes are inherently harmful to the community.¹⁵²

149. See *60795 Rimrock Canyon Rd.*, 2009 U.S. Dist. LEXIS 132737, at *6 (re-marking that “a drug manufacturer clearly ‘fit[s] into the class of persons for which the [civil forfeiture] statute was designed” (quoting *United States v. Bajakajian*, 524 U.S. 321, 338 (1997))). In *Bajakajian*, the Court noted that forfeiture in cases of failing to report currency when traveling outside of the country was intended to punish “money launderers, drug traffickers, and tax evaders.” See *Bajakajian*, 524 U.S. at 323. While it was perhaps improper to merely quote *Bajakajian* without examining the legislative intent of the specific provision of the forfeiture statute relating to drug manufacture, a “drug manufacturer” cultivating over a thousand marijuana plants likely does fit into the class of persons for which the offense was designed. See 21 U.S.C. § 881(a)(7) (2012) (providing for the forfeiture of “[a]ll real property . . . used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this title punishable by more than one year’s imprisonment”).

150. See *Commonwealth v. 1997 Chevrolet & Contents Seized from James Young*, 160 A.3d 153, 190 (Pa. 2017) (including parenthetical indicating that penalty imposed refers to “sentence [or] fine,” but neglecting to specify whether fine is to be valued based on fair market value or subjective considerations).

151. See, e.g., *817 N.E. 29th Drive*, 175 F.3d at 1309 (interpreting *Bajakajian* as creating “strong presumption” of forfeiture where objective value of property forfeited does not exceed statutory maximum fine for offense); *60795 Rimrock Canyon Rd.*, 2009 U.S. Dist. LEXIS 132737, at *9 (comparing pecuniary value of home, \$300,000, to maximum statutory fine, \$4,000,000); *United States v. 6625 Zumirez Drive*, 845 F. Supp. 725, 737 (C.D. Cal. 1994) (declining to focus solely on maximum penalty compared to home’s fair market value, noting substantial monetary interest in the property but also highlighting owner’s “‘right to maintain control over his home, and to be free from governmental interference, is a private interest of historic and continuing importance’” (quoting *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 53–54 (1993))).

152. See *1997 Chevrolet*, 160 A.3d at 170 (affirming commonwealth court’s rejection of Commonwealth’s generic claim that drug-related activity harmed society at large, requiring instead evidence as to “the type and quantity of drugs sold, the use of illegal drugs by purchasers, and the impact of the sales upon the neighborhood, without reliance upon general or ‘self-evident’ harm”). But see *Commonwealth v. Pruitt*, No. 1485 C.D. 2010, 2011 Pa. Commw. Unpub. LEXIS 697, at *6 (Pa. Commw. Ct. Aug. 22, 2011) (relying on claim that “it is essentially self-evident that illegal narcotics sales harm the surrounding community” to show harm caused by homeowner’s possession with intent charge (quoting *Commonwealth v. 542 Ontario St., Bethlehem, Pa.*, 989 A.2d 411, 419 (Pa. Commw. Ct. 2010))). The court in *542 Ontario St.*, although claiming that harm was self-evident in these offenses, went on to support the claim with evidence from the record, citing the large strain

B. *Preserving the Sanctity of Homeownership Without Rendering Forfeiture a Burnt Offering*

By prescribing so many factors that could be interpreted either in favor of or against forfeiture of residential properties for drug-related offenses, the 1997 *Chevrolet* court leaves property rights for low-income homeowners in peril.¹⁵³ This remains the case even though the forfeiture of a small family home does not coincide with the legislature's original intent of crippling large-scale drug organizations.¹⁵⁴ In fact, in examining the utility of forfeitures, it is apparent that the practice's laudable objectives are not met in cases such as *1997 Chevrolet*.¹⁵⁵

The first commonly cited goal of forfeiture is to punish the wrongdoer.¹⁵⁶ While it is certainly punishment to be evicted from one's home and stripped of a significant financial asset, in many cases of residential

the "countermeasures" taken by the police department placed on government resources and the heightened danger of criminal conspiracies. *See 542 Ontario St.*, 989 A.2d at 419. While it is questionable whether this purported harm would stand up to constitutional muster given the generic nature of the conspiracy explanation and the Supreme Court's hesitancy to credit solely governmental harm in *Bajakajian*, the court did attempt to make a specific showing of harm. *See id.*; *see also Bajakajian*, 524 U.S. at 339 ("The harm that respondent caused was also minimal. The failure to report affected only one party, the Government, and in a relatively minor way.").

153. For a critical analysis of the *1997 Chevrolet* court's holding and its implications, see *supra* notes 111–52 and accompanying text.

154. *See Klein, supra* note 15, at 208 ("Clearly, if law enforcement efforts to combat racketeering and drug trafficking are to be successful, they must include an attack on the economic aspects of these crimes." (quoting S. Rep. No. 98-225, at 191 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3374)); *see also* Sackett, *supra* note 38, at 502 (explaining that Congress amended the civil forfeiture provision of the federal Drug Control Act for the purpose of deterring and punishing "the enormously profitable trade in dangerous drugs").

155. For a discussion of the objectives of forfeiture, see *infra* notes 156–66 and accompanying text. Just as the sanctity of the home has been recognized by the Supreme Court, so too have the benefits and objectives of forfeiture. *See Payton v. New York*, 445 U.S. 573, 601 (1980) ("[N]either history nor this Nation's experience requires us to disregard the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic."). In his address to Parliament, William Pitt, the Earl of Chatham, stated:

The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement!

Id. at 602 n.54 (citation omitted); *see also Kaley v. United States*, 134 S. Ct. 1090, 1094 (2014) (explaining the societal benefits of forfeiture, although in the context of a criminal in personam forfeiture); *James Daniel Good Real Prop.*, 510 U.S. at 53–54 ("[Property owner]'s right to maintain control over his home, and to be free from governmental interference, is a private interest of historic and continuing importance." (citations omitted)); Stefan D. Cassella, *The Case for Civil Forfeiture: Why In Rem Proceedings Are an Essential Tool for Recovering the Proceeds of Crime*, 11 J. MONEY LAUNDERING CONTROL 8, 10–14 (2008) (describing instances in which civil forfeiture is valuable to law enforcement and society at large).

156. *See Kaley*, 134 S. Ct. at 1094 ("Forfeitures help to ensure that crime does not pay: They at once punish wrongdoing, deter future illegality, and lessen the

forfeiture, it is not only the wrongdoer who is punished.¹⁵⁷ Likewise, the goal of deterring drug-related activity is not necessarily achieved in cases of residential civil forfeiture because substance-abuse is highly prevalent among homeless and housing insecure populations.¹⁵⁸ Lessening the economic power of criminal enterprises—another purported benefit of forfeiture—is also unavailing in light of the small-scale nature of underlying offenses in most civil forfeitures; such activities can take place at a number of venues, and the seizure of one of these will not prevent an individual from conducting such transactions in other private or public places.¹⁵⁹

Yet another objective of forfeiture that civil in rem forfeiture does not accomplish is victim compensation, because unlike criminal forfeitures, which are often used for restitution, the entirety of proceeds from civil forfeitures in Pennsylvania are allocated to the district attorney to be used for the enforcement of the Controlled Substances Act.¹⁶⁰ Although the attorney general is authorized by statute to divert these funds to community-based crime fighting, the state's recent forfeiture reports indicate that exactly zero funds have been expended on these efforts.¹⁶¹ Therefore, while civil forfeiture could conceivably improve conditions in crime-damaged communities, its actual implementation in Philadelphia does not accomplish this end.¹⁶²

economic power of criminal enterprises.” (citation omitted) (internal quotation marks omitted)).

157. See Cassella, *supra* note 155, at 13 (arguing that civil forfeiture is particularly beneficial in cases where property sought to be forfeited belongs to third party). The very fact that civil forfeiture is considered a useful tool in seizing the property of a third party to a crime belies this objective. See *id.*

158. See Thomas P. O'Toole et al., *Self-Reported Changes in Drug and Alcohol Use After Becoming Homeless*, 94 AM. J. PUB. HEALTH 830, 832 (2004) (explaining that study conducted among homeless individuals living in Philadelphia reported 83% of respondents screened positive for substance abuse or dependence).

159. See, e.g., *United States v. 6625 Zumirez Drive*, 845 F. Supp. 725, 737–38 (C.D. Cal. 1994) (finding that home was not integral to its occupant's drug possession or transactions because property was “nothing more than a place at which drugs were sold,” and there was no additional link between commission of crime and home).

160. See 42 PA. STAT. AND CONS. STAT. ANN. § 5803(i) (West 2018) (authorizing Attorney General to allocate funds to district attorney, and allowing “[i]n appropriate cases” Attorney General to designate proceeds to be used to utilize community-based drug and crime-fighting methods or to transfer property to non-profit organizations to alleviate blight).

161. See KANE, *supra* note 10, at 53 (indicating that “\$0.00” was expended on “Community Based Drug & Crime Fighting Programs” from “\$2,203,272.00” in income obtained from forfeitures in Philadelphia County during fiscal year 2014–15); COMMW. OF PA., OFFICE OF ATT'Y GEN., *supra* note 10 (indicating that “\$0.00” was expended on “Community Based Drug & Crime Fighting Programs” from income obtained from forfeitures in Philadelphia County during fiscal years 2007–10).

162. See INST. FOR JUSTICE, *supra* note 7 (explaining that in Philadelphia, “between 2011 and 2013 half of the cases [of civil forfeiture] involved less than \$192”); Isaiah Thompson, *Law to Clean up “Nuisances” Costs Innocent People Their Homes*, PROPUBLICA (Aug. 5, 2013, 06:39 AM), <https://www.propublica.org/article/law-to>

Likewise, the traditional justifications of civil in rem forfeiture are inapplicable to civil forfeitures of primary residences.¹⁶³ Drug-related crimes that spur forfeitures of family homes are by and large purely domestic matters easily punishable by criminal fines and penalties, unlike crimes in which the perpetrator is outside the court's jurisdiction, rendering in personam jurisdiction impossible or impractical.¹⁶⁴ Therefore, imposing a presumption of excessiveness in cases of residential forfeiture would not undermine the utility or purpose of civil in rem forfeiture.¹⁶⁵

VI. CONCLUSION: FATE OF HOMEOWNERSHIP LEFT TO COURTS' DISCRETION

Homeownership provides individuals and families with security, safety, and wealth.¹⁶⁶ Among low-income communities, these benefits are unknown to a growing percent of the population experiencing homelessness.¹⁶⁷ To make matters worse, these same communities are targeted

clean-up-nuisances-costs-innocent-people-their-homes [https://perma.cc/J45Q-ADF5] (conveying criticism that financial incentives for law enforcement cause "officials to over-emphasize drug prosecutions at the expense of other crime-fighting").

163. See *United States v. Leonard*, 137 S. Ct. 847, 849 (2017) (Thomas, J., concurring) (contrasting modern implementation of civil forfeiture from historical practice). In expressing his skepticism of civil asset forfeiture's constitutionality, Justice Thomas stated:

First, historical forfeiture laws were narrower in most respects than modern ones. Most obviously, they were limited to a few specific subject matters, such as customs and piracy. Proceeding *in rem* in those cases was often justified by necessity, because the party responsible for the crime was frequently located overseas and thus beyond the personal jurisdiction of United States courts.

Id. (citations omitted).

164. *Cf. Cassella*, *supra* note 155, at 13–18 (providing examples of modern crimes that present jurisdictional difficulties which can be remedied by civil in rem forfeiture). Such instances include those in which the defendant is deceased. See *id.*; see also *United States v. Lay*, 456 F. Supp. 2d 869, 875 (S.D. Tex. 2006) (dismissing indictment of individual found guilty of wire, securities, and bank fraud, and denying victim's request for restitution where perpetrator passed away two months after verdict was rendered). Another scenario prompting civil forfeiture is where the wrongdoer is unknown, for example, when a courier is found in possession of criminal proceeds. See *Cassella*, *supra* note 155, at 14–15. Likewise, civil forfeiture is appropriate where the accused is a fugitive, and thus outside of the courts' jurisdiction. See, e.g., *United States v. \$671,160.00 in United States Currency*, 730 F.3d 1051, 1059–60 (9th Cir. 2013) (dismissing Canadian citizen's claim to seized property in civil forfeiture action where he deliberately avoided prosecution by leaving country, thus fitting statutory definition of fugitive under Fugitive Disentitlement Statute).

165. See *Leonard*, 137 S. Ct. at 849 (opining that the historical pedigree of civil forfeiture is not capable of upholding the constitutionality of its modern implementation).

166. See, e.g., BOEHM & SCHLOTTMANN, *supra* note 141, at 1 (stating that homes are main, if not only, source of wealth among most low-income families).

167. See generally Paisner, *supra* note 144, at 6–8 (providing overview of characteristics of homeless population).

most heavily by civil asset forfeiture practices, leaving those fortunate enough to own homes especially vulnerable.¹⁶⁸ Accordingly, these factors, along with the longstanding notion that homes are sanctified places, should be at the forefront of a court's decision as to whether permanently removing an individual or family from its home constitutes an excessive fine under the Eighth Amendment.¹⁶⁹

Certainly, some modifications the 1997 *Chevrolet* court made to civil forfeiture adjudication represent small victories for Pennsylvania homeowners.¹⁷⁰ Nevertheless, the court missed an opportunity to give proper weight to the long-recognized principle that the home is a place like no other and should enjoy the utmost protection.¹⁷¹ Although some are hopeful that the passing of Pennsylvania Senate Bill 8 will achieve this end, states that have implemented similar civil forfeiture reforms continue to seize guilty property.¹⁷² Likewise, Philadelphia's potential class-action set-

168. See *ACLU*, *supra* note 9, at 3 (mapping concentration of civil forfeiture in Philadelphia). This map illustrates that cash in rem forfeitures are highly concentrated in North Philadelphia neighborhoods. See *id.*

169. See, e.g., *Carey v. Brown*, 447 U.S. 455, 471 (1980) ("Preserving the sanctity of the home, the one retreat to which men and women can repair to escape from the tribulations of their daily pursuits, is surely an important value."); *Griswold v. Connecticut*, 381 U.S. 479, 495 (1965) ("The home derives its pre-eminence as the seat of family life. And the integrity of that life is something so fundamental that it has been found to draw its protection the principles of more than one explicitly granted Constitutional right."); *Weeks v. United States*, 232 U.S. 383, 394 (1914) (acknowledging the "sanctity of [a person's] home" in the context of Fourth Amendment searches); see also *Barros*, *supra* note 147, at 281 (describing the collateral effects of forced relocation, including "significant negative psychological impacts").

170. See *Commonwealth v. 1997 Chevrolet & Contents Seized from James Young*, 160 A.3d 153, 192 (Pa. 2017) (mandating courts to consider the subjective value of the home, the harm forfeiture would bring to third parties, and whether the forfeiture would deprive the owner of his or her livelihood).

171. See John Adams, *Adams' Minutes of the Review, King vs. Stewart (July 1774)*, reprinted in 1 *LEGAL PAPERS OF JOHN ADAMS* (Mass. Hist. Soc'y eds., 2018), <https://www.masshist.org/publications/apde2/view?id=ADMS-05-01-02-0003-0002-0014> [<https://perma.cc/Q8G4-A58U>] ("An Englishmans dwelling House is his Castle. The law has erected a Fortification round it . . . to deprive a Man of this Protection . . . is treat[ing] him not like an Englishman not like a Freeman but like a Slave. . . ."); see also *Barros*, *supra* note 147, at 256 (remarking that in addition to Fourth Amendment protections of homes, federal tax code, post-foreclosure rights of redemption, and just cause eviction laws are examples of favorable legal treatment homes receive); *supra* note 169 and accompanying text for specific statements made by the Supreme Court on the sanctity of homeownership.

172. See 2017 Pa. Laws 247 (codified as amended at 42 PA. CONS. STAT. § 5805(j)(3)) (holding Commonwealth to clear and convincing standard of proof); see also David Pimental, *Forfeitures and the Eighth Amendment: A Practical Approach to the Excessive Fines Clause as a Check on Government Seizures*, 11 *HARV. L. & POL'Y REV.* 541, 542 (2017) (highlighting that forfeiture persists even in states whose forfeiture legislation purported to end practice, like Montana and New Mexico); Midge Carter, *To Think That SB 8 Becoming Law will Effectively Reform Civil Asset Forfeiture is Naïve*, *ACLU OF PA.* (July 21, 2017), <https://blog.aclupa.org/2017/07/21/to-think-that-sb-8-becoming-law-will-effectively-reform-civil-asset-forfeiture-is-naive/> [<https://perma.cc/9B57-F527>] (arguing that due to weakened

tlement, which would do away with the current scheme of giving proceeds to the district attorney's office, and election of progressive district attorney Larry Krasner will not effectuate a categorical protection for homeowners across the state.¹⁷³ Until the courts adopt a presumption of excessiveness in cases of home forfeiture, the notion that the home deserves special protection under law will remain but a truism, unrealized by swaths of the public.¹⁷⁴

provisions and absence of right to counsel, Senate Bill 8 is unlikely to have impact necessary on Pennsylvania civil forfeiture practices).

173. See Defendant's Motion for Entry of Permanent Injunction at 2, *Sourovelis v. City of Phila.* (E.D. Pa. July 21, 2017) (No. 14-14687) (denying liability as to the violation of plaintiffs constitutional rights but seeking a "permanent injunction enjoining Defendants from retaining forfeited property and its proceeds for use by the Philadelphia District Attorney's Office and the Philadelphia Police Department"); see also Plaintiff's Response to and Request to Hold in Abeyance Defendant's Motion for a Permanent Injunction at 3, *Sourovelis v. City of Phila.* (E.D. Pa. Aug. 4, 2017) (No. 14-14687) (urging court to reject Defendant Philadelphia's attempt to obtain injunction, citing the fact that Plaintiffs are also seeking "retrospective relief in the form of a declaration that their constitutional rights were violated, nominal damages, and restitution"); Order, *Sourovelis v. City of Phila.* (E.D. Pa. Nov. 27, 2017) (No. 14-14687) (placing suit "in suspense pending the parties' settlement negotiations and the appointment of a mediator"). The class action at issue was brought by attorneys at the Institute for Justice on behalf of Philadelphia residents whose property was seized by the City. See INST. FOR JUSTICE, *supra* note 9 (explaining class-action law suit brought by Philadelphia residents against city government). For an overview of District Attorney Krasner's civil forfeiture reform goals, see generally KRASNER FOR DIST. ATT'Y, <https://krasnerforda.com/platform> [<https://perma.cc/7ZDU-GPRM>] (last visited Mar. 22, 2018).

174. See generally Raymond H. Brescia, *Sheltering Counsel: Towards a Right to a Lawyer in Eviction Proceedings*, 25 *TOURO L. REV.* 187, 207 (2009) (describing risk of homelessness among those facing eviction proceedings).