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From the Dark Tower: Unbridled Civil Asset Forfeiture

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FROM THE DARK TOWER: UNBRIDLED CIVIL ASSET FORFEITURE

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ABSTRACT

The Black Lives Matter movement reinforces that race dominates all aspects of the judicial system. Police officers are significantly more likely to stop African Americans than Whites. Even when a stop or arrest is unwarranted, law enforcement agencies can still profit from the property seized under the guise of forfeiture statutes. Various state and federal civil asset forfeiture statutes legitimize law enforcement seizing cash, homes, cars, and office equipment – all with nominal due process protections. Despite evidence of discriminatory police practices, the U.S. Supreme Court deems these forfeiture practices constitutional.

This article seeks to reignite the conversation about discriminatory policing and how racially biased policing results in law enforcement disproportionately seizing African Americans' property suspected of being related to illegal activity. But, it also attempts to situate issues of protest movements as a vehicle to move the Supreme Court to change discriminatory standards under forfeiture statutes.

"We shall not always plant while others reap
The golden increment of bursting fruit . . . ."[1]

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1. 32 COUNTEE CULLEN, *From the Dark Tower*, *in* AMERICAN POETS PROJECT 1, 61 (Major Jackson ed., 2013). Cullen's *From the Dark Tower* is a protest poem that reflects the mood of the Harlem Renaissance. The poem and its title are used as a metaphor for how the U.S. Supreme

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INTRODUCTION

The Black Lives Matter[2] movement reawakened America's great racial divide.[3] With civil unrest, the movement increased

Court addresses issues pertaining to African Americans.

2. *About the Black Lives Matter Network*, BLACK LIVES MATTER, http://blacklivesmatter.com/about/ (last visited Nov. 29, 2017) (defining the term Black Lives Matters as "[a] broadening [of] the conversation around state violence to include all of the ways in which Black people are intentionally left powerless at the hands of the state . . . [and] the ways in which Black lives are deprived of our basic human rights and dignity").

3. John Blake, *What Black America Won't Miss About Obama*, CNN POL. (July 1, 2016), http://www.cnn.com/2016/06/30/politics/why-black-america-may-be-relieved-to-see-obama-go/. For some, the election of President Obama meant racial equality had been achieved.

public scrutiny of discriminatory police practices and the legal system's disregard for Black lives. Fourth Amendment rights have been shamefully trampled and disguised as police officers acting reasonably.[4] Killing unarmed Black suspects—neither justified nor explained—is deemed lawful.[5] The Black Lives Matter movement took hold, in part, because of the hypocrisy of the criminal justice system and the threat Black males in particular face under the pretext of public safety.[6] Freddie Gray, Michael Brown, Trayvon Martin, Eric Garner, Tamir Rice, Sandra Bland, and many others, are the sons and daughters of grieving parents and the victims of a duplicitous judicial system.[7]

The judicial system manifests its disregard for Black individuals' civil liberties in unlawful stops, arrests, and police shootings.[8] Police officers are more likely to perform traffic stops on

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The racial epithets that surrounded his presidency, however, indicated that America had not settled the racial equality battle.

4. *See* Graham v. Connor, 490 U.S. 386, 388 (1989) (noting that police do not violate the Fourth Amendment during a seizure as long as police act reasonably); Tennessee v. Garner, 471 U.S. 1, 8 (1985) (same); *see also* Whren v. United States, 517 U.S. 806, 816–17 (1996) (holding there is no need for a balance analysis to determine the constitutionality of an automobile stop even if motorists commonly violate traffic codes as long as police have probable cause).

5. After the fatal shooting of Michael Brown, a grand jury failed to indict Ferguson police officer Darren Wilson for Michael Brown's killing. Moni Basu et al., *Fires, Chaos Erupt in Ferguson After Grand Jury Doesn't Indict in Michael Brown Case*, CNN (Nov. 25, 2014), http://www.cnn.com/2014/11/24/justice/ferguson-grand-jury/. Another grand jury also found no probable cause to indict New York police officer Daniel Pantaleo for the death of Eric Garner, who could not breathe when the officer continued to hold Mr. Garner in a choke hold. Andrew Siff et al., *Grand Jury Declines to Indict NYPD Officer in Eric Garner Chokehold Death*, NBC N.Y. (Dec. 3, 2014), http://www.nbcnewyork.com/news/local/Grand-Jury-Decision-Eric-Garner-Staten-Island-Chokehold-Death-NYPD-284595921.html. The trial of George Zimmerman ended in a not guilty verdict for the killing of Trayvon Martin. Greg Botelho & Holly Yan, *George Zimmerman Found Not Guilty of Murder in Trayvon Martin's Death*, CNN (July 14, 2013), http://www.cnn.com/2013/07/13/justice/zimmerman-trial/.

6. *About the Black Lives Matter Network*, *supra* note 2.

7. The names of unarmed black men and women who have died in police custody are numerous. Although some are commonly known to the general public, the names of others are limited to their circle of family and friends who remember the incidents of police abuse. For those victims, I respectfully honor their memory. *See generally* WSJ News Graphics, *From Ferguson to Dallas: A Recent History of Deaths Involving Police*, WALL STREET J. (July 8, 2016), http://graphics.wsj.com/dallas-police-involved-deaths/ (referencing widely publicized deaths).

8. *See Racial Profiling: Definition*, ACLU, https://www.aclu.org/other/racial-profiling-definition (last visited Nov. 29, 2017).

Blacks than Whites[9] and twice as likely to arrest African Americans than other racial groups during those stops.[10] Once in the criminal justice system, African Americans are more likely to receive harsher sentences.[11] This racially biased policing also results in law enforcement disproportionately seizing property belonging to African Americans suspected of being related to illegal activity[12] and "policing for profits" within the Black community.[13]

Various state and federal civil asset forfeiture statutes legitimize law enforcement seizing cash, homes, cars, and office equipment with no right to counsel and nominal due process protections.[14] Even when a stop or arrest is unwarranted, law enforcement agencies can still seize property under the guise of forfeiture statutes, and the U.S. Supreme Court deems such practices constitutional.[15]

For example, the Philadelphia Police Department seized seventy-one-year-old Elizabeth Young's vehicle when her fifty-

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9. The ACLU describes several instances where racial profiling has resulted in death. In the case of Amadou Diallo, an unarmed twenty-two-year-old male immigrant from New Guinea, four white officers shot Diallo nineteen times. The state attorney general studied the unit and found that "blacks were stopped at a rate 10 times that of whites, and that 35 percent of those stops lacked reasonable suspicion to detain or had reports insufficiently filled out to make a determination." *Id.*

10. NAZGOL GHANDNOOSH, THE SENTENCING PROJECT, BLACK LIVES MATTER: ELIMINATING RACIAL INEQUITY IN THE CRIMINAL JUSTICE SYSTEM 11 (2015), http://www.sentencingproject.org/publications/black-lives-matter-eliminating-racial-inequity-in-the-criminal-justice-system/.

11. *Id.* at 12; Tamara F. Lawson, *Teaching Civil Rights: Mainstreaming Civil Rights in the Law School Curriculum: Criminal Law and Criminal Procedure*, 54 ST. LOUIS U. L.J. 837, 855 n.112 (2010).

12. HENRY HYDE, FORFEITING OUR PROPERTY RIGHTS: IS *YOUR* PROPERTY SAFE FROM SEIZURE? 4–15 (1995); *see also* U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT 76–96 (2016) [hereinafter INVESTIGATION OF BALTIMORE P.D.], https://www.justice.gov/opa/file/883366/download.

13. *See* MARIAN R. WILLIAMS ET AL., INST. FOR JUST., POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE 6 (2010), https://www.ij.org/images/pdf_folder/other_pubs/assetforfeituretoemail.pdf. The term "policing for profits" is commonly used to describe the incentive created by state and federal laws that allow law enforcement to keep some or all of the proceeds from civil asset forfeiture.

14. *See generally* Civil Asset Forfeiture Reform Act of 2000, 18 U.S.C. §§ 983, 985, 28 U.S.C. §§ 2466, 2467 (2016) (providing a comprehensive authority for civil asset forfeiture). Claimants have a right to appointed counsel if the forfeiture involves a claimant's residential home. *Id.* § 983(b)(2)(A).

15. *See* Bennis v. Michigan, 516 U.S. 442, 449–50 (1996); Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 680–81 (1974).

year-old son pleaded guilty to selling marijuana out of her vehicle and home.[16] The aggregate street value of the marijuana was approximately $140. At the time the marijuana sales occurred, Ms. Young's son and grandchildren lived with her, but the police never suspected she was involved in the marijuana transactions. Significantly, Ms. Young was ill and her doctor had placed her on bed rest when the marijuana sales occurred. Nonetheless, the Philadelphia District Attorney's office initiated forfeiture proceedings and seized Ms. Young's home and vehicle through Pennsylvania's forfeiture statute.[17] Ms. Young was never charged with a crime.[18]

The initial forfeiture court proceeding began in May 2012, but it was not until May 2017 that the Supreme Court of Pennsylvania dismissed the forfeiture against Ms. Young's home and ordered the government to return her vehicle.[19] For five years, Ms. Young was prohibited from living in her home, and she was without her vehicle all because her son sold a few grams of marijuana.[20]

The data show Ms. Young is not an anomaly. Many forfeiture claims involve property owners involved in traffic stops, *Terry* stops, and low-level crimes.[21] Although the Supreme Court holds the discriminatory implementation of civil forfeiture constitutional,[22] the Court has acknowledged through concurring opinions, dicta, and dissents that the civil forfeiture process leads to unjust results. Recently, Justice Thomas stated, "the poor and other groups [are] least able to defend their

16. Commonwealth v. 1997 Chevrolet and Contents Seized from Young, 160 A.3d 153, 158–59 (Pa. 2017).

17. *Id.*

18. *Id.* at 160.

19. *Id.* at 197.

20. *Id.* at 159.

21. Significantly, many civil asset forfeiture seizures have values below $1500. HYDE, *supra* note 12, at 32; *see also* DICK M. CARPENTER II ET AL., INST. FOR JUST., POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE 29 (2d ed. 2015); Lauren Carasik, *Holder Assails Policing for Profit*, ALJAZEERA AM. (Jan. 22, 2015), http://america.aljazeera.com/opinions/2015/1/holder-assails-policing-for-profit.html.

22. *See* Bennis v. Michigan, 516 U.S. 442, 449–50 (1996); Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 680–81 (1974).

interests in forfeiture proceedings."[23] Despite the justice disparity, civil forfeiture remains constitutional.

In this Article, I argue Black Lives Matter and its sister organizations, collectively The Movements for Black Lives, can serve as an impetus to shift the U.S. Supreme Court's views on civil asset forfeiture. In fact, the Court is the proper venue: The civil rights movement sparked the *Brown v. Board of Education* holding;[24] the women's rights movement led to *Roe v. Wade*;[25] the LGBTQIA movement shifted views on same-sex marriage leading to the *Obergefell v. Hodges* holding.[26]

Part I of this Article surveys the evolution of civil forfeiture actions, including an analysis of the Civil Asset Forfeiture Reform Act of 2000 (CAFRA) and its historical purpose.[27] Part II examines how law enforcement police for profits—prioritizing crimes based on forfeiture income potential rather than public safety. Part III provides examples of selective policing and how forfeiture laws systematically dispossess African Americans of their property and shift ownership to law enforcement entities. Part IV analyzes the nexus between social activism and constitutional reform, using *Brown v. Board of Education* and *Roe v. Wade* as examples. Finally, Part V assesses what the Black Lives Matter movement has already accomplished and what it can accomplish in the realm of civil asset forfeiture.

I. EVOLUTION OF CIVIL ASSET FORFEITURE

Before examining the relationship between social activism and civil asset forfeiture, it is helpful to understand the guiding federal law authorizing civil asset forfeiture and its origin.[28]

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23. Leonard v. Texas, 137 S. Ct. 847, 848 (2017).

24. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

25. Roe v. Wade, 410 U.S. 113 (1973); *see* DAVID COLE, ENGINES OF LIBERTY: THE POWER OF CITIZEN ACTIVISTS TO MAKE CONSTITUTIONAL LAW 7 (Dan Gerstle ed., 2016).

26. Obergefell v. Hodges, 135 S. Ct. 2584 (2015); *see* COLE, *supra* note 25, at 91–93.

27. *See* Crimes and Criminal Procedure Act, ch. 645, 62 Stat. 683 (1948).

28. Perhaps, the Internal Revenue Service's (IRS) authority to seize assets for unpaid taxes is the most commonly known forfeiture process, but even the IRS seizure policies have been challenged due to abusive enforcement procedures. I.R.C. §§ 6330–44 (2016); IRM 5.10.1–5.10.1.5

Traces of civil asset forfeiture have deep roots and are found as early as the eleventh century in the "law of deodands."[29] Contemporary civil asset forfeiture, however, gained momentum in the eighties when the proverbial war on drugs began.[30] A newly established criminal forfeiture statute served as a valuable tool in the "tough on crime" crusade, but the forfeiture practices ultimately led to widespread law enforcement abuse.[31] In 2000, Congress enacted CAFRA to address some of the misuse.[32] With continued concern about unjust forfeiture practices, the House Judiciary Committee of the 115th U.S. Congress recently introduced civil asset forfeiture legislation to remedy the unjust practices.[33] These four central periods are explained below.

A. Historical Origins

The Department of Justice (DOJ), the agency benefiting the most from forfeiture, defines civil judicial forfeiture as "an *in rem* (against the property) action brought in court against the

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(May 20, 2016); Albert B. Crenshaw, *IRS Tightens Its Procedures for Seizing Propert*y, WASH. POST (Dec. 3, 1997), https://www.washingtonpost.com/archive/ politics/1997/12/ 03/irs-tightens-its-procedures-for-seizing-property/94035886-d90a-4c66-9e8f-dc2565d36d8d/?utm_term=.460937902652.

29. *See* Andrew Crawford, *Civil Asset Forfeiture in Massachusetts: A Flawed Incentive Structure and Its Impact on Indigent Property Owners*, 35 B.C. J.L. & SOC. JUST. 257, 260–61 (2015).

30. *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, 90–91 (1996); Annemarie Bridy, *Carpe Omnia: Civil Forfeiture in the War on Drugs and the War on Piracy*, 46 ARIZ. ST. L.J. 683, 694–95 (2014); *see also* Ron Champoux, *Real Property Forfeiture Under Federal Drug Laws: Does the Punishment Outweigh the Crime?*, 20 HASTINGS CONST. L.Q. 247, 250 (1992) ("Today, . . . forfeiture is used as a powerful method for attacking drug felony violations.").

31. CARPENTER ET AL., *supra* note 21, at 2; *see also* WILLIAMS ET AL., *supra* note 13, at 10–11 ("With these changes, the modern era of policing and prosecuting for profit had begun.").

32. Stefan D. Cassella, *The Civil Asset Forfeiture Reform Act of 2000: Expanded Government Forfeiture Authority And Strict Deadlines Imposed on All Parties*, 27 J. LEGIS. 97, 97 (2001); CARPENTER ET AL., *supra* note 21, at 2. *But see* Adam Crepelle, *Probable Cause to Plunder: Civil Asset Forfeiture and the Problems It Creates*, 7 WAKE FOREST J.L. & POL'Y 315, 315 (2017) ("When criminals take property, the law calls it theft. When law enforcement confiscates property, the process is called civil asset forfeiture.").

33. *See* Deterring Undue Enforcement by Protecting Rights of Citizens from Excessive Searches and Seizures Act of 2017, H.R. 1795, 115th Cong. (2017); *Federal Asset Forfeiture: Uses and Reforms: Hearing Before the Subcomm. on Crime, Terrorism, Homeland Security, and Investigations of the H. Comm. on the Judiciary*, 114th Cong. 8 (2015) [hereinafter *Federal Asset Forfeiture: Uses and Reforms*].

property. The property is the defendant and no criminal charge against the owner is necessary."[34] The Justice Department's definition does not indicate the property owner is denied a pre-deprivation hearing,[35] and often there is neither a criminal charge nor conviction against anyone. Although criminal asset forfeiture proceedings are *in personam* actions requiring a corresponding criminal charge before law enforcement may seize property, civil asset forfeiture has no such requirement.[36] Instead, civil forfeiture actions are fictitiously deemed *in rem*,[37] and seizure is therefore merely based on whether a law enforcement agency has probable cause to believe that the property is connected to illegal activity.[38] To meet its probable cause standard, law enforcement may rely on hearsay evidence and other highly unreliable and prejudicial evidence, such as affidavits from police officers involved in the investigation.[39]

Courts attribute the origins of treating civil forfeiture as an *in rem* action, in part, due to the Old Testament and the law of deodands.[40] An often quoted Biblical verse used to support the origins of forfeiture provides "If an ox gore a man or a woman, that they die: then the ox shall be surely stoned, and his flesh shall not be eaten; but the owner of the ox shall be quit."[41] English common law similarly deemed property to have

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34. *Types of Federal Forfeiture*, U.S. DEP'T JUST., https://www.justice.gov/afp/types-federal-forfeiture (last updated Feb. 1, 2017).

35. *Id.* The breadth of the Fifth Amendment pre-deprivation hearing violations is beyond the scope of this article; however, the author recognizes the problem and plans to address the issue in a subsequent article.

36. *See Guide to Equitable Sharing for State and Local Law Enforcement Agencies*, U.S. DEP'T JUST. (Apr. 2009), https://www.justice.gov/criminal-afmls/file/794696/download [hereinafter *Equitable Sharing*].

37. *Id.* Criminal forfeiture actions are *in personam* actions and provide greater due process protections to the property owner than civil forfeiture proceedings. The method of seizing property may occur through administrative action or judicial proceeding—either civil or criminal. *See, e.g.*, United States v. $106,647 in U.S. Currency, 93 F. Supp. 3d 419 (D. Md. 2015).

38. 18 U.S.C. § 983(c)(3) (2016).

39. *See* United States v. All Right, Title & Interest in Five Parcel of Real Prop., 830 F. Supp. 750, 756 (S.D.N.Y. 1993). *See generally* State *ex rel.* Woods v. Filler, 818 P.2d 209 (Ariz. Ct. App. 1991) (holding that the statute permitting hearsay evidence constitutional in meeting probable cause).

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

41. *Exodus* 21:28 (King James); *see* LEONARD W. LEVY, A LICENSE TO STEAL: THE FORFEITURE OF PROPERTY 7 (1996).

powers to commit crimes and thus held the property accountable for its actions, without holding the owner liable.[42] This history is relevant because the U.S. Supreme Court referenced this antiquity when it held civil asset forfeiture was constitutional under the Fifth and Fourteenth Amendments.[43] Although the *in rem* guilty-property syndrome in laws of deodands may have served both cultural and societal needs,[44] contemporary forfeiture laws diverge far from those purposes.[45]

B. Contemporary Forfeiture

Currently, there are over 140 federal civil forfeiture statutes.[46] The purpose of these contemporary forfeiture statutes was to derail the profits from organized crime, including drug trafficking.[47] As part of that strategy, Congress enacted the Racketeer Influenced and Corrupt Organizations Act (RICO)—the first criminal forfeiture statute.[48] As additional ammunition for the proverbial "war on drugs,"[49] Congress enacted the

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42. By separating the property from its owner, the crown need not find the owner culpable to import punishment against the property through seizure. Paul Schiff Berman, *An Anthropological Approach to Modern Forfeiture Law: The Symbolic Function of Legal Actions Against Objects*, 11 YALE J.L. & HUM. 1, 5, 42, 45 (1999); Jacob J. Finkelstein, *The Goring Ox: Some Historical Perspective on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty*, 46 TEMP. L.Q. 169, 181 (1973).

43. *See Calero-Toledo*, 416 U.S. at 680.

44. Berman, *supra* note 42, at 3–6.

45. Significantly, in customs and admiralty law forfeiture municipalities lacking jurisdiction over the person, an *in rem* action was the only recourse, leading to the government confiscating contraband and vehicles used to transport contraband. *See* Bennis v. Michigan, 516 U.S. 442, 472 (1996) (Kennedy, J., dissenting). Also, a number of forfeiture statutes served to expand executive powers to seize private property under war and military powers. *See* Second War Powers Act of 1942, ch. 199, 56 Stat. 176; War Powers Act of 1941, ch. 593, 55 Stat. 838; Departmental Reorganization (Overman) Act, ch. 78, 40 Stat. 556 (1918).

46. DEE R. EDGEWORTH, ASSET FORFEITURE PRACTICE AND PROCEDURE IN STATE AND FEDERAL COURTS 24 (3d ed. 2014).

47. Boudreaux & Pritchard, *supra* note 30.

48. Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961–68 (2016); *see* 130 CONG. REC. S14,209 (daily ed. Oct. 11, 1984); William H. Erickson & William D. Neighbors, *Pronouncements of the United States Supreme Court Relating to the Criminal Law Field: 1983–1984*, 103 F.R.D. 187, 298–99 (1985). RICO served as a model for many state forfeiture statutes. EDGEWORTH, *supra* note 46, at 37.

49. Michael Tonry, *Race and the War on Drugs*, 1994 U. CHI. LEGAL F. 25, 27 (1994) (discussing how the war on drugs disproportionately targeted African Americans).

Comprehensive Crime Control Act of 1984 (the Act).[50] The Act expanded law enforcement's ability to combat crimes related to drug activity and provided for the forfeiture of property used to facilitate those crimes.[51] Arguably, the most expansive aspects of the Act came in 1992 and included financial fraud and other commercial matters,[52] providing the DOJ greater authority to seize private property without a criminal conviction.[53]

Despite seemingly justifiable reasons to remove the profit from criminal activity, Congress drafted the Act so broadly that law enforcement could seize assets vaguely considered the proceeds of illicit activity.[54] These broadly drafted federal and state statutes have led to widespread forfeiture abuse and odd consequences.[55] Forfeiture actions include seizing "suspicious" cash from motorists during minor traffic stops[56] and seizing homes when any of the residents possess illicit drugs.[57] In

50. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976.

51. *Id. But see* United States v. $31,990 in United States Currency, 982 F.2d 851, 854 (2d Cir. 1993) ("While we recognize the formidable task faced by the government in its war on drugs, we decline to condone the abuse of civil forfeiture as a means to winning that war."). In the early 1980s, President Ronald Reagan professed a "war on drugs" that was designed to combat the rampant drug-related crimes occurring in the inner cities. These federal policies were modeled after New York's Governor Rockefeller who initiated a war on drugs through a series of mandatory minimum sentence legislation. *See* Brian Gilmore, *Again and Again We Suffer: The Poor and the Endurance of the "War on Drugs,"* 15 UDC/DCSL L. REV. 59, 66–67 (2011). Although the war initially took a therapeutic approach, the campaign later resulted in mass incarceration of African America men in particular. *Id.* at 66.

52. 18 U.S.C. § 981(a)(1)(D) (2016); HYDE, *supra* note 12, at 25.

53. HYDE, *supra* note 12, at 25. Prior to the Act, forfeited assets went to the general government fund, not the DOJ. *Id.* at 26–27.

54. *See* WILLIAMS ET AL., *supra* note 13, at 20–22; *see also* Mary Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325, 1333 (1991) (referencing the use of civil forfeiture as "an explicit alternative to criminal prosecution"). I, however, argue it is more commonly used as an implicit alternative to criminal prosecution.

55. Libretti v. United States, 516 U.S. 29, 43 (1995) (quoting Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 634 (1989)) ("[B]road forfeiture provisions carry the potential for government abuse and 'can be devastating when used unjustly.'"). *See generally* Ron Champoux, Note, *Real Property Forfeiture Under Federal Drug Laws: Does the Punishment Outweigh the Crime?*, 20 HASTINGS CONST. L.Q. 247, 249 (1992) (proposing the use of the Disproportionate Punishments Clause of the Eighth Amendment to ensure the seizure of property is proportional punishment for the crime).

56. *See* United States v. $38,005 in United States Currency, No. 5:15-CV-27-REW, 2016 WL 3545427, at *1 (E.D. Ky. 2016).

57. *See* United States v. Real Property Located at 2011 Calumet, 699 F. Supp. 108, 109 (S.D.

Bennis v. Michigan, the Court held Michigan police properly seized the vehicle of John Bennis, a man who entertained prostitutes in his family vehicle.[58] Mr. Bennis's wife neither authorized nor knew her husband was picking up prostitutes in their jointly owned vehicle.[59] Justice Thomas's concurring opinion expressed concern regarding the constitutionality of innocent property owners having their property subjected to forfeiture, yet justified the forfeiture practice because it is embedded in the American judicial system and has deep roots in English common law.[60]

The *Bennis* Court sent a message of uncertainty concerning equity and civil asset forfeiture. Supplementing Justice Thomas's concerns, Justice Stevens's dissent asserted neither "logic nor history" supports forfeiting the property of an innocent owner who lacks knowledge that property was used for illegal means.[61] Justice Stevens distinguished the case from precedent because Ms. Bennis lacked culpability, and there was a weak nexus between the vehicle and the prostitution.[62] The majority, however, adhered to common law traditions and upheld the state's seizure of the family vehicle.[63]

Although the Court has expressed concerns about forfeiture abuses,[64] a series of cases have consistently held civil asset forfeiture is not a taking within the meaning of the Fifth Amendment, and property owners are not entitled to pre-seizure notice or hearing.[65] The glaring injustices of forfeiture

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Tex. 1988).

58. Bennis v. Michigan, 516 U.S. 442, 443 (1996), *superseded by statute*, 18 U.S.C. § 983(d)(2)(A) (2016), *as recognized in* United States v. Ferro, 681 F.3d 1105, 1112 (9th Cir. 2012). *Bennis* was a 5–4 opinion with two concurring opinions filed. 516 U.S. at 457.

59. *Id.* at 444.

60. *Id.* at 453. *See generally* Robert Lieske, *Civil Forfeiture Law: Replacing the Common Law with a Common Sense Application of the Excessive Fines Clause of the Eighth Amendment*, 21 WM. MITCHELL L. REV. 265, 271 (1995) (referencing the jurisdictional element of civil forfeiture). Under English common law, the King could seize a person's property because it was "an offense to the King's peace, which was felt to justify denial of the right to own property." Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 682 (1974).

61. *Bennis*, 516 U.S. at 458–59 (Stevens, J., dissenting).

62. *Id.* at 462–63.

63. *Id.* at 453 (majority opinion).

64. Libretti v. United States, 516 U.S. 29, 43 (1995).

65. *See Calero-Toledo*, 416 U.S. 678–79; *see also* United States v. Eight Thousand Eight

actions were demonstrated in another high profile case, *Acadia Technology, Inc. v. United States*.[66] In *Acadia*, the owners of computer fans brought suit against the United States and sought to recover for an unconstitutional taking based on depreciation in value while the fans were in government custody.[67] The fans had been in custody for more than four years after the United States Customs Service seized them under the Tariff Act.[68] The court held that the unreasonable delay in returning the fans was not a taking.[69]

To justify these extraordinary practices, courts consistently rely on states' broad policing power during a pending criminal investigation.[70] The problem with that reasoning is many civil asset forfeitures have no parallel criminal proceeding,[71] suggesting the process violates the Takings Clause.

Additionally, because the civil forfeiture is deemed an *in rem* action, the government conducts warrantless seizures based on probable cause,[72] and unless the forfeiture involves a residential home, claimants are not entitled to pre-deprivation notice or hearing.[73] Although the proceedings lack sufficient procedural safeguards, the Supreme Court remains unwilling to hold forfeiture is a deprivation of due process. [74]

Hundred & Fifty dollars ($8,850) in United States Currency, 461 U.S. 555, 563–64 (1983) (determining whether three part inquiry permits forfeiture without notice or a pre-seizure hearing); Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (considering "(1) the private interest affected by the official action; (2) the risk of an erroneous deprivation of that interest through the procedures used, as well as the probable value of additional safeguards; and (3) the government's interest, including the administrative burden that additional procedural requirements would impose.").

66. 458 F.3d 1327, 1328 (Fed. Cir. 2006).

67. *Id.* at 1329–30.

68. *Id.*

69. *Id.* at 1328.

70. *See, e.g.*, Bennis v. Michigan, 516 U.S. 442, 452 (1996). In *Bennis*, the innocent wife argued that the abatement/forfeiture of the car was a violation of the takings clause because "the government may not be required to compensate an owner for property which it has already lawfully acquired." *Id.*

71. EDGEWORTH, *supra* note 46, at 8.

72. *Id.*

73. *See* United States v. James Daniel Good Real Prop., 510 U.S. 43, 53–54 (1993) (describing the competing interests involved in making exceptions to the necessity of a pre-deprivation hearing).

74. *Bennis*, 516 U.S. at 452–53.

C. Civil Asset Forfeiture Reform Act (CAFRA)[75]

Increased public awareness of the unexpected consequences of civil asset forfeiture captured the attention of the general public, the media, and Congress.[76] There were three common concerns. First, the threshold to seize property was too low when measured against the barriers claimants faced to challenge a forfeiture action.[77] Second, law enforcement's prioritization of crimes was based on forfeiture income potential, not public safety.[78] Finally, public sentiment about racial disparities in the criminal justice system and discriminatory policing suggested a need to restructure civil forfeiture statutes.[79]

Republican Congressman Henry Hyde was particularly concerned with the unjust results of civil forfeiture actions and spearheaded congressional reform.[80] In his book titled *Forfeiting Our Property Rights*, he revealed the glaring disparities that led him to understand the unwarranted consequences civil forfeiture has on innocent third parties.[81] These stories were the impetus for Congressman Hyde to lead the enactment of H.R. 1658 and the passing of CAFRA.[82]

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75. Civil Asset Forfeiture Reform Act of 2000, 18 U.S.C. §§ 983, 985, 28 U.S.C. §§ 2466, 2467 (2016).

76. *See generally* Robert O'Harrow, Jr., Sari Horwitz & Steven Rich, *Holder Limits Seized-Asset Sharing Process that Split Billions with Local, State Police*, WASH. POST (Jan. 16, 2015), https://www.washingtonpost.com/investigations/holder-ends-seized-asset-sharing-process-that-split-billions-with-local-state-police/2015/01/16/0e7ca058-99d4-11e4-bcfb-059ec7a93ddc_story.html?utm_term=.d74f38da7520 [hereinafter O'Harrow et al.] (emphasizing the praise drawn from organizations who have denounced the seizing of assets); Michael Sallah, Robert O'Harrow Jr., Steven Rich & Gabe Silverman, *Stop and Seize: Aggressive Police Take Hundreds of Millions of Dollars from Motorists Not Charged with Crimes*, WASH. POST (Sept. 6, 2014), http://www.washingtonpost.com/sf/investigative/2014/09/06/stop-and-seize/?utm_term=.fd326b779f19 [hereinafter Sallah et al.] (describing the controversial nature of these practices).

77. HYDE, *supra* note 12, at 6–7.

78. *Id.* at 29–30.

79. *Id.* at 43–45.

80. *See* Civil Asset Forfeiture Act of 2000, 18 U.S.C. §§ 983, 985, 28 U.S.C. §§ 2466, 2467 (2016).

81. *See* HYDE, *supra* note 12.

82. *See* Civil Asset Forfeiture Reform Act of 2000, 18 U.S.C. §§ 983, 985, 28 U.S.C. §§ 2466, 2467. Although there is limited legislative history on CAFRA, its predecessor bill has extensive legislative history, including Henry Hyde's 1996 committee report and Senator Sessions's floor statement. *See* H.R. REP. NO. 106-192 (1999). With his recent appointment as Attorney General, it will be interesting to see the role Sessions will play in CAFRA reform.

CAFRA was a bipartisan bill that took four years to conceive.[83] House Judicial Committee Chairman Henry Hyde introduced the final version, with the support of fifty-nine co-sponsors and a diverse coalition of supporters.[84] The bill was intended to address the inherently flawed manner in which federal jurisdictions implemented civil asset forfeiture, but like many amendments to legislation, the bill required compromises.[85] Arguably, those compromises led to a bill that failed to provide sufficient due process safeguards to property owners. Representative Hyde's floor statement reflects the attempts to conciliate law enforcement:

> H.R. 1658 also contains a number of provisions addressing the needs of the Justice Department and State and local law enforcement.
>
> These include increasing the availability of criminal forfeiture and the civil forfeiture of the proceeds of crimes . . . .

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83. *See* George Leef, *Sessions Has No Problem with Civil Asset Forfeiture – And That's a Problem*, FORBES (Jan. 3, 2017), https://www.forbes.com/sites/georgeleef/2017/ 01/03/sessions-has-no-problem-with-civil-asset-forfeiture-and-thats-a-problem. *See generally* Cassella, *supra* note 32, at 98 (noting CAFRA was enacted after four years of competing bills between the United States House and the Senate). Although there is limited legislative history on CAFRA, its preceding bills have extensive legislative history, including Henry Hyde's 1999 committee report. *See* H.R. REP. No. 106-192 (1999). At the time, Henry Hyde served as Chairman of the House Judiciary Committee and John Conyers, Jr. served as a Member of the House of Representatives for District 14. Also, Senator Sessions's floor statement is particularly notable, which introduced the Department of Justice's Sessions-Schumer counter proposal to the Hyde-Conyers bill.

84. In his floor statement, Senator Hatch referenced the compromises with the DOJ, Senator Sessions, and Senator Schumer and acknowledged the organizations supporting the bill.

> A broad coalition of organizations supported this bill, including the Chamber of Commerce, the American Bankers Association, the National Association of Homebuilders, the National Association of Realtors, the Institute for Justice, Americans for Tax Reform, the National Rifle Association, the American Bar Association, and the Fraternal Order of Police. Also, six former Attorneys General—William Barr, Richard Thornburg, Edwin Meese, Benjamin Civiletti, Griffin Bell, and Nicholas Katzenbach—endorsed the bill.

146 CONG. REC. 3654 (2000) (statement of Sen. Orrin Hatch).

85. Significantly, CAFRA does not include all forfeiture statutes. For example, IRS forfeitures, customs forfeitures, and interstate commerce forfeitures are all exempt from the procedural protections enumerated in CAFRA. *See* 18 U.S.C. § 983(i).

> This bill is one we can all be proud of.[86]

Perhaps law enforcement could take pride in CAFRA, but property owners could not. While CAFRA enhanced some protections for property owners, it also expanded the government's ability to use forfeiture in more crime-related circumstances and retained the low probable cause standard.[87] The major CAFRA reforms are highlighted below.

1. Shifts in the burden of proof

After seizing property, the government has sixty days to notify any potential property owners.[88] Before CAFRA, the property owner bore the burden to establish by a preponderance of the evidence that the property was not subject to forfeiture.[89] Now, the government bears the burden to establish a "substantial connection" between the property seized and the illegal activity, or that the property is criminal proceeds, by a preponderance of the evidence.[90] Before the government is forced to meet its burden, however, the property owner must file a claim to the property within thirty-five days of receiving notice of the government seizure.[91] That procedural requirement is riddled with complications. Because forfeiture is an *in rem* action, many property owners never receive actual notice of the seizure.[92] If the claimant fails to file the claim timely, law

86. 146 CONG. REC. H2040 (2000) (daily ed. Apr. 11, 2000) (statement of Rep. Henry Hyde).

87. Law enforcement must have probable cause to assert successfully the asset was connected to illegal activity. 18 U.S.C. § 981(b)(2)(B) (2016).

88. *Id.* § 983(a)(1)(A)(i).

89. *Id.* § 983(c)(1); 19 U.S.C. § 1615 (2016); *see also* HYDE, *supra* note 12, at 55 ("The law reverses the normal presumption of innocence, presuming the property 'guilty' unless the owner can prove otherwise.").

90. 18 U.S.C. § 983(c).

91. *Id.* § 983(a)(2)(b). Pre-CAFRA, the property owner had to post a bond to challenge a forfeiture action. 19 U.S.C. § 1608; *see, e.g.*, Faldraga v. Carnes, 674 F. Supp. 845, 845 (S.D. Fla. 1987) (granting defendant United States Custom Services' motion to dismiss plaintiff's complaint for failure to post a bond under § 1608). CAFRA, however, dispensed with that requirement. *See* 18 U.S.C. § 983(a)(2)(E).

92. *See* Caleb Nelson, *The Constitutionality of Civil Forfeiture*, 125 YALE L.J. 2446, 2483 (2016) ("[M]odern rules prescribing the procedure for in rem forfeiture actions require the government to send personalized notice to people with known interests in the property."). Without

enforcement administratively seizes the property if its value is below $500,000.[93] Predictably, the majority of federal civil forfeiture cases are not challenged.[94] Thus, the initial seizure's validity is rarely reviewed.[95]

For claimants who meet the thirty-five-day deadline, the government then has ninety days to file a verified forfeiture complaint, initiating the judicial forfeiture process.[96] The judicial forfeiture action has the formalities of any district court proceeding.[97] If the property owner survives these additional procedural hurdles, including the government's likely motion for summary judgment, the government presents its case-in-chief.[98]

The government may use circumstantial evidence to show the property was either used or intended to be used to commit a crime or facilitated the commission thereof.[99] Circumstantial evidence commonly includes establishing the property owner lacks legitimate income to justify the asset.[100] Police dog alerts

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actual notice, few property owners know that their time to challenge the forfeiture action in a judicial proceeding will expire in thirty-five days after the seizure. *See* David Pimentel, *Forfeitures Revisited: Bringing Principle to Practice in Federal Court*, 13 NEV. L.J. 1, 28 (2012) ("The high number of uncontested forfeitures may be a product, at least in part, of failures of notice.").

93. *See* Mendoza v. U.S. Custom & Border Prot., Civ. Action 05-6017, 2006 U.S. Dist. LEXIS 65174, at *12–16 (D.N.J. Sept. 12, 2006). *Compare* 19 U.S.C. §§ 1607, 1608, *with* Cassella, *supra* note 32, at 128 (comparing the notice and claim requirements for assets valued above and below $500,000).

94. CARPENTER ET AL., *supra* note 21, at 12.

95. *Id.*

96. *See* 18 U.S.C. § 983(a)(3)(A). If the government fails to initiate a judicial action, it must release the property to the claimant. *Id.*

97. *See* EDGEWORTH, *supra* note 46, at 124 ("In federal and state forfeiture practice, the general rules of civil procedure apply unless they are inconsistent with the forfeiture statute.").

98. *Id.*

99. 18 U.S.C. § 983(c)(3); *see* EDGEWORTH, *supra* note 46, at 155 ("Forfeitures may be established both by direct and circumstantial evidence and neither is entitled to any greater weight as a form of proof."). Forfeitable property typically falls into four categories: (1) instrumentalities/facilitating property; (2) criminal proceeds; (3) illegal contraband; and (4) enterprises. EDGEWORTH, *supra* note 46, at 11–16. With contraband, there is no property right, so a claimant does not have standing to challenge its forfeiture. *Id.* at 11–12. In other instances, the government must establish a substantial connection between the property and the offense. 18 U.S.C. § 983(c)(3). The standard is designed to require that the property have more than an incidental connection to the crime. United States v. Schifferli, 895 F.2d 987, 990 (4th Cir. 1990) ("At minimum, the property must have more than an incidental or fortuitous connection to criminal activity.").

100. *See* United States v. $174,206.00 in U.S. Currency, 320 F.3d 658, 662 (6th Cir. 2003)

to money with drug traces are also commonly used as government evidence, despite drug traces on money in circulation being prevalent.[101] If the government meets its burden, which it usually does, the property owner may assert as a general defense that there is an insufficient nexus between the property and the alleged criminal activity.[102] A claimant may also assert the innocent owner defense.[103]

2. *Innocent owner defense*

Perhaps the most needed CAFRA reform was the innocent owner defense.[104] Before CAFRA, however, property was subject to forfeiture even if the owner lacked knowledge that the property was used for illegal means—a concern the *Bennis* Court referenced but declined to change.[105] Now, a claimant establishes an innocent owner defense by showing by a preponderance of the evidence that the property owner did not

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(holding that the government met its burden by showing major disparity between claimant's tax returns over a five-year period and money found in the claimant's safe-deposit box).

101. While dog alerts are not independently strong enough to establish that property constitutes "proceeds," courts consider dog sniffs to be highly probative due to empirical evidence of dog-sniff reliability. *See* United States v. $30,670 in U.S. Funds, 403 F.3d 459, 448 (7th Cir. 2005) (considering scientific evidence showing that a properly trained dog would not be alerted to innocently contaminated currency, even if exposed to a large number of bills); *see also* United States v. Gaskin, 364 F.3d 438, 462 (2d Cir. 2004) (finding a dog sniff was probative if supported by other evidence, which included $16,000 in cash found in a shoe box of the defendant's car). *But see* United States v. $506,201 in U.S. Currency, 125 F.3d 442, 453 (7th Cir. 1997) ("[W]e are unwilling to take seriously the evidence of the post-seizure dog sniff . . . . Even the government admits that no one can place much stock in the results of dog sniffs because at least one-third of the currency in the United States is contaminated with cocaine in any event."); Muhammed v. Drug Enf't Agency, 92 F.3d 648, 653 (8th Cir. 1996) (holding a dog alert is "virtually meaningless" because "an extremely high percentage of all cash in circulation in America today is contaminated with drug-residue.").

102. EDGEWORTH, *supra* note 46, at 170–75.

103. 18 U.S.C. § 983(d).

104. *See generally* J. William Snyder, Jr., *Reining in Civil Forfeiture Law and Protecting Innocent Owners from Civil Asset Forfeiture:* United States v. 92 Buena Vista Avenue, 72 N.C. L. REV. 1333 (1994) (explaining why the Supreme Court first recognized the innocent owner defense).

105. Bennis v. Michigan, 516 U.S. 442, 455 (1996) (Thomas, J., concurring). The *Bennis* Court sent a message of uncertainty concerning equity and civil asset forfeiture. Specifically, in Justice Thomas's concurring opinion, he acknowledged the inequities embedded in law enforcement's ability to seize innocent parties' property; he concluded that the process is constitutional because of the long-standing accepted practice. *Id.* at 454–55. These deep roots have impeded progress and the Courts wherewithal to deem the civil forfeiture, as currently implemented, unconstitutional. *Id.*

know the property was connected to illegal activity.[106] A property owner, however, cannot willfully ignore criminal activity.[107] Instead, the claimant must establish that he or she did all that reasonably could be expected to end the illegal use of the property, such as calling the police.[108] The innocent owner defense may also apply to a bona fide purchaser or seller who did not know that the property was involved in illegal activity and subject to forfeiture.[109]

Despite the innocent owner triumph, the defense is somewhat of a hollow victory because the claimants who could raise an innocent owner defense often do not. Two main factors account for this problem, including the procedural hurdles to assert the defense and the lack of counsel to assist in the court proceedings.[110] As outlined below, claimants who choose to raise the defense often wait over six months before a judge reviews the matter—during that time claimants are without their cars, money, or whatever property law enforcement seized.

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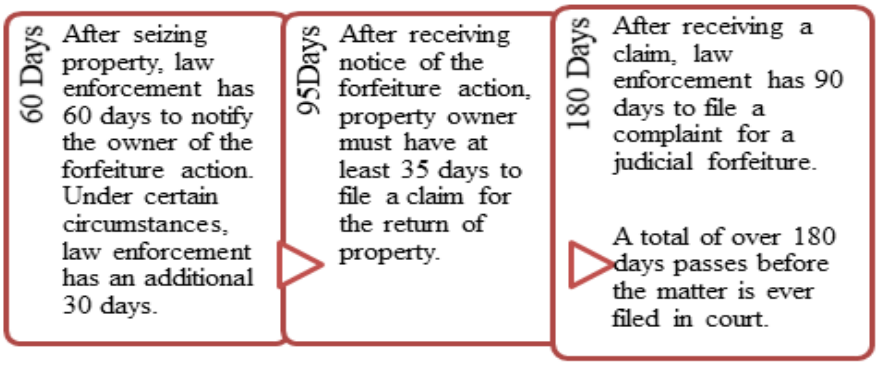
106. 18 U.S.C. § 983(d).

107. United States v. One Parcel of Prop., 985 F.2d 71, 72 (2d Cir. 1993) ("[W]here an owner has engaged in 'willful blindness' as to activities occurring on her property, her ignorance will not entitle her to avoid forfeiture."). If the person is aware of the illegal activity or involved in the activity, he or she forfeits this element of the defense. *See* United States v. Collado, 348 F.3d 323, 328 (2d Cir. 2003). In *Collado*, a building owner, who was the mother of a drug trafficking defendant who had lived in and dealt drugs out of building, had willfully ignored trafficking. *Id.* at 327. The owner admitted she suspected her son of drug involvement, and admitted her suspicions that defendant "may have been getting involved with drugs again" after his release from prison. *Id.* The owner conceded that $20 million worth of drug transactions occurred in or around her building over the course of a year. *Id.*

108. 18 U.S.C. § 983(d)(2)(A)(ii); *see also* United States v. 16328 S. 43rd E. Ave., 275 F.3d 1281, 1285 (10th Cir. 2002) (holding an "owner consents to drug use in her property if she fails 'to take all reasonable steps to prevent illicit use of [the] premises once [she] acquires knowledge of that use'").

109. 18 U.S.C. § 983(d)(3)(A).

110. To qualify for the innocent owner defense, one must prove that she "(i) did not know of the conduct giving rise to forfeiture; or (ii) upon learning of the conduct giving rise to the forfeiture, did all that reasonably could be expected under the circumstances to terminate such use of the property." *Id.* § 983(d)(2)(A)(i)–(ii).



Although a claimant can file a hardship petition to expedite the property's release,[111] most claimants would require assistance of counsel. Access to counsel, however, is not readily available to low-income claimants.

3. *Attorneys' fees and the right to counsel*

Lack of counsel is a barrier for claimants defending against any civil action, and CAFRA is no different.[112] Under CAFRA, there is no right to counsel unless the claimant is indigent and there is a corresponding criminal matter or if the forfeiture is for the claimant's residential home.[113]

Access to counsel ostensibly levels the proverbial playing field between property owners and the government, but the

111. CAFRA includes waivers for property owners to file requesting the release of the property pending final disposition. *Id.* § 983(f)(1)(A)–(D).

112. *See* David Baarlaer, *Going Pro Se: Handling Legal Problems on Your Own*, LAWYERS.COM (Sept. 16, 2011), https://blogs.lawyers.com/2011/09/going-pro-se-handling-legal-problems-on-your-own/ ("*Pro se* litigants lose, and sometime lose before they see the inside of a courtroom."). The Justice Department's Ferguson report revealed that if a defendant charged with a failure to appear is represented by counsel, the police department's policy was to dismiss the arrest warrant associated with the failure to appear. *See* CIVIL RIGHTS DIV., U.S. DEP'T OF JUST., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 2 (2015) [hereinafter INVESTIGATION OF FERGUSON P.D.], https://www.courts.mo.gov/file.jsp?id=95274; United States v. Kaley, 677 F.3d 1316, 1330–31 (11th Cir. 2012) (finding prosecutor's ability to restrain the accused citizens' property before trial hinders claimant's ability to hire counsel).

113. *See* David Smith, *A Comparison of Federal Civil and Criminal Forfeiture Procedures: Which Provides More Protections for Property Owners?*, HERITAGE FOUND. (July 30, 2015), http://www.heritage.org/crime-and-justice/report/comparison-federal-civil-and-criminal-forfeiture-procedures-which-provides.

right alone is insufficient.[114] Many forfeitures are unchallenged because the property value is too low to justify hiring an attorney.[115] Moreover, the law presumes petitioners can challenge state action in a judicial proceeding without considering power dynamics and socio-economic factors.[116] The state prosecutor has the power to file criminal charges against the innocent property owner. The chilling effect of criminal prosecution expands for those lacking racial or economic privilege.[117] Ultimately, the lack of counsel and the inferential threat of prosecution may deter claimants from challenging police action.

D. Recent Reform

Issues concerning access to counsel and police abuse of authority with forfeiture practices resonate with members of Congress and their constituents.[118] The latest CAFRA legislative reform was on March 29, 2017, when the House Judiciary Committee approved H.R. 1795, known as the Deterring Undue Enforcement by Protecting Rights of Citizens from Excessive Searches and Seizures Act of 2017 (Due Process Act).[119]

The bill's focus is to protect innocent Americans and their

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114. Pre-CAFRA, the Federal Circuit in *Acadia Technology, Inc. v. United States* described the alternative remedies the petitioners had at their disposal, including filing for a forfeiture action or request to refer the matter to the U.S. Attorney, and then file a motion for return of property. 458 F.3d 1327, 1334 (Fed. Cir. 2006). The court stated:

> [A] property owner may force the government either to return the property or to initiate forfeiture proceedings. If the government commences forfeiture proceedings after an inordinate delay, the owner may file a motion with the court requesting dismissal of the proceeding and return of his property on the ground that the delay has violated his due process rights, even if the property would otherwise be forfeitable.

Id.

115. *See* HYDE, *supra* note 12, at 32.

116. CARPENTER ET AL., *supra* note 21, at 29; *see also* Carasik, *supra* note 21 (discussing the disproportionate impact civil asset forfeiture has on the poor and minorities).

117. CARPENTER ET AL., *supra* note 21, at 29; Carasik, *supra* note 21.

118. Although attorneys' fees are authorized under CAFRA, few attorneys would be incentivized to accept a case where the assets seized average under $1434. HYDE, *supra* note 12, at 32.

119. H.R. 1795, 115th Cong. (2017). H.R. 1795's predecessor was H.R. 5283, 114th Cong. (2016).

property rights.[120] Chairman Goodlatte also emphasized the protections for innocent owners against undue government delays in returning seized property.[121] Correspondingly, the Due Process Act seeks to remove the financial incentives embedded in forfeiture.[122] Ranking Member Conyers shared concerns about protections for innocent owners and stressed the Due Process Act "will take significant additional steps to prevent unjust seizures and make the procedures concerning federal asset forfeiture less burdensome for innocent property owners."[123] His position reflects the sentiment of other Committee members, in particular, Chairmen Goodlatte and Sensenbrenner.[124]

Noting the burden forfeiture places on Americans whose property is intrinsic to basic survival, Congresswoman Jackson Lee[125] stressed, "[F]or an unusual process whereby the government may seize and forfeit someone's money, car, or other assets they need to sustain themselves, the standard should be higher. Therefore, [the Due Process Act] would elevate the burden on the government from 'preponderance of the evidence' to 'clear and convincing evidence.'"[126]

Henry Hyde proposed a clear and convincing burden of proof

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120. Chairman Goodlatte emphasized that the Act "protect[s] Americans . . . ." *House Judiciary Committee Approves Bill to Protect Americans' Property Rights*, U.S. HOUSE COMMITTEE ON JUDICIARY DEMOCRATS (May 25, 2016), https://democrats-judiciary.house.gov/news/press-releases/house-judiciary-committee-approves-bill-protect-americans-property-rights [hereinafter *House Judiciary Approves Bill*]. Chairman Sensenbrenner stated, [T]he Due Process Act makes common sense changes to federal forfeiture laws that help innocent Americans." *Id.*

121. Specifically, the Due Process Act "[s]peeds up the process for the government to notify the property owner of a seizure [and] [e]xpands protections to innocent owners by requiring the government to prove the connection between the property and the offense and that the property was used intentionally in order to seize it." *Id.*

122. H.R. 5283, 114th Cong. (2016) (instituting clear and convincing evidentiary standard on the government to prove the claimant is not an innocent owner).

123. *House Judiciary Approves Bill*, *supra* note 120.

124. *Id.* (noting the Due Process Act "strengthens protections for Americans whose property has been seized by law enforcement agencies").

125. *About*, U.S. CONGRESSWOMAN SHEILA JACKSON LEE, https://jacksonlee.house.gov/about (last visited Oct. 2, 2017). Congresswoman Sheila Jackson Lee is the 18th Congressional District of Texas and is a senior member of the House Committees on the Judiciary and Homeland Security. *Id.*

126. *House Judiciary Approves Bill*, supra note 120.

standard when he introduced an early version of CAFRA,[127] but the bill never made it out of the Committee because law enforcement zealously opposed the suggested standard. As a compromise, the preponderance of the evidence standard prevailed.[128] It is likely law enforcement will show similar resistance to the Due Process Act.

If the Committee releases the bill as drafted, the innocent owner defense will be strengthened significantly. Under the new standard, the government would bear the burden to show clear and convincing evidence that the third party is not an innocent owner.[129] Shifting the burden to the government should increase claimants' ability to retain their property.

Under CAFRA, the provision governing attorneys' fees is still limited to matters involving a residence and claimants with a related criminal matter.[130] The Due Process Act, however, would allow a claimant to recoup attorneys' fees if the matter settles for more than 50% of the value of the property that the government seized.[131] Civil Gideon advocates would assert that all litigants should have a right to counsel in these matters, regardless of whether they prevail.[132] Without that guarantee, attorneys are less likely to represent claimants on a contingency basis in forfeiture proceedings.[133]

The Due Process Act contains additional shortcomings. Particularly, pre-deprivation notices and hearing requirements would remain unchanged.[134] Furthermore, the onus remains

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127. HYDE, *supra* note 12, at 80–81.

128. *See* 18 U.S.C. § 983(c) (2016) (establishing the burden of proof by a preponderance of the evidence in civil forfeiture proceedings).

129. H.R. 5283, 114th Cong. (2016).

130. 18 U.S.C. § 983(b)(1) (2016).

131. H.R. 5283; *see also House Judiciary Approves Bill*, *supra* note 120 (The Due Process Act "[c]reates a right to counsel for Americans in all civil asset forfeiture proceedings, [and] [p]rovides that a claimant may recover attorneys' fees in victorious cases against a government forfeiture.").

132. *See* Louis S. Rulli, *On the Road to Civil Gideon: Five Lessons from the Enactment of a Right to Counsel for Indigent Homeowners in Federal Civil Forfeiture Proceedings*, 19 J.L. & POL'Y 683, 685 (2011) ("[T]here is renewed optimism that a civil right to counsel to protect basic human needs is indeed possible and may even be relatively close at hand.").

133. *See id.* at 723 (recommending that legislative reform occur because of the "tragic stories of individuals without lawyers during civil forfeiture proceedings").

134. *See* H.R. 5283.

with the property owner to file a claim after the government seizes the property; the matter remains an *in rem* action; a related criminal activity is not required; and there is no collateral consequence if law enforcement abuses its power in a forfeiture proceeding.[135]

Although the purpose of the bill is to address the financial incentives embedded in civil forfeiture, the property seized would still benefit law enforcement. The Due Process Act fails to address this major conflict of interest and supports a system of law enforcement policing for profits.[136] The bill, however, proposes national databases listing government-seized property.[137] Additionally, the DOJ Inspector General would continue to audit and report on sample forfeiture actions to Congress and the Attorney General.[138] These transparent measures may help to curb law enforcement using forfeiture as a revenue-generating mechanism. In a highly politicized Republican Congress, however, it is unlikely the bill will pass. Thus, the courts play an increasingly important role in addressing forfeiture abuses, like the economic incentives embedded in civil asset forfeiture for law enforcement.

II. THE CIVIL FORFEITURE ROULETTE WHEEL

Civil forfeiture does more than allow the government to seize a person's property without a pre-deprivation hearing or a corresponding criminal charge. It encourages law enforcement to seize private property as a way to support law enforcement budgets.[139] In essence, law enforcement agencies can profit from whatever property they can take, as proceeds from seized property are often allocated to law enforcement activities.[140] While annual financial audits confirm that forfeitures benefit

135. *Id.*

136. *See* WILLIAMS ET AL., *supra* note 13 and accompanying text.

137. *House Judiciary Approves Bill*, *supra* note 120.

138. *Id.*

139. *See* WILLIAMS ET AL., *supra* note 13, at 17–20.

140. O'Harrow et al., *supra* note 76 ("For hundreds of police departments and sheriff's offices, the seizure proceeds accounted for 20 percent or more of their annual budgets in recent years, according to a Post analysis.").

police departments' operating budgets, no empirical data supports law enforcement's argument that forfeiture deters crimes and improves public safety.[141] Instead, the financial incentives motivate law enforcement to police for profits rather than public safety,[142] often at the expense of individuals' Fourth Amendment rights.[143]

Justice Thomas expressed this concern, stating, "Improperly used, forfeiture could become more like a roulette wheel employed to raise revenue from innocent but hapless owners whose property is unforeseeably misused, or a tool wielded to punish those who associate with criminals, than a component of a system of justice."[144] Justice Thomas's prediction has proved true. In 2016, the DOJ reported receiving over $7.62 billion in federal forfeiture assets and an additional $314 million from its forfeiture adoption equitable sharing program.[145]

Forty states have forfeiture statutes that allow law enforcement to keep anywhere between 45% to 100% of forfeiture proceeds.[146] In 2015, the Institute for Justice, a non-profit law firm, ranked all states' civil asset forfeiture practices and gave Massachusetts and North Dakota an "F" ranking, while twenty-

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141. CARPENTER ET AL., *supra* note 21, at 7 (explaining that because federal and state data is provided only in broad categories of spending, it is impossible to evaluate individual expenditures).

142. WILLIAMS ET AL., *supra* note 13, at 6; *see* 21 U.S.C. § 881 (2016) (providing the basis for the seizure of property connected to illicit drug activity and property obtained through other unlawful means. There are other statutes that authorize law enforcement to confiscate property).

143. CAFRA requires that an officer have probable cause to seize property. Few property owners, however, timely challenge the forfeitures that in the majority of forfeiture cases, a judge never reviews whether probable cause existed. Thus, in most cases, the government takes property without presenting any evidence. *Civil Asset Forfeiture*, ACLU PA., https://www.aclupa.org/issues/forfeiture/ (last visited Oct. 2, 2017).

144. Bennis v. Michigan, 516 U.S. 442, 456 (1996) (Thomas, J., concurring).

145. The Justice Department's 2016 annual budget was $28.7 billion. U.S. DEP'T OF JUST., SUMMARY OF BUDGET AUTHORITY BY APPROPRIATION 2 (2016), https://www.justice.gov/sites/default/files/jmd/pages/attachments/2015/01/30/1_summary_of_budget_authority_by_appr.pdf; *see also* AUDIT DIV., U.S. DEP'T OF JUST., AUDIT OF THE ASSETS FORFEITURE FUND AND SEIZED ASSET DEPOSIT FUND ANNUAL FINANCIAL STATEMENTS FISCAL YEAR 2016, at 7 (2016), https://oig.justice.gov/reports/2016/a1706.pdf.

146. Lee McGrath & Nick Sibilla, *Trump Should Be Appalled by Police Asset Forfeiture*, WALL STREET J. (Mar. 5, 2017, 5:11 PM), https://www.wsj.com/articles/trump-should-be-appalled-by-police-asset-forfeiture-1488751876.

nine other states, including Arizona, received a "D" ranking.[147] These states received low grades partially because 100% of the property law enforcement seizes through forfeiture goes to law enforcement operations—not schools, not hospitals, not community development.[148] Public opinion reflects a high disapproval for forfeiture proceeds going to law enforcement.[149]

Despite rising public opposition to civil asset forfeiture, states are incentivized to expand forfeiture practices. For example, in 2017, Arizona senators passed Senate Bill 1142, which expanded law enforcement's ability to seize peaceful protesters' personal property to cover the costs of any property damage associated with riots.[150] Adding riots to Arizona's Racketeer Influenced and Corrupt Organizations Act (RICO) would have permitted law enforcement to summarily seize protesters' property based on a suspicion that the property was associated with illegal activity.[151] Although the bill never made it to the House floor, it would have been an additional weapon in Arizona's forfeiture statutory arsenal, which provides limited protection for property owners and great incentives for law enforcement to confiscate private property.[152]

Even though some state laws prevent law enforcement from using forfeited assets for police operations,[153] state police departments may bypass these restrictive state laws by participating in the Justice Department's forfeiture adoption and equitable sharing program.[154] Through the equitable sharing

147. CARPENTER ET AL., *supra* note 21, at 22.

148. Despite its lack of statehood, the District of Columbia is included although its residents continue to pay federal income taxes without any voting representation in Congress. *See id.* at 63 (discussing the District of Columbia as if it were a state and explaining the District's reforms that will end their participation in federal equitable sharing programs by 2018).

149. Emily Ekins, *84% of Americans Oppose Civil Asset Forfeiture*, CATO INST. (Dec. 13, 2016, 1:33 PM), https://www.cato.org/blog/84-americans-oppose-civil-asset-forfeiture.

150. S.B. 1142, 53rd Leg., 1st Reg. Sess. (Ariz. 2017).

151. *See id.*

152. *Bill Status Inquiry*, ARIZ. ST. LEGISLATURE, https://apps.azleg.gov/BillStatus/BillOverview/68892 (last visited Sept. 29, 2017).

153. For a summary of state asset forfeiture statutes and distribution procedures, see EDGEWORTH, *supra* note 46, at 243–51.

154. The Justice Department enters into cooperative agreements with state and local law enforcement agencies. These agreements allow state police to seize property that falls within a federal statute or if the state helped investigate a federal crime. ASSET FORFEITURE & MONEY

program, state police departments can seize property under federal authority,[155] transfer the property to the DOJ, and receive up to 80% of seized assets.[156]

Not surprisingly, the Justice Department identifies asset forfeiture as "a powerful tool that provides valuable resources to state and local law enforcement that may not have otherwise been available."[157] Significantly, the Justice Department's guidelines require that the money a state or local government receives from equitable sharing go to law enforcement purposes.[158] Although the legislative purpose of the federal adoption program is to encourage cooperation between state or local agencies and Federal law enforcement,[159] often the only apparent cooperation involves sending assets to the Justice Department to circumvent state due process limits or other state forfeiture standards. The adoption program simply increases financial incentives for states to adopt forfeiture practices and does little to enhance federal-state cooperation in battling crime.[160] The House Judicial Committee expressed this concern about the forfeiture adoption program during its enactment of CAFRA.[161]

> The Committee is concerned about two aspects of adopted forfeiture. The first is that since property or funds returned to state or local law enforcement agencies through adoptive forfeiture can be kept by these entities, the process can be used to bypass provisions of state laws or state

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LAUNDERING SEC., CRIM. DIV., U.S. DEP'T OF JUST., GUIDE TO EQUITABLE SHARING FOR STATE AND LOCAL LAW ENFORCEMENT AGENCIES 6 (2009) [hereinafter U.S. DEP'T CRIM. DIV.], https://www.justice.gov/criminal-afmls/file/794696/download.

155. Even police departments located in states prohibited from using state forfeiture funds for law enforcement purposes can funnel forfeiture assets into the state police department budget by participating in the Justice Department's forfeiture adoption program. *See id.*

156. CARPENTER ET AL., *supra* note 21, at 24–25; *see also* O'Harrow et al., *supra* note 76.

157. U.S. DEP'T CRIM. DIV., *supra* note 154, at 24.

158. *Id.* at 28.

159. 21 U.S.C. § 881(e)(3)(B) (2016).

160. CARPENTER ET AL., *supra* note 21, at 6.

161. H.R. REP. NO. 106-192, at 4 n.18 (1999).

> constitutions that dictate that property forfeited (pursuant to state forfeiture provisions) should be used for non-law enforcement purposes such as elementary and primary education . . . . Second, while the property returned through adoptive forfeiture must be used for law enforcement purposes, state and local governing bodies do not exercise their normal oversight role over how the property is used since it is not appropriated through the normal legislative process.[162]

The equitable sharing program continues to receive criticism. On January 16, 2015, former Attorney General Eric Holder issued an order that limited the forfeiture adoption program.[163] Holder's order provided that property seized under state law was no longer eligible for the federal adoption program unless the property related to child pornography, firearms, ammunition, explosives, or other public safety matters.[164] If the state agency was requesting federal adoption under the public safety exception, the Assistant Attorney General for the Criminal Division would have to approve the adoption.[165] A year later, however, then Attorney General Loretta Lynch announced the Justice Department would resume its equitable sharing program.[166] Despite a change in administration, nothing suggests Attorney General Jeff Sessions will significantly deviate from Lynch's Order.[167] Accordingly, both federal and

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162. *Id.*

163. The Justice Department asserted that the Order was a result of the agency's year-long review of its civil asset forfeiture program and its commitment to ensure its practices and policies were consistent with "civil liberties." *Federal Asset Forfeiture: Uses and Reforms* (referring to the testimony of Kenneth A. Blanco, Deputy Assistant Attorney General, Criminal Division, who discussed Holder's order for the federal asset forfeiture program).

164. O'Harrow et al., *supra* note 76.

165. *Id.*

166. On March 28, 2016, then Attorney General Loretta Lynch reinstated the federal adoption program. Christopher Ingraham, *The Feds Have Resumed a Controversial Program that Lets Cops Take Stuff and Keep It*, WASH. POST (Mar. 28, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/03/28/the-feds-have-resumed-a-controversial-program-that-lets-cops-take-stuff-and-keep-it/?utm_term=.88a6cfaa6836.

167. With his recent appointment as Attorney General, Sessions supports civil asset forfei-

state law enforcement agencies will continue to profit from asset forfeiture.[168]

III. CAFRA'S DISPARATE IMPACT ON COMMUNITIES OF COLOR

This Part examines the law through a different lens. The controversy in every major prosecutor's office is the racial bias impeding equitable policing practices.[169] Yet, the courts ignore the effect these practices have on the lives and property of African Americans and other communities of color. The DOJ's reports, *Investigation of the Ferguson Police Department*[170] and *Investigation of the Baltimore City Police Department*,[171] memorialize the disparate impact law enforcement practices have on African Americans and the financial factors that motivate law enforcement to engage in unjustified stops and frisks.[172] Those DOJ reports illustrate the nexus between discriminatory policing and abusive revenue-generating tactics.[173] They also reveal the limited remedies for victims of police discrimination.[174]

A. Assessing the Fergusons

The DOJ concluded that the Ferguson Police Department strategically targeted African Americans with stops, arrests,

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ture by law enforcement. He stated "there's 'nothing wrong with having the money be given to the officers who helped develop the case.'" Leef, *supra* note 83.

168. The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. Property the government seizes under CAFRA is subject to an excessiveness analysis under the Eighth Amendment's Excessive Fines Clause. Thus, if the government prevails in a civil asset forfeiture claim, the property the government seizes may outweigh the property owner's profit from the offense.

169. *See* Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795, 796 (2012). *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010) (arguing that although it is not socially acceptable to discriminate against people based on race, society still engages in institutional racism through the criminal justice system).

170. INVESTIGATION OF FERGUSON P.D., *supra* note 112, at 1–6.

171. INVESTIGATION OF BALTIMORE P.D., *supra* note 12, at 7.

172. *Id.*

173. *Id.* at 48 (discussing the "reasonable cause to believe that BPD engages in a pattern or practice of discriminatory policing against African-Americans."); INVESTIGATION OF FERGUSON P.D., *supra* note 110.

174. *See* INVESTIGATION OF FERGUSON P.D., *supra* note 112, at 3.

and unwarranted civil fines in violation of the Constitution and federal law.[175] The DOJ's investigation of the Baltimore Police Department's (BPD) law enforcement revealed similar systematic discriminatory practices.[176] Specifically, the DOJ noted that there were "severe and unjustified disparities in the rates of stops, searches and arrests of African Americans."[177] In one instance, the BPD stopped an African American man thirty times for loitering, but never charged him with a crime.[178] In another instance, an African American man filed a complaint stating that a police officer ordered him to exit his vehicle during a traffic stop and searched the vehicle without the man's consent.[179] When the search uncovered no contraband, "the officer pulled down the man's pants and underwear, exposing his genitals on the side of a public street, and strip-searched him."[180]

In addition to officers depriving individuals of basic human dignity and Fourth Amendment rights, both Ferguson and Baltimore police departments established policing priorities based on financial opportunities.[181] In 2015, Ferguson projected generating over $3 million in fines and fees for the city's operating budget, which represented 23% of its total projected revenues.[182] Although the focus of this article is on civil asset forfeiture, Ferguson's policing-for-profits practices—stopping innocent pedestrians and motorists, levying fines for inchoate charges, and using funds generated from court fines and

175. *Id.* at 15–41.

176. INVESTIGATION OF BALTIMORE P.D., *supra* note 12, at 47. The Baltimore investigation appropriately considered the history of racism in the city. *See id.* at 12–15.

177. *Id.* at 3.

178. *Id.* at 50.

179. *Id.* at 34.

180. *Id.* Although the Fourth Amendment limits strip searches to specific, narrow circumstances following an arrest, BPD officers often violate this standard. *Id.*

181. Ferguson's practice of policing for profits included over-ticketing, over-policing, high court fines, etc. *See* INVESTIGATION OF FERGUSON P.D., *supra* note 112, at 12–14; INVESTIGATION OF BALTIMORE P.D., *supra* note 12, at 20 ("BPD's law enforcement practices . . . exacerbate the longstanding structural inequalities in the City by encouraging officers to have unnecessary, adversarial interactions with community members that increase exposure to the criminal justice system and fail to improve public safety.").

182. INVESTIGATION OF FERGUSON P.D., *supra* note 112, at 10.

citations to fund government operations—are analogous to the same financial motivation that leads to forfeiture abuse.[183]

In Baltimore, when the officer seized cash during the above-referenced strip search, the officer allegedly promised to return the man's money if he "provided information about more serious crimes."[184] The report provided that when the complainant did not provide this information, "the officer arrested him and turned over only part of the confiscated money, keeping more than $500."[185] Ferguson's illegal searches in violation of the Fourth Amendment are directly linked to revenue-generating incentives.[186]

Although the DOJ's findings heightened awareness of discriminatory policing in Ferguson and Baltimore, national data support that there are many "Fergusons" throughout the country:

- Although Black and White Americans commit crimes at the same rate, Black suspects are twice as likely to be arrested during a traffic stop.[187]
- Black people are 3.7 times more likely to get arrested for drug charges, although their drug use is no greater than any other racial group.[188]
- Black people receive harsher sentences than other races.[189]
- Highway Patrol is more likely to stop black drivers and other drivers of color than white

183. The DOJ concluded that Ferguson's policing-for-profits practices deprive African Americans of property ownership. It also concluded that monetary incentives lead to corruption of a constitutional and compromised judicial system, which further undermines trust between law enforcement and the African American community. *See id.* at 80–88.

184. INVESTIGATION OF BALTIMORE P.D., *supra* note 12, at 34.

185. *Id.*

186. *Id.* at 17 ("The focus on assigning blame for less-than-satisfactory numbers . . . rather than problem-solving, is completely unproductive and weakens the collective morale of the BPD.").

187. GHANDNOOSH, *supra* note 10, at 10–16.

188. *Id.* at 15.

189. *Id.* at 12; Lawson, *supra* note 11.

drivers.[190]

- Black communities are disproportionately over policed.[191]

Whether Freddie Gray in Baltimore, Michael Brown in Ferguson, Trayvon Martin in Miami Gardens, Eric Garner in Staten Island, or Sandra Bland in Prarie View, discriminatory policing against black and brown communities is egregious, rampant, and well-documented.[192] Civil asset forfeiture is a collateral effect of this discriminatory policing, and forfeiture's financial incentives encourage racial profiling in law enforcement.[193]

B. Turning the Other Cheek

As a result of law enforcement's increased publicized aggression to black and brown communities, rarely do members of these groups regard police as demonstrating characteristics of the proverbial Officer Friendly.[194] Instead, every step is taken to avoid provoking an officer, and to escape not only an unwarranted arrest or fine, but death.[195] In *Utah v. Strieff*, Justice Sotomayor's dissent highlights this dynamic, suggesting unlawful stops against communities of color are part of systemic and recurring police misconduct.[196] Justice Sotomayor's dissent stated,

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190. Samuel R. Gross & Katherine Y. Barnes, *Road Work: Racial Profiling and Drug Interdiction on the Highway*, 1010 MICH. L. REV. 651, 660 (2002).

191. The Justice Department found that 44% of Baltimore City Police Department's stops were in two predominantly African American areas. Yet, that area only represented 11% of city's population. INVESTIGATION OF BALTIMORE P.D., supra note 12, at 6; GHANDNOOSH, *supra* note 10, at 15.

192. *See* Derrick Darby & Richard E. Levy, *Postracial Remedies*, 50 U. MICH. J.L. REFORM 387, 452 (2017); Sonja B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 66 STAN. L. REV. 803, 836–41 (2014); Tania Tetlow, *Discriminatory Acquittal*, 18 WM. & MARY BILL OF RTS. J. 75, 76–78 (2009).

193. *See* Devon Carbado, *Predatory Policing*, 85 UMKC L. REV. 545, 552–55 (2017).

194. Jessica Davis, *From Officer Friendly to Officer Fear*, BALT. SUN (Apr. 29, 2015), http://www.baltimoresun.com/news/opinion/oped/bs-ed-officer-friendly-freddie-gray-20150429-story.html.

195. *Id.*

196. *Utah v. Strieff*, 136 S. Ct. 2056, 2068–69 (2016) (Sotomayor, J., dissenting).

> [F]or generations, black and brown parents have given their children 'the talk'—instructing them never to run down the street; always keep your hands where they can be seen; do not even think of talking back to a stranger—all out of fear of how an officer with a gun will react to them.[197]

Despite this reality and well-documented statistics of biased policing against African Americans, few Fourteenth Amendment Equal Protection claims based on discriminatory policing survive a motion to dismiss or motion for summary judgment, particularly with police vehicle stops.[198] *Whren v. United States* clarified that under a Fourth Amendment analysis, police officers' pretextual motive is irrelevant if officers can articulate a valid reason for a traffic stop.[199] Broken tail lights, exceeding the speed limit, failure to come to a complete stop at a stop sign, or simply fabricating a traffic violation have historically served as a pretext for police to stop and search African Americans.[200] *Whren* further legitimized the practice.[201]

Although a few district court cases have ruled for plaintiffs challenging police conduct under an Equal Protection claim, the holdings are more of a testament to the social pressure the court experienced than a shifting standard for Equal Protection claims.[202] For example, in *Floyd v. City of New York*, the court

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197. *Id.* at 2070 (citing MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 95–136 (2010); JAMES BALDWIN, THE FIRE NEXT TIME (1963); W. E. B. DU BOIS, THE SOULS OF BLACK FOLK (1903); TA NEHISI COATES, BETWEEN THE WORLD AND ME (2015), MARIE GOTTSCHALK, CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS 119–38 (2015)).

198. *See, e.g.*, Whren v. United States, 517 U.S. 806, 809–19 (1996) (holding that the officer's probable cause to believe the petitioners violated the traffic code rendered the stop reasonable); Pinter v. City of New York, 976 F. Supp. 2d 539, 566 (S.D.N.Y. 2013).

199. *Whren*, 517 U.S. at 813; Johnson v. Crooks, 326 F.3d 995, 999 (8th Cir. 2003).

200. To prevail on an Equal Protection claim, a plaintiff must meet the insurmountable burden of establishing intentional racial discrimination. *See* Washington v. Davis, 426 U.S. 229, 239 (1976).

201. *Whren* distinguished an Equal Protection challenge to selective enforcement of the law based on race from a probable cause Fourth Amendment challenge. However, the underlying stop is often relevant to the Equal Protection claim. *See Whren*, 517 U.S. at 813.

202. *See* Floyd v. City of New York, 959 F. Supp. 2d 540, 562 (S.D.N.Y. 2013); Giron v. City of Alexander, 639 F. Supp. 2d 904, 913–14 (E.D. Ark. 2010).

held that the New York Police Department's notorious stop and frisk practice was a violation of the Fourth Amendment and the Fourteenth Amendment Equal Protection Clause because the police policy was designed to stop mostly African Americans.[203] Judge Scheindlin's order initially appeared to be a monumental victory, but when parties sought to use the *Floyd* holding to support other Equal Protection claims, courts quickly distinguished those cases.[204]

Other state courts had similarly isolated victories. *Giron v. City of Alexander* appeared to provide a ray of hope when it ruled that plaintiffs met their burden with statistical evidence that showed a police officer had disproportionally targeted Latinos for traffic violations.[205] Significantly, similar to Ferguson,[206] the City of Alexander experienced financial problems and used citations to generate revenue.[207] The data supported a disparate treatment claim in discriminatory police practices and the nexus between policing for profits.[208] Similar to *Floyd*, however, courts distinguished the finding of discriminatory intent in subsequent cases.[209]

Analogously, although the empirical data in Ferguson and Baltimore reveal rampant racial discrimination in the arrest patterns of African Americans, plaintiffs were unlikely to succeed in establishing the police departments violated the

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203. *Floyd*, 959 F. Supp. 2d at 562.

204. While the court noted the difficulty in proving such a claim, the plaintiffs presented statistical evidence that showed Latinos were disproportionally targeted for traffic violations by the same officer. The court awarded both compensatory and punitive damages, and also found the officer, his supervisor, and the city liable. *Id.*; *see* Lanausse v. City of New York, No. 15 Civ. 1652 (LGS), 2016 U.S. Dist. LEXIS 63414, at *15–16 (S.D.N.Y. May 13, 2016); *see also* Pinter v. City of New York, 976 F. Supp. 2d 539, 555–67 (S.D.N.Y. 2013) (holding that the officer's conduct in selectively policing a location where both homosexual and straight men visited was different from selectively policing a black-dominated neighborhood). *But see* Betts v. Rodriquez, No. 15-CV-3836 (JPO), 2016 U.S. Dist. LEXIS 171462, at *17 (S.D.N.Y. Dec. 12, 2016).

205. *Giron*, 693 F. Supp. 2d at 904.

206. INVESTIGATION OF BALTIMORE P.D., *supra* note 12, at 11.

207. *Giron*, 693 F. Supp. 2d at 913.

208. *Id.* at 929–31.

209. *See* McCoy v. City of Independence, No. 12-1211-JAR-JPO, 2013 U.S. Dist. LEXIS 120800, at *18–19 (D. Kan. Aug. 26, 2013) (holding there was no Fourteenth Amendment equal protection violation because race was one factor in the stop of plaintiff's vehicle, but not the only factor).

Equal Protection Clause.[210] Constitutional law scholars, civil rights experts, and criminal defense attorneys will attest to the hopelessness of challenging discriminatory police practices either under the Equal Protection Clause of the Fourteenth Amendment or as a selective-prosecution defense.[211] The standard to establish discriminatory intent is so preposterously high that anecdotes, statistical research, and glaring disparity of racial profiling seem meaningless.[212] Thus, establishing that law enforcement actions were motivated by discriminatory intent regularly fails unless there is a "smoking gun" statement from a law enforcement agent admitting to intentionally discriminating against a protected class.[213]

While community survival norms may require passive response to police actions, judicial standards similarly accept discriminatory policing practices. The driving question is why does the Supreme Court maintain and uphold civil asset forfeiture and other discriminatory practices as constitutional when societal realities contradict those conclusions?

IV. CREATING RECIPROCAL CHANGE

Looking to the courts for resolution of social justice issues has always been a slow process, and change in the law has rarely happened in isolation.[214] Furthermore, divesting property

210. *See* United States v. Armstrong, 517 U.S. 456, 464–65 (1996). Courts have refused to deem the process a violation of the Fourteenth Amendment Equal Protection Clause or the Takings Clause of the Fifth Amendment. The Court also refuses to deem a statute with a disparate impact on communities of color a violation of the Fourteenth Amendment Equal Protection Clause for many of the reasons previously cited. *Id.*

211. Darby & Levy, *supra* note 192, at 463–68; Darren Lenard Hutchinson, *"Continually Reminded of Their Inferior Position": Social Dominance, Implicit Bias, Criminality, and Race*, 46 WASH. U. J.L. & POL'Y 23, 23–33 (2014).

212. *See Armstrong*, 517 U.S. at 456. The *Armstrong* Court favored prosecutorial discretion and the Court established such a high legal standard that made it impossible for most plaintiffs to meet the unrealistic burden. *Contra* Griggs v. Dukes Power Co., 401 U.S. 424, 434–35 (1971); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

213. *See* McCleskey v. Kemp, 481 U.S. 279, 292 (1987); Washington v. Davis, 426 U.S. 229, 239–40 (1976).

214. *See* Faith Rivers James, Leadership Roundtable Article, *Leadership and Social Justice Lawyering*, 52 SANTA CLARA L. REV. 971, 977–80 (2012); LAWYERS' COMM. FOR CIVIL RIGHTS UNDER LAW, TOWARD A MORE JUST JUSTICE SYSTEM: HOW OPEN ARE THE COURTS TO SOCIAL JUSTICE LITIGATION? 61 (2016).

ownership from African Americans, Native Americans, and low-income communities is deeply embedded in the laws and the formation of this country.[215] The inequitable implementation of civil asset forfeiture further perpetuates this legacy and exacerbates a history of property deprivation in the African American community. While the double tripartite system of government is designed to create checks and balances that ensure a just and humane society, rarely does that ideal meet reality—particularly for low-income African American communities.[216] When the Supreme Court and all other branches of government fail to create that system of fairness, social activism serves as an important check for legal disparities.[217]

A. Using Movements to Change the Rule of Law

Notwithstanding Constitutional Amendments, the Supreme Court has frequently proven to be an unfavorable forum for issues pertaining to communities of color.[218] Despite the varying

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215. *See, e.g.*, Ezra Rosser, *Destabilizing Property*, 48 CONN. L. REV. 397, 435–41 (2015). *See generally* RICHARD ROTHSTEIN, COLOR OF LAW (2017) (suggesting that the Fair Housing Act of 1968 prohibited future discrimination, but did nothing to reverse residential discrimination patterns that had become deeply embedded).

216. *See* Victor Suthammanont, Note, *Judicial Notice: How Judicial Bias Impacts the Unequal Application of Equal Protection Principles in Affirmative Action Cases*, 49 N.Y. L. SCH. L. REV. 1173, 1177–90 (2005) (tracing racism in the courts and societal poverty, employment, policing, education, etc. from the Civil War to present). *See generally* Swati Prakash, *Racial Dimensions of Property Value Protection Under the Fair Housing Act*, 101 CAL. L. REV. 1437, 1437 (2013) (discussing how "courts underprotect low-income and minority families from property value depreciation and displacement"); Kelly J. Varsho, *In the Global Market for Justice: Who is Paying the Highest Price for Judicial Independence?*, 27 N. ILL. U. L. REV. 445, 454–56 (2007) (describing the accountability and diversity of the judiciary and how it affects public confidence in the courts).

217. *See* COLE, *supra* note 25, at 225–27. Quite frequently, media, political action committees, lobbyist, and other special interest groups use their power to amplify and frame an issue. Elected officials concerned with tracking constituents' views for reelection purposes often mold their policies to align with these constituents' demands. Social justice movements serve a similar function in the courts. *See Developments in the Law – International Environmental Law*, 104 HARV. L. REV. 1580, 1589 (1991) (arguing intergovernmental organizations' "decision making is . . . influenced by media reports of public opinion polls, scientific studies, and criticisms made by" international non-governmental organizations).

218. *See generally* Korematsu v. United States, 323 U.S. 214 (1944) (holding the internment of Japanese Americans during World War II constitutional); Plessy v. Ferguson, 163 U.S. 537 (1896) (upholding racial segregation as constitutional); Dred Scott v. Sandford, 60 U.S. 393 (1857) (holding African Americans were not U.S. citizens regardless of their status as free or as a slave).

perspectives and limited empirical data to measure the direct correlation between judicial review and protest movements, most scholars agree that public opinion influences courts.[219] Public opinion, as framed through protest movements, provides context to legal problems and has historically given courts a barometer of popular views—minimizing judicial backlash.[220] By humanizing a problem in ways lawyers often cannot in a judicial setting, these movements connect supporters, tap into moral obligations, increase public scrutiny of an issue, and may encourage Supreme Court review.[221]

Whether it be judicial activism or the Court protecting its implicit legitimacy, there exists a legacy of cases where the union of public opinion and Supreme Court review are increasingly apparent.[222] Most recently, *Obergefell v. Hodges*[223] exemplified how a social justice movement prepared the Court for a favorable decision.[224] Although this Article will not explore the LGBTQIA movement that led to *Obergefell*, the decision has proven to result in less judicial backlash than landmark

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219. *See* Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 YALE L.J. 2740, 2781–82 (2014) (illustrating how the Montgomery Bus Boycott story began with a social movement and influenced the courts); Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: the Case of Affirmative Action*, 105 COLUM. L. REV. 1436, 1438 (2005) (quoting Robert Post when he states "that the 'beliefs and values of non-judicial actors' heavily influenced the Court's result in *Grutter*"); Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 8 (2003) ("[C]onstitutional law and culture are locked in a dialectical relationship, so that constitutional law both arises from and in turn regulates culture.").

220. *See* COLE, *supra* note 25, at 12–13.

221. *Id.* at 72–73; *see also* Ruth Payne, *Animal Welfare, Animal Rights, and the Path to Social Reform: One Movement's Struggle for Coherency in the Quest for Change*, 9 VA. J. SOC. POL'Y & L. 587, 627 n.220 (2002).

222. *See, e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584, 2596 (2015) ("[C]hanged understandings of marriage are characteristic of a Nation where new dimensions of freedom become apparent to new generations, often through perspectives that begin in pleas or protests and then are considered in the political sphere and the judicial process.").

223. *Id.*

224. *See, e.g.*, Scott L. Cummings & Douglas NeJaime, *Lawyering for Marriage Equality*, 57 UCLA L. REV. 1235, 1237 (2010) (explaining public interest organization's role and influence on policy reform); Michael C. Dorf & Sidney Tarrow, *Strange Bedfellows: How an Anticipatory Countermovement Brought Same-Sex Marriage into the Public Arena*, 39 LAW & SOC. INQUIRY 449, 461 (2014) ("Sustained by incremental changes in public opinion, state courts and legislatures began to recognize same-sex marriage, in turn further energizing movement supporters and motivating opponents."); William N. Eskridge, Jr., *Backlash Politics: How Constitutional Litigation Has Advanced Marriage Equality in the United States*, 93 B.U. L. REV. 275, 311–12 (2013).

decisions such as *Brown v. Board of Education* and *Roe v. Wade*. Some argue that *Obergefell* did not face the same level of resistance because the Supreme Court's ruling aligned with public discourse on the issue of same-sex marriage.[225] The *Obergefell* trajectory was unlike *Brown v. Board of Education* and *Roe v. Wade*, where massive backlash included blatant defiance of the Supreme Court's orders.[226]

1. Brown v. Board of Education *and the civil rights movement*

At the time of the *Brown* decision, the National Association for the Advancement of Colored People (NAACP) Legal Defense and Educational Fund had more Supreme Court victories than any other organization.[227] Under Thurgood Marshall's leadership, the organization's legal strategy was to develop state cases and use them to challenge the *Plessy v. Ferguson*[228] "separate but equal" paradigm.[229] The Legal Defense Fund (LDF) also used the courts as a mechanism to educate and mold public opinion on social equity issues such as racially restrictive covenants.[230]

With *Shelley v. Kraemer*, as part of companion cases, the NAACP's Legal Defense Fund strategized to remove restrictive covenants that prohibited African Americans from living in white neighborhoods.[231] As the LDF launched its legal strategy, its plan was butressed by a Chicago Commission on Race Relations' report dispelling myths concerning the harms of integration and the "negro."[232] While oppositional segregation-

225. COLE, *supra* note 25, at 93.

226. *See, e.g.*, Carlos A. Ball, *The Backlash Thesis and Same-Sex Marriage: Learning from* Brown v. Board of Education *and its Aftermath*, 14 WM. & MARY BILL RTS. J. 1493, 1497 (2006) (describing incidents of resistance to the decision).

227. Clement E. Vose, *NAACP Strategy in the Covenant Cases*, 6 CASE W. RES. L. REV. 101, 102 (1955).

228. Plessy v. Ferguson, 163 U.S. 537, 550–51 (1896).

229. Vose, *supra* note 227 (describing NAACP's strategy).

230. *Id.* at 111.

231. *See* Shelley v. Kraemer, 334 U.S. 1 (1948). The case was technically not a NAACP case, but the organization worked with George Vaughn to coordinate arguments before the Supreme Court. *See* Vose, *supra* note 227, at 129.

232. Vose, *supra* note 227, at 114–16.

ists knew morality may not have been on their side at the time, there nonetheless existed a body of law in the courts that was.[233] Ironically, the courts, which lawyers so heavily rely upon to render unbiased decisions, were the favored forums by those segregationists striving to maintain status quo. Nonetheless, the LDF mobilized through the courts and effectively used the Supreme Court as a platform for racial reform.[234] While *Shelly v. Kraemer* deemed racially restrictive covenants unenforceable, the holding proved ineffective in desegregating housing and increasing opportunities for African Americans, Jewish Americans, and Asian Americans to purchase property in white neighborhoods.[235] One possible explanation for the hostile response was that the LDF effectively mobilized the Court, but did not effectively mobilize widespread public support—particularly with white segregationists.[236]

A similar challenge developed with *Brown v. Board of Education*.[237] Despite the *Brown* mandate, states refused to desegregate schools.[238] President Eisenhower rejected the *Brown* decision, and callously failed to enforce the law when Arkansas Governor Faubus ordered the National Guard to block African American students from entering a white high school.[239] Eventually, the Little Rock Nine courageously entered Little Rock's Central High School and began their classes in the midst of government-sanctioned violence.[240] With *Brown*, the LDF may have won the battle for school desegregation, but it lost the

233. *Id.* at 111.

234. *Id.* at 110.

235. *See* Abigail Perkis, Shelly v. Kraemer*: Legal Reform for America's Neighborhoods*, NAT'L CONST. CTR. (May 9, 2014), https://constitutioncenter.org/blog/shelley-v-kraemer-legal-reform-for-americas-neighborhoods.

236. *See id.* (discussing the public's efforts to undermine the implementation of *Shelly v. Kraemer*).

237. Brown *at 60: The Southern Manifesto and "Massive Resistance" to* Brown, LEGAL DEF. FUND, http://www.naacpldf.org/brown-at-60-southern-manifesto-and-massive-resistance-brown (last visited Dec. 6, 2017) [hereinafter Brown *at 60*].

238. *Id.*

239. *Integration of Central High School*, HISTORY, http://www.history.com/topics/black-history/central-high-school-integration (last visited Dec. 6, 2017).

240. Johanna Miller Lewis, *History of the Alternative Desegregation Plan and the Black Community's Perspective and Reaction*, 30 U. ARK. LITTLE ROCK L. REV. 363, 363 (2008).

war for education equity.[241] It appeared as though the *Brown* decision was a mere piece of paper.

Social reform, however, does not end with one judicial victory. Instead, a legal shift is often a springboard for continued social activism. A lesson from *Brown* was the impact inequality has on children's self-esteem and that segregation demoralizes human dignity.[242] This message resonated with courts in other civil rights actions and the Student Nonviolent Coordinating Committee (SNCC).[243]

With little faith in the judicial process, the SNCC and Dr. King's Southern Christian Leadership Conference (SCLC) used direct action as a foundation for change to restore human dignity to African Americans.[244] The SNCC built its protest movement on sit-ins that did not always align with the national civil rights litigation strategy.[245] Despite this conflict, the SNCC continued its sit-ins challenging Jim Crow laws and voter suppression—pushing for an inclusive political system and economic empowerment.[246] The LDF also moved forward challenging the delayed implementation of *Brown*, demanding full citizenship for the descendants of slaves who fought in a segregated army and who built many of the courthouses that rendered civil rights decisions.[247] The LDF continued to use the Constitution as the foundation to destroy Jim Crow legislation.[248]

Unpredictably, the SNCC sit-ins and SCLC protests were equally impactful as the LDF litigation initiatives on societal

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241. Brown *at 60*, *supra* note 237.

242. Tomiko Brown-Nagin, *Does Protest Work?*, 56 HOW. L.J. 721, 734–36 (2013) [hereinafter *Does Protest Work?*].

243. *Id.*

244. Leonard S. Rubinowitz et al., *A 'Notorious Litigant' and 'Frequenter of Jails': Martin Luther King, Jr., His Lawyers, and the Legal System*, 10 NW. J.L. & SOC. POL'Y 494, 572 (2016).

245. *Does Protest Work?*, *supra* note 242, at 734–35; *see* Francesca Polletta, *The Structural Context of Novel Rights Claims: Southern Civil Rights Organizing, 1961–1966*, 34 L. & SOC'Y REV. 367, 396 (2000).

246. Tomiko Brown-Nagin, *The Civil Rights Canon: Above and Below*, 123 YALE L.J. 2698, 2711 (2014) [hereinafter *Civil Rights Canon*].

247. PETER IRONS, A PEOPLE'S HISTORY OF THE SUPREME COURT 368–70 (1999).

248. *Civil Rights Canon*, *supra* note 246, at 2707.

reform, if not more so.[249] The lunch counter sit-ins and subsequent freedom rides increased public awareness and support for America's greatest shame—racism and related mob violence[250]—culminating into the Ku Klux Klan's murder of Freedom Summer activists: James Earl Chaney, Andrew Goodman, and Michael Schwerner.[251]

The LDF used its resources for change in the courts rather than street-protest movements as the SNCC and civil rights leaders used.[252] More by chance than choice, however, the LDF's legal strategy was bolstered by the social and political momentum non-lawyers created.[253] Just as the courts had become a forum to educate about the problem of racially restrictive covenants and shift public attitudes about segregation, the SNCC's and the SCLC's protests carved out opportunities for receptive courts to hear cases on racially segregated public accommodations.[254] This alignment is important because the Court relies on general public acceptance as a tool to combat widespread resistance to its decisions.[255] It is an alignment that strengthened civil rights litigation and moved the Court to overturn "separate but equal."[256]

2. Roe v. Wade *and the women's movement*

Roe v. Wade presented a more complicated model.[257] Scholars have extensively explored the social movement that led to *Roe v. Wade* and continue to explore the anti-abortion activists' attempts to erode the decision.[258] An important aspect of the

249. *Id.* at 2711.

250. *Murder in Mississippi*, PBS, http://www.pbs.org/wgbh/americanexperience/features/freedomsummer-murder/ (last visited Dec. 6, 2017).

251. *Id.*

252. Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941, 952 (2010).

253. *Id.*

254. *Id.* at 980.

255. Tom R. Tyler & Gregory Mitchell, *Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights*, 43 DUKE L.J. 703, 717 (1994).

256. Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954).

257. *See* 410 U.S. 113, 113 (1973).

258. *See generally* Deborah Dinner, *Strange Bedfellows at Work: Neomaternalism in the Making of Sex Discrimination Law*, 91 WASH. U. L. REV. 453, 460 (2014) (discussing "how the business

analysis is assessing the National Organization for Women (NOW) and other gender equity organizations' ability to mobilize public support and prompt the Court to legalize abortion.[259] Particularly noteworthy is how the protest movement framed the abortion issue and the reciprocal influence these protests had on the Court, as well as, the influence the Court had on the movement.

The women's movement strived for legalized abortion as an issue of full dignity, self-determination, gender equality, and an attempt to end coerced motherhood.[260] As the movement held protests throughout the nation, the Court seemed to understand the public sentiment about legal abortion but ignored the equity platforms that NOW and other organizations promoted.[261] Instead, the Court arrived at its decision through the medical lens of a woman's right to privacy, which was the same approach that peculated in various state courts.[262] Because of the Court's privacy lens reasoning, many argue that the *Roe* holding failed to address the true problem—a woman's lack of agency over her body and life.[263] Despite this shortcoming, the overwhelming impetus of the women's movement influenced the Court in upholding a woman's right to terminate a

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lobby mobilized against pregnancy discrimination claims"); Linda Greenhouse & Reva B. Siegel, *Before (and After)* Roe v. Wade*: New Questions About Backlash*, 120 YALE L.J. 2028, 2073 (2011) (discussing the "backlash narrative" that resulted from the Supreme Court's decision in *Roe v. Wade*); Mary Ziegler, *Originalism Talk: A Legal History*, 2014 BYU L. REV. 869, 898 (2014) (discussing the social movement around *Roe v. Wade*); Mary Ziegler, *Abortion and the Constitutional Right (Not) to Procreate*, 48 U. RICH. L. REV. 1263, 1272–73 (2014) (noting how "consultation laws forced anti-abortion activists to flesh out the supposed connections between *Roe v. Wade* and family law"); Bonny E. Sweeney, Note, Bering v. Share*: Accommodating Abortion and the First Amendment*, 38 CASE W. RES. L. REV. 698, 704–05 (1987) (discussing the impact of anti-abortion protests).

259. To illustrate, the ACLU's Women's Rights Project was an important gender equity organization. *See, e.g.*, *Tribute: The Legacy of Ruth Bader Ginsburg and WRP Staff*, ACLU, https://www.aclu.org/other/tribute-legacy-ruth-bader-ginsburg-and-wrp-staff (last visited Oct. 3, 2017). Under Ruth Bader Ginsburg's direction, ACLU litigated various gender inequality issues, often challenging social constructs about gender. *Id.*

260. *See* Reva B. Siegel, Roe*'s Root: The Women's Rights Claims that Engendered* Roe, 90 B.U. L. REV. 1875, 1880–86 (2010) (describing the women's movement's participation in legislative hearing protests, public speak-outs, and speeches).

261. *See id.* at 1880.

262. *Roe*, 410 U.S. at 153.

263. *See* Anita L. Allen, *The Proposed Equal Protection Fix for Abortion Law: Reflections on Citizenship, Gender, and the Constitution*, 18 HARV. J.L. & PUB. POL'Y 419, 439 (1995).

pregnancy.

Subsequent to the *Roe* decision, anti-abortion activists gained momentum, and the Court experienced increased pressure to overturn *Roe*.[264] This backlash and the Court's resistance to adopt an Equal Protection analysis forced the women's movement to reframe the abortion issue.[265] Rather than promoting equal protection, protest movements were simply trying to ensure that the Court reaffirmed the *Roe* holding.[266]

In various decisions since *Roe*, the Court has upheld regulatory barriers to a woman's ability to terminate a pregnancy.[267] For example, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court reaffirmed its holding in *Roe*, but also increased states' authority to regulate various aspects of abortion, including mandatory counseling before a woman terminates a pregnancy.[268]

Both sides felt *Casey* was a defeat.[269] The Court appeared to acknowledge not only the strong women's movement leading to legalized abortions, but also the growing counter-majority protests.[270] The *Casey* Court expressed concern with its legitimacy, providing: "The Court's power lies, rather, in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands."[271] Predictably, the abortion battle remains challenging

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264. *See id.* at 450.

265. *Id.* at 439–45.

266. *See id.*

267. Webster v. Reprod. Health Servs., 492 U.S. 490, 511 (1989); Planned Parenthood Ass'n of Kan. City, Mo., Inc. v. Ashcroft, 462 U.S. 476, 494 (1983).

268. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 869 (1992). The decision may have upheld a women's right to an abortion, but it tempered that choice by increasing barriers and treating women as if they are unable to make an informed decision. *Id.*

269. Jacque Wilson, *Before and After* Roe v. Wade, CNN (Jan. 22, 2013, 11:44 AM), http://www.cnn.com/2013/01/22/health/roe-wade-abortion-timeline/index.html ("Supporters on either side of the abortion issue [were] left confused after the Supreme Court rule[d] on Planned Parenthood of Southeastern Pennsylvania. v. Casey.").

270. *See Casey*, 505 U.S. at 861 ("In a less significant case, *stare decisis* analysis . . . would[] stop at the point we have reached. But the sustained and widespread debate *Roe* has provoked calls for some comparison between that case and others of comparable dimension that have responded to national controversies . . . .").

271. *Id.* at 865.

due to the strong counter protests and the ambiguity in what may be the "will of the people."[272]

B. Legitimacy Theory

Professor Barry Friedman's noteworthy book, *The Will of the People*, explores the correlation between normative values and the Supreme Court.[273] Significantly, Friedman notes the question is not whether the Court is influenced by public opinion, but how the Court is influenced and by who.[274] Essential to Professor Friedman's theory and the legitimacy equation is recognizing that the law remains a human experience, and the Justices are not immune from desiring the public to perceive their decisions as fair.[275] This alignment helps reduce judicial backlash and resistance to the Court's orders, as witnessed in *Brown* and, to a lesser extent, *Roe*.

Undoubtedly, assessing constitutional change through the lens of public opinion raises questions about judicial activism and the role of precedent.[276] Such a simplified explanation, however, overlooks that within the context of judicial review—the Supreme Court has both implicit and explicit legitimacy.[277]

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272. *See generally* BARRY FRIEDMAN, THE WILL OF THE PEOPLE (Abby Kagan ed., 1st ed. 2010) (writing how the "will of the people" and public opinion have shaped controversial Supreme Court's decisions, such as those on abortion); Gene Johnson, *Anti-Abortion Activists, Counter-Protesters Rally Around US*, AP NEWS (Feb. 11, 2017), https://apnews.com/e2110198d4804dbca6b629da0ffff631/anti-abortion-activists-counter-protesters-rally-around-us ("'I personally believe that abortion is a profound injustice to the human race,' [a counter-protestor] said.").

273. FRIEDMAN, *supra* note 272, at 14–18.

274. *Id.* at 378. Friedman extensively explores various forms of judicial activism from both conservatives and liberals, while documenting the battle between originalism and those who advocate for a living constitution approach. *Id.* at 301–03.

275. Tracey L. Meares & Tom R. Tyler, *Justice Sotomayor and the Jurisprudence of Procedural Justice*, 123 YALE L.J.F. 525, 537–39 (2014) (acknowledging the interplay between fairness and the Court's legitimacy). Justice Sotomayor has been cited as being particularly concerned with the fairness of the Court's decisions. *Id.* She has also referenced her concern that police action is deemed fair. *Id.*

276. *See generally* Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980) (examining the role precedent and public values play in constitutional interpretation).

277. *See* U.S. CONST. art. III, § 2. Although many state judges are elected, expectations are that the judges will render unbiased decisions, and not be swayed by how the decision will impact their reelection. *See* MAX WEBER, ECONOMY AND SOCIETY 759 (Guenther Roth & Claus

The Court's implicit legitimacy is based upon the Justices' legal expertise and the rational decisions they render,[278] while its explicit legitimacy is based on its authority as enumerated in the Constitution.[279] When the Court's legal expertise fails to align with mainstream norms, both its explicit and implicit legitimacy are questioned.[280] This effect does not suggest the Justices are trying each case in the proverbial court of public opinion. Instead, through time, judicial review should reflect the values of the people.[281]

According to the principles of legitimacy theory, when an authority drastically deviates from the psychological expectations of the status quo, its legitimacy diminishes.[282] Congress frequently voices concerns regarding judicial appointments. While congressional Republicans often fear that Democratic judicial nominees will employ judicial activism, congressional Democrats fear Republican judicial nominees will undermine constitutional progress and erode civil rights; however, neither

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Wittich eds., 2d ed. 1968); Alan Hyde, *The Concept of Legitimation in the Sociology of Law*, 1983 WIS. L. REV. 379, 383 (1983). *See generally*, Josh Bowers & Paul H. Robinson, *Perceptions of Fairness and Justice: The Shared Aims and Occasional Conflicts of Legitimacy and Moral Credibility*, 47 WAKE FOREST L. REV. 211 (2012) ("examin[ing] the shared aims and overlaps in operation and effect of these two criminal justice dynamics—the 'legitimacy' that derives from fair adjudication and professional enforcement and the 'moral credibility' that derives from just results—as well as the occasional potential for conflict").

278. Or Bassok, *The Supreme Court's New Sources of Legitimacy*, 16 U. PA. J. CONST. L. 153, 155 (2013) [hereinafter *New Sources of Legitimacy*]. Although many state judges are elected, expectations are that the judges will render unbiased decisions, and not be swayed by how the decision will impact their reelection. *See* WEBER, *supra* note 277; Hyde, *supra* note 277, at 382.

279. *New Sources of Legitimacy*, *supra* note 278, at 155; *see* U.S. CONST. art. III, § 2.

280. Tom Tyler's legitimacy theory supports that when a court's decision overwhelmingly usurps what appears just and the decision leads to absurd results, the court's legitimacy is questioned. *See* Sheldon Alexander & Marian Ruderman, *The Role of Procedural and Distributive Justice in Organizational Behavior*, 1 SOC. JUST. RES. 177 (1987); Bowers & Robinson, *supra* note 277, at 223; Rebecca Hollander-Blumoff & Tom R. Tyler, Symposium, *Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution*, 2011 J. DISP. RESOL. 1, 6–7 (2011); Or Bassok, *The Sociological-Legitimacy Difficulty*, 26 J.L. & POL. 239, 240–41 (2011); *New Sources of Legitimacy, supra* note 278, at 154.

281. *See* FRIEDMAN, *supra* note 272, at 18 ("Perhaps most important, in some of the most crucial moments in the struggle over judicial review there was an extraordinary engagement of the American people.").

282. *See id.* at 248; Alexander & Ruderman, *supra* note 280, at 177; Bowers & Robinson, *supra* note 277, at 223; Hollander-Blumoff & Tyler, *supra* note 280; Jojanneke van der Toorn et al., *A Sense of Powerlessness Fosters System Justification: Implications for the Legitimation of Authority, Hierarchy, and Government*, 36 POL. PSYCHOL. 93, 94 (2014).

sentiment is totally accurate.[283] Instead, Justices' decisions are increasingly more influenced by public opinion than the political views of the President who appointed the Justice or the Senators involved in the confirmation.[284]

Bush v. Gore exemplifies the dynamic between judicial review and legitimacy.[285] Precedent may have guided the Court's *per curiam* decision, but the Court would seemingly disregard public sentiment concerning the Florida voter count in what appeared to be an explicit abuse of political power to influence an election.[286] In his dissenting opinion, Justice Stevens wrote, "Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law."[287] Justice Stevens's dissent, which Justice Ginsburg and Justice Breyer joined, reflects the Court's effort to maintain its implicit legitimacy, as measured in part, by public opinion.

Post *Brown*, segregationists challenged the Court's legitimacy in rendering a decision that was not grounded in precedent.[288] Despite the cries of judicial activism surrounding *Brown*, Justices professed to rely on their legal expertise and precedent.[289] The Court, however, noted it "must consider

283. *Supreme Court Gallup Poll*, GALLUP, http://www.gallup.com/poll/4732/supreme-court.aspx%E2%80%8B (last visited Dec. 1, 2017) (showing survey results for a list of questions about the public's opinions of potential nominees).

284. *Id.*; *see also* Stephen M. Feldman, *The Rule of Law or the Rule of Politics? Harmonizing the Internal and External Views of Supreme Court Decision Making*, 30 LAW & SOC. INQUIRY 89, 109 (2005).

285. Bush v. Gore, 531 U.S. 98, 103 (2000) (holding it was a violation of the Equal Protection Clause to use different voter tabulation mechanisms in different Florida counties).

286. *Id.* at 156–58.

287. *Id.* at 128–29.

288. Although various extremist groups may resist the Court's decisions, it is the widespread dissent that tends to threaten the Court's legitimacy. Hollander-Blumoff & Tyler, *supra* note 280, at 728; *see also* Mary Ziegler, *Grassroots Originalism: Judicial Activism Arguments, the Abortion Debate, and the Politics of Judicial Philosophy*, 51 U. LOUISVILLE L. REV. 201, 208 (2013) [hereinafter *The Abortion Debate*].

289. In *Brown v. Board of Education*, the Court cited to six cases involving the "separate but equal" public education cases: *Cumming v. County Board of Education*, 175 U.S. 528 (1899); *Gong Lum v. Rice*, 275 U.S. 78 (1927), *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938); *Sipuel v. Oklahoma*, 332 U.S. 631 (1948); *Sweatt v. Painter*, 339 U.S. 629 (1950); and *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950), but distinguished those cases from *Brown* because the tangible

public education in the light of its full development and its present place in American life throughout the Nation."[290] Further, during the *Brown* oral arguments, Justice Frankfurter questioned John W. Davis, counsel for South Carolina in *Briggs v. Elliott*, about whether social conditions affect how the Court should interpret equal protection.[291] Davis replied that "what is unequal today may be equal tomorrow, or vice versa."[292] Davis's response ultimately opened the door for the Court to overrule *Plessey v. Ferguson* and inferred that precedent is applied in context.[293]

A similar sentiment continues with the Court's treatment of abortion. During Chief Justice Roberts's Senate confirmation hearing, Senator Arlen Specter questioned him on his position concerning the jurisprudence in *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[294] Although Chief Justice Roberts would not respond directly to his position on *Roe* or *Casey*, he indicated that an assessment of precedent involves a number of factors including settled expectation and whether the precedent is unworkable.[295] Despite Chief Justice Roberts's reluctance to deviate from precedent, he prudently acknowledged the importance of the Court's legitimacy, both as an adherent to precedent and an examiner of whether precedent is workable.[296]

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factors discussed in those six cases were not the sole issue expressed in *Brown*. Brown v. Bd. of Educ., 347 U.S. 483, 392–93 (1954).

290. *Brown*, 347 U.S. at 492–93.

291. IRONS, *supra* note 247, at 392.

292. *Id.*

293. *See New Sources of Legitimacy*, *supra* note 278, at 154 (explaining in the context of *Brown* how social science and public support can overcome legal precedent).

294. *See* Edward M. Kennedy Inst. for the U.S. Senate, *John Roberts: Supreme Court Nomination Hearings from PBS, NewsHour, and EMK Institute*, YOUTUBE (Jun. 25, 2010), https://www.youtube.com/watch?v=PNF_pwkP6gg.

295. *Id.*

296. Chief Justice Roberts further indicated:

> [I]t is a jolt to the legal system when you overrule a precedent. Precedent plays an important role in promoting stability and evenhandedness. It is not enough, and the Court has emphasized this on several occasions . . . that you may think the prior decision was wrongly decided. It does not answer the question; it just poses the question. You do look at these other factors: like settled expectations, like the legitimacy of the Court, like

Pro-life activists continue to question the role of judicial activism in *Roe* because the Court's decision seemingly had little grounding in precedent.[297] Significantly, the *Roe* Court noted that a decision that denied a woman's right to an abortion would come "at the cost of both profound and unnecessary damage to the Court's legitimacy . . . ."[298]

Justice Thomas expressed a similar concern in his dissent in *Whole Woman's Health v. Hellerstedt*.[299] He assailed his colleagues for their liberal judicial activism on the issue of abortion and suggested that the Court's constitutional standards shift depending on the decision the Court seeks to render.[300] In addressing the appropriate tiers of scrutiny for the abortion analysis and the resulting judicially created rights, he wrote, "[T]hese labels now mean little . . . . The Court should abandon the pretense that anything other than policy preferences underlies its balancing of constitutional rights and interests in any given case."[301] Justice Thomas's concern reinforces the argument that judicial standards are more malleable than the Justices may acknowledge. It again questions which legitimacy factors may lead Justices to change existing precedent.

In the area of civil asset forfeiture, the Court's review of the issue has become wedded to precedent without considering whether the forfeiture principles embedded in the laws of deodands are still workable in contemporary society.[302] Addi-

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> whether a particular precedent is workable or not, whether a precedent has been eroded by subsequent developments. All of those factors go into the determination of whether to revisit a precedent under the principles of stare decisis.

Edward M. Kennedy Inst. for the U.S. Senate, *supra* note 294.

297. *See The Abortion Debate*, *supra* note 288, at 220 (explaining that many anti-abortion groups attack *Roe* as being a demonstration of the Court's judicial activism with no basis in the Constitution).

298. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 869 (1992).

299. *See* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2321 (2016) (Ginsburg, J., concurring).

300. *Id.* ("I write separately to emphasize how today's decision perpetuates the Court's habit of applying different rules to different constitutional rights—especially the putative right to abortion.").

301. *Id.* at 2328 (Thomas, J., dissenting).

302. Berman, *supra* note 42, at 3 ("[B]y simply invoking historical precedent as a talismanic answer to today's riddles, the Court fails to provide any analysis of how the precedent might

tionally, criminal justice practices increasingly suggest that civil forfeiture procedures have become ethically illegitimate.

Legitimacy theory supports that community disappointment and disillusionment with court decisions incite civil disobedience and protest movements.[303] The next section explores this interplay by demonstrating how Black Lives Matter can influence the Supreme Court to ensure the Court maintains its legitimacy in the area of civil asset forfeiture.

V. BLACK LIVES MATTER: ERODING CIVIL ASSET FORFEITURE

Protracted litigation lowers community approval of the judicial process. But it is the historical interplay between protest movements and judicial review that creates a platform for movements, such as Black Lives Matter, to influence the Court's interpretation of civil asset forfeiture. Whether through an enhanced Eighth Amendment Excessive Fines or Fourteenth Amendment Due Process Clause analysis, the goal should be to instill protections for low-income communities and communities of color. Black Lives Matter is poised to create this reciprocal change to enhance the Court's diminished legitimacy.

Undoubtedly, the Black Lives Matter movement grew exponentially and garnered significant impact and influence.[304] Through social media, millions of people learned about a social injustice, mobilized, and demanded government accountability.[305] The social justice outrage resulted in protest in various factions of the community: activists, students, and community groups took to the streets protesting the grand jury findings of no probable cause to indict Ferguson police officer Darren

be justified.").

303. *See generally* Frances Olsen, *Socrates on Legal Obligation: Legitimation Theory and Civil Disobedience*, 18 GA. L. REV. 929, 930–31 (1984) (explaining Socrates defiance of the law of Athens and how this relates to current legal obligations when society as a whole disagrees with newly enacted legislation, court decisions, acts of war, and other societal interests).

304. Between 2014 and 2015, over 29 million tweets were recorded for four Black Lives Matter events. *See* Anealla Safdar, *Black Lives Matter: The Social Media Behind a Movement*, AL JAZEERA (Aug. 3, 2016), http://www.aljazeera.com/news/2016/08/black-lives-matter-social-media-movement-160803042719539.html.

305. *Id.*

Wilson[306] or NYPD officer Daniel Pantaleo.[307] Massive demonstrations stopped traffic on the Brooklyn Bridge.[308] Protesters prevented shopping in Minnesota's Mall of America and held die-ins in front of some of the stores.[309] Harvard Law students protested in the streets of Cambridge and Boston demanding that their Dean affirm that black lives matter, and students from other law schools participated in similar protests.[310]

These protests heightened awareness of police brutality against black and brown lives. In the executive branch, the Department of Justice investigations and subsequent reports found that police practices in both Ferguson and Baltimore showed a pattern of discriminatory policing.[311] Those reports were largely sparked by the Black Lives Matter movement.[312] In direct response to heightened awareness of discriminatory policing, the Justice Department investigated and entered into consent decrees with the cities of Baltimore, Maryland, and Ferguson, Missouri.[313] In assessing the African Americans' trust of Ferguson law enforcement, the Justice Department explicitly

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306. Monica Davey & Julie Bosman, *Protests Flare After Ferguson Police Officer Is Not Indicted*, N.Y. TIMES (Nov. 24, 2014), https://www.nytimes.com/2014/11/25/us/ferguson-darren-wilson-shooting-michael-brown-grand-jury.html?mcubz=0.

307. Dana Ford, Greg Botelho & Ben Brumfield, *Protests Erupt in Wake of Chokehold Death Decision*, CNN (Dec. 8, 2014), http://www.cnn.com/2014/12/04/justice/new-york-grand-jury-chokehold/index.html.

308. Ashley Southall & C.J. Hughes, *Dozens Arrested During Brooklyn Bridge Protest Against Police Violence*, N.Y. TIMES (Apr. 14, 2015), https://www.nytimes.com/2015/04/15/nyregion/protesters-arrested-as-brooklyn-bridge-is-snarled.html?mcubz=0.

309. *Chanting 'Black Lives Matter,' Protesters Shut Down Part of Mall of America*, N.Y. TIMES (Dec. 20, 2014), https://www.nytimes.com/2014/12/21/us/chanting-black-lives-matter-protesters-shut-down-part-of-mall-of-america.html [hereinafter *Chanting Black Lives Matter*].

310. Law students across the country were taking action, including Harvard Law students who used their Harvard privilege to bring about justice. *Letter to Dean Minow and Harvard Law School Administration*, COAL. HARV. L. SCH. (Dec. 8, 2014), https://harvardlawcoalition.wordpress.com/.

311. INVESTIGATION OF BALTIMORE P.D., *supra* note 12, at 47; INVESTIGATION OF FERGUSON P.D., *supra* note 112, at 70.

312. *See generally* J. CHRISTIAN ADAMS, INJUSTICE: EXPOSING THE RACIAL AGENDA OF THE OBAMA JUSTICE DEPARTMENT (2011) (arguing that under the Obama administration, the DOJ implemented a bias agenda addressing racial disparities by filling the Civil Rights Division with "liberal activist groups").

313. *See* Cynthia Lee, *Race, Policing, and Lethal Force: Remedying Shooter Bias with Martial Arts Training*, 79 LAW & CONTEMP. PROBS. 145, 146 n.12 (2016).

references the Michael Brown shooting.[314] The visibility of the Justice Department's increased scrutiny of these cities has led other municipalities to reassess the direct consequences of over-policing black communities—including practices that implicate civil asset forfeiture.[315] The Department of Justice also temporarily amended its equitable sharing program.[316]

On the legislative front, Campaign Zero, a strategy developed out of the Black Lives Matter movement, reports that various reforms have occurred through its activism.[317] The reforms are considered both practical, and perhaps, a bit less radical than many had expected.[318] Campaign Zero reports that:

> - At least 101 laws have been enacted in the past three years to address police violence.
> - New legislation has been enacted in 40 states since 2014.
> - Ten states (CA, CO, CT, IL, LA, MD, OR, UT, TX, WA) have enacted legislation addressing three or more Campaign Zero policy categories.
> - At least forty bills are currently being considered in [six] states to address police violence.
> - Executive action has been taken at the federal level as well as legislation.
> - Local ordinances have been passed in many of

314. To demonstrate the history of discriminatory police practices, the Justice Department indicates the trust between African Americans and Ferguson law enforcement was damaged "long before Michael Brown's shooting death in August 2014." INVESTIGATION OF FERGUSON P.D., *supra* note 112, at 79.

315. O'Harrow et al., *supra* note 76.

316. *Id.*

317. *See Track Progress of Legislation, Federal, State, and Local Legislation Addressing Police Violence*, CAMPAIGN ZERO, https://www.joincampaignzero.org/#action (last visited Dec. 7, 2017) [hereinafter *Track Progress of Legislation*]. Campaign Zero is described as "an agenda to resist President Trump and end police violence." *Id.*

318. Radley Balko, Opinion, *The Black Lives Matter Policy Agenda is Practical, Thoughtful – and Urgent,* WASH. POST (Aug. 25, 2015), https://www.washingtonpost.com/news/the-watch/wp/2015/08/25/the-black-lives-matter-policy-agenda-is-practical-thoughtful-and-urgent/?utm_term=.bc72f7bc169b.

America's largest cities.[319]

Much of the original civil unrest that Black Lives Matter sparked, however, was in response to the judicial branch upholding discriminatory practices. The movement demanded increased police accountability, but it appears the courts continue to legitimize racism under various constitutional provisions.[320] Judges deny suppression motions and give inadequate jury instructions that increasingly protect law enforcement.[321] Grand juries fail to find probable cause to indict police officers.[322] Characterization of black men being violent and dangerous are perpetuated in each court proceeding and courts appear to uphold laws that were created to maintain racial status quo.[323] Ironically, the judicial process continues to exonerate police officers, but each courtroom defeat leads to increased public awareness of discriminatory policing and the judicial system's complacency with the problem.[324]

Leaders of the Black Lives Matter movement continue to express their disappointment and frustration with the unfavorable outcomes in cases involving law enforcement abuse of power.[325] Additional frustration stems from an overall lack of lawyers and judicial involvement within the movement itself.[326]

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319. *Track Progress of Legislation*, *supra* note 317.

320. *See* Josephine Ross, *Cops on Trial: Did Fourth Amendment Case Law Help George Zimmerman's Claim of Self-Defense?*, 40 SEATTLE U. L. REV. 1, 4–8 (2016).

321. *Id.* at 38–43 (discussing that during the George Zimmerman trial, the jury never received instructions that the initial aggressor must use all reasonable means to retreat before using deadly force).

322. *Chapter Four: Considering Police Body Cameras*, 128 HARV. L. REV. 1794, 1803–05 (2015).

323. *See* GHANDNOOSH, *supra* note 10, at 15–18; *see also* Nick Wing, *When the Media Treats White Suspects and Killers Better than Black Victims*, HUFFINGTON POST (Sept. 19, 2017), http://www.huffingtonpost.com/entry/when-the-media-treats-white-suspects-and-killers-better-than-black-victims_us_59c14adbe4b0f22c4a8cf212.

324. Carl Bialik, *Police Killings Almost Never Lead to Murder Charges*, FIVETHIRTYEIGHT (May 1, 2015), https://fivethirtyeight.com/features/baltimore-police-officers-charged-freddie-gray/; *see The Problem*, CAMPAIGN ZERO, https://www.joincampaignzero.org/problem/ (last visited Dec. 8, 2017).

325. *The Latest: Black Groups in Cincinnati Upset by 2nd Mistrial*, U.S. NEWS (June 23, 2017), https://www.usnews.com/news/best-states/ohio/articles/2017-06-23/the-latest-day-5-of-jury-deliberations-in-ex-cop-trial.

326. *See* Purvi Shah et al., *Radtalks: What Could Be Possible if the Law Really Stood for Black Lives?*, 19 CUNY L. REV. 91, 94–95 (2015); Nyasha Laing, *The Role of an Activist Attorneys in*

With little support from the legal community, Black Lives Matter seeks other means of initiating community involvement to hold law enforcement and courts accountable.[327] One method is promoting resistance strategies, addressing both the direct and indirect consequences of law enforcement's abuse of power and the courts' inability to achieve justice.[328]

We have been here before. During the civil rights movement, the SNCC educated people about sit-ins, picketing, and strikes because progress in the courts was too slow and yielded disappointing results.[329] The LDF's work with Dr. King's SCLC led to favorable judicial decisions, executive enforcement of those decisions, and eventually legislative reform.[330] Similarly, the SNCC's resistance coupled with litigation led to economic empowerment.[331]

Similar to the SNCC and SCLC, Black Lives Matter has renewed attention to discriminatory practices against African Americans and has developed strategies to address the discrimination.[332] For example, Campaign Zero identifies ten policy solutions to protect the lives and property of black and brown communities.[333] One solution includes ending for-profit policing.[334] The campaign identifies several key strategies to meet this goal:

- End police department quotas for tickets and arrests;
- Limit fines and fees for low-income people;

#*BlackLivesMatter Movement*, YES! MAG. (Feb. 23, 2016), http://www.yesmagazine.org/issues/life-after-oil/the-role-of-an-activist-attorney-in-the-blacklivesmatter-movement-20160223.

327. *See Community Oversight,* CAMPAIGN ZERO, https://www.joincampaignzero.org/oversight (last visited Nov. 20, 2017).

328. *See, e.g.*, *Chanting Black Lives Matter*, *supra* note 309; *Solutions*, CAMPAIGN ZERO, https://www.joincampaignzero.org/solutions/ (last visited Nov. 20, 2017).

329. *Does Protest Work?*, *supra* note 242, at 735–36.

330. *Id.* at 729.

331. *Id.* at 735.

332. *About the Black Lives Matter Network*, *supra* note 2.

333. *We Can End Police Violence in America*, CAMPAIGN ZERO, https://www.joincampaignzero.org/#vision (last visited Nov. 20, 2017).

334. *Id.*

- Prevent police from taking the money or property of innocent people;
- Require police departments to bear the cost of misconduct;
- Require the cost of misconduct settlements to be paid out of the police department budget instead of the City's general fund;
- Restrict police departments from receiving more money from the general fund when they go over-budget on lawsuit payments.[335]

The Black Lives Matter movement's role was critical in the first step of increasing the visibility of police abuse of power. The movement also created an awareness of for-profit policing and discriminatory policing—a problem that likely would have been ignored without the protest movement.[336]

Another strategy for the Black Lives Matter movement to consider is building unlikely allies. Although discriminatory policing adversely impacts communities of color, conservatives and billionaire businessmen, such as the Koch brothers, are supporting criminal justice reform, including reducing mass incarceration resulting from the war on drugs.[337]

Barry Friedman's question of who most influences the Court remains an open question.[338] Although there is no empirical data to answer this question, Justices indifferent to public opinion may actually have a particular subset of the general public that influences their decisions.[339] The enactment of CAFRA required an unusual bipartisan partnership, including the support of then Senator Jeff Sessions and Representative

335. *End For-Profit Policing*, CAMPAIGN ZERO, https://www.joincampaignzero.org/end-policing-for-profit (last visited Nov. 20, 2017).

336. *See generally* COLE, *supra* note 25, at 204–08 (discussing the importance of popular information and increasing visibility of legal problems).

337. Molly Ball, *Do the Koch Brothers Really Care About Criminal-Justice Reform?*, ATLANTIC (Mar. 3, 2015), https://www.theatlantic.com/politics/archive/2015/03/do-the-koch-brothers-really-care-about-criminal-justice-reform/386615/.

338. *See* FRIEDMAN, *supra* note 272, at 378.

339. *Id.* ("If a justice is in tune with his peer group, and his peers have elite views not shared by most of the country, the justice will seem to be going his own way.").

John Conyers.[340] Now, Black Lives Matter and conservatives both recognize that civil asset forfeiture adversely affects their economic interests.[341] The only matter that Jeff Sessions and leadership of Black Lives Matter may have agreed upon is that civil asset forfeiture deprives property ownership without sufficient due process.[342] Not only are low-income African American communities impacted by civil asset forfeiture, wealthy white business owners have felt the brunt of property deprivation as well through application of forfeiture to wire fraud, mail fraud, and money laundering cases.[343] The Justice Department intervening in *Brown* was for similar reason—to protect the country's economic interests.[344] Perhaps the economic interest coupled with resistance-leaders will lead to similar results. Recasting the message broadly as basic property deprivation helps diverse factions to understand the problem.[345] This joint message is one courts are more likely to support openly because the Court's legitimacy is questioned by both conservative Whites and African Americans.[346]

Courts are also paying attention to the impact forfeiture has on the lives of everyday people. An examination of various federal and state forfeiture decisions signals to courts the national attention civil forfeiture has received—citing to HBO

340. *See* HYDE, *supra* note 12, at 79–80; *Attorney General Sessions Issues Policy and Guidelines on Federal Adoptions of Assets Seized by State or Local Law Enforcement*, DEP'T JUST. (July 17, 2017), https://www.justice.gov/opa/pr/attorney-general-sessions-issues-policy-and-guidelines-federal-adoptions-assets-seized-state [hereinafter *General Sessions Issues Policy*].

341. *See General Sessions Issues Policy*, *supra* note 340; *supra* Part I.

342. *General Sessions Issues Policy*, *supra* note 340.

343. United States v. Schlesinger, 396 F. Supp. 2d 267, 269 (E.D.N.Y. 2005), *aff'd*, 261 Fed. App'x 355 (2d Cir. 2008).

344. Derek Bell attributed the NAACP *Brown* victory to the increased concern of returning African American soldiers, their resistance attitudes, and changing economic conditions. Bell's interest convergence theory later proved true. The Justice Department intervened in *Brown*, in large part, because the Executive Branch was concerned with the U.S. international image—an image that would impact its economic opportunities. RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 19–24 (2d ed. 2012).

345. *Id.* at 70–74 (explaining binary thinking and its effects on racial progress).

346. As an example, the framing of the abortion debate remains critical to how the public perceives the issue. Subsequent to the *Roe* decision, the women's movement shifted from an agency lens to a more moderate right-to-choose lens. The movement adopted aspects of framing theory and began to frame the issue as one of a women's right to privacy. This shift was a direct result of how the *Roe* Court framed the issue. *See* Roe v. Wade, 410 U.S. 113 (1973).

specials and newspaper articles as examples of the inequality of asset seizure.[347] Generally, courts' reasoning aligns with the policy that forfeiture practice leads to inequitable results.[348]

These forfeiture protest data[349] appear to have also reached the Supreme Court. Justice Thomas continues to question the value of relying on the historical application of civil forfeiture.[350] Most recently, in a denial of certiorari in a civil forfeiture case, Justice Thomas wrote, "In the absence of this historical practice, the Constitution presumably would require the Court to align its distinct doctrine governing civil forfeiture with its doctrines governing other forms of punitive state action and property deprivation."[351] More significantly, Justice Thomas questioned "[w]hether this Court's treatment of the broad modern forfeiture practice can be justified by the narrow historical one is certainly worthy of consideration in greater detail."[352] Certainly worthy of consideration, and the Black Lives Matter movement has the power and protest data to demonstrate the need to change civil forfeiture practices.

Black Lives Matter is prime in framing civil asset forfeiture. Justice Thomas suggests that the timing to revisit the issue may be right.[353] Although the Court may refuse to shift the Equal Protection standard, as Justice Thomas has argued, "[t]he Court should abandon the pretense that anything other than policy preferences underlies its balancing of constitutional rights and interests in any given case."[354]

As Vincent Warren appropriately stated, "Law for Black

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347. *See, e.g.*, United States v. $106,647 in United States Currency, 93 F. Supp. 3d 419, 423 (D. Md. 2015) (referencing a 2015 Washington Post article on civil forfeiture abuse); State v. Sprunger, 458 S.W.3d 482, 492 (Tenn. 2015) (citing *Last Week Tonight with John Oliver* (HBO television broadcast Oct. 5, 2014)) (stating "civil forfeiture has recently been a topic of national conversation . . .").

348. *See* Leonard v. Texas, 137 S. Ct. 847, 849 (2017).

349. Big data had become a means to capture information on protest events, including documenting those in attendance. *See* Kraig Beyerlein et al., *A New Picture of Protest: The National Study of Protest Events*, SOC. METHODS & RES. 1, 2–5 (2016).

350. *Leonard*, 137 S. Ct. at 849.

351. *Id.*

352. *Id.* at 850.

353. *Id.*

354. Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2328 (2016).

Lives is about creating radical innovation in the way we think about our work as lawyers . . . into actually envisioning a legal document that includes fundamental, basic rights, and recognizes the humanity of Black people. We are planting the seed."[355] The Black Lives Matter movement is harvesting these seeds and the Court needs to pay attention.

CONCLUSION

The deaths of unarmed pedestrians heightened community outrage over police practices and reinforced the notion that various actions in society are legal, but morally reprehensible. The deaths of Michael Brown and Trayvon Martin are two glaring examples. The racial disparities in the criminal justice system and the direct consequences of discriminatory application of civil asset forfeiture are also problematic.

Nearly seventy years ago in *Shelley v. Kraemer*, the Court stated that "freedom from discrimination by the States in the enjoyment of property rights was among the basic objectives sought to be effectuated by the framers of the Fourteenth Amendment."[356] Yet, the Court disregards this objective and reasons that the disproportionate impact civil asset forfeiture has on communities of color falls within the broad police power of the state.[357] Therefore, from a practical perspective, the "cop on the beat" has unbridled power to seize private property[358] and has become the last word for civil asset forfeiture.

In the words of Curtis Mayfield, Black Lives Matter needs to "keep on pushing" to change this injustice.[359] Keep pushing to show the disparate impact discriminatory polic-

355. Shah et al., *supra* note 326, at 106.

356. Shelley v. Kraemer, 334 U.S. 1, 20 (1948).

357. *See* Bennis v. Michigan, 516 U.S. 442 (1995); Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974).

358. *See Bennis*, 516 U.S. at 453–56 (Thomas, J., concurring) ("When the property sought to be forfeited has been entrusted by its owner to one who uses it for crime, however, the Constitution apparently assigns to the States and to the political branches of the Federal Government the primary responsibility for avoiding that result.").

359. In 1964, musical legend Curtis Mayfield wrote "Keep on Pushing" as a protest song. The song surprised many when it became a hit on the pop charts. *Biography*, CURTIS MAYFIELD, http://www.curtismayfield.com/biography.html (last visited Oct. 6, 2017).

ing and civil asset forfeiture have on Black and Brown lives; keep on pushing to show the Supreme Court that its legitimacy will be questioned until it recognizes these discriminatory practices; and keep pushing until the Court ends law enforcement's ability to further displace property ownership from African Americans and other low-income communities of color.

> *"So in the dark we hide the heart that bleeds,*
> *And wait, and tend our agonizing seeds."*[360]

360. CULLEN, *supra* note 1.